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ECCLESIASTICAL LAW AND STATE LAW

The recently published, revised, supplemented and expanded edition of the 1938 textbook "Ecclesiastical Law" by Sergei Victorovic Troicki in Serbian language is a befitting occasion to call to mind his study on the ecclesiastical law, to percieve the contemporary place of the ecclesiastical law among legal sciences and once again examine its relationship with the state law. That the contemporary ecclesiasti cal law, being partly public, private, international, internal, objective, subjective, etc., cannot with complete reliability be classified into a separate branch of the law seems closest to the truth. Therefore, the ecclesiastical law may be said to make a separate sub subsystem within the subsystem of the autonomous law. The place of the ecclesiastical law and its relationship with the state law does not genuinely reflect the contemporary influence of the church on the state and society, which is much more powerful and more comprehensive than the influence of its ecclesiastical law. That the connection between the church and the state, and the ecclesiastical law and the state law, has almost never been broken is also shown by the fact that, starting from the Middle Ages, jurists have been awarded the degree (and title) of the doctor of the ecclesiastical and secular law (doctorus iuris utrisque).

Key words: *Church. State. Types of ecclesiastical law. Relationship be tween ecclesiastical and state law. Church and state relations.*

The ecclesiastical law in the ecclesiastical-law literature[1] is usually defined as the "statutable" law as it is based on the customary practices or ordinances and canons, which regulates the position, organisation and

[1] Dr Sergey Victorovich Troicki (1878 1972) was a professor at the Faculty of Law, University of Belgrade, a leacturer of cannon law in the capacity of a pofessor at the Theological Faculty; an expert of the Holy Synod of Bishops of the Serbian Orthodox Church; an excellent jurist; a famous expert in canon law; a polyglot and a writer of many works in the field of the ecclesiastical law. See: S. V. Troicki, *Crkveno pravo* [Church Law], Belgrade 2011, 521. Also see: Blagota Gardašević, "Dr Sergije Viktorovič Troicki", *Bo goslovlje*, XXIV (XXXIX), 1 2/1980, 175 188, and Dimšo Perić, "Sergije Viktorovič Tro icki i njegovo *Crkveno pravo*", *Anali Pravnog fakulteta u Beogradu* 1 2/2002, 177 183.

activities within the framework of the church itself and society. Today, it is thought that the ecclesiastical law is the law "in the area of one or several (as the Roman Catholic Church) states, within which exist (legally recognised) autonomous communities or institutions".[2] The ecclesiastical law also denotes "canon law (body of legislation of the church) which determines specific spiritual and social activities of the church and its members, or the ecclesiastical law created by the state as the system of the state legal regulations within the province of the church (organisation of the church, its legal position as to the state and inter-confessional relationships)".[3] When the concept of ecclesiastical law is determined in its broadest possible extended meaning, it may also include the rules "created by the religious authority", i.e. religious rules.[4] In spite of the similar determination of the concept, there are few laws the meaning of which is being thus argued over. This is not surprising though, as in the history of mankind the influence of the ecclesiastical law has always been dependent on the reach and effects of the church in a society. On this intersection depends the contemporary place of the ecclesiastical law and its relationshp with the state law.[5]

1. CHARACTERISTIC VIEWPOINTS ON THE PLACE OF THE ECCLESIASTICAL LAW

There are at least five specific viewpoints on the place the ecclesiastical law holds among other legal sciences.[6] They came into being depending on the priorities given by the legal and church scholars in the ecclesiastical law: secular over spiritual or spiritual over secular, that which makes it dependent on or independent of the state law, their individual or traditional classifications and typologies of the scientific disciplines, etc.

1.1. Ecclesiastical law as a type of public law

According to this monistic-statist viewpoint, the ecclesiastical law belongs to the public law. The viewpoint that the *ius sacrum* belongs to

[2] Toma Živanović, *Sistem sintetičke filozofije prava*, III, Belgrade 1959, 15.

[3] See: D. Perić, *Crkveno pravo*, Belgrade 1997, 21; Nikodim Milaš, *Pravoslavno crkveno pravo*, Belgrade 1926; Čedomilj Mitrović, *Crkveno pravo*, Belgrade 1929; Ante Crnica, *Kanonsko pravo Katoličke crkve*, 1937; S. V. Troicki, *Crkveno pravo* (skripte), I III, Belgrade 1937 1938.

[4] See: T. Živanović, *Sistem sintetičke filozofije prava*, II, Belgrade 1951, 14 15, 56 57 and III, 141.

[5] See: D. M. Mitrović, *Teorija države i prava*, Belgrade 2010, 187 209, and *Au tonomno pravo*, Belgrade 2010, 43 63.

[6] See: V. Troicki, *Crkveno pravo*, 41 50.

the public law existed in ancient Rome. It was recorded in the *Digesta* (I, I, 2). It reads: "Publicum ius in sacris. In sacredotibus in magistratibus consistit".[7] Such viewpoint was defended by many protestant legal authorities (Varkoening),[8] and sometimes by the Eastern Orthodox jurists and canonists who believed that the state is the only source of the law (N. Suvorov, A. G. Rozenkampf, A. Djordjević).[9] According to them, there is no need to make the distinction between the public and private law in the ecclesiastical law since the overall ecclesiastical law is public in its character, as a kind of emanation of the state sovereignty. In favour of this viewpoint stands the fact that the state usually enacts laws on church organisation or confirms some ecclesiastical regulations which due to the confirmation become legal in their character. That was particularly the case in the Byzantine state where the so-called "theory of symphony" had been applied for centuries to regulate the relationship between the church and the state. Its essence is as follows: in the interrelationship between the church and the state there are two extremely unnatural situations. These are *Caesaropapism*, when the ruler is the supreme head of the church and the state, and *Papal-caesirsm*, when the spiritual head is vested with authority both over the church and over the state. Since both situations are unnatural for the church and the state and inflict damage on the community, the existence of the two authorities is the best: the ecclesiastic and the state, like two interweaving circles producing three areas: a purely ecclesiastical area, a purely state area, and a common area. That is why – it was thought – the best form of the state is the one in which exists "symphony".[10] In modern times, state legislation referring to the internal church organisation emerged from the Lutheran concept of the state authority as the bearer of the episcopal church authority.[11] However, at the time it was also thought that the idea of the confirmation of the ecclesiastical laws by the state authorities was important only to the state – the ecclesiastical regulations become legally valid because of the confirmation by the state, but for the church, these regulations may be legally valid before they are being confirmed by the state.

1.2. Ecclesiastical law as a type of private law

According to this viewpoint, the ecclesiastical law belongs to the private law. The idea underlying this viewpoint is found in Jean-Jacques

[7] *Ibid.*, 45.

[8] See: S. V. Troicki, 45; Taube, "La situation internationale actuelle du Pape", *Archiv fur Rechts und Wirtschaftphilosopie*, 1907, 360 369, 510 518.

[9] See: S. V. Troicki, *ibid*. Н. Суворов, *Учебник церковного права*, 3rd edition, Москва 1908, 7; G. A. Rozenkampf, *Обозрение Кормчей книги в историческом виде*, Москва 1839[2].

[10] See: D. Perić, 165 167.

[11] See: R. Sohm, *Kirchenrecht*, Leipzig 1892.

Rousseau's teaching. According to Rousseau, religion is needed as a personal feeling, though every religious organisation damages the state. (Since logic requires consistency, the opposite may also be claimed: every state organisation damages the church, though it is not always so.) This Rousseau's idea was later repeated in the Gothic and Erfurt programmes in the words as follows: "Religion is a private matter" (*Religion ist Privatsache*).[12]

Such system, usually called the system of separation of church and state, does not in the least help bring about the solution to the problem of determining the nature of legal regulations which govern the internal church life. These regulations *per se* or independently of the stand the state takes on them cannot be classified within the private law. Also, this system confuses the nature of the ecclesiastical regulations with the state's stand on them. Already in the Digesta (38, 2, 14) it was written: "Public law cannot be altered by agreements made by private individuals" (*Ius publicum pactis privatorum non potest*). The will of the state with the authority to command stands above the will of private individuals. In Germany, this viewpoint was most consistently advocated by Adalbert Falck despite the reasons disputing the relevance of the viewpoint on the ecclesiastical law as the private law.[13]

The next question which may be posed reads: "Can private individuals by their own will alter the regulations of the ecclesiastical law?" And, the answer is yet again the same: "They cannot!"[14] For the church membership these regulations are of an even more superior authority and unalterability than the state laws. Such answer renders possible the conclusion that the ecclesiastical law is public in its character, although that character is not the one of the state but is *sui generis*, i.e. ecclesiastical. [15] Ecclesiastical regulations may become "the public law of the state", this being but an option which depends on the will of the state authorities, which determines the position of the church.

1.3. The admixture of the public and private nature of the ecclesiastical law

According to this compromising viewpoint (dualistic-statist), the ecclesiastical law is an admixture. Its one part belongs to the private and the other to the public law. This viewpoint is advocated by the earlier ecclesiastical-legal authors, including Schulte, Niels, Schteckart, Schilling or Maretzoll.[16]

[12] See: S. V. Troicki, 47.

[13] *Ibidem*.

[14] *Ibidem.*

[15] *Ibidem.*

[16] *Ibidem.*

The viewpoint of Maretzoll is characteristic. According to him: "Any man by his faith joins a religious community; hence the appearance of more or less particular religious relationships, which fully coincide with the state relationships almost everywhere and without exception where there is a purely national religion. For example, the Romans had it that the *ius sacrum* belonged to the *ius publicum*. Where there is no coinciding between the state and religious interests, as is the case in all Christian states, there the relationships between the body of the faithful and their religious community – the church, constitute the ecclesiastical law. If it has to do with the relationships of the church with respect to the state, the ecclesiastical law belongs to the state law as its constituent part. However, as it touches individual interests and gives them another form, it thus comes under the private law as well. All other matters in the ecclesiastical law are found on the above-mentioned border between the private law and the public law".[17] Maretzoll explains his viewpoint by the fact that every man by his own free will and faith joins the church as a religious community. These relationships belong to the ecclesiastical law because they are private in character. However, when it has to do with the public relationships of the church with respect to the state, the ecclesiastical law at large belongs to the state law.

The mentioned Maretzoll's viewpoint is not acceptable, because on the basis of it even the opposite may be concluded: that the ecclesiastical law at large falls under the state law since the public law (*ius publicum*) and the private law (*ius privatum*) are two traditional types of the state law, and not an area of the state law and an area of *droit social*, as it might be thought.[18] Most often they differ in subjects, contents or procedures of enactment, but not in its original character or the capability of the state to impose its sanctions. That is why Maretzoll's viewpoint is seemingly admixed. In effect, it is only formally dual and essentially statist-monistic.

There are still a number of important reasons challenging the viewpoint on admixed character of the ecclesiastical law. First of all, such viewpoint would be truthful if the church were a state institution. However, the church, as well as the state, is a perfect, fully free and sovereign society, *societas perfecta et plane libera*. Also, although it is true that the ecclesiastical law touches interests of private individuals, it still does not follow therefrom that any part of the ecclesiastical law should be considered private law in the same sense in which it is done in reference to the

[17] Maretzoll, *Lehrbuch der Institutionen*, 1886, 5. 7. See: S. V. Troicki, 47 48.

[18] The first systematic classification of the law, for the sake of calling to mind, is usually associated with the Roman dual (bipartite) division of the law into the *ius publi cum* and the *ius privatum*. As the classical Roman dual division has remained prevalent all the time, so it has also been in the 19th and 20th centuries at the time when a more comprehensive teaching of the legal sciences was much more paid attention to.

secular civil law. While the secular civil law moves within a space bounded by the laws created by the state for individuals, the ecclesiastical law, which is concerned with the interests of individuals (e.g. matrimonial law, right to private prayer or private study), moves within a space bounded by the regulations created by the church itself. Moreover, in addition to the regulations governing personal lives of the church membership, the ecclesiastical law also includes the provisions regulating the organisation and relationships of a society as a whole. For example, the ecclesiastical-administrative law and the ecclesiastical-judicial law are similar to the public state law, while the matrimonial and ecclesiastical-property laws are similar to the private state law. However, "this is but a similarity, just an analogy, because the mentioned branches of the ecclesiastical law in terms of their substance do not fall under either the public or the private law".[19]

1.4. Ecclesiastical law as a type of *droit social*

According to this sociological-pluralistic viewpoint, the ecclesiastical law falls under a special type of the *droit social*. Especially insistent upon this viewpoint are jurists who advocate the trichotomy in the law, claiming that the law at large should be dived into the public, private and *droit social*. In the last mentioned they include also the ecclesiastical law.[20] An interesting trichotomous division of the law was made by Rudolph von Mohl. According to it, in addition to the public law and the private law, there also exists the *droit social*. It is created on the basis of the original social authority, rather than on the derivative state authority. As a result, the ecclesiastical law cannot be classified either into the public or into the private law, and makes a third separate group of the law "beyond the state law". An interesting trichotomous division of the law was also made by Fridrich Karl von Savigny and Georg Fridrich Puchta. They, too, classified the ecclesiastical law into a third, separate group, in addition to the public law and the private law as the ecclesiastical law is the most voluminous and developed among all types of the laws.

The farthest in the matter at hand acted Georges Gurvitch, who classified the law at large – therefore, the ecclesiastical law as well – into one single law – the *droit social*. According to Gurvitch, the object of social regulation is the internal life of a community, while its externality, the manifestation of the *droit social*, consists of *social power* which is not linked up with the power of the state. *Droit social* can be "pure", i.e. completely independent of the state, and can (remaining "pure" nevertheless) be subjected to the protection of the state. It stems from the collective sense which Gurvitch calls "We". This is the *droit social* of a com-

[19] See: S. V. Troicki, 49.

[20] See: T. Živanović, III, 351, 354 355.

munity, which includes in an objective way, every active real entity and which embodies a beyond-time positive value... no mater whether it is organised or unorganised with the aim to organise social life, which means that it derives its binding force from the social group within which it was created and integrated".[21] That is why the *droit social* is integrative, spontaneous, the law of collaboration and co-operation. It "in its organised form addresses specific subjects of law – complex collective persons – that should be equally distinguished from the isolated individual subjects, as well as from the legal persons... These different *droit social* centres may be superior to the state (international bodies and organisations) or subordinated to the state (trade unions, co-operatives, trusts, factories, churches, decentralised public services, international organisations, etc.)".[22] On this basis Gurvitch creates his famous typology of law, in which concurrently with the state law exist three main types of the *droit social*.[23]

If the social-pluralistic viewpoint were to accentuate only the thought that the ecclesiastical law does not depend on the will of the state and private individuals, it would be acceptable. However, it equates the church with other associations (trade, scientific, charity, economy, etc.), which is why it is wrong. Although the mentioned associations are established by the will of their members, they are nevertheless formed within the state and granted the approval for their existence by the state, they are subordinated to the state sovereignty and can be terminated by the will of their members or the state. Thus is shown that the *droit social* is not quite an independent branch of the law, but that it is comprised of the elements of the public law and the private law. This is also the case with the secular part of the ecclesiastical law.

The first four presented viewpoints classify the ecclesiastical law into the secular law. In particular the first three viewpoints which take as their point of departure the idea that the state is the only source of the law (*kein Recht ohne Staat*). Ecclesiastical norms become legal only upon being approved by the state. More modern, the fourth viewpoint determines the ecclesiastical law as a type of the pluralistic *droit social*: the state is like "a small, deep lake which is lost in the vastness of the sea of the law, surrounded from all sides by it... ".[24]

In favour of the opinion that the state is the only source of the law yet two more important reasons are given. Firstly, the church itself cannot create the law for the law exists only where there is a threat of imposing sanctions upon law-breakers; and sanctions always needs coercion which

[21] See: G. Gurvich, *L' idée du droit social*, Paris 1932, 15.

[22] *Ibid.*, 46 95.

[23] *Ibid.,* 80 81.

[24] *Ibid.*, 30.

in turn requires external forcible imposition. Since the church does not have at its disposal its own external force, i.e. it does not have "its own police or army to enforce its sanctions", it may be concluded that the church cannot have its law. Thus, the only source of the law is the state. It can to a varying extent authorise other subjects to themselves create and to implement their law in its stead. However, in that case, it is the sanction of the state that is needed to punish the violators of such autonomous social regulations. And secondly, in the same territory only one sovereign body can exist, and it is the state.[25] It follows therefrom that the provisions of the ecclesiastical law also stem from the state sovereignty, i.e. that the ecclesiastical law is a type of the law dependent on the state and its law, which is not in agreement with all the ecclesiastical-legal writers.[26]

1.5. Troicki on the original nature of the ecclesiastical law, its original place and its relationship with respect to the state law

In the opinion upheld by Troicki, the ecclesiastical law does not fall under any of the existing groups of the legal or ecclesiastical disciplines, but differs from all of them by its original nature. As a result, it establishes an original relationship of the co-ordination with the secular law, and not of the subordination. It brings to mind the social-pluralistic teachings of Leon Petrazycki, Georges Gurvitch and other followers of the social pluralism in legal science.

In support of his viewpoint Troicki mentions a number of important reasons. In the first place, the church in terms of its origin, nature, objective and resources has at its disposal a significant distinguishing feature which makes it distinct from all other societies. It came into existence independently of the will of the state. Christian church was founded by Jesus Christ and his disciples, completely independently of the state.[27] And not only did the church come into existence independently of the state, but also despite the will of the state. In the first three centuries the state considered the church an illicit collegium – *collegium illicitum*.[28] That historical fact is in agreement with the claims of the mentioned advocates of social pluralism, who in their teachings also point out that social organisations and the law have come into being before or independently of the state and its law. However, Troicki obviously differs from the advocates of social pluralism when he claims that the church has not been created by the will of its members, but, according to its doctrine, "from

[25] *Ibid.,* 42 43.

[26] See: R. Sohm, *Krchenrecht die geschichilichen Grundlagen*, 1892. See: S. V. Troicki, 35 40.

[27] See: S. V. Troicki, 49.

[28] *Ibid.,*42 43.

up there, by the will of God himself". The church reflects human nature itself, and not the will of individual persons or collective groups. The church is not only a society, but an institution. It cannot be abrogated by the will of its members or the will of the state. According to its doctrine, it must exist forever. And while all other associations may belong to the public or to the private law branch, this is not the case with the ecclesiastical law.[29]

Departing from the mentioned points, Troicki further claims that the ecclesiastical law besides being not secular is moreover completely independent of the state. The law precedes the state. The state does not create the law, but the law, i.e. "natural legal sense" creates the state. Before him, that claim was emphasised by Leon Petrazycki, according to whom the law is a product of conscience, an individual-psychological experience. It exists as a multitude of legal experiences, i.e. as a product of emotions and intuition. Petrazycki calls this law an "individual experience" or "intuitive law". It appears spontaneously, comes into being directly from the conscience of an individual and manifests itself outside the state in the minds of individuals and collective experience. Petrazycki was among the first who thus opposed the opinions which point out the unity of the law based on the state coercion. He emphasised spontaneity and intuition as the elements decisive for coming into existance, the explanation and the determination of the law.[30] Exactly the same also does Troicki when he claims that there is no state without the law, but that the law may exist and, in effect, it does exist outside the state (for example, when it has to do with children, families or indigenous peoples who are incognizant of state organisation).[31] If the law can exist without the state, it follows therefrom that the church too may create its law on its own and independently of the state.

Neither is the third reason, which suggests that the state sanctions are important in the law, defendable. According to Troicki, the law exists even when there are no state sanctions. Moreover, outside the church too, there is a whole series of sanctions which are not coercive in their character (e.g. public disgrace, *infamia* in the Roman law). This even more so being the reason for the church to have sanctions which do not have the character of coercive force, but are nevertheless more efficient than any other coercive force (e.g. ecclesiastical ex-communication).

Trocki therefrom concludes that the change in legal conscience, and not the external coercion, determines the fate of legal institutions. If that were true, the legal would be only those norms which are voluntarily

[29] *Ibid.,* 44 and 49.

[30] See: L. Petrazycki, *Law and Morality*, Cambridge 1955 [*Teorija prava i mora la*, Beograd, Podgorica, Sremski Karlovci 1999 (transl.)].

[31] See: S. Troicki, 41.

obeyed by the morally motivated individuals, while it would not be the case with the norms which are disobeyed by the unmotivated individuals. The afore-mentioned contradiction in which Troicki becomes entangled by overly expanding the concept of law can easily be removed by way of which the ecclesiastical norms, which are based on the probability of the imposition of the mental punishment upon the wrongdoer, will be considered a type of the "naked law" (*nudum ius*), whilst all the other ecclesiastical norms, which are based on the probability of the imposition of the coercive force upon the wrongdoer, will be considered the complete or incomplete legal norms. Such a solution is not incorrect since even without the mentioned expansion it is possible to reliably determine the concept of law in its expanded meaning, which will be hereinafter shown.

Finally, Troicki points out, one cannot accept as true even the reason referring to the territoriality according to which the church cannot have its own – of the state – independent law, for then it would be the state (*statu*), whilist the interrelationships between the church and the state would fall under the international law (*ius inter civitates*). Although the church is found in the same territory as the state is found, it is still not found within the state area, thus rendering the possibility of the conflict between the church and the state lesser than that between the states. The truth of the matter is that the sovereignty is essentially indivisible. On the other hand, it is divisible as to its jurisdictions. (*Kompetenz-Kompetenz theory*). This means that the jurisdiction of the church sovereignty differs from the jurisdiction of the state sovereignty. In view of this important difference, Troicki concludes that the church sovereignty and the state sovereignty can exist in the same territory.[32] And furthermore – it is possible to consider the subjects of the international law, without being contradictory though, all the churches which conclude international agreements. The most famous are the concordats, i.e. the international agreements which regulate the international relationships between the church and the state. For instance, by the concordats have long since been regulated the relationsips between the Roman Catholic Church and the states, which is also the case with the Protestant Church and the Orthodox Church.[33] The most recent example is the concordat concluded between the Vatican and Montenegro in June 2011.

Troicki supports the above-mentioned claim by referring to the fact that in the modern state law and the international law exist teachings on the individual rights of citizens which are, in principal, outside the area of the state jurisdiction. This claim is very similar to Jean-Jacques Rousseau's teaching on the inherent natural rights of the people which precede

[32] See: S. V. Troicki, "Međunarodna zaštita religijskih prava", *Ariv za pravne i društvene nauke*, February March 1926.

[33] See: S. Troicki, *Crkveno pravo*, 45.

the society and the state. It follows therefrom that the state depends on the people, and not the people on the state. Within these rights have long since been included the freedom of speech, the freedom of assembly, the freedom of association, and, above all, the freedom of religion and conscience. In this field, it is not the state that is sovereign, but an individual, i.e. sovereign are his/her religious and moral conscience and will. If an individual is sovereign in the area of the mentioned individual rights, the fuller is the exercise of the "sovereignty of assembly" right of individuals united by their common religious beliefs in the church which by its provisions and on its own regulates the areas of the freedom of religion and conscience. And exactly here lies the answer to the objection according to which there cannot exist "status in statu", i.e. the state within the state. It is true that the state within the state cannot exist, but the church is not the state but "the kingdom which is not of this world". As a result, it "is not in the area of the state, but has its separate area at its disposal".[34]

A few more important ideas characteristic for the teaching of S. V. Troicki should be pointed out. First of all, he defended the right of the science of the ecclesiastical law to exist independently. He regarded as unnecessary the "purity" stands of the ecclesiastical-legal writers, who contested the concept of the ecclesiastical law, considering it as a type of *contradictio in adiecto*. Of a stimulating effect is also his other idea – that the conflict between ethics and the law does not hold. This idea of his is based on the claim that the church is not only a spiritual society, but also a secular one since the ecclesiastical law exists wherever the church exists. Otherwise, the church "turns into and moves to either the anarchic sects or the part of the state apparatus".[35] Neither does the formal factor of the law "contradict the substance of the church since the external forms are required by religion too, and even by ethics. Hence, coercion and its force are not the choice of the law".[36] The choice is concerned with freedom and love. Their promotion should not be only the task of the church, but of the state, too. In their absence, we must content ourselves with its being at least "decent" (civilised), i.e. to contain at least a "minimum of morality".[37]

The controversies between the first four viewpoints and the fifth viewpoint of Sergey Viktorovitch Troicki on the place of the ecclesiastical law may be softened by showing the multiple layers of the concept of the ecclesiastical law, its different types, chracteristics and its contemporary relationship with the state law.

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[34] *Ibid.,* 40.

[35] *Ibid.*, 39 40.

[36] *Ibid.*, 37.

[37] See: L. Fuller, *Morality of Law*, ed. Yale Universiti Press, New Haven and Lon don 1964, and *Moralnost prava*, Belgrade 2003 (transl.).

2. THE MULTILAYERDNESS OF THE ECCLESIASTICAL LAW CONCEPT AND ITS PLACE IN THE SYSTEM OF LAW

2.1. Secular and sacral ecclesiastical law

In Roman law, Marcus Tullius Cicero and Marcus Fabius Quintilian made a clear distinction between the *ius publicum* and the *ius sacrum*.[38] The former at large related to the secular law, and the latter to the ecclesiastical law. Today, that distinction is softened in favour of the secular law. It looks like the ecclesiastical law is a somewhat "softened" derivative of the state law.

Something like that is only partially acceptable on condition that within the ecclesiastical law itself an additional distinction is made between its *secular part* (e.g. its *ius publicum* and *ius privatum*, which refer to the organisation and the functioning of the church, its relationship with the state and the society, how the decisions and other regulations are brought, property-related relationships, matrimonial relationships, etc.) and purely *sacral part* (*ius sacrum*) which contains the earliest religious norms. Such additional division, which suits better the contemporary relationship between the church and the state, deviates from the original Roman division, but not to the detriment of the independent existence of the ecclesiastical law. It also exists independently even today, when it is concerned with its other, purely sacral part, when one may really speak of the original ecclesiastical law, which is not even a softened derivative of the state law. Also, under certain conditions, one may speak of the original nature and the original place of the ecclesiastical law at large, based on the prior assessment as to what is more prevailing in it. One may only ask whether all the ecclesiastical norms are really the legal ones.

The answer to the question about the ecclesiastical law norms being legal depends on how the general concept of the law will have been determined in anticipation. Thus is at the same time solved the question referring to the determination of the derived concept of the ecclesiastical law. Only then is it possible to embark upon the determination of the areas over which the ecclesiastical law and the state law spread, which depends on the historically changeable relationship between the church and the state. Therefore, on the answer to this question depends what place the ecclesiastical law in the system of legal and ecclesiastical sciences will hold.

2.2. The concept and types of the ecclesiastical law: complete, incomplete and unfinished

When it has to do with the determination of the concept of law, it should be emphasised that this concept is not one-sided. In fact, the law

[38] See: Cicero, *Pro domo*, 49; Quintilianus, *Institutiones*, II, 4, 33.

at large is composed of a number of basic layers, i.e. types of the law of different degrees of being legal. Such understanding of the law – resembling "a series of coverings of an onion bulb",[39] renders possible the determination of the ecclesiastical law conventionally in the expanded and restricted meanings, and thereafter the determination of its relationship with the state law, too.

In determining the *expanded concept of the (ecclesiastical and state) law*, notice should be taken that the law at large has at its disposal a certain number of common characteristics. They are externality (corporality), heteronomy, social character, regularity (demarcation of interests), the object to be regulated (the three separate types of social relationship: property-related relationships, the relationship of the government and the organisation of society), measurability and precision, the existence of a dispute and the coming into existence of the court, special formalisation procedure, social (external) sanction, the realisation of the social and legal values: order, security, peace, justice, freedom and the enabling of the "co-existence" of the people in a society.[40] Only by having these characteristics do social rules acquire legal character. However, the mentioned legal characteristics are not present in the same amount in all legal norms. Some legal norms have at its disposal all the mentioned common characteristics, and others do not. The former are complete, and the latter are incomplete. On this basis, it is possible to determine different types of the ecclesiastical law and the state law.

The complete ecclesiastical law includes only the norms which have all the characteristics of the law. This is also the case with the *complete state law*. The most obvious difference between those two types of law exists in reference to the subjects which create them and the types of their "legal sense", while other differences need not be so clearly expressed.

There is also *the incomplete ecclesiastical law*. It contains the norms which do not have all those legal characteristics, but have a majority of them at least. That is why it necessitates the posing of the question whether the incomplete ecclesiastical law should have a state sanction. Since both these two situations may be encountered, i.e. that the norms of the ecclesiastical law have or do not have at their disposal the state sanction, it follows that there are *two types of the incomplete ecclesiastical law*. The first type comprises the ecclesiastical law which contains the majority of the common legal characteristics, among which is included the state sanction too, and the second type is the ecclesiastical law with the majority of the common legal characteristics, among which is not in-

[39] See: D. M. Mitrović, *Teorija države i prava*, Belgrade 2010, 205 209, and *Au tonomno pravo*, Belgrade 2010, 62 63.

[40] See: R. Lukić, "Pojam prava", *Zbornik za teoriju prava*, II, Belgrade 1982, 28.

cluded the state sanction. For the first type of the incomplete ecclesiastical law one may say that it is "less perfect" than the complete ecclesiastical law, while for the second type of the incomplete ecclesiastical law one may not say even that. Yet, the law knows of the norms without sanctions (*leges imperfectae*), which is the case with the constitutional principles on the right of the citizens to work, the right to inviolability of privacy, the right to the conclusion of contracts in good faith, the right to freedom of conscience, etc. In view of the fact that such norms do not contain provisions as to someone's obligation to legally support them through sanctions, nor the enforcement of the sanctions either, it has rather to do with an illusion of the law or at least with something like the "naked law" (*nudum ius*).

All the afore-said about the incomplete ecclesiastical law also applies to the *incomplete state law*, which also has at its disposal the majority of the common legal characteristics with or without the state sanction. On this basis, *two types of the incomplete state law* can also be determined: the "less perfect" or "incomplete" state law and the "unfinished" or "unrealised" (*nudum ius*) state law. In comparison with them, the complete state and ecclesiastical law should represent the "higher degree of development of one in many ways the same social phenomenon" – the law in its entirety and at large.[41]

The determination of the law in its expanded meaning enables the determination of at least three types of the ecclesiastical laws and three types of the state laws, respectively. Each type of the law in its expanded meaning can be classified into three layers. The first layer consists of the *complete* ecclesiastical or state law. The second layer consists of the so-called *incomplete*, "imperfect" laws (John Austin) or the laws of "decreased value" (Ronald M. Dworkin and John M. Finnis), which is exactly what the ecclesiastical law and the state law are. The third layer consists of the illusions of the law – the *unfinished* or unrealised ("naked") ecclesiastical or state law. Neither are such norms, as already mentioned, insignificant from the position of the political culture and social life. Besides, it may chance that they subsequently gain the support of the state sanction (for instance, by the enactment of a legal or an ecclesiastical provision on imposing the sanction upon them, or by the decision of the constitutional or some other state and ecclesiastical court), whereupon they subsequently (*ex post*) become complete or perfect (*leges perfectae*).

Obviously, the concept of law is not one-sided, nor is it monlithic, but complex, detailed and as a whole composed of layers of different degrees of being legal. This at large applies to both the ecclesiastical law and the state law. The most important and stringent are the complete ec-

[41] *Ibid.,* 29.

clesiastical law and the state law. Afterward follow the incomplete ecclesiastical law and the state law. In the end is found the incomplete ecclesiastical or state law. The norms of the ecclesiastical or the state law which do not have at its disposal the majority of the common legal characteristics do not come under the law at all, but under the social rules.

Also, within each of the mentioned layers can be determined the "sublayers" of the ecclesiastical and state law, and within the sublayers their "sub-sublayers". It reflects the reality for within each type of the ecclesiastical or the state law there exist its special subbranches, and within each one of them there exist numerous institutions, subinstitutions and sub-subinstitutions, etc., all the way up to the norms which belong to the precisely determined type of the ecclesiastical or state law.[42]

In addition to the parallel, there exist the interwoven subbranches, institutions, subinstitutions, etc., of the ecclesiastical law and the state law, which makes the whole picture an unprecedentedly much more complex than the one shown. Perhaps, it is to the best to talk about the *ecclesiastical law as the special sub-subsystem within the area of the autonomous subsystem of the law*. It exists concurrently with other subsubsystems of the autonomous law and the subsystem of the state law, and comprises the unique law of the involved state.

Such determination does not diminish the importance of the ecclesiastical law, but makes contemporary both its place and its relationship with the state law. In contrast to other similar autonomous sub-subsystems of the law (corporate, guild, employer, trade union law or the rules of other social subjects), it is only the ecclesiastical law that has, in an undoubtedly recognised way, at its disposal – though only in one of its parts – the independence from the state. This being due to the particular role of the ecclesiastical teaching and the mission of the church in a society, in contrast to all other social organisations.

The afore-mentioned multilayerdness of the ecclesiastical law and the state law cannot be ascribed to chance. As suggested, it is used to finely tune the order of the relationships between the different importance and the degree of conflict, and, which is also important, to adequately legally regulate also those social areas which would, in the absence of the ecclesiastical law, be regulated by the state law or with the social norms. It is thus shown how between the state law and the social norms there exists a vast social area which is occupied by the ecclesiastical law. Also, it is readily observeable that all types of the state law belong to the secular law, while it is not the case with the ecclesiastical law.

The restricted concept of law (ecclesiastical and state) may be determined when only one of its legal characteristics is chosen as the most important. This is the case when the law as "a substantial normative phe-

[42] See: D. M. Mitrović, *Teorija države i prava*, 545 551.

nomenon" is determined with respect to the state sanction as its most discerning external characteristic. According to this measure, the legal norms would be only the complete and only those incomplete ecclesiastical and state norms which have at their disposal the state sanction. Other incomplete ecclesiastical and state norms, which do not contain the state sanction, would fall under the social rules, independently of the degree to which they have at their disposal other common legal characteristics. This statist viewpoint clearly points out that the law is always based on the force. It is only the force that is to a varying extent applied in the ecclesiastical and the state law. By such approach is modified the way in which the relationship between the state and the ecclesiastical law is determined. In that case, the *ius sacrum* would also become a derivative of the state law.

3. THE RELATIONSHIP BETWEEN THE ECCLESIASTICAL LAW AND THE STATE LAW

3.1. Dependent and independent ecclesiastical law

By making the distinction between the secular and the sacral part of the ecclesiastical law, the *division of the ecclesiastical law into the state-dependant law and the state-independent law* is pointed out. It is even possible to create a whole typology of the ecclesiastical law based on the mutual influences the state law and the ecclesiastical law have on each other. In one such typology, in addition to purely state law on the church, i.e. "state-ecclesiastical law" (*ius inter civitates et ecclesias*),[43] there would also exist a few types of the autonomous ecclesiastical law. The first would be the *ecclesiastical law in a purely dependent relationship on the state*. It would be integrated within the framework of a given order and realised by relying on the state coercion. The second would be the *ecclesiastical law as a kind of an admixture – the decentralised public* or *associated droit social*. The third would be the *ecclesiastical law in a pure and independent relationship with respect to the state*. It would realise its integrative role without relying on the state, its coercion and the law. The first two types of the dependent ecclesiastical law would fall under the secular law and the third independent type under the sacral ecclesiastical law.

The *independent ecclesiastical law* is particularly interesting, which complete independence of the state is being unnecessarily disputed on different grounds. It exists whenever the commands and sanctions against

[43] See: S. Avramović, *Prilozi nastanku državno crkvenog prava u Srbiji*, Beograd 2007; M. Radulović, *Obnova srpskog državno crkvenog prava*, Konrad Adenaur Fund, the Christian Cultural Center, Belgrade 2009.

the wrongdoers may independently of the state be passed and enforced by the various church organs and bodies (e.g. Holy Synod of Bishops or the Holy Synod of Bishops of the Serbian Orthodox Church on the grounds of the legal or moral assessment whether there is a wrongdoing or a transgression). Some writers think that this type of the ecclesiastical law is a pure manifestation of the contemporary legal pluralism, but of a secular type. Such claim is not quite correct for it is through the independent ecclesiastical law that is simultaneously being regulated the relationships between man and the church, the church and the divinity or between the very ecclesiastical bodies within the church. It is even less correct if within the independent ecclesiastical law are listed purely religious norms, the particular characteristic of which is the focusing on the issues referring to moral and legal determination. They always contain the judgment as to whether something has or does not have a religious value, the judgment of approval or disapproval, and it is quite distant from the contemporary legal pluralism of the secular type.

3.2. A few more important things pertinent to the relationship between the ecclesiastical law and the state law

The division of the ecclesiastical law into the state-dependent law and the state-independent law enables the discernment of a number of important things pertinent to the relationship between the ecclesiastical law and the state law:

- Firstly, that the ecclesiastical law at the same time consists of one type of the state law and of the three types of the autonomous law to a varying degree independent with respect to the state law;
- Secondly, that the first of the three mentioned types of the autonomous ecclesiastical law at large falls under the dependent law, the second only partially, while the third type is independent, i.e. out of the reach of the state law;
- Thirdly, that it is rendered possible to include within the dependent ecclesiastical law all the types of the complete and incomplete ecclesiastical law which are under the influence of the state law, especially in terms of the possibility to impose the state sanction, and within the independent ecclesiastical law only those types of the unfinished ecclesiastical law which are not under the influence of the state law and do not rely on the imposition of the state sanction;
- Fourthly, that the independent ecclesiastical law is also composed of the secular and sacral parts, which thus makes its concept even more complex. Before all, under the secular part of the

independent ecclesiastical law may fall the decisions made by the supreme and all the other subordinated church bodies, as well as their activities in the area of social community work, and under the purely sacral part of the ecclesiastical law fall the decisions of a stringently religious character (for example, how to observe the Lent, when and how to perform liturgy, etc.);

– And fifthly, that not even the secular part of the independent ecclesiastical law can be a kind of the law "competitive" with the state law – especially not today for it is exactly the state with its law that determines ("apportions") it indirectly and informally. The normative independence of the church is, out of necessity, limited in this area too by the requirement that the involved ecclesiastical regulations, at least in general, be harmonised with the constitution, the law and other state provisions.

Such obvious – though not a full supremacy, enables the state itself to directly organise the ecclesiastical relationships which are otherwise already regulated by the norms of the sacral ecclesiastical law. In that case, there is an interweaving of the state part and the sacral part of the dependant and the independent ecclesiastical law. However, the interweaving is not to the full because there exists a purely sacral part of the independent ecclesiastical law, which belongs to the purely ecclesiastical area. Its existence on its own and independently of the state does not challenge the full supremacy of the state law over the ecclesiastical law since the church by its own law cannot organise the state relationships. It can seldom affect even the content and the way of their regulation. As a result, in the states with democratic constitutions the scope and the content of the ecclesiastical law are not determined quite precisely. Thus is left room for the regulation of the social relationships through the ecclesiastical legal provisions, though only within the framework determined by the state through its legislation.

The relationship between the state law and the ecclesiastical law may also be viewed quite differently. When the ecclesiastical law is considered in its entirety, it follows that the supremacy of the state law over the ecclesiastical law is only quantitative and illusionary: it looks like the ecclesiastical law is inundated by the state law. When those deposits are removed from the substance, and the concept of the ecclesiastical law is reduced to its purely sacral part – suddenly surfaces the brilliance of its original quality of independence which depicts it as a historically older and more original than the state law, normally, to the extent to which the human striving towards the high spiritual worth is separate from the similar endeavours of the state and its law. And, not even today is this a small enterprise as it has to do with the substance, and not with the quantity. Troicki was not wrong, but went too far when he expanded the substantial

characteristics of the church to the ecclesiastical law at large. It did not exist even at the time whose contemporary he was.

3.3. The influence of the state law on the ecclesiastical law and the ecclesiastical law on the state law

Although the church is an extraordinarily important factor in the life of a society and the state, the same does not always apply to the relationship between the ecclesiastical law and the state law.[44] Until recently, there have existed or exist still today societies (for example, at the time of the Roman Empire, the early European capitalism or real-socialism) in which the ecclesiastical law was significantly reduced or restricted due to the overly powerful legal statism. Such churches have on the various historical grounds become the state churches (the Christian Church following the Edict of Milan in the Roman Empire, the Anglican Church as of Henry VIII or the Protestant Church as of Martin Luther) or were abrogated (as in the USSR and the members states of the socialist block /in most cases today's members of the European Union/).[45] Also, there existed such societies in which statism was destroyed for the reason of which the church had to assume the role of the state: somewhere, the church became the state (papal state), and elsewhere, it only acted in the stead of the state (the Serbian Orthodox Church during the occupation by the Ottoman Empire). Today, there exist various types of permeation and complementing between the ecclesiastical law and the state law, parallel to the supremacy of the state law, the existence of which types is in a dynamic balance which provides the law at large with the necessary measure of viability.[46]

The influence of the state law on the ecclesiastical law is obvious in the area of the *creation* of regulations. Three characteristic situations should be distinguished. In reference to the first, the state authorities beforehand and in the ordinary legislative way through the constitution or the law *authorise* the ecclesiastical subjects to create their law. Upon the adoption of their acts on the basis of the authority vested by the state, the subsequent confirmation by the state is no more required (the case of the so-called "ascertained consent", when the church enjoys more freedom). In relation to the second, the state subsequently *confirms* any general ecclesiastical act, the adoption of which does not require its prior explicit legal approval (the case of the so-called "convalidated consent", when the church enjoys less freedom). In regard to the third, the combined situation, when the church enjoys least freedom, the state first vests authority in the ecclesiastical subjects through the general provision, and thereupon

[44] See: D. Perić, *Crkveno pravo*, 21.

[45] See: Ch. Taylor, *A Secular Age*, Cambridge 2007.

[46] W. C. Durham Jr., "The Rights of Religious Communities to Acquire Legal Entity: A Summary of Recent Developments", A paper presented at the Conference "Re ligion and Law", Belgrade, May 2011.

subsequently *confirms* their acts. Without that confirmation, the ecclesiastical regulations cannot be valid before the law. Having the possibility to exert such double influence, the state authority finds additional security in that that the most important ecclesiastical acts and regulations are going to be in compliance with the most significant acts and regulations of the state law.[47]

The influence of the state law is even more obvious in the area of the *application* of the regulations of the sacral ecclesiastical law, as mentioned while determining the concept and the layers of the ecclesiastical law. Yet, there still exists a part of the ecclesiastical law outside the influence of the state and its state-ecclesiastical law. It is the independent, i.e. the pure sacral ecclesiastical law, within which framework the church may and should independently regulate and exercise its relationships without the interference of the state. That area, in conformity with the theory of symphony, traditionally belongs to the pure ecclesiastical legal area.

The *influence of the ecclesiastical law on the state law* is comprised of the ties of integration, collaboration, co-operation, co-ordination, correlation, etc., short of the domination though. Only now and then can the church through its authority and the credibility of its arguments directly influence the content of the state regulations pertaining to the church. However, the credibility is a matter of choice, and not the basis of being legally binding.

Although the church cannot directly influence the creation and implementation of the state regulations pertaining to the church, it can sometimes achieve that goal by exerting influence on its body of the faithful, who are at the same time citizens of the involved state. And the more widely the church is spread over, the stronger is its influence on the state through its body of the faithful. Obviously, the contemporary influence of the ecclesiastical law is not the same in comparison with the influence it exerted when the undeveloped state law relied on the ecclesiastical law and overtook it directly, or when the medieval state authority was so weak that it was unable to provide for the coercive force of the ecclesiastical regulations which it explicitly issued or implicitly accepted.

4. CONCLUSION

It seems that closest to the truth is the fact that the contemporary ecclesiastical law cannot with complete reliability be classified into a separate branch or area of the law as it is in its one part public, in its sec-

[47] See: G. del Vecchio, *Philosophie du droit*, Paris 1953; L. Zucca, "Law v. Religion", *Law, State and Religion in the New Europe*, Cambridge University Press, Cambridge 2010.

ond part it is private, in its third part it is international, in its fourth part it is internal, in its fifth part it is objective, in its sixth part it is subjective, etc. Thus, it may be claimed that the ecclesiastical law is a separate subsubsystem of the law within the framework of the subsystem of the autonomous law.

Leaving aside the state law pertaining to the church, today it may be said with reliability that the sacral and secular parts of the ecclesiastical law are the unique parts of the ecclesiastical law as being one complex type of the autonomous law with the oldest living tradition. And while the sacral part of the ecclesiastical law has a rather staying power, it may not be said of its secular part which has been continually developing.

Also, the ecclesiastical law is not being spread over on its own within its secular part, while it is being spread over on its own within its sacral part, within which the influence of the state and its law is neither possible nor desirable as it has to do with the quite original and from the very start quite independent ecclesiastical law. It may be said that it is the only type of the law which indeed does not depend on the state law.

Although almost the entire ecclesiastical law is today concerned with the purely organisational regulation of the church matters, and primarily with the organisation of the authority-related relationships (church hierarchy and organisation) and religious activities, it may also refer to the regulation of the family, educational, social-humanitarian, health and other aspects of life. In that part, the ecclesiastical law is similar to the norms of other social organisations. However, that area of the ecclesiastical law is not one-sided either, for at the same time its one part falls under the secular (public and private), and its other part under the purely sacral ecclesiastical law. This area reminds one mostly of the ideas upheld by those speaking in favour of the ecclesiastical law as being a type of the *droit social*. However, it is still not so because charity and profit are not one and the same in terms of the motivation for carrying out social community work. If it were different, the overall secular activities of the church would have to come under exactly the same provisions by which are regulated the activities of all the profitable and other like social organisations.

It is characteristic of the ecclesiastical law that through it is primarily regulated the realisation of mutual interests. However, when a dispute arises, primarily in the area of the religious rules, the contending parties refer to the permanent Church Court which, according to the precisely prescribed procedure, decides the dispute and pronounces the sanctions which are executed in an organised way, etc.

In short, the place of the ecclesiastical law and its relationship with the state law does not genuinely reflect the contemporary influence of the

church on the state and society, which is much more powerful and more comprehensive than the influence of its ecclesiastical law.

Today in the world there exist at least three formal-legal regimes for the regulation of the relationship between the church and the state in a society. The oldest *regime of the state church* exists when only one church is proclaimed the state church. Other churches are not abrogated, though only the state church has privileges at its disposal. In a somewhat more contemporary *regime of the recognised churches*, all the churches enjoy freedom, but only some among them are recognised and as a result maintain a certain relationship with respect to the state. The state exercises control over such recognised churches, provides financial support to them in proportion to their needs, the number of their believers, etc. On the other hand, the churches are forbidden to put to use the religious feelings of their members for political purposes. In the latest *regime of the separation of state and church*, churches are considered the private institutions with the work of which the state does not interfere, but only regulates it through its legislation. At the same time, the churches are forbidden to interfere with the state affairs.[48] There also exist different classifications.[49] Such relationship of the state with respect to the church is eristically explained by the need to ensure the freedom of religion. Despite this simulacrum,[50] history shows that it is impossible to fully separate neither politics from the religion nor the state from the church.

That the connection between the church and the state, and the ecclesiastical law and the state law, has almost never been broken is also shown by the fact that, starting from the Middle Ages, jurists have been awarded the degree (and title) of the doctor of the ecclesiastical and secular law (*doctorus iuris utrisque*).

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[48] *Pravna enciklopedija*, Belgrade 1979, 562.

[49] G. Robbers, "Constitution and Religion", *Constitutions et religions*, Tunis 1994; N. Đurđević, *Ostvarivanje slobode veroispovesti i pravni položaj crkava i verskih zajed nica u Republici Srbiji*, Beograd 2008.

[50] J. Baudrillard, *Simulacra and simulation*, Novi Sad 1991 (transl.).