

The Concept of Law in Biblical Narrative

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According to Charles Montesquieu (1689-1755), who was one of the first modern legal comparativists, law and religion have very similar functions – to guarantee morality, peace and tolerance in the given society. If a religion may not guarantee all this, it has to be done by law and other way around¹. In the XXth century relationship between law and religion was taken into account first of all by philosophy² and sociology (e.g. Max Weber), but in recent years also science of law had an ambition to say something about it³.

Paul Ricoeur's (1913-2005) ideas about looking for sources of evil in various narratives of ancient civilizations, including biblical stories and Greek mythology, inspired me to apply the same method in searching for the sources of the concept of law. This method helped me in better understanding the very origins of the modern concept of law and deserves to be developed further.

First, it should be noted that already in the Old (or First) Testament, especially in the Torah, we can find many different kinds of rules. For instance, relying on Ex 20-23 rules may be grouped into two different categories: *casuistic* and *apodictic*. “Casuistic law” applies rules and sanctions to very concrete cases: concerning relationships with slaves, punishment for different wounds and injuries, compensation for various thefts etc. On the other hand, the Prophetic books contain some critique for static and formal application of the Torah's *casuistic* rules (e.g. Ex 22, 20; 23, 9-12). The latter rules are proclaimed in the name of God and do not hold any sanctions. Frank Crüsemann considered these commands to be *apodictic* meta-norms or principles⁴. But this classification of rules does not help us to understand the very notion of law. In reconstructing the concept of law, I decided to look at the biblical story on “original sin” (Gen 3), because it is one of the oldest narratives of our civilization and rather similar narratives may be found in various different cultures. In this story we already observe the establishment of certain rules, their interpretation, violation and punishment. Thus, this narrative may also be interpreted as a *legal* story. In my

¹ Montesquieu. *Esprit des lois*. Paris, librairie de Firmin Didot Frères. 1856.

² E.g. see an interesting collection in *Annuario Filosofico Europeo. Diritto, giustizia e interpretazione*. Biblioteca di Cultura Moderna. Laterza. 1998

³ See e.g. collection of articles „*Deconstruction and the possibility of justice*“. Routledge. 1992

⁴ Joseph Ratzinger. *Jesus von Nazaret*. Libreria Editrice Vaticana. 2007.

opinion this story illustrates the very heart of the origin of the concept of law.

1. First of all, in this narrative we find certain *rules of human behavior*: God said, ‘You shall not eat of the fruit of the tree that is in the midst of the garden, neither shall you touch it, lest you die (Gen 3,3). Here we find some rules prohibiting or limiting certain behavior. These rules do not intend to regulate all possible types of human behavior, but appear when certain limits of this behavior are necessary. Moreover, these limits and prohibitions are not arbitrary but are justified by human needs – “you shall not eat ... lest you die.” In other words, the aim of these rules are directed to persons. Here law is not only instrumental in narrow sense, for it does not treat a human being as a mean, but serves for his/her welfare. It has to be said that the concept of law as a *set of rules* prevails in contemporary legal thinking (at least in civil law traditions).

2. Another feature of law, which we may grasp from the said story is *authority* and the *legitimacy* of this authority. The rules are established by God, who has the highest authority in this story and who does not need to justify his rules. “The serpent” in the narrative does not have the same authority for it can not establish the rules, but only raise questions about them. In contemporary Western legal traditions all public power has to come from the highest authority, which should have *sovereignty* (and which does not need to be justified) and has even some *sacral* features (think of the people, a parliament or a monarch). These bodies suppose to have the highest authority through the concept of sovereignty, which has theological roots. Moreover, the monarch can probably be directly related with sacral authority, but in a contemporary democracy also the parliament can be sacralized in a certain way (e.g. Lords Spiritual are members of the British Parliament).

3. Law has to be *promulgated* according to the said narrative. Rules are not only announced and promulgated publicly, but have to be *clear* and *unambiguous*. Therefore, the rules of human conduct are not to be only justified by the legislature, but should be rationally comprehensible. It is worth mentioning that the requirement of public promulgation of law and that law should be clear and comprehensible is among the commonly accepted principles of modern concept of law.

4. Another aspect of law, which I would like to mention is its *founding* nature. A new reality is *founded* by a word-logos: the prohibition to eat the fruit created completely new order or reality, which did not exist before and which may not later be ignored. Well-known principle *nulla poena sine lege* may be grasped from this act of prohibition in the narrative. At the same time a law paradoxically is *beyond the time*, for it appears together with human being and it is not possible to

grasp the very moment of its origin. It sometimes operates retrospectively from the future perspective. This aspect of law can be seen in a newly adopted Constitution or, for instance, in a custom which does not have a clear source and a definite time of birth. This *retrospective performative* aspect of law was analyzed by the French philosopher Jacques Derrida (1930-2004) in his “deconstructive” theory of justice⁵.

5. In looking at the nature of law we also have the possibility of *interpretation*: the serpent *interprets* the prohibition to eat the fruit. Here we can see that the law is immanently related with its interpretation, for it may not be found in the same way as objects of nature. It is commonly accepted that the modern concept of law (together with the concept of justice) may not be understood without the interpretive activity of judicial power and legal scholar. Although the meaning of the rule may be seen through glasses of certain tension between different possible significances, but in all cases the interpretation of rules has to be grounded on some reasonable methods, which may not arbitrary lead to opposite meaning of the word⁶. The famous idea that we have Constitution as much as it is officially interpreted by the courts is commonly accepted.

6. In the said story, law appears from one side as the rules of common behavior (Adam and Eve represent all humanity), but from the other side also contains some aspects of *individual or personal responsibility* and *accountability*. Adam and Eve are personally responsible for their activities according to the degree of their *guilt*. Therefore, the component of guilt-punishment is shown by the banishment from Paradise. As we see from the narrative, the punishment is closely connected with *violence*. Here we see the law's *efficiency* and inevitable *responsibility* as important principles of law. But we also note a certain paradox of law: on the one hand, it creates some rules, but on the other – it also creates the very possibility to break these rules. In other words – law creates the possibility of *unlawfulness*. Today, nobody questions the general and universal character of law or doubts personal accountability and efficiency as indispensable parts of its character. But it is not popular today to talk about the law's relationship with violence, especially when we are dealing with criminal law, for the latter emphasizes the *re-socialization* of the convicted, but not his/her punishment. But indeed, without the recognition of punishment and violence as important characters of law we may not reach our modern objectives of criminal law.

⁵ Jacques Derrida. *Force of law: „The Mystical Foundation of Authority“*. In „Deconstruction and the Possibility of Justice“. Routledge. New York. 1992. p. 3-29.

⁶ According to Marija Gimbutas, existence of the serpent and its efforts to give different meaning towards some established rules in the said story, shows certain possible conflict between new and more ancient religious narrative. See Marija Gimbutas. *Goddesses and Gods of Old Europe*. 1974. Quoted from Marija Gimbutienė. *Senoji Europa*. Mokslo ir enciklopedijų leidykla. Vilnius. 1996. p. 184.

7. Here we may also mention the law's *performative* character, which can be seen in the said biblical story. Law does not function by itself, but has *to be put into practice by someone*. In our case – the prohibition requires not only one's abstention from action, but also - some concrete positive action. This idea can be found in the letters of St. Paul, where he says that the “righteous before God” are not those who just hear the law, but those who obey it (Rom 2, 13). This idea is also found in Franz Kafka's “The Trial”, where it is shown that law only functions when it is personally realized⁷.

8. In this narrative we also see that law is related with *morals*. According to Kant law (through prohibitions) determines certain limits of human behavior and establishes rules of moral minimum. I would like to note that although legal positivism still tries to detach law from morals, a majority of theories of law today recognize at least some relationship with morals. Here we may also recall Kant's categorical imperative, which may be also explained as a moral principle justifying law: you should act only according to a maxim which at the same time could become a universal law (norm). Law's relationship with morality is also connected with *confidence* towards legal order. Law may not be enforced only from above, it requires a certain degree of *loyalty* and *good will*.

9. In the said biblical story we may also observe a certain *mysticism*: it is not explained why the fruits of one tree are poisonous. As Montaigne has stated, the mysticism of law as a duty to follow the rules occurs not because they are just, but because they are the laws⁸. Moreover, every public authority tries to legitimize itself by a certain mysticism or myth: the divine concept of monarchy, a nation's history and traditions or sovereignty of the people. Relying on Montaigne, Derrida asserts that the mysticism of law reveals itself especially in a (legal) custom: no one knows the origin of a particular custom, but everyone follows it because of the tradition.

10. In the end of this legal reconstruction of the said narrative I would like to mention that *justice* is one of the main aspects of law. The concept of justice, which we find in the said biblical story may be opposed with the “formal” justice of Greek myths or even of other biblical stories, where the Talion principle of an “eye for an eye” prevails. But the story of “original sin” may be interpreted in the way, that God for the sake of mercy and compassion breaks his own law: promised capital punishment is “substituted” by exile or by “life imprisonment”. Here we see that this kind of justice

⁷ Franz Kafka. *Der Prozess*. Frankfurt am Main und Hamburg. 1960. On the other hand it is interesting to mention here one Chinese philosopher's assertion that “passive Golden Rule” (do not do others what you would not want others to do unto you) routed in Judaism and Confucianism is more welcomed in processes of dialog than Christian-routed “active Golden Rule” (doing unto others what you would like others to do unto you). Tu Weiming. *Cultural diversity, intercivilizational dialog, and harmony – a Confucian perspective*. In Plenary session papers. IVR 24th World Congress in Beijing. Global harmony and rule of law. p. 43.

⁸ Cited from Jacques Derrida. *Force of Law: The „Mystical Foundation of Authority“*. In *Deconstruction and the possibility of justice*. Routledge. New York. 1992. p. 11-12.

let us even to break the law or to go beyond it. In this context we may mention the act of *grace* born in the monarchies already in the Middle Ages, which is used even in contemporary democracies. Moreover, we can recognize the principle of re-socialization here: a man is exiled in order to be “re-formed” and so that his guilt would be redeemed. In this story justice emerges as a meta or extra legal category, but its meaning is revealed rather by *via negativa* and not as a certain metaphysical definition.

In summarizing this short survey one may note that the essential characters of contemporary concept of law are to be founded in the biblical narrative of *original sin*. Looking at law through the glasses of this biblical story helps us not only to note the “unlawful” character of law, but also to find two extra-legal sides of law: *justice* as law's interior side and *violence* as its exterior side. As Pascale noted, law without justice becomes arbitrary, but justice without force and violence is inefficient⁹.

⁹ Quoted from Jacques Derrida. op. cit. p. 12-13.