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# CONCEPTUAL COMPARISON OF "POLITICAL QUESTION" AND "RELIGIOUS QUESTION" DOCTRINES**

## Autonomy of churches and religious communities and the scope of judicial review

" ...And I affirm that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws."
John Locke, *Letter Concerning Toleration*

**Summary**

*In this paper author performs a comparative conceptual analysis of two non-justicability doctrines born in the practice of the US Supreme Court - the political question doctrine and the religious question doctrine. The rationales for both doctrines are somewhat complementary and are contained in the principle of separation of powers, ie the separation between state and church, as well as the epistemological impossibility of the courts to delve into issues that are political or religious at their essence. In the second part of the paper, author analyzes various theoretical attempts to, in the absence of clear guidelines arising from case law, clearly shape the religious question doctrine, i.e. limit its application, since the absolute exclusion of issues that contain an admixture of a religious component from judicial control in modern secular state is not acceptable. In this sense, theoretical attempts that distinguish between normative and positive religious issues, those that arise within the framework of public and private law, were analyzed, as well as the attempt of the so-called secular translation, as a modality of limiting the religious questionn doctrine. Nevertheless, the author in the paper, starting from the historical development of the religious question doctrine, points out the (re)affirmation of the*

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*institutional autonomy of churches and religious communities as the core and the most consistent criterion for shaping this doctrine. Questions of self-determination of churches and religious communities (such as internal organization regulation, the election of leaders, and the formulation of one's own religious teaching) must therefore undoubtedly remain beyond the reach of judicial review. The author concludes in the paper that the further course of development of the religious question doctrine, ie will it be stable and predictable, and thus legitimate, or will it be non-linear and turbulent, as is the case with the political question doctrine in contemporary legal systems, will exclusively depend on adherence to this criterion of institutional autonomy of churches and religious communities.*

**Keywords:** political question doctrine, religious question doctrine, autonomy of religious organizations, separation of powers, judicial review.

## 1. Introductory remarks

Being faced with profound questions of religious doctrine and practice, civil courts have very often approached such cases very cautiously. The Holy Bible offers us two such vivid examples. Thus, Pontius Pilate, as someone who had the authority to impose the death penalty in the province of Judea, being involved in the simmering intra-Jewish religious conflict at the time, utters a somewhat powerless sentence that could be repeated by today's judge involved in a similar dispute: "What is the truth?"[1] On the same track, the Roman proconsul of Greece acted noticeably more decisively. Namely, on the accusations that the Apostle Paul "induce people to worship God contrary to the law", he responded that does not want to be a judge in matters over a Jewish doctrine, thus summarising the attitude that civil magistrates hold throughout the following centuries that they are not competent to judge of a religious truth![2] The aim of this article is to examine such attitude of the judicial authorities towards cases with a religious element in contemporary conditions, to show its non-linear evolution based on case law, and to outline its theoretical contours and rationale, as well as to provide arguments *pro* and *contra* of such behavior of today's supreme courts, primarily in the American, decentralized system of judicial review. We see the reason for such an endeavour in accepting the stance that determination of the relationship between religious autonomy and judicial authority is the very core of

[1] See N. Foster, „ Respecting The Dignity Of Religious Organizations: When Is It Appropriate For Courts To Decide Religious Doctrine?", *University of Western Australia Law Review* 1/2020, 191.

[2] R. W. Garnett, „A hands – off approach to religious doctrine: what we are talking about?", *Notre Dame Law Review* 2/2009, 842–843.

contemporary debates over conflicts between law and religion.[3] The position that in the system of separation between Church and state, not even the judicial branch of government can decide religious question, i.e. declare religious truth nor should never take sides in religious matters,[4] is widely known in the US legal system as "religious question doctrine". However, naming one legal phenomenon is not even close to adequately defining it. In fact, it can be said that the name itself in this case causes more doubts than it provides answers. First of all, this concept of judicial *hands off* approach is far away from coherent one, as the term doctrine would imply. To begin with, what matters could actually be undoubtedly clasiffied as religious? What rationale is justifying enough for such restraint of one branch of sovereign government in modern secular state? Does never "taking sides" really means never ever delving into religious disputable matters, or there are some tolerable, or even desirable exemptions? These are some of the issues that the article will try to shed the light on.

But firstly, it should be underlined, for the purpose of adequate conceptual analysis of the religious question doctrine, its obvious similarities, in the terminological, but also theoretical and evolutive sense, with the political question doctrine, another landmark of public law and praetorian practice of the US Supreme Court.[5] The paper will therefore show, through

[3] M. A. Helfand, „Litigating Religion", *Boston University Law Review* 93/2013, 495. On the relationship of religious autonomy to the other two branches of government, primarily the executive see V. Marković, „Doktrina polja slobodne procene i njena primena u vezi sa članom 9. Evropske konvencije", in: Državno–crkveno pravo kroz vekove (ur. Vladimir Čolović *et al*.), Mitropolija crnogorsko primorska – Institut za uporedno pravo, Beograd 2019, 297–324.

[4] C. C. Lund, „Rethinking the "Religious Questions" Doctrine", *Wayne State University Law School Research Paper* 6/2014, 1019.

[5] Although historically it appeared at a similar time to the American concept of the doctrine of political questions, the French analogue concept, acts of government (*les actes de gouvernement*), was jealously considered as a peculiarity of the French system exclusively. S. Manojlović, *Pojedinačni politički akti. Razgraničenje od upravnih akata*, neobjavljena master teza, Pravni fakultet Univerziteta u Beogradu, Beograd 2009, 1. With numerous similarities with the doctrine of political questions, acts of government, as Dendias described it, was one of the most discussed concepts in the French administrative law theory. ( See R. Marković, *Izvršna vlast*, Savremena administracija, Beograd 1980, 102–103.). It is a matter of interesting curiosity, however, that one of the cases in the practice of the French State Council which were turning point in the evolution of the concept of *les actes de govuernement* concerned religious issues, more precisely the decree on the dissolution of illegal religious congregations at the end of the 19th century. (M. Petrović, „Takozvani „akti vlade" i pravni pojam politike", *Zbornik radova Pravnog fakulteta u Nišu* 58/2011, 73) Although it is an interesting case of the intersection of religious and political issues, this and other cases of the French Council of State are not in the immediate focus of this article, since it primarily analyzes the practice and theoretical framework

the diachronic lens, the similarities between these two doctrines. These similarities have long been observed in theory, through providing their rationale in the first place. However, they are also sometimes noticeable on the verbal level as well. Thus, political question doctrine found its source in a quote from a Supreme Court decision that served as a very cornerstone of the decentralized system of judicial review (Marbury v. Madison), that "... questions in their nature political, or which are by the constitution or laws, submitted to the executive, can never be made in this court".[6] Similarly, through the plethora of cases, the Supreme Court, while explaining the "hands off" approach to the religious questions, took the stance that they were *purely ecclesiastical in character*.[7] Still, apart from the seductive similarities, there are certain differences between these two doctrines, some of which will be highlighted in detail in the article. For example, although analysis of political question doctrine seems quite instructive in our endeavors regarding religious question doctrine, it seems that the former one goes far beyond. This is because, while the courts avoid entering into the evaluation of a political question because they feel that one of the other two branches of government is better suited to resolve that question, there are cases, as later chapters will show, when the courts refrain from evaluating a religious question, although none another institution is not intended to fill such an adjudicative void. In such situations, however, one of the core functions of church autonomy is neglected, i.e. adjudicatory function whereby religious institutions are empowered to resolve their internal disputes. [8] This important function, however, can be useful to us for one last introductory, terminological distinction, between seemingly identical concepts, such are dejudicalization of religion and religious question doctrine. In our article, we do not take those terms as synonyms, mostly because the dejudicialization of religion, as Mayrl and Venny defined it, represents the opposite process to the active involvement of courts in determining the limits of freedom of religion, that is, in other words, it represents the strengthening of other, non-judicial actors in managing religious issues (legislatures, bureaucracy,

of American jurisprudence, since it went the farthest in shaping the separate concept of "religious question doctrine". However, for more on the concept of acts of government in French administrative law, see G. Breban, *Administrativno pravo Francuske*, Službeni list SRJ –CID, Beograd – Podgorica 2002, 222–226.; and in more recent publications e.g. C. Saunnier, *La doctrine des „questions politiques„ Étude comparée: Angleterre, États–Unis, France* LGDJ, Paris 2023; J. Bell, F. Lichère, *Contemporary French Administrative Law*, Cambridge University Press, Cambridge 2022, 164–166.

[6] U.S. Supreme Court, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), par. 99.

[7] See R.W. Garnett, 840.

[8] M.A. Helfand, 499.

quasi-public bodies).[9] As can be clearly seen, this definition clearly overlooks the role of religious institutions themselves, as relevant non-judicial actors. Religious question doctrine, on the other hand, very often highlights religious institutions and their autonomy and the right to self-determination. The ultimate purpose of this article is to reexamine the potential of such institutional autonomy of churches and religious communities to be served as adequate core of the contemporary religious question doctrine.

## 2. Political question doctrine

Like many other dangerous things, political question doctrine also gained itself safe appereance and innocuous name.[10] Doctrine itself derives from the distinction between legal and political questions and reflects (self) imposed limits of courts due to contrasting functions of different branches of government.[11] The development of the doctrine in the system of decentralized judicial review, such as the American one, went casuistically, from case to case, which is why the attempts to reach a clear theoretical synthesis of the doctrine were weak.[12] Truthfuly speaking, such not so successful attempts are partly a necessary consequence of the impossibility of a complete substantive demarcation of politics and law, i.e. the existence of numerous gray areas,[13] which at the same time are often very sensitive social issues. What

[9] D. Mayrl, D. Venny, „The dejudicialization of religious freedom?", *Social Compass* 3/2021, 345.

[10] R. F. Nagel, „Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine", *University of Chicago Law Review* 2/1989, 643.

[11] T. R. S. Allan, "Justiciability and Jurisdiction: Political Questions and the Scope of Judicial Review", in: *Constitutional Justice: A Liberal Theory of the Rule of Law,* Oxford University Press, Oxford 2003, 161.

[12] For more on political questions within centralized system of judicial review see V. Đurić, „Politička pitanja u sudskoj kontroli ustavnosti", *Pravni život* 12/2006, 1185–1196.

[13] O. Vučić, D. Stojanović, „Ustavno sudstvo na preseku prava i politike", *Anali Pravnog fakulteta u Beogradu* 2/2009, 101. In this sense, Lon Fuller's position that "justicability is essentially a matter of degree, since there are polycentric elements in almost all problems submitted to adjudication" appears as justified. According T.R.S. Allan, 188. Also interesting is the attempt to offer a theoretically coherent legal notion of politics, which is an endeavor made by Milan Petrović in Serbian legal theory. This author thus first distinguishes between the concepts of public authority and public service, whereby the dividing line is of an organic nature. Thus, the highest state bodies are not public service providers, but bearers of public authority instead. An additional, essential difference is found in the different types of subjective public rights that belong to state bodies. Thus, holders of public services have subjective public rights – functions, the characteristic of which is that they can be misused. On the other hand, the highest state bodies have absolute subjective public rights, whose characteristic is the impossibility of abuse in the legal sense, because they are exercised at the unlimited free discretion of their holders. For this

then can be considered as the rationale of the doctrine? In order to answer this question, it is necessary to briefly describe its evolution.

### *2.1. From traditional towards modern political question doctrine*

The roots of the political question doctrine go back to the very beginnings of judicial review in America and the famous case of *Marbury v. Madison*. The further colorful evolution of the political question doctrine can be seen in two phases: the traditional and the modern one, with the dividing line between the two phases being set by the Supreme Court itself in the case of *Baker v. Carr* in 1962. In the first, traditional phase, the political question doctrine was the doctrine of judicial restraint indeed, in the sense that the final decision on a certain factual question was left to the political branches of government, in accordance with the diction of Judge Marshall. After 1962, by the praetorian practice of the Supreme Court, the doctrine ceases to be an expression of judicial self - limitation, and becomes, quite the opposite, an expression of judicial power. Since the ruling in the case of *Baker v. Carr*, the Supreme Court grabs for itself *power to decide*, or to put it differently "deciding whether a matter has been committed by the Constitution to the another branch of government is a responsibility of the Supreme Court, as an ultimate interpreter of the Constitution, to decide".[14] How did this become possible? The answer is – by the Supreme Court's attempt to synthesize previous cases into a coherent and applicable test for determining whether it is necessary to invoke a political question doctrine in a specific case.[15] One such attempt was made in 1962 in a case concerning the refusal of the state of Tennessee to update its apportionment statute from 1901, despite the fact that the situation regarding the state population has changed dramatically, which supposedly gave some voters more voting rights than others.[16] Considering this case to be justiciable, Judge William J. Brennan crystallized six criteria by which the Supreme Court in the future can decide whether to invoke the political question doctrine, thus reformulating the political question doctrine. Therefore, in order to be declared as question that is *political in its nature*, and thus excluded from

author, the exercise of absolute subjective public rights thus represents the legal concept of politics and the added value to all, until that, unsuccessful non–legal attempts to define concept of politics. M. Petrović, 81–83.

[14] See T. L. Grove, „The lost history of political question doctrine", *New York University Law Review* 90/2015,1914.

[15] S. Dodson, „Article III and the Political–Question Doctrine", *New York University Law Review* 116/2021, 694–695.

[16] *Ibid.*

the judicial review, concrete issue needs to fulfill at least one of following requirements: (1)Textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) A lack of judicially discoverable and manageable standards for resolving it; (3)The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) An unusual need for unquestioning adherence to a political decision already made; (6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.[17]

Those six factors, besides founding the modern political question doctrine, also proved wrong the stance on impossibility of reducing the political question doctrine to rules or standards.[18] Also, since other justiciability doctrines (e.g. mootness, ripeness, standing issues etc.) address the parties to the case or factual context, the political question doctrine addresses the issue of the case itself. [19] Therefore, after the six Baker factors appeared, the key question has become whether the modern political question doctrine is jurisdictional or prudential? An analysis that, in approaching this question, directs attention towards the textual and teleological interpretation of the factors themselves seems meaningful. According to such an analysis, it is only the first, and the most straightforward factor, jurisdictional in its nature. The remaining ones are prudential. The first factor imposes a question is there a textually demonstrable constitutional commitment of the issue to a coordinated political department, thus having its ground explicitly in the Constitution. Otherwise, if the first factor were also prudential, the court would enjoy discretion in referring to it, even in cases where it is obvious that factor one is present, which would not make sense. The rest Baker factors are prudential, treating the competence of a court to resolve the issue (factors 2 and 3), or being constructed as an additional means of safeguarding the principle of separation of powers (factors 4,5,6).[20] The key consequence arising from the described difference is that only cases that fall under factor 1 are forever barred from adjudication. On the other hand, the cases that fall under the remaining Baker factors are changeable, and thus are not definitively exempt from judicial review,

[17] U.S. Supreme Court, Baker v. Carr, 369 U.S. 186 (1962).

[18] M. Tushnet, „Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine", *New York University Law Review* 80/2002, 1208.

[19] R. Park, „Is the Political Question Doctrine Jurisdictional or Prudential?" *UC Irvine Law Review* 2/2016, 264.

[20] *Ibid.,* 276.

since in the future, with a changed factual context, they may be considered justiciable.[21] Some scholars are of the stance that the formulation of these six factors actually has a more restrictive effect on the applicability of the doctrine, than it provides well-founded grounds for invoking it.[22] It seems that the analysis that separates jurisdictional and prudential factors in the manner described actually leads to the same conclusion - restricting the political question doctrine.

Finally, the description of the evolution of the political question doctrine, from traditional to modern, would not be complete if we do not refer to one global trend. It is about the modern phenomenon of judicialization of *mega* or *pure* politics, which no longer represents restriction of political question doctrine, but rather its demise. Judicialization of *pure* politics is the theoretical concept that encompasses a more active role of courts in electoral processes, issues of national security, macroeconomic plans, but above all, judicial activism in issues of formatting the collective identity and struggles over the *raison d'être* of the political community as such.[23] The range of cases that can be subsumed under the modern phenomenon of judicialization of pure politics is very wide - from the case of bilingualism before the Canadian Supreme Court, to the German Federal Constitutional Court dealing with issues of relations between a united Germany and the EU. Nevertheless, from the aspect of the subject of this paper, and because of the deep significance it can have on the formation of the identity of a political community, the cases with a religious element within this phenomenon are particularly interesting. Thus, for example, the Supreme Constitutional Court of Egypt, determining the scope of Sharia law in Egypt public law, imposed itself as an authoritative interpreter of religious Sharia norms. Similarly, the Supreme Court of Israel, interpreting the provisions of the Law on Return and Citizenship, actually offered its answer to the question "what does it mean to be a Jew, in Israel as a democratic and Jewish state". Given the simultaneously both ethnic and confessional character of the Jewish tradition, the Supreme Court's decision to recognize non-orthodox ways of converting to Judaism done abroad unequivocally represents the entry of the Supreme Court into the domain of religious doctrine. A similar, but reversed role has the Constitutional Court of Turkey, which is considered a key guardian of the strictly secular character of the

[21] *Ibid.,* 279.

[22] See E. Gill, „Judicial Answer To Political Question: The Political Question Doctrine In The United States And Israel", *Boston University Public Interest Law Journal* 2/2014, 259–260.

[23] R. Hirschl, „Judicalization of politics", in: *The Oxford Handbook of Political Science* (ed. Robert Goodin), Oxford University Press, Oxford 2011, 258.

Turkish state and has a role in limiting anti-secularist movements. This last example, moreover, shows the tendency to legalize pure politics in cases of so-called constitutional disharmony, considering the fact that strict Turkish secularism is opposed by the fact that the vast majority of Turkish citizens identify themselves as Muslims.[24] It is inevitable to note that judicialization of pure politics, or juristocracy impose a serious challenge to the separation of power principle, as well as lead to the demise of the political question doctrine.[25] Will that demise be the definitive phase in the evolution of the political question? We are of the opinion that such a conclusion would still be premature, both for reasons of historical experience,[26] as well as because of the latest events in Israel, which show the desire of the executive and legislative authorities to undermine the authority of the judicial branch and the Supreme Court of Israel in particular.

### *2.2. Political question doctrine rationale*

Dictum from the judgment of *Marbury v. Madison*, about the fact that "questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made to this court" is obviously of a disjunctive character, i.e. two categories of situations arise from it in which the judiciary cannot decide - issues that are political in nature and issues that, according to the constitution and the law, are delegated to the executive branch of government.[27] Despite this disjunctiveness, we can point out that the basic rationale of the political question doctrine lies in the separation of powers. The rationale of ill-equipment of the judiciary to resolve the cases which are *political in their nature* can be seen as a separate principle, but certainly deriving from the separation of powers. Or, to put it differently, if the court is incompetent to resolve the case, then the issue at stake is better committed to one of two other branches.[28] The

[24] R. Hirschl, „The New Constitution and the Judicialization of Pure Politics Worldwide", *Fordham Law Review* 2/2006, 735–740, 746.

[25] *Ibid*., 751.

[26] Comparative experience prompts us to be careful, since a withdrawal of acts of government (*le recul de les actes de gouvernement*) has already occurred once in France, due to both their frequent abuse and considering them as an anomaly. This tendency to narrow acts of government was prematurely greeted as a definitive prevention of the hypertrophy of political issues in the sphere of administrative law. (See R. Marković,107–108 as well as S. Manojlović, 40).

[27] S. Dodson, 691.

[28] R. Park, 274. For a different position, which clearly separates these two categories into jurisprudential nature of political question doctrine ("question political in their nature"), and political nature ("question submitted to the executive"), and thereby also separates jurisprudential nature from the concept of separation of powers see E. Gil, 253–255.

understanding of the political question doctrine as a *primary function of separation of powers*, as it is stated in Baker case, was, however, also present in the traditional, pre-Baker phase of the doctrine.[29]

Determining the immediate ground of the political question doctrine, however, is far from indisputable. Some authors believe that the immediate ground of the doctrine lies in Article III of the US Constitution, which extends judicial power to "cases" and "controversies". This conclusion is supported by the Supreme Court itself, which in a case from 2006. took the position that the doctrine of political issue, together with the doctrines of mootness and ripeness, originate in Article III's 'case' or 'controversy' language.[30] There are, however, some voices unwilling to accept such standpoint. According to them, the traditional stage of doctrine has nothing to do with Article III, nor was the argument of case and controversies requirement as a rationale for political question doctrine has ever been mentioned in that stage.[31] Similarly, even in the modern phase of the doctrine, some authors deny that its source is in Article III of the Constitution. Instead of Article III, according to them, the source of the doctrine lies in the provisions of the substantive law that governs the question. So the key question remains whether the norm of substantive law (e.g. Equal Protection Clause) allocates decision to entity other than courts. If it is so, then reference to Article III is redundant.[32] If this point of view is accepted, it further has significant and numerous consequences on the scope of application of the political question doctrine. Among other things, it may happen that the courts retain jurisdiction to decide matters that are peripheral to the political question. Such peripheral matters are, *inter alia*, determining which decision maker other than the judiciary has constitutional authority to resolve the question under the substantive law. More straight forwardly, it can happen that one substantive law allows judicial authority and another substantive law makes the same issue political (e.g. some redistricting plans may be non-justiciable under Guarantee clause, but may be justiciable under the Equal Protection Clause).[33] Although this departure from Article III towards substantive laws, as source of doctrine is justified by the fact that it makes the doctrine more workable,[34] the presented possible consequences

[29] R. Park, 265.

[30] US Supreme Court, *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); More on non justiciability doctrines see M. Davinić, *Koncepcija upravnog prava SAD*, Dosije, Beograd 2004, 169–190.

[31] R. Park, 265.

[32] S. Dodson, 683.

[33] *Ibid.,* 684–685.

[34] *Ibid.,* 735.

of this reorientation can actually be understood as another cause of narrowing the application of the political question doctrine.

### *2.3. Negation of political question doctrine*

However, in contrast to theoretical positions and judicial practice, which ultimately have the result of narrowing the application of the doctrine of political issues, there are positions for which such an effect is simply not enough. Instead, they go towards a complete denial of the existence of political acts, i.e. political question doctrine. One of the greatest critics of judicially untestable acts of government on the Old Continent was the French public law scholar, Leon Duguit. He called the doctrine of acts of government *sinister and absolutist*, since, according to him, this doctrine enables arbitrary deviations from the principles of material legality. Disrespecting those principles would mean that there is no public law at all. Certain decisions of the Tribunal for conflicts of jurisdiction were, therefore, warmly welcomed by Duguit as the definitive end of acts of government, as a relic of the regime of arbitrariness,[35] and their, it will turn out to be temporary, disappearance from French law, were marked as a significant element of his main theoretical construction - the transformations of public law.[36]

Even on the American continent, the political question doctrine has been criticized that actually, such doctrine, do not exist at all, because it is actually a cluster of disparate legal rules and principles which may lead to the decline of jurisdiction to hear a case or decide an issue.[37] Louis Henkin went the furthest in the seriousness of these criticisms, whose goal is not to minimize, but to completely eliminate exceptions from judicial review.[38] According to Henkin, the so-called the political question doctrine is nothing more than ordinary respect of the courts for the political domain, so there is no need for a special doctrine that would require judicial abstention.[39] In fact, he was of the opinion that the doctrine was a result of a progressive who considered judicial restraint as a necessary precondition to a certian social reforms.[40] Henkin was of the stance that the cases that are allegedly brought under the political question doctrine are not actually any extra abstention, but decisions on the merits, only that in the specific case such

[35] Cited according to M. Petrović, 74.

[36] L. Digi, *Preobražaji javnog prava,* Gece Kon, Beograd 1929, 199–206.

[37] M. E. Tigar, „Judicial Power, the Political Question Doctrine, and Foreign Relations", *UCLA Law Review* 6/1970, 1135.

[38] R. Nagel,1989.

[39] L. Henkin, „Is There a Political Question Doctrine", *Yale Law Journal* 5/1976, 597.

[40] R. Nagel, 1989.

a decision on the merits means that the issue is within the constitutional authority of the President or Congress. Thus political question doctrine becomes nothing more than ordinary constitutional interpretation which results in the standard deference to the lawful decisions of other branches of government.[41]

It could be noted that Duguit's critique is pretty much prescriptive. In contrast, Louis Henkin, in addition to his clear negative attitude towards possibility that certain issues remain outside the scope of judicial review, has, however, offered an coherent, normative in its nature critique of considering those issues as a political question doctrine.

### 3. Religious question doctrine

As we have seen from this summary, the political question doctrine is facing considerable controversies, non-linear evolution, and a recent trend of narrowing, due to the phenomenon of judicalization of politics. Given that, analogously to this trend, in theory there is also notion about the judicalization of religious freedom,[42] so one may rightfully ask: what about religious question doctrine? Long history of civil courts refraining from inquiry into religious issues was called religious question doctrine. Its analogies with the political question doctrine have long been recognized in the theory, which emphasized that the religious question doctrine is also a non-justiciability doctrine. In other words, as soon as a lawsuit appears before the court that would imply a judicial assessment of a question with a religious element, the court has no choice but to dismiss the case. [43] Moreover, even parallels between the key rationales of the two doctrines were drawn. Namely, the courts are equally incompetent to resolve both political and religious questions, and such incompetence derives from the constitutional principle of separation. In the case of political questions, it is a separation of powers, while in the case of religious question, it is the separation of state and church.[44] Similar to the political question doctrine, the religious

[41] See M. Tushnet, 1208.

[42] J. T. Richardson, „The judicialization of religious freedom: Variations on a theme", *Social Compass* 3/2021, 375–

391.

[43] J. Goldsetin, „Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs", *Catholic University Law Review* 2/2005, 499., as well as S. Levine, „The Supreme Court's Hands–Off Approach To Religious Questions In The Era Of Covid–19 And Beyond", *U. Pa. Journal of Constitutional Law* 24/2022, 277.

[44] J. Goldstein, 500. In regard to the separation of church and state, which is embodied in the USA in the Non–establishment clause, it is inevitable to emphasize that comperehensive separation is neither possible nor desirable, even in the American experience. (R.

question doctrine was applied in a whole series of different cases. Furthermore, with religious question doctrine the plethora of case law is even more heterogeneous, so that it includes almost all spheres of litigation: consumer fraud, child custody, divorce, employment discrimination, torts, etc. L. Tribe described such heterogeneity as American courts treated almost everything that even resembled inquiry into religious matters as a forbidden domain.[45] In fact, this kind of shorelessness can be taken as the first slight difference between those two doctrines, but before pointing out some more significant differences, it is necessary to show a theoretical attempt on systematization as well as the evolution of religious question doctrine through the presentation of a few most notable cases.

### *3.1. From institution centred toward question centred doctrine – is it really helpful?*

Given that the content of the dispute criteria was not particularly helpful for the theoretical systematization of the religious question doctrine, unlike the political question doctrine, scholars moved their focus to the analysis of the court's attitude in cases with a religious element, regardless of the content of specific cases. In this sense, it is notable to mention P. Dane's detailed schematism regarding the standpoint of the American courts, in the first place, towards cases with a religious element. This author classifies the approach of the courts in matters involving religious issues into four categories of abstention. The primary form of abstention is adjudicative abstention, which refers to the situations in which the court chooses not to hear certain intrareligious disputes at all. Besides adjudicative abstention, there is also a substantive interpretative abstention and it refers to the situation when courts do not abstain from hearing a case *in toto*, but still abstain from certain specific acts. This category can be split in two subcategories: jurisdictional interpretive abstention, in which a civil court would decline to try to identify the locus of religious authority within a religious community, and procedural interpretive abstention, in which a civil court declines to look into whether a religious community's own procedural forms have

W. Garnett, 851). As Professor Witte has observed in a witty manner, „wall" of separation in the public law has proved as more „serpentine", both in the sense of winding and twisting, and in the Edenic sense of "seductively simple". (according to R.W. Garnett, „Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?", *St. John's J. Legal Comment* 22/2007–2008, 523.). More on US understading of secularism in Serbian language see S. Gajin, „Skice za studiju o slobodi religije – princip odvojenosti crkve od države", *Strani pravni život* 2/1997, 67–74.

[45] See J. R. Goldstein, 520.

been complied with.[46] Bearing in mind this extremely instructive classification, we can paraphrase Fuller and say that judicial abstention in the religious matters is essentially a matter of degree as well.

The religious doctrine has its roots in medieval English law, where there were separate and parallel jurisdictions of two courts- Crown's and church ones, each having their own province.[47] Nevertheless, on American soil, religious question doctrine, or as it is also named in the literature, church autonomy doctrine, was born in the Supreme Court decision Watson v. Jones from 1871. The case concerned the question of who is the rightful elder of the Walnut Street Presbyterian Church in Louisville, Kentucky. Property which has been central in the dispute was conveyed by a man and his wife to the local church who was in presbytery that was in tension with the national church. Tensions exploded shortly after the Civil War, and the Old School Presbyter Church, just like Methodists and Baptists before, split over the sensitive issue of slavery. The result of the schism was two competing groups claiming for court ruling that the property in question belonged to the group that adheres more faithfully to the original teachings of the church. In this case, the Supreme Court ruled out that civil jurisdiction does not have jurisdiction over disputes that are purely ecclesiastical in nature, because they must be resolved by the church authorities. In other words, internal church hierarchy is the one who should decide which faction was the rightful claimant to the property.[48] By quoting that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories", Supreme Court has actually understood the religious question doctrine as a hierarchical deference principle.[49] There

[46] P. Dane, „The Varieties Of Religious Autonomy", in: *Church Autonomy: A Comparative Survey* (ed. Gerhard Robbers), Peter Lang, Frankfurt am Main 2001, 128–129. In addition to the categorization of abstention, this author also offers the classification of affirmative deference, which covers the variety of situations in which recognize the norm of religious institution at least, and rely in its own acting on the first order norms of religious community or decisions issued by its own decision–making body. Thus this author within the spectrum of affirmative deference includes recognition, substantive deference, decisional deference, constitutive and dynamic deference. P. Dane, 130. Affirmative deference actually means that the ultimate decision is still vested upon the court, but the court can now move focus from its determination of respective rights to the competent understanding of religious perspectives. A.Deagon, 80.

[47] J. R. Goldstein, 504.

[48] L. Weinberger, „The Limits of Church Autonomy", *Notre Dame Law Review* 3/2023, 1261., as well as E. Osborne, M. Bush, „Rethinking Deference: How the History of Church Property Disputes Calls Into Question Long–Standing First Amendment Doctrine", *SMU Law Review* 4/2016, 811–842.

[49] E. Osborne, M. Bush, 817. A similar position was confirmed more than 50 years later in the case of *Gonzalez v. Roman Catholic Archbishop.* In this case, the question of the

are, however, some scholars who saw in this judgment not only sincere, noble reasons for non-interference in internal religious matters, but rather a convenient tool for politically motivated support, to a faction that was more favorable to the Union in the after war period.[50]

As it can be seen from the mentioned cases, which mainly related to the question of church property, in its initial phase, religious question doctrine played the role of constitutional analog to religious arbitration, or to put it differently, had the dispute resolution function. Such function has been entrusted to religious institutions which were the preferable forum to resolve their own internal affairs. This doctrine thus has relied on the institutional character of religious organization.[51]

Further evolution of the doctrine went in the direction of shifting the focus from the institutional towards the substantive character. Simply

Archbishop's refusal to appoint as his chaplain a minor who did not complete the necessary theological schools, although such an obligation arose from the deeds signed by the relative of the minor Gonzalez, was raised before the Court. Referring to the Watson case, the Court pointed out that the appointment of a chaplain is a canonical act and that it is up to the religious authorities to determine whether the candidate meets the requirements. Moreover, Court has stated that "In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929), par.4. However, it should be drawn one subtle difference between court approach in *Watson* and in *Gonzales*, in the context of Dane s schematism. While Watson is undoubtedly an example of jurisdictional interpretive abstention, noting of acceptance of church tribunals decision in litigation before the secular courts clearly led us to the conclusion that Gonzales is an example of affirmative deference. If we strive to be completely precise, it would be actually the decisional deference subcategory. Also, in another case involving a property issue arising from a schism between two Presbyterian churches in Georgia, the well–known judge Brennan pointed out that allowing the civil courts to determine ecclesiastical questions would lead to a total subversion of religious bodies and would not be consistent with the American understanding of state and church relations. (See R.W. Garnett, 845).

[50] E. Osborne, M. Bush, 836–837. One may note that either Marbury vs. Madison, as an initial case that mentioned political questions, was not fully deprived of similar perspicacious and not so naive intentions of the judges. Thus Krbek states that judge Marshal purposefully chose this case for the establishing the judicial review, because he was sure that declaring the law unconstitutional went in favor of the administration in this case. See I. Krbek, *Ustavno sudovanje*, Jugoslovenska akademija znanosti i umjetnosti, Zagreb 1960, 46.

[51] M. Helfand, 533. This author further warns that the religious question doctrine was sometimes used to dismiss the cases even in situations where there was no appropriate forum to fulfill the adjudicative gap. In such cases, the religious question doctrine was used exactly contrary to its initial purpose, and instead of providing an adequate forum for discussing the religious question, it left the parties without a such an forum at all. *Ibid.,* 544–545.

put, the key question is not anymore *where* the dispute should end, but *what* types of issues the court cannot resolve. A key role in this evolutive shift, similar to the transition from the traditional towards the modern phase of the political question doctrine, was played by judge Brennan. In that sense, definitive transition was made in the case of the *Serbian Eastern Orthodox Diocese v. Milivojevich*. The Supreme Court of Ilionis has declared invalid the decision of the Holy Synod of the Serbian Orthodox Church in Belgrade to defrock the bishop Dionisije and to appoint administrator Fermilian, on the grounds that such an action was arbitrary, i.e. the internal church procedures were not followed. Judge Brennan influenced the Supreme Court to reverse this decision, considering that allowing civil courts to probe deeply enough into the allocation of power under the autonomous church law would violate the First Amendment, pretty much as civil determining the religious doctrine.[52] According to the dictum of the judgment of the Supreme Court, the fatal error of the Illinois Supreme Court was that it rested upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and therefore impermissibly substituted its own inquiry into church polity and resolutions based on those disputes.[53] There is an opinion that in this way, Brennan actually put the cart before the horse, because deference to the religious institutions has become nothing more than a method of avoiding a religious question.[54] A somewhat analogous situation was in the case of over church property issues in *Kedrof v. Russian Orthodox Church*,[55] but also in the *Ballard* case, which had nothing to do with church property, but rather with the constitutional provision of Free Exercise which was interpreted by the Supreme Court in such a way that inquiry over the truth or falsity of religious claims, such as the miracles of new testament or after death life is

[52] Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)

[53] *Ibid.*

[54] M. Helfand, 537.

[55] Similar to Milivojevich, in this case the Supreme Court reversed a decision of the New York Court of Appeals which had upheld a statute awarding control of the New York property of the Russian Orthodox Church to an American group seeking to terminate its relations with the hierarchical Mother Church in Russia. The New York Legislature had concluded that the Communist government of Russia was actually in control of the Mother Church, and that "the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy,' the Supreme Court did not follow this line of argumentation and concluded that Religious freedom encompasses the „power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *U.S. Supreme Court Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952)*

strictly forbidden.[56] At the first glance, one may notice that decision in Ballard is fully in line with the evolutive shift between institutional centered and question centered religius question doctrine.

But, despite that, we believe that it is precisely on the example of Milivojevich that it can be proven that the difference between these two phases, existing in theory, is at least exaggerated, if not completely unfounded. On a contrary, we are of a stance that the case of Milivojevich, like Kedrof, is completely on the track of institutional centered religious question doctrine. Firstly, that derives from the very dictum of the judgment. Just with reference to earlier church property disputes, Judge Brennan considered that the "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the dangers are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . The First Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. This principle applies with equal force to church disputes over church polity and church administration."[57] This quote can be understood as a preserving dispute resolution function, as well as promoting institutions centered religious question doctrine. Moreover, the number of situations in which the need for institutional deference may arise is so wide, but there is still one common denominator - respect for such institutional autonomy. So it would be pointless to emphasize every issue or group of issues as a turning point in the evolution. Therefore, in contrast to the political question doctrine, where judge Brennan really brought a significant turn, this was not the case with the religious question doctrine, and the division into *institution* and *question* centered phase is pretty much redundant. Moreover, insisting on such or similar divisions, in the consideration of religious question doctrine, can lead us back from one of the somewhat coherent factors, to an even greater casuistry.

### *3.2. Religious question doctrine rationale*

It has already been mentioned that the religious question doctrine, analogous to the political question doctrine, has two, mutually intertwined, rationales. Nevertheless, from the interesting observation that the cases in which the religious question doctrine was invoked, do not represent issues

[56] J. Goldstein, 510.

[57] Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)

of metaphysical nature, but rather what individuals or communities believed and how they acted, C. Lund draws an additional, intriguing conclusion. According to him, the rationale for the doctrine does not lie in judicial incompetence to resolve theological doubts, but rather lies in religious freedom. Thus, the decision whether to apply the doctrine depends on whether its application would make the Court better approach religious freedom.[58] Although it seems tautological and even insufficiently precise, we find this position worth mentioning, if for no other reason than the interesting possibility that the reason for the doctrine may be, analogous to Petrović's legal concept of politics, in the character of religious freedom as subjective public right. And indeed, if the state and its bodies that exercise public authority can be seen as a beariers of subjective public rights, is it not all the more possible to consider indivudals, and even more religious communities, as holders of the same subjective public right to freedom of religion?[59]

Both rationales were very succinctly summarized by Judge Kennedy when he questioned both *wisdom* and *constitutionality* of acting of the Supreme Court to act as a national theology board.[60] Wisdom and constitutionality reasons for religious question doctrine were given different names in theory, but in essence they represent, analogous to Park's analysis of 6 Baker factors, jurisdictional and prudential reasons for religious question doctrine. A. Deagon names them pragmatic rationale and principled rationale. Principled rationale derives from the constitutional principles of non-establishment and free exercise and represents the prevention of giving one religion discriminatory or preferential treatment through judicial examination of religious question. Pragmatic rationale, on the other hand, is a consequence of lack of judicial competence to decide religious question. This adjudicative disability is a consequence of a deeper epistemological problem, that is, the impossibility of secular judges being equipped with analytical tools to examine questions based

[58] "When courts think that religious liberty is best served by avoiding religious questions, they avoid them. When courts think that religious liberty requires answering religious questions, they do it" C.C. Lund, 1022.

[59] An example of reasoning based on this point of view can perhaps be the practice of the Supreme Court in cases of challenging measures that limited attendance at religious services during the Covid–19 pandemic. In these situations, the Supreme Court, starting from the inseparableness of individual and collective components of religious freedom, recognized the importance personal attendance has for Jewish religious services, as well as the fact that communion for Catholics cannot be done online. By doing so, the Court deferred to the claimant's own understanding of religion (See S. Levine, 307), which can also be considered an example of the affirmative deference approach, only this time it is not about decisional, but rather a substantive deference.

[60] C. C. Lund, 1027.

on nonrational sources.[61] In other words, religious truths are not a matter of true or false, because they are based on mysticism. They are not based on the logic of law, but, as was pointed out in the Milivojevich case, they are neither rational nor measurable by objective criteria.[62] Therefore, in such circumstances, we can paraphrase Njegoš's verse, and say that these questions are where (all?) judicial knowledge fails.

While, to put it in R. Park's analysis terminology, jurisdictional rationale is mostly undisputed,[63] the justification of prudential reason is highly contested. At the same time, these theoretical challenges can be taken as a kind of attempt to shape the religious question doctrine, since due to the diversity of cases in which the doctrine can be invoked, its uncritical and absolute use is neither possible nor advisable.[64] The value of these shaping attempts depends exclusively on whether it concentrates on pragmatic rationale, or whether it also penetrates into the sphere of principled rationale. A valuable endeavor in that direction is made by Goldstain, who, being aware of the fact that even when a case involves religion, it is not always clear whether a religious question has been raised, distinguishes between *normative religious questions* and *positive religious questions*. Starting from the analogy with the political question doctrine, and the terminology of the Baker case, this author considers normative religious question to be those questions for which the court really cannot use objective and rational tools (whether religious teaching is correct or not, how a religious association should be organized, which practices should be followed).[65] There is indeed an unbridgeable epistemological gap regarding these issues. On the other hand, positive religious questions are those questions that the court can resolve without the risk of crossing the epistemological border, that is, in Baker's language, those for which it has judicially discoverable and

[61] A. Deagon, "The 'Religious Questions' Doctrine: Addressing (Secular) Judicial Incompetence", *Monash University Law Review* 1/2021, 61–65. See also M. A. Helfand, „When Judges Are Theologians: Adjudicating Religious Questions", *Legal Studies Research Paper Series* 12/2017,10.

[62] R.W. Garnett, 856. Some authors, on the other hand, are of the opinion that the conception of law and religion as a systems with inherently distinct methodologies is actually an oversimplification of both law and religion. According to them, religious beliefs are based on the same type of evidence as secular ones, especially those that lack first–hand experience. See J.A. Goldstein, 536.

[63] Judicial dwelling into the profound religious matters would inevitably lead, even if the prudential reason of incompetence is abstracted, to a constitutionally prohibited entanglement with or endorsement of religion, which in the final consequence can rise to the level of prohibited denominational preference. M.A. Helfand, (2021), 11.

[64] J. A. Goldstein, 502.

[65] *Ibid*., 533.

manageable standards for resolving it. Such standards are the ones courts use ordinary and are based mainly on fact finding, since in this case the question is what one religion says on a specific topic. Therefore, resolution of positive question does not interfere with the authority of religious organization on their own matters, or as Goldstein summarized it *the government plainly cannot tell the Catholic Church who the Pope should be, but it would be hard to find that a court unconstitutionally meddles with the Church by saying who the Pope is*.[66] As an *a fortiori* affirmation of positive religious questions as a method for narrowing of religious question doctrine, it is very often cited an argument that judges are not really theologians, but they also do not have knowledge of technology, complex knowledge of medicine and finance, and yet very often, based on fact findings, they are obliged to make decisions in these matters as well.[67] Additionally, it is stated that there is no difference between knowing the content of a positive religious question and the procedure of knowing the foreign legal norms. This attitude is easily confirmed precisely in cases where the court needs to know the legal norm of a foreign state, which, coincidentally, is a religious norm at the same time, as is the case with the legal system of Iran, India or Israel![68]

However, not everything is so simple and binary even with this division. Analogous to the normative/positive question dichotomy, Lund develops his terminology of first order and second order religious questions. Second order will encompass temporal and empirical questions, that lie fully within the investigative capacities of the court, in contrast to the theological and metaphysical claims under first order questions. Although he admits that the difficulties may arise because it is possible overlapping between these two categories, Lund classifies typical cases of religious question doctrine (*Watson* and *Milivojevich*) as a second order question, with the summary statement that these cases do not include any theological or metaphysical question.[69] Although it is not explained in more detail, we cannot agree with this statement. From our standpoint, the issue that was put before the Court in *Watson*, and even more in *Milivojevich* had sever theological, and, dare to say, even metaphysical roots. To start with, the Supreme court judgment succinctly states that the issue of reorganization of the Diocese involves solely a matter of internal church government, as an issue at the core of ecclesiastical affairs.[70] It is evident that the judgment

[66] *Ibid*., 540. Or, in the same manner, it cannot be described as a meddling in Jewish doctrine an obvious subsumption that a ham sandwich is not kosher. A. Deagon, 70.

[67] M.A. Helfand, (2013), 548.

[68] J. A. Goldstein, 538.

[69] C. C. Lund, 1016.

[70] *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)

*ab verbatim* opposes the standpoint on this case as an example of second order, ie questions fully deprived of ecclesiastical elements. Our disagreement further stems from the concept of self-determination of churches and religious communities, which can be briefly described as self-regulation of one's own identity and internal organization in the first place. It is important to note that the ontological identity of the Church or the religious community exists beyond and before state recognition, which is thus nothing more than a matter of (declarative) legal reality.[71] So, in both cases, and especially in the *Milivojevich* case, ecclesiology expressed in concrete arrangement of internal organization is inseparable part of the theology. Although in specific cases the issues of property (*Watson*) and arbitrariness, yet autonomous, procedure (*Milivojevich*) were disputed, these issues are only an external, surface manifestation of a deeper issue that was threatened, which is the self-evident identity of these religious communities as such. The duty of the state to recognize their right to self-determination in these cases was contained in the self-restraint of the judicial branch of government, which prevented undermining the dignity of the religious parties to internally decide and regulate their own doctrines, which, let's underline once again, is the very core of religious question doctrine.[72] There is no doubt, therefore, that although the boundary between normative and positive, and first order and second order can indeed be blurred, the cases of *Watson* and *Milivojevich*, as well as those similar to them, unequivocally belong to the justifiably applied religious question doctrine. The difference, however, is that *Milivojevich* is undoubtedly a classic example of what Dane calls procedural interpretive abstention, and *Watson* is an equally classic example of jurisdictional interpretive abstention.

### *3.3. Attempts to shape religious question doctrine*

The considered dilemma, however, only imposes the need to go deeper in the theoretical considerations of drawing contours to the religious question doctrine. This need is even more necessary because, judicial practice has not produced any coherent factors similar to those in the Baker case and political question doctrine. On the contrary, the Supreme Court has failed to clarify a number of descriptive and normative issues, thus leaving the religious question doctrine more like a grab bag of precedents rather than a clear rule of deference.[73] Some scholars, as one of the possible

[71] B. Šijaković, *Ogledanje u kontekstu – o znanju i vjeri, predanju i identietu, crkvi i državi,* Službeni glasnik, Beograd 2011, 471 –472.

[72] N. Foster, 177.

[73] R.W. Garnett Garnett (2007), 526.

reasons for the absence of such a relevant test, which would emerge from judicial practice, marked the absence of agreed meaning upon the term "religion".[74] Therefore, before presenting, in our opinion, three relevant theoretical attempts to shape the religious question doctrine, we will briefly refer to this significant (incidental) question.

### 3.3.1. Legal determination of the concept of religion as a incidental question

The basic problem of legal determination of the concept of religion (in the context of our paper, as a incidental question) originates from two legitimate but conflicting tendencies. The first respects the position that, according to Đurić, in a modern secular state, state authorities, including the courts, are considered unfit to determine whether a certain belief system can be considered a religion.[75] Durham and Evans go even further in affirmation of the deference approach, while stating that in some jurisdiction there is a fear that *any* attempt to define religion may *itself* be an inappropriate intrusion into religious matters.[76] On the other hand, legal (by legislative or judicial authorities) definition of religion is sometimes necessary, especially in procedures of acquiring legal subjectivity,[77] if for no other reason, then because of the *ratione personae* limitation of religious freedom, i.e. due to the determination the beneficiaries of freedom of religion within the legal order. This is simply because if the courts could not discern which practices are 'religious,' then they could not credibly assess governmental actions in the field of exercising religious freedom.[78]

Hence the position that a demarcation line should still be drawn seems justified, but that drawing must be done with a gentle hand and must not be under- or over-exclusive.[79] In order to meet such goal, the theory

[74] J. A. Goldstein, 526.

[75] V. Đurić, „Pojam religije u pravu", u: *Religija, politika, pravo* (ur. Jovan Ćirić, Velibor Džomić, Miroljub Jevtić), Institut za uporedno pravo, Mitropolija crnogorsko–primorska, Centar za proučavanje religije i versku toleranciju, Beograd – Budva 2015, 182.

[76] W. C. Durham, C. Evans, "Freedom of Religion and Religion–State Relations", in: *Routledge Handbook of Constitutional Law* (eds. Mark Tushnet, Thomas Fleiner, Cheryl Saunders), Routledge London 2013, 245.

[77] For more on certain constitutional dilemmas related to the registration procedures of churches and religious communities, see V. Marković, M. Romić, „O ustavnosti registrovanja crkava i verskih zajednica – prilog proučavanju državno–crkvenog prava", *Strani pravni život* 1/2020, 45–61.

[78] J. A. Goldstein, 528.

[79] J. L. Neo, „Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication", *International Journal of Constitutional Law* 2/2018, 577.

offered several factors that can be helpful in defining religion within the legal order. Those factors include ensuring comprehensiveness, accounting for internal interpretational diversity, observing local particularities, and avoiding dominant sociocultural attitudes.[80] Exemplary case law of the European constitutional courts, on the other hand, gave birth to somewhat different criteria. The first, and the most important criteria, according to the practice of the Federal Constitutional Court of Germany, is the self-understanding of believers. However, self-awareness, as a subjective criterion, must necessarily be complemented by a second, objective criterion. This objective criterion is, according to the position of this Court, "factual confirmation, according to the spiritual content and external image, that it is really a religious community". A similar condition is set by the Italian Constitutional Court, who talks about the need for a religious community "to prove the nature and characteristics of a religious organization in accordance with the criteria prescribed by the state".[81] The theory describes such criteria differently, in more or less detail. Nevertheless, among such criteria, the requirement for the existence of a minimum organizational structure is almost unavoidably mentioned,[82] whereby the adjective *minimally* is no further described. In our opinion, this adjective should be understood as a concession to the criterion of organizational structure not being set under inclusive, and thus discriminatory. On the other hand, the condition of the organizational structure, together with the position of the Federal Constitutional Court of Germany that "the very concept of religious community a connection based on the state order, and not a purely spiritual community of a cult", [83] can potentially ease the definitional difficulties of state authorities, including the judiciary. Of course, on the condition that the state authorities refrain from evaluating the specific form of the organizational structure.

### 3.3.2. Differentiation between public and private law disputes as a criteria for shaping the doctrine

The political question doctrine, with all the difficulties of its understanding, appeared for a long time in terms of a more or less classified group of issues (the relationship between the legislature and the executive,

[80] *Ibid.,* 579.

[81] Cited according V. Đurić (2015), 184. For more information on attempts to define the concept of religion in the practice of European constitutional courts, see V. Đurić, *Sloboda veroispovesti u jurisprudenciji evropskih ustavnih sudova*, Institut za uporedno pravo, Beograd 2012, 27–32, 62–88.

[82] *Ibid.*

[83] *Ibid.*

the sphere of foreign affairs, appointment to high officials, powers related to the state of war or emergency). The cases, however, that are encountered in religious question doctrine are even more scattered. Therefore, it is attention worthy the attempt classification attempt made by Helfand, which in the second step can also serve as a theoretical criteria for shaping the doctrine as well. In determining the criteria for classification, he used an antique, well-known, but still not completely consistent division - the division into public and private law. According to this author, private law disputes implicating religious question doctrine usually involve the interpretation of contracts or other commercial agreements that include some sort of religious terminology (e.g. some purchase agreements for goods that have religious connotations, or marriage agreements stipulate a religious pattern of behavior). Invoking a religious question doctrine in those cases leaves the parties without legal recourse for a sometimes obvious legal wrongs. On the other hand, public law disputes implicating religious question doctrine are situations where the court is asked to apply the regulatory infrastructure in cicrcumstances that invariably require some sort of interrogation of religious doctrine or the scope of religious assertions.[84] In these situations, considering the rule of *stare decesis*, the Supreme Court will actually remove from the legal order the regulation by which entanglement is concluded. Narrowing the religious question doctrine in the sphere of private law matter relies on the fact that not all religious–context issues are too hard to understand and resolve by courts, so the rationale of incompetence, or pragmatic rationale could be overcomed by standard fact finding techniques, including expert testimonies[85] or even simplest subsumptions (e.g. that ham sandwich does not fit the Jewish kosher criteria).

This criteria for shaping the religious question doctrine is in accordance with one of its original functions, which was to ensure that the religious question is discussed before an adequate forum, only in an inverse way: by preventing the issue with religious terminology from being left without a forum for adequate resolution. Nevertheless, even in the private law case the absence of judicial self-restraint cannot mean disrespect for the right of a religious organization or its members to determine the meaning of their own religious commitments. This balance can be achieved with a contextual approach, where in addition to the objective meaning of a term, the meaning assigned to it by specific parties is also taken into account.[86]

[84] M. A. Helfand, (2017), 3.
[85] *Ibid.*, 24–25.
[86] N. Foster, 182.

On the other hand, the reason why public law issues may rest as a core of religious question doctrine is that theological investigation conducted by court in such cases will lead to the kinds of inequalities that convey impermissible entanglement between religion and the state, by asking judges to identify the scope and true meaning of religious doctrine or practices.[87]

Therefore, achieving a balance between protecting the freedom of religious groups to determine the doctrines of their own religion, as well as protecting the legitimate expectations of private parties who entered into arrangements based *inter alia* on the mutual understanding of their religious doctrines and terminology Foster called *hands off unless* approach. The term *unless* encourages courts to decline to decide a religious question unlees it is in a private law context and the parties have chose to subject themslves to a specific religious regime. As an added value of this approach, Foster emphasizes the maximum respect and protection of religious freedoms of religious groups![88]

The attempt to shape the religious question doctrine through a classification based on the whether it is a private law or public law dispute, therefore, has its advantages. Those advantages are: *prima facie* known classification criteria, preservation of the function of not leaving parties without a forum for resolution, as well as sensitivity to the institutional component of religious freedom that occurs with the *hands off unless* approach.

Unfortunately, the first advantage is one of the two biggest disadvantages of this approach at the same time. This is because, although the existence of division into public and private law is indisputable today, neither theory nor practice has made a clear and unambiguous demarcation line, perhaps due to reasons of objective impossibility. Furthermore, it can be argued that in modern conditions, this subtle difference is further blurred, which, of course, lowers the value of this criteria for shaping the religious question doctrine. Proof for this claim can be found in the fact that sometimes the same religious issues arise in the context of public law, and sometimes in private law,[89] but, even more, that the cases around which the religious question doctrine arose historically (church property issues) can be classified within Helfand's classification as a private law rather than a public law dispute.

Another disadvantage of this framing criterion is the inconsistent practice of courts in the USA even within the division into private law and

[87] A. Deagon, 66–67.
[88] N. Foster, 183.
[89] M. A. Helfand, (2017) 5.

public law disputes. Thus, there were cases in which the company (ConAgra, as a parent corporation of the Hebrew National Brand) was sued that their meat products were not 100% kosher, even though they were advertised as such, and the courts accepted *ad literam* their statements on the defining the words kosher were intrinsically religious in nature, and thus, as courts regrettably recongized, left consumer without remedy.[90] On the other hand, in 2012 there was judicial approval of regulatory infrastructure touching religious issues - kosher law. Namely, it is stated that those laws did not violate the establishment clause because it did not prescribe a standard for kosher, but rather required sellers to identify, as a matter of disclosure, individuals that are certified to determine that their food is kosher indeed.[91] With this inconsistent practice, the Supreme Court not only failed to develop the factors for shaping as it did with the political question doctrine, but also made it even more difficult and even somewhat meaningless the division into disputes of private and public law as a criterion for shaping the religious question doctrine. In other words, despite the initial potential, the criterion has become too casuistic for the two reasons mentioned. And to the problem caused by casuistry itself, further casuistry cannot be the answer.

### 3.3.3. (Lost in) secular translation

Absolute and unexceptionable application of the religious question doctrine can cause serious consequences. In cases of church property as well as alleged discrimination in employment, doctrine could be a fig leaf for maintaining the *status quo*, that is, preserving a powerful church stream or church institution as an employer immune to an otherwise potentially meritorious claim.[92] Particularly severe consequences may arise in the matters of applying doctrine in marriage law situations, with significant implications for the position of children and their right to freedom of religion. For example, in Zummo v. Zummo, applying adjudicative abstention, the Court refused to enforce the prenuptial agreement according to which father (who after divorce became a Catholic) agreed not to take children to the services that are contrary to the Jewish faith. The court asked itself "what is covered by the terms religious services and contrary to them, as well as what constitutes Jewish faith*"* and thus rendered this particular norm of agreement unenforceable.[93] Those examples once again show the inadequacy of the

[90] US District Court District of Minnesota, Civil No. 12–1354 (DWF/TNL) from 6.6.2012.

[91] *Ibid.*

[92] S. Levine, 282.

[93] Supreme Court of Pennsylvania, Zummo v. Zummo, 394 Pa. Superior Ct. 30 (1990).

previous criterion, but also impose the necessity of searching for its alternatives. One such alternative is offered by McCruden in something we can define as a *translation endeavour*. According to this author, when dealing with the religious issues, courts will convert the religious language in which the religious believer or the religious group presents their case into a form that is more consistent with the courts' understanding of what would constitute acceptable reasons. This articulates relevant interests and tells the believer what they mean in language that is consistent with secular or public reason.[94] It is also suggested that this approach should be complemented not by the neutral approach of judges, but by the approach of *honest objectivity*, in order to avoid situations of disinterest or, in a worse scenario, to use neutrality as a veil for secularism understood as counter or anti-religious. Honest objectivity is thus "moral perspective which is fair to all concerned, but is simultaneously as free as possible from the subjective religious or ontological preferences of the adjudicator".[95] One may note the seemingly obvious similarities with what Dane subsumes under "affirmative deference." However, at this point we would like to draw a subtle demarcation line. Namely, if *honest objectivity* inevitably goes hand in hand with the idea of secular translation, as its corrector, than the thesis on its compatibility with the *affirmative deference* categories cannot be supported. This is because the logical consequence of secular, as well as any other translation, is the lapse of some of the meaning of the translated term, which can also be contained in a religious norm. Through secular translation, the religious term will be consumed either way, but with honest objectivity there is a chance that such consuming will not be *mala fide*. Idea of affirmative deference, rest upon a completely different assumption - secular courts respect (and accept) the norms adopted by religious bodies as such, only in different degrees - from simple (declarative) recognition, to relying on them during the procedure.

The purpose of such approach is to adequately treat "the pragmatic rationale", which, as we have already said, can be subject to an exception from the application of the religious question doctrine, even by using "regular" court techniques. The problem, however, arises when the court gets carried away and finds itself in the role of translator into the secular language,

[94] According A. Deagon, 71. Habermas thus offers a classic example of translation, according to which the biblical idea of humanity created by the image of God has its secular translation in inviolable dignity of human beings. (J. Habermas, J. Racinger, *Dijalektika sekularizacije – o umu i religiji* (prev. D. Stojanović), Dosije studio, Beograd 2007, 28.) Dane also cites an example of an admittedly more porous secular translation in statutory treatment of kosher food as no more than no fat, or organic.(P. Dane, 139.)

[95] According to A. Deagon, 76.

and thus the values of that language, not only questions that fall under pragmatic rationale, but also go into what is principled rationale. Such a situation occurred in the case of *Cobaw*, where the court has imposed its own views on religious doctrine, by deciding whether discrimination on the basis of sexual orientation occurred. Namely, Christian youth camps refused to make a reservation for a campsite to a complaint (Cobaw Community Health Service) who was running the project designed to support service to same-sex attracted people. Victoria Supreme Court was of the stance that particular view that homosexuality is contrary to God's will is a matter of finding a fact in the first place, and more importantly, not a core doctrine of this specific Christian community. According to the statutory provisions of Christan youth camps, the facilities in its object are to be conducted in accordance with the fundamental beliefs and doctrines of the Christian Brethren, which was in line with the fact that Equal opportunity act recognizes that compliance with the obligation to act in non discriminatory way may in some circumstances conflict with the religious freedom. However, court neglected those arguments, stating that those statutory requirements do not *convert* secular purpose into religious one. And since activity of booking is wholy secular, and without intrinsically religious character, court considered that question of doctrinal conformity can not meaningfully arise. So although those who were runing the camp considered that their religion recquired them to refuse the booking, the Court considered that were not religiously obliged to do so.[96] From the above, it can be seen that this example does not meet the requirement for an honest objectivity approach, and it is also questionable whether it is based on what should be the purely pragmatic rationale of the religious question doctrine. Likewise, this case, although it borrows the terminology of conversion, clearly demonstrates certain shortcomings of the idea of secular translation. Those flaws derive from the core problem of translation itself – if the languages are so fundamentally different, there is a growing tendency that the spirit of the translated language remains lost. In this context, it means that translation done by courts may roughly curb the ability of religious individuals to participate in the democratic society on their own terms, and therefore undermine the opportunity for them to contribute to the democratic society. At the same time, translation approach is like to restrict the autonomy of religious institutions as well, by silencing them, or even worse, encouraging them to self-censor, because their vision does not coincide with what is publicly acceptable liberal language

[96] Supreme Court Of Victoria, *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014)

of natural and social statistical sciences.[97] Moreover, such an approach overlooks, as Durham described it plainly, the most fundamental insights that made modernity and modern pluralism possible—the recognition that within broad limits, society is both more stable and culturally enriched if it protects a wide array of different communities of belief—both religious and secular.[98] If there is no elementary guarantee that religious belief will be considered legitimate, at least, members of religious communities might not have agreed to the general social contract if joining the political community will expose them to the risk of violating their even deeper religious principles. Therefore, secular translation, especially if it does not contain *honest objectivity*, is thus a contribution to the tendency which, considering the essential incommensurableness of secular and spiritual values, creates presumptions in favor of the secular.[99]

However, much more significant than the incompatibility with these profound and far-reaching theoretical assumptions, is the influence of the secular translation idea on the religious question doctrine itself. The secular translation idea makes sense as long as it is limited to pragmatic rationale. Since the tendency has shown to interfere in what is understood as principled rationale, the whole idea became inverted. Instead of being seen as a solid demarcation line, which would also encourage democratic inclusivity, the idea of secular translation is actually used to erase every line of demarcation, while undermining tolerance and coexistence of different worldviews in pluralistic society. We may conclude that secular tranlsation as a criteria or method for shaping the contours of religious question doctrine

[97] A. Deagon, 73.

[98] W.C. Durham, „Religion and the World's Constitutions", in: *Law, Religion, Constitution* (eds. W. Cole Durham *et al*.), Routledge, London 2013, 20.

[99] W. C. Durham, 21–22. And Jürgen Habermas, in his famous polemic with Josef Ratzinger, emphasizes the need for secularized citizens to make an effort to translate certain contributions from the language of religion into publicly accessible language. However, the framework in which Habermas insists on this, which is his notion of post-secularity, is set, perhaps too optimistically, in such a way as to prevent a priori favoring of a secularist worldview. The basic feature of the post–secular framework is that in it naturalistic images of the world do not enjoy a *prima facie* advantage over those worldviews of a religious type. Therefore, in a post–secular society, the neutrality of the state authority when it comes to different worldviews is incompatible with the generalization of the secularist view of the world (J. Habermas, J. Ratzinger, 31–32). Hence, we can say that in the realized post–secular society, the idea of translation into a publicly accessible language is devoid of unfavorable attitudes towards religious opinion as such. What is a problem, however, is the question of whether the post–secular era has really arrived, and whether the insistence on secular translation, which often includes viewing religion as an inherently inferior category, is actually the clearest evidence that we answer on the first question is, unfortunately, still not affirmative.

cannot be endorsed, because instead of formulating, this idea proved to be a way to deny and even negate the very existence of religious question doctrine. In the given context, the real target was actually not the doctrine, but a very idea of religious autonomy instead!

### 3.3.4. Autonomy of churches and religious organizations as core of religious question doctrine – back to basics

As we have seen, various theoretical attempts to shape a religious question doctrine, in the absence of judicially created criteria, have their advantages and disadvantages. The attempt based on the division of disputes into public and private law ones is too imprecise, while the attempt that include the idea of a secular translation hides the danger of completely undermining the very existence of the doctrine. The division of disputes into normative and positive questions seems to be the most adequate, but one must bear in mind that it is not fully and completely precise either, and, therefore, must be supplemented. We see this necessary supplement, bearing in mind the historical development of the doctrine, in the (re)affirmation of the institutional autonomy of churches and religious communities. Such institutional autonomy can be divided into two main applications: matters that require a particular position on religious doctrine or belief, as well as matters that interfere with the religious instituton's internal governance.[100] To be clear, first application should not be equated with positive questions, but under it are meant cases like expulsion of member of a church on the basis of the church's own doctrinal standards.

It was a common tendency of US judicial decisions and public conversations to primarily focus on matters of individual rights and practices, while the distinctive place of religious entities as such were so often overlooked.[101] As a consequence of this tendency, the interpretation of question based, instead of institution based religious question doctrine appeared in the theory of religious question doctrine. The shortcomings of this interpretation have already been shown, so instead of repeating them, it is necessary to highlight, with a few words, the institutional autonomy of churches and religious communities, ie the right of religious communities to autonomy in structuring their religious affairs, as a very core of protecting religious freedom. Cole Durham, therefore, acknowledging that the first association see religious freedom is almost exclusively individual right, points out that religion virtually always has a communal

[100] L. Weinberger, 1260.
[101] R. W. Garneet (2007–2008), 516.

dimension.[102] Some of the commentaries of judgment in the *Kedrof* case, which inevitably represents an example of the application of religious question doctrine, understood such communal dimension, ie autonomy of religious organizations as a consequence of the fact that the state is not the sole possessor of the sovereignty. Further, this judgment implied that "the Church as a spiritual body has liberties which will be given protection directly rather than derivatively and those liberties differ from those possessed by the members of the Church." Religious question doctrine should be oriented primarily, if not exclusively towards these liberties.[103] The difference between liberties of the Church and liberties of church members actually implies the primacy of the first freedom in situations of conflict between the Church and its members, either as individuals or as a group in the form of a church faction. This kind of primacy is possible and even self-evident if we keep in mind the theory of moral subjectivity, as a basis for recognizing collective rights, in this situation for churches and religious communities. According to the theory of moral subjectivity as the basis for the existence of collective rights,[104] what makes a group as such a holder of rights is not the common interests that bind individuals, its members, but the possession of moral status as a logical prerequisite that precedes the interests and rights of the group and its individuals. The minimum condition that a group must fulfill in this sense is having a clear identity,[105] that is, self–awareness of one's own identity. Churches and religious communities, as we have already shown, undoubtedly possess such an awareness of their own identity, and fulfill the condition of having moral subjectivity, which, we repeat, precedes state recognition, but is separable and even independent of rights and interests, including rights to freedom of religion, of its own members.

Freedom of religion in its collective dimension, ie the autonomy of religious institutions as such can be understood, with the approach of concentric circles, for the undoubted core of the religious question doctrine. Hence, every time a question appears before the court that encroaches

[102] W. C. Durham, „The Right to Autonomy in Religious Affairs: A Comparative View", in: *Church Autonomy: A Comparative Survey* (ed. Gerhard Robbers), Peter Lang, Frankfurt am Main 2001, 683.

[103] R.W.Garneet, (2009), 863–864.

[104] There are authors who use the term corporative instead of collective rights for the rights of group entities as such. For more on this subtle, terminological distinction between those two concepts see P. Jones, *Group Rights*, https://plato.stanford.edu/archives/fall2022/entries/rights–group, 28.7.2023.

[105] M. Jovanović, „Postoje li kolektivna prava – I deo", *Anali Pravnog fakulteta u Beogradu* 1/2008, 101,102.

on the institutional autonomy of a religious organization, the court should defer from resolving the case. Or, to put it briefly, every issue that touches the autonomy of religious organizations falls under religious question doctrine, but not every example of religious question doctrine is also an issue of institutional autonomy of churches and religious communities. In those situations that do not represent the institutional autonomy of churches and religious communities, in order to avoid confusion, one can resort to the criterion of distinguishing between normative and positive religious question. Thus, to sum up, first and core circle of issues that fall under the concept and application of religious question doctrine are issues of autonomy of churches and religious organizations, and second circle are (other) normative religious question, while positive religious question remain outside the application of religious question doctrine, and thus, justiciable without the risk of jeopardizing the separation between church and state principle. The attempt to shape the religious question doctrine in this way - (re)affirming a primary focus on autonomy of religious organizations, complemented by the normative religious question criterion is not only in line with the historic evolution of the doctrine itslef (from its very beginings in Watson, over cases such as Milivojevich to some newest, from the times of COVID pandemic), but it is also compatible with the most notable classification of the courts behavior on these matters present among scholars. Thus, institutional autonomy of religious organizations covers both forms of substantive interpretative abstention (jurisdictional and procedural), as well as forms of affirmative deference. The only difference is that the court's respect for institutional autonomy of religious organization is immediate in the case of interpretative abstention, and in the case of affirmative deference it is rather in indirect form.

## 4. Concluding remarks

Our intention was to deal with two issues in this paper. Firstly, to perform a conceptual comparison of two seductively similar doctrines – those of *political question* and of a *religious question*. And secondly, and perhaps too ambitiously, but certainly more importantly, based on case law of US courts in the first place, we considered various theoretical attempts to shape the religious question doctrine, from a set of extremely heterogeneous cases into some kind of coherent and predictable whole. This second aim was motivated by the awareness that such a theoretical formulation, i.e. the crystallization of predictable indicators for the application of the religious question doctrine, is necessary because the remaining alternatives are

two equally unacceptable extremes – uncritical use of the religious question doctrine, incompatible with the secular character of the modern state, or complete denial of the existence of religious question doctrine, incompatible with the principle of autonomy of religious communities, which is, *inter alia*, the reverse side of the principle of secularity of state.

A conceptual comparison of political question doctrine and religious question doctrine revealed one key similarity and two differences. The key similarity between these two doctrines is the complementarity of their two rationales. With the political question doctrine, it is the constitutional principle of separation of powers and judicial incompetence to resolve questions which are in their nature political. Analogous to that, when it comes to the religious question doctrine, rationales are constitutional principle of separation between Church and the State, as well as judicial fundamental incompetence to meddle in questions purely ecclesiastical. Asking which issues deserve to be described as "purely ecclesiastical" shifted us, however, towards the first of the two differences between the doctrines. Unlike the political question doctrine, where the Supreme Court developed a test in the form of 6 Baker factors to determine whether or not there is a political question in a specific case, such a judicial step forward does not exist with the religious question doctrine. However, we are of the stance that this difference should not be exaggerated. This is because the US courts, led by the Supreme Court very often, since the very beginning of the religious question doctrine, have emphasized more or less explicitly that the institutional autonomy of religious organizations is the very core of the religious question doctrine. In other words, the Supreme Court did not consider it appropriate to analytically, as in the Baker case, seek for the determination factors of the religious question, when, for him, it was perhaps self-evident that there is only one key factor, and that is the autonomy of religious organizations as such! Perhaps also due to the court's inertia to emphasize this self-understanding position more decisively, various theoretical attempts to shape the religious question doctrine, and thereby necessarily limit it, appeared. Those attempts can be reduced to the distinction between normative and positive religious question, public and private law character of a dispute, as well as controversial secular translation, each with its own advantages and flaws.

Acknowledging the potential of distinction between normative and positive religious question, we, however, tried to reaffirm, or to make argument of autonomy of religious institutions more explicit in endeavor to shape the contours of religious question doctrine. We did it so because

the autonomy of religious organizations is a more solid criterion than the criterion of normative questions, although almost all normative questions can find its place and origin within the institutional autonomy of religious organizations, because of the self-determination argument. Moreover, autonomy of religious organizations as a key criteria in discerning whether or not a question falls under religious question doctrine proves to be even more valuable if we keep in mind the remaining, key difference between political question doctrine and religious question doctrine. First one went through and still is going through a non-linear, turbulent evolution, being (rightfully) too often contested, with uncertain and unpredictable directions of development in the future. In recent decades, we have witnessed the process of judicialization of pure politics, which has resulted in the demise of political question doctrine. But we truly doubt that such an demise would not be just another, temporal phase in the political question doctrine evolution. In contrast, religious question doctrine, having an autonomy of religious institutions as its well grounded, key criterion, has the potential to be applied in the future in one much more stable and predictable, and therefore, less contestated manner. Such application will occur, in fact, despite all the heterogeneity that the diversity of life of which religion is a pervasive and indispensable part entails. That this is indeed the case is confirmed by Dane when he said that "religious autonomy as part of a discourse of legal pluralism is a necessarily complicated and contested idea, much like other great values such as democracy or freedom".[106] Those values are not just great, but they are long lasting as well! Or to put it in Strasbourg Court words, *" religious communities traditionally exist in a form of organized structures*",[107] so as long as religious communities last in contemporary societies, thus implying the need for religious question doctrine, there will be a stable and self-evident indicator of its adequate and legitimate application. At the same time, such indicator, in a form of autonomy of religious organizations will prevent that religious question doctrine ever enter into the phase of demise.

[106] P. Dane, 146.

[107] ECtHR, Case of Metropolitan Church of Bessarabia and others v. Moldova, Application no. 45701/99, Judgment from 13.12.2001, para. 118.

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# ПОЈМОВНО ПОРЕЂЕЊЕ ДОКТРИНЕ ПОЛИТИЧКОГ И ДОКТРИНЕ РЕЛИГИЈСКОГ ПИТАЊА

## Аутономија цркава и верских заједница и опсег судске контроле

**Сажетак**

*Аутор у раду врши поредбено појмовну анализу две доктрине судског самоуздржања настале у пракси Врховног суда САД –доктрине политичког питања и доктрине религијског питања. Разлози за обе доктрине донекле су комплементарни и садржани су у принципу поделе власти, односно одвојености државе и цркве, као и епистемолошке немогућности судова да улазе у питања политичка, односно религијска у својој сржи. У другом делу рада, аутор анализира различите теоријске покушаје да се, у недостатку јасних смерница изниклих из судске праксе, доктрина религијског питања јасно уобличи, односно њена примена ограничи, будући да апсолутно изузимање питања која у себи носе примесу верске компоненте од судске контроле у савременој секуларној држави није прихватљиво. У том смислу, анализирани су теоријски покушаји који разликују нормативна и позитивна религијска питања, она која се јављају у оквиру јавног и она у оквиру приватног права, као и покушај тзв. секуларног превођења, као модалитета ограничавања доктрине рлеигијског питања. Ипак, аутор у раду, на основу историјског развоја доктрине религијског питања, истиче реафирмацију институционалне аутономије цркава и верских заједница као срж и најдоследнији критеријум уобличавања доктрине религијског питања. Питања регулисања унутрашње организације, избор поглавара, те формулисања сопственог верског учења тако несумњиво морају остати изван домашаја преиспитивања судске власти. Аутор у раду закључује да ће од привржености овом критеријуму институционалне аутономије зависити и даљи ток развоја доктрине религијског питања: да ли ће он бити стабилан и предвидив, те тиме и легитиман, или ће бити неправолинијски и турбулентан, као што је то случај са доктрином политичког питања у савременим правним системима.*

**Кључне речи:** доктрина политичког питања, доктрина религијског питања, подела власти, судска контрола, аутономија верских организација.

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