

*Throwing sand in the eyes of the dikastai*

**A. The conceptualisation of a coherent legal system: the charge of prostitution against Androtion.**

**Text 1**

**Dem. 22.24** οἱ νόμοι δ' οὐκ ἐῷσι λέγειν οὐδὲ τὰ ἔννομα τοὺς οὕτω βεβιωκότας, ἡμεῖς δ' ἐπιδείκνυμεν οὐ μόνον εἰρηκότ' αὐτὸν παράνομα, ἀλλὰ καὶ βεβιωκότα παράνομος, πῶς οὐχὶ προσήκει λέγειν περὶ τούτου τοῦ νόμου δι' οὗ ταῦτ' ἐλέγχεται; cf. §21.

And because the laws do not allow men who have lived such a life to put forward even lawful proposals, and finally because we are trying to show not only that he has moved an illegal decree but that he has lived in an illegal fashion, how is it not appropriate to discuss this law that applies to his actions? (Trans. Harris 2008)

**The concept of the flexibility of the legal system**

**Text 2**

**Dem. 22.25** καὶ μὴν κάκεινόν γε δεῖ μαθεῖν ὑμᾶς, ὅτι τοὺς νόμους ὁ τιθεὶς τούτους Σόλων καὶ τῶν ἄλλων τοὺς πολλούς, οὐδὲν ὅμοιος ὢν τούτῳ νομοθέτης, οὐχ ἐνὶ ἔδωκε τρόπον περὶ τῶν ἀδικημάτων ἐκάστων λαμβάνειν δίκην τοῖς βουλομένοις παρὰ τῶν ἀδικούντων, ἀλλὰ πολλαχῶς. ἤδει γάρ, οἶμαι, τοῦθ' ὅτι τοὺς ἐν τῇ πόλει γενέσθαι πάντας ὁμοίως ἢ δεινούς ἢ θρασεῖς ἢ μετρίους οὐκ ἂν εἴη. εἰ μὲν οὖν, ὥς τοῖς μετρίοις δίκην ἐξαρκέσει λαβεῖν, οὕτω τοὺς νόμους θήσει, μετ' ἀδεΐας ἔσεσθαι πολλοὺς πονηροὺς ἡγεῖτο· εἰ δ' ὥς τοῖς θρασέσιν καὶ δυνατοῖς λέγειν, τοὺς ιδιώτας οὐ δυνήσεσθαι τὸν αὐτὸν τούτοις τρόπον λαμβάνειν δίκην.

Next, you should also realize this: **Solon, the man who established these laws and most of our others—a lawgiver who was nothing like this man—did not provide one single way for men who wished to punish criminals, but many.** He understood, I think, this fact that **all men in the city would not have similar abilities or talents or the same degree of confidence or self-restraint.** If he were to enact such laws as were suitable for moderate men to pursue justice, he figured that many scoundrels would go scot-free. Yet if the system favoured men who were bold and talented speakers, private citizens would not have the same opportunity to obtain justice as the former. (Trans. Harris 2008)

**Text 3**

**Dem. 22.26-27** δεῖν δ' ὥς το μὴδέν' ἀποστερεῖσθαι τοῦ δίκης τυχεῖν, ὥς ἕκαστος δύναται. πῶς οὐνέσται τοῦτο; ἐὰν πολλὰς ὁδοὺς δῶ διὰ τῶν νόμων ἐπὶ τοὺς ἡδίκηκότας οἷον τῆς κλοπῆς. ἔρρωσαι καὶ σαυτῷ πιστεύεις· ἄπαγε· ἐν χιλίαις δ' ὁ κίνδυνος.

ἀσθενέστερος εἶ· τοῖς ἄρχουσιν ἐφηγοῦ· τοῦτο ποιήσουσιν ἐκεῖνοι. φοβεῖ καὶ [27] τοῦτο· γράφου. καταμέμφει σεαυτὸν καὶ πένης ὢν οὐκ ἂν ἔχοις χιλίας ἐκτεῖσαι· δικάζου κλοπῆς πρὸς διαιτητὴν καὶ οὐ κινδυνεύσεις. [οὐδέτερον βούλει τούτων· γράφου. κατοκνεῖς καὶ τοῦτο· ἐφηγοῦ.] τούτων οὐδέν ἐστι ταυτό. τῆς ἀσεβείας κατὰ ταῦτ' ἔστ' ἀπάγειν, γράφεσθαι, δικάζεσθαι πρὸς Εὐμολπίδας, φαίνειν πρὸς τὸν βασιλέα. περὶ τῶν ἄλλων ἀπάντων τὸν αὐτὸν τρόπον σχεδόν.

He thought that no one should be deprived of the right to obtain justice in a way **suited to his level of ability**. How then will this come about? If he creates many legal procedures for proceeding against offenders, as, for example, in the case of **theft**. You are strong and confident in your own ability: **arrest him and risk a fine of 1,000 drachmas**. You are weaker: **lead the magistrates to him, and they will do it**. You are also afraid of this: **bring a public charge**. [27] **You do not feel confident, and since you are poor, you would not be able to pay the fine of 1,000 drachmas; bring a private action before the arbitrator, and you will run no risk**. None of these procedures is the same. The situation is the same with cases of **impiety**: someone can make an arrest, bring a public charge, bring a private charge before the Eumolpidai, or make a denunciation to the King. And it is more or less the same for all other procedures. (Trans. Harris 2008)

Cf. the complementary and competing rationalisations of the legal system in other cases:

#### Text 4

**Hyp. Eux.4-6** καίτοι ὧ ἄνδρες δικασταὶ ἐπὶ τῶν δημοσίων ἀγώνων οὐ χρή τοὺς δικαστὰς πρότερον τὰ καθ' ἕκαστα τῆς κατηγορίας ὑπομένειν ἀκούειν, πρὶν, <ἂν> αὐτὸ τὸ κεφάλαιον τοῦ ἀγῶνος καὶ τὴν ἀντιγραφὴν ἐξετάσωσιν εἰ ἔστιν ἐκ τῶν νόμων ἢ μή· οὐ μὰ Δία οὐχ ὥσπερ ἐν τῇ κατηγορίᾳ Πολύευκτος ἔλεγεν, οὐ φάσκων δεῖν τοὺς ἀπολογουμένους ἰσχυρίζεσθαι τῷ εἰσαγγελτικῷ νόμῳ, ὃς κελεύει κατὰ τῶν ῥητόρων αὐτῶν τὰς εἰσαγγελίας εἶναι περὶ τοῦ λέγειν μὴ οὐ τὰ ἄριστα τῷ δήμῳ, οὐ κατὰ πάντων Ἀθηναίων. ἐγὼ δὲ οὔτε πρότερον οὐδενὸς ἂν μνησθεῖην ἢ τούτου, οὔτε πλείους οἶμαι δεῖν λόγους ποιεῖσθαι περὶ ἄλλου τινὸς, ἢ ὅπως ἐν δημοκρατίᾳ κύριοι οἱ νόμοι ἔσονται, καὶ αἱ εἰσαγγελίαι καὶ αἱ ἄλλαι κρίσεις κατὰ τοὺς νόμους εἰσί[σ]ασιν εἰς τὸ δικαστήριον· διὰ τοῦτο γὰρ ὑμεῖς ὑπὲρ ἀπάντων τῶν ἀδικημάτων, ὅσα ἔστιν ἐν τῇ πόλει, νόμους ἔθεσθε χωρὶς περὶ ἐκάστου αὐτῶν. ἀσεβεῖ τις περὶ τὰ ἱερά· γραφαὶ ἀσεβείας πρὸς τὸν βασιλέα. φαῦλός ἐστι πρὸς τοὺς ἑαυτοῦ γονεῖς· ὁ ἄρχων ἐπὶ τούτου κάθηται. παράνομά τις ἐν τῇ πόλει γράφει· θεσμοθετῶν συνέδριον ἔστι. ἀπαγωγῆς ἄξια ποιεῖ· ἀρχὴ τῶν ἔνδεκα καθέστηκε. τὸν αὐτὸν δὲ τρόπον καὶ ἐπὶ τῶν ἄλλων ἀδικημάτων ἀπάντων καὶ νόμους καὶ ἀρχὰς καὶ δικαστήρια τὰ προσήκοντα ἐκάστοις αὐτῶν ἀπέδοτε.

[4] Furthermore, *dikastai*, in public trials *the dikastai* should refuse to listen to the details of the prosecution until they have examined the main point actually at issue at the trial, and the written reply, to see whether the laws have been broken or not. What is wrong, god knows, is to say what Polyeuktos said in his prosecution: the defendants ought not to rely on the impeachment law. This orders that impeachments be brought against speakers themselves, for saying things not in the best interests of the people, not against all Athenians. [5] Personally, this would have been what I kept in mind above all else; and in my opinion no subject is more addressing than how, in a democracy, the laws will be master and impeachments and other cases will come before the *dikastai* in accordance with them. **This was why you laid down separate laws concerning each and every crime that occurs in the polis.** [6] Suppose someone is impious in religious matters: public actions for impiety before the *basileus*. He behaves badly towards his parents: there the archon takes the chair. Someone frames illegal proposals in the polis: a college of *thesmothetai* exists. He does something which merits summary arrest: that is the domain of the eleven. Likewise, to deal with all other crimes you provided laws and officials and courts appropriate to each. (Trans. Whitehead 2000 adapted).

#### Text 5

**Dem. 54.17-19** (*against Konon*) οἱ μὲν γὰρ νόμοι πολὺ τὰναντία καὶ τὰς ἀναγκαίας προφάσεις, ὅπως μὴ μείζους γίγνωνται, προείδοντο, οἷον (ἀνάγκη γάρ μοι ταῦτα καὶ ζητεῖν καὶ πυνθάνεσθαι διὰ τοῦτον γέγονεν) εἰσὶ κακηγορίας [18] δίκαι· φασὶ τοίνυν ταύτας διὰ τοῦτο γίγνεσθαι, ἵνα μὴ λοιδορούμενοι τύπτειν ἀλλήλους προάγωνται. **πάλιν αἰκείας εἰσὶ· καὶ ταύτας ἀκούω διὰ τοῦτ' εἶναι τὰς δίκας, ἵνα μηδεὶς, ὅταν ἤττων ἢ, λίθῳ μηδὲ τῶν τοιούτων ἀμύνηται μηδενί, ἀλλὰ τὴν ἐκ τοῦ νόμου δίκην ἀναμένῃ.** τραύματος **πάλιν εἰσὶν γραφαὶ τοῦ μὴ τιτρωσκομένων τινῶν φόνους γίγνεσθαι.** τὸ φαυλότατον, οἶμαι, τὸ τῆς λοιδορίας, πρὸ τοῦ τελευταίου καὶ δεινοτάτου προεώραται, τοῦ μὴ φόνον γίγνεσθαι, μηδὲ κατὰ μικρὸν ὑπάγεσθαι ἐκ μὲν λοιδορίας εἰς πληγὰς, ἐκ δὲ πληγῶν εἰς τραύματα, ἐκ δὲ τραυμάτων εἰς θάνατον, ἀλλ' ἐν τοῖς νόμοις εἶναι τούτων ἐκάστου τὴν δίκην, μὴ τῇ τοῦ προστυχόντος ὀργῇ μηδὲ βουλήσει ταῦτα κρίνεσθαι.

[17] For the laws, quite the reverse, have provided even for pleas of necessity and sought to prevent them from turning into something more serious. For instance—I've had to find out and research this subject because of this man—**there are suits for slander;** [18] **it's said that these take place so that people will not led on to beat each other when insulted.** Then again, there are suits for battery; I'm told that these exist to prevent anyone, when he is getting the worst of it, from retaliating with a stone or any other object of the sort, but to ensure that he waits for legal satisfaction. Again there are indictments for wounding to

prevent murder from occurring when people are wounded 19. The least significant, I think, the action for slander, has been provided for to avoid the ultimate and most serious offence, to ensure that murder will not be committed or people led on by degrees from slander to blows and from blows to wounds and from wounds to killing, but there should be an action for each of these acts laid down in the laws so that they are not judged by individual anger or whim. (Trans. Carey 2012).

## Text 6

**Aesch. 1.6-8.** προσήκειν δὲ ἔγωγε νομίζω, ὅταν μὲν νομοθετῶμεν, τοῦθ' ἡμᾶς σκοπεῖν ὅπως καλῶς ἔχοντας καὶ συμφέροντας νόμους τῇ πολιτείᾳ θησόμεθα, ἐπειδὴν δὲ νομοθετήσωμεν, τοῖς νόμοις τοῖς κειμένοις πείθεσθαι, τοὺς δὲ μὴ πειθομένους κολάζειν, εἰ δεῖ τὰ τῆς πόλεως καλῶς ἔχειν. [7] **πρῶτον μὲν γὰρ περὶ τῆς σωφροσύνης τῶν παίδων τῶν ἡμετέρων ἐνομοθέτησαν, καὶ διαρρήδην ἀπέδειξαν ἃ χρὴ τὸν παῖδα τὸν ἐλεύθερον ἐπιτηδεύειν, καὶ ὥς δεῖ αὐτὸν τραφῆναι, ἔπειτα δεῦτερον περὶ τῶν μειρακίων, τρίτον δ' ἐφεξῆς περὶ τῶν ἄλλων ἡλικιῶν, οὐ μόνον περὶ τῶν ιδιωτῶν, ἀλλὰ καὶ περὶ τῶν ῥητόρων.** Καὶ τούτους τοὺς νόμους ἀναγράψαντες ὑμῖν παρακατέθεντο, καὶ ὑμᾶς αὐτῶν ἐπέστησαν φύλακας... [8] **Πρῶτον μὲν γὰρ διέξεμι πρὸς ὑμᾶς τοὺς νόμους οἳ κεῖνται περὶ τῆς εὐκοσμίας τῶν παίδων τῶν ἡμετέρων, ἔπειτα δεῦτερον τοὺς περὶ τῶν μειρακίων, τρίτον δ' ἐφεξῆς τοὺς περὶ τῶν ἄλλων ἡλικιῶν, οὐ μόνον περὶ τῶν ιδιωτῶν, ἀλλὰ καὶ περὶ τῶν ῥητόρων· οὕτω γὰρ ἂν μοι μάλιστα ὑπολαμβάνω τοὺς λόγους εὐμαθεῖς γενέσθαι. Ἄμα δὲ καὶ βούλομαι, ὦ Ἀθηναῖοι, προδιεξελθεῖν πρῶτον πρὸς ὑμᾶς ὥς ἔχουσιν οἱ νόμοι τῆς πόλεως, πάλιν δὲ μετὰ τοῦτο ἀντεξετάσαι τοὺς τρόπους τοὺς Τιμάρχου· εὐρήσετε γὰρ αὐτὸν ἐναντίως ἅπασιν τοῖς νόμοις βεβιωκότα.**

[6] In my view our aim when we legislate should be to make laws that are good and advantageous to our constitution, and once we have legislated, we should obey the established laws and punish those who disobey them, if the city is to thrive. Observe, men of Athens, the great concern for decency shown by the other lawgiver's of that period. [7] **First of all they legislated for the decency of our children and they explicitly enacted how the freeborn boy should spend his time and how he should be brought up, then second for youths and third for the other age groups in succession, not just for private citizens but also for public speakers.** They put these laws in writing and deposited them with you, making you their guardians. [8] What I want to do now is to follow the same order in my speech to you as the lawgiver does in the law. **First of all I shall describe the laws established for the discipline of your children, then second those for the youths, and third in turn those for the other age groups, not only for private citizens but also for public speakers.** In this way I believe my argument will be easiest to understand. I also want, men

of Athens, first of all to give you a preliminary account of the city’s laws, then after to examine comparison Timarchos’ character; **for you will find that his life has been contrary to all the laws.** (Trans. Carey 2012).

## **B. The intent of the lawgiver**

### **Text 7**

**Dem. 22.30** Ἄξιον τοίνυν, ὦ ἄνδρες Ἀθηναῖοι, **καὶ τὸν θέντα τὸν νόμον ἐξετάσαι Σόλωνα**, καὶ θεάσασθαι **ὅσῃν πρόνοιαν ἐποιεῖτο** ἐν ἅπασιν οἷς ἐτίθει νόμοις τῆς πολιτείας... **[31]** ἀλλ’ οὐ τοῦτ’ ἐσπούδασεν, ἀλλὰ ταῦτ’ ἀπεῖπεν ὑπὲρ ὑμῶν καὶ τῆς πολιτείας. ἦδει γάρ, ἦδει τοῖς αἰσχροῦς βεβιωκόσιν ἀπασῶν οὔσαν ἐναντιωτάτην πολιτείαν ἐν ἣ πᾶσιν ἔξεστι λέγειν τὰ κείνων ὀνειδίδη. ἔστι δ’ αὕτη τίς; δημοκρατία. οὐκ οὐκ ἐνόμιζεν ἀσφαλές, εἴ ποτε συμβήσεται γενέσθαι συχνούς ἀνθρώπους κατὰ τοὺς αὐτοὺς χρόνους εἰπεῖν μὲν δεινούς καὶ θρασεῖς, τοιούτων δ’ ὀνειδῶν καὶ **[32]** κακῶν μεστούς· πολλὰ γὰρ ἂν τὸν δῆμον ὑπ’ αὐτῶν ὑπαχθέντ’ ἐξαμαρτεῖν, κακείνους ἦτοι καταλῦσαί γ’ ἂν πειρᾶσθαι τὸ παράπαν τὸν δῆμον (ἐν γὰρ ταῖς ὀλιγαρχίαις, οὐδ’ ἂν ὥσιν ἔτ’ Ἀνδροτιώνος τινες αἰσχίον βεβιωκότερες, οὐκ ἔστι λέγειν κακῶς τοὺς ἄρχοντας), ἢ προάγειν ἂν ὡς πονηροτάτους εἶναι, ἵν’ ὡς ὁμοιότατοι σφίσιν ᾧσι. τὴν οὖν ἀρχὴν τοῖς τοιούτοις ἀπεῖπε μὴ μετέχειν τοῦ συμβουλευεῖν, ἵνα μὴ φενακισθεῖς ὁ δῆμος ἐξαμάροτο μηδέν.

**[30]** It is also worthwhile to study Solon, men of Athens, the man who established the law, and to consider how much foresight he displayed for all the laws he included in our constitution (...). **[31]** But this was not his main concern. Rather, he imposed these restrictions to protect you and your constitution. He realized, yes, he realized that out of all constitutions, the one that is most hostile to men who have lived a shameful life is the one that grants all men the right to criticize their vices. Which one is that? Democracy. But Solon was aware of the danger that at some time in the future there might be a large group of men who were both eloquent and bold but also led lives full of vice and depravity. **[32]** These men might mislead the people and cause them to commit many mistakes; indeed, they might try to overthrow the democracy altogether. (In oligarchies, by contrast, it is not possible to criticize magistrates even if they have led lives more disgraceful than Androtion’s.) Or they might try to corrupt the people so thoroughly that they would turn out very much like themselves. He therefore completely deprived such men of the right to speak on public issues so they would not trick the people and cause them to make mistakes. But this fine, upstanding man paid no attention to these laws; not only did he think he needed to speak and move proposals despite this prohibition but he also did so in defiance of the laws. (Trans. Harris 2008)

See also **Text 2** (above).

### C. Prudential arguments based on precedent

#### Text 8

**Dem. 22.19** χωρὶς δὲ τούτων ἔμοιγε δοκοῦσιν αἵρεσιν ὑμῖν οἱ τοιοῦτοι λόγοι διδόναι, πότερ' οἴεσθε δεῖν προφάσεις καὶ λόγους ἀκούειν τῶν ἀδικούντων ὑμᾶς ἢ ναῦς κεκτηῖσθαι. εἰ μὲν γὰρ τούτου ταῦτ' ἀποδέξεσθε, ἔσται δῆλον ἀπάσαις ταῖς βουλαῖς ὅτι δεῖ πρόφασιν πιθανὴν ἐξευρεῖν πρὸς ὑμᾶς, οὐχὶ τριήρεις ποιήσασθαι· ἐκ δὲ τούτου τὰ μὲν χρήματ' ἀναλωθήσεται, ναῦς δ' οὐχ ἔξεθ' ὑμεῖς.

[19] Apart from this, in my opinion such arguments present you with a choice: either you decide that you should listen to excuses and arguments from men who are doing you wrong, or you should have ships. **If you accept these arguments from this man, it will be obvious to all Councils that they must find a plausible excuse rather than have triremes built. In that case, money will be spent, but you will not have ships.** (Trans. Harris 2008)

#### Text 9

**Dem. 22.35** εἰσὶ δὲ καὶ περὶ τῶν ἄλλων αὐτῷ λόγοι πρὸς τὸ φενακίζειν ὑμᾶς εὖ μεμηχανημένοι, περὶ ὧν βέλτιον ὑμᾶς προακοῦσαι. ἔστιν γὰρ εἷς αὐτῷ τοιοῦτος, μὴ πεντακοσίους ὑμῶν αὐτῶν ἀφελέσθαι τὴν δωρεὴν μὴδ' ὀνειδέει περιβαλεῖν· ἐκείνων ἁγών, οὐκ ἐμός. ἐγὼ δ' εἰ μὲν ἐμέλλετ' ἀφαιρησέσθαι τούτους μόνον, ἄλλο δὲ μὴδὲν ὠφελήσειν τὴν πόλιν, οὐδὲν ἂν ὑμᾶς σφόδρα σπουδάζειν ἡξίουν· εἰ δὲ τῷ τούτῳ ποιῆσαι πλείους ἢ μυρίους τοὺς ἄλλους πολίτας βελτίους εἶναι προτρέψετε, πόσῳ κάλλιον τοσούτους παρασκευάσαι χρηστοὺς ἢ πεντακοσίοις ἀδίκως χαρίσασθαι;

[35] He also has some arguments about other topics that are well designed to trick you. It is better for you to hear about them in advance. He has one argument that goes like this: 'Don't take an award away from five hundred of your fellow citizens nor cover them with disgrace. I am fighting for them, not for myself.' **If you were only about to take this away from them, but bring no other advantage to the city, I would not ask you to take the matter so seriously. But if by doing this you are going to encourage more than ten thousand other citizens to live better lives, how much better is it to make so many men virtuous than to grant five hundred a favour that they do not deserve?** (Trans. Harris 2008)

#### Text 10

**Dem. 22.39** ἔχει γὰρ οὕτως. ἂν μὲν ἀπογνῶτε τὴν γραφὴν ταύτην, ἅπαντές εἰσιν ἀπηλλαγμένοι καὶ δίκην οὐδεὶς οὐδεμίαν μὴ δῶ· τίς γὰρ ἔτ' ἂν καταψηφίσαιτ' ἐκείνων,

τὴν βουλὴν ὑμῶν ἐστεφανώκωντες ἣς οὗτοι προέστασαν; ἐὰν δὲ καταγνῶτε, πρῶτον μὲν τὰ εὖορκ’ ἔσεσθ’ ἐψηφισμένοι, εἴτ’ ἐπὶ ταῖς εὐθύναις ἕκαστον τούτων λαμβάνοντες, ὃς μὲν ἂν ὑμῖν ἀδικεῖν δοκῇ, κολάσετε, ὃς δ’ ἂν μὴ, τότε ἀφήσετε. μὴ οὖν ὥς ὑπὲρ τῆς βουλῆς λεγόντων καὶ τῶν πολλῶν ἀκούετε, ἀλλ’ ὥς ὑπὲρ αὐτῶν παρακρουόμενοις ὀργίζεσθε.

[39] This is the situation. **If you acquit** them on this public charge, they will get off scot-free and probably none of them will receive any punishment. For who would vote against them after you had given a crown to the Council where they were in charge? **If you convict**, you will first of all have voted in keeping with your oath, and second, you whoever you think has committed a crime and then acquit whoever has not. Do not listen to them as if they were speaking on behalf of the Council and the majority of its members, but show that you are angry with them for trying to deceive you in order to help themselves. (Trans. Harris 2008)

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