

Chapter 3: A Craft of Functional Lawmaking

Plato's *Nomoi* is neither primarily an investigation into laws that are good according to universal truth nor a work of legal philosophy aiming to develop a universal criterion to criticize or justify existing laws—nor does it have anything to do with justification in the sense of a political philosophy's conceiving of certain abstract norms or values as the fundamental principles of justifiable norms. Rather, this work is characterized by goal-directedness. Its aim is to develop a practicable *nomothetike*, that is, a kind of power-knowledge that citizens collectively implement in concrete situations to achieve a specific goal: cultivating their virtue, the highest form of which is justice—*dikaiosyne*. Unlike the *Politeia*, Plato's *Nomoi* is not an inquiry regulated by the will to know. Instead, it is a strategy governed by the will to power. Its principle is not truth that can be discovered but appropriateness determined by specific goals and power relationships among humans, as well as between humans and things.

3.1 The Purpose of Lawmaking

Θεὸς ἢ τις ἀνθρώπων ὑμῖν, ὃ ξένοι, εἴληφε τὴν αἰτίαν τῆς τῶν νόμων διαθέσεως; (Plato, *Laws* 1.624a)

A god or a man, who possesses the cause of the arrangement of *nomos* in your opinion, Strangers?

The first book of the *Nomoi* thus begins by asking what the cause (αἰτία) of *nomos* is. This is not an either/or question, because it is eminently clear that human actions are a cause of all functioning laws and orders; thus, the question is whether the causes (or the first cause) of *nomos* include divine elements. After Clinias has briefly established the divine elements causative of *nomos*, the Athenian turns to the purpose of the arrangement of *nomos*:

Κατὰ τί τὰ συσσίτια τε ὑμῖν συντέταχεν ὁ νόμος καὶ τὰ γυμνάσια καὶ τὴν τῶν ὀπλῶν ἕξιν;

For what purpose, in your opinion, did *nomos* arrange common meals, gymnastic school, and training in weapons?

What lies behind this question is a common belief held in ancient Greece: Law and order are products of *techne* exerted in service of certain goals that differ from those of observing laws. For both individuals and states, the act of following laws is a means, not an end. Clinias' first answer to the question is »πρὸς τὸν πόλεμον« [1.625d; for war] because victory over one's enemies is a necessary precondition for possessing property and almost all other political practices (cf. 1.626a–b). The Athenian is dubious of such an answer, since Clinias' understanding of war is, *prima facie*, limited to war between states. Clinias subsequently explains further, demonstrating the necessity of public war among citizens, as well as private war against oneself (cf. 1.626c–628b). This understanding, however, neglects the fact that fighting a war is merely a specific instrument resulting from strategic thinking based on specific situations and should not be considered an essential *ergon* of the *nomothetike*. This means that the *nomothetike*, as a *techne*, is not defined by war, which should, instead, be conceived of as an instrument or, in other words, a strategic *ergon* (1.628c–d):

Τό γε μὴν ἄριστον οὔτε ὁ πόλεμος οὔτε ἡ στάσις, ἀπευκτὸν δὲ τὸ δεηθῆναι τούτων, εἰρήνην δὲ πρὸς ἀλλήλους ἅμα καὶ φιλοφροσύνη, καὶ δὴ καὶ τὸ νικᾶν, ὡς ἔοικεν, αὐτὴν αὐτὴν πόλιν οὐκ ἦν τῶν ἀρίστων ἀλλὰ τῶν ἀναγκαίων [...]

The best thing is neither war nor civil war, which should never be desired, but peace and goodwill among each other; and the victory of a state over itself is obviously not one of the best things but something necessary.

Trevor J. Saunders (1997)⁹ elegantly translates »ἀλλὰ τῶν ἀναγκαίων« [but something necessary] as »it is just one of those things in which we've no choice.« This translation commendably illuminates the power relationship revealed by strategic thinking. We do not want war in any sense, but we are forced to fight wars against other states, against our fellow citizens, and against ourselves within each one of us: We have no choice in this, because we are forced by our *ergon* and strategy based on actual circumstances. Peaceful order in the state is a necessary condition of all political practices; similarly, peaceful order in an individual soul is a necessary condition of self-education. Fighting wars is thus a strategic *ergon* of the *nomothetike*, since order and law only exist in peaceful circumstances. If war is unavoidable, we must devote ourselves to fighting it, if we desire the *nomothetike*; and given that the ideal state has not yet been generated, if we desire to produce just individuals, the *nomothetike* is precisely what we must exert.

It is important to note that Plato does not advocate for some contemporary ideology in the name of the »rule of law« or »law and order.« In fact, he dislikes legal norms just as much as he dislikes war. In both the *Nomoi* and the *Politeia*, Plato argues that an ideally just state has no *nomos* in the form of legal order but only order produced by autonomous individuals (cf. Plato, *Republic* 4.425a–427a; *Laws* 4.739a–e). In the *Politeia*, legal order is considered pointless because a just state does not require it, while for a badly governed state, legal order by which the state is regulated is useless in that it accomplishes nothing (cf. Plato, *Republic* 4.427a). Nevertheless, based on strategic thinking (cf. *Laws* 4.739a–b), the later Plato attaches importance to legal order as an instrument of the *nomothetike*, whose essential *ergon*, as its goal, is »οὐκ ἄλλο ἢ πρὸς τὴν μεγίστην

9 See the English translations of *Plato Complete Works* edited by John M. Cooper (1997).

ἀρετὴν« [Laws 1.630c; nothing other than the highest virtue], that is, justice–*dikaiosyne*.

Lawmaking (νομοθεσία) is not equal to the *nomothetike* itself; rather, it is one of the instruments of the *nomothetike* that is applied in specific circumstances. Plato's dislike of legal order should not, moreover, be seen as a dislike of *nomos*, which can only be understood as »law« in specific contexts.

3.2 Plato's Concept of *Nomos*

The Greek word »νόμος« (*nomos*) is a polyseme whose meaning varies not only across time and between authors but also within a single author's work. It can be translated as »law,« »convention,« »custom,« »musical mode.« I suggest comprehending the term primarily as meaning »order,« which can be divided into the following categories:

- (1) An **order, in the broad sense**, is an ensemble of regularities in action shared by most individuals living in a given location.
- (2) I call it **legal order**, or simply **law**, when referring to an ensemble of statutes that command individuals to act in determined ways. If most people follow the commands of these statutes, then their actions will show regularities as obliged by the statutes.
- (3) I call it **autonomous order** when referring to an ensemble of regularities produced by individuals, each of whom acts either out of habit or out of rationality.
- (4) I call it **concrete order** when referring to an ensemble of regularities produced by individuals affected by a given synergy of various elements, such as laws, habits, rationality, tradition, productivity, relations of production, geography, or geopolitical situations.

In Plato's *Politeia*, *nomos* as legal order is, as mentioned in section 3.1, considered useless in terms of producing just order (4.425b):

Νομοθετεῖν δ' αὐτὰ οἶμαι εὔηθες· οὔτε γάρ που γίγνεται οὔτ' ἄν
μείνειεν λόγῳ τε καὶ γράμμασιν νομοθετηθέντα.

I think enacting it through lawmaking is silly, for commands and
statutes will never make it come into being or last.

So says Socrates. Conversely, autonomous order is highlighted, reflecting perfect unison among citizens' private *nomoi*. The autonomous order of a state is akin to a chorus without a conductor: When it is effective, all members seem to perform the same polyphony, even though each of them, in fact, sings independently, free from the conductor's command. In a just state, each individual acts exclusively according to their own nature, yet it appears that the ensemble of their actions can be described as an order, which continues to generate itself autonomously. To explain the relationship between the state's *nomos* and individuals' *nomoi*, Plato borrows Damon's music analogy (*Republic* 4.424c):

Δύδαμοῦ γὰρ κινουῦνται μουσικῆς τρόποι ἄνευ πολιτικῶν νόμων
τῶν μεγίστων.

For nowhere are modes of music changed without [changing] the
most fundamental political *nomos*.

This sentence entails a play on words, since νόμος also means »μουσικῆς τρόπος« (mode of music).¹⁰ The song sung by a single citizen is an individual *nomos*, that is, a private order produced by the nature of that person. Since the *nomos* of the state is an ensemble of individual *nomoi*, it is impossible for it to remain unchanged if some individual *nomoi* have changed.

Unlike the *Politeia*, which exclusively praises *nomos* as autonomous order, in the *Nomoi*, Plato obviously attaches importance to *nomos* as law in the form of statutes and rules. This does not mean, however, that his opinion on legal order has changed, as mere statutes are still consid-

10 Although μουσική often refers to »music,« it generally means any art over which the Muses presided.

ered useless. Rather, through the strategic thinking of the *nomothetike*, he develops a set of ways to make law effective and useful for collective education. Invoking Aristotle's commentary on the *Nomoi*, Schmitt (2011) accuses Plato of focusing excessively on contingent *nomoi* in the sense of statutes, opposing them to *politeia* (p. 37). Schmitt fails to recognize, however, that those statutes are part of the *nomothetike* that, as a *techne*, operates in contingent circumstances with regard to the necessary causality. Schmitt certainly overlooks important information in the text to which he refers, while Aristotle clearly points out Plato's purpose: »ταύτην βουλόμενος κοινοτέραν ποιεῖν ταῖς πόλεσι« [*Politics* 2.1265a; he wants to make this more suitable for adoption by actual states]. In *Nomoi* 4.709b–c, Plato applies an elegant analogy to explain the relationship between contingency (chance), causal necessity, and *techne*:

Ὡς θεὸς μὲν πάντα, καὶ μετὰ θεοῦ τύχη καὶ καιρὸς, τὰνθρώπινα διακυβερνώσι σύμπαντα. Ἡμερώτερον μὴν τρίτον συγχωρῆσαι τούτοις δεῖν ἔπεσθαι τέχνην· καιρῷ γὰρ χειμῶνος συλλαβέσθαι κυβερνητικὴν ἢ μή, μέγα πλεονέκτημα ἔγωγ' ἂν θείην [...] Οὐκοῦν καὶ τοῖς ἄλλοις ὡσαύτως κατὰ τὸν αὐτὸν ἂν ἔχοι λόγον, καὶ δὴ καὶ νομοθεσίᾳ ταῦτὸν τοῦτο δοτέον [...]

As God controls all things, all human affairs are controlled by God, assisted by chance and opportunity. Indeed, it is more appropriate to acknowledge that God and chance/opportunity must be accompanied by a third factor, which is *techne*. In a winter storm, for instance, the *techne* of steering may or may not seize any opportunity. I would consider this *techne* a great advantage if it did. Consequently, the same logos should apply to other cases, including lawmaking.

Everything in the world is dominated by chance (τύχη) and the divine necessity of causality, meaning that the circumstances in which one acts are determined not primarily by humans but by chance. The *ergon* one attempts to carry out, moreover, is tied to the necessary chain of causal relationships, which is determined by God, not humans. If a steersman

hopes to guide his ship and crew out of a storm, all he can do is grasp the related etiology, namely the necessary causal relationship between navigating out of the storm and the contingent circumstances in which he finds himself. The concrete skills he uses must be specific and contingent because the circumstances are specific and contingent. Since the ship is a common metaphor for the polis in ancient Greek discourse, the *techne* of steering (κυβερνητική) is, in fact, a metaphor for political *techne*, the craft of the soul.

As section 2.3 demonstrates, producing a just *politeia* requires sufficient individuals who possess justice–*dikaiosyne*. The just *politeia* also presumes a specific, concrete order that enables it to function; recognizing the absence of such an order, in his later works, Plato realizes that the most important task for his time is not to imagine the details of his utopia but to organize collective education appropriate to the actual circumstances. The legal order that he designs in the *Nomoi* is part of the *nomothetike*, whose strategic thinking always keeps in mind the concrete order. Across both his early and later theories, Plato never ascribes the ahistorical universality of ideas to *nomos* in the sense of law or legal order: Law is merely a contingent instrument of the *nomothetike*, exerted in specific circumstances. Schmitt obviously fails to identify Plato's thinking on *techne*, that is, a kind of concrete-order thinking that Schmitt himself praises in *Über die drei Arten des rechtswissenschaftlichen Denkens*, as Montserrat Herrero (2015) summarizes: »Within the framework of thought on concrete order, decision is dependent on concrete order, which originates in both the need to restore order and in the need of find a new order« (p. 66). The legislation proposed by Plato's Athenian follows the same logic.

Plato primarily uses the word »*nomos*« to refer to order in the broad sense; it thus denotes not only law or legal order in a narrow sense but also autonomous order, which is free from laws. Although he never uses »*nomos*« to refer to a concrete order, however, it is always kept in mind when he strategically thinks of order from the perspective of the *nomothetike*.

3.3 The *Nomothetike* and the *Nomos* of Souls

As mentioned above, in the *Politeia*, legal order is considered useless, since laws in the form of commands and statutes are incapable of effective functioning (cf. Plato, *Republic* 4.425b). Merely promulgating laws in the form of decisions and commands does not ensure that individuals will follow them; similarly, statutes written as part of a legal code cannot guarantee perpetual compliance. These are two problems that Plato seeks to resolve in the *Nomoi*. Despite recognizing the effect of legal order in that work, he does not change his opinion: For him, what makes legal order functional is neither legal order itself nor elegant νομοθεσία (law-making) focused on the content of laws but the νομοθετική (*nomothetike*), the *techné* of deploying various instruments to create real order that, in Plato's view, serves to cultivate virtue in citizens' souls.

In his book *The Nomos of the Earth*, Schmitt (2006) emphasizes the relationship between land and order, as denoted by the original meaning of »*nomos*.« In his view, *nomos* is »the immediate form in which the political and social order of a people becomes spatially visible« and »the measure by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process. Here, measure, order, and form constitute a spatially concrete unity« (p. 70). Strangely, Schmitt ascribes »the utopian plan-character of modern laws« to Plato's *Nomoi* while neglecting the fifth book of the *Nomoi*, which shares a similar perspective. Although Plato uses the term »*nomos*,« primarily in the derivative verb »νομοθετέω« or noun »νομοθεσία,« to denote law, he never equates *nomos* with legal order, nor does he neglect the fundamental role of land in political and social order.

According to Plato, when a new state is founded, the most important thing is the equal distribution of land, not the design or promulgation of laws, since the distribution of land determines whether laws can come into being and endure. He emphasizes that »ταῦτα τὴν τε γῆν καὶ τὰς οἰκῆσεις ὅτι μάλιστα ἴσας ἐπινεμητέον« [*Laws* 5.737c; the land and the houses must be distributed equally so far as possible] in the sense that »τὰ μὲν ἀγαθῆς γῆς εἶναι μικρά, τὰ δὲ χείρονος μείζω« [5.745c; the parts consisting of good land are small, while those [consisting] of poor

[land] are larger]. The reason for this is that social inequality undermines friendships and leads to the instability of *nomos* (cf. *Laws* 5.737b, 743c). In order to produce *nomos*, people must appropriate land. If the measure and distribution of the land is unfair, however, stable *nomos*, as a product of citizens' souls, cannot come into being; in the same sense, a *nomos* based on a distribution that will inevitably lead to significant social inequality in the future does not have the power to endure. Geopolitical circumstances must also be taken into consideration (cf. *Laws* 5.737c–d), as the existence of a *nomos* depends not only on a state's citizens and allies but also on its current or potential enemies. In this sense, Plato's *Nomoi* is characterized by political realism, emphasizing the real existence of *nomos* in a concrete space rather than a utopia in an ideal space. Within the framework of this political theory, »the disordering of space is a danger to the conceptions of law and policy, since, in such a space, the notion of concrete is lost and opens up to arbitrariness and opportunism« (Herrero 2015, p. 27).

For Schmitt, the basis of *nomos* is men in space, not ideal human beings whose existence and features are free from any concrete space (cf. Herrero 2015, p. 27): In this sense, Schmitt and the later Plato share the same opinion. In comparison to Schmitt, however, Plato obviously pays more attention to men than land because human souls are the primary cause of all political phenomena. Although soul necessitates space (cf. Plato, *Timaeus* 34b), land is merely an instrument of Plato's *nomothetike* because appropriating land, much like fighting a war, is not the goal of that *nomothetike*. Schmitt's (2011) focus remains fixed on the »Ur-Aktes« [p. 47; original acts] that bring *nomos* into being, with the result that the continuous acts that make *nomos* last are neglected.

Nomos, whether in the sense of legal order or order in general, keeps existing if and only if sufficient individuals keep following it. Its power to exist is constituted by the obedience of those individuals' souls. Thus, from the perspective of the *nomothetike*, as one of the two typical crafts of the soul, making the *nomos* of a political unity last is primarily nothing other than making the *nomoi* of individual souls last. In this sense, the governance of individual souls is inextricably linked to the *nomothetike*.

