

Chapter 1

THE (NON)-LEGAL THOUGHT OF NICCOLÒ MACHIAVELLI

1.1. Introduction

Machiavelli is the most ardent Romanist (or Rome-lover) among all modern political philosophers: Indeed his greatest single work is a set of *Discourses* on Livy's history of Rome (cf. Meinecke 1884, chaps. 4 and 5). But while most of the great Rome-lovers—most notably Dante, Leibniz and Rousseau—give enormous weight to Roman law as *the* towering and permanent Roman achievement (outlasting the fall of Rome herself; cf. Barker 1923) Machiavelli by contrast gives absolute priority to the personal creative genius of Romulus, of Numa, of the Antonine “good” emperors (Machiavelli 1950a, Book 1, chap. 10). (And brilliant personal creativity is far from the sober generality and deliberate impersonality of law.) Dante could say (in *De Monarchia*) that what “justifies” Rome is Christ's willingness to be born under Roman-law *jurisdictio* (*De Monarchia*, Book 2, *passim*); Leibniz could call Roman law *la raison écrite*, the only rival to geometry (Leibniz 1948a, 534); Rousseau could venerate the sheer *généralité* of a Roman law to which all egoistic *volonté particulière* must be subordinated (Rousseau 1959b, Book 4, *passim*). But Machiavelli rarely refers to Roman law (except to acknowledge briefly its continuing dominance) (Machiavelli 1950a, Book 1, “Introduction”): What mattered to him was Roman civic *virtù* and the personal genius of “founders” such as Romulus—who indeed neglected law to the point of fratricide, as in the killing of Romulus (*ibid.*, Book 1, chap. 9). What mattered to Machiavelli in short, was the very personal, extra-legal, extra-orderly creativity of great men (who are then worthy of perpetual “imitation,” whenever *fortuna* affords an historical opportunity) (*ibid.*, Book 2, Introduction). Rarely, indeed, has a “Romanist” given so little weight to Roman law, or in fact to law *tout court*, as Niccolò Machiavelli.

To appreciate exactly why Machiavelli gives such slight weight to law—even the law of his beloved Romans—a more general understanding of his political-moral philosophy and philosophy of history is necessary; it is to those aspects of his thought that one now turns.

1.2. Law as Personal Creativity in the “Legislator”

It is difficult to come to terms with Machiavelli on his own ground, since he has been more vilified and condemned than any social philosopher who ever wrote; he has served, in Michael Oakeshott's words, as “the scapegoat of the

European consciousness" (Oakeshott 1975, chap. 3, 234), as the source to whom all evil doctrines and practices can be traced. Since the sixteenth century his name has been used interchangeably with the ideas of scheming, treachery, bad faith, and political murder; his reputation in the English-speaking world was fixed as early as 1593 by Shakespeare, who placed a "Machiavellian" speech in the mouth of Richard Duke of Gloucester (soon-to-be Richard III), the supposed killer of the "little princes" in the Tower of London:

Why, then, I do but dream on sovereignty;
 Like one that stands upon a promontory,
 And spies a far-off shore where he would tread,
 Wishing his foot were equal with his eye;
 And chides the sea that sunders him from thence,
 Saying, he'll lade it dry to have his way:
 So do I wish the crown, being so far off;
 And so I chide the means that keeps me from it;
 And so I say—I'll cut the causes off,
 Flattering me with impossibilities—
 [...]
 Then, since this earth affords no joy to me,
 But to command, to check, to o'erbear such
 As are of better person than myself,
 I'll make my heaven to dream upon the crown;
 And, whiles I live, to account this world but hell,
 Until my misshap'd trunk that bears this head,
 Be round impaled with a glorious crown.
 And yet I know not how to get the crown,
 For many lives stand between me and home:
 And I,—like one lost in a thorny wood,
 That rends the thorns and is rent with the thorns;
 Seeking a way and straying from the way;
 Not knowing how to find the open air,
 But toiling desperately to find it out,—
 Torment myself to catch the English crown:
 And from that torment I will free myself,
 Or hew my way out with a bloody axe.
 Why, I can smile, and murder while I smile;
 And cry, content, to that which grieves my heart;
 And wet my cheeks with artificial tears,
 And frame my face to all occasions.
 I'll drown more sailors than the mermaid shall;
 I'll slay more gazers than the basilisk;
 I'll play the orator as well as Nestor,
 Deceive more slyly than Ulysses could,
 And, like a Sinon, take another Troy:
 I can add colours to the chameleon;
 Change shapes with Proteus for advantages,
 And set the murderous Machiavel to school.
 Can I do this, and cannot get a crown?
 Tut! were it further off, I'll pluck it down. [*Exit.*]
 (Shakespeare 1919a, *Henry VI*, Part 3, Act 3, Scene 1)

But it is not only a matter of Shakespeare: Frederick the Great of Prussia wrote a celebrated *Anti-Machiavel* (despite his own predatory bellicosity) (Frederick the Great 1760); and even today it is scarcely a compliment to call a policy “Machiavellian.”

Against all of these unflattering opinions, some scholars have taken the view that what Machiavelli really had in mind was the revival of ancient Roman civic virtue, Roman-republican love of country, and that the harsh advice given to the (new) prince in *The Prince* was necessary in an evil and violent age, in which one could not gain power and restore antiquity by calm and measured means. It is certainly true that later political-legal theorists as important as Montesquieu, Rousseau and Hegel saw Machiavelli in this second, Rome-restoring light (Hegel 1956, Part I, sec. II, chap. III); Rousseau even thought that Machiavelli’s real views were contained in the *Discourses* (a sustained eulogy for the Roman republic), and that *The Prince* was a satire against Renaissance princes (Rousseau 1959b, Book 2, chap. 7).

Rousseau’s view is more striking than plausible, but one can see why the argument about Machiavelli’s giving strong advice in evil times might be credible. Consider the political condition of Italy in 1512, when Machiavelli (lately driven from Florentine power) began to write *The Prince* and the *Discourses*: There was no national government or law whatever (and none on the horizon until the mid-19th century); the country was divided between five principal powers (the Papacy, Venice, Florence, France, and Spain) (Machiavelli 1950a, Book 1, chap. 12, *inter alia*)—with no single power strong enough (or bright enough) to overcome the others and consolidate, unified rule. This, surely, was a time to give tough-minded advice, if any time ever was; and *The Prince* is often taken to be the work of an Italian patriot anxious to restore the ancient civic greatness of Italy (hence the closing chapter of *Il Principe*, “Exhortation to liberate Italy from the barbarians”: Machiavelli 1950b, chap. 26).

Machiavelli’s advice was tough and quite shocking to his contemporaries, even if we have grown more used to it. His theory was perhaps more startling historically than absolutely—that is, more startling following on the essential social ideas of ancient and medieval thought, than considered in itself. Ancient thought, and even some Christian philosophy after Aquinas, had concerned itself with the notion of an ethical community designed for the attainment of virtue, and ruled by wisdom, reason, and law. Against this kind of Graeco-Christian backdrop Machiavelli’s ideas came as a terrible jolt:

My intention being to write something of use to those who understand, it appears to me more proper to go to the real truth of the matter than to its imagination; and many have imagined republics and principalities which have never been seen or known to exist in reality; for how we live is so far removed from how we ought to live, that he who abandons what is done for what ought to be done, will rather learn to bring about his own ruin than his preservation. A man who wishes to make a profession of goodness in everything must necessarily come to grief

among so many who are not good. Therefore it is necessary for a prince, who wishes to maintain himself, to learn how not to be good, and to use this knowledge and not use it, according to the necessity of the case. (Machiavelli 1950b, chap. 15)

With this celebrated paragraph, the entire medieval worldview of the relation between “this world” and a “higher” world, of the legal-political order as the “secular arm” of a universal *respublica christiana*, of politics and law as consequences of “the Fall” of man, were simply swept away, and the Papacy (with its canon law) was seen merely as one more (ineffective) power engaged in an impotent struggle for power in Italy. Machiavelli said with mock seriousness that he would not examine the Papacy too closely, because it was “upheld by higher causes, which the human mind cannot attain to” (Machiavelli 1950a, Book 1, chap. 2) but it was clear that he hated it (or rather felt contempt for it) because of its “universalist” pretensions—as in Boniface VIII’s *Unam Sanctum*—even though it could not unify Italy, let alone the world.

[A]s there are some of the opinion that the well-being of Italian affairs depends upon the Church of Rome, I will present such arguments against that opinion as occur to me; two of which are most important, and cannot according to my judgment be controverted. The first is, that the evil example of the court of Rome has destroyed all piety and religion in Italy, which brings in its train infinite improprieties and disorders; for as we may presuppose all good where religion prevails, so where it is wanting we have the right to suppose the very opposite. We Italians then owe to the Church of Rome and to her priests our having become irreligious and bad; but we owe her a still greater debt, and one that will be the cause of our ruin, namely, that the Church has kept and still keeps our country divided. And certainly a country can never be united and happy, except when it obeys wholly one government, whether a republic or a monarchy, as is the case in France and in Spain; and the sole cause why Italy is not in the same condition, and is not governed by either one republic or one sovereign, is the Church; for having acquired and holding a temporal dominion, yet she has never had sufficient power or courage to enable her to seize the rest of the country and make herself sole sovereign of all Italy. And on the other hand she has not been so feeble that the fear of losing her temporal power prevented her from calling in the aid of a foreign power to defend her against such others as had become too powerful in Italy; as was seen in former days by many sad experiences, when through the intervention of Charlemagne she drove out the Lombards, who were masters of nearly all Italy; and when in our times she crushed the power of the Venetians by the aid of France, and afterwards with the assistance of the Swiss drove out in turn the French. The Church, then, not having been powerful enough to be able to master all Italy, nor having permitted any other power to do so, has been the cause why Italy has never been able to unite under one head, but has always remained under a number of princes and lords, which occasioned her so many dissensions and so much weakness that she became a prey not only to the powerful barbarians, but of whoever chose to assail her. This we other Italians owe to the Church of Rome, and to none other. (Ibid.)

Machiavelli had an unfailing eye for hypocrisy and self-deception, for the gulf between what was claimed (e.g., “universal” *jurisdictio*) and what was actually done (little or nothing)—and he concentrated almost exclusively on actual historical achievement.

Machiavelli certainly (above all in *The Prince*) proposes no final “end” of man, or at least proposes no notion of a universal good attainable in a charity-

shaped *respublica christiana*; political power itself (mainly extra-legal) is a worthy end if it leads to historical *greatness*—if, that is, one is remembered in the court of history as a great, if not necessarily good, man (in the manner of Romulus; *ibid.*, Book 1, chap. 9). There is a sentence in Montesquieu's *Spirit of the Laws* (1748) which reveals the standard of “greatness” that Machiavelli had in mind: “The actions of men are judged, not as virtuous, but as shining; not as just, but as great; not as reasonable, but as extraordinary” (Montesquieu 1989, 278). This idea of historical greatness as a combination of uniqueness and success, overriding conventional morality and established law, is the most radical of all Machiavelli's ideas, and one that will later be returned to.

Machiavelli was the first great social theorist to insist on a sharp difference between morally good and politically great actions (even if Thucydides and Aristotle were aware of the distinction) (Pocock 1975, *passim*). Machiavelli, indeed, stresses an unbridgeable gulf between the (conventionally) morally good and the politically-historically great. To use a favorite example of his own: Liberality or generosity is commonly accounted a virtue in established morality—but in politics and statecraft the prince, in order to be “liberal,” must either spend his own money (which depletes the amount available for strictly necessary activities, especially war), or he must spend public funds on the public (thereby raising taxation. Machiavelli 1950b, chaps. 7–9). Therefore liberality or generosity is not a political good; but stinginess, rightly considered bad or contemptible in private life, becomes a political “good” which is even instrumental to greatness. To recall a second example often mentioned by Machiavelli: Mercy and clemency are rightly prized as private *virtues*. But (he continues), if a prince (and especially a new prince) shows too much mercy and clemency at the outset of rulership, this may bring on great disorder—if clemency is misread as weakness—and this will require greater rigor and cruelty in the end than would have been necessary had the prince been initially more firm. Therefore (Machiavelli suggests) minimal acts of necessary cruelty and violence, done at the outset, may prevent greater cruelties (including perhaps illegalities) later on (*ibid.*, chaps. 10–12). What Machiavelli was suggesting is that politics has internal “laws” of its own which are not deductions from a more general moral philosophy (in the manner of Kant: Kant 1922c, “Einleitung in der Rechtslehre”) but which are related only to the way in which power is obtained and kept.

The getting and keeping of power in turbulent and fast-changing times makes the idea of politics in Machiavelli an idea of constant princely activity; thus he offers a dynamic rather than static theory of political-social life. Machiavellian politics is no longer a search for a “motionless polity” (in Wolin's illuminating phrase: Wolin 1960, 1), in which a single best quasi-aesthetic pattern governs the entire kosmos—as in Book IV of Plato's *Republic*, in which the “harmonious” non-dissonant *psyche* is “writ large” in the harmo-

nious polis (ruled by philosophers), and then writ larger still in the “harmony of the spheres” in Book X (Plato, *Republic*, 443d–e, and Book 10, *passim*). Rather, in Machiavelli, there is a shift from questions of harmonious and stable rule (with resonances of quasi-mathematical consonance) to questions of power, of mastery, of control over an unstable, volatile complex of fast-moving forces. In Machiavelli, then, as *the* non-Platonist par excellence, harmony and geometrical “eternity” yield to a more modest provisional control over barely containable forces (Wolin 1960, “Machiavelli” chapter).

The problem of Machiavelli (as Wolin above all has seen) is to find a form of political-historical explanation which would somehow take account of dynamic, volatile, ever-changing social reality and still provide “directives” or guidelines—even if these are not “geometrically” necessary, in the Platonic manner. “In history,” Wolin (1960, chap. 2) insists, “Machiavelli found such a form of explanation, for the virtue of the language of history was that while it described movement and change, it also assumed certain constant factors operating over time” (cf. Machiavelli 1950a, Book 2, chap. 43). (For Machiavelli what was constant was not Platonic geometry but human psychology: For him it is a permanent truth that feelings of gratitude always degenerate into resentment—such that rulers should take quick advantage of their subjects’ grateful feelings; *ibid.*)

It is for these reasons that Machiavelli constantly says that the man who wants to achieve greatness in his own time must study examples of political success in the past (above all in Roman history) and then “imitate” (intelligently, creatively) those shining examples as nearly as present circumstances and *fortuna* will allow (*ibid.*, Book 2, “Introduction”).

The great Introduction to Book 2 of the *Discourses* on Livy contains the best statement of Machiavelli’s view of antiquity and a good statement of his theory of *imitatio* as the thing most necessary to present success. To be sure, Machiavelli begins by affecting contempt for antiquarians who are over-devoted to the past:

Men ever praise the olden time, and find fault with the present, though often without reason. They are such partisans of the past that they extol not only the times which they know only by the accounts left of them by historians, but, having grown old, they also laud all they remember to have seen in their youth. Their opinion is generally erroneous in that respect, and I think the reasons which cause this illusion are various. The first I believe to be the fact that we never know the whole truth about the past, and very frequently writers conceal such events as would reflect disgrace upon their century, whilst they magnify and amplify those that lend lustre to it. (Machiavelli 1950a, Book 2, “Introduction”)

But then eventually his own real view begins to steal in:

I repeat, then, that this practice of praising and decrying is very general, though it cannot be said that it is always erroneous; for sometimes our judgment is of necessity correct, human affairs being in a state of perpetual movement, always either ascending or declining. We see, for

instance, a city or country with a government well organized by some man of superior ability; for a time it progresses and attains a great prosperity through the talents of its lawgiver. Now, if any one living at such a period should praise the past more than the time in which he lives, he would certainly be deceiving himself; and this error will be found due to the reasons above indicated. But should he live in that city or country at the period after it shall have passed the zenith of its glory and in the time of its decline, then he would not be wrong in praising the past ... [Today], whoever is born in Italy and Greece, and has not become either an Ultramontane in Italy or a Turk in Greece, has good reason to find fault with his own and to praise the olden times; for in their past there are many things worthy of the highest admiration, whilst the present has nothing that compensates for all the extreme misery, infamy, and degradation of a period where there is neither observance of religion, law, or military discipline, and which is stained by every species of the lowest brutality; and these vices are the more detestable as they exist amongst those who sit in the tribunals as judges, and hold all power in their hands, and claim to be adored. (Ibid.)

And finally Machiavelli concludes this Introduction in these ringing words:

I know not, then, whether I deserve to be classed with those who deceive themselves, if in these *Discourses* I shall laud too much the times of ancient Rome and censure those of our own day. And truly, if the virtues that ruled then and the vices that prevail now were not as clear as the sun, I should be more reticent in my expressions, lest I should fall into the very error for which I reproach others. But the matter being so manifest that everybody sees it, I shall boldly and openly say what I think of the former times and of the present, so as to excite in the minds of the young men who may read my writings the desire to avoid the evils of the latter, and to prepare themselves to imitate the virtues of the former, whenever fortune presents them the occasion. For it is the duty of an honest man to teach others that good which the malignity of the times and of fortune has prevented his doing himself; so that amongst the many capable ones whom he has instructed, some one perhaps, more favored by Heaven, may perform it. (Ibid.)

What is astonishing in this “Introduction”—Machiavelli’s greatest encomium of antiquity in general and Rome in particular—is that Roman law does not make even a fleeting appearance; one is told of great Roman “lawgivers” (such as Romulus and Numa), but these lawgivers do not give *law*: Rather through highly personal “talent” they give institutions and virtues which are “as clear as the sun” and which are worthy of perpetual imitation. This is a quasi-aesthetic rather than legal view of “lawgiving”; it is (in Burckhardt’s famous phrase) “the state as a work of art” (Burckhardt 1896, vol. 2, 197). (Rarely has the word “lawgiver” had so little legal content.)

Given the Introduction to *Discourses*, Book 2, it is perhaps permissible to follow an interpretation of Machiavelli which accounts for the Romanizing “idealism” of the *Discourses* and the relative toughness and hardness of *The Prince*. The *Discourses* are a glowing description of Rome at her zenith: an ideal polity which is calm, prosperous, untroubled by an extra-worldly, transcendental religion driving fatal wedges between kinds of duties and virtues.

In the period under the good Emperors he will see the prince secure amidst his people, who are also living in security; he will see peace and justice prevail in the world, the authority of the Senate respected, the magistrates honored, the wealthy citizens enjoying their riches, nobility and virtue exalted, and everywhere will he see tranquillity and well-being. And on the other

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