

Religious origins of the rule of law conception in the United States

Orígenes religiosos en la concepción del estado de derecho en los Estados Unidos
Origens religiosas da concepção do estado de direito nos Estados Unidos

Recibido: 20 de abril de 2018. Aceptado: 10 de mayo de 2018

Written by:
Allalyev R.M.,⁷⁰

Abstract

At the ideological level, the protection of human rights and freedoms in the United States is proclaimed as a political, legal and moral axiom. It has become a generally accepted view that the rule of law conception reflects the meaning and content of the US legal system, which is based on the original values of the American people

The ideological source of the rule of law conception in the United States was the theological direction of natural law theory. The theological direction, based in the United States on the doctrines of Calvinism, developed an attitude to law as a supernatural entity that is not subject to the state. The article considers the influence of these ideas on the formation of the modern rule of law conception in the United States. It is impossible to give a comprehensive and correct definition of the rule of law that included all the meanings of the concept and its equivalents in all languages. This creates an analogy with large-scale sacred concepts, such as "God". It can be said that the concept "rule of law" is definitely similar in this sense to the concept "God", which is also inclusive in its sphere, and means the objectified supernatural entity that is the object of worship and the source of the good.

Keywords. The rule of law, natural law theory, the United States, theology, Calvinism.

Resumen

En el nivel ideológico, la protección de los derechos humanos y las libertades en los Estados Unidos se proclama como un axioma político, legal y moral. Se ha convertido en una opinión generalmente aceptada que la concepción del estado de derecho refleja el significado y el contenido del sistema legal de los Estados Unidos, que se basa en los valores originales del pueblo estadounidense.

La fuente ideológica de la concepción del estado de derecho en los Estados Unidos fue la dirección teológica de la teoría de la ley natural. La dirección teológica, basada en los Estados Unidos sobre las doctrinas del calvinismo, desarrolló una actitud hacia la ley como una entidad sobrenatural que no está sujeta al estado. El artículo considera la influencia de estas ideas en la formación de la concepción moderna del estado de derecho en los Estados Unidos. Es imposible dar una definición completa y correcta del estado de derecho que incluya todos los significados del concepto y sus equivalentes en todos los idiomas. Esto crea una analogía con conceptos sagrados a gran escala, como "Dios". Se puede decir que el concepto "estado de derecho" es definitivamente similar en este sentido al concepto "Dios", que también es inclusivo en su esfera, y significa la entidad sobrenatural objetivada que es el objeto de adoración y la fuente de lo bueno.

Palabras clave: El estado de derecho, la teoría de la ley natural, los Estados Unidos, la teología, el calvinismo.

⁷⁰ Senior Lecturer, Plekhanov Russian University of Economics

Resumo

No nível ideológico, a proteção dos direitos humanos e liberdades nos Estados Unidos é proclamada como um axioma político, legal e moral. Tornou-se uma opinião geralmente aceita que a concepção do estado de direito reflete o significado e o conteúdo do sistema legal dos Estados Unidos, que é baseado nos valores originais do povo americano.

A fonte ideológica da concepção do estado de direito nos Estados Unidos foi a direção teológica da teoria do direito natural. A direção teológica, baseada nos Estados Unidos sobre as doutrinas do calvinismo, desenvolveu uma atitude em relação à lei como uma entidade sobrenatural que não está sujeita ao estado. O artigo considera a influência dessas idéias na formação da concepção moderna do Estado de Direito nos Estados Unidos. É impossível dar uma definição completa e correta do estado de direito que inclua todos os significados do conceito e seus equivalentes em todas as línguas. Isso cria uma analogia com conceitos sagrados em grande escala, como "Deus". Pode-se dizer que o conceito de "Estado de Direito" é definitivamente semelhante a este respeito a "Deus", que é também incluir no seu âmbito, conceito e significa entidade sobrenatural objetivado que é o objeto de adoração e a fonte do bem.

Palavras-chave: O estado de direito, a teoria da lei natural, os Estados Unidos, a teologia, o calvinismo.

Introduction

Rooted in antiquity, the rule of law conception is a unique phenomenon that has emerged at the intersection of theory and practice in one of the most powerful states of our time, and has absorbed the fruits of scientific thought and brilliant speculation about the role of law in society developed over many centuries.

The origins of the rule of law understanding date back to the ancient Chinese legists, the works of Plato, Aristotle and Cicero. According to Socrates, "that is lawful that is just, both for man and for the state". Plato believed that observance of laws is inseparable from morality. By adopting the law, Aristotle argued, it is necessary to focus on morality and virtue. In this regard, he formulated the concept of *epieikeia* (or *aequitas* in the Roman law), which is defined differently by him in "Nicomachean ethics" and "Rhetoric". In the "Nicomachean ethics" *epieikeia* is "an amendment to the law in the case when the law does not resolve the situation because of its universality", and in Rhetoric – "justice beyond the written law". The concept of *epieikeia* was later adopted in the Middle Ages and developed by Thomas Aquinas (1225-1274) (Matusevich & Jean Gerson, 2016). Erik Zand, the current attorney of the state of Missouri, in his defense of *epieikeia*, notes that "the application of *epieikeia* in the Anglo-American tradition of law is operated mainly in order to fill the voids left by written law" (Eric G. Zahnd, 1996).

In the Anglo-Saxon tradition, the rule of law

reflects the general principle of constitutionalism, linked to procedural impartiality and the fair application of legal norms, on the one hand, but also to the ideas of protecting human dignity and respect for the rights of the individual, on the other. Recognition of the rule of law is inseparable from human rights and freedoms; it is a kind of guarantor of their reality, the main instrument of implementation and protection. At the ideological level, the protection of human rights and freedoms in the United States is proclaimed as a political, legal and moral axiom. It has become generally accepted that the rule of law conception reflects the meaning and content of the US legal system, which is based on the original values of the American people.

The peculiarity of the rule of law conception in the United States is its place at the intersection of politics, morality and law. The conception itself is seen as a kind of legal ideal that should be followed not only by the US, but also by other countries. It is about the nature and functioning of legal institutions according to the ideas of legal justice, which are common in American society. The political and ideological nature of the rule of law conception is closely linked to the political development of the United States. Therefore, it has a political aspect, because it is posed as a problem of political ideal. It is also given a moral dimension, it becomes a kind of moral setting, on the basis of which approaches to understanding the rule of law are determined.

The rule of law conception is alive, open, constantly self-renewing and, as the American historical practice shows, internally contradictory. Without its comprehensive analysis, it is difficult to adequately study the mechanisms of the functioning of the state legal system in the United States, the ideological impact of the United States on the development of political and legal processes in other countries. The author considers it necessary to study the reality of the rule of law conception in the American legal system, its metamorphosis, because the ideological meaning and the real practice of this conception often go in different ways.

Materials and methods

The methodological base of the research is based on the application of dialectical method of knowledge using historical, formal-legal, comparative-legal, system-structural methods of analysis of legal and social phenomena. Dialectical method became the basis for the disclosure of the subject of research, setting and implementation of the aim of research, ensuring compliance with the principles of scientific knowledge (objectivity, comprehensiveness, historicism, unity of theory and practice, the development of the subject of research, its logical certainty, and consistency). The comparative-legal method helped to reveal the originality of the American approach to understanding the rule of law and the peculiarities of its dynamics. The use of historical and legal research method contributed to the analysis of the historical situation of judicial decision-making in the considered historical era. The research of the topic was associated with the use of linguistic, interpretative, axiological methods.

Results

The ideological sources of the rule of law conception in the United States were the theological and rationalist directions of natural law theory. The theological direction, based in the United States on the doctrines of Calvinism, justified the attitude to law as a supernatural entity that is not subject to the state. The rationalist direction proved the existence of some abstract ideal, which determines the content of legal norms and restrictions for the procedures of legislative practice. As a result of the influence of these trends on political and legal life in the United States, the rule of law has been considered both as a political and moral ideal and

as a legal principle.

Discussion

Colonial law in the United States was sometimes compared to the legal system created by people who were shipwrecked. It was made up of three disparate parts that interact poorly with each other: the old laws elements preserved in the memory of the first settlers, new laws and legal elements created in response to the urgent need, packaged under the influence of religious beliefs. The main part of the English America was inhabited by people who, coming out of the religious power of the Pope, had not recognized the right to religious supremacy any more. They brought to the New world Christianity, in the form that Alexis de Tocqueville was defined as democratic and republican (Tocqueville, Alexis de. 2000).

Throughout its history, America has been an exclusively religious and predominantly Christian country. In the seventeenth century, the first settlers founded religious communities in the New World. Americans of the eighteenth century and their leaders interpreted revolution in religious, mostly biblical, expressions. The May Convention of 1776 proclaimed the freedom of religion as the truth and the natural human right in the Declaration of rights.

It is known that at the end of the XVI century, the English reformation resumed discussion of the problems of the state theocracy, as the reformed Christian Church sought to rise above the secular power. In New England, the well-known theologian D. Eliot (1604-1690) tried to justify the idea of the need to create a state that would be based solely on the legal principles set forth in the Bible (Karimsky, 1976). Absolutely all parts of the state power had to use the Holy Scriptures as a guide in all practical matters.

Puritan conformists, who shared the views of D. Eliot, invented a kind of argument in defense of intolerance towards different religious beliefs and to justify theocratic oppression. Their reasoning was as follows. In Eden there was no need for the state, for man was sinless. But after the fall it became necessary to establish the state, raising, controlling, punishing erring and negligent people (Pokrovsky, 1989).

In 1620, a group of puritans, who emigrated from England first to Holland and then to America, founded a settlement in New England to create a new way of life and a new society, to embody

the precepts of the Bible. In the history of the United States they are called the Pilgrim Fathers. On the ship "Mayflower", the Pilgrim Fathers signed an agreement among themselves, which, in particular, said: "This act united us in one political and civil body to maintain order among us and achieve the intended goal. In force of this act, we will set those fair and just laws, and those orders, rules and constitution, appoint such authorities as we deem appropriate and useful for the common good of the colonies" (Shumilov, 2006). In fact, this document was the first to formulate the idea of the rule of law in its American version.

Only after the adoption of the Bill of rights in 1689 there was the so-called "Puritan utopia" of the construction of the heavenly city, where all the commandments would be fulfilled. Its prominent representative was a moderate Puritan John Winthrop, who fought to ensure that the policy of the colonialist community was carried out in the spirit of Puritan theocracy strict dogmas.

Having headed "Church-state" (1630), for 20 years he condemned excesses and other vices, rejecting democratic projects of reforms, opposed transfer of the state affairs and justice to national Executive bodies. There was also a system of partial implementation of the Puritan utopia. Administrative and judicial functions were carried out by joint efforts of masters and priests. The ideological basis for the participation of the clergy in the affairs of the management of the colony was the words of the prophet from the Old Testament: "The Lord is our judge. The Lord is our lawgiver. The Lord is our king. He saves us". But the Puritan theocracy degenerated into the authoritarianism of the Governor and the oligarchy of masters and priests, which caused strong resistance of free colonists.

The puritans were followers of Calvinism, the main doctrine of which was the recognition of the sovereignty of God, that is, the Supreme power of God "in everything". From the doctrine of Calvinism the content of another doctrine-sola scriptura followed (lat. "only Scripture"). It characterized the attitude of Protestants to the Bible as the only source of the creed, the conformity of which is determined by the truth of all Christian writings. It was believed that the interpretation of the Bible should be based only on the Bible. It clearly follows from the above that the idea of the rule of law was one of the

logical products of the Calvinist doctrine of natural law. To get a primary idea of the essence of the idea of the rule of law, it was enough in the above postulates to replace "the Supreme power of God" with "the rule of law", and "the Bible" with "the Constitution".

It is very difficult and most likely impossible to give a comprehensive and correct definition of the rule of law, which would include all the meanings of this concept and its equivalents in all languages. All this creates an analogy with large-scale sacred concepts, such as "God". It can be said that the concept of "rule of law" is definitely similar in this sense to the concept of "God", which is also inclusive in its sphere, and means the objectified supernatural entity that is the object of worship and the source of the good.

It was Puritan covenantism that laid the first stones in the foundation of the rule of law, promoted respect for the law and jurisprudence (Pokrovsky, 1989). As H. Phillips noted, "historically, the rule of law was used against faith in the existence of the law with power – divine or natural – is above the power of earthly rulers, i.e. of the law, this limiting their power" (Phillips & Jackson, 1987). But the question arose immediately: if the people were to rule, who would be governed? The answer to this question was as follows. As for monarchy and aristocracy, although both clearly endorsed and prescribed in Scripture, the Lord still maintains supreme authority over the other and enforces a theocracy as the best form of government in church and state. It was considered that all legislation must derive from the Bible and extra-biblical law-making of people is sinful (Pokrovsky, 1989).

The Puritan-shared typological exegesis of Roger Williams was based on the establishment of a mandatory similarity between the events described in the Old and New Testaments. No fact of the Old Testament, R. Williams taught, could be understood in its true sense, as long as the event "parallel" to it was not found in the New Testament. Thus, the history of the ancient Israeli state was symbolically embodied in the life of Jesus Christ. Such a method led to a known decrease in the importance of such an important for the puritans of the Old Testament and its state and legal regulations. At the same time R. Williams emphasized the "revolutionary" and "democratic" nature of the gospel texts containing the preaching of equality, the

protection of the oppressed and destitute people. The New Testament became something of the revolutionary manifesto (Pokrovsky, 1989).

In the so-called “The Law Book of the freedom of the Massachusetts colony 1641”, it is said that no one will be deprived of his life and generally condemned, will not be deprived of property and honor “otherwise on the basis of written law enacted by the legislative Assembly (the colony) and appropriately published. When there is no law, he will be condemned on the basis of Scripture”. In the US Constitution, such references are no longer found. The text is entirely secular. However, the fathers of the Constitution firmly believed that the Republic they created would not die and would last for many years, but only if it remained committed to morality and religion. “The Republic is based on pure faith and strict morality”, said John Adams. The Bible was “the only reliable way to preserve the Republic”. “Our Constitution”, George Washington argued, “is only suitable for high moral and religious people”. He believed that intellect and experience showed that national morality could not be strengthened without religion and its principles.

The analysis of law enforcement practice was not without Scripture. A. de Tocqueville wrote that during his time in the United States at a jury hearing in Chester County (New York State), one witness stated that he did not believe in God and in the immortality of the soul. The judge refused to swear him in because, as he said, the witness had already eroded all faith in his words. “New York spectator” on August 23, 1831 wrote about this: “During the trial of a civil suit in Chester County (New York State) a few days later the witness who declared his disbelief in God was rejected. The judge who presided over the trial stated that he had not suspected to this day that a person could not believe in the existence of God, that it was on that faith that the conviction of the truthfulness of all the testimony in the trials was based, and that he did not know a single case in any of the Christian countries, wherever a witness who did not believe in God was allowed to testify”. Another striking example of the connections between law and Christian morals in the US are disputes relating to Mann Act, known as “Act on transport of white slaves” and entered into force on 25 June 1910, it established the responsibility of promoting with the help of a vehicle “any woman or girl for the purpose of prostitution or any other immoral

purpose, or in order to coerce and force to conduct any immoral activity” (Edward H. Levi, 1948). In 1917 in “Caminetti against the United States” case the Supreme Court applied the phrase “with any other immoral activity”. The prosecution based its argument on the literal meaning of the phrase “prostitution or any other immoral purpose”. It agreed that the phrase “other immoral values” included “words of such a general meaning that a judicial conviction on that basis was impossible”. Also the problem was the use of the phrase “any other immoral activity”. For example, the practice of polygamy was included in the category of immoral activities. In the case of “Cleveland against the United States” the court, quoting from one of the old cases, called polygamy “contrary to the spirit of Christianity and of the civilization which Christianity brought to the Western world”

Religious allusions and religious symbols dominate the political life of America, its rituals and ceremonies. The presidents always bring inaugural oath on the Bible and, along with administration officials officially take office at the very moment when they say the phrase “So help us Lord” (Braudel F. 2008). The founding fathers chose Latin phrases to express “sense of being chosen”, “sense of mission”: *Annuit Coeptis* (God approved our undertakings) and *Novus Ordo Seclorum* (New order for ages) as the motto for the New Republic.

Our public institutions are “calling for a Higher Being”, as Judge William D. Douglas put it. In turn, President D. Eisenhower stated that “recognition of the presence of the Supreme Being in the world is the first and most important sign of Americanism. Without God there would be no American form of government and American way of life” (Paul Johnson, 1958).

According to G. Myrdal, “the American creed” embodies “the ideals of the dignity of the individual human person, fundamental human equality, inalienable rights to freedom, justice and fair opportunities” (Gunnar Myrdal, 1944). American belief in freedom and justice — a sort of deeply ingrained “religious beliefs”, fervently professed by habitual atheists (Khomsky, 2014)

F. Braudel emphasizes that in addition to purely religious purposes, the preachers of the Far West created, unwittingly, the American way of life, the American life model that determines the type of civilization to which the newcomers (from 1860 – 1880) had to adapt (Braudel, 2008).

F. Braudel was sure that the religious factor is one of the explanations for the success achieved in the unity of American civilization. Of course, there are other explanations: "the life force of the nation", which is on the rise, the attractiveness of the social structure, where only money defines social boundaries and everyone was opened the way to wealth". For a European immigrant to accept these social rules means to abandon the old European norms, to find hope. This is the liberal aspect of this civilization, which, however, does not allow the individual evading the unwritten rules of the American life model.

Conclusions

The Calvinist doctrine of natural law was based on the anti-feudal principles of popular sovereignty and the right of resistance. It had a significant element of egalitarianism. At the same time, it carried the ideas of Protestantism that economic success is an expression of the divine will and "natural chosenness". It should be mentioned radical for the time, the point of view of Alexander Hamilton that "the sacred rights of mankind do not need to be sought out among the old parchments and dusty records. They are carved in the book of human nature by the hand of the deity himself, as if by the sunbeam, and the power of mortals is not able to erase or conceal them" (Alexander Hamilton, 1775).

The United States remains the longest-lived constitutional Republic in the world now. The founding fathers of the United States tried to create a government that would function not by overcoming human weaknesses, but by using them to create political stability and maximize individual freedom. They feared that the Federal government might someday become tyrannical. So the idea that even the Constitution and the Supreme Court cannot justify the violation of "higher law" that passes through American history (Brody, 1978). In our time, this approach can be found in the American legal literature. Professor of law at J. Reuben Clark Law School F. Gedicks, referring to the works of Cicero, Aurelius Augustine, Thomas Aquinas and the authors of the American Constitution, draws attention to their belief that an unfair law can not be a law (Gedicks, Frederick, 2009). For example, the US Secretary of state William Henry Seward (1861-1869) said that slavery was prohibited "by a law that is above the Constitution". But what could become such a law? Is it the rule of law or the rule of religious

norms? In practice, however, references to religious sources become less frequent, and the U.S. Supreme Court is increasingly pointing out that any disputes should be "considered in the light of historical commitment to the rule of law".

References

- Alexander Hamilton. (1775). "The Farmer Refuted," February 23, in Harold Coffin Syrett, ed., *The Papers of Alexander Hamilton, 1768–1778*, Vol. I (New York: Columbia University Press, 1961–1987).
- Braudel F. (2008). *Grammar of civilizations*. M.: Whole world, P. 453
- Brody D.E. (1978). *The American Legal System: Concepts and Principles*. Lexington.
- Cqueville, Alexis de. (2000). *Democracy in America*. Chicago: The University of Chicago Press. 2000. - 772 p.
- Edward H. Levi. (1948). *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press.
- Eric G. Zahnd. (1996). *Defense of Equity in Aristotelianism and Anglo-American Law*, Duke University Press.
- Gedicks, Frederick. (2009). "An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment", *Emory Law Journal*, vol. 58, pp. 585–673.
- Gunnar Myrdal. (1944). *An American Dilemma: The Negro Dilemma: The Negro Problem and Modern Democracy* (New York: Harper, 1944), p. 4.
- Karimsky A.M. (1976). *The Revolution of 1776 and the formation of American philosophy*. M.: Thought, 296 p.
- Khomsky N. (2014). *The system of government*. Talks about global democratic uprisings and new challenges of the American Empire. KoLibri, P. 37.
- Matusevich E. Jean Gerson. (2016). (1363-1429) and the history of law in England. *Electronic philosophical journal Vox*. Issue 21. <http://vox-journal.org/content/Vox%2021/Vox21-Matusevich.pdf> (Access date 23.01.2017).
- Paul Johnson. (1958). "The Almost-Chosen People", Vol. 9, No. 5, p. 88.
- Phillips O.H., Jackson P.O. (1987). *Hood Phillips Constitutional and Administrative Law*. 7th ed, P. 37.
- Pokrovsky N.E. (1989). *Early American philosophy. Puritanism*. M.: Higher Sch., 246 p.
- Shumilov V. M. (2006). *Legal system of the United States*. 2nd ed., rev. and exp. - M.: International Relationship, 2006. - 408 p.