

Part III
Religion Challenging the Law



On Laws and Their Spirit

Do Orthodox Concepts of Symphonia and Oikonomia Have an Impact on the Contemporary Legal Situation in Serbia?

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Abstract

The Orthodox Christianity had in some respects divergent development from that of the West, which also resulted in several conceptions that might have had an impact on the contemporary legal situations in the predominantly Orthodox countries. In this contribution we aim at examining the impact of two major points of divergence. One is the cooperative Church–state separation, that is sometimes dubbed as the *symphonia* of the two. Another set of concepts that arguably marked Orthodox church's understanding of the rule of law, at least in its internal procedures, is the principle of leniency (*oikonomia*). It allows for an interpretation of the laws in the interest of the person to which those are to be applied. We want to investigate which pieces of legislation might have been affected by these considerations and whether contemporary

challenges of the legal system in Serbia can be traced to some of the Orthodox doctrines. We conclude that while the contemporary Church–state relationship, as envisioned in the corresponding law of the country, demonstrates many traits that can be traced to the *symphonia* tradition, there is hardly any evidence that would support the claim that the decision-making processes in Serbian courts were marked by conscious application of the principle of *oikonomia*.

Keywords

Orthodoxy – Serbia – symphonia – oikonomia – secularity

1 The Relatives from the East: Orthodoxy Societies' Divergence from and Convergence with the West

Both Orthodox and Latin (Roman Catholic and the mainstream Protestant) Christianities emerged from the ruins of the Greco-Roman world. These branches perceive themselves as the direct heirs to the Christianized Roman Empire's traditions. Although they share much of the same Nicene-Chalcedonian dogmatic heritage and demonstrate important similarities in other areas, due to their divergent historical and intellectual development, they would be better described as sisters, rather than identical twins.

Among phenomena that emerged on the Orthodox side of the East-West theological divergence, the concepts of *symphonia* and *oikonomia* play an important role. Our goal is to explore the impact these have on the contemporary legal situation in the predominantly Orthodox country of Serbia. Given the historically close Church-state relationship in the Orthodox world, one might expect that the Orthodox canon law could have impacted the way legal norms and legality itself are understood and addressed. We contend that these topics merit deeper scrutiny, that may open new avenues of research of the issues concerning the rule of law in predominantly Orthodox countries. The issue of *oikonomia*'s impact on jurisprudence in them is rarely addressed, if at all.

We will at first take a historical approach in order to describe processes that led both to Orthodoxy's divergence and convergence with Western norms and values, with a focus on the Serbian case. This should serve as an introduction to our analysis of constitutional and legal norms that regulate the Church-state relationship in contemporary Serbia. We will also offer our perspective on how close this cooperative relationship is to the Orthodox ideal of the Church-State

symphonia. Another question that we intend to address is whether there are indications that the recent restoration of the cooperative Church-state relationship had a deeper impact on the understanding of the rule of law, related to the Orthodox principle of legal leniency (*oikonomia*).

One important disclaimer is necessary at this point. Whereas it is clear that the pre-modern ideas forged within the Eastern Roman framework cannot be translated from their original historical context into the modern one of a secular state in their entirety, they can still influence the way people and institutions behave, either as a consequence of a specific “political theology”,¹ and/or “partial modernisation”,² often by influencing what decision-makers perceive as good, just, or in line with the perceived national traditions.

2 Divergent from the West: *Symphonia* and *Oikonomia*

The Roman Empire undoubtedly had a profound impact on the development of European legal thought. It was from the Romans that we inherited principles such as *pacta sunt servanda* [“agreements must be fulfilled”], or *dura lex, sed lex* [“it is harsh, but it is the law”] and it is no coincidence that words or sentences in Latin are still being used when naming certain legal principles or procedures. This strict adherence to the letter of the law lies at the core of what the Rule of Law implies, as it creates a sense of legal security and predictability (i.e. stability), that is considered by some as one of the major causes of European and American prosperity³ and the “great divergence”⁴ of Western civilization from the rest of the world.⁵ If one were to agree with this argument, at least one significant part of the prosperity enjoyed by the Western nations today would have to be credited to the practical and legalistic mindset of the ancient Romans – and their subsequent European intellectual offspring, the Roman Catholic Church, among others.

There was, however, another Rome, that outlived the Western Roman Empire by almost one thousand years. That empire was centred on the “New Rome”, as the city of Constantinople was known. Its inhabitants called themselves *Romaioi* (the Romans) and for much of their history, they insisted on

1 Cf. Philpott, *Explaining the Political Ambivalence of Religion*, p. 507 et seq.

2 Cf. Rüschemeyer, *Partielle Modernisierung*, p. 382 et seq.

3 Cf. Acemoglu/Robinson, *Why Nations Fail*, Ch. 11.

4 Cf. Ferguson, *The Great Degeneration*, pp. 21–28.

5 Cf. Ferguson, *The Great Degeneration*, pp. 79–110. In an earlier work, Ferguson emphasized competition and property rights within the umbrella of the rule of law. Cf. Ferguson, *Civilization*, Ch. 1, 3.

keeping the memory and traditions of the ancient Empire alive. It was the culture that created a formative framework for Orthodox Christianity. The great divergence of the Christian East from the West could be traced long before the final schism of 1054. It was marked not only by the division-line of the Eastern and Western Roman Empires under Theodosius (c. 395 AD), but also linguistically, visible in the Eastern preference for Greek and the Western for Latin as their respective liturgical languages.

The specific Orthodox Church-state relationship was initially forged within the framework of the Christian Roman Empire. After the Imperial Insignia were sent to Constantinople in 476 AD,⁶ the bishop of Rome became the most important depositor of Roman traditions in the West. The specific trajectory of Latin Christianity's post-Roman development was thus initiated. The Eastern Roman Empire for some time remained in control of the four other major Christian sees. This prevented any of them from claiming the exclusive position of ecclesiastic supremacy in the entire Christendom – let alone over worldly rulers, in the manner the Pope of Rome could assert. Further, after the Muslim conquest of Syria, Judea, and Egypt (and with it, the patriarchal sees of Alexandria, Antioch and Jerusalem), the Patriarchate of Constantinople remained the only one still under the authority of the Christian Roman Empire. Both halves of the formerly united Christian world differentiated between the responsibilities of the ecclesiastic and the secular power. It was the quality of the relationship between the Church and state that they grew to perceive differently.

2.1 *Symphonia*

The Emperor Constantine's decision to end persecution of his Christian subjects had a profound effect on Christian political theology. Eusebius of Caesarea (260–340 AD) was among the earliest Christian writers to declare the Roman Empire responsible for providing the necessary conditions for Mankind's Salvation. In his *Ecclesiastical History*, Eusebius glorified Constantine the Great as a "Viceroy of God", with his realm reflecting the Kingdom of Heaven. It combined the peace achieved by the pagan Roman Empire with the One True Faith. Eusebius could be credited for drafting one of the earliest normative teachings in the history of Christian political theology. The emperor and the bishops oversaw different aspects of human existence, yet their cooperation was necessary to maintain the best possible conditions for the Divine-human communion on Earth.⁷

6 McNeill, *History of Western Civilization*, p. 191.

7 Cf. Eusebius of Caesarea, *Ecclesiastical History*, Books 8–10; Papanikolaou, *The Mystical as Political*, pp. 17–21.

St. John Chrysostom (349–407) differentiated between the person of the emperor and the institution of the empire. The rulers themselves were not appointed by God, but the very institution of the empire was. Unlike Eusebius, Chrysostom did not idealize the Empire. There could be no ideal community, other than the Church. The state should therefore concentrate on making the life in virtue easier, by punishing the criminals, rewarding the good and, in general, cooperating with the Will of God. There was to be a cooperative division of labour between the supreme bishop, responsible for the human souls and the emperor, in charge of the material welfare.⁸ Eusebius and Chrysostom contributed greatly to the emergence of doctrine that would become known as the *Symphonia* between the Church and its host state, thus setting the trajectory along which much of the Orthodox political theology developed in the subsequent centuries.

The Western political and theological conception of a proper Church-state relationship developed along a slightly different path, that was arguably set by Pope Gelasius I (p. 492–496). In his letter⁹ to the eastern, but at that point the only, Roman Emperor Anastasius I (r. 491–518), he argued that there were two kinds of authority – the sacred one (*auctoritas sacrata*) and the power of the kings (*regalis potestas*). The emperor was, like any other Christian, the son of the Church. He should, accordingly, learn from it, not lecture others on the matters of faith. The clergy had to obey the Imperial laws, but they could not be tried in the regular courts even for treason. Here Gelasius went a step further than Chrysostom, by claiming that the Church had the prerogative of independent jurisdiction (*privilegium fori*). The clergy “[...] must also render account before God for the very kings of men [...]”;¹⁰ which is why it alone should define the borders of both powers. In this regard, the Gelasian doctrine launched Rome’s rejection of the *symphonia*. Instead of a cooperative, the Church and state developed a more conflicting relationship, that in the end might have resulted in the final act of separation of Church and state.

In the East, the doctrine of *symphonia* was further advanced. Although theoretically supposing the co-equal relationship between the patriarch and the emperor, it in effect resulted in a more pronounced reliance of the Orthodox Church on its host state.¹¹ Emperor Justinian I (r. 527–565) wrote about two services, one clerical and the other imperial in his Sixth *Novella*.¹² Justinian how-

8 Cf. Chrysostom, *Homilies*; Papanikolaou, *The Mystical as Political*, pp. 23–26. Cf. Savramis, *Zwischen Himmel und Erde*, p. 91.

9 Written as a reaction to Emperor Zeno’s attempt to regulate religious doctrine by employing the prerogatives of the pre-Christian emperors.

10 Cited from: Canning, *A History of the Medieval Political Thought*, p. 36.

11 Cf. Gerogiorgakis, *Symphonie für große Trommeln und kleines Triangel*.

12 Cf. Justinian, *How Bishops and Other Ecclesiastics Shall be Ordained*.

ever, gave more weight to the imperial power, by emphasizing its responsibility for the harmony between the clergy and the government.¹³ The emperors of Constantinople often had to deal with different religious upheavals, caused by conflicts over definitions of Christian Orthodoxy. Even if they wanted to heed Gelasius' advice, they would soon find it more expedient to assert their prerogatives with the aim of securing not only peace, but Divine favour as well. This did not mean that the emperor could impose his view of the Christian Orthodoxy upon the Church. When such attempts were made, parts of the Church vigorously resisted,¹⁴ as was the case, for example, during the iconoclastic crisis.

Symphonia, in theory (not always in practice), represented an agreement between the Church and state that demanded a clear demarcation of each other's purview. The state was responsible for securing order and external security. The Church prayed for the Divine blessing and took care of the people's souls. It also had the prerogative of acting as the conscience of the state, as bishops could intercede with the authorities. On matters concerning (traditional) morality, the political elites ought to respect the advice they receive from the clergy.¹⁵ In exchange, the Church was to refrain from engaging in the daily political life, leaving these affairs to the state alone. However, as Gerogiorgakis argued, this relationship remained in flux, as the entire arrangement depended on both parties' readiness to self-limitation within this trade-off. In practical terms, *symphonia* only evolved into a euphemism for the system within which the sovereignty of the state remained unchallenged, while the Church remained subjugated to it.¹⁶

Although *symphonia* ended together with the empires that practiced it, it continued to serve as a point of orientation in the subsequent development of Orthodox political thought. Its actual historical reality rarely prevented Orthodox thinkers from idealising it in their political theologies. The Ottoman Empire created a *modus vivendi* with its Orthodox subjects by awarding special status to its clergy within the *millet* system. A similar arrangement was made within the Habsburg Empire after 1690, with gradual institutionalization of the metropolitan see of Sremski Karlovci (Karlowitz) as the representative of Austria's growing Orthodox populace. The series of national revivals in the Balkans was followed by the phenomenon of nationalisation of the local

13 Cf. Gerogiorgakis, *Symphonie für große Trommeln und kleines Triangel*, p. 178; Papanikolaou, *The Mystical as Political*, p. 26.

14 Cf. Küng, *Das Christentum*, p. 253.

15 Cf. Papanikolaou, *The Mystical As Political*, p. 27.

16 Cf. Gerogiorgakis, *Symphonie für große Trommeln und kleines Triangel*, p. 180.

hierarchies, that now tended to collaborate with the nation-state in a fashion reminiscent of its former symphonic tradition.¹⁷

2.2 *Oikonomia*

Another major development that could be regarded as divergent from the West is the importance of the principle of legal leniency (*oikonomia*) in Orthodox moral theology, that complements, but does not entirely derogate, the principle of strict adherence to the letter of the canon law (*akribeia*). The key meaning of the term *oikonomia* is derived from the Greek word for (household) management¹⁸ and refers to God's relationship with humankind and the way its salvation is managed. If applied in judicial terms, the *oikonomia* refers to deliberation on the meaning and purpose of the norm of the canon law and its relationship with the interest of salvation of the person in question. When judging transgressions, the Orthodox may opt for a more flexible interpretation and application of the canons, based on pastoral discretion with the interest of human salvation in mind. *Oikonomia* was never meant to serve as a convenient bypass to the canons but focused on deliberation about purposefulness of the rules in the given case. The punishment is regarded as the weapon of the last resort and, if one could make that intellectual stretch, failure. Orthodoxy's flexibility is sometimes used as a case in point when arguing in favour of Orthodoxy's "democratic spirit",¹⁹ at least if one were to accept the notion that the high standards of morality and strict laws were usually imposed by the ruling elites upon the ruled majority.

Stamatios Geroegeorgiakakis noticed that the *symphonia* tradition resulted in difficulties in formulating moral theology, that could result in clear preferences for certain types of legal norms.²⁰ In the West, the limits of the Church were discussed in legal terms already by Augustine (354–430), which also demonstrated preference for legal security.²¹ The *legalistic* approach to salvation and "judicial repenting of sins" were rejected among the Orthodox.²² If salvation is achieved through the Grace of God, it is difficult to transpose the sin into the legal concept of crimes. Christos Yannaras argued that unlike Western Christianity, the Orthodox had never framed morality within a legalistic and

17 Cf. Makrides, *Why Are Orthodox Churches Particularly Prone to Nationalization*; Šljivić/Živković, *Self-Ruled and Self-Consecrated*, p. 5.

18 Cf. Kallistos, 'Economy' according to Orthodox Theology, pp. 6–8; Maloney, *Oeconomia*, p. 92.

19 Makrides, *Orthodoxie und Demokratie*, p. 19.

20 Cf. Geroegeorgiakakis, *Symphonie für große Trommeln und kleines Triangel*, p. 181.

21 Cf. Bremer, *Theologische Hintergründe des Euroskeptizismus*, p. 87 et seq.

22 Cf. Geroegeorgiakakis, *Symphonie für große Trommeln und kleines Triangel*, p. 181.

objective context of social coexistence. Morality was not a legal, but foremost an existential, problem – the issue of salvation, that can only be obscured by the law.²³ Even some dogmatic positions could be seen as the guidelines, not as a set of legally binding principles.²⁴ In effect, this resulted in less ecclesiastic legal security, as the same norm could be applied with different results in similar cases, based on pastoral discretion of the person deciding whether to go with the *akribeia*, or ponder deeper on its consequences and apply the *oikonomia* instead. As long as the Orthodox Church continued to legally regulate certain aspects of the individual's legal status (especially on issues like marriage), the principle of *oikonomia* remained, even if through the back door, a part of the legal system of countries that had such arrangements with their Orthodox Churches.

After leaving the task of law-making to the state, even in areas that used to be its purview, the Orthodox Church developed a critical stance towards the strict implementation of the law itself. The legalistic understanding of morality, prevalent in the West, is often seen as a consequence of Western theological ignorance, and moreover, inability to recognize the spiritual truth of the person.²⁵ It would be wrong to equate this position to the rejection of the laws as such. The Orthodox criticism only points to certain limitations and has a strong preference for deciding on a case-to-case basis. This begs the question, whether this theologically grounded attitude had a spill-over effect, or more specifically: did it transcend the limits of the ecclesiastical law and find its way into the judicial practice in predominantly Orthodox countries?

3 Convergent with the West: Modernisation Processes since the 19th Century

Apart from their divergent development from the West, the predominantly Orthodox societies experienced (to a different extent) a certain level of exposition to processes of modernisation, that, with a noteworthy exception of the socialist modernisation (mostly 1945–1991), had convergence with the West as their aim. The Orthodoxy in the Balkans never faced modernisation-related upheavals on the scale experienced by the Russian Orthodox Church. It was nonetheless strongly affected by the interpretations of the pre-modern Orthodox traditions that were inspired by different aspects of modernisation

23 Cf. Yannaras, *The Freedom of Morality*, p. 26 et seq.

24 Cf. Turunen, *Official and unofficial Voices*, p. 247 et seq.

25 Cf. Naletova, *Human Rights*, p. 218.

and reactions to it.²⁶ The Enlightenment, although at its Western European peak barely present among the peoples of the Balkans, still affected small intellectual elites of their nascent nation-states. By insisting on rationalism, the Enlightenment also undermined the “unlimited sovereignty of religion”,²⁷ that was the hallmark of the Ottoman Empire, and consequently the main framework within which most Orthodox of the Balkans lived until the 19th century.

The new nations of the Balkans emulated European types of organizing state apparatus; that included adopting legal frameworks and legal thinking derived from their Western prototypes. Another consequence of the encounter with the ideas of the Enlightenment was the emergence of nationalism, that was quickly embraced by the Orthodox ecclesiastic elites as well. Vasilios Makrides believed that the Orthodox encounter with nationalism’s Western prototype usually resulted in refitting the pre-modern Orthodox orientations into the modern frame in a rather traditional way, which made the entire process appear not as an innovation, but rather an organic part of its teachings.²⁸ The nationalisation of Serbian ecclesiastic structures coincided with an increased secularisation of society, in part because nationalism gave more weight to language and folklore, rather than dogmatic religiosity. Not surprising that the second half of the 19th century was marked by the loss of the Church’s prestige and a decline in dogmatic religiosity in Serbia.²⁹

It should not be forgotten that the national orientation of the local Orthodox churches represents a relatively recent development. In the Eastern Roman Empire, the Imperial Church was expected to overcome divisions among its many peoples.³⁰ With the rise of nationalism, a strong connection between faith and ethnicity emerged,³¹ that, as Alexander Schmemmann put it, converted the medieval desire for the universal empire into a patchwork of conflicting nation-states.³² There had been a historical interconnection between the concepts of the Church, the people and the (home)land,³³ that could easily evolve into a nationally oriented Orthodox hierarchy and a cooperative Church-state relationship.

26 Cf. Buchenau, *Auf Russischen Spuren*.

27 Ferguson, *Civilization*, p. 67.

28 Cf. Makrides, *Why Are Orthodox Churches Particularly Prone to Nationalization?*, p. 329 et seq.

29 Cf. Timotijević, *Vek sumnje*, pp. 22–37.

30 Cf. Romans 10:12; Galatians 3:28.

31 Cf. Rogobete, *Morality and Tradition*, p. 287.

32 Cf. Schmemmann, *The Historical Road of Eastern Orthodoxy*, p. 289.

33 Cf. Makrides, *Why Are Orthodox Churches Particularly Prone to Nationalization?*, p. 330.

After the First World War, like in many other countries, a massive, yet short-lived religious revival took place, that was marked by the emergence of a robust Orthodox civil society. At the same time, the Serbian Orthodox Church (SOC) grew powerful enough to openly challenge the state, most notably by protracted negotiations on legislation regulating its activities,³⁴ and during the *Concordate crisis* of 1937. This period was marked by an unprecedented surge in theological production, that benefited from the influx of Russian *émigrés*.³⁵ This development was cut short by the events of the Second World War and communists' victory. Whereas the subsequent socialist modernisation could be regarded as divergent from its Western prototype, over time it resulted in a profound secularisation of the Orthodox population in Serbia,³⁶ thus, in our opinion, discontinuing any remaining influence Orthodoxy's worldviews might have had on Serbian jurisprudence.³⁷

During the 1990s, Serbian society was undergoing a profound change. As the Yugoslav state was facing its infamous end, the citizens of Serbia became more religious.³⁸ Their religious and ethnic self-identifications increasingly intertwined, and the SOC, previously marginalized, managed to regain the position of an influential actor in social life.³⁹ This resurgence of religion was not coupled with a deeper understanding of Orthodox theology. It was only after 2001, when Orthodox catechism was reintroduced into the Serbian public schools' curricula, that a significant portion of the Serbian population could be exposed to Orthodoxy's more complex ideas.

The convergence with the West through modernisation processes has never been complete. It could be argued that societies like Serbia entered the 21st century in a state of partial modernisation,⁴⁰ that is, in a state of coexistence of modern and traditional elements within the same societal order.⁴¹ Whether this was a consequence of the incomplete and partial socialist modernisation⁴²

34 Cf. Ramet, *The Serbian Orthodox Church*, pp. 234–236.

35 Cf. Buchenau, *Auf Russischen Spuren*, pp. 245–329.

36 Cf. Bakrač, *Tradicionalna religioznost pravoslavne omladine*.

37 Cf. Buchenau, *Kämpfende Kirchen*, p. 109 et seq. According to Buchenau, discrimination of religious people in Communist Yugoslavia increased as they climbed up the social ladder of the system.

38 According to the most recent census data (collected in 2011), less than 5% of the population were atheists.

39 Cf. Petrović, *Nationale Identität und Religion*, pp. 95, 225–233; Janjić, *Srpska crkva u komunizmu*, pp. 352–580; Aleksov, *The New Role of the Orthodox Church in Serbia*, pp. 356–362.

40 Cf. Fajfer, *Modernisierung im orthodox-christlichen Kontext*, p. 23.

41 Rüschemeyer, *Partielle Modernisierung*, p. 382 et seq.

42 A factor that might have contributed to the religious revival of the 1990s was preservation of the pre-modern collectivist solidarity patterns under socialism. Cf. Timotijević, *Modernizacija balkanskog grada*, p. 469 et seq.

or some other developments is of secondary importance for our deliberation. The main point is that a possibility emerged for the pre-modern Orthodox orientations to continue to function within the modern framework and that there has never been a complete convergence of Serbian modernisation processes with those in the West. After all, the actors that import certain norms also have a degree of autonomy when applying them to their domestic contexts,⁴³ especially by determining the way these get implemented in different situations.⁴⁴

4 How Close Are the Serbian Church and State Today?

Like many other political phenomena, the evolution of the relationship between Church and state in Serbia had certain dialectical qualities that demanded a new synthesis with every new epoch.⁴⁵ The period under socialism notwithstanding, the forces that have shaped most Church-state arrangements since the 19th century were the Orthodox political theology (with its tendency to draw conclusions from its pre-modern symphonic experience) and the “return to Europe”⁴⁶ drive – the ultimate goal of which has so far eluded Serbia. In terms of the Church-state relationship, this was always a two-way street, as despite the widespread perception of Eastern churches being docile and indifferent to political issues, the Orthodox Church in Serbia had a tradition of playing an influential political role.⁴⁷

While constitutional texts get adopted and implemented primarily because of their functional and instrumental value, they usually include another level of meaning. Their wording may endow them with a symbolic dimension, that stipulates certain moral values and foundational principles that constitute certain political community. As Paul Blokker argued, they may offer a specific interpretation of the past (symbolic dimension) and hopes for the future (aspirational dimension),⁴⁸ that reveal the cultural and political context in which they were adopted. His approach can easily be applied to laws that intrinsically carry symbolic weight, as they regulate issues that affect collective and individual identities.

The official separation of Church and state was initiated by the Yugoslav unification and completed in the aftermath of the Second World War. It was

43 Cf. Checkel, *Norms, Institutions and National Identity*, pp. 84, 89–90, 92–94.

44 Cf. Prokopijević, *Social Capital During Transition*.

45 Cf. Cvetičanin, *Politička mehanika i veština državnništva*, pp. 143–147.

46 Kaldor/Vejvoda, *Democratization in Central and East European Countries*, p. 60.

47 Cf. Buchenau, *The Serbian Orthodox Church*, pp. 72–8; Ramet, *The Serbian Orthodox Church*; Petrović, *Nationale Identität und Religion*.

48 Blokker, *Multiple democracies in Europe*, p. 72 et. seq.

confirmed by the latest Serbian constitution,⁴⁹ in force since 2007. In terms of identity, the country was defined as the “state of Serbian people and all the citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to the European principles and values”.⁵⁰ The state prohibits organisations that aim at “[...] inciting racial, national or religious hatred”.⁵¹ Serbian language and the Cyrillic script are in official use, while the minority languages and scripts may be used according to the law,⁵² with further reaffirmation of protection of minority ethnic identities in the Article 14 of this document.

Almost as soon as this Constitution was adopted, the actual level of Church-state separation was disputed. The key issue was whether the Constitution forbade any assistance, cooperation, or dialogue with the religious organizations.⁵³ Since the active role of the state was envisioned, as it “shall promote understanding, recognition and respect of diversity arising from the specific ethnic, cultural, linguistic or religious identity of its citizens through measures applied in education, culture and public information”,⁵⁴ the space was created for the interpretation that stipulated a cooperative character of relationships between the nominally separated Church and state. The status of the churches and religious communities can be interpreted as that of the public law entities, even though this possibility was not explicitly foreseen within the text.⁵⁵

The Law on Churches and Religious Communities was passed by the National Assembly in 2006, after being proposed by the Ministry of Religion and Minister Milan Radulović. The law was not passed without controversies. President Boris Tadić refused to sign the law. His opposition to its text was motivated by the strong criticism that came from parts of the Serbian liberal civil society. Despite Tadić’s rejection, the law was passed once again by parliament, thus circumventing the President’s opposition.

The law introduced a situation that is akin to what Kirsten Ghodsee dubbed “symphonic secularism”. This is a state of coexistence of the modern secular with the traditional-religious elements of the Orthodox past in Church-state-nation relationships, that imposes a *symphonia*-style arrangement even on

49 Cf. *Ustav*, Art. 11.

50 *Ustav*, Article 1.

51 *Ustav*, Art. 5 al. 3; cf. Art. 49.

52 *Ustav*, Art. 10.

53 Cf. Đurić, *Zakonsko uređivanje*, p. 43.

54 *Ustav*, Art. 48.

55 Cf. Đurić, *Zakonsko uređivanje*, pp. 45–47.

non-Orthodox religious communities.⁵⁶ Both the Serbian Constitution⁵⁷ and the Law on Churches and Religious Communities distinguish linguistically between churches and religious communities and legally between the *traditional* and the *non-traditional* ones. The former distinction, although only formal and without any legal consequences, implies that the lawmakers had an eye on regulating the Christian-style organisations that are usually the ones that use the term *church*. The latter distinction has important consequences, as it awards the churches and religious communities (that were acknowledged before 1945 as such) the *traditional* status and guarantees them the right to have their representatives in different government-organized fora and to cooperate with public institutions like schools, hospitals, the Army, etc.

The traditional religious communities are those that had had a “centuries-long presence” (*viševjekovno prisustvo*) prior to the adoption of this law. The true legal ground for their position *vis-a-vis* the state is derived from the existence of the pre-WWII laws regulating the matter.⁵⁸ The legal continuity of the Serbian Orthodox Church was recognized according to the laws of 1836 and 1929. Its importance is seen in its “[...] historical, state-creating and civilizational role in shaping, preserving and developing the identity of the Serbian people”.⁵⁹ This is an interesting statement, the likes of which can be found in other predominantly Orthodox countries, for example Bulgaria.⁶⁰ Besides the SOC, the pool of traditional religious organizations includes: the Roman Catholic Church, the Slovak Evangelical Church (Augsburg denomination), the Reformed Christian Church, the Evangelical Christian Church (Augsburg denomination), the Islamic religious community and the Jewish religious community.⁶¹ In order to register a new religious community, signatures of 0.001% of Serbian citizens are needed, with presentation of the basic goals and teachings of the religion in question and sources of financial means for its operations.⁶² This practically means that at least 71 signatures would suffice for registering the new religious organization. Traditional religious communities on the other hand were registered *ex lege*, as was later the Banat branch of the Romanian Orthodox Church.

The state has the possibility to assist religious communities in implementing their autonomous decisions. Religious communities may determine

56 Cf. Ghodsee, *Symphonic Secularism*, pp. 234, 241–243.

57 Cf. *Ustav*, Art. 11.

58 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 4, and Art. 10.

59 *Zakon o Crkvama i verskim zajednicama*, Art. 11.

60 Cf. Petkoff, *Church-State relations under the Bulgarian Denominations Act 2002*, p. 317.

61 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 4.

62 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 18.

themselves, based on their autonomous regulations, who should be considered as members of their clergy,⁶³ which introduces the possibility for the state to act in certain situations as an enforcer of these norms. The state also introduced the rule that a clergy member cannot be tried in a court of law for fulfilling her/his duty, nor can the information gathered during a confession be accepted as a piece of evidence in a court of law.⁶⁴ This is an important privilege from the point of view of Orthodox theology. It is also an interesting form of legal immunity, given the fact that the clergy members are not officials of the state⁶⁵ who usually enjoy this benefit. Clergy members belonging to a religious community in Serbia are entitled to social benefits and insurance financed from the Serbian budget, regardless of their citizenship.⁶⁶ They and their donors may also be exempt from taxes.⁶⁷

During the same year, the state also embarked on partially resolving one major property rights issue – restitution of the property nationalized/confiscated by the communist regime. In this regard, an important exemption was made, favouring Serbian religious communities. The law considering restitution of their property (or adequate compensation)⁶⁸ was passed five years before the general law concerning the same issue.⁶⁹ Whereas it could be said that the former law did place religious communities in a privileged position over most Serbian citizens, it also brought much needed practical experience in dealing with restitution before accepting the challenge of dealing with a much larger number of requests by the ordinary citizens.

One might claim that the designation *traditional* for specific and by far the largest religious communities of the country, also created a pool of organized interest representation, within which the SOC usually (if not almost exclusively) assumes the leading role. It represented the voice of the traditional churches and religious communities within the National Council for Education.⁷⁰ Its bishop Porfirije (Perić) of Jegar (today the SOC's Patriarch) was even elected a chairman of the board of the national Regulatory Authority for Broadcasting (*RRA*, since 2014 *REM*), where he represented the interests of all the traditional religious communities. The same bishop was the first bishop designated for

63 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 7.

64 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 8.

65 Cf. Đurić, *Zakonsko uređivanje*, p. 52 et. seq.

66 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 29.

67 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 30.

68 Cf. *Zakon o vraćanju (restituciji) imovine*.

69 Cf. *Zakon o oduzetoj imovini i obeštećenju*.

70 Cf. Orlović, *Politički život Srbije*, p. 374.

the oversight of the Orthodox army chaplains, a service reintroduced in 2011.⁷¹ Military and police cadets also regularly take part in religious ceremonies, like swimming for the holy cross on the Epiphany day. Another important area of cooperation is the official religious ceremonies, mostly on the local level. These events usually represent a public celebration of the patron saint, or the official religious holiday of the local community, as is the case with the capital city of Belgrade.⁷²

5 Is There a Contemporary Form of “Symphonia” in Serbia?

The relationship between the Church and the Serbian state has not, of course, been labelled as “symphonic” within any specific legal text. One of the earliest such descriptions was uttered by the then Prime Minister (today President), Aleksandar Vučić, during his election campaign.⁷³ Within the law itself, the relationship is described as rather cooperative⁷⁴ – necessary in order to “advance religious freedoms and realize common good and common interests”, which may also require the state or units of local self-government to financially support their religious communities.⁷⁵ Such cooperation was made possible in several areas of public interest. The law introduced the right of religious communities to organize religious education in public schools,⁷⁶ with certain limitations, that aim at avoiding stirring up controversies due to possible negative depictions of other religions in these curricula.

Considering the issues mentioned in the previous part of this contribution, one may be right to ask whether and to what extent these newly established forms of the Church-state cooperation deserve the qualification *symphonic*, and to which extent this new form diverges from its pre-modern blueprint. One should be careful not to use *symphonic* for every cooperative relationship between the Church and state within the Orthodox context. Even if one decides to use this adjective in order to describe the current state of their relationship, one ought not to downplay the fact that in every Orthodox country there is some degree of the Church-state separation and religious freedom enshrined within their legal documents. Therefore, the usage of the term *symphonic*

71 The Serbian Army also issued designated military prayer books for its Orthodox, Roman Catholic and Muslim personnel.

72 Cf. Maksimović/Šljivić, *Prayers and Power*.

73 Cf. B92, „Država i crkva – svojevrsna simfonija“.

74 Cf. Draškić, *Ustav Srbije*.

75 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 28, and Art. 44.

76 Cf. *Zakon o Crkvama i verskim zajednicama*, Art. 40.

needs to be conditioned on strict distinction between its pre-modern ideal and its current manifestations. On the other hand, the application of this term would be justifiable if it served the purpose of distinguishing between the usual forms of cooperative Church-state separation and their Orthodox manifestations that, when going beyond them, tend to exhibit traits reminiscent or analogous to their pre-modern ideals.

The political elites usually tend to avoid engaging in controversies related to religion's role. In the former communist countries, this was often conveniently done through the rulings of the constitutional courts,⁷⁷ instead by the institutions with the direct democratic legitimacy. Where the judiciary was able to preserve the limits of both state's and Church's purviews, a cooperative relationship did not represent a threat to democracy itself. It appears that the cooperative relationship emerges where there is a strong need to balance individual freedoms of the citizens with communitarian and other legitimation policies based on traditional identities.

Religious associations in Serbia, according to the Constitutional Court, should not be treated like any other civic associations, as they have specific traits that are the basis of their distinct legal position. It also discussed whether differentiation between the *traditional* and other religious communities infringed on the principle of equal treatment. The court insisted that the Constitution prescribed equal treatment, but not equality (*ravnopravnost, ne jednakost*). The differentiation was labelled as historical, compatible with the OSCE and the Venice Commission's documents.⁷⁸ Some authors found the explanations offered by the Court neither convincing nor consistent.⁷⁹ The flexibility of the Court, in our opinion, reflected the overall shift of Serbian jurisprudence towards a more favourable view of religion's role.

We believe that the lawmakers intended to keep the Church and state separated, at least in order to comply with the existing international standards in this area – and especially considering the foreign policy goal of joining the EU. There was some evidence, though, that the lawmakers wanted to create a framework that would not go against the needs and feelings of the country's largest religious denomination. The minister who coordinated the procedure stated that the draft was a product of debates between the state, traditional religious communities and representatives of several non-government organizations and human rights groups, including the Venice Commission. According

77 Cf. Richardson, *Religion, Constitutional Courts, and Democracy*, p. 135.

78 Cf. Đurić, *Zakonsko uređivanje*, p. 47.

79 Cf. Draškić, *Ustav Srbije*, p. 39.

to the minister's testimony, the SOC had an important role in finalizing the draft.⁸⁰

Stamatios Gerogiorgkakis described the symphonic relationship within the Eastern Roman Empire as having the following consequences: (1) the roles of the emperor and the Church were strictly separated; (2) the emperors were in charge of regulating the worldly affairs of their subjects, managing only the state apparatus and acting as enforcers of the autonomously accepted Church decisions, when necessary; (3) the Church was expected to govern itself and only work towards the preparation of the believers for the Kingdom of Heaven.⁸¹ The book authored by the former minister Milan Radulović is revealing in this regard already on its outer covers. When translated into English, the title reads *The Restoration of the Serbian Ecclesiastic-State Law* (or jurisprudence). In his view, some of the traits listed by Gerogiorgkakis were present in the pre-1941 Church-state relationship.⁸²

The new law, adopted in 2006, aimed at restoring most of this tradition,⁸³ although within the new normative and political environment. Given Ghodsee's observations on the Bulgarian situation,⁸⁴ it could be said that the Serbian state adopted a similar approach.⁸⁵ Like in Bulgaria, it extended this contemporary iteration of the old symphonic thinking onto all the traditional religious communities within the country. Although the SOC is by far the largest of all, and thus acts as the first among the equals, other traditional religious communities enjoy a similar status and privilege. Eager to maintain the inter-ethnic peace, the state created a symphonia-like relationship not with the SOC alone, but with a pool of traditional religious communities, that also cooperate among themselves in order to maintain and enhance their position.

For the contemporary Orthodox societies, one of the most important legacies of *symphonia* is the notion that the Church serves as the "keeper of the [E]mpire's conscience", meaning that on matters of morality (and more recently, national issues) the political elites are expected to consider the advice of the clergy.⁸⁶ This implies that the Church-state cooperation should only be conditionally present, or as long as there is some kind of communication that enables the Church to express its opinions on the most important issues. In its contemporary iteration, there are policy domains that could be described

80 Cf. Radulović, *Obnova srpskog državno-crkvenog prava*, pp. 18–24.

81 Cf. Gerogiorgkakis, *Symphonie für große Trommeln und kleines Triangel*, p. 177 et seq.

82 Cf. Radulović, *Obnova srpskog državno-crkvenog prava*, p. 79.

83 Cf. Radulović, *Obnova srpskog državno-crkvenog prava*, p. 88 et seq.

84 Cf. Ghodsee, *Symphonic Secularism*.

85 Cf. Šljivić, *Symphonic Democracy*, pp. 148 et seq., 154–161.

86 Cf. Papanikolaou, *The Mystical as Political*, p. 27.

as the *conscience* of contemporary Serbian society. As already mentioned, the Church has its representatives in structures that influence public education, media regulation and the morale of the Army. On the other side of the symphonic bargain, some exceptions notwithstanding, the Church refrains from commenting on issues of daily politics. Patriarch Irinej (2010–2020) was also known for his rather affirmative stance towards the government, whose officials indeed described their relationship with the Church as symphonic.⁸⁷

Another important part of the symphonic bargain is that the state feels obliged to protect the canonical integrity of its Church, with visible foreign policy implications. The canonical jurisdiction of the SOC extends primarily over what used to be Yugoslavia. In North Macedonia, the overwhelming majority of Orthodox adhere to the canonically unrecognized *Macedonian Orthodox Church*. When in the early 2000s the SOC attempted to re-establish its canonical presence, both North Macedonia and Serbia felt obliged to protect the interests of their hierarchies. When the SOC's Archbishop of the autonomous Orthodox Archbishopric of Ohrid Jovan Vranishkoski was sentenced to prison on controversial charges in North Macedonia, Serbia responded by introducing sanctions towards its southern neighbour.⁸⁸ Serbia registered only the Romanian Orthodox Church's branch that operates under a canonical agreement with the SOC and declined to register other branches for which no previous agreement with the SOC was reached. Another uncanonical organization, the *Montenegrin Orthodox Church*,⁸⁹ was denied registration with similar explanation. The SOC's clergy in Kosovo is also partly funded by the state, as this area of its canonical jurisdiction is considered particularly politically sensitive. Another situation that could have had foreign policy implications was the controversial *Law on freedom of religion and convictions* in Montenegro, that foresaw a *de facto* confiscation of the most important SOC's shrines. The SOC played an active role in ousting Milo Đukanović from power and the initialisation of the first democratic transition in Montenegrin history. This possibly prevented the complete collapse of diplomatic relations between Montenegro and Serbia.⁹⁰

87 Cf. footnote 64.

88 Cf. Šljivić/Živković, *Self-Ruled and Self-Consecrated*, p. 18.

89 From the perspective of canonical Orthodoxy, this is one of the most controversial organizations that uses the term *Orthodox Church* in its name. Cf. Šljivić/Živković, *Self-Ruled and Self-Consecrated*, pp. 19–27.

90 Montenegro recently expelled the Serbian ambassador and Serbia almost responded in kind.

Within the contemporary legal praxis in Serbia, there were situations, although rare, in which court decisions targeted those who insulted the dignity of the Orthodox hierarchs. There are no blasphemy laws, and any similar issue can only be addressed through private lawsuits. In 2009, one NGO activist from Serbia had to serve a prison sentence, after refusing to pay the indemnities ordered by the court for insulting four Serbian bishops. He referred to them as “the four riders of the Apocalypse”. The judge decided that this represented not an insult to the bishops alone, but to all the Orthodox believers, himself included. The public reaction was rather telling, as there were only small protests targeting this decision, with somewhat visible outcries in the media, but to no avail.⁹¹

Another interesting issue is whether religious revival and (re)establishing a closer relationship between Church and state had effects beyond the issues immediately concerning national identity. If religious revival took deeper roots, one might assume that a rising interest for religious doctrines would manifest itself in greater familiarity with the basic concepts of Orthodox canonical jurisprudence, at least among legal professionals.

We intended to conduct a survey among Serbian judges in order to establish whether there was an impact of the Orthodox principle of *oikonomia* in the way contemporary Serbian jurisprudence operates. Due to the outbreak of the COVID-19 pandemic, our initial research design had to be abandoned. However, based on our preliminary interviews with a rather small number of Serbian judges, we remained sceptical regarding the existence of such a spill-over effect. Whereas there are decision-making processes that involve considering the well-being of the affected – and thus bear some semblance to that of the *oikonomia* – we have not found any indication that our initial respondents were consciously applying any principle other than the reasoning that is a result of secular legal training alone. Serbian judges are bound to the strict adherence to the letter of the law – even in cases when the strict adherence to its letter may incur disproportionate damages to one of the parties involved. As stated in one recent verdict by the First Basic Court in Belgrade, “[...] it is not prescribed by the relevant norms, that the court, while deciding on the costs incurred, is authorised to consider the reasons of proportion, purposefulness, justice, and equity”.⁹² The realms of spiritual authority and secular power of the state remained separated in this regard.

91 *Radio Slobodna Evropa. Protest podrške Petakovu.*

92 Verdict no. P 21458/19 of the First Basic Court in Belgrade.

6 Conclusions: Limited Impact of Orthodoxy on the Contemporary Legal Situation in Serbia

Our findings correspond to another, at first glance, unrelated phenomenon. Whereas in the West the contemporary religious situation may be described as *believing*, without *belonging*, in Eastern Europe it appears that the exact opposite is the case.⁹³ The principle of *symphonia* corresponds more to the *belonging* part of this formula, whereas *oikonimia* can be applied by an individual that is strongly anchored in Orthodoxy and its teachings, either as a believer or as a part of her/his training. Due to historical reasons, this is rarely the case, as only generations that were educated after 2001 experienced a broader and a more systematic encounter with the basics of the Orthodox theology, let alone more advanced principles of its judicial reasoning.

We believe that at the level of collective identity (*belonging*) the key actors have more interest in building upon those foundations that link the nation to its origins in the past. However, more than a century of modernisation attempts did not prioritise cultivation of more sophisticated pieces of Orthodox thinking in Serbian society. The principle of *oikonomia* could not be easily reconciled with the demand for legal security, which is why it was never incorporated into the curricula designated for the future generations of Serbian practitioners of law. After the moral-spiritual bond between the Church and state was cut, the secular legal system could be autonomously legitimised based on the modern foundations alone. The only situation in which *oikonomia* may find its application is the one envisioned by the Serbian Law on Churches and Religious Communities, and only when implementing autonomous decisions of the SOC considering its clergy or other representatives.

Those traits of the contemporary Church-state relationship that might be regarded as reminiscent of the Orthodox *symphonia* ideal have a modern phenomenon of national identity (and national interests) as the meeting point of the two. In effect, the imperatives of the modern bureaucratic state have kept their precedence over Orthodox ideals.

Biography

Dragan Šljivić is a former PhD student of the University of Erfurt. He successfully defended a PhD thesis considering the impact of the Orthodox Church

93 Cf. Rumänische Kultur, Orthodoxy und der Westen, pp. 13–16.

and its political theology on embedding of democracy in Bulgaria and Serbia between 2007 and 2012.

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