

Lycurgus to Moses: Thinking with Lawgivers in Legal and Political Philosophy

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Lecture III. The Lawgiver's Point of View in Plato and Aristotle

PART I – Taking Stock: lawgiver discourse and its reconfiguration in Plato and Aristotle

Text A: Aristotle on thought (*dianoia*) & craft (*technē*) as causes of coming into being of a house: 'Some of the things that come to be come to be from a certain kind of thought and skill, e.g. a building or a ship (for a certain skill and thought is a cause of both of these), while others come to be not by means of any skill but through nature...' (*Protrepticus* B11, tr. Hutchinson & Johnson)

Text B: Aristotle in the *Nicomachean Ethics* [EN] on need for law/lawgiver:

'And surely he who wants to make men, whether many or few, better by his care must try to become capable of legislating, if it is through laws that we can become good. For to get anyone whatever—anyone who is put before us—into the right condition is not for the first chance comer: if anyone can do it, it is the man who knows, just as in medicine and all other matters which give scope for care and wisdom'. (EN 1180b23-28, trans. Barnes/Kenny)

Text C: Plato's Athenian Visitor [AV] in the *Laws* (*Nomoi* [Leg.]) on purpose of law:

'Now would not every [sc. lawgiver] lay down all the laws (*ta nomima*) for the sake of what is best?' (Leg. 1.628c6-7, trans. Lane). [And cf. Text A to Plato Leg. 4.709b7-c1.]

Thinking with lawgivers allowed classical & postclassical Greek authors (including Athenian orators) to:

- Do politics within what Lane, *Of Rule and Office*, described in the case of rule and rulers as:
 - 'deeply ingrained evaluative nimbus of long-standing Greek approaches to the figuration of rulers' (19): can make the same statement about the figuration of lawgivers
 - 'broadly shared social horizon of evaluative expectations' vs 'fetish of...philosophical idealism' (20). Lawgivers may be imperfect (Minos and Lycurgus) but not malicious.
- Succeed in simultaneously explaining:
 - why these are the laws ('they are Solon's laws'): Hart's rule of recognition function
 - why these are good laws ('...& Solon was a [wise] lawgiver'): Fuller's inner morality of law
 - why these are good laws ('...& Solon was a [wise] lawgiver'): Outer morality of law: reconciliation.
- Construe the purpose(s) of laws as the intent of lawgiver, inviting their abstraction/idealization:
 - From Descartes to Dworkinian Athenians: why Solon rather than Hercules the judge?
 - Thomas (2004): Athenians' frustrations with post-403 BCE *nomothetai* process fosters idealization of Solon / singular lawgiver
 - Constructing the standpoint of the lawgiver in Plato:
 - History/myth/origins:
 - Specific historical/mythical lawgivers – esp. Minos and Lycurgus
 - Archaeology/genealogy of lawgivers in *Nomoi* 3 – see further below
 - Literary construction of the dialogue as an exercise in lawgiving:
 - Three 'discursive legislators' in both *Politeia* (*Republic*) and *Nomoi*
 - End of Leg. 3, but also already 2.666a3: 'Hadn't our laws better say...'
 - In *Nomoi*, further fictional) board of lawgivers for Cretan colony
 - But in both dialogues, these small-group efforts still work toward idealized point of view of a singular lawgiver – explicit in *Nomoi* at various points, e.g. Text D

Text D: Clinias: 'I'd instruct our lawgiver...' (4.723b7-8), responding to AV about what 'the lawgiver' should do (723b3ff.). This further idealization begins as far back as 4.709d-e where the AV apostrophizes an imagined lawgiver (who first of all asks for a city with a young tyrant).

- Constructing the standpoint of the lawgiver in Aristotle:
 - *Pol.* 2 Historical/mythical lawgivers; literary ones (e.g. Plato); anonymous postulated ones (e.g. Carthaginian lawgiver)
 - Bridging the *Nicomachean Ethics* to the *Politics*
 - Bridging the theory/practice and ideal/non-ideal theory divides

Text E: Aristotle, *Nicomachean Ethics* on why law is important and its features:

'If (as we have said) the man who is to be good must be nobly trained and habituated, and go on to spend his time in upright occupations and neither voluntarily nor involuntarily perform base actions, and if this can be brought about if men live in accordance with a sort of intelligence and correct order, provided this has strength—if this be so, the paternal command has not the required strength or compulsive power, nor in general has the command of one man, unless he be a king or similar; but the law has compulsive power, while it is at the same time an account proceeding from a sort of wisdom and intelligence. And while people hate men who set themselves contrary to their impulses even if they do so correctly, the law when it commands what is upright is not burdensome'. (*EN* 1180a14-24, trans. Barnes/Kenny). See again Text B.

Further resonances with lawgiver discourse in previous lectures: Plato on reconciliation & friendship (outer morality of law) and wisely selective positing, including promulgation (inner morality of law):

Text F: What is best as purpose of law/lawgiver? Purpose of reconciliation through friendship:

- i. Plato, *Leg.* on three judges of family strife: the third is 'able to take this single family which is at odds with itself and not destroy any of them, but reconcile (*diallaxas*) them for the future, and give them laws to keep them on good terms with one another' (1.627e4-628a3)
- ii. Plato, *Leg.* on aim of friendship: 'The fundamental aim of our laws was for our people to be as happy as possible, and as far as possible friends with one another' (5.743c5-6, trans. Griffith)

In this picture: law for Plato as combining wise selection/decision and civic promulgation:

Text G: Plato, *Leg.* on what is called law: 'Presiding over all this [sc. pleasures/pains and expectations about both]—deciding which of them is better or worse—is calculation (*logismos*); and when this is enacted by the city as a whole, it is called 'law''. (*Leg.* 1. 644d1-3, trans. Griffith; more literally, 'and when it becomes the common view of the city' (Meyer))

Text H: law is 'the distribution of reason' (*Leg.* 4.714a1-2: *tēn tou nou dianomēn*, trans. Meyer)

NB: while Plato may not be thought of as concerned with laws and lawgivers outside the *Nomoi*, this concern is hiding in plain sight elsewhere in his works; and what is unique in *Nomoi* is also important.

PART II – Two skeptical challenges (already intellectually emergent) faced by Plato and Aristotle

Skepticism about the inner morality of law – charging an inner dysfunction of law instead:

- i. Generality can make law inequitable
- ii. Stability can make law inflexible

Text I: Eleatic Visitor, Plato, *Statesman* 294a10-c4 (trans. Rowe):

'law could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best...law...resembles some self-willed and ignorant person, who allows no one to do anything contrary to what he orders, nor to ask any questions about it, not even if...something new turns out for someone which is better, contrary to the prescription...laid down'.

Skepticism about the outer morality of law – charging that law's purpose may be manipulative:

one strand in the *nomos-phusis* debate.

Text J: Thrasymachean challenge in Plato, *Republic*:

the 'ruling body' that dominates each kind of polity (1.338d9), 'lays down laws (*tithetai...tous nomous*) to its own advantage' (1.338e1-2, trans. Lane).

PART III – Approaches taken to skeptical challenges by Plato and Aristotle: invoking lawgivers

To danger of inner dysfunction of law: ‘the rule of law’ cannot be detached from standpoint of lawgiver

Cf. the Athenian orator Lysias, who urged a jury to ‘have the same mind in passing judgement as in legislating’ (fr. 87, as quoted in Mantovani 2024: 130).

To cope with generality and inflexibility of law – the intent of the lawgiver has to be maintained

- The content of law can be elevated: law as distribution of divinely inspired reason
 - Paradoxically doubles down on inflexibility – so long as intent maintained
- The content and form of law can be supplemented by lawgiver’s intent:
kairos (*Statesman*) /unwritten customs & Daily Meeting (*Laws*) / equity (Aristotle)

Text K: Plato, *Nomoi* ‘unwritten customs’ and ‘what people call “the law of their fathers”’ as complements to law: ‘the bonds that hold any political system together...if they are out of key, and get out of true, then they are like the timber supports which carpenters put in...’ (7.793a-c)

Text L: Plato, *Nomoi* on the Nocturnal Council/Daily Meeting: ‘This body...will need to manifest human excellence in all its fullness, and that means, above all...keeping its eye fixed on a single target and consistently aiming all its shafts at that’. (*Leg.* 12.962d1-5, trans. Griffith as is Text K)

Text M. Aristotle, *Rhetoric* on equity as the intention of the lawgiver (1.13.13-19, trans. Freese):

[13] ‘For that which is equitable seems to be just, and equity is justice that goes beyond the written law. These omissions are sometimes involuntary, sometimes voluntary, on the part of the legislators; involuntary when it may have escaped their notice, voluntary when, being unable to define for all cases, they are obliged to make a universal statement, which is not applicable to all, but only to most, cases... [17] And it is equitable...to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator...[19] to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the dicast [juror] looks only to the law, and the reason why arbitrators were appointed was that equity might prevail’.

To danger that laws are manipulative/ed: the human lawgiver exercises a *technē* within evaluative nimbus

Text N: Aristotle, *Politics* 1.1253a30-32, trans. Reeve, modified:

‘though an impulse toward this sort of community [i.e. a *polis*] exists by nature in everyone, the first framer [sc. of a *polis*] is the cause of the greatest goods (*ho de prōtos sustēsas megistōn agathōn aitios*)’ – with law and justice mentioned & implied to be what such framing will establish.

Text O: Plato, *Laws* 3 on the origin of *nomothesia*: joining together of patriarchal clans into cities: ‘of course each group were necessarily in some way pleased (*areskein*) by their own laws/customs (*nomous*) and looked down on those of others (3.681c1-2, trans. Lane).

Text P: Plato, *Laws* 3 on the role of the earliest lawgivers (3.681c7-d5, trans. Lane):

‘it is necessary to choose from among themselves [the clans] some assembled common persons

[i] to look at the legal customs (*nomima*) of all the clans, to choose – visibly pointing out and delivering up to the leaders and heads of the people, such as the kings – those of them that are particularly acceptable with respect to common use (*eis to koinon*); these persons will be called lawgivers (*nomothetai*), and will

[ii] act to establish (*katastēsantes*) the rulers/officeholders (*archontas*), creating out of the separate autocracies a sort of aristocracy, or perhaps kingship, and

[iii] by means of this change (*metabolē*) they will live in (*oikēsousin*) a [sc. new] *politeia*.¹

¹ I translate similarly to Schöpsdau (‘und unter dieser umgewandelten Verfassung werden sie dann leben’), taking the subject of the final finite verb to still be the lawgivers (like the subject of the preceding participles), but broadened to include them in a general reference. Schöpsdau comments wryly that Plato ‘in den Satz zuviele Informationen hineinpacken wollte’ (372, in commentary ad loc. to 681d4-5).

Coda for further consideration – laws, lawgivers and commands

If lawgivers are laying down laws, how can they not be issuing commands? Further affront to the inner morality of law: danger that threat of violence/force [not a worry for Hart or Fuller] can make law brutal.

Law can be prefaced by persuasive preambles: Plato's double theory of law in the *Nomoi*.

How/does this avoid Hart's criticism of command theories?

For Hart, laws issue commands, but a command theory of obedience cannot explain how and why people switch from one sovereign to the next. Only the internal point of view can do that.

For Plato, law does issue commands, and because laws are framed by lawgivers, this means that there is a sense in which lawgivers frame the commands in which laws in a narrow sense consist. But:

- a command theory of law alone would make lawgivers brutal. Only combining force and persuasion in each doubled law can express the lawgiver's rational purpose, and create the willing obedience which roughly equals Hart's acceptance.
- Moreover, the lawgiver is still operating one level up: though they may be attributed with the issuance of commands/use of force, they are actually framing commands that will go into operation only within an accepted framework.
- Revisiting the young tyrant who should be 'the contemporary of a distinguished lawgiver' (*Leg.* 4.710c7-8) whose conjoined efforts can most quickly and easily change a constitution (*Leg.* 4.710d6-8, 710e7-9).
- A single such person combining the two is also conceivable, even ideal (4.711d6-712a3). But (I would argue) these remain two distinct roles.

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