

EDGS WORKING PAPER

Number 25

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January 20, 2015

Presented at the Political Science EDGS Speaker Series on January 20, 2015. This work was made possible by a grant from the Equality Development and Globalization Studies (EDGS) program at Northwestern University, funded by the Rajawali Foundation in Indonesia.

BEYOND NATION AND RELIGION: TRADITIONAL IDENTITY SHAPES THE LAW

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Introduction

After the tearing down the Berlin Wall, old continent became new again: borders of the East and West became much more soften and relaxed and feelings of belonging to one space-geographically and historically-reached almost every corner of the Continent. But soon after it was visible that boundaries which divided European soil for decades remained present trough cultural, anthropological and legal characteristics which remained there as products of living under different socio-moral schemes. I am probably not isolated scholar who concludes that in a peculiar way communist regimes developed and even secured religious life in Central and Eastern European countries which were ruled by the repressive regimes. It is a paradox (or not) that the countries which were not free and were under regime pressure developed vibrant and very much alive spiritual life of citizens. Living in the catacombs was a 'window' towards individual and collective liberty and a sign of resistance to corrupted state. By looking at religious life under communism, through eyes of Christian and believer, one might recognize famous 'thorns' of Saint Paul who kept religion there stable and alive. Repression therefore could be perceived as Cross which made religion flourish. 'Religion as Freedom' remained hooked to the sentiments of nations of Central and Eastern Europe regardless of religious denomination they belong. The most concrete example of existence of mutual traditional identity in recent legal history was Croatian referendum on Marriage. It is not news that circumstances in which believers lived in particular states preserved religious identity and traditional way of living which existed before 'communist came'. Those traditional views are the most present in family issues and subsequently laws (especially if we perceive 'law as a mirror of culture'). Traditional values of marriage are present in all three, most represented religious groups in that part of the World: Catholicism, Christian Orthodoxy and Islam. Regardless of the facts that those collective religions were heavily used for labeling and used as another element of tribalization, it is also a fact that on the common ground those groups were able to work together in achieving higher goals and needs. Croatian referendum case is clear example where groups who were hostile to each other during War times managed to sit together and defend-trough Law-what those believed is right and worth fighting for. This is just one example how East part of the Europe developed differently comparing to its West counterpart which also nominally religious became more secular and altogether distant from religiosity.

Part I

I've recently read a notion that America is religious and Europe secular. In the excellent book by Peter Berger and Grace Davie it was argued that religion in America has its own special (and though important) role and that political Europe (predominantly Western part of it) seeks an environment which is secular but really anti-religious in its essence. It is paradox that the cradle of Christianity becomes want to be its funeral home at least when we are talking about public manifestations of religious belonging. At the same time Christianity which was 'exported' to the new worlds flourish there at least in the formal sense of the meaning. In the meanwhile other religions came to Europe and at the same time political systems which develop secularity and frame it within the legal systems found out that using secularity can be great mechanism for defending against other and different and at the same time keeping the idea of human rights alive, but without religious and sometimes ethnic flavor. This is particularly the case of the recent scarf bans in France. On the one hand protection of human rights is something we do not discuss this days and on the other hand public morals or *order public* of the system we live in could and often come into the clash. When I was speaking with Mrs. Davie in London at the beginning of this year we both agreed that it is the major task for society to seek the path (not the solution) in which it is possible to put in coexistence human rights and individual (religious) freedoms on one side and public morals of the majority, *de facto*, public morals of the state. It is important to understand that human rights should never mean ruling of minorities, but majorities should in their maximum capacity and by knowing its powers and positions do everything to protect minorities to its maximum possible line of existence. The European problem connected with the ruling of left wing socialist orientated parties produced detachment of the system from religion and religious groups which produces 'new religion' which should be adequate for all: secularism. Secularism looks that it gives similar rights to everyone, but little bit more to nonbelievers-and here we are in problem, if not moral, than constitutional and legal and it is multilayered. In legal theory (and theory of state) population is one of the essential elements of the state, and therefore religious beliefs of the same population mean, because human obviously comes with all characteristics he/she has: religion is important one. Second issue is that European legal systems are also build upon the rules which derive from religious norms such is canon law,¹ and it is not possible to cut off itself from the cultural structure of what the system is built upon. Third issue here is that social and left wing governments do not understand religious concepts and traditions and in the name of human rights proclaim absolute secularism which in its purest form should mean absence of God in the public sphere. They do not realize that for doing that they would need to erase identities of it citizens which would mean a road to dictatorship and creating identity without free will of the subjects. Celebrating religious holiday or having Crucifix² in the classroom is more than 'ordinary' faith of its citizens; religious beliefs constitute beliefs of the nations in accordance they wish to live. Forth situation and problem

¹ Presumption of innocence is a canon law norm and typical example of the norm deeply rooted in public legal systems and frameworks: *Ei incumbit probatio qui dicit, non qui negat*, (lat.)

² *Lautsi v. Italy*, see: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040#{"itemid":\["001-104040"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040#{) Legendary case held in front of the European Court of Human Rights, in which majority of judges decided that cross in the classroom in the public school in Italy does not affect anybody's right. Cross as a 'passive' symbol represent tradition and therefore does not actively influences someone's quality of life.

arose when secular driven governments decide to follow human rights and proclaim that all people are equal and have right to their particular identity and then when they encounter behavior which does not 'fit' their perceptions of the 'living within the public body'. Then they use same concept which they rejected, secularism becomes 'creed of the state' and there are no places for religious infiltration. Secularism becomes church without the 'Church'. It is not a secret that French Republic strengthen its rules on wearing public symbols in the public schools just for the fear of Muslim extremism and all other faiths are just collaterals. What is to be done: secularism should transform its position from dogma to dialogue in which it should mean that there are place there for everyone, but with solid understanding and respect towards predominant forms (and spirits) of the culture which forms public morals and order public. It can always be a problem if the group who requests right of the system does not respect the system which should give the rights. But then again, acknowledging that religion is important. Saying that it does not form public morals, even in today's world is just would be too pretentious. Lawyers have to do their part: shape the law to fit! Law should be a tool for religious cohabitation, although there could be critiques about curing the society from top to bottom rather than bottom to top; but I am always saying you have to act where your place to work is.

In his recent book famous legal philosopher Brian Leiter³ discusses '*Why Tolerate Religion?*'⁴ and also explains philosophical dimensions of court rulings which could work in America but not in Europe, where established secularism holds firm place within division of powers. Although Leiter critically examines elements of religion and why it should have special place within (legal) system, the issue that religion is as a phenomenon which addresses questions of ultimate reality /"religious beliefs involve, explicitly or implicitly a metaphysics of ultimate reality"⁵/ address spiritual element which is so important to humans and should not be marginalized. Societies which did not realize that spirituality is important did not succeed and new de-spiritualization of society in form of radical secularism, could lead to the same consequences, or on contrary, as it is a case in former communist countries produced even bigger dedication to religion. By accepting the role of religion and by non-insisting on its passive place states could lead to a new and better contemporary problem solving, especially in complex religious and ethnic societies. Another issue is that it seems that the countries which were under communist/socialist rule somehow preserved connection with Christianity in a different way it was the case in the West. Suppression and living in catacombs actually and in paradox helped spiritual life flourish.⁶ Westerners soften its attitude to the Christian roots and conformism bleach spiritual foundations of Europe even much more than secularism did. Therefore it is not surprise that traditional countries like Italy and Spain went away from its Christian foundations and France far most than all. Principles of secularism therefore were not accepted equally well in the Central and Eastern Europe. Recent case of the constitutional referendum in the newest EU state-Croatia shown all complexity and even drama of the clashes of cultural identification. I am not saying that states should be religious driven, but have to be religiously aware. While 'fight against God' is continuing, even more and more policy makers realize that by rejecting its own

³ Brian Leiter, professor of Legal Theory and Philosophy of Law, University of Chicago, Law School.

⁴ Leiter, Brian; *Why Tolerate Religion?*, Princeton University Press, 2013.

⁵ Id., p. 47.

⁶ Jason Weinberg and A. James Mc Adams.

cultural and therefore legal roots diminishes options to reject other unwanted behavior on the basis of cultural incoherence. Also by ignoring values of majority state and legal system seriously endangers democratic concept of governance. It will be shown that there is perpetual fight against sacred in the public sphere, but in spite of the fact that this is happening, courts and therefore states are not in position to reject spiritual element of the nation(s) at least for that tiny part which is connected with culture, tradition and therefore desire of the wanted place to live. In this notion mostly all religious groups could find common ground and recognize that they all belong to traditional identity and same desires in shaping of the law, especially when it is a word about the place where their traditions all meet: family.

Part II

Croatian constitution can be changed in two ways; one is by regular procedure conducted in Parliament in which two thirds of all representatives had to vote in favor of the statutory change. Other and until now never used mode is constitutional change done by people itself in non-indirect way-by referendum. Croatian regulations require that 10% of the voting body sign formal request for referendum in which 50% of people who vote had to be in favor of the decision proposed. This relatively low percentage of votes for changing quite firm constitution is a result of recent constitutional change which happens just before Croatia joined EU: ruling party and opposition agreed that it would be too risky to jeopardize entering EU after all those painful years of negotiations. This change of constitution opened the door more widely to citizens' initiatives in which people would also be more involved by its activism and influence. Until recently there wasn't any successful collecting of votes, but just before this summer, Croatian public was faced by the largest public initiative started by relatively small and yet unknown NGO „In the Name of the Family“ in which respectable number of 749 316 signatures were collected in just two weeks, more than was required by Croatian referendum laws. This caused largest public debate in the Nation since the days of independence.

Although Croatian Family Law defines marriage as a union of man and woman, citizens' initiative insisted that this should be part of constitution as marriage is one of the highest moral values of Croatian society and therefore should be written there as a safeguard that this will not be changed by political decision of any ruling party in the future. As leaders of the Initiative said, what happened in France with legalization of gay marriages and allowing adoption to same sex couples just speeded the decision to organize action like this. Croatia is predominantly Catholic country and majority of its citizens feel that marriage should be protected as a union of man and woman and as a place where State should intervene to protect procreation which is in interest (at least economical if not existential) of every modern state. This Initiative was confronted by same-sex activities groups and various NGO from liberal spectrum. Initiative has support of the most of the major religious groups in the country: Catholic Church, Islamic Community and Orthodox Church, while Jewish Community was divided by accepting the action or by suggesting to its believers that they should follow their conscience. Pro-gay activists argued that

this initiative would harm human rights of the persons of different sexual orientation and feel that Croatia would go backwards if this change takes effect. Initiative was arguing that they are not against gay rights and that those rights should be regulated by law, but by the nature of things those unions could not be called marriage and that child adoption should only be reserved for the heterosexual couples. The legal issue here is that allowing gay couples entering marriage and adopting children would break public morals which is legal standard in which all norms of the society (both social and religious) can be found dunked in (from civil to criminal and medical laws etc.). Concerning eastern part of the EU, these public morals as moral and furthermore therefore legal standards for instance can be found in countries such as Poland and Hungary.

Regarding the notion that those issues should not be regulated by constitution since those are in the sphere of human rights, it is argued that European court of human rights decided that right to marriage is not a human right and that family law is one of those branches of laws which European union legislation doesn't cover for the reasons of cultural differences between the states although same-sex couples have rights in terms of free movement of people and labor laws. Croatian Government which is currently left orientated (social democrats) has hands hand-cuffed and there are attempts made in order to stop the referendum. It can be argued that one level of rejecting gay-marriages and child adoption is based on defending public morals and for some, regardless of the existence of the former it is rooted in the notion of natural law which follows the nature of things (*natural law theories, e.g. see: John Finnis*). The argument is that even if marriage may be social phenomenon, delivering babies is not, which is biological/natural in its essence.

For lawyers, legal theorists and constitutional lawyers there is always perpetual question what law should represent? According to some, law should be reflection of the majority's prevailing moral feelings on particular questions and issues and therefore citizens should have right to live in the county which is shaped by their moral and/or religious beliefs. Religion and religious issues is different than any other social phenomenon partly for the reason that includes the questions of ultimate reality and desire for fulfilling rules and duties which sometime require fight for the frameworks (including the legal system) in which followers want to live in. On the other hand pluralistic society and human rights which we accept require that we accept the rights of people who think differently and who are part of minority groups. By doing so we are also accepting that all men are equal in their choices and decisions and that freedom is greatest of all goods (given by God or nature). But are there some individual questions which become more public and communal for which individual need to demand social interference and regulation? Balancing between the rights of majority and minority is the key task which will make global pluralistic society work. On the one hand allowing minority rights to be fully lived should be in some sort of accordance with the society as a whole. Can it happen that by allowing minority to live its beliefs and style of life at any time and always, society causes, as some harshly call it "dictatorship of minority"? This also must not be the excuse to allow repressive measures against minorities just for the reason those are different.

Proportionality principle should be followed which will balance between the rights of majority to live in organizational society which represent values of its culture and minority rights which

have to be extended to the ultimate line of possibility. E.g. it would not be right to ask from the state which is based on Sharia to allow selling whiskey on the streets but would be reasonable to ask if Christians may use wine in the services they perform. Furthermore, maybe it would not be right to ask to allow same-sex adoption in the traditional Catholic society but it would be more than fair to allow equal property rights for same sex couples? To balance all this through law, sensitive and tolerant approach is needed on all sides. There are various combinations of issues which cover this area; many times those are not black and white. If, for instance credo of the society is religious freedom-then that freedom will be in some cases restricted by the principles of public security, or public morals, and sometimes even then religious rights will prevail as strongest argument in the confrontation in case (*see: Brian Leiter writings and Multani Case*). Here we can have again new concerns on established religions and those who are not. On the other hand if secularism (*laïcité*) principle is basic credo of the society which exists parallel to religious freedom principle like in France (although one should doubt that there something like exclusive secularism exists at all), it should be protected even if that would mean restrictions of some sort (*see: About-Picard Law*). Which public values will be recognized and protected and which will not and which will be even suppressed? The crucial thing is that minority had as much power as possible, but at the same time it is important that majority doesn't feel that is ruled by minority. On the other hand prevailing attitudes of majority and public morals must not be excuse for repression. Democracy has to retain its virtue not to smash small and weak; in its essence it is consisted of chance to decide and win and also with the possibility to be free, to be different and to act differently. If we would put this into theological perspective, freedom is essential God's gift-if God wants me to be free and choose on my own, who is one who (an when) can prevent it (*see: talk Bergoglio-Skorka*)? Of course we should always consider limits in terms in which Stuart Mill operated. Balancing between acquiring rights in the society which live different style than mine and maintaining respect to that different society which one is also part of is a test for modern state and society we are living today. We shall see how this test situation will be resolved in Croatia. Will we be going French-or rather not?

In November 2013 Croatian Parliament approved referendum which will determine if the definition of marriage as a union of woman and man should enter country's constitution. Although majority of MP's were against the idea (left wing parties) they could do little to prevent the parliament to allow its happening. This was amalgamated with the current wish to change the rules of the referendum in order to prevent similar referendums in the future. Rules which were good enough to have for entering the EU are not popular with the ruling party now when they oppose the idea which were risen as question (reserving marriage just for heterosexual couples).

After unprecedented and hard public debate which caused unimaginable division in Croatian society which was followed by activism on both sides (pro et contra), activism which was unseen ever before, on the 1st December 2013, 66 % of Citizens which decided to vote (37 % of all with the voting right went out for voting) have voted for the formulation "Marriage is Union of Women and Man", while 33% were against.

This norm will become Art. 62. par. 2. of the Croatian Constitution. It is important to say that same sex couples already have or will have same rights as married couples with the two distinctive characteristics: homosexual couples will call their union “registered partnership” and they will not have the right to adopt children. With the strong support of the Catholic Church, Serbian Orthodox Church, Islamic Community and Jewish Community Beth-Israel, Croatia, the newest EU member which just 20 years ago was dragged in the terrible war decided to join Bulgaria, Hungary, Latvia, Lithuania and Poland, as the European Union country which have traditional definition of marriage protected by its Constitution.

Part III-European Legislation

Definition of Marriage in Europe (EU and Non-EU)

Bulgaria:

Art. 46.

“Marriage is free union of man and woman.”

Hungary:

Art. L

“State of Hungary will protect institution of marriage as union of man and woman which is stipulated by free decision and institution of family which is stone base of nation existence.”

Latvia:

Art. 110.

“The state will protect and support marriage – union made between man and woman, family, rights of parents and rights of children.”

Lithuania:

Art. 38.

“Marriage is stipulated on the basis of the free approval of man and woman.”

Poland:

Art. 18.

“The marriage as the union of men and woman equally as family, motherhood and fatherhood will be under protection “

Croatia:

As of 1st December 2013 by Referendum (Yes 65, 83%, No 33, 55%)

Art. 62. par. 2.

„Marriage is life union of woman and man. “

Part IV – Map

South East Europe Ethnic Map - Source: GRID-Arendal: Centre collaborating with the United Nations Environment Programme (UNEP), Arendal, Norway

