

# The Rule of Law in Athenian Democracy and in Plato's *Laws*

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## Summary

This paper examines how Plato both draws on Athenian ideas about the rule of law but also refines and reforms in accord with his philosophical views. Like the Athenians, Plato also believes in the importance of the accountability of officials, but takes a different approach. The Athenians required all officials to submit their accounts to the logistai selected by lot each year and allowed average citizens to bring charges before the euthynoi, who introduced cases to court (*Ath. pol.* 48,4–5). Plato strongly believes in the principle of accountability, but places the task in the hands of scrutineers, who are appointed by election and not by lot (*Leg.* 715c, 874e–875d). Plato also believes strongly in the importance of fairness in procedure and adopts several Athenian procedures while also introducing reforms. In Athens there was equality before the law and in access to office, but Plato thought that democracy took the principle of equality too far. As a result, Plato introduces different penalties and different rights for members of different census classes, for citizens and foreigners (854c–855a) and for parents and children (944a–c).

## Introduction

Modern scholars writing about the political thought of the ancient Greeks concentrate most of their attention on the main forms of government discussed by Plato, Aristotle and other authors: democracy, oligarchy and aristocracy, tyranny and kingship.<sup>1</sup> Less attention is paid to the concept of the rule of law and the role of legal institutions. Yet the Athenians of the fifth and fourth centuries BCE firmly believed that their political system was based both on democracy – the rule of the people – and the rule of law.

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<sup>1</sup> See for example the essays of K. Raaflaub and J. Ober in: C. Rowe – M. Schofield (eds.), *The Cambridge History of Greek and Roman Political Thought*, Cambridge 2000. J. Ober, *Political Dissent in Democratic Athens: Intellectual Critics of Popular Rule*, Princeton 1998, and P. C. Cartledge, *Ancient Greek Political Thought in Practice*, Cambridge 2009, do not discuss the importance of the rule of law. See my review of the latter in E. M. Harris, Review of J. Ober, *Political Dissent in Democratic Athens*, in: *Classical Review*, 50, 2000, pp. 509–511.

The word *dēmokratia* was not invented until the second half of the fifth century BCE, possibly as late as the 430s.<sup>2</sup> The Athenians of the Classical period strongly believed in the rule of law. In his Funeral Oration delivered in 322 BCE, Hyperides (*Epitaph.* 25) declares: “For men to be happy they must be ruled by the voice of law, not the threats of a man; free men must not be frightened by accusation, only by proof of guilt; and the safety of our citizens must not depend on men who flatter their master and slander our citizens but on our confidence in the law” (transl. Cooper). According to Thucydides (II,37), Pericles in his Funeral Oration praised his fellow citizens: “In public life we do not violate the laws because we obey those in office at any time and the laws, especially those established to protect victims of injustice.”<sup>3</sup> When the young men of Athens became ephebes, they swore to follow the established laws, those magistrates who give prudent orders and any laws that may be established prudently in the future.<sup>4</sup> The Athenians did not find the rule of law in conflict with democracy: Aeschines (3,6) says that when the Athenians obey the law, the democracy remains safe. On the other hand, when the courts allow themselves to be distracted by irrelevant charges, the laws are ignored, and the democracy is destroyed (Aeschines, 1,179. Cf. Demosthenes, 24,75–76).

The Athenian conception of the rule of law shared many features in common with the modern concept.<sup>5</sup> First, they believed in the principle of equality before the law. In fact, there was a provision enacted in 403/402 BCE that “it is not permitted to enact a law directed at an individual unless that same

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2 See E. M. Harris, *The Flawed Origins of Democracy*, in: A. Havlíček – C. Horn – J. Jinek (eds.), *Nous, Polis, Nomos. Festschrift Francisco L. Lisi*, St. Augustin 2016, pp. 43–55, on the origins of the terms *demokratia* and *oligarchia*.

3 For discussion of this passage see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, Cambridge 2006, pp. 29–39.

4 For the text of the oath see M. N. Tod, *A Selection of Greek Historical Inscriptions*, II, Oxford 1948, p. 204.

5 For detailed comparison see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, Oxford 2013, pp. 4–11. A. Lanni, *Law and Justice in Classical Athens*, Cambridge 2006, and *id.*, *Law and Order in Ancient Athens*, Cambridge 2016, claims that the Athenians did not have the rule of law in the sense of deciding cases by consistent rules in statutes, but this view ignores key sources and has been widely rejected. See E. M. Harris, Review of A. Lanni, *Law and Justice in Classical Athens*, in: *Dike*, 12/13, 2009/2010, pp. 323–331, and E. M. Harris, Review of A. Lanni, *Law and Order in Classical Athens*, in: *The Journal of Hellenic Studies*, 138, 2018, pp. 270–272. See also P. Gowder, *The Rule of Law in the Real World*, Cambridge 2016, P. Scheibelreiter, *Nomos, engklema und factum*, in: G. Thür – U. Yiftach – R. Zelnick-Abramowitz (eds.), *Symposium 2018: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, Wien 2018, pp. 212–250, M. Canevaro, *The Rule of Law as the Measure of Legitimacy in the Greek City States*, in: *Hague Journal of the Rule of Law*, 9, 2017, pp. 211–236, and K. A. Kapparis, *Athenian Law and Society*, London – New York 2018.

law applies to all Athenians" (Andocides, 1,87).<sup>6</sup> In Euripides' play *The Suppliant Women* (433–434, 437), Theseus, the king of Athens, announces that "when the laws are written, both the powerless and the wealthy have equal justice, and the lesser man with justice on his side prevails over the powerful man" (cf. Thucydides, II,37,1). This principle was implemented by the way the Athenians formulated their laws, many of which begin with the words: "if anyone" followed by a verb containing the name of the offense. Second, the Athenians thought that all officials should be accountable before the law. Every official in Athens had to present records of their financial transactions to a board of *logistai* (accountants), and anyone who wished could present a charge against an official before the *euthynoi* ([Aristotle], *Ath. pol.* 48,4–5. Cf. Aeschines, 3,15). Even Pericles, the leading politician in Athens at the beginning of the Peloponnesian War, was deposed from his office as general and fined (Thucydides, 2,65). Third, the rule of law requires that all statutes and legal procedures be accessible to all. The Athenians certainly made their laws and decrees accessible by inscribing the most important ones on *stêlai* and placing them in central locations.<sup>7</sup> The Athenians also attempted to make their laws clear and easy to read (Demosthenes, 20,93). Fourth, the Athenians tried to make their legal procedures fair and transparent. Defendants had to be presented with the charges against them and had the right to present documents and witnesses to prove their innocence.<sup>8</sup> They also took measures to ensure that judges would be impartial and not influenced by bribes. Fifth, the Athenians believed that there should be no punishment without law. In fact, there was a rule that officials could not apply a law which had not been written down, that is, enacted by the Assembly and included in the lawcode (Andocides, 1,87). Laws went into force on the day they were enacted and could not be applied retroactively (Demosthenes, 24,43). In fact, many laws explicitly state that they are to go into effect "henceforth" (*to loipon*) and not be used about actions in the past.<sup>9</sup> One must not make the

6 M. H. Hansen, *Nomos ep' andri in Fourth-Century Athens: On the Law Quoted at Andocides 1.87*, in: *Greek, Roman and Byzantine Studies*, 57, 2017, pp. 268–281, believes that the text of this law found in *Andocides* (1,87), which permits exceptions to this rule after a vote of five thousand, is genuine but see M. Canevaro, *Honorary Decrees and νόμοι ἐπ' ἀνδρῶν: On IG II<sup>3</sup> 1 327; 355; 452*, in: L. Gagliardi – L. Pepe (eds.), *DIKE: Essays on Greek Law in Honour of Alberto Maffi*, Milan 2019, pp. 71–86, for detailed refutation. Cf. P. J. Rhodes, *Nomothesia in Fourth-century Athens*, in: *The Classical Quarterly*, 35, 1985, pp. 55–60.

7 On the accessibility of Athenian law see J. Sickinger, *The Laws of Athens: Publication, Preservation and Consultation*, in: E. M. Harris – L. Rubinstein, *The Law and the Courts in Ancient Greece*, London 2004, pp. 93–110.

8 On the plaintiff and its role in promoting fairness in procedure by informing the defendant about the charges see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 114–136.

9 On the expression *to loipon* see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 425–430.

mistake of believing that the Athenians had popular sovereignty in the fifth century BCE and the sovereignty of law only starting in the fourth century BCE.<sup>10</sup> The ideal of the rule of law went back to Solon and continued after Cleisthenes' reforms of 508 BCE right down into the Hellenistic period.<sup>11</sup> As we have seen in the passage from Aeschines (3,6), the Athenians believed that democracy and the rule of law went hand in hand and did not find the two ideals incompatible.<sup>12</sup>

In his longest work, the *Laws*, Plato shares the Athenian respect for the rule of law. Like the Athenians, Plato believes that the highest virtue of a citizen is obedience to the laws (715c). On the other hand, if the laws do not rule and officials are not subject to the laws, the community will be destroyed (715d). At the same time Plato enters into a complex dialogue with the Athenian legal system.<sup>13</sup> In some cases Plato follows the rules found in the laws of Athens, but in others he modifies them. This paper will discuss four main areas of his approach to the rule of law: the accountability of officials, fairness in procedure, equality before the law, and the problem of the open texture of statutes.

## 1. The accountability of officials

One of the main features of the rule of law not only in Athens but also in the Greek *poleis* was the accountability of officials.<sup>14</sup> As Pierre Fröhlich has shown, the vast majority of Greek *poleis* created methods to ensure that officials would obey the law and not embezzle public funds.<sup>15</sup> Different cities

10 For the view that Athenians had popular sovereignty in the fifth century BCE and the sovereignty of law only starting in the fourth century BCE see M. Ostwald, *From Popular Sovereignty to the Rule of Law: Law, Society and Politics in Fifth Century Athens*, Berkeley – Los Angeles 1986, and M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, Oxford 1991, pp. 150–155, 300–304.

11 For the ideal of the rule of law in Solon see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 3–28.

12 For the evidence showing that the Athenians believed democracy and the rule of law went hand in hand in the fifth and fourth centuries BCE see E. M. Harris, *From Democracy to the Rule of Law? Constitutional Change*, in: C. Tiersche (ed.), *Die Athenische Demokratie im 4. Jahrhundert: Zwischen Modernisierung und Tradition*, Stuttgart 2016, pp. 73–87.

13 For detailed comparison of Athenian legal and political institutions and the institutions of Magnesia see G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, Princeton 1960. I do not discuss Plato's *Crito* in this essay because its theme is the moral obligation of the citizen to obey the law and the decisions of the courts. This essay studies the legal procedures of Magnesia, a very different topic.

14 For the rule of law as a criterion of legitimacy for the Greek *polis* see M. Canevaro, *The Rule of Law as the Measure of Legitimacy in the Greek City States*.

15 P. Fröhlich, *Les cités grecques et le contrôle des magistrats (IV<sup>e</sup>–I<sup>er</sup> siècle avant J.-C.)*, Genève 2004. D. Cohen, *Law, Violence and Community in Classical Athens*, Cambridge 1995, pp. 43–51, does not discuss the accountability of officials in Plato's *Laws*.

had different procedures, but the basic principle was universal. At Athens the Council had a general supervision of officials during their term of office.<sup>16</sup> Private individuals could also bring an *eisangelia* against an official during his term of office to the Council.<sup>17</sup> Once his term of office was completed, each official was required to present his accounts to a board of *logistai*, who checked these records to see if the sums tallied and made sure no sums were stolen ([Aristotle,] *Ath. pol.* 48,4–5). If they discovered any embezzlement, bribery or maladministration, they handed the case to a court. In the first two cases the fine was ten times the amount. After officials submitted their accounts, anyone who wished could submit an indictment to one of the *euthynoi* with the name of the offense and the amount of the penalty. Both the *logistai* and the *euthynoi* were selected by lot, the *logistai* from the Council, the *euthynoi* from all citizens. If the *euthynos* who received the charge judged it proven, it was handed to the judges in the deme for private cases and to the *thesmothetai* for public cases. The case was then heard by a regular court with several hundred judges ([Aristotle,] *Ath. pol.* 48,4–5; 54,2).

In the *Laws* (XII,945e–948b), Plato has a very interesting section on his scrutineers, also called *euthynoi*.<sup>18</sup> Plato believes that this position is far too important to be given to men selected by lot and creates an elaborate system of election. Every year all citizens meet at the summer solstice, and each proposes the person fifty years old or above whom he considers the most virtuous. Those who receive votes are divided into two groups, and those with fewer votes eliminated. The process is repeated until only three are left. During the first year however twelve are selected. These men are given crowns and their honor announced. These are dedicated as a first fruit (*akrothinia*) to Helios, are to serve until they are seventy-five and to live in the precinct of Apollo and Helios. They are to divide all officials into twelve groups and to examine all those who have finished their term of office. They then post the penalty or fine they impose in the *agora*. But they also enjoy special religious honors and civic privileges. The person who comes top of the list in a given year also serves as the eponymous magistrate. If there is a tie among the top three candidates, the leading candidate is selected by lot. Finally, they

16 On the supervision of officials by the Council see P. J. Rhodes, *Athenian boule*, Oxford 1972, pp. 147–162.

17 On *eisangelia* to the Council see M. H. Hansen, *Eisangelia: The Sovereignty of the People's Court in Athens in the Fourth Century B. C. and the Impeachment of Generals and Politicians*, Odense 1975, pp. 112–120.

18 On the *euthynoi* see G. R. Morrow, *Plato and the Rule of Law*, in: *Philosophical Review*, 50, 1941, pp. 116–119, G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 219–229, K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, III, Göttingen 2011, pp. 534–544, and M. Piérart, *Platon et la cité grecque: théorie et réalité dans la constitution des Lois*, Paris 2008, pp. 456–458.

are given elaborate funerals, which recall hero cults with a stone crypt, and three kinds of games celebrated each year.

There are several aspects of this institution that merit attention. First, Plato clearly considers the task of keeping officials accountable so important that he does not assign it to officials selected by lot. This is in keeping with Plato's principle that a court should have few judges who are highly qualified (766d). The *euthynoi* are elected by an elaborate procedure to ensure the most virtuous are selected, and only those over fifty are qualified to make sure that they have experience as well as virtue. They also acquire more experience through their continual service up to the age of seventy-five. The use of election and permanent tenure of office recall the Spartan *gerousia*; at Athens they resemble the Areopagus, whose members went through a selection process, also served for life and enjoyed special honors at religious ceremonies.<sup>19</sup> The special funerals recall the burial rites for Spartan kings (Herodotus, VI,58,1-3). Even though the *logistai* and the *euthynoi* had the main duty, the Areopagus could also exercise surveillance over officials ([Demosthenes,] 59,80-3). In democratic Athens the task is assigned to average citizens, who serve only a year; in Plato's *Laws* this task requires virtue and experience. For this reason there is a rigorous process of selection and life-long tenure of office. The elaborate rituals seem to create a cult of the rule of law.<sup>20</sup> In Athens accountability was enforced by a series of procedures carried out by different bodies. Plato endows the function with a religious aura to create respect for authority. Despite its similarities to some institutions in Athens and Sparta, this is a uniquely Platonic creation.<sup>21</sup>

On the other hand, the *euthynoi* themselves are subject to the laws: the principle of accountability is so important that not even those who hold other offices are exempt (947e, 948a). If any of the *euthynoi* is a disgrace to his office and distinctions, he can be accused before the *euthynoi* and the Guardians of the Laws and if convicted, be deprived of his position and honors. This prevents the *euthynoi* from becoming an oligarchic body. These rules also made the *euthynoi* of Magnesia accountable in a way that the *euthynoi* of Classical Athens were not accountable.

19 On the Areopagus and its reputation see E. M. Harris, *Aeschylus' Eumenides, The Role of the Areopagus and Political Discourse in Attic Tragedy*, in: A. Markantonatos – E. Volonaki (eds.), *Poet and Orator: A Symbiotic Relationship in Democratic Athens*, Berlin – Boston 2019, pp. 389–419. On the *dokimasia* of archons and Areopagites see C. Feyel, *Δοκιμασία: la place et le rôle de l'examen préliminaire dans les institutions des cités grecques*, Nancy 2009, pp. 171–184.

20 Alberto Esu draws my attention to the cult of fear in Sparta, which was created to promote obedience to the law, and the statue of a personification of Fear in the office of the Ephors (Plutarch, *Ages*.).

21 Cf. G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, p. 227: "The result of this remodelling is an institution different from anything we know of in any historical state."

In addition to the oversight exercised by the *euthynoi*, every citizen in Magnesia has the right to bring an action against officials who treated them unfairly. If the rural magistrates impose unfair levies, seize property without the owner's consent, or receive gifts or make unfair decisions, the injured person can bring an accusation in the common courts (761e–762a). In another provision, if an official makes an unjust judgment, the wronged person can sue for double the amount of damage in the common courts (846b). These procedures are close to the Athenian procedure for *euthynai* but without the intervention of the *logistai* and *euthynoi*.<sup>22</sup>

## 2. Fairness in procedure

Plato also makes innovations in legal procedure to enhance fairness.<sup>23</sup> In the Athenian legal system there were private actions and public actions. For private actions after around 400 BCE, the accuser would present the defendant with a summons to appear before a magistrate. On the agreed day, the accuser would present a document with his charges and the defendant would reply by denying them.<sup>24</sup> The case was then sent to a public arbitrator, who would attempt to reconcile the litigants.<sup>25</sup> If unable to reach an agreement, the arbitrator would give a judgment. If the parties agreed, the case would be settled and not proceed further. If one of the litigants did not accept the judgment, the case was handed to a court, which heard the litigants and decided by majority vote. If the accuser lost at this level, he paid a fine of one-sixth of the amount claimed.<sup>26</sup> There was no chance for appeal unless one of the litigants could prove that a witness for his opponent had committed perjury. Otherwise the decision by the court could not be overturned. Plato introduces three levels of courts (766d–768c).<sup>27</sup> He retains the first level of

22 Cf. G. R. Morrow, *Plato and the Rule of Law*, pp. 116–117.

23 On the legal system of Magnesia see in general G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 241–296. In his discussion of the rule of law in Plato's *Laws*, D. Cohen, *Law, Violence and Community in Classical Athens*, pp. 43–51, does not discuss fairness in procedure.

24 On the plaintiff and its role in initiating litigation see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 114–136.

25 On private and public arbitrators see E. M. Harris, *Trials, Private Arbitration, and Public Arbitration in Classical Athens or the Background to [Arist.] Ath. Pol. 53, 1–7*, in: C. Bearzot – M. Canevaro – T. Gargiulo – E. Poddighe (eds.), *Athenaion Politeiai tra storia, politica e sociologia: Aristotele e Pseudo-Senofonte (= Quaderni di Erga/Logoi)*, Milano 2018, pp. 213–230, with references to earlier treatments.

26 On the *epobolia* see D. M. MacDowell, *The Athenian Penalty of Epobolia*, in: E. M. Harris – G. Thür (eds.), *Symposion 2007: Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte*, Wien 2008, pp. 87–94.

27 For commentary see K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, II, Göttingen 2003, pp. 427–437. Cf. L. Rossetti, *Processo et istituzioni giudiziarie nelle "Leggi" di*

the Athenian system by requiring the litigants to use an arbitrator first, but allows them to choose the arbitrator.<sup>28</sup> The public arbitrators at Athens were assigned by lot ([Aristotle,] *Ath. pol.* 53,5). If one litigant rejects the arbitrator's judgment, the case goes to a court composed of villagers and tribesmen. If the defendant loses at this level, he must pay another one-fifth of the penalty. If the defendant rejects this verdict, he can take the case to the Select Judges. If he loses again, he has to pay one and a half times the amount of the original penalty. If the accuser rejects the judgment of the arbitrator and wins at the second level, he gains another one-fifth of the penalty, but loses this amount if the court votes against him. If the prosecutor rejects the decision at this level and loses at the next level, he must pay half the amount of the penalty. This adds another level of decision to the Athenian system, but resembles the Athenian system by imposing penalties for litigiousness.

In the *Apology* (37a–b), Plato records Socrates' objection to Athenian legal procedure for public cases, which took place in one day. According to Socrates, one day does not allow the defendant an adequate amount of time to discuss the charges.<sup>29</sup> Plato appears to respond to this criticism in the *Laws* (855c–856b). First, he assigns capital cases to the guardians of the laws. Second, Plato eliminates the procedure of *timêsis* or the assessment of the penalty. In Athenian courts the accuser and the defendant each proposed a penalty in the second phase of a public case, and the court chose one of the proposals.<sup>30</sup> Plato removes this procedure by making death the penalty in certain cases. Third, Plato has the trial take place over three days. On each day the accuser and defendant speak, but after this each of the guardians of the laws reviews the case and fills in any points omitted by the litigants. These points are then recorded, and the judges sign the documents. Fourth, at the end of the third day, the judges vote openly. Plato does not discuss the reasons for these procedures, but appears to believe that by discussing the case in public over three days and voting openly, the judges will act more responsibly than those who vote by secret ballot as in Athens. In several ways, Plato draws on Spartan procedure before the *Gerousia*, where the case was heard over several days and the voting was done openly. Morrow rightly remarks about open voting: “the juridical intent underlying Plato's proposal

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Platone, in: A. Giuliani – N. Picardi (eds.), *L'Educazione giuridica*, VI: *Modelli storici della procedura continentale*, Perugia 2004, pp. 7–10.

28 Cfr. K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, II, p. 429: “Platon vereinigt hier demnach Elemente beider attischen Konzeptionen, indem er eine Apellation von dem privaten Schiedsgericht an die ordentlichen Gerichte zulässt.”

29 Cf. G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, p. 255.

30 On the *timêsis* see A. R. W. Harrison, *The Law of Athens: Procedure*, Oxford 1971, pp. 166–168.



is clearly to enforce his principle of judicial responsibility, and thereby to protect the citizen against the abuse of judicial power."<sup>31</sup>

In Athenian law there was a statute of limitations for private cases.<sup>32</sup> No one could bring a private charge after five years. The rule made no exceptions and was the same in all circumstances. According to Demosthenes (36,25–7), the rationale behind the statute was to prevent frivolous lawsuits. After a period of five years, it might be hard to prove one's case. In the *Laws* (954c–e), Plato takes the principle that there should be a time-limit to private cases, but attempts to take different circumstances into account.<sup>33</sup> In Magnesia, land and houses are inalienable so there can arise no dispute about their ownership, but there can still be disputes about movables.<sup>34</sup> Plato limits to one year claims for items seen to be used in public spaces such as the city, the *agora* and the temples. The implicit assumption is that if no one brings a charge when the object is in plain sight, this would indicate that the person in possession must have ownership. The situation is different with objects used openly in the countryside: here Plato retains the period of five years found in Athenian law. If the object is concealed inside a house in the city, the limit is three years; in a house in the countryside ten years. If the object is transported to a foreign country, there is no time-limit. Plato maintains the basic principle from Athenian law but creates different rules for different circumstances. We will return to this point in the discussion of open texture.

### 3. Equality before the law

I will deal with the topic of equality before the law very briefly. In Athenian law, statutes often take the form of a conditional sentence with the protasis starting "If anyone ..." followed by a verb with the name of the offense with the penalty or procedure in the apodosis.<sup>35</sup> No distinction is made between male and female, youth and adult and citizen and foreigner. In some cases we find a monetary penalty for a free person and fifty lashes for a slave (e.g. *SEG* 26:72, lines 14–16; *IG* II<sup>2</sup> 1362, lines 9–10); in the *Laws* Plato sometimes makes the same distinction between the penalties for slaves and free (764b, 881c, 882b, 914b–c). In penalties for free persons in Athenian law however no

31 G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, p. 289.

32 For the statute of limitations see Demosthenes, 36,25–7; 38,17, with J. F. Charles, *Statutes of Limitation at Athens*, Chicago 1938.

33 K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, III, pp. 558–559, does not analyze the differences between the statute of limitations at Athens and the rules in Magnesia.

34 On the ownership of land in Magnesia see G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 103–112.

35 For the standard form of Athenian laws see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, p. 140.

differentiation is made. This was in accordance with the principle of equality before the law (see above). In the *Republic* (VIII,558c, 562e–563d) Plato expresses the view that democracies take the principle of equality too far and in the *Laws* Plato often assigns different penalties for different categories of offenders. One of the most elaborate examples of this Platonic approach is found in the law of assault in which the penalty varies if the offender is older or younger, or a citizen or a foreigner (879e–882a). In general, when a younger man beats an older man, there should be a harsh penalty, but when an older man strikes a younger man, the latter should put up with this treatment in silence (878e–879a). There are also different rules for parents who kill children and for children who kill parents (868c–869c). In certain cases, there are also different penalties for those in different property-classes (756d–e, 774a, 880c–d, 934d, 945a, 948a).<sup>36</sup> There is no parallel in Athenian law in which property-qualifications were only pertinent when it came to holding office.

#### 4. Law's open texture

I come to my final topic, the issue of open texture. This is a term coined by the British legal theorist H. L. A. Hart. In his *The Concept of Law* H. L. A. Hart observes that the law must refer to broad classes of persons or classes of acts, things, or circumstances.<sup>37</sup> The operation of the law therefore depends on the “capacity to recognize particular acts, things and circumstances as instances of the general classification which the law makes”. In most cases, this is not a difficult process. From time to time, however, one encounters “fact-situations ... which possess only some of the features of the plain cases but others which they lack”. One might try to avoid this problem by formulating detailed definitions of key terms that would clarify how they were to be applied in any given situation. Yet, as Hart rightly notes, it is impossible to find a rule “so detailed that the question whether it applied or not to a particular case was always settled in advance and never involved, at the point of actual application, a fresh choice between open alternatives”. The legislator simply cannot know in advance all the different kinds of situations that will occur in the future (“ignorance of fact”). Nor can legislators predict what other interests may come into play in any given situation and possibly take precedence (“indeterminacy of aim”).

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36 Cf. G. R. Morrow, *Plato's Cretan City: A Historical Interpretation of the Laws*, pp. 134–135.

37 For the analysis of law's “open texture” see H. L. A. Hart, *The Concept of Law*, Oxford 1961, pp. 121–127.

The view that the law must provide general rules goes back to Plato and Aristotle and was implicit in Athenian legislation as we have seen. In the *Statesman* (295a) Plato compares legislators to trainers who “cannot do their work in detail and issue special commands adapted to the condition of each member of the group. When they lay down rules for physical welfare, they find it necessary to give bulk instructions having regard to the general benefit of the average pupil.” In a similar way, the legislator “who has to give orders to whole communities of human beings in matters of justice and mutual contractual obligation will never be able in the laws he prescribes for the whole group to give every individual his due with absolute accuracy”. Instead the legislator will make “the law for the generality of his subjects under average circumstances. Thus he will legislate for all individual citizens, but it will be by what may be called a ‘bulk’ method rather than an individual treatment ...”

Aristotle (*Pol.* 1292a33) also noted that the laws should deal with all general matters, but that magistrates would deal with particular circumstances. This was necessary “because of the difficulty of making a general rule to cover all cases” (*Pol.* 1282b2). In particular, Aristotle (*Ath. pol.* 9,2) noted that the laws of Athens were often unclear, leaving the power of decision for any given case in the hands of the court. Some argued that the lawgiver Solon did this deliberately so as to unfetter the judges’ power of the judges to decide cases. But Aristotle rightly dismisses this view and argues that the alleged lack of clarity results from the difficulty of “defining what is best in general terms”.

The Athenian legal system had two ways of addressing the problems of open texture. First, if there was any doubt about the way a general rule was to be applied to a particular case, there were records of previous decisions, which litigants could use to show that the law had previously been applied in one way and not in another.<sup>38</sup> The other was the use of *epieikeia*, that is, the argument that there existed exceptions to the general rule in the relevant statute.<sup>39</sup> The problem for Plato was that the interpretive space created by open texture provided an opportunity for rhetorical manipulation, which he criticizes at length in the *Gorgias*. He makes his reservations clear in a re-

38 On the use of decisions in previous cases as arguments about the interpretation of laws see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 246–273 and E. M. Harris, *The Athenian View of an Athenian Trial* in: C. Carey– I. Giannadaki – B. Griffith-Williams (eds.), *The Use and Abuse of Law in the Athenian Courts*, Leiden 2018, pp. 42–74, for a complete list of previous cases mentioned in extant forensic speeches.

39 On *epieikeia* in the Athenian courts see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 274–301. On *epieikeia* as a moral virtue see Ch. Horn, *Epieikeia: The Competence of the Perfectly Just Person in Aristotle*, in: B. Reis (ed.), *The Virtuous Life in Greek Ethics*, Cambridge 2006, pp. 142–166.

mark he makes when discussing rules about fraud in the marketplace. In the *Laws* (916d–e), Plato criticizes *hoi polloi*, the majority of mankind, for believing that lying and deceit are acceptable as long as they are done *en kairō* – on the right occasion, or in the right circumstances – but leaving these circumstances undefined (*aoristos*). In his view, it is not permissible for the lawgiver to leave this matter undefined. On the contrary, he must clarify the upper and the lower limits. In other words, it is not enough for a lawgiver to lay down a general rule and then allow litigants and judges to decide what circumstances permit exceptional considerations to override the rule. The lawgiver must indicate precisely where the exceptions lie and what effect they will have on the application of the rule. When discussing penalties, Plato advises the lawgiver to give clear guidance to the judge (934b). In public cases, Athenian law gave the court the power to impose whatever fine or punishment the court deemed appropriate after listening to arguments made by both sides. But Plato says that the lawgiver should act like a painter and give a sketch of the actions to be covered by the law and thus help the judge in finding the appropriate penalty for an offender.

This is an aspect of Plato's approach to Athenian statutes that has not received much attention in the main works on the *Laws* such as Morrow and Piérart. These are excellent works, but their main interest is about political institutions. Let us start with two examples from the laws about homicide. Athenian law contained three basic categories of homicide ([Aristotle,] *Ath. pol.* 57,3): *phonos ek pronoias* ("intentional homicide"), which was tried at the Areopagos (Demosthenes, 23,22–8), *phonos akousios* ("involuntary homicide") tried at the Palladion (Demosthenes, 23,71–3), and *phonos dikaios* or *kata tous nomous* ("just homicide or homicide according to the laws") at the Delphinion (Demosthenes, 23,74–7). The first category contained a potential ambiguity. The phrase *ek pronoias* means "intentional" or done in such a way that the person is aware of what the consequences of his action will be. But what kind of intention is meant? In modern American law there is a distinction among three categories – first degree murder, in which the offender intends to kill, second degree murder, in which the offender intends only to harm, and voluntary manslaughter, in which the offender kills after provocation. But Athenian law did not specify. This made homicide committed after provocation a "hard case" as is shown by Demosthenes, 21,70–76 and Antiphon's *Third Tetralogy*.<sup>40</sup> In the first case a man killed a victim who had struck him in an insulting way. The court divided almost exactly evenly, but convicted by one vote. According to Demosthenes, those voting to acquit were willing to allow the offender the right to retaliate to a greater degree

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40 On these cases see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 186–8.

than the harm he suffered. In the *Second Tetralogy* the accuser and the defendant differ over the nature of the intent required for a conviction: the accuser believes that all he has to do is to prove that the killer acted willingly and not under constraint.<sup>41</sup> The defendant and his supporting speaker claim that he lacked the intent to kill even though he acted willingly.

In the statutes about homicide in his *Laws* (865a–874e), Plato attempted to remove these ambiguities.<sup>42</sup> To deal with cases of provocation such as the one in the *Third Tetralogy*, Plato adds two categories of homicide not found in Athenian law (*Leg.* 866d–867e). First, there is the case where someone acts in anger and retaliates immediately without planning ahead to kill, then feels repentance. Second, there is the man who is insulted and becomes angry, then later kills with the intent to kill and feels no remorse. The latter resembles the person who kills willingly, while the latter is like the person who kills unwillingly. Plato therefore imposes a harsher penalty on the latter and a milder on the former. If a man kills a free person with his own hand, in anger, and without prior planning, he will go into exile for two years. On the other hand, if a man kills in anger but kills “after planning” i.e. to kill, he will go into exile for three years. Thus Plato distinguishes between a case where the defendant kills without intending to and a case where the defendant aims to kill and achieves his aim. Because the latter is a more serious offense, it receives a harsher penalty. Here Plato adds two new categories to deal with cases that did not fit clearly into the Athenian categories and reduced the amount of open texture.

In regard to the second category of homicide, *phonos akousios* or “involuntary homicide” there was an issue about the extent to which someone could be held responsible for a death caused by his own actions. In Athenian law, one could be held responsible for murder not only when one caused death by direct physical violence, but also for causing death indirectly, for instance, by giving an order to kill someone.<sup>43</sup> But if one committed an action, which set off a chain of events that resulted in the death of another person, to what extent could this person be held responsible? For instance, if someone was responsible for a choral competition and for training the boys for the perfor-

41 For analysis of the meaning of *ek pronoias* and its possible ambiguity see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 182–189.

42 The analysis of M. Piérart, *Platon et la cité grecque: théorie et réalité dans la constitution des Lois*, pp. 423–434, concentrates mainly on procedural aspects of homicide law and finds several parallels with Athenian law. T. J. Saunders, *Plato's Penal Code: Tradition, Controversy and Reform in Greek Penology*, Oxford 1991, also does not make a detailed comparison between the Athenian law of homicide and the law of Magnesia on this topic. K. Schöpsdau, *Platon. Nomoi (Gesetze): Übersetzung und Kommentar*, III, pp. 316–317, does not see how the vagueness of the Athenian law about intentional homicide created the need for the new categories.

43 See E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 391–404.

mance, but then one of the boys died after drinking a potion given by someone else to improve his voice, could he be held responsible for involuntary homicide (*phonos akousios*)? One could argue that by placing the boy under the supervision of another person, who administered the potion, the chorus-producer had “caused” his death and was guilty of murder. This is in fact the argument made by an accuser in an Athenian court (Antiphon, 6,11–14).

Plato attempts to resolve this issue by limiting the extent to which someone could be held responsible for a death caused by his own actions but against his will. Plato does not allow a charge of unwilling homicide to be brought whenever someone’s actions set off a chain of events that eventually leads to the death of another person. The law applies only when death comes about by the direct physical causality of the defendant (*Leg.* 865): “And if one man kills another by his own hand, but unwillingly, whether it be by his own unarmed body, or by a tool or a weapon, or by giving a drink or solid food, or by application of heat or cold (lit. ‘fire or winter’), or by deprivation of air, either with his own body or through other bodies, in every case let him be considered to be one who has killed with his own hand and let him pay the following penalties.” In other words, the defendant’s action cannot be a remote cause of death, but must be a proximate cause. Here again Plato is specifying the circumstances to be covered by the statute and attempting to remove potential ambiguities of the category of involuntary homicide in Athenian law.

One can see how the method works in the law of sale concerning latent defects. As we have just seen in the discussion of Hyperides’ *Against Athenogenes* (15), the Athenians had a law about the sale of slaves, which required that “When anyone sells a slave, he must state in advance any ailment the slave has; should he fail to do so, there is a procedure for return (*anagogē*).”<sup>44</sup> The law does not specify what kinds of illnesses nor envisage the possibility that the slave may have a disease that the master cannot discern. Nor is a time limit set down. The regulations formulated by Plato (*Leg.* 916a–b) are much more detailed: he lays down different rules depending on whether the seller or the buyer are skilled workers such as doctors and trainers and thus should be able to recognize diseases. He imposes a time limit on the right of return, which makes sense since it would be unlikely that a disease noticed long after the purchase originated before the purchase and was thus the fault of the seller. He also makes a separate rule for epilepsy, which of course might not show up as soon as other diseases. Finally, he creates a special rule for the slave who has committed murder and is thus polluted. We may find this an odd sort of defect, but since the Greeks believed that pollution could

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44 On the rules about latent defects in contracts of sale see F. Pringsheim, *The Greek Law of Sale*, Weimar 1950, pp. 472–497.

cause disease or misfortune, this provision makes good sense.<sup>45</sup> Instead of creating a general rule and leaving it to the courts to determine how to deal with unusual circumstances, Plato sets forth time-limits and deals with exceptional cases.

Another area where Plato is more specific and detailed than Athenian law is in regard to impiety. As far as we can tell, the crime of impiety was not defined in Athenian law, though the Athenians obviously had some idea of what the term meant and what kinds of actions normally fell under the description “impious”. For instance, when Meletus brought his charge of *asebeia* against Socrates, he listed three charges: 1) introducing new gods (Plato, *Apol.* 26a), 2) not believing in the gods (27a), and 3) corrupting the young (24c). In his reply to these charges, Socrates implicitly accepts Meletus’ view that these actions did constitute *asebeia* since he does not challenge his accuser on this legal point, but seeks rather to show that the charges are false on factual grounds. In the *Laws* (885b), Plato does not leave the concept undefined. Instead he lists three specific types of *asebeia*: 1) not believing in the existence of the gods, 2) believing that the gods exist, but do not pay attention to human beings, and 3) believing that the gods are easily influenced and led astray by sacrifices and prayers. Where Athenian Law left the term undefined, Plato lists several specific categories of *asebeia* to clarify meaning of the term and remove potential ambiguities.

Athenian law contained a general statute about “cowardice”, which provided a procedure and a penalty for several offenses relating to military discipline.<sup>46</sup> The three main offences covered by this law were “throwing away one’s shield”, “leaving one’s position” (*lipotaxion*) and “leaving the army” (*lipostratia*) (Aeschines, 3,175–176). The law about cowardice punished these offenses with the loss of citizen rights but did not provide a definition of the main terms. In the *Laws* (943d–945a) Plato observes that one must distinguish between cases in which one is forced to abandon one’s weapons and cases in which it is shameful to throw them away. He recalls the example of Patroclus, who lost his weapons to Hector, but was no coward (*Il.* XVI,791–817; XVII,125; XVIII,78–85). One can also lose one’s weapons when thrown from a height, in a storm at sea, when caught in a torrent or in many other

45 On pollution for homicide see E. M. Harris, *The Family, the Community and Murder: The Role of Pollution in Athenian Homicide Law*, in: C. Ando – J. Rüpke (eds.), *Public and Private in Ancient Mediterranean Law and Religion*, Berlin – München – Boston 2015, pp. 11–35, and E. M. Harris, *Pollution for Homicide after 400 BCE: More Evidence for the Persistence of a Belief*, in: L. Gagliardi – L. Pepe (eds.), *DIKE: Essays on Greek Law in Honour of Alberto Maffi*, Milano 2019, pp. 143–150.

46 On the law about cowardice (*deilia*) see E. M. Harris, *The Rule of Law in Action in Democratic Athens*, pp. 217–218 with criticism of D. Hamel, *Coming to Terms with lipotaxion*, in: *Greek, Roman and Byzantine Studies*, 39, 1998, pp. 361–405, who does not understand the structure of the law.

circumstances. One should therefore make a distinction between “abandoning” one’s shield (*rhipsaspis*) and “losing one’s shield” (*apoboleus hoplon*). When one loses one’s shield because of circumstances beyond one’s control, it is not the same as deliberately throwing it away (Plato, *Leg.* 944c). The person who deserves punishment is the one who “finds the enemy at his heels and instead of turning round and striking back with the weapons he has, deliberately let them drop or throws them away, preferring a coward’s life of shame to the glorious and blessed death of a hero” (transl. adapted from Saunders). Where Athenian law left the phrase “throws away one’s shield” undefined, Plato describes the specific circumstances that the judge must take into account when judging cases, thereby reducing the “open texture” of the law.

## Conclusion

In the *Laws* Plato takes many of the principles implicit in the Athenian conception of the rule of law and develops them in new ways. He accepts the principle that officials must be accountable, but creates different procedures for reaching this goal. To promote fairness in procedure, he creates a more complex structure of courts. In most cases he adheres to the principle of equality before the law, but departs from this tenet in certain cases, especially in regard to elders and parents. Finally, Plato attempts to reduce the amount of “open texture” in statutes to ensure predictability in adjudication. The *Laws* of Plato shows that the rule of law was a widely shared ideal in the Greek *poleis*, but different regimes might attempt to implement this ideal in different ways.<sup>47</sup>

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47 For the rule of law as an ideal shared by democracies and aristocracies see E. M. Harris, *Democracy and the Rule of Law in Classical Athens*, pp. 3–28, and M. Canevaro, *The Rule of Law as the Measure of Legitimacy in the Greek City States*. I would like to thank Jakub Jinek for the invitation to present an oral version of this paper at the May 2019 meeting of the *Collegium Politicum* in Pardubice. I would also like to thank Alberto Esu for reading over an earlier version and offering helpful comments.