

## PLATO, ARISTOPHANES AND US

FERDINAND F. STONE,  
professor of Tulane University,  
New Orleans (Louisiana)  
USA

Jurists for the most part have traditionally held that Greeks wove ancient ideas into philosophies which the Romans later made into legal principles from which they constructed a science of jurisprudence. Without in any way denying the great contribution of Roman legal science, this essay is directed to exposing again some of the ideas which so well served the Romans and ourselves. Much of the material for this essay is drawn from that excellent yet neglected work of Plato, *The Laws*,<sup>1</sup> neglected because school examination questions are more frequently set on his more popular *Republic*. Plato was over seventy when he began to write *The Laws* and Professor A. E. Taylor suggests that in this work Plato at last turned "to the matters that had always been nearest to his heart", namely, the art of statesmanship.<sup>2</sup> In *The Laws* there are three speakers: an Athenian whose experiences seem to parallel Plato's, a man from Crete and a Spartan. The Cretans are resolved to refound a city long deserted and the argument of the book is addressed to that project. It ranges far and wide from religion and the gods to warfare and education. Our concern in this essay is with the laws for the new city.

With regard to the *necessity for laws*, the Athenian remarked that "mankind must either give themselves a law, and regulate their lives by it, or live no better than the wildest of wild beasts" since "there is no man whose natural endowments will ensure that he shall both discern what is good for mankind as a community and invariably be both able and willing to put the good into practice when he has perceived it".<sup>3</sup> And again he said that the legislators must do all they can to "rivet your city together while it is still in its inception, with no avoidable omission, major or minor, of anything that may be called law, custom or usage; all are the rivets of society".<sup>4</sup> Thus he would seem to approve Louisiana's act of including in her Code,

<sup>1</sup> Plato, *The Laws* (A. E. Taylor translation) Everyman's Library Edition (hereafter referred to as *The Laws*).

<sup>2</sup> Professor Taylor associates Burnet with this remark. See J. Burnet, *Platonism* (1928) 94.

<sup>3</sup> *The Laws*, IX, 874-5.

<sup>4</sup> *The Laws*, VII, 793.

article 21, which provides that: 'In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.'

Plato saw three tasks for the jurist: *First and foremost*, he should promote throughout the community the highest type of personality attainable, namely, complete goodness.<sup>5</sup> Plato admitted that should a man be born with the capacity to attain to this complete goodness, he would need no laws to govern him.<sup>6</sup> However, he pointed out that in any society there is an element, he termed it a "minority", which has no desire to attain to complete goodness and for these the jurist must make orders that they may be weaned or deterred from evil.<sup>7</sup> Even the great majority of citizens, who wish to live in goodness, need direction, since there often exists confusion as to what is right, and they also need encouragement to continue right conduct.<sup>8</sup> Thus Plato saw the role of law as educative, namely, directing man towards the good. It is interesting in this connection to note that certain modern jurists have opposed the elimination of "fault" as a criterion for delictual liability on the ground that it serves an educative function, teaching man to eschew willful and negligent conduct and rewarding his diligence.

With regard to this mission of education and direction, Plato was not satisfied by simple imperatives<sup>9</sup> such as are found in early codes of laws whereby the text was accepted as being of divine origin<sup>10</sup> and hence not subjected to man's reason. Plato's lawmaker would appeal to man's reason, intelligence and sense of honor and fitness by means of *preambles* to the actual laws which would instruct men in the reason and virtue of the specific law.<sup>11</sup> In fact, much of *The Laws* could be considered as a "preamble" "to prepare the reader of the legislator's enactments to receive" the law "in a spirit of friendliness and consequent docility".<sup>12</sup> Plato said that these preambles were not the text of the law but educative only.<sup>13</sup> One is reminded of the fact that many modern statutes in the United States contain "Declarations of Policy" or statements as to the "Purposes of the Act" and that much debate has taken place as to whether these are part of the legislation itself. Further, the Constitution of the United States and the Charter of the United Nations are also prefaced by preambles and at least in one Ame-

<sup>5</sup> Professor Taylor's introduction to *The Laws*, xv.

<sup>6</sup> *The Laws*, ix, 875.

<sup>7</sup> Professor Taylor's introduction to *The Laws*, xv.

<sup>8</sup> *Ibid.*

<sup>9</sup> Professor Taylor's introduction to *The Laws*, xv.

<sup>10</sup> e. g. *The Code of Hammurabi* (Johns' trans. 1903) (2285-2242 B. C.).

<sup>11</sup> Professor Taylor's introduction to *The Laws*, xv, xvi. But preambles would not be attached to all laws, only to major ones.

<sup>12</sup> *The Laws*, iv, 723.

<sup>13</sup> See: G. Morrow, *Plato's Cretan City*, Princeton Univ. Press (1960) 554-5. *The Laws*, iv, 723.

rican decision the preamble to the United Nations Charter was held not to create a binding obligation on the United States.<sup>14</sup>

However, no one can doubt that in these preambles the law givers are instructing courts, juries and citizens as to the legislative reasoning behind the enactments, hoping thereby to enlist obedience and support.

Plato was by no means unaware of another problem which troubles us still, namely, our attitude toward a rule of law which we consider unwise or unjust. It was Socrates in the *Crito*<sup>15</sup> who, on being urged to flee to avoid the imposition of the sentence of death, argued that should the laws and government of Athens come to him and ask: "What are you about? Are you not by an act of yours to overturn us —the laws, and the whole state, as far as in you lies? Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals?" And Socrates died obedient to the law. Though Plato spoke much of "right law" probably discerned by the use of reason, no evidence is found that he would support civil disobedience, according to Professor Morrow. The individual may "try to persuade the law that they are wrong but he may not disobey".<sup>16</sup>

Plato, realizing full well that the citizens of the new state were not gods but men, often confused, rebellious and errant, saw the second and third tasks of the jurist to be the working out of a system of political institutions and the provision of a legislative code. He emphasized again and again that these were at best housekeeping tasks serving the main purpose of educating the citizen in virtue.

With regard to a *system of political institutions*, two positions are of significance to us. *First*, his appreciation of the struggle for dominance between the legislative and judicial power, between the aristocratic lawgiver and the popular courts. The question arose as to the amount of discretion which the new state would allow the courts in the matter of fines or penalties, particularly in the cases of wounding or other inflicted hurts. Plato was quite clear that the courts had discretion in all cases as to the occurrence or non-occurrence of the event, *i.e.* the facts.<sup>17</sup> Plato was not however willing to entrust to the popular courts all questions of fines and penalties, considering that wherever possible such should be set by the statute.<sup>18</sup> Plato's distrust of the competence of the popular courts was undoubtedly influenced both by the trial of Socrates and by certain features of Attic procedure, which we should now examine:<sup>19</sup> First, as to the courts of law, the dicasts or jurors themselves. Staveley remarks that even in the fifth century there existed a permanent panel of no less than 6,000 jurors, and that later any

<sup>14</sup> See: *Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617 (1952).

<sup>15</sup> Jowett's translation of *The Dialogues of Plato* II, p. 151.

<sup>16</sup> G. Morrow, *Plato's Cretan City* (1960) 569.

<sup>17</sup> *The Laws*, IX, 875.

<sup>18</sup> *The Laws*, IX, 876.

<sup>19</sup> *The Laws*, p. 266 fn. 1.

citizen over thirty who was not indebted to the state or deprived of rights could register for duty as a juror and appear on the day of a trial for selection by lot.<sup>20</sup> Harrison tells us that in an important political trial in 415 B.C. the jurors numbered 6,000.<sup>21</sup> From the time of Perikles these jurors were paid and allegations were made that the positions became almost a sort of political dole.

Aristophanes in *The Wasps*<sup>22</sup> speaks of a dicast as a "lawcourt lover, no man like him, judging is what he dotes on, and he weeps unless he sit on the front bench of all" nearest the parties, witnesses and orators. Rogers, an English barrister, pleads that no confusion be entertained between the Athenian jurors and the English jury, pointing out that the dicasts were truly a popular assembly rather than twelve good Englishmen and true, that further the Athenian jurors were supporters of demagogues, too often swayed by rhetoric, and uninstructed as to the law by any impartial person.<sup>23</sup>

*Secondly*, there was no discussion of views among the individual members of the jury.<sup>24</sup> Plato spoke of these people as "poor spirited and inarticulate".<sup>25</sup> Certainly, they had no training in law or the process of judging. It is also difficult to imagine full discussion among 1200 jurors in the limited time at their disposal.

*Thirdly*, the voting was secret and hence no reasons were ever given for the vote.<sup>26</sup>

*Fourthly*, although the court was sworn to "maintain an impartial and judicial silence", in fact they often expressed their sympathy or disapproval of one side or the other by applause and clamor, and sometimes turned a deaf ear to the maxim of hearing both sides.<sup>27</sup> Aristophanes, in *The Wasps* states the rule thus: "T'was a very acute and intelligent man, whoever it was, that happened to say 'Don't make up your mind until you've heard both sides'." He represents one of his characters as pleading: "Come don't decide against us, pray don't, Father, before you've heard both sides". To which the Father replied: "But my dear boy, the thing's self-evident."<sup>28</sup> (An early example of *res ipsa loquitur*?) Or again we find Demosthenes speaking to the jurors, and reminding them that they should be guided

<sup>20</sup> E. S. Staveley, *Greek and Roman Voting and Election* (1972), p. 95.

<sup>21</sup> A. R. W. Harrison, *The Law of Athens*, II (1968-1971), pp. 47-48.

<sup>22</sup> *The Wasps* (Roger's translation) 89.

<sup>23</sup> Roger's introduction to *The Wasps* of Aristophanes xxxviii, xxxix, xlii.

<sup>24</sup> *The Laws*, p. 266 fn. 1.

<sup>25</sup> *The Laws*, ix, 876.

<sup>26</sup> *The Laws*, p. 266, fn. 1.

<sup>27</sup> Harrison tells us that the jurors swore they would vote according to the laws and decrees of the Athenian people and of the Council of 500 or in any case not covered by a law, in accordance with what was most just, and, without fear or favor, they would vote on the matter in issue after listening to both sides and they would take no bribe either direct or indirect. Harrison, II, p. 48.

<sup>28</sup> Aristophanes, *The Wasps*.

“by the laws and by the judicial oath, by whose terms, among other obligations, you are sworn to give to both sides an impartial hearing”.<sup>29</sup>

But, however much Plato may have disapproved of the popular courts as they functioned, he saw them as a logical development of the principle of Athenian democracy, namely, “the right of all citizens to take part in the government”.<sup>30</sup> He did not abolish them in the new proposed city, but he devised a system “in which popular participation, selected competence and repeated examination” found place.<sup>31</sup> Thus, Plato would establish a procedure of appeal from the popular court. He envisioned the first trial as one “before neighbors and friends who are best acquainted with the matters in dispute”.<sup>32</sup> One is here reminded of the early conception of the English jury as those who knew the parties best and could best decide on their veracity.<sup>33</sup> If a man did not get a satisfactory decision from this first trial, Plato would have him proceed to another court, and if the two courts failed to agree and settle the matter, the judgment of a third court would be final in the case.<sup>34</sup>

Next, Plato sought to secure that “there should be real material preparation of a case before it comes into court”.<sup>35</sup> Theretofore, these preliminary proceedings had been “almost wholly formal, their main object being to ensure only that the suit had been regularly instituted and all documents to be used at the hearing specified and inventoried”.<sup>36</sup> It is fairly certain that Plato would have favored modern methods of discovery, interrogatories and pre-trial conferences. By means of this advance preparation, Plato believed that the court would have time and information for due deliberation.<sup>37</sup>

Plato also sought to see to it that the judges should be men of superior intellect who could discuss the principles of justice which undergirded the statutes, and not “content themselves with a safe legal “yes or no”.<sup>38</sup> As he wrote: “In a community where the constitution of the courts is thoroughly sound, and the persons who will have to exercise the judicial functions have been properly trained and made to pass the most exacting tests, it will be entirely right and fitting that such courts should be allowed a wide discretion in assessing the fines or other penalties of offenders.”<sup>39</sup>

Perhaps the most interesting innovation in Plato’s city was the provision against abuse of the magistrate’s or judge’s power, namely, “any citizen who considers that he has been wronged by a magistrate’s action or decision

<sup>29</sup> De Corona 226.

<sup>30</sup> Morrow, *Plato’s Cretan City*, Princeton Press, 1960, p. 252.

<sup>31</sup> Morrow, p. 255.

<sup>32</sup> *The Laws*, vi, 766-7.

<sup>33</sup> Forsyth, *History of Trial by Jury* (1852), 158 et seq.

<sup>34</sup> *The Laws*, vi, 767.

<sup>35</sup> *The Laws*, vi, 766.

<sup>36</sup> *The Laws*. Taylors note 4 at p. 148.

<sup>37</sup> England’s notes to *The Laws* I, p. 589.

<sup>38</sup> *Ibid.*

<sup>39</sup> *The Laws*, ix, 875-6.

may bring suit for damages against the magistrate or judge concerned".<sup>40</sup> This was but one facet of Plato's plan whereby by mutual checks all officers of government were made responsible for their official acts and held to account for abuses of official power.<sup>41</sup> This accountability was before the ordinary courts,<sup>42</sup> as in England and the United States, and not before special courts as in France. One wonders what Plato would have thought of our modern ombudsman.

Turning now to the third task which Plato set for the jurist, namely, the formulation and prescription of a code of laws for the city,<sup>43</sup> certain things may be noted. *First*, Plato clearly saw the need for and importance of written laws. He wrote: "Is it not true that of all the writings to be found in cities, those which relate to laws, when you unfold and read them, ought to be by far the noblest and the best? And should not other writings either agree with them or, if they disagree, be deemed ridiculous?"<sup>44</sup> But Plato also recognized the importance of custom or usage<sup>45</sup> which along with law form "the rivets of society." He spoke of it as the "unwritten law",<sup>46</sup> the "mortises of a constitution, the connecting links between all the enactments already reduced to writing . . . and those yet to be recorded".<sup>47</sup> Even so, these traditions in his opinion "should neither be designated laws nor left unformulated".<sup>48</sup>

*Secondly*, Plato knew the value of the comparative study of law and so was in the tradition of Lycurgus and Charondas, the latter being described by Aristotle as "better informed and otherwise equipped" than any of the legislators of his day. Plato wrote that in framing a code of laws for the new city, the legislator should take such local Cretan laws as met his approval or laws from other places, no concern to be felt as to their foreign nature or origin "so long as we judge them superior".<sup>49</sup>

*Thirdly*, Plato did not believe that all aspects of man's life should be ruled by law, but, even though detailed provisions are not always given, general guides of morality may be expressed by the wise legislator.<sup>50</sup>

*Fourthly*, Plato was aware that even the wisest legislator could not foresee all the problems that might arise in the new city and that gaps would exist in the legislation that would have to be filled by the young men who succeeded

<sup>40</sup> Morrow, p. 548. *The Laws*, vi, 767.

<sup>41</sup> Morrow, p. 551.

<sup>42</sup> *Ibid.*

<sup>43</sup> *The Laws*, v, 735. Plato said: "For you must know that there are two things which go to the making of a constitution: the conferring of office on individuals is one, the other is the providing of these officials with a code of laws."

<sup>44</sup> *The Dialogues of Plato* (Jowett trans.) v, 858 (p. 241).

<sup>45</sup> *The Laws*, vii, 793.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *The Laws*, III, 702.

<sup>50</sup> See Plato, "The Statesman", in *The Dialogues of Plato* (Jowett trans.) iv, p. 498.

the old draftsmen. To these Plato would say: "Friends and preservers of law, there will be a host of omissions in the different departments of our present legislation; that simply is not to be helped. Not but what we shall do all we can to sketch the outlines of the more considerable departments as well as of the whole system. But you will have to fill up this outline and must be told what your aim in doing so is to be".<sup>51</sup> One is reminded of article 1 of the Swiss Civil Code which recognizes that the code may not cover every case and that in such an event the judge is to decide the matter as if he were a legislator making a law for that particular case.

*Fifthly*, Plato knew that the laws laid down might well be found to be outmoded, ill adapted or contradictory in day by day experience, thus requiring amendment or revision. The question for Plato, as for Justinian, Napoleon and the Law Commission of England was how to accomplish these reforms without undermining the stability of law. Plato provided that those who administered the laws should from such practical experience with their working, provide supplemental regulations and annual amendments which would be considered temporary or provisional.<sup>52</sup> One is here reminded of the praetorian edicts of later Rome. Then Plato provided that after ten years of experimentation, the various magistrates, acting together with the original legislator if he be still alive, would report to the curator of laws such omissions and proposed amendments. Plato then said that when these proposals have been brought to perfection, they would be added to the rest of the laws originally established.<sup>53</sup>

Finally, Plato remarked on the fact that the laws of the various existing societies were often confusing and conflicting and that such a fate could well happen to the new city unless some means be found to keep it on proper course. He suggested that such confusion resulted from the fact that the aims of the legislators were conflicting: some of them seeing their aim as the restriction of power to a certain group regardless of the effect on others; others saw as their aim the acquisition of riches whether or not this was done at the cost of enslavement of others; others saw liberty as the object of legislation; and still others combined or tried to combine these aims, sometimes adding new ones.<sup>54</sup>

For Plato the aim of the legislator must be virtue which encompasses: courage, temperance, wisdom and justice. These would be taught by lawgivers and guardians of the other citizens by example as well as by exhortation.<sup>55</sup>

<sup>51</sup> *The Laws*, vi, 770.

<sup>52</sup> *The Laws*, vi, 772.

<sup>53</sup> *The Laws*, vi, 772. Professor Taylor comments that such changes shall only be possible if desired by the body of magistrates, the popular assembly and the representatives of the oracular shrines unanimously. Note 1 on p. 155 of *The Laws* (Everyman's Edition).

<sup>54</sup> *The Laws*, xii, 962.

<sup>55</sup> *The Dialogues of Plato* (Jowett trans.) v, pp. 354-5.