The First Law of the Gortyn Code Revisited

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THE FIRST LAW ON THE Great Code[1] at Gortyn (*I.Cret.* IV 72.1.2f) has traditionally been understood to mean "whosoever may be likely to contend [in court] about a free man or a slave is not to seize him before trial" (ὅς κ' ἐλευθέροι ἢ δόλοι μέλλει ἀνπιμολὲν, πρὸ δίκας μὲ ἄγεν);[2] and the first column as a whole (1.2–2.2), which elaborates the legal rules for such disputes, has been understood to prohibit the seizure without court approval of persons over whom one claims authority.[3] In 1982 Haim Rosén argued that the first law should rather be understood to mean "quiconque va aller à un procès *contre* un homme libre ou un esclave, ne doit pas enlever avant le procès";[4] in his view, in other words, the law prohibits seizure of an opposing litigant before trial and the column can be understood as a general prohibition of seizure in the process of self-help. In 1988 I challenged Rosén's view and reasserted the traditional view that the first column prohibits self-help only in

[1] I use this traditional appellation in full awareness that, as many have noted, it is not a 'code' in the strict sense: see M. Gagarin, "The Organization of the Gortyn Law Code," *GRBS* 23 (1982) 129–46 at 129.

[2] The translation is by R. F. Willetts, *The Law Code of Gortyn* (=*Kadmos* Suppl. 1 [Berlin 1967]).

[3] As will become clear, I use the expression "claims authority" to include both claims of ownership of a slave and claims of temporary power over someone in bondage.

[4] "Questions d'interpretation de textes juridiques grecs de la plus ancienne époque," *Symposion 1977* (=*Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte* 3 [Cologne 1982]) 9–32, esp. 9–18; Rosén's translation at 11. Rosén's views were endorsed by H. van Effenterre ("Le droit et la langue à propos du code de Gortyne," *Symposion 1979* [=*Akten* 4 (Cologne 1983)] 115–28), but he has more recently indicated (in conversation) that he has changed his mind.

the case of seizure of persons whose status is in dispute.[5] Now Raphael Sealey, while apparently accepting my philological arguments against Rosén, has nonetheless revived Rosén's view, concluding that the first column is "a general prohibition against self-help before recourse to forensic justice."[6] Sealey argues that "it is easy to see how a dispute might arise about a slave ... but it is not clear how a dispute could arise *in the same sense* about a free man" (my italics). As "a free man is not likely[7] to be the thing in dispute," the law cannot prohibit only the seizure of a disputed party, but must, at least in the case of a free man, prohibit seizure of one's adversary. Thus, Sealey concludes, it provides a broad prohibition of seizure and its location at the beginning of the inscription indicates the importance attached to it by whoever determined the arrangement of provisions in the Great Code.

The importance of this issue for understanding not only early Greek legal procedure but also social and economic conditions at Gortyn requires examination of Sealey's argument in some detail. Closer examination will show that his interpretation is highly improbable, if not impossible, and that there is good reason to adhere to the traditional view. I shall conclude with some brief remarks about wealth and legislation at Gortyn.

(1) Rosén's case hinged on reinterpreting the datives in the first sentence as indicating the person *against whom* one is contesting. I argued primarily from other uses of ἀνπιμολέν and related words that the traditional understanding of the datives as the person *about whom* one is contesting was correct. Sealey (39 n.40) calls my philological arguments "cogent" and accepts it in the case of slaves; but as he cannot see how a dispute could arise about a free man, he suggests that in this case the dative represents the opposing litigant. In other words, he apparently accepts my philological arguments against Rosén for one of the datives (δόλοι), and Rosén's philological arguments for the other (ἐλευθέροι), without giving any indication how he would reconcile the two. Sealey's solution, moreover, would require the paired datives ἐλευθέροι ἒ δόλοι

[5] "The First Law of the Gortyn Code," *GRBS* 29 (1988) 335–43; other objections in A. Maffi, *Studi di epigrafia giuridica greca* (Milan 1983) 3–112.

[6] *The Justice of the Greeks* (Ann Arbor 1994: hereafter 'Sealey') 38–41.

[7] Sealey does not attempt to justify the step from "it is not clear how" to "is not likely."

to have different constructions in the sentence ("whoever contends *against* a free man or *about* a slave is not to seize him before trial"), although the text provides not the slightest hint of this difference.

Even if Rosén's interpretation were possible, it is highly improbable that these two closely parallel words could be construed in such different senses; on Sealey's view, moreover, the law would regulate two different matters, the seizure of a slave claimed as property by one of the litigants and the seizure of one's adversary, although, again, there is not the slightest hint of this degree of legal complexity in the text. Thus, in addition to overcoming the philological objections raised against Rosén, Sealey needs to explain how a reader could be expected to understand the dual construction he proposes without any indication in the text. In fact Sealey's concern here is unwarranted, for, as I shall spell out below (#4), it is quite possible that a dispute might arise about a free man.

(2) Sealey also discusses the unstated object of ἄγεν in the apodosis: "he is not to seize [him] before trial." The traditional view is that a man must not seize the person he claims before a trial. Sealey argues that this interpretation works for a slave but not for a free man, who would not be the object of a dispute; with respect to free men, therefore, the law must prohibit seizure of an adversary. Sealey does not explain, however, how or why someone would seize his adversary when he was about to go to trial (μέλλει ἀνπιμολέν) or how he could go to trial after seizing his adversary; and yet the provisions that follow clearly envision a trial. If A has a dispute with B concerning C, A can seize C before the trial and there will still be a trial to decide if his possession is legal; this is a limited form of self-help. But if A seizes B before the trial, this more extreme form of self-help is fundamentally incompatible with legal proceedings; indeed, even according to Sealey's model of "controlled self-help,"[8] legal procedure eliminated this kind of self-help. It thus seems very unlikely that seizure of an adversary would be followed by a dispute in court, and it is impossible to imagine a law being written to provide for such cases.

[8] Sealey's view of the evolution of legal procedure in Greece "from uncontrolled self-help to controlled self-help" (see esp. 91–111) is based on H. J. Wolff, "The Origin of Judicial Litigation among the Greeks," *Traditio* 4 (1946) 31–87.

(3) The opening sentence is followed by provisions concerning penalties for illegal seizure (1.3–12) and a rule concerning the disposition of the case if the accused denies seizure (1.12ff). These are followed by a pair of provisons that clarify the meaning of the first law: "if one [litigant] pleads he is a free man and the other that he is a slave, those who testify[9] he is free are to prevail; but if they contest about a slave, each claiming he is his" (αἰ δέ κα μολῆι ὁ μὲν ἐλεύθερον ὁ δ[ὲ δ]ῶλον, κάρτονανς ἔμεν [ὅτερο]ί κ' ἐλεύθερον ἀποπονίοντι. αἰ δέ κ' ἀνπὶ δόλοι μολίοντι πονίοντες ϝὸν ϝεκάτερος ἔμεν, 1.15–20), the judge must decide according to certain rules (1.20–24). Most of the rest of the column (1.24–51) lays out regulations that apply after someone has been convicted of illegal seizure.

The sentences just quoted clarify the litigation mentioned in the first law ("whoever is going to contend about a free man or a slave"): the first explains litigation about a free man, while the second explains litigation about a slave. In each protasis, the litigants are designated in the nominative (ὁ μὲν ... ὁ δέ, ϝεκάτερος) but the objects of contention are in the accusative (ἐλεύθερον ... δῶλον, ϝὸν). The two possibilities are clear: either A and B dispute C's status, one claiming he is free, the other that he is a slave (his slave presumably), or A and B dispute which of the two owns C, who is agreed by both to be a slave. This shows that the Rosén/Sealey hypothesis—that the first law might envision a dispute *against* a free man—must be wrong, for in both cases the two litigants dispute the status of a third person. The status of a litigant is never at issue.

(4) The provisions in 1.15–20 also explain how a dispute could arise *about* a free man. A dispute about a slave presents no difficulty; two parties contest ownership, each claiming the slave is his (1.18ff). A dispute about a free man is more complex, but 1.15f indicates that such a dispute would arise when one party claims the man is free, the other that he is a slave. This could happen in several ways; let me suggest two: (a) one man claims that another has, among the slaves in his possession, a

[9] The expression "those who testify" must designate witnesses at the trial, for the verb ἀποπονίο is always used of the testimony of witnesses, as opposed to μολέν, which is used of the litigants' pleas: see M. Gagarin, "The Function of Witnesses at Gortyn," *Symposion 1985* (=*Akten* 6 [Cologne 1989]) 29–54, esp. nn.20, 36.

person who in fact is free; perhaps the man was illegally enslaved, or perhaps he has worked off his debt-bondage; (b) a man sees a person living as a free man whom he thinks is actually his slave, perhaps a slave of his who has escaped; another person (presumably a free men), however, perhaps a friend or relative of the person claimed, responds that the disputed person is in fact free. Status was very difficult to prove in ancient Greece, where the lack of documentation meant that one had to rely primarily on witnesses. The Athenian case of Pancleon, discussed at Lys. 23, illustrates some of the difficulties (see also Dem. 59), and even if legal rules and social conditions at Gortyn were quite different from Athens, it is likely that similar situations could arise. In fact, the ability of Gortynians legally to pledge themselves as surety for debt probably made disputes about the status of 'free men', *i.e.*, men whom someone claimed were free, more common there. It would be normal for the abbreviated language of a law to refer to a dispute in which one litigant claimed a man was his slave while another claimed he was free by saying "if someone disputes about a free man." Obviously another party has denied that the person in dispute is free; otherwise there would be no dispute. The same explanation holds, moreover, for the other provisions on the first column referring to a free man as the object of a dispute: fines of "ten staters for a free man" (1.4f) are fines for seizure in cases where the one party claims the man is free, *etc.*[10] A dispute about a free man in this sense may not be about status precisely "in the same sense" as a dispute about a slave, but the two senses are surely close enough that the lawgiver would reasonably treat the two in a single provision.

(5) Sealey argues that the last provision in this section, "there shall be no liability for someone seizing a person convicted [in court] or who is pledged" (τὸν δὲ νενικαμένον καὶ τὸν κατακείμενον ἄγοντι ἄπατον ἔμεν, 1.56–2.2), is consistent with his view that the first column provides a general prohibition against seizure before a trial, for it allows self-help in the enforcement of a judgment after a trial. He takes τὸν νενικαμένον to mean anyone convicted of any offense and leaves τὸν κατακείμενον unexplained. But as τὸν κατακείμενον designates one who has

[10] Of course in the provisions referring to procedure after the verdict, "free man" will designate one whose status has been declared to be free (*e.g.* 1.25f).

pledged himself to another as surety for debt[11]—and the law surely implies that it is the creditor who is allowed to seize him—it is reasonable suppose that τὸν νενικαμένον is also limited to a verdict that puts the convicted person under an obligation, presumably for debt.[12] There is no reason to take this provision as authorizing self-help generally in the enforcement of verdicts.

If this final provision applies only to the seizure of persons convicted or pledged for debt, then it fits well with the traditional interpretation of 1.2f, for it provides two exceptions to the general prohibition of seizure of "free men." The exceptions apply to cases where one man, previously free, has legally come into another man's power (probably because of debt); but they do not invalidate the general prohibition against seizing persons whose status is a matter of dispute.

(6) The penultimate provision in this section also clearly supports the traditional interpretation of 1.2f: "if someone-who-is-*kosmos* [nominative participle] seizes (a person), or another seizes (a person) belonging-to-someone-who-is-*kosmos* [genitive participle], they are to contend after he steps down, and if there is a conviction, he shall pay the fine that is written from the day he made the seizure" (αἰ δέ κα κοσ[μ]ίον ἄγει ἢ κοσμίοντος ἄλλος, ἢ κ' ἀποστᾶι, μολέν, καΐ κα νικαθεῖι, κατιστάμεν ἀπ[ὸ ἃ]ς [ἀμέρα]ς ἄγαγε τὰ ἐγραμένα, 1.51–55). This law embodies the principle that while in office the *kosmos* should not be involved in litigation, but that when he leaves office the litigation will proceed and any penalty he owes will be calculated from the time of the original offense.[13] The provision clearly envisages the *kosmos* being a party to the suit, either because he seizes someone or because someone else seizes a person belonging to him. There is no provision, however, for a

[11] Oddly, Sealey says (40) that "little is known about Gortynian procedures of surety" (when a man has pledged himself to another) and implies that we know more about a defeated litigant. In fact, we know more about the person who pledges himself (τὸν κατακείμενον); see *I.Cret.* IV 41 cols. 5–6; R. F. Willetts, *Aristocratic Society in Ancient Crete* (London 1955) 54ff.

[12] Such is the clear sense of νενικαμένος at 11.32 and probably also in 9.25; see Willetts (*supra* n.2) *ad* 1.56–2.2.

[13] The same principle is currently being tested in the United States courts in *Jones vs Clinton.* At this point the District Court has granted the President "temporary immunity" and has put the case on hold until he leaves office; see 869 *Federal Supplement* 690 (E.D. Ark. 1994).

kosmos being seized by a legal adversary. To be sure, the first condition mentioned, "if someone-who-is-*kosmos* seizes (a person)," does not preclude the possibility that a *kosmos* might seize his adversary, but if this were the lawgiver's concern, one would surely expect him to allow for the reverse of it, "if another seizes someone-who-is-*kosmos*" (expressed by an accusative participle). Clearly the lawgiver's concern is the seizure of a third party by one litigant in a dispute with another.

(7) Finally, even if slaves were allowed to litigate at Gortyn,[14] if the lawgiver had wished to write a "general prohibition against self-help before recourse to forensic justice," he would not have needed to specify the status of the adversary who was to be seized. Elsewhere in the Code a person's free or slave status is mentioned only when it is legally significant, usually because the treatment of a situation is different for persons of different status (as the penalties are different for seizure of free men and slaves), or because there is a clear need to specify a person's status. The two statuses are nowhere else conjoined as here ("free man or slave") except once in the discussion of mixed marriages (7.4ff), where a law provides for a woman having "free and slave children" (from different fathers). Thus, we would expect the legislator to have a good reason for specifying the two statuses in 1.2, and the reason is surely that the issue in dispute is precisely the status of the person seized. The specific question is slightly different in each case: in the case of a slave, whose is he? in the case of a free man, is he really free or is he someone's slave?[15] But in both cases the law prohibits seizure of persons whose status is in dispute and thus the text refers specifically to their status.

Although the Gortyn code is traditionally dated to the middle of the fifth century,[16] it probably represents social and econ-

[14] Sealey (39) disputes my contention that a slave would not be an adversary in a dispute. Neither the Code nor the other Gortyn laws is explicit on this matter, and so he might be right, but I still think it is more likely that persons of slave status did not engage in litigation themselves: see Gagarin (*supra* n.5) 341f.

[15] The difference is spelled out at 1.15ff (*supra* #3).

[16] L. H. Jeffery, *The Local Scripts of Archaic Greece* (Oxford 1961) 313. Sealey (38) claims that "dates in the sixth and fourth century cannot be excluded"; this may be true, but a fifth-century date is by far the most likely.

omic conditions of an earlier period. The provisions on the Code may have been enacted earlier than the time when they were inscribed (or reinscribed) on the Code, or may represent the customary rules of an earlier period. It seems clear, however, that pledging oneself as surety for debt was still allowed in fifth-century Gortyn, as it was in pre-Solonian Athens, and that in some cases temporary (or perhaps not so temporary) servitude resulted (Willets [*supra* n.11] 36). One could also be sentenced by a judge to servitude for debt, and we can assume that this bondage was also temporary and would end when the debt was worked off or otherwise paid. Gortynian society therefore included not only slaves (*douloi*) and serfs (*woikees*) but free men (*eleutheroi*) who were temporarily in bondage. Although the problem of free men who were now 'slaves' apparently troubled Gortyn, it did not act, as Solon had, to make such debt-bondage illegal.

The Solonian approach certainly favored the poor, who were or might become enslaved, and was probably disliked by the rich;[17] at Gortyn the rules were more favorable to creditors. First, although the restriction of self-help would prevent anyone who felt that a free man was being illegally detained from taking matters into his own hands, the one exception to this restriction (1.56–2.2) would allow anyone to seize a free man who had pledged himself or had been convicted. If "possession is eleven points of the law, and they say there are but twelve," this exception gave a large advantage to creditors, who could seize a debtor at will, whereas the debtor's supporters would have to go to court to obtain his release. Once in court, however, the debtor had a significant advantage, for the party whose witnesses testified the man was free prevailed in a trial (1.16ff). The legislation thus puts a heavy burden on the formal witnessing[18] of procedures that might lead to debt-bondage, for one would need a witness to free a man illegally enslaved. But if these procedures are adequately witnessed, then the Gortynian legislation seems to protect the rights of both sides. In this it appears to strike more of a middle ground between rich and poor than Solon's cancellation of debts and elimination of debt-bondage.

[17] The nature, intent, and actual economic effect of Solon's legislation are all matters of controversy beyond the scope of this paper. For a balanced summary of views see A. Andrewes, *CAH*[2] III.3 (1982) 377–82.

[18] On formal and accidental witnessing see Gagarin (*supra* n.9).

In sum, the elaboration of an entire column of laws on this issue indicates that disputes over status were a significant concern at Gortyn. The laws that sought to alleviate these concerns, whether a creation of the fifth-century or of earlier custom or legislation, seem intended to balance the rights of rich and poor and to increase reliance on the legal system, while preserving self-help in certain cases. The delicacy of this middle-ground approach is strong evidence of the kind of guiding purpose behind the legislation that Sealey argues for on other grounds, but in my view this suggests that the provisions were probably enacted in the fifth century rather than being taken over from customary rules. The same conclusion is suggested by the very limited rôle granted to self-help. We are far beyond the point where seizure of one's adversary was a matter of concern; and we should not try to import this archaic, extra-legal procedure into the rather sophisticated code we can read today.

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