

*Essay*

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## The State's Authority in Religious Rights<sup>\*</sup>

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### Summary

Legal analysis of church-state relations in European countries presupposes a concept or at least a notion of the state. The concept is largely avoided in contemporary legal and political theory. Nonetheless, Western and Central European Continental legal systems, including the Croatian Draft Law on the Legal Position of Religious Communities of April 2002, tacitly presuppose the idea that the state is omnipotent in regulation of religious matters.

An adequate analysis of a Central European ex-communist social system will probably find within it the following four layers of social interaction: the state, society, civil society and various communities ranging from families to religious communities. The state, far from being omnipotent, has by its nature very limited powers to regulate religious matters. When the state is dealing with religious rights it is not dealing with Truth and Transcendence; rather is it allocating its own terrestrial resources that include money, i.e. public assistance to religious communities, and access of religious communities to channels of public influence such as public schools and public media.

*Key words:* state, church, legal system, religious community, religious rights, Croatia, Catholic church, sovereignty, constitution



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Legal analysis of church-state relations in European countries presupposes a concept or at least a notion of the social system. I am using the term social system to refer to the following four layers of social interaction: the political state or, briefly, the state; the market society or, briefly, society; and the civil society; various communities ranging from families and local communities to religious communities and political movements, which overlap with the other three layers or fall outside their networks.

The obvious problem with the four concepts is that they are all, as social philosophers like to put it, highly contested. The problem with the concept of the state is less obvious.

### *Avoidance of the State*

The concept of the state, which is central to the problem at hand, is largely avoided in contemporary legal and political theory. An illustration of the current non-use of the concept is *The International Library of Essays in Law and Legal Theory*. It includes 65 volumes of reprinted essays on topics ranging from natural law and international law to family law and African law, but without a single volume devoted to the state. A similar situation is observable in political science. It is true that *The Schools of Thought in Politics*, a series paralleling *The International Library of Essays in Law and Legal Theory*, includes two volumes of reprinted essays under the title *The State and its Critics*. However, introduction to these volumes states that

*recent work on the state, with very few exceptions, evades the principal philosophical questions the state now raises... when fundamental questions are broached, it is from the perspective of political philosophies several centuries old.<sup>1</sup>*

Although avoided in recent discussion<sup>2</sup>, legal analysis presupposes necessarily a notion or – ideally – a concept of the state.

A vital role of the concept is now being demonstrated in the Croatian Law Centre's project "The Law on Political Parties". A central issue is the scope of judicial review of, on the one hand, the registration of political parties and, on the other, decisions of political parties. At first it seemed that the issue was purely technical and should be regulated in accordance with established routines of the Croatian legal system. Hence the first working draft law on political parties did not provide judicial remedies either for a ministerial refusal to register a political party that has allegedly failed to meet registration requirements laid down by the law or for a decision of the party tribunal that has violated principles of procedure, such as the principles *audiatur et altera pars* and *nemo judex in causa sua*. A closer analysis has revealed, however, that established routines and even principles of the Croatian legal system tacitly assume sovereignty of the state

<sup>1</sup> A. Levine, Introduction, in Id. (ed.), *The State and Its Critics*, Aldershot: Elgar, 1992: X.

<sup>2</sup> See more in I. Padjen and M. Matulović, Cleansing the Law of Legal Theory: A View from Croatia (Editorial), *Croatian Critical Law Review*, vol.1, no.1, 1996: 94-99.

apparatus and a bureaucratic legal system rather than sovereignty of the people and the rule of law.

Needless to say, the scope of judicial review is also a central issue of the state regulation of church-state relations.

### *Is the State Omnipotent?*

The second major point I want to make is that Western and Central European continental legal systems, including the Croatian legal system, tacitly presuppose a notion of the state. I will try to reconstruct it (some would prefer: deconstruct it) by explicating some of its constituent assumptions.

The basic assumption is that the State is omnipotent in regulation of religious matters. The assumption implies, roughly, the following: the State can at will recognise (or not recognise) a religious community, grant (or deny) it juridical personality, allow (or forbid) its religious beliefs and practices, confine its activities to sacristy or let a church run the national school system, and so on. The fact that a state, in this case the Croatian State, has adopted a constitution that guarantees religious freedom and separates church and state is considered largely irrelevant. According to the assumption, the Croatian State could have adopted and still can adopt a different constitution, which forbids public worship of religious beliefs or, on the contrary, establishes a state religion.

Although I consider the assumption patently wrong, it cannot be easily dismissed *a limine*. International legal principles of freedom of religion and belief can put it aside under normal circumstances only. State sovereignty is likely to prevail in emergency. Thus, following September 11, 2001, President of the United States suspended many of well known international human rights<sup>3</sup>. In many countries emergency is a regular state of affairs. In fact, from the perspective of both political liberalism, as proclaimed in – say – the 1st Amendment to the US Constitution, and new Catholic teaching, as declared in *Dignitatis humanae* adopted by Second Vatican Council<sup>4</sup>, most contemporary states exercise emergency powers in relation to religious rights<sup>5</sup>.

The idea of state sovereignty, especially when interpreted as implying omnipotence, is commonly linked to the long history of rule by naked power. The third major point I want to make is that the idea of omnipotent state sovereignty and its implementation can

<sup>3</sup> See e.g. early reactions to the U.S. measures taken against immigrants within the U.S.: D. Campbell, Fears Grow Over Civil Liberties Clampdown, *Guardian*, 26 September 2001, <http://www.guardian.co.uk/woronorror/story/0,1361,558241,00.html>; A. Ramasastry, Indefinite Detention Based Upon Suspicion: How the Patriot Act Will Disrupt Many Lawfuyl Immigrants' Lives, 5 October 2001, <http://www.writ.news/findlaw.com/commentary20011005-ramasastry.htm>.

<sup>4</sup> Declaration on Religious Freedom (*Dignitatis Humanae*), in: W.M. Abbott (ed.), *The Documents of Vatican II*, New York: Guild Press, 1966: 675-696.

<sup>5</sup> A comprehensive survey that may validate the point is e.g. K. Boyle/ J. Sheen (eds.), *Freedom of Religion and Belief: A World Report*, London: Routledge & Kegan Paul, 1997.

be understood better as an expression of some further assumptions that are of quasi-religious origin.

### *Quasi-Religious Assumptions*

The first is the assumption behind the maxim “The wrong can have no right”. The maxim is, of course, the formula whereby the Catholic Church, followed also by some of early Protestant communities, has justified the state prohibition of all other forms of belief. However, it is conveniently overlooked that the assumption behind the maxim is deeply embedded in legal systems of continental Europe. As Gray Dorsey demonstrated in his analysis of the roots of European legal tradition, both Greek law and Roman law have been preoccupied with translating the highest truth into practical reason<sup>6</sup>. The European continental legal process, as analysed – for instance – by Mirjan Damaška, can be seen as still operating on the same premise. Thus a European state espouses “a comprehensive theory of the good life”<sup>7</sup> and implements it by a hierarchical organisation of authority<sup>8</sup>. Moreover, Western and Central European states do not even pretend to be neutral in matters of scientific knowledge. While most European states have disestablished their national churches, virtually all have established national academies of science. And it is inconceivable that a single European state would treat its own academy of science on equal footing with national academies of ancient or imported sciences such as astrology or transcendental meditation.

The second quasi-religious assumption that propels the idea of omnipotent sovereignty is the idea that the essential mission of the state is to coerce citizens to become good. A locus classicus that expounds the idea is the following passage from Aquinas's *Treatise on Law*:

“From becoming accustomed to avoid evil and fulfil what is good, through fear of punishment, one is sometimes led on to do so likewise, with delight and of one's own accord. Accordingly, law, even by punishing, leads men to being good.”<sup>9</sup>

A Croatian translation of the same passage is categorical. It reads, roughly, as follows: “one is sooner or later led on to do so likewise<sup>10</sup>”. Whatever the right reading, it is

<sup>6</sup> Gray L. Dorsey, *Jurisiculture: Greece and Rome*, ch.5 Universal Truth and Practical Wisdom, New Brunswick: Transaction Publishers, 1989: 54-72.

<sup>7</sup> Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, ch.III.II The Activist State, New Haven: Yale University Press, 1987: 80-87 and passim.

<sup>8</sup> *Id.*, I.II. The Hierarchical Ideal, 18-22 and passim.

<sup>9</sup> Thomas Aquinas, *Summa theologiae*, IaIIae, Q.92, A.2, in: Thomas Aquinas, *Treatise on Law*, Chicago: Henry Regnery.

<sup>10</sup> Toma Akvinski, *Izbor iz djela*, vol. 2, ed. B. Bošnjak, Zagreb: Naprijed, 1990: 631.

essential to note that the idea behind the passage has been a pivotal idea of the classical Christian political teaching.<sup>11</sup>

Although classical, it cannot have much in common with the original Christian faith (at least if one takes Christ's passion seriously). First, ordinary Christians cannot believe that one can be coerced into being good in God's eyes. Secondly, the plasticity of human behaviour, which is assumed by the passage, is akin to Pavlov's psychology rather than Christian anthropology. However, coercion into goodness backed by quasi-religious justifications is still a prerogative of the state. Most Europeans still take it for granted, without even asking for reasons, that the state has the authority to educate and discipline their children.

### *The Church's Need of Omnipotence*

The third quasi-religious assumption that propels the notion of omnipotent sovereignty is the idea of papal sovereignty, which was formulated in the 14th century, i.e. before the modern ideas of sovereignty. According to J.M. Wilks, the papal claim to sovereignty was derived from a marriage of Christianity and Platonic realism, which could produce only the idea of an essentially totalitarian society based on principles of Christianity.<sup>12</sup> Now, I am not trying to suggest, *ultra et extra* Wilks's findings, that papal sovereignty inspired either modern ideas of sovereignty or modern totalitarianisms, which twisted the modern ideas to justify the omnipotent state and its leader. What I am suggesting is something much simpler: whenever the Catholic Church acts as the sovereign power that educates the universal truth, the Church needs an equally omnipotent counterpart who can implement the Church's teaching by coercion; although contemporary Western and Central European states pay at best only lip service to Christianity, they still eagerly play the role expected by the Church and its Protestant offspring; the rationale of the continuing marriage of the Church and the State is the fact that they are both political and quasi-religious institutions. This is not to say that the Catholic Church and other overly politicised Christian Churches have lost their religious dimension altogether. I am merely claiming that their reliance on the state coercion has spoiled a part of their religious mission.

I hope that the next point I want to make has become obvious by now: contemporary Western and Central European systems of church-state relations, such as the most recent version of the Croatian Draft Law on the Legal Position of Religious Communities<sup>13</sup>, can be properly understood only in light of the still dominant, though tacitly assumed, Western and Central European notion of the state I have just sketched. To prove the

<sup>11</sup> Vatican II documents which depart from the idea are probably the best indicator of its prominence in the classical Christian, esp. Catholic teaching. See esp. *Pastoral Constitution of the Church in the Modern World (Gaudium et spes)*, in Abbott, note 4, esp. sect. 36 *The Rightful Independence of Earthly Affairs*.

<sup>12</sup> M.J. Wilks, *The Problem of Sovereignty in the Later Middle Ages*, Cambridge: Cambridge University Press, 1964: 17-19.

<sup>13</sup> Republika Hrvatska / Ministarstvo pravosuda, Konačni prijedlog zakona o pravnom položaju vjerskih zajednica, Zagreb, 24 April 2002.

point suffice it to mention two salient features of the Draft Law. The first is the provision that only hierarchical religious communities count as religious communities (Article 1). The second is the provision that a commission of experts appointed by the Minister of Judiciary will advise him on facts relevant to registration of an applicant as a religious community (Article 23 Section 6).

### *The State's Limited Authority*

The next point is that adequate analysis<sup>14</sup> of a Central European ex-communist social system will probably find within it all the four layers of social interaction mentioned in the opening lines: the state, society, civil society and various communities ranging from families and local communities to religious communities and political movements. It is essential to note that the state, even when it is taken in its broadest sense, so that it includes not only the political people but also political parties and political 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 institutions and their activities. The institutions include civic associations, other NGOs and autonomous public institutions in education, culture, science, media, health and welfare. Civil society includes in principle also religious communities, some of which are overly political, and private foundations, which are very few in number.

A further point is that within the context of the four tier social systems in ex-communist countries of Central Europe, the State, far from being omnipotent, has by its nature very limited powers to regulate religious matters. Thus, for instance, the Croatian State is by its constitutional law as well as by its social structure ("nature") prevented from giving or denying at will juridical personality to associations or from curbing activities of religious associations.

The Croatian Constitutional Court has ruled that an association may exists even if it is not registered in accordance with the Law on Associations<sup>15</sup>. It may suffice that an association enjoys rights under laws on administrative and judicial procedures<sup>16</sup>. In the Court's view, judicial recognition of *jus standi* has the following implications: "...when

<sup>14</sup> Adequate legal analysis presupposes an integral jurisprudential concept of the state, i.e. a concept that is philosophical in nature and informed not only by legal doctrine (legal dogmatics) but also by social sciences, most notably political science. A jurisprudential concept of the state is ideal in two senses. First, in the sense of a normative ideal. This part, which prescribes the content of a good state, belongs to legal philosophy, which is an integral part of political and social philosophy. Secondly, in the sense of an ideal type. This part, which defines the potential of empirically existing states, belongs to normative legal science (legal dogmatics). It is self-explanatory that a choice of the jurisprudential concept for the analysis of, say, the Croatian state must be realistic. *Mutatis mutandis* the same applies to concepts of the market society and civil society.

<sup>15</sup> Republika Hrvatska / Ustavni sud, Rješenje br.U-I-8843 / 1997 i dr. (3 February 2000), Obrazloženje, II.3.2, *Narodne novine*, 20/2000.

<sup>16</sup> *Ibid.*

a trial court recognises to a form of association that is not a juridical person the capacity of a party in a suit, the court gives it the capacity of a party (in that suit only); but it also recognises juridical capacity (to be a bearer of rights and obligations), which is not limited to a concrete suit<sup>17</sup>. The Court concludes that an unregistered association, although lacking juridical personality, may be a “bearer of rights and duties” and enjoy “corresponding legal protection” and hence “legitimacy”<sup>18</sup>.

Article 16 of the Croatian Constitution specifies reasons for limiting freedoms and rights it guarantees. The reasons are as follows: freedoms and rights of other people, legal order, public morality and health. The limitations must be instituted by law. They should be proportional to the need of limitation in a particular case<sup>19</sup>.

If my analysis holds, my final and main point is obvious: when the State is dealing with religious rights it is not dealing with Truth and Transcendence; rather is it allocating its own terrestrial resources that include money, i.e. public assistance to religious communities, and access of religious communities to channels of public influence such as public schools and public media.

P.S. My analysis has suggested that the assumption of the State's omnipotence is a corollary of an overly politicised Christianity. The context indicated that it is Western Christianity. The assumption is somewhat different in Eastern Christianity, which has been built around overly religious empires<sup>20</sup>.

<sup>17</sup> *Ibid*, Obrazloženje, II.3.3.

<sup>18</sup> *Ibid.*, Obrazloženje, II.3.4.

<sup>19</sup> Ustav Republike Hrvatske: Pročišćeni tekst, *Narodne novine*, 41/2001.

<sup>20</sup> See e.g. Ernest Benz, *Duh i život Istočne Crkve*, Sarajevo: Svjetlost, 1991, esp. ch. X. Political Ideas of the Orthodoxy, 145-154.