1.1. Law and Legal Procedure in Early Greece

To write about early Greek legal thought requires, first, some consideration of what this expression might have meant at the time. “Legal philosophy” in the modern sense did not exist before Plato, but “legal thought,” in the sense of thinking about law, undoubtedly did. We find various reflections on law explicitly or implicitly in the writings of many who are now classified separately as poets, philosophers, sophists, or historians, but whom the Greeks would have grouped together under the term *sopboi*—“wise men.” In thinking about law, however, the Greeks differed considerably from us in their basic construction of the subject.

This is evident in the first place in the fact that there is no single word or phrase in Greek that conveys the general notion of “law,” as, for example, in the expressions “early Greek law” and “Athenian law.” The closest equivalent to “law” is *nomos*, which can mean a legal rule or statute and is also broadly used for “custom,” “tradition,” “social norm,” etc., but which never means “law” in the most general sense that the English word can have. ¹ *Nomos* does not come to designate a law (or statute) until the fifth century B.C.; earlier Greeks used different words: *thesmos* (“what is laid down”), *rhêtra* (“what is said”), and *graphos, grammata* (“what is written”). In fifth-century Athens, the plural of *nomos*—*hoi nomoi*—can designate the entire set of a community’s laws, and this is perhaps the closest the Greeks could come to our general sense of “law.” But *hoi nomoi* still designates only “the laws” and does not...

¹ This paper is the result of a joint effort, with Gagarin writing the first draft of Sections 1.1–3 and Woodruff of 1.4–6; both of us then read and revised all sections. All translations are by the authors unless otherwise indicated. We received much good advice at a meeting in Williamsburg, Virginia, from the authors of other chapters in this volume, and we especially thank Fred Miller for his many useful comments and suggestions as well as his overall stewardship of this project.

² Along with archaeological discoveries, poetry is our main source for Greek civilization in the eighth century B.C.; no inscriptive evidence for Greek law is earlier than the seventh century B.C. (see below, Section 1.2). One must exercise care in using poetic sources, of course, since their intent is not historical accuracy; but to the extent that similar features are found in several different sources, we can be more confident that these accurately represent conditions at the time.

³ On the meaning of *nomos*, see Section 1.4 below. English differs from Latin and many modern languages in using only one word (“law”) for both a legal rule and an entire institution (the Law). Contrast Latin (*lex, ius*), French (*loi, droit*), German (*Gesetz, Recht*), etc.
necessarily include that aspect of law we would categorize as the legal process (i.e., courts, trials, etc.). For “legal process,” the closest equivalent was dikê—“judgment,” “settlement,” “trial”—which, especially in its later form dikatosynê, comes to mean “justice” with much the same broad range of meaning as the English word.

Early Greek thinkers tended to be concerned with one or the other of two aspects of law: substance and process. The earliest are more concerned about the means of regulating conflict and bringing order to society (process); later there was more interest in the rules and standards that govern the way humans lived their lives (substance). To some extent, however, this change reflects the emergence of self-conscious reflection on theoretical issues that does not appear in our earliest sources, the poets.4

The poems of Homer and Hesiod, composed around the end of the eighth century B.C., already indicate the importance the Greeks attached to the rudimentary process they had developed for the peaceful settlement of disputes. In the Iliad this is most evident in the trial scene portrayed on Achilles’ great shield. On the shield are two cities, one at war, the other at peace. In the latter, there are just two scenes in the town, a trial and a wedding, and one scene in the country, a harvest. The inclusion of a trial in itself conveys the sense that a process for resolving conflict is an essential ingredient of peace and prosperity. The details of Homer’s portrayal, moreover, indicate the characteristic features of this process. The scene portrays two litigants who wish to resolve their disputes:

Meanwhile a crowd gathered in the agora, where a dispute had arisen: two men contended over the blood price for a man who had died. One swore he’d pay everything, and made a public declaration. The other refused to accept anything. Both were eager to obtain a settlement from a referee. People were speaking on both sides, and both had supporters; but the heralds restrained them. The old men took seats on hewn stones in a sacred circle; they held in their hands the scepters of heralds who raise their voices. Then the two men rushed before them, and they in turn gave their judgments. In the middle there lay two talents of gold as a gift for the one among them who would give the straightest judgment. (Il. XVIII.497–508, as quoted in Gagarin and Woodruff 1995, 6)

Two men disagree about payment for a man who has been killed. The precise point of disagreement has been much debated and need not concern us here,5

4 This poetry was probably composed and transmitted largely without the help of writing. It is difficult to speak of substantive law before the introduction of writing because rules of all sorts (legal, moral, practical, religious, etc.) tend to be undifferentiated in oral cultures, as in Hesiod’s Works and Days. Writing provided a means of distinguishing laws from other rules. See further Gagarin 1986, 1–17.

5 The main possibilities are that the two men disagree about the amount of payment, or
for the procedural details are fairly clear. They seek a resolution and so they have brought their dispute to the _agora_, or central meeting place, where a special gathering of elders will hear the case. A crowd of onlookers and supporters attend the session; they express themselves vocally and have to be restrained by heralds. The litigants plead their case one after the other, after which the elders express their opinions. One of these opinions is eventually determined (probably by consensus) to be “the straightest judgment (dikē),” and the elder who gave this opinion is rewarded with a prize. There is much that we are not told (Homer is, of course, not a legal historian), but ideally (we may assume) the litigants accept the “straightest” (fairest, most acceptable, most just) judgment and are reconciled, and the community thus remains at peace.

Already here we see the main features of the Greek concept of procedural justice. First, the process is public; like all large gatherings it takes place in the _agora_, and much of the community is present. A small group of respected members of the community “judge” the case—that is, they seek the best (“straightest”) resolution; in other scenes of judgment there is often a single judge, but this variation does not appear to affect the other features. The entire process is oral: Litigants speak their cases, judges speak their settlements, and the members of the crowd voice their feelings. It is a characteristically Greek scene with substantial community participation, turbulent but still orderly. The goal is a settlement that is “straight,” the primary metaphor for justice in early poetry.

And since there is no mechanism for enforcement of the settlement (and enforcement would be incompatible with the loosely structured society portrayed by Homer), “straightest” must be determined by some sort of consensus, and the outcome must, in the long run at least, have the support of the community.

The importance of this process is also evident in the work of Homer’s contemporary Hesiod, who tells us he experienced it directly in the course of a dispute with his brother Perses over the division of their inheritance. In _Works and Days_ he complains that Perses has been trying to get more than his fair share of their father’s estate and worries that the “gift-devouring kings” who want to judge the case may side with Perses. In a long passage (_WD_ 213–85), he urges first Perses, then the kings, then Perses again, not to give way to “crooked” justice, for in the long run crooked justice will result in famine and destruction for the whole community, whereas straight justice will lead to prosperity. Hesiod summarizes his advice in the following conclusion:

whether the agreed sum has been paid, or whether payment must be accepted or may be accepted. See Gagarin 1986, 26–33, with further references.

6 A “straight” settlement may originally have been a straight boundary line dividing a disputed piece of property, but the metaphor is also often used of speech that is truthful, honest, and unbiased (“straight talk”.

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This was the way of life (nomos) Zeus established for human beings: for fish and beasts and flying birds he allowed that one may eat another, since there is no justice (dike) among them; but to human beings he gave justice, which turns out to be much better. For if someone is willing to speak justly (ta dikai) in full knowledge, wide-seeing Zeus makes him prosper; but if someone lies intentionally under sworn oath in giving testimony, and so hurts justice, he is incurably ruined. From that time forth his family will be left in obscurity, while the family of an oath-keeping man will prosper ever after. (WD 276–85, as quoted in Gagarin and Woodruff 1995, 19)

Like Homer, Hesiod understands the importance of the legal process; a corrupt process will lead to ruin, whereas justice leads to prosperity. Hesiod is also aware, like Homer, that justice is an oral process requiring speech that is just, here specifically in the form of truthful testimony and true oaths.

Hesiod also portrays this process for settling disputes in his Theogony, where he praises the Muses for the blessings they can give a king:

If the daughters of great Zeus [the Muses] should honor and watch at the birth of one of the kings who are nourished by Zeus, then they pour sweet honey on his tongue, and the words from his mouth flow out in a soothing stream, and all the people look to him as he works out what is right (diakrinonta themistas) by giving judgments (dikai) that are straight: he speaks out faultlessly and he soon puts an end to a quarrel however large, using his skill. That’s why there are kings with intelligence: so they can turn things around in the agora for people who have suffered harm, easily, persuading them with gentle words.

As he comes to the hearing, they seek his favor like a god with respect that is soothing, and he stands out from those assembled. (Th. 81–92, as quoted in Gagarin and Woodruff 1993, 19–20)

Here, although there is only a single judge, the process resembles Homer’s description in several ways: It takes place in the agora, where a crowd is assembled; people come forth to seek a resolution for their dispute or some compensation for injury. The king’s success depends in part on his intelligence and his ability to find a straight (fair, just) resolution, but Hesiod’s main point is that with the Muses’ help the king is also a successful speaker. His honeyed tongue speaks “a soothing stream” of words and he persuades the people (litigants and supporters) “with gentle words.” The gifted king, in other words, is able not only to declare a resolution to a dispute that is fair, but to speak it effectively, so that both sides will be satisfied and accept the settlement. Such a king is honored like a god.

These scenes, together with many briefer references to settling disputes, give a good picture of how the Greeks at the time envisioned law in terms of an
effective process for achieving a fair resolution to conflict. “Straight” justice required in the first place a process for hearing the pleas of both litigants—a requirement summed up in the maxim attributed to Hesiod but perhaps coined at a later time: “Do not judge a case before hearing both sides” (Hesiod, frag. 338, as quoted in Merkelbach and West 1967). The hearing took place in a public setting, open to all members of the community, and a judge or group of judges, who were figures of authority (often kings), heard the pleas and proposed settlements. A straight dikê provided adequate compensation for loss and for the most part satisfied the litigants. The entire process was oral: A set of speech acts by litigants and judges (and perhaps by onlookers, too) culminated in the straight settlement persuasively delivered by a judge. As Hesiod’s complaints make clear, the process did not always work as envisioned, but straight justice ideally not only resolved conflict between litigants, but also contributed to the general harmony and cohesiveness of the community.

1.2. The Emergence of Written Laws

The poetry of Homer and Hesiod shows that a process for settling disputes was well established in Greece at the beginning of the archaic period (ca. 700–500 B.C.). By this time we can also discern the main features of that characteristic Greek political form, the polis (“city-state” or “city”). Greece remained a collection of independent city-states through the classical period (ca. 500–322 B.C.) and beyond, each polis being governed by its own set of laws. The political structure of most cities in the archaic period was some form of oligarchy with at least one deliberative body. Democracies developed in some cities by expansion of the franchise beyond the wealthy, and some cities experienced a period of “tyranny,” or the illegitimate rule of a single man.

Our evidence for different cities varies widely, but none of it is inconsist-

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8 This fragment is not included in Hesiod, *The Homeric Hymns and Homerica*, edited by Evelyn-White 1914.
9 We should note that a similar process is found in many early communities in other parts of the world; see, for instance, Köhler 1956.
10 Of course, there were similarities among many of these independent legal systems, and some small cities may have adopted laws of a larger city with little change, but it remains problematic whether we can usefully speak of “Greek law.” For further discussion, see Todd 1993, 15–6, 32–3, and other works cited there.
11 “Tyranny” reproduces the Greek word tyrannis, but many of the tyrants ruled benevolently and did much to promote their city’s culture. The Athenian tyrant Pisistratus (sixth century B.C.) ruled “more like a citizen than a tyrant”; he maintained the laws as they had been before him and, when accused of homicide, he even appeared in court, though his accuser did not (Aristotle, *Ath. 16*).
12 For the archaic and classical periods, in addition to poetry and archaeology, our sources include the accounts of later historians and philosophers, which vary widely in reliability, and inscriptions recording laws and other material. Inscriptions have been found, somewhat haphazardly, all over Greece, but they are often incomplete or fragmentary and very difficult to
Thus, writing created the idea of laws as a special class of rules backed by the authority of the polis. The stories of the lawgivers, moreover, even if much distorted (and sometimes clearly false), also conveyed the sense that the community’s many different laws were a unified set. Even in the fourth century, Athenian litigants spoke of “the laws of Solon” as including all Athenian laws, even though many of them had been enacted long after Solon’s time. Lawgivers could easily become idealized, and some were said to have been given their laws by a god (see Section 1.5.2 below), thus adding to the authority of their legislation. In sum, publicly displayed, written legislation conveyed the sense that the community had a coherent collection of fixed norms of behavior backed by the authority of the polis, which we would call the city’s “law.”

From all this we see that during the archaic period, Greek law was developing into a productive combination of fixed, stable, written legislation together with an oral, dynamic process for settling disputes. Although some thinkers focused their attention on one aspect or the other, Solon, who not only wrote an extensive set of laws for Athens but also wrote poems reflecting on his political accomplishments, seems to understand the connection between them when he says, “I wrote laws [thesmoi] too, equally for poor and rich, and made justice (dikê) that is fit and straight for all” (Solon, frag. 36.18–19, as quoted in Gagarin and Woodruff 1995, 27). Here for the first time we see substantive laws (thesmoi) and legal process (dikê) put together, suggesting that they are part of a single sphere of human activity, though this thought is not further developed at this time. But Solon’s verses suggest that archaic Greeks understood the close connection between written laws and the process of settling disputes, even if they did not have a word for this unified entity.

Other sixth- and fifth-century B.C. thinkers also seem to understand justice (dikê) as legal process. For example, the idea of a dynamic process of dispute settlement underlies Anaximander’s use of the metaphor of justice to describe the behavior of the cosmos: “they render justice (dikê) and retribution (tisis) to each other for injustice (adikia) according to the assessment of time.” Like litigants in court seeking retribution for injuries, the elements may give and take from each other, but over time the universe maintains a stability, which is not inert but is a dynamic process. Justice resides in the process, producing just outcomes in the long run though not necessarily in each case. Similarly, Heraclitus’s paradoxical equation (Heraclitus, DK 80, as quoted in Gagarin and Woodruff 1995, 22) of justice (dikê) and strife (eris) conveys the idea that the essence of justice is not permanence but a dynamic process of adversarial competition. But Heraclitus also sees the importance of substan-

the statement, “the following was pleasing to the polis” (i.e., “the polis approved the following”). The Dresos law can be found in Gagarin 1986, 81–2. See Section 1.3 below for one provision of the law.
tive law for the survival of the city: “The people must fight for the law (*nomos*) as they would for the city walls” (Heraclitus, DK 44, as quoted in Gagarin and Woodruff 1995, 7; see further Sections 1.5.1 and 1.6.1 below).

The continuing interest in law as process is evident in the story of Deioces, the first king of the Medes, told by the mid-fifth-century B.C. historian Herodotus, which illustrates the sharp difference between the traditional, oral procedure in Greek law and an oriental legal process using writing (Herodotus, *History* I.96–100, as quoted in Gagarin and Woodruff 1995, 80–1). At first, when the Medes were still living in separate villages, Deioces acted like an archaic Greek judge: He was a prominent citizen to whom people came to have their disputes settled. He gained a reputation in his own village for “practicing justice (*dikaiosynê)*,” and soon people in other villages heard of it and began coming to him. In the end they would take their disputes to no one else; Deioces (as we might say) had cornered the market on settling disputes. One day, realizing the power this gave him, he stopped judging cases entirely, saying he needed to tend to his own business. Lawlessness (*anomia*) and disorder immediately ensued. When the situation became intolerable, a group of Medes gathered and decided that they needed to institute a monarchy. Naturally, they chose Deioces as their first king.

Once Deioces was king, his whole approach to justice changed. He built a large new palace and shut himself off from his people, conducting all business through messengers. Specifically with regard to law, Herodotus tells us, Deioces

became a severe guardian of justice. People had to put their cases in writing and have them sent in to him; then he made his decisions and sent them back. In addition to this procedure for legal disputes, he established others: if he heard of anyone assaulting someone, he would send for him and impose on him a punishment appropriate to the crime, and he had spies and observers throughout the extent of his kingdom. (Herodotus, *History* I.100)

Herodotus presents this story as a historical event, but most scholars consider it fictional. We see it as a discourse contrasting Greek legal procedure, which Deioces follows at first, and an oriental type of justice, which he implements once he becomes king. When Deioces becomes king, law changes from an oral, public procedure open to the whole community to a closed process dependent on writing, in which the king is an absolute judge (presumably not himself subject to the law), dispensing decisions alone and in writing. Law thus is removed from the people and controlled by a single ruler. From this perspective, the story can be seen to illustrate the importance the Greeks attached to maintaining their traditional oral public procedure, thereby keeping law open to the participation of ordinary people.