



Unwritten Laws? Legacies from Antigone and Lycurgus

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Abstract

Sophocles' *Antigone* refers to "unwritten laws", as does Thucydides' Pericles. From the late fifth century BCE, the idea that laws are more effective when learned by memory and observation than when written down creates a distinctive current in political reflections. Plutarch even claimed the Spartan lawgiver Lycurgus had prohibited the writing down of his laws.

This lecture considers how Greek authors' reflections on the interplay between writing and orality remain relevant to modern debates about ethical formation.

Introduction

Are there unwritten laws that transcend whatever a given political community has written down? If so, can they empower rulers or citizens to defy the written laws? Conversely, might unwritten laws be more powerfully effective than written laws in guiding actions? Might their bodily incorporation shape us more deeply than written laws could ever do?

The idea of 'unwritten law' would become proverbial in ancient Greek – though it was first used, so far as we know, in Sophocles' play *Antigone*: a play written in democratic Athens. In Athens, the idea of 'unwritten law' was parasitic on the written laws for which the city had become known, dating back especially to its great lawgiver Solon. But the idea of 'unwritten law' would become most associated with a different great lawgiver, Lycurgus, and with the laws that he gave to ancient Sparta: the tradition would be told that he prohibited the writing down of his laws.

So the contrast between written and unwritten law is partly a contrast between Athens and Sparta, at least in their main ways of presenting themselves, as underscored by later authors looking back at those Greek cities in their heyday. Indeed, as the handbook of Roman law, the *Institutes* commissioned by the emperor Justinian, would put matters centuries later, there was a fundamental distinction between Athenian and Spartan laws on this point:

Justinian, Inst., trans. Moyle:

I.II.3: 'Our law is partly written, partly unwritten, as among the Greeks...'

(...ius nostrum aut ex scripto aut ex non scripto...)

I.II.9: 'The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute.'

(Ex non scripto ius venit quod usus comprobavit. nam diuturni mores consensu utentium comprobati legem imitantur.)

I.II.10: 'And this division of the civil law (ius civile) into two kinds...appears to have originated in the institutions of two states, namely Athens and Lacedaemon [Sparta]; it having been usual in the latter [sc. Sparta] to commit to memory what was observed as law, while the Athenians observed only what they had made permanent in written statutes.'

(Et non ineleganter in duas species ius civile distributum videtur. nam origo eius ab institutis duarum civitatum, Athenarum scilicet et Lacedaemonis, fluxisse videtur: in his enim civitatibus ita agi solitum erat, ut Lacedaemonii quidem magis ea quae pro legibus observarent memoriae

mandarent, Athenienses vero ea quae in legibus scripta reprehendissent custodirent.)

The distinction highlights how the Athenians relied on written law ('the Athenians observed only what they had made permanent in written statutes') while the Spartans instead relied on customs transmitted through memory and practice (it was usual there 'to commit to memory what was observed as law'). Both written laws and unwritten customary practices are tools for what I call the 'promulgation' of laws, by which I mean, how laws are made public such that they can be known by those subject to them, and internalized by them.¹

While taking seriously this broad contrast between Athens and Sparta in terms of the tools of law that they each distinctively emphasized, I will be arguing in this lecture that both cities, Athens and Sparta, in fact made use of both written and unwritten laws (as the Romans themselves would later do). And the moral of my story will be that these Greek cases suggest that in political life more generally, written and unwritten laws need to complement each other, rather than be opposed to each other. This will lead me to suggest two important lessons for today. On the one hand, that unwritten laws, including customs and conventions, can be as important as written laws in protecting the health of a political community. On the other hand, that we should be very wary of anyone – ruler or citizen - who defies the written laws in the name of higher laws or values: because the higher unwritten laws that are worth protecting are most often those aligned with the values and customs of the community, not opposed to them.

Background and Context

In my January (2025) lecture, I described how the Greeks adapted a written alphabet from the Phoenicians, using it first for inscriptions on cups and tombstones around 750 BCE, before starting to write up occasional laws on stone or wood about a century later. Especially in Athens, writing gradually began to permeate society: it was used in business transactions, in family matters such as wills and adoption, in political record-keeping. And as I showed last time, the Athenians made great use of written laws: writing up all over their city the laws of Solon, their greatest lawgiver, seemingly soon after he laid them down in 594 BCE.

Yet as I argued, writing should be understood as a tool: and as such, it is just one tool among others. I pointed out in my September (2024) lecture that the Greeks sometimes engaged in 'singing the laws' in order to ingrain them in people's memories. They saw 'singing the laws' as a tool that could be used in primitive societies without written laws, but also, as a tool that could be used *alongside* written laws in more sophisticated societies as well. And the same is true of memorization and practice of laws more broadly: these are tools that can be used to *replace* written laws, but also, to *complement* them.

The Greek vocabulary for law itself manifests these dualities. Laws could be described (including in the very inscription of the laws themselves) as *ta grammata* (the writings), but also, individually, as *hē rhētra* (lit. speech) – the latter being used by Plutarch's Lycurgus to indicate laws received through the spoken words of the Delphic oracle. As this divergence indicates, the powerful but partial spread of writing in Greece, and above all in Athens, raised basic questions of governance and culture.

In thinking about tonight's topic of 'unwritten laws', we must take heed of these dual possibilities, and indeed, of a broader set of possibilities still. 'Unwritten laws' can refer to different modes of initial transmission: it can mean laws that were not originally written down (but were later), as opposed to laws that were originally made in writing – or it can refer only to laws that *remain* unwritten. The phrase can also refer to different modes of subsequent reception and internalization: sometimes 'unwritten laws' refers to laws received solely through memorization and practice – even though 'unwritten laws' don't have a monopoly on memorization and practice (since those can also be generated by the study and reading of laws that have been written down). The content of 'unwritten laws' may also vary: they are usually fundamental laws, but that may mean fundamental to the political constitution, or fundamental to the detailed habits of everyday social life. Finally, 'unwritten laws' can refer to different originators or origins: laws that were laid down by gods; laws that were laid down by human lawgivers or political assemblies; or laws that evolved through customary practice or judicial decisions (like the common law).

¹ For tonight's purposes, I will focus on their being made known to the male citizens of each of these two ancient Greek political societies, which both included female citizens without full political rights as well as enslaved people who were deprived of active political claims as well as being deprived of other core liberties.

Many of these possibilities will feature in tonight's lecture: Antigone invokes 'unwritten laws' that were originated by the gods, remain unwritten, and are passed down through practice – though they relate to just one area of life, that of the religious rites of burials and funerals. But in Antigone's archaic Thebes, as in the democratic Athens in which the play named for her was written by Sophocles, these unwritten laws were not the only laws: they were a complement to the written laws made by the city or past lawgivers.

Compare the British Constitution, which also features unwritten laws or conventions as complements to written laws; there too, the conventions are primarily limited to one area of life, that of the political process (such as when collective cabinet responsibility applies, or whether the leader of the party that has won the most seats in a general election must be invited by the Crown to form a government).

By contrast to those two cases: the Spartan lawgiver Lycurgus was credited with making solely 'unwritten laws' as a lawgiver that were laid down by him (though approved by the god Apollo), remained unwritten at his behest (though some were later written down), covered the whole spectrum of social life in intimate detail, and were passed down solely (at least so it is claimed) through memorization and practice.

As I turn now to Antigone and then to Lycurgus (in both cases, alongside other Greek figures and texts), I shall be arguing that these two figures were in fact more similar than I have so far made them seem. On my reading of *Antigone*, she is not invoking the 'unwritten laws' against the state or the community: instead, she is aligned with the community in opposing the ruler's edicts, which themselves break the laws. Thus 'unwritten laws' for Antigone are rooted in the practices of the community, the same kinds of habits and practices that the 'unwritten laws' of Lycurgus sought to instill.

Antigone

So first, Antigone, a legendary Theban princess whose story is presented in Sophocles' play of that name. Antigone was one of the two daughters of Oedipus, the erstwhile king of Thebes, who had abandoned the throne after learning that he had unwittingly killed his father and married his mother. As the play opens, Oedipus' two sons (Antigone's brothers) have both been killed: fighting against each other to take their father's throne. As a result, Antigone and her sister Ismene find themselves living under the domination of their uncle Creon, who has seized the vacant throne of Thebes, and to whose son Haemon Antigone has already been betrothed.

The action of the play hinges on Creon's proclamation that one brother (Eteocles) should be buried with full religious rites and political honours, while the other (Polyneices) should remain unburied, being held responsible for having outraged his duties to both kin and city. Left unburied and so dishonoured, attracting flies and vermin, the body of Polyneices graphically embodies the violation of traditional Greek religious practices requiring families to bury their dead with the appropriate rites.

Antigone attempts to convince Ismene to join her in burying the body of their dead brother, but when she fails, goes out to do so alone – covering the body and performing the required rites – and even goes back a second time to cover the body with dirt again after it has been uncovered again at Creon's orders. As a result, she is challenged and condemned by Creon, who orders that she should be buried alive as punishment for defying his proclamation. While Creon eventually changes his mind, persuaded by a wise seer, Teiresias, to bury Polyneices and release Antigone, that reversal comes too late. Antigone has already hanged herself in the cave, leading the devastated Haemon to kill himself by her side, upon hearing which his own mother (Creon's wife) kills herself as well. Creon is left humbled and bereft, finally recognizing and lamenting the tragic outcome of his arrogant commands.

Now while Antigone was a legendary character of a distant and foreign past, Sophocles' play about her is a product of democratic Athens: written by an Athenian and produced by the city for performance at a religious festival, before an ordered public array of officeholders, citizens, foreign visitors, and others. It thus reflects the ability of Greek drama to capture what Simon Goldhill has called the tensions characterizing the Athenian 'citizen as a political subject'.²

Moreover, this particular play was written and produced at a notable moment in democratic Athenian

² Simon Goldhill, 'Greek Drama and Political Theory', in Christopher Rowe and Malcolm Schofield (eds), *The Cambridge History of Greek and Roman Political Thought* (Cambridge: Cambridge University Press: 2000), 60-88, at 69.

history, as we can see from the timeline below.

Timeline of Athenian and Spartan history

c.9th-7th century BCE **Lycurgus as lawgiver in Sparta** (historical or legendary)

6th century BCE

594 **Solon as lawgiver in Athens** (later seen as proto-democratic moment)

c. 546–510 Tyranny in Athens

508 Overthrow of tyrants and establishment of democracy

5th century BCE

499-479 Persian Wars

460–446 Wars of Athenian Delian League versus Sparta and her allies

460s Word *dēmokratia* starts to be widely used

c.441 Sophocles, *Antigone* first performed

431–404 Peloponnesian War between Athens and Sparta (and their respective allies)

431 Pericles, ‘Funeral Oration’ delivered (and subsequently written up by Thucydides)

So *Antigone* was produced after decades of war had left Athenians torn by competing demands of *oikos* and *polis*, roughly family vs polity, as to how the dead should be commemorated and by whom. Was it primarily the duty of their kin to bury each corpse, and to do so in a way distinguishing their lineage and wealth? Or was it now primarily the duty of the city to bury them as equals who had died for a common democratic cause? That topical issue reverberates throughout Sophocles’ play and its themes of burial as an arena for struggle between kinship ties and political power.

Likewise reverberating throughout the play, and resonating with a similarly broad but distinct historical moment, was the issue of whether unwritten laws exist at all, and if so, how to weigh their demands. In fact, the phrase ‘unwritten...laws’ almost certainly appears in Greek for the first time in this very play (on a plausible assumption about relative chronology). It encapsulates the ‘tragic moment’ in which Athenians were experiencing what French scholars have called a ‘torn consciousness’: between the archaic order of gods and mortals, and the new civic and democratic order of human-made laws and norms.³

Moreover, as the historian Rosalind Thomas has pointed out, it was only once laws were generally expected to be written – embodying human civic authority, whether that of the great lawgiver Solon or of a subsequent assembly – that the idea of unwritten law could even be formulated. Thomas has argued that while Sophocles may be coining a new phrase in referring to ‘unwritten...laws’, this is parasitic on the real novelty at this historical moment, which was the existence and spread of *written* law (taking the moment in a broad sense from the first surviving inscriptions in Dreros in the second half of the 7th century). As she writes: ‘You do not distinguish unwritten laws from written until you are beginning to see written law as a definite category’.⁴ So written law is as much a problem in the play *Antigone* as is unwritten law.

And that opens the door to my view that most existing interpretations of the play – which, whether by Hegel or Heidegger, Judith Butler or Bonnie Honig, tend to oppose Antigone as a civil disobedient against the ‘state’, whether in the name of family, the gods, or individual conscience – oversimplify what it presents. In contrast, I shall now argue that Antigone is not portrayed as opposing the state or its public laws. And this is because Creon is not equated in the full drama of the play with the state. Instead, what the play shows is that a political community consists in its people, not just in its temporary ruler. The identity of the people is articulated by their shared norms, including religious norms. But what gives those norms authority is not just one individual’s reading of them, but rather, the whole network of the community in which they are

³ Jean-Pierre Vernant and Pierre Vidal-Naquet, *Myth and Tragedy in Ancient Greece*, trans. Janet Lloyd (New York: Zone Books, 1988), 25; quoted by Goldhill, ‘Greek Drama’, 69.

⁴ Rosalind Thomas, ‘Written in Stone? Liberty, Equality, Orality and the Codification of Law’, in *Greek Law in Its Political Setting: Justification Not Justice*, edited by Lin Foxhall and A. D.E Lewis (New York: Oxford University Press, 1996), 8-31, at 16 (first published in the *Bulletin of the Institute of Classical Studies* 40 (1995) 59-74).

embedded.

Reading the *Antigone*

Let's go straight to the crucial scene, in which Creon accuses Antigone of having buried Polyneices and performed the religious rites (Il.447-455, trans. Grene, modified Lane):⁵

Creon: *'[D]id you know that there had been an edict [verb: *kērussō*] against your action?'*

Antigone: *'I knew it; of course I did. For it was public.'*

Creon: *'And did you dare disobey those laws (pl. *nomous*)?'*

Antigone: *'It was not Zeus who proclaimed the edict [verb: *kērussō*]; nor did Justice...enact such laws (*nomous*) as that... I did not believe your proclamations [noun: *kerugma*] had such power to...override the god's legal ordinances [which are] unwritten and secure (*agrapta...nomima*).'*

Creon in line 449 calls his own orders about the treatment of the brothers' bodies, 'laws'. But Antigone pointedly calls them not laws, but rather, 'edicts' or 'decrees'. She twice uses a related verb and noun (*kērussō*, *kērugma*) rooted in the word for herald (*kērux*), and so referring to what a herald proclaims on behalf of a ruler or some other body. And she contrasts those proclamations by Creon with the divine ordinances that are identified not only with Zeus, but also with a cosmic principle of Justice, and have a standing much more like law (*nomima* can be used for laws or for law-like customs or ordinances).

In other words, Antigone is not invoking 'higher laws' to invalidate ordinary everyday laws, setting up a conflict of laws in which the gods must prevail. Rather, she is challenging Creon's claim to have issued laws at all. The 'unwritten ...laws' that she invokes (*agrapta...nomima*, literally, laws or customs that are not put down in writing), are being opposed by her, not to the city's laws, but rather to the new ruler's arbitrary dictates.

The city's laws and customs are actually aligned with the demands of divine justice. And those are 'secure' (*asphalē*) both because they are underpinned by the gods, and also, I suggest, because they are rooted in longstanding recognition and acceptance in the community.

So Antigone is not a courageous loner, a radically isolated civil disobedient who alone can see the divinely ordained truth. On the contrary. Antigone is speaking on behalf of well recognized communal customs, rooted in religious understanding, that are visible to everyone: everyone, that is, except for the arrogantly oblivious Creon.

Here is further support for my reading. Earlier in the play, Creon himself distinguished between the general laws he had established in the city, and what he had 'here proclaim[ed] [verb: *kērussō*] to the citizens', regarding how the bodies of the two sons of Oedipus were to be treated (Il. 191-3). That is, he used there precisely the same verb (*kērussō*) that Antigone would later use in her crucial 'unwritten laws' speech. So in that speech, she is merely quoting his own words back to him. In his own earliest words, his proclamation against burying Polyneices never amounted to a law (though in later speeches he had dressed it up as such).

And the chorus, who in Greek tragedies typically embody the views of some part of the public community (sometimes specifically its elders, or its women), do the same. Creon has acted alone, they imply, the Chorus Leader urging him that 'You need good counsel...and need to take it' (Il.1097-98, *euboulías dei...labein*). Yet Creon has resisted this, at l. 735 demanding of his son: 'Should the city tell me how I am to rule them?'

In fact, the chorus do understand very well how rulers should act. The Chorus Leader had earlier pointed out that Creon's edict about the bodies of his nephews was simply '[his] pleasure', whereas in fact his 'power' as a ruler should have been understood to be limited to acting within the law: 'To use any legal means lies in your power, both about the dead and those of us who live' (Il. 213-14). Eventually, in accepting Teiresias' counsel (which he had again initially resisted) and deciding to free Antigone, Creon finally recognizes that laws must constrain edicts and decrees: 'I am afraid it may be best, in the end of life, to have kept the old accepted laws' (Il. 1113-14, Grene trans. modified by Lane: the key words are *tous kathēstotas nomous*). But he does so too late.

⁵ Sophocles [vol. I], *Oedipus the King, Oedipus at Colonus, Antigone*, trans. Grene (Chicago, 2013), modified Lane.

Thus, on my reading, Creon makes neither human nor divine laws. Creon, not Antigone, is the law breaker: breaking both human and divine laws. In speaking up for the 'unwritten...laws', Antigone is in fact speaking up for all the laws, humanly made and divine together, and against Creon's lawlessness in breaking them all. By proclaiming edicts that undermine and contradict the laws, Creon transgresses his power, and duty, as a ruler to safeguard them.⁶

On my interpretation, the crucial point is not just that the laws in question have divine sanction, but rather, that they have long been incorporated into the life of the political community. And the chorus, symbolizing that community, is portrayed as being squarely on Antigone's side. As Haemon puts it: '[T]he city mourns for this girl' (l. 693, trans. Grene). So it is not Antigone, but Creon, who is the loose cannon, the lone wolf. Rather than embodying the laws of the state, he usurps and oversimplifies the place of the political community itself. The *Antigone* asks us not what it means to defy the state but rather, and more deeply, who it is in a human community that counts for, speaks as, and acts so as to serve, the state.

From Antigone to Pericles

My reading of *Antigone* makes it easier to understand the other surviving earliest reference to 'unwritten laws' in any Greek text, which is found in a text written at least a decade later. This is the 'Funeral Oration' by the leading Athenian politician, Pericles: a real speech delivered in 431 BCE, the first year of the Peloponnesian War between Athens and Sparta, though the only version that we have is the one composed by Thucydides, in his *History* of that war, which cannot be dated as precisely. I discuss this speech now as a coda to the first part of the lecture on Antigone, for as scholars have pointed out, the speech can be read as a democratic Athenian response to the problem of unwritten laws in that play. If *Antigone* raised the problem of the place of unwritten laws in a polity, Pericles responds squarely that democracies need unwritten laws as well as written laws: and they need the two to work together.

As Elisabetta Poddighe summarizes the views of Victor Ehrenberg:

'in a sort of long-distance dialogue, Pericles in the Funeral Oration...responded [to Sophocles' Antigone] that Athenian democracy was pervaded by a profound respect for unwritten laws, that unwritten laws, as distinctive features of Athenian politeia, were values of all, not of a part, that such laws were valid as an expression of shared consensus'.⁷

Pericles' speech was a natural context in which to take up the ethics and legalities of burial once again. For it was one of the annual 'funeral orations' delivered each year in Athens by a speaker elected to offer praise to those who had died fighting on behalf of the city. In this ritual performance, the city staked its claim as chief mourner, as it were, ahead of the family and kin who would traditionally have been responsible to bury them, and conducting ceremonies that emphasized their equal citizenship in lieu of their unequal patrimonies.

Thus the occasion and purpose of Pericles' speech – in relation to both unwritten laws, and public burials – resonates powerfully with the themes of *Antigone*. Let us see precisely how Thucydides' Pericles phrases his response, speaking of 'unwritten laws' while praising the uniqueness of the Athenian political community:

'We enjoy a form of government that does not emulate the institutions of our neighbours... Democracy is the name we give to it, since we manage our affairs in the interests of the many not the few...'

A spirit of freedom governs our conduct, not only in public affairs but also in managing the small tensions of everyday life, where we show no animosity at our neighbours' choice of pleasures, nor cast aspersions that may hurt even if they do not harm.'

⁶ On the ruler's duty to safeguard the laws, see Melissa Lane, *Of Rule and Office: Plato's Ideas of the Political* (Princeton: Princeton University Press, 2023).

⁷ Elisabetta Poddighe, 'Agraphoi nomoi e politeia nel discorso funebre di Pericle', *Dike* 22 (2019): 3–80, at 41: 'Secondo Ehrenberg, in una sorta di dialogo a distanza, Pericle nell'*Epitafio* avrebbe risposto che la democrazia ateniese era pervasa da un profondo rispetto verso le leggi non scritte, che le leggi non scritte in quanto caratteri distintivi della *politeia* ateniese, erano valori di tutti, non di una parte, che tali leggi erano valide in quanto espressione di unanime consenso'. Trans. above by Emily Salamanca. Poddighe is summarizing and endorsing the views of Victor Ehrenberg, Victor Ehrenberg, *Sophocles and Pericles* (Oxford: Blackwell, 1954) in an Italian translation thereof.

Although we associate as individuals in this tolerant spirit, in public affairs fear makes us the most severely law-abiding of people, obedient to whoever is in authority and to the laws [nomos], especially those established to help the victims of injustice and those laws which, though unwritten (agraphoi), carry the sanction of public disgrace. (Thuc. 2.37 (spacing added, trans. Mynott)⁸

As I read this speech, Pericles is including the unwritten laws within the larger category of the city's laws as a whole. He is not opposing the unwritten laws to the city's written laws, or using the former to trump the latter – no more than Antigone was, on my reading, opposing the divine laws to the city's written laws. Rather, Pericles is arguing that these unwritten laws – which with other scholars such as Ehrenberg and Poddighe, I construe broadly as political customs – are part and parcel of the city's overall legal and political identity.

Such a complementarity between written and unwritten laws can be found more broadly in Athenian public discourses throughout the heyday of its democracy. As Poddighe puts it:

*It is perhaps in Pericles' logos epitaphios [Funeral Oration] that we can identify the original context in which the principle of the complementarity of written and unwritten laws was established—laws intended to serve the public interest and safeguard the spirit of politeia.*⁹

In this context, the particular role of the 'unwritten laws' is to 'carry the sanction of public disgrace', that is, one might infer, to bring with them blame for misdeeds that might not be captured in the more rigid and specific terms of the written laws, but which could, if carried out shamelessly and blamelessly, undermine the overall public order.

Read thus, Pericles' appeal to 'unwritten laws' is very similar to the idea of the unwritten British constitution. In fact, many of the documents that have constitutional status in the UK – including the Magna Carta, the 1689 Bill of Rights, and others – are written down, as indeed they were when they were each first promulgated. But these documents are embedded in a set of principles, judgments and norms that were either originally 'unwritten' (in the sense of being oral judgments rather than written statutes), or that remain unwritten, as in the case of constitutional norms or conventions that ministers of the Crown have traditionally followed but that are not strictly speaking legally binding on them.

This means that it is incumbent on those participating in political life to live up to these conventions and keep them – without which, the whole system will fall apart. As the scholar (and Emeritus Gresham Professor of Law) Vernon Bogdanor has noted:

*'...the peculiarity of the British constitution is that it lacks an umpire. It is the players themselves, the government of the day, who interpret the way in which the rules are to be applied'.*¹⁰

Thus, for Antigone, for Pericles, and for modern Britain, the written and unwritten laws of a city should be understood as complementary. They are not opposed sources of authority. Rather, both have authority when they are acknowledged as being rooted in widespread civic understanding and practice.

For Pericles, however, the unwritten customs and norms (which Pericles explicitly calls 'unwritten laws') went far beyond the narrowly political conventions of collective Cabinet responsibility and the like, which are the main content of the unwritten British Constitution.¹¹ Instead, the unwritten customs of Periclean Athens embrace the more intimate, informal, and multifarious ways in which people behave: for Pericles, referring to adults interacting in social settings and public spaces.

Yet while Athens went far beyond modern Britain in the scope of its unwritten laws, no society took that extension of unwritten customs to permeate the whole of society more seriously than did Sparta. This was already recognized by Xenophon, who described the Spartan lawgiver Lycurgus not as promulgating written laws (as the Athenian lawgiver Solon would do), but rather, as doing his work as lawgiver instead by

⁸ Thucydides: *The War of the Peloponnesians and the Athenians*, trans. Jeremy Mynott (Cambridge: Cambridge University Press, 2013).

⁹ Poddighe, 'Agraphoi nomoi', 66, trans. Emily Salamanca.

¹⁰ Vernon Bogdanor, *Politics and the Constitution: Essays on British Government* (Aldershot, Hants, England, and Brookfield, VT, USA: Dartmouth University Press, 1996), 26.

¹¹ Barendt, Eric. 'Is There a United Kingdom Constitution?' *Oxford Journal of Legal Studies* 17 (1997) 137–46, at 142–3 (and on 142, quoting Bogdanor as cited above).

fashioning ways of life (*tithenai* the *epitēdeumata* Lak. Pol. 6.4), in the sense of customs that are independent of any kind of written formulation. Yet in ancient Sparta, unlike Periclean Athens, unwritten customs were not just used to complement written laws. Instead, it seems that their scope extended to the point of being able to substitute for all or most of the laws that in other cities would be written – as we shall now consider.

Lycurgus

What then of Sparta? Strikingly, there is no surviving epigraphic (inscriptional) evidence of written Spartan laws.¹² That said, the second-century CE Greek traveller Pausanias, who testified to having seen Solon's laws written up in Athens, would also refer in passing to Lycurgus as having 'written (*grapsanta*) the laws for the Spartans' (5.4.5, trans. Lane). Still, at the very least, the contrast with Athens' proclivity for writing laws up, and down, is striking.¹³ And it seems to have allowed for the invention and spread of an extreme claim about Sparta, namely that Lycurgus himself had banned the writing down of his laws. As the scholar Michael Flower puts it: 'the very scarcity of written laws [in Sparta] made it possible to invent the tradition that they had been prohibited'.¹⁴ (2002, n.40)

To my mind, this tradition – which would have a terrific afterlife, being repeated for centuries – was indeed invented. And so far as we know (and I have argued elsewhere, have good reason to believe),¹⁵ it was invented by Plutarch, where we find it most famously and first encapsulated.

Plutarch was a biographer, a philosopher and more general scholar, writing in the first to second centuries CE in Greek (in a city under Roman hegemony). He was especially interested in ancient Sparta, composing a life of Lycurgus (alongside his life of Solon) together with accounts of the sayings of various Spartan men and women.

Here are the crucial passages of Plutarch's *Lycurgus* which purport to describe Lycurgus' prohibition on the writing down of his laws. Notice that, as I pointed out earlier, instead of being referred to as *ta grammata* ('the writings / written laws'), each law of Lycurgus was called by him a *rhētra* ('the spoken thing').

Plutarch, *Lycurgus* (all, trans. Perrin, with slight modifications by Lane):

Plut. Lyc. 13.1: 'None of his laws were put into writing by Lycurgus, indeed, one of the so-called *'rhētras'* forbids it. For he thought that if the most important and binding principles which conduce to the prosperity and virtue of a city were implanted in the habits and training of its citizens, they would remain unchanged and secure, having a stronger bond than compulsion in the fixed purpose (*tēn prohairesein*) imparted to the young by education, which performs the office of a law-giver [more literally: which completes a lawgiver's ordering] for every one of them'.

For Plutarch, it is the *prohairesis* imparted through habituation and training—which must refer above all to the Spartan *agōgē* or training course for young men—that is credited with being able to create more secure and strong mores than written laws could do. For Plutarch's portrait of Lycurgan Sparta, reading and studying written laws is neither inevitable nor advisable as a path to virtue. Instead, hearing and practicing orally transmitted laws—laws transmitted orally and in practice, whether or not they are also written down—is the best means of ethical habituation. And notice the emphasis on maintaining security: while Plutarch uses different adjectives (*akinēta* and *bebaia*) from Sophocles, the idea that unwritten laws are, paradoxically, more securely fixed than written ones, is common to both authors.

¹² As Terrence Boring, *Spartan Literacy* (Leiden: Brill, 1979), 50-63, shows, there is also relatively little evidence of other Spartan written texts, even of the titles of Spartan writings that no longer survive, compared to the long list of both extant and lost writings from Athens.

¹³ See the discussion of writing up vs writing down in Melissa Lane, 'Writing Laws: Solon to Hammurabi', <https://www.gresham.ac.uk/watch-now/writing-laws>.

¹⁴ Michael A. Flower. 'The Invention of Tradition in Classical and Hellenistic Sparta', in *Sparta: Beyond the Mirage*, edited by Anton Powell and Stephen Hodkinson, 191–218 (Swansea and London: The Classical Press of Wales and Duckworth, 2002), at 212 n.40.

¹⁵ See Melissa Lane, 'Lifeless Writings or Living Script? The Life of Law in Plato, Middle Platonism, and Jewish Platonizers', *Cardozo Law Review* 34 (2013) 937-64, and Melissa Lane, 'Platonizing the Spartan *Politeia* in Plutarch's Lycurgus', in *Politeia in Greek and Roman Philosophy*, eds. Verity Harte and Melissa Lane, Cambridge University Press, 2013, 57-77.

Thus lawgiving is to be diverted away from written laws, into the unwritten norms and customs that can be imparted by education:

Plut. *Lyc.* 13.2: *'And as for minor matters, such as business contracts, and cases where the needs vary from time to time, it was better, as he thought, not to hamper them by written constraints or fixed usages, but to suffer them, as occasion demanded, to receive such modifications as educated men should determine. Indeed, he assigned the function of lawgiving wholly and entirely to education'.*

By this move of Lycurgus in inculcating the *telos* of the city into the citizens' habits through unwritten laws, Plutarch tacitly suggests that they will be best equipped to make their own precise judgments of how to act in each circumstance – an inference supported by a passage in Plutarch's 'Sayings of Spartans':

Plut. *'Sayings of Spartans' (Moralia 227b): "Being asked why he had not made use of written laws, he [Lycurgus] said, 'Because those who are trained and disciplined in the proper discipline can determine what will best serve the occasion (tou kairou)'.*

Plutarch's 'Sayings of Spartans' also offers an explanation given by a Spartan king (notably, not Lycurgus) as to why a particular set of laws, those regarding bravery, were maintained as 'unwritten' rather than being provided in written form for 'young men to read'. Here, the emphasis is on the way that practice is superior to reading of what is written – and also on the purported Spartan response to Lycurgus (in keeping his laws unwritten) rather than on any prohibition that he might have issued:

Plut. *'Sayings of Spartans' (Moralia 221b): 'When someone inquired why they kept the laws in regard to bravery unwritten (agraphous) and did not have them written down and thus give them to young men to read, Zeuxidamus said, "Because the young ought to accustom themselves to deeds of manly valour, a better thing than to apply their mind to writings'.*

To be sure, some have argued that this statement was intended to confine the 'unwritten laws' to those regarding courage only, and that such a restriction makes good historical sense.¹⁶ But the more influential tradition has been generated by the global prohibition stated explicitly in the *Life of Lycurgus*, reiterated there in the following sentence:

Plut. *Lyc.* 13.3: *'One of his rhētras accordingly... prohibited the use (mē chrēsthai) of written laws...'*

Nevertheless, Plutarch's purported Lycurgus prohibition here on writing down the laws at all, is heightened by the fact (which escaped me in writing about this text more than a decade ago)¹⁷ that Lycurgus is depicted elsewhere in the 'Life' as having made use of writing – as a tool – for several other purposes. He 'wrote down and collected Homer's poems' (*Lyc.* 4.4 – clearly an anachronistic claim); and he even instituted the use of writing in Spartan elections (referring to the role of *grammateia* or scribes in so doing, in *Lyc.* 26.3). Plutarch even acknowledges that later Spartan kings inserted a clause into the so-called 'Great Rhētra', something like the fundamental Spartan constitutional law, in a verb that unmistakably suggests that they did so in writing (*Lyc.* 6.4: verb *parengraphō*).¹⁸

¹⁶ See Boring, *Spartan Literacy*, 27: 'Plutarch knew and used many sources which shared, to some degree, the tradition of the unwritten constitution of Lycurgus', and goes on there: 'In addition to his ordinary sources, he made a personal examination of the Spartan archives...during which, he must have noticed the absence of formal law codes from the earlier centuries...At the same time he must have seen, or have been made aware of, the numerous types of written laws which did exist long before his own time...; of these he said nothing. In *Lycurgus* 13.1 he simply overstated the actual situation and applied the prohibition to all types of legal documents and laws. In *Moralia* 221B, he was more specific.'

¹⁷ See the references to two articles by Melissa Lane published in 2013, above.

¹⁸ The scholar Ellen Millender has cited this and other evidence in making a case (accepted by Flower in the footnote cited above) for the likelihood that at least some Spartan laws were inscribed in writing: see Ellen G. Millender, 'Spartan Literacy Revisited', *Classical Antiquity* 20 (2001) 121–64.

Thus, the prohibition on writing down the laws is not depicted by Plutarch as part of an overall or complete rejection of the use of writing as a tool in Sparta. Spartan society was well capable of using writing as a tool in some contexts, and later Spartans even seem to have used it as an occasional tool for law. Rather, what Plutarch's portrayal of Lycurgus suggests – echoed in the *Institutes*' portrayal of Spartan law – is that writing as a tool of law has drawbacks as well as advantages. If the purpose of law is civic reconciliation and unity, as I argued in my January lecture – which in Sparta took a much more stringent and austere form than in Athens – the tradition associated with Lycurgus and Sparta suggests that this may be better inculcated by memory and practice that begins with what is oral, rather than by the promulgation and study of writing.

Conclusion

This brings me back to the two lessons which I would draw from this lecture for today. Both of them arise from the view of unwritten law as the other side of the coin of written law: it is not something completely other, but rather, aims at the same fundamental purposes, aiming to shape a shared and complementary set of ethical and legal and political norms.

In that light, lesson one is, as I put it earlier, that unwritten laws, including customs and conventions, can be as important as written laws in protecting the health of a political community. In fact, the complementarity – even interdependence – of written laws and unwritten customs was already observed and celebrated by Plato (writing a half-century or so after Thucydides). Plato put the point generally, portraying '*unwritten customs*' and '*what people call "the law of their fathers"*' as *essential complements to law*:

'the bonds that hold any political system together...if they are out of key, and get out of true, then they are like the timber supports which carpenters put in...' (Plato, *Nomoi* [Laws], 7.793a-c, trans. Saunders).

Moreover, Plato in this work (called the *Laws*) insists that lawgivers must concern themselves with these unwritten customs or laws just as much as they concern themselves with the written laws. Otherwise the whole legal and political and ethical system will malfunction (its hidden supports will collapse).

And yet, while unwritten laws are important, they are not a license for rulers to do as they please. That is the second lesson, the one which I drew primarily from my reading of *Antigone*. To reiterate: we should be very wary of anyone – ruler or citizen - who defies the written laws in the name of higher laws or values: because the higher unwritten laws that are worth protecting are most often those aligned with the values and customs of the community, not opposed to them.

Where do these arguments leave us? *Antigone* suggests that we would do well to pause before allowing rulers to claim authorization to break existing written laws, on the basis of an appeal to higher unwritten laws or principles that are at odds with what those written laws would prescribe. Rather, the varied Greek traditions of invoking unwritten laws suggest that unwrittenness, like writing, is a tool, not an automatic trump. Like any tool for promulgating laws, it has to be assessed in light of the overall purpose of the legal system and political community: of which the ruler must, on pain of suffering Creon's fate, hold themselves to be not the dictator, but the servant.

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