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DID ATHENS HAVE CONSENSUAL CONTRACTS? A RESPONSE TO LORENZO GAGLIARDI

First, many thanks to colleague Gagliardi for looking again at questions regarding what others too call consensual and real contracts in classical Athens, tough problems that have challenged many legal scholars, yielding no consensus.[1] Contracts are of special interest to Roman legal historians and modern lawyers, for whom this Latinate word is weighty indeed. For Athens, forensic testimonia about "agreements," *homologiai*, are few, variable, and of uncertain significance. Without Roman and modern law, would anyone have described these *homologiai* as contracts in the Roman or modern sense? As *homologia* is not a technical word, could a law say that all *homologiai* are *kuriai*? And what does *kurios* mean? When Gagliardi translates these terms he uses "validi" and "vincolanti," but these are not synonyms. In considering alternative ways of looking at our meager Attic evidence, I avoid Roman or modern notions of contract in favor of Athens' less rigorous approach to legal issues, and I take particular care with our sources.

Gagliardi begins by quoting eight passages and then later a ninth from Plato, to document "the law [*la legge*] that affirms the principle [*il principio*] of *homologia kuria*" (a phrase which he acknowledges probably did not exist). Presented as such, these passages are intended to establish the existence of a law on contracts. However, they raise a number of questions, some of which Gagliardi addresses later in his essay. I go text by text, following Gagliardi's order, to consider what our evidence amounts to, reserving until later a discussion of the word *kuria*.

1) In Hypereides *Athenogenes* 13, the plaintiff says that Athenogenes "will presently tell you [*dikasts*] that the law (*ho nomos*) says that however many things one man agrees with (*homologein*) another are *kuria*. Yes my friend, just things; things that are not just it forbids to be *kuria*. From the laws themselves I will make this clear to you." The plaintiff then cites a number of laws, none mentioning *homologia,* which he says he has spent "night and day" searching out, for example a law against selling defective slaves in the market. There is general agreement that these other laws

[1] The scholarship on these questions is massive. It was not my assignment nor was there time to work through this material and provide fully researched answers to the many questions raised. I evaluate Gagliardi's contribution, and suggest possible answers to some principal problems.

which the plaintiff cites imply that, despite his claim, the first "law" he mentions (*ho nomos*), if it was a specific law, contained no stipulation that agreements be just, because he would have cited that particular clause from "the law" instead of desperately hunting for others. Hence in one way at least, the speaker has misrepresented this "law." He does not say what else the "law" mentioned. The puzzling shift from "the law" to various laws raises the question whether his phrase "the law" is here a general term for Athenian legislation, rather than designating a specific law, notwithstanding Gagliardi's insistence toward the end of 4.4. (Neither of Gagliardi's claims that [Dem.] 47.77 [see 2 below] and 48.11 prove the existence of a law of consensual contracts is compelling.)

In 5.2b, Gagliardi returns to *Ath*., arguing—after a lengthy discussion of modern Italian law—that "the whole action" of this case "appears to be based on the law of *homologia*." However, in the extant parts of this speech *homologia* occurs only in section 7 (without the article; cf. *homologema* in section 20). The speaker repeatedly refers to his written agreement with Athenogenes as *sunthēkai* (8 twice, 10, 12 twice, 14, 18), and uses the verb *sunthesthai* to describe his act of agreement (18). Why, if the whole action was based on the law of *homologia*? Gagliardi concludes by accepting the majority view that "the judicial action" brought by the plaintiff was a *dikē blabēs*. The evidence is insufficient to claim that it was based on a law of *homologia*. The plaintiff himself nowhere adduces such a law.

2) The speaker of [Dem.] 47.77 refers to "the law (*nomos*) and the deposition (*martyria*) that however many things one person agrees with (*homologein*) another shall be *kuria*," in order to challenge what he describes as Theophemos' disregard of their arrangements about a payment. After the law and the deposition are read out, the speaker discusses various witnesses' testimonies (47.78), but no law. It again remains unclear what this "law" was, why the speaker mentions it so briefly and so late in his account (the relevant story began in section 49), what else (if it was a specific law) it may have contained, and why the speaker juxtaposes the following *homologia* clause with "the deposition." Reflecting this problem, various editors print Dobree's emendation reversing these two words: "the deposition and the law that...."

3) In an aside, the speaker of Isokr. 18.24 mentions that the dikasts "require that private (*idias*) agreements must be publicly (*dēmosiai*) *kuriai*." What is the significance of *idias* and *dēmosiai*, "private" and "public"? Gagliardi does not mention this passage again. We shall return to it.

Gagliardi then quotes three other sources (texts 4–6) for "consensual contracts," which mention that people must agree voluntarily (*hekontes*). In 4.3 he will conclude on grounds of logic that texts 1–3 have probably omitted this stipulation from the text of the law. Here and later he thinks that such a stipulation implies that the object of agreement must be free of defects, a modern idea that we shall consider.

4) In [Dem.] 56.2 (a case also brought as a *dikē blabēs*), the plaintiff tells the dikasts that he relies on them and on "your *nomoi*" which bid that voluntary *homologiai* be *kuriai*. Why "laws" in the plural, a phrase repeated in the next section? In 4.4 Gagliardi will address this question by referring to a passage in Aristotle's *Rhetoric*, where (I argue below) there is no reason to suppose that two hypothetical laws are Athens' laws. In 5.2.a Gagliardi returns to [Dem.] 56. Although he asserts that the whole argument of this speech is that the defendants had violated a *homologia* (and section 1 mentions "a *homologia* to do *ta dikaia*, just things," and both *homologiai* and *sunthēkai* are mentioned in 6 and 11), the plaintiff states repeatedly (6 twice, 7, 10, 11, 12 three times, 14 twice, 15 twice, and so on) that he and the defendants made a *sungraphē*, stipulating the terms of the loan, the ship's route (3, 9 and *passim*), the interest rate (12), penalties (10, 27), and that the ship was collateral (4, 6, 38). In 37 the plaintiff orders the clerk to read this *sungraphē* out in court. He nowhere mentions the phrase "voluntary *homologia*." Moreover, after section 2 not only does he nowhere refer to Attic *nomoi* that voluntary *homologiai* are *kuriai*, in section 48 he tells the dikasts that on that very day, they are legislating (*nomothetein*) whether they "think that *sungraphai* and *homologiai* must be strong (*ischurai*)" rather than *akuroi* (50). This passage suggests that Athens had no such law. Gagliardi also does not bring to bear section 10, where the plaintiff mentions "your laws which order shipowners and supercargoes to sail to the port where they agreed (*sunthōntai*) or be liable to the severest penalties"; section 16, where the speaker demands "not to make *akuron* the *sungraphē* which they [the defendants] also agreed (*homologein*) was *kuria*" (here *kuria* should not mean "binding," because the defendants would never agree to that); section 26 where he says "nothing for us is more *kuria* than the *sungraphē*"; or section 27, where his challenge to the defendant to show that their *sungraphē* was not *kuria* may imply that some agreements were not *kuriai*. Also, section 14 makes clear that the plaintiff is not an Athenian. I shall return to these sections, and to the plural "laws."

5) [Dem.] 48.54 asks how a person is not mad who thinks he does not have to do what he agreed to (*homologein*) and voluntarily made an agreement (*suntithemai*) with someone also voluntarily, and swore. Gagliardi cites this text as attesting "the Athenian law which affirmed the principle of *homologia kuria*" (2). At the opening of the speech (48.9–11), however, Kallistratos says three times that he and Olympiodoros made not a *homologia* but written *sunthēkai* ("agreements") and swore oaths about sharing an inheritance; he names the witnesses to their *sunthēkai*; and he has the clerk read out in court "the *nomos* according to which we wrote up our *sunthēkai*." I agree with Gagliardi that these men's agreement was legal, and not wrongful collusion. Does section 54 refer to "the law on *homologia*"? It does not mention laws, but only *homologein*, *suntithemai*, and that both men were *hekontes*; it calls the offender mad but not a lawbreaker. In section 11 Kallistratos has the

nomos read out specifying how they were to write up their *sunthēkai*. Whether this law specified that such *sunthēkai* were *kuriai* is not indicated. It may be noted that in sections 10 and 22 Kallistratos could have used the verb *homologein* but instead says *koinēi bouleuomesthai*, of his arrangements with Olympiodoros, "we devised everything by mutual agreement." He often refers to what they "swore." The single use of *homologein* in 48.54 seems to be casual rather than legal language. This passage does not attest a law on *homologiai*.

6) In Plato *Symp.* 196c, arguing that all men voluntarily serve Erōs, Agathon quotes Alkidamas of Aiolis that "'our city's kings, the laws,' say that *homologiai* made voluntarily on both sides are just." Again we have plural laws which are not necessarily Athens'. Also, no other source calls voluntary agreements "just." Gagliardi does not discuss this passage again.

7) According to Dinarchus 3.4 (325 BC), "the common law (*koinos nomos*) of the city bids that if someone, having made an agreement (*homologēsas*) in the presence of (*enantion*) the citizens, breaks it, he shall be liable for wrongdoing." This sentence is an aside to the main issue in this case, Philokles' misconduct in the Harpalos affair. What is a *koinos nomos*? Could it (or the passage) imply that Deinarchos is citing no specific law? In 4.4 Gagliardi suggests that the expression may indicate that such provisions were included in various laws. This may (but need not) conflict with his earlier effort to recover the text of "the law on consensual contracts." He objects to the hypothesis of Domingo Avilés in a forthcoming essay, who argues, following Maschke, that Athens had no such general law but only various specific provisions. And why "in the presence of citizens"? *Enantion* has been variously emended. Gagliardi prints but does not explain Lloyd-Jones's emendation (*eis hena tina* for *enantion*), although the next text Gagliardi cites includes the phrase *enantion marturiōn*, "in the presence of witnesses." Why should "citizens" be specified, or is that a slip for "witnesses"? Deinarchos also does not mention *kuria.* Is this "common law of the city," mentioned in 325 BC, different from provisions seen in earlier sources?

8) The speaker of [Dem.] 42.12 (the speech is undated) mentions a law bidding that *homologiai* made "before witnesses" are *kuriai*, in this case an agreed-upon date for exchanging property. This could support (7), that by 325 citizens had to witness at least some types of agreements. Do either or both of these provisions reflect (later versions of?) what Gagliardi calls Athens' law on consensual contracts?

9) In Plato *Crito* 52d–e (first presented in 4.1), imaginary laws tell Sokrates in jail that by escaping he would transgress the *sunthēkai* and *homologiai* that he made with them, "not having been compelled by force, or deceived, or forced to decide in a short time," and that he could have withdrawn his agreement by leaving Athens at

any time over his seventy-year life. Gagliardi considers this an "implicit reference" to Athens' law on consensual contracts. The "not having been compelled…" clauses could but need not imply that under certain circumstances, *homologiai* in Athenian law might not be binding.

After quoting these passages, Gagliardi asks (3) whether they are explained by an Athenian law on consensual contracts, or else by Wolff's theory of *Zweckverfügung*, "disposition for a determined purpose." I agree with him (4.1) in rejecting the theory of *Zweckverfügung*, which he rightly shows will not fit a number of sources (although it does fit, e.g., [Dem.] 56). However, Hyp. *Ath*. 15, quoted at the start of 4.1 and a key part of his refutation of Wolff, expressly refers to a different law than Gagliardi's "contract law," and a special situation recorded from early Hellenistic Ephesos [also in 4.1] need have nothing to do with Attic law. Nonetheless, Wolff arrived at his theory after rejecting the idea that Athens had a law of consensual contracts. Rejecting *Zweckverfügung* will not automatically resurrect that alternative hypothesis, which here Gagliardi does not defend, simply concluding (after n. 25), "We can therefore fix a first point: *homologia* was a contractual accord," a conclusion he rephrases at the start of 4.2: "Attic law recognized the validity of contracts based on pure consent."

All this evidence makes clear that our sources for an Athenian law whose main provision was that whatever *homologiai* people made were *kuriai* are truly meager. Speakers mostly mention it once and in fairly minor contexts, sometimes as asides. [Dem.] 56.48–50 seems to deny that it existed. Litigants often speak not of *homologiai* but of *sunthēkai* or *sungraphai*, which they might not do if they were appealing to a law on *homologia*. We also are ignorant of the verdicts in these cases. In addition, as many scholars including Wolff and Thür have pointed out, as phrased such a law would be unlikely and even absurd. If I agree to buy my neighbor's donkey but the next day change my mind, am I legally bound by my agreement, especially if money and donkey have not changed hands? Gagliardi's first passage (from Hyp. *Ath.*) raises the further issue, what if an agreement is unjust? In 4.4 he will argue that two hypothetical conflicting laws mentioned by Aristotle in *Rhet.* 1375b8–11, one that whatever people agree on (*sunthōntai*) are *kuria*, the other forbidding making illegal agreements (*suntithesthai*), are probably Athenian laws. Yet if so, why would the speaker of Hyp. *In Ath.* 13ff. not have cited this second law, instead of many other less relevant laws which he says he has spent "night and day" searching out? The "law" or "laws" or "common law of the city" on *homologiai* to which various speakers refer, must have included other provisions or restrictions (although apparently not mentioning the justice or legality of agreements) or else been different altogether, which speakers seemingly do not want to go into. Before we can claim that anyone refers to Athens' "law affirming the principle of *homologia kuria*," we need to know what the other provisions of that law were. As Avilés asks in his forthcoming *Mouseion* essay, did any Athenian law

affirm general legal rules, instead of targeting specific issues? Several scholars have noted that in Athens, if you felt that someone had not honored an agreement, you could take him to court. This did not require a general law of contracts.

What then could the clause "however many things one man agrees with another are *kuria*" mean, and whence did it derive? We may consider at least four possibilities. First, very simply, the clause of the *homologia* provision most commonly quoted begins with the word *hosa*, "however many." Might this clause prohibit weaseling out of some part of an agreement? Second, this clause may have been used in various laws (compare the plural *nomoi* mentioned by several sources listed above; Maschke 1926: 165; Avilés, forthcoming) where agreements had to take precedence over other considerations, in particular the risk of foreign jurisdictions in shipping cases. In [Dem.] 56.47, the plaintiff, a non-Athenian, alludes to this problem: what if his case had been brought at Rhodes? Lenders in Athens would naturally be unwilling to take such risks. The plaintiff's frequent references to agreements as binding make sense in the context of the shipping loan that was the basis of this case; those provisos need not be extended to other types of agreements. Third, such a clause may also have been used in special circumstances, for example when people wanted to opt out of legal protections, as again Avilés mentions. The Ephesos inscription that Gagliardi refers to and which Avilés describes in detail, specifies that in the immediate crisis, agreements were to prevail over laws, and includes the clause "what they have agreed on (*hōmologēmena*) is *kuria*." Such uses would explain why most litigants only briefly mention this provision, without saying very much about it. It might seem to help them, without actually pertaining to their case.

Finally, fourth, what does *kuria* mean? Let us return to Isokrates 18.24 ([3] above]), that the dikasts "require that private (*idiai*) *homologiai* must be publicly (*dēmosiai*) *kuriai*" (or "*kuriai* by public authority"). Now, way back when polis institutions were forming, the question might well arise, should public authority enforce agreements made between private individuals? The measure quoted by Isokrates said, not that all private agreements were valid, but that private agreements could be enforced by public authority, a crucial step in the growth of public order. I suggest that *kuria* also had this meaning in Solon's famous law (*Digest* 47.22.4) that whatever demesmen, phratries, religious groups, sailors, dining or burial clubs, pirates or traders agreed on (*diathōntai*) among themselves, were *kuria* unless forbidden by public statute: here *kuria* cannot mean "binding." Classical Athenians rarely referred to this measure because its principle had long been established. But sometimes orators found it useful to mention, because it could look like a general law on agreements. Although not used in Solon's law, the word *homologein* may reflect a time when writing was uncommon and agreements were mostly oral.

Finally, the evidence cited for general legislation regarding real contracts (agreements where in addition, things change hands), specifying that these things must be free of defects, seems also inadequate. The laws cited in Hyp. *Ath*. , for

example that slaves must be free of defects, may imply that there was no such general legislation. In 4.3, having concluded that a "voluntary" provision was probably a part of Athens' legislation on consensual and real contracts, Gagliardi further deduces that this provision implies that objects of agreement must be free of defects. The problem is evident. If two people agree, why must it be said that they agree "voluntarily," what can this mean? However, Gagliardi's inference is not necessary, and would also imply vague and careless legislation. "Voluntary" could mean (for example) "not under compulsion." In the *Crito* passage, Plato specifies that those who agree must not be forced, or deceived or given too little time; the Hellenistic law at Ephesos mentions violence. However, these clauses need not reflect provisions in Attic law (cf. Plato's "too little time"). In case of defects, people could go to court and litigate, without the need for specific laws.

I am not the first to query experts in Roman and modern law about the dangers of introducing foreign concepts into ancient Athenian contexts. The Athenians had no jurisprudence, there was no *diritto attico*, no *dottrina*. Gagliardi often refers to "*il principio* of the *homologia kuria*," while doubting the phrase *homologia kuria*. I doubt the *principio* also. The Athenians did not conceive of *consenso* as a *fonte di obbligazioni*. While aware of these problems (4.2), Gagliardi's essay continues to approach Attic *homologiai* through Roman law (many pages use Latin legal terminology, cf. seven occurrences between notes 35 and 37 in 4.2), and modern civil law. *Homologiai, synthēkai* and the like require a careful, philological understanding of ancient Greek texts and of Greek sociology where law was embedded in social realities more important than it. Contract is a powerful word in Roman and modern law. Attic lawgivers and dikasts typically took a broader view of human relations than the legal formalisms of Roman or modern contracts.

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