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SIMULATION OF ATHENIAN COURT

A New Teaching Method

Many European countries have been developing new university curricula over the last few years, curricula in which Legal History and Roman Law have not been favored subjects. Even in so traditional and prestigious university centers like most of those in Germany and Austria are, these disciplines have become less important. In some places they have been reduced from obligatory subject to optional ones or they have completely lost their independence, being combined with other disciplines (*e.g.* Roman Law with Civil Law). Ancient Greek law in most places is just a wishful thinking idea, no more than a dream of the past. Nevertheless, a number of universities in Italy, Spain, France, Greece and some Eastern-European countries are encouraging examples resisting this trend. They are showing how the presence of legal history in the curricula of law faculties is in full accord with the Bologna process and the urgent need to «produce» students with practical skills. Value of legal history for law students is still considered in some countries as an important part of legal education, as it has been for centuries. But the wave of popular changes may undermine this attitude even in the universities and law faculties maintaining support for it.

In order to shore up the existing position of Legal History and Roman Law – to stress their importance in forming young lawyer's thinking and reject the usual objections of positivists and reformers that they are burdens for practically oriented students – professors of legal history have to come up something that can justify the presence of legal history in modern law school curricula. One way to strengthen an old and once highly venerated subject may be, among

other ideas, to offer a new method of teaching it, one which could strongly influence practical skills of students.

A kind of an attempt was offered in the Faculty of Law at the University of Belgrade. Legal History and Roman Law still exist there as a two-semester mandatory subject in the first year of studies. A considerable segment of Legal History is devoted to Ancient Greek Law. As a part of this course, for more than ten years we have been developing simulation of trial in different cases from ancient Athenian court. A group of the most interested students (usually about forty) are encouraged to act as the litigants in one of the twelve preserved speeches of Isaeus. Taking the role of either plaintiff, defendant or presiding magistrate (*archon*)[1] students are free to develop arguments, invent various types of proofs, and perform their roles, all in accordance with the rules that existed in the *heliaia* court. The basis for the facts of each simulation is a speech of Isaeus, but as the opposing side speech is not preserved, the counter court-speech is an opportunity for students to improvise, developing their legal imagination. This inevitably affects the arguments and speeches of students playing the role of Isaeus' client as well. The result is a trial that is a more or less suitable variation of the case reported by the source.

At the Summer Seminar *State and Private Economy in Antiquity* organized jointly in Belgrade on April 23 - 26, 2003 by the Faculty of Law, University of Graz and the Faculty of Law, University of Belgrade, a presentation in English of the Nicostratos estate case (Isaeus IV) was made for participants by the first years Belgrade law students. Most of the conference participants were so impressed with the performance that they urged me to report this teaching method, which some of them are now going to test at their law schools. For that sake, I will offer a short description of how the simulation works and some dilemmas that can be connected with it.

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[1] While S. Todd, *The Shape of Athenian Law*, Oxford 1993, p. 82, stresses that presiding magistrate was a minor official, appointed usually by lot, M.H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, Oxford 1991, p. 82, asserts that although the right to preside over the courts belonged in principle to all magistrates, in practice most cases, particularly family and inheritance cases (which are almost exclusively the topic of Isaeus' speeches) were handled by archons.

Description of Trial Simulation

About the beginning of semester, students are offered the opportunity to choose one of Isaeus' twelve speeches. They form teams of three and are free to decide on who will play the roles of plaintiff, defendant and magistrate. For the first speech on the estate of Cleonymos (fortunately one of the less complicated ones) the first group has two weeks for preparation, while the others each have respective number of weeks more, and experience after watching and judging the first case. Before the first case is heard, all members of the group who will take role of *dikastai* – jurors during the semester, are supposed to swear a heliastic oath [2].

Students perform the main trial only, without the *anakrisis*, due to limited information about it. The trial starts with introductory words from the presiding magistrate. He/she states who the parties are and presents impartially what the main issue is, offering a place at the *bema* to plaintiff who speaks first. After defendant's speech (both speeches are limited to about ten minutes), both litigants are allowed about three minutes to present their second speech – replica, a review in which they are not permitted to introduce new proofs.

The students are free to use all kind of evidence. They usually call witnesses or have help from *synegoroi* (roles performed by other students from the group), quote laws, read different documents (*diatheke*, contracts, personal letters, receipts), challenge the testimony of a slave under torture (*basanos*) [3], call for statements of a *kyrios* instead of female members of family, etc. After the last speech of the

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[2] The heliastic oath is modeled in fairly authentic form based upon preserved Demosthenes' speech against Timocrates, Dem. XXIV 149-151: «I will cast my vote in consonance with the laws and with the decrees passed by the Assembly and by the Council, but, if there is no law, in consonance with my sense of what is most just, without favor or enmity. I will vote only on matters raised in the charge, and I will listen impartially to accusers and defenders alike», as quoted in Hansen, *The Athenian Democracy* cit., p. 182.

[3] Although probably *basanos* was mostly, but not exclusively, used in public prosecutions, it seems to be one of favorite types of proofs that students use in Isaeus' cases, even with all complicated procedural demands (permission of the owner, consent of both parties to accept it as evidence, etc.), as described in Dem. XLIX 55 and G. Thür, *Beweisführung vor dem Schwurgerichtshöfen Athens. Die Proklesis zur Basanos*, Wien 1977.

defendant, both parties are free to claim if they eventually want to accuse some of opponent's witnesses for giving false testimony with the *dike pseudomartyrion* [4], what has become one of the student's favorite strategies.

The time limit is measured with a *klepsydra*, made of two clay garden pots with holes in the bottom. During presentation of proofs the «clerk» stops the water, as was done in Athens. The other ways of creating a realistic simulation of the Athenian court are two voting urns and the voting procedure. The urns are made of cardboard and painted in different colors – the first of bronze and the second of wood. There are also bronze painted cardboard ballots – discs with a short axle, one with a hole in it and the other without a hole. All students of the group (and even visitors) play the role of *dikastai*, and are asked to vote by dropping ballots into the urns. They drop either the ballot with a hole for plaintiff or the ballot with a full axle for the defendant into the «bronze» urn for a winner, while the remaining ballot is dropped into the «wooden» urn. All the voting equipment was made by students themselves and is used in subsequent trials. After the trial and its result, a discussion of the strong and weak points of each side's presentation, the behavior of the litigants, procedural errors, the persuasiveness of the litigants and witnesses, how the simulation was performed compared with an actual Athenian trial, etc. is the obligatory, final and most important part of the exercise.

The Advantages of the Method

The main advantages of this method are easily apparent. Being novices in law school, students enjoy this kind of legal performance very much, as they are for the first time in their lives playing «real» roles in a court. They are always very enthusiastic, and they start thinking like the party that they are playing the role of, very often with an incredible level of identification. They often ask for comments and a discussion of the critical points of the case for hours

[4] As reported by Aristotle, *Athenaion Politeia*, 68, 4.

after the trial is over, sometimes even for weeks. Some of them even acquire nicknames in accordance with their Greek names and role in the case.

It is evident that this teaching method resembles a combination of two popular modern American educational patterns and subjects at law schools – the legal clinic (in this case a clinical simulation) and mock trial competition. During a recent meeting in Skopje, which was dedicated to advanced methods in legal teaching and in particular to law clinics [5], I was advised by ABA (American Bar Association) experts in clinical education to name this model of Athenian court simulation *Clinical Legal History* [6]! They strongly supported this method, saying that legal history presented in that way would be very acceptable to accreditation commissions in their evaluation of law schools' curricula. Besides this pragmatic consideration, this method really helps students to get accustomed to the ancient Athenian way of thinking and judging, and to acquire legal history emotionally and personally rather than merely learn it as a school obligation.

There are numerous other advantages to the simulation. Each week it involves not only the main participants but all students from the group in the story of Athenian law. Often some of them are witnesses or *synegoroi*, but all of them are regularly *dikastai*, who must follow each presentation patiently, because they must vote on the outcome and discuss the procedural and substantial aspects of the case after the trial is over. This method vigorously develops both the legal reasoning and legal imaginations of the first-year law students. They are faced for the first time with the logic of the accusatorial system with all its advantages and difficulties. Students are faced with the problem of keeping their speeches within the time allotted and the need for procedural economy. They must find the strongest proofs and think about arrangement of arguments according to the criteria that they think are proper to the case. And of course, it is a very effective way of cultivating the rhetorical skill of students at the very beginning of their careers.

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[5] ABBA CEELI Balkan Law School Linkage Initiative, Skopje (Macedonia), December 6-8, 2002.

[6] This will be probably the name that will find a place as an optional subject in the new curriculum of the School of Law in Belgrade.

During the course, the numerous questions that arise from a practical point of view are surprising. Some of them are not always easy to answer. It shows how deeply and intensely students are already starting to think about issues of Athenian court procedure. I will list some of them as an example of how their questions can be both engaging and intriguing, although some of them are naive, as well: Since cross-examination did not exist, was it possible for a party to interrupt an opponent's witness for a short question? Did the opponent stand or sit during the speech of the other party? Did they use a gavel or some other device to keep order during the trial? Was it possible to use oral witnesses, and not only sealed witness statements prepared in advance? Or both can be used in the same trial? Did parties and witnesses take any kind of informal oath before statements? Who spoke first in *diadikasia* cases, as there were no plaintiffs in these situations? Did Athenians have an action for disturbance and noise? Did the rule of law exist in Athens? Did the heliasts rise from their seats when the magistrate appeared? Did the magistrate take care of the *klepsydra* or did some other person do it? What happened with the *klepsydra* during a *synegoros* intervention? What happened if there were not enough votes in the urn, i.e. if somebody had not put a ballot in both urns? Were litigants nearby urns, controlling the ballots counting? Did they have scribes who recorded some parts of the process or at least a verdict? Was verbal contact allowed between the plaintiff and defendant? How were litigants punished for improper behavior in court? All those and dozens of similar questions show their level of interest in and understanding of the Athenian trial system. Most of all they reveal how enthusiastically students want to investigate the intricacies of ancient court rules.

An important educational outcome of such a simulation is that some elements of the trial process become clearer only after they have been role-played. For example, students learn how *dikastai* usually react. From their own experience in the simulation, they come to realize that jurors probably based their opinions much more upon emotional grounds and the persuasiveness of the litigants, than upon the facts and legal arguments presented at trial. Also, students gain an early understanding of the importance of social context: one of favorite procedural *topoi* that student – litigants almost inevitably exploit in their speeches are remarks about poor, but honest people, unpopular but rich ones, brave soldiers, pedophiles, people who

have connections with *hetaira* or *pallake*, old experienced men, and the examination of litigants' characters. These should be formally irrelevant today as well as in the past but are present in nearly all cases, ancient and modern. Students become very aware how strongly the social attitudes of judges can influence a trial. One can also get a full impression of how long the voting procedure lasted with a real amateur *dikasterion* of 201, 401 or more jurors, if it takes at least ten minutes for about forty «student dikastic jurors» to vote and to have their votes counted. Young students, whose expectations are increasingly shaped by a globally accelerating society, learn that justice requires patience; facts cannot be played out and perfect justice dispensed all in the space of two hours as it is in films. These are only a few advantages that are self-evident to every participant in the court simulation.

A few words about extrinsic motivation. Students who take part in this activity are, of course, rewarded at the examination. Their presence and participation during the whole semester of court simulation is evaluated, and they are therefore not obliged to take the part of the Legal History exam dealing with Ancient Greek Law. It will be possible to quantify this advantage more easily in the near future when a certain number of credits will be given for participation in Athenian court-simulations.

Possible Problems with the Method

Of course, there are some questions about the method as well, both on the educational and technical levels. The most important is whether the «Americanization» of the teaching of ancient Greek law and legal history affronts the academic level and seriousness of the discipline. I doubt that decisive answer is possible on that point. On the practical side, there is a strong tendency for students to borrow some elements from modern court procedure, particularly those they pick up from movies about the judiciary in the common law system. This is mostly manifested in their tendency to make use of oral testimony and to give a promissory oath before a statement, in the manner of Anglo-Saxon courts, something not generally characteristic of Athenian trials. Although these are not completely appropriate to a

simulation of fourth-century B.C. Athens, there can nevertheless be some space to allow students to do so [7], as it makes the case more colorful and exciting. With oral testimony, students are advised to use at least some of sealed written statements of a witness (*martyria*) which are presented during the *anakrisis*. A similar question could be raised about the more active role of the presiding magistrate than in Athenian law courts practice («*archon*-student» usually tends to read proofs and documents, serve the pipe of clepsydra, handle the case more vigorously, etc.). These changes lessen the authenticity of Athenian court procedure. But, complete authenticity has to be sacrificed at some points to make the process more vivid and create a higher level of interest and activity in the students. There is no doubt that this approach needs to be improved and revised in some aspects. But it is nevertheless clear that in its present form it develops students' legal reasoning and their feeling for legal history, connecting them to ancient court theater and enabling them to become positively disposed toward and familiar with ancient Greek law.

Conclusion

Although other questions can arise as well, it seems that the positive aspects of this teaching method outbalance all potential objections. The possibility of its application in courses of Roman law makes it even more important and relevant. This educational technique can simultaneously make legal history more interesting for contemporary students and more acceptable for law faculties and educational authorities of our days. If it can help in this context to preserve legal history in the curricula of European law faculties, with its all other advantages for legal education, the simulation of ancient courts appears as a teaching method of multifaceted benefit.

[7] At least as late as 380 B.C. witnesses testified orally, and they could therefore have been interrogated (Andok. I 14). See also Todd, *The Shape* cit., p. 96.