The intellectual impetus that Božidar Bakotić gives to his students has been all too often in the shadow of his magisterial care. This paper is meant to be a tribute to both. First, it is a tribute to what may well be the tenet of his teaching. This is the idea that legal problems worthy of study—not merely of international law but of any legal system—are trans-systemic. They are regulated (in fact or potentially) by two or more legal systems, such as international law, national law or laws of federal units. Analytical legal theory, which was taking shape at the time he introduced me to trans-systemic legal problems almost four decades ago, takes as its privileged subject-matter the legal system, including its relations to other systems of prescription, be they legal or not (esp. moral). Hence I owe to Professor Bakotić my understanding as well as interest in the discipline that has become my primary academic concern. Secondly, this paper is both an outcome and recognition of the reassurance Božidar gave me at the critical point when I was treading on the virgin land of church and state scholarship in Croatia (as well as a small token of gratitude for my whole academic career).

To avoid pathos, which easily creeps into a tribute to a cherished teacher, this paper is not meant to be as solemn or as sober as its title may suggest. Rather than sincerely serving a higher end (such as the enlightenment of policymakers...
in the trinity of Church, State and University), the paper is an end in itself. The model is violin four hands, with simultaneous *pizzicato* and bow movements, that is, a musically light but somewhat tricky piece composed *arte gratia artis* and played at the New Year parties of the Zagreb University Faculty Club. My piece is composed to entertain two groups of connoisseurs, including those among each group who find my main theme or topic unkindly parochial or plainly dull but might be interested in observing how one performs on all fours.

The first group are traditional European legal scholars, most notably internationalists like Professor Bakotić himself, who operate within the inherited (chiefly German 19th century) legal dogmatics, with—to put it mildly—a sanitary disregard for more recent theoretical frameworks (chiefly American) such as the—meanwhile well past its prime (in fact almost extinct)—Myres McDougall and Harold Lasswell policy-oriented jurisprudence [hereinafter: POJ]. The second group are still active students or at least admirers of the late Myres McDougall and Harold Lasswell.

My obvious intention is to entertain both groups with the same performance to the point of oblivion, but, just to be nasty, at the very end reveal unexpectedly why it appealed to them. Since the intention could hardly be realised even by a better mind, I may at least purvey a bit of slapstick when my long awaited principal point falls flat.

I. Problems, Standpoint and Focus of Inquiry

Major participants of church and state relations in Croatia entertain perspectives that are barely articulated, analysed even less in Croatian scholarship, and usually distorted in the Croatian media, but which are nonetheless often conflicting. As noted in an earlier study,

The Austrian Concordat of 1855, the *de facto* governing document between the state and the Catholic Church from the first Yugoslavian state through the Second World War, is most likely still the model of church-state relations that corresponds most closely to the tacit sense of what influential Catholic clergy today would regard as the soundest approach. On the other hand, the liberal end of the Croatian political spectrum would likely view the socialist ban of religion from the public sphere as the more appropriate model. While the Catholic Right abruptly gained the upper hand in the 1990’s, the Liberal Left is slowly regaining it in this decade."

---

Given the conflicting perspectives, it is surprising that on the one hand no lawyer (other than the present writer)\(^7\) has questioned the legal appropriateness of the membership of Catholic theological schools of Croatian public universities, while on the other, quite unexpectedly, tremendous public pressure was mounted to force the rector-elect of Zagreb University to resign in 2001 solely for the reason that he was a priest and professor of a Catholic faculty of theology.\(^8\) These conflicting perspectives are the major practical problem of this inquiry. Jurisprudential silence on the problem is the theoretical one.

In view of the problems, enlightenment, that is, acquisition and dissemination of knowledge, may well be both the most pressing need of the church and state in Croatia today, and the highest attainable goal of this inquiry. This may be served best by a policy inquiry, which follows the policy-oriented jurisprudence of the late Harold D. Lasswell and Myres S. McDougal,\(^9\) adjusted to meet editorial constraints and methodological innovation. Thus in contrast to the standard POJ dichotomy,\(^10\) enlightenment is not considered here to be the goal which defines a scholarly observer, and differs in kind from power, that is, the making of authoritative decisions, which defines a decision-maker. Enlightenment is seen in this inquiry as an essential ingredient of a rational decision and as such a goal defining the standpoint of a decision-maker seeking authority as well as the standpoint of a scholar. Nonetheless, this inquiry is, as announced in the introductory remarks, interested primarily in scholarly pursuits. The substantive policy goals of this inquiry should be read in this light.

---


This inquiry is focused on the published legal acts, mostly of a general scope, which regulate the legal position of the Catholic Theological Faculty with regard to Zagreb University. The relationship between other Catholic theological schools and Croatian state universities is analysed only incidentally.\footnote{This paper draws partly on Padjen, note 7, ch. 2.2.1.}

\section*{II. Basic Public Order Goals}

POJ requires a policy analyst to postulate explicitly the basic public order goals of their inquiry.\footnote{Ibid., “The Explicit Postulation of Basic Public Order Goals”, at 34–35.} The requirement was squarely at odds with both positivism and naturalism in legal thought at the time POJ was being formulated several decades ago. However, already at that time, the content of the requirement, though not the method, coincided with the idea that the very existence of international law implies certain basic rights of states.\footnote{E.g. Juraj Andrassy, \textit{Međunarodno pravo}, 5.izd. [\textit{International Law}, 5th ed.] (Zagreb: Školska knjiga, 1971), par. 16, at 68–84.} Today the requirement may be understood as a demand to explicate interpretive presumptions, which is a tenet of purposive interpretation in law.\footnote{See Aharon Barak, \textit{Purposive Interpretation in Law}, trans. (Princeton NJ: Princeton University Press, 2005), at 145–147, 170–172 and \textit{passim}.}

This inquiry postulates the basic public order goals recommended by Lasswell and McDougal, that is, the basic values of human dignity or a free society, which imply “demands for the greater production and wider sharing of all values and preference for persuasion over coercion”\footnote{Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, \textit{Human Rights and World Public Order: The Basic Policy for an International Law of Human Dignity} (New Haven CT: Yale University Press, 1980), esp. at 377–378.} These values are either identical to or compatible with the values of social democracy\footnote{McDougal’s political (not to be confused with foreign-political) orientation may well be epitomised by the textbook Myers S. McDougal and David Huber, \textit{Property, Wealth, Land: Allocation, Planning and Development—Selected Cases and Other Materials on the Law of Real Property} (Charlottesville VA: Michie Casebook Corp., 1948), which was alleged in two states, Texas and Washington, to violate the Constitution by advocating planning. \textit{Appreciations}, note 9, at 67.} on the one hand, and contemporary Catholicism\footnote{D.D. Granfield, “Towards a Goal Oriented Consensus”, \textit{Journal of Legal Education}, 19:4 (1967), 379–302, esp. at 380–383.} on the other.

Social democracy, as one variant of liberal democracy, differs from libertarian democracy, which is the other variant, by starting from
the premise that freedom involves the opportunity to adopt a plan of life autonomously, which can only occur when the concrete circumstances of a person’s life do not inherently rule out too many choices. For freedom in this sense to be meaningful, every person must have a right to the social goods that enable free action.\textsuperscript{18}

Human dignity or a free society is a basic value also cherished by Catholic teaching as redefined by, or in the era of, Vatican Council II.\textsuperscript{19} Human dignity in Catholic teaching assumes, on the one hand freedom of belief,\textsuperscript{20} and on the other the autonomy of human creations,\textsuperscript{21} most notably of the state and man-made law.\textsuperscript{22} In this regard, the teaching of Vatican Council II is compatible with many political values of liberal democracy. However, the principles of Catholic social teaching are obviously closer to its social than its libertarian variant. The principles include the common good and its common use, with a preference for the needy, subsidiarity, participation, solidarity and the basic values of truth, freedom and justice.\textsuperscript{23}

Both social democracy and Catholic social teaching require, or at least coincide with, social pluralism. As a presumption concerning Croatia, pluralism implies that the Croatian (or a similar) social system includes the following three layers of social interaction: the political state or, in short, the State; a market society or, in short, society; and civil society. The State, even when it is taken in its broadest sense, so that it includes not only political people (\textit{demos, populus}) but also political parties and pressure groups, is a rather limited layer of interaction. Society includes all economic market institutions and relations, such as commercial societies and contractual exchanges. Civil society includes not-for-profit autonomous groups and their activities, groups ranging from ordinary families and local communities to religious communities, autonomous public institutions in education, culture, science, media, health


\textsuperscript{23} Justitia et pax, note 21, ch. IV, at 125–161.
and welfare, and civic associations, other NGOs and social movements. Groups and relations of one layer often overlap with the other three layers and sometimes fall outside the Croatian social system.\textsuperscript{24}

Liberal democracy coincides with the idea of the modern (originally Humboldt’s) university, which requires that university introduces its students to knowledge for its own sake in the way knowledge is acquired by scientists or scholars, that is, by research.\textsuperscript{25} The university is distinguished from the polytechnic (\textit{Fachhochschule}) by scientific or other scholarly research being both the foundation and method of teaching. Hence, what distinguishes the university from the research institute (such as the Max Planck institute or, in Croatia, the Ruder Bošković Institute) cannot be research or even academic excellence. It can only be the status of the university teacher and of the university itself, including the status of university departments or faculties. This status includes, on the one hand, the right to teach freely (which may be legitimately denied to a teacher at a polytechnic or to the polytechnic itself) and, on the other, the right to research freely plus the right to academic self-government (which are largely incompatible with the status of a research scholar in a research institute or of the institute itself). The academic status of a university teacher is guaranteed by tenure, that is, by legal protection from dismissal without just cause.

The basic values of POJ, which are also subscribed to by this inquiry, coincide with the principles of the UN Charter and of the Universal Declaration of Human Rights.\textsuperscript{26} POJ principles also coincide with basic UN\textsuperscript{27} and European\textsuperscript{28} human rights instruments and the Constitution of the Republic of Croatia.

\textsuperscript{26} McDougal, note 15, at 34–35.
\textsuperscript{28} Konvencija za zaštitu ljudskih prava i temeljnih sloboda [Convention for the Protection of Human Rights and Fundamental Freedoms], \textit{NN:DMU} 18/97, 6/99.
III. Clarification of Public Policies

The participation of a theological school of a religious community in a Croatian state university should conform primarily to the following provisions of the Croatian Constitution of 1990:29

III. Protection of Human Rights and Fundamental Freedoms:

2. Personal and Political Freedoms and Rights:

   Art. 41

   1. All religious communities shall be equal before the law and shall be separately from the State.

   2. Religious communities shall be free, in conformity with law, publicly to perform religious services, to open schools, teaching establishments and other institutions, social and charitable institutions and to manage them, and shall in their activity enjoy the protection and assistance of the state.

3. Economic, Social and Cultural Rights:

   Art. 67

   1. The autonomy of universities shall be guaranteed.

   2. Universities shall independently decide on their organization and work in conformity with law.

IV. Organisation of Government:

1. The Croatian Sabor (Parliament)

   Art. 82

   2. Laws (organic laws) which elaborate the constitutionally guaranteed fundamental freedoms and human rights ... shall be passed by the Croatian Sabor (Parliament) by a majority vote of all its deputies.

VII. International Relations:

1. International Agreements

   Art. 134

   International agreements concluded and approved in accordance with the Constitution and made public, and which are in force, shall be part of the domestic legal order of the Republic and shall have legal force superior to law. Their provisions may be changed or repealed only under conditions and in the way specified by themselves or in accordance with the general rules of international law.

Now, if the separation clause of Art. 41(1) of the Croatian Constitution is read in isolation, a theological school of a religious community cannot participate in

29 Ustav Republike Hrvatske, Narodne novine [hereinafter: NN] 56/90, 135/97, 113/00, 28/01, 41/01. Other relevant constitutional provisions include guarantees of equality regardless of inter alia religion (Art. 14), prohibition of incitement to religious hatred (Art. 39), and freedom of religion (Art. 40).
a state university. However, in Croatia, as in some other countries, the adjective “state” as a qualifier of “university” is not decisive. Croatian legislation does not use the adjective as such a qualifier at all. Nor is it necessarily a decisive circumstance that the State, that is, the Republic of Croatia, founds or funds a university. Thus far, the State has founded and funded all seven operative universities in Croatia, and is likely to fund even the Croatian Catholic University in Zagreb, which is currently under construction.

Croatian constitutional standards are more liberal than their German counterparts. Hence German analyses of the participation of theological schools in public universities, although highly illuminating, can be of little direct assistance in interpreting the religious clauses of the Croatian Constitution.

More fruitful, primarily as an interpretive presumption, is the idea of pluralism, briefly outlined in Section 2. Seen in this light, a Croatian university counts as an institution of Croatian civil society even if it is founded and funded by the Republic of Croatia, provided the university is autonomous. It follows that a theological school of a religious community may participate in a Croatian state university provided the following requirements are met:

A. The state university enjoys the autonomy guaranteed by Art. 67 of the Constitution. The Constitutional Court of the Republic of Croatia, in its decision of 2000 which annulled several provisions of a law on higher education, specified that university autonomy consists of the following: the freedom of scientific, artistic and technological research and creation; the adoption of educational, scientific, artistic and professional programmes; the election of teachers and heads; decisions on criteria of enrolment; and decisions on internal organisation.

31 Zakon o visokim učilištima [The Law on Institutions of Higher Education], NN 96/1993, 34/94 etc., Arts. 9–10, came closest to such use by providing that a university is a public institution of higher learning that can be founded only by the Republic of Croatia. Zakon o znanstvenoj djelatnosti i visokom obrazovanju [The Law on Scientific Activities and Higher Education], NN 123/03 etc., which is now in force, Arts. 48–49, provides that a university can be either public or private, empowering not only the Republic of Croatia but also counties and towns, that is, units of regional and local self-government, to found public universities.
32 The Universities of Zagreb, Split, Osijek, Rijeka, Zadar, Dubrovnik and Pula.
33 See esp. Martin Heckel, Die theologischen Fakultäten im weltlichen Verfassungsstaat (Tübingen: Mohr-Siebeck, 1986).
34 Comp. Padjen, note 7, sect. 2.2.1.a), at 152–156.
B. The State may—but need not—pass a law ensuring that theological schools of all the religious communities within the Croatian legal order are equal before the law concerning participation in state universities pursuant to Art. 41(1) of the Constitution. If the Croatian Sabor (Parliament) passes a law on the matter, the law should be organic, pursuant to Art. 82(2) of the Constitution.

C. Conditions of participation should be laid down by the university’s autonomous general legal act, pursuant to Arts. 67 and 41(1) of the Constitution. Such an act should provide for a mode of participation of a theological school in a university that ranges from full membership equal to the status of other university schools (faculties, departments, etc.), to the awarding of university degrees for the completion of theological studies, and to access for theology teachers and students to non-academic university services (e.g. university restaurants).

D. A theological school that is a candidate for participation in an autonomous state university:

DA. belongs to a religious community that counts as a religious community within the Croatian legal order;

DB. meets the scholarly (research, educational, information, etc.) criteria expected by the scholarly community from a university school (faculty, department, etc.). This may be the most controversial of all the constitutional requirements since it implies that a theological school may, but need not, comply with scholarly requirements for reasons that are closer to what is conventionally termed culture than to science in the sense that the term is understood by natural scientists;

DC. enjoys status compatible with the status of a university department or faculty, while the teachers of a religious school enjoy status compatible with the status of university teachers, both explicated in Section 2. The Constitutional Court of the Republic of Croatia determined that the autonomy of universities guaranteed by Art. 67 of the Croatian Constitution includes, inter alia, the rights stated in Art. 3 of the Law on Institutions of Higher Education of 1993 (hereinafter: the LIHE), finding that several other provisions of the LIHE itself had violated those rights. Art. 3 of the LIHE reads as follows:

1. Institutions of higher education are established on the principle of academic autonomy and freedom in accordance with the Constitution of the Republic of Croatia and the Law.

36 Zakon o visokim učilištima, NN 96/93, 34/4, 48/95, 29/96, 54/96.
37 Ustavni sud, note 35, obrazloženje II.
2. The autonomy of an institution of higher education shall be particularly expressed in: freedom of scientific, artistic, and technological research and creation; establishment of educational, scientific, artistic, and professional programmes; appointment of teaching staff and heads; decisions on student enrolment criteria; establishment of study regulations; and determination of internal organisation.

E. the mode of participation of a school in a state university (stated ad C) corresponds to the degree in which the school fulfils the requirements stated ad D).

F. The university alone determines, on the basis of its general legal act stated ad C and within the limits of the organic law stated ad B, whether the theological school meets the requirements stated ad D, and if so, what mode of participation is open to it.

IV. Tendencies in Past Decisions

This section outlines tendencies in past decisions towards or against the basic public order goals postulated in Section 2 and public policies clarified in Section 3.38

1. Expulsion and Reinstatement by Decree (1952–1990)

The Catholic Theological Faculty in Zagreb39 [hereinafter: the CTFZ], which was started in the 13th and established in the 18th century, became one of the first three faculties making up the University of Zagreb [hereinafter: UZ], as (re)structured in 1874.40 The communist-run Government of the People's Republic of Croatia abolished the CTFZ as a UZ faculty on 29 January 1952.41 The fact that UZ authorities never expelled the CTFZ from UZ is today recognised by Croatian deans of theology as a sign of the degree of autonomy of

---

38 For a more detailed, but partly outdated account, see I. Padjen, note 7, ch. 2.2.1.b–g), at 154–186.
39 Katolički bogoslovni fakultet u Zagrebu.
40 ⟨www.unizg.hr/170.0.html⟩ (23.12.2008) and ⟨www.kbf.hr/stranica.aspx?pageID=5⟩ (23.12.2008) provide a brief official history of the University of Zagreb and of the Catholic Theological Faculty in Zagreb respectively.
41 Sveučilište u Zagrebu, Sveučilišni vjesnik, 41 (1995) posebni broj, at 73. Ugovor između Sveučilišta u Zagrebu i Katoličkoga bogoslovnog fakulteta u Zagrebu [The Contract between the University of Zagreb and the Catholic Theological Faculty in Zagreb], Bogoslovska smotra, 66:2–3 (1996), at 537–540, esp. the Preamble.
UZ even during the time of the most rigid communist rule. The first post-
communist Government of the Republic of Croatia declared on 23 July 1990 its
own act of expelling the CTFZ from UZ null and void *ab initio*. The Assembly
of UZ declared on 26 February of 1991 that the CTFZ had continuously been a
UZ faculty, recognising all its acts in the period of its expulsion as being valid
*pro foro civili.*

Although outside a university, the CTFZ continued its operations as an inde-
dependent faculty of the Catholic Church in Croatia, its degrees being recognised
outside though not in Croatia, that is, in Yugoslavia. The Catholic colleges of the
ology in Makarska in 1971, Split in 1972, Dakovo in 1987 and Rijeka in 1988 were affiliated to the CTFZ. When the CTFZ was reinstated as part
of UZ in the 1990s, the colleges became part of UZ. The CTFZ also estab-
lished four institutes offering minor professional programmes as parts of the
Faculty, most notably the Catechetical Institute for educating teachers of reli-
gion. The only Catholic institution of higher education in Croatia that is not
affiliated to the CTFZ is the Faculty of Philosophy of the Society of Jesus in
Zagreb.

---

42 J. Baloban and P. Aračić, “Teologija u javnom sveučilištu” [“Theology in a Public Uni-

43 Sveučilište u Zagrebu, note 41. Ugovor, note 41, in its Preamble notes that it was the
Croatian Sabor (Parliament) that declared the Decision of the Croatian Government of 29
January 1952 null and void. There is no record of such a decision of the Croatian Sabor on the


45 The Croatian name of the colleges at the time of their affiliation was ‘Visoka bogoslovna
škola’ [Higher Theological School], which was changed into ‘Teologija’ [Theology] after the CTFZ
was reinstated as part of UZ in the 1990s.

46 The Franciscan school started at the latest in 1708 and merged with the theology insti-
tute founded in Šibenik in 1699. ⟨http://public.carnet.hr/ofm/st/sam/makarska/theol.html
⟩ (23.12.2008).

47 Started in the late Middle Ages, and has continuously operated since 1970. ⟨www.kbf-
st.hr/Povijest_2.htm⟩ (23.12.2008), at 2.

48 Founded in 1866. ⟨www.dj.kbf.hr/povijest.html+teologija+u+%C4%91akovi&hl=hr&ct
=clnk&cd=1&gl=hr⟩ (23.12.2008).

49 Started in the 17th century, and founded in 1947. ⟨www.rijeka.kbf.hr/izbornik.php?stranica
=povijest⟩ (23.12.2008).

of Croatia, e.g. the Katehetsko-teološki institut in the Catholic Theological Faculty in Split.
⟨www.kbf-st.hr/Povijest_2.htm⟩ (23.12.2008). An independent institution of the sort is Visoka
teolosko-katehtska škola in Zadar. ⟨http://zadar.hbk.hr/index.php?option=com_content&task
=view&id=41&Itemid=71⟩ (23.12.2008).

51 Founded in 1662, abolished in 1773. Founded again as Filozofski institut in 1937, renamed
Filozofsko-teološki institut Družbe Isusove in 1990 and as Filozofski fakultet Družbe Isusove in
1994; while not affiliated with the CTFZ, it offers programmes of study in philosophy and reli-
gious culture within the UZ Centre of Croatian Studies. ⟨www.ffdi.hr/?do=ustroj⟩ (23.12.2008).
In lieu of an appraisal of developments in the 1952–1993 period in the light of Sections 2 and 3, suffice it to note that with the Croatian Law on Professional Education of 1982 (Art. 203), still in force in the initial post-communist years, a university was a loose association of university faculties. Hence the re-instatement of the CTFZ as part of UZ had primarily a symbolic value. Virtually all the relevant legal effects of re-instatement could have been achieved by con-validation of the academic grades and degrees awarded by the CTFZ after 1952.


The requirements in Section 4 (A–F) were carried out by means of the LIHE as follows:

A. As pointed out at the time the draft LIHE was being debated in public (and as found by the Croatian Constitutional Court in 2000), the LIHE violated university autonomy, as guaranteed by Art. 67 of the Constitution, in several ways. For this reason alone, the participation of a theological school of a religious community in a Croatian state university under the LIHE would violate, and in fact did violate, the separation clause of Art. 41(1) of the Constitution.

B. Art. 18 of the LIHE laid down the conditions of participation as follows (abbreviations added):

The Status of Institutions of Religious Education:

1. Institutions of higher education established by religious communities shall be entitled to the same rights as schools of higher education and faculties if they fulfil the conditions of this law.

2. The position of institutions, as defined by section 1 of this article, operating as faculties within a public university shall be determined by a contract between the university and the founder of the institution.

A minor defect of Art. 18 was that the LIHE was not adopted by the majority required for an organic law. A major defect was that the LIHE Transitional
and Concluding Regulations, Art. 150, ensured a privileged position for the CTFZ. Art. 150 read as follows:

1. The position and activities of the CTFZ as a constituent of UZ shall be determined by an agreement between the founder of the CTFZ and UZ with the approval of the Croatian Bishop’s Conference and the Parliament of the Republic of Croatia.
2. The CTFZ shall continue operating within UZ until the agreement as defined by Paragraph 1 of this Article is concluded.

Thus the State, by means of a special law, granted the CTFZ the status of a UZ faculty, leaving it to UZ, and not even to UZ acting alone, merely to determine the mode of the CTFZ’s participation in UZ.

C. Since Croatian universities under the LIHE did not enjoy the autonomy guaranteed by the Constitution (not even the autonomy proclaimed by Art. 3 of the LIHE itself), no university could autonomously determine the conditions under which a theological school of a religious community could participate in a state university. Thus the Statute of UZ [hereinafter: the UZ Statute of 1996 or the Statute], which was supposed to be the highest autonomous act of the University, did not even mention the possibility of a theological school other than the CTFZ participating in UZ. The Statute, by means of Art. 193, merely implemented and elaborated upon Art. 150 of the LIHE by providing that the position of the CTFZ as a member of UZ would be regulated by a contract between the CTFZ and UZ, and be confirmed by both the Croatian Sabor (Parliament) and the Croatian Bishops’ Conference.

DA. Needless to say, the CTFZ was (and still is) a theological school of a religious community recognised in Croatia (as a matter of fact it was the Catholic Church, that is, the Holy See, which recognised the Republic of Croatia rather than the other way around).

---

55 Statut Sveučilišta u Zagrebu (Zagreb, 13.07.1994).
56 The statute was not an autonomous act for two reasons. According to Art. 105(2.2) of the LIHE, the statute was adopted by the University Governing Council, which was, according to Art. 106(3)(4) of the LIHE, appointed by the Croatian Sabor (Parliament). According to Art. 5(3), the statute was confirmed by the Founder, that is, the Republic of Croatia via its Government. Hence the Constitutional Court declared, inter alia, Arts. 5(3), 105(2.2), 106(3)(4) of the LIHE as violating Art. 67 of the Constitution and for that reason void. Ustavni sud, note 35, obrazloženje III.III.5, III.II.3.1–3.2. See comment Padjen, note 35, at 492–493.
DB. Neither the LIHE nor the Government of Croatia decision on the reinstatement of the CTFZ as part of UZ left any room for UZ to appraise whether the CTFZ was meeting the scholarly (research, educational, information, etc.) criteria expected by the academic community from a university school (faculty, department, etc.) The omission was perhaps to be expected in a country that had switched in 1990 in an instant from communism to nationalism.

DC. The LIHE guaranteed the CTFZ and its teachers the status of a UZ faculty and UZ teachers respectively, despite the fact that CTFZ teachers lacked academic freedoms and other academic rights recognised, in principle, even by Art. 3 of the LIHE. Moreover, the State secured for CTFZ teachers and members of the Faculty of Philosophy of the Society of Jesus the position to control appointments and advancements in philosophy in Croatian universities and the Institute of Philosophy in Zagreb.

That CTFZ teachers were not entitled to the status enjoyed by other UZ teachers became obvious, if not earlier, with the Contract on the Position and Activity of the Catholic Theological Faculty concluded on 11 March 1996 by UZ and the CTFZ pursuant to Art. 150 of the LIHE and Art. 193 of the UZ Statute of 1996, and confirmed by the Croatian Sabor and Croatian Bishops’ Conference of the Catholic Church [hereinafter: the UZ-CTFZ Contract of 1996 or the Contract]. Art V. of the Contract provides for the following:

1. The Great Chancellor of the CTFZ shall require, pursuant to church laws, from the Congregation of Catholic Education the “nihil obstat” of the Holy See before nominations of full professors, approval of the statute and curriculum, and confirmation of the election of a dean.
2. Every teacher of the CTFZ shall have approval of his or her ordinary.
3. Teachers of subjects that concern the faith and morality shall receive from the Grand Chancellor “canonic mandate” or “venia docendi”, pursuant to church laws.
4. If the Great Chancellor denies or revokes to a teacher the “canonic mandate” or “venia docendi” for reasons that concern the faith and morality or church discipline, the teacher shall not belong to the Faculty.
5. The University shall pass decisions that concern the CTFZ respecting the rights of the Great Chancellor.

The State secured gradually to CTFZ teachers and members of Faculty of Philosophy of the Society of Jesus the position to control appointments in phi-

58 Departments of philosophy in the faculties of philosophy of UZ and the University of Split (the latter department is now part of the University of Zadar).
59 Institut za filozofiju u Zagrebu, a public research institute.
60 Ugovor, note 41.
losophy through a series of interconnected acts. Art. 74 of the LIHE following
the pattern set up in the last decade of communist rule in Croatia, made the
appointment to a university scientific/teaching grade dependent on appoint-
ment to a scientific grade (e.g. a candidate could be appointed to the sci-
cientic/teaching grade of full professor of philosophy if they had been appointed
to the scientific grade of senior fellow in philosophy). However, Arts. 160–161
of the Law on Professional Education of 198261 and Art. 57 of the Law on
Scientific Research Activity of 198662 made the appointment to a scientific grade
dependent on the opinion rendered by a self-governing body, namely, an expert
committee for a scholarly field (e.g. for law or the philosophy of physics, etc.)
appointed by the Assembly of the self-governing Union of Croatian Univer-
sities. In sharp contrast, post-communist legislation substituted self-governing
university organs with state appointed organs. The substitution was conducted
in two steps.

In the first step, Art. 99(3) of the LIHE made the appointment to a scien-
tific grade dependent on the opinion of a field council, while Art. 60 of the Law
on Scientific Research Activities of 199363 provided that the Minister should
appoint members of field councils. On the basis of these provisions, the Minis-
ter appointed on 25 April 199464 a ten-member field council for social sciences,
including a teacher of the Faculty of Philosophy of the Society of Jesus,65 and a
ten-member field council for humanities, including a teacher of the CTFZ.66

In the second step, Art. 99 of the LIHE, as amended in 1996, made the
appointment to a scientific grade dependent on the opinion of an expert com-
mittee,67 authorising on the one hand, the Rectors’ Conference to appoint one
half of the members of an expert committee and, on the other, the Minister
to appoint the other half of the members, including the chair. Since the Rec-
tors’ Conference consisted of rectors elected by university governing coun-
cils (Art. 108 of the LIHE), which were appointed by the Croatian Parliament
(Art. 106 of the LIHE), expert committees instituted by Art. 99 of the LIHE,
as amended in 1996, were in origin wholly government organs in violation
of Art. 67 of the Constitution (as found by the Constitutional Court, which
annulled them).68 On the basis of Art. 99, the Rectors’ Conference and the

61 Zakon o usmjerenom obrazovanju, NN 20/82.
62 Zakon o znanstvenoistraživačkoj djelatnosti, NN 14/86.
63 Zakon o znanstvenoistraživačkoj djelatnosti, NN 96/1993.
64 Republika Hrvatska—Republic of Croatia/Ministarstvo znanosti i tehnologije—Ministry of
Science and Technology, Most, god. 2., br. 9 (Zagreb: travanj 1994), at 1. “Imenovanja: Članovi
područnih vijeća”.
65 Dr. Ivan Kopr ek of the Faculty of Philosophy of the Society of Jesus.
66 Dr. Franjo Sanjek of the CTFZ.
67 Zakon o izmjenama i dopunama Zakona o visokim učilištima, NN 54/1996, pročišćeni tekst
59/1996.
Minister of Science on 27 April 1999 appointed twenty-two expert committees, including a six-member expert committee for both philosophy and theology, which included two CTFZ teachers, one member of the Faculty of Philosophy of the Society of Jesus and only one teacher of the Department of Philosophy of the UZ Faculty of Philosophy.69

Thus in the two steps outlined above, the Republic of Croatia reinstated philosophy as a subject with the status of *ancillae theologiae*.

E. The mode of participation of the CTFZ in UZ corresponded partly to the status of the CTFZ and its teachers in the Catholic Church, but did not correspond to the degree in which the CTFZ fulfilled the requirements stated in Section 4 *ad D*. Special status is accorded to the CTFZ by Art. III and Art. VIII of the Contract. Thus while Arts. 147–149 of the LIHE transferred founding and property rights over university faculties (which previously were claimed by the State) to universities,70 and Art. 150 of the LIHE recognised the Catholic Church’s rights over the CTFZ, Art. III of the Contract divided founding and property rights over the CTFZ between the Church, UZ and the CTFZ itself in the following way:

2. UZ and the Zagreb Archdiocese with the Croatian Bishops’ Conference represented by the Grand Chancellor of the CTFZ assume in equal proportion founding and property rights over the CTFZ, and transfer to the CTFZ property rights over moveables used for its activities.

4. In the case of the termination of this Contract or of an attempt at abolishing the CTFZ as part of UZ, the Archdiocese with the Croatian Bishops’ Conference is entitled to resume all property and founding rights over the CTFZ.71

Art. VIII (2) of the Contract provided, in a manner characteristic of concordats,72 for negotiations between the parties of the Contract as the only means

---

69 Odluka o ustroju matičnih povjerenstava i o imenovanju članova, predsjednika, i zamjenika predsjednika matičnih povjerenstava [Decision on the Structure of Expert Committees and on the Appointment of Members, Chairs and Deputy Chairs of Expert Committees], NN, 43/99, lists the following members of the Expert Committee for the fields of Philosophy and Theology (including the institutional affiliation of the members): Franjo Sanjek, CTFZ, chair; Ivan Golub, CTFZ; Branko Despot, UZ Faculty of Philosophy; Srdan Lelas, UZ Faculty of Science and Mathematics; Ivan Macan, Faculty of Philosophy of the Society of Jesus; Boris Kalin, full professor.

70 The transfer of property rights over faculties was very probably without legal effect even at the time the LIHE came into force. Property rights over an object other than a thing, such as a university or a university faculty, were perhaps conceivable under the Austrian General Civil Code par. 353, which was applicable to property relations in Croatia till the Yugoslav Osnovni zakon o vlasničkim odnosima [Fundamental Law on Property Relations], Službeni list SFRJ 6/80, 36/90. According to Art. 2 of Zakon o vlasništvu i drugim stvarnim pravima [Law on Property and Other Rights over Things] NN 91/96, a right of property is possible in principle only over a thing.

71 Ugovor, note 41.

of resolving disputes that may arise out of its interpretation and application. Hence the position of the CTFZ in UZ was exempted not only from the UZ autonomous legal order but also from the State legal order.

Despite the fact that teachers of the CTFZ, as demonstrated by Art. 5 of the UZ-CTFZ Contract of 1996, did not enjoy the academic rights proclaimed by Art. 3 of the LIHE, other provisions of the LIHE, the UZ Statute of 1996 and the UZ-CTFZ Contract of 1996 recognised, at least implicitly, that in university decision-making, the CTFZ had the rights of any other UZ faculty and a CTFZ teacher had the rights of any other UZ teacher.

F. As noted more than once, UZ did not have the competence under the LIHE to determine autonomously whether the CTFZ was meeting the requirements for participating in UZ. However, UZ did have the competence—but did not use it—to propose autonomously to the CTFZ the mode of its participation in UZ, and to determine the mode jointly with the CTFZ.


The Treaty between the Holy See and the Republic of Croatia on Co-operation in Matters of Education and Culture73 has several provisions relevant to the participation of theological schools of the Catholic Church in Croatian state universities. The provisions add little or nothing to the provisions of Croatian legislation, the UZ Statute of 1996 and the UZ-CTFZ Contract of 1996 outlined and analysed in section 4.2. However, the Treaty provisions demonstrate clearly the main concerns of the Catholic Church with regard to the participation of Catholic schools in Croatian state universities.

The concerns are briefly as follows: the Church should be free to found Catholic institutions of higher education, including institutions for the education of teachers of religion, and to provide academic ministry in universities (Art. 10.1, 10.3, 11.1); Catholic institutions of higher education should have “publicly recognised rights”, that is, the power to award academic and professional grades and degrees recognised under Croatian law (Art. 10.1, 11.1); the Republic of Croatia should provide adequate funding for the CTFZ, its affiliated institutions and Catholic schools for teachers of religion (Art. 10.2, 11.2); students of Catholic schools for teachers of religion should have the status of

---

students in institutions of higher education that have publicly recognised rights (Art. 11.3); all relations, including the application of Croatian law and disputes, between the Catholic Church and the Republic of Croatia in matters of higher education should be regulated by agreement (Art. 10.1, 10.3, 14, 15.2).

It should be pointed out that the Treaty has no provision requiring the Republic of Croatia to secure the participation of the CTFZ in UZ.

Pursuant to the Treaty, the Catholic theology colleges in Split and Makarska merged into the Catholic Theological Faculty in Split in 1999 and joined, by means of a contract, the University of Split in 1999. Theology college in Đakovo, transformed into a Catholic theological faculty, also joined by contract the Josip Juraj Strossmayer University in Osijek in 2006. The inclusion of Croatian Catholic theological schools in Croatian state universities has thus been completed or nearly completed. Only a small theology college in Rijeka has remained thus far affiliated with the CTFZ rather than included in its nearest state university (which is the University of Rijeka).

There is no indication in the Treaty that the Church is intent on positioning itself as a religious authority above Croatian state universities. Nonetheless, the Church policy of regulating all relations with Croatia, as well as with other states, only by agreement can hardly be realised together with the equality of all religious communities, which in Croatia is guaranteed by Art. 41(1) of the Croatian Constitution. The reason is twofold.

First, equality before a law on the distribution of public goods (burdens and/or benefits), such as participation in state universities, can be achieved only by legal acts, procedures and systems that provide for equal treatment of all legitimate candidates for the public goods. A paradigmatic example is a public procurement procedure. Croatia had entered into four treaties with the Holy See (these include, in addition to the Treaty on Co-operation in Matters of Education and Culture of 1997, the Treaty on the Spiritual Charge of Catholic Believers Who Are Members of the Armed Forces and Police Services of the
Republic of Croatia of 1997, the Treaty on Legal Issues of 1997 and the Treaty on Economic Issues of 1998 before adopting the Law on the Legal Position of Religious Communities in 2002, which authorises the Croatian Government in Art. 9 to regulate relations between the State and a religious community by a contract. The government has made such contracts with a dozen smaller religious communities, starting in 2002 with the two most numerous ones, namely the Serbian Orthodox Church in Croatia and the Islamic Community in Croatia. However, neither the purpose nor the function of the Law is to provide equal treatment to all religious communities present in Croatia; rather it is to confer a unique status on every single community selected by the Government as its partner.

The second and more important reason is that the Catholic Church is the only religious community in the world that has the capacity under international law to enter into international agreements. Hence, even if the Republic of Croatia distributed public benefits to religious communities through agreements reached on the basis of a procedure providing equal treatment to every single one, the Catholic Church would come out privileged by the very fact that its agreement with the State belongs to a superior legal system, namely international law.

For these reasons both the UZ-CTFZ Contract of 1996 and the Treaty on Co-operation in Matters of Education and Culture are incompatible with the equality clause of Art. 41(1). However, they do not necessarily—at least not any more—violate the clause. Although Art. 134 of the Croatian Constitution suggests that a treaty, that is, an international agreement, which is a part of the Croatian legal order has a legal force inferior to that of the Constitution, the force of an international agreement is for some practical purposes superior to the Constitution.

---

80 Ugovor o dušoriznjestvu katoličkih vjernika, pripadnika oružanih snaga i redarstvenih službi Republike Hrvatske, NN:DMU 2/97.
81 Ugovor o pravnim pitanjima, NN:DMU 3/97.
82 Ugovor o gospodarskim pitanjima, NN:DMU 18/98.
83 Zakon o pravnom položaju vjerskih zajednica, NN 83/02.
84 Ugovor o pitanjima od zajedničkog interesa, NN 196/03, no. 3109.
85 Ugovor između Vlade Republike Hrvatske i Islamske zajednice u Hrvatskoj o pitanjima od zajedničkog interesa, NN 196/03, no. 3110.
87 On the special status of the Holy See in international law, see in Croatian literature Davorin Lapaš, Međunarodne nevladine organizacije kao subjekti međunarodnog prava [International
To begin by paraphrasing Blackstone, if without a remedy there is no right, there is no wrong either. By the same token, in the Croatian legal order there is no room for violation of the Croatian Constitution by an international agreement because there is no remedy for such a violation.\textsuperscript{88} The Constitution of the Republic of Croatia, which in judicial review of constitutionality follows the German Basic Law,\textsuperscript{89} has no provision that would give the Croatian Constitutional Court competence to review the validity of either treaties/international agreements or contracts/agreements under domestic law.\textsuperscript{90} Hence the Court has declared itself incompetent to review a decision of the United Nations\textsuperscript{91} and even a contract between the Croatian Government and the Croatian Bishops’ Conference executing the Treaty on Co-operation in Matters of Education and Culture between the Holy See and the Republic of Croatia.\textsuperscript{92} A regular Croatian court is even less likely to review an international agreement, since the Court refrains even from applying such instruments.\textsuperscript{93}

Furthermore, there is no room for violation of the substantive provisions of the Croatian Constitution by a treaty, since there is no international judicial remedy for violation of such a provision. Art. 46 of the Vienna Convention on the Law of Treaties does recognise that a treaty violating a rule of internal law of fundamental importance may be invalid under international law. However, the rule violated must regulate the “competence to conclude treaties”.\textsuperscript{94} In addition, there is no international judicial remedy for any treaty between the Holy See and the Republic of Croatia, since such a treaty provides that all disputes arising from it shall be settled by an agreement of its parties.\textsuperscript{95}

\textsuperscript{88} Cf. Padjen, notes 5–7.

\textsuperscript{89} Art. 93 des Grundgesetzes für die Bundesrepublik Deutschland, BGBL., S.1 (1949).

\textsuperscript{90} Čl. 128. Ustav Republike Hrvatske [Art. 128 Constitution of the Republic of Croatia], NN 56/90, 135/97, 113/00, 28/01, 41/01.


\textsuperscript{92} Ustavni sud Republike Hrvatske, Rješenje broj: U-II-2885/2003 (11.02.2004).

\textsuperscript{93} A vivid illustration is the finding that the Županijski sud u Zagrebu [the County Court in Zagreb] has not applied even once the 1st Protocol (on property rights) of the European Convention for Human Rights in ten years of its validity in Croatia. Marko Bonišačić, \textit{Pravo vlasništva u Europskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda [The Right to Property in the European Convention for the Protection of Human Rights and Fundamental Freedoms]} (Faculty of Political Science, Zagreb University: Master of Science Thesis, 2006), at 176, footnote 475.

\textsuperscript{94} UN Document A/CONF. 39/27; Bečka konvencija o pravu ugovora [Vienna Convention on the Law of Treaties], \textit{Službeni list SFRJ: Dodatak međunarodni ugovori} 30/72.

\textsuperscript{95} Čl. 14. Ugovora o suradnji u području odgoja i kulture [note 79], NN:DMU 2/97; Ugovor o dušobrižništvu katoličkih vjernika, pripadnika oružanih snaga i redarstvenih službi Republike...
A further consideration is that international agreements and other public contracts between the Catholic Church (that is, its units or organs) and the Republic of Croatia are legally protected from criticism of unconstitutionality. The leading Church paper has labelled such criticism a slander, that is, a criminal offence punishable under Art. 200 of the Croatian Criminal Law. The label itself would be a slander if there was a judicial venue wherein one could prove that the Treaties do violate the Constitution. Since the venue is not available, it is wise not to analyse the Treaties in public.

Finally, the Catholic Church claims that its diplomacy, and by implication its international agreements, serve higher ends. In a multicultural world, where “anything goes,” such a claim is, paradoxically, stronger than in a Christian country that practises the separation of church and state.

A *lex inferior* invalidating *legi superiori* is not a Croatian peculiarity. In the relationship between a treaty and a constitution, the superiority of the former over the latter merely reflects the dynamics of international law and domestic law in the past fifty years. In the relationship between church and state in Croatia, the dynamics have been fairly stable for more than a century, despite the apparent intermission of the forty-five years of communist rule, and may be encapsulated by the following paraphrase of the famous Otto Myer’s dictum: “Die Verfassung vergehet, die Verwaltung bestehet, das Konkordat in die Ewigkeit geht.”

While the Croatian Constitutional Court is legally incompetent to review the Treaty on Co-operation in Matters of Education and Culture, the Court has found itself competent to declare several provisions of the LIHE null and void on the grounds that they violated the Constitution, esp. Art. 67 on university autonomy. However, the new law on the matter, adopted in 2003 under
the title the Law on Scientific Activity and Higher Education [hereinafter: the LSAHE],\textsuperscript{104} blatantly violates the Constitution again in some of the ways declared unconstitutional by the Court in 2000.\textsuperscript{105} It is worthy of attention in this context that the LSAHE confers the competence to appoint members of expert committees on the National Council for Science (Art. 19(2)), which is appointed by the Croatian Sabor (Parliament) (Art. 111(1)). For this reason, the National Council for Science is a state organ. Interestingly enough, the expert committee for philosophy and theology was retained even under the coalition government led by the Social Democrats from 2000–2003.\textsuperscript{106} However, teachers of Catholic religious institutions now make up only five out of eleven committee members.\textsuperscript{107}

Neither the LSAHE nor the new statute of the University of Zagreb adopted in 2003\textsuperscript{108} mention Catholic theological faculties. They do not have to, since contracts between Croatian Catholic theological faculties and Croatian state universities are likely to outlive both the LSAHE and university statutes, just as the Austrian Concordat has outlived the states wherein Croatia has happened to exist in the past hundred years.

V. Conditions of Decision

As noted, “the relation between Church and State is the greatest subject in the history of the West.”\textsuperscript{109} But even if the subject was considerably less complex, it is unlikely—\textit{pace} Lasswell and McDougal\textsuperscript{110}—that any study, let alone an essay of this format, could identify all the conditions of past and future decisions.

\textsuperscript{104} Zakon o znanstvenoj djelatnosti i visokom obrazovanju, NN 123/03, 105/04 etc.
\textsuperscript{105} I. Padjen, “Mrak u novom pakovanju” [“Darkness in a New Wrapping”], Feral Tribune, 19:911 (01.03.2003), at 56.
\textsuperscript{106} Pravilnik o ustroju i načinu rada područnih vijeća i matičnih odbora [Regulation on the Structure and Procedures of Field Councils and Expert Committees], NN 76/05.
\textsuperscript{107} Pero Aračić, CTF Đakovo; Stjepan Baloban, CTFZ, chair; Branko Despot, Faculty of Philosophy UZ, deputy chair; Tomislav Ivančić, CTFZ; Ivan Koprek, Faculty of Philosophy of the Society of Jesus; Milan Polić, Teachers’ College UZ; Zdravko Radman, Institute of Philosophy, Zagreb; Nenad Smokrović, Faculty of Philosophy U Rijeka; Franjo Šanjek, CTFZ; Lino Veljak, Faculty of Philosophy UZ; Boran Berčić, Faculty of Philosophy U Rijeka. (www.nvz.hr/index.php?option=com_content&task=view&id=46) (28.12.2008).
\textsuperscript{110} Lasswell and McDougal, note 9, at 37 “In policy-relevant performance of the scientific task, inquiry will be made for the interplay of the multiple factors affecting decision …. In such inquiry, Bentham is supplemented by Freud”.
All that can be done, in this as in most other policy-oriented legal inquiries, is the following: first, to imagine probable inconvenient but avoidable future decisions; secondly, to project preferable future decisions which would, to a greater extent than inconvenient decisions, realise basic public order goals (as postulated supra in Section 2) and public policies (as clarified supra in Section 3); thirdly, to identify—by a thought experiment (which could be upgraded partly in a broader study by empirical research)—the conditions that are common to both past and future decisions. The experiment would above all reduce the complexity of potential conditions by counterfactually identifying the conditions that are common to major past, inconvenient and preferable decisions.¹¹¹

The complexity of potential conditions in this inquiry can be reduced by asking whether past decisions (in Section 4) and future—inconvenient and preferable—decisions (in Section 6) on the participation of a theological school of a religious community would have happened had a certain prima facie condition not taken place, or is likely to happen if that condition does not obtain. A counterfactual identification easily eliminates a number of events as probable future conditions although they have been prima facie conditions of past decisions. Thus, the experiment easily eliminates illiteracy, peasantry, communism, Yugoslavia, urbanisation, industrialism, etc. as conditions of future decisions.

There are at least two series of events that cannot be eliminated. On the one hand, there is the strong allegiance of the Croatian population to Catholicism.¹¹² On the other, there is a long-lasting tension between clericalism and anticlericalism. Contrary to the dominant clerical lore, Croatian anticlericalism was cultivated not only by the communists, who ruled the country from 1945 till 1990, but also by the Croatian peasant movement, which was the dominant political force in the country between the two world wars.¹¹³ Brief periods of clericalism, at the climax of the Habsburg Empire at the turn of the 20th century¹¹⁴ and after the collapse of Yugoslavia in the 1990s,¹¹⁵ were exceptions

¹¹¹ Briefly on counterfactual thinking, B. Danermark et al., Explaining Society: Critical Realism in the Social Sciences (London: Routledge, 1997), at 100–103.
¹¹² E.g. a comparative survey M. Tomka, "Religion in Europe. Sociological Considerations with Special References to Central and Eastern Europe", in M. Polzer et al. (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), 17–37.
rather than the rule. If there is anything like a standard of church and state relations in Croatia, it is the Venetian legacy. Venice, which ruled and/or in other ways profoundly influenced the coastal areas of Croatia throughout the first thousand years of Croatian history, had its cake and ate it: Catholicism was the official Venetian religion, while the Pope and the papists were Venice’s major political adversaries.116 The Croatian city state of Dubrovnik, which also defended its independence successfully against Venice,117 adopted much of Venetian constitutionalism, including a healthy disregard for clerical meddling in politics.118 The integration of present-day Croatia into Europe is likely to adversely affect Croatian clericalism, though not in a politically correct way but rather a Venetian one.

All this said, the identification of counterfactuals does not mean a blind eye can be turned to the fact that Croatia has been swept up in the past hundred years alone by three major wars and several major crises, most of which originated from outside Croatia. A severe crisis may provoke unavoidable decisions, which cannot even be envisioned. A less severe crisis, such as the economic depression that may break out in Croatia in mid-2009, may provoke avoidable decisions within a rather wide range, from a new rise of clericalism to, though less probably, a new containment of the Catholic Church to a degree like that in the second half of communist rule.119

VI. Avoidable and Preferable Decisions

The probable but avoidable future decisions on the participation of Catholic theological faculties in Croatian state universities will primarily affect the cultural component of Croatian universities. This is now pluralistic and tolerant. However, ethical codes adopted by the University of Rijeka in 2004120 and the

---


117 See e.g. Ilija Mitic, Dubrovačka država u međunarodnoj zajednici [The State of Dubrovnik in the International Community] (Zagreb: JAZU i NZMH, 1988).


119 The dividing line de jure and de facto was the Protocol of 25.06.1966 o razgovorima koji su vodeni između predstavnika Svete Stolice i vlade SFR Jugoslavije [The Protocol of Talks Conducted between Representatives of the Holy See and the Government of the SFR Yugoslavia], Službeni list SFRJ: Dodatak međunarodni ugovori 11/66.

University of Zagreb in 2007\(^{121}\) promulgate political correctness, which is inimical to belief in absolute values and by implication to Christianity.\(^{122}\) Moreover, the allegedly non-legal Ethical Codex of the University of Zagreb is designed to create an autonomous legal order as if the university was a medieval but secular church. Thus the Codex denies fundamental rights and freedoms guaranteed by the Croatian Constitution, most notably the freedom of expression, which is a constituent of the modern (Humboldt’s) university.\(^{123}\) While the Codices are now largely laws on the books, the further integration of Croatia into Europe will probably turn them into law in action. Their implementation may not directly affect the participation of Catholic theological faculties in Croatian state universities. However, the implementation of political correctness will insulate theological faculties as reserves of religious aboriginals.

Croatian Catholic theological faculties and their teachers may wish to be concerned more with the environment they now serve than with the status they were deprived of under communist rule. To that end, they may start teaching by example and advise their superiors to recognise that by the Church’s own standards, on the one hand, a modern university is entitled to academic rights not only in relation to the state and business but also to the Church; and on the other, Catholic faculties of theology and their teachers are not entitled to such rights towards the Church and consequently cannot be entitled to full membership of autonomous state universities.

The recognition may result in minimal institutional change. If a Croatian state university which is now autonomous decides to elect again a priest as its rector, the university should be as legally free to do so as it has been in the past fifteen years. The same should be the case if the Croatian Rectors’ Conference, which is now also autonomous, decides with the consent of both university philosophers and university theologians to elect a joint expert committee on academic appointments in theology as well as philosophy. All that may be required is that the vote of a Catholic theological faculty in the senate of a state university (usually one of twenty-five or even seventy votes) counts in decisions on scholarly matters (appointments and advancements to scientific grades, approval of curricula and research projects, etc.) as an advisory opinion.

---

121 Etički kodeks Sveučilišta u Zagrebu (15.05.2007) ⟨www.unizg.hr⟩.
VII. From Four Hands to a Full Trio

Let me now reveal, as announced in my introductory remarks, why this study is a policy-oriented inquiry and nonetheless easily accessible even to traditional European legal scholars who operate within the inherited—chiefly German 19th century—legal dogmatics124 and have a disregard for more recent theoretical frameworks, most notably for Lasswell and McDougal's POJ.125 The reason, which has not been noticed in the arduous European literature on POJ,126 is at least threefold. First, the POJ system of values is a fairly obvious, though expanded, adaptation of Eduard Spranger’s typology of personality.127 Secondly, POJ relies explicitly on Max Weber's theory,128 whose key concepts have been adopted from German legal scholarship.129 Thirdly, Lasswell's conceptual framework of political science, which is well known as the 4Ws (Who, What, When, How),130 is too similar to the mainstream European, that is, German and Roman legal tradition to be an original New World idea. To put it more precisely, Lasswell's 4Ws are in all probability an adaptation of the 4Ws (Wer,
Wem, Was, Woraus) of the German framework of the Fallanalyse, which is in turn an adaptation of the 5Qs “Quis, quod, coram quo, quo iure petatur a quo, quisquis libellus recte compositus habet” of the cognition civil procedure formulated in the post-classical period of Roman law.

But there may be additional reasons why a policy-oriented inquiry is easily accessible to legal scholars educated on German literature. First of all, POJ may be traced back to the characteristically German idea that law is a means to balance conflicting interests. The idea lends itself to the view that if there is no conflict of interest, a conflict of legal rules is not practically relevant. Thus if there is no conflict of interest (between, say, agnostics and Catholics or scientists and theologians) over the participation of the Catholic Theological Faculty in Zagreb in the University of Zagreb, there is no relevant conflict between the constitutional rule requiring the equality of all religious communities before the law and the treaty rules giving the Catholic Church a status above ordinary laws or even the Constitution. Furthermore, even if there is such a conflict, it is not resolved by legal rules but by a decision (policy) which may take the form of an individual (concrete) legal norm but does not logically follow from (abstract) legal rules (norms). It does not follow because, as taught by Kant, the application of a rule is not an inference but an artistic creation that presupposes talent and practice rather than knowledge or logic. Finally, since a (concrete) decision cannot logically follow from (abstract) rules, it is superfluous to engage in a search for basic goals of a public order by derivation, as Lasswell and McDougal liked to put it. It suffices that the goals are postulated.

The line of reasoning I have just described and ascribed to both POJ and mainstream German legal thought defies the expectations of ordinary people to be treated equally under the law, in the ordinary, that is, logical sense of “equally”. If so, the search for a just law should be resumed within POJ, integrating the social scientific study of policy recommended by Lasswell and

\text{132 Ibid., at 505, referring to V. Radovčić, “Gradanski proces u režimu općeg (recipiranog rimskog) prava” ["Civil Procedure in the Regime of General (Received Roman) Law"], Zbornik Pravnog fakulteta u Zagrebu, 37:5–6 (1987), repr. in Id., Pravni aspekti u učenjima antičke retorike [Legal Aspects in Teachings of Ancient Rhetorics] (Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2004), at 273.}\\
\text{133 See briefly Karl Engisch, Einführung in das juristische Denken, 5. Aufl. (Stuttgart: Kohlhammer, 1971) at 144 ff., 180 ff.}\\
\text{135 Lasswell and McDougal, note 9, at 34.}\\
\text{136 Ibid.}
McDougal with two more conventional lines of inquiry. The first is legal dogmatics, that is, interpretation of positive law with a view of application (performed in this study). The second is legal philosophy, that is, a search for basic public order goals beyond positive law, personal preferences and public sentiments (avoided in this study). Since the integration of science, dogmatics and philosophy can hardly be accomplished by a single individual, POJ should be practised by inter-disciplinary ensembles to avoid lapsing into a performance on all fours (which I have taken the risk of committing, as noted in my introductory remarks). Myres S. McDougal's lifelong collaboration with Harold Lasswell, precisely because they did not belong to the same discipline, is again a model to be followed.

I was fortunate enough to have been introduced by Professor Božidar Bakotić to both legal and collaborative scholarship at the same time. The experience gave me a start that still keeps me going.

137 E.g. Appreciations, note 9, at 66.
138 Padjen and Bakotić, note 1.