

Religion and Law as the Social Governance Pattern: Based on the Diachronism of Christianity and Law

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Abstract

Although religion and law are two different patterns of social governance, the philosophy and value they pursue as well as their manifestation have some common attributes and relationships. In the west, although the management power of religious groups have on themselves and the influence of religious spirit on the society belong to the scope of social power, a certain kind of “selective affinity” exists between sociology of religion and sociology of law, which is indispensable for the interpretation of the uniqueness of Western society. While as a belief, the freedom of religion is the soul of religion as well as a human right, which is the same as the freedom of thought. Although religion has a positive impact on the maintenance of social order to a certain extent, the negative impact produced by the social power exercised by religious activities on the society determines that legal restrictions must be placed on religion.

Key words: Religion; Law; Social; Religious belief

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INTRODUCTION

In the west, the existence of law relies on the support of faith. The religion and the law have become the most

effective means of regulating society and have integrated with each other for a long time in western society and thus have very close contact. The basic western legal concepts and legal system were covered with a layer of holy halo in the process of historical development due to the profound influence of religion, especially Christian, although this halo has gradually faded in contemporary western society. Berman argued that the formation of the western legal tradition cannot be separated from Christian, but it did not completely originate from Christian, either. In the view of Berman, there are homology and synchronic characteristics between law and religion, and the connectivity between them is manifested specifically as

the law restricts the future with its stability; while the religious challenges all existing social structures with its sacred concept. ... The law gives the religion its sociality, while the religion gives the law its spirit, direction and holiness the law needs to gain respect. (Berman, 2003, p.12)

Religion is not a deviation phenomenon of history but the inevitable product of the historical development of human society, which is produced and maintained from adapting to the historic needs of human society. As Engels pointed out: “All religions are just the reflection of the illusion of the external forces in people’s minds which control people’s daily life, in this reflection, the human power takes the form of superhuman force.” (Engels, 2004, p.354)

However, in the west, believing in religion, especially Christian is not a personal act, but a kind of collective belief in the ultimate meaning of life. It is a kind of common mental constraints of social community on the group, which has great effect on maintaining social moral order. It is parallel with morality and law, which have some common elements and values. There is a kind of inseparable origin relations between religion and law, as American contemporary jurist Harold J Berman pointed out:

Any society, even the most civilized society, also has beliefs toward transcendental values as well as common ideas that

believe in the ultimate goal and holy things; similarly, even in the most primitive society, there are organizations and procedures of social order as well as established ways of distributing rights and obligations and common beliefs in justice. These two aspects of social life are in opposition to each other: The prophetic and mysterious side of religion and the organized and reasonable side of law are contradictory. However, they're interdependent and mutually conditional. Any law system shares certain factors in religion — ritual, tradition, authority and universality. People's emotion toward law is cultivated and externalized relying on this, otherwise, law will degenerate into a dead dogma. Similarly, any kind of religion also has elements of law, with which it will degenerate into a private religionism (Berman, 2003, p.83).

In the west, whether the formation of law tradition or the glory of the legal system, Christian civilization has made the greatest contribution. Whether the Bill of Rights from the UK, *Declaration of Human Rights* from the France, or Declaration of Independence from the USA, all reveal the concept that "human rights are derived from God", indicating that Christian culture has the most profound influence on the western rule of law. Therefore, it is very necessary to focus on the contribution of Christian culture on the western legal tradition and legal belief among many religious roots.

1. THE HOMOGENEITY OF LAW AND RELIGION: THE GREEK PERIOD AND THE HEBREW PERIOD

The Hebrew law whose birth was between 12 BC to 5 BC, was formulated taking Moses' Ten Commandments as the reference and was revised and expanded by emperors and priests of successive dynasties. The Hebrew was the most heavily affected by the old Code of Hammurabi during its formation and development process, but its legislative thought was derived from the Hebrew's religious thought. The Hebrew law regards legislation as the Lord's will be, represented by "Moses' Ten Commandments", this kind of legal system which integrates law, religion and morality into one endows the Hebrew law with both religious discipline and moral character. Therefore, the Hebrew law has these basic features: (a) It retains some of the clan customary norms; (b) It is closely related to the Hebrew monotheism and has both religious discipline and moral character. This results in the blending and integration of law, religion and morality. "Moses' Ten Commandments" may be said to be the typical example of this "three-in-one"; (c) God is the embodiment of justice. The Hebrew law regards legislation as the Lord's will, and the prophets and kings just legislate and manage people for the god, therefore punishing crimes using law is also known as the "divine punishment".

If we want to study the relationship between religion and law, we have to investigate the evolution of the relationship between religion and law from elaborating the theory of the Greeks rather than that of some other ethnic,

because ancient Greek philosophers had extraordinary philosophical insight for natural and social phenomena. Although some of the assumptions and conclusions put forward by Greek thinkers failed to withstand the test of time due to experiences and discoveries in later generations, the approach these thinkers put forward with terminologies and used to discuss basic life problems as well as the approach of seeking various possible solutions to these problems have brought sustained and effective impact on the later generations.

In general, the thought of natural law and the religious thought of ancient Greece have homologous features. We comprehend the religious and legal thoughts of ancient Greek through Homer's Epic and the Odyssey as well as other poems. In ancient Greece, law was regarded to be issued by the God, and humans could only cognize law with the inspiration of the God's will. Hesiod argued that wild animals, fish and birds kill each other because they do not know the law; while Zeus, the chief of the olympian gods, gave law to mankind as his greatest present. In the early stages of ancient Greece, law and religion are oneness to a large extent. In the legal and legislative issues, people often cited Delphi's words of wisdom; his famous saying is regarded as an authoritative opinion in clarifying the God's intention. Religious rituals penetrated in the forms of legislation and judicature, and priests play an important role in the judicial process. As the supreme judge, the responsibility and power of the emperor were regarded to be granted by Zeus himself. The dualism in the ancient Greek philosophy of law where the religious law and secular laws coexist had a great impact on the concept of natural law which was derived from it later. Heraclitus called the natural law "the divine law", and argued that the divine law dominates all at its will and all human laws exist because of the existence of the only divine law; and Aristotle also used a lot of natural law views in his proposal of the theory on the classification of law.

2. DUALISM OF LAW AND RELIGION: ANCIENT ROME

During the period of ancient Rome, the relationship between law and religion was in some way different from that during the period of Greek and Hebrew Culture. Since Roman statute law had been established for a long time, enjoying a high level of secularization, religion and law had been separated long before and in a more thorough way. Under that circumstance, law ended up as an independent social domain and complete system. However, it is widely accepted that in the ancient Rome, the bond between law and religion had never been cut off. After Romulus established the city of Rome, he set up the post of divination, claiming that any decisions to be made must be divined, which manifested the important role

religious rites and customs played in the Roman Republic. After stating the relationship between the natural law and the human law, Cicero, the famous thinker in the ancient Rome shifted to the religious law, emphasizing that religious rites and customs should be regarded as the basic law of the Roman Republic and that the observation of the religious rites and customs was in line with the reverence for the natural law.

The emergence and development of Christianity inside the Roman Empire also serve as the evident of the close relationship between law and religion. Since the second half of the 2nd century when dramatic reform happened in the Roman society, changes took place in both the nature and position of Christianity. Unlike what had been advocated in its original doctrine, which was opposition to the Roman reign, hostility to the rich, equality and universal love, Christianity turned to focus on obedience and anticipation of the afterlife, which was passive but played an active role for the existence of it, for it made the Roman rulers change their policy about Christianity from simple suppression to the judicious application of carrot and stick, which, to a great extent, guaranteed the survival of Christianity. Eventually, in 313 AD, Constantine, the Roman Emperor issued Edict of Milan, legalizing the existence of Christianity. In the 4th century AD, the Roman Emperor was converted to Christianity which was afterwards established Christianity as the state religion. By then, Christianity had become the new spirit for the legislation which was characterized by the dominance of the principle of “favor libertatis”, deprivation of the right of the father to decide the life and property of his children to mitigate the severity of patriarchy, and softening of the law of obligation to care for the debtors. One of the highlights during the period was the amendment of the slave law, endowing the slaves with rights to appeal to liberty to the judge when they were abused by their masters and extending the ways to set the slaves free. In those days, the influence of Christianity on the Roman Empire was not limited to the legal field. It also exerted profound influence on the social values and ethical concepts of the people and promoted greatly the moral standard in the age of barbarism. Every practice, from the restraint to maltreat and kill babies to opposition to the marriage legislation of Augustan, manifested the benevolence and excellence of Christianity. The new spirit of Christianity was also reflected from the restraint and sanction of divorce, for it stipulated the consensus of the spouses as the effective element of marriage.

3. RELIGIOUS LAW OVER THE SECULAR LAW

Since the Pope emerged on the political stage in Western Europe, church became a cross-national independent political power at unimaginable speed. Its influence

was unprecedentedly profound. With vast territory and independent revenue right and complete right of jurisdiction, church was initially equipped with most of the features similar to those of the modern states both politically and economically. In addition, philosophy of law was also under control of the church and its doctrine. Laws were just made by God accidentally rather than the inevitable result of logic. “The rule to govern the Heaven is formulated at the God’s will be rather than according to the God’s wisdom”, which means will would be placed above intellectuality and dominate rationality.

As far as the relationship between the cultural tradition of Christianity and the evolution history of the Western law system since the Middle Ages is concerned, it would be proper to say that ecclesiastical law was the manifestation of the religious origin of the Western law in the Middle Ages in Europe. During that period, one of the distinct features of the law development in Western Europe was the mutual permeation of law and religion. Religion was said to have a huge influence on the emergence and development of law. Besides the interaction of the reformation and Vatican theocracy in the early stage of Vatican with sovereignty of the secular overlord, religion and legal tradition made contributions to the formation of the modern Western legal thought and legal system unparalleled by any period in the history.

With the support of church, ecclesiastical law and secular law co-existed and competed with each other. Since the magisterium was centralized earlier and faster than the political power, in a long period of time, ecclesiastical law was predominant over the secular law, which was another distinct feature of the law in the Middle Ages in Western Europe. The widespread use of the ecclesiastical law which was beyond the border during the period was to a great extent due to its self-contained systematization.

Besides the folk law as the background the ecclesiastical law included the theological theories of the church as the origins such as the Bible, Decretal, resolutions of the synods and some principle and systems in the secular law. The Bible which is made up of The Old Testament and the New Testament was regarded as the general source of the beliefs of the schools of Christianity and imposed binding on the secular court with supreme force of law. Therefore, it would not be exaggerating to claim that the system of the ecclesiastical law was rooted in the interior commandment of Christianity church to the believers and the stipulations to handle and solve dispute within the church: The law of contract of the church came from the emphasis on the vow in the doctrine of Christianity, to be specific, the contract that must be fulfilled of the obligation fulfillment based on the principle of equality and rationality; The marriage law of church originated from the jurisdiction over the sacraments, which was reflected from the consensus of the two parties in the

marriage, monogamy and the stipulations about the prohibition or revocation of the marriage; The law of property of church was based on the jurisdiction of the church over the priesthood with payment and the division of the salary of different ranks of clergies; the inheritance law of church came from the jurisdiction of the church over the testament, for example, the two systems of testamentary succession and intestacy succession stipulated about the movable property succession; The legal system about crime and infringement and the relevant judicial process of church were evolved from the jurisdiction over sins, for example, the opportunity to allow criminals introspect in the criminal law, the conscientiousness principle and inquisitional proceedings in the procedural law, the protection of the land ownership of the monks and laymen feudal lords and the rent and revenue right of the church as well as the stern punishment for the occupancy of the church property. All had made the ecclesiastical law system become more vivid and integral in the Middle Ages in Europe. In addition, the principle of “all people are equal before the law” stressed by the Christianity church in the Middle Ages as well as the concepts about the real right, occupancy, integrity according to the statute of limitation exerted a profound influence on the contemporary law system in the western society.

CONCLUSION

The church and ecclesiastical law in Western Europe predominated over the secular power for a time but ended up with silence under the violent impact of the Protestant Reformation in the 16th century. As early as in the 14th century, the opposition to the church system was echoed in the western world. The appeal to have another round of religious reform to the church system and secular system was unprecedentedly intense since the 15th century. In 1517, Martin Luther proclaimed to abolish the right of jurisdiction of the church and deprive the ecclesiastical law of the legal function through the Reformation. After that, Protestantism was rising and boarded the political stage in Western Europe. The Reformation advocated by Martin Luther promoted the secularization of law and induced legal positivism. More importantly, it freed law from the direct interference of the theological doctrines and church. Although Protestantism denied the legislative function of the church in terms of faith, but it held that “In the country and among the people governed by the rule of Christianity, there existed a Christian conscience.” As another form of Protestantism after Lutheranism, Calvinism highlighted the holiness of the individual will in the right of property and contract, which provided a religious basis for the formation of the concepts of social contract and respect for the ruler’s will in the western society in days to come. Just as Berman said, from the

German Revolution in the 16th century to the British Revolution in the 17th century and even to the French revolution in the 18th century, while making attempts to getting rid of the state secularization in the narrow sense under the control of Roman Curia, the governments in the European countries could not escape from the religionization and even sanctification of the property and contract. What had been achieved in the Protestant reformation came to become the axis with the dynamic development of the law of property and contract in the contemporary Western society.

The foundation of the two most representative legal systems in the capitalist world such as the civil law system and the Anglo-American law system symbolized the accomplishment of the Western legal convention. The civil law system based on Roman law and the Anglo-American law system is entirely different in various aspects such as the source of law, code compilation, judicial proceedings and verdict methods. However, all the Western law systems share the common historical origin from which they not only acquired the common terms and techniques but also common concepts, principles and values. For example, both of them divide distinctively the criminal law and the civil law and analyze crimes according to the concepts including behavior, intentional or negligence, causal relationship and obligation and etc.. Behind the common categories of analysis, there are common policies and values.

Therefore, it was the church and its law that were the media for the Westerners to have the initial idea of the law system. In particular, Protestantism that emerged after Reformation effectively promoted the development of the western law in the modern times including some rules of law which originated from the ecclesiastical law and the religious doctrines, for example, “principle of conscience” in the trial (which means the judge must firstly “judge” himself before judging the defendant), defense techniques and procedures in the trial, and combination of conscience and balance (which generated Equity). Besides, the last will and testament was the benevolent bestowal to rescue the soul of the dead in the religious sense, but it later became the important private right to handle the personal property in the secular law. The concepts about the holiness of individuals and conscience in the Protestant doctrine have become the core in the ideology of the sacred individual will in the right of property and contract in the western countries in the modern times. In addition, the principle that the puritans devoted their lives to resisting the former church and state power actually implied the philosophy that the natural law should be over the ecclesiastical law and secular law, which was later the basis for various liberal rights advocated in the United States Declaration of Independence and Constitution against the British Law in the name of human conscience and human rights.

That was why Pound, the famous sociologist specialized in American Law said,

The ideas of religion played a decisive role during the formation of the American law. Without regard to the Puritanism, we cannot obtain a full picture of the legal system of US or understand the American law of the last century. (Pound, 1989, p.23)

On the other hand, the influence law exerted on religion lies in its urging of the legalization of the commandments of religion. Some religions even take legal norms (commandments, standards, rules) as the core. As claimed by the Jewish, the Jewish people are excellent nationality under the sacred law. In the ancient Israel law there were 10 commandments proposed by the prophet Mose including showing respect to parents, forbidden to kill people, to steal, adultery, to forswear or

to fraud and etc. The religious commandments therefore had similar functions as the civil law. Essentially, Christianity is a summary of its secular law, for all the religious organizations must have their internal disciplines to contain its believers. The religious law is in nature the law for the social organizations to regulate and govern themselves, the social law similar to the national law.

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