



Christian Theological Grounds of Jurisprudence: Historical and Contemporary Aspects

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Abstract

Relevance of Christian theological grounds of jurisprudence stems from the fact that a religion in general and Christianity in particular, remains one of the main regulators of social behavior, whereby the question of the connection between the law and religion as well as the question of the relationship between the Christian theology and jurisprudence arises. The purpose of this study is to reveal historical and contemporary aspects of the similarity, difference and interaction of Christian and legal spheres of the social reality. In particular, the interdisciplinary approach provided the combination of exegesis and hermeneutics, dialectics, dogmatic and historical methodological tools, and was used to retrace the evolution of the law and to disclose various connections between legal and religious prescriptions and the content. The main intersection points of the law and religion, particularly Christianity, such as sacredness, values, morality and axiomatic assertions are disclosed as well as the religious basis of the historical and contemporary law is proved in the article. The outcomes of the study are of practical value for implementating and affirming



the rule of law, for strengthening of authority of the legal system and legal order in Ukraine with the means of the Christian religion and religious institutions.

Keywords: crossing points of law and religion; axioms of law and religion; christian values and morality; commandments, spirituality.

Introduction

Contemporary society tends to absolutize the concept of a law and legal norms due to the idea of the rule of law as the primary principle of the social organization. Quintessential secularity is regarded as one of the main mandatory features of the modern nation-state (Loughlin, 2015). Moreover, the idea of the separation of the secular law and religion is shared by J. Loughlin, A. Romashko and other. Christian theologians offer different reasoning for the separation of the religion and law. Firstly, the idea that only the obligatory law for Christians is the Divine law, whereas the positive law and ethics both are relative; secondly, the idea that Christians should live by faith and not by law; thirdly, the idea that the resurrection of Christ freed Christians from every legal or moral obligation and bounded them by His commitments.

We turn to the position that considers the law in close relation to the religion, and support the view of many scholars that the total separation of the law and religion is detrimental. According to the H.J. Berman's words, this separation "caused the massive loss of confidence in law and the massive loss of confidence in religion" (Krestovska & Matvieieva, 2019). The law playing an extremely important role in the consolidation and functioning of the society, cannot be based solely on itself or the will of a legislator, and cannot serve as an absolute measure of all human values.

In fact, the highest purpose and the final function of the law in the human society is a projection of the transcendent Divine Law into a real life. This is the highest providential essence of law. We share Berman's premise that the law channels and communicates with

the religion through four principal ways: a ritual, traditions, authority, and universality (Harold, 2000). Not only connections between the natural law and theology, but also grounds of the positive law, laid in the Scripture, are on the research agenda nowadays. As an example, an American scholar, D. Opderbeck (2019) provides an understanding of praxis of the positive law from the position of the Christian theology.

Many legal scholars point to the perniciousness of the total separation of the law and religion and morality, and accordingly the separation of jurisprudence and theology, considering that its ability to express a holistic picture of the world acted as a universal pillar of social values, in particular. The failure of the secularized science and the liberal theory to account for 'nonrational' or religious yearnings has been cited as the primary reason for the popular decline in the appeal of the liberal political ideology and the rise of politics of the right-wing evangelism in its stead (Underkuffler, 1995).

Analysis of the Western tradition of law, its current crisis and the problem of reconciliation of law and religion as a way out of the impasse are central to the research of the American historian of law H. J. Berman ("Western tradition of law: the era of formation"; "Faith and law: reconciliation of law and religion"), who believes that respect for the law is justified only when the law refers to something higher than itself, otherwise there is a kind of idolatry. Studies on the interrelation of the law and religion are particularly active in societies that have recently been positioned as atheistic. A good example of such a study was A. Romashko's thesis concluded that the legal sphere correlated with the sacred sphere during different periods of the development of legal systems in every civilizational model. The hallmark of the



contemporary period is the indirect influence of the sacred sphere on secularized legal systems, exercising mainly through philosophical and ethical categories (Romashko, 2005).

Ukrainian scholar D. Vovk (2009) argues that the relationship between the law and religion in a society at the post-secularized stage is characterized as follows: the recognition of the fact that religiosity does not disappear in the contemporary society; "rehabilitation" of the religious paradigm in the understanding of law, in particular, the gradual recognition of the religious justification of law; strengthening the interaction of law and religion as forms of social and individual consciousness and regulations; increasing the importance of general social functions of law (ideological, educational, communicative, etc.); the departure from the traditional autonomous model of state relations and churches. Authors share these ideas and confirm that many aspects of Christian grounds of jurisprudence are not enlightened comprehensively.

Methodological Framework

In this article the complex interaction between the law and Christian religion is analyzed from the position of theoretical jurisprudence, and its special mission is to reveal connections between Christianity and law in its historical retrospective and contemporary co-existence. The mainstream of the methodology is the interdisciplinary approach used in this study due to the complex object of the research that combines sacred and secular spheres of social regulations. This approach implies the study of law as an integral part of the social regulation together with morality, ethics, and religion. Particularly, the interdisciplinary approach in this study involves the combination of exegesis applied to sacred Christian texts and hermeneutics applied to secular legal texts. Nevertheless, the authors take into account the borderline between these methods that lay in both the recognition and non-recognition of revelation as a way of knowing the truth.

According to the principles of exegesis, the holistic content of the Holy Scripture is open only for inspirited readers. This characteristic feature should distinguish the research in the field of law-and-religion from similar studies in the fields of law-and-economics, law-and-literature and law-and-sociology. The value-based approach allowed to understand the place and rank

of the law in the paired categories of the law, morality and religion, and to affirm the primary role of religion in the process of emerging and being the law. Christianity and law both are regarded as normative value systems. This approach is used to reveal the connections between morality and law as well.

Considering normative aspects of the raised issue, dialectics was used to retrace the evolution of the law and to disclose various connections between legal and religious prescriptions and the content of Christianity and the contemporary law. Dogmatic ontology was explored for understanding the transcendent nature of the Holy Scripture in the context of the legal study. The legal nature of the research conditioned usage of the analytical approach, whereby legal and religious norms and principles were regarded as the result of the enactment, adoption, or the act of recognition implemented by public authorities such as the state, governmental entities or Christian church institutions. Recognising Christianity as a historical religion (Cottrell, 1964), we cannot ignore the methods of historical research. The legal nature of the proposed study obliges the use of the formal legal (dogmatic) research method with special attention paid to the content and sanctions of legal prescriptions.

Results and discussion

Sacredness as an intersection point of law and religion

It seems axiomatic to declare that the main feature of a religion is its sacred nature manifested in assigning the holiness to certain worldviews, objects, beings, institutions. The



existence of a religious system is possible only in the dimension of sacredness. We argue that despite the rational basis of the legal sphere, sacredness and faith as its core elements give extremely deep meaning to the concept of law and the idea of law; therefore, the faith strengthens the influence of legal regulations. In particular, the idea of the rule of law is a kind of credo of the contemporary state and law-abiding citizens as well. It seems to be proved, that the religion in general, and Christianity in particular, stand in an opaque and complex relationship to the global Rule of Law, in particular the Christian religion is both a specific source and a deeply sedimented general foundation of the globally expansive Rule of Law (Walker, 2020). Moreover, the rule of law has some features of the sacred phenomenon, firstly: the rule of law, like religious faith, is a phenomenon of consciousness. The authors share B. Tamanaga's opinion, that 'for the rule of law to exist, people must believe in, and be committed to the rule of law. They must take it for granted as a necessary, proper, and existing part of their political-legal system. This attitude is not itself a legal rule. It is a shared political ideal that amounts to a cultural belief.

When this cultural belief is pervasive, the rule of law can be resilient, spanning generations, surviving episodes, in which the rule of law is flouted by government officials. When this cultural belief is not pervasive, however, the rule of law will be weak or non-existent' (italics are ours) (Tamanaha, 2007). The faith in the rule of law is to some extent irrational despite the rational grounds of law. Intuitive faith in the rule of law enables the believer to affirm an ineffable commitment to the law when the rational grounds, though often available, are insufficiently powerful to sustain it (Apreleva, 2010).

I.A. Isaiev (2006) analyzing the sphere of the sacred considers the field of jurisprudence as one of its most important levels. Entering the world of the sacred 'we enter the realm of human law', according to which the "eternal" law reminds itself by the symbols of justice, rising above all cultural norms, right and wrong ones. To understand the content of the law, in addition to identifying the characteristics of the reality or manifestations of human properties, it is extremely important to consider its deep spiritual and cultural foundations. Belief in the existence of ontological (divine or natural) foundations of the law is the most stable irrational motive for lawmaking.

Christian religion and law both may be regarded as normative value systems. Nevertheless, the nature and origin of their values are completely different. Christian values stem from the transcendent idea of God whereas values of law and legal values stem from the human nature or the nature of social relations. The ultimate version of the origin of law values was presented by normativist theory 'Law is valuable precisely because it is a norm' (Kelsen, 1941). In any case from any position of contemporary cognition of the law, the values of law are determined by mundane reasons. 'Law ignores the supernatural, reducing itself only to certain external spheres of existence (politics, economics, social management, conflict resolution, etc.).

Religion, on the contrary, relies on the irrational (or rather they cannot be appreciated) absolute values from the position of law, encompassing holistic human existence' (Kalinin, 2010). Thus, values in the Christian religion are absolute; the values in law are relative. Christianity proceeds from the understanding of the value as absolute good that has significance in any relation and for any subject. In Christianity the values in question have an absolute divine source and therefore are endowed with an absolute moral dimension.

Christian values are not reduced only to evangelical precepts and moral rules. They constitute a whole system which elements are the following (by L.V.Baeva): 'ontological – God, Existence, immortality (eternity); anthropological – the human being, the soul, free will, faith, hope, love, salvation; ethical - good, love for neighbour, non-resistance to evil, forgiveness, suffering, martyrdom, holiness, virtue; aesthetic – beauty as an expression of



God in the world, the beautiful thing as a form of goodness; cognitive-mystical - Holy Scripture and Tradition, prayer, grace; symbolic – Church, an icon, worship, rites and rituals; social – the Christian community, synodality, humanity' (Baeva, 2007).

It seems that the list must be amended by justice (Kozlovskiy et al., 2019). The supreme good, which is the source of all other values as well, is the God-revealed truth about the Most Holy Trinity as the absolutely perfect Spirit. This truth is the highest point in the hierarchy of the Christian values because it is the source of faith. The doctrine of the uniqueness of the human person as an immortal, spiritual being created by God in His own image and likeness occupies a crucial place in the correlation of Christianity and law. Law, and likewise the Christian religion contains and defends universal human values such as justice, humanness and humanity. As a value-normative system, the Christian religion determines the legal behaviour of believers, assessing it in terms of compliance with religious norms and principles.

Religion is an important factor in the formation of the positive attitude to legal and state institutions, the formation of law-abiding behaviour. According to M. Eliade's words, the law is endowed with a sign of holiness, because it is recognised as a divine institution and is in this respect the material embodiment of the Sacred in worldly life (Eliade, 1994). Religious dogmas and precepts have played and continue to play the role of the state creative factor, becoming both an unofficial and often an official normative system of individual state entities and entire geographical areas.

Axiomatic assertions in law and religion

The positive law contains some self-evident assertions likewise the religious dogma. An example is the rule of *Nemo iudex in causa sua* (no-one can be judged in his own cause). In particular, the idea of the superiority of law over the state cannot be verified by simple experience; the rule of law is a guide to an action and not a strictly coercive means like other legal regulators. But it is a question whether these axiomatic provisions of law play the same fundamental role alike the religious dogmas. From the positivist point of view legal axioms are regarded as subsidiary to legal norms, notwithstanding effective means of the legal speculation that help in the decision of legal cases (Krestovska & Matvieieva, 2019).

The opposite opinion considers the axioms as the basic elements of the legal system (Ogleznev & Surovtsev, 2018). And at last, some scholars strongly criticize the idea of insertion axiomatic methods and phenomena into the legal sphere (Madej & Horák, 2018). Recognizing the rational core in every above-mentioned opinion, we assert that the religious dogmas and legal axioms have some common and some particular features. Both the dogmas and legal axioms are regarded as truth that does not need verification. The difference is that the criticism of the Christian dogmas is appropriate by no means while axioms in law are rational and may be criticised.

Moreover, the fundamental role of dogmas in Christianity is doubtless, while the role and place of legal axioms in the law is a question. Finally, religious dogmas and legal axioms both play ambivalent role in the theological and philosophical discourse. Theology asserts religious dogmas as a point of understanding every element of the religion, while axioms in jurisprudence play the technical role to some extent. They are tools for solving intellectual problems in the field of law, form results of theoretical generalization of the legal life, i.e., principles of law, and specific legal regulation.

In all primary cultures the idea of law was associated exclusively with the religious consciousness. In this matter, we fully share the position expressed, in particular, by Yu. V. Tikhonravov (1997) regarding the religious roots of law. He believes that the connection



between the emergence of law and the forceful influence of religion is directly causal. Moreover, the fact of the religious force determines the law in its positive (legal) form, i.e. in the legislative acts established by the state authorities.

Moreover, law and legal consciousness have not only grown out of the religious life and religious consciousness and, as it were, are secondary to them, but also retain this powerful layer of meaning at all stages of their development. According to H. Kelsen's conclusion, 'the earliest social order has a completely religious character. Originally it knows no sanctions other than religious ones, that is, those emanating from a superhuman authority. Only later, at least within the narrower group itself, do there appear, side by side with the transcendental sanctions, sanctions that are socially immanent, that is to say, socially organized, to be fulfilled by the individuals according to the provisions of the social order' (Kelsen, 1941).

If the sacred moment characterizes the law in terms of its deep spiritual content, which has not only cultural but also historical roots, the moment of sanctity characterizes the law in terms of boundary grounds that give it an imperative, normative unwavering and irresistible force (Isaev, 2006). An oath on the Bible during the judge's oath in many countries of the world is a perfect testimony to that (Zubov, 2004). Religion in general and Christianity in particular should be regarded as the basis of law from some principal positions. Firstly, the historical origins of the law lay in the sacred fabric. Every existing system of the positive law stems from the transcendent idea of the supreme order and the carrier and translator of this order. The idea of non-human and supranatural origin of law is dominant in theology, philosophical doctrines and everyday legal consciousness.

Many examples may be given. The Church Fathers regard conscience as the natural law placed by God in the human heart at the time of creation: 'When God created man, He sowed in him something divine, a certain thought which has in itself, like a spark, both light and warmth; a thought which enlightens the mind and indicates to it what is good and what is evil – this is called conscience, and it is a natural law' (Dorotheus, 2013). John Locke (1823), whose ideas are laid in the basis of contemporary understanding of the civil society, law and state, repeatedly asserted, that law as well as reason had been given by God.

The Old Testament in its origin is a collection of concrete provisions given to God's own chosen people. Legalization of the moral, as paradoxical as it sounds, means the restoration of the beginnings of divine law (Isaev, 2006), moreover, in the sacred legal order the ethical

values find a completely new meaning - the meaning of eternal values. The historical and civilizational mobility of human consciousness and natural depravity of human beings do not allow the human being to accept the Divine law in its integrity. During various epochs and in different communities, only a part of the Divine law was accepted and realised.

A good example of such conclusion demonstrates the Saviour's sermon on a divorce. He said that Moses allowed the divorce to his people 'because you were so hard-hearted, that Moses allowed you to divorce your wives, but it was not like this from the beginning. ...Anyone who divorces his wife – I am not speaking of an illicit marriage – and marries another, is guilty of adultery' (Matthew 19: 8-9). That sermon established the highest moral and legal ideal of marriage, unattainable for many people, and furthermore conditioned partial transfer of the institute of marriage from the realm of Canonic law to the field of secular law. Moreover, the understanding the marriage has changed dramatically in the realm of protestant confessions.

In case the human law rejects the absolute divine norm and replaces it with the opposite one, it becomes illicit, no matter what legal attire it is dressed. For example, the law of the Decalogue clearly states: 'Honor your father and mother'. And if any secular law declares that respect for the parents is a crime, the legislator becomes a wrongdoer. In other words,



the human law never contains the divine law in its integrity, but in order to retain its role as a law, it must not contradict the divine law. Therefore, most peoples have retained the attitude to a law as a shrine thus far.

Morality as a link of law and Christianity

In the positive law itself we can easily find a moral component. Morality and law complement each other. The rules of law serve and should serve as guides to morality, to consolidate and protect the moral principles of society. On the other hand, the force of laws increases if they are based not only on power and coercion but also on public morality. The legal system of a state-organized society enshrines the vital requirements of morality. In the process of creating regulations, the legislator takes into account the state of public morality, ethical

culture of the people, assumes that the positive law should be ethical, and laws – should be fair and humane. According to I. Kant (1998), the relationship between the positive law and morality is the following: the law is the first degree, the necessary minimum of morality.

The law allows only those actions of individuals that are outwardly compatible with the requirements of the ethical law: 'the universal imperative of duty can also go as follows: act as if the maxim of your action were to become by your will a universal law of nature' (Groundwork of the metaphysics of morals 4:421) (Kant & Korsgaard, 1998). The final purpose of the law is to create conditions for self-realization of an individual (Inshyn et al., 2021). Further, without morality as an organic segment of the rule of law, no rule of law is possible, because it is based on the duty of individuals to obey the law – a moral duty, of course.

According to the guiding principles of the Council of Europe, the most important references to the rule of law is 'the "devotion" of member states "to the spiritual and moral values, which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles, which form the basis of all genuine democracy' (European Commission for Democracy Through Law, 2011). It is important that, in contrast to the secular doctrines of natural law, the moral and legal ideal of Christianity is extremely specific and has its own register of virtues set forth by Christ in the Sermon on the Mount (Matthew 5: 3-10): humbleness, mercy, meekness, sincerity, peacefulness, righteousness, patience.

These virtues are moral in the nature; nevertheless, they should be regarded as the source of law, as God's legal ideal given to us. The universality of this moral ideal is due not only to the fact that it is absolute and eternal. In addition to other virtues, this natural law is addressed to the personal conscience of each person and to the community as a whole. The very nature of the human as a spiritual being is composed in such a way that the moral ideal is natural to each person.

St. John Chrysostom (1980) stated that human nature already had the law of conscience from one's birth:

It is, that when God formed man, he implanted within him from the beginning a natural law. And what then was this natural law? He gave utterance to conscience within us; and made the knowledge of good things, and of those which are the contrary, to be self-taught. For we have no need to learn that fornication is an evil thing, and that chastity is a good thing, but we know this from the first. And that you may learn that we know this from the first, the Lawgiver, when He afterwards gave laws,



and said, "Thou shalt not kill," did not add, "since murder is an evil thing," but simply said, "Thou shall not kill;" for He merely prohibited the sin, without teaching (Chrysostom, 1980).

Realising the absolute nature of these commandments, knowing how imperfect the sinful man is, the legislator must encourage the moral conduct through consistent and persistent

rules called the law. The Sermon on the Mount entered the law of the Christian civilization, albeit in an interpreted form. So what is the law? The law is a way of objectifying the eternal moral ideal given to us by God in specific rules and principles (Ivanov, 2012).

Legal and religious norms play the key role in the interaction of legal and religious systems. Sometimes, legal norms textually reproduce religious prescriptions that preceded them temporally and by origin. A law and religion support each other, and their demands largely coincide. In case prescriptions of legal and religious norms coincide their impact on the social

development amplifies. Cohesion of the legal and religious prescriptions creates affirmation for the socially approved behavior in the consciousness of an individual. And contrariwise, legal norms that are not filled with universal values, the religious or moral content and contradict Orthodox canons become "doomed" to their non-acceptance, non-performance or observance only on the basis of law-abiding, but not law-respecting motives (Malko & Lipinskiy, 2018).

The interaction of a law and religion is expressed through sanctification of legal institutions and relationships and a law itself that can generate a special emotional attitude of believers towards them. By sanctifying the law or its institutes, the religion declares violation of the law as a sin and thus promotes the implementation of the law. The law commands the observance of laws, and, in fact, the religion does the same. Such prescriptions of the Christian religion as "thou shalt not kill", "thou shalt not steal", and «thou shalt not bear false witness" are protected by the Criminal law. As a result of such interaction, the socially necessary human behavior is ensured by sanctions of both legal and religious norms, by the state and church coercion, by a threat of the supernatural punishment and the promise of supernatural rewards.

The Christian religion, being a moral and normative system, influences the formation and implementation of secular legal norms. The Christian norms, for the most part, are not directly embodied in the legislation, but affect law-making and the law enforcement indirectly. This form of the interaction of Christianity and the law is the most sophisticated one as it seems not explicit but nevertheless significant for the law. By adopting and sanctifying the norms of the Old Testament (Decalogue), Christianity translated them into the secular law. Implementation of Ten Commandments into the positive law is disclosed by W. Huber (1994) as a historical five-stage process and assumed that contemporaneity should be the time of convergence between biblical legal thought and Western legal systems.

The Decalogue and Sermon on the Mount should be considered as a significant primary source of the contemporary criminal, family and constitutional legislation. The secular law is undoubtedly closely connected with the public activity and the public good, and to the contrary the religion is connected closely with morality and with a sense of the sanctity.

However, the complete separation of legal and religious institutions does not require a complete separation of legal and religious values. Jesus Christ treated the law with great respect. Indeed, He identified it with justice, mercy, and faith. He said that the meaning and essence of the law – is love for God and for your neighbour. He condemned the Pharisees



for violating the law. He says that they care only about formalities, neglecting the essence: “Woe to you, teachers of the law and Pharisees, you hypocrites! You give a tenth of your

spices-mint, dill and cumin. But you have neglected the more important matters of the law-- justice, mercy and faithfulness. You should have practiced the latter, without neglecting the former” (Matthew 23:23).

Although it is possible to separate completely secular norms from religious ones, the latter actually play a significant role in shaping the law-abiding human behavior, producing a stable system of values, acting as motives for the socially positive behaviour. As an example, the idea of justice plays the significant role in the operation of the legal mechanism. The states try in all possible ways to present their policy and decisions as fair, reflecting the moral expectations of the society. If this is achieved, then such decisions will acquire not only the state but also social power, which will increase their activity.

Conclusion

Religion in general, and Christianity in particular, stand in the complex relationship to Law, and their interaction is much more complicated than confrontation is. The rational basis of the law does not contradict the idea of faith as a core of the religion; moreover, the faith strengthens the influence of legal regulations. In particular, the rule of the law concept has some features of a sacred phenomenon, and even in strictly secular social systems with a sharp distinction between the law and religion, they need each other since the law gives the religion grounds of social functioning, and the religion inspires respect for the law. And on the contrary, destruction of religious foundations, wherever it occurs, has never been useful to the law and order. The religion, Christianity in particular, is one of the factors in recognizing legal prescriptions as just and consistent with morality. We also emphasize that the links between the law and religion are not linear and arise at the level of both homogeneous elements (e.g., religious consciousness and legal consciousness, religious norms and rules of the law) and disparate components (e.g. religious ideology and a legal system, state and religious activities).

The Christian religion and secular law are both regarded as the normative value systems. Strictly speaking, the nature and origin of religious and legal values are different as long as the first stem from the idea of God, and the latter stem from human nature. Nevertheless, the law and religion act as elements of the system of social regulation. Religion in the human society largely determines the behaviour of people. The vast majority of right holders is bearers of a religious idea and perceives the world and society through the prism of religious attitudes.

On the other hand, the bearers of the religious idea establish a legal system and accordingly invest their religious values in it, and these values in turn are sacred, i.e., they have their ultimate source according to their ideas of the divine will, the cosmic law. As to the form of the religious and legal prescriptions it should be said that the religion and law contain some

self-evident assertions, respectively dogmas and axioms. The difference is that the dogmas must not be criticised, but legal axioms may. The role of the dogmas in Christianity is doubtless, while the role and place of the legal axioms in the law is open to question.

The following point of interaction of religion and law is morality. Such human virtues as humbleness, mercy, meekness, sincerity, peacefulness, righteousness, patience are regarded as the God's legal ideal given to us. The fundamental role of religion in the origin and development of the law is proved by historical facts. For example, the Old Testament in its origin, is essentially a collection of concrete provisions given to God's own chosen people,



the *laos* -people and *Ekklesia*- church and the church wishes to preserve its holy tradition as part of the life of the church which 'embraces the truth of the New Testament' and its views on legal issues (Nicolaidis, 2010). Religion is thus one of the determinants of the formation

process of specific legal norms, institutions and branches of law, and the legal system as a whole. Thus, the historical development confirms the constant need of mankind both in the picture of the world, the model of the worldview offered by the religion, and in the normative regulator based on the absolute transcendental values.

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