

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

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Lecture II. Functions of Lawgivers from Solon to Fuller

Introduction – Recap; from epistemic to justificatory functions; architects & lawgivers

Recap of Lecture I:

- a. Lawgivers (by which I mean: archaic & early classical Greek lawgivers, as constructed by classical & postclassical Greek authors) not characteristically rulers:
Craftsmen build a house but do not issue commands that it be inhabited.
- b. Lawgivers acting within and with reference to evolving legal world
- c. Lawgivers as selective positors: wisely selecting laws which they lay down
- d. Lawgivers as embodied 'rules of recognition' (H.L.A. Hart): epistemic function in identifying which are the laws, based on acknowledgement by public/officeholders

Lecture II, building on 'wise selecting' in Lecture I:

Contrast epistemic function of lawgivers in identification of laws: the laws *are* the laws of *Solon*

with justificatory function: the laws of Solon *are* the laws of Solon *because they are good*

- Plut. *Sol.* 3.3: his poems contained 'justifications for his acts' (trans. Perrin).
- Wise selective positing – e.g. Solon having 'put in order (*dietaxe*) the constitution' (*Ath. Pol.* 7.2) – for two purposes:

- i. 'Inner morality of law' (Fuller): the values inherent to (good) law; Solon *eunomia*
- ii. Outer morality of law (Lane coinage): for Solon, acting as 'reconciler' to create civic unity by drawing new bounds of justice

TEXT A. Housebuilding & lawgiving in Descartes, *Discourse on Method* (emphasis added)

- (i) ... there is seldom so much perfection in works composed of many separate parts, upon which different hands had been employed, as in those completed by a single master.
- (ii) Thus it is observable that the buildings which a single architect has planned and executed, are generally more elegant and commodious than those which several have attempted to improve.
- (iii) Thus also, those ancient cities which...have become, in course of time, large towns, are usually but ill laid out compared with the regularity [sic; read 'regularly'] constructed towns which a professional architect has freely planned...
- (iv) In the same way I fancied that those nations which, starting from a semi-barbarous state and advancing to civilization by slow degrees, have had their laws successively determined, and, as it were, forced upon them simply by experience of the hurtfulness of particular crimes and disputes, would by this process come to be possessed of less perfect institutions than those which, from the commencement of their association as communities, have followed the appointments of some wise legislator...
- (v) And, to speak of human affairs, I believe that the pre-eminence of Sparta was due not to the goodness of each of its laws in particular, for many of these were very strange, and even opposed to good morals, but to the circumstance that, originated by a single individual, they all tended to a single end. (trans. Veitch for Project Gutenberg)

TEXT B. Lon L. Fuller, *The Morality of Law* (rev. edn, 1969)

- i. In chapter on 'The Morality that Makes Law Possible': 'the viewpoint of a conscientious legislator' (93)
- ii. Purpose of law: 'the enterprise of subjecting human conduct to the governance of rules' (74)

PART I – The Outer Morality of Solon's Laws: the purpose of a 'reconciler' (*diallaktēs*) (see Allan 2016)

Main accounts of Solon: Herodotus' *Histories* (5th c. BCE); 'Constitution of the Athenians' (*Ath. Pol.*, 4th c. BCE); Aristotle, *Politics* (4th c. BCE); Plutarch's *Solon (Parallel Lives*, early 2nd c. CE).
Plus: laws, many of which arguably contain 'a Solonian kernel' (Scafuro 2006: 175); similarly, poems.

TEXT C. Solon as voluntary reconciler & persuader (prologue/epilogue to his formal roles)

- i. Plut. *Sol.* 12.2 (trans. Lane): Solon drew on his public reputation [Leão & Rhodes Fr.4b] in having:
 - 'come forward to the middle [sc. of the two factions divided over Cylon's coup; also an expression for engaging in public affairs]' and
 - 'persuaded' men accused of polluting the city to stand trial & accept its outcome.
- ii. Plut. *Sol.* 29.2 (trans. Lane): late in life, Solon refused to take sides against the emerging tyrant Peisistratus, but instead 'tried to calm him and make him mindful (*nouthetein*)'.

TEXT D. Plutarch *Sol.* on Solon being chosen for triple roles: as *archōn* (particular officeholder); as 'reconciler' (*diallaktēs*); and as lawgiver (*nomothetēs*)

- i. A group of 'the wisest of the Athenians...saw that he was the one man least implicated in the errors of the time; that he was neither associated with the rich in their injustice, nor involved in the necessities of the poor' (14.1, trans. Perrin); this group [continued in ii]
- ii. 'therefore besought him to come forward publicly and put an end to the prevailing dissensions'
- iii. Solon 'was chosen as archon after Philombrotus and at the same time as reconciler and as lawgiver' (14.2, trans. Lane).
- iv. But note that once his archonship ended, his role as lawgiver continued in these terms: 'No sooner were the laws of Solon put into operation than some would come to him every day with praise or censure of them, or with advice to insert something into the documents, or take something out. Very numerous, too, were those who came to him with inquiries and questions about them, urging him to teach and make clear to them the meaning and purpose of each several item' (25.4, trans. Perrin).

TEXT E. *Ath. Pol.* on Solon being chosen for double roles: as *archōn* and *diallaktēs*

- i. At a moment when Athenian factional division was strong, the two sides 'chose in common Solon as reconciler and archon and entrusted the *politeia* to him' (5.2, trans. Lane) (note that 'entrusted' can have a specific sense of 'to a reconciler')
- ii. Despite no inclusion of third role (lawgiver) there, *Ath. Pol.* also describes Solon as laying down laws; e.g. 7.1: 'Solon established a constitution and laid down other laws' (trans. Lane).

TEXT F. Plutarch (*Sol.* 16.1-2) implying common purpose for Lycurgus and Solon, but contrasting means

Common ends:

- i. purpose that Lycurgus as lawgiver (& here, vs. Plutarch's own *Life* of Lycurgus, also king) of Sparta, had pursued: 'the safeguarding and unanimity of the city' (*sōtēria kai homonoia*). Plutarch implies that Solon had same purpose.

Contrasting means: Lycurgus: Lycurgus had 'great authority, many friends, and power (*dunamin*) to support his reforms' in Sparta, using 'force rather than persuasion' (16.1).

Contrasting means: Solon in same text: Solon by contrast lacked the ability to enforce a comparable abolition of the statuses of being rich and poor in Athens, but instead he relied for his 'power (*dunameōs*)' 'only on the wishes of the citizens and their confidence in him' (16.2).

Rejected entreaties to become a tyrant (vs case of Pittacus of Mytilene: tyrant and lawgiver) (14.3-15.1).

TEXTS G-J: Grounds for possible objections, all Plutarch, *Sol.*, trans. Perrin, unless otherwise stated:

TEXT G: on Solon using force: 'those things wherein he hoped to find them open to persuasion or submissive to compulsion, these he did, combining both force and justice together, as he says himself' (15.2)

TEXT H: on Solon's powers: 'They also appointed Solon to reform the constitution and make new laws, laying no restrictions whatever upon him, but putting everything into his hands, magistracies, assemblies, courts-of-law, and councils. He was to fix the property qualification for each of these, their numbers, and their times of meeting, abrogating and maintaining existing institutions at his pleasure' (16.3)

TEXT I: on Solon giving an order to the Council: '...Solon...ordered (*etaxen*) the council of the Areiopagus to examine into every man's means of livelihood, and chastise those who had no occupation'. (22.3)

TEXT J: *Ath. Pol.* on Solon as *kurios*: 'Solon having become master (*kurios*) of affairs made the people free both at the time and for the future by prohibiting loans secured on the person, and he laid down laws, and enacted cancellations of debts both private and public...' (*Ath. Pol.* 6.1, trans. Rackham).

NB: prohibiting loans/cancellations of debts *not* in role as lawgiver. Cf. (and vs.) Everson trans. of *kurios*: 'When he had taken power...'

PART II – Solon’s *eunomia* and Lon Fuller’s ‘inner morality of law’

Vocabulary: *thesmos* (also Draco): in his own poems and laws, but *nomos* in later texts about him; *eunomia*, e.g. W4: ‘Lawfulness (*eunomiē*) reveals all that is orderly and fitting’ (trans. Gerber).

Table 1 (Lane).

<i>Fuller: Rex’s failures in making ‘laws’</i> (39, summary)	<i>Lane: Solon’s successes</i>	<i>Evidence for Solon</i> (Plut. <i>Sol.</i> trans. Perrin if not said otherwise)
1. Rules (vs ad hoc judgments)	√	W36: ‘I wrote laws for the lower and upper classes alike [lit. ‘for bad and good alike: a conventional form of reference], providing a straight legal process for each person’ (trans. Gerber) [W = West: collection that includes and numbers Solon’s poems]
2. Publicly promulgated	√	‘All his laws...were inscribed upon <i>axones</i> ...’ (25.1)
3. Prospective (vs retrospective)	√	‘...where a condition was as good as it could well be, he applied no remedy, and introduced no innovation, fearing lest, after utterly confusing and confounding the city, he should be too weak to establish it again and recompose it for the best.’ (15.1) [suggestive of prospective; not exact]
4. Understandable & clear	√ for most / x for some [but underlying purpose?]	‘it is said that his laws were obscurely and ambiguously worded on purpose to enhance the power of the popular courts. For since the parties to a controversy could not get satisfaction from the laws the result was that they always wanted jurors to decide it, and every dispute was laid before them, so that they were in a manner masters of the laws’ (18.3)
5. Non-contradictory	√ for most / x for some	‘But in general Solon’s laws concerning women seem very absurd... to punish the same offence now severely and inexorably, and now mildly and pleasantly...is unreasonable...’ (23.1-2)
6. Possible to follow	√	‘when, at a later date he was asked whether he had provided the best laws for the Athenians, his reply was, “The best that they would accept”’. (15.2)
7. Sufficiently stable (to orient subjects’ action)	√	‘All his laws were to have force for a hundred years...’ (<i>Sol.</i> 25.1) ‘And he fixed the laws to stay unaltered for a hundred years...’ (<i>Ath. Pol.</i> 7.2 (trans. Rackham))
8. Sufficiently congruent with with ‘their actual administration’	√	‘he gave every citizen the privilege of entering suit in behalf of one who had suffered wrong... Being asked... what city was best to live in, ‘That city’ he replied, ‘in which those who are not wronged, no less than those who are wronged, exert themselves to punish the wrongdoers’. (18.3)

PART III – The Authoritativeness of Greek Lawgivers (redux)

VS. Lanni & Vermeule (2012): oaths ‘can be seen as a form of popular ratification’ (914); ‘...Solon’s proposed constitution underwent a form of popular ratification’ and this answers the question of ‘how...the lawgiver’s proposed constitution [became] binding on the citizens’ (917).

Table 2 (Lane).

	<i>When oaths taken?</i>	<i>By whom?</i>	<i>Vocabulary (emphases in bold added for visibility)</i>
Herodotus 1.29.1-2 (trans. Godley, modified Lane)	In advance	One oath by all citizens	‘... Solon the Athenian ... after making laws for the Athenians at their request, went abroad for ten years, sailing forth to see the world, he said. This he did so as not to be compelled to repeal any of the laws (<i>tōn nomōn</i>) he had made, since the Athenians themselves could not do that, for they were bound by solemn oaths to abide live (<i>chrēsesthai</i>) for ten years by according to whatever laws (<i>nomoisi</i>) Solon should <u>lay down</u> ’.
<i>Ath. Pol.</i> 7.1 (trans. Rackham, modified Lane)	After laws laid down by Solon and written up publicly	One oath by all citizens Another oath by only the Nine Archons (= 3 archons + 6 <i>thesmothetai</i>)	‘he established a constitution and <u>laid down</u> other laws (<i>nomous</i>), and they ceased to observe live according to (<i>chrōmenoī</i>) the ordinances (<i>thesmoi</i>) of Draco, except those relating to homicide. They wrote up the laws (<i>nomous</i>) on the Boards and set them in the Royal Colonnade, and all swore to observe live according to (<i>chrēsesthai</i>) them; and the Nine Archons used to make affirmation on oath at the Stone that if they transgressed any one of the laws (<i>tōn nomōn</i>) they would dedicate a gold statue of a man...’
			More on <i>chraō</i> [2] in middle (<i>chraomai</i>): LSJ: one sense is ‘live under laws’ as part of ‘III. <i>experience, suffer, be subject to</i> , esp. external events or conditions’: <u>Descriptive uses (LSJ):</u> Hdt. 1.173.4: Lycians, 1.216.1: Massagetae, both w/ <i>nomoisi</i> (dative). Also Xen. <i>Mem.</i> 1.2.24; Eur. <i>IA</i> 543. <u>Prescriptive uses in inscriptions, but of existing laws (LSJ):</u> <i>IG9(1)</i> .334.19; <i>Riv.Fil.</i> 58.472. <i>Cambridge Greek Lexicon</i> (Diggle et al.): sense (4) of <i>chraomai</i> : ‘(of a people) make habitual use of, use, have - w. dat. <i>certain foods, clothing customs, or sim.</i> Hdt. Ar.’
Plut. <i>Sol.</i> 25.2 (trans. Perrin, modified Lane)	After laws laid down by Solon	One oath by the Council Another oath by the 6 <i>thesmothetai</i>	‘...the Council took a joint oath to ratify uphold (<i>empedōsein</i>) the laws (<i>nomous</i>) of Solon, and each of the <i>thesmothetai</i> ... swore separately at the herald’s stone in the market-place, vowing that if he transgressed the statutes (<i>tōn thesmōn</i>) in any way, he would dedicate at Delphi a golden statue of commensurate worth’.

Coda:

- Entrenchment of the laws – by the Athenians themselves: Fr. 93a and 93b in Leão and Rhodes.
- Plut. *Sol.* 25.4 on Solon’s decision to absent himself from Athens for ten years: ‘In this time he hoped they would become accustomed (*sunētheis*) to the laws’ (trans. Perrin, modified Lane).

Works cited (not otherwise indicatively cited on handout, and not already listed in handout for Lecture I)

Allan, William. ‘Solon and the Rhetoric of *Stasis*’, *Mouseion* 15 (2018) 113-129.
Lanni, Adriaan & Adrian Vermeule. ‘Constitutional Design in the Ancient World’. *Stanford Law Review* 64 (2012) 907–949.
Leão, Delfim Ferreira, and P. J. Rhodes (eds). *The Laws of Solon: A New Edition with Introduction, Translation and Commentary*, revised paperback edition. London and New York: I.B. Tauris, 2016.
Scafuro, Adele C. ‘Identifying Solonian Laws’. In *Solon of Athens: New Historical and Philological Approaches*, edited by Josine Blok and André P. M. H. Lardinois, 173-96. 2006.