

Lawgivers On the Topicality of a Figure

Interdisciplinary Colloquium, October 5 – 7, 2006
Magnus-Haus, Berlin

Exposé

The reference to “the lawgiver” has recently lost a considerable amount of its plausibility. While it was clear in the 19th and 20th century who filled this role, whether the ruler or the people, today it is hardly possible to ascertain who really creates the laws. Is it the European parliament, the heads of state who sign treaties, or international standards? There are a number of candidates, several of which are considered to be legitimate petitioners for the office of “lawgiver”, others seem to have appropriated legislative power for themselves. Such private, no longer democratically derived quasi-lawgivers stretch the boundaries of the lawgiver figure.

Yet the cult surrounding the lawgiver, which dates back to the Enlightenment, resonates to the present day. The search for the lawgiver continues, despite the varying forms of laws and their various sources and developments. The recognition of multifaceted competing legislative authorities and forms does nothing to change this. In principle, every prescriptive power should be able to assume the empty seat of the lawgiver. The only question that is generally asked is a normative one: Does this power bear the title of “lawgiver” legitimately, or should it be excluded from this position?

Although the conditions of its proliferation upset the plausibility of the lawgiver figure, its topicality is unabated. This conclusion is reason enough to inquire into its rhetorical and legal constitution. All the configurations that the lawgiver has undergone throughout history – as the founder of a religion like Moses, founder of a community as in ancient Greece, as a mere technical function for the production of laws as in Roman law, or as a sovereign ruler as in the Baroque period – the lawgiver’s *persona ficta* itself has remained untarnished. Modern dictators, too, have donned the mantle of the lawgiver, without bringing the figure as such into disrepute. Why is this figure as indestructible as it is necessary? One reason could be that the paradoxes of legislation retreat behind the personification(s) of the lawgiver and become invisible. Whether the king or the people create the laws, whether in incarnated form or in the collective, in each scenario the legislative process is connected to a speaking subject. This disguises the empty fundament of the authority upon which the legislation must base itself.

In its performative capacity the lawgiver reconciles the nonderivability of each law, emphasizing either the moment of “giving”, the act of “setting”, or of “finding” the law. Sometimes the lawgiver behaves more like the editor of existing laws, sometimes more like the author of new ones, with Justinian and Napoleon as the two prototypes. While the Roman emperors, as codifiers of preexisting laws, can appeal to the legal tradition, the modern lawgiver justifies his laws by appealing to other sources, to nature, reason, the common good or the nation.

Today's legislative power, which legitimizes itself solely through process, secretly profits from such legitimacy forces. We have gotten so used to speaking of the lawgiver because this avoids problems of founding and origin. This is another reason for the continuity of the figure. It even seems that this figure of the lawgiver, which had moved into the background for a while, is becoming current to the extent in which the law is being fractured into various highly heterogeneous parts. The more amorphous the talk of law, one could say, the greater the need for a figure to connect the fragments.

Consideration of this figure may bring analytical profit even to those who don't see any signs of a rebirth of the lawgiver. This figure allows us to measure whether and to what extent conditions of globalization have caused legal systems to drift from classical legislative forms. By comparing older and newer lawgiver figures culturally and historically, the conference aims to create a basis for the categorization of contemporary national and international legislative processes and assess these according to their degree of novelty. Is the existence of a multitude of competing legal traditions really a new situation historically, or has this not always been the case, disguised by the figure of the lawgiver as a rhetorical topos and as the personification of normative processes? Is the current anonymization of the lawgiver just the last (or second to last) phase of a long process of de-personalization, leading from the mythical or historical lawgivers of earlier epochs (Hammurabi, Moses, Minos, Lykurg...) through the political sovereign (monarch or people) as lawgiver up to its dissolution into parliamentary legislative *proceedings* (and recently into European bureaucracy)? Is such concealment conceivably necessary in order to create legitimacy and authority for lawmaking beyond mere „normativity of the fact“? How is the constitutional state's ideal of an impersonal „rule by laws“ related to the „fight for law“ (Rudolf Ihering), which is currently being conducted on the most varied international stages by notable (national and inter- or supra-national) players, whether for the introduction of a European constitution, the „democratization“ of Iraq, or the creation of legal gray areas such as Guantanamo Bay? Was the classical model of the „constitutional state“ a political fiction, whose effectivity is now beginning to weaken under the current cultural and political conditions?

The conference will explore the topicality of the lawgiver and simultaneously call this figure into question. Scholars of various disciplines are invited to illuminate the functions and workings of this figure from legal, historical and rhetorical perspectives.

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