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## The Principle of Fairness in Athenian Legal Procedure: Thoughts on the Echinus and Enklema

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GERHARD THÜR

## THE PRINCIPLE OF FAIRNESS IN ATHENIAN LEGAL PROCEDURE

Thoughts on the Echinus and Enklema\*

When two citizens of a state carry out their dispute in court, each one expects not to face discrimination at the outset. Any procedural code that has been generally accepted must account for organizational provisions which, on the one hand, ensure that the court can make a decision without external pressure or corruption, and on the other, bind the conduct of litigants and their associates to specific rules and regulations. One of these rules is the 'Neuerungsverbot', i.e. a prohibition on introducing new evidence. According to modern regulations on procedure, a court of appeals is only allowed to recognize evidence that was previously submitted by litigants to the trial court. In recent times, there has been discussion of a 'Neuerungsverbot' in effect even during the original trial as a way to prevent dragging out the case. Athenian litigation knew a similar 'Neuerungsverbot', undoubtedly for trials that passed through mandatory official arbitration (*diaita*).<sup>1</sup> At Athens, though, the concern was not with limiting the length of the case, but rather with protecting the litigants against surprise attacks by their opponents during the main trial (which had a time limitation). Both rules are consistent with the notion that a principle of fairness governed the conduct of a trial.

The organization of courts and procedures are highly dependent on their social surroundings. Judgments considered to be just can be determined in a number of ways, and yet the objectivity of the court and

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<sup>1</sup> Harrison (1971) 97, 102.

fairness for both litigants are timeless problems. For the legal historian, it is of interest to investigate the different ways in which these principles were formed and how they are products of their time.

For generations, trial law at classical Athens, which is well documented, has been researched from these angles. As a result, the Athenian trial has been either revered as the paradigm of democratic jurisprudence, or vilified as the arbitrary rule of the easily-swayed, uneducated masses.<sup>2</sup> In this article, I would like to avoid this type of ideologically driven assessment, which is, in my opinion, dubious. It will prove intriguing enough to observe trial law at Athens within its historical setting. For this reason, we must then refrain from modern assumptions on legal establishments of the truth. In Athenian litigation, laws on evidence were affected by the democratic organization of the popular courts (*dikastēria*); and arising out of the details of evidentiary law [132 we will find some regulations on fairness, which governed the interaction of the litigants.

The effort of the Athenians themselves to create equal opportunity for both litigants on their day in court is striking and has been investigated thoroughly. The following provisions can be counted among the democratic regulations in effect for the day in court: equal distribution of jurors from all ten tribes of the citizenry on the day of the main trial; the distribution of seating in the *dikastēria* which were just then assembled by lot; and the assignment of the *dikastēria* by lot to the court magistrates sitting on that day as presiders. Up to the last moment then, no one knew which jurors would be deciding on which trials; corruption was therefore impossible. It was just as unlikely that factions (similar to the theater business today) could take their seats in groups and, through demonstrations of approval or disapproval, fire up the spirits of their fellow jurors for or against a litigant. This dangerous ‘uproar’ (*thorubos*) of the jurors and the role that group dynamics played in the trial will be discussed further below. It was through these measures as well as the meticulously organized secret ballot, that an objective ruling by the democratic popular courts was best assured. Another, quite simple, mechanism was conducive to establishing equal opportunity for litigants. For both the prosecutor and defendant, the exact same amount of time was measured out by a waterclock (*klepsudra*). All of these mechanisms are described in great detail in chapters 63-69 of the

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<sup>2</sup> See Todd (1973) 91, with additional bibliography.

*Athenaion Politeia* and documented through archaeological evidence from the agora.<sup>3</sup>

Yet the strict rules just mentioned, which govern the course of a trial at Athens, have little to do with ‘fairness’. I will call these the ‘external’ framework for equal opportunity in court. Is there also an ‘internal’ framework that dictates the content of the speeches? It is here that we can speak of rules on ‘fairness’. Anyone who is relatively well acquainted with the Athenian court speeches will immediately doubt that speakers were guided by any kind of principle of fairness. The main trial before the jurors was an *agōn*, or battle of speeches. The litigants and their co-speakers (*sunēgoroi*) appear to have carried out their disputes like freestyle wrestlers; it seems as if every defamatory trick, every surprise attack were permissible. But, as is generally known, the Athenian trial did not just consist of the speeches and the vote in the *dikastērion*. In order to recognize the guiding principles, we must observe the entire process at least from the time that the suit was filed, but by rights, we should observe the entire private dispute happening before this point as well. The first precept of fairness to be recognized is that trials at the *dikastēria* ought to be avoided entirely. Any decent individual handled his private disagreements within his circle of friends and relatives. It is virtually a *topos* to attack an opponent during a trial for having allowed private agreements |<sup>133</sup> to fall to ruins.<sup>4</sup> Apart from this type of argument in court, an infringement on this precept of fairness did not result in any legal consequences. The ‘spirit of conciliation’ (‘Gütegedanke’) certainly must be kept in mind for the remaining discussion of state-run procedure.

When looking for the legal framework that governs the fair conduct of the litigants it is reasonable to begin with the filing of the suit or the accusation. Thus, the provision that the accuser had to summon the accused in front of witnesses, *klētēres*, need not be taken into consideration.<sup>5</sup> It protected the accused against a default judgment that was wrongly issued, but it does not belong to the provisions that affected the content of the speeches.

Without naming the principle of fairness directly, in 1938 Franz Lämmli came close to this theme with specific, philological questions. On the basis of Andokides 1 and Pseudo-Lysias 6, he sought to determine how a speaker reacted in court to unforeseen evidence or argu-

<sup>3</sup> Boegehold (1995); Thür (2000).

<sup>4</sup> Scafuro (1997) 69-75; Lanni (2005) 115f.; (2006) 48f.

<sup>5</sup> Harrison (1971) 85.



ments by his opponent, and to what degree the written version of the speech accounted for the arguments of an opponent that were heard for the first time in the *dikastērion*. This second question, which is a philological one in the narrowest sense of the word, I wish to let rest here. It seems to me worthwhile only for speeches in which the speaker himself had a personal, political interest in publishing, as for instance the three speeches of Andokides or Demosthenes 18 and Aeschines 3. The majority of private speeches, however, originate from the work of logographers. We can thus assume that they were published word-for-word, just as the speaker had memorized them and presented them before the court. In most cases, though, the documents that would have been read aloud in court have been lost. My assumption is that the original texts, in accordance with legal practice, appended at the end of the published speeches as a dossier of files recorded on wooden tablets. Unfortunately, later rhetorical instruction lost interest in these by-products of trial procedure, which were considered ‘artless’ by these types of schools, but which hold great significance for the legal historian. As a result, by and large only the lemmata *marturia*, *proklēsis*, or *nomos* are retained in a speech. At best, the lemmata are accompanied by texts of the documents from the dossier that was originally affixed, and in the worst case, by forgeries that have been reconstructed out of the text of the speech. These speeches written by logographers have something to tell us about the rules of fairness.

Lämmler has already asked rather clearly how the logographers, who devised speeches for their clients word-for-word in advance, could have known an opponent’s position, which would have been revealed for the first time in the *dikastērion*. Which institutions ensured that the litigants 1) did not hopelessly speak at cross-purposes in court and 2) were not left totally <sup>134</sup> unprepared when suddenly confronted during the trial with accusations that were never previously voiced? Both of these problems are to some extent resolved satisfactorily within the Athenian system.

The first question resolves itself through the litigants’ own interest in proving or disputing the material demands of the suit that has been filed. It is a well-known fact that the opposing positions of the litigants did not collide for the first time in the main trial at the *dikastērion*, but rather were revealed in preliminary proceedings, which were conducted by a court official or a state-appointed private individual, a selected *diaitētes*. The *prodikasiai* fulfilled this role in murder trials, the of-

ficial *diaita* in most private cases, and the *anakrisis* in the remaining procedures. Lämmli<sup>6</sup> had determined that it was not the court official who questioned the litigants on the preliminary points of the trial in the *anakrisis*.<sup>7</sup> Instead, the litigants questioned each other on topics that were relevant to their own arguments and provoked each other for statements and concessions, and in this way they prepared their speeches before the *dikastērion*. As legal provisions, two laws were enacted. One obligated the litigant to answer his opponent's questions (Dem. 46.10): "Both opponents are compelled to answer each other's questions, but not to be a witness"<sup>8</sup> A second law held the litigants to an affirmative response so that the one giving consent could no longer dispute the wording in court (Dem. 49.12): "the present *homologiai* (acknowledgments), made by the litigants in front of witnesses, are definitive."<sup>9</sup> I have already explained the likely procedural function of this 'law on *homologiai*' years ago.<sup>10</sup>

These preliminary proceedings can be viewed from two different perspectives. On the one hand, the substance of the trial is structured in such a way that the court has a basis for an objective ruling. On the other, the litigants could draw out supporting arguments for their upcoming speeches through well-crafted questions. When we take the techniques and methods of conducting the trial into consideration, the game of question-and-answer in the preliminary trial stands in opposition to the comprehensive speeches delivered before the courts, which were, as we know, staffed with several hundred jurors. In short, we can speak of a 'rhetorical' segment of the trial, the main hearing, and a 'dialectic' segment, the preliminary hearing.<sup>11</sup> By supplementing the rhetorical segment where the judgment was delivered, with a dialectic segment that was necessary for preparation, <sup>135</sup> the Athenians clearly intended to support fairness during the conduct of the trial.

Thus far, the scholarship is in agreement. The points that I am about to make, however, will be highly controversial. In contrast to the

<sup>6</sup> Lämmli (1938) 83; see also Thür (1977) 76; (2005) 156.

<sup>7</sup> Also Wolff (1961), (1965) 2519f.

<sup>8</sup> Dem. 46,10: ΝΟΜΟΣ. Τοῖν ἀντιδίκωιν ἐπάναγκες εἶναι ἀποκρίνασθαι ἀλλήλοισι τὸ ἐρωτώμενον, μαρτυρεῖν δὲ μή ...; see also Isai. 6,12.

<sup>9</sup> Dem. 42,12: ... ἀλλ' ἀνθ' ἑνὸς δύο νόμους ἤκει πρὸς ὑμᾶς παραβεβηκώς, ἕνα μὲν τὸν κελεύοντα τριῶν ἡμερῶν ἀφ' ἧς ἂν ὁμόση τὴν οὐσίαν ἀποφαίνειν, ἕτερον δὲ τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίου ποιήσωνται μαρτύρων.

<sup>10</sup> Thür (1977) 155.

<sup>11</sup> Thür (1977) 156, 313; (2005) 152.

generally accepted view, I will attempt to demonstrate that fairness had such a far-reaching influence in Athenian litigation that the litigants had to present each other with their body of evidence in *every* procedure, and deposit these into sealed clay containers (*echinoi*) regardless of whether the trial had to pass through an obligatory *diaita* or an *anakrisis*. Lastly, I wish to tie the principle of fairness together with a topic of more recent interest: the ‘relevance’ of claims made during the trial. Irrelevant—*exō tou pragmatos*—was not what was beside the point *legally*, but rather what the accuser did not explicitly list in his complaint, in his *enklēma* or his *graphē*.

In the scholarship on the first issue in question, the use of *echinoi*, the prevailing opinion is that the ‘Neuerungsverbot’ applied only to the private proceedings that were instituted by the Forty, four of whom were responsible for each tribe.<sup>12</sup> The individual members of the Forty in charge, unlike the jurisdiction of the archons, did not conduct an *anakrisis*, but rather assigned a *diatētēs* to the litigants from a list of citizens who had completed their 59<sup>th</sup> year. This ‘official’—or better yet, ‘selected’—*diatētēs* performed the same function in terms of legal procedure as the court magistrate within the *anakrisis*. The *diaita*, nevertheless, was peculiar in that it ended with a suggested decision of the *diatētēs*, an *apophasis*. Because we never hear about the content of the decision given by the *diatētēs*, it must have consisted simply of a notation on the *enklēma*, either supporting or rejecting the claim (much like the verdict of the court). The litigants could reconcile themselves (*emmenein*, AP 53, 2) with the suggestion of the *diatētēs*, or just as after an *anakrisis*, they could enter into (*ephiēnai*) the rhetorical segment of the trial and after speech and counter-speech, let the *dikastērion* make the decision on their case. Should this latter situation occur, the *diatētēs* had to hand over all of the documentary material to the member of the Forty in charge, who was presiding over the *dikastērion* as the court magistrate. In a catalogue of offices, the *Athenaion Politeia* describes the procedure of the obligatory *diaita* within a section on the Forty. Here we learn of the provision that the litigants could only use documents in the *dikastērion* that had already been furnished to the *diatētēs* (AP 53, 3).<sup>13</sup> Did this ‘Neuerungsverbot’ apply only to proceedings before the *diatētēs* or also to all other court proceedings?

<sup>12</sup> Harrison (1971) 97.

<sup>13</sup> AP 53, 2-3: ... οἱ δὲ παραλαβόντες, [ἐ]ὰν μὴ δύνωνται διαλύσαι, γιγνώσκουσι, κὰν μὲν ἀμφοτέροις ἀρέσκη τὰ γνωσθέντα καὶ ἐμμένωσιν, ἔχει τέλος ἡ δίκη. ἂν δ' ὁ ἕτερος ἐφῆ τῶν ἀντιδικῶν εἰς τὸ δικαστήριον, ἐμβαλόντες τὰς μαρτυρίας

<sup>136</sup> Before the discovery of the *Athenaion Politeia* the answer was seemingly clear. According to Meier-Schömann, all documents to be read aloud before the *dikastērion* had to be submitted beforehand in both the *anakrisis* and the *diaita*.<sup>14</sup> The opinion that the *echinoi* mentioned in the *Athenaion Politeia* would have been used only in the pre-trial before the *diaitētēs*, but not in the *anakrisis*, goes all the way back to Bonner.<sup>15</sup> Thus there would not have been a ‘Neuerungsverbot’ in *anakrisis* procedures. This view has prevailed until now even though in 1982 archaeological evidence for just such a document container from the 4<sup>th</sup>/3<sup>rd</sup> century B.C. was finally published. The evidence consists of a lid to a clay pot with the inscription: “...*ex anakriseōs*...”<sup>16</sup> This discovery, nonetheless, has not yet led to a reevaluation of the standard view.<sup>17</sup> In *Symposion* 1997, Wallace for example writes, “...use of the *echinos* in *anakriseis* was intended only as a way of preserving documents vital to the case.”<sup>18</sup> It is therefore time for a critical reassessment of Bonner’s view from 1905. *Sedes materiae* is, nonetheless, not Bonner but Lämmli. In a chapter entitled “Die Bedeutung der *anakrisis* im attischen Rechtsverfahren”<sup>19</sup> from his 1938 study mentioned above, Lämmli carefully handled all of the sources that supposedly proved Bonner’s thesis. Despite great skepticism and substantial counterarguments, Lämmli comes to the conclusion that the ‘Neuerungsverbot’ did not apply to the *anakrisis* procedures. This is wrong.

Before I go into the sources, I must first address the assumptions that guided these authors’ approaches to Athenian trial law. The jurist calls this foundational conception ‘dogmatics.’ In jurisprudence, dogmatics does not imply a system of doctrine, but rather principles found through inductive reasoning to better understand a legal system. The obligatory *diaita* is a good example of this. Until now, the view was maintained that the selected *diaitētēs* would decide the trial of first in-

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καὶ τὰς προκλήσεις καὶ τοὺς νόμους εἰς ἐχίνους, χωρὶς μὲν τὰς τοῦ διώκοντος, χωρὶς δὲ τὰς τοῦ φεύγοντος, καὶ τούτους κατασημνήμενοι, καὶ τὴν γνώσιν τοῦ διαιτητοῦ γεγραμμένην ἐν γραμματείῳ προσαρτήσαντες, παραδιδόασιν το[ῖ]ς δ’ τοῖς τὴν φυλὴν τοῦ φεύγοντος δικάζουσιν. (3) οἱ δὲ παραλαβόντες εἰσάγουσιν εἰς τὸ δικαστήριον, ... οὐκ ἔξεστι δ’ οὔτε νόμοις οὔτε προκλήσεσι οὔτε μαρτυρίαις ἀλλ’ ἢ ταῖς παρὰ τοῦ διαιτητοῦ χρῆσθαι ταῖς εἰς τοὺς ἐχίνους ἐμβεβλημέναις.

<sup>14</sup> Meier/Schömann (1883-87) 867.

<sup>15</sup> Bonner (1905) 48; see also (1930) 284.

<sup>16</sup> Boegehold (1982); on this point, see below nn. 77-87 with text.

<sup>17</sup> Todd (1973) 129 is at least skeptical.

<sup>18</sup> Wallace (2001) 98.

<sup>19</sup> Lämmli (1938) 74-128.

stance and the *dikastērion* would function as the court of appeals after the *ephiēnai* of the losing party.<sup>20</sup> Steinwenter had already shown in 1925 that we cannot speak of an ‘appeal’ but rather of the resorting to the court, which has exclusive jurisdiction, after a simple attempt at an amicable agreement through the *diaitētēs*.<sup>21</sup> The battle over the modern description of *epheſis* and its dogmatic classification might appear as mere quibbling but it has consequences that are not always apparent to philologists. <sup>[137</sup> From the modern perspective, it seems completely understandable that a ‘Neuerungsverbot’ must have been in place for an appeals process, thus presumably for *diaita* procedures, but not for procedures that took place after a preliminary *anakriſis*, since these would have been decided as a trial of single instance.<sup>22</sup> Lämmli voiced concern about this conclusion in consideration of Steinwenter’s findings.<sup>23</sup> The need to protect the litigants from new pieces of evidence being introduced unexpectedly (what I call ‘fairness’) would have existed equally in both types of procedures. Indeed, even according to Lämmli, the sources allow for no other conclusion.<sup>24</sup> Lämmli supported his arguments with a highly forced, dogmatic classification of the *anakriſis*,<sup>25</sup> a point that I do not wish to explore any further. Let us now turn to the sources.

The conclusion from silence that *echinoi* were mentioned in connection with the *diaita* but never together with the *anakriſis* is overturned by the inscription on the clay lid. Under these circumstances, the fact that some lexica<sup>26</sup> do not make this same restriction to the *diaita* can at least serve as a supporting argument. More important are the allegedly positive testimonia that a litigant could have presented new evidence to the *dikastērion* after the *anakriſis*. Once again, we must clear up a persistent misunderstanding. A ‘Neuerungsverbot’ controlled by *echinoi* can, of course, only be valid for *written records*, which were read out by the clerk to the court. For this reason, the physical demonstration of the supposedly dead slave girl in a murder trial (Isokr. 18, 52)—classified by Bonner as ‘real evidence’—is irrelevant for our subject,

<sup>20</sup> E.g. MacDowell (1978) 209.

<sup>21</sup> Steinwenter (1925) 68-74.

<sup>22</sup> Bonner (see above n. 15).

<sup>23</sup> Lämmli (1938) 92f.

<sup>24</sup> Lämmli (1938) 94.

<sup>25</sup> Lämmli (1938) 88f.

<sup>26</sup> Harpokration, *Lex. Seg. s.v. echinos*; for further attestations, see Boegehold (1995) 222-226.

just like the offer to interrogate slaves under torture before the eyes of the jurors (Aisch. 2, 126). The ‘Neuerungsverbot’ at Athens did not pertain to everything that we would include as ‘evidence,’ rather only to *documents*. The virtual staged performance and rhetorical tricks just mentioned could not have been prevented by the *echinoi*.

In the realm of rhetorical devices, Lämmli has already made reference to instances of *exomosia* allegedly performed for the first time before the court (Isai. 9, 18; Dem. 19, 176; 58, 7; 59, 28. 84; Aisch. 1, 45. 68; Isai. 2, 33; 8, 42; Dem. 47, 14).<sup>27</sup> He is on the right track when claiming that the corresponding written records were already presented during the *anakrasis*.<sup>28</sup> Likewise, a number of other rhetorical tricks can easily be connected to evidence which either was already presented or should have been presented: the feigned ignorance of opposing evidence (Isai. 9, 9; <sup>138</sup> Isokr. 17, 38); the challenge put to an opponent to submit specific evidence (a slight variation is that the judges in the *diaita* procedures were called upon to demand specific evidence);<sup>29</sup> the offer to introduce further evidence to the judges or, a trope stemming from *sunegoria*, to vouch for one’s own assertions as a witness (Dem. 19, 176). We cannot agree with Lämmli that these tricks only worked if new evidence would have been permissible in the main trial.<sup>30</sup> One always can operate on the premise that the path of documentary evidence only passed through the *anakrasis* before the main trial.

The rhetorical tricks just mentioned, therefore, do not constitute a strong argument either for or against either side. Nor are the two passages relevant, which do not come from the court speeches, but, according to Lämmli, argue for the introduction of new evidence into the main trial. Plutarch refers to a political trial against Kallias, in which he allowed his impoverished cousin Aristeidēs to give confirmation *ex tempore* as a witness that he had voluntarily foregone assistance (Plut. Aristeidēs 25).<sup>31</sup> Important procedural details should not be extracted

<sup>27</sup> Lämmli (1938) 100.

<sup>28</sup> Likewise Thür (2005) 167-169.

<sup>29</sup> Lämmli (1938) 103.

<sup>30</sup> Lämmli (1938) 103.

<sup>31</sup> Plut. *Aristeid.* 25: ‘Ο δὲ Καλλίας ὄρων ἐπὶ τούτῳ μάλιστα *θορυβοῦντας* τοὺς δικαστὰς καὶ χαλεπῶς πρὸς αὐτὸν ἔχοντας, ἐκάλει τὸν Ἀριστείδην, ἀξιῶν *μαρτυρῆσαι* πρὸς τοὺς δικαστὰς, ὅτι πολλάκις αὐτοῦ πολλὰ καὶ διδόντος καὶ δεομένου λαβεῖν οὐκ ἠθέλησεν, ἀποκρινάμενος ὡς μᾶλλον αὐτῷ διὰ πενίαν μέγα φρονεῖν ἢ Καλλίᾳ διὰ πλοῦτον προσήκει... ταῦτα τοῦ Ἀριστείδου τῷ Καλλίᾳ *προσμαρτυρήσαντος*, οὐδεὶς ἦν τῶν ἀκουσάντων ὃς οὐκ ἀπήει πένης μᾶλλον ὡς Ἀριστείδης εἶναι βουλόμενος ἢ πλουτεῖν ὡς Καλλίας.



from later sources: does this case technically deal with a witness testimony, a supporting speech (*sunēgoria*),<sup>32</sup> or an interjection, which falls into the realm of virtual staging? At any rate, the “theft of a deposition,” suggested by Anaximenes (Rhet. Alex. 15, 7f., 1432a), belongs to this latter category: “Testify for me Kallikles; by the Gods, it was not I—I tried to stop him as he did the deed.”<sup>33</sup> The fact that Kallikles would be safe from a *dikē pseudomarturiōn* by this outcry should not be attributed to the sophistic content of an alleged witness testimony. Rather, as is indicated by the concluding statement, it can be attributed to the fact that we are dealing with a staged act of disruption and not a *marturia* submitted in written form and properly deposited during the pre-trial.

The six speeches from the Demosthenic corpus that Lämmli adduced as direct evidence for the use of new evidentiary material in <sup>139</sup>*anakrasis* trials require a somewhat more detailed argument: Dem. 53, 17; 34, 46; 29, 28; 43, 47; 59, 5 and 37, 45.<sup>34</sup> In my opinion, these passages are either inconclusive or they prove the exact opposite.

Two speeches deal with *graphai*;

1.) In the speech against Nikostratos (Dem. 53), Apollodoros speaks of a *graphē pseudoklēteias* that was previously brought against Arethousios. During and after the *anakrasis*, Arethousios inflicted damages on Apollodoros, which, nevertheless, could not forestall Apollodoros from eventually winning the trial (Dem. 53, 15-18). For our purposes, the differing account of the two incidents in question is significant.<sup>35</sup> In

<sup>32</sup> Despite the term (*pros*)*marturein*, such moralizing claims about poverty and wealth made in court most likely come from a *sunēgoros* speech, see Thür (2005) 152-155; Lämmli (1938) 107 argues for a witness deposition.

<sup>33</sup> *Rhet. Ad Alex.* 15, 7-8: ... ἔστι δὲ καὶ κλέπτειν τὴν μαρτυρίαν τρόπῳ τοιῶδε· μαρτύρησόν μοι, ὦ Καλλίκλεις· μὰ τοὺς θεοὺς οὐκ οὖν ἔγωγε· κωλύοντος γὰρ ἐμοῦ ταῦτα ἔπραξεν οὗτος. καὶ διὰ τούτου ἐν ἀποφάσει ψευδομαρτυρήσας ψευδοματυρίου δίκην οὐχ ὑφέξει. (8) τοιγαροῦν ὅταν μὲν ἡμῖν συμφέρῃ κλέπτειν τὴν μαρτυρίαν, οὕτως αὐτῇ χρῆσόμεθα· ἐὰν δὲ οἱ ἐναντίοι τοιοῦτόν τι ποιήσωσιν, ἐμφανιοῦμεν τὴν κακοποιίαν αὐτῶν καὶ συγγραψαμένους μαρτυρεῖν κελεύσομεν.

<sup>34</sup> Lämmli (1938) 99, 117, 121.

<sup>35</sup> Dem. 53, 16-17: ... ὡς δὲ τούτου διήμαρτον, καὶ ἐγὼ μάρτυρας μὲν ὦν ἔπασχον ἐπιούμην, αὐτὸς δὲ οὐδὲν ἐξημάρτανον εἰς αὐτοὺς, ἐνταῦθα ἤδη μοι ἐπιβουλεύουσι τὴν μεγίστην ἐπιβουλήν· (17) ἀνακεκριμένου γὰρ ἤδη μου κατ' αὐτοῦ τὴν τῆς ψευδοκλητείας γραφὴν καὶ μέλλοντος εἰσιέναι εἰς τὸ δικαστήριον, τηρήσας με ἀνιόντα ἐκ Πειραιῶς ὅπῃ περὶ τὰς λιθοτομίας παίει τε πῦξ καὶ ἀρπάζει μέσον καὶ ἐώθει με εἰς τὰς λιθοτομίας, εἰ μὴ τινες προσιόντες, βοῶντός μου ἀκούσαντες, παρεγένοντο καὶ ἐβοήθησαν. ἡμέραις δὲ οὐ πολλαῖς ὕστερον εἰσελθὼν εἰς τὸ δικαστήριον πρὸς ἡμέραν διαμεμετρημένην, καὶ ἐξελέγξας αὐτὸν τὰ ψευδῆ κεκλητευκότα καὶ τὰ ἄλλα ὅσα εἴρηκα ἡδίκηκότα, εἶλον.



section 16, Apollodoros summoned witnesses to an attack on his rosebeds that was perpetrated during the *anakrisis*. And yet after the *anakrisis*, shortly before the main trial, when he was nearly tossed down into a stone quarry (17), he does not describe his rescuers as *martures*. The word *exelenxas* (17), which is used in reference to the main charge, the *dikē pseudoklēteias*, does not lead to the conclusion that a deposition on a subsidiary topic could be subsequently furnished as evidence.

2.) In the first part of the speech against *Neaira* (Dem. 59), Theonnestos mentions a *graphē paranomiōn*, which Stephanos brought and won against a proposal put forth by Apollodoros (5). The fact that Theonnestos, a supporter of Apollodoros, attributes his opponent's victory entirely to calumny, false witness, and accusations falling outside the scope of the charge, offers us no evidence of depositions brought forth subsequently.<sup>36</sup>

The rest of the passages come from private cases that have passed through an *anakrisis*.

3.) I cannot unravel the complicated argumentation of the speech against Phormion here (Dem. 34),<sup>37</sup> but it is clear that the ship captain Lampis, a key figure of the trial, was not available as a witness at the time. In section 11, the speaker has witnesses testifying to Lampis' response to a question earlier posed in front of these witnesses; in section 46, he speaks of an opposing testimony given by <sup>140</sup>Lampis that Phormion had confirmed by a third party.<sup>38</sup> The speaker complained that he, for this reason, could not attack Lampis' testimony with a *dikē pseudomarturiōn*; but this is false because the deposition was given in an *ekmarturia* (cf. Dem. 46, 7). In this regard, the following words are rele-

<sup>36</sup> Dem 59, 5: ... γραψάμενος γὰρ παρανόμων τὸ ψήφισμα Στέφανος οὐτοσί καὶ εἰσελθὼν εἰς τὸ δικαστήριον, ἐπὶ διαβολῇ ψευδεῖς μάρτυρας παρασχόμενος ὡς ὦφλε τῷ δημοσίῳ ἐκ πέντε καὶ εἴκοσιν ἐτών, καὶ ἔξω τῆς γραφῆς πολλὰ κατηγορῶν, εἶλε τὸ ψήφισμα. Lämmli (1938) 121 is wrong here.

<sup>37</sup> On this speech, see Wolff (1966) 63-74, especially 69.

<sup>38</sup> Dem. 34,11: Αὐτὸς μὲν τοίνυν ὁ Λάμπις, ὃ φησιν ἀποδεδωκέναι τὸ χρυσίον (τούτῳ γὰρ προσέχετε τὸν νοῦν), προσελθόντος αὐτῷ ἐμοῦ, ἐπειδὴ τάχιστα κατέπλευσεν ἐκ τῆς ναυαγίας Ἀθήναζε, καὶ ἐρωτῶντος ὑπὲρ τούτων, ἔλεγεν ὅτι οὔτε τὰ χρήματα ἔνθοιτο εἰς τὴν ναῦν οὔτος κατὰ τὴν συγγραφὴν, οὔτε τὸ χρυσίον εἰληφῶς εἶη παρ' αὐτοῦ ἐν Βοσπόρῳ τότε. καὶ μοι ἀνάγνωθι τὴν μαρτυρίαν τῶν παραγενομένων. ΜΑΡΤΥΡΙΑ.

§ 46: ... ἐγὼ δ' οὐκ ἔχω τί χρήσωμαι τοῖς τούτου μάρτυσιν, οἳ φασιν εἰδέναι τὸν Λάμπιν μαρτυροῦντα ἀπειληθέναι τὸ χρυσίον. εἰ μὲν γὰρ ἡ μαρτυρία ἢ τοῦ Λάμπιδος κατεβάλλετο ἐνταῦθα, ἴσως ἂν ἔφασαν οὔτοι δίκαιον εἶναι ἐπισκῆπτεσθαι μ' ἐκείνῳ· νῦν δ' οὔτε τὴν μαρτυρίαν ταύτην ἔχω, οὔτοσί τε οἴεται δεῖν ἀθῶρος εἶναι οὐδὲν βέβαιον ἐνέχυρον καταλιπῶν ὧν πείθει ὑμᾶς ψηφίζεσθαι.

vant (46): “ If the testimony of Lampis was brought forth here before the court, ...” The speaker thus makes it clear that Phormion—instead of an *ekmarturia* of the absent Lampis—ought to have filed and presented a *marturia* for the absent man. Therefore, whether a deposition from Lampis could have been introduced for the first time in the main trial<sup>39</sup> is not the point.

The next three passages share something in common; as a rhetorical *topos*, the speakers maintain that their opponents took them by surprise. The informative value of these passages should therefore not be placed much higher than the rhetorical tricks discussed above.

4.) In speech 29, Demosthenes defends his witness Phanos, who was brought forth in a guardianship case, against a *dikē pseudomarturiōn* by Aphobos. Allegedly Demosthenes had not foreseen that Aphobos, in his prosecution speech, would introduce depositions regarding guardianship accounts that had already been decided. For this reason, Demosthenes did not at this time have any witnesses on hand (27).<sup>40</sup> Lämmler acknowledged that Demosthenes’ surprise must have been an act, since in every trial dealing with witness testimony arguments from the prior trial were introduced; but if all evidence had to have been disclosed before the present hearing, Demosthenes certainly could not have gotten away with this trick.<sup>41</sup> In reality, a lot more would have been expected of the jurors. In section 39, Demosthenes introduces precisely those witnesses whom he supposedly<sup>141</sup> had not prepared.<sup>42</sup>

The two remaining passages will also show that the rhetorical trick of feigned or alleged surprise does not justify any conclusions on matters of legal procedure.

5.) In the speech against Makartatos (Dem. 43), Sositheos attempts to substantiate Eubilides’ rightful claim to the estate of Hagnias with an unusually large number of testimonies (43, 31-46). At the end of this section, Sositheos apologizes to the jurors for this exceptional quantity

<sup>39</sup> As Lämmler (1938) 77, 117 argues.

<sup>40</sup> Dem. 29, 28: ... αὐτὸς μὲν γὰρ μάρτυρας ψευδεῖς παρεσκεύασται περὶ τούτων, συγχωρηγὸν ἔχων Ὀνήτορα τὸν κηδεστὴν καὶ Τιμοκράτην· ἡμεῖς δ’ οὐχὶ προειδότες, ἀλλ’ ὑπὲρ αὐτῆς τῆς μαρτυρίας ἡγούμενοι τὸν ἀγῶνα ἔσεσθαι, τοὺς περὶ τῶν ἐκ τῆς ἐπιτροπῆς χρημάτων μάρτυρας οὐ παρεσκεύασμεθα νῦν. ὅμως δέ, καίπερ οὕτως τούτου σεσοφισμένοι, τὰ πράγματα αὐτὰ διεξιῶν οἶμαι ῥαδίως ὑμῖν ἐπιδείξειν δικαιοτάτ’ ἀνθρώπων τοῦτον ὠφληκότα τὴν δίκην, ...

<sup>41</sup> Lämmler (1938) 121.

<sup>42</sup> Dem. 29, 39: ... περὶ τοίνυν πάντων τούτων, πρῶτον μὲν περὶ τῆς προικός, εἴθ’ ὑπὲρ ὧν καθυφείκεν, εἴθ’ ὑπὲρ τῶν ἄλλων, ἀναγνώσεται τοὺς τε νόμους καὶ τὰς μαρτυρίας, ἵν’ εἰδῆτε. ΝΟΜΟΙ. ΜΑΡΤΥΡΙΑΙ.

of depositions on the grounds that his party lost a previous trial over the estate because of being ‘unprepared’ (*aparaskeuoi*) (47).<sup>43</sup> Again, we cannot draw any conclusions about the permissibility or impermissibility of new evidence from the rhetorical trope of explaining that a defeat was suffered because of a surprise.<sup>44</sup> Even if all the evidence is out in the open, a cleverly devised speech can achieve effects of the unexpected.

6.) The best example of this phenomenon is a section of the speech against Paintainetos (Dem. 37), which Lämmli viewed in isolation.<sup>45</sup> Nikoboulos, the speaker, mentions that Paintainetos had just won on the same issue with a *dikē metallikē* against Euergos, because Pantainetos had surprised him with unforeseen accusations (47), such as mistreatment of heiresses, and had brought forth the corresponding laws.<sup>46</sup> The allegations, however, could not have been such a great surprise. In sections 22-33, Nikoboulos had already cited in great detail the complaint that Pantainetos filed against him, which corresponded to the one filed against Euergos. Even <sup>142</sup>the accusation of effrontery against heiresses is included (33).<sup>47</sup> Thus, it is likely that Pantainetos had al-

<sup>43</sup> Dem. 43, 47: Ἀναγνῶναι μὲν τὰς μαρτυρίας ταύτας ἐξ ἀνάγκης ἦν, ὧ ἄνδρες δικασταί, ἵνα μὴ τὸ αὐτὸ πάθοιμεν ὅπερ τὸ πρότερον, ἀπαράσκευοι ληφθέντες ὑπὸ τούτων.

<sup>44</sup> Contra Lämmli (1938) 121.

<sup>45</sup> Lämmli (1938) 121f.

<sup>46</sup> Dem. 37, 45-47: Βούλομαι δ' ὑμῖν καὶ δι' ὧν τοὺς πρότερον δικαστὰς ἐξαπατήσας εἶλε τὸν Εὐεργον εἰπεῖν, ἵν' εἰδῆθ' ὅτι καὶ νῦν οὐδὲν οὔτ' ἀναιδείας οὔτε τοῦ ψεύδεσθαι παραλείψει. πρὸς δὲ τούτοις καὶ περὶ ὧν ἐμοὶ δικάζεται νυνί, τὰς αὐτὰς οὐσας ἀπολογίας εὐρήσετε· ὅσπερ ἔλεγχος ἀκριβέστατός ἐστιν ὑπὲρ τοῦ τότ' ἐκείνων σεσυκοφαντῆσθαι. οὗτος γὰρ ἠτιάσατ' ἐκείνων πρὸς ἅπασιν τοῖς ἄλλοις ἐλθόντ' εἰς ἀγρὸν ὡς αὐτὸν ἐπὶ τὰς ἐπικλήρους εἰσελθεῖν καὶ τὴν μητέρα τὴν αὐτοῦ, καὶ τοὺς νόμους ἦκεν ἔχων τοὺς τῶν ἐπικλήρων πρὸς τὸ δικαστήριον. (46) καὶ πρὸς μὲν τὸν ἄρχοντα, ὃν τῶν τοιούτων οἱ νόμοι κελεύουσιν ἐπιμελεῖσθαι, καὶ παρ' ᾧ τῶ μὲν ἡδικοκότη κίνδυνος περὶ τοῦ τί χρὴ παθεῖν ἢ ἀποτεῖσαι, τῶ δ' ἐπεξιόντι μετ' οὐδεμιᾶς ζημίας ἢ βοήθεια, οὐδέπω καὶ τήμερον ἐξήτασται, οὐδ' εἰσήγγειλεν οὔτ' ἔμ' οὔτε τὸν Εὐεργον ὡς ἀδικοῦντας, ἐν δὲ τῶ δικαστηρίῳ ταῦτα κατηγορεῖ καὶ *δυσὶν ταλάντοι*ν εἶλε δίκην. (47) ἦν γὰρ οἶμαι κατὰ μὲν τοὺς νόμους *προειδόμενα τὴν αἰτίαν*, ἐφ' ἣ κρίνεται, ῥάδιον τάληθῆ καὶ τὰ δίκαι' ἐπιδείξαντ' ἀποφεύγειν, ἐν δὲ μεταλλικῇ δίκῃ, περὶ ὧν οὐδ' ἂν ἠλπισεν αὐτοῦ κατηγορηθῆσθαι, χαλεπὸν παραχρῆμ' ἔχειν ἀπολύσασθαι τὴν διαβολήν· ἢ δ' ὄργη <ή> παρὰ τῶν ἐξηπατημένων ὑπὸ τούτου δικαστῶν, ἐφ' ᾧ τὴν ψῆφον εἶχον πράγματι, τούτου κατεψηφίσατο.

<sup>47</sup> Dem. 37, 33: ΕΓΚΛΗΜΑ. Ἐνταυθὶ πόλλ' ἄττα καὶ δεινά μοι ἄμ' ἐγκαλεῖ· καὶ γὰρ αἵκειαν καὶ ὕβριν καὶ βιαίων καὶ πρὸς ἐπικλήρους ἀδικήματα. τούτων δ' εἰσὶν ἐκάστου χωρὶς αἱ δίκαι καὶ οὔτε πρὸς ἀρχὴν τὴν αὐτὴν οὔθ' ὑπὲρ τιμημάτων τῶν

ready submitted the law on heiresses during the *anakrisis*. It is entirely feasible, although in no way proven by Nikoboulos' bold assertion (47), that at that time Pantainetos succeeded in infuriating the jurors with irrelevant arguments against Euergos, even if he could have foreseen them from the *enklēma* and the laws that were submitted as evidence. Nikoboulos capitalizes here on his position as the first speaker in a *paragraphē* trial in order to invalidate these arguments in advance.

Our overview of the concrete examples collected by Lämmli, which constitute the alleged submission of new evidence in *anakrisis* trials, has now reached its conclusion. There is not a single instance in which he has proved that a litigant made use of a document in the main trial that had not already been submitted during the *anakrisis*. Even if the 'Neuerungsverbot' has by chance only been preserved in the literature for *diaitētēs* trials, once we take into consideration the recently published *echinos* inscription and the structural similarity of the *anakrisis* and obligatory *diaita*, there is no doubt that the prohibition on new evidence, by the principle fairness, was equally valid for both procedures.

With that, we have arrived once again at the 'dogmatics' of Athenian litigation. From this perspective, yet another widespread misconception clouding our understanding of the 'Neuerungsverbot' needs to be dispelled. Here I can keep it brief. For Lämmli it was clear that a 'Neuerungsverbot' at Athens could have only been valid for the submission of *documents*, and therefore, only from the time when evidence was submitted in written form. A verbal testimony by a witness could not be restricted.<sup>48</sup> For him, the implementation of the mandatory *diaita*,<sup>49</sup> the written deposition,<sup>50</sup> and the *echinoi* was undoubtedly related to the 'Neuerungsverbot'. This is, however, not necessarily the case. I have elsewhere demonstrated that the earlier, verbal testimony, and the later, written one employ the same formula.<sup>51</sup> In both instances, the witness simply affirms a statement formulated by one of the litigants, just as if he were taking an oath. And in murder trials, the witness, from the earliest time on, in fact had to bind this statement with a solemn oath on the guilt or innocence of the accused during the *prodi-*

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αὐτῶν, ἀλλ' ἡ μὲν αἴκεια καὶ τὰ τῶν βιαίων πρὸς τοὺς τετταράκοντα, αἱ δὲ τῆς ὕβρεως πρὸς τοὺς θεσμοθέτας, ὅσα δ' εἰς ἐπικλήρους, πρὸς τὸν ἄρχοντα.

<sup>48</sup> Lämmli (1938) 111.

<sup>49</sup> 403-401 B.C., Lämmli (1938) 111; preferable is 399/98 B.C., Scafuro (1997) 126, 392.

<sup>50</sup> 389 B.C. at the earliest, Lämmli (1938) 119; cf. Rubinstein (2000) 72.

<sup>51</sup> Thür (2005) 154f.

*kasiai*. Thus, a surprise attack by way of new testimonies during the main trial was precluded.<sup>52</sup> We can envision the oral deposition in the *anakrasis* as right in line with the *prodikasiai*, only without the solemn <sup>143</sup> oath; the litigants would have to have revealed to one another the individual witness or witnesses and the formula of the verbally delivered testimony or testimonies. With the arrival of the written form, the structural nature of the testimony had not been transformed, rather, only the medium for transmittance—from the *anakrasis* to the main trial, and from the main trial if necessary to the trial for false witness. Testimonies in the form of written documents only eliminate arguments about the exact wording of the deposition formula. Once we acknowledge that there was an identical formulation for both the verbal and written testimony, we arrive at an important conclusion: from the earliest of times, the Athenian trial had already recognized the principle of fairness.

From where, then, does the peculiarity of *diaitētēs* trials originate? Basically in the year 399/8, the pretrials from private cases that had piled up since 404 were handed over to 60 year-old citizens. The bulk of the trials needed to be amicably resolved without having to employ the expensive *dikastēria*. Thus, quasi-official authorities were designated as “arbitrators” (*diaitētai*) who then proposed a settlement, the *apophasis*, which did not in fact cut off the path to the *dikastērion* for either party. Possibly, the written form of the testimony emerged from the obligatory *diaita*. For the first time, it was not the magistrate presiding over the *dikastērion*, one of the Forty, who conducted the pre-trial, but rather a private individual selected by lot. In these instances, the court magistrate could no longer ensure that the same formulation was used for the testimony delivered before the pretrial and the main trial. Written documents, protected within sealed *echinoi*, just as those already used for private documents in the 5<sup>th</sup> century,<sup>53</sup> provided the technical solution to the problem. Soon the written testimony and the *echinoi* were in fact no longer restricted to the *diaita* trials. The new method of documentation corresponded with the meticulous regulation of the trial under the Athenian democracy of the 4<sup>th</sup> century. Neither the formula of the testimony nor the ‘Neuerungsverbot’ were affected by the introduction of the written form.

Up to this point, I have handled two technical elements of procedure, which protect the litigants from unforeseeable attacks during the

<sup>52</sup> As recognized by Lämmler (1938) 106.

<sup>53</sup> Boegehold (1995) 79f.

main trial in accordance with the rule of fairness: 1) The compulsory question and answer process, after which an opponent could no longer dispute a concession (*homologia*) made in front of witnesses and 2) the ‘Neuerungsverbot’ which was in existence from as far back as we know and which was safeguarded through the mechanisms that developed out of the *diaitētēs* trial: written documentation and the *echinoi*. One last element remains to be addressed. It is one that Lämmli recognized,<sup>54</sup> but until now has been pushed aside. It goes without saying that the accused learned the position of his accuser from the written complaint, the *graphē* or *enklēma*, and the accuser, conversely, that of the accused through the *antigraphē*.<sup>144</sup> Are these documents also conducive to fairness? Do they too protect against unforeseen attacks?

Very few written complaints have survived with their wording intact. Harrison lists five examples.<sup>55</sup> I would like to add two more. The most detailed example is Nikoboulos’ citation of the *enklēma* that Pantainetos submitted in a *dikē blabēs* (Dem. 37, 22-33). At first glance, the colorful array of attacks appears, in terms of the law, to be just as undisciplined as the content of many speeches. Lanni gives a very good explanation of these findings in the speeches based on the non-professional nature of Athenian popular courts; the legal establishment of the truth at Athens included recognition of a litigant’s entire character.<sup>56</sup> One component, however, has escaped Lanni’s notice: a regulation that kept the subjective personal attacks of an accuser in check and that upheld fairness in a trial. This regulation, in my opinion, directly relates to the written complaint. A clause in the jurors’ oath reads (Dem. 24, 151): “...I will vote in accordance with the charge...”<sup>57</sup> Consequently the litigants, after the case was called, swore before the jurors “to keep to the point” (AP 67, 1).<sup>58</sup>

<sup>54</sup> Lämmli (1938) 11.

<sup>55</sup> Harrison (1971) 91f.

<sup>56</sup> Lanni (2005) 121-123, (2006) 59-64.

<sup>57</sup> Dem. 24, 149-151: ΟΡΚΟΣ ΗΛΙΑΣΤΩΝ. Ψηφιοῦμαι κατὰ τοὺς νόμους καὶ τὰ ψηφίσματα τοῦ δήμου τοῦ Ἀθηναίων καὶ τῆς βουλῆς τῶν πεντακοσίων. ... (151) καὶ ἀκροάσομαι τοῦ τε κατηγοροῦ καὶ τοῦ ἀπολογουμένου ὁμοίως ἀμφοῖν, καὶ διαψηφιοῦμαι περὶ αὐτοῦ οὐ ἂν ἢ δίωξις ἤ.

<sup>58</sup> AP 61, 1: ... ταῦτα δὲ ποιήσ[αντες εἰ]σκαλοῦσι τοὺς ἀγῶνας, ὅταν μὲν τὰ ἴδια [δι]κάζωσι τοὺς ἰδίους, τῷ ἀριθμῷ δ', [ἕνα ἐ]ξ [ἐκά]στων [τ]ῶν δικῶν τ[ῶ]ν ἐκ τοῦ νόμο[υ], κ[α]ὶ δι[ιο]μνύ[ουσι]ν οἱ ἀντίδικοι εἰς αὐτὸ τὸ πρᾶγμ[α] ἐρεῖν Lanni (2005) 113, (2006) 100 attaches no practical significance to this oath at all.



How do we reconcile these oaths with the inconsistent findings from the court speeches? Rhodes<sup>59</sup> and Lanni<sup>60</sup> look for contextual criteria, i.e. which of the speaker's comments are relevant and which are not. I posit that the Athenians had a different notion of 'relevance' from that of an observer concerned with today's law of procedure. The Athenians proceeded from the rule of fairness: what pertained "to the point" was that which was stated in the written complaint. All of the accusations that the accuser wrote down in the *enklēma* and thus disclosed to his opponent could be brought up before the *dikastērion* without the accuser violating his oath. This explains the entire catalogue of accusations in Pantainetos' *enklēma* mentioned several times (Dem. 37, 22-33).<sup>61</sup> In *Symposion 2003*,<sup>62</sup> I proved that the 145 sum demanded by Pantainetos, the *timema* of 2 talents (46),<sup>63</sup> was already apparent from the first claim, in particular from the twofold doubling of the 30 minae (a half talent) that Nikoboulos' slave Antigenes had taken away from Pantainetos' slave. All of the other accusations up to the mistreatment of heiresses (33) are simply the rhetorical backing for the material demand of the charge. These accusations would be considered 'irrelevant' by modern standards. In order to bring these charges into court without reproach by the judges, Pantainetos included every last accusation in his *enklēma*.

Of the remaining complaints or indictments whose wording has survived, we do not know if the texts are complete. Dem. 45, 46 is presumably a complete *enklēma* (including the answer to the charge) from a *dikē pseudomarturiōn*.<sup>64</sup> According to Dionysius of Halicarnassus,

<sup>59</sup> Rhodes (2004).

<sup>60</sup> Lanni (2005) 114

<sup>61</sup> Dem 37, 23-33: λέγε δ' αὐτὸ τὸ ἔγκλημα, ὃ μοι δικάζεται. ΕΓΚΛΗΜΑ. Ἐβλαψέ με Νικόβουλος ἐπιβουλεύσας ἐμοὶ καὶ τῇ οὐσίᾳ τῇ ἐμῇ, ἀφελῆσθαι κελεύσας Ἀντιγένην τὸν ἑαυτοῦ οἰκέτην τὸ ἀργύριον τοῦ ἐμοῦ οἰκέτου, ὃ ἔφερεν καταβολὴν τῇ πόλει τοῦ μετάλλου, ὃ ἐγὼ ἐπριάμην ἐνενήκοντα μινῶν, καὶ αἴτιος ἐμοὶ γενόμενος ἐγγραφῆναι τὸ διπλοῦν τῶ δημοσίῳ. ... (§ 25) καὶ ἐπειδὴ ὥφλον ἐγὼ τῶ δημοσίῳ, καταστήσας Ἀντιγένην τὸν ἑαυτοῦ οἰκέτην εἰς τὸ ἐργαστήριον τὸ ἐμὸν τὸ ἐπὶ Θρασύλλῳ κύριον τῶν ἐμῶν, ἀπαγορεύοντος ἐμοῦ. ... (§ 26) ... Κάπειτα πείσας τοὺς οἰκέτας τοὺς ἐμούς καθέζεσθαι εἰς τὸν κεγχρεῶνα ἐπὶ βλάβῃ τῇ ἐμῇ. ... (§ 28) ... Καὶ κατεργασάμενος τὴν ἀργυρίτιν, ἣν οἱ ἐμοὶ οἰκέται ἠργάσαντο, καὶ ἔχων τὸ ἀργύριον τὸ ἐκ ταύτης τῆς ἀργυρίτιδος. ... (§ 29) ... Καὶ ἀποδόμενος τὸ ἐργαστήριον τὸ ἐμὸν καὶ τοὺς οἰκέτας παρὰ τὰς συνθήκας, ἃς ἔθετο πρὸς με. (§ 33, see above n. 47).

<sup>62</sup> Thür (2006) 163f.

<sup>63</sup> See above n. 46.

<sup>64</sup> Dem. 45, 46: ΑΝΤΙΓΡΑΦΗ. Ἀπολλόδωρος Πασίωνος Ἀχαρνεὺς Στεφάνῳ Μενεκλέου Ἀχαρνεὶ ψευδομαρτυρίων, τίμημα τάλαντον. τὰ ψευδῆ μου κα-



Deinarchos 3 mentions the *enklēma* from a *dikē blabēs*, which begins in a similar manner to Pantainetos'.<sup>65</sup> Of the public suits, the *eisangelia* against Alkibiades (Plut. Alk. 22, 3) is composed of several serious reproaches for sacrilege of the mysteries.<sup>66</sup> The *graphē asebeias* against Socrates (Diogenes Laertios 2, 40) includes only two accusations, and whereas the second one (corrupting the youth) by modern standards was legally irrelevant, it was perhaps rhetorically more dangerous than the charge<sup>146</sup> of *asebeia*.<sup>67</sup> The *antidosis*-petition (*graphē*) against the aged Isokrates (Isokr. 15, 5. 30), which Harrison did not take into consideration, included a three-tiered claim: 1) the liturgy to be taken over, 2) the unfair acquisition of income as a logographer, and 3) yet again corruption of the youth.<sup>68</sup> This last charge has nothing at all to do with a liturgy in a *diadikasia*. Even if the historicity of the *Antidosis* (Isokr. 15) is disputed,<sup>69</sup> the technical formulation of the *graphē* seems to me, at any rate, to be consistent with actual practice. Another passage not con-

τεμαρτύρησε Στέφανος μαρτυρήσας τὰ ἐν τῷ γραμματεῖῳ γεγραμμένα. <Στέφανος Μενεκλέους Ἀχαρνεύς> τάληθῆ ἔμαρτύρησα μαρτυρήσας τὰ ἐν τῷ γραμματεῖῳ γεγραμμένα.

<sup>65</sup> Dion. Hal. *Dein.* 3: ... προσκειμένην δὲ ἔχει τὴν γραφὴν ταύτην· 'Δείναρχος Σωστράτου Κορίνθιος Προξένω, ᾧ σύνειμι, βλάβης ταλάντων δύο. Ἐβλαψέ με Πρόξενος, ὑποδεξάμενος εἰς τὴν οἰκίαν τὴν ἑαυτοῦ τὴν ἐν ἀγρῷ, ὅτε πεφευγὼς Ἀθήνηθεν κατήειν ἐκ Χαλκίδος, χρυσοῦ μὲν στατήρας ὀγδοήκοντα καὶ διακοσίους καὶ πέντε, οὓς ἐκόμισα ἐκ Χαλκίδος εἰδότης Προξένου καὶ εἰσηλθὼν ἔχων εἰς τὴν οἰκίαν αὐτοῦ, ἀργυρώματα δὲ οὐκ ἔλαττον εἴκοσι μυνῶν ἄξια, ἐπιβουλεύσας τούτοις.'

<sup>66</sup> Plut. *Alk.* 22, 3: ... τὴν μὲν οὖν εἰσαγγελίαν οὕτως ἔχουσαν ἀναγράφουσι· 'Θεσσαλὸς Κίμωνος Λακιάδης Ἀλκιβιάδην Κλεινίου Σκαμβωνίδην εἰσήγγειλεν ἀδικεῖν περὶ τῷ θεῷ, [τὴν Δήμητραν καὶ τὴν Κόρην,] ἀπομιμούμενον τὰ μυστήρια καὶ δεικνύοντα τοῖς αὐτοῦ ἐταίροις ἐν τῇ οἰκίᾳ τῇ ἑαυτοῦ, ἔχοντα στολὴν οἴανπερ ὁ ἱεροφάντης ἔχων δεικνύει τὰ ἱερά, καὶ ὀνομάζοντα αὐτὸν μὲν ἱεροφάντην, Πουλυτίωνα δὲ δαδοῦχον, κήρυκα δὲ Θεόδωρον Φηγαιᾶ, τοὺς δ' ἄλλους ἐταίρους μύστας προσαγορεύοντα καὶ ἐπόπτας παρὰ τὰ νόμιμα καὶ τὰ καθεστηκότα ὑπὸ τ' Εὐμολπιδῶν καὶ Κηρύκων καὶ τῶν ἱερέων τῶν ἐξ Ἐλευσίνος.'

<sup>67</sup> Diog. Laert. 2, 40: 'Ἡ δ' ἀντωμοσία τῆς δικῆς τοῦτον εἶχε τὸν τρόπον· ἀνακεῖται γὰρ ἔτι καὶ νῦν, φησὶ Φαβωρίνος, ἐν τῷ Μητρῶν· 'τάδε ἐγράψατο καὶ ἀντωμόσατο Μέλητος Μελήτου Πιπθεύς Σωκράτει Σωφρονίσκου Ἀλωπεκῆθεν· ἀδικεῖ Σωκράτης, οὓς μὲν ἡ πόλις νομίζει θεοὺς οὐ νομίζων, ἕτερα δὲ καινὰ δαιμόνια εἰσηγούμενος· ἀδικεῖ δὲ καὶ τοὺς νέους διαφθείρων. τίμημα θάνατος.'

<sup>68</sup> Isokr. 15, 5: 'Ἐδήλωσαν δ' οὕτω διακείμενοι· τοῦ γὰρ ἀντιδίκου περὶ μὲν ὧν ἡ κρίσις ἦν οὐδὲν λέγοντος δίκαιον, διαβάλλοντος δὲ τὴν τῶν λόγων τῶν ἐμῶν δύναμιν καὶ καταλαζονεθομένου περὶ τε τοῦ πλοῦτου καὶ τοῦ πλήθους τῶν μαθητῶν, ἔγνωσαν ἐμὴν εἶναι τὴν λειτουργίαν. ... (§ 30) Ἐκ μὲν τοίνυν τῆς γραφῆς πειρᾶται με διαβάλλειν ὁ κατήγορος, ὡς διαφθείρω τοὺς νεωτέρους λέγειν διδάσκων καὶ παρὰ τὸ δίκαιον ἐν τοῖς ἀγῶσι πλεονεκτεῖν, ...

<sup>69</sup> Mirhady / Too (2000) 201f.

sidered by Harrison likewise points in the direction that I have been arguing: Zenothemis proceeded against Protos in a *dikē emporikē* with a cluster of accusations, of which intoxication during a storm at sea (Dem. 32, 27)<sup>70</sup> could not have been legally relevant, regardless of whether the type of case, which is in dispute, was a *dikē blabēs* or *exoulēs*.<sup>71</sup> In opposition to Lanni<sup>72</sup> then, I do not see any essential difference in the standard of relevance between regular trials and maritime cases. In both instances, the accuser anchored his legally irrelevant attacks in the *enklēma*. Admittedly, this point does not affect Lanni's observation that personal invective appears less frequently in maritime cases.<sup>73</sup> If litigants and witnesses had to tolerate general verbal abuse in court, specific attacks were included in the *enklēma* as a precaution.

Lanni's conclusion that the obligation to keep to the point was strictly observed in murder trials<sup>74</sup> is, however, confirmed when taking the *enklēma* into account. Here, the *enklēma* is supplanted by the solemn oaths sworn by the litigants, the *diōmosiai*. The wording of the oaths still conforms to Drako's homicide law<sup>75</sup> and does not allow for <sup>147</sup> excessive verbiage.<sup>76</sup> For this reason, it seems to us today that murder trials were conducted more 'fairly' than the rest.

As a follow up to our discussion of the *echinoi*, the clay jars, which in my opinion contained the documents to be read aloud before the *dikastēria* in all trials at Athens from the early 4<sup>th</sup> century on, and of 'relevance', which in my opinion was closely connected to the wording of the charge, let us now return to the lid of the clay jar mentioned at the outset.

Scholarly opinion is unanimous that the jar in question can be identified as an *echinos* by the inscription that is fragmentarily preserved and superimposed with ink. In the second line, the words *djiamarturia*

<sup>70</sup> Dem. 32, 27: ... εἰ μὲν γὰρ ἂν γέγραφεν οὗτος εἰς τὸ ἐγκλημὶ ἐποίηι, οὐκ ὀφλεῖν ἂν δίκην δικαίως, ἀλλ' ἀποθανεῖν Πρωτοῦς ἔμοιγε δοκεῖ. εἰ γὰρ ἐν κακοῖς καὶ χειμῶνι τοσοῦτον οἶνον ἔπιεν ὥσθ' ὅμοιον εἶναι μανία, τί οὐκ ἄξιός ἐστι παθεῖν; ἢ εἰ γράμματ' ἔκλεπτεν, εἰ ὑπανέωγεν.

<sup>71</sup> Thür (2003) 71f.

<sup>72</sup> Lanni (2005) 126-128. The requirement of a written contract, Lanni (2006) 161-166, cannot be discussed here.

<sup>73</sup> Lanni (2005) 127, (2006) 169f.

<sup>74</sup> Lanni (2005) 124-126, (2006) 96-105.

<sup>75</sup> Thür (2004) 36f.

<sup>76</sup> Cf. Ant. 6, 16.

and *ex anakriseōs* can be read clearly.<sup>77</sup> The case from which it originates can easily be explained as a *dikē pseudomarturiōn* against a *diamarturia* performed before the archon in an inheritance dispute: a relative of one side had petitioned by *epidikasia* before the archon for the inheritance to be assigned; in opposition, a witness was brought forth making the claim that “the *klēros* cannot be assigned (*mē epidikon einai*), because legitimate sons exist.”<sup>78</sup> The relative challenged this testimony, the *diamarturia*, as false. After that, the archon had to stop the *epidikasia* and conduct an *anakrasis* concerning the *dikē pseudomarturiōn*. Not until the relative wins this process, thus after the conviction of the witness, can the archon issue the *epidikasia*; on the other hand, if the legitimate son (or sons) is in the right, the estate can be entered into, *embateuein*, without any official assignment.

The extant lid then likely comes from the *anakrasis* of a trial dealing with witness testimony; it certainly involves four documents (line 1), which the accuser (line 4) planned to have read aloud. Along these lines, Soritz-Hadler attempted to restore the words that were not preserved in the text.<sup>79</sup> The first document to be read aloud was the deposition under attack, the *diamarturia* (line 2). This document of course did not come from the *anakrasis*, but from the *epidikasia* (the term itself is restoration, lines 1/2). Only the three remaining documents come from the *anakrasis*. They were, as often in Greek document files, submitted in reverse chronological order, thus the oldest at the bottom.<sup>80</sup> After the disputed *diamarturia* was read aloud, the charge and the response to it, which were recorded together on a document,<sup>81</sup> were read out (line 4, mostly restoration). For the next document, presumably the accuser had submitted a *marturia* (restored at the end of line 3), most likely followed by a *nomos*, that of mistreatment (*kakosis*, line 3), which needs to be restored at the beginning of line 3. Who was mistreated is uncertain.

<sup>77</sup> I include the text with the restoration by Soritz-Hadler (1986) 106, which, in my opinion, is still quite probable: [ἔνεστι : τὰ]δε : τέτταρ[α : τῶ]ν : ἐκ [ : τῆς : ]<sup>2</sup> ἐπιδικασίας : δ]ιαμαρτυρία : ἐξ ἀνακρίσεως [ : ]<sup>3</sup> νόμος : ἐπικλήρω]ν κακώσεω[ς : μαρτυρία : ]<sup>4</sup> γραφαί : ἀντ]ιδί[κων : name]ρ : ἐπέθ[ηκεν : ]<sup>5</sup> name ]<sup>6</sup> name. The version from Boegehold (1982) 4 is again upheld in Boegehold (1995) 81; Wallace (2001) 92f. sets out all versions of the text in a well-arranged format.

<sup>78</sup> See, for example, Dem. 44, 46; this point is dealt with at length by Wolff (1966) 121-131.

<sup>79</sup> Soritz-Hadler (1986).

<sup>80</sup> Soritz-Hadler (1986) 106; for documents in reverse chronological order, see *IPArk* p. 93, n. 38.

<sup>81</sup> Cf. the *antigraphē* in Dem. 45, 46 (above, n. 64).

From the speech against Pantainetos, anyhow, it appears that ‘mis-treatment of heiresses’ was a potential topic of personal invective.<sup>82</sup> |<sup>148</sup>

Wallace vehemently attacked this hypothetical reconstruction of the trial and the submitted documents, although it is entirely probable based on Athenian legal practice. His main argument is ‘relevance’ (which he misunderstood): “...we have no idea what documents were relevant to this particular case.”<sup>83</sup> He makes the following objection to Soritz-Hadler’s suggested restoration of a [*nomos epiklērōn kakōseōs*] as the basis of personal invective:<sup>84</sup> “...would this justify sealing up in the *echinos* the text of an extraneous law?”<sup>85</sup> We have seen that, in accordance with the principle of fairness, even the documents that were meant to be read aloud in the epilogue and were *not* pertinent to the main issue were disclosed to an opponent in the *anakrisis* and placed in the *echinos*. A law on *kakōsis*, whether it deals with heiresses [*epiklērōn*]<sup>86</sup> or, as Wallace suggests, orphans [*orphanōn*] or parents [*goneōn*], is best suited to a witness testimony suit against a *diamarturia* involving inheritance issues. Thus, it seems facile to me to make use of the *echinos* lid for a dubious *diamarturia* against a *graphē, phasis* or *eisangelia* based on the word *kakōseōs* alone.<sup>87</sup> Wallace not only misunderstood ‘relevance’, but also did not recognize the ‘Neuerungsverbot’ associated with the *echinoi*.

The obligation to speak to the point, which is defined as ‘relevant’ in the written complaint, and to make no substantial accusations beyond that, can be attributed to the rule of fairness. But what sanctions did a speaker risk if he violated this obligation? Lanni does not answer this question.<sup>88</sup> Neither the court magistrate nor the jurors were allowed to admonish a speaker and eventually make him withdraw his words. To control the litigants there was, in my opinion, only one archaic mechanism, the jurors’ collective utterance: the spontaneous outcry, *thorubos*.<sup>89</sup> The jurors indeed for their part had the obligation to

<sup>82</sup> Dem. 37, 45 (see above n. 46). Soritz-Hadler (1986) 106 (with n. 25) has already demonstrated this point clearly.

<sup>83</sup> Wallace (2001) 93.

<sup>84</sup> See above n. 82.

<sup>85</sup> Wallace (2001) 95.

<sup>86</sup> Wallace (2001) 95 incorrectly takes exception with the genitive plural, but cf. τοὺς νόμους ... τῶν ἐπικλήρων in Dem. 37, 45 (above n. 46).

<sup>87</sup> Wallace (2001) 97.

<sup>88</sup> Lanni (2005) 124, (2006) 98f. remains inconclusive.

<sup>89</sup> Bers (1985). The jurors kept a close watch on the litigants to ensure that they kept ‘to the point.’ The speakers, on the one hand, disguised their own di-

give both parties an equal hearing,<sup>90</sup> but they could let out their heated emotions as a group at any time.

In order to control the 'relevance' of an assertion, then, the jurors did not need any knowledge of the law. They simply had to take note of the wording of <sup>149</sup> the *enklēma* and could protest any deviation. In order to guarantee the spontaneity of this control mechanism and to prevent any disruptions from factions, even the seating in the *dikastērion* was assigned to the jurors by lot.<sup>91</sup> In this way, the external regulations for ensuring equal opportunity and the principle of fairness observed within the speeches go hand-in-hand.<sup>92</sup>

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gressions as appeals to the patience of the jury to hear them 'so long as you are willing to listen' (e.g. Dem. 21, 129f.). On the other, they called upon the jury 'not to permit' the digressions of their opponents (e.g. Dem. 45, 50). For further examples of *thorubos* affecting the content and organization of the speeches, see Bers (1985) 11.

<sup>90</sup> Dem. 24, 151 (see above n. 57).

<sup>91</sup> Boegehold (1995) 38, 67-76.

<sup>92</sup> I thank Jess Miner for translating my German text.

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