

Tomasz Gałkowski

The Charter of the Rights of the Family in the Context of Theology of Law

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TOMASZ GAŁKOWSKI

Cardinal Stefan Wyszyński University in Warsaw, Poland

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The following considerations, first of all, require an explanation what theology of law is as well as revealing its legally valid form of existence as a way of looking at, interpreting and understanding the phenomenon of law as human reality. I realize that dealing with law from theological perspective will not be approved of by lawyers, not so much because of the possibility of a different look at law but as far as its usefulness for jurisprudence and established law is concerned. Theology of law has its opponents who emphasise that combining theology and law is inconsistent and thus impossible due to the problematic — for secular minds — the main notion of theology, which is God. In such an approach one can first and foremost notice the lack of acceptance of theological cognition in today's world, in which purely intellectual cognition becomes a model for all cognition. Therefore, it is a negation of the possibility to comprehend reality which goes beyond intellectual rationalism. It is, however, not noticed that theological rationalism displays a type of receptiveness to what cannot be explained by intellectual rationalism. An additional motive which denies the possibility of looking at law from the standpoint of theology is positivism (including legal positivism), which rejects the existence of absolute and unquestionable reality, transcendental, cultural and ahistorical values.¹

¹ A. COMTE wrote: “The word *law* has to be removed from the language of politics in the same way as the word *cause* from the language of philosophy. One of these

Theology of law

What is theology of law then and in what way should it be practised so that its sense and meaning for law can be noticed? People involved in theology of law define it as a discipline which deals with the legal experience of the human being in the light of Divine Revelation. One can pose a question whether Revelation says something about law but not in the context of the community of believers of the Old and the New Jerusalem. Theology tells us about God who revealed Himself to the human being as the Creator, Saviour and Redeemer. Revelation discusses the created world and its relation to its Creator. Consequently, the whole reality of the created world together with all the products of human activity become the object of theological cognition.

One of the dimensions and products of human life is the law. A person lives for it, creates it and on this account he/she is the object of theology of law and, as a consequence, so is the law itself. Thus, theological anthropology plays the main role in theology of law. The answer to the question concerning the human being is at the same time the answer concerning his/her relations with another human being, including the normative ones. This is hardly a novelty, since law is always perceived in the light of the one for whom it is created. What is new is the attitude in which law is perceived in the context of the human being as he/she was created by God in His own image, saved and redeemed by Him.

An essential quality of theology of law is its specific theological, ecclesiological look at law as one of the elements of human life on the way leading to salvation. Sustaining its continual reference to the source, which is Divine Revelation, theology of law can retain its epistemological meaning as one of the forms of human cognition, which broadens and complements its other forms.²

In the proper approach to the theology of law guilt lies partially on the side of theology itself, which assumes some idea of God. The starting point of considerations should be the word of God, revealing Himself and speaking to the person. This word always remains the good news, it is a promise which arouses hope and gives the power of conduct, which is the source of consequences for theology of law. If the object of theo-

theological-metaphysical terms is immoral and anarchic, and the other — irrational and sophistic” (author’s translation); *Rozprawa o duchu filozofii pozytywnej. Rozprawa o kształcie pozytywizmu*. Warsaw 1973, p. 544.

² Cf. F. D’AGOSTINO: “La teologia del Diritto positivo: Annunzio Cristiano e Verità del Diritto.” In: *Evangelium vitae e diritto. Acta Symposii internationalis in civitate Vaticana celebrati 23—25 mai 1996*. Libreria Editrice Vaticana 1997, p. 123.

logical cognition is some idea of God, then as a consequence the object of interest of theology of law will be some *lex* understood in a static way as the explicit will of God. This way of looking at law was reflected in the issue of verifiability of references of the established law to the natural moral law.

However, the theological character of such deliberations was lost on the way, since they often ended in dispersing in different theories of the natural law. These theories then constituted epistemological references for deliberations about law.

Nonetheless, if the word of God, whose acceptance is to serve salvation, remains at the starting point, *lex* will be expressed in a dynamic way as a promise (*diateke, testamentum*), addressed at a particular person in a historic moment and striving to come true.³ Thus, the word of God will raise hope and give strength to pursue defined goals. Then, this promise will allow looking at the established law in a broader light. It gives a starting point in order to go beyond what is considered correct and what is the result of legislative compromise. Such an approach, however, focused on content analysis of a legal relation may face an accusation that theology wants to fill the established law with content. At this moment its usefulness becomes extremely dubious. However, a more appropriate approach of theology of law to law itself is also feasible. Its point of reference should be not only content analysis of a legal relation but the very intersubjective, social relation of obligation, provided that one does not identify juridical pertinence with prescriptivism semantically or in terms of content. The content dimension of a legal relation is the outcome of the rational drawing up of the relation itself. Therefore, the juridical pertinence should not be reduced to prescriptivism, since this reduction would indicate that it is prescriptivism that forms the basis of social life and not that the co-existence of people in a community is the basis of prescriptivism, which in turn can be of moral or legal character. Focusing only on the content aspect of a legal relation makes law a rather static reality due to explicit legal solutions.

Therefore, the starting point of theology of law ought to be a legal relation or as a matter of fact its protagonists, that is the people creating it in the aspect of obligation and filling it with content. This legal relation becomes the object of reference for the details of Revelation, through which theology of law interprets the situation of the person. Theology of law interprets the situation of the human being in the light

³ Cf. IDEM: "Teologia del diritto alla prova del fondamentalismo." In: *Ius divinum. Fondamentalismo religioso ed esperienza giuridica*, a cura di F. D'Agostino. Ed. IDEM. Torino 1998, pp. 113—115.

of the revealed truth, analyses and shows the person the potential of living in a community, which surpasses his own ingenuity. Thus, theology of law does not sacralise earthly values but thanks to relating them to a different form of cognition, imparts their new understanding, contributes to broadening horizons and changing current paradigms. It is a hermeneutical category of understanding a legal relation and a certain cognitive form whose conclusions might become an inspiration for legislative activity.⁴

The starting point of theology of law is law itself, which is a value in the life of a person aspiring to salvation. Law is a value because it shapes and expresses a binding force of interpersonal relations. The role of theology is interpreting these relations from a new angle, which is a hermeneutical reference point for intellectual deliberations. In theological approach to law one can notice a different vision of basic legal concepts: the legal system can open itself to a legal experience; the presentation of marriage can go beyond the rigid frames of a contract and open to marital covenant and unity; sanity is joined by personal responsibility; instead of talking about following legal procedures one can emphasise administering justice; a human being can become the subject of law.

Hermeneutical categories for theology of law in the Charter of the Rights of the Family

The Charter of the Rights of the Family proclaimed by the Holy See 30 years ago is an example of such theological look on law. The Introduction of the document explains it “is not an exposition of the dogmatic or moral theology of marriage and the family [...] nor is it a code of conduct for persons or institutions concerned with the question [...]. The Charter is also different from a simple declaration of theoretical principles concerning the family” (2).⁵ The document does not specify its character but only gives the aim of its publication. It is “presenting to all our contemporaries, be they Christian or not, a formulation — as complete and

⁴ Cf. T. GAŁKOWSKI: “Etyczne i teologiczne implikacje dla teorii prawa i praktyki prawniczej.” In: *Prawoznawstwo a praktyka stosowania prawa*. Eds. Z. TOBOR, I. BOGUĆKA. Katowice 2002, pp. 271—283.

⁵ I quote the text of the Charter of the Rights of the Family after: <http://nccbuscc.org/laity/marriage/charterfamily.shtml> (accessed 12.6.2013). Quoting the fragments of the Introduction to the Charter I give the numbers of its particular paragraphs in brackets.

ordered as possible — of the fundamental rights that are inherent in that natural and universal society which is the family” (2).

In the presentation of the aim one can already see certain elements characteristic of thinking about law — since the Charter talks about inherent rights, which go beyond positive and conventional statements. For the Charter presents, as far as it is possible, complete and ordered fundamental rights of the family. The foundation of this belief is the fact that “the rights enunciated in the ‘Charter’ are expressed in the conscience of the human being and in the common values of all humanity. The Christian vision is present in this Charter as the light of Divine Revelation which enlightens the natural reality of the family. These rights arise, in the ultimate analysis, from that law which is inscribed by the Creator in the heart of every human being” (3).

The document, whose subject is expressing the fundamental rights of every family, “reflects the Church’s thinking in the matter” (2). In its wording, since it talks about every family, be it Christian or not, the Charter does not impose at the starting point its own solutions discussing Christian or Catholic rights of the family. The starting point is the law which exists between the persons who make up the family. However, the description of the legal relations which are formed within the family was complemented by the image of the family and the relationships between its members, which were in the Creator’s plan when he decided to make the person in His own image and concluded that it was not good for the person to be alone. These rights were inscribed by the Creator in the heart of every human being. Therefore, the Charter states clearly that the basis of understanding the fundamental rights of the family in a complete and ordered way is finding out who the human being is and what the common values of mankind are. The content of the Charter of the Rights of the Family exemplifies applying theological categories to the rights each family is entitled to. The family and legal relations of obligation were presented in the light of the truth about the human being and the family, which were interpreted according to God’s plan and shown in Divine Revelation. The rights of the family presented in the Charter are the result of their theological interpretation, but on the other hand they are also a certain suggestion for legislation which refuses to understand and establish them in this way. In the Introduction to the Charter we read that it contains “postulates and principles for legislation to be implemented [and] offers to all who share the responsibility for the common good a model and a point of reference for the drawing up of legislation” (4). The fact that the Charter expresses the postulates and principles directed at legislators means that it was noticed that the legal solutions proposed by modern legal trends and legislative solutions were inadequate

to social life. Discussing the Charter of the Rights of the Family from the perspective of theology of law one can see in it, so to speak, a product of theological examination of the rights of the family. On the other hand, the rights expressed in the Charter remain in a way removed from those existing in the civil legislation because they are the result of their interpretation in the light of what we learn about family relations from the Revelation. They would remain unchanged no matter if there existed the same, similar or contradictory to them, laws in civil legal orders or not. The element holding together the rights of the family contained in the Charter and the rights of the civil order is the fact that the former ones were drawn and offered to the “quarters and authorities concerned” (1) due to the inadequacy of international and public laws in relation to the truth about the human being and the family preached by the Church. One can state with full conviction that in such a situation they are the outcome of presenting them in a theological perspective. Otherwise, without referring them to civil laws (public and international) at the starting point one could not talk about any theology of law in the proper sense.

Let us look at the theological indicators of the rights of the family which are included in the Charter and their possible influence or implications on the rights of the family established in the civil orders. I will limit myself to the statements contained in the Preamble.

In point A the Charter uses the wording contained in other kinds of legislative documents, such as the rights of a person, the rights of an individual. However, it additionally states that these rights, having a social dimension, find an innate expression in the family. Referring to what was previously said in the Introduction, one should emphasise that these rights “arise, in the ultimate analysis, from that law which is inscribed by the Creator in the heart of every human being.” It means that on this account they deserve to be strongly defended “against all violations and respected and promoted in the entirety of their content.” Additional motivation indicated by the origin of the rights of the family appeals to us not to treat them selectively and in limited scope but to protect them in their integrity. Theological source of the rights of the family points out that the person can have faith in the word of God, which assures that the earthly order is not arbitrary in character but is watched over by Providence. Therefore, the activity of the person does not come down to choosing conventional solutions and giving in to social trends.

What is emphasised in point B is the indissolubility of the marriage, which is the foundation of a profound and complementary relationship between a man and a woman. The theological source stressing the indissolubility of marriage indicates that there is sense in the marital union, which is expressed in stability, thereby aiming at the opportunity of sus-

tained mutual shaping of the spouses. It is a certain indication for the public or international legislation not to establish laws that allow disintegration of a marriage too easily and not to be guided in their regulations by laxism when judging whether the marital union disintegrated completely, but to raise hope for the possibility of improvement in the relationship which is breaking up.

In point C, a belief that only marriage was entrusted with the mission of transmitting life is highlighted. Thus, it is emphasised that nobody irrespective of the spouses can influence the possibility of giving birth to offspring by them or make it conditional to anything; human life is a value which cannot be manipulated and which should be protected from the very conception, regardless of the way it originated. In such an approach one can see an appeal that every conceived life should have parents in the already formed family environment, in which parents will take care of extensive development of their child. The postulate contained in this fragment of the Charter also suggests that civil legislative should establish such laws which will enable childless parents to adopt children and which will protect the “unwanted” children.

In point D it is stressed that the family is a natural society, prior to the state. It means that the truth about the family and its rights is not dependent on any public authority. Every public authority ought to seek the truth, act in the truth and according to the truth about the family, which is independent of its legislative whims. This look at the family is at the same time some form of trust in the public authority, which can comprehend the earthly order and establish laws which will express it. It manifests faith in the human reason, also the legislative one, not devoid of autonomy and the ability to express itself in an objective and universal way. The law which will lose its objectivity and universality relating to what results from outlaw reasons of existence shall not deserve respect.

In the point that follows (E) there comes a significant statement which says that the family “constitutes a community of love and solidarity,” thus being “much more than a mere juridical, social and economic unit.” Such wording emphasises the fact that the family cannot be perceived solely from the point of view of social or economic rights that it is entitled to, since the family is not merely a legal entity. Although this phrasing expresses the equality of the persons remaining in a legal relation which cannot yield to any form of subordination, it highlights other than legal and much deeper bond uniting the family members. This statement stresses that the smallest and most basic form of life, which is the family, is founded on the values of solidarity and compassion. Thus, public legislation — as long as the above values are promoted by the state as well as by the extralegal elements strengthening marriage — receives assistance

in ensuring the stability and proper functioning of the marital unity. One cannot summarise marriage in legal formulas and simultaneously create such laws that would thwart the values of solidarity. Consequently, we read at the same point that it is the family who decides about teaching and passing down the cultural, ethical, social, spiritual and religious values. Public legislation can neither limit these possibilities nor direct them in such a way that the family would be restricted or deprived of what it considers right for its members.

Solidarity ties, which the person learns first of all in the family, make him contribute to the development of every man and the society (which will be discussed in points F, G) perceiving another person not only as the subject of legal relations, but above all as a human being with his/her dignity. Theological approach gives this attitude an additional dimension of seeing in the person someone created in the image of God Himself, who is the God of dialogue, personal God and God capable of sacrifice, but also demanding God. This new and broader in meaning image of the person complements the extremely dispassionate picture of the human being who is the subject of law. For such persons and their families legislation can modify the laws, institutions, social and economic programmes, which negatively influence “the fundamental needs, wellbeing and the values of the family” (point J), especially in the situations (the Charter mentions the situation of poverty) which “prevent them from carrying out their role with dignity” (point K).

The Charter of the Rights of the Family with its theological attitude to the family and its protagonists is an inspiration for the public legislation. It presents the plan of God instilled in human nature concerning marriage and the family (point L). We must realize that in the secularized world raising the issue of the family in order to promote what it is meant to be in the plan of God is incompatible with the image of the world. However, next to the “official” picture of reality it demonstrates prophetically different, deeper, broader and strengthened by God’s plan image of the human family. The principles expressed in the Charter are “a prophetic call in favour of the family institution” (Introduction, 4). Opening oneself to faith, sometimes even not fully conscious, gives the opportunity to understand better the things created by the human and for the human. To be able to propose and promote the Christian image of the family, theology of law should not as much invoke the details of Revelation, but through them appeal to the identity and tradition of the society shaped largely by the values which Revelation conveys and which became the part of this society’s life. Accepting the values of the family and ensuring its rights in the public and international legal acts of the highest importance does not safeguard the family from the process

of re-definition, though. The Charter of the Rights of the Family shows these values which, protected by the public legislator, guarantee the existence and the proper functioning of the family. “The Charter offers to all who share responsibility for the common good a model and a point of reference for the drawing up of legislation and family policy, and guidance for action programmes” (Introduction, 6).

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TOMASZ GAŁKOWSKI

The Charter of the Rights of the Family in the Context of Theology of Law

Summary

The author in his article analyses the content of the Charter of the Rights of the Family in theological perspective. First, he emphasises the specificity of theology of law, whose reference point are the persons creating a relation in the obligation aspect (proper relation). This relation is subject of the new understanding in the light of the details of Revelation. They constitute hermeneutical categories for theology of law in the Charter of the Rights of the Family. Next, the author analyses its particular points from the angle of these categories. In his conclusions he emphasises that opening oneself to faith gives the possibility of fuller understanding of the things created by the human being (including law) and for the human being.

TOMASZ GAŁKOWSKI

Charte des droits de la famille dans la perspective de la théologie juridique

Résumé

Dans son article, l'auteur analyse le contenu de la Charte des droits de la famille dans la perspective théologique. Tout d'abord, il souligne la spécificité de la théologie juridique dont le point de départ sont les personnes qui forment une relation dans un aspect de devoir (relation juridique). Cette relation juridique est interprétée à la lumière des données de la Révélation. Dans la Charte des droits de la famille, elles constituent des catégories herméneutiques pour la théologie du droit canonique. Ensuite, l'auteur analyse ses points particuliers juste à la lumière de ces catégories. Dans la conclusion, il souligne qu'une attitude ouverte à l'égard de la foi donne la possibilité de mieux comprendre les choses créées par l'homme (y inclus le droit) et pour l'homme.

Mots clés: théologie juridique, Charte des droits de la famille

TOMASZ GAŁKOWSKI

La Carta dei Diritti della Famiglia nella prospettiva della teologia del diritto

Sommario

Nel suo articolo l'autore analizza il contenuto della Carta dei Diritti della Famiglia in prospettiva teologica. In primo luogo sottolinea la specificità della teologia del diritto il cui punto di partenza è rappresentato dalle persone che creano relazioni nell'aspetto relativo ai doveri (relazione legale). Tale relazione legale è sottoposta a lettura alla luce dei dati della Rivelazione. Essi costituiscono le categorie ermeneutiche per la teologia del diritto nella Carta dei Diritti della Famiglia. Successivamente l'autore analizza i suoi singoli punti alla luce di tali categorie. Nelle sue conclusioni sottolinea che l'aprirsi alla fede dà la possibilità di comprendere più pienamente le cose create dall'uomo (tra cui il diritto) e per l'uomo.

Parole chiave: teologia del diritto, Carta dei Diritti della Famiglia