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## **RELIGION IN FAMILY RELATIONS – RIGHT OF THE CHILD TO CHOOSE RELIGION AND/OR RIGHT OF PARENTS TO RAISE THE CHILD ACCORDING TO THEIR OWN RELIGIOUS BELIEFS**

### **Abstract**

The state has an obligation to respect the principle of religious freedom. According to that principle, religious orientation of the parents should not be questioned, but on the other side child should be protected by the state in the sense that religious practice of the parents is not harmful for development and well-being of the child. State policy can take a stand that it is exclusive right of parents to determine the religion of the child and to raise the child in a religious way, or instead of that, child of a certain age can have the right to choose own religion. Religious norms are connected to the law through the guarantying of religious rights and freedoms. Although the parent which exercises parental rights primarily raise the child, since the determination of religion is a matter that significantly affects the life of a child, the author's view is that a parent who does not exercise parental rights has the right to give consent to the choice or the change of child's religion, and without his consent, another parent cannot determine child's religion. Courts should avoid decisions that are based strictly on parents' religious beliefs. However, due to the parents' religious beliefs, the well-being of the child can be endangered (prohibition of undertaking medical interventions, blood transfusion). The author considers that existence of potential concrete risk is enough (a statement that medical intervention would not be allowed) so the parental responsibility, due to parent's religion, would be assigned to another parent.

**Keywords:** Religious freedom, religion, political science of religion, child's religion, parental responsibility, right of the child, child well-being

### **Introduction**

A human is a social, political being, a *zoon politikon*. He belongs to the social community, and primarily he is a part of the family as the basic structure of the society. In antique times, the dominant policy of society considered that raising

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the children was responsibility of the state - *the polis*. The children upbringing was public, political issue. At the present time affiliation to a particular religion and the confession of religion represents belonging to a particular community. Politics can influence on religion by favoring one religion or by having a neutral attitude to all religions. Also *vice versa* applies, religion influences on the politics.<sup>2</sup> Since religion is a part of culture, there was no society without religion in the history.<sup>3</sup> This tells us about the importance of religion for the family as a basic part of society. If the substantial parts of the family are parents and children, the question of the child's and parents' religion is, beyond doubt, of significance for family law, but also for the whole society. The child's upbringing has an immeasurable role in its formation in a social individual. Hence, religious upbringing and religious education of the child play an important role in the process of upbringing. Whether, and to which religion, will child belong, draws concrete consequences through the practice of different religious rules and practices that significantly affect the life of the child. The consequences are in the field of politics (since every religious belief consists of certain political belief),<sup>4</sup> health (proscription of undertaking certain medical interventions),<sup>5</sup> education (attending religious or state schools), cultural identity (life within a society or life in religious communities) of the child (eg. *kibutz* in Judaism).

Religious affiliation is often understood as an aspect of morality and ethics. The moral and religious beliefs and their free use are correlated in the international documents. The state is obliged to respect the principle of religious freedom, i.e. the choice whether someone is going to practice certain religion.<sup>6</sup> The state politics can take a position that the parents have exclusive right to choose the religion of the child and to educate the child religiously or that the child of a certain age has right to choose a religion independently. When it comes to adult persons possessing full legal capacity, it cannot be disputed that they can independently choose their own religion, whereas in case of children, the question whether they can independently choose their own religion and at what age or whether the parents are entitled to do that in the name of the child is still open. We are motivated to explore this topic by the fact that there is no single provision in Serbian family law addressing the religion of the child. The religious beliefs of

2 See more: Miroљub Jevtić, Political Science and Religion, *Politics and Religion*, Vol. 1, no. 1/2007, Belgrade, pp. 59-69.

3 Frances Raday, Culture, Religion and Gender, *International Journal of Constitutional Law*, Vol. 1, no. 4/2003, Oxford University Press and New York University School of Law, p. 667.

4 Tocqueville writes so in the opus *About democracy in America*, cited according to: Miroљub Jevtić, Alexis de Tocqueville as Predecessor of Political Science of Religion, *Teme*, Vol. 36, no. 1/2012, University of Niš, Niš, p. 104.

5 Relation between religion and medical protection, especially undertaking of medical interventions, appears as the most important matter regarding child's well-being. Refusing to treat the child, due to certain religious rules, can cause (and caused) death of child as a result of refusal of diabetes treatment – Robert J. Bruno, Child Protection As A Judicial Burden On Religion And The Impact Of Religious Liberty Legislation, *Cardozo Law Review*, Vol. 21, no. 2-3/1999, Yeshiva University, p. 681.

6 More on relationship between law and religion and the principle of religious freedom: John Laws, Religion and Law, *South Carolina Law Review*, Vol. 62, no. 3/2011, University of South Carolina School of Law, p. 473.

parents are not only disputable in the case of carrying out medical interventions, but also in case of providing medical treatments to the child through non-conventional methods, if the religious rules mandate such practice. In that case, the parent can be responsible for neglecting the child and can lose parental custody. In cases of lack of consent for carrying out medical interventions and treatment of the child, the child is put in jeopardy as it does not have the same level of medical protection as other children do, and therefore, the state is stepping in as a responsible to ensure medical protection to the child if the parents do not do so.<sup>7</sup> The parents' religion also plays role in case of immunization of the child and in particular, in cases of voluntary and mandatory vaccination.

Even though the choice and the change of the religion of the child has not been deeply explored in the theory of Serbian family law, the theoretical discussions on this topic in the foreign literature date back to the end of XIX century - the year 1899.<sup>8</sup>

When it comes to practicing religion in the relationship between the parents and the child, we can distinguish several levels thereof: the religious beliefs of the child, the religious beliefs of the parent, religious education of the child, religious practice of the child, the choice of the child's religion, the change of the child's religion.

### **Influence of Religion on family relationships**

Significant changes in the family life over the last decades have the following causes: significant changes in social and religious life; decrease of the interest and rejection of marriage as one of the basic institutions of family relationships;<sup>9</sup> change of the treatment of the society towards the partnerships of the same sex individuals.<sup>10</sup>

Religious norms are connected to law through the guarantying of religious rights and freedoms.<sup>11</sup> The question of religious freedom has been one of the

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7 At the beginning of XXI century in the USA, 35 states had provisions on criminal responsibility of a parent who denies medical care to the child on religious grounds, whereas almost all of the states, 45 of them in particular, have provisions on civil law guarantees in cases of denial of medical treatments to the child by the parents as legal guardians: Robert J. Bruno, *Child Protection As A Judicial Burden On Religion And The Impact Of Religious Liberty Legislation*, *Cardozo Law Review*, Vol. 21, no. 2-3/1999, Yeshiva University, p. 684.

8 Leo Pfeffer, *Religion in the Upbringing of Children*, *Boston University Law Review*, Vol. XXXV, no. 3/1955, Boston University School of Law, p. 333.

9 Whereas in 1940, the child was born by single mothers in only 4%, today even 41% of children in the USA are born by single mothers, and in 2007, 25.8% of children were raised by single parents: Lynn D. Wardle, *The Jurisprudence of Parenting and the Influence of Religion on Effective Parenting*, *International Journal of the Jurisprudence of the Family*, Vol. 5/2014, New York, p. 439.

10 Justice Munby, *Families Old and New – the Family and Article 8*, *Child and Family Law Quarterly*, Jordan Publishing, 2005, p. 503.

11 Farrah Ahmed, *Religious Norms in Family Law: Implications for Group and Personal Autonomy*, in: *Managing Family Justice in Diverse Societies*, Maclean Mavis, Eekelaar John (eds.), Oxford, 2013, p. 38.

most disputed questions throughout the history.<sup>12</sup> In modern times, family members in Christian societies are less religious.<sup>13</sup> Modern, mostly Western societies, are characterized by increase of secularity – separation of state and church. In the area of family relationships, it can be noted that religious people tend more to form matrimony than extra-marital partnership.<sup>14</sup> Over the last couple of decades, family law increased its interest in religion, with explanation that human migrations (especially those of different confessions) and ban on discrimination based on religious beliefs, have as a result the increased interaction between law and religion.<sup>15</sup> Family law expanded its field of activity also as a consequence of weakening of the religious ties and legal recognition of many, until that time, *de facto* relationships similar to marriage.<sup>16</sup> Religion has become especially important in family law in modern times since the multicultural element is evermore present, i.e. the conclusion of marriages between individuals of different nationalities and different religions, in which children will be borne and raised according to the rules of one cultural, religious dogma. Family life and thereby family law as well, is closely connected with religion in the countries with strong influences of religious and customary rules.<sup>17</sup> The norms of contemporary family law in Western societies are of secular nature, based on principle of religious neutrality. However, religious heritage is inevitably incorporated in the family law norms, as it would be evident through the case law of the foreign courts and the European Court of Human Rights. The manner in which the questions on conclusion of marriage, divorce, and abortion are regulated is to a high degree conditioned by religious opinions.<sup>18</sup> In line with the principle of religious freedom, many religions and their groups emphasize that they have the right to raise children according to their own rules. Concerning the extent of the influence that the religion once had on family relationships and exercise of parental rights, the relevant fact is that the courts took the children away from the parents who de-

12 Jennifer A. Drobac, For the Sake of Children: Court Consideration of Religion in Child Custody Cases, *Stanford Law Review*, Vol. 50/1998, Stanford University Law School, p. 1609.

13 Craig Lind, Keating Heather, Bridgeman Jo, Taking Family Responsibility or Having It Emposed? in: *Taking Responsibility, Law and The Changing Family*, Lind Craig, Keating Heather, Bridgeman Jo (eds.), Ashgate, 2011, p. 3.

14 Margaret F. Brinig, Religion and Child Custody, *University of Illinois Law Review*, Vol. 2016, no. 4, University of Illinois College of Law, p. 1370.

15 Jane Mair, Örcü Esin, *The Place of Religion in Family Law: A Comparative Search*, Cambridge, 2011, p. 360.

16 Anne Bottomley, Simone Wong, *Changing Contours of Domestic Life, Family and Law*, Oxford, 2009, p. 2; On concept of *de facto* family in the light of Art. 8 ECHR: Louise Crowley, *Family Law*, Dublin, 2013, p. 100.

17 On relationship between faith and law: Thom Brooks, Legal Positivism and the Faith in Law, *The Modern Law Review*, Vol. 77, no. 1/2014, London, p. 141. Sometimes even the church refers to decisions of the ECtHR: Andrew T. Guzman, Linos Katerina, Human Rights Backsliding, *California Law Review*, Vol. 102, no. 3/2014, Berkeley, p. 618; Peter De Cruz, *Family Law, Sex and Society*, London, 2010, p. 21.

18 Merel Jonker, Van den Hoven Mariette, Schrama Wendy, Religion and Culture in Family and Law, *Utrecht Law Review*, Vol. 12, no. 2/2016, Utrecht University School of Law, p. 2.

clared to be atheists.<sup>19</sup>

On the one hand, there is a constitutional guarantee of freedom of religion, and on the other hand, there is a separation of state and religion.<sup>20</sup> Thus, parents have freedom to practice the religion and raise their child according to their religious beliefs, whereas the norms that regulate granting parental responsibility and exercise of parental rights are of secular character, with elimination of religion as a condition for exercising of parental rights.

In many countries, among which Islamic states,<sup>21</sup> Israel,<sup>22</sup> and South Africa<sup>23</sup> stand out, conclusion of marriage and divorce are regulated by religious norms.<sup>24</sup> The regulations in force are religious norms at the same time.<sup>25</sup> Civil law in Islam is a part of the religious law.<sup>26</sup> In Islamic states, the culture and law reflect religious beliefs.<sup>27</sup> The religious influences on the (family law) norms in these countries can be seen, for example, through the ban or restrictive conditions for abortion, divorce, prohibition on establishing same-sex partnerships (homosexual). When compared to all other fields of civil law, the religious matters are the most closely related to family law. That is mostly true especially when it comes to the family law norms. It is stated that the USA is the most religious country of the western world, the part of which are also Poland and Ireland.<sup>28</sup> The followers of the Catholic religion, fundamental Protestants and orthodox Jews advocate

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- 19 Lee M. Friedman, The Parental Right to Control The Religious Education of a Child, *Harvard Law Review*, Vol 29, no. 5/1916, Harvard Law School, p. 488; Similar, parental custody was not granted to the parent exclusively because he declared himself to be an atheist: Bernard Haugen, Orlin Backes, Religion in Custody Proceedings, *North Dakota Law Review*, Vol. 38, no. 1/1962, University of North Dakota School of Law, p. 98.
- 20 On the principle of freedom of religion in the Constitutions of the European countries, see: Vladan Kutlešić, Religion and Religious Groups in Constitutions Comparatively, with Special Emphasis on Proposals for New Constitution of Serbia, *Politics and Religion*, Vol. 1, no. 1/2007, Belgrade, p. 126.
- 21 Hugues Fulchiron, The Family Court Judge Taking Religious Convictions Into Account: A French and European Perspective, *International Journal of the Jurisprudence of the Family*, Vol. 5/2014, New York, p. 20. On the importance of the religion in Islamic law on questions of conferral of parental custody serves the fact that the mother does not have a right on a sole parental custody if she marries a non-Muslim man.
- 22 Linda E. Mitchell, *Family Life in Middle Ages*, London, 2007, p. 185, that the family is in the center of the Judaism. The State of Israel gave the right to religious courts to decide in the matters on conclusion of marriage and divorce: Karin Carmit Yefet, Israeli Family Law as a Civil Religious Hybrid: A Cautionary Tale of Fatal Attraction, *University of Illinois Law Review*, Vol. 2016, No. 4, University of Illinois College of Law, p. 1509.
- 23 Waheeda Amien, Muslim Family Law in A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context, *International Journal of Law, Policy and Family*, Vol. 24, No. 3, 2010, Oxford University Press, p. 362.
- 24 Barbara Stark, *International Family Law*, Ashgate, 2005, p. 251.
- 25 Miroљub Jevtić, Religion and Relations Between Genders, *Politics and Religion Journal*, Vol. 2, No. 1, 2008, Belgrade, p. 148, on reasons why Muslims do not accept secularization – separation of state and church.
- 26 Julia Halloran McLaughlin, Taking Religion Out of Civil Divorce, *Rutgers University Law Review*, Vol. 65, No. 2, 2013, Rutgers School of Law, p. 403.
- 27 Shabnam Ishaque, Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to Identity, *International Journal of Law, Policy and Family*, Vol. 22, No. 3, 2008, Oxford University Press, p. 394.
- 28 Tamar Morag, Religious Tradition and the Corporal Punishment of Children: A Comparison of American and Israeli Legal System, *International Journal of Law, Policy and Family*, Vol. 25, No. 3, 2011, Oxford University Press, p. 343. We note certain contradiction that the USA is, according to the author, at the same time an extremely liberal, but also a religious country.

non-existence of divorce, ban on abortion, surrogate motherhood and marriage of the same sex individuals.<sup>29</sup>

The decisions of the religious courts in national states have often had influence on decisions of the European Court of Human Rights. When deciding in matters of granting or losing parental responsibility, the national courts had referred to religious affiliation of parents as the decisive circumstance, which the Court in Strasbourg was later to decide about (*Palau-Martinez vs. France, Hoffman vs. Austria*).<sup>30</sup>

One additional argument in favor of influence of religion on the family law norms is reflected through the connection of the medieval family law and canon law. *De facto*, the medieval family law that is *ius commune* of the European family law was religious law.<sup>31</sup>

The disputed questions that motivate us to explore this subject relate to the following cases: divergent opinions of child and parents concerning child's choice of religion; granting of parental custody; exercise of parental rights in case of divorce; carrying out medical interventions; education of the child. Focusing on the day-to-day exercise of parental rights, the situations in which the religion can have significant role are occurring when choosing the child's name, carrying out medical interventions, exercise of physical punishment, clothing choices,<sup>32</sup> nutrition choices for the child.<sup>33</sup>

## International Law

### *International Documents*

The state has a complex (legal and political) task that, on one hand, it does not interfere in religious orientation of parents in line with freedom of religion, but on the other hand, it has to ensure the child protection in a sense that the

29 Notes, The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation, *Michigan Law Review*, Vol. 82, No. 7, 1984, University of Michigan Law School, p. 1715.

30 On this case: Ivana Krstić, *Right to Respect for Private and Family life*, Art. 8 of the European Convention on Human Rights, Belgrade, 2006, p. 90.

31 It is stated that the Mediterranean countries (Italy, Greece, Portugal, Spain, Cyprus, Malta) are characterized by three important cultural segments: strong influence of religion, central role of the family and weak(er) influence of the state system: Paul Galea, Cohabitation, Single Parenting, Extended-Family Parenting, and the Role of the Kinship and Religion, *International Journal of the Jurisprudence of the Family*, Vol. 2, 2011, New York, p. 168.

32 Clothing habits may reflect religious orientation. However, if the clothing habits are in collision with the rules of the said state, especially educational system, that can lead to the expelling of the child from school. That is confirmed by the case from the French case law, when three girls were expelled from the secondary school because they refused to remove the scarves from their heads during the classes. See: Sylvie Langlaude, *The Right of the Child to Religious Freedom in International Law*, Leiden, 2007, p. 19.

33 It is stated that the parents' confession can manifest itself in exposing the child to the hazardous substances (poisons), dangerous animals and sexual activities: Robert J. Bruno, „Child Protection As A Judicial Burden On Religion And The Impact Of Religious Liberty Legislation“, *Cardozo Law Review*, Vol. 21, No. 2-3, 1999, Yeshiva University, p. 684. We are of the opinion that here is the case of practices related to mostly to religious cults.

parents' religious practices do not harm the development and well-being of the child. Through conclusion of international and regional treaties, national states take obligation to respect the mentioned provisions of the international law.

The most complete international document that regulates the rights of the child, the Convention on the Rights of the Child, deals with the religion of the child. According to Art. 14 of the Convention on the Rights of the Child,<sup>34</sup> the national states have obligation to respect the right of the child to freedom of thought, conscience and religion. It is clear that thereby the choice of the religion is expressly prescribed as the right of the child. However, the problem is that Art. 14, para. 2 also obliges national states to 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. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The Convention on the Rights of the Child makes a balance between the right of the child to choose the religion and the evolving capacities of the child.

The International Covenant on Civil and Political Rights<sup>35</sup> acknowledges in Art. 18, para 4 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.<sup>36</sup> Art. 13, para 3 of the International Covenant on Economic, Social and Cultural Rights<sup>37</sup> guarantees the liberty of the parents to ensure the religious and moral education of their children in conformity with their own convictions. The Human Rights Committee states that the child of a certain age can independently make choices concerning religious matters and its opinion concerning faith or beliefs have to be taken into consideration.<sup>38</sup> Art. 18 of the Universal Declaration of Human Rights regulate the right to choose and prac-

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34 The Convention on the Rights of the Child, „Official Gazette of the SFRY – International Treaties“, no. 15/90 and „Official Gazette of the FRY – International Treaties“, no. 4/96 and 2/97. The SFRY (later Serbia) is one 196 countries that ratified the Convention of the Rights of the Child. Even though the USA signed it on 16 February 1995, it is still the only UN member state that has not yet ratified this Convention. The answer to the question why the USA did not (still) ratify the Convention could maybe be best explained by the opinion that the Convention on the Rights of Child is the most dangerous attack on parental law in the history of the USA: Tamar Morag, Religious Tradition and the Corporal Punishment of Children: A Comparison of American and Israeli Legal System, *International Journal of Law, Policy and Family*, Vol. 25, No. 3, 2011, Oxford University Press, p. 351.

35 The International Covenant on Civil and Political Rights, „Official Gazette of the SFRY – International Treaties“, No. 7/71.

36 Other provisions of Art. 18 prescribe that: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of own choice, and freedom, either individually or in community with others and in public or private, to manifest the religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair the freedom to have or to adopt a religion or belief of own choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

37 Ibidem.

38 See: Ivana Krstić, Right of Parents to Educate Children in line with their Religious and Moral Beliefs, in: *Identity Metamorphosis of Serbia*, Radmila Vasić, Milena Polojac (eds.), University of Belgrade Faculty of Law, Belgrade, 2016, p. 189.

tice religion.<sup>39</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief acknowledges the right to freedom of thought, conscience and religion of adults and children.<sup>40</sup>

### *Regional documents*

The Convention for the Protection of Human Rights and Fundamental Freedoms (Convention, ECHR) represents the most significant international contract in the European area, the act of the Council of Europe, which was signed in Rome on 4 November 1950. After the Convention, 14 Protocols were brought with it. Serbia (the State Union Serbia and Montenegro) ratified ECHR in April 2003.<sup>41</sup> Article 9 of the European Convention on Human Rights provides a right to freedom of thought, conscience and the religion. This includes the freedom to change a religion or belief, and to manifest a religion or belief, alone or in community with others, privately or publicly through customs, preaching or ceremonies. Also, with the basic text of the Convention, Article 2 of the Protocol 1, provides duty for the country to respect the right of parents to have their children educated in accordance with their religious and philosophical beliefs.<sup>42</sup>

The Council of Europe has issued two Recommendations: Recommendation 1202 (1993) about Religion tolerance in a democratic society and Recommendation 1720 (2005) about education and religion.

American and African regional instruments have different approach. American Convention on Human Rights in the article 12 guarantees the right to freedom of religion, as well as the right for the parents to have their children educated in accordance with their religious and moral views, while the African Charter on Human and Peoples' Rights, in the article 17 provides just the right to education, without saying that it has to be in accordance with religious and moral views. However, this lack has been overcome in the African Charter on the Rights and Welfare of the Child, where every child is guaranteed the right to freedom of thought, conscience and religion. Parents, according to this document, have the obligation to help their children to accomplish this right. The Charter of Fun-

39 „Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change the religion or belief, and freedom, either alone or in community with others and in public or private, to manifest the religion or belief in teaching, practice, worship and observance.“

40 Frances Raday, Culture, Religion and Gender, *International Journal of Constitutional Law*, Vol. 1, No. 4, 2003, Oxford University Press and New York University School of Law, p. 677.

41 „Official Gazette of the Serbia and Montenegro – International Treaties“, No. 9/2003. Beside this Convention, Serbia and Montenegro ratified also: the First Protocol from 20 March 1952, Protocol No. 4 which secures certain rights and freedoms not included in Convention from 16 September 1963 and the First Protocol with it, Protocol No. 6 about abolition of death penalty from 28 April 1983, Protocol No. 7, Protocol No. 12 and Protocol No. 13 about abolition of death penalty in all circumstances.

42 More about this state obligation, and whether international documents prescribe state duty to provide religious education in the system of state education for child: Marija Draškić, On Religious Instructions in Public Schools: A Second Time, *Annals of the Faculty of Law in Belgrade*, 2007, University of Belgrade Faculty of Law, Belgrade, p. 178.

damental Rights of the European Union in the Article 14, par. 3 acknowledges the parents' right to provide their children with an education which is in accordance with their religious, philosophical and pedagogical views. The specific of the Charter of the European Union is that there is no another document, international or regional, which mentions pedagogical beliefs.

## **Parental responsibility or the right of the child**

### *Parental responsibility*

Religious freedom is understood in modern times as a human right of each person to choose whether and what religion will he/she practice.<sup>43</sup> One of the fundamental rights in the corpus of parental rights is the right of parents to educate their children. Determining the child's religion is a part of the child's upbringing process. The right of parents to determine the child's religion had its roots in the *patria potestas* of a father to determine the child's religion as his exclusive right. The significance of father's authority is best confirmed in case law in examples when, after father passed away, the fact that mother of the Protestant religion remarried to a man of Catholic religion, was enough for mother to be deprived of her parental rights, i.e., to have her child taken away.<sup>44</sup> By proclaiming equality of parents in the exercise of parental rights,<sup>45</sup> both parents while married, jointly and consciously educate their child and decide on all child-related issues as well as religious education of the child. Questioning the parents' rights to determine the child's religion, and to educate a child in accordance with their religious beliefs, is interference with the unity and privacy of the family. It is a conflict between the well-being of the child and the right of parents to carry out the religious education of the child. Religious education of the child is one aspect of parental rights. By the religious education of the child parents perform an important part of the entire process of upbringing, by baptizing a child, taking a child to religious buildings, attending religious services and ceremonies, shaping the future of the child and its attitudes. It is often considered that a child who is not baptized does not represent a part of the Christian community. Until the promotion of the concept of a child's right, one of the parents' primary duties was to impose religious beliefs to the child. Indeed, when considering the religious education of children, it is suggested that parents, before all other institutions, have

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43 Polikarpos Karamouzis, Religions, Education and Democracy the Necessity of Inter-Religious Education in the Modern Public School System, *Politics and Religion*, Vol. 3, no. 1/2009, Belgrade, p. 112.

44 Lee M. Friedman, The Parental Right to Control The Religious Education of a Child, *Harvard Law Review*, Vol. 29, No. 5, 1916, Harvard Law School, p. 486. Similarly, Rachel Taylor, Parental Responsibility and Religion, in: *Responsible Parents and Parental Responsibility*, Rebecca Probert, Stephen Gilmore, Jonathan Herring (eds), Oxford, 2009, p. 125 and Pfeffer Leo, Religion in The Upbringing of children, *Boston University Law Review*, Vol. XXXV, no. 3/1955, Boston University School of Law, p. 334.

45 Katharina Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities*, Antwerpen, 2007, p. 83.

a decisive influence on the adoption of a child's religion and the consolidation of religious patterns into the child's awareness from the earliest age.<sup>46</sup>

Parents have a constitutionally protected explicit right to determine the religion of the child and his/her religious education.<sup>47</sup> However, parental rights in this area are not absolute, they are limited by the age of the child, and especially for the protection of the child, when, due to the religious beliefs of parents, the health of the child is endangered.<sup>48</sup> The question arises as to whether the courts should judge if the religion of parents and practice of that religion is in the child's best interest or whether it is necessary to prove the harmfulness of that religion for the interests of the child.<sup>49</sup> If it is allowed to prove that religion is in the best interests of the child, it presupposes a positive attitude towards religion, because it considers the possibility of a positive effect of a religion on the child. Conversely, if it is allowed to prove the harmfulness of religion, the assumption is that there is a negative impact of religion on the child.

Considering religion from a child's perspective, what is the practical effect of the child's right to choose religion at a certain age? Namely, if a child of a certain age (for example at the age of 15) intends to become a member of a religion or a sect, the parent will have no rights in relation to such decision of a child. If the right to choose a religion is not recognized to the child, any formal act by which a child accesses a particular religion would have no legal effect if the parents disagree. By recognizing the right of a child to choose a religion at a certain age, it would be possible for a child, if he/she wishes so, to leave the family home and join life in the religious community.<sup>50</sup> If it is a matter of recognizing the right of a

46 Nemanja Krstić, Jasmina Nedeljković, Danijela Gavrilović, Evaluation of Family in the Light of Religiousness – Comparative Analysis of East European societies, *Religion and Tolerance*, Vol. XIV, No. 26, 2016, Center for Empirical Research of Religion, University of Novi Sad Faculty of Philosophy, p. 211.

47 Constitution of the Republic of Serbia, „Official Gazette of the Republic of Serbia”, No. 98/2006, Article 43: „Freedom of thought, conscience, beliefs and religion shall be guaranteed, as well as the right to stand by one's belief or religion or change them by choice. No person shall have the obligation to declare his religious or other beliefs. Everyone shall have the freedom to manifest their religion or religious beliefs in worship, observance, practice and teaching, individually or in community with others, and to manifest religious beliefs in private or public. Freedom of manifesting religion or beliefs may be restricted by law only if that is necessary in a democratic society to protect lives and health of people, morals of democratic society, freedoms and rights guaranteed by the Constitution, public safety and order, or to prevent inciting of religious, national, and racial hatred. Parents and legal guardians shall have the right to ensure religious and moral education of their children in conformity with their own convictions.“

48 Matt Steinberg, Free Exercise of Religion: The Conflict Between Parent's Rights and a Minor Child's in Determining the Religion of the Child, *University of Louisville Journal of Family Law*, Vol. 34, No. 1, 1995-1996, University of Louisville School of Law, p. 229. Also the Constitution of the Republic of Serbia treats it, though indirectly, not for parents who threaten the child, but for religious communities, stating in the Article 44 that Constitutional Court may ban a religious community only if its activities infringe the right to life, right to mental and physical health, the rights of child, right to personal and family integrity, public safety and order, or if it incites religious, national or racial intolerance. However, since the child becomes a member of the religious community with the parents' consent, if the religious activities of that community would appear as contrary to the child's welfare, parental right with regard to determination of the child's religion would not be untouchable in the sense of assessment by public authorities.

49 Also: John Eekelaar, Children between Cultures, *International Journal of Law, Policy and Family*, Vol. 18, No. 1, 2004, Oxford University Press, p. 189.

50 Jason S. Marks, The Solomonic Paradox Revised: Should Custody Proceedings Determine A Child's Religion, *Santa Clara Law Re-*

child to choose a religion independently or to change a religion, which does not condition the departure from the family home, we stand at the point of view that this should be recognized. However, if the recognition of the rights of the child would enable him/her to become a member of a religious sect and thus prevent parents from acting legally in the interests of the child and prohibiting the application of religious rules that are harmful for him/her, parents should be enabled to maintain the right to religious education of the child.

If the right of parents to determine the child's religion independently is brought into a question, the conflict can arise between the wishes of the parents and well-being and interests of the child. Namely, the parent may have certain views on the child's religion, but it is observed whether the wishes of the parents are contrary to well-being of the child. The question of religious education and the choice of religion refer to whether a child is a central subject, when it is his/her exclusive right, or parents within the scope of parental rights can determine religion in accordance with their own rules of child's upbringing.

In the field of medical interventions for religious purposes, if the doctrine of absolute parental rights is applied, after performing certain activities (such as circumcision) *restitutio in integrum* is not possible.<sup>51</sup> Practicing of this ritual prevents the child from canceling the actions of the religious action later, when getting certain age and (or) maturity, if he does not agree with such religious practice.

### *The right of the child*

The question of religious affiliation is predominantly seen from the perspective of adults - parents, while in earlier times the child's religiousness was not considered. However, with the development of a child's capacities, it is often the case that the child's religious attitudes influence parents, what is the concept of religious education as a two-way process.<sup>52</sup> The legislation of the Republic of Serbia does not include provisions on the right of the child to choose religion. Unlike the whole set of rights of a child introduced into Serbian legal system in 2005, the right to choose a religion is not provided by law. According to the Family Act

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view, Vol. 33, No. 2, 1993, Santa Clara University Law School, p. 361, states that child at least at the age of 12 has religious identity, while children younger than 12 lack religious conscience that can be expressed.

- 51 The circumcision of male children is specific for Islamic and Jewish community. This issue is one of the basic questions for existence of religious identity. Judaism ties the circumcision (*brit milah*) with the eighth day after child's birth. In Islam it is called *khitan*, and although it is not strictly precised in Quran, it is embellished in Islamic tradition. Differently from Jewish law, exact age is not foreseen and it can be performed in the period from seven days after birth until legal age. It is interesting that this ceremony exists in religions which are mutually intolerant to high degree and share the history and presence of religious conflicts (wars). See: Eric Rassbach, Coming Soon to a Court Near You: Religious Male Circumcision, *University of Illinois Law Review*, Vol. 2016, No. 4, University of Illinois College of Law, p. 1349.
- 52 See: Nemanja Krstić, Jasmina Nedeljković, Danijela Gavrilović, Evaluation of Family in the Light of Religiousness – Comparative Analysis of East European societies, *Religion and Tolerance*, Vol. XIV, No. 26, 2016, Center for Empirical Research of Religion, University of Novi Sad Faculty of Philosophy, p. 214.

of Serbia<sup>53</sup> the child has the following rights: to know his or her origins (knowing the parents); to live with parents; to maintain personal relations with a parent he/she does not live with; to complete and proper development; to education; to undertake legal affairs; to freely express his/her own opinion.<sup>54</sup> The realization of some of these rights is related to the age of the child (insight into the birth register, the choice of high school, deciding which parent to live with, whether and how to maintain personal relations with the parent who does not exercise parental responsibility), which is in Serbian law at the age of 15. The problem of child's religion is reflected in the fact that the child does not have enough experience and knowledge to make the choices that are the best for him/her until acquiring certain maturity. Considering that among the aforementioned rights of a child at the age of 15 there is no word about the right of the child to choose (change) religion, the basic question is whether the child at the age of 15 can freely choose religion, i.e. can he/she, if the parents have already determined his/her religion, change it. The previous and the most important question is whether parents can determine their child's religion on their own, and what would be the consequences if a child, who is able to form an opinion and express it, refuses the religious education imposed by his/her parents. By non-regulating the legal age of a child for the choice of religion, the child's religious capacity remains separated from the corpus of the rights of a child envisaged by the Family Law.

In relation to the religious identity and age of the child we find that there are three groups of children: children who are young and have no awareness of religion, therefore, they cannot express an opinion (when parents have sole authority in determining and confessing religion); children who are below the legal limit for free and independent choice of religion, but they have awareness, maturity for decision-making on choice; children with a legally required age for choosing religion. However, even when a child with a required legal age decides to practice a certain religion, the court should judge the child's choice in accordance with his or her best interests. Serbian legal system belongs to the category of states that do not determine the legal limit for the independent choice and confession of a child's religion. Thus religion distinguishes itself from other issues that a 15-year-old child can decide independently about (taking a medical intervention, choosing a high school, deciding which parent to live with). We do not find this to be a good solution, having in mind that the child should be given the opportunity, if he/she has religious beliefs and proper age, to decide independently about the religion, under condition that this is not detrimental to his/her development. If a 15-year-old child intended to choose or change religion, and that religion would harm the child, although the child should have been granted this right, parents could institute proceedings in which the court would prevent the child from becoming a member of the given religion.

53 „Official Gazette of the Republic of Serbia“, No. 18, 2005, 72/2011 and 6/2015.

54 Marija Draškić, *Family Law and the Rights of the Child*, University of Belgrade Faculty of Law, Belgrade, 2007, p. 229.

The capacity of a child to decide independently gradually increases with the age of the child, and accordingly, the child's identity is gradually acquired.<sup>55</sup> Religious identity depends on the religious heritage, the involvement of the child in religious practice, but also on his/her own religious beliefs. Bearing in mind that the child from the youngest age can be involved in the religious activities of parents, it is concluded that parents have the absolute and exclusive right to educate their child in accordance with their own religious and philosophical beliefs. In this way, the child, as a rule, acquires the religious identity of the parents.<sup>56</sup>

The issue of child religion becomes important in the following areas, at the very moment when the child is at the center of these institutes - when a child at the international and national level is recognized as the holder of certain rights: in disputes concerning the implementation of parental rights, in the case of religious practices related to the child (baptism, circumcision), in the independent right of the child to choose or change religion, when initiating adoption, when giving the child a foster care.<sup>57</sup>

It is unclear why it is not explicitly stipulated in Serbian law that a 15-year-old child can choose a religion if we know that a 10-year-old child can express his/her opinion during a judicial and administrative procedure if he/she is being able to form his/her own opinion. In the practice of the United States' courts children at the age of 12 and 13 had a right to decide which religion to confess.<sup>58</sup> We do not think that this is the age that our legislator or courts should follow, however, if this matter is considered an important issue for the life of a child, the age of 15 which is required for other children's rights under the Family Act would be adequate for Serbian legal system.

However, the controversy is related to the question "how would a child choose a religion at the age of 15 if he or she has been raised in accordance with certain religious beliefs since the youngest age?" The period from the age of 15 in which a child already has a formed religious identity shows that it would be difficult to change religion, although this is not inconceivable in practice. The question of parents' disagreement over the choice of a child's religion and religious education becomes irrelevant when the child reaches a certain age to make the decision independently. An extreme belief according to which parents should

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55 John Eekelaar, Children between Cultures, *International Journal of Law, Policy and Family*, Vol. 18, No. 1, 2004, Oxford University Press, p. 185.

56 In such a way also: Marija Draškić, Right of the Child to Freedom of Religion in the School, *Annals of the Faculty of Law in Belgrade*, No. 1-4, 2001, University of Belgrade Faculty of Law, p. 516.

57 In case of adoption social service strives to match child's religion and religion of adopters: Notes, The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation, *Michigan Law Review*, Vol. 82, June 1984, University of Michigan Law School, p. 1710; Federal state of Massachusetts had strict regulation in statute about necessity of same religion of the child and adopters: Leo Pfeffer, Religion in The Upbringing of Children, *Boston University Law Review*, Vol. XXXV, No. 3, 1955, Boston University School of Law, p. 378.

58 Bernard Haugen, Orlin Backes, Religion in Custody Proceedings, *North Dakota Law Review*, Vol. 38, No. 1, 1962, University of North Dakota School of Law, p. 98.

refrain from baptizing a child until the child reaches the age to decide independently is contrary to the right of parents to educate the child in accordance with their religious beliefs.

### *Religion in the proceeding of the parental responsibility assignment*

The exclusive right of parents to choose the child's religion, as well as modern principle of separation of state and religion prevents religion from being an important factor in disputes on exercise and granting of parental rights. Giving advantage to one parent, when reaching decision on granting parental rights, solely on the basis of the religion is unjustified and leads to breaches of the principles of equality of parents and freedom of religion. As a basic rule, the courts should avoid adopting decisions based on religious beliefs of the parents.<sup>59</sup> However, the state as the protector of the interests of the child can take into consideration the religious aspect through courts' decisions, if the religion of one (or both) parents jeopardizes health, development or well-being of the child. The case of the European Court for Human Rights *Eskinazi and Chelouche v. Turkey* sheds more light on the question of importance of the religious courts in Israel in cases of granting parental responsibility.<sup>60</sup>

59 Alan Jay Sekulow, Paul Benjamin Sisney, Constitutionally Protected Parental Rights in Child-Custody Arrangements and The Impact of Religion on Children, *Regent Journal of Law and Public Policy*, Vol. 1, No. 1, 2009, Regent University School of Law, p. 174. Similarly, Jason S. Marks, The Solomonic Paradox Revised: Should Custody Proceedings Determine A Child's Religion, *Santa Clara Law Review*, Vol. 33, No. 2, 1993, Santa Clara University Law School, p. 347.

60 *Eskinazi and Chelouche v Turkey*, Case No. 14600/05, Judgement dated 6 December 2005. The petitioner is the Franco-Turkish national of Jewish confession with residence in Turkey. The petitioner and her husband who lives in Israel married in 1997. They got a daughter in Israel in 2000. The spouses lived on the relation Turkey-Israel-France. They intended to move to France, but the mother took then 4-years-old daughter away with her to Turkey in 2004 and filed for divorce there. The mother was granted temporary exercise of parental rights. The father filed for divorce before the Rabbinical Court in Israel. That court adopted a judgement in May 2004 without hearing and attendance on behalf of the mother that she is obliged to return the child to Israel according to the Hague Convention and that the father is entitled to take away the child's passport upon its return. The said judgement prohibited the mother and the child from leaving the territory of Israel. In line with the mentioned judgement of the Rabbinical Court, the Turkish court rendered a decision that the mother is obliged to return the child to Israel, where it spent the most of its life. It was established that the mother acted fraudulent and retained the child, contrary to the assurances that she would travel to Turkey for 10 days only as usual. The petitioner complained that the decision of the Turkish court to return the child to the father violated her right to respect for family life.

The European Court for Human Rights emphasized that the Art. 8 of the Convention has to be interpreted in line with provisions of the Hague Convention. It was established that the mutual relationship between the mother and her child represents a fundamental element of the family life. The court found that the mother's decision to retain the child, contrary to the initial consent of the father that the child stays for 10 days only, represents illegal retention of the child in line with the Hague Convention. The petitioner's claim that the decision of the Rabbinical Tribunal was adopted in her absence is irrelevant, having in mind that the decision of that court did not deal with the merits of the dispute, but was related to the obligation to return the child according to the Hague Convention. The decision of the Turkish court that the mother would not be exposed to emotional suffering due to the child's return to Israel was not arbitrary. The Turkish authorities did not breach their obligations arising from the Convention. Taking into consideration the petitioner's argument that she and the child would be discriminated through application of the religious criteria of the Rabbinical Court in Israel, the court noted that the family had lived in Israel for a long time period and that the child's family life existed there. The allegation that the child was not heard in the proceedings before the Israeli court was rejected by referring to the insufficient

Disputes regarding exercise of parental responsibility could be primarily centered on child's religious education, so called "spiritual custody".<sup>61</sup> Parents' religious convictions, in general, should not be discrediting circumstance for exercise of parental responsibility, unless exposure to religious practice threatens the child.

When assigning the parental rights, the basic question in the light of parents' religion refers to if existence of concrete threat to child as a result of certain religious practice should be sought, or, instead, existence of general rules of religion in question (which are harmful for child) is enough to exclude that parent for sole custody. We find that concrete risk is needed, although even general risk is sufficient if the parent gives the statement in the court proceedings that in the case of concrete risk for the child (medical intervention) he/she will apply religious rules which endanger well-being of the child. Preventive approach makes an order to the court not to allow coming of the consequence for the child, but that general risk justifies decision making with reference to parents' religion. The opposite also stands - if the parent, despite of general religious rules which can endanger the child's well-being, makes a statement (and acts accordingly), that he/she would allow medical intervention undertaking and raise the child isolated from religious holidays and education system, deciding only on the basis of the parents' religion appears as unjustified.

We have pointed out the influence of multiculturalism to Family Law, which is especially reflected in cases when whole families move from one cultural system to another, thus replacing previous religious (family) practice with present secular regulations of home country. It cannot be disregarded that religious rules of country of origin coincided with positive law provisions and thus enabled: corporal, physical punishment of the child,<sup>62</sup> religious education, and dominant model of father authority. Regardless of certain family practice conditioned by the religious aspect, if that practice does not jeopardize the child's well-being, although contrary to domestic country predominant model, there are no elements for the parental liability. If there is a risk for the child, interests of the child would be protected in an indirect way, through the supervision of parental rights.

Child protection can refer to current and immediate risk or future and general risk of religious practices for child. During the proceedings for acquiring parental responsibility court can apply one of three approaches when considering religion. The first is the current influence of religion to child's welfare. In such a case, court examines influence of religion on child's well-being regardless of the

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age of the child for making statements before the court. The court did not establish the violation of the right to respect for family life.

61 Philip Veerman, Caroline Sand, Religion and Children's Rights, *The International Journal of Children's Rights*, No. 7, 1999, Kluwer Law International, p. 387.

62 There is deep connection between corporal punishment of children and religion: Tamar Morag, Religious Tradition and the Corporal Punishment of Children: A Comparison of American and Israeli Legal System, *International Journal of Law, Policy and Family*, Vol. 25, No. 3, 2011, Oxford University Press, p. 340.

fact whether the religious practice previously led to harmful consequences for the child or not. Then court observes potential harmful influence on child. Harmful influence of religion on both, physical and psychical child's development is required, as proof that religious practice leads to harmful effects for child. While the first approach allows examination of positive religious influence on child's well-being, the second excludes that possibility.<sup>63</sup> The third attitude implies direct harmful influence on the child. Here the court, before consideration of the religion in the light of harmful influence on the best interests of the child, requires proof that parent's religion has already caused direct harmful effect either on physical or psychical well-being of the child. Thus, by proving the harmful consequence, deciding on exercise of parental responsibility is directly implied.

When examining parents' religion the court can take into account: current harmful influence of religion on the child (requires present or in immediate future harmful influence of parents' religion on the child); immediate threat of harmful influence (requires proof of harmful influence of parents' religion on the child); existence of the risk of harmful influence (requires potential danger of parents' religion on the child); absence of any kind of risk, but religion as an important factor for decision about parental responsibility regardless of effects on the child (requires examination of parents' religion with no effects on the child).<sup>64</sup> If the widest approach is applied to examine parent's religion, it could end in a way that parent loses litigation just because of religious convictions without their negative effects on the child, while in the case of the narrowest approach, another parent would get parental responsibility only if he/she proves immediate harmful influence of religion on the child, respectively that concrete harmful effect on the welfare of the child has already appeared.<sup>65</sup> We are not in line with the attitude that immediate harmful effect on the child should emerge, considering that courts have primary obligation to respect the principle of the best interests of the child, and in that respect preventive approach should be taken – for example, in the case that child needs blood transfusion, court should not wait that refusal of the parent for such intervention cause consequences for child's health, it is sufficient that parent states before state officials that in a such case he/she would refuse undertaking of this or similar medical intervention (cases of Jehova Witnesses). Our standpoint is that potential risk for child's welfare is condition for granting of parental rights.

If parents' religious convictions are examined, we are on the parental re-

63 Jenna Blackwell, The Role of Religion in Child Custody Disputes, *Appalachian Journal of Law*, Vol. 5, No. 1, 2006, Appalachian School of Law, p. 26.

64 Jennifer A. Drobac, For the Sake of Children: Court Consideration of Religion in Child Custody Cases, *Stanford Law Review*, Vol. 50, 1998, Stanford University Law School, p. 1632.

65 Contrary to consideration of harmful effects of religion on child in this part of article, it is stated that child's attendance in religious services significantly reduce the possibility that child demonstrates certain forms of delinquency, as selling the narcotics: Lynn D. Wardle, The Jurisprudence of Parenting and the Influence of Religion on Effective Parenting, *International Journal of the Jurisprudence of the Family*, Vol. 5, 2014, New York, p. 462.

sponsibility field, suitability of parents and their personal characteristics, but if harmful effect or risk for the child is considered, then primarily the right of child is in the focus. Our standpoint is that child is in the center of observation, so parents' lifestyle and their religious beliefs have complete freedom until they do not endanger child's well-being. To say it this way: spouses have complete freedom to confess or not to confess certain religion and practices of such religion (religious nutrition, life in religious communities, exposure to ascetic lifestyle, refuse of medical treatments), but that practices are different when members of some religion have children and parental responsibility for them. In that case religious practices are observed in the light of child's best interests.

### *The best interests of the child*

The principle of the best interests of the child is considered as supreme principle in all procedures concerning child. It has been especially emphasized with regard to exercise of parental rights. Interpretation of the best interests of the child in the light of religion imposes answer to the question is the best interest of the child to be raised according to certain religion or without religion. The conflict may occur due to the fact that child with certain maturity and age has different view than parents about the religion which is in its best interest, as well as the way to confess it. Specific issue is whether the court needs to consider religious views of parents when judging the best interests of the child.<sup>66</sup> Surely, it is for certain that determination of the child's religion and religious education are aspects of parental rights. In cases when both parents, of different religious views, are qualified to obtain exercise of parental rights and raise their child in accordance with personal religious practice, courts are judging characteristics of the parents bearing in mind the principle of the best interests of the child. Courts in USA find religious and cultural identity of the child as integral part of the principle of the best interests of the child.<sup>67</sup> Examination of religious lifestyle of parents is an integral part of examination of the best interests of the child.<sup>68</sup> When assigning parental rights, courts take into account the stability of child, meaning, if the child created family relations and was growing up in one cultural and religious surroundings, it must be analyzed how the change of these circumstances would reflect on child, especially if cultural and religious surroundings are substantially different (for example, conversion of child from Islamic or Jewish

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66 Jennifer A. Drobac, For the Sake of Children: Court Consideration of Religion in Child Custody Cases, *Stanford Law Review*, Vol. 50, 1998, Stanford University Law School, p. 1610.

67 Ann Estin Laquer, Toward a Multicultural Family Law, *Family Law Quarterly*, Vol. 38, No. 3, 2004, American Bar Association Section of Family Law, Chicago, p. 515. It is similar in the Islamic Law: Kuek Chee Ying, Tay Eng Siang, Unilateral Conversion of a Child's Religion and parental Rights in Malaysia, *Singapore Academy of Law Journal*, Vol. 24, 2012, Singapore Academy of Law, p. 108.

68 Lauren D. Freeman, The Child's Best Interests vs. The Parent's Free Exercise of Religion, *Columbia Journal of Law and Social Problems*, Vol. 32, No. 1, 1998, Columbia University School of Law, p. 77.

into liberal democratic surroundings of “western countries” or *vice versa*. In this case in the context of religious and cultural heritage we believe that age of child is substantial circumstance bearing in mind that the older is the child, the greater is the influence of established religious rules. If stability of the child is placed as the principle equal to the principle of the best interests of the child, although religious freedom of both parents to raise their child according to their religious views should be respected, splitting of the child between two religions can be harmful for the child.<sup>69</sup> On the contrary, it is stated that growing up of the child in two religion surroundings helps in a way that the child on his/her own can choose the religion afterwards and it contributes to greater level of (religious) tolerance.<sup>70</sup>

If in judging the best interests of the child it is found that religion is an integral part of the child’s identity, then the court also considers the fact which parent could realize that child’s need in a better way. If it is determined that religion is not a part of the child’s identity, then the court does not observe religion as an integral part of the best interests of the child. In the case of little child, the parental rights to define child’s religion can not be questioned, except if it would be harmful for the child. When the child is capable to express the opinion regarding the choice of religion, then the court is obliged to make the judgment between the right of child and right of parents if dispute between child and parents arise.

### *Determination of the child’s religion*

#### *1. Determination of the religion during marriage of parents*

Since the parents exercise their parental rights together and agreeably, education of the child, including religious education, should be the result of their common decision. Although it is not very likely, it is also not excluded that bigger disagreements which would require court intervention could occur during marriage due to different attitudes of parents regarding child’s religious education. There are two issues during marriage which are least disputable between parents and they refer to where would child be born and would the child be included in religious activities of parents.<sup>71</sup>

69 Like that, Jennifer A. Drobac, For the Sake of Children: Court Consideration of Religion in Child Custody Cases, *Stanford Law Review*, Vol. 50, 1998, Stanford University School of Law, p. 1655. See: Lauren D. Freeman, The Child’s Best Interests vs. The Parent’s Free Exercise of Religion, *Columbia Journal of Law and Social Problems*, Vol. 32, No. 1, 1998, Columbia University School of Law, p. 92.

70 Carolyn R. Wah, Religion in Child Custody and Visitation Cases: Presenting the Advantage of Religious Participation, *Family Law Quarterly*, Vol. 28, No. 2, 1994, American Bar Association Section of Family Law, Chicago, p. 280.

71 Christine Piper, Mediation and Vulnerable Parents, in: *Vulnerabilities, Care and Family Law*, Wallbank Julie, Herring Jonathan (eds.), New York, 2015, p. 119.

## 2. Determination of the religion due to divorce

The issue of exercise of parental rights in the context of religious affiliation of parents appears in two cases – when the court decides about assigning of the parental rights, most often in marriage litigation, as well as when both parents exercise parental rights after decision on entrusting of child, regarding upbringing of the child about religious views. Dispute over religious education of child is more often manifested in marriages between parents of different confessions and, if we have in mind that the number of inter-religious marriages is increasing,<sup>72</sup> and then also the divorce rate in general, the importance of solving the conflict between parents over religious upbringing of child is being emphasized.<sup>73</sup>

Due to cultural and historical circumstances, in some countries there is special interest in determining child's religion, as well as that child gets (or should the child get) religion different from parents' religion, especially when the religion of child is changed in the case of adoption.<sup>74</sup> Religious upbringing of child is one of disputable issues after divorce or because of separated life of parents. The importance of the religious education of the child due to divorce of parents, if the parents are members of different religions and are active in confessing it, is confirmed by the fact that court can determine attendance of the child in the religious ceremonies and rituals of both religions, which means in two churches.<sup>75</sup> There are two segments of the religious identity of the child which are substantial for our observation: firstly, determination of religion and then the change of the religion of the child.

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72 Because of contemporary migrations tens and hundreds of million of people conclude international marriages and get children in these marriages. According to certain data, around 10% of world population is in families in which transnational elements are present: Carola Suarez-Orosco, Marcelo M. Suarez-Orosco, Familyhood across Borders, in: *What is Parenthood?*, Linda C. McClain, Cere Daniel (eds.), New York, 2013, p. 281. Significant part of this percent consists of international marriages between persons of different confessions. While the child from the marriage of parents of different nationality can be, for example, half Frenchmen, half Moroccan, in the religious sense the same child cannot be half Christian and half Muslim. About that: Samuel P. Huntington, *The Clash of Civilizations*, *Foreign Affairs*, Vol. 72, No. 3, 1993, Council on Foreign Relations, New York, p. 27.

73 Jason S. Marks, *The Solomonic Paradox Revised: Should Custody Proceedings Determine A Child's Religion*, *Santa Clara Law Review*, Vol. 33, No. 2, 1993, Santa Clara University Law School, p. 316.

74 Like that also: Laura J. Schwartz, Religious Matching for Adoption: Unraveling the Interests Behind the „Best Interests“ Standards, *Family Law Quarterly*, Vol. XXV, No. 2, 1991, American Bar Association Section of Family Law, Chicago, p. 187.

75 Susan Higginbotham, „Mom, Do I Have to Go to Church?": The Noncustodial Parent's Obligation to Carry Out Custodial Parent's Religious Plans, *Family Law Quarterly*, Vol. 31, No. 3, 1997, American Bar Association Section of Family Law, Chicago, p. 588; According to the opinions of psychologists, differently from earlier points of view, it is considered that exposure of the child to the influences of more religions is not against interests of the child: Olivier Fuldauer, Book review of *Religion and Culture in Canadian Family Law* by John Tibor Syrtash (Butterworths, Toronto, 1992), *Dalhousie Journal of Legal Studies*, Vol. 2, 1993, Dalhousie University Schulich School of Law, p. 357.

### 2.1. *Determination of the child's religion by the parent who exercises parental rights*

According to the principle of the equality of parents and common exercise of parental rights, differently from earlier times when child, as a rule, received father's religion, both parents agreeably determine the child's religion. But, this issue becomes disputable in the case of divorce of parents. Dispute may appear when parent who exercises parental rights has the intention to include the child into one religion and the parent who has right to exercise personal relations with the child disagrees – suggests another religion for the child or does not want that child becomes a member of any religion. The question is how this conflict can be solved? If the conflict between parents occurs regarding religious education of the child, would it be necessary to prove that certain religion is harmful for the interests of the child or it is in his/her best interest to confess the certain religion. Some courts in USA were refusing to consider the change of decision of exercising of parental rights due to religion of parents, finding it as exclusive right of parent who exercises parental rights.<sup>76</sup> We do not completely agree with this practice, referring to, before all, right of parent who does not exercise parental rights to decide on substantial issues for the child's life. The principle of religious freedom leaves wide power to the parent who exercises parental rights to determine child's religion and raise the child according to his/her religious views. The parent who exercises parental rights should not be denied in exercising the parental rights only on the basis of her/his confession, without proofs that religious practice of the parent was harmful for the child.<sup>77</sup> In order to decide to assign the child to another parent, it is necessary that this parent proves that religious views and practice had harmful effects for the child, taking into account, before all, education and medical protection of the child.

### 2.2. *Consent of the parent who has right to contact with the child*

According to the Serbian law the parent who exercises parental responsibility has an obligation to provide consent of another parent with regard to substantial matters which affects child's life. There are differences between Serbian and comparative law in substantial issues which affect child's life. The Family Act of Serbia explicitly states that these issues are: change of child's residence, child's education, disposing of the child's high-value properties and undertaking of medical intervention. These issues are not exhaustive and they have descrip-

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76 Notes, The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation, *Michigan Law Review*, Vol. 82, No. 7, 1984, University of Michigan Law School, p. 1725.

77 Jennifer A. Drobac, For the Sake of Children: Court Consideration of Religion in Child Custody Cases, *Stanford Law Review*, Vol. 50, 1998, Stanford University Law School, p. 1610.

tive character,<sup>78</sup> so the court can treat other questions as substantial for child's life. There is a little bit wider scope of substantial matters in the theory of Family Law than listed in the Family Act - these questions are concerning: the change of child's name,<sup>79</sup> undertaking of the medical intervention, change of residence, enrollment or change of the school,<sup>80</sup> religious education (choosing or change of confession),<sup>81</sup> child's circumcision.<sup>82</sup>

Different (daily) matters could be controversial in connection to child's religious upbringing and raising. Thus it is emphasized that nutrition, as well as clothing style represent manifestation of religious upbringing. Dispute may arise if parent who does not exercise parental responsibility allows the child to eat the food which is forbidden according to the religious rules,<sup>83</sup> or if the parent imposes certain dress code.<sup>84</sup> Litigations about child's baptizing, while child is still in tender years, are among the most common litigations with religious aspect.<sup>85</sup> Undertaking of religious medical interventions (circumcision) and child's vaccination are also considered as significant religious matters.

Religious education of the child and affiliation to certain religion can be attached to quantity of time that parent who does not exercise parental rights spends with the child, as well as to the quality of that relation. Namely, if during realization of the right to contact between child and that parent (especially during weekend) the parent is obliged to take the child to religious (church) services, it can affect negatively to their mutual relation, especially if that parent is

78 Marija Draškić, *Family Law and the Rights of the Child*, University of Belgrade Faculty of Law, Belgrade, 2007, p. 262.

79 About child name changing: Jonathan Herring, *The Shaming of Naming: Parental Rights and Responsibilities in the Naming of Children*, in: *Responsible Parents and Parental Responsibility*, Probert Rebecca, Gilmore Stephen, Herring Jonathan (eds.), Oxford, 2009, p. 105-122. Change of the child's personal name appears, most often, when mother concludes new marriage and shows intention that child acquires step-fathers surname. Courts, especially in the case of contact continuation between father and child, stands that child should not lose the relationship with father personalized by surname: Lindsey Mendoza, *Prohibited Steps Orders and the Protection of Children*, in: *Children and the Law*, Lockton Deborah J. (ed.), London, 2000, p. 82. The case *Dawson v Wearmouth* (1999) AC 308, states that court considers that child's surname, given on the child's birth didn't come from nowhere, but represents biological link between father and the child. Surname serves as a child's connection with father's cultural and biological heritage.

80 Daniel Monk, *Parental Responsibility and Education: Taking a Long View*, in: *Responsible Parents and Parental Responsibility*, Probert Rebecca, Gilmore Stephen, Herring Jonathan (eds.), Oxford, 2009, p. 143-164.

81 During the process of the Convention on the Rights of the Child enactment, Morocco recommended regulation by which the child on the birth should obtain father's religion: Geraldine Van Bueren, *The International Law on the Rights of the Child*, Kluwer Law International, Hague, 1999, p. 157.

82 Rachel Taylor, *Parental Responsibility and Religion*, in: *Responsible Parents and Parental Responsibility*, Probert Rebecca, Gilmore Stephen, Herring Jonathan (eds.), Oxford, 2009, p. 130.

83 Susan Higginbotham, „Mom, Do I Have to Go to Church?": The Noncustodial Parent's Obligation to Carry Out Custodial Parent's Religious Plans, *Family Law Quarterly*, Vol. 31, No. 3, 1997, American Bar Association Section of Family Law, Chicago, p. 587.

84 Imposing of religious convictions of the parent who does not exercise parental responsibility to the child could lead to suspension of contact with the child. In such a way, Appellate court in France confirmed decision of first instance court that suspended father's contact rights with his daughters, because he demanded from them to wear veil and forbid them to swim at the public swimming pool: Stefano Troiano, *Parental Responsibility and Religious Education*, *International Journal of the Jurisprudence of the Family*, Vol. 5, 2014, New York, p. 211.

85 *Ibidem*, p. 195.

an atheist. Taking into account that the quantity of time which child spends with the parent is at stake, if another parent is ready to compensate the time of child's attendance to the religious service to another parent there is no dispute, but if the parent is not ready to that, then the obligation of the parent to take the child to the service within the time he has right to according to the court decision must not be determined.<sup>86</sup> Although the parent who exercises parental rights primarily has right to determine child's religion, the parent who has right to contact with child can, also, religiously educate the child.<sup>87</sup> The parent who exercises parental rights can religiously educate the child if the child agrees to that, what is conditioned by child's age and maturity. If, on the other way, the child does not have necessary age, the parent who exercises parental rights can independently determine child's religion even if another parent does not agree. That parent can courtly require the ban of determination of child's religion if affiliation to certain religion would be harmful for child's development. *Onus probandi* in that case is on the side of parent who does not exercise parental rights. The mentioned situation is substantially different than the one when the child is not assigned to the parent due to affiliation to certain religion because the child has already been assigned to one parent by court decision. We do not find that it is necessary to examine useful influence of religion on child as condition to not determine the child's religion, but on the contrary, the parent who claims that religious education is not in the interest of child has to prove it.

Our standpoint is that the parent who does not exercise parental rights has right to provide consent for choosing or changing of the child's religion, meaning that another parent can not determine child's religion without his consent.<sup>88</sup> It is impossible that the parent who exercises parental rights determines child's religion without consent of another parent. However, this is valid in the case if determination of religion would be harmful for child. Otherwise, the parent who does not exercise parental rights could disable any decision regarding upbringing of the child. The parent who does not exercise parental rights, anyway, should be informed on the intention of another parent to include the child into certain religion, after what he/she would give or deny the consent. We do not understand the necessity of consent as the right for its misuse and thus disabling of religious education of child. The point is in the involvement of the parent who does not

86 About that also testifies the judgment in the case *Zummo v Zummo* 574 A. 2d 1130 (Pennsylvania Supreme Court 1990). About this case: Matt Steinberg, Free Exercise of Religion: The Conflict Between Parent's Rights and a Minor Child's in Determining the Religion of the Child, *University of Louisville Journal of Family Law*, Vol. 34, No. 1, 1995-1996, University of Louisville School of Law, p. 228; Jennifer A. Drobac, For the Sake of Children: Court Consideration of Religion in Child Custody Cases, *Stanford Law Review*, Vol. 50, 1998, Stanford University Law School, p. 1656.

87 Cherie N. Brown, In the System: Facilitating the Reunification of the Child and the Parents Through Religion, *Hofstra Law Review*, Vol. 42, No. 2, 2013, Hofstra University, Maurice A. Deane School of Law, New York, p. 611. The parent who does not exercise parental rights has no right to educate the child oppositely from the "primary" religion if it would be harmful for the child.

88 The same is declaration of the French courts: Hugues Fulchiron, The Family Court Judge Taking Religious Convictions into Account: A French and European Perspective, *International Journal of the Jurisprudence of the Family*, Vol. 5, 2014, New York, p. 26.

exercise parental rights into wide circle of issues concerning the child because the fact that one parent exercises parental rights on the basis of court decision does not mean that he/she can educate the child without any restrictions. Also, parental rights to decide about substantial issues do not serve to parent who does not exercise them to do anything what is not in the child's interest, including unjustified denial of consent for determination of religion. Concretization of previously said is reflected in this example: if the parent intends to baptize the child, he/she must inform another parent; if not, such action should not be allowed; if another parent deny consent after information, it should be considered if consent is denied with or without justification. All mentioned (should be) is valid by the child's age of 15, when the child is supposed to choose religion independently (if it has not been already done).

Serbian family legislation has no provisions regarding child's religion – neither parental right to determine child's religion nor child's right to choose religion in certain age. One possibility is to observe the issue of child's religion and include it into our legislation as substantial issue affecting child's life, by which the parent who exercises parental rights (also) formally and legally could not determine child's religion without another parent's consent. Another option is that it is assumed that right of the parent who exercises parental rights to determine child's religion is exclusive and independent. We are closer to the first solution since determination of the religion is not different in importance than other important issues affecting child's life, such as child's education or undertaking of medical intervention. In addition, to support our understanding – consent of the parent who does not exercise parental rights is also needed in the case of medical intervention undertaking and since it can be conditioned by religious convictions (circumcision, blood transfusion), then another parent should also be asked for permission regarding choose of religion. In such a way, if, as a rule, consent of both parents is required for undertaking of medical intervention (medical intervention which undoubtedly has the character of religious intervention like circumcision is),<sup>89</sup> it should also be required in case of determination and (or) change of child's religion.

Although most cases in this article have been related to emotional and physical well-being of the child, there are examples in the field of child's alimentation that religious convictions of parents endangered material well-being of the child.<sup>90</sup>

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89 The German Court in Cologne (*Cologne Landgericht*) confirmed that this issue became reality of case law when deciding in 2012 about performance of circumcision: Hugues Fulchiron, The Family Court Judge Taking Religious Convictions into Account: A French and European Perspective, *International Journal of the Jurisprudence of the Family*, Vol. 5, 2014, New York, p. 14.

90 Thus, the parent, a member of religious community did not pay alimentation for child because religious rules forbade alimentation of child who did not live in religious community or, even, obliged members of the religious community to give all of their incomes (and properties) to religious community. See about that: Robert J. Bruno, Child Protection as a Judicial Burden on Religion and the Impact of Religious Liberty Legislation, *Cardozo Law Review*, Vol. 21, No. 2-3, 1999, Yeshiva University, p. 687.

*Comparative law*

When it comes to comparative law, there is no unique position. Legislative policy advocates the view that for the autonomous choice of religion either the age limit is not determined, or it is determined, but in a very diverse manner. In Germany, children between 10 and 14 years old may request to be heard in the case that parents want to change their previous religion.<sup>91</sup> When a child is 12 years old, he/she may demand not to be raised in the spirit of another religion than the one he/she was raised up until then, and by the age of 14 he/she has full legal capacity in the matter of religion choice. In the Swiss law a child has this right from the age of 16.<sup>92</sup> In Norway a 12-years-old child may independently choose the religion he or she will confess. Finland requires the age of 15 for the choice of religion.<sup>93</sup> In Italy the age of the child is not explicitly determined, but it is widely accepted that a 14-years-old child can freely choose his or her own religion.<sup>94</sup> Austrian law takes up a stance that a child after the age of 12 years may not be educated in accordance with a particular religion against his or her will, while at the age of 14 he or she has the right to decide on his/her religion.<sup>95</sup>

Among the federal states in the USA, we would like to point out, that in Indiana and Arizona when entering into an agreement on exercising parental rights, the religious education of the child is one of the admissible parts of the agreement.<sup>96</sup> This testifies to the fact that disputes about the child's religion could be more frequent, and that it is therefore possible for parents to reach an agreement on this important issue. The (pre)marital contract of spouses which would (also) determine the religion of a child would not be valid.<sup>97</sup> Alaska is one of the first states in the USA that has introduced into its legislation the possibility for the court in the parental rights proceedings to consider the religious in addition to the physical, emotional, mental and social needs of the child.<sup>98</sup> Attending a religious school, religious classes, visits to church services and ceremonies are some

91 According to one study, in Germany, about 60% of people conclude marriages in the church: Paul Galea, Cohabitation, Single Parenting, Extended-Family Parenting, and the Role of the Kinship and Religion, *International Journal of the Jurisprudence of the Family*, Vol. 2/2011, New York, p. 164.

92 Hugues Fulchiron, The Family Court Judge Taking Religious Convictions into Account: A French and European Perspective, *International Journal of the Jurisprudence of the Family*, Vol. 5, 2014, New York, p. 29.

93 Marija Draškić, Right of the Child to Freedom of Religion in the School, *Annals of the Faculty of Law in Belgrade*, No. 1-4, 2001, University of Belgrade Faculty of Law, p. 519.

94 Stefano Troiano, Parental Responsibility and Religious Education, *International Journal of the Jurisprudence of the Family*, Vol. 5, 2014, New York, p. 195.

95 See Article 5 of the Law on Religious Education of Children (*Bundesgesetz über die religiöse Kindererziehung*).

96 Margaret F. Brinig, Religion and Child Custody, *University of Illinois Law Review*, Vol. 2016, No. 4, University of Illinois College of Law, p. 1385.

97 Leo Pfeffer, Religion in the Upbringing of Children, *Boston University Law Review*, Vol. XXXV, No. 3, 1955, Boston University School of Law, p. 360.

98 Jenna Blackwell, The Role of Religion in Child Custody Disputes, *Appalachian Journal of Law*, Vol. 5, No. 1, 2006, Appalachian School of Law, p. 31.

of the issues that can be parts of this agreement.<sup>99</sup>

### Practice of the European court of human rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty, a Council of Europe Act, signed in Rome on November 4, 1950. It came into force after three years, on September 3, 1953, at the moment when it was signed by 15 member states of the Council of Europe. The signatories to the Convention are all member states of the Council of Europe. The Convention provides for material and procedural rights, which, in the event of a violation by Member States, are protected by the European Court of Human Rights, as well as mechanisms for monitoring the application of the provisions of the Convention. Following the Convention, 14 protocols were also adopted with it. Three articles are important for the family law: the right to respect private and family life (Article 8), the right to marry (Article 12) and the prohibition of discrimination (Article 14). Serbia (the State Union of Serbia and Montenegro) ratified the Convention in April 2003. The ECHR judgments are binding on the state of Serbia.<sup>100</sup> We will observe the religion of children and parents within the right to respect for family life. Religion and moral insights are an integral part of family life. Although religion has been left outside of modern family law, the European Court of Human Rights has ruled on the violation of the right to respect family life in relation to the religious beliefs of parents. Modern family law has the imperative of neutrality in its operation.<sup>101</sup> To grant parental rights, to decide on the right to contact, to decide on adoption, foster care, without reference to sex, age, material status, religion, nationality, citizenship, in short, without discrimination on any ground.<sup>102</sup> Nevertheless, in a contemporary, secularized society, when assessing the best interests of a child in cases of granting parental rights, adoption or foster care, the court takes into account the religious orientation of the parents and the child. Also, the state is obligated to take into account the parents' religious beliefs and to protect the child if the religious practice of the

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99 Brian H. Bix, *Marriage Agreements and Religion*, *University of Illinois Law Review*, Vol. 2016, No. 4, University of Illinois College of Law, p. 1673.

100 The Constitutional Court of Germany also confirms the "binding role of the ECHR judgments on domestic law" when, on the occasion of the *Görgülü* case, states that "in the German legal system, the ECHR has the status of a federal law and must be taken into account when interpreting domestic law. The ECHR judgments have a binding character for all state authorities and impose an obligation to prevent, within their jurisdiction, a continuous violation of the Convention and create a situation consistent with the Convention." See: Andreas Hanke, *Custody and Visitation Rights in Germany after the Decisions of the European Court of Human Rights*, *Family Law Quarterly*, no. 3/2001, American Bar Association Section of Family Law, Chicago, p. 359.

101 In support of the claim that family law cannot be neutral: Carlos Martinez De Aguirre, Is „Living Together, Loving Each Other“ Enough for Law? Reflections on Some „Brave New Families“, *International Journal of the Jurisprudence of the Family*, 3/2012, New York, p. 51.

102 On the contrary, in the Islamic law it is required that a parent exercising parental rights belongs to Islam: Kuek Chee Ying, Tay Eng Siang, *Unilateral Conversion of a Child's Religion and Parental Rights in Malaysia*, *Singapore Academy of Law Journal*, Vol. 24/2012, Singapore Academy of Law, p. 107.

parents threatens to endanger the child.

Reference of the domestic courts to the parents' religion in the context of deciding on entrusting children and exercising parental rights constitutes a violation of the right to respect for family life.<sup>103</sup> That is the case in the *Hoffman v. Austria*<sup>104</sup> case where the European Court of Human Rights pointed out that the domestic courts were estimating whether a mother was suitable to exercise parental rights, with regard to her religion in connection with the ban on blood transfusion, the absence of a traditional holiday (Christmas, Easter) and the way of life of members of this religion, which is different from most nationals. The Supreme Court did not acknowledge the statement of the mother that she would allow blood transfusion in case of need, and that she was ready to let the children spend religious holidays (Christmas and Easter) with the father.<sup>105</sup> Also, the negative effect that children may suffer due to the change in the decision about the exercise of parental rights is not sufficiently considered. In this way the domestic court failed to take into account the opinion of court experts and based its decision on granting parental rights exclusively on the parents' religion.<sup>106</sup> The violation of the right to respect for family life in relation to the right to equality has been established.<sup>107</sup>

In another case, *Palau-Martinez v. France*,<sup>108</sup> the Court stated that the deci-

103 Although the United States provides for the possibility of religious arbitration in the exercise of parental rights, decisions of these religious informal bodies do not have a binding character for civil courts. Julia Halloran McLaughlin, Taking Religion out of Civil Divorce, *Rutgers University Law Review*, Vol. 65, no. 2/2013, Rutgers School of Law, p. 445.

104 *Hoffman vs Austria*, case. no. 12875/87, judgment of 23 June 1993. The applicant is an Austrian national who married in 1980 and got two children born in 1980 and 1982. Both spouses were Catholics. The wife changed her religion and became a member of Jehovah's Witnesses. In 1983 she initiated the divorce proceedings and took the children with her. Marriage was divorced in 1986, and both spouses filed a request for the exercise of parental rights. The first instance and the second instance courts, on the basis of the opinion of the expert and attachment of children to their mother, granted her the parental rights. However, in September 1986, the Supreme Court ruled that mother's religion had a detrimental effect on children and granted parental rights to the father. The applicant complained that the change in the decision to exercise parental rights violated the right to respect the family life.

105 A statement by a parent who practices religious attitudes may be the reason for changing the decision to exercise parental rights: Carolyn R. Wah, Religion in Child Custody and Visitation Cases: Presenting the Advantage of Religious Participation, *Family Law Quarterly*, Vol. 28, no. 2/1994, American Bar Association Section of Family Law, Chicago, p. 271. Thus, the father was granted parental rights because the mother, a member of Jehovah's Witnesses, stated that in the event of a danger to her child, she would not inform the father about it.

106 A completely opposite attitude than the one of the European Court of Human Rights was taken in the case of *Hoffman* by the Nebraska Court of Appeal in the *Garett vs Garret* case 527 N.W.2d. 213 (Ct Ap 1995), stating that the court cannot decide (only) on the basis of a hypothetical future injuries to a child who would require medical intervention. Jennifer A. Drobac, For the Sake of Children: Court Consideration of Religion in Child Custody Cases, *Stanford Law Review*, Vol. 50/1998, Stanford University Law School, p. 1654.

107 Geraldine Van Bueren, *The International Law on the Rights of the Child*, Hague, 1998, p. 79.

108 *Palau-Martinez in France*, case. no. 64927/01, judgment of 16 December 2003. The applicant was a French citizen born in 1963, the mother of two children born in 1984 and 1989. After the husband's departure from the family home, in 1994, she initiated a divorce proceedings. In September 1996, the Court ordered the joint exercise of parental rights. The children had a place of residence with their mother, and the father was granted the right to contact with children. While spending school summer vacation in 1997 with him, the father kept the children and enrolled them in a local school. In January 1998, the Court amended the

sion of the domestic court to grant the children to the father after living for three years with their mother constituted an interference with family life. Assessing the conditions in which children live with both parents, the Court treated parents differently in terms of the mother's religion. The court's decision did not specify any concrete circumstances for the mother's religion to detrimentally affect the daily education of children. In addition, the domestic court did not seek the opinion of experts - social services or psychologists - to determine the influence of religion on the education of children.<sup>109</sup> No link between the harmfulness of children's interests and their living conditions in the mother's home was ascertained. The European Court of Human Rights found that different treatment had no justification and that a violation of Article 14 and Article 8 of the ECHR was cumulative.<sup>110</sup> We believe that parents' religion can be a discrediting circumstance only if a certain religious belief of a parent is harmful to the well-being of a child. The absence of a potential threat to the interests of the child should not lead to granting parental rights by reference to the parents' religion. The fact that the mother stated that she would allow medical intervention, and that the child would celebrate religious holidays with the father, eliminated the existence of a potential, abstract danger to the child, and therefore the basis for parent's religion to be a decisive fact in granting parental rights. Additionally, there was no circumstance that indicated the already occurring adverse effects per child. In this case, there was neither an abstract nor a concrete danger of religious beliefs regarding the welfare of the child. In the second case, similarly, none of the facts that mother's religion adversely affects, or has already affected, the welfare of the children, has not been established, and there was no basis for amending the decision on exercising parental rights.

## Conclusion

When parental rights are being assigned, religion must not be decisive factor, but it should be observed as one of circumstances by which court would be guided under the condition that it has significant influence on the welfare of the

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original decision and granted the exercise of parental rights to the father, while the mother had the right to contact. The Court's reasoning was reflected in the fact that the mother acted contrary to the interests of the children, since she was a member of Jehovah's Witnesses. The decision was confirmed by the Supreme Court in July 2000. The applicant complained that the decision to grant the father the right to parental rights on the grounds that she was the member of the sect had led to a violation of the right to respect for family life. Similarly to the decision of the European Court of Human Rights in this case, the Italian courts are of the view that even very affiliation of the parents to Jehovah's Witnesses is contrary to the interests of the child. Thus, "... the independent exercise of parental rights must be conferred whenever a parent cannot provide the child with dominant educational model that guarantees the child's socialization, as well as the security necessary for a stable development ... while the mother's affiliation to Jehovah's witnesses obviously destabilizes the child and provides the child with an educational model that makes proper socialization impossible." About that: Stefano Troiano, Parental Responsibility and Religious Education, *International Journal of the Jurisprudence of the Family*, Vol. 5/2014, New York, p. 209.

109 Geoffrey Shannon, *Child Law*, Dublin, 2010, p. 100.

110 See the case *Cosac v Romania*, N. 28129/05, Sentence from 14. January 2010.

child. From the legal and political view, if there is separation of the state (law) and religion – the principle of religious freedom, if it is determined that religion of the parents can be harmful for the upbringing and development of the child, it is wrong if the religion is not considered and if the assessment of potential harm of religion of parents for the interests of child is not made.

Religion can be analyzed as personal characteristic of the parents or as an element influencing the assessment of the best interests of the child.

If child at the age of 15 has right to choose high school independently, it should also be allowed that 15-year-old child can choose the religion on his/her own. Although the court is not allowed to judge religious views of the parents according to the principle of the religious neutrality, indirectly it is allowed through the judgment of religious views in the context of the best interests of the child, in three areas – assigning and exercise of parental rights, adoption and fostering. Activities of grown up members of the religion can not be the same as religious activities practiced by children. Parents have right and freedom to decide about child's religion and raise their child according to their religious views. A rule by which the child in the age of 15, with certain maturity, could decide independently if he/she would practice religion should be included into Serbian legal system, like other children rights. In the case of divorce, it is necessary that the parent who does not exercise parental rights agrees to determination or the change of religion of the child made by the parent to whom the child was assigned by the court's decision. This question is one of substantial questions which influence the life of child.

With regard to religious affiliation of parents when assigning parental rights, it is necessary that there is potential concrete risk for the welfare of child because of parents' religion. Also, if in the past there was the fact implying that religion of parents caused harmful consequences for the child, it is enough for assigning the child to another parent. Subsequent action and appearance of the consequence are not in the accordance with the interests of the child, but previous behavior of parents is taken as good reason for the change of decision regarding parental rights. Bearing in mind that, undoubtedly, the question of determining and the change of religion in comparative law are considered substantial, it would be good to amend the Family Act by clear statements that determination or the change of child's religion is substantial issue for which the consent of both parents is needed. Also, to the corpus of child's rights from the age of 15 should be added the right to choose or to change the religion, but only if it is not harmful for the well-being of the child, in which case the "right of veto" of parents would be activated in the case of independent choice of religion of child.

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## РЕЛИГИЈА У ПОРОДИЧНИМ ОДНОСИМА – ПРАВА ДЕТЕТА НА ИЗБОР ВЕРОИСПОВЕСТИ И/ИЛИ ПРАВО РОДИТЕЉА НА ОДГОЈ ДЕТЕТА СХОДНО ЊИХОВИМ ВЕРСКИМ УБЕЂЕЊИМА

### Сажетак

Држава има обавезу да поштује принцип верских слобода. У складу са тим, верска оријентација родитеља не сме бити довођена у питање, али са друге стране, дете треба да буде заштићено од стране државе у смислу да верска припадност родитеља не буде претња за развој и добробит детета. Државна политика може заузети став да је религија детета ексклузивно право родитеља који могу подизати своје дете у верском смислу, или да дете у одређеним годинама има право да одабере своју религију. Верске норме су повезане са правом кроз гаранцију верских права и слобода. Иако родитељи имају примарну улогу у подизању детета, а одређивање религије битно утиче на живот детета, аутор сматра да они родитељи који подижу своје дете имају право да дају сагласност на избор или промену религије детета, и да без њихове сагласности, други родитељ не може одредити религију детета. Судови би требало да избегавају одлуке које су засноване стриктно на вери родитеља. Међутим, због вере родитеља добробит детета може бити угрожена (забрана употребе медицинских интервенција, забрана трансфузије крви). Аутор сматра да је постојање потенцијалног конкретног ризика довољно (став о недозвољавању медицинских интервенција) да се родитељска одговорност пренесе на другог родитеља.

**Кључне речи:** верске слободе, религија, политикологија религије, религија детета, одговорност родитеља, права детета, добробит детета

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