5

Etched into Collective Memory

Ancient Constitutions

The idea of God-given basic laws carved in stone is ancient and can be found in many early civilisations. Consider Yahweh giving Moses the Ten Commandments as tablets of stone, or Rome's Law of the Twelve Tables (451 BCE), bronze plaques posted at the Forum until their destruction in a Gallic raid (390 BCE). There is one crucial difference between them: the Law of the Twelve Tables largely omits gods – they are not invoked nor are they its source. The text is characteristic of the practical Romans, coming straight to the point: 'If the plaintiff summons the defendant to court the defendant shall go',[1] says the opening of table 1. No incantation, no exordium, just: 'go'. The reason for this straightforwardness is simple: the Twelve Tables were not bestowed by the gods, they were prepared by a commission. How very modern. In the newly founded Roman republic, Romans could no longer rely on a king ruling by the grace of god. They had just overthrown their last and widely despised King Tarquinius Superbus (Tarquin the Proud) in 509 BCE.[2] This obliged them to rethink many parts of Rome's law and administration. They did so by way of a rather formal procedure (a committee) and recorded the result in a formal document (the Tables). This constitutional act, in parts recognisable by contemporary standards, proclaimed both a new 'we' (organisation under new leadership) and a legal system. Despite the great differences with the present,[3] the English classicalist Mary Beard is certainly right in saying that the Twelve Tables

[1] Table I: 'Si in ius vocat, ito.' Translation by Allan Chester Johnson, Paul Robinson Coleman-Norton & Frank Card Bourne, 1961 http://avalon.law.yale.edu/ancient/twelve_tables.asp (consulted on 24 May 2019).

[2] The Roman Republic was founded in 509 BCE, when, according to tradition, the last king of Rome, Lucius Tarquinius Superbus, was overthrown by the first consul of the Republic, Lucius Iunius Brutus.

[3] As Capogrossi Colognesi, referring to Livy, says: 'The Twelve Tables had made the will of "the people" – as embodied in the assemblies – the foundation of the legislative process, and had granted it an autonomous status.' Capogrossi Colognesi 2014, p. 87. Capogrossi Colognesi points out that there are more differences than similarities between what we now call 'law',

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represent an important junction in a contingent developmental process leading to state formation and, ultimately, modern states and constitutions.[4]

THE TWELVE TABLES

The Twelve Tables were certainly not delivered to the Romans on stone tablets from upon the high skies of Anu and Bel or from Mount Sinai. Nor were they even unanimously acclaimed; they were born out of the flames of conflict. The political situation in Rome was unstable after the overthrow of the last king; the institutions, law and social organisation of the old class-based society were not adequate for the new relations.[5] Wealthy patricians had monopolised high civil, religious and military offices which enabled them to control all power and dominate the city-state of Rome. By the end of the sixth century BCE however, the city's prosperity had become increasingly dependent on the workers, small traders and artisans – the plebeians – the Roman labour class, ranking only above slaves. The Twelve Tables were the outcome of this struggle, known as the Conflict of the Orders.[6] The plebeians had tired of the exploitation and oppression they endured under the old guard and revolted. Soon after the birth of the young Republic (509 BCE), Rome was confronted with a major plebeian insurrection, the Secession of the Plebs. It was a surprisingly peaceful uprising for the day and age – the plebs went on strike. In a dramatic gesture, the plebeians abandoned the city en masse in 494 BCE, paralysing public life, in an attempt to force political change. Their protest succeeded. The plebeians were granted representatives (Tribunes of the Plebs) and their own assembly (the Plebeian Assembly, or People's Assembly);[7] the tribunes of the Plebs represented the plebeians in the general public assembly of the republic (the Centuriate Assembly)[8] which had an important – at times a final – say in most of the government business of the Roman Republic. This nominal representation did not protect individual plebeians from patrician domination and associated exploitation. The patricians were entrenched in the senate, the real centre of power in the republic, which appointed two of its members as consuls in charge of the Republic's general administration. Even with their own tribunes, the plebeians had little to no influence on decisions about public funds, law, warfare and leadership. Despite all their efforts, the plebeians made scarcely any progress after the early concessions: the doors of the senate remained firmly closed to them. In 462 BCE, the plebeian tribune Gaius Terentilius Harsa tried to pass another law limiting the consuls'

'constitutional law' and 'state' and the Roman understanding of them; in particular Roman political institutions were very different from their modern counterparts (p. 71–72).

4 Beard 2015, p. 143.

5 Cf. Capogrossi Colognesi 2014, p. 57–63.

6 Beard 2015, p. 146.

7 'Concilium Plebis' in Latin.

8 'Comitia Centuriata' in Latin.

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power by defining it more precisely. But senate foot-dragging until Harsa's term expired succeeded in thwarting his motion. Another major conflict seemed imminent, certainly when the plebeians also began demanding that the city's 'laws' be made public rather than kept secret so only patricians could invoke them. There was complete deadlock until the idea took hold that there should be an enquiry before any decision or arrangement was made. A time-honoured good-governance classic: buy time by study; appoint a committee. The Romans had heard of Athens' positive experiences with codified laws – the Solonian Constitution. In 454 BCE Rome sent three men to Athens to *transcribe* Solon's laws and, more generally, find out more about the way of life and the political institutions of other Greek cities. The commissioners took their time. It was two years before the embassy returned with the requested copy of the Solonian Constitution. But it paid off. The Roman Senate decided the Greek example would serve as the basis for Roman law, the only question was how to 'Romanise' it? Who would compose the first draft? The Plebeian tribunes succeeded in having a decemvirate (commission of ten men, *decemviri*) appointed for a year, tasked with drafting Roman laws (the Twelve Tables) emulating the Greek example.[9] The undertaking was considered so important that the 'regular magistrates' (consuls, proconsuls, quaestors, praetor, censor and the like) were suspended for a year (451 BCE).

The Ten-Man-Commission[10]was chaired by Appius Claudius and was – ineluctably – composed exclusively of patricians. It published a draft of Ten Tables of Laws within a year. Everyone in the city was invited to read, consider and discuss the proposed laws, which was to be followed by a general, public discussion. All very modern, as were the consequences: trouble. Whilst the decemvirate's work was much appreciated, most Romans thought it incomplete. At least another two tables were required. The following year another decemvirate was established, which had to work in far more difficult circumstances. After much controversy and even sex scandals,[11] two additional tables were completed. Along with the ten earlier laws, they were inscribed on bronze and posted at the forum in the city centre. They remained there for less than sixty years before being destroyed in a Gallic raid (or – more likely – pillaged; bronze was valuable). Their brief period at the marketplace belies the substantial influence the Twelve Tables have had in the many centuries of Roman rule and civilisation since. Their content became part of Romans' living memory, passed down from one generation to the next (both orally and in writing) and internalised. Cicero says that schoolboys at the start of the first century BCE still had to learn the Twelve Tables by rote. He complained that almost no one knew them off by heart fifty years later (c. 55 BCE). It proves yet again – there is really only one enduring grievance: everything used to be better in the old days.

[9] For a 'first-hand' report – 400 years after the occasion – cf. Cicero 2008, p. 51–56.
[10] The 'Decemvirate' in Latin.
[11] Beard 2015, p. 149–150.

The Twelve Tables clearly show how laws and constitutions made the transition over time from divinely mediated to human rules and how written 'legal' regulations came to play an increasing role in a society's organisation and governance. There is no mention of any god in the Twelve Tables[12] and they did not even have to explain who the 'we' was: S.P.Q.R. The senate and people of Rome – evidently. Twelve plaques enshrining and displaying a city-state's laws. After the Greek example, where constitutional experimentation had been taking place for several hundred years.

GREECE

Classical Greece could rightfully claim the title of the very first constitutional country in antiquity, were it not that Greece was not one country at the time. Ancient Greece consisted of a collection of city-states (*poleis*), colonies and settlements with a shared language, religion and culture. Between the seventh and second centuries BCE, many of the maritime and highly successful Greek city-states had collections of laws governing both city governance and relations between citizens. These laws were a patchwork of private-law rules – governing relations between citizens – and public-law rules – governing relations between citizens and government, the status of citizens and their leaders. Ancient Greeks would not have considered them a patchwork; the modern distinction between private-law and public-law rules arose at a much later date. This is, for instance, illustrated by rules governing family affairs. Nowadays the regulation of family affairs and family law is largely the domain of private law, whilst in ancient Greece it was a matter of public concern and 'public law': government played a major role in setting the rules concerning family matters since it was considered a matter of public order. In Thebes you were not permitted to start a family, let alone get married, without the permission of the king or city assembly (*ekklēsia*). If you could not find a partner, you could get an exemption from the family ban if your father promised to give his sons to the army. Adoption was often a public matter too.[13] On the other hand, things we nowadays consider almost self-evidently public and subject of governmental regulation, were not seen in the same light by the ancient Greeks. Take the administration of justice. The laws of many ancient *poleis* deemed it *not* a direct matter for the government (king, ruler, or city government), but instead one for citizens to settle through a jury, mediator or judge whom they themselves appointed. A form of dispute resolution we would now call mediation. As confusing as ancient Greek commingling of the distinction between public and private spheres can be for us, they did distinguish between legal rules of divine origin and ordinary secular rules.

[12] Although Table X is about sacred law (worship, sacrifices, funerals, and so on), it does not invoke the gods. Nonetheless Table VII stipulates that using magic spells or prayers, or black magic to dispatch someone is a capital offence. Hartley was, of course, correct in saying: 'The past is a foreign country; they do things differently there.' Hartley 2014, p. 1.

[13] Tomlinson 2006, p. 10.

The latter increased in step with expanding economic activity. It worked as a catalyst. Trade puts a great deal of strain on human relations and groups. How can people trust one another? In your own group or tribe, you can hold each other to account after a transaction. This is no longer possible when you have bought something from a 'stranger' in a casual place. As trade is a very attractive way of exchanging surpluses and products, and hence of increasing both parties' wealth, prosperity and well-being (trade increases your chances of survival and gives you greater control of the environment), human communities have tried to find various ways of solving its drawbacks. First, by converting occasional exchanges, in which parties more or less accidentally encounter each other, into institutionalised exchanges (dedicated marketplaces, fairs, larger gatherings) in which the presence of a crowd allowed increased social control. Later these markets became even more concentrated, allowing further control and standardisation. Markets were drawn to the cities. The French historian Fernand Braudel shows how:

> In rather minimal form perhaps, markets […] existed in very ancient times within a single village or group of villages – the market being a sort of itinerant village, as the fair was a sort of travelling town. But the decisive step in this long history was taken when the *town* appropriated these hitherto modest little markets. […] The *urban* market may have been invented by the Phoenicians. Certainly, the Greek city-states of about the same period all had a market on the *agora*, the central square; they also invented or at any rate propagated money, which clearly furthered the career of the market […].[14]

Then as now, markets required rules. Not because markets could not function independently or find a balance, but simply because increasing the intensity of exchange and trade entails somehow organising the core element – *trust*. This was achieved with fiduciary abstractions and institutions: money and rules. The rise and fabulous success of the Greek city-states show how these processes go hand in hand. There was a proliferation of trading cities in the area around the Aegean Sea from the seventh century BCE. The seafaring Greeks, aided by a common language and culture (which facilitated mutual communication and hence trust) successfully utilised a new, large-scale source of wealth – large-scale overseas trade between concentrated trading centres (cities).[15] As these urban centres grew, there was a large-scale proliferation in legal rules (*nomoi*) and other fiduciary institutions. Naturally, these rules varied from place to place: every city-state had its own history and traditions. Local situations differed and accordingly, so did the law. Some city-states were literally thousands of kilometres apart. Yet, it is also interesting to look at the similarities. Unlike Mesopotamian constitutions, many of these city-state rules – which usually formed a single entity with the city-state's form of government (*politeia*) – no longer

[14] Braudel 1992, p. 228.

[15] Hall 2015, chapter 2 (*The Creation of Greece*) and chapter 3 (*Frogs and Dolphins Round the Pond*), p. 51–99.

referred to gods or divine origins of the laws most of the time. We know that the Greek city-states' various forms of government in the period were predominantly 'secular': they were made by humans. Religion played a much smaller role than it had in ancient Mesopotamian governance. A second striking aspect is the competition between city-states over who actually had the best laws and governance system. The ever-rivalrous Hellenes, of course, liked nothing more than a good competition (just think of the Olympic and Pythian Games),[16] but the comparisons of laws and city-states' forms of government by great thinkers like Plato and Aristotle are still extraordinary. They are enquiring quests for 'good' laws and the best forms of government, which have appealed to the imagination and served as an example right up to this day. These antique studies are all the more impressive as they were largely intended simply as comparative research into which city formula worked best. The quest for the best formula came with a bonus, for the best-organised city was most of the time also the strongest city with the best opportunities to outperform other cities or even to overpower them.

DRERos AND DRACO

The oldest *polis* legal code, or constitution, belongs to Dreros on the island of Crete (c. 650–600 BCE).[17] The code's preamble, found on a carved stone in the temple of Apollo at Delphi, states:[18]

> May God be kind (?). The city has thus decided; when a man has been *kosmos* [chief magistrate, ruler], the same man shall not be *kosmos* again for ten years. If he does act as *kosmos*, whatever, judgements he gives, he shall owe double, and he shall lose his rights to office, as long as he lives, and whatever he does as *kosmos* shall be nothing. The swearers shall be the *kosmos* (i.e., the body of *kosmoi*) […].

It is a sort of ancient one-term limit. Whoever was president or chief ruler for one term could not hold that office again for ten years. Violation of this cooling-off period was severely punished: all of the transgressor's acts were null and void, he could never hold office again, and was liable for damages resulting from his rulings (all damages awarded had to be repaid double) and the council of wise man could intervene at any time and replace him. The Dreros law does invoke God, but chiefly for form's sake as an incantation; the law itself was passed by the city.

Vastly more famous than this relatively obscure legal code is the Draconian constitution, or Draco's code. Created by the Athenian legislator Draco in about 624 BCE, we only actually know these laws from later references. As far as we know, these first Athenian laws chiefly governed criminal law. This is quite modern in itself. Draco's

[16] Hall 2015, chapter 7 (*The Rivalrous Macedonians*), p. 181 ff.
[17] (Michael) Scott 2016, p. 31.
[18] Meiggs & Lewis 1969, p. 2–3.

code introduced the distinction between murder (intentional homicide) and manslaughter (unintentional homicide). It contains little about the functioning of the Athenian government. This 'Draconian constitution' does not appear to be much of a constitution at first sight. But once we appreciate its underlying intention – putting an end to the formerly common practice of taking the law into one's own hands and the disruptive consequences feuds and retaliation had on Athenian society – it gains a more familiar ring. The essence of Draco's code was twofold: halting cycles of vengeance, and prescribing that crimes and offences mentioned in the laws would be dealt with in court instead of citizens taking the law into their own hands. Various courts were also established for different kinds of offence or crime, and they were accessible to every citizen. The laws also partially ended class justice. Nonetheless, Draco's code is mainly remembered for a single quality: its 'draconian' character. Almost all violations of the rules in his law code carried the death penalty. If the Athenians had applied all these laws to the letter, they would certainly not have been able to withstand the Persian invasion in around 500 BCE thanks to a dearth of inhabitants.

THE SOLONIAN CONSTITUTION

The Draconian constitution failed to stymie internal dissension in Athens, which by the turn of the sixth century BCE was a rapidly growing and wealthy port city. This bustling *polis* was riven by constant clashes between established interests and impetuous upstarts – an age-old story in places where markets and opportunities proliferate rapidly, and everyone gets caught up in the ferment of quick profits.

Solon came to the fore in the midst of this tumultuous situation. He was a politician, poet and good legislator – a sort of cross between Confucius, King Hammurabi and King Solomon. This archetypical wise ruler, and scion of an aristocratic Athenian family, rose to prominence around 600 BCE not only as an apt army commander, but also as an adviser in a conflict between Megara and Athens over the possession of the island of Salamis. He knew better than anyone how things worked in the city – what the interests were – the landed nobility's long-standing traditions, rights and agricultural interests, and the mercantile classes' aspiration to put the *polis* on the map. Solon understood that Athens would need to bridge the differences between the city's competing factions if it were to survive the intense competition with other Greek cities.[19] It was no easy task. The power struggles between the landed aristocratic families had been partially curbed by Draco's code, but the gentry still dominated the Athenian government whilst traders, artisans and small farmers were all but excluded from it. Many ordinary Athenians were crippled by large debts and debt bondage, which was exacerbated by the nobility's (successful) litigiousness. The city was literally hamstrung. In a desperate attempt to end the upheaval, the Athenian citizenry awarded Solon autocratic powers to make a legal code which would go beyond Draco's code – new

[19] (Michael) Scott 2016, p. 32.

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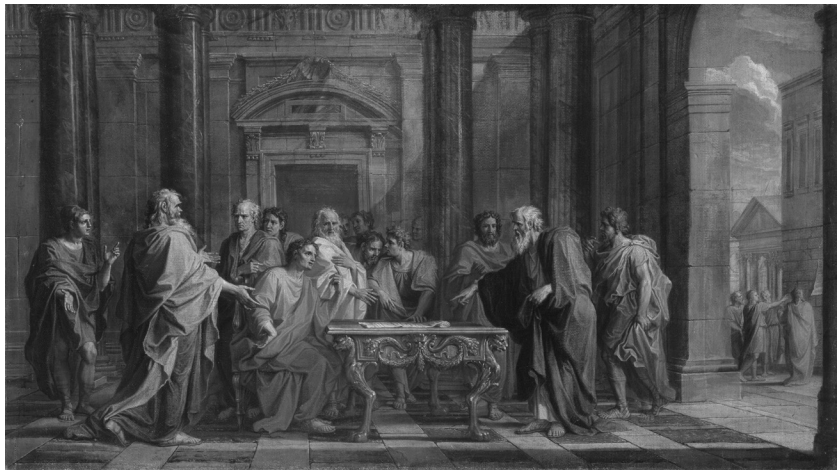
laws on good, fair and just governance. Solon promulgated his revolutionary legal code in 594 BCE. Its rules were not limited solely to capital crimes but regulated just about all aspects of social life. Solon used his laws to open the city's government and public administration to all citizens. The Athenians were divided into four classes, based on property not heredity. All four groups were in principle given a say in the city's government, with the poorest classes allowed to participate in the *Ekklēsia* (popular assembly) and serving on the *Heliaia* (people's court) but barred from the other tiers of government. The *Ekklēsia* would later on serve as the cornerstone, the very foundation, of the democracy instituted by Cleisthenes from 508 BCE. Solon crafted his laws subtly, attempting to inspire the often improvident Athenians to behave with political responsibility. There were to be no political games; Solon's laws stipulated that in a political conflict every citizen must vote according to his 'conscience' and always choose the most just option above partisan interests. The laws also tried to resolve the city's rampant debt problem. They abolished all debts and debt bondage of an Athenian citizen was prohibited.[20] In addition, penalties in the Draconian code were reduced, new family and inheritance laws were introduced (allowing non-family members to inherit), parents were – how modern – obliged to have their children learn a trade, and children were, in turn, obliged to support their parents in old age. The common thread in Solon's legislation is that it forced Athenian citizens to take each other into account in order to foster and maintain harmonious and workable relations in the *polis*, or *eumonia*: good order.

Solon's laws also encompassed important economic reforms. They imposed export restrictions on agricultural products, except for olive oil. Attican produce was to feed the Atticans and not merely serve as something to be exchanged for luxury goods. Everyone was also obliged in principle to dig their own well, but those who failed to find water were entitled to use their neighbours' well. The laws contained many rules aimed at mitigating disputes between neighbours – about relatively minor matters such as planting trees and problems caused by trees, digging ditches, where to place beehives, nuisance caused by dogs, and so forth. Solon's laws also instituted a surprisingly open immigration policy: foreigners who practised a trade in the city and came to live in Athens with their whole family could obtain civil rights. We can discern without too much difficulty a city constitution in Solon's laws, even if they contained many laws that we would categorise as criminal or private law today. This do not detract from its core intention: regulating society through government intervention in a context of rules on leadership, law and society.[21]

Solon's legal code was engraved on rotating wooden rolls and posted at the agora (marketplace) where everyone could read them. They were also seen by the Roman embassy that came to study the Athenian constitution one hundred and fifty years later.

[20] *Ibid.*, p. 33.

[21] Lanni and Vermeule also assume that Solon's laws can be considered a constitution, like many other Greek and Roman sets of laws. They compare antique constitutions, including



Noël Coypel (1628–1707), *Solon upholds his laws against the objections of the Athenians*, c. 1672

Solon might have been wise, like the great King Hammurabi, but he was by no means modest. He praised his reforms in his poems:

> To the demos [the people] I have given such honour as is sufficient,
> neither taking away nor granting any more.
> For those who had power and were great in riches,
> I equally cared that they should suffer nothing wrong.
> Thus I stood, holding my strong shield over both,
> and I did not allow either side to prevail against justice.[22]

He was a bringer of peace who brought the Athenian aristocracy and citizenry together and wanted them to know this. For 'if someone other than I had taken power,' he boasted:

> some ill-intentioned and greedy man, he would not have been able to control the people. For had I been willing to do what pleased the opposing party then, or what the others had planned for them, this city would have lost many men.

the Draconian and Solonian constitutions, with modern constitutions in an article in the 2012 *Stanford Law Review*. There are, of course, significant differences. Classical antiquity lacked our modern political institutions and the design, classification and meaning of the law was different. A characteristic difference is that ancient constitutions were often drafted by a single individual, sometimes even a foreigner. As a rule, modern constitutions are drafted by groups or dedicated committees, and are usually adopted by delegates, who are often parliamentary representatives. What are the strengths and weaknesses of these drafting methods? A product of many minds certainly has many strengths, including a greater likelihood of enjoying widespread support, but there are situations in which a single author would be advantageous in modern relations. Cf. Lanni & Vermeule 2012.

[22] Solon, Fragment 5.1; (Michael) Scott 2016, p. 32.

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> That is why I made a stout defence all round, turning like a wolf among many hounds.[23]

The hounds eventually got the better of him, when a clique associated with Peisistratos usurped power in 546 BCE. By then elderly and powerless, Solon witnessed the demise of his 'third-way' politics and the moderate governance he had laboured so hard to achieve. He could not have known that his legacy had laid the foundations for Athens' zenith from 500 BCE, when after the introduction of democracy and a victory over Persia the golden era of Perikles blossomed: a period of unprecedented accomplishments in democracy, philosophy and the arts.

ARISTOTLE

The Solonian Constitution promoted unity in Athens, which facilitated social mobilisation, prosperity and order. These key factors enabled this small *polis* to withstand the mighty Persian empire[24] and become a great power for a time. Whether or not following the Athenian example, other Greek city states established constitutions of this kind too. As mentioned, the Greek philosopher Aristotle counted at least 158 of them around 325 BCE. Which one functioned best? What kind of rules made a polity strongest, happiest and most prosperous? It has remained an intriguing question to this day. Aristotle addresses it in Book II of his great work *The Politics*. His analyses are very precise and systematic – scientifically sound. By way of introduction, he argues that one, of course, needs to determine what one is talking about before embarking on a comparison. What are city-state 'constitutions' (*Politeia*)? Aristotle says that politeia are about 'the organisation of the offices [of state], and in particular the one that is sovereign over *all* the others':[25] government, including the executive and judiciary. Constitutions deal with the way in which authority and supreme power (sovereignty) is shaped. Aristotle's constitutional concept is essentially the same as Dicey's aforementioned broad definition, only it precedes it by more than two thousand years. Aristotle was confronted by great variety in the constitutions he studied, which, of course, had to do with the fact that this multitude of city-states had different societies, contexts and backgrounds. In some cases, citizens were closely bound by family ties, descent and tradition, and had a shared identity; other cities citizens did not share much more than a common defensive wall – a loose-knit collection of assorted inhabitants and communities living in the same place and sharing little in common. Aristotle gives the example of the Persian city of Babylon – part of the city was still unaware that the city had fallen two days after its capture (in 538 BCE).[26] Obviously government needs to be organised differently when citizens share little in common than when there is a close, homogeneous community.

[23] Solon's poem fragment 35. Cf. (Michael) Scott 2016, p. 32.
[24] Decided by the battles of Salamis (480 BCE) and Plataea (479 BCE).
[25] Aristotle 1962, *The Politics*, III.6, 1278 b6-b15. My Italics.
[26] Aristotle 1962, *The Politics*, III.3, 1276 a24-a34.

Step two of Aristotle's classification of constitutions is perhaps the most essential. In this, he addresses the aim of a constitution and the purpose of a form of government. We might be tempted to disregard this question nowadays, perhaps taking the answer for granted. Aristotle's answer starts with what sounds like a platitude: the greatest good of a form of government is 'justice', giving each their due.[27] For Aristotle, this is of supreme importance:

> This good is greatest, and is a 'good' in the highest sense, when that knowledge or skill is the most sovereign one, i.e. the faculty of statecraft. In the state, the good aimed at is justice; and that means what is for the benefit of the whole community. Now all men agree that justice means equality in some sense [...] that justice is some entity which is relative to persons, and that equality must be equal for equals.[28]

Fine. Of course. But surely this is self-evident? Not quite. Aristotle's idea of the purpose of constitutions only really becomes apparent farther in the text. What exactly does justice mean? Certainly not the identification of the individual with the community as conceived by Aristotle's teacher Plato (c. 427 – 347 BCE) in his book *The Republic*. In Plato's totalitarian utopia, property is communal and all of the community's efforts are focused on political unity, harmony and shared values: it is a community that endeavours to eliminate differences between people; what is good for the community is good for the individual and vice versa – they have to become one. Aristotle considers this an absurd goal and a misleading principle for organising a state.[29] His basic principle is that people are different and always have different needs and interests. As such, the organisation of the state must aim to recognise these differences, recognise people and, strive for the happiness and contentment of as many members of the community as possible, instead of the happiness of the community as such. Recognising differences and doing them justice is the starting point and goal of political organisation. It sounds surprisingly contemporary, especially considering modern scientific insights into the biological roots of our desire for recognition. A good state must, according to Aristotle, constantly look for the *best in* all its diverse citizens in order to turn this into the best *for all* its citizens. In this way, a polity can work towards developing some kind of happiness maximisation,[30] not for a small group, but for all citizens in a political community, a *polis*.[31]

In his third step, Aristotle takes these principles on the forms and aims of constitutions to look for patterns. He classified the Greek city-state constitutions known to him into three 'good' leadership systems (or systems of government): *monarchy* (government by a single competent leader), *aristocracy* (government by a select group

[27] 'Suum cuique tribuere' as the later Roman adage puts it.
[28] Aristotle 1962, *The Politics*, III.12, 1282 b14-b23.
[29] Aristotle 1962, *The Politics*, II.5.
[30] Aristotle 1962, *The Politics*, VII.13, 1332 a32-a38.
[31] Aristotle 1962, *The Politics*, VII.9, 1329 a17-a27.

of the 'best' or most competent people) and what he calls *polity* or majority rule by the citizenry. Aristotle argued that the three good forms could degenerate into three perverted forms. 'Tyranny is monarchy for the benefit of the monarch, oligarchy for the benefit of the men of means, democracy for the benefit of the men without means. None of the three aims to be of profit of the common interest.'[32] Aristotle considered democracy a perverted form of government solely focused on the short-term and short-sighted interest of those without means. There are still those, thankfully a minority, who would concur.

One of Aristotle's greatest strengths is his appreciation that there is no one-size-fits-all constitution, even though he did favour *integrative* constitutions able to deliver the greatest happiness to the greatest number of citizens. Aristotle thinks that the most likely way of achieving this aim is through majority rule, polity, but maximal happiness of this kind might be achieved through other forms of government as well.[33] The challenge is, of course, preventing degeneration and perversion. Aristotle's prescription for this is a familiar one. He prized mixed forms of government (also known as the *mixed constitution*) in which power is divided between branches of government that keep each other in check because they can only be held temporarily and have to work together. The Greco-Roman historian Polybius (c. 200 – 120 BCE),[34] a great admirer of Aristotle, regarded the mixed constitution as key to the success of the Roman republic.[35] Intelligent and integrative government facilitated Roman victory in the Punic Wars against Hannibal's Carthage in the second and third centuries BCE. Rome's mixed constitution enabled it to utilise and deploy its human resources more effectively than its authoritarian opponent. Hannibal, a brilliant strategist, was dependent on mercenaries and allies – ultimately he simply could not match the sheer limitless resources of the 'we' of Rome.

The aim of this book is, of course, not to give a comprehensive overview of the great thinkers of antiquity but to learn more about the origin and provenance of constitutions. Aristotle's study of constitutions provides an excellent insight into this. Why do societies, like the Greek city-states, have rules to organise their government and society? What are their consequences?

Aristotle's study shows that constitutions are a solution to the organisational problem of growing and competing mercantile societies in ancient Greece. How do you take concerted action in a new environment like this? How do you deal with kin, acquaintances and strangers, and with the many conflicting interests? How do you lead a group of this kind? And how do you organise this group so that every member has a place in it and can flourish? There are essentially two

[32] Aristotle 1962, *The Politics*, III.8, 1279 b4-b10.
[33] Aristotle 1962, *The Politics*, IV.3, 1289 b30-1290 a25.
[34] Polybius 1923, book VI.
[35] Asmis 2005, especially p. 378.

options. Either the individual is *absorbed* by society and becomes one with it. Thus, mostly under the condition that society also commits to the fate and well-being of the individual 'family' member: the family's happiness is the family member's happiness. The community and the individual correspond entirely. Community and society become one as well. Members serve their interest by serving the group interest; failing to do so harms the group, the other members and essentially the member herself. The other option – favoured by Aristotle and his ilk – recognises that community and individual values and interests do not automatically correspond and tries to find some solution to this by making agreements about leadership, social class divisions, privileges, minority rights and so forth. The former position in which individual and community become one might initially appear to have only theoretical significance, but nothing could be farther from the truth. Major state ideologies, past and present, including theocracy as well as Communism and other humanist schools,[36] strive for exactly this kind of political and hence social unity of the group and its members. For many Christians and their leaders in early mediaeval Europe, for instance, the aims and interests of the community and its members were one and the same: serving God.[37] The modern conception of individuality was unimaginable.[38]

Aristotle is also relevant because he raises the topical issue of social engineering. Can you use rules on law, leadership and other institutions to direct and change the course of a society and markets? Or are the edifices of law and leadership not much more than the coincidental proceeds – the outcomes – of the dynamics of human society? In other words: do these institutions *matter*?[39] Do the channels of constitutions and their institutions direct the flow and course of the water, as institutionalists (old and new) believe, or is it the water current that shapes the channels? Aristotle certainly belongs to the former school; he is a neo-institutionalist avant la lettre.[40] He argues that a good, constitutional organisation of governance can shape a society's direction, provided the overall setup of this organisation is convincing, appealing and internalised:

> The same things are best for a community and for individuals, and it is these that a lawgiver must instil into the souls of men.[41]

You could put this on a modern election poster and win votes with it.

[36] Social and evolutionary humanism in particular. Harari 2016, p. 246–257.
[37] As Church Father Augustine wrote (and prescribed) as early as 426 CE in *De Civitate Dei*.
[38] Siedentop 2014, chapters 14 (*Fostering the Peace of God*) and 15 (*The Papal Revolution: A Constitution for Europe?*) and *Epilogue: Christianity and Secularism*.
[39] Not in everyone's view, but North argues that they *do*. Cf. his famous book on institutions North 1990.
[40] Friedland 1991, p. 223–262.
[41] Aristotle 1962, *The Politics*, VII.14, 1333 b26–b37.

PLATO AND WISDOM AS A SOURCE OF LAW AND GOVERNMENT

Aristotle's conception of law and government as nothing more than products of human endeavour – the random outcome of a political process – has always felt a little uncomfortable, certainly for lawyers. The Australian political philosopher Tom Campbell writes that 'for many lawyers […] the very idea that law is a manifestation or type of politics seems almost offensive.'[42] This is not a modern aversion, but an enduring attitude rooted in classical antiquity. We like to think of fundamental and legal rules as a form of higher wisdom, either of divine origin or passed down over generations from wise ancestors. This is also a cornerstone of modern common law legal systems, as found in the United Kingdom and partly in countries such as Australia, India and the United States.[43] Law is mainly derived from case law in this system – at least, in theory. It is underpinned by the idea that law arises from precedent – collections of judicial decisions. Layer upon layer of this literally 'common law' arises from tradition, custom and precedent, giving expression to a society's 'latent' wisdom.[44] Passed down from generation to generation, the law stems from a society's history and is the expression of the wisdom of centuries. It is a far cry from modern 'continental' legal systems, in which fundamental rules and legal rules are made in the present by living people and legislation is the main source of law. It does not feel right to believers in 'wise' law, like most legal scholar in common law countries, even if these days most law in these jurisdictions is also promulgated in man-made laws.[45]

The idea of seeing constitutions and law as inherited forms of wisdom and tradition, and using them as such, has many advantages. First, it gives guidance; the very survival and transmission of these organisational and legal rules has proven their worth.[46] It obviates the need for the current generation expend time and energy reinventing the wheel. Traditions, inherited wisdom and law, time-honoured forms of leadership and organisation are in this respect efficient. This guidance also binds; 'wise' inherited law confers legitimacy and socialises members of a society. Who can contradict the ancestors and long-established insights? Organisation according to long-standing practices and rules also promotes mutual trust and social cohesion and effectively appeals to our abstract imagination by referring to bygone events, departed people and the like. As a human species, we are sensitive to tradition and custom[47] and tend to regard old customs and insights as normatively binding.[48]

[42] Campbell 2012, p. 228.
[43] O'Scannlain 2004, especially p. 757–759 and p. 762–763.
[44] Vermeule 2007.
[45] Mattei & Pess 2008.
[46] 'Law is, of course, the result of this socially formed mentality in adapting the race to its physical surroundings, and in striving to overcome those surroundings', as Zane puts it. Zane 1998, p. 3.
[47] We are naturally sensitive to and follow custom. Cf. Amodio, Jost, Master & Ye 2007.
[48] Beetham argues that legitimacy always has a normative structure. It is always derived from rules (e.g. legal rules) that can be justified (in terms of a shared belief in them), and legitimacy

Tradition, precedent, inherited wisdom and custom have a great capacity to legitimise decisions.[49]

The authors of Hammurabi's stele and the Solonian Constitution insisted that they were *wise*. Which is hardly surprising; we are all susceptible to the self-evidence of the relationship between law, justice and wisdom. It strikes a chord – the Platonic chord. That law and politics needed to reflect justice and wisdom was a foregone conclusion for the Athenian philosopher Plato (427–347 BCE). An ideal society and perfect state[50] entail handing power to people with the capacity to govern with knowledge and wisdom.[51] If what Plato calls the *guardians* are well prepared for their duty to govern then they will do so wisely. These guardians must be properly raised, educated and exempted from military training in order to be able to perform their duties in society's interests and not merely serve their own interests.[52] It would be best if philosophers, as the wisest and most reasonable people of all, were to rule the state. Plato ascribes the following words to Socrates in *The Republic*.

> Unless, said I, either philosophers become kings in our states or those whom we now call our kings and rulers take to the pursuit of philosophy seriously and adequately, and there is a conjunction of these two things, political power and philosophical intelligence, while the motley horde of the natures who at present pursue either apart from the other are compulsory excluded, there can be no cessation of troubles, dear Glaucon, for our states, nor, I fancy, for the human race either.[53]

This idea of the wise ruler, the wise government and the wise law has survived through to the present day.[54] It is still reflected in the idealisation of rulers and judges, reverence for and authority of precedent, tradition and 'constructed' law in the form of legal principles, as well as protest against transient, man-made (constitutional) law that breaks with tradition and inherited wisdom.[55] Certainly after the emergence of large-scale societies in states and the secularisation of government, wisdom as a source of law and leadership shifted into the background.[56]

in the form of 'expressed consent on the part of those qualified to give it'. Cf. Beetham 1991, chapter 3 (*The Normative Structure of Legitimacy*), p. 64–99.

[49] Weber argues that tradition confers authority and is one of the three sources of legitimacy (alongside rational-legal and charismatic authority). Cf. Weber 1964, p. 328–329. For further refinement, cf. Matheson 1987.

[50] Plato, *The Republic*, Volume 4, book 5, 427 e. (and Plato 1983, p. 197).

[51] Plato, *The Republic*, Volume 4, book 5, 428 b.

[52] Plato, *The Republic*, Volume 4, book 5, 428–429.

[53] Plato, *The Republic*, Volume 7, book 5, 473 d.

[54] All over the world. Chinese Confucianism has parallels with Plato's ideas and is still influential in political theory in China today. Cf. Jenco 2010.

[55] 'The great modern fallacy that a constitution can be made, can be manufactured by a combination of existing force and tendencies' as Garner says referring to Burkhardt. Garner 1990, especially p. 52.

[56] The nineteenth century historian Burckhardt regarded the emergence of states at the end of the sixteenth century as the root of the evil. He wrote of the perversions of state formation: 'In this process, intellect came halfway to meet power. What power could not attain by violence,

Many people in the eighteenth century thought it a worrying development, as they witnessed reason and empirical insight supersede age-old custom and tradition. A year after the French Revolution, Edmund Burke, the Anglo-Irish father of conservatism, warned that the loss of the latent wisdom of generations even endangered the law as *law*:

> We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them.[57]

And yet, in spite of sullen nostalgia and bitter complaints, over the centuries law and constitutional law increasingly have become a human endeavour, trailing in the wake of rational humanism – a shared and profane belief which has steadily spread around the world from the late Middle Ages onwards.

intellect freely offered, in order to remain in its good graces […] Literature and even philosophy became servile in their glorification of the state […]' Burckhardt 1979, p. 136–137.

[57] Burke 2003, p. 74.

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