

## 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 VI. Are we all legislators now? Athens to Nietzsche

#### **Introduction**

**Text A:** Claim of bad character of a 'contemporary' putative lawgiver (law-proposer): Dem. 24.108:

'I undertook to prove that he [Timocrates] is amenable to the indictment in every respect, first, because he legislated illegally (*para tous nomous nomothetounta*); secondly, because his proposals were contrary to existing statutes; and thirdly, because they were injurious to the commonwealth...'

**Text B:** Cicero, *De Republica* 2.1 (trans. Zetzel, CUP, 2<sup>nd</sup> edition):

'Cato used to say that the organization of our state [Rome] surpassed all other states...in others there were generally single individuals who had set up the laws and institutions of their commonwealths – Minos in Crete, Lycurgus in Sparta, and in Athens, which frequently changed its government, first Theseus, then Draco, then Solon, then Clisthenes, then many others; finally, when Athens was drained of blood and prostrate, it was revived by a learned man, Demetrius of Phalerum'.

**Text C:** Nietzsche 'Introduction to the study of the Platonic Dialogues' (Basel lectures 1871-2):

'Plato's legislative mission is at the center of what he wills. He measures himself with Solon and Lycurgus' and sets himself 'as a model to be imitated'.

Three cases of post-archaic lawgivers in deeds as well as words, to consider themes of:

- I. Attic orators: the lawgiver's point of view: purpose or intention; bad (later) lawgivers? *nomothetai* as: singular initiators / collective deciders
- II. Demetrius of Phalerum: the lawgiver in an exceptional role; sources/purposes of wise selection
- III. Nietzsche: law, custom and the overcoming of morality – stability vs revolution
- IV. Conclusion: (what) can the singular lawgiver figure contribute to political theory?

**Recap:** *schema of the role of the Greek lawgiver (broadly as an ideal type)*

**BI: Genealogies of law and lawgivers from Zaleucus to Hart**

- 'wisely selective laying down' (not *ex nihilo*) by a designated or authorized lawgiver whose laws must be accepted by the people (drawing on modified version of Hart)
- the lawgiver *qua* lawgiver is not a ruler (does not issue commands to execute laws)

**BII: Functions of Lawgivers from Solon to Fuller**

- the lawgiver is credited with / must have external purpose: reconciliation/unity (Solon)
- and an inner purpose: formal features of law, especially generality & stability (Fuller)
- both of these together enable the lawgiver to serve not only an epistemic function (identifying the laws as embodied rules of recognition) but also a justificatory one (our laws are our laws as the laws of Solon; they are the laws of Solon because they are good).
- oaths don't serve to ratify.

**BIII: The Lawgiver's Point of View in Plato and Aristotle:**

- emphasizes purpose (intent)
- invites idealization of a lawgiver: including and beyond Platonic 'discursive legislators'
- to danger of inner dysfunction of law (risks of generality and stability of legal form):
  - o unwritten customs / equity
- to danger of outer dysfunction of law (manipulative or exploitative ethical purpose):
  - o notice that the figure of the lawgiver is constructed within 'evaluative nimbus'; namegiving and other similar crafts link *nomos* to *phusis*

**BIV: Written laws? Ethical education in Plutarch's Lycurgus and related debates**

- different affordances and limitations of written law
- different senses of 'unwritten law' (made by gods; cultural evolution; lawgiver)
- writing as a tool of law; the form of law makes lawgiver more than just pure normativity
- metaphorical writing on the heart/soul: Greek & Biblical themes in Neo-Pythagoreans

**BV: Moses and Greek lawgivers in Philo, Josephus and Rousseau**

- Moses as combining *dunamis* of ruler ('king') / lawgiver / high priest / prophet (Philo)
- Moses and God as both 'lawgivers' with discernible intentions (Philo, Josephus)
- Jewish use of external writing in ethical habituation to achieve writing on heart/soul:
  - o *Nomos empsuchos* ('living law': including Patriarchs before written law given)
  - o Incorporation of writing (through reading) into festivals, thus communal practice (P/J/R)
- Acceptance ('legislative power') expressed in antiquity of laws (Rousseau): duration/stability

## I. **The Athenian orators in the long fourth century: on the point of view of the lawgiver**

### 1. Athenian efforts at legal consistency:

Text D: Procedure for changing laws post-403 BCE fixed collection of laws (Canevaro 2013: 150):

- a. Assembly does not pass or repeal laws; instead can invite proposals to change
- b. Proposals have to be posted and read out several times
- c. Assembly appoints jury-like body of *nomothetai* (501 or 1001) who hear:
  - i. Speech by proposer of change (may include proposal to repeal first)
  - ii. Speech by opponent of change (who was elected by assembly)
- d. *Nomothetai* vote change up or down (their decision is final)

Text E: i. 'If any of these rules was ignored, anyone could prosecute the proposer on a public charge of enacting an inexpedient law' (*graphē nomon mē epitēdeion theinai*) (Canevaro 2013: 158)

- ii. such a prosecution, 'if successful, resulted in the repeal of the law enacted by the defendant' (Canevaro 2013: 157)

Text F: '...the Athenians in the fourth century clearly envisaged each law to form part of a coherent whole, and often argued their cases taking such consistency as a given' (Canevaro 2013: 160):

- a. he cites Aeschines (3.37–40) for the claim that 'it was impossible for two contradictory laws about the awarding of crowns to be valid at the same time'.
- b. Lane: see also Dem. 24.34 for a law that 'forbids the introduction of anything repugnant to existing laws, except after the abrogation of the law previously enacted'; 24.36: 'As a safeguard against such a dilemma [i.e., a conflict of laws causing the jury to be unable to avoid violating their oath to uphold the laws] the lawgiver [here, can take to be Solon] made this provision in your interest'.<sup>1</sup>

2. Appeals to the intent of the lawgiver – conceived as the singular lawgiver who initiated a law (as vs. the collective *nomothetai* who voted to establish or retain it):

Text G: Aesch. 3.44: 'some legislator' (unknown name of past proposer)

Text H: Dem. 24.103: Solon 'a very different lawgiver' from Timocrates (defendant); cf. 106, 113

Text Hi: Intent: Dem. 24.138: 'the law that he has dared to establish reveals his character'

Text Hii: Illegal act as 'lawgiver': Dem. 24.108: 'I undertook to prove that he [Timocrates] is amenable to the indictment in every respect, first, because he legislated illegally (*para tous nomous nomothetounta*); secondly, because his proposals were contrary to existing statutes; and thirdly, because they were injurious to the commonwealth...'

### II. **Demetrius of Phalerum** (lived 350-280 BCE; held sway in Athens 317-307 BCE)<sup>2</sup>

Text I: 20A SOD *Marmor Parium* B 15-16, Ep. 13 (composed in 264/3):

- '...(from) the time when Demetrius made laws in Athens, in the year when Demogenes was archon in Athens'.

Text K: 20B SOD, from Georgius Syncellus, *Chronological Abstract*:

- 'Demetrius of Phalerum was known as the third lawgiver in Athens. After having restored democracy to the Athenians he went to Egypt'. But see 18 SOD (Plutarch, *Demetrius* [Poliorcetes] 10.2) and 19 SOD (Strabo, 9.1.20) vs / for D. on democracy.

Text L: 16A SOD, from Diod. Sic. 18.74-1-3:

- 18.74.1: 'When the Athenians could not get rid of the garrison [of Macedonians]...it was unanimously decided to send an embassy to Cassander...they concluded peace on the following terms: the Athenians were to retain their city and territory and their revenues and ships and everything else....and they were to appoint as overseer (*epimeletēs*) of the city one Athenian, who had the approval of Cassander. Demetrius of Phalerum was elected. He assumed the supervision of the city and ruled (*ērxen*) in a peaceful and—in relation to the citizens—caring way.'

<sup>1</sup> All translations from orators here are the Loeb translations.

<sup>2</sup> Texts and translations by SOD (Stork, van Ophuijsen, Dorandi) in Fortenbaugh and Schütrumpf 2000, using 2018 paperback edition – all citations in this section to be construed as Demetr. XXX, SOD.

Text M: 1 SOD, from Diog. Laert. 5.75-83:

- Mi: 5.75: ‘...He attended the lectures of Theophrastus. Through public speeches (*dēmēgorōn*) before the Athenians, he led the city for ten years...’ (Suda: *dēmagōgos*)
- Mii: 5.77: [after he was ousted in 307/6] ‘...they tore down his likenesses, sold some, threw others into the sea and cut still others into pieces in order to make chamber-pots of them...one statue is preserved on the Acropolis. ...according to Favorinus, they also registered the year in which he was archon as (the year) of ‘lawlessness’ (*anomias*)’.
- Miii: 5.80: ‘In quantity of books and number of lines he surpassed almost all the members of the Peripatos of his day; he was well-educated and widely experienced beyond anyone. Of these (books) some are historical, some political, some on poets and some rhetorical; there are collections (not only) of public speeches and embassy addresses, but also of Aesopic fables and much more. They are: *On Legislation in Athens*, 5 books; *On Constitutions in Athens*, 2 books; *On Leadership of the people*, 2 books; *On (the Art of) Politics*, 2 books; *On Laws*, 1 book; *On (the Art of) Rhetoric*, 2 books...’
- Miv: 5.82: ‘He said...That speech has as much force in political affairs as iron has in war’.

Text M: 53 SOD, from Cicero, *De Legibus*: the character Marcus (who ‘is’ Marcus Tullius Cicero) on the earliest Athenian burial customs as appropriately modest and pious (2.63), and then continues:

Text Mi: 2.64: ‘Later, after funerals had begun to grow more sumptuous and full of laments, as the Phalerean [Demetrius of Phalerum] writes, they were abolished by Solon’s legal decree. Our own decemvirs have recorded this law in almost the same words in the tenth Table...’

Text Mii: 2.66: ‘But...Demetrius says that the magnificence of funerals and graves increased to roughly what it now is in Rome, a custom on which he himself placed legal restrictions, for as you know he was not only a very learned person but also to the highest degree a citizen of his community, and most apt at governing the city. He restricted expenses...limited the size of new tombs...appointed a magistrate specifically to look after this [the latter]’.

Text N: Offices and institutions new or reinforced / modified in Demetrius’ time include:

- *gunaikonomoi* (‘censors of women’)
- *nomophulakes* (whose role is contested)
- *agōnothetēs* to oversee the production of plays for civic festivals: *dēmos* now *chorēgos*
- *ephēbeia* revived (though reduced from two years to one)

### III. **Friedrich Nietzsche** (1844-1900)

Text O: ‘One must desire the means when one desires the end — this political insight was clear in the mind of all legislators’. (KSA 13 15[45] 1888 WP 142; trans. Cameron & Dombowsky p.291).

Text P: *Dawn*, Book I sec. 9 (trans. Brittain Smith, *The Complete Works of Friedrich Nietzsche*, vol. 5, Stanford UP series; all translations below are from that series)

- ‘Concept of the morality of mores.—In relation to the way of life of humankind for entire millennia, we present-day humans live in a very unaccustomed, immoral age: the power of custom is astonishingly enfeebled and the sense of morality so refined and lofty that one can say it has well nigh evaporated. Hence, for us, the late born, fundamental insights into the emergence of morality become difficult...’
- As, for instance, right away with the very *first proposition*: morality is nothing other (therefore, above all *no more!*) than obedience to mores, no matter what ilk they might happen to be; mores, however, are merely the *traditional* manner of acting and evaluating. In matters where no tradition commands, there is no morality; and the less life is determined by tradition, the smaller the orbit of morality becomes. The free human being is unaccustomed and immoral because, in all things, he *wants* to depend upon himself and not upon a tradition...’
- What is tradition? A higher authority, which one obeys not because it commands what is *useful* to us, but because it *commands*.
- ... Originally, all training, all tending to health, marriage, the art of healing, agriculture, war, speaking and keeping silent, traffic with one another and with the gods belonged in the domain of morality...Originally, then, everything was a matter of custom, and anyone wishing to elevate himself above custom had to become lawgiver and medicine man and a demigod of sorts: that is, he had to *create customs*—a terrifying, life-threatening thing! ...’

Text Q: *The Anti-Christ* (Stanford University Press volume; translator one of several listed)

'A code of law such as that of Manu arises like every good book of law: it summarizes the experience, prudence and experimental morality of long centuries, it concludes, it creates nothing more. The precondition for a codification of this kind is the insight that the means of lending authority to a slowly and expensively won truth are fundamentally different from those with which it might be proved. ...

A double wall [against continued experimentation]: first, *revelation*, which is the claim that the rationality of these laws is *not* of human descent, *not* slowly sought and found amid blunders, but merely communicated, of divine origin, whole, perfect, without a history, a gift, a miracle... Then *tradition*, which is the claim that the law had already existed since time immemorial, that it would be impiety, a crime against ancestors, to place it in doubt. The authority of the law is founded on the propositions: God gave it, the ancestors *lived* it'.

Text R: *Human, All Too Human* (trans. Handwerk) – p.177, p.179:

'These philosophers...each of them was a contentious, violent, *tyrant*. They were tyrants, hence what every Greek wanted to be and what everyone was whenever he *could* be. Perhaps only Solon was an exception; in his poems he tells how he scorned personal tyranny. But he did it out of love for his work, for his setting down of laws; and to be a lawgiver is a more sublimated form of tyranny. Parmenides, too, set down laws, as Pythagoras and Empedocles probably did as well; Anaximander founded a city. Plato was the incarnate desire to become the supreme philosophical giver of laws and founder of states; he seems to have suffered terribly from the nonfulfillment of his nature, and toward the end his soul was filled with the blackest bile.'

Text S: *Daybreak [=Dawn]* Book V, no.496 (trans. Hollingdale, CUP edition, as in Lane, *Plato's Progeny*)

'The evil principle.—Plato has given us a splendid description of how the philosophical thinker must within every existing society count as the paragon of all wickedness: for as critic of all customs he is the antithesis of the moral man, and if he does not succeed in becoming the lawgiver of new customs he remains in the memory of men as 'the evil principle'. From this we may gather what the city of Athens, tolerably freeminded and avid for innovation though it was, did with the reputation of Plato during his lifetime: is it any wonder if, filled with the 'political drive' as he himself says he was, he attempted three times to settle in Sicily, where at that time a Pan-Hellenic Mediterranean city seemed to be in process of formation? In this city, and with its help, Plato intended to do for all the Greeks what Mohammed later did for his Arabs: to determine customs in things great and small and especially to regulate everyone's day-to-day mode of life. His ideas were as surely practical as those of Mohammed were practical: after all, far more incredible ideas, those of Christianity, have proved practical! A couple of accidents more and a couple of other accidents fewer - and the world would have seen the Platonisation of the European south; and if this state of things still persisted, we should presumably be honouring in Plato the 'good principle'. But success eluded him: and he was thus left with the reputation of being a fantasist and Utopian - the more opprobrious epithets perished with ancient Athens'.

#### IV. **Should we all be legislators now? How if at all might the singular lawgiver signify?**

Text T: J.R. Seeley, *Introduction to Political Science*, 1<sup>st</sup> series, Lect. VI (Seeley 1908) – also quoted in Waldron, *The Dignity of Legislation* (Waldron 1999: 8):

Ti (p.145): 'In earlier times, the state, that is the power which issues commands and inflicts punishments, was hardly supposed capable of making law. It could conduct a campaign, levy a tax, remedy a grievance, but law was supposed to be in a somewhat different sphere. Law was a sacred custom; the state might administer, or enforce, or codify it; but legislation, the creating, or altering, or annulling of law, was conceived as a very high power, rarely to be used, and concerning which it was doubtful who possessed it...Often religion was called in, and commonly some degree of fiction was used to conceal the too daring alteration that was made...'

Tii (pp.145-6): 'On this point we have completely broken with the tradition of earlier times... [T]he state of the nineteenth century...is the Legislation-state. It has abandoned the exercise of many powers which states used to wield, but the power which states in past time were afraid to claim it uses with the utmost freedom and with indefatigable energy. It makes law and unmakes it, and alters it. Law it conceives simply as the opinion of the majority, founded upon discussion and reasoning'.

Text U: Tuck, *Active and Passive Citizens*, 68:

'...far-reaching implication of what I have been calling an agentive view of democracy. If we were genuinely to be legislators, and not people who are legislated for, a great deal of how we think about our political life would inevitably change. Imagine forming one's political opinions as if one had in the end to move forward effectively with a majority of one's fellow citizens!...[P]olitical desires are...desires for what I want to do with my fellow citizens, and that means I have to think to some extent like the plumber, about what can be done, as well as like the householder, who knows what he wants to be done... the "can" here is not a technical question: it is a fundamentally political question, since it turns in great part on what enough of my fellow citizens will accept'.

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