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THE NEED FOR COMPARATIVE LAW IN THE SEARCH FOR GREEK LEGAL UNITY: A RESPONSE TO PHILLIPS

In “The Problem of Unity in Greek Law,” Moses Finley outlined the methodological difficulties facing attempts to find unity in Greek law.¹ Because laws from different *poleis* are rarely identical, it is necessary to determine which differences are “negligible nuances”² that leave a significant correspondence, and which are so fundamental that they undermine the argument for unity. At the other end of the scale, drawing similarities at too high a level of generality becomes meaningless, leaving us, in Finley’s words, with “nothing worth discussing.”³ The challenge is to find meaningful correspondences that reveal something distinctive and interesting about Greek culture or law.

In his thoughtful contribution, Phillips argues that *hubris*, as a substantive legal category, satisfies the criteria for Greek legal unity. I agree with Phillips’ basic conclusion. But bearing in mind Finley’s admonition, I want to see if we can be more precise about what the basic principle that is shared by the various *hubris* laws was, and why this unity reveals something interesting and important about Greek law and culture. And as we try to weigh the significance of any unified “Greek Law” that we find, we have to compare this law to the laws of other times and places to make sure that what we have found is distinctive in some interesting or important way. And by distinctive, I do not necessarily mean unique, but different from at least some other legal systems in a way that tells us something about the Greeks. I suggest that *hubris* satisfies this criterion because it places Greek law in a category of legal systems that protect personal dignity, as opposed to Anglo-American systems that protect reputation, but not dignity.

The first question is whether there is sufficient similarity in the laws regarding *hubris* of different *poleis* (or quasi-*poleis*) over time. I agree with Phillips that unity need not be an all-or-nothing proposition, and that the presence of one or a few nonconforming *poleis* that did not have a procedure for *hubris* does not rule out the possibility of unity among other *poleis*. The evidence for the actual *hubris* statutes collected by Phillips do not present the problem of determining which statutory differences are disqualifying and which are mere nuance: to be sure, there are

¹ Finley 1975: 137.

² Finley 1975: 137.

³ Finley 1975: 137.

differences in procedure, penalty, and so forth, but these seem to be clearly minor variations.

But *hubris* presents another difficulty for judging unity: because it is typically not defined by statute, we cannot be sure that the term meant the same thing in different places at different times. The meaning of vague legal terms may have changed significantly even within one polis over time. For example, in a recent dissertation Kellam Conover has shown how the meaning of *dorodokia* in Athens changed over time from a notion of private theft during the fifth century to an emphasis on disloyalty and treason in the fourth century, particularly in response to the growing threat from Macedon.⁴ If the proposed unity is simply that many Greek city-states provided a legal action against “*hubris*,” however that term might be defined, then, as Finley would say, “there can be no argument, but there is equally nothing worth discussing.”⁵

I assume that Phillips is making a broader claim, that the Greek legal category of *hubris* included the features of insult to the victim’s honor that we see in the Athenian sources. I think that *hubris did* have a stable core meaning relating to intentional personal insult, and Phillips’ use of the Ten Thousand as a quasi-polis is ingenious and helpful to his case. But it is important to acknowledge that if we take away the sources that do not give any indication of the criteria for *hubris*, then the evidence for a stable, unified concept of *hubris* as an action for affronts to honor becomes rather thinner. And of course, the sources tell us nothing about whether the protection of slaves under the law of *hubris* was unique to Athens or a more general Greek phenomenon. This is important because for some scholars, the inclusion of slaves in the Athenian *hubris* law, though unenforced, is central to the meaning of the law: the argument is that the inclusion of slaves suggests that the focus is less on the injury suffered by the victim, and more on the excessive behavior of the perpetrator, which at least in Athens is associated with antidemocratic behavior.⁶ If there is any truth to this interpretation, then one wonders whether *hubris* laws in Greek oligarchies might have had a significantly different emphasis.

Let us turn now to the other issue raised by Finley: is the proposed unified legal concept at a level of generality that can tell us something of interest about the Greeks? As Gagarin has pointed out, the goal of exploring potential unity in Greek law cannot be to fill in gaps in our knowledge about other *poleis* because there are simply too many individual divergences.⁷ Rather, identifying a common Greek legal concept is valuable primarily when it reveals something distinctive and important about the Greeks or their legal system. To determine if a legal concept is distinctive, we need to consider how other systems treat the same issue. To extend an example from the paper, a finding that many *poleis* imposed the death penalty on intentional

⁴ Conover 2011.

⁵ Finley 1975:137.

⁶ E.g., Ober 2005: 113–124.

⁷ Gagarin 2005:33–34.

murderers does not tell us much of interest about the Greeks because so many other societies took the same approach. A legal concept may also be distinctive but not significant: the fact that the United States requires drivers to drive on the right side of the road and England requires the opposite does not reveal anything about the two cultures or their laws.

But there are generalizations that are both distinctive and significant. Gagarin's work on the unity of Greek procedural law provides an example of how comparative analysis can help elucidate what legal features are distinctively "Greek," and how those features may reflect and reinforce different social values and systems. The significance of the Greeks' preference for amateurism and written substantive law but oral trial procedure is highlighted when compared to the very different approach taken in Hellenistic, Roman, and early English legal procedure.⁸ In short, I think a comparative approach may help clarify what is at stake in designating *hubris* as a "Greek" legal concept. I cannot provide an in-depth comparative analysis here, but I can offer some tentative suggestions.

First, it is important to note that the notion of a legal action for insults to honor was by no means unique to the Greeks.⁹ The Romans, of course, had the legal category of *iniuria* (insult, outrage) to protect against insults to one's dignity. And even some modern civil law systems include a law of insult that provides a remedy for affronts to one's honor. For example, the modern German criminal provision on insult (*Beleidigung*) reads: "Insult is punished by imprisonment for a term of up to one year or by a fine, and where the insult is made by means of physical assault, by a term of up to two years or by a fine."¹⁰ A legal commentary elaborates on the meaning of insult: "Insult, which is not precisely described in the section ... is to be understood as an attack on the honor of another person ... through expressions of lack of respect, low respect, or disrespect."¹¹ The German law of insult is not a relic: criminal charges for insult, usually involving insulting gestures or verbal abuse, are commonly brought as private prosecutions in Germany, though only a small percentage proceed to the conclusion of trial.¹² As comparative law scholars have noted, there is no parallel to the law of insult in American law.¹³

While the law of insult in civil law concerns injuries to personal honor, (or, in more modern terms, dignity or personality), American law protects one's public reputation, but not personal honor or dignity. For example, the American law of

⁸ Gagarin 2008:206–224.

⁹ It is important to note that the Greek law of *hubris* appears to have required physical assault along with insult to the victim's honor, not insult alone. Because it is the protection of insult (which, in my view, distinguished it from simple assault in Athenian law) that is distinctive, I emphasize that aspect in this comparative discussion.

¹⁰ StGB § 185, quoted and discussed in Whitman 2000:1298.

¹¹ OLG[Court of Appeals for Selected Matters], NJW, 38 (1985), 1720 (F.R.G.). Quoted and discussed in Whitman 2000:1302–1303.

¹² Whitman 2000: 1293.

¹³ Whitman 2000: 1293.

defamation requires that harmful statements reach a third party, while the law of insult applies to purely private interactions that insult one's honor; and truthful but insulting statements generally do not constitute defamation, while truth is generally not an issue in cases of insult. Comparative law scholars have argued that this distinction between systems that protect dignity versus those that do not has far-reaching effects on the legal treatment of privacy, free speech, and even criminal law.¹⁴

So how does this comparative analysis help us respond to Finley's challenge to find commonalities that tell us something of interest about the Greeks? Unlike the procedural unity that Gagarin identifies, the Greek concept of *hubris* did not represent a significant departure from most pre-modern Western legal systems. But it does place the Greeks within a category of legal systems that provide legal protection of honor and dignity as opposed to those that do not. In sum, Phillips' important contribution has plausibly identified *hubris* as an example of substantive Greek legal unity.

BIBLIOGRAPHY

- Conover, K. 2011. *Bribery in Classical Athens*. (Ph.D. dissertation, Princeton).
- Finley, M.I. 1975. "The Problem of Unity in Greek Law" in *The Use and Abuse of History* (New York: 134–152).
- Gagarin, M. 2008. *Writing Greek Law*. (Cambridge).
- _____. 2005. "The Unity of Greek Law" in M. Gagarin & D. Cohen, eds., *The Cambridge Companion to Ancient Greek Law* (Cambridge: 29–40).
- Ober, J. 2005. *Athenian Legacies: Essays on the Politics of Going on Together*. (Princeton).
- Whitman, James Q. 2000. "Enforcing Civility and Respect: Three Societies" *Yale Law Journal* 109:1279–1398.

¹⁴ E.g., Whitman 2000.