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ON CRYSTALLIZATION OF LAW

The article introduces the problem of autonomy of law. The paper examines the medieval origins of legal positivism from a historical approach, sketching the main theories concerning the emergence of law, and phrasing some preliminary consideration for a historical and philosophical view of the problem of the birth of law. As a result of reasoning the article suggests some legal historical and human ethological ideas relating to the phenomena of crystallization of the law.

Key words: *Autonomy of law. – Emergence of law. – Human ethology. – Legal positivism. – Medieval law. – Philosophy of history*.

1. INTRODUCTION

In this article I attempt to sketch some viewpoints to illuminate the emergence of law as a special phenomenon, giving a contribution to the thinking on the real nature of law. It is often believed that law has been formed and shaped from the medium of social customs and has become a rational structure gradually and linearly. Although this interpretation can catch either side of the birth of law, namely that the law does not come into the existence over one or two days, the law needs special social situations in order to disentangle itself from the medium of other social rules. However these situations can deeply influence the rapidity of the rise of law.

As is well known, the law does not have equal importance everywhere and in every legal cultural region. In some places, such as in the West, the law is a highly regarded instrument for social control. Elsewhere legal institutions have less importance compared to traditional so-

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cial rules and education. Thus, I tend to suppose, law needs to have a special cultural and social situation to reach a very developed and sophisticated condition– a condition wherein the law appears as the ultimate argument in deciding conflicts. In order to see the reasons for that process, wherein the law can become an highly important phenomenon, we should circumambulate some historical, theological momenta besides legal philosophical problems, and we should also touch on some questions of the philosophy of history.

2. ON AUTONOMY OF LAW

Theories of legal positivism, in extreme cases, think: if moral arguments are kept out of legal discussions, this practice is useful from social aspects. Antecedents of this thought can already be discovered in the work of Langdell, who asserted and approved the autonomy of law, because this autonomy could guarantee neutrality and the balancing of law in a plurality of social mores.[1] However, as it will be touched upon, these modern and secular ideas are deeply rooted within protestant theology. This is probably true concerning the thoughts of Josef Raz, wherein the law appears with "content-independent" and "preemptive" characters. Thus, as a norm-based and juridical authority-based force or power demanding an absolute and unconditional validity. In Raz's interpretation, the law requires authority[2] and this circumstance can distinguish law from advice. However the real question is, how the law is delimitable from morality and religious rules on the basis of its demand to authority, when we know "moral or religious rules" can be hardly real rules, if they do not claim and require an unconditional following. These are also only opinions without demand to unconditional following and general validity.

Raz properly showed that, the law, according to its essence, requires moral authority.[3] However it is highly dubious to suppose that the law needs only a demand to moral authority, but a certain measure of morale is not a necessary element of law. Namely, Raz does not ask that evident and obvious question, and he also does not answer the question of why the law demands legitimacy and moral authority, if moral content is not necessary for the existence of law, and the law can exist without this. It is highly useful to consider that moral references are always promises relating to certain kind of values. Thus, if we experience that, as Raz has

[1] Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts*, Boston, Little, Brown, and Company, 1871; See also James G. Milles, "Leaky Boundaries and the Decline of the Autonomous Law School Library", *Law Library Journal,* Vol. 96:3 387–423, 2004.

[2] Joseph Raz, *Ethics in the Public Domain*, Oxford, Clarendon, 1994, p. 215.

[3] Joseph Raz, "Hart on Moral Rights and Legal Duties", Oxford Journal of Legal Studies 1984:4, pp. 123–131

asserted it, the law requires moral authority (namely in general by moral references which are properly speaking indirect promises) and this phenomenon belongs to the nature of law, we can reasonably suppose that the law makes only such promises as can be accomplished through numerous concrete legal norms (at least formally and theoretically). Our supposition is probably true, even if the everyday legal practice is not equal to the content of the legal system in many essential aspects (for example in Nazism or Communism). That is another issue: when law helps certain values to come into existence, this sometime creates more damages than a passive manner of law.

3. ON THE MEDIEVAL ORIGIN OF LEGAL POSITIVISM

As is well known, legal positivism maintains the duality of law and morals, the idea of the autonomy of law, however this stream does not sincerely take into account the relationship between its ideas and reality, not to mention the theological origins of its thoughts. Max Weber has already shown the connection betweenprotestant puritanism and the capitalist economy. However legal positivism also takes its origin from late medieval thinking. In the Christian Middle-Age canonical and ecclesiastical law dominated against profane law and legal institutions. At this time, Christian morality provided an unambigous basis for the interpretation of thinking about the law and justice. On the trail of a struggle between the papacy and the Holy Roman Empire the profane domination wished to get emancipation and to become independent of ecclesiastical influence.

From the aspect of legal philosophy Dante's pamphlet, namely De Monarchia, was an excellent and highly characteristic sign of this process. He thought that profane power and ecclesiastical power both derive directly from God. [4] He mentioned an example, namely the antique profane Roman Empire, which could come into existence without contribution from the ecclesiastical power and papacy, because these did not exist when Rome was born. However we should take into consideration, the Roman kings, the member of College of Pontiffs and (at least at early times) praetors were sacerdotal people, so they embodied both sacred and profane domination.

The ideas of Dante were later repeated by Marsilius of Padua[5] and William of Ockham[6] later. By the way, we can regard William of Ockham

[4] Dante Alighieri, *De Monarchia*, Boston and New York, Houghton, Mifflin and Company, 1904, pp. 137, 196–207.

[5] Marsilius of Padua, *The Defender of Peace*, Cambridge, Cambridge University Press, 2005.

[6] William of Ockham, *Quaestiones et decisiones in quattuor libros sententiarum*, Lyon, 1495, Vol. II, pp. 19. See also: Marilyn McCord Adams, *William Ockham*, Notre Dame. Ind., University of Notre Dame Press, 1987.

as the first positivistic legal philosopher, who thought that God could have given other statutes for us aside from the law of Bible, and we would have to respect those in the same way. However Ockham emphasized the goodness of God in order not to characterize Him as a despot. In a paradoxical way, he did not take into account that the absolute character of God could suffer damage from the formally emphasis on a precise and definite quality (namely,charity) relating to God.

Later John Wyclif also asserted the primacy of secular power in secular things and that ecclesiastical goods are taxable. At thebeginning of the 15th century the autonomy of secular power and secular law was emphasized only against ecclesiastical power, but it was not related to morality. Just about one century later this view commenced to change. Although Machiavelli did not deal with legal philosophy explicitly, he executed a significant deed emphasizing the special logic of political power, in reality the autonomy of the political sphere not only against ecclesiastical power, but against morality too. Ironically, Dante and Machiavelli, who represented a rational and pragmatical stream in political thinking, thay were actually idealists, and they both had to suffer banishment.

Nevertheless Machiavelli anticipated and foreshadowed Max Weber's distinction between responsibility-morality and conscience-morality, showing the special, expediency-based logic of politics. It was a very important moment for the legal positivistic view, because if political power is independent of morality, political power-created law is independent of moral consideration too. However it is a favorite topic of later ages.

The Reformation in 16th century, especially the Calvinist variation, wished to enforce rational reason in the realm of theology. Calvin argued as if continuing the ideas of Ockham when he said, the reason for salvation is only God itself, and it is nothing else. Namely, if there were a reason for salvation above this, it would be a more powerful thing than God, however this is obviously nonsense and impossible. As Calvin said: *"For if it has any cause, then there must be something antecedent, on which it depends; which it is impious to suppose. For the will of God is the highest rule of justice; so that what he wills must be considered just, for this very reason, because he wills it. When it is inquired, therefore, why the Lord did so, the answer must be, because he would. But if you go further, and ask, why he so determined, you are in search of something greater and higher than the will of God, which can never be found. Let human temerity, therefore, desist from seeking that which is not, lest it should fail of finding that which is. This will be a sufficient restraint to any one disposed to reason with reverence concerning the secret of his God."* [7]

[7] John Calvin, *Institutes of the Christian Religion*, Philadelphia, Published by Philiph H. Nicklin and Hezekiah Howe, New Haven, 1816, Vol II, pp. 444.

Thus, Calvin warned, we should not search for causes of salvation besides the will of God, otherwise we will miss things which exist, while we are looking for such phenomena that do not exist. This argument, according to its structure, is highly similar to the logic of legal positivism, which emphasizes the importance of available legal security instead of often changeable, variable and particular morality and justice. As Calvin writes: *"and this is what I asserted from the beginning, that we must always return at last to the sovereign determination of God's will the cause of which is hidden of God's in himself."* [8]

I suppose this intellectual structure is similar to the argument of legal positivism not only accidentally, but rather that the relationship between these phenomena has deeper roots. We should not forget that the structures of thinking and forms of arguments tend to spread not only in a conscious way. Some ideas can shape all territory of culture, and not only that area of culture where it was born. Moreover, consequences of some thoughts can emerge after other circumstances have also been shaped. Legal positivism, which emphasizes the available,, in the same way asserts the autonomy of law, and that the essence of law is in law itself. However, what does Calvin establish? As we saw: *"and this is what I asserted from the beginning, that we must always return at last to the sovereign determination of God's will the cause of which is hidden of God's in himself."*[9] However, what can be proper, or at least defendable theologically by the concept of God, is highly dubious concerning the relative category of the law in legal philosophy. Especially, if a juridical decision (which is formally correct from the legal aspect) is unacceptable for a majority of society. Nevertheless, thoughts of Ockham and ideas of Calvin prepared the intellectual ground to accept ideas about "content-independent" authority.

There were further consequences of the secularization of Western law, when Thomas More had to warn about the human-created limits of divine law,[10] and Montaigne could describe with indignation, how human lives were sacrificed on the basis of legal formalism, when some people's innocence became obvious after the sentence concerning their death had been created, but had not been pronounced.[11] We should not forget that the legal institution of appeal has generally arrived gradually and slowly.

[8] *Ibid*., 446.

[9] *Ibidem*.

[10] Thomas More, *Utopia*, London, A. Murray, 1869, p. 46.

[11] *"How many innocent people have we known that have been punished, and this without the judge's fault; and how many that have not arrived at our knowledge? This happened in my time: certain men were condemned to die for a murder committed: their sentence, if not pronounced, at least determined and concluded on. The judges, just in the nick, are informed by the officers of an inferior court hard by, that they have some men in custody, who have directly confessed the murder, and made an indubitable discovery of all*

As Burckhardt has reminded us, the 16th century was a changing, transforming age with a lot of uncertainty, insecure and fatalistic feelings.[12] The idea of predestination has derived from these circumstances among others. Shakespeare's drama The Merchant of Venice also has a highly ironic attitude relating to legal formalism, which had to win against the formal argue of Shylock, because mere reference to morality was not enough in the legal process at that time. We can call the 16th century the age of prepositivistic law, after the natural law and legal philosophy emerged on the trace of Grotius' and Pufendorf's works.[13] Natural legal conceptions could push prepositivistic-formalistic ideas to the background, however only temporarily, because when the role of Roman law became stronger, and Western history once again saw a period of moral-plurality, simultaneously positivistic forms of thinking returned more strongly.

Thus, we should inquire into ideas about the autonomy of law on the basis of their historical shaping. Natural law often asserts that there is a transcendent non-formal law next to or above positive law, however this legal interpretation usually establishes the contents of that sublime law on the basis of an ideological preliminary supposition. I tend to think, it cannot be an accident, that the Catholic legal philosophy has a more significant natural legal tradition compared to the protestant based philosophy of law, because pre-protestantism or pre-reformation (Dante, Marsilius of Padua, Ockham, Wyclif, Hus) and Reformation prepared legal positivism by separation of the sacred and profane powers.

We probably can establish that the "modern" and "secular" imagined ideas about the autonomy of law are based on political-theological thoughts at least half a thousand years old. It is also true that conceptual-analytical legal efforts have derived from theological related legal positivism. However that is a huge question, what kind of scientific results can descend from only belief-like, politically and theologically based ideas.

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the particulars of the fact. Yet it was gravely deliberated whether or not they ought to suspend the execution of the sentence already passed upon the first accused: they considered the novelty of the example judicially, and the consequence of reversing judgments; that the sentence was passed, and the judges deprived of repentance; and in the result, the poor devils were sacrificed by the forms of justice." Michel de Montaigne, *Essays*, Stanford, Stanford University Press, 1958, pp. 819–820.

[12] Jakob Burckhardt, *The Civilisation of the Renaissance in Italy*, US. Dover – Courier Corporation, 2012, p. 303.

[13] Hugo Grotius, *On the Laws of War and Peace*, New York, M. Walter Dunne, 1901; Samuel Pufendorf, *Of the Law of Nature and Nations*, London, 1729; Craig L. Carr (ed.), *The Political Writings of Samuel Pufendorf*, Oxford University Press, 1994.

4. THEORIES CONCERNING THE EMERGENCE OF LAW

In Western legal thinking there is the view that we can only speak about law and the state from a certain developed social and historical situation, wherein these phenomena had reached definite stations of development. Among others American Legal Realism fought against this view with some success. This stream, namely American Legal Realism, has shown the complicated webs of social control in so called primitive societies.[14] However it must be a necessity that Western ideas relating to law and the state have been shaped in this way, because the thinking about law and state could analyses directly only those situations and conditions wherein this legal thinking has emerged, namely the circumstances of the 16th and 17th centuries and later ages. Thus, relatively sophisticated phenomena provided themselves as the basis for legal philosophical inquiries, so philosophy of law tended to think that the phenomena of its age had a general character. Bodin's terminology of and his sovereignty-theory survived its own time, and appears again and again in Austin, Somló and others up to the 20th century, although the principle of democracy dominated in these late ages. Nevertheless, a special fiction got general about demarcation between no-state and state and traditional rules and the law. However these ideas did not take into consideration, for example, that the Roman Empire did not exist as a state according to our recent Western theories and categories, and only Roman municipal institutions (for example the senate of Urbs) decided matters of the Empire, and these institutions operated further in the Middle ages too, after the defeat of the Empire.

After the 16th century, so-called social contract theories have in wholly speculative way supposed that supremacy come into existence through agreement between the leader and other members of society. Numerous theories thought jurisdictional functions and their operation result in the emergence of law. In this interpretation a lot of decisions can mature the law. However the main problem is that the law does not have as outstanding and excellent a role everywhere as it had and has in Rome and in the West. Namely, law has not become an independent social phenomenon in every culture detaching itself from religious and moral spheres. Religious determination of the law is obvious in the Islamic world.[15] In Japan education and conciliatory processes have fundamental importance in treating conflicts.[16] In China there is an old legend that the

[14] Karl Nickerson Llewellyn, E. Adamson Hoebel, *The Cheyenne way; conflict and case law in primitive jurisprudence*, Norman, University of Oklahoma Press, 1941.

[15] Joseph Schacht, *An Introduction to Islamic Law*, Clarendon, Oxford, 1966.

[16] Hajime Nakamura, *Ways of Thinking of Eastern Peoples: India, China, Tibet, Japan*, Honolulu, East-West Center Press, 1964; Edward T. Hall, *Beyond Culture*, Anchor Press/Doubleday, Garden City, New York, 1981, pp. 107–112.

law was invented by a guilty Northern nation, which died out, because of its sins,[17] and therefore Confucianism considers exemplary manners are the most important aspect of social control.[18] Thus, Western theories and ideas concerning an autonomous law and the importance of law are not universal conceptions.

Moreover, a human ethological phenomenon is highly important for understanding the law, namely so called rule-following behavior.[19] Its essence is that humans have an instinctive, biologically coded inducement to keep social rules. Rule-following behavior can exist relatively efficiently in little traditional groups (those consisting of about 100–150 people), because rules and customs are clear, and so-called normative aggression of members of society touch directly people who neglect common rules. It is also clear that certain rules of coexistence can exist as religious rules in bigger societies, and finally we can see secular legislation in numerous legal cultures. The big question is whether subsequent developments are accidental momenta or rather consequences of special social-cultural situations.

5. SOME PRELIMINARY CONSIDERATIONS FROM THE ASPECT OF PHILOSOPHY OF HISTORY

Sir Henry Maine was perhaps the first scholar who distinguished so-called progressive societies from stationary societies, classifying Rome and the West within the first type and, for example, India in the second category. [20] In contrast to this interpretation Spengler (as Ibn Khaldūn did about six centuries earlier) [21] thought that every civilization moves along a certain developmental curve from birth to decline and death. However, Spengler referred properly to the magical-mystical character of the Eastern cultures and to the circumstance that Eastern cultural phenomena do not show as high a degree of differentiation the Western phenomena. Thus, at this point there is a contradiction between the ideas of Maine and Spengler, namely Spengler did not distinguish between two types of cultural progressions.

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[17] Tibor Bakács, "Hommage á prophesseur Tamás Prugberger" in: *Ünnepi Tanulmányok Prugberger Tamás professzor 60. születésnapjára*, Miskolc, Novotni Alapítvány, 1997, pp. 15–21, 20.

[18] David L. Hall, Roger T. Ames, *Thinking Through – Confucius*, Suny Press, Albany, New York, 1987, p. 241.

[19] Vilmos Csányi, "Reconstruction of the Major Factors in the Evolution of Human Behavior" *Praehistoria*, Vol. 4–5, 2003–2004, pp. 221–232.

[20] Henry Maine, *Ancient Law*, New York, Henry Holt and Company, 1873, pp. 21–23.

[21] Ibn Khaldūn, *The Muqaddimah: An Introduction to History*, 3 vols., New York, Princeton, 1958.

Nietzsche outlined the duality of Apollonian– and Dionysian-principles in Greek culture. According to Nietzsche, these phenomena induced the progress of the Greek civilization. However this German philosopher did not create any general theory from this idea. It is quite clear that the model of Spengler is similar to the thoughts of Nietzsche, but the intellectual system of Spengler is not able to describe all the cultural formations in an accurate and adequate way, because for example the Chinese or Indian cultures are too old and too "balanced" and linear to be pressed into Spengler's cycles. Of course, this circumstance does not mean that none of the cultures form special cultural cycles. And at this point I changed the terminology of Maine, so I call the inquired entities progressive and stationary cultures instead of progressive and stationary societies.

It seems that progressive cultures can form a special developmental curve, although Maine did not mention the declines of these progressive structures. It is considerable too that Nietzsche, although not constructing a general and elaborated cultural theory on the basis of his ideas relating to Greek culture, mentioned the principle of "perpetual return", which has become a key idea in Spengler's theory. Nevertheless, it was a big question for me, whether it is possible that those progressive cultures are brought into motion by a duality of two contrasting principles or forces. Nietzsche's idea must be a possible solution, if we consider numerous further positions relating to culture and humanity. Namely, Huizinga perceived that so-called antithetical groups generate the development of culture, [22] Jung, on the basis of a statement of Heraclitus, also emphasized that circumstance, that antithetic psychical energies set spiritual progress in motion.[23] It is also not indifferent that Karl Löwith, on the basis of Hegel's idea, supposed that the contra-Asiatic spirit of the West lies hidden in the critical attitude. [24] However, criticism needs different, conflicting values and views, which are in most cases held by various national entities.

A model appeared in my thoughts on the basis of these considerations. I presume two modes of existence of cultures. One is a cyclical, progressive cultural form that is determined by the duality of two cultural entities. The other is a stationary, quite monistic structure, wherein this kind of sharp duality is missing, although there can be a certain plurality. However, a main cultural entity dominates this plurality in a hegemonic way and the other entities do not pose a serious challenge to it.

[22] Johan Huizinga, *Homo Ludens: a study of the play element in culture*, London, Maurice Temple Smith Ltd., 1970, pp. 66–74.

[23] Carl Gustav Jung, *Über die Psychologie des Unbewussten*, Zürich, Rascher, 1943, pp. 95–105.

[24] Karl Löwith, "Der Europäische Nihilismus", in: *Sämtliche Schriften*, Vol. II, Stuttgart, Metzler, 1983, p. 538.

In my interpretation Mesopotamian (Sumerian-Akkadian), Greek (Pelasgian-Hellene), Roman (Etruscan-Italic), and Western (Mediterranean-Northern) cultures are dualistic-progressive cultural systems. In these cultural areas two entities coexist in a quite balanced way, although one of them is (or was) more determinant at the beginning. The other entity could become emancipated only gradually, during quite a long process. The culminations of these cultures can be realized when their contrasting principles and views penetrate, impregnate, and complement each other. This event can result in highly considerable, moreover emblematic phenomena. As I suppose, these contrasting views are the idealistic and materialistic attitudes in Mesopotamia shaping a special theology and epics with problems of life and death. The main question of the Gilgamesh epic is the first manifestation of a thinking which will be called "Western" in later epochs. Death and the ending of life became connected with the value of life in this epic, as this problem would later be treated in the legend of Orpheus or by Goethe. Life and death are not detached so sharply in Eastern religious philosophies.

These contrasting principles are chaos and order as spiritual forces in the Greek culture, forming tragedy as a genre, as Nietzsche established.[25] However it is thought-provoking that Greek sculpture transformed starting from an Apollonian-character approaching to a Dionysian-spirit, while expression became feminine leaving previous masculine characters. I agree with Julius Evola that anxiety and imperialistic attitude were the main principles of Rome. [26] These principles resulted in an especially sophisticated legal system, which took its formality from anxiety, and its power-character from the imperialistic attitude. Finally emotion and analytical rationality must be principles of Western culture creating polyphonic, contra-punctual, instrumental music. These emblematic genres mean wholly new phenomena of human culture, not resembling anything existing earlier.

However nowadays I presume, there is a totally new dual-progressive cultural entity emerging, namely Latin-America which Huntington characterized as an independent civilization.[27] He only mentioned this entity with its determining Catholic character and its integrated ancient cultural elements, but I argue that the recent development of South-America is connected with its dual character, namely with the duality of Western and aboriginal Indian cultural principles. The rise of this cultural area is realizable in economic and literal areas alike.

[25] Friedrich Nietzsche, *The Birth of Tragedy*, Arlington, VA. Richer Resources Publications, 2009.

[26] Julius Evola, *Revolt against the modern world*, Rochester, Vt., Inner Traditions International, pp. 258–266, 1995 (1934).

[27] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York, Simon & Schuster, 1996, pp. 31–39.

Of course, the culminations of these cultures mean the classical condition of those cultural forms at the same time. However from this point the contrasted principles start approaching their opposites. But, as is known, things have different opposites from various aspects. For example, the Western emotional attitude gradually becomes speculative and often cynical and the rational habit of mind approaches an irrational attitude. We can see the mainstream of this process after the philosophy of Hegel from Schopenhauer to Freud, Jung and the more modern intellectual efforts relating to instinctive phenomena, while the emotionally rooted arts become abstract, constructed and experimental. In Greece tragedy transformed into comedy and order– and force-ideal turned into enervation in Hellenistic sculpture. Roman imperialism turned to a defensive spiritual form wherein anxiety dissolved too, namely in Christian trust towards God. There are some sculptural and epochal signs concerning this transformation in Sumerian-Akkadian Mesopotamia, especially in the commercialization of culture before rise of Assyrian Empire.

During these transformations the spiritual capitals of these cultures shift to relatively "tabula rasa" territories, where intellectual processes can develop further being unaffected by the restrictions of traditions. The Hittite Empire so became the cultural center of Mesopotamian-rooted civilization after the great time of Babylon mediating Sumerian-Akkadian culture to Greece and Italy. Likewise, Alexandria formed the most important Greek cultural center when Athens declined, and Byzantium became the real capital of the empire while Rome perished. North-America could rise from the 18th century representing and diffusing a new European spirit.

There are the stationary cultures opposite to these dual-cyclical forms. These stationary cultural systems are relatively monistic, and they have a very long lifespan. In my interpretation Chinese, Indian, Japanese and more or less Islamic cultures are such cultural systems. As I mentioned, in these cultural regions there can be some plurality, and elements of this plurality can also have different origins. However, the significant spiritual opposites and contrasts are missing in these systems and main cultural entities can assimilate different influences, as China imbibed Mongolian and Central-Asian impacts. Although these influences were significant sometimes, they never acquired an importance compared to autochthonic elements. And there can be lot of nations and languages in India, but Hinduism and its spirit penetrate all societies, representing about 80 percent of the population and having a hegemonic position. Similarly Islamic culture could receive various cultural phenomena into itself from Arabian to Persian or Turkish elements, but after this it did not leave any alternatives besides itself, providing its hegemony not only culturally but in a military sense too. As we know Christianization in the West was not so totally independent of southern inquisitions. Namely we

know among others the Nibelung and Edda sagas have been preserved moreover by presumably ecclesiastical people[28] and Rome represented "only" spiritual, religious and cultural primacy and did not have a military force against the Northern regions of Europe.

In monistic-stationary cultures there is no considerable differentiation of cultural phenomena, because differentiation needs a critical attitude, which takes its origin from a real plurality. However this critical view cannot be developed in a monistic-hegemonic medium. Painting, philosophy, religion, architecture, arts and scientific "disciplines" are not in a separated state in these cultural systems. These phenomena exist only as different sides of the same spiritual reality, preserving its classical forms and avoiding autotelic innovation. It is highly characteristic that adoption, example-following, respect for customs and traditionalism are more significant in monistic-stationary cultures than they are in the West. Moreover the role of separate, autonomous law is not so important in these areas as it is in Western culture. It is a big question, whether the importance of law is connected with the heterogeneity of a culture. But I tend to suppose that cultural diversity within a civilization heightens the role of law as it seems in the melting pot, namely in the USA where Campos could say even there is jurismania.[29]

6. LEGAL HISTORICAL AND HUMAN ETHOLOGICAL CONSIDERATIONS TO THE CRYSTALLIZATION OF LAW

Ludwig Gumplowicz created an especially interesting theory about the birth of state and law.[30] In his interpretation, the state always came into existence through a fight between different "races" (properly speaking, national entities). According to Gumplowicz the lower classes of societies are originally inhabitants of a conquered territory. This population has been submitted to conquerors, but it gradually became similar to the winners culturally. Thus, a nation can come into existence even without the disappearance of the original social differences. Law emerges as an instrument for maintaining the relationship of domination, substituting personally realized and enforced dependence. However, the law could become a very efficient weapon for the lower classes to obtain their emancipation later, helping the development of the political nation. This highly

[28] Nibelung saga probably by Konrad writer, who was writer of bishop of Passau, Pilgrim in 10th or an anonymous poet at the bishop's court in 12th century; Edda saga by Brynjólfur Sveinsson bishop in 17th century.

[29] Paul F. Campos, *Jurismania: The Madness of American Law*, New York, Oxford University Press, 1998.

[30] Ludwig Gumplowicz, *Der Rassenfampf. Sociologische Untersuchungen*, Innsbruck, Verlag der Wagnerische Univ. Buchhandlung, 1909, p. 218.

witty and attractive theory has numerous elements of the truth, but it does not take into account the natural cooperation between nations and the instinctive inclination towards obedience[31] within groups, independent of whether it operates in inter– or intra-cultural relations. However this ingenious legal theorem is a very exciting and valuable contribution to the knowledge of social progress and at the same time is highly relevant from the aspect of philosophy of history.

Considering that the ideas of Ortega are very similar to Gumplowicz's thoughts, I must suppose Ortega knew of Gumplowicz's theory at least indirectly. In spite of the nationalist attitude of the beginning of 20th century, Ortega thought that the state is not a consequence of national development and progress. Just to the contrary, nations have been formed by states.[32] These powers, namely states, can force different populations to coexist by providing common aims for them. This is the spiritual and physical factor that shapes a nation from various, formless groups. Ortega mentioned for example France, which consisted of numerous "nations" before a central will formed them, creating French nation. Ortega's idea is very important for the philosophy of history as well as for legal philosophy. Namely, it can illuminate the nature of national progress and the essence of development of state and law.

If we accept that the state is connected with a national plurality and we suppose a close connection between state and law, we can also accept that the rise of law needs a cultural heterogeneity. Zlinszky inquired into a highly ancient period of law, namely the origin of Roman law. The problem of the beginning of Roman law is an especially reasonable question in light of our topic. How is it possible that the small and rudimentary Rome had a well-developed legal system highly early, when numerous huge and well advanced Eastern empires did not have such a sophisticated construction? Zlinszky marked the cultural and social heterogeneity of Rome as reason for the rise of law.[33] According to him, the population of Rome had wholly different origins and customs and unity of social practices lacked in Rome, so that in the beginning conflicts were not solved in a proper way. According to Zlinszky, the law substituted for customs. However he did not mark that cultural entity where the rules derived from. It is clear the law is a power-phenomenon. Thus, it is hardly credible that there was not a certain entity from where the rules took their origin. This cultural entity was Etruscan culture, which had hegem-

[31] Stanley Milgram, *Obedience to Authority: An Experimental View*, New York, Harper and Row, 1974.

[32] José Ortega y Gasset, *The Revolt of the Masses*, Notre Dame, Ind., University of Notre Dame Press, pp. 150–170, 1985 (1930).

[33] Zlinszky János, *Állam és jog az ősi Rómában*, Budapest, Akadémiai Kiadó, 1996.

ony from every aspect (culturally and as a military force) in Italy in the 8th and 7th century B.C..

I have already expounded on the relationship and similarity of formal-ritual-symbolic Etruscan religion to the institution of early Roman law (in iure cession, mantipatio, stipulation) in my other study. [34] Here I only wish to hint, that there are well known circumstances showing that, firstly, early Roman law had a religious origin,[35] and secondly Etruscan formal religion[36] thoroughly influenced Roman religion by its predictable processes and respect for Fate. Consequently, we can suppose that the roots of Roman law are worth researching in the area of Etruscan religion. Of course, that is another question, how the formality of Roman law dissolved and received a secular character during process of praetor peregrinus. However the essence of the phenomena is that the rise of law needed a complex cultural medium.

Thoughts of Gumplowicz, Ortega and Zlinszky concerning the emergence of state and law seem to refute that previous and recent conception wherein the law has been shaped in quite homogenous mediums of certain nations. These conceptions relating to the plural cultural origin of law do not get in conflict with Kohler's ideas (namely every culture creates such law for itself, which is adequate for its own nature and spirit),[37] because Kohler abstained for that interpretation, which identifies the concept of culture with the concept of national cultures.

I too tend to suppose the necessity of cultural heterogeneity relating to the rise of law wholly on the basis of human ethological knowledge. As I mentioned, rule following behavior is a biologically coded characteristic of humans, and it can exist especially consistently in small traditional groups. Eibl-Eibesfeldt showed that social rules are accepted by people fundamentally emotionally and by belief-like ideas, and are not followed on the basis of rational decisions. The constructional inclination or ability and sensitiveness to symbols of humans have an important role in this phenomenon. Namely the human clings to his own group as an entity and to the abstract idea of this group. Thus, this loyal manner and emotion concerns not only members of the group. The affection for the group operates through symbols, for example by adherence to the name of the group, the flag or other signs.

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[34] Szmodis Jenő, *A jog realitása (The Reality of the Law)*, Kairosz, Budapest, 2005.

[35] Gustav Demelius, *Untersuchungen aus dem römischem Civilrechte*, Weimar, Hermann Bühlau, 1856; Max Weber, *Economy and Society: an outline of interpretive sociology*, Berkeley, University of California Press, 1978.

[36] Massimo Pallottino, *The Etruscans*, London, Allen Lane, 1974, pp. 130–150.

[37] Joseph Kohler, *Das Recht als Kulturerscheinung*, Würzburg, Druck und Verlag Stahelschen Universitäts Buch & Kunsthandlung, 1885.

It is also a highly interesting phenomenon that the dominant individual can be substituted with abstract ideas or rules in human groups. [38] This is a modern human ethological knowledge about a highly ancient human fact, but Gumplowicz mentioned a similar process about 100 years ago. As he described his supposition, the relation of personal domination gradually transformed, shaping the domination of abstract institutions and rules during the rise of law and state.[39] However Gumplovicz did not suspect that, firstly this process has a prehistorical and evolutionary origin, and secondly this phenomenon has already existed in early, relatively homogenous groups as well.

A further characteristic of the human, indoctrinability, or a low degree of inclination to refuse commands, obedience, imitation, refers to the fact that human behavior is fundamentally rule-following in a more or less clear and firm rule– and custom-order, and the solutions to conflicts do not need physical force in most cases. Attachment to the group results in sensitiveness concerning the disapproval of the group, so this psychical normative aggression is fundamentally enough to control society. In these situations and circumstances the rules do not always appear in conceptual forms, but rule following behavioral practices can control and organize the order of little societies almost instinctively. Of course, the plurality and heterogeneity of social practices and rules appear in bigger communities (such as tribes or unions of tribes), so rule-following behavior cannot operate as involuntarily as it can in little groups. As I suspect, certain essential rules get confirmation by common cult and they appear as religious rules at this period of social evolution, namely in the social reality of tribes. Thus, common practices are fixed in an unconscious way or in belief-like ideas in small groups (genus), but these practices are embedded with an expressively religious character in a tribe or in an alliance of tribes.

As is generally known, religious rules can operate highly efficiently. If a religion creates and has a quite homogenous medium, its norms are respected as similar customs are followed in a traditional small group. Thus, various religions can provide obedience quite thoroughly and firmly in their own medium. Consequently, there is not a necessity to create expressively legal norms. However, if significantly different religious entities have to coexist lastingly, certain rules appear necessarily as legal norms. Thus, as I see, the law can precipitate or crystallize from mediums of religious or traditional rules, and this can happen only in heteronomous cultural and religious situations. This process is highly probable despite the fact that crystallized rules can gain support from a new, syncretized

[38] Irenäus Eibl-Eibesfeldt, *Human Ethology*, New York, Aldine de Gruyter, 1989, p. 345.

[39] Ludwig Gumplowicz, *Rasse und Staat*, Wien, Manz, 1875.

religion, as happened in Rome. Roman law remained in a religious medium for a long time after that, a special syncretic religion emerged from Etruscan fatalism and Italic active transcendent ideas.

It is also thought-provoking, that the role of law (with collections of legal customs, formal legislation and statutes) became significant in the West after great migrations. In my opinion the mixture of Mediterranean and Northern cultures means the beginning of Middle Age. The spirit of statutes and jurisdictional system had an ecclesiastical character providing a certain harmony between Christian morality, the old Roman cultural and spiritual aspirations and the pagan reality of new societies. The monarchies played an important role in the creation of this special synthetic balance with support of knowledge of highly efficient ecclesiastical practices relating to public administration. However the spirit of the Western law was fundamentally influenced by Christian morality and Biblical ideas at the beginning. Nevertheless the essence of this process is the emergence of law, which got a secular character and self-value after monarchies had aspired to emancipation from ecclesiastical power.

The difference between the Mediterranean and Northern cultural character became obvious during the events of the Reformation, and it is also visible when treating of economic problems. This fundamental duality of the cultural tradition of the West must be an important phenomenon during the crystallization of Western law, which got significant impacts from Roman law too. I think without this duality, Roman law would be dissolved in canonic law, as was visible in late antique legal progress.

Thus, we should regard the law not only as an independent organic consequence of a homogenous spiritual and cultural phenomenon and progress, but consider it as a crystallization from the values of different cultural entities.