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## “ARGUING AGAINST THE LAW”. NON-LITERAL INTERPRETATION IN ATTIC FORENSIC ORATORY

### *Abstract*

Scholars often maintain that Athenian juries cared little for what the statutes had to say and ruled according to their own whims rather than following any written norms. This paper aims to show that, on the contrary, whenever a statutory norm was directly applicable to the case at hand (which, however, seems quite rare) its wording posed a definite boundary to acceptable legal argument and could not easily be argued away. In the extant forensic speeches, only in a particular set of cases do we find arguments for a departure from the letter of the law (which I call, borrowing an expression used by Aristotle, “arguing against the law”): when the speaker argues for narrowing the scope of application of a statutory norm to fewer cases than the literal reading implies.

Such “arguments against (the letter of) the law” are not to be confused either with the addressing of ambiguities that result from the “open texture” of legal language or with the concept of equity as a corrective to strict law. The former remains within the compass of the norm as defined by its wording; as for the latter, orators never frame their arguments as a request to bypass strict law in the name of justice or fairness. Seeming appeals to equity turn out, on closer inspection, to be instances of legal construction. Nonetheless, at the end of the paper a suggestion is made as to how considerations of equity could have played a role in decision-making.

Spesso si legge che i tribunali ateniesi non si preoccupassero troppo di rimanere fedeli alla legge scritta ma decidessero in modo soggettivo. Lo scopo di quest’articolo è dimostrare che, al contrario, laddove esistesse una norma di legge applicabile al caso trattato (il che, però, sembra avvenisse raramente), la lettera limitava decisamente il numero delle possibili argomentazioni e non poteva essere messa in discussione con facilità. Nelle orazioni conservate, solo in una serie di casi particolari gli oratori osano richiedere al tribunale di scostarsi dalla lettera della legge (fatto che, ispirandomi ad un’espressione aristotelica, definisco “argomentare contro la legge”): si tratta delle situazioni in cui propongono di ridurre l’estensione dell’applicazione della norma a meno casi di quanti sembrerebbero impliciti nella formulazione letterale della stessa.

Tali “argomenti contro la (lettera della) legge” non vanno confusi né con la risoluzione di ambiguità dovute a imprecisioni nel linguaggio legislativo, né con l’appello all’equità come correttivo a un’interpretazione troppo rigida. Nel primo caso, l’interpretazione rimane all’interno dell’ambito circoscritto dall’espressione letterale; per quanto riguarda l’equità, gli oratori non chiedono mai di violare la lettera della legge in nome di considerazioni di giustizia. Quando sembrano farlo, a un’analisi più approfondita risulta che si tratta, in realtà, di particolari modi di interpretare le leggi. Ciononostante, alla fine dell’articolo propongo un possibile modo in cui l’equità potrebbe aver svolto un ruolo nelle decisioni giudiziali.

According to the *Athenaion Politeia* (11.1-2), Solon decided to leave Athens after he began to be approached by fellow Athenians asking him to interpret provisions of his laws for them. As explanation for his decision to embark on a trip, as the writer has it, he alleged that he did not think it appropriate for the lawgiver himself to interpret his own laws but, on the contrary, everyone should simply do as was written<sup>1</sup>.

The point of this anecdote is probably that the lawgiver, once he has promulgated his laws, has to step out of the picture, letting the laws speak for themselves<sup>2</sup>. By itself, however, this contention, that one should just “follow the laws as they are written”, seems quite naïve. In many cases it would not help just to refer to “what is written” when facing a problem of legal interpretation, and such cases are found in ancient Greece as well. If an Athenian statute grants seemingly unlimited freedom of contract, stating that whatever the parties agree upon is to be binding<sup>3</sup>, and another one establishes that anyone who sells grain grown in Attica abroad is to be fined<sup>4</sup>, how should a court rule in a suit in which someone who has made a contract about the sale of grain abroad demands that his contract partner abide by the terms of that contract? How is a court supposed to do simply as is written under such circumstances? Should the court force the defendant to abide by the contract? And if someone then prosecutes the defendant for exporting grain out of Attica, should the court of this subsequent lawsuit punish him for breaking the law, although a former court of the same state forced him to do so?

Or one could even imagine a person agreeing to another’s proposal to murder someone for money and the relative “contract” being agreed to in due form, or two people reaching an understanding to commit any other major violation of the law and giving it “legal” force by fulfilling whatever formal requirements may apply. (In fact, in most legal systems no law explicitly states that murder is forbidden: there are sanctions for murder, to be sure, but the phrase “murder is illegal” is found nowhere<sup>5</sup> and if we are simply to “do what is written” we may be at a loss in this respect.) Nonetheless, it would be absurd to expect any legal system to recognize such covenants as valid and declare the designed assassin bound by the contract he has made to perpetrate the murder. If any court really accepted this point of view there would be an intolerable contradiction between the law that forbids murder and the law on contracts; the same would apply to any other law challenged by a contract and the whole corpus of law would be worthless.

These examples alone show that any application of statutory law requires a certain amount of interpretation. Apart from that, literal application of the law can result in what many people see as injustice, a fact that the Romans as early as Cicero’s time knew so well that it had already

1. Ath Pol. 11.1: οὐ γὰρ οἴεσθαι δίκαιον εἶναι τοὺς νόμους ἐξηγεῖσθαι παρῶν, ἀλλ’ ἕκαστον τὰ γεγραμμένα ποιεῖν.

2. This is a common trait of all ancient lawgiver stories: see Szegedy-Maszak 1978.

3. Dem. 42.12; 47.77 and others; see below, II.1.

4. Dem. 34.37; 35.50; Lyc. 1.27.

5. Least of all in Draco’s homicide law (IG I3 104), which was still in force in Classical Athens.

become proverbial<sup>6</sup>. A ruling that is formally correct but unjust is likely to undermine the people’s faith in the legal system, which is supposed to produce just results; on the other hand, statute as the supreme source of law cannot be simply brushed aside whenever the judge believes it leads to injustice. In such cases, those involved may feel there is a need to find a way of interpreting the statute other than through its literal application, an interpretation that makes it yield a just result while not calling into question the fundamental obedience due to it. Both considerations – that literal application can lead to injustice and that, even if one were to take a fully legalistic-positivistic stand, literal interpretation is often simply impossible anyway – point to the conclusion that there have to be methods for construing written law, which we may call – a phrase I borrow from Steven Johnstone<sup>7</sup> – interpretive protocols.

Establishing these interpretive protocols is one of the tasks and challenges of any legal system: rarely do the statutes themselves tell the litigants and judges how they are to construe them. In modern states, an entire class of professional jurists are concerned with this matter; interpretation protocols are laid down in the writings of legal scholars and are invested with more or less binding force through court decisions that constitute – formally or informally – precedents to which future rulings are expected to conform. In ancient Athens, however, there was no legal literature, and judgments did not entail discussion among the judges, let alone publication of the grounds on which the court adhered to a particular interpretation of the law and discarded another. Consequently, whatever interpretive protocols there were can hardly have been written down in any kind of text to be handed down to future judges. Due to the lack of explicitly stated rules of statutory construction, it is tempting to infer that there were none at all<sup>8</sup>.

In this paper I will attempt to show that, contrary to this notion, interpretive protocols did exist at least as far as the respect of the letter of the law was concerned: the letter of the law posed a nearly absolute limit to any interpretation, a limit that, contrary to what many scholars have claimed, could not be overstepped at whim. Only in a particular way, involving the narrowing down of the scope of a legal norm, was it possible for a speaker to propose that a jury disregard the literal meaning of a statutory provision in ruling on a given case. First, however, I will deal with the concept of equity, which is often thought to have enabled Athenian juries to bypass strict law; then I will analyze those passages in Attic oratory where the speaker does propose to depart from the literal meaning of the law; in the final remarks I will sum up the argument and, besides, try to suggest a way in which equity may have played a role in the juries’ decision-making.

I. Equity II. “Arguing against the law” in Attic oratory. II.1 Hypereides, *Against Athenogenes*. II.2 Demosthenes and Aeschines over the crown. II.2.a

6. Cic. *De officiis* 1.33: “summum ius summa iniuria” factum est iam tritum sermone proverbium.

7. Johnstone 1999: 22-33.

8. So basically Yunis 2001: 174; cf. Phillips 2009: 117-8.

Proclamation in the theatre. II. 2.b. Proclamation before the audit. III. Final remarks.

### I. Equity

Some scholars maintain that a source of law separate from statute and sometimes overriding it is found in equity. Equity is regarded as something opposed to the literal meaning of statutory dispositions<sup>9</sup>. The origin of this idea lies in Aristotle's views on ἐπιείκεια as well as his suggestions about how to "argue against the law"<sup>10</sup>. I will address these topics next, considering how they have become the conceptual framework within which every scholar addresses the issue. It is impossible to read modern literature on equity in the Athenian legal system without being confronted with Aristotle's treatment of the matter. Therefore, it is necessary to address Aristotle's ideas even if one thinks (as I do) that they do not really correspond to the actual practice of the law courts and forensic oratory in fourth-century Athens<sup>11</sup>: the very concept of equity, its opposition to literal interpretation and the idea that it may be a source of law different from statute is ultimately based on a reading of the philosopher's works themselves, so it is important to spell these premises out in order to be fully aware of them while analyzing the relevant passages in the orators. Otherwise, we would run the risk of subconsciously reading Aristotle's ideas into the texts at hand<sup>12</sup>.

Aristotle discusses his concept of ἐπιείκεια<sup>13</sup> first and foremost in the *Nicomachean Ethics* (5.14 1137a31 - 1138a3). Within this passage we find some assertions about equity being a corrective to an overly literal interpretation of the laws (1137b11 - 28):

"[...] Equity (τὸ ἐπιεικές), though just, is not legal justice, but a rectification of legal justice (ἐπανόρθωμα νομίμου δικαίου). The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover adequately in a general statement. So in matters where, while it is necessary to speak in general terms, it is not possible to do so adequately, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement is defective and erroneous because of its absoluteness, to rectify the defect by deciding as the lawgiver would himself decide if he were present on

9. See Harris 2004:1-4 with further literature.

10. Cf. Arist. Rhet. 1375b15: μάχεσθαι ταῦτη πρὸς τὸν νόμον; 1376b16 (in the part on contracts): ἄπερ ἂν τις πρὸς νόμον ἐναντίον μαχέσαστο and the following, interesting remarks.

11. On this subject see Harris 2006: 162-66.

12. Cf. Todd 1993: 23, where he criticizes MacDowell (1978) for trying to study Athenian law "without preconceptions" while he himself fails to become aware of his own modern preconceptions (such as the one that substance is more important than procedure, a notion with which Todd disagrees), which consequently inform his treatment of the material.

13. For a more complete discussion of Aristotle's concept of ἐπιείκεια see Brunschwig 1996.

the occasion, and would have enacted if he had known about the case in question. Hence, while the equitable is just, and is superior to one sort of justice, it is not superior to absolute justice, but only to the error due to its absolute statement. This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality<sup>14</sup>.”

From this passage we can see that Aristotle considers equity to be, as we may put it, a way of construing statutory law. Although he does not make an explicit distinction between the “letter” and the “spirit” of the law, the expression νόμιμον δίκαιον, “legal justice”, must refer to what we call the “letter of the law”, whereas its corrective, τὸ ἐπιεικές, is linked to the actual will of the lawgiver, so that we could identify it with our “spirit of the law”. That by νόμος, or the adjective νόμιμος, he means the wording of a statutory provision and not the deep meaning that may be attached to it is shown by the sentence where he says that the lawgiver, though knowing the error implied in stating things in general terms, is nonetheless forced to do so and be content with a defective pronouncement<sup>15</sup> as well as by the passage in which he implies that the lawgiver himself, had he had a chance to rule on the case at hand, would have expressed himself differently<sup>16</sup>. Therefore, it is apparent that Aristotle here does not envision equity as a source of law lying outside and possibly going against the lawgiver’s intention, nor does he leave room for the idea that legal rules could *per se* be at odds with justice.

The subject of equity is found again in *Rhetoric* 1.13 1374a-b, where the underlying concept of νόμος is qualified by the adjective γεγραμμένος as referring specifically to “written” law. The philosopher is, again, apparently mainly concerned with the literal meaning of the law rather than what we would call its spirit: he maintains that equity characteristically leads the judge to side with the lawgiver instead of with the written law and to look not at what the lawgiver says but at what he means<sup>17</sup>, a statement that would not make sense if by “the law” he did not mean its strict wording as opposed to the intention underlying it.

Close to this is another passage, *Rhet.* 1.15 1375a25-b25, which addresses the issue of how to argue against a law that favours the opponent. Statutes are listed among the so-called non-technical proofs (ὑτεχνον πιστεῖς: 1375a 22), thus as a kind of evidence. Like the other non-technical proofs, they can favour either the speaker’s own case or that of the opponent; therefore, arguments are needed either to support or to undermine their use in the case at hand. The arguments for and against written law as evidence are expounded systematically. The author orders them in a parallel way: each of the arguments to be used when the law favours the opponent’s case – so that one has to argue against following the letter of the law – is opposed to another argument which one is to use when the law favours one’s own

14. Transl. by H. Rackham, with some modifications.

15. EN 1137b 14-16: ἐν οἷς οὖν ἀνάγκη μὲν εἰπεῖν καθόλου, μὴ οἷόν τε δὲ ὀρθῶς, τὸ ὡς ἐπὶ τὸ πλεόν λαμβάνει ὁ νόμος, οὐκ ἀγνοῶν τὸ ἁμαρτανόμενον.

16. Ibid. 22-24: ὁ γὰρ ὁ νομοθέτης αὐτὸς ἂν εἶπεν ἐκεῖ παρών, καὶ εἰ ᾗδαι, ἐνομοθέτησεν.

17. 1374b 11-13: (It is ἐπιεικές) καὶ τὸ μὴ πρὸς τὸν νόμον ἀλλὰ πρὸς τὸν νομοθέτην, καὶ μὴ πρὸς τὸν λόγον ἀλλὰ πρὸς τὴν διάνοιαν τοῦ νομοθέτου σκοπεῖν.

case and has to argue for adherence to it (see Mirhady 1990). In 1375b8-13, however, Aristotle introduces a passage that does not fit into this scheme. Mirhady (1990: 404) maintains that it concerns “the interpretation of a law or laws and the obsolescence of a law” and goes on to state that “interpretation is needed both where there is a conflict between two laws or between clauses of a single law and where there is some ambiguity in a law”. The reason why Aristotle inserts this passage even though it disrupts the parallelism is probably to be seen in the fact that, as Mirhady himself points out, these arguments can only be used if certain conditions are given, whereas the others can be used in any situation.

It is questionable, however, whether Aristotle here is actually concerned with the interpretation of the law. This entire passage on the rhetoric of law (1374a25-b25) is devoted to the arguments available to a litigant when a statutory norm favouring the opponent’s case is brought forth as evidence; in this event, the litigant has to use one of the retorts expounded here. Pointing out contradictions between the law cited by the opponent and another legal norm, or its ambiguities or obsolescence, is a means to refute the opponent’s claims as far as they are based on that particular statute; in other words, it is an instance of “arguing against the law”, just as much as any other of the anti-legal arguments found in this passage. So the passage at hand is hardly about interpreting “the law” (*ius*) as a whole, but only concerns itself with a single legal norm (*lex*) – the one that the opponent might cite in his favour – and provides rhetorical tools for countering arguments from the text of a statute.

At any rate, equity only plays a limited role in the “arguments against the law”. It is listed in 1375a 30-1 as but one of the arguments that can be opposed to the opponent’s use of a citation from a statute. In forensic speeches no passage is found where the speaker actually asks the judges to put equity above written law. It is necessary to make a distinction between equity and – to use Aristotle’s own words – “arguing against the law”. In the following I will try to show how far, if at all, one can witness these two things going together.

## II. “Arguing against the law” in Attic oratory

With respect to what actually happens in Athenian forensic rhetoric rather than to Aristotle’s intention, Mirhady’s statement as reported in the previous chapter is, in fact, accurate: when statutes or different provisions of the same statute contradict each other, then interpretation is needed, since in actual practice there is no way an orator can openly ask the court to disregard any statutory norm and place equity or unwritten law above statute<sup>18</sup>. Aristotle’s description in *Rhet.* 1.5 1375b8-13, on the other hand, is right in so far as wherever a contradiction between statutory norms is found the judges must bypass literal interpretation and follow a non-literal interpretive protocol in construing the law, thus making a decision against the letter of the statute in question. As I have argued above, such cases are bound to happen in any legal system. In fourth-

18. As we shall see below and is confirmed by the findings in Harris 2006.

century Athens there must have been lawsuits where it was necessary for either party to “argue against the law” and ask the jury to depart from a literal reading of a statutory norm. The question is now how far in actual forensic speeches there are legal arguments that are, explicitly or implicitly, directed against a literal construction of statutory norms. To answer it, we need to find out whether arguments implying bypassing the letter of the law are actually found in the orators and, if they are, what kind of deviations from it are concretely envisaged. Assessing the respect that a legal system has for the law requires inquiring into the form and extent that non-literal interpretation is actually expected to assume, and the measure of this is the kind of arguments litigants use in practice. In the following, therefore, I will analyze corresponding passages from those speeches in which we find arguments aimed at persuading an Athenian court to disregard the precise wording of a statute.

In fact, not many speeches are preserved whose line of argument actually turns on the construction of statutes<sup>19</sup>. In most cases, the outcome of the dispute depends on questions of fact or more general considerations regarding the character of the opponent and the like. This applies even to the passages quoted by scholars to support their views on the role of equity in Athenian judicial practice<sup>20</sup>. In most of the cases that they either invoke or try to rule out as evidence for equity considerations, no statutory clause is explicitly dealt with. In Dem. 21.71-5, for instance, the legality of the use of deadly force is at issue. Demosthenes reports a lawsuit against one Euaion, who was found guilty of killing a certain Boiotos in a fight that ensued after his victim had hit him once with his fist. Euaion was found guilty; Demosthenes points out that he lost the suit by one single vote and surmises that those judges who voted to acquit the killer thought it was proper for him to retaliate in that way, whereas the others found he had overstepped the limits of legitimate self-assertion. As we do not know the exact wording of the statutory norm or norms on which the case turned, we cannot determine whether bypassing strict law played a role or whether judgment both for and against the defendant depended on two equally possible ways of construing the statutes<sup>21</sup>.

In the same way I will not consider other passages that, though named in the literature on equity, cannot be linked to any precise statutory norm. Arguments dealing with general considerations of fairness, humanity and the like without being opposed to the concrete wording of a statutory norm lie outside the scope of this paper<sup>22</sup>. After these cases are excluded, three

19. Cf. Harris 2007: 345: “Relatively few of the cases for which the preserved speeches were written involve disputes about the meaning of the law”.

20. For these see Meyer-Laurin 1965; Harris 2004.

21. My concept of “arguing against the law” ought not to be confused with that of “open texture” (Harris 2000). While “open texture” refers to the possibility of construing the wording of the law in different ways, “arguing against” it means that a litigant proposes a construction that is at odds with its literal meaning; this can happen regardless of whether or not there is any doubt about what this meaning is. The former is a quality of the law itself; the latter is a kind of legal argument dealing with statutory norms.

22. These are studied mainly in Meyer-Laurin 1965 and Harris 2004. The passages that either scholar (or both) uses as examples of appeals to equity are: Aes. 1. 8-25; Dem. 18. 274; 21.43; 21.71-75; 21.90 and 94; Dem. 30 and 31 in general; 59.80-83; Din. 1.55-59; Isoc. 18.34, and the passages listed

passages remain which contain arguments against the letter of the law: Hypereides 3 (5), *Against Athenogenes*, 13-22; Aeschines 3, *Against Ctesiphon*, 35-48 (with the corresponding passage in Demosthenes' defense speech, Dem. 19.120-21); and *ibid.*, 9-31 (Dem. 19.111-19). I will now analyze these passages in the same order as listed.

## II.1 Hypereides, *Against Athenogenes*

Hypereides' speech *Against Athenogenes* deals with a case where the law on contracts is liable to cause the same problems that I have outlined at the beginning of this paper. Hypereides' client, a young man named Epikrates<sup>23</sup>, claims to have been cheated into stipulating a sale contract with the defendant, an Egyptian metic by the name of Athenogenes, who owned a perfumery loaded with debts. In order to get rid of these debts, Athenogenes, according to Epikrates' account<sup>24</sup>, took advantage of the young man's love for one of the slaves who belonged to the business, tying up the sale of the boy with that of the perfumery as a whole. The love-struck Epikrates was so eager to conclude the transaction and get a hold of the boy that he failed to pay attention to the fine print of the written sale contract prepared by Athenogenes, which contained a clause establishing that the buyer was to discharge all debts the business had incurred<sup>25</sup>. One of the business slaves, Midas, had, in fact, caused a certain amount of debt. As it turned out after the transaction was concluded and Epikrates became the owner of the perfumery, those debts amounted to the horrific sum of five talents, which Epikrates could never have surmised from the information he had received during the contract negotiations. Consequently, he sued Athenogenes in what was probably a *dike blabes*<sup>26</sup>, in which he hoped for the court to release him from the self-incurred duty to take Athenogenes' debts upon himself.

Now in Athens there was a statutory norm, which Phillips (2009) refers to as "the general law of contracts", which established that whatever the parties had agreed upon was to be valid<sup>27</sup>. The text of the statute is nowhere cited directly but just paraphrased; therefore, there is a great amount of doubt as to its exact wording, including the crucial question whether or not it contained a clause specifying that the rule applied only to legal or

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below.

23. The name has been reconstructed by editors in a fragmentary passage in chapter 24; see Whitehead 2000: 327.

24. In this paper I will simply assume that Epikrates' version of the story (the only one we know, and defended by adducing evidence that is now lost beyond recovery) is true, and ask what legal consequences it may have. In other words, I will not be concerned with questions of fact but exclusively with questions of law.

25. Maffi 2008: 212 claims that Epikrates would have assumed the debts independently of the contract just on account of the sale; see however Talamanca 2008, who points out that in the speech itself there is little to confirm this theory.

26. Since the beginning and the end of the speech are lost, we do not know for sure what kind of lawsuit Epikrates chose to file and what the exact terms of the dispute were. Scholars generally agree that he filed a *dike blabes* and wanted the court to void the contract, although he may conceivably have restricted his requests to the nullification of the deceptive clause.

27. On the question of the possible invalidity of contracts and other transactions in Athenian law see Cantarella 2012a.



fair agreements. Phillips (2009: 93-106) has argued, based on a thorough study of all ancient sources for that law<sup>28</sup>, that it contained no such rule – nor any further limitation, for instance willingness of one party, lack of deceit and force, and so on – and therefore, if taken literally, declared any and every contract to be valid, including fraudulent and even illegal ones<sup>29</sup>.

In particular, he shows that the passages where philosophers speak of such a requirement are most likely concerned with hypothetical cases, hardly with Athens’ actual legal system. Even the passage in Aristotle’s *Rhetoric* that we have seen above<sup>30</sup>, according to Phillips (95), does not necessarily refer to any actual Athenian situation. But even if it does, it actually confirms his position: the philosopher speaks of two different statutes, one (ὁ μὲν) stating that any and every contract shall be valid, and another (ὁ δὲ) prohibiting illegal contracting. There is no hint of any limitation in the first statute of the freedom of contract: only the second one limits it, thereby contradicting the other one, which is likely to be the general law of contract on which the present dispute turns.

But if Aristotle is referring to an actual statute, one may wonder if the second law he introduces in this section also has its counterpart in real Athenian legislation. If it does, however, why does Hypereides not quote it? I assume, by way of hypothesis, that the second law Aristotle hints at is the one found in *Digest* 47.22.4 (Arnaoutoglou 1998 no. 34). There, the Roman jurist Gaius reports a statute, generally believed to be Solonian, which established that

If the inhabitants of a deme, or members of a *phratría*, or members of groups aiming to hold religious feasts, or sailors, or members of groups dining together or providing for their burial, or members of religious clubs, or individuals engaged in some enterprise for plunder or trade, whatever they agree between themselves will be valid unless forbidden by public statutes<sup>31</sup>.

28. The strongest confirmation that there was no justice requirement is however Hyp 3.13 itself, as we shall see below.

29. Kußmaul 1969: 34-7 argues that the word ὁμολογία and the related verb forms originally referred to a *pactum*, a settlement aimed at rendering a given situation final, thus barring further dispute (cf. Carawan 2006), rather than a *contractus*, which creates obligations for the future. The statute on ὁμολογία must then have meant that no claim or state of affairs prior to the settlement could later be held against it (for instance, if a creditor has renounced part of his claim he is henceforth bound by this decision). In the fourth century, however, this norm had come to be understood as applying to any agreement. If this is correct, it is no longer surprising that the statute as devised by the original lawgiver did not contain any legality or justice requirement: no obligation ensued for the contractors to do anything (save refrain from challenging the new situation), so they could not be bound by the settlement to do anything illegal, either; besides, such a clause would likely have opened up the case for further litigation, thereby defeating the very aim of the statute. A justice requirement seems just as superfluous, provided each party to the agreement waives his rights willingly; if anything, we would expect a volition clause.

Kußmaul also compares a Hellenistic statute from Ephesus (Syll.<sup>3</sup> 364), which deals with land ownership and contains a clause very similar to the Attic law of contracts (ll. 85-7). This clause obviously refers to *pacta* in the sense he explains and does not contain any legality or justice requirement; interestingly, it does contain a volition clause (ll. 75-7 and loc. cit.) which betrays the concern that some people may have been forced (βιασθέντες) to accept the settlement.

30. 1375b 8-11: οἷον ἐνίοτε ὁ μὲν κελεύει κύρια εἶναι ἅτι' ἂν συνθῶνται, ὁ δ' ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον.

31. Transl. by Arnaoutoglou.

Now while it is quite plain to see how in certain cases a contradiction is bound to arise between this statute and the general law of contracts, Epikrates' case obviously does not fall under it. The law Gaius reports only concerns agreements made within associations, not between unrelated individuals. Furthermore, it does not address questions of justice but its aim is obviously to establish a hierarchy of norms within the state; none of this is relevant to the case dealt with in Hyp. 3.

In sum, all available evidence points to the wording of the general law of contracts not imposing any limitation on the validity of agreements and thus validating even such agreements that were obviously at odds with justice. This looks like a textbook case of *summum ius summa iniuria*: while the law says that Epikrates must assume all the debts of the perfumery, it is certainly not fair that an inexperienced young man, after being hoodwinked by a crook taking advantage of his romantic feelings into buying a business encumbered by an enormous amount of debt, should now be liable for it although he had no part in bringing it about. This seems precisely the kind of situation in which a litigant is to follow Aristotle's rhetorical tactics in order to reject the text of a law. Hypereides could make Epikrates state, for instance, that unwritten law provides a higher standard to follow than statute or any other of the lines of argument listed in the passage of the *Rhetoric* described above, including the appeal to equity. Instead, Epikrates argues that a justice requirement is indeed contained, albeit not stated explicitly, in the statute. To do so, he embarks on a quite lengthy analysis of statutes that, in his view, show that in Athenian law only just agreements or dispositions are recognised as valid (13-22)<sup>32</sup>.

First of all, Epikrates discloses to the jury the argument he expects Athenogenes to put forth, that is, a reference to the general law of contracts to claim that the contract is valid in any case (ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης, ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ, κύρια εἶναι). To this he opposes his take on the meaning of the law:

τά γε δίκαια, ὦ βέλτιστε· τὰ δὲ μὴ τοῦναντίον ἀπαγορεύει μὴ κύρια εἶναι.

Yes, just contracts, my friend: the unjust ones (the law) declares invalid.

*Pace* Harris (2000: 49), the statement “the unjust ones (the law) declares invalid” is very likely nothing more than Epikrates' own interpretation of the statute on contracts. If there were a statute with such wording, the following passage with its lengthy quotation of a series of statutes unrelated to the present case would be pointless (Kästle 2012: 193, 202), especially since at least two of the four statutes quoted in 14-18 – the one on brides in 16 and the one on testaments in 17 – do not contribute anything to the assessment of what is just in the present case, and the speaker himself only draws attention to the fact that they contain a justice requirement<sup>33</sup>. The main aim of this passage is not to define justice more concretely but to

32. Long paraphrases and analyses of this argument are found especially in Harris 2000: 48-54 (who, however, thinks that the law did contain a justice requirement); Phillips 2009: 106-14.

33. This does not prevent Epikrates from drawing direct parallels to his case whenever the opportunity presents itself, as he does in 18. Of course, every argument available will be used.

prove that the law that seemingly favours Athenogenes must be construed as if it contained a justice requirement.

The words that follow the sentence cited above confirm this interpretation. The sentence ἐξ αὐτῶν δέ σοι τῶν νόμων ἐγὼ φανερώτερον ποιήσω contains an odd transition from the singular ὁ νόμος to the plural οἱ νόμοι. In Athenogenes’ supposed argument the word νόμος is most naturally taken to refer to the particular statute known as the law of contracts; when Epikrates retorts that “the law” only allows just contracts and invalidates unjust ones he is likely referring to that particular statute as well; otherwise the change of grammatical subject would be overly awkward. Moreover, taking the sentence ἐξ αὐτῶν σοι τῶν νόμων φανερώτερον ποιήσω to mean that Epikrates is now going to expand on the substantial content of the justice requirement<sup>34</sup> is far-fetched. Without any direct object of the expression φανερώτερον ποιήσω explicitly stated, it must be taken to refer to the content of the preceding sentence, which states no more than that “the law declares unjust contracts to be invalid.” Then, however, what follows must be an explanation of why it is so, not a disquisition aimed at filling the justice requirement with concrete meaning. And if it is indeed such an explanation and if there were a statute declaring illegal contracts void, this very statute is what would come next. Instead, Epikrates in 14 speaks about the law that forbids lying in the market place, and also the subsequent laws too are all unrelated to the present case<sup>35</sup>.

Thus, the only satisfying interpretation (also confirmed by the results of Phillips’ analysis) is that Hypereides contends that the general law of contract forbids unjust contracts in spirit, although not literally, and then goes on to “make it clear”, that is, make it plainer for Athenogenes (and the jurors) to see that the system of the laws as a whole requires contracts to be just. This requirement can then be said to be made by the law on contracts as well, if we assume (as Hypereides here obviously does) that a unique legislative intent underlies the entire legal system.

To be sure, in order to detect a principle contained in the laws as a whole a litigant must infer it from the texts of the actual statutes. Therefore, Hypereides makes his client cite several statutory norms that back up his contention of an implicit justice requirement. The first is the one that forbids lying in the market place<sup>36</sup> (ch. 14); Epikrates points out that Athenogenes did lie to him to persuade him to agree to the sale contract. The second establishes that any ailment that escaped notice on the sale of a slave leads to the nullity of the sale, even if the seller did not know about it (15). If so, Epikrates argues, then the sale contract at hand must *a fortiori* be nullified since the seller was well aware of the defect afflicting the slaves he sold along with the perfumery. Then he goes on to show that contracts referring to free people, too, must be just in order to be valid: engagements, which in Athens were contracts between the groom and the bride’s father, are void by law if the father has lied to the groom about some important characteristic of the bride such as legitimacy or citizenship (16). Next, he

34. As Harris (2000: 49–50) apparently does.

35. With the exception of those cited in 22, on which see below.

36. On this rule see Cantarella 2012b.

refers to the well-known Solonian law on inheritance, which explicitly declares wills invalid if, for example, the testator has been influenced by a woman and in a few other cases (17). Again, he uses the statute at hand for an argument *a fortiori*: if one may not even freely dispose of his own property by way of an unjust testament, then one certainly cannot make arrangements for somebody else's property by means of an unjust contract, as Athenogenes is trying to do. Then the same statute is highlighted again from a different point of view: wills are invalid if the testator was under the influence of a woman; Epikrates acted under the influence of Antigona, a former prostitute now united in a kind of joint venture with Athenogenes, therefore his contract is invalid. Thus Epikrates tries to narrow the compass of the norm from contracts in general to just ones. Linguistically, this is expressed in particular by the particle γε in the phrase τὰ γε δίκαια in chapter 13<sup>37</sup>, a particle one of whose main usages is precisely limitation or narrowing down<sup>38</sup>.

Scholars generally assume that Epikrates is trying to persuade the jury that the array of statutes he cites in 13-22 have a direct bearing on his case and should therefore be applied directly. Since there is little doubt that none of them really applies (with an exception which will be stated below), he is thought to be trying to fool the jury into thinking they do. While there can be an element of this as well (as usual, one can discover several argumentative strategies being employed at the same time), the main line of the argument is aimed at uncovering a justice requirement that, in Epikrates' opinion, is implicit in the legal system of Athens as a whole. The unrelated statutes are thus cited not because they "apply" but because they help disclose the real meaning of the law on contracts (cf. Harris 2004: 12).

In chapter 22 Epikrates cites two more statutes. The immediate context is his anticipation of a possible defense strategy: Athenogenes may claim not to have known about the debts his slave had incurred. Here yet another statute, which the speaker explicitly refers to as Solonian, comes into play, establishing that liabilities incurred by a slave must be paid by the master for whom the slave was working when he or she caused the damage. Epikrates then blames his opponent for not heeding the law but basing his argument on breach of contract, and to back this up he mentions the statute establishing that a decree cannot override a statute: if so, an unjust contract can *a fortiori* not do so either.

Phillips is unique in arguing that the law about the liability for damages caused by slaves actually applies to Epikrates' case<sup>39</sup>. Since it is the slave Midas who has incurred the debts that now plague the perfumery, the speaker can arguably demand that the person who owned him when the debts were incurred be held responsible for them. Whitehead (2000: 324) thinks that if this law really applied, Epikrates would not have had to present his battery of unrelated statutes; however, this overlooks the fact that in forensic speeches several different and often intertwined lines of argument are often present. The speaker puts forth each and every

37. This is already observed by Phillips 2009: 92 n. 11.

38. Denniston 1950: 140.

39. For criticism of this view see Kästle 2012: 201. For the sake of argument, I will follow Phillips' interpretation as far as I think it possible.

argument he thinks can persuade some jurors, and the redundancy is useful because very probably not all jurors are going to be persuaded by the same arguments, so those who do not buy into line of argument A may find line of argument B convincing and vice versa<sup>40</sup>. In particular, in Athens it was apparently not at all clear that private contracts were subordinate to the law: litigants could at least argue the opposite in court and try to persuade the jury to decide according to this principle (Phillips 2009: 95-7).

There is some room for doubt about the actual meaning of the provision. Phillips takes it to regulate cases in which a slave is borrowed by someone who is not his or her master and, while working for that person, causes losses (whether they are debts or fines depends on how we fill a lacuna in the papyrus text) and to establish that they are to be paid by the borrower instead of by the owner (in the following simply “the liability law”). Hypereides’ quotation of the statutory norm runs as follows:

τὰς ζημίας ἃς ἂν ἐργάσωνται οἱ οἰκέται καὶ τὰ ἀναλώματα (ἀδικήματα)  
διάλυειν τὸν δεσπότην παρ’ ᾧ ἂν ἐργάσωνται οἱ οἰκέται.

Phillips (112) translates: “Whatever losses and expenses slaves occasion shall be discharged by the master for whom the slaves are working,” which is also the translation printed by Whitehead. Phillips accuses Hypereides of misrepresenting the meaning of the law, which he claims refers to slaves borrowed by another person and not sold to a new master. Nonetheless, the wording of the law itself points to ownership, and thus sale, not to borrowing, for through borrowing alone no one can become master (δεσπότης) of a slave. If the borrower of the slave were meant, the text would simply say “he for whom the slaves are working”, not “the master for whom...” The way the norm is phrased only makes sense if we interpret it as Blass<sup>41</sup> and Wyse (s.u.) do, that is, as regulating cases in which a slave, after causing damage or incurring a debt, was sold to another person prior to the filing of a lawsuit or the beginning of other litigation regarding the damage or debt in question. In such situations, uncertainty arose as to who was to be held responsible for the expense, the old master or the new one. This is the kind of problem that col. VII 10-15 of the Gortyn Code also answers<sup>42</sup>. The Athenian statute comes down on the side of the former master being responsible for it. We cannot ignore the fact that the statute speaks explicitly of a δεσπότης, but we must conclude that the legal responsibility can only be borne by someone who is the legal master of the slave who has caused the debt and that the clause “for whom the slaves are working” specifies that the duty to cover the slave’s debts or damages is on the person who was his master at the time he caused them. This conclusion is confirmed by the

40. Cf. Wohl 2010: 8-9.

41. Cf. his Latin paraphrase (Blass 1869 ad loc.): *is dominus cuius erat servus cum damnum intulit*.

42. See Wyse 1904: 506; Willetts 1967: 70, who expounds the traditional interpretation according to which the buyer had sixty days’ time to return the slave who had caused a damage to free himself from liability. Jakab 1997: 93 takes this provision to mean that the buyer had sixty days to surrender the slave who has caused the damage to the person affected. For the discussion see *ibid.* n. 34 with further literature.

parallelism of the two clauses τὰς ζημίας ἄς ἂν ἐργάσωνται οἱ οἰκέται and παρ' ᾧ ἂν ἐργάσωνται οἱ οἰκέται (one can also wonder whether the second of these clauses is not best translated as “under whom they cause the loss”, with ζημίας being understood with ἐργάσωνται; cf. Blass’s Latin paraphrase referred to above).

It is, therefore, more plausible to interpret the provision in the same way as Hypereides does and to assume that on this point there is really no misrepresentation on his part. If so, we have indeed a statute that is both directly applicable to the case at hand and favours Epikrates. This means, however, that a conflict exists between this law and the general law of contract, which in turn raises the question of the relationship between the two norms.

Phillips (113-4) suggests an interpretive protocol that could be used by Athenogenes in refuting Epikrates’ prosecution. He seems to assume that his is the correct one, whereas the one that is entertained in the speech and on which Epikrates’ line of argument is based is wrong, and draws this conclusion from the text of the general law of contract itself, claiming that its lack of a legality requirement proves that other legal norms concerning sales are *ius dispositivum*<sup>43</sup> and thus overridden by the agreement undergone by Epikrates. This, however, is highly questionable, since there is no *a priori* answer to the question whether the lawgiver’s silence about legality and justice requirements is accidental (he forgot or did not think it necessary to spell them out) or in itself meaningful (the lawgiver embraced the principle *caveat emptor*, so that any buyer or seller who found himself cheated had to blame only himself and live with it instead of seeking redress with the *polis* – which is, I admit, a perfectly conceivable legislative decision). The very notion that the law has to be construed according to the lawgiver’s will, intuitive as it is, is nonetheless an assumption external to the law itself, and in fact sophisticated jurists are likely to dismiss it. Legal construction is conceivably simply a matter of assessing the scope of a given norm and establishing the meaning it assumes in the context of the legal system as a whole, and not of reconstructing what the original lawgiver may have meant by it.

Phillips’ position seems to imply that any statutory norm that conflicts with the general law of contract is to be construed as *ius dispositivum*, thus only applying by default whenever the parties have not agreed otherwise. He reaches this conclusion on the grounds that said law contains no legality requirement. This view, however, faces serious objections. First of all, it simply assumes that a statute’s application can only be limited by another legal norm if there is a special clause to this effect in the statute itself. This is questionable because, as I argue at the beginning of this paper, the limitation of legal rules by other ones that overlap with them is a logical requirement

43. Following a definition common in civil-law systems, I call *ius dispositivum* statutory norms that apply only by default, that is, if the parties have not agreed otherwise; *ius absolutum*, on the other hand, refers to norms that cannot be dispensed with and therefore automatically nullify any contract clause that contradicts them. In European civil codes the nature of a rule as *ius dispositivum* or *absolutum* is sometimes explicitly stated in the statute, but in many cases it has to be established by way of interpretation. This is not to be confused with Phillips’ own use of the word “dispositive” (113 n. 74), by which he obviously means “decisive”, “settling the question”.

of any legal system rather than something subject to the discretion of a single legislator. Moreover, if we agree that Athenian statute law had to be to some extent open to change, and if – as Phillips himself points out (p. 107) – in ancient Athens changes were customarily brought about by new legislation rather than by a rewriting of the old statutes, it makes little sense to maintain that a statutory provision could only be overridden if it said so in the statute itself. Besides, quite a few statutes undisputedly limited the law of contract in Athens<sup>44</sup>. It is not clear why these ones would override the law of contract but the liability law would not. Phillips fails to provide a plausible criterion as to which statutes override which, so one could simply assert the opposite and maintain that the liability statute is just another one of those laws that limit the application of the contract law. Finally, there is little to suggest that Athenian lawgivers ever meant any statute they enacted to be only *ius dispositivum* rather than a fully binding norm expressing the will of the *polis*. If statutory texts were to be interpreted in that way we should at least expect there to be a conditional clause to the effect that “(the provision contained in the main clause) is valid unless the parties have agreed otherwise”. Such sentences are, at best, rare in actual Greek statutes, and there is no hint that the liability law contained one. Therefore, one could well regard it as more appropriate to follow the principle *lex specialis derogat legi generali*<sup>45</sup>, which privileges the law that has a smaller compass (applies to fewer cases) over the one with a more general bearing<sup>46</sup>. If we do so, then the law cited by the speaker in 22, being the one with the smaller compass, overrides the more general law of contract, so that Epikrates’ legal interpretation is to be regarded as correct and Phillips’ (and, hypothetically, Athenogenes’) as wrong<sup>47</sup>.

The subject of the present inquiry, to be sure, is not what we modern scholars think is the proper way of construing Athenian statutes, but what the Athenian themselves thought about the matter. Hypereides does not use the counter-arguments that I have just listed but phrases the question rather differently. Possibly, he had to make use of all kinds of legal arguments available to him because the letter of the general law of contract was obviously a formidable obstacle to making his case in front of an Athenian jury. He could not afford to assert without further qualification that “legal provision A breaks legal provision B” but had to explain away

44. Phillips 2009: 107-9.

45. For this principle in modern legal systems see for instance DuPasquier 1942: 147-50 (for continental Europe; in Common Law countries this principle hardly seems to play a role, but see Solan 1993: 37, who mentions it briefly). This rule of statutory construction is well known in continental Europe. If a statute says “oral agreements are just as binding as written ones” and another says “bank loans need to be put in writing to be valid”, it will not help a hypothetical banker demanding that an oral bank loan be declared valid to refer to the general law about the formlessness of agreements and argue that loans are agreements and therefore the general law about the validity of agreements applies. The norm that refers to bank loans in particular overrides the one about agreements in general and not the other way around.

46. The American principle that the newer law overrides the older one was probably unavailable to the Athenians, who, as far as we can tell, lacked records of the dates of the enactment of their statutes.

47. Since the specific law is contained in the general one, if the general one were given precedence the specific one would be overridden in any single case, which would make it meaningless. Such a legal construction would be untenable.

the wording of provision A, narrowing its literal meaning to a set of cases into which his own did not fall. In 13-18 he has his client marshal an array of unrelated statutes which he maintains prove that the general law of contract had an implicit justice requirement; then he tackles the question whether the legal evaluation would change if Athenogenes did not know about the debts incurred by Midas<sup>48</sup>. Should Athenogenes claim that in such a case it is only fair for the present owner of the perfumery and its slaves to be held responsible for the debts attached to it, Epikrates has a response handy: he points to another law – supposedly a Solonian one – in which the opposite principle is upheld (22). Thus Hypereides does not embark on an abstract line of argument concerning statutory construction such as those Phillips or I use in a lawyer-like manner. Instead, he constantly tries to depict an ideal of justice and fairness (we might say: equity) to which Solon was allegedly committed and to show that it is actually embodied in the written laws of the city. Abstract rules such as *lex specialis derogat legi generali* are likely to work only with professional jurists used to such abstraction; the man on the street will be more responsive to arguments about justice and fairness.

## II.2 Demosthenes and Aeschines over the crown

The narrowing of a statutory norm and the assessment of the limits of its application are also the cornerstone of the most famous legal dispute in Attic oratory, the one between Aeschines and Demosthenes over the crown that Ctesiphon had proposed in the Assembly be awarded to the latter. Quite uniquely, we have the speeches of both sides, that is, Aeschines 3 (*Against Ctesiphon*) and Demosthenes 18 (*On the Crown*); and we also know how the court ruled, that is, in favour of Ctesiphon, the defendant<sup>49</sup>, whom Demosthenes supported with the speech mentioned above. Aeschines filed a *graphe paranomon* against Ctesiphon on several grounds, disputing his contention that Demosthenes deserved the award and also claiming the decree proposed by Ctesiphon to be illegal on two accounts: at the time of the proposal Demosthenes was still subject to audit for his term of office as *teichopoios*, and the law prohibited magistrates to be awarded crowns before the audit; besides, Ctesiphon's decree provided that the awarding of the crown be publicly announced in the theatre, whereas according to Aeschines the law imposed that such announcements be made in the Assembly only. In the following, I will first analyze the second point in dispute and then turn to the first, which has caused more debate among scholars.

### II.2.a Proclamation in the theatre

In his prosecution speech, Aeschines contends that it is illegal to announce the award of a crown to a citizen in the theatre: the law, he alleges,

48. At this point in the speech Epikrates explicitly suggests that agreements should only be regarded as valid if the parties fully understood what they were agreeing to. On this topic see Carawan 2006: 346-50.

49. Plut. Demosthenes 24.



establishes beyond any doubt that the proper place to do so is exclusively the Assembly (Aes. 3. 32-48). He first cites a statute<sup>50</sup> according to which crowns awarded by the Council or the Assembly must be announced at their respective place itself and nowhere else (32). Ctesiphon’s decree contradicts this law and Aeschines has it read out (33-4). He then goes on to refute an argument that he foresees Ctesiphon and his co-litigant Demosthenes will put forth: that the Dionysiac law, as he himself calls it<sup>51</sup>, explicitly permits the announcement of the award in the theater whenever the Assembly sees fit to do so (35-6). This would amount, he argues, to admitting the existence of two statutes contradicting each other; such a situation would not only be unbearable, but also impossible since “the lawgiver who founded the democracy” has introduced a body of *thesmothetai* tasked precisely with reviewing the laws every year and amending them whenever it proves necessary, thereby eliminating any contradiction between different statutes (37-40).

Aes. 3.37-40 displays a “rhetoric of law” much different from that which we have seen above in Epikrates’ case. He forcefully and graphically equates contradictions between statutes with a state of political degeneracy, and he basically asks his listeners the following question: What kind of state would we be living in if the same thing was both imposed and prohibited by the laws (37)? One might reply: It would simply be a situation in which one has to regard the more specific norm as an exception to the other. As I have shown above, such a situation is given in any state with written laws, and there is nothing “degenerate” or “anarchic” about it. Aeschines’ rhetoric aims at making the listeners think the opposite. Nonetheless, such an argument is not sufficient in itself: Aeschines must dispose of the other law, as the following shows. Apparently, the jury cannot be expected to be content with an outright denial that there might be a contradiction between statutes but needs some sort of explanation of why the wording of the statute favouring the opponent is no obstacle to deciding in favour of the speaker.

In 41-8 Aeschines goes on to explain why the Dionysiac law does not apply to the case at hand. He tells a story about the custom of having things announced in the theatre growing more and more disturbing to the participants at the Dionysia as well as furthering false claims to glory that ultimately had negative effects on the democracy. To put an end to this situation, some lawgiver decided to prohibit making announcements in the theatre altogether except for those of crowns awarded to an Athenian citizen by foreign cities. Proof of the correctness of this interpretation, Aeschines argues, is to be found in a clause that provides that crowns announced in the theatre be dedicated to Athena and thus taken away from the person crowned. Such a poor treatment of the awardee, who is awarded a crown and deprived of it at the same time, is only possible in the case of honours conferred by foreign states (46). As Carey ad loc. notes<sup>52</sup>,

50. The transmitted text of Aes. 3 contains no documents (statutes, decrees, and the like). The response speech, Dem. 18, does, but the documents are regarded as spurious by virtually all scholars.

51. This speech is our only source for this statute. Dem. 21.51 speaks of “the laws that concern the Dionysia”, which probably refers to the same statute that is mentioned here.

52. Carey 2000: 181.

Aeschines slips over this point rather quickly, presumably in order that the jurors may not stop to think that the dedication of the crown to a god, especially the goddess who bears the same name as the city itself, actually enhances rather than reduces the honour.

We do not know the content of the Dionysiac law except for what Aeschines and Demosthenes tell us about it. While the former only paraphrases it, the latter actually has it read out (Dem. 19.120; the orator does not call it “Dionysiac law”, but it is clear that it is about crowns announced in the theater, so we must assume it is not the same statute that Aeschines has the court secretary read out at 3.32). There is little doubt that the statutory text the manuscripts of Demosthenes display at this point is spurious, therefore, what knowledge we have of the Dionysiac law is based on the paraphrases found in both speeches. That said, the picture of its content that the two speeches provide is coherent, and the difficulty of reconstructing it has often been exaggerated. It is true, however, that the argument made by Aeschines in 3.41-45 and the one made by Demosthenes in 19.120-21 do not match: Demosthenes does not address Aeschines’ argument that the Dionysiac law only applies to crowns awarded by foreign states; instead, he puts forth the very argument Aeschines has anticipated, pointing out the clause that establishes an exception to the prohibition whenever the Council or the Assembly votes to allow the proclamation of the crown in the theatre. I suggest that this is one case in which either speech (probably Aeschines’) was revised for publication after delivery in court, thus disrupting at some point the correspondence between the arguments<sup>53</sup>.

Aeschines’ interpretation of the statute is hardly persuasive. In his own paraphrase or quotation of its text in 44 and 45, after the indication that crowns bestowed by a deme or *phratría* may not be proclaimed in the theatre, we find the words μήθ’ ὕπ’ ἄλλου μηδεός, which are shown by the addition of φησί to be a verbatim quotation from the law. Now there is no reason to assume that “nobody else” should be taken to mean “nobody except foreign states”. But then the prohibition must apply equally to any crown, not only foreign ones, and so must the exceptions contained in the statute. Therefore, the words πλὴν ἐάν τις ὁ δῆμος ἢ ἡ βουλὴ ψηφισῆται τούτους δ’ ἀναγορευέτω (Dem. 19.120) must apply to all possible crowns, including those bestowed by the Athenian people, as is the case with the one Ctesiphon’s decree provided be given to Demosthenes. Aeschines’ argument is flawed.

It is clear, at any rate, that Aeschines in 41-8 is trying to cope with a statute whose wording favours the opponent. The way in which he does it, contrived though it is, is worth paying attention to. It should be noted that the legal opinion Aeschines argues for implies a departure from the letter of the law only in as far as it introduces a limitation of its scope that is not contained in the wording itself. Obviously unable to find in the text of the Dionysiac statute itself any explicit indication that it applies exclusively to crowns awarded by foreign states, Aeschines infers this limitation from the fact that it provides that the crown is to be dedicated

53. On the evidence of revision in Aes. 2 see Harris 1995: 10-11; Carey 2000: 93-4 (cf. 95 n. 10). Carey 2000: 165 also states that Aes. 3 too shows evidence of editing before publication.

to Athena. Whatever we may think of his argument that this dedication belittles the receiver and people will be more thankful to their city if the crown hangs on their wall rather than in a temple, the interpretive protocol used here is basically the same that is found in *Against Athenogenes*: an apparent contradiction between statutes is resolved by limiting the scope of application of the statute that favours the opponent to include only cases other than that which the dispute at hand is concerned with. This is done by reconstructing the lawgiver’s intention. The main difference from the *Athenogenes* dispute is that Aeschines does not cite other statutes to infer from them a legal idea which, as the whole corpus of statutes is supposed to form a coherent system, is then generalized. Instead, he has to use the provisions of the Dionysiac law itself to prove his point. It is indeed difficult to see what general legal idea could come to his aid here. His whole case is based not on justice or a broader sense of legality but on technicalities of procedure (and this may well be the fundamental weakness of his case). His attempt to discover at the bottom of the statute a particular logic that would support his case may be flawed, but it reflects a kind of argument that is attested in other speeches as well<sup>54</sup>.

## II.2.b Proclamation before the audit

Aeschines’ second line of attack concerns the proposal to crown Demosthenes in and of itself. In 9-31, Aeschines claims that it is against the law to crown a magistrate who is still subject to audit. When Ctesiphon introduced his motion Demosthenes had not yet undergone the audit for the office of *teichopoios* he had held<sup>55</sup>, so the motion was illegal and rightly questioned by means of a *graphe paranomon*. Demosthenes 18.111-19 retorts that according to Ctesiphon’s decree the crown is to be awarded not for his term of office but for donating money out of his own pocket to finance the building of the fortifications. His use of his private wealth, Demosthenes argues, is not subject to audit in the way the performance of a public office is. Therefore Aeschines’ accusation is frivolous.

Against the opinion held by most scholars ever since antiquity, E. M. Harris has argued that Demosthenes is right also in this respect<sup>56</sup>. He reconstructs the statutory provision in question as stating ἀρχὴν ὑπεύθυνον μὴ στεφανοῦν, which he maintains can be translated in two ways: either “a magistrate still subject to audit shall not be crowned” or “a term of office for which the audit has not yet taken place shall not be awarded a crown<sup>57</sup>”. Indeed, the word ἀρχή in Attic Greek can mean both “magistrate” and “term of office”. Harris thus assumes that the dispute turns on which

54. Cf. for instance, besides the line of argument used in the *Athenogenes* speech studied above, Aes 1.7-25; 3.9-45.

55. Aeschines takes issue with the expected objection that *teichopoios* was not an office subject to audit. In fact, Demosthenes’ speech does not contain any such claim, thereby implicitly agreeing with what Aeschines says here, so we can ignore this side of the issue.

56. See especially Harris 1994: 140-47. Further Harris 2000: 59-67; 2006: 164-65; contra, for instance, Meyer-Laurin 1965: 32. Carey 2000: 161, while seriously considering Harris’ arguments, still sees a possibility to make a case for Aeschines’ opinion.

57. Harris’ position is developed over several papers (see the previous footnote). Here I sum it up as it stands at present.

one of these two meanings is intended in this context: Aeschines claims that the law speaks of a “magistrate”; Demosthenes, on the other hand, takes the passage to refer to a “term of office”. In this view, the dispute is one between two equally possible literal meanings of the provision; no departure from the letter of the law is envisioned in either case, but there is only incertitude as to what this literal meaning actually is.

However, I would like to suggest an alternative view of this construction problem, a view that I think is more compatible with Attic idiom. The verb στεφανοῦν is generally used with respect to a person: rarely is any inanimate object “crowned”, and crowning something as abstract as a “term of office” is outside of what seems to be natural Attic idiom<sup>58</sup>. If this is correct, we are left with the first translation, “a magistrate still subject to audit shall not be crowned,” and must accept the fact that the statute *literally* says that no one who is still subject to audit for any office he has held may be awarded any crown at all. This interpretation, however, meets the objection from common sense that Harris (1994:146) raises: anyone who holds several offices one after another could never receive a crown unless he either stepped down or failed to get re-elected, and this would apply especially, paradoxical though it is, to a popular and successful politician like Perikles, who was elected general fifteen times in a row (Plut. *Pericles* 16.3) and therefore, if we accept Aeschines’ legal standpoint, would never during this time have been able to be awarded a crown by the Athenian people.

As should have become clear by now, I do not think that the literal interpretation of a statute is necessarily the correct one; more to the point, from what we have seen so far, we have to conclude that it was, in fact, possible for Athenian litigants to argue for a non-literal construction of a statutory norm, at least within the limits I have expounded above. It was acceptable even for Athenian jurors, who were bound by their oath to follow the (written) laws, to depart from their literal meaning as long as the departure consisted only in narrowing their application to fewer cases than the wording seemed to allow. Demosthenes’ counter-argument seems actually to point in this direction. By narrowing the scope of the legal norm to apply exclusively to what the magistrate does in his term of office, he argues for a departure from what, according to the most idiomatic interpretation, is the literal meaning of the law, a departure that, however, as the evidence considered so far suggests, was probably regarded as relatively unproblematic in Athenian legal culture.

Although the case in point was arguably judged principally on account of Demosthenes’ political career rather than of legal technicalities, more than four fifths of the jurors did not think it at odds with their conscience and their oath to vote for the defendant, Ctesiphon, and acquit him and his decree from the charge of illegality, although they had sworn to uphold the laws of Athens. Epigraphic evidence also suggests that crowns such as the one proposed by Ctesiphon were not rare in fourth-century Athens

58. The verb is used in Eur. Tr. 1030 with Ἑλλάδα as its object; in And. 4.26 with τὴν πόλιν καὶ τὴν οἰκίαν. These words can however be regarded as collective nouns, thus referring ultimately to people. In all other passages in Attic prose that I know of the object of the verb is a person.

(Harris 1994: 146-7). Obviously, most Athenians did not share Aeschines' opinion about the correct understanding of the statutes he cites. If the reconstruction of the legal texts proposed by Harris is correct (which is admittedly uncertain), the Athenians apparently had little difficulty accepting a non-literal application of a statutory norm – “non-literal” in the sense that it restricted the application of the written norm at hand to a smaller compass of cases than was apparent from the norm itself and thus ignored its wording in a certain range of occurrences. On the other hand, the restrictive construction of the Dionysiac law proposed by Aeschines was not accepted, probably because his reconstruction of the supposed will of the lawgiver was too far-fetched. Unlike this statute, the one prohibiting the crowning of magistrates still subject to audit was not applied literally, presumably because common sense told the Athenians that what the lawgiver actually meant was that no magistrate should be crowned *for any of the things for which he was still subject to audit*, not that he was forbidden from being crowned altogether.

### III. Final remarks

It should be clear by now that the Athenian jurors in deciding this case did not blatantly ignore their own laws but followed an interpretive protocol that did not consist in simple literal interpretation. As I have argued above, literal interpretation is not always a viable protocol for construing statutes, so it is hardly surprising that a legal culture with even a modest degree of sophistication would have discarded it and turned to more sophisticated ones. If, as seems likely, some of the jurors sitting in any fourth-century court, while not being by any means professional jurists, at least possessed a fairly long forensic experience, they must have been aware of the difficulties that too literal a reading of the written laws raised. On the other hand, as the examples show, the wording of a statute cannot simply be ignored. No doubt speakers in Athenian courts can and do from time to time claim they are expounding the will of the lawgiver and implicitly oppose this to literal-minded construction, but they apparently also couch their interpretation in a context where it is assumed that that will can only be reconstructed correctly by taking proper account of what the law actually and literally says. Obviously, the lawgiver cannot be made to say something that directly contradicts any of the words he uses; but he can be second-guessed in such a way as to narrow the scope of his statements to fewer cases than the wording of the statute might imply.

This, however, begs the question: which interpretive protocol is one to follow in a given case? Which interpretive protocol did the average Athenian judge choose and what criteria informed his choice? Certainly he did not get his instructions from a Supreme Court or from writings of professional jurists, since there were no such things in classical Athens. The lack of written legal science probably prevented the legal culture from crystallizing into a fixed system of interpretive rules. Under an authoritarian system of statutory construction, just about every legal norm is couched in a long tradition of construction and application. At Athens, on the other hand, while this may have been the case with a few

widely known norms (the one on the crowning of officials being an obvious candidate), it is hardly conceivable that this could have been the case with most of the statutes that were in force by the fourth century.

Here equity may come into play. We may imagine that equity was the way in which Athenian jurors chose between different interpretive protocols, none of which was regarded as inherently more correct than any other. This could account for the fact that litigants use so many words trying both to depict themselves as righteous men and good citizens and their opponents as lowlifes and to persuade the jurors that justice is on their side. The dikastic oath, on the other hand, demands that the court avoid breaking statutory law by its ruling; conceivably, then, strictly legal arguments will provide the jurors with an interpretive protocol showing them that to decide in favour of the speaker does not constitute a breach of law and a violation of their oath but, on the contrary, is in conformity with the spirit, if not the letter, of the statutes. Thus the jurors can in good conscience rule in favour of the speaker.

Note that something similar to the hypothesis thus exposed is known also from modern times. In the 19<sup>th</sup> century, a European school of legal thought called *Interessenjurisprudenz* also suggested that the judge start his inquiry about the merits of a case, so to speak, from the other side: he should first establish what is just and equitable in a given case, and only afterwards begin looking for a formal justification of his ruling<sup>59</sup>. This view was put forth in direct opposition to the *Begriffsjurisprudenz*, which saw the judge basically as an automaton whose only function was to deduce the solution to the case at hand from the applicable legal norms in an almost mathematical way, without his own ideas of justice and fairness entering into the equation. One may doubt that this view of the judicial process ever corresponded to reality. In the USA, Lawrence M. Solan has argued that while judges have a set of interpretive rules in dealing with statutes, these are often contradictory, and there are no identifiable criteria as to which one of them is to be used in any specific situation, but courts seem to pick whichever one best suits the desired outcome<sup>60</sup>. It is no stretch, therefore, to imagine something similar happening in Athenian law courts, prompting an experienced speechwriter to put forth one of several possible interpretive protocols to help the jurors combine the desired outcome, of whose fairness he tried to convince them in the speech, with their duty to stay faithful to Athens' corpus of written law.

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59. DuPasquier 1942: 210-12.

60. Solan 1993 (see esp. 59-63); Solan 2010 expresses a somewhat more moderate view. Scholarly criticism of the canons of statutory construction is much older, see Milkva/Lane 1997: 25-7.

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