

Historical and
Philosophical
Foundations of
European Legal
Culture

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Edited by

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Motto: *Ius est ars boni et aequi* (Ulpianus, D. 1, 1, 1).

*To those who built, step by step, our legal heritage in Europe;
also to those who led monotonous lives in the hope of
doing a good legal job and of living an honest life;
and for those who must keep up with the Heritage.*



The picture of the Coliseum. "The Truth about God" by Troy Devine.

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INTRODUCTION

I

Of course, actions speak louder than words, but this book is also an action. The book with a title "Historical and Philosophical Foundations of European Legal Culture" examines, on the one side, the historical, theoretical, and axiological foundations of the European legal culture, and on the other side, practical impact of these origins on current European law and legal ways of thinking in Europe. The book includes considerations about the history of law as well contemporary legal issues. The book consists of seven chapters. The details about each chapter are in part II of this Introduction.

The Thesis. Generally speaking, in this book it is claimed that it can be spoken of the one European legal culture in terms of the common origins (Roman law, Greek philosophy, Medieval jurisprudence as the *ius commune*), but this is also correct to talk about national legal cultures and traditions in Europe (like the French legal tradition etc.). However, to understand the present day law and legal profession, it is necessary to go back to the values, theories, and thinkers important for European law from ancient times to the 19th century. The book not only presents the theoretical and historical issues of the European legal culture but also acquaints the audience with the true axiological foundations of our contemporary legal institutions, and the methods of legal thinking in Europe. It is clear that many of our current legal concepts and institutions come from Aristotle, Ulpian, Aquinas, Hobbes or Savigny. Of course, we are aware of the recent impact coming from common law scholars (like Dworkin). However, we focus on "more European" heroes.

The Authors and the justification of the choice of their topics. This work makes some important links between the past of law and new challenges and problems in European law as well. What is crucial is that the recognised Authors come from different countries and some of them have double cultural or national identities or belongings. It takes two to tango. The writers come from the Czech Republic, Finland, Poland, France, Italy, and Taiwan. Their perspectives are also full of subtle nuances in understanding of the essence of the European legal culture. While writing about the European legal culture we choose such topics in

our chapters we think are the most important and relevant for our legal heritage in Europe and legal practice nowadays. This is a substantially consistent book treating important problems of the European legal culture. Starting with Plato, going to Justinian, Medieval scholars but also Hobbes and Spinoza, making references to Savigny and modern scholars from both France or Germany, it seems logical in terms of European legal traditions. I guess that, on the one hand, considerations on relations between virtue, justice and law, and on the other hand, problems concerning legal interpretation and legal ways of thinking or argumentation understood as a practical job of lawyers, are the clue, the *heart*, of the European legal culture.

This book may be understood as a concise legal-theoretical-philosophical-historical monograph on the European legal culture. The most important parts or elements of this culture are presented in this book. Not giving the benefit of the doubt, let us take a look at more details.

The Content: a link between the chosen topics and the main idea of the book. To understand who we are as contemporary European lawyers, as said, the Authors go back not only to Plato, Ulpian, Justinian or Medieval canonists and jurists like Baldus or Bartolus, but also bravely "jump" to Savigny's canons and the 19th century French school of free research or analyse the actual place and role of European law and its principles like the proportionality principle, or they focus on European legal culture in domestic and international law. Notwithstanding this, the idea of the unity of the European legal culture understood as a set of ideas, principles, concepts, attitudes, and methodologies is visible behind each of the seven chapters. Here come many references to Greek philosophers, Roman lawyers or Medieval canonists and early modern philosophers or natural law thinkers. It is important to say that for legal theory in Europe, the 19th century was a very ground-breaking age: with the great codifications and modern legal concepts, and new rules of interpretation. But the 19th century scholars were impressed by Roman law and the *ius commune*. Also the 20th century legal thought with Kelsen or the realists seems essential. So is the fragmented circle of ideas that is open for the new¹.

That said, but now more precisely speaking, in this book, we start with Plato's considerations on virtue and law (see: chapter I). Why Plato? We do think that there is no Aristotle without Plato, and there is no St. Thomas without Aristotle, and there are no European theories of natural rights

¹ For example, Savigny was rejected by Géný, who was rejected by Kelsen, who was rejected by American and Scandinavian realists, who were rejected by the institutional positivists, who are rejected by the postmodernists etc.

without St. Thomas, and there are no 20th century human rights without many theories of natural rights and natural law, inspired by St. Thomas or ancient philosophers. It is difficult to imagine any European legal culture without human rights coming from human dignity nowadays. Afterwards, we pay attention to Justinian's Code's impact on legal culture in Europe, especially in Medieval times, but not only in those times - we claim Justinian's heritage is still important. Law is still about justice (see: chapter II). Then we focus on the concepts of law (*ius, lex*) in the early modern theory of law - in Aquinas, Hobbes, and Spinoza. We think Spinoza might have been like a real founding father of positive liberties in both the early modern theory of law and political theory, especially in context of freedom of thought. We think we could even say about this forgotten scholar: Spinoza was a founding father of liberalism (see: chapter III). Such liberties like the freedom of thought have been crucial in the European legal culture, European political theory and European culture at all. Furthermore, principles of legal interpretation and legal reasoning in the 19th century both Germany (Savigny and other German scholars) and France (the dogmatic method; the School of free research) are important part of our story as well (respectively, see: chapter IV and chapter V). These questions are significant in this place: How do we interpret a law? And how do we think as lawyers? Finally, we consider the problem of the origins of the principle of proportionality in European law (see: chapter VI), as this principle is the clue in citizen state relations from points of view of the individual and state authorities. In the end, as a last straw, we consider what the place of the European legal culture in international (and domestic) law is (see: chapter VII). How have we been learnt and how do we promote our European legal concepts? Why are we between legality and humanity?

The structure of this story is logical, and the Reader should feel that this story is consistent.

The Reader. The book is especially dedicated to scholars and students interested in legal history, jurisprudence (legal theory and philosophy), and European law, in particular, in context of the origins of the European legal culture. Moreover, in fact, this work is addressed to all lawyers working in both the common law and the civil law traditions who want to be really aware of our legal heritage in Europe. It is dedicated to everybody who wants to know more about Europe and its legal culture. The question why we, lawyers in Europe, think as we think is answered in this book. However, this is true is that the perspective presented in the book is more "continental", what makes the content maybe even more interesting for common law scholars, students, and practitioners as well.

This book is about the phenomenon, which seems to be like a *bridge* between the past and the future. We cross that bridge when we come to it. What is succinct we also focus on the present situation of law and legal science in Europe. This book is not to beat around the bush.

II

Here are the details concerning each chapter in the book.

In a chapter entitled "**Virtue and Law in Plato's *Laws*" (chapter I)** ChiShing Chen claims that it is generally agreed that *Laws* is the last work of the dialogues of Plato. The concept of virtue as the harmonious relationship between one's reason and passion discussed in Plato's *Laws* reflects his final ideas regarding human virtue and how one's virtue can be cultivated by the laws. In this paper, Chen first shows how Plato derives the idea that the purpose of the law is to cultivate the virtues of the citizens; and then he discusses how Plato designs his laws to accomplish such goal.

In a chapter entitled "**What Is Jurisprudence? Is It Still Justinian's 'Science of Things Divine and Human'? Is It Still 'the Science of the Just and the Unjust'?" (chapter II)** Dawid Bunikowski points out that the paper is to answer the question what jurisprudence is. Is it still "the science of things divine and human", as it was wonderfully stated in the Code of Justinian in 529, following Roman law (Roman jurisprudence) and great Roman jurists like Ulpian? Is jurisprudence still "the science of the just and the unjust", as we read in the Code? Bunikowski proposes to go back to Justinian's Compilation, Book I. Of Persons, I. Justice and Law: *Justice is the constant and perpetual wish to render every one his due. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.* The thesis is that our contemporary Western jurisprudence is rotten: we lost metaphysics in law, especially after the time of the Salamanca school of natural law. The concept of virtue based on Thomistic Aristotelianism was essentially redefined by the Northern school of natural law (Grotius, Pufendorf, Wolff etc.). *Ius est ars boni et aequi* (Ulpianus, D. 1, 1, 1) is a slogan, since moral philosophy as "a mother of law" (Baldus, *Commentaria* to D. I.I.2) seems dubious. The necessity of going back to the three roots and the true origins of jurisprudence, i.e. to the heritage of Areopagus, Colosseum, and Golgotha, is becoming so obvious. This was and is Justinian's heritage. Due to the nature of things and scope of such a subject, this is the largest book chapter.

In a chapter entitled "**The Labour Pains of the Early Modern Concept of Law: *Ius* and *Lex* in Aquinas, Hobbes, and Spinoza**" (chapter III) Seppo Sajama explains the concepts of "*ius*" and "*lex*" in both Hobbes and Spinoza. The paper makes also references to the relevant conception by St. Thomas Aquinas. This is stated that Thomas Hobbes's distinction between *right* and *law* (*ius* and *lex*) is a central part of his social contract theory. The purpose of this paper is to examine the usefulness of Hobbes's distinction, to contrast it with Baruch Spinoza's understanding of the same concepts, and to show that the doctrine of contract is the crucial point at which Hobbes and Spinoza part ways. It is also argued that Spinoza was right in his criticism of two central doctrines closely connected with Hobbes's *ius* / *lex* distinction: those concerning inalienable rights and the absolute bindingness of contracts. Hobbes's distinction never gained popularity, but traces of Spinoza's ideas can be found within the Continental tradition of political theory.

In a chapter entitled "**Canones of Savigny as the Basis for Interpretation of the Law in European Continental Legal Culture**" (chapter IV) Jan Winttr shows that codified continental law is traditionally interpreted by four classical interpretive methods, firstly introduced collectively by Savigny. Although, for example, France uses a classical two-element system (*interpretatio grammatica* and *interpretation logica*) and Poland uses a three-element system (see above), we can always find basic ideas of grammatical, systematic, historical and teleological interpretation. The paper aims to show that these four methods form the core of European legal culture. The four principles are partly derived from Roman law and partly from the 19th century jurisprudence, and all the various legal arguments can be subsumed under one of them. The distinction between *verba legis* and *ratio legis* stems yet from Roman Law. The Digest contains maxims which prefer grammatical interpretation and maxims which prefer teleological interpretation as well. The distinction between *verba legis* versus *ratio legis* is the basis of the modern jurisprudence. That corresponds to *interpretatio grammatica* and *interpretation logica* in the work of Thomasius and Boehmer. Systematic and historical methods of interpretation as separate elements are promoted mainly in the 19th century when emphasised by Savigny. We can find similar principles in the Digest as well. The deliberate and systematic creating of complex legal codes as well as the development of legal theory in the 19th century led to the invention of abstract legal concepts and their systematics, settling ground for systematic interpretation as we know it today. Today's historical interpretation, searching for intentions of the legislator in the explanatory memoranda to bills, preparatory materials of

legislative committees as well as stenographic protocols of parliamentary debates, is not conceivable without public access to those documents. Such documents started first being published during the 19th century. In 1835 von Wächter formulates his so-called *Paktentheorie*. The individual methodologies differ by their rules of priority, i.e. which method is to be preferred in the case of collision. For example while the Polish legal theory prefers grammatical interpretation the German legal theory emphasises teleological interpretation. However, the practical differences are not significant – even the Polish admit departing from the wording of statues in cases when the text is absurd or the result of an obvious legislative error. The four classical interpretation methods are suitable to continuously serve as the ground principles of legal interpretation in the European legal culture while developing arguments relating to priority rules applicable to those methods remains as meaningful as ever.

In a chapter entitled "**The French Legal Dogmatic Method and Its Critics around the 19th-20th Centuries**" (chapter V) Véronique Champeil-Desplats claims that the aim of the paper is to show that since the beginning of the 19th century, French legal science has been built on the model of the School of Exegesis (*Ecole de l'Exégèse*). This model is characterized by: a) a presentation of legal texts and codes: repetition; b) a legal method of interpretation: the search of the intention of the law-maker; c) a reasoning from legal text: the syllogism; d) a conception of the work of legal science: the formulation of principles. During the 19th century, this model was very influential in the world. It was quickly identified as *the* classical or dogmatic legal method. In the end of the 19th Century, strong reactions against it were observed and more generally against the formalisms of legal reasoning and legal science. Critics emerged and their ideas spread in numerous states: in France by the School of free research (*Ecole de la libre recherche*), in Germany by the School of the free law, in Austria, England, Italy, Scandinavian countries from the legal realism theories and in the USA by the criticism of the Mechanical jurisprudence and the adherents of sociological jurisprudence and American Realism. The paper shows that if these critics came from very heterogeneous philosophical, ideological and epistemological presumptions, they nonetheless shared a common faith in the emergence of new social sciences or in the epistemological and methodological renewals of others to change legal science, indeed, to build a "true" legal science. To the classical logico-deductive legal method was then opposed a more promising method associated to the emerging social sciences: the experimental method based on observation of reality, induction, and if possible, on prediction. Finally, in Europe as in the USA at this time, the

different attempts to found a new legal science had a common commitment to or a fetishism for “reality”. The aim is to identify the supposed “real” legal sources or what the normative authorities have actually done when they produced the law, in order to predict future legal decisions.

In a chapter entitled **"Principle of Proportionality as a Product of European Legal Culture"** (chapter VI) Pavel Ondřejek makes the argument that the principle of proportionality represents in many states a core principle for determining what limitation of a fundamental right might be considered in conformity with constitution and what may not. This principle is clearly a product of the European legal culture and despite the fact, that it originated in post-war German constitutional doctrine, its roots are older, going back at least to the Prussian administrative law of the 18th and 19th centuries. The idea of proportionality as a form of justice may be traced already in Antique philosophy. Research shows that key elements in promoting the proportionality principle are the products of German legal culture (e.g. human rights as objective order of values or central value of human dignity, substantive conception of state governed by law – *Rechtsstaat*). It is of particular importance to compare from this viewpoint the method of proportionality and the method of balancing applied in the US. Studies on proportionality and constitutional culture illustrate the principle of proportionality as a product of culture of justification as opposed to culture of authority. Differences in legal culture thus provide an answer to the question why the proportionality principle is not applied in the US constitutional law. Finally, the adoption of this method of constitutional reasoning in the Central and Eastern European (CEE) States after the democratic transition is discussed. Within this part the Author elaborates on previous studies on the democratic transition in CEE States. The key questions regarding the application of this principle involve questions on universality and neutrality of this principle as well as judicial deference towards a democratically elected legislator. All these questions arise both in theoretical research on this principle and in practical legal reasoning before courts.

In a chapter entitled **"European Legal Culture in Domestic and International Law: Formalism, Emotions and the Struggle for Humanity"** (chapter VII) Alberto Puppò aims to show that European legal culture is expressing two deeply different subcultures: he will call the domestic-oriented subculture “the culture of the formalistic Rule of Law”, and the universal-oriented subculture “the culture of humanity-based law”. The relevance of a culture depends on whether scholars have been educated and trained in dealing with domestic or international issues. Of

course, as a question of fact, it is not impossible that the same scholar has received training in both; therefore, it is obvious that the Author will not defend a metaphysical argument, but just a conventional or cultural one. It is probably true that when we think about legal culture the first thought is of legality. It is not necessary but it is a fact that in many European domestic legal systems, scholars and judges receive formalistic or legalistic legal education. The idea that the law is generally binding and that no one (not even the sovereign) can legitimately act without a legal authorization is probably *the point* of the social practice we normally call the Law; our language has captured such aspiration in the expression *the Rule of Law*. To the extent that international judges are often international scholars, they have a different view of their role. They cannot rely on the existence of a democratic government that deals with law reform. They have to play an active role as they have been educated to be reformers and not just the guarantors of the stability that characterizes legality and the *Rule of Law*. The potential struggle between these subcultures – that is, between legality and humanity – could be clarified by an analysis of how the influence of a legal subculture plays an important role in the fashioning of judicial (legal and moral) reasoning. The way in which legal scholars can deal with such a struggle depends on the weight they attribute to several factors, as the role of emotions in hard cases. As a conclusion the Author will take seriously the Kelsenian struggle between purity and universalism by showing how both subcultures could operate on the same author and have important effects on legal theories.

The book culminates in some concluding remarks consisting of also free thoughts on the future of the European legal culture.

The Editor,
Joensuu, North Karelia, on 9 June 2016



"School of Athens" by Raphael Sanzio, The Vatican Museum. Source: the Internet.

CHAPTER I

VIRTUE AND LAW IN PLATO'S *LAWS*

CHISHING CHEN*

Structure

Introduction

I. Soul and Image in Book Ten of *Laws*.

II. Habituation and the Virtue of the Citizens.

III. Reason and Passion in Plato's *Laws*.

Conclusion

Appendix 1: Ratio and proportion in the *Law* of Plato

Introduction

The approach Plato adopts for his writing of the *Laws* can be deciphered in book ten of the *Laws*, where he provides the rationale for, and enchantment with, piety and punishment for impiety. The Athenian starts with criticism of the conventional understanding of the relationship between *physis* and *nomos* (889), which believes that the regularity of heavenly bodies and their movements comes first and should be valued, whereas divine and human laws are conventional and arbitrary. On the contrary, the Athenian shows that souls, as the best motions that self-move and move other things, are primary. Souls control the world; good souls cleave to divine reason and are

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perfectly virtuous; they are gods (899b)¹ who generate harmony; while evil souls associate with unreason and, hence, produce chaos.

We mortals cannot see souls, mortal or divine, or their reason; we can only do our best to understand the images of the grand design produced by divine reason. The grand design of gods simply reserves better places for better souls, and its opposite abodes for base ones. Gods provide the grand design but do not dictate to humans the direction we are to take. Our human souls primarily determine, and are responsible for, the direction of the paths we take; ascending to get closer to the divine soul or descending to Hades (904b)². The best effort to imitate the divine grand design, the main purpose of *Laws*, is to promote virtue among the citizens³, and the better composition and concordance of reason and passion in the human soul.

Plato understands how citizens can be pulled by strong forces of all kinds, and that can offset easily his efforts to cultivate the virtue of the citizens. To counter such forces, Plato suggests many benign counterforce throughout the *Laws*; only then, he believes, can one deal with the most important task of the law: achieving harmony between reason and emotion.

In *Laws*, reason, spirit and appetite are hierarchically positioned in the human soul. The reasons presented in *Laws* aim to induce people in many ways to move upward; the nocturnal council represents the prime leading force in the continual search for the virtue needed for the polis. The council also guides law-making for the city with the overlapping membership of the Guardians of the law; since only a minority of the Guardians (ten out of

¹ *Athenian: Now consider all the stars and the moon and the years and the months and all the seasons: what can we do except repeat the same story? A soul or souls- and perfectly virtuous souls at that- have been shown to be the cause of all these phenomena, and whether it is by their living presence in matter that they direct all the heavens, or by some other means, we shall insist that these souls are gods. Can anybody admit all this and still put up with people who deny that 'everything is full of gods'?*

² *...Our King... Seeing all this he contrived a place for each constituent where it would most easily and effectively ensure the triumph of virtue and the defeat of vice throughout the universe. With this grand purpose in view he has worked out what sort of position, in what regions, should be assigned to a soul to match its changes of character; but he left it to the individual's acts of will to determine the direction of these changes.*

³ In the beginning of the *Laws*, the Athenian points out that promoting the virtue of the citizens should be the primary aim of the legislator, when the tradition of the laws are reviewed (630b-e). Chapter ten of the *Laws* simply provides the theoretical foundation.

thirty seven, 961, 752e) are also councilors in the nocturnal council their influence in the nocturnal council is mainly persuasive in nature.

Spirit, as associated with reason, advances one's character with the virtue of courage, and secures one's fight against all wars, external and internal, including winning over one's excessive appetites. Appetite itself seems to lose its motivating force⁴ and can only be helped by reason or spirit, or checked by fear and punishment. Overall, Plato recognizes the importance of habituation, both in the right and the wrong direction, and introduces many ways to facilitate good habituation for the citizens, especially when they are young.

I. Soul and Image in Book Ten of *Laws*

It is important to first obtain a correct understanding as to how Plato approaches designing and writing his *Laws*, in order to comprehend the meaning of virtue and law, and reason and passion in his last dialog. I believe that Plato does have a well-developed theory supporting his last endeavor⁵. I believe that it is important for us to understand *Republic*, better, since it substantially develops the ideas of images and imitation and is consistent with the ideas one finds in *Laws*⁶.

In the early dialogues, Socrates is famous for his practice of elenchus which emphasizes the examination of one's soul. In *Republic*, Plato equally emphasizes both the examination and analysis of one's soul and the object or image one's soul ponders. I believe Plato makes an original contribution in *Republic* on top of the Socratic practice of examining one's soul through elenchus. The ideas of images and imitation are further developed by Plato

⁴ I agree with Bobonich that, unlike the *Republic*, emotion in the *Laws* is not an agency-like part of the soul shaping one's final choice. See Ch. Bobonich, *Plato's utopia recast: his later ethics and politics*, Oxford 2002, especially p. 259. Desire may still provide motivation to facilitate all the institutions of habituation devised throughout the dialogue of the *Laws*, Plato may simply not want to articulate such motivation again.

⁵ I discuss such theory in the *laws* only. But I believe the theory has a long development and can be traced back at least to Plato's later dialogs, for example, the division of the divine and human. Original and imitation are important concepts for the *laws*; they are also discussed but not articulated in *Sophist*. Please see my working paper, Plato the Integrator – A Study of *Theaetetus* and *Sophist*.

⁶ I further elaborate these ideas in my working paper, Justice and Law in *Republic* and *Mencius*.

as a result. The idea of rule of law can also be found in *Republic* and is well maintained in *Laws*⁷.

In Book Ten of *Laws*, Plato, through the Athenian, states that everything that can be perceived is produced through a series of stages, with the impulses in the soul as their primary initiation (894a)⁸. Thus, the dialog *Laws*, as a piece of writing that we can read, was first initiated in Plato's soul. The *Laws* is the path to our understanding what was in Plato's mind and what he tried to convey to us.

What is equally important, though, is that Plato believes that his production of the *Laws* was the result of his best effort to imitate what would be produced by the soul that is most divine and virtuous, i.e. the gods⁹. We humans cannot directly perceive divine reason. Only through the images of what is produced by gods, i.e. the cosmos, can we try to understand the underlying reasons (898de)¹⁰. The *Laws* therefore represent two of Plato's best efforts: to understand the divine reason regarding what human laws should be; and put his understanding in an accessible way, i.e. in the *Laws*, for us to understand. In that sense, the *Laws* is what Plato believes the best human laws one can come up with, unless one can successfully challenge him¹¹.

⁷ *Ibidem*.

⁸ Now, what conditions are always present when anything is produced? Clearly, an initial impulse grows and reaches the second stage and then the third stage out of the second, finally (at the third stage) presenting percipient beings with something to perceive. This then is the process of change and alteration to which everything owes its birth.

⁹ Soul can cleave to the divine reason to guide everything to an appropriate and successful conclusion (897ab). However, mortal eyes will not be able to look upon reason; we can only look at an image of the object (897de).

¹⁰ Athenian: ... Everyone can see its body, but no one can see its soul-not that you could see the soul of any other creature, living or dying. Nevertheless, there are good grounds for believing that we are in fact held in the embrace of some such thing though it is totally below the level of our bodily senses, and is perceptible by reason alone. So by reason and understanding let's get hold of a new point about the soul.

¹¹ Two articles of Laks inspired me. A. Laks, *In What Sense Is the City of the Laws a Second Best One?* [in:] F. Lisi (ed.), *Plato's Laws and its historical Significance*, Sankt Augustin 2001, pp. 107-114; A. Laks, *Plato's "Truest Tragedy", Laws Book 7, 817a-D'*, [in:] C. Bobonich (ed.), *Plato's Laws: A Critical Guide*, Cambridge 2010, pp. 217-231. These two papers are also related to my argument. Firstly, since every reasonable effort is one that best imitates the grand design of the gods, Plato is truly

In Book Ten of *Laws*, Plato again sketches the divine grand design. He believes it is very simple: “ensure the triumph of virtue and defeat of vice throughout the universe” (904b). Accordingly, the gods reserve better and higher places for better and virtuous souls and worse and base places for the evil and degenerate ones. However, it is up to the human souls to decide on their direction. The *Laws* therefore focus on the virtue of the citizens, and help in every possible way to direct citizens to ascend to the good.

II. Habituation and the Virtue of the Citizens

In the *Laws*, Plato still treats reason as the most important capacity for one to raise one's personal status. A knowing soul understands how to head toward virtue and thus become a better soul. Understanding also secures one's virtuous status since one does not reach the better status merely by chance, and it may not last. However, at the same time, Plato recognizes very well in the *Laws* that reason can only present a mild force that is much weaker to the many strong attractions leading one to deviate from the path to virtue. As a response, Plato devises many institutions and practices throughout the *Laws* to offset the forces that will pull one away from virtue.

In Book One of the *Laws* (644d-645c), Plato suggests that we should see ourselves as puppets of the gods. We are pulled in all directions by different pressures of these strings and as a result, we act unstably¹². But one of the

open in the sense to leave his *Laws* to someone else and to be amended accordingly if one can come up with a better imitation. This point is best reflected in his best tragedy-related argument. Secondly, the City of the *Laws* is the best in the sense of the best imitation of divine reason; Plato believes that's what one should do and what one can best do. But it does not mean that there is no room left for improvement. On the contrary, we humans can always improve and get closer to the divine (become god-like). Therefore, the *Laws* can be, and should be, examined to see how and where the City of the Law can be further built. In Book Ten, Plato says there are always three aspects; the first is what the object actually is, the second is the definition and the third is the name (895d); these can best describe what Plato has in mind.

¹² Again, here I do not mean the pulling comes from the agency-like part of soul. The individual as a whole is pulled. I think the theological discussion in Book Ten of the *Laws* also provides us with the clue why that is the case. The *Laws* focuses on the ascending path of the human soul with the help of divine reason. The right direction that can uplift one toward virtue is decisive.

cords, the golden, divine one, pulls us toward the direction based on calculation. The force of such pulling, however, is mild since it is reasonable. We therefore need further help in order to have the pull of the golden cord prevail. I think the habituating practices Plato devises in the *Laws* are needed to fight against other strong emotional pulling¹³ in us, and to clear the way for the gold cord.

In reviewing why the Cretan laws have such a high reputation in the Greek world, Plato believes one must interpret the lessons of history in such a way that we can learn from traditions. He believes that the reason why Cretan laws are great is because they follow the right priorities and teach the Cretan people accordingly. The best divine benefit is good judgment, but mortals are not born with such benefit. The Cretan laws are right to aim at the second best divine benefit: the “habitual self-control of a soul that uses reason” (631c). I believe such interpretation by Plato to explain the reason why Cretan laws in the past proved successful, reflects an important belief held by Plato: laws should help the citizens in every way to form the important habit of resorting to reason for self-control. Plato thus does not simply rely on the persuasiveness of the laws; in the *Laws*, but also widely adopts the device of habituation for the cultivation of the virtue of the citizens.

Generally speaking, Plato wants people to live under the guidance of the *Laws* in an environment which exhibits proportionality to the best degree one can achieve¹⁴. Education that is not based on reason can be seen as a kind of habituation; it is especially necessary for helping children to respond in a measured way without first understanding the reason why (653). However, habituation alone cannot do the job for virtue cultivation. In order to understand how Plato harmonizes reason and passion among the

¹³ One such pulling is discussed in the beginning of Book Four when the future colony, Magnesia, is planned. The Athenian keeps Magnesia away from the sea since founding the state near the sea and asking the citizens of Magnesia to be virtuous requires ‘a very great savior indeed and lawgivers of divine stature would be needed to stop sophisticated and vicious characters developing on a grand scale’. (704d)

¹⁴ I trace Plato’s such effort in Appendix 1, with the understanding that I need a better explanation for the criteria of my selection. The dissertation of Kerch first points me to examine all the measured terms in the *Laws*. See T. Kerch, *Being dear to God: due measure and moderation in late Plato*, 2008 (Dissertation). But I think all these usages are not for the virtue of moderation, as Kerch thinks; rather they are institutions and practices for the purpose of habituation that Plato devises in the *Laws*.

citizens to better cultivate their virtue, one needs to examine the ideas of reason and passion in the *Laws*.

III. Reason and Passion in Plato's *Laws*

As discussed in section two, Plato believes that the divine design is simple: virtuous and better souls move upward. The decision whether or not to move upward depends on the individuals themselves. Since souls are the only ones that are capable of moving themselves and others, determining how to guide the souls of the citizens to head upward becomes the most challenging task of the *Laws*. The habituation discussed in the previous section contributes indirectly by offsetting the strong pulling effects of desire and emotion; and by providing a supportive environment to facilitate the proportionate thinking of the citizens. Work is still needed to address the concordance of reason and passion in the souls of the citizens and to lead them to the path that moves upward.

The purpose of the laws of the ideal state is to cultivate the virtues of the citizens. Since few or none of us is born with a sense of good judgment, we need to learn to be able to consistently respond in a measured way. The educational aim of the *Laws* is hence noticeable. The dialogue *Laws* explains that such a task addresses the citizens in the polis individually and as a whole; i.e. both the individual soul and the personified soul of all the people of the polis. I believe Plato has two general designs in mind in addressing the souls of people in general. Firstly, Plato understands the importance of the organization of the polis; if better people can be placed in leading positions, the polis and the citizens will be better off (744c)¹⁵. Secondly, laws should not simply be commands dictating or directing people on what to do and not do. Plato emphasizes the preambles of the laws, which are the text written before the rules and regulations of the laws. The preambles not only explain the rationale behind the laws and encourage people by addressing their sense of honor¹⁶, but also address the people through command as if the preambles and the laws are coming from a quasi-divine authority¹⁷.

¹⁵ *In short, the citizens must be esteemed and given office, so far as possible, on exactly equal terms of 'proportional inequality', so as to avoid ill-feeling.*

¹⁶ See J. Pradeau, *Colloquium 4: Enchanting the Souls on Plato's Conception of Law and "Preambles"*, [in:] *Proceedings of the Boston Area Colloquium of Ancient Philosophy* 2005, vol. 21, pp. 125-137.

¹⁷ See A. Nightingale, *Writing/Reading a Sacred Text: A Literary Interpretation of*

For example, in dealing with the care of orphans, the Athenian believes they should instruct the three Guardians on duty for the year to look after the orphans as though they were their own children. For the guidance of the officials and the guardians, a suitable preamble should be composed, as follows:

...a guardian should fear, in the first place, the gods above, who are aware how deprived orphans are, and secondly the souls of the departed, whose natural instinct is to watch with particular care over their own children, showing benevolence to people who respect them and hostility to those who treat them badly. ...A guardian or official with even the slightest sense has a duty to give close attention to all these warnings, and take great care over the training and education of orphans, helping them in every possible way, just as if he were contributing to the good of his own self and family. (927a-c)

The laws follow the preamble:

76. *[I]f a man refuses to comply, and harms a child deprived of its father or mother, he must pay double the damages that he would have to pay for a crime committed against a child with both parents living.*

...

77. *[I]f this law is contravened in such respects,*
 (a) *a guardian should be punished by his official,*
 (b) *an official should be summoned before the court of Select Judges by the guardian and punished by a fine of twice the damages as estimated by the court. (927d-928b)*

If a guardian is suspected of neglect or malpractice by the relatives or other citizens, he should be summoned before the same court.

78. *He must be fined four times the sum he is found to have taken, half the fine going to the child and half to the successful prosecutor (928c).*

When the orphan has grown up and concludes that he was badly treated by the guardian, he may bring a suit for incompetent guardianship within five years of its expiry.

79.

- (a) *If a guardian is found guilty, the court is to estimate what he is to suffer or pay;*
- (b) *if an official is found guilty of injuring the orphan*
 - (i) *through negligence, the court must assess how much he is to pay to the child;*
 - (ii) *by criminal conduct, then in addition to paying the sum assessed, he must be ejected from the office of Guardian of the Laws,... (928c-d)¹⁸.*

Plato believes that virtue is the result of a concord of reason and passion in the soul, when 'feelings of pleasure and affection, pain and hatred' are 'channeled in the right courses' (653a-c). Habituation is responsible for the correct channeling for children before they can understand the reasons why. After the child grows up, education is needed to account for the correct formation of one's feelings; i.e. '*hate what we ought to hate*' and '*love what we ought to love*' (653c)¹⁹.

The institution of the drinking party represents another idea and practice by which Plato teaches people how to be moderate and not to abuse their appetite (637, 673e). Plato believes it is better to let people drink and learn self-control than to forbid drinking. Such a drinking party provides people with the opportunity to experience going off-balance, and it trains people not to exceed their limits the next time. The drinking party shows Plato's idea of laws not as command and control, but rather that laws are tolerant of fault and provide opportunities to learn and improve²⁰. However, if one cannot control oneself after being given the opportunity to learn, fear and punishment are just reactions of the laws to the excessive desire and appetite of the citizens.

Courage is a much better element in the soul than desire and appetite for self-improvement. In *Laws*, courage helps one to fight against enemies within and without. Courage prevents one from being conquered by oneself, in the sense of giving up to pain and pleasure (633b-e). The problem with

¹⁸ See Plato, *The Laws*, translated by T. Saunders, Penguin 1970, pp. 469-472.

¹⁹ See C. Gill, *Plato and the Education of Character*, „Archiv für Geschichte der Philosophie“ 1985, vol. 67, Issue 1, pp. 1-26.

²⁰ ... *No: in general, the unjust man deserves just as much pity as any other sufferer. And you may pity the criminal whose disease is curable, and restrain and abate your anger, instead of persisting in it with the spitefulness of a shrew; but when you have to deal with complete and unmanageably vicious corruption, you must let your anger off its leash... (931c-d).*

courage is that it may not be controlled by reason. Plato believes that in such cases, what one needs is education. In the *Laws*, if one kills out of anger and not premeditation, the punishment is leaving the polis for a period. Such a person can be admitted back to the country if he can pass the examination of the officials on his return (866d-867e).

Reason is supreme in both the individual soul and polis as a whole. For the individual soul, education is the most important way to cultivate reason; the subjects of education include mathematics, geometry and astronomy (817-8)²¹. For the polis as a whole, determining what virtue is to be pursued should be the most important issue, and should be constantly explored and put into practice through the laws. In the *Laws*, Plato reserves such a task for the nocturnal council, the most important deliberative institution in his constitutional design. I believe the nocturnal council represents the element of dialectical examination for the polis, and it is the place where elenchus may be used to constantly pursue what is virtuous for the polis. I believe that the nocturnal council, serving its deliberative function for the city, preserves the important core idea of Socrates and Plato, that virtue should be constantly examined. The difference, however, is that the most able citizens of the polis are the ones to do the examining jobs in the *Laws*.

The members of the nocturnal council consist of some senior members of the Guardians of the Law and all the important officials who have left office, including the current and all the previous officials responsible for education.²² The overlapping of membership between the nocturnal council

²¹ In addition to formal education, legislation also serves the function of education through preambles as discussed. Officials should also, as a rule, articulate and explain as part of the administrative duties.

Athenian: Well then, isn't our doctrine going to be the same about all serious questions? If our guardians are going to be genuine guardians of the laws they must have genuine knowledge of their real nature; they must be articulate enough to explain the real difference between good actions and bad, and capable of sticking to the distinction in practice. (966a)

²² As Stalley points out, there are two accounts in *Laws* for the specification of the membership of the nocturnal council. See R. Stalley, *An Introduction to Plato's Laws*, Hackett 1983, especially p. 190.

... Its membership is to be: (1) those Priests who have won high distinction, (2) the ten Guardians of the Laws who are currently the most senior; (3) the Minister of Education for the time being, together with his predecessors in office... (951d-e) The ten Guardians of the Laws who are currently the eldest were to convene together with all persons who had won awards of distinction and the travelers who had gone abroad to see if they could

and other major branches of office means that what the nocturnal council finds to be good for the polis can be put into practice through persuasion, and not just by authority.²³

Conclusion

At the end of the *Laws*, the Athenian is invited to be a partner in the foundation of the state (969c). Plato believes his *Laws* represent the best interpretation of divine reason, but the dialogue cannot guarantee that the best polis will be developed as a result. In different times and places, real people living under his design will determine how good or bad the polis will become. The ideal state presented in the *Laws* seems to be the best blueprint one can come up with to uplift the people under its ruling, no matter who the particular people are.

In the latter part of the last century, an aretaic turn was initiated in the philosophical community due to Anscombe's criticism of the deontic and the utilitarian approaches.²⁴ The legal scholarly community responded in the beginning of this century.²⁵ This article aims to raise the attention of the virtue-related jurisprudence of Plato, since he may be the first thinker to develop the idea that laws should aim at the cultivation of the virtues of the citizens in a substantive way, as shown in this article. Platonic legal philosophy therefore has both historical meaning when one explores the foundation of European legal culture, as well as practical meaning when one ponders the virtue-related jurisprudence for the future legal development of the law.

discover any special method of keeping a legal code intact. When these observers got back safe and sound, they were to be accepted as suitable associates of the council, provided they had first passed the scrutiny of its members. (961a)

²³ As discussed in the beginning of the article, the current Guardians of Law who also serve in the nocturnal council are less than the total number of Guardians of Law. These Guardians of Law, whose work involves both deliberation and decision making, are the minority and cannot make final decisions on their own. That is why I think they can persuade the Guardians of Law in law making, but cannot dictate the development of the law. Again, reason works through mild pulling and not authoritative power.

²⁴ See G. Anscombe, *Modern Moral Philosophy*, „Philosophy” 1958, vol. 33, issue 124, pp. 1-19.

²⁵ See L. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, „Metaphilosophy” 2003, vol. 34, no. 1/2, p. 178-213.

Appendix 1: Ratio and proportion in the *Law of Plato*²⁶

Educational effect of drinking parties (645)

Education from childhood in virtue is what in discussion. The Athenian suggests view human being as puppet of god, and pulled by various cords. One of the cord is what we should hang on, the golden cord, transmits the power of ‘calculation’.

Correct arts (667-668)

The correctness would depend not much on the pleasure given, but the accurate representation of the size and qualities of the original. The representational equality, i.e. what is equal is equal and what is proportional is proportional, and this does not depend on anyone’s opinion that it is so. Accuracy, and nothing else whatever, is the only permissible criterion. All music is a matter of representation and imitation. The music we ought to cultivate is the kind that bears a resemblance to its model, beauty.

Lessons of history – the reasons for Sparta’s success (691-692)

If you neglect the rule of proportion, the result is always disastrous. A first-class lawgiver’s job is to have a sense of proportion. The Sparta splits its single line of kings into two, so as to restrict its powers to more reasonable proportions. It gives prudent influence of age by giving the twenty-eight elders the same authority in making important decisions as the kings. The ‘third savior’ of Sparta is a kind of bridle on the government by the power of ephors, five annually elected officials who in addition to wide executive and judicial powers exercised close control over the conduct of the kings. This is the formula that turned your kingship into a mixture of the right elements. Its stability ensured the stability of the rest of the state.

Addresses to the new colonists (716)

Like approves of like (excess apart, which is both its own enemy and that of due proportion) is what reflects God’s wishes. In our view, it is God who is pre-eminently the “measure of all things”.

Laws and preambles (719)

A poet cannot control his thought, but a legislator must not let his laws say two different things on the same subject. A funeral must be moderate and you must say what “moderate” means and how big or small it may be.

²⁶ See Plato, *The Laws*, translated by T. Saunders, Penguin 1970.