

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

The 2024 Isaiah Berlin Lectures, Faculty of Philosophy, University of Oxford

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Lecture I. Genealogies of law and lawgivers from Zaleucus to Hart

Introduction – Role and Reception of Ancient Lawgivers

1. Main characters: Greek lawgivers including:
 - a. Zaleucus of Locri (7th cent. BCE – some sources describe as the first Greek lawgiver)
 - b. Lycurgus of Sparta (c. 9th-7th cent. BCE: dates hazy even for Greeks, if not mythical)
 - c. Draco of Athens (7th cent. BCE)
 - d. Solon of Athens (6th cent. BCE)
 - e. Charondas of Catania (probably 6th cent. BCE)

Plus: Moses, as fashioned in postclassical Greek authors (Philo & Josephus).

Aristotle, *Pol.* 2.12: some 'lawgivers' were *dēmiourgoi* (craftsmen) of constitutions (including Lycurgus & Solon), vs. some who were *dēmiourgoi* of laws only.

2. Focal vocabulary for this lecture: lawgiver as *nomothetēs* (singular) and *nomothetai* (plural), from *nomos* (law / custom) and *tithēmi* (lay down)
3. 'Cult of the legislator' (Wisner 1997) in the later history of political thought
4. A starting point (Canevaro 2016, in which long vowels not marked; emphasis added)

TEXT A: 'The authority of the laws derived from the authoritative action of the *nomothetes*. This conception of the authoritative lawgiver had important consequences. The Athenians, as early as the fifth century BCE, saw Draco and Solon as the authors of their laws.... Because of this, they had an institutionalized understanding that the laws should not be changed; viewed them as separate from the day-to-day administration of the *polis*, and therefore outside the scope of the action of the normal governmental bodies; they saw them as the province of specially appointed *nomothetai* acting at special times; finally, despite the fact that Solon's laws were not strictly speaking a 'code', the Athenians understood them as part of a system, the product of a unified rationality, and therefore consistent and coherent....'

5. Three fundamental questions about Greek Lawgivers:
 - a. When (in what circumstances) were they designated?
 - b. How did they act, in terms of the speech acts that were characteristic of their role?
 - c. What made their acts (*i.e.* the laws they laid down) authoritative?

Chronological genealogy of Zaleucus as first Greek lawgiver? Or conceptual 'genealogy' (Pettit 2023) as developed by H.L.A. Hart (*The Concept of Law*, 3rd edn 2012 / 1st edn 1961, chs. V-VI)?

PART I – The *When* of Greek Lawgivers: when were they designated?

No tradition of '*prōtos heuretēs*' (first discoverer/inventor) for law itself; cf. Daedalus for sculpture.

TEXT B: on the social evolution of law preceding lawgivers: in several texts of Isocrates:

- Theseus as first king of Athens, who did not give laws but rather achieved synoecism, the bringing together of the inhabitants of Attica into one place (*Encomium of Helen*, 10.35).
- Those early Athenians developed their laws (*Panath.* 124; cf. *Paneg.* 38-9), and post-Theseus, turned the city into a democracy and wrote down the laws (*Panath.* 144).
- Later still, Solon legislated for Athens (*Areopag.* 7.16).

TEXT C: Lawgivers designated, often through oracles, in response to felt social needs: Zaleucus in scholiast to Pindar *Ol.* 11.17, citing Aristotelian ‘Constitution of the Locrians’:¹

- Locri came to be ‘ruled by good laws’ following the citizens’ request to Apollo as to ‘how they could be delivered from great civic trouble’.
- In response, Apollo sent an oracle indicating that ‘a shepherd, named Zaleucus, would be able to bring to the citizens renowned laws’.
- When Zaleucus identified, he explained that ‘Athena appeared to him in a dream’.
- In response, he was ‘freed’ and ‘established as lawgiver’

PART II – The *How* of Greek Lawgivers → ‘Wise Selecting’ as part of ‘Selective Positing’

Wise Selecting:

Sources of special epistemic ability:

- i. Relationship with the gods: Zaleucus above; compare Lycurgus of Sparta (Plut. *Lyc.* 6.1, 29.4-5) and Demonax of Cyrene (Hdt. 4.161)
- ii. Travel and social interaction: Solon of Athens
- iii. Study: Charondas of Catania (laws also widely adopted elsewhere):

TEXT D. Diodorus Siculus 12.11.3-4 (trans. Green, modified, emphasis added):
‘They also chose for their lawgiver the best man among such of their citizens as were admired for their learning, this being Charondas. This was the man who, after making a study of all legislations (*nomothesias*), picked out (*exelexato*) the best elements in them, which he then drew up in order (*katetaxen*) in his own laws. But he also worked out and formulated many ideas of his own....’

TEXTS E-G: Strabo 6.1.8, trans. Lane; incl. Ephorus ap. Strabo = FGrHist 70 F139 (Jacoby)

TEXT E: ‘...Ephorus, in his mention of the written legislation (*nomographias*) of the Locrians which Zaleucus arranged in order (*sunetaxen*) out of the Cretan, Spartan, and Areopagitic [that is, Athenian] legal customs (*nomimōn*)...’ (Ephorus ap. Strabo, underlining added)

TEXT F (precedes Text E): ‘They [sc. the Locri Epizephyrii] are believed to have been the first people to use written laws. (Strabo not crediting Ephorus here)

TEXT G (follows after Text E): Ephorus called Zaleucus ‘among the first’ to define penalties for crimes in law (as vs. leaving them up to judges), and also that he ‘put in order (*diataxai*)’ the contract laws ‘in simpler language’. (Ephorus ap. Strabo, underlining added)

TEXT H: Diodorus Siculus (12.20) on Zaleucus: ‘Zaleucus was chosen as lawgiver, and proceeded to lay down new (*kainēn*) legislation from the beginning (*ex archēs*), starting first with the heavenly deities’ (trans. Lane; cf. Green 2006).

Selective Positing:

Clement of Alexandria (c. 150-211 CE) – report that Zaleucus held to be first of the Greeks who ‘laid down laws’ (νόμους θέσθαι / *nomous thesthai*, *Strom.* 1.16.79.4-5) (vs. Minos of Crete).

Positing does not involve commands and is not an act of ruling (on ruling: Lane 2023), on this point with Rousseau (*Social Contract*): lawgiving as ‘a particular and superior activity that has nothing in common with human dominion’. Positing as ‘power of’, due to designation and acknowledgment.

¹ Ar. Frag. 548 Rose = schol. to Pindar *Ol.* 11.17, reporting ‘The Constitution of the Locrians’ by Aristotle and/or members of the Lyceum; for the suggested translation, I thank René de Nicolay.

PART III – The *Authoritativeness* of Greek Lawgivers

- '[T]he step from the pre-legal to the legal *may* be accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unknown rules'.
(Hart 2012: 94-5, emphasis added; *pace* Gagarin 1989: 2, citing Hart 1961: 92)

- While '[i]t *may*... be...that an authoritative list or text of the rules is to be found in a written document or carved on some public monument', this is 'not itself the crucial step'
(Hart 2012: 94, emphasis added; 95)

- Hart's 'rule of recognition' as 'acknowledgement...as *authoritative*' (2012: 95, emphasis original): a higher-order rule about what counts as first-order rule (law), from '*internal point of view*'
 - Greek lawgivers as *embodiments* of the rule of recognition: distinctive, paradigmatic and apt focal points for later citizens and outside observers

Conclusion – Berlin on Montesquieu (*Against the Current*, 203).

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