

## Introduction: The idea of law

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The idea of law has been at the heart of Western civilization since its beginnings in ancient Greece. All that we consider distinctive about our civilization, above all its genius for maintaining a peaceful communal life that leaves room for a remarkable variety in thought and action, is bound up with the idea of law.

Yet why that is so, or even whether it is so, despite a long and rich history of reflection on the meaning, merits, and intricacies of the idea of law, has remained obscure. Indeed, so marked has been the indifference to examining our understanding of the idea of law (as opposed to studying the operation of legal systems) that attempts to repudiate the idea of law have gone unnoticed. As a result, we stand in danger of losing our greatest blessing without having learned to understand or appreciate it.

But if the nature of the idea of law, and the pattern of its development, has remained elusive, the starting point for such an inquiry is easily discerned in ancient Greece. In the fifth century B.C., where the story begins, the word used to denote law was *nomos*, and the historical phenomenon to which the discussion of *nomos* referred is readily identified. The *nomoi* of Athens were the rules collected by a group of *anagrapheis* or “inscribers” who had been empowered to engrave them on stone. These rules were thought of, probably not altogether accurately, as having been derived from Draco’s Code of 621–620 B.C. and its revisions in the next century by Solon (who had used the word *thesmoi* to describe his rules). As Aristotle tells us in the *Athenian Constitution*, Solon’s laws were written up on “the Boards” (three four-sided structures of wood or perhaps stone revolving on pivots), which were set up in the Royal Colonnade. And Solon prescribed that the laws should remain unaltered for a hundred years.<sup>1</sup>

<sup>1</sup> Aristotle, *Athenian Constitution* 7.1, in *Athenian Constitution; The Eudemian Ethics; On Virtues and Vices*, trans. H. Rackham (London: Heinemann, 1935).

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In 403–402 B.C., there was a general review of these laws, and the additions and changes prepared by the *nomothetai* or “lawmakers” were recorded on the stone wall along with the already existing laws. It was declared that no law passed before 403–402 B.C. was valid unless it was included in the new inscriptions made between 410 and 403 B.C.; no charge for offenses committed before that year could be brought, and no new regulations could override the law thus established. A central record office was set up to keep public records on rolls of papyrus that could be brought into court and read out. And the records of laws passed after the fifth century B.C. include the date, the procedure, and the official bodies by which the law was passed, along with the name of the proposer. There was also a regular procedure for inspecting the laws in order to weed out inconsistencies and redundancies. Judgments given in court were recorded and regarded as precedents. That anyone who proposed a measure that contravened established law was subject to severe punishment was only one of the precautions against reckless or inconsistent innovations. To ensure that magistrates observed the law, every citizen had a right to charge a magistrate with illegal conduct. And the *graphe paranomon*, or indictment for illegality, was regularly used.

The pride of the ancient Greeks in the fact that Athens was, as Theseus says in *Oedipus at Colonus*, “A state that rules by law, and by law only,” is evident throughout their literature.<sup>2</sup> Although the law came under attack almost as soon as it was established, and various aspects of the law became subjects of dispute, it was agreed that the rule of law is the mark of a high civilization and that its opposite, lawless tyranny, reduces its subjects to slaves and is characteristic of barbarism. Expressions of this veneration for law appear regularly throughout the fifth and fourth centuries B.C. in the tragedies, the histories, and the arguments of the orators.

When the wife of Darius, in Aeschylus’ *Persians*, asks who is the master of the army, she is told that the Greeks are neither the slaves nor the subjects of any man, just as in Herodotus, Darius is assured that the Greeks are both free and able to act together as an army because they fear the law as much as Darius’ subjects fear him. In *Prometheus Bound*, Zeus is described as a “tyrant” because he exercises power capriciously according to no fixed known law: “I know that he is savage,” says

<sup>2</sup> Sophocles, *Oedipus at Colonus* 1040–44, in *The Complete Greek Tragedies*, vol. II, *Sophocles*, ed. David Grene and Richmond Lattimore (Chicago: University of Chicago Press, 1959).

Prometheus, “and his justice a thing he keeps by his own standard.”<sup>3</sup> Euripides’ Jason tells Medea that in following him she received more than she gave because “instead of living among barbarians,” she had inhabited a Greek land and learned “how to live by law instead of the sweet will of force.”<sup>4</sup> In *The Suppliant Woman*, Theseus reproves the herald from Thebes for “seeking a master here” because “this city is free, and ruled by no one man.” He explains that “nothing is worse for a city than an absolute ruler,” for whereas without law, “one man has power and makes the law his own,” once there is written law, both rich and poor “have recourse to justice.” And “if the little man is right, he wins against the great.”<sup>5</sup>

Theseus’ words were echoed by the orator, Isocrates, who said that the mark of Athens’ greatness is that “finding the Hellenes living without laws and in scattered abodes, some oppressed by tyrannies, others perishing through anarchy, she delivered them from these evils by taking some under her protection and by setting to others her own example; for she was the first to lay down laws and establish a polity. This is apparent from the fact that those who in the beginning brought charges of homicide, and desired to settle their mutual differences by reason and not by violence, tried their cases under our laws.”<sup>6</sup> Later, in the fourth century B.C., in the debates about the proper response to Macedonian power, Aeschines distinguished monarchy and oligarchy which “are governed by the will of the rulers” from democratic regimes which are governed by “established laws,” and “it is the laws that guarantee the security of citizens in a democratic city.” And Aeschines’ opponent, Demosthenes, made the same point: “The laws, Athenians, you have sworn to obey; through the laws you enjoy your equal rights; to the laws you owe every blessing that is yours. . . .”<sup>7</sup>

Law, its admirers believed, was opposed to both decrees (*psephismata*) and to custom. It was opposed to decrees, by which they meant particular, occasional decisions applying to one individual, because they identified

<sup>3</sup> Aeschylus, *Prometheus Bound* 184–85, in *The Complete Greek Tragedies*, vol. I, Aeschylus, ed. David Grene and Richmond Lattimore (Chicago: University of Chicago Press, 1959).

<sup>4</sup> Euripides, *The Medea* 532–36, in *The Complete Greek Tragedies*, vol. III, Euripides, ed. David Grene and Richmond Lattimore (Chicago: University of Chicago Press, 1959).

<sup>5</sup> Euripides, *The Suppliant Women* 400–60, in *The Complete Greek Tragedies*, vol. IV, Euripides, ed. David Grene and Richmond Lattimore (Chicago: University of Chicago Press, 1959).

<sup>6</sup> Isocrates, *Panegyricus* 39–40, in *Isocrates*, vol. I, trans. George Norlin (Cambridge, MA: Harvard University Press, 1928).

<sup>7</sup> Demosthenes, *Against Meidias* 188, in *Demosthenes*, vol. III, trans. J. H. Vince (Cambridge, MA: Harvard University Press, 1935).

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law with permanent rules which define wrongdoing and its corresponding punishment equally for all Athenians. Demosthenes thus warns Athenians that if particular legislative acts are allowed to prevail over rules, then “our laws are no better than so many decrees.” And he points out as well, what is implicit in this view of law, that law has nothing to do with bargaining or arbitration between parties of opposed interests. That is why, Demosthenes argues, his opponent was obliged “to prove that he has not done what I have charged him with. . . . He may argue as if the question at issue were whether he is to be delivered unto Demosthenes’ hands,” but “the truth is quite otherwise,” because “you never ‘deliver’ a malefactor to his accuser; for when someone has been wronged, you do not exact the penalty in such a form as the injured party urges upon you in each case.” Demosthenes goes on to state what appears as a leading theme in the philosophical discussions, that “laws were laid down by you before the particular offences were committed, when the future wrongdoer and his victim were equally unknown. What is the effect of these laws? They ensure for every citizen the opportunity of obtaining redress if he is wronged. Therefore, when you punish a man who breaks the laws, you are not delivering him over to his accusers; you are strengthening the arm of the law.”<sup>8</sup>

Law was contrasted to custom because it was held that the rules of law had to be recorded. The history of the word *nomos* suggests, however, that this was not definitely established before the fifth century. Herodotus used *nomos* in the sense of both written and unwritten law; he speaks of Solon’s *nomoi*, which are clearly statutes, but he also uses *nomos* when he says that the Corinthians’ “law did not allow the ships to be given for nothing,” which was not likely to have been written. In Thucydides as well, when Pericles speaks of the *nomos* of delivering funeral orations or of the Corcyrean *nomos* about the cutting of vine poles or about the rules of succession to the priesthood of Hera of Argos, it is not clear whether he is referring to statutes. But generally, from the fifth century onwards it is taken for granted that law must be written. For otherwise, it was argued, law cannot acquire that formal character and permanent definiteness that ensures the kind of security for which the law is valued.

Reliance on “unwritten law” was accordingly denounced as a rejection of law and a resort to tyranny. When Andocides reproved magistrates for undermining the law, he equated arbitrary decisions with “unwritten law.” Allowing magistrates to appeal to “unwritten law,” he says firmly,

<sup>8</sup> Ibid., 28–30.

introduces arbitrariness because it enables the magistrate to ignore the established law and make whatever law he pleases. Since “unwritten law,” or custom, consists of the conflicting materials out of which the formal rules of law have been fashioned, giving custom precedence over law is tantamount to letting the magistrate make his own selection. The same point is made in Euripides’ *Orestes*. When Menelaus is charged with having acquired barbarian ways because he remains friendly to Orestes after he had murdered his mother, Menelaus’ excuse that, “It is a Greek custom, I think, to honor your kin,” is scornfully dismissed: “But not to put yourself above the laws.”<sup>9</sup>

In short, it was agreed in the popular discourse of ancient Greece that law consists of rules made without reference to any particular outcome as opposed to commands, designed to produce substantive consequences here and now; that they were easy to identify as such because they had been formally defined and authentically recorded; and that observing such rules consists in conforming to impersonal conditions.

The agreement on the opposition of law both to the commands of tyrants and to custom served to identify the law. But once attention was turned to scrutinizing systematically the character of the law itself, there was no such unanimity even among the ancient Greeks. And from the fifth century B.C. to the present, there has been a continuous conversation about the character and significance of the idea of law. That conversation is the subject of this book. It is, in other words, an account of what has been thought about a certain sort of social arrangement, which consists of a set of recorded rules, recognized to have been made by human beings and subject to being changed by them, for regulating an association whose members subscribe to these rules. My object is to relate not what the law has been at any time or place, but how it has been understood and how that understanding has changed. Only systematic discussions of the law are considered, and then only such discussions as have introduced important departures from what has been said before. Reflections on “law” in any other sense, such as the commands of a divinity or of a tribal chieftain, the regularities of nature, or usages and regulations that have not been articulated as changeable rules, except insofar as any of these is taken to have some connection with law in the sense used here, are excluded.

This book is not designed to provide anything like a complete history of reflection about the nature of law. Rather, what the reader can find here is

<sup>9</sup> Euripides, *Orestes* 480–90, in *The Complete Greek Tragedies*, vol. IV.

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an exposition and analysis of the main questions that have, since ancient times, been asked about the idea of law and the pattern of the answers that they have received. The omission of many important and distinguished discussions, both of the past and present, has been imposed partly by the constraints of time and space, but also by the leading concern of this book. That concern is to disengage from a vast literature what has been deemed essential to the idea of law, and to show how, in the course of being explored and refined, the idea of law has become confused and exposed to attack, and how that attack has been, and can be, resisted by those who wish to preserve that peculiar achievement of Western civilization, the marriage of order with diversity.

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*Part I*

Law anchored to a cosmic order

## 1 Plato

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No philosopher is more emphatic about the opposition between law and tyranny than Plato. He defines a tyrant as a ruler who is at liberty to do what he pleases, to kill, to exile, to follow his own pleasure in every act, and he condemns tyranny in a number of different contexts. In the *Seventh Letter*, he urges that Sicily should not be subject to the despot, but to law. In the *Eighth Letter*, he says that “either servitude or freedom, when it goes to extremes, is an utter bane. . . . The due measure of servitude is to serve God. The extreme of servitude is to serve man. The god of sober men is law.” To substitute the rule of law for tyranny ought to be the aim of every ruler, for only in that way could a city prosper. Indeed, so obvious is this truth, Plato concludes, that anyone disposed to establish a tyranny should “turn back and to flee for their lives. . . . Let them endeavor to put on the form of a king and to be subject to kingly laws, enjoying the highest honors by the consent of willing subjects and of the laws.”<sup>1</sup> In the *Statesman*, Plato describes as the best of all constitutions “The rule of one man, if it has been kept within the traces, so to speak, by the written rules we call laws,” and he warns that when the rule of one man is “lawless it is hard, and the most grievous to have to endure.”<sup>2</sup> In the *Laws*, the Athenian Stranger says that rulers should be called “ministers of the law” because “the preservation or ruin of a society depends on this more than on anything else. Where the law is overruled or obsolete, I see destruction hanging over the community; where it is sovereign over the authorities and they its humble servants, I discern the presence of salvation and every blessing Heaven sends on a society.”<sup>3</sup>

<sup>1</sup> Plato, *Eighth Letter* 354e–356e, in *Thirteen Epistles of Plato*, trans. L. A. Post (Oxford: Clarendon, 1925).

<sup>2</sup> Plato, *Plato's Statesman* 302e–303a, ed., trans. J. B. Skemp (New Haven, CT: Yale University Press, 1952).

<sup>3</sup> Plato, *The Laws of Plato* IV, 715d–e, trans. A. E. Taylor (London: Dent, 1934).



The Stranger emphasizes, moreover, that it is because the law consists of rules that are framed when the wrongdoer and his victim are equally unknown that the law secures the stability of the city. For otherwise, whoever achieves power could not be restrained from governing in his own interest, which would provoke others to try to replace him, thus producing endless turmoil. And it is essential to the character of law that it be written because “legal enactments, once put into writing, remain always on record, as though to challenge the question of all time to come . . . since even the dull student may recur to them for reiterated scrutiny.”<sup>4</sup>

Law must also be sharply distinguished from custom. This distinction appears in Plato’s reference in the *Laws* to an age when men did not “so much as possess an alphabet, but regulate[d] their lives by custom and what is called *traditionary* law.” Then men lived not in cities, but separately in families as did the Cyclopes who, according to Homer, had not even “gatherings for councils nor oracles of law, but . . . each one utters the law to his children and his wives, and they reckon not one of another.” But when many different families came together into a larger settlement, the Stranger explains, as each family brought its own “habits of conduct” and “preferences,” they could live together only by agreeing to accept common rules. And these had to be framed by a legislator who adopted what he deemed to be best among the variety of customs brought into the larger community by the smaller groups of which it is composed. The laws may be such local customs “as have our approval” or they may be drawn “from other quarters.” Where the laws come from is of no consequence.<sup>5</sup> What matters is a clear determination of what customs constitute law. In other words, law replaces custom; law makes a definitive selection out of a variety of conflicting customs.

Plato is equally uncompromising about the obligation to obey the law. The history of systematic reflection on the idea of law may be said to open with the argument between Socrates and his friends in the *Crito*. There Socrates addresses himself to explaining why he is obliged to obey the law, and in doing so, he answers the more general question: Does the idea of law include an unqualified obligation to observe it? Although Socrates knows himself to be innocent of the crime for which he had been sentenced to die, when Crito urges him to attempt to escape, Socrates replies that though his sentence was unjust, refusing to submit to it would constitute an even graver injustice. And he establishes his obligation by arguing that though he might at any time have left Athens, he had chosen not to do so. He had in all ways enjoyed the benefits of the kind of life

<sup>4</sup> *Laws* X, 890e–891a.

<sup>5</sup> *Laws* III, 680e–681a; III, 702.

that the laws of Athens secured for him and had even brought children into the world in Athens. In all these ways, he had tacitly accepted membership in the community and had thereby undertaken an obligation to obey its laws. Therefore, if he now attempted to escape from what the law had imposed on him, the laws might justly rebuke him by saying: "Although we have brought you into the world and reared you and educated you, and given you and all your fellow-citizens a share in all the good things at our disposal, nevertheless by the very fact of granting our permission we openly proclaim this principle: that any Athenian, on attaining to manhood and seeing for himself the political organization of the state and us its laws, is permitted, if he is not satisfied with us, to take his property and go away wherever he likes . . . not one of our Laws hinders or prevents him from going away wherever he likes, without any loss of property. On the other hand, if any one of you stands his ground when he can see how we administer justice and the rest of our public organization, we hold that by so doing he has in fact undertaken to do anything that we tell him . . . you are behaving like the lowest type of menial, trying to run away in spite of the contracts and undertakings by which you agreed to live as a member of our State . . . you are breaking covenants and undertakings made with us, although you made them under no compulsion or misunderstanding, and were not compelled to decide in a limited time."<sup>6</sup>

What is important here is not merely the argument that the citizens are obliged to obey the law even when it conflicts with their interests, but also the *reason* why Socrates considers this obligation intrinsic to law. Socrates' argument clearly attaches law to an association made by subscription to rules governing it. And he emphasizes that this kind of association, the *polis* or city-state, is not imposed by nature but made by men. This implies, on the one hand, that men may renounce their membership in a *polis* by leaving it, as they cannot do by leaving their families or tribes. But on the other hand, it implies that a *polis* exists only insofar as its members observe its laws. Once its members cease to subscribe to the law, the *polis* ceases to exist. And that is why Socrates says that if he disobeyed the law, he would be unable to refute the charge that he would thereby be destroying Athens. For the laws would say to him: "Can you deny that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the Laws, and the whole State as well? Do you imagine that a city can continue to exist and

<sup>6</sup> Plato, *Crito* 51c–52a, in *The Last Days of Socrates*, trans. Hugh Tredennick (London: Penguin, 1954).