

ROLE OF THE PARENTS IN THE EXERCISE OF THE CHILD'S RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

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ABSTRACT

The right of the child to freedom of thought, conscience and religion is one of the four participation rights of the child, protected under Article 14, paragraph 1 of the UNCRC. As such, it enables the child to be an active member of society. However, due to child's vulnerability, immaturity and dependency on adults, the role of parents in exercising this (and other) right(s) is of a great importance. As the child's legal representatives, parents are entitled to provide direction and guidance in the exercise of this child's right (Article 14, paragraph 2 of the UNCRC). Nevertheless, according to Family law theory, such direction and guidance must be subject to certain limitations. Additionally, parents are entitled to decide about child's religious upbringing, which can result in conflict between their right to determine child's religion and child's rights, such as right to education, right to life, survival and development, and rights to physical integrity, self-determination and health. Conflicts are also likely to arise in case of divorce of parents in regarding the determination of child's religious upbringing. While discussing the right to determine child's religion, the role and rights of adoptive parents shall not be overlooked. Finally, the limitations of the right of the child to manifest religion are also examined.

Keywords: Article 14 of the UNCRC, Best interests of the child, conscience and religion, ECtHR, Parental direction and guidance, Right of the child to freedom of thought, Role of parents

1. INTRODUCTION

Historically, children were regarded as passive objects of law, “*legally incompetent, and thus unable to act or exercise rights on their own behalf.*”¹ In the 1950s, this approach started to change as there was a growing awareness that children’s legal position should be redefined. These changes started occurring primarily within the United Nations, which, in the 1959, adopted the UN Declaration on Children’s Rights, proclaiming the rights and freedoms of children in only ten principles. However, due to its non-binding nature, its impact was primarily symbolic.² On the other hand, general human rights treaties adopted in this period – either within UN or Council of Europe – granted rights to *everyone*, but did not explicitly recognize children as holders of these rights.³ The reason for that lay in the fact that children were still considered as emotionally, spiritually and materially dependent on adults.⁴

It was in 1989, when the UN Convention on the Rights of the Child (hereinafter: UNCRC)⁵ – “*the clearest and fullest statement of children’s rights*”⁶ – was adopted, that their legal position changed. Thus, from passive objects of law, on whose behalf others (parents or legal representatives) made decisions, children became active subjects who independently enjoy different rights in all areas of their life: personal, societal, educational, health, social, economic, cultural, and judicial-protective.⁷ These rights are commonly categorized into three groups, known as the ‘3P’: protection, provision and participation.⁸ Some legal scholars also add prevention as a fourth category, thus referring to it as ‘4P’.⁹

Among these rights, special attention is given to the right of child to freedom of thought, conscience and religion, a right that child enjoys as member of

¹ Benyusz, M.; Raisz, A., Introduction, in: Benyusz, M.; Raisz, A. (eds.) *International Children’s Rights*, CEA Publishing, Miskolc-Budapest, 2024, p. 13.

² Hrabar, D., *Special Protection of Human Rights of Children I: History of Children’s Rights*, in: Benyusz, M.; Raisz, A. (eds.) *International Children’s Rights*, CEA Publishing, Miskolc-Budapest, 2024, p. 36.

³ Hlača, N.; Popović, P., *The Child’s Right to Freedom of Conscience and Religion*, Bogoslovska smotra, Vol. 79, Issue 2, 2009, p. 278.

⁴ *Ibid.*

⁵ UN Convention on the Rights of the Child, Official Gazette of the SFRY, No. 15/1990, Official Gazette of the Republic of Croatia – International Treaties, Nos. 12/93, 20/97.

⁶ Freeman, M., *A Magna Carta for Children? Rethinking Children’s Rights*, Cambridge, United Kingdom, New York: Cambridge University Press, 2020, p. 6.

⁷ Hrabar, D. *et al.*, *Family Law*, Official Gazette, Zagreb, 2021, pp. 199-203; Hrabar, D. *Introduction to children’s rights*, in: Hrabar, D. (ed.), *Rights of the child. Multidisciplinary approach*, Biblioteka Udžbenici, Faculty of Law University of Zagreb, pp. 11-37, pp. 28-29.

⁸ Freeman, *op. cit.*, note 6, p. 131.

⁹ Hrabar, *op. cit.*, note 2, p. 27; Hrabar, D. *et al.*, *op. cit.*, note 7, pp. 199-200.

society.¹⁰ The need to discuss this right is becoming increasingly important, especially in the context of changes occurring within EU (such as migration and arrival of workers from third-world countries), which pose challenges to the integration of the children of different culture, religion and tradition into European societies. Considering that, in exercising of all child's rights – including the right to freedom of thought, conscience and religion – the assistance and guidance of parents is not only necessary, but rather welcomed, this paper will focus on their pivotal role in its realization.

Questions such as – How do parents fulfil that role in the society where the integration of their children of different culture, religion and tradition might be challenging? Should their role be subject to certain limitations? How should conflicts between parental right to determine child's religious conviction and child's rights be resolved? Can parental religious conviction be used as a justified reason for keeping their child out of public education/ for refusing necessary medical treatment/ for subjecting their child to medical procedures that are not medically indicated? Is the role of adoptive parents equal to the role of biological ones in determining the child's religion? Is the parent, with whom the child lives after the divorce, entitled to solely decide on religious upbringing of the child? – will be discussed.

2. THE RIGHT OF THE CHILD TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

Before the adoption of the UNCRC, the right of the child to freedom of thought, conscience and religion “*appeared in international treaties adopted within the framework of the United Nations only indirectly, establishing a right whose subjects are exclusively parents.*”¹¹ However, Family law scholars argue that the child was guaranteed this right even before the adoption of the UNCRC- albeit implicitly – as the International Covenant on Civil and Political Rights (ICCPR)¹² and European Convention on Human Rights (ECHR)¹³ guaranteed the right to freedom of thought, conscience and religion to *everyone*.¹⁴

¹⁰ *Ibid.*, p. 201; Jakovac-Lozić, D., *The child as the holder of the right to freedom of conscience, religion, or other beliefs*, Collected Papers of the Faculty of Law in Split, Vol. 39, 2002, p. 45.

¹¹ Hlača; Popović, *op. cit.*, note 3. See also: Jakovac-Lozić, D., *op. cit.*, note 10.

¹² International Covenant on Civil and Political Rights (ICCPR), UN General Assembly resolution 2200A (XXI), 1966.

¹³ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

¹⁴ Langlaude Doné, S.; Tobin J., *Article 14. The Right to Freedom of Thought, Conscience, and Religion*, in: Tobin, J. (ed.), *The UN Convention on the Rights of the Child – A Commentary*, Oxford University Press, Oxford, 2019, pp. 477 and 487; Samardžić, S., *Legislative history of the UN Convention on the*

With the adoption of the UNCR, the right of the child to freedom of thought, conscience and religion was explicitly acknowledged and protected. Article 14, paragraph 1 of the UNCRC states that State Parties shall respect the right of the child to freedom of thought, conscience and religion. As fundamental civil and political human right, it encompasses, on the one hand, the right of the child to manifest his or her beliefs, and on the other, the obligation of State Parties to respect, protect and promote this right within their jurisdiction without discrimination of any kind (Article 14, paragraph 1 in connection with Article 9, paragraph 1).¹⁵ Alongside the right of the child to freely express views in all matters concerning him or her (Article 12 of the UNCRC), the right to freedom of expression (Article 13 of the UNCRC), and the right to free association and peaceful assembly (Article 15 of the UNCRC), the right to freedom of thought, conscience and religion, is one of the four participation rights of the child.¹⁶ *These rights regulate children's relationships with family members and, more broadly, with all individuals and institutions with whom they come into contact.*¹⁷ Moreover, they ensure that the child is not only visible,¹⁸ but also recognized as an active subject of law.

Given its significance, the right of the child to freedom of thought, conscience and religion has been the subject of analysis of both legal scholars and European Court of Human Rights (hereinafter: ECtHR). While Schanda depicts it as “*inseparable and prominent fundamental right, that according to the ECHR, is one of the pillars of 'democratic society,'*”¹⁹ Freeman argues that “*there is no right which illustrates better the inherent dignity of man.*”²⁰ The ECtHR echoes these views, describing this right as “*one of the most vital elements that go to make up the identity of believers and their conception of life, but... also a precious asset for atheists, agnostics, sceptics and the unconcerned*”.²¹

In addition to its protection under the UNCRC, the right of the child to freedom of thought, conscience and religion also found its protection under general human right treaties, such as the International Covenant on Civil and Political (1966),

Rights of the Child, in: Benyusz, M.; Raisz, A. (eds.), *International Children's Rights*, CEA Publishing, Miskolc-Budapest, 2024, pp. 41-61, p. 51.

¹⁵ See: Hlača; Popović, *op. cit.*, note 3, p. 281.

¹⁶ See more about these rights: Šimović, I., *UN Convention on the Rights of the Child: Participation*, in: Benyusz, M.; Raisz, A. (eds.) *International Children's Rights*, CEA Publishing, Miskolc-Budapest, 2024, pp. 137-159.

¹⁷ *Ibid.*, p. 138.

¹⁸ The term “visible” firstly refers to the child's active role in his or everyday life, as well as in his or her society and community, and secondly, to his or her visibility in judicial and administrative proceedings.

¹⁹ Schanda, B., *The freedom of religion of children*, *European Integration Studies*, Miskolc, Vol. 19, Issue 1, 2023, p. 248. [<https://doi.org/10.46941/2023.e1.11>].

²⁰ Freeman, *op. cit.*, note 6, p. 186.

²¹ Judgment *Bayatyan v. Armenia* (2011), 54 EHRR 15, para. 118.

the European Convention on Human Rights and Fundamental Freedoms (1950), and the European Charter of Fundamental Rights (2000),²² all of which guarantee the right to freedom of thought, conscience and religion to *everyone*.^{23 24} Both Article 9, paragraph 1 of the ECHR and Article 10, paragraph 1 of the Charter state that “*everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance*”. The same wording is provided in the Article 18, paragraph 1 of the ICCPR, with only few subtle differences.

Evidently, there is one difference between these Articles and the Article 14, paragraph 1 of the UNCRC. Specifically, Article 18, paragraph 1 of the ICCPR, Article 9, paragraph 1 of the ECHR and the Article 10, paragraph 1 of the Charter elaborate on the content of the right to freedom of thought, conscience and religion, that is, they specify what it includes. In contrast, Article 14, paragraph 1 of the UNCRC does not determine the content of this right.²⁵ The reason for this lies in the persistent resistance to acknowledge that children have the right to change their religion.²⁶ Due to this omission, some legal scholars have been questioning whether the UNCRC grants children the right to change their religion. While Freeman argues that the UNCRC does not grant the child a right to change or choose his or her religion,²⁷ other legal scholars claim that the Convention can be interpreted as establishing a presumption in favour of the child’s right to choose or change religion.²⁸

Even though Article 14 of the UNCRC does not elaborate on the content of the right of the child to freedom of thought, conscience and religion, more states have expressed reservations to this Article than any other in the UNCRC²⁹ – the con-

²² Charter of Fundamental Rights of the European Union (Charter), Official Journal of the European Communities, 2000/C 364/01.

²³ For more on the application of the ECHR on children see: Hlača; Popović, *op. cit.*, note 3, pp. 287-288.

²⁴ In this regard, Vlašković argues that “*the child’s equal entitlement is the outcome of the interpretation of the ECHR provisions that the rights and freedoms will be guaranteed to ‘everyone’ combined with the prohibition of discrimination*”. Vlašković, V., *Children’s Rights in the Council of Europe – Framework*, in: *Children’s Rights in Regional Human Rights Systems*, Raisz, A. (ed.), CEA Publishing, Miskolc-Budapest, 2024, p. 48.

²⁵ Šimović, *op. cit.*, note 16, p. 151; Langlaude Doné, S.; Tobin J., *op. cit.*, note 14, pp. 488 and 489.

²⁶ *Ibid.*, p. 488.

²⁷ Freeman, *op. cit.*, note 6, p. 186.

²⁸ See: Schanda, *op. cit.*, note 19, p. 247; Langlaude Doné; Tobin, *op. cit.*, note 14, p. 478; Jakovac-Lozić, *op. cit.*, note 10, pp. 38-39; Hrabar *et al.*, *op. cit.*, note 7; Čolaković, M., *Religious commitment of parents vs. the BIC in exercising his rights to physical integrity*, Faculty of Law, University of Mostar, IBU Repository, p. 69, available at: [<https://omeka.ibu.edu.ba/items/show/1181>], Accessed 3 March 2025.

²⁹ When the UNCRC entered into force, in 1990, 21 States expressed reservations to this Article. Varadan, S., *The principle of evolving capacities under the UN Convention on the Rights of the Child*,

cession to the Islamic states was made.³⁰ These reservations blur the line between children as rights-holders under the UNCRC and parents as their legal representatives, who have the right and duty to provide direction and guidance in the exercise of these rights but do not themselves hold the rights granted by the UNCRC.

Accordingly, Family law theory argues that such concessions are contrary to the Article 51, paragraph 2 of the UNCRC, which states: “*A reservation incompatible with the object and purpose of the present Convention shall not be permitted*”.³¹ A similar stance was taken by the UN Committee on the Rights of the Child, which, in the General comment No. 5 (2003),³² paragraph 15, expressed deep concern that “*some States have made reservations which plainly breach Article 51 (2)*” and in the General Comment No. 20 (2016),³³ paragraph 43, “*urges States parties to withdraw any reservations to Article 14 of the Convention*”. However, reservations were not made solely by the states, but also by the Holy See, which “*underlines in its reservation to the Convention the ‘primary and inalienable rights of parents’*.”³⁴

3. PARENTAL DIRECTION AND GUIDANCE IN THE EXERCISE OF THE CHILD’S RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

A child’s parents, as holders of parental responsibility over the child, have the rights and duties to make decisions concerning the child, including those con-

International Journal of Children’s Rights, Vol. 27, p. 312., available at: [\[https://brill.com/view/journals/chil/27/2/article-p306_306.xml?ebody=pdf-130820\]](https://brill.com/view/journals/chil/27/2/article-p306_306.xml?ebody=pdf-130820), Accessed 3 March 2025.

³⁰ During the drafting of the Convention, representatives of certain countries considered the exercise of child’s freedom of religion to be a threat to parental rights, and potentially, to the best interests of the child. In particular, representatives of Islamic countries expressed certain objections, arguing that the proposed solutions contradict to their national legal systems and tradition, according to which children follow the religion of their parents. Radina, A., *The right of the child to freedom of religion*, 2018., doctoral thesis, p. 28.; Samardžić, S., *op. cit.*, note 14. See also: Hlača, N., *Religious Upbringing, Children’s Rights, and Child Circumcision*, Collected Papers, Second International Scientific Conference, Law Faculty of the University “Džemal Bijedić” Mostar, 2014, p. 59; Freeman, *op. cit.*, note 6, p. 186; Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 477, 479 and 489.

³¹ *Ibid.*

³² UN Committee on the Rights of the Child (2003). General Comment No. 5 (2003) – General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

³³ UN Committee on the Rights of the Child (2016). General Comment No. 20 (2016) – The Implementation of the Rights of the Child during Adolescence, CRC/C/GC/20, 6 December 2016.

³⁴ Schanda, *op. cit.*, note 19, p. 252; Hlača; Popović, *op. cit.*, note 3, p. 292.; Varadan, *op. cit.*, note 29, p. 312.

cerning child's religious upbringing.³⁵ These rights and duties have their roots in the law of nature, as parents are the ones who gave birth to the child and therefore should be the first ones to take care of him or her. Accordingly, human rights treaties acknowledge that responsibility and do not prohibit them to upbringing their children according to their religious or philosophical beliefs. On the contrary, *"it is widely accepted that parents' right to freedom of religion and respect for family life includes a right to bring up their children in accordance with their own religion and beliefs."*³⁶

Among these treaties, the UNCRC holds foremost position. It not only acknowledges the indispensable role of parents in providing direction and guidance to the child in the exercise of this right but gives them primacy regarding the transmission of the religion, beyond which, any state intervention must cease.³⁷ Specifically, paragraph 2 of Article 14 of the UNCRC prescribes that the State Parties must respect the rights of the child's parents, or, when applicable, legal guardians, to provide direction in the exercise of this right, in a manner consistent with the child's evolving capacities. This standpoint was confirmed by the ECtHR in the case of *Bayev and Others v. Russia*,³⁸ in which it concluded that *"nothing in the applicants' actions diminished the right of parents to enlighten and advise their children, to exercise with regard to their children the natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions."*

In light of this, the question arises as to how parents provide such direction. First, as legal representatives of the child in realizing or exercising child's right to freedom of religion, parents can determine the religious affiliation of the child at his or her earliest age.³⁹ Second, they can influence development of his or her religious identity or affiliation through everyday family life – namely, parents will decide whether the child will take part in religious ceremonies (e.g., participation in pilgrimage), about his or her religious education, about the way the child will dress,

³⁵ In this regard Hlača and Popović argue that *"no form of upbringing... can be exempt from transmitting, teaching, or assisting children in discovering certain values"*. Hlača; Popović, *op. cit.*, note 3, p. 284.

³⁶ Langlaude Doné; Tobin, *op. cit.*, note 14, p. 494.

³⁷ Šimović, *op. cit.*, note 16, p. 151; Hlača; Popović, *op. cit.*, note 3, p. 282.

³⁸ Judgment *Bayev and Others v. Russia* (2017), App. No. 67667/09, 44092/12 and 56717/12 (ECtHR, 20 June 2017), para. 82.

³⁹ Čolaković, *op. cit.*, note 28, p. 68; Novaković, U., *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*, Politics and religion, Vol. 12, Issue 1, p. 159; Lucić, N., *Representation in relation to Essential Personal Rights of the Child*, Collected Papers of the Faculty of Law, in Split, Vol. 58, Issue 3, p. 829.

whether he or she will eat pork or practice fasting, etc.⁴⁰ In making these decisions, parents have a wide discretion, limited only by law and child's well-being.⁴¹ In this regard, Jakovac-Lozić points out that *"it then becomes clear that parents will pass on their belief, whether theistic or atheistic, as well as certain philosophical convictions to their children, teaching and raising them in such an environment"*.⁴²

An understanding that parents of child's religious identity was not introduced by the UNCRC – it was already existent within the UN legal framework.⁴³ The UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, from 1981, prescribed that a child's parents, or, when applicable, legal guardians, *"have the right to organize the life within the family according to their religion or belief, and bearing in mind the moral education in which they believe the child should be brought up"*. In line with this, in case of *Abdi Ibrahim v. Norway*,⁴⁴ the ECtHR stated that *"it is clear when the child lives with his or her biological parent, the latter may exercise Article 9 rights in everyday life through the manner of enjoyment of his or her Article 8 rights."*

3.1. LIMITATIONS OF PARENTAL DIRECTION AND GUIDANCE

Despite the fact that parents have a pivotal role in relation to the child's right to freedom of thought, conscience and religion, they do not have the right to indoctrinate or coerce the child to accept a particular belief or religion.⁴⁵ Therefore, Family law theory considers that the influence of parents in shaping their child's religious values and beliefs should be limited and will only be legitimate if three preconditions prescribed by the UNCRC are met.⁴⁶

First, parental direction and guidance needs to be conducted in a manner consistent with the child's evolving capacities (Article 14, paragraph 2 in connection with Article 5). This means that, as the child grows and becomes more mature, his or her opinion should be given more weight, and the role of parents dimin-

⁴⁰ *Ibid.*; Čolaković, *op. cit.*, note 28, p. 69; Langlaude Doné; Tobin, *op. cit.*, note 14, p. 495; Taylor, R., *Parental Responsibility and Religion*, in: Probert, R.; Gilmore, S.; Herring, J. (eds.), *Responsible Parents and Parental Responsibility* Probert, Oxford and Portland, Oregon, p. 128.

⁴¹ *Ibid.*; Čolaković, *op. cit.*, note 28, p. 69; Jakovac-Lozić, *op. cit.*, note 10, p. 44.

⁴² Jakovac-Lozić, *op. cit.*, note 10, p. 38.

⁴³ Hlača, Popović, *op. cit.*, note 3, p. 279.

⁴⁴ Judgment *Abdi Ibrahim v. Norway* (2021), European Court of Human Rights [GC] Application No. 15379/16 para. 140.

⁴⁵ Langlaude Doné; Tobin, *op. cit.*, note 14, p. 495.

⁴⁶ Šimović, *op. cit.*, note 16, p. 149.

ishes.^{47 48} This standpoint was upheld by the UN Committee on the Rights of the Child in its General Comment No. 20 on the implementation of the rights of the child during adolescence (2016),⁴⁹ paragraph 43, in which it emphasized that *“it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence”*.

Second, parental direction and guidance must be appropriate (Article 5 of the UNCRC), meaning that *“it is forbidden to raise and educate a child in a religion that encourages discrimination against others or to practice religious beliefs that would be detrimental to the child’s physical, health or development.”*⁵⁰ It must also be in line with the best interests of the child (hereinafter: BIC), meaning that the role of parents can be limited by the principle of the primary protection of the BIC.⁵¹ As a matter of fact, this principle can ‘overrule’ the position of the parents. For example, if the religious beliefs of the parents and the child would endanger the BIC – such as when both the child and the parents refuse medical treatment (e.g. blood transfusion), thereby putting the child’s life at risk– the protection of the BIC should prevail.⁵² Thus, in case of *Jehovah’s Witnesses of Moscow and Others v. Russia*,⁵³ the ECtHR stated that parental refusal of the medical treatment may be overruled through judicial intervention in the interest of the child.⁵⁴

Lastly, the direction and guidance of parents will be legitimate if parents have respected the views of the child in all matters concerning the child (Article 14,

⁴⁷ Hlača; Popović, *op. cit.*, note 3, p. 283 and 286; Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 494-495; Čolaković, *op. cit.*, note 28, p. 69; Majstorović, I., *The realization of the right of the child to express his/her views – How »visible« are children in Croatian family judicial proceedings?*, Annual of social work, Vol. 24, Issue 1, 2017, p. 57; Lundy, L.; Tobin, J.; Parkes, A., *Article 12. The Right to Respect the Views of the Child*, in: Tobin, J. (ed.), *The UN Convention on the Rights of the Child – A Commentary*, Oxford University Press, Oxford, pp. 411-412.

⁴⁸ In this regard Novaković states: *“The Convention on the Rights of the Child makes a balance between the right of the child to choose the religion and the capacities of the child.”* Novaković, U., *op. cit.*, note 39, p. 156.

⁴⁹ UN Committee on the Rights of the Child, General Comment No. 20, 2016.

⁵⁰ Radina, *op. cit.*, note 30, pp. 67-68.

⁵¹ Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 477, 479, 486 and 492; Freeman, M., *op. cit.*, note 6, pp. 8, 241-242 and 390; Khazova, O. A.; Dawit Mezmur, B., *UN Committee on the Rights of the Child, Reflections on Family Law Issues in the Jurisprudence of the CRC Committee: The Convention on the Rights of the Child @ 30*, in: Brinig M. (ed.), *International Survey of Family Law*, Intersentia, Cambridge – Antwerp – Chicago, 2019, pp. 305-328, p. 315; Vučković-Šahović, N. et al., *The rights of the Child in International Law – Rights of the Child in a Nutshell and in Context: all about Children’s Rights*, Stämpfli Publisher, Bern, 2012, p. 488.

⁵² Čolaković, *op. cit.*, note 28, p. 74.

⁵³ Judgment *Jehovah’s Witnesses of Moscow and Others v. Russia* (2010) European Court of Human Rights, Application No. 302/02.

⁵⁴ *Ibid.*, paras. 131-144.

paragraph 2 in connection with Article 12).⁵⁵ In other words, parents must understand what this right means for their child and the way the child wishes to express his or her thought, conscience and religion, while also considering child's evolving capacities.⁵⁶ However, it is not clear what should be done in the case of a conflict between parents and the BIC, as the UNCRC does not provide a solution.⁵⁷

Therefore, each State Party needs to find and prescribe an appropriate solution that would resolve such situations. For example, in Croatia, in the case of a conflict between the parents and the child, the child (represented by a special guardian *ad litem*) or the parents could initiate a non-contentious judicial proceeding in which a Court would make a decision in line with the best interests of the child. Before this judicial proceeding, the child and the parents would have to attend mandatory counselling before the Croatian Institute for Social Work, where they would be provided with assistance in reaching consensual solution.⁵⁸ In these proceedings, competent authorities should respect the role of the child in protecting and promoting his or her right to freedom of religion – in accordance with the child's age and maturity and, of course, the child's best interests.

4. PARENTAL RIGHT TO DETERMINE CHILD'S RELIGIOUS AFFILIATION VS. CHILD'S RIGHTS

4.1. PARENTAL RIGHT TO ENSURE CHILD'S EDUCATION IN ACCORDANCE WITH RELIGIOUS BELIEFS AND THE CHILD'S RIGHT TO EDUCATION

Apart from acquiring religious knowledge through family life, a child receives such knowledge through education as well.⁵⁹ However, even then, the role of parents is strongly appreciated,⁶⁰ and the need to achieve harmony between the religious education of the child and the personal beliefs of the parents, is required by several

⁵⁵ Šimović, *op. cit.*, note 16, p. 149; Langlaude Doné; Tobin, *op. cit.*, note 14, p. 493.

⁵⁶ *Ibid.*, p. 493.

⁵⁷ In this regard, Langlaude Doné and Tobin J. state that “*in the event of a conflict between parent's and a child's view in this context, the views of the child must be determinative where the child is of sufficient maturity*”. *Ibid.*, p. 496.

⁵⁸ Article 94, paragraph 6 and Article 109 of the Croatian Family Act, Official Gazette No. 103/15, 98/19, 47/20, 49/23, 156/23.

⁵⁹ Lucić, *op. cit.*, note 39, p. 830.

⁶⁰ In this regard Hrabar states: “*Education, both as a process and as content, must be aligned with parental upbringing; otherwise, it creates confusion for the child and undermines the parents' responsibility for the harmonious development of the child's personality*.” Hrabar, D., *The Impact of Parental Religious and Philosophical Beliefs on the Upbringing and Education of Children in Croatian Legislation*, Collected Papers of Zagreb Law Faculty, Vol. 68, Issue 3-4, 2018, p. 322.

international legal documents.⁶¹ The most important among them is Protocol No. 1 to the ECHR, which can be said to strongly appreciate the role of the parents in the sphere of children's education, including religious education.⁶² Its Article 2 prescribes that *"no person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."*

The importance of this provision has been recognized in the jurisprudence of the ECtHR, which in the case *A.R. and L.R. v. Switzerland*,⁶³ concluded that *"the parent's right to provide for their children's education is mainly protected by Article 2 of Protocol No. 1 to the Convention, which is in principle the lex specialis in relation to Article 9 of the Convention."*⁶⁴

In essence, the Court explained that when public education provided by the State, does not align with the religious or philosophical convictions of the parents, Article 2 of the Protocol No. 1 will apply as *lex specialis*, rather than Article 9 of the ECHR.⁶⁵

The pivotal role of parents – besides being acknowledged by the Protocol 1 to the Convention, is also acknowledged by the Charter of Fundamental Rights of EU, which is the only legal document that mentions parental pedagogical beliefs aside to religious or philosophical ones.⁶⁶ Its Article 14, paragraph 3 states that *"the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national law governing the exercise of such freedom and right"*.

However, such acknowledgment of the (pivotal) role of parents does not mean that in cases of a conflict between parental right to ensure the child's education in accordance with their religious beliefs and the child's right to education, the parental right will prevail. On the contrary, the right of the child to education takes precedence and parents' religious conviction cannot be used as a justified reason

⁶¹ Lucić, *op. cit.*, note 39, p. 830.

⁶² Schanda, *op. cit.*, note 19, p. 248; Jakovac-Lozić, D., *op. cit.*, note 10, p. 43.

⁶³ Judgment *A.R. and L.R. v. Switzerland* (2017), European Court of Human Rights, Application No. 22338/15.

⁶⁴ See also: Judgment *Folgerø and Others v. Norway* (2007) European Court of Human Rights [GC] Application No 15472/02, para. 84; Judgment *Lautsi and Others v. Italy* (2011) European Court of Human Rights, Application No. 30214/06, para. 9.

⁶⁵ See: Hrabar, *op. cit.*, note 60, p. 330.

⁶⁶ Novaković, *op. cit.*, note 39, p. 189.

for keeping their child out of public education.⁶⁷ This standpoint was upheld by the ECtHR in case *Martins Casimiro and Cerveira Ferreira v. Luxembourg*,⁶⁸ where the Court stated: “Where the parents’ right to respect for their religious convictions, rather than enhancing the child’s right to education, came into conflict with it, the interests of the child prevail.” A similar conclusion was reached in case *Osmanoğlu and Kocabaş v. Switzerland*, where it concluded that “the children’s interest in a full education... prevailed over the wish to have their daughters exempted from mixed swimming lessons...”⁶⁹ Finally, in the case of *A.R. and L.R. v. Switzerland*,⁷⁰ the Court emphasized that religious norms which are woven into parental education do not grant exemption from obligation to observe state law but rather prevent State from indoctrinating children through such teaching.⁷¹

4.2. PARENTAL RIGHT TO DETERMINE A CHILD’S RELIGION AND THE RIGHT OF THE CHILD TO LIFE, SURVIVAL AND DEVELOPMENT

As legal representatives of the child, parents have both rights and duties to represent the child in all matters concerning him or her, including in deciding on medical treatments and interventions. Accordingly, Article 6, paragraph 2 of the Convention on Human Rights and Biomedicine,⁷² or the so-called Oviedo Convention, prescribes that “when a minor does not have a capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority of a person or body provided for by law. The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.”

In order to consent, the parents need to be capable of doing so, aware of the situation, and informed about the procedure by the child’s doctor. Even though in most

⁶⁷ In this regard, Schanda states that the “States are given a wide power of discretion in connection with the organization of public education, as the objective of public education is to transfer knowledge in objective, critical, and pluralist way; however, an exemption may not be requested from compulsory education even for religious reasons.” Schada, *op. cit.*, note 19, p. 250.

⁶⁸ Judgment *Casimiro and Cerveira Ferreira v. Luxembourg* (1999) European Court of Human Rights, Application No. 44888/98.

⁶⁹ Judgment *Osmanoğlu and Kocabaş v. Switzerland* (2017), Judgment *Lautsi and Others v. Italy*, European Court for Human Rights, Application No. 29086/12, paras. 91-92 & 95-106.

⁷⁰ Judgment *A.R. and L.R. v. Switzerland* (2017), European Court of Human Rights, Application No. 22338/15.

⁷¹ *Ibid.*, paras. 40-41, and 49.

⁷² Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Council of Europe, European Treaty Series – No. 164.

cases, parents accept doctor's opinion and consent to necessary medical interventions (such as blood transfusion or surgery) without hesitation, it can also occur that they refuse to do so – due to their religious or other beliefs.⁷³ In doing so, the parents may potentially endanger child's right to life, survival and development (Article 6 of the UNCRC). Such *“opposition to the application of a medical procedure solely on the basis of their religious or cultural affiliation is unacceptable...and cannot be upheld if such an intervention does not protect the best interests of the child”*.⁷⁴

Thus, in order to prevent that *“the child is put in jeopardy as it does not have the same level of medical protection as other children do...”*, the State should intervene and *“ensure medical protection to the child.”*⁷⁵ ⁷⁶ In cases of conflict over a medical intervention between the child and the parent(s), and the matter should be resolved through court mediation and/or with the participation of other state bodies responsible for protecting the rights and interests of the child.⁷⁷ In Croatia, in such cases, the medical staff has an obligation to inform the Croatian Institute for Social Work (hereinafter: CISW) about it. Employees of the CISW need to assess the whole situation and if necessary, appoint the child a special guardian *ad litem* with the goal of assuring him/her objective and impartial representation of his or her rights and interests.⁷⁸ In resolving this conflict, the principle of BIC should be a guiding principle, because the religious conviction and rights of the parents should not be exercised at the expense of the rights of the child, especially of the right to life, survival and development, nor should they endanger the BIC.⁷⁹

⁷³ Bubić, S., *The Best Interest of the Child Standard and Its Application in the Context of Exercising Parental Care*, Collected Papers, Second International Scientific Conference, Law Faculty of the University “Džemal Bijedić” Mostar, 2014, pp. 11-32, pp. 20-21.

⁷⁴ *Ibid.*, p. 21. See also: Čolaković, *op. cit.*, note 28, p. 81.

⁷⁵ Novaković, *op. cit.*, note 39, p. 167. See also: Čolaković, *op. cit.*, note 28, p. 81.

⁷⁶ This standpoint was affirmed by ECtHR in case of *Jehovah's Witnesses of Moscow and Others v. Russia*, where the Court's reasoning suggests that, while *“adult persons obviously have to be provided with the opportunity of making truly free decisions, and courts must be able to overrule the decisions made by parents in respect of the minor members of the group in the interest of the children.”* Schanda, *op. cit.*, note 19, p. 251.

⁷⁷ Čolaković, *op. cit.*, note 28, p. 76.

⁷⁸ Article 17 of the Croatian Act on the Protection of Patients' Rights, Official Gazette of the Republic of Croatia No. 169/04; Article 240, para. 1, pt. 5 of the Croatian Family Act; This won't apply in every case, as under the Article 88 of the Croatian Family Act, a sixteen-year-old child can independently give consent for a preventive, diagnostic or therapeutic medical procedure if that procedure is not related to the risk of serious consequences to the physical or mental health of the patient child. Otherwise, the general presumption is that the child is always represented by his/her parents as legal representatives.

⁷⁹ Čolaković, *op. cit.*, note 28, p. 81.; In this regard, Cohan states: *“Parents can make martyrs out of themselves, but they must not do that out of their own child.”* Cohan, J. A., *Judicial Enforcement of Lifesaving Treatment for Unwilling Patient*, Creighton Law Review, Vol. 39, 2006, p. 863.

4.3. PARENTAL RIGHT TO DETERMINE A CHILD'S RELIGION AND THE RIGHTS OF THE CHILD TO PHYSICAL INTEGRITY, SELF-DETERMINATION, AND THE ENJOYMENT OF THE HIGHEST-ATTAINABLE STANDARD OF HEALTH

The right of parents – as legal representatives of the child – to decide on medical interventions related to the child also encompasses medical procedures carried out for religious purposes, such as male circumcision.⁸⁰ By consenting to male circumcision, parents aim to “*promote a child's best interests by allowing his full acceptance into the community.*”⁸¹ At the same time, they also subject a child to a medical procedure that is not medically necessary, and that results in permanent bodily changes.⁸² “*In resolving such conflicts, the best interests of the child, as the primary criterion enshrined in the Convention on the Rights of the Child, must be the guiding principle, as the religious beliefs and interests of the parents must not prevail over the well-being of their child.*”⁸³

Unlike in situations involving refusal of blood transfusion, chemotherapy or certain surgical procedures – where the child's right to life is jeopardized – consenting to the circumcision of the child does not jeopardize his or her right to life but nevertheless encroaches upon child's right to physical integrity, self-determination, and health.⁸⁴ These rights are protected under Article 24 of the UNCRC, which, in paragraph 3, prescribes that “*States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children*”.

This formulation raises several questions: Does the term “children”, within the context of this provision, refer only to female or also to male children? Do “traditional practices prejudicial to the health of children” refer only to female genital mutilation? Can male circumcision – which encroaches upon child's right to physical integrity, self-determination and health – be considered as a “traditional practice prejudicial to the health of children” as well? According to Čolaković, when the Convention was being drafted, the term “traditional practice” primarily referred to female genital mutilation, but instead of using the term “female children”, a more generalized term, “children” was used.⁸⁵

⁸⁰ Čolaković, *op. cit.*, note 28, p. 70.

⁸¹ Taylor, *op. cit.*, note 40, p. 130.

⁸² *Ibid.*

⁸³ Čolaković, *op. cit.*, note 27, p. 67.

⁸⁴ *Ibid.*, p. 72.

⁸⁵ *Ibid.*, p. 70.

The distinction between these two procedures is clearly drawn in soft-law instrument adopted by Parliamentary Assembly of the Council of Europe in 2013 – The Resolution 1952 (2013). While in case of male circumcision, the Assembly calls on Member States to “*clearly define the medical, sanitary and other conditions to be ensured for practices which are today widely carried out in certain religious communities,*”⁸⁶ in relation to female mutilation, it calls on them to “*publicly condemn the most harmful practices, such as female genital mutilation, and pass legislation banning these.*”⁸⁷ Why is it so and is it in accordance with the principle of non-discrimination contained in Article 2 of the UNCRC? The answer can be found in Hlača’s conclusion that “*biological diversity of genders inevitably leads to discrimination: in the case of interfering with the bodily integrity of girls, a ‘stronger’ terminology should indeed be used, and it should be referred to as mutilation, which is punishable due to significantly different and much more severe consequences of interfering with a person’s bodily integrity.*”⁸⁸

Today, most Member States to the UNCRC and the Council of Europe do not consider the complete prohibition of circumcision of young boys to be “effective” or “appropriate measure”, in contrast to the prohibition of female mutilation. Namely, “*the circumcision of male children is hardly even considered a ‘medical procedure,’ but rather an act of exercising the parents’ religious freedom.*”⁸⁹ ⁹⁰In 2012, following strong reactions from Jewish and Muslim communities after the decision of the District Court in Keln, which “*concluded that circumcision of boys for religious reasons, if they are unable to give consent themselves, is not justified by the consent of their parents – meaning it constitutes a criminal act of bodily harm*” – the German legislator amended Civil Code.⁹¹ Finally, the right of parents to consent to the medically unnecessary circumcision of a child who is unable to reason or form a judgment was legally regulated.⁹²

⁸⁶ Resolution 1952 (2013), pt. 7.5.1.

⁸⁷ *Ibid.*, pt. 7.5.2.

⁸⁸ Hlača, *op. cit.*, note 30, p. 65.

⁸⁹ *Ibid.*, p. 54.

⁹⁰ In this regard Talyor concludes: “*Whether or not circumcision can be justified as being in the best interests of the child, it is clear that the law protects the interests of parents. It allows parents to fulfil their own religious obligations by permanently marking the child with the symbol of their religion at an age where he is not capable of accepting that religion for himself.*” Taylor, R., *op. cit.*, note 40, p. 131.

⁹¹ Čolaković, *op. cit.*, note 28, pp. 76-77.

⁹² *Ibid.*, p. 77.

Section 1613d of the German Civil Code now reads as follows: 1) *The care for the person of the child includes the right to give consent to the medically unnecessary circumcision of a male child who is not capable of reasoning and forming a judgment, if this is to be carried out in accordance with the rules of medical practice. This does not apply if circumcision, even considering its purpose, jeopardizes the best interests of the child.* 2) *In the first six months after the child is born, circumcision also may be performed pursuant to*

5. THE ROLE OF ADOPTIVE PARENTS

As previously discussed, Article 14, paragraph 2 of the UNCRC – which prescribes that parents, or when applicable, legal guardians, have rights and duties to provide direction and guidance in the exercise of the child's right to freedom of thought, conscience and religion - acknowledges the indispensable role of parents in this regard. However, questions arise as to whether it also acknowledges the indispensable role of adoptive parents and whether their position in this regard is equal to that of biological parents.

According to the ECtHR, the relationship between biological and adoptive parents is quite comparable. In *Kurochkin v. Ukraine*, the ECtHR pointed out that *“the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention and such a relationship, arising from a lawful and genuine adoption, may be deemed sufficient to attract such respect as may be due for family life under Article 8 of the Convention.”*⁹³ A similar standpoint was expressed in *Ageyevy v. Russia*,⁹⁴ and even more explicitly in *Taganrog Lro and Others v. Russia*, in which the Court concluded that *“as long as there is no evidence of abuse, violence or unlawful coercion, decisions about whether to give a child a religious or non-religious education... are to be made exclusively by the child's parents or the custodial parent...”*⁹⁵

In support of the view that the position of adoptive parents is equal to the position of biological ones in this regard, is the fact that, by adopting a child, adoptive parents become the holders of parental responsibility and therefore, should have the same rights, duties and responsibilities as biological parents. In this context, two situations can be distinguished. The first situation involves biological parents being divested of parental responsibility, and the child being adopted. The adoptive parents become holders of parental rights, duties and responsibilities arising from parental responsibility and biological parents have no influence regarding child's religion. The second situation involves child being compulsorily taken into public care, but the biological parents still have parental responsibilities or contact rights aimed at facilitating their reunion with their child. In such cases, biological

subsection (1) by persons designated by a religious group to perform this procedure if these persons are specially trained to do so and, without being a physician, are comparably qualified to perform circumcisions.

⁹³ Judgment *Kurochkin v. Ukraine* (2010) European Court of Human Rights, Application No. 42276/08, para. 37.

⁹⁴ Judgment *Ageyevy v. Russia* (2013) European Court of Human Rights, Application. No. 7075/10, para. 120.

⁹⁵ Judgment *Taganrog Lro and Others v. Russia* (2022), European Court of Human Rights, Application No. 32401/10, paras. 172. & 175.

parents retain influence regarding the child's religious upbringing, even though it is limited.

This standpoint was affirmed by the Grand Chamber judgment passed in the case of *Abdi Ibrahim v. Norway*. The Court noted: *"To some degree he or she (biological parents) may also be able to continue doing so (exercise Article 9 rights) where the child has been compulsorily taken into public care, for example through the manner of assuming parental responsibilities or contact rights aimed at facilitating reunion. The compulsory taking into care of a child inevitably entails limitations on the freedom of the biological parent to manifest his or her religious or other philosophical convictions in his or her own upbringing of the child."*⁹⁶ A similar standpoint was taken in *Kilic v. Austria*, in which the Court stated that *"compulsory taking into care of a child inevitably entails limitations on the freedom of the biological parents to manifest their religious or other philosophical convictions in their own upbringing of the child"*.⁹⁷

When discussing the role of adoptive parents regarding the child's religious upbringing and whether they have the right to determine child's religious affiliation, the child's cultural and religious identity and background should not be overlooked. This raises an important issue - Should the right of adoptive parents to change the religion of the child prevail over the child's right to preserve his or her religious and cultural identity? For example, if Catholic parents adopt a two-year-old Muslim child, can they raise him or her as a Catholic, or are they obligated to respect and preserve the child's religious identity?

Article 14, paragraph 2 (parental guidance in exercise of the child's right to freedom of thought, conscience and religion) in connection with Article 5 (parental guidance and a child's evolving capacities) and Article 18 (parental responsibilities and state assistance) of the UNCRC, as well as Article 8 (right to respect for private and family life) and Article 9 (freedom of thought, conscience and religion) of the ECHR, suggest that parents are entitled to raise a child in their religious denomination. On the other hand, Article 8, paragraph 1 of the UNCRC, which states that *"States Parties undertake to respect the right of the child to preserve his or her identity..."* and Article 20, paragraph 3 of the UNCRC, which addresses the care for children temporarily or permanently deprived of parental responsibility, and prescribes that *"while considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural*

⁹⁶ Judgment *Abdi Ibrahim v. Norway* (2021) European Court of Human Rights [GC], Application No. 15379/16 paras. 140-141.

⁹⁷ Judgment *Kilic v. Austria* (2023), European Court of Human Rights, Application No. 27700/15, paras. 106 & 145.

and linguistic background,” suggest that adoptive parents are bound by the child’s religious identity.

The decisive factor for reaching a decision in each case will be the principle of the primary protection of the BIC. This means that the interests of the child’s biological or adoptive parents shall not override the BIC, as prescribed by Article 3 of the UNCRC. This standpoint was confirmed in the most recent Grand Chamber decisions of the ECtHR, such as in *Kilic v. Austria*, *Abdi Ibrahim v. Norway*, and *Strand Lobben and Others v. Norway*.⁹⁸

6. RELIGIOUS UPBRINGING OF CHILDREN AFTER DIVORCE OF PARENTS

While deciding on divorce of marriage involving a minor child, the court must, among other matters, determine the exercise of parental responsibility and decide with which parent the child will live. As that parent, with whom the child will live, will make everyday decisions about the child and his or her upbringing, the question arises whether he or she can solely decide on the religious upbringing of the child. Under Article 18, paragraph 1 of the UNCRC “*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child*”, meaning that the UNCRC emphasizes the importance of joint exercise of both parents and that both parents should be involved in the (religious) upbringing of the child. So, the question is: How should this be done?

In Croatia, the Family Act includes a general provision that parents have the right, duty, and responsibility to exercise parental responsibility equally, jointly, and consensually (Article 104).⁹⁹ However, regarding the specific issue of religious upbringing, the Family Act introduces a more detailed provision (Article 100), which addresses parental representation in relation to essential personal rights of the child - child’s name, place of residence, and the choice or change of the child’s religion.¹⁰⁰

¹⁰¹For legal representation and decisions on child’s essential personal rights, written

⁹⁸ Judgment *Strand Lobben and Others v. Norway* (2019), European Court of Human Rights [GC], Application No. 37283/13, paras. 204-206.

⁹⁹ See more about Croatian legal framework on parental responsibility after divorce: Korać Graovac, A. *Parental care following divorce in the Republic of Croatia*, Law, identity and values, Vol. 2, Issue 2, pp. 45-63. [<https://doi.org/10.55073/2022.2.45-63>].

¹⁰⁰ Lucić, *op. cit.*, note 39, p. 818.

¹⁰¹ In cases where a child is without appropriate parental care, the Croatian Social Welfare Center issues a decision placing the child under guardianship and appointing a guardian to represent the child. See: *Ibid.* pp. 833-835.

consent of the other parent will be needed (Article 100, paragraph 2).¹⁰² If the parent refuses to consent, the child (represented by a special guardian *ad litem*) or the parent(s) can institute a non-contentious judicial proceeding in which the court will make a decision in line with the BIC. The court will decide which parent will represent the child in respect of the religious upbringing of the child.¹⁰³

While deciding with which parent the child will live and how parental responsibility shall be exercised, the court shall not consider religious conviction of one parent as a disadvantageous factor.¹⁰⁴ This standpoint was upheld in *Hoffman v. Austria*,¹⁰⁵ and later in *Palau-Martinez v. France*,¹⁰⁶ in which the ECtHR concluded: “Such a difference in treatment is discriminatory ... if it is not justified by a ‘legitimate aim’ and if there is no ‘reasonable relationship’ of proportionality between the means employed and the aim sought to be realized.” Furthermore, the court shall not put one parent in a less favourable position, based on a fear that his or her religious beliefs might potentially jeopardize a child’s rights or interests.¹⁰⁷ This standpoint was affirmed in case of *Vojnity v. Hungary*,¹⁰⁸ in which the ECtHR concluded that as there is “no reasonable relationship of proportionality between a total ban on the applicant’s access rights and the aim pursued, namely the protection of the best interest of the child...”

7. LIMITATIONS TO THE RIGHT OF THE CHILD TO MANIFEST HIS OR HER RELIGION OR BELIEFS

In contrast to the child’s right to freedom of religion – which is considered an absolute right, the right to manifest one’s religion is regarded as relative, meaning

¹⁰² In this regard Lucić observes that Family Act does not mention anything about the proving the authenticity of the written consent, that is, there is no obligation to have it certified by the competent authority. *Ibid.*

¹⁰³ Before this judicial proceeding, the child and the parent(s) need to attend mandatory counselling before the Croatian Institute for Social Work, where they would be provided with assistance in reaching a consensual solution (Art. 329, para. 1, pt. 5 CFA).

¹⁰⁴ In this regard, Schanda states: “Although the membership in a church may not be taken into consideration in child custody disputes, the court may assess its consequences.” Schanda, B., *op. cit.*, note 19, p. 253. See also: Lucić, *op. cit.*, note 39, p. 831; Jakovac-Lozić, *op. cit.*, note 10, p. 40; Bubić, *op. cit.*, note 73, p. 26.

¹⁰⁵ Judgment *Hoffman v. Austria* (1994), 17 EHHR 293, paras. 33 & 36. See more about this case: Lucić, N., *op. cit.*, note 39, p. 831.

¹⁰⁶ See also: Judgment *Palau-Martinez v. France* (2003) European Court of Human Rights, Application No. 64927/01. See more about this case: Bubić, *op. cit.*, note 73, p. 26.

¹⁰⁷ In this regard, Novaković states: “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.” Novaković, *op. cit.*, note 39, p. 170.

¹⁰⁸ Judgment *Vojnity v. Hungary* (2013) European Court of Human Rights, Application No. 29617/07.

it may be subject to certain limitations.¹⁰⁹ Under Article 14, paragraph 3, those limitations will be justified only if three requirements are fulfilled: they must be provided by law, they must pursue to achieve a legitimate aim (e.g. to protect public safety, order, health or morals, or the fundamental rights or freedom of others) and they must be necessary in a democratic society.¹¹⁰ This means that if a State intervenes in this right, the intervention must comply with the principle of proportionality and pass a classic “proportionality test” to avoid violating that right.¹¹¹

In *Dogru v. France*¹¹² and *Kervanci v. France*,¹¹³ the Court concluded stated that “the interference in question was justified as a matter of principle and proportionate to the aim pursued” and that “the purpose of that restriction on manifesting a religious conviction was to adhere to the requirements of secularism in state schools”.¹¹⁴ However, in *Grzelak v. Poland*, the Court was “not satisfied that the difference in treatment between non-believers who wished to follow ethics classes and pupils who followed religion classes was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued”.¹¹⁵

8. CONCLUSION

The right of the child to freedom of thought, conscience, and religion is a right of great importance for the child’s spiritual and emotional development. A child enjoys it as a member of society, firstly within relationships with family members, and then, within society. It found its protection under Article 14 of the UNCRC, which in paragraph 1 states that State parties shall respect the right of the child to freedom of thought conscience and religion. However, this provision does not elaborate on the content of the right, leaving open questions for legal scholars as to whether the UNCRC grants the right to the child to change his or her religion.

¹⁰⁹ Schanda, *op. cit.*, note 19, p. 247; Radina, *op. cit.*, note 30, pp. 39-40; Jakovac-Lozić, *op. cit.*, note 10, p. 43; Langlaude Doné; Tobin, *op. cit.*, note 14, p. 507.

¹¹⁰ See more about these requirements: Langlaude Doné; Tobin, *op. cit.*, note 14, pp. 508-509.

¹¹¹ *Ibid.*, pp. 507-509.; In this regard Langlaude Doné and Tobin state: “Children may not have an absolute right to manifest their religion or beliefs, but it is clear that if a state wishes to limit this right, it carries the heavy burden of explaining why the limitation is necessary to achieve the aims prescribed under Article 14(3).” *Ibid.* pp. 508-509, p. 507 and 514.

¹¹² Judgment *Dogru v. France* (2008) European Court of Human Rights, Application No. 27058/05.

¹¹³ Judgment *Kervanci v. France* (2008) European Court of Human Rights, Application No. 31645/04.

¹¹⁴ *Ibid.*, paras. 69 & 77. See more on this cases: Langlaude Doné, Tobin, *op. cit.*, note 14, p. 512; Schanda, *op. cit.*, note 19, p. 249.; *Grzelak v. Poland*, App. No. 7710/02 (ECtHR, 22 November 2010), para. 100. See more about this case: Lucić, *op. cit.*, note 39, pp. 830-831.

¹¹⁵ *Grzelak v. Poland*, App. No. 7710/02 (ECtHR, 22 November 2010), para. 100. See more about this case: Lucić, *op. cit.*, note 39, pp. 830-831.

Besides being protected by the UNCRC, the right of the child to freedom of thought, conscience and religion is also protected under some human rights treaties, such as the International Covenant on Civil and Political Rights (1966), the European Convention on the Protection on Human Rights (1950) and the European Charter of Fundamental Rights, which guarantee the right to freedom of thought, conscience and religion to everyone. Because of the term “everyone” and the principle of non-discrimination, it is a commonly held opinion in Family law theory that the child was guaranteed this right even before the adoption of the UNCRC. Unlike the UNCRC, these treaties elaborate on the content of this right.

Even though a child is the sole and independent holder of this (and other) right(s), in realizing it, the child’s parents, as holders of parental responsibility, shall not be omitted. The UNCRC acknowledges the indispensable role of parents in the exercise of this child’s right (*Bayev and Others v. Russia*). Under Article 14, paragraph 2, the child’s parents are both entitled and obliged to provide direction and guidance in the exercise of the child’s right in a manner consistent with child’s evolving capacities. Parents provide that direction and guidance in two ways: 1. After the child is born, parents determine his or her religion, 2. They influence the child’s opinion and upbringing throughout everyday life. However, that direction and guidance need to be limited, as parents are not allowed to indoctrinate their child, or coerce him or her to accept certain beliefs. To be legitimate, it must be appropriate, in line with the child’s evolving capacities and the principle of the BIC and must respect the child’s views. This standpoint was confirmed by the Committee on the Rights of the Child, which stated that it is the child who is the holder of this right, not the parents, and that their role diminishes as the child’s autonomy increases during adolescence.

As holders of parental responsibility over the child, the child’s parents are entitled to determine the child’s religion and decide about his or her religious upbringing. This can result in conflicts with the child’s rights, such as the right to education, the right to life, survival and development, and the rights to physical integrity, self-determination and health. Even though the child’s parents should be involved in the child’s education and the state shall respect their right to ensure the child’s education in accordance with their religious or philosophical beliefs (Article 2 of the Protocol 1 to the ECHR), their religious conviction cannot be used as a justified reason for the exemption of the child from school (*Martins Casimiro and Cerveira Ferreira v. Luxembourg*, *Osmanoğlu and Kocabaş v. Switzerland* and *A.R. and L.R. v. Switzerland*).

Referring to the medical interventions performed on the child, two situations can be distinguished: 1. Parents, as the child’s representatives, refuse necessary medical

intervention due to their religious beliefs and 2. Parents, the as child's legal representatives, submit the child to medical intervention that is not necessary, but is in line with religious beliefs (e.g. male circumcision). While in the first situation, by refusing necessary medical intervention, parents endanger the child's right to life, survival and development, in the second situation, the child's right to physical integrity and self-determination, and right to health are jeopardized. In case there is a conflict between the child's right to life, survival and development, and the parent's right to determine the child's religion, parental refusal of the medical intervention can be overruled by the principle of BIC (*Jehovah's Witnesses of Moscow and Others v. Russia*).

In the case of a medical intervention that is not medically necessary and is carried out based on the parents' beliefs - such as male circumcision - the question arises whether, like female genital mutilation, it falls under "traditional practices prejudicial to the health of children". Since today the majority of member states to the UNCRC and the Council of Europe hardly even consider it a "medical procedure," but rather an act of exercising the parents' religious freedom, and do not view its prohibition as an "effective" or "appropriate measure" - in contrast to female genital mutilation - it can be said that this represents a case of positive discrimination, inevitably resulting from the difference between the sexes.

Adoptive parents of the child, even though not explicitly mentioned in Article 14, paragraph 2, just like biological parents have the right to provide direction and guidance to the child. Therefore, their position is quite comparable to the position of the biological parents (*Kurochkin v. Ukraine*, *Taganrog Lro and Others v. Russia* and *Ageyevy v. Russia*). In case of changing or choosing the child's religion, the question arises as to whether they are entitled to change or choose the child's religion, or are they bound by child's religious identity. While several arguments go in favour of their right to raise the child in accordance with their religious conviction, there are also arguments that go in favour of preserving the child's religious identity. The answer should be found by approaching each case individually, guided by the principle of BIC.

After the divorce of parents, the parent with whom the child lives shall not be entitled to decide about child's religious upbringing on his or her own. As the UNCRC advocates the principle of common and shared responsibilities, both of the parents should be involved. In Croatia, the parent who is representing the child regarding essential rights of the child, among which is the choice or change of religion, shall have the written consent of the other parent. While deciding about the exercise of parental responsibility, and with which parent the child will live, religious conviction of the one parent shall not be taken as a disadvantageous

factor (*Hoffman v. Austria* and *Palau-Martines v. France*) nor one shall one parent be put in a less favourable position due to the fear that his or her religious practice might harm the child (*Vojnity v. Hungary*).

Finally, unlike the right of the child to the freedom of thought, conscience and religion, the right of the child to manifest his or her religious beliefs is a relative right, meaning it can be subject to certain limitations. According to Article 14, paragraph 3, to be justified, those limitations/ interferences need to be provided by law, pursue a legitimate aim (for the protection of public safety, order, health, or morals, or the fundamental rights and freedoms of others) and be necessary in democratic society. In cases *Dogru v. France* and *Kervanci v. France*, the Court found them to be justified, whereas in *Grzelak v. Poland*, it did not.

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