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THE RHETRA OF EPITADEUS AND TESTAMENT IN SPARTAN LAW*

The Rhetra of Epitadeus is one of many problems arising from the obscurity of Spartan legal history. In his valuable book about the legal system of Sparta, Douglas MacDowell clearly shows how many problems arise in connection with this law or *rhêtra*, regulating freedom of disposition over property.[1] Although the *rhêtra* is commonly attributed to somebody named Epitadeus, it is not completely clear if such a law really existed, who Epitadeus was (and whether or not he was an ephor or magistrate), when he lived and when the *rhêtra* was passed, and even whether its author was indeed Epitadeus or possibly even Lykourgos. More questions than answers! No wonder, bearing in mind how many controversies still affect that even more important early Spartan "constitutional" document, the "Great Rhetra" preserved in Plutarch's Lykourgos.[2] However, the system established by the less famous *rhêtra* attributed to Epitadeus, which permitted free disposition of house and land, must have been a landmark in the social, political and economic history of Sparta. It caused structural changes in the *polis*. Therefore, it is the social aspects of the reform which receive most attention from modern scholars.[3] David Asheri in the sixties was the only one who treated the legal problems of Epitadeus' work more

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[1] MacDowell, D., *Spartan Law*, Edinburgh 1986, 99-110.

[2] See most recently the contributions by Thommen, L., *Lakedaimonion Politeia*, Stuttgart 1996, 17; Liberman, G., *Plutarque et la* "*Grande rhètra*", Athenaeum 85/1997, 204; Hans van Wees in Hodkinson, S. – Powell, A., *Sparta: New Perspectives*, London 1999, 1-41.

[3] To mention just a few relatively recent authors: MacDowell himself; Christien, J., *La loi d'Epithadeus*, RHDFE 52/1974, 197-221; Forrest, W.G.A., *A History of Sparta 950-192 B.C.*, London 1968, 137; David, E., *Sparta between Empire and Revolution (404-243 B.C.)*, New York 1981; Oliva, P., *Sparta and her Social Problems*, Prague 1971, 190; Marasco, G., *La retra di Epitadeo e la situazione sociale di Sparta nel IV secolo,* AC 49/1980, 131.

profoundly.[4] So my aim in this paper is primarily to establish the legal content of the *rhêtra*.

But let us examine the main sources first. Two of them are fundamental. In his *Life of Agis,* section 5, Plutarch gives us information which has served as a basis for all modern speculations. He records a change in the law, permitting a Spartiate to give his house and his lot of land to anyone he wished, either during his life or at his death. ...Ἐπιτάδευς... ῥήτραν ἔγραψεν ἐξεῖναι τὸν οἶκον αὑτοῦ καὶ τὸν κλῆρον ᾧ τις ἐθέλοι καὶ ζῶντα δοῦναι καὶ καταλιπεῖν διατιθέμενον.[5] The second source, Aristotle in *Politics,* 1270a 15-34, although much closer to the time of the reform, does not mention the name of the legislator. He is criticizing the process of increasing social inequality in Sparta and says that "*he*" (an unnamed legislator) is responsible for permitting those who so wished to give away or bequeath their property (διδόναι δὲ καὶ καταλεἰπειν ἐξουσίαν ἔδωκε τοῖς βουλομένοις).[6]

The sources, however, say nothing about the date of the law, and both are silent about the legal aspects of the *rhêtra* as well. What primarily interests both of them are its political and social consequences. Nevertheless, a number of scholars, particularly those who are not lawyers, do not hesitate to conclude that the *rhêtra* introduced the institution of the will (or testament) to Sparta.[7]

Before discussing the main problem – if testament really existed in Sparta or not, it seems sensible to deal first with a few non-legal questions. A long time ago, by the end of the 19th century, Edward Meyer suggested that the law of Epitadeus was a myth.[8] In the second half of the 20th century Forrest,[9] Cartledge[10] and

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4 Asheri, D., *Laws of Inheritance, Distribution of Land and Political Constitutions in Ancient Greece,* Historia 12/1963, 1-21.

5 "But when a certain powerful man became an ephor, a man wilful and difficult in character, named Epithadeus, who had quarreled with his son, he proposed a rhetra that it should be permitted both to give one's own house and lot to whoever one wished during one's lifetime and to bequeath them by will" (MacDowell's translation).

6 "for he [the legislator] quite rightly made it dishonourable to buy property or to sell what one has, but he permitted those who wished to give it away and to bequeath it" (MacDowell's translation).

7 Jannet, Cl., *Les institutions sociales et le droit civil a Sparte*, Paris 1885; Guiraud, P., *La propriété foncière en Grèce, jusq'à la conquête romaine,* Paris 1893; Beauchet, L., *Histoire du droit privé de la république athénienne, I-IV,* Paris 1897, III 431; Norton, F.O., *A Lexicographical and Historical Study of Diatheke*, Chicago 1908, 42; Herman, K.F. – Thalheim, Th., *Lehrbuch der griechischen Antiquitäten, II Rechtsaltertümer*, Leipzig 1895, 48; Busolt, G. – Swoboda, H., *Griechische Staatskunde,* I-II 1920-1926, II 722; MacDowell, D., 108.

8 Meyer, E., *Die Lykurgische Verfassung*, RhM 41/1886, 589 n. 1; *Forschungen zur alten Geschichte I,* Halle 1892, 258 n. 3. He was broadly followed by Niese, B., *RE* 6/1909, 217, s.v. "*Epitadeus*".

9 Forrest, W.G.A., 137.

10 Cartledge, P., *Sparta and Lakonia*, London 1979, 165.

Schütrumpf[11] have also argued against the existence of the *rhêtra* of Epitadeus, while the most convincing contribution against the authenticity of the *rhêtra* came recently from Hodkinson[12]. As Aristotle did not mention Epitadeus by name, old authors attributed this reform to Lykourgos! "*He*", the legislator mentioned by Aristotle, therefore should mean "Lykourgos". On this view, all those changes were introduced before, possibly well before the Peloponnesian War. However, Busolt[13] and Beloch[14] had already rejected Meyer's doubts, and they were followed by the majority of later historians. MacDowell has also shown that there is nothing in Aristotle which contradicts Plutarch's statement that the law in question was the one proposed by Epitadeus[15]. It was an innovation, making a change in the old system traditionally attributed to Lykourgos. So most scholars today accept the existence of the *rhêtra* of Epitadeus as a historical fact.[16]

If so, then who was Epitadeus, and when did he live? Plutarch says that he was an ephor. He also notes at the beginning of the text that the harmful social effects of his reform became obvious "about the time when they put a stop to Athenian dominance and gorged themselves on gold and silver", which should mean after the Peloponnesian War. So much from the sources.

Further speculations, however, are offered in the literature. Some scholars (led by Niese in the old RE) connect the name of Epitadeus with one Epitadas, a Spartan commander, who according to Thucydides lost his life in 425 B.C. fighting near Sphakteria. This would make the date of the *rhêtra* earlier than the Peloponnesian War. Another group of scholars follow the idea of Arnold Toynbee that the reform associated with the name of Epitadeus took place after the loss of Messenia, probably about 357 B.C.[17] According to this view, Epitadeus the ephor might be the grandson of the Spartan commander Epitadas. On this reconstruction, the *rhêtra* appeared some time after the major conflict between Sparta and Athens. In short, modern opinions about the date of the *rhêtra* oscillate over a few decades before or after the Peloponnesian War. However, the majority of scholars hold that the *rhêtra*

[11] Schütrumpf, E., *The Rhetra of Epitadeus: A Platonist's Fiction*, GRBS 4/1987, 447: "the account in *Agis 5* is a mere fiction in a Platonic spirit and is therefore historically useless".

[12] Hodkinson, S., *Land Tenure and Inheritance in Classical Sparta*, CQ 36/1986, 378; *Property and Wealth in Classical Sparta*, London 2000.

[13] Busolt, G., *Griechische Geschichte I,* Gotha 1893, 523 n. 2.

[14] Beloch, K.J., *Griechische Geschichte*, III 1, Freiburg 1922, 346 n. 2.

[15] MacDowell, D., 104.

[16] E.g., Asheri, Oliva, Christien, MacDowell, and recently Thür, G. in *Der Neue Pauly Enzyklopädie der Antike*, Stuttgart-Weimar 1997, III, 528 s.v. "*Diathêkê*".

[17] Toynbee, A., *The Growth of Sparta*, JHS 33/1913, 272-275; *Some Problems of Greek History,* London 1969, 337-343. His dating was followed by Cary, M., *Notes on the History of the Fourth Century*, CQ 20/1926, 186, but for different reasons.

probably appeared by the end of the fifth or at the very beginning of the fourth century B.C.[18]

Having established a historical context, we approach the main question: what was the legal essence of Epitadeus' reform? As we have already seen, most scholars simplify its legal content by saying that the *rhêtra* introduced the institution of will (or testament).[19] The translation of Plutarch's statement offered by MacDowell is typical: "he proposed a *rhêtra* that it should be permitted both to give one's own house and lot to whoever one wished during one's lifetime *and to bequeath them by will*". Full stop. Other translations are similar. Very convenient for translators, very clearly comprehensible for an ordinary reader, but not completely adequate, in my opinion, from the legal point of view.

For what does "a will" mean in terms of Greek law? What kind of will are we talking about? Is it a will with or without adoption, or to use Athenian terminology, *diathêkê* with or without *eispoiêsis*? Is it the same type as a Roman or modern will, the one with "*institutio heredis*", testament with *Erbeinsetzung* in German terminology? I would hesitate to give a positive answer without further discussion.

A century ago legal historians, using a comparative approach, tended to find similarities or identities between early old Roman and Greek law wherever they had a chance. Thus Schulin stated that a testament similar to that of Roman law was introduced in Sparta already by Lykourgos.[20] Bruck rejected Schulin's idea about Lykourgos, but he too asserted that testament in Sparta was introduced some time before Epitadeus.[21] Most other scholars, including more recent modern ones, relying mainly on the earlier comparativists, show complete confidence in Plutarch, and agree that nobody else but Epitadeus was the creator of the *diathêkê* or will in Sparta.[22]

The basic argument for this view is Plutarch's wording. In describing Epitadeus' innovation he says "*katalipein diatithemenon*" – "to leave by testament". Considering the meaning of words like *diatithemenon, diatithesthai, diathêkê,* and other derivatives of the same root in the Hellenistic legal terminology that underlies the usage of Plutarch's time, his formulation can really denote nothing else but a testament. Linguistically it is absolutely clear. But we should bear in mind two obvious facts: a) that Plutarch wrote biographies, not a study in legal history, and

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18 Thür, G. in *Der Neue Pauly*, s.v. "*Diathêkê*" suggests that it happened in 400 B.C.

19 Welwei, K.-W. in *Der Neue Pauly Enzyklopädie der Antike*, Stuttgart-Weimar 1997, III 1174, s.v. *Epithadeus*, is more cautious and avoids defining the innovation by Epitadeus as the introduction of testament.

20 Schulin, F., *Das griechische Testament vergleichen mit dem römischen*, Basel 1881, 39.

21 Bruck, E.F., *Die Schenkung auf den Todesfall im griechischen und römischen Recht*, Breslau 1909, 57.

22 This position is confirmed by Thür, G., in *Der Neue Pauly Enzyklopädie der Antike*, Stuttgart-Weimar 1997, III 527.

his reliability is highly questionable;[23] b) that Plutarch wrote about this event almost half a millennium later, within the framework of classical Roman law, whose dominant mode of inheritance was of course testament. This is why Plutarch could not conceptualise Epitadeus' innovation in the law of inheritance, nor formulate it for readers of his time, in any other way than as an introduction of testament. Like any non-jurist, two thousand years ago or today, he would simply use the label "testament" to denote any and every form of disposition *mortis causa*.

However, we should not assume without reservation that testament in the Roman or modern sense (i.e. with *institutio heredis*) was familiar to any Greek state. Not even to Athens. There can be no doubt that testamentary adoption did exist at Athens, but can we therefore equate it completely with the Roman testamentary *Erbeinsetzung*? I have my doubts. It is important to note that every form of Roman testament was a legal act independent of adoption. There may be room for disagreement as to whether *testamentum calatis comitiis* was *Erbeinsetzungs-testament* (as the majority of authors believe) or *Legatentestament* (as De Sanctis or Wiacker claim), but it was definitely not connected with adoption. The same applies to all other forms of Roman wills.

In Athens, however, "testament" which produces a universal heir was inseparable from adoption (which is why we are obliged to differentiate between *diathêkê* with *eispoiêsis* and *diathêkê* without *eispoiêsis*). Adoption was the principal legal act that brought about *mortis causa* consequences: it is because he has been adopted that the heir becomes an heir. To use Maffi's terminology: adoption was an element of "inheritance strategy".[24] A man becomes a universal heir because he steps into the shoes of a son, which is why *diathêkê* with *eispoiêsis* was not available to a person who already had a son of his own. By contrast, the existence of a natural son did not automatically disqualify a Roman from making a will. This is the reason why some scholars hesitate to classify "*diathêkê* with *eispoiêsis*" clearly as testament, but prefer terms such as "adoption *mortis causa*" or "adoption with inheritance purposes" (Schulin, Lambert). In a word, we should be very cautious in using the basically Roman term "testament" to apply to Athenian cases of testamentary adoption.[25] In

[23] As Plutarch said himself once (*Nikias, 1*), he did not want to compete with historians, but to extract from history the characters of distinguished people (*ethos kai tropos*).

[24] Maffi, A., *Adozione e strategie successorie a Gortina e ad Atene*, Symposion 8/1990, 205

[25] Of course the effects of adoption and testament are very similar, if not the same: the adopted son becomes a universal heir, he takes care of the family and cult, etc. But strictly speaking, the inheritance effects of adoption *inter vivos* and s.c. testamentary adoption are also nearly the same. According to the criteria of hereditary consequences, therefore, adoption *inter vivos* could also be called a will, in that it causes universal succession. However, there is no *heredis nominatio* in adoption. It is a separate institution in Roman law, different from testament. Therefore it seems that Bonfante, P., *Scritti giuridici varii*, Torino 1916, 333 is right

the same way it is not always safe to use Athenian legal terminology in Spartan cases.[26]

In addition, we should not simply ignore Aristotle's statement. There are again two reasons: a) Aristotle was almost contemporary with the time of the reform – he is only fifty years or slightly more away from the *rhêtra*; b) the legal background of Aristotle was much more secure than that of Plutarch. This is why, in legal matters, in this case, we should give credence to the philosopher rather than to Plutarch. And Aristotle's wording is a bit different: he states that a Spartan legislator permitted his people to *didonai de kai kataleipein*. Not a word about *diathêkê* or *diatithesthai*. In order to be more comprehensible to his readers, Plutarch has simply added two "words of explanation": he has built in *zônta* before *dounai* (thus emphasizing that this is a "lifetime gift") and *diatithemenon* after *katalipein* (to add the meaning "leave by will"). This information, or rather this interpolation on Plutarch's part, is the only source mentioning the term "will" in connection with Epitadeus. It gives us strong grounds for doubting whether Epitadeus introduced testament into Sparta, at least not in its Roman or modern sense of a testament with *Erbeinsetzung*.

But, what did he do, then? What kind of legal act did Epitadeus invent? What form of disposition in case of death was this? The majority of those scholars who believe Plutarch to be saying that Epitadeus introduced a will are completely silent about these questions, and avoid answering them. Most of them probably suppose without explicit acknowledgment that it was *diathêkê*,[27] presumably the same institution as in Athens. Glotz (in his *Solidarité*) is one of the rare birds who explicitly compares the *rhêtra* with the law of Solon on inheritance.[28] The implication is that both reforms created the same innovation: that is, testamentary adoption. A new economic situation in Sparta, the rise of private property, the impact of what Aristotle calls "*philochrêmatia*" or love of wealth, the impact of Athenian law: taken together, these could provide a reasonable explanation.

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to conclude: "*la successione testamentaria vera e propria, romana, non è stata mai conosciuta dai Greci*". In another place, he confirms the same idea: "*Il cosidddeto testamento greco o è un' adozione a causa di morte, o una donazione a causa di morte*", 421. In performing adoption, the *de cuius* rarely states that he is naming an heir in this way, but usually stresses other reasons: *gerotrofia*, tomb-cult preservation, deprivation of disliked relatives of their share of inheritance. For more details, see Rubinstein, L., *Adoption in IV. Century Athens*, Copenhagen 1993, 62ff.

[26] I am grateful to Prof. G.Thür for this remark. E.g., there is no term such as *proix* among Dorians, but the idea of dowry existed and was performed through the gift in Gortyn. The same could be the case with the disposition *mortis causa* – there was no separate institution of testament, but the effects of testament could have been performed through gift.

[27] Thür, G., in *Der Neue Pauly*, s.v. *Diathêkê*, III 528 is explicit: "In Sparta wurde die *d.* erst durch eine Rhetra (Gesetz) des Ephoren Epithadeus um 400 v.Chr. eingeführt (Plut. Agis 5)".

[28] Glotz, G., *La solidarité de la famille dans le droit criminel en Grèce*, Paris 1904, 332.

Unfortunately, however, the sources do not support this conclusion. Neither of the terms used by Aristotle (*didonai* and *kataleipein*) are ever related to testamentary adoption, which is always denoted in Athenian sources (mainly orators) as *diathêkê* or *eispoiêsis*.[29] Besides, a further and decisive argument against this view has been pointed out by Asheri.[30] The two sources (both Plutarch and Aristotle) are unanimous that Epitadeus' *rhêtra* brought to an end the traditional Spartan constitution, that his reform ruined the traditional "number of households" fixed by Lykourgos, and caused concentration of land in the hands of the few. Adoption, by contrast, brings about completely different consequences: it was a method of keeping alive the households of citizens, of maintaining the *oikos*, of preventing it from becoming *eremos*. This is why Asheri rightly states that Epidateus' innovation cannot have been testamentary adoption. Instead, he suggests that Epitadeus introduced new free forms of will, of the type that exist in Attic sources, "free-will types", as he says.[31] He does not use the standard scholarly term "*diathêkê* without *eispoiêsis*" (testament without adoption, *Legatentestament*, legacy by will), but it is pretty clear that this is what he is referring to. So far, therefore, we have been offered two solutions: what Epitadeus introduced was either testamentary adoption or *Legatentestament*.

But let us turn back to the sources. It is probably not a pure coincidence that both Plutarch and Aristotle apply the same words to denote the legal essence of this reform: the owner is still not allowed to buy property or to sell what he has, but he is allowed now to *didonai* and *kataleipein* (Aristotle) or *dounai* and *katalipein* (Plutarch) in respect of his house and lot. The meaning of the first term is beyond question. *Didonai* or *dounai* derives from *didomi*: to give, to present, to make a gift. Besides, Plutarch adds "*zônta dounai*", during one's lifetime. So it is clear that the word is about the gift *inter vivos*.

However, the second term, *kataleipein*, according to Liddell-Scott for example,[32] has two basic meanings: "to leave behind" and "to leave an inheritance". In a word, the term *kataleipein* alone, without additions such as *en diathêkê, diatithemenon*, etc., does not convey any implication of disposition by will. Like *lassen* in German, *laisser* in French, *lasciare* in Italian, and *ostavit* in most Slavonic languages, *kataleipein* has the sole meaning "to leave (the property in case of death)". But it does not necessarily have the legal overtone "to leave the property by testament". *Kataleipein* simply denotes succession, without any exclusive association either with intestate or with testamentary succession.

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[29] Rubinstein, L., 22 notes that there are twelve examples of testamentary adoption, but she also names those acts as wills.

[30] Asheri, D., *Sulla legge di Epitadeo*, Athenaeum 49/1961, 54.

[31] Asheri, D., *Laws of Inheritance,* 13.

[32] Liddell, H.G. – Scott, R.A., *A Greek-English Lexicon,* Oxford 1869, 796.

Let me therefore offer a new translation. The accurate legal meaning of the crucial point of the text should be: "Epitadeus ... proposed a *rhêtra* that permitted free disposition over house and lot by gift *inter vivos* and by leaving them *mortis causa*" (Plutarch). Or, to put it more simply, in less juridical wording: "He [the legislator] ... permitted those who wished, to make a gift or leave property" (Aristotle). As to what kind of act *mortis causa* is being referred to, Aristotle is silent. But it is, as we have shown, probably neither will (as in testament) nor testamentary adoption. The question is, why Aristotle did not add anything after *kataleipein* to explain it.

The formulation and syntax of Aristotle's text may itself suggest an answer. The first act that he mentions – the one *inter vivos* – is unquestionably a gift. Without any change in wording, Aristotle implies that the second act – the one *mortis causa* – is the same, a kind of gift as well – a gift *mortis causa*.[33] This important hypothesis can I think be confirmed with several supporting arguments.

a) In the same place, a few lines later, Aristotle uses the word *diathemenos* denoting "will" in its Athenian sense of testamentary adoption (*kan apothanê me diathemenos* – "*if one dies without making a will*", etc.). But the context of this second passage is completely different: he is talking about the marriage of the *epiklêros*.[34] So it is evident that by saying *diathemenos* in this second passage, he has in mind Athenian testamentary adoption. There is therefore no reason then why he should not have said, a few sentences before, *didonai kai diatithesthai* or *didonai kai kataleipein en diathêkê* instead of *didonai kai kataleipein*, if the essence of that legal act was the same as the one mentioned later – a will, in the sense of a testamentary adoption. This contrast, I suggest, implies that the wording of the first Aristotle passage is legally significant and closely connected with the gift.

b) We do not know much about the deeper legal past of Sparta. However, it is beyond question that a gift was in use well before the 5th century B.C., just as in all other primitive legal systems, as Diamond pointed out.[35] The same can be seen in Homeric society as well.[36] But, there is also indirect evidence that Spartans were familiar with a gift *mortis causa* as well. A famous inscription from the 5th century

[33] Christien, J., 216 argues that the act was *donatio mortis causa* as it "donnait aux riches les garanties nécessaires". Although her point of view is rather socially and economically oriented, she clearly points to *donatio mortis causa* as a possible legal nature of the act.

[34] Aristotle, *Politics* 1270a, 13-15: "As it is, one can give the heiress to whoever one wishes; and if one dies without making a will, whoever one leaves as heir gives her to whoever he wishes." (MacDowell's translation).

[35] Diamond, A.S., *Primitive Law, Past and Present*, London 1971, 259. Herodotos, VI 62, in the story of king Ariston who fell in love, testifies clearly that a gift *inter vivos* operated at that time quite freely in Sparta.

[36] The gift of Telemachus to Piraeus, *Od*. XVII 74-83 was considered as a *donatio mortis causa* already by Roman jurisprudence, *I*. 2,7,1; *D*. 39, 6, 1 (Marcianus, 9). See also Bruck, E.F., *Schenkung,* 8.

B.C. Peloponnesian polis of Tegea attests the dispositions of an otherwise unknown Spartiate (or perhaps, as Thür suggests, a *perioikos*) named Xoutias. Although there are numerous controversies concerning this text, Thür has successfully shown that it was neither testament nor oracle, arguing that it was a kind of deposit.[37] This very plausible and well attested view does not in fact conflict with Bruck's suggestion that the dispositions of Xoutias could be a deposit, with traces of a gift *mortis causa*.[38] In short, if we avoid controversies about legal nature of Xoutias' act, it is still evident that the inscription from neighboring Tegea could lead to the conclusion that the idea of giving at least a sum of money to a third party in case of death, was not unknown to 5th century B.C. Sparta.

c) The contemporary law of Gortyn was Dorian by origin, like that of Sparta, and therefore they seem to be closely comparable. One can find there several further examples of gifts, some of them probably *mortis causa*. They consisted mainly of certain sums of money, and were limited by the lawgiver (LCG III 17-31[39], III 37-40[40], X 14-20[41]). There are obvious examples of gifts *inter vivos* as well (LCG IV

[37] Thür, G., *IG V/2, 159: Testament oder Orakel?,* Festschrift für Arnold Kränzlein, Graz 1986, 123; Thür, G. – Taeuber, H., *Prozessrechtliche Inschriften der griechischen Poleis*, Wien 1994, 1-11.

[38] Bruck, E.F., *Schenkung,* 42-45 puts this case within the title "... Spuren der Schenkung auf den Todesfall". See also van Effenterre, H. – Ruzé, F., *Nomima II*, Roma 1995, 218. A similar combination of deposit and gift *mortis causa* was made by Lykon in Demosthenes, *Contra Callippus LII*, 20-23.

[39] (The following translations are given according to Willetts, R.F., *The Law Code of Gortyn*, Berlin 1967): "If a man die leaving children, should the wife so desire, she may marry, holding her own property and whatever her husband might have given her according to what is written, in the presence of three adult free witnesses; ... And if he should leave her childless, she is to have her own property and half of whatever she has woven within and obtain her portion of the produce that is in the house along with the lawful heirs, as well as whatever her husband may have given her as is written". The qualification of the legal act as a *gift mortis causa* ("eine Gabe des Manes an die Frau für den Fall seines Todes") was clearly pointed out by Bruck, E.F., *Schenkung,* 16.

[40] "If the husband or wife wish to make payments for porterage, (these should be) either clothing or twelve staters or something of the value of twelve staters, but not more". *Komistra* is translated strangely by Willetts as "payments for porterage", although a more proper translation would be just "gift". Some scholars consider it "Totenbeigaben" (Bruck, E.F., *Totenteil und Seelgerat im Griechischen Recht*, München 1926, 95), others take it for *donatio divortii causa* (Dareste, R. – Haussoullier, B. – Reinach, Th., *Recueil des inscriptions grecques*, I 459), some speak about gifts performed by the husband or wife in favor of a third person (Guiraud, P., 240), etc.

[41] "A son may give to a mother or a husband to a wife one hundred staters or less, but not more. And if he should give more, the heirs are to keep the property if they wish, once they have handed over the money".

48-V 7[42], X 20-25[43]). Although there is room for doubt and deep discussion about the legal nature and basis of particular cases (specially the controversial *komistra* in III 37-40), it is not easy to deny that both gift *inter vivos* and gift *mortis causa* existed side by side in Gortyn. But, special attention should be given to the text in XII 1-5. In this final supplementary column, the lawgiver confirms all kind of gifts made before the Code, prescribing that all further gifts should be given in accordance with the new law.[44] It seems therefore that the Gortynean lawgiver brackets together regulations governing both gift *inter vivos* and gift *mortis causa*. It is evident also that Gortyn had no testament. Why should we then expect it to exist in Spartan law, which was unquestionably less developed?

d) In the 4th century B.C., it seems that gift *mortis causa* became familiar to some Greek city-states, and that it no longer had any strict limits. An inscription from Dodona (Epirus) shows that the deceased *didôti* (gifted in case of death) all his movables, but some immovables as well: a meadow, a vineyard, a garden plot.[45]

e) There are plenty of examples in the Athenian orators which are usually classified as gift *mortis causa* or as *Legatentestament*.[46] What is important to note

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[42] "And if the father, while living, should wish to give to the married daughter, let him give according to what is prescribed, but not more. Any (daughter) to whom he gave or pledged before shall have these things, but shall obtain nothing besides from the paternal property. Whatever woman has no property either by gift from father or brother or by pledge or by inheritance as (enacted) when the Aithalian *startos*, Kyllos and his colleagues formed the *kosmos*, such woman are to obtain their portion". Most older scholars (e.g., Dareste, R. – Haussoullier, B. – Reinach, Th., I 465) agree that this provision speaks about dowry, as an anticipation of inheritance, performed by father during his lifetime; see also Schaps, D.M., *Economic Rights of Woman in Ancient Greece*, Edinburgh 1979, 86. However, Willetts, R, 22 believes that it is a gift *inter vivos* independent from hereditary share, an addition to her inheritance.

[43] "If anyone owing money or being the loser in a suit or while a suit is being tried should give anything away, the gift shall be invalid". For more details about the legal nature of the act (gift *mortis causa* or *inter vivos*), see Maffi, A., *Chreos nel "codice" di Gortina*, Atti del Seminario sulla problematica contrattuale in diritto romano (Milano, 7-9 aprile 1987), I, Cisalpino – Goliardica 1988, 285.

[44] "If a son has given property to his mother or a husband to his wife in the way prescribed before this regulations, there shall be no liability; but henceforth gifts shall be made as here prescribed".

[45] Dareste, R. – Haussoullier, B. – Reinach, Th., II, 61; Bruck, E.F., *Schenkung*, 111-112. This is a quite controversial text in regard to its legal nature and who was beneficiary, but there is no doubt that *de cuius* disposed over immovables, and that a word to denote disposition was *didôti*.

[46] E.g., the cases of Nicostratus, who gifted (*dounai*) to Telephus his property in Isaeus IV, *On the Estate of Nicostratus*, 8; of Lycon, who deposited his money with the banker Pasio, with the option of giving it to his friend Cephisiades in case he did not come back from the trip (*ebouleto de dôreian dounai autô, ei ti pathoi, to argyrion*), Dem. *C. Callippus* LII 20-23; and of Androcleides, who made over (*didonai*) his money and valuables to his compatriot Pherenicus in Lysias, *Fragment 3a (On Behalf*

from the legal point of view, without detailed analysis, is that those are all dispositions of individual items in case of death, denoted by the words *dounai, edôken, didômi, epididômi*, without denomination of a (universal) heir. Or, to put it clearly in civil law terminology, those are all singular dispositions.[47] Legal historians would usually qualify them as *Legatentestament*, *diathêkê* without *eispoiêsis*, or *Vermächtnistestament*. However, I do not see in these texts any substantial differences between *Legatentestament* and gift *mortis causa*. This kind of theoretical distinction is particularly artificial when applied in Greek law. It reflects the influence of Roman-law concepts, which do not always fit Athenian law (just as Athenian legal terminology does not always fit similar Spartan institutions).

However, the main point worth noticing here is that there are at least four cases in Athenian law where the right of disposition seems to be unrestricted: the dispositions of the commander Conon in Lysias XIX, *On the Property of Aristophanes,* 39-40, who *edôken* in case of death a sum of money to temples, to his brother and to his brother's son, while leaving the remaining 17 talents out of 40 to his own son; the disposition performed by the father of Demosthenes in *C. Aphobus I*, 4-6; the disposition of Diodotos in Lysias XXXII, *Against Diogeiton,* 5-7; and finally the singular disposition of the famous Athenian banker Pasio in Demosthenes, *C. Stephanus I, XLV* 28. Most of these dispositions in case of death were not contested at court, which suggests that they were legal, even though testators (Conon, the father of Demosthenes, Diodotos) had their own legitimate sons. Clearly, therefore, limits in singular disposition over property did not exist any longer in 4th century B.C. Athens, even if *de cuius* had legitimate sons. No wonder that dispositions in case of death without adoption, performed by childless men, were even more common in Athens as well.[48]

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of Pherenicus, Concerning the Estate of Androcleides), Todd, S., *Lysias*, Austin TX 2000, 354; see also Bruck, E.F., *Schenkung*, 85.

[47] *Black's Law Dictionary*, VI ed., St. Paul, Minn. 1990, 1431: "*Singular successor*. A term borrowed from the civil law, denoting a person who succeeds to the rights of a former owner in a single article of property (as by purchase), as distinguished from a universal successor, who succeeds to all the rights and powers of a former owner, as in the case of a bankrupt or intestate estate". Note that an important explicit sentence is missing: the singular successor inherits only assets, while the universal one inherits both assets and liabilities. It is clear only if one reads the text on p. 1535: "*Universal succession*. In the civil law, succession to the entire estate of another, living or dead, though generally the latter, importing succession to the entire property of the predecessor as a juridical entity, that is, to all his active as well as passive legal relations".

[48] Rubinstein, L., 85 has listed some of the most famous examples, including s.c. Plato's "will" recorded in Diogenes Laertios, III 41-43. She omitted "wills" of other philosophers described there (dispositions of Aristotle, Theophrastos, Straton, Lykon and Epicurus), probably because most of them are later than the IV century B.C.

Let me try to sum up. The change brought about by Epitadeus in the Spartan law of inheritance did not introduce any new institution – particularly not a will (testament). Such a heavy stroke of legislative innovation was not appropriate to the conservative Spartan way of thinking, nor to their legal system and society. Sparta had very simple, undeveloped legal institutions in private law, definitely less advanced then those of Gortyn, which did not recognise a testament. Philological and comparative reasons suggest that Epitadeus' innovation was less dramatic in form, but more important in essence. He probably just modified existing simple institutions: he only removed limits to disposition by gift, either *inter vivos* or *mortis causa*. As both sources agree, he permitted the house and lot (immovable) to become the objects of a gift.[49] If the acts permitted by Epitadeus consisted of singular dispositions such as gifts *mortis causa*, without the nomination of a universal heir, it could lead exactly to the consequences observed by both Plutarch and Aristotle – i.e., the concentration of property in the hands of a small circle of people and the diminishing number of *oikoi*. Although Plutarch's explanation that Epitadeus proposed his *rhêtra* because of a quarrel with his son sounds bizarre, it fits with other arguments that the main aim of the reform was to get rid of existing bans in disposition over property. The point of Epitadeus' intervention was essential (breaking up the limits), not formal (an introduction of new forms of disposition). In a word, Epitadeus introduced neither testament nor any new form of disposition *mortis causa*. He simply enabled Spartans to dispose by means of an existing instrument – the gift (*inter vivos* or *mortis causa*), but without the previous restrictions. This included the right of disposition over immovables, even where the *de cuius* had a legitimate son.

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[49] Plutarch says it explicitly: *ton oikon autou kai ton klêron,* while it is also evident from Aristotle's statement that the entire story is about immovables: at the beginning of this part of the text he firstly notes the problem that land has come into the hands of a few (*eis oligous êken hê hôra*), and latter on laments that two-fifths of the land belongs to women (*tôn gynaikôn tês pasês hôras tôn pente merôn ta dyo*).