MICHAEL GAGARIN (AUSTIN)

RESPONSE TO MICHELE FARAGUNA

In his fine paper, Michele Faraguna takes certain facts about writing in the Athenian legal process, and draws conclusions from them that differ from my own view of the nature of the legal process. In my response I will try to make clear precisely where I agree and where I disagree with his views.

Faraguna and I agree that by the fourth century, at least, the specific accusation in a case – either the *enklēma* in a private suit (*dikē*) or the *graphē* in a public suit – was put in writing, though the *enklēma* was probably not written down in earlier times. In addition, we both accept Thür's argument that the *graphē* or *enklēma* established the boundaries within which the litigants had to remain in order to keep their arguments from going "outside the issue" (*exō tou pragmatos*). However, the reason why the accusation exerts this kind of control over the litigants' arguments and the jurors' decision is not that it was put in writing, since even when the *enklēma* was presented orally, the accusation controlled the case in the same way. In Antiphon 6, for example, the speaker quotes the charge against him together with his response,[1] and this charge then controls the arguments that follow, just as a written charge would. But this speech was probably delivered in 419 when the *enklēma* was not yet written down in this case, and the speaker's words also imply that the charge and his own response were not written down but presented orally ("they swore"). Thus, even though in this case the accusation was delivered orally, it controls the case in the same way as a written accusation would. Indeed, in almost any legal system, whether or not writing is used, there must be a statement of the charge and this statement must exert some control over the arguments in the case. Writing has nothing to do with this function.

In addition to the accusation, of course, other written documents played a role in the judicial process. Perhaps as early as the late fifth century (as Faraguna argues) these documents together with the *graphē* or *enklēma* were collected at the *anakrisis* or the arbitration hearing, were sealed in jars (*echinoi*), and were later read out in court by the clerk during the trial. Each litigant could include whatever documents he wished as long as they were presented at the preliminary hearing and were sealed

[1] Antiphon 6.16: "They swore that I killed Diodotus having planned the death, but I (swore) that I did not kill him either by planning or by my own hand" (διωμόσαντο δὲ οὗτοι μὲν ἀποκτεῖναί με Διόδοτον βουλεύσαντα τὸν θάνατον, ἐγὼ δὲ μὴ ἀποκτεῖναι, μήτε χειρὶ ἐργασάμενος μὴτε βουλεύσας).

in the *echinos*. No other documents could be used in court.[2] These facts are well known, but Faraguna and I disagree about the importance of these written documents.

First, Faraguna emphasizes the importance of the preliminary hearing in establishing which written documents would be used in court. I agree that this was an important function of the preliminary hearing, but the presentation of written documents occupied only a small part of the hearing, which mostly consisted of oral questions and answers between the magistrate and the two litigants. The dialogue was conducted entirely orally and could last into the night; the collection of written documents was of secondary importance.

Second, although most litigants introduce written documents into their pleadings, the oral arguments control the use of these documents, not vice versa. Litigants not only select which documents to use and when and how to use them, but they (or their logographer) in fact write many of these documents themselves, especially witness statements. In the fourth century witness testimonies are recorded in writing, in part to ensure that they will be available in case there is a later suit for false witness (*dikē pseudomartyriōn*), but they carry no more weight because they are written down than they did in earlier times, when they were presented orally. To support his view that written documents are more important, Faraguna cites the speaker at Isaeus 6.15, who says that the facts must be confirmed by witnesses, but this statement could just as easily have been made when witnesses presented their testimony orally. Written documents have some importance in the Athenian legal process but they do not control the judicial process, let alone subvert its fundamental orality.

In their pleadings, litigants express a variety of views about the importance of written documents. Some downplay the value of a document such as a will or a contract, but others stress the importance of these same documents. The litigant's attitude is usually determined by which position fits best with his argument. Thus, examples where a litigant maximizes or minimizes the importance of a written document prove nothing. All we can say is that many Athenians were suspicious of certain kinds of written documents, especially wills, but most also had respect for some written texts, especially laws, whose authority is never questioned in court.

Faraguna argues that one example from Isaeus 5 shows the importance of a written document, but this passage does not really support his conclusion. At one point in this speech (5.25-26) the speaker refers to an agreement (*homologia*) that was reached at the last minute in court; he says that some of the details of this

[2] The shameless man (the *aponenoēmenos*) in Theophrastus (*Characters* 6.8), to whom Faraguna refers, ignores this rule when he brings an *echinos* full of documents into court with him. Because he has no moral sense, he intends to violate the rules by substituting a different *echinos* with different documents for those that were presented at the preliminary hearing.

agreement were hastily written down in a *grammateion* but others were only agreed to orally in front of witnesses:

> **[25]** Leochares, the man who went surety for him and who is to blame for all our troubles, denies that he went surety, as witnesses have testified, claiming that this is not included in the document written up in court. At the time, gentlemen, we were in a hurry on the platform, and we wrote down some things but secured witnesses to others. But our opponents agree that those matters that were agreed on then which are in their own interest are valid, even if they are not in writing, but they deny the validity of what is not in their interest, unless it is in writing. **[26]** But I, gentlemen, am not surprised that they deny things they agreed to, since they are not even willing to carry out those that were written.[3]

Faraguna claims that in the last sentence of this quotation the speaker insists on the privileged status of the written document as a method of proof and criticizes his opponents because they are unwilling to do what is written. This is true, but in the first part of the passage the speaker criticizes his opponent for violating the part of the agreement that was not written down but to which witnesses have testified – that the opponent agreed to provide surety. Thus, the speaker insists that both parts of the agreement should be followed, oral and written, and he criticizes his opponents for violating both. The advantage of a written agreement is that its terms are harder to deny, and the fact that the opponents do not follow the written agreement is thus more shameless. But those parts of the agreement that were written down do not have a privileged status just because they were written. And the fact that the speaker never introduces the written agreement in court, though he does call witnesses (5.24) to confirm his narrative account of the entire agreement, oral and written, shows clearly that the written agreement has no special importance for his case.

The use of written texts certainly increased over time, in law as in the rest of life, but the question remains, how did this affect Athenian judicial procedure? Faraguna argues that the increasing use of written texts made Athenian procedure more technical and less rhetorical. I cannot agree. First, as I noted, oral dialogue still dominated the preliminary hearing. Second, whatever the significance of the preliminary hearing, the most important stage of the judicial process was the trial, and this consisted almost entirely of oral pleadings by the litigants. The boundaries of their arguments may have been controlled by the specific charge filed by the plaintiff, but the fact that the accusation was written was not significant, and within the boundaries set by the accusation, the speakers themselves (or their logographers) determined what arguments they would make and which written documents they

[3] ὁ δ᾽ ἐγγυησάμενος αὐτὸν Λεωχάρης καὶ τῶν πάντων ἡμῖν κακῶν αἴτιος οὔ φησιν ἐγγυὴσασθαι ἃ καταμαρτυρεῖται αὐτοῦ, ὅτι ἐν τῷ γραμματείῳ τῷ ἐπὶ τοῦ δικαστηρίου γραφέντι οὐκ ἔνεστι ταῦτα. Ἡμεῖς δέ, ὦ ἄνδρες, τότε ἐπὶ τοῦ βήματος σπεύδοντες τὰ μὲν ἐγράψαμεν, τῶν δὲ μάρτυρας ἐποιησάμεθα· οὗτοι δέ, ἃ μὲν αὐτοῖς συμφέρει τῶν ὁμολογηθέντων τότε, κύριά φασιν εἶναι, εἰ καὶ μὴ γέγραπται, ἅ δ᾽ οὐ συμφέρει, οὐ κύρια, εἰ μὴ γέγραπται. [26] Ἐγὼ δ᾽, ὦ ἄνδρες, οὐ θαυμάζω ὅτι ἔξαρνοί εἰσι τὰ ὡμολογημένα· οὐδὲ γὰρ τὰ γραφέντα ἐθέλουσι ποιεῖν.

would introduce in support these arguments. None of these documents was constrained by formulaic requirements, and in many cases the documents were actually written by the litigant himself (or his logographer) specifically to fit the needs of his argument. Thus, the arguments controlled the use of written documents, not vice versa.

On the other hand, the essentially oral nature of Athenian law does not mean that it was dominated by rhetorical and extra-judicial elements, as Faraguna claims. As Rhodes (2004), Lanni (2006), and others have argued, the Athenians had a broader concept of legal relevance than we do today, but for the most part litigants managed to stick to the issue. Writing was primarily used to ensure a level playing field – what Thür calls "fairness"; it prevented a speaker from surprising his opponent with a new document at the last minute, but it did not alter the fundamental orality of the judicial process.

Finally, I would agree with Faraguna that writing was used with increasing frequency in the administration of law for keeping records, but I doubt these records were preserved by magistrates beyond their term in office. Faraguna cites Demosthenes 38.15, where a fourteen-year-old *enklēma* is read out in court, as evidence that documents were officially preserved, but this charge was brought against the speaker's father, and it is more likely that either the father himself kept a copy of the *enklēma* or that he remembered what it said and told his son.

Even if we cannot say in absolute terms how important these various uses of written texts were in the Athenian judicial process, we can say with certainty (as I argue in Gagarin 2008) that by comparison with other early legal systems, the role of written documents in Athenian judicial procedure was far more limited and that this was the main reason why the Athenian legal system was never dominated by professionals, as all other legal systems have been, and why the language of Athenian law remained much less technical than it is in almost every other system. Even in the Hellenistic period, when the use of writing increased in all areas of life, in most cities the role of written documents in court appears to remain limited and the legal process retained its fundamentally oral, non-professional, and non-technical nature.

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