

VARIATION XI

LEGAL NATURE OF RELIGION (1) (2)

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The initial question asked by the conveners of the Conference, namely, «Is a ‘religion’ capable of being included into a positive legal order?», implies, or at least can be read to imply, that religion is the name of a phenomenon which can be defined but cannot be regulated by positive law; and that even if it can, a positive legal order may, but need not, include religion. All the implications of that initial question are highly problematic.

(1) The paper is a contribution to the research project «Legal System : Basic Problems» supported by the Croatian Ministry of Science, Education and Sports in 2007-2009.

(2) The subtitle of the original contribution to the Conference was «with a special reference to Croatia». Since the original has meanwhile expanded into a tripartite study, still in progress, on, first, the definition of religion in law, i.e. practice, and in philosophy and social sciences, i.e. theory; secondly, legal nature of religion; and, thirdly, religious nature of law, only the summary of the first part and two sections of the second part are included in this paper.

I. – IS RELIGION UNDEFINABLE?

The first implication of the question, «Is a 'religion' capable of being included in a positive legal order?», namely, the implication that a religion can be defined, may seem obvious. However, the implication is not supported either by practice or theory.

The implication is not supported at least by Croatian practice, namely, by Croatian constitutional law on religious affairs (3). Principal constitutional acts, namely, the Constitution (4) and the Law on Legal Position of Religious Communities (5), do not define religion either in a conventionally explicit way, that is, analytically (*per genus proximum et differentiam specificam*) (6), or in a similar way, that is, in a discernible synthetic (7) or implicit (8) but informative way. There are no published decisions of either the Croatian Constitutional Court (9) or regular Croatian

(3) For background information on church and state or religion and law in Croatia see I. PADJEN, «Catholic Theology in Croatian Universities: Between the Constitution and the Treaty; A Policy Oriented Inquiry», in print in B. VUKAS, *Liber amicorum Bakotic* (Bruxelles: Brill, 2009); *ibid.* (URL: http://ceenj.net/index.php?option=com_remository&Itemid=59&func=startdown&id=10); «Law and Religion in Post-Modernity: Dilemmas Prompted by the Croatian Catholic University», in M. POLZER, S. DEVETAK, L. TOPLAK, F. UNGER and M. EDER (eds.), *Religion and European Integration: Religion as a Factor of Stability and Development in South Eastern Europe* (Weimar: European Academy of Sciences and Arts, 2007), 377-398; «Legal Position of Minority Churches in Croatia: Enforcement of Morality», in S. DEVETAK, L. KALČINA and M. POLZER (eds.), *Religion and Democracy in Moldova* (Maribor: Institute for Ethnic and Regional Studies – ISCOMET, 2005), 247-260; «The Status of Minor Religious Communities in Croatia: A Revival of Legal Pluralism», in S. DEVETAK, L. KALČINA and M.F. POLZER (eds.), *Legal Position of Churches and Religious Communities in South-Eastern Europe* (Ljubljana-Maribor-Vienna: ISCOMET, 2004), 93-106; «Chiesa e Stato in Croazia», in S. FERRARRI, W.C. DURHAM e E.A. SEWELL (ed.), *Diritto e religione* (Milano: Il Mulino, 2004), 73-105, tr. of «Church and State in Croatia», in S. FERRARI and W.C. DURHAM (eds.), *Law and Religion in Post-Communist Europe* (Leuven: Peters, 2003), 57-80; «The State's Authority in Religious Rights», *Politička misao / Croatian Political Science Review*, vol. 33, no. 5 (2002), 137-143; «Katolicizam i nacionalizam u Hrvata 1990.-ih: pravnoteorijski pogled (II)» <«Catholicism and Nationalism among the Croats (II)»>, u Hans-Georg FLECK (prir.), *Liberalizam i katolicizam u Hrvatskoj II. dio: Zagreb, 5.-6. ožujka* (Zagreb: Friderich-Naumann-Stiftung, 1999), 139-242; «Katolicizam i nacionalizam u Hrvata 1990.-ih: pravnoteorijski pogled» <«Catholicism and Nationalism among the Croats in the 1990s: from the Perspective of Legal Theory»>, u G. CVITAN (ur.), *Liberalizam i katolicizam u Hrvatskoj: Split, Vila Dalmacija 2.-4. lipnja* (Zagreb: Friderich-Naumann-Stiftung, 1998), 235-272.

(4) Ustav Republike Hrvatske, *Narodne novine*, 56/90, 135/97, pročišćeni tekst <consolidated text> 8/98, 124/00, 28/01.

(5) Zakon o pravnom položaju vjerskih zajednica, *Narodne novine*, 83/02.

(6) In the sense of Gajo PETROVIĆ, *Logika <Logic>*, 11. izd. (Zagreb: Školska knjiga, 1977), at 136-138 and Richard ROBINSON, *Definition* (Oxford: Clarendon Press, 1950), at 96-98.

(7) *Ibid.*, 98-106, warning of vicissitudes of the synthetic method.

(8) *Ibid.*, at 106-108.

(9) URL: http://www.usud.hr/default.aspx?Show=c_praksa_ustavnog_suda&m1=2&m2=0&Lang=hr.

courts (10) or Croatian public administration (11) that would define religion in a conventional explicit way. Nonetheless, Croatian law has recognized several religions and, even that, in an indirect way, namely, by recognizing religious communities (12).

In not defining religion explicitly Croatian constitution legislation is similar to constitutional instruments of several other legal systems, including the US Constitution (13).

A different approach is taken by US and Canadian laws. American courts of law (14) and public administration (15) have provided quite explicit definitions of religion with constitutional weight. The Supreme Court of Canada formulated a definition of religion that at least looks analytically and states that religion is a thorough set of

(10) URL: <http://www.vsrh.hr/EasyWeb.asp?pepid=473>.

(11) Acts of Croatian public administration are not published systematically, and even decisions of the Croatian administrative court are reported selectively.

(12) See «The Status»(2004), note 1.

(13) J.M. GUNN, «The Complexity of Religious Experience and the Definition of 'Religion' in International Law», *Harvard Human Rights Review*, vol. 16 (2003), 189-215, note 7, lists the following examples of fundamental enactments that regulate religion without defining it: the USA, Constitution, Amendment I; Federal Republic of Germany, Grundgesetz, article 4; India, Constitution, Articles 25-28; Japan, Nihonkoku KENPŌ [Constitution], Article 20; Spain, La Constitución, Article 16; also International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention Relating to the Status of Refugees, European Convention for the Protection of Human Rights and Fundamental Freedoms; American Convention on Human Rights; African Convention on Human Rights and People's Rights.

(14) Most notably in *Davis v. Beason* 133 U.S. 333 (1890), which states inter alia: The term 'religion' has reference to one's views of his relations to his Creator, and in the obligations they impose of reverence of his being and character, and of obedience in his will. It is often confounded with the cultus or the form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the Constitution, in declaring that the Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.

(15) The US Internal Revenue Service has been reported to apply in recognizing a religion the following criteria, without requiring of an applicant for the status of a religion to meet all of them: 1) a distinct legal existence; 2) a recognized creed and form of worship; 3) a definite and distinct ecclesiastical government; 4) a formal code of doctrine and discipline; 5) a distinct religious history; 6) a membership not associated with any other church or denomination; 7) an organization of ordained ministers; 8) ordained ministers selected after completing prescribed studies; 9) a literature of its own; 10) established places of worship; 11) regular congregations; 12) regular religious services; 13) schools for religious instruction of the young; 14) school for the preparation of its ministers. The Institute on Religion and Public Policy, Response to United Kingdom Charity Commission's Consultation Public Benefit and the Advancement of Religion, DIM.NGO/407/08, 7 October 2008 (URL: http://www.osce.org/documents/odihr/2008/10/34071_enpdf). Virtually identical list of the criteria is reported by Bruce J. CASINO, «Defining Religion in American Law» (URL: <http://www.religiousfreedom.com/articles/casino.htm>).

beliefs regarding a higher power, tied with a person's view of him or herself and his/her needs to realize spiritual completeness (16).

Hence the central problem of this paper : why or how, on the one hand, Croatian constitutional law has recognized religions without defining religion; while, on the other, the US and Canadian constitutional laws have defined religion? Is not the reason for such choices that Croatian law is still traditional, whereas American law, which has also endorsed religious or theological definitions of religion (17), has been able to improve its definitions of religion by relying on social sciences (18) and can make further progress by relying on the same source of knowledge (19)? Editorial constraints permit to reproduce here only the concluding part of the answer.

Rodney Stark's argument that it would be arrogant «to cling to the belief... that everything is one big meaningless accident» (20) may well be the moral of the attempts to conceptualize religion. For the purpose at hand, results of the attempts can be encapsulated in the following finding: neither philosophical nor scientific approaches can provide a reliable answer to the question «What is religion?». Conceptualization of religion is even more perplexing than conceptualization of many other social phenomena, since religion is an essentially contested concept – perhaps even more contested than man, tragedy, or revolution – in that disputes about its content «cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone» (21). Essential contestability is not a peculiarity of social sciences and humanities. All scientific theories – including theories of natural sciences – are underdetermined by facts and value laden (22). For this reason fundamental concepts of natural sciences, such as substance, causality and mech-

(16) *Syndicat Northcrest v. Amselem* (2004) 2. R.C.S. 551 para. 39.

(17) *E. g.* : *Davis v. Beason* 133 U.S. 333 (1890), note 14; *United States v. Seeger* 380 U.S. 163 (1965).

(18) *See e.g.* J.M. DONAVAN, «God is as God Does», *Constitutional Law Journal*, vol. 6 (1995), 91-95.

(19) *Ibid.*, 95-99.

(20) Rodney STARK, *Discovering God : the Origins of the Great Religions and the Evolution of Belief* (New York : Harper, 2007), at 399.

(21) In the sense of J.N. GRAY, «On the Contestability of Social and Political Concepts», *Political Theory*, vol. 5, no. 3, (August, 1977), 331-348, cit at 344; relying on W.B. GALLIE, «Essentially Contested Concepts», *Proceedings of the Aristotelian Society*, vol. 56, (1956), 167-198, which identified religion as such a concept.

(22) M. HESSE, «Theory and Value in the Social Science», in Ch. HOOKWAY and Ph. PETTIT (eds.), *Action and Interpretation : Studies in the Philosophy of the Social Sciences* (Cambridge : Cambridge University Press, 1978), 1-16, esp. at 1-2.

anism may be as contestable as culture or nation (23). If so, borders between philosophy, science, common sense and even literature and religion are not nearly as distinct as it is often assumed. To give but a few examples, science is based on assumptions that are often of philosophical, theological, artistic or religious origin, some of which, such as matter or essence, may have become a part of common sense; theology presupposes science (e.g. in identification of the texts that are believed to be evidences of revelation), and so does philosophy (e.g. in determining limits of conceptual analysis characteristic of philosophy).

For these reasons there cannot be conclusive evidence that religious claims are mere fancy or that phenomena considered to be religious are all there is about religion or that such phenomena are expressions or consequences of other purely empirical contents. If religion, as the people who have it claim, transcends the observable, definitions that express or describe the essence of religion as something observable cannot be true even if there are such things as essences and the definitions express or describe the alleged essence of religion accurately; likewise, concepts and more complex theoretical constructs of religion modeled on natural sciences cannot provide a true account of religion. Thus there are no conclusive reasons that religion as belief in, say, the holy or god or God is – or is not – a mere compensator; or that religion as a relationship between, say, a human being, on the one side, and the holy or god or God, on the other, does – or does not – exist. By the same token a theory of religion that purports to explain – rather than define – its subject-matter as a social phenomenon, say, as «a system of general compensators based on supernatural assumptions» (24), may very well be an accurate explanation of the subject-matter but cannot be defended against the objection that the subject-matter – partly or entirely – is not religion.

Hence the solution of a part of the central problem : by defining religion, perhaps even on the basis of scientific criteria, American and Canadian constitutional law may be less traditional than Croatian but not any better. American lawyers have found long ago

(23) *Ibid.*, at 2.

(24) Rodney STARK and William SIMS BAINBRIDGE, *A Theory of Religion* (1987; New Brunswick NJ : Rutgers University Press, 1996), at 39.

that religion cannot be constitutionally defined (25). At the same time the partial solution transforms the central problem into a simpler form, which dispenses also with both the constitutional level and the query why: how can law, without a definition of religion, recognize a religion or religions?

The conclusion that religion cannot be conceptualized either philosophically or scientifically is merely an aspect of the developments in western thought that have led to the now widespread attitude in humanities – or even the spirit of the time – that is known as post-modernity (26). According to Jean-François Lyotard, who has invented the term, the attitude is marked by the collapse of «grand narratives» (esp. Marxism) and, what is in this context far more important, a crisis in our ability to provide an adequate – «objective» – account of reality. From a post-modern perspective, the central problem of this section, namely, whether religion can be conceptualized is prone to initiate wrong lines of inquiry, like any other question of the type «What is X?», such as «What is religion?» from a perspective of philosophy of the late Ludwig Wittgenstein (27). Not surprisingly, since it is also a current – though not the mainstream – of post-modernity (28).

Now, one may ask appropriately why this chapter has analysed attempts to conceptualize religion although the spirit of the time makes it obvious that such attempts are bound to fail. The reason is outlined in the next paragraphs.

(25) A. BOWSER, «Delimiting Religion in the Constitution: A Classification Problem», *Valparaiso University Law Review*, vol. 11 (1977), 163-226; and G.C. FREEMAN, III, «The Misguided Search for the Constitutional Definition of 'Religion'», *Georgetown Law Review*, vol. 71 (1983), 1519-1565.

(26) Jean-François LYOTARD, *La condition postmoderne: rapport sur le savoir* (Paris: Les éditions Minuit, 1979). The characterization largely agrees with Wolfgang Iser, *Unsere postmoderne Moderne*, 3. Aufl. (Weinheim: VCH Acta humaniora, 1991), which analyses postmodernity in a wide range of contexts (including literary and architectural), finding, at 263 ff., that its central idea is the plurality and incommensurability of reason(s). Both sources associate the idea primarily with the late 20th century French authors Jean Baudrillard, Jacques Derrida, Michael Foucault and Jean Lacan, tracing its roots to Martin Heidegger and Friedrich Nietzsche.

(27) Robert SAMEK, *The Legal Point of View* (New York: Philosophical Library, 1974), 3 f, with regards to philosophical questions about law.

(28) WELSCH, *note 24*, at 80, notes that several influential thinkers who neither recognize nor declare themselves as post-modernists count as such: the key figure is doubtlessly Ludwig WITTGENSTEIN in his *Philosophical Investigations*; other prominent figures include cultural relativists, most notably Peter Winch, Thomas Kuhn and Paul Feyerabend.

II. – IS RELIGION LEGAL?

The second implication of the question «What is ‘a religion’ capable of being included in a positive legal order?» is that religion is not capable of being regulated by law. The implication seems to be obvious, despite a widespread regulation of religion.

A reason follows from the conclusion of the first part that, according to post-modernity, religion cannot be defined or conceptualized either philosophically or scientifically. If it is not possible to define or conceptualize religion, how is it possible to know that what is legally regulated as religion is, indeed, an instance of religion rather than one of superstition or ideology or culture or anything else?

Another reason is that some protestant theologians (29) and, under their influence, even the Catholic Church make a distinction between faith and religion (30). It assumes that faith denotes man's surrender to God, while religion denotes man's construction of God. Faith is surrender in the sense of opening one's self to accepting God's mercy, that is to accepting Him on His own terms, whatever they may be, even if they raise in the believer a profound doubt in the very existence of God and an irresistible despair of his own existence. Religion is, in a sharp contrast, belief in a man-made deity, ranging from a human interpretation of God's revelation in word or deed to a human invention of deities or sacred times, places, things and persons, with the apex in worshiping one's own self, such as self-divinization of a clan (31). On that account it may indeed appear that religion is some-

(29) *Esp.* Karl BARTH, *Kirchliche Dogmatik*, Bd. I, 2 (Zurich: Evangelischer Verlag, 1948), at 327 ff, juxtaposing God's revelation in Christ and human religion, which is never authentic, whether it is Christian or non-Christian; and arguing that religion, made by humans, becomes authentic if it serves as the medium of God's revelation.

(30) D. GALLAGHER, «The Obedience of Faith: Barth, Bultman and Dei Verbum», *Journal of Christian Theological Research*, vol. 10 (2006), 39-63, finds that Karl BARTH and Rudolf BULTMAN, two protestant theologians, have influenced the the Catholic formulation of faith as expressed in *Dei Verbum: Dogmatic Constitution on Divine Revelation*, solemnly promulgated by Pope Paul VI, 18 November 1965 (URL: http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118-dei-verbum_en.html). According to GALLAGHER, *Dei Verbum* finds in the Pauline phrase «obedience of faith» (Romans 1:5 and 16:26) the basis for the relation between a believer, acting in faith, and God, revealing himself in Jesus Christ. It is recognized today that the distinction of faith and religion has been common even in the Middle Ages, as revealed *inter alia* by Jean D'Arc in her trial.

(31) See: Rosino GIBELLINI, *La teologia del XX secolo*, 3a ed. (Brescia: Editrice Queriniana, 1996), Croatian tr. Id., *Teologija dvadesetog stoljeća* (Zagreb: Kršćanska sadašnjost, 1999), at 16-18; Jakov JUKIĆ /Željko MARDEŠIĆ, *Lica i maske svetog <Faces and Masks of the Holy>* (Zagreb: Kršćanska sadašnjost, 1997), at 26-20.

thing external and collective while faith is internal and private to a believer and hardly – if at all – communicable.

However, the appearance is deceptive. The distinction between faith and religion cannot imply that the two are kept apart by sort of a spirit-proof wall. On the one hand, Christians are likely to maintain that authentic faith is always practiced in a community and already for that reason inextricably intertwined with a religion. This is to say that from a Christian perspective they are analytically distinct only; and, what is crucial, distinguishable only by human discernment that is guided by God's mercy (hence Christians devoted to asceticism typically regard their religious leaders as lax, while the latter regard the former as scrupulous, each side judging the other as being prone to religious practices bordering with apostasy, and considering itself the bulwark of the authentic Christian faith). On the other hand, at least ecumenical Christians are prepared to recognize authentic faith in some religions other than their own. A more important consideration with regard to the Christian understanding of the relationship between faith and a religion is that the distinction between the two may well be alien to non-Christians, let alone non-Westerners.

A further reason why religion may seem to be incapable of being legally regulated is again Western but philosophical. In a Cartesian perspective, from Descartes through Locke and Kant to Margolis, my mental phenomena, including religious representations, are in two senses private: they are privately owned and inalienable (e.g. my faith is mine and another person cannot have the same faith); they are cognitively private (only I can know my faith while another person can only surmise my faith on the basis of my behavior) (32).

In a sharp contrast Wittgenstein's latter philosophy opens a perspective that tries to overcome Cartesianism. From the new perspective faith merely appears to be internal – or private – to an isolated individual, since private thoughts, whether religious or not, cannot be said to exist (33). Hence when I say «I have a great faith

(32) See «Privacy», Hans-Johann GLOCK, *A Wittgenstein Dictionary* (Oxford: Blackwell, 1996), at 304.

(33) Ludwig WITTGENSTEIN, *Philosophische Untersuchungen* (Frankfurt a. M.: Suhrkamp, 1977). See also: Henry LE ROY FINCH, *Wittgenstein – The Later Philosophy* (Atlantic Highlands NJ: Humanities Press, 1977), esp. 14. «Wittgenstein's Place in Western Thought», at 239-251; P.M.S. HACKER, *Wittgenstein Place in Twentieth-Century Analytic Philosophy* (Oxford: Blackwell, 1996).

in Jesus Christ!» I can mean what I say only because I have learned from others, not only by speaking their language and observing their behavior but by sharing the same form of life, what it means to have a great faith in Jesus Christ.

Hence rather than dis-believing law regulating religion, it may be intellectually more profitable inquire whether religion would be possible – at least in Europe (and perhaps even in the West) – had it not been included in positive law or, to put it more bluntly, if religion was not legal. The inquiry calls for an analysis of, on the one hand, the legal nature of religion and, to that end, for a new inquiry into defining and conceptualizing religion, but now from a perspective of law and legal theory; and, on the other, the religious nature of law.

Chapter 1 has analyzed summarily attempts to conceptualize religion because the reasons against such attempts, powerful as they are, still leave room for new attempts on different assumptions.

The mainstream post-modern criticism of concept building is inconsequential. Jacques Derrida, the leading thinker of the mainstream post-modernity (34), has cast doubt on the possibility of meaningful communication as well as of objective knowledge (35). Nonetheless, he continued doing philosophy, devoting, moreover, the last decade of his life to discussing religion (36). A tension between his skepticism, especially with regard to explanatory power of the social sciences and humanities (37), on the one hand, and the flow of his philosophical writings, on the other is hardly explicable. If the tension is explained by the openness of Derrida's philosophy to *belle lettres*, the same reason explains why such a philosophy cannot generate a social science.

(34) *Esp.* Jacques DERRIDA, *Writing and Difference*, tr. by A. Bass (London: Routledge & Kegan Paul, 1978).

(35) Barry SMITH et al., «Open Letter Against Derrida Receiving an Honorary Doctorate from Cambridge University», *The Times* (9 May 1992) claims that Derrida's work «does not meet accepted standards of clarity and rigor».

(36) *Esp.* Jacques DERRIDA, «Faith and Knowledge: the Two Sources of 'Religion' at the Limits of Reason Alone», in ID., and G. VATTIMO (eds.), *Religion* (Stanford CA: Stanford University Press, 1988); ID., *Acts of Religion*, ed. by G. ANDIJAR (New York: Routledge, 2002). See also: John D. CAPUTO, *Prayers and Tears of Jacques Derrida: Religion without Religion* (Bloomington IN: Indiana University Press, 1997); Hugh RAYMENT-PICKARD, *Impossible God: Derrida's Theology* (Burlington VT: Ashgate, 2003).

(37) *E.g.* Jacques DERRIDA, «Structure, Sign, and Play in the Discourse of the Human Sciences», in ID., *note 32*, 278-293.

Post-modernity has not discouraged the mainstream sociology from concept and theory building (38). At a glance, methodology of social sciences is today more cautious and less ambitious. But even this is not necessarily a novelty. Self-restraint was professed even fifty years ago by Thomas Merton, who renounced grand theory and pleaded for sociological theories of the middle range instead (39).

Social sciences have relinquished last defences against ideology. Hence an interesting question, which can be answered, if at all, primarily by social sciences operating within a «grand narrative» such as Marxism and concerned with religion and «other forms of ideology»: how is rational choice theory's (40) imperialism (41) related to the decline of the regulatory welfare state since the early 1970s (42), even now when there is a wide consensus that it was the deregulation of financial industry which has brought about the economic recession beginning in 2007 (43)? An even more intriguing question is whether the post-modern disdain for social sciences has functioned, contrary to political intentions of post-modern thinkers, as ideological lubricant of neoliberal capitalism (44). While the questions may be preposterous, they illustrate vividly why social sciences, especially of religion, if they are possible, may be worth pursuing.

The main and remaining part of this chapter has a triple task: first, to outline tenets of a theory of law and religion, which can be developed from an integral theory of law sensitive to post-modern

(38) See e.g. John GERRING, *Social Science Methodology: A Criterial Framework* (Cambridge: Cambridge University Press, 2001); Garey GOERTZ, *Social Science Concepts: A User's Guide* (Princeton NJ: Princeton University Press, 2005).

(39) Thomas MERTON, *On Theoretical Sociology* (1957; New York: The Free Press, 1967), 39-72.

(40) E.g. D. HECKATHORN, «Sociological Rational Choice», in G. RITZER and B. SMART (eds.), *Handbook of Social Theory* (London: Sage, 2003), 274-284.

(41) See a bibliography on economic imperialism at URL: <http://philpapers.org/browse/economics-imperialism>. It is indicative that the instruction «economics rational choice imperialism» given to Google on 31 August 2009 resulted in 45.500 titles, the first seven being scholarly rebuttals of the charge that rational choice was imperialist. The very first was B. FREY and S. MEIER, Two Concerns about Rational Choice: Indoctrination and Imperialism (URL: <http://ideas.repec.org/p/zur/iiewwp/104.html>).

(42) In the absence of conventional wisdom on the subject see A. G. Marshall, Global research on the collapse of the Breton Woods and the oil crisis 1973 (URL: www.globalresearch.ca/index.php?context=va&aid=14614).

(43) The instruction «financial crisis deregulation» given to Google on 31 August 2009 resulted in 526.000 titles.

(44) «Law and Religion in Post-Modernity» (2007), note 1.

constrains and extended to religion; secondly to demonstrate that the theory can provide *inter alia* a solution to what has been left of the central problem of this paper, namely, an answer to the question how law without a definition of religion can recognize a religion or religions; thirdly, to indicate that the theory is valid because it is to a great extent a common sense legal doctrine of law and religion, or church and state, widespread in contemporary Europe and, perhaps, the whole West. The chapter is divided into the following sections: 2.1. Elements of a Theory of Law and Religion; 2.2. Criteria for Recognition of a Religion.

A. – *Elements of a theory of law and religion*

Is it possible to have a social science of religion even though religion may be, among other things, a relation to the holy or god or God or the like? The question can be answered positively if certain conditions obtain. They are divided, solely to facilitate reading, into the following two sub-sections (2.1.1 and 2.1.2).

1. *Framework, Methods, Suppositions, Openness*

This sub-sections outlines the following elements of the theory of law and religion: a conceptual framework, methods of inquiry, suppositions about religion and openness to pluralism.

a) *Framework*. If religion may be, among other things, a relation to the holy or god or God or the like, a social science of religion may exist provided there is an adequate theoretical framework. Such a framework can be, *inter alia*, an integral legal theory, which has been developed in Croatia under a variety of influences (45), and

(45) Chiefly by Nikola VISKOVIĆ, *Pojam prava <A Concept of Law>*, 2. izd. (1976; Split: Logos, 1981) under influence of Carlos Cossio (see e.g. in Luis RECASÈNS SICHES, Carlos COSSIO, Juan LLAMBIAS DE AZEVEDO, Eduardo GARCIA MAYNEZ, *Latin American Legal Philosophy*, tr. Cambridge MA: Harvard University Press, 1948), analysed systematically in Nikola VISKOVIĆ, *Pravo kao kultura: egološka teorija prava Carlosa Cossija <Law as Culture: Carlos Cossio's Egological Theory of Law>* (Rijeka: ICR, 1990). Also: Ivan PADJEN, *(Ne)čudorednost (međunarodnog) prava: pristup filozofiji prava <The (Im)Morality of (International) Law: an Approach to Philosophy of Law>* ICR, 1988), with a summary in English; «Katolicizam i nacionalizam u Hrvata», note 1. Lon FULLER interactionist jurisprudence, e.g. in *The Morality of Law*, rev. ed. (New Haven CT: Yale University Press, 1969), is another prominent instance of integral theory of law cherished in Croatia. Integral theory can be formulated also by joining – without sincretism – Hans KELSEN's pure theory of law, e.g. in *General Theory of Law and State*, tr. (New York: Russel and Russel, 1961) and Max WEBER's interpretive sociology, esp. in *Wirtschaft und Gesellschaft* (Tuebingen: Mohr, 1956), which is a sociology derived from theory of law and state. Stephen P. TURNER and Regis A. FACTOR, *The Lawyer as Social Thinker* (London: Routledge, 1995).

can be extended further to cover also the relation between law and religion. The centerpiece of an integral theory of law is analytical theory, that is, a meta-theory of legal dogmatics, which explains, on the one hand, fundamental legal concepts, such as legal norm or legal subject and, on the other, legal system and its relations to other relevant entities, such as another legal system and morality. Integral legal theory is intertwined with legal philosophy, since the two disciplines share the same problems. They include legal methods (from knowledge of law till decision in law) and the nature or concept of law. Since legal theory can perform its tasks provided it has adequate concepts of society, legal theory cannot be separated from sociology. A promising route of acquiring concepts of society is to include into legal theory elements of sociology. The remaining part of this section outlines briefly specific elements of sociology, but also of philosophy, that should be included into integral legal theory to expand it into a theory of law and religion.

b) *Methods*. A belief that it is possible to have a social science of religion even though religion may be, among other things, a relation to the holy or god or God or the like, implies that such a science, to be distinct from other possible forms of cognition, such as mysticism or philosophy or everyday experience, operates by certain methods. The most obvious are description and explanation; their function is objectivity.

While the distinctive logical operation of science is explanation, descriptions provided by scientific inquiries are only in an ideal model of science reducible to explanations so that questions of the kind «What is X?» are reduced to the question «Why and/or how has X come into being?». Hence the value of descriptions provided by social sciences and humanities, most notably by history. History became scientific in the 19th century largely due to the accuracy of historical descriptions backed by records listed in footnotes (46). The value of description in humanities and social sciences may be reinforced by Wittgenstein's later thought, which has found the task of philosophy in description rather than explanation of uses and rules of language (47). «Unlike causal explanations, which can in principle go on forever», descriptions of linguistic use or rule

(46) Anthony GRAFTON, *The Footnote: A Curious History* (Princeton NJ: Princeton University Press, 1999).

(47) WITTGENSTEIN, note 31, pars. 109, 496, 654-655.

come to an end (48). «Our mistake is to look for a further explanation here, when we ought to look at what happens as a ‘proto-phenomenon’» (49).

While description in the just stated way may be both the very beginning as well as end of social sciences and humanities, causal explanation characteristic of natural science is a distinguishing feature of psychology and a part of sociology.

Finally, objectivity of science, to the extent it is possible, is a function of methods, primarily of explanations, and the pragmatic criterion of the successful prediction and control of the environment (50).

b) *Suppositions*. The question whether it is possible to study religion scientifically (even though religion can be, among other things, a relationship to the holy or god or God or the like) can be answered positively provided one adopts, explicitly or tacitly, the following three connected suppositions, which may be held separately in the sense that acceptance of any of the three does not entail necessarily adoption of the other two.

The first is that religion is partly observable but cannot be known by observation only. If religion is not observable, it can be, perhaps, the subject of mystical experience or of artistic expression or of philosophy that has accesses to the unobservable and uses language as a means of expression only (51). Such a philosophy may conceptualize religion (e.g. by *a priori* knowledge of the religious) (52) but religion cannot be the subject-matter of science. However, the observation of the observable part may but need not suffice to gain knowledge of the unobservable part of religion.

The second supposition is epistemological realism, namely, the belief that «sense experience reports a true and uninterrupted, if limited account of objects; that it is possible to have faithful and

(48) «Explanation» in GLOCK, *note 30*, 111-114, at 111.

(49) WITTGENSTEIN, *note 31*, par. 655.

(50) HESSE, *note 20*, at 2.

(51) Such philosophy is exemplified by the interpretation that Plato's Socrates always wins the argument because he engages in a dialogue with himself rather than with another person. The interpretation (I believe to have heard on Croatian Radio Channel III) appears to me to be an instance of not merely Cartesianism but also of the bulk of modern Western philosophy, that is, Western philosophy after the epistemological and before the linguistic turn.

(52) E.g. «Religious *a priori*», *Doxa: Christian Thought in the 21st Century* (URL: http://www.geocities.com/meta_crock/experience/priori.htm).

direct knowledge of the actual world» (53). It follows from the previous paragraph that sense experience may, but need not, furnish all that we can and want to know about religion. Hence the supposition is rather weak and may be designated modest realism. It is close to the view that «the world extends beyond the reality of our minds» (54).

The third supposition, which partly overlaps with the second one, is that language can make meaningful and true statements about the world. While the supposition may be trivial, it departs from a widespread though unarticulated assumption of contemporary philosophy, especially of a widespread current of post-modernism (55). It is the assumption that language can talk meaningfully about itself but not about the world, as if language itself was not also a part of the world. A closer analysis may reveal that the assumption is distinctly modern in the sense that it implies language is a mere means of expression of the solipsistic subject. It would be preposterous to say that the assumption is false or misleading. It may well be that it supports rich narratives about religion comparable to mystical or artistic accounts mentioned earlier. However, the assumption is too modest even for the modest realism.

c) *Openness*. While the acceptance of the three suppositions excludes certain philosophical positions, it does not commit to a particular orientation in contemporary social theory other than a broad analytic tradition, which is what has been left of the mainstream (or at least one major stream) sociology after it has been cleansed of positivism and/or naturalism (56). The theory of law and religion is open also to other orientations, that is, to methodological pluralism, which is another distinguishing mark of contemporary social sciences (57).

(53) In the sense of J.N. GRAY, «On the Contestability of Social and Political Concepts», *Political Theory*, vol. 5, no. 3, (August, 1977), 331-348, cit at 344; relying on W.B. GALLIE, «Essentially Contested Concepts», *Proceedings of the Aristotelian Society*, vol. 56, (1956), 167-198, which identified religion as such a concept. «Realism», in D.G. RUNES (ed.), *Dictionary of Philosophy* (Totowa NJ: Littlefield, 1977), 264.

(54) Thomas NAGEL, *The View from Nowhere* (New York: Oxford University Press, 1986), at 90.

(55) In the sense of Lyotard and Welsch, *note 24*.

(56) Th. UEBEL, «Twentieth-Century Philosophy of social Science in the Analytic Tradition», in S.P. TURNER and P.A. ROTH (eds.), *The Philosophy of the Social Sciences* (Oxford: Blackwell, 2003), 64-88, at 71. On the other major stream see B. FAY, «Phenomenology and Social Inquiry: From Consciousness to Culture and Critique», in TURNER and ROTH, *note 54*, 42-63.

(57) *Ibid*.

Thus the theory of law and religion shares two ideas promoted by post-empiricist philosophy of science (58). The first is that «to call a study a science implies that there is an empirical constraint on the acceptability of its statement» (59). The second is that

scientific theories are much more holistic structures than was previously realized, in a sense which induces the point that the meaning of a term is partly determined by its relation with other terms in its theory; and partly in consequence of this holism, there is no absolutely pre-theoretical observation language relevant to the conduct of science (60).

The theory of law and religion is open also to a current of post-modernity (61) by assuming, as already noted with regard to description, the fecundity of the ordinary language philosophy of the later Ludwig Wittgenstein for social sciences (62). Due to the same source of inspiration the paper is also modern. Namely, Wittgenstein follows the Kantian method of presupposition, which divides the world into the *a priori* and *a posteriori* (63) and makes it possible to replace the Cartesian division of the outer world and the inner world (64) or, colloquially, of the body and mind. Wittgenstein's philosophy carries «the Kantian method to the point of *wiping out the inner world of private objects altogether*» (65).

The same method is followed, though in different directions, by neo-Kantian students of society, most notably by Max Weber (66) and Hans Kelsen (67), whose theories provide much of the framework of integral theory of law.

(58) David THOMAS, *Naturalism and Social Science: A Post-Empiricist Philosophy of Social Science* (Cambridge: Cambridge University Press, 1979), at 2.

(59) *Ibid.*

(60) *Ibid.*

(61) WELSCH, note 26.

(62) *Esp.*: WITTGENSTEIN, note 31; Peter WINCH, *The Idea of a Social Science and its Relation to Philosophy*, 3rd impr. (London: Routledge & Kegan Paul, 1961); B.R. WILSON (ed.), *Rationality* (Oxford: Blackwell, 1970); R. WIGGERHAUS (Hg.), *Sprachanalyse und Soziologie: Die sozialwissenschaftliche Relevanz von Wittgensteins Sprachphilosophie* (Frankfurt a. M.: Suhrkamp, 1975).

(63) Immanuel KANT, *Critique of Pure Reason*, tr. N. Kemp-Smith (New York: St. Martin's Press, 1965), 48-55; *KrV B10-B18*.

(64) Henry LE ROY FINCH, *Wittgenstein - The Later Philosophy: An Exposition of the Philosophical Investigations* (Atlantic Highlands NJ: Humanities Press, 1977), at 22.

(65) *Ibid.*

(66) *Esp.* WEBER, note 43; Id., *The Methodology of the Social Sciences*, tr. (Glencoe IL: The Free Press, 1949).

(67) *Esp.* KELSEN, note 43; Id., *Der soziologische und der juristische Staatsbegriff* (Tuebingen: Mohr, 1928).

Emile Durkheim, whose concept of religion is considered here to be the most fruitful starting point of a theory of religion, is related to Wittgenstein not by method but by the idea that «concepts are collective representations» (68), which has been seen as «equivalent of to the simple but fertile idea, rediscovered half a century later by Wittgenstein, that concepts operate within forms of social life, according to rules» (69).

The theory of law and religion is open to orientations that imply criticism, namely, uncovering, with a view of changing, un-reflected presuppositions of both theoretical (esp. scientific) and practical (esp. legal) thinking (70). Thus ordinary language philosophy provides a framework for analyzing conceptual puzzlements in law as well as in scholarship (71), while critical rationalism, which is in the foundations of post-empiricism, demands never to accept a solution of a problem as final (72). The paper is *via* Max Weber (but also *via* Marx and Durkheim) open also to critical theory of the Frankfurt School, which is concerned with social conditions of doctrines and institutions (73).

It is tempting to structure integral theory of law also as a policy oriented inquiry (POJ) formulated by Harold Lasswell and Myres McDougal. POJ identifies a practical problem, delimits the focus of inquiry, postulates basic public order goals, clarifies public policies, outlines tendencies in past decisions towards or against the basic public order goals, analyses conditions of decision, projects probable future decisions and invents alternative decisions (74). Editorial constraints prevent any further extension of this paper (75).

(68) Emile DURKHEIM, *Les Formes élémentaires de la vie religieuse et le système totemique en Australie* (Paris : Alcan 1912), at 621.

(69) Stephen LUKES, *Emile Durkheim; His Life and Work : A Historical and Critical Study* (Harmondsworth : Penguin, 1973), at 437, referring to the use made of Wittgenstein by Winch, note 60 (1960),

(70) See I. PADJEN and M. MATULović, «Cleansing the Law of Legal Theory (Editorial)», *Croatian Critical Law Review*, vol. 1, no. 1 (1996), at 110-111.

(71) WITTGENSTEIN, note 31. See also e.g. : SAMEK, note 25; WINCH, note 67.

(72) E.g. : Karl POPPER, *Conjectures and Refutations* (London : Routledge & Keagan Paul, 1963), esp. at 33-39; H. ALBERT, «Der Mythos der totalen Vernunft», in Th.W. ADORNO u. a., *Der Positivismusstreit in der deutschen Soziologie* (Darmstadt : Luchterhand, 1969), 81-101.

(73) E.g. : Th.W. ADORNO, «Soziologie und empirische Forschung», in *Positivismusstreit*, note 70, 81-101. Juergen HABERMAS, *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy*, tr. (Cambridge : The MIT Press, 1998).

(74) Harold D. LASSWELL and Myres S. McDOUGAL, *Jurisprudence for a Free Society* (New Haven CT : New Haven Press, 1992), esp. ch.1 «Criteria for a Theory About Law», at 3-139.

(75) An attempt to broaden integral theory of law and religion to include POJ is, «Catholic Theology» (2009), note 1.

2. *The Concept and Candidates*

a) *The Concept*. Durkheim's key ideas concerning religion are as follows : first, religion is «(a)bove all, ... a system of ideas by means of which individuals represent to themselves the society of which they are members, and the obscure but intimate relations which they have with it» (76); secondly, there is no difference in principle between religion and science, since, on the one hand, fundamental notions of science are of a religious origin (77) and, on the other, science is becoming a religion (78). Had Stark and Bainbridge appreciated Durkheim's idea that religion is characterized by self-divination of a clan is compatible even with a fairly narrow concept of religion, taken for granted in the West today, which implies that belief in transcendence is essential to religion. The reason of compatibility is that an individual achieves palpable transcendence in her or his offspring whereas a clan, that is, a social group, provides not only tangible security to the offspring but also memory of their ancestors thus uniting mortal individuals into a transcendent collective that to its adherents appears to be immortal. Several modern groups have functioned as such transcendent collectives, most notably churches, nations and states.

b) *Candidates*. Had Stark and Bainbridge's systematic social theory of religion written from the perspectives of natural sciences as well as of rational choice (79), assimilated Durkheim's key ideas it may have recognized, on the one hand, a plethora of (quasi)religions – most notably science – in contemporary world; and, on the other perhaps even itself as an instance of science as a religion. This brings back the central problem, namely, how law without a definition of religion can recognize a religion or religions. Before tackling the problem again it will be useful, first, to outline, several sets of contemporary Western beliefs and / or practices that are *prima facie* candidates for (quasi) (80) religions, secondly, analyze briefly what they have in common and, thirdly, note difficulties of

(76) Emile DURKHEIM, *Les Formes élémentaires de la vie religieuse et le système totemique en Australie* (Paris : Alcan 1912), at 323

(77) *Ibid.*, at 616.

(78) Steven LUKES, *Emile Durkheim : His Life and Work : A Historical and Interpretive Study* (Harmondsworth : Penguin, 1977), at 71-77.

(79) STARK and BAINBRIDGE, note 2.

(80) In the sense of John E. SMITH, *Quasi-Religions : Humanism, Marxism and Nationalism* (Houndmills : Macmillan, 1994).

identifying them on the basis of Durkheim's – or any other – concept of religion.

Quite independently of its spread and function, the Enlightenment, which is in the roots of scientific rationalism (81), has a content strikingly similar to the long dominant religion in the West, that is, Christianity. Thus the Enlightenment, which is nowadays recognized as a rise of new paganism (82), substituted impersonal nature for the Christian personal God (83), natural laws for divine laws (84), neo-pagan view of history (the original golden age of classical civilization → lapse into a dark age dominated by priests → the heavenly city of the enlightened humanity) (85) for the Christian view of history (Eden → fall → Eden), and love of humanity for the love of God (86).

The essential articles of the religion of the Enlightenment (which were at every point opposed to those of the established, that is, Christian philosophy) may be stated thus: (1) man is not natively depraved; (2) the end of life is life itself, the good life on earth instead of the beatific life after death; (3) man is capable, guided solely by the light of reason and experience of perfecting the good life on earth; and (4) the first and essential condition of the good life on earth is the freeing of men's minds from the bonds of ignorance and superstition, and of their bodies from the arbitrary oppression of constituted social authorities (87).

Quite independently of its spread and function, but very much like the Enlightenment, Marxism, which is the main progenitor of Russian Communism, also has content strikingly similar to Christianity. Thus Marxism, substituted the proletariat for the impersonal nature that had substituted for the Christian personal God, socio-economic laws for the natural laws that had substituted for divine laws, neo-neo-pagan view of history (the original golden age of clas-

(81) *Comp. e.g.* Paul HAZARD, *The European Mind 1680-1715*, trans. (New York: A Meridian Book, 1963), ch. VI «Science and Progress», at 304-318 and Steve FULLER, *Science* (Minneapolis MI: University of Minnesota Press, 1997), ch. 4 «Science and Superstition», at 40-79.

(82) *E.g.* Peter GAY, *The Enlightenment: An Interpretation – The Rise of Modern Paganism* (New York: Vintage Books, 1966).

(83) Carl L. BECKER, *The Heavenly City of the Eighteenth-Century Philosophers* (1932; New Haven CT: Yale University Press, 1966), at 63 f.

(84) *See ibid.*, at 51 f.

(85) *Ibid.*, at 123 f. On the Dark Age *ibid.*, at 111.

(86) *Ibid.*, at 130.

(87) *Ibid.*, at 102-103.

sical civilization → lapse into a class society → the heavenly city of communism) (88) for the Enlightenment view that had substituted for the Christian view of history (89), and, perhaps, revolutionary de-alienation for the love of humanity that had substituted for the love of God.

While Enlightenment and Russian Communism have lost much of their original vigor, in Croatia as well as in the West, scientific rationalism is still the least disputed (quasi)religion of modernity. It is a religion less by its content, which does not include visible substitutes for the articles of faith professed by Christianity, Enlightenment and Communism (90). Scientific rationalism is a (quasi)religion primarily by its function, which was prophesized by Auguste Comte's bold theory that humanity develops in three stages, namely, theological, metaphysical and positive, the last one being the age of science (91). But the function is not quite unrelated to the content. Suffice it to note the exuberant claims made by, or on behalf of, theories of evolution (92) or the usual outcome of judicial conflicts between medicine and religion (medicine wins).

The primacy of scientific rationalism as a (quasi) religion in the West today is threatened by divination of nation (93), sport (94), money (95), consumption (96), even capitalism as such (97) and, bizarrely enough, by a concoction of post-philosophical post-modernism and religious fundamentalism under conditions of neo-liberal

(88) *Ibid.*, at 123 f. On the Dark Age *ibid.*, at 111. Similarly *A New Catechism: Catholic Faith for Adults*, prep. by the Hierarchy of the Netherlands, tr. (New York: Herder and Herder, 1967), at 276-277.

(89) *See ibid.*, at 161 ff.

(90) Steve FULLER, *The Governance of Science* (Buckingham: Open University Press, 2000), at 99-101.

(91) *Ibid.* See also Auguste COMTE, *Cours de philosophie positive* (1830-1842), 1^{re} et 51^e lection.

(92) *See* Mary MIDGLEY, *Evolution as a Religion: Strange Hopes and Stranger Fears*, rev.ed. (London: Routledge, 2002).

(93) SMITH, *note 78*.

(94) *E.g.* on baseball as American civil religion Brian Reich, *Gospel on the Mound: Our National Pastime and the Culture of Religion* (URL: <http://www.stadiummouse/religion/ReligionandSports.pdf>).

(95) *E.g.* William GREIDER, *Secrets of the Temple: How the Federal Reserve Runs the Country* (New York: Simon and Schuster, 1988), at 52-54, 231-240, 420-423.

(96) *E.g.* McCREA ADAMS, «Advertising Characters: the Pantheon of Consumerism», in S. MAASIK and J. SOLOMON (eds.), *Signs of Life in the USA: Readings on Popular Culture for Writers* (Boston: Bedford Books, 1997), 359-368.

(97) Ž. TANJIĆ, «Kapitalizam kao religija: izazov za kršćanstvo» <«Capitalism as a Religion: A Challenge to Christianity» (I), *Glas Koncila*, 12 /1552 (21.03.2004.) (URL: http://www.glas-koncila.hr/rubrike_teoloski.html?broj_ID=781); (II) *Glas Koncila*, 13 /1553 (23.03.2004.), (URL: http://www.glas-koncila.hr/rubrike_teoloski.html?broj_ID=823).

capitalism. Nationalism is not only functioning as a religion in Durkheim's sense, that is as self-divination of a social group, but may even have origin in conventional religions (98). Divination of capitalism is still explained best by Marx's analysis of commodity fetishism (99). Consumerism and «sportism» are as omnipresent as to defy serious comparative analysis with more traditional religions. A wing of postmodernism has gone out of its way (100) to undermine credibility of science but fueled inadvertently the concoction of religious fundamentalism and economic neo-liberalism that ruled the world in the past eight years (101).

In contrast to (quasi)religions of the previous paragraphs, which are forms of collective consciousness functionally similar or even identical to the religion in Durkheim's sense, there evolve new instances of (quasi)religions that are forms of individual consciousness but common to many individuals and, as such, instances of individualistic humanism as a (quasi)religion (102). If a significant feature of religion is coming to terms with death, a job today may be a most sophisticated way to do so without drinking oneself into oblivion: «Death is hard to keep in mind when there is work to be

(98) Thus Adrian HASTINGS, *The Construction of Nationhood: Ethnicity, Religion, Nationalism* (Cambridge: Cambridge University Press, 1997); Bosnian: ID., *Gradnja nacionaliteta*, prij. (Sarajevo: Buybook, 2003).

(99) Karl MARX, *Das Kapital*, I, 1.4. «Fetischkarakter der Ware und sein Geheimnis», tr. in R. FRIEDMAN (ed.), *Marx on Economics* (Harmondsworth: Penguin, 1961), at 50-60. Analysed as an indispensable contribution to sociology of religion by the leading Croatian Catholic sociologist of religion Jakov JUKIĆ, *Lica i maske svetog* <*Faces and Masks of the Sacred*> (Zagreb: Kršćanska sadašnjost, 1995), «Ideologija i religija» 67-177.

(100) E.g. Bruno LATOUR, *Politics of Nature: How to Bring the Sciences into Democracy*, tr. (Cambridge MA: Harvard University Press, 2004). See criticism in James R. BROWN, *Who Rules in Science: An Opinionated Guide to the Wars* (Cambridge MA: Harvard University Press, 2001); Steven WEINBERG, *Facing Up: Science and Its Cultural Adversaries* (Cambridge MA: Harvard University Press, 2001). A more balanced account of the science wars is offered in Ian HACKING, *The Social Construction of What?* (Cambridge MA: Harvard University Press, 1999).

(101) S. BEGLEY, «Bring On the 'Reality Based Community,'» *Newsweek* (17 November 2008), 35-36, in a comment «on the guiding ideology behind the Bush administration's poisonous science polices» argues that the real problem wasn't tax cuts and war spending, or even Bush's refusal to take any action to reduce greenhouse gases. «The truly poisonous legacy of the past eight years is one that spread to much of society and will therefore be much harder to undo: the utter contempt with which those in power viewed inconvenient facts, empiricism and science in general.»

(102) *Comp. SMITH*, note 78.

done» (103). An even more sophisticated way is to spend in solitude day and night at a computer and worship Google as God (104).

Since ideologies as forms of false consciousness have been listed as *prima facie* candidates for (quasi)religions, the list of the candidates would not be complete without a frame of mind that may, perhaps, also fall under Durkheim's concept of religion. It is madness. Robert Sapolsky has formulated a conceptual construct that equates religion and madness, finding madness functioning as religion already in shamanism. Although his text starts with the warning, apparently addressed to pious Christians, that the text may be offensive to religious feelings of the readers, it ends by crediting Ignatius Loyola, the founder of the Jesuit Order, with the finding that religion and madness are often mixed up (105).

c) *Family resemblance*. The outline of attempts to conceptualize religion coupled with the brief inventory of more common (quasi)religions in the West indicates amply that instances which fall under the concept of religion have a family resemblance only. This is to say, by way of example, that the instance 1 has properties ABCDE, the instance 2 has properties ABF, the instance 3 has properties DEFG, etc. (106). It is precisely the fact that not only «religion» but many other words of ordinary language are used in ways that have family resemblance only, why essentialism is wrong, that is, why it is wrong to hold «the view that there must be something in common to all the instances of a concept that explains why they fall under it and that the only adequate or legitimate explanation of a word is an analytic definition» (107).

(103) Alain DE BOTTON, *The Pleasures and Sorrows of Work* (New York: Pantheon, 2009), «sums up a job's ultimate purpose: 'Death is hard to keep in mind when there is work to be done», according to the book review by M. CONLIN, «The Things We Do for Money: Philosopher Alain de Botton dissects the wide world of work, from the heavenly to the hellish», *Business Week* (9 June 2009), 064.

(104) The Church of Google lists the following proofs that Google is God: # 1. Google is the closest thing to an Omniscient (all-knowing) entity in existence, which can be scientifically verified; # 2. Google is everywhere at once (Omnipresent); # 3. Google answers prayers; # 4. Google is potentially immortal; # 5. Google is infinite; # 6. Google remembers all; # 7. Google can «do no evil» (Omnibenevolent); # 8. According to Google trends, the term «Google» is searched for more than the terms «God», «Jesus», «Allah», «Buddha», «Christianity», «Islam», «Buddhism» and «Judaism» combined; # 9. Evidence of Google's existence is abundant. http://www.thechurchofgoogle.org/Scripture/Proof_Google_Is_God.html.

(105) SAPOLSKY, «Psihičke bolesti i religijsko iskustvo», <«Mental Disorders and Religious Experience»>, tr. *Hrvatski Radio III* (11.07.2009. :23.30-00.05.) and (12.07.2009. :23.30.-00.00).

(106) WITTGENSTEIN, note 31, S. 67, 77, 164, 236. «family resemblance», in GLOCK, note 30, 120-124.

(107) *Ibid.*, at 120.

Durkheim's all-inclusive concept of religion is taken here to be a construct adequate to primitive society, which is also a construct (108). Hence Durkheim's concept of religion may be applied without a great strain of imagination to nation or the state but not to other structures of modern society. The reason is that in the course of differentiation of western societies, and even of several developed non-western societies, religion has become, or is supposed to have become, a distinct dimension of social life. Religion has become a distinct dimension largely due to the multi-layered western legal tradition, which has differentiated social consciousness into, *inter alia*, common sense, sciences social sciences and humanities, and philosophy (109). However, the net result has not been a secular world without religion. On the contrary, phenomena which have been traditionally associated with religion, such as community or philosophy or music or law, have re-emerged within allegedly non-religious beliefs and practices that function as (quasi)religions. Moreover, in modern society there are many social groups with beliefs and practices of (quasi)religious nature, such as ethnic communities and political movements, which aspire to become global societies like nation-states (110).

Identifying on the basis of Durkheim's – or any other – concept of religion a set of modern beliefs and/or practices rather than another one is vulnerable to the objection of arbitrariness. The theory of law and religion formulated in this paper is not designed as a prescripted doctrine, which proposes how Durkheim's (or any other) concept of religion ought to be used in identification of religions, that is, in selection of some candidates for the job from among many. The theory should provide *inter alia* a solution to

(108) Primitive society is formulated here as a construct in the sense of an ideal type, for reasons indicated in Chapter 1, that is, independently of the arguments in Adam KUPER, *The Invention of Primitive Society: Transformations of an Illusion* (London: Routledge, 1988), at 8, that the book is «about something which does not exist and never existed», since primitive society was created by 19th century students of society as the imagined opposite to western civilization, so that «the history and theory of primitive society is the history of an illusion. It is our phlogiston, our aether; or, less grandly, our equivalent to the notion of hysteria». The new and augmented edition is ID., *The Reinvention of Primitive Society: Transformations of a Myth* (London: Routledge, 2005).

(109) I. PADJEN, «Fascism as a Reaction to the Western Legal Tradition», in I. GOLDSTEIN and N. Lengel KRIZMAN (eds.), *Anti-Semitism, Holocaust, Anti-Fascism* (Zagreb: Zagreb Jewish Community, 1997), 215-234, at 233-234.

(110) Global in the sense of Georges GURVITCH (ed.), *Traité de Sociologie*, t. 1, 2nd éd. (Paris: Presses universitaires de France, 1963); Croatian: ID. (red.), *Sociologija*, sv. 1 (Zagreb: Naprijed, 1966), prij. II.V, 231-250. Globalisation has the same sense.

what has been left of the central problem of this paper, namely, an answer to the question how law without a definition of religion recognizes a religion or religions. The task is made additionally complex by the suppositions stated at 2.1.1.b, which rule out the explanation that anyone – including a legal order, that is, its organ(s) competent to recognize religions – can know that a candidate for religion is – or is not – a religion.

B. – *Legal criteria of recognition*

Hence another part of the solution of the main problem of part I of this paper: in the absence of a concept or definition of religion arbitrariness in legal – but also non-legal – recognition of a set of beliefs and/or practices as a religion can be – and often is – reduced significantly by observing legal criteria. Integral theory of law divides them into positive (2.2.1) and extra-positive (2.2.2) legal criteria.

1. *Positive Legal Criteria*

Positive legal criteria are primarily though not exclusively procedural.

Positive law is used here in the sense derived from the syntagma *jus civitate positum*, that is, law made by the state. The state is substituted by a law-making authority, which may be, in addition to a state, also a private individual, say, in making a will, and the international community, say, in creating custom. Law is a set of standards of conduct. Such standards are norms or rules (111), values, principles and also sets of standards, for instance institutes, like hire-purchase, or systems, like the Croatian legal system. A standard of conduct, for instance a norm on truth-telling, belongs to positive law if it meets the double requirement of being, first, made by an act of will and, secondly, by a law-making authority. Since almost anyone can create standards of conduct, a distinguishing mark of a legal standard is that it has been made by an act of will as distinct from an act of thought (112) or reason (113).

(111) *Contra* Georg Henrik VON WRIGHT, *Norm and Action* (London: Routledge & Kegan Paul, 1963), 1-17.

(112) Hans Kelsen, *Pure Theory of Law*, tr. (Berkeley: University of California Press, 1967), at 9-10.

(113) St. Thomas AQUINAS, *Summa Theologiae*, I-II, Questiones 90-97; English tr. Id., *Treaties on Law* (Chicago: Henry Regnery, n.d.), Question 90, First Article, Reply Obj. 3.

Procedure or procedural law is the law that regulates its own change, primarily by conferring competences to change laws and by prescribing conditions, forms and effects of legal acts (statutes, contracts, judgments etc.); secondarily by recognizing and ranking certain arguments, for instance, of purpose in interpretation (114) or hearsay in evidence. Procedure is distinguished from substance, which is the sense of the law that grants non-procedural rights and duties to its addressees, for instance, defines religion or grants to religious communities freedom of worship or tax exemptions.

Criteria of positive – primarily procedural – law can reduce arbitrariness in recognition of an instance as a religion by virtue of the fact that the subject-matter of a contemporary European (and, perhaps, Western) legal order is already pre-fabricated by positive law in that not only conventional religions but also candidates for religions have several distinctly legal features or, briefly, «legal nature». The legal nature of a religion in a contemporary European (and, perhaps, Western) society consists of the following conceptual construct, more precisely, an ideal type (115).

a) *Personality* (116) as a *pre-requisite of recognition*. A religion can be legally recognized if it is the religion of a person or, put in a more technical English, of an entity (117). The person or entity is most commonly a community that already has juridical personality under its own – religious – law (esp. Christian communities) (118) or meets requirements to acquire juridical personality under secular law. A set of beliefs and/or practices that belongs to a single individual has little chance to be recognized as a religion. A reason (though not a decisive one) is that one-man corporations for religious purposes (e. g. solitary or free-lance believers) are rare or even nonexistent.

b) *Legal ends of recognition*. A community (and, hypothetically, an individual) is recognized as religious to be distinguished from

(114) Esp. Aharon BARAK, *Purposive Interpretation in Law*, tr. (Princeton NJ: Princeton University Press, 2005), at 47.

(115) In the sense of M. WEBER, «Objectivity» in *Social Science and Social Policy*, in *Id.*, *Methodology*, note 64, at 90.

(116) *Subjektivitetaet* in German or *subjektivnost* in Croatian.

(117) *E.g.* the IRS criterion 1, note 13.

(118) Ugovor o pravnim pitanjima <Treaty on Legal Issues>, *Narodne novine: međunarodni ugovori*, 3/97 between the Holy See and the Republic of Croatia in Article 2 Section 2 provides for that the Republic of Croatia shall recognize public law personality to all the Church institution that have such personality under provisions of canon law.

other entities by either benefits, that is, legal rights, or by burdens, that is, legal duties. If conflict prevention and resolution is an important function of law, there cannot be legally neutral legal recognition of an entity or of a set of beliefs and/or practices as religious.

c) *Freedom of religion.* A legal order recognizes as a religious community a social group that claims recognition but does not recognize a group that does not claim it even though the group meets usual requirements of recognition. A legal order that is distinct from a religion and its legal order does not accept their protest based on religious ground against the claim advanced by another group to be recognized as a religion. Likewise, a religion can be banned on non-religious grounds, such as public morality, but not on religious grounds, such as heresy.

d) *Legal system.* A legal act, whether private, like contract of sale, or private, like a recognition of a religion, as well as any other element of law (personality, value, i. e. end, freedom etc.) presupposes a legal system, which is structured to meet several requirements. Thus legal standards of conduct, especially rules, should be general or abstract, duly promulgated, prospective in operation, etc. Two requirements are of crucial importance to recognition of religions: determinacy and completeness of law (119). To this end administrative organs competent for recognition, who inevitably exercise a wide discretion (not only but also for the reason that religion cannot be defined) are legally or even constitutionally required to limit their own powers by declaring how they are going to use them (120). This is the standard way for public administration in the governance under law to define religion, often by inventing different definitions of religion to meet diverse ends of the system (121) and giving rise to administrative and constitutional adjudication.

(119) *E.g.* : FULLER, *note 43*, 33-94; VISKOVIĆ, *note 43*, 244-254; BRIAN BIX, *Law, Language and Determinacy* (Oxford : Oxford University Press, 1995).

(120) *E.g.* ERNEST GELLHORN and BARRY B. BOYER, *Administrative Law and Process* (St. Paul MI : West, 1981), 79-81. Comp. The IRS criteria for recognizing a religion, *note 13*.

(121) Hence the US dilemma whether religion may be defined differently for purposes of the establishment clause (prohibiting the government to establish an official state church) and of the free exercise clause (prohibiting the government from interfering into the exercise of religion). *E.g.* STEVEN H. SHIFFRIN and JESSE H. CHOPER, *The First Amendment* (St. Paul MI : West, 1996), at 727.

2. *Extra-Positive Legal Criteria*

The positive criteria of recognizing a religion are backed by extra-positive legal criteria. They are of two kinds, namely, extra-positive standards and legally relevant relations.

Extra-positive standards are standards of conduct that do not belong to positive law. Such a standard may not belong to positive law because it is not made by an act of will (122). Examples are general principles of law or canons of interpretation of law if or before they are not recognized as standards of positive law. A standard may be extra-positive also because they it is not made by a law-creating authority. Examples are principles of conventional morality or business ethics.

A social relation is a case consisting of at least two actors in the environment where at least one is performing an action towards the other thus increasing the chance of the other's (re)action. A legally relevant social relation is of one of the following three kinds : a relation causing or regulated by or caused by a legal standard. Hence the extension of legal theory to the study of social relations includes formulation or acceptance, within integral theory of law, of both concepts of society and methods of social sciences, most notably causal and functional explanation (123). Legally relevant social relations may as «the nature of things» exert «the normative force of facticity» (124). Hence integral theory of law combines and balances justification and explanation of legal standards and social relations.

Meta-positive legal criteria can back positive legal criteria in reducing arbitrariness in recognition of an instance as a religion by virtue of the fact that legal features of religion have an underlying structure consisting *inter alia* of both extra-positive standards of conduct and legally relevant social relations. In other words, the subject-matter of a contemporary European (and, perhaps, Western) legal order is already pre-fabricated not only by positive but also by meta-positive legal criteria. The «deep structure» of the legal nature of religion in a contemporary Western or European society consists in the following :

(122) See Kelsen, *note 110*, and Aquinas, *note 111*.

(123) Ernest Nagel, *The Structure of Science* (New York : Harcourt, Brace & World, 1961); Serbian : ID., *Struktura nauke*, tr. (Beograd. Nolit, 1974), 2.II.3, 18-22.

(124) See Julius Stone, *Human Law and Human Justice* (Stanford CA : Stanford University Press, 1965), 207-210.

a) *Understanding*. A lawyer, whether a law-maker or a theorist, can identify a set of beliefs and/or practices as a religion only by understanding the subjective meaning that those who entertain the beliefs and/or engage in the practices attach to the words expressing the beliefs and actions constituting the practices. In doing so the lawyer acts as a sociologist of social action, who assumes society is a construct made by individual human beings (125), and, consequently, concerns herself as a Weberian interpretative sociologist with the subjective meaning that social actors attach, for instance, to prayers or thrift (126).

b) *Trust*. A lawyer can understand subjective meanings attached to religiously relevant words and actions only if she assumes initially – without taking it for granted later on – that authors of the beliefs and actions are in their intentions truthful or veracious. Thus the lawyer must assume that a person requiring recognition of his beliefs as a religion means the content of the beliefs. The lawyer's assumption that a speaker is truthful or veracious must be made, even without thinking, if their communication is to succeed. It is a corollary of Habermas's insights that «a speaker in uttering a sentence necessarily makes validity claims» and «that what he says is true» (127). In doing so the lawyer acts as a participant in the ideal speech situation, which is «neither an empirical phenomenon nor a mere construct, but rather an unavoidable supposition reciprocally made in discourse. This supposition can, but need not be, counterfactual; but even if it is made counterfactual, it is a fiction that is operatively effective in the process of communication» (128).

c) *Concepts*. To identify and instance of religion a lawyer needs a concept of religion that is adequate to both the subject-matter, that is, the beliefs and practices that may count as instances of religion,

(125) In the sense of A. DAWE, «The Two Sociologies», *British Journal of Sociology*, vol. 21 (1970), 207-218.

(126) See MAX WEBER, «Ueber einige Kategorien der verstehenden Soziologie», in ID., *Gesammelte Aufsätze zur Wissenschaftslehre*, 3. Aufl. (Tuebingen: Mohr, 1968), 427-474, at 427 ff.

(127) J. HABERMAS, «Was heisst Universalpragmatik», in K.-O. APPEL, *Sprachpragmatik und Philosophie* (Frankfurt a. M.: Suhrkamp, 1976), 174-272, at 237-238, summarized and translated in Thomas MCCARTHY, *Critical Theory of Juergen Habermas* (Cambridge MA: The MIT Press, 1979), at 280.

(128) Juergen HABERMAS, «Wahrheitstheorien», in ID., *Vorstudien und Ergaenzungen zur Theorie des kommunikativen Handelns* (Frankfurt a. M.: Suhrkamp, 1984), 127-183, cit. at 180; tr. in MCCARTHY, note 125, at 310.

and the already existing concepts of the subject-matter. The latter include the concepts formulated, on the one hand, by the people who entertain religious beliefs or engage in religious practices and thereby become subjects of legal regulation, and on the other, the lawyers who regulate or study law and religion. The three levels of understanding, namely, between the lawyer and subjects of legal regulation, the subjects themselves and the lawyer and other lawyers is necessary for the reason that not only the lawyer as a law-maker or a legal theorist but also every single subject of law and other social actor engages in conceptualization of social phenomena. Moreover, conceptualisations made by social scientists are not radically divorced from common sense understanding in the social world because they both rest on typification (129).

Empirical candidates for religion that have a family resemblance coupled with competing concepts of religion lend themselves to the idea that anything may pass as a religion. The reason is that a family resemblance framework differs logically from an ordinary concept. The extension of an ordinary concept, that is, the number of cases to which the concept applies, increases as the concept's intention, that is, the number of concept's attributes, decreases. The concept that covers cases with a family resemblance is applicable to more cases if it has more attributes (130). The complexity may be most economically reduced by typification, that is, by formulating and applying an ideal type of religion (131).

An ideal-type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct (132).

According to Weber, the ideal type is nothing of the following: historical reality; «a schema under which a real situation or action

(129) Alfred SCHUETZ, *On Phenomenology and Social Relations: Selected Writings*, ed. by H.R. WAGNER (Chicago: The University of Chicago Press, 1970), 111-122, at 119. See also Susan HECKMAN, *Weber, the Ideal Type and Contemporary Social Theory* (Notre Dame: Notre Dame University Press, 1988), at 71.

(130) Gary GOERTZ, *Social Science Concepts: A User's Guide* (Princeton NJ: Princeton University Press, 2006), at 10.

(131) See A. KEDAR, «Ideal Types as Hermeneutic Concepts», *Journal of the Philosophy of History*, vol. 1, no. 3 (2007), 318-345.

(132) «Objectivity», note 113, at 90.

is to be subsumed as one instance» (133); a description of reality; a hypothesis (134); a definition *per genus proximum et differentiam specificam* (135); «a 'model' of what 'ought' to exist» (136). The ideal type differs in principle from the model, that is, the concept of natural sciences, in the following way: whereas the model must correspond to the reality, the ideal type is used to measure the degree in which the reality departs from constellations presented by the ideal type (137).

In Weber's work there are four kinds of ideal types: an individual ideal type, e. g. of a medieval city economy (138), is an account not of a single phenomenon but of a constellation of elements common, in fact or potentially, to a number phenomena (139); a generic ideal type, is more complex than but not logically different from an individual ideal type; examples are exchange (140) or capitalism or Christianity, the latter being abstracted from and therefore referring to a multitude of recurring phenomena (141); an ideal type that describes the alleged essence of a complicated system of ideas (142), e. g. of Christianity (143); an ideal type of development (144), which «states what only approximately or partly happens in a number of cases» (145). For the purpose at hand the most significant Weber's claim may be that «all specifically Marxian 'laws' and developmental constructs – insofar as they are theoretically sound – are ideal types» (146). The claim is significant as it applies – at least potentially – to Marx's and other attempts to formulate social laws on the emergence, change and withering away of religion.

(133) *Ibid.*, at 93.

(134) *Ibid.*, at 90.

(135) *Ibid.*, at 93.

(136) *Ibid.*, at 92.

(137) Barbara SAEGESSER, *Der Idealtypus Max Webers und der Naturwissenschaftliche Modellbegriff* (Basel: Druckerei Birkhauser, 1975), at 171. See also «Objectivity», note 113, at 93.

(138) *Ibid.*, at 90.

(139) Thomas BURGER, *Max Weber's Theory of Concept Formation: History, Laws, and Ideal Types*, exp. ed. (Durham NC: North Carolina, 1987), at 131-132.

(140) «Objectivity», note 113, at 100.

(141) *Ibid.*, at 90.

(142) BURGER, note 137, at 132.

(143) «Objectivity», note 113, at 96.

(144) *Ibid.*, at 101.

(145) BURGER, note 137, at 133.

(146) «Objectivity», note 113, at 103. See also Judith JANOSKA-BENDL, *Methodologische Aspekte des Idealtypus: Max Weber und die Soziologie der Geschichte* (Berlin: Duncker & Humblot, 1965), 89-114.

d) *Relevance*. A lawyer, even if she is a law-maker who recognizes beliefs and practices as religions rather than a theorist who studies how recognition is in fact granted, may try to formulate the content and scope of the concept of religion as if she were a theorist who is interested in knowledge for its own sake. Should one take this approach, an obvious choice is to follow again Max Weber. His central problem is the constitution of culture: «what is the criterion on the basis of which the phenomena that qualify as interesting, important or significant can be defined?» (147). Weber maintains that the formal goal of science determines the kind of facts that are worth knowing. If the goal is knowledge of the general laws, what is worth knowing are those elements of reality which are common to all phenomena. They are studied by nomological sciences, such as sociology and economics (as well as natural sciences). If the goal is knowledge of the uniqueness of concrete phenomena, it is the things with individual peculiarity that are worth knowing. They are studied by cultural sciences, primarily by history (148). Nomological sciences cannot provide a solution to the problem of constitution, since they are committed to a radical reduction of qualities to quantities (149). Cultural sciences can solve the problem – but up to a point only – by following the principle of value relevance, which relates meaning to culture (150). First, the principle relates subjective meaning and cultural meaning (151): while the final end of a cultural science is the knowledge of the cultural significance of concrete historical events, most notably of the subjective meanings that social actors attribute to their actions, rather than construction of ideal types and other concepts, concrete historical events are culturally significant solely in light of values implied in scientific concepts (152). Secondly, the principle relates values implied in concepts of cultural sciences and values of social actors, especially of cultural scientists (153): cultural phenomena are studied from several evaluative points of view, most

(147) Guy OAKES, *Weber and Rickert: Concept Formation in the Cultural Sciences* (Cambridge MA: The MIT Press, 1988), at 23.

(148) See Max WEBER, *Roscher and Knies: The Logical Problems of Historical Economics*, tr. (New York: The Free Press, 1975), at 56-57; «Objectivity», note 113, at 77-81; BURGER, note 137, at 67-68.

(149) OAKES, note 145, at 22.

(150) E.g. «Objectivity», note 113, at 111. Oakes, at 26. See also Alexander von SCHELTING, *Max Webers Wissenschaftslehre* (Tuebingen: Mohr, 1934) 227-235; BURGER, at 39-41, 54, 99.

(151) OAKES, note 113, 27-32.

(152) See «Objectivity», note 113, at 111.

(153) See OAKES, note 145, at 27, 32-40.

notably from the «culturalist» viewpoint, such as Weber's, and the «materialist» viewpoint, such as Marx's; the pluralism of values, within as well as outside cultural sciences, is irreducible and, when a radical conflict arises, irresolvable (154). The ultimate reason or cause, which is just as common in science as in everyday life and no science can obviate, is stated by a metaphor :

The light which emanates from those highest evaluative ideas always falls on an ever changing finite segment of the vast chaotic stream of events, which flows away through time (155).

e) *Points of View*. The lawyer in search of criteria for recognizing religions may find what she has been looking for in the concept of legal points of view which may well be structured as the idea of religious points of view. H.L.A. Hart has introduced the idea in the following passage of his *Concept of Law* :

The following contrast again in terms of the 'internal' and 'external' aspect of rules may serve to mark what gives this distinction its great importance not only of law but of the -structure of any society... it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal' points of view (156).

Hart recognizes that his analysis of the points of view is similar to (157) Peter Winch's distinction between rules and habits (158) and by implication also to Max Weber's concern with human behavior «if and in so far as the agent or agents associate a subjective sense with it» (159). Hart's analysis has proved to be highly controversial as well as influential (160).

(154) See MAX WEBER, *Gesammelte Aufsätze zur Religionssoziologie* (Tuebingen : Mohr, 1963); Bosnian ID., *Protestantska etika i duh kapitalizma*, prij. (Sarajevo : Veselin Masleša, 1968), concluding remarks at 213-215. See also : «Objectivity», note 113, at 67; OAKES, 145, at 33; Stephen P. TURNER, *The Search for a Methodology of Social Science* (Dordrecht : Reidel, 1986), at 202-203.

(155) «Objectivity», note 113, at 111.

(156) H.L.A. HART, *The Concept of Law* (Oxford : Clarendon Press, 1961), at 86. See also at 55-56, 99.

(157) HART, note 154, at 242.

(158) WINCH, note 60, at 57-65.

(159) *Wirtschaft und Gesellschaft*, note 43, quoted by WINCH, note 67, 3rd impression, at 45.

(160) See e.g. C. GRANT et al. (eds.), *The Legacy of H.L.A. Hart : Legal, Political and Moral Philosophy* (Oxford : Oxford University Press, 2009). Relevance of Hart's theory in the former Yugoslav republics is indicated by Mimir MATULović, *Jezik, pravo i moral : filozofija prava Herberta Harta <Language, Law and Morality : Philosophy of Law of Herbert Hart>* (Rijeka : ICR, 1986); on the legal points of view at 69-74.

According to Bix's interpretation of Hart's account, a person who has an external point of view acts because she feels obliged, that is, out of fear of consequences, whereas a person who has an internal point of view acts because she is obligated, that is, out of duty (161). The interpretation can be refined in the following way : both persons act for a reason; the reason of a person acting from the external legal point of view or, briefly, the external legal point of view is the belief that the person's legally relevant action shall be followed by the legal system's reaction (punishment or reward), the nature of connection (reason or cause) between the action and reaction being irrelevant to the person acting; the reason of a person acting from the internal legal point of view or, briefly, the internal legal point of view, is the belief that the person's legally relevant action is justified by rules of the legal system, a possible reaction of the legal system to the action being irrelevant to the person acting; however, the internal point of view, that is, acceptance of rules of the legal system as reasons justifying action, does not imply acceptance of the legal system as justified or, at least, of morality as justification of the legal system (162). Thus Hart's internal legal point of view is supposed to perform two tasks that both Winch and Kelsen (163) would regard as mutually incompatible. It is supposed, on the one hand, to account for rules within a legal system as reasons justifying actions that are justified by other rules of the system (esp. by a rule or rules of recognition, which «specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts» (164).); and, on the other, to account for the legal system as distinguished from a set of separate rules (165), by identifying it as something that does not need justification. Hart seems to have failed to notice that the second task cannot be purely descriptive since it consists of a selection of data, which is always value laden. If so Hart has not managed to formulate a positivist theory of law,

(161) B. BIX, «H.L.A. and the Hermeneutic Turn in Legal Theory», *Southern Methodist University Law Review*, vol. 52 (Winter 1999), at 174.

(162) The point stressed by *ibid.*, at 175, and Joseph RAZ, *The Authority of Law* (1979), at 154-155.

(163) E.g. : *General Theory*, note 43, on the Basic Norm, at XV, 110 ff, 120, 436 and *passim*; *Pure Theory*, note 110, on the Basic Norm, at 201-221 and *passim*.

(164) HART, note 154, at 92.

(165) *Ibid.*, at 90.

that is, an ethically neutral description of law (166). His theory is rather an account of law that is at least partly prescriptive. It is tainted by the author's personal moral preferences, which are in the eyes of a positivistic legal scholar characteristic of jus-naturalist legal scholarship (167).

Hart's cryptic remark in the «Preface» of the *Concept of Law* that «the book may also be regarded as an essay in descriptive sociology» reveals that the incompatibility of the two accounts is, perhaps inadvertently, a paradoxical relationship that has a logical though hidden solution. The solution is offered by Wittgenstein's latter thought. A part of the solution is provided by the idea that the task of philosophy is description rather than explanation of uses and rules of language (168). «Unlike causal explanations, which can in principle go on forever», descriptions of linguistic use or rule come to an end (169). «Our mistake is to look for a further explanation here, when we ought to look at what happens as a 'proto-phenomenon'» (170). The remaining part of the solution can be found in Wittgenstein's remarks that the problems studied in the *Philosophical Investigations* «are being seen from a religious point of view.» (171). «A possible clue may lie in the reiterated theme of his writings that explanations, reasons, justifications, come to an end», the way they come to an end in religion (172). When seen in light of the proposed solution, Hart's internal point of view may very well be by its method – though not by its content – a religious point of view, which describes, that is, recognizes without a further explanation, including justification, a «proto-phenomenon». This can be a law or law, as it is in Hart's *Concept of Law*. But it is more in accord with the nature of the internal point of view that the «proto-phenomenon» is the holy or god or God or, to put it succinctly, the religious.

(166) Contrary to H.L.A. HART, «Positivism and the Separation of Law and Morals», *Harvard Law Review*, vol. 71, no. 4 (1958), 593-629.

(167) See L.L. FULLER, «Positivism and Fidelity to Law – A Reply to Professor Hart», *Harvard Law Review*, vol. 71, no. 4 (1958), 623-672, at 657-661.

(168) WITTGENSTEIN, note 31, Abs. 109, 496, 654-655.

(169) «Explanation» in GLOCK, note 30, 111-114, at 111.

(170) WITTGENSTEIN, note 31, Abs. 655.

(171) NORMAN MALCOLM, *Wittgenstein: A Religious Point of View?*, ed. by P. WINCH (London: Routledge, 1993), at 1.

(172) *Ibid.*, at 2.

Following standard analyses of Hart's legal points of view (173), it is useful to make a distinction between a whole specter of religious viewpoints, which may include the following: the extreme internal viewpoint, which is characteristic of a devoted believer who has unreserved faith in the religious as such; two moderate internal viewpoints, the first typical of an «*à la carte* Catholic», who picks and chooses aspects of the religious, the second typical of a scientist of religion, who tries to understand the religious «from within» but without believing in it; the moderate external viewpoint, characteristic of a non-believer in the midst of religious fundamentalists, who takes part in religious rites just to hide away his infidelity; two extreme external viewpoints, the first of an alien who goes out of her way to understand beliefs and actions of her hosts but without whether they engage in a religion or what makes it a religion, the second of a natural scientist who studies the religious by methods of neuropsychiatry; the mixed internal and external point of view of a devoted believer who has unreserved faith in the religious as such and scorn for the anti-religious as such, as is the case with a pious Christian who is concerned adversely with Satanism. Needless to explain, the internal points of view are closer to sociology of social action (1.2.3), while the external points of view are closer to sociology of social system (1.2.4).

Now, the moral of the reinterpretation of Hart's legal points of view for the lawyer who searches for criteria of recognizing religions is twofold.

First, there is a limit of viewpoints that a legal order, whether secular or religious, may take with regard to religions. A legal order acting from an extremely internal point of view can recognize only one set of beliefs and/or practices as a religion. To recognize more than one instance the order must take a moderate internal point of view. However, since organs of a legal order are made of humans, there is a practical limit to the variety of instances, that is to the family resemblance, which can be recognized as religions. A legal order that recognizes religions from a moderately external point of view is likely to do more harm than good, roughly in a way vegetarians would regulate steak-houses. An extremely external religious point of view suits a legal order just as well as an individual

(173) *E.g.* Neil McCORMICK, *H.L.A. Hart* (Stanford CA : Stanford University Press, 1981).

who tells his religious neighbor that religion is opium for the toiling masses. Even when there is a reason to distinguish mad from religious belief, the best one can do is to distinguish mad from neurotic religious belief and consider the problematic belief neurotic (174). From the perspective of a critical theory, which extends to a theory of social system, it may be reasonable to broach the question whether communism, or science or sports are religions. However, to legally recognize and regulate any of them without its consent as a religion would amount to a perversion of law. It is common knowledge that the mixed internal and external point of view is not admissible even as a criticism, since it lends itself to witch-hunt.

It goes without saying that the reinterpretation of Hart's legal points of view as religious points of view is a conceptual construct, perhaps an ideal type covering perspectives with a family resemblance, approximately in the sense of «culturalism» or «materialism» noted above.

f) *Efficacy*. The ideal type of religion formulated by a lawyer may include a condition that a set of beliefs counts as a religion only if it socially «works». Thus a doctrine counts as a religion if it causes meaningful mental events occurring in human individuals and the events cause in turn human overt activity. The problem for the lawyer, as well as a scientist, is to determine that the set of beliefs rather than other events, such a fashion, is the cause. The lawyer may find guidelines in the conception of objective possibility and adequate causation that Weber has developed by adopting a legal doctrine for purposes of social theory. According to the theory, science describes causal relations in historical reality just like attorneys in a court of law, namely, by describing individual causal links which take the form on the basis of everyday experience, and cannot be calculated because every particular event is the result of enormous, perhaps infinite conditions. Thus the cultural science descriptions of causes, given in the form of genetic ideal types, indicate only the objective possibility of an event taking place. But this is again the possibility seen from the viewpoint of a particular scholarly discipline or a discipline of a particular current, for instance, «culturalist» or «materialist» (175).

(174) See D. BERMAN, «Religion and Madness», *Journal of Religion and Health*, vol. 45, no. 3 (2006), Abstract (URL: <http://www.springerlink.com/content/v8571044822m2370>).

(175) «Objectivity», note 113, 164-188. See also TURNER and FACTOR, note 43, 121-135.

g) *Practice*. A lawyer, even if she is a theorist who studies how recognition is in fact granted rather than a law-maker who recognizes beliefs and practices as religions, may try to formulate the content and scope of the concept of religion as if she were a law-maker who has to make a decision no matter what. Should one take this approach, a reasonable choice is to follow Aquinas and, indirectly, Aristotle.

Aquinas is sometimes interpreted as maintaining that practical reasoning has the same structure of a syllogism as speculative, that is, theoretical reasoning. Thus it is said that

In general, the form of the practical syllogism is as follows :

Major premis (from synderesis) : X is right (or wrong).

Minor premis (from reason) : This is a case of X.

Conclusion (from conscience) : This ought to be done (or avoided) (176).

However, Aquinas's key passage runs, roughly, as follows : «hence we find in the practical reason something that holds the same position in regard to operations (i.e. actions – trans. by I.P.), as, in the speculative intellect, the proposition holds in regard to conclusions.» Aquinas's account suggests something very different from the interpretation quoted above. First the result of practical reasoning is not a conclusion but action (177). For that reason, secondly, the structure of the two types of reasoning cannot be the same. Whereas in speculative reasoning the conclusion follows from premises, in practical reasoning the action is measured by premises. Thirdly, the action cannot be a necessary consequence of the premises. Even if a conclusion that something ought to be done followed necessarily from premises, the actor could choose not to act following the conclusion. Fourthly, at least when a major premise is human law (178), it may be uncertain and for that reason the hypothetical conclusion of practical syllogism could not follow necessarily from the premises.

Aquinas's of practical syllogism may help a lawyer who has to make or prepare a decision on the legal recognition of a set of

(176) D.J. O'CONNOR, *Aquinas and Natural Law* (London : Macmillan, 1967), at 43.

(177) AQUINAS, *note 11*, Question 90, First Article, Reply to Objection 2 : «hence we find in the practical reason something that holds the same position in regard to operations (i.e. actions – trans by I.P.), as, in the speculative intellect, the proposition holds in regard to conclusions.»

(178) *Ibid.*, Questions 95-96 on human law. See also on the place of human good in Aquinas's practical philosophy in G. GRISEZ, «The First Principle of Practical Reason : A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2», *Natural Law Forum*, vol. 10 (1965), 168-196.

beliefs and/or practices as a religion in three ways. First, to note that legal reasoning can be inductive, that is, by starting with a single action and following it by analogy till a general practice is established (179). This is, quite obviously, the most common way of recognizing religions, which had began in «the time immemorial» with the acceptance of a creed and its rites as the religion. Secondly, to note that legal reasoning can be deductive (180). This is the common way of recognizing new creeds and rites as religions on the basis of constitutional, statutory and precedential provisions. Thirdly, to wonder whether that the now widespread doubt in logic in law, especially in deductive legal reasoning, may be a corollary of the roots of post-modernity in modern philosophy, starting with Kant's explanation of the way intuitions are brought under understanding by rules of judgement (181). Whatever the explanation, its consequences must terrify any lawyer or doctor or engineer – but also a physicist who has to formulate concepts on the basis of observation :

A physician, a judge, or a ruler may have at command many excellent pathological, legal, or political rules, even to the degree that he may become a profound teacher of them, and yet, none the less, may easily stumble in their application. For, although admirable in understanding, he may be wanting in natural power of judgment. He may comprehend the universal in abstracto and yet not be able to distinguish whether a case in concreto comes under it. Or the error may be due to his not having received, through examples and actual practice, adequate training for this particular act of judgment (182).

This is the paradox of post-modernity : the idea that «those who can't teach», which was promulgated by Kant, has at long last won now that Kant's philosophy is relegated to modernity. A lawyer who wants to practice his theory by judging or advising on the legal recognition of religions need not concern herself with the question whether the solution is that post-modernity is just the emperor's

(179) See e.g. Georg SCHWARZENBERGER, *The Inductive Approach to International Law* (London : Stevens & Sons, 1965), esp. at 37-42.

(180) Emphasized by *ibid.* and recognized even by the advocate of the new rhetoric Chaim PERELMAN, *Droit, morale et philosophie* (Paris : Pichon et Durand Auzias, 1968), ch. V «Le raisonnement juridique», 93-100.

(181) E.G.Ch. NORRIS, «The Blank and the Die : Some Dilemmas of Post-Empiricism», *International Journal of Philosophical Studies*, vol. 14, issue 2 (June 2006), 159-189.

(182) KANT, note 61, at 178; *KrV A 134, B 172-173*.

new cloths. But she may recover a bit by taking Aquinas more seriously (183).

Before the reader who has arrived this far may takes a rest may wish to consider whethether the conceptual construct offered in this unfinished chapter (2), sprinkled perfunctorily by few footnotes, is only a highly abstract check-list for unknown lawyers who may find themselves involved someday in law or theory of the recognition of religions or is the check-list also, as announced, to a great extent a common sense legal doctrine of law and religion, or church and state, widespread in contemporary Europe and, perhaps, the whole West.

III. – IS LAW RELIGIOUS?

The third implication of the initial question, «What is a ‘religion’ capable of being included in a positive legal order?», is that a positive legal order may but need not include a religion.

If any it is this implication that seems to be beyond reasonable doubt: inexistence and disappearance of religions in vast areas of the world; the separation of church and state; widespread legal positivism, which denies that positive law may have any content that has not been created by human will.

Not a single one of the just stated facts is as firm as obvious. This chapter, if and when it is completed, will argue that it may be both theoretically and practically more rewarding to answer the question from a very different angle, by extrapolating findings of the previous chapter and asking: could law recognize religion without being religious?

(183) See also James GORDLEY, *Foundations of Private Law* (Oxford: Oxford University Press, 2006), 7-31.