

Introduction: Writing Greek Law

This book examines the history and significance of writing in Greek law. I start from the assumption that although writing in general, and writing law in particular, share certain common features in almost any culture, there are also culturally specific aspects to writing and writing law. I shall argue, in fact, that writing, and specifically writing law, played a significantly different role in Greek law than in other comparable “premodern” societies.¹ Moreover, both by its presence and just as importantly by its absence, writing was a key factor in shaping the special, even unique, nature of Greek law. Thus, a study of the history of writing and Greek law from the beginning through the classical period and (briefly) into the Hellenistic Age will help us understand what Greek law is, how it developed in the special way that it did, and why it became so different from the legal systems with which most legal historians are familiar. The results of this study have important implications for resolving the long debated question of “the unity of Greek law” – that is, in what sense, if any, it is useful to speak about “Greek law” as a coherent institution – and for understanding the special nature of Greek law.

My thesis, in brief, is that from the beginning, the Greeks used writing extensively for legislation with the intent of making their laws available to a relatively large segment of the community, whereas other cultures wrote extensive sets (or codes) of laws for academic purposes or propaganda but these were not intended to be accessible to most members of the community and had relatively little effect on the actual operation of the legal system.

¹ I leave the term “premodern” intentionally vague, but in general I use it to designate a society that has some sort of state, as opposed to tribal, organization, that makes use of writing, and has established judicial procedures. For this study I will draw my comparisons primarily from the premodern legal systems of the ancient Near East, particularly the code of Hammurabi, from early English common law, and from early Roman law. Several other premodern legal systems I have examined, such those of medieval Europe and China during the Qing dynasty, seem to be consistent with my thesis, but to keep this study manageable, I confine my comparisons to the three areas mentioned above.

On the other hand, the Greeks made very little use of writing in their legal procedure and allowed only a minimal use of writing during the trial itself; other cultures made far more use of writing in this area, often putting written documents at the heart of the trial process. These features of writing in Greece worked to keep the law from becoming overly technical and to prevent the development of the sorts of legal professions found in most other legal cultures.

The three words in my title, “Writing Greek Law,” may seem fairly straightforward, but they raise important issues that need to be discussed at the outset. I begin with writing, a complex phenomenon that developed at different times, in different ways, and for different purposes in societies all over the world. No single theory explains the invention or the effect of writing, and so I will confine myself to writing in post-Bronze-Age Greece. Our earliest evidence for the Greek alphabetic script, the ancestor of later Roman and Cyrillic scripts, comes from inscriptions dated to around 750 or a bit earlier.² Whether this script was first invented in the half century or so before this time, as most classicists think, or perhaps two or three centuries earlier, as many Near-Eastern scholars and a few classicists think, is of no relevance for this study, since in the absence of earlier texts, we can only guess what writing was like before the time of these inscriptions. Greek script is clearly based on Near-Eastern consonantal scripts in use in the ninth or tenth centuries, and most probably on the Phoenician version of these scripts. The most important Greek innovation was to take several signs for consonants not used in Greek and use them for Greek vowels, thus producing the first fully alphabetic script, as distinct from the consonantal scripts that preceded it. This development made it easier for a reader to pronounce unfamiliar words phonetically, and this enabled more people to gain the ability to read and write. This was probably one reason why, as we shall see, rates of literacy in Greece, though low by standards of modern developed countries, were certainly higher than those of the ancient Near East or the Greek Bronze Age.

As for the term “Greek,” the decipherment of Linear B has shown that Greek-speaking people entered the area we now call Greece during the Bronze Age, perhaps around 2000. This civilization came to an end around 1150 and with it knowledge of the Linear B syllabic script, used to write Greek, also ended. Whether Greeks in the Bronze Age had law in

² All dates in this book are BCE unless the contrary is either noted or obvious. For further discussion and references, see below, Chapter 2.

any sense is a subject of speculation,³ but if they did, we can do nothing more than guess what it was like; thus, in this study I will ignore this period; for our purpose, Greek civilization begins in the prehistoric period following the fall of the Bronze Age, the period often called the Dark Ages, which lasted until around 750.⁴ Greek civilization continued through the archaic and classical periods (ca. 750–500 and 500–323 respectively), and then into the Hellenistic period, which began after the death of Alexander the Great in 323. With the Roman conquest of Greece from about 150 to 30 BCE (later in parts of the Near East) Greek culture usually coexisted with Roman culture (and with Roman law). This study will focus largely on the archaic and classical periods, with some brief remarks on the Hellenistic period (down to the first century BCE) at the end.

The meaning of the term “law” has been discussed extensively. In *Early Greek Law* I accepted the systematic and logical, though fairly narrow, positivist view of H. L. A. Hart, that law required a relatively formal procedure for settling disputes together with a set of rules that were in some way recognized as special and as having a special authority, and could thus be called laws (Gagarin 1986: 1–9). I also argued that before the Greeks wrote laws, they had no true laws, because they had no other means besides writing to “recognize” (in Hart’s sense) a law – that is, to differentiate a law from other kinds of rules. In preliterate Greece rules that we might call laws existed, but, as we see in a work like Hesiod’s *Works and Days*, these rules were preserved and transmitted side by side with religious rules, rules of etiquette, practical rules of agriculture, and many others. I concluded, therefore, that in early Greece, legal procedures came into existence before substantive laws were “recognized” by being put in writing.

I continue to find Hart’s positivist framework useful for the study of law, and in particular for understanding the effects of writing, but we need to be more flexible in thinking about law, particularly law in a preliterate society. Anthropologists have long studied law as dispute-settlement – that is, law settles disputes and resolves conflicts that threaten the social order, thereby maintaining order and benefiting society. The Greeks themselves arguably took this view of law, which is implicit in Hesiod’s portrayal of the iron age, in which law is absent, in the story of Deioces (below Chapter One), and

³ See van Effenterre 1989 and C. Thomas 1984 for two different approaches to this question. Both scholars assume a moderate degree of continuity between the Bronze Age and later Greek civilization, but it seems that in most respects the break was nearly complete (Raaflaub 1997a: 625–6 summarizes the argument).

⁴ Some would dispute the term “dark” age, and of course as archaeology unearths more material, this period becomes steadily less dark.

elsewhere. But this is not the only way that law can be understood, and stimulated by recent work in anthropology, scholars are beginning to understand Athenian law in terms of “regulating [not resolving] conflict” (Osborne 1985: 52) and even as promoting conflict in some cases by providing a forum for (male, aristocratic) conflict to play out. In this view, litigation is not only a means of punishing violations and restoring order, but is also an important ritual process working to construct and validate the community’s norms and values.⁵ From this perspective, law (*dikē*) resembles other forms of competition (*agōn*) in Homer, such as athletic contests: just as games negotiate and validate athletic status (X is the fastest runner, Y the best wrestler, etc.), so too, *dikē* negotiates and validates an individual’s general standing in the community.

Even if we understand law in this way, however, we should not deny its value in settling disputes. Just as the games at the funeral of Patroclus, with their host of minor conflicts all peaceably resolved in different ways, stand in sharp contrast both to the conflict between Achilles and Agamemnon (which could not be resolved by the community itself but was finally brought to an end by external events) and to the war that has been suspended, but only temporarily, so too, the “trial” that takes place on Achilles’ shield (Chapter One) is a prominent feature of the city at peace because it prevents disputes like this from becoming destructive. Thus law may be a forum for regulating and even promoting conflict, and for negotiating community values, but at the same time, it prevents conflict from becoming open warfare.

In what follows, I will thus treat law both as conflict resolution and conflict regulation, resolution being more often the explicit message of a law, with regulation often observable in the background. In addition, the positivist view of law as a set of certain kinds of rules will also be useful, especially in thinking about the significance of the introduction of written laws.

Whatever the problems raised individually by the words “writing Greek law,” combinations of these words are even more problematic. To begin with “writing Greek,” in addition to the dispute about the date when the Greek alphabetic script was invented, there is considerable disagreement about issues such as why the Greek alphabetic script was invented, and who could (and who did) read and write this new script. The reasons why the Greeks first wrote are not directly relevant to this study, since as far as we know, laws were not written for at least a century after writing was first

⁵ Among those sharing this approach are Cohen 1995; Foxhall 1996: 133–40; and Johnstone 1999.

used. Unlike other cultures, it does not appear that the Greeks invented writing for commercial purposes, since during this period there is scarcely any evidence of writing for commerce or of laws written to meet commercial needs. Commercial accounts may have been kept on perishable materials, as they were in the Bronze Age (where the accident of fire led to their preservation), but it is nonetheless striking that among the hundreds of surviving archaic inscriptions, none (to my knowledge) is a commercial document *per se*, and very few early legal texts are relevant to commerce. As we shall see, the experience of writing was not the same for the Greeks as for other cultures, and it seems highly unlikely that they invented writing for commercial purposes.⁶

A more important question for us about writing Greek is whether the creation of a more fully alphabetic script, including vowels, than the Near-Eastern script from which it was derived made the experience of reading and writing Greek something different from what it was in other cultures. Here, we need not follow Havelock in maintaining that (to oversimplify) the creation of a true alphabet led the Greeks to think rationally;⁷ but it does seem likely that from the beginning Greek would have been easier to read and write than other early scripts, and in particular that it was easier to read unfamiliar texts in Greek. A notable feature of early Greek writing is the variety of texts we have and the spontaneity many of them suggest (see B. Powell 1989). This is particularly striking in contrast to the uses of writing in the Greek Bronze Age, which was mostly for keeping records within the large palace administrations, or even the ancient Near East, where writing is confined mostly to traditional works of literature, official historical records, commercial and legal documents, and a few other purposes. It is also generally accepted that whereas in these other cultures writing was primarily in the hands of professional scribes, a far greater diversity of people could write and read in Greece.

As for “writing law,” I have already alluded to Hart’s analysis of laws as rules. He distinguishes “primary rules” (rules of conduct) from “secondary rules.” These latter are of three types, rules of recognition, rules of change, and rules of adjudication, which specify (respectively) how we know that a rule is a law, how existing laws are changed or new laws are enacted, and how disputes are settled concerning the meaning or application of a law or

⁶ This is not to say that B. Powell (1991, 2002) is correct that the Greeks invented the alphabet in order to write down the Homeric poems. But the Greek alphabet does appear to have been designed to record the sound of speech, not to record objects, as commercially inspired scripts often do.

⁷ See Havelock 1963, 1982, and other works. Herrenschmidt 2000 takes the idea that reading Greek creates a special mentality even further (below, Chapter 2, n. 3).

set of laws.⁸ Particularly useful is Hart's notion of rules of recognition. These may take many forms, from the widely accepted understanding that a specific list of rules is authoritative, to more complex rules specifying, for example, enactment by a certain body or pronouncement by a certain magistrate. But a major limitation of Hart's analysis for our purposes, is that (as noted above) it sheds little or no light on the situation in early Greece, where a legal process existed without "recognized" legal rules.

Although in Hart's analysis writing usually plays a crucial role in recognition of law, he does not claim that recognition necessarily requires writing. A set of rules that are preserved and transmitted orally from one authoritative poet or speaker to another and are widely understood to be authoritative would satisfy Hart's rule of recognition. But actual historical examples of this are rare. The best known may be medieval Icelandic society as portrayed in the sagas, particularly in *Njal's Saga*, which I discuss in detail below (Chapter One). But even if a few other such examples of recognized oral laws could be cited, there is no evidence for oral or unwritten laws with this kind of authority in ancient Greece.

The Greeks did sometimes speak of unwritten, or oral, or sung laws, and in Chapter One I will consider the evidence for and implications of these concepts. I shall argue there that although "law" can be a useful metaphor for a diverse assortment of rules, and the concept of oral law is helpful in, for example, characterizing the period before writing in Greece, the writing down of laws gave these texts a qualitatively different status than that of oral or unwritten laws as they are usually understood. In Greece, at least, as we shall see in Chapter Three, writing law did not mean taking a preexisting oral text and committing it to writing, but creating a new text to be written down. This written text might be based on earlier oral rules, but the written law was qualitatively different from the oral rules that preceded it. In this sense, writing could be said to have created law for the Greeks – law, that is, in the sense of statutes. But writing down these statutes also started the process of establishing the institution of Law – always however in the plural for the Greeks: *hoi nomoi* ("the laws").⁹ And not only was writing a crucial tool in the creation of law, but in some archaic cities the word "writing" served all by itself to designate a law or laws.

⁸ Hart 1994, esp. 91–9.

⁹ The Greeks never had a word corresponding to our word Law in the sense of a single institution encompassing both rules and procedures. The singular *ho nomos* ("the law") can designate a single statute or a broad concept, but the closest expression to, say, "Athenian law" would be the plural, "the laws (*hoi nomoi*) of the Athenians."

The third combination of words in my title, “Greek Law,” is equally problematic, though it may not appear so to readers new to the field. The issue here is whether, or in what sense, we can legitimately or usefully speak of Greek Law as in some sense a single institution or system when, as is well known, throughout the archaic and classical periods, and to some extent even after the conquests of Alexander, Greece was divided politically into scores of independent poleis (“city-states”) and other territories. Each polis had its own legal system, and though some of these could be more or less similar to one another, and some poleis copied or borrowed rules from others, in cases where we have sufficient evidence to judge, notably Athens and Gortyn, significant differences between the laws of the two cities are evident.

Although the question of “the Unity of Greek Law” had been addressed by many earlier scholars, it was Moses Finley, some fifty years ago, who drew attention to its importance, first in a book review and then in a more comprehensive paper entitled “The Problem of the Unity of Greek Law.”¹⁰ Using the example of marriage, Finley asserts (140):

If we take as nodal points the Homeric poems, Gortyn, Athens and the earliest Greek papyri from Ptolemaic Egypt, I am unable to discover a single common ‘basic conception’ or ‘principle’ except for the notion, familiar from societies of the most diverse kinds all over the world, that marriage is an arrangement involving families past, present and future, and the transmission of property.

For Finley, in other words, to the extent that we can speak of general features of “Greek Law,” these are so general as to make the concept useless, whereas at any useful degree of specificity, the evidence (which, to be sure, is limited) contradicts the theory of a unified entity.

With some exceptions, Finley’s challenge has been accepted by Anglo-American scholars¹¹ but rejected by continental scholars, who have continued to speak of such things as an abstract spiritual unity (*geistige Gemeinsamkeit*) formed around certain basic concepts (*Grundvorstellungen*) of the sort that Finley dismissed as useless.¹² I have elsewhere defended Finley’s view with regard to the substantive provisions of the law, but these may not represent the whole story (Gagarin 2005), and it should not surprise us if the common

¹⁰ Finley 1951 (reviewing Pringsheim 1950), Finley 1966 (which I quote from the 1986 reprint).

¹¹ E.g., Todd 1993: 15–16 (more fully in Todd and Millett 1990: 7–11). Sealey (1990, 1994) is the main exception.

¹² The quotes are from Wolff 1975: 20–2; see also Biscardi 1982, whose very title (*Diritto greco antico*) is assertive.

cultural heritage of Greece manifested itself in some way in the legal systems of the different poleis.

My own view is that a useful concept of unity can be found in judicial procedure in a broad sense, including not just the process of litigation but also such matters as the organization of justice (legislation, courts, judges/jurors, magistrates), structural features of legislation, and particularly the use of writing (Gagarin 2001). Among the broad similarities in this area are that laws in Greece reveal a large concern with procedural matters, that automatic procedures involving oaths or witnesses are relatively rare as opposed to open forensic debate on the part of the litigants and free and rational decision making by a judge or judges, and that writing is extensively used for legislation but is relatively little used during the legal process. In all these respects, most other premodern legal systems differ from Greek law.

This study will begin (Chapter One) with what we know of law before writing was introduced to Greece some time before 750. Evidence for law in this preliterate period necessarily comes to us indirectly from literary sources, especially the poems of Homer and Hesiod, and we will examine passages from both poets for information about rules governing conduct and procedures for dispute settlement at this time. The poems portray a well-developed public process for resolving disputes peacefully, which seems to have enjoyed widespread support in the communities portrayed. I will describe the main features of this process and examine performative and ritual elements in it. I will refer to this process as “oral law” in the sense of a legal process conducted without writing. This does not mean that the Greeks had oral laws – that is laws preserved and transmitted orally. None of the evidence commonly cited for oral laws in this sense (unwritten laws, sung laws, or remembered laws) in fact supports this view. This is especially clear by contrast with early Icelandic society, which has the best claim to have had oral laws. Since there are no signs of anything similar in Greece, I prefer to designate the norms and standards we find in the poems that look like laws as “oral rules.”

In Chapter Two I turn to the earliest inscriptions, which in the first century (ca. 750–650) are all private. The range and variety of these suggests that writing rapidly became popular among many people, not just the elite, in many parts of the Greek world. After a brief survey of these early private inscriptions, I examine some of the earliest legal inscriptions, which begin to appear about 650. These come from all over Greece, though the greatest concentration is on the island of Crete and especially the city of Gortyn. Another Cretan city, Dreros, is also of special interest as the site of the earliest surviving Greek law. I will pay particular attention in this chapter to the

physical features of these early inscriptions, which are often ignored, since these provide evidence that from the beginning laws were inscribed and displayed publicly in order to be read. This is not to deny the important role of some of these legal texts as visual monuments, but the legislators' primary intent was to make the texts available for reading by the community.

Building on this conclusion, in Chapter Three I ask why the Greeks first began to write laws. There is not a single answer to this question, but certain general motives are apparent, namely the desire accurately to fix and preserve detailed regulations that can not easily be preserved orally and the community's desire to affirm its own authority. Moreover, all this legislation was written within the larger context of the growth of communities during the archaic period, when many cities were exerting control over larger territories and larger and more diverse populations and were experiencing steady economic growth. Such growth would have increased the occasions for disagreement and dispute and the likelihood of conflict among members of the community, as well as increasing the potential for disagreement or uncertainty about traditional rules. It was the need for greater public authority and clearer and more detailed rules, I will argue, that ultimately produced the need for written legislation.

Chapter Four will continue this discussion of the reasons for writing laws by closely examining one single law, Draco's homicide law, which was first written in Athens in 621. We do not have the original inscription, but a late-fifth-century copy will provide the basis for this discussion. I will challenge the common explanation scholars have given, that this law was written in response to a crisis in Athens. I will instead argue that with Athens undergoing the same kind of growth as other Greek cities, Draco was motivated by the same concern as lay behind some of the early inscriptions, in particular the need to add a large amount of new detail to traditional rules and to preserve and communicate these details accurately. In addition I will show that Draco conceived of his homicide law as a comprehensive law, and that he consciously strived to organize its provisions clearly and logically in order that those who might need to use the law could do so more easily.

Chapters Three and Four together argue that the purpose of early legislation in Greece was not to resolve specific crises or to strengthen elite control over the majority of citizens, but rather to establish precise and detailed rules that could be used with relative ease by members of the community. The ultimate cause of this legislation was not so much conflict, between rich and poor or between competing aristocratic families, as the pressures of population growth, economic expansion, and increasing diversity. Taken together these trends rendered the traditional oral rules

and customs no longer adequate for settling the increasing number and different kinds of disputes that arose. Written laws, with their fixed, detailed rules and procedures served the needs of these diverse populations and in so doing also helped strengthen their sense of being a unified political community. In strengthening the people's sense of community, written laws in early Greece have a similar effect as written laws in other early legal systems, but in other respects, such as their attention to detail and concern with procedure, Greek laws are different. We will explore this and other such differences at greater length in later chapters.

Chapter Five will examine the little evidence we have for writing in other areas of law besides legislation in archaic Greece. Only one such use is well attested – writing was an essential part of the new procedure of *graphē* (“writing”) instituted by Solon, but was only used for the initial charge or indictment. Otherwise, I will note the highly questionable evidence for the writing down of rules (*thesmia*) by the Thesmothetae in early Athens. No other use of writing is attested in archaic legal procedure, and the essential orality of procedure is confirmed by the duties of the *mammon* (“rememberer”), which we will examine. One of these rememberers, Spensithios, is employed both to write and to remember, but his duties are not inconsistent with the basic duality of written laws and an oral legal process in archaic Greece.

Because of the disproportionately large number of fifth-century inscriptions from Gortyn, the next two chapters (Six and Seven) will be devoted to these. In the first, we will consider all the inscriptions except for the Great Code, which we will take up in Chapter Seven. First, I examine a sample of texts that show some of the same features as earlier inscriptions but a greater degree of organization in the physical layout of the text, as well as the syntactical and structural organization of its provisions. These inscriptions, which range in length from one to seven columns, are particularly important in providing a fuller context for the Great Code. They show that Gortynian legislators in the fifth century were inscribing larger, more complex collections of laws in one continuous text, and were developing techniques of organizing these provisions clearly and coherently. These developments prepare the way for the even larger and more sophisticated organization we will find in the Code.

Chapter Seven is devoted to the Gortyn Code, both in itself and in comparison with the equally grand inscription of Hammurabi's laws, which is similar in length and breadth of coverage but very different in other important respects. I first consider the references to writing and written texts in each code; at Gortyn these always refer to laws, but in Hammurabi's laws they always designate other sorts of documents.