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Indice

Domingo Avilés

Homologia in the Citations of the Attic Orators[1]

Abstract

While the majority of scholars hold that in classical Athens there was a statute establishing that all agreements (*homologiai*) were valid, some have questioned this view. The most commonly used argument for the existence of a specific law on agreements is the presence of a few passages in the Attic orators where reference is allegedly made to such a statute. The present article argues that these passages do not actually settle the question. The Attic orators usually only cite single paragraphs out of longer legal texts – notwithstanding their frequent use of the word *nomos* to refer to the passages they cite – and give us no clue as to their position and function in the context of the statute, which becomes clear if we compare the extant inscription of Draco's law on homicide with its citations in the orators. It is thus impossible to settle the question of whether a single and specific law on agreements existed based on citations found in forensic speeches. All we can do is make a probability assessment based on what is otherwise known about *homologia* clauses in Greek law.

Mentre la maggior parte degli studiosi ritiene che nell'Atene classica una legge stabiliva che tutti gli accordi (*homologiai*) fossero validi, alcuni hanno messo in discussione questo punto di vista. L'argomento più comunemente usato per affermare l'esistenza di una legge specifica relativa agli accordi è la presenza di alcuni passaggi negli oratori attici che si ritiene facciano riferimento ad essa. Il presente articolo sostiene che tali passaggi in realtà non provano ciò che dovrebbero dimostrare. Gli oratori attici (nonostante usino frequentemente la parola *nomos* in riferimento ai passaggi che citano) sono soliti citare solo singoli paragrafi di testi giuridici più lunghi e non ci danno alcun indizio sulla loro posizione e funzione nel contesto della legge in questione, cosa che risulta chiara se confrontiamo l'iscrizione conservata della legge di Dracone sull'omicidio con le sue citazioni negli oratori. Risulta quindi impossibile risolvere la questione dell'esistenza di una legge unica e generale sugli accordi partendo unicamente da citazioni presenti nei discorsi forensi. L'unica cosa che possiamo fare è effettuare una valutazione di probabilità in base a ciò che è altrimenti noto circa le clausole sull'*homologia* nel diritto greco.

1 I would like to thank Prof. David Mirhady for reading over an earlier draft of this paper, my wife Alicia Grudzinskas for helping me revise the final draft and, last but not least, the anonymous referee for *Dike* for his or her useful suggestions.

It is generally assumed that the wording we find in passages of several forensic speeches, Ὅσα ἂν ἕτερος ἑτέρωι ὁμολογήσῃ κύρια εἶναι, is a more or less direct quotation of a "general law of contracts" (Phillips 2009), which in this view was enacted precisely to establish that whatever one party agreed with another – especially, it would seem, in patrimonial matters – was legally valid. Less clear is whether the wording of that statute contained any limitation to the general rule, namely, whether agreements that were fraudulent, unjust or illegal were explicitly excluded from the protection afforded to contracts in general.[2] Be that as it may, at least the core of the supposed law of contracts seems to be well attested in our sources.

Some, however, have dismissed the idea of a general law of contracts, claiming either that there were, in fact, several laws containing ὁμολογία-norms (Maschke 1926: 165; Avilés 2012) or that the ὁμολογία in question was actually a procedural one, that is, a concession of a point by one of the litigants, who was consequently bound by his word and could no longer retract it when arguing his case in court (Thür 2013; id. 1977: 152-28; Jakab 2006). This view, however, is very controversial, and the prevailing opinion seems to be that there was in fact a general law of contracts in the sense that one statute (or two: Gagliardi 2014) had the specific function of establishing as a general rule that agreements were legally binding (see most recently Gagarin [forthcoming]; Gagliardi 2015).

In my recent article on this topic (Avilés 2012) I argued that in classical Athens there was no written statute whose primary object was to spell out and give legal force to the rule that all agreements were binding. Instead, there were clauses in (presumably) several different statutes declaring that the parties could validly dispense with the regulations laid out in the main part of the statute by agreeing otherwise. In my argument I focus on the likelihood of such a scenario based on what is known about ὁμολογία-clauses in laws that we do possess. In the present paper, on the other hand, I argue that the evidence some scholars cite for the existence of a general law on ὁμολογία is, in fact, inconclusive, so that our assessment of the matter must rely on the general likelihood of this being the case. Gagliardi (2014: 192; 2015: 1542[3]) bases his dismissal of my thesis mainly on passages in the orators that he claims prove that such a law did exist, namely Hyp. 3(5).13, Dem. 47.77 and Dem. 48.11. In this paper I argue that, on the contrary, the evidence provided by these passages supports

2 Phillips 2009 argues that there was no limitation of this sort in the text of the statute, except perhaps for a provision that both parties must agree willingly (ἑκών: cf. Gagliardi 2014: 187-196; 2015: 1534-1540; Cantarella [1966] 2012). However, the lack of an illegality provision need not imply that Athenian juries would have accepted any and every voluntary agreement without exception, even a manifestly unjust or illegal one, since the possibility of a rejection on such a basis likely did not have to be spelled out in the statute (Avilés 2011: 26).

3 While in this article I do respond to objections raised against my thesis after the publication of Avilés 2012, I cannot deal with all of those contained in Gagliardi 2015, a paper that I have been able to read only recently.

my hypothesis just as much as it does the generally held view that there was actually a general law of contracts. First, however, I summarize my argument for the general likelihood that the norm on the validity of agreements was a secondary clause of (presumably) several legal texts rather than the main norm of a specific statute (we may call these "arguments from general likelihood"); for a complete exposition of these arguments I refer the readers to Avilés 2012. Then I go on to assess whether the evidence for the norm in question is more consistent with a single law of contracts or with my view (I call these "evidentiary arguments"). I shall argue that the evidence provided by those texts is inconclusive, that is, the wording of the passages in question is equally likely on either view, so that the matter must be settled by considerations based on general likelihood. In my opinion, such considerations clearly point to there being no law of contracts in the sense in which modern scholars generally use this expression.

Summary of the arguments from general likelihood

These arguments are not to be confused with purely speculative ones, which normally end up merely confirming the author's biases. In the context of this article the likelihood of something is determined exclusively by whether or not it follows an otherwise known pattern. In other words, it does not matter whether you or I find the existence of a law of contract in ancient Athens logical or plausible, but whether this hypothesis is consistent with what we otherwise know about Greek legal history. The premise of this kind of reasoning is that a hypothesis that fits an existing pattern is more likely to be correct than one that does not; so if in all cases where we know the context of a statutory norm a particular wording X is found within a clause that has the function Y, and then we come across a clause with wording X but do not know what function the clause at hand has within the statute, we may fairly infer that its function is most likely Y. It goes without saying that this method can only yield probabilistic results; but this is all we can achieve in researching ancient history anyway. Consequently, I am far from claiming that the existence in classical Athens of a statute dedicated specifically to stating that all agreements were binding is impossible per se or that I have conclusively disproved this notion; I only think that it is less likely to be true than the opposite view.

It may however be misleading to claim squarely that "there was no law of contracts." A more accurate way of phrasing my thesis is the following: What we call "the law of contracts" is, in fact, most likely a legal norm not found in one specific statute exclusively dedicated to stating it, but contained in several different ones and compounded by the common-sense notion that agreements must be abided by. This common-sense notion can be regarded as axiomatic since an agreement consists of reciprocal promises and a promise is by defini-

tion something one has at least a moral duty to abide by.[4] Furthermore, it is apparent that making a ὁμολογία to settle conflicts had a long tradition in Athens, seeing as the rituals accompanying it seem to have been well established at the time our forensic speeches were written, which is evidenced, for instance, by the narratives in Hyp. 3(5).8-9 and [Dem.] 48.8-9. Even if there had been no statutory provision backing up the validity of settlement agreements like this, a jury would still have had to uphold them since in the dikasts' oath they had promised to judge "according to their most just judgment" (γνώμῃ τῇ δικαιοτάτῃ: Dem. 20.118, 23. 96).

As I have mentioned above, how we should decide on this subject is a matter of known patterns: the wording of the rule Ὅσα ἂν ἕτερος ἑτέρωι ὁμολογήσῃ κύρια εἶναι points to it being a subordinate rule in a statute that deals with other matters rather than the main clause of the statute itself. I can state this with a good degree of confidence because the other passages that contain legal norms couched in such vocabulary are consistent with this view.

The evidentiary arguments

The main thrust of the arguments that have been levelled against my thesis has been to point out passages in the orators that seem to prove that a law of contract did exist; in other words, the emphasis lies on the evidentiary side. Needless to say, these objections stand or fall with whether or not the passages in question can bear the burden placed on them, that is, whether their wording is clear or explicit enough to indicate exactly which statute the speaker is referring to and which part of that statute the norm in question is being quoted from.

We can test our ability – or lack thereof – to ascertain such things by considering the one existing case in which we have access to both the text of the statute itself and speeches that mention it. There is one law that is both conserved on stone (albeit only fragmentarily) and quoted in extant speeches, Draco's law on homicide (IG I^3 104; *Nomima* I, 02), which is cited at least twice in the speech *Against Aristogeiton* (Dem. 23). By comparing these two quotations from Draco's statute with the inscription itself we can learn a few things about how Athenian litigants typically quoted laws, which will help us better assess

4 It is not a common-sense rule, on the other hand, that an agreement between two individuals should override a law of the polis. Therefore, while a statute enjoining that agreements be abided by seems superfluous, it is necessary to have statutory norms regulating whether and under which circumstances agreements between the parties are to take precedence over the statute in question. It is also dubious to claim, as Gagarin (forthcoming) does, that "[p]arties to a dispute […] could almost always make an agreement […] that resolved the dispute in any way they wished, and the court would have no further involvement." Out-of-court settlements were not always able to prevent litigation, as is shown precisely by many of the speeches usually cited with respect to ὁμολογία (for instance, Hyp. 3[5] and [Dem.] 48).

our ability to reconstruct the text of lost statutes from the citations found in the speeches.[5]

Against Aristocrates (Dem. 23) is a γραφὴ παρανόμων against a decree proposed by one Aristocrates, which granted Charidemos of Oreus, a mercenary leader from Euboea whom the Athenians regarded as a friend and benefactor, special protection against murder. According to the proposed decree, he was to be privileged to such an extent that anyone who should kill him could, among other things, be summarily arrested, even on the territory of poleis other than Athens (§ 109). The speaker argues that such norms contradict the entire body of Athenian laws and the will of the lawgiver as expressed in it (we might say they are "unconstitutional"). To back up his claim he cites an array of laws pertaining to homicide. There has been much debate about the provenience of these citations and which ones stem from the Draconian statute that is conserved in IG I^3 104 (cf. Canevaro 2013: 37-39); as it turns out, only two of these quotations can be attributed to it with certainty: the one in § 37 (cf. IG I^3 104, 26-29) and the one in § 60 (cf. ibid., 36-38).[6] Now, a close reading of the context surrounding these two quotations shows that, if we did not already know that they come from the same statute, we would be utterly unable to tell one way or the other.

In § 37 the speaker tells the court clerk to read out the statutory passages that buttress his arguments with the words Λέγε τοὺς ἐφεξῆς νόμους. The definite article is certainly prompted by ἐφεξῆς. In § 60 we find similar wording to introduce a new quotation from what we know is the same statute: Λέγε τὸν μετὰ ταῦτα νόμον. There is no indication that the statute at hand has already been cited before. In practice, whenever in an Attic forensic speech the speaker uses the word νόμος, we might just as well render it as "paragraph" or "norm" rather than "law", for rarely is an entire statute quoted in front of the jury. The same situation is found in another Demosthenic speech where provisions from the laws on homicide are cited: in Dem. 43.57, after ἀναγίγνωσκε καὶ τοὺς ἑτέρους νόμους we read provisions from Draco's statute, albeit in a different order from that in which they appear in the inscription (see Stroud 1968: 49), and then some other lesser known laws.[7] Here too the document inserted in the text of the speech displays only part of the statute. One must however be aware that it is generally difficult to assess the authenticity of the documents that we

5 Canevaro 2013: 30-31 argues against the view that the orators often manipulated the text of the statutes they had read out in court by changing the order of the provisions, quoting the law at hand selectively or even changing their wording. I agree with him except with regard to selective quoting, which one can hardly deny happens in Dem. 23 (see below).

6 The other references to statutes regarding homicide are found in § 28, 44, 51, and 62.

7 Less clear for our present purpose is Dem. 9.44: … ἐν τοῖς φονικοῖς γέγραπται νόμοις, ὑπὲρ ὧν ἂν μὴ διδῷ φόνου δικάσασθαι, ἀλλ'εὐαγὲς ᾖ τὸ ἀποκτεῖναι, 'καὶ ἄτιμος' φησὶ 'τεθνάτω.' At any rate, the vague phrasing ἐν τοῖς φονικοῖς νόμοις hardly gives us any clue about the number of homicide laws – not even whether there were actually more than one at all.

occasionally find in the manuscripts of the speeches of Attic orators,[8] especially when, as is the case here, the speaker does not draw from them verbatim quotations which he then analyzes and interprets in the speech proper. Therefore, as far as evidence for the thesis of this article is concerned, Dem. 43.57 must be taken with a grain of salt.

Also notice that in Dem. 23.23, after the court clerk has read out a passage of the law on the jurisdiction of the Areopagos, the speaker literally interrupts him (Ἐπίσχες). This interruption shows that it was customary and accepted for litigants to have not entire statutes, but only excerpts from them read out in court.

The evidence thus shows conclusively that, whenever in the Attic orators a speaker claims to be quoting a νόμος, he is most often having the court clerk read out only those passages of the statute that are relevant to the case he is making; more importantly, nothing in the language of the speech will indicate whether it is only a partial quotation or not. Therefore, in the absence of the actual inscription of the supposed law on ὁμολογία we have no way to determine whether the famous clause that orators and philosophers like to cite or allude to is actually the main clause of it or, as I argue, a secondary provision establishing that the preceding ones are subject to being overridden by an agreement between the persons involved.[9] The only way to assess the likelihood of either thesis is to look at parallels in legal texts we do possess and establish a pattern to which we may assume the ὁμολογία-provision mentioned in the orators conformed. But what about the question of how many statutes there were that contained such a clause? One might think that, since in several speeches reference is made to ὁ νόμος in the singular, it were a given fact that there was only one such law. In the following I argue that, despite the language used by the orators in those passages, it is perfectly possible that there were several laws of this kind, although their exact number will most likely forever remain beyond our ken.

The passages referring to the statute on homologia

Several passages might be adduced as evidence that there existed only one law dealing with contracts. Three of these in particular are cited by Gagliardi (2014: 191-192) to this end: Dem. 47.77 and 48.11 and Hyp. 3 (5).13. I first look at Dem. 47.77.[10] In this speech the anonymous speaker (whom, following a usage common among scholars, I shall be calling "the Trierarch" from now on) is suing one Euergos and one Mnesiboulos for false testimony (δίκη ψευδομαρτυριῶν), since they were instrumental in his being defeated in

8 This is the subject of Canevaro 2013, where Dem. 43 is however not dealt with.
9 In modern (Continental) terms we would call this *ius dispositivum* (cf. Avilés 2011: 32).
10 The authenticity of this speech has been questioned ever since antiquity.

court by Theophemos, his actual enemy. The Trierarch focuses for the most part on Theophemos himself and accuses him of several instances of malfeasance, among them his pretense to grant the Trierarch a postponement regarding the money he owed him pursuant to the judgement of the court, all the while planning to raid his house for valuables (49-77). The Trierarch was about to pay Theophemos off when he was assigned another trierarchy, a situation that forced him to spend money on the tasks imposed by his new office. Consequently, he had to relocate the money he had kept handy to pay off the winning party and was thus unable to meet the deadline for the payment. So he asked Thephemus for a continuation and the two men agreed to postpone the due date (50). After that, however, Theophemos proceeded as though no continuation had been granted: he broke into his opponent's house together with the two defendants and seized part of his property as security. The Trierarch objects to this behaviour on the grounds that, since his opponent had agreed to postpone the due date of the payment, he was no longer in default. To back this up, he has a statute read out:

> … Καὶ τὰ ἐνέχυρά μοι οὐκ ἀπεδίδου, ἀλλ' ἔτι καὶ νῦν ἔχει ὡς ὑπερημέρου ὄντος. ὅτι δ' οὐκ ἦν αὐτῷ ὑπερήμερος, ἀνάγνωθί μοι τὸν νόμον καὶ τὴν μαρτυρίαν, ὃς κελεύει κύρια εἶναι ὅ τι ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ, ὥστε οὐκέτι ἦν αὐτῷ δήπου ὑπερήμερος.
> ΝΟΜΟΣ. ΜΑΡΤΥΡΙΑ.
> … And he would not return to me the securities, but he still holds them now as though I were in default. To prove that I was not in default to him, read out for me the statute[11] and the witness testimony – the statute according to which what one agrees with another shall be valid, so that I was no longer in default to him.
> LAW. TESTIMONIES.

Here the definite article is merely proleptic, preparing as it does the relative clause that follows. It also bears pointing out that, if we follow Gagliardi in maintaining that Dem. 47.77 proves the existence of a single law of contracts, by the same token we must conclude that this law is unlikely to have regulated patrimonial transactions, since the context makes it clear that the *homologia* the Trierarch is talking about is a procedural one: his opponent agrees to allow him

11 One may notice that in many editions there is a comma between μαρτυρίαν and the relative clause, which suggests to the reader that the statute that is the antecedent to that clause is already well-known and the relative clause only adds additional information. But this is begging the question (the punctuation we find in our manuscripts does not go back to the authors themselves, so the modern editors freely decide where to put commas and other punctuation marks). In English and other modern languages there is a difference between writing, e.g., "the statute that we based our agreement on" and "the statute, which we based our agreement on": in the second case, the statute is already known and the information added does not determine which one we are talking about.

to pay him off later than was established by a statute regulating the settlement of disputes.[12] So, according to Gagliardi's own logic, the statute in question is most likely not related to patrimonial matters and therefore, if he is right about the existence of a law specifically regulating patrimonial contracts, it must be regarded as yet another statute on contracts, a fact that implicitly lends plausibility to the thesis that there were several laws containing *homologia* clauses. To this reasoning one might object, following Carawan (2006: 360), that "there is no juristic authority at Athens competent to determine that the phrasing of a law on a sort of obligation does not properly apply to another".[13] But this argument cuts both ways: if a general law on patrimonial transactions can be construed to provide an overarching rule that a speaker can then use to back up his point of view on a procedural matter, then it is also possible that a clause found in a procedural statute to the effect that agreements between the parties must be observed was applied by some litigants to cases outside the scope of its original wording. Consequently, every time an Athenian orator refers to "the law that declares that all agreements must be abided by" in a patrimonial context, nothing prohibits us from assuming that the law referred to or even quoted in the speech did not originally apply to patrimonial matters at all.

The next passage is Dem. 48.11. The speech deals with an inheritance dispute between two men, the speaker and Olympiodoros, who were both involved in the litigation that had followed upon the death of their common relative Comon. Instead of fighting the issue out in court, Olympiodoros and the speaker had agreed (§ 54: ὡμολόγησε) to divide the estate into equal parts among themselves and to help one another defeat any other claimants who might show up (which in Athenian law could happen at any time, even years after the *de cuius*'s death). A series of lawsuits ensued, at the end of which Olympiodorus managed to establish himself as the sole heir. At this point, however, he refused to make good on the agreement and share the estate with the speaker. Thus the speaker sues Olympiodorus on the grounds that he has violated their agreement (48.11).

Nothing about the wording of Dem. 48.11 enables us to identify what law the speaker is referring to. Scholars usually assume that it is the "general law of contracts" because we do not know of any other that might be intended here, but in so doing they are reading things into the text and we cannot simply assume what is in question. The passage reads as follows:

12 I may point out here that this is exactly the function I claim all *homologia* clauses had (see above and Avilés 2012): they served to establish that a statutory norm might be dispensed with by the parties if they so agreed. In modern terms, they clarified that a particular provision was *ius dispositivum* and not *ius absolutum*.

13 Carawan is addressing precisely the procedural agreement mentioned in Dem. 47.77 as well as that referred to in Dem. 42.12 and argues that the *homologia* at hand could well be the one regulated by the supposed general law of contracts, whose existence is in question. My point here is that these passages are compatible with both views.

> Καὶ μάρτυρας ἐποιησάμεθα περὶ τούτων πρῶτον μὲν τοὺς θεοὺς οὓς ὠμόσαμεν ἀλλήλοις, καὶ τοὺς οἰκείους τοὺς ἡμετέρους αὐτῶν, ἔπειτ' Ἀνδροκλείδην Ἀχαρνέα, παρ' ᾧ κατεθέμεθα τὰς συνθήκας. βούλομαι οὖν, ὦ ἄνδρες δικασταί, τόν τε νόμον ἀναγνῶναι καθ' ὃν τὰς συνθήκας ἐγράψαμεν πρὸς ἡμᾶς αὐτοὺς καὶ μαρτυρίαν τοῦ ἔχοντος τὰς συνθήκας. λέγε τὸν νόμον πρῶτον.
> And we made our witnesses first of all the gods by whom we had sworn to each other and our own relatives, then Androkleides of Acharnae, with whom we deposited the document of the contract. Now I would like to have read out, gentlemen, both the statute pursuant to which[14] we wrote our mutual agreement and the testimony of the person who holds the contract document. Read the statute first.

Again, the definite article is used first to prepare the relative clause, then to refer to the statute just mentioned; there is no hint that it might be prompted by the law in question being universally known to the jurors. Moreover, the word ὁμολογία does not even appear in this passage, nor is there any indication that the statute that is about to be quoted and on which the parties are basing their agreement is some general law of contracts rather than a more specific one.

I shall now consider Hyp. 3(5).13. Epikrates, the speaker, claims that he has been trapped in a fraudulent contract by his opponent Athenogenes. He wanted to buy a perfumery from Athenogenes, who in turn wanted to get rid of it because of the debts its slave workers had incurred. So Athenogenes made it a condition for the sale that Epikrates sign a contract in which he promised, among other things, to take upon himself the debts that encumbered the business. During the entire negotiation Athenogenes pretended that those debts amounted to much less than was actually the case. Consequently, Epikrates requests that the jury void the contract, at least in so far as it enjoins him to take over the seller's debts. He then addresses the likely objection he expects his opponent to raise, that the law declares all agreements to be valid:

> Ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἑτέρωι ὁμολογήσῃ, κύρια εἶναι.
> In a moment Athenogenes will be telling you that the law commands that whatever one agrees with another be valid.

The use of the definite article in this sentence might suggest that there is only one law that regulates ὁμολογίαι. But does the expression ὁ νόμος always refer to a specific, single statute? I think there is room for doubt.

Besides the passage in Hypereides seen above, in a few other places we find the singular ὁ νόμος in a context where it is not at all clear whether a single statute is referred to or whether the reference is, more generally, to the laws of

14 Cf. above n. 11.

the city as a whole, in which case it would be virtually equivalent to the plural οἱ νόμοι. This fact seems to contradict Todd (1993: 18-9), who distinguishes between οἱ νόμοι in the plural as "the law" and ὁ νόμος in the singular as "a (single) statute". That this distinction may be less absolute than he claims is suggested by several passages relating precisely to the supposed law of contracts, where we read both οἱ νόμοι κελεύουσιν (Dem. 56.2; Plat. *Symp*. 196c) and ὁ νόμος κελεύει (Hyp. 3 [5].13; Dem. 42.12; [Dem.] 47.77; Din. 3.4; Arist. *Rhet*. 1.15 1375 b7-10). I shall now analyze the relevant passages in the orators in some detail.

In Din. 3.4 we read:

> Καὶ ὁ μὲν κοινὸς τῆς πόλεως νόμος, ἐάν τις <ἑνί τινι> (Lipsius: ἐναντίον mss.) τῶν πολιτῶν ὁμολογήσας τι παραβῇ, τοῦτον ἔνοχον εἶναι κελεύει τῷ ἀδικεῖν. ὁ δὲ πάντας Ἀθηναίους ἐξηπατηκώς […] ἐπὶ τὴν ἀπολογίαν ἥκειν φήσει τὴν ὑπὲρ τῆς αἰτίας τῆς εἰς αὐτὸν γεγενημένης;
> And the common law of the city, on the one hand, ordains that, whenever one agrees to something with one of the citizens and then breaks his promise, he is guilty of committing injustice; he, on the other hand, who has cheated all Athenians […], will say that he has come to defend himself against the accusation leveled at him?

This is meant as an *argumentum a fortiori* against the defendant, who has allegedly betrayed not only one person but all Athenians. If the words ὁ κοινὸς τῆς πόλεως νόμος referred to a specific statute, the definite article would be hard to explain since that statute has not been introduced beforehand. The word ὁ cannot be construed as demonstrative either, because in this context it obviously serves as a definite article to a substantive, which need not have such a word accompanying it, so that its presence is significant.[15]

In Lys. 1.26-27 we read:

> Ἐγὼ δ' εἶπον ὅτι 'οὐκ ἐγώ σε ἀποκτενῶ, ἀλλ' ὁ τῆς πόλεως νόμος, ὃν σὺ παραβαίνων περὶ ἐλάττονος τῶν ἡδονῶν ἐποιήσω, καὶ μᾶλλον εἴλου τοιοῦτον ἁμάρτημα ἐξαμαρτάνειν εἰς τὴν γυναῖκα τὴν ἐμὴν καὶ εἰς τοὺς παῖδας τοὺς ἐμοὺς ἢ τοῖς νόμοις πείθεσθαι καὶ κόσμιος εἶναι.' οὕτως, ὦ ἄνδρες, ἐκεῖνος τούτων ἔτυχεν ὥνπερ οἱ νόμοι κελεύουσι τοὺς τὰ τοιαῦτα πράττοντας, οὐκ εἰσαρπασθεὶς ἐκ τῆς ὁδοῦ, οὐδ' ἐπὶ τὴν ἑστίαν καταφυγών, ὥσπερ οὗτοι λέγουσι.
> I responded: "It is not I who will kill you, but the law of the city, which you have broken and valued less than your pleasure; and you have preferred to

15 Ὅ in ὁ μέν… ὁ δέ (or in ὁ μέν alone) can serve as a demonstrative pronoun (Gildersleeve 1900: 216-221 [§515-519]), in which case it often has the indefinite meaning "one… another" (cf. Schwyzer II, 216). This, however, happens only when the word does not precede a substantive in the clause at hand. In the present case, were a specific but hitherto unnamed statute being referred to, we would read νόμος μέν τις or the like.

> commit such a misdeed against my wife and my children rather than to obey the laws and be a decent person." In this way, gentlemen, that man got what the laws ordain those who offend in such manner shall suffer – not having been dragged in from the road nor having sought refuge by the house hearth, as the accusers claim.

Lysias then (28-9) cites two statutes, one of which is presumably the law on *moicheia*,[16] the other Draco's homicide law, which allows a man to kill his wife's lover if he catches him on the act (Todd 2007: 126-127). Yet in this passage he first uses the singular ὁ νόμος. The words ὁ τῆς πόλεως νόμος echo the same expression found in Din. 3.4 as well as τὸν τῆς πόλεως νόμον in paragraph 29 of Lysias' speech itself. Also, the plural οἱ νόμοι only a few lines below seems perfectly equivalent to the singular since both expressions refer to the law "killing", or ordering to kill, the adulterer. One might however explain this by arguing that, since each statute is a subset of the laws of the city as a whole, what one of them establishes can be said to be commanded by "the laws" in their entirety (so Todd 1993: 18-9), so that there remains a difference between the singular and the plural. Nevertheless, the nonchalance with which the singular accompanied by the definite article is used in these contexts suggests that the orators' use of it is generic, not specific, thus referring to the law as an abstract object rather than to a single piece of legislation. In neither passage does the article refer to a statute mentioned anywhere before. One might argue that the law of contracts was so well-known as not to require a previous mention for the definite article to be used, but does this apply to the statute Lysias is thinking of, too, which deals with another matter entirely? How many statutes does it apply to? It is far more likely that the definite article is generic in these cases.

In Dem. 42.12 the text reads as follows:

> Τυχὼν δὲ τούτων ἀμφοτέρων παρ' ἐμοῦ Φαίνιππος οὐδ' εἰς ἑτέραν τῶν ἡμερῶν ἀπήντησεν· ἀλλ'ἀνθ' ἑνὸς δύο νόμους ἥκει πρὸς ὑμᾶς παραβεβηκώς, ἕνα μὲν τὸν κελεύοντα τριῶν ἡμερῶν ἀφ' ἧς ἂν ὀμόσῃ τὴν οὐσίαν ἀποφαίνειν, ἕτερον δὲ τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων.
> Phaenippos, though having been granted both of these things by me, showed up on neither day, but he has come to you after breaking not one, but two laws: one ordaining that one must reveal his property within three days of swearing the oath, and another ordaining that the agreements people make with each other be valid, if they are done in the presence of witnesses.

16 So Carey 1995: 412. For a discussion of this passage (with an alternative hypothesis regarding the law cited) see Todd 2007: 124-125.

Here the reference must indeed be to a specific statute, which for all we know is only one since the definite article is used. However, this statute might well refer only to procedural matters: the wording of this passage is no more to be expected on the assumption that there existed a general law of contracts than it is on the assumption that a law regulating procedure in cases like this contained a clause that pertained to special agreements between the parties and established that the agreement should override the general norm.

It is also worth asking how much stock we can put into information that comes from an orator regarding the number of laws that apply to a certain case anyway. Why would they have known without doing extensive research of the kind described in Hyp. 3 (5).12? Also, if the clauses from those hypothetical different statutes were similar or identical in their wording, how could the average Athenian remain aware that there were, in fact, several such clauses in several different laws? He likely was not. In this case, references to a so-called "law of contracts" were most probably actually references to a generic legal norm phrased in the typical way everybody knew rather than to a particular law found in a particular inscription.

The most likely conclusion to be drawn from all of this is that the citations of the supposed law of contracts that we find in the Attic orators provide, in fact, little evidence that this statute existed in the sense in which scholars usually understand it: a law enacted specifically to establish that contracts must be abided by. Even in the very few cases where the speaker is unambiguously referring to a single law, we know nothing about the position and function of the clause in question within the whole of the statute. Therefore, the only way we can decide the issue is by assessing how likely either hypothesis is in light of the patterns we can otherwise notice in Greek statutory law.

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