

Character Evidence in the Courts of Classical Athens

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ABSTRACT

This doctoral thesis aims to explore the underlying rationale of the (by modern standards) wide use of character evidence in the courts of classical Athens. Linking divergent areas of social sciences such as law, history, psychology and social anthropology, this interdisciplinary quest examines under a socio-political prism the question of legal relevance in Athenian forensic rhetoric. Specifically, I am concerned with an in-depth analysis of the surviving court speeches placed in their context in order to reveal the function of the Athenian courts and the fundamental nature of Athenian law.

I explore the utmost aims of the first democratic system of justice and give a verdict as to its orientation towards the attainment of key notions such as the rule of law, equity and fairness, or social stability through utilitarian dispute resolution. My claim is that, although ancient and modern definitions of such ideals are in essence incomparable, the Athenians achieved the rule of law in their own terms through the strict application of legal justice in their courts. In such a legal system, no 'aberrations' or irrelevant 'extra-legal' arguments may carry significant weight.

Central for my argument is the homogeneous approach to (legal and quasi-legal) argumentation from Homer to the orators, in a period covering more than four centuries. Close analysis of the dispute-resolution passages in ancient Greek literature exposes the striking similarities with the rhetoric of litigants in the Athenian courts. Therefore, instead of isolating (in time and space) the sphere of the Athenian courts of the mid-5th to the late-4th centuries, my holistic approach discloses the need for an all-embracing interpretation of the wide use of character evidence in every aspect of argumentation. I argue that the explanation for this practice is to be found (on a subjective level) in the Greek ideas of 'character' and 'personality', the inductive method of reasoning, and (on an objective level) in the social, political and institutional structures of the ancient Greek polis. Thus, a new exegesis to the question of legal relevance for the Greeks emerges.

τὸ γὰρ μετὰ πολλῶν παραδειγμάτων διδάσκειν ῥαδίαν ὑμῖν τὴν κρίσιν καθίστησι
(Lycurgus, *Against Leocrates*, 124)

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FOREWORD

A PhD is a demanding and challenging undertaking. It is a multidimensional educating process that tests personality, skills, determination; it also assesses human relationships. It demands composure, adaptability, clear and productive thinking focused on straightforward objectives, and definitely a bunch of people for support and encouragement; togetherness. The current project begun in the midst (and partly because) of a severe multilevel crisis; this calamity is equally educative. Though principally economic, it has also proved its capacity to test all the aforementioned. The agent's personal stance is uniform regardless of the context, and is revealed in respect to the PhD as well as in respect to the everyday challenges and vice versa. I guess this is why this stance is called 'personal'; not a particularly impressive inference, but it is drawn from comparison and experience.

The extreme focus required for a PhD assists in the comprehension of the value of general perspective and open-mindedness in the real world. The primary lesson I learned in the process (both as a PhD student and as a Greek in times of crisis) is that nothing is so bad that it can't get worse. Hence, it still has some good in it which must be discovered and appreciated; it 'must' because this is certainly much better than not discovering and not appreciating it. Also, keeping this stance of realistic optimism is useful. It helps to believe that no dead ends exist; at least until the opposite is proved. It also helps because it instils distrust when something is presented as a dead end that allows for 'one and only' solution. After all, it is stimulating to pave a new way and any assistance in that direction is valued. Nonetheless, I discovered that many people are prone to get trapped in dead ends in politics or personal life. Actually, maybe there are some that copiously work for it:

Faust: The mob streams up to Satan's throne; I'd learn things there I've never known...

Mephistopheles: The whole mob streams and strives uphill: One thinks one's pushing and one's pushed against one's will.

Having advanced these preliminary considerations, I chose to endorse them and integrate them to my personality. For argument's sake, deliberately and without much effort I applied them to this work. Escaping from my typical doubt (considering it inappropriate on this occasion) about 'one and only' solutions, I treated other scholars' opinions with the greatest respect and, I hope, justice. I retained and implemented the idea that when confronted with choosing one way or another, a third is possible. Yet I deliberately relied on the findings of many great works available in international bibliography; I refer to them as long as they advance or corroborate my study. High tone polemics are avoided since again, such an approach is better than her opposite. I still believe, as I will prove the Greeks did, in the unity of character and its imprint on a person's acts in diverse fields. I also believe in its changeable nature; hopefully the twofold challenge of my life improved my skills as an academic and made me a better man. Both need to be proved.

I may now proceed to the hardest but most pleasant task: to communicate to the people that supported me the magnitude of appreciation they deserve. This thesis has been originated, developed and written at the University of Exeter. During these years, I had the luck to witness its wide-scale development and improvement. Keeping in line with my characteristic method of reasoning, I could not avoid mentioning these structural positive influences and their similarities to my position; like my university, I also aimed at progress and I had a thesis to 'construct'. Still, *ἄνδρες γὰρ πόλις* so many thanks are owed to the University staff. Special appreciations go to the Departments of Law and Classics, and to the great people that constitute them. I would like to thank, in particular, my two supervisors Anthony Musson and Richard Seaford. Anthony offered me tireless help and support from the very first to the very last stages of my dissertation. Being a great scholar, agreeable and calm in testing moments, he provided the necessary balance to reach the destination. Richard has been my mentor in all respects. Always responsive to my ideas, he wholeheartedly helped me in shaping both my academic and my private mentality. Purposely or not, he is a *μυσταγωγός*.

I would also like to thank the many notable scholars who unreservedly provided their assistance in different ways and at different times. Lynette Mitchell stood by me from the very beginning as a tutor and a friend. Jenny McEwan granted intellectual support and guidance in hard technical issues of my thesis. Christopher Gill, apart from providing the spark through his work, had the courtesy to read, comment and deliberate on parts of my thesis. Edward Harris partly inspired and influenced the subject of this work through our correspondence in the early days. I had also profited from the comments of Michael Gagarin who read and commented on this thesis, as well as from the stimulating discussion I had with William Fortenbaugh. Special thanks to Christopher Carey who, as the external examiner, suggested remarkably useful and apposite amendments. To all of them I direct my genuine esteem as scholars and my deep gratitude.

Finally, I would like to record some more personal debts, though without becoming too personal. I would like to thank my Exeter friends and colleagues whose presence, encouragement, and liveliness made these years there enjoyable and productive. As another friend of mine in another setting, quoting a line from a movie, once said to me: "I will miss our conversations". Equal thankfulness goes to those people in Greece who saw me off and welcomed me back as a *φίλος*. They certainly understood and excused the weakness of my situation: nothing is worth as much as a discussion while wandering the alleys of Thiseion and Plaka under the shadow of the Acropolis. Enormous indebtedness goes to the man who taught me to appreciate the splendour of Hellas, my *δάσκαλος* Alexandros Tsoumbas: *Χαίρε*. My final acknowledgment goes to my family in Nikaia with the hope that they will not get offended for leaving them last. I am sure that my brother, Nikolaos, will not bear any grudges (as he has proved so many times in the past) and he will assist me in giving an acceptable justification to our parents, Efstathios and Despoina. After all, apart from keeping for them this honouring position, this work is dedicated to them with much love. Without their affection and support nothing could happen.

Ευχαριστώ.

NOTES ON CONVENTIONS

1. *Ancient authors*

In the footnotes I abbreviate names and works of ancient authors as in Liddell H.G. & Scott R. (eds.), *Greek-English Lexicon* (1st ed. 1843), Oxford: Clarendon Press (1996), and in Glare P.G.W. (ed.), *Oxford Latin Dictionary*, Oxford: Clarendon Press (1982).

I have used Greek texts from the Perseus Digital Library, accessible online via the <http://www.perseus.tufts.edu/hopper/>. I have italicised the Greek text and the translation in words or phrases that I consider of special importance. At times, in quoting Greek or Latin texts, I choose to omit certain sentences or parenthetical expressions: this will be indicated with the sign '[...]’.

I have used published translations of Greek texts, usually modified by me, for the following works:

HOMER:

Murray A.T. (ed.) (1924), *The Iliad* Cambridge, MA., Harvard University Press; London, William Heinemann, Ltd.

- (1919), *The Odyssey*, Cambridge, MA., Harvard University Press; London, William Heinemann, Ltd.

HOMERIC HYMNS:

Evelyn-White H.G. (ed.) (1914), *The Homeric Hymns and Homerica*, Cambridge, MA.; Harvard University Press; London, William Heinemann Ltd.

ARISTOTLE:

Rackham H. (ed.) (1934), 'The Nicomachean Ethics', in *Aristotle in 23 Volumes*, Vol. 19, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

- (1944), 'The Politics', in *Aristotle in 23 Volumes*, Vol. 21, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

- (1952), 'The Athenian Constitution', in *Aristotle in 23 Volumes*, Vol. 20, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

Freese J.H. (ed.) (1926), 'The Rhetoric', in *Aristotle in 23 Volumes*, Vol. 22, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

PLATO:

Shorey P. (1969), 'The Republic', in *Plato in Twelve Volumes*, Vols. 5 & 6, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

Lee D. (2003), *The Republic* (first edition 1955), Penguin Books Ltd.

Lamb W.R.M (1955), 'Alcibiades 1, Alcibiades 2, Hipparchus, Lovers, Theages, Charmides, Laches, Lysis', in *Plato in Twelve Volumes*, Vol. 8 Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

- (1967), 'Euthydemus, Protagoras, Gorgias, Meno', in *Plato in Twelve Volumes*, Vol. 3, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

Fowler H.N. (1955), 'Euthyphro, Apology, Crito, Phaedo', in *Plato in Twelve Volumes*, Vol. 1, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

- (1925), 'Parmenides, Philebus, Symposium, Phaedrus', in *Plato in Twelve Volumes*, Vol. 9 Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

ATTIC ORATORS:

Maidment K.J. (1968), *Minor Attic Orators in two volumes 1, Antiphon Andocides*, M.A. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1968.

Gagarin M. and MacDowell D.M. (1998), *Antiphon and Andocides*, University of Texas Press.

Carey C. (2000), *Aeschines*, University of Texas Press.

Adams C.D. (1919), *Aeschines*, Cambridge, Harvard University Press; London, William Heinemann Ltd.

Lamb W.R.M (1930), *Lysias*, M.A. Cambridge, Harvard University Press; London, William Heinemann Ltd.

Todd S.C. (2000), *Lysias*, University of Texas Press.

- Vince C.A., Vince H.A. (1926), *Demosthenes*, M.A. Cambridge, Harvard University Press; London, William Heinemann Ltd. 1926.
- Murray A.T. (1939), *Demosthenes*, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1939.
- DeWitt N.J. (1949), *Demosthenes*, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1939.
- Yunis H. (2005), *Demosthenes, Speeches 18 and 19*, University of Texas Press.
- Harris E.M. (2008), *Demosthenes, Speeches 20-22*, University of Texas Press.
- MacDowell D.M. (2004), *Demosthenes, Speeches 27-38*, University of Texas Press.
- Scafuro A.C. (2011), *Demosthenes, Speeches 39-49*, University of Texas Press.
- Bers V. (2003), *Demosthenes, Speeches 50-59*, University of Texas Press.
- Edwards M. (2007), *Isaeus*, University of Texas Press.
- Worthington I., Cooper C., Harris E.M. (2001), *Dinarchus, Hyperides, and Lycurgus*, University of Texas Press.
- Norlin G. (1980), *Isocrates*, Cambridge, MA, Harvard University Press; London, William Heinemann Ltd.

2. Modern works

The following modern works are abbreviated:

- LSJ Liddell H.G., Scott R. & Jones H.S. (eds.), *Greek-English Lexicon* (1st ed. 1843), Oxford: Clarendon Press, 1996.
- OED Simpson J.A. & Weiner E.S.C. (eds.), *The Oxford English Dictionary* (1st ed. 1933), Oxford: Clarendon Press, 1989.
- DK Diels H. & Kranz W. (eds.), *Die Fragmente der Vorsokratiker, griechische und deutsche* (12th ed.), 1966.

3. Legal cases and materials

The citation of legal cases and materials follows the Oxford University Standard for Citation of Legal Authorities (OSCOLA).

ἴτω δίκαια φανερός, ἴτω ξιφηφόρος

INTRODUCTION

The character of man is his fate (*ἦθος ἀνθρώπῳ δαίμων*) according to Heraclitus¹. The word *ἦθος* derives from *ἔθος* (habit), highlighting the typical Greek inductive method of reasoning through which a multitude of past acts serves to extract a human's true character. In apparent contradistinction, the word *δαίμων* indicates a god, a deity or divine power². Its root meaning denotes "one who distributes or assigns a portion"³. Destiny and fate are perfectly suitable words to transmit the symbolic meaning of the word in its current use. Character, as designated by a person's past acts, is responsible for his fate. Man himself, not any deity, controls his destiny. If this inherent interplay of the divergent meanings of the word *δαίμων* is pushed to the extreme, man through his character and actions creates or controls his personal *δαίμων*. So strong is the sense of individual responsibility; so decisive is human control over life.

The Heraclitean *δαίμων* is neither the anthropomorphic deity of the poets⁴ nor the subject of the conventional religious beliefs observed as fictitious by Democritus, Prodicus or the theatrical Sisyphus⁵. It is an expression of the divine element that can take many forms⁶ and on an allegoric level symbolises the reconciliation of nature (natural philosophy) with the divine (religion). The supernatural (in the form of fate) is influenced by humans to the extent that man (through his character) directs his own future. Thus character is attributed probative value for deeds of the past and predictive value for the future. By the same token, character evidence breaks into the courtrooms to promote the implementation of justice by assisting the quest for the discovery of truth.

¹ Heraclitus, fr. 114. Tr. by Kahn (2004).

² LSJ s.v. *ἦθος*, *δαίμων*.

³ Kahn (2004), p. 261.

⁴ See Heraclitus fr. B.32.

⁵ The Sisyphus fragment (DK 88B.25) was traditionally attributed to Critias, though later research has shown that its authorship probably belongs to Euripides. Cf. Kahn (1997).

⁶ Heraclitus fr. B.67.

1. The Main Question

Character evidence was widely used in the courts of classical Athens and this raises significant issues as to the foundations of this practice. The central question that triggered this research concerns the causes and the aims of this wide use of character evidence in the Athenian courts. In the ancient forensic speeches litigants proceed to argumentation which would sometimes fail the test of relevance in a modern court; this has to be explained. Notwithstanding the fact that ancient sources mention a (legal or quasi-legal) rule of relevance⁷, namely the requirement that litigants ought to speak to the point, both parties proceeded to an apparently liberal use of extra-legal argumentation and (to modern eyes) irrelevant material⁸. But did the Athenians actually assess this material as irrelevant?

Modern scholars offer differing interpretations of the apparent readiness to accept 'irrelevant' material in the Athenian courtrooms and have reached divergent conclusions as to the overall aims of the Athenian system of justice. These interpretations are influenced by the significance that each researcher is willing to afford to this extra-legal material. One stream of scholarship attributes great weight to it and, as a result, finds the Athenians unwilling to strictly enforce the law in their courts. Since the Athenians permitted quasi-legal evidence to influence their verdicts (as proved by the continuous presence of such evidence in the speeches) then the implementation of justice based on the strict enforcement of the letter of the law is undermined. Hence, each commentator questions the true role of the court and substitutes the enforcement of law with alternative propositions.

Interpretations and proposals of this stream range from decision-making based on equity and fairness to achieve ad hoc and personal justice to the attainment of social order by channelling class feuding and socio-political contest for honour to an objective and acceptable non-violent arena. For instance, Cohen

⁷ Arist. *Rhetoric* 1354a22-3; *Ath. Pol.* 67.1.

⁸ By the term 'extra-legal' I refer to the kind of argumentation that is not directly based on or referring to positive law. By this token, character evidence is considered as a form of extra-legal argumentation, though it clearly has a legal bearing in the sense of supporting the court (and the litigants) as regards the probability of essential facts in order for the legal case to be established.

argues that the wide use of extra-legal argumentation (that would be considered as irrelevant in modern courts) and the invocation of notions such as patriotism and status or appeals to pity by litigants, support the view that the courts were formulated in such a way as to serve social and political ends⁹. Todd goes so far as to claim that in Athens, law and politics were ultimately indistinguishable¹⁰. Lanni, slightly deviating from this approach, argues that such a wide use of extra-legal argumentation brought about inconsistent verdicts by the Athenian courts, with the result that cases were knowingly judged in an ad hoc basis, the major aim being the attainment of equity¹¹. Osborne mixes up the inherent democratic nature that the Athenians reserved for their system with the purpose that it served and argues that the institutional framework and the courts in particular aimed at the embodiment of the rule of the majority¹².

Although this stream is correct to afford noteworthy role to the wide use of extra-legal argumentation, they tend to underrate the commitment of the Athenians to the ideal of the rule of law. By this approach, rules and procedures that promoted the strict enforcement of the law and proved the commitment of the Athenians to this ideal are systematically downplayed. However, careful analysis of the court speeches reveals that notions such as the Heliastic oath weighed far more than these researchers are willing to acknowledge. Relevance was also respected by the requirement to speak to the point, with the written plaint specifying the particular charges ('the point') that formed the accusation¹³. Tactics such as insistence on writing and penalisation of any reference by litigants to non-existent or unwritten laws, have to be taken into account. Such rules were not accidental and they prove that far more evidence than subjective discovery of irrelevant argumentation is needed in order to question the Athenian dicasteries' upholding of the rule of law.

⁹ Cohen (1995), Osborne (1985), Lanni (2006).

¹⁰ Todd (1993), p. 29.

¹¹ See Lanni (2005), (2006); Cf. Christ (1998a), esp. pp. 41-2 and 195-6; Scafuro (1997), pp. 50-66.

¹² See for e.g. Osborne (1985).

¹³ Gagarin (2012).

The other stream of scholarship, sometimes downplaying the significance of the wide use of extra-legal argumentation and character evidence in particular, insists on the attainment of the rule of law. Researchers like Ostwald and Sealey, building on the institutional and procedural framework of the Athenian legal system, argue that the Athenians had achieved the strict application of law¹⁴. Another trend of the same stream approaches this question by the close analysis of the surviving forensic speeches. So, for instance Harris, Meyer – Laurin, and Meinecke argue for the prominence of the rule of law, embodied in a strictly legal resolution of disputes¹⁵. Harris in particular, offering a highly idealised picture of Athenian adjudication, led his critics to observe that he refers to the extra-legal argumentation as “stray comments reflecting only the amateurism and informality of the system”¹⁶. Nevertheless, the continuous and wide presence of character evidence in the delivered speeches makes it too obvious and noteworthy to be considered as simple aberrations to the norm of relevant legal argumentation.

This stream is correct to maintain that the Athenians were indeed committed to the rule of law. Nevertheless, the presence of extra-legal argumentation needs somehow to be explained acknowledging its admittedly significant role in the speeches. Underrating what is obvious is equivalent to leaving their thesis vulnerable. Yes, the institutional framework, the procedures and the laws unequivocally aim at the attainment of the rule of law. However, this is not proved simply because these factors are compared *against* the wide presence of character evidence and found to prevail. The thesis is not entirely convincing if the factors promoting the rule of law are put into a quantitative and qualitative comparison against those that may inhibit it. Another explanation is needed; a new thesis that reconciles these ostensibly antithetical features and finds an underlying homogeneous approach behind the Athenian attitudes to the rule of law and the relaxed rules of relevance.

¹⁴ Ostwald (1986), pp. 497-525; Sealey (1987), pp. 146-8.

¹⁵ Meyer – Laurin (1965), Meinecke (1971), Harris (2000).

¹⁶ Lanni (2005), p. 113.

This thesis bridges the gap and proposes a solution to the dilemma between the above two streams of scholarship. It takes an approach that reveals the rationale behind the wide use of character evidence in a way that conforms with the deeply rooted in the Athenian conscience ideal of the rule of law. Therefore, this thesis belongs to the research trend which maintains that the Athenian courts sought to implement the idea of the rule of law as the Athenians perceived it, yet it offers an original approach as to the method of proving this point. My view stands in general agreement with Herman who points out that “Athenian litigants were not, as has traditionally been held, deliberately departing from the issue at hand...but conscientiously observing standards of relevance altogether different from ours”¹⁷. This thesis aims to demonstrate, by focusing primarily (though not exclusively) on character evidence, the relevance of such argumentation to the issue at hand, namely what evidence the Athenians perceived as relevant to a legal case, how they argued such evidence and, ultimately, why they perceived such argumentation as relevant. The innovative deployment of the Greek ideas of character and personality, as well as the Greek method of reasoning, and their application to the legal setting allow the deduction that *extensive reference to character evidence was received by the court as relevant to the legal case and served its quest for truth in uncovering the exact facts*. Thus, in their view, the wide invocation of character evidence promoted the application of the written law without inhibiting the consistency and predictability of the court verdicts. In order to verify this hypothesis a series of secondary (though equally decisive) questions need to be asked and assumptions to be tested and verified.

2. Current Scholarship and Research Hypotheses

This thesis aims to discover the primary reasons behind the Athenian liberal (by modern standards) approach to forensic argumentation. One of the most striking features of the Athenian courtroom speeches is, according to modern scholars, the litigants’ readiness to resort to extra-legal argumentation, sometimes perceived as irrelevant to the legal charge. This has been

¹⁷Herman (2006), p. 149. However, I do not agree with the view that this ‘observation of their standards of relevance’ was a conscious departure from the issue at hand. On the contrary, I aim to demonstrate throughout this thesis, by focusing primarily though not exclusively on character evidence, that it did refer to the issue at hand.

interpreted in various ways depending on the focus, the background, and the aims of each researcher. Nevertheless, their contrasting positions unite them on a higher level. What they all share is the failure to avoid interpretations based on modern presuppositions; this is a flaw that this thesis aspires to avoid.

To offer but a few examples, Lanni discusses 'relevance' in the Athenian courts with the assumption that the notion of 'relevance' in modern western courts sets the standard against which the Athenian 'liberal' approach should be contrasted. The fact that the Athenians had such an approach (according to modern standards) is explained by the discovery of a covert role for the courts¹⁸. Harris stands at the opposite extreme and argues for an extreme legalism implemented by the participants of the legal system through the rigid application of the rule of law. Although he examines what the 'rule of law' signified for the ancient Greeks, he fails to liberate himself entirely from modern presuppositions as to the normative meaning of the 'rule of law', especially when this is applied to a pre-modern state¹⁹. Furthermore, sharing Lanni's presuppositions about 'relevance' downplays extra-legal argumentation referring to it as 'aberration from the norm' being a 'way of distracting the judges from the charges in the plaint'²⁰. Rhodes has recently asserted that Athenian litigants actually spoke 'to the point'; however, he interprets the court speeches based on a 'modern' approach (i.e. whatever is 'logically relevant' and does not

¹⁸ Lanni (2006) sees the Athenian popular court as an institution indifferent as to the application of the 'rule of law', which aimed at giving contextualised ad-hoc decisions, thus settling disputes by taking into account wider notions of justice and equity rather than strictly applying objective rules in a consistent manner (thus disclosing her presuppositions as to what the 'rule of law' means); cf. Christ (1998a) esp. pp. 41-43 and 196; for a different exegesis based on the same assumptions stressing the political dimension of the courts, see Todd (1993); the same pattern (search for an exegesis based on modern presuppositions) is valid for social anthropological studies such as Cohen (1995) and Ober (1989).

¹⁹ Harris, by concentrating on divergent aspects of the Athenian legal system which promoted a strict application of the law (such as the Heliastic oath, the written plaint, the prevalence of substance against procedure etc.), offers an account of the Athenian system based on modern –especially procedural- conditions for the attainment of the 'rule of law'. I acknowledge that Harris has offered many accounts as to what the 'rule of law' meant for the ancient Greeks though without, in my opinion, liberating himself from the normative presence of the modern 'rule of law'. My perception of his work is that by following a comparative account of the two legal cultures he places emphasis on the similarities (sometimes downgrading the differences) in order to present the Greek legal system as scarcely alien (or even a precursor) to the (normative) modern one. Nevertheless, I am not sure whether this can be a valid undertaking, since I do not believe that the two legal systems may be compared. The difference of structures, psychology and sociology precludes such a comparative study and this is one of the points that my thesis aims to prove.

²⁰ Harris (2013).

create 'exceptional prejudice'), thus omitting a technical examination of the issue²¹. His conclusion may be criticised as subjective and arbitrary²².

My general point is that divergent interpretations offered by modern scholars share a set of 'normative' (though not uncontroversial) presuppositions which, by influencing their methodology, restrict any room for a reading of the speeches that is as objective as possible²³. This tendency recalls the effort of Athenian litigants who, although their way of reasoning and argumentation was restricted by the fact that they competed on a canvas painted by a common set of ethical norms, nonetheless focused on (or ignored) different pieces, offering a personal interpretation of the facts.

The first research hypothesis of this thesis is that the wide use of character evidence is the result of the socio-political structures, the psychology and the way of reasoning of the Greeks. In particular, the Athenians believed that this approach to argumentation was illuminative for the legal case and would *enable them to discover the truth*. Since most disputes in their courts were factual, a wide approach to character evidence and the presentation of contextual and background information facilitated them, in accordance with their ideas and following an inductive method of reasoning, to uncover the true facts of the case. Afterwards they could proceed to the application of the written law to these facts and, thus, the attainment of legal justice. Therefore, psychological reasons largely caused the wide use of character evidence in their argumentation which, by being a method that assisted the discovery of the truth, facilitated the implementation of their 'rule of law'. This hypothesis of interpreting the role of the courts (assisted by the speeches of the litigants and the wide invocation of character evidence) as 'objective discoverers of truth' runs (as we have seen above) contrary to the conclusions of current researchers²⁴ who reserve for them alternative aims and results.

²¹ Rhodes (2004); This is true for Griffith-Williams (2012), pp. 160-1..

²² For a criticism see Harris (2013).

²³ By 'objective' I mean a third-person reading, as far as possible closer to the ancient protagonists' perceptions.

²⁴ The scholars who in one way or another have expressed reservations or denied the Athenian courts' upholding of the law and the discovery of truth include Cohen (1995) who sees them as institutions for pursuing personal feuds, Lanni (2006) and Christ (1998a) who believe that the invocation of extra-legal material facilitated the rendering of ad hoc judgments and the jurors

The second research hypothesis is that this quest of the Athenian courts for the discovery of the truth and the subsequent application of the letter of the law was in truth facilitated and not obstructed by the wide use of extra-legal material. According to this assumption, the information that the courts received concerning the background and the wider context of a dispute was welcomed as directly relevant to the facts and, rather than widening the scope of the legal case in order to induce the jurors to vote in accordance with norms of equity and *epieikeia*²⁵, it actually assisted them to focus more on the innocence or guilt in that particular case and thus to correctly apply the law²⁶. By the same token, and always by reference to the Greek ideas of character and personality, litigants' reference to the harsh impact of an adverse verdict, citation of a list of their liturgies and / or advertisement of their adherence to (at first glance irrelevant) ethical norms of the polis acquire probative value.

The same conclusion applies to the third hypothesis of this thesis, which is an extension of the second so as to embrace emotional argumentation. For the Greeks, human emotions and desires are cognitive processes and informed by beliefs and reasoning. *Pathos* is taken to be 'rational' in the sense that it is based on a cognitive evaluation of a particular situation, and the person, drawing on preconceived ethical beliefs and stereotypical assumptions instilled in him by the environment, reacts with the proper response, i.e. feels the proper emotion. As a result, proper emotional responses (positive or negative) should be provoked in jurors by the argumentation of the litigants (with regard to the right persons, at the correct timing and context, for the right reason) and triggered the appropriate reaction in the form of sentencing or acquittal. Emotional argumentation was therefore based on the legal argumentation and was always coupled with the justice of one's cause. However, how certain can

paid little attention to the letter of the law, Todd (1993) who overstates the political decision-making of the courts to the expense of its legal role, and Ober (1989) who downplays the commitment of the courts to the attainment of truth and prefers to see them as institutions of social significance in facilitating the dialogue between the mass and the members of the elite.

²⁵ On the role of *epieikeia* see Harris (2013), pp. 274ff. According to him, when a litigant used an argument based on *epieikeia*, he was not asking the court to reject the written law but was demonstrating that his case was an exception to the general rule contained in a statute and that in his specific case other legal considerations should take precedence.

²⁶ Contra Lanni (2006), especially at pp. 46ff.

we are that the popular courts and their amateur audiences abode by these rules?

The above issues therefore bring to the fore the question of the competence of Athenian jurors. The common opinion regarding the direction of the Athenian courts can be summarized as such: “the popular and unprofessional nature of the jury much relaxed the need for logical, relevant treatment of points of law and increased the opportunities for irrelevant, but brilliant digressions and emotional appeal”²⁷. Others prefer a more balanced view, arguing that “their verdicts might be coloured by factors outside the issue; they might, for instance, decide to temper strict justice with mercy if a defendant’s past life warranted it; they might allow the prejudices of the moment on occasion to override reason, as of course modern juries sometimes do. But ultimately their courts were intended to arrive at just decisions; decisions based on the laws; decisions primarily on matters of fact; decisions on specific cases which came before them”²⁸. The conclusion of decisions based on justice and equity, rather than strict law, was promoted by Lanni²⁹ as well.

On the other hand, researchers believing in an Athenian rule of law make a more convincing case. Harris for instance, refers to the whole range of procedures and factors that secured a high level of sophistication for the Athenian legal system, and surely cannot be blamed for stating that “modern scholars (except those who believe in necromancy) cannot raise Athenian judges from the dead and ask them why they voted the way they did in a particular case”³⁰. After all, as Gagarin observes (referring to scholars who have uncritically accepted the picture of Philocleon as the stereotype of the Athenian juror) “the accuracy of the portrayal can surely be doubted. There probably were jurors like Philocleon voting on actual cases, but that these constituted the majority or even a large minority of jurors is doubtful. If they had, the Athenian legal system could hardly have survived long”³¹. The fourth hypothesis of this thesis is that Athenian jurors had a high degree of competence and experience.

²⁷ Kennedy (1963), p. 160.

²⁸ Carey (1994b).

²⁹ Lanni (2006).

³⁰ Harris (2006a), p. 179.

³¹ Gagarin (1994), p. 47.

They judged (as proved by the litigants' argumentation as interpreted by the model of this thesis) human action in perfectly rational and nearly objective terms and it may be safely concluded that they formed one of the most qualified popular audiences of recorded history³².

This fact contributed towards the achievement of a relative amount of consistency and predictability of court verdicts rather than decision-making on an ad hoc basis³³. This is yet another hypothesis supported by this thesis. Lanni focuses on the pragmatic difficulties of the period such as the sparse documentation for cases kept in the Metroon, and on legal issues such as the absence of a binding *ratio decidendi* and the limited discussion of precedents in the forensic speeches. However, notwithstanding the genuine difficulties in reaching a safe conclusion on the matter, there are some factors which are decisive on the balance of probabilities. These have been treated by Harris³⁴ and include i) the fact that in legal disputes before the Athenian courts, there is a targeted use of precedent (though most of the cases concern factual disputes rather than disputes about the meaning of the law), ii) the correct estimate of the written and oral resources that could be used for the transmission of the rationale behind verdicts (so as to create a homogeneous approach in the future), and iii) other factors that could assist in reaching consistency such as a) the coherence offered by the references to the intent of the lawgiver and b) the interpretation of laws by reference to other statutes. These served as homogenising factors and set the basic principles of the legal system, at the same time placing a framework and boundaries to the discretion of the judges.

This thesis confirms and supplements the above conclusions. What is original is the methodology used in proving the degree of consistency and predictability of Athenian verdicts, which is based on a close analysis and theorisation of the litigants' rhetoric in accordance with Greek psychology. In order for the court to be able to achieve consistency, a sub-hypothesis needs to be fulfilled, namely that rules of relevance had been developed. This again may be answered in the

³² This is true both as regards the popular courts and the court of the Areopagus. I do not share Lanni's (2006) suggestion that these institutions had divergent approaches to justice.

³³ Lanni (2004).

³⁴ Harris (2007b).

affirmative. In answering *how* we know that the Athenian courts had already developed a more or less sophisticated approach to relevance, three factors may be cited: i) the requirement to 'speak to the point', ii) the absence of complaints from the litigants as to what is relevant and iii) the consistent patterns of argumentation throughout the approximately one century of our enquiry.

In deciding *what* is relevant for Athenian courts we may use the following reasoning. The evident loyalty of litigants to certain patterns of argumentation signifies the relevance and success of these patterns as regards their reception by the court. This strategic and tactical consistency of argumentation shows a consistency of rhetorical approach to a legal case which in turn is accepted as valid and 'to the point' by jurors. This underlying homogeneity of rhetoric reveals an agreement of all parties to a judicial case as to what is relevant. To make it plain, all recurring arguments that emerge throughout the period of the Attic orators may be safely pronounced as relevant for the Athenians. Thus, we may infer from the speeches as a general rule that i) any argument that was directly relevant to the legal case, the written law or the ethical norm enforced by that law and / or ii) any argument that was relevant to the more general character trait that embraced this norm were received by the court as relevant.

So, having extracted the examples of *what* kind of argumentation found in the speeches is relevant, can we theorise and (re) construct the Athenian rules of relevance? In other words can we answer the question *why* the ever-recurring patterns of argumentation (and especially extra-legal and character evidence that concern us here) were received as relevant? The Greek ideas of character and personality, as well as the Greek method of reasoning provide a way to understand why the patterns of extra-legal argumentation found in the orators were indeed relevant in their perception. This underlying rationale may assist in the comprehension of the rules of relevance in Athenian courts and explain the consistent approach to character evidence.

A litigant had to prove whether or not there was a breach of the law specified in the written plaint. The legal statute enjoyed unquestionable authority and it

embodied or was related to a communal ethical norm. The central issue to be proved by the invocation of character evidence was a litigant's general adherence or not to that norm which would increase the probability of the parties' allegations as to the particular charge. Following an inductive way of reasoning (and taking into account the, for the Greeks, relative unity of virtue or vice), adherence to this particular norm reveals the possession of a related, more general character trait. Hence, by reference to a multitude of remote or close examples of his past acts, a litigant aimed at proving the possession of this particular general trait. By deduction in turn, the possession of this trait would prove his adherence to the ethical norm thus making respect for the law which formalised it more likely. Extra-legal, irrelevant argumentation would be the most serious impediment to the achievement of consistency and could have led to ad hoc judgments based on the particularities of each case; but this did not happen (at least to a degree that would incur the questioning of the Athenians, since such argumentation is entirely absent from the speeches). Relevance was not a black hole. Athenian forensic rhetoric, in close proximity with their ideas of character, had developed its rules of relevance which were apparently accepted and substantiated by the courts.

The above conclusion though, is subject to reservations: i) the uncertainty as to the existence of a written, formal rule of relevance that one ought to speak to the point; ii) the lack of trained personnel and formal processes to direct the jurors as to what is relevant and to enforce the rules of relevance, iii) the rough edges and subjectivity as to the boundaries of which norms are or are not included in a general character trait. Nonetheless, the relatively limited number of complaints (mainly of rhetorical value), as to the other party's abuse of the rule of relevance, provide a significant argument in support of our hypothesis. Thus, the fact that the Athenian courts were staffed by an amateur personnel (albeit of high quality and experience), and the development of at least relatively concrete and clear rules of relevance contribute to the central hypothesis that the Athenian approach to character evidence did not obstruct consistency and predictability of verdicts.

Another assumption of this thesis is that Athenian laws had a substantive orientation. Siding with Harris³⁵ in that respect, this thesis maintains that Athenian laws were very much concerned with directing human conduct and setting standards of behaviour. Nonetheless, although Athenian statutes were not overwhelmingly concerned with procedure³⁶, the creation of a mechanism for the settlement of disputes was undoubtedly an equally significant aspect of the Athenian (and Greek) judicial process since the archaic period. Harris, in order to prove his suppositions, examines the wording of a number of Athenian laws that were primarily concerned with substantive matters. This thesis aims to add to his findings by examining the rhetoric of litigants and their insistence (in accordance with Greek ideas of personality) on presenting themselves as ethical adherents of the community. The fact that Athenian laws encompassed and enforced a wider ethical norm of the polis meant that when Athenian jurors decided a legal case, the letter of a specific law was applied but a wider ethical norm was reinforced. This was the essence of the legal enforcement of morals in classical Athens, namely the reinforcement of the wider ethical norm that triggered the enactment of a particular law. In this way the court, apart from its primary task of implementing the rule of law by applying specific laws to particular legal cases, acted also as the moral educator of the polis in the absence of an official public system of education, strengthening thus the substantive orientation of the laws.

A further hypothesis of this thesis diverts from the aforementioned legal issues and focuses on the Greek ideas of character. Contrary to the conclusion of some researchers³⁷ the Greeks did not hold a firm and universal belief in a stable and unchanging human character. Close examination of the Greek perceptions and ideas of *ethos* reveals a highly flexible approach to the issue and an uncertainty as to the stability of *ethos*. This has important implications for the method of argumentation in forensic fora as to the width and content of character evidence offered by litigants. The flexibility and uncertainty allowed them to offer lengthy accounts of previous acts of varied proximity to the legal

³⁵ Harris (2009).

³⁶ This position is taken for example by Ober (1989); Todd (1993); Gagarin (1986); Osborne (1985).

³⁷ Lanni (2006), pp. 60-62, n. 92 is prominent among them.

case (though in accordance with the rules of relevance described above and their ideas of character) in order to convince the jurors of the truth of their presented facts. Furthermore, such a lengthy account of their positive character traits (and the opponent's negative) aimed at an increase of their credibility in a setting that relied heavily and almost exclusively to the litigants' rhetoric. The enormous significance afforded to words in the Athenian legal setting led to the gradual evolution of scattered and loose approaches to argumentation into a finely formed art of rhetoric.

This brings me to the last hypothesis of this thesis which does not take a static view of Athenian litigation, especially in relation to forensic rhetoric and argumentation. The first chapter serves to fulfill that aim by offering a historical overview of rhetorical argumentation from Homer onwards. It includes a search for the origins of argumentation in general and of character evidence in particular, combined with background information about the nature of litigation in the period before the Attic orators. Development of such rules of rhetoric led to their consolidation into an art to be applied in the courts of classical Athens. By this time, the art of rhetoric had reached its climax, the methods and tactics of argumentation had been clarified, and consistent patterns had emerged.

3. Setting the Context

3.1. Relevant characteristics of the ancient Greek World

In order to discover the underlying reasons behind this Athenian (and Greek) approach to argumentation, it would be useful to address a series of questions relating to the unique features of this civilisation. What are the main features that might have influenced their attitude to argumentation in general and character evidence in the courts in particular? The socio-political structures of the newly formed polis, an originally weak state, formed the Greek ideas of 'character' and 'personality'³⁸, placing the benefit of the community to the fore.

³⁸ I use the term 'personality' throughout this thesis for the sake of convenience as the most practical word to be used in order to give to the reader a familiar meaning she can grasp. The concept of 'personality' in classical Greece is a complex one and distinct from our own (as will be shown in Chapter 5). The question of whether the Greeks had a distinct word for the term 'personality' as a modern audience understands it depends on the meaning we attach to this word. With the potential meanings ranging from psyche to ethos and character, I prefer to retain the English word throughout and attach to it the meanings of i) how a person perceives herself

The individual and the *oikos*, in an era of ground-breaking changes, gradually conceded their hereditary powers to the polis and increasingly depended on the public institutions. Realities such as the invention of writing, the novel hoplite warfare and the more objective and impersonal legal procedures, posed new challenges for the subjects. The ancient 'person' thinking of himself as a constituent of the community rather than a subject to be protected by the Leviathan-state, wholeheartedly adhered to the ethical norms of the polis.

Philosophical enquiries also played significant role in the formation of these ideas and the resulting wide use of character evidence. The inductive and deductive method of reasoning provided for the extraction of grounded conclusions based on a multitude of examples. The fact that the Greeks did not acknowledge the person's ethical autonomy of action in every single instance of his life meant that any act should be considered in connection and in conjunction with the rest, resulting in the extraction of a coherent set of character traits. The belief that the emotions are rational processes based on preconceived experiences and beliefs permitted a unified approach to character, a coherent interpretation of human behaviour and an attribution of blame or merit liberated from asterisks and exclusions (such as 'acting irrationally in the grip of emotion').

3.2. The Athenian Legal System

Demonstration of the characteristics and peculiarities of the legal system that influenced the Athenian approach to character evidence is necessary in order to set the context of the current study. Although these will be discussed in detail in Chapter 2, it is useful to sketch here the limits they set and their implications. The system of justice of the first direct (and radical) democracy had inherent features which promoted the constitutional structures of the Athenian polis, while concurrently facilitating the overall aim of the attainment of the rule of law in the way the Athenians understood it. Their commitment to political

in relation to the community, ii) how the individual interacts with herself during the decision-making process and iii) how the community perceives the 'person', the 'subject', the 'individual' as a distinct entity. All these complex notions are primarily related to modern philosophical considerations about 'individual personality' for which it is not clear that the Greeks ever really had a word.

egalitarianism dictated the democratic nature of the system on all its stages. Staffing every office by sortition from the qualified male Athenian citizens, and providing for decision-making by popular vote in panels ranging from 201 voters up to six thousand were the two pillars of the system's democratic nature. The pervasive ideology of amateurism (with more or less significant detours from this rule, such as the presence of logographers) though instigating a strong adversarial atmosphere, allowed for a less bureaucratic but more flexible and comprehensible approach to justice.

These features have significant implications for forensic rhetoric. The lack of professionals signified the need for self-regulation with the possibility of minimal regulation being present. In such a context, due to the absence of strict enforcement mechanisms, rules of relevance may be relaxed and argumentation in the courts may be controlled only by the uproar of the jurors. The amateur litigants were careful not to expose the professional touches of the logographers and insisted on the human tendency to storytelling reminiscing everyday conversation. The fierce adversarial contests sometimes occasionally resulted in name-calling and similar methods of blackening the opponent's person. The Athenian legal system's structures, procedures and laws facilitated the wide use of character evidence.

3.3. Comparators

The above discussion highlights the differences between ancient and modern approaches to 'character' and 'personality' and the striking dissimilarities between the Athenian and modern legal systems. Although this is not a comparative work, comparators are sometimes needed in order to locate relevant terminology, emphasise key points and demonstrate the rationale behind the Athenian practices.

The first comparison is between ancient and modern conceptions of 'personhood'. Opposing ideas of these notions³⁹ may produce alternative

³⁹ Both 'character' and 'personhood' are central to the better understanding of the Athenians' approach to law in general and to character evidence in particular. Although defining these notions is far from indisputable, I take 'character' to mean the aggregate of behavioural traits as revealed by actions or habits and distinguish one person from another. In that sense 'character',

approaches to forensic argumentation (e.g. a more liberal or stricter approach to character evidence) and, in turn, diverse explanations and interpretations of this fact. Disregard of the dissimilar structures of these two eras (e.g. the modern industrial, impersonal state compared to the ancient polis) may lead to misunderstandings as to their influence on various fields of human life. Modern presuppositions about these concepts tend to take an unjustified normative force. By the same token, the Greeks' different approach to extra-legal argumentation leads scholars to issue conclusions about the attainment or not of (even today) controversial and problematic concepts such as the 'rule of law' or 'relevance'. These concepts, as we understand them today, were influenced by modern ideas such as the individualistic conception of 'personhood', the individual's autonomy against a repressive sovereign or exclusively modern conditions such as the need for individual rights against impersonal bureaucratic states. Therefore, the rules of relevance or the rule of law in the Athenian context need to be conditioned by the above reservations and be treated in their own merits.

A comparison that is occasionally used in this thesis is between the Athenian legal system and those of the Western capitalist democratic states, especially the Anglo-American ones. Comparison with these highlights the different lines that may be followed in order to reach similar goals, such as the rule of law and democracy. Nevertheless, the aims and procedures of these legal systems are not taken as normative examples. On the contrary, in the course of this study it is demonstrated that definitions and interpretations of key notions may differ and call for fresh examination. For instance yes, the Greeks had certainly developed a sophisticated notion of the 'rule of law' to which they strongly adhered. Nevertheless, their notion of the 'rule of law' was unique and in many ways distinct from its modern counterpart. Therefore any classification of the Athenian legal system as 'rule of law based' or 'equity based' is unjustified, unless these terms are clearly defined and given their contextual meaning. I believe that the legal system of classical Athenian democracy provides a

apart from its internal denotation, it also has external implications and returns to its original use as a mark engraved or impressed (upon a coin or seal), thus a distinctive mark or characteristic distinguishing one thing from another. 'Personhood' on the other hand refers to a unique conception of the individual self, the status of being a 'person', a 'human being' having certain capacities and attributes.

noteworthy, comprehensive example of a different (though equally valid) approach to justice.

The aforementioned normative force that is sometimes attributed to modern legal systems in comparison with the Athenian obstructs the objective application and interpretation of the evidence. In that sense, such an approach, aggravated by a romantic and idealistic approach of some modern scholars as to the nature of modern systems, exaggerates the ‘otherness’ of Athenian law⁴⁰. Nevertheless, a more realistic line followed by scholars and personnel that are actual practitioners or closer workers of the law⁴¹ illuminates the problems and inefficiencies of modern systems and exposes the questions that still remain problematic; these are not too remote from the ones asked in the Athenian courts. The advantages and disadvantages of the adversarial mode of trial as opposed to a more inquisitorial approach, the democratic or elitist approach to law, and the competence of laymen to decide on questions of fact in a responsible manner, are recurrent themes that chronologically originate in classical Athens. Therefore the Athenian approach to character evidence can deepen our understanding of the key, knotty questions which have their roots in the emergence of a court system⁴².

Changes in the adversarial character of the Commonwealth legal systems have been proposed and advocated throughout the previous century and still persist⁴³. The ‘legal laissez-faire’⁴⁴ heavily influenced the method of attaining the ‘truth’ in a court-room; the adversarial mode of trials (or ‘fight’ theory) found

⁴⁰ Cf. Gagarin (2003), p. 197.

⁴¹ E.g. the seminal book by Frank (1949).

⁴² For the persistence of these issues, and especially of the problem of character evidence see McEwan (2002), published shortly before the introduction of the Criminal Justice Act 2003: “Although criticisms have regularly been directed at this area of the law, it is only recently that dissatisfaction has generated reformist zeal not only within the Law Commission, where it might be expected, but in political circles also”.

⁴³ Apart from the reformist zeal in England and Wales, one can also consult the Discussion Paper 62, Sidney: 1999 of the Australian Law Reform Commission on the adversarial – non adversarial debate.

⁴⁴ Frank (1949), Ch. 6: “The legal laissez-faire assumes that, in a law suit, each litigious man, in the court-room competitive strife, will through his lawyer, intelligently and energetically try to use the evidential resources to bring out the evidence favourable to him and unfavourable to his court-room competitor; that thereby the trial court will obtain all the available relevant evidence; and that thus, in a socially beneficial way, the court will apply the social policies embodied in the legal rules to the actual facts, avoiding the application of those rules to a mistaken version of the facts”.

many supporters in the assumption that the ‘fight’ theory and the ‘truth’ theory coincide⁴⁵. However, is it really an objective of a common law hearing to discover the truth or merely to decide on the cases presented by the parties?⁴⁶ According to the distinguished legal historian Vinogradoff an ancient trial “was not much more than a formally regulated struggle between the parties in which the judges had to act more as umpires and wardens of order and fair play than as investigators of truth”⁴⁷. In the course of this thesis it will be unequivocally demonstrated that this statement is far from accurate and that at least the Athenian courts were overwhelmingly interested in the attainment of truth; though the fact that lawyers regard modern adversarial systems in such terms illustrates the worthiness of the comparison.

The exclusionary or inclusionary approach to the admissibility of character evidence in particular touches upon the democratic or elitist nature of the system. Firm disbelief in the laymen’s (fact-finders) capacity to contain themselves on deciding on the relevant issues of a case has brought about a restrictive approach to the admissibility of evidence. This exclusionary tactic’s reception is far from unanimous (since it arguably creates more problems than it solves⁴⁸), thus generating voices for a more liberal and inclusionary attitude⁴⁹. Distrust in the competence of jurors leads to the withholding of evidence, which in turn promotes an elitist approach to justice by creating a self-regulating and maybe unchecked legal bureaucracy. This encapsulates the real danger of broadening the gap and alienating the general public. With these in mind, comparison with its extreme Athenian opposite (namely that of a highly inclusive and democratic legal system) is incumbent.

The above themes set the relevant axes within which the limited but targeted comparison will emerge throughout the thesis. Although at times such thematic comparison may be viewed as arbitrary and random, the complete picture will

⁴⁵ Frank (1949): “They think that the best way for a court to discover the facts in a suit is to have each side strive as hard as it can, in a keenly partisan spirit, to bring to the court’s attention the evidence favourable to that side”.

⁴⁶ Jolowicz (1996).

⁴⁷ Vinogradoff (1920), at p. 348, paved a way to be followed by many [e.g. Cohen (1995)] in the interpretation of ancient legal systems.

⁴⁸ E.g. McEwan (2002), pp. 190-1.

⁴⁹ See for example McEwan (2007), p. 188 n. 4.

slowly emerge. By avoiding anachronistic value-judgments and unnecessary modern presuppositions it will be made plain that the existence of a highly democratic and citizen-friendly legal system is achievable, provided that the laymen participants are properly educated through experience and that each person is assigned a clearly designated and proper role. Modern methods of fact-finding ease the burden and smoothen the inequalities between the parties, while the rationalisation and codification of the relevant rules of evidence assist in the objective and efficient conduct of the trial, avoiding agonistic or sportsmanship demonstrations. As a result, the unbiased use of relevant data will demonstrate that a legal system's adversarial character and the quest for truth may not be mutually exclusive.

3.4. Collection of Data

The basic source of evidence is the canon of the ten Attic orators in the form of the approximately one hundred surviving forensic speeches⁵⁰. The chronology of these refers to more than a century ranging from approximately 420 BC to the 320s BC⁵¹, albeit not uniformly distributed. Before proceeding to the main points of discussion, there are some important general considerations that have to be taken into account. These concern the uncertainties surrounding the material. Firstly there cannot be certainty about the number of surviving speeches that were actually delivered in court. Some of them were rhetorical exercises and, thankfully, can more or less be identified.

However, even when there is certainty (to a degree) that a speech was written and delivered in court, ambiguity still remains as to the extent of revision between this time and its publication⁵². This process of alteration had three stages: the first being the actual delivery in the courtroom, the second being the revision by the orator and the third the exact publication and also the transmission (with mistakes) by copyists through the centuries. Written speeches were the models upon which a litigant was based; nonetheless, oral

⁵⁰ Ober (1989) conveniently offers a list of the speeches delivered before the Courts, the Boule, and the Assembly.

⁵¹ Hansen (1991), finds the earliest speech (Ant. 6) to be written in 419/18 BC and the latest (Dem. 56) in 322.

⁵² For the revision of speeches, see Dover (1968); Usher (1976); Johnstone (1999); Todd (1993), p. 37..

delivery entails minor detours from the script. Apart from the linguistic detours, actual speeches also contained non-scripted, extemporaneous elements⁵³ that do not appear in the texts but would be extremely useful in the picturing of characters. Other omissions include the failure, generally, to incorporate the actual texts of the laws and decrees, as well as the testimonies of witnesses.

Regarding the second stage, namely the revision of the text before publication, this seems less puzzling. Firstly, such a revision, whatever its extent and if existed at all, gives us an account of the best and most refined argumentation that the speechwriter could offer, including evidence from character. This is a good indication of what argumentation concerning character ought to be used and would have appealed the most to an Athenian jury. Secondly, although the revision need not be uniform, there is no way to discover whether one speechwriter revised his speeches more than the other or that the speeches of a defendant or of a public suit were altered more than the corresponding ones of a prosecutor or of a private trial. Thus, there is no choice but to analyse what is present in the texts, not what it might have actually been said in court. Without overestimating the difficulties posed by the evidence, caution should still remain in its treatment.

4. The Structure of the Thesis

As mentioned above, this thesis explores the multidimensional influences, causes and aims whose resultant produces the wide use of character evidence in the Athenian court system. Chapter 1 finds the beginning of the thread whose end reaches the Athenian rhetoric of the fourth century. The identification of similarities between classical age's forensic argumentation and archaic dispute resolution as presented in literature provides the first step towards the conclusion that the causes of the liberal approach to rules of relevance have to be sought in the distant past. Travelling through these four centuries and highlighting the ground-breaking developments assist in locating the use of character evidence in their temporal context. The progressive emergence of the polis-state and its legal system, though altered the orientation and aims of Athenian law (from equitable arbitration to the rule of law), left the broad

⁵³ Johnstone (1999), p. 12.

approach to argumentation from character almost intact. This fact is stimulating and calls for further explanation.

Chapter 2 acknowledges the (by modern standards) excessive reliance of the Athenian legal system on personal worthiness and merit, a factor that created incentives to litigants and judges to place more weight on evidence from character. Its structures, institutions, laws and procedures provoked litigants to unfold even remotely relevant aspects of their personalities. The purposeful survival of this tendency from the archaic age, which provides yet another vote of confidence to this traditional practice, certified that for the classical Athenians, proper judicial process and the rule of law were best served by having the rules of relevance relaxed. The first two chapters therefore provide the series of choices that the Athenians made and the socio-political context within which argumentation from character operated. The consistent presence of this wide approach to character evidence in divergent arenas of argumentation, its persistence down to the classical age, and its eventual formal endorsement by the advanced official legal system, prove that the causes for this practice were deeply rooted in the collective psyche.

Chapter 3 is the first step towards the explanation of this phenomenon. The causes need not be solely sought in external forces such as the structures and the institutions of the Greek polis. These decisively influenced psychology and philosophical ideas and vice versa. This chapter explores the Greek ideas of character and proves that their beliefs are directly connected with their rhetorical practices. Unequivocal trust to the probative and predictive force of human ethos instigated the important assistance of character evidence to arguments from probability. On the other hand, uncertainty as to the fixed and unchanging nature of character provoked the flexibility of argumentation evident in the speeches. The inductive method of reasoning fertilised the speeches with series of examples from a man's past acts, a practice which was evidently expected by the audience. In other words, the Greek perceptions of human psychology decisively formed the content and the methods of character evidence.

Chapter 4 applies the conclusions of the previous chapter to the forensic speeches and explores the divergent methods and strategies that the rhetoricians used for the portrayal of character. Its aim is broader than mere application of the conclusions of Chapter 3. A step further is taken towards a comprehensive exploration of the tactics behind the argumentation from character in order to offer an accurate account of this part of Athenian rhetoric. At the same time, the rhetorical strategies and the content of the speeches concerning character evidence are contrasted to modern Anglo-American approaches. Besides, this comparison offers a clear insight of the socio-political background of the Athenian polis.

Chapter 5 returns to the investigation of Greek psychology. This time, not 'character' but 'personality' and 'human action' are analysed and contrasted with their modern counterparts. The need for a different approach is highlighted and the model of the 'objective – participant' person being applied as more suitable for the ancient context. This model provides that the human mind and human action can be understood and interpreted in objective terms, relenting from the modern highly subjective definitions. The ethically participant (rather than individualistic) ancient person accepts and wholeheartedly adheres to the conventional ethical norms of his society. These ideas serve as adequate causes for the wide use of character evidence in all types of argumentation. When the facts are unknown, past deeds may be inferred from a person's typical method of reasoning and action as revealed by his characteristic deeds and motivation. Examples of past behaviour serve as proofs of this person's general adherence or non-adherence to the norms (and consequently laws) of the polis.

The final Chapter answers some of the standard questions surrounding Athenian law by reference to this new model of interpretation of the Athenian speeches. Acknowledging the paramount influence of the ideas explored in the previous chapters, this chapter analyses the imminent, utilitarian effects of character evidence in the courts. The wide use of extra-legal argumentation neither hindered legal justice nor inhibited jurors' rational judgment. Examination of legalistic and rhetorical aims such as propensity, credibility and

good will, is necessary in order to prove the compatibility of this practice with the rule of law. Analysis of ancient beliefs about human emotions and their relation to rational decision-making is required to demonstrate that *pathos* argumentation is not irreconcilable with straight judgment based on law. One more time, modern presuppositions may be disorienting and what contemporaries consider as irrelevant argumentation may not be so after all.

1 CHAPTER ONE: THE ARCHAIC ORIGINS OF CHARACTER EVIDENCE: FROM HOMER TO CLASSICAL ATHENS

The central idea of this chapter originates from the fact that all researchers (to my knowledge), isolate and examine the (admittedly better attested) more recent picture of Athenian courts of the late 5th and 4th century. This thesis follows a more holistic approach to the issue of extra-legal argumentation, thus reference to rhetorical approaches found in other literary sources and in other periods is unavoidable. The current chapter offers a historical background to the main theme of character evidence and illuminates the sequence of changes that took place in the field of rhetoric before the age of the Attic orators. . The transformation of dispute-settlement, the development of instinctive argumentation to an art (rhetoric), and the codification of oral rules after the re-invention of writing, all taking place in the archaic period, offer the key to understand later issues of Athenian law. My main aim is to examine the Athenian legal system and the presence of character evidence from a holistic point of view, not by examining it as a corpse, witnessing its very last moments and performing an autopsy using modern medical tools (in the form of presuppositions and definitions), but as a living organism which evolved for centuries. In such a way, by avoiding unnecessary anachronisms and by getting rid of modern stereotypes about (even today) controversial notions such as relevance, equity and the rule of law, a plausible explanation can be offered.

This chapter proves that the wide (to modern perception) use of character evidence in Athenian courts is a tendency surviving from the (broadly defined) Greek administration of justice of the archaic period¹. This tendency is also to be found in Greek literature therefore an all-embracing explanation for this phenomenon needs to be offered. Undoubtedly,

¹ This expression presupposes a (strict or loose) unity of Greek law (or at least a structural consistency of Greek legal behaviour) through time and space, which although has met the contention of scholars, it is now accepted, including by myself. Cf. Gagarin (2005), Foxhall and Lewis (1996), pp.1-2.

in a pre-judicial or proto-judicial form of adjudication, one cannot expect coherent rules providing for strict legal argumentation. After the dismissal of self-help as a justified method of performing justice (though its remnants survived down to the classical age²), the emergence of arbitration aiming at the reconciliation of disputants favoured the human beings' natural tendency to storytelling³. By this token, positive portrayal of character supported parties in their effort to gain the good will of the arbitrator, enhanced their credibility and, thus, the plausibility of their story. Also, the public character of these early legal systems⁴, where disputes arose among members of a small-scale society and decided openly in the agora, may have supported the emergence of public opinion as an important factor to be taken into account. Litigants, apart from merely mentioning the facts of a (in legal terms) loosely defined dispute, were probably obliged to win the approval not only of the judge(s) but also of the audience. Lacking the assistance of modern science in the gathering of evidence, the believability of a story usually based on controversial facts was improved by the positive portrayal of the litigant's *ethos* (character). The presence of spectators had important implications on the judges' decisions and the way a dispute ended.

Therefore, if this line of thought is correct, traces of this tendency to extra-legal argumentation are to be found in texts surviving from the archaic period. However, the claim that such wide use of character evidence was born in an environment of arbitration, favouring equity and reconciliation, does not mean that this was the case in 4th century Athens. On the contrary, the fact that argumentation retained its basic features despite the transformation of the legal system calls for a plausible explanation. Therefore, the fact that although the tactics of argumentation evolved but the framework of basic principles, strategies, and aims persisted through time, leads us to look for a steady, underlying cause which is to be found in the Greek ideas of character and personality. The separation of legal and quasi-legal spheres (each serving a different aim, enforcing written law in courts and equity in out of court

² Cf. Christ (1998b), p. 26; this issue will be discussed later in the chapter.

³ Cf. Gagarin (2003).

⁴ Cf. Gagarin (1986), pp. 46 and 133-4.

arbitration) and the more elaborate context (a belief in the rule of law and the legal norms' gradual acquisition of substance) could have diminished the effects of extra-legal argumentation; nonetheless its persistence is stimulating and must be examined.

In order to prove my point of the existence of this wide use of character evidence in archaic Greece and in divergent contexts I will examine the literary evidence of this period, concentrating on argumentation from character during the settlement of disputes. Nevertheless, since direct evidence is sometimes slim, I will examine the developments in argumentation and the role of character in general, since persuasive speech can take many forms, depending on its purpose. Moreover, indirect evidence will be provided by examining other remnants of rhetoric from the archaic period. Legal remnants of the archaic system of justice which survived to the classical one will be used as circumstantial evidence. Norms and rules found during that period in an embryonic state were later developed and codified. Furthermore, the process of transformation of oral (mainly procedural) rules into written (gradually substantive) laws⁵, may have produced an alternative approach to justice (from arbitration by potentially arbitrary magistrates to a court system based on the rule of law), with serious implications on the legal system as a whole. Within that context, I suggest that the Athenian courts' rule of relevance that litigants ought to 'speak to the point' is also a remnant of the past, an oral requirement of the archaic age, which was later codified and substantiated.

In this world of change, the amateurism and openness of the early legal system remained intact, being products of the polis as a political organisation and not

⁵ This reform is regarded as typical within the process of evolution of a legal system from a primitive to more elaborate state. This is evident on the archaic law codes [e.g. inscriptions from Dreros, Chios and Eretria (all dating in 650-620 BC), the homicide Law of Draco, Gortyn's law code etc.]; Gagarin (1986) observes that one of the most notable things about all Greek laws from the very beginning is the way in which they focus on procedure and do not concentrate either on defining criminal activity or on establishing fixed penalties for fixed crimes; Todd and Millett (1990) state that "In Athens, so far as we can tell, procedural law held both a chronological and a logical priority... Procedure came first and a substantive right could only exist where there was a procedure available to create that right". However, the laws gradually took a substantive orientation, especially obvious in the Athenian setting during the age of the Attic orators [Harris (2009)].

products of the later democracy (though they may be appreciated as its seeds). Although population increase, supported by the unusually large (for a polis) territory of Attica, challenged the idea of 'personal justice' based on familiarity, of the previous face-to-face community nonetheless, the continued belief in this kind of justice (cf. Aristotle *Politics* 1326b) promoted the wide use of character evidence in Athenian courts. Persuasion of public opinion became more important than ever with the creation of mass jury courts. The need for an art of persuasion taught by professional experts became more evident, as well as the emergence of a body of professional speechwriters. However, the the framework and the aims of rhetoric remained intact. Persuasion through the invocation of one's good character and meritorious personality became the rule in such an adversarial and agonistic environment. Denigration of opponents, maximisation of credibility, and every effort to gain the good will of mass juries constituted the components of the driving forces behind extra-legal argumentation in Athenian courts. The authority of written law, and the limitations to litigants and jurors alike, transformed the system and established the courts as guardians of the laws..

These new realities and the increasing rationalisation and codification of legal rules brought about a progressive attainment of a degree of consistency and predictability to the legal system. The gradual emergence of rhetoric as an art (assisted for example from the consolidation and organisation of rules in handbooks, such as the one mentioned under the names of Corax and Teisias in the early fifth century) and the patterns of ad hominem argumentation provided guidelines for the, at least, practical and utilitarian definition of 'relevance', possibly developed through the archaic period and infused into the classical Athenian court-rooms. Abstaining from the unnecessary anachronisms and presuppositions of some modern scholars, this approach to relevance will be presented as a Greek (and Athenian) practice per se, evaluated in its own terms rather than judged against the attainments of modern legal systems.

1.1 *The Origins of Character Evidence in Homer*

It is widely acknowledged that traces of the art of rhetoric⁶ can be found in Homer⁷. Odysseus had the ability ‘to speak lies like truth’ (*Od.* 19.203), exploiting a subsequently defined trick, specifically the accumulation of wealth of circumstantial detail, making the whole thing seem too complicated to have been invented⁸. A similar technique, either to conceal a lie or to enhance the verisimilitude of a story, was used in later years to make the weaker argument defeat the stronger or to support a case in Athenian courts⁹. A passage from Aeschines is enlightening:

“When the other boasters tell lies, they try to make their speech vague and imprecise because they are afraid of being disproved, but whenever Demosthenes boasts, first he tells his lies under oath, conjuring destruction upon himself; second, he dares to tell what he knows will never happen and actually calculates the time when it will happen, and he tells the names of people whose bodies he has not seen, deceiving his audience and imitating those who tell the truth.” (3.99)

Dionysius of Halicarnassus identified this device as one of the main virtues in persuasive speech, “a power of conveying the things about which one speaks to the senses of the audience” (*Dion. Hal. Lys.* 7), explaining that it is achieved by a grasp of circumstantial detail¹⁰. Similarly, when Lysias gives a detailed description of a trial under the Thirty (*Lys.* 12.37), he offers a vivid narrative of their character’s brutality following the path of his archaic predecessor. He describes their cruelty in detail, exemplified by their not refraining from taking “even the earrings of a woman [Polemarchus’ wife] who had been wearing them when she entered his house for the first time—that is, on the day of their wedding” (12.19). Apart from merely enhancing the verisimilitude of his

⁶ By ‘rhetoric’ I refer either to the subsequently developed art or to the natural instinct of argumentation and mode of speech inherent in any human being facing the challenge of persuading others. I hope that the difference in use will be obvious by the context.

⁷ Kennedy (1980) pp. 9–15 and (1963) pp. 35– 40, stresses a number of similarities between Homeric rhetoric and its classical form. Also see Edwards (1991) pp. 55–60; Karp (1977), Cole (1991) pp. 33–46.

⁸ Cole (1991), p. 39.

⁹ See Schmitz (2000), pp. 66-7.

¹⁰ Cf. Schmitz (2000), p. 64: “The strategy of mentioning specific dates and places and giving specific names is one of the most persistent ways of achieving verisimilitude, employed in countless fictional narratives from antiquity to the present day”.

arguments and reaching an emotional climax, Lysias also walks on the footpath that Homer firstly opened.

Appeals to emotion are far from infrequent in Homer¹¹. Securing the good will of one's hearers is sought after, not only through words of praise but also by one's friendly character. The effort for the appeasement of Achilles' wrath in Book 9 of the Iliad is shouldered by Odysseus, Phoenix and Ajax, the ambassadors being chosen for their potential influence on the hearer. Indeed, Achilles acknowledges (*Il.* 9.198) that they are the men he loves most¹². In sharp contrast, Achilles, disregarding Odysseus' emotional appeals, rejects Agamemnon's offers on the basis of the latter's untrustworthiness, based on his previous acts that reveal his general disposition¹³(esp. 9.373-378). Phoenix takes over, reminding Achilles of his past acts and his affection since his early life, in an effort to re-establish their personal relationship. Such a technique of enumerating previous beneficial acts is also familiar in later orators. Phoenix's use of Meleager's story¹⁴, analogous with the use of later orator's 'examples', acts as argumentation from precedent in order to convince Achilles of the soundness of his council. Finally, Ajax experiments with the technique of indirectly addressing one's target by talking to another (here Odysseus) saying essentially 'let's go home – we are wasting our time'. Then, directly addressing Achilles he offers a protestation of love and honour from his friends. Although Achilles is not convinced to set his wrath aside, a little deviation from his original position is achieved¹⁵.

¹¹ For emotional appeals in Homer see Carey (1994a), p. 27; Kennedy (1980), p. 12.

¹² Cf. Kennedy (1980), p. 11.

¹³ Cf. Kennedy (1980), p. 13, where Kennedy takes a less conservative approach by stating: "The character (ethos) of Agamemnon, which he regards as evil, is to him a more important factor than the emotional appeals which have been made." This reference to previous acts as revealing an individual's character and general disposition is indeed one of the most important weapons of the Attic orators and of litigants diachronically.

¹⁴ On the use of historical example cf. Kennedy (1963), pp. 37-8.

¹⁵ Kennedy (1980), p. 14. Cf. Kennedy (1963), p. 36: "the speaker relies heavily on his personal authority and the impression he gives, as does Agamemnon in his debate with Achilles in book one. Thus also Athena increases the poise and dignity of Telemachus in *Odyssey* 2.12, to make up for his youthfulness. Later rhetoricians did not forget the importance of weight of character in effecting persuasion". Kennedy concludes that "Much can be learned about classical rhetoric from the ninth book of the Iliad. Many devices of invention, arrangement and style were clearly in use long before they were conceptualised and named... The role of ethos, or character, is particularly strong...".

Homer offers us direct examples of argumentation during settlement of disputes, though in a proto-legal, pre-court society. Notwithstanding these reservations, he offers us extremely valuable evidence about the existence and the use of rhetoric in archaic Greece, especially about types of argumentation during conflict crises before a mass audience. Therefore, although lacking a (not yet existent) strictly legal substance, the roots of later forensic persuasive speech can be traced. Consciously or not, and though Homeric poems lack arguments from probability, *ad hominem* argumentation forms the basis of persuasive speech in circumstances of adversarial nature, reserving for 'evidence' from character a central role. It is in this light that I aim to examine the following literary evidence.

The first scene I would like to examine is the conflict between Agamemnon and Achilles in Book 1 of the Iliad. This dispute constitutes the triggering event of the poem, being the cause of all the resulting pains. The facts are widely known. The Achaean army is devastated by a god-sent plague due to the abduction of the daughter of Apollo's priest. Achilles calls an assembly (1.54, 1.57), which resembles legal proceedings¹⁶, in order for a solution to be found. Since the girl had been granted to Agamemnon, Calchas the prophet, after securing the protection of Achilles for his subsequent speech, predicts that, in order for the plague to end, Agamemnon has to give her back. Agamemnon, enraged, begins a quarrel with Calchas (1.104). He stresses the prophet's evil disposition, particularly against himself:

"Prophet of evil, never yet have you spoken to me a pleasant thing; ever is evil dear to your heart to prophesy, but a word of good you have never yet spoken, nor brought to pass" (1.105-7).

However, portraying himself as protector of the people, agrees to Calchas' demand: "Yet even so will I give her back, if that is better; I would rather the

¹⁶ Havelock (1978), pp. 129ff.; Bonner and Smith (1930-38 reprinted 1968), pp. 2-11.; White (1985), p. 33.

people be safe than perish” (1.115-6). This constitutes a first indication of how rhetoric could be used in a dispute before a mass audience.

Nonetheless, the insistence of Agamemnon to replace the girl by taking another’s [and in that way he unilaterally declares the case closed (1.138-40)], provokes Achilles’ wrath and the dispute escalates. Speaking on behalf of all the army, in an effort to gain the concord and support of the people and isolate the king (1.122-25), he insults him¹⁷ by demonstrating his greed (*φιλοκτεανώτατε πάντων* - 1.122). Agamemnon, although acknowledging Achilles’ purpose to ‘induce’ to persuasion both the king and the audience, replies:

“Do not thus, mighty though you are, godlike Achilles, seek to deceive me with your wit (*κλέπτε νόω*); for you will not get by me nor persuade me” (1.131-2)

stating that he has a valid claim due to his status as a king, which he is going to enforce (1.137-9).

The poet, sketching Achilles’ emotional state, portrays him as “glaring from beneath his brows” (1.148). His reply is again insulting (1.158: dog-face) but more importantly reveals the king’s ingratitude and injustice (1.155-68). These arguments which made an impact on the army (cf. 2.239-40) provoke Agamemnon’s reaction who characterises Achilles as the most hateful to him due to his propensity for violence [“for always strife is dear to you, and wars and battles” (1.177)].

Preventing further escalation (taking place through resort to violence as opposed to mere rhetoric), Athena intervenes and restrains Achilles. The latter, justifying his behaviour and putting the blame on the adversary, says that Agamemnon’s arrogance was the cause of this dispute (1.203, 1.205). However, the insulting words continue (1.225: drunkard), with Achilles focusing

¹⁷ Harding (1994), pp. 197ff., following other scholars, traces the origins of the comic abuse or invective [*loidoria*] to Homeric name-calling.

on Agamemnon's injustice, cowardice and non-adherence to widely acceptable values:

"with the face of a dog but the heart of a deer, never have you had courage to arm for battle along with your people, or go forth to an ambush with the chiefs of the Achaeans. That seems to you even as death. Indeed it is far better throughout the wide camp of the Achaeans to deprive of his prize whoever speaks contrary to you. People-devouring king, since you rule over nobodies; else, son of Atreus, this would be your last piece of insolence" (1.225-232).

The final piece is provided by Nestor's intervention (the famous for his persuasive rhetoric aged king of Pylos), who tries to gain their good will¹⁸ and their respect¹⁹. However, the unbalanced triangle of Nestor as arbitrator, Agamemnon (superior king) and Achilles (half mortal king) as litigants, and silently acquiescing subordinate warriors as audience did not produce reconciliation or any inducement to resolution²⁰. The conflict is suspended with a last adversarial exchange²¹.

The preceding scene is not a mere quarrel or an exchange of insults. On the contrary, since the disputants are surrounded by an audience both parties try to prove the validity of their claim. Both sides base their argumentation on widely acceptable (though frequently conflicting or ambiguous) norms²² and the conflict escalates (facilitated by the denial of retreat or the existence of a clear hierarchy

¹⁸ Hom. *Il.* 1.258: "you two quarrelling, you who are chief among the Danaans in counsel and chief in war".

¹⁹ Hom. *Il.* 1.258ff: "Listen to me, for you are both younger than I. In earlier times I moved among men more warlike than you, [260] and never did they despise me... [270] And I fought on my own; with those men could no one fight of the mortals now upon the earth. Yes, and they listened to my counsel, and obeyed my words. So also should you obey, since to obey is better".

²⁰ Lloyd – Jones (1971), p. 13: "Had Nestor and not one of the disputants been the king, they would have been obliged to follow his instructions. But the quarrel is one in which the king, whose duty it is to give justice to his subjects, is himself a party, so that the human machinery for securing justice cannot be set into motion."

²¹ Hom. *Il.* 1.284ff: "In answer to him spoke lord Agamemnon: [285] "All these things, old man, to be sure, you have spoken as is right. But this man wishes to be above all others; over all he wishes to rule and over all to be king, and to all to give orders; in this, I think, there is someone who will not obey. If the gods who exist for ever made him a spearman, [290] do they therefore license him to keep uttering insults?". "Brilliant Achilles broke in upon him and replied: "Surely I would be called cowardly and of no account, if I am to yield to you in every matter that you say. On others lay these commands, but do not give orders to me".

²² Cf. Gagarin (1986), p. 105.

of these norms). Within a legal context, such a conflict of norms is rarer, since the law (unambiguous compared to unwritten norms) specifies how a case is to be decided. Prosecutors contain a series of adversarial incidents of a dispute in a single offence referred to in the written plaint, thus limiting the spectrum of irrelevant argumentation, as well as preventing any potential conflict of ambiguous norms.

Nonetheless, tendency towards liberal, ad hominem argumentation remains, especially in contexts resembling Athenian courts, in a system promoting adversarial argumentation and favouring the atmosphere of a village moot before large juries. Undoubtedly, some similarities with the Attic speeches are unavoidable. Achilles, inferior in status, tries to support his arguments with the concord of the audience²³. His main aim is to arouse hostility against the person of Agamemnon, since his cowardice and greed has led him to injustice and ingratitude against the whole army. On the other hand, Agamemnon, stresses his superior status and wants a quick end to the dispute, even by the threat of self-help. Both parties feel obliged to excuse themselves and put the blame on the other side, especially when addressing a respectable or superior third party. Gradually it becomes evident that rhetoric is the only weapon of participants to this dispute since violence (through the intervention of Athena) is declared unacceptable. Homer thus provides us with the first example of persuasive speech, in a context of conflict before a mass audience.

The second scene comes from the Iliad's Book 23, presenting two speeches of Antilochus, Nestor's son, both delivered after a chariot-race held under the auspices of Achilles in honour of Patroclus. Diomedes won the race and Antilochus came second (exploiting his skills or even trickery), overtaking Menelaus who finished third. However, Achilles, pitying Eumelus who, though meritorious, finished last, proposed to give him the prize for the second place. This provoked Antilochus' fury, who immediately protested. His purpose was to

²³ Humphreys (1983), p. 230 observes that in acephalous or 'stateless' societies disputants try to mobilise public opinion in support of acts of self-help. The community cannot remain uninvolved in the dispute, though it may be reduced to silent acquiescence in a questionable victory of the stronger party. She sets this scene as example, together with Telemachus' unsuccessful attempt to arouse public opinion against his mother's suitors in the Ithacan assembly in Odyssey 2.

secure the prize, assisted solely by means of his rhetoric, and he proceeded in three steps. Firstly, he stressed the injustice of this proposal, by presenting himself as the owner of the prize from which Achilles wanted to strip him (23.544: *μέλλεις γὰρ ἀφαιρήσεσθαι ἄεθλον*). If Achilles wanted to honour him, he should give Eumelus another prize, and not Antilochus'. Secondly, he puts the blame on Eumelus for finishing last, claiming that, although brave, in order to secure a good place he should have prayed to the Gods²⁴. Antilochus finishes his speech with a threat of self-help²⁵.

Antilochus' speech had attained its purpose, evidenced by Achilles' smile; he kept the mare and other gifts were announced for Eumelus. Nevertheless, although this dispute ended at its very beginning, Menelaus stood forth and accused Antilochus of stripping him of the second place through trickery (23.570-85). Therefore, the prize belongs to him, unless Antilochus accepts an oath-challenge²⁶, swearing that his deceit had not been done willingly. This is the moment of Antilochus' second speech. His implicit treacherousness and the threat of having a dispute with Menelaus induce him to surrender the prize and make reconciliation the best available purpose for his speech. Thus, while his first speech had an adversarial tone, claiming that he had been treated unjustly, his second speech resembles the procedure of arbitration (Menelaus himself asks for the leaders of the Achaeans to act as judges to their case) and aims at reconciliation. Antilochus, acknowledging his guilt but placing the blame on his

²⁴ Hom. *Il.* 23.546-7: *ἀλλ' ὤφελεν ἀθανάτοισιν εὔχεσθαι: τό κεν οὔ τι πανύστατος ἦλθε διώκων*. This argument seems to be a distant ancestor of a similar one from the fifth century's Antiphon's Tetralogies. There (*Ant.* 3.3.8) the prosecutor of a young man who has accidentally killed a boy while practising javelin-throwing argues that the young man may have been guilty of impiety and so, being 'stained', was manoeuvred by the gods into a predicament which would result in his condemnation for accidental homicide. One could also add Andokides' attempt to attack a similar accusation of 'condemnation due to impiety' by his opponents. He says: "We are asked to believe that the only object of the gods in saving me from the dangers of the sea was, apparently, to let Cephisius put an end to me when I reached Athens. No, gentlemen. I for one cannot believe that if the gods considered me guilty of an offence against them, they would have been disposed to spare me when they had me in a situation of the utmost peril—for when is man in greater peril than on a winter sea-passage? Are we to suppose that the gods had my person at their mercy on just such a voyage, that they had my life and my goods in their power, and that in spite of it they kept me safe?" (*Andok.* 1.137).

²⁵ Hom. *Il.* 23.553-4: *τήν δ' ἐγὼ οὐ δώσω: περὶ δ' αὐτῆς πειρηθήτω ἀνδρῶν ὃς κ' ἐθέλησιν ἐμοὶ χεῖρεσσι μάχεσθαι*.

²⁶ This is yet another remnant of the Homeric period which survived down to the classical Athenian legal system.

youth (a stereotype that continued down to the classical period), asks for Menelaus' patience and good will while offering the mare (23.587-92). Faithful to the purpose of reconciliation and recognising Menelaus' superior status (23.588), he even offers further goods from his possessions (23.593-4). Instead of a resort to insulting name-calling of previous instances, Antilochus mollifies Menelaus by calling him king (*ἄναξ*), a better and more powerful man (*πρότερος καὶ ἀρείων*), nourished by Zeus (*διοτρεφὲς*). Not only reconciliation is achieved, but Menelaus, soothed by Antilochus' speech, allows him to keep the prize, an outcome which in fact makes us wonder whether this was Antilochus' underlying purpose behind the apparent change of his rhetoric between his first and his second speech.

Homer, by offering in a short space two antithetical speeches by the same person, both achieving the same result (albeit through different tactics), enlightens us as to multiple potential uses of rhetoric, and offers a paradigm for suitable speech in different circumstances. Antilochus' dynamic and aggressive rhetoric of the first speech gave place to the mollifying and reconciliatory one when encountering Menelaus. This adjustment was successful and, by its accomplishment of Antilochus' aim to keep the prize, we may also infer that it was purposeful. The persons, the audience, and the purpose, set the environment for rhetoric; it is true that in accordance with these same factors Aristotle in late 4th century classified the types of rhetoric²⁷.

The third piece of evidence comes from book 3 of the Iliad. The scene is set on the walls of Troy. There, the old Trojans observe the Achaean leaders and ask Helen for information. When king Priam asks about a man and Helen identifies him as Odysseus, Antenor intervenes and offers his memory of their previous meeting. Odysseus and Menelaus were sent as envoys to Troy and Antenor describes his account of their rhetorical skills (3.212-24). He praises Menelaus for his precision and fluency; to this positive image he contrasts Odysseus' awkward original stance, followed by his eloquent speech:

²⁷ For deliberative speeches in Homer see Toohey (1994) where he examines five deliberative speeches of Nestor; Kennedy (1980), p. 11, finds similarities of Homeric rhetoric with yet another genre, namely epideictic oratory.

“But when wily Odysseus leaped up, he stood there, his eyes fixed on the ground, and looked up from under his eyebrows. He did not move the sceptre back and forth, but held it immobile, like an ignorant man. You could say that he was surly and witless. But when his voice came, loud, from his chest, his words like snow, no other man could compete with Odysseus” (3.216-24)²⁸.

Rhetoric had already established rules. Solemn performance and eloquent, pointed speech (a rule that acquired formality in Athenian courts) were the usual criteria for judging an orator’s quality. Nevertheless, the uncommon factor about Odysseus that surprised the audience was the interplay between personality (as wilfully presented by his original stance), performance, and speech. Public oratory required not only skill at verbal composition but also skill of another sort – a performative imagination through which character could be imagined and portrayed²⁹. Odysseus, a pioneer indeed of argumentation from character, by this antithesis between character (by means of his awkward stance) and speech (having surprising gravity), enraptured his audience, in a memorable - as to rhetorical skills - performance. Such a skilful presentation of a case, though concentrating on sketching character through the speech’s composition and not presentation, is attributed centuries later to Lysias by Dionysius of Halicarnassus. In my opinion, as in Lysias’ case, the great impact of Odysseus’ rhetoric was due to

“the impression that this arrangement has not been deliberately and artistically devised, but is somehow spontaneous and fortuitous. Yet it is more carefully composed than any work of art. For this artlessness is itself the product of art”³⁰.

Homer was indeed a master of this art.

²⁸ Cf. Bers (2009), p. 27: “Antenor commends Menelaus’ speech for excelling in what we might suppose were the usual criteria, clarity and persuasiveness ... there was, then, a way one was expected to speak, or at least to wield the sceptre, the physical object that, as it were, gave one the floor. Odysseus succeeds in part by playing off against an established mode to trick his audience into taking him for a dolt, or at least an amateur in the grip of embarrassment and fear”.

²⁹ Fredal (2001), p. 253.

³⁰ Dion. Hal. (Lysias 8.25-34).

The final scene is Thersites' 'arhetorical' performance in Book 2 of the Iliad. The Greeks tended to define things by their opposites, in forms of binaries (e.g. Greek / barbarian, man / woman, free / slave) and this is what I will try to do: uncover the ideas of skilful rhetoric by examining the model of its opposite. The poet, in order to allow the reader to judge the subsequent scene, offers a preliminary description of his person:

"He was the ugliest man of all those that came before Troy - bandy-legged, lame of one foot, with his two shoulders rounded and hunched over his chest. His head ran up to a point, but there was little hair on the top of it" (2. 216-19).

Thersites' rhetoric lacked the qualities that were mentioned before: it was mistimed, imprecise, disorderly, and disrespectful while his only care was to "set the Achaeans in a laugh"³¹. His speaking voice is characterised as loud, presumably too loud, and shrill (2.223-224), two qualities skilled speakers of the classical period worked to avoid³². Although he does not possess Achilles' status, he uses the same arguments (albeit distorted) against Agamemnon, even takes Achilles' side regarding their previous dispute, without considering his inferiority. This stood in contrast to the Homeric model of aristocratic domination where commoners who spoke out of place were soundly thrashed or worse³³. Unsurprisingly then, when Odysseus decides to put an end to this measureless speech, his act receives the unanimous approval of the army.

This last scene sheds light on two more issues, the first relating to the reaction of the people, and the second to the method that Odysseus used to silence Thersites. Although Thersites breaks the 'silent acquiescence' of the army and raises his voice, his act is far from justified. Mobilisation of the public opinion failed and as a result his punishment was applauded by his comrades.

³¹ Hom. *Il.* 2.212-15: "The rest now took their seats and kept to their own several places, but Thersites still went on wagging his unbridled tongue - a man of many words, and those unseemly; a monger of sedition, a railer against all who were in authority [*kosmos*], who cared not what he said, so that he might set the Achaeans in a laugh."

³² Bers (2009), p. 27.

³³ Fredal (2001) citing Martin (1989): In such a world "speaking length and audience tolerance were directly proportional to social rank: from Zeus to the lesser gods, from Achilles and Agamemnon to the lesser chieftains and soldiers. Aristocrats could by definition talk longest and best". Cf. Dover (1974), p. 30.

Furthermore, his general disposition (apart from his failed rhetoric), was certainly important in receiving such contempt by the public. Homer describes one (soldier) saying to the other

“Odysseus has done many a good thing ere now in fight and council, but he never did the Argives a better turn than when he stopped this man's mouth from prating further. He will give the kings no more of his insolence”³⁴.

It is evident that apart from his speech, his character and status also condemned him. As far as the method used in performing this widely accepted act, Odysseus

“beat him with his sceptre about the back and shoulders till he dropped and fell a-weeping. The golden sceptre raised a bloody weal on his back, so he sat down frightened and in pain, looking foolish as he wiped the tears from his eyes” (2.265-9).

But what does this sceptre represent in this and other contexts from archaic Greece? Firstly, it is a symbol of public authority³⁵. It arguably symbolises religious authority³⁶, being a gift of Zeus, and possibly constitutes a “dimming memory” of divine kingship³⁷. What is of major importance is its potential symbolism of judicial authority, as presented in the trial scene of Achilles’ shield (Iliad 18.497-508)³⁸. This symbol of rhetoric is used as the tool of punishment against Thersites, the unskilled speaker who dared to insult the kings without even carrying the sceptre (thus without having permission to speak³⁹). And by whom is he checked? By Odysseus, the skilled speaker, the one who rightfully holds the sceptre in his hands. The symbolism of that scene is powerful.

³⁴ Hom. *Il.* 2.272-7.

³⁵ See Gagarin (1986), p. 27.

³⁶ Gernet (1965), p. 240; Cf. Hom. *Iliad* 2.101-8; Gagarin plausibly states that such a religious symbolism of the sceptre is not present in Homer [Gagarin (1986) at p. 27, n. 28].

³⁷ Mondy (1980), p. 211; pace Calhoun (1962), p. 436.

³⁸ “The town elders sat in a ring, on chairs of polished stone, the staves [skeptra] of clarion criers in their hands, with which they sprang up, each to speak in turn”. Havelock (with reference to the dispute between Agamemnon and Achilles) states: “The performance of judgment is also a function of rhetoric: the one is achieved through the other, so that the sceptre is both a judge's symbol and a speaker's symbol”.

³⁹ The sceptre, apart from its symbolism, was also a practical way of achieving order in the course of crowded debates, since only the carrier had the right to speak.

Rhetoric in Homer had already rules of substance and procedure. Most of its basic features are present, only to be further developed in the following centuries. Procedural rules were set (albeit unwritten) as to who and when is allowed to speak. Substantive issues were developed as to how and what one ought to say in order to qualify as a skilled speaker. Finally the personality, disposition and character of a speaker were equally important in either adversarial speeches or deliberative ones.

The Scene on the Shield of Achilles

The most famous juridical scene of the archaic period comes from Homer's description of a trial depicted on the shield of Achilles in book 18 (Il. 497-508) of the Iliad. The scene runs as follows:

"In the assembly place were people gathered. There a dispute had arisen: two men were disputing about the recompense for a dead man. The one was claiming to have paid it in full, making his statement to the people, but the other was refusing to receive anything; both wished to obtain trial at the hands of a judge. The people were cheering them both on, supporting both sides; and heralds quieted the people. The elders sat on polished stones in a sacred circle, and held in their hands sceptres from the loud-voiced heralds; with these they were then hurrying forward and giving their judgments in turn. And in the middle lay two talents of gold, to give to the one who delivered judgment most rightly among them."⁴⁰

Although the legal interpretation of the dispute, as well as the above translation, is not free from controversy⁴¹, what is of interest here is not to offer yet another explanation but to highlight and utilise the uncontroversial facts of the scene. Thus, the previous discussion of rhetorical remnants will be followed by one about legal remnants of the archaic age, which were largely retained, reintroduced or transformed in the classical period. The large amount of such remnants has to be examined under the light of the conservatism and traditionalism of the Greeks⁴². This ideological context will add one more brick

⁴⁰ Translated by Macdowell (1978).

⁴¹ The translator (D.M. Macdowell) admits that lines 499-500 could be rendered: "the one was claiming to have paid it in full ..., but the other was denying that he had received anything".

⁴² This traditionalism extends from "the inclination of composers of epitaphs to perpetuate traditional formulae and to use resounding Homeric epithets" [Dover (1974), p. 7], to the political nostalgia and search for the reestablishment of the *patrios politeia*, the ancestral constitution, which was "always a Good Thing: the term *patrios politeia* silenced the critics and they could

to the plausibility of this thesis' suggestion that the liberal use of character evidence was characteristic of the early stages of Greek law and, although substantiated and transformed, was nevertheless retained by Athenian litigants⁴³.

The main issues arising from this scene (whether it is imagined or real, does not make any difference) must be examined, since they contribute to our understanding of the archaic judicial process and may offer some insight on their approach to argumentation.. One feature of the classical Athenian legal system that has drawn attention from the vast majority of scholars is the adversarial nature of its trials.

Adding to this the real difficulties of the era, such as examining factual issues in an environment where collection of evidence was based solely on testimonies, one can explain the 'my word against your word' approach as well as the dependence of the system on partisan witnesses⁴⁴.

This last observation brings me to the multidimensional role of people in archaic trials, as evidenced by the trial scene on the shield. Starting with the described partisanship, one may safely argue that litigants had to direct their argumentation both to judges and crowd. Scholars studying the settlement of disputes in early Greek literature, such as the famous scene depicted on the shield of Achilles, have often noted that a public forum like the agora or the assembly seems to have been an essential element in the early judicial

only retaliate by arguing that *their* ideal was the *true* ancestral constitution." [Hansen (1991) p. 297]. As Hansen (1991), p. 296 notes: "Like many Greeks, the Athenians had a soft spot for the 'golden age', the belief that everything was better in olden times and that consequently the road to improvement lay backwards and not forwards".

⁴³ This tendency, evident in the archaic age and persistent until the classical one, had deep roots in the psychology and philosophy of the Greeks. An all-embracing solution will be offered in the course of the next chapters.

⁴⁴ Arist *Politics* [1269a] refers to a "quite absurd" ancient law from Cumae of Magna Graecia: "for example, at Cumae, there is a law about murder, to the effect that if the accuser produces a certain number of witnesses from among his own kinsmen, the accused shall be held guilty". This certainly reflects a period during which social peace and stability mattered more than justice, but also reveals the difficulty of gathering evidence in order to solve a case.

process⁴⁵. This was possibly yet another incentive for a broader invocation of character evidence, in an effort to receive good will, persuade a mass audience and increase credibility. Secondly, under such conditions of a village moot, people tend to speak by heart; litigants follow their natural tendencies, with argumentation resembling everyday disputation. This environment of village moot or 'personal justice' achieved by familiarity was positively endorsed during the classical period.. Aristotle, in a time when the polis (and the Athenian democracy) was reaching its end, still believed that straight judgment can be achieved by judges personally knowing the character of litigants⁴⁶. The courts of classical Athens, whether or not functioning within a 'face-to face' society⁴⁷, in an effort to understand the context of a dispute and its background in an era when the gathering of hard evidence was impossible, allowed for a wide use of oral evidence directed at the portrayal of litigants' personality and mode of life, in order to bridge the gap.

Public opinion was important for verdicts as well. The crowd, putting heavy pressure on the parties to accept a fair deal offered by the judges' best opinion

⁴⁵ Lanni (1997), p. 188 recaps scholarly assumptions: "It is often assumed that the spectators at Homeric and Hesiodic dispute settlements were the precursors of the classical Athenian juries. MacDowell, for instance, writes that the 'speakers haranguing the crowd on the shield of Achilles [...] are forerunners of the orators who addressed the Athenian juries', and Humphreys examines Hesiod and Homer in an attempt to map 'the transformation of the crowd into a jury' in Attica".

⁴⁶ Arist. *Politics* [1326b 15-20]: "in order to decide questions of justice and in order to distribute the offices according to merit it is necessary for the citizens to know each other's personal characters, since where this does not happen to be the case the business of electing officials and trying law-suits is bound to go badly; haphazard decision is unjust in both matters, and this must obviously prevail in an excessively numerous community".

(πρὸς δὲ τὸ κρίνειν περὶ τῶν δικαίων καὶ πρὸς τὸ τὰς ἀρχὰς διανέμειν κατ' ἀξίαν ἀναγκαῖον γνωρίζειν ἀλλήλους, ποῖοί τινές εἰσι, τοὺς πολίτας, ὡς ὅπου τοῦτο μὴ συμβαίνει γίνεσθαι, φαύλης ἀνάγκη γίνεσθαι τὰ περὶ τὰς ἀρχὰς καὶ τὰς κρίσεις. περὶ ἀμφοτέρω γὰρ οὐ δίκαιον αὐτοσχεδιάζειν, ὅπερ ἐν τῇ πολυανθρωπίᾳ τῇ λίαν ὑπάρχει φανερώς.);

cf. Wolff (1946), p. 38: "Jolowicz compared the Homeric 'istor' to the English jury in its most primitive form, when it was not yet a body of men who decided on the ground of the evidence laid before them, but a group of neighbours who gave their verdict on the ground of their own knowledge of the facts involved... Jolowicz's comparison certainly fits in with Iliad 23.486, where Agamemnon is called upon by Idomeneus and Ajax to act as an umpire familiar with the facts, as he is himself one of the spectators, in their controversy over the result of a chariot race. It is also in complete agreement with the etymological meaning of the term istor, and there can be little doubt that it applies as well to the istor who appears on the shield of Achilles."

⁴⁷ Face to face society is supported by: Finley [1973] 1985, p. 17 and (1983): pp. 28-9 and 82; Osborne (1985), pp. 64-5; Hunter (1994), pp. 96-119; Cohen D. (1991), pp. 155-6; Whitehead (1986), p. 69; For a contrary view see Cohen E. (2000), pp. 105ff.

acted as the legitimising force of a verdict. This can be interpreted as the root of 'decision-making by majority vote' of later times. Spectators could hold judges to account (as they arguably did in classical Athens)⁴⁸, limiting arbitrariness or inconsistency of decisions. Possibly, this was a subsidiary factor that induced archaic *thesmothetae* to write down their previous decisions for future reference⁴⁹.

Finally, the whole picture of archaic trials reveals the openness of the system. This aspect, favouring wide participation of amateurs, increased liberality in argumentation and, by the same token, resort to character evidence. Classical Athens insisted on an ideology of amateurism even after the full development of the court system. Despite their degree of experience, magistrates responsible for introducing cases to courts were plain citizens selected by lot, as were the jurors. Legal direction by any expert judge was absent, as was any formal deliberation before the verdict. Litigants, sometimes resorting to the aid of supporting speakers (and these, at least in principle, had a direct interest in the case), were expected to speak for themselves. Legal experts were approached with suspicion and overacting participants faced serious dangers⁵⁰. In this legal environment, taking into account the traditionalism of ancient Greeks, it was safe to walk on the path of your predecessor, retaining the role originally ascribed to his office. Although the system evolved (from equity and reconciliation to law enforcement and 'winner – loser' system) and transformed⁵¹, significant trends remained.

1.2 Rhetoric in the Poems of Hesiod

Hesiod provides us with further evidence as to the evolution of the law in archaic Greece and the emergence of a legal system. What is particularly

⁴⁸ See Lanni (1997); on the incorruptibility of masses as opposed to less numerous panels of expert judges see Arist. *Politics* [1286b26-35], and *Ath. Pol.* 41.2; cf. Neel (1994) at p. 108; Mirhady (2006).

⁴⁹ Arist. *Ath. Pol.* 3.4.

⁵⁰ Cf. Lanni (1999), p. 29; Legal expertise as suspicious and as incentive for sycophancy is discussed by the majority of legal historians and classicists (an indicative list would include Lofberg (1976), Christ (1998a), Macdowell (1978) 62-66; Osborne (1993); Harvey (1993); Harris (1999).

⁵¹ For instance, Humphreys (1983) suggests that this partisan crowd was the precursor of the mass juries.

important to this study is the (explicit and implicit) evidence that both his major poems (*Theogony*, *Works and Days*) provide regarding argumentation during the settlement of disputes in the late 8th or early 7th century BCE⁵². The first passage that is of aid in tracing the remnants of archaic Greek law, with wide use of character evidence being one of them, comes from Hesiod's *Theogony* (80-93). In that passage the poet refers to the benefits that the Muses confer on kings. If the Muses favour a king, Hesiod says:

"soothing words flow from his mouth. And all the people look at him, deciding the proprieties with straight settlements. And he, speaking surely, quickly and intelligently puts an end to even a great dispute." (84-90) Therefore there are intelligent kings, in order that in the agora [the public meeting or market place] they may easily restore matters for people who have suffered damages, persuading them with gentle words".⁵³

Evidence is therefore provided that the gift of persuasion and the value of rhetoric must have been already present in the archaic Greek system of justice. It may be assumed that when a notion (here rhetoric) is valued to such a degree that even the kings are considered blessed if the Muses confer on them this benefit, this notion is also looked for by common people, let alone by litigants. Moreover, such a system of – presumably - voluntary arbitration⁵⁴ which favours equitable decisions with a view to reconciliation possibly provides a fertile ground for more natural and liberal argumentation. To follow Hesiod, rhetoric is valued for its soothing force in a village moot, capable of convincing both litigants and spectators for the 'straightness' of a judgment. Nevertheless, since public opinion played an important role in the proceedings, it need not be speculative if it is suggested that apart from the judge, litigants had to convince the audience as well. Conformity with public opinion by gaining its goodwill and concord would increase the chances of reaching a favourable conclusion⁵⁵.

⁵² See Gagarin, (1986) p. 19, n.2.; cf. West (1966), pp. 40-48; Janko (1982), pp. 228-31 places Hesiod's works in the first half of the seventh century.

⁵³ Tr. Gagarin (1986), p. 24.

⁵⁴ Ibid. at n. 25.

⁵⁵ Roth (1976) recognises that in this passage the king's "unerring speech and gentle words are an integral part of his work as an arbitrator. The king's judicial function is actually at least as prominent in this passage as his oratorical performance". She goes as far as to suggest that the gift of the Muses to the kings was the memorisation of an oral collection of legal rules, which formed the basis of their judgment (p. 336): "If every citizen was obliged to remember the laws,

The second piece of literary evidence comes from Hesiod's *Works and Days* (27-39). The central theme is the dispute⁵⁶ between the poet and his brother Perses, after the division of their inheritance. Whatever the details of the case, Hesiod is unwilling to submit (or resubmit) the dispute to the 'gift-devouring kings' and calls his brother to settle the matter themselves. The voluntary nature of arbitration and Hesiod's dislike of the judges (and / or their previous decision) have urged some scholars to propose that the recital of the *Works and Days* was an attempt to mobilise public opinion in order to achieve justice as he imagined it⁵⁷.

If this approach is correct (and in my opinion it largely is), then Hesiod's *Works and Days* provides a testimony of a litigant's plea in an effort to convince a mass audience. Liberal approach to argumentation could have reached the heights of poetry, and Hesiod's verses provide us with a monument of positive character portrayal, namely a quiet, pious, caring individual valuing justice above anything else⁵⁸. Following an ordinary for a litigant adversarial model of pleading, the main binary of this poem is between *dike* and *hubris* (or *bie*)⁵⁹. His portrayal is continued in lines 189-94:

a judge must have had a more specific obligation to remember them accurately. Memory, then, was an essential faculty for an early Greek judge". Such a verdict, being welcome by an already educated community familiar with legal rules, would embrace the kings with broad respect. This thesis is criticised by Gagarin due to the absence of other literary evidence (particularly in Hesiod), but one way or another, both acknowledge the important role of the audience in the pressure they could exact on the judge. Gagarin (1986), p. 26; Cf. Humpreys (1983), p. 237.

⁵⁶ Griffith (1983), p. 57 suggests that the dispute is entirely a poetic fiction. Even in such a case, Hesiod is likely to have drawn a picture of the process for settling disputes with details familiar to his audience (cf. Gagarin (1986), p. 34, n.44).

⁵⁷ Humpreys (1983), p. 231, recognising the importance of the public pressure, states that "Works and Days (28-9) does not specifically state that the case was judged in public, but since listening to lawsuits was one of the diversions of the idlers in the agora, it seems likely that there was an audience. He hopes to reach a wider audience with his grievances by expressing them in poetry: he has no confidence in formal legal institutions". She even finds in this passage traces of the primal transformation of an audience into a jury.

⁵⁸ Cf. *Works and Days* (276-80): "Zeus established the following way of life [*nomos*] for men: whereas for fish and beasts and winged birds it is the custom to eat one another, since there is no law [*dike*] among them, to men he gave law, which is by far the best thing."

⁵⁹ Cf. Gagarin (1986), p. 47: "This opposition has a general aspect, namely the contrast between observing and violating the norms of the society, and a more specific aspect referring to the observation or violation of rules for the proper operation of the legal process".

“Settlements will be by force and one man will destroy the city of another. And there will be no appreciation of a man who keeps his oath nor of a just (*dikaïos*) man nor of a good man, but they will instead honour the doer of evils and violence. Justice (*dike*) will be by force and there will be no respect, and the worse man will injure the better man by speaking with crooked words, and he will swear a false oath”.

In his effort to win good will, Hesiod uses arguments that are in concord with the values of his audience⁶⁰. Also, by presenting justice as a matter of importance to each individual, he heightens the level of attention⁶¹. In a subtle way, he attacks his brother’s character (214-6, 274-5) and transforms himself into a preacher of justice for the benefit of the polis (225-237). Positive portrayal of one’s character, innuendoes aiming at character assassination, and an effort to gain the goodwill of the audience by presenting oneself as a peaceful, just citizen, who by his behaviour promotes the public interest, are specific patterns of extra-legal argumentation in the Attic orators. Hesiod provides both direct and implicit evidence of a primal forensic rhetoric, traces of which have travelled through time and space to 4th century Athens. The innocent victim who acts in wholehearted adherence to the quiet communal norms required by the new institution of the polis (i.e. the image of a *philopolis*), whose personal dispute becomes a matter for the whole community and through the norms and ideas expressed achieves universality, touches the heart of Athenian forensic rhetoric.

1.3 Probability and Character Evidence in the Homeric Hymn to Hermes

The Homeric Hymn to Hermes is an invaluable piece of evidence about settlement of disputes in the late archaic period (presumably towards the end of the sixth century BCE)⁶². The dispute arises when the newly born Hermes steals Apollo’s cattle, hides them in a cave and slaughters two of them. Apollo, inquiring about his cattle accuses Hermes of the theft, while the latter in a masterpiece of character portrayal, denies that he even knows what cattle are, due to his infant ignorance. That moment is crucial to understand the use of character evidence in the archaic period. Hermes, in establishing character evidence as a method of pleading one’s case, sheds light on the inconsistency

⁶⁰ Cf. *Arist. Nic. Eth.* 1167a-b.

⁶¹ Cf. *Arist. Rhet.* 1415b3-5.

⁶² E.g. Janko (1982), p. 143; Papakonstantinou Z. (2007), p. 83.

of the deed with his personality, pointing to the unnaturalness of the deed for a person of his calibre and his age. Such an act neither conforms to his 'role' nor to the stereotypical behaviour to be expected by an infant. It is actually the very first evocation of an argument from probability. His disposition is to care about childish matters:

"Am I like a cattle-lifter, a stalwart person? This is no task for me: rather I care for other things: I care for sleep, and milk of my mother's breast, and wrappings round my shoulders, and warm baths. Let no one hear the cause of this dispute; [270] for this would be a great marvel indeed among the deathless gods, that a child newly born should pass in through the forepart of the house with cattle of the field: herein you speak extravagantly. I was born yesterday, and my feet are soft and the ground beneath is rough; nevertheless, if you will have it so, I will swear a great oath by my father's head and vow that [275] neither am I guilty myself, neither have I seen any other who stole your cows —whatever cows may be; for I know them only by hearsay." (265-278)

However, the conflict escalates. Apollo's insulting words (280ff.) and threats of use of force, make Hermes suggest submission of their dispute to Zeus. An assembly of gods was called (326), with Zeus setting "the scales of judgment for them both" (324). The following scene reveals the adversarial nature of voluntary arbitration, where accusations and counteraccusations go hand in hand, in a manner reminding the method of argumentation in classical Athenian courts. Apollo, the 'plaintiff', concentrates on the central issue of the dispute accusing Hermes, the 'defendant', while the latter resorts to counteraccusations and a presentation of the wider context of the conflict, stating that Apollo burst into his house in an illegal search (368-86)⁶³. Apollo, launching insults against the infant Hermes (336-40, 345) presents his case providing circumstantial evidence: Hermes was the thief. Any efforts from the infant to prove himself innocent, though ingenious, were unsuccessful. Apollo concludes that Hermes

"lay down in his cradle in the gloom of a dim cave, as still as dark night, so that not even an eagle keenly gazing would have spied him. Much he rubbed his eyes with his hands as he prepared falsehood, and himself straightway said roundly: `I have not seen them: I have not

⁶³ Cf. Gagarin (1986), p. 40; MacDowell (1978), p. 148; for the tendency of the prosecutor to transform a dispute into a legal case and of a defendant to offer a wider background and context, see Johnstone (1999).

heard of them: no man has told me of them. I could not tell you of them, nor win the reward of telling.” (358-365).

Hermes on the other hand begins with an attack against Apollo’s character pointing particularly on his violent behaviour and procedural norms:

“He brought no witnesses with him nor any of the blessed gods who had seen the theft, but with great violence ordered me to confess, threatening much to throw me into wide Tartarus” (369-374).

Then, portraying himself as weak and above suspicion, in contrast with Apollo’s strength, offers a tricky, sophistic oath:

“For he has the rich bloom of glorious youth, while I was born but yesterday —as he too knows —, nor am I like a cattle-lifter, a sturdy fellow. Believe my tale (for you claim to be my own father), that I did not drive his cows to my house —so may I prosper—nor crossed the threshold: this I say truly. I reverence Helios greatly and the other gods, and you I love and him I dread. You yourself know that I am not guilty: and I will swear a great oath upon it:—No! by these rich-decked porticoes of the gods. And someday I will punish him, strong as he is, for this pitiless inquisition; but now do you help the younger.” (375-386)

The poem, magnificently describing Hermes’ acting who, in his effort to gain the goodwill of the Gods and support his credibility, even kept his swaddling-clothes in order to prove that his character and age were inconsistent with such a deed:

“So spake the Cyllenian, the Slayer of Argus, while he kept shooting sidelong glances and kept his swaddling-clothes upon his arm, and did not cast them away. But Zeus laughed out loud to see his evil-plotting child [390] well and cunningly denying guilt about the cattle.” (388-390).

The dispute ends with Zeus convincing them to give up their anger, both taking positive steps to achieve reconciliation, which after all was the aim of voluntary arbitration of disputes⁶⁴. Nonetheless, even under such secure conditions, the

⁶⁴ Luban (1986), p. 289: “The dispute between Apollo and Hermes is resolved by an amicable settlement and not a judgment. If we pose the dilemma: peace or justice?-then Zeus’ answer is ‘peace’”.

poem offers an undoubted confirmation of the value of evidence from character in archaic Greece.

1.4 The Transcendent Play: Aeschylus' *Eumenides*

The *Eumenides* (458 BCE) begins the action in a pre-judicial society, where the dispute arises not due to a breach of a (written) law but due to an act of intentional homicide⁶⁵. This is unacceptable by the aggrieved parties and calls for retribution through self-help. The play is interpreted as the aetiological myth behind the establishment of the court of Areopagus and, by the same token, the court-system in general. Therefore, although referring to the distant past, Aeschylus mixes contemporary elements of judicial procedure and offers a transcendent picture of Athenian courts. Analysis of this play offers an insight to the underlying legal and rhetorical ideas of the day. Although sometimes deviating from the strict treatment of argumentation, the following discussion illuminates Athenian approaches to justice three decades before the period of the orators, sketches the canvas on which they have put their marks and reveals the structural and ideological tensions instigated by the reforms in the function of the Areopagus.

The Furies, acting on behalf of Clytemnestra (the victim) chase Orestes (the perpetrator) to exact his punishment (135-140, 176, 185ff. 300). The Furies represent the Old Order, where acts of vengeance and retribution, justified by a primal sense of justice, lead to an interminable circle of violence between opponents. Orestes, desperate for protection, introduces the dispute in the public sphere, by asking the aid of Apollo. The purification offered by the latter (281-7, 445, 578), being a stage of the early process of overcoming the pollution inflicted on the perpetrator of homicide (which left its remnants to the classical age as well), is not sufficient. On the other hand, the Furies want the dispute to remain private. Only an intervention by a powerful, respected and widely accepted third party could end this circle of violence, by channelling the feud into an acceptable institution (here arbitration by Athena). Again, however, this is not perfectly legitimate, even though both parties agree to submit their

⁶⁵ See Sommerstein (2010); Leao (2010); Naiden (2010). For a more general commentary see Somerstein (1989).

dispute to her. Athena, declares herself incompetent (470-2) and announces the foundation of a new institution, the court of the Areopagus. This new institution, which was foreseen by Apollo, provides alternative means of exacting justice, in the form of persuasive rhetoric rather than raw force (81-2). The fact that jurors are chosen among the finest citizens of Athens reserves consideration for public opinion, legitimising thus its operations.

The facts of the case are not in dispute (463, 588, 611). Orestes has killed his mother, Clytemnestra, following the oracle of Apollo, in order to avenge the murder of his father. However, the parties disagree as to whether the murder was justified (lawful homicide 468, 472) or not, and both believe in the validity and justice of their claims (155, 210-220, 272, 312, 510). A mere conflict as to priority of values conceals a conflict between two worldviews. Gradually, the establishment of the court and the transformation of a never-ending dispute into a purely legal issue, transforms a pre-judicial society of disorder and self-help (personified by the Furies), into the new order of the Olympians, namely an ordered polis, founded on legality, justice and reconciliation⁶⁶.

The legal issues of the case are equally fascinating. The play transcends spacetime and shows a picture of three different systems of justice, one based on self – help and retribution, another on voluntary arbitration, and finally the formal adjudication within a court system. The first system represents a pre-judicial era, where justice was equated with retribution and punishment. The second system represents a proto-judicial form of justice, which although retained down to the classical period, was based on equity⁶⁷ rather than enforcement of law. Finally, the court of the Areopagus represents the rule of law; a legal order where disputes are transformed into legal cases, argumentation takes the form of forensic rhetoric, and an impartial jury gives its verdict in accordance with law (680, 710). This new institution, supported by the powerful members of society (here Athena), inspiring respect and fear – deterrence (690, 827), recognises as its primary aim the harmony of the polis.

⁶⁶ Cf. Seaford (2003).

⁶⁷ See Arist. *Nic. Eth.* [1137a32–1138a3]; See also Arist. *Rhet.* [1374a25–b23]; cf. Beever (2004).

Public interest and social order provide benefits for the parties themselves; apparently, when the Furies (the losing party of a tie vote) face the dilemma of dwelling honoured in a prospering Athens or leaving (851-870, 887), they decide for the former (900).

Nevertheless, this picture of the court is not fully consistent with the Athenian system in practice. Arbitration can be a win-win system, but court decisions tend to create winners and losers⁶⁸. Under the latter, reconciliation is not possible and losing parties may be aggrieved and subsequently hostile to the polis. On the other hand, lenient treatment or avoidance of harsh punishment to keep both parties satisfied may become disadvantageous. When the Furies describe how disorder and injustice will prevail if the unjust fears no more, they anticipate possible tensions and balance of interests that this court system has to encounter.

Aeschylus proposes a mixture of the three systems of justice, retaining the positive features of each. Fear of punishment (in the form of violent retribution) of the first system, is transformed and legitimised under the shield of the polis, and the law, impartial and cold provides in advance the outcome of each case. Arbitration, especially in a voluntary manner aims at reconciliation. Aeschylus retains this utmost purpose as beneficial to the new order. Thus, for the new system to promote the harmony of the polis, it has to aim at the reconciliation of the parties, simultaneously promoting the good will of the losing party towards the city. Instead of simply using the strong arm of the law as punishment and deterrence, which could provoke humiliation and create incentives for revenge, one should aim at the transformation of the losing party into an educated good member of the polis. Finally, the arbitrariness of primitive systems is substituted by the rule of law as expressed by the verdicts of an impartial court. Legitimacy is guaranteed by the participation of citizens, the jurors' submission to oaths and the public's harmonious adherence to decisions.

⁶⁸ Nevertheless such an absolute conclusion could be smoothed by the Athenian trials' *timesis* phase.

Aeschylus' vision, as interpreted here, notwithstanding the expressed reservations, is not entirely alien to Athenian courts. Although arbitration (promoting equitable solutions) and court system (reaching legal verdicts) coexisted in classical Athens in a parallel fashion, this process of evolutionary experimentation transformed the archaic ideas about justice and created new ideals. Athenian traditionalism is undisputed, but the extremely important innovations of written law-codes, mass jury courts (as opposed to potential arbitrary magistrates), and legal verdicts (verified by oaths), allowed for a different approach to justice. In this context of tension and order, experimentation and steadiness, reconciliation and punishment, a new legal system emerged; elaborate, pluralistic, and capable of achieving the rule of law. The new courts of law, final guardians of legality, retained tolerance to liberal argumentation, allowing for flexibility, albeit without inhibiting the emergence of the rule of law.

In the *Eumenides* in particular, as far as rhetoric is concerned, many similarities can be observed with the Attic orators. A wide use of extra-legal argumentation is adduced, notwithstanding the fact that Athena reminds the jurors to respect their oath (490, 710). Certainly, this does not mean that, as Aeschylus favoured a semi-legal, semi-equitable approach to justice, the same is true for Athenian courts of the late 5th and early 4th century. Nevertheless, this liberal argumentation found in the *Eumenides*, adds one more argument that this approach was a remnant of the archaic age, neither inconsistent with legality and justice nor with the requirement of 'speaking to the point'. Character evidence, though more relevant to the context of arbitration, was apparently (and purposefully) not restrained under the new system of courts.

In the play, Orestes and Apollo use arguments about the 'public interest', try to gain the good will of the jurors and picture the impact of a positive verdict (289, 670). In the Attic orators, it is usual for a litigant, apart from mentioning any harsh impact of a potential adverse verdict, to stress the justice of his case in connection with the positive public impact that a favourable to himself outcome

would produce⁶⁹. On the other hand, the adversarial nature of Athenian trials forced opponents to refute such an argument in order to prevent a favourable to the adversary verdict⁷⁰. Hence, such a 'public impact' consideration still retained its force. However, what is not explicitly evidenced in the Attic orators (and this is certainly explicable) is the kind of argumentation resembling that of the Furies. They, in their part, also argue about the impact that an adverse verdict would have, not on them (as in the Attic orators) but on the polis (502, 720). This impact was their direct threat of destruction and famine that would fall on the city. Nonetheless, in the context of Athenian trials, such arguments would be suicidal⁷¹. Aeschylus, through the final appeasement of the Furies, reveals the proper way of making this system work. One way or another, invocation of such argumentation based on public interest remained central and relevant to the legal case.

Another similarity with the Attic orators, refers to the issue of 'political correctness' shown by hereditary loyalty to the court, the constitution, or the jurors (or the opposite, hereditary enmity)⁷². A similar argument is adduced (455-6) to reveal the friendly relations of Orestes' father, Agamemnon (whose death he avenged), with Athena. This argument aimed at the establishment of contact with the jurors, directly or indirectly in order to gain their good will. A similar tactic is used by Apollo, when he argues that his oracle interpreted the will of Zeus (617-21). Athenian litigants frequently refer to their services to the polis and their friendly relations with highly respected members of society or their detestation and enmity to persons hated by the jurors as well⁷³. This establishment of concord in order to produce a friendly disposition of the audience is also suggested by Aristotle (e.g. *Rhetoric* 1381a, *Nic. Eth.* 1167a-b).

⁶⁹ See for e.g. Dem. 28.24. A more exhaustive account of this kind of argumentation will be offered in the course of this thesis therefore I offer here indicative examples.

⁷⁰ See for e.g. Dem. 25.42.

⁷¹ Covert threats were possible and sometimes obvious at first glance, though such an explicit threatening argumentation would certainly produce the opposite result that the one aimed at. Definitely, the inability of Athenian jurors to harm the whole polis (in contrast with the Furies' real threat) certainly played a role; cf. Lys. 14.

⁷² See for e.g. Dem. 25.32.

⁷³ See for e.g. both Demosthenes' and Aescines' effort to reveal the opponents' contact with (condemned for treason) Philocrates in Dem. 18, 19 and Aeschin. 2 and 3.

Athena, in a procedure resembling ‘*anakrisis*’⁷⁴, had already asked for the background of the parties, as well as the background to the dispute. Apollo, a supporting speaker (579), argues for the justice of Orestes’ act (as well as his own support) by arguing that his oracle was Zeus’ command, which here represents the ultimate law (621). Apollo is the infallible interpreter of Zeus’ will, and since Orestes’ act conformed to his interpretation, it is unavoidable that the three of them are in concord. Again, this resembles paradigms from Athenian courts, in the sense that litigants offered themselves interpretations of relevant laws, and tried to prove that their acts were in concord with the interpretation of the stronger party, the majority vote of the jury. In the absence of *ratio decidendi*, winning litigants’ speeches, substituted the archaic judges’ opinions from which the ‘straightest judgment’ was chosen (as represented in the scene of Achilles’ shield), and contained the verdicts’ rationales⁷⁵. The adversarial nature of argumentation is much more evident than in Attic orators but nevertheless retains similar characteristics. Refutations of the adversary’s arguments, a wider background of the dispute (625) in order to prove one’s right, an effort to gain the goodwill of the judge (666), arguments from precedent (not strictly legal but persuasive: 718) and reference to gratitude (725) are offered.

A closer look of the above issues is revealing. Athena establishes the fairness of the procedure by asking both parties to submit their cases (428). The Furies, while interrogating the matricide Orestes, rejoice at their successful attempts in showing his guilt (589), simultaneously trying to influence the jurors. On the other hand, Orestes, willingly submits his fate to Athena. His former supplication

⁷⁴ Wolff (1946), p. 70; Harris (2000), pp. 76-7.

⁷⁵ If my interpretation of the underlying philosophy behind decision-making in archaic and classical trials is correct, similarities can be drawn between the Homeric judges’ prize for ‘straight dike’ (as appears in the scene of Achilles’ shield) and the ‘jurors’ pay’ in Athens (a measure proposed by Pericles himself shortly after the reforms of Ephialtes). Therefore, at the same time as being a democratic measure for the facilitation of wider and indiscriminate participation in Athenian juries, jury pay may as well symbolise an acknowledgment of every single Athenian juror’s ability to reach a ‘straight dike’. The jurisdiction of the archaic judges (offering their opinions in advance before deciding the best solution) passed to litigants, thus sliding over the last semi-professional participants of the system of justice. Finally, this last form facilitated the ‘black or white’ approach of courts, whereas the previous form, was retained in its most suitable sphere, that of arbitration.

(474), although not taking place in the course of the trial, also reminds scenes from Athenian trials where defendants chose this ultimate method of asking for pity, coupled with their innocence⁷⁶. Apollo, the supporting speaker, uses euphemistic words for the court directly addressing the jury (614) and for Athena (664), while degrading the Furies with insulting name-calling (644). Furthermore, the praise for the dead manly warrior Agamemnon (625, 637), especially in light of his sneaky murder by a woman (627) and wife, is used to arouse the emotions of the jurors (638), and closely resembles the tactics of argumentation in Athenian homicide trials. Finally, Apollo's personal occupation as being the infallible soothsayer of Zeus' will (616) proves the justice of Orestes' act, and again reminds the positive or (mainly) negative effect of referring to occupation or calling in the Attic orators in order to prove or disprove the credibility and disposition of a litigant.

The use of precedent is equally interesting. Although modern scholars attribute different characteristics and aims to this form of argumentation in Athenian courts⁷⁷, it is useful to remember that Aristotle in his *Rhetoric* (not a legal treatise but a manual for speakers), treated precedent as a form of example whose aim was not solely to prove the legality of a case but to persuade the audience about the truth or plausibility of an argument by reference to the past (e.g. Rhet. 1356b, 1357b, 1377a etc.). In the *Eumenides*, at first sight, a similar approach is taken, but a closer look will reveal that different forms of precedent (factual, legal, persuasive) had already been clarified.

Starting with the simplest form of precedent that is used in the text, the factual, it does not require any legal insight but merely rational thought in recognising similarities and differences. Apollo in support of his argument that father is the real parent of a child, and therefore Orestes' act of matricide is justified in avenging the death of his father, cites the following as example, which although not repeatable has persuasive force:

⁷⁶ Johnstone (1999) and Naiden (2004) have already plausibly suggested that this act on the part of Athenian defendants, apart from merely arousing the emotions of jurors, was also a practical way of ritualising and visualising their total submission to the Athenian demos and the will of the court.

⁷⁷ E.g. Lanni (1999); Harris (2007b).

“The mother of what is called her child is not the parent, but the nurse of the newly-sown embryo. The one who mounts is the parent, whereas she, as a stranger for a stranger, preserves the young plant, if the god does not harm it. And I will show you proof of what I say: a father might exist without a mother. A witness is here at hand, the child of Olympian Zeus, who was not nursed in the darkness of a womb, and she is such a child as no goddess could give birth to” (658-65).

Notwithstanding the fact that such an argument is far from persuasive and highly sophistic, it nonetheless shows how an argument from precedent could be used in support of one’s case. The second example is deeper and more revealing. When Apollo argues that Zeus gives a greater honour to a father’s death, the Furies remind him that Zeus himself bound his aged father (640-3). Nevertheless, Apollo, in a logically and legally persuasive argument, distinguishes the two cases by arguing that

“Zeus could undo fetters, there is a remedy for that, [645] and many means of release. But when the dust has drawn up the blood of a man, once he is dead, there is no return to life.” (644-7).

An act of homicide needs to be distinguished from a rectifiable act of violence. Finally, I would argue that the third example of argumentation from precedent suffices to clinch the issue. Both litigants address the jurors while they vote, arguing for the justice of their case (711-714). The Furies threaten them with their rage while Apollo directs them to respect his oracles, which come from Zeus. To this the Furies protest and refer to them as outside the scope of Apollo’s oracle since they are impure. Apollo’s reply is convincing:

“Then was my father mistaken in any way in his purposes when Ixion, who first shed blood, was a suppliant?” (717-8).

Apollo refers to a previous, unmistakable ‘verdict’ taken by Zeus. How similar were the two cases? The most complete account of Ixion's tale comes from Pindar in his Pythian Odes. Ixion is a fundamental character in Greek mythology, significant in many respects, but is chiefly known as the first human

to shed kindred blood. This occurred when Ixion invited his father-in-law, Deioneus, to come and collect the price that Ixion owed him for his bride. Upon his arrival, Deioneus fell into a pit filled with burning coals Ixion had camouflaged. Because this was a crime new to the human race, nobody could purify Ixion and he wandered in exile. Zeus took pity on him and decided not only to purify Ixion, but to invite him to Olympus as a guest. The similarity of the case Apollo chooses is striking. The first example of legal precedent is set, in Aeschylus' aetiological myth behind the creation of the court.

Concluding, it is evident that in these early, and maybe unsure, days of the new court system (following the reforms of Ephialtes), influences of the status quo are evident. The *Eumenides* provides an example of the method of argumentation during the settlement of disputes, establishing the claim that a wide use of character evidence was indeed present before the age of the Attic orators. By the same token, this way of argumentation, survived from previous years and probably, from previous systems of justice.

1.5 Evidence from Comparison: The Story of Deiokes

The Median Deiokes was a man of great ability and popularity as described by Herodotus in his Histories (1.96ff.). Although written in the second quarter of the 5th century, and this alone explains many of this period's biases, the story refers to the late 8th century BCE. Deiokes, a man of mark in his own village (since the Medes had established themselves in small settlements) was chosen to arbitrate his fellow villagers' disputes. His reputation for integrity and fair judgment made him a preferable judge for all the Medes, until one day, realising his great power, he announced that he got tired from this process and wanted to retreat to privacy. The result was an increase of disorder and contempt for law; therefore the Medes called for a general meeting in order to deliberate on the issue. Their decision was to centralise the government by setting up a monarchy, with Deiokes being their chosen ruler. Deiokes' first act was to command his subjects to build him a palace and to grant him the protection of a private guard. Nevertheless, this was not the only change. A certain ceremonial was established to prove his superiority and the procedure of justice was transformed.

“Once his sovereign power was firmly established, he continued his strict administration of justice. All suits were conveyed to him in the form of written documents, which he would send back after recording upon them his decisions”⁷⁸.

The above story provides valuable evidence, especially if examined through a Greek lens and evaluated in contrast to their practices. Although it does not explicitly provide evidence for the kind of argumentation used before a tribal judge, the passage is illuminating if contrasted to the Greek public and open approach to justice. It may therefore be used as circumstantial evidence (by comparison) in order to supplement our previous findings. Firstly, an inference may be drawn that Deioces, in his early steps, acquired his prominent status due to the support of public opinion as well as the voluntary acquiescence of litigants to his verdicts. This suggests that decisions were taken publicly, in a kind of a village moot, resembling the archaic Greek practice as described by Homer, Hesiod, and the Homeric Hymn to Hermes⁷⁹.

This picture, which closely resembles the Greek experience of the archaic period, is contrasted with Deioces’ behaviour after his acquisition of power. Village moot is substituted by autocratic decision-making, arbitration and reconciliation by espionage and punishment, and presumably relaxed, oral, liberal argumentation by stricter, shorter, written pleas⁸⁰. Herodotus, by providing this example from Persian experience, offers a sharp contrast with the traditional openness of the Greek legal system, which favoured amateurism and participation rather than professionalism (which could prove dangerous) and exclusion, and promoted a democratic legitimisation of judiciary rather than Deioces’ autocratic (and potentially arbitrary) methods. In Athens for instance, public opinion retained its traditional role as the legitimising force behind decisions⁸¹ and litigants’ argumentation should take this into account. The

⁷⁸ Hdt. *Hist.* 1.100: In addition to this there were other practices he introduced: if he heard of any act of arrogance or ostentation, he would send for the offender and punish him as the offence deserved, and his spies were busy watching and listening in every corner of his dominions”.

⁷⁹ Cf. Gagarin (1986), p. 25.

⁸⁰ A similar system of justice operated in Egypt (Diod. Sic. 1.75-6) and the Greeks could not have been unaware of it.

⁸¹ Lanni (1997), p. 183 observes that “the spectators played a crucial role in the social dynamic of the courts and had an important effect both on the litigants’ arguments and on the jurors’ decisions ... the corona helped to rectify one of the perceived institutional weaknesses of the

presence of elite bystanders and numerous spectators in the *corona* may have affected the litigants' rhetoric in a number of quite different ways⁸². The connection between the classical Athenian approach to justice (and, by inference, to argumentation) and its archaic counterpart is obvious. The story of Deiokes proves that the Athenians were aware of alternative approaches to justice; nonetheless they deliberately and purposely chose to retain an open and public legal system. A significant component of this system was the liberality in argumentation enjoyed by litigants, in the belief that this served the courts' purpose of attaining the truth.

1.6 Archaic Legal Remnants in the Classical Legal System

1.6.1 Homicide laws

Apart from the archaic legal remnants drawn from the trial scene depicted on the shield, even more can be adduced. First of all, in order to avoid speculation, hard evidence should be adduced, like the inscriptions of Draco's homicide laws of the seventh century. These laws reveal the traditionalism of Athenians, since they were attributed a divine origin⁸³ and due to their ancestry, were valued above all other laws at least until the late fourth century⁸⁴. They remained unspoilt during Solon's important innovations of the early 6th century, survived Cleisthenes' reforms of 508/7 BC, and were the first to be re-inscribed (unaltered) during the wide revision of laws in the last decade of the 5th century⁸⁵. The great respect of the Athenians for their tradition salvaged Draco's laws unchanged for more than three centuries. The extension of homicide laws (e.g. by introducing the procedure of *apagoge*, introduced in the second half of the fifth century⁸⁶), simply corroborates the idea that ancestral legal norms,

Athenian democracy, the immunity of its mass juries from formal accountability"; cf. p. 188: "The *corona* may have served to rectify a perceived weakness in the Athenian democracy...the decisions of a jury could not be appealed and jurors were the only state officials not subject to an *euthyna*...The presence of bystanders may have served as an informal *euthyna* for jurors, since it insured that the jurors could not make collective judgements without the immediate knowledge of a section of the community."

⁸² Lanni (1997).

⁸³ Dem. 23.70; Antiph. 5.48.

⁸⁴ Cf. Antiph. 5.14, 87-9; 6.2-4; Dem. 23.70-9.

⁸⁵ IG I(3) 104.

⁸⁶ Hansen (1976); Volonaki (2000).

overwhelmingly procedural, gradually gained substance and developed simultaneously with the whole system. Their supplementation by the introduction of supportive written laws and their non-legalistic definition through oral norms did not strip them of their initial rationale⁸⁷. Changes were made with a view to extend the scope of the original law, rather than alter or repeal it⁸⁸.

1.6.2 Archives

Another traditional aspect that was supplemented and enhanced during the next centuries was the inscription of archives and records. The archaic period was an enormously significant era in every aspect of human life. In particular, wider utilisation of writing, gradually made law the property of all citizens indiscriminately (especially in the context of openness of a Greek polis). Even if the original purposes of written laws were the avoidance of arbitrariness (to be effected by the presence of checks from other members of the ruling elite) and the inscription of the more controversial rules⁸⁹, nevertheless, with the aid of time, written rules acquired the status of the only legitimate law, seen as the ultimate democratic and just ruler⁹⁰. Also, it was a major step towards a society ruled by law. Writing laws and recording previous decisions (as the *thesmothetae* did) triggered a habit of public lawmaking and enforcement, which in turn was undoubtedly proved a prolific seed of later democracy. Citizens were now able to see the actual law carved on wood or stone⁹¹, and at Athens in particular, they even developed a public archive, the *Metroon*⁹². By the

⁸⁷ Maybe in this Athenian traditionalism we may find an explanation of the absence of a public procedure for homicide (*graphe phonou*). Although Hansen (1976) 110-112 and (1981) 14-17 argues for the existence of such a procedure, the total absence of hard evidence makes it unlikely. Cf. Macdowell (1978), p. 175; Gagarin (1979), pp. 322-3.

⁸⁸ Volonaki (2000), p. 174.

⁸⁹ See Thomas (2005).

⁹⁰ This is sustained by the Athenians' (whether or not accurate) beliefs regarding their written laws (e.g. Theseus' speech in Euripides' *Suppliants* 430-4: "When the laws are written down, then both the weak and the rich have equal justice"). Thomas [(2005) n. 90 at p. 43] writes: "What remains clear, however, is that by the classical period written law was widely regarded as *in itself* conducive to fairness, justice, and equality – not only democracy". Such beliefs led the Athenians to respond to their two short-lived oligarchic coups of 411 and 404 with an extended revision and re-inscription of their laws, and a law providing for the enforcement solely of written laws in the law courts.

⁹¹ Cf. Macdowell (1978), p. 45.

⁹² For an excellent study in the development of public recording in Athens see Sickinger (2007).

introduction of written laws (*nomoi*) for the substitution of *thesmoi*⁹³, the early judges' possible arbitrariness was curtailed. In classical Athens, officials were forbidden to use unwritten laws (Andoc. 1.85-7), litigants faced the threat of severe punishment for citing a non-existent law (Dem. 26.24) and, by the early fourth century, witnesses presented their testimonies in written form. Originating in the innovations of archaic Greece, a modern legal system had emerged.

1.7 Conclusion

One could find many examples of ancestral legal remnants in classical Athenian law, whether concentrating on procedure or in the powers of the officials⁹⁴. Although Athens experienced important changes and innovations in the fields of law and politics, the fact that these were probably less violent than in other city-states provided for a smoother evolution of its legal system. Oral rules and norms were codified in the form of written laws, disputable *themistes* of the past gave place to *nomoi* legitimised by the community, and self-help was substituted by an elaborate system, either of law-courts or public and private arbitration.

The system developed through progressive consolidation of previous norms. These, after being recorded and publicised, were gradually substantiated, clarified, and supplemented in order to reach the picture sketched in the Attic

⁹³ “*Thesmos* was a rule laid down or imposed by authority... whereas *nomoi* were generally accepted rules of behaviour... by the fourth century *nomos* was the normal word for a statute, a law published in writing and validated by a political process” Macdowell (1978), p. 44; The usual Athenian word for law in the seventh or sixth century was *thesmos*, but *nomos* in the fifth and fourth. Ostwald (1969) suggests that the substitution of *nomos* for *thesmos* was a deliberate act of policy by Cleisthenes as part of the establishment of democracy in 507 BC.

⁹⁴ For instance, Wolff (1946), pp. 82ff. says about the procedure of ‘*anakrisis*’: “in an epoch when a well-established judicial system, by requiring written plaints and peaceful summonses, had long succeeded in eliminating force as a means of seeking the realization of rights, the *anakrisis* none the less still reflected the function of the archaic official, who maintained the peace of the community by inhibiting arbitrary acts of self-help and arranging for a judicial control of its use.”; Cf. the procedure of ‘*epidikasia*’: “The right to employ self-help might be beyond doubt, and then it was the duty of the public authority to lend it its backing. This too is reflected in an institution of the classical legal system of Athens; and here the original function of the magistrate is even more clearly visible, since it resulted in a lawful use of self-help by virtue of a mere provisional permission of the archon. This was the *ἐπιδικασία*, an act through which the archon, upon request, allowed heirs who were not descendents, and as such domestic successors, of the deceased to take possession of the latter's estate; an *ἐπιδικασία* decree was also issued for him who claimed the hand of an heiress as her closest kinsman. The *ἐπιδικασία* was an administrative act based on police power, not a judgment.”.

orators. Although primal oral rules were mainly procedural (and this is attested in the epigraphic evidence), in classical Athens substance was equally, if not more, important⁹⁵. In the absence of hard evidence, any effort to reconstruct a precise history of character evidence in Athens may resort to speculation. However, my impression, based on the above discussion, is that the evident (to modern standards) wide use of such argumentation has firm roots in the past. Its persistence and its preservation have to warn us against any easy conclusions based merely on the evidence provided by the Attic orators. Deeper roots have to be traced and universal explanations of this phenomenon need to be sought.

The existence of rhetoric, not as a scientifically formulated art but as a set of common sense rules formed by a natural inclination towards persuasive speech, is apparent from Homer onwards. Literary evidence supports such a view. Hesiod portrays persuasive speech as a gift of the Muses. Hermes offers the first attested argument from probability, in an example of adversarial argumentation closely resembling arguments from classical Athens. The presence of procedural norms in early Greek law and their codification, interpreted together with the methods of argumentation attested in the archaic literature, induces one to argue for the presence of a rule of relevance in archaic Greece, with the sole requirement to 'speak to the point', which was gradually substantiated and gained clarity and precision before the age of the orators.

This argument becomes less speculative due to the fact that this rule is attested 1) in relation to the court of Areopagus, and 2) in relation to private suits (*dikai*). The court of the Areopagus was respected as the most ancient and traditional court institution of Athens. Its origins cannot be traced with precision, with myth and history further clouding the picture. Aristotle informs us that litigants there were forbidden to speak outside the issue (Arist. *Rhet.* 1354a22-3). In conjunction with this, in *dikai*, the court procedure most resembling archaic trials (as depicted e.g. in the shield of Achilles), it was required that "opposing

⁹⁵ Cf. Harris (2009).

litigants swear to direct their speeches to the actual issue” (Arist. *Ath. Pol.* 67.1)⁹⁶.

In my opinion, it is not a mere coincidence that this rule of relevance is provided for these two institutions. It is reasonable that in archaic trials, litigants, far from exchanging insults, gossiping and deviating from the main points of the case - which would certainly disgruntle the audience (in the agora) and the judges (who had to judge other cases as well⁹⁷) – they were encouraged to offer their viewpoint, not in a limitless manner but by speaking to the point. Though originally loosely formulated, the self-regulation of the parties informed by the component of the views of litigants, spectators, and judges as to what is relevant, presumably could define this rule⁹⁸. Such an approach coincides with the more general picture of Greek law. The Greeks, believing in the capability of anyone to grasp the meaning of legal justice, interpreted their laws by common sense. By the same token, verdicts were validated by the assent of the majority, rather than by legal expertise.

The result of this approach was their indifference as to codification of their findings in a scholarly manner, but the success in making law a common property⁹⁹. After all, their laws were not strange to them; they were made by the community and for the community. Plain citizens were the first and the last to understand them and adjust their behaviour accordingly. They deserved the acknowledgement of their capability in defining them and the privilege of interpreting and enforcing them. Athens in particular offers a good example, as common sense interpretation of laws was proved by the majority decision-making of mass juries. Although it may be argued that such an approach may lead to inconsistency, the traditionalism of Athenian society, the limitations

⁹⁶ A lot of passages from the Attic orators verify this point, namely that in public suits (*graphai*) one was more free to use extra-legal argumentation than in other types of suits, and will be discussed in due time.

⁹⁷ Hom. *Od.* 12.438-440: “ἦμος δ’ ἐπὶ δῶρπον ἀνὴρ ἀγορήθην ἀνέστη

κρίνων νείκεα πολλὰ δικάζομένων αἰζηῶν; cf. Herodotus’ story of Deioces.

⁹⁸ The framework of what and why was received as ‘relevant’ in the age of the orators has been treated in the Introduction.

⁹⁹ Lycurgus for instance, prohibited the recording of laws, on the grounds that they would be more secure if they were implanted in every citizen’s memory and way of life (Plut. *Life of Lycurgus* 13).

posed by the presence of written laws, and the obligation of jurors to judge in accordance with their oath (thus according to the laws), enabled the Athenian courts to overcome this trap. Additionally, litigants were required to speak to the point, and probably (to the Athenians' opinion) were largely successful¹⁰⁰. It therefore needs to be asked why they were successful by their own standards instead of supplementing their own view with modern presuppositions. Modern scholars, especially when using a developmental or a structural methodology cannot really be objective about relevance in Athenian courts. Modern presuppositions need to be forgotten and a deep understanding of the Greek ideas and way of thinking needs to be promoted. After all, in such controversial issues such as the definitions of the rule of law or legal relevance, no easy solutions can be offered. What was considered relevant in 19th century Britain may be irrelevant today or what is relevant in contemporary United States may be irrelevant in Saudi Arabia.

The consistent patterns that Athenian litigants followed for more than a century can be interpreted as the substantiation of a previously uncodified concept as to what is relevant. Presumably, these patterns reveal that after years of experimentation, argumentation found in the Attic orators was considered to be to the point as regards the illumination of factual and legal issues. Simultaneously, jurors probably expected their invocation, affording to such arguments a second dimension as efficient means of persuasion. The final point, namely that all participants in Athenian trials remained loyal to patterns, proves that Athenian courts (though maybe following a different path) were actually capable of achieving a relative, at least, degree of consistency, supported by their consistent approach to rhetoric and to what is relevant. Deciding strictly legal issues as well as highlighting the significance of social norms, extended the rules of relevance but conformed to judging cases in a manner far from ad hoc or inconsistent. The next chapters will further illuminate the issue.

¹⁰⁰ Cf. Rhodes (2004).

2 CHAPTER TWO: INCENTIVES FOR WIDE USE OF CHARACTER EVIDENCE IN THE ATHENIAN LEGAL SYSTEM

2.1 *Characteristics of the Athenian Legal System as Incentives for Wide Invocation of Character Evidence*

The purpose of this discussion of the Athenian legal system is not to give a detailed account of its institutions and procedures; this is an undertaking beyond the scope of the present study. On the contrary I will briefly concentrate on some key aspects and peculiarities that relate to the wide use of extra – legal argumentation in Athenian courts and provide some aid in understanding the extent and types of character evidence put forward by the litigants.

2.1.1 : **The Democratic Nature of the System**

The first aspect to be highlighted is **the democratic nature** of the system. As in all its institutions and constituents, the Athenian legal system was consistent in its pursuit of strict democracy. Equality in the opportunities for participation, by demolishing the barriers of birth and wealth, signified a right to participate in every public business. By the same token, all Athenian citizens could participate in the process of adjudication. Each year, any male citizen over the age of thirty could put himself forward and be selected by sortition as one of the 6,000 jurors that manned the Athenian courts. Private cases were decided by a democratic jury of at least 201 members, public ones by at least 501, a number that in most serious cases was multiplied and (though extremely rarely if ever) could extend to all 6,000 jurors. Verdicts were taken by majority vote, without the aid of any legal experts and judges, or the opportunity for formal deliberation among jurors. Aristotle says that the ballot of the courts was a major contributing factor to the creation of democracy, since when the demos took power over the courts, magistrates' powers were delimited and common people increased their influence

¹. As a result, participants in Athenian adjudication were obliged to convince

large panels acting as representatives of the body of the 30,000 or so Athenian citizens. Therefore any argument they used and, in particular, any evidence from character they invoked should conform to the mentality of the polis and its communal norms.

2.1.2 : The Ideology of Amateurism

Directly connected with the democratic nature of the Athenian legal system, is the pervasive ideology of **amateurism**, or the “complete absence of professionals or experts”². In essence, the interconnection of these two characteristics lies on the Athenian belief that “professionalism and democracy were regarded as, at bottom, contradictory”³. The fact that wide participation of laymen was promoted through the introduction of measures such as state pay, annual rotation in most public offices, and sortition between nominees, added to the absence of competent state machinery, such as a Director of Public Prosecutions or police, cases were initiated and pursued until their end by private individuals. These features were so deeply entrenched in the democratic ideology of the polis, to the extent that legal professionals were seen with suspicion and hostility.

The importance of this characteristic of the Athenian legal system when seen as an incentive for the wider use of character evidence can be traced by analogy, in particular with modern English criminal law. Drawing from research on the development of the English criminal process from the mid-eighteenth to the late twentieth century one can sketch “a broad movement from ideas of responsibility as founded in character to conceptions of responsibility as founded in capacity”⁴. During this process “as confidence in substantive evaluations of character diminished, yet as demands for legitimisation increased, the criminal process was in search of a conception of criminal responsibility which could be explicated in legal, technical terms, and hence legitimated as a form of specialist knowledge underpinning an impersonal mode of judgment. The full articulation of such a system depended, however, on a

¹ Arist. *Pol.* 1274a1ff.

² Hansen (1991), p. 180.

³ Hansen (1991), p. 308.

⁴ Lacey (2001), p. 250.

number of other institutional features which developed only slowly from the late eighteenth century on: an adversarial trial dominated by lawyers; a sophisticated law of evidence; a further professionalization of legal practice.”⁵. By contrast, the Athenians never felt the pressing need for such an ‘impersonal’ mode of judgment or for the legitimisation of democratic court verdicts through formalisation and expertise. The character of the ‘polis – citizen’ relationship as opposed to the modern ‘state – individual’, the absence of urbanisation and industrialisation (that supports a more individualistic mode of living), and their distinctive ideas of ‘character’ and ‘personality’, allowed for a composite idea of responsibility based on ‘status’ (adherence to behavioural standards as a result of being a citizen) and ‘personality’ (a human being with distinct dispositions and traits). The total lack of professionalism is merely the – astonishing - sign of this approach.

The results of this fact can be observed in divergent fields and stages of adjudication. Litigants, with (in principle) minimal help from legal experts or speechwriters, conducted research into the relevant laws and decrees, and they largely decided the strategy and presentation of their case. Therefore, the amateur litigant faced a number of challenges; either to rely entirely on legal documents and technical issues (which could trigger the suspicion of the audience) or to concentrate on narrative and extra – legal argumentation. Either way one ought to keep a balance, since his adversary lurked to expose the opponents’ weaknesses. The amateurism of the system is also highlighted by the slim limitations on the presence of allegedly partisan witnesses and supporting speakers, whose aim was predominantly to promote the parties’ interests⁶. Nonetheless, any generalisation could be misleading and caution is needed in the treatment of the role of witnesses in Athenian courts. Their function has been interpreted as highly biased, yet certain safeguards could be implemented in order to ensure their compliance with the requirement to attest to the truth of alleged facts. Disregard of this expectation or non-appearance at the trial could trigger a prosecution against them (*dike pseudomarturion*) or alternative safeguarding procedures such as *exomosia*, *kleteusis* and *dike*

⁵ Lacey (2001), p. 268; cf. pp. 269-272.

⁶ Humphreys (1985); Todd (1990b).

lipomarturiou. In cases of false witnessing, their (written from 380 BC onwards) testimonies could be used as evidence in a subsequent trial against them. Although these mechanisms may have limited the presence of untruthful partisan witnesses (this may be partly proved by the fact that there are rare attacks against their characters to undermine their credibility and trustworthiness), the lack of coherent and formalised legal rules allowed for uncertainty in that field too⁷.

The ideology of amateurism in the Athenian legal system led the protagonists to neglect any systematic and professional treatment of legal rules. A lot of interpretations and explanations can be offered, but the essence remains that the Athenians regarded law as common sense and common property, departing from the idea of expertise. As a result, diachronically, rules of admissibility are interpreted at will. Certainly at least in homicide cases before the Areopagus litigants were obliged to speak only to the charge in question; this rule possibly had effect in the popular courts as well especially in private cases⁸. Nevertheless, such a compact rule could be open to a series of interpretations. The accusatorial nature of Athenian courts and the amateurism of participants meant that litigants could exploit it to their advantage and make use of a more liberal interpretation of the 'speak to the point' clause. This in turn could facilitate an expansive use of character evidence relating either to the issue of guilt (in the form of propensity evidence) or to the trustworthiness and credibility of the speakers. In theory, therefore, the absence of any exclusionary rules means that the rule of relevance could have been transformed into a black hole, an all-inclusive clause, vulnerable to subjective interpretations as to its meaning⁹.

⁷ However, Carey (2011), p. 16 rightly observes: "There is no reason to doubt that witnesses do offer moral support and that the identity, status and public record of a witness are set to the credit of the litigant. But it would be a mistake to suppose that the factual message is of no interest. Witnesses are *always* called to attest a fact, never merely to state their support; and there are penalties for (proven) false testimony. And there is no real reason to believe that Athenians were more prone to give false evidence than moderns".

⁸ Arist. *Ath. Pol.* 67.1; Dem. 57.59, Lys. 9.1; cf. Lys. 3.46, Antiph. 5.11, 6.9.; Rhodes (2004) argues that forensic speeches focus mostly on the charge in question.

⁹ Nonetheless, as will be shown in subsequent chapters (and was mentioned in the Introduction), there were adequate methods of deciding whether and why an argument was 'to the point' and what should be received as 'relevant'.

Furthermore, the lack of formalisation in almost every part of the system (no strict legal precedence, no official detailed record of past decisions, no *ratio decidendi* etc.) allowed for divergent interpretations of court verdicts. As a result of this relative uncertainty, defendants thought necessary, in addition to a precise reply to the legal charges, to offer a more general account of their life in an effort to increase their chances of success by provoking the audience's good will and advertising their character's credibility. The objectives of the system in accepting such arguments and the themes / patterns that speakers followed are the subjects of another chapter. What is important here is the attested belief that evocation of character evidence was necessary in order to offer a complete speech. As Todd, somewhat excessively, notes: "the way to success in an Athenian court is to use all your available artillery"¹⁰.

How the rule of relevance (i.e. that litigants should speak to the point) could be enforced is even more complicated. Again, the absence of a professional expert or judge responsible for the direction of the jury as to the admissibility of evidence, led this enforcement to be effected presumably by the disapproval of the audience¹¹. The *thorubos* (tumult) could take place in dicastic and non-dicastic settings and could be originated from the panel of jurors itself or from the spectators watching the legal case from the *corona*¹². Bers, in the still most informing study on dicastic *thorubos*, concludes that "fairly early in the fifth century *thorubos* was common at large official meetings"¹³. In the dicastic context, there could be positive and negative reasons that incited uproar. A speaker could ask the jury to confirm or disprove a story or a fact¹⁴ or he could incite the jurors to interrupt, limit or control the speech of the opponent (presumably due to the latter's irrelevant argumentation)¹⁵. In [Dem.] 45, Apollodorus asks the jurors:

"Let him not, then, leave this and talk about matters regarding which I am not suing him; and do you, if he is so shameless, refuse to permit it" ([Dem.] 45.50).

¹⁰ Todd (1993), p. 138.

¹¹ Bers (1985)

¹² For reference to *thorubos* in symbouleutic contexts, see Dem. 19.23, 113; 18.143; 19.15, 45, 122; Aeschin. 1.34, 80; 2.84, 153; 3.82, 224; Andoc. 2.15; Lys. 12.73.

¹³ Bers (1985), p. 3, Plut. *Life of Aristides*, 4.1.

¹⁴ See Is. 5.20; Dem. 18.10; 44.79; 47.44; 50.3; Din. 1.41-3.

¹⁵ See Hyp. 1.11; Dem. 19.75, 162; 18.2, 160; 21.28, 40; Is. 6.62.

In fact, Apollodorus himself had already been the victim of dicastic *thorubos* as he mentions earlier in his speech. He claims (no matter how much he overdramatises) that his opponent:

“by reading these documents and making other false statements which he thought would favour his case, he made such an impression on the jury that they refused to hear a single word from me. I was fined one-sixth of the amount claimed,” was denied the right of a hearing, and was treated with such contumely as I doubt if any other man ever was, and I went from the court, men of Athens, taking the matter bitterly and grievously to heart”. ([Dem.] 45.6)

Thus, the panel’s (more or less fair) spontaneous negative reaction to a litigant’s argumentation could cause disturbances and pose a serious problem to the smooth delivery of his speech¹⁶. In anticipation to this, Hyperides tells the jurors:

“Just as you have allowed my accusers to conduct the prosecution as they wanted, so allow me to deliver my defence, to the best of my ability, in the manner I choose. Don’t interrupt me, asking, ‘Why do you tell us this?’ Don’t add anything of your own to the prosecution’s arguments but rather listen carefully to my defence”.¹⁷ (Hyp. 1, fr. 2)

The dicastic *thorubos* was the most efficient method of keeping litigants’ rhetoric to the point. Nonetheless, this self-regulating mechanism of the court would probably carry with it the pros and cons of large bodies with their mass psychology. Despite the fact that Athenian juries were largely experienced in listening to lengthy and eloquent speeches, the oral delivery, the lack of exclusionary rules of evidence, and the absence of any kind of deliberation¹⁸ before the vote could presumably make them disregard any inconsistencies in the litigants’ argumentation, allow room for extraneous issues and be swayed

¹⁶ E.g. Dem. 45.6; 57.63-65; cf. Hyp. 4.31.

¹⁷ Cooper, the translator and editor of this speech for the University of Texas Press Series of Attic Orators, comments on this passage (p.71, n. 5): “Speakers often ask their audience not to interrupt. It is hard to know whether in any given speech this is a real concern or a rhetorical play, but it is likely that such interruptions were not uncommon and the Athenian courtroom could at times be a noisy place, with jurors interjecting their own thoughts and comments”.

¹⁸ For the absence of jurors’ deliberation between themselves prior to the vote, see Arist. *Pol.* 2.1268b7-11. For the significance of deliberation in modern courtrooms and the supposition that jurors may reach their decisions before deliberation, see McEwan (2003), p. 5 and n. 16 with relevant bibliography.

by irrelevant information. An anecdote from Plutarch (*On Garrulity* 504c), illuminates the matter:

“Lysias had given to a certain accused criminal an oration of his own writing. He, having read it several times over, came to Lysias very much dejected, and told him that, upon his first perusal of it, it seemed to him to be a most admirable piece; but after he had read it three or four times over, he could see nothing in it but what was very dull and insipid. To whom Lysias, smiling: What, said he, is not once enough to speak it before the judges?”

- Absence of Burden and Standard of Proof

Closely connected to the dominant ideology of amateurism is the absence of a theorised formal concept of the burden of proof (*onus probandi*). The lack of professionalism left its mark in this field too; in the Athenian jurisprudence we find nothing similar to the Latin maxim: “*semper necessitas probandi incumbit ei qui agit*”¹⁹. Yet, in practice, Athenian litigants generally followed the rule that the introducer of an assertion or fact has the duty of proof. In principle, the burden felt on the claimant since the original initiation of the proceedings. In the *anakrasis* he had to follow the procedural rules in order to establish that his case was *eisagogimos* by providing all the evidence he planned to present at the trial, place it in the *echinos*, and prove that there was an alleged breach of a specific law²⁰. The defendant had to follow a similar procedure in order to counter the prosecutor’s allegations and both of them were obliged to take an oath (*antomosia*).

Until that point the burden remained on the side of the prosecutor, with the written plaint setting the legal burden that had to be proved. In support of this we may adduce the fact that the prosecutor spoke first in the court. However, if the defendant wanted to block the prosecutor’s case, he could make use of a special plea (in the form of *paragraphe*, *diamarturia*, or *antigraphé*). Then the burden was shifted and it was for the defendant to prove his alleged points as to

¹⁹ “At all times the compulsion of proving a case lies on the plaintiff”; [tr. in Sienkewicz and McDonough (1999)].

²⁰ See Harrison (1971), pp. 94 ff.; Thur (2007); Harris (2013a).

why the prosecutor's case was inadmissible. The defendant thus spoke first in the hearing.

The best example of this shift of the burden of proof can be found in *paragraphe* cases where a defendant objected to a *dike emporike*²¹. In order for the prosecutor to initiate his case, he should present a valid contract for shipment to or from Athens that was allegedly breached. Up to that point, the burden of providing this contract fell on the prosecutor. However, if the defendant denied the existence or the validity of such a contract, he could initiate a *paragraphe*; then, the burden shifted on his side in order to prove his allegations. Therefore, although the concept of the burden of proof was underdeveloped and uncodified, some procedural and practical rules substantiated it in loose terms.

Nonetheless, any resemblance to an elaborate concept stops at this point. There was no division between a legal and an evidential burden of proof, in addition to the uncertainty as to the requirements for the establishment of a *prima facie* case²². Although the written plaint limited the scope for irrelevant evidence and set a common ground for argumentation (with the most cases concerning factual disputes, thus the facts requiring presentation of evidence were more or less specified), there was a call for both parties to make the best of their cases, using all the legitimate means at their disposal. One significant aspect was their resort to extra-legal argumentation thus, the absence of a concrete concept of the burden of proof could be regarded as an incentive. Both parties shared an equal evidential burden and had the obligation of a total attack against their opponent's allegations by providing evidence to prove their alleged facts and disprove their opponent's. Furthermore, the fact that it was a battle of words between the parties signified a need to increase their credibility and diminish their opponent's. To recap then, it can be plausibly said that the Athenian concept of the burden of proof (if there could be extracted anything close to this) bears a closer resemblance with its modern counterpart in civil

²¹ Harrison (1971), p. 123. For the *dike emporike* see Lanni (2006), pp. 150ff.

²² By 'legal burden of proof' I mean "the burden of persuading the tribunal of fact of the truth or sufficient probability of every essential fact in issue" or, in other words, "to prove the elements of the case or defence to the appropriate standard"; by 'evidential' I mean the requirement "to adduce sufficient evidence to justify, though not require, a favourable decision". See Glover (2013).

cases (where the law retains a neutral position in relation to litigants), with the requirement that whoever presents a fact or an allegation, he is the one who carries the responsibility of proof.

Hand in hand with the burden of proof comes the concept of the standard of proof, namely the degree of certainty or probability which the evidence must generate in the mind of the tribunal of fact in order for the party bearing the burden of proof to gain a favourable verdict. In modern English jurisprudence, this level of proof varies between civil and criminal cases, in the first being proof 'on the balance of probabilities'²³ and in the second proof 'beyond reasonable doubt'²⁴ so that the jury are 'sure of guilt'²⁵. Although the definition of the terminology is far from unambiguous in Anglo-American law, there is at least some guidance for the fact-finders to follow²⁶. In Athenian law, the absence of such a concept signified an uncertainty as to the expected proof of the allegations in the written plaint, however objectively these allegations and the breach of the law could have been documented. The absence of *ratio decidendi* and of any deliberation between the jurors before the verdict leaves a grey area of subjectivism surrounding the passing of court verdicts. In other words, evidence that could have satisfied the subjective level of proof required by a particular Athenian juror might have been less conclusive for another who had set a higher standard of proof.

This uncertainty as to the required level of proof induced Athenian litigants to follow a race in proving their case as convincingly as possible (setting the standard of proof to the highest level), using any relevant or remotely relevant argument at their disposal and taking a wider approach to extra-legal argumentation in order to damage the opponent and his credibility. Each litigant raised the stakes, with character evidence providing a significant weapon in his

²³ See *R (N) v Mental Health Review Board (Northern Region)* [2006] QB 468, esp. at [62]; *In re B (Children) (Care Proceedings: Standard of Proof) CAFCASS Intervening* [2009] 1 AC 11.

²⁴ This formulation has been approved on more than one occasion by the House of Lords, e.g. *Woolmington v DPP* [1935] AC 462, 481; *Mancini v DPP* [1942] AC 1, 11; *Miller v Minister of Pensions* [1947] 2 All ER 372, 373.

²⁵ E.g. *Summers* [1952] 1 All ER 1059.

²⁶ See McEwan (2003), p. 134: "Most British and American judges think it best to avoid giving a definition of beyond reasonable doubt, leaving it to juror common sense to fix the appropriate level of certainty", with "the absence of a definition clearly affects verdicts as much as the terms of any definition that is provided".

armoury. Apart from the legitimate use of such argumentation, a litigant (especially the prosecutor who spoke first) might (in the absence of opposition by the jurors) resort to irrelevant pleas about his opponent in order to direct and partly control the latter's reply. In simple words, the prosecutor, by presenting irrelevant facts or allegations not included in the written plaint, placed the burden of disproving them to the defendant and, potentially, raised the standard of proof for him by demanding a multilevel refutation. Usually, these new allegations concerned the opponent's character²⁷ and put him in the uncertain position, either to refute them with the risk of alienating the jury by responding to irrelevant matters or disregard them with the danger of being accepted by the court as true²⁸.

To recap then, the Athenian amateuristic approach to justice precluded the formulaic development of the concepts of burden and standard of proof. The uncertainty as to who had the onus of proving the facts of the legal case and to what degree, provoked an even wider use of character evidence in an attempt to convince the undirected jurors about the verisimilitude of a story. This unpredictability surrounding the persuasion of the jury, triggered the introduction of even more (similar or more remote to the dispute) facts and allegations which called for a greater resort to extra-legal argumentation in order to be proved. Nevertheless, this point of doubtfulness should not be pressed too far since the Athenian law had developed safeguarding mechanisms to counterbalance the risks of this highly amateuristic approach.

- Evading Amateurism

The institutional structure and rules of the Athenian democracy in relation with the promotion of an amateuristic ideology to participation soon revealed the need for a more artful approach to public argumentation and delivery of speeches. Although there is some doubt regarding the sociology and activity of different classes of Athenian citizens to the workings of the democracy, at least as far as the courts are concerned the figures are striking and speak for themselves. At least six thousand fully eligible Athenian citizens over the age of

²⁷ E.g. Lys. 9.1-3.

²⁸ Hyp. 4.32; Dem. 18.9; Aeschin. 1.166-170.

thirty (out of a total of approximately twenty thousand over that age in the fourth century)²⁹ nominated themselves for jury service to be selected by lot at the start of each year. The six thousands jurors of a particular year (since there was annual change to the composition of this panel due to a competition for places)³⁰ were eligible to show up on each particular court day, with these varying between approximately 175 and 225 times per year. The fact that a *graphe* hearing took the whole day and the time allotted to *dikai* varied according to the value of the suit (with the suits for over 5000 drachmas lasting more than two hours), a single active juror could decide tens or even hundreds of cases annually and thousands during his lifetime. Keeping in mind that this juror could have also served the Athenian democracy from other positions (such as magistrate, *bouleutes*, or a simple spectator of the Assembly), he was extremely qualified and experienced in abstract, or when compared to modern jurors. Nonetheless, what he shared equally with his modern descendant was the ability to decide factual disputes by resort to lay common sense, not particularly negative a factor in principle³¹.

As far as the parties to these hundreds of lawsuits that reached the courts (and the much more that were decided at deme level or through arbitration) are concerned, Athenian ideology compelled them to retain the identity of *idiotai* throughout the proceedings. In theory, the initiation and conduct of both private and public cases should remain in private (amateur) hands, making it a punishable offence to pay someone else to appear as your advocate in court³². What is of particular interest to this study is the actual preparation of litigants' speeches and their delivery in the courts. The formidable experience of addressing mass juries, the usually high stakes of the legal cases, and the need for a professional legal and extra-legal preparation of a speech gave rise to the need for a focused expertise in speech-writing. In other words, the emergence of rhetoric as an art, the study of the psychology and response of mass juries to divergent kinds of argumentation and the more scientific method of approaching oral delivery called for (in theory, undetectable) ways to evade the restrictions of

²⁹ Hansen (1991), p. 91.

³⁰ Hansen (1991), p. 182, citing Kroll (1972), pp. 69-90.

³¹ For 'common sense' in modern jurisprudence, see McEwan (2003), pp. 16-23.

³² Todd (1993), pp. 94-6; Hansen (1991), p. 180; Dem. 46.26.

amateurism. An amateur litigant therefore could resort to the assistance of a *synegoros* (or a team of *synegoroi*) or a *logographer* in order to make the most of his case.

A *synegoros* was in principle a friend or relative of the speaker, having a good reason for being given the time by the litigant to address the jury³³. Personal interest to the case, affiliation with the speaker and enmity with the opponent were regarded as valid reasons, avoiding thus a financial or professional link with the litigant³⁴. Nonetheless, the frequency of their appearance is a matter of controversy³⁵. An even more significant figure is the one of the speech-writer (*logographos*)³⁶. A litigant who had not studied the art of rhetoric and was inexperienced or uncertain of legal matters and “since for most people litigation was a unique or rare experience rather than a career, it was far more useful (if one could afford it) to obtain the advice and help of another kind of expert which flourished in the fifth century, the professional speechwriter (*logographos*)”³⁷. This shadow figure (not mentioned in the speeches but acting behind the scene) could provide advice on how to present a case or even provide part or the whole text of a speech. The ancient Athenian logographer, unlike a modern advocate, “had considerable latitude to exaggerate, suppress and even invent aspects of his story in order to make the best of his client’s case”³⁸. What we usually see in the surviving speeches is, therefore, a refined version of forensic

³³ For a comprehensive discussion on supporting speakers see Rubinstein (2000). Up to that work, modern scholarship preserved one of two functions for the *synegoros*: either as “a ‘super-witness’ whose role in the legal proceedings amounted to a display of solidarity with the main litigant” (true in private cases) or as the “Vicarious Voice of the main litigant only if it was universally agreed that the main litigant could not be expected to plead his case adequately because of exceptional circumstances” [Rubinstein (2000), p. 17]. Rubinstein (2000, p. 18) adds one more function, interpreting the role of *synegoros* as “a ‘with-speaker’ who could join in the proceedings because he had a personal or political interest in the case, and whose role in the trial would not necessarily be perceived as a token of his personal solidarity with the main litigant. Rather, such a speaker might represent himself as involved in the dispute in his own right, but without necessarily having to represent the legal dispute as ‘his’ action”.

³⁴ Lys. 32.2, 9-10; Dem. 18.

³⁵ Todd (1993), p. 95, n. 19 says that only thirteen of the surviving speeches were delivered by *synegoroi*; see also Carey (2011), pp. 13-4. On the other hand, Rubinstein (2000, Chapter 2 and Tables 1 and 2), reserves a more significant role for them and argues that this practice which was “hitherto considered exceptional was in fact the norm in certain types of legal action” She finds 25 speeches delivered by *synegoroi* and 6 delivered by elected prosecutors.

³⁶ See Lavency (1964); Dover (1968); Usher (1976).

³⁷ Carey (2011), p. 19.

³⁸ Griffith – Williams (2013), pp. 24-25.

argumentation, interesting enough to have been published, revealing many times the elegant, though covert, touches of professionalism.

2.1.3 : The Adversarial Nature of the System

An issue with serious implications for argumentation in forensic fora is the adversarial nature of the trials. As it has already been noted the absence of competent state bodies tended to promote an adversarial approach to legal cases. Disputes were transformed into legal charges and feuds were neutralised for the benefit of social order through their introduction in the non-violent sphere of adjudication. In accordance with the principle of party autonomy, the role of the court as adjudicator is essentially passive, limited to hearing the evidence and arguments presented by litigants. Litigation in this form takes the character of a contest or fight between opponents, each aiming to present his own case in the best possible light and to cause maximum damage to the case of the rival³⁹. Aristotle had already observed that:

“The forensic kind [of speech] is either accusatory or defensive; for litigants must necessarily either accuse or defend” (Arist. *Rhet.* 1358b)

“One must therefore make room in the hearer's mind for the speech one intends to make; and for this purpose you must destroy the impression made by the adversary. Wherefore it is only after having combated all the arguments, or the most important, or those which are plausible, or most easy to refute, that you should substantiate your own case” (Arist. *Rhet.* 1418 b)

Aggravated by the agonistic environment of Athenian society, litigiousness became the channel for the persecution of an adversary, using any means at his disposal. As a result, evidence from character acquires greater significance during the presentation of cases before mass juries. Argumentation ad hominem was an effective weapon in the quest for victory, in fora where credibility and trustworthiness were of utmost importance⁴⁰. Aristotle notes that

³⁹ See Frank (1949), Ch. 6. The ‘fight theory’ he develops which is another way of naming the adversarial mode of conducting trials in realistic terms, poses significant problems in the appropriate, though idealistic, utmost aim of the court as institution of finding the ‘truth’. In practice, lawyers abstain from being facilitators of the court system's implementation of justice in this respect, and winning a case becomes much more important than ascertaining the true facts. Cf. Kubicek T.L. (2006).

⁴⁰ Arist. *Rhet.* (1372b – 1373a) notes a series of probable victims. Within this category fall those that are either of bad repute or their character and life do not support their case: “And those who

“Evidence partly concerns ourselves, partly our adversary, as to the fact itself or moral character; so that it is evident that one never need lack useful evidence. For, if we have no evidence as to the fact itself, neither in confirmation of our own case nor against our opponent, it will always be possible to obtain some evidence as to character that will establish either our own respectability or the worthlessness of our opponent” (Ar. Rhet. 1376a).

Under such conditions, jurors usually have to choose between two different versions of the same story. Opposing parties struggle to prove their credibility, while at the same time diminishing the opponent's. Invocation of a trustworthy character may induce jurors to positively receive a litigant's pleas showing him a high degree of good will. These have to account as contributing reasons for the vividness of narratives and the rich storytelling in the speeches of the Attic orators as well as the presentation of background, seemingly irrelevant, information.

2.1.4 : The Genuine Difficulties in Crime Investigation

A further, substantial, issue to be taken into account is the era under consideration. The insufficient, barely existent, methods of crime investigation and evidence collection⁴¹, urge us to view oral, forensic argumentation under a different light. Extra-legal considerations (character evidence, background information and contextualisation of the dispute in question) gain weight in Athenian courts, which relied substantially on issues of probability. This means that the general tendencies and character traits presented in forensic speeches were (in theory) evoked in order to assist the jurors, following a deductive method of reasoning, to extract the truth and resolve the factual dispute that originated litigation. In other words “the importance of this mode of argumentation will have reinforced the commonsense assumption that the plausibility of specific statements about an individual can be assessed with reference to his or her established patterns of behaviour”⁴². Most cases

have been slandered, or are easy to slander; for such men neither care to go to law, for fear of the judges, nor, if they do, can they convince them; to this class belong those who are exposed to hatred or envy.”

⁴¹ The fact that investigation was a problematic field of Athenian law is proved by Antiph. 5.67-71 where he refers to past crimes that have been unsolved or, even worse, men were condemned due to undue hurriedness with their innocence being proved through time.

⁴² Carey (2011), p. 19.

concerned factual rather than legal disputes and arguments from probability were predominantly used to illuminate issues of fact⁴³, so Athenian litigants frequently highlight their arguments' probative value, with jurors having to evaluate them within a very uncertain environment.

Furthermore, the limited scale of the Athenian polis makes unavoidable that (at least) some of the parties involved in litigation were already known. The direct evidence that survives in the form of forensic speeches (although to a great extent coming from upper class and high profile cases where litigants could afford the hiring of a speechwriter) reveals that, especially (but not only) in the case of distinguished individuals, one's character and mode of life, could become notorious by being circulated through gossip in advance of a trial. Whether or not Athens was a face-to-face society one fact is indisputable regarding the ethical homogeneity of its inhabitants: this polis differed a lot from industrial, socially fragmented and territorially vast (compared to Attica) states. This social and ethical homogeneity of Athens allowed for the identification of popular opinion regarding acceptable morals and norms, thus aiding litigants in their effort of designing their strategies, by knowing in advance the kind of arguments that would probably receive the good will of jurors. Complete adherence to communal norms was the utmost character evidence and an unmistakable indicator of a litigant's personality.

In this uncertain judicial environment regarding the proof of the presented evidence, litigants' speeches (and their witnesses' deposits) posed as the sole source of information. Therefore, a litigant ought to design a careful strategy and efficient tactics in order to enhance his trustworthiness as a person and the believability of his words. Thus, apart from the factual considerations surrounding and to an extent inciting a wider use of character evidence, the issue of credibility has to be taken into account. In this battle of words between two competitors, the effort for the receipt of the jurors' good will was great. Adding to this the limited flexibility open to jurors in the issue of sentencing, it

⁴³ Gagarin M. (1994); Harris E.M. (1994).

was a matter of utmost importance for a litigant to provide all the necessary evidence which could tip the balance in his favour⁴⁴.

2.1.5 : The Flexibility of the System

Before proceeding to conclusions, one should take into account the outstanding flexibility of the system. Apart from the convenience offered by the lack of strict adherence to legal precedents or the avoidance of *ratio decidendi* for legitimising the majority verdicts, one should add one more peculiar feature. In particular, the Athenian legal system allowed for the presence of many divergent procedures for prosecuting the same act; presumably, this was chosen by the plaintiff as better suiting the circumstances of his specific case. The reasons offered for the presence of this special characteristic of the Athenian legal system include: the democratic tendency of providing equal and uninhibited access to the courts⁴⁵, the flexibility offered to the prosecutors by allowing them to calculate the risk⁴⁶; it offered an answer to the problem of enforcement in a system which relied on the volunteer. All these rationales are valid enough to explain the matter. In my opinion one more piece is needed to complete the puzzle, which can be seen as the 'glue' bringing together all these features, and this will become clear in the course of the next chapters. For the moment it suffices to say that there was an underlying cause illuminating the Athenian approach to this particular issue. This was the Greek ideas of 'character' and 'personality' and the relationship of the person with the community.

All these are grounded on the fact that the Greeks understood human beings and 'personhood' in a way different to ours. The 'objective – participant' model

⁴⁴ See Carey (2011), p. 19: "If they wished to show leniency to a defendant they believed to be guilty, or to withhold success from a prosecutor whose motives or behaviour they considered suspect, they could only register this desire by voting for acquittal or conviction, or (in 'assessed' cases only) by choosing the more lenient of the penalties proposed. It was therefore necessary not only to project a character which invited trust but also to present oneself as deserving the judges' goodwill in order to ensure that any inclination on the part of the judges to be swayed by factors outside the issue counted in one's favour".

⁴⁵ E.g. Dem. 22.25-7; for discussion of the rationale see Carey (2004), esp. P. 131; also see Osborne (1985), Todd (1993).

⁴⁶ Carey (2004) accepts this as a part of the rationale, though protesting against 'neat explanations' which lead to oversimplification.

of the self (as described by Gill⁴⁷) provides the key for a better understanding since it offers the most suitable model of interpretation. An ancient Athenian understood himself as an integral part of the community, wholeheartedly adhering to its ethical norms. His highest goal was to act in harmony with his particular 'role' assigned to him in the society, and the attainment of virtue lie on the accomplishment of this task in the best possible way⁴⁸. But how this characteristic of the Athenian legal system provided an incentive for further use of character evidence?

The description of this characteristic is offered by Demosthenes (22.25-7):

"Moreover you should grasp this fact, that Solon, who framed these and most of our other laws, was a very different kind of legislator from the defendant, and provided not one, but many modes of procedure for those who wish to obtain redress for various wrongs. For he knew, I think, that for all the citizens to be equally clever, or bold, or moderate folk, was impossible. If, then, he was going to frame the laws to satisfy the moderate man's claim to redress, many rascals, he reflected, would get off scot-free, but if he framed them in the interests of the bold and the clever speakers, the plain citizen would not be able to obtain redress in the same way as they would. But he thought that no one should be debarred from obtaining redress in whatever way he can best do so. How then will this be ensured? By granting many modes of legal procedure to the injured parties. Take a case of theft. Are you a strong man, confident in yourself? Arrest the thief; only you are risking a thousand drachmas. Are you rather weak? Guide the Archons to him, and they will do the rest. Are you afraid even to do this? Bring a written indictment. Do you distrust yourself, and are you a poor man, unable to find the thousand drachmas? Sue him for theft before a public arbitrator, and you will risk nothing. In the same way for impiety you can arrest, or indict, or sue before the Eumolpidae, or give information to the King-Archon. And in the same way, or nearly so, for every other offence."

The truth of this assertion is examined by Carey (2004), and his conclusion is that it is accurate in a high degree (specifically that an Athenian could choose between different procedures of varying risk in cases of e.g. assault, rape, guardianship, theft etc.) provided that some adjustments are made⁴⁹. Osborne

⁴⁷ Gill (1996).

⁴⁸ This might explain some weird maxims such as 'justice is doing what pertains to oneself' which was apparently appealing to Plato, and that 'the virtue of a woman is to be least talked by men either for good or for bad' assigned to Pericles in his Funeral Oration.

⁴⁹ The main adjustment being that this model was one-way; namely the prosecutor could opt out for a lesser and less risky offence and not vice-versa, except where the criteria for the more severe action were met. [Carey (2004) p. 130].

observes that Demosthenes in fact leaves a whole dimension out of the question. The procedure followed determined the consequences for the defendant as well as the prosecution⁵⁰.

Now that the picture is complete the already apparent implications may be highlighted. The first is noted by Demosthenes himself: human beings are unequal in respect of their internal and external characteristics. The level of cleverness, boldness and skilfulness differs among individuals and this has to be taken into account by the legislator. This divergence is even more apparent in case of status, wealth and power. Therefore it is assumed that the procedure chosen reflects the individual characteristics of the parties. These characteristics have to be (and in a great degree are) presented before the Athenian jurors in order to explain this procedural choice. The insolent Meidias in Demosthenes 21, wealthy and powerful though he is, has to be punished for *hubris*. In his case, a lesser punishment would not suffice and would simply make him more hostile and thus dangerous to the people. Therefore Demosthenes has to portray him as fulfilling these characteristics. On the other hand, in Demosthenes 54, the young and inexperienced prosecutor could not pursue a risky and demanding public prosecution, as this would have been above his powers. This offer of justifications based on stereotypical assumptions about youth and inexperience is a well-attested pattern of argumentation. It aims at causing the sympathy of the audience and preventing any thought of sycophancy; apparently it had the above implication as well, i.e. a litigant's deeds conforming to his 'role' and personality⁵¹. In other instances, natural strength could be used for the arrest of a criminal in cases that this was permitted⁵². Questions could arise in case that this failed or was not pursued. Also, as Aristotle observes (*Rhet.* 1372a) questions may arise if "a man wanting in physical strength were accused of assault and battery, or a poor and an ugly man of adultery".

The status of the defendant determined the risk that a prosecutor would be willing and able to take. An excuse of inability to find witnesses due to the

⁵⁰ Osborne (1985), p. 43.

⁵¹ E.g. Dem. 27.2; 29.1; 44.1; 53.13; 58.3; Antiph. 1.1; 5.1, 5, 79.

⁵² See Hansen (1976).

intimidation of the defendant's personality and power is attested in the speeches⁵³. As a result a safer course of action should be followed. The dangers posed for the prosecutor by a failed public prosecution, contrasted to the financial benefits of a successful private one, could induce him to pursue, wherever possible, the latter path. The invocation of liturgies by defendants and the anticipation of such a plea by prosecutors illuminate the matter further. In contrast, a prosecutor, calculating the weakness of a defendant, could choose the procedure most suitable to his aims. . The prosecutor in Lysias 14 asks for the extermination or banishment of Alcibiades the Younger since his weakness and skills rendered him harmless and unable to inflict any harm to Athens⁵⁴. Calculation of risk and benefit, determined by the individual characteristics of the parties, seems to be central in the Athenian approach to justice. As a result, invocation of character evidence seems inescapable.

2.1.6 : Autonomy of the Courts

Finally, in order to complete the picture of this peculiar (to modern understanding) system of justice, yet another substantial aspect has to be considered: specificity. The Athenian approach to justice seems very far apart from the modern which views the autonomy of the courts as a sine qua non of a fair trial. The dominant definition of this term is related to the concept of the separation of powers and means the absence of interference of the other branches of government to the workings of the judiciary. However, other interpretations of court autonomy are more closely related to this thesis and serve as further incentives to the wide use of character evidence. The first concerns the internal autonomy of the courts, i.e. the autonomy which a panel of judges enjoyed in relation to other panels and their decisions. The absence of formalism and professionalism in the Athenian system of justice produced the underdevelopment or total lack of the legal rule of *ratio decidendi*, the concept of binding precedent, and the principle of *stare decisis*. In relation to this, a particular panel was liberated and enjoyed significant flexibility and latitude in reaching a verdict. This, in conjunction with the limited flexibility of the court in proposing the sentence in most trials, facilitated the wide use of character evidence, giving to litigants one more opportunity in their effort to win the good

⁵³ See for e.g. Lys. 7.21.

⁵⁴ Lys. 14.44-5.

will of the jurors, enhance their credibility and, at the balance, win a favourable verdict.

Secondly, although the Athenian court was in principle sovereign and its decisions were unappealable, it did not enjoy total autonomy and separation from its socio-political environment. As Carey notes and it is widely true “over and above any practical reasons for the inclusion of such material, the most important factor is cultural. Whereas most modern systems surround the law court with artificial rules and barriers designed to treat the individual case in isolation, the Athenians viewed the trial within the lives of the parties, the judges and the community as a whole”⁵⁵. The above two factors contributed to the attested wide approach of Athenian courts to character evidence and, even though they might be considered by them as relevant to the legal case and its facts, they nonetheless served the aforementioned secondary rhetorical purposes as well. In other words, adding these reasons to the absence of authoritative decision as to the admissibility of evidence, of formal collective deliberation, and of principles such as *stare decisis* and standard of proof, convincing each particular juror that the evidence adduced is relevant and, on the top of that, winning his sympathy and his positive vote, was a parallel to the legal case, though significant aim of rhetoric, an aim more prone and open to extra-legal argumentation⁵⁶.

Arguably, one could identify two acceptable forms of character evidence; 1) arguments directly relevant to the offence in question that tend to reveal a specific propensity or disposition enhancing the probabilities of committing the specific crime, and 2) more general arguments about one’s life, illuminating the personality of the party, revealing character traits and disposition, as well as credibility. In principle, a litigant should rely solely on the first set of arguments at the guilt phase of the trial, while mentioning the second during the sentencing

⁵⁵ Carey (2011), p. 19.

⁵⁶ Cf. Griffith-Williams (2012), p. 155: “In the absence of an authoritative decision from an objective adjudicator, each of the dicasts had to make up his own mind about the relevance and cogency of all the evidence which the litigants in a particular case had chosen to adduce. Of course, we have no means of knowing the thought processes by which the dicasts reached their decisions. It seems likely that at least some of them, in any given case, might have been susceptible to means of persuasion that were not strictly rational or legal”.

phase⁵⁷. The (desired) absolute equality of individuals, translated in the courtroom as absolute equality before the law (meaning that one has to stand totally stripped of any distinguishing personal factors enjoyed due to e.g. status, merit, or life), resulted in the prohibition of litigants' invocation of any merit from one's life outside the courtroom, retaining the realm of the courts autonomous from the socio-political sphere. This narrow view taken by modern law, means that character evidence should be invoked solely through arguments concerning the reputation of the litigant; persons from his immediate environment are called to testify on the question. In addition, the modern approach allows only for the invocation of past offences (or criminal past) in order to portray a litigant's character. Contrastingly in classical Athens argumentation from character could take many forms. These included a litigant's reputation among the wider public, opinion and circumstantial evidence, and particular past events highlighting personality traits (usually inadmissible in modern courts).

However, the above factors tend to create a misleading account of Athenian courts, picturing them as promiscuous fora, incapable of delimiting litigants' argumentation, thus reaching ad hoc and inconsistent decisions. Quite the contrary; the Athenians were fully capable (albeit apparently unwilling sometimes)⁵⁸ of instituting elaborate and unambiguous procedures. For instance, the court of the Areopagus with its highly respected and solemn processes was widely received as the most scrupulous tribunal in Greece⁵⁹. In particular, the Areopagus had stricter rules governing forensic argumentation which did not apply to the popular courts. The conscious decision concerning the latter, namely that both forms of character evidence (1, 2 above) are acceptable in a courtroom, allowed for the development of informal and empirical rules of relevance that governed both the invocation of directly relevant, as well as (seemingly) extraneous character evidence. As will be demonstrated in the course of this thesis, this approach becomes evident by the consistent patterns of argumentation that Athenian litigants followed and by the themes they chose to highlight. By the same token, the rarity of arguments from private life [apart from those directly relevant to the offence belonging in

⁵⁷ See Harris (2006a).

⁵⁸ Cf. Carey (2004), esp. p. 132.

⁵⁹ Lyc. 1.12; Aeschin. 1.92.

category (1)], and the frequency of invocation of particular themes from public life showing adherence to communal norms, prove the present interpretation of the issue.

2.2 Procedures as Further Incentives

Character evidence is central to the examination of argumentation in Athenian trials. Analysis of extra-legal argumentation is a prerequisite for a deeper understanding of the workings of Athenian courts. As it is not yet time for the examination of its objectives, I now aim to concentrate on the practical driving forces behind this broad approach. An interesting and intriguing factor, inherent in the legal system, is the nature of Athenian laws and procedures that facilitated this wide use. The open texture of legal statutes and the wide range of admissible (or even required) evidence, together with the semi-autonomous sphere of Athenian courts (which sometimes seemed to intertwine with the political sphere), forced litigants to design their rhetorical strategies in such a way as to encompass a non-provocative, carefully designed positive sketch of their personality. Sometimes, when the charges themselves were designed to require a deeper examination of one's general behaviour and mode of living, litigants legitimately concentrated on evidence from character.

As stated above, legal procedures were divided into public (*graphai*) and private (*dikai*), classified by who had the right to initiate proceedings for legally actionable wrongs. Apart from these 'normal' procedures, there were some 'extraordinary'⁶⁰ ones, which although having a public character (in the sense that they were initiated by *ho boulomenos*) and designed to correct public wrongs, it would be inaccurate to be classified under the category of *graphai*. Two of them were largely political, designed either to protect the citizen body from potential usurpers of political rights (*dokimasiai*) or concerned with the accountability of magistrates and public officials for their actions while in office (*euthunai*). The peculiarity of these procedures lay on the fact that they de facto concern the whole citizen body for mainly political and not strictly legal reasons; anyone could initiate proceedings and any public official was accountable.

⁶⁰ I borrow the term from Todd (1993), where he uses this term in order to denote the procedures not belonging either to the category of *graphai* or *dikai*.

According to Hansen, every year the Council had to handle 509 dokimasiai and the courts at least 700⁶¹. The same several hundreds of magistrates (in the wider sense, including the *bouleutai*) had to undergo the process of *euthunai* at the end of their tenure. This process included a thorough examination of the officials' financial record and any malpractice alleged against the official. This procedure was the citizens' first and foremost weapon for holding his magistrates accountable⁶². The Athenians' obsession for encountering corruption and the fierce political antagonism, coupled with their litigiousness and competitiveness, are just some logical reasons for assuming that several cases ended up in court.

2.2.1 *Graphai and Dikai*

As far as the type of the legal case is concerned it seems that, though not universally observed⁶³, in public cases (*graphai*), character evidence and personal behaviour was more important in making a case. With the reservation that each litigant's opinion is biased (in the sense that he tries to fit his rhetoric to his case) the following evidence has some seeds of truth (or at least, since they were argued before a large audience, plausibility). Demosthenes states that jurors in private cases (*dikai*) focus on the issue at hand; in public ones, they decide in accordance with the spirit and the norms of the state and for the honour of the ancestors⁶⁴. This is recognised by Plato who, in the *Laws*,

⁶¹ Hansen (1991), p. 220.

⁶² Hansen (1991), p. 222.

⁶³ See Lys. Fr. 7 [175] ff: "Since his return [from exile], he has never offended any of the Athenians, either by mentioning his own benefactions or by drawing attention to other people's offences. But now something must be said about him, because he is defending this *dike* against the sort of man who under the Four Hundred went into exile, made Decelea his base, and joined the enemy in attacking his fatherland".

⁶⁴ Dem. 18.210; cf. Ruschenbush (1968), pp. 47-53; Dem. 21.25-8, 32, 44-5. This statement is largely accurate, at least as an anticipation of the defendants' effort to widen the focus of the legal case and induce the jurors to take into account extra-legal considerations. This differentiation between private and public cases is supported by statistics; for example, prosecutors mention the jurors' oath more in public than private cases, in their effort to limit the defendants' opportunities for maneuvering [see Johnstone (1999), p. 37]. On the other hand, defendants refer to their services to the city and ask for *charis* more in public cases than in private ones [Johnstone (1999), p. 128]. However, prosecutors themselves originated (to some extent) this response from the defendants in public cases since they presented the whole polis and the jurors as the victims of the defendants' alleged crime [Johnstone (1999), p. 52: "public prosecutors spoke, for example, of the 'polis' more than three times as often as speakers in other kinds of cases"]. Moreover, Rubinstein (2000, p. 22) uses the model of team-based prosecution in public cases in order to draw attention "to the fact that there seem to have been important differences between public and private actions in regard to the way in which the pleading was conducted in the courtroom".

provides for two forms of trial: the one when a private person accuses a private person of injuring him and desires to gain a verdict by bringing him to trial and the other when a person believes that the State is being injured by one of the citizens⁶⁵.

Moreover, in Lysias 30, the prosecutor objects⁶⁶ because defendants in public cases (as opposed to private ones) proceed to win a case by counter-accusations and irrelevant considerations. The peculiar thing is that in the same case, the very same person in the prologue of his speech says:

“There have been cases, gentlemen of the jury, of persons who, when brought to trial, have appeared to be guilty, but who, on showing forth their ancestors' virtues and their own benefactions, have obtained your pardon. Since, therefore, you are satisfied with the plea of the defendants, if they are shown to have done some service to the State, it is fair that you should also listen to the accusers, if they show forth a long course of villainy in the accused” (Lys. 30.1).

Apart from trial considerations, and since (as it has already been noted) Athenian courts did not enjoy total autonomy, the interpretation of the acceptable degrees of relevance depended on external considerations as well, such as the type of the legal case and the particular circumstances of the period. Regarding the influence of the prevailing circumstances, the speaker of Lysias 30 blames the opponent for behaving contrary to the public interest. He states that his opponent

“also knew that whenever the Council in a given year has enough money for its administration, it does no harm, but whenever it is reduced to desperation, it is forced to accept impeachments (*εἰσαγγελίαι*), to confiscate the property of the citizens, and to allow itself to be persuaded by those of the orators whose advice is most corrupt” (Lys. 30.22).

Such a tendency to condemn rich citizens and confiscate their wealth could indeed be a dangerous problem for the whole system, albeit a not assessable one. Hansen notes that it probably pertained mainly to crisis periods⁶⁷. In his

⁶⁵ Plat. *Laws* 767B.

⁶⁶ Lys. 30.9.

⁶⁷ Hansen (1991), p. 315.

assertion's support, he cites the Third Oration of Hypereides, which was spoken in the period of peace after the settlement of 338: in it there are three examples of how the Athenian courts did *not* fall into the temptation of condemning a number of rich mining-concessionaires, although the accusers' proposals for confiscation were very tempting⁶⁸. On the other hand, another source maintains that in those very same years the richest of all the mining-concessionaires, Diphilos, was condemned to death and executed and his fortune of 160 talents distributed among the citizens⁶⁹. If such a tendency even in periods of crisis indeed existed, its implications to character evidence are obvious. In addition to his innocence concerning the strict legal case at hand, one had to convince the jury of his value as a person, which underlie the fact that his acquittal would be on the public interest due to his continuing lavish benefactions to the polis. Furthermore, the above factors (his favourable disposition to the polis *and* his innocence) made him a person worthy of the jurors' pity⁷⁰. These are issues that are going to be discussed analytically in the course of this study but, nonetheless, highlight at present the structural pressures and tensions that formed the Athenian approach to character evidence.

2.2.2 : *Sui Generis* Procedures

The following procedures are referred to as *sui generis* in the sense that they do not belong to the normal, broad procedures of *dikai* and *graphai*⁷¹. The procedures of *dokimasia* and *diadikasia* will serve as indicative examples of widely used extraordinary procedures that, by their nature, induced litigants to a broader invocation of character evidence. Let us start with *dokimasia* as an example of a procedure inducing the parties to broad invocation of character evidence, thus revealing a structural incentive to such an approach. Definitely, as in most cases, there is no consensus among scholars about the purpose of this procedure. Disagreement can be narrowed down to two trends. Some scholars assert that it was introduced to test a candidate's legal qualifications both as a citizen and for the office in question, mainly to protect the idea of

⁶⁸ Hyp. 3.32-38.

⁶⁹ Plut. *Mor.* 843D. Harris (2006a) on the other hand cites other instances when it is convincingly proved that Athenian courts did not decide under such extra-legal influences.

⁷⁰ The fact that an appeal to pity presupposed a litigant's innocence is proved by Konstan (2000).

⁷¹ For the implications of this classification see Todd (1993), p. 112 ff.

'citizenship' and the citizen body from unauthorised intrusions⁷². On the other hand, scholars suggest a deeper examination of a candidate's suitability for public office, recognising in the *dokimasia* "a comprehensive enquiry, covering not only the candidate's legal qualification but also the probity of his life, both public and private"⁷³. According to the evidence, I take the latter view to be closer to the truth. I aim to show that apart from the direct evidence based on litigant's surviving speeches, this conclusion is supported by the wider trend of the Athenian legal system to allow broad invocation of character evidence. I would describe this relationship as bidirectional. The structural design of the Athenian legal system was the result of a deeper belief in the relevance of argumentation from character; nonetheless, it also became an incentive and justification for its even wider use.

Dokimasia technically signified the formal judicial scrutiny of one's suitability for a particular civic role⁷⁴. On a symbolic level it was the confirmation by the polis, either before the Council or the Court (or both in some cases), that a man was eligible for his registration on the citizen list⁷⁵, for taking up public office⁷⁶ or for addressing civic bodies⁷⁷. As Todd notes *dokimasia* was yet another "procedure designed to protect the integrity of the citizen body from any intrusion by those who do not share the fullness of citizen privilege"⁷⁸. Such an intrusion could take place due to technical reasons (as in the case of a person whose parents were not both Athenian citizens), but also due to behavioural reasons (for instance, leading a disreputable life by prostituting oneself, squandering his patrimony, abusing his parents and so on)⁷⁹. Therefore the procedure itself (especially its second leg) instead of being narrow and specific, called for a wide use of

⁷² See Headlam (1933), pp. 96-102; Hignett (1952) pp. 205 and 232; Harrison (1971), p. 201; MacDowell (1978), p. 168.

⁷³ Adeleye (1983), p. 296; for this trend see Bonner (1933), pp. 12-3 and 40; Jones (1960), p. 48; Hansen (1991), p. 219.

⁷⁴ Arist. *Ath. Pol.* 45.2 and 55.2-4; Lys. 16; 25; 26; 31; Aeschin. 3.14ff says that the law specifically provided for the scrutiny of anyone who was to be in charge of any state business for more than thirty days and anyone who was to preside over a court.

⁷⁵ See Lipsius (1905-15), pp. 270-8; Kahrstedt (1936), pp. 59-63; Harrison (1971), pp. 201-3; Rhodes, Boule (1971), pp. 176-8.

⁷⁶ Arist. *Ath. Pol.* 45.2 and 55.2-4; Lys. 16; 25; 26; 31; MacDowell (1978), pp. 167-9; Harrison (1971), pp. 200-5.

⁷⁷ Aeschin, 1.186; 1.28ff.

⁷⁸ Todd (1993), p. 288.

⁷⁹ Cf. Hansen (1991), p. 219: "And even if he [the candidate] possessed all the formal qualifications he could always be turned down on the ground that he was unworthy to hold office".

character evidence. An objecting plaintiff could point to instances of misbehaviour according to citizen standards, in order to prove the unworthiness of the candidate. On the other hand the defendant, by presenting evidence of good conduct (or providing for the absence of any reprehensible activities), could win the good will of the jury and gain a favourable verdict. Such argumentation is evident in all surviving cases of *dokimasia*, either concerning scrutiny for public office or for addressing the assembly. Litigants themselves, recognising this fact, state that in cases of *dokimasia* a more general account of the defendant's life is under question⁸⁰. *Dokimasia* is essentially an investigation of one's behavioural record and

“although in other trials it is appropriate to defend oneself simply on the charges, in *dokimasiai* it is fair to give an account of one's whole life”⁸¹.

In order to understand the seriousness of the procedure, the importance of civic participation for the citizens of classical Athens has to be kept in mind. In a purely legal context, this procedure meant that every single year hundreds of Athenians⁸² were obliged to undergo this scrutiny. In addition to this number, the compulsory annual rotation of public officers and the prohibition of holding any allotted public office twice in a lifetime (apart from the office of *bouleutes*) certify the major importance of this procedure which concerned the majority of the citizenry. In practical terms, this means that the *dokimasia* was the first (compulsory) contact of an overwhelming percentage of Athenians with the city's judicial process. Adding to this account the *dokimasia* of young (*ephebes*) Athenians for the acquisition (or, formal recognition) of citizenship, it can be safely concluded that all citizens were educated in legal matters in such a way as to consider the scrutiny of behavioural traits as reliable evidence in the quest for truth. Although presumably to a certain extent the procedure remained a formality, there is still evidence of cases that eventually ended up in court. According to Aeschines the law specifically provided for the scrutiny of anyone who was to be in charge of any state business for more than thirty days or

⁸⁰ Lys. 24.1.

⁸¹ Lys. 16.9; cf. 16.1, 16.3.

⁸² Without taking into account the military *dokimasiai* for the cavalry etc., the number of allotted public offices amounted to more than seven hundred.

anyone who was to preside over a court. In the corpus of Lysias, at least five of the thirty forensic speeches concern charges initiated during a *dokimasia* for public office. Additionally, according to the procedure of *dokimasia rhetoron* (scrutiny of orators)⁸³ anyone deciding to address the Assembly (or a popular court)⁸⁴ could be called for a *dokimasia*⁸⁵, in the form of a challenge initiated by anyone who wished (*ho boulomenos*), in order to test his eligibility. Aeschines' *Against Timarchus* is a good example of how this procedure could be used (or abused) in order to disqualify a potential opponent and strip him of his political rights.

Diadikasia is the 'only private extraordinary procedure'⁸⁶. It was initiated by a private individual in order to secure a claim, yet in the eyes of the law he was not received as the prosecutor, nor was the opposing party the defendant. In fact all parties, since there could be more than two rival claimants, were treated on equal terms. This is best exemplified by reference to an actual inheritance dispute [Dem. 43.8-10], where five claimants were competing to secure a claim on a particular estate. Cases were decided by a first-past-the-post system rather than by absolute majority and this is yet another indication of their extraordinary nature. Furthermore, the procedure of *diadikasia* conferred no absolute rights to the winning claimant. For instance, in inheritance cases (where *diadikasia* was widely used) it solely proved that the winning party had a better title to the estate than that put forward by his defeated opponents. If a new challenger disputed the winning claimant's rights, the case could be re-opened and re-examined.

The procedure of *diadikasia* by its nature called for an immediate, though relative victory against (sometimes) more than one rival. There were no allegations concerning a breach of a particular law, nor was the content of the

⁸³ This procedure, although under the name of '*dokimasia*', has two important differences from the normal procedure of *dokimasia* discussed above. Firstly, unlike the normal procedure, this scrutiny of orators is retrospective, in the sense that it "concerns the right to speak in public of a man who in most cases has already exercised that right". Secondly, this procedure is initiated by a charge brought by *ho boulomenos* rather than having the automatic application of the normal *dokimasia* procedures. See Todd (1993), p. 116.

⁸⁴ See Fox (1994), pp. 148-51.

⁸⁵ Aeschin. 1.2, 32, 64, 81, 186.

⁸⁶ Todd (1993), p. 120, n. 20.

litigants' argumentation contained by the charges written on the plaint. Disputes, especially in inheritance cases, mainly concerned factual matters rather than disagreements about the meaning of the law. Usually, argumentation of litigants focused on the validity of an adoption or a will and, due to the limitations posed by the inadequate methods of scientific proof regarding such issues, litigants' rhetoric relied heavily on arguments from probability. Aggravated by the potential multi-party clash, each party sought to supply the court with sufficient primary (relating directly to the legal case) and secondary (relating to the credibility of the parties) reasons in order to decide in his favour. The nature of the verdict in a *diadikasia* (first-past-the-post), transformed the normal strategy of litigants' argumentation (i.e. proof as to the points mentioned in the written plaint), concentrating to a proof relative to the other parties' position. Ultimately, there was no need for a claimant in a *diadikasia* to convince the court as to the truth of his case per se but, unlike a *dike* or a *graphe*⁸⁷, to convince the court more than his opponents. Wider invocation of (positive and negative) character evidence served exactly this purpose.

2.3 : Specific Charges as Further Incentives

In order to reveal the wide spectrum of offences that followed an open texture and favoured a broad approach to character evidence, reference to specific examples of legal charges will be made. In this context, 'open texture' signifies the lack of formalism of the Athenian jurisprudence, and its resulting abstention from developing detailed definitions of its legal terminology⁸⁸. The wording of legal statutes has to be, in principle, clear and unambiguous in order to allow

⁸⁷ I acknowledge that in a system lacking the formalised concepts of burden and standard of proof it is risky to maintain that a prosecutor had to prove his case in absolute terms rather than in terms relative to the defendant's position. However, in principle, the Athenian courts in a *dike* or a *graphe* ought to deliver their verdicts by reference to the legal charges as specified in the written plaint, *in personam*, for or against the specific person of the defendant. Therefore, this was a point of reference which ought to contain both the jurors' decision-making and the litigants' argumentation. In an inheritance case the argumentation referred more to the future of the estate and to the testator's *oikos*, so it may be suggested that the proceedings focused *in rem*. Thus, the court had to assess the relative trustworthiness and background of the claimants in order to decide who would be the best inheritor of the estate and, in sequence, in all probability, whom among the claimants the testator would have chosen as his beneficiary.

⁸⁸ For an analysis of 'open texture' and its meaning, see Hart (1961, pp. 125ff.). For the 'open texture' in Athenian law see Harris (2000). This definition of 'open texture' does not include Osborne's understanding of this phrase as 'procedural flexibility' [Osborne (1985), pp. 43-44]. Procedural flexibility in Athenian courts is treated in 2.1.5.

limited scope to judges for innovative interpretations⁸⁹. The same approach to legal statutes was taken by the Greeks as well, yet in the recognition that the effort of the law-maker to predict and cover all future cases may prove futile and infeasible⁹⁰.

As a result, the specific wording of legal statutes could originate disputes about the meaning of the law, especially aggravated by reference to key words open to interpretation. Thus, litigants' effort to prove their legal case included a suggestion as to the definition of legal terminology. In order to support their conclusions and show that the opponent breached the particular legal statute in question, they proceeded to a wide invocation of character evidence to prove that, in addition, his conduct contravened the spirit of the laws. For instance, the meaning of the word '*hubris*' which signified a particular offence (*graphe hubreos*) was interpreted by reference to the intent of the lawgiver and the spirit of the laws. A more liberal or strict interpretation could change the litigants' argumentation and strategy⁹¹. This factor could be an incentive to the speaker to offer further character evidence in order to demonstrate that the opponent's act, sometimes deduced by his more general behaviour, opposed the deeper, 'hidden' behind the literal interpretation, meaning of the statute. To illuminate the issue, reference is made to examples from forensic speeches.

2.3.1 : Examples of Graphai

In this section, reference to the political offence of the *graphe paranomon* (public prosecution against illegal decrees) will be made, and to the 'criminal' offence tackled by the *graphe hubreos* (public prosecution for insolent, dishonouring assault). The aim is not to offer yet another analysis of the offences' technical issues but to provide two more examples of procedures calling (or allowing) for invocation of evidence of character from two procedures which come from divergent fields of law. As mentioned above, an indicative charge relates to acts of *hubris*. The substantive elements of this offence are not free from controversy among scholars. Presumably, the essence of *hubris* is

⁸⁹ This is one of Fuller's eight rules in order for a failure of the system to be avoided. Fuller (1969).

⁹⁰ Pl. *Statesman*, 295a; Ar. Pol. 1282b2; Ath. Pol. 9.2; cf. Dem. 24.68; Aes. 3.199; Lyc. 1.9.

⁹¹ The more characteristic example is Lys. 10.

to be found in the mental state of the perpetrator and / or in his intentions with respect to the social status of the victim⁹². According to Carey “it is difficult to avoid the conclusion that *hubris* had a subjective (intention / mind-set) as well as an objective dimension (the fact of assault)”⁹³. The subjective dimension gave to the *graphe hubreos* its ‘open texture’ and made it more challenging for a litigant to prove. In order to assist this quest for demonstrating the perpetrator’s mind-set, a prosecutor could resort to wider invocation of character evidence. As a result, the perpetrator’s general disposition could be found on trial as much as the objective element of the assaultive fact. In addition, if the plaintiff was required to prove a degradation of his dignity and status, his own disposition and way of life could be called in question as well. To make it plain, the intention of the perpetrator to inflict insolent assault was to be found in his mind, with evidence from character illuminating the case (specifically his past behaviour which proves a propensity to commit such acts), while the degradation of the victim was to be found in his social status and / or his respectable, non-provocative character. In modern counterparts this brings to mind a particular defence or mitigatory allegation for defamation where the court recognises that the claimant’s reputation and position in the community is so poor that any comment would be incapable of further defamation⁹⁴.

Returning to classical Athens, maybe the most famous speech in the context of *graphe hubreos* is Demosthenes 21. Although it is questioned whether it was actually delivered before the Court, it nevertheless gives valuable evidence as to the Athenian approach to the offence⁹⁵. The whole speech is centred on Meidias’ portrayal as a wealthy, insolent oligarch who chafed under democratic

⁹² Cf. MacDowell (1976), Fisher (1992), Cairns (1993).

⁹³ Carey (2004), p. 118.

⁹⁴ *Burstein v Times Newspapers Ltd* [2000] EWCA Civ 338; [2001] 1 WLR 579; [2001] EMLR 364.

⁹⁵ There have been serious attempts to argue that this speech is an unrevised draft [e.g. Dover (1968), pp. 172-74], or that it has never been delivered in court, based on the argumentation made by Aeschines (3.52) and followed by Plutarch (*Demosthenes* 12). MacDowell (1990), pp. 23-28 examines the traditional view that this speech never came to court and concludes that “there is no proof, then, that the speech was not delivered”. Rubinstein (2000), pp. 208-9 argues for an alternative interpretation of the accusation made by Aeschines that Demosthenes sold his case, in the sense that the latter agreed to propose a small penalty at the *timesis* phase in return for a sum. Harris (2008), pp. 85-86, argues for the authenticity and actual delivery of this speech in court.

and social norms⁹⁶. His particular behaviour in Demosthenes' assault illuminated Meidias' general traits: he harassed Demosthenes in every way possible, he destroyed his festival chorus' costumes, he tried to corrupt the officials and the judges, "he bawled and threatened, standing beside the umpires as they took the oath" (Dem. 21.17). These were simply the incidental signs of Meidias' more general disposition, as revealed in his behavioural comparison with certain stereotypical patterns. He spoke loudly and often, getting his way with bribery when shouting didn't work, and when all else failed, with threats and intimidation⁹⁷. In Demosthenes' words

"if for nothing else, yet for those harangues that he delivers at every opportunity and for the occasions that he chooses for them, he would deserve the severest penalty" (Dem. 21.202).

On the other hand, Demosthenes' honour was affected, not only due to the insolent public assault in the crowded theatre, but also due to his own democratic and peaceful character: the exact opposite of Meidias. His patience and adherence to the norms of the polis are reflected in his conduct at the time of the assault. His decision to 'repay' through a speech rather than a punch encapsulates his devotion to acceptable public norms, but also his desire to protect weaker individuals from Meidias' insolent treatment. It is the character and personality of such men that runs the greatest risk of being maltreated:

"It is exactly the weakest and poorest of you that run the greatest risk of being thus wantonly wronged, while it is the rich blackguards that find it easiest to oppress others and escape punishment" (Dem. 21.123).

Meidias' characteristic contempt for acceptable behavioural norms and Demosthenes' loyalty to democratic and cooperative ideals were as much at issue as the violent act itself. Both parties' characters were relevant to the charge. *Hubris* offers thus a good example of an incentive to broader – justified – invocation of character evidence.

⁹⁶ Cf. Fredal (2001).

⁹⁷ Cf. Dem 21. 59, 133, 135-7.

The *graphe paranomon*, a very frequently used charge according to the surviving evidence⁹⁸, was seemingly the main juristic weapon in the struggle for dominance between high-profile individuals in the Athenian agonistic political arena. It could be initiated by *ho boulomenos* from among Athenian citizens, by an allegation under oath that a particular decree was illegal. The accusation was either that the decree was unconstitutional, formally or materially, or that it was undesirable and damaging to the interests of the people⁹⁹. Adverse judgment in a *graphe paranomon* had a twofold consequence: the arraigned decree was thereupon null and void and, if the case was brought within a year from the decree's enactment, the proposer was punished¹⁰⁰.

What is of interest here in relation with this offence is its highly political nature in addition to the idea of 'public interest'. Many of the surviving speeches concentrate on the fact that the decree in question is not just technically unconstitutional but also damaging to the interests of the *demos*. A convenient and usual method of proving this, apart from the obvious type of argumentation relating to its future disadvantageous consequences, was also the hostile character portrayal of the proposer. However, Demosthenes, in maybe the most famous and perfect forensic oration of classical Athens (Demosthenes 18: *On the Crown*) stated:

"I suppose that our ancestors built these law-courts not that we should assemble you here to listen to us abusing one another with scandalous accounts of our private lives, but that we may convict someone if he has offended against the city"¹⁰¹.

⁹⁸ We possess thirty-five examples of its use in the period 403-322, a very large number compared to the slim evidence we have. Hansen infers that "there is nothing against supposing that the jurors must have judged a *graphe paranomon* something like once every month. A similar procedure, though not so frequently employed, was the *graphe nomon me epitedeion theinai*, concerning permanent laws whose numbers were significantly less than temporary decrees.

⁹⁹ For the principal study on *graphe paranomon* one should refer to Hansen (1974).

¹⁰⁰ Hansen (1991), p. 207.

¹⁰¹ Dem. 18. 123. However, through the centuries he has been accused for not observing in practice his own theoretical remarks, and winning this legal case against Aeschines by resort to irrelevant arguments. Nevertheless, Harris (1995) has proved that in fact Demosthenes offered an elaborate address of Aeschines' legal arguments and, presumably, this was the decisive factor of his total victory.

Character evidence in Athenian courts concentrated mainly at the public (and especially political) behaviour of litigants. Therefore, a tested method of convincing the jurors to cancel a decree was firstly to question its proposer's intentions. A series of past harmful proposals, dishonest disposition, and propensity to reject as a person the polis' conventional ethical and political norms, constituted the usual arsenal at the plaintiff's disposal¹⁰². These same considerations were taken into account to the similar offence of *nomon me epitedeion theinai* to the extent that Demosthenes advises the jurors to

“have regard also to the disposition of the man; for the law which he has had the audacity to propose is significant of his character” (Dem. 24.138).

However, the issue remained a strictly legal (and highly technical) one, and any effort to argumentation from character was supplementary to the main cause of proving the illegality of the decree.

This attested fact of attacking the proposer's character in order to question his intentions and thus reject the decree per se is supported and partly explained by reference to a frequent target of *graphai paranomon*: grants of citizenship and honorary decrees¹⁰³. Reference to these is needed in order to offer an example where, in addition to the proposer's character, the recipient's one was at issue as well. This refers to cases of naturalisation of aliens who had already proved their merit through their services to the city. In fact, Athenian appraisal for citizenship led to the official legal provision that citizen rights must correlate with worthiness. In the speech against Neaera it is cited that:

“there is a law imposed upon the people forbidding them to bestow Athenian citizenship upon any man who does not deserve it because of distinguished services to the Athenian people... the law permits to any Athenian who wishes to prefer it an indictment for illegality against the candidate, and he may come into court and prove that the person in question is not worthy of the gift, but has been made a citizen contrary to the laws. And there have been cases ere now when, after the people had bestowed the gift, deceived by the arguments of those who

¹⁰² See for example Dem. 18.41, 311ff; Aeschin. 3.151, 155, 159-63, 175-6; Dem. 22.24, 49-54, 78; 25.37, 39-40.

¹⁰³ Honours and grants of citizenship formed a very large part of all the decrees passed by the Athenian Assembly in the fourth century. Of the thirty-three *graphe paranomon* cases for which we know the content of the indicted decree, twenty one concern such issues. See Hansen (1991) pp. 157 and 211.

requested it, and an indictment for illegality had been preferred and brought into court, the result was that the person who had received the gift was proved to be unworthy of it, and the court took it back. To review the many cases in ancient times would be a long task; I will mention only those which you all remember: Peitholas the Thessalian, and Apollonides the Olynthian, after having been made citizens by the people, were deprived of the gift by the court.” (Dem. 59.89).

As a result, it is an obvious inference that character and merit were the central issues of these charges, in accordance with the provisions of the law .

2.3.2 : Examples of *Dikai*

As we have already seen, *dikai* were charges brought by private individuals in cases concerning private disputes. In principle, this could serve to limit the invocation of character evidence to issues of guilt, namely to arguments from probability concerning the proof of the disputable facts of the case, or to issues of credibility, facilitating the effort of the litigants to enhance their trustworthiness and win the good will of the jury. However, the public nature of Athenian litigation induced litigants to try to widen the perspective of private disputes and argue for a broader impact of their particular case, so as to make it a matter of concern for the city as a whole. Grounding his assertions to character evidence, a prosecutor could present his opponent’s conduct as dangerous for the entire community (although arguing a private case), and a defendant could respond by presenting his opponent as a malicious prosecutor having ulterior motives¹⁰⁴. Moreover, in some cases, the flexibility of procedural choice for a prosecutor induced him to argue for the aggravated charge (usually a *graphe*) and *a fortiori* prove the lesser charge he chose to bring (the present *dike*). In order to exemplify the aforementioned points, I will refer to two cases of *dike aikeias* (private suit for battery) and a *dike blabes* (private suit for damages). In the first set of cases, priority will be given to the factors of procedural flexibility and the prosecutors’ effort to transform a *dike* into a public matter, while in the latter case the focus will shift to the ‘open texture’ of a *dike* statute.

The first set of cases that will be closely examined is Isocrates 20 (*Against Lochites*) collated with Demosthenes 54 (*Against Conon*). Both are cases of

¹⁰⁴ E.g. Dem. 55.

aikeia where the prosecutor had to prove that the opponent was the first to strike and, also, anticipate the defendant's attempt of "making light of the injuries received" (Isoc. 20.5)¹⁰⁵. In both cases, nevertheless, the speakers do not limit their argumentation in simply proving these points. Both of them insist that a *graphe hubreos* would have been just as readily available in view of the defendant's behaviour (Dem. 54.1; Isoc. 20.2, 4, 5)¹⁰⁶. Therefore, despite the fact that the prosecutor (due to his moderation) chose to bring a private suit, the issue was nonetheless a public one. Relying on a portrayal of the defendant by reference to character evidence, the prosecutors demonstrate his contempt for the laws and for the citizen body, transform the case into a public matter and call for his punishment (Isoc. 20.11, 20). The defendant's general characteristic conduct increases the likelihood of breaching the particular law that formed the substance of the *dike aikeias* by reference to his characteristic contempt for the intent of the lawgiver and the spirit of Athenian laws. The fact that the unprovoked attack did not lead to greater misfortunes is solely due to the speaker's temperance (Isoc.20.8). If people like Lochites and Conon (who are proved to have a *hubristic* character) are allowed by the court to continue their reprehensible behaviour (and it is certain that they will as their character proves), then the mere *aikeia* will escalate and reach homicide (Dem. 54.17-19; Isoc. 20.8)¹⁰⁷.

Dike blabes (private suit for damages) is the most frequently attested private procedure in the Attic orators¹⁰⁸. It applies to a variety of cases concerning damages, presumably due to its open texture and the absence of separate, more specific and better defined actions. The unifying idea under the term 'blabe' was its application to instances where "action or inaction caused (especially material) harm"¹⁰⁹. Such instances included breach of agreements and contractual obligations (e.g. Dem. 48; Hyp. 3), damages to property (Dem.

¹⁰⁵ Carey (2011), p. 100.

¹⁰⁶ Todd (1993), p. 271.

¹⁰⁷ For this recognised sequence of related offences, in ascending order of seriousness, see Todd (1993), pp. 268-269: "Ariston, for instance, the plaintiff in Dem. 54, claims that the *dike kakegorias* was intended to stop a quarrel degenerating from verbal abuse (*loidoria*) into violence (*plegai*: lit. 'blows'); the *dike aikeias*, from violence to physical injuries (*traumata*); and the *graphe traumatos ek pronoias*, from injury to killing (*thanatos*), which would itself give rise to a *dike phonou*".

¹⁰⁸ Todd (1993), p. 279; Osborne (1985), pp. 56-8.

¹⁰⁹ Mumenthey (1971), p. 89.

55), or maladministration of a trust (Dem. 38). However, Demosthenes 39 is a test case where the prosecutor, exploiting the open texture of the term '*blabe*', seeks to apply it to non-material or potential damage to be suffered in the future¹¹⁰. In this case, the dispute arose between two half-brothers, Mantitheus and Boeotus. Their father, Mantias, died before Boeotus reached the age of majority and could register him on the list of citizens in his *deme*. Boeotus took advantage of this event and had himself registered under the name of Mantitheus (Dem. 39.5). His half-brother protested to this and, in the absence of a more specific procedure, brought a *dike blabes*. Nevertheless, if this private action was to be applied to his case, Mantitheus had to convince the judges that the term '*blabe*' could extend beyond its normal interpretation of 'physical damage to some material object' (e.g. Dem. 55.12, 20, 28), so as to embrace acts that "simply cause some annoyance or might cause inconvenience in the future"¹¹¹.

In order for Mantitheus to convince the judges, he should prove that the likelihood of potential future harm was immense. Hence, apart from merely mentioning what hypothetical situations might cause him or the state damage or annoyance (Dem. 39.7-18), he should provide compelling reasons that Boeotus would in all probability take advantage of them. Boeotus is presented as a meddlesome person, associated with a gang of blackmailers (Dem. 39.2, 13, 25, 34) and, quite often, finds himself in court. This increases the likelihood of being convicted in a trial and be forced to pay fines. Consequently, in case of confusion between the two Mantitheuses, sons of Mantias, this could cause material damage to the speaker who might find himself obliged to go to court to clarify the matter. Additionally, Boeotus had recently faced charges for evasion of military service (39.16-17) and had been defendant in certain suits (39.19). Apart from the dangers originating from this aspect of Boeotus' character, he did not stop short from interfering with Mantitheus' life to the extent that he had laid claim to the office to which the Athenians elected the latter (39.19). Finally, the confusion around the persons under the name Mantitheus, son of Mantias, could (taking into account Boeotus' reprehensible conduct) damage the

¹¹⁰ For Demosthenes 39 and the *dike blabes* see Carey – Reid (1985), p. 166.

¹¹¹ Harris (2000), p. 58.

speaker's reputation among the polis. Consequently, reference to Boeotus' character was invoked to serve the focus of Mantitheus' case (resulted by the 'open texture') to future and hypothetical situations. Nevertheless, the Athenian court rejected this liberal interpretation of the term '*blabe*', no matter how probable (by reference to Boeotus' character) future damage appeared.

2.3.3 : Examples of *Sui Generis* Legal Cases (Inheritance and *Dokimasia Rhetoron*)

In section 2.2.2 we have seen how the procedure of *diadikasia* served as an incentive for a wider invocation of character evidence. In this section reference will be made to legal cases under this procedure in the form of disputes about inheritance. The aforementioned (2.1.4) genuine difficulties in investigation and crime detection apply particularly to this category due to the regular disagreement as to the authenticity of the document presented as the deceased's will. In order to approach this question, the court had to rely on the likelihood of each potential answer, weighed by the credibility of each particular claimant, and by the probability of whether the document put forward as his will genuinely represents the testator's wishes¹¹².

In inheritance disputes, claimants' argumentation primarily focused on the facts of the case since in most of the cases the legal context was straightforward¹¹³. Litigants never dispute the right of a legitimate son (natural or adopted) to inherit his paternal estate; but they do contest the legitimacy of a particular claimant or the validity of a particular adoption¹¹⁴. This in turn originated an excessive reliance on arguments from probability which was implemented by references to the burial of the dead and conduct of funeral rites, to feuds within the family dating back to previous generations, and to extensive invocation of character evidence. The last was predominantly used to alter the equilibrium as to the relative credibility of the claimants (taking into account the first-past-the-

¹¹² Griffith-Williams (2012), discusses this point by reference to the speakers' argumentation in Isaeus 7 and Isaeus 9, two cases where the rhetoric of the parties suggests that in all likelihood the presented will cannot express the genuine wishes of the testator.

¹¹³ For instances where the law's 'open texture' concerning succession could affect the litigants' argumentation, see Harris (2000), pp. 35-39.

¹¹⁴ Griffith-Williams (2012), p. 152.

post system of the verdict), but also to illuminate the facts of the case. In Isaeus 4 there is an effort to associate the opponent with a potential forgery of a contested will by reference to his past criminal record. Chariades, who was imprisoned for theft and absconded from Athens to escape justice on a subsequent charge, had all the characteristics of a would-be forger. On the other hand, the law-abiding and trustworthy citizens Hagnon and Hagnotheus would be more worthy recipients of the estate¹¹⁵.

Dokimasia rhetoron constitutes an indicative example of how a particular legal charge could be transformed into a general (deeply political) attack against one's character and behaviour¹¹⁶. This case (Aeschines 1) was brought as a counter-attack by Aeschines in order to damage his opponents' chances of success in his prosecution of Aeschines. The latter argued that the defendant, Timarchus, had illegally addressed the assembly since his past reprehensible behaviour rendered him ineligible to do so. The allegation was that, in the past, he had prostituted himself and had squandered his patrimony. The law offered a list of acts that rendered a man ineligible to address the Assembly. Aeschines offers his account of these acts, which may not be exhaustive, but includes violence toward parents or failure to support them, military derelictions, prostitution, and squandering an inheritance¹¹⁷. All these actions constituted offences that could be tried separately and incur the penalty of *atimia* (loss of citizen rights). Since such acts concern behavioural issues, they interrelate with evidence of character. Illegal (and morally reprehensible) behaviour should be proved by reference to character evidence and could turn the odds in the decision before an Athenian audience.

In order to support his argumentation, Aeschines directed his attack on the defendant's bad character, and especially on specific allegations of indecency (in contrast to the advertisement of his decency). The uselessness of

¹¹⁵ For a detailed discussion of these issues see Carey (2011), pp.127-133 who interprets these points as "an attempt to sway the judges on the ground of the different characters of the two sides, the brothers loyal to Athens, ready always to do their duty to the state, and Chariades, criminal and disloyal to the city" and Griffith-Williams (2012), pp. 160-1 who finds a potential relevance to the legal case, as far as the attack on Chariades is concerned..

¹¹⁶ It also constitutes a good example for 'open texture' since the term 'rhetor' could have a broad and a narrow meaning. Hansen (1983), pp. 39-40.

¹¹⁷ Aeschin. 1.28-32.

Timarchus' character (as revealed by his past acts) dictated the withdrawal of the honour of citizenship, since the mere acknowledgement of this privilege connoted disgrace for the polis as a whole. Aeschines portrays himself as a person of dignity who acts, unsurprisingly, in the public interest. His speech, (as in most trials from classical Athens), is allegedly intended to be given on behalf of the citizens¹¹⁸. The setting of this highly politicised public suit played a significant role in his effort to portray himself as a good citizen. In order to anticipate the obvious allegation of sycophancy against wilful prosecutors, Aeschines becomes the solemn prosecutor of indecency. Character evidence is indeed central. Furthermore, Aeschines' character assassination of Demosthenes (the supporting speaker for the defence) is noteworthy. Instead of deviating from the main charges, Aeschines willingly uses relevant accusations even against Demosthenes. In the course of the speech, the latter is portrayed as a pimp, homosexual, glutton and corrupt person, squanderer of his property, being himself a disgrace to the city. In that way he becomes Timarchus' alter ego rendering both undeserving of the jury's good will. On the contrary, they deserve condemnation. Timarchus was eventually punished with *atimia* (loss of citizen rights) and Demosthenes postponed the initial prosecution against Aeschines for three whole years.

2.3.4 Timesis

A further classification in Athenian law that is of interest for this study is the separation of legal trials into *ἀγώνες τιμητοί* (charges for which the litigants put forward their proposals as to the evaluation – *τίμησις* – of the penalty) and *ἀγώνες ἀτίμητοι* (offences for which the penalty was fixed, as prescribed by law)¹¹⁹. The procedure runs as follows: the trial was divided in two main parts, each one ending with the jurors' vote. The first part (guilt phase) was constituted by the litigants' speeches as to the guilt or innocence of the defendant. After the court's decision on this matter, both litigants had to put forward their respective proposals (one each) as to the assessment of the penalty (sentencing phase).

¹¹⁸ This technique, aiming at the establishment of a special relationship of concord and unanimity between the speaker and the audience, is evident from Homer onwards. Although it is not evident solely on forensic settings (cf. Ar. *Wasps*; Mc Glew (2004), it is in the Attic orators that achieved its perfection.

¹¹⁹ On the procedure of *timesis* an indicative bibliographical list would include MacDowell (1978), pp. 253-4; Harisson (1971), p. 80, who offers a classification of the offences; Todd (1993), p. 134.

The trial ended with the jurors' vote, and the proposal receiving the majority vote was enforced. The normal process (probably) did not include any hints during the guilt phase regarding a litigant's evaluation of the sentence. Harrison notes the possible exception of litigants coming to terms as to the penalty in advance of the trial¹²⁰. Todd refers to cases where a litigant could warn of his thoughts in advance¹²¹. Such behaviour is evident in Aristophanes' *Wasps* (where in the trial scene the indictment also includes the *timema*); apart from comedy, it is also evident in the fragmentary speech of Deinarchos *Against Proxenos* (Dion. Hal. Dein. 3). The latter may be taken as a clue that reference to the *timema* in advance could function as a rhetorical ploy, advertising the confidence of a litigant in his case. Scafuro's reference to more passages from the Attic orators, induces her to offer another (speculative) proposal, namely that there may have been a regular procedure of compromise on the penalty in *ἀγώνες τιμητοί*¹²². One way or another, in both types of trials, jurors had little control over the penalty imposed¹²³, whether this was fixed by statute or by the litigants' proposals. The latter suggests that traces of the system of arbitration had intruded into the court system.

Aristotle (*Rhetoric* 1374; *Nic. Eth.* 1137b) had already recognised that arbitration is the suitable system for equitable and ad hoc justice whereas the court system favours the rule of law. However, in some cases, statute penalties may be harsh and potentially unjust. The general scope of written laws (so as to cover general situations) and the inflexible application of the wording of a written statute neither allow for deeper insight into the details of each particular case nor the evaluation of specific extenuating circumstances that could abate the harshness of a prescribed penalty. Furthermore, the adversarial nature of the Athenian courts tended to create winners and losers, with the potential danger of escalation of feuding to the detriment of the polis. The procedure of *timesis* was designed to perform this mollifying duty: it brings a mixture of the two systems (arbitration and courts) into life in search for proportionality. Todd suggests that the function of *timesis* [was] to encourage both litigants to keep

¹²⁰ Harisson (1971), p. 81 referring to Dem. 37.40.

¹²¹ Todd (1993), p. 134.

¹²² Scafuro (1997), pp. 393-4.

¹²³ Lanni (2006), p. 119.

their proposals moderate, for fear of stampeding the jury into the opponent's arms¹²⁴. Here, the paradigm of Plato's *Apology*, the "only example of a speech that purports to have been delivered at the *timesis* phase"¹²⁵ is enlightening. Although he was condemned by a narrow margin, both parties insisted on taking the matter to the extreme. The death penalty proposed by the plaintiffs was countered by a haughty, but ineffective suggestion on the part of the philosopher. The narrow margin widened and Socrates was condemned to drink the hemlock. Nevertheless, although enlightening, this case is atypical. In the majority of cases (especially in those decided by narrow margin), the procedure of *timesis* would probably result to milder penalties or a compromise between the parties.

This brings us to the most direct relationship of *timesis* with character evidence and extra-legal argumentation in general. Harris¹²⁶ has offered a detailed analysis of this issue. His main thesis is that Athenian courts did not decide cases on political grounds and that extra-legal arguments, especially those concerning public services or status, did not influence the court's decisions about guilt or innocence. Contrastingly, such arguments were legitimately used during the *timesis* phase and could have a mitigating effect on the sentence¹²⁷. Although I am convinced that the Athenian courts' verdicts were overwhelmingly based on legal issues, promoting thus the rule of law, my impression is that extra-legal argumentation could have a supportive (and highly probative) effect to a litigant's case, even during the 'guilt phase'. To what extent such argumentation influenced the decision of every single Athenian juror cannot be adduced with precision. The weaknesses of the evidence allow for nothing more than educated speculation. Nevertheless, the absence of surviving (but one, the atypical Plato's *Apology*) speeches delivered during *timesis* phase, the frequency of extra-legal argumentation both during the guilt phase of *ἀγώνες τιμητοί* and in speeches delivered in *ἀγώνες ἀτίμητοι*, and their (rarer but evidenced) invocation by plaintiffs, induce me to acknowledge a different and more central role for this practice. If the importance of such argumentation was

¹²⁴ Todd (1993), p. 134.

¹²⁵ Harris (2006a), p. 177.

¹²⁶ Harris (2006a), p. 177.

¹²⁷ Harris (2006a), p. 175.

reserved solely for the estimation of the wrongdoer's sentence, not one of the above would be so evident in the surviving literature. Nonetheless, the presence of the procedure of *τίμησις* was yet another incentive for broader invocation of extra-legal argumentation. It allowed for a more accurate estimation of the deserved penalty, due to both parties' appeal to mitigating or aggravating factors. Finally, it induced Athenian citizens to conform to legal and social norms, as the balance of probabilities ordained that in their lifetime they would inevitably have to adduce such behaviour in court.

2.4 : Limitations to the Incentives

Notwithstanding the above examples that some cases favoured a broader approach to character evidence, Athenian litigants were aware that this was not equally acceptable in all trials. Justice required them to speak to the point and stay clear from irrelevant statements¹²⁸. One way or another, litigants were asked to argue on a specific legal charge, their argumentation (in theory) being restricted by the documented written plaint¹²⁹. This meant that if they wanted to win, they had to adjust their arguments (even those lying at the margins of relevance to the issue) in such a way as to destroy their opponent's legal case. However broad the notion of relevance might have been for the Athenians, circumstances themselves obliged them to pay close attention to the matter. Aristotle signifies that

“the law is the subject in forensic speaking; and when one has a starting-point, it is easier to find a demonstrative proof” (Arist. *Rhet.* 1418a).

For this reason, he observes, litigants who even are at a loss for valid arguments can resort to attacks on the adversary, remarks about oneself, or attempts to arouse emotion. As long as they could present them as relevant to their case, any argument could be of some worth.

On the other hand, Aeschines, in anticipating Demosthenes' supporting speech in defence of Timarchus, warns the jurors that he,

¹²⁸ For private *dikai*, see Arist. *Ath. Pol.* 69.1; for homicide trials see Arist. *Rhet.* 1354a22-23.

¹²⁹ Harris (2013a).

“the clever speechwriter, will discover many irrelevant diversionary arguments, to the detriment of the city’s system of justice”¹³⁰.

Relevance, apart from its strictly legal significance, had also acquired a practical one as a rhetorical weapon. Athenian litigants, whether or not respecting in practice the rule against irrelevant statements, in theory at least recognised it as overwhelmingly valid. In Lysias 9, a defendant in an *apographe* (writ of confiscation) complains about the use of irrelevant character evidence against him. He says:

“What on earth did my opponents have in mind when they ignored the point at issue and sought to defame my character? Are they unaware that they are supposed to keep to the point? Or do they recognise this, but devote more attention to other matters than they should, thinking that you will not notice? ... I would be surprised if they think that out of ignorance you can be persuaded by their slanders to vote for a conviction. I had expected that I would face trial on the basis of the indictment and not of my character” (Lys. 9.1-3).

In homicide cases, the rule against irrelevant argumentation was purportedly stricter. The fact that the panel of jurors in the court of Areopagus (composed by former holders of the nine archonships) was more experienced than in other courts (composed by any allotted male citizen over the age of thirty), allows us to assume that this rule was better observed. As early as Antiphon’s speeches, it was recognised that it was unacceptable to adduce irrelevant (according to their standards) material. In a defence speech for a charge of unintentional homicide the speaker argues that the prosecutor

“surely does not deserve your [i.e. jurors] trust, but rather your disbelief, when in a case like this he directs his accusation to charges other than those that are the subject of his prosecution. I am fairly certain you would not convict or acquit someone for any reason other than the crime itself” (Antiph. 6.10).

A similar respect for relevance is shown by Lysias in a speech before the Areopagus, where the defendant says:

¹³⁰ Aeschin. 1.166.

“I wish I were allowed to demonstrate his wickedness by referring to other events...I shall omit everything else, but mention one episode I think you should hear about, as evidence of his outrageous audacity....[although] it is unlawful to mention irrelevant material in your court” (ἀλλ’ ἐπειδὴ παρ’ ὑμῖν οὐ νόμιμόν ἐστιν ἔξω τοῦ πράγματος λέγειν) (Lys. 3.44ff).

Arguably then, in all cases and courts, litigants were aware that to a greater or lesser degree they ought to keep to the point and avoid irrelevant argumentation. Especially in homicide cases (Arist. *Rhet.* 1354a22-3) and in private suits (*Ath. Pol.* 67.1) a formalisation of this ‘rule of relevance’ (which evidently required a statement under oath)¹³¹ forced litigants to pay an even closer attention. However, the question of what is relevant is really a subjective one (even in contemporary times), but as it will be demonstrated in due course, there were some patterns of argumentation that the Athenians followed, as to what was regarded positive or reprehensible conduct, how and when it should be argued. These patterns demonstrate that the Athenians had, in the main, a fixed idea of the kind of argumentation which should be admissible in a courtroom. Furthermore, the same ever recurring patterns show that the steps taken by the Athenians in their effort to objectify the subjective approaches to relevance, although had not produced formalised rules and controlling mechanisms, were largely adequate to limit litigants’ complaints to a minimum. Thus, a consistency of argumentation may be found in Athenian courts, especially as to how and what should count as relevant character evidence. The fact that an Athenian litigant or a limited number of jurors (in the absence of formal rules of admissibility and enforcement procedures) may have followed their own, subjective ideas, is not enough to demolish a more coherent picture of Athenian approach to relevance. The majority had steady ideas of relevant argumentation and the reason for this is to be found in the ethical coherence of the Athenian polis and the underlying unifying assumptions about character and personality they shared.

Johnstone¹³² and Rubinstein¹³³ have shown that defendants were more prone to digressions towards irrelevant statements, usually being the receivers

¹³¹ Gagarin (2012), p. 295, n. 5; Rhodes (2004).

¹³² Johnstone (1999), p. 94.

¹³³ Rubinstein (2000), p. 195.

(positively or negatively) of ad hominem argumentation. Defendants cited their public services and liturgies quite more often than the prosecutors in order, both to erode the authority of the prosecutor's story and to construct a relationship with the jurors that could afford them the latter's good will. Furthermore, defendants asked for *charis* and pity, so they had to provide good reasons for such appeals to have any effect. Johnstone explains these tendencies of the defendants by reference to the asymmetric roles they had in relation to the prosecutors. The different, harsher for the defendant, consequences of an adverse verdict triggered appeals to more general considerations, countering the prosecutors' attempt to contain the disputed story to a legal case based solely on the written statute. According to the same author, the defendant's character was on trial as the prosecutor's was not¹³⁴. In general terms it is accurate that a defendant had more incentives to provide character evidence in order to support his case. Although his character was not on trial, nonetheless the proceedings were *in personam*, so (in the special context of an Athenian trial discussed above) he had to persuade the jurors by reference to arguments from probability that he is not the person to have committed the illegal act. The defendant's character had probative value as to his guilt, in the sense that most factual disputes called for wider invocation of character evidence in order to prove the likelihood of an alleged act. Besides, in adversarial trials which consist predominantly of oral evidence and litigants act as the main source of information, parties attempt to prove their credibility and trustworthiness, to convince of their story and, in turn, receive the good will of the audience.

Apart from the defendants, these considerations affected the strategy and tactics of the prosecutors as well, mainly as preemptive references in order to anticipate and neutralise such argumentation by their opponents. Lysias recognises that it

“has become the custom in this city whereby defendants make no defence against the charges, but sometimes deceive you with irrelevant statements about themselves, showing you that they are fine soldiers, or have captured many enemy ships while serving as trierarchs, or have made hostile cities into friendly ones” (Lys. 12.38).

¹³⁴ Johnstone (1999), p. 97. However, the author admits (pp. 98ff.) that this assumption is subject to many reservations.

Aeschines in *Against Timarchus* argues that

“in courts the defendants use counteraccusations against their accusers to escape their prosecution by turning the jurors’ focus on irrelevant matters” (Aeschin. 1.179-80).

However, the prosecutor in a speech during a *dokimasia* (Lysias 26), where the defendants argued that it was valid to offer a more general account of their life, takes a neutral approach, de facto accepting the validity of such a defence. Before proceeding to counter the defendant’s evidence concerning his character, he observes that

“today he will make but a brief reply to the charges brought against him, skimming over the facts and shuffling off the accusation with his defence; and he will tell how he and his family have spent a great amount on the State, have performed public services with ardent zeal, and have won many brilliant victories under the democracy; that he himself is an orderly person, and is not seen acting as others of our people venture to act, but prefers to mind his own business. I do not think it difficult to refute such statements” (Lys. 26.3-4).

One way or another, Athenian litigants endeavoured to justify the introduction of ad hominem argumentation and put the blame on the opponent for initiating such a challenge. Retaining the adversarial character of the trial, parties presented their controversial, potentially prejudicial statements as aides to the quest for truth or, at least, as comments authorised by resort to fairness. To be certain, this is not unfamiliar in modern court-rooms. The approach of modern English common and statute law is similar, in its effort to control and put some checks and balances in the adversarial parts of the trial. According to it, a litigant should not gain an advantage by introducing prejudicial evidence; fairness requires that the opponent must have the opportunity to refute such claims¹³⁵. Section 101 of the CJA 2003 states among others:

“In criminal proceedings evidence of the defendant’s bad character is admissible if... (f) it is evidence to correct a false impression given by the defendant and (g) the defendant has made an attack on another person’s character”.

¹³⁵ See Criminal Evidence Act 1898 s. 1(3); Criminal Justice Act 2003 s. 101 (1) (e), (f) and (g).

Thus, apart from its probative value or relevance, evidence ought to be admitted due to considerations of fairness; this was recognised by the Athenians as well.

The issue of fairness was deemed central for another reason; both parties ought to have equal treatment before the laws and the court. Demosthenes warns the jurors not to accept any irrelevant pleas by Aeschines since not only he (Demosthenes) is not the man on trial (implying that this would be a valid excuse?), but also he wouldn't be given any more time after the defence speech to give his own account on the matter¹³⁶. Furthermore, defendants ought not to gain an unfair advantage by offering a false impression that couldn't be corrected afterwards. On a prosecution speech against Nicomachus the *anagrapheus*, the prosecutor states:

"I should have made no reference to these events had I not learnt that he was going to attempt, by posing as a democrat, to save himself in despite of justice, and that he would produce his exile as a proof of his attachment to the people...so that he cannot expect to get any credit on that account" (Lys. 30.15).

Since prosecutors anticipated such statements, they pre-emptively tried to gain themselves an advantage (or avoid a disadvantage), creating bias and curtailing the defendants' freedom for tactical manoeuvring. A usual method for achieving this was the insistence on relevance rules and the Heliastic oath, which provided that speeches and verdicts should be given in accordance with law. In addition, the defendants' wide use of irrelevant extra-legal argumentation was attacked as a weakness to find more precise and directly related to the charge argumentation. Lysias says that the defendant 'failing to find a plea for his own defence, he will try to slander me'¹³⁷. Demosthenes wonders whether irrelevant argumentation doesn't mean simply that he's at a loss for good arguments:

"Who would choose to make accusations when he's on trial, if he had a defence he could make?"¹³⁸.

¹³⁶ Dem. 19.213.

¹³⁷ Lys. 30.7.

¹³⁸ Dem. 19.213.

Defendants, on the other hand, sought to place the responsibility for irrelevant argumentation (especially concerning character) on the prosecutor. Following a rationale similar to that of CJA 2003, it was widely accepted that in the course of a litigant's attack on another's character, fairness demanded a chance for response. Nevertheless, the blame should be placed on the initiator. As early as Antiphon there are examples (from homicide cases) of such argumentation. In Antiphon 5 (*On the Murder of Herodes*), the defendant finds it terrible that the prosecutor compelled him to defend himself on such, irrelevant, issues¹³⁹. Lysias offers a similar argument on a non – homicide case. The defendant (Lys. 9) argues that since “my opponents are defaming me I am forced to make my defence on the basis of all these topics”¹⁴⁰. Demosthenes argues repeatedly that the digression from normality in offering character evidence, both in defence of himself and against Aeschines' character, is due to the prosecutor's provocation. It is important to note that Demosthenes reminds the jurors about this on almost every single occasion. From the very start of his speech he offers his view of the matter:

“Now if Aeschines had confined his attack to the charges in his indictment, I in turn should now be giving my defence of the decree. But since he has wasted just as many words in detailing other matters and lied about me in most of them, I think it necessary, and at the same time fair (δίκαιον), to speak briefly on these matters first, so that none of you may be led by irrelevant arguments into listening less sympathetically to my pleas against the indictment” (Dem. 18.9).

This point is repeated several times. In 34-5 he says:

“I demand and beg of you, men of Athens, to remember this throughout the whole trial, that if Aeschines had not made charges that were extraneous to the indictment, I should not be speaking on any irrelevant matters”. In 50 he says that “it is Aeschines' fault for having bespattered me, so to speak, with the dregs of his own wickedness and his misdeeds, of which I had to clear myself for the benefit of those who were born after the events'. More significantly, in 124 he states that ‘Aeschines chose to rail against me rather than accuse me. Well, in that exercise he should not get away with less than he gave”¹⁴¹.

¹³⁹ Antiph. 5.75; see also 6.8.

¹⁴⁰ Lys. 9.3.

¹⁴¹ Dem.18.124; see also 18.126: I was forced to reply due to the slanders uttered by my opponent; cf. 18.256.

It becomes obvious then that in the case of broad extra-legal argumentation which, in the absence of formalised rules, could be considered at the margins of relevance, both defendants and prosecutors felt (not only legally, but also ethically and rhetorically) obliged to excuse themselves and put the blame on the opponent. This course of argumentation determined the behaviour of supporting speakers, but even the presentation of evidence about deceased. In a trial concerning an estate, the son of the deceased says:

“About my father – since the prosecution speeches have treated him as a criminal – please forgive me if I report what he has spent on the city and his friends” (Lys. 19.56).

The issue of relevance also arose when litigants referred to third persons. In the most famous speech of Lysias, against Eratosthenes, the former member of the Thirty, he says:

“Let nobody claim that I am making irrelevant charges against Theramenes, when it is Eratosthenes who is on trial, because I hear that he will defend himself by claiming he was an ally of Theramenes and shared the same activities” (Lys. 12.62).

Athenian litigants, notwithstanding the extended (compared to modern courts) liberality they enjoyed, consciously or subconsciously felt the need to offer the above excuses. The evidence on our disposal allows us to extract that this was a successful method of tranquilising a hostile audience, avoiding *dikastic thorubos* (uproar), and finally send the arrows against the opponents. Considering the above, the main point remains, namely that the issue of relevance was substantial and existent in Athenian courts. Litigants remained alert that deviation towards irrelevant argumentation was enough to hurt their credibility and trustworthiness, therefore their chances of success. Within an overwhelmingly agonistic and demanding environment, litigants ought to present their case, handling simultaneously public opinion.

Nevertheless, Athenian litigants, despite their condemnation of irrelevant statements, felt obliged to offer a more general account of their case, presumably believing that this is appropriate, legitimate and illuminative of the particular case. There was trivial opposition to the relevance of such evidence

(which was clearly significant in arguing a case and had an impact to the decision-making process) and there is nothing inconsistent in their approach. The defendant in Lysias 21 states:

“In regard to the counts of the accusation, gentlemen of the jury, you have been sufficiently informed; but I must ask your attention also for what has yet to be added, so that you may understand what kind of person I am before you give your verdict upon me” (Lys. 21.1).

In the ninth fragment of Lysias’ speeches the litigant says that

“it is not because of the crimes of my opponents (prosecutors) that I expect to win this case, but instead because of my own good character” (Lys. Fr. 9 [60]).

Thus, although the issue of relevance was central, and most of the times at the cutting edge of the antagonism between litigants in their effort to gain the good will of the jurors, it was also acknowledged that character evidence could shift the balance (especially in public cases) and turn the verdict in favour of one party or another.

2.5 : Conclusion

The discussion above which is indicative and not exhaustive demonstrated that the Athenian legal system was designed in a way as to create incentives for evaluating, controlling and directing the more general behaviour of Attica’s inhabitants and Athenian citizens in particular. The structural encouragement for broader invocation of extra-legal argumentation was a useful tool in assisting this aim. Nevertheless, in order to acknowledge law as “the enterprise of subjecting human conduct to the governance of rules”¹⁴², the court system and its decisions must have a certain degree of consistency and predictability. Lanni argues that the formal Athenian court system played a vital role in maintaining order by enforcing informal norms. To her opinion, “the enforcement of extra-legal norms also permitted the Athenians to enforce a variety of social norms while maintaining the fictions of voluntary devotion to military and public service and of limited state interference in private conduct”¹⁴³. Nevertheless, in order to

¹⁴² Fuller (1969), p. 96.

¹⁴³ Lanni (2009).

be able to adjust one's behaviour to such extra-legal norms, one must be *certain* as to *which* are these norms (which according to Lanni are informal and unwritten), *what* they provide (in order to conform to them), and *when* they are enforced. A simple threat of spontaneous, sporadic and discontinuous punishment for a breach of unidentified norms could only lead to the obsolescence of the court system as a whole. Lanni characterises the Athenian court as "highly unpredictable and prey to distracting stories". My question is how such a system of unpredictability, inconsistency and incoherence, could provide a serious incentive for the adjustment of everyday social behaviour to generally acceptable and coherent norms. In my opinion, only a *consistent* approach as to the reasons for punishment can provide a considerable deterrent and Lanni's suggestion does not offer it. Furthermore, punishment has to be counter-balanced by an offer of rewards, especially in a shame/honour-culture, in order to provide an incentive for the average citizen to willingly conform to communal standards of behaviour. Such a balance could strengthen the role of courts as determinants of acceptable social norms.

In particular, as far as Athens is concerned, deeper factors underlie both the adherence of individuals to ethical norms and the belief in the relevance of their presentation (or advertisement) in courts. These have to be traced in the psychology of the ancient Greeks which can be revealed by re-examining and questioning modern presuppositions and applying a more suitable model of interpretation. In what follows in the next chapters, I will try to show that the Athenian ideas of 'character' and 'personality' influenced and dictated their approach to justice. The courts were designed to work in harmony with these ideas and this is proved by their internal processes. The belief in the stability and indivisibility of a man's character could aggrandise a single act's weight in proving credibility or propensity. By the same token, the courts' methods had significant effects on the life of the polis. Their centrality in the Athenian life, and the frequency of the ordinary man's occupation with them, caused their significant influence on the average citizen's life. Private and public behaviour were continuously checked and re-examined, providing yet another incentive to conform to the polis' social and legal norms. Again, according to Gill's 'objective-participant' model of the self, a person's ethical beliefs are influenced

and informed by the environment. Adherence to these beliefs and successful performance of one's role in the community constituted the individual's path to virtue. Thus, showing an understanding of the social norms and demonstrating a real or pretended conformity with them were the guaranteed ways of achieving good reputation and social standing. Finally, the patterns and conventions followed by Athenian litigants facilitated this process. Allowing for consistency of verdicts and avoiding ad hoc judgments, Athenian courts were able to direct and educate the citizens as to the meaning and the content of the acceptable ethical and social norms.

3 CHAPTER THREE: GREEK IDEAS OF 'CHARACTER'

This chapter analyses the Greek ideas of 'character' (*ethos*). In these I will try to discover the original causes of the wide use of character evidence in forensic argumentation in general which survived to the practices of the logographers of Athenian courts. I consider surprising the fact that current bibliography (to my knowledge) contains periodic treatments and lacks a complete and in-depth account of this issue. Examination of Greek conceptions and assumptions regarding 'character' are sporadic and usually of limited focus. *Ethos* thus is typically discussed in relation to other issues, such as the concept of 'will' or 'character' depiction in literature. This impedes my current study which, although it concerns character evidence in the courts of classical Athens, nevertheless has to rely on a more general analysis of Greek approaches to 'character'.

What were the Greek assumptions about character? What did they think about its 'indivisibility'? In other words, does the whole character illuminate a particular trait and vice-versa? Is a person's general reputation for having a character capable of performing good or bad activities relevant to e.g. a charge of prostitution as in the prosecution of Timarchus? Do humans consistently follow identical behavioural patterns regardless of the stimuli? Such are the questions that have to be asked in order to discover the original perceptions that caused the excessive to modern standards reliance of the Athenian courts to argumentation from *ethos*. The analysis begins with a literature review of modern research on the Greek ideas. Then, modern approaches to 'character' will be discussed in order to highlight the complexity of the theme and the presuppositions that contemporary researchers unavoidably carry when analysing Athenian speeches. Having sketched the context, I will proceed to a close analysis of the Greek ideas of 'character', as evidenced in the works of the poets, the philosophers and, finally, the orators. Indeed, the conclusions expose the rationale behind the wide use of character evidence in Greek rhetoric. Application of these conclusions to the speeches delivered in the Athenian courts will take place in the next chapter.

3.1 Modern Research on Greek Ideas of 'Character'

Close inspection of whether the Greeks regarded a human being's character as innate and given from nature (*phusis*) is essential. Its outcome in turn will expose a belief as to its stability and invariability. As will be demonstrated in the relevant section, the ground-breaking Sophistic movement¹ produced an intellectual antithesis between nature and nurture, in the form of the question of whether *phusis* or *nomos* played the dominant role in the configuration of a man's *ethos*. This question lay at the heart of the intellectual scene of the late fifth century and left its mark on the great philosophical works of Plato and Aristotle.

Nevertheless, as Dover warns in his book on Greek popular morality

"the extent to which an individual's behaviour is determined by his innate capacity and disposition and the extent to which it is determined by the environmental forces which have operated in him, including example, precept and habituation, constitute a problem to which it is customary to give extremely confident answers founded on little evidence and even less intellectual effort"².

This observation is applicable to both laymen when judging their contemporaries and some modern historians when examining the sources. Indeed, this (hazardous for a scholar) inclination has to be taken seriously. Interpreting 'character' may be highly controversial, so my aim here is to avoid easy solutions and ungrounded judgments. For instance Dihle assumes that *phusis* is fixed character, while for Fortenbaugh *phusis* can refer to an innate condition which is hard but not impossible to alter. More importantly, *phusis* may also be used of what might be called 'second nature', that is an acquired trait that has acquired deep roots over time³.

¹ The Sophistic movement which flourished especially in Athens (and other democratic cities, especially Syracuse) in the second half of the fifth century owes a lot to the philosophical and scientific discourses of the Presocratics. The employment of the art of rhetoric as a method of persuasion for their beliefs, but also as a mode of thinking, provided a ground for suspicion as to their trustworthiness and the justice of their causes, especially obvious in the writings of Plato. On the Sophists see Guthrie (1969).

² Dover (1974), p. 88.

³ See Fortenbaugh (2007), pp. 58-60.

Dover's influential remarks are frequently employed by scholars, but the aforementioned tendency for easy solutions (whether due to *phusis* or due to nurture) still exists. However, judgments as to the question of natural and unchangeable character traits are of utmost importance to studies similar to the present one, having significant implications for their outcomes. Most legal historians remain silent on the issue. In contrast, Lanni was daring enough to follow a clear line and base her discussion of the use of character evidence in Athenian courts on the assumption that "the Athenians tended to view character as stable and unchanging"⁴. She strongly asserts that "character is normally regarded in classical Greek culture as stable and unchanging, with the implicit assumption that it is a natural attribute over which the defendant has no control"⁵. Although she acknowledges that normally this would create intense questioning as to the moral blameworthiness of such an individual, she leaves unjustified her observation that "litigants generally do not challenge the idea that one's character should be factored into the jury's calculation of moral desert"⁶.

On the other hand Dover, who seems to be Lanni's basic secondary source⁷, carefully observes that "in our sources the dramatic situation or the requirements of an argument in court often decide whether a speaker pronounces in favour of nature or of nurture"⁸. Saunders notes that "occasionally Demosthenes makes an implicit distinction between offenders who are evil by nature and those whose depravity has been acquired"⁹. This fact, namely that the orators were free to use 'character' as best suited their case is a rejection of a firm universal belief in the unchangeable nature of character and a first indication of the complex nature of the Greek opinions on the issue. As it has been noted before, the biased nature of Athenian forensic speeches does not only pose problems but also provides answers. In such an agonistic environment where every single mistake could be manipulated and emphasised by the opponent, no orator would have the suicidal tendency to use

⁴ Lanni (2006), p. 60.

⁵ Lanni (2006), p. 62.

⁶ Lanni (2006), p. 62.

⁷ See Lanni (2006), p. 60 n. 92. Although Lanni refers to passages from orations, these are less than adequate for reaching such strong conclusions.

⁸ Dover (1974), p. 88.

⁹ Saunders (1991), p. 116.

such an unpopular argument that would meet the immediate rejection of the audience.

Therefore even a single argument from the speeches that supports the changeability of a man's character should not be attributed to mere opportunism. On the contrary, it may serve to question any firm contention that the Greeks believed in the unchangeable nature of 'character'; examples will be given in due course. I consider the above discussion sufficient as to the general context that surrounds modern research on Greek ideas of 'character'.

3.2 'Character' in Modernity

Before proceeding to the discussion of the ideas of character in classical Athens, it is useful to clarify some of the terms and notions that are connected with this theme. In order to offer a comparative glimpse of the issue, reliance on modern definitions of, especially, Anglo – American sources, is unavoidable. This approach need not be anachronistic; it is just an agreement on and comparison of terminology and definitions, for better communication and understanding. Later in this chapter I aim to examine how the Athenians used these notions, highlighting the proximity or distance of the two approaches.

The first notion concerning an examination of character evidence is that of character proper and character in law. Seemingly, there is no explicit legal definition of what constitutes the character of a person, and the law relies in the common sense use of the term. According to 'The Oxford English Dictionary' *character* means: "the mental and moral qualities distinctive to an individual; strength and originality in a person's nature; a person's good reputation"¹⁰. Other, relevant to my study, definitions could include 'The combination of qualities or features that distinguishes one person, group, or thing from another', 'A description of a person's attributes, traits, or abilities', 'Public estimation of someone; reputation', 'Status or role; capacity' etc.

These definitions reveal how broad a meaning the word can take in its common usage. On the other hand, partly addressing this problem, 'character' in law is

¹⁰ OED, s.v. character.

attributed a narrower interpretation. Usually, it means “a person’s tendency to behave in a particular way”¹¹. It is used interchangeably with

“disposition and propensity, which are alternative terms with the same meaning... Thus a person might be described as having a violent disposition if he has several convictions for assault or as having an honest character if she has a reputation for integrity”¹².

Nevertheless, as usual in social sciences, terminology is subject to interpretation. Broad and narrow definitions can be offered, not only depending on the social and legal context of a particular period or place, but even on the personal background of a judge¹³. Generally, ancient Athenians preferred a broad definition of ‘character’, as it will be proved by their argumentation in the law-courts in due course.

Apart from the difficulties of defining character in a legal context, one also has to examine the notion of character evidence. This phrase in law may be described as proof or attestations about an individual's moral standing, his general nature, behavioural traits, and reputation in the general community. Keane in *The Modern Law of Evidence* asserts that character evidence in any event, may constitute evidence of a person’s actual disposition, his propensity to act, think, or feel in a given way¹⁴. It is hardly unobservable that different persons give different definitions of the terms. If *character* for Dennis (mentioned above) simply means a person’s tendency to behave in a particular way, then this tendency is evidenced by taking into account considerations such as his morals and feelings; evidence of past behaviour can be adduced to support an argument about a good or a bad character. Nevertheless, in order to rely on such a ‘*tendency – approach*’, a certain belief becomes, to a great extent, unavoidable, that a person’s character is unchangeable and indivisible. The same person will behave in a steady way throughout the years, and his general traits will triumph and be revealed regardless of contexts and situations.

¹¹ Dennis (2010), p. 784.

¹² Dennis (2010), p. 784.

¹³ To make things worse, as Dworkin (1986), p. 36 famously, though exaggerating, remarked about legal realists’ approach: “Some realists...said there is no such thing as law, or that law is only a matter of what the judge had for breakfast”. cf. Kozinski (1993).

¹⁴ Keane, (2010), p. 439.

The English common law took the straightforward view that a person's character is indivisible¹⁵. Thus, if a defendant claimed to have a good character and referred to one particular type of good behaviour, the prosecution could refute the claim by cross-examining him on misconduct in another respect¹⁶.

Modern psychology has rejected both the simplicity and the universality of this approach¹⁷. Behaviour is conceived to be a function of both disposition and situation, and their mutual interaction¹⁸. This does not go quite so far as to destroy the claim that character is 'indivisible'; nevertheless, it shows that character evidence should be treated with caution and maybe be limited in its admissibility in the courtrooms. On the other hand, other scholars suggest that human behaviour is not entirely arbitrary and "Character has both predictive force and probabilistic significance concerning a person's past acts or omissions"¹⁹. Modern psychological research tends to see behaviour as determined by a combination of personality characteristics and situational factors. The acknowledgment by social science that individuals may act in accordance with established character traits provides useful theoretical backing for the claim that past criminal behaviour has probabilistic value for legal fact-finding²⁰. Therefore the still unanswered question of indivisibility and steadiness of character is also a question demanding illumination by the Athenians' practices in their courts.

But where is the justification for the probative value of 'character' to be found? In the past, this was primarily grounded on the intuitive conclusions of laymen as provided by popular assumptions. Such an approach is evident in the aforementioned obsolete picture of the English legal system. The abandonment of character-responsibility and the increasing professionalization of the legal

¹⁵ Dennis (2010), p. 794.

¹⁶ *Winfield* (1939) 27 Cr. App. R. 139 at 141 (Humphreys J.); *Stirland v DPP* [1944] A.C. 315 at 326 (Viscount Simon L.C.).

¹⁷ McEwan (2007), p. 188 correctly warns against the cherry-picking and uncritical use of empirical evidence and experimental data. According to her "although the debate on the admissibility of the accused's bad character has been increasingly informed by empirical evidence, lawyers have, in typical fashion, managed to use the same research to support both sides of the argument".

¹⁸ Davis (1991), p. 518.

¹⁹ Zuckerman (1987), p. 190.

²⁰ Redmayne (2002), p. 684

discourse called for a scientific justification, if 'character' was to be used to predict behaviour. Until the 1960s, research on character was dominated by the *'trait theory'*²¹. This assumed that people had relatively stable personality traits which could be utilised to predict future conduct.

This theory, which reserved a highly probative role for 'character', was gravely questioned. As a result it gave ground to *'situationism'*. This sought to explain behaviour in terms of situational, rather than personal, causal factors. By the same token, for *'situationism'*, character evidence has no probative value. During the 1980s, however, it was recognised that this approach too was naïve, and there has now been something of a rapprochement between it and trait theory, referred to as *'interactionism'*: both personal disposition and situations determine behaviour. "Today, no one contends that people fail to exhibit stable personality characteristics, and no one questions whether social contexts shape affect, cognition and action...there simply are no longer any situationists"²². Questions nevertheless still remain as to how broadly these stable traits should be interpreted, thus how predictive these dispositional tendencies can prove in divergent situations. Uncertain conclusions characterise even modern times.

Modernity has brought about a broad movement from ideas of responsibility as founded in character to conceptions of responsibility as founded in capacity. The conception of responsibility founded in capacity is based on notions of human agency which emerged in Europe in the philosophy of the Enlightenment. The idea of the self-determining moral agent, equipped with distinctive cognitive and volitional capacities of understanding and self-control provoked significant consequences for law. This change is evident in the metamorphosis of the English legal system, which shifted from its eighteenth century character-based responsibility (according to which individuals were held accountable for their general conduct) to a capacity-based responsibility (where individuals are to be held accountable for the specific acts that they choose to do at a given time)²³. Although character-responsibility has left its traces and is deeply embedded in notions such as the 'reasonable person' or objective

²¹ This historical review is taken from the objective parts of Redmayne (2002).

²² Caprara and Cervone (2008), pp. 64 and 110.

²³ See Lacey (2001).

standards of proof leading to normative judgments concerning an individual's behaviour, 'character' is (theoretically) harshly reserved for specific questions of fact. Otherwise, broader character evidence would violate a "social commitment to the thesis that each person remains mentally free and autonomous at every point in his life"²⁴; a conclusion that is inapplicable in ancient times.

3.3 'Character' for the Greeks

3.3.1 The Beliefs of the Poets

The above discussion demonstrates the difficulty of ending up in unmistakable judgments as regards the nature and functions of 'character'. In what follows, Greek beliefs will be revealed, beginning with the thoughts of the intellectuals. By this term I mean the poets, philosophers, and thinkers, as separate from the orators, who although offering sophisticated ideas of 'character', they tend to manipulate it and provide biased, self-interested views. Therefore, discussion of forensic speeches will be considered separately next.

'Character' for the Greeks is usually referred to as 'ethos' (*ἦθος*)²⁵. It is also denoted by 'tropos' (*τρόπος*) and 'kharakter' (*χαρακτήρ*). *Ethos* (especially in the singular) best suits our case since it is the word that best captures the disposition of a human being, particularly focusing on inherent personal traits, observed as they are externalised through behaviour. LSJ following Aristotle (*Nic. Eth.* 2.1.1) sees *ἦθος* as the lengthened form (slight variation) of the word *ἔθος* which means habit²⁶. For Aristotle, *ἦθος* is the product of *ἔθος* (as revealed by their linguistic proximity), thus moral or ethical virtue may be acquired through virtuous habits. *Tropos* is usually found in the plural (*tropoi*)²⁷ meaning ways and manners, whereas *kharakter* focuses on the distinctive marks of a person, his 'characteristics'. Both words nevertheless are not excluded from denoting 'character' in its current sense, depending on the context. What is of interest here however, is not a philological approach to the

²⁴ Wigmore (1983), par.55 at 1151.

²⁵ This is also the term used by the rhetoricians.

²⁶ LSJ, s.v. *ἦθος*.

²⁷ See Pind. *Nem.* 1.42; Hdt. 1.107, 3.36; Plat. *Phaedr.* 252D, 278D, *Laws* 655D; Aesch. *Prom.* 11, 309, *Agam.* 856; Ar. *Peac.* 350, 935. In the singular, it usually denotes 'character' in a more external and practical way: cf. Ar. *Plut.* 245, *Wasps* 1002, *Thesm.* 93.

issue but rather an enquiry of whether the Greeks believed in an unchanging character which is provided by nature.

Hesiod in the *Works and Days* (l. 67, cf. 78) describes the myth of Pandora. Hermes is charged by Zeus to put in her “a shameless mind and a deceitful character” (ἐν δὲ θέμεν κύνεόν τε νόον καὶ ἐπίκλοπον ἦθος). Character is therefore considered as something given by the gods at the moment of creation. On the other hand, when he uses the word in the plural (*WD* 699: ἦθεα κεδνὰ διδάξης, cf. *Theog.* 66) it can be translated as ‘manners’ which, although close to *ethos* and indicative of character (as behavioural traits), are acquirable. For Hesiod then, it seems that *ethos* is inborn and presumably (given his silence on the issue and the fact that it is provided by the gods) unchangeable. The use of the word’s plural tense refers to manners, ways, and customs, a use that remained unaltered through the centuries. Its commonest use refers to general customs of groups or nations, therefore a distinct notion of the one that interests us here²⁸.

In the singular the word retains its Hesiodic meaning denoting inborn characteristics, at least until Aeschylus’ *Agamemnon* (458 BC). Aeschylus writes:

“Even so a man reared in his house a lion’s whelp, robbed of its mother’s milk yet still desiring the breast. Gentle it was in the prelude of its life, kindly to children, and a delight to the old. Much did it get, held in arms like a nursing child, with its bright eye turned toward his hand, and fawning under compulsion of its belly’s need. But brought to full growth by time, *it showed the nature it had from its parents*” (χρονισθεὶς δ’ ἀπέδειξεν ἦθος τὸ πρὸς τοκέων) (l. 718-725).

Ethos is inborn in both human beings and animals; sooner or later it overcomes acquired superficial traits and is revealed. This idea of ‘character’ attributed to *physis* (nature) remained popular and central to the intellectual discussions of the time. The question of character’s heredity puzzled Greek thinkers²⁹.

²⁸ See for eg. Hdt. 2.36; Thuc. *Hist.* 2.61, 6.18; cf. [Aesch.] *Prom.* 186. The commonest expression was ἦθεά τε καὶ νόμους referring to both morals and laws.

²⁹ See for e.g. Plat. *Meno* 95e (especially Theognis’ fragment), 93a-94e; *Protag.* 327b-c; Eur. *El.* 369f.; more generally see Dover (1974), pp. 91-2.

Athenian law (either following a psychological or a practical rationale) never got rid of it entirely³⁰.

Pindar, writing in the first half of the fifth century, provides an alternative to the above. In the *Eighth Nemean Ode* he writes:

“May I never have such an ethos, father Zeus; may I stick to the simple paths of life, so that when I die I will not fasten a bad name to my children”³¹ (l. 35).

Pindar uses ἦθος as something that can be changed through life. The appeal to Zeus may denote a worry that the Gods can favour or disfavour a man by changing his *ethos* but the essence remains: it can be altered through the course of life. This conclusion becomes more evident when two other passages from the same poet are compared. In the *Eleventh Olympian Ode* (l. 20) he writes: “For neither the fiery fox nor loud-roaring lions change their ethos”³². Here, in order to differentiate the use of the word he refers to ἦθος as ἐμφυές (innate, inborn). Inborn ‘*ethos*’ cannot change in contrast to ‘*ethos*’ per se. It is unclear however which attributes he considers as innate and which can be acquired or reformed. To complete the picture and prove that the adjective before the word ἦθος was not accidentally used, citation of the *Thirteenth Olympian Ode* (l. 13) is needed. Pindar there, in order to highlight the second use of the word ἦθος as unchanging, accompanies it by the adjective συγγενές (inborn) (ἄμαχον δὲ κρύψαι τὸ συγγενές ἦθος). Thus either Pindar recognises two kinds of ἦθος: one that may change through the course of one’s life and one that contains a person’s innate attributes or he vacillates on the subject and the use of the adjective before the word *ethos* is merely an emphatic tautology. In any case, the absence of a firm supposition is noteworthy, yet the step towards a belief in the changeability of character has been taken.

³⁰ Hereditary punishment was a not uncommon feature of Athenian law (e.g. in some forms of perpetual *atimia* as the one referred in Dem 9.42-5; cf. Hansen (1976), p. 119). By ‘psychological rationale’ I mean an honest belief in the hereditary nature of a disposition for wrongdoing, as one could implicitly infer by the wide invocation of family evidence in the orators. By ‘practical rationale’ I mean the twofold attempt of Athenian law to neutralise through punishment a hostile *oikos* as a whole, and to punish the descendants of a traitor in order to avoid their potential future vengeance. Both matters will be discussed in due course.

³¹ εἴη μὴ ποτέ μοι τοιοῦτον ἦθος, Ζεῦ πάτερ, ἀλλὰ κελεύθους ἀπλόαις ζωᾶς ἐφαπτοίμαν, θανῶν ὡς παισὶ κλέος μὴ τὸ δῦσφαιμον προσάψω.

³² τὸ γὰρ ἐμφυές οὔτ’ αἰθῶν ἀλώπηξ οὔτ’ ἐρίβρομοι λέοντες διαλλάξαντο ἦθος.

Sophocles' *Ajax* and *Antigone*, both relatively early works of the poet³³, further highlight the change of attitude towards 'character'. In the *Ajax* (l. 595) Sophocles writes: "You have foolish hope, I think, if you plan so late to begin schooling my ethos" (μῶρά μοι δοκεῖς φρονεῖν, εἰ τοῦμόν ἧθος ἄρτι παιδεύειν νοεῖς). The word ἧθος is here translated as temper and it denotes the wide spectrum of meanings that it can take. Nevertheless it certainly refers to the disposition of the hero (more specifically his tenacity), and most importantly to the possibility of its alteration. Ajax does not seem in principle to deny that this can be accomplished. His dissent lies on the fact that it is 'too late'³⁴. Sophocles certainly looks aware of the problematic issues linking 'character' and education, issues that were at the centre of attention of the rising Sophistic movement. What is of significance here is primarily the acknowledgment of (or, more conservatively, the reference to) change of character by means of education.

The wide variance of uses of the word ἧθος, but also a rising awareness of the possibility of its change and its adjustment to different situations is provided in the *Antigone* (l. 705-709):

"Do not, then, bear one ethos only in yourself: do not think that your word and no other must be right. For if any man thinks that he alone is wise—that in speech or in mind he has no peer—such a soul, when laid open, is always found empty"³⁵.

This passage comes close to modern 'interactionism'. *Ethos* here denotes the adaptable (and as such acquirable) attributes of a person. It may be differentiated by the inborn characteristics (an idea which is not abandoned) since it can change and be adjusted according to the circumstances. Assessing

³³ The *Ajax* is believed to be written c. 450-430 BC, while the *Antigone* should be dated c. 441 BC.

³⁴ Presumably, Plato would disagree with this approach. See for e.g. Plat. *Lach.* 201a-b: "And if anyone makes fun of us for seeing fit to go to school at our time of life, I think we should appeal to Homer, who said that "shame is no good mate for a needy man." So let us not mind what anyone may say, but join together in arranging for our own and the boys' tuition". The quote (attributed to Socrates) "κάλλιον οψιμαθῆς ἢ αμαθῆς" has become proverbial among Greece.

³⁵ μή νυν ἐν ἧθος μοῦνον ἐν σαυτῷ φόρει, ὡς φῆς σύ, κούδεν ἄλλο, τοῦτ' ὀρθῶς ἔχειν. ὅστις γὰρ αὐτὸς ἢ φρονεῖν μόνος δοκεῖ, ἢ γλῶσσαν, ἢν οὐκ ἄλλος, ἢ ψυχὴν ἔχειν, οὗτοι διαπυχθέντες ὠφθησαν κενοί.

external situations and acting in a seemingly incoherent (thus sometimes impersonal) manner is an acknowledged, possible way of action.

This view of potentially changeable character is evidently supported by Euripides. In the *Hippolytus* (428 BC) he writes:

“O that in answer to my prayer fate might give me this gift from the gods, a lot of blessedness and a heart untouched by sorrow! No mind unswerving and obdurate would I have nor yet again one false-struck, but changing my pliant ἦθεα ever for the morrow I would share the morrow's happiness my whole life through”³⁶ (l. 1111-15).

Although the word is here used in the plural, the strict rules of poetic metres and the context of the speech have to be taken into account. Euripides clearly refers to personal behavioural manners and not to objective customs or ways of thinking. In other words, what is at stake here is the adaptability of character traits to divergent situations, together (though separately mentioned) with the adaptability of thought perspectives (δόξα). Furthermore, voluntary choice or education may alter one's character traits. For confirmation of this, I cite a quote from the *Suppliants*:

“for noble nurture carries reverence with it, and every man, when once he has practised virtue, scorns the name of villain. Courage may be learned, for even a baby learns to speak and hear things it cannot comprehend; and whatever someone has learned, this it is his wont to treasure up till he is old. So train up your children in a virtuous way.”³⁷ (l. 911-7).

So, up to now two possibilities emerge: either character is stable and unchanging though it cannot be fully revealed since one may choose to (or involuntarily) act ‘out of character’³⁸, or one's character is flexible, adaptable, and responsive to situations. For the moment it is preferable to interpret the

³⁶ εἶθε μοι εὐξαμένῃ θεόθεν τάδε μοῖρα παράσχοι, τύχαν μετ' ὄλβου καὶ ἀκήρατον ἄλγεσι θυμόν.
δόξα δὲ μήτ' ἀτρεκῆς μήτ' αὖ παράσημος ἐνείη,
ῥάδια δ' ἦθεα τὸν αὔριον μεταβαλλομένα χρόνον αἰεὶ
βίον συνευτυχοίην.

³⁷ τὸ γὰρ τραφῆναι μὴ κακῶς αἰδῶ φέρει: αἰσχύνεται δὲ τὰγάθ' ἀσκήσας ἀνὴρ
κακὸς γενέσθαι πᾶς τις. ἢ δ' εὐανδρία διδασκός, εἴπερ καὶ βρέφος διδάσκεται
λέγειν ἀκούειν θ' ὣν μάθησιν οὐκ ἔχει. ἂ δ' ἂν μάθη τις, ταῦτα σώζεσθαι φιλεῖ
πρὸς γῆρας. οὕτω παιῶδας εὖ παιδεύετε.

³⁸ Cf. Ar. *Wasps* (1002):

ἀλλ' ὦ πολυτίμητοι θεοὶ ξύγγνωτέ μοι: ἄκων γὰρ αὐτ' ἔδρασα κού τούμοῦ τρόπου.

Greek views as considering both: *ethos* may refer to deep inborn traits that, though concealable, are unchanging and with the aid of time revealed³⁹, *and* it may refer to more superficial attributes and behavioural manners that can be altered either through education or through voluntary choice and subsequent habituation⁴⁰. At that time approximately, at the second half of the fifth century, the rise of the Sophistic movement gave a boost to the aforementioned issues, leaving its imprint on people of all intellectual levels from Protagoras and Plato to common folk⁴¹.

3.3.2 The Rise of the Sophists⁴²

The present enquiry would be incomplete and deceptive, if account of the significant, ground-breaking, intellectual developments of the Sophists was not taken. Unfortunately, the original works of this movement's exponents survive in inadequate quantity and fragmentary form. In addition, evidence of their thoughts survives in works of their critics (primarily Plato) and is highly biased. Thus it has not facilitated researchers in reaching fair conclusions as to the Sophists' true intellectual contribution. What is objective and certain though is that the Sophists provoked new perspectives in most issues that occupied the Greek intellectual world. Some of their ideas, based on cutting-edge theories of the Presocratics, constituted the intellectual bridge between earlier natural philosophers and later philosophical trends. The practical aims of the Sophists, supplemented with their self-determination as paid experts of knowledge, paved the way towards a more pragmatic, scientific, and professional approach to abstract and informal notions. For instance, the handbooks of Corax and Teisias in Sicily transformed the, previously scattered, rules of rhetoric into an

³⁹ This poses yet another problem which will be especially revealed in our discussion of the forensic speeches. If character is stable but one chooses to act 'out of character', how and when one could recognise the true natural traits?

⁴⁰ See for e.g. Ar. *Peace* 350, 935.

⁴¹ As Guthrie (1969, at p. 73) notes, quoting W.C. Greene (Moirs, p. 251f.): "most scholars would probably agree that the chief value of this composition (i.e. *Anonymous Iamblichus*) lies in showing 'how far the stock ideas and arguments of the age penetrated into rather ordinary minds'."

⁴² In what follows, for the sake of convenience, I will treat the Sophists as exponents of a single intellectual movement, though I acknowledge that each one proposed his independent views, which many times were radically different or even antithetical to the others'. For the 'Sophists' one should look at Guthrie (1969); Kerferd (1981); Rankin (1983). For a selective bibliography in English see McComiskey (1994).

art, consequently urging subsequent thinkers (such as Antiphon) to research and experiment on more precise fields⁴³.

The conclusions of the Presocratics concerning the origin and nature of the cosmos, and the doubts they raised about the order and the divine source of the physical world, found fertile ground in the restless minds of the Sophists, who pushed this enquiry forward. As Guthrie writes:

“We are entering a world in which not only sweet and bitter, hot and cold, exist merely in belief, or by convention, but also justice and injustice, right and wrong”⁴⁴.

The antithesis between *nomos* and *phusis* is transferred from the cosmological sphere to the essential questions about human nature. To what extent does *phusis* endow humans with certain and unchanging attributes and what implications do acquired beliefs and conventions have on a person? Is man by nature a political animal or does his savage nature have to be tamed and suppressed? Finally, is human virtue innate or subsequently acquired? What implications does this have for the conception of a person's character? These sample questions are necessary in order to show the Sophistic movement's significance for the original question, i.e. whether a person's *ethos* is innate, stable and unchanging.

The enquiry shall begin with some common ground upon which divergent opinions may be offered. This is the assumption that human nature in its original state is so savage and self-seeking as to be unable to form ordered political communities in the sense that civilisation demands them. Human nature needs rectifications (or adjustment) in order to learn to act in obedience to society's cooperative values. This is skilfully portrayed in Plato's 'Protagoras', where the sophist is Socrates' interlocutor. The theme of the dialogue concerns the unity of virtue and whether it is teachable. Protagoras' famous claim was that he could teach *arête*⁴⁵ (virtue), a thesis that Socrates doubted, questioning the very

⁴³ See Gagarin (1991).

⁴⁴ Guthrie (1969), p. 59.

⁴⁵ The notion of *arête*, as well as the particular word (as in most other cases that formed the topics of Plato's dialogues) lacked a specific and adequate definition. (For different definitions

'teachability' of virtue⁴⁶. The great sophist's whole intellectual testament was thus at stake. Conversing with elegance and skill, Protagoras finally tempts Socrates towards accepting that virtue is teachable.

What is of major importance here is the fact that for Protagoras, humans are equipped by nature with *ἐντεχνος σοφία* (practical wisdom) but lack the so-called quiet, cooperative virtues, which are essential to the formation of ordered communities. The natural (of varying degree among humans) intelligence should be supplemented by moral virtue⁴⁷. Therefore Zeus ordered Hermes to provide *all* humans with *aidos* and *dike*

"for cities cannot be formed if only a few have a share of these as of other arts. And make thereto a law of my ordaining that he who cannot partake of *aidos* and *dike* shall die the death as a public pest." (322d).

Therefore humans are receptive to virtue which, although not innate, can be subsequently acquired, thus can be taught. *Nomos* (in the form of both positive law and ethics) must be employed to improve human *phusis* for the sake of polis-formation⁴⁸.

Protagoras, however, discloses an implicit compassion for the natural state of humans. Others are still harsher. Nature is disorderly and varies with the individual. Human nature may be corrupt, savage and self-seeking. Actually

"there was a time when the life of men was disorderly and beastlike, the slave of brute force, when the good had no reward and the bad no punishment. Then, as I believe, men laid down

see e.g. Pl. *Meno* 71e; *Gorg.* 492c) Socrates' interlocutors insist on giving widely accepted examples of *arête* or putting forward popular beliefs, whose legitimacy is then questioned. However, as will be discussed in the next chapter, this very dialectical reflection based on the questioning of common norms, forms the core of Platonic (and Greek) philosophy, as opposed to the individual, monastic philosophic reflection idealised in the Enlightenment. This has significant implications on the Greek ideas of personhood, as opposed to the modern ones. See Gill (1996).

⁴⁶ This formed a central topic of discussion at the end of the fifth century and beginning of the fourth. See for e.g. the anonymous treatise *Dissoi Logoi* (Double Arguments).

⁴⁷ Cf. Protag. fr. 3, DK: 'Teaching needs both nature and practice'. This comes close to Isocrates' thesis on the combination of natural ability and practice [see Isocr. *Antidosis* 186-192 and Arist. *Nic Eth.* 1103a].

⁴⁸ The Greek word *πολιτισμός* comes much closer to my use of the word 'civilisation' here.

laws to chastise, that justice might be ruler and make insolence its slave, and whoever sinned was punished”⁴⁹.

According to this developmental view of human civilisation, *nomos* was the catalyst that liberated humans from their savage nature and allowed them to prosper. On the other hand, there were people who questioned this civilising ability of *nomos*, though still accepting that humans are naturally inclined towards wrongdoing; for they alleged that self-seeking interest is the strongest instinct. These ‘realists’ (as Guthrie names them) retain the gloomy picture of humans’ original state, though doubting of whether this can be truly altered. For them, habituation in moral virtue does not transform human nature. A superficially wholehearted adherence to quiet ethical norms simply forms a pretext, until the necessary conditions for the true human nature’s exposure are met.

Thrasymachus in Plato’s Republic⁵⁰ (regardless of the extent of his picture’s distortion) poses a good example of a ‘realist’. For thinkers like him justice is identified with the interest of the stronger. The absence of proper definitions, the complexity and subjectivity of common beliefs, and the self-interested denotation of moral canons do not actually allow scope for such questions. As long as a person has the power to fulfil his wishes, the true justice or injustice of his cause is irrelevant. In other words, as Glaucon and Adeimantus propose, a man in possession of the ring of Gyges (that conferred invisibility to his wearer), would certainly reveal true human nature by showing that no one could resist the temptation of committing an injustice for his (supposed) self-interest, with the foreknowledge that it would not be punished⁵¹. There is no value judgment in this conclusion. It is simply a (pessimistic) observation of the *natural necessity* that induces this course of events. Human beings’ inner self is guided by the laws of nature which dictate the pursuit of self-interest as the only true (and unchangeable) disposition. Human laws and morals merely act as a

⁴⁹ [Euripides] *Sisyphus*, fr. 25.1-8 DK (See ch.1, n. 5). Cf. Dem. 25.15.; Diod. Sic. 1.8.1-7.

⁵⁰ Plat. *Rep.* 1.336b ff.

⁵¹ Cf. Antiph. fr. 44 A, DK: “justice consists in not transgressing the laws and usages (*νόμιμα*) of one’s state. Therefore the most profitable means to manipulate justice is to respect the laws when witnesses are present but otherwise to follow the precepts of nature.”.

deterrence which, whenever possible and profitable, will be disregarded. *Nomos* can only suppress natural disposition; it never alters it.

The above discussion opens the path to the next question, concerning the legitimacy of human laws that are designed to suppress nature. Hippias refers to human law as the “*despot of mankind, (which) often constrains us against nature*” (Plat. *Prot.* 337d). Callicles, though declaring himself not a sophist, claims that

“the fact is this: luxury and licentiousness and liberty, if they have the support of force, are virtue and happiness, and the rest of these embellishments—the unnatural covenants of mankind—are all mere stuff and nonsense” (Plat. *Gorg.* 492c).

Human justice is inferior to natural justice; man-made laws are unnatural (thus illegitimate) attempts of the weak and incompetent to inhibit the natural (thus legitimate) laws that bless anyone who has the strength and ability to satisfy his needs and rule. Human nature is not simply unchangeable but should also be inviolable.

To conclude then, the Sophistic movement and its era left an invaluable intellectual testament. What is relevant to my study is primarily their common belief that man in his original state is not naturally endowed with those virtues that are necessary for the formation of communities; indeed, the opposite would be closer to truth. Men may naturally differ in their intellectual and physical abilities (and capabilities) but still share certain ‘beastlike’ traits and dispositions, which stand apart from the (ideal for cooperation and coexistence) quiet ethical virtues. These are subsequently acquired and, depending on natural adaptability, education, and practice, they may be perfected.

The extent to which these virtues are expressions of a single virtue (*arête*) and how this latter may be defined are open to examination. The importance lies on the fact that these characteristics (e.g. justice, moderation, self-control) constitute expressions of human character (*ethos*) and are acquired through the course of one’s life. Disregard of shared laws and norms of a community may

reveal (apart from a superficial propensity to committing a particular crime) one's incapability or unwillingness to "partake of respect and right, and shall die the death as a public pest"⁵². Punishment and reprobation act as deterrents for future pests; as a result, "virtue can be instilled by education" (Plato, *Prot.* 324b). Doubt may be expressed as to how deeply virtue can be instilled and change human nature, but it seems plausible to suggest that for all the Sophists, at least as far as quiet virtues are concerned, a man's *ethos* differs from a man's nature (thus is not inherent by nature). Either superficially (through the suppression of natural vices) or deeply (through a wholehearted and honest adherence to conventional norms), one's character as exposed by one's life cannot be defined as 'natural'.

This has important implications for the original question (whether character is stable and unchanging). If the first conclusion is taken as true ('superficial adjustment'), the *true nature* of one's character is very rarely revealed and expresses only the worse. What we observe in everyday dealings would only be expressions of one's *imposed* character. In other words, if every man's nature is self-seeking and decides everything in terms of raw interest (but is suppressed), then the deployment of any conventional virtue would be dishonest and calculative. On the contrary, any expressive act of the *true -natural- character* would be very carefully concealed from the public to avoid reprobation. Therefore the question is transformed to "in what circumstances can we identify a person's true character?", though if everyone's nature is in essence beastlike, this query becomes meaningless.

If the second conclusion is taken as valid ('deep adjustment'), character is not natural and, undoubtedly, not unchanging. Humans have natural abilities (mainly intellectual), though what they call ethical dispositions are acquirable. Human nature may be altered and improved from its savage original state, which means that character may be adjusted to fit the particular circumstances. Virtue (however defined) can be taught and character traits may be altered either through education or through partaking in conventional norms. For the

⁵² Although this is an idea expressed by Protagoras (Plat. *Prot.* 322d), it is not distinct from Plato's own (*Rep.* 410a)

exponents of this thesis, “neither *nomos* nor the political virtues are ‘by nature’, but a ‘return to nature’ is the last thing that is wanted”⁵³. Therefore for the Sophists, ‘character’ is neither natural nor unchangeable or, it is natural, suppressed, and hardly revealed.

3.3.3 The Theories of the Philosophers

A complete analysis of the Platonic and Aristotelian positions on the subject is definitely unattainable. Nevertheless, staying focused on the primary question of the stable or changeable nature of human character will render their ideas comprehensible. Together with this main aim, supplementary conclusions as to the philosophers’ approaches to human character will be illustrated.

3.3.3.1 The Ideas of Plato

Clarification of some methodological issues concerning Plato forms a prerequisite for the following discussion. Awareness of Plato’s intellectual progress through the course of his life, as exposed by his gradual disengagement from the Socratic influence (to the extent that research can specify it) and the tireless development of new concepts and ideas, compels me in the limited space that I can devote to treat his writings in an improperly unified manner. Minor detours and inconsistencies will not be emphasised since the aim of my enquiry is to reveal the complex nature of Greek ideas of ‘character’ in the sense that it cannot be reduced to simple aphorisms. Indeed, Plato’s own continuous dialectic on the matter, which led to rejections and affirmations of previously developed ideas, proves this very assertion. Moreover, I regard Plato’s intellectual detours as slight, insignificant deviations in what is overall, to my eyes, a coherent Platonic theory.

The main questions to be asked are similar to the ones addressed by the Sophists (whose influence on Plato’s themes of enquiry is great). They include whether human nature is fixed and inescapable, whether ‘character’ is unchanging, and what is the influence of education on a person’s moral configuration. To use Meno’s words:

⁵³ Guthrie (1969), p. 68.

“I wonder whether you can tell me, Socrates, whether arete is teachable, or, if not teachable, at least a product of habituation. Or perhaps it isn’t the kind of thing one can practise or learn, but is a natural human endowment.” (*Meno* 70a; 86d).

This enquiry alone, and since Platonic arête has undoubtedly an ethical connotation⁵⁴, would suffice to suggest that the Greeks had not reached undeniable conclusions as to the fixity of human *ethos* (cf. *Meno* 95b). To support this, Socrates’ hypothetical answer of any Athenian layman to Meno’s question may be cited:

“Stranger, you must take me to be high in the gods’ favour, if you really think I know whether or not arete is teachable or how people come to get it” (Plat. *Meno* 71a).

This question will be considered in due course. First, as a prerequisite, Plato’s view of human nature has to be understood.

A question on Plato’s view of human nature unavoidably staggers between myth and reality. This explains why reference will be made to two famous Platonic myths, the Chariot myth in the *Phaedrus* and the Foundation Myth in the *Republic*. Starting with the second myth, which is not free from controversy, I quote in full:

“While all of you in the city are brothers, we will say in our tale, yet God in fashioning those of you who are fitted to be Rulers mingled gold in their generation, for which reason they are the most precious—but in the Auxiliaries silver, and iron and brass in the farmers and other craftsmen. And as you are all akin, though for the most part you will breed after your kinds, it may sometimes happen that a golden father would beget a silver son and that a golden offspring would come from a silver sire and that the rest would in like manner be born of one another. So that the first and chief injunction that the god lays upon the Rulers is that of nothing else are they to be such careful guardians and so intently observant as of the intermixture of these metals in the souls of their offspring, and if sons are born to them with an infusion of brass or iron they shall by no means give way to pity in their treatment of them, but shall assign to each the status due to his nature and thrust them out among the artisans or the farmers. And again, if from these there is born a son with unexpected gold or silver in his composition they shall honour such and bid them go up higher, some to the office of guardian, some to the

⁵⁴ Cf. the rejection of Meno’s popular definitions in 72a.

assistanceship, alleging that there is an oracle that the state shall then be overthrown when the man of iron or brass is its guardian". (Plat. *Rep.* 415a-c)

Plato dreams of a peaceful and well-ordered state, specifying meritocracy as its ultimate purpose. In other words he aims at an "aristocracy of talent"⁵⁵. What is of importance to my study is Plato's true (though poetically expressed) belief in a form of natural selection through an innate gradation of skills. Humans are not born equal, at least as far as their aptitudes are concerned. Intelligence, talent⁵⁶ and ability may vary and this is likened to unequal quantities of gold, silver and iron. For Plato, human breeding may be compared to horse breeding in reaching a desirable result, although the outcome is not mathematically guaranteed. Nonetheless, amid their natural differences, they have one most important characteristic in common: they are brothers, they come from the same race, they are humans. This observation leads me to the second Platonic myth, as presented in the *Phaedrus* (246a ff.). My concern here is not with the souls' composition or its tripartite nature, but with their experiences before incarnation. I will try to classify my understanding of the myth under three headings: a) common experience of the Forms, b) *recollection* of the Forms and c) individual choice.

The first Platonic belief is the one that puts each individual human being under the auspices of common nature. This concerns the souls' state and experiences before incarnation, when these dwell outside the sky's sphere as followers of the gods. There, they experience the sight of the true Forms, namely the unborn, eternal and unique expressions of notions such as Beauty, Justice, and *Sophrosyne* (*Phaedr.* 247e-248b). What is common to all souls that (after some failure) occupy human bodies is that they have necessarily experienced these true Forms (249b, 249e). This has a significant implication

"For a human being must understand a general conception formed by collecting into a unity by means of reason the many perceptions of the senses" (Plat. *Phaedr.* 249b-c).

⁵⁵ Plat. *Rep.* (2003) transl. by D. Lee, p. xliii.

⁵⁶ Cf. Plat. *Phaedr.* 269D.

Every person has the ability to do this by the mere experience of the Forms. Nevertheless, since the degree of this experience varies, the soul that has seen the most will lead the human life of a philosopher while the one that has seen the least will lead the life of a tyrant; the rest are classified accordingly. To recap up to now, for Plato, all human beings have by nature the ability to identify and conceptualise the sensate expressions of the Forms, though the degree of their heavenly experience may influence their ways of life. This latter issue may have significant influence on these souls' ability for *recollection*.

Before considering the other implications of the 'chariot myth', it is firstly necessary to link it with Plato's broader theory of knowledge as recollection. This should probably be ascribed to Socrates, since both his famous paradoxes (such as no one does wrong voluntarily and, therefore, knowledgeably) and the maieutic methodology perfectly suit it. The basic features of this theory are presented in the *Meno*. There Socrates tries to experimentally prove to Meno that what humans call 'knowledge' is nothing but recollection. Deep introspection and dialectic reflection permit to the individual access to material that he already has as innate. What humans understand as 'learning' is a process of serious dialectical testing of their beliefs. Socrates' methodology (the *elenchus*) provides the necessary procedure for the successful outcome. Our beliefs may be true or false but we can never find out unless they pass the touchstone of rational questioning. During this process, in a way reminiscing Socrates' interlocutors, we may end up in *aporia*. This is nonetheless the first step towards true knowledge, since it allows for the rejection of false beliefs and further reflection on ones undecided. Therefore, a person who has honestly dedicated his life to such a quest for the truth cannot end up with false outcomes, since the truth exists already inside him. In addition, this truth is common to all humans (due to their experience of the Forms), therefore they all share (apart from a common nature) a common inherent experience of truth. By the same token, no one who undertakes such an effort can be consistently bad or immoral (since his false beliefs would be rejected), and only good people can have consistent characters⁵⁷.

⁵⁷ See for e.g. Plat. *Lysis* 214c-d: "What I believe they mean is that the good are like one another, and are friends, while the bad—as is also said of them—are never like even their own

For Plato the knowledge humans acquire in the course of their earthly lives is not external, but simply a recollection of material they already have access to, engrained in them before incarnation due to the mere experience of the Forms. As has already been said, its degree varies and this may have implications as to the easiness of this recollection⁵⁸. There enters the picture what I regard as a concept of ‘individual choice’. Regardless of the type of life reserved for everyone due to the degree of the experience of the Forms (philosopher, tyrant and so on), a person remains free to live it justly or unjustly⁵⁹. Such souls (since their falsity is due to lack of knowledge / recollection)

“falling to earth, were so unfortunate as to be turned toward unrighteousness through some evil communications and to have forgotten the holy sights they once saw” (Plat. *Phaedr.* 250a).

Nevertheless, this is not the end of the story; because Plato wholeheartedly believed in the value of education. Now the answer must be given as to whether virtue is teachable.

Plato’s whole life proves one very point: he strongly believed in improvement and devoted his life to this cause. Being the offspring of a powerful *oikos* belonging to the higher class of Athens, he did not hesitate to dedicate himself to philosophy. He envisioned a perfect, just state, where the matching of upright community ethics with the individual’s virtuous internal *ethos*, would allow a person to live in accordance with true justice. For Plato education was of utmost importance for human souls. His contemporaries were profited by the establishment of the Academy, while the rest of us by his written works. Each human soul by its nature carries a memory (which may become nostalgia) of the Forms and it has the ability to dig deep and uncover it. The moral environment must be undoubtedly appropriate, and proper education may prove expedient for the cause.

selves, being so ill-balanced and unsteady; and when a thing is unlike itself and variable it can hardly become like or friend to anything else”.

⁵⁸ Cf. Plat. *Phaedr.* 250a.

⁵⁹ Plat. *Phaedr.* 248e: “Now in all these states, whoever lives justly obtains a better lot, and whoever lives unjustly, a worse”.

In the *Republic*, a large part is devoted to a detailed analysis of every part of education that, in addition to a receptive nature, would produce the ideal state's Guardians and Philosophers-Kings. Character is shaped through education. Indeed, proper upbringing produces good men since harmony penetrates deeply into the mind and so grows in true goodness of character⁶⁰. Individuals should learn from their youth to recognise beauty and goodness in all its manifestations; thus they will participate in the true nature of the good. Music, literature, intellectual and physical education contribute to a common aim: virtue. Humans can change their character, provided that they are corrupt. Disoriented due to ignorance, forgotten the beauty of the Forms, they are in desperate need of proper alignment. Although one's disposition and talents are partially predetermined prior to incarnation⁶¹, *ethos* is open to amendment.

In the dialogue *Laches*, Socrates challenges his interlocutors to prove their suitability for the role of educators. How can someone test it? Socrates gives the answer in telling them:

"please, could you give examples of people whom you have taken in hand and whose characters you have changed from bad to good" (Plat. *Laches* 187a)⁶²

The tripartite human soul contains an irrational, intractable part, which needs to be tamed and controlled. The rational part, as another charioteer, has to take all the necessary measures to enforce its will. This is a continuous, intense process, expressions of which may be experienced through the course of one's life. However, a philosophic life provides the charioteer with an iron bridle, with which he can discipline the bad horse and restore the chariot (soul) to order⁶³. Repetition of this punishing (and didactic) process creates habitual responses⁶⁴, allowing the rational part to rule and forcing the irrational to obey with fear and

⁶⁰ Plat. *Rep*, 401e.

⁶¹ Plat. *Phaedr*. 252c-d; 269d.

⁶² "δότε παράδειγμα τίνων ἤδη ἄλλων ἐπιμεληθέντες ἐκ φαύλων καλοὺς τε κάγαθοὺς ἐποίησατε".

⁶³ Plat. *Phaedr*. 254b-c.

⁶⁴ Cf. Plat. *Rep*. 444d-e: "ἀρετὴ μὲν ἄρα, ὡς ἔοικεν, ὑγεία τέ τις ἂν εἴη καὶ κάλλος καὶ εὐεξία ψυχῆς, κακία δὲ νόσος τε καὶ αἰσχος καὶ ἀσθένεια... ἄρ' οὖν οὐ καὶ τὰ μὲν καλὰ ἐπιτηδεύματα εἰς ἀρετῆς κτῆσιν φέρει, τὰ δ' αἰσχροῦ εἰς κακίας;"

respect⁶⁵. Provided that a soul has not been corrupted to an irreversible degree, therapy through suitable schooling is possible⁶⁶.

It may be tempting to suggest that the aforementioned evidence reveals a Platonic belief in the indivisibility of a person's character. What I mean by this is that a person has a similar dispositional response to every situation, regardless of the stimuli. Yes, there is some truth in this, but only half. As noted above, for Plato virtue is knowledge, in the form of the proper recollection of the Forms. Provided that a person has reached a state of 'knowledge' that allows him to remember the true Forms and act accordingly, his *ethos* becomes stable and directed towards the 'true good'. However, the possibility of going astray remains, in case that the rational part leaves the soul unguarded⁶⁷. On the other hand, a morally corrupt person, who due to this fact lacks the ability to dialectically and aesthetically experience the reminiscence of the Forms, is unstable and impulsive, responding spasmodically to dissimilar stimuli, though constantly (unless by chance) in an unethical direction. In such a person's soul, the wicked untamed horse has grown so powerful as to take control of the chariot, leading it to disaster.

All the above reveal a deep and sophisticated belief in the changeable nature of human soul (from bad to good and not the opposite, since once someone becomes truly good, he has already established access to the Forms). By the same token a belief in the changeable nature of human character may be adduced. All virtuous characteristics, such as moderation and self-control are acquirable, through the recollection of the Forms. As a result, Plato may not be supposed to share the pessimistic view of the Sophists as regards human nature. Human souls were once followers of the gods. They took part in this mystic initiation which takes place before incarnation; they experienced the Forms. They are neither good nor bad⁶⁸, though they carry the notion of the

⁶⁵ Ibid. 254e: "ὅταν δὲ ταῦτόν πολλακίς πάσχων ὁ πονηρὸς τῆς ὑβρεως λήξει, ταπεινωθεὶς ἔπεται ἤδη τῆ τοῦ ἡνιόχου προνοίᾳ, καὶ ὅταν ἴδῃ τὸν καλόν, φόβῳ διόλλυται".

⁶⁶ Plato's belief in rehabilitation through punishment is expressed in the *Gorgias* (e.g. 478a, 517b), in the *Republic* (409), and in the *Laws* (e.g. 908e). Legal punishment for a diseased soul is compared to medical treatment for a diseased body. For discussion see Saunders (1991); Mackenzie (1981).

⁶⁷ Pl. *Phaedr.* 256c.

⁶⁸ Cf. Plat. *Lysis* 216e; 218a-b.

'truly good' hidden inside them. Human nature is not even close to the savagery picture, desperately needing rehabilitation through instruction. For the Sophists, education comes to suppress and conceal innate vices; for Plato education comes to illuminate and regenerate innate virtues.

3.3.3.2 The Works of Aristotle

In what follows an abbreviated account of Aristotle's ideas of 'character' will be offered. Since Aristotle's theses will be further highlighted during the next chapters, namely the ones that focus on *ethos* in relation to forensic rhetoric, the present discussion will be as abridged as possible. The first significant point of development, compared to previous thinkers, in the Aristotelian comprehensive theory of *ethos* is the dissociation of moral progress from growing intellectual knowledge. For Aristotle, the correct process of moral progress deviates from the traditional account of virtue as an ideal that a person has first to comprehend and acquire in order to use it. On the contrary, virtue(s) are attained by exercising and practising them on a constant basis, in an intentional, voluntarily chosen manner. For him

"the virtues therefore are engendered in us neither by nature nor yet in violation of nature; nature gives us the capacity to receive them, and this capacity is brought to maturity by habit" (*Nic. Eth.* 1103a).

Human ethics need to be detached from nature, for human action is not knowable and predictable as cosmic or natural events are. Human action in practical life cannot become the content of knowledge in the same way as a cosmic phenomenon or a technical procedure⁶⁹.

For Aristotle, practical human action is determined and judged by rules and norms relative to the environment. In his accounts of *ethos* in the *Poetics* or in the *Rhetoric*, he presupposes a kind of ethical consensus in the audience as a

⁶⁹ Dihle (1982), p. 55. Cf. P. 58: "Aristotle also loosened the rigid interconnection between nature and human affairs which is typical of the main stream of Greek ethical thought. Only nature and its lasting order make it possible to know something objectively and to offer rational proof of that knowledge. In moral life objective knowledge can only refer to the nature of man, to the just, and to other entities that never occur as such in empirical life".

precondition for a proper response to tragedy and epic as well as oratory⁷⁰. Evaluation of individual actions is materialised by reference to the acceptable socio-ethical norms. For instance

“we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts. This truth is attested by the experience of states: lawgivers make the citizens good by training them in habits of right action—this is the aim of all legislation, and if it fails to do this it is a failure; this is what distinguishes a good form of constitution from a bad one.” (*Nic. Eth.* 1103b).

However, habit and chance are not sufficient for the attainment of virtue. Precisely at this point a sort of ‘knowledge’ comes into play. The agent must knowingly choose to perform these habitual virtuous acts, simultaneously being in a certain state of mind:

“first he must act with knowledge; secondly he must deliberately choose the act, and choose it for its own sake; and thirdly the act must spring from a fixed and permanent disposition of character.” (*Nic. Eth.* 1105a)⁷¹.

Since the virtues are neither endowed by nature, nor are they emotions or capacities (cf. 1106a), Aristotle asserts that they must be dispositions. But what does he mean by ‘disposition of character’? As usual, he provides the answer:

“The dispositions (ἔξεις) are the formed states of character in virtue of which we are well or ill-disposed in respect of the emotions; for instance, we have a bad disposition in regard to anger if we are disposed to get angry too violently or not violently enough, a good disposition if we habitually feel a moderate amount of anger; and similarly in respect of the other emotions.” (*Nic. Eth.* 1105b).

These dispositions are not predetermined by nature but moulded through individual choice and practice⁷².

⁷⁰ Gill (1984), p. 164.

⁷¹ Cf. 1105b: “Thus although actions are entitled just and temperate when they are such acts as just and temperate men would do, the agent is just and temperate not when he does these acts merely, but when he does them in the way in which just and temperate men do them. [5] It is correct therefore to say that a man becomes just by doing just actions and temperate by doing temperate actions; and no one can have the remotest chance of becoming good without doing them”.

“Not to know that it is from the exercise of activities on particular objects that states of character are produced is the mark of a thoroughly senseless person” (*Nic. Eth.* 1114a).

Individuals are therefore responsible for their character traits, to an extent that they may be characterised as ‘voluntary’, and consequently be justly blamed⁷³. However, mere consciousness of behaving in a certain manner does not provide an opportunity for change. Habit may have already become second nature, shaping the individual’s deliberate choice of the means and ends (*προαίρεσις*), in accordance with one’s accepted ethical standards. Habitual virtues and vices are dispositions affecting the choice which the intellect has to make afresh in any given situation (*ἔξεις προαιρετικά*). Practice of these is deliberate, and this produces their consolidation as to form a more general character disposition. The resulting consolidation of such traits leads to voluntary (thus blameworthy) though possibly inadvertent responses. In Aristotle’s words

“when you have let a stone go it is too late to recover it; but yet it was in your power to throw it, since the moving principle was in you. So, too, to the unjust and to the self-indulgent man it was open at the beginning not to become men of this kind, and so they are unjust and self-indulgent voluntarily; but now that they have become so it is not possible for them not to be so” (*Nic. Eth.* 1114a).

The above discussion reveals Aristotle’s belief in human emancipation, at least in an early stage of life, as far as the forging of individual ‘character’ is concerned. Nevertheless, by introducing the notions of voluntary choice and intentionality in practical life (cf. 1109b ff.), Aristotle favoured an ‘interactionist’ approach as opposed to sheer determinism. Apart from fixed character traits, other conditions also influence human action. In real life, the practical intellect (as opposed to the theoretical one) is the main contributor to decision-making,

⁷² Cf. 1114a: “They acquire a particular quality by constantly acting in a particular way. This is shown by the way in which men train themselves for some contest or pursuit: they practice continually. Therefore only an utterly senseless person can fail to know that our characters are the result of our conduct”.

⁷³ Cf. 1114a: “Again, it is irrational to suppose that a man who acts unjustly does not wish to be unjust or a man who acts self-indulgently to be self-indulgent. But if without being ignorant a man does the things which will make him unjust, he will be unjust voluntarily”.

in conjunction with one's dispositions, taking into account the surrounding circumstances of each situation. Chances for the exhibition of ideal (in vitro) freedom of choice are hardly presented in everyday life, where other factors have to be weighed. For this very reason, and since only deliberate action accurately reveals an individual's *ethos*, human actions have to be evaluated by reference to the situation at hand.

This is illustrated by reference to two examples (1110a): if a tyrant were to order a subject to do something base, having his parents and children in his power or if a ship's crew throws the goods overboard in a storm (for in the abstract no one throws goods away voluntarily, but on condition of its securing the safety of himself and his crew, any sensible man does so). Both the terms, then, 'voluntary and 'involuntary', must be used with reference to the moment of action. And, since virtue is concerned with passions and actions, and on voluntary passions and actions praise and blame are bestowed, on those that are involuntary pardon, and sometimes also pity, to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for the legislators with a view to the assigning both of honours and of punishments (1109b).

The aforementioned reference to passions is significant in yet another respect: one aspect of the Aristotelian concept of *hamartia*⁷⁴. In that sense, a person may erroneously act in the grip of *pathos* (passionate emotion), instead of acting in accordance with his generally stable *ethos*. Emotional passion may lead to a wrong judgment which, though not always morally unacceptable, leads to negative results. *Pathos* may thus temporarily suspend and overcome the relatively predictable expression of fixed character traits; fault may consequently result from acting contrary to one's *ethos*. This does not entail a more general wickedness of character or badness of the particular emotion. It simply highlights an incidental badness caused by an inappropriate (as regards the context) acting on that emotion. In other words, a person's emotional state may be justified, albeit knowledge of when, where, and how he should act upon it determines its quality.

⁷⁴ On *hamartia* see Bremer (1969); Stinton (1975); Sherman (1996).

A parallel state to *hamartia*, though more permanent in nature and concentrating on reason rather than emotion⁷⁵, is *akrasia*⁷⁶. The term means 'lack of control' or 'weakness of will', and it describes a persistent state of the soul; one on the basis of which the doer habitually acts. This state can be described as the intellectual knowledge of the right action (based on reasoning, assisted by one's correct general beliefs) but failure to commit it due to one's desires. In other words, with *akrasia*,

"it must be the case that someone who is being led by desire to enjoy a pleasure he thinks he should not enjoy must no longer be holding together the line of reasoning which forbids him from enjoying it. But it is not the correct general belief that he has abandoned: he held to it before the akratic episode; he holds to it afterward; and in the interim he does not undergo an intellectual conversion or corruption. Thus, during the akratic episode, some particular belief must be in some way lacking, of the sort which would have made his general belief effective"⁷⁷.

This disharmonious state of the soul (where the intellect does not coincide with the impulses), stands between the perfect harmony of intellect, impulses and action (*arête*) and perfect disharmony (*kakia*). In the case where the intellect does not coincide with the impulses but nonetheless the person acts in a correct way, this state is called *enkrateia*; this may be compared to *akrasia* as a state of an individual's ethical progress.

What can therefore be extracted from this brief discussion of Aristotle's ideas in relation to the present investigation can be summarised as follows. For Aristotle, character is not provided to humans by nature. On the contrary, it is moulded by the habitual and intentional exercise of certain patterns of behaviour, in accordance with accepted ethical standards. Nature provides for the capacity of humans to intellectually control and determine actions, choices, and even emotional responses, the quality of which is shaped through the course of one's life. Nonetheless, once reaching the decisive point, one's *ethos* becomes

⁷⁵ Pakaluk (2005), p. 253: "any sort of departure from correct conduct on account of some emotion even less similar to sensual desire is called "*akrasia*" in an even more remote and metaphorical sense".

⁷⁶ On *akrasia* see Rorty (1980); Pakaluk (2005), pp. 233-244.

⁷⁷ Pakaluk (2005), p. 251.

unchangeable. Humans are thus blameworthy or praiseworthy for their characters and ethical dispositions, as far as this is evaluated by reference to deliberate choices. However, one's quality of character is determined (and assessed) in accordance with the established norms of his environment, not against any abstract laws of nature. Thus, human *ethos* is the result of multiple components. As far as how one's 'character' may be documented, this has to happen by reference to a multitude of previous acts, deliberate in nature, insignificantly determined by external influences, capable of revealing a fixed disposition.

All these have important implications to the present enquiry, to the extent that they illuminate an insight into the Greek way of practical reasoning. Remembering that the centre of attention is the discovery of the causes triggering the wide use of character evidence in the courts of classical Athens is adequate for acknowledging the importance of Aristotle's observations. His approach as to how one's *ethos* is to be judged, as to when an act highlights a character trait, and as to why invocation of a multitude of past acts may be necessary in order to prove one's fixed character, offer the underlying rationale behind the practice of the orators.

3.4 *The Practice of the Orators*

Having sketched thus far the intellectuals' approaches, it is now time to analyse the orators' assumptions about 'character' as presented in the forensic speeches. It has to be noted in advance that the adversarial nature of the speeches, coupled with the fact that in the courts' setting honesty weighed far less than success, make ideas of 'character' yet another rhetorical device at the orators' disposal. Litigants are not concerned about truth or objectivity and advertise their assumptions as facts, in a manner that would best fit their case. Therefore the elasticity (and even inconsistency) with which some ideas are presented should cause no surprise. On the contrary, such manipulation reveals the absence of any fixed presuppositions about 'character'. The hypothetical presence of such presuppositions would necessarily prevent any innovative interpretations or rhetorical handling of 'character' in the fear of alienating the jurors. The present research will address the same core questions regarding the

stable and unchangeable nature of character, as well as its indivisibility which, in the forensic environment, had a central role to play.

The enquiry may begin with a foundational observation that the orators in general (presumably pointing to a widespread assumption) seem to support a relatively consistent and barely changeable character. Definitely within the course of an Athenian trial, this had its practical reasons. Within the context of a trial where litigants were the sole primary source of information and their argumentation relied heavily on arguments from probability, a moralising plaintiff, in his effort to prove the defendant's wrongdoing, was more than willing to point to the latter's past reprehensible behaviour. The necessary assumption of a stable and unchanging disposition paved his rhetorical path in effortlessly proving one's present misconduct by reference to earlier instances. On the other hand a defendant, in the absence of a certified record of criminality, could point to his earlier beneficial acts, highlighting a consistent, positive character. Furthermore, in cases where the parties could point to their opponent's previous transgressions, the accusatorial mode of trial permitted for the curtailing of an adversary's credibility by reference to past misconduct. In contrast, the factor that demonstrates the rhetorical opportunism of 'character' assumptions lies in cases where one's past wrongdoing had been decidedly proven. There, counter to what has been evidenced so far, a litigant was perfectly able to argue for his rehabilitation or picture his past conduct as 'out of character'.

For the illustration of these general considerations, specific examples may be offered. The belief in a deeper unchanging natural disposition is best exemplified by Lysias in his speech *Against Alkibiades the Younger*, where he suggests that a criminal nature cannot change; as a result such a man does not deserve forgiveness due to the hope for improvement⁷⁸. Demosthenes also, advertises a belief in natural honesty, a quality which prevails through the course of one's lifetime⁷⁹. One's reputation and reception by the general public

⁷⁸ Lys. 14.2.

⁷⁹ Dem. 32.26; cf. 36.44. See also Dem. 25.15: "The whole life of men, Athenians, whether they dwell in a large state or a small one, is governed by nature and by the laws. Of these, nature is something irregular and incalculable, and peculiar to each individual; but the laws are something universal, definite, and the same for all. Now nature, if it be evil, often chooses wrong, and that is why you will find men of an evil nature committing errors".

should be determined by his own past behavioural traits rather than by any scheming defamation⁸⁰. Aeschines (in that issue) sides with Demosthenes, maintaining that natural disposition always prevails, regardless of the fact that someone may pretend to be a man of another character for a short interval⁸¹. However, this last point raises questions as to the recognition of this 'natural character'. If a person can pretend and act purposefully 'out of character', or is free to argue for the changeable nature of *ethos*, the matter becomes complicated. For instance, Andokides felt free to argue that

"My judgment is changed now from what it was before... my present conduct is much more characteristic of me than my earlier conduct" (Andoc. 2.24-6).

Although such kind of argumentation is rare in Athenian trials, since defendants do not admit guilt and try to conceal any past reprehensible acts, it nevertheless demonstrates a flexible approach as to the steadiness of a man's character. Within such a fluid and subjective matrix of beliefs, how can someone judge when true character is revealed? One answer is given by Lysias who suggests that

"although a person could create a false character for a short period, nobody could conceal being a criminal for a period of seventy years" (Lys. 19.60).

Duration therefore forms significant evidence of one's true disposition. Consistency of good behaviour is another factor that has to be assessed. A mere single transgression may decidedly reveal an inherent character defect. Demosthenes argues that a single offence should not be attributed to a circumstantial mistake; it rather exposes the inbred true nature of a man. In his prosecution speech *On the False Embassy* he says that

⁸⁰ Cf. Dem. 21.134: "But if you did not do it and it was all a fabrication, and if the rest of the soldiers, instead of reproving the slanderers, chuckled over you, it only shows that from your general manner of life they thought that such a story exactly fitted you. It was yourself, then, that you ought to have kept more under control, instead of accusing the others".

⁸¹ Aeschin. 3.78, 3.89, 3.163.

“The legislator simply forbade any acceptance of bribes... considering that a man who has once accepted them and been corrupted by money no longer remains a reliable judge of what is good for the city” (Dem. 19.7).

More analysis of this idea is provided in the speech *Against Meidias* where Demosthenes argues that

“it was not acceptable to the city that people should be honest for a time and then thieves, but only that, where the property of the community is concerned, they should invariably be honest; for it was felt that a man of that kind had been honest during the earlier period not by nature but by evil design in order to be trusted” (Dem. 24.133).

The aforementioned passages reveal the depth of rhetorical manipulation of ‘character’, in the absence of any fixed popular beliefs. An orator could argue according to his best interests, either that one’s character is stable or that rehabilitation is possible, although in principle it was more rewarding to rely on the first argument. Moreover, a clever and deceitful litigant could neutralise his adversary’s record of positive actions by pointing to a (real or imaginary) opportunism that would best suit his case. Therefore, for a modest, law-abiding defendant, an offence could be described as a minor transgression that is ‘out of character’, whereas for the moralising plaintiff such an action exposes the earlier opportunism of the defendant in trying to create a false impression of honesty and lawfulness.

This lack of uniformity of approach suggests that in the context of an Athenian trial, *almost any (even remotely relevant to the offence) past act, could be invoked to assist the argumentation of a litigant*. This is also advocated by Lysias 26 [contrary to the modern trend which renders evidence (even offences) from the distant past as inadmissible⁸²], where the prosecutor directs the jury to examine the defendant’s conduct during a period long past, nearly thirty years before the trial⁸³. The case could go further, in reprobating someone for his ancestors’ follies, and suggesting that he is a hereditary enemy of the polis⁸⁴.

⁸² See Rehabilitation of Offenders Act 1974.

⁸³ Lys. 26.5.

⁸⁴ Lys. 14.30, 14.40.

The potential opportunistic behaviour of an adversary is skilfully presented by Demosthenes in *Against Meidias*. There, the arrogant and hubristic behaviour of the wealthy Meidias is contrasted (in anticipation) to his humble performance in the court. In order to leave no space for his opponent's presentational tricks, Demosthenes warns the jury:

"Now I know that he will set up a wail, with his children grouped about him, and will make a long and humble appeal, weeping and making himself as pitiable a figure as he can. But the more he humiliates himself, Athenians, the more he deserves your hatred. Why so? If in his past life he was so brutal and violent because it was impossible for him to be humble, it would be right to abate some of your anger as a concession to his natural temper and to the destiny that made him the man he is; but if he knows how to behave discreetly when he likes, but has deliberately chosen the opposite line of conduct, it is surely obvious that, if he slips through your fingers now, he will once more prove himself the man you know so well"⁸⁵.

Within this ideological context, sudden changes in a man's behaviour could be exposed as highly suspicious. *In the absence of an acknowledgment of a person's freedom of choice in every single instance of his life, deviations from normal behaviour could be easily attributed to external causes.* In the highly agonistic Athenian environment, inconsistent attitude, in public cases as a rule, gave rise to suspicions of bribery and corruption. This is best exemplified in the fierce forensic contests between Demosthenes and Aeschines, where both orators point to the other's aberrational acts⁸⁶. On the other hand, such aberrations from the normal attitude could be explained by reference to the circumstances of the particular situation. Many defendants ask the jurors to try them by human standards and apply rules similar to the modern 'reasonable man test', pointing to the situational factors rather than their character. The implication is that as long as the agent did not (under the examined circumstances) fall below the attitude required by his fellow citizens, judgment should be given in his favour. Euphiletus, the defendant in a case of lawful homicide, asks the jurors to judge him as they would judge themselves in the same situation⁸⁷. Andokides tells the jurors:

⁸⁵ Dem 21.186; cf. 45.63.

⁸⁶ See for example Dem. 19.28, 101-102, 104, 111, 225-6, 311 etc.; Aeschin. 2.36,41, 51, 54, 122, 124 etc.

⁸⁷ Lys. 1.1; cf. Andoc. 2.7; Antiph.6.

“since you ought to reckon cases by human standards, as you would if you were in trouble yourselves: what would each of you have done?” (Andoc. 1.57).

Consequently a ‘situationist’ tactic was not missing from the orators’ arsenal, provided that it would work in their client’s best interests.

Thus far the pre-eminence of a popular belief in an inbred, stable disposition, albeit not firmly grounded, and vulnerable to reservations has been demonstrated. These would be best discussed if the focus is slightly adapted to illuminate whether character is changeable or not. The starting point will be the relation between character and time; in other words, how far back should we look in order to find evidence concerning a person’s character? Is the stereotypical assumption that youth characters are moulded by education cited in the orators? Is this also valid for men in their maturity?

Examples underlining widely held beliefs about youth dispositional traits are cited in multitude in the forensic speeches. Young men are collectively sketched as being prone to aggressiveness and drunkenness, with their eruptive temperament being responsible for their misconduct. In the balance of probabilities, it is the young that start a quarrel, whereas maturity conveys patience and calmness⁸⁸. By the same token, youth can be blamed (or excused) for past misdemeanours. This age-disposition reveals a belief in the changeable nature of character, albeit on a group basis. What about individual character? Andokides, who is a supporter (due to personal considerations) of the theory that a person can change through the course of his life, asks not only to be excused for his past offences but also to be pitied. He says that to err is a great misfortune, and since error and misfortune are common to everyone, the person that was so ill starred as to err, contrary to his nature due to his youthfulness or folly, deserves sympathy rather than hostility⁸⁹.

⁸⁸ The most characteristic example is to be found in Antiph. *Third Tetralogy*: 4.1.6; 4.3.2; 4.4.2; 4.4.6.

⁸⁹ Andoc. 2.6-7.

Aeschines is inconsistent in his approach. In his speech *Against Timarchus* he leaves outside the defendant's behaviour during his youth. He says:

"Observe, men of Athens, how reasonable I shall be in dealing with this man Timarchus. Any abuses he committed against his own body while still a boy I leave out of account. Let it be void, like events under the Thirty or before Euclides, or any other official time limit of this sort that has been laid down. But the acts he has committed since reaching the age of reason and as a young man and in full knowledge of the laws, these I shall make the subject of my accusations, and I urge you to take them seriously" (Aeschin. 1.37).

On the other hand, during the fierce contest with Demosthenes, in his effort to ridicule him and show his bad character he recalled the nicknames of his opponent since his minor age:

"As a child he was known as Batalus for a certain readiness for humiliation and perversion. When he left childhood behind he brought suits for ten talents against each of his guardians and got the name Argas. As a man he acquired the further name common to all unscrupulous men, sycophant" (Aeschin. 2.99).

Again therefore, popular beliefs are manipulated as to suit the orator's best interest, highlighting merely the absence of any rooted idea on the matter.

Demosthenes seems to incline towards an unchangeable nature of a man's disposition. Examples have already been cited where he characterises as opportunistic any deviations from normal, consistent behaviour. To the extent that any firm conclusions may be discerned from his biased speeches, this belief is sealed in his speech *Against Aristogeiton 2*. Although such an assumption on the unchangeable nature of a man's character suits his case, the rhetoric is striking:

"But after you had let him off, admittedly in hope of amendment, and then shortly after had to punish the same man again for speaking and acting against the best interests of the city, what reasonable excuse is left you if you are a second time hoodwinked? When you have tried him by deeds, why need you trust his words? In cases where you have not yet an accurate test ready to hand, it may perhaps be necessary to judge by words. [22] But, for myself, I am amazed that there are men so constituted that, though they deposit private property with those

only whose past record shows them to be honest, they entrust public affairs to men who have been admittedly proved unscrupulous”⁹⁰.

Nevertheless, Lysias provides an example of a belief in the reformation of character:

“What inducement, then, could you have for approving this man? Because he has committed no offence? But he is guilty of the gravest crimes against his country. Or do you think he will reform? Then, I say, let him reform first in his bearing towards the city, and claim a seat on the Council later, when he has done her a service as signal as the wrong that he did her before” (Lys. 31.24).

Finally, examination of the orators’ ideas about the character’s indivisibility has to take place. By this term I mean the narrowness or the extensiveness of a single act’s probative value, the potential degree of remoteness or proximity of two separate acts as regards relevance, and the holistic or fractional approach to ethical traits as expressed by individual acts. To make the matter clearer, I offer as an example Aristotle’s treatment of the issue. He argues:

“The motives which lead men to do injury and commit wrong actions are depravity and incontinence. For if men have one or more vices, it is in that which makes him vicious that he shows himself unjust; for example, the illiberal in regard to money, the licentious in regard to bodily pleasures, the effeminate in regard to what makes for ease, the coward in regard to dangers, for fright makes him desert his comrades in peril; the ambitious in his desire for honour, the irascible owing to anger, one who is eager to conquer in his desire for victory, the rancorous in his desire for vengeance; the foolish man from having mistaken ideas of right and wrong, the shameless from his contempt for the opinion of others. Similarly, each of the rest of mankind is unjust in regard to his special weakness”. (Arist. *Rhet.* 1368b)

Aristotle describes vices as categorised under general types (in conjunction with the divisibility of a single virtue into many) which, due to their inducement towards respective negative character traits, lead to acts of injustice. What is of importance here is that a single act is treated as revealing a more general trait, in a manner that sheds light onto this defect and may illuminate similar acts in the future. An inherent character defect for, say, greed, can thus be exposed by

⁹⁰ Dem. 26.21-2; cf. 57.28

a single act of that kind; the general manner of this defect however, will characterise all subsequent acts that fall under this category. A past act of bribery for instance may lead to the conclusion that the individual in question suffers from the vice of greed, and hence be used as evidence in a case concerning the voluntariness or not of financial mismanagement.

If this conclusion is pushed to the extreme and, since all character defects end up in injustice, a proponent of character's indivisibility (or a desperate litigant) could point to past acts as revealing a propensity for wrongdoing or unlawfulness. By the same token, non-adherence to commonly accepted social norms (or even to a single one) may characterise an individual as a social misfit. At first glance such an approach is incompatible with contemporary presuppositions and rejected by the modern approach to justice. Freedom of choice and volitional capability is reserved for every single act in a person's life with every incident examined on its merits. This is where modern 'relevance' stands as regards character evidence, with the rules of exclusion overshadowing these of admissibility.

The Athenian courts evidently took a different route, as is highlighted by the broad invocation of character evidence. This route concentrated more on the general character traits as exposed by individual acts, rather than focusing on the surrounding circumstances that triggered the single disputable particular act that gave rise to litigation. *Thus instead of setting the wider context which would lead to an equitable decision or a verdict in accordance with the parties' social power, such argumentation was received as 'to the point', assisting the jurors in reaching a legal verdict. In other words, the litigants' insistence on a number of past acts, that may be received by moderns as only remotely (or not nearly) relevant, can be likened to a number of (more or less elegant) touches in the portrayal of the opponent's character traits.* Nevertheless this is a matter that will be closely examined in the course of another chapter, when the methods and strategies of the Athenian argumentation from character will be discussed. For the moment the ideological context shall be set, within which these methods operated.

Direct evidence of the above considerations is provided by Aeschines. In his speech *Against Ktesiphon* he maintains that

“a man who does not love his nearest and dearest will never feel concern for outsiders like yourselves; nor could a man who is evil in his private life be of use in public life; and a man who is worthless at home can never have been a man of honour as envoy in Macedonia – he changed his position, not his disposition” (Aeschin. 3.78).

He cites this passage as proof to his aforementioned discussion about the adversary’s character traits. Demosthenes’ lack of devotion to his daughter was proven by his contemptible attitude shortly after her death when, instead of mourning, he

“put a garland on his head and white raiment on his body, and there he stood making thank-offerings, violating all decency” (Aeschin. 3.77).

This – irrelevant to modern eyes – scene is vividly depicted in order to show Demosthenes’ impassive and calculative disposition which characterises him and his attitude towards his fellow citizens.

A person retained his basic characteristics, which were revealed regardless of whether he acted in private or in public⁹¹, in Athens or elsewhere⁹², against his own body, the Gods, his family or the city as a whole⁹³. In these terms Aeschines explains the law on the scrutiny of orators (also valid for any kind of scrutiny). In disfranchising the abusers of their parents the rationale was that

“if anyone mistreats the ones whom he should honour on a level with the Gods, what sort of treatment, says the legislator, will people unconnected with him, and indeed the city as a whole, receive from him?” (Aeschin. 1.28).

Regarding those who had prostituted themselves or mistreated their own body, the legislator, according to Aeschines, provided for their exclusion from public business, ‘for the man who has wilfully sold his own body would casually sell

⁹¹ E.g. Dem. 57.59.

⁹² Aeschin. 1.107; cf. Dem 25.60-62; 54.3.

⁹³ See Aeschin. 1.28-32.

out the interests of the city'. Finally, the man who has squandered his private property would treat the city's interests in much the same way⁹⁴. The above considerations elucidate the Athenian legal system's tendency to pass laws and judgments on the subject's merits, reserving for the idea of 'worthiness' a central role, since it presupposes a high degree of stability and indivisibility of character⁹⁵.

More examples of the same approach may be given in order to clarify further the issue. In the example above, the virtues and vices as regards a person's relationship with money are mentioned. Loyal to the belief of character indivisibility, Lysias provides the following quote:

"About my father – since the prosecution speeches have treated him as a criminal – please forgive me if I report what he has spent on the city and his friends. I am doing this not from a desire for glory, but as evidence that the same man does not both spend a great deal voluntarily and want to steal part of the public property despite very great danger" (Lys. 19.56).

This passage, interpreted as I suggest, provides yet another underlying rationale for the frequent invocation of past benefactions towards the city by threatened defendants. Such argumentation, instead of showing off one's economic status or asking for undeserved gratitude by referring to irrelevant considerations, was in fact relevant to the Athenian mind. A benefactor loves his city and his fellow citizens. He even uses his property, in a lavish manner, for their advantage. This reveals the disposition of a *φιλόπολις*, cancelling out his opponent's 'slanders' aiming at revealing a propensity for law-breaking. His previous beneficial acts speak for themselves.

Before concluding the present enquiry on the orators' ideas of 'character' it is important to examine whether all past acts are afforded with the same degree of probative value. Character is revealed only when a person acts intentionally and with free will⁹⁶. Thus, if external circumstances compel a particular course of

⁹⁴ Aeschin. 1.29-30.

⁹⁵ See analytical discussion in Ch. 2.

⁹⁶ I only refer to the revelation of character traits and not to culpability. Even if less severely treated by Athenian law, involuntary perpetrators were still attributed absolute liability for their acts. Cf. Hansen (1976), p. 119.

action, Athenian prosecutors avoided using it as a basis of attack⁹⁷. The underlying cause for this rationale is to be found in the actual law of Athens. Demosthenes observes that

“the laws treat the wilful and insolent transgressors as deserving more resentment and a heavier punishment than other classes of offenders. First then, all the laws of damage—to take these first—order the offender to pay the amount twice over if the damage is wilful, but only once if it is involuntary. This is reasonable, because, while the injured party is in any case entitled to relief, the law does not ordain that the resentment against the aggressor should be the same, whether his act is voluntary or involuntary. Again, the laws of homicide punish wilful murder with death, perpetual exile, and confiscation of goods, but accidental homicide they treat with much consideration and charity”⁹⁸.

Usually, prosecutors referred to issues where external factors influenced a person’s actions as part of a pre-emptive strategy in order to reduce the force of such arguments made by the defendants. Poverty and need were considered as the most significant external factors compelling a person to act in a reproachable manner. Thus, opponent’s actions which could be attributed to such factors were not often invoked during character assassination since they would have less force. As early as Antiphon’s Tetralogies the hypothetical prosecutor recognised that “Need can compel anyone to speak and act against his nature”⁹⁹. Lysias regarded such action as involuntary and in generalising this assumption he observes:

“It is a custom accepted as just among all mankind that in face of the same crimes we should be most incensed with those men who are most able to avoid criminal action, but should be indulgent to the poor or disabled because we regard their offences as involuntary” (Lys. 31.11).

Demosthenes acknowledges this fact and before initiating character assassination he exclaims

⁹⁷ Cf. Arist. *Rhet.* 1368b: “Men act voluntarily when they know what they do, and do not act under compulsion. What is done voluntarily is not always done with premeditation; but what is done with premeditation is always known to the agent, for no one is ignorant of what he does with a purpose”.

⁹⁸ Dem. 21.42-3; cf. 24.67; 57.45; cf. Arist. *Rhet.* 1416a.

⁹⁹ Antiph. 3.3.1; cf. 3.3.9; cf. Dem. 29.22; 23.148; 59.58.

“I shall pass over what may be blamed on poverty, and will proceed to specific charges against your character” (Dem. 18.263).

On the other hand, a person reveals his true character as soon as he acquires the power or wealth to behave insolently. The prosecutor of Lysias 28 accuses characters like the defendant’s that

“As soon as they become rich, they come to hate you, and they are no longer prepared to be ruled by you but to rule over you” (Lys. 28.7).

thus revealing their true character. In the passage mentioned earlier, where the prosecutor of Euandrus, in Lysias 26, refers to blameworthy behaviour occurring nearly thirty years before the trial, he justifies this choice as follows:

“As to his love of quiet, I say that we ought not to investigate his sobriety today, when there is no chance for him to be licentious: we should rather examine that period in which, being free to choose either way of life, he preferred to mark his citizenship by illegal acts. For the fact of his committing no offences now is due to those who have prevented him; but what he did then was owing to the man’s character and to those who vouchsafed him a free hand”¹⁰⁰.

Thus it may be concluded that, together with youth, some external factors could lead to the voluntary exclusion of particular acts from those revealing character and could be invoked as evidence.

Apart from poverty and need, other factors could be invoked as mitigating one’s blameworthiness due to a lack of complete sobriety. Drunkenness¹⁰¹, anger, and love¹⁰² could be adduced in order to assist one’s rhetoric. Demosthenes, in

¹⁰⁰ Lys. 26.5; cf. the argumentation in Lys. 7.27; 25.16.

¹⁰¹ ‘Drunkenness’ could be sometimes cited as an aggravating factor, depending on the needs of a litigant’s case. Cf. Dem. 19.196-9; 54.3-7; 54.16. Aristotle in the *Nic. Eth.* distinguishes between acting *through* ignorance from acting *in* ignorance (1110b), drunkenness causing the second, definitely being more blameworthy since it has to be attributed to one’s choice; cf. 1113b, referring to an enactment of Pittacus by virtue of which ‘drunkenness’ doubled the penalty.

¹⁰² Cf. the Athenian law on wills (Dem. 46.14: Any citizen, with the exception of those who had been adopted when Solon entered upon his office, and had thereby become unable either to renounce or to claim an inheritance, shall have the right to dispose of his own property by will as he shall see fit, if he have no male children lawfully born, unless his mind be impaired by one of

his effort to distinguish the present case from an earlier precedent which could be used by Meidias as a plea in mitigation, points to exactly these issues:

“Then again we shall find that he has not the same claim to consideration as these others. For in the first case the man who struck the judge had three excuses: he was drunk, he was in love, and he did not know what he was doing in the darkness and the night. Polyzelus again explained that owing to his ungovernable temper he had lost his head when he committed the offence; there was no hostility behind the act and no intention to insult. But Meidias cannot plead any of these excuses”¹⁰³.

Furthermore, the time and place of the act posed as indicative factors, undoubtedly revealing one’s true character. Demosthenes again, insists more than once that an attack taking place during daylight and in full publicity is extremely likely to expose the hubristic and insolent nature of the perpetrator¹⁰⁴. The fact that he

“was assaulted by a personal enemy early in the day, when he was sober, prompted by insolence, not by wine, in the presence of many foreigners as well as citizens, and above all in a temple which I [he] was strictly obliged to enter by virtue of my [his] office” (Dem. 21.74)

further clarifies the issue. All these factors therefore should be considered when deciding the intention and voluntariness of an act, which unquestionably expose one’s true character.

3.5 Punishment and Character

I would consider this survey incomplete if I would not offer a brief reference to the Athenian rationale for punishment in relation to assumptions about ‘character’. My aim is not to offer yet another description of the Athenian

these things, lunacy or old age or drugs or disease, or unless he be under the influence of a woman, or under constraint or deprived of his liberty.”; cf. Dem. 48.56.

¹⁰³ Dem. 21.38-40, 180; for ‘anger’ cf. 21.41: “For what sort of pretext, what decent and moderate excuse, can he show for his conduct? Anger? Possibly that will be his plea. But whereas in cases where a sudden loss of self-control has impelled a man even to inflict a wanton insult, it is open to him to say that he has acted in anger; if, on the other hand, he is detected in a continuous course of law-breaking, spread over many days, surely this is far from a mere fit of anger and he stands convicted of a deliberate policy of insult”. *Pace* Aristotle’s *Nic. Eth.* 1111a21 stating “For it is probably a mistake to say that acts caused by anger or by desire are involuntary”.

¹⁰⁴ Dem. 21.38, 74.

methods of punishment but to examine them in light of their consequences on 'character'¹⁰⁵. What best characterises the Athenian legal system is its quite frequent draconian penalties, especially exemplified by the threat of the death sentence¹⁰⁶. Such harsh measures at first glance may support the absence of any belief in rehabilitation, with retribution being the only means of exacting justice. Nevertheless, since the Homeric times, restitution and retribution can be regarded as the founding pillars of the Greek penal system¹⁰⁷. Remnants of a primal approach to justice are also to be found in the Athenian legal system¹⁰⁸. The Athenians, although advertising their penal system as democratic and humanistic, were in reality not remote from the other Greek poleis¹⁰⁹. As has been demonstrated, Greek philosophers had developed a rational belief in mental and ethical reform, sufficient to transform the penal system so to primarily aim at the rehabilitation of offenders. Nonetheless, in Athens, this transformation did not occur.

Athens was above all a Greek polis. It found itself in a constant state of war, and so any internal disorder would have been gravely punished. Hence, widening its perspective, the Athenian legal system ought to concentrate on the society rather than the individual. In such a way, the draconian penalties can be explained in terms of deterrence, rather than seen as measures exposing certain ideas of individual 'character'. Death, total *atimia*, and exile, even though considered harsh and inhumane penalties, practically achieved the twofold aim of (one way or another) getting rid of a social misfit and having a deterrent effect on potential future criminals¹¹⁰. This is particularly verified by the Athenian legal system's weakness of bringing criminals to justice, in the absence of policing and enforcement mechanisms.

¹⁰⁵ For Athenian 'punishment' one may consult Allen (2000); Todd (1993), pp. 139ff; Hall (1996); Hansen (1976); Saunders (1991); Cohen D. (2005). Relevant traces can be found in Mackenzie (1981).

¹⁰⁶ Death sentence features prominently in our sources, though the disproportionate number of high profile cases included in them renders its vast percentage unlikely in practice.

¹⁰⁷ Cf. Mackenzie (1981), pp. 106 ff.

¹⁰⁸ Cf. Hansen (1976), pp. 118ff.

¹⁰⁹ Hall (1996).

¹¹⁰ Deterrence of future misconduct was an extremely common pattern of argumentation in Athenian courts. See for example: Dem. 21.37, 220; 22.7; 23.94; 24.101; 25.17; 36.58; 42.15; 45.87; 50.66; 51.12; 54.43; 56.48; 59.113; cf. Arist. *Nic. Eth.* 1113b.

The above conclusion that the Athenian methods of punishment are not decisive as to their ideas of 'character' may be supported by the existence of *timesis*. During this process, both litigants proposed just – in their view – penalties, between which the court had to decide. Nevertheless, the *agones timetoi* included very serious and reprehensible offences¹¹¹. Since the guilt had already been proved, punishment in accordance with a belief that character is unchangeable would signify the automatic categorical infliction of the harshest penalty. On the contrary, the condemned offender could propose a milder penalty, even a fine, which means that a non-rehabilitated criminal would be set free and remain socially active. Definitely, questions of proportionality come into play which, nevertheless, cannot fully neutralise the effect of this procedure in relation to considerations concerning the Athenian ideas of character.

On the other hand, other offences were treated less harshly, expressed by the pecuniary penalty of fine or confiscation. Imprisonment was rarely inflicted, usually reserved for those awaiting trial. This is the other side of the coin and, since it is highly unlikely that the Athenians had separated crimes open to rehabilitation from others that are not, it has to be maintained that their methods of punishment do not illuminate their assumptions about 'character'. This can be additionally demonstrated by the (in some, admittedly limited cases) existence of multiple procedures and penalties with which an offence could be punished¹¹². Therefore, if the same act could be both prosecuted in a private trial and punished with a fine and in a public trial punished with death, this cancels any further discussion that connects punishment with Athenian presuppositions of an unchanging ethos.

Finally, example may be adduced of partial *atimia*, in cases of prohibition of exercising the same type of civic action. In cases of guilt for proposing an illegal proposal, the offender incurred this type of penalty after three condemnations by the court. On the other hand, when a plaintiff failed to get one fifth of the votes or withdrew the case before the hearing, this type of *atimia* (prohibition of bringing the same type of prosecution) was inflicted from the first time. Hence,

¹¹¹ For a listing of (probable) *agones timetoi* see Harrison (1971), pp. 81-2.

¹¹² See Ch. 2; cf. Carey (2004).

neither an Athenian belief that repetition (three times) reveals propensity may be adduced, nor that a single time is sufficient so, again, this divergence can be explained by taking into account a desire for proportionality. Moreover, the fact that the offender was, in these cases, punished with partial *atimia* of specific scope inhibits a conclusion that the Athenians believed in a total indivisibility of character. Therefore, my proposal is that the Athenian methods of punishment may reveal the underlying rationales of deterrence, retribution, and restitution but, in the case of offenders' rehabilitation, relevant to the question of 'character' stability, it would be unsafe to offer any firm conclusions. Definitely, this is a fertile area for further research.

3.6 Conclusion

In order to complete this chapter it is essential to point to some final connections of the Greek ideas of character with the evidence used in Athenian courts. The implications of these ideas will be further highlighted in subsequent chapters, in which it will be discussed in detail why the Athenians used 'character' in their courts, how they invoked it, and what issues this argumentation included. All these matters will be analysed on the basis of the aforementioned enquiry. The above Greek ideas of 'character' will offer a fresh viewpoint, providing for a new mode of interpretation. Consequently, a delineation of the axis upon which the following chapters will be designed is essential.

First of all consideration has to be given to the highly flexible approach of the Athenian assumptions about 'character'. The poets, in particular, with their divergent suggestions, educated the masses in yet another non-dogmatic way of approaching such complex issues. Following the characteristic open-mindedness of the Greek intellect, the multiple contrasting beliefs concerning 'character' allowed for an equally flexible and inconsistent approach by the orators. Hence, the rhetorical manipulation of the issue should be attributed to the absence of fixed presuppositions. Nevertheless, the fixed confidence in the probative value of *ethos* assisted the wider use of character evidence for rhetorical purposes. Apart from this, the conviction that a person is totally responsible for his actions (excluding the exceptional circumstances discussed

above) and that these result from a relevantly consistent character, permitted the unproblematic attribution of guilt and blameworthiness without raising further complications.

Furthermore, the extensive (to a great degree compared to the fragmented modern societies) ethical consensus of the juries, gave rise to common rhetorical patterns of argumentation (*topoi*) which were developed through time¹¹³. These were based on common standards of behaviour (reminiscent of the modern 'reasonable man') and were extended so as to embrace the demand for the individuals' adherence to common norms. Thus, as it will be subsequently shown, a person who understood himself as an integral part of the community with an assigned role, perceived these norms as setting the level of moral blameworthiness or praise.

Another feature of character evidence in the courts of classical Athens that has to be discussed is the invocation of many examples of previous behaviour in order to reveal one's character. This has to be explained by reference to both the (familiar to the Greek intellectuals) inductive mode of thinking and to the practical reason of avoiding a counter-plea of opportunism. If there was not the uncertainty as to the extent to which Aristotle's theory of habitual (repetitive) behaviour appealed to the popular masses, it could have been included in the aforementioned reasons. After all, Athenian litigants by referring to numerous past acts aimed to expose a fixed character trait rather than an opportunistic 'out of character' behaviour.

Additionally, the belief in the existence of different 'groups' of traits (e.g. greed, dishonesty etc.), permitted seemingly divergent and irrelevant past actions (that fell under a certain behavioural category) to be adduced in order to prove a particular virtue or vice. The potential acceptance of the unity of virtue or vice made an individual virtuous or bad per se. As a result, under this extreme but

¹¹³ Todd (1990c), p. 148 sees the direction of this approach as more useful than the opposite usually applied by modern scholars: "In the study of the Athenian jury, the question has received considerably more attention, but from the opposite perspective. Instead of using the social values of the jury to examine the craft of the advocate, scholars have (of necessity) used the advocate to examine the jury". The Athenian jury had "a corporate identity and common values or attitudes" (p.149) and "the values and aspirations of Athenian citizens were a matter of consensus rather than of division" (p.169).

not impossible scenario, any past act (even irrelevant to the particular charge by modern standards) that revealed the general virtue or wickedness of a person could be invoked in support of a litigant's case. In other words, since unlawfulness reveals antisocial behaviour, any apparent non-adherence to social norms would point to the same direction. Since a person with an evidenced particular vice can be characterised as wicked overall, and breaking the law is also wicked, this particular vice (even if it is irrelevant to the offence) can be adduced to expose the wickedness.

Finally, the Athenian supposition that an individual may change through education or at least his vices can be suppressed by fear, gave rise to the reception of the Athenian laws as having a deterrent effect on potential wrongdoers. In this light, the laws have a didactic nature, transforming the individuals for the benefit of the community. Athens, being a typical Greek polis, usually esteemed the public interest higher than the individual. The *oikoi* were gradually superseded by the polis, and the community developed yet another test for assessing the faithfulness of the citizens to common values. Punishment and acclaim educated the Athenian citizens as to their ways of interacting; the underlying cause is a belief in the adaptable nature of humans.

The Greek views of 'character' shall be adduced to explain the presence of character evidence since the Homeric period (chapter 1). This fact proves that such a broad invocation of ad hominem argumentation is not a classical Athenian phenomenon and has to be explained by reference to more general considerations. On the contrary, it has to be examined as part of a broader approach to character in relation to law (namely character evidence in the speeches together with the structural and procedural incentives that have been demonstrated in chapter 2); this approach also has to be elucidated in light of the Greek perceptions of 'character'. These perceptions, in addition to the Greek perceptions of 'personhood' which will be discussed in the next chapters, will offer a comprehensive underlying cause for the above features, as well as for the wide use of character evidence in Athenian courts.

4 CHAPTER FOUR: METHODS OF PROVIDING EVIDENCE FROM CHARACTER IN ATHENIAN COURTS

The aim of this chapter is to examine the methods and tactics by which character evidence was adduced in the courts of classical Athens. This question is linked to deeper issues of Athenian life. As has already been argued in the previous chapter, the Athenian ideas of 'character' directly influenced the tactics they used in their courts. Furthermore, the newly developed disciplines of rhetoric, dialectic and logic, also played a major part in shaping the methods of argumentation. For instance, the combination of the inductive way of reasoning, supported by the undecided questions regarding the stability of one's character (which in more sophisticated circles gradually gave way to a belief in the changeable nature of character), forced litigants to use a series of past examples and actions in order to deduce a character's certain trait. Apart from these issues, the more practical side of rhetoric will be examined, discussing devices and tricks employed by orators in order to obscure an opponent's ethos or to hide weaknesses in their own case. In the course of the chapter, more familiar issues from the life of modern courts will be discussed and comparison will be made as to how they approached what we would consider to be modern methods of portraying character, such as arguing from previous offences and reputation.

Chapter 3 has investigated the Greek assumptions about 'character', with the assurance that many of them would illuminate an analysis of the methods through which a person's *ethos* was revealed in the Athenian forensic environment. However, the fact that these assumptions were not fixed and constantly evolved, produced a flexible approach to the acceptable ways of argumentation from character. The absence of durable presuppositions regarding the stability or changeability of character and the ways that this may be proved, meant that in the agonistic setting of Athenian courts weak presumptions would inevitably be questioned and manipulated. As a result, adding to the extensive use of character evidence, numerous tactics were

adduced in order to expose a person's *ethos*. General reputation, previous offences, reprehensible past acts, as well as more innovative rhetorical techniques such as negative comparisons and allegories, make up the list of how Athenian litigants could present character.

This flexibility of choices has led many scholars, consciously or subconsciously insisting on an idealistic view of current practices, to focus on the dissimilarities of the Athenian legal system to modern ones, and highlight its remoteness¹. Yet, even if this comparison is taken as valid, the correct inference may not be so exact. Current law of evidence admits that a person's character may be inferred by evidence of general disposition, by evidence of specific examples of his conduct on other occasions (including, in the case of bad conduct, evidence of his previous convictions), or by evidence of his reputation among those to whom he is known². Some scholars include even the simple exercise of a particularly ill-regarded calling³ or negative character testimony in the form of statements such as "I have never heard anything ill of the defendant's character"⁴, while others suggest the further relaxation of admissibility rules⁵. As will be shown, such evidence is not absent from Athenian courtrooms.

Additionally, current legal trends progress towards a wider and more flexible approach to character evidence. Under common law, only reputation⁶ (and not specific events) was admitted and evidence should relate to a time proximate to that of the offences charged⁷. The traditional prohibition of referring to specific past acts is relaxed and the defendant himself may adduce such evidence⁸. The Criminal Justice Act 2003 relaxes the rules of admissibility by promoting a more

¹ Cf. Gagarin (2003), esp. at p. 197: "New approaches have taken over [in the study of Athenian law], approaches that, although healthy and stimulating in many ways, tend to exaggerate the otherness of Athenian law. This is not so much because historians present a false picture of Athenian law, as because they misrepresent aspects of our own legal system, relying on a traditional, idealistic view of it that is increasingly being challenged by certain branches of contemporary legal studies. When we take a more realistic look at our own system, however, Athenian law may not appear so different".

² Keane (2010), p. 439.

³ Munday R. (2005), p. 38.

⁴ Rowton (1865) L. & C. 520; Redgrave (1982) 74 Cr.App.R. 10; Munday R. (1997), p. 248.

⁵ E.g. Auld LJ, Review of the Criminal Courts of England and Wales: Report (London, TSO, 2001); cf. McEwan (2002).

⁶ Rowton (1865) L. & C. 520; Redgrave (1982) 74 Cr.App.R. 10.

⁷ Munday (1997), p. 248.

⁸ Howard, Crane and Hochberg, (1990) §18-14.

flexible approach to the probative force of evidence from previous behaviour and misconduct. Besides, the relaxation of the admissible ways by which one's character may be revealed, suggests that the 2003 Act intends to facilitate the admission of evidence concerning an accused's bad character. Accordingly, prosecutors ought to be entitled to invoke the defendant's entire discreditable past, and not simply their previous convictions⁹. The CJA 2003 goes as far as to include the appearance or dress of a defendant to classify as 'conduct'¹⁰, although this is merely reserved for the correction of any false impression already given by the party in question. A gradual shift is apparent, leading to a relaxation of the rules for the invocation of character evidence in modern courts.

Leaving aside the absence of a solid set of Athenian beliefs about 'character' which facilitated a more liberal approach to argumentation, and its similarity to modern approaches, some of the conclusions shall be recalled that pave the way for the forthcoming discussion. These form the ideological context and explain the presence and relevance of the (more or less familiar) methods of character invocation in Athenian courts. As has been demonstrated in the previous chapter, the emergence of the polis structure reflected the need for a simultaneous emergence of cooperative values to replace (or sometimes supplement) the archaic agonistic ones. These values, necessary for communal and peaceful living, marked the essence of coexistence in the civilised polis as opposed to the unrestrained past. However, this (natural or not) human tendency for barbarity needed to be altered, tamed, and adapted to the new reality. Transformation of human nature presupposed the transformation of *ethos*, in the sense of promoting the cooperative virtues and suppressing the self-seeking vices. This new kind of 'polis-behaviour' demanded unqualified adherence to communal laws and ethical norms which had to be proved in practice, by reference to one's particular acts and general behaviour. A multitude of such acts should be presented in order to prove consistent and wholehearted devotion to the communal life of the polis.

⁹ Munday R. (2005), p. 41.

¹⁰ Criminal Justice Act 2003, s. 105 (5).

In the absence of a firm belief in the stability of character, the difficulty of proving a fixed positive character was surpassed by the invocation of (numerous or impressive) previous virtuous deeds. Prolonged positive conduct, free from blemishes, was required to prove dispositional kindness. The absence of an acknowledgment of a person's freedom of choice in every single instance of his life meant that any past reprehensible acts could be taken as the exposition of true *ethos*, as opposed to the opportunistic, hypocritical, superficially virtuous conduct. The classification of character traits (either virtues or vices) in broad, general categories, supported by an inductive mode of reasoning, meant that reprehensible acts could be used in order to categorise the person in question as possessing the relevant character defect. Consequently, such a person could be blamed as capable of performing any reprehensible act attributable to that particular flaw.

Court argumentation was adjusted in order to suit these prevalent ideas. Evidence from past life, through the invocation of many past acts, especially relevant to the particular character trait highlighted by the legal charge, is the rule to be followed by all the orators. Crude characterisation, either as direct insults or in the form of innuendoes, simply emphasised the conclusions of the aforementioned evidence. Furthermore, reference to the general or specific reputation (among the whole polis or the immediate circle, referring to general character or specific traits) facilitated a deductive mode of thinking, aiding a speaker's cause in proving credibility, worthiness or baseness. On the other hand, following Aristotle's remarks, character could be portrayed at the time of the trial, either through the *logoi* of the speaker or through the mode of delivery. In what follows, specific examples from Athenian court speeches will be examined in order to prove the aforesaid points.

4.1 Evidence from the Past

Reference to **past acts** was the prevalent method of argumentation in the Athenian courts. Although the norm demanded such references to be supported by witnesses, in the absence of direct evidence and testimonies, jurors had to rely on circumstantial evidence in order to decide such issues. Aeschines, in such an atypical case, in his effort to excuse the absence of witness testimonies

from his speech against Timarchus, highlights this struggle for the attainment of truth, especially in instances where the future of the testifiers was at stake:

Come now, in the name of Zeus and the gods, if they had resorted to the same defence that Timarchus and his advocates now offer, and demanded that someone should testify explicitly to the crime, or else that the jurors should refuse to believe the charge, surely according to that demand it would have been absolutely necessary for the one man to testify that he gave a bribe, the other, that he took a bribe, though the law threatens each of them with death precisely as in this case if anyone hires an Athenian for a disgraceful purpose, and again if any Athenian voluntarily hires himself out to the shame of his body. Is there any man who would have testified, or any prosecutor who would have undertaken to present such proof of the act? Surely not... [F]or what foot-pad or adulterer or assassin, or what man who has committed the greatest crimes, but has done it secretly, will be brought to justice? For whereas such of these criminals as are caught in the act are instantly punished with death, if they acknowledge the crime, those who have done the act secretly and deny their guilt, are tried in the courts, *and the truth can be determined by circumstantial evidence only [based on probabilities] (εύρίσκεται δὲ ἡ ἀλήθεια ἐκ τῶν εἰκότων)*. (Aes. 1.87-91)

In what follows, proof will be offered for the fact of the presentation of character traits through the use of inductive reasoning, by reference to past acts. Irrelevant at first glance, such references illuminated the opponent's tendency to behave in particular reprehensible ways which, given the circumstances of the case, would assist the jurors in reaching a decision about the facts. Therefore, if the charge was relevant to a specific character defect (e.g. indecency, corruption, antisocial behaviour etc.) instances of past conduct revealing the existence of such a flaw would be received by the court as relevant. Evidence of such reasoning will be provided in the next paragraph, concentrating on character portrayal. This means that specific episodes of the past which deal directly with the offence will be largely ignored, since they form too obvious a method of arguing a case.

To make it plain, an example taken from Aeschines' argumentation against Timarchus during a *dokimasia rhetoron* can be offered. The main charge focused on the prostitution of Timarchus and (less) on the squandering of his patrimony. Aeschines refers to specific incidents from Timarchus' past life in order to prove his breach of the law. . Firstly, specific acts are cited which refer

to the main charge in question. He enumerates the houses of older, indecent men in which he has been kept (1.40, 43, 52-3, 57 etc.) and the episodes of squandering his family estate (1.97-102). Nevertheless, the question still remains if this unwitnessed case is going to seem probable, namely what led Timarchus to resort to this kind of behaviour? And secondly, in anticipation of the defence's arguments, isn't the acquisition and squandering of such a property inconsistent with the sale of his body for money? Aeschines replies by a single, powerful argument: Timarchus' character, gluttonous and excessive, made him an unrestrained victim of pleasures. How was this proved? By reference to his previous (seemingly irrelevant) conduct. Timarchus was "slave to the most disgraceful pleasures, gluttony and expensive eating and flute-girls and courtesans and dice and the other activities that should never have control of a decent and freeborn man" (1.42). His only care was to find a rich *choregos* (1.54) in order to continue his way of life, spending his time at the gaming house (1.53) and financing his extravagant tastes (1.65, 94-5). His unrestrained nature (proved by the above examples) is also revealed by the violent and unprecedented way he and his company treated his former 'owner' (1.59). A series of past acts, either central to the main charge or marginal, may by induction reveal specific character traits which, in turn, will serve as the catalyst in increasing the likelihood of the opponent's criminal behavior.

All these prove my main two points. Firstly, a legal case and the proof of the facts could be based on the portrayal of the opponent's character. Without this mastery in the characterisation of Timarchus, Aeschines would probably have less success than that he achieved in this unwitnessed case. Secondly, the inductive way of reasoning, and the belief in general categories of character traits, indicate the method (and content) of argumentation in Athenian courts. Taking into account the Athenian ideas of character, reference to past events, which on the surface seem unconnected with each other and irrelevant to the legal case, could indeed prove decisive to the legal case. Gluttony, drunken violence, extravagant spending and gambling, may at first glance seem unconnected, especially if adduced in a case of male prostitution. Nevertheless, they all spring from a general character trait: excess. Timarchus' unrestrained nature was the cause and the end of all his deeds. His character got him into a

circle of evil from which he could not escape. What was left was the financing of his indecent pleasures; to achieve this, again, he did not stop at anything. He sold his body in an analogous way to his squandering of his patrimony. He devoured his inheritance in the same manner as he embezzled public property (1.106-116). This is Timarchus' character and these are his past deeds that prove it¹¹. He is unworthy of sharing rights with the rest of the Athenian citizens, hence should be convicted.

The same conclusion may be deduced from the speech of Lycurgus against Leocrates. The breach of a decree forbidding people to flee from Athens after the disaster of Chaeronea, was the point of conflict in that speech. Lycurgus, the decent patriot, claims that Leocrates left Athens out of cowardice and infidelity. Leocrates claims that he left Athens for trade. How can Lycurgus prove his assertion? By reference to Leocrates' disloyal character which embraces the single act of fleeing Athens. His past acts prove his unpatriotic stance but also explain its underlying causes in the form of the lack of emotional ties and intimacy to his country, his ancestors and his dearest. His conduct had been firmly opposed to that of the venerable ancestors (1.14) in the way he defamed Athens to the people of Rhodes (1.18). After that, he stayed at Megara, unashamed of being 'an alien on the borders of the land that nurtured him' (1.21). He even did not stop short of uprooting the 'ancestral images' and conveying his property to safety (1.25). He also broke the law (not under consideration in the current plaint, but indicative of his disloyal and traitorous character) in transporting corn to other places than Athens. The above considerations illuminate the underlying reasons that triggered Leocrates' treacherous acts the night he fled Athens and support Lycurgus' allegations as to why, due to his character, 'no city let him reside within it as an alien' (1.133-4). Leocrates' betrayal was total: against his country (1.18, 26, 45), his ancestors (Lyc. 1.25), and the gods (1.26, 76). All his past deeds have been

¹¹ Researchers tend to criticise Aeschines' attack on Demosthenes' character in 1.170-6 as irrelevant. In my opinion, following the same method of reasoning, it is not. Demosthenes, the supporting speaker for the defence, was one of Timarchus' closest associates. He is presented as Timarchus' alter ego in an effort to reveal his lack of credibility. He is accused for exactly the same kind of behaviour (squandering patrimony, corrupt, indecent pervert, patron etc.), making the audience to wonder as to who is more to blame and be condemned. In this way, not only he cancels out Demosthenes' trustworthiness, but also highlights the fact that 'like is keen to like', both being reprehensible and damnable.

performed out of deliberate choice and prove the ungrateful inclination of his character. Even non-citizens who have not been nurtured by the Athenian soil did not show such hatred against the city to have endured to remain outside the army in these times of peril (1.39); Leocrates did. Such disloyal men are bad, whether as citizens, guests or personal friends; for they will enjoy the advantages offered by the state but will not consent to assist it too, in times of difficulty (1.133). His more general character trait has been proved, leaving no question as to the motives behind his flight.

More examples may be offered to prove that a litigant's past acts, followed by an inductive method of reasoning, reveal a key character trait which illuminates the facts of the case and prove the speaker's crucial points. In Lysias 1, reference to the background of the case portrays Euphiletus as the naïve husband, who was slow to understand and incapable of plotting the alleged trap against Eratosthenes¹². The case was probably presented before the *ephetai* at the Delphinion, the jurors being experts and probably retaining the same stance against irrelevant argumentation as in their original post, the court of the Areopagus¹³. In Lysias 3, the whole context of the dispute, as revealed by reference to numerous past acts, assists in the characterisation of both parties. The jury is not invited to give a verdict based on equity by taking into account the whole story. Nor was the background of the dispute presented to help the jurors reach an ad hoc verdict by reference to the particularities of the case. Conversely, they are invited to give a verdict on the specific allegation of wounding with premeditation, as illuminated by the attitude of both litigants. The speaker's (defendant) temperance and the prosecutor's violent and hubristic character make it highly improbable that the first was responsible for the brawl¹⁴. It is of utmost importance to note here that this case was heard by the court of Areopagus, the stricter institution as far as its attitude to extra-legal argumentation is concerned.

¹² Lys. 1.10-5; cf. Todd (2008), p. 93; Carey (2011), pp. 35-6.

¹³ See Rhodes (1981), p. 647.

¹⁴ For the defendant's temperance see Lys. 3.4, 9-10, 13, 17, 30, 40; for the prosecutor's hubris see Lys. 3.5, 6, 8, 12, 15-8, 23, 29, 45; cf. Todd (2008), pp. 278ff.; Carey (2011), p. 82. The same pattern is followed by Demosthenes in Dem. 54.

In Lysias 32, a *dike epitropes* (a suit for impropriety in the conduct of the position of guardian), reference to a multitude of Diogeiton's past acts highlights his dispositional deceitfulness¹⁵. Hypereides in *Against Athenogenes* portrays yet another deceitful character, who (jurors are emphatically informed) is an Egyptian (Hyp. 3.3). His past conduct proves that he is fraudulent, ungrateful and disrespectful, characteristics which make him a probable candidate for committing the alleged fraud against the speaker. He escaped from Athens after Chaeronea (3.29) (betraying the agreement with the laws of the state which welcomed him), he betrayed his second host country Troezen (3.29ff.) (changing his position, not his disposition), and he maltreated his kin (3.35). Likewise, being meddlesome and speechwriter, Athenogenes and his equally deceitful mistress (3.2: the most gifted courtesan of her time) were too cunning for a quiet farmer such as the speaker (3.26).

All the above lead us to discuss the scholarly attempt to use litigants' remotely relevant references to the background of the dispute in justification of the thesis that these were adduced in order to aid the jurors in reaching an ad-hoc, just verdict based on the particular circumstances of the case¹⁶. According to them, Athenian courts were less concerned with the legal case at hand and extended their perspective in order to embrace the whole context of the relations between the parties. By this token, verdicts were founded on equitable justifications (e.g. fairness) and cases were decided on an ad hoc basis. However, as has already been shown, the context and background of disputes (or even references entirely unrelated to the particular dispute) were in concord with the Athenian ideas of character and the ways in which these could be adduced, serving in turn as proofs for the establishment of the factual truth.

Lanni, in order to support her aforementioned thesis, refers to two cases which undoubtedly suit her aim. The first case is Dem. 53 (*Against Nicostratus*), arising from an *apographe* (writ of confiscation for a state debtor). Lanni focuses

¹⁵ Carey (2011), p. 109: "Lysias presents us with a plausible villain (even where he offers no corroborative evidence) by striving for consistency in the actions narrated. Diogeiton conceals the scale of the estate as he conceals his brother's death. He cheats on his daughter's dowry, as he cheats his wards by cunningly transferring to them the whole cost of sacrifice (§21), funeral monument (§21) or liturgy (§24, §26) disguised as half the cost. And he persistently avoids attempts to resolve the dispute (§2, §12).

¹⁶ Lanni (2006), pp. 46ff.

exceedingly on the fifteen paragraphs in which Apollodorus explains to the jurors the background of the dispute: his respect for *philia* and his generous behaviour towards Nicostratus are contrasted with the latter's ingratitude and vicious plotting against him. What Lanni nevertheless fails to mention is that from the proem, the prosecutor is noticeably worried about an allegation of bringing a malicious prosecution. Such a counter-accusation was relevant in all public suits where *ho boulomenos* could initiate proceedings, let alone in cases of *apographe* (which involved financial profit for the prosecutor). Secondly, although the speech is indeed divided into two equal parts (one concerned with the hostile relations between the parties which triggered Apollodorus decision to indict, the other referring to the merits of the case), when the speech was actually delivered in court, the first part consisted solely of narrative (with a minor detour at its end when Apollodorus calls witnesses), whereas in the second part (the proof of the plaintiff's point) Apollodorus called witnesses five times, for every single point he mentioned. Therefore the emphasis and the practical balance of the speech concentrated overwhelmingly on the proof of the main charge.

The second case Lanni cites is Dem. 47, a case of false witnessing. The original case that triggered the *dike pseudomarturion* was a *dike aikeias* (assault), won by Theophemus against the speaker. The latter then accused Theophemus' brother and brother-in-law of falsely witnessing on a key issue. The witnesses had testified that Theophemus offered an eyewitness slave woman for torture, an offer that the speaker refused. In the surviving speech, he moves on three axes: i) direct proof that the witnesses lied and that he in fact asked for the slave's testimony, which Theophemus cunningly avoided (47.4-18), ii) reference to the incidents leading to the fight generating the original trial (47.19-48), and iii) reference to the incidents after the original trial and before the current *dike pseudomarturion* (47.49ff.). The first axis needs no justification for it is directly related to the case. The second proves by circumstantial evidence that the slave would in fact testify that it was Theophemus (and not the speaker) who delivered the first blow (i.e. against Theophemus and for the speaker). Thus Theophemus, by the failure to have the eyewitness testifying, gained a crucial advantage. Accordingly, it is illogical to believe that

Theophemus had asked for the slave to testify, whereas the speaker denied it. As a result, the witnesses lied. The final axis refers to violent incidents on the part of Theophemus who, being at an advantage after the verdict of the original trial, plotted against the speaker in order to compel him to drop the current *dike pseudomarturion*. Therefore, the whole speech, with the detailed references to the background of the dispute, is logically coherent, relevant to the case at hand, carefully aiming (using divergent tactics) at proving the main point: false witnessing. Also, the coherence of argumentation was promoted by the opponents' character presentation which formed a link between the three aforementioned axes. Examined in this light, the speaker's reference to a multitude of past acts performed by the parties (and to depositions of men who suffered from his opponents in the past) is designed to portray both litigants' characters, rendering probable the fact that the malicious, violent and hubristic Theophemus delivered the first blow against the reasonable, moderate and lawful speaker¹⁷.

Lastly, Lanni refers to inheritance cases and argues that speakers resort to argumentation from equity, advertising their affinity to the deceased against the formal document of the will. However, such cases are of special nature since the trial ceases to be adversarial and all claimants have equal claims. Furthermore, references to closeness aim to question the validity of the presented document, at a time when the means for testing it largely relied on circumstantial evidence. In any case, regardless of the special nature of inheritance disputes which makes them more suitable as examples of Lanni's suggestions, her conclusions may not be so accurate after all since a wider perspective and more general considerations need to be taken into account¹⁸. Apart from the reference to inheritance cases, *apographai* and *dikai pseudomarturion* provoke similar arguments, highlighting the atypical nature of these procedures. During the former, the state was deemed to be the main interested party, with the prosecutor acting as its agent. The fact that in such a public case the initiator of the charge would gain material benefit rendered him suspect of sycophancy. As far as the *dikai pseudomarturion* are concerned,

¹⁷ Regarding Theophemus' and the witnesses' conduct see for e.g. Dem. 47.28, 31-33, 52ff. For the speaker's see Dem. 47.34-6, 38, 68ff.

¹⁸ See Griffith-Williams (2012); cf. Ch. 2.2.2 and 2.3.3.

these formed an attempt on the part of the losing party to reopen and reargue the original case (cf. Dem. 47.46). Nevertheless, as has been proved, even in such cases litigants were largely committed to illuminating the main issues of the case, their argumentation being relevant and 'to the point'.

To conclude then, as Aristotle emphasised, reference to a multitude of deliberately chosen past acts could inductively prove a more general character trait. Correspondingly, the character trait in question could deductively illuminate the hidden facts of the case that formed the essence of the dispute. In cases where the existence of stereotypical beliefs was strong as to a particular characteristic of a litigant, reference to past acts was welcomed, but not necessary. For instance, following a deductive method of reasoning, the mere fact of being an Egyptian (Hyp. 3) or a Phaselite (Dem. 35) could automatically allow for a presumption of certain particular characteristics such as dishonesty and fraudulence, with the same ease that hubris and intemperance could be deducted from being young¹⁹. In addition to other methods of proof such as direct evidence and witness testimonies, arguments from probability, supported by circumstantial evidence contributed to the efforts of Athenian jurors to reach a decision in accordance with his oath, as to the particular legal case. The Athenian beliefs about character, supported by their mode of reasoning extended the ways by which character could be adduced and rendered relevant any reference to seemingly remote or unrelated past acts.

4.2 Reputation and Associates

In everyday dealings, character and personality are closely connected with reputation. Both notions are determined by the perceptions of a person's social circle, with reputation resulting from the opinions of people witnessing his everyday dealings. Furthermore, reputation is yet another distinctive feature of an individual, and it may be adduced in courts as evidence for a party's ethical standing. Public estimation of someone may prove decisive in a legal case, especially in a forensic setting such as the Athenian (chapter 2) and in a culture placing more emphasis in questions of honour and shame²⁰. In what follows, the

¹⁹ The same is true for solecism as an indication of barbarism (cf. Dem. 45.30; 36.1; but see Plat. *Apol.* 17d-18a) or for growing long hair as a sign of elitism (Lys. 16).

²⁰ See the discussion of 'shame-culture' versus 'guilt-culture' in chapter 5. Cf. Cairns (1993).

importance of a person's reputation will be investigated (either among the general public or his immediate social circle), its effect to the argumentation in Athenian courts, and the ways by which it was adduced.

Having a comparative perspective would be useful in order to grasp the importance of the Athenian practice. Modern law of evidence in the United Kingdom provides that

“the character of a person may be proved by evidence of general disposition, by evidence of specific examples of his conduct on other occasions (including, in the case of bad conduct, evidence of his previous convictions), or by evidence of his reputation among those to whom he is known”²¹.

Under common law solely reputation²², and not specific events, was admitted (although this is at present relaxed and the defendant himself may adduce evidence of particular acts²³). In the United States, the Federal Rules of Evidence (405, 608) provide for the use of reputation as an acknowledged method of proving character. When character is used circumstantially and hence occupies a lesser status in a case, proof may be only by reputation and opinion, prohibiting the most convincing (but more prejudicial) method of providing specific instances of past conduct. In both these jurisdictions, the importance of evidence from the reputation of the parties is proven.

In classical Athens, both a (probably well-known) person's general reputation and the opinions of his immediate social environment could be put forward. Nevertheless, the presence of partisan witnesses²⁴ who belonged to the circle of litigants and their (alleged) role of supporting a litigant's case rather than illuminating the truth meant that their quality and credibility determined the seriousness of their testimony²⁵. Moreover, a litigant's associates could also

²¹ Keane (2010), p. 439.

²² *Rowton* (1865) L. & C. 520; *Redgrave* (1982) 74 Cr.App.R. 10.

²³ Howard, Crane and Hochberg (1990), §18-14.

²⁴ Another remnant of the pre-4th century age referred to in chapter 1; cf. Humphreys (1985); Thür G. (2005).

²⁵ On the role of witnesses see Thür G. (2005); Humphreys (1985); London; Todd, (1990); Rubinstein (2005b). For a different view, namely that the legal risk of being prosecuted for false witnessing forced even a litigant's supporters to testify the truth, see Mirhady (2002) and Scafuro (1994).

affect his reputation, as well as character evidence given about a third party close to the litigant. This flexible and all-inclusive approach elevated the issue of reputation to a prominent place, having both probative and rhetorical significance. Strategically, reputation could be used to reveal the relevant character traits of litigants. Tactically, it could serve as a rhetorical *topos* leaving to the audience the impression that they already know and adhere to the arguments of the speaker.

All these are best exemplified in the case of Aeschines against Timarchus²⁶. Aeschines' difficulty in finding witnesses to testify against the defendant could seriously undermine the proof of his case. In his effort to explain and justify this difficulty (Aes. 1.44-8, 71-3, 160-4) he seeks to downplay the importance of direct testimonies and replace them with common report²⁷. The fact that Timarchus was already a well-known figure among Athenians assisted the orator in presenting his character, though complete certainty is impossible as to the accuracy of his comments²⁸. Timarchus' reputation is blackened to a great extent, with Aeschines provoking the agreement of the audience²⁹ – in this way he sought to transform the jurors to partisan witnesses, confirming Aeschines' assertions³⁰. Common report and reputation have acted as the connective elements which put Aeschines and the jurors on the same side: standing in agreement as to Timarchus' guilt, his reputation formed the catalyst for his conviction³¹. Such a verdict would indeed not be unjust if indeed the defendant

²⁶ Also discussed by Hunter (1991).

²⁷ E.g. Aeschin. 1.90: "while the man on trial, who has been denounced by the testimony of his own life and of the truth, is to demand that he be judged, not by the facts that are notorious, but by the testimony of witnesses, then the law is done away with, and so is the truth".

²⁸ cf. Aeschin. 1.20, 44, 55, 80, 157, 186, 189.

²⁹ E.g. Aeschin. 1.159: "To which class do you assign Timarchus—to those who are loved, or to those who are prostitutes? You see, Timarchus, you are not to be permitted to desert the company which you have chosen and go over to the ways of free men". This very impressive tactics was used by Demosthenes against Aeschines himself in Dem. 18.52: "I call you Philip's hireling of yesterday, and Alexander's hireling of today, and so does every man in this Assembly. If you doubt my word, ask them; or rather I will ask them myself. Come, men of Athens, what do you think? Is Aeschines Alexander's hireling, or Alexander's friend? You hear what they say".

³⁰ E.g. Aeschin. 1.89: "Now if this trial were taking place in another city, and that city were the referee, I should have demanded that you should be my witnesses, you who best know that I am speaking the truth. But since the trial is at Athens, and you are at the same time judges and witnesses of the truth of what I say, it is my place to refresh your memory, and yours not to disbelieve me".

³¹ E.g. Aeschin. 1.85: "This, then, I understand to be the testimony that has been offered you by the people of Athens, and it would not be proper that they should be convicted of giving false

was notorious for precisely the kind of conduct both directly relevant to the legal case and sufficient to condemn him³². After all reputation was the fair resultant of a man's past behaviour, being as credible as witnesses and testimonies given at the time of the trial³³.

On the other hand, Timarchus (and offended litigants in general) could dispute the accuracy of such reports and dismiss them as common slander. Aeschines replies by referring to the deification of Common Report, presenting as evidence for its unerring approach quotations from poetry. Demosthenes, Timarchus' supporting speaker and main disputant of Aeschines' assertions as slanderous and inaccurate (Aeschin. 1.125), would use the same kind of argumentation when it best suited his interests³⁴. Aeschines himself, when confronted with negative arguments about his own reputation would dismiss them as inaccurate, emphasising the truth (Aeschin. 2.153). Other orators too used general reputation as a means of presenting the character of the parties, presumably those that were already recognisable among the Athenians³⁵. In cases therefore where the (relevant to the legal case) past conduct of the parties acquired the status of common report throughout the polis, it could

testimony. When I, fellow citizens, say not a word, you of yourselves shout the name of the acts of which you know he is guilty; strange, then, it would be if when I name them, you cannot remember them; even had there been no trial of this case, he would have been convicted; strange indeed then if when the charge has been proved, he is to be acquitted!"

³² Aeschin. 1.44: "Indeed, I am very glad that the suit that I am prosecuting is against a man not unknown to you, and known for no other thing than precisely that practice as to which you are going to render your verdict. For in the case of facts which are not generally known, the accuser is bound, I suppose, to make his proofs explicit; but where the facts are notorious, I think it is no very difficult matter to conduct the prosecution, for one has only to appeal to the recollection of his hearers." Cf. 1.116.

³³ Aeschin. 1.93: "In the first place, let nothing be more credible in your eyes than your own knowledge and conviction regarding this man Timarchus. In the second place, look at the case in the light, not of the present moment, but of the time that is past. For the words spoken before today about Timarchus and his practices were spoken because they were true; but what will be said today will be spoken because of the trial, and with intent to deceive you. Give, therefore, the verdict that is demanded by the longer time, and the truth, and your own knowledge." cf. Aeschin. 1.125ff. referring to the deification of Common Report and its unerring approach to people's conduct, presenting quotations from poetry as evidence.

³⁴ Dem. 21.1, 195, 134: "If you did what your fellow-troopers say you did, Meidias, and what you complain of them for saying, then you deserved their reproaches, because you were bringing harm and disgrace both on them and on these jurymen here and on all the city. But if you did not do it and it was all a fabrication, and if the rest of the soldiers, instead of reproving the slanderers, chuckled over you, it only shows that from your general manner of life they thought that such a story exactly fitted you. It was yourself, then, that you ought to have kept more under control, instead of accusing the others". Demosthenes uses arguments from reputation frequently, cf. 24.128, 34.40, 45.63.

³⁵ Indicatively see Lys. 6.3, 6; 7.12; Reputation among the Greeks Lyc. 1.14.

indeed prove a powerful weapon in a litigant's arsenal, sufficient to disturb the equilibrium of a case (cf. Dem 52.1-2).

Closer to modern perceptions of character evidence in the form of reputation are the occasions when witnesses with direct knowledge of the events provided evidence for the character of the parties. Again, however, the similarities do not exceed the differences. Litigants continue to play the prominent role since they themselves testify about their own (or the other party's) conduct, merely providing witnesses for confirmation of their story. Furthermore, witnesses testified exclusively on questions of fact, leaving the issue of character to be illustrated only as a side-effect. For instance, Timarchus' characterisation as immoral and indecent was confirmed by his immediate circle's knowledge or testimonies concerning his licentious acts³⁶. Lysias' use of witnesses also focuses on their direct knowledge of facts, although they not infrequently shed light on the character and moral uprightness of the parties too³⁷. Direct or indirect testimonies could also have rhetorical use³⁸ since by placing witnesses in the position of praising a litigant envy or jealousy could be avoided.

As becomes evident from a close inspection of witness testimonies, these had direct bearing on the case, shedding light on the most relevant issues. The reading of depositions meant the stoppage of the time allotted to the speaker; this could nonetheless damage the flow of his speech or incite an audience's unease. Thus orators were very careful as to the moments that they allotted to witnesses and the importance of the facts the latter were called to confirm. Finally, noteworthy is the limited characterisation of witnesses in Athenian

³⁶ Timarchus' notoriety among his immediate environment and his fellow demesmen (apart from his general reputation discussed above) played an important role in Aeschines' portrayal of his character. Cf. Aeschin. 1.44-7, 59, 67-9, 78, 103-4 and against Demosthenes 2.155.

³⁷ Direct knowledge of the facts assisted in the determination of status (e.g. Lys. 13.64, 23.4, 8, 11), citizen virtue and liturgies (e.g. Lys. 16.8, 13-4, 17; 19.58-9; 20.25; 21.10; 31.14, 16, 19), family relations and kin's uprightness of conduct (e.g. Lys. 20.26-9; 32.18), and lawlessness and disrespect for social norms (31.23; 13.66, 68, 81-2).

³⁸ *Rhet.* 1418b: "In regard to moral character, since sometimes, in speaking of ourselves, we render ourselves liable to envy, to the charge of prolixity, or contradiction, or, when speaking of another, we may be accused of abuse or boorishness, we must make another speak in our place, as Isocrates does in the *Philippus* and in the *Antidosis*". On avoiding envy in Athenian courts, see Spatharas (2011); Dyck (1985).

courts³⁹. The inviolability of witnesses' credibility in practice is evident as demonstrated by the rare attempts at character assassination against them. This may be explained by reference to the Athenian procedures against false witnessing, which in this respect promoted a substantive rather than rhetorical attack against perjurers. On the other hand, supporting speakers did not enjoy such 'immunity', their characters and credibility being as much a target as those of the main opponent⁴⁰.

Apart from the direct characterisation of the parties achieved by the testimonies of those having immediate knowledge of the facts, an indirect means of character portrayal could also emerge from the immediate circle. The character of a man resembled the character of his associates, and so linking a litigant with reputable or wicked men illuminated his own traits. Aeschines continually links Timarchus with the most disreputable men of Athens, notorious for exactly the kind of indecent behaviour with which he charged him⁴¹. He uses the authority of Euripides in order to prove that "the man is such as is the company he loves to keep"⁴². As a matter of fact, this was a widely held opinion⁴³ provoking the extensive use of a litigant's associates in order to illuminate his character. The same strategy is also followed in the clashes against Demosthenes, where both Aeschines and Demosthenes try to associate their opponent with the convicted fugitive Philocrates⁴⁴. Fifty years earlier Lysias used the same tactics in order to show the affinity of Eratosthenes with Theramenes⁴⁵, whose character is

³⁹ These mostly take place in the speeches of Aeschines, for e.g. 1.41, 62, 67, 103; 2.64, 155; cf. Dem. 45.71.

⁴⁰ For characterisation of supporting speakers, either in a positive or negative way, see for e.g. Andoc. 1.150; Lys. 30.31, 34; 31.32; 32.1; Lyc. 1.138; Aeschines v Demosthenes in 1.131-2, 141, 163, 166-7, 170-5, 181, 194-5; the whole of Aeschines 3 turns arrows against Demosthenes, the main target, while in 2.184 presents his own supporting speakers in a positive manner. Cf. Rubinstein (2000).

⁴¹ See for e.g. Aeschin. 1.70.

⁴² Aeschin. 1.152, quotation taken from Euripides' *Phoenix*.

⁴³ See for e.g. Hom. *Od.* 17.218; Plat. *Symp.* 195b; Arist. *Eudemian Ethics* 1235a; Theophr. *Char.* XXIX.

⁴⁴ Indicatively see Aeschin. 3.57-8, 60-2, 72; Dem. 19.8, 15, 23, 94-7, 115, 119, 144, 150, 174, 189, 236, 245, 333. Aeschines tries to associate Demosthenes with Callias of Chalcis in 3.89, 94, 104.

⁴⁵ See Lys. 12.62ff.

portrayed in the most negative manner. More examples could be offered but I consider them unnecessary since the point has been proven⁴⁶.

Finally, character portrayal of a third party, apart from witnesses, associates, and supporting speakers, could regard deceased persons. Whenever relevant, litigants proceeded to such characterisation in order to prove important points of their argumentation. To demonstrate this reference to the character portrayal of Eratosthenes (Lysias 1) may be made, as presented by the defendant in a charge of intentional homicide, Euphiletus. The facts of the case are well-known, basically concerning the lawfulness of Euphiletus' killing of his wife's lover. Athenian law, for the protection of the sanctity of *oikos* and the integrity of the citizen body, provided that a citizen could kill on the spot the seducer of any female family member which fell under his protection. However, Eratosthenes' kin alleged that the victim was tricked and fell into a well organised trap which Euphiletus prepared in order to kill him with impunity. Euphiletus, in order to prove that the deceased had in fact seduced his wife, presents him as a serial corruptor of women, highlighting his propensity for such conduct by reference to analogous episodes from his past⁴⁷. In Lysias 19, the case concerned the confiscation of the deceased Aristophanes' property. The property was confiscated but its value did not meet popular expectations. As a result, suspicion arose against some of his relatives for concealing a substantial part. In harmony with the defence strategy of minimising the scale of Aristophanes' wealth, the speaker presents the latter as spendthrift, whose extravagance and expenditure to achieve social recognition substantially reduced the collected wealth⁴⁸. In Lysias 13, a trial against Agoratus (alleged informer of the Thirty), the speaker insists that the jury should punish the defendant and take vengeance for the murders for which he should be held responsible. The deceased men were virtuous and respectable patriots, loyal to the democracy⁴⁹. Especially their latter characteristic induced Agoratus to inform against them, rendering him a collaborator of the Thirty. To conclude then, when litigants

⁴⁶ Indicatively for more examples one could look at Lys. 16.11; 24.5; fr. 1 (2); Dem. 18.21, 82, 131, 137; 21.110, 139, 190, 209; 22.38; 24.130, 174; 25.37, 39, 45, 61; 34.36; 37.48; 38.27; 39.2; 40.9, 32, 57; 43.48; 52.20-2; 54.31-7; 56.7; 57.60; 58.27.

⁴⁷ Lys. 1.4, 8, 15-6, 26.

⁴⁸ See for e.g. Lys. 19.18, 23, 42-3.

⁴⁹ See for e.g. Lys. 13.1-2, 60-62, 92.

resorted to argumentation from character concerning deceased persons, this was directly relevant to the case, illuminating decisive issues.

4.3 Delivery (*hypokrisis*) and Presentation

A very important method of presenting character in Athenian courts concerns delivery. According to Aristotle (*Rhet.* 1403bff.), this topic had not been treated systematically before his own time; only lately it came into notice and, after all, it was – rightly - considered vulgar. Aristotle's negative attitude towards delivery⁵⁰ (once again attributing it to the inadequacy of the audience) has been explained by reference to Platonic influence on him⁵¹. Nevertheless, he briefly touched upon the matter, admittedly without devoting too much attention to it, considering it necessary as a useful tool in the influencing of an audience's opinion. The gap of systematic treatment would be filled by Theophrastus in the next generation, with his now lost work *On Style*⁵². On the other hand, Roman writers considered delivery of utmost importance. For Cicero

“[D]elivery alone is supreme. In speaking: without it the greatest orator cannot be of any account, and a moderate speaker who is trained in this field can often defeat his superiors”⁵³.

In this, ancient theorists are at one with modern research, demonstrating the importance of divergent techniques, delivery and presentation supporting verbal communication⁵⁴.

⁵⁰ *Rhet.* 1403b: “as at the present day actors have greater influence on the stage than the poets, it is the same in political contests, owing to the corruptness of our forms of government. But since the whole business of Rhetoric is to influence opinion, we must pay attention to it, not as being right, but necessary; for, as a matter of right, one should aim at nothing more in a speech than how to avoid exciting pain or pleasure. For justice should consist in fighting the case with the facts alone, so that everything else that is beside demonstration is superfluous; nevertheless, as we have just said, it is of great importance owing to the corruption of the hearer”.

⁵¹ Fortenbaugh (1986).

⁵² Porter (2009), pp. 97-8 narrates his interpretation of the process as such: “A parallel development appears to have taken place in the realm of *hypokrisis*, or delivery, which gradually detached itself from its origins in drama and came to be transferred over to the art of rhetoric. Dramatists at first acted in their own plays (1403b23–24), but owing to the increased complexity of the stage and, no less importantly, to the powerful appeal of delivery (to which Aristotle's *Poetics* bears witness), they then turned these roles, and their voices, over to professional actors. The need for practical manuals arose, and eventually parallels to rhetorical delivery were noticed, for instance by Thrasymachus in his *Appeals to Pity* (1404a14). But apparently no substantive technical treatise on rhetorical *hypokrisis* existed down to Aristotle's day, even if handbooks on acting and uses of the voice and vocalization in poetic contexts (for instance, tragic and rhapsodic recitations) had been developed, such as that by Glaucón of Teos (1403b21–26).

⁵³ Cicero, *On the Orator* 3.213; Cf. *Rhetoric to Herennius* 3.19; Quintilian 11.3.2.

The issue of dramatic presentation and delivery in the ancient courts may indeed change the way of analysis and interpretation of Athenian orations. The alleged theatricality of litigants is a matter of controversy among researchers. According to one view, the (original) orations were, in a very real sense, performance texts, punctuated with entrances and exits, marked for the display of laws and contracts, witnesses and suppliants, and not infrequently, the speaker's own theatrical gesture. Accordingly, the creation of *ethos* is the staging of a recognizable persona, portrayed by the live performances of the litigants⁵⁵. By the same token, concentrating on the similarities between public performances in forensic environments and in the theatre⁵⁶, law court speeches can be seen as essentially 'dramatic', where orators share the same challenges with actors and use similar performance techniques. The process of self-dramatization through delivery meant that the speaker had to proceed through different, upward stages. Memorising the speech, rehearsing a convincing rhetorical 'performance' in advance, and creating a (seemingly spontaneous) likeable persona were necessary to convince an experienced and exacting audience. This process of dramatic characterization through the enactment of a vivid and consistent character, attained through the careful balance between speech and action, was strategically significant indeed for a court basing its decisions on circumstantial evidence and probabilities. Delivery itself formed an implied argument from probability: the character before the jury is incapable of behaving in the manner alleged⁵⁷.

The other trend in scholarship acknowledges the potentiality of such dramatic action by Athenian litigants, though questioning its extent and eventual successfulness. The discussion of emotional pleas has already demonstrated that excessive theatricality and tones could damage a litigant's case, provoking negative responses by the audience. Skilled speakers and professional logographers were definitely aware of this, preferring a balanced, *untheatrical* mode of delivery. Moreover, careful examination of the tone of the rhetoric of

⁵⁴ Steel (2009).

⁵⁵ Scafuro (1997), esp. Pp. 50-66. Cf. Kavoulaki (1999); Buis E. (2004).

⁵⁶ See Ober & Strauss (1990).

⁵⁷ Carey (1994a), pp. 40-42.

the orations (especially of highly emotional passages such as appeals to pity) suggests that the “fundamental intent of these appeals as they are composed by professionals is compatible with a dignified delivery”⁵⁸. Regardless whether *idiotai* consciously or unconsciously resorted to theatrical delivery or imitation of tragic style, the slim evidence provided by the Attic orators hinders the extraction of any strong conclusions.

Indeed, to my knowledge, there is only one passage explicitly referring to such a theatrical mode of delivery in court, Dem. 19.252⁵⁹. This is alleged to have been performed by the ex-actor Aeschines, in a period when character presentation through the speaker’s skilful delivery had begun to be appreciated. Other researchers extract more examples of rhetorical ‘action’ from the wording of the speeches, though uncertainty persists as to the exactness of these remarks⁶⁰. On the contrary, by concentrating on Aristotle’s observation that delivery is a matter of voice (*Rhet.* 1403b26)⁶¹ direct references can be found in the later orations, especially by Demosthenes. This may be yet another clue indicating the rising importance of vocal delivery over time, but also a hint that vocal and not acting skills were still valued the most. Also, in the *Nicomachean Ethics*, the Stagirite claims that voice is an important medium for conveying character⁶².

Furthermore, the importance of voice is demonstrated in stories reaching us from antiquity. The appreciation of vocal skills is exemplified in the person of Isocrates who actually refrained from public speaking due to a natural deficiency in his voice (Isoc. 5.81; 12.10) and in the many anecdotes that reach

⁵⁸ Bers (2009), p. 92; cf. Konstan (2000); pace Johnstone (1999), p. 116 with n. 44.

⁵⁹ Dem. 19.252: “He illustrated his remarks by representing to the jury the attitude of the statue; but his mimicry did not include what, politically, would have been much more profitable than an attitude,—a view of Solon's spirit and purpose, so widely different from his own”.

⁶⁰ See for e.g. Fredal (2001); judging from the words of the speech, other ‘theatrical’ passages can also be traced such as Dem. 19.255.

⁶¹ *Rhet.* 1403b26ff.: “Now delivery is a matter of voice, as to the mode in which it should be used for each particular emotion; when it should be loud, when low, when intermediate; and how the tones, that is, shrill, deep, and intermediate, should be used; and what rhythms are adapted to each subject. For there are three qualities that are considered — volume, harmony, rhythm”.

⁶² *Nic. Eth.* 1125a13-14.

us about Demosthenes' vocal training⁶³. The Homeric origins of this appraisal of voice seem to be restricted to volume and malleability, which could support or advance the eloquence of a speaker⁶⁴. Over time, the stories circulated about Pythagoras⁶⁵ uncover the total advancement of speech to a new dimension:

“Dispensing with appearances altogether and occulting himself from his pupil audiences, he appeared to them in a disembodied form, as a pure voice. His pupils, reduced to silence, were given over to an utter absorption of their master's voice...it was Pythagoras, not his Homeric predecessors, who revealed the logic of the voice by which rhetoric works (and had always worked) its magic”⁶⁶.

Voice as an aesthetic phenomenon in its own right was finally capable of moving a mass audience, which in turn learnt to appreciate it as the rhetorical manifestation of a performance culture.

This is best illustrated by reference to Demosthenes' anxiety to diminish and ridicule the impact of the well-trained actor's voice (Aeschines) during their contests. Demosthenes' own natural vocal insufficiency must certainly have played a role, since the direct comparison between the two would be inescapable⁶⁷. Nevertheless, Demosthenes through the interplay of preaching and mockery⁶⁸, tried to cancel out his deficiency and induce the jurors to

⁶³ Demosthenes, after his failure in his first public appearance, is said to have studied elocution under the actor Neoptolemus. Also, famous are the accounts of Demosthenes shouting against the sea and rehearsing with pebbles on his mouth. [Plut.], *Lives of the Ten Orators*, 844; Plut. *Dem.* 6-7, 11.

⁶⁴ Cf. Hom. *Il.* 3.221 (Odysseus' great voice which totally changed his appearance); 5.764 (the proverbial voice of Stentor); the Bards were also aware of the voice's imitative powers, see for e.g. 13.195; cf. *Homeric Hymn to Apollo* 171-5.

⁶⁵ Diog. Laert. 8.10, 15; Iamblichus, *Life of Pythagoras* 7: Pythagoras used to lecture for long periods to his pupils, whether hidden behind a curtain or lecturing only at night in utter darkness. “For five years [his disciples] would keep silent, merely listening to his speeches without seeing him, until they passed a test. From that point on they were allowed into his house and were able to see him”.

⁶⁶ Porter (2009), p. 93; cf.: “The emergence of the voice in the guise of disembodied logos represents the triumph of the voice as an aesthetic phenomenon in its own right, its liberation from the constraints of sight, though not from the body per se. The voice when it is heard has a body of its own: it has pitches, melodiousness, timbre, rhythms, and other euphonic qualities”.

⁶⁷ E.g. Dem. 19.216: “You must not notice what a fine loud voice he has, and what a poor voice I have”; Cf. 19.206. Even if this natural defect of Demosthenes has been improved by his maturity, the recurrent reference and comparison with Aeschines' voice proves his relevant inadequacy or at least his concern.

⁶⁸ 19.337: “On that famous voice of his, however, I really must offer some observations. For I am informed that he sets great store thereby, and that he hopes to overawe you by an exhibition of histrionic talent. When he tried to represent the woes of the House of Thyestes, or

disregard (or even despise) Aeschines' rhetorical ability. It is not vocal talent that really matters when it comes to serious considerations. Demosthenes' appointment for the delivery of the Funeral Speech (despite Aechines' great voice) proves the point (Dem. 18.285). Patriotism requires wholehearted devotion to the homeland, sharing its joys and misfortunes, therefore "the chosen speaker should not lament their fate with the feigning voice of an actor, but express the mourning of his very soul" (Dem. 18.287). Natural gifts should be used in the service of the fatherland, leaving aside inessential petty demonstrations⁶⁹, while remaining silent in crucial moments (Dem. 18.308, 313). Voice is merely the extension of a man's character; it cannot alter his *ethos* and transform him from vicious into virtuous. Voice is just the instrument of communication; in principle, one's *ethos* and spirit count (Dem. 19.336, 338).

All the aforementioned points illustrate Demosthenes' concern for diminishing any effects that would arise from Aeschines' charismatic rhetorical delivery. Indeed, evidence reveals the existence of stereotypes relating voice with character. In the previously mentioned passage from the Nic. Ethics, Aristotle links a deep voice, and a deliberate utterance to the great-souled man; to speak in shrill tones and walk fast denotes an excitable and nervous temperament, which does not belong to a person who cares for few things and thinks nothing great. Thus vocal training promoted the stability and correct volume and malleability of voice, in an effort to improve natural defects⁷⁰. On the other hand loud and raucous voice could be interpreted as intimidating signs of an arrogant oligarchic member of the elite⁷¹. The physical presentation of high valued notions such as *arete* (virtue) and *enkrateia* (self-control) presupposed certain

of the men who fought at Troy, you drove him from the stage with hisses and cat-calls, and came near to pelting him with stones, insomuch that in the end he gave up his profession of actor of small parts; and I think you would be behaving very strangely if now, when he has wrought measurable mischief, not on the stage, but in his dealings with the most momentous affairs of state, you should be favourably impressed by his beautiful voice".

⁶⁹ Dem. 18.280: "It really makes me think, Aeschines, that you deliberately went to law, not to get satisfaction for any transgression, but to make a display of your oratory and your vocal powers. But it is not the diction of an orator, Aeschines, or the vigour of his voice that has any value: it is supporting the policy of the people, and having the same friends and the same enemies as your country".

⁷⁰ The speaker's grievance in Dem. 45.77 proves the point: "For myself, men of Athens, in the matter of my outward appearance, my fast walking, and my loud voice, I judge that I am not one of those favoured by nature; for in so far as I annoy others without benefiting myself, I am in many respects at a disadvantage".

⁷¹ Cf. Dem. 21.72; 25.9; 57.11; Is. 6.59.

patterns of public conduct (the mode of speaking included) which would be positively interpreted by the trained audience.

It now becomes clear that such stereotypical presuppositions embrace every part of an orator's 'presentational system': delivery, voice, and appearance. The latter too came to reveal a person's character and beliefs, interpreted again by reference to stereotypical convictions of the audience. As has already been shown (Dem. 45.77), outward appearance and fast walking could be annoying for the others, hinting at an undisciplined personality. On the other hand, meretricious public conduct was adequate for advertising a specific *ethos*⁷². The interpretation of appearance by reference to stereotypical conceptions could damage or enhance a litigant's case.

According to Demosthenes, Timarchus was "jeered at through slanderous interpretation of his handsomeness" (Aes. 1.126). Indeed, Aeschines focuses too much on Timarchus' appearance, trying to provoke mockery, condemnation and disgust⁷³. Fifty years earlier, shortly after the fall of the Thirty, when the growing of long hair was still a sign of elitist (even oligarchic or Spartan) sympathies, Lysias puts his (long-haired young aristocrat) client Mantitheus as protesting against censure of such kind⁷⁴. As a matter of fact, Lysias concentrates more than any other orator on appearance and physical characteristics. This may indicate the strength of the audience's expectations and stereotypical preconceptions during that particular era or it may be yet another factor revealing this orator's interest for (and mastery in) dramatic characterisation. Litigants' looks (supported by theatricality) provided direct

⁷² Cf. Dem. 19 314: "Behold him pacing the market-place with the stately stride of Pythocles, his long robe reaching to his ankles, his cheeks puffed out, as who should say, "One of Philip's most intimate friends, at your service!" He has joined the clique that wants to get rid of democracy,—that regards the established political order as an inconstant wave,—mere midsummer madness".

⁷³ Cf. Aeschin. 1.61, 95: "and this man [Timarchus] himself, not yet, by Zeus, repulsive to the sight as he is now, but still usable", "this defendant [Timarchus] had lost his youthful charm, and, as you would expect, no one would any longer give him anything".

⁷⁴ Lys. 16.19: "it is not fair, gentlemen, to like or dislike any man because of his appearance, but rather to judge him by his actions; for many who are modest in speech and sober in dress have been the cause of grievous mischief, while others who are careless of such things have done you many a valuable service".

evidence⁷⁵ and physical attributes could be displayed and manipulated in order to emphasise a vital point⁷⁶.

To conclude then, although evidence as to the extent and the quality of theatrical delivery in Athenian courts is slim, it is undeniable that at least a speaker's voice and appearance could provide evidence as to his character and beliefs. Based on the community's stereotypical presuppositions, orators presented and manipulated easily interpretable stock types in accordance with their interest. This approach created patterns of presentation (and rhetoric) which allowed for the anticipation and consistency of argumentation strategies. In this way, the court remained adjacent to society and its preconceptions, with the argumentation presented by litigants retaining its relevance according to their collective beliefs⁷⁷. After all, a close examination of the aforementioned evidence proves that a speaker's voice, physique and attributes were presented (and were interpreted by the audience) in a manner logically relevant to the case at hand. The accusation of Timarchus concerning prostitution was closely connected with his beauty; the physical disability of the speaker in Lysias 24

⁷⁵ Depending on the nature of the case, such evidence could be critical; See for e.g. Lys. 24 (For the Disabled Man), where the (obvious to the audience) physical disability of the speaker could prove decisive for the jurors' decision; see esp. 24.7, 12 [on this speech see Wohl V. (2009)]; for Lysias' use of outward appearance as evidence cf. Lys. 31.12: "This man, therefore, deserves no indulgence; for neither was he disabled and thus unfit for hardship, as you see for yourselves..."

⁷⁶ See for e.g. Lys. 10.29 where Lysias stresses the antithesis between the adversaries' strong bodies and coward souls: "And indeed, gentlemen, the taller and more gallant they are in looks, the more they are deserving of anger. For it is clear that, though strong in their bodies, they are ill in their souls"; cf. Lys. 31.12; 20.3.

⁷⁷ In reality, how remote from the Athenian practice is the section 105 (5) of the Criminal Justice Act 2003, providing that the 'appearance' and even the 'dress' of a defendant may classify as 'conduct'? This section, entitled 'Evidence to Correct a False Impression' allows the prosecution to adduce evidence in order to correct a false impression made (expressly or impliedly) by the defendant's conduct at the time of the trial. It provides: "101 (4): Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression. 101 (5) provides: In subsection (4) "conduct" includes appearance or dress". For example, if the defendant appears in court wearing a clerical collar or a military or police uniform. Even if he holds a copy of the Bible in his hands while giving evidence about his respectable family life, he may be said to be responsible for the creation of a misleading impression. See *Robinson* [2001] Crim LR 478 with Glover (2013), p. 191 who expresses the hope that this case would be decided differently under the CJA 2003.

was directly relevant to his pension; the stereotypical assumption about the oligarchic sympathies of the long-haired youths was anticipated in a *dokimasia* where the fear of rejection due to cooperation with the Thirty was imminent; loud, raucous voice was linked with the intimidating behaviour of insolent members of the elite, and so on. Finally, to be clear, this enquiry is limited to the methods of character presentation in Athenian courts and their proximity (in accordance with Athenian beliefs) to the legal case at hand; therefore any question or value judgment about the correctness of these stereotypical beliefs is beyond the scope of this thesis.

4.4 *Logoi and Lexis*

Apart from *hypokrisis*, character portrayal could be effected by *logoi* (what should be said) and *lexis* (how it should be said). Invocation of poetry, remotely relevant laws, similes and comparisons were included among methods of outlining character in Athenian courts. Starting with the last, the comparative way of thinking allowed for the extensive use of metaphors and contrasts in Athenian courts. Aristotle in his *Rhetoric* continuously advises the proportionate and stylistically correct use of examples from the past or the imaginative invention of vivid and relevant comparisons⁷⁸. In particular, he proposes the (positive or negative) contrast with well-known historical figures (1368a). This method of character portrayal is frequently adduced by the Attic orators. Although reluctant to contrast themselves with the famous and idealised heroes of the past, speakers often resort to association of their opponents with persons notorious for their negative deeds⁷⁹. Whenever a comparison with notable figures of the past was adduced, it was simply invoked to reveal the littleness of the adversary⁸⁰. Serious ethical weaknesses of past figures were also mentioned, as being shared by the opponent⁸¹ and even comparison with

⁷⁸ See for e.g. Arist. *Rhet.* 1356b, 1357b, 1377a, 1393a etc.

⁷⁹ See for e.g. Lys. 6.17, 45; 21.20; Dem. 58.38. Also, for the frequent comparisons with the Thirty see Andoc. 1.101; Lys. 25.31; Dem. 24.90, 164.

⁸⁰ Usually such comparison was invoked in public disputes (e.g. about the worthiness of a person for crowning or the legitimacy of a legal statute). Aeschines contrasted Demosthenes against Pericles and Miltiades in order to highlight his smallness for being crowned (Aeschin. 3.181), with Demosthenes using the same argument against Charidemus (23.196ff.) and Aristogeiton (26.6). However, when this argument was used against him by Aeschines, he discarded it as irrelevant since one ought to be judged by reference to his contemporaries (Dem. 18.209, 316ff.).

⁸¹ Dem. 21.143ff; 165.

mythical personas was put into play⁸². All of them were drawn from a pool of relevant past incidents, supporting the speaker's argumentation in relation to a character trait of the opponent relevant to the offence⁸³.

Furthermore, in conformity with Aristotle's suggestions (*Rhet.* 1384a) comparison was effective with men who resemble us. Demosthenes compares his character and deeds with Aeschines' (Dem. 18.265; for similar direct comparison between litigants cf. Dem. 50.58), Aeschines' treacherous behaviour with his co-ambassadors' upright behaviour (Dem. 19.229-30), his own prudent reaction with that of other victims found in similar situations (21.39, 71ff.), and Meidias' insolent attack with the lesser insolence of previous notable offenders (21.38, 63ff.). Finally, as Aristotle observes (*Rhet.* 1368a) "if a man has done anything alone, or first, or with a few, or has been chiefly responsible for it; all these circumstances render an action noble". Demosthenes took advantage of it, advertising his outstanding behaviour during the crisis of Elateia (18.173).

Past acts and previous deeds are thus offered for comparison for the sake of portrayal of character and its assessment by reference to common standards. Nevertheless, such acts, not infrequently in a forensic setting, take the form of argumentation from precedent, a controversial issue that has attracted the attention of recent scholarship⁸⁴. Though I am convinced by the arguments offered by Harris, my purpose here is to shed light on another use of precedent in Athenian courts: that of character portrayal. This is also discussed by Aristotle (cf. Arist. *Rhet.* 1356b, 1357b, 1377a, 1393a etc.) who exemplifies the use of rhetorical examples in proving a litigant's argument. Apart from a comparison with the acts triggering the legal charge, the opponent's character may be compared with that of a previous offender. This is especially useful when the speaker seeks to emphasise a particularly relevant character trait that was allegedly decisive to the conviction of a past perpetrator, or when he

⁸² Dem. 19.247; 18.127, 180; Antiph. 1.17.

⁸³ Metonymies and metaphors could also be used in a positive manner, emphasising the speaker's positive traits [see Wohl (2009)].

⁸⁴ Harris (2007b); pace Lanni. (2004).

highlights the fact that the present defendant is morally reprehensible in an even greater degree.

In the (admittedly relevant to the legal case) examples from precedent offered by Demosthenes against Meidias, the latter's arrogance and intemperance is emphasised by contrasting it with former convicted offenders (21.38). Furthermore, earlier precedent was invoked to reveal the reasonableness of notable men who succumbed to the authority of the laws and the power of the demos, as opposed to the disrespect shown by lawless and insolent individuals finding themselves on trial (Dem. 26.6-7; 24.134-8; cf. 19.271-81). The list of examples that prove this use of precedent for character portrayal may be lengthened by reference to comparisons between former trierarchs convicted for cowardice and desertion of their posts (Dem. 51.8-9), betrayal of the country⁸⁵, instigation to manslaughter by mere words as opposed to the defendant's aggressive and violent nature (Dem. 54.25), or the contrast of a former convicted hierophant's worthiness and merit against the sacrilegious and lawless prostitute Neaera (54.25)⁸⁶. The main point is that presentation of character could be achieved by divergent means, left to the initiative and the imagination of the orators.

A similar means to character portrayal by reference to precedent is by the citation of laws. Reference to legal documents that could allegedly be applicable to the particular case assisted a litigant to enliven his argumentation and sketch the characters of the parties. For instance, Ariston, the speaker of Demosthenes 54 cites the law against hubris in order to reveal its applicability to the defendant's conduct, further emphasising the gravity of his offence. In addition, the speaker's choice of indicting him for a less serious offence (*dike aikeias*) reveals his modesty and lack of vindictiveness. Therefore, citation of laws could be used to reveal the character and ethics of both litigants. In such a way, an applicable statute reflected the ethos of the party that resorted to the

⁸⁵ E.g. Lyc. 1.52-3; 93, 112, 117, 122.

⁸⁶ The more general issue of character worthiness is addressed in Dem. 23.199-200, when Demosthenes is comparing the honours given to previous benefactors of Athens with the proposal of Aristocrates for the bestowment of great (and illegal) honours to Charidemus. Demosthenes via this comparison questions not only the legality of the proposed law but the worthiness of the acceptor per se.

prohibited conduct, as well as the adherence of the speaker to the laws of the state⁸⁷.

However, a balance should be kept in the use of legal statutes, since detailed knowledge of the laws could be (stereotypically) interpreted as suspicious (i.e. a prerequisite for sycophancy). On the other hand there is the paradigm of the inattentive young speaker of Hypereides 3 (*Against Athenogenes*). In that speech a perfumer was accused of fraud in the sale of his business, due to the inappropriate 'fine print' of the contract transferring huge debts to the plaintiff. Nevertheless, the fault stood at the buyer's side who, carelessly, signed the contract. In his speech, the extensive use of (at first glance) irrelevant legal statutes aimed to reveal the defendant's breach of the 'spirit of the laws', seen as a single, diachronic entity. Furthermore, the - now scholastic - reading and use of statutes (which the speaker hastened to justify), although attributed to *force majeure*, is contrasted with his previous folly in signing the contract, emphasizing thus the fact that his character has changed by becoming more careful since his lesson has been learnt. His adherence to the laws of Athens (in opposition to his Egyptian adversary's disrespect for their spirit) and the improvement of his conduct made him morally stand on the right side and therefore undeserving of this unjust punishment produced by the unfair contract⁸⁸.

Another authority, standing beside the laws and similarly shaping people's norms and behaviour, is poetry⁸⁹. Epic and lyric poetry provided the 'norm' of righteous conduct that should be adhered to and followed. Aristotle recommends its use as a kind of ancient testimony or evidence, sanctioning a litigant's argumentation⁹⁰. The mere invocation of didactic passages highlights the speaker's education as well as his adherence to the notions he advertises. This partly explains the citation of poetry solely by senior political figures in high-profile public cases. In the unwelcome event of lack of witnesses, poetry may be invoked for support in the interpretation of the law or the assessment of

⁸⁷ For further analysis and examples see De Brauw (2001).

⁸⁸ Cf. Scafuro (1997).

⁸⁹ See for e.g. Dorjahn (1927); Perlman (1964); Ford A. (1999).

⁹⁰ Arist. *Rhet.* 1375a-b.

a character's uprightness. This point may be proven by reference to Aeschines' use of a verse from Euripides:

"before now he has been made judge of many cases, as you today are jurors; and he says that he makes his decisions, not from what the witnesses say, but from the habits and associations of the accused; he looks at this, how the man who is on trial conducts his daily life, and in what manner he administers his own house, believing that in like manner he will administer the affairs of the state also; and he looks to see with whom he likes to associate. And, finally, he does not hesitate to express the opinion that a man is like those whose "company he loves to keep."
(Aeschin. 1.153)

The relevance of this analysis to the argumentation of Aeschines is noteworthy, even if it is scrutinised scholastically point by point. In the extant speech Aeschines focuses on the reprehensible habits of Timarchus, emphasising his association with disreputable men. The truth of this passage is also reflected in the fact that as Timarchus squandered his patrimony in order to finance his immoral desires, in the same way he mismanaged and embezzled public property. The provision of the law which forbids the exercise of civic rights for those who had debauched or prostituted themselves reflects the same basic idea:

"For the man who has made traffic of the shame of his own body, he thought would be ready to sell the common interests of the city also" (Aeschin. 1.29).

In all the above Euripides stands as witness. But comparison should also be offered, in anticipation of his opponents' arguments, of the differences between legitimate and 'Timarchean' love. Again the intellectual and moral heritage of poetry, in the verses of Homer now, is invoked (Aeschin. 1.141ff.)⁹¹.

Apart from Aeschines, another orator, Lycurgus, used poetry extensively in his orations⁹². Again, the aim was the successful and vivid character portrayal,

⁹¹ Aeschines was fond of using poetry in his speeches. Relevant verses are used for the justification of his arguments concerning reputation and common report (*φήμη*) (Aeschin. 1.129; 2.144ff) or offering a comparison between his contemporaries and the distinguished men of the past (3.184-5, 190). Demosthenes replied to these in 18.209, 316.

⁹² Although only one of his orations is surviving it is safe to conclude that Lycurgus used poetry freely in all his speeches. Cf. Dorjahn (1927), p. 88 with n. 7.

comparing his opponent's alleged acts against the standards of behaviour offered by the poets. Through the quotation of verses from Homer, Euripides and Tyrtaeus, Lycurgus emphasises the magnitude of Leocrates' offence, which amounted to treachery. Simultaneously, he advertised his own adherence to these norms, presenting a solemn patriotic *ethos*. The quotation of epigrams commemorating the heroism of the war dead in Marathon and Thermopylae further highlights Leocrates' betrayal. He promised to make a just accusation, neither falsifying nor speaking outside the point (Lyc. 1.11, 23). In his opinion (and presumably in the jury's) he "conducted the trial rightly and justly without slandering the private life of the defendant or digressing from the subject of my [his] indictment" (Lyc. 1.149).

Quotations from poetry operated as the epitome of the Athenian common standards of behaviour against which a person's character and deeds ought to be assessed. In Athenian society, which was – when compared to modern societies – (ethically and ideologically) coherent, communal expectations as to one's mode of behaviour were understandable. Their ideas of character and personality directed a wholehearted adherence to the norms of the polis, proved by deeds, over and above any egoistic considerations. This conformity between law and ethics (expressed by the legal enforcement of morals) promoted the uniformity of behavioural standards among citizens and, given the conservative nature of the Athenian society, a consistency of approach regarding the execution of justice. By the same token, the importance of character evidence was upgraded, with litigants proving their simultaneous adherence to laws and morals by the use of a single argument. Conformity with laws signified the same for morals, leaving limited scope (e.g. in the absence of written laws as the Heliastic oath indicates) for external considerations such as equity. The application of the rule of law, decision-making consistency, and execution of justice were in concord.

A society which meditated in the form of binaries and contrasts and put exceptional emphasis on written and spoken *logos* would unsurprisingly develop a deep understanding of the importance of silence. Pythagoras trained his followers in a five-year silence test that silence too is *logos* ("καὶ τὸ σιωπᾶν

λόγος”) (Philostr. *Life of Apollonius*, 1.1). In the Athenian courts, the presentation of character could be achieved either by the things said or by those unsaid. Decency ordained the avoidance of licentious language even when describing the adversary’s acts⁹³. Respectable men not only shrink from performing such acts but restrain themselves from merely mentioning them, even by using euphemistic language⁹⁴. Others, apart from their adherence to decency, highlight their respect for family bonds in order to justify their silence and simultaneously portray their character⁹⁵. Further proof is provided by the speaker of Lysias 3, another example of the orator’s mastery in dramatic characterisation. Facing the charge of ‘wounding with premeditation’ and arguing his case before the Areopagus, he concentrates on his age, social standing and respectability in encountering his opponent’s pleas. Well-known for his public services and military achievements, as opposed to his provocative opponent’s characteristically violent and antisocial past conduct, he acknowledges the danger he faces by the mere disclosure of the events. Highly vexed by this fact, he asks for the jurors’ pity, not for the possibility of conviction, but “for having been compelled, as a result of such transactions, to stand my trial on such a charge” (Lys. 3.48). Shame and decency ordained silence, secrecy, or better quietness, for a man of his character (3.9, 10, 30, 40). Such a man would never risk all his life’s achievements by resorting to such senseless acts (3.4, 34, 41). His character’s portrayal has been completed.

Finally, (as in modern courts)⁹⁶ negative character testimonies such as “I’ve never heard anything ill of the defendant’s character” could also be adduced or

⁹³ See Carey (1994a), pp. 174-5: “In theory of course this type of constraint looks like a terrible handicap. In practice it is an enormous boon. Litigants are well aware that if the jurors are left to imagine the details for themselves they will come up with something far more shocking than the actuality. Speakers are also able to exploit such modest silence in order to present themselves as men too decent to utter filth, while the opponent emerges as someone who is prepared to do things which decent people shudder even to utter”.

⁹⁴ Dem. 21.79; 54.9, 17; for a very indicative example see Aeschin. 1.55: “Now the sins of this Pittalacus against the person of Timarchus, and his abuse of him, as they have come to my ears, are such that, by the Olympian Zeus, I should not dare to repeat them to you. For the things that he was not ashamed to do in deed, I had rather die than describe to you in words”; cf. Aeschin. 1.76.

⁹⁵ Dem. 45.3: “As for myself, men of the jury, a large property was left me by my father, and this was in the possession of Phormio, who furthermore had married my mother while I was out of the country on public business, serving as your trierarch. (How he managed it, perhaps it is not proper for a son fully to explain about his mother)”.

⁹⁶ Rowton (1865) L. & C. 520; Redgrave (1982) 74 Cr.App.R. 10; Munday (1997), 248.

transmitted by the speakers⁹⁷. However, in modern courts this role is reserved for the witnesses, whereas in the courts of classical Athens, litigants themselves provoked or incited the audience or even their opponent to testify on the truth of such a matter. The supposition was that if there is a negative testimony to an alleged fact, it would have been received as true by the court.

4.5 Conclusion

The Athenian ideas of character (discussed in chapter 3) illuminate their courts' approach to character evidence. The inductive mode of deliberation necessitated the reference to numerous incidents from a litigant's past life in order to prove the desirable point. As Lycurgus said in *Against Leocrates*: "For if my point is backed by frequent illustrations, I am rendering your verdict easy" (Lyc. 1.124). Furthermore, the absence of firm conclusions on the subject allowed for the existence of a variety of methods in providing evidence. The newly developed art of rhetoric and the emphasis on performance as a key factor of Athenian culture provided even more available techniques in presenting a case. The persuasive strength of delivery, supported by a carefully drafted speech with references to examples, analogies and widely acknowledged authoritative sources, promoted the vividness of character portrayal and its effectiveness in producing results.

The social concord as to the accepted communal norms and the wide agreement on the value of cooperative virtues rendered argumentation in courts predictable and grounded on traditional patterns. As a result, and taking account of the procedural norms that litigants and jurors should respect, it is not unlikely that the Athenian courts could actually achieve a significant degree of consistency. After all, no litigant ever criticised the jurors for an inconsistent approach. On the contrary, citation of precedents was not uncommon, having persuasive power. The overall aim of litigants, when the point of dispute rested on the interpretation of the facts of the case which was the rule in Athenian courts, was to highlight a character trait particularly relevant to the case at hand, in order to reveal adherence or disrespect for communal norms.

⁹⁷ See for e.g. Dem. 21.176; 29.24; 37.56; Ant. 6.9; Lys. 5.3; 7.25-9.

This brings me to the link between this chapter and the next, which examines the Greek perceptions of 'personhood'. The Greeks, interpreting the person as overwhelmingly a social being which primarily was a constituent of the polis and only secondarily an 'individual', evaluated one's personality by reference to his adherence to shared values. Thus, any person shown to act in uniformity with them was simultaneously credited with loyalty to the polis and its laws. Contrastingly, disrespect for collective norms (as revealed by reference to past acts) reflected the existence of character flaws which, in the extreme, proved a detachment of the person from the community. In the next chapter therefore these Greek perceptions of the 'person' will be discussed and more light will be shed on litigants' patterns of argumentation in Athenian courts.

5 CHAPTER FIVE: GREEK PERCEPTIONS OF 'PERSONALITY' APPLIED IN THE ATHENIAN COURTS

In the previous chapters I have highlighted the problems and controversies surrounding the interpretation of the wide use of character evidence in the courts of classical Athens. Chapter 1 aimed at the presentation of the issue in its entirety. The wide invocation of argumentation from character is not a peculiar feature of the Athenian courts nor is it to be found only in fourth century sources. On the contrary, the presence of this type of argumentation from Homer onwards, in both judicial and other contexts, calls for a magnification of perspective in order to give a universal explanation for this attitude. Chapter 2 confined the perspective to the Athenian legal system, focusing on the factors that provided formal incentives for Athenian litigants to resort to a wide use of character evidence. The mere presence of such formal enticements in the judicial context calls for a plausible exegesis. Chapter 3 proposes that the rationale behind the wide argumentation from character is to be found in the Greek ideas of 'character'. The conclusions offered in this chapter are applied in Chapter 4 in order to analyse the ways and methods that the Athenians used to portray their characters. The main suggestion of this chapter is that the Greek assumptions about character called for (and caused) a wide invocation of character evidence, especially in the form of several characteristic past acts. The current chapter aims to complete the explanation of this practice. This is to be found in Greek ideas of 'personality'.

The issues of 'personality' and 'personhood' are problematic since controversy persists as to the particular definitions and uses of these words¹. Ancient models of the 'person' differ significantly from the prevalent modern theories. However, latest trends in the philosophy of mind and ethics reveal a shift to the ancient ones, as providing a more plausible model. These theories are not just abstract philosophical enquiries. They deeply penetrate the 'collective mind' and form what could be described as "common perceptions of

¹ The range of (everyday or more technical) meanings of 'personality' and 'self' simply reveal an aspect of the problem. Cf. Gill (1996), pp. 1-2.

'personality'". As a result, 'human beings' or 'individuals' whose ideas of their 'selves' are influenced by the mere fact that they find themselves surrounded by predefined structures (e.g. the modern state), gradually internalise the prevalent opinions of their groups. Thereafter, these assumptions influence every aspect of public and private life, such as art, politics and ethics. As a matter of fact, rules of relevance and argumentation in courts have also been substantially influenced by modern ideas of 'personality' and 'human motivation', restricting the use of character evidence as far as possible. This important factor ought not to be neglected in any discussion of the issue, and in particular in what concerns us, specifically evaluations of 'relevance' and discussions about the legitimate extent of character evidence in courts.

In what follows I will contrast modern with ancient philosophical models of 'personality', applying the latter to the context of Athenian courts. Building on the work of modern scholars who study the ancient ideas of the human mind and its functions, we will discover their mode of thinking, decision-making, and acting. The application of these ideas in the context of the Athenian courts will reveal an underlying (maybe only partly conscious) rationale for the wide use of character evidence. Furthermore, such an effort will allow us to evaluate objectively the relevance of such argumentation in relation to their standards and perceptions. The enquiry will proceed with a contrast of modern to ancient philosophy of ethics, which further illuminates litigants' ethical motivation as presented in their speeches. This undertaking will allow an assessment of their arguments' substance and provide us with a model for the interpretation of problematic cases (e.g. the invocation of liturgies). The study of ancient 'personality' will be permeated with the division between 'shame-culture' and 'guilt-culture' and its implications.

5.1 Models of the Human Mind: Action-Theory and Practical Reasoning

In what follows examination will be offered of the approach to human motivation and action of modern philosophers of the mind, and comparison will be made with those of the Greeks. Christopher Gill, in his seminal work on Greek

'personality'², building on the work of modern thinkers, offers a plausible model of interpretation of Greek psychology and motivation. According to him, the preponderate Cartesian model of the human mind, for which mental processes and actions derive from a single source of consciousness (a unitary 'I'), can prove misleading when applied to ancient Greek psychology. Contemporary thinkers³ question the Cartesian model as being overly 'subjective', replacing it with a more appropriate, which understands human action in 'objective' (non-subject-centred) terms⁴. For instance, human action can be interpreted as motivated by reasons and reasoning rather than by conscious acts of will⁵. Following such an approach, Greek psychology and perception of human motivation can be best understood and evaluated on their own terms, rejecting the misleading and, until recently, very influential developmental accounts that evaluated Greek examples of human action by reference to Cartesian and post-Cartesian ones⁶.

Contemporary action-theory accepts that an agent's reasons for a given action provide a plausible causal explanation for that action⁷. An agent's reasons for acting illuminate the causes which produce that action and can be best understood in objective (third-personal) modes of enquiry. As a result, prominent modern notions such as a person's (as a unified locus of self-consciousness) 'autonomy of the will' in every single instance of his life are challenged. Furthermore, such 'objectivist' trends find their precursors in Greek literature and philosophy, either in Homeric psychology or in Aristotle's account of the 'practical syllogism'. In this light, human action is presented as following by a process of logical reasoning, whose stages express the human being's beliefs and desires which finally cause that action. This kind of practical syllogism has its roots in the 'crucial mark of human rationality', namely "the ability to conceptualise (to structure one's responses in terms of universal

² Gill (1996).

³ See for e.g. Williams (1993); Wilkes (1988); for a detailed discussion and bibliography see Gill (1996), Ch. 1.1-2.

⁴ For the definition of 'subjective' and 'objective' in this context see Gill (1996), pp. 6-7.

⁵ Cf. Gill (1996), p. 12.

⁶ Prominent developmental accounts are those of Snell (1953); and Adkins (1970). For criticism of these accounts see Gill (1996), Ch. 1.1.

⁷ Davidson (1980).

concepts), and – a capacity implied by conceptualisation – the ability to *reason*, to make inferences and draw conclusions”⁸.

Inferential *reasoning*, as a source of human action, can be divided into ‘means-end’ type and ‘rule-case’ type. In both cases the agent decides the ‘end’ to be attained by reference to his beliefs and desires. In the first type of reasoning, the action is directed ‘through the possible’, by evaluating the efficacy and difficulty of available means for achieving that ‘end’. In the second type of reasoning, the present case is placed into a general class. The agent deduces the appropriate mode of action from a preconceived set of actions that form the ‘rule’ which according to his experiences or perceptions can achieve that ‘end’. To use a Homeric example, Odysseus (without considering the available means) applies to his own case the general principle that “whoever is to be best in battle must stand his ground strongly” (Il. 11.409-10)⁹. Both types of reasoning, nevertheless, have significant implications for how others perceive and evaluate a person’s actions. Additionally, the fact that human action is determined by reference to one’s experiences and presuppositions (in the form of the beliefs used for reasoning and the ways of forming desires) and exhibits the sense of time (the ability to weigh the advantages of future courses of action, and the sense of one’s own past)¹⁰, has equally important effects, especially (as will be demonstrated) in a courtroom. For instance, past acts acquire an exceptionally predictive (and probative) force since (after a process of conceptualisation) they may expose a human’s characteristic beliefs and desires.

Patterns of behaviour may be abstracted in order to form character traits and reveal the person’s internalised beliefs and typical desires that direct his action. As a result, it becomes easier to infer the usual ‘ends’ that such a person pursues and the ‘means’ by which this person uses to attain them, i.e. his characteristic ‘practical syllogism’. In other words, ‘rule-case’ and ‘means-end’ reasoning can serve the purposes of uncovering (or attributing) motivation and

⁸ Gill (1996), p. 52.

⁹ Gill (1996), p. 53; for further discussion of this passage and other cases of Homeric deliberation see Ch. 1.3-4.

¹⁰ Gill (1996), p. 55.

assessing the facts in light of litigants' characteristic conduct, thus making the reconstruction of the 'true facts' more probable.

The above considerations are negated by the modern (Cartesian and post-Cartesian) conception of the human mind. Interpretation of human action as the independent decision, detached from the ethical environment, of a self-conscious subject, whose 'autonomy of the will' in every single instance of his life is recognised, automatically diminishes character's probative value. Past acts can no more serve as possible indicators of future behaviour (in the form that has been described above) and each act is independent and cut off from the rest (dissociated from the agent's 'characteristic' reasoning). In the context of the courts in particular, this preconception of human action and motivation has banished as irrelevant any reference to litigants' previous conduct, leaving small room for invocation of previous offences of the same type. The above reasoning leads us to infer that even conclusions as to the 'liberality' or 'strictness' of notions of relevance may be totally misleading and unwarranted, especially when not specifying the normative model of interpretation and the reasons for its application. The following examples aim to illustrate and prove the appropriateness of the 'objective' model of human motivation to Athenian court speeches in order to attain a more plausible interpretation of their content.

5.1.1 The Model Applied to Forensic Speeches

In order to prove the suitability of this model in interpreting forensic speeches it will be applied to divergent examples, spread through time and referring to different types of cases. The analysis will begin with Antiphon's First Tetralogy, a model speech which exemplifies modes of argumentation based on probability. Then real cases will be examined to see whether any patterns may be extracted. In Antiphon's First Tetralogy the facts are in dispute, the only undeniable being the discovery of two murdered men (a master and a slave) in a dark street of Athens. The only evidence is the late slave's oral testimony shortly before he died, whereby he allegedly recognised the defendant as their murderer. Arguments from probability and potential motives are adduced in order to prove the guilt or the innocence of the defendant.

The prosecutor aims to demonstrate a motive for the defendant. In order to ascribe it he uses the model of human motivation described above. Based on reasons for reasoning and on the stereotypical beliefs of the audience, he tries to *'impose a plausible end'* that the defendant sought. According to his logical arguments and by reference to 'rule-cases', no other man had any motive in killing these people (Antiph. 2.1.4). Common criminals are not likely to have killed the men since, their 'end' being stealing their cloaks, they failed to do so. Neither was the killer drunk, since he would have been identified by his fellow drinkers. Referring to similar rule-cases he concludes that no one but the defendant had a motive to kill them. The 'end' imposed on him was to avoid further prosecution by the victim (after he had been recently indicted by him and convicted), and after rendering unattainable all the other available 'means' of achieving this 'end', the only way left was murder. Therefore the prosecutor by reference to rule-case type reasoning excluded all the other candidates and –by inference- imposed an 'end' to be achieved from the defendant. By reference to the background of the case (previous convictions and certainty of further prosecution) he consolidates the presence of this 'end' and excludes all other available 'means' of achieving it¹¹, apart from the one that solves the case: murder.

The defendant, on the other hand, rejects the prosecutor's arguments by reference to the same types of practical reasoning, rather than to the Cartesian subjective model. Firstly, through a 'means-end' type of reasoning, he questions the very 'means' of achieving the 'end' imposed on him by the prosecutor, taking as valid the hypothesis that this 'end' is true. In accordance with Aristotle's 'practical syllogism' he states that even if he wanted the victims dead, there were *easier* and *safer* means of achieving it, such as not being present at the murder (Antiph. 2.2.8). As a result, even if the 'end' was valid, the prosecutor's allegation that no other 'means' were available collapses. Then, he questions the imposed 'end' (Antiph. 2.2.9) stating that he would prefer to live without property (after a possible further conviction) than be executed (as a penalty for murder). In order to prove the above (namely the rejection of motive

¹¹ The background of the case and the enmity of the defendant with the victim made reconciliation unattainable. Furthermore, the defendant was quite certain that he would be convicted and suffering heavy penalty; see Ant. 2.1.8.

by denying the 'end') he sketches his character by reference to 'rule-cases'. His past acts (liturgies, loans to friends, performance of sacrifices and obedience to laws etc.) prove –by conceptualisation- the virtue of his character, making him – by inference – an unlikely candidate to such kind of conduct. In his words: "That's the way I am, so don't convict me of anything unholy or disgraceful" (Antiph. 2.2.12)¹².

In the concluding speeches, the prosecutor silences the character aspect of his opponent's speech, insisting on the presence of motive by reemphasising a 'rule-case' type of human action: his prosperity is not an indication of his innocence; on the contrary "fear of losing this prosperity makes it likely that he committed this unholy murder" (Antiph. 2.3.8). Furthermore, he insists that on the balance of probabilities, homicide was the easiest available 'means' for the defendant to achieve his 'end'. The defendant replies by reference –again- to 'rule-cases' (Antiph. 2.4.5, 8ff.) insisting on his character and on his social role, stating that rich men do not look for trouble (2.4.9).

The aforementioned method of argumentation about human motivation has significant implications. Firstly, reference to the background of the case creates a likely motive, making more probable the attribution of an 'end' to the opponent¹³. If human motivation is based on reasons and reasoning, then plausible reasons must be adduced in order to impose a believable 'end' to be achieved by the deed that triggered the legal dispute. Secondly, inferential reasoning by the jurors may take two forms, which I call 'external rule-case' type and 'internal rule-case' type, based on their experiences and stereotypical presuppositions. The 'external rule-case' type, bearing on issues of status, class or social role takes the form of "Rich men do not fight in dark streets – He is a

¹² On serving the polis with 'person and property' as the essence of good citizenship, see Christ (2006). On liturgies as testimonies of good character see Rubinstein (2000), pp. 213 ff. On the extension of liturgies as to embrace any kind of virtuous public conduct Lewis (1960), Saunders (1991), p. 114; cf. Millett (1998), pp. 241-2.

¹³ This model of interpretation puts the (usual) discussions of the background to the dispute and its context within the logical argumentation referring to the *specific act* that gave rise to the legal dispute. In order to prove the commission of this act by the opponent, a plausible motive should be offered, and this was usually discovered in the history of the adversaries' relations. This model of interpretation rejects Lanni's assertions as to the irrelevance of such argumentation and its interpretation as providing more general reasons to the jurors to reach a verdict based on general notions of justice and equity rather than strict reasoning about the particular case. See Lanni (2006).

rich man – He did not fight”, whereas the ‘internal rule-case’ type, refers to a person’s character and takes the form “His past acts show that he is a decent man – Decent men do not commit this type of acts – He did not commit that act”. Finally, this model has important implications as to a ‘means-end’ type of human motivation in the courts, since once an ‘end’ seems probable, the inspector has to question and evaluate divergent courses of actions to achieve it (i.e. the ‘means’). Thus a litigant in such an adversarial context will try to impose an ‘end’ on the opponent (this ‘end’ being legal/ethical or illegal/unethical per se) and then reject all the available ‘means’ of achieving it, apart from the one which solves the particular legal case.

The above considerations highlight the importance and the relevance of character in inferring or attributing motivation and action, especially in relation to the *particular act* which generated litigation¹⁴. Therefore in such uncertain factual circumstances, the objective consideration of human motivation by reference to one’s characteristic beliefs and desires (as exposed by past acts) and –by conceptualisation- to one’s character, aim at answering (sometimes in terms of probability) the question: “Did the defendant commit the illegal act”?

After exemplifying the framework and the model by reference to Antiphon’s First Tetralogy, real court speeches and divergent types of legal cases may be examined. Lysias 4 is a defence speech presented before the Areopagus on a (possibly private) charge of premeditated wounding¹⁵. The prosecutor has placed an ‘imposed end’ of homicide on the defendant (Lys. 4.5), based on their enmity and former disputes arising particularly from a process of *antidosis*. The latter, following the pattern of questioning the available ‘means’ of reaching the imposed (by the adversary) ‘end’, concludes that if ‘premeditated wounding’ was actually what he looked for, he would have already carefully planned the alleged plot by taking a weapon with him. What is different in relation to Antiphon’s First Tetralogy (and forms a pattern as will be proved) is the questioning of the prosecutor’s motive in bringing the charge and the imposition

¹⁴ My interpretation therefore is diametrically opposed from Cohen (1995) and Ober (1989), by highlighting the role of the courts (and of litigants’ speeches) as ‘objective discoverers of truth’, with character evidence significantly facilitating this quest.

¹⁵ On the problems surrounding this particular offence and the speech in general see Todd (2008).

of an 'end' on him in an entirely symmetrical form of argumentation. Without the need for proof as to the 'means' that the prosecutor used (since the 'means' used was the litigation *per se*), defendants try to replace the alleged 'end' of achieving 'justice'¹⁶ by imposing a less noble (or unethical) one as the cause of initiating the (false) prosecution.

This is consistent with our model of human motivation since, with the 'means' (i.e. prosecution) being already present, the inspector should discover the 'ends'. If the 'ends' were indeed 'justice' and 'legality' and remained undisputed by the defendant, then the prosecution automatically becomes valid, diminishing the possibilities of the defendant's innocence. On the other hand, if the 'ends' are questioned and replaced by condemnable ones the prosecution in all probability becomes frivolous. In this particular case therefore, the defendant argues that the prosecutor initiated this false prosecution in order to avoid paying the amount owed and retain a woman who was possibly to be exchanged as well in the *antidosis* (Lys. 4.8). The background to the dispute illuminated his motivation as well. In an all-or-nothing adversarial legal dispute both parties' motivation and actions are at stake, interpreted by the 'objective' model discussed above. Nonetheless, at the centre of every argument stand the facts that triggered the particular legal case. The jurors had to decide as to whose party's interpretation of the events was closer to the truth.

Lysias 5 (For Callias), regardless of its brevity further illuminates the issue. Referring to an 'external rule-case' by implication of the testifiers' social role and status as slaves, the speaker imposes on them an 'end' to be achieved (namely, to be released) by the wrongful 'means' of false witnessing. Their status and the circumstances make the use of *inappropriate* 'means' (which in the particular case condemn the defendant) more probable. In Lysias 7 the defendant in a case (*graphe*) of impiety (uprooting a sacred olive-stump) disputes *both* the imposed (by the prosecutor) 'end' as implausible *and* the 'means' of achieving that 'end'. Stating that he was not compelled by poverty to venture on such an act, or that the plot was declining in value while the stump existed (Lys. 7.14) he finds no plausible 'end' that could have motivated him.

¹⁶ Although sometimes this 'end' is coupled with secondary reasons such as 'revenge'.

Furthermore, by reference to his positive characteristics (his great regard for his native land and for sacred olives, his lavish spending on liturgies and trierarchies etc.), he insists that such a deed does not coincide with a man of his sort (Lys. 7.25, 31, 41). On the other hand, even if the 'end' was plausible, easier 'means' of achieving it were possible (7.15, 24) especially for a man of his intelligence (7.12). Contrastingly, the opponent's 'end' was not the attainment of 'justice'. This is proved by the fact that although the defendant provided him with all 'means' possible for attaining this 'end', the prosecutor rejected them and insisted on his false prosecution (Lys. 7.34)¹⁷. Therefore, since the prosecutor's 'end' was not justice, another 'end' has to be found. As usual, the imposed 'end' for a false prosecution is money (Lys. 7.39), and the exegesis offered for its initiation is that this was the only 'means' available for reaching this 'end' (7.40).

In Demosthenes 47 the prosecutor in a *dike pseudomarturion* argues that the opponents used illegal and violent 'means' in accordance with their character and past acts, their 'end' being the avoidance of the current trial which would expose their lies and serve as aggravating evidence for the original trial¹⁸. In Demosthenes 53, Apollodorus, the plaintiff of an *apographe*, denies any improper motive for initiating this suit and replaces it (by reference to the background of the dispute) with the more plausible and noble 'ends' of revenge in accordance with justice. The 'means' available for taking this revenge was the initiation of the current *apographe*, in accordance with law. In Lysurgus 1, the prosecutor of an *eisangelia for treason* rejects the opponent's alleged 'end' for leaving Athens (i.e. trade; cf. Lyc. 1.55) by reference to the 'means' he used (Lyc. 18ff.). By reference to 'external rule-cases' he compares the 'means' that tradesmen use when departing, with the uncommon ones used by the defendant¹⁹. These 'means' and his character (by reference to 'internal rule-

¹⁷ This passage, if interpreted in light of this model, illuminates the inner reasoning behind the challenges (dares) in Athenian courts. Slaves' tortures and oath-challenges provide the 'means' to attain the 'ends' of learning the truth and achieving justice. Facilitation of this 'means' signifies adherence to the 'end' of truth, while their rejection reveals ulterior motives. For the use of 'dares', see Johnstone (1999). Their extensive presence in Athenian courts highlights the dominance of disputes about 'facts' rather than 'law'.

¹⁸ For discussion of this case see Ch. 4.

¹⁹ Lyc. 1.55: "The first point is that men travelling as merchants do not leave by the postern on the beach; they embark inside the harbour with all their friends watching to see them off.

case' type of reasoning through Leocrates' past acts) prove the 'end' of treason. In Lysias 16, the defendant of a *dokimasia*, who is accused for collaboration with the Thirty, rejects any motive on his part for such conduct. His past acts conceptualised reveal an egalitarian and *philopolis* character, wholeheartedly adhering to the polis' democratic norms ('internal rule-case'; Lys. 16.10ff.). He also rejects the 'external rule-case' of judging by one's appearance and imposing oligarchic affiliations from the mere fact that a man grows his hair long (Lys. 16.18-20). As a result, no collaboration with the Thirty may be attributed to him.

The above patterns of argumentation remain intact in *dikai* as well, both on the part of the prosecution and on the defence. Demosthenes 54 (*Against Conon*) is a prosecution speech in a *dike aikeias* (private prosecution for assault). The background to the particular deed that generated the proceedings illuminates the case as to the opponents' characters and (as a result) their motives. Their character is portrayed by reference to violent and hubristic behaviour (54.3-6), revealing a characteristic pattern of practical syllogism ('internal rule-case' type). The tension alleged by the opponent between the parties led to the creation of a motive for an unprovoked attack (the opponents' usual 'means' of achieving their 'ends' as presented by the speaker). The 'end' as portrayed in the assaulter's conduct was the violent humiliation of the victim (54.9). On the other hand, the defendants would reject such a motive and would downgrade the case to a usual violent brawl between youngsters (54.14ff.). This is rejected by the prosecutor by reference to their own good character (being incapable for such deeds, and achieving the 'end' of justice by legal and mild 'means' 54.15-6, 24)²⁰ and to the opponent's (distinguishing them, especially the 'father' Conon, from the 'brawl between youngsters' 'external rule-case' 54.22-4).

After establishing the true facts of the case, the prosecutor proceeds to reject the opponent's alleged challenge to torture the slaves, Conon's oath-taking, and to prove the falsity of the defendant's witness testimonies. Starting with the first,

Secondly, they go along with their attendant slave, not with their mistress and her maids. Besides, what need had this Athenian to stay five years in Megara as a merchant?"

²⁰ The invocation of harsher, though irrelevant, laws serves to highlight the mild 'means' via which the prosecutor chases his 'ends'. As a character trait, it may be interpreted as modesty and reasonableness, standing in opposition to the defendants' illegality and hubris.

the prosecutor rejects the allegation that the defendant asked for the slaves' torture in order to establish the true facts and thus attain justice, by exposing the fallaciousness of their 'means' (54.30). The fact that the challenge was issued too late, missing many opportunities hitherto, exposes the true 'end' of their challenge which was to delay the main trial (by reference to their usual practical reasoning, since they had employed such delaying tactics in the past too; 54. 26, 29). A similar argument from precedent (revealing Conon's character by reference to his past acts) reveals the spuriousness of his oaths (54.39-40). Finally, the falsity of the testimonies is proved firstly by reference to an 'external rule-case' whereby partisan witnesses should not be afforded the same credibility as neutral ones (54.32ff.). Thereafter, the prosecutor proceeds to an 'internal rule-case' type of reasoning, exposing the particular witnesses' unreliable character, thus making them probable candidates for perjury (54.34ff.).

In Demosthenes 55, the speech comes from a defendant in a *dike blabes* (private suit for damages). The prosecutor alleges that the defendant's building of a wall inhibiting drainage caused his property to flood after a heavy storm. Again, the background to the dispute illuminates the particular case by exposing the motive of the prosecutor in bringing a false charge, making the imposed (by the defendant) 'end' more probable. The opponent's past acts reveal a desire to take by any means the defendant's property (55.1-2). The previous inaction of the prosecutor through the course of many years (55.4-7) reveals that the defendant had not committed any illegal or inappropriate deed. This omission, coupled with the fact that he did not suffer any significant damage (52.21-2), excludes the 'end' of justice, replacing it with the 'end' of misappropriating his property. The 'means' for achieving it is the current false prosecution.

To recap, in accordance with the Greek model of practical reasoning (and modern action-theory), character in Athenian courts is invoked to illuminate the motives for committing the actionable deed (defendant) or initiating the prosecution (prosecutor). This motive may be exposed [by reference to a person's character (by conceptualisation as revealed by his past acts)] by questioning (and usually imposing) the 'end' to be achieved and by evaluating

the 'means' by which this 'end' was sought. Character also reinforces stereotypical presuppositions by reference to 'rule-cases'. According to this type of reasoning, the person (his character traits, his status, or his action) is placed in a more general category, making the existence of a motive more or less probable by reference to the 'rule'. This interpretation of character evidence in Athenian courts (a person's past acts, his characteristic practical syllogism, and the background to the dispute) are directly relevant to the legal case and are invoked to illuminate the particular facts which triggered the charge²¹. Jurors were not asked to give their verdicts on litigants' characters but litigants' characters illuminated the facts of the legal case as these were specified in the written plaint²².

5.1.2 The Impact of the Verdict as a Supplementary Reason for Reasoning

The Greek mode of practical reasoning sheds light on yet another problematic feature of Athenian courts, namely the numerous references to the impact of a verdict. These could take three forms and provide a supplementary reason for reaching a verdict: impact on the jurors, impact on the parties, and impact on the polis. However, it is of utmost importance to remember that such references were *always* coupled with justice (in the strict legal sense), thus providing yet another (supplementary) reason for reasoning. In other words, having proved the justice of their case, litigants proceeded to strengthen their argumentation by reference to further reasons which (correctly interpreted) would emphasise the justice of their case.

To begin then, we may examine litigants' (especially defendants') references to the harsh impact of an adverse verdict²³. Appeals to pity were not uncommon in Athenian courtrooms, sometimes being supplemented by (actual or verbal)

²¹ Pace Christ (1998a), pp. 41 and 196.

²² On the role of the 'plaint' see Harris (2013). Harris convincingly asserts that the written plaint served as the 'point' on which litigants' argumentation should refer to and jurors' decision should focus. Therefore the requirement of 'speaking to the point' is best illustrated by reference to the written plaint.

²³ My interpretation of references to 'harsh impacts' opposes that of Lanni (2006), especially in the sense that Lanni interprets them as widening the legal case by introducing statements which could influence the jurors' decision by references to wider norms (such as equity). My interpretation supports the view that such references further illuminate the legal case, support argumentation about the innocence or guilt of a litigant and induce the jurors to decide in accordance with the law and their oath, by providing yet another reason for their reasoning.

simulation of supplication²⁴. Johnstone (1999) has extracted a pattern from this practice, namely that such appeals were adduced in cases of a real threat to the *oikos* of the defendant as a result of the jurors' verdict. This unjust threat is aggravated by the defendant's innocence, standing in contrast to the services that this particular *oikos* has offered to the polis²⁵. Following a similar rationale, questions of proportionality may come into play²⁶. Of particular importance is the fact that such appeals to pity are not received as inhibiting the rational judgment of the jurors; rather they serve to reinforce and assist it. Appeals to pity *presuppose the defendant's innocence* and are always adduced in order to highlight the *undeserved suffering* of the defendant (and as a result of his *oikos*), giving the jurors yet another valid reason for his acquittal²⁷.

In addition to the personal impact of an adverse verdict, references to its consequences on the polis at large were not uncommon. Even in present times, judges and juries think about the political cost of a decision and many times try to convey their verdicts in accordance with public policy²⁸. However, the Athenians seem to have placed more emphasis on such considerations, taking into account the relative instability and (alleged) insecurity of the polis and its constitution²⁹. Again, nonetheless, arguments about public impact are always adduced to reinforce the legality of one's case, offering one more reason to the jurors to decide in accordance with his story³⁰. Good management of property

²⁴ For the statistics of these approaches and further analysis see Johnstone (1999), pp. 109-120; on supplication in Athenian courts see Naiden (2004); 'pity' as an emotion will be further discussed in chapter 6.

²⁵ See for e.g. Lys. 3.47; Lys. 4.20; Lys. 7.41; Lys 9.21; Lys. 19.33; Lys. 20.35; Lys. 21.25; cf. Andoc. 1.146-9. Cf. Macdowell (1962), p. 163 where he observes that: "for the family to become extinct would be a misfortune not only to Athens, but also in the usual Greek view, to the dead members of the family itself".

²⁶ See esp. Lys. 24.6-9; Dem. 55.35. Likewise, arguments from reciprocity and requests for *charis* complete the aforementioned pattern.

²⁷ For 'pity' as a response to unmerited suffering' highlighting the innocence of a defendant, see Konstan (2000). This is not a case of 'jury nullification' since the defendant does not ask for 'pardon' (which implies an admission of 'guilt').

²⁸ Griffith (1997).

²⁹ The insecurity that the Athenians felt as regards the democratic constitution began with the reforms of Kleisthenes and the establishment of democracy in 508/7 and reached its climax after the two short periods of oligarchic coups in 411/10 and 404/3. However, the anti-tyrannical sentiment and the insecurity about the democratic constitution were especially recurrent in times of crises. This is best reflected by the passing of **relevant** anti-tyranny legislation, e.g. the alleged original purpose of ostracism, the decree of Demophantus (410 BC), and the law of Eukrates (337/6 BC).

³⁰ The fact that 'public impact argumentation' supplemented, rather than replaced, the legal argument is proven by Harris (2007b) in his discussion of liturgies. Although I do not agree with

and future material contribution to the polis is a well-attested pattern of forensic speeches³¹. Likewise, non-pecuniary considerations could be brought forward³² and especially the impact that a verdict would have on the life of the polis, as a sign of approval or disapproval of behaviour. In this kind of reasoning, verdicts would become known and be circulated throughout the polis or in some occasions of high profile cases, throughout the Greek world. Therefore, litigants tried to persuade the jurors that voting for their case would have an educational impact on the whole city and especially on the youth³³. Conversely, a verdict could have an adverse impact on the legal system and the courts in particular if, for example, a sycophant's prosecution would be upheld. This would open the floodgates to similar false prosecutions.

Finally, references to the impact of the verdict on jurors (personally, not as representatives of the polis) complete the picture. Jurors are frequently reminded to vote in accordance with the law, especially by reference to the Heliastic oath³⁴. Although many restrictions³⁵ were offered in order to limit the jurors' discretion as to whether they should apply the letter of the law in their decisions, their informality jeopardised their effectiveness. Still, the fact that no Athenian litigant asks them (even implicitly) to disregard the law by giving precedence to other considerations, and the fact that no defendant admits his guilt and expresses remorse (by offering, again, extraneous reasons and benefits as a recompense and incentive for lenient treatment), are significant indicators that cases were decided in accordance with the law³⁶. Furthermore, jurors were reminded of the social sanctions that an allegedly illegal verdict

his assertion that liturgies were invoked in order to influence jurors on the *timesis* phase (otherwise they could be seen as irrelevant aberrations), his analysis of verdicts as uninfluenced by 'public impact argumentation' when this stood in opposition to legality is convincing; see for e.g. Hyp. (*Euxenippus*) at 34.

³¹ See for e.g. Lys. 19.61; cf. 20.36; 21.13-5; 19, 25.

³² Andoc. 1.145; Lys. 6.48. This kind of considerations is reinforced by reference to a flip-side argument found in Lys. 14.44: "what is more, even if he left the city he could do you no harm, craven and pauper that he is, with no ability for business, at feud with his own folk and hated by everyone else; so neither is there any reason here to be heedful of him".

³³ Aeschin. 2.180; Aeschin. 1.186; 1.194; Lys. Lys. 1.47; Lys. 5.5; 14.45; Lys. Fr.7 [134].

³⁴ On the statistics of the Heliastic oath in forensic speeches, see Johnstone (1999), pp. 33-45; my view regarding the role and effect of the *dikastic* oath in Athenian courts coincides with that of Harris (2006a), *contra* Christ (1998a), pp. 194-6.

³⁵ E.g. the Heliastic oath, the written plaint, the *echinoi*, social sanctions, etc.

³⁶ Cf. Aristotle, Rhet. 1358b32-33: "For example, a man on trial does not always deny that an act has been committed or damage inflicted by him, but he will never admit that the act is unjust; for otherwise a trial would be unnecessary".

would produce, referring especially to the shame this would incur when facing their families³⁷.

To conclude then, problematic (and at first glance irrelevant) appeals may be interpreted in light of the Greek model of human motivation as incentives for further reasoning emphasising the proper outcome to the particular legal case. Litigants present themselves as ‘adherents’ of the community’s values, obeying its norms, seeking common ‘ends’ and having mutual interests with the jurors. The ‘end’ of achieving legal justice in a particular case is the most important reason influencing the jurors’ reasoning for reaching their verdict. In conformity with this reason, other supplementary ones were offered in order to strengthen a litigant’s case and convince the jurors that their decision promotes the common interest. Although a defendant’s innocence in a particular case would be enough to convince the jurors to vote for acquittal (in accordance with their oath), this is highlighted by reference to the undeserved and disproportionate suffering and / or the (past and future) services to the community. The common ‘end’ is the implementation of justice in both its legal and its wider meaning (since these were *identical* in the forensic speeches) and the ‘means’ to achieve this is the appropriate verdict. Such an outcome serves the interests of the jurors (in keeping their oath and implementing justice ‘in accordance with the laws’), of the polis (in a utilitarian and an ethical sense), and of the speaker (avoiding the ‘unmerited suffering’). As a result, in accordance with the Greek model of practical reasoning, references to the impact of a verdict (which always coincided with legal justice) cohere with legal argumentation and offer fitting (secondary) reasons for reasoning, without – in principle - obstructing rational and impartial judgment³⁸.

5.2 ‘Participant’ Personality and Ethical Motivation

In the preceding section it has been demonstrated how human action may be interpreted in ‘objective’ terms. That is, a person’s beliefs and desires provide

³⁷ See for e.g. Aes. 1.187: “What then, pray, are you going to answer, you in whose hands the decision now rests, when your sons ask you whether you voted for conviction or acquittal? When you acknowledge that you set Timarchus free, will you not at the same time be overturning our whole system of training the youth?”

³⁸ Emotional appeals (e.g. pity, anger, envy etc.) as consistent with legal argumentation and ‘emotions’ as consistent with ‘reason’ will be discussed in chapter 6.

the reasons for reasoning which generate human motivation and action. This model is diametrically opposed to the modern 'subjective' view of human action which is based on the Cartesian philosophy of mind. In a similar vein, ancient ethical motivation differs from the modern Kantian and post-Kantian model. Gill, based on the work of Williams and MacIntyre, develops his model of the 'ancient self' which he describes as 'objective-participant' (as opposed to the modern 'subjective-individualist'). The Kantian model presupposes that moral life is grounded in a distinctive individualistic stance adopted by the moral agent. A key example of this idea "is Kant's thesis that the moral response involves, or implies, an act of 'autonomy', or self-legislation, by which the individual agent binds himself to universal principles"³⁹. This fundamentally 'individual-centred' approach prescribes that "only the individual herself (the possessor of a uniquely subjective viewpoint) can determine the validity of the rules that he legislates for herself"⁴⁰. Such a 'person' exercises his capacity for autonomy by establishing moral principles for himself, in a process that involves "abstraction from localised interpersonal and communal attachments and from the emotions and desires associated with these"⁴¹.

This kind of moral 'autonomy' coupled with the 'autonomy of the will' presupposed for every single instance of a person's life, may have implications for a legal system and its courts. Legal enactments may be interpreted as utilitarian expressions of 'positive law' distinct from the ethics of a community. Law, lacking the moral foundation provided by concurrence with the ('critical' or 'conventional') morality of the community, may be received as a useful –though independent- tool for subjecting individuals to the governance of 'positive' rules. Any question concerning ethics might be questioned and ejected from the legal discourse, making obsolete any discussion about the identification of legal with moral norms. The significance of the individual's level of adherence to conventional ethics is devalued and the court's function is as an (ideally) autonomous realm. Furthermore, the notion of 'moral autonomy' presupposes the idea that one's ethical stance should not be evaluated by reference to communal norms, rendering issues of 'merit' based on 'overall personality'

³⁹ Gill (1996), p. 7.

⁴⁰ See Gill (1996), p. 9, with n. 27.

⁴¹ See Gill (1996), p. 11 regarding the 'subjective-individualist conception' of the self.

meaningless. As a result, evidence from character in modern courts, where it is already considered irrelevant according to the modern 'subjective' model of human action, is further restricted by reference to the agent's 'ethical motivation' as well.

On the other hand, current interpretations of the ancient model of ethical motivation promote a less 'individual-centred' approach. According to such theories, ethical life should be understood "primarily in terms of the development of dispositions by whole-hearted engagement in the value-bearing practices, roles, and modes of relationship of a specific society"⁴². Based on the idea that human beings are functionally adapted to participate in interpersonal and communal relationships, this ethical life is at the most fundamental level shared rather than individuated. For Williams, ethical knowledge is achieved in a life guided by 'thick' (culturally localised) ethical values rather than by 'thin' (universalised) ones. For MacIntyre in particular, ethical thinking is influenced by a conception of what is required by the social role which each individual inhabits⁴³. Thus, in contrast to the Kantian model, the fullest possible (practical and psychological) engagement of the individual with the localised nexus of roles and relationships in which he finds himself, dictates, forms, and transforms the beliefs which produce the desires and ultimately the reasoning for human action. The kind of reasons and reasoning taken to motivate one's actions cannot be analysed adequately without reference to his engagement with this localised nexus. In other words the individual agent's actions are based "on reasons and reasoning informed by the action-guiding beliefs of his community and by his engagement with his social role"⁴⁴ and these, in turn, are effectuated and publicised by these actions.

This analysis brings out the essence of the different approaches to ethical motivation as exemplified by the aforementioned opposing theories. The implications that such divergent approaches have in courts are obvious, though it might be useful to specify them. The ancient 'participant' model of the self presupposes an -as far as possible total- adherence to the communal ethical

⁴² Gill (1996), p. 7.

⁴³ MacIntyre (1985), p. 128.

⁴⁴ Gill (1996), p. 86, cf. pp. 175-6.

norms. Any claim to moral 'individualism' or any attachment of the individual to 'universal' norms become absurd, with the result that such a moral agent becomes 'moral outsider' suffering the dreadful (especially for an ancient) penalty of living in isolation. A human being's ethical stance is compared with accepted standards, with actions and ethical motives being evaluated according to these. Total adherence to these norms presupposes their practical effectuation, signifying a 'worthy', properly motivated social 'participant'. Additionally, if ethical beliefs are taken as directing human action, then a person proving their internalisation by previous conduct by being motivated by the 'correct ethical beliefs', renders himself (almost) incapable of 'unethical action'. Taking into consideration the ancient legal system's identification of 'positive' law with 'ethical' norms (the first following and officialising the second), then the aforementioned 'ethical person' renders himself normally incapable of 'illegal action' as well. The ancient 'participant' ethical model which holds that adherence to the community's proper ethical beliefs directs virtuous (according to this community's standards) action, renders 'character' a central means of evaluating, understanding, and testing human deeds.

To the above analysis, the characteristics of a small-scale agricultural community (applicable to Athens whether it was indeed a 'face to face' society or not) or a 'shame-culture' shall be calculated. There is no need here to enter into a detailed examination of the different approaches and (alleged) distinctions offered by scholars between 'shame-cultures' and 'guilt-cultures'⁴⁵. It has been convincingly proved that sharp dissimilarities between these are not justified⁴⁶. In ancient Greece (and classical Athens in particular) 'shame' was heaped on the individual agent not merely as an emotive reaction to external sanctions but as the result of self-criticism. Evidence shows that the communal standards of behaviour and the society's ethical norms were *internalised* by the individual agents⁴⁷, carrying with them the related ethical judgments⁴⁸. This process of

⁴⁵ Although there is no need to distinguish between 'shame-cultures' and 'guilt-cultures', classical Athens will be referred to as a 'shame-culture' for the sake of convenience.

⁴⁶ See Williams (1993); Cairns (1993); Konstan (2003).

⁴⁷ Cf. Plat. *Prot.* 325c-326e.

⁴⁸ Gill (1995), p. 25 describes this process as follows: "Shame, both in Greek and modern culture, does not depend simply on the force of the social judgments made by other people on one's actions. It also depends on the individual's *internalisation* of the ethical judgments made

internalisation may be evidenced by reference to the ‘internalised other’⁴⁹ (the imaginable figure who expresses society’s ethical judgment). Thus a (real or imagined) fear of external sanctions functioning in the conscience of the agent provides the catalyst for incurring the emotion of shame⁵⁰, simultaneously covering much of the ground which differentiates it from ‘guilt’.

A characteristic of such societies is emphasis on questions of honour and reputation. Although this difference between ‘shame-cultures’ and ‘guilt-cultures’ is not one of kind but of degree (placing more or less emphasis on issues of ‘reputation’, ‘honour’, ‘face’ etc.)⁵¹, the focus shifts from one’s actions and concentrates on the agent. To put it simply, questions such as ‘what kind of person one *is*’ tend to overshadow questions such as ‘what kind of actions this person *does*’⁵². As a result, emphasis is placed on the agent’s personality and character, as means of proof and relevant factors to be assessed for the interpretation of his acts. Nevertheless, as has already been shown, a person’s character is exposed through conceptualisation by reference to a multitude of past acts⁵³, and this in turn is (through inference) used to interpret past or predict future behaviour.

The relative identification between a citizen and his community in the ancient polis stands in contrast to the modern detachment (and resulting tension) between the individual and the state. In the ancient context, the habitual participation of the person in all the interpersonal nexuses of small-scale subcultures (*oikos*, neighbourhood, *demos*, phratry, and ultimately polis) signified the affiliation of the individual with these institutions⁵⁴. This attachment to each particular socio-political circle, which creates ethical *adherents* and

in one’s society, so that these become ‘one’s own’, as well as part of the discourse of the society”.

⁴⁹ Williams (1993), Ch. 4.

⁵⁰ ‘Shame’ as an emotion will be discussed in the Chapter 6.

⁵¹ Cairns (1993), p. 44.

⁵² Cairns (1993), p. 45: “[although] there is a certain amount of evidence which suggests that Greek culture actually did place greater emphasis on the excellences of persons and on ideal self-image than we do, the difference is again one of degree, for focus on agents rather than acts can only be a matter of emphasis; any focus on oneself as a certain type of person must take into account the character of one’s acts, and any rejection or repudiation of a specific act must encompass a conception of one’s selfhood.”.

⁵³ See Ch. 3 and 4.

⁵⁴ Evidenced for example by the emphasis the ancient Athenians placed on the demotic name for the identification of a certain individual.

outsiders, ultimately signifies a degree of interdependence between individual with, for instance, his polis, to the extent that their improvement or deterioration go hand in hand. Any individual act may have a bearing on the well-being or disintegration of the community; if this act is based on ethical beliefs and can be predicted by inference from 'character' or 'personality' (i.e. wholehearted adherence to the conventional behavioural norms of the community), then the emphasis put on 'what the person *is*' is justified.

The above outcomes, as drawn from psychology (in the form of the human being's 'participant' personality with its implications for the person's ethical motivation), social anthropology (as the characteristics of a 'shame-culture'), sociology and politics (in the relationship of the individual with surrounding structures, such as the state), need to be considered carefully when examining the use and relevance of character evidence in the courts of law. In what follows, the above models and their results will be applied in the courts of classical Athens.

5.2.1 The 'Participant' Person in the Athenian Courts

Our analysis of the above conclusions promotes the following reflections, provided by the analysis of the Athenian courtroom speeches' patterns of argumentation (sometimes heavily criticised by modern scholars):

- i) Litigants advertised their whole-hearted adherence to communal (conventional) ethical norms,
- ii) Legal adversaries compete as to the relative degree of internalisation of these norms,
- iii) Litigants compete within a coherent set of ethical norms officialised by the undisputed authority of the laws, and
- iv) Litigants observe the behavioural standards required by their social 'role'.

The results coupled with the general remarks offered in the previous section (5.1) will allow us to propose a new (all-embracing) interpretation of the role of character evidence in Athenian courts (and the Greek culture in general).

5.2.1.1 Whole-hearted Adherence to the Norms of the Polis

The main aim of Athenian litigants was to show that their *characteristic ethical motivation* was guided by the principles of their community. Their actions, being directed by cooperative values, are adduced to earn them complimentary characterisations such as *sophron* (self-controlled), *prothumos* (eager to serve the polis), and *ennomos* (law-abiding), while proving their respect for the informal rules of proper forms of social interaction such as *philia*. As a result, such an Athenian litigant whose (in accordance with the Greek ideas of 'character' and way of reasoning) numerous past acts prove a high degree of internalisation of the coherent, unquestioned set of communal ethical norms, proves himself an *ethical adherent* of the community and, by inference, a person incapable of performing illegal, anti-social acts.

There is no need to dwell extensively on the content of these norms since this theme is treated many times by respectable scholars⁵⁵. What is needed is to focus on the cooperative character of the majority of the norms adduced in Athenian courts. This proves that the Athenian courts were not arenas for competition through an arbitrary measurement of honour and status. Rather, in these institutions the publicised adherence to conventional ethics and the accomplishment of public services were taken as means of proof for the particular legal case. Virtuous past acts verified authentic internalisation of social norms leading in turn to honest, proper, cooperative citizen conduct. Appropriate ethical beliefs influenced analogous desires. I will offer just a few examples.

5.2.1.1.1 *Sophrosyne* or Antisocial Behaviour? – Hubris and Indecency

In Demosthenes 21, the famous statesman tries to prove his rival choregus Meidias' hubristic behaviour, which culminated in his assault during the religious festival of the Great Dionysia. Meidias' past acts⁵⁶ reveal his inherent antisocial and antidemocratic stance which achieved the status of a character trait.

⁵⁵ See for e.g. for *aidos* Cairns (1993); for *sophrosyne* Rademaker (2005); for manhood Roisman (2005); for litigiousness and bad citizenship Christ (1998a) and (2006) respectively; for *hubris* Fisher (1992), Cairns (1996); MacDowell (1976).

⁵⁶ Meidias' record of past acts is full of attempts of bribery, insolence, violence and hubris, proving him a social and ethical outsider. His wealth and power make him arrogant, voluntarily transgressing and showing contempt for the laws. See for e.g. Dem. 21.17, 21.66-70, 21.79, 21.85ff., 21.109-112, 21.123-4 et.al.

Rejecting any argument that the insolent aristocrat acted ‘out of character’ swept away by anger, he asserts that Meidias “is detected in a continuous course of law-breaking, spread over many days; surely this is far from a mere fit of anger and he stands convicted of a deliberate policy of insult” (Dem. 21.41-2). This is further proved by the evaluation of Meidias’ public-spiritedness by reference to his liturgies. Without objecting to the validity of such an evaluation, Demosthenes asserts that the polis has not been given a proper share of Meidias’ riches which he used totally for his haughty showing off (Dem. 21.158)⁵⁷. His behaviour makes him a social and ethical outsider of the polis, a “common enemy of the state” (21.142)⁵⁸.

In Demosthenes 53, the usual ethical motivation of the opponents (i.e. contempt for the ethical norms of the community) as presented by their past acts, illuminates the present case of false witness (disrespect for the laws, inhibition of justice) as well as the original case *dike aikeias*⁵⁹. In Demosthenes 54, the assaulters’ antisocial behaviour as expressed by their brutality and violence has put the prosecutor in a position to shrink from even narrating their abusive language and deeds. Apart from a rhetorical trick (as discussed in Ch. 4), his silence may reveal a *sophron* character. Being in ethical concord with the jurors, his high degree of internalisation of the communal norms makes him believe that even the citation of his adversaries’ unethical deeds could bring shame⁶⁰. *Sophrosyne* (moderation, self-restraint), the ultimate cooperative virtue of the polis⁶¹, could be presented in numerous forms, having a bearing on the person’s behaviour in the private sphere, in social interaction and the courts⁶².

⁵⁷ Nonetheless, public service and invocation of liturgies are not rejected as irrelevant. They have probative value as means of proving a person’s character and ethical motivation.

⁵⁸ For the jurors’ inducement to anger and punishment of the defendants in order to make them examples for future possible transgressors in different contexts (e.g. in a *graphe* or in a *dike*) see Rubinstein (2004), (2005).

⁵⁹ The respective characters of the opponents provide the ground which links the speaker’s argumentation. On the one hand, the *philopolis*, law-abiding, reasonable and *sophon* citizen (53.33-5, 38, 44, 68-70) stands against the violent, disrespectful, greedy and illegal adversary (53.28, 31, 52-60). The first is motivated by the correct ethical norms while the second reveals his characteristic contempt for them at every single opportunity.

⁶⁰ Cf. Aeschin. 1.55.

⁶¹ See for e.g. Fisher (1976), p. 41; Seaford (1994), p. 611 with n. 150 and 151; Rademaker (2005).

⁶² Self-restraint could be expressed as control of sexual desires, as moderation in the face of conflict or excessive litigation, as the denial of unjust enrichment or bribery etc. Acts of this kind reveal a more general character trait which makes the person incapable of *paranomia* (both in the form of breaking the law and of breaking the ethical norms).

In the context of the law courts, as Rademaker observes, a claim of *sophrosyne* could be made both *ad rem*, to prove that a speaker is innocent of certain types of aggression, and *extra causam*, to suggest that he is generally incapable of injustice⁶³.

Aeschines, the rigorous patriot, presents himself as the protector of the communal ethical norms of decency⁶⁴. He repeatedly characterises his main target, Demosthenes, as effeminate pervert, squanderer of his patrimony, and unprincipled in every possible way⁶⁵. However, his non-adherence to the virtuous ethical norms of the polis is best exemplified by his outrageous behaviour after the death of his daughter. Demosthenes was presented as the man who perjured himself on every occasion and perverted the burial rites of his own daughter⁶⁶. A man of his character is definitely unworthy of being crowned by the Athenians for his services.

Andokides, answers one of the main charges (placing a suppliant's bough on the altar during the Mysteries) by reference to his opponent's moral character. He asserts that Callias, a member of the Kerukes, did not hesitate from committing impiety in order to trap Andokides. His other deeds prove his moral baseness: he did not refrain from establishing sexual relationship with mother and daughter (despite being himself a priest of the Mother and the Daughter, namely Demeter and Persephone), perjuring himself at the Apaturia, and destroying his own family⁶⁷.

In Lysias' speeches allegations of disregard for communal ethical norms are also present, proving the pattern of argumentation by reference to the litigants' reactions as to the set of communal norms⁶⁸. On the other hand, adherence to the ethical norms of the community is invoked to receive credit, making the

⁶³ Rademaker (2005), p. 233.

⁶⁴ E.g. Aeschin. 1.117; 2.180. Demosthenes replies by reference to Aeschines' hubristic attitude against an Olynthian woman (19.196-99).

⁶⁵ See for e.g. Aeschin. 1.131, 163-4, 167, 170ff., 181; 2.23, 88, 127, 148, 151, 179; 3.155, 162, 167, 172-4.

⁶⁶ Aeschin. 3.77-8.

⁶⁷ Andoc. 1.124-31.

⁶⁸ See for e.g. Lys. 4.4-9; 13.66; 14.25-7; 24.15.

person an ethical companion, truthful and law-abiding, who deserves to be treated by the court accordingly.

5.2.1.1.2 Citizen and Democrat

In Demosthenes 22, Androtion's behaviour is characterised as undemocratic, lawless and tyrannical, surpassing in violence even the deeds of the Thirty (Dem. 22.49-54). His characteristic disrespect for the laws of the polis are presented as the 'beliefs-reasons' on which the opponent's reasoning was based in order to make the unconstitutional proposal for which he is prosecuted. His non-adherence to the ethics of the polis transformed him into this unrestrained and vicious figure⁶⁹. The illegal proposal was merely the culmination of such a person's acts. As stated in Demosthenes 24, such ethical outsiders do not deserve to bear the fruits of the polis' noble morals⁷⁰.

The opponents' conduct is also contrasted to the Athenian national character (*τῆς πόλεως ἦθος*):

"[...] truthful, honest, and, where money is concerned, not asking what pays best, but what is the honourable thing to do. But as to the character of the proposer of this law, I have no further knowledge of him, nor do I say or know anything to his prejudice; but if I may judge from his law, I detect a character very far removed from what I have described" (Dem. 20.13).

Bribery and corruption (in opposition to the *ἦθος* of the polis) are regularly invoked as improper motives caused by the adversary's moral failure⁷¹. In accordance with our model, an act must be explained by reference to the agent's beliefs. Reprehensible acts prove the agent's non-adherence to the

⁶⁹ This characteristic disrespect for the laws of the polis and contempt for fellow citizens becomes a pattern to be followed in other trials for unconstitutional or illegal measures. Cf. Dem. 24.76-7, 124.

⁷⁰ Cf. Dem. 24.197, where the defendants do not deserve the jurors' characteristic compassion shown to people in misfortune, since they failed to do the same when in power.

⁷¹ See for e.g. Dem. 24.3: "while Timocrates has their fee in his pocket, and never introduced his law until he got it, I, so far from getting any reward from you, am risking a thousand drachmas in your defence". Cf. Dem. 24.14. Corruption (especially of officials) – the psychosis of the Athenians – had become the stereotypical argument of most Athenian litigants; see for e.g. Lys. 26.23-4; 27.2-3; 27.9-10; 30.25; Antiph. 6.34 et.al. This was a central argument in the fierce judicial contest between Demosthenes and Aeschines; see for e.g. Aeschin. 2.154, 165-6; 3.69, 85-6 91, 94, 104-105, 113, 125, 129, 149, 156, 167, 209, 214, 218, 220, 222, 237, 239, 240, 259; cf. Din. 1.44; Hyp. 5.20; For Demosthenes' accusations against Aeschines for corruption see for e.g. Dem. 18.44 49, 52, 131, 284, 286, 297; 19.145-6, 230, 265, 275, 314.

norms of the polis and this factor becomes decisive in attributing motive to a questionable deed. Yet, the character trait remains present and the characteristic defective ethical motivation as well⁷². This is exemplified by reference to Timocrates' character on a prosecution speech in a *graphe paranomon*:

“Yet from what gain do you think that such a man would restrain his hand or what would he hesitate to do for lucre's sake, when he did not disdain to legislate in contradiction of himself, though the laws forbid contradiction even of others? It seems to me that, so far as effrontery (*ἀναιδείας*) goes, such a man is ready to do anything” (Dem. 24.65)⁷³

Similar accusations referring to the (abstracted) character of the defendant, whose traits oppose Athenian ethical values, further illustrate the case:

“For what fatal or dangerous act will he shrink from, men of Athens,—this polluted wretch, infected with hereditary hatred of democracy? What other man would sooner overthrow the State, if only—which Heaven forbid!—he should gain the power? Do you not see that his character and his policy are not guided by reason or by self-respect (*αἰδώς*), but by recklessness? Or rather, his policy is sheer recklessness. Now that is the very worst quality for its possessor, terribly dangerous for everyone else, and for the State intolerable.” (Dem. 25.32)

A litigant's unpretentious respect or lofty contempt for the laws revealed his typical attitude towards the polis and the democratic constitution⁷⁴. Past conduct proving a characteristic disregard of the laws and the court judgments is a common accusation to be found in Athenian courts⁷⁵. Contrastingly, absence of criminal convictions or infrequent inhabitation of the courtrooms was adduced

⁷² On the other hand, ethical concord may be adduced in order to prove the justice of one's case; see for e.g. Dem. 36.58: “Phormio, then, men of Athens, who has in so many ways proved himself of service to the state and to many of you, and has never done harm to anyone either in public or in private, and who is guilty of no wrong toward this man Apollodorus, begs and implores and claims your protection...”.

⁷³ Cf. Dem. 57.59.

⁷⁴ The speeches of Lysias are more indicative of patterns of argumentation regarding loyalty to the democracy since they were written and delivered in troubled times. Many cases were triggered by alleged cooperation with the Thirty and this was a common background for one's argumentation as to political affiliations. See for e.g. Lys. 12 and Lys. 13. Cf. Lys. 9.17; 10.31; 20.17; 30.7-8; Fr. 3.a.2; Fr. 7.

⁷⁵ See for e.g. Dem. 42.2, 8-10, 15, 30; 43.6; 50.45; 58.14; Lys. 30.4-5.

as positive evidence for a person's adherence to the laws⁷⁶. This latter plea was a rhetorical *topos* of prosecutors (usually to be found in the prologue) to refute accusations of sycophancy⁷⁷. Being a *philopolis* demanded positive acts of proof⁷⁸, egalitarian attitudes⁷⁹, and wholehearted adherence to the communal customs⁸⁰. Sometimes this could be said to cause the envy of grudging countrymen⁸¹. Although it should not be taken at face value, the strength of Euphiletus' assertion in identifying himself with the law (his hand becoming the weapon that enforced justice)⁸² is exceptional and indicative of his complete devotion.

The most explicit way of proving unequivocal loyalty to the polis was military service. This was the most informative opportunity to sacrifice self-interest for the common good and demonstrate adherence to the ideology of the community. Serving the polis by one's own person revealed total commitment and complete adherence to its ethical and heroic values⁸³. Heroism and excellence were honoured and rewarded, whereas cowardice and draft-evasion were reprimanded as signs of bad citizenship⁸⁴. Voluntariness was exceptionally valued. Deliberate devotion to state service was not as fictitious

⁷⁶ See for e.g. Lys. 5.3; 25.16; 26.21-2; Antiph. 6.9; 4.19.

⁷⁷ See for e.g. Aeschin. 1.1, 116, 159; 2.181-2; Lys. 16.10; Lys. 19.55; 22.1-4; 26.15; Dem. 18.222-6. Cf. Christ (1998a), pp. 148ff.

⁷⁸ E.g. Andoc. 1.56, 68, 101, 102, 134; Dem. 18.86, 88, 94, 108-111, 125, 173, 179-180, 197, 206, 277, 288, 298, 306; 19.166, 170-173, 230; Antiph. 6.38, 50. On the other hand, enemies of the polis were also easily identified by reference to their treacherous past acts. These revealed a character trait that directed such conduct and were attributed to a character defect; see for e.g. Lys. 12. 2, 36, 42, 82, 94; 13.2, 30, 59, 65; 22.14.

⁷⁹ Aeschin. 1.141; cf. Lys. 14.9.

⁸⁰ Aeschin. 2.23; contrast this with the conduct of the Thirty in perverting the burial rituals in Lys. 12.18 or Demosthenes' alleged conduct in Aeschin. 3.77-8.

⁸¹ See for e.g. Lys. 24.3: "So now, gentlemen, it is clear that he envies me because, although I have to bear this sore misfortune, I am a better citizen than he is".

⁸² Lys. 1.5, 26, 1.29, 1.47, 1.50; in 1.26 Euphiletus (the defendant arguing for a lawful homicide) states: "It is not I who am going to kill you, but our city's law, which you have transgressed and regarded as of less account than your pleasures, choosing rather to commit this foul offence against my wife and my children than to obey the laws like a decent person".

⁸³ See for e.g. Dem. 54.44 (members of an *oikos* serving both in person and their property); cf. Lys. 20.14, 23 as indicative of loyalty and affection to the polis; cf. Lys. 7.30-1; 16.13-8; 21.6-11, 24. Such considerations are adduced as possible grounds for acquittal in Lys.6.46-9; cf. Aeschin. 2.167ff. (continuous military record since his youth) in reply to Dem. 19.113;

⁸⁴ See Christ (2006), Ch. 2 and 3. For references to cowardice or military evasion in the orators see for e.g. Aeschin. 2.79, 148; 3.151, 155, 159-60, 163, 167, 175-6, 181, 214, 253 (references to Demosthenes' conduct in deserting his post in the battle of Chaeronea); cf. Dem. 21.110, 133, 166-7 (Meidias deserting his post and discovering questionable methods to avoid risking his life with his fellow citizens) cf. Lys. 14.9, 17, 44; 21.20; 10.25ff. These arguments are usually adduced on grounds of 'fairness', i.e. in anticipation of or reply to similar accusations of the opponent.

as Lanni suggests⁸⁵ nor as impossible as a modern state's citizen would suppose. Contrastingly, the close identification of the citizen with the state, the imminence of real threats against the *oikoi* of a 'polis at war', and the obvious, appreciable impact that the voluntary participant could make (this impact being extended to himself, i.e. the community's opinion) were adequate incentives for voluntary self-sacrifice⁸⁶. This extreme sacrifice of self-interest⁸⁷ revealed a *philopolis* personality that had internalised and adhered to the common norms to the extent of self-denial. By inference, such a person was an unlikely candidate for breaking the laws of the polis. Military service as a means of proof is thus adduced several times in the court speeches.

5.2.1.1.3 Respecting the Norms of *Philia*

Philia designates a variety of positive bonds based on a sliding scale of affection and utility among social circles such as kin, friends, comrades, and fellow citizens⁸⁸. In the majority of such positive relationships, affection and concern dominate merely calculative considerations based on a strictly formal and objective structure of obligations⁸⁹. Nevertheless the presence of a

⁸⁵ Lanni, (2009), p. 30 states that "the Athenian approach of enforcing extra-legal norms through the courts created state sanctions for violations of public service norms, while at the same time permitting the Athenians to maintain the fiction that Athenians fought for and served the state out of patriotism". Even though I am opposed to Lanni's more general argument (enforcement of extra-legal norms) in the sense that Athenian courts predominantly enforced the written laws and (as a side-effect) the moral norms hidden behind the particular statutes, my thesis proves the more specific argument about the fictitiousness of voluntary service equally wrong. Lanni bases her supposition on entirely anachronistic grounds. In particular she asserts that the Athenian state purposefully enforced such extra-legal norms since it provided for the advantage of bolstering "the democratic ideal of a limited state" (p. 24). Furthermore, the Athenians were able to "maintain the fictions of an unregulated private sphere" (p. 28). I consider these suppositions entirely alien to the context of an ancient polis and the Athenian state in particular. I prefer to side with Finley's perception of the polis as a potentially "all-encompassing" community [cf. Fisher (1976), p. 1] which could regulate any kind of private or public behavior [for the regulation of the private sphere, and the tensions created by the conflicting interests of the polis and the *oikos*, see Seaford (1994)]. Finally, I also disagree with Lanni's assertion that the polis was militarily supported by coercion rather than patriotism and voluntarism, interpreting it as yet another anachronistic assumption of a modern state's citizen. I prefer to see the polis as a 'nation at (constant) war' [cf. Adkins (1960), pp. 28-32; Dover (1974), pp. 159-60 with n. 32] whose citizens had internalized the Homeric agonistic values of *arete*, and where draft-evasion was the exception of the norm (and sign of 'bad citizenship'). After all, if Athenians were coerced to go to war, who were the ones that voted for it?

⁸⁶ Cf. Fisher (1976).

⁸⁷ For 'self-interest' as the utmost sign of 'bad citizenship' see Christ (2006), p. 9. By conceptualization (and with reference to our discussion of the brutality of human 'nature'), human beings showing excessive self-interest reveal their uncultivated character, which renders them unsuitable for living in a polis. By inference, such characters could break any communal law or norm to achieve their selfish goals.

⁸⁸ Mitchell (2002) Ch. 1; cf. Konstan (1996).

⁸⁹ Konstan (1996), p. 86.

persuasive informal set of reciprocal norms emphasises and exemplifies the degree of affection between *philoï*. A citizen of an ancient Greek polis realised himself by reference to a nexus of such relationships carrying varying degrees of affection and divergent obligations. *Oikos*, friends, phratry, deme, and polis all make (sometimes contradictory) ethical requests on their members. However, virtuous citizenship presupposed the sacrifice of one's self-interest (or his *oikos*' and friends') for the sake of his polis⁹⁰. As the polis supersedes individual households and regulates private sphere, private reciprocal obligations based on *philia* are limited (and transformed) to suit the interests of the wider community⁹¹.

The written laws of the polis coexist with informal norms, both collections making ethical requests to the individual. The agent's degree of discipline to and observance of these is up to his character and personality. Betrayal or breach of the rules of *philia* exposes a character trait which is typical of more general conduct. The stronger the bonds between two people, the more serious the injustice the perpetrator commits; and if he dares to injure his own *philoï*, nothing would stop him from acting analogously against his fellow citizens or his polis⁹². Breach of the norms of *philia* makes the perpetrator a probable lawbreaker⁹³. This rationale was formalised by the Athenian legal system which provided for the penalty of *atimia* in cases of maltreatment of parents⁹⁴. This offence included physical abuse as well as negligence of performing certain obligations required by virtue of this relationship: *trophe*, *oikesis*, and *taphe*⁹⁵. Breach of the requirements of *philia* in the orators could take many forms and

⁹⁰ However, obligations based on *philia* were deemed so powerful that could be offered as excuses (or as more valid reasons than e.g. bribery) for law-breaking in courts; see Dem. 20.195-6.

⁹¹ See Seaford (1994), chs.4, 6.

⁹² Cf. Arist. *Nic. Eth.* 1160a: "Injustice therefore also is differently constituted in each of these relationships: wrong is increasingly serious in proportion as it is done to a nearer friend. For example, it is more shocking to defraud a comrade of money than a fellow-citizen; or to refuse aid to a brother than to do so to a stranger; or to strike one's father than to strike anybody else. Similarly it is natural that the claims of justice also should increase with the nearness of the friendship, since friendship and justice exist between the same persons and are co-extensive in range".

⁹³ Lys. 30.23: "for if a man commits such crimes against his own relatives, what would he do to strangers?"

⁹⁴ Andoc. 1.74; Xen. *Mem.* 2.2.13; Dem. 24.60; Aeschin. 1.28.

⁹⁵ Aeschin. 1.13; cf. Hansen (2006), p. 56.

designate the character defects of disloyalty and ingratitude⁹⁶: abandoning a father in need⁹⁷, refusal to bury him⁹⁸, defrauding brothers and kinsmen⁹⁹, bringing false charges against kin or friends¹⁰⁰, betraying friends or neighbours¹⁰¹ are just some of the categories¹⁰² that shocked the audience and exposed a litigant's wickedness and propensity to breach proper norms.

5.2.1.2 Creating Boundaries: Ethical Adherents and Outsiders

Moral agents acting in accordance with the objective / participant model of the self, are engaged in 'primary' (*first-order*) reasoning to apply their deeply rooted ethical beliefs (i.e. the beliefs of their community) for determining the proper course of action in a particular situation. However, sometimes secondary (*second-order*) reasoning is employed denoting the reflection about the goals or rules which are operative in first-order reasoning. This may trigger questions as to the conventional ethical beliefs and, if applied to a specific situation, give rise to problematic cases¹⁰³. Such problematic cases may be interpreted and illuminated by reference to second-order reasoning since the application of first-order reasoning and conventional norms would dictate a different course of action. This situation is frequent in Greek tragedy but absent from Athenian courts. There, conventional ethical norms are indisputable, forming a coherent universal set of action-guiding rules. Litigants competed to prove their whole-hearted adherence to these norms by reference to their past acts which indicate a high degree of internalisation of indisputable communal beliefs¹⁰⁴.

The existence of an unquestioned universal set of conventional social norms (which precluded notions like the 'moral autonomy' and 'self-legislation' of the

⁹⁶ On the other hand, observance of these obligations revealed affection, loyalty and observance of the ethical norms of the community. See for e.g. Lys. 7.41; 24.6; Andoc. 1.118-9. Supporting speakers usually invoked their personal intimacy with the litigant they assisted; see for e.g. Dem. 20.1; 58.3.

⁹⁷ Dem. 24.200; or a close relative Aeschin. 1.103.

⁹⁸ Dem. 25.54; Aeschin. 1.99; Lys. 31.30.

⁹⁹ Dem. 24.127; 36.36; (sister) 24.202; 25.55; (guardians embezzling property of orphans) Dem. 27.65; 28.15-6.

¹⁰⁰ Dem. 45.53, 56,70; Aeschin. 2.93; 3.51, 172.

¹⁰¹ Dem. 25.57; 53.4; Andoc. 1.54, 56, 68 in reply to Lys. 6.3, 7, 23-4; 14.26-7, 44; 15.10; 32.10; Fr. 8.

¹⁰² For a more detailed treatment of the issue see Christ (1998a), pp. 167ff.

¹⁰³ See Gill (1996), pp. 117, 133, 181, 237, 239.

¹⁰⁴ Burkert (2013), p. 76: "To belong to a group is to conform to its standard of purity; the reprobate, the outsider, and the rebel are unclean".

individual) permitted an objective (by reference to the invoked evidence) evaluation of a person's degree of loyalty to the ethics of the polis. In the Athenian courts' setting, this fact gains greater importance. In a society that professed the conformity of written laws with unwritten ethical norms, adherence to the latter signified obedience to the former. The of Athenian laws in particular, assisted the deeper internalisation of ethical norms by reference to the law's moralising effect¹⁰⁵. This is also exemplified by the frequently inaccurate attribution of Athenian laws to the (largely imagined) figure of Solon. The authority-figure of the 'ideal lawgiver' demonstrated the ethical coherence of Athenian laws and the legal system's almost mystical continuity through time. This imagined figure impersonated the ethical prototype of the Athenian legal system, persuading the jurors to interpret the Athenian laws by reference to its demands¹⁰⁶. When Athenian jurors decided a legal case, a specific law was applied and a wider ethical norm was reinforced¹⁰⁷. The court acted as the moral educator of the polis which reinforced the single, universal, coherent set of primary ethical norms as 'action-guiding principles'. As a side-effect, the 'participant' ethical model of the self was thus sheltered and promoted.

The aforementioned considerations stress the importance for a litigant of presenting himself as a committed ethical adherent rather than the holder of an individualistic stance which could render him a moral outsider. In fact, a fierce contest as to who will prove himself as closer to the communal values emerges as a pattern from the court speeches. In Antiphon 1 the speaker asserts that his stepmother poisoned his father, whose honour and justice he seeks. In doing this he has to face the wrath of his own kin who instead of avenging the dead, side with the murderess. The dead man fell "victim of those who should least of

¹⁰⁵ On the substantive orientation of Athenian laws see Harris (2009); cf. Farenga (2006), pp. 276-9.

¹⁰⁶ On the figure of the 'ideal lawgiver' and its implications see Johnstone (2009), pp. 25-33; cf. Harris (2006b). I borrowed the notion of the authority figure as assisting to the internalization of norms from Cairns (1993), p. 39 since I find its application to the Athenian legal system's context with its frequent invocation of the 'ideal lawgiver' as suitable.

¹⁰⁷ This I consider to be the essence of the 'legal enforcement of morals in classical Athens', namely the reinforcement of the wider ethical norm that triggered the enactment of a particular law. In this way the court, apart from its primary task of implementing the rule of law by applying specific laws to particular legal cases, acted also as the moral educator of the polis in the absence of an official system of education. Cf. Rubinstein (2005a).

all have done this” (Antiph. 1.21) and this proves their ethical depravity. His kin have isolated him but he is not alone. He refers to the jurors and states:

“For you are my kin; those who should have avenged the dead and supported me are his murderers and my opponents” (Antiph. 1.4).

This exact argument concludes Demosthenes’ plea for justice in Demosthenes 28 after the alleged embezzlement of his property by his cousin Aphobus who had acted as his guardian. Aphobus betrayed the conventional ethical norms and the obligations of *philia* between kin. The twenty-year old Demosthenes states:

“Succour us, then, succour us, for the sake of justice, for your own sakes, for ours, and for my dead father's sake. Save us; have compassion on us since these, our relatives, have felt no compassion. It is to you that we have fled for protection” (Dem. 28.20).

Litigants could also focus on the adversary’s moral depravity as illustrated by his expulsion from his own social circles¹⁰⁸. These circles, although closer to the opponent, should nonetheless be treated as representative of the polis’ attitudes. Their reaction to the opponent’s misconduct paved the way and posed the example of the proper treatment he should receive from the jurors. Especially illuminating is the treatment that Aristogeiton received from his fellow prisoners. They, refusing to withstand Aristogeiton’s unacceptable (even for them) behaviour “passed a resolution not to share fire or light, food or drink with him, not to receive anything from him, not to give him anything” (Dem. 25.61). What should therefore be the proper response of the jurors to such a person who even in prison was an ethical outcast? The same rhetorical question was asked of jurors judging cases between Athenians and foreigners, the former presenting the latter as total outsiders¹⁰⁹.

¹⁰⁸ See for e.g. Dem. 21.197: “That is my own opinion of him [that he is an unhallowed ruffian]; [for how else are we to describe a creature whom his own troopers, his brother-officers and his friends cannot stomach?”.

¹⁰⁹ See for e.g. Hyp. *Athen.* 3: the opponent “is a speechwriter, a man of affairs and, most significant of all, an Egyptian”; cf. Dem. 35.1-2.

Nonetheless the prototype of the ethical outsider in the Athenian courts was the objectified persona of the sycophant¹¹⁰. Application of religious purification language and rites (used for *pharmakoi*) was appropriate to cleanse the city from the unclean sycophants. These inverters of social norms manipulate and abuse the legal system, thus mutilating the cohesion of the polis¹¹¹. In the case against Aristogeiton referred to above, in which Demosthenes presents his opponent as the typical sycophant-outsider¹¹² (being an outcast even in jail), he also provides the proper response to such ethical outcasts:

“His case is incurable, men of Athens, quite incurable. Just as physicians, when they detect a cancer or an ulcer or some other incurable growth, cauterize it or cut it away, so you ought all to unite in exterminating this monster. Cast him out of your city; destroy him.” (Dem. 25.95)

5.2.1.3 Ethical Motivation Prescribed by the Social ‘Role’

Thus far it has been proved that according to the ancient model of the self, ethical motivation is provided by the agent’s whole-hearted adherence to the ethical norms of his community. One significant aspect of this fitted engagement with the community’s values is ethical motivation and action according to what is required and expected due to the agent’s social role and status¹¹³. Frequent use of such reasoning can be found in the Athenian courts. Following stereotypical beliefs as to how a ‘virtuous citizen’, a ‘righteous youngster’ or a ‘respectable member of the elite’ should behave, litigants stress and manipulate these expectations in order to support the legal case. Instances of misfit with the social role or ethical motivation of a person revealed his more general contemptible character trait that illuminated the particular case.

A ‘good citizen’ was expected to engage in certain forms of social conduct. In Demosthenes 18, the famous orator compares his civic behaviour with that of

¹¹⁰ For a similar discussion about the underlying connotations of being a sycophant see Christ (1998a), pp. 50ff.

¹¹¹ Christ (1998a), p. 54 refers to the second sycophant scene of the *Acharnians* (esp. l. 944-5) as symbolic of the sycophant’s conduct: “the sycophant’s restless and disruptive energy is literally contained and this inverter of norms is himself appropriately turned upside down”; cf. the figure of Cleon – Paphlagon in the *Knights*.

¹¹² Cf. Christ (1998a), pp. 57-9.

¹¹³ Gill (1996), Ch. 1.3 discusses Odysseus’ monologue in Hom. *Il.* 11.401-10 where his ethical motivation is dictated by his social role and accordingly decides to act as a ‘good Homeric chieftain’ would do.

Aeschines. Every single quote is best understood by reference to the ethical motivation provided by their respective roles as ‘citizens’; though the one was virtuous, the other contemptible, in accordance with the Athenian society’s expectations:

“You were an usher, I a pupil; you were an acolyte, I a candidate; you were clerk-at-the-table, I addressed the House; you were a player, I a spectator; you were cat-called, I hissed; you have ever served our enemies, I have served my country.” (Dem. 18.265)¹¹⁴

Exercising a menial calling could also be interpreted as unfitting and degrading for a citizen¹¹⁵. Stereotypical beliefs as to the virtue of farmers as opposed to merchants and hand-workers are repeatedly found in ancient literature. Unsurprisingly then, they are followed in the court speeches (albeit sometimes manipulated), allegedly placing undue emphasis on the ‘person’ rather than the ‘deed’ of the legal charge¹¹⁶. However, even in such circumstances, these allegations illuminated an aspect of the opponent’s character which could be invoked in connection with the offence¹¹⁷. In Demosthenes 57, the exercise of a menial calling was adduced in order to prove that the defendant was not an Athenian citizen. Selling ribbons in the agora or (for his mother) serving as a nurse did not coincide with Athenian citizenship¹¹⁸.

¹¹⁴ Cf. Dem. 19.299-300.

¹¹⁵ Such stereotypical beliefs relating to one’s appearance or calling survive in different forms even in our days and are sometimes adduced in the courts [Munday (2005), p. 38]. In the small-scale society of the ancient polis, their force would unavoidably be greater. Cf. Ar. Rhet. 1367a: “Customs that are peculiar to individual peoples and all the tokens of what is esteemed among them are noble; for instance, in Lacedaemon it is noble to wear one’s hair long, for it is the mark of a gentleman, the performance of any servile task being difficult for one whose hair is long. [27] And not carrying on any vulgar profession is noble, for a gentleman does not live in dependence on others”.

¹¹⁶ See for e.g. Dem. 37.52: “When anyone asks him, “What valid charges will you be able to make against Nicobulus?” he says, “The Athenians hate money-lenders”.

¹¹⁷ See for e.g. Arist. *Nic. Eth.* 1121b who refers to different callings as revealing character traits: “The other sort of people are those who exceed in respect of getting, taking from every source and all they can; such are those who follow degrading trades, brothel-keepers and all people of that sort, and petty usurers who lend money in small sums at a high rate of interest all these take from wrong sources, and more than their due”. For invocations of the opponent’s menial calling see for e.g. Dem. 18. 127, 129, 209, 261-2, 267; 19.70, 95, 120, 200, 247, 314; 37.52; 57.31, 35; Lys. 30.27-8.

¹¹⁸ Dem. 57.31, 35: “57.31: We on our part acknowledge that we sell ribbons and do not live in the manner we could wish, and if in your eyes, Eubulides, this is a sign that we are not Athenians, 57.35: He has said this too about my mother, that she served as a nurse. We, on our part, do not deny that this was the case in the time of the city’s misfortune, when all people were badly off; but in what manner and for what reasons she became a nurse I will tell you plainly. And let no one of you, men of Athens, be prejudiced against us because of this; for you will find today many Athenian women who are serving as nurses”.

Bravery and self-sacrifice were also expected from a 'virtuous citizen'¹¹⁹. The same degree of adherence to Athenian ethical norms was demanded from the metics as well. The 'role' of a peaceful metic prescribed the return of gratitude for his residence in Athens and generosity to the polis that nurtures him¹²⁰. Failure to act accordingly and conform to the social expectations could expose wrong ethical motivation and be used as a means of proof of the legal case. The same degree of gratitude towards the Athenians was expected in cases of naturalisation. Apollodorus, acting in accordance with this 'role', in revealing his gratitude and his resulting ethical motivation states:

"When it came to fixing the penalty, the jurymen wished to impose a sentence of death upon him, but I begged them to do nothing like that on a prosecution brought by me, and I agreed to the fine of a talent which these men themselves proposed,—not that I wished to save Arethusius from the death penalty (for he deserved death on account of the wrongs which he had committed against me) , but that I, Pasion's son, made a citizen by a decree of the people, might not be said to have caused the death of any Athenian" (Dem. 53.18)

Analogously, behavioural scripts were prescribed for other classes of persons as well, such as youngsters. Again, the presence of stereotypical presumptions about youngsters' characters and conduct are decisive and set the norm¹²¹. Such agents needed to excuse themselves for bringing lawsuits in order to avoid any prejudice for litigiousness and meddlesomeness¹²². The typical youngster had not fully internalised the ethical norms of his community and behaved in accordance with his impulses and desires. The characteristic prejudice against youth's lack of self-control¹²³, hubris and aggressiveness¹²⁴ could decisively turn the balance against a young litigant. In Lysias 16, the young long-haired aristocrat Mantitheus needs to explain the

¹¹⁹ See for e.g. Lys. 30.5; 31.7: "My opponent has placed a higher value on his personal safety than on the public danger"; cf. Lyc. 1.

¹²⁰ See for e.g. Lys. 12.20; Fr. 7; on the other hand, a metic's hostile behaviour revealed a more general enmity against the polis; see Lys.24.14.

¹²¹ Arist. *Rhet.* 1369a: "For if the young happen to be irascible, or passionately desire anything, it is not because of their youth that they act accordingly, but because of anger and desire. Cf. 1389a: The young, as to character, are ready to desire and to carry out what they desire".

¹²² For this *topos* see for e.g. Antiph. 1.1, 30; 5.1, 79; Dem. 27.2; 29.1; 44.1; 53.13; 54.1; 58.3.

¹²³ E.g. Antiph. 3.3.6.

¹²⁴ E.g. Antiph. 4.1.6; 4.3.2; 4.4.2; 4.4.6; Lys. 24.15-6; Dem. 54.14.

ethical motivation behind his conduct, which was untypical for his role¹²⁵. On other occasions, young adversaries are accused of not putting their natural characteristics in the service of the state. Their role prescribed bravery and vehemence in war rather than cowardice¹²⁶. Their role also prescribed shyness and decency¹²⁷. On the other hand, similar expectations were existent for mature and respectable citizens. Failing to act in accordance with the role of the *sophron* man was contemptuous and blameworthy¹²⁸.

5.3 The Invocation of Liturgies as the Culmination of the ‘Objective / Participant’ Model

The invocation of liturgies in the Athenian courts has been the core of controversy in modern scholarship, perceived as providing the most characteristic type of extra-legal argumentation. On the one hand, scholars insisting on structural interpretations assert that by adducing their liturgies, litigants entered into a contest for honour and prestige highlighting the underlying role of the Athenian courts. Furthermore, structural tensions of the democratic system such as those between the elite and the demos were regulated and fashioned by the jury’s control of Athenian liturgists through the court system (and the final accommodation between rich and poor) or by the elitist implicit threats of withdrawal presented through their orations¹²⁹. Based on similar methodology, an alternative interpretation is offered by Millett, who sees the liturgies as “disruptive of elite cohesion” and as “a weapon that the rich

¹²⁵ Lys. 16.20: “I have had occasion to observe, gentlemen that some people are annoyed with me merely for attempting at too early an age to speak before the assembly. But, in the first place, I was compelled to speak in public to protect my own interests; and indeed, in the second, I do feel that my tendency has been unduly enterprising: for in reflecting on my ancestors, and how they have continually taken part in the administration, I had you also in my view...”.

¹²⁶ In charging them with cowardice, the speaker of Lysias 10 asserts: “Indeed gentlemen of the jury, the more impressive and youthful my opponents are in appearance, the more they deserve your anger” (Lys. 10.29).

¹²⁷ E.g. Dem. 42.24: There is one thing only, men of the jury, in which anyone could show that this man Phaenippus has been ambitious of honour from you: he is an able and ambitious breeder of horses, being young and rich and vigorous. What is a convincing proof of this? He has given up riding on horseback, has sold his war horse, and in his place has bought himself a chariot - he, at his age!—that he may not have to travel on foot; such is the luxury that fills him. Cf. the arguments of the *dikaïos logos* in Ar. *Clouds* l. 961ff.

¹²⁸ See for e.g. Lys. 3.4: “If I am guilty, gentlemen, I expect to get no indulgence; but if I prove my innocence as regards the counts of Simon’s affidavit, while for the rest you consider my attitude towards the boy too senseless for a man of my age, I ask you not to think the worse of me for that, since you know that all mankind are liable to desire, but that he may be the best and most temperate who is able to bear its misfortunes in the most orderly spirit”.

¹²⁹ See Ober (1989), pp. 226-30 and Davies (1981), pp. 88-132 respectively.

turned against each other as well as against the egalitarianism of democracy”¹³⁰. Although such interpretations may be valid (as secondary to the main role of the courts as enforcers of the law) they are not free from complications.

The main idea that such invocations were centred on ideas of reciprocity is vulnerable on the following grounds. This notion is better understood in the form of ‘generalised reciprocity’ involving a ‘gratuitous gesture’ on the part of the obligated, thus revealing his noble and unforced generosity rather than a restricted (‘quid-pro-quo’ type) re-payment of the services¹³¹. Furthermore, an (even implicit) assertion that a specific breach of the law could be annulled and redeemed by reference to public services would automatically place the polis (the demos, i.e. the jurors) and its legal system (which the Athenians highly valued) in a position of inferiority against the assets of a wealthy litigant¹³². Explicit statements of such type are totally absent from Athenian courts; to impose them on the (implicit) reasoning of the litigants or the (unknown) deliberation of the jurors would be inappropriate. Finally, by adhering to the interpretation of the institution of law (and consequently the courts) as fundamentally designed to break such cycles of reciprocity, I consider it unlikely that Athenian jurors succumbed to such reasoning in defiance of legal justice and their oath¹³³. On the contrary, I would assert that even implicit argumentation of this type would run the great risk of backfiring by alienating the jury, if the latter considered it as irrelevant and obstructive of legal justice.

Even when scholars concentrate on legalistic issues, controversy persists. In this field the main controversy concerns the degree to which the invocation of liturgies by Athenian litigants influenced the verdict of the jurors. To offer but a couple of indicative examples, Christ concentrates on the incentives given by wealthy litigants to the jurors to show gratitude (*charis*) and vote for him by

¹³⁰ Millett (1998), p. 250.

¹³¹ See Donlan (1981-2), pp. 154-71; cf. Gill (1996), pp. 133, 139, 142, 145 et.al.

¹³² The fact that any such statement is absent from the Athenian court speeches is indicative. Gill (1996) explains on these terms the rejection of Achilles to the gifts of Agamemnon in Iliad 9. Agamemnon, severely breached the norms of reciprocity between chieftains and an acceptance of the gifts (by the method that Agamemnon chose) would unequivocally place Achilles in a position of inferiority.

¹³³ Cf. Seaford (1994), Ch. 3 and 6.

reference to the future material benefit his acquittal will mean for the polis¹³⁴. However, Harris convincingly demonstrates by reference to the few known court decisions that such argumentation did not have the force to make the jurors betray their oath and vote contrary to the law¹³⁵. Harris then goes as far as asserting that the invocation of liturgies aimed at distracting the jurors, though it was relevant at the *timesis* phase (regarding the assessment of the penalty)¹³⁶. However, such a conclusion is not supported by evidence¹³⁷ and does not fit with the steady presence of such argumentation in *agones atimetoï*. As a matter of fact, since the decisions of Athenian trials rarely survive, any effort to uncover the implicit reasoning of the jurors is based on circumstantial evidence and is largely speculative. What is needed is a more objective method of interpreting the invocation of liturgies rather than a resort to subjective explanations. In my opinion, applying the 'objective' / 'participant' model is a suitable and valid starting point for the objective interpretation of forensic speeches.

In the first part of this chapter it has been shown how the invocation of liturgies may serve to illustrate the character of litigants, by reference to their typical 'practical reasoning'. Frequent, lavish and voluntary liturgies that exceed the requirements of the law reveal by conceptualisation the character of a law-abiding, magnanimous¹³⁸ public benefactor, thus rendering him an unlikely candidate for performing a crime¹³⁹. Such argumentation is not rejected by the prosecutors as irrelevant. On the contrary, acknowledging its value, they attempt to diminish the effect of their opponent's public expenditure stating either that this took place out of selfish opportunistic calculation (thus it does not reveal the genuine character of a pro-democratic wealthy *philopolis*) or that the

¹³⁴ Christ (1998a), pp. 92-3; cf. Lanni (2005), (2006), pp. 46-64.

¹³⁵ Harris (2006a), pp. 66-72; cf. (2013).

¹³⁶ Harris (2006a).

¹³⁷ See the statistics in Jonhstone (1999), p. 94. A close reading of the court orations indicates that the invocation of liturgies was not restricted to *timētai díkai*. It is hardly convincing to suggest that Athenian litigants, knowing that their liturgies were only relevant during a *timesis*, would voluntarily and emphatically reveal their implicit purpose of distracting the jurors by asking them to betray their oath. The risk of alienating them would have been extremely high.

¹³⁸ See for e.g. Lys. 21.5; Cf. Arist. *Rhet.* 1366b on magnificence and magnanimity as components of virtue.

¹³⁹ See for e.g. Antiph. 2.2.12; Lys. 7.25, 31, 41; cf. Lys. 19.56: "I do this, not for mere vainglory, but to bring in as evidence the fact that the same man cannot both spend a great deal without compulsion and covet some of the public property at the gravest risk."; Dem. 52.26: "Then we are to believe, in the first place, that he wronged a man who would be able to do him injury to twice the amount of his gains, and secondly that my father in this instance was a base lover of gain, whereas in regard to special taxes and public services and gifts to the state he was not."

type of liturgies performed by the opponent was useless to the polis as a whole¹⁴⁰. Therefore, as a matter of fact, a 'rule-case' type of reasoning could lead the jurors to assert whether such a person was capable of performing an illegal deed¹⁴¹, assist the litigant to win their good will and increase the credibility of his character. Adding to this the shame-culture's emphasis on the 'person' rather than the 'act' it may be suggested that the invocation of liturgies coincides with this model and becomes relevant in solving a particular legal case.

The second type of reasoning that has been discussed ('means-end' type) may assist in interpreting more problematic cases. The most characteristic and notorious passage is found in Lys. 25.13 which, though usually curtailed and taken out of context, reads:

"But my purpose in spending more than was enjoined upon me by the city was to raise myself the higher in your opinion, so that if any misfortune should chance to befall me I might defend myself on better terms"

Reading merely this statement may leave the impression that a person's liturgies enter into the courtroom as external and irrelevant aid in order to distract the jurors from the facts of the case. However, this case involves a charge of 'subverting the democracy'. The speaker continues:

"Of all this credit I was deprived under the oligarchy; for instead of regarding those who had bestowed some benefit on the people as worthy recipients of their favours, they placed in positions of honour the men who had done you most harm, as though this were a pledge by which they held us bound. You ought all to reflect on those facts and refuse to believe the statements of these men: you should rather judge each person by the record of his actions."

¹⁴⁰ See for e.g. Dem. 21.158; Lyc. 1.139-40. Lycurgus in particular highlights the ethics of his troubled era by stating that the only useful liturgies at that time were the ones concerned with the war preparation of Athens against its enemies. cf. Lys. 31.12; Dem. 38.25; 42.3, 25.

¹⁴¹ Cf. Lys. 21.1; Is. 4.29-30 where the speaker alleges the forgery of the will presented by his opponent who apart from being a denounced criminal has never served the polis either with his property or with his person. The question at issue is one of fact, argumentation based on circumstantial evidence and probabilities. Furthermore, the issues decided during a *diadikasia* put the fate of the property in the centre of attention rather than concentrating on a specific legal offence. On the other hand, by reference again to 'rule-case' type of reasoning, prosecutors could impose a plausible motive to their wealthy opponents (using their liturgies as evidence) such as that found in Antiph. 2.3.8.

Even if taken at face value, the statement is clearly relevant to the legal charge by referring to his characteristic attitude towards the demos. However, we may stretch the analysis more¹⁴². The speaker is accused of oligarchic affiliations. The period is uneasy since shortly after the fall of the Thirty and the restoration of the democracy such cases were frequent. By reference to 'external rule-type' reasoning, wealthy members of the elite (especially those who stayed in Athens during the reign of the Thirty) were the usual suspects, but also vulnerable targets, of sycophants (25.1, 3). The speaker is clear as to his aims from the beginning of his speech:

"And I claim, gentlemen, if I am found to have been the cause of none of our disasters, but rather to have performed many services to the State with both my person and my purse, that at any rate I should have that support from you which is the just desert" (25.4, cf. 11-12)

The speaker continuously revokes the unjust 'rule-case' reasoning which renders him suspect for being disloyal to the democracy¹⁴³. Switching to a 'means-end' type of reasoning, he annuls any ulterior 'end' that could be imposed on him by his enemies for his extravagant spending and his great resources¹⁴⁴. In this model, the 'means' is his lavish expenditure, while the 'end' imposed could be the showing off of his power which could –stereotypically– render him suspect. On the contrary, he advertises a different 'end' for his lavish expenditure. This 'end' is pro-democratic (in opposition to the charge with which he is accused), humble and respectful to the power of the demos. The allegation is simple: I performed lavish liturgies for the sake of my polis and the

¹⁴² The speaker at the beginning of his speech clarifies his intentions as to how he will try to persuade the jurors of his innocence: "I will now try to explain to you who of the citizens are inclined, in my view, to court oligarchy, and who democracy. This will serve as a basis both for your decision and for the defence that I shall offer for myself; for I shall make it evident that neither under the democracy (Lys. 25.7).

¹⁴³ Lys.25.5-6: "But in fact they conceive that your resentment against those men [the Thirty] is sufficient to involve in their ruin those who have done no harm at all. [6] I, however, hold that, just as it would be unfair, when some men have been the source of many benefits to the city, to let others carry off the reward of your honors or your thanks, so it is unreasonable, when some have continually done you harm, that their acts should bring reproach and slander upon those who have done no wrong."

¹⁴⁴ Imposition of a selfish 'end' is not unusual in relation to public services, therefore it is anticipated'; Cf. Lys. 26.4: "As regards the public services, I say that his father would have done better not to perform them than to spend so much of his substance: *for it was on account of this that he won the confidence of the people and overthrew the democracy*; and so our memory of these deeds must be more abiding than of the offerings he has set up¹ in record of those services."

democracy because I am a loyal citizen. Knowing that many sycophants (i.e. the enemies-outsiders of the state who behave like oligarchs themselves and had offered pretences to the Thirty)¹⁴⁵ lurk, I considered this ‘means’ (performing liturgies) as the best available for proving my character and my loyalty to the constitution, and for achieving the ‘end’ of gaining your good will (out of my respect for and submission to the democratic law court) for the sake of justice.

Such argumentation may also be interpreted by reference to the ‘participant’ model of the self as influencing the agent’s ethical motivation. Voluntary lavish expenditure for the benefit of the community shows in practice a whole-hearted adherence to the norms of the community. Supporting by one’s possessions the democratic institutions of the community, as well as profusely financing the military of the polis proves the internalisation and adoption of this community’s practices and undertakings. In addition, according to the agent’s adherence to his role in the community, performance of public services’ ethical motivation could be interpreted as “this is how a virtuous member of the elite should act”¹⁴⁶. The agent’s role in the community may be adduced to illuminate cases of naturalised citizens as well:

“Whatever concerns the state, however, and all that concerns you, I perform, as you know, as lavishly as I can; for I am well aware that for you who are citizens by birth it is sufficient to perform public services as the laws require; we on the contrary who are created citizens ought to show that we perform them as a grateful payment of a debt.” (Dem. 45.78, cf. 85)

A citizen’s role dictated the subordination of his *oikos*’ obligations to the ones of the polis:

“[...] never once when I had to perform a public service in your aid did I consider it a hardship that I should leave my children so much the poorer, but much rather that I should fail in the zealous discharge of my obligations.” (Lys. 21.23)

¹⁴⁵ Lys. 25.19, 31.

¹⁴⁶ This stands in conformity with the Greek aristocratic values, according to which members of the elite undertake the expenses of the democracy and act as protectors of the demos.

The frequent invocation of liturgies is best understood as the culmination of the ancient model of the 'objective / participant' self and they should be interpreted accordingly; not by reference to modern presuppositions and subjective perceptions.

6 CHAPTER SIX: PURPOSES OF CHARACTER EVIDENCE IN THE COURTS OF ATHENS – PREDOMINANCE OF LAW OR RHETORIC?

In the preceding chapter it has been demonstrated how the Greek perceptions of 'personality' influenced and fertilised argumentation in Athenian courts. Specifically, I have proved that these ideas explain the (by modern standards wide) use of character evidence and render it relevant to the legal charge in dispute. Setting aside the psychological and anthropological analysis of the previous chapter, a more legalistic explanation of this kind of rhetoric in Athenian courts may be offered. Yes, according to the prior analysis, the methods of giving character evidence (chapter 4) were dictated by the Greek ideas of character (as set in chapter 3). Furthermore, the Greek way of practical reasoning and ethical motivation (chapter 5) provides the model of interpretation for the forensic speeches, rendering groundless any analysis influenced by modern presumptions of relevance or the rule of law. However, apart from the obvious purpose of arguing convincingly the legal case, character evidence had secondary purposes as well. These aims, based on legalistic and rhetorical grounds, provide critics of the Athenian law with fertile ground for harsh interpretations, arguing that these secondary purposes aimed at the distraction of jurors from the legal case. Again, however, what is understood today as extra-legal argumentation neither obstructed legal justice nor inhibited the jurors' rational legal judgment.

The first part concerns the use of character evidence regarding issues of strict law, such as the speaker's fundamental aim of proving his adversary's propensity for reprehensible behaviour. Furthermore, the topic calls for a discussion of the (sometimes misinterpreted and blamed) genre of forensic rhetoric, which in turn gave rise to harsh criticisms about the implementation of justice in the Athenian courts. This discussion of forensic rhetoric, although comprehensively researched, is necessary for my thesis in order to reveal the underlying tensions brought about by the wide use of character evidence in Athenian courts. These tensions have already been shaped since antiquity by the work of Aristotle '*On Rhetoric*'. Opinions include sharp reproaches of the

ways that the orators tried to manipulate the popular juries with the latter's alleged inclination to give verdicts based on emotional considerations rather than on the laws. Character evidence is central in this respect since (apart from the strictly legal questions of propensity and the quasi-legal questions of credibility) this method of argumentation involves questionable extra-legal ways of winning the good will of an audience which in turn may be induced to decide cases on ethical or emotional grounds.

6.1 'Character' in Strict Law – Proving Propensity

The most 'legal' use of character evidence is its assistance in answering questions of guilt. Even in modern days, the legitimate purpose of proving or disproving one's guilt is achieved by proving the propensity of the accused to commit the particular crime in question or to aggrandise his blameworthiness due to his more general way of living in order to make him an unreliable character. In classical Athens, analogous efforts of proving one's criminal disposition (if talk can be made about such) were extended to the accuser (especially in terms of having a propensity to bring malicious prosecutions and, therefore, act as a sycophant) and were prolonged in order to cover more issues than the particular crime under question. In chapter 3 I have highlighted the fact *that the lack of a particular uniformity of approach regarding ideas of 'character' in Athenian courts meant that almost any past act could be invoked to assist the argumentation of the litigants. Furthermore, the inductive way of reasoning supported such an approach and allowed for extracting conclusions about issues of propensity to criminality by reference to a series of reprehensible past acts that in a modern court would probably have been rejected as irrelevant.*

On the other hand, in chapter 2 (referring to incentives for wide use of character evidence), I have pointed to the difficulty of gathering evidence for an Athenian trial, lacking the support of technological means and being left to private initiative. Taking into consideration that in the majority of surviving cases parties mainly dispute about questions of fact and not questions of law (where there seems to be an apparent agreement between the parties as to the meaning and the correct interpretation of the legal statute in question)

¹ assists in the better understanding of the difficulty. Moreover, such a situation increases the importance of character evidence, which could tip the balance in favour of one litigant or another. After all, the presence of the innovative (especially in the 5th century) rhetorical tactic of argumentation from probability reveals the weakness of the ancient courts in being absolutely certain about the facts of a case². Additionally, the fear of rhetorical manipulation of juries by litigants led the Athenians to put greater weight (according to a famous rhetorical *topos*, in the degree it can be trusted) on one's actions (during the course of his life) than on one's words (especially in the highly agonistic environment of the court). Therefore, for the Athenians, a presentation of a series of past acts may securely reveal a person's general disposition, and thus should be given more weight than words at the time of trial³.

The issue of propensity occupied the work of thinkers at least since the fifth century BC. Aeschines insisted that past acts can predict future behaviour⁴. His whole prosecution speech against Timarchus consisted of a combination of specific indecent events from the defendant's life with references to his general reputation. Using an inductive method of reasoning, Aeschines argues that Timarchus's appetite for lust, gluttony and hubris proved his general propensity for criminal and indecent behaviour⁵. The prosecutor of Lysias 14 in anticipating the defendant's plea for acquittal due to his previous honourable acts, proceeds to a series of allegations against them, highlighting their indecent and disorderly (private and public) behaviour, in order to conclude that

¹ Harris (2007b) shows that out of the twenty nine legal cases of the Lysianic corpus, the twenty six primarily involve questions of fact.

² Argumentation from probability was primarily employed in cases where the facts of a case were in dispute. See for e.g. Gagarin M. (1994); Harris E.M. (1994).

³ For the *logos - ergon* antithesis see for e.g. Aeschin. 1.179-81, 93; 2.5; 3.168, 174; Dem. 18.276; 55.2; Antiph. 2.2.2; 2.3.3; 5.84; 6.47; Andoc. 1.7; 3.1; Lys. 7.30; 12.33; 19.61; 25.13; 34.5.

⁴ Aeschin. 1.127.

⁵ Then, using a deductive way of reasoning, Aeschines could argue that for an indecent man like Timarchus it was highly likely to have prostituted himself. Cf. Aristotle's *Nic. Eth.* 1103b: "our actions, as we have said, determine the quality of our dispositions"; 1114a: They acquire a particular quality by constantly acting in a particular way. This is shown by the way in which men train themselves for some contest or pursuit: they practice continually. Therefore only an utterly senseless person can fail to know that our characters are the result of our conduct".

“Indeed, there is nothing that they have been spared, or have spared. For, their propensity is to be ashamed of what is honourable and to glory in what is base”⁶.

On the other hand defendants could also use analogous argumentation in order to prove a prosecutor’s propensity for bringing sycophantic suits. The following statement is revealing:

“I think, then, men of Athens, that nothing could be more to the purpose than to bring forward witnesses to these facts. For if one is continually making baseless charges, what can one expect him to do now?”⁷

In fact, this quote perfectly respects even a modern court’s rules, in the sense that it refers specifically to a person’s past offences of the exact same nature as the alleged crime, passing the test of relevance. The Athenians were more than capable of assessing the degree of relevance of a past act, overwhelmingly promoting the most relevant at the expense of the most remote⁸. Therefore, both the quantity of one’s past acts and the quality in terms of gravity and relevance to the particular case, played a major role in an orator’s decision as to whether and when such arguments should be adduced.

The adversarial nature of an Athenian trial meant that propensity arguments could be also adduced (especially by the defendants) in order to highlight the positive side of a person’s character. A defendant that led an orderly life, performing honourable deeds or liturgies for his fellow citizens, had proved his merits and his inclination to act in a good manner. In fact, one’s good will towards the polis and his fellow citizens could have been dispositional rather than opportunistic⁹. For example, the speaker of Lysias 19 exclaims that the account and accomplishments of his father’s whole life overwhelmingly prove that he never acted because of greed and he never had the propensity for such

⁶ Lys. 14.44.

⁷ Dem. 36.55; 52.26.

⁸ A similar argument is given by Harris (2007b), regarding legal precedent, *pace* Lanni (2004). In our case, although the Athenians were inclined to admit evidence that modern courts would tend to dismiss as irrelevant (but evidently they did not as their practice suggests), they carefully designed their speeches in order to promote the most relevant and proximate. See for e.g. the directly relevant argumentation in Dem. 18.125; 37.56; 44.38; 50.68; 54.3-7, 16; 57.59-60.

⁹ Cf. Dem. 36.55-6.

a flaw¹⁰. The prosecutors, on the other hand, concentrated on their lack of propensity for excessive litigiousness, which could lead to the serious allegation of sycophancy. Almost every prosecutor alleges his inexperience in legal matters. Whenever possible, he argues that it is actually the first time he attends a court, the fault being the defendant's since he was obliged to bring a public suit due to the latter's grave illegality.

What may be extracted regarding the probative value of character in revealing propensity in Athenian courts is that it does not differ sharply from the modern ideas. The nature of Athenian trials and the philosophical ideas of the period dictated a less offence-focused argumentation, embracing other matters such as litigants' positive or negative former acts. Nevertheless the essence of argumentation is the same, with the central aim being the revelation of one's character traits in relation to the legal case at hand. No matter whether the Athenians used more (and slightly different sometimes) paths for achieving this, proving one's propensity to commit (or not to commit) a particular crime was the utmost goal to be achieved. The reasons for the trivial deviations from the modern norm are mainly to be attributed to the Greek ideas of character discussed in the previous chapter, but again, these prove that both litigants and jurors regarded such argumentation as relevant to their case.

6.2 'Character' in Rhetoric – Persuasion, Credibility and Good Will

Although this topic has been treated extensively by numerous scholars the multitude of divergent views and interpretations of the ancient sources calls for a fresh more straightforward view of the controversial issues. Furthermore, the treatment of the secondary (less legal) uses of character evidence is necessary to the development of my thesis, since it has provided a superficially valid justification for those researchers rejecting the implementation of the rule of law by the Athenian courts. Based on the views of some Athenian writers¹¹, these scholars have placed too much weight on the rhetorical uses of ad hominem argumentation, deducing that the courts slipped into an extra-legal way of decision-making. Their conclusions that litigants based their pleas on irrelevant

¹⁰ Lys. 19.13.

¹¹ For a polemic against the Athenian legal system due to its manipulation by witty orators, see for e.g. Isocrates' 7.33-4; Xen. *Apol.* 4; Dem. 23.206 etc.

matters led them to the inference that the Athenian courts downplayed their legal role, primarily serving other, mainly socio-political roles¹². To what extent is such a statement valid that character evidence chiefly played an extra-legal role? Were the aims of rhetoric, especially as presented in the law-courts, incompatible with legal argumentation? Is the modern researchers' view influenced by the bias of ancient writers? These matters will be discussed in the next paragraphs, paving the way for the next parts of my thesis, discussing questions of relevance in Athenian courts.

As has been demonstrated, apart from the strictly legal use of character evidence (the proof of propensity), argumentation from character may also be used for other, secondary reasons. These include the effort to enhance the credibility and trustworthiness of a speaker, and gaining the good will of an audience through ethical and / or emotional pleas. Especially in the enormously adversarial environment of the Athenian law courts, which was sometimes susceptible to such argumentation, the extent of these secondary, extra-legal aims acquire additional significance. Keeping in mind the high stakes of the majority of the surviving Athenian trials, it is not difficult to deduce that litigants could employ all acceptable means in order to convince the jury and reach their ultimate goal: victory¹³.

Nevertheless, the experience of Athenian jurors and the fact that any mistake would be exposed by the adversary signified the need for very careful rhetorical strategy and tactics. This need was covered by the emergence of professional logographers and the study of rhetoric as a discipline. The absence of professional lawyers meant that the amateur Athenian litigant would have to deal with every step of a trial. Most importantly, in general terms it is often said that a litigant was required to speak for himself¹⁴. That created a twofold issue: either someone would have to face the realities of amateurism and commit (very) costly mistakes or he would professionalise the job either by hiring a

¹² In the previous chapters I have referred to relevant literature, for e.g. Ober (1989), Cohen (1995), Christ (1998a), Lanni (2006).

¹³ This is the ultimate goal of the parties in modern trials as well; cf. Kubicek (2006), Ch. 1.

¹⁴ For the extent of assistance that Athenian litigants received by their friends and supporting speakers see Rubinstein (2000). The evidence for a law requiring that litigants ought to speak for themselves come from Quintilian's, *Institutio Oratoria* (2.15.30), and is accepted by Bonner (1927); Goldhill (2002), 62; Kennedy (1998), p. 219.

professional logographer¹⁵ or by studying the secrets of rhetoric himself¹⁶. As a result, sophists, philosophers and professional speechwriters competed in trying to find the nature of persuasion, composing numerous theoretical and practical treatises on rhetoric¹⁷, depending on each one's primary interests.

Undoubtedly, our view of rhetoric has been shaped by Aristotle. The penetrating thought of the Stagirite and his enormous ability in classification has haunted the study of the discipline since antiquity¹⁸. In the *Rhetoric* he classifies the different kinds of proofs (*pisteis*) as artful (*entechnoi*) or artless (*atechnoi*) depending on whether they belong in the province of rhetoric, in other words whether they have been provided through the orator or they were already in existence. The first set of *pisteis* includes witnesses, tortures, contracts, laws, and the like (being there at the outset), while the second, which concerns us here, includes those proofs that must be devised by ourselves, in the form of moral character, emotion, and argument (*Rhet.* 1355b35ff.). Although the effects of persuasion through moral character and emotion may often be said to overlap¹⁹, Aristotle does not support such a conclusion regarding forensic rhetoric. These key terms, together with *eunoia* (good will) and *axiopistia* (credibility, trustworthiness), definitely need clarification.

Preliminary clarification of the roles of *ethos* and *pathos* in relation to forensic argumentation is necessary. My aim is to concentrate on Aristotle's *Rhetoric*

¹⁵ For the *logographer* see 2.1.2. The differences between amateur and professional speech in the Athenian courts with the shortcomings of the first that the second tried to correct is the theme of Bers (2009). The extent of the logographer's assistance to an amateur client forms a continuum, ranging from "the high end, a *logographos* composing and delivering a speech himself...to the extreme low end, a functional illiterate making an unrehearsed, truly spontaneous speech" is described in Bers (2009), p. 10; cf. Dover (1968), Ch. 8.

¹⁶ The most famous example is to be found in the face of Strepsiades in Aristophanes' *Clouds*.

¹⁷ Aristotle's *Rhetoric* being the most famous, without underestimating the influence of Plato (see for e.g. Gorgias, Phaedrus) or the practical handbook of Anaxim. *Rhet. ad Alex.* Others have reached us through fragments or only by their names, though they seemingly had substantial impact on their contemporaries, such as Thrasymachus, Prodicus, and Theopompus of Chios.

¹⁸ Although his lack of interest in (or even dislike of) forensic oratory hindered him from giving us a more accurate and detailed view of this genre [see Trevett (1996)]. Furthermore, his interest in discussing rhetoric as a discipline forming the counterpart of dialectic, led him sometimes to a more theoretical than practical approach. This is also the reason that makes questionable whether the *Rhetoric* forms an accurate guide for the study of Athenian rhetoric in particular [see Hesk (2009); Harris (1994); Mirhady (1990); Carey (1996)].

¹⁹ Carey (1994), at pp. 35, 39, 44.

which, due to its importance and its 'intellectual approach' to the subject²⁰, has created disputes and misinterpretations. It is said that for Aristotle, the importance of *ethos/pathos* argumentation should be attributed to the inadequacy of the audience (cf. *Rhet.* 1354b; 1415b) and the weaknesses of the system which permitted such aberrations²¹. Although Aristotle admires systems which strictly prohibit speaking outside the issue and pass laws so inclusive that leave nothing to the discretion of the dicasts, evidently this is hardly realistic. Thus, room is left for the rhetoricians to resort to emotional pleas, by focusing on methods of putting the judges into a certain frame of mind. As a result, "in their case love, hate, or personal interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasure or pain" (*Rhet.* 1314b). Such rhetorical devices "are outside the question, for they are only addressed to a hearer whose judgment is poor and who is ready to listen to what is beside the case" (*Rhet.* 1415b). Nevertheless, not all judges are such, and definitely Athenian judges did not lack the experience or the mental capacity to uncover rhetorical tricks²². It must also be noted that Aristotle particularly refers to *emotional pleas* which, as will be shown later, have (to an extent) to be distinguished from character evidence. However, an all-inclusive interpretation is usually given, citing Aristotle as hostile to any kind of rhetorical argumentation as inconsistent with law²³, rendering mass juries incapable of regulating extra-legal references.

The question then admittedly is a complex one and the situation deteriorates if a question is asked as to why Aristotle, contrary to his suggestively negative opinion of rhetoricians who placed too much weight in the treatment of emotional appeals, devotes a substantial part of the *Rhetoric's* Book II to the analysis of 'non-essentials' like emotions and types of personality. This may be explained as an inconsistency of approach (doubtful when referring to Aristotle) or as a practical division of Aristotle's approach to rhetoric as 'idealistic' and

²⁰ I borrow the term from Carey (1996).

²¹ Based on Arist. *Rhet.* 1354a,b; 1415b, this is the interpretation of e.g. Carey (1996), p. 40, n.24; Trevett (1996), pp. 378-9.

²² Cf. Harris (1994).

²³ Harris (1994), (2006b) shows that such inconsistency is non-existent. No Athenian would consider rhetoric as inconsistent with legal argumentation, and no litigant would even think of inducing the jurors to disregard the law in favor of equity or other considerations.

'realistic'²⁴. Could there be another explanation for this? The answer will be given in due course, after the necessary clarification of the aforementioned key terms. For the moment it suffices to state my position that his hostility is against the degree and quality of emotional pleas suggested by his intellectual opponents. Aristotle is not overwhelmingly hostile to balanced emotional pleas which do not hinder the rational ability of the receiver, although he knows that these may sometimes be interpreted as irrelevant.

In Aristotle, *ethos* has primarily an ethical or moral sense and is associated with the self-presentation of the speaker²⁵. He is definitely not inimical to this and acknowledges its importance. The accounts of Aristotelian persuasion through character can be found in the chapters 1.2 and 2.1 of the *Rhetoric*. According to Fortenbaugh, the first refers to judicial settings while the second to deliberative²⁶. In his view, in forensic environments the speaker must show *epieikeia* (uprightness of character) which parallels moral virtue (*Rhet.* 1377b 25-6). *Ethos* here refers to moral disposition, as distinct from 2.1 where it is supplemented by the speaker's reference to his deliberative capacities (wisdom, *phronesis*) and the advertisement of his good will towards the audience. Nonetheless, the rhetorical practice of the Athenian courts indicates that this traditional (Homeric) tripartite persuasion (wisdom, virtue, good will) was present in full in the law-courts²⁷. Apart from the surviving speeches, this tripartite division is also verified by (probably) Anaximenes of Lampsacus advice in the rhetorical treatise *Rhetorica ad Alexandrum* (1436b 22-6).

As shown in chapter 5, Greek ideas of ethical motivation dictated that in order for an orator to be successful (especially in the portrayal of character), account must be taken of the beliefs and values of the audience he wants to persuade²⁸.

²⁴ See for e.g. Rodgers (1984).

²⁵ Gill (1984), p. 165; cf. P. 153.

²⁶ Fortenbaugh W. (2006), Ch. 18, pp. 317 ff.

²⁷ This was the idea in Fortenbaugh (1992), where he sees the *Arist. Rhet.* 1.2 and 2.1 as complementary. In Fortenbaugh (1996) he prefers to see them as distinct referring to different settings. The fact that Aristotle deals very briefly with persuasion through character as opposed to his account on emotions (2.2-2.11) is attributed to the familiarity of the audience with this kind of argumentation, since it held its roots in Homer. This lack of originality, as opposed to Aristotle's new, cognitive analysis of emotions, led him restrict the length of the former and expand that of the latter.

²⁸ Cf. Classen (1991).

In that respect, character is of utmost importance and “may almost be called the most effective means of persuasion he possesses” (*Rhet.* 1356a 10-14). One’s *axiopiastia* (credibility) depends on the convincing of the audience of his adherence to popular norms; moral character needs to be presented accordingly. For Aristotle, this impression of one’s *ethos* is created through the speech and achieved through the skilful use of language, not by what people think of him before he begins to speak (*Rhet.* 1356a 8-10). Appropriate arguments, style and delivery, in a manner that is *prepon* (fitting) to the speaker, are necessary to create a particular impression of one’s character to the audience. In contrast, Isocrates refers to a speaker’s *ethos* as something achieved throughout one’s life, i.e. his prior reputation (*Isocr.* 15.278). This can be said to be more effective in face-to-face communities (not rejected in principle by Aristotle as has been shown in chapter 1). Furthermore it has been recently argued that “the aspect of character was perhaps relatively straightforward in Athenian oratory because in the law courts defendants spoke on their own behalf; advocacy...greatly complicated the use of character”²⁹. Nevertheless, Aristotle’s remarks fit better with Attic oratory where speakers, regarding presentation of character, relied to a great extent on rhetoric. Careful argumentation was employed in order to highlight or darken the more or less advantageous details of an (even well-known) event, to eulogise one’s past acts in proving an upright way of life, to advertise his good will towards the audience, the polis and its norms.

Persuasion through *pathos* has different implications. Here, the centre of attention departs from the speaker and focuses on the hearer. From ‘persuasion through the speaker’s character’ it becomes ‘persuasion through the hearers’ emotions’. In particular, the orator concentrates on ways and methods that could produce the desired emotional effect on his audience. Emotional appeals had been very popular with the writers of rhetorical handbooks, forming the central theme of their treatises. Aristotle, although he recognises the importance of the audience’s emotional condition (*Rhet.* 1377b 21-31) as a result of its inadequacy, nevertheless remains hostile to such practices, though not

²⁹ Steel (2009), p. 81. As we have seen before, this may be accepted with some reservations.

universally³⁰. His negative remarks form a reply to the writers who have themselves *overstated* the importance of emotional appeals, presumably at the expense of legitimate strictly legal argumentation and character evidence³¹. But to what extent does Aristotle's treatment of emotion differ from that attributed to other writers? And to what extent may be said that emotional appeal was relevant and successful in Athenian courts?

Emotional pleas have always been regarded as targeting the impulsive, irrational parts of the human mind and soul, thus hindering its ability for rational thought. On the other hand, Aristotle's treatment of emotions in the *Rhetoric* 2.2-2.11 is original and contributes significantly to the development of philosophical psychology. It is explaining the tie between belief and emotion, intending to show that *human emotions can be based on the outcomes of rational calculation*. An orator's ethical and emotional argumentation need not aim at arousing illogical reactions but provide grounds for trust without undermining the impartiality of the audience³². In other words, such argumentation about the moral uprightness of a litigant's character which provides reasons for reasoning (and as a result it may cause mild emotional reactions), differs sharply from what Aristotle's adversaries advised their readers. Their kind of argumentation, according to the Stagirite philosopher, was outside the issue, referring to extraneous matters, undermining the audience's impartiality and critical thinking. In this way the audience, which was provoked to feel pleasure and pain, was directly affected in judgment (cf. *Rhet.* 1377b 31-1378a6; 1378a 20-21). On the contrary, *argumentation producing sensible emotional responses based on beliefs and reasoning retains its legitimacy since it does not hamper the audience's straight judgment*.

The preceding paragraphs have indicated yet another critical point concerning ethical and emotional argumentation. Aristotelian persuasion through character is not intended to arouse emotional reactions in the audience. The uprightness of one's moral character provides reasons for trusting the speaker, without undermining the audience's judgmental ability. Presenting good character by

³⁰ Cf. Carey (1996), p. 40 n. 24.

³¹ Cf. Fortenbaugh (2006), p. 325.

³² Fortenbaugh (2006), p. 317.

showing adherence to widely accepted norms and beliefs can be a way of making oneself credible (*axiopistos*), significantly contributing to persuasiveness by legitimate means. Secondly, this kind of argumentation may overlap with (or be seen as) emotional pleas which, again, need not be illegitimate and irrelevant. What may be called trustworthiness, when focusing on the speaker, can also be called good will (*eunoia*), when focusing on the audience's response. However, the triggering act remains the same: the speech and argumentation which provides reasons for a cognitive procedure providing the aforementioned results. Lastly, emotional argumentation may be unrefined and irrelevant, aiming at arousing crude responses in the unsophisticated mob, thus undermining rhetoric and justice per se³³. To conclude, in Gill's precise words

“a prose orator either can appeal to his audience to view his figures in an ‘ethical’ way, as characterised agents, whose moral or personal qualities are presented for calm and rational assessment. Or he can aim at a more intuitive response, inducing his audience to share his figures’ emotions or to respond to the *pathos* of their situation, with very limited critical or ethical detachment”³⁴.

In the course of the above discussion reference has been made to the issue of good will, which also needs some clarification. The issue of securing the good will of the audience was crucial and common to all litigants. In all parts of a speech, from the *prooemium* to the *epilogue*, speakers aimed at establishing concord with their hearers³⁵ simultaneously undermining their opponent's chances of success. Either through the presentation of their own (dispositional or occasional) good will towards their hearers, or through the presentation of their *ethos* or *pathos*, speakers sought for a mild and impartial or an intensely emotional and partial kind of good will. As a result, four meanings of *eunoia* are present in the law courts.

A speaker's good will towards his polis (represented by the jurors) could be revealed through his *ethos*, arguing that his *philia* towards his polis and compatriots is an established disposition, a character trait acquired through his

³³ This strategy was very risky as to its results, as will be shown in due course, especially when dealing with experienced audiences like the Athenian.

³⁴ Gill (1984), pp. 165-6, and n. 99.

³⁵ Cf. Arist. *Nic. Eth.* 1167a-b; cf. McGlew (2004).

civic *paideia*. Past services to his polis, enumeration of liturgies and other benefactions, and a more general adherence to the norms of the audience as a proof of civic virtue³⁶, formed patterns of argumentation in Athenian courts. Regardless of whether he asked for the jurors' *charis* (gratitude) by referring to such arguments, the essence remains the use of the Homeric tripartite division (virtue-wisdom-good will) in order to secure the *eunoia* of the audience. On the other hand, a speaker's good will could be proved by more emotional argumentation. In reference to occasional, spontaneous reactions, which though not proving an established character, could nonetheless prove his emotional attachment to his polis. He may invite the audience to share the *pathos* he felt during such moments and respond accordingly. Therefore both *ethos* and *pathos* could be adduced in a litigant's speech in order to advertise his good will³⁷.

As far as the *eunoia* of the audience is concerned, again, this might be divided into two kinds: mild and passionate. The audience may react in an unemotional way, acknowledging the trustworthiness of a speaker and attributing a fair amount of credibility, though retaining their impartiality and critical thinking in order to reach a just result. It was a rhetorical *topos* to ask for the *eunoia* of the audience (especially in the *Prooemium*), and definitely this kind of good will equated to fair hearing rather than an invitation to the jurors to behave contrary to their oath, in an emotional, biased manner. In fact, there was nothing to prevent an audience from feeling good will toward all speakers, even though the speakers are opposed to each other. That is what Isocrates calls "common good will" (*koine eunoia*, Isoc. 15.22)³⁸. On the other hand good will may reach its climax and imitate 'friendship'³⁹, inducing the audience to more passionate and partial responses⁴⁰. Although this was prohibited by the Heliastic oath (Dem. 24.151), the mere presence of such a clause in the oath reveals the

³⁶ Cf. Arist. *Rhet.* 1367b: "We ought also to consider in whose presence we praise, for, as Socrates said, it is not difficult to praise Athenians among Athenians. We ought also to speak of what is esteemed among the particular audience, Scythians, Lacedaemonians, or philosophers, as actually existing there".

³⁷ Cf. Fortenbaugh (2006), p. 338.

³⁸ Fortenbaugh (2006), p. 334 n. 44.

³⁹ Arist. *Rhet.* 1378a19; *Nic. Eth.* 1166b33 where good will is described as "less intense *philia*"; Fortenbaugh (1992), pp. 219-220.

⁴⁰ For a study of such responses, see Bers (1985).

existence of the problem. The most famous and characteristic example comes from a speech delivered by Apollodorus (Dem. 45) against Stephanus for false testimony, in prolongation of a trial between himself and his stepfather Phormio. Apollodorus says that his opponent “made such an impression on the jury that they refused to hear a single word from me: I was fined one-sixth of the amount claimed, was denied the right of a hearing, and was treated with such contumely as I doubt if any other man ever was, and I went from the court, men of Athens, taking the matter bitterly and grievously to heart”⁴¹. Although such episodes may be described as “aberrations from the norm” where the court “have yielded to emotional appeals and failed to perform their duty of upholding the law”⁴², they nonetheless highlight the untypical emergence of passionate good will towards one of the parties, reaching the extent of prejudice. After all, this is what Aristotle detested the most.

*From the above evidence it is revealed that the popular conclusion regarding emotional pleas and prejudice in Athenian courts, i.e. litigants digressing to irrelevant argumentation thus hindering the correct execution of justice, may not be so accurate after all. Especially when referring to Aristotle, modern researchers must be very careful in citing his *Rhetoric* for support. Moreover, regarding the court speeches in particular, new studies have shown that emotional argumentation could in truth damage a speaker’s case. In her study on *dicastic* anger, Rubinstein has noted that emotional pleas needed to be carefully checked, having different, proper degrees of intensity⁴³. Depending on the type of the case and the composition of the audience, speakers had to adjust their argumentation, avoiding emotional extremities. Similarly, Bers argues that professional speech in the courts of classical Athens aimed at the restraint of the speaker’s affect, thus correcting a common mistake of amateur speakers. In his words “an individual amateur litigant, lacking the logographer’s restraining hand, would more likely yield to his emotions and allow his rage to break out, thereby offending his judges and harming his case”⁴⁴. The changing attitudes in Athenian society, namely the transition from the approval of anger,*

⁴¹ Dem. 45.6.

⁴² Harris (1994), p. 137.

⁴³ Rubinstein (2004).

⁴⁴ Bers (2009), p. 98.

rage and aggressive emotions of the heroic age to their restraint due to the emergence of cooperative values such as moderation and self-control, ordained similar behaviour in the courts of law⁴⁵. Evidently, this is not to suggest that emotional pleas were abandoned or even condemned⁴⁶; however, the emergence of a new ethics was at hand, once more rendering easy conclusions concerning the Athenian legal system inappropriate.

Our final consideration in this effort for clarification of rhetorical terms concerns *axiopistia* (credibility, trustworthiness). Credibility concerns the believability of the person, either litigant or witness. The strict legal application of the notion of credibility relates to the testimony of a witness or party during a trial. Testimony must be both competent and credible if it is to be accepted by the tester of fact as proof of an issue being litigated. Questions may arise concerning the credibility (including reliability) of a witness (or a litigant) who testifies about the facts in issue or facts relevant to the issue⁴⁷ and this also decides the weight that a testimony deserves. Overall, a trustworthy and respectable speaker enhances his chances of being successful.

Aristotle in his *Rhetoric* (1356a) links credibility with character:

“The orator persuades by moral character when his speech is delivered in such a manner as to render him worthy of confidence; for we feel confidence in a greater degree and more readily in persons of worth in regard to everything in general, but where there is no certainty and there is room for doubt, our confidence is absolute”.

By the same token, counter-attacking the adversary and assassinating his moral character is equally recommended: for it would be absurd to believe the words of a speaker who is himself unworthy of belief (*Rhet.* 1416a). These conclusions had been reached by earlier orators as well. Antiphon, in one of the earliest surviving speeches observes that ‘when there are no witnesses, you are forced to reach a verdict about the case on the basis of the prosecutor’s and

⁴⁵ For a study of ‘rage’ and the aforementioned transition see Harris W. (2001), esp. Chs. 7,8.

⁴⁶ This is evident by their presence in the surviving speeches; see for e.g. Dem. 21.34; 24.118 Lys. 6.17; 31.11; Isoc. 18.4,36; 20.6, 9, 22 etc.

⁴⁷ Dennis (2010), p. 12.

defendant's words alone'⁴⁸ so the jurors 'must examine what each side swore and decide which of us was more truthful and swore more correctly'⁴⁹. Andokides, in his defence speech repeatedly tries to attack the credibility of the prosecutors, by referring to allegations of dishonesty and sycophancy. Projecting his own beliefs onto the jurors he continuously uses phrases such as 'you know what sort of men they are...'⁵⁰ in order to diminish the credibility of his opponents. The examples are numerous and occur in almost every extant speech, even in cases where the court had to decide on an inheritance, where the claims were equal and the structural unsymmetrical adversarial nature of the trial was neutralised. Similar efforts can be found in Lysias. The prosecutor on the scrutiny of Evandrus acknowledged that 'It is your business, gentlemen of the Council, to inquire whether you will reach a better decision in the matter of this scrutiny by listening to me or to Thrasybulus, who will defend this man'⁵¹.

6.3 Emotional Argumentation

The previous section demonstrated the, in principle, unjustified universal condemnation of emotional appeals as inconsistent with rational judgment and irrelevant to the legal case. This approach is heavily influenced by the post-Kantian assumptions of a 'reason – passion' contrast with the first requiring total abstraction and detachment, being, as a result, incompatible with the second. The Greeks however narrate a completely different story⁵². For them, human emotions and desires are informed by beliefs and reasoning. A person's emotional world is totally dependent on and informed by contextual stimuli, such as cultural presumptions and upbringing. In other words, *pathos* is taken to be 'rational' in the sense that it is based on a cognitive evaluation of a particular situation; the person, drawing on preconceived ethical beliefs and stereotypical assumptions instilled on him by the environment, reacts with a proper response, i.e. feeling the proper emotion⁵³. Therefore, the Greek ideas of personality and the human mind discussed in chapter 5, illuminate this problematic case as well. The 'objective / participant' human being's emotional

⁴⁸ Antiph. 6.18; cf. Lys. 22.17.

⁴⁹ Antiph. 6.16.

⁵⁰ Andoc. 1.133; cf. 1.139.

⁵¹ Lys. 26.21.

⁵² See for e.g. Gill (1996), at pp. 22, 104, 179, 203 and 227; cf. Cairns (1993), at pp. 6-10.

⁵³ For Chrysippus in particular, emotions depended on (or, more strongly, were) beliefs. See Gill (1996), p. 227.

responses (as well as human action) are formed by his ethical judgments leading to a rational – *cum* – emotional consistency. As a result, patterns of emotional response are created which can then be evaluated and characterised as acceptable or unacceptable by reference to shared ethical norms for such responses.

This story is also evident in Athenian courts. Appeals to pity are not uncommon in the forensic speeches, especially of the defendants. But did these appeals prejudice the jurors unfairly in order to reach an irrational and unjust decision? Regardless the underlying motives of the speakers, such emotional appeals were not inconsistent or incompatible with rational judgment. Pity was asked by the jurors as the *proper emotional response to the particular situation of the innocent defendant*. Based on the proper beliefs (as presented by the defendant), the correct reasoning and evaluation of the particular case would lead the jurors to acquit the appealing litigant, simultaneously showing the proper emotive reaction of pity. *Unmerited suffering* is the key phrase that denotes the proper understanding of the emotion of pity in classical Athens⁵⁴. The cognitive dimension of the emotions is thus evident. However, together with the psychological element, reference can be made to structural considerations in order to prove this compatibility between the emotional appeals to pity and the rational evaluation of the particular legal case. The cognitive dimension is demonstrated by the establishment of a relationship between the jurors and the litigant, whereby the latter exemplified (either through words or enactment) his submission and trust to the power of the demos⁵⁵, asking for its proper emotional response⁵⁶. Finally, noteworthy is this emotional appeal's very reasonable and targeted usage in cases of harsh impact, and especially when the preservation of an *oikos* was at stake⁵⁷. Its proper and targeted use signifies the very 'rationality' of its application.

⁵⁴ Cf. Konstan (2000), p. 129.

⁵⁵ See Johnstone (1999), p. 110.

⁵⁶ Cf. Konstan (2000), p. 138: "[h]e is making vivid to the jury what losing his case would mean for himself and his family, precisely on the assumption that he is innocent. His object is not to ask for mercy, in the sense in which mercy presupposes guilt; it is to make sure that no irrelevant motive, such as personal hostility, political partisanship, or favour toward his accuser, may induce the jury to convict him, by making clear what is at stake if they do so".

⁵⁷ Cf. Johnstone (1999), at pp. 111-120.

As far as appeals to *dicastic* anger are concerned (although as an emotion diametrically antithetical to pity) the same patterns emerge⁵⁸. Aristotle defines anger as “a desire, accompanied by pain, for a perceived revenge on account of a perceived slight” (Arist. *Rhet.* 1378a31-2). Appeals to anger or rage (*orge*) (which, as an emotion is dictated by the relevant beliefs that produce it)⁵⁹ are always coupled with the guilt of the opposing party. The argument is context-sensitive and is only adduced in public cases (*graphai*) or in *dikai* where the legal offence called for the punishment of the perpetrator (signified by the verbs *kolazein* or *timoreisthai* and their derivatives)⁶⁰. Appeals to *orge* are invoked (in accordance with Aristotle’s analysis in the *Rhetoric*) only against a specific individual, provided that the person appealed to has to feel that he has been injured personally. By contrast, *misos* is represented as an emotion that can be directed against an entire category of people, without presupposing a feeling of personal injury⁶¹.

The perfect rationality of these emotions and their usage in Athenian courts is therefore evident. In Rubinstein’s words “what held speakers back from appealing openly to *dicastic orge* in *dikai* may have been their fear that such appeals might back-fire, because their claim that their case was of common concern simply would not have seemed plausible enough for the *dicasts* to accept that line of explicit emotional argumentation”⁶². Finally, it is noteworthy that Athenian defendants never tried to assuage the jurors’ stirred anger through an expression of remorse or repentance because this would simply mean admission of guilt. However, if they believed that the jurors voted carried away by their emotions rather than according to their oath, such efforts might have been present. For the simple fact that their admission of guilt would not automatically condemn them (since the jurors would assess extraneous considerations) and the (more influencing) appeals to emotions would provide them with a better chance.

⁵⁸ See for e.g. Rubinstein (2004) and (2005a); Konstan (2008); Harris W. (2008), Ch. 8.

⁵⁹ Arist. *Rhet.* 1380a.

⁶⁰ See Rubinstein (2004), (2005a).

⁶¹ Rubinstein (2004), p. 193.

⁶² Rubinstein (2004), p. 195.

Shame⁶³ (*aidos* or *aiskhune*) is the emotion of “pain or disturbance concerning those ills, either present, past, or future, that are perceived to lead to disgrace, while shamelessness is a disregard or impassivity concerning these same things” (Arist. *Rhet.* 1383b12-14). This emotion is prompted by three elements: a particular disgraceful act, the fault of character that is revealed by the act, and the (real or imagined) loss of esteem brought as a result before the community at large. As becomes evident, shame before the community presupposes an adherence to and internalisation of conventional ethical norms and proper courses of action, whose breach would be perceived as reprehensible by the community and trigger negative judgments against and disgrace to the agent. The fact that this reaction by the community may even be totally imagined reveals the significance of this process of internalisation for the emotion of shame⁶⁴. Shamelessness, on the other hand, entails either the agent’s indifference as to his reputation or the lack of knowledge as to which acts or character traits are disgraceful. This latter aspect is brought forward in the forensic speeches.

Shamelessness in Greek orators is directed against an opponent whose conduct and previous acts prove indifference as to the conventional ethical norms. Shame is the indicative emotion which renders an agent adherent to or unreceptive of the community’s values. Hubristic, arrogant conduct is coupled with shamelessness⁶⁵. A shameless person is one who “has not stopped short of the utmost limits of depravity”⁶⁶. In a similar manner, concerning misuse of the laws and sycophancy, Demosthenes asks Aeschines “Are you not ashamed to prosecute for spite, not for crime?”⁶⁷. Any breach of communal norms coupled with the agent’s lack of shame proved the latter’s lack of internalisation of ethical norms, with the subsequent results discussed in chapter 5 (rendering himself an ethical outcast of the community). On the other hand, a speaker’s silencing of the opponent’s (what are said to be) exceptionally reprehensible

⁶³ See Konstan (2003); cf. Cairns (1993).

⁶⁴ As Cairns (1993), p. 5 asserts: “to experience shame is to place an action, experience, or state of affairs in the category of the shameful, the criteria of the shameful being supplied by subjective attitudes and cultural conditioning... an occurrence of fear, shame, anger, or *aidos* relates to some perceived attribute of the world ‘out there’”.

⁶⁵ See for e.g. Dem. 21.109, 151, 201.

⁶⁶ Dem. 22.47.

⁶⁷ Dem. 18.121; cf. Dem. 37.52; Dem. 43.38.

and indecent acts may be used to reveal his unequivocal adherence to the community's morals⁶⁸. Phrases such as "I am ashamed to say how mean and shabby they are"⁶⁹ are not uncommon. The most indicative example comes from Aeschines:

"Now the sins of this Pittalacus against the person of Timarchus, and his abuse of him, as they have come to my ears, are such that, by the Olympian Zeus, I should not dare to repeat them to you. For the things that he was not ashamed to do in deed, I had rather die than describe to you in words (*ἄ γὰρ οὐτοσὶ ἔργω πράττων οὐκ ἠσχύνετο, ταῦτ' ἐγὼ λόγῳ σαφῶς ἐν ὑμῖν εἰπὼν οὐκ ἂν δεξαίμην ζῆν*)" (Aeschin. 1.55).

The 'rationality' of this emotion and the 'reasonable' outcomes it causes are obvious.

Finally, focusing on the jurors calls for an analysis of the emotion of envy⁷⁰. Aristotle defines this (*Rhet.* 1386b18-20) as a painful emotion arising from the prosperity of a person who is 'similar' to us, thus produced by an unfavourable comparison with someone who seems to possess something that we lack. Although the 'rationality' of this emotion and its grounding on the agent's beliefs and reasoning are evident, further analysis is due. Apart from concentrating on techniques of inoffensive self-praise before a mass audience (these techniques acknowledging the 'rationality' of the emotion, aiming at cancelling or substituting the beliefs or the reasoning that provoke it), the main aim here is to demonstrate the role of liturgies in neutralising the jurors' potential envy. In chapter 5, the multidimensional role of the invocation of liturgies has been demonstrated. These findings may be supplemented with the interpretation of this practice as potential obstruction to the arousal of envy.

Adducing liturgies, instead of being a method of distracting the jurors from the particular legal offence, may be contrastingly seen as a method of keeping them focused on the point. Considering certain that the adversary of a wealthy litigant would try to excite the envy (and suspicion) of the jurors against a wealthy

⁶⁸ See Chapter 4, the section on 'silence'.

⁶⁹ Dem. 23.208; cf. 48.2.

⁷⁰ See Spatharas (2011); Dyck (1985).

litigant, the latter, by enumerating his liturgies, reveals his public-spiritedness and asks them not to decide the case by reference to irrelevant motives. In order to achieve this he refers to his public expenditure as generous *sop* sharing⁷¹ or even true sharing. The speaker of Lysias 19 exclaims:

“Consider, as you survey the time that is past, all that is found to have been spent on the city: at this moment, too, I am equipping a warship from the residue; my father was equipping one when he died, and I will try to do what I saw him doing, and raise, by degrees, some little sums for the public services. Thus in reality it continues to be the property of the State” (Lys. 19.62).

Envy, although an emotion, was again treated as ‘rational’ deriving from relevant beliefs and a course of reasoning. Appeals to emotion were not incompatible with rational consideration of the legal case; rather they reinforced it by reference to a different kind of reasoning.

6.4 Conclusion

Aristotle in the *Nicomachean Ethics* evaluates the quality of a person’s emotional response and its relation with virtue by reference to the mean (*to meson*). He provides that

“[...] to feel [fear and confidence and appetite and anger and pity and, in general, pleasure and pain] at the right time, with reference to the right objects, towards the right people, with the right motive, and in the right way, is what is both mean [*meson*] and best, and this is characteristic of virtue”. (1106b21-3)

The Athenian legal system, as presented in the speeches of the orators, encouraged litigants to use character evidence and appeals to emotion in a similar, rational manner. Proper emotional responses should be provoked with regard to the right persons, at the correct timing (in *dikai*, *graphai* etc.), with the appropriate reaction in the form of a legal verdict, always combining written law and justice. Behavioural patterns were thus formed and propagated by the jurors and the court (acting as a section of the *demos*, therefore as a coherent

⁷¹ See for e.g. Lys. 18.21.

ethical sub-community) in the Aristotelian way⁷², whereby a virtuous community propagates its ethical beliefs (as discussed in chapter 5) and the appropriate emotional responses (chapter 6). In this way the court through its verdicts structurally acted as the educator of the polis, testing, reinforcing and propagating the correct ethical motivation and reasoning of the citizens. Thus, the court, in order to achieve this legal enforcement of norms, not only had to decide in accordance with the written law which encapsulated an underlying ethical norm but (it is unavoidable to suggest that) it had to do it in a fairly consistent way as to allow the citizens to adjust their behavior accordingly.

The aforementioned considerations also reveal the importance and the complexity of the uses and purposes of character evidence and extra-legal argumentation in Athenian courts. Opposing arguments and divergent conclusions (both from ancient and modern sources) have confused the picture and called for a fresh consideration of the issues. Contrary to the popular perception regarding the susceptibility of Athenian courts to irrelevant considerations, the above discussion has proved that *ethos* and *pathos* argumentation could be relevant and legitimate in a forensic setting. Aristotle particularly acknowledged character evidence as the most important assistance in arguing a case. The surviving speeches prove that this was true for the protagonists of the Athenian legal system as well. Moreover, emotional pleas could also be relevant and legitimate, provided that they were checked and kept to a balanced degree. Athenian jurors, with minor aberrations, were experienced and thus more than capable of recognising the rhetorical strategy of litigants, not letting themselves be tricked and manipulated. In truth, such an effort could backfire and damage a speaker's chances of success. Therefore, modern researchers should be cautious when they underestimate the ability and desire of Athenian jurors to perform according to their oaths in order to enforce their notion of the rule of law.

⁷² Cf. Gill (1995), p. 58.

CONCLUSIONS

In these final remarks, conclusions are drawn as to the issues that have been raised by this thesis and the further implications that my findings may have for research. Analysis of character evidence, a dominant aspect of Athenian forensic argumentation, is central to the better understanding of the nature of Athenian law and its placement within its appropriate socio-political and cultural boundaries. In the first instance, the issues discussed touch upon the Athenian approach to law and justice; the question of relevance predominates. Closer inspection shows that the evidence offered by this thesis radiates in most fields of human life. Building on its outcomes, further research is needed in order to grasp its wide-ranging impact.

This thesis aspired to be deeply 'political' in the Aristotelian sense of the word. The flaws of historical materialism, as disguised in the form of Western Capitalism or Marxism, have repeatedly been exposed and the homo economicus has slipped into following a deeply antisocial, utilitarian stance. The western worldview with its deification of the consumerist market economy has led to an egocentric, individualistic barbarism. On the other hand, the Greek worldview, as subtly presented by this thesis, poses as an alternative. Ideas and mentality may form the foundations of social and historical progress, being the driving forces behind the institutional and political development. Resistance to voracious selfishness need not take the form of an alternative ideology which accepts the same patterns of thought but interprets them differently. The emergence of an alternative lifestyle directed by the *tropoi* of the participatory, communal homo politicus may be brought forward as the way ahead. Therefore this thesis aimed at familiarising its reader with an alternative worldview, by taking a step away from the materialistic conception of being and placing the political human at the forefront.

As has been demonstrated, the legal structures of the ancient polis in particular, retained their original political character of serving the needs of the citizens. Abstaining from taking an elitist, cut off from the society, autonomous path,

justice remained a matter of the community. Direct and unimpeded partaking in the civic workings gave meaning to the 'objective/participant' person's life. The field of the courts was run by laymen whose deeply rooted traditional conceptions guaranteed a coherent and consistent approach to justice in the form they moulded it. Though focusing on character evidence and the administration of justice, this thesis touched upon wider issues which can change our perspective of the world.

1. Key Findings

This thesis demonstrated the consistent presence of character evidence during the archaic and the classical period. Alongside other examples from the earliest period in which evidence exists proof was offered that this approach to forensic argumentation, typical of the fifth century, was inherited from the practices of the past (Chapter 1). This conclusion allows us to observe the Athenian legal system as a single living organism which changed and evolved through the centuries, rather than a corpse whose last moments are used for autopsy. Furthermore, evidence drawn from throughout the Greek world, demonstrated the inner uniformity of Greek law as an entity, regardless of the superficial differentiations of the laws of each polis.

In both legal and quasi-legal fields, broad citation of argumentation drawn from the speaker's ethos challenges the rule of relevance that required adversaries to 'speak to the point'. However, the persistence of this practice and the consistent patterns of argumentation which were (intuitively or consciously) followed by the speakers, accepted by the audience, and permitted by the structures, call for explanation. If these were leading to confusion and dispute, the Athenians would have developed stricter controlling mechanisms. The incentives offered by the legal system itself (Chapter 2) prove the opposite. The implication of this thesis was that the rule of relevance was substantively respected, in accordance with the standards the ancient Athenians had set. These standards had to be uncontroversial and objective, rather than questionable. If the underlying causes of this practice were solid, the first step towards consistency of approach through time and space would have been taken.

The wide invocation of character evidence is proved to have its roots on psychological factors and may be safely partly attributed to the Greek ideas of 'character' (Chapter 3). Both philosophical and popular confidence in the probative value of character allowed the emphasis it enjoyed in forensic argumentation. In an era when proof beyond doubt was not facilitated by technological means, other forms of evidence (such as circumstantial demonstrating probability) gained ground. Of these alternative forms, character was the most trustworthy. Belief in the unity of virtue or vice induced litigants to advertise their good traits and highlight their opponent's reprehensible ones, even though (at first glance) they may seem only remotely relevant. Uncertainty as to the changeable nature of a person's character led to the citation of a series of examples from the past, in order to prove consistency of behaviour and militate against allegations of opportunism. The uncertain conclusions about human character caused the flexible approach of the orators and explain the varying theories expressed in the speeches. Nonetheless, responsibility for one's actions was not questioned (regardless whether other forces such as chance or accidental ignorance come into play) with attribution of guilt and blameworthiness remaining unproblematic.

The above conclusions of Chapter 3 as to the first underlying cause of the wide approach to argumentation from *ethos* reveal the rationale behind the strategies and methods the Athenians used to portray character. These have been explored, while illustrating the patterns the orators followed. As a result, these patterns made forensic argumentation relatively consistent and predictable. Its content though, was directly linked to deeper issues of Athenian life. Sociological and cultural considerations have to be taken into account in order to understand the rhetorical tactics of ancient orators. The importance of living in a face-to-face community leaves its mark on the strategies of providing character evidence. In the context of a 'shame culture' reputation and gossip carry significant weight, disproportionately to what they are afforded in modern courts. Comparison with the Anglo-American approach is necessary in order to highlight the cultural forces influencing the semi-autonomous realm of the

courts. To complete the picture, technical issues have also been discussed, mainly concerning the presentation and delivery of the speeches.

These two chapters (3 and 4) examined the Greek ideas of 'character' and illustrated how these worked in practice. Another driving force, the Greek ideas of 'personality', decisively influenced forensic argumentation (Chapter 5). Ancient ideas of the 'person', as opposed to modern ones, form yet another cause for the wide approach to character evidence and explain many rhetorical patterns. Researchers assume modern ideas of personality which are completely unsuitable for application in the setting of classical Athens. This is central to this thesis' argumentation since it has proved that in order to comprehend and explain the Athenian approach to justice, the Cartesian and Kantian models of the 'subjective-individual' person have to be replaced by the ancient 'objective-participant' self. This methodological issue constitutes the key for a more accurate and proper interpretation of Attic rhetoric. What is more, recognition of this fact reveals the problematic nature of comparative studies. The Athenian legal system's procedures and practices can only be evaluated in accordance with their standards. When contrasted to modern approaches, clarification has to be made of the terms and standards through which this comparison is made. Any references to controversial notions such as the rule of law or relevance and any evaluations as to whether the Athenians actually attained them are invalid, unless clear definitions of these terms are given. Judging the ancient Athenians according to whether they had actually attained anything similar to the modern 'rule of law' is anachronistic.

Chapter 5 therefore proved in objective and unambiguous terms the relevance of character evidence which is, at first glance, unrelated to the offence. Deeper understanding and application of the ancient model of the human mind and action theory (instead of their Cartesian and post-Cartesian counterparts) exposed the Greek method of reasoning. Questions as to the facts of a case or as to whether a litigant committed an alleged deed were answered by reference to his previous record of actions which revealed his way of thinking. In addition, the application of the ancient theory of ethical motivation illustrated that the many instances of litigants' invocation of their wholehearted adherence to the

norms of the community, was not simply a rhetorical device to win the good will of the jury but had deeper causes and implications. Keeping in mind the unity of virtue and vice and the indivisibility of character (discussed in Chapter 3), obedience to communal rules proved the person's affiliation to the polis and the community as a whole. As a result, a person who had demonstrated proper / improper ethical motivation was deemed to be capable / incapable of committing a crime. These findings were illustrated by reference to many examples from court speeches. Understood in such terms, character evidence becomes surprisingly relevant.

Thus far, the main ideas answer to the presence and the persistence of the wide invocation of character evidence through the centuries and identify the structural and psychological reasons that caused it. The final Chapter (6) limits its focus to the legal system (once again after Chapter 4). Based on a close examination of the forensic speeches, it exposed the more practical and legalistic purposes of character evidence in the courts. By questioning the effect that such argumentation allegedly had on jurors, the secondary aims that it served have been detected. The conclusion is that, regardless the fact that many researchers interpret character evidence as a means of distracting the jurors' rational thinking by arousing their emotions, the susceptibility of Athenian courts to irrelevant argumentation remained minimal and rarely obstructed the smooth execution of justice. The rule of law (as the Athenians understood it) prevailed and, among other factors, credit has to be given to the wide use of character evidence.

2. Further Implications of the Thesis

As noted above, the study of character evidence in the legal sphere touches upon further issues of everyday life. The sphere of the courts is not autonomous from other fields of social and political life; this is true in the case of classical Athens, where the 'objective-participant' person lacked the modern 'autonomy of the will' and the audiences of public bodies were manned by the same people. Litigants carried with them their personal merit and characteristic ethical motivation they displayed through the course of their everyday life.

This reality of the Athenian legal system, which is proved by this thesis' close inspection of forensic rhetoric, may be extended to other fields such as the theatre and political rhetoric. A comparative study may put together the evidence from political speeches and theatrical plays in order to discover similarities and differences as to their respective approaches to character and personality. This may disclose the extent of homogeneity between the argumentation displayed in a theatrical *agon*, in a fierce political contest and in the adversarial arena of a court. In this way, constants of a popular culture will emerge and the extent of diffusion of philosophical ideas to the popular masses will be revealed. Although this influence is bidirectional, a solid argument will be offered to those that see arenas such as the theatre and the Pnyx as educators of the public.

What is certain from my thesis is that the argumentation offered in the courts differed from the theatrical *agon* in a very important aspect. While litigants displayed 'first-order' ethical reasoning, showing their complete adherence to the undisputed conventional ethics of the community, theatrical characters proceeded to 'second-order' reasoning, examining and questioning these norms. The reasons for this approach are many and to an extent obvious. Firstly, the role of theatre differs from that of the court. Regardless whether a poet longed for the prize, theatrical characters enjoy a certain freedom, while litigants risk their life and property in reality. Thus for the latter it is of utmost importance to win the good will of the jurors by showing their unequivocal submission to the rules of the community. At the end of the day, the one and only norm to be judged in the court is the written law that the defendant had allegedly breached. This alone is enough to forbid any 'second-order' reasoning that challenges the law of the polis; no one dared to question it or to provoke jurors to vote on other issues and this is yet another indication of the prevalence of the rule of law in Athenian courts. The only court speech that seems to display 'second-order' reasoning, criticising the practices of Athenian courts and the systematic attitudes of litigants and jurors is Plato's *Apology of Socrates*. This may also form the focus of further research and analysis on the above grounds.

This thesis also relied on the understanding and application of the Greek method of reasoning. It has been argued that the strategies and the content of character evidence have been formed in accordance with the inductive mode of thinking. Either in a conscious or an unconscious way, the influence it has exerted on argumentation is indisputable. Nevertheless, the type of argumentation influenced in turn the functions of the legal system and the nature of Athenian law. The obvious question that logically follows is that: "If the inductive mode of reasoning influenced and formed to an extent the Athenian legal system, did it have similar consequences for other institutions as well?". Maybe the question seems far-fetched and overambitious, but what is the relationship of a population's typical method of reasoning to formations such as the polis-state, to constitutions such as the democratic, or to religious types such as polytheism? Building on the methodology of Plato in the *Republic*, does the human psyche resemble the institutions humans create? Is there a link between the Greek ideas of 'character', 'personality' and the political and social structures they formed? Such questions which fall outside the sphere of the present study may nonetheless be equally fruitful if met.

Insisting on the realm of reasoning, light should be shed on the 'Greeks and the Rational', as dictated by the findings of Chapter 5. There, it has been proved that the ordinary Athenian, sitting in the popular arena of the courts, judged human action and motivation in perfectly rational terms. Litigants and jurors alike insisted on proofs based on logical argumentation in which the aims, motives and past acts formed the parts of an almost mathematical equation. Human action was thus judged in nearly objective terms. The striking fact is that this argumentation was offered to a large audience of average, sometimes illiterate, citizens. Farmers, merchants, hand-workers over the age of thirty interpreted human action (possibly intuitively) as the use of all available means in order to achieve the desired end, which in turn illuminated the particular facts of the case. It seems that this audience was particularly experienced in such matters and since it formed the core audience of every public institution of classical Athens it may safely be concluded that it was one of the highest-quality popular audiences of recorded history. Therefore further research may

be undertaken on similar grounds regarding the factors and the rationale that directed decision-making in other popular bodies as well.

Leaving aside the implications of the thesis for the Athenian socio-political life, I want to highlight its major implications for its legal system. It has been demonstrated that character evidence may be seen as a remnant of the archaic age. This provides a link of the classical legal system with its archaic counterpart, supporting the view that it should be regarded as a single organism that evolved and changed through time. This approach may help us to shed light on the poorly recorded archaic system, by discovering its similarities with the better recorded classical one. Procedures, institutions and practices of the classical system may have already been present in older times, though in an embryonic state. Transformations may have concealed the common core of two practices. To give but an example, the reward to the judge with the better judgment of archaic times (prize) may have given its place to the democratic jurors' pay (a law initiated by Pericles himself). In this symbolic way, every Athenian citizen (rather than a single elder judge) was considered capable of giving straight judgment and the polis was certain that he would do so. This does not mean that no alterations or innovations took place; it simply means that research has to take a holistic approach regarding the Athenian legal system in order to uncover the causes and rationale behind its major changes.

Focus on the classical legal system reveals even more opportunities for further research. Researchers so far have been convinced that argumentation and decision-making in the popular courts differed from the stricter approach taken by the Areopagus (and the Maritime cases as well). However, the exactness of argumentation in the popular courts and the fact that my thesis finds no major differentiations between argumentation in the various court settings calls for investigation. Relevance may thus be reconsidered, as well as the Athenian (and modern) certainty about the expertise of the Areopagus. This does not diminish this respected court's value; it rather appreciates the efficacy and worth of the popular courts. Hand in hand with this approach goes the capability of Athenian courts to achieve consistency. Although this topic has already been treated in the past

¹, this thesis may assist by focusing on the litigants' patterns of argumentation and the jurors' way of decision-making. It has been demonstrated that both followed a consistent, rational and nearly objective approach, and this adds to the opinion of those who maintain that the Athenian courts were able to achieve consistency.

Finally, attention should be given to the methods of punishment which may illuminate their originator's ideas of character. Although these methods may be instigated by other considerations as well, they undoubtedly reveal a great amount about the psychological convictions and the priorities of a people. For instance, acceptance of the possibility of rehabilitation produces milder, less final sentences and indicates a trust in character's changeable nature. On the other hand, severe penalties may highlight the society's assumption that a criminal does not change. In more practical terms, it may express the state's need for deterrence due to its weak proactive mechanisms and its commitment on public peace and security rather than on the individual. This is indeed a fertile ground for further research.

My thesis has explored a series of issues, touching upon several fields of social sciences. It is certainly challenging to follow an interdisciplinary approach. Combination of evidence from law and history, sociology and social anthropology, politics and psychology is demanding but worthwhile. This is definitely not the end of the story; no one (including myself) would have been satisfied if it was, so the above examples indicate possible ways for advancement. What is more fascinating and valuable after all is for this thesis to become a stimulus and a stepping stone for fruitful and honest dealing with the Greeks and their underrated system of law. Hopefully, the various influences that gathered their forces to produce this result, will offer as many inspirations for the advancement of research and for the good of humanity.

¹ Lanni (2004); Harris (2007b).

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