INTRODUCTION

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When Michael Gagarin and I first met in Berkeley in the mid-1970s, we were the only two scholars (both at the very beginning of our careers) in the United States who thought of their academic specialization as "Greek law." At that time Douglas MacDowell was the only British scholar with such an established specialization. In other words, the study of Greek legal history was a largely continental European enterprise, and it was traditionally dominated by German, and secondarily French and Italian scholars. The composition of the contributors to this volume testifies to the dramatic changes to this field of study in the last twenty-five years. This is due to a variety of factors, including the decline in interest in most areas of pre-modern legal history in countries such as Germany that were once the bedrock of the discipline, as well as the marked increase in interest among British and American scholars. The majority of the contributors to the volume are thus British and American because this is where in recent years there has been the greatest amount of scholarly interest. Although the most eminent and established senior figures in Greek legal studies include many Europeans (represented here by Cantarella, Maffi, Rupprecht, Modrzejewski, and Thür), a younger group of Anglo-American scholars (not all of whom, of course, figure in this volume) are rapidly making their mark on this discipline. In selecting the contributors for this volume, Michael Gagarin and I tried to represent the wide variety of approaches and subject matter areas that characterize Greek law scholarship. We also deliberately included both the most senior and some of the newest and most promising researchers (such as Allen, Lanni, Rubenstein, Thomas, Todd, and Yunis), as well as distinguished individuals, such as A. A. Long and Robert Parker, whose areas of specialization lie outside of Greek law, but whose expertise can fruitfully be brought to bear on important topics of central concern in

our field. Our aim was to provide the reader with not only a broad and intensive introduction to the field, but also a sense of where it is going, a sense of the exciting variety of intellectual and disciplinary perspectives that are increasingly being brought to bear in studying Athenian and other Greek legal systems. We have thus included essays representing a number of traditional approaches, as well as some that push the boundaries of the field.

Along with the shift in the center of gravity away from traditional centers such as Germany and toward the United States and England, there has been an even more important change in the presuppositions about what Greek law is and how one ought to study it. The advent of Anglo-American scholars has brought a variety of new perspectives and methodologies to the field. New questions are being asked, neglected sources used, and comparative and theoretical perspectives brought to bear on Greek legal institutions. This is in significant part because of the simultaneous intellectual growth of the disciplines of classics and legal, social, and cultural history. Scholars with a whole new set of questions, methods, and research agendas have turned their attention to Greek legal institutions. They have revolutionized and enriched the field through their efforts, and we hope that our selection of contributors provides the reader with a sense of the excitement and innovation that now characterize much of the work being done in this field. This expansion of scholarly activity has also, as one might expect, been accompanied by the growth of a much larger audience for scholarship in this area. Thirty years ago scholarship regarding Greek law, with the exception of handbooks like the one written by MacDowell,[1] was published in specialist journals and scarcely read outside of a fairly narrow circle of researchers. Today, no longer the province of a handful of specialists, Greek law has increasingly been recognized as vital for an understanding of a whole range of political and social institutions in ancient Greece. This can most clearly be seen, for example, in studies of gender and sexuality, ancient democracy, politics and political theory, social conflict, and so on. At the same time, sources such as the Athenian legal orations, which were once scarcely read except by Greek law specialists, have now been recognized as being of central importance for the study of Athenian social, political, and cultural history.

One of the most welcome developments, in my opinion, has been the demise of orthodox paradigms for the study of Greek law. In the 1970s the field appeared to be divided between two approaches: a

[1] MacDowell (1978).

majority of continental European scholars, for the most part trained in law, who focused largely on technical doctrinal questions, following the model of civil (and Roman) law jurisprudence; and a much smaller group of British classicists, with little knowledge of legal theory or substantive law, who concentrated largely on procedural and institutional issues. In retrospect these differences now seem less important than they once did because both schools of thought now stand in far greater contrast to the variety of approaches that have exploded the boundaries of the study of Greek legal history in recent years. There is now no dominant paradigm, and the result is that questions previously neglected are now being explored and older issues once thought resolved are being reexamined by a wide range of perspectives, many of which draw on the methods and insights of other disciplines. Whereas disputes in Greek law once tended too often to focus on stale controversies and arid disputation of narrow doctrinal questions, now lively and multifaceted debate swirls around fundamental questions of Greek legal practice and institutions and their relation to broader political and social frameworks. Such controversies are only to be welcomed and encouraged, and the reader of this volume, the editors hope, will emerge with a sense of the way in which such discussions are expanding the contours of this field of inquiry.

As a way to explore further some of these issues of scope and method, as well as to provide the reader with a context for what is to follow, we now turn to an overview of some of the contributions to this volume and the questions the authors raise.

In the opening chapter, "The Unity of Greek Law," Michael Gagarin addresses one of the oldest controversies in Greek law, which involves some of the most basic questions defining our field of study, such as, "What is Greek law?" Continental scholars had once largely assumed a fundamental unity of Greek legal institutions across the Greek world. Challenged in the 1950s by Moses Finley to justify this assumption in light of a good deal of evidence that suggested the contrary, these scholars retreated from the notion of unity of institutions to a more limited view of an underlying unity of basic ideas.[2] Gagarin argues that Finley's view vis-à-vis continental scholars was correct: There was no "Greek law" in terms of common underlying legal ideas and basic principles of substantive law. Gagarin resumes Finley's critique, showing how in the area of marriage and inheritance there are fundamental differences among the laws of various Greek cities, differences significant enough to

[2] See Gagarin for references.

render the idea of any common underlying fundamental conceptions (*Grundvorstellungen*) meaningless.[3] More importantly Gagarin suggests the way in which the idea of this unity is largely the product of, or made possible by, our lack of evidence for other Greek legal systems: "The more detailed our knowledge, the more clearly the differences stand out." This underscores major methodological problems that remain to be explored; as the contributions of Rupprecht and Mordzejewski in this volume show, there are still many influential adherents to the unity thesis. In the Anglo-American world, however, the overwhelming tendency is to speak of "Athenian law" or the law of particular *poleis* when referring to legal doctrines or institutions.

Gagarin also shows that what is ultimately at stake in such debates – and this is vitally important – is the desire to use what we do know to reconstruct what we do not.[4] Scholars have attempted to use the idea of Greek law to reconstruct the huge gaps in our knowledge about cities other than Athens. Using Greek evidence as well as analogies from modern American law, Gagarin shows the folly of attempting to do so.

Having properly indicated the way in which we can now regard this issue as settled, Gagarin then moves the discussion to a new level. He advances a provocative and interesting claim that places the question of Greek law in a new perspective. He suggests that although there is no *substantive* Greek law, there may well be underlying common ideas in the realm of procedure, understood in the broadest terms as legal process. He makes the highly original and important claim that one of these underlying procedural notions has to do with the way in which trials in Greece, in contrast with many other premodern legal systems, consisted of litigants freely presenting their cases "as they saw fit." Another claim focuses on the way in which Greek legislators readily acknowledged the notion of "gaps" in the laws because they saw the role of judges as "filling in" what was required to do justice in individual cases. This, he suggests, is in stark opposition to legal systems that believe that gaps must at all costs be avoided and seek to deny the "lawmaking" capacity of judges. These are very large claims that will require a lot of comparative research both inside and outside of ancient Greece to explore.[5] As always, Sparta, which did not have a system of written

[3] See also my analysis of *hierosulia*, which reaches the same conclusion based on an examination of all the evidence concerning the crime of "theft of sacred property" (1983: Chapter 4).

[4] See also D. Cohen (1989, 1991) on these methodological issues.

[5] The contrast with civil law systems oriented toward comprehensive codifications is useful, but these same issues have been hotly debated in many such jurisdictions. The Swiss Civil

laws, may prove an obstacle to acceptance of the universality of such ideas.

What is important here, however, is that Gagarin has refocused the debate in an extraordinarily useful way. Here we see, in strong contrast to the state of the discipline a few decades ago, the way in which contemporary scholarship has moved us beyond the aridity of earlier debates about the "unity of Greek law." What Gagarin suggests here is that we focus instead on the features of the "Greek" way of thinking about *how law functions and is practiced* in a polis. This suggests that the Greek attachment to what Gagarin calls "procedure broadly understood," and, to my mind, might be more aptly labeled as legal process, has to do with the distinctive forms of political organization that characterized Greece in the age of the polis. In the challenge that this bold thesis presents, and in the way in which it can be addressed only through comparative legal historical studies, Gagarin has opened the door to the "Greek law" debate of this century.

Rosalind Thomas's chapter, "Writing, Law, and Written Law," shows the way in which the contributions of social and cultural historians have enriched the study of Greek legal traditions. It also provides an example of how far the study of Greek law has come in the past few decades. Thomas is perhaps the leading expert on literacy and writing in ancient Greece. Building on her work on the role of written texts and literacy in the development of political institutions, she addresses here important questions about the nature of written law, its connection to political and social developments in archaic and classical Greek *poleis*, and the relationship between written and unwritten law.

Above all, Thomas shows how important it is to understand legal developments, such as the introduction of written laws, in the political and social context. This may seem evident to some, but to legal historians used to thinking of the legal system as having an autonomous life of its own, this point is anything but obvious. For this reason, and because of general advances in our understanding of the impact of the introduction of writing and literacy, Thomas's work goes well beyond earlier scholarship on the nature and importance of written law in archaic and classical Greece.

Thomas argues that, "the writing down of law was probably undertaken in a variety of ways by different city-states for rather varied

Code, enacted early in the twentieth century, for example, provides that a judge who refrains from deciding a case because of the silence or insufficiency of the law fails in his fundamental duty as a judge.

purposes; depending on politics and context, such written laws did not have identical implications everywhere." Examining the variety of evidence (much of it fragmentary) that we have for the legal traditions of different *poleis*, she demonstrates how the adoption of written legislation was connected to fundamental political and social changes that transformed the archaic polis. The innovation of written statues seems often to come at times of crisis or institutional reform. In such situations the device of writing down the law may, depending on the political setting, serve to limit or underscore the power of officials and rulers.

Even more important from a comparative legal historical standpoint is Thomas's discussion of the nature of early Greek legislation and its relation to unwritten laws or norms. Thomas points out that the introduction of written laws builds on preexisting traditions and norms. In deference to modern, positivistically oriented lawyers, she is hesitant to label such norms as "laws" even though the Greeks had a clear conception of "unwritten laws." We need not be so deferential to the quibbles of legal philosophers, however, because legal anthropology and comparative legal history have shown clearly enough that elaborate legal systems can function in the absence of written codes. In any event, one of Thomas's central insights is that written statutes appear often to have been introduced to solidify and make permanent innovations or resolutions or controversial points: "This brings us to the probability that for most communities the laws which went up in writing were particularly special: these were not the ones agreed by all, but the contentious ones, the rules which constantly caused trouble. . . ." Although David Daube had made the same argument about early Roman and Biblical codifications, his contribution on this crucial issue has too often been ignored and has scarcely had any impact on historians of Greek legal institutions.[6] Thomas's analysis of particular cases of early codification reveals how crucial it is to look at the broader social and political context of legal innovation.

Thomas's chapter, then, is a vivid illustration of the way in which the flourishing of Greek social and cultural history has in turn produced nothing less than a minor revolution in the study of Greek legal history. Without the advances in our understanding of the introduction of writing and the nature and scope of ancient literacy, this nuanced and rich account of the introduction of written legislation would not have been possible. Likewise, it is Thomas's authoritative understanding of these issues that enables her to sketch the relation between written and

[6] See D. Daube (1947, 1973).

unwritten law in a way that goes far beyond earlier discussions and to demonstrate how, from this perspective, "this new idea of written law may even have represented the first use of official writing by the early polis, and it is not surprising to find that these early groups attempt to set apart the law in as many special ways as possible in an attempt to give it an authority it might not otherwise have. . . . It was radical new laws which needed this kind of protection rather than the traditional customs and rules of a community."

In "Law and Religion" Robert Parker explores the different dimensions of the relation of law and religion in Greece. As the preeminent scholar of Athenian religion he is ideally suited for such a task. His study reflects the development in our understanding of the institutional framework of Greek religious practice and of its integral connection to the political institutions of the polis. It also shows, like Thomas's contribution, the way in which "nonspecialists" in Greek law have become increasingly sophisticated in dealing with legal issues and texts, as well as with the relation of legal issues to the broader social, cultural, and political context.

It is apt that Parker deals at length with the important contribution of the German philologist, Kurt Latte, to our understanding of the sacral element in legal process. Like Latte, Parker is not a specialist in Greek law, but also like Latte he has read widely in comparative legal history. His grounding in this subject and other relevant disciplines has also enabled him to go considerably beyond Latte in important respects, for example, by seeing the limitations of the evolutionary theories of law implicit in Latte's account of the development of oaths and the like. Both scholars show how classical scholars and ancient historians can, if they acquire a solid-enough understanding of legal institutions, use their own extraordinary specialist expertise, in this case in religion, to make a unique contribution to the understanding of aspects of Greek legal tradition and practice.

In Chapter 4, "Early Greek Law," Michael Gagarin takes on another large and fundamental issue. The history of early Greek law is an enormously fraught subject to which generations of scholars have devoted their learning and ingenuity. The same is true of early Roman, Germanic, and English law, for example, because the origins of most premodern legal systems are cloaked in the obscurity of historical eras for which little reliable evidence exists. The study of the early developments in legal systems thus raises serious substantive and methodological questions. In regard to the earliest period of Greek law (defined in this chapter as ca. 700–500 B.C.) these questions have to do with issues such

as the literary nature of the sources; questions, in the case of Homer, as to what extent they refer to actual legal institutions and of what historical period; how to interpret and generalize from isolated and fragmentary evidence; how to counter the "evolutionist" tendency to use what we know of later periods to reconstruct what developments "must have" been like; and how to deal with the very large temporal gaps in our sources in this period and the implications they have for attempts to trace institutional "continuities" into later periods.

Traditionally, scholars of Greek law have been reluctant to confront these methodological problems, in significant part because such a methodological critique seems to threaten our ability to say anything about the legal institutions of this period of which we know so little. Scholars often admit that any conclusions must be "speculative" but then expend enormous energy arguing for and against such speculations. The history of the scholarship on topics such as the trial scene depicted on the shield fashioned by the god Hephaestus for Achilles (*Iliad*, 18.497–508) bears ample witness to this tendency. Although there is still a pressing need for many such methodological issues to be more fully addressed, some contemporary historians of early Greek institutions have made considerable advances in taking them into account.[7] In regard to early Greek law, the development of Michael Gagarin's work in this area demonstrates how much progress has been made.

Gagarin is the leading modern scholar of this difficult and arcane area of Greek legal history. His chapter on the topic demonstrates that awareness of methodological difficulties does not preclude drawing important conclusions from the evidence we have. Developing themes he also discusses in his chapter on the unity of Greek law, Gagarin shows how the Greek understandings of dispute resolution and legal process eschew formalistic legal ritual in favor of oral proceedings in which litigants and judges are relatively free to present and decide the case as they see fit. Gagarin sees the "two aspects of early Greek law – written legislation and oral procedure" – as "an unusual combination, unlikely to be the result of influence from some other legal system. Rather, I would suggest, both aspects exemplify the Greek tradition of open, public debate and discussion among a large segment of the community." In my view such conclusions are based on a sober assessment of what the limited evidence we have can and, more significantly, *cannot* tell us. Gagarin engages at some length Gerhard Thür's interpretation of the shield of Achilles. A comparison of their approaches reveals how vitally important

[7] On methodological issues in Greek law, see D. Cohen (1989).

such methodological awareness is, for Thür's seemingly almost total lack of concern for methodology leads him to extreme and untenable conclusions that Gagarin has little difficulty demolishing. It is perhaps not unfair to generalize here by claiming that to a significant degree (though by no means completely) the greater concerns for methodological issues characterize contemporary Anglo-American scholarship on Greek law in comparison with its continental counterpart.

Another merit of Gagarin's approach raises a different serious methodological issue that has engaged not only legal historians but also the wider historical disciplines. This concerns the use of comparative evidence from other legal systems. Gagarin rightly rejects the so-called comparative method as employed by earlier major figures in Greek legal history such as Louis Gernet, Hans Julius Wolff, Kurt Latte, and, more recently, Gerhard Thür. This method, rooted in unexamined presuppositions ultimately derived from nineteenth-century social evolutionist theories, proceeded from the starting point that comparative evidence can be used to reconstruct the legal institutions of early Greece because, "that in matters legal the human mind is so constructed as to seek similar solutions for similar situations under analogous conditions, needs no justification" (Wolff 1946: 35). Modern scholarship in anthropology, social theory, historiography, and other disciplines has more than adequately revealed the glaring inadequacies of such approaches. In the rest of his chapter Gagarin provides an example of how comparative evidence from, for example, Near Eastern legal systems may fruitfully be employed, not as an evolutionary "model" on which to base "reconstructions" but rather as an analytical tool. Drawing on the important differences between early Greek and Near Eastern approaches to legal process, Gagarin arrives at the important hypothesis that

> From the beginning, Greek law conforms to this Greek tendency toward openness and public debate that some (e.g., Lloyd 1979) have seen as the root of Greek intellectual achievements. And as it grew during the archaic period, Greek law maintained this productive combination of fixed, stable, written legislation together with an oral, dynamic process for settling disputes that will persist in Athens right through the classical period.

In Chapter 5, "Law and Oratory at Athens," Stephen Todd lucidly emphasizes the participatory and oral nature of Athenian litigation. He explores the role of the orators in this system where litigants were, at

least in principle, expected to prepare and present their own cases. This participatory, democratic characteristic, he points out, extends also to the lay judges who are expected to reach decisions without conferring and without any instruction in the law by legal experts. Todd largely confines himself to an elucidation of the differences among the orators, the tradition that led to the corpus we now possess, and the role of the logographer, or speechwriter, in Athenian litigation. Although earlier scholars like Wolff looked at legal advocacy, one of the distinguishing features of contemporary Anglo-American scholarship on Athenian law has been ever greater attention to the rhetorical and performative dimensions of Athenian trials, as well as to the crucial importance of rhetoric as an organizing category for both forensic oratory and legal thought.

In "Relevance in Athenian Courts" Adriaan Lanni, guided by a lawyer's understanding of the dynamics of ancient and modern litigation, uses the issue of relevance to raise some of the most important and most controversial questions in contemporary Greek law scholarship. Traditionally, scholars of Greek law had measured Athenian trials by the standards (frequently idealized) of contemporary legal systems and often found them wanting. Athenian orators too frequently "perverted" the legal process by rhetorical appeals to emotion or irrelevant facts and issues. The "better" advocates, in this view, stuck closer to the case at hand and thus displayed a commitment to the rule of law. This view has come under attack in recent years, provoking a wide range of responses from the community of Greek law scholars.[8] The main thrust of the critique was to suggest that before criticizing Athenian trials against some modern criterion, we ought to ask how the Athenians themselves understood the purposes, nature, and legitimate scope of the trial and of the kind of justice it sought to achieve. Seen from this perspective, Athenian trials may seem very different from their modern counterparts, but this is not because selfish demagogues or unscrupulous orators distorted the legal process but rather because the Athenian judges and litigants in this participatory system had very different expectations about what a trial was and how legal justice should be conceived. Such interpretations have roused the ire of scholars who want to defend Athenian courts as committed to the rule of law, which in their opinion apparently consists in confining the trial to the relevant legal and factual issues.[9] But

[8] For the critique, see Osborne (1985), Ober (1989), and D. Cohen (1991, 1995, 2003). For the response, see Lanni's lucid exposition of the various positions and her bibliography.

[9] See, e.g., Harris (1994), Rhodes (2004).