

Understanding *Nomos**

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In an article published in 1953 titled 'Nehmen/Teilen/Weiden: Ein Versuch, die Grundfragen jeder Sozial- und Wirtschaftsordnung vom Nomos her richtig zu stellen',¹ Carl Schmitt laments the demise of the original meaning of *nomos* as land appropriation.² This, according to Schmitt, was not a sudden eclipse of the original meaning of *nomos*—the Sophists were the first to inaugurate the process which was completed by Plato, by which time *nomos* had acquired the meaning of mere rules. For Schmitt, the original meaning of *nomos* indicated space and location, or to put it differently, the important thing was the relation between order and orientation. Schmitt rejects the thesis, first put forward by Philo of Alexandria and 'repeated for years' down to Bodin and Pascal, that Homer never used the word *Nomos* (with the accent on the first syllable). Schmitt goes on to cite the third verse of the beginning of the *Odyssey* as proof of his claim of the existence of *nomos* in Homer. The verse is:

Many cities *astea* did he visit and many were the nations with whose customs *nomos* [according to the standard version: *noos*] he was acquainted.

Schmitt argues that the replacement of *noos* with *nomos* might seem as the introduction of a *apax legomenon* and, hence, felt unsatisfactory. This he brushes aside as so much unnecessary philological quibble. Homer may not have used the word *nomos*, but he used 'typical words' in combination with *nomos*. These words are *Amphinomos* [one who rules externally], *Ennomos* [one who rules internally], *Eryvnomos* [one who rules over vast expanses] and *Astynomos* [one who rules over a city]. Schmitt asserts that all these proper names designate space and location, that they point to a piece of land 'which the bearer of the name has acquired through appropriation and division'.³ In such cases proper

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names have greater evidential validity than other words.

Having established the primacy and the antiquity of *nomos* as appropriation of land, Schmitt goes on to consider the word *nomos* itself. He explains:

The Greek noun *Nomos* comes from the Greek verb *nemein*. Such nouns are *nomina actionis*, indicating an action as a process whose content is given through the verb. Which action and process is indicated by *nomos*? Quite obviously, it is the action and the process of *nemein*.⁴

Schmitt identifies three meanings of *nemein*.⁵ The first meaning of *nemein* is to take or appropriate. *Nomos*, therefore, indicates an action and a process whose content exists in a *nemein*. Secondly, *nemein* means to divide or distribute. The second meaning of *nomos*, therefore, is the action and process of division and distribution. It is this meaning of *nomos* that has survived and flourished, whereas the first meaning of *nomos* as appropriation has long been forgotten in European jurisprudence. Lastly, *nemein* means pasturage, indicating the productive work which goes with ownership. *Nomos*, therefore, means the type and means of the production and manufacture of goods. What these three meanings of *nomos* illustrate, says Schmitt, is that before contemplating any legal, economic, and social order or theory, three simple questions must be asked: Where and how was it appropriated? Where and how was it divided? Where and how was it produced?⁶

At the present moment, without going into the implications of Schmitt's thesis, it would be useful to stay for a bit longer with the meanings of the word *nomos*. Martin Ostwald in his *From Popular Sovereignty to the Rule of Law: Law, Society, and Politics in Fifth-Century Athens*⁷ makes it very clear at the outset of his discussion of *nomos* that 'I am here not concerned with its musical sense of "tune," nor with the geographical sense of "pasture", "abode", "district," etc., which it carries in its oxytone form.'⁸ Ostwald argues that the basic idea underlying *nomos* at all times in its history was that of a social norm. The revolutionary step was its adoption into the vocabulary of law and politics in fifth-century Athens.⁹ Ostwald traces the history of *nomos* from the time of its earliest use to the end of the fifth-century. A short summary of his arguments would be appropriate at this juncture.

What was distinctive about the archaic notion of *nomos* was its timeless quality. There was no attempt to enquire into the origin in time of any given *nomos*. The existence of *nomoi* was part and parcel of how the universe was constructed. It was inconceivable to contemplate the non-

existence of a given *nomos*. The gods existed, were prone to demanding veneration and required rituals to be performed for their appeasement. A particular *nomos* was perceived as a way of life, which prescribed rules of rectitude, or was connected to particular customary practices and rituals. As Pherecydes of Syros said: 'Zas (Zeus) and time existed always'.¹⁰ The norms of life, therefore, were decreed from time immemorial and were there for all times to come. The *nomos* represented continuity and durability. It must be added that in the case of religious *nomoi*, the priests and priestesses who supervised the worship of gods were drawn from noble families and had hereditary control over the most important priesthoods. The 'state' never interfered in cultic and ritual matters, but ensured to protect divine worship since the gods were regarded as the guarantors of the stability of the social order and their neglect or displeasure might bring harm to the city. What was significant was that the difference between a practice people follow and a rule that they are obliged to obey is blurred. Ostwald illustrates this with an example from Hesiod:

This was the *nomos* [here it could mean way of life, custom, or law] Zeus established for human beings:
 for the fish and beasts and flying birds he allowed that one may eat another, since there is no justice among them;
 but to human beings he gave justice, which turns out to be much better.¹¹ (*Works and Days*, fr. 276-280)

In the case of men, therefore, the obligation, if at all, remains an abstract 'ought', commended but not enforced by social pressure.

The replacement of *thesmos* with *nomos* as the official term for statute had far reaching consequences for Athenian law, but also affected the archaic connotations of *nomos*. This was probably brought about by the reforms of Cleisthenes, though the reforms were initiated by Solon and were taken to their logical conclusion by Ephialtes.¹² The general term for 'social norm' was transformed into a term to indicate specific enactments. These statutes were prescriptive, and as a consequence of becoming the official term for 'statute', *nomos* acquired prescriptive connotations that were latent in the archaic period.

A statute, unlike the archaic *nomoi*, had a precise beginning in time where it was possible to envisage a past in which a statute did not exist, as well as a future in which it will cease to exist. The validity of such enactments was established by the legislative machinery of the 'state' and the roots of allegiance to a *nomos* as statute were radically different from those of the archaic period. Norms and values of religion, social conduct,

and individual rectitude were deeply affected by the newly attached prescriptive element to the use of *nomos*. The timelessness, validity, and durability of the older connotations of *nomos* began to be questioned. The shift from a god-centred to a man-centred universe ended up in attributing to human agents what was hitherto confined to an immutable and timeless realm.

The growing influence of the legal and political use of *nomos* spread to areas that were strictly non-legal by the second half of the fifth century. Thus, the gods are now seen to *write nomoi*. In two Euripidean passages,¹³ the rules of religious conduct appear as enacted *nomoi*. Towards the last third of the fifth century, the reach of human initiative in legislating laws was not only confined to the political sphere, but spread to customs, behavioural norms, and to a more limited extent, religious practices. These were regarded as having been enacted and as being enforceable.

Nomos no longer expressed social and religious customs and practices, and, therefore, new ways had to be found to express those areas that were once covered by the archaic notion of *nomos*. The adjective *nomimos* was coined, and the verb *nomizo* was used to indicate concrete customary practices, specific acts of personal behaviour, and performance of particular religious rites. Ostwald cites the example of the Praxiergidai Decree to suggest that by mid-fifth century religious *nomima* could be the subject of statutory enactments: the right to perform certain religious *nomima* was confirmed and guaranteed by the secular organs of the 'state' by the enactment of *nomos*. *Nomima* were increasingly seen as rules that described both belief as well as practice. In the fourth century, *nomimos* was also used to describe persons or acts that conform to statutes. It was clear by the end of the fifth century that the sovereign people set the norms of political as well as moral conduct. When the secular authority came into conflict with religious or social *nomima*, the conflict was resolved by the political authority stepping into shouldering religious obligations and protecting religious claims. At times, the claims of religion were incorporated as part of the *nomos* that the state had sworn to uphold.

Ostwald sees the attenuation of the archaic connotation of *nomos* and the ascendancy of the legal and political view as the reason for the slackening of the bonds by which society is held together. A rift was created between rule and practice in all matters pertaining to the realm of social values and conduct. The reactions against what was seen as a democratic establishment mentality followed. Ostwald attributes this reaction against democracy and its most potent symbol *nomos* as the

'generation gap'. Young aristocrats as well as members belonging to industrial families rebelled against the spirit and values of democracy. Ostwald focuses on the important role Sophistic teaching played in formulating a response against the democratic order and the ubiquity of *nomos*. He, however, exonerates Older Sophists like Protagoras, Gorgias, and Thrasymachus from having a direct role in promoting discontent. Their ideas were certainly influential, but the most visible opponent of *nomos* came to be the idea of *physis*.

It would be incorrect to imply that resorting to *physis* in order to counter the influence of *nomos* came as a bolt from the blue. Sophocles in the *Antigone* had portrayed a situation where secular popular sovereignty could come into conflict with familial religious obligations. *Antigone* asserts the value of both, while warning against the dangers of a state too rigid becoming insouciant to divine demands whose implementation belongs to the family. Similarly, *physis* as a counterpoint to *nomos* affirmed the existence of a force stronger than conventional morality, whose free expression ought not to be impeded by any external force. The idea of the power of *physis* is clearly reflected in fragment 920 of Euripides who says: nature willed it, unconcerned as it is for the laws. The argument in favour of *physis* showed the innate, steadfast character of *physis* bearing permanence and reality, while all externals were beset with folly and a transitory nature. Ostwald gives the instance of the Milean Dialogue to illustrate that Athenians used the *nomos-physis* opposition in order to justify the assertion of superior power: human *nomoi* are made to look futile when faced with the natural impulse to assert superior power. He also finds the deep imprint of Sophistic teaching and Sophistic values in the arguments put forward by the Athenians at Melos. Even the gods were subjected to the constraints of *physis* in the dialogue. Ostwald argues that though the Sophists may have stimulated the Athenians to apply physical doctrines to the critique of society, their own knowledge of *physis* was derivative of the ideas of the *physikoi*, the natural philosophers such as Anaxagoras, Democritus, and Diogenes of Appollonia. At the same time, he finds the reflection of an agnostic anthropocentrism as found in the teachings of Protagoras and Prodicus in the Milean Dialogue.

In the last part of the book, Ostwald looks at the attempts to institute Athenian democracy by subordinating popular sovereignty to the principle of sovereignty of law. Henceforth, written law would have precedence over the popular organs of democracy. It was an eventual triumph of *nomos*. The period of the most revolutionary democratic reforms in Athens also saw the rise of the Athenian Empire. This is a

paradox that remains largely unanswered in Ostwald, partly because it strictly falls outside the scope of the book.

Several important questions emerge from the discussion of Schmitt and Ostwald that have a bearing on the understanding of *nomos*. In his larger work on *nomos*, *Der Nomos der Erde in Völkerrecht des Jus Publicum Europaeum*, Schmitt puts the blame for the destruction of the original meaning of *nomos* as land appropriation on the Sophists' construction of the *nomos-physis* opposition. This, he alleges, had reduced *nomos* to a normative category, instead of a fact of life.¹⁴ On the other hand, Ostwald is less categorical in his indictment of the Sophists, but does attribute to the overall impact of their teachings a certain decline in the value of *nomos* as it developed in the fifth century. He also blames the Sophists of propagating an agnostic anthropocentrism that seriously challenged Athenian democracy and its leitmotif, *nomos*. In order to make any progress in understanding *nomos*, a detailed examination of the impact of the Sophists would, therefore, be in order. Further, the question of the meaning of *nomos* as land appropriation still remains. If, indeed, it was so central as Schmitt claims then its disappearance should be a matter of some concern and further investigation.

Before looking at the Sophists in some detail, some preliminary remarks and clarifications are due. Firstly, there is a tradition of looking at the Sophists as a movement that had a homogenous character and unity of doctrine. Evidence, historical and philological, shows that this was far from true. Kerferd warned of this trend not so long ago:

Perhaps too much attention was been given in the past to attempts to arrive at general characterisations of the Sophists and the sophistic movement. This is not so because general characterisations are in themselves in any way improper. But they must be based on detailed studies of the actual evidence concerning individual Sophists. Such evidence is often deficient, inadequate and difficult to interpret. But the same is true of the Presocratics generally, yet in their case detailed scholarly investigation and reconstructions can hardly be said to have been seriously deterred. A similar detailed approach to individual Sophists is now demanded, since only in this way will it be possible to go behind traditional receptions.¹⁵

Secondly, the fragments of the Sophists are translated in a manner which reflects the influence of the philosophical vocabulary of Plato and Aristotle, surely not the best friends of the Sophists and far removed in time from the Older Sophists of the fifth century. A certain fidelity to the

possible language of the Sophists is, therefore, imperative.

It has been suggested that once the validity of *nomos* as statute was shaken by the Sophists, the greatest problem that arose as a consequence was to re-establish an inner norm that was independent of legislative changes.¹⁶ Such a norm was earlier provided by religion: in fact religion and law in archaic societies were closely connected. The pre-socratics had begun the process of enquiring into the truth about the Gods. After all, the Greek gods were stationed inside the world,¹⁷ and once the accounts of the poets gave way to the insights of the pre-socratics, the questions regarding the origin, nature and role of the gods were bound to be raised. The pre-socratics could no longer rely on the mythical accounts of the origin of the gods. Experience and the evidence of their senses must instead account for the origin of the gods. The pre-socratics visualised gods in terms of the idea of divinity that was infinite and unlimited. They spoke of the divine in terms of the idea of 'All': all-encompassing, all-governing.¹⁸ Though their primary purpose was to understand Nature and the idea of Being, their speculations were steeped in religious belief and feeling. It was not their purpose to reform religion or cultic practices, but they can certainly be called religious thinkers:

Doubtless their concept of nature as a self-enclosed, self-regulative system is the intellectual foundation of science...But neither can we forget on this account that those who discovered this concept of nature believed that they found in it not only the principles of physical explanation, but also the key to the right ordering of human life and the answer to the problem of destiny. They began with the faith that nature itself was animated by that Wisdom and Justice which the most enlightened conscience of their race had imputed to Zeus. So long as this faith lived, they could transfer to nature the reverence hitherto reserved for Zeus and could therefore call nature ... "god" without indulging in an empty figure of speech...[T]hat they, and they alone...dared transpose the name and function of divinity into a realm conceived as a rigorously natural order and, therefore, completely purged of miracle and magic. To *moralize* divinity was not their main, and certainly not their unique, contribution.¹⁹

The Sophists took the insights of the pre-socratics a step further and brought the question of divinity into the realm of 'rational anthropology'. That is to say, they enquired into the problem of accounting for the universal dispersion of the idea of god/divinity and the sources of such

a belief. As Protagoras says in the Platonic dialogue named after him:

Since then, man had a share in the portion of the gods, in the first place because of his divine kinship he alone among living creatures believed in gods.²⁰

Protagoras' 'Great Speech' in the Platonic dialogue represents an extremely important facet of fifth century thought. The Older Sophists like Protagoras were attempting to develop a humanistic-rationalistic tradition that cannot easily be captured by the conventional *mythos/logos* category. One finds, for example, the use of both a mythical account as well as a rational one in Protagoras' 'Great Speech'. They challenged the tradition of oral poetry with oral and written prose and privileged *logos* over the mythic-poetic tradition. This was an attempt pitched at various levels to try to develop and to practice abstract and analytical thinking, which was achieved through a mixture of oral and literate practices.²¹ In this sense they represent a transitional phase in Greek thought. It is also crucial to note that the Older Sophists provided an anthropocentric challenge to the earlier theistic strand represented by the poetic tradition. Susan C. Jarratt characterises the Sophists as operating within a *mythos-nomos-logos* framework. She perceives the Sophistic view of *nomos* to be one where '*nomos* signifies the imposition of humanly determined patterns of explanations for natural phenomena in contrast to those assumed to exist "naturally" or without the conscious intervention of human intellect...*Nomos* marks, on the one hand, a difference from social order and law under a mythic tradition, and, on the other, looking toward the fourth century, an epistemological alternative to philosophy as the ground of logic and timeless truth.'²²

Therefore, E.R. Dodds, rightly teases out the 'two great issues' that were the concern of the Sophists. Firstly, they were interested in the ethical question concerning the source and validity of moral and political obligation. And secondly, they speculated about the springs of human conduct—why do humans behave as they do and how can they be induced to behave better.²³ Clearly, the Sophists were concerned with ethical questions and were preoccupied with finding ways of making human lives better. In spite of this the charges of agnosticism, immoralism and the vitiators of the original meaning of *nomos* as land appropriation still refuse to disappear.

Protagoras' 'Concerning the Gods' fragment is often seen as the most obvious example of the alleged agnosticism of the Sophists. The fragment consists of two lines:

Concerning the gods I am unable to know, whether they exist or whether they do not exist or what they are like in form; For there are many hindrances to knowledge, the obscurity of the subject and the brevity of human life.²⁴

Taking the themes reflected in the first sentence, it is clear that the existence (*hôs eisin*) and the form/nature/appearance (*idean*) of the gods is the central issue being addressed in the fragment. However, the fragment remains inaccessible as long as it is not read along with Protagoras' 'Human-Measure' fragment.²⁵ The fragment reads:

Of everything and anything the measure [truly-is] human(ity): of that which is, that it is the case; of that which is not, that is not the case.

A remarkable recent study²⁶ of the 'Human-Measure' fragment persuasively suggests that Protagoras' reasoning was both/and oriented. Humans, therefore, measure both what is and what is not. Protagoras seems to be suggesting that qualities are directly perceived or experienced by humans and hence are relative to people. This is not to suggest that there is a suggestion of a kind of open ended relativism that makes objective judgement about anything impossible. Rather, every human judgement about anything is objectively correct within a frame of reference: A is B for C and A is not B for D.

'Concerning the Gods' therefore points to a different approach to religion rather than preach agnosticism. It perceives 'religion primarily as an anthropological fact to be understood in the light of its meaning and function in human civilization and social structure.'²⁷ In short, the gods were comprehensible only in human terms. There can indeed be a reconciliation between popular religion and philosophical truth as long as the measure of all things was human.²⁸

Aristotle's *Rhetoric* (1402a23) contains the following statement which for all times seems to seal the fate of the Sophists as immoralists:

And this is what one means by 'making the weaker argument stronger'

(Michael J. O'Brien's translation in Rosamond Kent Sprague (ed.), *The Older Sophists*.²⁹)

To make the weaker cause stronger.

(Kathleen Freeman's translation in *Ancilla to the Pre-Socratic Philosophers*.³⁰)

And this is what 'making the worse appear the better argument' means.

(John Henry Freese's Loeb translation of Aristotle's *Rhetoric*.³¹)

Making the weaker *logos* stronger.

(Michael Gagarin's and Paul Woodruff's translation in Michael Gagarin and Paul Woodruff (eds.), *Early Greek Political Thought from Homer to the Sophists*.³²)

It is clear from the examples given above that there is great disparity among all these translations of the statement Aristotle attributes to Protagoras. It is therefore necessary to reproduce the Greek version in full:

καὶ τὸ τὸν ἥττω δὲ λόγον κρείττω ποιεῖν τοῦτ ἔστιν
or, *ton hêtô de logon kreittô poiein.*

To begin with, there is a problem regarding translating *logos*. It had a richness and diversity of meanings that a single word of translation will necessarily fail to capture. Neither the word 'argument' nor the word 'cause' adequately capture the meaning intended in the fragment. Gagarin and Woodruff, therefore, rightly retain *logos* without attempting a translation. Kerferd has suggested the following ways in which the Older Sophists could have rendered *logos*:

These are first of all the area of language and linguistic formulation, hence speech, discourse, description, statement, arguments (as expressed in words) and so on; secondly, the area of thought and mental processes, hence thinking, reasoning, accounting for, explanation (cf. *orthos logos*), etc.; thirdly, the area of the world, that about which we are able to speak and to think, hence structured principles, formulae, natural laws and so on, provided that in each case they are regarded as actually present in and exhibited in the world process.³³

It is therefore advisable to retain *logos* as such while keeping in mind the various meanings it lends itself to.

Again, *hêtô* and *kreittô* did not suggest the ethical tone that Plato and Aristotle impart to it in the fourth century.³⁴ Hence, instead of translating the two words as 'better' and 'worse', it is preferable and more accurate to translate them as 'stronger' and 'weaker'. Also, the 'Stronger and Weaker' *logoi* fragment is to be read in conjunction with the Two-*Logoi* fragment: Two contrary *logoi* are true concerning every experience.³⁵

In the light of this, Protagoras seems to be suggesting that 'Of the two *logoi* in opposition concerning any given experience, one is—at any given time—dominant or stronger, while the other is submissive or weaker.'³⁶

This point is further strengthened by an example from Plato's *Theaetetus*, where Protagoras says:

[B]ut I say that the wise man is he who makes the evils which appear and are to a man, into goods which are and appear to him... That to the sick man his food appears to be and is bitter, and to the man in health the opposite of bitter. Now I cannot conceive that one of these men can be or ought to be made wiser than the other: nor can you assert that the sick man because he has one impression is foolish, and the healthy man because he has another is wise; *but the one state requires to be changed into the other, the worse into the better.*³⁷

What this means is that humans who measure anything and everything, substitute a preferred, but weaker, *logos* for a less preferable, but dominant at the moment, *logos* of the same experience. The question of preaching immorality, therefore, does not arise. Human beings possess certain abilities and are blessed with certain *technē*. These abilities define the nature of what we are, the manner in which we live, the very thing that is at stake is our ability to be human. Thus we must always choose between alternatives that will make, not only our individual lives, but the life of the community worth living.

For Protagoras, as well as many of the other Older Sophists, *logos* meant not only discourse but a way of choosing between competing ways of life. These could be the choices between the just and the unjust, between war and peace, or between two states of being. In defending the teachability of *aretē*, Protagoras challenged the claims of birth and inheritance, so crucial, as it will be clear subsequently, for the meaning of *nomos* as land appropriation. In celebrating the values of justice, moderation and holiness, Protagoras was clear that their value lay in their being beneficial to the *polis*. *Logos* helped good judgement, which in turn was essential for arriving at consensus in the city. *Nomos*, therefore, had to be based on consensus rather than on the whims of tyrants or gods, or even a democratic body that claimed absolute truth to be on its side. This insight into practical matters which was achieved through *logos* and human experience was to form later the basis for Aristotle's idea of *phronesis*. *Nomos*, as it unfolded in the fifth century seemed to the older Sophists robbing them of an essential freedom of attitude to things and events, individual judgement and responsibility towards one's actions. All this, however, was circumscribed by a sense of community. Finally, Sophists like Protagoras believed that political life was not founded on isolating qualities and excellences that were desirable; no amount of devising constitutions and public institutions would help as long as one

did not acknowledge the centrality of one factor. This factor was power. It is greed and the excessive competition for power that brings down a polity and the reign of *nomos*.³⁸ Legislation and statutes were not enough to contain *stasis*. It required the collective force of custom, law, and consensus to found a workable polity.

II

Almost in the opening pages of Martin Ostwald's book, there appears a statement which suggests that once the hold of the upper classes over the Areopagus went into the hands of the people, that 'constituted the political popular sovereignty we call democracy.'³⁹ What is suggested here is that the more *nomos* took a legal and political overtone and began to codify archaic law, the less the hold of the upper classes and the aristocrats. The picture this account presents is of the aristocrats yielding to strong political pressures mounted by the *demos* in Athens. This process, it is suggested, ended up in the opening up of the avenues of political control to a more heterogenous body of citizens.

It can be argued that the contrary was true. On the one hand the history of the development of *nomos* as statute, at least in the fifth century, can be seen as legislating measures to confront crises that arose from time to time. The *nomoi* that were devised were reactions to particular situations, and if people developed an attachment to them, it was largely due to the emergence of an establishment mentality as well as the security that familiarity imparted. On the other hand, the codification of customary law helped ensure the continued political and economic predominance of the aristocrats in times that threatened social unrest.⁴⁰ Even when, after the overthrow of the Thirty Tyrants, Athenians decided to subordinate popular sovereignty to the principle of sovereignty of law, the basis for that became the *patrios politeia* and the *patrioi nomoi*.

Social unrest and discontentment among the *demos* could potentially threaten the continuation of customary law and political behaviour. Codification helped stop this process. Law and religion, it has already been noted, were inseparable in Greek antiquity. Religious conservatism prevented any new innovations to be included in the codification of law. Therefore, the overall beneficiaries were the aristocrats who had the most to lose if customary law was changed. It is correct to assume that once laws were properly defined and written down, there was less scope for the arbitrary use of customary law. But this also helped secure uniform behaviour on the part of the members of the aristocracy who held positions of officials and judges. Walter Eder argues that the

codification of law helped the aristocrats gain a cohesive identity:

Power and property could only be defended if the aristocracy acted as a homogeneous group. Thus it had to be the prime goal to develop a sense of unity by promoting a consistent code of conduct and by strengthening political consensus within the group. All the members of the group should be offered equal, or at least similar, political opportunities. Ideally, the aristocracy should form a monolithic bloc.⁴¹

Further, codification provided a legal basis for existing property arrangements. This rendered ineffective demands for cancellation of debts and demands for distribution of land. Even after the abolition of debt-bondage, it was the aristocracy that benefitted the most. The liberation of the peasants had made land available, since the enactment of *nomoi* had not removed the causes of impoverishment, small farmers had no choice but to sell their land to the aristocrats. *Nomos* as statute did in no way affect the political influence of the aristocrats which was closely tied to their economic influence. Nor did it affect the ways in which wealth was increased: war booty, jurisdiction, trade, and acquiring of slaves.

There is, however, an important clue that can be found in Schmitt⁴² regarding the status of *nomos* as land appropriation. He credits Aristotle with retaining the meaning of *nomos* that affirmed the original relation between order and orientation: it still alluded the idea of spatial dimension as well as with the fair division of property. This claim requires detailed examination.

In *Politics* 2.4, Aristotle rejects Plato's recipe for order, unity and homogeneity by saying that 'There are two impulses which more than all others cause human beings to love and care for each other: "this is my own", and "this I love".'⁴³ He goes on to say that in a state constituted after the manner of Plato's *Republic* no one would be in a position to say this. Having conceptually distanced himself from Plato's views, he goes on in the next chapter (*Politics* 2.5) to reject Plato's arguments about the public ownership of property as measure against preserving the neutrality of interests of the guardians. Aristotle wants property to remain in private hands, while making a distinction between ownership and usufruct: 'each man has his own possessions; part of these he makes available for his own immediate circle, part he uses in common with others.'⁴⁴ This, however, was not merely an institutional arrangement. There was greater conceptual baggage attached to the ownership of property:

Moreover there is an immense amount of pleasure to be derived from the sense of ownership; every man bears love towards himself and I am sure that nature meant this to be so. Selfishness is condemned and rightly so, but selfishness is not simply love of self but excessive love of self. So excessive greed to acquire property is condemned, though every man, we may be sure, likes to have his bit of property. And there is this further point: there is very great pleasure in giving, helping friends and associates, making things easy for strangers; and *this can only be done by someone who has property of his own.*⁴⁵

What, then, was the best way of acquiring property? Aristotle's answer is unambiguous. In order that citizens enjoy the privilege of property and of a high standard of living, slaves must be acquired, other races must be exploited and denied political freedom.⁴⁶ He justifies slavery by resorting to the conception of 'natural' slavery. The argument Aristotle puts forth is important because it reveals his conception of the *polis*:

It is then part of nature's intention to make the bodies of free men to differ from those of slaves, the latter strong enough for the necessary menial tasks, the former erect and useless for that kind of work, but well suited for the life of citizen of a state, *a life divided between war and peace.*⁴⁷

Aristotle is unsentimental about the merits of acquiring property through the instrumentality of war, and even provides a moral justification for it:

This arises under the convention which provides that all that is captured in war becomes *legally* the property of the captors...Surely it is in a sense goodness or ability which attains a position of command and is therefore best able to use force; and that which is victorious is so in virtue of superiority in some form of goodness. It seems therefore that force is not without a goodness of its own'.⁴⁸

It is not surprising then that Aristotle likens the knowledge of acquiring slaves to raiding and hunting.

As he proceeds with his discussion on the ways property is acquired, Aristotle once again makes it clear that property, and not work, forms the basis of livelihood in a city. In doing so, the *polis* is portrayed as essentially a warrior state:⁴⁹

If then we are right in believing that nature makes nothing without some end in view, nothing to no purpose, it must be that nature has made all things specifically for the sake of man. This means that it is part of nature's plan that the art of war, of which hunting is a part, should be a way of acquiring property.⁵⁰

It is then only a short conceptual leap that is required for Aristotle to argue that in a *politeia* the distribution of political power itself is not enough, something more is of consequence:

The essential point is that where the possession of political power is due to the possession of economic power or wealth, whether the number of persons be large or small, that is oligarchy, and when the unpropertied class have power, that is democracy. But, as we have said, in actual fact the former are few, the latter many. Few are wealthy but all share freedom alike: and these are the bases of their claim to a share in the *politeia*, property in the one case, free status in the other.⁵¹

The above statement, however, leaves the matter of the relationship between the right to rule, property ownership, and citizenship vague. Aristotle returns to the theme in Book VII of *Politics*:

[W]e are left with this conclusion: that this constitution, both in its military and its civil functions, should be put into the hands of the same class of people....Property too must belong to this class; it is essential that citizens should have ample subsistence, and these are citizens. The lower-class element has no part in the state nor any other class that is not productive of virtue. This is evident from our postulates; being happy must occur in conjunction with virtue, and in pronouncing a city happy we must have regard not to part of it but to all its citizens. It is also clear that property must belong to these; the agricultural workers will be slaves or non-Greeks dwelling in the country round-about.⁵²

Aristotle does not sweep away the notion of *nomos* as statute. He constantly refers to the need for laws in a city; all activities in the *polis* were subject to laws. At the same time, Aristotle is extremely cautious on the question of the efficacy of laws. In Book II, chapter 8 of *Politics*, he feels that the law in itself has no power to secure obedience except if human beings over a period of time get used to the idea of obeying laws. Easy changes in laws weakens the power of the law.⁵³ Aristotle's views on *nomos* become clear only when the fact of his discussion of the morphology of

growth and decay of constitutions is taken into account. Unlike Plato, he does not fix a definite order in which the various forms of polity grow and decay, nor are these forms of polity designed to serve the same end, namely the establishment of order. The attempt at devising a 'mixed' constitution on the assumption of holding separate classes together in a single polity is seriously marred, firstly, by the lack of a shared sense of community, and secondly, his hierarchy of *axiomata* of rule: the old rule the young, masters rule slaves, the intelligent rule the stupid, the property-owning citizen rules the non-property owning non-citizen, and so on. In effect, the status and value of *nomos* became a factor of the discussion regarding constitutional forms.⁵⁴

Aristotle's views on *nomos* as legislation/statute/rules keeps clear of any reference to *nomos* as appropriation. *Nomos* at a certain point in the *Politics* assumes a tone and tenor that is not far removed from its modern connotations:

We must begin by asking an old and fundamental question — whether it is better to be ruled by the Best Man or by the Best Laws. It is the view of those who believe that monarchical government is good that the laws enunciate only general principles and cannot therefore give day-to-day instructions on matters as they arise... For the same reason it is obvious that to rule by the letter of the law or out of a book is not the best method.

On the other hand, rulers cannot do without a general principle to guide them; it provides something which, being without personal feelings, is better than which by its nature does feel. *A human being must have feelings; a law has none...* [I]t is preferable that law should rule rather than any single one of the citizens... [E]ven if it be shown that certain persons ought to rule, these persons should be designated protectors of the law or its servants.⁵⁵

Thus, the supremacy of *nomos* as rule or statute is affirmed, but with his usual caution by Aristotle.

Schmitt endorses Aristotle's retention of the meaning of *nomos* as order and orientation, but it is not a whole-hearted endorsement. That Aristotle holds that law requires a lawgiver who gives 'day-to-day instructions on matters as they arise' must surely make Schmitt, the votary of decisionism,⁵⁶ happy. But to be told that law has no feeling must also disappoint him. At the same time by calling property a natural institution — it ought to be noted that the two other natural institutions in Aristotle's scheme of things are slavery and politics — Aristotle removes the question of appropriation from the scope of *nomos* as rule/statute/

legislation. This is not to suggest that appropriation becomes arbitrary. Here again, the problem of what is arbitrary and what is lawful is relegated to the discussion on constitutions and the morphology of regimes.⁵⁷ What gives appropriation, and the instrumentalities that aid appropriation such as war, pillage, destruction and possession, legitimacy are the distinctions he draws between Greeks and barbarians, between the naturally free and the naturally slavish, and the specious relation he draws up between mastery and virtue and between virtue and possession of property.

The life of the citizen, it has already been noted, is a life divided between war and peace. Force has a goodness of its own. This force must be used in order to enable citizens to enjoy a high standard of living. Therefore, Aristotle creates a dual system catering both to the needs of war and of peace. The rules of appropriation refer, henceforth, to the concrete spatial dimension of the state, whereas the rights and duties of the citizen are taken care of by the *nomoi* that exist in the form of rules/statutes.

Western political thought has had to contend with the problem of good order since the time *nomos* as rule/legislation/statute was brought in to aid the process of striking a balance between the claims of the state and the questions of individual and social rights and justice. This uneasy balance between *nomos gegrammenos*, the positive law, and *nomos koinos kata physin*, the natural law did not always fulfill the contrasting claims of liberty, stability, and prosperity. Even when positive law and religion were brought under the purview of the all embracing *nomos*, the problem of their being 'external' and operating on individuals and society from the 'outside' remained something to contend with for a long time in Western social and political thought.

Machiavelli symbolises this conflict admirably.⁵⁸ The fear of disorder and chaos was his chief preoccupation. Liberty and republican values were to be cherished, but a strong prince was preferable to a weak republic. Cities are great because rulers know how to use power. By wielding power they create societies that have stability, security, a sense of power and splendour. Of all the values that Machiavelli cherishes in leaders who are able to build great cities—moral strength, generosity, loyalty, civic sense, power, glory—the virtue of *expansion of the patria* remains supreme. One has to just look at the titles of the chapters of *The Prince* and *The Discourses* to understand the importance Machiavelli places on territorial expansion. This is central, also, to his general view of human nature: humans require only a lip service to liberty, but cherish greater than anything else security, property and the desire for revenge.

Lo stato for Machiavelli became a notion of the state as an estate or territory to which the prince held title. It was a way of protecting the patrimony of the prince. The notion combined the idea of being an instrument of the power of the prince as well as a way of reflecting rights and duties. Republics and principalities become a species of *stato*, the chief characteristic of which becomes patrimonial rule – a form of rule where the distinction between the prince's rule of his household and the rule of his realm are blurred. If the expansion of his *patria* is the prime-mover in the case of the prince, so it is for people living in a strong and well governed polity:

For, wherever increasing populations are found, it is due to the freedom with which marriage is contracted and to its being more desired by men. And this comes about where every man is ready to have children, since he believes that he can rear them and feels sure that his patrimony will not be taken away, and since he knows that not only will they be born free, instead of into slavery, but that, if they have virtue, they will have a chance of becoming rulers. One observes, too, how riches multiply and abound there...For everybody is eager to acquire such things and to obtain property, provided he be convinced that he will enjoy it when it has been acquired.⁵⁹

Therefore, if one can hold and expand the *patria*, then the only impediment that has to be removed from the governing of a *stato* and a household is religion.

The morality of Machiavelli is a pagan morality. Christian morality, with its values of charity, mercy, sacrifice, love of God, forgiveness, contempt for the goods of this world and preoccupation with salvation, creates immeasurable obstacles in the way of establishing a strong and prosperous polity. For Machiavelli, as Berlin rightly points out,⁶⁰ a well-governed *patria* stands outside virtue, vice and justice. An element of the state as standing outside vice and virtue does not disappear after Machiavelli. Hobbes' *Leviathan* grants the Sovereign absolute power to go to war. John Locke, a slave trader himself, anchors the 'chief end therefore, of Mens uniting into Commonwealth, and putting themselves under Government, is the Preservation of their Property...Lives, Liberties and Estates, which I call by the general name, Property'.⁶¹ For Locke, too, the chief means of acquiring property was through war and capturing slaves: slavery for him is the result of a 'State of War continued, between a lawful Conqueror, and a Captive'.⁶² In justifying war and capturing slaves, Locke's turn of phrase as well as argument is Aristotelian in every sense.

It is another matter that the rise of industrialism and technology has radically altered the equation between appropriation, distribution and production. Modern ideologies like Liberalism and Marxism have had to contend with these questions constantly, without great many satisfactory resolutions in sight. The increased convergence between domestic and international law has lessened the prospects of the old style of appropriation. Yet, explanations have to be found for Fascism, Soviet Communism, regional wars and other related phenomena in our own century. Ideas of free market are constantly brought face to face with the growth of an underclass in the developed and industrialized countries. *Nomos* as appropriation and *nomos* as law continue to happily coexist, though the language they use, the guises they adopt might be very different from what the Greeks had first envisaged. The problem of order and harmony still remain, despite the prophets of the 'end of history' persuasion declaring the triumph of liberal democracy.

Is this an instance of the idea of *nomos* being fundamentally flawed at the outset, or is it the case of old dogs being unable to learn new tricks? To look for possible answers and correctives, one will have to reappraise the *mythos-nomos-logos* framework of the Sophists on the one hand, and take seriously non-European and non-Western models of organising society and politics on the other hand.

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