

## **Law, Religion and Conflict**

Religion and secular law could be concurring ways of social organisation and form concurring basis for social beliefs and interaction. On a conceptual level they could be mutually excluding, forming, each taken separately, a perfect frame of reference for legal rights and duties. Lastly there is an acute political problem in approaching law, religion and possible conflicts. Three thesis are examined:

I Major monotheistic religions have a system of positive laws on their own and independent from the secular legal system;

II Each citizen professing a monotheistic religion lives in two different positive systems of law at the same time: secular and religious;

III This obvious source of conflict cannot be conceptually minimized, but could be pragmatically harmonized.

This paper concentrates on Judaism, Christianity and Islam, not being discriminatory to other religions, but taking these to be the major influence in the West, this limitation can be excused. This paper treats all religions with the same and most high regard.

### **I**

The first questions to clarify are, what a system of positive law is, how 'religious law' can be defined and what kind of legal organisation the three major monotheistic religions offer.

Positive law could be defined according to Hart (1973) as a (complete) set of rules given to a society in a specific process of rule-setting by a recognised law giver/maker. Positive law can be re-ruled and changed in a specific process and positive law commits every person in the society to act according to it, independently of the individual's opinions or wishes. Positive law is mandatory to every citizen and does not to have be accepted as law by each, in fact positive law is ruling law at the moment of its publication or acclamation.

Positive laws can be very specific in their object, e.g. specifying a fine of \$ 500 for traffic transgressions but they can at the same time be very open, as a constitution. Both, the specific and the open rules, being mandatory. They can be interpreted, but only in a very narrow sense, for the process of interpretation itself is positivistically defined and the parameters of interpretation also. The narrowly defined semantics of law interpretation in a positivistic system shall be further called 'closed semantics'.

On the other hand there is natural law, ethics and law principles. These are normally abstract and open for interpretation, for example the self evident right to live. How can it be defined? Why is it self evident? Does this right endorse a prohibition of suicide? Or take the principle of non-discrimination as a bare principle: what does it precisely rule? What it rules depends on its fixation as result of interpretation. This interpretation is unlike the former, a very open process, since every person or institution could at any time, based on common sense, join the discourse. The semantics here used is wide in meaning and intentions, in this sense 'open semantics'.

In this case, religion seems to have no positive law, since it could be taken as a set of principles of morals and faith. This might well be the case in dogmatics. But focussing on the three major monotheistic religions, the perspective shifts: what has to be analysed is not salvation or grace but what embracing a religion involves. Professing means also being part of a church – defined as the worldwide community of believers in an institutional organization –, what involves following the rules of that church as institution and as organisation. The community of believers has to follow not only religious dogmae but also organisational rules of the institution 'church'.

In Judaism God deals with the Hebrew in the sense of law ruling giving them Salvation but expecting them to follow many commandments for it. Those commandments are not only religious principles, but most of them in the Books of Moses 2 – 5 are apodictic and casuistic, ruling very broad matters but also specific cases in the way laws do (Zemer 2002).

Note the positivistic scheme working here: in a formal process the sovereign – God – as law maker gives the laws to Moses. The Hebrew have to accept and follow them even if some or many do neither understand nor think the rule to be legitimate. The mandatory aspect of every commandment as law is not derived from individual wish or interpretation but from the formal process of law-making. If the people or an individual do not follow the rules, punishment will be certain. God also sets the process of closed semantics for changing the law and discussing the appliance of it. Furthermore, a rule can only change if the lawmaker re-rules, like God several times did.

Taking Islam it is important to note, that some 10% of Koran's verses rule like laws do, next to the Koran there is the Shariah, a law-corpus claiming to bind the community of believers legally in the same way the Koran does (Mumisa 2002). Both represent a set of positive law which Muslims – individual and states – are obliged to follow. Once again the positivistic scheme applies here. A Sovereign, God, gives in a sequence of formal processes laws to his people. As part of the formal process, God institutes the semantics needed to interpret his laws. Although the Moslem semantics may be more open than the Jewish (Elon 2004 and Zemer 2002), they still are narrow enough to be considered positive legal discourse. Once again, note that the semantic does not appeal to higher Will or Providence, but only to the positive set of law and to their teleology.

In Judaism and Islam the discourse is not about changing laws or thinking about principles how to interpret them, but about finding the existing religious rule covering the given law case.

The highest degree of formality is perhaps reached in the Roman Catholic shape of Christianity. The Catholic Church has in the Corpus Iuris Canonici – CIC – a law Canon comparable to every civil code or indeed to every constitution ruling church organisation and many aspects of life such as marriage or education. The collection of church law represents everything the positivistic schemes requires.

There is no metaphysics involved in the CIC. In Canon 1059 CIC the church explicitly admits the existence of formal Divine principles on the one hand but also the independent positive canonical rule on the other, being the former at least as important as the first.

As seen above, there seems to be no difference in the conceptual schemes for state law and religious law. Both endorse positivistic views and hold to the scheme as presented before. The three monotheistic religions are therefore not only guided by abstract principles of moral and faith, but by very positivistic laws, these not responding to God's Will, but only to the written (or stated) law itself and to a semantically defined and closed process of interpretation.

## II

The consequence from the above is, that every religious citizen is at the same time guided by the state law and by the religious law. This means first that the believer-citizen has two legal systems of guidance binding herself, second that this two could be opposed and third that in case of opposition, it would not be clear which one to follow.

Take as example marriage. According to the CIC (Can. 1108) marriage is only validly consumed if a priest offers the sacrament. According to the legal system e.g. in Switzerland (ZGB 97 III) marriage is valid only if conducted by the local city officers. Furthermore, Swiss law prohibits church marriages before the civil ceremony allowing it to take place afterwards. This could be as such a problem, imagining now, for the sake of the argument, that the church would re-rule that Canon stipulating the religious marriage to take place before the civil duty. The Swiss Catholic Citizen would now be in a very unpleasant situation.

The difficulty of the situation embraces the three above mentioned consequences of the double guidance. The marrying citizen faces two fully positivistic legal systems, the system of state law defining marriage as a civil process and the church law defining marriage as a sacrament.

The problem is not the one or other aspect of the individual citizen's loyalty to the state nor the aspect of Salvation promised by the church; the problem are both law systems as positive and therefore mandatory. The marrying citizen is committed to both and has to endorse both. Note that going to another country would not solve the problem but only stress the conceptual dimension of it. Going to another country means minimizing the conflict using international agreements of marriage recognition. The other possibility of leaving the church or marrying civil-only isn't a solution either since it is the same strategy of evasion.

In this situation of conflict there is no other solution than to take a decision and break with one legal system. Although this seems obvious, the real problem is, there is no a priori reason to choose which specific system to break with, i.e. each citizen chooses in the suitable way for her without having always to stick to the same law. There is no conceptual possibility of prevision, which positive system the citizen will follow and which she will drop. This dilemma has some politically frightening consequences.

People will evaluate their preferences first and then decide which system to follow, there is no a priori commitment of the individual to the state law even if there is an a priori commitment to positive law as such. Positivism alone does not provide criteria to decide for a system, since its basic assumption is, that the valid law is one unique body. Indeed, according to the positivistic sense, a member of the social body has to respect the law, every law, including concurring laws! The decision in the above mentioned case has to be taken because of positivism but contradicts positivism itself!

A possible counter argument is, the state and the professed religion do not have the same 'binding status' or, the semantics of the state law is closer defined than the semantics of religious law, being the positive power of state law stronger than religious law, since religion is a subsystem of society and the state its basic system.

This argument does not bare reason, but it is not applicable to the religious person. For her, religion and therefore church ruling, is as important as state rules are. Taking the view, the Orthodox believer is not a fundamentalist; he recognises both above mentioned systems to be concurring and himself to be in the dilemma, which one to follow, but he is likely to refuse accepting state law as stronger than church ruling and vice versa. Both positive systems themselves have no inherent criteria to ease his choice, since no one is a system embedded in a bigger one, but they are completely independent.

This dilemma is most likely to happen on individual base for minority Believers forcing them to take a decision not eased by the sate law system, as for example Muslim living in non Arabic countries or Christian living in Islamic countries.

This view is not new, John Locke noted this potential conflict within the citizen and believer between state and positive church law, namely Catholic law. His solution was to exclude Catholics or any Believer under dual positivistic rule from Citizenry (Locke, Ed. 1975, 46). Perhaps there are other and better general solutions to this problem.

### III

A possible answer in form of conclusion and outlook should be sketched now. As discussed above, there is an indifference between both systems of positive law, state and church. There are roughly three strategies to handle the dilemma on the conceptual level. A first possibility pledges for an hierarchy of law systems imposing the state law as it's highest level. A second strategy would try to fusion both law systems and a third could deny the relevance of the problem at all.

The first strategy has its problems in the assumption the religious person would accept this hierarchy with the state law on its top. The orthodox believer takes his religion to be a constituting part of his self as person, he surely could accept his citizenry as such too, but never at a higher hierarchical

level, since religion gives his life a purpose and explains him the 'last things' giving them a sense and him a hope. Although the state as nation could do that too, by trying to enter the former's core domain, it is here again concurring with religion. Since the state is fully immanent and the 'last things' need at least a bit of transcendence (Haus 1998), religion as advocate of transcendence per se has the stronger position here. So, introducing a hierarchy of law systems makes the choice even more unfavourable for state law.

The second strategy implies a merge of both, state and religious law, into a sole positive law system. This can be achieved first by instituting a theocracy, making state law part of religious law, second making religious positive law part of the state positive law and third broadening the definition of positivism by accepting Dworkin's Principles of Law (1986) as part of the positive system and searching for the same principles inherent to religious and state law. Note that both first strategies aren't conceptual at all, indeed by accepting the unavoidability of the problem they try to solve it in a pragmatic sense.

There surely exist common principles to religious and state law, take the commitment to truth, to solidarity and to freedom, all very important to continental and common law and to religion as well. There would be also common principles of interpretation, for example hierarchy of rules or taking justice always as an aim. On the other hand each closed semantics of interpretation is different. Sharing principles as such does not mean applying them in the same way. Besides, sharing the same principles does not mean giving them the same priority or even sense. So far, broadening the concept of positivism by introducing principles of law could solve the problem of the dilemma at the price of imposing another one, the problem of the relationship between the interpretative semantics of those principles.

The third strategy denies the relevance of the problem at all taking religion and the state to be just two subsystem of the many a person lives in (Luhmann 1977). Perhaps there exists the possibility of

conflict, but people act according to the circumstances and search a valid behaviour or a strategy to undergo the dilemma in a pragmatic way.

As a matter of international law every person is citizen of a given state or/and inhabitant of one. Most people are members of a church, all orthodox believers at least. Churches are identifiable entities treated by state positive law as corporations, state departments or associations, what means that the state acknowledges them the capability of juridical action. Therefore the strategy of harmonization is one of the harmonization of churches, not implying the aggregation of individuals, since this task is fulfilled by the churches themselves.

Two basic models of interaction of church and state are conceivable, the separation and the integration. Separation from state and church means organizing churches as associations or as corporations just like others. This model bases on the idea of system hierarchy, giving the state the task and the position to integrate all subsystems. The integration model accepts some churches as part of the state assigning them specific tasks in welfare and culture. This model bases on the assumption, churches are more important to the state system than other groups of interest in society.

On the other hand there could be the institution of a religion as state religion or accepting the church as part of the state meaning a setting to ease potential conflicts between church and state. The aim of minimizing potential conflicts and maximising harmony by integration of the church in the state is pursued also by integrating positive religious law in the state law.

Integrating religion as churches in the state does not automatically mean setting an hierarchy in which state law is above church law, but means setting up a system of reciprocal adjusts, religious law completing state law and the other way round. Politically it would be correct the state to lead the integration since he is the one interested in minimizing conflicts, as well as it could be the church initialising this process in order to maintain its special structures.

The state in accepting different churches as part of its own organisation has to stipulate a basic consensus between itself and the churches and between them as such. Often this consensus culminates in a joint declaration as result of negotiation and compromises and as such in a positive rule itself. Now, integrating the churches in the state organisation creates a positive rule that could function as point of reference for possible dilemmas. The same way international law treaties work, the state church joint declaration would work in a context of defined semantics as a rule of obedience or as one of re-ruling, solving perhaps not the whole conceptual problem, but harmonising the practical one without leaving the formal positivistic scheme! Conflicts could still exist, but there would be a primary rule to ease or solve them, not having to be solved by individual decision. There is a positive rule of preference.

Of course, the model is not perfect, since it cannot be perfect as shown above: there is no conceptual solution to the problem, but interesting enough the model we live in – especially in the USA and Europe – could be the best one.

Since the Other-Religious minorities are growing, in Europe and in North America, the state should try to incorporate them into the model, being this the political desiderata of this first and therefore incomplete draft.

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