

Sima Avramović

CONSTITUTIONALITY OF RELIGIOUS INSTRUCTIONS IN PUBLIC SCHOOLS – *RES IUDICATA*

In her response to my contribution on the constitutionality of religious instruction in public schools, as a part of the prolonged discussion on that topic in this journal,¹ Professor Marija Draskic has tried again to move the focus of the debate from a legal ground to the field of value judgments and, one may say, even rooted in an ideological basis. As I am of opinion that this kind of journal primarily requires legal argumentation, it was how I modeled my first response to her text. I will follow the same approach this time as well, including only a few indispensable and pertinent observations on a non-legal basis to the extent, which is necessary to avoid the impression of some of her arguments being left uncontested.

Already the very title of her second text in Serbian does not follow the normative and official terminology – religious instruction („verska nastava“).² Professor Draskic uses the colloquial term instead – „veronauka“ (religious teaching) implying (at least in Serbian vocabulary), con-

1 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; S. Avramović, „Pravo na versku nastavu u našem i uporednom pravu“ (Right to religious instruction in in our and Comparative Law, *Anali PFB* 2005/1, 46–64; M. Draškić, „O veronauci u državnim školama, drugi put“ (On religious teaching in public schools, the second time“), *Anali PFB* 2006/1, 135 – 151. My reaction to the first text by M. Draškić was published with a considerable delay due to change of the journal editorial board and postponement in printing, although the manuscript was accepted by the then editor-in-chief at the beginning of 2003.

2 Art. 9–12 and Art. 14 of the Act on amending the Act on Elementary School (Official Gazette of the Republic of Serbia, No. 22/2002 of April 26, 2002), as well as Art. 3–6 and Art. 10–11 of the Act on amending the Act on High School (Official Gazette of the Republic of Serbia, No. 23/2002 of May 9, 2002) use consequently the term „religious instruction“.

sciously or not, the character and content of its curriculum, devoid of any analysis of it.

Much more uncovered than that is the way in which her response is posted at the very beginning – not as a discussion with legal argumentation that I developed, but as an attempt of clash with the Serbian Orthodox Church (although religious instruction in public schools is organized for other six denominations as well), and as a discussion on its values, taking religious instruction as the battlefield.

Trying to prove the allegedly disastrous effects of introducing religious instruction in public schools, she opens her response by quoting extreme statements of several individuals, i.e. the authors of particular articles in the periodical *Pravoslavlje (Orthodoxy)* on abortion, Western culture, New Belgrade, Orthodox upbringing of girls, religious instruction in public schools, atheist parents, reformation.³ Only a few quoted texts can be regarded as reflections of the official standpoint of the Serbian Orthodox Church, but some of them, e.g. the Christmas Epistle of Patriarch Pavle for 2002, are so artificially taken out of the context, that it is easily perceptible at first glance.⁴

Official standpoint of the Serbian Orthodox Church on abortion, children upbringing, or religious instruction, etc., is close to opinions of many other Christian churches, primarily of the Roman Catholic one. The disagreement on these issues is a matter of personal choice. But, the way that these viewpoints are presented by Professor Draskic leaves the impression of the Serbian Orthodox Church being anachronistic and fanatic as a whole,⁵ from what it follows that its religious instruction must be the same. Her main concern in this discussion is the issue of the program and scope of religious instruction in the system of education with regard to the students' needs (p. 144), and not the question argued in my response, i.e., whether legislative introduction of religious instruction

3 No need to say that individual views in any periodical do not necessarily represent standing of the editorial board or of the founding institution. Would it mean that the editorial board of the Annals of the Faculty of Law in Belgrade, and the University of Belgrade Faculty of Law itself, share all opinions expressed in the Faculty's journal?

4 „(Atheist parents)... have thrust their own offspring onto roads of false happiness and pseudo freedom... they have ruined the lives of their children...“, p. 138. By the way, the quotation is cited according to the daily newspaper Danas (as well as Christmas Epistle of Patriarch Pavle for 2003), although it is easy to reach the original text of the epistles in different ways, including the Internet official site of the Serbian Orthodox Church.

5 She is explicit on that issue later in her article: „The values promoted by the Serbian Orthodox Church on the contrary, are almost always fraught with anti-westernism, xenophobia, high intolerance, and even aggression“, p. 144. One-sidedness and ideological colour of the statement is evident, and legal journal is definitely not the proper place to contest it.

in public schools is in compliance with the Constitution or not. I am of opinion that legal questions are to be treated primarily in a legal journal, while I would still leave a discussion on values to competent scholars of different profiles to examine more exhaustively and expertly the pedagogical, psychological, ethical, social, philosophical and other aspects of religious instruction.

However, a serious problem appears when she discusses the content of religious instruction. Professor Draskic does not consider relevant to examine at least one of the many manuals published on that topic to perform at least a short syllabus and content analysis, but she forms her standpoint upon superfluous individual press interviews, and through simplified and blanket statements and evaluation of the Serbian Orthodox Church ideology. In the same time she neglects a very important point: that religious instruction is, according to the law, organized and strictly controlled by the state authority – the Ministry of Education and Sports. She also neglects the provision that „*manuals and other teaching materials for religious instruction shall be approved by the Minister of Education upon unanimous proposal by traditional religious communities*“.⁶ It is evident that the character and the content of that subject are *ex lege* established in interaction of the state, churches and religious communities, and not exclusively by the Serbian Orthodox Church. The law stipulates that the Commission competent for proposals on religious instruction performance comprises representatives of all seven traditional churches and religious communities,⁷ and that it is required to reach an absolute consensus on the syllabus and the content of the manuals. Not a single manual for religious instruction may be used by any confession with no consent of the other six denominations (and, of course, without the opinion of the state authority, based upon the estimation of experts from the Ministry of Education). Such a solution represents a unique democratic model of religious instruction set-up in comparative European legislation.

6 Art. 4 of the Act on amending the Act on High School. Also, Art. 9 of the Act on amending the Act on Elementary School prescribes quite similarly that „curriculum and syllabus of religious instruction shall be enacted in agreement of Minister of education and Minister of religion, upon unanimous proposal by traditional churches and religious communities“ (Paragraph 1) and that „The Government of the Republic of Serbia shall form the Commission to harmonize proposals on syllabi on religious instruction of traditional churches and religious communities, proposals on manuals and other teaching materials, to give opinion to Minister of education on election of counselors for religious instruction and for religious instruction organization and performance follow-up“ (Paragraph 2).

7 Serbian Orthodox Church, Roman Catholic Church, Islaamic Religious Community, Slovak Evangelical Church (a.c.), Christian Reformed Church, Evangelical Christian Church (a.c.) and Jewish Religious Community.

In this way, specifically on the religious instruction ground, the modern model of Church-State relations is confirmed in Serbian legislation, namely the so-called system of cooperative separation. However, speaking in her response on separation of State and Church issues, Professor Draskic recognizes only two traditional models, „two main categories“: countries within which there is a more or less close connection between the State and Religion and, on the other hand, the system of State and Church separation (mentioning France, the U.S. and Slovenia). She evidently recognizes separation of State and Church only in these few countries. Completely wrongly she goes further on with her classification and includes in the first category (where there is „a more or less close connection between the State and Religion“), two „sub-models“: model of subordination and model of coordination.⁸ The classification could be considered as a contribution to theory of Ecclesiastical Law, if she has not ignored ample relevant literature on contemporary models of cooperation between Church and State (that I pointed to in my previous article). She could have easily understood the notorious fact that the model of cooperation (coordination) characterizes legal systems where the principle of separation of Church and State is applied, and that there are many more countries that recognize separation, out of France, the U.S. and Slovenia.⁹ Exactly in those countries where constitutions accept the principle of state neutrality and separation of Church and State (including the Serbian Constitution), the cooperative model is affirmed. Due to its wide acceptance in many countries during recent years (Belgium, Germany, Austria, Spain, Italy, Portugal, etc.) authors usually consider it as the third, theoretically different system of Church-State relations, along with the standard two – the model of separation and the model of a State Church.¹⁰

I also have to draw attention to another inaccuracy and inconsistency. She claims that in secular countries, where separation is thoroughly carried out (France, the U.S., Slovenia) there is no space for religious instruction or confessional teaching of a certain religion.¹¹ However, in France, along with a specific form of religious assistance in all state

8 M. Draskic (2006), p. 139.

9 G. Robbers, *State and Church in the European Union*, Baden-Baden 1996, 324.

10 Contrary to usual views relations between State and Church are often closer in Protestant countries (and, of course, in Orthodox countries) rather than in predominantly Catholic ones. See details in J. Robert, „Religious Liberty and French Secularism“, *Brigham Young University Law Review*, Provo 2/2003, 638. Those who want to judge about the systems of Church-State relations very instructive could be an article available also at the Internet, G. Robbers, *Constitution and Religion*, <http://www.univ-tlse1.fr/publications/Constit/Robbers.html>

11 M. Draskic (2006), p. 141

schools by the priests (*aumôniers, chaplains*), who may have a regular paid position in public schools upon the request of the parents, confessional religious instruction within general curriculum is regularly organized in provinces of Alsace and Lorraine.¹² It is true that it is a consequence of specific historical circumstances, and that religious instruction exists at the part of the French territory only. But, this clearly leads to inevitable conclusion that, even in a *par excellence* laic state like France is, the existence of religious instruction in public schools is not considered to be unconstitutional.

I feel no need to dispute to the same arguments that Professor Draskic repeats – that religious instruction in public schools violates the right to non-disclosure of religious conviction, prohibition of imposing religious conviction, the right of parents to ensure the religious education of their children in accordance with their own religious and philosophical convictions, the right of the child to freedom of thought, conscience and religion. I have already exposed strong legal and theoretical counterarguments on those issues in my previous response, but she did not challenge them on the same ground. Instead, she utilizes individual life-examples and the experience of her relative (p.142, n. 24); she points to a questionable „study“ carried out by the agency „Faktor plus“, reported by the daily newspaper „Politika“, as an argument that people who declared themselves as believers in the census made such a statement „due to tradition, and not because they are really believers“ (p.147); she considers the fact that the increased number of children who choose religious classes at Serbian schools, after the Decree on Religious Instruction was replaced with the Act on Amending the Act on Elementary and High School, to be the crucial argument for „imposing religious conviction“, taking it for granted without regard to many other possible factors (p. 147); she admits that the European Court of Human Rights did not take position that religious instruction in public schools violates religious freedom, but she announces quite self-confidently its eventual future rule following her line of thinking. I leave to the readers to evaluate her and mine arguments.

How deep is the lack of understanding of contemporary development in Church-State relations, strongly confirms her reaction on my statement that it is possible to seek for a *sui generis* analogy between nationalization and abolition of religious instruction by the communists. I remain the opinion that the restitution of forcefully eradicated religious instructions in public schools is legitimate in the same way as denatio-

12 B. Basdevant-Gaudmet, „State and Church in France“, State and Church in the European Union (ed. G. Robbers), Baden – Baden 1996, 132. The religious instruction is confessional, very similar to the German model.

nalization is. After all, most countries of the former socialist bloc took that position, excluding Slovenia and Albania. On the contrary, Professor Draskic claims that „if there is anything by which the communist regime was similar to modern democratic institutions of a liberal State, that it is surely consistent perseverance on the valuably neutral relation toward different religious determinations of its citizens“ (p. 146). I would say that the relationship of communist regimes towards religious questions and churches cannot be so easily qualified as „neutral“. Neutrality of contemporary State towards religion, its secularity and separation of Church and State in modern European legal practice and ecclesiastical law have a specific, completely different meaning than the communist „neutrality“ has had. It seems that this conclusion is out of any dispute.

As to her criticism that I have to read laws and international documents more carefully, and not to „amend“ them, I have to stress that the idea that the state has an obligation towards parents – tax payers considering organization of religious instruction in public schools, is in no way a consequence of my false comprehension of laws or international documents. It is only an acceptance of the statement of prestigious German scholar in public and ecclesiastical law, Professor Gerhard Robbers, what I have noted clearly in the appropriate footnote. In addition, she imputes that I want to promote temperamental discussion on sects,¹³ with the statement that religious instruction is considered by European states and institutions as an important mechanism in handling harmful activities of the sects, that is as an alternative preventive measure instead of repressive ones. Not only the *Nastase Report* debate, but also many other opinions expressed in public by members of the Council of Europe Parliamentary Assembly,¹⁴ its resolutions and recommendations speak of

13 I published long ago an article on that topic, promoting not a temperamental, but a very modern and balanced approach, which does not discriminate small religious communities, protecting in the same time society of possible abuse of religious freedom without legislative repression, S. Avramovic, „Verska sloboda i njena zloupotreba – istorijski i aktuelni pravni aspekti“ (Religious Freedom and its Abuse – Historical and Contemporary Legal Aspects), *Anali PFB* 1998/4–6, 346.

14 Along with detailed discussions held on the *Nastase Report* preparation and many other interventions that stressed the necessity and usefulness of religious instruction, let me quote one of the latest interesting opinions on that issue, the one by René van der Linden, the President of the Council of Europe Parliamentary Assembly of April 28, 2005: „Given the many possible prejudices and stereotypes regarding religions, it is important to have structured, rational instruction in schools. That would help combat fanaticism, fundamentalism and xenophobia more effectively“, http://assembly.coe.int/ASP/Search/PACEWebItemSearch_E.asp?search=religious+education. If religious instruction is set-up as in the Serbian legislation, with thorough supervision and cooperation of the State, all traditional churches and religious communities in modeling curricula, syllabi and manuals, than it is clear that such a school subject may foster building of bridges among different religions, and not their confrontation.

the need to study religious contents in public schools, as an important element of tolerant democratic society.¹⁵

To bring to a close, as for me, the whole prolonged discussion in this journal, I have to mention an additional matter that is not unimportant. A few years ago, the Constitutional Court of Serbia was examining the constitutionality of decrees and acts introducing religious instruction in public schools. Professor Draskic and I have participated in the public debate on that topic at the Court, among the other speakers. Many participants, along with Professor Draskic, were challenging a need for religious instruction introduction in public schools and its supposed content and social effects, even though it can be qualified to the best as a legal-political and pedagogical issue, which is irrelevant in a dispute on the constitutionality of a legal act. At the Session of November 4, 2003 the Constitutional Court of Serbia decided to refuse the initiative to declare unconstitutionality of the mentioned legislative acts.¹⁶ After the promulgation of the decision in the Official Gazette of the Republic of Serbia, the issue whether religious instruction in public schools is in accordance with the Constitution or not is *res iudicata*, at least on formal legal ground, notwithstanding one likes it or not.

15 One of the latest examples is Recommendation No. 1720 of October 4, 2005, stressing in the Par. 11 as follows: „The Council of Europe assigns a key role to education in the construction of a democratic society, but study of religions in schools has not yet received special attention“. The word is, of course, primarily about a cognitive approach to religious contents, but it still stresses the importance of education in schools for a proper understanding of religion. It was a matter of concern back before adoption the Recommendation No. 1178 of February 5, 1992 on sects and new religious movements. It might be a bit unpleasant for human rights „extremists“ who usually cite France as one of countries with the best attitude towards religious freedom, but exactly that country was among the first who took more radical solutions in dealing with sects, rather than a preventive one through religious instruction. A particular inter-minister body was formed since 1996 with the aim to analyze, follow and search for adequate methods of reaction, including the „struggle“ of the state against illegal sects activities (Mission interministérielle de lutte contre les sectes – „MILS“). France was in addition the first country to pass the Act (usually called About-Picard Law) prescribing criminal and illegal sects activities, treated as „the fraudulent abuse of the state of ignorance or weakness“ of particularly vulnerable persons, mostly of children and young people. For more see reaction of the French Government on broad criticism of the Act, <http://www.ambafrance-uk.org/asp/service.asp?SERVID=100&LNG=en&PAGID=240>.

16 Official Gazette of the Republic of Serbia, No. 119/2003 of December 4, 2003.