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PRIVATE AGREEMENTS PURPORTING TO OVERRIDE POLIS LAW: A RESPONSE TO ATHINA DIMOPOULOU

Athina Dimopoulou's discussion of "legal invalidity in Greek inscriptions" proves the importance of context in Greek legal studies. Although Dimopoulou skillfully presents an enormous amount of information gathered from a large number of inscriptions culled from a vast geographical area and covering a period of almost 1,000 years, these documents (relatively few from Athens) are sometimes highly fragmentary and almost always deal with matters for which we lack context. Accordingly, Dimopoulou found it, in her words, "a difficult task" to answer from these epigraphical materials even the most basic questions about statutory invalidity. Only when she turns to Athens,[1] in her final Section entitled "invalidity and contracts in Athens," is there evidence available (albeit no inscriptions) to provide context and therefore to allow a meaningful discussion as to "whether contractual liberty could extend to include even agreements that were forbidden by the law" (p. 265). In contrast to the bare facticity of the inscriptional evidence earlier considered, Athenian literary texts allow Dimopoulou to identify a "standard provision" in Athenian contracts (*syngraphai*) which asserts that nothing, not even laws or decrees, is to have greater legal authority (in Greek, is to be *kyriōteron*) than the written agreement of the parties—a provision that I shall hereafter refer to as the *kyriōteron* clause. But this "standard provision," she asserts, was directly in conflict with a fundamental Athenian conception that saw "the rule of law as an expression of the will of the people," *not* as the will of individuals purporting to negate Athenian *nomoi* and *psēphismata* by private agreement (p. 266). A contractual provision was therefore necessarily invalid if it purported to authorize "as valid something that was forbidden by law." Dimopoulou finds "plausible" the alternative explanation that the "standard provision" is not really an effort to assert priority over laws and decrees, but is merely "declaring the written document to be the most valid instrument of proof … the most authentic embodiment of the contracting parties' mutual obligations" (ibid.).

[1] Athens is the only one of the hundreds of ancient Greek poleis for which there survives detailed information concerning political, social and legal institutions: Whitehead 1993: 135–36; Pečirka 1976: 6; Mossé [1962] 1979: 29; Gernet 1964: 61.

Context, however, in my opinion, suggests that the *kyriōteron* clause should not be interpreted as a statement of evidentiary priority, but should be read literally as purporting to invalidate conflicting laws or decrees. Although scholars seem uniformly to conflate two separate contractual provisions [2]—the κυριώτερον clause and the clause κυρία ἡ συγγραφή—the two provisos make two quite different assertions.

1. The clause κυρία ἡ συγγραφή: To say that a contract is κυρία does not necessarily mean anything more than that the contracting parties have agreed to be legally bound by the terms of the covenants contained therein. In classical Greek, the word *kyria* does carry a multitude of significations and implications: the Liddell-Scott-Jones Greek Lexicon offers more than a dozen basic meanings—and a multitude of nuanced differentiations within the basic divisions. But in all contexts *kyria* conveys—in the Lexicon's words—such meanings as "having power," "having authority," being "valid," being "authorized" etc. When described as *kyrios*, a law (*nomos*) or decree (*psēphisma*) is "in force" or has "legal effect." [3] A court that is *kyrios* is one having legal authority.[4] Something *akyros* lacks legal authority.[5] While the clause κυρία ἡ συγγραφή may have come in Hellenistic Egypt to have an evidentiary signification (for reasons unique to that time and jurisdiction), [6] and while evidentiary primacy might have logically been one natural result even in classical Athens of contracting parties' agreement that a contract be *kyria*, no Athenian evidence even suggests that the clause κυρία ἡ συγγραφή seeks to invalidate laws or decrees, at Athens or elsewhere.[7]

2. The *kyriōteron* clause: The *kyriōteron* clause, however, does state its intention to override jurisdictional law, but tellingly it is attested at Athens only in contracts related to maritime commerce, and elsewhere in classical Greece only in loan

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[2] The leading modern commentator on these clauses, Vélissaropoulos-Karakostas, in her seminal work on contractual obligations discusses the *kyriōteron* clause amidst her treatment of ἡ ρήτρα κυρία ἡ συγγραφή in the section of Chapter 3 devoted to ἡ σύμβαση στην ελληνικήν αρχαιότητα (1993:176–79). Elsewhere, she suggests that *kyriōteros* should be understood as a mere intensification of *kyrios*: "Dans certains témoignages, la valeur de l'adjectif *kyrios* est accentuée par l'emploi de la forme κυριώτερος") (2001: 108). Cf. Paoli [1933] 1974: 72–74.

[3] See Dem. 24.117 (τοὺς ἄλλους νόμους ἀκύρους οἴεται δεῖν εἶναι, αὐτὸν δὲ καὶ τὸν αὑτοῦ νόμον κύριον); Dem. 50.1 (περὶ τῶν νόμων, πότερα κύριοί εἰσιν ἢ οὔ). Cf. Dem. 23.32 (τὸν νόμον κύριον).

[4] See Dem. 13.16; 26.9; 57.56.

[5] Dem. 24.2, 79, 102, 148, 154.

[6] Mélèze-Modrzejewski 1984:1180; Vélissaropoulos-Karakostas 1993: 176–79, 2001: 108.

[7] Two passages from Plato and Aristotle, often cited in this context, are discussed in the Appendix.

agreements governing credit advanced to *poleis* [8]—both special situations where commercial considerations explain, and justify, the appropriateness of a contractual clause subordinating polis laws or decrees to private covenants. If the *kyriōteron* clause were not to be interpreted literally—overriding laws (*nomoi)* and decrees (*psēphismata*)—a borrowing jurisdiction, by its own unilateral legislative action, would have been free to avoid responsibility for repayment. [9] Because of this inescapable reality, in the case of loans to *poleis*, scholars seem to have had no difficulty in accepting the literal language of the *kyriōteron* clause—viz. that "no law or decree shall have greater legal authority (shall be *kyriōteron*) than the contract" that has been entered into. [10] Commercial reality—and evidentiary considerations—mandate, with regard to agreements among private parties, a similar acceptance of the "plain meaning" of the *kyriōteron* clause.

The sole private-sector examples of the *kyriōteron* clause are preserved in disputes relating to Athenian maritime contracts (*nautikai syngraphai*). The text of the only actual maritime contract surviving from antiquity, preserved in Demosthenes 35,[11] provides explicitly that as to the matters encompassed therein,

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[8] IG XII, 7, 67, 77 ff. (=Migeotte 1984: 49, ll. 41 ff.): τῆς δὲ συγγραφῆς … μηδὲν εἶναι κυριώτερον μήτε νόμον μήτε ψ[ήφ]ισμα … [μή]τε στρατηγὸν μήτε ἀρχὴν ἄλλα κρινοῦ[σ]αν ἢ τὰ ἐν τ[ῇ συγγ]ραφῇ γεγρ[αμμ]ένα μήτε ἄλλο μηθὲν μήτε τέχνῃ μήτε πα[ρε]υρέσει μηδεμιᾷ, ἀλλ᾽ εἶναι τὴν συγγραφὴν κυρίαν. Cf. IG XII, 7, 69, 46 ff.; 70.8 ff. See also Migeotte 1984: 51, l. 28.

[9] The recent Greek economic crisis offers a startling parallel, confirming the practical need to include the equivalent of a *kyriōteron* clause in documentation governing loans to sovereign debtors. Although many modern sovereign debt agreements have long provided for governing law and venue other than that of the borrowing jurisdiction, as of January 2012 only about 20 billion Euros of Greek sovereign and sovereign-guaranteed debt had been borrowed under documentation providing for UK law and London venue; the remaining 177.3 billion Euros were explicitly governed by the law of the Greek sovereign borrower. Creditors belatedly recognized that the Greek government might unilaterally modify its laws so as effectively to avoid liability under the debt instruments. As a result, the troika of creditor representatives ultimately insisted on the equivalent of a *kyriōteron* clause, and Greece was forced to abandon the section providing for the application of Greek law, instead accepting contractual arrangements mandating governance by English law, as determined by London courts, a change adopted (against fierce parliamentary opposition) by the Boule on February 23, 2012: Νόμος 4050/2012: *Κανόνες τροποποιήσεως τίτλων* (Greek Bondholder Act 4050/12). See Zettelmeyer, Trebesch and Gulati 2013: 11 and Appendices 1 and 2; Buchheit and Gulati 2010.

[10] For example, Vélissaropoulos-Karakostas, an advocate of the evidentiary interpretation for *kyriōteron* clauses in contracts involving private parties (1993: 178–79), interprets such clauses in loan agreements with individual jurisdictions as absolutely precluding any future legislation or other effort adverse "aux droits du prêteur soit au moyen d'une loi ou d'un décret, ou résolution quelconque, soit par le fait d'un magistrate de la cité" (2001: 104).

[11] On the authenticity of this document, see Bresson 2008: 67–71; Lanni 2006: 156, n. 41; MacDowell 2004: 131; Ankum 1994: 106, 2000: 294–97; Purpura 1987: 203–35, 1996.

"nothing shall have greater legal authority (shall be *kyriōteron*) than this contract." [12] One of the litigants, Androkles, explains more fully that "the contract does not allow anything to be of greater legal authority (to be *kyriōteron*) than the terms written therein and does not allow anything—no law, no decree, nothing whatsoever—to take priority (*prospherein*) over the contract." [13] The same provision of overriding effect was found in the written agreement that is the subject of litigation in Demosthenes 56, a case involving a maritime dispute over an alleged failure to deliver Egyptian grain to Athens. The speaker there echoes the sentiments of Androkles: "for us, nothing is of greater legal authority (*kyriōteron*) than the contract." [14] In my opinion, it is not by chance that the *kyriōteron* clause is found only in maritime finance context: nautical undertakings—predominantly involving non-Athenians,[15] necessarily foreign in scope and operation, involving a sphere of life distinct from the domestic political configurations of Attika—represented no challenge to the sovereignty at Athens of the Athenian *dēmos*.

Maritime contracts arose in the world of *emporia* (commercial exchange by sea) "sharply separated," conceptually and legally, from other areas of Athenian life, especially those related to the polis [16]—a division recognized juridically by the explicit detachment of "commercial maritime" laws (*emporikoi nomoi*) from those of the landed community (*astikoi nomoi*).[17] Geographically, transactions in the Athenian agora in their essence are inherently tied to Athens; commercially, agora arrangements tend to be relatively simple—at retail, often undocumented and largely unwitnessed. Athenian popular sovereignty would have been directly challenged by a claim of priority over Athenian law for agreements made in connection with such domestic transactions, and no such *kyriōteron* claims are attested. Indeed, for these fleeting domestic transactions formal contracts are scarcely needed and in fact are virtually unknown.[18] For local commerce, arrangements in writing were wholly unknown at Athens until well into the fourth century—and only very late in that

[12] § 13: κυριώτερον δὲ περὶ τούτων ἄλλο μηδὲν εἶναι τῆς συγγραφῆς.

[13] Dem. 35.39: ἡ μὲν γὰρ συγγραφὴ οὐδὲν κυριώτερον ἐᾷ εἶναι τῶν ἐγγεγραμμένων, οὐδὲ προσφέρειν οὔτε νόμον οὔτε ψήφισμα οὔτ' ἄλλ' οὐδ' ὁτιοῦν πρὸς τὴν συγγραφήν·

[14] Although the written agreement has not been preserved, §26 confirms the presence of the provision in the contract underlying the litigation: οὐδ' ἐστὶν ἡμῖν οὐδὲν κυριώτερον τῆς συγγραφῆς. αὕτη δὲ τί λέγει καὶ ποῖ προστάττει τὸν πλοῦν ποιεῖσθαι;

[15] Much of the maritime merchant population at Athens in the fourth century used Greek only as a second language. See Cohen 1992: 29–30, 101–10, 144–46. Xenophon states explicitly that non-Greeks constituted a large portion (πολλοί) of the commercially oriented metic population—"Lydians, Phrygians, Syrians, and every-other-kind of non-Greek" (*Por*. 2.3). Xenophon's claim is confirmed by other evidence: Gauthier 1972: 123–24 and n. 55. Cf. IG II^2 1956; Pope 1935: 67–68; Launey 1949, 1: 67–69.

[16] Gofas 1993: 167.

[17] Hesykh. s.v. ἀστικοὶ νόμοι. Cf. Dem. 35.3.

[18] The earliest known non-maritime written contract appears to be the fourth-century *syngraphē* reported at Isok. 17.20.

century did written agreements cease to be unusual.[19] In contrast to the relatively simple retail dealings of the landed agora, sea trade in the fourth century was extraordinarily intricate—inherently international, inherently complex, and early reduced to memorialization in elaborate agreements. Most importantly the forum for potential litigation, and the laws of that yet undetermined forum were unknown and unpredictable at the time of entry into agreement. Although open access to commercial courts may have been an Athenian innovation (Vélissaropoulos 1980: 248), many other states, including Syracuse, Macedonia, Rhodes and Byzantion did offer similar access to foreigners in maritime matters.[20] (A Demosthenic scholion even insists that foreign maritime merchants could litigate wherever they chose.)[21] Sometimes the parties would perforce find themselves unexpectedly in court in an unanticipated jurisdiction. Thus a ship, damaged while traveling from Sicily to Athens, became in Kephallenia the object of maritime litigation between Athenians and Massalians relating to the terms and conditions of underlying maritime loan contract(s).[22] In an emporic world of uncertain venues and a multiplicity of jurisdictional interests, an agreement on the supremacy of contractual arrangements offered desirable stability to all participants, and should have offended no individual jurisdiction.

Uncertainty of ultimate venue is illustrated by the rich context revealed in the litigation relating to the only surviving ancient Greek maritime contract. Demosthenes 35 details the large number of separate jurisdictions and distinct nationalities involved in a single maritime transaction. Merchants sailing from Athens are to purchase in Mende or Skione 3,000 containers of Mendaian wine. From there the wine is to be shipped to the Bosporan kingdom for sale—or, at their choice, the borrowers are authorized to proceed as far north on the western coast of the Black Sea as the Borysthenes River (today the Dnieper, in Ukraine). Thereafter, the ship is to return to Athens—a distance in excess of 1,500 kilometers. However, the defendants supposedly insisted that the ship had been destroyed while traveling from Pantikapaion to Theodosia (§31). But Androkles claims that the ship actually made a detour to Khios (§§ 52–54). Even beyond the many areas touched by the journey, persons involved directly or peripherally in this transaction came from a variety of lands and *poleis*. An Athenian, a Karystian, and two Phaselites were parties to the contract. A Boiotian was one of the witnesses to the document. In the

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[19] See Pringsheim 1955; Thomas 1989: 41–45; Harvey 1966: 10.

[20] See Dem. 32.18 (Syr.), 7.12 (Mac.), 56.47 (Rh.), 45.64 (Byz.). Cf. de Ste. Croix 1961: 111.

[21] Sch. to Dem. 21.176: ἐξῆν γὰρ τοῖς ξένοις ἐμπόροις ὅπου ἐβούλοντο ποιεῖσθαι τὰς δίκας. At §176, Demosthenes is recalling how Evander of Thespiai won a judgment for two talents against Menippos of Karia in a commercial maritime suit (*dikē emporikē*) at Athens. Cf. Harris 2003: 17–18.

[22] Dem. 32.8–9**.**

ensuing litigation, depositions are offered by persons from Halikarnassos and Hestiaia.

Variant jurisdictions might reach variant conclusions concerning a claim of contractual priority over local law. We have no way of knowing whether such provisions were merely hortatory (creating a moral obligation or a practical business imperative) or whether the parties really anticipated that in the unlikely event of court litigation some Greek *poleis* might be willing to favor the parties' consensual arrangements over polis law or to accept the contractual provisions exactly as agreed in the absence of polis law covering the subject(s) in dispute. But we do know that in the case of persons resident at Athens, the Athenians categorically rejected such attempts at absolute "contractual autonomy." To the contrary, the Athenians threatened capital punishment for residents of Attika who undertook to ship grain to any location other than Attika,[23] and forebade residents to lend money for delivery of grain to sites outside Attika.[24] Athenian law further provided that once ships arrived in Athens—without regard to the parties' undertakings—no more than one third of cereals on board could be re-exported.[25] The *dēmos,* as legislature or as court, controlled the affairs of Athens, and no contractual provision could alter that fact. But Athenian law, as Dimopoulou points out, might not encompass a matter covered by the contract, and in any case the law remained "a matter open to interpretation" (p. 271). The *kyriōteron* clause in its "plain meaning" could still dictate, even at Athens, the results of a case. Modern scholars need not reject that "plain meaning."

APPENDIX

Because of the general rule, multitudinously attested at Athens, that whatever parties agree to is "legally binding" (*kyria*),[26] a number of scholars have accepted the legal efficacy of private agreements purporting to override Athenian law, [27] even when these contracts provide for behavior in violation of societal values or polis rules.[28] Failure to differentiate the *kyria* clause from the *ouden kyriōteron* provision has resulted in many attempts over many years to explain away the literal language of

[23] Dem. 34.37, 35.50–51. Cf. Lyk. 1.27.

[24] Dem. 35.51. Cf. Dem. 56.11.

[25] Aristot. *Ath. Pol*. 51.4. Cf. Harp. and Suidas, s.v. ἐπιμεληταὶ ἐμπορίου.

[26] For the fullest documentation of this paradigm, see Gagliardi (in this volume): section 2. Cf. Cohen 2006; Dimopoulou (above): nn. 124–25 with related text; Thür (forthcoming).

[27] Gernet 1964: 80, n. 4, Gernet 218–219; Partsch 1909: 149, 1913: 447.

[28] Aviles 2011: 28 ("all available evidence points to the wording of the general law of contracts not imposing any limitation on the validity of agreements and thus validating even such agreements that were obviously at odds with justice"). Cf. Phillips 2009: 106, *pace* Kästle 2012, esp. 201.

the *kyriōteron* clause.[29] These variegated efforts to refute the supposed "standard provision," however, invariably fail to adduce direct evidentiary support for their rejection of the "plain meaning" of the *kyriōteron* clause.

In fact, the only relevant Athenian evidence that Dimopoulou offers in support of her interpretation are two philosophical passages, one from Plato's *Laws* and the other from Aristotle's *Rhetoric*—works whose juridical examples and proposals are generally not accepted by modern scholarship as reflecting actual Athenian usage.

1. Plato: Dimopoulou points out that Magnesia, the state representing not the utopia of Plato's earlier *Republic* but merely the "reformed" Athens of the *Laws*,[30] would generally have allowed legal action for violations of agreements (*homologiai*) but not for any covenants that laws or decree(s) prohibit.[31] Scholars, however, uniformly believe that "Plato's descriptions must not be taken as simply reproducing actual law." [32] For example, in Magnesia, a vendor financing a sale by entering into a contract providing for future payment would have to "grin and bear it" (*stergetō*) if the purchaser did not honor the agreement—diametrically the opposite of the actual law in classical Athens where, as Dimopoulou correctly asserts, "the basis of Athenian contractual commitment was agreement" (p. 265). Similarly, in the *Laws* a buyer would be denied court access to enforce arrangements permitting delayed delivery of goods.[33] Here again only if consensual understandings had not been legally enforceable at Athens would Plato's provisions actually have reproduced existing Athenian law. It seems clear that the law cited by Dimopoulou "is a measure of [Plato's] own devising" (Phillips 2009: 95), and, put simply, "Plato's Laws is not a reliable source for Athenian law." [34]

2. Aristotle: In the *Rhetoric*, Aristotle mentions the possibility that a law somewhere may be self-contradictory or in conflict with another prevailing law, and offers an example in which one law holds that whatever people agree upon be legally binding

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[29] See Cantarella 2011; Vélissaropoulos-Karakostas 2001:103; Rupprecht 1971: 19, 72; Hässler 1960, *passim.*

[30] Kahn 1993: xviii–xxiii. Cf. Morrow [1960] 1993: 592.

[31] Ὅσα τις ἂν ὁμολογῶν συνθέσθαι μὴ ποιῇ κατὰ τὰς ὁμολογίας, πλὴν ὧν ἂν νόμοι ἀπείργωσιν ἢ ψήφισμα, … δίκας εἶναι τῶν ἄλλων ἀτελοῦς ὁμολογίας (*Laws* 920d).

[32] Pringsheim 1950: 40. A good example of Plato's recasting of Athenian practice is his proposal for publishing laws: see Bertrand 1997, esp. 27–29.

[33] 849e: ἐν τούτοις ἀλλάττεσθαι νόμισμά τε χρημάτων καὶ χρήματα νομίσματος, μὴ προϊέμενον ἄλλον ἑτέρῳ τὴν ἀλλαγήν· ὁ δὲ προέμενος ὡς πιστεύων, ἐάντε κομίσηται καὶ ἂν μή, στεργέτω ὡς οὐκέτι δίκης οὔσης τῶν τοιούτων περὶ συναλλάξεων. Cf. *Laws* 915d6–e2 (no legal action for delayed sale or purchase [μηδ' ἐπὶ ἀναβολῇ πρᾶσιν μηδὲ ὠνὴν ποιεῖσθαι μηδενός·]).

[34] Phillips 2009: 95, and n. 20. In accord: Hansen 1983: 311–12; Todd 1993: 40.

(*kyria)*, and another forbids people from making agreements contrary to law.[35] Dimopoulou suggests that "both of these laws may have existed in Athens" (p. 269), but most scholars believe that here "we cannot presume that Aristotle has any Athenian law in mind, let alone the general law of contract" [36]—especially since the Stagirite was knowledgeable of the laws of scores of Greek communities through his association with the study and publication of 158 Hellenic "constitutions" (*politeiai*). Although, as Dimopoulou notes, Aristotle recognizes that laws make contracts legally effective (*kyrioi*),[37] Aristotle does not attempt to resolve the logical conundrum as to whether the laws that make private agreements *kyrioi* are themselves therefore potentially subordinated to such contracts' claims of priority over the very laws making these contracts *kyrioi*. Aristotle does envision, however, the possibility of convincing a polis court to override the laws of its own polis, suggesting that skillful advocates, confronting unfavorable polis statutes, should insist that these laws must yield to natural or universal law (where that law is favorable to the advocate).[38]

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[35] καὶ εἴ που ἐναντίος νόμῳ εὐδοκιμοῦντι ἢ καὶ αὐτὸς αὑτῷ, οἷον ἐνίοτε ὁ μὲν κελεύει κύρια εἶναι ἅττ᾽ ἂν συνθῶνται, ὁ δ᾽ ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον (1375b8–11).

[36] Phillips 2009: 95. Aviles believes that Aristotle's examples "do not really correspond to the actual practice" in fourth-century Athens (2011: 22, 27). Harris 2007: 59: "Aristotle's Rhetoric is a work of theory; it does not claim to describe the actual discursive practices of the Athenian courts." Pringsheim explicitly doubts the existence at Athens of "a general statute forbidding illegal agreements" (1950:39).

[37] αἱ μὲν συνθῆκαι οὐ ποιοῦσι τὸν νόμον κύριον, οἱ δὲ νόμοι τὰς κατὰ νόμους συνθήκας (1376b8–9).

[38] φανερὸν γὰρ ὅτι, ἐὰν μὲν ἐναντίος ᾖ ὁ γεγραμμένος τῷ πράγματι, τῷ κοινῷ χρηστέον… (1375a27–29).

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