

KAREN RØRBY KRISTENSEN (ODENSE)

RESPONSE TO RAYMOND WESTBROOK

For long, the rather enigmatic καὶ ἐάν, the initial words of Drakon's law on unintentional homicide have troubled scholars. Initially, this was translated into 'and if'. Since scholars were unable to explain the absence of provisions relating to intentional homicide, a different translation was proposed. Many scholars now subscribe to the interpretation of these modest words as 'even if' and thus endow ἐάν with a concessive force. However, Professor Westbrook has argued persuasively that this does not provide a satisfying explanation, either, on the grounds that such an extreme ellipsis is unlikely in any law, and, further, that intentional homicide is unlikely to have been punished with exile alone.¹ However, if a court could pass a verdict of exile, I suppose that the same court could pass one of death, too. Evidently, at the time when the original law was passed, in the late seventh century B.C., killings were no longer regarded as a matter to be settled in disputes that involved solely two or more families. Moreover, there are no obvious reasons why capital punishment would not have been an option in the later Archaic Age as it certainly was in the Classical period: clemency, compassion and Human Rights were no issues in antiquity.

Hence, I am fully inclined to agree with Westbrook's doubts relating to the translation of καὶ ἐάν as 'even if' in the first line of Drakon's homicide law, and thus favour the plain and simple translation 'and if'.

Professor Westbrook suggests that we may find an alternative explanation for καὶ ἐάν if we look at the Near-Eastern legal codes. Whilst I am no expert in Near-Eastern law, I have chosen to approach the question of legal codes as a literary legal genre from a Cretan point of view. Crete is the place where we supposedly find legal codes in the Greek sphere. The first question I should like to address is this: is the law code really a single legal genre? Secondly, I shall repeat a question recently raised by K.-J. Hölkamp: 'What's in a code?'² I believe different 'codes' will produce different answers to this question. Professor Westbrook holds that we need to look for the underlying legal principles and disregard differences caused by time and space. In the past half a century or so, we have been troubled by the discussions

¹ This is the implication of the interpretation of καὶ ἐάν, as 'even if', that is to say: 'even if a man not intentionally kills another, he is exiled' (translation M. Gagarin *Drakon and early Athenian Homicide Law* New Haven and London 1981: xvi).

² K.-J. Hölkamp "What's in a code? Solon's laws between complexity, compilation and contingency", *Hermes* 133, 2005: 280-293.

on the unity of Greek law and on this question scholars remain divided. Recently, some bridge building has taken place, suggesting a unity of *procedural* Greek law while leaving substantive law to all its diversity.³ However, Professor Westbrook's proposition means that we should be further troubled by the unity of *law* in general!

We learned above that 'the characteristic that mark these sources [i.e. the legal codes] as belonging to a single genre, ... lie in both their form and content'. Their form, that is the casuistic conditional sentence, a protasis succeeded by an apodosis, is thus a feature of the law code.⁴ Moreover, we are told that 'the law codes are not a concatenation of individual laws or even associated laws.'

Archaic Greek legislation does indeed consist of casuistic formulas, though sometimes in very elaborate sequences. Likewise, in many cases the content of individual pieces of legislation concerns aspects of every-day life. Similarity in content does not prove much, though. For example adultery may have occurred everywhere and therefore hardly proves that a universal legal principle did apply, because, as Professor Westbrook argues, 'some discretion was allowed to the husband'. In fact, according to the Law Code of Gortyn the husband was to receive a fine. Only if the relatives of the adulterer failed to pay the fine or ransom would the husband be allowed to do whatever he wanted to the adulterer.⁵ The whole situation aims at an out-of-court settlement and the removal of any future claims. In case of adultery the husband would always be the individual most directly affected: the interest of the wife's family and the family of the adulterer would be of only secondary importance.

I shall now proceed to discuss Professor Westbrook's 'goring ox'. I find it hard to believe that his test case proves more than that:

1. Goring oxen were a problem
2. Oxen had long horns in these societies
3. Greece apparently did not suffer from goring oxen.

We do, nonetheless, have evidence for savage dogs (in Gortyn), although disputes arising in connection with injuries caused by dogs remained an issue that concerned only the owner of the dog and the individual who had sustained damage.

We may go on to pose another question. When do individual laws become legal codes? I cannot really answer this question on the basis of the Cretan material. However, Crete proves excellent as an example of the nature of archaic legislation and how it evolved over time. Genuine archaic laws are known in substantial numbers from Crete; we have some 225 pieces of legislation, including small fragments as well as fully preserved legal texts, most notably the so-called Law

³ See for example M. Gagarin "The Unity of Greek Law" in M. Gagarin & D. Cohen (eds.) *The Cambridge Companion to Ancient Greek Law* Cambridge 2005: 29-40.

⁴ This is also the case for the casuistic formula without the conditional sentence proper: 'he who does this or that, shall pay so and so'. So is the case also in Exodus cited above in Professor Westbrook's paper: 'He who strikes a man and kills him shall be put to death'

⁵ See *IC IV 72 II.20-24*, and further in *II.28-36*.

Code of Gortyn. But despite the survival of this extraordinary inscription, the organisation of legislation into legal codes is not a prominent feature of Archaic Cretan law! On the contrary, nearly two centuries were to pass before the Cretans began to compile and organise legislation to the extent attested in the Law Code of Gortyn. Sections of this inscription certainly have been the object of theoretical considerations, but even these are few. These considerations seem, however, to have favoured the process of organisation, rather than that of ‘paradigmatic foundation for further legal discussions’. The first column of the Code constitutes such a case: on the basis of the occurrence of a *vacat*, we can identify several closely related pieces of legislation, which at some point were compiled so as to form an entity.⁶ We may subdivide the text of this column into six sections. The first deals with illegal seizure of the person who was the object of a dispute (I.2-12), followed by a singleton casuistic conditional sentence that appears to be an amendment of the preceding law (I.12-14). The following section (I.15-36) no longer concerns seizure, but the actual substance giving rise to the process of litigation. The evident connection is the ban against seizure of the person whose status was the issue in the following law. Upon this follows a law prescribing the procedure to be followed if closure of the matter is prevented (for example if the disputed man took sanctuary in a temple, I. 36-49). Three short additions close the first law of the Law Code (I.49-51, I.51-56, I.56-II.2). The last of these provisions refers back to the initial piece on seizure by stating whom one could legally seize.

We can thus identify two different processes: first, an attempt to incorporate and organise legislation relating to the same situation, and, second, the continuous process of enacting supplementary additions to the original law, which in this case was also brought together with another law of related substance. Although the result is impressive, the first law of the Law Code remains a compilation of related legislation. Eventually the Law Code was organised into a shape where the individual pieces form a coherent entity. Careful analysis of the Law Code suggests that it was a compilation undertaken over some length of time during which legislation was not only compiled but also subjected to reorganisation of the individual laws, and to the addition of further supplementary enactments. In that respect, the Law Code is not a code; rather it is a thematically coherent inscription, which even suffers from a number of shortcomings. Professor Westbrook states that the casuistic method precludes comprehensiveness. The implication of this contention is that the Law Code of Gortyn is not a code. The case to which Westbrook refers demonstrates exactly that: the inheritance law was designed to

⁶ See in particular M. Gagarin “The Organisation of the Gortyn Law Code” *Greek Roman and Byzantine Studies* 23 1982: 129-146 (especially 138-140), A. Maffi “Processo di status e rivendicazione in proprietà nell Codice di Gortyna: ‘Diadikasia’ o azione delittuale?” *Dike* 5, 2002: 111-134, discussing the suggestions of Thür in *Symposion XII* (1999), and K.R. Kristensen “Codification, Tradition, and Innovation in the Law Code of Gortyn” *Dike* 7, 2004: 135-168.

cover all possible cases.⁷ However, the fourth and fifth groups of heirs were so loosely defined that this reflects a way of thinking, more than it reflects an attempt to fill all possible gaps.

Even if I could be persuaded that the Law Code is indeed a legal code, which I cannot, I find it troubling to see how this could be part of a tradition. A considerable number of inscriptions, some of them admittedly quite fragmentary, were scattered all over the Pythios temple in Gortyn and are all dated within a period of some seventy-five years.⁸ They do, nonetheless, contain the casuistic formula. They appear to be dealing with family matters, political matters, sacred matters and so on, and even possible injuries to individuals and property. The famous eight laws from Dreros,⁹ more or less the contemporaries of Drakon's homicide law, were not arranged in a form even remotely resembling a continuous code; rather, the text consists of eight single enactments, still in the form of the casuistic formula. At least four dozens of legal inscriptions from Crete antedate the so-called codes and were all separate single legal enactments published at random on the walls of the temples in for example Dreros, Lyttos, Gortyn and Axos.¹⁰ The so-called codes do not antedate the late sixth or perhaps even the fifth century B.C. By this point in time (that is, the late sixth century B.C.), the masons had begun to cut their laws in continuous boustrophedon in one or more columns. Still, there are also a number of cases where individual pieces of legislation that were unrelated to one another were listed in the same column.¹¹

⁷ See *IC IV 72 V.5-28*.

⁸ *IC IV 1-27, 29-38, and 40, c. 600-525 B.C.*, although *IC IV 30* could be dated even lower 500 B.C. (?).

⁹ P. Demargne & H. van Effenterre *Bulletin de correspondance hellénique* 61 1937: 333-348 (republished in *Recueil d'inscriptions politiques et juridiques del'archaïsme grec I Rome* 1994 I no. 81), H. van Effenterre "Une bilingue étéocrétoise?" *Revue de philologie, de littérature et d'histoire ancienne* 3, 1946: 131-138, and H. van Effenterre "Inscriptions archaïques crétoises" *Bulletin de correspondance hellénique* 1946: 588-606 no. 1-6 (except for no. 6, they are republished in *Nomima. Recueil d'inscriptions politiques et juridiques del'archaïsme grec I Rome* 1994 nos. 64, 68 (see also *Nomima. Recueil d'inscriptions politiques et juridiques del'archaïsme grec II Rome* 1995 II no. 89), 27, 66 and *Nomima II* no. 10).

¹⁰ In addition to the eight laws from Dreros, there are the Gortynian inscriptions from the Pythion *IC IV 1-27, 29-38, and 40*. Amongst these there are a number fragments that may not belong with the Pythion, though P. Perlman ("Gortyn. The first seven hundred years. Part II. The laws from the Temple of Apollo Pythios" in Th.H. Nielsen (ed.) *Even More Studies in the Ancient Greek Polis*, 6, 2002: 187-227) has recently argued that they all do. Further texts of this type are the 'main code' of Axos (see below), as well as H. & M. van Effenterre "Nouvelles lois archaïques de Lyttos" *Bulletin de correspondance hellénique* 1985: 158-162 (= H. van Effenterre & F. Ruzé *Nomima. Recueil d'inscriptions politiques et juridiques del'archaïsme grec I Rome* 1994, no.12).

¹¹ See for example *IC IV 43AabBab*, which comprises four non-related and individual laws, and *IC I xviii 5* from Lyttos where the upper part beyond the punctuation mark in line

Furthermore, the number of inscriptions that could reasonably be designated as ‘codes’ are desperately few: the ‘main code’ of Axos consists of a cluster of eight inscriptions,¹² which *may* have shared a common content and *may* have been part of the same wall. In addition to the famous Code, no more than two inscriptions could be called codes, and they too are from Gortyn.¹³ The origin of the so-called legal codes of Crete appears to be the result of a longer development within an internal Greek tradition. The casuistic formula is a feature that is a characteristic of codes, at least as much as a characteristic of individual pieces of legislation. It even extends beyond Near-Eastern and Mediterranean law and legislation: it is also a feature of orally transmitted Icelandic laws, of the laws of Geágás of the twelfth and thirteenth centuries, as well as of the Mediaeval Danish landscape laws.

Still, I agree with Professor Westbrook’s objections to the widespread translation of καὶ ἐῴμ in the first line of Drakon’s law, though I do not believe we can make out the content of the preceding law. Compilations of Cretan legislation are unpredictable: sometimes the sequences of individual stipulations within them are well considered; sometimes they are not. We do not have evidence that the case would have been any different at Athens in the late seventh century B.C.

seven seems to deal with inheritance (line 3 σὺν τοῖ ἀδε[λπιῶι]). The lower part is apparently on theft (line 15 συλῆν ‘rob’).

¹² See *IC* II v 1-7, and 11, c. 525-500 B.C.

¹³ That is, *IC* IV 41 I-VII as well as *IC* IV 75A-D where pledge apparently is the issue in all four columns.

