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THE RELIGIOUS BASIS OF CONTEMPORARY LAW

INTRODUCTION

Since the sixteenth century, the progressive secularization of societies has been evident. As Le Brass stated, the process of reformation continues to this day (*le grand reformation*) [Le Brass 1956, 3]. On the one hand, this should be evaluated positively, since the separation of secular and ecclesiastical authority promotes the development of religious tolerance, and thus the growth of individualization of people and the creation and development of new socially desirable values [Berger and Luckman 2010, 23]. On the other hand, nowadays there is little awareness of ties by which religion and law are connected. Both of these institutions were created in the early stages of the formation of society and influenced each other. On the one hand, legal norms influenced the shape of the organization of the worship of deities, the course of rituals, etc., on the other hand, the values presented in religious dogmatic gave rise to pointing as sources of law by justifying their divine origin and popularizing them. The progressive process of secularization has contributed to instilling in the mind of modern people the conviction that law and religion are institutions independent of each other and the values presented by them should be kept separate. It is forgotten that the law in the early stages of social development was justified by religious norms. The divine origin of the law or the authority and its violation were treated as an offense against God (political-religious

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monism) [Burgoński 2014, 216-39]. Genesis of what is considered today to be the marker of a democratic state under the rule of law finds its original foundation in religion. However, secularization promotes the development of sciences, including legal sciences. It gives impetus to researchers to indicate (create or denote [Russell 2005, 873-87]) values other than religious in justification of legal institutions initially justified through the prism of religion. Therefore, it is worth pointing out some examples to confirm the religious basis of modern legal institutions, and present the process of evolution of the argumentation of their importance in the functioning of society.

The article is divided into two main parts. In first (The mutual influence of religion and law on each other in the process of their formation) is described how the law and religion are understood in further considerations while in the second, divided into two parts (is described how the law and religion are understood in further considerations and The influence of non-religious institutions on religious law) were presented the genesis of legal institutions in contemporary law such as parental authority, age of maturity, social policy, public order protection, food law, postmortem protection of human corpses and graves as well as how secular institutions such as property and marriage influenced the religious law. The results are contained in final part- Final remarks.

1. THE MUTUAL INFLUENCE OF RELIGION AND LAW ON EACH OTHER IN THE PROCESS OF THEIR FORMATION

It is necessary to indicate what the author understand under the concepts of law and religion. In the literature there is plenty of definitions of law [Zirk-Sadowski 2021, 23-142]. For the purposes of this article by law I mean a set of universally accepted (internalized [Borucka-Arctowa 1981, 75]) norms, the non-observance of which is threatened with sanction [Koszowski 2019, 73]. Therefore, it is not only law in positive terms, created by authorized bodies, whose sanctions are formalized and executed within the framework of the state [Ehrlich 1912, 155-56]. In turn, by religion for the purposes of further argumentation I mean the dominant system [Oosten 1985, 283] of beliefs and practices in a given community [Durkheim 1990, 26]. It also crucial to indicate that in the text I treat as religious law the

law that finds its justification in religious norms . As an aside, it should be pointed out that the concept of belief system refers to the belief in improvable phenomena with the available level of knowledge and technology. This is a category independent of ethical judgments, i.e. indicating whether a given belief is good or bad, right or wrong.

Law and religion were already formed during the initial phases of society's formation. Initially, norms adhered to by individuals were internalized by others ones and their collectivities, consequently forming certain universal norms [Hechter and Opp 2001, 13]. Each recognition of a given norm found different individual justifications – everyone interpreted differently why he or she adheres to a given norm or why believes [Finnemore and Sikkink 1998, 914]. Undoubtedly, religious norms allowed somehow to unify the justification for positive adherence to legal norms (in addition to sanctions), which contributed to strengthening social ties and catalyzed social growth and development [Partridge 1981, 256]. One cannot unequivocally give priority to any of the institutions in question. Although nowadays they are considered independent of each other, in their genesis they were practically inseparable [Allalyev 2018, 213-14]. If there is no law, religion would have remained a diffuse and non-institutional belief system, and if it were not for religion, law would not have gained widespread effectiveness and social acceptance [Katzenstein 1996, 52]. In other words, in order for law (and its performative authority [Quéma 2015, 63]) to find acceptance and spread in the original stages of social development, the existence of religion was necessary. In order for a legal norm to emerge, a religious norm was necessary. This is evident in the first legal codes, especially in their preambles [Bojarski 1999, 7-12]. At the same time, the justification of law by religious norms was based not only on the belief in the existence of a higher being (God, Deities), but also the worship of the dead [Zhao 2014, 280]. The latter is a contemporary exemplification of the departure from religious justification of legal norms. Initially, it was pointed out that by providing legal protection to the dead (human corpses, their resting places, etc.) religious values are protected (art. 197 of Criminal Code¹). This was abandoned, indicating that in the case of violation of a human corpse or grave, the legally protected good is another value – depending on the legislative solutions adopted – collective (social order, pub-

¹ Act of 19 April 1969, the Criminal Code, Journal of Laws No. 13, item 94.

lic order) or individual (dignity, honor, good name) [Najman 2021, 241-54]. It is therefore worth examining other, less obvious, examples of the remnants of religious law in current legal systems.

2. RELIGIOUS BASIS OF CONTEMPORARY LAW AND HOW IT IS EXPLAINED

It is widely believed that the modern values to which lawmakers often refer in the preambles of constitutions find their origin in the thoughts of 18th century philosophers. As J.P. Hill argues, this is not entirely true. This author indicated that the principle of equality before the law derives from Christian axiology, proclaiming the equality of all people as created in the likeness of God [Hill 2018, 6]. As J. Berman points out, the hierarchical structure of ancient Near Eastern societies was rejected on theological grounds. The value of the members of the state of Israel derives from a collective consensual relationship with God, in which each member is a subordinate king of the King over Kings [Berman 2008, 169]. J.P. Hill emphasizes how crucial the principle of equality was to the development of trade and economy at the beginning of the modern era with increased social mobility and the rise of international exchange [Hill 2018, 6].

From the principle of equality before the law, J.P. Hill further derives the development of institutions related to the provision of assistance to vulnerable people (social policy) [Hill 2018, 7-8]. This author points out that according to the accepted principle of equality of all people, every person is entitled to the same respect, regardless of his wealth, health or social status (Lev 25, 35-38). Nowadays, the indicated institutions are justified by natural rights and their roots in human dignity to which every person is entitled as well as the principle of humanity or social justice [Ziemiński 1996, 33].

A. Grief and G. Tabellini show that the value of community, proclaimed in Christian doctrine, and therefore social ties other than those based on blood ties, contributed to the development of the institution of the legal person (corporation), and thus provided the basis for the development of commercial law and, consequently, economic growth and development [Grief and Tabellini 2015, 25]. Today, economic growth and development and the revolutionary changes of political and social systems in the 19th

century, which contributed to the transition of significant financial resources into the hands of private entities (until then, capital was concentrated in the hands of the State) and the possibility of making investments with the security of investors, are indicated as justification for the legal person [Skory 2019, 165].

Another example of the remnants of religious law in modern secular-law institutions is the protection of the dead. At the outset, it should be pointed out that the protection of the dead is twofold – it includes the protection of the physical remains (corpse) of the deceased and other values associated with him, such as honor, good name, image, etc. Legal protection of the dead finds its justification in the cult of the dead and the perception of the dead as deities, often influencing the world of the living [Makarewicz 2009, 147-220]. The issue of dealing with corpses was similarly shaped. The basis of their protection was originally based on the belief in the existence of a particle of God in the human body [Hacker 2015, 42-43] or the belief that the dead have the ability to interfere in the world of the living [Iwicka 2018, 24]. Nowadays, the indicated institutions are justified by collective goods, such as social order, public order [Najman 2021, 241], or individual goods, such as dignity, honor (with the assumption that some personal goods are subject to posthumous legal protection) [ibid., 245].

Next example of the remnants of religious law in contemporary law is the institution of parental authority. Originally, parenthood and the resulting powers over the child were justified on biological grounds [Diertrich 2021, 563]. The simplest explanation for this view is that a child is created from a man, which gives rise to a property claim to that child. For hundreds of years, children were seen as an extension of their father's body (*extensio patris familia corpus*) [Purvis 2014, 653; Vial-Dumas 2014, 208-313]. This belief was derived from the Judeo-Christian parable of the creation of man by God and then woman from man's rib. Just as the God-creator was the ruler (owner) of the entire World, including all human beings by virtue of being their creator, man endowed by God with the ability to procreate had power over the child as property, a product of the reproductive capacity of the arranged woman and could force them to work, decide about them, give them in marriage or sell them like slaves – depending on the needs [Woodhouse 1992, 1036]. Hence the origin of *patria potestas* in Roman law [Litewski 2003, 190-91]. Nowadays, neither in leg-

isolation nor in doctrine does it indicate from what arises the attribution to parents of the attribute to custody, representation and management of the property of a minor child. Some authors emphasize the Roman origin of this institution [Stepień 2019, 62; Vial-Dumas 2014, 303; Purvis 2014, 64]. The key to understanding the idea of certain social phenomena is to find the answer to the question of why they occur. With regard to parental authority, it is only accepted as an axiom that it is vested, in principle, in the biological parents of a child vis-à-vis the child from the moment of birth until the child reaches the age of majority. The question of whether the axiological basis of parental authority is other than that derived from treating the child as an “investment for the future” remains unresolved [Cochrane 1975, 373-90]. As an aside, it should be highlighted that the belief that the child is the property of the father is still practiced today in Muslim countries [Montgomery 1988, 323-42].

One more example of the religious law in modern legislation is environmental law. Its foundation finds different justifications depending on the developed beliefs. In Hindu currents, the norm prescribing the protection of other species and inanimate nature stems from the belief in the wandering of souls and reincarnation [Kieniewicz 1980, 75-81; Jakimowicz-Shah and Jakimowicz 1982, 10-14]. In the Catholic religion, it is recognized that man not only lives on earth, but from it he was called to life. With this corresponds the term of the first man (Hebrew: Adam), which means the dust of the earth, from which the human being was formed by God [Romejko 2017, 249]. In addition, the earth is identified as the property of God (The earth is the Lord’s and what fills it, the world and those who dwell on it (Ps 24, 1), You must not sell the earth forever, for the earth belongs to me, and you are sojourners and settlers with me (Lev 25, 23). Today, the protection of the environment is justified by scientific considerations. The long-term dangers of global warming and the disappearance of biodiversity are rightly emphasized [Johansson, Hjältén, de Jong, and von Stedingk 2013, 98-112].

Other sphere of law in which the influence of religious law is evident in the branch of food law and the related issue of animal rights. As indicated above, some religions, particularly those derived from Janisism (Jainism) [Jakimowicz-Shah and Jakimowicz 1982, 12], consider as an axiom the immortality of the soul and its wandering and reincarnation, that is, the belief that after a person dies, his soul ascends or is reborn under another

form. It follows that other living beings should not be eaten, as they may be another incarnation of the deceased. The Bible, in turn, in Genesis, stipulates the prohibition of eating blood, since blood is identified with God, as something that gives life, and life comes from God (Gen 9, 4). Examples of the influence of religious law on modern dietary law can be seen especially in Israel [Vered 2010, 19-22] and Muslim countries and India.² On the other hand, however, some researchers point out that the prohibition of eating certain animals, even in the scriptures, was originally due to epidemiological reasons [Nanji and French 1985, 681-83]. Nowadays, the justification of certain dietary norms, in addition to health factors, is justified by the same considerations as environmental protection, as well as natural laws, from which, among other things, the limited legal personality of animals is derived [Plavoet 2020, 49-58].

An undoubted example of the remnants of religious law in modern legal systems are the elements of rituals in the form of invoking God during the oath or taking an oath, originally derived from religious rituals [Hill 2018, 20; Bojarski 1999, 9]. Religious basis are visible also in some administrative proceedings as issuance of ID card or retire. Both are connected with rites of passage initially appealed to beliefs in unification with world of ghosts, demons or apparitions [Stephenson 2015, 54-69].

The bicameralism of parliaments can also be an example of the religious law in modern constitutional law. As indicated above, power was originally justified by divine origin, or anointing from the ruling God [Bojarski 1999, 5]. This led to an increase in the importance of those dedicated to influencing the growth and spread of beliefs on which the authority of power was based (the later clergy). Over time, the clergy began to intervene in the decision-making of power by constituting its non-economic base, which was particularly important during economic crises. Depending on historical circumstances, advisory bodies, later legislatures, in which representatives of the clergy sat, were developed. It is worth noting here that the role of religion was originally scientific, i.e. religious norms were used to justify certain natural or social phenomena. With the development of science and technology, the role of the clergy began to weaken and its representatives were supplanted by representatives of science. However,

² See <https://www.national-geographic.pl/artukul/w-indyjskim-miescie-wprowadzon-o-zakaz-sprzedazy-i-konsumpcji-miesa> [accessed: 30.11.2023].

it should be emphasized that the clergy originally, as now, was distinguished by a high level of education compared to other social groups. Hence, the aftermath of this, i.e. the presence of “enlightened” people in legislative bodies are today’s upper chambers of parliament [Hill 2018, 22].

As an example of the remnants of religion in modern law, it can be also pointed the seats of authority. The separation of certain spaces reserved exclusively for the authorities derives its original justification from the division of spheres into *sacrum* and *profanum* [Broda 2009, 118]. The essence of this division is contained in the distinction of two orders, of which the first refers to everything sacred, pertaining to worship and religious worship, while the second is associated with secular, secular, everyday space [Nowacka 2016]. Just as the space on Earth was set apart for the deity, so with the development of statehood, leaving aside strategic, economic and economic considerations, a sphere began to be set apart for authority and ascribed to it inviolability, similar to that of the sacred zone. Today, the seats of power are subject to legal protection. However, no other basis for their creation is indicated other than organizational or representational considerations. It is forgotten that the institutions of seats of public authority derive from religious law [Hill 2018, 17].

The last of the examples already cited of the religious law in modern law is the creation of places commemorating a particular event or person (such as monuments) and granting them legal protection. Today as a justification for the creation of such places is indicated the right to memory [Löytömäki 2014, 16], which finds its origin in primordial beliefs [Whitehouse 2002, 300] and the cult of the dead [Makarewicz 2009, 231].

3. THE INFLUENCE OF NON-RELIGIOUS INSTITUTIONS ON RELIGIOUS LAW

As indicated in the introduction, law and religion have been shaped in parallel, interpenetrating each other and influencing their final shape. Therefore, it is worth noting the opposite phenomenon of religion absorbing secular institutions, as presented above. An example of this is the concept of dignity, which is nowadays identified with the teachings of the Catholic Church. Previously, the special position of man was justified by the presence of God in the human body, or the creation of man in the like-

ness of God. The gradual spread of ideas moving away from justifying reality with religion, and referring to science (including philosophy) contributed to the development of concepts other than God justifying certain regularities that are scientifically inexplicable at the current level of knowledge and technological advancement. Hence, dignity began to be pointed out as an attribute justifying the special position of man in the world, but also as a feature that statues the equality of people [Broda 2009, 120].

Another example of modern religious law derived from secular law is marriage law. Originally, it was an institution that ensured the political and social empowerment of individuals by allowing the accumulation of capital and begetting an offspring to ensure that property remained at the disposal of the family [Bront and Nowacka 2008, 10]. The Church changed the perception of this institution by making it a sacrament that imposes moral obligations on spouses.

Next example where religious law seeks to justify secular law is the right to property [Wesoły 2010, 232-344]. Property developed in the process of social and economic development. Initially, religious currents were not interested in the issue of property, in particular, pointing to their metaphysical justification [Popiołek 2019]. As religious institutions became richer, they began to justify it by appealing to non-economic values, in particular to religion. Some authors point to the biblical justification of the right to property, as given from God (Neh 9, 36). From the above they also derive the right of pre-emption (Lev 25, 23). However, it does not seem possible to look for the universalization of the institution of property in religious law. Property is primary in relation to the community, as it arises from the internal need for privacy of the individual [Młynarska-Sobaczewska 2013, 33]. Thus, it seems that property is primary as to religion.

FINAL REMARKS

Nowadays the law should stand apart from political disputes over history, ideology and religion. It should be remembered that the law is the pillar on which a multicultural society stands. Law is the basis on which history, ideology and religion can compete for supremacy. In defining their boundaries, the law-makers must be balanced and mindful that the beliefs of one citizen do not interfere with or dominate the freedoms and beliefs of

another. Religion is certainly a matter of individual or community belief, but it is not necessarily theistic. There are known religions that do not believe in God or any divine Being. Religion undoubtedly has its basis in a system of beliefs or doctrines that are believed by those who follow them to be conducive to their mental well-being, but it would not be correct to say that religion is nothing more than a doctrine or belief. Religion may not only establish a code of ethical principles to be followed by its adherents, it may also prescribe rituals and ceremonies, gestures and modes of worship that are considered an integral part of the religion, and these forms and rituals may even extend to such spheres of life as nutrition or clothing. Bearing above in mind, the purpose and task of contemporary jurists is, firstly, the verification of contemporary legal institutions, which largely functioning in current legal systems as remnants of religious law, often lacking non-religious justification. Secondly, recognizing that legal institutions originally derived from religious law are important for the proper functioning of society, the search for their non-religious justification. Finally, thirdly, creating new legal institutions reliable justification shall be provided in isolation from religious norms, in many cases converted to non-religious mores functioning in modern societies.

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The Religious Basis of Contemporary Law

Abstract

Religion and law intermingled and influenced each other both in the early stages of the formation of society and in the subsequent processes of its development. It is impossible to say unequivocally which of the two developed earlier or which had a greater influence on the modern form of the other. Today, questions concerning the relationship between law and religion are rarely the subject of research. The prevailing view that proclaims the secularisation of law, while undoubtedly justified, seems to overlook the religious origins of many modern secular institutions of law, such as, equality before the law, social policy, parental authority or the posthumous protection of human corpses and graves. As it seems, the move away from religious justification of legal institutions is a valid solution, prompting legal scholarship to seek explanations for the functioning of the legal system. The purpose of this article is to point out that law and religion intermingled in the creation of their final forms, resulting in the spread of legal institutions derived from norms of a religious nature. This encourages the creation (or denotation) of legally protected values and the search for their scientific (non-religious) basis.

Keywords: law; religion; religious basis of law.

Podstawy religijne współczesnego prawa

Abstrakt

Religia, jak i prawo wzajemnie przenikały się i wpływały na siebie zarówno w początkowym etapie tworzenia się społeczeństwa, jak i w dalszych procesach jego rozwoju. Nie sposób jednoznacznie stwierdzić, które z nich wykształciło się wcześniej, ani też, które miało większy wpływ na współczesną formę tego drugiego. Obecnie rzadko

podejmowane są kwestie odnoszące się do relacji między prawem i religią. Dominujący pogląd głoszący laicyzację prawa, choć niewątpliwie uzasadniony, zdaje się nie dostrzegać religijnego pochodzenia wielu współczesnych, jak by się zdawało, świeckich instytucji prawa, takich jak, zasada równości wobec prawa, polityka społeczna, władza rodzicielska czy pośmiertna ochrona dóbr osobistych. Jak się wydaje, odejście od religijnego uzasadniania instytucji prawnych jest rozwiązaniem słusznym, napędzającym nauki prawne do poszukiwania wyjaśnień funkcjonowania instytucji prawnych. Celem artykułu jest wskazanie, że prawo i religia w okresie kreacji swoich finalnych form wzajemnie się przenikały, czego skutkiem jest upowszechnienie instytucji prawnych wywodzących się z norm natury religijnej. Sprzyja to tworzeniu (bądź denotowaniu) wartości prawnie chronionych i poszukiwaniu ich naukowych (poza religijnych) podstaw.

Słowa kluczowe: prawo; religia; religijne podstawy prawa.

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