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Chapter VIII

Religious rights in Croatia: legal regulation of culturalism¹

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“Everything goes with everything else”³

Attempts of the left-liberal Government of Croatia installed in 2011 to introduce health education relaxing conventional sexual morality and advancing gender mainstreaming, and to legalize the same-sex marriage, has prompted problems of this inquiry. The solution consists of two parts.

The first part (1) is the framework of the inquiry, which (1.1) outlines problems in detail, (1.2) adopts a theoretical approach, (1.2.1) defines theoretical constructs, (1.2.2) construes basic concepts, (1.2.3) postulates explicit values, and (1.3) formulates hypotheses of the inquiry.

The second part (2) is the policy analysis proper. It performs the following tasks: (2.1) The identification of the constitutional principles, or *jus cogens*, that are in accord with postulated values and serviceable as the ground for the appraisal of the decisions in the next section. (2.2) A description of the Croatian left liberal legal decisions on human reproduction and an appraisal of the decisions as tending towards, against or past the constitutional principles or *jus cogens*. (2.3) The identification of conditions of the decisions, which consists of two steps: (2.3.1) the ascription of the Croatian left liberal decisions on human reproduction to left

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¹ All the translations of Croatian titles (between slashes) in the footnotes are provided by the author.

² © 1930–, actor and theatre director.

³ A reply to the question „Is there anything you have learned between your 40th and 50th birthday?” in the interview to the women’s magazine “Svijet” in 1980. The reply included the explanatory remark “One can be a rotten scoundrel *potpuni šuft* and a great conductor”.

liberalism as (A) a culture, (B) a worldview, termed culturalism, and (C) a religion; (2.3.2) explanation of the action-guiding reasons to which the Croatian left liberal decisions on human reproduction are ascribed by left liberalism as ideology. (2.4) A forecast and appraisal of future decisions. (2.5) A proposal of alternative decisions that are more in conformity with the constitutional principles or *jus cogens*.

The context of the problems is the conflict between Croatian left liberalism and Croatian ethnic traditionalism, which may be seen as an instance of a much wider Western development. The wider conflict was described a quarter of a century ago as the Culture Wars between the right-wing, orthodoxy or conservatism, on the one side, and left-wing, liberalism or progressivism, on the other.⁴ For reasons *infra* at 2.3.1, the Croatian left liberal decisions on human reproduction will be ascribed to the worldview termed culturalism as a set of beliefs and demands with religious functions that is a part of, or closely related to, left liberalism. Hence the title of this paper.

The motto of the paper, “Everything goes with everything else”, is a reminder that the unity of the beautiful, the true and the good may not be possible even within a theatre but only at the frieze of the Frankfurt Alte Oper; that is, on the building whose owners have converted it, in a self-ironic twist proportional to the pomposity of the idea of such a unity, into a multipurpose entertainment hall. The motto is used *ex abundandi cautela* as a *caveat* that Croatian left liberalism, culturalism, religion, ideology, and other basic concepts about society used in this paper are merely ideal types (see *infra* at 1.2.1.BA). The emphatic warning should remind the reader that, within the framework of this inquiry at least, a person who holds some of the views categorized in the paper as left liberal or culturalist does not necessarily hold all the views categorized that way; furthermore, that she can hold, and in fact often does hold, also very different views, including some categorized as ethnic traditionalist, conservative or orthodox, which are according to the paper diametrically opposed to left liberal and distant from both plain left and plain liberal views. But the motto is also a reminder that not only concepts, or at least basic concepts, of social sciences but also everyday concepts, all or at least some, are ideal types. This is to say that social world is possible only if its participants share, and to the extent they share, the assumption that although, as the motto points out incisively, everything *goes* with everything else, it is not the case that everything *agrees* with everything else. Not to put a too fine a point on it, the social world is possible precisely for the reason that its participants take seriously inferences about human action and interaction according to the pattern underlying the saying *Qui bene bibit, venit in caelum*.⁵

⁴ James Davison Hunter, *Culture Wars: the Struggle to Define America — Making Sense of the Battles over the Family, Art, Education, Law, and Politics*, Basic Books, New York 1991.

⁵ Qui bene bibit, bene dormit. Qui bene dormit, cogitat non malum. Qui cogitat non malum, non peccat. Qui non peccat, venit in caelum. Igitur: qui bene bibit, venit in caelum = He sleeps well who goodly drinks. Who sleeps thus well no evil thinks. Who thinks no evil never sins. Who sins

1. Framework

1.1. Problems

The problem of the paper is both legal and jurisprudential. The legal problem is that Croatia has been torn, for the past quarter century, by conflicts that were in 1990s identified and regulated as ethnic and in the 2000s recognized as moral. The jurisprudential problem is that Croatian legal scholarship has not even noticed religious features of the conflicts let alone proposed how to regulate them as religious by law.

The ethnic conflicts that raged in Croatia in the 1990s and persist as subtler but differentiated tensions today should be of interest at least to countries with a predominantly Catholic population and an inclination towards clericalism. The inclination has been described by the late Joseph Tischner (March 12, 1931–June 28, 2000) as the attitude — widespread among Catholics still after the II Vatican Council — that the unity of the Church and the State is comparable to eating meat on Friday, that is, a venial sin.⁶ A related inclination in Croatia in the 1990s was diagnosed as a fascist (more accurately: nazi) tendency, which was fostered by Croatian communists reorganized as ethnic nationalists with the aid of their former snitches, chiefly under the name of the Croatian Democratic Union and with the backing of a bulk of Croatian Catholics.⁷ As other ethnic nationalisms the Croatian variant has properties of a religion.⁸ The nazi tendency, whose mellowing into ethnic traditionalism was balanced by top-to-bottom corruption in the late 2000s,⁹ may well be on a comeback.¹⁰

not, salvation wins. Therefore: He who drinks so well, surely shall be saved from Hell. Translation according to <http://firedirectioncenter.blogspot.com/2008/07/tgif.html> (access: 06.08.2010).

⁶ “The International Conference on ‘Christianity and Democracy’” (sponsored by Fundacja im. Stefana Batorego; Warsaw: Palace of Culture and Science, Warsaw Hall, 26–27 June 1993).

⁷ Ivan Padjen, *Approaching Aliens: A Plea for Jurisprudential Recovery as a Theoretical Introduction into (Ex) Socialist Legal Systems*, “Dalhousie Law Journal” 1991, Vol. 14, No. 1, p. 23–64, esp. 40–45; Ivan Padjen, Miomir Matulović, *Cleansing the Law of Theory: A View from Croatia (Editorial)*, “Croatian Critical Law Review” 1996, Vol. 1, No. 1–2, p. 1–122, esp. 53–74; Ivan Padjen, *Vjera u narod bez vlasti i vlasništva: Crkvena šutnja 1961.–1971. i glasnost 1990.–[The Faith in ‘Narod’ without Power and Property: Ecclesiastical Silence in 1961–1971, and ‘Glasnost’ in the 1990s]*, “Politička misao/Croatian Political Science Review” 2012, Vol. 49, No 4, p. 175–211.

⁸ Ivan Padjen, *Nacionalizam kao religija [Nationalism as a Religion]*, “Feral Tribune”, god. 23, br. 1067 (3.03. 2006).

⁹ E.g. the prime minister, a deputy prime minister and at least two ministers of the late 2000s have been tried and/or sentenced on charges of corruption.

¹⁰ Deputy chairman of the Croatian Democratic Union resigned both the party office and party membership on 27 February 2015, explaining that the party’s political orientation had become extreme right while the party’s organization had been based on military and police obedience.

This paper is concerned with the main adversary of Croatian ethnic traditionalism, as manifested by the legal decisions on human reproduction that have been proposed and/or adopted by the Government of Croatia in 2011–13. Human reproduction is used here to designate biological, cultural and social (other than market economic) dimensions of the reproduction of humans. The decisions have concerned directly health education relaxing conventional sexual morality and advancing gender mainstreaming, and legalization of the same-sex marriage, but impinged also on gender identification, sexual mores, human procreation and child rearing. The major coalition parties that form the incumbent government¹¹ have been established also (as well as virtually all the other Croatian parliamentary parties today) by former officials and rank and file of the Croatian League of Communists.¹² Since the names of the major coalition parties are The Social Democratic Party of Croatia and The Croatian People's Party — Liberal Democrats, their decisions on human reproduction are by the names of their authors left liberal. Arguably a significant number of both supporters and opponents of the Coalition Government would agree that the Coalition program,¹³ which has been used to justify the decisions, is left liberal by its content.

1.2. Theory

The inquiry is formulated in terms of the policy analysis developed initially by Harold D. Lasswell and Myres S. McDougal¹⁴ and adjusted¹⁵ to integral theory of law and critical legal scholarship. Integral theory of law, which is a stream of

Drago Prgomet in „Nedjeljom u dva”, HTV1 (1 Mar 2015, 2:00–3:00 PM), <http://www.hrt.hr/enz/nedjeljom-u-2/> (seen: 1.03.2015, 11:00 PM).

¹¹ See the official website of the Government of the Republic of Croatia in English, <https://vlada.gov.hr/en>.

¹² See e.g. Paula. M. Pickering, Mark Baskin, *What is to Be Done? Succession from the League of Communists of Croatia*, “Communist and Postcommunist Studies” 2008, Vol. 41, p. 521–540.

¹³ Kukuriku koalicija, Plan 21, <http://www.kukuriku.org/plan21/ukratko/uvod/> (read: 2.03.2015).

¹⁴ Harold D. Lasswell, Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy*, New Haven Press, New Haven, CT 1992, esp. Ch. 1: *Criteria for A Theory About Law*, p. 3–38.

¹⁵ Esp. Ivan Padjen, *Law and Religion in Post-Modernity: Dilemmas Prompted by the Croatian Catholic University*, in: Miroslav Polzer et al. (eds.), *Religion and European Integration: Religion as a Factor of Stability and Development in South Eastern Europe*, The European Academy of Sciences and Arts — Edition Weimar, Weimar 2007, p. 377–398; Goranka Lalić Novak, Ivan Padjen, *Europeanisation of Asylum: From Sovereignty via Harmony to Unity*, “Politička misao/Croatian Political Science Review” 2009, Vol. 46, No. 5, p. 75–101; Ivan Padjen, *Catholic Theology in Croatian Universities: Between the Constitution and the Treaty; A Policy Oriented Inquiry*, in: Budislav Vukas, Trpimir Šošić (eds.), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Božidar Bakotic*, Nijhoff, Leiden 2010, p. 13–40; *idem*, *Metodologija pravne znanosti: pravo i susjedne discipline [Methodology of Legal Science: Law and Neighbouring Disciplines]*, Pravni fakultet Sveučilišta u Rijeci, in print 2015, see: Ch. 2.5.3: *Istraživanja de lege*

conventional European legal scholarship, conceptualizes law as a unity of, on the one hand, positive and extrapositive legal standards and, on the other, social action.¹⁶ Critical legal scholarship inquires into presuppositions of law, assuming *inter alia* that lawyers are a part of legal problems as well as of legal solutions.¹⁷

1.2.1. Constructs

(A) Neither philosophical nor scientific approaches can provide commonly acceptable concepts or explanations of culture, worldview, ideology or religion. While all scientific theories — including theories of natural sciences — are underdetermined by facts and value laden,¹⁸ theories and even concepts of social sciences and humanities, at least the basic ones, such as revolution and tragedy, are contestable, that is, loosely linked to facts and inherently evaluative. Culture, worldview, ideology and religion are essentially contested concepts in that disputes about their content “cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone”.¹⁹ Suffice it to note here that culture, which is the most inclusive of the key concepts of this inquiry, is not an independent entry in the most comprehensive encyclopedia of the history of philosophical concepts ever produced. In the encyclopedia culture shares the same entry with philosophy of culture,²⁰ thus admitting that culture is a scholarly construct which exists, like beauty, in the eyes of the beholder, rather than as an entity out in the world.

(B) A basic concept or proposition of a social science can be cognitively useful only if it is recognized or even construed as an ideal-type, that is, a heuristic device to recognize and learn (understand, interpret, describe, explain, ‘measure’, etc.) data about human interaction (conditions, participants, actions, means, esp. symbolic, results, etc.). An ideal-type is cognitively fecund, because it is inevitably informed empirically, but does not have a truth value. In that the ideal-type differs

ferenda: *upotreba Lasswelove i McDougalove političkopravne analize* [Research de lege ferenda: the Use of Lasswell and McDougal's Policy Analysis], p. 165–178.

¹⁶ Introduced into Croatian legal theory by Nikola Visković, *Pojam prava: prilog integralnoj teoriji prava* [The Concept of Law: A Contribution to Integral Theory of Law] (1976), 2nd ed., Logos, Split 1981, which lists, at 33–356, as the major integral conceptions of law the ones developed by Savigny, Hauriou, Stammler, Del Vecchio, Gurvitch, Lask, Mayer, Radbruch, Westermann, Wiaecker, Fechner, Coing, Siches, Reale, Cossio, Pashukanis and Cerroni.

¹⁷ See Ivan Padjen, Miomir Matulović, *op. cit.*, esp. at p. 110–111.

¹⁸ Mary Hesse, *Theory and Value in the Social Science*, in: Christopher Hookway, Philip Pettit (eds.), *Action and Interpretation: Studies in the Philosophy of the Social Sciences*, Cambridge University Press, Cambridge 1978, p. 1–16, esp. at p. 1–2.

¹⁹ In the sense of John Nicolas Gray, *On the Contestability of Social and Political Concepts*, “Political Theory” 1977, Vol. 5, No. 3, p. 331–348, cit. at p. 344; relying on Walter Bryce Gallie, *Essentially Contested Concepts*, “Proceedings of the Aristotelian Society” 1956, Vol. 56, p. 167–198, which identified religion as such a concept.

²⁰ *Kultur, Kulturphilosophie*, in: *Historisches Woerterbuch der Philosophie*, Bd. 4, I–K, Schwabe & Co, Basel 1975, p. 1309–1324.

from a model, a concept used in natural sciences, which is construed to represent facts.²¹ Concepts and propositions about human interaction developed and used in everyday communication are also ideal types but different from ideal types of social sciences.²²

(BA) The concepts of culture, worldview, ideology and religion *infra* at 1.2.2 are construed as ideal-types. The concept of religion, which is a principal tool of this inquiry, is construed at some length.

(BB) The explanations of the Croatian left liberal decisions on human reproduction by conditions *infra* at 2.3 are ideal types of development.²³

The first ideal type is developmental in a weak sense. It is the ascription of an action, including a decision or a reason, to an action-guiding reason why the action is justified (instrumentally and/or practically, esp. ethically) and hence probable. An action-guiding reason could be simple, such as a value or a rule, or complex, such as an institution or a legal system. The first ideal type is used in this paper to ascribe the Croatian left liberal decisions on human reproduction to action-guiding reasons that pertain to left liberalism as a culture, a worldview and a religion.

The second ideal type is developmental in a strong sense. It is the explanation of an action, including a decision or a reason, by an interest, that is, expected advantage, that renders the action probable. This ideal type describes a causal sequence by stating “what only approximately or partly happens in a number of cases, and, therefore, cannot be given the status of a causal law of nature”.²⁴ The second ideal type in this paper is used to explain by left liberalism as ideology the action-guiding reasons to which the Croatian left liberal decisions on human reproduction are ascribed.

1.2.2. Concepts

(A) *Culture* is human communication. It includes symbolic communication (verbal, musical, gestural etc.) and non-symbolic actions (e.g. ways of courting the opposite sex or of hewing wood etc.) into which symbolic communication

²¹ Max Weber, 'Objektivitaet' sozialwissenschaftlicher und soziopolitischer Erkenntnis, in: *idem, Gesammelte Aufsätze zur Wissenschaftslehre*, 3. Aufl., Mohr, Tübingen 1968, p. 146–214. See Barbara Saegesser, *Der Idealtypus Max Webers und der Naturwissenschaftliche Modellbegriff: Ein begriffskritischer Versuch*, Birkhaeuser, Basel 1975, esp. p. 159–172.

²² See Alfred Schutz, *On Phenomenology and Social Relations*, ed. by H.R. Wagner, University of Chicago Press, Chicago, IL 1970, esp. Chapter 5: *Selective Attention: Relevances and Typification*, p. 118–122, extracted *inter alia* from *idem, The Well Informed Citizen: An Essay on the Social Distribution of Knowledge*, 1946, Vol. 13, No. 4, p. 463–467; T.D. Wilson, *Alfred Schutz, Phenomenology and Research Methodology for Information Behaviour Research*, <http://www.informationr.net/tdw/publ/papers/schutz02.html> (read: 10.03..2015).

²³ Max Weber, 'Objektivitaet'..., p. 203–204.

²⁴ Thomas Burger, *Max Weber's Theory of Concept Formation: History, Laws, and Ideal Types*, 2nd ed., Duke University Press, Durham, NC 1976, at p. 133.

is woven. Culture is constituting as well as constituted by a human community, which is free or appears to its participants to be free from either natural or social necessity. The definition just stated is broad enough to include, first, a non-utilitarian pursuit of values embodied in such activities as arts, which are the most commonly considered ingredient of high culture (in charge of special government ministries), and religions;²⁵ secondly, human activities to subdue nature, such as agriculture and horticulture;²⁶ and, thirdly, ideologies (see *infra* at C).

(B) *Worldview* consists of beliefs and demands. They can be abstracted from a culture. But a worldview can be held also by an individual or a small group independently of a culture. Worldview is structurally and functionally similar to philosophy, religion (see *infra* at D) and ideology (see *infra* at E).

(C) *Ideology* (in a narrow sense) is an account, which is partly distorted by dominant economic and political interests, of the functioning and legitimacy of (modern) society. Like a traditional culture, which unifies members of a community, ideology is widely accepted although it both reflects and serves interests of the proprietary socio-economic class. A mode of capitalism, such as industrial or financial capitalism, and/or a particular ruling class (e.g. industrial capitalists, financial capitalists, business managers, members of professions, civil servants, military officers, etc.) can have its own ideology, which differs partly from ideologies of other modes of capitalism and/or other ruling classes. For those reasons it is possible that a mode of capitalism has several ideologies developed by different classes and even social strata — most notably intellectuals — which are not proprietors of the means of production and are even critical of aspects of capitalism. For the same reasons a modern culture, a worldview and a religion can be and often is ideological.²⁷ The concept of ideology in a wider sense includes

²⁵ Eugene Halton, *The Cultic Roots of Culture*, in: Richard Muench, Neil. J. Smelser (eds.), *Theory of Culture*, University of California Press, Berkeley, CA 1992, p. 29–63.

²⁶ See *Culture*, in: Andrew Edgar, Peter Sedgwick (eds.), *Cultural Theory; The Key Concepts*, Routledge, London 1999, p. 101–103.

²⁷ See esp.: Karl Marx, Friedrich Engels, *Deutsche Ideologie*, in: *idem*, *Werke*, Bd. 3, Dietz, Berlin Ost 1962, http://www.mlwerke.de/me/me3/me3_000.htm; Karl Marx, *Das Kapital*, 1. Kap., 4. Absch.: *Der Fetischcharakter der Ware und sein Geheimnis*, in: Karl Marx, Friedrich Engels, *Werke*, Bd. 23, Dietz, Berlin Ost 1962, http://www.mlwerke.de/me/me23/me23_000.htm. See also: Martin Seliger, *The Marxist Conception of Ideology*, Cambridge University Press, Cambridge 1977; a critical exposition: Kurt Lenk (Hrsg.), *Ideologie, Ideologiekritik und Wissensoziologie*, 7. Aufl., Luchterhand, Darmstadt 1976, a selection of writings on ideology and related problems; Jeffrey Alexander, *The Promies of a Cultural Sociology: Technological Discourse and the Sacred and Profane Information Machine*, in: Richard Muench, Neil. J. Smelser (eds.), *op. cit.*, p. 293–323, on the ideological and religious role of technology; Jakov Jukić (Željko Mardešić), *Ideologija i religija [Ideology and Religion]*, in: *idem*, *Lica i maske svetoga: ogledi iz društvene religiozije [Faces and Masks of the Sacred: Essays on Social Religiology]*, Kršćanska sadašnjost, Zagreb 1995, p. 67–178, views of the leading Catholic religiologist in Croatia in the late XXth century on the relevance of Marxist analysis of ideological functions of religion to Christians.

also the ideology or ideologies of dominated classes, such as the proletariat or, in the contemporary world, of the hired labor. The concept of ideology is used in this inquiry in its narrow sense.

(D) A concept of *religion* is developed in the following eleven theses, which are — however — not meant to be revolutionary.²⁸

(DA) In contemporary societies, in addition to conventional religions such as Christianity or Islam or Buddhism, there are many other sets of beliefs and practices that have been labelled religions: enlightenment,²⁹ Marxism,³⁰ scientific nationalism,³¹ statism,³² sovereignty,³³ nation,³⁴ sports,³⁵ money,³⁶ spending,³⁷ Google,³⁸ even capitalism as such³⁹ and work as oblivion of death.⁴⁰

(DB) An additional reason why there is no reliable definition of religion is the paradox of religious rights: contemporary societies, which are allegedly secularized, at a closer look are swarmed by religions; however, what counts as

²⁸ Relying on Ivan Padjen, *Legal Nature of Religion*, in: *Convictions philosophiques et religieuses et droits positifs*, Bruylant, Bruxelles 2010, p. 480–481.

²⁹ Comp.: Paul Hazard, *The European Mind, 1680–1715*, trans. by J. Lewis May, A Meridian Book, New York 1963, Ch. VI: *Science and Progress*, p. 304–318; Carl L. Becker, *The Heavenly City of the Eighteenth-Century Philosophers* (1932), Yale University Press, New Haven, CT 1966, at p. 123 f.

³⁰ Carl L. Becker, *op. cit.*, at p. 161 f.

³¹ Steve Fuller, *Science*, University of Minnesota Press, Minneapolis, MI 1997, Ch. 4: *Science and Superstition*, p. 40–79.

³² E.g. Hans Kelsen, *Gott und Staat*, “Logos: Internationale Zeitschrift fuer Philosophie der Kultur” 1922–23, Bd. XI, H. 3, p. 261–284; repr. in *idem*, *Aufsätze zur Ideologiekritik*, Luchterhand, Neuwid a. R. 1964, p. 29–55.

³³ E.g. Jacques Maritain, *Man and the State*, University of Chicago Press, Chicago, IL 1951, Ch. 2: *The Concept of Sovereignty*, p. 28–53.

³⁴ E.g.: Cruise O’Brian, *GodLand: Reflections on Religion and Nationalism*, Harvard University Press, Cambridge, MA 1988; John E. Smith, *Quasi-Religions: Humanism, Marxism and Nationalism*, Macmillan, Houndmill 1994.

³⁵ E.g. baseball as an American civic religion, according to Brian Reich, *Gospel on the Mound: Our National Pastime and the Culture of Religion*, <http://www.stadiummouse/religion/ReligionandSports.pdf> (read: 12.08.2009).

³⁶ William Greider, *Secrets of the Temple: How the Federal Reserve Runs the Country*, Simon and Schuster, New York 1988, at p. 52–54, 231–240, 420–423.

³⁷ Adams McCrea, *Advertising Characters: the Pantheon of Consumerism*, in: Sonia Maasik, Jack Solomon (eds.), *Signs of Life in the USA: Readings on Popular Culture for Writers*, Bedford Books, Boston, MA 1997, p. 359–368.

³⁸ http://www.thechurchofgoogle.org/Scripture/Proof_Google_Is-God.html (read: 12.08.2009).

³⁹ Željko Tanjić, *Kapitalizam kao religija: izazov za kršćanstvo (I. dio)* [*Capitalism as A Religion: A Challenge to Christianity (1st part)*], “Glas Koncila”, god. 43, br. 12/1552 (21.03.2004), http://www.glas-koncila.hr/rubrike_teoloski.html?broj_ID=781 (read: 12.12.2013); *idem*, *Kapitalizam kao religija: izazov za kršćanstvo (II. dio)* [*Capitalism as A Religion: A Challenge to Christianity (2nd part)*], “Glas Koncila”, god. 43, br. 13/1553 (28.03.2004), http://www.glas-koncila.hr/rubrike_teoloski.html?broj_ID=823 (read: 12.12.2013).

⁴⁰ Alain De Botton, *The Pleasures and Sorrows of Work*, Pantheon, New York 2009.

a religion is determined conventionally, the most important convention being law. Legal definition of religion has four salient features. Firstly, in post-modern societies law is to a great extent determined by human rights, which empower every single individual to declare at will whether she or he has a religion and what the content of their religion is.⁴¹ By the same token, secondly, a social group that cultivates a set of beliefs and practices similar to conventional religions is empowered to declare that their beliefs and practices are not a religion. Thirdly, national, transnational and international legal acts tend to provide protection to personal conscience and philosophical conviction that is equal to protection they provide to religion.⁴² Fourthly, Western legal orders, which are today virtually by default liberal, sanction religions, conviction and conscience positively only, that is, by recognizing their identity and privileging them, but not negatively, by persecuting them because they are what they are or profess to be. Liberal orders sanction negatively, or appear to sanction negatively, only certain actions, such as hate speech, irrespective of whether the actions are performed by a religious community or a person of a certain conviction.

(DC) The view that in contemporary societies religion is what is legally recognized as religion does not ignore the feature that is widely held to be the definiens of religion, namely, sanctity.⁴³ The idea of order, which is the fundamental idea of philosophy of law,⁴⁴ is intimately related to or even identical with the idea of the holy.

(DD) Since there is no reliable answer to the question “What is religion?”, theories of secularization, which claim that in modern society religion is disappearing,⁴⁵ may be based on a misconception of their subject-matter. Arguably

⁴¹ *Syndicat Northcrest v. Amselem* (2004), S.C.R. 551.

⁴² Čl. 40. Ustava Republike Hrvatske [Art. 40 of the Constitution of the Republic of Croatia], “Narodne novine”, 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14; Art. 4 des Grundgesetz fuer die Bundesrepublik Deutschlands [Art. 4 of the Basic Law of the Federal Republic of Germany], (23 Mai 1945; Zuletzt geaendert durch Art. 1 G v. 23. Dezember 2014. / 2438); Art. 18 of the Universal Declaration of Human Rights, UNGA Res 217 A (III) of 10 December 1948, UN Doc A/810, at 71 (1948); Art. 18 of the International Covenant on Civil and Political Rights, UNGA Res. 2200 (A), of 16 December 1966, UN Doc. A/6316 (1966), entered into force 23 Mar 1976.

⁴³ E.g.: Émile Durkheim, *Les Formes élémentaires de la vie religieuse et le système totemique en Australie* (1912), 5ème éd., Les Presses universitaires de France, Paris 1968, Livre III, Ch. 5., sect. 1, p. 387–392, http://classiques.uqac.ca/classiques/Durkheim_emile/formes_vie_religieuse/formes_elementaires.pdf; Rudolf Otto, *Das Heilige: Ueber das Irrationale in der Idee des Goettlichen und sein Verhaeltnis zum Rationalen* (1917), 4. Aufl., Trewendt & Granier, Breslau 1920, https://archive.org/details/RudolfOtto_dasHeilige (read: 1.12.2012).

⁴⁴ Grzegorz Leopold Seidler, *Die Grundidee der Rechtsphilosophie*, “Archiv fuer Rechts- und Sozialphilosophie” 1978, Bd. 64, No. 2, p. 145–161.

⁴⁵ Kevin Schultz, *Secularization: A Bibliographic Essay*, “Bibliographic Review”, <http://www.iasc-culture.org/THR/archives/AfterSecularization/8.12RBibliography.pdf> (read: 1.12.2012).

they misinterpret disappearance or weakening of manifest Christianity as a full-fledged secularization.

(DE) The claim of theories of secularization that religion is a negative condition of social development is a prejudice. It fails *inter alia* to take into account Parson's dismissal of the so-called Hobbesian problem. According to Parsons, if most people in most situations follow hypothetical imperatives, as assumed by the Hobbesian problem, social order cannot be created.⁴⁶ Hence religions that command people to act altruistically are conditions of social order and for that reason also of social development.

(DF) Unlike the claim that religion is only a negative condition of social development, criticism of religion as a false consciousness, or ideology, is in many respects valid. The criticism is paralleled by a distinction, which has been made by protestant theologians and assimilated by the Catholic Church, between faith, as a surrender to God's mercy, and religion, as a human fabrication of the sacred.⁴⁷

(DG) Precisely the fact that conventional religions have diverse effects regulated by law requires a jurisprudential concept of religion. The reason why the concept is needed is not to label something as a religion. As noted *supra* at DB, such a label might be protested as a violation of rights. At the same time, the label is not legally required since liberal laws regulate conscience and conviction as if they were religions. A concept of religion is needed for at least the following reasons. First to learn consequences of the legal recognition of a set of beliefs and/or practices as a religion, especially in education and media, against the will of those who hold the beliefs and/or engage in the practices. Secondly, to explore *pace* liberalism the feasibility of preventing, by means used in legal regulation of religion, negative consequences that may be inherent to a set of beliefs and/or practices with salient features of a religion. Thirdly, to prepare a tradeoff between rights of legally recognized and legally non-recognized religions. Fourthly, to probe into limits of legal regulation of religion.

(DH) Emil Durkheim's concept of religion is most fecund for a policy analysis of religious rights in Croatia. Although Durkheim has not left a succinct definition of religion, the gist of his views of the matter is encapsulated in the following two statements: Religion is "Before all, [...] a system of ideas with which the individuals represent to themselves the society of which they are members, and the obscure but intimate relations which they have with it",⁴⁸ "Religion holds within it, from the very beginning, but in a muddled sort of way, all the elements

⁴⁶ V. esp. Talcott Parsons, *The Structure of Social Action*, The Free Press, New York 1968, at p. 89 ff. See also Richard Muench, *Theorie des Handelns: Zur Rekonstruktion der Beitrage von Talcott Parsons, Emile Durkheim und Max Weber*, Suhrkamp, Frankfurt am Main 1982, at p. 31 ff.

⁴⁷ See: Rosino Gibellini, *La teologia del XX secolo*, 3a ed., Editrice Queriniana, Brescia 1996, Croatian tr.: *idem*, *Teologija dvadesetog stoljeća*, Kršćanska sadašnjost, Zagreb 1999, at p. 16–18; Jakov Jukić, *Lica i maske svetoga...*, p. 26–30.

⁴⁸ Émile Durkheim, *op. cit.*, Livre II, Ch. VII, sect. IV, at p. 219; English trans.: *idem*, *Elementary Forms of Religious Life* (1915), 5th impr., Unwin & Allen, London 1964, at p. 225.

that have given rise to the various manifestations or collective life.⁴⁹ Durkheim's concept of religion is deemed fruitful here for the following reasons:

- it is conventional. It is applicable to beliefs and practices commonly held as religions, such as Christianity or Buddhism;

- it is comprehensive. It includes theistic religions, such as Judaism, Christianity and Islam, and atheistic religions, such as Buddhism, Jainism and Brahmanism;⁵⁰

- it is contextual. It links religion to virtually all the other aspects of society, that is, to arts, morality, law, philosophy and science, with a possible exception of economy.⁵¹ Thus there is no difference in principle between religion and science, since, on the one hand, fundamental notions of science are of a religious origin⁵² and, on the other, science is becoming a religion;⁵³

- it is developmental. While in primitive societies religions are syncretic, that is, encompassing all aspects of social life, in more developed societies religions tend to become distinct from arts, morality, science etc.

(DI) Durkheim's concept as amended by Charles Taylor is even more fecund. Taylor construes three ideal-types of the triangular relationship between the individual, her religion and her polity. In the paleo-Durkheimian relationship there is a union of church and polity with a membership in the church that is compulsory for all the political subjects other than few foreigners and heretics. In the neo-Durkheimian relationship a political subject has a choice of belonging or not belonging to one or none of several churches but belongs, whether she likes it or not, to the polity that has a providential role to play. The expressive individualism is, according to Taylor, quite un-Durkheimian, in that both religious and political choices are not only free but also strictly personal, so that at the end of the day an individual is likely not to belong to either a church or a polity.⁵⁴

(DJ) The addition of this paper to Taylor's typology is that expressive individualism by weakening impersonal links between the individual, on the one hand, and both the church and the polity, on the other, strengthens inadvertently personal links between the individual and her fellow individuals. Since the impersonal links tend to be political, personal links turn out to be not only moral but moral claims to enforce morality by law.

⁴⁹ *Ibidem*, *Prefaces to L'Année sociologique*, in: Yash Nandan (ed.), *Émil Durkheim: Contributions to L'Année sociologique*, Free Press, New York 1980, at p. 54; cit. by Marcel Fournier, *Émile Durkheim: A Biography*, trans. by David Macey, Polity Press, Cambridge, UK 2013, at p. 317.

⁵⁰ Marcel Fournier, *op. cit.*, at p. 317.

⁵¹ *Ibidem*.

⁵² Émile Durkheim, *Les Formes...*, Livre III, concl., sect. IV, at p. 417.

⁵³ Steven Lukes, *Émile Durkheim: His Life and Work: A Historical and Interpretive Study*, Penguin, Harmondsworth 1977, at p. 71–77.

⁵⁴ Charles Taylor, *Varieties of Religion Today: William James Revisited*, Harvard University Press, Cambridge, MA 2002, at p. 93–95.

(DK) In Western societies there is a widely observed though tacit agreement — which is hardly if ever discussed — between legally recognized religions and legally recognized non-religions that the former are while the latter are not religions.

The agreement is legally justified by the legal separation of church and state in modern societies. Hence a typical Western state is legally secular even if its government prescribes its schools to display crucifixes in state-school classrooms, since “the cross had become one of the secular values of the [...] Constitution and represented the values of civil life”.⁵⁵ The secular nature of such a prescription has been recognized even by the European Court of Human Rights’s argument that “prescribing the presence of crucifixes in State-school classrooms — a sign which, undoubtedly refers to Christianity — [...] is not in itself sufficient [...] to denote a process of indoctrination”.⁵⁶

The agreement is explicable by the benefits that both religions and non-religions derive from the separation. Although the Catholic Church and other Christian churches at first resisted secularization of their assets, they have managed to turn other aspects of the separation to their advantage. An indication of the advantage is a discrepancy between the institutional grandeur of Christian churches and a negligible number of practicing Christians in Western European societies. At the same time, many groups and institutions have derived benefits precisely from the fact that they are legally recognized as non-religions providers of services that used to be provided by legally recognized religions. The cases in point are public research and educational institutions, which are considered secular even if their findings and teachings are as exact as theology, astrology or *die Rassenwissenschaft*.

1.2.3. Values

While all the constructs advanced in this paper, as ideal types informed by experience, are implicitly value-laden, policy analysis includes also explicit fundamental values, which are meant to be postulated. There are several obvious candidates for fundamental meta-positive values of legal regulation of religion. The first is human dignity as defined by Lasswell and McDougal, namely, as the widest possible shaping and sharing of all other values. The values include rectitude, respect, wealth, etc.⁵⁷ While the postulation of human dignity as the highest value might be *prima facie* acceptable in a policy analysis of religious rights in Croatia, since the value is compatible with social teaching of the Catholic

⁵⁵ Republica Italia, Consiglio di Stato, according to the European Court of Human Rights, Grand Chamber, Case of Lautsi and others vs. Italy (Application no. 30810/46), Judgment (18 March 2011), sect. 16.

⁵⁶ *Ibidem*, sect. 71.

⁵⁷ Harold D. Lasswell, Myres S. McDougal, *op. cit.*, at p. 34–35.

Church⁵⁸ and Catholicism is the most widespread denomination in Croatia, the value is not specific enough to identify the points of conflict that usually are and ought to be regulated by law, including religious rights. The second candidate is natural law expounded by Thomas Aquinas. However, the first precept or principle of natural law according to Aquinas, namely, that good is to be done and ensued, and evil is to be avoided, is also too general.⁵⁹ Hence the third candidate. It is self-preservation, which is Aquinas's first specific precept of natural law⁶⁰ and, at the same time, “the first foundation of natural Right”, according to Hobbes.⁶¹ The first reason why self-preservation is postulated as the highest value is the assumption that human rationality can be improved upon. On that assumption, religious conflicts, whatever their ultimate causes, can be prevented by legal regulation at a cost that is lower than, on the one hand, consequences of such conflicts and, on the other, net costs of non-religious — especially economic — conflicts. The assumption is backed by a relative success of the separation of church and state in some Western societies. The second reason is that a value higher than self-preservation may provoke rather than prevent religious conflicts. Thus a government guaranty of religious freedom is likely to be less objectionable than government assistance to religious communities, since such assistance is likely to be considered discriminatory towards communities that are not recognized as religious.

1.3. Hypotheses

The Identification of the practical problem is the first hypothesis. Section 2.2 describes the Croatian left liberal decisions on human reproduction and appraises them as tending towards, against or past constitutional principles or the *jus cogens*.

The second main hypothesis has two principal parts. The first, which is examined in Section 2.3.1, is that the decisions can be ascribed to the tenets of culturalism. The second, which is examined in Section 2.3.2, is that the decisions can be explained as ideological consequences of financial capitalism.

The third hypothesis, examined in Section 2.4, is that, under given economic conditions, Croatian ethnical traditionalists and other conservatives, and even non-conservatives are likely to react to left liberalism or culturalism in several disparate ways.

⁵⁸ Dom David Granfield, *Towards a Goal-Oriented Consensus*, “Journal of Legal Education” 1967, Vol. 19, No. 4, p. 379–402, esp. at p. 280–383.

⁵⁹ Thomas Aquinas, *Treatise on Law: Summa Theologica, Questions 90–97*, Henry Regnery Co., n.d. Chicago, IL, Q. 94, Art. 2, at p. 59–60.

⁶⁰ *Ibidem*.

⁶¹ Thomas Hobbes, *De cive*, 1.7, <http://www.unilibRARY.com/ebooks/Hobbes,%20Thomas%20-%20De%20Cive.pdf> (read: 15.10.2010).

The fourth hypothesis, which is made good in Section 2.5, outlines legal regulation of left liberalism culturalism that would be more in accord with constitutional principles.

2. Analysis

2.1. Principles

Constitution of the Republic of Croatia includes the following provisions on religious rights, which are compatible with survival as the meta-positive value of legal regulation of religion: A guarantee of the freedom of conscience and religion and free public profession of religion and other convictions (Art. 40); equality of all religious communities before the law and the separation of all religious communities and the state; freedom of religious communities, in conformity with law, publicly to perform religious services, to open and manage schools and social institutions and to enjoy the protection and assistance of the state (Art. 41). As constitutional provisions, they are *jus cogens*.

The following provisions of the Constitution are also directly relevant to the decisions described in Section 2.2:

“All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics. All persons shall be equal before the law.” (Art. 14);

“Freedom of thought and expression shall be guaranteed.” (Art. 38 Sect. 1);

“The family shall enjoy special protection of the state.” (Art. 61 Sect. 1);

“Parents shall bear responsibility for the upbringing, welfare and education of their children, and they shall have the right and freedom to make independent decisions concerning the upbringing of their children.” (Art. 61 Sect. 1).

Although the right to religious association is not directly relevant to the decisions described in Section 2.2, it may be useful to note that there are no reported judicial decisions on, or even public controversies over, the existence or practice of religious groups without legal status in the Republic of Croatia (there is a still not observed ECHR judgment on the full recognition of some minor religious communities by the Republic of Croatia).⁶² Hence it can be safely assumed that unincorporated religious groups manage to enjoy freedoms and rights guaranteed by Croatian law, invoking Art. 43 of the Croatian Constitution, which guarantees to everyone the right to freedom of association, Art. 7 of the Law on Legal Position

⁶² European Court of Human Rights, Case of Savez Crkava ‘Riječ života’ vs. Croatia (Application no. 7798/08), Judgment Final (8 December 2008), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102173#{"itemid":\["001-102173"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102173#{).

of Religious Communities,⁶³ which guarantees the freedom of religious association, and provisions of Croatian law that guarantee *jus standi* to unincorporated entities (Art. 7 Sect. 3 of the Law on Civil Procedure,⁶⁴ Art. 2 Sect. 4 of the Law on General Administrative Procedure,⁶⁵ Art. 17 Sect. 2 of the Law on Administrative Disputes,⁶⁶ i.e. on the judicial review of administrative action).

2.2. Decisions

Identification of the practical problem is the first hypothesis. This section describes the Croatian left liberal decisions on human reproduction and appraises them as tending towards, against or past the *jus cogens*.

The Government of the Republic of Croatia installed in 2011, with a support of influential media and a growing following, accelerated gender-mainstreaming by implementing a health upbringing curriculum⁶⁷ that, in addition to relaxing restraints of conventional sexual morality,⁶⁸ advanced inclusive language about LGBTIH issues; and by announcing openness to legalization of the same-sex marriage.⁶⁹ The measures were paralleled by a loss of autonomy of the religious program at the Government controlled Croatian Radio and Television.⁷⁰

⁶³ Zakon o pravnom položaju vjerskih zajednica, “Narodne novine”, 83/2002, 73/2013.

⁶⁴ Zakon o parničnom postupku, “Narodne novine”, 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13.

⁶⁵ Zakon o općem upravnom postupku, “Narodne novine”, 47/09.

⁶⁶ Zakon o upravnim sporovima, “Narodne novine”, 20/10.

⁶⁷ Agencija za odgoj i obrazovanje, Kurikulum zdravstvenog odgoja [Agency of Upbringing and Education: Curriculum of Health Upbringing], http://www.azoo.hr/images/zdravstveni/Kurikulum_zdravstvenog_odgoja.ppf_ (read: 4.09.2013); the most_controversial issues are underlined in the excerpt Kurikulum zdravstvenog odgoja — teme za 4. Modul / Curriculum of Health Upbringing — topics of the Module 4: http://zdravstveniodgoj.com/uploads/multiple_upload/b61ddd39-0975-bb0f-b94c-9a62f0ed2906_kurikulum_4.modul.pdf (read: 4.09.2013).

⁶⁸ As put succinctly by Mr. Zeljko Jovanovic, Minister of Science, Education and Sports, “parents do not have the right to keep their children in ignorance. A workshop will be held, with a special emphasis on positive behavior. The expression ‘pornography’ shall not exist in the elementary school [...]. School physicians will talk with children about masturbation”. *Jovanović: Roditelji nemaju pravo držati djecu u neznanju* [Jovanovic: Parents do not Have the Right to Keep Children in Ignorance], “Dnevnik”, 28.08.2013, repr. <http://dnevnik.hr/vijesti/hrvatska/ministar-zeljko-jovanovic-predstavio-plan-i-program-zdravstvenog-odgoja---300445.html> (read: 1.11.2014).

⁶⁹ Kukuriku koalicija, Plan 21.: 19. Ljudska prava i građanske slobode; 2. Rodna ravnopravnost, 3. Sloboda izbora životnog stila [Curriculum Coalition, Plan 21: 19. Human Rights and Civil Freedoms; 2. Gender Equality; 3. Freedom of Choice of a Life Style], [http://www.kukuriku.org/plan21/ljudska-prava-i-gradjanske-slobode/\(5 August 2013\)](http://www.kukuriku.org/plan21/ljudska-prava-i-gradjanske-slobode/(5%20August%202013)) (read: 4.09.2013).

⁷⁰ Hrvatska biskupska konferencija “Reagiranje Tiskovnog ureda HBK na istup HRT Komunikacija u emisiji Mir i dobro” [Croatian Bishops’ Conference “Reaction of the CBC Press Office to CRT Communication in the Emission Peace and Goodness”], 3.11.2013, <http://www.>

President of the Republic of Croatia (2010–15), by profession a law professor, who had been nominated to the non-partisan highest office by the Social Democratic Party, supported the health upbringing curriculum.⁷¹

According to the main newspaper of the Catholic Church in Croatia, the proposed health upbringing curriculum “imposes gender ideology that does not observe findings of developmental psychology, does not know terms of balanced and integral development of a human person, denies the value framework as a necessary ingredient of upbringing, is implemented illegally and coercively into the school curriculum, violates the right of parents to choose upbringing of their children”.⁷² The newspaper interpreted the gender ideology, which inspired the proposed health upbringing curriculum, as a belief that a child acquires by birth only a biologically determined sex but not a gender, since the child chooses freely a gender, or non et al, later on in life.⁷³

A liberal public intellectual labeled the health upbringing as “health confessional instruction”.⁷⁴

The Constitutional Court of the Republic of Croatia rescinded the curriculum on a procedural ground, namely, as violating *inter alia* the right of parents to take part in adoption of the curriculum.⁷⁵ In a seemingly unrelated decision, on criteria of appointment to scientific ranks, the Court declared and maintained, in a manner reminiscent of constitutional rulings on church and state, the separation of science and the state.⁷⁶ The Minister of Science, Education and Sports commented the

hbk.hr/?type=vijest&ID=462; *Biskupi digli glas: “Vjeronauk se diskriminira, a vjeroučiteljima je upitna egzistencija”* [*The Bishops Raised their Voice: “Confessional Religious Instructions is Being Discriminated Against, While the Catholics’ Existence is at Stake”*], “Jutarnji list”, 18.10.2013, <http://www.jutarnji.hr/hbk-nezadovoljan-polozajem-vjeronauka-i-ukidanjem-autonomije-religijskog-programa-na-hrt-u/1133838/> (read: 19.10.2013).

⁷¹ *Predsjednik se uključio u raspravu. Josipović uz Jovanovića: Podržavam uvođenje zdravstvenog odgoja u škole* [*The President has Joined the Debate: Josipović with Jovanovic: I support Introduction of Health Upbringing to Schools*], “Novi list”, 28.12.2014, <http://www.novolist.hr/vijesti/hrvatska/josipovic-uz-jovanovica-podrzavam-uvodenje-zdravstvenog-odgoja-u-skole?articleid=related> (read: 30.12.2012).

⁷² Branislav Stanić, *U 25 gradova na vjerničku inicijativu održan do sada neviđen ‘prosvjed igračkica’: Ne dirajte im djetinjstvo!* [*‘The Toys’ Protest’, Not Seen Earlier, Held in 25 Towns*], “Glas Koncila”, god. 51, br. 50/2008 (16.12.2012.), p. 1, http://www.glas-koncila.hr/index.php?option=com_php&Itemid=41&news_ID=21665 (read: 30.10.2014).

⁷³ Nikola Radić, *Što je to u pozadini zdravstvenog odgoja koji se nameće u školi? Idemo li prema ‘gender’-društvu* [*What is Behind the Health Upbringing That is Imposed at School? Are We Heading Towards a ‘Gender-Society’*], “Glas Koncila”, god. 51, br. 50/2008 (16.12.2012.), p. 9, http://www.glas-koncila.hr/index.php?option=com_php&Itemid=41&news_ID=21665 (read: 30.10.2014).

⁷⁴ Zarko Puhovski, *Zdravstveni vjeronauk* [*Health Religious Upbringing*], “Pescanik”, 31.12.2012, <http://pescanik.net/zdravstveni-vjeronauk> (read: 12.11.2014).

⁷⁵ Ustavni sud Republike Hrvatske, Odluka Broj: U-II-1118/2013, “Narodne novine”, 63/13.

⁷⁶ Ustavni sud Republike Hrvatske, Odluka Broj: U-II-1304/2013, “Narodne novine”, 99/13.

Court's Decision on the Health Upbringing Curriculum claiming that the Court did not rescind the Curriculum. The Prime Minister and Chairman of the Social Democratic Party, a lawyer by education, declared that a cultural war was going on in Croatia.⁷⁷ President of the Court reacted to the Prime Minister's comments of the Court's rulings: "Enough!"⁷⁸

"In Name of the Family", a civic association of Catholic provenance, backed by virtually all religious communities, initiated a referendum on the question whether to add to the Constitution of the Republic of Croatia the provision that marriage is a life union of a man and a woman.⁷⁹ 749,316 voters (cca 20% of the electorate) supported the initiative.⁸⁰ Croatian Parliament called the referendum.⁸¹ The Constitutional Court announced that the referendum was constitutional.⁸²

In a heated public debate it was claimed *inter alia* that the referendum was discriminatory since the right to marry is a fundamental human right.⁸³ President of the Republic opposed the referendum, claiming that it was not needed but that, if held, would send a moral message.⁸⁴ The Prime Minister castigated the

⁷⁷ *Reakcije na odluku Ustavnog suda; Milanović: "Vrlo agresivna grupa ljudi provodi kulturni rat"; Jovanović: "Kurikulum zdravstvenog odgoja nije ukinut" [Reactions to the Constitutional Court Decision; Milanović: "A Very Aggressive Group is Waging a Cultural War"; Jovanović: "Curriculum of the Health Upbringing is not Rescinded"]*, "Slobodna Dalmacija", 22.05.2013, <http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/210889/Default.aspx> (read: 12.11.2014).

⁷⁸ A. Milković, *Jasna Omejec, predsjednica Ustavnog suda: "Moj odgovor Milanoviću: Sad je dosta"* [Jasna Omejec, President of the Constitutional Court: "My Reply to Milanović: Now it is Enough"], "Gloбус", 13.07.2013, <http://gloбус.jutarnji.hr/hrvatska/moj-odgovor-milanovicu--sad-je-dosta> (read: 12.10.2013).

⁷⁹ <http://uimeobitelji.net/> (read: 20.10.2014).

⁸⁰ *Provjereni potpisi za referendum "U ime obitelji" [Referendum Signatures Verified: "In name of the Family"]*, "Glas Istre", 3.09.2013, <http://www.glasistre.hr/vijesti/hrvatska/provjereni-potpisi-za-referendum-u-ime-obitelji--421980> (read: 30.10.2014).

⁸¹ Hrvatski sabor, Odluka o raspisivanju državnog referenduma [Croatian Parliament, Decision on Calling a National Referendum], Klasa: 014-01/13-01/03 (8.11.2013), "Narodne novine", 134/13.

⁸² Priopćenje Ustavnog suda Republike Hrvatske o narodnom ustavnom referendumu o definiciji braka [Announcement of the Constitutional Court of the Republic of Croatia on the Popular Constitutional Referendum on the Definition of Marriage], Broj: SuS-1/2013 (14.11.2014), "Narodne novine", 138/2013.

⁸³ *Referendumska definicija braka diskriminirajuća je za manjine [The Referendum Definition of Marriage Discriminates Against Minorities]*, "Večernji list", 11.11.2013, <http://www.vecernji.hr/hrvatska/referendumska-definicija-braka-diskriminirajuca-je-za-manjine-902688>.

⁸⁴ *Josipović: Referendum je nepotreban ali će imati velike moralne poruke. Predsjednik RH Ivo Josipović na kavi s građanima rekao je da će na referendumu o braku glasovati protiv [Josipović: Referendum is Not Needed but Will Have Great Moral Messages. President of the RC Ivo Josipovic at the Coffee With Citizens Said at the Referendum He Would Vote Against]*, "Večernji list", 30.11.2013, <http://www.vecernji.hr/za-i-protiv/josipovic-referendum-je-nepotreban-ali-ce-imati-velike-moralne-poruke-906045> (read: 1.11.2014).

referendum after it was held as covertly homophobic, emphasising that he could not pronounce himself on the issue beforehand.⁸⁵

At the time the referendum was being prepared, a professor of family law, who was a member of the *Iustitia et pax* commission of the Croatian Bishop's Conference, supported the law on registered partnership of the same sex persons. However, she opposed legislative provisions that would grant parental rights to the persons *qua* parties of such partnerships, on the ground that provisions already in force regulate parental rights irrespective of sexual orientation.⁸⁶ The Referendum was held on the 1st of December 2013. The turnout was 37.90%. The result was Yes 67.87% against 33.51% No, while 0.062% of the votes cast were invalid.⁸⁷ The result was declared valid by the State Electoral Commission⁸⁸ and the Constitutional Court.⁸⁹

Croatian Parliament adopted a law on registered partnership of persons of the same sex, without significant opposition of either religious communities or civic associations at the end of 2014.⁹⁰

⁸⁵ Milanović: “*Ovaj referendum je topovska priprema za referendum o ćirilici, no neće im proći!*” [Milanović: “*This Referendum is Artillery Preparation for a Referendum on the Cyrillic Script*”], “*Jutarnji list*”, 1.12.2013, <http://www.jutarnji.hr/milanovic--referendum-o-braku-je-topovska-priprema-za-referendum-o-cirilici--no-uce-im-proci--/1143683/> (read: 30.10.2014).

⁸⁶ Marinko Jurasić, *Korac Graovac*: “*Ne treba izmišljati skrb o djeci za homoseksualce*”: *Obiteljski zakon ima instrumente zaštite djece koji vrijede i za istospolne partnere*, “*Večernji list*”, 18.10.2013.), repr. <http://zdravstveniodgoj.com/news/ne-treba-izmisljati-skrb-o-djeci-za-homoseksualce> (read: 20.10.2014).

⁸⁷ Državno izborno povjerenstvo / Službene stranice, Referendum 1. prosinca 2013: Potpuni službeni rezultati državnog referenduma — stanje 2.12.2014. u 9.00 sati: pristupilo je glasovanju 37.90%, za 65.87%, protiv 33.51%, nevažeći i nebačeni listići 0.62% [The State Electoral Commission / Official Pages, Referendum of 1 December 2013: Complete Official Results of the State Referendum: status on 2 December 2014 at 9 A.M.: turnout 37.90%, for 65.85%, against 33.51%; not valid and/or not cast: 0.62%], <http://www.izbori.hr/2013Referendum/rezult/rezultati.html> (read: 2.12.2014).

⁸⁸ Državni izborno povjerenstvo, Odluka za to da se u Ustav RH unese odredba po kojoj je brak životna zajednica žene i muškarca [The State Electoral Commission, Decision to Add to the Constitution of the RC the Provision that Marriage is a Life Community of a Man and a Woman], Klasa: 014-02/13-07/24; Urbroj: 507/18-13-2 (10.12.2013.), “*Narodne novine*”, 147/13.

⁸⁹ Ustavni sud RH, Odluka u povodu okončanja postupka nadzora nad ustavnošću i zakonitošću provođenja državnog referenduma održanog 1. prosinca 2013., na kojem je članak 62. Ustava Republike Hrvatske dopunjen novim stavkom 2. [Constitutional Court of the RC, Decision Concerning the End of the Supervision of the Constitutionality and Legality of the State Referendum Held on 1 December 2013], Broj SuP-O-1/2014, Zagreb (14.01.2014), <http://www.usud.hr/uploads/Odluka%20u%20povodu%20okon%C4%8Danja%20postupka%20nadzora%20nad%20ustavno%C5%A1%C4%87u%20i%20zakonito%C5%A1%C4%87u%20provo%C4%91enja%20dr%C5%BEavnog%20referenduma%20odr%C5%BEanog%201.12.2013.pdf> (read: 14.01.201).

⁹⁰ Zakon o životnom partnerstvu osoba istog spola, “*Narodne novine*”, 92/14.

The decisions on human reproduction summarized above depart from the constitutional principles listed in Section 2.1 in the following ways. First, the attempt to impose health upbringing violates Art. 40 of the Croatian Constitution on the separation of religious communities and the state, which implies the separation — to the extent that is humanly possible — of any worldview and the state. The fact that the attempt was justified by allegedly scientific grounds is legally irrelevant, since it is obvious that such attempts cannot be justified by science. Secondly, the attempt violates also the constitutional provision that parents have the right and freedom to make independent decisions concerning the upbringing of their children (Art. 61 Sect. 1 of the Constitution). Thirdly, the equalization of the homosexual partnership and the (heterosexual) marriage may imply that the special protection of the family by the state (Art. 61 Sect. 1 of the Constitution) no longer applies to the natural procreation of children, because it is peculiar to the heterosexual marriage.

To dispel any possible misunderstanding, it is useful to make here three additional notes. First, the left liberal claim that there is a fundamental human right to marry does not run counter the constitutional principles in Section 2.1. However, the claim implies — inadvertently — that the fundamental human right to marry includes the right to polygamy and/or polyandry, on the one hand, and the right of juridical persons to marry, on the other. Secondly, the constitutional principles are not violated either by The Law on Registered Partnership of Persons of the Same Sex or by the existing legislative provisions that empower persons who meet certain requirements, without regard to their sexual orientation or gender, to adopt children. Thirdly, a hypothetical legislative provision that would empower registered partners of the same sex to adopt children, if the provision required that adoption in every single case was in the best interest of a child to be adopted, would not violate the constitutional principles in Section 2.1 either.

2.3. Conditions

2.3.1. Ascription

This section ascribes (in the sense *supra* at 1.2.1.BB) the Croatian left liberal decisions on human reproduction to (A) a culture, (B) a worldview, and (C) a religion. The section provides evidence for the first part of the second main hypothesis (*supra* at 1.4)

(A) *Culture* The decisions at 2.2 can be ascribed to the culture that is termed left liberal in Croatia, left-wing or progressive in Europe and liberal in the United States.⁹¹ It is identical or at least akin to political correctness, which

⁹¹ James Davison Hunter, *op. cit.*, at p. 43. Johnathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion*, Random House–Vintage Books, New York 2012,

became an influential code of conduct and a set of undelying beliefs in North American Universities at the turn of the 1990s.⁹² Liberalism is also closely related to a widespread set of beliefs and demands that presented itself before the collapse of communism as humanism.⁹³ Liberalism in that sense is a culture that finds moral authority in “the spirit of the modern age, rationalism and subjectivism”.⁹⁴ It differs from the culture that is known as conservative, right-wing or orthodox,⁹⁵ which finds moral authority in an external and transcendent instance.⁹⁶ A social psychologist claims to have found empirical differences between dominant Western cultures that consist in the following: while liberal wisdom is most sensitive to care/harm, less to liberty/oppression, even less to fairness/cheating, and is virtually insensitive to loyalty/betrayal, authority/subversion and sanctity/degradation,⁹⁷ the conservative wisdom treats all six values equally.⁹⁸ The social psychologist’s claim is corroborated by the entry ‘Left Liberalism’ in Liberapedia, a specialized lexicon of Wikipedia that provides, as evidenced by its name and content, an internal account of left liberalism. The entry reads as follows:

Left Liberalism is a form of liberalism that cares about suport for vulnerable people and freedom for everybody. Left Liberals sometimes disagree with the centre-left and classical liberalism. Left Liberalism aligns more with modern liberalism such as social liberal ideas.⁹⁹

(B) *Worldview* Since culture defined as human communication (*supra* at 1.2.2.A) is diffuse, the Croatian left liberal decisions oh human reproduction can be ascribed only to a more structured point. An appropriate candidate for the job is a worldview, which has been defined as consisting of beliefs and demands (*supra* at 1.2.2.B). Hence the decisions are ascribed to the worldview that is abstracted from left liberalism as a culture. In accordance with its content, which consists of views of human reproduction, the worldview is termed culturalism. Like other

XXIII. f & Ch. 7, p. 150–179. An exemplary liberal publication is the magazine “The Nation”, which is self-described as the flagship of the Left, <http://www.amazon.com/The-Nation/dp/B000CNEFRE> (read: 2.03.2015).

⁹² See: David Horowitz, Paul Collier (eds.), *The Heterodoxy Handbook: How to Survive the PC Campus*, Regnery, Washington, DC 1994; Jeffrey Williams (ed.), *PC Wars: Politics and Theory in the Academy*, Routledge, New York 1995.

⁹³ See esp. Paul Kurtz (ed.), *Building A World Community: Humanism in the 21st Century*, Prometheus Books, Buffalo, NY 1989.

⁹⁴ James Davison Hunter, *op. cit.*, at p. 43–46 ff.

⁹⁵ *Ibidem*, and Johnathan Haidt, *op. cit.*, Ch. 7, p. 150–179. An exemplary conservative publication is the magazine “National Review”. See J. Quinn, *Top 10 Conservative Magazines*, <http://usconservatives.about.com/od/gettinginvolved/tp/TopConservativeMagazines.htm>.

⁹⁶ James Davison Hunter, *op. cit.*, at p. 43.

⁹⁷ Johnathan Haidt, *op. cit.*, at p. 350–353.

⁹⁸ *Ibidem*, at p. 356–358.

⁹⁹ *Left liberalism*, Liberapedia, http://liberapedia.wikia.com/wiki/Left_Liberalism (read: 8.03.2015).

basic constructs of this inquiry, culturalism is also an ideal type. It is construed as culturalism in the strong sense (BA) and culturalism in weak senses (BB).

(BA) *Strong* The first tenet of culturalism in the strong sense is that humans are a product of culture in that nature, which had generated humans as well as other species, had been changed by humans to the extent that culture is the distinctly human nature and disponible for further change by humans. Hence it is appropriate to designate left liberalism as culturalism. The designation needs refining. Culturalism is materialism, that is, the worldview that the world can be explained by itself, that is, by matter.¹⁰⁰ In ordinary speech naturalism is equivalent to materialism.¹⁰¹ “Since the end of the 17th century naturalism may designate any teaching that explains ‘nature’ as the foundation and norm of all phenomena, also of history, culture, morality and art.”¹⁰² But culturalism as materialism is not naturalism or at least it is not plain naturalism.¹⁰³ Hence the ideas such as *Ius naturale est quod natura omnia animalia docuit*¹⁰⁴ are incompatible with left liberalism.

The second tenet is that humans can know human nature, that is, culture. Left liberalism is construed here as a worldview consisting of three disparate ways of knowing (or grasping reality with functions of knowing), the third one being a corrective of the truth in law, which is a result of the first way. The first is science, that is, knowledge methodically gained by observation rather than speculation. For that reason materialism, especially as naturalism, is opposed to philosophy *qua* philosophy.¹⁰⁵ However, while earlier left and liberal worldviews considered findings of natural science to be exact,¹⁰⁶ left liberalism freely draws on theories that natural science is a social construct.¹⁰⁷ The second way of knowing is arts,

¹⁰⁰ Werner Post, Alfred Schmidt, *Was ist Materialismus? Zur Einleitung in Philosophie*, Koesel, Muenchen 1975.

¹⁰¹ *Ibidem*.

¹⁰² Günter Gawlick, *Naturalismus*, in: *Historisches Woerterbuch der Philosophie*, Bd. 6, Schwabe & Co., Basel 1984, p. 517–519.

¹⁰³ A set of beliefs and demands overlapping with left liberalism was labelled naturalism in Ivan Padjen, *Nezrela demokracija Hrvatska* [The Immature Democracy Croatia], in: Milan Podunavac, Bilijana Đorđević (eds.), *Ustavi u vremenu krize: Postjugoslovenska perspektiva* [Constitutions in the time of a Crisis: A Post-Yugoslav Perspective], Udruženje političkih nauka Srbije i Fakultet političkih nauka Univerziteta u Beogradu, Beograd 2015, p. 173–196, relying tacitly on *idem*, *(Ne)čudorednost (međunarodnog) prava /The (Im)Morality of (International) Law*, ICR, Rijeka 1988, sect. 3.3. heb, at p. 173. The term naturalism as the designation of a similar set of beliefs is used also by Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, Harvard University Press, Cambridge, MA 1989, p. 495–520 and *passim*.

¹⁰⁴ Natural law is what nature teaches all animals. *Digesta* 1,1,1,3.

¹⁰⁵ Werner Post, Alfred Schmidt, *op. cit.*, at p. 10.

¹⁰⁶ See e.g. Richard York, Brett Clark, *Marxism, Positivism and Scientific Sociology: Social Gravity and Historicity*, “The Sociological Quarterly” 2006, Vol. 47, No. 3, p. 425–450.

¹⁰⁷ E.g. Bruno Latour, *Politiques de la nature. Comment faire entrer les sciences en démocratie*, La Découverte Armillaire, Paris 1999. See criticism Ian Hocking, *The Social Construction of What?*, Harvard University Press, Cambridge, MA 2000.

that is, a creative transformation of the world.¹⁰⁸ Hence the high value that left liberalism ascribes to high culture. The third is introspection, that is, examination of one's own thoughts and feelings, built upon sensation or feeling of stimuli. The reliance on the second and the third way of knowing, which are peculiar to every single knowing subject, may be seen as a precondition of the third tenet. The reason is that introspection may well be the only way to know one's human nature, especially one's gender, which is — according to a prominent view that fits into the ideal type of left-liberalism — determined by nurture rather than nature.¹⁰⁹ Introspection is also necessary to rectify the law's insensitivity to one's pain.¹¹⁰ Since a change of human nature is an act of artistic creation it is seen here as implying artistic experience.

The third tenet is that a human being not only can but ought to change human nature totally. What distinguishes the third tenet from conservatism is the belief in the actuality, possibility and desirability of a *total* change of one's gender, sex, marriage, family, procreation, end of life; and also of creating new human life artificially and of bringing up human offspring in institutions other than families since families are prone to abusing children.¹¹¹ The belief is construed here to include the following reasons: the nature that is of concern to humans has already been changed by humans totally; the changes made thus far have not eliminated oppression, especially sexual and/or gender oppression to women, LGBTIH individuals and minorities etc.; there are no legitimate social constraints on an individual's liberty to bring about further changes; such changes can be, as artistic creations, fulfilling and also liberating morally, politically and legally.

The ideal-type of culturalism as a worldview implies that there is a logical sequence between, on the one hand, an action, such as a Croatian left liberal decision on human reproduction, and a tenet of culturalism as a worldview; and, on the other, between the three tenets. Logical sequence is not a logical necessity but a strong reason for believing and/or deciding and/or doing something. Thus the acceptance of the first

¹⁰⁸ See James Davison Hunter, *op. cit.*, at p. 248.

¹⁰⁹ "We believe it is indispensable to deconstruct the binary sex/gender system that shapes the Western world so absolutely that in most cases it goes unnoticed. For 'other sexualities to be possible' it is indispensable and urgent that we stop governing ourselves by the absurd notion that only two possible body types exist, male and female, with only two genders inextricably linked to them, man and woman. We make trans and intersex issues our priority because their presence, activism and theoretical contributions show us the path to a new paradigm that will allow as many bodies, sexualities and identities to exist as those living in this world might wish to have, with each one of them respected, desired, celebrated." International Gay and Lesbian Human Rights Commission [IGLHRC], 2005, Institutional Memoir of the 2005 Institute for Trans and Intersex Activist Training, p. 8, <http://www.iglhrc.org/files/iglhrc/LAC/ITIAT-Aug06-E.pdf>

¹¹⁰ See esp. William E. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering*, Dartmouth & Ashgate, Aldershot, UK 1998.

¹¹¹ On the presumption of the family abuse of children see David Horowitz, Paul Collier (eds.), *op. cit.*, p. 53–64.

tenet is a strong reason for accepting the second, while the acceptance of the second reason is a strong reason for accepting the third one. It is strong but not conclusive. Hence, one can accept one tenet but not the others without committing a logical error of the kind that if all men are mortal and Socrates is a man Socrates is not mortal.

The ideal type of culturalism as a worldview concerned with human reproduction, while informed empirically, is designed to recognize a conceivable but historically or empirically rare belief that humans are a product of culture.

(BB) *Weak* Weak versions of culturalism as a worldview consist of one or two of the tenets specified *supra* at 2.3.1.BA. Suffice it to note here few examples.

Weakening the first tenet into a belief that humans are a product less of nurture and more of nature may belong not only to culturalism and left liberalism and also to worldviews and/or cultures such as Enlightenment or Marxism. The Enlightenment's idea of progress implies that humans change the world they are born into a human artefact and that the changes thus far have been (*inter alia*) liberating but not liberating enough.¹¹² The idea was a cornerstone also of Marxist communism.¹¹³ Its main achievement, advocated by congresses of the Communist Party of the Soviet Union from the mid 1950s till the mid 1980s, should have been the Baikal Amur Magistral, the irrigation project in Central Asia to divert by nuclear explosions Siberian rivers that flow into the Arctic Ocean into Central Asia instead (the project was eventually frustrated by a growing opposition of scientists).¹¹⁴

Scepticism toward findings of natural science, which is defined as the second tenet of culturalism, has been a trademark of conservative policies on global warming in the USA in the past quarter of a century.¹¹⁵

(C) *Religion* Ontological assumptions of culturalism, as stated in the first tenet *supra* at 2.3.1.B, are materialistic and as such atheistic.

¹¹² For a historical account that is on the whole sympathetic to the idea see e.g. Sidney Pollard, *The Idea of Progress: History and Society*, Penguin, Harmondsworth, UK 1968. For a collection of historical and on the whole critical essays see e.g. Gabriel A. Almond, Martin Chodorow, Roy Harvey Pearce (eds.), *Progress and its Discontents*, University of California Press, Berkeley, CA 1982.

¹¹³ E.g. Alfred G. Meyer, *The Idea of Progress in Communist Ideology*, in: Gabriel A. Almond, Martin Chodorow, Roy Harvey Pearce (eds.), *op. cit.*, p. 67–82.

¹¹⁴ See: Alexander Dallin, *The XXVth Congress of the CPSU: Assessment and Context*, Hoover Institution, Stanford, CA 1977, at p. 21, referring to *XXV. S'ezd Kommunisticheskoi partii Sovetskogo Soyuzu, 24. fevralya–5. marta 1976. goda: stenograficheskii otchet v 3-kh tomakh*, Politizdat, Moskva 1976; Michael L. Bressler, *Water Wars: Siberian Rivers, Central Asian Deserts, and the Structural Sources of a Policy Debate*, in: Stephen Kotkin, David Wolff (eds.), *Rediscovering Russia in Asia, Siberia, and the Russian Far East*, Sharpe, Armonk, NY 1995, p. 240–255; Christopher J. Ward, *Breznev's Folly: The Building of BAM and Late Soviet Socialism*, University of Pittsburgh Press, Pittsburgh, PA 2009.

¹¹⁵ John Arit, *Bush vs. Bush vs. Bush: Which Bush is Most Conservative? You Might Be Surprised*, "Bloomberg Politics", <http://www.bloomberg.com/politics/articles/2015-01-13/which-bush-is-most-conservative-you-might-be-surprised> (read: 15.01.2015).

Since conservatism is defined as a worldview that finds moral authority in an external and transcendent instance,¹¹⁶ left liberalism as its opposite cannot be ethically religious, either. The most important property that distinguishes left liberalism from religion is the left liberal idea and practice of free change of one's gender, sex, marriage, family, procreation, end of life and also of free artificial creation of new human beings. From the standpoint of conservatism, the idea and practice degrade utterly sanctity of human life.¹¹⁷ Catholics, at least the Catholic Church in Croatia, are eager to present left liberalism and its transformations as a materialistic and atheistic reaction to Christianity that emerged in the late Middle Ages.¹¹⁸ Without denying that there is more than a grain of truth in the Catholic presentation of left liberalism, it may be even more intellectually rewarding to see the presentation as an inverted mirror image of theories of secularization (see *supra* at 1.2.2.DD) that is tacitly in agreement with left liberalism that the latter, unlike Christianity, is not a religion (see *supra* at 1.2.2.DK).

However, there are strong reasons to identify left liberalism, including culturalism, as a religion and, moreover, a theistic religion. The first is a theistic content of the three tenets outlined above. Namely, only God (at least as conceived of by conventional monotheistic religions, i.e. Judaism, Christianity, and Islam) is not created, knows her origin and can change it. However, the left liberal God is every individual for herself rather than an eternal, omnipresent, omnipotent etc. being, or a nation, Leviathan, proletariat, etc. For that reason left liberalism can be categorized as a polyanthropism modelled on polytheism. Secondly, the theistic nature of left-liberalism, and also of an important stream of contemporary pure liberalism, is manifested by endless efforts to construe moral and political obligation based on consent. The effort is reminiscent of the refusal of the Holy See (the Pope as God's vicar plus Curia) of the third party settlement of disputes with other states.¹¹⁹ Thirdly, left liberalism is, not unlike Christianity throughout much of its history, determined to proselitize and, moreover, enforce its beliefs and demands by man-made laws.

2.3.2. Explanation

This section explains the action-guiding reasons to which the Croatian left liberal decisions on human reproduction are ascribed to (*supra* at 2.3.1) by left liberalism as ideology. The section provides evidence for the second part of the second main hypothesis (*supra* at 1.4).

¹¹⁶ James Davison Hunter, *op. cit.*, at p. 43.

¹¹⁷ See Johnathan Haidt, *op. cit.*, at p. 350–353.

¹¹⁸ Ivan Tišov, an interview with Marguerite A. Peeters, *Posljedica zapadne kulturne revolucije gubitak je vjere [A Consequence of the Western Cultural Revolution is a Loss of Faith]*, "Glas Koncila", god. 54. br. 6 / 2120 (8.01.2015), p. 6–7.

¹¹⁹ E.g. Herbert Franz Koeck, *Concordats*, in: *Encyclopedia of Public International Law*, ed. by R. Bernhardt, North Holland, Amsterdam 1984, p. 43–49, at p. 46.

(A) Capitalism

To the extent reasons, including reasons of action, are ideological they are consequences of modes of production. They correspond roughly to economic systems in the orthodox economic literature. An economic system is a set of decisions on “*what* goods and services are to be produced”, “*how* these goods will be produced” and “*who* will receive the benefits of this production”.¹²⁰ Only two major types are relevant here: industrial capitalism in the period ca 1945–1980, and financial capitalism in the period ca 1980-.¹²¹ Every condition (culture, industrial capitalism etc.) is construed as an ideal-type (explained *supra* at 1.2.1.B). The two types can be recognized in a description of economic developments in the USA in the post-WWII.

The following description fits the type of industrial capitalism:

Before 1980, economic policy was designed to achieve full employment, and the economy was characterized by a system in which wages grew with productivity. This 4 configuration created a virtuous circle of growth. Rising wages meant robust aggregate demand, which contributed to full employment. Full employment in turn provided an incentive to invest, which raised productivity, thereby supporting higher wages.¹²²

The following description fits the type of financial capitalism:

After 1980, with the advent of the new growth model, the commitment to full employment was abandoned as inflationary, with the result that the link between productivity growth and wages was severed. In place of wage growth as the engine of demand growth, the new model substituted borrowing and asset price inflation. Adherents of the neo-liberal orthodoxy made controlling inflation their primary policy concern, and set about attacking unions, the minimum wage, and other worker protections. Meanwhile, globalization brought increased foreign competition from lower-wage economies and the prospect of off-shoring of employment. The new neo-liberal model was built.¹²³

(B) Ideology

Although the beliefs and demands that are commonly recognized as liberal or progressive in the United States of America, or left liberal in Croatia and in Liberapedia, are described by both their opponents and proponents as left, left liberalism as a worldview and a religion designated culturalism is also an ideology, construed as well as other basic concepts of this inquiry as an ideal type. More precisely,

¹²⁰ David Kennett, *A New View of Comparative Economic Systems*, Harcourt, Fort Worth TX, 2002, at p. 5–6.

¹²¹ *Ibidem*, p. 54–57.

¹²² Thomas Palley, *America's Exhausted Paradigm Macroeconomic Causes of the Financial Crisis and Great Recession*, “New American Contract: A Project of American Foundation”, July 22, 2009), at p. 3–4, [http://www.newamerica.net/publications/policy/america_s_exhausted_paradigm_macroecomic_causes_financial_crisis_and_great_recession\(???\)](http://www.newamerica.net/publications/policy/america_s_exhausted_paradigm_macroecomic_causes_financial_crisis_and_great_recession(???)).

¹²³ *Ibidem*, at p. 4.

it is an ideology of financial capitalism but developed, if one looks at the historically or empirically existing views that fit the concept, primarily by social groups that are neither financial capitalist nor their managers. As ideology in general or a particular ideology, culturalism conceals interests it serves. The following comparison, which is a part of the USA folklore, is instructive in that regard: liberals/progressives are pro-choice, against capital punishment, for higher taxes of the rich and for government aid to the unemployed and to unwed mothers, while orthodox/conservatives are pro-life, for capital punishment, for lower taxes and against government aid to the individuals who do not want to work or who breed beyond their means. The comparison is instructive by not even mentioning economic problems that divide the USA and thereby suggesting that not only abortion and taxation but also taxation and government aid to the unemployed are quite unrelated to the ownership of the means of production. Principal ideological practices and/or functions of culturalism can be summarized in the following five points.

(BA) Depopulation

Capitalism in the 19th century England was accompanied by the Victorian morality, which tied human sexual activities to procreation and fostered the latter so that Victorian houses were “swarmed by children”.¹²⁴ The Victorian morality was beneficial to the then prevailing mode of capitalist production, which was labor intensive. Financial capitalism, which has transferred a bulk of manufacturing and services from the West to the East and developed financial industry instead, needs less labor even in Asia and Latin America, where manufacturing still matters.

By promoting reproductive rights culturalism decreases both population and unemployment in the West and thus facilitates further dismantling of the welfare state, which is to financial capitalism unnecessary and for that reason too heavy a burden.

(BB) Eutanasia

The aging population in the USA has driven the share of government spending for pensions to 20% and for health to 22% of the total USA government spending.¹²⁵ Although the costs of dying of a single individual at the beginning of the 21st century are not dramatically higher than they were forty years earlier, they raise now much concern because the costs of medical care in general have increased from ca 6% to over 10% of the USA gross national product.¹²⁶ Similar developments have been taking place in the rest of the West. Thus in 2011,

¹²⁴ Richard J. Evans, *The Victorians: Gender and Sexuality*, <http://www.gresham.uk.ac/lectures>, <https://www.youtube.com/watch?v=FUwhSN1MsyI> (read: 8.03.2015).

¹²⁵ <http://www.usgovernmentspending.com/> (read: 8.03.2015).

¹²⁶ Anne. A. Scitovsky, *The High Cost of Dying: What Do the Data Show?*, “The Milbank Quarterly: A Multidisciplinary Journal of Population Health and Health Policy” 2005, Vol. 83, No. 4, p. 825–841.

EU-27 general government expenditure amounted to 49.1% of the gross national product, while government expenditure on ‘social protection’ and ‘health’ taken together accounted for 54.8% of the total government spending of the EU-27 in 2011.¹²⁷

By promoting euthanasia culturalism justifies decreases of both government and private spending on pensions and medical care for the sick and the elderly.

(BC) Minorities

The classical liberalism (esp. of the Federalist papers) had been concerned above all with the protection of minorities. The minorities it was concerned with were the proprietary classes. They were to be protected from the expropriation by the non-proprietary classes.¹²⁸ The old (especially Marxist and/or communist) left has maintained that the principal antagonism is the one between the bourgeoisie and the proletariat so that the emancipation of the proletariat would include the emancipation of women as the oppressed sex. The contemporary socially concerned liberalism recognizes that the grave and increasing economic inequalities, between a class of at most 1–10% of the Western population that owns more than 90% of assets and the 90–99% of the population that owns the remaining 1–10% assets,¹²⁹ are destructive not only of liberal democracy but also of economic development.¹³⁰

The culturalist care for any vulnerable minority perverts the original intent of minority protection, which could be implemented only at a cost of either liberalism or democracy, into political arrangements that can be neither liberal nor democratic nor, for that matter, functional as legal institutions; abstracts the emancipation of women and LGBTIH persons from its socio-economic context; and, most importantly, diverts attention away from problems and prospects of financial capitalism.

(BD) Banking

In financial capitalism banks operate according to the principle that banks privatize their profits but nationalize their debts. The principle, which has been ascribed — allegedly wrongly — to Andrew Jackson, the seventh USA

¹²⁷ European Commission/Eurostat, General government expenditure in 2011 — Focus on the functions ‘social protection’ and ‘health’, http://ec.europa.eu/eurostat/statistics-explained/index.php/General_government_expenditure_on_social_protection_and_health (read: 8.03.2015).

¹²⁸ Ph. Allott, *The emerging International Aristocracy*, “New York University Journal of International Law and Politics” 2002, Vol. 35, p. 309–338, esp. at p. 324 ff.

¹²⁹ Edward Fullbrook, *The Political Economy of Bubbles*, “Real-World Economics Review” 2012, No. 59, <http://rwer.wordpress.com/2012/03/12/rwer-issue-59/> (read: 22.03.2012).

¹³⁰ E.g.: Joseph E. Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future*, Norton, New York 2012; Ferdinand Mount, *The New Few or a Very British Oligarchy*, Simon & Schuster, London 2012; Thomas Piketty, *Le capital au XXI siècle*, Éditions du Seuil, Paris 2013.

President,¹³¹ was implemented by the government bail out of banks in 2008–2009 and justified by ideologues of financial capitalism as a self-explanatory necessity¹³² and by critics as a necessity created by inadequate government regulation.¹³³ According to an account critical of financial capitalism, 40% of every price paid, by cash as well as credit, is interest rates and provisions to banks.¹³⁴

Culturalism, by undermining the role of family as a social unit undermines also the role of family as a lender — often of the first and last resort — and thus exposes people to an even greater dependence on banks.

(BE) Culturalism

The old (Marxist and/or communist) left explained the social structure and development according to the basis-superstructure formula, whose gist runs as follows:

In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given state in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence but their social existence that determines their consciousness.¹³⁵

Stalinism reversed the formula in socialism in the following way:

The superstructure is the product of the base, but this does not mean that it merely reflects the base. On the contrary, no sooner does it arise than it becomes an exceedingly active force, actively assisting its base to take shape and consolidate itself, and doing everything it can to help the new system finish off and eliminate the old base and the old classes.¹³⁶

¹³¹ John Carney, *Sorry, Andrew Jackson Probably Never Said That 'Den Of Thieves' Quote*, "Business Insider", 27 Jan 2010, <http://www.businessinsider.com/sorry-andrew-jackson-probably-never-said-that-den-of-thieves-quote-2010-1> (read: 10.03.2015).

¹³² *Bank Bail-Out: Leaving Las Vegas*, "Economist", 22 Nov 2008, p. 21.

¹³³ Anat Admati, Martin Hellwig, *The Bankers's New Clothes: What is Wrong with Banking and What to Do about It*, Princeton University Press, Princeton, NJ 2013, p. 129–147, esp. at p. 139.

¹³⁴ Ellen Brown, *It's the Interest, Stupid! Why Bankers Rule the World*, "Global Research", <http://www.globalresearch.ca/its-the-interest-stupid-why-bankers-rule-the-world/5311030> (read: 8.11.2012).

¹³⁵ Karl Marx, Friedrich Engels, *From Preface to "A Contribution to the Critique of Political Economy"*, in: Karl Marx, Friedrich Engels, Lenin, *On Dialectical Materialism*, Progress, Moscow 1977, at p. 43.

¹³⁶ Josef Visarionovič Stalin, *Concerning Marxism in Linguistics*, in: *idem, Essential Stalin: Major Theoretical Writings*, ed. by B. Franklin, Anchor Books, Garden City, NY 1972, at

The formula was reversed by stalinists to serve their revolution from above,¹³⁷ which was rightist so that it “cast the country deep into its imperial, autocratic past”¹³⁸

There is an interesting parallel between stalinism and culturalism. Stalinism reversed the basis-superstructure formula after the communists had built the institutions (chiefly the Communist Party) they considered to belong to the political superstructure and used them to change the inherited — capitalist — relations of production. The change did not necessarily facilitate transition to communism and thus far has ended where it started, namely, in capitalism. The historical events that could be ascribed to culturalism, such as the Croatian left liberal decisions on human reproduction, have assumed a reversed basis-superstructure formula after it had become apparent that the relations of production in the countries of the actually existing socialism would not develop into communism. Hence the proximity of culturalism to Engels’s criticism of the family but not to his criticism of private property and the state.¹³⁹

Cognitive fecundity of the parallel can be noticed if cultural studies, as an empirical or historical activity, are ascribed to culturalism as the ideal type construed in this inquiry. The resurrection of interest in the study of culture is due largely (though by no means exclusively) to “The decline of the materialist impulse in general and the classical Marxian emphasis” and “The simultaneous resuscitation of Marxian scholars such as Gramsci [...] who insisted on the independence of the cultural factor in the historical process.”¹⁴⁰

(BF) Moralism

Globalisation of capitalism¹⁴¹ and weakening of the state in the past forty years¹⁴² have changed dramatically the relation of law to morality in both nation states and international relations.

In Ancient Rome law was considered to be, in modern terms, a minimum morality. The idea was expressed by the maxim *Not omne quod licet honestum*

p. 408; cit. acc. to Ivan Padjen, *Marxism and Positivism in Soviet Theories on the Foundations of International Law*, Dalhousie University Faculty of Law, LL.M. thesis, 1975, at p. 45.

¹³⁷ Robert C. Tucker, *Stalin in Power: The Revolution from Above, 1928–1941*, Norton & Co., New York 1992.

¹³⁸ *Ibidem*, a summary at <http://books.wwnorton.com/books/978-0-393-30869-3/> (read: 8.03.2015).

¹³⁹ Friedrich Engels, *Der Ursprung der Familie, des Privateigentums und des Staats. Im Anschluss an L. H. Morgan’s Forschungen*, 6. Aufl., Dietz, Stuttgart 1894; repr. in: Karl Marx, Friedrich Engels, *Werke*, Bd. 29, Dietz, Berlin 1990.

¹⁴⁰ Richard Muench, Neil. J. Smelser, *Preface*, in: *idem* (eds.), *op. cit.*, at p. X. See also Andrew Edgar, Peter Sedgwick (eds.), *op. cit.*, *Introduction*, p. 1–9 and *Cultural Studies*, p. 100–103.

¹⁴¹ E.g. Joseph Stiglitz, *Globalization and Its Discontents*, Penguin, London 2002.

¹⁴² See esp. Susane Strange, *The Erosion of the State*, “Current History” 1997, Vol. 96, No. 613, p. 365–369; eadem, *The Westfailure System*, “Review of International Studies” 1999, Vol. 25, No. 3, p. 345–354.

*est.*¹⁴³ Law as a minimum of morality is not a concession to libertarian anarchy but the very foundation of legal order. An essential ingredient of (objective) law, as a unity of general legal standards, are moral virtues and standards, such as *bonus pater familias* and truth telling, while an essential ingredient of (subjective) right is moral autonomy of the individual. For the same reason, law as a minimum morality, which implies separation of church and state (or religion — including religious moralities — and laws, on the one hand, and secular laws, on the other), is an essential ingredient of freedoms of consciousness and religion.

In the international community as it was thirty years ago, the question about the relation of international law to morality would be pragmatically odd. Since every discourse on law necessarily includes some principles of the distribution of benefits and burdens, that is, a notion of justice, in the context of thirty years ago, in which a mass of discussions presupposed perceptibly different but inarticulated notions of justice, it was beside the mark to ask which of them was valid. A less obvious reason of the oddity was the positivisation of international legal studies, which trivialised the question by implying that answers to it could be arbitrary stipulations only.¹⁴⁴

Culturalism substitutes the issues that in earlier modes of capitalism were recognized as political and legal by moral problems. By presenting its own beliefs and demands as universally morally valid and by imposing them all on others as law, culturalism creates an illiberal legal order that is comparable to the unity of the Catholic Church and the state or of the Communist Party and the state. Such a moralisation of law without politics is, needless to say, serviceable to financial capitalism, which is even without such a generous service lapsing into totalitarianism.¹⁴⁵

2.4. Forecast

Under the conditions *supra* at 2.3, in the West, that is, North America and EU, including Croatia, there is a growing acceptance of the beliefs and demands that can be ascribed to left liberalism, including culturalism. There are no signs that the conditions and, consequently, the tendency of acceptance could change significantly in a foreseeable future. Croatian ethnical traditionalists and other conservatives, and even non-conservatives such as plain liberals and plain leftists, are likely to react to the tendency by one or more of the following activities:

¹⁴³ *Digesta*, 50, 17, 144.

¹⁴⁴ Ivan Padjen, (*Ne*)*čudorednost (međunarodnog) prava*, sect. 2.1.2.1.ga-gb, at p. 64.

¹⁴⁵ On the lapse see e.g. D. Strpić, *Moderna normal: kontekstualne teorijske osnove političke analize socijalnih ciklusa i kriza u Matrix-kapitalizmu* [*The Modern normal Contextual Theoretical Basis of Political Analysis of Societal Cycles and Crises in Matrix-Capitalism*], “Politička misao/Croatian Political Science Review” 2009, Vol. 46, No. 3, p. 9–38.

persisting in the culture war; engaging in a crusade, perhaps strengthened by an alliance with jihadists; retreating into pre-political communities; acquiescing to and assimilating the emerging neo-liberal totalitarianism. Hardly any of the just listed reactions could result in laws and actions in accord with the constitutional principles *supra* at 2.1.

2.5. De lege ferenda

Legal responses to left liberalism, including culturalism, that would be more in accord with constitutional principles *supra* at 2.1 than the probable responses *supra* at 2.4, may be one or more of the following (*comp. supra* 1.2.2.DG):

(A) Government agreement with proponents of culturalism, incorporated as a civic association, on the instruction of culturalism as an optional course in public schools, comparable with confessional religious instruction (Catholic, Orthodox, Islamic etc.).

(B) Negative sanctioning of possible culturalist destructive practices comparable to negative sanctioning of practices of destructive groups, including destructive religious sects, already advocated in Croatia.¹⁴⁶

(C) A tradeoff between the rights of legally recognized religions to provide optional confessional religious instruction in Croatian public schools and the rights of culturalist associations that their beliefs and demands are taught in public schools.

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¹⁴⁶ Zaključci usvojeni na Međunarodnoj konferenciji "Destrktivne skupine i mladi" pod pokroviteljstvom Primorsko-goranske županije i Grada Rijeke [Resolution of the International Conference "Destructive Groups and the Young" Under the Auspices of the Primorsko-Goranska County], <http://www.cisk.hr/2011/03/rijecka-deklaracija/> (read: 9.03.2015).

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