

# THE IDEOLOGICAL SOURCES OF EUROPEAN LAW: THEIR TYPES AND AXIOLOGICAL NATURE



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The drastic globalization cause the urgent need for establishing a certain comprehensible and generally recognizable 'universe', which would provide the ability to regulate various new relations, arising on both individual and state levels. Today, the European law might be considered as such a 'universe', since it has not only acquired a widespread recognition and application on the European continent, but also became a grounds for establishing the international law.

Hence, in the process of analysing the above-mentioned problem, there occurs another necessity – to define the notion of 'sources of law'. The jurisprudence differentiates a few definitions of this phenomenon: narrow, or normative and broad, or philosophical-legal.

It is also very important to find out what, actually, European law is. Should one dwell on Romano-Germanic Law and Anglo-American Law? Is it the European Union law, or the law on which the practice of the Council of Europe and the European Court on Human Rights rest? Is it the law of all European countries?

A famous Swedish scholar Eric Annars pointed at historical and legal unity of Western, Southern and Northern European law. He attributed Russia, as a Euro-Asian country, to Europe as well, emphasizing, however, that law began developing in this country in the 18th Century, after Russia had become a member of the Western European legal family [7, 140–141, 254]. Nevertheless, the same author asserts that Russian Law has been reformed according to European samples only under the influence of the Russian-French War of the early 19th century [7, 357–364]. In other words, Annars believed that the European law was founded and developed in the Roman Empire, later in Byzantium, Carolingian Empire, Scandinavia and Balkans.

An American scholar Harold J. Berman uses the notion of the "Western legal Tradition", which he interprets as the synonym to the notion of "European law". He asserts that this 'tradition' was established in the 11th century, when the manuscript the *Justinian's Digest* (534) was discovered in one of the Italian libraries in 1080. This manuscript was later used in many countries of Europe together with the *Popular Law*. Since 1087, the *Digests* had been serving as the basis for law education at European universities: firstly, in Bologna (Professor Irneriy), and later at the universities of Paris, Orleans, Prague, Vienna, Krakow, Oxford, and others. At the same time, Roman law has acquired wider application in courts [1, 124–131].

The second stage of the Roman law reception in Europe started in the 19th Century, with the implementation of the Napoleonic Code in France, Austria, Germany, Russia and other continental states. English Law (though it developed in a quite different way – as a precedent law) has also fallen under the influence of Roman Law.

In his world-famous book "*Major Legal Systems in the World Today*" (the book has run into ten French editions and three In Russian and in many other world languages), the founder of comparative Law Studies Rene David states that "the Romano-Germanic law family" and "the family of common Law" (Anglo-American) make up together "the family of Western Law". Moreover, analysing the law of the countries of Central and Southern America, the scholar uses the term "Non-European Systems of Law" [19, 23–24, 57–58].

Obviously, according to this concept, the notion of “Western Law” rests on conceptual and content criteria, whereas the notion of “European (Non-European) Law”— on geographical ones.

Professor V. I. Muravyov believes the term “European law” has been used in order to determine the combination of legal norms that regulate the activities of the Council of Europe, European Union, OSCE, European Association of Free Trade, and other European institutions [17, 141–147].

Considering the above-mentioned peculiarities of the issue under discussion, Academician Kostytskyi differentiates two meanings of the notion “European law”: 1) The notion of “European law” is closely associated with the “Western Law” and refers to: a) Romano-Germanic Law; b) Anglo-American Law; c) mixed law, popular in Europe, America, Asia, Africa, and Australia; 2) European law is the law of the European Union, the latter being viewed as a supranational confederative association that covers, to essential extent, the field of private legal relations, as well as inevitably extends to the sphere of public legal relations [14, 25].

Thus, the importance and topicality of the article under discussion have been stipulated by the diversity of legal scholars’ perception of the fundamental notions, definitions and categories of European law.

The issue of origins of the European law sources has been a direct object of research for the following scholars: Academician M.V. Kostytskyi [14], Professors I. M. Lutskyi [15], V. M. Vovk [8, 9, 10, 11], S. H. Melenko [16]. Besides, S. S. Averintsev [6], E. Annars [7], M.M. Kosmiy [13], B. Russell [18], R. David [19] and others have also been engaged with investigating the problem under discussion. However, it should be borne in mind that none of the above-mentioned legal scholars has studied the issues of determining the axiological essence of the ideological sources of European law and its extrapolation on the field of International law directly.

The objective of the article is the justifying the provision concerning the complex, functionally complicated, axiological nature of Ancient Greek philosophy of law, Roman law and Christian ethics as the ideological sources of European law. The objective of the article presupposes the fulfilment of the following tasks: to summarize the concept of ideological sources of European law by Kostytskyi; to carry out a thorough analysis of the sources of European law; to trace out the process of formation of philosophy of law and State within the philosophy of Ancient Greece; to determine and to describe the peculiarities of the Roman law formation; to ascertain the conceptual bases of philosophical, legal, and social ideas of Christianity.

In the process of detailed analysis of European law, with the aim of its further unification and broader global application, there arises an urgent necessity to determine and thoroughly investigate its ideological bases, since it is impossible to perceive the axiological essence and ontological aspects of any phenomenon without being aware of its sources.

Taking into account the concept of Kostytskyi, we should consider Ancient Greek philosophy of law, the theory of Roman law and Christian ethics as the three ideological-methodological sources of European law.

In the course of cognitive analysis of the ideological and methodological sources of European law, there occurs a quite natural question: what is meant by the universality, the overall accessibility and even the objective necessity of using such a social-axiological phenomenon as European law? Doesn’t its uniqueness lie in the nature of its ideological-methodological sources? To answer this question, it is advisable to give a brief description of each source, as well as to determine its characteristic features. The three sources, due to their combinability and synthesis, have stipulated the formation of such an extraordinary phenomenon as European law.

One should note that each of the European law sources, identified by Kostytskyi, has occurred in different chronological periods. For instance, the first references to Ancient Greek philosophy of law appeared in the 7th-6th century BC, when the Ancient Greek philosopher Thales developed his own ideological system, thus having founded philosophy of nature as a brand new type of scientific cognition. Roman law, in its turn, has appeared as a universal tool of regulating social relations, caused by the development of the Roman Empire. On the other hand, Christian ethics, as one of the three ideological sources of European law, has been taking its present-day shape since the moment of founding of Christianity, a modern world religion at those times. It is also important that Roman law and Christian ethics appeared after Ancient Greek philosophy of law had eventually developed into a separate branch. That is why the ideological concepts and systems of the Ancient Greek philosophers have exercised direct and indirect influence upon the process of formation of the two former sources. In other words, there is an opportunity to observe the inter-influence of all the ideological sources of European law in the course of their historical development and universalization. In this way, the effect of Christian ethics on Roman law is notable in both the latter’s evolution, and in the further formation and promotion of new philosophical systems that

correspond to each historical-chronological period. On the other hand, legal conscience, that was so peculiar for the Roman society, has affected, to some extent, the formation of Christian postulates.

Ancient Greek philosophy (philosophy of law being one of its integral parts) was founded approximately in the 7th-6th century BC. Those were the times, when various sociological and civil processes have reached the level at which any individual does not only think of acquiring the necessary means of survival and existence, but also tries to adequately explain most natural processes and phenomena, taking place around him. During that chronological period, the Greek cities-states were the areas with the most favourable conditions for such a phenomenon as “philosophy”. The factors, that have provoked the formation of philosophy, were the Ancient Greeks’ desire to achieve individual’s absolute freedom on the one hand, and the climatic conditions of Ancient Greece, that were favourable enough for producing agricultural goods – on the other. Besides, a great number of cities-states had diversified forms of state administration and social-political institutions, as well as geographical peculiarities that have stipulated the progress of navigation, religious beliefs, etc. The Ancient Greeks’ attempts to logically comprehend the essence of the surrounding world have led to the analysis of human’s being in the Universe on the whole, whereas their willingness to explain the nature of various phenomena, that could not be explained in empirical way, has given a start to the formation of the philosophical analysis. Due to such an extraordinary way of thinking, the Ancient Greek philosophers began expressing and justifying the concept about the natural indivisibility of the Universe and a human being, as its integral part. Thus, Ancient Greek Philosophy faced the problem of “being”, which became one of the cornerstone objects for its analysis.

Besides, within Ancient Greek philosophy, there appeared a judgment concerning social being. As a result, we have to deal with such notions as justice, law, tradition, custom, which, with the flow of time, have acquired certain features, subject to logical analysis of the next generations of philosophers.

The further philosophical interpretation of the above-mentioned conceptual categories has provoked direct and indirect influence of the ideological maxims, worked out by the Ancient Greek philosophers, upon both contemporary and European law. That is the reason why academician Kostytskyi asserts that even today, two and a half millenniums later, the philosophical and legal views of the Ancient Greek scholars remain important and topical for the development of European law. The ideas of justice, state bound by the rule of law, supremacy of law have become a cornerstone of law making in the post-socialist and post-Soviet countries. These categories also lie in the basis of the Constitution of Ukraine of 1996 [14, 27].

The second ideological source of modern European law is Roman law. Its formation has been caused by the expansionist cravings of the Roman Empire. The process of affiliating the new territories required an efficient mechanism of their administration, which would prevent the possible loss of these territories later on because of some hostility of the local population. However, the efficiency of such a mechanism without the application of law (probably, the most universal regulator of social relations) was not only doubtful, but also impossible. In 451-450 BC, with the purpose of creating an effective means of regulating the social relations, a specially elected committee of ten respected citizens held a written fixation of all active norms of Jus Commune that existed on the territory of the Roman Empire at that time. Thus, twelve tables with the texts of normative acts, that reflected more than 120 customs, have been compiled. These tables were exhibited in the Center of Ancient Rome so that everyone could get familiar with their contents.

As it has already been mentioned, the formation of Ancient Greek philosophy took place about 7th-6th century BC, whereas the date of foundation of Roman law coincides with the adoption of the Law of the Twelve Tables in the middle of the 5th century BC (in 451-450 BC, to be more exact). These two phenomena, which later on were perceived as the two sources of European law, had been developing simultaneously without influencing each other. Nevertheless, there were certain historic factors that have introduced some changes into the course of this development and due to which Roman law and Ancient Greek philosophy have become the ideological sources of European law. The most important of these factors was the invasion of Ancient Greece by the Romans. It is known from the History of Ancient Greece that the expansionist plans of the Romans reached their highest point during the third war against Macedonia (171-168 BC). The war has resulted in the Battle of Pydna, after which the Macedonian kingdom was practically destroyed. So, the Roman invasion of Ancient Greece was finished in the second century B.C. Naturally, the ideological doctrines of the Roman State were aiming at introducing on the territory of the defeated enemy their own, higher-ranked fundamental principle of *mores maiorum* (the “*Customs of Ancestors*”), attempting thus to emphasize the inferiority of the “little Greeks” (*graeculi*) [16, 200].

However, when the Romans set the first contacts with the Greeks they realized, according to B. Russell, their own ignorance. The Greeks were far better than the Romans in numerous spheres of social life, particularly, in philosophy. The only advantage of the Roman invaders concerned their military preparation and social cohesion [18, 342]. Hence, Greek culture and arts, due to their considerable evolutionary supremacy, have spurred the Romans to adopt these better paradigms voluntarily. It should also be emphasized that the above-mentioned process was not forced at all [6, 137–149].

In other words, the so-called “intersection” or “encounter” of Ancient Greek philosophy and Roman law had been taking place since the moment of Roman invasion. At that time, Ancient Greek philosophy was about 500 years old and had been existing as the independent phenomenon, whereas Roman law was still in the process of its formation in spite of its 200-year existence. At the time Ancient Greece was invaded by the Roman Empire, Ancient Greek philosophy was a widely recognized branch of science. Unfortunately, no one can say the same about Roman law of that period. The expansionist desires of the Romans were directed to their neighbours at first and later on spread over beyond Europe, to the territories of Asia, Middle East and Northern Africa. Consequently, the invasion of the new areas and the conquest of their population required immediate reforms in the administrative system of the Roman state, as well as the construction of a new governmental system. Law appeared to be the very tool that has conferred the administrative system with all the necessary functions and made it quite efficient. That is why the territorial growth of the Roman Empire was accompanied with the correspondent changes in its administrative structure and positive law. At the same time, the pragmatism and practicality of the Roman society have endowed Roman law with all the universal qualities that are still very important nowadays.

The Roman invasion has given a start to the direct impact of Ancient Greek Philosophy on the whole, and philosophy of law in particular, on the processes of further formation and development of Roman law. However, it was a one-way influence, which may be explained by the following factors. First, the chronological factor – at the moment of Roman invasion Ancient Greek philosophy was complete, constant, unified and impenetrable, whereas Roman law was still in the process of formation, thus being unable to exercise any influence on Ancient Greek philosophy. Second, the factor of axiological fullness of Ancient Greek philosophy and Roman law. Hellenic philosophy of those times was a complete and integrated phenomenon, filled with axiological essence, and was able, due to it, to “share” this axiology with other social phenomena like Roman law. That is why we can dwell upon a one-sided nature of the effect of Ancient Greek Philosophy on the processes of formation and development of Roman law, and not vice versa. Besides, Ancient Greek philosophy of that time was presented as a ‘closed’ system, while Roman law was ‘open’ enough for the influence of other systems.

The above-mentioned influence lasted until the beginning of a new era, that is until the moment Christianity and its ethic doctrines were founded and introduced into society.

According to Professor V. M. Vovk, the development of European law has become possible due to the unity of cultural prospects: the first prospect is closely connected with the regeneration of the idea about the regulatory role the law plays in any society. The second prospect refers to the formation of Christian civilization. The third one is the idea of the extraterritorial nature of law, which is based on the recognition of law as a principal social value. However, when it comes to the impact, Roman law exercised on European law, we should differentiate between the authenticity of the unique legal regulatory system on one hand, and its interpretation, with the preservation of basic components – on the other [8, 15; 11, 31]. Dwelling upon the issue under discussion a Polish philosopher T. Giaro mentions certain forms of the Roman law “reincarnation” or “reception”, which are rather common on the territory of Europe [12].

As to Christian ethics as an ideological source of European law, it has to be borne in mind that ethics is a science that studies morality. The latter is an efficient practical and metaphysical tool that has been used by humanity throughout a long period to classify the acts of individuals and society in compliance with the gradation scale “good-evil”. Owing to morality, people are capable of determining the values in individual’s actions and behaviour, customs, law and positive humane deeds being a direct product of their expression. It is due to such behavioural manifestations that an individual can perceive himself as an independent, conscious and reasonable God’s Creature. As to ethics as a science, Kostytskyi states that it appears together with civilization. It derives from traditions, customs, myths and turns into a source of law [14, 28]. Various ethical principles are reflected in the fields of both positive and natural law, playing one of the key roles in the processes of their formation, development and evolution.

Ethical norms are not of static nature. They are subject to evolutionary changes and develop together with all the spheres of social being. Ethics has acquired its brightest and most powerful evolutionary impulse after Christianity had been proclaimed a world religion.

Christian ethics started to be considered as an ideological source of European law after Ancient Greek philosophy and Roman law. Christianity originated in the 1st century AD in Palestine and is closely associated with the life and activities of Jesus Christ. It is interesting that Roman law has played a significant role in the formation and development of Christianity. Palestine was under the Roman rule at that time and Pontius Pilate, who has indicted Jesus to death penalty, occupied the position of the Roman governor there. The verdict itself was delivered by the Roman court, in accordance with the norms of both Roman and local Judaic law. Moreover, the Roman soldiers executed the sentence. In other words, Roman law, which had already been considerably exposed to the influence of Ancient Greek philosophy of law by the 1st century AD, has played one of the key roles in the formation and development of Christianity. That is, the direct influences of Roman law, as well as the indirect effect of Ancient Greek philosophy, have been exercised on Christianity and its ethical norms since the very moment of their formation. However, it was a 'one-way affect', as Christianity did not possess all the necessary instruments to influence Roman law (the latter being in the highest point of its development at that time) and Ancient Greek philosophy. Later on, this direct influence has become impossible because of the prohibition of Christianity in the Roman Empire. As to the affect, Christian ethics had upon Hellenic Philosophy it was quite similar to that of Roman law: it was practically impossible due to the fact that Ancient Greek Philosophy of that time was a completed, closed system with no chance for intrusion or interference. On the other hand, the influence of Ancient Greek philosophy on both, the further development of Roman law and Christianity, was acquiring, under various circumstances, new direct and indirect forms of expression. That is why, the reverse process was absolutely impossible.

Speaking of the inter-influence between Roman law and Christian ethics, it is important to point out that it was mostly of one-way nature until 325. Till that time Christianity was prohibited in the Roman Empire and could exercise only indirect influence on the provisions of Roman law (for example, certain normative acts concerning the prohibition of Christianity and possible punishment for its disciples have been issued in the Roman state all the time). Such a state of things changed drastically in 325, when Emperor Constantine proclaimed Christianity a state religion of the Roman Empire. Consequently, Christian ethics has acquired a permanently growing importance and forced out Pagan Ethics. According to Kostytskyi, throughout the 17 centuries of its existence, Christian ethics has become the most prevalent in the world. Though it has no traces in Roman law, beginning with The Laws of the Twelve Tables, the codification of the Laws was performed by the lawyers-Christians, which, undoubtedly, had considerable impact on the process and technology of the codification [14, 28]. Therefore, here we have the inter-influence between Roman law and Christianity.

Taking into account all the above-mentioned peculiarities, we might assert the existence of the inter-influence between Roman law and Christian ethics. It has been stipulated by the fact that the systems of both Roman law and Christian ethics have been marked in the period under discussion with certain "openness". Whereas the Hellenic philosophy of law had already acquired the features of a "closed" system. To put it differently, Ancient Greek philosophy kept affecting both Roman law and Christian ethics, meanwhile remaining "impenetrable" for the influence of the latter. Here lie the axiological peculiarities, so typical of the ideological sources of European law.

Although Christian ethics is viewed by Kostytskyi as a phenomenon, contributed to Roman law, the codification of popular law in Europe has taken place directly, on the basis of Christian ethics [14, 28]. It has become a consequence of certain fundamental principles, to which every Christian should keep to throughout his entire life. These principles are piety, mercifulness, generosity, all-forgiveness, mortification of pride, humility, love to the Saviour and others.

Taking into consideration the essence of the concept of the three ideological sources of European law by Academician Kostytskyi, it should be emphasized that Hellenic philosophy of law, Roman law and Christian ethics did not only occur at different chronological periods, but also contained different essence and performed different functions. All these ideological sources of European law have had different impact on the processes of its formation and evolution. Nevertheless, the gradual synthesis of these affects has eventually caused the appearance of a universally regulating phenomenon – European law.

Analysing the inter-influence of the three ideological sources of European law we come up to the following conclusion: this interaction took place within the sources and not beyond them. That is, Ancient Greek philosophy had an impact on the formation and evolution of Roman law and Christian ethics, whereas

the latter two inter-penetrated each other. As to the result of this threesome interaction and inter-influence – European law –, it is the first normative-regulatory expression of the European legal ideas, which in juridical (not philosophical-political) aspect came very close to the concept of supremacy of law, which made its way through far later, at the acme of the feudal-absolutist system. We mean here Magna Carta (The Great Charter of Liberties), which reached 800 years of its history on June 15, 2015. It still plays not only great theoretical, but also practical role, positively influencing the idea of supremacy of law and its values. It was practically the first normative-regulatory act that expressed supremacy of law [3, Ch. 18–19]. Several articles of this legal document contained provisions that reflected the ideas of “Constitutional Monarchy” and “limited powers”, as well as lay in the basis of the concept “government under law”. This concept, known since 13th century, may be perceived as a forerunner of the 19<sup>th</sup> century principle “the rule of law”.

Numerous western scholars stick to this theory, emphasizing that Magna Carta, in many respects, was a spiritual and legal predecessor of the notion, which is presently known as “the rule of law” or “the supremacy of law” [5]. Magna Carta is a typical medieval charter, written in hand on a parchment and sealed by King John on June 15, 1215 “in the meadow of Runnymede, on the Thames River, not far from London” [2, Ch. 9–12]. With the flow of time, this document has received the name of The Great Charter of Liberties due to its “extraordinary, unusual peculiarities, which actually, justify the notion “great” [2, Ch. 9].

Magna Carta has got its second name (The Great Charter of Liberties) due to the word “libertas”, which meant “freedoms” as “liberties”, “privileges”, that is the “right to administer jurisdiction in the city that was given by the act of granting”. In this sense, “liberties of England” constitute the principles of English law. The word “freedoms” in the meaning of “liberties” has been used in such phrases as “the freedoms of a subject” and “the freedoms of the king”: “the king also had some freedoms and prerogatives that set certain liabilities upon his subjects; however, his freedoms, like those of his subjects, have been granted, limited and protected by law” [2, Ch. 14].

When The Great Charter of Liberties appeared, the king’s powers (known later as “prerogatives”, that is “exclusive rights”) were called “the freedoms of the king”. They were considered as the “liberties” of the same origin as the “liberties” of church, barons, whole cities or even the “liberties of all free people [“freemen”]. As all other “liberties”, the “liberties of the king” were recognized as the ones originating from “law”. Here lies the source of “*the theory of the predominance of law*”, which “dates back to the time of foundation of England”. Those were the times, when Germanic tribes, that “have settled in the southern part of Britain, founded “Angleland” or “England”. They were neither the subjects of the Roman Empire, nor were familiar with Roman Law. Nevertheless, they have introduced common law, the essence of which constituted the universal recognition of mutual rights and duties”. This is why the British claim that The Great Charter of Liberties “was, in its basis, the implementation of the principle of the supremacy of law” [2, Ch. 13].

Taking into account the above-mentioned ideas, we might conclude that Hellenic philosophy of law, Roman law, and Christian ethics constitute the ideological sources of European law. All of them did not only appear in different chronological periods, but also contained various axiological meaning and essence. Consequently, all these ideological sources of European law had different impact on its formation and evolution. However, the gradual synthesis of the latter effect has stipulated the formation of European law as a universal human phenomenon, which, in its turn, has laid the foundation for the formation of another global, quite complicated and, at the same time, extraordinarily important universal human phenomenon – international law.

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### **Меленко С. Види та аксіологічна природа світоглядних джерел європейського права**

*Анотація.* У статті на основі логіко-аксіологічного аналізу досліджується проблематика означення світоглядних джерел європейського права крізь призму філософсько-правової методології, а також визначається притаманний їм аксіологічний зміст. Визначається феноменологія формування філософсько-правового змісту світоглядних джерел європейського права та процеси його нормативізації, переходу з категорії світоглядних ідей до сфери нормативного регулювання відносин у соціумі. Зазначаються особливості вказаного прояву та його екстраполяція на стан сучасного європейського законодавства, яке несе у собі безпосередній міжнародно-правовий регулюючий зміст.

*Ключові слова:* європейське право, міжнародне право, давньогрецька філософія, римське право, християнська етика, філософія права, морально-етичні цінності, Magna Carta, Європейська Конвенція про захист прав людини і основоположних свобод.

### **Melenko S. The ideological sources of European law: their types and axiological nature**

*Abstract.* The article under discussion deals with the problem of determining the ideological sources of European law in the context of various philosophical and legal methodologies, their axiological contents being the primary aspect of investigation. The article also traces out the phenomenology of these methodologies' formation, as well as the process of European law transition from the category of ideological notion to the sphere of normative regulation of social relations. The peculiarities of the above-mentioned process and its extrapolation on the state of the present-day European legislature (the latter possessing certain direct international-legal regulatory contents) have been investigated in the article as well.

*Key Words:* European law, international law, Ancient Greek philosophy, philosophy of law, ethical values, the European Convention of Human Rights and Fundamental Freedoms, Magna Carta.