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CONSTITUTION & REMARKS ON RELIGION: THE PROBLEM OF THE COMPATIBILITY IN XX–XXI CENTURIES

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INTRODUCTION: THE SOCIO- LEGAL OR JUST LEGAL PROBLEM?

The modern (XX end XXI beginning) thinking paradigm which has taken root in the nowadays theoretical debates has in principle changed the subject of the research which was relevant in the epoch of Immanuel Kant. These days, however, researches challenge even the initial approach, which maintains the existence of universal norms of morality. These debates have already become a perpetual problem of theory of law and philosophy of morality. Some contemporary philosophers maintain that the modern society and doctrine have became so courageous that not only they are challenging the quality of belief, which was typical of the reformist and counter-reformist epochs, more that that, they raise question about the meaningfulness of Christian belief, despite the fact that for ages Christian truths were undisputed source of moral norms. It is obvious that when the doctrine challenges Christian values it also challenges Christian moral values. There is nothing wrong with the challenge in itself as science must be challenging different concepts, however the variety of concepts or doubts about what was previously regarded as a norm is reflected in the existing system of values.

Thus modern paradigm of philosophy is characterized by rejection of any preliminary assumptions and it challenges things that have been unchallenged for centuries. Secularization of Christian morality is followed by inevitable tendency of law becoming more and more positivist, the tendency aggressively prevailing over morality.

There are two quite equal tendencies in modern Legal theory and Philosophy of morality. One of them recognizes the existence of universal moral norms, the other denies it. Representatives of the first viewpoint do not separate law from morality and argue that it is only the law, which does not contravene norms of morality, which may justify the name of the Law. Advocates of the second theory argue that norms of morality are relative and therefore can not be universal, thus law does not necessarily need to reflect existing norms of morality, as it is impossible.

Most prominent representatives of the first doctrine are Ronald Dworkin, John Finnis, Tom Nagel, Tom Scanlon; the second doctrine is represented by Hans Kelsen, Richard A. Posner, Bernard Williams and others. All researchers mentioned hereinabove are famous professors of law and philosophy, who have had an impact on the scientific paradigm.

What is the influence of the theoretical competition between the mentioned theories and changes in the thinking paradigm on the question debated in this article i.e. constitutional legal relations and formation of constitutional systems?

Even though the content of the concept of morality is quite problematic, doctrines of different sciences describe it using more or less similar definitions. The definition given in Oxford dictionary maintains that morality is “a

system of norms, which establish responsibilities of a man in relation to the society and other men".[1]

As mentioned hereinbefore, academic tendencies which deny the objectiveness of existence of common norms of morality are quite obvious. Denial of morality rests on several key arguments. The main argument holds that norms of morality are relative, i.e. some things are regarded as moral by some persons, whereas others think, others things are moral. This holds very much true in individualized society of today, where virtually everyone has his own list of norms and the vision of morality, therefore the universal system of morality is nothing but an utopia and objectively is impossible. Hans Kelsen in his "Pure Theory of Law" does not think for a moment that norms of morality can not be relative, more that than he maintains that even Jesus Christ came to earth having other objectives but spreading peace.[2] Richard A. Posner also describes Jesus Christ as a violator of the then existing norms of morality. With this argument the author makes an effort to deny the Christian nature of morality.[3]

Having recognized that the universal system of moral values is impossible we come to a logical conclusion that we should not even aim at establishing one, whereas every effort to establish one could be classified as Sisyphus job. From the viewpoint of this attitude the models of communication and behavior are only influenced by subjective understanding of moral norms.

Another argument which denies the existence of universal norms of morality holds that even if there are universally recognized laws, there will be no mechanism, which could force one to fulfil the duty bestowed upon him and there are no ways as to how transform this moral norm an imperative. Therefore, even if there were universal laws of morality, they may merely be regarded as a declaration, whose implementation depends on goodwill of the person.

It is natural that this position of the doctrine in a sense legitimizes the relativity of morality in modern society. Once the concept of subject morality is possible, why should not it be possible for everyone to have his personal set of values, whose quality would depend solely on the person himself? The usefulness of subject concept of morality was soon noticed by public at large. "Subjective moralities" nowadays not only influence behavioural motives between public at large, but also the behaviour of other constitutional legal subjects, comments on the norms of law etc. Thus dominant becomes an attitude that all types of behaviour are moral, given the fact they are within law. It is obvious that this approach lumps morality and legal norms together, therefore the expected degree in morality can be as high or low as it is entrenched in legal norms. The conclusion is, that legal norms are not based on universal norms of morality and the concept of morality being subjective eliminates it as a source of law, which could be applied in everyday life. If only a fraction of the society takes this stanza, we are indirectly involved in a situation which reminds of the state described by Max Weber, which continued until the arrival of capitalism, where coexistence of several moralities was possible. One of these was "external morality" which allowed things to be condemned in relations "between brothers", the other was much stricter if compared to the external one.[4]

This position which sadly enough is dominant in the majority of post communist states makes us look for morality in legal norms even the, when the contents of the norm are contrary to common reason or other legal acts. If we accept that norms of morality are relative and they do not necessarily command duty and that everyone is entitled to judge the environment from "his own" subjective perspective, we become entangled in a paradoxical situation where legal norms as sole possible models of moral behavior become absolutely immoral for public at large as they can not mirror the plethora of existing subjective systems of morality.

Therefore we may state that by discarding the view that there are universal legal norms, we have to oppose the statement that legal norms can be moral at all, because no existing legal norm can reflect all systems of subjective morality. Society and maybe even the state finds itself in a dangerous position, where de facto the society does not recognize the existing norms of morality and the existing norms of law are nothing but strict imperatives, who are followed because of fear of sanctions, conformism or other motives. Therefore when a subject of constitutional legal relations behaves within the boundaries of existing norms, this behaviour is regard as exceptionally immoral. In circumstances like these the public not only airs its opinion about a particular institution or official, but also states that the norm of law does not comply with its own conception of morality and therefore can not be treated as moral. It is obvious that the theory which approves of non-objectivism of moral norms only facilitates legal nihilism.

I. CONSTITUTIONAL LAW AND RELIGIOUS REFERENCES: SOME HISTORICAL ASPECTS.

It goes without saying, that the constitution, being by far the most important compilation of legal rules, has the function of regulation of public relations. the doctrine of constitutional law recognizes that constitutional legal relations are not regulated by written norms only but by constitutional conventions as well, which are developed through daily workings of constitutional subjects. Thus constitutional conventions may be described as a particular behaviour of government representative or official, which is in compliance with established norms of constitutional morality, which is constitutional behaviour.

If we were to agree with proponents of the moral relativism theory, we will have to agree that compulsory legal norms are non - existent and therefore the behaviour

[1] Oxford Dictionary, Dorling Kindersley Limited and Oxford University Press. – Vilnius: Alma littera, 2001. P. 529.

[2] Kelsen H. Grynoji teisės teorija. – Vilnius: Eugrimas, 2002, p. 85–88.

[3] Posner A. R. The Problematics of Moral and Legal Theory. – Cambridge, Massachusetts, London, England: The Belknap Press of Harvard University Press, 2002. P. 10.

[4] Weber M. Protestantiškoji etika ir kapitalizmo dvasia (*Protestantism and the Spirit of Capitalism*). – Vilnius: Pradai, 1997. P. 48.

of subjects of constitutional legal relations, which is not regulated by written word, shall not necessarily be regulated by requirements to abide by universal norms of morality. The question then is what are the motives of behaviour of government representative or official if legal norms do not regulate their behaviour in an imperative manner anymore? In our opinion, the best we can be looking forward to is the behaviour of the subject based on the requirements the subject creates for his own system of values. However it is more likely that this behaviour will be influenced by personal, political or conjuncture benefits, because without universal system of moral norms, there is no instrument, which serve for the purpose of evaluation of the quality of behaviour.

Don't we see the same situation in the practice constitutional legal relations of a number of post totalitarian states? Is this the same everywhere? How and why in some countries morality is universally regarded basis for not only constitutional but also public legal relations? It goes without saying that in Anglo-Saxon countries both moral values and guarantees safeguarding the application of moral values have a different status, which is the reason they deserve a deeper insight in this article.

Albert Venn Dicey having analyzed the models of behaviour of constitutional legal subjects and sources of law firmly states that in the United Kingdom there is a system of political morality – „orders, regulating the work of public officials, which are not found in any law <...>".[1] The author has also noted that it is moral and political responsibility which makes the subjects of constitutional legal relations follow them without challenging their existence.

More importantly, in the hierarchy of sources of constitutional law in the United Kingdom general political and moral values stand on equal footing with statute law and common law. General political and moral norms are so important that they are reflected in formal written norms and in the practice of constitutional legal relations. Adherence to the norms of morality at highest level, i.e. constitutional legal relations, guarantees that when adjudicating a case the court will follow norms of morality when interpreting an Act of Parliament or a previously resolved case. This way the court not only resolves a case but is deeply involved in the mechanism of checks and balances as an independent and free judiciary. Despite of the fact that English courts have to follow written norms, in extreme cases they may disregard an act of parliament which violates common moral norms.[2] The doctrine of British constitutional law recognizes that common moral values must have major support of the society to make sure there is no conflict between competing norms of morality. Thus legal doctrine of the United Kingdom recognizes that moral values are universal and therefore applicable to public relations. It is important that moral values could be protected in the court of law. In this protection, however, priority should be given to written law. It is obvious that here a norm of morality becomes a moral imperative, failing to follow it is not only immoral but also not useful, because the court may base its decision on the basis moral values.

The attitude of the United States of America is similar and maybe even more vivid. The President of the United States swears with his hand on the Bible. Above the chairs of Chairmen of the Senate and the Congress carved in stone is the maxim In God we trust. Is this only respect to history, customs, architectural and artistic authenticity the place? Answers to these questions call for a brief passage into the history of the United States of America. The first to settle in New England were protestants, Congregationalists, Presbyterians, Quakers, puritans and other whose political views are were influenced by ideas of Christian Protestantism, noted for ascetics, feeling of responsibility and very stringent moral requirements. That's why M. Weber has written "<…> hardly there could have been a more intensive form of religious evaluation of moral behaviour, that that spread by Calvinist amongst its supporters".[3] Thus moral assumptions became moral imperatives of political theory and practice, which are up to now very well reflected in constitutional legal relations. Most probably there is no other state in the world, which had such strict moral requirements to every man in the society and the society itself from the very beginning. The Mayflower Compact (11 October, 1620) was one of the most important documents, which had a tremendous influence on the further development of constitutionalism in the United States of America.[4]

Needless to say there was a logical connection between *Mayflower Compact* and the requirement of the Old Testament. The Compact bound all members of the new community to adhere to the requirements of the Bible. It is important that The *Mayflower Compact*, taking it's root from the Old and New Testaments, already at that time was regarded as a political covenant. These days a political covenant is understood as a behaviour of legal and undoubtedly constitutional subjects, which is regulated by a system of norms.

The Mayflower compact first creates a community and only after that a government for that community.[5] This short compact underlined fundamental values, which are binding for everyone. Constitutional doctrine of the USA, recognizes that there is a clear link between the *Mayflower Compact* and Connecticut constitution (the first in the world) which transpires through the contents of legal norms. Ever since that time, moral values have become an inextricable part of legal and political life, and have been further reflected in the development of constitutionalism in the United States. Therefore we have to admit without reservation " *The American constitutional tradition derives in much of its form and content from the*

[1] Daisy A. V. Konstitucinės teisės studijų įvadas. – Vilnius: Eugrimas, 1998. P. 22–24.

[2] Alder J. Constitutional and Administrative law. – London: Macmillan Press LTD, 1994. P. 69.

[3] Weber M. Protestantiškoji etika ir kapitalizmo dvasia. – Vilnius: Pradai, 1997. P. 102.

[4] Lutz D. S. Colonial Origins of the American Constitution. A Documentary History. – Indianapolis: Liberty Fund, 1998. P. 32.

[5] Lutz D. S. The Origins of American Constitutionalism. – USA: Louisiana State University Press, 1988. P. 21.

Judeo – Christian tradition as interpreted by the radical Protestant <...>".[1]

Changes in the religious composition of the population of the US followed by the influx immigrants with other but Christian religious values did not have any significant effect on the contents and imperativeness of moral norms. New Christian arrivals would accept the morality of the United States in an acceptable Christian form, whereas representatives of other religions, such as Buddhists, Muslims had to adopt the existing system of values not in the form of compulsory Christianity, but as established and therefore compulsory rules of moral behaviour. Requirements of the Decalogue were compulsory and even useful for followers of all religions. The binding character of moral norms was guaranteed by granting the courts with the right to use moral values as a source of law. In case there were loopholes in law or collision of norms or any other unforeseen circumstances someone taking another person's property could not justify his behaviour because of lack of legal norms. Moral requirement "Thou shall not steel" comes from the Decalogue and commands not to take anything which does not belong to you, it is very strict and has no exceptions. Thus in this case the court would plead a person guilty, because everyone, including the culprit, knows that no one can take another persons property, even if there is no provision on that in law or there is another circumstance which seemingly might justify the wrongdoer. Therefore, we must underline that the principle of the separation of church and state in the Bill of Rights of the Constitution of the USA („*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.* ") was developed with the view to provide the right to chose a religion, rather than atheism. Years after, it transpired that not only did the separation of church and state mean the right to choose a religion, but it also implied a right to choose none.

International law also rests on the recognition of universal moral values. The Nuremberg court when adjudicating the case of leaders of the Third Reich based its opinion on the fact that the defendants violated universal moral values.[2] However, how could one violate such values if they are non existent? Thus the court when taking the decision has recognized that compulsory moral values do exist and the violation of the said values must be punished. It is true, that this argument does not convince the opponents. They claim that the Nuremberg process does not prove the existence of universal norms of morality, it has only established the victory of one of subjective conceptions of morality.[3] It is difficult, however, top agree with this position as norms of morality applied by courts can hardly ever be classified as subjective, if this was the case we would deny the legitimacy and justice of such system of law.

Even though constitutional cannon law took shape only in XIX century, the majority of researchers identify it with public cannon law, as the nation of God was not only a totality of legal structures. In the case of church the term constitution in general means status, described by legal elements, the content of belief and believers, who at the same time are a unified and organized structure.[4]

Therefore we maintain that the system of moral values objectively exists and must be used. Those public relations which are not regulated by constitutional norms are found in political practice. In this situation moral values become a source, which indicates the behavior and principles to be used by the subject of constitutional legal relations.

Therefore it is quite obvious that the religious foundation, which is probably the Christian foundation, was the axis of the western legal tradition.[5] With all the respect to the Roman law, we may only regard it as a method of improving law as an instrument. All of the Roman law, however, becomes void and empty without the system of fundamental rights and freedoms. Christian heritage is a part of the tradition that had developed the concept and the system of the human rights and freedoms. Therefore, paradoxical as it may seem, but a modern man, whom I would relate to a being that has an extremely low sense of history, must understand that Christianity is one of the initial and major preconditions of his rights and freedoms.

Thus we may observe that Christianity, by being an official power through ages, disseminated its moral values and universal and mandatory. The universality of morality was "enhanced" by the positive law with its actual sanctions for its violations

Things changed when in the USA *the separation of state and church* became a constitutional principle. However the paradox is that this principle of *separation* in the USA was introduced not as a way for a citizen to reject a religion, but as a principle that guarantees a possibility to freely choose one. The society that was build at the dawn of American constitutionalism is the society of diehard religious followers. Therefore, in terms of its embedded meaning, the *separation* sought to defend the right to choose a religion.

French way towards the *separation* was a little bit different. Long running dominance of the Catholic Church urged to curb its power on the making of decision at national level. Given this context, it is no wonder that in 1905 France adopted a law that separates the state and the church and it sought to curb the powers that the Catholic

[1] Lutz D. S. The Origins of American Constitutionalism. – USA: Louisiana State University Press, 1988. P. 7.

[2] Alder J. Constitutional and Administrative law. – London: Macmillan Press LTD, 1994. P. 17.

[3] Posner A. R. The Problematics of Moral and Legal Theory. – Cambridge, Massachusetts, London, England: The Belknap Press of Harvard University Press, 2002. P. 10–20.

[4] Hervada J. Diritto Costituzionale Canonico. – Milano: A. Giuffre, 1989. P. 5–24.

[5] Christian foundation. Quite paradoxically but we need to be talking about the catholic-protestant foundation in this situation, because it were the religions whose philosophy was the cornerstone of the modern concept about human rights and freedoms. In the Byzantine branch of Christianity with all of its sub-branches the problem of freedom was and remains visible when looking at it through the eyes of public and national priorities.

Church traditionally had, rather than guarantee religious pluralism. For many countries, secularisation became a constitutional principle" i.e. a legal value. This principle is entrenched in constitutions and laws.

However the separation of state and church had a major effect on the development of the socium. By separating state and church, the values promoted by church were also separated from the state. Therefore the application of those values in the life of the state became dependent on the goodwill of individual actors. It is a known fact that in majority of countries religious values have remained a part of the tradition and the system of customs, however, secularisation build solid preconditions for moral relativism.

The principle of *separation,* however, did not become constitutional everywhere. There is a whole range of other constitutional systems in the world where the situation is completely different and is worthwhile of yet another look at it and analysis.

II. REMARKS ON RELIGION IN MODERN CONSTITUTIONS: THE PROBLEM OF THE UNDERSTANDING AND INTERPRETATION.

However religious aspects are not only a relict of the ancient times. A whole range of contemporary constitutions mention religion or God in one way or another. For this purpose we only need to analyze some European constitutions and their contents to be able to tell that not only they do not contradict moral norms, but they are treated with great respect there. The preamble of the 1949 of German constitution states that, the German nation creating this constitution understands the responsibility "before God and people". Greek constitution of 1975 was adopted "in the name of holy, unite and inextricable Trinity". Quite similarly in the preamble of the Constitution of the Republic of Ireland of 1937 the Holy Trinity is referred to as the source of power.[1] The preamble of the Constitution of Australia of 1990 reads that the state is created with the blessing of God.[2]

Other constitutions not only make references to God, but also refer to particular established religions. The Constitution of Argentina adopted in 1853 and amended in 1994 reads that the Federal government supports the Catholic faith.[3] The Spanish Constitution refers to the Catholic Church as an entity that the Government should co-operate with. [4]

Constitutions of Denmark and Norway not only establish Lutheran faith as the established faith in those countries but also provide for a monarch to be a member of the Lutheran congregation.[5]

When analyzing one of the most recent and modern constitutions, the 1997 constitution of Poland, we find a clear reference to the system of values "We recognize our responsibility before God and our consciousness" in another paragraph " <…> Those who believe in God as the source of truth, justice, good and beauty <…> "[6].

Probably no one would dare to call Polish constitution medial and falling outside the scope of modern constitutionalism. Given it is modern, why then the Polish nation obliges to God and asks him to be the witness just as in the Mayflower Compact passed three hundred years ago? The question is how those references to religion in Polish, German, Danish, Spanish, Australia, Chile or Greek constitutions should be treated from the viewpoint of modern constitutional doctrine. The question is as to how this responsibility before God is to manifest in constitutional legal relations?

It is obvious that authors of the constitutions mentioned hereinabove perceived that it is impossible to foresee and regulate all future public phenomena and it is futile to expect that constitutions will be able to give answers to all the questions that the future has in store. Thus reference to Christian values sends a clear message that the subject of constitutional legal relations, when confronted to loopholes in the constitution or in other cases has to behave in a way whereby he is made responsible for common values. It is obvious that the declaration of moral values, which indirectly mirrors the contents of the Decalogue becomes an important source of law, which should influence the thinking of the subject at times when no other written source is available. It is only those constitutional conventions which will take shape this way, which will not only complement the written constitution, but will be in harmony with its spirit.

We have to state, that there is an important difference between safeguarding moral norms in Anglo- Saxon and civil law countries. The divide between the two systems is that courts in civil law countries do not have authorization to base its decisions on moral norms and therefore the safeguarding of moral norms depends on the systems of values of the subject. This is reflected in the behaviour of subjects constitutional relations.

Even if differently, the constitutions of Lithuania, Latvia, Estonia, Czech Republic seeks to solve the same issue as constitutions of Poland and Germany, - that is the issue of quest to a common system of values. The preamble of the constitution states that Lithuanian nation shall

[1] Constitution of Ireland (1937) "In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial…"

[2] Constitution of Australia (1990) "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth".

[3] Constitution of Argentina (1853) Artículo 2º "El Gobierno federal sostiene el culto católico apostólico romano".

[4] Constitution of Spain (1978) Article 16. „The public powers shall take into account the religious beliefs of Spanish society and maintain the appropriate relations of cooperation, with the Catholic Church and other denominations."

[5] Constitution of Denmark (1953) Section 4. "The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State" and Section 6 „The King shall be a member of the Evangelical Lutheran Church".

Constitution of Norway (1814) Article 2. "The Evangelical-Lutheran religion shall remain the official religion of the State" and Article 4. "The King shall at all times profess the Evangelical-Lutheran religion, and uphold and protect the same".

[6] Constitution of Poland (1997) http://www.sejm.gov.pl/ english/konstytucja/kon1.htm

seek for "an open, just, harmonious civil society and the state ruled by law". Needless to say that equitable and harmonious society is the one which respect and cherishes moral values. Of course moral values can not be protected by courts. Our courts follow laws only (article 109 of the Constitution). However some legal writers think that our constitution "does not block way for court precedent to be one of the sources of law"[1]. Evidently, that "weather this phenomena finds its place in Lithuania or not will depend on the degree of wisdom in the work of judges. The authors agree that it is important weather a particular wrongdoing is interpreted in the right way by courts, however, the system of moral values, on which decisions will be based is equally important.

The purpose of constitutional peacekeeping is "peacekeeping in social life". Our question is weather grammatical interpretation of constitutional norms solely can ensure peacekeeping in social sphere? Even the decision of the Constitutional Court of Lithuania on the abolishment of capital punishment passed in December 1998 was based on moral grounds apart from those of legal, criminological and sociological nature.

Fairly often legal writers discuss what should be done when "a provision of legal act clearly violates the human essence itself, however, no direct answer is found in the text of law"[2]. Thus interpretation of legal norms, even if indirectly, falls onto requirements of moral norms, as "human essence" is too complex to describe by legal norms. It is only those constitutional conventions, which form on the basis of moral values, which will be recognized and respected. The importance of constitutional conventions is not challenged by the national legal doctrine,- "The following are regarded as auxiliary sources of constitutional law - court practice, legal principles, conventions, doctrine (auxiliary sources of constitutional law have a special place in the hierarchy of sources; when needed they supplement other sources of constitutional law"[3]. The authors concur with the opinion of other legal writers, who argue that in terms of hierarchy written constitutional norms are preferred over constitutional conventions. It case of competition between a written norm and a convention, the preference is given to the former. That's why a number of legal writers show their respect to conventions, but treats them as auxiliary sources of law anyway. However, the importance of constitutional conventions grows substantially, when there is no written norm, because it is then that the conventions become the main, rather than an auxiliary source of law and the motives of behaviour of the subject can draw on this source exclusively.

It goes without saying that constitutional conventions are and will remain an important source of reference in Lithuanian constitutional law. It takes quite a while before they form. This tendency as noticed by Woodrow Wilson ages ago: Frankly speaking our democracy does not copy the doctrine, it has been in constant development. Our democracy is not comprised of theory, but also of common rules of behaviour. It was crated on the basis of aspiration and belief, and slow formation of customs".[4]

However, even though a number of models of behaviour of subjects of constitutional relations are not regulated *de jure*, they are abided by and in a sense are binding. Thus constitutional conventions fill in the gaps of written law. J. Alders's statement that „written constitutional can never be perfect" applies to Lithuania as well.[5] Thus the function of constitutional conventions is to fill in the existing gaps in law.

Moral norms become a very important source as the longevity of constitutional convention will depend on the behaviour and motivation of subjects of constitutional law. The model of behaviour which is not bases on moral values, entails future conflicts. Therefore quite often various restrictions for legal relations in political systems are in fact of the religious nature.[6] Therefore the contents of a convention in new circumstances depend on the system of values and will of the subject. The behaviour model formed on the basis immoral values will form a convention which, just as the stability of constitutional system, will be revised one day anyway.

CONCLUSIONS

1. The norms of morality could be an important source of law, which determine the behaviour of a subject of constitutional legal relations. In Western tradition norms of morality can be linked only with the West Christian heritage (Catholic – Protestant). The subjects of constitutional legal relations should follow the constitution and universal moral maxim. This, however, is yet to be achieved. In Anglo-Saxon countries moral values are regarded as a source of law and stem from the Decalogue. Imperativeness as a universal character of moral values is not challenged in theses countries and courts often base their decisions on moral values as well. Religious pluralism in Anglo-Saxon countries does not prevent individual groups of society from drawing on common moral values that for some groups are obligatory because of the metaphysical nature, whereas for others they are a long running and obligatory tradition.

2. Group of the Constitutions of the countries with civil law tradition (Germany, Greece, Poland, Denmark, Norway, Spain, Argentina etc.) make reference to religious values as the highest manifestation of justice. These provisions of constitutions give the basis for the Christian values to be represented as the moral values of the whole society.

[1] Žilys J. Konstitucijos stabilumas teisinės kultūros kontekste / Konstitucija, žmogus, teisinė valstybė / Konferencijos medžiaga. – Vilnius: Lietuvos žmogaus teisių centras, 1998. P. 21.

[2] Jarašiūnas E. Pagrindinių teisių katalogas ir konstitucinė justicija / Žmogaus teisių apsaugos mechanizmas / Konferencijos medžiaga. – Vilnius. Lietuvos žmogaus teisių centras, 1997. P. 8.

[3] Birmontienė T. Lietuvos konstitucinės teisės šaltiniai / Lietuvos konstitucinė teisė. – Vilnius: LTU Leidybos centras, 2001. P. 57.

[4] Schechter L. S. Roots of the Republic, American Founding Documents Interpreted. – Madison: Madison House, 1990. P. 3.

[5] Alder J. Constitutional and Administrative law. – London: Macmillan Press LTD, 1994.

[6] Fioravanti M. Costituzione. Il Mulino Lessico della politika. – Bolognia, 2006.

3. Other countries such as France, Belgium, Lithuania, Estonia and Latvia stem moral norms from the development of social processes. Thus moral values as a source of law are recognized indirectly only. Quite often the subjects of constitutional legal relations base their behaviour on moral values. However this form presents a greater problem for the development of common moral values as moral relativity does not provide for the preconditions necessary to reach "a public covenant".

4. The article emphasizes that irrespective of the fact that *separation of state and church* refers to it as an integral principle of the rule of law, this principle can not be treated as a universal composite part of the rule of law. It is only a national element of the rule of law. Constitutional separation of the state and church is not and must not be an irreplaceable part (element) of the rule of law. If this is a constitutional principle in Lithuania, then Danish and Norwegian principles are absolutely opposite by making a selection of religions and by naming particular national religions. It is obvious that the countries that do not have *separation of state and church* may also be labelled as the *states ruled by law* just as other states where the *separation of state and church* is a constitutional principle. In the states that have national religions or where constitutions single out certain religions as "traditional", those religions become important factors that influence societal processes and the doctrine of the church exists as one of the sources for the interpretation of positive law and even the creation of law.

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KONSTITUCIJA IR RELIGINĖS NUORODOS: DERMĖS PROBLEMA XX–XXI AMŽIUOSE

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S a n t r a u k a

Straipsnyje analizuojami kai kurių pasaulio šalių konstitucijų religiniai bruožai, mėginama ne tik atskleisti egzistuojančių nuostatų turinius, bet ir pateikti šiuolaikinę tokių normų interpretavimo koncepciją.

Darbo pradžioje apžvelgiama teorinė religijos ir teisės santykio problema, analizuojama valstybės ir religijos santykių istorinė raida. Straipsnyje pabrėžiama, jog religinis pradas, krikščioniškasis pradas buvo Vakarų teisės tradicijos šerdis. Romos teisei tegalime priskirti teisės, kaip instrumento, ištobulinimo laurus. Krikščioniškasis paveldas – tai ta tradicijos dalis, kuri sukūrė ir išplėtojo žmogaus teisių ir laisvių sampratas ir sistemas. Turbūt šiuolaikiniam žmogui, kuriam būdingas itin silpnas istoriškumo pojūtis, mintis, kad krikščionybė yra šiandieninių jo teisių ir laisvių pirminis ir beveik vienintelis šaltinis, skamba paradoksaliai.

Religija ir valstybės institucijos ilgai buvo vienos sistemos integralios dalys. Todėl tuo žmonijos raidos laikotarpiu krikščionybė, būdama valstybinės valdžios dalis arba pati būdama valdžia, skleidė savąsias *moral values*, paversdama jas visuotinėmis ir privalomomis. Krikščioniškosios moralės universalumą palaikė ir užtikrino pozityviosios teisės nustatytos realios sankcijos dėl jos pažeidimo. Tačiau krikščioniškoji religija, išgyvenusi reformacijos ir kontrreformacijos epochą, suskilo, iš katalikų baž-

nyčios atimdama monopoliją kalbėti visų krikščionių vardu. Būtent ši aplinkybė – krikščioniškųjų religijų gausa – lėmė bažnyčios atskyrimo nuo bažnyčios principą. Iš pradžių šis principas buvo diegtas siekiant ne drausti religijas, o leisti jų veiklą, nes tik valstybinės religijos nebuvimas garantavo tikėjimo pliuralizmą. Todėl *separation of state and church* susidarė ne kaip priemonė, garantuojanti teisę netikėti, o kaip konstitucinis principas, garantuojantis teisę tikėti, tačiau laisvai, be valstybės prievartos, pasirenkant tikėjimą. Tikėjimo pliuralizmas įtvirtino ir netikėjimo teisę. Nors daugelyje visuomeninių sistemų tos vertybės liko kaip tradicijos ir papročių sistemos dalis, tačiau sekuliarizacija sukūrė prielaidas moraliniam reliatyvizmui. Straipsnyje akcentuojama, kad valstybės atskyrimas nuo bažnyčios turėjo reikšmingos įtakos sociumui, nes netiesiogiai atskyrė bažnyčios *moral values* nuo pozityviosios teisės.

Valstybės ir bažnyčios atskyrimo nuostata tapo daugelio konstitucinių sistemų dalimi. Pirmieji ją įtvirtino amerikiečiai, vėliau (1905 m.) Prancūzija priėmė įstatymą, kuriame taip pat atskyrė valstybę nuo bažnyčios. Italija, su Vatikanu 1929 m. pasirašiusi Laterano susitarimą, taip pat pasirinko *separation* principą. Tad XX a. daugeliui valstybių sekuliarizacija tapo teisine vertybe – konstituciniu principu. Valstybės ir bažnyčios atskyrimas tapo konstituciniu principu ir Lietuvos Respublikoje (Lietuvos Respublikos Konstitucinio Teismo jurisprudencija).

Straipsnyje pabrėžiama, kad nežiūrint į tai, kad *separation of state and church* teorijoje minimas kaip integralus teisinės valstybės elementas, jis negali būti traktuojamas kaip universalus *rule of law* elementas. Tai – tik nacionalinis teisinės valstybės elementas. Konstitucinis valstybės ir bažnyčios atskyrimas nėra ir neprivalo būti nepakeičiamas teisinės valstybės elementas. Jeigu Lietuvoje tai – konstitucinis principas, tai Danijos ar Norvegijos Karalystėse konstitucinis principas teigia visai priešingai, įtvirtindamas valstybinį kai kurių religijų statusą. Akivaizdu, kad minėtos šalys, kuriose nėra *separation of state and church,* taip pat gali būti laikomos teisinėmis valstybėmis, lygiai taip pat, kaip ir tos šalys, kuriose *separation of state and church* yra konstitucinis principas. Valstybių, kuriose egzistuoja valstybinės religijos, konstitucijos išskiria tam tikras religijas kaip tradicines, tos religijos tampa reikšmingais konstitucinių arba visuomeninių santykių subjektais, darančiais įtaką visuomeniniams procesams, o bažnytinė doktrina egzistuoja kaip vienas iš pozityviosios teisės interpretacijos ir net teisės kūrimo šaltinių.

Pagrindinės sąvokos: konstitucija, šiuolaikinė konstitucija, religiniai aspektai, bažnyčios ir valstybės teisiniai santykiai.