GERHARD THÜR

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gerhard.thuer@oeaw.ac.at
http://www.oeaw.ac.at/antike/index.php?id=292

GERHARD THÜR (VIENNA)

LEGAL PROCEDURE IN THE GORTYN CODE RESPONSE TO MICHAEL GAGARIN

At present Michael Gagarin is the greatest authority on Cretan legal sources. Since his books on *Drakon* (1981) and *Early Greek Law* (1986) we have discussed together the meaning of *dikazein* in archaic Greek sources from Homer to Draco and Gortyn. The following few remarks will carry on our arguments. *Dikazein* is the key word in understanding ancient Greek legal procedure. Our late friend Mario Talamanca (1979) took part in the discussion as Eva Cantarella and Alberto Maffi still do. While friendship has always survived we all had and still have completely different points of view. Disregarding my view on Homer I will concentrate on Gortyn. Nevertheless, also on this topic I hold the idea of a unity of Greek law, a unity not of uniform legal institutions, but rather of different developments derived from consistent basic ideas, to speak with Hans Julius Wolff, the founder of our Symposion: "verschiedene Ausformungen einheitlicher Grundgedanken."

Our modern understanding of judge and judgment doesn't go back further than to Late Antiquity. Today judges are civil servants, who decide the facts at their own discretion, legally bound by law codes or precedents and embedded in a hierarchy of public jurisdiction. This legal culture comes from the Roman *cognitio extra ordinem* and is called "Beamtenjustiz." The *ordo iudiciorum* of the Roman republic and principate was different. In a first stage one of the supreme magistrates, the *praetor*, appointed the trial by admitting a *legis actio* or a *formula*, and then a board of laymen, *centumviri* or *recuperatores*, or a single layman, the *iudex privatus*. Only in the second stage the laymen gave decisions, strictly bound by the wordings proposed by the plaintiff and decreed by the magistrate. This system was also used in ancient Athens, except for the *iudex privatus*. Nowhere in Greece do we find an authority like a civil servant especially engaged in jurisdiction.

My first objection to Gagarin is that until now he never did answer my question, who the Gortynian *dikastas* was. Wolff thought of a *iudex privatus*, but was universally and rightly rejected. Gagarin seems to follow the general opinion the *dikastas* was a special authority like a modern judge [now closer explained in the written version of his paper]. But there are no parallels in any Greek source. Beyond Gortyn we have some inscriptions which tell us the *kosmoi*, the Cretan magistrates, also acted as *dikastai* (see *Nomima* 1.74, 81, 2.80). The magistrates' *dikazein* and *gignōskein*, everywhere else equal to *krinein*, is exactly what the Gortynian *dikastas* did. My conclusion is when the Law Code is speaking of a *dikastas* it means the

single *kosmos* responsible for the kind of cases in issue, the *ksenios kosmos* for example (XI 14-17) and the *dikastas* for *hetairiai* (see Gagarin, above p. 138f.). In the highly technical language of the Code *dikastas* seems to mean the "competent magistrate;" likewise in archaic Athens the competent *archon* is called *dikastēs* (Dem. 23.28, 41.71), which term later is reserved for the men sitting in the jury. Anyway, for Athens and Gortyn the translation "judge" in our technical sense is misleading. With the Code I prefer to stick to *dikastas* having in my mind the *kosmos* responsible for the case.

After these, I think, necessary preliminaries I come to Gagarin's main subject: the fundamental distinction between *dikadden* and *krinen*, rule and decide respectively. First, what was the normal method and what the exception, and second, could either procedure change into the other, as Maffi has argued.

First, before looking at default and exception we must clarify both methods. *Omnynta krinen porti ta moliomena* in XI 26-31 seems to be very simple: the *dikastas*, the magistrate, is allowed to decide the case at his own discretion. Normally the verb *omnynta* is overlooked. Aristotle mentions in his *Politics* (128b 9-12) that, formerly, some kings (comparable to magistrates) gave judgments under oath. In historical times only private arbitrators seem to have given their awards under oath (Dem. 52.30f.). In a society where oath swearing was taken seriously, as the Law Code presupposes, with his own free decision the *dikastas* took a great personal risk. To the parties, who had no appeal to a higher court, it was a sacral guarantee for correct decision. This method demonstrates on the one hand the progressive and on the other the archaic character of Gortynian litigation.

The oath of the Gortynian *dikastas* was not like the heliastic oath sworn by the Athenian jurymen at the beginning of each year. Later, they sat in the large law courts and cast their votes anonymously. In Gortyn it was a more serious matter: the oath was sworn by a magistrate every time when he passed a free decision in a lawsuit. So he took personal responsibility and, besides sacral punishment, with every biased judgment risked his social reputation.

Problematic is the meaning of *porti ta moliomena* in XI 30-31. I prefer Willet's translation "according to the pleas" to Gagarin's "with reference to the pleadings." Normally in Greek trials the court decision is on the claim and counterclaim. Here I follow Maffi. Even when the *dikastas* was allowed to decide at his own discretion he was restricted to the pleas, to a simple "yes" or "no". In a general rule on trial decision this is in no way superfluous to mention. The phrase has nothing to do with evidence, as Gagarin holds (above, p. 137): "...this would mean that he should consider the evidence on both sides, including witnesses, and any arguments that either side might present." Since both the pleas and the pleadings were oral it is difficult to distinguish the meanings of *molen*. However, explaining the phrase as a provision on free assessment of proofs seems to me thinking in a too modern way.

Still dealing with my first point to clarify both methods of rendering a decision I come to the most controversial topic, the meaning of *dikadden*. It obviously does not

mean *dikazein* in the sense of what the Athenian jurymen did, rendering decisions by secretly voting. We all agree that in 5th century Gortyn no law courts existed. However, one can compare the *dikadden* of the Gortynian *kosmos* with the *dikazein* of the Athenian *basileis* in Draco's law on homicide. In my—not uncontested—opinion the *basileis* formulated the *diōmosiai*, the oaths to be sworn initially by either litigant before the 51 *ephetai* voted on the case (*diagnōnai*). Also a board of *ephetai* did not exist in Gortyn. But I think we can, how controversial the issue might be, compare the Gortynian *dikadden* with the *dikazein* decree of the Athenian *basileis*. Cautiously Gagarin now translates *dikadden* simply with "rule" and I agree with him. Inconsistently and without sufficient explanation in his new book *Writing* (2008, 96) he still translates the *dikazein* of the Athenian *basileis* with "judge" in contrast to "decide" for *diagnonai*. I think "rule" is correct for *dikazein* in either case.

A Greek magistrate usually did not render verdicts, he was competent in ruling. Also in the Gortynian Code there are several examples of ruling, *dikadden*, beyond trial decisions: in V 31 the *dikastas* is not yet deciding an action for partition; he just provisionally assigns the estate to one of the claimants until the property will be divided. Also the heiress (VIII 40-7) is assigned to the relative who refuses to marry her not by verdict, but by a simple order. These cases are parallel to the *epidikasia* decrees of the Athenian *archon* in inheritance and family issues. Also the *dikaksato lagasai* in I 6 is a simple order, and everywhere in Greece the word for a magistrate's imposing a fine is *katadikazein*. All these passages are additional arguments that the Gortynian *dikastas* belongs among the magistrates. He is the *kosmos* competent for the matter in issue.

But what did the *dikadden* of the *kosmos/dikastas* in a lawsuit look like? The general provision, XI 26-31, directs him—I quote Gagarin's translation (above, p. 128): "to rule (*dikadden*) according to witnesses or an oath of denial." The meaning of *kata* (according) is problematic. Did the *dikastas* rule or decide before or after the swearing ceremony? Gagarin correctly holds the oath follows the ruling and whether sworn or not, the defendant automatically won or lost his case. By *dikadden* the *dikastas* imposed the oath upon a litigant. The case of the divorced woman charged with having taken away her ex-husband's property (II 36-45) shows that the swearing ceremony took place after the ruling. After swearing, no further *dikadden* was necessary. And if the woman refused to swear within a certain time (XI 46-55) she lost the case and, pace Maffi, no *krinen* decision followed. Fortunately the provisions on the divorced women are detailed enough. Other provisions on decisive oaths can be explained only by conjecture, as Gagarin correctly did.

But I completely disagree with Gagarin on the meaning of the first phrase in XI 26-28, *kata maityrans...dikadden*. Here we have the same methodological problem. In the code there are a many short references in technical language, but only one provision goes into details, IX 24-40. I concentrate on lines 34-40: first, the witnesses had to "speak" (*apoponnionton*), and after they had "spoken" (*profeiponti*)

the *dikastas* had to rule that the plaintiff and the witnesses swear. The crucial word is *apoponen*, in the Code it is only used for witnesses. Gagarin translates it with "testify." He holds (above, p. 134): "This unique double requirement—the witnesses testify and swear—may have been included because in this case one of the original parties has died and so the legislator wished to impose an extra degree of certainty on the ruling."

I think the requirement is neither double nor unique. Fortunately, again we have some details not mentioned in other provisions, which allow us to conjecture. In my opinion *apoponen* doesn't mean to testify. Rather the witness declared before the *dikastas* that he is ready to testify. Then the *dikastas* had to rule that the witness should swear the decisive oath. This is the procedure behind the concise technical phrase *dikadden kata maityrans*. IX 24-40 provides neither a double requirement nor an extra degree of certainty. It sheds light on the normal procedure of witness testimony of Gortyn. In X 34-40 not the method of evidence is unique, but rather the liability of the heirs of a deceased debtor reduced to the simple amount (line 40).

With these conjectures the general provision in XI 26-31 shows a completely consistent structure: when the Code provides decisions by ruling, the magistrates were bound to impose decisive oaths upon witnesses and/or litigants, in all other cases the magistrates were allowed or sometimes—when explicitly provided—obliged, to take the oaths themselves. In any case oaths were necessary, but an oath sworn by different persons: by the witness (to be conjectured), by a litigant (*apomoton*), or by the magistrate (*omnynta*). The sources from the 6th century are too fragmentary to allow even conjectures on how *dikazein* exactly looked like. Gagarin's question whether automatic procedures or free decision making was the normal method of judicial decision in the Gortyn Law Code seems to be a more or less apparent one.

BIBLIOGRAPHICAL NOTE

For my full arguments and references see my contribution "Die Einheit des 'Griechischen Rechts.' Gedanken zum Prozessrecht in den griechischen Poleis", *Dike* 9, 2006, 23-62 and my Review of Michael Gagarin, *Writing Greek Law* (Cambridge 2008), *Zeitschrift der Savigny Stiftung, Rom. Abt.* 126, 2009, 482-94.