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## RESPONSE TO DAVID WHITEHEAD

As David Whitehead explains above, he and I are engaged in a dialogue which has been complicated by the fact that some of his arguments were anticipated in a paper which neither of us knew when he wrote the first version of his paper and I wrote the first version of my response. It remains true, however, that I am one of those who have accepted the point of orthodoxy which he challenges,<sup>1</sup> and that I still now believe it to be correct.

One point of orthodoxy Whitehead rightly does still accept, that for charges of military dereliction the *strategoï* were the εισάγουσα ἀρχή: it is clear that the *strategoï* are envisaged as εισάγουσα ἀρχή in Lys. 15. Alc. 2. 1-4; and there are enough other instances of various officials' acting as εισάγουσα ἀρχή for cases falling within their particular area for that to be not merely acceptable but unsurprising. I am happy to agree with him that this certainly does not mean that all ten would preside in a single trial, and that (as when "the *thesmothetai*" were the εισάγουσα ἀρχή) the likelihood is that, despite the use of the plural at the beginning of that speech, in a single trial just one would preside.<sup>2</sup> Dem. 39. Boe. Nom. 17 allows us to qualify this view in one way: with reference to 349/8 the speaker says that he in his capacity as taxiarch was obliged to receive a λήξις for λιποτάξιον, and if the money had been available for law-court stipends he would have had to εισάγειν.<sup>3</sup> So by the middle of the fourth century the taxiarchs, in addition to or instead of the *strategoï*, could act as εισάγουσα ἀρχή for some military cases.

But the question reopened by both Bertazzoli and Whitehead is who would have formed the jury, and I am afraid Dem. 39. 17 does not help us to decide that. I suspect that when shortage of funds led to a suspension of the law-courts that was a general suspension, and it would have applied to courts trying military cases whether they had ordinary juries or juries composed of soldiers.

I agree with Whitehead that we cannot assume that the juries composed of soldiers in Plato's *Laws* (12. 943 A-D) must have been copied from Athens.<sup>4</sup> All that we can say, which helps the orthodox position a little but only a little, is that the

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<sup>1</sup> Rhodes (1972), 183 n. 4.

<sup>2</sup> Cf. Whitehead, n. 6 and p. 34.

<sup>3</sup> Harrison (1971), 32-3, thought tentatively, and I think more confidently, that this means act as εισάγουσα ἀρχή (cf. Whitehead, p. 34).

<sup>4</sup> Cf. Whitehead, pp. 30-2, 34-5.

*Laws* shows that the notion of such juries was not unthinkable in fourth-century Greece.

Whitehead does not rely much on the vocatives used by the speakers in *Lys.* 14-15. *Alc.* 1-2, and I think rightly.<sup>5</sup> The Areopagus is addressed as βουλή (e.g. *Lys.* 7. *Ol.* 1); the court at the Delphinium usually as ἄνδρες, once as Ἀθηναῖοι (*Lys.* 1. *Caed. Erat.* 1 etc., contr. 6); these two speeches regularly use the standard ἄνδρες δικασταί (14. 1 etc., 15. 1 etc.). But I think that is what we should expect if the jury in a military case was thought of as an ordinary jury recruited in an extraordinary way rather than as an extraordinary body, so ἄνδρες δικασταί proves nothing. In fact the jury of initiates (§ 31) who tried Andocides in 400 is addressed regularly as ἄνδρες (*Andoc.* 1. *Myst.* 1, 3, etc.); but he addresses it just once as ἄνδρες δικασταί (§ 136), and in one other passage he addresses it as Ἀθηναῖοι, and proceeds to ask τί ὁμόσαντες δικάζετε; (“what have you sworn before acting as jurors?”) and to quote from the jurors’ oath (§ 91).<sup>6</sup> However, since Andocides’ other speeches are not addressed to law-courts, we cannot say whether this is because of the special nature of the jury or is simply a feature of Andocides’ style.<sup>7</sup> I should, incidentally, expect juries composed of initiates or soldiers to be paid, just as regular juries were paid.<sup>8</sup>

We should certainly accept Whitehead’s general point about statements which a speaker makes about the jurors as “you”, ὑμεῖς.<sup>9</sup> Again and again in law-court speeches this form of address assimilates the jury being addressed to the whole body of Athenian citizens and, through them, to other sections of the citizen body which might overlap to a greater or lesser extent with the present jury. The one passage which, because it is more specific than the others, might have a claim to be taken more seriously is his third, 14. 15:

You did not dare to abandon the ranks or to choose what was pleasant for you yourselves; no, you were much more afraid of the laws of the *polis* than of the danger of facing the enemy.

<sup>5</sup> He has a passing reference to this at p. 30.

<sup>6</sup> Otherwise δικασταί appears in that speech only with reference to the jury of 6,000 which tried a γράφη παρανόμων (§ 17). δικαστήριον is used in that speech of that court and of the court which condemned Dioclesides for false testimony (§ 66), and § 28 has the decision on rewards for informants entrusted to ἐν τῷ τῶν θεσμοθετῶν δικαστηρίῳ τοὺς μεμνημένους, “the initiates in the *dikasterion* of the *thesmothetai*”. *Lys.* 6. *Andocides*, a speech for the prosecution in the same trial, uses ἄνδρες δικασταί once (§ 33), Ἀθηναῖοι once (§ 50) and ἄνδρες Ἀθηναῖοι four times (§§ 8, 17, 41, 55).

<sup>7</sup> In his speeches to the assembly Andocides uses normally Ἀθηναῖοι (2. *Return* 6 etc., 3. *Peace* 1 etc.), twice ἄνδρες (2. *Return* 1, 5), never ἄνδρες Ἀθηναῖοι.

<sup>8</sup> Whitehead poses the question at p. 25.

<sup>9</sup> Cf. Whitehead, pp. 28-30.

But Whitehead's interpretation is strengthened if we consider with that § 14:<sup>10</sup>

Bear in mind, gentlemen of the jury, that of the soldiers [and then we have verbs in the third person] some were ill and others were lacking provisions; and the first category would gladly have stayed in their *poleis* to receive treatment, the second might have left to attend to their domestic affairs, others might have served as light-armed, others might have faced danger in the cavalry.

I think Carey is wrong to take those who might have served as light-armed or as cavalry as some of those who were ill<sup>11</sup> – having begun with two reasons for leaving the force the speaker then adds two more<sup>12</sup> – but otherwise I agree with him that the speaker starts by speaking not just of the Athenian army but of the whole allied force,<sup>13</sup> and then, as he says, “the shift to the second person is addressed to [or, I should rather say, assimilates the force to] those jurors who might fit into the categories described”. In this passage as in the others the speaker is using the second person for rhetorical effect, not seriously claiming that the jurors are men who might have deserted the army but did not. The second person does not require us to believe that all the jurors, or indeed any of them, had served in the army in question. We are left, then, with 14. 5 as the passage on which the whole argument turns:

The law prescribes that if someone deserts his post because of cowardice, while the others are fighting, the soldiers are to judge his case.

After the law has been read, the speaker's recapitulation in § 6 focuses only on its covering both those who withdraw from the ranks and those who fail to join the ranks; there is no other mention of the composition of the jury.

Whitehead emphasises the practical difficulties.<sup>14</sup> They will not have been as great in the 390's as in the time of *Ath. Pol.*, with *pinakia* and the daily allotment of individual jurors to courts. In the 390's men currently registered as jurors were assigned to a panel for the whole year, and then day by day not individuals but whole panels were allotted to courts.<sup>15</sup> If in 415 and again in 400 it was possible to exclude the uninitiated from the jury trying a case concerning the Mysteries,<sup>16</sup> it

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<sup>10</sup> Cf. briefly Whitehead, p. 28 with n. 16.

<sup>11</sup> Carey (1989), 157-8.

<sup>12</sup> Thus the translation of Todd (2000).

<sup>13</sup> Accepted by Whitehead n. 14.

<sup>14</sup> Whitehead, pp. 25-6, 34.

<sup>15</sup> E.g. MacDowell, (1978), 37-8.

<sup>16</sup> Andoc. 1. *Myst.* 28, 31, with the interpretation of MacDowell (1962), 82, accepted by Whitehead, n. 8 and p. 35. Note that this was done for the trial of Andocides in 400 as well as in 415.

would have been equally possible to limit the jury in a military case to men who had fought as hoplites (on any occasion or on the occasion in question), and if necessary to amalgamate panels to secure a sufficient number of jurors; presumably, as often in Athens, what a man said about himself would be accepted as true unless somebody challenged it. It does not seem to me unthinkable that the Athenians would have exposed themselves to procedural difficulties of this kind. The difficulties would indeed have been greater in the system described by *Ath. Pol.*, but we should not invoke that fact in discussing the system of the 390's.

τοὺς στρατιώτας δικάζειν, “the soldiers are to judge”, is indeed presented, as Whitehead says, not as a direct quotation from the law but as what “some men dare to say” the law states.<sup>17</sup> But does that make it suspect? As presented to us it is indeed “troublingly vague”<sup>18</sup> – but this is partly because it is a clause in which the speaker is uninterested and to which he therefore does not return. It is no less possible that the actual text of the law specified soldiers who had served in the campaign in question (if that is what was intended) than that the speaker has invented a special kind of jury when that is totally irrelevant to his argument. On the face of it, the most likely reason why the words τοὺς στρατιώτας δικάζειν are used and nothing is made of them is that they were uncontroversially correct.

So I agree with Whitehead that statements addressed to the jury in the second person prove nothing and that the issue depends entirely on 14. 5; but I think he dismisses 14. 5 too readily.

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<sup>17</sup> Cf. Whitehead, pp. 26-7.

<sup>18</sup> Whitehead, p. 27.