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There is a bibliography of Professor MacDowell's publications on p.xv-xxiii.

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LAW OF PROCEDURE IN ATTIC INSCRIPTIONS

Gerhard Thür

Legal proceedings in ancient Athens have been studied for nearly 200 years.[1] Although scholars began by working with literary sources, they increasingly made use of a discipline, new and budding in the nineteenth century, Greek epigraphy. Koehler's *Corpus Inscriptionum Atticarum* (*CIA*) accordingly found its way into the fascicles of Lipsius' manual of Athenian law, published successively from 1905 to 1915. Lipsius, however, a typical German 'Altphilologe', was not very much interested in new epigraphical sources. The great task for him was to incorporate into his work Aristotle's recently discovered *Athenaion Politeia*. In my opinion, Lipsius' manual is the climax of the nineteenth-century philological approach to the Athenian law of procedure.

The leading twentieth-century manual today – in 2001 – is, for all its incompleteness, Part III, 'Procedure', in the second volume of Harrison's *The Law of Athens*, a work finished after the author's death in 1969 and published in 1971 by today's honorand. Scholarship has MacDowell to thank, not only for his own contributions, but for having saved this important work. Here, as in MacDowell's own *Law in Classical Athens* of 1978, inscriptions are more than decoration. Based on epigraphical sources, both authors – like most contributors to this volume – thoroughly discuss the historical background of legal institutions. Likewise does Rhodes in his *Commentary on the Aristotelian* Athenaion Politeia (1981/93). From chapter 42 – and especially from 63 – onwards, Aristotle is dealing with legal proceedings. After these major contributions of modern scholarship, one should think that only a few recently-published inscriptions need be added as a supplementum to the study of legal procedure in Athens. Unlike the study of law in other Greek poleis,[2] there seems to be no need for a special discipline, 'legal epigraphy', in the field of legal proceedings in Athens.

I shall now tell you of some of my own experiences working with legal inscriptions. After that, I shall try to outline the very special position legal epigraphy holds in regard to the study of law in classical Athens, and I shall give some examples to illustrate what I understand to be its task. It may

perhaps be the case that, especially in Athens, to know the law of procedure is more helpful for the epigraphist than a knowledge of epigraphy is for understanding legal procedure.

In the 1960s, as a student of Hans Julius Wolff in Freiburg im Breisgau, I began to study the law of evidence in Athenian courts. At that time Wolff was working on his book *Die attische Paragraphe* (1966) – discussed by Carawan in this volume – and was mainly interested in Attic oratory. So I did my best to share his interests. The result was my study, *Die Proklesis zur Basanos* (1977), a modest topic which led me, nevertheless, to some new ideas about the Athenian system of proofs. Sources were strictly limited to literary ones – so I thought; years later I came upon *IG* I^3 96.19 (412/11 BC) where, without further context, the noun *basanos* is mentioned; any reference to a *proklēsis*, my special interest, is to be excluded. Epigraphy is no help in explaining *basanos*.[3] I also used the method applied by Wolff in his *Paragraphe*, as he called it 'Gesamtinterpretation'. One must not pick out only a few words of a forensic speech for study; rather, one must investigate the whole legal issue and consider the interests of the litigant and his opponent.[4] Refining Wolff's method, I soon found myself at a dead end: one can prove everything as well as its opposite. It is impossible to find out what litigants really intended or even are likely to have intended.[5] Looking for 'die wahre Absicht' behind the words of a forensic speech often leads to absurdity or at least – as shown by Stephen Todd in this volume – to aporia.

Later, too, I followed Wolff. One of his favorite projects was collecting all the legal inscriptions of the Greek world.[6] Moving from Vienna to Munich in 1976 to work on this project, I found an unforgettable colleague in the person of the late Diederich Behrend, one of the best legal epigraphists in Germany.[7] Compared with oratory, inscriptions speak the clear language of official documents – no 'Textkritik', no ambiguities about 'wahre Absicht' – instead, prosopography and lacunae, new challenges both. Behrend undertook a 'Repertorium' of all legal inscriptions; I went on with legal proceedings. We started from different ends, Behrend with two regions of Asia Minor, the Troad and Mysia, and I, after sampling two small inscriptions from Samos,[8] chose Arcadia, a region with only a few (but utterly difficult and interesting) texts on legal procedure (*IPArk*). After some delay, both projects were published in 1994.[9]

While finishing the Arcadian inscriptions, with the aid of alternating assistants, I switched my focus to Athens. Some progress has been made in the form of smaller contributions, but at the moment, no end of a volume *IPAth* is in sight.[10] After my return to Austria, I instead found a colleague to work with me on inscriptions from the Argolid.[11] We will handle this

volume first and so I cannot give you a final report on Athens; instead, I will explain our methods and present some preliminary material. Work has been prolonged by two methodological problems. The first has to do with our definition of the material, that is, of what constitutes an inscription on legal procedure. We take the broadest view and so we are compiling every text referring to litigation and the settlement of legal disputes, every penalty-clause, and every promise of personal immunity (*asylia*-clause).[12] As Behrend's Repertorium shows, if one uses these criteria, more than half of all legal inscriptions concern procedure. The second problem is inherited from Wolff. Although we comment on every single inscription, we still follow his method of 'Gesamtinterpretation'.[13] These two methods (compiling as many texts as fulfill any of our criteria and commenting in accord with 'Gesamtinterpretation') require a great amount of time; checking by autopsy every important lacuna on stone takes even more.

What does an 'ideal' commentary on an inscription concerning legal procedure look like? As everywhere else in the Greek world, so also in Athens there are no inscriptions confined strictly to legal proceedings. Everywhere, substantive and adjective law, statutes on concrete issues and on judicial enforcement, are mixed up in one and the same text, mostly in decrees. In my opinion, to argue which of the two came first historically seems useless.[14] To understand the procedural part of a text one has to look at the entire text. To understand the entire text, one has to explain its full historical and legal background. This is Wolff's 'Gesamtinterpretation' transferred from oratory to epigraphy. In our editions, we substantiate this concept in a very simple way: after printing the entire text of the inscription with an apparatus criticus, we add a synoptic German translation; footnotes to the translation explain the historical background, philological and epigraphical problems, and questions of substantive law. The commentary on procedure can then concentrate on the essentials. In order to combine all our commentaries – in a distant future – so as to provide a Greek Law of Procedure, we follow a rough schema clearly influenced by Harrison: Part I, Judicial Organization: jurisdictional magistrates, lawcourts and their respective competences (Harrison's 'Judicial Machine'); we add: litigants, types of proceedings, localisation of lawcourts, costs, assistant staff, and equipment. In Part II we follow the order of a lawsuit (Harrison's 'Process at Law'): summons, claim, preliminary hearing and hearing in chief, evidence, judgement, and execution. Occasionally, Part III deals with penalty-clauses. Further information about the framework and how it is used practically may be found in the volume on Arcadia.[15] In Athens we have the special problem that many prominent historical inscriptions also make small-scale references to legal proceedings. Is it necessary or at least worthwhile to

discuss the entire texts and the huge amount of controversial non-juristic literature about them? Certainly not. But sometimes the legal issue can help solve historical problems. The principle of 'Gesamtinterpretation' works in both directions.

For the moment, I will consider only the legal aspect of inscriptions. How much can epigraphy contribute to a better knowledge of the Athenian law of procedure? If we just count the number of procedural inscriptions, it seems an enormous amount. Some years ago, Christian Koch published in his thesis *Volksbeschlüsse in Seebundangelegenheiten* commentaries on all procedural inscriptions of the First Athenian League, altogether 52 texts: 12 political decrees and 40, also political, but more or less uniform, honorary decrees, with only summary comments.[16] From *IG* I^3 there are about 50 more texts, including nr. 96, mentioned earlier, containing only the word βάσανος. Going on to the field of *IG* II, we have from Euclides down to the end of the Lycurgan period 85 inscriptions needing full commentary and about 100 honorary and proxeny decrees; from the first edition of *IG* III and later publications there are also about 50 defixiones, binding spells against opponents, witnesses, supporters, magistrates, public arbitrators, and judges of lawsuits. Summing up, we come to a figure of more than 300 Athenian procedural inscriptions from the fifth to fourth centuries BC. Compared with the 42 inscriptions quoted in Harrison II (1971) and the 29 in MacDowell's part III (1978), it seems impressive. Yet even MacDowell has included the most important references and Harrison all the essential ones that were published at the time of their respective works. Nevertheless, collecting, restoring, and commenting on the bulk of all procedural inscriptions makes good sense. Progress will be made in small steps and in both directions: better insights into some details of legal proceedings on the one side, better texts and better historical understanding on the other.

It would be taxing to give a long list of tiny observations and small conjectures on texts. I would rather take the opportunity to present my basic ideas about the Athenian law of procedure and to discuss them in the light of some selected inscriptions. My topics will be: (1) the two stages of Athenian lawsuits (a preliminary one before a magistrate and then the hearing in chief) and the age of this system; (2) what we know about arbitration; (3) peculiarities of evidence; and (4) the form of judgement.

The first topic is the division of a preliminary and a decisive stage in Athenian procedure. The queen of Athenian procedural inscriptions – in its importance to be compared only with the law code of Gortyn – is Draco's law on homicide from 621/20 BC, republished in 409/8 BC. The standard edition *IG* I^3 104 has adopted Stroud's text of 1968; only revolutionary

epigraphic technology would be able to produce a better one. Disregarding the regulations of homicide, I will concentrate on lines 11–13; in them we shall find the whole structure of legal proceedings, even for classical Athens. After the provision 'Even if someone kills someone without premeditation' (so Stroud 1968, 6) or 'not intentionally' (so Gagarin 1981, XVI) or 'without malice aforethought' (so Carawan 1998, 33) the text runs: δι|κάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] E[*lacuna* 17]E [β]ολ|εύσαντα· τὸς δὲ ἐφέτας διαγν[ô]ν[α]ι (the *basileis* are to *dikazein* ... the *ephetai* are to *diagignōskein*).

In several articles I have compared these weighty but hardly pellucid words with language and procedure in homicide trials of the fifth through fourth centuries.[17] For the classical period, procedure is clear: the *basileus* as initiating magistrate holds three προδικασίαι, during which the opponents and their witnesses swear the most solemn oaths of guilt or innocence, called διωμοσίαι. Then the *basileus* has to bring the case before a board of judges, the Areopagus or the 51 '*ephetai*'. The 'judges' in either case decide simply by voting.[18] In Antiphon 6.16, the accused χορηγός (*chorēgos*) implores the *ephetai* to decide by their vote which of the two *diōmosiai* is 'more truthful and pure'. The wording of the *diōmosiai* quoted by the *chorēgos* contains each side's case in a nutshell, as Gagarin notes in his new Antiphon translation (1998, 81 n. 19). The line of defence was that the *chorēgos* did not kill the boy μήτε χειρὶ ἀράμενος μήτε βουλεύσας ('whether by [my] hand, raising it,[19] or by instigating / planning'). The first member of the disjunctive phrase ('whether...') exactly fills the lacuna in Draco's law ending with the (same) second member, 'or by instigating'; thus: αἴτιον φόν[ο] ἦ[ναι ἢ χειρὶ ἀράμενον] ἢ [β]ολ|εύσαντα.[20] To sum up: the wording of the *dikazein* clause in Draco's law accommodates the formulation of a *diōmosia*. In the classical period, the *basileus* formulates the *diōmosiai* in a *prodikasia*; similarly, the action of *dikazein* in Draco's law is the formulation or enacting of the *diōmosiai* by the plural number of *basileis* (cf. *Ath. Pol.* 57.4) who hold the initial hearing, the *prodikasia*. As in the classical period, the *ephetai* of Draco's law perform the activity of *diagignōskein* after the (plural) *basileis* perform the action of the *dikazein* – they decided by voting which of the two *diōmosiai* was the better one. So I should translate Draco's provision on procedure: 'The *basileis* are to enact (the *diōmosia*, that): "he (the defendant) is responsible for homicide whether by his hand, raising it, or by instigating". The *ephetai* are to decide by vote.' Referring to a direct or an indirect act of killing, in l. 12/13 Draco states two possible charges a plaintiff or pursuer can make.[21] *Dikazein*, consequently, does not mean 'für verantwortlich erklären' (Wolff 1961, 70), nor does it mean either 'adjudge' (Stroud 1968, 6; Gagarin 1981, XVI), or 'give judgement' (Carawan 1998, 33); rather,

it means, 'to decree', that is, to enact the contradictory oaths necessary for the trial. In later homicide trials the continuity seems quite evident. All other trials in classical Athens have the same primitive structure: a board of laymen-judges votes on two statements on which the opponents have sworn their oaths, called *antōmosiai*.[22] These oaths have much less weight than *diōmosiai*. From the archaic period onward, the *terminology* of jurisdiction changed – not its *structure*. In the fifth through fourth centuries BC, the *archontes* no longer perform the δικάζειν; the judges, the δικασταί sitting in the lawcourts, do. Now δικάζειν is used synonymously with διαγιγνώσκειν and κρίνειν. We have only a few traces of the earlier δικάζειν in some literary sources where the initiating magistrate is called 'δικαστής' in contrast to the *hēliaia* which is to perform the διαγιγνώσκειν (Dem. 23.28, 43.71; *An. Bekker* 242.19–22).

Based on *Ath. Pol.* 3.5 most scholars think archaic magistrates had the power to decide trials by their own competence rather than to introduce them to a lawcourt. One must be extremely cautious with this source.[23] When *Ath. Pol.* uses the verb κρίνειν and when Aristotle mentions κρίνειν under oath in his *Politics* (1285b9–12), one can see parallels to the law code of Gortyn, ὀμνύντα κρίνεν (I 12 and often). Perhaps in archaic times Athenian magistrates also gave verdicts under oath, but we have not a single reference to such a κρίνειν. On the other hand, when δικάζειν or the term δικαστής are attached to a magistrate, he is very likely to bring the case to the *ephetai* or the *hēliaia*: the bi-partite procedure is in evidence.

After Draco's law, δικάζειν is first mentioned again in the famous Phaselis-decree, *IG* I^3 10 (*GHI* 31) dated 469–450 BC. Some scholars even use the term δικάζειν, in my opinion incorrectly, to date the inscription. In l. 18/19 the stone reads: ε]ὶ μὲν καταδικασ|[*lacuna* 10]η ἄκυρος ἔστω. Recent editors fill the lacuna in this way: καταδικάσ|[ει, ἡ καταδίκ]η ἄκυρος ἔστω: 'if the magistrate (mentioned l. 15/16) condemns (active)'. Indeed, here the ἀρχαί (l. 16) seem to give judgement themselves rather than merely act as introducing and presiding magistrates on the classical pattern. But the language used elsewhere in the text: [τὰς δ]ίκας γίγνεσθαι παρ|[ὰ τῶι πο]λεμάρχωι (l. 9/10) and δέξηται δ|[ίκην] (l. 16/17) can be understood more easily in the sense of the fourth century: lawsuits have to be tried at the *polemarchos*' court (l. 9/10) and no other (initiating) magistrate is allowed to accept an action (δίκη).[24] Accordingly, there is no reason to restore the active καταδικάσ[ει in l. 18/19; I would rather follow the earlier restoration by Dittenberger: καταδικάσ|[θηι, ἡ μὲν δίκ]η ἄκυρος ἔστω. With the passive construction the decree does not say by whom the defendant is to be sentenced, and in fact there is no need to do so. Since the time of Draco, boards of judges are known and initiating magistrates as well.

From the point of view of a legal historian, the restored verb καταδικάσ[ει is too tentative and unconvincing to allow it to put aside the usual pattern of jurisdiction performed in two stages. Following Wade-Gery, the editors of *GHI* (p. 68) hold that the Phaselis-decree must date before Ephialtes' reforms (462 BC) by which the magistrates – allegedly – lost their power of giving verdicts. Since legal procedures, divided into an introductory stage and a decisive one, were in use both before and after Ephialtes, his reforms cannot date the decree. Only 'soon after the battle of the Eurymedon' (469 BC), can stand (*GHI* p. 67).

My second topic is arbitration, in Athens to be divided into 'private' and 'public'. We have relatively few sources concerning private arbitrators: four settlements in arbitration proceedings are handed down, two in a literary text, Dem. 59.47, 71, and two inscriptions from the fourth and third centuries BC, Ferguson 1938 nr. 2 (cf. Lambert 1997), and *IG* II^2 1289. Ferguson 1938 nr. 1 (cf. Lambert 1997), on the other hand, is a formal private arbitral award (and not a 'settlement') as they are known also from outside Athens, one from Chios and one from Corcyra.[25] The awards use terms such as δικασταί, καταδικάζειν, ἐπικρίνειν, and γιγνώσκειν; the settlements, consequently, use διαλλάττειν in fourth and διαλύειν in the third century BC. Arbitrators are called διαιτηταί, διαλλακταί or διαλυταί. As far as we know, Hellenistic Athens did not make use of international arbitration by judges, δικασταί, sent by foreign states. Athenians rather themselves rendered international awards,[26] so international arbitration is not a topic in the Athenian law of procedure.

Looking at the three Athenian inscriptions concerning private arbitral awards or settlements, some peculiarities in terminology are striking: consistently Ferguson 1938 nr. 2 (265/4? BC Lambert 1997) has: ἐπὶ τοῖσδε διελύσαντο (l. 3) and ὑπὸ τῶν αἱρε|θέντων διαλυτῶν (l. 5/6); two arbitrators managed a settlement, a *dialysis*, between two contending groups of the 'Salaminii'. Besides terminology the even number of 'two' points to an arbitral settlement: the litigants agreed in a solution proposed by two men, evidently one chosen by each party.

About one century earlier, the same Salaminii had been tried and settled (διήλλαξαν, l. 2) by five διαιτηταί (l. 2, 5/6; διαλλακταί, l. 81), Ferguson 1938 nr. 1 (363/2 BC). The odd number of five and the verb ἔγνωσαν (l. 5) show that these arbitrators rendered a formal award, perhaps by casting votes. After the 'decision' passed by five arbitrators (normally two of them appointed by each party, the fifth chosen by the four), the litigants explicitly agreed to keep the arbitral award (καλῶς ἔχειν, l. 5). This illustrates best the new theory brought up by Scafuro 1997, 123–8 denying that an Athenian formal arbitral award had any binding or executive force.[27] Only

the litigants' ὁμολογεῖν (l. 4/5), a public declaration to keep the award, and the claimant's ἀφεῖσθαι (l. 65/6), a formal releasing of the defendant from liability, were to become relevant to an eventual lawsuit. Arbitration itself belonged more to social control than to legal enforcement. In regard to these observations, terminology seems to be consistent in the inscription Ferguson 1938 nr. 1, too.

Difficulties arise in the third text, *IG* II² 1289 (mid-third century BC):[28] τάδε διέλυσαν οἱ δικασταὶ [ἐπιτρεψάν]|των ἀμφοτέρων (l. 3/4; 'the following arbitral settlement has been achieved by the judges resorted to by both parties'). Who are the δικασταί? In a settlement, *dialysis*, we expect to find *dialytai* as in the contemporary inscription, Ferguson 1938 nr. 2. About 100 years later, a formal award from Corcyra[29] reads: [τάδ' ἐπέκριναν] οἱ δικασταὶ καὶ κοινοί (l. 1; 'verdict of the judges and commonly chosen arbitrators'). Here, arbitrators appointed in advance when a building contract was entered, after failing to reconcile the litigants, finally rendered a formal award (ἐπί|[κρισις, l. 19/20).[30] In Corcyra, arbitrators (κοινοί) giving an award might have been called 'judges' under the influence of the terminology of international arbitration.[31] The same influence on terminology is probably to be found in the inscription from Hellenistic Athens, *IG* II² 1289. Arbitrators sent from foreign cities, whether they manage settlements (διαλύειν) or render formal awards (δικάζειν, γιγνώσκειν, κρίνειν), always were called δικασταί.[32] So the term δικαστής changed from 'magistrate initiating lawsuits' in archaic times to 'man of the jury / judge' in the classical period and includes the meaning 'arbitrator' in Hellenistic times. The explanation for 'judges' settling a case in arbitration proceedings in the Hellenistic inscription *IG* II² 1289 might then be that the meaning of δικαστής had changed; this makes better sense than seeing these *dikastai* as arbitrators 'chosen from the board of the Heliasts' (Ferguson 1938, 48).

Public arbitration is quite different. Harrison (1971, 66–8) treats public arbitrators, διαιτηταί, in an appendix to private arbitrators following his chapter 'Courts'. MacDowell (1978, 207–9) does better, combining them with the tribal judges, the Forty, established in 403/2 BC or very soon thereafter. The proper place of public arbitrators, in my opinion, is among the magistrates. Every male Athenian citizen had to serve as a διαιτητής in his sixtieth year. Though he holds no office he has public responsibility for his duties (*Ath. Pol.* 53.6). By the bureaucratic creation of this institution, the mature Athenian democracy of the fourth century aimed at two goals: to settle most trials by reconciling the opponents and to prepare the remaining ones for the hearing in chief. *Ath. Pol.* 55.5 mentions that the public arbitrator swears a solemn oath before rendering ἀπόφασις, giving his sentence. Parallel to private arbitration (Dem. 52.30 ff.),[33] it seems to

me that the oath is necessary only when the litigants agree with a formal award. If the convicted party does not agree, the 'sentence' is completely irrelevant. Then, *diaita* is only an introductory stage and the trial goes forward. At the hearing in chief no speaker makes use of an *apophasis* whether in his favour or against his opponent.[34]

For pleading at court, public arbitration is important in a different way. No other documents are to be introduced during the hearing in chief than those used at the *diaita*. To ensure this provision Aristotle mentions – only connected with public *diaita* – containers, ἐχῖνοι, where each party's documents are to be sealed up (*Ath. Pol.* 53.2). Lämmli (1938, 117) has held that the provision prohibiting new documents did not apply to cases tried by one of the archons at his own preliminary hearing, the *anakrisis*. Years ago (1977, 316 ff.) I stressed the close relationship between *diaita* and *anakrisis* in preparing the hearing in chief. At least, plaintiff and defendant are obliged to answer each other. The problem of using new documents is to be reconsidered in the light of a tiny inscription, the famous 'cheese pot', a lid of a ceramic pot with painted letters. In his editio princeps Boegehold (1984) has identified the pot with an *echinos*. From the inscription, at least this much is clear: the *echinos* was not used in a *diaita* but in an *anakrisis* – a phenomenon mentioned nowhere in literary sources. This makes a strong point that, at least at the end of the fourth century BC, prohibiting new documents was not restricted to *diaita* cases.[35]

Outside Athens the same technical equipment is used for the same purpose: the approximately contemporary *'symbola'* between Stymphalus and Demetrias/Sikyon, *IPArk* 17.41–7 (303–300 BC), prohibits litigants from using documents at the δικαστήριον that were not shown to the *'synlytai'* at a preliminary hearing. These συνλῦται, alternatively called δικασταί (*IPArk* pp. 221–4), have a double role: they attempt to reconcile the litigants preparing the non-settled cases for the hearing in chief like Athenian public arbitrators and, sitting as a lawcourt, they decide the issues. Here, the functions of public arbitration and *anakrisis* are concentrated in the same persons. So, the *echinos* lid and the parallel from Arcadia open further discussion about *anakrisis* in Athens.

At the end of an *anakrisis* or after an unsuccessful public *diaita* the case is to be introduced to court. The term is εἰσάγειν εἰς τὸ δικαστήριον. This is known very well from literary and epigraphical sources.[36] Relatively new is the 'Law in the City-Eleusinium' published by Kevin Clinton (1980). In this inscription two εἰσάγειν are mentioned. In l. 28 the *basileus* has to introduce a *phasis*, in l. 38 the nine archons (most probably) introduce private *dikai*; nothing of great importance, indeed. Based on a better restoration suggested by Stumpf (1988, 226), it turns out that the *basileus*

is to be fined if he does not introduce the *phasis*. A parallel appears in the 'Athenian Law of Silver Coinage', published by Ronald Stroud (1974). Here too, special magistrates have the duty to introduce *phaseis* (ll. 18–26) under the risk of being punished (ll. 32–4).[37]

Since Athenians did not use strict legal terminology, εἰσάγειν εἰς τὸ δικαστήριον has a further meaning: to bring an individual – not a lawsuit – to court, i.e., to sue someone. This is easily comprehensible if a private person acts as plaintiff: by εἰσάγειν he can only sue his opponent. In epigraphical sources sometimes difficulties arise: if a magistrate is ordered to 'εἰσάγειν', one has to question whether he has to introduce a lawsuit or to sue a person. In the first case he has jurisdiction, ἡγεμονία τῶν δικαστηρίων, in the second case he does not. This may be doubtful for some of the ad hoc appointed magistrates in Athens, some only known from inscriptions. If a direct object – a *dikē* or a person – is mentioned the answer is obvious; if not, sometimes, there is a simple solution: if the magistrate has to care for something, for example building the city walls, if he is ἐπιμελητής, and imposes a fine, it is his task to act as plaintiff. Only when a *dikē* is mentioned does he have jurisdiction.[38] Surprisingly, the two ἐπιστάται, οἵτινες ἐπιμελήσονται, also called οἱ ἐπὶ τὰ τείχη ἠιρημένοι in *IG* II^2 244, (337/6 BC) function in both positions in different cases: acting as a plaintiff after fining an entrepreneur on the one hand and introducing and presiding over private trials between two entrepreneurs on the other.[39]

Inscriptions are full of details about magistrates and their competences. Procedure itself, however, is known almost completely from literary sources. So my last two points, 'peculiarities of evidence' and 'the form of judgement', will be very short.

Rooted in archaic principles, the law of evidence in classical Athens is very primitive. In spite of Aristotle's *Rhetorica* (1375a 24), in court only one kind of evidence in a legal-technical sense exists: the witness. The three other of the five so called 'non artificial proofs' (for I exclude 'laws' as they have nothing to do with evidentiary facts) are based on witnesses: written contracts, if not acknowledged by the opponent, depend completely on witnesses; depositions of slaves under torture and litigants' oaths originate in extra-judicial proceedings witnessed by the parties' supporters.[40] Beginning from archaic times, witnesses in homicide trials, by swearing the same (above mentioned) *diōmosiai* of guilt or innocence as the litigants themselves swear, are partisans of either the prosecutor or the defendant. The function even of the unsworn witness was always the giving of evidence in support of one or the other of the litigants: no witness can be compelled by a court or by a party to appear; swearing an oath of disclaimer

(ἐξωμοσία), he always has the chance to avoid any responsibility.[41] Only a positive deposition, after a protest by the opponent, makes the witness liable to a δίκη ψευδομαρτυρίων.

The division of witnesses and assignment to one or the other of the opponents is the consequence of the primitive way of wording a deposition. It was customary for the litigant's party to formulate an assertion, usually introduced with the words: 'A.B. testifies that "he knows" that...' or 'A.B. testifies that "he was present" when...', and the witness – insofar as he had not sworn the opposite out of court – has nothing else to do except to confirm the statement by his presence in court. There is no narration by the witness himself, no cross examination, no questions by the court, not a single word spoken by the witness. All this is well known from literary sources since the beginning of the fourth century BC. From outside Athens there is epigraphical evidence that depositions are made in the same way.[42]

In view of this widespread practice it seems very strange that the Athenians until the beginning of the fourth century BC should have handled the matter in a completely different way. Before a statute was enacted according to which witnesses were to testify in a written document to be read out at court,[43] they allegedly had reported the facts in their own words and also answered questions.[44] All this is modern construction. The transition from oral to written testimony is nothing other than the transition from non-documented to documented testimony. The formula 'to know something' is the same before and after introduction of written evidence.[45] Written evidence is one of the bureaucratic measures that goes hand in hand with public *diaita*. Epigraphy is no help on this topic. I can refer only to one generally known source, *IG* II^2 1258 (324/3 BC): a cult group, the Eikadies, honour one of their members for having entered an ἐπίσκηψις, a formal protest against a witness at the end of a lawsuit.[46] This only confirms what we knew before from *Ath. Pol.* 68.4.

From the next chapter of *Ath. Pol.* (69) we can see what a judgement normally looked like. This is the last topic in my very general survey on inscriptions and legal procedure. The huge panels of jurors cannot declare a verdict in any other way except to approve or reject the charge. Like the citizen attending the assembly, and also like the witness, the man of the jury can only vote to a given text by 'yes' or 'no'. In this type of jurisdiction, contrary to international arbitration, there is no authority to formulate and to pronounce a verdict. The trial is over when the herald calls out the number of votes: καὶ ἀναγορεύει ὁ κῆρυξ τὸν ἀριθμὸν τῶν ψήφων... (*Ath. Pol.* 69.1). Consequently, the rare judgements published on stone quote only the charge, or a part of it, and note condemnation or acquittal.[47]

Two judgements from Athens also seem to refer to the number of votes

just as judgements from other poleis sometimes do. *IG* II² 1646a (= *IDélos* 104–22bα; 346/5 BC), very badly preserved, is to be excluded: because it is a judgement by default most probably the figure 444 does not mean votes but rather drachmai to be paid by the individual who had been sentenced.[48] The other one, *IG* II² 1641 B (= *IDélos* 104–126 C, middle of the fourth century BC), an acquittal, records 100 votes for the plaintiff, and 399 for the defendant. Summing up, 499 votes point to a *dikastērion* of 501 judges. Two votes are missing, difficult to explain. The reason for publishing the judgement was the acquittal, unquestionably in favour of the defendant. The reason for publishing the figures of the votes seems, however, to have been in favour of the plaintiff: 100 votes from a total of 499 are exactly more than one fifth. One vote less for the plaintiff, and he would have had to pay a fine of 1000 drachmai. The inscription, perhaps after arguing about the two missing votes at court, secures that the plaintiff will not be fined.[49]

After reviewing legal proceedings from the preliminary stage to the sentence I come to a conclusion. As I stressed at the beginning, epigraphy by itself offers only a poor chance for studying the Athenian law of procedure. Only details, certainly not without interest, result. On the other hand, for working on legal inscriptions, an idea of legal proceedings known from literary sources is absolutely necessary.[50]

Notes

[1] See Thür 1991a.

[2] See Wolff 1981, 606 (= 1982, 123 ff.).

[3] For additional sources on *basanos* from New Comedy, including recently published ones, see Thür 2001, 155–63.

[4] See Wolff 1971.

[5] Returning to this topic, nevertheless, in Thür 2003, 60–83.

[6] See Wolff 1981 (= 1982).

[7] Cf. Behrend 1970 and 1990.

[8] Both inscriptions are included, with full bibliography, in the Corpus-volume published recently by Klaus Hallof, *IG* XII 4/1 (nr. 169 'Krämerinschrift', 245/4 BC, and nr. 172 'Getreidegesetz', *c.* 250 BC).

[9] Behrend 1994, a preliminary version has been included in David Packard's CD-Rom *PHI* nr. 6; Thür / Taeuber *IPArk* 1994.

[10] See, meanwhile, the thesis Koch 1991 and his articles 1993a, b, 1996 [2000]; Palme 1987; Dreher 1989, 1990; (cf. also 1995); S. Koch 1989; Stumpf 1986; 1987, 1988, 1996; Thür 1985, 1987, 1990, 1991b, 1995, 2000, 2002b.

[11] In her book on international arbitration Harter-Uibopuu 1998 touches on some essential inscriptions of the Argolid.

[12] See *IPArk* pp. XI f.

[13] See *IPArk* p. XII.

[14] For Athens, at least. See my remarks 1997, 593 on Gagarin 1986.

[15] See *IPArk* p. XI.

[16] Koch 1991.

[17] See Thür 1989, 56 ff.; 1990, 150–2; 1991b, 57 ff.; 1996a, 71 with further references.

[18] See MacDowell 1963, 41 ff. and 56.

[19] In the fourth century BC the verb ἄραμενος (so the manuscripts) was obsolete and in a law quoted in Andoc. 1.94 replaced by ἐργασάμενος. Unnecessarily (see Thür 1990, 152), but widely accepted Dobree conjectured ἐργασάμενος in Ant. 6.16.

[20] For full arguments see Thür 1990, 152 n. 42.

[21] In Ant. 6 the claimant chose to sue for killing indirectly, the defendant denies both forms of acting (16); the 'αἴτιος' (responsible) of Draco, l. 12, is denied emphatically by the defendant in the following section (17).

[22] Harrison 1971, 99 ff.

[23] See Thür 1996a, 62–4.

[24] For details see Koch 1991, 49 ff. and 55.

[25] See the list Thür 1987, 472 ff. (cf. *BE* 1988, 400; *SEG* XXXVII 1987, 1782 bis); from outside Athens see *SEG* XXII 1967, 508 (Chios, 4th cent. BC, cf. Behrend 1990) and *IG* IX 1^2 4.794 (Corcyra, 2nd cent. BC, cf. Thür 2002a).

[26] See Habicht 1995, 229–34 (1997, 228–33).

[27] Arguing about some details Thür 2002c, 407.

[28] See Thür 1987, 473 for further references.

[29] *SEG* XIII 1956, 384, now *IG* IX 1^2 4.794.

[30] See Thür 2002a.

[31] See Roebuck 2001, 279–84.

[32] Cf. *IK* 28/1.82 l. 43/4 (Iasos, 3rd cent. BC?); see Thür 2002a, 333 f.

[33] See Harrison 1971, 66 n. 2.

[34] The argument in Dem. 21.83–6 is how badly the public arbitrator was treated by the opponent; the ἀπόφασις itself is of no importance.

[35] See Soritz-Hadler 1986, 106 ff.; however, Wallace 2001, 98: 'use of the *echinos* in *anakriseis* was intended only as a way of preserving documents vital to the case'. Adele Scafuro kindly pointed out to me that a *diaita* took place in an inheritance – *diadikasia* (Dem. 43.31, deposition). Was it a public or a private one? Another deposition (43) mentions only an *epidikasia*, in 48 f. the verb ἀνακρίνειν is used.

[36] See Harrison 1971, 21.

[37] In l. 26 the stone has: ἐσαγόντων εἰς τὸ δικαστήριον, in l. 33 εἰσαγ[αγέτω (Stroud) is to be corrected to εἰσαγ[γελλέτω, see Stumpf 1986, 38.

[38] See Thür 1985, 68.

[39] See my restorations 1985, 67 f.: in l. 35/6 the magistrate is plaintiff, in l. 31/2 he is presiding over the court.

[40] See Thür 1977, 316–18; 1996b on evidence by tortured slaves.

[41] For the recent debate on the 'purpose of witnesses' see Rubinstein 2000, 70 f.

with further references in note 138.

[42] See the *symbola* from Stymphalus *IPArk* 17.12, 43/44, 303–300 BC (with commentary p. 239) and the 'judgement of Cnidus' *IK* 41 (*IvKnidos* I, ed. Blümel 1992) 221.43–65, *c.* 300 BC (cf. *Syll.*[3] 953), where ll. 67–72, however, provide an *'anakrisis'* of the witnesses unknown in Athens.

[43] Probably at the very beginning of the 4th century BC, see Rubinstein 2000, 72.

[44] See, e.g., MacDowell 1978, 242. Using the formula 'to know' both sources quoted by Rubinstein 2000, 73 (Andoc. 1.69, Lys. 17.2) point to the way of testifying by mere confirmation; the problem is only whether a witness is allowed to speak as συνήγορος too.

[45] Cf. Ant. 1.6–8, see Thür 1995, 327–30.

[46] See Harrison 1971, 195.

[47] See Thür 1987 (cf. above, n. 25).

[48] See Stumpf 1987, 213–15.

[49] See Stumpf 1987, 213. In private discussion Stephen Todd pointed out that, counting the full figure of 501 judges present at court, the 100 votes for the plaintiff might not have been enough to avoid the fine. In his opinion, the inscription could have been the basis for further proceedings.

[50] I thank Adele Scafuro for discussion – and improving my English – during my stay at Brown University in September–October 2002.

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