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A RESPONSE TO JEAN-MARIE BERTRAND

[1] Setting the context

This is the third of a sequence of papers presented by Jean-Marie Bertrand, each expounding different facets of a single chapter of Aristotle's *Rhetoric* (1.13 = 1373b1-1374b23) and its relation to Athenian judicial procedure.[1] The first paper in the sequence (Bertrand 2002) dealt with Aristotle's double use in this chapter of the unusual term *epigramma*:[2] developing an idea put forward but only in passing by Lipsius,[3] Bertrand argued that we should read this not as an abstract term meaning "classification" or "designation," but instead to denote some concrete aspect of pre-trial procedures, and he suggested specifically that it refers to the prosecutor's *enklêma* or indictment. The next paper, with response by Andréas Helmis, was delivered at the previous meeting of the Symposion (Bertrand 2006): rather than covering a specific piece of Aristotelian terminology, this dealt instead with *erôtêsis* (cross-examination of the opposing litigant), and included the suggestion that occasional depictions of *erôtêsis* in our speeches may be a literary (re-)presentation of encounters which had already taken place at pre-trial proceedings such as the *anakrisis*, rather than reflecting the realities of a trial. By contrast, this third paper reverts methodologically to the starting-point of the sequence, in that it focuses on Aristotle's use of a single word (this time *proairesis*: broadly "moral choice"), and its use in philosophical texts as well as in oratory.

The task of the respondent is primarily to deal with the paper as delivered (or at least as pre-circulated), but in this case I have interpreted my responsibilities more broadly, so as to look at the present *proairesis* paper in the context of its predecessors in title. My justification is partly that the three papers together paint a broad picture of Athenian judicial and pre-trial procedure which I find stimulating though not wholly convincing, and I propose to explore some of my reservations in the final part of my response. But, firstly, the three papers together also raise some methodological issues about the language of Aristotle's *Rhetoric*.

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[1] I understand that further papers in the sequence are planned on *pisteis* (traditionally "proofs") and on *epieikeia* ("equity" or "fairness").

[2] Arist., *Rhet.*, 1.13.9 = 1373b38-a2: ἐπεὶ δ' ὁμολογοῦντες πολλάκις πεπραχέναι ἢ τὸ ἐπίγραμμα οὐχ ὁμολογοῦσιν ἢ περὶ ὃ τὸ ἐπίγραμμα ... ("… since, while frequently acknowledging that they have committed the action, [defendants] refuse to acknowledge either the *epigramma* or else the thing that the *epigramma* is about …").

[3] See n.5 below.

[2] Methodological issues of language

One of the things I have found most interesting about Bertrand's three papers (particularly the first and third in the sequence, with their close reading of Aristotelian terminology) is the striking unfamiliarity of the language under discussion. This is in part a simple difference of literary genre, in that my own background in Athenian law has approached the subject primarily from the perspective of the Orators rather than through philosophical treatments of justice. But if so, I seem not to be alone in this respect: it is notable that *proairesis* appears nowhere in the indices to either of the standard reference works on Athenian law (those of Lipsius and of Harrison),[4] while *epigramma* gets only one passing reference (in a Lipsius footnote).[5]

There seems to be a tendency for scholars working on Aristotle's *Rhetoric* and those working on Athenian forensic oratory to speak (as it were) a different language, both in the literal sense of using separate terminology but also in the metaphorical sense of non-communication: it is notable for instance that Grimaldi, in an otherwise excellent commentary on the *Rhetoric*, glosses the *epigramma* passage by asserting that the term has a technical legal meaning, but cites neither ancient text nor secondary literature to support this.[6] Against this background, one of the most valuable aspects of Bertrand's approach here is to bring the two languages together and highlight their discrepancies.

Whereas the problem with *epigramma* was the absence of parallels in any author for Aristotle's usage in this text, the word *proairesis* (as has been shown in Bertrand's current paper) recurs repeatedly in Aristotle's ethical treatises,[7] not

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[4] Harrison (1968-71.ii: 266) does have one index entry s.v. *epigrapheis*, but the passage in question deals only with the board of officials whose task was to assess individuals' liability to *eisphora* (1968-71.ii: 36).

[5] Lipsius (1905-15: 997) presents one four-word index entry, prioritising the verbal phrase (ἐπιγράφειν or ἐπιγράφεσθαι τίμημα) over the noun (ἐπίγραμμα). The structure of this index entry is matched in the one passage to which it refers (1905-15: 252): here Lipsius' discussion focuses on the use of the verb with *timêma* whether in the active voice (as at Aristoph., *Wealth*, 480) or more commonly the middle (as at Isok. 18.33, 16.41, and elsewhere) to denote the prosecutor's appending of a proposed penalty (*Strafantrag*) to his writ (*Klageschrift*); and he continues with the supplementary point that the noun *epigramma* can on this basis be used as a synonym for the proposed penalty itself (as at Dem. 38.2). The only mention of *epigramma* as it is used in *Rhet.*, 1.13.9 = 1373a1-2 appears in a footnote to this passage (p. 252 n. 37), where Lipsius – like Bertrand, but without further discussion – suggests that it may be a synonym for *enklêma*.

[6] Grimaldi (1980: 294): "The title or name given to an offence to classify it and to place it in a certain category as a violation of a specific law, and as subject to a certain court of law and certain penalty, is called τὸ ἐπίγραμμα."

[7] My own TLG count finds the noun *proairesis* occurring 21 times in the *Rhetoric* (in each case denoting moral purpose, moral preference, or moral choice), 61 times in the *Nikomakhean Ethics*, 52 times in the *Eudemian Ethics*, 30 times in the *Magna Moralia*,

surprisingly given their focus on issues of moral responsibility. It is frequent also in the Orators, though here the pattern is more complex. Partly this is because the word can be used in other senses also (e.g. to denote personal predilection or public policy or even allegiance to a political faction, as well as the mental element in wrongdoing).[8] But there are in addition some oddities of distribution: *proairesis* as a noun is found nowhere in the forensic work of the five early Orators, where it appears only in the epideictic speeches of Isokrates (five times, plus once in the Letters attributed to him);[9] by contrast, it appears no fewer than forty-seven times in the work of four of the five later Orators (the exception being Deinarkhos), with thirty-eight of these examples being Demosthenic, and twenty-five being found in forensic speeches (obviously with some overlap).[10]

On the basis of the Orators' chronological distribution, it is tempting to suggest that discussion of *proairesis* as an abstract concept represented by a noun might have become fashionable first in the field of ethical philosophy,[11] and have been picked up from there by the Orators: initially by Isokrates, whose philosophical links and/or pretensions are well-attested, and in forensic contexts only from the second half of the fourth century. This hypothesis could account also for the rather mixed picture that one finds in the other probably contemporary rhetorical treatise (the pseudo-Aristotelian *Rhetorika Pros Alexandron*, now generally attributed to Anaximenes), which is regarded as a much more pragmatic (not to say amoral) handbook,[12] and is certainly much less influenced by Aristotelian ethical philosophy: at first sight, Anaximenes' frequency of usage (nine examples of the noun *proairesis* in a single-book treatise) would seem comparable to Aristotle's (twenty-one in three books of the *Rhetoric*) – until one notices that whereas Aristotle's passages nearly all denote a moral choice or preference, several of Anaximenes' refer instead to a private course of action or public policy with no overtones of moral intention.[13]

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and only 48 times in the rest of the corpus. These figures do not take account of instances of the verb *proaireomai*.

[8] As at Aiskh. 1.195 (predilection), Hyp., *Epitaph.*, §3 (public policy) and Dem., *Ep.*, 3.2 ("devote himself to the *proaireseis* of the *dêmos*").

[9] The speeches in question are Isok. 1 *To Demonikos* (twice: 374-370 BC); Isok. 15 *Antidosis* (twice: 354-353); and Isok. 12 *Panathenaikos* (once: 342-339); the dramatic date of the *Letter to Timotheos* is 345.

[10] It should however be noted that the distribution of the noun even among broadly similar categories of speech can be very uneven: there are for instance 18 examples in the public speeches of Demosthenes (only 2 in the private speeches), but 13 of these occur within the *Crown* speech. The pattern for the cognate verb *proaireomai* (overwhelmingly though not always middle) is broadly similar, but not identical: unlike the noun, for instance, it is found five times in Deinarkhos, and twice in Lysias.

[11] The noun is found only 4 times in the corpus of Plato (contrast 34 examples of the verb), which might make him a transitional figure in this respect.

[12] See e.g. Cope (1867: 402) on "the much higher moral tone" of Aristotle's *Rhetoric*.

[13] E.g. a proposal of public policy (Anaxim. 33.3 = 1439b14), or a line of action or of speech (Anaxim. 1.3 = 1421b21-22, cf. sim. Anaxim. 20.4 = 1434a4 and 20.5 = 1434a9).

[3] Aristotle on juristic principles: some reservations

These observations would seem to raise questions not simply about the generic location of Aristotle's *Rhetoric* – what sort of work is this, and how therefore should we read it as evidence for legal history? – but also about the formation of a technical vocabulary of Athenian law. If we accept Bertrand's previous proposal that *epigramma* in this chapter of the *Rhetoric* is being used to mean *enklêma*, the question arises as to why Aristotle has chosen such an unfamiliar word: the unexpectedness of this usage is particularly striking given that Aristotle does use the (to us more obviously legal) term *enklêma* in the sense of "indictment" on two previous occasions in the *Rhetoric*, one of which occurs only six lines before the notorious *epigramma* (1.13.7 = 1373b33).[14]

One possible explanation, of course, would be that Athenian legal terminology may have been somewhat less technical in practice than is often assumed by modern handbooks. There is generally speaking some merit in explanations of this type, at least in my view, because of a linguistic point that was itself the subject of a famous Roman-law study by Daube (1969: 11-64), who pointed out that the use of what he called "action nouns" is characteristic of a more highly developed technical vocabulary than are phrases based on the corresponding verbs. Against this background, it is notable that modern discussions of Athenian legal procedure tend naturally but perhaps deceptively to use noun-based phrases like *graphê hubreôs* ("public prosecution for *hubris*") to denote ideas which in Greek are usually expressed by phrases with the verb *graphesthai*.[15]

In the case of *enklêma*, however, explanations of this type are less persuasive, precisely because this word is used in the Orators on 135 occasions specifically as a noun. So I am driven to the suggestion that Aristotle may be deliberately distancing himself from standard legal vocabulary, or perhaps even that he simply has a rather fuzzy understanding of Athenian law. There is certainly what looks suspiciously like an elementary legal howler in the *Rhetoric*, in that Aristotle chooses *moikheia* (either "adultery" or "seduction," depending on the view taken of a modern scholarly debate)[16] as one of his examples to illustrate the type of offence that is committed against an individual rather than against the community, despite the implications of its being an offence which seems to have given rise to a *graphê* but not a *dikê* (i.e. a

[14] The other use of *enklêma* with this meaning in the *Rhetoric* is at 1.12.5 = 1372a22. (The word is also used at *Rhet.*, 2.4.17 = 1381b5, but in the sense of "wrongs suffered".)

[15] I have discussed more fully in a previous paper (Todd 2000, at pp. 32-34) the significance of this point in the context of the formation of a technical vocabulary of law at Athens.

[16] For the minority view that *moikheia* was an offence that can be committed by a man only in situations where the woman is married, see D. Cohen (1991: 98-132, esp. at pp. 99-101); the traditional consensus, that she simply had to be a citizen, has been re-stated e.g. by Carey (1995: 407-408) and by Kapparis (1999: 297-298), each with refs. to earlier scholarship.

public prosecution that could be brought by any citizen, rather than a private prosecution that could be initiated only by the victim).[17]

It would be tempting, at least for rhetorical purposes and to stimulate discussion, to take an extreme position here: in other words, to argue that Aristotle's apparent lack of sympathy for the way in which the law of Athens was structured (as evidenced by his classification of *moikheia*) should make us wary of using any statement in the *Rhetoric* as evidence for Athenian thinking about law, unless independent confirmation can be found. But I am by no means sure how far I would want to go here, so I restrict myself to suggesting that although Bertrand has succeeded in showing that we do in the Orators find discussions of the mental element in wrongdoing, the question remains how far we can take Aristotle's interest in mental element as evidence for its being an established juristic principle underlying the structure of the whole of Athenian law.[18]

Obviously mental element does have an embedded status within the law of homicide, where the deliberate killing of a citizen has implications both for procedure and for jurisdiction which would have to be resolved through discussion before the case could come to trial.[19] A similar interest in motivation is implied by the name of the *trauma ek pronoias* procedure (lit. "wounding with intent"), though this perhaps should be regarded as an attenuation of homicide. But homicide could be a special case, since procedurally it is handled in rather unusual ways at Athens.

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[17] Arist., *Rhet.*, 1.13.3 = 1373b23-24 (ὁ μοιχεύων ["one who commits *moikheia*"] alongside ὁ τύπτων ["one who hits"] as offences against the individual, in contradistinction to ὁ μὴ στρατευόμενος ["one who fails to undertake military service"]); the public nature of the *graphê moikheias* is noted here by Grimaldi (1980: 291).

[18] My following paragraph is not of course claiming that mental element was an issue that non-homicide courts might not find persuasive, as in the case of Polyeuktos of Kydantidai, who is said to have been acquitted of treason apparently on the basis that he had acted without treasonable intent (Dein. 1.58 [a reference I owe to Edward Harris], with Worthington 1992: 222-223). My point is simply that in the absence of established juristic principles, the issue would have to be argued afresh each time on the basis of e.g. popular views of morality. (Statements such as Lys. 10.31, which claim that the legislator makes no allowance for anger, are purely *ad hoc* – i.e. "my opponent will not be able to point to any statement in the *kakêgoria* law legitimising anger as an excuse" – and do not in my view constitute evidence for the existence of a juristic principle dealing with intent.)

[19] I am not wholly unsympathetic to the argument of Carawan (1998) that homicide cases specifically may have seen the development of some quite sophisticated jurisprudence, either by the Basileus at preliminary hearings, or else by the Areiopagos or the ephetic courts who tried the case. It is worth bearing in mind that the Areiopagos at least had permanent membership, and we may presume that it was used to conducting debates in its capacity as a council. So even though we do not to my knowledge have evidence for there being any formal opportunity for debate during the trial of a homicide case, nevertheless the members of the Areiopagos will presumably have been able to chat through any legally interesting case informally and subsequently, to an extent that might have facilitated the development of a common mind among them.

Indeed, it is worth noting that Athenian law used different terminology to denote the preliminary hearings conducted by the Basileus in homicide proceedings on the one hand, and on the other hand those conducted by other officials presiding over other cases: we should therefore pause before assuming that the type of jurisprudence putatively developed through *prodikasiai* in the area of homicide can provide a model for how other officials would handle the *anakrisis*.[20]

As is often the case, one thing that this discussion has illuminated is the extent to which our knowledge of Athenian legal procedure, much of it derived from the Orators, is dominated by the events of the trial itself. To that extent, we need to play close attention to any evidence for the broader context of pre-trial proceedings or the juristic thinking that may underlie them, even if the status of that evidence is itself controversial.

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[20] I am not aware of any complaints in our speeches about partisan handling of the *anakrisis*, in the way that we do at times get hints that complaints were made about procedural impropriety on the part of an arbitrator (e.g. Meidias' charge against Straton in Dem. 21.83-96, where presumably Meidias had a much clearer – because successful – complaint than Demosthenes lets us hear).

[*] D. Allen's important discussion of proairesis in S. Goldhill/R.G. Osborne, Rethinking Revolutions through Ancient Greece, pp. 183-217 (Oxford, 2006), came to my notice only after I had received the proofs for the present volume.