AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE
24

SYMPOSION 2013

Verlag der Österreichischen Akademie der Wissenschaften
ÖAW

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ÖSTERREICHISCHE AKADEMIE DER WISSENSCHAFTEN
PHILOSOPHISCH-HISTORISCHE KLASSE
DOCUMENTA ANTIQUA – ANTIKE RECHTSGESCHICHTE

AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE

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Band 24

Verlag der
Österreichischen Akademie
der Wissenschaften

Wien 2014

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SYMPOSION 2013

Papers on Greek and Hellenistic
Legal History
(Cambridge MA, August 26–29, 2013)

Vorträge zur
griechischen und hellenistischen Rechtsgeschichte
(Cambridge MA, 26.–29. August 2013)

edited by / herausgegeben von
Michael Gagarin – Adriaan Lanni

Verlag der
Österreichischen Akademie
der Wissenschaften

Wien 2014

Vorgelegt von k. M. Gerhard Thür
in der Sitzung vom 24. Oktober 2014

with the support of
the Loeb Classical Library Foundation and Harvard Law School

Diese Publikation wurde einem anonymen, internationalen
Peer-Review-Verfahren unterzogen.

This publication has undergone the process of anonymous, international peer review.

Die verwendete Papiersorte ist aus chlorfrei gebleichtem Zellstoff hergestellt,
frei von säurebildenden Bestandteilen und alterungsbeständig.

ISBN 978-3-7001-7748-7

Formatted for printing by James Townshend, Department of Classics, Harvard University
Druck und Bindung: Ferdinand Berger & Söhne, Ges.m.b.H., A-3580 Horn
http://hw.oeaw.ac.at/7748-7
http://verlag.oeaw.ac.at
Printed and bound in the EU

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PREFACE

The nineteenth meeting of the Society for Greek and Hellenistic Legal History, the Symposion, took place in Hauser Hall at the Harvard Law School in Cambridge, Massachusetts, USA, August 26–29, 2013. In seven sessions spread over four days we heard fifteen papers and responses (two responses delivered in absentia) by scholars from eight countries in Europe and North America. As in the previous meetings no general subject was provided: every speaker was free to report his or her latest studies. In addition, a boat tour of the Boston harbor and (for many) a walking tour of Boston and Cambridge provided a break from the proceedings.

Funding for the meeting was generously contributed by the Loeb Classical Library Foundation and by the Harvard Law School, under the leadership of Dean Martha Minow. We are particularly grateful to both institutions for recognizing the continuing importance of funding academic enterprises such as this one, when so many other sources of such funding are being reduced or are disappearing entirely. We are also grateful to Dean Minow for her warm and gracious welcome, which opened the meeting. And we thank Joseph Mélèze-Modzerjewski, one of the founders of our Society who regretfully could not attend in person, for welcoming us via Skype. Further thanks are due to Kaitlin Burroughs at the Law School for administrative and logistical support before, during, and after the meeting.

Publication of the volume would not be possible without the excellent work of James Townshend of the Department of the Classics, Harvard University, who has formatted all the contributions according to the strict specifications of the Austrian Academy and has provided the Index Locorum. And finally, we thank Gerhard Thür, who has been our liaison with the Academy publications staff, has helped with reading proofs, and has ensured that we maintain consistency with Symposion standards.

AUGUST 2014

Michael Gagarin
Adriaan Lanni

MARTIN DREHER (MAGDEBURG)

DIE RECHTE DER GÖTTER[1]

Gliederung:

Ausgehend von der Beobachtung, daß die Griechen ihre Götter in verschiedenen Zusammenhängen als Inhaber von Rechten angesehen haben, möchte ich die "Rechte" der Götter in einem weiten Sinn verstehen und dabei zunächst durchaus den modernen, eher umgangssprachlichen Gebrauch des Begriffs zugrundelegen. Es führt nicht weiter, die ganze Problematik abzutun mit dem Verweis darauf, daß den Göttern keine "legal personality" zugekommen sei, daß sie also keine "'juristisch'erfaßte Personengruppe" im positiv-rechtlichen Sinn gewesen seien.[2] Vielmehr

[1] Eine erste Version dieses Beitrags wurde beim Colloquium Atticum II am 20. 6. 2013 an der Universität Hamburg vorgetragen, s. http://www.geschichte.uni-hamburg.de/arbeitsbereiche/altegeschichte/CA2013.html. Ich danke Werner Rieß für die Einladung und den Teilnehmern des Kolloquiums für ihre freundlichen Hinweise.

[2] Horster 2004, 15, die diese Position zu Unrecht Finley 1952, 95, zuschreibt.

liegt die Bedeutung des Themas für die Rechtsgeschichte meines Erachtens darin, daß die zunächst nicht strikt juristische Kategorie der göttlichen Rechte in Zusammenhang steht mit der Rechtsordnung der Polis und darauf verschiedene Auswirkungen hatte. Daher soll hier untersucht werden, inwiefern die Götter beteiligt an der menschlichen, positiven, staatlichen Rechtsordnung erscheinen.[3] Die Götter als Rechtssubjekte, als aktiv am Rechtswesen beteiligte Akteure, die Götter als Träger von Rechten sind also das Thema. Dabei ist es selbstverständlich, daß wir nicht nach einer tatsächlichen, sondern nur nach der Rechtsstellung der Götter in der Vorstellungswelt der Griechen fragen können. Insofern handelt es sich im Kern um eine mentalitätsgeschichtliche Fragestellung, die jedoch viele Anhaltspunkte aus der positiven Rechtsordnung gewinnt.

In der Literatur sind eher selten und sehr verstreut einschlägige Aussagen zu finden, die zwischen Religions-, Rechts- und Wirtschaftsgeschichte angesiedelt sind, aber sich das Thema als ganzes nicht stellen. Am meisten wird über den Landbesitz der Götter und dessen Verwaltung gearbeitet, weil hier innerhalb der Poleis der größte Handlungsbedarf bestand und es dazu die konkretesten Quellen gibt.

Die zentrale Besonderheit bei der Rechtsstellung der Götter ist natürlich von vornherein, daß sie nicht physisch greifbar waren,[4] wenngleich die Griechen sie sich als physisch existent vorgestellt haben. Wir stoßen auf die Ambivalenz, daß die Götter einerseits Rechte hatten, daß sie diese aber andererseits meist nicht in eigener Person wahrnahmen. So wurden etwa keine direkten Verträge mit Göttern geschlossen, obwohl diese meist als (eben fiktive) Vertragspartner fungierten. Immerhin trafen die Götter in Einzelfällen selbst Entscheidungen über ihr Eigentum in Form von Orakeln, wie über Kirrha nach dem Ersten Heiligen Krieg oder über die sogenannte heilige Orgas in Athen,[5] aber auch diese Entscheidungen erfolgten immer nur auf menschliche Befragung hin.

Die genannte Ambivalenz hat auch die Konsequenz, daß man die Götter zu keinen Pflichtausübungen zwingen konnte. Es blieb bei moralischen Pflichten, die die Götter hatten; erfüllten sie sie nicht, konnte man sich darüber aufregen, sich beschweren, aber niemand kam auf die Idee (wie es tatsächlich in anderen, sogenannten primitiven Kulturen vorkommt), sie zu bestrafen, oder ihnen einen Prozeß zu machen und sie zu verurteilen. Daher gab es auch keine formalen Sanktionen gegen sie, sondern allenfalls eine moralische Bestrafung wie den Entzug oder die Einschränkung von Opfern, an denen die Götter nach griechischer Ansicht offenbar großen Gefallen fanden.

Im folgenden wird versucht, eine systematische Zusammenstellung der relevan-

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[3] Zeitlich bewegt sich der Beitrag vor allem in der archaischen und klassischen Zeit, greift aber auch auf Dokumente der hellenistischen und vereinzelt der römischen Epoche zurück.

[4] Weitere Implikationen zählt Isager 1992b, 120, auf.

[5] Zu Kirrha vgl. Aisch. 3, 108f.; zur Orgas Thuk. 1, 139; IG II^2 204; vgl. Horster 2004, 126f.; Papazarkadas 2011, 244ff.

ten Aspekte unseres Themas in fünf Gliederungspunkten vorzunehmen.

I. Die Götter als Stifter von Recht und von Rechten

Der erste Bereich, an den man bei diesem Thema vielleicht denkt, sind die *agraphoi nomoi*, die ungeschriebenen Gesetze, die auf die Götter zurückgeführt werden. Sie gelten seit ewiger Zeit, werden von der ganzen Gesellschaft anerkannt und dürfen nicht hinterfragt werden.[6]

Dieser Bereich soll hier nur am Rande erwähnt sein, da er sich nur gelegentlich mit der menschlichen Rechtsordnung berührt. Im Prinzip steht er neben dieser Rechtsordnung, beide Bereiche ergänzen einander. In Ausnahmefällen kann es aber dazu kommen, daß sie in direkten Widerspruch geraten. Einen solchen, kaum lösbaren Zwiespalt führt uns bekanntlich die mythologische Figur der Antigone im gleichnamigen Drama des Sophokles vor Augen: "Ich hielt deine Gesetze nicht für so bedeutend, daß sie einen Menschen dazu veranlassen könnten, die ungeschriebenen und unumstößlichen Gesetze der Götter zu übertreten," sagt Antigone zu Kreon.[7] Das Gebot, die Toten zu begraben, ist eine Forderung der Götter der Unterwelt; Kreon hingegen hat verboten, daß sein getöteter Feind Polyneikes, der Bruder der Antigone, begraben wird. Wer die göttlichen Gebote mißachtet, wird von den Göttern selbst bestraft (vgl. die Prophezeiung des Teiresias, Kreon werde ein schlimmes Schicksal erleiden).[8] Diese göttlichen Strafen sind oft nicht weniger gefürchtet als die von Menschen verhängten.[9]

Ein zweiter Bereich göttlicher Rechtsetzung eröffnet sich dort, wo die weltliche Rechtsordnung auf die Götter zurückgeführt wird. Diese Vorstellung findet sich allerdings fast nur in abstrakten Formulierungen, nach denen alles Recht von Zeus stammt und Dike, das personifizierte Recht, als Tochter des Zeus (und der Themis) auftritt.[10]

Die Zurückführung von konkreten Rechtsordnungen auf göttliche Inspiration war hingegen bei den Griechen, im Unterschied zu anderen Völkern, kaum verbreitet. Nur Sparta führte seine ursprüngliche politische Ordnung, vor allem die sogenannte Große Rhetra, auf das Orakel Apolls zurück, das dann auch weitere, dem Gesetzgeber Lykurg zugeschriebene Gesetze sanktionierte. Die sonstigen frühen Gesetzgeber der griechischen Poleis legitimierten sich hingegen nicht durch einen göttlichen Auftrag oder göttliche Aussagen, sondern durch ihre eigene, menschliche Weisheit.[11]

II. Die Götter als Rechtssubjekte

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6 Vgl. Gagarin 2008, 33.

7 Soph. Ant. 453–455.

8 Ant. 988ff. Vgl. Pecorella Longo 2011, 50. 52 im Hinblick auf Asebie in Athen in der Zeit vor dem Gesetz des Diopeithes.

9 Vgl. Horster 2004, 43f.; Dreher 2006, 248; Chaniotis 2012, 212ff..

10 Hom. Il. 1, 238f.; Hes. Theog. 902; vgl. Burkert 2011, 204.

11 Vgl. Burkert 2011, 374; Dreher 2012, 69.

a) Die Majestät der Götter

Die Götter als übermenschliche, auf einer höheren Ebene angesiedelte Wesen, in deren Hand das menschliche Schicksal lag, hatten ein Recht auf Verehrung, Kult und Opfer. Wurden diese menschlichen Pflichten vernachlässigt, zürnten die Götter und konnten die Menschen strafen. Natürlich erwarteten die Menschen im Gegenzug das Wohlwollen der Götter. Bei manchen Griechen mag die Vorstellung eines Tauschs wie zwischen Geschäftspartnern vorhanden gewesen sein,[12] indem ein Anspruch auf ein bestimmtes göttliches Wohlwollen entwickelt wurde. Privat wurden auch Votivgaben mit feststehenden Wünschen oder Ansprüchen verbunden. Aber das war sicher nicht die offizielle Lesart. Das Verhältnis zwischen Gottheit und Menschen war nicht quantifizierbar: soviel Opfer gegen soviel Wohlwollen. Die von den Göttern erwartete Leistung war auch nicht wirklich einzufordern. So beklagt Aristophanes ironisch, an den Götterstatuen sehe man: die Götter nehmen nur, geben wollen sie nicht.[13] Die Menschen flehen, daß die Götter ihnen Gutes bescheren; es war ihnen bewußt, daß sie von Göttern letztlich einseitig abhängig sind.

Die Mißachtung der göttlichen Majestät, etwa Beleidigungen und Respektlosigkeiten, wie sie sich besonders als Fehlverhalten im Kult manifestieren, konnten zu Klagen wegen *asebeia* führen.[14] Profaner Hintergrund des vielleicht nur oberflächlich religiösen Vergehens gegen die offiziellen Poliskulte mag das Durchbrechen des gemeinschaftlichen Zusammenhangs der Gesellschaft gewesen sein, aber die Götter waren zumindest das Instrument, der Kitt, der für diesen Zusammenhalt als essentiell betrachtet wurde. Daraus speiste sich ihre Bedeutung in diesem Zusammenhang.

Auch die umgekehrte Vorstellung kommt vor, wenngleich nur im Mythos bzw. in dramatischen Szenen: Die Götter selbst haben bereits in der frühen Dichtung auch eine amoralische Seite und tun Unrecht, so daß schon Xenophanes Ende des 6. Jh. v. Chr. den Vorwurf formulierte: “Alles haben Homer und Hesiod den Göttern aufgeladen, was bei den Menschen Vorwurf und Schimpf ist: Stehlen, Ehebruch treiben und einander betrügen.”[15] Als Verbrecher bzw. als Anstifter von Verbrechen tauchen Götter in athenischen Dramen auf: Im Hippolytos des Euripides hat einerseits Theben den Gott Dionysos nicht wie es sich geziemt geehrt, also seine religiösen Pflichten nicht erfüllt. Aber andererseits wird Hippolytos trotz seiner Frömmigkeit ungerechterweise vom eigenen Vater (Theseus) getötet. Schuld daran ist jedoch die Göttin Kypris, die auf diese Weise ungerechte Rache übt, wie sogar ihre “Götterkollegin” Artemis konstatiert.[16] In der Schlußszene der “Wolken” des Aristopha-

[12] Vgl. z.B. Hom. Il. 1, 39ff.; Bruit Zaidman 2001, 26.

[13] Aristoph. Eccl. 802ff.

[14] Vgl. dazu zuletzt Pecorella Longo 2011, mit einer Auflistung der athenischen Asebie-Prozesse S. 44f. Zur Asebie in inschriftlichen Texten vgl. Delli Pizzi 2011.

[15] Xenophanes 21 B 11 (Diels / Kranz), Übersetzung nach Burkert 2011, 371.

[16] Eur. Hipp. 1306f.; vgl. Bruit Zaidman 2001, 127.

nes rät Hermes dem verzweifelten Bauern Strepsiades, sich für die gottlose Erziehung, die Sokrates und seine Schüler dem Sohn Pheidippides angetan hatten, mit Einreißen des Daches und Niederbrennen des Hauses zu rächen. Allerdings handelt es sich dabei nicht einfach um den Rat zur Lynchjustiz, sondern um die Anwendung eines archaischen Rügebrauchs, einer Wüstung des Hauses, die durch vorhergehende Verstöße des Betroffenen gegen die Gemeinschaftsnormen in gewisser Weise gerechtfertigt ist.[17] Zur Zeit des Aristophanes wäre jedoch die Vorgehensweise des Strepsiades, in der Realität praktiziert, ein klarer Rechtsbruch gewesen. Versteht man aber den Bauern als willfähriges Werkzeug der Götter,[18] dann sind es diese selbst, die die Asebie des Sokrates bestrafen. In analogen dramatischen Szenen ist es Zeus, der die Strafe durch seine eigenen Werkzeuge, Donner und Blitz, direkt, ohne menschliches "Instrument," vollzieht.

b) Götter als Eigentümer von Immobilien

Der sogenannte heilige Besitz an mobilen und immobilen Sachen war nach traditioneller Meinung nicht oder nur in unbedeutendem Ausmaß abgegrenzt vom öffentlichen Besitz.[19] Dagegen erhob sich spätestens seit den 1990er Jahren Widerspruch, dem ich mich im Kern anschließe:[20] Die Dreiteilung der Griechen in privat (*idion*) – öffentlich (*demosion* oder *hosion*) – heilig (*hieron*)[21] ist ernstzunehmen, auch wenn die Trennung im griechischen Sprachgebrauch nicht immer strikt besteht. Der Befund kann hier nicht näher diskutiert werden, er bildet nur den Hintergrund für die

[17] Diese Interpretation, die im Kern schon früher entwickelt worden war, wird besonders nachdrücklich vertreten von Schmitz, 2004, 357ff.; vgl. das entsprechende Resümee bei Schmitz 2008, 155. 163. Ich danke Winfried Schmitz für den Hinweis auf diese Quelle und seine Ausführungen dazu.

[18] So Schmitz, 2004, 375. ders. 2008, 163. Insofern ließe sich die Episode auch unten dem Abschnitt III d, Götter als Vollstrecker, zuordnen.

[19] Vgl. u.a. Finley 1952, 95; Harrison 1968 I 235; Vial 1984, 276f. Nach Papazarkadas 2011, 7, dominierte diese Sichtweise bis zum Ende des 20. Jahrhunderts.

[20] Isager 1992b, 119; Ampolo 1992, 27; Maffi 1997, 350. 354; D'Hautcourt 1999; Horster 2004, 9ff. 33ff. 165ff. Dignas 2002 passim, unter Berücksichtigung der Kritik von Migeotte 2006, 237 A. 20. 238 A. 31; Papazarkadas 2011, 1ff (mit einer Literaturübersicht in Auswahl). 240ff. Migeotte hatte in seinen früheren Arbeiten die Gleichsetzung von sakralem und öffentlichem Eigentum favorisiert, vertrat dann aber zunehmend die grundsätzliche Trennung beider Bereiche; vgl. Migeotte 1998 und den Rückblick auf eigene und fremde Positionen bei dems. 2006, 235–238. Die Debatte ist jedoch noch im Gang: Rousset 2013, 128, kritisiert die Meinungsänderung von Migeotte und plädiert in seiner Studie, die sich auch ausführlich mit Papazarkadas auseinandersetzt, gegen die strikte Trennung von öffentlichem und 'heiligem' Landbesitz. Die von ihm angeführten Formulierungen der Quellen (ἡ ἱερὰ καὶ δημοσία χώρα oder γή, 125ff.) zeigen, daß im Verständnis der Griechen 'heiliges' Land auch als Unterkategorie von öffentlichem Land verstanden werden konnte, ohne jedoch seinen sakralen Charakter zu verlieren.

[21] *Locus classicus* ist Aristoteles, pol. 1267b33f. bzw. rhet. Alex. 1425b, der diese Dreiteilung dem Hippodamos von Milet in den Mund legt. Vgl. dagegen für die Zweiteilung in öffentliches und privates Land dens. pol. 1330a10–13.

eigentliche Aussage dieses Abschnitts, daß nämlich die Götter uns sehr deutlich als Eigentümer entgegentreten, hier zunächst als Eigentümer von immobilen Sachen.[22] *Temene*, Tempel, Altäre, Bäume, Haine, Grundstücke, Häuser, Gewässer u.a. sind durch klare inschriftliche Aussagen, oft auf *horoi* (Grenzsteinen) mit dem Namen einer Gottheit im Genitiv, als persönliches Eigentum derselben gekennzeichnet. Meines Wissens ist hingegen in den Inschriften nie vom Eigentum eines Heiligtums, *tou hierou*, die Rede.[23] Interessant ist, nebenbei bemerkt, auch, daß mehrere Gottheiten zusammen gemeinsames Eigentum haben konnten.[24]

Wie und nach welchen Kriterien die abgegrenzten Stücke Land, die der Gesamtpolis zugeordneten *temene*, ursprünglich an die Gottheit kamen, ist nicht mehr nachzuvollziehen. Allenfalls sind Rückschlüsse aus der Anlage von Apoikien möglich. Dort und bei sonstigen vereinzelten Neuaufteilungen von Land traf man die bewußte Entscheidung, ein bestimmtes Landstück den Göttern zu überlassen.[25] Über die Hintergründe schweigen die Quellen: War diese Zuweisung als "Schenkung" gedacht, oder wurde ein "rechtlicher" Anspruch der Gottheit erfüllt? Gab es Kriterien für die Größe des *temenos*?[26] Wurde die Größe des bewirtschafteten heiligen Landes nach dem Bedarf für Kulthandlungen kalkuliert?

Der Landbesitz einer Gottheit konnte auch aus Gebietseroberungen[27] und aus Konfiskationen nach Gerichtsurteilen oder politischen Auseinandersetzungen resul-

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[22] Vgl. Isager 1992b, 119f.; Maffi 1997, 350; Horster 2004, 136; dies. im Druck (bei Anm. 17); Burkert 2011, 152, und viele andere. Migeotte 2006, 233f., erläutert, daß Formulierungen in den Quellen, Heiligtümer 'gehörten' einer Polis o. ä., keinen Widerspruch dazu bilden, sondern die Verwaltung des Heiligtums meinen (s. aber u. Teil V).

[23] Das vermerkt auch Rousset 2013, 124, gegen Velissaropoulos-Karakostas und Horster. Hingegen übergeht Rousset die zahlreichen klaren Quellenäußerungen über Götter als Landeigentümer zunächst völlig, bis er später (127ff.) ganz selbstverständlich von den Göttern als (Mit-)Eigentümern spricht.

[24] Vgl. Horster 2004, 77: Beispiel für hochrangige und niedrige Gottheit; Papazarkadas 2011, 25: Beispiel für gleichrangige Gottheiten.

[25] Vgl. die Wiedergewinnung von Oropos durch Athen 335 v. Chr.: Hyp. 3 (Eux.), 16 mit Papazarkadas 2011, 102ff.: Die *horistai* hatten dem Gott Amphiaraos einen Teil des neu gewonnenen Landes zugeteilt.
Herodot erzählt, daß der ägyptische König Amasis verschiedenen griechischen Städten Land zur Errichtung von Altären und Tempeln geschenkt habe. Das bedeutendste dieser Heiligtümer habe Hellenion geheißen. "Diesen Städten gemeinsam gehört das Heiligtum ... Die Aigineten haben ein eigenes Heiligtum des Zeus, die Samier eines der Hera, die Milesier eines des Apollon" (Hd. 2, 178, 3). Herodots Formulierung will die Poleis sicher nicht in Konkurrenz zu den göttlichen Eigentümern setzen, sondern spricht sie als Sachwalter der Götter an, als de-facto-Besitzer der Heiligtümer, die sie verwalten und nutzen, s. u. Teil V.

[26] Bei der Verteilung der 3000 Landlose (*kleroi*), in die Athen das Gebiet der abgefallenen und zurückeroberten lesbischen Poleis (außer Methymna) aufgeteilt hatte, erhielten die Götter 300, berichtet Thukydides 3, 50, 2; hier erhielten die Götter also 10% des Landes, einen Anteil, der ihnen auch häufig von der Kriegsbeute geweiht wurde.

[27] Dazu Rudhardt 1992, 225–227.

tieren.[28] Im letzteren Fall ist eine zusätzliche Verknüpfung mit der menschlichen Rechtsordnung gegeben.

Welche feierlichen Formen der Weihung es gegeben haben mag, durch die Land nicht nur durch einen menschlichen Willensakt, sondern auch sichtbar rituell in göttliches Eigentum überführt wurde, und ob deren Ausführung immer als notwendig angesehen wurde, damit das Land in göttlichen Besitz überging, entzieht sich weitgehend unserer Kenntnis.[29] Der einzig bekannte Ritus ist der feierliche Umgang um das entsprechende Stück Land.[30]

Land konnte den Göttern auch von Privatpersonen geweiht werden; die bekanntesten und immer wieder zitierten Beispiele sind die Weihungen von Nikias auf Delos und von Xenophon in Skillus.[31] Ob solches Land in der Vorstellung der Beteiligten immer in göttliches Eigentum überging, ist eine schwierige Frage. Bei Nikias war es wohl so, daß das geweihte Land an den schon vorhandenen Besitz Apolls in Delos angegliedert wurde. Bei Xenophons Weihung ist das weniger sicher; auch wenn Xenophon selbst vielleicht Artemis als Eigentümerin ansah,[32] könnten die Spartaner weiterhin ihn selbst als Eigentümer betrachtet haben, da sie ihn dazu gemacht hatten.

Der Umgang mit göttlichem Eigentum unterlag in vielfältiger Hinsicht Regeln, die im allgemeinen von Menschen festgelegt wurden und zum Teil rechtsförmig gestaltet waren. In eher seltenen Fällen, wenn das Land im Krieg gewonnen wurde offenbar immer,[33] und teils auf direkte Weisung der Gottheit war jegliche Nutzung verboten, und das göttliche Land mußte brachliegen, so das Gebiet von Kirrha und die sogenannte Orgas an der Grenze zwischen Athen und Megara (s. o.) oder das Pelargikon am Abhang der athenischen Akropolis bis 431 v. Chr.[34] Im allgemeinen aber war die wirtschaftliche Nutzung gestattet bzw. vorgeschrieben, wozu das Land in der Regel verpachtet wurde.[35] Dabei gab es auch Einschränkungen verschiedener

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[28] Vgl. Maffi 1997, 351f; Horster 2004, 80. 174; Migeotte im vorliegenden Band, ab ca. A. 14. Ein frühkaiserzeitliches Dekret Milets ehrt einen Bürger, der den Gott (Apollon Didymeus) und den Demos als Erben seines gesamten Vermögens eingesetzt hatte, vgl. Günther 2008. Für den Hinweis auf die Gottheit als Erben danke ich Linda-Marie und Wolfgang Günther.

[29] Die Forschung spricht viel von Konsekrationen, macht sich aber kaum Gedanken um deren konkrete Formen. Bei beweglichen Weihegaben ist der Vorgang klarer zu bestimmen, aber auch einfacher, s.u.

[30] Vgl. Rudhardt 1992, 228f. mit Verweis auf IG II^2 1126.

[31] Plut. Nik. 3, 6; Xen. anab. 5, 3, 6–13. Weitere Fälle bei Horster 2004, 142.

[32] Horster 2004, 178, stellt das Eigentum der Artemis nicht in Frage.

[33] Vgl. Rudhardt 1992, 227.

[34] Thuk. 2, 17, 1.

[35] Nach Horster 2004, 6, war die Verpachtung bis in die klassische Zeit eher die Ausnahme; das erscheint durchaus angreifbar, auch wenn explizite Belege (z.B. IG I^3 84 von 418/17) rar sind. Detaillierte Bestimmungen über die Verpachtung finden sich insbesondere in den Tafeln von Herakleia, Tafel I, Z. 95ff. (Uguzzoni / Ghinatti 1968), Ende 4. /Anfang 3. Jh. v. Chr.

Art:[36] Hier war das Hereinbringen von Vieh verboten, dort war die Verpachtung als Weide ausdrücklich gestattet. In Arkesine etwa war die Beweidung verboten, bei Übertretung gingen die Schafe in den Besitz des Heiligtums über. Hier war das Fischen streng verboten, dort wurden Fischereirechte verkauft (Delos). Auch für Menschen bestanden Einschränkungen: In Böotien durfte der heilige Hain von Demeter Kabeiria und Kore nur von Eingeweihten betreten werden.[37] In Bezug auf die Nutzung und die Zugänglichkeit von heiligem Land bestand also keine Einheitlichkeit. Offenbar haben sich lokale Traditionen entwickelt, in denen sich der Respekt gegenüber der Gottheit auf verschiedene Weise zeigte.

Bei Übertretung von Verboten wurden Strafen verhängt, die zum Teil zumindest auf rechtlichem Weg durchgesetzt werden konnten. Die verhängten und eingetriebenen Geldbußen gingen meist an das Heiligtum selbst, aber auch eine Teilung mit der Polis kam vor.[38] Bei einem Einzug der Buße durch Magistrate der Polis ist nicht immer klar, welche Kasse den Betrag erhielt.

Die Götter waren als Eigentümer des heiligen Landes auch die Eigentümer der Einnahmen aus der Landverpachtung, die häufig in Naturalien entrichtet wurden.[39] Die Einnahmen gingen im allgemeinen an das Heiligtum,[40] aber auch an die Polis, ähnlich wie bei Geldbußen.[41] Man hat den Eindruck, daß in großen Poleis oder großen Heiligtümern, wo eine differenzierte Verwaltung bestand, die Einnahmen direkt an die Heiligtümer oder an die Kasse von Heiligtümern (in Athen die Tamiai der Athena und der anderen Götter) flossen, in kleineren Poleis war die Trennung zwischen Staats- und Tempelkasse vielleicht nicht so strikt. Falls auf Landbesitz Steuern erhoben wurden, wie in Athen die *eisphora*, so ist davon auszugehen, daß der Pächter die fällige Summe zu entrichten hatte.[42] Auf diese Weise hat man vermieden, daß ein Gott zur steuerpflichtigen Person mit entsprechenden Konsequenzen geworden ist.

Ein Forschungsproblem besteht darin, ob das Eigentum einer Gottheit unveräußerlich war. In der Tat sind so gut wie keine Verkäufe oder Schenkungen bekannt, die einmal der Gottheit geweihtes Land ihr wieder entzogen hätten.

Eine mögliche Ausnahme macht eine Angabe, die, wohl wegen ihrer obskuren

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[36] Dazu Horster 2004, 103ff. 172

[37] Paus. 9, 25, 5.

[38] Vgl. Horster 2004, 130. 178.

[39] Vgl. Ampolo 1992, 24f. für Herakleia (in der Magna Graecia).

[40] So ganz selbstverständlich Isager 1992b, 120f.; vgl. die explizite Formulierung IMylasa II Nr. 829, Z. 4: ὅπως τοῦ διαφόρου καταλελειμμένου πρόσοδος ὑπάρχηι τοῖς θεοῖς und ähnlich Z. 21, vgl. Dignas 2000, 123f.; SEG 28, 332/1 v. Chr.: ὅπως ἂν τῷ Ἡρακλεῖ ... πρόσοδος ᾖι (Textzusammenhang bei Horster 2004. 139); vgl. auch Horster 2004, 167 (Herakleia in Sizilien). 173 (Arkesine). 177 (Samos).

[41] Aus dem Hafen von Delos erzielten sowohl die Polis als auch das Heiligtum Einnahmen, vgl. Linders 1992a, 10.

[42] So Isager 1992b, 121f. Die Besteuerung auch des heiligen Landes wird in der Forschung allgemein bejaht, vgl. z.B. Papazarkadas 2011, 97.

Herkunft, von vielen Gelehrten unbeachtet bleibt: Aristot. *oec*. II 1346b: "When the Byzantians were in need of money they sold (ἀπέδοντο) the *temene* that were administered by the city (*demosia*); those under crops, for a term of years, and those uncultivated, in perpetuity. Likewise they sold *temene* administered by *thiasoi* and *temene* administered by phratries, especially those located on private estates."[43] Eine weitere Ausnahme könnten die sogenannten *rationes centesimarum* enthalten, die trotz des Bedenkens einiger Forscher den Verkauf von Immobilien der Athena Polias im lykurgischen Athen belegen dürften.[44] Schließlich wurden in Philippoi in Makedonien in der zweiten Hälfte des 4. Jh. *temene* des (kultisch verehrten) Königs Philipp, des Ares, der Heroen und des Poseidon verkauft.[45]

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[43] Zitiert nach Papazarkadas 2011, 264 A.15; griechischer Text und französische Übersetzung bei Migeotte im vorliegenden Band, A. 8; beide gehen mit andere Interpreten von Verkäufen aus. Allerdings ist das Prädikat ἀπέδοντο ambivalent, es kann sowohl den Verkauf als auch die Verpachtung, jeweils durch Versteigerung, ausdrücken. Für eine Verpachtung spricht, daß ein Teil der *temene* nur auf Zeit vergeben wird, für einen Verkauf, daß im nachfolgenden Text Käufer erwähnt werden (ὠνοῦντο). Da eine Verpachtung heiligen Landes üblich war, hätte sie auch kaum Anlaß für die Aufnahme in die vorliegende Textsammlung gegeben. Vielleicht muß man daher unterscheiden, daß landwirtschaftlich genutztes Land verpachtet, unfruchtbares verkauft wurde. Allerdings darf die Terminologie der anonymen Schrift aus der zweiten Hälfte des 3. Jahrhunderts v. Chr. auch nicht überstrapaziert werden. Horster 2004, 159 A. 63, scheint die Stelle nur auf Verpachtungen zu beziehen, vgl. 77 A. 60.

[44] Vgl. auch Migeotte in diesem Band, bei A. 10ff. Daß einige Forscher entgegen dem Text der Inschriften eine Verpachtung statt eines Verkaufs annehmen, liegt wohl daran, daß sie den Verkauf von heiligem Land von vornherein für ausgeschlossen halten. Vg. die Dokumentation der Forschungslage bei Horster 2004, 156–159, die selbst, wie die Herausgeber Lewis und Lambert, von Verkäufen ausgeht. Bei ihrer Bezugnahme auf Lambert 1997 übersieht Horster jedoch, daß jener insofern differenziert, als er zwar annimmt, das verkaufte Land sei Eigentum der Gottheit (S. 199–203), aber wirklich essentielles Eigentum wie "shrines, precincts and meeting places" sowie verpachtetes Land, das für die Ausgaben der Kultgemeinschaft unabdingbar gewesen sei, sei nicht verkauft worden (S. 236). Insofern deutet Lambert meine untenstehende Differenzierung in Kern- und Außenbereich an, ohne sie jedoch richtig bewußt zu machen. Lamberts Position wird auch von Papazarkadas 2011, 135, unzutreffend vereinfacht: heiliger Besitz sei nicht in die Verkäufe eingeschlossen gewesen, weil entsprechende Eigentums-Bezeichnungen (wie *temenos*) in den Inschriften fehlten (auch dieses Argument findet sich bei Lambert nicht). Papazarkadas setzt im übrigen an vielen Stellen die absolute Unverkäuflichkeit von heiligem Land voraus. Eine weitere Parallele zu meiner Differenzierung könnte jedoch seine Unterscheidung von zwei Kategorien von heiligen Olivenbäumen (*moriai*) in Athen darstellen, wenn sie denn, so unklar wie sie formuliert ist, in diesem Sinne gemeint sein sollte: "on the one hand *moriai*, distinguishable sacred olives with no or very limited geographic concentration, and, on the other hand, flora consecrated to divinities as part of a wider frame of sacred real property" (281).

[45] SEG 38, 658. Zum Text mit neuen Ergänzungen und zur Literatur vgl. den ersten Teil von Migeottes Beitrag im vorliegenden Band. Die Inschrift ist erwähnt von Horster 2004, 158 A.62, die allerdings in Frage stellt, daß es sich um einen Verkauf gehandelt habe.

In wenigen Fällen, die sich alle nicht vor dem dritten Jahrhundert v. Chr. ereigneten, wurde heiliges Land an Gläubiger einer Polis verpfändet. Während in Akraiphia das Land durch einen Verzicht des Gläubigers im Eigentum der Polis verblieb, war es in Sikyon bereits ins Eigentum des Gläubigers übergegangen, konnte jedoch bald darauf aufgrund einer Spende des Attalos I. wieder zurückgekauft werden.[46] In ähnlicher Weise gab später, im Jahr 27 v. Chr., der Gläubiger Lysias auf Anordnung des Augustus ein im Bürgerkrieg wohl als Ganzes verpfändetes Dionysos-Heiligtum an die Thiasiten von Kyme zurück.[47] Offenbar endgültig in das Eigentum der Gläubiger waren heilige Haine in Kalymna übergegangen.[48]

Finley und andere haben sicherlich darin recht, daß es kein gesetzliches Verbot der Veräußerung von heiligem Land gab.[49] Daher ist es grundsätzlich vorstellbar, daß auch solches Land veräußert wurde. Aber der vielfältig belegte Respekt vor göttlichem Eigentum (s. auch unten zum mobilen Eigentum) macht es unwahrscheinlich, daß in der Praxis oft mit Landverkäufen oder -verpfändungen zu rechnen ist.[50] Und in der Tat existieren für direkte Verkäufe kaum eindeutige Belege. Abgesehen von den Verkäufen in Philippoi, die nur geringe Erlöse brachten, könnten nur die *rationes centesimarum* belegen, wenn sie denn wirklich so zu verstehen sind, daß in einer bestimmten historischen Phase in größerem Umfang heiliges Land verkauft wurde.

Diese Beobachtungen lassen sich durch folgende Annahmen in Übereinstimmung bringen. Die Lösung liegt meines Erachtens darin, daß wir die Kategorie "heiliges Land," die im allgemeinen als einheitliche Kategorie verstanden wird, differenzieren. Aussagen wie: "Die Haine besaßen unverletzliche Sakralität, waren

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[46] Akraiphia: Migeotte 1984, Nr. 16 B. Walbank hat daher in seinem Kommentar zu Polyb. 18, 16, 1–2 (wo die Episode ebenfalls erzählt wird) auch an eine Hypothek in der speziellen Form einer πρᾶσις ἐπὶ λύσει gedacht: F.W. Walbank, A Historical Commentary on Polybius II, Oxford 1967, 570–571.

[47] H. Engelmann, die Inschriften von Kyme, Bonn 1976, Nr. 17 mit Kommentar. In ähnlicher Weise hat Augustus die Rückgabe von Immobilien an den Artemis-Tempel von Ephesos veranlaßt, vgl. Alföldy 1991 (freundlicher Hinweis von H. Halfmann).

[48] Die jeweiligen Inschriften bei Migeotte 1984, Nr. 16 B (Akraiphia) . 17 (Sikyon) . 59 (Kalymna; zu den ebenfalls verkauften Phialai s.u. A. 64) mit dem dortigen Kommentar; vgl. auch dens. 2006, 236; dens. im vorliegenden Band bei A. 29–32; Horster 2004, 47. Ebenso dürfte das eingestürzte Haus, das die Polis Delos Anfang des 3. Jh. v. Chr. verkaufte und das ein Privatmann zuvor dem Apollon geweiht hatte (IG XI 2, 162A Z.42f.; vgl. Migeotte im vorliegenden Band A. 13), als (verkäufliche) Außenbesitzung angesehen worden sein. Ähnlich IDélos 1408 A II, Z. 46 im Jahr 162 v. Chr.

[49] Vgl. Migeotte 1984, 395f.: "les terres publiques, même sacrées, pouvaient être aliénées, par vente ou par saisie, mais sans doute dans des situations d'extrême urgence." Vgl. dens. 1980, 167f. ; 2006, 237 ; Rousset 2013, 123f. Allerdings wird ein Verbot des Verkaufs von sakralem Besitz in einer späten (1. Jh. v. Chr.?) Inschrift aus Athen erneuert: IG II^2 1035, Z. 8f., vgl. Horster 2004, 48 A. 115.

[50] So schon Guiraud 1893, 362ff. Isager 1992b, 121, vertritt die eigenartige Meinung, daß nur soeben konfisziertes Land wieder verkauft werden konnte.

sie doch Wohnstatt von Göttern,"[51] erscheinen als zu pauschal. Denn einerseits können wir einen Kernbereich des heiligen Landes unterscheiden, welcher direkt der kultischen Verehrung der Götter diente. Dazu wären alle Grundstücke zu rechnen, auf denen ein Altar, ein Tempel, ein Schrein, eine Statue oder ein sonstiges, die Gottheit repräsentierendes Symbol vorhanden war, das Gegenstand der Verehrung war. Es ist kaum vorstellbar, daß Grundstücke aus dieser Kategorie regulär verkauft oder verpfändet werden konnten, selbst wenn sie teilweise oder weitgehend wirtschaftlich genutzt wurden.[52]

Andererseits gehörten den Göttern, wie wir gesehen haben, Landstücke, die ausschließlich wirtschaftlicher Nutzung unterlagen. Dazu zählten Äcker, Weiden, Haine, Teiche oder Steinbrüche, wo keine kultische Verehrung stattfand[53] und die wir daher als Außenbereich des heiligen Landes bezeichnen können.[54] Dabei spielte es keine Rolle, ob dieses Land, das ebenfalls als *temenos* bezeichnet werden konnte und als *hieros* galt, mit entsprechenden *horoi* als Besitz der Gottheit ausgezeichnet war oder nicht. Falls Land aus dem Eigentum einer Gottheit verkauft wurde, ist wohl, ebenso wie bei Verpfändungen, nur an diese letztere Kategorie von heiligem Land zu denken.[55]

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[51] Horster 2004, 93.

[52] Wahrscheinlich war auch nur dieser Kernbestand an heiligen Grundstücken geeignet, als Asylstätte zu dienen. Es war doch ein konkretes Symbol der göttlichen Präsenz nötig, damit ein Ort sowohl für *hiketai* als auch für Verfolger als Zufluchtsort erkennbar war.

[53] Ein eindrucksvolles Beispiel sind die zahlreichen landwirtschaftlichen Grundstücke, die in der zweiten Hälfte des 3. Jahrhunderts vom Artemis- und Apollontempel in Mylasa gekauft wurden, um sie sogleich wieder an die früheren Eigentümer zu verpachten, vgl. Dignas 2000. Auf diesen Grundstücken wurden die beiden Gottheiten, auch wenn diese jetzt die Eigentümer waren, gewiß nicht kultisch verehrt. Dignas stellt ganz zu Recht die ökonomische Bedeutung des Landes in den Vordergrund. Ähnliches gilt z.B. für den Steinbruch des Herakles in Akris, dessen Einkünfte nach Beschluß des Demos von Eleusis für den Kult des Heros verwendet werden sollten: SEG 28, 103, vgl. Horster 2004, 139; vgl. IG II ^{2} 47 mit Papazarkadas 2011, 42.

[54] Migeotte unterteilt im vorliegenden Band alles öffentliche Eigentum, sakral oder profan, in "domaine privé de l'État" und "domaine public de l'État." Diese Differenzierung überschneidet sich zum Teil mit der hier vorgeschlagenen. Was speziell das heilige Land betrifft, so erkennt Migeotte (nach A. 2) ebenso wie frühere Kommentatoren im Hinblick auf die zitierte Philippoi-Inschrift an: "ces téménè n'étaient pas les lieux réservés au culte de leurs propriétaires, dont la vente est difficilement concevable, mais sans doute des terres des la campagne environnante."

[55] Ich sehe hier eine Parallele zum Umgang der Heiligtümer mit Geld. Während Münzen, die der Gottheit als Weihegeschenke zugedacht waren, soweit wir wissen, nicht mittels Zahlungen aus dem Eigentum der Gottheit entfernt, sondern, zumindest was das Material betrifft, dauerhaft aufbewahrt wurden, fungierte Geld (und sicherlich auch Naturalien), das als Pachtzins, Abgabe für Opferdienste u.a. in die Tempelkasse geflossen war, als normales Zahlungsmittel, das für verschiedene Zwecke wieder ausgegeben wurde.
Im übrigen wird aus praktischen Gründen immer wieder die Notwendigkeit entstanden sein, auch immobilen göttlichen Besitz, ebenso wie Weihegaben (s. o.) zu "entsorgen," etwa wenn nach dem Peloponnesischen Krieg die der Athena geweihten *temene* auf dem

Inwiefern müssen die Götter nun tatsächlich als Landeigentümer betrachtet werden? Nach Horster (s. o. Einleitung) waren die Götter keine `juristisch´ erfaßte Personengruppe und ihr Eigentum keine 'juristische' Kategorie. Es sei keine klare Kategorisierung im griechischen Recht vorhanden. Das ist aber bei vielen Gegenständen so, die nach unseren Begriffen zum griechischen Recht gehören. Die Götter wurden jedenfalls von den Griechen als wirkliche Eigentümer betrachtet. Wenn sie schon auf den *horoi*, die ja auch als offizielle Dokumente galten, als solche verzeichnet wurden, so werden sie auch im entsprechenden Kataster, sofern es ein Kataster gab, als Eigentümer eingetragen gewesen sein. Die Götter haben damit eine dokumentierte Rechtsstellung eingenommen.

Die Götter waren also Rechtssubjekte im administrativen Bereich der Polis. Im allgemeinen war es jedoch aufgrund ihrer nicht gegebenen physischen Anwesenheit sicherlich nicht nötig und nicht üblich, sie auch förmlich in die Bürgerschaft einzugliedern, wie jedoch Ampolo meint.[56] Das Beispiel, auf das er sich stützt, daß nämlich die Thurier den Windgott Boreas wegen dessen Unterstützung gegen Dionysios von Syrakus das Bürgerrecht verliehen hätten, stellt einen einmaligen Vorgang dar, bei dem eine im übrigen recht niedrig stehende Gottheit für die Bürgerschaft vereinnahmt werden sollte.

c) Götter als Empfänger von Opfern sowie als Eigentümer von mobilen Weihegaben

Wie oft und wie viel einer Gottheit geopfert wurde, legten zwar die Menschen fest, aber diese waren der Überzeugung, daß eine Gottheit ein grundsätzliches "Recht" auf den Erhalt von Opfern besaß. Das kommt in der, wenngleich wohl stark verallgemeinernden, dem Didymos zugeschriebenen Aussage des Harpokration zum Ausdruck, wonach jeder Gottheit ein Stück Land zugewiesen worden sei, aus dessen Erträgen man die Opfer finanziert habe.[57] Von den Opfern erreichte zwar nur ein Teil die göttlichen Personen in physischer Form, vor allem als Rauch von verbranntem Weihrauch oder Tierfett, aber nur auf diese Weise konnten sich die Menschen das Wohlwollen der Götter "erkaufen," von dem sie sich abhängig glaubten. Die Stifter erwarteten sich, wie sie selbst auch auf Inschriften festhielten, eine "freundli-

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Gebiet des Ersten Athenischen Seebunds (vgl. Papazarkadas 2011, 20) wieder an die bisherigen Verbündeten Athens zurückfielen, wobei deren heiliger Charakter sicher nicht immer gewahrt wurde; oder wenn ein Kultverein einfach aus praktischen Gründen aufhörte zu existieren. Man muß vermuten, daß dann, wenn auf einem solchen verlassenen *temenos* der Altar allmählich überwuchert wurde oder der kleine Schrein einstürzte, von der Polis oder ihren Untereinheiten eine sorgfältige Entsorgung der Baulichkeiten vorgenommen und das Grundstück möglicherweise einem profanen Gebrauch zugeführt wurde.

[56] Ampolo 1992, 26; ders. 2000. Quelle ist Ail. var. 12, 61.

[57] Harpokration A 196, s. v. ἀπὸ μισθωμάτων; vgl. Ampolo 2000, 16; Dignas 2000, 118; Papazarkadas 2011, 76.

che Gegengabe" des Gottes.[58]

Neben den Opfern erhielten die Götter Weihegaben in Form von mobilen Gegenständen (zu Land als Weihegabe s. o.), deren Eigentümer sie mit der physischen Aufstellung bzw. Niederlegung im Tempel oder Heiligtum wurden.[59] Für diese Weihungen werden i. a. die Termini ἀνατίθημι und καθιερόω gebraucht.[60] Ähnlich wie die *horoi* auf heiligem Land trugen viele Weihegaben Inschriften mit dem Namen der Gottheit im Genitiv, die sie als deren Eigentum ausweisen. In ihrem vor kurzem erschienenen Corpus "Neue Inschriften aus Olympia" haben die Herausgeber P. Siewert und H. Taeuber für diese Kategorie den treffenden Begriff der "Sakralbesitzinschriften" geprägt.[61]

In den größeren Heiligtümern, in denen auch wertvolle Gegenstände, besonders aus Edelmetall, geweiht wurden, erfolgte meist eine sorgfältige Inventarisierung, so daß der Besitz einer Gottheit überschaubar und kontrollierbar blieb. Beschädigte Gegenstände und Kleinteile mit Metallwert, die sich in den Heiligtümern anhäuften, wurden auf ausdrücklichen Beschluß von Rat und Volk und unter Aufsicht von sakralen und profanen Amtsträgern zu neuen Gefäßen oder Barren eingeschmolzen, die wiederum im Heiligtum verblieben. Die Namen der ursprünglichen Weihenden hielt man auf eigenen Listen fest. T. Linders gelangt aus den inschriftlichen Anhaltspunkten zu der für Metallgegenstände gültigen Hypothese "that votives were regarded as remaining votives as long as the material existed."[62] Im allgemeinen galt also auch das mobile Eigentum einer Gottheit als unveräußerlich.[63] In extremen Notlagen konnte jedoch auch dieses, wie wir es schon beim immobilen Eigentum gesehen haben, von der Polis verpfändet werden und in das Eigentum des Gläubi-

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58 Vgl. Burkert 2011, 147 mit Beispielen.

59 Im Beitrag von Harter-Uibopuu zum vorliegenden Band ergibt sich aus Argumenten des Dion Chrysostomos die Frage, inwiefern auch den Göttern geweihte Statuen deren Eigentum sind.

60 Zur Terminologie vgl. Rudhardt 1992, 214ff. 223f.

61 Die Herausgeber weisen darauf hin, daß unsicher bleibe, ob diese Inschriften von den Stiftern oder den Verwaltern des Heiligtums angebracht wurde. Mir scheint ziemlich sicher die letztere Annahme zuzutreffen. Vgl. als Eigentumsbeleg etwa auch I.Iasos 220, Z.9, zitiert von Harter-Uibopuu im vorliegenden Band.

62 Linders 1989/90, 284; vgl. auch Dignas 2002, 20. Linders macht auch darauf aufmerksam, daß die Goldschmiede, die mit dem Einschmelzen solcher Gegenstände aus dem Amphiareion in Oropos beauftragt wurden, nicht aus den geweihten Münzen, sondern aus der laufenden Kasse des Tempels bezahlt worden seien. Eine spezielle Regelung in Iasos sah vor, daß ungenutzte und unbrauchbare Gegenstände in das Eigentum des Priesters übergehen sollten, I.Iasos 220, Z.8, zitiert im Beitrag von Harter-Uibopuu zum vorliegenden Band.

63 Aisch. 3, 21 referiert die athenische Vorschrift, nach der Amtsträger vor ihrer Rechenschaftslegung keine Vermögenswerte weihen (καθιεροῦν) dürften. Das impliziert, daß die Polis keinen Zugriff mehr auf geweihte Gegenstände hatte, um eventuell bestehende Ansprüche an den Amtsträger durchzusetzen.

gers übergehen, wenn die Schuld nicht getilgt wurde.[64]

Gegenstände ohne Materialwert, insbesondere Keramik, wurden, wenn sie überhandnahmen, in Gruben innerhalb des Heiligtums vergraben. So blieben auch diese innerhalb des Territoriums der Gottheit und damit in deren Eigentum.

Eine Randgruppe von Weihungen findet sich auf Fluchtafeln, und zwar in der Kategorie der Verbrechensflüche. Der Verfasser oder die Verfasserin der Fluchtafel setzt, neben der Verfluchung des Diebs, der angerufenen Gottheit das verlorene Gut oder ein Teil davon als Belohnung aus, wenn die Gottheit das Gestohlene wieder herbeibeschafft, meist indem sie den Dieb dazu veranlaßt, das Gut zurückzubringen.[65]

Auch das mobile Eigentum einer Gottheit wird in den Quellen als *hieros* gekennzeichnet und damit von privatem und öffentlichem Eigentum abgegrenzt (s.o.). Beispielsweise ist in den Abrechnungen der Hieropoioi von Rhamnous in einem Archontenjahr vom "Geld der (Göttin) Nemesis," in anderen Jahren nur vom "heiligen Geld" die Rede.[66] Neben Geld und Gebrauchsgegenständen konnte auch Vieh zum mobilen Eigentum der Gottheit gehören.[67]

d) Götter als Eigentümer von Sklaven

Größere Heiligtümer mit ständigem Publikumsverkehr und zahlreichen Kultveranstaltungen waren meist im Besitz von Tempelsklaven. Die jeweilige Gottheit konnte, natürlich durch ihre menschlichen Sachwalter, Sklaven ebenso wie anderen Tempelbedarf käuflich erwerben.

Sklaven konnten jedoch auch in das Eigentum einer Gottheit übergehen, nachdem sie in deren Heiligtum (als *hiketai*) Schutz, meist vor der grausamen Behandlung durch ihre Herren, gesucht hatten und in Verhandlungen mit dem bisherigen Eigentümer oder durch eine richterliche Entscheidung eine Lösung der Asyl-Situation zustande kam. Bis eine Lösung erfolgte, in Gortyn waren dafür bestimmte Fristen vorgeschrieben,[68] war die Gottheit nur vorübergehender Besitzer solcher Sklaven. In einigen Heiligtümern konnten die Sklaven dann in das dauerhafte Ei-

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[64] Zwei Fälle sind bekannt, in denen heilige Gefäße aus Edelmetall als Pfänder fungierten: In Olbia kaufte ein ausländischer Wohltäter heilige Gefäße (ἱερὰ ποτήρια) zurück, kurz bevor sie der Gläubiger in der dortigen staatlichen Münze einschmelzen ließ. In Kalymna waren die Phialen ebenso wie die heiligen Haine (s. o. A. 48) vom Gläubiger zu einem früheren Zeitpunkt in Besitz genommen worden, wie ein um 300 beschlossenes Schiedsurteil festhält. Die Texte bei Migeotte 1984, Nr. 44 A, Z.14–19 (Olbia) und Nr. 59, Z.8–10 (Kalymna); vgl. schon dens. 1980, 165ff.

[65] Einschlägig sind im griechischen Bereich die Fluchtafeln aus Knidos. Vgl. Dreher 2010, mit weiterer Literatur; ebd. S. 332 zur Kategorisierung dieser Flüche als "Verbrechensflüche" statt der meist verwendeten Bezeichnung "prayers for justice."

[66] IG I^3 248 = Meiggs / Lewis 53, ca. 450–440 v. Chr.; vgl. Davies 2002, 117ff.

[67] Vgl. Isager 1992a.

[68] Vgl. Maffi 2003.

gentum der Gottheit übergehen und ihr als Hierodulen dienen.[69]

Weihungen von Sklaven, bei denen diese, wie andere Weihegaben, faktisch dem Tempel übereignet wurden, scheinen hingegen selten vorgekommen zu sein.[70] Häufiger sind Weihungen, deren eigentliches Ziel die Freilassung der Sklaven gewesen ist. Inwiefern die Sklaven dadurch Eigentum der Gottheit wurden, ist in der Forschung umstritten. Zumindest als vorübergehender Eigentümer von Sklaven galt nach verbreiteter Forschungsmeinung der Gott Apollon in Delphi, dem nach Ausweis der Freilassungsurkunden die Sklaven in der feierlichen Form der sakralen Freilassung zunächst verkauft wurden, damit sie in einem nächsten Schritt ihre Freiheit erlangen konnten.[71] Als dauerhaft zumindest zum Teil in göttlichem Eigentum stehend betrachtete man vielleicht die in Leukopetra freigelassenen Sklaven, da sie an Festtagen der Göttermutter Autochthon dienen mußten.[72] Ebensowenig wie die nur symbolisch der Göttin geweihten Kinder lebten sie jedoch ständig im Heiligtum.

e) Götter als Kreditgeber (Gläubiger) bzw. *Euergetai*

Aus den Schätzen, die sich in den Tempeln ansammelten, wurden Kredite sowohl an Privatleute,[73] vor allem aber an Poleis vergeben. Auf den Täfelchen aus dem Tempelarchiv von Lokroi Epizephyrioi lautet die Standardformel für solche Kredite, mit denen die Polis zum Beispiel den Bau von Türmen oder von Befestigungsanlagen oder die Herstellung oder den Kauf von Waffen finanzierte: "Die Stadt hat auf Beschluß von Rat und Volk vom Gott (i. e. Zeus) als Anleihe aufgenommen: (Summe)."[74]

In der Forschung wird kontrovers diskutiert, wie die Städte mit solchen Krediten umgegangen sind. Nach der traditionellen, den Poleis gegenüber eher kritischen Ansicht wurden die Tempelschätze als Staatseigentum betrachtet, dessen sich die Regierungen bei Bedarf bedienen konnten. Damit wird gern der Vorwurf der übertriebenen Staatsraison, des Eigennutzes, der Leichtfertigkeit und Respektlosigkeit gegenüber dem göttlichen Eigentum verbunden.[75] In manchen Fällen haben sich die

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[69] Belege bei Thür 2003, 33f.; vgl. auch Latte 1920, 107f.

[70] Vgl. Burkert 2011, 111, mit einigen literarischen Quellen. Ein (spätes) Beispiel ist IG X.2.2.233 (Kolobaise, 200 n. Chr.). Hingegen ist die Weihung einer entlaufenen Sklavin an die Göttin, die sie dann selbst aufspüren soll, eher als Racheakt zu verstehen, bei dem das Schicksal der Sklavin offen bleibt. Vgl. zu beiden Fällen Chaniotis 2012, 215f.

[71] Vgl. Latte 1920, 109f.: "der Gott als Kontrahent auftritt." Für den Hinweis auf die Sklavenfreilassung danke ich Gerhard Thür.

[72] Vgl. Youni 2005; Chaniotis 2012, 215.

[73] Vgl. z.B. Davies 2002, 118.

[74] Costabile 1987, 104. Vgl. ebd. 108: "Infatti non il santuario di Zeus, *l'Olimpieion*, ed i suoi sacerdoti, … e nemmeno i magistrati preposti alla sua amministrazione sono considerati creditori della *polis*, ma Zeus stesso, … Egli è concepito dai Locresi come una divinità poliade ed una concreta realtà dell *polis*."

[75] Zur traditionellen Ansicht vgl. o. A. 20. Vgl. ferner Garland 1990, 86. Weitere Literatur

Poleis in der Tat recht großzügig aus den Tempelkassen versorgt. Verschiedentlich wurden Kredite nicht oder nicht vollständig zurückerstattet.[76] Auf Delos sind nicht gezahlte Zinsen nicht als Schulden in die nächste Amtsperiode der Verwaltung übertragen worden.[77] Insgesamt gesehen stellten die Städte jedoch seriöse Regeln auf und bedienten sich keineswegs ganz freihändig bei ihren Göttern.[78] In Athen, Delos und Lokroi wurde die Rückzahlung von Geld, das aus den Tempelkassen entnommen worden war, zumindest grundsätzlich erwartet. Perikles weist darauf hin, daß die Schätze bei Inanspruchnahme auch wieder zurückerstattet werden müßten, was dann wohl doch weitgehend unterblieb, während in Lokroi mehrfach Rückzahlungen verzeichnet sind.[79] Darüber hinaus wurden in Athen und Delos Zinsen auf die entnommenen Gelder erhoben (s. u. Schluß). In Halikarnaß hat man die verpfändeten Grundstücke säumiger Schuldner von Apollon, Athena und Poseidon eingezogen und verkauft.[80]

Umgekehrt ist nicht bekannt, daß Götter auch Schuldner gewesen wären, d.h. ein Heiligtum eine Anleihe bei einer Polis oder bei Privaten aufnahm. Wenn ein Heiligtum seinen Verpflichtungen zu Opfern oder Kultveranstaltungen nicht nachkommen konnte, mußte dafür vielmehr die zuständige Einheit (Polis, Phyle usw.) einstehen.[81] Ein Gott oder eine Göttin als Schuldner war für die Griechen wohl nicht vorstellbar.

III. Die Götter als Rechtsakteure

a) Götter als Richter.

Zeus wurde zwar nicht als der christliche Weltenrichter, der alle Seelen nach ihrem Tod in Gerechte und Ungerechte scheidet, aber im allgemeinen als szeptertragender, oberster Rechtswahrer verstanden, der die menschlichen Richter bei ihren Urteilen unterstützt bzw. wegen "schiefer Rechtssprüche" der hohen Herren die ganze Gemeinschaft straft, gegebenenfalls aufgrund einer "Anzeige" des als Göttin 'Dike' personifizierten Rechts.[82] Athena tritt in den Eumeniden des Aischylos als mit ab-

bei Dignas 2002, 16, die selbst die Gegenmeinung vertritt.

[76] Vgl. Linders 1992a, 11, und Dreher 2006, 252f., für Delos.

[77] I.Délos 98 (= Marmor Sandwicense) = Migeotte 1984 Nr. 45 II = Rhodes / Osborne 28; vgl. Dreher 1995, 127f. 253–55.

[78] Vgl. Horster 2004, 176. 197.

[79] Zu Athen s. Thuk. 2, 13, 3–5; Meiggs / Lewis 58. Dabei ist zu bedenken, daß der Hauptteil der von Thukydides genannten Summe, nämlich 6000 Talente, kein geweihtes Geld, sondern Geld war, welches die Polis im Tempel deponiert hatte, vgl. Dreher 2006, 247 A. 3. Zu Lokroi s. etwa die Tafeln 32 und 33, vgl. Costabile 1987, 109. 111. Allerdings bleibt es ausdrücklich den Institutionen der Polis überlassen, wann und wie der Kredit zurückgezahlt wird, vgl. dens. 1992, 168.

[80] Syll.^{3} 46, Z. 2–4, zitiert bei Migeotte im vorliegenden Band, A. 18.

[81] Vgl. dazu die Bestimmungen über das Apollonheiligtum von Aktion gegen Ende des 3. Jh. v. Chr., ed. pr. Ch. Habicht, Eine Urkunde des Akarnanischen Bundes, Hermes 85, 1957, 86–122, Z.36–41. 50–52. Vgl. Czech-Schneider 2002, bes. 86–88.

[82] Hom. Il. 16, 385–392; Hes. erg. 250f. 256–268.

stimmende Richterin über den Muttermörder Orest in Erscheinung, ebenso als *dea ex machina* bei Euripides.[83] Neben dem Glauben daran, daß die Gerechtigkeit des Zeus sich zumindest langfristig durchsetzt,[84] findet sich jedoch auch Kritik daran, daß der Göttervater "Frevlern und Gerechten gleichen Teil" zukommen lasse.[85]

Beim Gottesurteil entscheidet die Gottheit und teilt ihre Entscheidung durch vorher festgelegte Zeichen mit. In historischer Zeit ist uns für ein solches Verfahren allerdings nur das Urteil von Mantineia bekannt.[86] Eine Form von göttlicher Entscheidung, wenngleich meist nicht als Urteil, treffen auch die verschiedenen Losorakel der griechischen Welt.

Die Vorstellung von H. Versnel, in den von ihm als "prayers for justice" kategorisierten Fluchtafeln seien Götter gleichzeitig als Kläger und Richter betrachtet worden, ist an anderer Stelle zurückgewiesen worden.[87] Davon unberührt kommen sowohl in den Fluchtafeln als auch in anderen Zeugnissen vielfältige Formen des Glaubens an eine göttliche Gerechtigkeit zum Ausdruck, die im vorliegenden Zusammenhang jedoch nicht einschlägig sind.[88]

b) Götter als Zeugen

In den Eiden vor Gericht wurden die Götter als Zeugen dafür angerufen, daß die Wahrheit gesagt wird.[89] Die athenischen Richter schworen bei Beginn ihrer Amtszeit, sich an die Gesetze zu halten.[90] Bei vielen Rechtsgeschäften wurden die Götter als Zeugen in Anspruch genommen; oft begaben sich die Vertragspartner (z.B. eines Darlehens oder Kaufvertrags) in ein Heiligtum, um dem Eid eine zusätzliche sakrale Aura zu verleihen.[91]

Das System der Beeidung beruhte auf der Gewißheit, mindestens aber auf der Hoffnung, daß niemand einen Meineid schwört, weil er sonst eine göttliche Strafe zu erwarten hat.[92]

c) Götter als Rechtsbeistände

In den "Wolken" des Aristophanes sucht der Bauer Strepsiades schließlich Rat bei

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[83] Aisch. Eum. 734ff.; Eurip. Or. 1640ff.
[84] Sol. Fr. 36, 3 West.
[85] Theognis 373–378; vgl. Burkert 2011, 375f.
[86] Thür /Taeuber IPArk 8, um 460 v. Chr. (?); vgl. Dreher im Druck A. 26.
[87] Dreher 2010, 323ff.
[88] Vgl. etwa Chaniotis 2004; ders. 2009.
[89] Vgl. Latte 1920, 5–47; vgl. auch den Vortrag von G. Thür beim Colloquium Atticum II, s. o. A. 1.
[90] Demosth. 24, 149–151
[91] Vgl. Burkert 2011, 379f.
[92] Andererseits war den Griechen bewußt, daß immer wieder Meineide geschworen wurden, sowohl in der menschlichen als auch in der (sie spiegelnden) Götterwelt, vgl. Burkert 2011, 381. In den Gerichtsverfahren der klassischen Zeit, in denen beide Parteien einen Eid leisten mußten, kam es sogar notwendigerweise jedesmal zu einem Meineid.

einer Hermesstatue und nennt Hermes seinen ξύμβουλος. Dieser Terminus bezeichnete in Athen die beratenden Beisitzer der Thesmotheten, die einen halboffiziellen Status besaßen.[93]

d) Götter als Vollstrecker

Bei öffentlichen und privaten Verfluchungen werden die Schuldigen der Strafe der Götter ausgeliefert.[94] Im Fall der öffentlichen Verfluchung handelt es sich um einen Rechtsakt, in den die Götter eingebunden werden, während private Verfluchungen, gerade in Form von Fluchtafeln, außerhalb der Rechtssphäre liegen.[95]

e) Götter als Partei

In ihrer Eigenschaft als Eigentümer von Land konnten die Götter in Auseinandersetzungen über das Eigentumsrecht geraten.

Ein Streit innerhalb einer athenischen Kultgemeinschaft (*orgeones*) wurde von einem Schiedsgericht dahingehend entschieden, daß das umstrittene Land Eigentum der Göttin sei und bleibe.[96]

In einer der athenischen Diadikasie-Urkunden tauchen die beiden, als Archegeten bezeichneten Heroen Meneleos (=Menelaios) und Herakles als Parteien auf, die von einem athenischen Gericht zur Leistung einer Liturgie verpflichtet werden, da sie offenbar Landeigentum im Demos Phegaia besaßen.[97] Falls ein gewöhnlicher Sterblicher die Gegenpartei bildete,[98] mag es erstaunen, daß dieser Mann es wagte, in einen Prozeß mit Überirdischen einzutreten, ohne direkte Aktionen dieser Heroen gegen sich zu fürchten, und daß auch die athenischen Richter nicht von vornherein den Heroen das Feld überließen. Aber gerade diese Haltung der Beteiligten sowie die zugrundeliegende Möglichkeit der Rechtsordnung, göttliche Wesen vor Gericht als gleichberechtigte Partei zu behandeln, zeigt, daß die Götter in ihrer Eigenschaft als Landeigentümer ihren übermächtigen, majestätischen Status (s. o. II a) verloren und als "normale," quasi-menschliche Rechtssubjekte behandelt wurden.

f) Götter als Schützer bzw. Patrone ihrer Priester

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93 Aristoph. nub. 1481.

94 Vgl. Latte 1920, 61ff.; Horster 2004, 44. Die Strafklausel in den berühmten Teiorum Dirae (Meiggs / Lewis 30 + SEG 31, 984 = Körner 1993, 78. 79) wird jetzt von Maria Youni 2012 (freundlicher Hinweis von A. Maffi) als profane Bestrafung "loin d'exprimer une imprécation vague d'ordre religieux" (35) gedeutet.

95 Vgl. Dreher im Druck.

96 IG II^2 1289; Papazarkadas 2011, 203, ist in seiner Interpretation nicht immer eindeutig.

97 IG II^2 1932, Z. 12–14. Als fällige Liturgie wird in den Kommentaren die Proeisphora vermutet.

98 Das vermutet Isager 1992b, 121 A. 22; die Angabe der jeweiligen Kontrahenten ist auf dem Stein allerdings nicht mehr erhalten (Z. 13 und 14 enden jeweils mit ἀντ[ὶ ...), so daß im allerdings sehr unwahrscheinlichen Fall auch eine weitere Gottheit genannt gewesen sein könnte.

Zu Beginn der homerischen Ilias greift der Gott selbst ein, nachdem Agamemnon den Apollon-Priester Chryses schroff abgewiesen und dessen Tochter nicht freigegeben hatte. Nicht nur Agamemnon persönlich, sondern das gesamte griechische Heer wird durch eine Pestepidemie für das Handeln des Heerführers bestraft.[99] Apoll wahrt hier die Rechte seines Dieners und Schützlings. Insbesondere Herodot erzählt einige weitere Fälle, in denen Vergehen an einem Priester oder einer Priesterin von der zuständigen Gottheit bestraft wurden.[100]

g) Götter als Amtsträger

In den Inschriften von Didyma ist der Gott Apollon mehrmals als Stephanephoros in den Magistratslisten aufgeführt. Der Herausgeber Rehm und spätere Kommentatoren stimmen darin überein, daß dies in Jahren wirtschaftlicher Schwierigkeiten geschah, in denen die Polis niemanden finden konnte, der bereit war, die mit hohen Ausgaben verbundenen Aufgaben des Amtes zu übernehmen. In diesem Fall musste der Gott eingesetzt werden, um das angesehenste Amt der Stadt auszufüllen, und seine bedeutendste Pflicht war es, mit seinen im Heiligtum vorhandenen Mitteln als *euergetes* der Polis zu fungieren, wie es später auch manche römische Kaiser taten.[101]

IV. Götter und Heroen

Nach Ampolo spielen die ansonsten durchaus bestehenden Unterschiede zwischen Göttern und Heroen auf sozio-ökonomischem Gebiet keine Rolle.[102] Gerade als Rechtssubjekte (s. o. II), also als Eigentümer von Immobilien und von Opfern bzw. Weihegaben können in der Tat alle Götter und Heroen gleichermaßen fungieren.[103] Unterschiede ergeben sich eher bei den anderen Funktionen, indem Heroen nicht als Stifter von Recht (I) und als Rechtsakteure (III) in Erscheinung treten.

V. Göttliche Rechte und menschliche Rechtsordnung

Zum Teil sind die Rechte der Götter, da diese nicht physisch präsent sind (s. o.

[99] Hom. Il. 1, 8ff.

[100] Vgl. etwa Migeotte 2006, 235ff.; Horster 2012, 11 A. 26.

[101] Die entsprechenden Stellen sind im Register bei Rehm, 1958, 354 unter θεὸς Apollon (Stephanephor) zusammengestellt bzw. der chronologischen Tabelle S. 380ff. zu entnehmen. In allen Fällen, sie reichen von 299/98 v. Chr. bis 15/4 v. Chr., übt der Gott das Amt zusammen mit bzw. unmittelbar nach einem menschlichen Amtsinhaber aus, dessen Name in den Inschriften mit μετὰ (und Akkusativ) angefügt ist. Zur anzunehmenden wirtschaftlichen Notlage vgl. Rehm S. 260. Für den Hinweis auf diese Funktion des Apollon Didymeus bedanke ich mich bei Herrn Kollegen Helmut Halfmann.

[102] Ampolo 2000, 15. Ähnlich Horster 2004, 22, über die Praxis der Verehrung.

[103] Dion Chrys. 31, 81 (zitiert von Harter-Uibopuu im vorliegenden Band) etwa hält ausdrücklich fest, daß Asebie gegen Heroen gleichwertig mit derjenigen gegen Götter sei.

Einleitung) von menschlichen Sachwaltern wahrgenommen worden. Beschlüsse über Kulte, über Priester, über Heiligtümer und ähnliches wurden im allgemeinen von den Institutionen der Poleis gefaßt, auch von Untereinheiten der Polis wie Phylen, Phratrien, Demen oder verschiedenen Kultorganisationen.[104] Auch Beschlüsse von Heiligtumsverwaltungen, Amphiktyonien, Priestern oder Sehern[105] konnten verbindliche Regelungen festlegen. Die Poleis delegierten manche Aufgaben an ihre Amtsträger, aber auch z.B. den Schutz des verpachteten heiligen Landes an dessen Pächter.[106] Alle diese Regelungen faßt die moderne Forschung unter dem Begriff der *leges sacrae* zusammen, die hier nicht näher behandelt werden können.[107]

Letztlich konnten die menschlichen "Vertreter," wie sie in der modernen Literatur meist genannt werden, relativ großzügig über das Eigentum der Gottheit verfügen, sofern die Voraussetzung eingehalten wurde, daß die Maßnahmen wiederum dem Heiligtum bzw. der Gottheit dienten. Z.B. erlaubte der Demos von Piräus die Nutzung von Steinen und Lehm aus dem Dionysos-Temenos, um das Theater des Gottes auszubauen.[108] Vom Umgang mit den Tempelschätzen war schon die Rede.

Aufgeklärten modernen Menschen mag es widersinnig erscheinen, daß die Götter, die man sich als unendlich mächtiger als die Menschen vorstellt, den Schutz menschlicher Gesetze benötigen sollten. Allerdings sind solche Schutzmaßnahmen gerade in historischen und auch in zeitgenössischen sogenannten Gottesstaaten noch bis ins Extreme gesteigert worden. Vielleicht dienen sie letztlich mehr dem Zusammenhalt der politisch-religiösen Gemeinschaft als dem Wohlergehen der Götter.

Da der griechischen Antike solche Phänomene, die wir gern mit religiösem Fanatismus in Verbindung bringen, weitgehend fremd waren, waren auch Vergehen gegen göttliche Rechte nicht sehr intensiv und nicht sehr konkret sanktioniert. Entsprechende Delikte wurden wohl nur unter den Tatbeständen *asebeia* und *hierosylia,* gegebenenfalls noch *hybris,* verfolgt, alles sehr wenig konkrete Tatbestände, vielleicht gerade, weil auch die Rechte der Götter selbst sehr unbestimmt waren.[109] Garland hat die konkreten Tatbestände knapp so festgehalten: "There were four categories of offences: misconduct in connection with certain religious festivals,

[104] Vgl. etwa Migeotte 1984, 363 (Kreditvergabe an fremde Staaten); Ampolo 1992, 26f.; dens. 2000, 15; Sourvinou-Inwood 2000; Davies 2002, 117ff.; Horster 2004, 165ff.; Papazarkadas 2011, 99ff.; Dreher im Druck.

[105] Zu den griechischen Priestern vgl. Dignas / Trampedach 2008, darin zur Problematik der Begriffe 'Priester' und 'Seher' den Beitrag von Henrichs; vgl. auch Horster / Klöckner 2012.

[106] Vgl. Horster 2004, 184.

[107] Vgl. zur Terminologie Dreher im Druck. Den neuen Ansatz einer "Collection of Greek Ritual Norms" (CGRN) schlagen Carbon / Pirenne-Delforge 2012 vor.

[108] Vgl. Horster 2004, 160.

[109] Vgl. Dreher 2006, 254; dens. im Druck S.10. 13 mit A. 36. Zur Unbestimmtheit der Götterrechte vgl. z.B. auch Todd 1993, 310; Pecorella Longo 2011, 47f. Vgl. zu Hierosylie und Asebie bei Dion Chrysostomos den Beitrag von Harter-Uibopuu in diesem Band.

theft of temple property, *asebeia* and atheism."[110]

Auch Priester konnten in Athen wegen Asebie verurteilt werden, wie der Hierophant Archias wegen rechtswidriger Opferung bei einem Kultfest.[111]

Das Verhältnis zwischen den Göttern als Rechtssubjekten und ihren menschlichen "Vertretern" läßt sich letztlich nicht leicht in Formeln fassen. Angesichts der vielfältigen Aufgaben und Entscheidungsmöglichkeiten der menschlichen Seite mag man nicht einfach von Eigentümern und deren "Verwaltern" ausgehen, die im sonstigen Leben an die Weisungen des Eigentümers gebunden waren. Könnten die Götter eher als eigentliche, als ideelle oder "virtuelle" Eigentümer bezeichnet werden, die betreffenden menschlichen Gemeinschaften als Mit- oder Untereigentümer?[112] Könnte ihre Rechtsstellung ähnlich aufgefaßt werden wie die von Frauen oder Kindern, die, als Erben, Eigentümer wurden, aber über dieses Eigentum nicht verfügen konnten? Am Ende müssen wir vielleicht doch am besten in der griechischen Terminologie verbleiben und die menschlichen Institutionen, die im Namen der Götter handelten, als eine Art *kyrios* verstehen, nur im Rechtssinn natürlich, nicht als soziale oder hierarchische Einordnung. Der Terminus selbst und verwandte Begriffe wie κυριεία oder κυριεύειν werden in den Quellen für das Verhältnis von menschlicher Verwaltung göttlichen Eigentums durchaus verwendet, wenngleich nicht ausschließlich,[113] und bekräftigen somit die inhaltliche Analogie.

Schluß

Es hat sich gezeigt, daß die Götter in mehrfacher Weise mit der menschlichen Rechtsordnung verbunden wurden.

Die Sicht der Griechen auf die Götter war sicher nicht einheitlich, ebensowenig wie in anderen Epochen auch. Grundsätzliche Kritiker oder Leugner der Götter, die es auch unter den Griechen gegeben hat, können auch die einzelnen Eigenschaften dieser Wesen nicht akzeptiert haben. Die meisten Menschen werden aber die Götter angesichts von deren vorstehend aufgeführten und weithin anerkannten Funktionen durchaus als Rechtssubjekte gesehen haben. Ein großer Respekt vor den Göttern und ihren Rechten war weit verbreitet. Auf der einen Seite steht also eine "echter," direkter, unmitelbarer Glaube an die Götter und an ihre Rechte, gerade im privaten,

[110] Garland 1990, 86.

[111] [Dem.] 59, 116.

[112] Immerhin heißt es in dem Vertrag über das Apollonheiligtum in Aktion (o. A. 81), Z. 36–38: ὅσα δὲ κέκτηνται οἱ Ἀνακτοριεῖς ἱερὰ χρήματα τοῦ Ἀπόλλω[νος τοῦ Ἀκτίου] ἢ ἀναθέματα π[ρὸ] τοῦ τὰν ὁμολογίαν γραφῆμεν, ὑπάρχειν αὐτοῖς ἴδια, τὰ δὲ | [ἐν τῶι μετὰ ταῦτα χρόνωι] ἀνατεθέντα τῶν Ἀκαρνάνων εἶμεν. Die diesbezügliche Interpretation von Czech-Schneider 2002, 86ff., bleibt in sich widersprüchlich. Vgl. zur Konstruktion einer Art von Miteigentum meine Bemerkungen zu Migeotte in Dreher 2006, 251f. Der Gedanke ist von Rousset 2013, 129, zustimmend aufgegriffen worden.

[113] Die Terminologie ist untersucht von Migeotte 2006, 238–243. Neben den genannten hat er die Termini προστασία, ἐξουσία und ἐπιμέλεια für das besagte Verhältnis ausgemacht und hält sie für weitgehend äquivalent.

inoffiziellen Bereich.

Diese Haltung findet Unterstützung auch im offiziellen oder öffentlichen Bereich. Der Straftatbestand der Asebie (und Hierosylie) zeigt das. Auch die Hikesie wird weithin als "Grundrecht" angesehen, das auch staatlicherseits anerkannt wird,[114] wenngleich es nicht gesetzlich sanktioniert war. Inwiefern es sich dabei um politische Instrumentalisierungen der Götter handelt, ist ganz schwer zu sagen und kann nur für den Einzelfall diskutiert werden.

Allerdings sind dann gerade im politischen Bereich, nämlich bei der Verwaltung des göttlichen Eigentums durch Gremien und Institutionen, Beispiele für eine, sagen wir, recht pragmatische Haltung zu beobachten. Sicherlich war die ideologische Konstruktion so, daß die Gottheit die Polis-Gemeinschaft schützte und man ihr unterstellte, daß sie letztlich auch ihr Eigentum dafür einzusetzen bereit war. Aber es hat doch den Anschein, als ob in Einzelfällen der Zugriff auf das göttliche Eigentum recht bedenkenlos und unverblümt erfolgte, gerade wenn wirkliche oder vermeintliche militärische Notwendigkeiten ins Feld geführt wurden.[115] Das zeigen etwa die Unterschiede zwischen Lokroi Epizephyrioi und Delos (s. o.): Vom delischen Apollon-Tempel wurden für die Kredite an die Polis Sicherheiten genommen und Zinsen erhoben. Beides ist in den Dokumenten aus Lokroi nicht erwähnt, auf denen die Rückzahlung von Krediten an das Olympieion durch die Polis festgehalten ist.[116] Wenn aber tatsächlich Normen verletzt wurden, in unserem Zusammenhang das Eigentum einer Gottheit mißbraucht wurde, wie es vereinzelt tatsächlich geschah (besonders eklatant waren natürlich Tempelplünderungen),[117] dann bedeutet das nicht, daß diese Normen, zumindest im allgemeinen Bewußtsein, abgelehnt worden wären. Vielmehr bestätigt gerade die Kritik an der Normverletzung die prinzipielle Geltung der Norm.[118] Eine offizielle Inanspruchnahme göttlichen Eigentums durch die Poleis dürfte jedenfalls durch die Vorstellung gerechtfertigt worden sein (ausdrücklich ist sie nicht überliefert), daß die Polis in eine Notlage geraten sei, in welcher sich die Schutzgottheit der Stadt gegenüber ihren Schutzbefohlenen gern

[114] Vgl. etwa die gegenseitigen Forderungen von Athen und Sparta vor dem Beginn des Peloponnesischen Krieges, Thuk. 1, 126ff.

[115] So urteilt Davies 2002, 126: "In the fourth century as in the fifth, a city could not run a serious navy without taking a coldly instrumental attitude towards the assets of its gods," obwohl er auch die Einschränkungen bei der Verwendung der Tempelschätze (nur für kultische oder militärische Zwecke) anerkennt.

[116] Vgl. Costabile 1992, 168f. mit Diskussion einer möglichen Ausnahme.

[117] Zu Mißbräuchen s. Migeotte 2006, 236, der sie allerdings auch als Ausnahmen einstuft und im folgenden den überwiegend korrekten und respektvollen Umgang der Griechen mit dem göttlichen Eigentum hervorhebt. Das wird bekräftigt von Dreher 2006. Mit derselben Tendenz Papazarkadas 2011, 90.

[118] Wenn Dion Chrys. 31, 54–56 die Ephesier dafür lobt, das im Artemis-Tempel deponierte Geld, sofern es offiziell registriert ist, nicht anzurühren, entsteht leicht der Eindruck, es könne sich um eine Ausnahme handeln. Und dabei handelt es sich bei diesem Geld nur um eine Art von Bank-Depositen von Privatleuten und Gemeinwesen, noch nicht einmal um der Gottheit geweihtes, 'heiliges' Geld.

großzügig erweisen und als Wohltäterin fungieren wolle, wenn man nicht sogar eine diesbezügliche Pflicht der Gottheit annahm.[119]

Das Gesamtbild der Rechte der Götter stellt sich also, wie einleitend angekündigt, sehr differenziert dar.[120] Wir dürfen jedenfalls unsere, rationale Sicht der Dinge nicht auf die Griechen übertragen. Anläßlich der Anleihen der Athener bei ihren Tempelschätzen schreibt David Lewis: "Although the Athenians drew their distinction between *demosia* and *hiera*, even going to the lengths of charging themselves interest when they borrowed from Athena, I do not think that we can rationally support their attitude. It was they themselves, after all, who decided that Athena was going to make a loan." [121] Lewis hat zwar erkannt, daß die moderne Sichtweise anders ist, aber er scheint damit, als der "richtigen," auch die antike Sicht korrigieren zu wollen.

Zum Abschluß möge noch ein vergleichender Blick auf die christliche Welt gestattet sein. Im Christentum ist Gott nicht als Eigentümer, Rechtssubjekt usw. gedacht, da man ihn sich viel erhabener, der menschlichen Welt entrückt und überlegen vorstellt. Am ehesten spricht man von der Menschheit insgesamt als "Eigentum" Gottes, aber auch nur im übertragenen Sinn, ohne konkret rechtliche Bedeutung; immerhin werden Metaphern dieser Art verwendet, wie: "ich bin dein," "wir sind Kinder Gottes." Dafür bilden aber die Heiligen, die als in die Nähe Gottes gerückte Menschen eher mit den antiken Heroen zu vergleichen sind, eine Kategorie, die stärker als Rechtsträger gesehen wird.[122] Besonders Kirchen, Kapellen, Altäre werden, ähnlich wie die Immobilien der griechischen Gottheiten, als Eigentum dieser Heiligen betrachtet, die bei einer Verletzung ihrer Rechte ähnlich strafend reagieren können wie die antiken Götter.

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[119] So D'Hautcourt 1999, 260.

[120] Dafür plädiert auch D'Hautcourt 1999, besonders 252, wenngleich seine Überlegungen unsystematisch bleiben.

[121] Lewis 1990, 259.

[122] Den Hinweis auf die christlichen Heiligen verdanke ich Gereon Becht-Jördens.

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PHILIPP SCHEIBELREITER (WIEN)

GELDVERWAHRUNG BEI ARTEMIS, SKLAVENVERKAUF AN APOLLO. ÜBERLEGUNGEN ZUR FUNKTION DER EINBINDUNG VON GÖTTERN IN DEN PRIVATRECHTLICHEN VERKEHR: ANTWORT AUF MARTIN DREHER*

Angesichts der umfassenden Darstellung Martin Drehers ist es in der Antwortschrift nur möglich, auf ausgewählte Fragen näher einzugehen, welche die Götter als Rechtsstifter und als Rechtssubjekte betreffen.

I. Dreher ist grundsätzlich zuzustimmen, dass die Vorstellung von „göttlicher Rechtsstiftung" im antiken Griechenland ein selten belegtes Phänomen darstellt. Die spartanische Rhetra etwa kann auf ein Apollo-Orakel zurückgeführt werden, wogegen die *nomoi* der archaischen Nomotheten nicht auf göttlicher Weisung, sondern auf deren „menschlicher Weisheit" beruhen.[1] Dieser Befund kann auch durch zwei weitere Belege nicht erschüttert werden, welche hier dennoch ergänzend angeführt werden sollen. So ist die Bezugnahme auf göttliche Rechtsstiftung zum einen auch für Kreta tradiert,[2] wie aus dem Beginn der platonischen *Nomoi* hervorgeht (Plat. *Leg*. 624a):[3]

> ΑΘ. Θεὸς ἤ τις ἀνθρώπων ὑμῖν, ὦ ξένοι, εἴληφε τὴν αἰτίαν τῆς τῶν νόμων διαθέσεως;
>
> Κλ. Θεὸς, ὦ ξένε, θεὸς, ὥς γε τὸ δικαιότατον εἰπεῖν· παρὰ μὲν ἡμῖν Ζεύς, παρὰ δὲ Λακεδαιμονίοις, ὅθεν ὅδε ἐστίν, οἶμαι φάναι τούτους Ἀπόλλωνα. ἦ γάρ;
>
> *Der Athener: Ist es ein Gott oder irgendein Mensch, ihr Gastfreunde, der bei euch als Urheber eurer Gesetzgebung gilt?*

* Für Hilfestellungen bei der Manuskriptgestaltung bin ich Frau PD Dr. Kaja Harter-Uibopuu von der Kommission für Antike Rechtsgeschichte, Österreichische Akademie der Wissenschaften / Wien zu besonderem Dank verpflichtet.

1 Dreher in diesem Band bei Anmerkung 11.

2 Gagarin (1986) 60; vgl dort auch: „The claim of divine or semi-divine origin is not widespread."

3 Übersetzung nach Schöpsdau (1990) Plat. *leg*. 624a ad locum.

> *Kleinias: Ein Gott, Fremder, ein Gott, wie man mit vollem Recht sagen muss; bei uns Zeus, bei den Lakedaimoniern aber, von wo unser Freund da herkommt, geben sie, glaube ich, den Apollon an. Nicht wahr?*

Lykurg habe von Apollo die Gesetze empfangen, Minos von Zeus.[4] Als gemeinsamer Nenner für die „Gesetze" beider Poleis wird deren göttlicher Ursprung formuliert.

Zum anderen findet sich auch bei den archaischen Nomotheten ein Beispiel für göttlich inspirierte Gesetzgebung: Nach einer Tradition, welche der aristotelischen „Politeia" von Lokroi Epizephyrioi zugeschrieben wird,[5] seien Zaleukos seine Gesetze von der Göttin Athene im Traum diktiert worden (Aristot. fr. 548 Rose):[6]

> ἐπειδὴ γὰρ ἐχρῶντο τῷ θεῷ πῶς ἂν πολλῆς ταραχῆς ἀπαλλαγεῖεν, ἐξέπεσεν αὐτοῖς χρησμός, ἑαυτοῖς νόμους τίθεσθαι, ὅτε καί τις ποιμήν, ὄνομα δ' ἦν Ζάλευκος, πολλοὺς νόμους δυνηθείη τοῖς πολίταις εἰσενεγκεῖν δοκίμους. Γνωσθεὶς δὲ καὶ ἐρωτηθεὶς πόθεν εὕροι, ἔφησεν ἐνύπνιον αὐτῷ τὴν Ἀθηνᾶν παρίστασθαι. διὸ αὐτός τε ἠλευθέρωται καί νομοθέτης κατέστη.
>
> *Denn als sie das Orakel befragten, wie sie denn die große Verwirrung abwenden könnten, da fiel der Orakelspruch so aus, dass sie sich selbst Gesetze geben sollten. Als irgendein Hirte, der Zaleukos hieß, es vermochte, viele gute Gesetze für die Bürger vorzuschlagen, und er bekannt wurde und gefragt, woher er denn diese Gesetze hätte, sagte er, dass sich ihm Athena im Traum zur Seite gestellt habe. Deshalb wurde er selbst freigelassen[7] und als Gesetzgeber eingesetzt.*

Einige Details des Fragments werden von Aristoteles als historisch angesehen und von der modernen Forschung auch so aufgefasst: Dies betrifft zum Beispiel die Mitteilung, dass Zaleukos seine Tätigkeit zur Zeit einer Stasis (ταραχή) aufnahm[8] oder dass er viele Gesetze (πολλοὶ νόμοι) verfasst[9] und schriftlich fixiert (τίθεσθαι)[10] habe. Bei der Anekdote der „Berufung" des Zaleukos handle es sich hingegen um einen Topos,[11] wie er im vierten Jh. n. Chr. bei Ephoros, Platon und Aristoteles entwickelt worden sei.[12] Plutarch wiederum schreibe diese Legenden dem Einfallsreichtum des jeweiligen Nomotheten zu, welcher versucht habe, durch die Einbindung eines Gottes in den Prozess der Normensetzung eine besondere

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4 Vgl. dazu auch Plat. *Leg*. 632d.

5 Vgl. dazu Hölkeskamp (1999) 48 mit A. 41; vgl weiters Szegedy-Maszak (1978) 205; Gagarin (1986) 58–62.

6 Schol. In Pind. *Ol*. 10,17 und Clem. Alex. *Strom*. 1,70,3.

7 Zaleukos wird hier als Sklave dargestellt, worin Gagarin (1986) 59 das Prinzip vom Nomotheten als „political outsider" verwirklicht sieht.

8 Gagarin (1986) 58–59; Dreher (2012) 66.

9 Dreher (2012) 66.

10 Gagarin (1986) 58 A. 23.

11 Mühl (1929) 54–55; Hölkeskamp (1999) 47–48; Hose (2002) 205; Scheibelreiter (2013a) 989–992.

12 Vgl. dazu auch Hölkeskamp (1999) 44–45.

Legitimation zu verleihen.[13] Demgegenüber hat es bereits Mühl als nicht notwendig erachtet, Berichte wie jenen über die Berufung des Zaleukos auf diese Weise als Erfindung von Autoren des vierten Jh. abzuurteilen, da sich darin die Vorstellung vom göttlich inspirierten *nomos* widerspiegle.[14] In diesen Zusammenhang passt – unter der Prämisse, dass dies nicht nur auf das gesatzte Recht allein zu beziehen ist – auch der Ausspruch Heraklits, dass die *nomoi* der Menschen von einem göttlichen *nomos* „genährt" warden.[15]

II. Als Rechtssubjekte begegnen die griechischen Götter einmal im Mythos, wo sie – wie Dreher betont – wie Menschen agieren.[16] Diese anthropomorphe Sichtweise, wie sie in den homerischen und hesiodischen Epen transportiert und von Xenophanes kritisiert wird,[17] stellt jedoch eine wichtige Schablone für das „Recht der Menschen" dar: Als mythisches *exemplum* für ein *moicheuein* dient etwa der Ehebruch von Aphrodite mit Ares, wie er in der Odyssee im Demodokos-Gesang geschildert wird.[18] Für den Rechtshistoriker von vordringlichem Interesse ist in dieser Szene darüber hinaus die daran anschließende Beschreibung der *engyesis* (Garantenstellung/Bürgschaft), welche Poseidon für Ares dem Hephaistos gegenüber übernimmt: Durch den Dialog zwischen dem gehörnten Ehemann und dem Meeresgott werden jene rechtlichen Strukturen erkennbar, die das (menschliche) Haftungsrecht dieser Zeit ausgemacht haben.[19]

Von diesem Rechtsverkehr der Götter untereinander ist jener in die Welt der Menschen reichende zu unterscheiden. Hier treten die Götter als Rechtssubjekte mit den Menschen in Verbindung. Dreher hat das umfangreiche Material dazu geordnet und Kategorien geschaffen, wonach Götter als Rechtssubjekte (Eigentümer von Immobilien oder Sklaven, Vertragspartner)[20] oder als Rechtsakteure (Richter, Zeugen, Rechtsbeistand, Vollstrecker oder Prozessparteien)[21] auftreten. Der Fokus soll in der Folge auf zwei Probleme gelenkt werden, welche dem Bereich des „Vertragsrechts" zuzuordnen sind:[22] Einerseits soll das Phänomen menschlicher „Stellvertretung" in Zusammenhang mit Tempelverwahrung durch Götter kurz vertieft werden

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13 Plutarch, *Numa* 4,6–8; vgl. dazu auch Polyb. 10.2.8; Cic. *de nat. deor*. 3,91; DH 2,61; Ephoros FGrHist 70 F 48 (= Strabo 10.4.19).

14 Mühl (1929) 55; Mühl (1933) 85–88.

15 Heraklit 22 B 114 DK.

16 Dreher in diesem Band A.14–15.

17 Xenophanes fr. 21 B 11.

18 Hom. *Od*. 266–366.

19 Vgl. dazu Partsch (1909) 9–23; ausführlich widmen sich der Interpretation dieser Szene die Beiträge von Cantarella (1964) und (1987).

20 Dreher in diesem Band A. 12–81.

21 Dreher in diesem Band A. 82–101.

22 Kurz soll ein Problem des dem von Dreher gewählten Schlagwort „Götter als Kreditgeber" subsumierbaren Tempelbankwesens angesprochen werden. Danach ist näher auf die Rolle der Götter bei der Sklavenfreilassung einzugehen.

(III.). Andererseits ist der Frage nachzugehen, welche Rolle dem Gott als „Käufer" eines Sklaven in Zusammenhang mit der Freilassung zugekommen sein könnte (IV.).

III. Aufgrund der Beschriftung einzelner *horoi* ist es unzweifelhaft, dass die betreffenden Liegenschaften als – soweit dieser Begriff für das griechische Recht zulässig ist – im Eigentum eines Gottes stehend erachtet wurden.[23] Gleiches trifft auf Gelder zu, welche in einem Tempel „offen" deponiert oder vom Tempel dargeliehen wurden.[24] So ist etwa in Lokroi zu lesen, dass die Stadt ein Darlehen bei Zeus aufnahm (ἀ πόλις ἐχρήσατο πὰρ τῶ Διὸς).[25] In Sardes wiederum wird das dem Tempel geschuldete Geld als „Gold der Artemis" (τὸ χρυσίον τῆς παρακαταθήκης τὸ τῆς Ἀρτέμιδος)[26] bezeichnet.[27] In diesen und vergleichbaren Rechtsgeschäften wurden die Götter von Tempelbeamten „vertreten": Da dem altgriechischen und hellenistischen (im Unterschied zum klassisch römischen) Recht die direkte Stellvertretung nicht fremd war,[28] könnte man dies so auslegen, dass zB. die Artemis von Ephesos Geschäftsherrin war, während der Tempeldiener (der Megabyzos)[29] als ihr direkter Stellvertreter fungierte. Nach diesem Muster lässt sich etwa folgender Bericht des Xenophon interpretieren (Xen. *Anab*. 5,3,6):

> Τὸ δὲ τῆς Ἀρτέμιδος τῆς Ἐφεσίας, ὅτ' ἀπῄει σὺν Ἀγησιλάῳ ἐκ τῆς Ἀσίας τὴν εἰς Νοιωτοὺς ὁδόν, καταλείπει παρὰ Μεγαβύζῳ τῷ τῆς Ἀρτέμιδος νεωκόρῳ, ὅτι αὐτὸς κινδυνεύσων ἐδόκει ἰέναι, καὶ ἐπέστειλεν, ἢν μὲν αὐτὸς σωθῇ, αὐτῷ ἀποδοῦναι· ἢν δέ τι παθῃ, ἀναθεῖναι ποιησάμενον τῇ Ἀρτέμιδι ὅ τι οἴοιτο χαριεῖσθαι τῇ θεῷ.
>
> *Das Geld bei der ephesischen Artemis ließ er bei dem Megabyzos, dem Tempeldiener der Artemis, zurück, als er sich mit Agesilaos auf den Weg fort aus Asien nach Böotien aufmachte, weil er selbst meinte, sich nun auf der Reise in Gefahr zu begeben, und trug ihm auf, ihm das Geld zurückzugeben, wenn er selbst gerettet würde. Wenn ihm aber etwas widerführe, solle er es der Artemis weihen und damit machen, wovon er glaube, dass er damit die Göttin erfreue.*

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[23] So Dreher in diesem Band bei A 22–23.

[24] Dass das Eigentum an den Valuten ursprünglich beim Darlehensnehmer verblieben ist, entspricht dem Surrogationsprinzip; vgl. dazu Kränzlein (1964) 89; Herrmann (1975) 326; Simon (1965) 48; Rupprecht (1967) 57; Schuster (2005) 43–44. 89–93; vgl. dazu auch die Beiträge von M.J. Sundahl und G. Thür in diesem Band.

[25] Tafel 22,10; vgl. auch 28,7 (beide zitiert nach Costabile, 1992).

[26] ISardes 7,1,1 col. I 3; vgl. zur sachenrechtlichen Konstruktion dieses Rechtsgeschäfts Scheibelreiter (2013) 52.

[27] Auch für Ephesos kann – entgegen der Mitteilung von Dio Chrys. 31,54, dass die deponierten Gelder von der Göttin nicht angetastet würden – ein Gebrauchsrecht des Tempels nicht ausgeschlossen werden; zur Diskussion vgl. Burkert (1999) 65–65; dagegen Walser (2008) 177–178.

[28] Vgl. dazu etwa schon die Ergebnisse von Röhrmann (1968).

[29] Vgl. zum Megabyzos die Ausführungen von Burkert (1999) 62–63.

Xenophon vereinbart, dass der Megabyzos das bei Artemis hinterlegte Geld für die Göttin verwenden solle, wenn ihm (= Xenophon) auf seiner Expedition nach Böotien etwas widerführe: Dann nämlich solle das Geld der Göttin verfallen und der Priester darüber in ihrem Sinne verfügen. Das Geld war zwar bei Artemis hinterlegt worden, Ansprechpartner des Xenophon ist aber der Megabyzos.

Wenn diese einfache Konstruktion nach griechischem (wie auch nach heutigem) Rechtsverständnis unproblematisch anmutet, so lassen manche Quellen erkennen, dass eine juristisch präzise Trennung zwischen dem Gott und dem Tempel bzw. Tempelbeamten nicht immer möglich ist. Wie unscharf hier die Grenzen verliefen, belegt etwa ein weiterer Sachverhalt über die Tempelverwahrung bei der Artemis von Ephesos: In den *Bacchides* des Plautus (und wohl auch in ihrem Vorbild, dem *Dis exapaton* des Menander)[30] wird sowohl der Reichtum des Artemistempels von Ephesos als auch der Reichtum des Artemispriesters, welcher das Geld zur Verwahrung übernahm, als Argument dafür angeführt, dass die in Ephesos deponierten Gelder besonders sicher verwahrt seien.[31] Wenn man den Priester nur als Stellvertreter der Göttin ansieht, so wäre sein persönlicher Reichtum ohne Belang.[32]

Dass oft nicht nur schwer zu entscheiden ist, wer als Partei eines solchen Geschäftes mit dem Gott/dem Tempel/dem Tempelbeamten angesehen werden kann, sondern zuweilen auch die Parteien schwer voneinander geschieden werden können, belegen einige Texte aus dem Tempelarchiv des Zeus von Lokroi Epizephyrioi:[33] Dort heißt es, dass der Tempel das von ihm dargeliehen Geld zurückerhalten solle, „wann immer es Rat und Volksversammlung beschließen" – ἀποδόμεν | δὲ ὁπανίκα κα τᾶι βωλᾶι καὶ τῶι δάμωι δοκεῖ.[34] Diese Klausel stellt also auf die jederzeitige Rückforderung des Darlehens durch den Darlehensgeber – den von der Polis Lokroi verwalteten Tempel – ab. Diese Rückgabeklausel wird aber auch dann vereinbart, wenn die Polis selbst beim Tempel Kredit aufnimmt. So liest man in Tafel 22,10–13:[35]

> ἐπὶ τούτων ἀ πόλις ἐχρήσατο πὰρ τῶ Διὸς | ἐκ τῶ θ̣ησαυρῶ δόγματι βωλᾶς καὶ δάμωι | ἀποδόμεν δὲ ὅπω κα δοκεῖ καὶ ὁπόκα κα δοκεῖ.
>
> *Unter (der Amtszeit von) diesen nahm die Stadt von Zeus das Geld auf aus dem Tempelschatz durch Entscheidung von Rat und Volk(sversammlung), unter der Bedingung, das Geld zurückzugeben wie und wann immer sie es beschließen.*

Nach moderner Dogmatik läge damit auch ein „In-Sich-Geschäft" vor, da die Polis den Tempel einerseits mit verwaltet und über die Vergabe der Darlehen beschlossen hat, andererseits selbst die Darlehen beim Tempel aufnahm. All diese Beobachtun-

[30] Men. *Dis ex*. Fr. 5 (112 K-T, 126 K); vgl. dazu auch Men. *Dis ex*. 55–57.
[31] Plaut. *Bacch*. 306–314; 337–341.
[32] Scheibelreiter (2012) 218–220.
[33] Die Tafeln 8,22 und 38, zitiert nach Costabile (1992).
[34] Text zitiert nach Costabile (1992) Tab. 8,7–8.
[35] Weitere Beispiele finden sich in Tafel 8,8–9 und 38,12–13 (zitiert nach Costabile, 1992).

gen bestätigen die These von Dreher, dass die „Vertreter" eines Gottes relativ frei über das göttliche Vermögen verfügen konnten, sofern dies dem Tempel / der Gottheit zugutekam:[36] Die Götter bedurften menschlicher Prokuratoren, um als Vertragspartner überhaupt agieren zu können. Daher kann umgekehrt dort keine Tempelverwahrung im Sinne eines Rechtsgeschäftes zwischen dem Hinterleger und dem Verwahrer (Gott/Priester) angenommen werden, wo der Gott mit dem Deponenten nicht durch einen Stellvertreter in Kontakt tritt. So ist etwa die Vorgehensweise des Euclio in der *Aulularia*, der sein Gold der Göttin Fides anvertrauen möchte, nicht als Depot bei der Göttin zu qualifizieren, sondern als der Versuch, das Geld im Tempel zu verstecken,[37] da in der ganzen Szene nichts von einem Tempelbeamten zu lesen ist.[38]

IV. Sklavenfreilassung

Auch in Zusammenhang mit der Freilassung von Sklaven konnten Gottheiten als „Vertragspartner" auftreten. Wie Youni unterstreicht, ist der größte Teil der Inschriften, welche die Freilassung von Sklaven dokumentieren, in religiösen Kontext gebettet,[39] und zwar „in the sense that a temple of a divinity was involved in some way."[40] Die vorwiegend in den delphischen Freilassungsinschriften (3. Jh. v. Chr.–2. Jh. n. Chr.) belegte Praxis ist die eines Sklavenverkaufs an Apollo („Verkaufsfreilassung").[41] Dreher hält mE zu Recht fest, dass – nimmt man den Kauf als formgültig geschlossen an – der Gott dadurch vorübergehend Eigentümer des Sklaven wurde.[42]

Als eine zweite Möglichkeit, den Gott zum Eigentümer des Sklaven zu machen, um mit seiner Hilfe die Freilassung des Sklaven zu bewerkstelligen, weisen die

[36] Dreher in diesem Band bei A. 78–80.

[37] Plaut. *Aul*. 580–586. 608–611.614–618. 668–669. 676.

[38] Vgl. dazu Andreau (1968) 500 A. 3.

[39] Dies trifft nur in beschränktem Maße auf die im Corpus der Inschriften von Kalymnos überlieferten Freilassungen zu. Die Teilnahme des Gottes erfolgt etwa in TC 158 Z 5 durch Anrufung der Götter Helios und Gaia (als Zeugen?), vgl. Babakos (1973) 10. Dies ist mit Latte (1920) 111 nicht als Freilassung durch den Gott zu verstehen. Weitere religiöse Aspekte betreffen die Freilassung von Sklaven zu heiligen Festen oder die Publikation im Apollotempel, vgl. dazu Babakos (1973) 11 A.3.

[40] Youni (2010) 316. Die Einbindung eines Dritten in die Freilassung ist auch für das römische Recht gut belegt. Dort konnte die Freilassung durch einen Dritten erfolgen, indem der Eigentümer den Sklaven mit der Nebenabrede verkaufte, dass der Käufer den Sklaven freilasse – *ut manumittatur*, oder der Sklave sich mithilfe eines Dritten aus den Mitteln seines *peculium* freikaufte (*redemptio suis nummis*), vgl. dazu die neuere Untersuchung von Heinemeyer (2013).

[41] Vgl. dazu Albrecht (1978) 137–148.

[42] Dreher in diesem Band bei A. 71; ebenso Latte (1920) 109; Youni (2010) 316.

Quellen die Weihung des Sklaven an eine Gottheit aus („Weihefreilassung"):[43] So ist es etwa in Inschriften aus Epirus, Böotien und Makedonien belegt.[44]

Latte hat den wesentlichen Unterschied beider Rechtsgeschäfte in ihrer jeweiligen Rechtswirkung gesehen: Während der Verkauf an den Gott als neuen Herren den Sklaven vor allem vor dem Zugriff des ehemaligen Eigentümers schützen sollte, bot die Weihung des Sklaven vorwiegend Schutz vor dem Zugriff eines Dritten.[45]

Der Kauf / Verkauf des Sklaven bzw. seine Weihung an die Gottheit ist in jedem Fall nur ein der Freilassung vorhausgehender Akt und von dieser zu unterscheiden. Dies wirft für die religiösen Freilassungen die Frage auf, wann bzw. ob der Gott die Freilassung nach dem Erwerb des Eigentums an dem Sklaven vollzog oder ob diese *uno actu* bereits mit der Übergabe des Sklaven an den Erwerber als vollzogen angesehen werden konnte.[46] Zu dieser Form[47] des Sklavenverkaufs vermerkt Youni:[48] „From the legal point of view, divine ownership meant simply, that the slave did not belong to anyone and was in fact free." Damit betrachtet Youni das Problem von der Rechtswirkung her: Der Verkauf des Sklaven führt in letzter Konsequenz zu dessen Freiheit, während der Verkauf bloß fingiert wurde, da die Freilassung in dieses Rechtsgeschäft eingebettet werden musste.[49]

Dies ist nicht unproblematisch: Worin bestand die Fiktion? Wenn ein Kaufvertrag nur angenommen wurde, ohne vorzuliegen, so konnte dieser wohl auch keine Rechtswirkungen entfalten, etwa den Übergang des Eigentums am Sklaven, was von der Zahlung des Kaufpreises abhing, an den Gott. Die bloße Quittierung des Kauf-

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43 Albrecht (1978) 123–137.

44 Vgl. dazu die Literatur bei Youni (2010) 316.

45 Latte (1920) 109–110.

46 Hierin läge ein wesentlicher Unterschied zum römischen Recht, wo die *manumissio* prinzipiell einer bestimmten Form bedurfte und nach dem Kauf zu vollziehen war: Nach *ius civile* durch *vindicta* vor dem *praetor*, durch Eintragung in die *census*-Liste oder durch Testament, nach prätorischem Recht mittels Freilassung *inter amicos* oder *per epistulam*. Das Unterbleiben der Freilassung nach einem Verkauf des Sklaven konnte mit dem Verlust der Patronatsrechte einhergehen oder sogar dingliche Wirkung entfalten; zu dieser dinglichen Wirkung in Zusammenhang mit dem Verstoß gegen die Nebenabrede (*lex*) beim Sklavenkauf vgl. etwa D. 18.1.56 (Paul. 55 ad ed.). Ein Sklave, der unter der Bedingung der Freilassung verkauft wurde, konnte nach einem Gesetz des Kaiser Marc Aurel sogar *ipso iure* frei werden, wenn der Käufer der Verpflichtung zur *manumissio* nicht nachgekommen war. Darüber hinaus verlor der Käufer die Patronatsrechte zwar nicht, konnte dem Sklaven aber nicht wirksam *operae* auferlegen, vgl. D. 38.1.13pr (Ulp. 38 ad ed.) *Si quid hac lege emptus sit, ut manumittatur, et ex constitutione divi Marci pervenerit ad libertatem, operae ei impositae nullum effectum habebunt*. (Wenn jemand unter dieser Abrede gekauft worden ist, dass er freigelassen werden solle, und nur durch das Gesetz des Mark Aurel zur Freiheit gelangt ist, dann werden ihm auferlegte Werke keine Wirkung zeitigen.)

47 Davon sind all jene Fälle eines „echten Sklavenverkaufs" an den Tempel zu unterscheiden, vgl. Youni (2010) 327 A. 75.

48 Youni (2010) 326–327.

49 Literatur zusammengestellt bei Albrecht (1978) 146 A. 229.

preises, der realiter nicht gezahlt worden war, reichte dazu nicht aus.[50] Die Fiktion kann also nicht den Kauf selbst betreffen, sondern etwa darin liegen, dass das Geld nicht vom Käufer (Gott), sondern von dem Sklaven selbst stammte.[51] Es bleibt zu fragen, wie die Freilassung juristisch konstruiert war: Latte überlegt, „ob es sich dabei von vornherein um volle Befreiung oder nur um einen Tausch handelt, der dem Sklaven an Stelle des harten Jochs eines menschlichen Herrn das mildere des Gottes brachte."[52] Der Sklave würde dann insofern frei, als sein neuer, göttlicher Herr dauerhaft auf die Ausübung des Eigentumsrechtes verzichtet.[53] Partsch[54] und Pringsheim[55] haben vermutet, dass der Gott nur Treuhandeigentum an dem Sklaven erlange.

Dem hat Albrecht unter Verweis darauf widersprochen,[56] dass der Sklave damit nur faktisch, nicht aber juristisch frei wurde und es eben eines weiteren Aktes der Freilassung bedurft hätte, welcher durch den Gott (vertreten durch seine Priester) hätte durchgeführt werden müssen.[57] Albrecht nahm einen Kaufvertrag zwischen dem Sklaveneigentümer und dem Gott an; da das Geld jedoch aus dem Vermögen des Sklaven stammte, wurde dieser kraft Surrogationsprinzips Eigentümer des Kaufobjektes und somit seiner selbst. Darüber hinaus verzichtet der Käufer auf jegliches Eigentumsrecht, da der Kauf stets unter der Bedingung: ἐφ' ᾧτε ἐλευθέρον εἶμεν erfolgte.[58] Eine weniger dogmatische Sichtweise vertritt schließlich Kränzlein, demzufolge die wesentliche Rechtsfolge des Verkaufs an die Gottheit nicht der Eigentumserwerb des Gottes, sondern der Eigentumsverlust des Verkäufers gewesen sein musste.[59]

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[50] Vgl. dazu die Ausführungen von Albrecht (1978) 155–157. Auch beim so genannten „fiktiven Darlehen" wurde ja nicht die Zahlung des Kaufpreises fingiert, sondern die Auszahlung eines Darlehens; vgl. dazu grundlegend Pringsheim (1950) 245–270; vgl. weiters Rupprecht (1967) 131–147; Thür (2010); Pfeifer (2013) 97–107; Scheibelreiter (2014).

[51] Vgl. etwa auch Youni (2010) 316: „the most religious manumittors were aware of the fact that the god actually did not pay the money."

[52] Latte (1920) 102.

[53] So etwa Beauchet II (1897) 278–282.

[54] Partsch (1909) 361–364.

[55] Pringsheim (1950) 108; 185–187.

[56] Zum Argument, dass „Götter keine Sklaven gehabt hätten," vgl. Albrecht (1978) 145.

[57] Albrecht (1978) 142. Als weiteres Argument dagegen wird von Albrecht (1978) 142–143 ins Treffen geführt, dass der Sklave bei einem bloßen Eigentümerwechsel auch seine *paramone*-Pflicht nicht vorzeitig durch eine *apolysis* hätte ablösen können, da er dazu wieder der vermittelnden Rolle eines Dritten bedurft hätte.

[58] Albrecht (1978) 147 fasst seine These zusammen: „Von daher ergibt sich also, dass es sich bei der *prasis ep' eleutheria* um einen echten Kaufvertrag handelt, den der damit betraute Dritte, hier der Gott, zum auch juristisch durch das Surrogationsprinzip und den Vorausverzicht auf alle überschießenden Rechte gesicherten alleinigen Erwerb des Eigentumsrechts an sich selbst auf Seiten des Sklaven abschließt, der dadurch unmittelbar die volle Freiheit erwirbt."

[59] Kränzlein (2010a) 118–119.

Allen Deutungsversuchen der religiösen Freilassung ist gemein, dass dem Gott eine vermittelnde Rolle zukommt: Er ist Vertragspartner des ehemaligen Sklaveneigentümers. Als solchem werden ihm *bebaioteres*[60] gestellt.

Nimmt man an, dass die Freilassung durch den Gott erfolgte, welcher den Sklaven zu diesem Zwecke erworben hat, so wäre zu erwarten, dass der Freigelassene dann dem Gott zur *paramone* verpflichtet wurde. Tatsächlich enthalten zB. einige der makedonischen Freilassungsurkunden die Verpflichtung des ehemaligen Sklaven, bei der Gottheit zu bleiben. Aufgrund dessen musste der Freigelassene zu bestimmten Tagen (*ethimoi hemerai*) Dienst im Tempel leisten.[61] Doch dieser Befund ist trügerisch, da diese Dienste im Tempel oft mit einer *paramone*-Verpflichtung gegenüber dem ehemaligen Herrn kombiniert waren.[62] Da die *paramone* das Verhältnis des Sklaven gegenüber seinem ehemaligen Herrn betrifft,[63] könnte dies als Indiz dafür gewertet werden, dass sich der ehemalige Herr (der Verkäufer des Sklaven) als derjenige gerierte, welcher die Freilassung vollzogen hatte und dem daher die Patronatsrechte zukamen. Es ist allerdings zu hinterfragen, ob aus der Zuweisung der Patronatsrechte allein so weitgehende Schlüsse für die Konstruktion der Freilassung unter Einbindung eines Gottes gezogen werden können.

Unstreitig ist, dass die Einbeziehung des Gottes als Partei in den Prozess der Freilassung dem Sklaven große Vorteile brachte:

(1) Da der Sklave keine Rechtspersönlichkeit hatte, musste der Kauf über einen Dritten abgewickelt werden: Selbst wenn er über die finanziellen Mittel verfügte, konnte er sich nicht selbst seinem Herren abkaufen.[64]
(2) Die Freilassung mit Hilfe des Gottes bot ausreichend Publizität,[65] was ja auch die inschriftliche Fixierung im Heiligtum belegt.[66]
(3) Die Einbindung der Gottheit in die Freilassung bot dem ehemaligen Sklaven Schutz vor Ansprüchen Dritter oder des ehemaligen Eigentümers: Diese hätten daher mit dem Gott einen übermächtigen Gegner für einen eventuellen Prozess um den Sklaven.

V. Gerade dieser letztgenannte Aspekt ist nach antikem Rechtsverständnis als durchaus rationales Argument zu werten. Auch für das frühe römische Recht lässt sich ein Beispiel anführen, welches auf einer vergleichbarer Argumentation beruht: Der klassische Jurist Gaius interpretiert in seinem Zwölftafel-Kommentar die so

[60] Ausführlich Partsch (1909) 352–355, insbes. 353 A.1.
[61] Youni (2010) 321–322.
[62] Youni (2010) 322: „It was usual to combine the paramone with the condition of service at the temple. In these cases the freed person had to stay with the former master while offering his services to the temple on holidays."
[63] Youni (2010) 320; ausführlich dazu Kränzlein (2010b).
[64] Latte (1920); Youni (2010) 316.
[65] Youni (2010) 323.
[66] Anders möchte dem Kränzlein (2010a) nicht zu viel an Bedeutung beimessen, da die Inschriften an der Tempelmauer ja nur Abschriften der Urkunden darstellten.

genannte *dedicatio in sacrum*. Nach dem Zwölftafelsatz 12,4 (Bruns) habe derjenige, welcher eine streitverfangene Sache seinem Gegner während des laufenden Prozesses dadurch entzog, dass er sie den Göttern weihte, das Doppelte des Wertes der Sache erlegen müssen. Dies interpretiert Gaius wie folgt (D. 44.6.3, Gai. 6 comm. ad 12 tab.):[67]

> Rem, de qua controversia est, prohibemur in sacrum dedicare; alioquin dupli poenam patimur – nec inmerito, ne liceat eo modo duriorem adversarii condicionem facere. Sed duplum utrum fisco an adversario praestandum sit, nihil exprimitur; fortassis autem magis adversario, ut id veluti solacium habeat pro eo, quod potentiori adversario traditus est.
>
> *Eine Sache, über die ein Rechtsstreit im Gange ist, werden wir gehindert, zu einem kultischen Zweck zu stiften; andernfalls erleiden wir die Strafe, das Doppelte ihres Geldwertes entrichten zu müssen, und nicht unverdient, weil es sonst freistünde, auf diese Weise die Ausgangslage des Streitgegners zu erschweren. Doch wird nichts darüber ausgesagt, ob das Doppelte ihres Geldwertes der Staatskasse oder dem Streitgegner zu entrichten ist; vielleicht aber eher dem Streitgegner, damit er gewissermaßen dafür entschädigt wird, dass er [in Gestalt des Gottes, dem der Streitgegenstand dargebracht wurde] einem mächtigeren Streitgegner ausgeliefert worden ist.*

Dass der Dedikant die Zahlung der hohen Strafe an den Gegner (*adversarius*) und nicht an den Staat zu leisten hatte, begründet also Gaius damit, dass der Geschädigte zur Erlangung der Sache nun seinerseits mit einem viel mächtigeren Gegner (*potentior adversarius*) prozessieren müsste, nämlich mit dem Gott. Mit Gaius kommentiert hier ein Jurist des zweiten Jh. n. Chr. eine archaische Rechtsvorschrift, und Gaius stellt seine Interpretation auch nur als die ihm attraktivste Möglichkeit dar, die Norm auszulegen, wenn er seine Ausführung mit *fortassis autem magis* einleitet. Immerhin lässt Gaius eine Diskussion erahnen, in welcher die Angst vor dem Gott als Prozessgegner ins Treffen geführt wurde. Auch für das (frühe) römische Recht fände damit das Ergebnis Drehers Bestätigung, dass die Götter als Rechtssubjekte betrachtet und als solche mit einer gewissen Selbstverständlichkeit in den privatrechtlichen Verkehr eingebunden wurden.

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ABORTION* IN ANCIENT GREECE

Foreword

The topic of abortion in ancient Greece, and particularly in Athens, has been studied at length especially in its medical and social dimensions,[1] but has received less consideration in the more specific legal field. One of the most important contributions in this latter perspective is the paper presented at the 1999 Symposion by Stephen Todd,[2] whose interest was concentrated especially on the difficult and controversial interpretation of the fragments of a lost Lysian speech concerning abortion.[3] The purpose of my paper is to reconsider this issue, obviously taking into account Lysias' fragments that in fact may represent our main legal source on the topic, and focusing my attention on the possible ways abortion could be handled under a legal perspective. My paper will be structured on three themes: first I will deal with the issue of the general perception of abortion in the Greek *poleis*, and especially in Athens (§ 1); then, I will attempt an overall interpretation of the fragments of the aforementioned Lysian speech (§ 2); finally, I will take the fragments as a starting point for some reflections about the possible "public" relevance of abortion (§ 3).

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* The most common Greek term—but not the sole one (see e.g., *infra*, n. 8)—for abortion is (*ex*)*amblōsis*; it appears, for instance, in the title given to a Lysian speech whose few extant fragments represent one of our main sources concerning the political and legal relevance of the issue. It is important to stress that, as the analysis of these fragments (see *infra*, § 2) shows, the notion covered by the word (*ex*)*amblōsis* comprises not only our "abortion" in a proper sense, but also, more loosely, some cases that we would describe as "miscarriage" (e.g., the expulsion of the foetus as a result of a blow to the woman's stomach).

1 See e.g., Fontanille (1977); Carrick (1985); Murray (1991); Angeletti (1992); Hanson (1992); Riddle (1992); Riddle (1997); Laale (1992–1993); Demand (1994), 57–63; Kapparis (2002).

2 Todd (2003).

3 The latest editions of the fragments are those of Floristán Imízcoz (2000) and Carey (2007), which are more complete than the previous ones of Thalheim (1913) and Gernet (1926). As for the title, the speech is referred to either as περὶ [τῆς] ἀμβλώσεως (Theon Rh. *Prog*. 69 Sp.; Hermog. *Prolegomena in librum περὶ στάσεων* 200 R.; Harpocr. *ss.vv*. ἀμφιδρόμια, ὑπόλογον) or as περὶ τοῦ ἀμβλωθριδίου (Sopat. Rh. *Ἐκ διαφόρων τινὰ χρήσιμα* 300 R.) or as κατὰ Ἀντιγένους ἀμβλώσεως (*Lex. Cant*. *s.v*. ἐπιτίμιον).

1. The Perception of Abortion in the Greek *Poleis* and in Athens: an Overview

Today, even if it is of course a private matter, the most echoed feature of abortion is the political one, with its legal, medical, and ethical implications. In this respect, it is impossible not to think about the central role the issue played in the last USA presidential campaign between Mitt Romney and Barack Obama, with the former supporting the "pro-life" movement and the latter promoting the "pro-choice" one.[4] In fact it is well known that nowadays laws allowing a voluntary interruption of pregnancy are founded upon the idea that it is necessary to protect the physical and mental health of the mother, and that it is the mother who has the right to decide what to do with her pregnancy. By contrast, any opposition to abortion has its rationale in the ethical, if not religious, conviction that the foetus has "right to life," and that consequently the mother who decides to abort in fact kills a human being. It is of course impossible to find any evaluation of this kind in ancient Greece—as well as in Rome, at least until the Christian era.[5] Regarding the first point—the choice given to the mother—we are repeatedly told by a good number of sources that the mother was only a vessel for her child, and that fatherhood played a much more important role than motherhood.[6] Then, as far as the second stance is concerned—the right to life of the foetus—we should note that, even though—as we will see—the concept that the foetus was a living being had already begun spreading towards the end of the fifth century BC, the actual notion of a "right to life" is unknown, and we never read in the sources words of sympathy or pity for an aborted foetus.[7] So what kind of idea is it possible to draw from our sources about the general perception of abortion in ancient Greece?

From a religious perspective, abortion caused *miasma*, and a lot of sacred laws in different *poleis* and at different times banned women who had had an abortion from entering a temple or a sacred place.[8] At least two things are noteworthy in

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4 http://2012.candidate-comparison.org/?compare=Romney&vs=Obama&on=Abortion.

5 Cf. *e plurimis* Kapparis (2002), 173–174; *contra* Dölger (1933), with the critique by Crahay (1941), 9–10.

6 Aesch. *Eum*. 658–661; cf. also Eur. *Or*. 552–554; Arist. *Gen. anim*. 728a; 729a–b. For further analysis of these sources under the particular perspective of the topic here discussed cf. Pepe (2012), 268–269.

7 Kapparis (2002), 138–139. For some scholars, a kind of respect for the life of the foetus can be read in Ael. *VH* 5.18, according to which a pregnant woman found guilty by the Areopagus of *pharmakeia* was executed only after she gave birth to her baby, since the newborn was considered "not responsible," *anaition* (a general principle, unrelated to a specific case, is stated in D.S. 1.77.9); but the passage is "suspiciously late and suspiciously vague" to imply "a perception of rights for the unborn child" (Todd [2003], 237 n. 13, who concludes that "this may be the view of Aelian rather than of the Areiopagos"); see also Crahay (1941), 18.

8 For example, the sacred law of 331–326 BC from Cyrene (*SEG* 9,72, esp. 24–27) states that the woman who aborts a formed baby is polluted as with someone's death, while if the foetus is not yet formed she is polluted as with childbirth (noteworthy here is the fact that at a certain stage of the pregnancy the foetus is considered a human being: cf. *infra*,

these documents: first, no distinction is drawn between miscarriage and induced abortion, so that we may infer that they had exactly the same weight;[9] second, abortion requires essentially the same kind of purification prescribed for other non-criminal sources of pollution, such as loss of virginity, sexual intercourse, menstruation, childbirth and natural deaths; nowhere is it treated like a private or a public offense. In fact, the greatest Athenian philosophers, Plato and Aristotle, recommended it in the description of their ideal states at least in certain circumstances and under certain conditions, as a means of birth control.[10] The former affirmed that women who conceived in an inappropriate period of their lives had to get rid of the foetus,[11] while the latter, fixing a limit to the procreation of children, declared that abortion should be preferred to exposure, provided that it was performed before the foetus reached "life and sensation."[12] Of course, the rules these philosophers indicate are to be taken only as a display of their personal positions,

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esp. § 3). An inscription from Delos (*LSS* 54), which can be ascribed to the second or first century BC, prescribes a purification of forty days after an abortion, and Nardi (1963), 64, comparing these forty days with the seven days required in the same text for a purification after a childbirth, suspects that the term *diaphthora* used in this source to indicate abortion (l. 6) has to be referred only to an induced abortion; *contra* Parker (1983), 355 has shown that—in *LSS* 91 for example—*phthora* (l. 11) is also used in the same way for dogs and donkeys, so that it is impossible to think that its only meaning is "procured abortion." For further discussion see especially Nardi (1971), 132–134, 191–192, 213–214, 394–395; Parker (1983), 352–356; Adam (1984), 151–153; Kapparis (2002), 170–173.

9 The only possible exception concerns a well-known inscription from Philadelphia (*LSA* 20) of the second or first century BC, where (ll. 19–21) there is explicit reference to abortive drugs, contraceptives, and anything else which could cause the killing of a child; cf. Parker (1983), 355–356; Kapparis (2002), 214–218.

10 On the Platonic and Aristotelian passages discussed hereafter see the rich bibliography cited in Kapparis (2002), 243 n. 44; see moreover Loddo (2013), 107–121.

11 Plat. *Resp*. 460e–461c: after stating that a woman should bear children between her twentieth and fortieth year, while a man should do so between the ages of thirty and fifty-five years—i.e., during "the maturity of their body and mind" (ἀμφοτέρων [...] ἀκμὴ σώματός τε καὶ φρονήσεως; slightly different ages are indicated in Plat. *Leg*. 785b, 833c–d)—the philosopher adds that it is better not to "bring to light" (μηδ' εἰς φῶς ἐκφέρειν; on the meaning of this unclear expression see Nardi [1971], 117–122) a foetus conceived beyond the proper age and to dispose of it on the understanding that such an offspring cannot be reared (οὕτω τιθέναι ὡς οὐκ οὔσης τροφῆς τῷ τοιούτῳ). It is worth remembering that Plato's utopian state had to be composed of a constant number of 5,040 families, and that this number needed to be controlled with the various means indicated in *Leg*. 740 d–e.

12 Arist. *Pol*. 1335b25–6. After that time—for the reasons we will examine further (*infra*, § 3)—it was considered a crime (μὴ ὅσιον). Probably, in Aristotle's thought, the foetus acquired "life and sensation" (αἴσθησιν [...] καὶ ζωήν) from the moment in which its body began to move and was clearly differentiated in its various parts; this moment—cf. Arist. *Hist. anim*. 583b14–23—was identified with the fortieth day for the male foetus, and with the ninetieth for the female one.

since we do not have any evidence of the existence of a concrete social strategy of this kind in the Athenian *polis*.[13] In fact, if we now turn to the medical perspective, we find an apparently opposite trend in the oath Hippocrates' followers had to swear, when they promised they would not give abortifacients to women.[14]

So what about the legal field? Can this passage of the Hippocratic oath be taken as proof of the presence of a statutory rule prohibiting abortion, which doctors had to respect? Was there in Athens a legal ban on abortion, at least concerning free women who belonged to an *oikos*? Together with the greatest part of the recent scholarship, I seriously doubt it. In fact, the only evidence stating expressly that abortion was forbidden is late and extremely vague. I am referring particularly to a passage of a work included in the *corpus* of Galen, known as "Whether what is in the womb is a living being" (*Εἰ ζῷον τὸ κατὰ γαστρός*, in its Latin title *An animal sit quod est in utero*).[15] In order to demonstrate that yes, the foetus is a living being, the unknown author remembers that two of the greatest ancient lawmakers, Lycurgus and Solon, pupils of—hence inspired by—Apollo and Athena, established a punishment for abortion in their laws. They would not have done this if they believed that what is in the womb is not alive.[16] Now, since no other ancient author confirms this point,[17] it is better to take it with a grain of salt.[18]

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[13] For the different situation in the Roman world—where abortion was at some point considered as a threat to the state policy of population growth—cf. Kapparis (2002), 148–151.

[14] [Hipp.] *Jusj*. 15–16: οὐδὲ γυναικὶ πεσσὸν φθόριον δώσω. The bibliography concerning this passage—which seems to be in contradiction with other passages of the *Corpus Hippocraticum* that deal with abortive remedies (e.g., [Hipp.] *Mul. aff*. 1.72) or where a doctor is said to cause an abortion ([Hipp.] *Nat. puer*. 13)—is in fact endless, and here I will just offer a little sample of its various interpretations. Jones (1924), 39 takes the Hippocratic prohibition in the sense that the doctor himself was not allowed to apply the pessary. Edelstein (1967), 3–4, pointing to the fact that the medical practice was different from the oath's prescriptions, thinks that the oath was composed by an esoteric group influenced by Pythagorean ideas. According to Mottura (1986) the passage was interpolated after the influence of Christianity. Nardi (1971), 59–66 states that the Hippocratic medicine prohibited only the administration of a *pessos* (vaginal suppository) that was recognized as *phthorios*, hence potentially harmful to the mother's life; for this reason the doctor was allowed to use on pregnant women other remedies, provided that they were not *phthoria*. Similar remarks are developed by Angeletti (1992), 159–161, who insists on the opposition in the Hippocratic *corpus* between *pharmaka phthoria* and *ekbolia*, and underscores that the latter were not forbidden because they served to expel a dead foetus (cf. Soran. *Gyn*. 1.60).

[15] For this pseudo-Galenic work, influenced by Platonic ideas that Galen rejected, cf. Kapparis (2002), 201–204.

[16] [Gal.] *An animal sit quod est in utero*, 19.179 Kühn.

[17] Some of those convinced of the existence of such laws (e.g., Thonissen [1875], 257–258; Lallemand [1885], 34; Calleimer [1877], 225; Laale [1992–1993], 159) indicate as further confirmation of their authenticity a passage of Musonius Rufus (a Roman philosopher of the first century AD) mentioned by Stobaeus (*Anth*. 4.24a.15; the work of

But there is also another reason that the story has to be considered unreliable. It is barely conceivable that both in Sparta and in Athens the exposure of a newborn baby, if not the killing of an infant, was at least socially tolerated, while an interruption of pregnancy was prohibited.[19] Without any doubt, just as it was only the father who had the power to decide whether to rear a newborn child inside the *oikos*, we have to presume—since we do not have any direct evidence on this point—that it was only the father who could decide whether his wife should abort (and in this sense we probably have to take the aforementioned passage of the Hippocratic Oath).[20] Certainly women were acquainted with a lot of methods (herbal potions, physical exercises and manoeuvres, midwives' remedies and help)[21] in order to free themselves of an undesired pregnancy; but of course they had to take this course of action—moreover, at extreme risk to their own lives[22]—without their husbands knowing. A married woman could not openly deliberate whether to have an abortion without her husband's consent, but I do not think there was any need of a specific law: basically it was a private matter. Exactly as happened when a woman ventured to expose her newborn child,[23] the husband could immediately repudiate the wife who had aborted if he suspected, or succeeded in finding out, that she had

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Musonius *Εἰ πάντα τὰ γινόμενα θρεπτέον*, which includes this passage, can also be read on a papyrus: see Powell [1937]). In the passage the philosopher wants to show that all the ancient legislators considered it detrimental for their cities to have a small number of children, whereas they thought it advantageous to have a lot of them; for this reason they forbade women to abort, and imposed penalties on those who broke the law. But, as demonstrated by many scholars (cf. e.g., Nardi [1971], 12–16; Kapparis [2002], 149–150), there is little doubt that the "laws" Musonius has in mind are not the Greek, but rather the Augustan ones on abortion.

18 In order to prove that the passage is unreliable, it has been inferred that probably the information had been generated by an anecdote in Plut. *Lyc*. 3, where it is said that the Spartan legislator prevented a woman from having an abortion (but it is not said that hence he decided to make a general law banning abortion!); and, since the name of the Spartan lawmaker is usually connected with that of his Athenian *alter ego*, the pseudo-Galen (or his source) instinctively mentioned Solon also: see Crahay (1941), 12; Nardi (1971), 37–41. Some scholars (e.g., Kapparis [2002], 179) have however argued against this view, since probably the pseudo-Galenic treatise was written before Plutarch's works.

19 Cf. Glotz (1904), 350.

20 In this sense Glotz (1904), 352; Harrison (1968), 73 n. 1; Demand (1994), 61.

21 Cf. e.g., Theophr. *Hist. plant*. 9.9.2; 9,11.4; for midwives' expertise cf. Plat. *Theaet*. 149 c–d. A practical example of a physical exercise that caused an abortion to a prostitute is provided in [Hipp.] *Nat. puer.* 13, although modern doctors state that the method described (a series of jumps on the heels) would never cause the expulsion of a well-implanted foetus (cf. e.g., Hellinger [1952], 116–117 n. 5).

22 Cf. e.g., Hipp. *Mul. aff.* 1.72.17–21.

23 See e.g., what happens to Pamphila in Menander's *Epitrepontes*.

intentionally done something in order to free herself of the foetus.[24] In fact, he would assume that the most probable reason for the abortion, not to say the only one, was the consequence of her having committed *moicheia*.[25] Similar intra-familiar measures were of course valid also for unmarried women, and were effected, once again inside the *oikos*, by their *kyrioi*.[26]

2. The Fragments of the Lysian Speech: an Attempt at Interpretation

Despite the doubts concerning the existence of a law banning abortion, some scholars believe that the Athenians could rely on a public action for abortion called the *graphē amblōseōs*, and maintained that a fragment of the lost Lysian speech on the topic might actually provide clear evidence for it.[27] But, once again, I seriously doubt it, for at least three reasons. First, if we admit that there was no statutory law forbidding abortion, I find it difficult to imagine that there could be an action, since it is reasonable to suppose that a lawsuit was admissible only when it was founded upon an existing statute;[28] next, we have no other confirmation that this specific *graphē* really existed; last but not least, I do not think that the content of the passage in question supports the hypothesis of the existence of such a *graphē amblōseōs*. However, it is better to have a closer look at the fragment and at its traditional interpretation.

> [fr. 1: *Lex. Cant*. *s.v*. ἐπιτίμιον (19 Carey)] ἐπιτίμιόν τι ἦν κατὰ τῶν σιωπησάντων [Sauppe: ὀλιγωρησάντων] τὴν γραφήν. Λυσίας ἐν τῷ κατὰ Ἀντιγένους ἀμβλώσεως· σκέψασθε δὲ καὶ ὡς Ἀντιγένης πεποίηκεν οὑτοσί· γραψάμενος τὴν μητέρα ἡμῶν ἀξιοῖ λαβεῖν τὴν ἀδελφήν, καὶ ἀγωνίσασθαι μὲν ἵνα μὴ ἀποτίσῃ τὰς χιλίας δραχμάς, ἃς δεῖ ἀποτίνειν ἐάν τις μὴ ἐπεξέλθῃ γραψάμενος.

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[24] It was not easy, however, to establish whether a woman had suffered a miscarriage or had rather deliberately procured an abortion, since even doctors could have doubts on this point: see e.g., Hipp. *Epid*. 5.53 with the comment of Demand (1994), 57–58.

[25] Furthermore, at least in Athens, in earlier times the punishment of a woman caught in *moicheia* was decided exclusively by the family (see e.g., the story of Leimone punished in the house by her father Hippomenes: cf. Aesch. 1.182; Her. Lemb. *Epit*. 1; D.S. 8.22). It is likely that the issue of women's fidelity became a priority for the *polis* as well—which did not want any bastard within the citizen body—only in 451/0 BC, when the well-known Periclean law on citizenship ordered that only the offspring of two citizens (who moreover must be lawfully married) could be citizens; on this point see especially Kapparis (1995), and, more generally, Cohen (1991).

[26] Kapparis (2002), 103–107.

[27] Caillemer (1877), 225; Gernet (1926), 238–239; Harrison (1968), 72–73, who, however, never uses explicitly the expression *graphē amblōseōs* to indicate the action.

[28] On this point, and against the conviction expressed by some scholars that the Athenians lacked the principle *nullum crimen sine lege*, see especially the recent contributions by Harris (2013) and Pelloso (forth.).

The passage, preserved in the *Lexicon Cantabrigiense*,[29] is part of a gloss concerning the *epitimion*, i.e., the sum of money that had to be paid by whoever abandoned a public prosecution or did not obtain at least one-fifth of the jurors' votes at the end of the trial.[30] The text is commonly translated as follows:

> Epitimion *was a penalty against those who neglected a* graphē*. Thus Lysias in his speech* Against Antigenes on Abortion*: "See [men of the jury] how Antigenes here has behaved. After initiating a public prosecution against my mother, he now thinks it right to take my sister [as a wife],*[31] *and to carry on with the prosecution in order that he may not have to pay the 1,000 drachmas that anybody, for initiating a* graphē *without following it through, has to pay."*

Interpreting the passage to mean that Antigenes prosecuted Lysias' client, a woman represented in court by her son, with a *graphē amblōseōs*, Gernet, with an amendment that has been generally accepted,[32] corrected the title of the speech from *kata Antigenous* to *pros Antigenē*, since *kata* is used to designate a prosecution speech, while *pros* is the preposition that regularly refers to defence speeches against the prosecutor, in this case Antigenes.[33] The French scholar says very little about the possible procedural and/or substantive terms of the *graphē amblōseōs*; he only states that it had to be "d'application restreinte" and that it should be compared with other *graphai* with which similarly private offences—for example, *moicheia* or *kakōsis*—were prosecuted.[34] More detailed is the explanation of its possible practical utility

[29] The reference edition for this work, formed by a complex of glosses to Harpocration in a Cambridge manuscript (but four glosses can also be read on a papyrus published by Miller [1868], 385), is that of Houtsma (1870), reprinted in Latte and Erbse (1965), 61–139. On the basis of various clues it is possible to state that the sources used in the work are usually good, and as a rule they are quoted accurately (this happens also in our fragment, which in fact ends with the citation of a Demosthenic passage—[Dem.] 58.6, 20, 34—that similarly mentions the 1,000-drachma fine for a prosecutor's abandoning a *graphē*): cf. Houtsma (1870), 6–7 (= Latte and Erbse [1965], 66–67).

[30] On this fine, and the probably connected *atimia*, cf. Paoli (1974), 319–325; Harrison (1971), 83, 103, 175–176; Hansen (1976), 65; Todd (1993), 143; Harris (1999); Wallace (2006).

[31] Better than "my mother's sister:" see Todd (2003), 242.

[32] Cf. e.g., Lecrivain (1932), 532 n. 6; Harrison (1968), 72; Buis (2003), 53–54. The amendment was already suggested by Lipsius (1912), 609 n. 33, and Thalheim (1913), 332 n. 4.

[33] The complex reconstruction of the possible relationship among the parties involved in the trial, proposed by Gernet (1926), 239 and n. 2, has been recently disputed by Todd (2003), 248. There is no need to examine in detail their theories here; I would just like to underscore that in my opinion it is not necessary to suppose, as both scholars do, that the girl Antigenes asks in marriage is an *epiklēros*; actually, in fact, nothing in the text—beginning with the verb *axioi*, which does not mean "he pretends," but rather "he thinks it right"—suggests it.

[34] Gernet (1926), 238–239: "l'avortement punissable est un délit qui lèse un intérêt privé—comme le meurtre. Mais, malgré l'analogie du meurtre, rien ne s'opposerait, a priori, à ce que la poursuite de ce délit pût avoir lieu par voie de γραφή, comme l'ὕβρις, comme la

given by Harrison. It is true, says Harrison, that abortion was normally considered a private wrong against the father; however, "the fact that a γραφή was available might suggest that abortion was regarded as a public wrong also and as such open to prosecution by ὁ βουλόμενος. […] We cannot rule out the possibility that it was only the embryo *qua heir to his father* that was thought of as wronged and that the γραφή only lay in cases such as the present seems to be, where the father is dead and where it might be very much in the interest of the embryo's next of kin to procure an abortion."[35]

Now, some serious critics have been moved to reject Harrison's assumptions. For example, Kapparis has underscored that Harrison's thesis is untenable because "there is not a single scrap of evidence from the classical period suggesting a perception of the unborn as the victim."[36] And Todd stated that "it may be inappropriate to think of the foetus as having rights vis-à-vis the father."[37] Furthermore, I would like to stress that, if the *graphē* had its justification in the aforementioned alleged Solonian law banning abortion, it had to cover all cases of abortion, and not, as Harrison maintains, only some peculiar situations. This hitch has led Todd to propose an alternative hypothesis; for him, the *graphē* the fragment is referring to is not necessary a *graphē amblōseōs*; in fact he wonders whether the case discussed by Lysias "might represent, for instance, an extended use of the catch-all *graphē hybreōs*," which, in this circumstance, was used by Antigenes, supposed to be the actual husband (cf. the passage of Sopater quoted *infra* as fr. 5), against his wife who "had procured an abortion without proper consent."[38] But I confess I find it very difficult to agree with Todd since I am firmly convinced that a

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μοιχείᾳ, et, plus pertinemment, comme la κάκωσις (mauvais traitements à l'égard des parents et orphelins)." But it is worth noting that the reason that *moicheia* was prosecuted with a *graphē* is evident, since, after the Periclean law on citizenship, it was in the interest of the community not to introduce a bastard inside the *polis* (see also *supra*, n. 25). As far as the *graphē kakōseōs* is concerned, the reason that the action could be brought by anybody is that "a person of advanced years [and I add that the same can be said also for young orphans] might have found difficulty in setting a δίκη on foot, whereas to secure redress by γραφή he had only to obtain the goodwill of some third party who was competent to sue (ὁ βουλόμενος)" (Harrison [1968], 77; cf. also 117).

35 Harrison (1968), 72–73 (author's italics).

36 Kapparis (2002), 187.

37 Todd (2003), 246.

38 Todd (2003), 247–248, 249. In Todd's reconstruction (see esp. 249), Lysias' client, a widow, submitted to the remarriage with Antigenes, but set out to make the union a childless one, in order not to harm her previous children; thus, the situation underlying the speech can be understood—on the basis of the interpretation proposed by Foxhall (1996), 144–149—as intermediate between the one described in Dem. 27.31 (where Demosthenes' mother refused to marry Aphobos because this union would be detrimental to her children) and the one delineated in Lys. 32 (where Diogeiton's daughter decided to remarry and have children, with the result that the children of her first marriage were disadvantaged by this situation).

situation like this had to be resolved inside the *oikos*, not in a public trial. In fact, we do not have any other evidence that a husband ever publicly prosecuted his wife for this reason.[39]

The point is that, in my opinion, the fragment of the *Lexicon* does not need to be understood in the way it is generally understood, namely as a demonstration of the existence of a *graphē amblōseōs* or of a *graphē* whatsoever to prosecute abortion. First of all, the aim of the *Lexicon*'s gloss is not to show the general context of the trial, in order to demonstrate how the *graphē* in cases of abortion worked, but rather to give an example of a practical application of the *epitimion*. Second, even if we admit that abortion, at least in the current case, is prosecuted with a *graphē*, we have to explain why the other significant fragments of the speech[40] unambiguously agree on the fact that in this circumstance abortion was treated like homicide; hence, we should infer that it was the subject not of a *graphē*, but rather of a *dikē phonou*.[41] Finally, we should not underestimate that the hypothesis we are dealing with is based not on the original text of the gloss but instead on Gernet's amendment of the title of the speech from *kata Antigenous* to *pros Antigenē*, and so on the presumption that the defendant is a woman prosecuted for abortion with a *graphē* by Antigenes. If we were to accept as genuine the bequeathed title *kata Antigenous*, the hypothesis would not hold any more.

There are, I think, two possible solutions to these difficulties. The first and most economical one—recently advanced by Kapparis—postulates that, since the content of this fragment is inconsistent with the others, we may suppose that the author of the gloss has made a mistake, and that he quoted a passage from a Lysian speech against Antigenes that, despite the title erroneously given to it (*amblōseōs*), had nothing to do with abortion.[42] But I believe that there can be a better solution that saves the text as it is handed down. The *Lexicon*'s passage begins with an exhortation by the speaker to consider how scornfully Antigenes *pepoiēken*, i.e., has behaved in the past and continues to behave in the present. Hence, isn't it possible that, when the speaker mentions the *graphē* (*grapsamenos*), he is talking not about

[39] In this perspective, it is interesting to note that the radical change in Athenian society between Solon's reform (which "altéra profondément le caractère primitif de la puissance paternelle:" Glotz [1904], 350) and the age of Demosthenes, did not substantially affect family law: on this point see especially Humphreys (1977–1978); Humphreys (1993); Roy (1999), 8.

[40] They are quoted *infra*, in the text. I do not consider "significant" the four fragments from the lexicographic tradition (*infra*, n. 46), since they just mention the meaning of some particular words employed in the oration, without adding any valuable detail concerning its background.

[41] Glotz (1904), 352 (with bibliography, n. 3); Laale (1992–1993), 162; Kapparis (2002), 187–193.

[42] Kapparis (2002), 190–191.

the current trial, but instead about another trial, a *graphē*[43] previously initiated against the mother of the speaker?[44] Isn't it possible that the passage derives from a generic section of the speech, the aim of which is simply to underscore what a haughty individual Antigenes is? I rather think so, and I am happy to read that Todd also recognized this as "a possible hypothesis."[45]

Hence, if indeed this passage says nothing relevant about the current trial and the possible legal treatment of abortion, it is necessary to look at the other fragments of the speech. It is worth starting with a few general points that concern the nature and the typology of the works that quote the fragments, and the context in which they are quoted. The works mentioning the speech, all very late (from the second century AD on), are of two types. On one side there is the lexicographic tradition[46] that, with the sole exception of the fragment of the *Lexicon Cantabrigiense*, displays two constant features: first, it casts doubt on the Lysian paternity of the speech, and second, it is not helpful for the reconstruction of the background of the speech, since

[43] In this case, *graphein* has to be referred to the moment at which the formal charge was presented before the magistrate, or to the *anakrisis*; see *LSJ*, *s.v.* γραφή III.1 ("bill of indictment"), *s.v.* γράφω B.3; for the expression ἀποφέρειν τὴν γραφὴν πρὸς τὸν ἄρχοντα, "the technical term for handing in the written claim," see Harrison (1971), 88 and n. 9.

[44] The possibility of a double litigation is denied by Harrison (1968), 73 n. 1. As far as I know, despite what Harrison writes in the same footnote (and cf. also Todd [2003], 241), Glotz (1904) nowhere states that the passage may be understood as referring to a previous trial.

[45] Todd (2003), 241–242, who raises however some objections against it. First of all, he thinks that in this case the present tense of the main verb *axioi*, "he thinks it right," might sound "slightly awkward." Second, he finds it difficult to reconcile the idea of a previous trial initiated by Antigenes with the content of the fragment of Sopater (quoted *infra* in the text as fr. 5), "which refers to Antigenes as accusing his own wife in either the current speech or at least the current case, using the verb *katēgoreō*, standardly predicated of the prosecutor;" even if he admits that this argument "is not wholly conclusive, because *katēgoreō* is occasionally used in a loose sense, for instance to complain that a defendant is behaving inappropriately by seeking to usurp the rôle of prosecutor," I think the explanation I will give in the text can clarify the content and the context of the fragment. As for the first objection, reflecting on the value of Greek tenses, I think it conceivable to admit that the present *axioi* here does not necessarily refer to the actual moment in which the words are uttered. The preceding perfect *pepoiēken* attracts the present *axioi*, so that the latter may represent an action that began in the past and continues to produce its effects in the present, if not and potentially in the future in terms of intention. For example, we can imagine that the *anakrisis* had already been concluded and that Antigenes decided and still has the intention (*axioi*) to carry on (*agōnisasthai*) with the prosecution in the near future (just as he decided in the past and now still has the intention to ask for the hand of the speaker's sister; but it is clear that actually he is not asking for it at that moment).

[46] This tradition is represented by Poll. 2.7 (27 Floristán Imízcoz); Harpocr. *s.v.* ἀμφιδρόμια (22 Carey); *s.v.* θεμιστεύειν (23 Carey); *s.v.* ὑπόλογον (24 Carey).

it references just single words of it without any indication of the overall context.[47] On the other side, the second tradition is represented by, mostly late, rhetorical works. One of the fragments comes from the *Progymnasmata* of Theon:[48]

> [fr. 2: Theon Rh. *Progymn*. 2,69 Spengel (20b Carey)] ἤδη δέ τινα καὶ παρὰ ῥήτορσιν εἴρηται θετικὰ κεφάλαια, καὶ δὴ καὶ ὅλοι λόγοι νομίζοιντ' ἂν σχεδὸν εἶναι θέσεως, ὡς ὅ τε περὶ τῶν ἀνακαλυπτηρίων ἐπιγραφόμενος Λυσίου καὶ ὁ περὶ τῆς ἀμβλώσεως· […] ἐν θατέρῳ δὲ εἰ τὸ ἔτι ἐγκυούμενον ἄνθρωπός ἐστι, καὶ εἰ ἀνεύθυνα τὰ τῶν ἀμβλώσεων ταῖς γυναιξί, Λυσίου μὲν οὔ φασιν εἶναι τούτους τοὺς λόγους, ὅμως δὲ οὐκ ἀχάριστον τοῖς νέοις γυμνασίας ἕνεκα καὶ τούτοις ἐντυγχάνειν.[49]

The other fragments are quoted from commentators and commentaries that have to do with Hermogenes, author of the well-known *stasis/status* theory.[50]

> [fr. 3: *Proleg. in Hermog. Stat.* 200,16 Rabe (20a Carey)] τῶν γὰρ προβλημάτων τὰ μέν ἐστι πολιτικά, τὰ δὲ φιλόσοφα, τὰ δὲ ἰατρικά, τὰ δὲ μέσα τούτων, ἃ πολιτικὴν μὲν ἔχει τὴν ζήτησιν, ὕλην δὲ ἢ ἰατρικὴν ἢ φιλόσοφον. καὶ περὶ μὲν πολιτικῶν εὔδηλόν ἐστι, τίνα φύσιν ἐπιδέχεται, τὰ δὲ ἰατρικὰ τοιαῦτά ἐστι, οἷον διὰ τί τὸ βρέφος ἓξ μηνῶν οὐ ζῇ, ἑβδόμῳ δὲ γεννώμενον ἢ ἐνάτῳ ζῇ. φιλόσοφα δέ, εἰ ἡ ψυχὴ ἀθάνατος. τὰ δὲ μικτά, οἷον ἐγκύμονά τις ἔτυψε κατὰ γαστρὸς καὶ κρίνεται φόνου, […] ἐνταῦθα μέντοι δεῖ τὸν μελετῶντα τοῖς ἐπισταμένοις ἀνατιθέναι τὰς αἰτίας, ὡς καὶ ὁ Λυσίας ἐν τῷ Περὶ ἀμβλώσεως κρίνων φόνου

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[47] The only exception may be represented by the word *amphidromia* handed down by Harpocration (22 Carey) , since from that term we could perhaps suppose a polemical allusion in the speech to the fact that abortion had deprived the father of his power to accept the baby inside the *oikos* (cf. also fr. 5, *infra* in the text). *Amphidromia* were "a religious celebration rather than a legal requirement, but legally it was important to the child that his paternity should be acknowledged, for on it depended both his membership of the *oikos* and his citizen status" (MacDowell [1978], 91). Main sources on *amphidromia* are Aristoph. *Av*. 494, 922 (with the relevant *scholia*); *Schol*. Aristoph. *Lys*. 757; Isae. 3.30; Dem. 39.22; Plat. *Theaet*. 160c–161e; Hesych., *Etym. magn*., *Lex. Seg*. *s.v*. ἀμφιδρόμια.

[48] Aelius Theon is a rhetorician and sophist attributed to the first or second century AD; on his work see esp. Lana (1959).

[49] "Some heads of argument which are connected with a thesis [on the peculiar meaning of the word see *infra*, in the text and n. 62] are already used even in the orators. Indeed, whole speeches could be regarded as close to a thesis, like the speech *Concerning the Wedding-Gifts* attributed to Lysias, and the speech *Concerning the Abortion*. […] In the other speech the question is whether what is still in the womb is a human being, and whether women are exempt from liability in matters connected with abortions. People say that these speeches are not by Lysias, but nevertheless it is no bad thing for young men to encounter them as well for the sake of practice." The translation of this and the following fragments is that of Todd (2003), 252–255.

[50] On Hermogenes see especially Heath (1995); more generally, on the *status* doctrine, cf. Calboli Montefusco (1986).

τὸν αἴτιον βιάζεται ζῷον τὸ βρέφος ἀποδεικνύναι καὶ πανταχοῦ φησιν· ὥσπερ οἱ ἰατροὶ καὶ αἱ μαῖαι ἀπεφήναντο.[51]

[fr. 4: Sopat. Rh. *Scholia ad Hermog. Stat.* 5,3 Walz (20c Carey)] εἰσὶ γὰρ καὶ ἰατρικὰ καὶ φιλόσοφα ζητήματα· καὶ ἰατρικοῦ μὲν ζητήματος παράδειγμα, ὃ καὶ μεμέληται τῷ Λυσίᾳ· εἰ ὁ ποιήσας ἐξαμβλῶσαι γυναῖκα φόνον ἐποίησεν· δεῖ γὰρ γνῶναι πρῶτον, εἰ ἔζη, πρὶν ἐτέχθη. ὅπερ φυσικῶν καὶ ἰατρικῶν ἐστι.[52]

[fr. 5: Sopat. Rh. (?) *Ἐκ διαφόρων τινά χρήσιμα* 300,10 Rabe *Proleg. Syll*. (=*RhM* 64 [1909] 576) (20d Carey)]: ὅτι Λυσίᾳ μεμελέτηται ἰατρικὸν πρόβλημα παράδοξον ῥητορικῶς μεθοδευθὲν περὶ τοῦ ἀμβλωθριδίου, ἐν ᾧ Ἀντιγένης κατηγορεῖ τῆς ἑαυτοῦ γυναικὸς φόνου ἀμβλωσάσης ἑκουσίως, φάσκων ὡς ἐξήμβλωκε καὶ κεκώλυκεν αὐτὸν πατέρα κληθῆναι παιδός.[53]

This second tradition also displays a constant feature, since all the sources agree that Lysias' speech was written for a case of abortion prosecuted as homicide. This does not mean, however, that they depict a coherent scenario for the trial; on the contrary, since each passage gives very different details, taken together they are "desperately confusing."[54] The most important information they give can be summarized as follows:

fragment	**identity of the defendant**	**possible context**
2	? woman ? (ταῖς γυναιξί)	not indicated

[51] "Of problems, some are political, some philosophical, some medical, and others are combination of these—i.e. the ones where the question at issue is political, but the materials used to answer it are drawn from medicine or philosophy. In the case of political problems, it is clear what nature they take, whereas medical questions are of the following type: for instance why a foetus at six months is not alive, whereas in the seventh or ninth month of conception it is alive. A philosophical question is e.g. whether the soul is immortal. Mixed questions are ones like whether a person who strikes a pregnant woman in the stomach can also be accused of homicide. […] Here however it is necessary for the orator examining the topic to entrust the task of explanations to those who are experts, as Lysias also does in the speech *On the Abortion*: adjudging as guilty of homicide the person responsible, he needs to present the foetus as a living thing, and on every point he says 'as the doctors and the midwives made clear'."

[52] "There are also medical and philosophical questions. An example of a medical question is one which is examined in Lysias: whether a person who caused a woman to have an abortion caused homicide—for it is necessary to determine first whether the foetus was alive before birth, and this question is a matter both of natural science and of medicine."

[53] "That a medical problem is treated rhetorically and expounded as a paradox by Lysias *On the Aborted Foetus* (in which Antigenes accuses his own wife of homicide, claiming that she deliberately caused an abortion), stating that she had had an abortion and prevented him being called the father of a child."

[54] Kapparis (2002), 185.

3	man (τὸν αἴτιον)	? a man hit a pregnant woman in the womb causing her an abortion ? (ἐγκύμονά τις ἔτυψε κατὰ γαστρὸς καὶ κρίνεται φόνου)
4	man (ὁ ποιήσας)	a man caused a woman to have an abortion (ὁ ποιήσας ἐξαμβλῶσαι γυναῖκα)
5	woman, wife of Antigenes, prosecuted by Antigenes	the woman had deliberately caused an abortion without proper consent (ἀμβλωσάσης ἑκουσίως)

As is evident from the synopsis, it is very difficult to reconcile the material given by these references, inasmuch as they disagree about the possible context of the trial and about the identity, and particularly the gender identity, of the prosecutor and of the defendant. That is why usually, in formulating their theories about the speech, scholars either completely ignore some of the sources—obviously, those inconsistent with the idea they develop—or point out which ones are for them the most reliable and which ones are instead to be discarded.[55] But I think there could be another possible solution.

I would like to mention, first of all, that while now all scholars agree that the Lysian speech was actually delivered in a court,[56] in the past some doubts were cast on its nature, since it seemed possible that it should be considered just a rhetorical exercise.[57] Now, while I acknowledge that some of the details in the fragments make it difficult to deny authenticity to the speech, I also think that some other arguments are developed from a merely rhetorical perspective.

For example, fr. 3 and 4, respectively *prolegomena* and *scholia* to Hermogenes' *Staseis* ("Issues"), discuss the types of issues (*zētēmata, problēmata*), distinguishing among political,[58] philosophical and medical ones. Both agree that Lysias' speech is a clear example of a medical question (or at least of a mixed one, containing a

[55] For example, Glotz (1904), 353 and Harrison (1968), 72–73 build their theories respectively on fr. 3 (*Prolegomena in Hermogenis Status*) and 1 (*Lexicon Cantabrigiense*). Todd (2003), 250, who considers the fragment of the *Lexicon* as the most important one, explains the indications in the other fragments as references to previous cases, and states that "presumably he [*scil*. Lysias] would have presented that discussion by way of contrast, to argue that whatever was alleged against his client's mother had happened before the sixth month of pregnancy" (that is, before the moment the foetus was generally considered alive, and therefore she was not guilty of anything). Kapparis (2002), 188–193 relies on fragments 2 and 4 to demonstrate that an accusation for homicide was brought by Antigenes against his wife "because she had an induced abortion evidently without his consent."

[56] Thalheim (1913), 333; Gernet (1926), 238 n. 2; Nardi (1971), 86 n. 135; Kapparis (2002), 247 n. 43; Todd (2003), 239.

[57] Cf. e.g., Baiter and Sauppe (1839), 175.

[58] The meaning of the term "political" here, probably to describe a "legal" question, has been briefly discussed by Todd (2003), 238 n. 18.

combination of political issues and medical material). In particular, the anonymous author of fr. 3 appreciates the fact that Lysias, accusing of homicide the man responsible for having caused an abortion (i.e., miscarriage) to a woman,[59] repeatedly refers to the depositions of doctors and midwives, who during the trial demonstrated that a foetus is a living being. In similar terms, Sopater (fr. 4)] says that Lysias' speech examined[60] the issue of whether the foetus is alive before being born.

Now, I think that the way the content of the speech is presented in these two passages, and in particular the insistence on the opportunity of demonstrating that the foetus should be considered a living or a human being, reproduces an example of a rhetorical classification based on *status* theory; the theory, namely, that dealt with the categorization of the "types of issues" treated in a speech. So we know that, for example, the question could concern the reconstruction of the facts ("what really happened?"; this is the *stasis stochasmos*, *coniectura* in Latin); or, if there was no doubt about what happened, the question could concern the description of the facts themselves ("is it possible to include the facts in a given definition?"; this is the *stasis horos*, *definitio* in Latin).[61] Now, I think this latter *stasis* is the key to understanding the sense of our passages; the "issue" in Lysias' speech can be identified according to the *stasis horos*, or *definitio*, since what happened is known ("a woman was hit and had a miscarriage"), but it is not clear how what happened has to be categorized ("can this fact be classified as homicide?").

A similar conclusion can be drawn from fr. 2, even though in this case the perspective is different. Also in this passage Theon reports that Lysias examined whether the foetus is a human being (*anthrōpos*) and whether women are or are not responsible in matters connected with abortions. Here, however, Theon is talking about *theseis*, advanced preliminary exercises in which "the student is required to argue for or against some general proposition,"[62] and he is saying that there are some speeches—like Lysias' *On Abortion*—that can be considered as close to a *thesis*. Hence again, rather than analysing the content of the speech, it is probable that Theon is just examining the case, showing the general situation Lysias had to deal with, and proposing it for his pupils as a training issue (*gymnasias heneka*). At this point it is not difficult to read in the same perspective fr. 5, where it is clearly stated that the problem Lysias was concerned with is a "paradox," and that he developed it in a rhetorical way.

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[59] If we connect the quotation of the speech with what the author has stated previously, we can infer that the woman lost her baby after being hit in the womb by the defendant; this situation is a *topos*: see *infra*, § 3. On the Greek vocabulary of abortion/miscarriage, see the footnote to the title of this paper.

[60] In the Greek text we read *memēletai*, a verb that, as Todd ([2003], 239 n. 21) recognizes, was also employed technically with the meaning of "to declaim."

[61] Calboli Montefusco (1986), 35; Heath (1995), 20–21, 101–107.

[62] Heath (1995), 16, 260; hence I think Todd (2003), 253 n. 53 is incorrect in thinking that the thesis is the "head in which a general proposition is developed in support of a case."

I would like to make it clear that my remarks are not at all intended to deny that Lysias ever wrote a speech for a case involving abortion; actually I do not think we have reason to doubt it. My point is simply that it is not worth trying to reconstruct the procedural situation underlying Lysias' speech from these fragments, since their authors were not interested in it, nor in the details of the original trial; the rhetoricians' attention was caught by the singularity of the issue and by the mix of political and medical arguments in it, so that, from a certain moment on, the speech became a model for rhetorical exercises, a starting point of "variations on the theme" that may probably account for the different and "desperately confusing" information they give.[63]

3. Some Remarks on the Legal and Political Impact of Abortion in Fourth-Century Athens

Despite the impossibility of reconstructing a real situation through the fragments, the context in which they are preserved permits us to formulate some conclusions and to identify some plausible backgrounds. As for the conclusions, even in the absence of trustworthy evidence that a specific legal regulation on abortion existed, or that it was a kind of offence *ho boulomenos* could ordinarily prosecute with a specific or generic *graphē*, nevertheless the unanimity and the persistence of the rhetorical tradition of Lysias' fragments on the point—beyond the individual and differing details—indicates that at least on certain occasions, such as the trial in which Lysias' client was involved, the woman who aborted or the man who caused her to abort could be prosecuted with an action for homicide.[64] This is of no little importance, if we consider, for example, that in Rome abortion was never considered homicide, not even when, under the empire, the notion of homicide was extended to include infanticide and newborn exposure.[65] This divergent attitude between Athens and

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[63] A good comparison can be provided by one of the lesser declamations attributed to Quintilian (277), where the theme is whether the husband who lawfully killed his pregnant wife caught red-handed in committing adultery, should be considered responsible for the homicide of the foetus, given that "the punishment of pregnant women shall be deferred until the day of delivery" (*supplicia praegnatium in diem partus differantur*).

[64] Obviously it is out of question that in this trial the defendant could be the husband who induced his wife to have an abortion, since, if he did so, he simply exercised his right (on the point see, *e plurimis*, Glotz [1904], 350–351).

[65] D. 25.3.4 Paul. 2 *sent*.; on the problems of this fragment, its possible interpolation and chronology cf., *e plurimis*, Harris (1994), 19–20. It is interesting to add that also in the Model Penal Code the possibility of equating abortion to homicide is excluded; in fact, only the "person who has been born and is alive" (MPC § 210.0) is identified with the "human being" who is the victim of a criminal homicide (committed "purposely, knowingly, recklessly or negligently," MPC § 201.1). In Italian law, where the elimination of an embryo beyond the time limits prescribed by law is governed by the specific regulation on abortion, there are many doubts about a possible identification

Rome can be easily explained if we cast a quick glance at the different embryological theories developed in ancient times.

All Roman jurists followed the Stoic tradition according to which the foetus should be considered only as a portion of its mother, *mulieris portio vel viscerum* (D. 25.4.1.1 Ulp. 24 *ad ed.*); hence, a not-yet-born baby is not a human being (*partus nondum editus homo non recte fuisse dicitur,* D. 35.2.9.1 Pap. 19 *quest.*), but rather a hope of a human being (*spes animantis*, D. 11.8.2. Marc. 28 *dig.*).[66] This idea was also popular in the Greek world; for example, in the fifth century Empedocles denied the foetus a human nature, saying that it had to be considered, once again, "part of the mother."[67] Between the fifth and the fourth century BC, however, Hippocrates and his school showed for the first time that the foetus is alive, at least from a certain moment of the pregnancy on,[68] and this idea was accepted by the most important philosophers of the time, especially Aristotle.[69] Of course, this new medical stance could have significant consequences in the legal field, and it is in light of this new theory that the situation depicted in Lysias' speech can be understood. If so, we have a confirmation that causing the death of a foetus could sometimes require an institutional means of prosecution. We may also try to imagine under what circumstances such a case went beyond the limits of intraoecal repression, by sketching out some possible scenarios that are suggested by some hints provided by the context in which Lysias' fragments are preserved.

Let's first imagine (this is the situation we can reconstruct from fr. 5 and possibly also from fr. 2) that a man divorced his pregnant wife, and that afterwards she decided to abort, perhaps—I take this suggestion from a passage of the Digest I'll discuss below—due to her hatred toward the man. What could the ex-husband do in this situation? We don't have any evidence for Athens, but maybe we can infer something from the law code of Gortyn. There it is clearly stated that a divorced man did not lose his potential rights as to the conceived and not yet born child; after the birth, in fact, the woman had to show the baby to him, so that he could decide whether to legitimize it or not (col. III 44–52):

αἰ τέκοι γυνὰ κ-
ε[ρ]ε[ύο]νσα, ἐπελεῦσαι τõι ἀ-
νδρὶ ἐπὶ στέγαν ἀντὶ μαιτ-
ύρον τριõν. αἰ δὲ μὲ δέκσαι-
το, ἐπὶ τᾶι ματρὶ ἔμεν τὸ τέκ-
νον ἢ τράπεν ἢ ἀποθέμεν· ὀρκ-
οιοτέροδ δ'ἔμεν τὸς καδεστ-

between abortion and homicide, given the heated medical debate on the moment when life is supposed to begin; generally, however, abortion is not considered homicide.

66 Cf. Balestri Fumagalli (1983); Ferretti (2008), 11–16; Bianchi (2009), 273–341.

67 [Plut.] *Plac. phil*. 907c; 910c; on the point see Nardi (1971), 154–159.

68 For the sources see Nardi (1971), 93–115.

69 See *supra*, n. 12.

ὰνς καὶ τὸς μαίτυρανς, αἰ
ἐπέλευσαν.[70]

Now, if a divorced woman exposed her newborn baby without first showing it to the father, she had to pay a fine in the event that she was defeated in court (col. IV 8–17):

γ-
υνὰ κερεύονσ'αἰ ἀποβάλοι
παιδίον πρὶν ἐπελεῦσαι κατ-
ὰ τὰ ἐγραμμένα, ἐλευθέρο μ-
ὲν καταστασεῖ πεντέκοντα
στατερανς, δόλο πέντε καὶ ϝ-
ίκατι, αἴ κα νικαθεῖ.[71]

It is realistic to deduce by *a fortiori* reasoning that she was also subject to a penalty if the ex-husband found out that she had decided to abort. We don't know what the penalty was—we can only suppose it was a greater one. Thus, the law code of Gortyn provides a situation that is not resolved inside the *oikos* but instead is subject to the decision of the judge.

If so—and without entering the complex topic of the unity of Greek law (discussed in this volume by David D. Phillips), but just supposing that similar circumstances received similar regulations—, we might infer that also in Athens, in this particular situation where the *oikos*' mechanisms were not effective (since the husband had already divorced the woman!), matters concerning abortion required regulation by institutional means; and, since a specific action was lacking, a private action for homicide could do. It may be no coincidence, moreover, that exactly this same situation—at least according to Tryphoninus—led the emperors Severus and Caracalla (211 AD) to punish abortion for the first time in Roman law with a public sanction; in fact they established by a rescript that the pregnant woman who after the divorce had aborted in order not to generate a child by her hated previous husband was to be punished with temporary exile.[72]

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[70] "If a wife who is separated (by divorce) should bear a child, (they) are to bring it to the husband at his house in the presence of three witnesses; and if he should not receive it, the child shall be in the mother's power either to rear or expose; and the relatives and witnesses shall have preference in the oath as to whether they brought it" (the translation of this and the following passage from the Gortynian code is that of Willetts [1967]). The subsequent lines (col. III 52–IV 8) contain the rules concerning the child of an *oikea* born after the divorce. Also in this case, it is stated that the woman has first to show the baby to its father; only if the father decides not to rear it, will the child belong to the *oikea*'s owner.

[71] "If a woman separated (by divorce) should expose her child before presenting it as is written, if she is convicted, she shall pay, for a free child, fifty staters, for a slave, twenty-five." In fact the situation is more detailed and complicated than has been described in the text: see Maffi (1997), 19–20.

[72] D. 48.19.39 Tryph. 10 *disp.*; cf. D. 48.8.8 Ulp. 33 *ad ed.*; D. 47.11.4. Marc. 1 *reg*.

We can next imagine a second scenario, this time suggested by fr. 3 and 4. Let's suppose that a third person has hit a pregnant woman in the womb, causing her to abort. Evidently a situation like this could not be resolved by intra-familiar means, and for this reason the case we are dealing with is a kind of *topos* envisaged in many other ancient sources (for example, in a Sumerian legal collection, in the Code of Hammurabi, in the Bible)[73] as well as by the Roman jurists. The only situation contemplated in the Digest, however, concerns a pregnant slave, and Ulpian says that the person responsible for her abortion in consequence of a blow *Aquilia teneri quasi rupto* (D. 9.2.27.22 Ulp. 18 *ad ed.*; cf. D. 9.2.39 pr. Pomp. 17 *ad Muc.*); we don't know what happened if the abortion was caused in this way to a free woman, although some scholars think that an *actio utilis legis Aquiliae* could be appropriate.[74] As for the other texts, in a passage of *Exodus* in the Latin translation of Saint Jerome we read of a man who, for hitting a pregnant woman in a fight, has to pay the compensation required by the woman's husband through an arbitration.[75] More interesting for us, however, is the Septuagint version of the passage, where it is said that this penalty has to be paid only in the case that the aborted foetus is imperfectly formed; on the contrary, if the aborted foetus is perfectly formed, the offender shall give "life for life, eye for eye, tooth for tooth," and so on.[76] It is not clear how this Alexandrian variant from the Hebrew version could have been generated, but the point it is not relevant here.[77] It is, however, clearly noteworthy that it supposes the same distinction between not yet formed (hence non-living) foetuses and formed (hence living) ones outlined by Hippocrates and implied by the aforementioned fragments of Lysias' speech. Thus, both Lysias and the passage of the Septuagint gave the same answer to the question of how the violent act of a

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[73] For a detailed analysis of the various sources see Péter (1992), 216–229. Interesting information can be moreover found in the papyri quoted by Adam (1989), 201–203.

[74] Nardi (1971), 190 n. 115; Péter (1992), 228–229.

[75] *Ex*. 21.22 (*Vulgata*): *si rixati fuerint viri, et percusserit quis mulierem praegnantem, et abortivum quidem fecerit, sed ipsa vixerit: subiacebit damno quantum maritus mulieris expetierit, et arbitri iudicaverint*, "if men quarrel, and one strike a woman with child and she miscarry indeed, but live herself: he shall be answerable for so much damage as the woman's husband shall require, and as arbiters shall award."

[76] *Ex*. 21.22–5 (Septuagint version): ἐὰν δὲ μάχωνται δύο ἄνδρες καὶ πατάξωσιν γυναῖκα ἐν γαστρὶ ἔχουσαν, καὶ ἐξέλθῃ τὸ παιδίον αὐτῆς μὴ ἐξεικονισμένον, ἐπιζήμιον ζημιωθήσεται· καθότι ἂν ἐπιβάλῃ ὁ ἀνὴρ τῆς γυναικός, δώσει μετὰ ἀξιώματος· ἐὰν δὲ ἐξεικονισμένον ἦν, δώσει ψυχὴν ἀντὶ ψυχῆς, ὀφθαλμὸν ἀντὶ ὀφθαλμοῦ, ὀδόντα ἀντὶ ὀδόντος, χεῖρα ἀντὶ χειρός, πόδα ἀντὶ ποδός, κατάκαυμα ἀντὶ κατακαύματος, τραῦμα ἀντὶ τραύματος, μώλωπα ἀντὶ μώλωπος, "if two men fight and strike a pregnant woman and her child comes forth not fully formed, he shall be punished with a fine. According as the husband of the woman might impose, he shall pay with judicial assessment. But if it is fully formed, he shall pay life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe."

[77] Nardi (1971), 169 n. 53.

person who had caused an abortion to a woman in an advanced stage of her pregnancy was to be considered.

But we can also go further and—taking this idea from fr. 1, where it is said that the woman was represented in court by her adult son—propose a third scenario, supposing that the woman *de qua* is a widow. We know very little about widows, and particularly pregnant widows, in ancient Athens; one piece of the available information is however of primary importance for us, since it is the renowned (and probably Solonian in its kernel)[78] law quoted in the pseudo-Demosthenic *Against Macartatus*[79] as well as in the *Athenaion Politeia*[80] (cf. also Isae. 7.30). The law concerns orphans, heiresses, *oikoi exerēmoumenoi* and widows who stay in their husbands' *oikoi*[81] claiming to be pregnant (*phaskousai kuein*); the archon is ordered to take care (*epimeleisthō*) of them, so that, if somebody mistreats them (*hybrizē*) or does anything contrary to law or custom (*poiē ti paranomon*), he has the power to penalize him. If the offender seems to be deserving of a more severe punishment, the archon is to summon him and bring him before the Heliaia; if he is convicted, the Heliaia is to assess whatever penalty the convicted offender is to suffer or pay. Of course it is not my concern to deal with the many problems this text creates, nor is it my intention to analyse in detail the possible meaning of the expressions *hybrizein* and *paranomon ti poiein*. I think Adele Scafuro in her valuable essay on the identification of Solonian laws has given an accurate definition of them.[82] Comparing the pseudo-Demosthenic text with the passage of the *Athenaion Politeia* concerning the archon's jurisdiction (56.6),[83] she concludes that "*hybrizein* and *poiesai paranomon ti* were yoked to an umbrella concept which at some point came

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[78] Scafuro (2006), *passim* and esp. 179–180. On the law see also Cudjoe (2000), 206–235.

[79] [Dem.] 43.75: Ὁ ἄρχων ἐπιμελείσθω τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων καὶ τῶν οἴκων τῶν ἐξερημουμένων καὶ τῶν γυναικῶν, ὅσαι μένουσιν ἐν τοῖς οἴκοις τῶν ἀνδρῶν τῶν τεθνηκότων φάσκουσαι κυεῖν. τούτων ἐπιμελείσθω καὶ μὴ ἐάτω ὑβρίζειν μηδένα περὶ τούτους. ἐὰν δέ τις ὑβρίζῃ ἢ ποιῇ τι παράνομον, κύριος ἔστω ἐπιβάλλειν κτλ., "let the archon take care of orphans, heiresses, and families that are about to become extinct (*oikoi exerēmoumenoi*), and of women who remain in the houses of their deceased husbands declaring that they are pregnant. Let him take care of these, and not permit anyone to mistreat them. And if anyone mistreats them or does anything contrary to law or custom, he shall have power to penalize him."

[80] Arist. *Ath. Pol*. 56.7: ἐπιμελεῖται δὲ καὶ τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων, καὶ τῶν γυναικῶν ὅσαι ἂν τελευτήσαντος τοῦ ἀνδρὸς σκήπτωνται κύειν. καὶ κύριός ἐστι τοῖς ἀδικοῦσιν ἐπιβάλλειν ἢ εἰσάγειν εἰς τὸ δικαστήριον, "he (*scil*. the archon) takes care of orphans and heiresses and of women who, when their husbands die, declare that they are pregnant. He has full power to fine the offenders or to bring them before the jury-court."

[81] According to Harrison (1968), 39 n. 2, "the words ὅσαι μένουσιν suggest that there might be women who did not so remain."

[82] Scafuro (2006), 181.

[83] Scafuro (2006), 182–185.

to be called *kakōsis*."[84] And *kakōsis*—as we can deduce especially from some specific fourth-century cases and from some Solonian laws—"is treatment of others that may be unlawful or contrary to the social code […] or, […] wilful taking advantage of an individual in an act executed in the belief that the individual is without protection and the doer can get away with it."[85] Unfortunately, ancient authors do not provide a practical instance of *kakōsis* against a pregnant widow, since the only examples in logographic and lexicographic sources concerns *epiklēroi* and orphans; from these, we can state that *kakōsis* could consist either in a failure to fulfil an obligation (for example, the obligation of the husband to have intercourse with the *epiklēros* thrice a month) or in a plan to commit an unlawful act (for example, a plot to defraud an orphan of his estate).[86] The only possible but hypothetical evidence concerning *kakōsis* against a pregnant widow, as we can infer from a lemma in Harpocration quoting a Solonian law (F 54: Harpocr. [274], Suid. [502], Phot. [514,6] *s.v.* σίτος), might be the provision regarding failure to provide maintenance (*sitos*) to orphans and to women, the category of women likely including also pregnant widows.[87]

Given this situation, it is clear that we cannot go so far as to infer that causing or inducing a widow to abort could be included in the concept covered by *hybrizein* or *paranomon ti poiesai*.[88] However, it is enough to underscore that in this provision the pregnancy of the widow goes well beyond the boundaries of the *oikos* and acquires also a kind of public dimension. Since the law in general clearly has to do with the safeguard of inheritance lines in *oikoi* that were vulnerable under this point of view, and since, in particular, the pregnant widow served as a regulator for the right of succession in the house of her husband, the protection given to her granted protection also to the unborn baby.[89] Viewed from this perspective, it is conceivable that the "killing" of her child ought to be punished.

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[84] Scafuro (2006), 191; see also Harrison (1968), 101–104; Rhodes (1981), 633.

[85] Scafuro (2006), 191.

[86] Scafuro (2006), 187.

[87] Scafuro (2006), 189.

[88] On the point see also Cudjoe (2000), 79: "the question as to the extent to which the archon intervened in cases of maltreatment of widows and orphans […] does not appear to have a definite answer to it. In fact, the available evidence seems to suggest that in many respects the archon had little or no power of initiative against offenders who committed lawless acts against widows and orphans in spite of the powers conferred on him by the law."

[89] This observation could bridge a gap in our knowledge of the law of intestate succession traditionally attributed to Solon and preserved at [Dem.] 43.51. In fact, it is noteworthy that in the Solonian law posthumous children are not mentioned at all, since this law seems to concern only children who are already born and legitimate (*gnēsioi*), and it is evident that a *conceptus nondum natus* satisfies neither requirement. Only if there were not legitimate children a father disposed of his estate by will (Dem. 46.14; for a posthumous adoption initiated by the family or by the archon in the case that the head of the *oikos* had died without offspring and without having made a will see especially Isae.

Ultimately, there was no Athenian law banning abortion since, in ordinary circumstances, abortion was something private that affected only the *oikos*; thus, the head of the *oikos* had to take internal measures against the woman who decided to abort without proper consent (the same happened in Rome, from Romulus on). Of course, as far as the man was concerned, no legal action could be initiated against him if he induced his wife (or another woman of whom he was *kyrios*) to have an abortion, since he was simply exercising his right to do so. However, beyond this ordinary rule, there could have been some particular situations that required a more formal intervention or an institutional kind of control and punishment, in order to defend the rights of the father when these rights could not be enforced through his familial authority and power.

ABBREVIATIONS

DS Ch. Daremberg, E. Saglio, *Dictionnaire des antiquités grecques et romaines d'après les textes et les monuments*, Paris, 1877–1919

LSA F. Sokolowski, *Lois sacrées de l'Asie Mineure*, Paris, 1955

LSJ H.G. Liddell, R. Scott, *A Greek-English Lexicon*, revised and augmented throughout by H.S. Jones, Oxford, 1996

LSS F. Sokolowski, *Lois sacrées des Cités grecques*. Supplément, Paris, 1962

SEG *Supplementum Epigraphicum Graecum*

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7.30. For posthumous adoption and its legal compulsoriness see Rubinstein [1993], 25–28, 105–112). It is true, however, that there are some clues in our sources that a man about to die could give his wife some instructions *mortis causa* concerning an unborn baby (cf. e.g., Lys. 13.39–42; Hyper. *Lyc.* fr. 4); in case they were lacking, it was the duty of the archon to provide a guardian to the widow and to the unborn son.

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AVORTEMENT ET INFANTICIDE DANS L'ÉGYPTE HELLÉNISTIQUE. TRANSFERTS DE DROITS ET TRADITIONS GRECQUES : RÉPONSE À LAURA PEPE.

Le thème de l'avortement et de l'infanticide ne cesse d'interpeller les chercheurs tournés vers les sciences de l'antiquité tant ce thème trouve d'échos dans les questionnements des hommes et des femmes d'aujourd'hui. Le journal français *Le Monde* consacrait ainsi le 8 juin 2013 un important article aux controversées « boites à bébé », les *Babyklappen*, qui permettent d'abandonner anonymement un nouveau-né. Le système né à Hambourg en 1999, compte maintenant 98 « boites » disposées près d'hôpitaux ou de cliniques sur le territoire de l'Allemagne, et dont le modèle a fait école ensuite, en Autriche, en République Tchèque, ainsi qu'en Afrique du Sud, en Inde et au Japon.[1]

Laura Pepe montre, en jurisgréciste, avec talent et précision, la complexité de l'enquête pour le monde grec classique, en particulier dans l'Athènes des orateurs, et singulièrement chez Lysias. Nous adhérons à sa conclusion prudente et nuancée qui montre qu'un mari ne pouvait engager d'action en justice contre son épouse qui aurait avorté mais qu'il existait des circonstances où la femme pouvait être poursuivie de manière institutionnelle si elle avait porté atteinte aux droits du père dans le cadre de l'*oikos*. Notre ambition sera ici de poursuivre l'enquête dans le cadre des sources disponibles pour l'Égypte hellénistique. Nous la limiterons à deux aspects venant en complément des travaux menés par Sophia Adam dans le cadre du *Symposion 1982* sur la femme enceinte dans les papyrus grecs,[2] ou de la réflexion synthétique que nous avions proposée dans un ouvrage paru en 2010.[3]

Il s'agira ici d'étudier les documents permettant de réfléchir à la question de la responsabilité d'un avortement dans le cadre de la famille grecque en Égypte, et singulièrement du rôle du *kyrios*. Cette question peut être abordée grâce à deux sources grecques datant du premier siècle av. n. è., une *lex sacra* d'un sanctuaire de Ptolémaïs en Haute-Égypte, et une lettre privée d'un mari à son épouse provenant

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1 *Le magazine du Monde*, 8 juin 2013, p. 34 (de 2000 à 2010, 278 nouveau-nés ont été abandonnés dans les *Babyklappen* allemandes). Cf. *Le Monde* du 26 décembre 2009. Le système était courant en Europe du Moyen Âge jusqu'à la fin du XIX^{e} siècle.

2 Adam S., 1983. Cf. aussi Adam S., 1984. Kapparis K., 2002, Chap. 6 « Abortion and the Law », p. 167–194, ne cite ni la documentation papyrologique ni les travaux de S. Adam.

3 Legras B., 2010, p. 15–48. Nous y envisageons également les textes médicaux égyptiens et grecs sur la question.

d'Oxyrhynchos. Les lois sacrées d'époque hellénistique mentionnant l'avortement constituent de fait un corpus en constante augmentation, le dernier publié — à notre connaissance — étant une inscription de Mégalopolis en Arcadie, datant environ de 200 av. n. è., *SEG* XXVIII 421 reprise par Eran Luppu, *Greek Sacred Law. A Collection of New Documents (NGSL)* n°7, l. 6–7 (l'avortement y est nommé διάφθερμα). L'étude de ces deux sources doit être replacée dans un contexte documentaire où aucun *diagramma* royal et où nulle activité législative des trois cités grecques d'Égypte ptolémaïque ne concernent le droit familial en matière d'avortement ou d'infanticide.[4]

1. Des transferts de droit concernant l'avortement de l'Égypte vers la Grèce?

Il convient en premier lieu de rappeler la place que tient l'Égypte aux yeux des Grecs dans la problématique d'éventuels transferts de droit vers le monde des cités grecques sur la question de la mort provoquée du fœtus ou du nouveau-né. L'idée centrale est que les anciens Égyptiens protégeaient strictement l'enfant à naître. Diodore (I, 80, 3) affirme qu'ils « sont contraints de nourrir tous leurs enfants en vue de l'accroissement de la population, considéré comme le facteur essentiel de prospérité pour la campagne comme pour les villes ». Strabon donne la même information dans la *Géographie* (XVII, 2, 5). La question d'éventuels transferts de droit est abordée par Diodore (I, 77, 9) et par Plutarque, *Sur les délais de la justice divine* (7) à propos de la femme enceinte condamnée à mort. Diodore: « Les femmes enceintes condamnées à mort n'étaient pas exécutées avant leur accouchement. La même loi a été adoptée également par bon nombre de Grecs »; Plutarque: « mais ne pensez-vous pas par ailleurs que certaines cités grecques ont bien fait d'adopter cette loi d'Égypte (τὸν δ'ἐν Αἰγύπτῳ νόμον) selon laquelle la femme enceinte condamnée à mort est épargnée jusqu'à son accouchement? ». Philon d'Alexandrie, *Des vertus* (139) cite aussi cet emprunt en écrivant: « Quelques-uns des législateurs (ἔνιοι τῶν νομοθετῶν) me paraissent s'être inspirés de ces principes quand ils ont introduit la loi sur les femmes condamnées ». Diodore justifie cette loi, car « il est injuste qu'un innocent partage le châtiment d'un coupable, qu'une peine soit infligée à deux individus pour le même crime et en outre que, le crime ayant été perpétré du fait d'une intention mauvaise, un être dépourvu d'intelligence subisse le même châtiment; enfin, et c'est là l'essentiel, que le procès étant intenté à la femme enceinte à titre personnel, il ne convient pas de faire périr l'enfant qui appartient à la fois à son père et sa mère ». Philon met en avant, quant à lui « l'acte impie entre tous de tuer au même moment, en un seul jour, un petit et sa mère ». Moïse aurait trouvé cette loi tellement juste qu'il l'aurait étendue à tous les animaux de la terre.

Des parallèles existent de fait dans le monde grec. Élien, un auteur de la Seconde Sophistique, rapporte que le tribunal de l'Aréopage à Athènes condamna à mort une magicienne, mais qu'elle ne fut pas mise à mort avant d'avoir accouchée:

[4] Adam S., 1983, p. 10–11.

« En acquittant l'enfant innocent, ils ne condamnèrent à mort que la seule coupable (*Histoire variée* 5, 18) ». Le droit romain interdit d'inhumer une morte avant que le fœtus qu'elle porte ne soit expulsé, car « celui qui contrevient à cette loi se rend coupable de la mort d'un être animé auquel on peut espérer de conserver la vie » (*Digeste* 11, 8, 2). Le droit attique ne permettait pas de distribuer un bien à des héritiers latéraux quand la femme était enceinte. Il est de même possible de recenser 49 mentions des droits de l'enfant à naître dans le *Digeste.* Le papyrus *Rendel Harris* 1 (lignes 16–21), un papyrus littéraire écrit d'une main élégante qui date du troisième siècle de n. è., conserve un passage du stoïcien Musonius Rufus qui est également connu grâce à Stobée (IV, XXIV, 15 et IV, XXVII, 21). Musonius, qui écrit au premier siècle de n. è., affirme que l'avortement et la contraception étaient punis par les lois grecques. La justification qu'il en donne repose sur la nécessité d'une politique nataliste pour lutter contre le fléau social qu'est le manque d'enfants. La difficulté de ce témoignage est que Musonius ne cite aucune loi, et qu'il est aisé de le prendre en défaut. N'affirme t-il pas — à tort — que tous les législateurs ont interdit d'empêcher les conceptions? De toute évidence Musonius qui est avant tout un philosophe ne peut être considéré par ses lecteurs dans l'Égypte romaine comme une source historique fiable.[5] Le témoignage de Musonius Rufus n'a donc pas plus de valeur que d'autres textes qui ont été parfois invoqués pour affirmer l'existence de lois réprimant l'avortement avant le troisième siècle, en particulier le serment d'Hippocrate où il est dit: « Jamais je ne donnerai un médicament mortel à qui que ce soit, quelques sollicitations qu'on me fasse, jamais je ne serai l'auteur d'un semblable conseil, … Je ne donnerai pas non plus, aux femmes, de pessaire abortif. Je conserverai ma vie et ma profession pures et saintes ». Hippocrate demande en fait que soit respecté un principe plus général, la distinction entre l'être animé ou non. L'avortement devient impossible pour lui quand le fœtus devient animé. Il a de fait lui-même participé à un avortement et donné dans les *Maladies des femmes* (I, 68) des recettes de drogues abortives et des moyens abortifs directs.[6] L'historien et le juriste attaché à l'étude du droit égyptien ancien rencontrent les mêmes difficultés quand ils cherchent à isoler une loi sur la répression de l'avortement, la mort du fœtus ou l'infanticide. Un papyrus de Turin (1887 v*erso* 3, 1) mentionne bien une plainte officielle à Éléphantine sous Ramsès IV (env. 1156–1150 av. n. è.) ou Ramsès V (env. 1150–1147 av. n. è) contre un prêtre, Penanouqet, qui obligea une femme, la citadine Tarepyt, à avorter. Mais il s'agit — selon Pascal Vernus — d'une pratique « réprouvée ».[7] Aucun texte n'autorise à admettre qu'elle fût interdite par la loi.

[5] Cf. la critique de Musonius par Glotz G., 1904, p. 353 (3).
[6] Cf. Kapparis K., 2002, p. 7–31.
[7] Vernus P., 1993, p. 126.

2. Des responsables d'avortement ou d'infanticide au premier siècle av. n. è.?

L'inscription *Lois sacrées des cités grecques. Supplément (LSCG. Suppl.)* n°119, gravée sur une colonne conique de basalte, a été publiée en 1883 par E. Miller se faisant le porte-parole de Gaston Maspero (*Revue archéologique*, II, p. 181–183). Achetée chez un teinturier à Menshieh (l'antique Ptolémaïs), elle a d'abord été conservée au Musée de Boulaq, puis a été transportée au Musée gréco-romain d'Alexandrie où Evaristo Breccia a pu la voir et la photographier (*Catalogue général des antiquités égyptiennes du Musée d'Alexandrie. Iscrizioni greche et latine*, Le Caire, 1911, n°163, Planche XXX, 73). Elle a aujourd'hui disparu: les éditions de Franciszek Sokolowski (1962), d'André Bernard (1992) et de Jean Bingen (1993) se fondent donc sur les précédentes et sur la photographie de Breccia. La mise en caisses des collections des Musée en attendant sa reconstruction et son réaménagement (seule la façade du Musée étant conservée) laisse peu d'espoir de pouvoir la retrouver, si elle était encore présente dans les collections, dans un proche avenir. Il s'agit d'une loi sacrée sur les délais de purification à respecter pour entrer dans un sanctuaire, qui selon A. Bernand serait celui d'Asklépios et d'Hygie.[8] Ce règlement relatif à l'obligation d'être ἁγνός pour pénétrer dans un espace sacré trouve de nombreux parallèles dans le monde grec et hellénistique.[9] Il s'agit clairement de prescriptions religieuses faisant intervenir la notion d'impureté, et non celle, juridique, de culpabilité. Ces prescriptions consistent en des jours d'interdiction d'entrer dans le sanctuaire, et non dans des sanctions de droit public ou privé. Son intérêt est cependant grand pour les jurisgrécistes, car il fournit une source incontestable pour l'histoire des mentalités sur l'avortement dans une cité grecque de la Basse époque hellénistique. Le débat historiographique entre épigraphistes a été intense afin de déterminer très précisément les impuretés rituelles liées à l'avortement. La discussion a été d'autant plus vive que la pierre lacunaire a incité certains savants à faire des propositions que d'aucuns ont pu considérer comme audacieuses. Ces interdits sont, comme dans l'ensemble du monde grec et hellénistique, les relations sexuelles, la naissance et la mort. F. Sokolowski qui ne donne pas de traduction globale du texte, concentre son commentaire sur les lignes 4 et 7. Il propose de lire à la ligne 4 ἀπ' ἀπαλλ[αγῆς, un terme qui « désigne la mort d'un *fœtus* », en renvoyant aux inscriptions mentionnant l'avortement où les termes utilisés sont φθορεῖον (drogue abortive), *LSAM* n°20, l. 20–22 (Philadelphie, I^{er} siècle av. n. è.); διάφθορά, *LSCG*, *Suppl*. n° 54, l. 6 (Délos, fin du II^{e} siècle av. n. è) et *SEG* XIV 529, l. 17 (Kos, II^{e} siècle av. n. è.);[10] φθορά, *LSCG*, *Suppl*. n° 91 l. 11

[8] Bernand A., 1992, II, p. 117.

[9] Cf. Bingen J., 1993, p. 219.

[10] Liste plus complète des lois sacrées concernant l'avortement dans Luppu E., 2005, p. 209–210: *IG* II^2 1365, l. 22 (I^{er} siècle de n. è.): φθορά; *LSCG* 55, l. 7 (Attique, II^{e} siècle de n. è.): φθορά; *LSCG* 139, l. 12 (Lindos, II^{e} siècle de n. è.): φθορά; *LSAM* 84, l. 5 (Smyrne, II^{e} siècle de n.è): ἔκτρωσις; *LSCG* 154 A, l. 24 (Kos, III^{e} siècle av. n. è.) : forme verbale ἐκτρῶι. Mais le terme ἐκτρωσμός reste uniquement attesté dans la loi

(Lindos, III^e siècle de n. è.) et ἐκβάλλω, *LSCG*, *Suppl*. n°115 B, l. 24–27 (Cyrène, fin du IV^e siècle av. n. è.). Il passe ensuite dans son commentaire à la ligne 7 qui concerne « l'exposition des enfants ». Il ne fait curieusement aucun commentaire personnel sur les lignes 5 et 10 où figure (à deux reprises donc) le mot ἐκτρωσμός, en renvoyant seulement en note à l'analyse très générale de Gerhard Plaumann:[11] « Plaumann croit que les règlements distinguent entre l'avortement et l'accouchement normal suivi de l'exposition ou de l'allaitement d'enfant ». Il est curieux aussi qu'il ne fasse pas le rapprochement avec le terme ἔκτρωσις qui figure dans une loi sacrée de Smyrne publiée en 1953, *LSAM* 84, l. 5, relative au culte de Dionysos Bromios, et avec une loi sacrée de Kos relative au culte de Déméter, *LSCG* 154 A, l. 24 où se lit la forme verbale ἐκτρῶι.

André Bernand propose à l'inverse des restitutions éclairées par une traduction intégrale portant en particulier sur les lignes qui nous intéressent ici plus particulièrement, les lignes 4–5 et 9–10.

Lignes 4–5:... ἂν ἀπαλλ[αγῆ ἡ γο]ι[ν]ή, ἐκτρωσμοῦ συν[ελθόντος, μ΄]·

« … Mais si meurt l'embryon, à la suite d'un avortement, quarante jours »

Lignes 9–10: ... [τὴν μὲν αἰτί]ιαν ἐκτρωσμοῦ μ΄, [ἀπαλλαγῆς ἕνεκα]·

« la responsable d'un avortement, quarante jours, à cause de la mort de l'embryon ».

La lecture du mot ἐκτρωσμός est sûre. Mais son interprétation pose la question du caractère volontaire ou accidentel de la mort de l'embryon. Il est attesté depuis Aristote (*Historia Animalium* 583 b) pour lequel il désigne la perte involontaire, non provoquée, de l'embryon dans les quarante jours après la conception.[12] Il s'agit donc ici d'une « fausse couche ». Dans le même passage Aristote utilise le terme ἔκρυσις, « écoulement », pour la perte du fœtus dans les sept premiers jours, et les termes διαφθορά/διαφθείρω pour désigner de manière générale l'avortement. Les lois sacrées ne font ordinairement pas de différence entre l'avortement provoqué et l'avortement involontaire, en se concentrant sur d'autres caractères et spécificités des avortements. La *lex sacra* de Cyrène, *SEG* IX 72=*LSCG, Suppl*. 115, B l. 24–27 distingue ainsi la visibilité ou non de l'embryon « lorsqu'une femme avorte, si le fœtus est visible, la souillure est celle qui vient d'un mort; s'il n'est pas visible, la maison est souillée comme par une naissance ». Le grand intérêt de la lecture d'André Bernand — si elle était exacte — serait de fournir un premier témoignage sur la notion de responsable d'un avortement (ligne 9–10). Il ne s'agit donc pas

sacrée de Ptolémaïs.

[11] Sokolowski F., 1962, p. 202 (1). L'analyse renvoie à Plaumann G., 1910, p. 55–57.

[12] Ce terme est construit sur le même radical que ἔκτρωμα et ἔκτρωσις. Le terme ἄμβλωσις utilisé par Lysias, comme le rappelle Laura Pepe, n'apparaît ni dans les papyrus ni dans les inscriptions grecques d'Égypte.

clairement ici d'une « fausse couche ». A. Bernand souligne dans son commentaire cette volonté de tuer le fœtus: « quarante jours (de période de purification) pour un avortement. C'est ce geste, qui supprime la vie, qui est jugé la souillure la plus grave ».[13] A. Bernand ne dit rien de cette responsable (ἡ αἰτία) de l'avortement, mais il doit s'agir d'une avorteuse. La lecture proposée des lignes 4–5 expliquerait la gravité de cette souillure, l'avortement (ἐκτρωσμοῦ συν[ελθόντος) provoquant « la mort de l'embryon » (ἂν' ἀπαλλαγῇ ἡ γο]ι[ν]ή).

Or cette lecture doit être remise en cause, comme l'a montré Jean Bingen dans une réédition très critique vis-à-vis d'André Bernand, où il dénonce sa méthode (l'absence de lettres pointées ce qui laisse à penser que le texte est certain), des fautes de grec (un barbarisme l. 2).[14] Il faut en effet pour le regretté savant bruxellois dissocier les lignes 4 et 5. Le mot ἀπαλλαγή doit être pris dans son sens général de « mort », « décès »: cette ligne donne donc la période de purification (perdue) en cas de décès.[15] L'avortement est bien mentionné ligne 5, la période de purification étant également perdue: ἀπ' ἐκτρωσμοῦ συν[… . Il se refuse par ailleurs à restituer [τὴν μὲν αἰτί]αν aux lignes 9 et 10 et ne propose (avec des lettres pointées) que les deux premières lettres de la ligne 10 (c'est-à-dire la même expression qu'à la ligne 5): ἀπ' ἐκτρωσμοῦ. Il n'est donc plus question de femme « responsable de l'avortement »).

Cette lecture de J. Bingen, que nous suivons, conduit à réduire à néant le commentaire fondé sur les interprétations d'A. Bernand, puisqu'il devient impossible par la critique interne du document d'interpréter le terme ἐκτρωσμός, comme un avortement volontaire ou involontaire (la fausse couche).

Son interprétation générale du texte est cependant très intéressante au niveau des relations entre les hommes et les femmes, et au niveau des transferts culturels. Il propose une solution convaincante aux répétitions du texte. La clé du texte est en effet le sexe des personnes visées, hommes ou femmes.[16] Les lignes 3 à 8 se réfèreraient uniquement aux hommes et les lignes 10 à 14 aux femmes. On observe que les délais de purifications sont les mêmes pour les deux sexes, à l'exception de cas mentionnés lignes 11–14. Seule la femme est concernée par le délai de 7 jours imposés après les menstruations (l. 13). Après des relations sexuelles, le temps de purification est de deux jours, mais la femme doit en sus accomplir un rite purificateur avec du myrte. Les prescriptions relatives à la maladie (τὸ πάθος, l. 3) et aux menstrues (l. 13, καταμήνια) ont par ailleurs suscité un débat sur les transferts de pratique religieuse vers le monde hellénistique. Il s'est cristallisé dans l'*opus* de Louis Moulinier sur le pur et l'impur, qui y voit des « influences

[13] Bernand A. 1992, II, p. 118.

[14] Il s'agit de l'absence d'article devant le participe substantivé ὑποκε[ίμενα.

[15] Luppu E., 2005, p. 209, se demande s'il ne s'agirait pas d'une fausse couche (« miscarriage? »). Mais il n'explicite pas son interrogation (on peut supposer qu'il suit ici F. Sokolowski).

[16] Sur les rapports de genre dans les lois sacrées, cf. en général Cole S.G., 1992.

barbares ».[17] Ceci est contestable, car on trouve trace de ces interdits dans les règlements attiques,[18] et rien ne permet — en l'état actuel de nos connaissances — de déceler des influences égyptiennes dans les institutions politiques et religieuses de la cité grecque de Ptolémaïs.[19] Il s'agit donc bien plutôt, durant l'époque hellénistique, d'une extension d'interdits inscrits antérieurement dans les mentalités grecques comme l'a montré Laura Pepe. Cet élargissement des interdits se poursuit dans les siècles postérieurs: au troisième siècle de n. è. l'inscription de Lindos, *LSCG. Suppl.* 91, l. 11 étend l'interdiction de pénétrer dans un sanctuaire pour toute personne en contact pour une fausse couche (φθορά) « d'une femme, d'une chienne ou d'une ânesse ». On constatera enfin le caractère panhellénique de la durée de quarante jours d'interdiction à la suite d'un avortement pour toutes les lois sacrées publiées à ce jour.

La question de la responsabilité d'une personne pour la mort d'un enfant par infanticide à la naissance se présente sur un terrain plus solide avec un papyrus d'Oxyrhynchos, le *P. Oxy*. IV 744, qui a fait couler beaucoup d'encre depuis sa publication en 1904 par Bernard P. Grenfell et Arthur S. Hunt. Il montre clairement — si le texte est bien établi — que la décision d'éliminer (l. 10: ἔκβαλε) un enfant nouveau-né fait l'objet d'une injonction du père, Hilariôn. La volonté doit s'imposer à sa femme, Alis (et à son entourage), mais le document ne dit pas si la mère a respecté l'ordre de son époux. La lettre exprime aussi une vraie tendresse conjugale entre les époux qui sont frère et sœur. La lettre s'explique par l'éloignement d'Hilariôn qui se trouve à Alexandrie alors que la maison familiale doit se trouver à Oxyrhynchos. Nous en donnons la traduction d'après le texte établi par l'*editio princeps*:[20]

> *Hilariôn à sa sœur Alis, les plus nombreuses salutations ainsi qu'à dame Bérous et à Apollônarion. Sache que nous sommes encore maintenant à Alexandrie. Ne t'inquiète pas. S'ils retournent tous chez eux, moi je reste à Alexandrie. Je te prie et te demande avec insistance: prends soin du petit. Dès que nous recevrons notre salaire, je te l'enverrai. Si, ce qui est maintenant très vraisemblable* (πολλαπολλων = πολλὰ πολλῶν?)*, tu accouches* (τέκνις)*, si c'est un garçon, garde-le; si c'est une fille, expose-la. Tu as dit à Aphrodisias: "qu'il ne m'oublie pas." Comment*

[17] Moulinier L., 1950, p. 64

[18] Pour les menstrues, *IG* II^2 1365, l. 20 (premier siècle de n.è.). Pour les autres documents cf. Luppu E., 2005, p. 210.

[19] La loi sacrée *SEG* XXVIII 421=*NGSL* n°7, l. 8–9 concerne un sanctuaire dédié aux cultes égyptiens de Mégalopolis en Arcadie, mais cet exemple reste isolé. Le règlement délien, *LSCG. Suppl.*54, l. 7–8, est relatif au culte d'une déesse Syrienne, peut-être Atargatis. Cf. Bingen J., 1993, p. 226 (28): « S'il y a 'influence barbare', ne l'imputons pas à l'Égypte ».

[20] Trad. fr. dans Legras B., 2010, p. 39.

pourrais-je t'oublier? Je te prie donc de ne pas t'inquiéter. L'an 29 de César (Auguste), (mois de) Payni, 13.

(Verso) (Lettre) à délivrer à Alis de la part d'Hilariôn.

Cette lettre singulière, bien connue des papyrologues,[21] a suscité deux articles contradictoires dans la *ZPE*, le premier en 1998 (t. 121) par Stephanie West, et le second en 1999 (t. 127) par Paul McKechnie. La discussion porte sur la ligne 9 où S. West lit τέκηι et non τέκηις (τέκηι{ς}) et propose de voire dans l'énigmatique πολλαπολλων un sobriquet (« A nickname ») pour Apollônarion, un surnom peut-être fondé sur une mauvaise prononciation enfantine. Ce serait donc elle la femme enceinte: « Si Apollônarion accouche, si c'est un garçon garde-le: si c'est une fille, expose-la ». Apollônarion serait une femme de condition inférieure appartenant à la famille d'Hilariôn. Ce serait probablement une femme seule, une femme non mariée plutôt qu'une veuve. Dans ce cas, il ne serait plus question d'une injonction d'infanticide d'un mari à son épouse, mais d'éliminer à la naissance la fille d'une femme (une servante?) de la maison. Le contexte ne serait plus matrimonial, mais social. La réponse est venue dès l'année suivante avec P. McKechnie qui se refuse à suivre ces propositions et maintient l'interprétation commune. Ce document trouve donc sa place dans l'importante documentation d'époque romaine concernant l'abandon d'enfants à la naissance, dont le destin était soit la mort, soit d'être recueillis et de devenir des esclaves. Le texte concernerait bien le pouvoir du père de famille. Cette documentation sur les enfants ἀναίρετοι, ἀπὸ κοπρίας, κοπριαναίρετοι a été amplement étudié, en dernier lieu par Sarah Pomeroy et Olivier Masson.[22] On sait que cet abandon touchait surtout les petites filles, et que cette question est centrale pour tous les spécialistes du statut des femmes dans l'Égypte ptolémaïque et romaine. Comme dans les autres sociétés grecques, les petites filles font l'objet d'abandon, que l'on ne peut quantifier en Égypte à la différence d'autres espaces. Dans les cités hellénistiques de Milet et d'Ilion en Asie mineure, le taux d'exposition des filles atteint 50% des naissances.[23] Cependant les sources montrent une rupture entre l'époque hellénistique et l'époque romaine. Les sources pour l'époque ptolémaïque n'offrent *stricto sensu* aucune source documentaire certaine concernant l'abandon des bébés filles. Mais le thème est bien

[21] Cf. *BL* I, p. 328; *BL* II 2, p. 97; *BL* III, p. 132; *BL* IV, p. 60; *BL* VII, p. 130; *BL* VIII, p. 237; *BL* IX, p. 181; *BL* XII, p. 136. Les éditions sont nombreuses: A. Deißmann, *Licht von Osten*, 4e éd., Tübingen, 1923, p. 134–136; *Sel. Pap.* I 105; G. Millighan, *Selections from the Greek Papyri*, Cambridge, 1910, p. 32–33, n°12; A. Laudien, *Griechische Papyri aus Oxyrhynchos für den Schulgebrauch ausgewählt,* Berlin, 1012, p. 2, n°1; S. Witkowski, *Epistulae Privatae Graecae quae in papyris aetatis Lagidarum servantur*, Leipzig, 1911, p. 131–133, n°72; H. Lietzmann, *Griechische Papyri*, Bonn, 1924, p. 7, n°5.

[22] Pomeroy S., 1986; Masson O., 1996.

[23] Brulé P., 1990.

présent dans la littérature alexandrine.[24] La *lex sacra* de Ptolémaïs du premier siècle av. n.è. peut être ptolémaïque ou romaine: le *P. Oxy*. IV 744 date du principat augustéen. À l'inverse les sources d'époque romaine montre clairement l'importance du phénomène d'abandon des filles à la naissance. Le phénomène pourrait s'expliquer par la volonté des immigrants hellénophones d'élever toutes les filles pour favoriser une endogamie grecque dans le royaume lagide.[25]

Conclusion

Notre conclusion se voudra modeste et prudente, en raison des difficultés que présente notre documentation. Un éventuel transfert de droit de l'Égypte ancienne vers le monde des cités grecques ne peut être prouvé, en l'absence de tout texte législatif égyptien connu concernant l'avortement. Cette absence doit être mise en relation avec la question discutée de l'existence d'une éventuelle loi interdisant l'avortement dans la Grèce des cités. Les deux documents étudiés, l'un épigraphique, l'autre papyrologique, ne permettent pas plus d'affirmer que la législation ptolémaïque aurait traité de la question de l'avortement et de l'infanticide. La loi sacrée de Ptolémaïs traduit une approche strictement religieuse de l'impureté, et la lettre privée d'un mari à son épouse, qui et clairement datée de l'époque augustéenne, pose en fait la question du pouvoir de décision du *kyrios* sur les membres de sa famille, mais sans permettre d'affirmer péremptoirement que l'épouse ait obéi à l'injonction d'infanticide de leur bébé-fille. La tradition grecque tend cependant à considérer que le père avait ce pouvoir et qu'une épouse légitime ne pouvait socialement et juridiquement s'y opposer.

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[24] Cf. Posidipppe, *Hermaphrodite* (F 12).

[25] Cf. Legras B. 2010, p. 32–33.

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HUBRIS AND THE UNITY OF GREEK LAW*

The question of the unity of Greek law has exercised scholars since the nineteenth century and remains a subject of debate.[1] For the last half-century or so, participants in this debate have tended, consciously or not, to divide themselves along geographical and linguistic lines. Starting with Ludwig Mitteis,[2] those on the European continent have generally championed the concept of the unity of Greek law, while American and British scholars, taking their lead from Moses Finley,[3] have usually rejected it.[4] For the most part, the unity controversy has focused on substantive law, but in 2005, opening a new round in the debate, Michael Gagarin drew attention to the realm of procedural law, adopting a position of compromise between the unitarian and separatist camps in suggesting that the Greek *poleis* demonstrated a significant legal unity in procedure but not in substance.[5] I propose to show here that evidence for unity in the Archaic and (especially) Classical periods exists in at least one specific and important area of substantive law. I will begin by offering explicit criteria by which questions of Greek legal unity (whether substantive or procedural) should be judged; I will then demonstrate that hubris, as a

* Embryonic versions of this paper, in whole or in part, were delivered at meetings of the Friends of Ancient History (November 2006) and the Classical Association of the Middle West and South (April 2007), and at the University of California, Santa Barbara (January 2011). I wish to thank those audiences, and above all the participants at Symposion 2013, including in particular my respondent Adriaan Lanni, for their thoughtful comments and stimulating discussion.

1 *Pace* Rupprecht (2005) 329.

2 Mitteis (1891).

3 Finley (1951), (1975).

4 Before Finley disputed it, Mitteis' unity doctrine was the *communis opinio*. For a useful summary of the history of this debate see Gagarin (2005). As Gagarin notes, one prominent exception to this general categorization of scholars is the unitarian Raphael Sealey: see Sealey (1990) 151–60, (1994) 59–89.

5 Gagarin (2005), esp. 40: "The unity I find in Greek law, therefore, is a general procedural unity, grounded in the archaic and classical periods, not the substantive unity, grounded in Hellenistic law, in which Mitteis and his followers believed." Gagarin was critiqued by Thür (2006), who commences by pronouncing that "Greek law exists" ("Griechisches Recht existiert," 23) but concludes that its procedural unity lies in the eye of the (modern) beholder ("Die 'Einheit' des griechischen Prozessrechts liegt in der Art und Weise, wie man es heute—rückblickend—betrachtet," 57).

substantive legal category, meets these criteria and therefore may be meaningfully designated as a concept of "Greek" law.[6]

I. The unity question and the problem of method

Each side of the unity debate cites essential and incontestable facts of the Archaic and Classical Greek world as the basis for its position. Separatists note the autonomy of the hundreds of individual *poleis*, and the instances of observable difference between *poleis* in discrete and fundamental areas of law (see *infra*, n. 17). Unitarians adduce the common heritage of culture and custom—"cultural nationhood," in Finley's phrase[7]—that all Greeks shared, local institutional, dialectal, ethnic, and legal variation notwithstanding. In the famous and oft-cited[8] words of Herodotus (8.144), "Greekness" (τὸ Ἑλληνικόν) is defined by common blood, language, sanctuaries of the gods, and sacrificial rites, and by "similar customs" (ἤθεά τε ὁμότροπα). Although customs (ἤθεα) may of course include laws (νόμοι), this broad summary of Hellenic identity is insufficient evidence for meaningful legal unity.[9] The assertions of Panhellenic legal norms in the Attic orators, such as they are, usually are of little more value, but occasionally they may be significant. In Lysias 1, for example, Euphiletus contends that *moichoi* (seducers) traditionally receive severe penalties not only in Athens but in all Greece (ἐν ἁπάσῃ τῇ Ἑλλάδι, Lys. 1.1–2). This may amount to no more than a statement that the Greeks generally regarded sleeping with another man's wife or other female dependent as a Very Bad Thing.[10] Harsh penalties (allegedly) meted out to such offenders throughout Greece would not necessarily demonstrate Greek legal unity any more than the death penalty available for murder in California, China, and Saudi Arabia indicates a unity among those systems. But if we find specific support for Euphiletus' assertion in the presence of *moicheia* as a distinct legal category elsewhere in Greece, we may hypothesize a degree of unity in this area (see *infra* with nn. 20–24).

The traditional methodological weakness of the unitarian camp has been excessive reliance upon the general statements of cultural commonality expressed by Herodotus, the orators, and others. Inaugurating the debate, Mitteis claimed that "the numerous individual statutory laws of the Greek states rested, in essence, on the same juristic concepts, and the same institutions evolved with only slight

6 Cf. Ruschenbusch (1965) 306–7; Wolff (1975) 21 (*infra*, n. 15).

7 Finley (1975) 134.

8 E.g., Biscardi (1982) 9; Wolff (1975) 21 with n. 40.

9 Finley (1975) 134–35 stresses the importance of distinguishing νόμος 'custom' from νόμος 'law' in the discussion of Greek legal unity; but on the problems posed by such a distinction see Low (2007) 93–102.

10 Note, though, that in this area, as in so many others, Sparta represents an anomaly. Under certain circumstances, Spartan law permitted behavior that fell under the Athenian rubric of *moicheia* (X. *Lac. Pol*. 1.7–9; Plut. *Lyc*. 15.12–13; Polyb. 12.6b.8; MacDowell (1986) 82–88).

nuances."[11] But such evidence as he provides for this position[12] contains little of substance:[13] we find cited the boilerplate contrasts drawn by Greek authors of varying dates between Greek and barbarian customs; Isaeus 2.24 on the alleged unity of Greek (and barbarian!) law on adoption, which ranks with Lysias 1.1–2 on *moicheia* in terms of evidentiary value; and Dio Chrysostom's *obiter dictum* on the *koina dikaia* of Greece (37.17: the Corinthians, along with Thebes and Elis, resisted Sparta ὑπὲρ τῶν κοινῶν δικαίων τῆς Ἑλλάδος), which refers not to a commonality of legal principles or systems but merely to the right of *polis* autonomy (cf. Dem. 2.24: the Athenians resisted Sparta ὑπὲρ τῶν Ἑλληνικῶν δικαίων), a principle that all Greeks professed, however much some violated it in practice. As recently as 1982, Arnaldo Biscardi asserted that "notwithstanding the indisputable diversity of the various city regulations, it is indeed true that among these there existed a common denominator made up of a foundation of juridical principles shared by all the *poleis*," and that the "unitary cultural foundation" attested by Herodotus "could not fail to reflect itself in certain basic principles common to the quite diverse juridical regulations."[14] But basic principles[15] can only take us so far;[16] and the attested variations between the laws of different *poleis* have been shown in some cases to be major discrepancies that appear to result from very different root concepts.[17] In order to discover meaningful unity in Greek law, we must be able to demonstrate instances in which these common basic principles (to the extent that

[11] Mitteis (1891) 62: "die zahlreichen einzelnen Statuarrechte der griechischen Städte im Wesentlichen auf den gleichen juristischen Anschauungen ruhten und die gleichen Institutionen mit nur geringen Nuancen entwickelten."

[12] Mitteis (1891) 62–63 with nn. 1–3.

[13] Cf. Finley (1975) 135.

[14] Biscardi (1982) 8–9: "nonostante la indiscutibile diversità dei vari ordinamenti cittadini, è pur vero che tra di essi esisteva un comune denominatore costituito da un fondo di principî giuridici condivisi di tutte le *poleis*. ... questo fondo culturale unitario...non poteva non riflettersi in alcuni principî di base, comuni ai pur diversi ordinamenti giuridici."

[15] Biscardi, *supra* n. 14; cf. Wolff (1965) 2516, (1975) 21: "Grundvorstellungen," including "dogmatic concepts common to all Greeks such as δίκη, βλάβη, ὕβρις, ὁμολογεῖν, κύριος" ("an allen Griechen geläufige dogmatische Begriffe wie δίκη, βλάβη, ὕβρις, ὁμολογεῖν, κύριος"); Sealey (1994) 67 ("underlying ideas"); Rupprecht (2005) 329 ("basic juridical conceptions").

[16] Finley (1975) 137 is most emphatic with regard to the nature of this limitation: "Is it illuminating or useful to reduce the basic principles of the law of property to three assertions—that private ownership exists, that the next-of-kin other than blood-heirs have no claim, and that the metaphysics of ownership are not Roman—and then to dismiss all else as minor detail, mere nuance? If that is all that is meant by the unity of Greek law, there can be no argument, but there is equally nothing worth discussing. What does such a generalization tell us about the Greeks or their law? Of what use is it conceptually or as an analytical tool?"

[17] See especially Finley (1975) on marriage, family, and property law, and Finley (1951) on sale.

they are common or basic) are specifically manifested in actual law, whether substantive or procedural.[18]

To this end, we should apply three criteria. The first and most frequently employed is the attestation of a significant similarity in the laws of two or more independent *poleis*. At present, such comparisons, and the resulting commonalities asserted or disclaimed, tend prominently to feature Athens and Gortyn.[19] Obviously, the greater the number of *poleis* that exhibit a common legal concept, the stronger the argument for unity; unfortunately, we must rely on very limited source material, since we possess little evidence for the laws of the majority of the Greek world. On the other hand, within these limited sources, we must account for the possibility of anomaly. The absence of a concept from, say, the preserved Gortyn codes, or the demonstration that Gortynian and Athenian law diverge significantly on a given topic, does not prove that Greek legal unity is a fiction. Unity is not, or at least should not be, an all-or-nothing proposition. Just as the anomalous treatment of gambling and prostitution in the state of Nevada does not compromise the unity of American law, so local divergences, even significant ones, on discrete topics do not suffice dispositively to refute the proposition of Greek legal unity.

We should rather expect, owing to the number, autonomy, constitutional variation, and wide geographical distribution of the *poleis*, that such legal commonalities as exist would be reflected to different degrees and in different areas of law in the various *poleis*. So, for example, both Athens and Sparta possessed a substantive category of *moicheia*, which was regulated by law certainly at Athens ([Dem.] 59.64–70, 87; Dem. 23.53; Lys. 1.30–31; Aeschin. 1.91, 183; [Arist.] *Ath. Pol*. 59.3) and possibly at Sparta (Plut. *Lyc*. 16–18 notwithstanding).[20] Although the

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[18] Cf. Finley (1975) 138: "Any discussion of the unity of Greek law, whether unity is deemed to be total or partial, must eventually come down from the stratosphere of juristic mode of thought (*Rechtsdenken*) and juristic sensibility (*Rechtsgefühl*) to mundane operational—and that means historical—questions."

[19] E.g., Sealey (1994) 59–89; Gagarin (2005); to a lesser degree, Finley (1975); Thür (2006).

[20] Plutarch reports the story that one Geradas, a Spartiate of the distant past, when asked by a foreigner about the punishment of *moichoi* at Sparta, responded that they did not exist; when pressed, he stated that the penalty was payment of a bull so large that it could extend its head over Mt. Taygetus and drink from the Eurotas. To the question, "How could there be so large a bull?" Geradas answered, "How could there be a *moichos* in Sparta?" While the foreigner's initial question is perhaps broadly informative (implying that *moichoi* are punished everywhere; cf. Lys. 1.1–2: *supra* with n. 10), this anecdote proves only that by the time of Plutarch this is what the Spartans wanted to believe about their ancestors. It is inconceivable that there did not exist at least a "rule" (MacDowell (1986) 87) and a remedy—in other words, an *agraphos nomos*—governing illicit heterosexual intercourse; unusual sexual license (see the references in n. 10) does not imply total sexual license. MacDowell plausibly hypothesizes (*ibid*.) that "a man might not have sexual intercourse with another man's wife unless the husband gave permission,

two cities conceptualized the term differently (*supra* with n. 10), in both "it covered wrongful intercourse with either an unmarried or a married woman."[21] The same is evidently true in the Great Code of Gortyn (*IC* IV 72 col. 2, lines 20–45).[22] Especially since, from the point of view of comparative law, such a category spanning improper sexual relations with both married and unmarried women is a rarity,[23] the existence of laws regarding *moicheia* in such disparate *poleis* as Athens and Gortyn (and possibly Sparta)—not to mention the humiliating punishments for *moichoi* elsewhere in Greece (sanctioned by custom if not by statute)—qualifies *moicheia* for investigation as a "Greek" legal concept.[24]

Hubris parallels *moicheia* significantly in these respects. Hubris is a concept that is both generally and characteristically Greek, and section II below will document the existence of hubris as a substantive legal category in multiple Greek states. These findings should be neither assumed *a priori* nor dismissed on the grounds that hubris, as the designation of a behavioral phenomenon, was uniquely Greek and apparently universal throughout the Greek world. Behavioral phenomena do not automatically or necessarily translate into legal concepts. *Schadenfreude* and *machismo* are both behavioral terms originally unique to speakers of German and Spanish, respectively—and the Greeks would have labeled some manifestations of each as hubris—but neither, to my knowledge, is the name of a legal offense.

The second criterion for the analysis of Greek legal unity is the presence of a substantive or procedural phenomenon in a community composed of Greeks from different *poleis*. We can hypothesize that the laws of such a community tend to

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nor with an unmarried woman unless, being unmarried himself, he carried her off to keep her in his own house (which would constitute marriage)."

21 MacDowell (1986) 87. For the Athenian definition of *moicheia* as wrongful 'seduction' of a woman regardless of her marital status—rather than 'adultery', which would require that the woman be married—see [Dem.] 59.65–70, where an allegation of *moicheia* involves Phano, an unmarried woman; MacDowell (1978) 124–25; Harris (2004b); Patterson (1998) 114–25; Omitowoju (2002) 73–95, esp. 76–77. (Dover (1994) 209 and Carey (1995) 407–8 note that marriage is not a necessary condition for *moicheia* but nonetheless translate it 'adultery'.) *Contra* Lipsius (1905–15) 429; Cohen (1991) 98ff.; Todd (1993) 277–78.

22 Schmitz (1997) 111–14, 124–28; for comparison to Athens see also (e.g.) Cole (1984) 110–11; Harris (2004a) 290.

23 Cohen (1990) 147 notes that such a category would be "unique among early Western and Near Eastern legal systems" (cf. Cohen (1991) 99); this observation contributes to his argument that *moicheia* must mean 'adultery'. But we should not elide demonstrably well-evidenced anomalies simply because they are anomalous (cf. Omitowoju (2002) 73).

24 Cf. Cantarella (2005) 243–45, who adds evidence for laws on *moicheia* in Locri Epizephyrii (Aelian, *VH* 13.24; attributed to Zaleucus), Lepreum (Heracleides Ponticus fr. XIV Müller, *FHG* = Arist. fr. 611.42 Rose), and Aeolian Cyme (Plut. *Mor*. 291f (*Quaest. Graec*. 2)). For a comprehensive discussion ranging far beyond Athens (despite its title), see Schmitz (1997); also Forsdyke (2008), esp. 3–26.

reflect Biscardi's "common denominator" of Greek legal principles, owing to (and as a function of) the diversity of origin of the inhabitants. Ideally, we should be able to cite evidence from actual communities, such as colonies established as cooperative ventures by multiple *poleis*, or other newly-founded cities that drew significant numbers of settlers from different parts of the Greek world. A prominent example of the latter is Alexandria in Egypt, founded by Alexander the Great in 332/1[25] and inhabited, by the third century, by Macedonians, Greeks of diverse origins, Egyptians, mercenaries of even more diverse origins, Jews, Persians, Syrians, and others.[26] For this very reason, among others, Alexandria presents a mixed blessing for the study of comparative Greek law. While much Alexandrian legal material is preserved in papyri of the Hellenistic and Roman periods, we must contend with the possibility of Egyptian (and later Roman) influence, and also with the top-down phenomenon of legislation under a monarch (whether a Ptolemaic king or a Roman emperor), which tends to reduce local variation and contrasts with the characteristically autonomous and communitarian law of the Classical *poleis*.[27] But hubris represents a special case: while the possibility of the leveling influence of monarchy remains, we may discount any meaningful Egyptian influence on the substance of the Alexandrian law of hubris, since hubris was a specifically Greek concept. Moreover, while Alexandrian law borrowed significantly from Athenian law, the influence of the latter is uneven: as P. M. Fraser observed, "the Attic element is only one of several in the code, and by no means the predominating. More elements can be shown, both in respect of terminology and of procedure, both to be contrary to the Athenian practice in vital respects and to correspond to the usage of various cities of the Aegean islands and of Asia Minor."[28]

To these permanent communities we may add temporary communities that also comprise Greeks from various cities and regions. For example, we might expect the

[25] Arr. *Anab.* 3.1.5–3.2.2; Plut. *Alex*. 26, including the (alleged) prophecy that the city "would be the nurse of men from every land" (παντοδαπῶν ἀνθρώπων ἐσομένην τροφόν, 26.6).

[26] Fraser (1972) 1.38–92, esp. 60–75. Strabo 17.1.12 cites Polybius' (= Polyb. 34.14) division of the population into Egyptians, mercenaries, and Alexandrians. Most of the mercenaries will have been Greek or Macedonian; among the rest were Gauls. Note the comment reported from Polybius regarding the "Alexandrian" segment of the population: "for, even granted that they were all mixed together (μιγάδες), they nonetheless were Greeks by descent and preserved the common custom of the Greeks (ἐμέμνηντο τοῦ κοινοῦ τῶν Ἑλλήνων ἔθους)." Some of these Greeks doubtless relocated to Alexandria from residences elsewhere in Egypt (cf. Bosworth (1988) 247).

[27] Pringsheim (1950) 6–8; Finley (1951) 82–85, (1975) 137; Gagarin (2005) 38–39. Much more positive about the value of Egyptian Greek material as evidence for the unity of Greek law is Rupprecht (2005) 328–29.

[28] Fraser (1972) 1.111. Cf. 1.115: "The city-code...did not conform to any single known system, and may have been the fruit of Peripatetic study of comparative Greek law." As will be seen below (number 6), hubris is an area where Alexandrian and Athenian law coincided in terminology but diverged in procedure.

regulations governing Panhellenic festivals, including the stephanitic games, to conform broadly to the legal norms of the Greeks in general, as well as specifically to those of the hosts. I have been unable to discover a law dealing with hubris in these sources,[29] but there is another *ad hoc* Panhellenic community that clearly employed hubris as a concept of law (*infra*, number 5). The fabled "Ten Thousand" Greek mercenaries recruited by Cyrus the Younger for use against Artaxerxes II Mnemon included soldiers from Arcadia, Achaea, Argos, Sparta, Elis, Sicyon, Megara, Boeotia, Locris, Aetolia, Acarnania, Ambracia, Dolopia, Thessaly, Olynthus, Amphipolis, Dardanus, Chios, Samos, Miletus, Rhodes, Crete, Syracuse, Thurii, and, of course, the Athenian Xenophon and some of his countrymen.[30] In most important respects, especially after reaching the Black Sea, the Ten Thousand functioned, and were recognized, as a *polis*: they met in assembly, exercised the right to select and depose their leaders, independently negotiated and concluded treaties with foreign powers, and administered domestic justice.[31] The critical missing element was a defined (and stationary) territory that they could call their own, and this deficiency would have been remedied had the troops accepted Xenophon's proposal to found a colony on the Black Sea (X. *Anab*. 5.6.15–31), whose adult citizen male population in 400/399 would have exceeded that of Sparta and constituted at least half that of Athens.

Less valuable than evidence from actual communities, but still informative, is evidence from virtual or fictional communities. In Plato's *Laws*, Cleinias of Crete, Megillus of Sparta, and an anonymous Athenian draft hypothetical laws for an imaginary city, which Cleinias may apply in practice to a new colony to be founded on Crete by a coalition of Cretan cities led by Knossos (Pl. *Leg*. 702b4–d5). Plato's choice of characters, and the interplay between them, is significant: the Cretan, the Spartan, and the Athenian represent distinct legal systems but are able to reach agreement in composing legislation. Since both the author and the most loquacious of his characters are Athenian, there is naturally some Athenian influence on these laws, but in at least some significant areas Plato's hypothetical laws bear little resemblance to actual Athenian law,[32] and we may reasonably posit that Plato's sources included the laws of cities other than Athens as well as his own idealistic speculations. We must remember, too, that Plato did not write for Athenians alone.

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[29] Herodotus' statement (6.127) that the tyrant Pheidon of Argos "committed the greatest act of hubris of all the Greeks" (ὑβρίσαντος μέγιστα δὴ Ἑλλήνων ἁπάντων) by forcibly deposing the Elean presiding magistrates of the Olympic games (cf. Ephorus, *FGrHist* 70 F 115) and conducting the contests himself gives no firm indication that hubris appeared in the regulations governing the festival.

[30] Lee (2007) 9, 60–66.

[31] On the Ten Thousand as a mobile virtual *polis* see Dillery (1995) 59–98; Hornblower (2004); Perlman (1976–77) 278; Rehdantz (1888) 7; *contra* Lee (2007) 9–11.

[32] E.g., homicide (Pl. *Leg*. 865a–874d), wounding (874e–879b), real property, and commercial law (on wounding see Phillips (2007) 100–3; for the last two see Finley (1975) 136).

Although he could not expect to count many Spartans among his readers, the expectation of dissemination of his work—as well as his own intellect and researches—will have encouraged Plato to represent his Spartan and Cretan with at least plausible accuracy. For our immediate purposes, Plato is of limited utility, as the *Laws* contain no law on hubris *per se*—although hubris-words figure prominently in the Athenian's general statement of legal principle on *biaia*, "acts of violence," at *Leg*. 884–885b, and occasionally elsewhere.[33]

Plato's student Aristotle expected a similarly broad reception; and significantly, unlike his teacher, Aristotle was not an Athenian born and bred but a native of Stageirus in Macedonia. Aristotle also exceeded Plato in his knowledge of the laws of the various Greek states, having supervised the detailed and comparative study of the constitutions of 158 *poleis*.[34] Aristotle's *Rhetoric* contains practical advice for litigants and speechwriters prosecuting and defending against a number of charges, including hubris, and he designed his *topoi* to function and resonate in the Greek world generally, not only in Athens.[35] In a number of passages in the *Rhetoric* and *Nicomachean Ethics* he essays a substantive definition of hubris, which is especially valuable for our purposes, since Athenian law (at least) failed to provide one (*infra*, number 1).

The preceding criteria have been spatial, their purpose being to measure the extent of a legal phenomenon over the various Greek *poleis* and in communities comprising Greeks from multiple *poleis*. The third criterion is temporal. Gagarin cites "Finley's insistence that any work utilizing the concept of Greek law should identify significant features that are common to *all times and places* for which we have evidence."[36] As a practical matter, our ability to make such a demonstration is severely compromised by the nature of our sources. For most of the Greek world outside Athens, Gortyn, Sparta, and Alexandria, the sources for each *polis* are already so scanty that the continuity of legal concepts is extremely difficult, if not impossible, to prove. "All times and places" is simply unrealistic; if we obey this admonition to the letter, the search for unity is over before it begins. But a less absolute and dogmatic approach may still attain meaningful results: an argument for

[33] See especially Fisher (1992) 480–92, esp. 484: "in delineating five types of serious *hybris* and proposing a general law for them, as well as in many others of his legal formulations, [Plato] shows full awareness of the Athenian law (and, it may be, of laws about *hybris* in other cities)"; Saunders (1991) 270–71, who concludes (271): "In Plato's hands the legal application of the general concept of *hubris* is pervasive: it covers virtually any act of violent aggression against people or property, especially, but not exclusively, those in need of special respect and protection, such as that given in the law of *aikia* to foreigners, parents, other seniors and (in some circumstances) slaves. The general concept is given legal teeth, *in specific contexts*" (emphasis in the original).

[34] D. L. 5.27; Hsch. s.v. Ἀριστοτέλης; Rhodes (1993) 1–2.

[35] Fisher (1976) 179–80, (1992) 9ff.; *contra* MacDowell (1976) 27–28; Cairns (1996) 6 n. 32.

[36] Gagarin (2005) 34 (emphasis mine).

unity in any particular area of Greek law should, ideally, include evidence that spans both a significant sample of communities for which evidence exists and a significant period of time. The catalogue of sources that follows in the next two sections of this paper, arranged according to the first two criteria above, also takes account of the date of each source, and demonstrates that a substantive legal category of hubris was both widespread and lasting.

II. Hubris in the laws of discrete (theoretically) homogeneous[37] *poleis*

1. The Athenian law of hubris and the problems of its interpretation and application are sufficiently familiar as to require only summary treatment here. The law (Dem. 21.47), most likely authored by Solon[38] and still the controlling statute in the fourth century (cf. the paraphrase at Aeschin. 1.15), provided that "if a person commits hubris (ὑβρίζῃ) against another, whether a child or a woman or a man, free or slave, or does anything unlawful (or 'contrary to custom': παράνομόν τι)[39] to any of these," any willing and capable Athenian might bring a *graphē* before the *thesmothetai*. The *graphē hybreōs* was a *dikē timētos* without penal limit: a convicted defendant was sentenced to "whatever he is deemed fit to suffer or pay" (ὅτου ἂν δοκῇ ἄξιος εἶναι παθεῖν ἢ ἀποτεῖσαι).[40]

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[37] By this term, as qualified, I mean *poleis* whose citizens claimed common origin and descent from the remote(r) past. The Athenians famously claimed autochthony (e.g., Isoc. 4.24), the Spartiates descent from the Heracleidae and their Dorian followers (e.g., Tyrtaeus fr. 2 West; Hdt. 5.72 with Phillips (2003) 308–9; Cartledge (2002) 81); Por(d)oselene/Nasos was founded by Aeolians in or before the seventh century (Kirsten (1953) col. 244; Stauber (1996) 1.208).

[38] See Murray (1990); Fisher (1990) 123–24 with references (124 n. 3), (2000) 91–94; van Wees (2011); cf. MacDowell (1976) 26.

[39] This vague and troublesome phrase has occasioned diverse interpretations. The best, in my opinion, is Fisher (1992) 54, who understands the initial clause of the law to mean "if anyone commits (what is usually regarded as serious) *hybris* against anyone or does something *paranomon* (sc. in that general area) against anyone."

[40] Dem. 21.47 (*lex*): Ἐάν τις ὑβρίζῃ εἴς τινα, ἢ παῖδα ἢ γυναῖκα ἢ ἄνδρα, τῶν ἐλευθέρων ἢ τῶν δούλων, ἢ παράνομόν τι ποιήσῃ εἰς τούτων τινά, γραφέσθω πρὸς τοὺς θεσμοθέτας ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστιν, οἱ δὲ θεσμοθέται εἰσαγόντων εἰς τὴν ἡλιαίαν τριάκοντα ἡμερῶν ἀφ' ἧς ἂν ἡ γραφή, ἐὰν μή τι δημόσιον κωλύῃ, εἰ δὲ μή, ὅταν ᾖ πρῶτον οἷόν τε. ὅτου δ' ἂν καταγνῷ ἡ ἡλιαία, τιμάτω περὶ αὐτοῦ παραχρῆμα, ὅτου ἂν δοκῇ ἄξιος εἶναι παθεῖν ἢ ἀποτεῖσαι. ὅσοι δ' ἂν γράφωνται [γραφὰς ἰδίας] κατὰ τὸν νόμον, ἐάν τις μὴ ἐπεξέλθῃ ἢ ἐπεξιὼν μὴ μεταλάβῃ τὸ πέμπτον μέρος τῶν ψήφων, ἀποτεισάτω χιλίας δραχμὰς τῷ δημοσίῳ. ἐὰν δὲ ἀργυρίου τιμηθῇ τῆς ὕβρεως, δεδέσθω, ἐὰν [δὲ] ἐλεύθερον ὑβρίσῃ, μέχρι ἂν ἐκτείσῃ. "If a person commits hubris against another, whether a child or a woman or a man, free or slave, or does anything unlawful (or 'contrary to custom') to any of these, any willing Athenian to whom it is permitted shall file an indictment with the *thesmothetai*. The *thesmothetai* shall bring the case before the *hēliaia* within thirty days after the filing, unless some public business prevents it; otherwise, at the first opportunity. Whomever the *hēliaia* convicts, it shall punish him immediately with whatever he is deemed fit to

Notoriously, the legislator fails to define hubris; the law focuses on procedure. Nonetheless, most commentators[41] concur that the descriptions of hubristic assaults in the Attic orators—the most famous being the near-fatal beating of Ariston that culminated in Conon's rooster dance over his prone body (Dem. 54.1, 8–9)—correspond to the definition of hubris advanced by Aristotle.[42] In brief, for the

suffer or pay. As for those who file an indictment in accordance with this law, if a person does not prosecute, or prosecutes but does not receive one-fifth of the votes, he shall pay 1000 drachmas to the public treasury. If [the defendant] is punished with a fine for his hubris, he shall be imprisoned, if he committed hubris against a free person, until he pays the fine."

41 See above all Fisher (1992) 37 *et passim*; also, e.g., Cope-Sandys (1877) 1.239–40, 2.17; Lipsius (1905–15) 424–26; Harrison (1968–71) 1.172; MacDowell (1976) 27–30, (1978) 129–32; Fisher (1990); Murray (1990); Cohen (1991) 178, (1995), esp. 143–62, (2005) 216; Todd (1993) 107, 270–71 (without explicitly citing Aristotle); Harris (2004b) 63–65; Spatharas (2009) 31–38. Cf. MacDowell (1990) 18–23, 262–68; Cantarella (1983). The most influential dissenting views are those of Gernet (1917) 183–97, esp. 195–96 (the *graphē hybreōs* was aimed at acts perpetrated against the community as a whole, and in particular against its religious principles), Ruschenbusch (1965) (the *graphē hybreōs* was a catch-all procedure intended to redress all wrongs against the person), and Gagarin (1979) (the *graphē hybreōs* "could apply to any attack against a person" (236) but was intended for use against severe and unprovoked physical assaults); on these theories see the critique by Fisher (1992) 53–62.

42 See especially *Rhet*. 1373b38–1374a15: ἐπεὶ δ' ὁμολογοῦντες πολλάκις πεπραχέναι ἢ τὸ ἐπίγραμμα οὐχ ὁμολογοῦσιν ἢ περὶ ὃ τὸ ἐπίγραμμα, οἷον λαβεῖν μὲν ἀλλ' οὐ κλέψαι, καὶ πατάξαι πρότερον ἀλλ' οὐχ ὑβρίσαι..., διὰ ταῦτα δέοι ἂν καὶ περὶ τούτων διωρίσθαι, τί κλοπή, τί ὕβρις, ... ὅπως ἐάν τε ὑπάρχειν ἐάν τε μὴ ὑπάρχειν βουλώμεθα δεικνύναι ἔχωμεν ἐμφανίζειν τὸ δίκαιον. ἔστι δὲ πάντα τὰ τοιαῦτα περὶ τοῦ ἄδικον εἶναι καὶ φαῦλον ἢ μὴ ἄδικον [ἡ] ἀμφισβήτησις· ἐν γὰρ τῇ προαιρέσει ἡ μοχθηρία καὶ τὸ ἀδικεῖν, τὰ δὲ τοιαῦτα τῶν ὀνομάτων προσσημαίνει τὴν προαίρεσιν, οἷον ὕβρις καὶ κλοπή· οὐ γὰρ εἰ ἐπάταξεν πάντως ὕβρισεν, ἀλλ' εἰ ἕνεκά του, οἷον τοῦ ἀτιμάσαι ἐκεῖνον ἢ αὐτὸς ἡσθῆναι. "But seeing that people often admit having committed an act but do not admit either the title [of the act] or what the title concerns—for example, [they admit] 'taking' but not 'stealing', or 'striking first' but not 'committing hubris'..., for these reasons concerning these matters too it must be determined what is theft, what is hubris, ...so that, whether we wish to demonstrate that such is the case or not, we are able to make clear our claim to right. All such cases are a dispute over whether a person is unjust and bad or not unjust: the depravity and the offense lies in the deliberate choice [of the actor], and words such as these indicate the deliberate choice as well [as the act]; for example, hubris and theft. For if a person struck, he did not in all cases commit hubris, but only if he did so for a reason; for example, in order to dishonor his victim or give himself pleasure"; *Rhet*. 1378b14–30: τρία ἐστὶν εἴδη ὀλιγωρίας, καταφρόνησίς τε καὶ ἐπηρεασμὸς καὶ ὕβρις...καὶ ὁ ὑβρίζων δὲ ὀλιγωρεῖ· ἔστι γὰρ ὕβρις τὸ πράττειν καὶ λέγειν ἐφ' οἷς αἰσχύνη ἐστὶ τῷ πάσχοντι, μὴ ἵνα τι γίγνηται αὐτῷ ἄλλο ἢ ὅ τι ἐγένετο, ἀλλ' ὅπως ἡσθῇ· οἱ γὰρ ἀντιποιοῦντες οὐχ ὑβρίζουσιν ἀλλὰ τιμωροῦνται. αἴτιον δὲ τῆς ἡδονῆς τοῖς ὑβρίζουσιν, ὅτι οἴονται κακῶς δρῶντες αὐτοὶ ὑπερέχειν μᾶλλον...ὕβρεως δὲ ἀτιμία, ὁ δ' ἀτιμάζων ὀλιγωρεῖ... "There are three types of contempt: scorn, spite, and hubris. ... A man who commits hubris also exhibits contempt, for hubris is doing and saying things

Athenians, as for Aristotle, what distinguished hubris from *aikeia* (ordinary battery, defined in Athenian law as ἄρχειν χειρῶν ἀδίκων, "beginning unjust hands"; i.e., starting a fight without justification)[43] was the perpetrator's *mens rea*: hubris was battery aggravated by the malicious intent of the perpetrator, typically (but not necessarily) to bring shame upon his victim and/or pleasure to himself—in other words, literally adding insult to injury.[44]

2. A fourth-century inscription from Por(d)oselene/Nasos (*IG* XII 2.646 = Stauber (1996) no. 36), the largest of the Hekatonnesoi located between Lesbos and the Asia Minor coast,[45] lists citizens fined for various offenses by the courts and the

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that involve shame for the victim, not in order that anything accrue to the actor other than what happened, but so that he may feel pleasure; those who act in response do not commit hubris but get vengeance. The cause of pleasure for those who commit hubris is their belief that by doing [others] ill they themselves excel more.... Dishonor is an element of hubris, and he who dishonors exhibits contempt." Other important passages include *Rhet*. 1384a15–18, 1402a1–3; *EN* 1149b20–1150a1. In a forthcoming article (Phillips (forthcoming)) I argue that Aristotle is correct as to the characteristic elements of shame and self-aggrandizement but incorrect in his rejection of anger, retaliation, and ulterior benefit to the perpetrator, and that in defining hubris we must also attend to Xenophon's *ep' agathōi* standard (*infra*, number 5).

[43] Dem. 23.50 (*lex*); [Dem.] 47.40, 47 (cf. §§7, 8, 15, 35, 39; Isoc. 20.1); cf. Arist. *Rhet*. 1402a1–3. The formula dates back at least to Draco (*IG* I^3 104.33–35).

[44] Dem. 54.1, 8–9: Ariston prosecutes Conon by a *dikē aikeias* but asserts that Conon would have been liable to a *graphē hybreōs*; the prime indicator of Conon's hubris is his rooster dance. Likewise, the speaker of Isocrates 20, prosecuting a *dikē aikeias*, accuses his defendant Lochites of hubris (§§1–6); in Demosthenes 21 (e.g., §§25, 28, 31–35) Demosthenes alleges that Meidias' actions qualify both as *aikeia* and as hubris. Lys. fr. 279 Carey *Against Teisis*, described by Dionysius of Halicarnassus as "a narrative dealing with hubris" (διήγησίν τινα...ὑβριστικήν, D. H. *Dem*. 11) and delivered in either a *dikē aikeias* or a *graphē hybreōs*, describes Teisis' luring Archippus into his house, tying him to a column, and whipping him (with Teisis' slaves repeating the assault the next day). At Aeschin. 1.58–64, the similar assault upon Pittalacus by Hegesander, Timarchus, *et al*. is described as hubris (§62); the lawsuits filed (but subsequently dropped) by Pittalacus against Hegesander and Timarchus (*ibid*.) were probably either *dikai aikeias* or *graphai hybreōs*. Isae. 8.41 with Isae. fr. VIII Baiter-Sauppe: Diocles of Phlya was prosecuted by *graphē hybreōs* for imprisoning his brother-in-law in his house and thereby procuring his *atimia* (ἠτίμωσε, 8.41: for an argument that this refers simply to shaming, not—as it is traditionally interpreted (e.g., Wyse (1904) 621)—to disfranchisement, see Avramović (2010)). The only other certain instance of the *graphē hybreōs* is the case initiated (but later dropped) by Apollodorus against the freedman (now metic) Phormion for marrying Apollodorus' mother Archippe (Dem. 45.3–5); the *casus litis* was the impropriety of the marriage and/or Phormion's seduction of Archippe during her first marriage, to Apollodorus' father Pasion (§84). [Dem.] 53.16: Nicostratus and Arethusius sent a citizen boy to pluck roses from Apollodorus' garden "so that, if I caught him and bound or beat him in the belief that he was a slave, they could bring a *graphē hybreōs* against me."

[45] On the problems of identification arising from Strabo 13.2.5–6, 618–19, see Stauber (1996) 1.198–208.

boulē. Lines 23 through 25 (*init*.) of text *a* read: ἐπὶ πρυ[τάν]ιος Ἀπολλωνίδα ἐπίτιμα ἐκ τᾶν δίκαν· [Ἀ]γησίστρατος Ἀγησιστράτειος τᾶς ὕβριος ἐπίτιμον ἐγ δίκας χρύ(σω) [στ]ά(τηρας) δδπ΄ "Fines resulting from the lawsuits while Apollonidas was *prytanis*: Agesistratus son of Agesistratus, fine for hubris resulting from a lawsuit, 25 staters of gold." Ὕβριος, genitive of the charge (cf. the next item, at lines 25–26: the same Agesistratus was fined 6 staters for theft, φώρας), indicates that hubris was the name of the offense, and hence comprised a substantive legal category, as at Athens. While we do not know what Agesistratus did, or, more generally, what actions qualified as hubris under the law of Nasos, the offense was evidently a serious one: with the 25 staters imposed on Agesistratus for hubris compare the standard fine of 10 staters for naval desertion or dereliction of duty (offenders designated λιπόναυται: *a* 7–13, *c* 48–54).

3. We have some evidence that hubris constituted a specific offense at Sparta. Herodotus (6.85) relates that when the Aeginetans learned of the death of Cleomenes I (*ca*. 490), "they sent ambassadors to Sparta to denounce Leotychidas (II) concerning the hostages being held at Athens. The Spartans convened a court and rendered a verdict that the Aeginetans had been treated with extreme hubris by Leotychidas (δικαστήριον συναγαγόντες ἔγνωσαν περιυβρίσθαι Αἰγινήτας ὑπὸ Λευτυχίδεω), and they sentenced him to be extradited and conveyed to Aegina in return for the men being held at Athens."[46] Leotychidas had cooperated with Cleomenes in seizing ten Aeginetan hostages and depositing them for safekeeping with the Athenians, the Aeginetans' blood enemies (Hdt. 6.73); significantly, the Aeginetans' allegation and the Spartan reaction coincide with Athenian sources in categorizing wrongful imprisonment as hubris (Isae. 8.41; [Dem.] 53.16: *supra*, n. 44). It is likely that hubris was among the charges the regent Pausanias confronted upon his recall to Sparta in 478/7. Thucydides (1.95), who accepts the allegations against Pausanias, credits his recent history of violent behavior (ἤδη βιαίου ὄντος αὐτοῦ) with motivating the Ionians to defect to Athenian leadership, asserts that his countrymen recalled him owing to multiple accusations of grave wrongdoing they had received from other Greeks and to the fact that his command was approximating a tyranny (καὶ γὰρ ἀδικία πολλὴ κατηγορεῖτο αὐτοῦ ὑπὸ τῶν Ἑλλήνων τῶν ἀφικνουμένων, καὶ τυραννίδος μᾶλλον ἐφαίνετο μίμησις ἡ στρατηγία), and reports that upon his return he was punished for his private offenses against individuals (τῶν μὲν ἰδίᾳ πρός τινα ἀδικημάτων ηὐθύνθη) and, though acquitted

[46] Τελευτήσαντος δὲ Κλεομένεος ὡς ἐπύθοντο Αἰγινῆται, ἔπεμπον ἐς Σπάρτην ἀγγέλους καταβωσομένους Λευτυχίδεω περὶ τῶν ἐν Ἀθήνῃσι ὁμήρων ἐχομένων. Λακεδαιμόνιοι δὲ δικαστήριον συναγαγόντες ἔγνωσαν περιυβρίσθαι Αἰγινήτας ὑπὸ Λευτυχίδεω, καί μιν κατέκριναν ἔκδοτον ἄγεσθαι ἐς Αἴγιναν ἀντὶ τῶν ἐν Ἀθήνῃσι ἐχομένων ἀνδρῶν. See de Ste. Croix (1972) 351; MacDowell (1986) 133–34, 148–49; Fisher (1992) 138–39, (2000) 105–6. Pritchett (1974) 5 (Table 1) identifies the charge as hubris.

of the most serious charges—in particular, medism—was relieved of command.[47] The more skeptical Herodotus relates that Pausanias' hubris was the stated pretext for divesting the Spartans of their hegemony over the Hellenic League (**πρόφασιν τὴν Παυσανίεω ὕβριν προϊσχόμενοι** ἀπείλοντο τὴν ἡγεμονίην τοὺς Λακεδαιμονίους, 8.3).[48] The testimony of Herodotus, coupled with Thucydides' description of violent, tyrannical, and Persian behavior—all commonly associated with hubris in the Greek mind[49]—makes it all but certain that hubris featured prominently in the rhetoric used against Pausanias at trial, even if it did not constitute a formal charge.[50]

4. Hippodamus of Miletus (b. *ca*. 500), most famous for his urban planning, proposed that all laws and the corresponding lawsuits be divided into three categories: hubris, damage (*blabē*), and homicide (Arist. *Pol*. 1267b37–39).[51] This strongly suggests that hubris already existed as a substantive legal category in at least one, and probably more, of the *poleis* that Hippodamus lived in or visited.[52]

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[47] ἤδη δὲ βιαίου ὄντος αὐτοῦ οἵ τε ἄλλοι Ἕλληνες ἤχθοντο καὶ οὐχ ἥκιστα οἱ Ἴωνες καὶ ὅσοι ἀπὸ βασιλέως νεωστὶ ἠλευθέρωντο· φοιτῶντές τε πρὸς τοὺς Ἀθηναίους ἠξίουν αὐτοὺς ἡγεμόνας σφῶν γίγνεσθαι κατὰ τὸ ξυγγενὲς καὶ Παυσανίᾳ μὴ ἐπιτρέπειν, ἤν που βιάζηται. οἱ δὲ Ἀθηναῖοι ἐδέξαντό τε τοὺς λόγους καὶ προσεῖχον τὴν γνώμην ὡς οὐ περιοψόμενοι τἆλλά τε καταστησόμενοι ᾗ φαίνοιτο ἄριστα αὐτοῖς. ἐν τούτῳ δὲ οἱ Λακεδαιμόνιοι μετεπέμποντο Παυσανίαν ἀνακρινοῦντες ὧν πέρι ἐπυνθάνοντο· καὶ γὰρ ἀδικία πολλὴ κατηγορεῖτο αὐτοῦ ὑπὸ τῶν Ἑλλήνων τῶν ἀφικνουμένων, καὶ τυραννίδος μᾶλλον ἐφαίνετο μίμησις ἢ στρατηγία. ... ἐλθὼν δὲ ἐς Λακεδαίμονα τῶν μὲν ἰδίᾳ πρός τινα ἀδικημάτων ηὐθύνθη, τὰ δὲ μέγιστα ἀπολύεται μὴ ἀδικεῖν· κατηγορεῖτο δὲ αὐτοῦ οὐχ ἥκιστα μηδισμὸς καὶ ἐδόκει σαφέστατον εἶναι. καὶ ἐκεῖνον μὲν οὐκέτι ἐκπέμπουσιν ἄρχοντα...

[48] See Macan (1908) 1.2.361 on the difficulties with the sentence that concludes with the quoted words. The referent of προϊσχόμενοι and subject of ἀπείλοντο may be the Athenians, the other (non-Peloponnesian) allies, or some combination of the two.

[49] E.g., S. *OT* 873 (ὕβρις φυτεύει τύραννον); Hdt. 3.80; Arist. *Pol*. 1310b–1311b, 1314b23–27, 1315a14–31 with Fisher (1992) 27–31.

[50] Cf. Macan (1908) 1.2.362: "the phrase [*scil*. τὴν Παυσανίεω ὕβριν] may be a current one, descriptive of the proceedings recorded more fully by Thuc. 1.94, 95, and touched by Hdt. himself [at] 5.32," which mentions Pausanias' alleged aspiration to tyranny over Greece (ἔρωτα σχὼν τῆς Ἑλλάδος τύραννος γενέσθαι). Plutarch accuses Pausanias of "many acts of hubris" (πολλὰ...ὑβρίζοντος, *Cimon* 6), which will have included his corporal punishment of common soldiers (*Arist*. 23): compare the case of Xenophon and the muleteer (*infra*, number 5). Additional sources include Diod. 11.44.3–6; Nepos, *Paus*. 2.6; on the hubris of Pausanias see Fisher (1992) 132 n. 308, 344, 381.

[51] ᾤετο δ' εἴδη καὶ τῶν νόμων εἶναι τρία μόνον· περὶ ὧν γὰρ αἱ δίκαι γίνονται, τρία ταῦτ' εἶναι τὸν ἀριθμόν, ὕβριν βλάβην θάνατον.

[52] Also according to Aristotle (*Pol*. 1274b18–23), Pittacus (*ca*. 650–570), lawgiver of Mytilene, wrote a law mandating that the penalties for offenses be aggravated if the offender was drunk, "since more people commit hubris (ὑβρίζειν) when drunk than when sober." Since this is virtually the extent of our knowledge on this law (it is also referenced at Arist. *Rhet*. 1402b11–12; Plut. *Mor*. 155f (*Sept. Sap. Conviv*. 13); D. L. 1.76; the last two assert that the penalty was doubled), we cannot conclude with any

III. Hubris in the laws of communities with members from multiple *poleis*

5. In the spring or summer of 400, encamped at Cotyora by the Black Sea, the Ten Thousand (*supra* with nn. 30–31) established a court of law, with a jury consisting of the company commanders (*lochagoi*), and resolved that their generals submit to review (X. *Anab*. 5.7.34–5.8.1). The charge brought against Xenophon was hubris: "several people (τινες) accused Xenophon, claiming to have been struck (παίεσθαι) by him, and they brought the charge that he was guilty of hubris (ὡς ὑβρίζοντος τὴν κατηγορίαν ἐποιοῦντο: 5.8.1)."[53] In the ensuing narrative, the first of the several prosecutors—who are not specified by name or by city of origin—alleges that the relevant events occurred during the previous winter, while he was assigned by his tentmates to drive a mule, "although he was a free man" (ἐλεύθερος ὤν, 5.8.5). Prosecution and defense stipulate that one day, on the march, Xenophon ordered the prosecutor and his mule to unload their cargo—the baggage belonging to the prosecutor and his tentmates—and carry in its stead a grievously ill soldier, but then, having sent them forward, found the prosecutor digging a grave for the man while he was still alive; when the prosecutor refused to carry the man further, Xenophon struck him (5.8.6–10). The prosecutor notes that the man subsequently died anyway; upon Xenophon's retort, "We are all going to die; should we all be buried alive on that account?" the attending crowd "shouted out that he had struck him too few blows" (τοῦτον...ἀνέκραγον ὡς ὀλίγας παίσειεν), thereby acquitting Xenophon by acclamation and cowing his other accusers into silence (5.8.11–12).

Xenophon then offers a lengthy disquisition whose purpose is to distinguish hubris from other instances of and motives for striking people (5.8.13–26). He opens by confessing still other previous uses of violence (5.8.13–16):

> Ἐγώ, ὦ ἄνδρες, ὁμολογῶ παῖσαι δὴ ἄνδρας ἕνεκεν ἀταξίας ὅσοις σῴζεσθαι μὲν ἦρκει δι' ὑμῶν ἐν τάξει τε ἰόντων καὶ μαχομένων ὅπου δέοι, αὐτοὶ δὲ λιπόντες τὰς τάξεις προθέοντες ἁρπάζειν ἤθελον καὶ ὑμῶν πλεονεκτεῖν. εἰ δὲ τοῦτο πάντες ἐποιοῦμεν, ἅπαντες ἂν ἀπωλόμεθα. ἤδη δὲ καὶ μαλακιζόμενόν τινα καὶ οὐκ ἐθέλοντα ἀνίστασθαι ἀλλὰ προϊέμενον αὑτὸν τοῖς πολεμίοις καὶ ἔπαισα καὶ ἐβιασάμην πορεύεσθαι. ... ἄλλον δέ γε ἴσως ἀπολειπόμενόν που διὰ ῥᾳστώνην καὶ κωλύοντα καὶ ὑμᾶς τοὺς πρόσθεν καὶ ἡμᾶς τοὺς ὄπισθεν πορεύεσθαι ἔπαισα πύξ, ὅπως μὴ λόγχῃ ὑπὸ τῶν πολεμίων παίοιτο.
>
> *Gentlemen, I admit that I have indeed struck men on account of their lack of discipline—those who were content to be saved by you while you were marching in order and fighting where required, while they themselves had abandoned their stations and were running ahead, wishing to seize plunder and take more than you.*

confidence that hubris was a named offense under Mytilenean law, although, as Fisher (1992) 208 observes, "it seems far from unlikely."

[53] There is no reason to doubt the identification of the charge, as between this statement of the charge and the end of Xenophon's speech at 5.8.26, the word ὕβρις and its derivatives ὑβρίζειν and ὑβριστός occur six more times. For discussion of Xenophon's trial see Fisher (1992) 125–26; Lendle (1995) 355–59; Couvenhes (2005) 452–53; Lee (2007) 101–3; Flower (2012) 146–47.

If we all did this, we would all be dead. And also, when someone has shown weakness and refused to stand up, instead forsaking himself to the enemy, I have struck him and forced him to go forward. ... And, perhaps, when someone was lagging behind due to laziness and preventing both you in the front and us in the rear from proceeding, I struck him with my fist so that the enemy would not strike him with a spear.

Having thus defended the use of force against individuals when it is applied with the purpose of enforcing military discipline,[54] Xenophon comes to the crux of his argument (5.8.18–19):

ἁπλοῦς μοι...ὁ λόγος. εἰ μὲν ἐπ' ἀγαθῷ ἐκόλασά τινα, ἀξιῶ ὑπέχειν δίκην οἵαν καὶ γονεῖς υἱοῖς καὶ διδάσκαλοι παισί· καὶ γὰρ οἱ ἰατροὶ καίουσι καὶ τέμνουσιν ἐπ' ἀγαθῷ· εἰ δὲ ὕβρει νομίζετέ με ταῦτα πράττειν, ἐνθυμήθητε ὅτι νῦν ἐγὼ θαρρῶ σὺν τοῖς θεοῖς μᾶλλον ἢ τότε καὶ θρασύτερός εἰμι νῦν ἢ τότε καὶ οἶνον πλείω πίνω, ἀλλ' ὅμως οὐδένα παίω....

*My argument...is simple. If I punished someone for his own good, I think I should submit to the same sort of judgment as parents do at the hands of their sons and teachers do at the hands of their students; doctors, too, burn and cut for the good (*scil. *of their patients). But if you believe that I commit these acts out of hubris, bear in mind that now I have more confidence, thanks to the gods, than I did then, and I am bolder now than I was then, and I drink more wine, but all the same I don't hit anybody....*

Here and throughout the trial scene, the concept of hubris applied by the Ten Thousand conforms to the Athenian model.[55] The prosecutors bring hubris charges because Xenophon struck them, and the muleteer—the only prosecutor to speak—claims that he was beaten for no good reason; Xenophon defends himself on the grounds that his actions were not just merited but beneficial. In Athenian law, a blow struck with justification did not constitute *aikeia*—defined as striking the first blow *without* justification (ἄρχειν χειρῶν **ἀδίκων**: *supra*, number 1)—and

[54] Despite the resolution of the army, passed on the proposal of Xenophon, that disobedient soldiers were to be punished by any witnessing troops in concert with the commanding officer (*Anab*. 3.2.31–33), to which Xenophon alludes at 5.8.21 (when Xenophon was beating men for indiscipline, "you neither came to their aid nor joined me in striking the one who was being disorderly"), this was a tendentious argument, as we see by comparison with the case of Pausanias and the Ionians (*supra*, number 3). While the limitations of our evidence do not permit generalization, it appears that Greek soldiers not infrequently expected to enjoy immunity from corporal punishment by their superiors (cf. the next note). References to such punishment or the threat thereof (short of the death penalty for major offenses) frequently involve Spartan officers and non-Spartan subordinates, who respond in hostile fashion: in addition to the Pausanias case, note Thuc. 8.84; X. *Hell*. 6.2.18–19. See Pritchett (1974) 232–45; Couvenhes (2005).

[55] This is not to say that an Athenian general had the right to strike his subordinates; in the fourth century, at least, the sources ([Arist.] *Ath. Pol*. 61.2; Lys. 3.45; Dem. 54.3–5) appear to indicate *e silentio* that he did not.

therefore *a fortiori* could not qualify as hubris. Xenophon's jury (presumably to be counted among those who ἀνέκραγον at 5.8.12) agrees with him that his assault on the muleteer was justified, and so acquits him (cf. 5.8.21, in reference to the conduct of bystanders as Xenophon inflicted punishment: ὅτι δὲ δικαίως ἔπαιον αὐτοὺς καὶ ὑμεῖς κατεδικάσατε, "you yourselves have cast judgment that I was right to hit them [i.e., undisciplined soldiers]"). Earlier, when Xenophon interrogates the muleteer regarding the cause of his beating (5.8.4–5), his questions serve to rule out some typical circumstances and causes of hubristic assault advanced by Athenian litigants: the answers establish that Xenophon was not attempting to seize or recover property (cf. [Dem.] 47.41), the two men were not engaged in erotic rivalry (περὶ παιδικῶν μαχόμενος: cf. Lys. 3.5–7), and Xenophon was not drunk (μεθύων ἐπαρῳ̃νησα: cf. Dem. 54.3, 7–8, 16). Neither prosecution nor defense gives any indication of the degree of physical harm inflicted, and as both agree that Xenophon's motive was to compel the muleteer to transport a comrade, it is unlikely that he used debilitating force.[56] What qualified an assault as hubris, then, was not its severity but other factors, of which we have a hint when the muleteer asserts his free status at 5.8.5:[57] already at least inconvenienced by the task of driving a mule, which was typically slave labor, he ended up submitting to a punishment that was both humiliating for a free man and pointless, since the sick soldier died despite Xenophon's intercession (5.8.11).

6. Among the laws of Alexandria preserved in the mid-third-century *Dikaiomata* (*PHalensis* 1) is a law on hubris (col. IX, lines 210–13), which reads:

> Ὕβρεως. ἐάν τις καθυβρίσηι ἕτερος ἑτέρου τ[ῶ]ν ἀγράφων, ὁ τα[λαιπωρού]μενος τιμησάμενος δικασάσθω, προσγρα[ψά]σθω δὲ ὀνομαστί, τ[ί ἂν φῆι] ὑβρισθ[ῆ]ναι καὶ τὸν χρόνον ἐν ὧι ὑβρίσθη. ὁ δ[ὲ] ὀφλὼν διπλοῦν ἀπ[οτεισάτω,] ὃ ἂν τὸ δικαστήριον τιμήσηι.
>
> *Hubris.*[58] *If a person commits hubris against another of a type not covered by the written law, the aggrieved party shall assess the penalty and bring suit, and he shall*

[56] The same applies to the instances in which Xenophon struck stragglers to prevent them from succumbing to the elements or to the enemy: 5.8.13–16, partially quoted above.

[57] Cf. Isoc. 20.5–6: "Now, Lochites will probably try to belittle the matter, ...claiming that I suffered no harm from the blows (πληγῶν).... For my part, if there had been no hubris involved in what happened, I would never have come before you [the jury]; but as it is, I have come to exact punishment from him not for the physical damage (τῆς ἄλλης βλάβης) that resulted from his blows, but for the indignity (αἰκίας) and the dishonor (ἀτιμίας), things at which free men should feel the greatest anger and for which they should obtain the greatest retribution"; Dem. 21.72, on Euaeon's killing of Boeotus in response to a single blow: "It wasn't the blow (πληγή) that caused his anger, but the dishonor (ἀτιμία); it isn't being hit (τὸ τύπτεσθαι) that is so terrible for free men—terrible though it is—but being hit for the purpose of hubris (τὸ ἐφ' ὕβρει)."

[58] The genitive in the title indicates that hubris is the formal charge to be brought in accordance with this law; cf. the preceding clauses governing "threatening with a weapon" (σιδήρου ἐπαντάσεως, col. VIII, lines 186–92), "offenses committed while

add to his written complaint specifically how he claims to have been treated with hubris and the time when he was treated with hubris. The convicted (defendant) shall pay twice the amount that the court assesses.[59]

In substantive terms, this law is more informative than its Athenian counterpart (*supra*, number 1): while it fails to define hubris as such, it indicates that many (probably most) instances of hubris are justiciable under other sections of the Alexandrian code. These include the laws immediately preceding the hubris law in the *Dikaiomata*, which address threatening with a weapon (col. VIII, lines 186–92); offenses against the person (εἰς τὸ σῶμα) committed while under the influence of alcohol, at night, on sacred ground, or in the agora (col. IX, lines 193–95); battery by a slave upon a free person (col. IX, lines 196–202); and battery by a free person upon a free person (col. IX, lines 203–9).[60] The significant procedural difference between Alexandria and Athens is that in Alexandria the action for hubris is a *dikē*, available only to the wronged party.[61] A papyrus document contemporary with the *Dikaiomata* (*PHibeh* 32, 246 or 245 B.C.)[62] records the distraint (the *verso* bears the label ἐνεχυρασία) of 38 sheep by one Heracleitus son of Heracleitus, who is awaiting enrollment in the Alexandrian deme of the Castoreioi,[63] from a Macedonian soldier named Neoptolemus against a total fine of 220 drachmas (a principal fine of 200 dr. plus an ἐπιδέκατον of 20 dr.) assessed in a lawsuit for hubris that Neoptolemus lost by default (πρὸς καταδίκην ἔρημον ὕβρεως, lines 7–8).[64]

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drunk" (μεθύοντος ἀδικιῶν, col. IX, lines 193–95), "a slave who has struck a free person" (δούλῳ ἐλεύθερον πατάξαντι, col. IX, lines 196–202), and "battery among free persons" (πληγῆς ἐλευθέροις, col. IX, lines 203–9). For the last two compare the apparent reference to a δίκη πληγῶν in the lacunose col. V, line 115 (which in all probability also contained a reference to the δίκη ὕβρεως).

59 See Bechtel et al. (1913) 22, 107–17; Meyer (1920) no. 70; Partsch (1920) 54–76; Taubenschlag (1955) 435–42; Velissaropoulou (1981) 45–46, 126–29, 160–61; Fisher (1992) 83–85; Hirata (2008).

60 With the penalty for hubris (double the assessed damages) compare the penalties for battery among free persons: 100 dr. for a single blow by the aggressor (ἄρχων χειρῶν ἀδίκων), double the assessed damages for multiple blows, and triple the assessed damages for battery upon a magistrate in the performance of his duties (compare, for Athens, the stress laid by the speaker at [Dem.] 47.41–42 and by Demosthenes at Dem. 21.31–34 on their official roles as trierarch and *chorēgos* respectively).

61 Hirata (2008) 680 is rightly cautious as to the conclusion drawn by Partsch (1920) 61 and others (e.g., Fisher (1992) 84) that the court had full discretion in penal assessment.

62 Grenfell-Hunt (1906) no. 32; Mitteis (1912) no. 37; Bechtel et al. (1913) 117; Partsch (1920) 61; Velissaropoulou (1981) 127; Fisher (1992) 85 n. 12; Hirata (2008) 678 n. 15.

63 On the identification of the deme and the status of Heracleitus as a "probationary" or "prospective" Alexandrian citizen see Fraser (1972) 1.44, 49–50; 2.119 n. 41, 133–34 nn. 104–6.

64 For additional examples from the Egyptian *chōra*, of various dates, see Taubenschlag (1955) 436–38.

7. Finally, returning to the fifth and fourth centuries, and casting the widest possible net, we find that the term hubris enjoyed broad and lasting currency in the language of international relations. In particular, hubris could be alleged as a *casus belli*. Our best examples come from Thucydides' analysis of the proximate causes of the Peloponnesian War. In 433, the Corinthian ambassadors attempting to dissuade the Athenians from the alliance proposed by Corcyra assert that they did not found Corcyra in order to be treated with hubris by the Corcyraeans (ἐπὶ τῷ ὑπὸ τούτων ὑβρίζεσθαι), among whose numerous acts of hubris is the forcible and spiteful seizure of Epidamnus in 435 (ὕβρει δὲ καὶ ἐξουσίᾳ πλούτου πολλὰ ἐς ἡμᾶς ἄλλα τε ἡμαρτήκασι καὶ Ἐπίδαμνον ἡμετέραν οὖσαν κακουμένην μὲν οὐ προσεποιοῦντο, ἐλθόντων δὲ ἡμῶν ἐπὶ τιμωρίᾳ ἑλόντες βίᾳ ἔχουσιν, 1.38). Later in their speech, the Corinthians summarize these and other complaints as "justifications...sufficient *according to the laws of the Greeks*" (δικαιώματα μὲν οὖν τάδε πρὸς ὑμᾶς ἔχομεν ἱκανὰ **κατὰ τοὺς Ἕλλήνων νόμους**, 1.41). After the Corinthian mission fails, and Athens and Corinth have clashed over both Corcyra (at the battle of the Sybota islands in August 433)[65] and Poteidaea (immediately thereafter), at the first conference of the Peloponnesian League in 432/1 the Corinthians accuse the Athenians of hubris (μέγιστα ἐγκλήματα ἔχομεν ὑπὸ μὲν Ἀθηναίων ὑβριζόμενοι, 1.68).[66] Half a century later, in 381/0, during the waning years of their own hegemony, the Spartan ephors declared war on Phlius on the grounds that the Phliasians were guilty of hubris (τῷ δ' ὄντι ὑβρίζειν δοκούντων τῶν Φλειασίων φρουρὰν φαίνουσιν ἐπ' αὐτοὺς οἱ ἔφοροι, X. *Hell*. 5.3.13) in their treatment of returned exiles (5.3.10–12).[67] These are only a few episodes among many demonstrating the use of the term hubris—before, during, and

[65] For the date see *IG* I^3 364 = Meiggs-Lewis (1988) no. 61; Hornblower (1991–2008) 1.89.

[66] While the evidentiary problems with reported speech in Thucydides (in light of his famous and disputed programmatic statement at 1.22, among other factors) are well-known (see, e.g., Finley (1942) 36–73; Gomme-Andrewes-Dover (1945–81) 5.393–99; Hornblower (1987) 45–72), there is nothing inherently unlikely in the use of hubris language by Corinthian (or any other) ambassadors; and that the Corinthians actually did use such language is suggested by its relative paucity in Thucydides as a whole: "...Thucydides seems exceptionally reluctant, even more than other historians, to use the strongly condemnatory *hybris*-terms in his own voice, in narrative or judgmental analysis. Of the thirteen cases, six are found in speeches, and five more...in contexts which clearly reflect the rhetorically charged moral condemnation (or defences against such charges) made by individuals in the narratives" (Fisher (2000) 106; see also Murphy (1997) 76–77).

[67] Both Thucydides' Corinthians and Xenophon's Phliasian exiles allege abuses of law by their adversaries. The Corinthians maintain that the Corcyraean offer of third-party arbitration is specious (Thuc. 1.39); the Phliasian exiles contend that their attempts to recover property are frustrated by courts rigged by their erstwhile ejectors, and they are fined by their city for coming to Sparta to complain (X. *Hell*. 5.3.10–12; cf. 5.2.8–10). On accusations of hubris made by Spartans see Fisher (2000) 105–6; on the Phlius episode see Fisher (2000) 110–11.

after the fact, by actors and narrators alike—to condemn the aggression of rival states.[68] We are therefore entitled to speak of hubris as a term of "Greek" law[69] due not only to its manifestation, from the sixth century to the third (and beyond), in the legal systems of various individual *poleis* and in the quasi-*polis* of the Ten Thousand, but also to its role as a vital element in the vocabulary of the fledgling Greek international law.[70]

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[68] For a survey of the phenomenon from the late Archaic period to Philip II and Alexander the Great, see Fisher (1992) 136–42. Note, *inter alia*, (1) the inscribed bases of the Athenian dedications to Athena for their victory in 506 over the Boeotians and Chalcidians, whose "hubris they quenched" (ἔσβεσαν ὕβριν) (*IG* I^3 501 = Meiggs-Lewis (1988) no. 15 = Simonides fr. 100 Diehl ≈ Hdt. 5.77), only to have the latter's Spartan allies two years later urge war on Athens again, resuscitating the charge of the Athenians' "extreme hubris" in expelling Cleomenes and his men in 507 (ἡμέας...καὶ τὸν βασιλέα ἡμέων περιυβρίσας ἐξέβαλε, Hdt. 5.91; cf. 5.72, 74); (2) the hubris imputed to the Persian invaders of 490 (Paus. 1.33.2–3; Stafford (2005) 198–200) and 480–479 (e.g., A. *Pers*. 807–8, 821–22; Hdt. 7.16α; cf. the judgment of Croesus, Πέρσαι φύσιν ἐόντες ὑβρισταί, Hdt. 1.89; see also MacDowell (1976) 20; Michelini (1978) 42 with n. 22; Cairns (1996) 21; Fisher (2002) 220–24; Papadimitropoulos (2008)); (3) the allegations of Thebes' hubris (before and) during its hegemony (e.g., X. *Hell*. 6.5.46, 371/0: Procles of Phlius entreats the Athenians to prevent Theban hubris against Sparta; Isoc. 6.54, 108, composed 366 or later: Isocrates' Archidamus, son of the Spartan king Agesilaus, urges his countrymen to continue and intensify the fight against the Thebans, who have committed hubris against Sparta); and (4) Philip's citation of the fable of War and Hubris to the leaders of the Chalcidic League in or about 351/0 (Theopompus, *FGrHist* 115 F 127) and the Athenian response in kind (e.g., Dem. 9.32–35, delivered in 341: Philip's acts of the utmost hubris (τῆς ἐσχάτης ὕβρεως, §32) include destruction, occupation, invasion, and extortion of Greek states, as well as exercise of Amphictyonic prerogatives).

[69] As it is characterized at *Collatio* 2.5.1 (Paulus [*fl*. late second–early third century A.D.], *de iniuriis* 1) = Justinian, *Inst.* 4.4 pr.: *contumelia...quam Graeci* ὕβριν *appellant*; the *Collatio* continues, *...apparet non esse verum, quod Labeo* [*fl*. late first century B.C.–early first century A.D.] *putabat, apud praetorem iniuriam* ὕβριν *dumtaxat significare* (for discussion see Hitzig (1899) 54–80; Partsch (1920) 62–64; Hirata (2008) 680–81).

[70] On the use and limitations of this term see Low (2007) 77–128.

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THE NEED FOR COMPARATIVE LAW IN THE SEARCH FOR GREEK LEGAL UNITY: A RESPONSE TO PHILLIPS

In "The Problem of Unity in Greek Law," Moses Finley outlined the methodological difficulties facing attempts to find unity in Greek law.[1] Because laws from different *poleis* are rarely identical, it is necessary to determine which differences are "negligible nuances"[2] that leave a significant correspondence, and which are so fundamental that they undermine the argument for unity. At the other end of the scale, drawing similarities at too high a level of generality becomes meaningless, leaving us, in Finley's words, with "nothing worth discussing."[3] The challenge is to find meaningful correspondences that reveal something distinctive and interesting about Greek culture or law.

In his thoughtful contribution, Phillips argues that *hubris*, as a substantive legal category, satisfies the criteria for Greek legal unity. I agree with Phillips' basic conclusion. But bearing in mind Finley's admonition, I want to see if we can be more precise about what the basic principle that is shared by the various *hubris* laws was, and why this unity reveals something interesting and important about Greek law and culture. And as we try to weigh the significance of any unified "Greek Law" that we find, we have to compare this law to the laws of other times and places to make sure that what we have found is distinctive in some interesting or important way. And by distinctive, I do not necessarily mean unique, but different from at least some other legal systems in a way that tells us something about the Greeks. I suggest that *hubris* satisfies this criterion because it places Greek law in a category of legal systems that protect personal dignity, as opposed to Anglo-American systems that protect reputation, but not dignity.

The first question is whether there is sufficient similarity in the laws regarding *hubris* of different *poleis* (or quasi-*poleis*) over time. I agree with Phillips that unity need not be an all-or-nothing proposition, and that the presence of one or a few nonconforming *poleis* that did not have a procedure for *hubris* does not rule out the possibility of unity among other *poleis*. The evidence for the actual *hubris* statutes collected by Phillips do not present the problem of determining which statutory differences are disqualifying and which are mere nuance: to be sure, there are

1 Finley 1975: 137.
2 Finley 1975: 137.
3 Finley 1975: 137.

differences in procedure, penalty, and so forth, but these seem to be clearly minor variations.

But *hubris* presents another difficulty for judging unity: because it is typically not defined by statute, we cannot be sure that the term meant the same thing in different places at different times. The meaning of vague legal terms may have changed significantly even within one polis over time. For example, in a recent dissertation Kellam Conover has shown how the meaning of *dorodokia* in Athens changed over time from a notion of private theft during the fifth century to an emphasis on disloyalty and treason in the fourth century, particularly in response to the growing threat from Macedon.[4] If the proposed unity is simply that many Greek city-states provided a legal action against "*hubris*," however that term might be defined, then, as Finley would say, "there can be no argument, but there is equally nothing worth discussing."[5]

I assume that Phillips is making a broader claim, that the Greek legal category of *hubris* included the features of insult to the victim's honor that we see in the Athenian sources. I think that *hubris did* have a stable core meaning relating to intentional personal insult, and Phillips' use of the Ten Thousand as a quasi-polis is ingenious and helpful to his case. But it is important to acknowledge that if we take away the sources that do not give any indication of the criteria for *hubris*, then the evidence for a stable, unified concept of *hubris* as an action for affronts to honor becomes rather thinner. And of course, the sources tell us nothing about whether the protection of slaves under the law of *hubris* was unique to Athens or a more general Greek phenomenon. This is important because for some scholars, the inclusion of slaves in the Athenian *hubris* law, though unenforced, is central to the meaning of the law: the argument is that the inclusion of slaves suggests that the focus is less on the injury suffered by the victim, and more on the excessive behavior of the perpetrator, which at least in Athens is associated with antidemocratic behavior.[6] If there is any truth to this interpretation, then one wonders whether *hubris* laws in Greek oligarchies might have had a significantly different emphasis.

Let us turn now to the other issue raised by Finley: is the proposed unified legal concept at a level of generality that can tell us something of interest about the Greeks? As Gagarin has pointed out, the goal of exploring potential unity in Greek law cannot be to fill in gaps in our knowledge about other *poleis* because there are simply too many individual divergences.[7] Rather, identifying a common Greek legal concept is valuable primarily when it reveals something distinctive and important about the Greeks or their legal system. To determine if a legal concept is distinctive, we need to consider how other systems treat the same issue. To extend an example from the paper, a finding that many *poleis* imposed the death penalty on intentional

[4] Conover 2011.
[5] Finley 1975:137.
[6] E.g., Ober 2005: 113–124.
[7] Gagarin 2005:33–34.

murderers does not tell us much of interest about the Greeks because so many other societies took the same approach. A legal concept may also be distinctive but not significant: the fact that the United States requires drivers to drive on the right side of the road and England requires the opposite does not reveal anything about the two cultures or their laws.

But there are generalizations that are both distinctive and significant. Gagarin's work on the unity of Greek procedural law provides an example of how comparative analysis can help elucidate what legal features are distinctively "Greek," and how those features may reflect and reinforce different social values and systems. The significance of the Greeks' preference for amateurism and written substantive law but oral trial procedure is highlighted when compared to the very different approach taken in Hellenistic, Roman, and early English legal procedure.[8] In short, I think a comparative approach may help clarify what is at stake in designating *hubris* as a "Greek" legal concept. I cannot provide an in-depth comparative analysis here, but I can offer some tentative suggestions.

First, it is important to note that the notion of a legal action for insults to honor was by no means unique to the Greeks.[9] The Romans, of course, had the legal category of *iniuria* (insult, outrage) to protect against insults to one's dignity. And even some modern civil law systems include a law of insult that provides a remedy for affronts to one's honor. For example, the modern German criminal provision on insult (*Beleidigung*) reads: "Insult is punished by imprisonment for a term of up to one year or by a fine, and where the insult is made by means of physical assault, by a term of up to two years or by a fine."[10] A legal commentary elaborates on the meaning of insult: "Insult, which is not precisely described in the section … is to be understood as an attack on the honor of another person … through expressions of lack of respect, low respect, or disrespect."[11] The German law of insult is not a relic: criminal charges for insult, usually involving insulting gestures or verbal abuse, are commonly brought as private prosecutions in Germany, though only a small percentage proceed to the conclusion of trial.[12] As comparative law scholars have noted, there is no parallel to the law of insult in American law.[13]

While the law of insult in civil law concerns injuries to personal honor, (or, in more modern terms, dignity or personality), American law protects one's public reputation, but not personal honor or dignity. For example, the American law of

8 Gagarin 2008:206–224.

9 It is important to note that the Greek law of *hubris* appears to have required physical assault along with insult to the victim's honor, not insult alone. Because it is the protection of insult (which, in my view, distinguished it from simple assault in Athenian law) that is distinctive, I emphasize that aspect in this comparative discussion.

10 StGB § 185, quoted and discussed in Whitman 2000:1298.

11 OLG[Court of Appeals for Selected Matters], NJW, 38 (1985), 1720 (F.R.G.). Quoted and discussed in Whitman 2000:1302–1303.

12 Whitman 2000: 1293.

13 Whitman 2000: 1293.

defamation requires that harmful statements reach a third party, while the law of insult applies to purely private interactions that insult one's honor; and truthful but insulting statements generally do not constitute defamation, while truth is generally not an issue in cases of insult. Comparative law scholars have argued that this distinction between systems that protect dignity versus those that that do not has far-reaching effects on the legal treatment of privacy, free speech, and even criminal law.[14]

So how does this comparative analysis help us respond to Finley's challenge to find commonalities that tell us something of interest about the Greeks? Unlike the procedural unity that Gagarin identifies, the Greek concept of *hubris* did not represent a significant departure from most pre-modern Western legal systems. But it does place the Greeks within a category of legal systems that provide legal protection of honor and dignity as opposed to those that do not. In sum, Phillips' important contribution has plausibly identified *hubris* as an example of substantive Greek legal unity.

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[14] E.g., Whitman 2000.

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COUNCILS OF ELDERS AND ARISTOCRATIC GOVERNMENT IN THE CRETAN POLEIS

According to Ephorus the Cretans had a Council of Elders with the same name and the same functions as the Spartan Gerousia. Its members were selected among those who had assumed the highest magistracy (*kosmos*) and were worthy and appreciated for their virtue. The Elders' tenure was life-long, and the Council's role in the constitution was advisory concerning the most important affairs of the city.[1] Again, drawing a parallel with the Spartan constitution Aristotle states that the Council of Elders, which the Cretans call βουλή, is composed by former *kosmoi*, and has the same authorities as the Spartan Council. Aristotle criticizes the Cretan Elders because their tenure for life and are the fact that they do not give account for their administration 'privileges greater than their merit deserves', and their exercising their power not according to written laws but at their own discretion is dangerous for the state.[2]

Both Ephorus and Aristotle give general accounts of the fourth-century[3] institutions of what they represent as a unified Crete without distinguishing among the different cities, as opposed to inscriptional evidence, which reveals a much more differentiated institutional setting as regards the archaic and classical *poleis* of Crete. On the subject of Councils in the cities of Crete before the third century, however, epigraphic testimonies are so scarce that the overall existence of Councils in archaic and even in classical Cretan *poleis* may be put in doubt. After all, did early Cretan constitutions possess an institutionalized Council? If they did, what was the Council's composition and what authorities did it have? Furthermore, what was the role of the Council in the political system of each *polis*? How was it related and how did it interact with the other authorities of the *polis*'s government? The answers to these questions have important consequences for our understanding of Cretan institutions. This paper investigates the scanty epigraphic evidence on Cretan Councils in the archaic and classical periods and tries to provide some answers to the above questions, so far as this is permitted by the extremely fragmentary condition of many Cretan inscriptions, and by problems of dialect. In the first part I

[1] Ephorus *ap*. Strabo 10.4.18, 22 (*FGrHist* 70 F149).
[2] Aristotle, *Politics* 2, 1272a 9, 34–39.
[3] All dates are B.C.E. unless otherwise stated.

will examine the testimonies and in the second I will discuss aspects of the government of the Cretan cities in the light of the evidence.

I. The institutional vocabulary of Crete has its own particularities, which are more marked in the earlier sources. A notorious example is the earliest law from Dreros on the iteration of the office of *kosmos*,[4] where a vast bibliography has attempted to interpret the nature of the boards of officials obliged to take an oath, not least because the names of the two of these boards appear only in this document. Despite the different opinions, the general consensus is that the *kosmos*, the *damioi* and the Twenty of the Polis were Dreros's governing bodies in the seventh century, and most scholars believe that the Twenty of the Polis composed some sort of an aristocratic Council.[5]

Apart from the phrase 'the Twenty of the Polis' which presumably denotes an early Council, the two terms used in Cretan inscriptions for Council are a) βολὰ/βωλὰ (the dialectal forms of the word βουλὴ, which is the usual designation of a Council in Greek antiquity), and b) πρεισγεία/πρησγήια (the dialectal forms of πρεσβεία, which is the Cretan equivalent for γερουσία). In non-democratic cities Councils were often called γερουσίαι and were composed of γέροντες (Elders), a term referring either to the actual age or to the authority and respectability of the Council's members.[6]

The earliest evidence of a Cretan βολὰ occurs in a late sixth- or early fifth-century inscription from Axos containing regulations about public sacrifices.[7] The preserved final part of this statute imposes fines on priests, who keep for themselves parts of the sacrificial animals against the law, then sets the procedure in court, and directs the *kosmos* in charge to exact the fines or be liable to pay them himself. The last paragraph of the law sets the obligation for the Council to provide the sum of twelve staters for buying the sacrificial animals for the festival of Kydanteia, which was celebrated every two years:[8] κατὰ τὰ αὐτὰ τοῖς Κυδαντείοις διδόμεν τρίτοι ϝέτει τὰν βολὰν ἰς τὰ θύματα δυόδεκα στατῆρανς. The expression κατὰ τὰ αὐτὰ ('in the same way')[9] probably indicates that the Council provided the funds for other sacrifices too. Apart from the information that sixth-century Axos had an institutionalized Council called a *bola* with the authority to provide the funds for

4 Demargne – Van Effenterre 1937, 333–48 (*ML* no 2; *IGT* no 90; *Nomima* I, no 81).

5 Ehrenberg 1943, 14–18; Beattie 1975, 14; van Effenterre 1986, 396; *IGT* 337; Hölkeskamp 1994, 148; Gehrke 1997, 59; Hölkeskamp 1999, 91; Seelentag 2009a; Youni 2011, 37.

6 For the importance of age in participating in public affairs cf. Plato, *Laws* 1, 634d–635a, stating that in Crete young men were not allowed to have an opinion on laws or to criticize them.

7 *IC* II v 9 (*IGT* 106+107).

8 *IC* II v 9 ll. 11–14: "In the same way, at the Kydanteia the *Bola* is το give every third year for the victims twelve staters."

9 For this expression cf. the Great Code of Gortyn, *IC* IV 72, VI ll. 1–2.

sacrifices in public festivals, all other aspects of this Council, e.g. its composition, number of members, duration of office, and competence remain obscure.

The second attestation of a βολὰ occurs in a treaty between the cities of Knossos and Tylissos with the mediation of Argos, dated ca. 460–450. Two inscriptions, one found in the Agora in Argos and the other found at the sanctuary of Artemis in Tylissos preserve some of the conditions of the agreement between the two Cretan cities.[10] One of these provides that if a Knossian in Tylissos calls for an embassy from his own city, the Tylissians are obliged to satisfy his request and follow the embassy wherever needed; the same rule applies for a Tylissian's request in Knossos. If the city's officials do not provide the expenses for the maintenance of the ambassadors,[11] the Council (βολὰ) must immediately impose on the *kosmoi* an indemnity of ten staters. Thus any Tylissian complaining that the *kosmoi* had not acted in conformity with the law on hospitality—specifically, with the provision on covering the Tylissian ambassadors' maintenance costs—would turn to the Council. The Council had to investigate the claim and in case of infringement, it ordered immediately (αὐτίκα) the *kosmoi* to pay an indemnity of ten staters to the Tylissian ambassadors.

The fact that the text does not specify which city's Council is meant may create an ambiguity: it may be taken to mean either that the Councils of Knossos and Tylissos had the authority to impose the indemnity on their respective officials, or that this competence was bestowed on the Council of Argos. However it is very unlikely that the Argive Council had jurisdiction over foreign magistrates; moreover, on a practical level it would be very complicated for citizens of the two Cretan cities to refer to the Council at Argos, which would then impose the indemnity on the *kosmoi* of Knossos or Tylissos each time there was an infringement. The *interpretatio facilior* is preferable and we should assume that in the middle of the fifth century Knossos had an institutionalized Council called βωλά.[12] The provision for a similar procedure in Tylissos implies that in this city there was also a Council, probably with the same name. The Council's authority over the *kosmoi* may have been part of a general competence in international matters and bilateral relations or of a general authority to oversee the financial activity of the *kosmoi*. It is noteworthy that in some Cretan cities in the Hellenistic period the competence of judging questions related to laws of hospitality belonged to a special board of Elders called the *Eunomia*.[13]

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[10] *IC* I viii 4 (Argos) and *IC* I xxx 1 (Tylissos) (*Nomima* I, no 54 I+II).

[11] For the 'ξένια τὰ ἐκ τῶν νόμων' cf. *IC* I v 53 ll. 47–48.

[12] *ML* 104; Wallace 2013, 196.

[13] E.g. *IC* I xvi 5 (Lato) ll. 34–36: [αἰ] δέ τί κα ἔλῃται Λατίοι ἢ Βολοντί[οι, ἐπιόντων οἱ πρείγιστοι]/ [οἱ ἐ]πὶ τα[ῖ]ς Εὐνομίαις οἱ ἑκατερῆ ἐρευνίοντες καὶ ῥυθμίττον[τες ---]/πρὸς αὐσαυτὸς καὶ τἆλλ[α] πάντα χρήμενοι, καθώς κα ἐπεικ[ὲς ἦι ---]. On the *Eunomia* see Guarducci 1933, 204–205; van Effenterre 1942, 46.

A *bola* is probably attested also in a decree preserved in an inscription from Lyktos dated ca. 500. The decree sets a ban on receiving aliens in the city, with two exceptions: persons over whom a Lyktian himself has power, and the citizens of Itanos.[14] The decree further provides that if anyone receives an alien, the sitting κόσμοι or the ἀπόκοσμοι shall exact a fine of a hundred cauldrons for each alien 'by reason of enactment of the Council': Αἰ δέ κα [δέκσετ]αι ἢ κοσμίων ἢ ἀπόκοσμο[ς ὐπὲ]ρ ϝωλᾶς ϝαδᾶς ἑκατὸν λέβητ[ας πράκσ]ει ἑκάστω ὅσος κα δέκσεται.[15] The reconstruction of this passage is controversial but according to the more probable interpretation, fifth-century Lyktos had a Council involved in legislative activity, with the authority to exclude aliens from the city. If this interpretation is valid, it is an important piece of information, because it provides the unique attestation in Crete of a Council vested with legislative authority, which in this case probably concerned the enactment rather than the proposal or validation of the law.

Finally, two inscriptions from Gortyn may possibly attest to the presence of a Council; both occur in desperately fragmentary texts where βολὰ can be read but not much can be made in a missing context. The first inscription belongs to the earliest set of laws dated to the sixth century, which were inscribed on the walls of the sanctuary of Apollo Pythios.[16] The preserved letters in the fourth line "--]νεσβολανημ[ε]ν" may refer either to a Council (ἐς βολὰν ἤμ[ε]ν) or to a removal (ἐσβολὰν ἤμ[ε]ν). In the second inscription, which is dated to the fifth century,[17] the phrase ἐ]μ βολᾶι ('before the Council') seems to be the most supported interpretation.[18]

The term πρεισγεία is attested in an inscription of the beginning of the sixth century found at Prinias, a site identified with the ancient city of Rhitten. Only a few words survive from this archaic text which was inscribed on the four sides of a pillar,[19] but the word πρησγήια can be clearly read twice (and remarkably, with two different spellings). This term corresponds to the Attic πρεσβεία which may designate either an embassy or a panel of elders that composed the Council of the

[14] *IGT* no 87 (*Nomima* I, no 12).

[15] Ibid. ll. 4–7. The reconstruction of this passage is by Gagarin – Perlman (forthcoming). Fαδὰ is the feminine form of the epigraphically attested word ἄδος meaning 'statute'. Previous editors read in l. 6 a koppa instead of a rho, and suggested two possible reconstructions: either ἐ]ϙ Fωλᾶς Fαδᾶς (= by force of a law of the Council) or ἐ]ϙFωλᾶς Fαδᾶς (= by force of the law on ἐκβολά), but ἐκβολά is an otherwise unattested noun hypothetically equivalent to the Athenian *exoule*, and moreover one would expect instead ἐσβολά, in analogy with e.g. ἐσδυσάμενος. On previous readings and reconstructions see M. van Effenterre 1990; Chadwick 1987, 329–334; Bile 1988, 32–34 and passim; *IGT* no 87; *Nomima* I, no 12; Hölkeskamp 1999, 200.

[16] *IC* IV 23 l. 4: --]ν ἐσβολὰν ἤμ[ε]ν.

[17] *SEG* 49 (1999), 122 = Gagarin – Perlman (forthcoming), GOR3.

[18] Gagarin in Gagarin – Perlman ad. loc.

[19] *IC* I xxviii 7 (*Nomima* I, no. 63).

polis. The latter interpretation, generally accepted by scholars,[20] is compatible with the literary evidence on the name of the Council in Crete discussed above. The presence of a Council in this early inscription may be also supported by some indications in the text which suggest that it contained one or more enactments[21] of constitutional nature.[22]

The word πρεισγήια is also possibly restored in an inscription from Axos,[23] but there is no context to indicate the meaning of this word. If this word refers to the Council of Elders then we must presume that at Axos two alternative names were used to designate the Council since the previously discussed text from Axos employs the term *bola*.

Furthermore, the Rhittenian Elders are designated as πρείγιστοι in an inscription of the beginning of the fifth century.[24] This text records an unequal treaty between Rhitten and its powerful neighbor Gortyn.[25] In lines 8–12 a prohibition is set against Gortynians taking security from Rhittenians; if a Gortynian is convicted for infringement of this law, he shall pay double the value of the security, and the Rhittenian *kosmos* is to exact payment. If the *kosmos* fails to exact payment, the πρείγιστοι are directed to exact it from them. This provision recalls similar measures

[20] Guarducci in *IC* I xxviii 7; Van Effenterre – Ruzé in *Nomima* I, no 63.

[21] On the basis of the direction of the lines in this peculiar pillar, Gagarin – Perlman (forthcoming) argue that it possibly contained two enactments.

[22] For example the phrase "with all force" in l. A1, according to Guarducci's suggested restoration παν]σεϝδὶ = πανσυδί might be related to a decision of the Council. Another example is l. D2 where one possible restoration is ἐνέα ἢ σὺν πλί[οσι], an expression known from other epigraphic texts, where it refers to the lawful composition of a city's organ or to the majority provided for by the law for taking a decision in that body. For instance, a fifth-century constitutional law from Teos forbids the infliction of capital punishment on a citizen unless it is imposed by a board composed of at least 200 citizens (ἄμ μὴ σὺν διακοσίοισιν ἐν Τέω ἢ πλέοσιν: Youni 2007, 729–730). By analogy, the phrase 'with nine or more' in the text from Prinias could specify the quorum of the participants or the majority of votes of the Councilors for taking a decision, although these considerations are purely speculative.

[23] *IC* II v 7.

[24] The adjective πρείγυς means 'old', cf. *IC* IV 75 C ll. 3–4 (Gortyn, 5th century). The comparative occurs in IC IV 72 XI l. 55; also in *IC* IV 248 l.1 (Gortyn, 1st century) where it may denote a Council (Bile 1988, 341). The superlative πρείγιστος is often used in the regulations about the *patroiokos* in the Great Code of Gortyn, e.g. *IC* IV 72 VII ll. 17–18, 20, 23–24, 27. In Hellenistic and imperial inscriptions the term πρείγιστος was a generic name for the members of a Council of elders or of the board of εὐνομία and also for other officials, e.g. *SEG* 28 (1978), 753 (Rethymnon, 3rd/2nd century); *IC* IV 294 (Gortyn, 1st century C.E.); *IC* III iii 7 (Hierapytna, 2nd century C.E.) During the third and second century a Gortynian πρείγιστος was stationed at the dependent island of Kaudos (*IC* IV 184 and *SEG* 23 (1973), 589, l. 24). One of his duties was to receive the stipulated amount of salt from the inhabitants in cooperation with another board of officials, the ὧροι. This πρείγιστος was a specific official whose seat was at Kaudos rather than a member of the Council.

[25] *IC* IV 80. *Nomima* I, no 7; Hansen – Nielsen 2004, 1186.

found in other Cretan inscriptions that provide for the liability of officials with their personal property in case they fail to exact fines.[26] Although the text does not specify whether the Elders are Rhittenian or Gortynian we may hold it for certain that they were a Rhittenian panel, with the authority to oversee their own city's officials. If the term πρησγήια in the previously discussed inscription from Rhitten denotes a Council then it seems that this name for the Council was preserved for at least one century. Although dependent on Gortyn, Rhitten still had her own administrative organs. In Gortyn control over the *kosmoi* for their financial administration was the task of specific magistrates called *titai*, and it is very likely that in Rhitten this was a duty of the Council.

Summing up the epigraphic sources pertaining to a Council in chronological order, a board of twenty citizens is attested in Dreros since the seventh century; a βολὰ is attested in Axos and probably in Gortyn since the sixth century and in Knossos, Tylissos, and Lyktos since the fifth century. Finally, a πρεισγήια is attested in sixth-century Rhitten and its members, the πρείγιστοι, are attested in the same city about a century later. Despite the varying degree of certainty concerning these instances, even according to the most skeptical approach the undisputable evidence suggests that Councils of Elders must have existed also in other Cretan *poleis* since the archaic period.

The mere existence of a Council in a *polis*, however, does not advance substantially our knowledge of this city's institutions unless more information is provided about the Council's functions and tasks. More importantly, the presence of a Council in a *polis* does not imply per se that it had probouleutic competence, as it is sometimes assumed. We know that Councils existed in all types of constitution, whether they were democratic, aristocratic or oligarchic, and they already had a role in the Homeric society,[27] but their functions were highly differentiated according to their socio-political context. If seventh-century Dreros had a Council composed of twenty Elders, its obligation to take the oath about the *kosmoi* shows that it was placed among the most important administrative bodies of this city, but it does not imply anything about its duties. The role of Councils in the political system of the early Cretan cities cannot be clarified until some essential questions are taken into consideration, concerning a) the Council's authorities; b) the Council's composition, i.e., the number of its members, how these were appointed, the criteria for their selection, their length of tenure; c) the degree of the Council's formalization (for example: Were there scheduled meetings or did it meet occasionally to address specific issues and provide ad hoc solutions? Were its authorities specifically provided for by the law? Was its composition fixed or was it subject to a temporary consensus among powerful individuals or groups?). In examining the role of Cretan

[26] See Youni 2011, 170–72.
[27] Wallace 2013.

Councils some spatial and temporal parameters should also be taken into consideration.

Firstly, since each Cretan city had her own constitution and set of laws, many institutional differences are observed from one *polis* to another.[28] The population and the citizenry of each Cretan city were composed differently (for example the citizens of each city were distributed into a different number of *phylai*, which had different names; in the Eastern part of the island there was a marked Eteocretan influence). Alphabets and dialects had differences, and so did calendars, including different month's names and festivals.[29] From this we may infer that, at least in the archaic period, the administrative organs and the political groups probably did not develop in the same way and did not have the same authorities in all cities.

Secondly, we should keep in mind the progress of institutionalization from the archaic to the Hellenistic period as the organs of the city's government were progressively formalized and assumed a distinctive function in the constitution. The Hellenistic period marks a transition of Cretan institutions towards a uniform Greek model, under the influence of intestate relations with other Greek *poleis*. The legal and institutional vocabulary of Hellenistic Cretan decrees is much closer to that of decrees from other parts of the Greek world, a fact that is best illustrated in a number of imported formulas and terms.[30] By contrast, government in the Cretan cities during the archaic and classical periods had its own particularities which make comparison of the Cretan political organs with, for example, those of democratic Athens unfortunate.[31] The processes of institutionalization in the early *poleis* are wholly unclear, and we should guard from assuming too much from later sources and considerations. For example, as regards the Drerian Council of the Twenty, it is very doubtful that it had acquired any specifically fixed competences in the seventh century. Most probably the tasks assumed by the Council were ad hoc, and were determined more by the personal authority of its members than by institutional rules, and in fact there is no evidence about the extent to which this situation had changed in the sixth or even in the fifth century.

There is some evidence about the duties of the Council in the cities of Axos, Knossos, Tylissos, Lyttos and Rhitten. As we saw, in sixth-century Axos the *bola* was responsible for the administration of the funds for sacrifices in at least one public festival, which may imply a more extensive competence of the Council in the administration of public finances. About Lyttos we are informed that in the

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[28] Pointed out by Ephor. ap. Strabo 10.4.17. On the diversity of Cretan institutions see Perlman 1992; Link 2003; Chaniotis 2005.

[29] Chaniotis 1996.

[30] On 'imported' formulas such as the preamble 'βωλὰ καὶ ἐκκλησία' in Cretan decrees after the third century see Bile 1988, 321, who also points out the difference between the archaic βολὰ of Axos and the βωλὰ in Hellenistic cities.

[31] See Fröhlich's observation on the different nature of Cretan Councils as compared to those of other Greek *poleis* (2004, 517).

beginning of the fifth century the *bola* was responsible for enacting a statute, but we ignore the procedure that was followed and it is not clear whether this single attestation of the Council's legislative authority was part of its regular tasks or an exceptional duty. About the middle of the fifth century the respective *bolai* in Knossos and her dependent Tylissos had the authority to oversee that the *kosmoi* complied with the laws on hospitality, and in case of infringement the Council exacted an indemnity. During the same period the *preigistoi* in Rhitten, which had become dependent on Gortyn, had financial control over the *kosmoi* in what concerns the collection of fines, and if these officials failed to exact the fines fixed by the treaty, the *preigistoi* made them pay the fines themselves. This authority of the Rhittenian Council may be paralleled to the authority of the Councils of Knossos and Tylissos, as in both cases the Councils oversee the financial administration of the *kosmoi* in interstate affairs.

Thus the main authority attested epigraphically for early Cretan Councils is their involvement in the financial administration of their *polis*, especially in controlling the officials' conformity with the laws on exacting fines and indemnities. A parallel from Hellenistic Dreros may suggest that financial control over the *kosmoi* was a usual task of the Council. In the ephebic oath a heavy fine is imposed on *kosmoi* failing to administer the oath to each year's ephebes, and the Council is authorized to exact the fines from the *kosmoi* or else each one of its members is liable to pay double the fine. In its turn, the Council is controlled by another panel of magistrates called the ἐρευταὶ τῶν ἀνθρωπίνων.[32] On the other hand, there is no evidence from archaic or classical Crete about the Council's judicial competence, as opposed to information from other Greek cities about Councils judging specific types of cases. Among the numerous procedural enactments that are preserved from the Cretan *poleis* and especially from Gortyn, the Council is not implicated, although judicial authority of the *kosmos* and the *dikastas* (= judge) is well attested.[33]

More importantly, there is no attestation whatsoever about a Cretan Council's involvement in preparing the bills for discussion and introducing them in the assembly (προβούλευσις), which was one of the most important duties of Councils in many Greek cities. The only probable involvement of the Council in legislation occurs in fifth-century Lyktos, but there, rather than having a probouleutic role, the

[32] *IC* I ix 1 ll. 128–134 (late 3rd or early 2nd century).

[33] An instance of the Council's judicial authority is attested later in Knossos, where a board composed of the *kosmos* and the Council had joined judicial authority in interstate matters. One of the clauses of a third-century treaty between Knossos and Miletus sets the prohibition for Knossians to buy a Milesian as a slave and vice versa, and gives the Knossian *kosmos* the authority to order any Knossian who was brought before him with this charge to release the Milesian. If however the Knossian has any counterclaims, competence to judge the case is with 'the *kosmos* and the Council'. *IC* I viii 6 ll. 18–31: ἐὰν δέ τι ἀντιλέγωσιν περὶ ὅτινός κα, κρίνειν ἐγ Κνωσῶ/ μὲν κόσμον καὶ βουλάν ἐμ Μιλήτωι δὲ τοὺς τοῦ ἐμπορ/ου ἐπιμελητὰς πέντε ἀμέραις, ἀφ' ἃς κα καταστα θῶ/σιν ἐπὶ τὸ ἀρχεῖον.

Council seems to have had the authority to enact laws on its own right. In fact, the few surviving prescripts of decrees from Lyktos, Eltynia and Gortyn, where only mention of the people is made, suggest that the Council was not involved in *probouleusis*.[34] It is also very likely that *probouleusis* by the Council was neither systematically nor uniformly required in the Hellenistic period. In fact, the sources suggest that it was rather occasionally required. Cooperation of the Council with the Assembly does appear in the enactment formula of some decrees,[35] but the typical prescript of Hellenistic degrees from the majority of the Cretan cities mentions only the *kosmoi* and the *polis*.[36] Even inside a single city practice is not uniform. In third-century Praisos, for example, one decree is introduced as 'the decision of the boule and the *koinon* of the Praisians, on the *kosmos'* proposal', [37] but another contemporary decree is introduced as an enactment of the magistrates (ἄρχοντες) and the *koinon*.[38] The term 'archontes' probably includes both the council and the *kosmoi*, but this does not imply a *probouleusis* by the boule; quite on the contrary, it appears more as an enactment agreed upon and introduced by a small governing group to the assembly for approval. By using Hellenistic examples I do not intend to draw conclusions about government and institutions of the archaic and classical periods, but the observation that προβούλευσις was not a uniform practice even in later times implies that this task was not among the Council's authorities in the earlier periods.

In what concerns the composition of the Council, the terms πρεισγήια and πρείγιστος suggest that its members were chosen among the elders of the elite, presumably among the ex-*kosmoi*[39] and, as Ephorus vaguely states, among those who were adjudged men of approved merit.[40] Unless new sources come to light we

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[34] Lyktos, late 6th or early 5th century: van Effenterre – van Effenterre 1985, 157 A and 157 B (*IGT* nos 87 and 88; *Nomima* I, nos 12 a and B). Eltynia, late 6th or early 5th century: *IC* I x 2 (*IGT* no 94; *Nomima* II, no 84). Gortyn, mid-5th century: *IC* IV 78.

[35] E.g. *IC* III iv 2: Ἔδοξε Ἰτανίων τᾶι βουλᾶι καὶ τᾶι ἐκκλησίαι; cf. *IC* III iv 3, 4, 7 (Itanos, 3rd century).

[36] *IC* I viii 6: Ἔδοξε Κνωσίων τῶι κόσμωι καὶ τᾶι πόλει (Knossos, mid-3rd century). *IC* I xviii 8: Δεδόχθαι Λυττίων τοῖς κόσμοις [καὶ τῆ]ι πόλει (Lyttos, 3rd century); *IC* IV 168: Γορτυνίων οἱ κόσμοι καὶ ἁ πόλις (Gortyn, 218); *IC* II i 1: Δεδόχθαι τοῖς κόσμοις καὶ τᾶι πόλει τῶν Ἀλαριωτῶν (Allaria, ca 204/3); *IC* II v 17: Ἔδοξε Ϝαξίων τοῖς κόσμοις καὶ τᾶι πόλει (Axos, ca 204/3); *IC* II iii 2: Ἀπτεραίων οἱ κόσμοι καὶ ἁ πόλις (Aptera, after 170); *IC* I v 52: Ἔδοξεν Ἀρκάδων τοῖς κόσμοις καὶ τᾶι πόλει (Arkades, after 170), to cite only a few examples.

[37] *IC* III vi 10: θεός. κόσμου γνώμα· ἀγαθᾶι τύχαι· ἔδοξε Πραισίων τᾶι βουλᾶι καὶ τ<ῶ>ι κοινῶι, ἐκκλησίας [κ]υρίας γενομέ[νης].

[38] *IC* III vi 9: Ἔδοξε Πραισίων τοῖς ἄρχουσι καὶ τῶι κοινῶι, ἐκκλησίας κυρίας γενομένης.

[39] As Arist., *Pol*. 2, 1272a 33–35 states for the fourth century.

[40] Ephor. *ap*. Strabo 10.4.22: περὶ δὲ τῶν μεγίστων συμβούλοις χρῶνται τοῖς γέρουσι καλουμένοις. Καθίστανται δ' εἰς τοῦτο τὸ συνέδριον οἱ τῆς τῶν κόσμων ἀρχῆς ἠξιωμένοι καὶ τἄλλα δόκιμοι κρινόμενοι.

shall never know how the members of Cretan Councils were appointed or what their number was, if indeed their number was fixed by law, although the fact that the number of the *kosmoi* in each city was not fixed suggests that the same was probably true of the Council. The Twenty of the Polis were one of the three main governmental bodies in archaic Dreros, but it is not secure to infer from this that the number of the Drerian Council's members remained the same in later periods. In any case, it seems safe to suggest that the number of the Council's members in the Cretan cities was small, if we take into account the restricted number of citizens. Even in a *polis* as important as third-century Gortyn the quorum of the assembly was only three hundred citizens.[41]

II. The scarcity of evidence about Councils is in striking contrast with the abundant information on the authorities of the *kosmoi*, the supreme magistrates in Cretan *poleis*. The presence of the *kosmoi*, who were the omnipotent archons and administrators of political power in classical and Hellenistic Cretan *poleis*, is already striking in the archaic sources, beginning with the famous statutes regulating their tenure from seventh-century Dreros and sixth-century Gortyn. Clearly, they had general authority over all important state affairs. Especially the authority of the *kosmos* to pronounce judgment and inflict fines is amply attested in the early inscriptions;[42] in fifth-century Gortyn their jurisdiction includes private law, as for example in the marriage of the *patroiokos* (the Cretan equivalent of the *epikleros*).[43] Competence of the *kosmoi* in the city's relations with her dependencies is attested in fifth-century Gortyn.[44] The well-known Spensithios decree from sixth-century Datalla shows that the chief magistrates were responsible for the administration not only of human (ἀνθρώπινα) but also of divine matters (θήια), i.e., they were involved in the city's cult.[45] This text reveals another important piece of information, namely that the authority of the *kosmos* could also be shared by other persons who did not bear this title, as in the case of Spensithios himself, who is

[41] *IC* IV 162, ll. 2–3: [τάδ' ἔϝαδε τ]ᾶι [πόλι] ψαφίδδονσι τρια/[κατίων π]αριόντων (decree dated c. 250/200, imposing the use of the new bronze obols and banning the use of silver obols used until then). The number of three hundred is considered by scholars as the quorum of the assembly: Guarducci, *ad loc.*; Chaniotis 1996, 292; Rhodes – Lewis 1997, 311. The same quorum is attested in another Gortynian decree dated c. 168 (*IC* IV 181, l. B 7).

[42] Some early examples are: Demargne – Van Effenterre 1937, 333–348 (Dreros); *IC* I x 2 (Eltynia); Van Effenterre – van Effenterre 1985, 157 B (Lyktos). Authority to inflict and exact fines in sixth- and fifth-century Gortyn: *IC* IV 14 g–p 1; *IC* IV 79; *IC* IV 80. Cf. *IC* IV 184, ll. 11–13. See Gagarin 2001.

[43] *IC* IV 74, VIII 53–56.

[44] *IC* IV 80 (*Nomima* I, no 7), ll. 4–7. There is more information about the *kosmoi*'s competence in interstate affairs in Hellenistic documents, e.g. *IC* I iii 1, ll.5–8; *IC* I v 52, ll. 40–42; *IC* I vi 1; *IC* I viii 8, ll. 9–11.

[45] Jeffery – Morpurgo-Davies 1970, 118 (*Nomima* I, no 22 B) ll 1–3.

honored by the city with the life-time office of *poinikastas* and, at the same time, is allowed to the "same jurisdiction as for the *other kosmoi* for every kind of trial."[46]

Remarkably, a Lyktian law on aliens shows that the authority of the sitting *kosmoi* was also shared by the '*apokosmoi*'. The meaning of the term ἀπόκοσμος is not clear; it may be either '*kosmos*-elect'[47] or, more plausibly, 'ex-*kosmos*'.[48] According to the traditional interpretation, the Lyktian law provided for heavy penalties in case a *kosmos* or an *apokosmos* received aliens against the law.[49] In a forthcoming corpus of Cretan archaic and classical inscription Gagarin and Perlman propose a new interpretation, according to which it was the sitting κόσμοι and the ἀπόκοσμοι who inflicted the penalties.[50] The plausibility of the former or the latter interpretation does not affect the core of my argument, and the same is true of the ambiguity of the term ἀπόκοσμος. However it may be, this passage has important consequences for our perception of the concept of power in early fifth-century Lyktian mentality, because it shows that *kosmoi* were grouped together with *apokosmoi* either as liable to or as those who inflicted fines. If the latter interpretation is correct, this would be the unique—to my knowledge—attestation of the competence of future (or ex-) magistrates to inflict penalties, which implies a conflation of the powers of sitting magistrates with the power of the rest of the ruling class, either potential or ex-*kosmoi*.

Epigraphic, literary and archaeological evidence points to the fact that the Cretan *poleis* from the archaic until the Hellenistic period were governed by small elites with privileged access to agricultural labor and pastoral land.[51] Excavations currently conducted at Eleutherna have brought to light luxurious burials of the local aristocracy dated to the sixth century.[52] Aristocratic government by an elite restricted in number continued during the Hellenistic period. A typical example of governance by a small group of aristocrats is provided by Lato, a *polis* flourishing in the second century.[53] A remarkable number of magistrates' names from the last

[46] Ibid. B ll. 7–10: δίκα δὲ ὄτερόν κα .ώληται ὸ ποινικασ[τὰ]ς αἶ περ οἰ ἄλλοι κρησεταιην.

[47] Manganaro 1966, 16; Bile 1988, 274, by analogy with '*apodromos*' (an 'adult male citizen-elect').

[48] Gauthier 1977; Van Effenterre – van Effenterre 1985, 171–72; *SEG* 46 (1996), 1201. Perlman 2005, 1153 considers both possibilities. Papakonstantinou 1996, 93–96 argues that an ἀπόκοσμος was a κόσμος discharged for maladministration and compares this term with the ἄκρηστος of the early Drerian law, but his arguments are not convincing. Chadwick's interpretation of the word as meaning "non-*kosmos*" (1987, 331) is also improbable. The term ἀπόκοσμος occurs once more in a later inscription from Axos (Manganaro 1966, 11–22).

[49] *Nomima* I, no 12.

[50] Gagarin – Perlman (forthcoming), Lyktos 1A.

[51] For an example see Haggis et al. 2004 (Azoria in the 6th century).

[52] Panagopoulos 2010.

[53] The analysis that follows is based on the sources and conclusions supplied by Baldwin Bowsky 1989b. See also Baldwin Bowsky 1989a; Tréheux 1984. Similar conclusions

quarter of the second century has been preserved which shows that the kosmate was monopolized by an aristocratic elite composed exclusively of a few families.[54] Baldwin Bowsky has assembled the prosopographic evidence and reconstructed a number of family lines from among those who composed the ruling gene of Lato, showing the vitality and continuity of this city's aristocratic families through the second century and into the first. During this period, not only the persons that held public office belong to the same families, but also there are the same persons who appear in the sources as officials of lower rank and later as chief magistrates. Sometimes brothers served on the same board of *kosmoi*[55], and these officials had at their disposal a secretary who was chosen from the family, often a brother or son of one of them.[56] Even six generations of a single family have been traced to have filled the kosmate or the college of *Eunomiotai* in third- and second-century Lato[57]. Clearly, at that period, in Lato the members of the ruling class belonged to a restricted number of clans (γένη), and only a relatively small part of the population of Lato dominated public offices.[58] The fact that members of the board of *kosmoi* were the heads of the powerful households explains the varying number of members of each year's *kosmoi*.

Aristocratic government by small elites was supported by a network of institutions shared by all cities and founded on the organization of the citizens in tribes and *hetaireiai*, as well as on collective activities such as warfare, hunting, exercise at the *gymnasion*, common messes at the *andreion* and rites of initiation. Significantly, all these domains of public life were the privileged subject of statutory regulation since the earliest period of Cretan legislation. In seventh-century Dreros some of the earliest laws pertain to the education in the boys' *agelai*, to the *hetaireiai* of the citizens and to the *phylai* which had a major role in politics.[59] In sixth-century Eltynia lengthy statutory rules governed behavior of every age class in the *andreion*.[60] In the early sixth century a Gortynian law on the *andreion* probably set the appropriate way to serve wine and the allowed quantities for participants

have been drawn from the analysis of prosopographic data from other Hellenistic Cretan cities. For Amnisos see Chaniotis 1988; idem, 1992, 305–309. For Hierapytna, Guizzi 2001, 328–30.

54 Cf. Willetts 1955, 113 and passim.

55 *IC* I xvi 23 and 31; Davaras 1963, 159 no 14.

56 *IC* I xvi 26 and 32; *IC* I xxii 2; Bousquet 1938, 389.

57 Baldwin Bowsky 1989b, 336.

58 Baldwin Bowsky 1989b, 343.

59 A law 'on the *hetaireiai*' set the 20th of the month Hyperboios as the final date for the graduation of boys from the *agela* and their enrollment in the men's *hetaireiai*: van Effenterre 1946, 597 no 3 (*IGT* no 92; *Nomima* I, no 68), Dreros, 7th/6th century. Role of the phylai: van Effenterre 1946, 590–97 no 2 (*IGT* no 91; *Nomima* I, no 64), Dreros, 7th/6th century. For the importance of the phylai as the essential group of citizens see Youni 2011, 127–34.

60 *IC* Ix 2. On this law see *IGT* no 94; *Nomima* II, no 80; Hölkeskamp 1999, 107–109; Mandalaki 2010; Youni 2011, 176–78.

according to their age class.[61] A lengthy statute from fifth-century Gortyn, extending over at least three columns, regulated issues such as the quantities of each product destined for the citizens' contribution to the common messes, cases of failure to supply the fixed quantity, and torts relating to the contribution.[62] A law from Eleutherna, dated to the late sixth or early fifth century probably contained similar provisions.[63] The goods that were part of a citizen's contribution to his *andreion* were considered as a distinctive part of his property and were protected by special provisions, as in a Gortynian law of the fifth century, which exempts from surety the essential supplies destined for the *andreion*.[64] At sixth-century Axos, dining at the *andreion* was also provided for foreign workers hired by the *polis* to carry out specific public work.[65] Legislation on the *hetaireiai* from the classical period survives from Gortyn, where a special 'judge for the *hetaireiai*' is attested, and from Axos, whereas laws on the *hetaireia* from the Hellenistic period are preserved from various cities.[66]

It is of interest to observe that the essential activities of public life, although institutionalized and operating in a framework regulated by the laws, were penetrated by a parallel system of private initiative based on a culture of excellence, bravery, and the bonds of friendship. An example of a formalized institution where some aspects were left to private initiative exercised arbitrarily is the education of young citizens. In his detailed description of *ephebeia* in fourth-century Crete, Ephorus reports that the boys were assembled in the *agelai* by the most conspicuous and influential boys—not by a *polis* official—who chose their companions at their discretion. The leader of each *agela* was, again, not a person appointed by the *polis* but the father of the assembler, who had authority to lead them to hunting and running races and to punish anyone who was disobedient.[67] In this context it becomes evident that political power and influence do not necessarily pair with an office. Influential elite members did not have to be magistrates to exercise their power; influence could be exercised through sons, brothers or other members of

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[61] *IC* IV 4.

[62] *IC* IV 77 B. Cf also *IC* IV 143, which probably treated the same subject. For contribution to the syssitia cf. Arist., *Pol*. 2, 1272a 12–21. See also *IGT* 430–432; Lavrencic 1988, 151–54; Chaniotis 1995, 44–45; Guizzi 1997.

[63] *IC* II xii 5.

[64] *IC* IV 75 B. A much later law from Lyktos (*IC* I xviii 11, 2nd or 3rd century C.E.) which refers to the distribution of fruits to the *startoi* "according to the πάτρια" shows how deeply rooted the common messes were in Cretan mentality.

[65] *IC* II v1.

[66] Gortyn: *IC* IV 42 B (early 5th century), *IC* IV 72 X ll. 33–39 (mid-5th century). Judge of the *hetaireiai*: *IC* IV 42 B. Axos: Manganaro 1966, 11–12 (4th century). Unknown city near Rethymnon: *SEG* 28 (1978), 753 (3rd or 2nd century). Malla: *IC* I xix 3 A (late 2nd century).

[67] Ephor. *ap*. Strabo 10.4.20.

kin.[68] On the other hand, an individual's authority could be so overwhelming as to allow him to usurp the chief office and 'act as *kosmos*' against the law, as implied by the early law of Dreros.

United by bonds of friendship and by communal life in the camps of war, in the ever-disputed borders of their *polis* or in the urban common messes and *gymnasion*, the group of *hetairoi* dominated over the rest of the population, formed by workers and cultivators, persons excluded from the *hetaireiai*.[69] The number of the *apetairoi* was so significant as to merit distinctive regulations in the code of Gortyn. In fact, lengthy provisions regulate rape and adultery when committed by or against a citizen (designated as ἐλεύθερος), an ἀπέταιρος or a slave and impose different indemnities accordingly.[70] In fifth-century Gortyn every citizen belonged to a *hetaireia*,[71] as in seventh-century Dreros and plausibly in the other Cretan cities. Indeed, participation in the common messes symbolizes above all the equality of the participants,[72] but it is also true that legal equality and social inequality can very well coexist.[73] Inside the group of *hetairoi*, the members of the kosmate, of the Council and of the lesser offices were selected not among all citizens but from the noblest and most powerful families. The examples of Lato and of other Cretan cities, strongly suggests that, as a general rule, in the Cretan *poleis* eligibility for the office of *kosmos* continued to be restricted to certain gene in the Hellenistic period as well.[74]

It seems that Crete provides a rare exception to the generally sound observation that the culture of Greek elites was competitive and agonistic rather than cooperative.[75] Whereas constitutions in most other Greek cities experienced numerous and usually violent changes no such evidence exists concerning the *poleis* of Crete. We hear of no tyrannies, no revolts of the demos, no *staseis* or revolutions of any sort. It seems that the elites that governed the Cretan cities managed to contain opposition and to control dissent, not least because they proved successful in cooperating and obtaining the necessary degree of consensus which entailed the

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[68] Cf. Link 2003, 144, who gives the example of Peisistratos in Athens. Cf. Gehrke 1997, 37.

[69] Cf. Chroust 1954, 280–82 who stresses the difference between membership in elite groups such as the *hetaireiai* and general citizenship.

[70] Rape: *IC* IV 72 II 2–16; Adultery: ibid. 20–45. The fact that citizens are designated as ἐλεύθεροι does not mean that technically the *apetairoi* were not of free status; it means that the only persons who are worth to be considered as free are the citizen members of *hetaireiai*.

[71] Maffi 2003, 163. For the role of *hetaireiai* see also Link 1994, 22–27; Maffi 1997, 463; Montechi 2007.

[72] Schmitt-Pantel 1992, 70. On the role of *syssitia* in the initiation of the youth see also Bremmer 1990, 135–38. On terminology see Bile 1992.

[73] Maffi 2003, 170.

[74] As Arist., *Pol*. 2, 1272 a 33–35 states about the fourth century.

[75] Wallace 2013, 196.

stability of their regime. The essential domain where consensus was necessary was the distribution of power, a theme that underlies numerous instances of Cretan archaic and classical law-making. An early system of distribution of power concerning the chief office of *kosmos*, providing for a certain period to elapse before a person could repeat tenure, was created in the seventh century[76] and lasted until sometime in the sixth. At that time it was substituted by a system that provided for the annual rotation of the *phylai* in the kosmate.[77] The former system concerned individuals whereas the latter laid importance on the tribes. This suggests that by the sixth century the focus on decision making was transferred from individual persons to groups with common interests. Evidently, the tribes in sixth-century Cretan cities had achieved coherence and internal concord to a certain degree. This entailed the central political role the tribes assumed as the essential units of negotiation of political power. At the same time, establishing hierarchies within the phyla could be perpetuated—or else disputed—in the context of such institutions as the *andreion*.[78]

In fact, as inscriptional, archaeological and literary evidence suggests, the core of the Cretan *polis* was the *andreion*, not the assembly.[79] The *andreion* is the public place where civic life happens, discussion of civic affairs takes place, the future of the city is planned, and politics is negotiated.[80] There were specific rituals that provided for the exact order of activities in the *andreion*, including instructive stories about the war exploits and the achievements of the bravest men. The Cretan historian Dosiadas reports that in third-century Lyktos the best portions of meat

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[76] Dreros: Demargne – van Effenterre 1937, 333–48. Gortyn: *IC* IV 14, p–g. Possibly also in Eleutherna: *IC* II xii 4, cf. *Nomima* I, no 83.

[77] Pace Perlman 1992, 194–95, the inscriptional evidence that reports a system of rotation of the tribes is not incompatible with Aristotle's statement that only members of a few *gene* were eligible for the office of *kosmoi*. Rotation of the phylai does not necessarily imply that each year's *kosmoi* were selected among all tribe members; on the contrary, reference to the *startoi* in the Code of Gortyn may suggest that *kosmoi* belonged to a subdivision of the phyla.

[78] Despite the attested stability, my intention is not to draw an ideal picture of the Cretan political system. Aristotle, *Pol*. 2, 1272a 27 asserts that even the sitting *kosmoi*'s authority could be disputed by a parallel system of power: conspiracies could be formed either by some members of the college of *kosmoi* or by private citizens to overthrow the sitting *kosmoi*, and the *kosmoi* could also resign during their term of office. This statement is in all fours with my analysis on the parallel function of institutionalized and non-institutionalized systems of power.

[79] Furthermore, recent bibliography has questioned the traditional separation between the cultic and secular aspects of dining, and suggested that buildings such as the Delphinion at Dreros may have also served the functions of an *andreion*. See Sjoegren 2001, 86–91 and 135; Carter 1997, 89; Koehl 1997, 142; Mazarakis Ainian 1997, 389.

[80] Cf. Papakonstantinou 2002, 140–41. On the *andreion* see Talamo 1987; Lavrencic 1988; Link 1994, 9–29. For *andreia* in third-century Lyktos see the description of Dosiadas ap. Athenaios 4, 143 a–b (*FGrHist* 458 F 2).

were reserved for those who had been distinguished for their bravery or wisdom.[81] The armors hanging on the walls of the *andreion*, dedicated by the elite members,[82] constantly reminded table-companions of the power and authority of these families. The strict ritual that governed life in the *andreion* reproduced traditional values and reinforced the authority of the powerful families, thus entailing the continuation of established hierarchies.

Concluding, in our investigation of the sources we saw that although Councils of some sort are attested on Crete since the seventh century, they are rarely mentioned in the sources and information about their duties is even scantier. The main activity attested for Cretan Councils in the fifth and fourth century is their involvement in financial administration (providing the funds for a public festival in Axos, financial control over the *kosmoi* in what concerned their exacting of fines in Knossos, Tylissos and Rhitten). Judicial authority of the Councils is not attested. With respect to legislative competence, it seems that in Lyktos the Council had enacted a law concerning aliens. On the other hand, Cretan Councils did not have probouleutic authority. It seems that, at least in the archaic period and possibly also in the classical period, political power and the governance of Cretan cities were exercised both inside and beyond the level of institutionalized public offices; they were rather negotiated in the context of communication, interaction and cooperation of the elites, whose primary concern was to achieve equality among their members and stability in their participation in government.[83] No doubt, the name Ἰσοκάρτης carved on a shield offered by a Cretan aristocrat to a sanctuary in the seventh century[84] implied the domination (κρατεῖν) of equality (ἴσον) not among the members of the (invisible) *demos*, but among the members of the elite. The main purport was an equal share in the administration of public affairs, such as this is attested in the constant pursuit of an effective strategy of alternation in the office of *kosmos*.

How are we to explain the shadowy appearance in our sources of Councils?[85] In a system which relied on hierarchies created in the interior of tribes and gene as much as it relied on the formal governing panels of the *polis*, and where models of civic behavior, everyday life and the administration of the city were informed by the significant political role of tribes, *hetaireiai*, common meals at the *andreion* and the preponderance of the kosmate, the authorities and competences of the Council may not have been extensively defined by law, and it is most likely that in the earlier

[81] See the description of Dosiadas cited in the previous note. A ritual of the *hetaireiai* during the celebration of the Pythian festival is attested in fourth-century Axos (Manganaro 1966, 11–12; *SEG* 23 (1973), 566).

[82] Viviers 1994, 248–49.

[83] Osborne 1996, 275–78; Seelentag 2009.

[84] Perlman 2002, 219 no 10 and 220 no 17.

[85] Also of assemblies, but this would be the subject of another paper.

period they were barely determined.[86] This does not imply that the Elders did not have a say in the city's administration, especially when serious matters of policy were at stake. After all, they were the same persons who alternated in public offices, and even when elite members did not hold offices, their influence could be exercised in a number of ways, either through other members of their kin who held an office or by using their power inside their group of *hetairoi* and tribe.[87]

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[86] The fact that the functions of Cretan Councils were not specifically determined is probably reflected in the assertion of Ephorus and Aristotle that Councils had an essentially advisory role in government (above, n. 1).

[87] I wish to thank Michael Gagarin and Alberto Maffi for their comments on earlier drafts of this paper.

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APPENDIX — INSCRIPTIONS

1. DRERos (Law on the Iteration of the Kosmos, c. 650)
Demargne & van Effenterre 1937b = *SEG* 27, 620 = Bile 29–30 no. 2 = *IGT* 90 = *Nomima* I, 81 = GP Dr1

1 ← ἆδ’ ἔϝαδε | πόλι· | ἐπεί κα κοσμήσει, | δέκα ϝετίον τὸν ἀ-
1a ← θιός· ολοιον
2 → ϝτὸν μὴ κοσμῆν· αἰ δὲ κοσμήσιε, ὅπε δικάκσιε | ἀϝτὸν ὀπῆλεν | διπλεῖ | κἀϝτὸν
3 ← ἄκρηστον | ἦμεν | ἆς δόοι, | κὄτι κοσμήσιε | μηδὲν | ἤμην. *vac*.
4 → ☒ ὀμόται δὲ | κόσμος | κοὶ δάμιοι | κοὶ ἴκατι | οἱ τᾶς πόλ̣[ιο]ς̣.

2. AXOS (Law concerning sacrifices, 6th or early 5th century)
IC II v 9 = *IGT* 106+107 = GP A9

[----]
ον ἀποδόμεν η[---]
συνγνοίη αὐτός, τοῖς δ’ ἰαροῦσ-
ι, ὅτι κα πέρονται πὰρ τὰ ἠγ-
ραμένα, αἰ μή τις αὐτὸς δοίη μ-
5 ὴ ὑπ’ ἀνάνκας, τιτουϝέσθο σ-
τατῆρα κατὰν θυσίαν ϝεκάστ-
αν καὶ τῶ κρίος τὰν διπ̣λ̣εία-
ν· πορτιπονῆν δ’ ᾆιπερ τῶν ἄλ-
ον. αἰ δ’ ὁ κοσμίον μὴ ἀποδοίη τ-
10 ὰ ἐπιβάλοντα ϝίσανς τιτου-
ϝέσθο. κατὰ τὰ αὐτὰ τοῖς
Κυδαντείοις διδόμεν τρίτο-
ι ϝέτει τὰν βολὰν ἰς τὰ θύ-
ματα δυόδεκα στατῆρανς.

3. LYKTOS (Decree on aliens, 5th century)
Van Effenterre – van Effenterre *BCH* 109 (1985), 157 B = *SEG* 35 991; *IGT* 87; Bile 12A; *Nomima* I, 12A = GP Lyktos1A

→ [Θιοί. Ἔϝ]αδε | Λυκτίοισι | ἀλ(λ)ο-
← πολιάταν | ὅστις κα δέκσ[εται . . . .]
[. . . .]εν, | αἰ μὴ ὀσωϝυτός τε | [καρτῆ]-
ι | καὶ τὸνς Ἰτανίονς. | Αἰ δέ κα [δέκσ]-
5 [ετ]α̣ι | ἢ κοσμίων | ἢ ἀπόκοσμο[ς ὐ]-

[πέ]ρ ϝωλᾶς | ϝαδᾶς | ἑκατὸν λέβητ[ας πρ]-
[άκσ]ει | ἑκάστω | ὅσος κα δέκσεται. | Τ[. .]
[. . . .] δὲ | οἰ ἐσζικαιωτῆρες | ἐπ' ὅτε [. . . .]
[παύ]σεται | αἰ [. . . ἀ]ν̣ί̣ωνται, | π[. . . .]
[. . . .]ρ̣ϝωιο[---]δ̣ο̣μεν
[. .]οκο[---]τ̣αι | τ[. . . .]

4. KNOSSOS – TYLISSOS (Treaty, mid-5th century)
IC I viii 4* = *ML* 42 B
frg. b.1

. . . . ανον το . . . . πρ[α]-
τομε̄νίαν ἄγεν κατὰ ταὐτ[ὰ . . . .] . *h*ο ἀμ[φ]-
οτέρο̄ν. χρε̄̃ματα δὲ με̄̃ 'νπιπασκέσθο̄ *h*ο Κνο̄̃σιο[ς]
ἐν Τυλίσο̄ι, *h*ο δὲ Τυλίσιος ἐν Κνο̄σο̄ι *h*ο χρε̄̃ιζ[ο̄]-
ν. με̄δὲ χο̄̃ρας ἀποτάμνεσθαι με̄δατέρονς με̄δ' ἄ[π]-
ανσαν ἀφαιρῖσθαι. ο̄̃ροι τᾶς γᾶς· *h*υο̂ν ὄρος καὶ Α-
ἰετοὶ κἀρταμίτιον καὶ τὸ το̂ Ἀρχο̂ τέμενος κα[ὶ]
*h*ο ποταμὸς κε̄̃λ Λευκόπορον κἀγάθοια, *h*ᾶι *h*ύδο̄-
ρ ῥεῖ τὄμβριον, καὶ Λᾶος. *h*ῖ κα τοῖ Μαχανεῖ θύο̄μ-
ες τὸνς ϝεξε̄̃κοντα τελέονς ὄϝινς, καὶ τᾶι *h*<ε̄̃>ραι
τὸ σκέλος ϝεκάστο̄ διδόμεν το̂ θύματος. αἰ δὲ συ-
μπλέονες πόλιες ἐκ πολεμίων ἕλοιεν χρήματα
*h*οπᾶι συνγνοῖεν *h*οι Κνο̄̃σιοι καὶ τοὶ Ἀργεῖοι
*h*ούτο̄ ε̄̃μεν. τοῖ Ἄρει καὶ τἀφροδίται τὸν Κνο̄̃σι-
ον ἰαρέα θύεν, φέρεν δὲ τὸ σκέλος ϝεκάστο̄. τὸν Ἀ-
ρχὸν τὸ τέμενος ἔχεν το̄̃ν Ἀχάρναι. τοῖς θύονσι
ξε̄̃νια παρέχεν τὸνς Κνο̄σίονς, τὸνς δ' Ἀργείονς
το̂ι χορο̂ι ἐν Τυλίσο̄ι. αἴ κα καλε̂ι *h*ο Κνο̄̃σιος πρ-
εσγέαν, *h*έπεσθαι *h*οπυῖ κα δέε̄ται· καἴ χο̄̃ Τυλίσ-
ιος τὸν Κνο̄̃σιον κατὰ ταὐτά. αἰ δὲ με̄̃ δοῖεν ξένι-
α, βο̄λὰ ἐπαγέτο̄ ῥύτιον δέκα στατε̄̃ρο̄ν αὐτίκα ἐ-
πὶ κόσμος, κε̄̃ν Τυλίσο̄ι κατὰ ταὐτὰ *h*ο Κνο̄̃σιος.
*h*α στάλα ἔσστα ἐπὶ Μελάντα βασιλέος. ἀϝρε̄̃τευ-
ε Λυκο̄τάδας *h*υλλεύς. ἀλιαίαι ἔδοξε τᾶι το̂ν
ἰαρο̂ν. ἀ(ϝρε̄̃τευε) βο̄λᾶς Ἀρχίστρατος Λυκοφρονίδας.
τοὶ Τυλίσιοι ποὶ τὰν στάλαν ποιγραψάνσθο̄ τάδε·
αἴ τις ἀφικνοῖτο Τυλισίο̄ν ἐνς Ἄργος, κατὰ ταὐτά
σφιν ἔστο̄ *h*ᾶιπερ Κνο̄σίοις.

5. PRINIAS (=RHITTEN) (Fragment of constitutional laws, c. 600–575)
IC I xxviii 7 = *Nomima* I, 63 = GP Pr7

Text 1

B2 [---]...νο[---] ←
B1 [---]ι | τρὶς ϝε[---] →
A4 [---]εν | ἐπεὶ τάδε [---] ←
A3 [---] πέρηται | πσε.[---] →
A2 [---]κα ϝέκτος | α.[---] ←

Text 2

C1 [---] αἰ δέ τις [---] →
D1 [---] πρεισγήια [---] ←
D2 [---]μενεα ἢ συνπλι.[---] →
D3 [---] πρεσγήιαι | ο.[---] ←
A1 [---].σεϝδὶ ἀποϝει[π---] ←

6. GORTYN (Treaty Gortyn-Rhitten, c. 450–400)
IC IV 80 = *Nomima* I, no 7 = GP G80

θιοί. ἐπὶ τοῖδε [Ρ]ι[ττε̃ν]ι[οι Γ]ορ[τυνίοις αὐτ]όνο̣μ[ο]ι κ' αὐτόδικοι *vac*. τὰ θ[ύ]-
ματα παρέκοντες ἐς Βίδαν τρί[τ]ōι [ϝέ]τει τριακατίονς <σ>[τ]ατε̃ρανς καὶ πεν-
τε̃κοντα. στέγαν δ' ἄν κα ϝοικοδομε̃σ[ει . . . . .]ς ε̃ δένδρεα πυτεύσει, τὸν
ϝοικοδομε̃σαντα καὶ πυτεύσαντ[α] καὶ πρίαθαι κ' ἀποδόθαι. *vac.* τὸν δὲ σταρτ-
αγέταν καὶ τὸν κοσμίοντα ὅς κ' ἄγε̄[ι] Ρ[ι]τ̣τε̃νάδε κοσμε̃ν πεδὰ τô Ριττε̄νίō
κόσμō τὸν με̃ πειθόμενον τô 'πορ̣ίμ[ō, δ]αμιό̣με̄ν δὲ δαρκνὰν καὶ κατακρε̃θαι πεδ-
ά τε τô σταρτô καὶ πεδὰ τôν Ριττε̄νίōν· πλ[ίο]ν δὲ με̃ δαμιό̣με̄ν· αἰ δὲ πλίον δαμιὸσ-
αι ε̃ με̃ κατακρε̃σαιτο, κσενείαι δίκα[ι δι]κάδδεθαι. ἐνεκυραστὰν δὲ με̃ παρέρπε-
ν Γορτύνιον ἐς τô Ριττε̄νίō. αἰ δέ κα ν[ικ]αθ̣ε̃ι τôν ἐνεκύρōν, διπλεῖ καταστα̃σ-
αι τὰν ἀπλόον τιμὰν α̃ι ἐν τα̃ι 'πόραι ἔ[γρα]τται, πράδδεν δὲ τὸν Ριττε̃νιον κόσμ-
ον. αἰ δέ κα με̃ πράδδōντι, τὸνς πρειγ[ίσ]τονς τούτονς πράδδοντας ἄ̃πατον

ἔμεν̄ *v.* τὰ ἐγραμμέν', ἄλλα δὲ μέ. *vac.* ὅτι δέ [κα αὖ]τ[ι]ς ἀνπιπαίσοντι τὸ κοινὸν οἱ Ρι-
ττένιοι πορτὶ τὸνς Γορτυνίον[ς . c.6 . .]ν̣ τ̣ὸν κάρυκα Ριττ̄ενάδε ἐν ταῖδ <δ>έ-
κα παρέμ̄εν ἢ αὐτὸνς ἢ ἄλλονς π[ρ]ὸ̣ [τούτ̄ον ἀπ]οκρίνεθθαι κατ' ἀγορὰν ϝε̄υμέν-
15 αν τᾶς α[ἰ]τίας ἃς κ' αἰτι[ά]σ[ονται, τὰν δ]ὲ κρίσιν ἔ[μ̄ε]ν ἃ̣ιπερ ταῖς ἀ[— — — —]

7. GORTYN (c. 600–525)
IC IV 23 = *IGT* 125 = *Nomima* II, 25 = GP G23

1 - -] . ς ϝίκα[τι.
2 - - ἀ]ϝυτὰν. *vac.*
3 - -] τ̣ο ϝοικ̣ήος ǀ
4 - -]ν̣ ἐσβολὰν ἤμ[ε]ν. ǀ
5 - -]τ̣εσθαι ǀ . οτο . σ
6 .]αι τ̣ὸ ϝὸ̣ ἀποδόμεν ǀ [- -
7-8a- -] αἰ μὴ ϙ' ὀπυστυῖ μὴ̣ ἐ]νϝοικεν. *vac.*
8b - - τ̣ὸν Γ[ο]ρτ̣υνίον
9 - -]τι. *vac.*
10 - -].ιβ [- -
11 ὃς δέ κα̣ [- -]

8. GORTYN (5th century?)
Magnelli 2008: no 3 = *SEG* 49, 1221= GP Gortyn3

← - -]δ̣ . [- -
→ - -]λοντο[- -
- -]δερ̣ . . . [- -
- -].ε̣.ταιδ[- -
5 - -]ιεν̣ταιι[- -
- - ε]μ̣ βολᾶι[- -
- -]ρηιοσ[- -
- -]δ̣εκ̣οδι[- -
- - τὰ]εγραμ[(μ)ένα - -
10 - -]νος μ̣[- -
- -]ρ̣αι[- -

ALBERTO MAFFI (MILANO)

IL CONSIGLIO DEGLI ANZIANI E LE ISTITUZIONI POLITICHE DELLE CITTÀ CRETESI: RISPOSTA A MARIA YOUNI

La relazione di Maria Youni (MY) è suddivisa in due parti: la prima esamina i principali testi epigrafici che menzionano l'esistenza e la competenza del Consiglio degli Anziani nella Creta arcaica e classica. La seconda parte esamina il ruolo svolto dal Consiglio nel quadro delle istituzioni politiche delle città cretesi.

I. Riguardo ai testi esaminati da MY nella prima parte, credo si debba apprezzare l'estrema cautela con cui cerca di ricavare indicazioni sulle caratteristiche del Consiglio da testi spesso frammentari e comunque di difficile e incerta interpretazione. Dal confronto fra i testi esaminati MY trae la conclusione che il Consiglio non sembra esercitare funzioni che vanno oltre il semplice controllo sul comportamento degli altri organi di governo della città, in particolare dei *kosmoi*. Rispetto alla dottrina prevalente, MY restringe ulteriormente la portata di tale funzione di controllo, sostenendo che riguarda essenzialmente l'aspetto finanziario, cioè la correttezza nel maneggio del denaro pubblico. Mi sembra una limitazione eccessiva, e ritengo quindi che resti valida l'affermazione di S. Link, secondo cui al Consiglio spettava "eine juristische Aufsicht über andere Beamte":[1] dunque un controllo sul piano della correttezza dei comportamenti giuridicamente prescritti (non solo quindi di carattere finanziario), piuttosto che un controllo di carattere politico. Rispetto ai testi epigrafici presi in considerazione da MY mi sembra interessante fare qui qualche osservazione soltanto sull'accordo Gortina-Rhittenia,[2] in particolare sulla clausola delle ll. 8–12, dove si prevede una responsabilità dei membri del Consiglio (se è corretto identificarli con i *preigistoi* menzionati dall'iscrizione). In base a questa disposizione i *preigistoi* sono tenuti ad esigere dai *kosmoi* (di Rhittenia) la somma della condanna che essi non abbiano provveduto a loro volta ad esigere dal cittadino di Gortina, che, contravvenendo all'accordo, abbia ricevuto in pegno (o abbia pignorato) un bene di un cittadino di Rhittenia.[3] Si deve

[1] S. Link, *Das griechische Kreta*, Stuttgart 1997, p. 115.

[2] IC IV 80 = H. v. Effenterre et F. Ruzé, *Nomima*, Roma 1994, vol. I nr. 7.

[3] Riporto le traduzioni delle ll. 11–12 di Gagarin (in corso di stampa): "And if they do not exact payment, there is to be immunity for the elders who exact it from them," e di *Nomima* cit.: "S'ils ne le font pas, les Anciens feront payer ces derniers, impunément."

quindi supporre che, a loro volta, i *preigistoi* che non osservino l'obbligo di multare i *kosmoi* inadempienti, possano essere chiamati a rispondere del loro comportamento omissivo. Con quale mezzo giuridico? Dei mezzi recentemente passati in rassegna da L. Rubinstein,[4] escluderei che la responsabilità dei *preigistoi* possa essere fatta valere dai loro successori, dato che, stando ad Aristot. *Polit*. 1272 a 37 ss., si tratta di una carica vitalizia (*dia biou*). Restano allora due possibilità: o anche a Rhittenia esisteva una magistratura di controllo sovraordinata anche al Consiglio, ma vi sarebbe in apparenza una duplicazione con il controllo esercitato sui *kosmoi* dal Consiglio stesso; oppure la responsabilità dei *preigistoi* inadempienti potrebbe essere fatta valere da un privato cittadino, che agirebbe nell'interesse pubblico. Tuttavia la seconda eventualità contrasta con l'affermazione, contenuta nel passo già citato di Aristotele, secondo cui i membri del Consiglio a Creta non possono essere chiamati a rispondere dei loro atti (sono cioè *anupeuthynoi*). D'altra parte, trattandosi appunto di una carica vitalizia, il cittadino danneggiato dall'inerzia dei *kosmoi,* e indirettamente dei *preigistoi*, potrebbe agire in giudizio contro i *kosmoi* una volta usciti di carica (se vale l'analogia con IC IV 72 col. I 51–54), ma non potrebbe agire contro i *preigistoi*. Qualunque sia la soluzione da dare all'interrogativo che pongono le ll. 11–12 dell'accordo in questione, IC IV 80, sempre che sia lecito generalizzare sulla base di un singolo provvedimento normativo, pone per Creta il problema di un eventuale controllo sul Consiglio, che dovrebbe attuarsi chiamando i suoi membri a rispondere per l'inosservanza degli obblighi di sorveglianza sui magistrati a cui erano tenuti.

II. Quanto al ruolo del Consiglio nel quadro delle strutture costituzionali delle città cretesi, MY sottolinea giustamente la preminenza in campo politico dei magistrati supremi, ossia dei *kosmoi*. La documentazione epigrafica conferma il giudizio di Aristotele sulla debolezza della costituzione delle città cretesi, dominate dalla lotta tra fazioni aristocratiche al di fuori dei binari tracciati da norme costituzionali assenti o non rispettate. MY ne ricava la conferma che la vita politica delle città cretesi non era guidata dagli organi tipici della polis classica: Consiglio e Assemblea esistevano, ma non svolgevano un ruolo decisionale determinante. Il potere dei *kosmoi* si basava piuttosto sullo *startos*, incarnazione militare della tribù, sull'eteria e sull'*andreion*. MY porta così il suo contributo a un dibattito che continua ad essere uno dei nodi fondamentali della ricerca relativa al rapporto fra politica e organizzazione sociale nella Grecia antica. La questione può essere riassunta in questi termini: le istituzioni politiche si sono innestate su strutture sociali prepolitiche, oppure queste ultime sono state create o almeno rielaborate dalla polis? Forse si può proporre una risposta di compromesso: certamente la comunità prima della polis aveva una propria organizzazione, che però è stata assorbita e integrata

[4] L. Rubinstein, *Individual and Collective Liabilities of Boards of Officials in the Late Classical and Early Hellenistic Period*, in B. Legras – G. Thür (eds.) Symposion 2011, Wien 2012, p. 328–354.

dalle istituzioni politiche. Naturalmente si tratta di un processo storico che deve essere ripercorso e ricostruito per ogni singola situazione locale. MY ha certamente il merito di aver attirato l'attenzione sulla ricchezza di dati che Creta ci offre in proposito. Tuttavia non credo che le strutture pre-politiche abbiano avuto a Creta il ruolo politico preponderante che MY, sulla scia di un'autorevole parte della dottrina,[5] attribuisce loro. Per lo meno a partire dalla nostra documentazione epigrafica di V secolo, istituzioni come *startos*, *pyla* ed *hetaireia* erano già integrate nelle strutture politiche della polis classica. Non a caso tutte e tre le istituzioni or ora menzionate sono inserite nel Codice di Gortina in contesti giuridici caratteristici della polis classica. Mi riferisco in particolare all'*hetaireia*. Secondo MY il gruppo degli *hetairoi* dominava il resto della popolazione (lavoratori e agricoltori), che non ne facevano parte. Osservo tuttavia che, stando alle norme sull'adozione contenute nelle coll. X e XI del Codice di Gortina, tutti i cittadini fanno parte di una *hetaireia*. Lo dimostrano il fatto che l'adozione deve essere approvata dall'assemblea cittadina e il fatto che gli adottati possono provenire "da qualsiasi parte" (col. X 33–34): comunque si debba interpretare quest'ultimo requisito, certamente non esclude che l'adottato possa provenire dall'esterno del sistema delle *hetaireiai*.

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[5] V. da ultimo: S. Link, *Education and pederasty in Spartan and Cretan society*, in S. Hodkinson (ed.), *Sparta. Comparative Approaches*, Swansea 2009, p. 89–112.

MICHAEL GAGARIN (AUSTIN, TX)

RHETORIC AS A SOURCE OF LAW IN ATHENS

Ten years ago I published a paper (Gagarin 2003) in which I argued that the litigants' rhetorical pleadings played a significant role in determining the facts in an Athenian trial. In this paper, I argue that these same rhetorical pleadings also played a significant role in determining the law for an Athenian trial. I am aware that in practice it may not be possible to separate the determination of facts and of law—an issue I will return to at the end of this paper—but for analytic purposes it is useful to begin by treating these separately.

In seeking to know what were the "sources of law" in classical Athens, we must first note that the expression can be used in two different senses, historical and legal. For Athenian law, historical sources are the evidence scholars use in their efforts to learn what the law was in Athens, whereas legal sources are the materials that Athenian jurors and others looked to in determining what the law was that they should apply to the particular case they were judging. As Todd presents them (1993: 30–48), historical sources for Athenian law include forensic speeches, historical and philosophical writings such as the *Athenaion Politeia*, a variety of other literary sources, inscriptions, documents preserved in the speeches, and archaeology. Todd then examines the legal sources (1993: 49–63) beginning with statutes, but after statutes, he can find little else: only custom and perhaps foreign law, in his view, may also function as sources of law independent of statute.

To be sure, the Athenians themselves had no concept of a "source" (in the legal sense) for their law.[1] They knew that the city had enacted a large number of laws over the years, that these laws were written down and available for all to read, and that they could not appeal to any other laws if they became involved in litigation. They knew further that in order to introduce the text of a law in court, the text had to have been presented before the trial, at an arbitration or other kind of preliminary hearing, and that the severest penalty was prescribed for anyone who cited a non-existent law (Dem. 26.24). Finally, they knew that all members of the jury had sworn an oath that they would judge the case according to the laws and decrees of the city. We should further note that the only expression Athenian litigants used to convey the sense of the modern phrase "Athenian law" was "the laws."[2] Thus, to ask

[1] I owe this observation to Charles Donahue in the discussion following my paper.

[2] TLG searches for any combination of *nomos* and *Athenaios* come up empty. Other qualifications are found ("your laws," "the established laws," etc.), but never "Athenian law," "Athenian laws," "the laws of the Athenians," or any similar expressions.

about the sources of Athenian law, one would have to ask about the sources of "the laws," a question that an Athenian would understand as asking about the sources of their statute law, to which he would probably respond "the Athenian *demos*" *vel sim*. Todd's account of legal sources, therefore, makes good sense, since in essence, the written statutes were the only source for Athenian law that an Athenian would consciously cite.

That said, I think we can press the question a bit further by asking just how an Athenian juror would have known not only what the words of the law were, but what these words meant and how, if at all, they applied to the case he had to decide. All jurors swore an oath that they would judge according to the law, but this cannot be the end of the story, since the text of the law did not necessarily make clear the law's full meaning or its applicability to the case at hand. In some cases, moreover, more than one statute may arguably be relevant, so that differing and possibly conflicting statutes may have to be considered. In such cases, how did a juror decide just what the law was as it applied to the case he was deciding?

Todd downplays such concerns by arguing that an Athenian trial was not so much concerned with applying the law to the concrete case, but treated laws as providing limits or guidelines within which the jury decided the dispute between individual litigants. Thus, jurors had to take various laws into account in reaching their decision but did not have to decide about the precise meaning or applicability of any particular statute or choose between competing statutes. Todd's position may be valid for some cases, but I think we must take more seriously the repeated emphasis in the speeches that the jurors had a duty to decide according to the law, and that this duty would have forced them to confront difficult questions about the meaning and applicability of different statutes.

Besides statutes, then, what sources could a juror look to for guidance in deciding what the law was and whether it applied to the case he was deciding? The answer I propose is that jurors and others had to look primarily to the speeches of the two litigants. In addition to introducing some statutes or parts of statutes directly by having them read out to the court by the clerk, and discussing or alluding to other statutes that were not read out, litigants also regularly told jurors what these laws meant and how they applied to the case at hand. They might also explain the legislator's purpose in enacting a statute and how this should influence the jury's interpretation of the law. My claim is that these discussions in the forensic speeches amounted to an important legal source for Athenian jurors and others at the time. Of course, speeches did not have the formal authority of statutes, but when the two litigants disputed the meaning of a statute, or cited different statutes in support of their opposing positions, the jury had no other source to turn to than the litigants' pleadings.

To demonstrate this, I will examine several cases in which questions arise as to the meaning or applicability of a law, and will try to show how in these cases the pleadings of the two litigants functioned together with statutes as sources of law that

helped the jurors determine the meaning of the law in question. Of course, a litigant's assertion about the meaning of a law would not be authoritative (though he might try to make the jurors think that it was); it would carry weight only to the extent that it was accepted by the jurors, or by most of them, and even then it would take more than one case to establish this as the accepted meaning of a law. When it came to determining the meaning of a law, no single case had the kind of authority that, for example, the United States Supreme Court has. But in the absence of judicial authorities, litigants' speeches would have been the Athenians' only guide to the meaning of a law besides the texts of the statutes themselves.

Let me begin with Lysias 1. The speaker, Euphiletus has been accused of homicide but argues that the killing was justified. He tells a long and quite persuasive story about the happy marriage he thought he had, until one day he learned that a certain Eratosthenes had seduced his wife. He was stunned by the news and decided to catch Eratosthenes in the act. The next time Eratosthenes visited, a maid reported it to Euphiletus, who gathered a group of friends and burst into the bedroom. They found Eratosthenes in bed with his wife, whereupon Euphiletus ran him through with his sword.

In committing this act, he says, he was simply following the law's command:

> *He admitted his guilt, and begged and entreated me not to kill him but to accept compensation. I replied, "It is not I who will kill you, but the law of the city. You have broken that law and have had less regard for it than for your own pleasure. You have preferred to commit this crime against my wife and my children rather than behaving responsibly and obeying the laws." So it was, gentlemen, that this man met the fate which the laws prescribe for those who behave like that. (1.25–27)*[3]

Soon after this (28), Euphiletus has the clerk read out "the law." He does not say which law this is, and no text survives in the manuscripts, but it is reasonable to assume that it was a law on adultery, probably the *graphē moicheias* (*Ath. Pol*. 59.3), which may have prescribed death for adultery either as the sole penalty or as one possible penalty if the *graphē* was an *agōn timētos*.[4] Then, after again noting that Eratosthenes had offered to pay him ransom money, Euphiletus repeats his argument that he was merely obeying the law:

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[3] κἀκεῖνος ἀδικεῖν μὲν ὡμολόγει, ἠντεβόλει δὲ καὶ ἱκέτευε μὴ ἀποκτεῖναι ἀλλ' ἀργύριον πράξασθαι. ἐγὼ δ' εἶπον ὅτι (26) "οὐκ ἐγώ σε ἀποκτενῶ, ἀλλ' ὁ τῆς πόλεως νόμος, ὃν σὺ παραβαίνων περὶ ἐλάττονος τῶν ἡδονῶν ἐποιήσω, καὶ μᾶλλον εἵλου τοιοῦτον ἁμάρτημα ἐξαμαρτάνειν εἰς τὴν γυναῖκα τὴν ἐμὴν καὶ εἰς τοὺς παῖδας τοὺς ἐμοὺς ἢ τοῖς νόμοις πείθεσθαι καὶ κόσμιος εἶναι." (27) οὕτως, ὦ ἄνδρες, ἐκεῖνος τούτων ἔτυχεν ὧνπερ οἱ νόμοι κελεύουσι τοὺς τὰ τοιαῦτα πράττοντας. (trans. Todd)

[4] See Carey 1995: 410–12

> *But I did not accept his offer. I reckoned that the law of the city should have greater authority; and I exacted from him the penalty that you yourselves, believing it to be just, have established for people who behave like that. (29)*[5]

The problem with Euphiletus' argument at this point is that even if the law he has just cited prescribed death as the punishment for adultery—and more likely it only prescribed a process in which the penalty was assessed later and thus could be death or some other punishment—it almost certainly did not authorize a person to execute a violator without a trial. Euphiletus thus has another law read out, "the law from the stele on the Areopagus" (30). The text of this law is also not preserved in the manuscripts, but it is almost certainly the law that is preserved in Demosthenes 23.53:

> *If someone kills a person unintentionally in an athletic contest, or seizing him on the highway, or unknowingly in battle, or after finding him next to his wife or mother or sister or daughter or concubine kept for producing free children, he shall not be exiled as a killer on account of this.*[6]

Now, strictly speaking, this is not a law about the penalty for adultery. It is a law about various circumstances, including catching a man in bed with your wife, in which you will not be punished for killing someone. It is an old law, probably enacted by Draco more than two centuries earlier. It was still in effect in Lysias' time,[7] but it seems to have been little used, since none of the many other cases of adultery mentioned in oratory or comedy is handled in this way. Most commonly the adulterer is held for ransom, as Eratosthenes evidently expected to be in this case. Thus, killing an adulterer on the spot may have seemed to many Athenians a remnant of the distant past, and Euphiletus clearly understands that the jury may be reluctant to approve of his action. On the other hand, if, as appears to be the case, there was no single statute governing adultery but rather a variety of statutes existed which might apply in different circumstances, jurors would have had to decide the proper punishment for adultery on a case-by-case basis. They would thus have had to decide about the appropriate response to adultery in this case, and in making this decision they would have had to rely primarily on information presented by the two litigants.

Now, not only has Euphiletus told a very effective story about the facts of the case, he has also told an effective story about the meaning of the law concerning

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[5] ἐγὼ δὲ τῷ μὲν ἐκείνου τιμήματι οὐ συνεχώρουν, τὸν δὲ τῆς πόλεως νόμον ἠξίουν εἶναι κυριώτερον, καὶ ταύτην ἔλαβον τὴν δίκην, ἣν ὑμεῖς δικαιοτάτην εἶναι ἡγησάμενοι τοῖς τὰ τοιαῦτα ἐπιτηδεύουσιν ἐτάξατε. (trans. Todd)

[6] ἐάν τις ἀποκτείνῃ ἐν ἄθλοις ἄκων, ἢ ἐν ὁδῷ καθελὼν ἢ ἐν πολέμῳ ἀγνοήσας, ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ, τούτων ἕνεκα μὴ φεύγειν κτείναντα.

[7] Many years later Demosthenes (23.53) treats the law as valid, though this position may be influenced by his overall argument in that speech.

adultery that would likely be persuasive, in part because of the vivid use of direct speech at crucial points, including when he quotes himself in the passage cited above:

> *It is not I who will kill you, but the law of the city. You have broken that law and have had less regard for it than for your own pleasure. You have preferred to commit this crime against my wife and my children rather than behaving responsibly and obeying the laws. (1.27)*

This is not everyday language; it resembles more the speech of a judge explaining to a convicted man why he must be punished. We will never know whether Euphiletus actually said anything like this, but it hardly matters. The vividness of the scene and the formal, judicial quality of Euphiletus' pronouncement, which is followed quickly by the reading out of the law in its archaic language, would have encouraged the jurors to think that Euphiletus was presenting an authoritative explanation of the law.

To strengthen his case, Euphiletus has another law read out. The text of this law does not survive, but Euphiletus explains that this law sets a lighter penalty for rape than for adultery (1.32–33). I leave aside the much-debated issue whether Euphiletus is correct that adultery was a more serious crime than rape;[8] regardless of its truth, the argument serves to emphasize the seriousness of adultery as a crime and thus the need for a severe penalty, such as Euphiletus has inflicted. And since Euphiletus has given a clear and not implausible account of the meaning of the laws on rape and adultery, it is likely that many jurors also found his argument persuasive.

All in all, Euphiletus has presented a strong, though not conclusive, argument that the laws required (or at least allowed) him to kill Eratosthenes. The prosecution, however, also gave a speech, and they almost certainly told a different story about the law. They probably began by citing the law on homicide, which clearly prescribes a trial for those accused of homicide.[9] They would have argued that this law commanded them, Eratosthenes' relatives, to avenge his death, which was a clear case of intentional homicide on the part of Euphiletus. They also presumably cited one or more laws on adultery, probably including a law about holding an adulterer for ransom and prohibiting entrapment.

Whatever the precise details of their speech, the jury would then have been left to choose between competing stories about the meaning and relevance of various laws relating to adultery and homicide. It was then up to each juror to determine for himself which litigant's story about the laws was correct in this case, and with no higher authority or any other source to look to for guidance, jurors would necessarily have been guided primarily by the two speeches they had just heard.

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[8] See Harris 1990, Carey 1995, Todd 2007: 130–34.

[9] They could cite the opening lines of Draco's law (*IG* I^3 104), or the provision cited in Dem. 23.22, that the Areopagus is to judge (*dikazein*) cases of homicide. Cf. the argument in Dem. 23.25–27.

Because the jury decided the whole case in one vote, no one could ever know to what extent their verdict was influenced by arguments about the law or which arguments about which laws had had the most influence. A litigant (or anyone else) could talk with some jurors after the trial, but they could almost certainly not interview the hundreds of jurors who had voted. In many cases, moreover, not only would the views of different jurors differ, but even a single juror might have mixed views. Only where the vote was overwhelmingly one-sided and one could talk to a reasonably large number of jurors who all gave the same reasons, only then could someone be confident that a particular line of reasoning had prevailed in the case. But this probably happened rarely, if at all.

Even so, if the jury voted for acquittal in Euphiletus' case, and especially if they did so by a large majority, this would certainly send the message that a person might be allowed to kill an adulterer found in bed with his wife. This would not necessarily have made Euphiletus' argument the authoritative interpretation of the law, but if defendants in other similar cases used similar arguments successfully, then this interpretation could achieve a *de facto* authority, and could be followed with some confidence by others. But no successful interpretation could be relied on with absolute certainty, and litigants in new cases could still try to persuade a jury that a different interpretation was the true meaning of the laws.

Now, questions about the meaning and applicability of one or more laws were raised in many other cases besides Lysias 1. In most of these only one of the litigants' speeches survives, but in one of the few cases where we have speeches from both sides, the case "On the Crown," we know that Aeschines and Demosthenes disagreed about the meaning and relevance of laws pertaining to two matters: the need for the recipient of a crown to have passed an audit and the proper place for the presentation of a crown. Regarding the first of these, both litigants refer to the same law but interpret it differently: Aeschines (3.9–31) argues that the requirement for an audit before receiving a crown applies to the two offices that Demosthenes held at the time of Ctesiphon's decree, both of which required an audit. For his part, Demosthenes argues (18.111–19) that the law does not apply to these offices because the decree in question was not honoring him for the work he did in those offices but for his other services to the city. On the second matter, Aeschines cites a law specifying that crowns from the people must be presented in the Assembly and argues that another law which Demosthenes will cite allowing crowns to be presented in the theater applies only to crowns for foreigners (3.32–48). In response, Demosthenes argues that this second law allows crowns for Athenians to be presented in the theater, and points to a number of cases in the past where this had been done.

Scholars disagree about which speaker has the better argument on each point,[10] and the opinions of the jurors probably differed also. But the jury had to decide the case, and with regard to the meaning and applicability of these laws, jurors would have been guided primarily by the texts of the laws that were read out to them and the arguments of the two litigants about these texts. But because these arguments about specific laws formed only a small part of each speaker's case, we cannot conclude from the jury's overwhelming verdict in favor of Ctesiphon that all of the jurors, or even most of them, agreed with Demosthenes' interpretation of the law on either point.[11] Both litigants stress that the main issue in the case is whether Demosthenes has or has not always acted in the best interests of Athens,[12] and this may likely have been the determinant factor for most jurors, whatever their opinion was about the meaning of the laws. Thus the verdict in this case would probably have had little or no value as a precedent in determining the meaning of either of the specific laws that the litigants discussed.

In other cases, however, the interpretation of the law appears to be a central issue. Lysias 10, for example, apparently centers around the correct interpretation of the law on slander. Theomnestus is accused of slandering the speaker by claiming that he killed his father. Theomnestus' defense will apparently be that although he accused the speaker of killing, he did not call him a killer, *androphonos*, the word explicitly prohibited in the law, and that saying that someone killed is not the same as calling him a killer. Against this, the speaker argues that by prohibiting the use of the word *androphonos*, the law also intended to prohibit the use of equivalent expressions, such as "he killed."[13] If in fact this was Theomnestus' argument, then the case probably was decided according to whether the jury accepted Theomnestus' narrow, letter-of-the-law interpretation or the speaker's broader interpretation which seems to accord with common sense. How they decided is unknown.[14]

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[10] See, e.g., Gwatkin 1957, Harris 1994: 141–48, 150, 2000: 59–67, MacDowell 2009: 388–89, Worthington 2013: 296, 299–301.

[11] *Contra* Harris, who argues (2000: 67) that because the jury voted for Demosthenes by a wide margin, "we are safe in concluding that the judges did not find any of Aeschines' arguments persuasive." It is certainly possible, however, that most jurors agreed with Aeschines on one or both points about the violation of specific laws, but nonetheless voted for Ctesiphon because they were persuaded by Demosthenes' defense of his service to the city, which both he and Aeschines stress is the most important issue in the case. Harris had it right in an earlier article (1994: 148): "we have no way of knowing the precise reasons why the court voted to acquit Ctesiphon."

[12] E.g., Aes. 3.49–50, Dem. 18.53–59. Both men devote far more time to the issue of Demosthenes' public career than to the alleged conflicts between the decree and the two laws.

[13] In discussing non-literal interpretations of the law, Aviles 2011 concludes that litigants only make such arguments in order to narrow the scope of a statute, but Theomnestus' non-literal interpretation would clearly expand the scope of this law.

[14] The speaker mentions that the case was heard by an arbitrator but does not reveal the arbitrator's ruling. This may suggest that he ruled against the speaker, for the speaker

Another example where the interpretation of a law appears central to the case is Isaeus 11. Here the main issue, as the speaker Theopompus presents it, is the meaning of a clause in the law on intestate succession, which Theopompus has the clerk read out to the court before he even begins his speech. The law, as preserved in Demosthenes 43.51, specifies inheritance by a set of relatives, up to and including *anepsiōn paides*, literally "children of cousins," if any of these are alive. The dispute in Isaeus 11 concerns the precise meaning of *anepsiōn paides*. Does it mean that the heirs include children of the deceased's cousins—that is, his first cousins once removed, as we would say in English—or does it specify children of two cousins—that is, children of the deceased's father's cousins, or the deceased's second cousins. Only on the second interpretation does Theopompus count as a close enough relative to inherit, and so naturally he argues for this view. Another claimant evidently argued for the first view.

It is impossible to say objectively which of these arguments is correct. We know that Theopompus won at least two earlier cases in his long battle over the estate of Hagnias, and this may mean that these earlier juries agreed with his interpretation of *anepsiōn paides*, but this is not certain, as they may have had other reasons for their decision. And no matter what these earlier juries decided, their verdicts were not final or authoritative, or else Theopompus would not have had to defend his interpretation of *anepsiōn paides* once again in Isaeus 11, which he also won. To judge from litigants' arguments in other inheritance cases, considerations besides the strict meaning of the law sometimes influenced the jury, especially when the application of the law left room for doubt, and Theopompus also raises a number of other issues in this case. Thus, whatever the reasoning behind any of the previous verdicts, Theopompus' opponents must have felt that they had some chance of winning a different decision from a new jury. The most we can say, therefore, is that Theopompus' interpretation of the law—that *anepsiōn paides* means second cousins—had apparently been favored by several juries and thus was probably more likely to prevail in future cases. Interestingly, there is no sign that any legislation was enacted, or even contemplated, that might have decided once and for all the meaning of the law in this context.

Although I could easily add more examples, the cases we have examined thus far are sufficient to show that Athenian litigants commonly differed concerning the meaning and applicability to their case of one or more laws, and that in such cases the jury's understanding of these laws and their applicability would have been influenced not only by the text of any relevant statutes that were read out or otherwise presented to them in court, but also by the rhetorical arguments presented by the two litigants. It seems, then, that the forensic speeches that contain these

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would likely have mentioned a ruling in his favor; but even if the arbitrator did rule for Theomnestus, the jury in the case did not necessarily reach the same verdict. It seems likely that, as Harris (2000: 57) says, there was no dispute about the facts, but without Theomnestus' speech, we cannot be certain of this.

arguments about the meaning of a law must have been a significant source of law, in the legal sense, indeed the most important source after the texts of the laws themselves. In other words, just as the stories litigants tell about the facts of the case are a significant source for the jury's knowledge and understanding of these facts, so too the stories they tell about laws constitute a significant source for the jury's knowledge and understanding of the laws.

Now, litigants in all legal systems tell stories about the meaning of the law. In modern legal systems, the influence of these stories is usually controlled by some person of authority, typically a judge. Often there is an ultimate authority, like the United States Supreme Court, that issues binding and final decisions about the meaning of laws. But many cases still involve some degree of interpretation of the law beyond a judge's instructions or a Supreme Court's ruling, and in such cases the arguments of litigants and their lawyers can affect the meaning of our laws. Legislators may make laws, and judges or jurists may give their authoritative opinions about what those laws mean, but their opinions may still leave room for disagreement about whether or not the law applies to a specific act in a particular case. Thus, the verdict will sometimes depend not only on how effectively each side can establish the facts to favor its position, but also on how effectively each side presents its interpretation of the law as it relates to those facts. And if certain interpretations repeatedly prove effective in court, then over time the *de facto* meaning of the law may come to include those interpretations.

I emphasize the need for repeated success if an interpretation is to become authoritative. A single case in which a certain story about the meaning of the law is successful is not enough to produce a change in the law. In fact, a single success may have the opposite effect, as happened in the case of two high-profile insanity trials in the United States. In the first, in 1979, a man was accused of assassinating San Francisco Mayor George Moscone and Supervisor Harvey Milk, in large part because Milk was the first openly gay person elected to the San Francisco Board of Supervisors. The defense lawyer in the case successfully argued, among other things, that his client had become temporarily deranged under the influence of eating too many Twinkies, a high-sugar junk food, and that this amounted to mental infirmity under the law. The argument, which was forever after labeled the Twinkie defense, was successful, and the jury acquitted the defendant. The case drew national attention, however, and the Twinkie defense was so widely ridiculed that it led the California legislature to change the law explicitly to prevent such defenses in the future.

In the second case, in 1982, John Hinckley shot and nearly killed President Reagan, a crime that shook the country. Hinckley was acquitted largely on the testimony of six psychiatrists, who assured the jury that he had a "diminished (mental) capacity" at the time of the crime. A popular uproar ensued and a new law was passed that restricted future insanity defenses by more precisely defining "diminished capacity," putting the burden of proof on the defense not the

prosecution, and by limiting the role of testimony from expert witnesses in such cases. In both cases, in other words, the defense's successful argument about the law led to legislation that sought to prevent similar interpretations of the law in the future.[15]

In Athens, on the other hand, when there was a dispute about the meaning of a law—for example, whether the law on slander (at issue in Lysias 10) should apply narrowly to only the words explicitly mentioned or more broadly to the concepts contained in those words—not only was there no higher judicial authority who could decide the question, but as far as we know, no legislation was ever passed, or even contemplated, that might revise or clarify the meaning of this law or any other existing law. Nor does any litigant ever suggest that an ambiguity in the law could or should be eliminated by legislation. One reason for this is probably that litigants seem to think it impossible that the law could be ambiguous. On the contrary, they appear to take for granted that the meaning of the law is clear, and that any interpretation other than their own is simply wrong.

Aeschines makes this point in his discussion of the law on audits in *Against Ctesiphon*. After explaining the meaning of the law and indicating how Demosthenes will dispute this meaning, he has the text of the law read out and adds that when others dispute the meaning,

> *it is the job of you jurors to remember the law and confront their insolent claims with it; and you must reply to them that you refuse to tolerate an unprincipled sophist who thinks he can nullify the laws with his words. . . . Men of Athens, the public speaker and the law must say the same thing. When the law says one thing and the public speaker another, your verdict should go to the just claim of the law, not the insolence of the speaker. (3.16)*[16]

In other words, any opponent who proposes a different interpretation of the law is misstating the law; his words and the words of the law are not saying the same thing. Demosthenes, of course, with equal confidence will give his own, completely different, interpretation of the law (18.111–19).

Similarly, on the issue of where crowns should be presented, Aeschines, knowing that Demosthenes will introduce a different law, emphasizes the impossibility of two valid laws conflicting with one another. The law introduced by Demosthenes, he argues, cannot allow for the presentation of crowns in the theater, as it may seem to do, because this would contradict the law Aeschines cites, which requires crowns to be presented in the Assembly:

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[15] For a brief history of the evolution of the insanity defense see Ewing 2008: xvii–xx.

[16] ὑμέτερον ἔργον ἐστὶν ἀπομνημονεύειν καὶ ἀντιτάττειν τὸν νόμον πρὸς τὴν τούτων ἀναίδειαν, καὶ ὑποβάλλειν αὐτοῖς ὅτι οὐ προσδέχεσθε κακοῦργον σοφιστὴν οἰόμενον ῥήμασι τοὺς νόμους ἀναιρήσειν . . . χρὴ γάρ, ὦ ἄνδρες Ἀθηναῖοι, τὸ αὐτὸ φθέγγεσθαι τὸν ῥήτορα καὶ τὸν νόμον· ὅταν δὲ ἑτέραν μὲν φωνὴν ἀφιῇ ὁ νόμος, ἑτέραν δὲ ὁ ῥήτωρ, τῷ τοῦ νόμου δικαίῳ χρὴ διδόναι τὴν ψῆφον, οὐ τῇ τοῦ λέγοντος ἀναισχυντίᾳ. (trans. Carey)

> *If . . . this kind of habit has insinuated itself into your political practice, so that there are invalid laws publicly inscribed among the valid laws and there are two laws opposed to one another dealing with a single issue, what term could one use for a constitution in which the laws order one both to do and not to do the same things? But this is not so. (3.37–38)*[17]

Demosthenes concurs, and elsewhere he explains the legislative process for ensuring that no two laws conflicted:

> *You see the excellent method that Solon provides for enacting laws. First, it comes before you, men who have sworn an oath and exercise supervision over this and other matters. Next, opposing laws are repealed so that there is one law for each subject. This avoids confusion for private individuals, who would be at a disadvantage in comparison to people who are familiar with all the laws. The aim is to make points of law the same for all to read as well as simple and clear to understand. (20.93, trans. Harris)*[18]

Both Demosthenes and Aeschines, then, appear convinced that their understanding of these laws is correct and no other interpretation is possible. The jurors had to decide between the two with no guidance from any independent authority or other sources, besides the pleadings they had just heard. As noted above, the verdict in favor of Demosthenes did not necessarily mean that all or even a majority of jurors accepted his interpretation of either of the laws in question; but it probably gave some weight to his position, especially in view of the magnitude of his victory,[19] and could thus influence future cases where the same issues arose.

Thus, although no single case could establish an interpretation as authoritative, a single case could carry some weight depending on the size of the verdict[20] and the centrality of the legal issue to the case. If, for example, Euphiletus won his case overwhelmingly, his interpretation could have considerable influence on future trials; but the case would not establish this view as authoritative unless several other

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[17] εἰ γὰρ . . . τοιοῦτον ἔθος παραδέδυκεν ὑμῶν εἰς τὴν πολιτείαν ὥστ' ἀκύρους νόμους ἐν τοῖς κυρίοις ἀναγεγράφθαι, καὶ δύο περὶ μιᾶς πράξεως ὑπεναντίους ἀλλήλοις, τί ἂν ἔτι ταύτην εἴποι τις εἶναι τὴν πολιτείαν, ἐν ᾗ ταὐτὰ προστάττουσιν οἱ νόμοι ποιεῖν καὶ μὴ ποιεῖν; ἀλλ' οὐκ ἔχει ταῦθ' οὕτως. (trans. Carey) Dem. 24.32–36 makes a similar point.

[18] συνίεθ' ὃν τρόπον, ὦ ἄνδρες Ἀθηναῖοι, ὁ Σόλων τοὺς νόμους ὡς καλῶς κελεύει τιθέναι, πρῶτον μὲν παρ' ὑμῖν, ἐν τοῖς ὀμωμοκόσιν, παρ' οἷσπερ καὶ τἄλλα κυροῦται, ἔπειτα λύοντα τοὺς ἐναντίους, ἵν' εἷς ᾖ περὶ τῶν ὄντων ἑκάστου νόμος, καὶ μὴ τοὺς ἰδιώτας αὐτὸ τοῦτο ταράττῃ καὶ ποιῇ τῶν ἅπαντας εἰδότων τοὺς νόμους ἔλαττον ἔχειν, ἀλλὰ πᾶσιν ᾖ ταὔτ' ἀναγνῶναι καὶ μαθεῖν ἁπλᾶ καὶ σαφῆ τὰ δίκαια. For the work of the Nomothetai in overseeing fourth-century legislation see most recently Rhodes 2003. The process was created not by Solon but by legislation at the end of the fifth century.

[19] Aeschines received less than one-fifth of the votes and thus had to pay a fine.

[20] The jurors' votes were counted and the total was presumably announced to the court, so that it would be known to all.

litigants made the same argument in other cases and also succeeded. At some point—exactly when is impossible to say—this interpretation of the law would cease being challenged and the law's meaning would be established. It could still be challenged, but challenges would be so unlikely to succeed that they would occur only rarely, and perhaps for other motives.[21]

In sum, the rhetorical arguments of litigants had a significant influence on the Athenians' understanding of the meaning of their laws, and in some circumstances could determine this meaning authoritatively. This is not to suggest that rhetoric somehow could override the law, or that it was more important than law in the Athenian system. By general consensus statutes were the primary source of law; they were given the primary place in the judicial oath that all jurors swore and litigants regularly call on the jury to decide according to the laws. That the Athenians believed in the rule of law cannot be doubted.[22] But a commitment to the rule of law and to deciding cases according to the laws (as required by the judicial oath) did not obviate the need to interpret laws with respect to the case at hand.[23] The oath also contained a clause requiring jurors to decide cases according to their "most just judgment" (*tēi dikaiotatēi gnōmēi*). Even if this clause applied only in cases where there was no law, and more likely it was not restricted to these,[24] interpretation of the law and of its application would be necessary in most cases. We should also note that law and justice go hand in hand in Athenian forensic rhetoric: not only is justice never introduced in opposition to law,[25] but law is never introduced in opposition to justice either. Thus, to use one's most just judgment in interpreting a law is not only consistent with the rule of law but is often an essential part of the process of deciding according to the law. The Athenian jurors were bound by their oath to decide according to the law, but they were free, and had to be free, to decide according to their best judgment just what the law was in relation to the case at hand. And that judgment was necessarily influenced by the arguments they had heard the two litigants make.

Finally, in this paper I have concentrated on the interpretation of laws, but in actual practice the jurors would have had to consider facts and laws together. This situation was not peculiar to Athenian law. Even today in the common law, in which judges are regularly called on to interpret the law, interpretation (as one scholar puts it) "requires a constant conversation between the facts and the rules."[26] Judges must

[21] A homicide accusation, for example, barred the accused from entering most public places, and thus could be used (as in Antiphon 6) to prevent the accused from prosecuting others in an unrelated case.

[22] Even David Cohen has explicitly endorsed the Athenian commitment to the rule of law (Cohen 2005), though Harris seems to continue to see him as a diehard opponent of the rule of law (e.g., Harris 2006).

[23] See Kästle 2012: 174–75 with n. 63.

[24] Harris 2006 argues for such a restriction; *contra* (most recently) Kästle 2012: 185–86.

[25] Harris 2006: 168–70.

[26] Scheppele 1988: 102; see more generally 86–106.

always decide not only how to interpret the law in relation to the established facts, but also which of the many facts in the case are relevant to the law in question. This is true even when they are hearing cases on appeal, where litigants concentrate on questions of law; litigants on appeal introduce the facts that they consider relevant to understanding the application of laws to their particular case, and judges must in turn decide which facts are relevant to their decision about the law.

For jurors in Athens, the facts and the law were even more closely interwoven, since litigants necessarily included all their arguments about both in their one speech. In Lysias 1, for example, Lysias arranges the facts so that they tell the story of a crime, adultery, and its punishment, not the story of a homicide and its justification. This arrangement produces a certain interpretation of the facts—a story of adultery and its punishment—and this in turn allows Lysias to tell a particular story about Draco's law, namely that it prescribes death as the penalty for adultery, rather than that it justifies homicide in certain situations. The prosecution, as noted, certainly had a different understanding of the facts and thus also of the law. They probably told the story of a homicide, committed by Euphiletus, for which the law on homicide demanded punishment. But the speaker's strategy is to make the punishment of adultery the primary story of both the facts and the law, so that the jurors will focus on this particular story of adultery and on the laws concerning adultery, not the laws concerning homicide. Thus, in practice the rhetoric of legal interpretation is intertwined with the rhetoric of factual determination.

In sum, in Athens the laws were primary, but in most cases rhetoric was crucial to deciding which laws were relevant, what these laws meant, and how they should apply to the case at hand. In this respect, rhetoric was a significant source of Athenian law.

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TELLING STORIES ABOUT ATHENIAN LAW: A RESPONSE TO MICHAEL GAGARIN

It is somewhat flattering to be asked to respond to a paper which takes as one of its starting points something that the respondent has published twenty years ago.[1] It can also be intellectually stimulating, particularly if (as here) it is a problem on which you have not subsequently written, because it invites reflection on those aspects of your earlier treatment where you have either changed or retained your views, as well as considering the impact of more recent work by other scholars.

In the present case I probably would want to retain at least the broad context of what I was attempting in 1993, which was to emphasise the consequences of the absence in classical Athens of certain ways of determining or developing law which are familiar from modern legal systems: judicial case law in common-law systems, and juristic writings in what I understand of their civil-law counterparts.[2] In both contexts, of course, what distinguishes Athens from modern jurisdictions is the absence of the sort of judicial authority within the lawcourt (as opposed to pre-trial hearings) that can impose or control particular interpretations of the law. But in response to Gagarin's paper, I am more than happy to support him in broadening the search for other sources of law beyond the bare texts of statutes to examine habits of statutory interpretation, including (in Gagarin's phrase) the stories that orators tell about the meaning and relevance of various laws. So let me suggest here two areas that may be worth exploring at some point in the future where appropriate space can be devoted to them, plus a couple of speculative interpretations arising out of my own continuing work on Lysias which can be put forward more briefly, before closing with a pair of examples to illustrate a broader if unresolved problem.

My first suggestion is the possibility that the rôle played by the phenomenon identified by Gagarin may have differed in different areas of law. The obvious example to consider here would be homicide, in view of the stability of membership which characterised certainly the Areiopagos and possibly to some extent the ephetic courts. In an extensive treatment, Carawan has argued for a higher level of juristic competence on the part of homicide judges than in other types of Athenian

[1] Todd (1993: 49–63), as discussed by Gagarin, this vol., at p.131 and esp. p.132.
[2] Todd (1993), at pp.60–61 and at pp.53–54 respectively.

court:[3] a significant factor here will presumably have been the extent to which the same judges heard repeated cases, which may have facilitated the development of the settled opinion of the court on how to interpret particular points of law—guided, if so, by the pleadings of successive orators.[4] It may be relevant, as noted in a different context by Lanni (2004: 304), that homicide law is also unusually detailed in its substantive provisions. It is not clear to me whether we should therefore expect a different pattern of story-telling about law in such cases, but that is perhaps too large a question to be explored within the available word-limit.

My second suggestion is that it may be worth giving some consideration to the question of precedent, because of the way that Gagarin's argument is predicated on stories about the law being told repeatedly.[5] It is notoriously the case that Athenian orators are much more concerned with reminding the jury about the likely impact of their vote in what has been termed "prospective precedent" (Lanni 1999: 43),[6] whereas their references to previous cases are significantly less common and, crucially, tend to be phrased in terms of a general appeal to treat the defendant with equal severity rather than an attempt to establish the view taken by the previous court of a point of law (Lanni 1999: 49–50). But Lanni does in this context note that there are some exceptions, including e.g. the cases of Euaion and of Euandros in Demosthenes' speech *Against Meidias*.[7] Had time and space permitted, it might have been interesting to consider why this unusual phenomenon occurs repeatedly in

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[3] Carawan (1998: 154–167), arguing that *ephetai* were selected from among members of the Areiopagos (i.e. against the view that they were replaced at the end of the fifth century by *dikastai*, pp.161–162), that they therefore shared the legal experience of Areiopagite justices (p.167), and that the sophistication of legal argument in the speeches reflects this (p.159).

[4] It is worth remembering that the Areiopagos was not just a homicide court: we have to my knowledge no evidence for any formal process of jury deliberation here (any more than in the dikastic courts, where it seems clear that the jury voted immediately after hearing the litigants), but members of the Areiopagos will have been used to meeting in other contexts as a deliberative council.

[5] E.g. "certain interpretations repeatedly prov[ing] effective in court" (Gagarin p.139 above), and esp. "it would take more than one case to establish [a litigant's assertion] as the accepted meaning of a law" (Gagarin p.133 above).

[6] As my former student Richard Stonehouse pointed out to me, this is typically presented in educative terms, but in terms not of educating the defendant (who is deemed to be beyond redemption) but of improving the rest of the citizen body. We may note the frequency with which invitations to punish are associated with phrases about making "the citizens" (or "the others") "better" (βελτίους): e.g. Lys. 14.12; 31.25; Dem. 22.35; 25.17; Dein. 1.27; Lyk. 1.67.

[7] Euaion's killing of Boiotos (Dem. 21.71–72), with detailed explanation of events and motives (and narrowness of vote for conviction), contrasted with Demosthenes' own treatment by Meidias (21.73–74); Euandros' conviction for arresting Menippos during the Mysteries (21.175–6), with similarly detailed comparison to the circumstances of Demosthenes' own case (21.177).

this particular speech: is it something about the orator's persona, or the fact that the speech was apparently published but not delivered?

On the subject of precedent, I have sometimes been tempted to suggest a couple of places in Lysias where it is I think at least possible that what purport to be statements about law may in fact be allusions to previous cases—albeit both these interpretations are highly speculative, because they would each require us to make an assumption about the result of the case that is putatively being alluded to. One is the argument advanced against Euandros, whose candidature as Arkhōn is being scrutinised and challenged in Lys. 26, that "if he were now undergoing his *dokimasia* before becoming a member of the Council, and his name had been written on the *sanides* as one who had served in the cavalry under the Thirty, you would reject him even without an accuser."[8] On the face of it, there are some strikingly close similarities here to the allegations faced by Mantitheos, the speaker in an evidently previous *dokimasia* case (Lys. 16), who was himself a candidate for the council, and allegedly a former member of the cavalry under the Thirty, with the evidence against him being the presence of his name on the *sanides*, or, as Mantitheos himself terms it using a possibly derogatory diminutive, the *sanidion* (wooden tablet used for temporary records, evidently here for listing names).[9] It is generally agreed that the speech against Euandros can be firmly dated to the summer of 382, and that the speech for Mantitheos must belong certainly after 394 and probably before (or at least not long after) 389.[10] Unlike that of Euandros, the result of Mantitheos' *dokimasia* is unknown: if we were to read Lys. 26.10 as alluding to it, then this would entail assuming that Mantitheos was defeated, and defeated so heavily that his case could be thought of as not having required an accuser; it would also mean that Mantitheos' case had been enough of a *cause célèbre* to be remembered at the date of Euandros' hearing, and for the result to be regarded as a statement of legal principle.[11] But why else should Lys. 26.10 refer specifically to cavalry service and to the *sanides*?

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[8] Lys. 26.10 (a different Euandros from the one in the previous footnote): <καὶ> εἰ μὲν βουλεύσων νυνὶ ἐδοκιμάζετο καὶ ὡς ἱππευκότος αὐτοῦ ἐπὶ τῶν τριάκοντα τοὔνομα ἐν ταῖς σανίσιν ἐνεγέγραπτο, καὶ ἄνευ κατηγόρου ἂν αὐτὸν ἀπεδοκιμάζετε.

[9] Prospective membership of council: Lys. 16.1, etc. Allegation of cavalry service: 16.3, 6, etc. Admission that his name was included on the *sanidion*: 16.6 (the latter combined with the assertion that his name had not been included in another official context which Lysias claims to regard as more reliable documentary evidence, viz. the Phylarkhs' list of those required to repay the *katastasis* or equipment allowance).

[10] Euandros because of his presence in the Arkhōn list for 382/1 (which incidentally implies that Lysias lost this case). *Terminus post quem* for Mantitheos is provided by the latter's record in military campaigns of 395–4 (Lys. 16.13, 15–16); *terminus ante quem* by an apparent hostile allusion to Thrasyboulos of Steiria (16.15), which would seem to make better sense either before or soon after the latter's death in 389.

[11] Given the gap between 389 and 382, this might perhaps be easier to credit if there had been other similar cases in the intervening period (cf. Gagarin's suggestion about repeated interpretations, noted above at n.5 of this response).

My second speculation concerns the allegation brought against the defendant Agoratos in Lys. 13.66 that "So then, being this sort of man, he has tried to commit *moikheia* (broadly, adultery) with wives of the citizens, and to corrupt free-born women, and has been caught as a *moikhos*, and for this the penalty is death."[12] This is an odd passage, because it is one of very few extant texts to claim that adultery is punishable by death, and to make sense of this claim involves making certain assumptions. One possibility would be to extend the suggestion put forward in another context by Gagarin's paper, viz. that the law cited at Lys. 1.28 relates to the otherwise sparsely-attested *graphē moikheias*, for which he suggests that death may have been either the sole penalty fixed by statute, or alternatively an option if the procedure was an *agōn timētos*.[13] As an explanation of Lys. 13.66, however, this would only work if the death penalty in a *graphē moikheias* were statutory, but I am not aware of any other evidence for this: certainly no such evidence is cited in the discussion of this procedure by Lipsius, who indeed suggests that the reference at 13.66 could be to the sort of informal penalty exacted by Euphiletos in Lys. 1.[14] An alternative possible explanation, however, would be to develop this suggestion by Lipsius, in a way hinted at but not developed in the first volume of my Lysias commentary:[15] this would entail assuming both that Lys. 1 was delivered earlier than Lys. 13 (which is certainly possible, as the former speech can be dated only as occurring within the career of Lysias) and also, more significantly, that Lys. 1 resulted in an acquittal, i.e. that the point of the claim at 13.66 about death being the penalty for adultery is that the jury are deemed all to know that Euphiletos in that earlier case got away with killing Eratosthenes on the grounds that the latter was an adulterer. I should perhaps emphasise that I am not by any means claiming that this second explanation is a correct one, but simply that it entails making a different set of assumptions. More significantly for present purposes, it were to be correct, then we would have another example of a *cause célèbre* being used as a statement of law.

Perhaps the fundamental question raised by Gagarin's paper is, how far did Athenian law courts operate on the basis that interpretation had to be contested afresh on every occasion, or alternatively, how far was this a system in which the recurrence of concurring interpretations might take on something like the force of settled law? There may be issues here arising out of the continuing debate among scholars over the applicability to Athens of the term 'rule of law'. Here I think my

[12] Lys. 13.66: γυναῖκας τοίνυν τῶν πολιτῶν τοιοῦτος ὢν μοιχεύειν καὶ διαφθείρειν ἐλευθέρας ἐπεχείρησε, καὶ ἐλήφθη μοιχός· καὶ τούτου θάνατος ἡ ζημία ἐστίν. For the question of whether Agoratos' status as an alleged former slave is being presented here as an exacerbating circumstance, see the discussion of Gärtner (1997: 42–44) in Todd (2013: 45).

[13] Gagarin, at n.4 and accompanying text.

[14] Lipsius (1905–15.ii: 432 n.50). Of more recent scholars, Carey (1995: 410) states simply that "we do not know the penalty."

[15] Todd (2007: 50 n.31), suggesting that Lys. 13.66 (erroneously referred to there as 13.68) "may suggest that Eratosthenes' case [= Lys. 1] was still fresh in the speaker's mind."

current view (in the light again of work done over the past couple of decades) would be that on the one hand, scholars like Harris are undoubtedly correct to emphasise the extent to which orators tell juries that their task is to implement the law;[16] but on the other hand, that this is not incompatible with the view that appealing to the rule of law is fundamentally an ideological statement (what sort of democratic state are we?). Here I find very attractive Gagarin's emphasis on law as something for orators to tell stories about: jurors do not have to articulate the reasons for their decision, and it is worth noting again the absence of mechanisms to police or control such interpretations within the court room.

This brings me to a closing problem, which I shall illustrate with two examples. It is sometimes suggested that in cases of inheritance, Athenian dikastic juries may have shown a tendency to vote in favour of blood-ties rather than wills, though the evidence for this is not in fact as clear-cut as might appear.[17] But assuming for the sake of argument that such a tendency did exist (which is not I think implausible), should we classify remarks like those in Isaios 1 as a legal principle,[18] i.e. (in Gagarin's terms) as an example of orators telling consistent stories about law? or should it be better seen as a social prejudice, or indeed possibly (depending on how you read *Ath.Pol.*'s claim that the oligarchs of 404/3 repealed the clauses restricting testamentary freedom)[19] as an example of class prejudice?[20]

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[16] See the discussion, with refs., in Gagarin's paper (notes 22–25 and accompanying text); it is a topic that I have tended to avoid writing about, barring a probably over-brief discussion in Todd (1993: 299–300).

[17] Admittedly Isaios, in the most explicit statement of this position, commends the courts for their habit of deciding in favour of those who claim by kinship rather than those who claim by will (Isai. 1.41: τοῖς κατὰ γένος ψηφίζεσθαι μᾶλλον ἢ τοῖς κατὰ διαθήκην ἀμφισβητοῦσιν), but we should not forget that that is precisely what he is wanting the jurors to do in the present case. Then there is Aristoph., *Wasps* 583–587, where Philokleon sets out a disdain for the testator's intention as evidence for the unrestricted power of the *dikastai*, but it is worth emphasising that he does not say "we give the *epiklēros* to the next of kin," but to "anyone whose entreaties persuade us" (ὅστις ἂν ἡμᾶς ἀντιβολήσας ἀναπείσῃ, trans. Sommerstein, Aris & Phillips): i.e., the joke is about capriciousness, not about consistency of social prejudice. A third passage, Arist., *Prob*., 29.3 = 950b5–9, does speak of those in "some law courts" (ἐνίοις δικαστηρίοις) voting for kin ahead of wills, but is not explicitly a reference to Athens.

[18] Isai. 1.41, cited in previous footnote.

[19] *Ath.Pol*. 35.2 (trans. Rhodes, Penguin): "They annulled the laws of Solon which provided scope for disagreement (ὅσοι διαμφισβητήσεις ἔσχον), and the discretionary power which was left to jurors, in order to amend the constitution and leave no opportunity for disagreement (lit. "straightening the *politeia* and making it *anamphisbētētos*"). For instance, in the matter of a man's bequeathing his property to whoever he likes, the Thirty gave the testator full and absolute power (κύριον ποιήσαντες καθάπαξ), and removed the attached difficulties ('except when he is insane or senile, or under the influence of a woman'), so that there should be no way in for malicious prosecutors (*sykophantai*); and they did likewise in the other cases."

My final example comes from an area of procedural law in which several members of the Symposion have published important work.[21] It concerns the torturing of slaves for evidence, which is notoriously and repeatedly described by the Orators as a more reliable form of evidence than the testimony of witnesses, in what evidently purport to be statements of legal principle.[22] Does the recurrent nature of such statements—to my knowledge, the Orators contain only one example of the counter-argument, that it is in the nature of those under torture that they will say whatever they think the torturer wants to hear[23]—constitute an example of orators telling a recurrent and therefore authoritative story about law? Not I think if one accepts the earlier and very persuasive argument of Gagarin that orators are far more ready to issue challenges to torture but do not normally respond to such challenges.[24] But how then could one tell the difference between recurrent stories that are statements of settled law and those which are statements of social prejudice? This, as I said in my introduction, is a problem that I am not sure I know how to resolve.

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[20] I.e., if the passage in the previous footnote is read as implying that the Thirty were more sympathetic to testamentary freedom *per se* (either because they had less conservative attitudes to the family, or perhaps because they were less distrustful of written wills), though the only explanation explicitly offered by *Ath.Pol*. is one that sees them attempting to restrict the scope for statutory interpretation in a somewhat naïve bid to limit the power of the democratic juries.

[21] E.g. Thür (1977) and Gagarin (1996).

[22] The similarity of phrasing and word-order between Isai. 8.12 and Dem. 30.37 suggests a legal as well as a rhetorical topos ("of those who have testified as witnesses, some have before now been held to be testifying untruthfully, whereas of those who have been tortured, none have ever been convicted of making untrue statements under torture": τῶν μὲν [Dem. adds γὰρ] μαρτυρησάντων ἤδη τινὲς ἔδοξαν οὐ τἀληθῆ μαρτυρῆσαι [Dem. has οὐ τἀληθῆ μαρτυρῆσαι ἔδοξαν], τῶν δὲ βασανισθέντων οὐδένες πώποτε ἐξηλέγχθησαν ὡς οὐκ ἀληθῆ ἐκ τῶν βασάνων εἰπόντες [Dem. has εἶπον]).

[23] Antiphon, 5.31–32, at §32: πρὸς τούτων εἰσὶν οἱ βασανιζόμενοι λέγειν ὅ τι ἂν ἐκείνοις μέλλωσι χαριεῖσθαι.

[24] Gagarin (1996: 9), noting a significant numerical disparity between nearly forty cases where the orator reports his own challenge to the opponent, versus only four where he seeks to explain his rejection of a challenge issued by the opponent (three of the latter being cases where he does so in order to explain the contrast with the supposedly superior challenge that he had issued in return). Ant. 5.31–32, as noted by Gagarin (1996: 8) is not a response to a challenge, but an attempt to undermine the credibility of torture that has been carried out unilaterally by the opposition.

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THE ATHENIAN LEGAL SYSTEM AND ITS PUBLIC ASPECTS*

In the wake of the cultural historical turn, many researchers have put an emphasis on the symbolic side of some aspects of human behavior and ritual practices. Before we can treat symbolic messages of Athenian procedural law, we have to focus on the pre-condition that made the transmission of such messages possible—i.e., the fundamentally public character of the Athenian legal system, ranging from the commitment of offenses up to their treatment in court and their punishment.

Anyone who has been following German news in 2013 may be struck by a discussion that has been ongoing for quite some time now: the thorny question of which press agencies and journalists are guaranteed seats during the trial against Beate Zschäpe, a neo-Nazi activist who was involved in the killing of Turkish and Greek immigrants. Beyond the sensitive topic related to the German past, the issue at stake in this debate is immediate access to the lawcourt proceedings. To an Athenian audience the answer would have been crystal clear: it was a fundamental principle of Athenian democracy that legal proceedings were public,[1] held in buildings (the *dikastēria* for the most part) but open for bystanders to watch and listen to what was happening on the dikastic stage.[2] What is more, Athenian culture was, in many aspects, a culture of public display.[3] The immediacy of the circumstances of living and the highly democratic system contributed to this culture of conscious openness and the accessibility of many social practices. Performance studies have recognized this fact and many studies have been devoted to this

* I would like to thank my student helpers Sebastian Bündgens, Tobias Nowitzki, and Jan Seehusen for providing me with much of the secondary literature.

1 The same is true for the US: Amendment 6 of the American Constitution stipulates that all trials must be public. In principle, the same is true for the German legal system (cf. § 169 of the *Gerichtsverfassungsgesetz*), apart from cases where special circumstances might make it preferable for the accused and/or the victim that court proceedings be held behind closed doors. Cf. the commentary on § 169 GVG by Wickern, in: Löwe-Rosenberg, Vor § 169 GVG and the commentaries on Art. 6 of the European Convention on Human Rights and Art. 14 of the International Covenant on Civil and Political Rights by Esser, in: Löwe-Rosenberg, EMRK Art. 6 and Art. 14 IPBPR Rn. 377–390.

2 On the central role of the bystanders in court proceedings, cf. Lanni 1997.

3 On the aspect of display with regard to the lawcourts specifically, cf., e.g., Hall 1995; Slater 1995. With regard to other social and cultural aspects, cf. Bonanno 1997; Cartledge 1997; Gentili 1997; Schmitz 2004, 403; Liddel 2007.

phenomenon, mainly pertaining to theatrical performances, but also the lawcourts.[4] And nevertheless, the public character of the entire Athenian legal system is normally taken for granted by most scholars so that an in-depth study of what this kind of public aspect actually means is still missing. This paper seeks to show that this public aspect of law is not self-evident when we compare the Athenian legal system to that of other pre-modern societies, and that much more significance is involved here than just the general assumption that Athenian democracy insisted on the public accessibility of their legal proceedings.

As I will show, the public was relevant to all aspects of the Athenian system of law, ranging from the *perpetration* of misdeeds (if they were supposed to make sense), to their *definition* in the absence of legal experts who could have defined the facts of an offense, to the *treatment of the offense* in the lawcourts proper, and, last but not least, to the *execution of many penalties* meted out to convicted offenders. Thus, openness and visibility lay at the heart of the Athenian understanding of justice and democracy, and not just because the Athenian body politic assumed that a trial could only be fair if it was watched and supervised by the people, but because accessibility of facts ensured communication. Thus, symbolic messages could be conveyed to all parties involved, including the opponent in court, the jurors, the presiding magistrate, and the broader public. In a semi-oral society without mass media, the sending and correct receiving of messages were crucial to the functioning of the political and social system. Athenians believed that this decisive communication could only be upheld by making as many aspects of life as public as possible,[5] including the cosmos of the law. And because this goal was largely achieved in the legal system, it could become a cornerstone of Athenian democracy, as Aristotle writes.[6]

We modern observers are not the only ones who are struck by the extremely public character of the Athenian legal system. In *Clouds*, Aristophanes mocks the Athenian fondness for litigation. Athens, according to Strepsiades, is recognizable from above only by its lawcourts in the heart of the city. ("Student: And this is a map of the whole world. Do you see? Here's Athens. Strepsiades: What do you mean? I don't believe you; I don't see any jurors on their benches.")[7] Strepsiades could have picked the Assembly of the People to characterize the city of Athens. But meetings of the Ekklēsia were "only" held approximately every ten days, whereas trials took place almost every day, apart from holidays. And many people knew what was going on before and during a trial. So, if one thought of Athens, the courts came

4 E.g., the contributions to Harris–Leão–Rhodes 2010.

5 Exemplary Athenian sources are D. 18.10; Hyp. *Lyc*. 14; ideologically Isoc. 3.52. But also Spartans put strong emphasis on leading life in public so as to avoid gossip and slander, e.g. Agesilaus, as described in X. *Ages*. 5.7; 9.1–2. The examples could be multiplied.

6 Arist. *Ath*. *Pol*. 41.2. Cf. *Pol*. 1275a22–33 (= 3.1.4–5); 1275b15–21 (= 3.1.8).

7 Ar. *Nu*. 206–208 (transl. by Sommerstein); cf. Ar. *Av*. 40–41.

to mind immediately. According to Aristophanes, they were conspicuous even from above, and thus symbolized the city and its litigious and garrulous citizens.[8] The Old Oligarch even complains that one of the reasons why the Athenians hardly have time to attend to important state affairs properly and deal with all requests is the fact that they decide more private and public suits and account renderings (*euthunai*) than all other people taken together do.[9]

The Perpetration of Misdeeds, the Definition of Violent Acts as (Il)legitimate, and the Definition of *hubris*

As far as violence is concerned, the dichotomy of public versus hidden violence charged a violent act with semantic meaning.[10] For violence to be acceptable and, in the lawcourts, to be judged as legitimate, it had to be committed in public, open for all to see and assess. Bystanders and passers-by could join the fracas, comment on it, or intervene.[11] The perpetrators could summon them as witnesses later in court. So it was vital for the person who deemed himself in the right to constitute a certain public for his act of violence. Exposing an act of violence to public scrutiny facilitated communication about it and certainly also restricted the level of violence. Only the presence of a public enabled the perpetrator to convey a symbolic message to an audience, i.e., that he was in the right and was the stronger party, and that his rival was a weakling deserving to be ridiculed and shamed in public. In this game for power and even physical supremacy, the audience fulfilled a vital function: ideally it would condone, if not legitimate, the violent act and, most of all, it would immediately construct meaning and thus make sense of the violence perpetrated.

If we regard this dichotomy of public versus hidden violence as a semantic marker, we also come to a better understanding of what hidden violence meant. If a perpetrator committed a violent act away from the public limelight, he had something to hide. There was not only no message to be transmitted to a discerning audience, but the perpetrator had a bad conscience and therefore could not justify his actions. By removing his violence from the public gaze and adjudication, he actually admitted that his behavior was unacceptable. There is, of course, the vast domain of domestic violence to which women, children, and especially slaves were subject. This kind of violence was taken for granted by Athenian male citizens and therefore deemed irrelevant. The *kurioi* regarded this kind of hidden violence as justified

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[8] Athenian envoys speaking before the Spartan Assembly address the fact upfront that many of Athens' allies regarded Athenians as litigious (Thuc. 1.77.1).

[9] Ps.-X. *Ath. Pol*. 3.2: ἔπειτα δὲ δίκας καὶ γραφὰς καὶ εὐθύνας ἐκδικάζειν ὅσας οὐδ' οἱ σύμπαντες ἄνθρωποι ἐκδικάζουσι … . Christ 1998 discusses in detail the complex discussions Athenians had about their legal system and its abuse. On litigation and its consequences for Athenian culture, cf. Johnstone 1999, 126–133.

[10] On the following, cf. Riess 2012, 51–65.

[11] A good example is Lysias 3.12; 16–18, where a kind of street fight is described. On the frequency of such batteries, cf. Lys. 3.39; 42.

paternalistic coercion of human beings under their power. The Attic orators abound with examples of open violence. To enumerate just a few:

Alcibiades allegedly dragged his wife by her hair across the Agora as she was about to file for divorce with the Archon *basileus*.[12] In doing so, he ignored her rights as a citizen woman, expressed his utter disrespect for Athenian democratic institutions, and reasserted his power as a *kurios* over his wife. Two weeks later she died under mysterious circumstances and her family did not dare file charges for homicide against Alcibiades. He could have acted otherwise but wanted to make it abundantly clear to the Athenian public what amount of power he wielded, over his wife as well as over Athens' political and legal institutions.

In another instance, we see how deliberately Alcibiades sought the public scene in order to construct himself as superior in relation to a colleague. When he served as *chorēgos* together with Taureas, he punched the latter and/or one of his chorus boys in the face and drove them out of the theater of Dionysus during the performance of the play.[13] Choregic competition was normal, but this violent breach of social conventions was certainly not. More than a generation later, Demosthenes suffered the same fate at the hands of Meidias. Through Demosthenes' famous speech we are well informed about this incident.[14] It is obvious that Alcibiades and Meidias did not act on the spur of the moment, but chose the theater of Dionysus very deliberately to dramatize their superiority. In both cases, we learn that the audience did not agree at all with the aggressors, and yet they tried their luck, as if to test what kind of bullying behavior they could get away with. Both aggressors assessed their situations and their immense social capital correctly: Alcibiades still won the prize in the choregic competition and Demosthenes was successful only in his *probolē* action against Meidias, but eventually might not have delivered his speech in court at all.[15] Maybe he was bribed or came to the conclusion that his loss of face in public was more severe than Meidias' daring punch.

Conon and his sons attacked Ariston in the Agora at night and deliberately established an audience to dramatize their rowdy behavior.[16] Most of all, Conon performed a rooster dance in order to mock Ariston brutally in front of onlookers.[17] Ariston does not tell us to what extent he was responsible for the escalation of the long-term conflict, but obviously his opponents did not shrink from attacking him in plain view of other people in the Agora, because they felt they were in the right.

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[12] Ps.-And. 4.14; Plu. *Alc*. 8.4; indirectly Lys. 14.42; Antiphon fr. 67 (Thalheim–Blass).

[13] Ps.-And. 4.20–21; D. 21.147; Plu. *Alc*. 16.5–8; cf. Th. 6.15–16 (indirectly).

[14] D. 21, mainly 21.74.

[15] On the discussion of whether or not Demosthenes delivered the speech, cf. most recently Dreyer 2000.

[16] D. 54.

[17] D. 54.9. On the meaning of ancient Greek cock-fighting, cf. Csapo 1993; in reference to Aeschines 1 in particular, cf. Fisher 2004.

In cases of homicide, things got more serious and difficult. After having been cuckolded by his wife for quite some time, Euphiletus famously gathered a posse of friends to lend legitimacy to his killing of the adulterer Eratosthenes, to achieve a theatrical effect, and to stage his private revenge as an execution on behalf of the laws of the city.[18] Although this excessive kind of revenge was almost certainly obsolete and frowned upon at the end of the fifth century, it might still have been legal because it was in accordance with Athenian laws.[19] Euphiletus could have acted otherwise,[20] but by flaunting his physical prowess in front of friends he might have intended to regain some of his social standing that he had lost as a husband who had been cheated by his wife. To what extent Euphiletus tried to construct himself as a tyrannicide by killing Eratosthenes, who might have been a very well-known aristocrat, remains a matter of interpretation.[21]

Very clearly, the killing of the oligarch Phrynichus in broad daylight by the metics Thrasybulus of Calydon and Apollodorus of Megara (Lysias, Lycurgus), if we want to follow Thucydides' version,[22] is constructed as a tyrannicide modeled after the killing of Hipparchus by Harmodius and Aristogeiton. Political assassinations followed cultural, constitutional, and semantic rules revolving around visibility. I distinguish two categories, each of them conveying a specific symbolic message: in the democratic hoplite polis, male citizens wanted to assess everything, including homicide. The murder of another citizen could only be acknowledged as a tyrannicide if the assassin approached his victim in public and had the courage to kill him in front of discerning onlookers. The public display of the deed helped the citizens to define its legitimacy and determine whether or not it constituted tyrannicide. In monarchies and established tyrannies, however, the rulers were protected by bodyguards. The *dēmos* was in no position to adjudicate the legitimacy of their monarch's rule. Power-mongers at court and family members killed these rulers behind closed doors. These dynastic murders did not need the people to condone them. The assassins did not even try to present these killings as tyrannicides.[23]

Let us have a look at the other side of the coin: is it true that hidden violence versus an Athenian citizen was normally regarded as unacceptable? Again, the

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[18] Lys. 1.4; 23–24; 26–27; 29; 34; 41–42; 47; 50.

[19] The *nomos tōn kakourgōn* (Lys. 1.28), the lawful homicide statute (Lys. 1.30), and the *dikē biaiōn* (Lys. 1.31); cf. Todd 2007, *ad loc*. with detailed discussion of older literature on whether or not the first law could also be the one on *moicheia* and the third one a *dikē blabēs*. Cf. Omitowoju 2002, 98–105.

[20] He deliberately refused to accept Eratosthenes' money in compensation (Lys. 1.29).

[21] Cf. Riess 2012, 76, n. 242, based on Perotti 1989/90, 47–48.

[22] Th. 8.90–92; Lys. 13.70–76 (unspecific as to time); Lycurg. 1.112–115. Cf. Lys. 7.4; 20.11–12; 25.9; Plu. *Alc*. 25; HGIÜ I 140. According to Lycurgus, the assassination happened at night, near the well close to the willows. This completely different setting decisively alters the meaning of this coup.

[23] Cf. Riess 2006, 85–86.

evidence is overwhelming and corroborates the thesis presented so far. Take, for example, the case of Teisis, who detained Archippus in his house and had him whipped by his slaves a whole night long.[24] Under Athenian law, an Athenian citizen could not be detained; furthermore, it was a terrible offense to subject him to the horror of whipping. In this case, the fact that slaves whipped an Athenian citizen not only turned the world upside down but also severely breached Athenian social codes. When Archippus was finally carried out of the house on a litter and displayed to onlookers at the samples market, a highly performative act, the bystanders were utterly shocked. Even Teisis' friend Antimachus was horrified when he heard what was going on inside the house and demanded the immediate release of Archippus.[25]

Apollodorus relates in court that his long-term enemy Nicostratus tried to kill him outside the city, at night, by trying to push him into a quarry. The jurors were so appalled that they were on the verge of sentencing Nicostratus to death.[26]

In Antiphon 1, a son prosecutes his stepmother for having poisoned his father many years ago. We only hear his side of the story, but the fact that the woman killed her husband by giving him a potion to drink is especially heinous. As a rhetorical strategy, the speaker appeals to mythological exempla by evoking the insidious Clytemnestra's murder of Agamemnon upon his glorious return from Troy.[27] The message is clear: it is shameful for a man to die not in an open fight where he can look his enemy in the eyes, but by the scheming hands of a malicious and cowardly woman.

Antiphon 2.1 is one of Antiphon's fictional tetralogies, but these cases, probably rhetorical exercises, are telling because they had to be plausible. A rich man was killed in the street at night together with his slave, a heinous crime because he could not defend himself. His opponent was a coward, had lost in court several times, and was up for another trial, which he presumably would have lost. Because he wanted to prevent this looming court case, but most of all because he knew no other way out, he resorted to murder, committed away from the public gaze because he had no arguments to justify his shameful deed.[28]

But it was not just violence that was charged with meaning through the presence or absence of a public. The notorious lack of concise definitions of what factors constituted an offense appears in a somewhat different light, if we take into consideration that the meaning and significance of misbehavior were also discussed and interpreted in public, most of all in cases in which the misconduct was on display, open to the gaze of all. The notion of *hubris* shall suffice as an example. The important *concept of hubris* is not comprehensible without considering its performative aspect. A certain behavior can best be assessed as *hubris* by others if

[24] Lys. fr. CXXIX 279 (numbered according to Carey 2007).
[25] Lys. fr. CXXIX 279.4–6.
[26] Ps.-D. 53.17–18.
[27] Antiphon 1.17.
[28] Antiphon 2.1.6–7.

and when it is displayed and performed. The very visibility of hubristic behavior is also, among others, a defining factor for *hubris*. Research has focused for a long time on the question of whether or not hubristic behavior always required a direct object, a victim who was humiliated by the *hubristēs*. Fisher's definition, which states that *hubris* is "the committing of acts of intentional insult, of acts which deliberately inflict shame and dishonor on others," has become classic.[29] Other scholars disagree, and argue that excessive self-assertion alone figured as *hubris*—that is, there was no need for a victim who could be affected by this kind of "thinking big."[30] As important as these points are, they neglect an even more important factor: Athenians could do without a precise definition of *hubris* because they saw and experienced *hubris* whenever it occurred. And in the lawcourts they verified whether or not what they had seen corresponded to their cultural preconceptions of what *hubris* was all about. This means that in order for a behavior to be assessed as *hubris*, it normally had to be performed in public. The sources imply this performative aspect of *hubris*, with and without a victim affected:

> *It was not the blow that aroused his anger, but the humiliation. Being beaten is not what is terrible for free men (although it is terrible), but being beaten with the intent to insult. A man who strikes may do many things, men of Athens, but the victim may not be able to describe to someone else even one of these things: the way he stands, the way he looks, his tone of voice, when he strikes to insult, when he acts like an enemy, when he punches, when he strikes him in the face. When men are not used to being insulted, this is what stirs them up, this is what drives them to distraction. No one, men of Athens, could by reporting these actions convey to his audience the terrible effect of outrage in the exact way that it really and truly appears to the victim and those who witness it. (D. 21.72, transl. by E. Harris)*[31]

> *Will you be the only person in the world who has the greatest reputation for being stuffed with so much arrogance toward everyone that even those who have nothing to do with you get irritated when they see your pushiness, your shouting, the way you strut around with your entourage, your wealth, and your abuse—and then find yourself pitied the minute that you are on trial? (D. 21.195, transl. by E. Harris)*[32]

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[29] Fisher 1992, 148; similarly, Fisher 1992, 1; 25; 56; 493, etc. Gagarin 1979, 230 and Cantarella 1983 follow Fisher.

[30] Hooker 1975; Michelini 1978; Dickie 1984; MacDowell 1990, 18–23; Cairns 1996, 1.

[31] D. 21.72: οὐ γὰρ ἡ πληγὴ παρέστησε τὴν ὀργήν, ἀλλ' ἡ ἀτιμία· οὐδὲ τὸ τύπτεσθαι τοῖς ἐλευθέροις ἐστὶ δεινόν, καίπερ ὂν δεινόν, ἀλλὰ τὸ ἐφ' ὕβρει. πολλὰ γὰρ ἂν ποιήσειεν ὁ τύπτων, ὦ ἄνδρες Ἀθηναῖοι, ὧν ὁ παθὼν ἔνι' οὐδ' ἂν ἀπαγγεῖλαι δύναιθ' ἑτέρῳ, τῷ σχήματι, τῷ βλέμματι, τῇ φωνῇ, ὅταν ὡς ὑβρίζων, ὅταν ὡς ἐχθρὸς ὑπάρχων, ὅταν κονδύλοις, ὅταν ἐπὶ κόρρης. ταῦτα κινεῖ, ταῦτ' ἐξίστησιν ἀνθρώπους αὐτῶν, ἀήθεις ὄντας τοῦ προπηλακίζεσθαι. οὐδεὶς ἄν, ὦ ἄνδρες Ἀθηναῖοι, ταῦτ' ἀπαγγέλλων δύναιτο τὸ δεινὸν παραστῆσαι τοῖς ἀκούουσιν οὕτως, ὡς ἐπὶ τῆς ἀληθείας καὶ τοῦ πράγματος τῷ πάσχοντι καὶ τοῖς ὁρῶσιν ἐναργὴς ἡ ὕβρις φαίνεται (emphasis added).

[32] D. 21.195: σὺ μόνος τῶν ὄντων ἀνθρώπων ἐπὶ μὲν τοῦ βίου τοσαύτης ὑπερηφανίας πλήρης ὢν [πάντων ἀνθρώπων] ἔσει φανερώτατος, ὥστε καὶ πρὸς οὓς μηδέν ἐστί σοι

Although these passages do not explicitly mention an audience, they might imply onlookers. D. 21.195 mentions people *seeing* Meidias' pushiness. In these passages, we may assume that the *hubristēs* might have displayed his self-indulgent state of mind. An impertinent look or gesture could be symbolically charged with the notion of *hubris*, because it may have been performed in front of an audience, however small.

But the public and performative aspect of misconduct refers not only to its actual perpetration, but also to its ensuing *negotiation* and *judgment* in court. From the archaic days on, the judgment of offenses was considered a public affair. Most famous, perhaps, among archaic sources is the description of a trial scene on Achilles' shield, as presented in Homer's *Iliad*.[33] In this scene, it is a group of elders, referred to as "knowers" (*histores*), who judge the case. They are more or less dependent on a crowd, which voices its opinion loudly. It would be rash to say that the *histores* are the precursors of the later Attic magistrates who presided over the various lawcourts, and that the onlookers are the precedents of the Attic jurors, but it seems obvious that at least some communities somewhere in the archaic Greek world discussed and judged disputes in front of a public interested in fair trials and successful conflict resolution.[34]

If we move forward in history to the Athenian court system, we see that the public aspect was at the heart of all stages of the legal process. For the trial itself, this is self-evident. The courts were located in or near the Agora.[35] The only exceptions were the homicide courts: the Prytaneion aside, the Areopagos, the Palladion, the Delphinion, and the court at Phreatto were located outside the Agora proper, in all probability in order to avoid pollution. If we want to follow Stroud's thesis, Draco's and Solon's wooden *axones* originally stood on the Acropolis, the religious center of the city, probably within a building because of their perishable material. We do not know when these foundational texts were inscribed on bronze *kurbeis*, stele-like monuments. If this measure was taken around 480 BCE, as Stroud proposes,[36] it might have been related to the implementation of an increasingly democratic political system. It took a small step for Ephialtes to bring the revered monuments down into the Agora, the civic heart of the city, around 461 BCE. The

πρᾶγμα, λυπεῖσθαι τὴν σὴν θρασύτητα καὶ φωνὴν καὶ [τὸ] σχῆμα καὶ τοὺς σοὺς ἀκολούθους καὶ πλοῦτον καὶ ὕβριν θεωροῦντας, ἐν δὲ τῷ κρίνεσθαι παραχρῆμ' ἐλεηθήσει; (emphasis added).

33 Hom. *Il*. 18.497–508.

34 MacDowell 1978, 18–23. According to Cantarella 2005, 346, we see here "une procedure dont l'origine va conduire à la necessité du pouvoir public de soumettre à son contrôle la violence privée."

35 Thompson–Wycherley 1972, 52–72, esp. 52; Boegehold 1995, 10–16, and figures 1–10; Knell 2000, 96–105. Lanni 1997, 185, emphasizes, based on older literature, that around 340 the different courts were centralized in one building in the Agora, in front of the later Stoa of Attalus.

36 Stroud 1979, 43.

wooden *axones* were kept, for better protection, within the Prytaneion, and the *kurbeis* might have been put up near the Royal Stoa, open for all to see. When the *anagrapheis* undertook the great project of revising the laws of Athens at the end of the fifth century, they inscribed the laws onto "walls" at the Royal Stoa. It was the common understanding of democratic-minded Athenian citizens that the laws should be on public display.[37] And we know that Aristotle could read the old *kurbeis* which were still on display in front of the Royal Stoa.[38] While it is certainly true that Athenians kept more and more written records in the Metroon, the state archive, they still inscribed important laws and decrees as well as treaties in stone and put up these inscriptions either in the Agora or on the Acropolis, clearly with the intent to preserve these decisions by the People for all times and make them accessible to the entire citizenry.[39] And although recording decrees in stone might well have been the exception, owing to the expense and the labor involved, the pieces of major relevance were easily accessible. What is more, Athenians obviously had easy access to the texts kept in the Metroon; at least we never hear that there were any difficulties retrieving texts from that archive.[40]

Oratory emerged in and through the necessity to plead successfully in the courts and in the Assembly of the People.[41] If the trial had not been public, there would have been no need to excel in public speaking. We do not hear of anything comparable to the sophistication of Attic forensic oratory in ancient Near Eastern cultures, for example. But the litigants and their supporting speakers not only spoke to the jurors and presiding magistrates, but also to many people watching and listening on the side. There were bystanders, and we do not hear of any restrictions

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[37] Gagarin 2008 *passim* convincingly shows that, from the early days on, writing was used to make the laws available to a broad public, but that litigation itself preserved its predominantly oral character. More focused on the emergence of institutions alongside the genesis of the law is Hölkeskamp 1999. Most recently, Hawke 2011 has questioned the *communis opinio* that the writing of laws ensured fairness and guaranteed the lower social classes access to the law. According to him (190–197), the elite members of society initiated the legislation process as a means of conflict resolution among themselves. Once writing calcified the Homeric epics, thus making them obsolete and unsuitable as normative codes of social behavior, the upper echelons strove to clarify and draft new rules for their social interactions, i.e., their fierce competition for prestige and power. And since literacy was in the hands of a small expert elite at first, it was they who profited most from the new medium. It was only in a second step that the people in general learned to understand the significance of written laws as the "guarantor of the power of the *demos*" (197).

[38] Arist. *Ath. Pol*. 7.1.

[39] Gagarin 1986 *passim* describes the public enactment of laws in impressive terms, e.g. 144: "Thus from its beginning Greek law exemplifies the fundamentally public character of Greek culture, of which Athenian democracy was just the most extreme manifestation."

[40] Sickinger 1999, 194–195.

[41] Cf. the contributions by Gagarin, Bons, Cooper, and Worthington to Worthington 2010.

for their participation. Possibly foreigners, metics, women, children, and even slaves might have been present. We cannot gauge the extent to which they influenced the outcome of a trial, but from what we know they were not a silent crowd, but hissed, booed, laughed, and shouted, and thus clearly expressed their opinions on the case in question.[42] We cannot go into detail concerning ritual theory, but it is obvious that court proceedings then and now bear many characteristic traits of civic rituals, a fact that recent research has brought out clearly.[43] And rituals only work when there is a public in attendance.

Even before an actual trial took place, the procedure of choosing the judges to staff the various lawcourts had to happen in the open and was thus subject to public scrutiny. From the fifth century on, Athenians constantly reformed and refined the system.[44] They must have been obsessed by the specter of someone's tampering with the integrity of the selection process, mainly by bribery. This constant mistrust of one another led to the selection process being held in plain view of all interested citizens. At some time around 410 the Athenians designed a complicated allotment machine (*klērōtērion*) that assigned the individual judges to the lawcourts on a particular day at random. Two fragments of such *klērōtēria* have been found in the Agora. Aristotle describes the procedure at length and modern scholars have tried their best to explain it to their readers, and have thereby run into inconsistencies and considerable vagueness.[45] We do not have to go into all the intricacies of this

[42] At least nineteen speeches mention spectators or address them directly (Lanni 1997, 184). Thus, the onlookers became informal witnesses of the trial. Their lively reactions may have put pressure on the jurors in some way or other. Since the jurors were not subject to rendering account, the bystanders served as an informal *euthunai* (Lanni 1997, 188–189). In my opinion, we can even go one step further: without onlookers no proper courtroom ritual was possible. It was the bystanders only that enabled this courtroom ritual to actually take place. The allotment procedure framed the solemn ceremony of rendering justice. Cf. the next footnote. In theory, a trial could unfold without an audience, but this must have been highly unusual. Normally, at least some relatives and close friends, the social entourage of a litigant, were present to lend support to their speaker. If a trial was deliberately organized *in camera* without a very good reason, it was deemed invalid and illegitimate by the Athenians. The death sentences the Thirty issued in the Boulē were considered judicial murders, and not just because the Thirty had democrats executed, but also because to the Athenians, non–public trials were a *contradictio in adiecto*.

[43] In his multi-volume work *Rationale of Judicial Evidence: Specially Applied to English Practice*, J. Bentham was one of the first to term the courtroom a "theatre of justice." many should follow, e.g., Humphreys 1988, 482; Ober–Strauss 1990, 238; 270; Wilson 1991/92; Hall 1995 *passim*; Slater 1995, 144–147; Lanni 1997, 183; Bers 2000; Cohen 2005, 22; Hall 2006, 14; 353–390; Harris–Leão–Rhodes 2010; Riess 2012, 22–32, based on Victor Turner's theory of the social drama.

[44] Boegehold 1995, 21–42, vividly describes three court days in different epochs.

[45] Arist. *Ath. Pol*. 63.4–66.3; 63.2 mentions twenty lot machines, two for every tribe. Cf. Thompson–Wycherley 1972, 53–55; Boegehold 1995, 32–34; 58; 230–231; plate 6; Knell 2000, 97–98.

procedure; instead I would like to emphasize the inordinate amount of time that up to 6,000 adult men devoted every morning to the highly complicated public selection of jurors, a process that Athenians insisted had to be conducted in the fairest possible way in order to prevent even the suspicion of bribery. These citizens gathered at dawn to "play" for maybe up to an hour with the lot machine before they knew on which jury they would serve on that particular day.[46]

But even before the start of the trial and the jury selection process, the public was involved to some degree. The choice of procedure, too, happened in a semi-public so that many people already knew what was coming up in court and by which procedure a particular case was framed and tried. To file charges against an offender, the plaintiff had to address an archon in his office. As the initiator of the lawcourt proceedings, the plaintiff will have made sure to disseminate what had been spoken in the archon's office. He had to gather evidence and muster witnesses, he talked to friends and family so that the law-court proceedings appear to be the final stage of a long-term attack strategy. When the magistrate was confronted with a case, he listened to the complaints and verified whether the procedure suggested was appropriate to the case in question and whether he or another official was the right person to initiate lawcourt proceedings. This means that the magistrate held preliminary hearings, *anakriseis*, or, in the case of homicide, three *prodikasiai* in three consecutive months, where the circumstances of the crime, as well as the procedure, were discussed and the magistrate was chosen by the plaintiff. The applicability of the procedure chosen was crucial, for Athenian procedural law was highly complicated. For many offenses, a variety of procedures was at the plaintiff's disposal. To give just one example: in order to seek redress in a case of *moicheia*, illegitimate sex, a *kurios* had many options. He could request ransom money from the *moichos*, subject him to the painful and humiliating radish-and-ash treatment (*rhaphanidōsis*),[47] lead him away to the Eleven by *apagōgē* or *endeixis*, or launch either a *graphē moicheias* or a *graphē hubreōs*. An *eisangelia* or the private suit of a *dikē biaiōn* (in case of rape) could also be brought against a *moichos*.[48]

Every procedure had its pros and cons. With the public suit of a *graphē*, one could aim for a more severe penalty (preferred in political trials). But bringing a *graphē* also entailed a certain degree of risk: if one failed to win one-fifth of the votes, one had to pay a fine of a thousand drachmas. So, in many instances, bringing a *dikē* might have been safer and preferable, because there was less risk involved and the outcome was more lucrative. The penalty the defendant had to pay went to the victorious plaintiff! So, it was social expedience, above all, that influenced a plaintiff's decision on which procedure to take. In other words, the more social and

[46] Huizinga [4]1964, 76–88, famously emphasizes the ritualistic "play" elements inherent in pre-modern court proceedings. His observations apply to Athenian court practice particularly well.

[47] On the humiliation of the adulterer, cf. Kapparis 1996.

[48] Riess 2012, 53, n. 145.

economic capital or the more power the prosecutor held, the more risky procedure he could choose.[49] And the speakers are frank about it: Ariston opens his speech by saying that he should have brought a public suit against Conon and his sons, but that, advised by his friends and given his young age, he preferred to bring a *dikē* only:

> *But when I unexpectedly recovered and was out of danger, I initiated this private case for battery (*dikē aikeias*) against him. All the friends and relatives whom I asked for advice were saying that for his deeds Conon was liable to summary arrest (*apagōgē*) as a cloak stealer, and to public suits for* hybris *(*graphai hubreōs*). But they advised me and urged me not to involve myself in greater troubles than I could handle; and also, not to be seen to complain more than a young man should about what was done to me. I have acted accordingly and, because of those advisors, have instituted a private case, but I would, with the greatest pleasure, men of Athens, have put him on trial on a capital charge. (transl. by Bers)*[50]

The speaker in *Against Androtion* is also candid about the social capital and expediency involved in the choice of procedure:

> *You are strong and confident in your own ability: arrest him and risk a fine of 1,000 drachmas. You are weaker: lead the magistrates to him, and they will do it. You are also afraid of this: bring a public charge. You do not feel confident, and since you are poor, you would not be able to pay the fine of 1,000 drachmas; bring a private action before the arbitrator, and you will run no risk. (transl. by E. Harris)*[51]

Thus, self-confidence on the part of the plaintiff played a decisive role in the procedure chosen. According to Todd, the choice of procedure was all about social rank, prestige, and power, because the whole purpose of Athenian litigation was to "reassess the relative social position of the two litigants,"[52] so that the choice of procedure was a statement about both the defendant and the prosecutor. Todd explains: "It is for this reason that Athenian law granted to the would-be prosecutor a wide range of procedures for use in a given case; and also that the latter's choice of

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[49] Todd 1993, 284: "the choice of procedure was determined less by substantive considerations than by the relative circumstances of the two litigants." Cf. also ibid. 160–163; 271; and Osborne 1985 *passim*.

[50] D. 54.1: … ὑγιάνας καὶ σωθεὶς ἀπροσδοκήτως ἔλαχον αὐτῷ τὴν δίκην τῆς αἰκείας ταυτηνί. πάντων δὲ τῶν φίλων καὶ τῶν οἰκείων, οἷς συνεβουλευόμην, ἔνοχον μὲν φασκόντων αὐτὸν ἐκ τῶν πεπραγμένων εἶναι καὶ τῇ τῶν λωποδυτῶν ἀπαγωγῇ καὶ ταῖς τῆς ὕβρεως γραφαῖς, συμβουλευόντων δέ μοι καὶ παραινούντων μὴ μείζω πράγματ' ἢ δυνήσομαι φέρειν ἐπάγεσθαι, μηδ' ὑπὲρ τὴν ἡλικίαν περὶ ὧν ἐπεπόνθειν ἐγκαλοῦντα φαίνεσθαι, οὕτως ἐποίησα καὶ δι' ἐκείνους ἰδίαν ἔλαχον δίκην, ἥδιστ' ἄν, ὦ ἄνδρες Ἀθηναῖοι, θανάτου κρίνας τουτονί.

[51] D. 22.26–27: ἔρρωσαι καὶ σαυτῷ πιστεύεις: ἄπαγε: ἐν χιλίαις δ' ὁ κίνδυνος. ἀσθενέστερος εἶ: τοῖς ἄρχουσιν ἐφηγοῦ: τοῦτο ποιήσουσιν ἐκεῖνοι. φοβεῖ καὶ τοῦτο: γράφου. καταμέμφει σεαυτὸν καὶ πένης ὢν οὐκ ἂν ἔχοις χιλίας ἐκτεῖσαι: δικάζου κλοπῆς πρὸς διαιτητὴν καὶ οὐ κινδυνεύσεις. Cf. also Isoc. 20.2.

[52] Todd 1993, 161.

procedure (inevitably in some sense a political choice) determined both the penalty faced by the defendant and the risk faced by the prosecutor."[53] But this is not all. In the absence of any clearly defined facts that constituted an offense, the prosecutor partly shaped the meaning of an offense through his choice of procedure. It served as a point of orientation for all those who had to deal with the case in the subsequent weeks and months. So, while it is true that mainly reasons of social expediency stood in the foreground in choosing an appropriate procedure, the selection process was also guided by the personal assessment of a misbehavior, of which the jury should be convinced. The circumstances of a case all converged and crystallized in the choice of procedure. By opting for one, the plaintiff sent a polyvalent message to a diverse audience, the message being his subjective framing of the case, which was all-important in want of precise definitions of crimes and other misdeeds. Although Athenian procedural variety has been the object of frequent study and many explanations have been advanced,[54] one obvious reason, it seems, has been neglected so far: from a more general perspective, we could say that the Athenians' concentration on procedural law served to counterbalance the weakness or, let us rather say, the underdevelopment of Athenian substantive law. By allowing the prosecutor to choose from a variety of options, this system enabled him to shape the case according to his assessment and intentions.[55]

The final phase of this complex decision-making process, its presentation to the magistrate and the involvement of family, friends, witnesses, and, ultimately, the opponent and his entourage, enabled the assessment of the crime on the part of an interested public. The choice of procedure already sent important messages to the presiding magistrate, the jurors, the broader public, and, most of all, to the opponent in court. In other words, the choice of procedure was a form of symbolic communication, an aspect that has not been treated in sufficient detail in research. It

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[53] Ibid. 162–163.

[54] Osborne 1985, 43–44, by speaking of the "open texture of Athenian law," emphasizes the aspect of procedural flexibility, now taken up by Carey 2004, esp. 112, with 132, n. 2, whereas Harris 2000, 30, n. 8, means by this term the flexible application of generally acknowledged substantive law. In the context above I refer to Osborne's usage of the term.

[55] Riess 2008, 92: "Speaking of Athenian procedural flexibility in general, we should begin seeing the various procedures in relation to each other. Behind the choice of procedure lay important decision-making processes that not only influenced the initiation and unfolding of the trial, but also conveyed symbolic messages to the audience concerning the self-image of the prosecuting party. The choice of procedure itself, including the preceding decision-making process, framed a positive self-image and was already the first step in the denigration of the opponent's character. Choosing one procedure out of many was not only a question of legal expediency and social propriety, but also an integral part of the performative actions taken against a criminal. Athenian law was far from being user-friendly, but through its immense procedural flexibility it enabled prosecutor and defendant to craft images of self and other with suggestive force and thus to express opinions and biases that go far beyond legal technicalities."

was, in itself, already part of the juridical spectacle, part of the Social Drama about to unfold, not merely an intrinsic part of the attack strategy chosen by the plaintiff. We should try to close this gap in research by a close reading of those forensic speeches for which we know the procedure chosen. In these cases we should wonder why a particular procedure was chosen and what kind of intentions on the part of the plaintiff might have underlain the decision-making process, a large-scale undertaking, indeed.

One example shall suffice in this context. It is transmitted within Demosthenes' famous speech against Meidias.[56] Although Nicodemus of Aphidna was not killed in public in 348 BCE, the spectacular mutilation of his corpse, which reminds one of a *maschalismos* (Nicodemus was found with his eyes put out and his tongue cut off) suggests a political motive. Contemporaries suspected that Demosthenes was involved in the affair. Nicodemus was a friend of Meidias'. Meidias, however, was an archenemy of Demosthenes. Nicodemus had slandered Demosthenes and intended to prosecute him for desertion. Shortly before filing suit, Nicodemus was killed. Meidias and the victim's family suspected that Demosthenes had commissioned the murder for political reasons. Aristarchus, a young friend of Demosthenes', was suspected to be the murderer.[57] Interestingly enough, this is the only case, as far as I know, which was tried in two different procedures and for which we have evidence, a particularity which is nowhere treated in detail in the secondary literature. By probing into this case we might come to a better understanding of how and why an Athenian plaintiff might prefer a certain procedure over another, and what kind of strategies he might pursue. It would have been the moral obligation of the victim's family to initiate a *dikē phonou* before the Areopagos. This was the normal procedure, expected by everyone. But Meidias pressed ahead, certainly in agreement with Nicodemus' family. He filed an *ephēgēsis*, followed by an *apagōgē*, and thus brought the case before the Boulē.[58] The *ephēgēsis* was a public procedure, a type of *graphē* that could be brought by anyone, by *ho boulomenos*. Facing this aggravated procedure, the defendant would have been barred from going into exile. He would have had to wait for the proclamation of the sentence and, if found guilty, he would be executed on the spot.[59] This procedure is rarely attested and shows that Meidias, who was actually not involved in the case, intended to send a strong signal to a public interested in politics. He wanted to make it abundantly clear that this was a political murder

[56] D. 21.104–122 and scholia 21.102; 104; 116; 205.

[57] Aeschin. 1.171–172; 2.148; 166 with scholia; Din. 1.30–31; 47; Rhet. Gr. (Walz) VIII 48 (Sopath. Rh.); Idomeneus *FGrHist* 338 F 12; Arist. *Rhet*. 2.23 (1397 b 7–8).

[58] Hansen 1976, 135–136, nr. 23; Riess 2008, 84–86, nr. 14.

[59] Cf. the classic study on the *apagōgē* procedure by Hansen 1976; with special reference to its application in homicide cases, cf. Evjen 1970 and Volonaki 2000. According to Volonaki 2000, 170–173, the *apagōgē phonou* as a procedure distinct from the *apagōgē kakourgōn* may have been introduced either after 404 or 410–404. It allowed the plaintiff to operate within the parameters of the Amnesty.

which affected the whole community of Athenians, not just the victim's family. By having the suspect physically dragged off to the magistrates, Meidias would have ensured a high level of publicity.[60] But his theatrical attempt failed in the Boulē, after which the victim's relatives filed a *dikē phonou*. Aristarchus went into exile, which his opponents must have taken as a tacit admission of guilt. Demosthenes' opponents took the case very seriously and time and again tried to involve the highly politically active orator in it. The reasoned suspicion that he might have been responsible for the murder would have turned Demosthenes into an *atimos*, someone who was deprived of most of his citizen's rights. Thus, he would have been excluded from public speaking, a severe restriction for Demosthenes, who pursued his politics mainly via public speeches. And while Nicodemus' friends saw his killing as politically motivated, the hit man acted expressively and full of hatred. The signal character of the mutilation is in need of explanation. Why was a less drastic removal of Nicodemus not enough for his killer(s)? Private hatred cannot, of course, be excluded, but the fact that Demosthenes' opponents tried to involve him in the affair again and again should make us think. It suggests that at least some political motives underlay the crime.

The legal process was concluded by finding the defendant innocent or guilty. A verdict of guilt entailed various kinds of punishment, ranging from monetary fines to execution. According to procedure the penalty was either fixed by statute (*atimētos*) or the jurors had to vote on it, following either the prosecutor's recommendation or the culprit's suggestion (*timētos*). It is striking that the *execution of* some well-known *penalties* often happened in full view of the people so that the public could guarantee the proper conclusion of the legal process. The names of state debtors, for example, were inscribed in stone so as to expose them to public shame.[61] Sarah Forsdyke and Winfried Schmitz have shown in their works that methods of popular justice such as charivari, standing at the pillar, or subjecting a *moichos* to the radish-and-ash treatment (inserting a large radish into the seducer's anus and burning his pubic hair with hot ashes) oscillated between private vengeance and sentences meted out by the state.[62] These shaming measures (*Schandstrafen*) were, at least, condoned by the state and more or less integrated into the penal system of many cities. According to Forsdyke, formal and informal ways of social control and punishment were inextricably intertwined, with no recognizable linear development from

[60] Gernet 1981, 262–263, briefly mentions the public aspect of the *apagōgē* procedure. On the symbolic meaning of known *apagōgē* cases in Athens, cf. Riess 2008, 62–71; 91–92; 91: "The *apagōgē* procedure with its summary arrest preserved the old notion of self-help even more clearly than the *dikē phonou*."

[61] Cf. MacDowell 1978, 164–167; Todd 1993, 118; 143–144; 283; 301.

[62] See Forsdyke 2008 *passim*, who calls this and other forms of popular justice "street theater" owing to their public aspects and their frequent embeddedness into festive contexts; Schmitz 2004, 277–280 (charivari); 309 (development from popular justice [Rügebrauch] to private vengeance that was more and more perceived as a problem); 402–406 (historical development from shaming to punishment by state authorities).

informal to official, state-inflicted punishments. But it was of prime importance that these shaming punishments, whether formal or informal, be executed in public; otherwise, they would not have achieved the goal of shaming the perpetrators. Schmitz, who is willing to assume a chronological development from shaming practices to state-issued punishments, vividly describes how the Agora turned from a public space where culprits were humiliated to a political space where magistrates of the city exacted shaming punishments on offenders.[63] Even gathering legal evidence from slaves by torture had to occur in public, in front of the Hephaisteion in the Agora.[64] And before drinking hemlock became the standard capital punishment for respectable citizens at the end of the fifth century,[65] stoning,[66] throwing from a cliff (*barathron*), [67] and *apotumpanismos* (a form of bloodless crucifixion) [68] were conducted in plain view of the people,[69] although we cannot speak of a "theater of horror" as in Medieval or in Early Modern times.[70] Lysias 1 preserves an atavism for us, so to speak. Although Euphiletus could have applied the *apagōgē* procedure and ensured that the Eleven would execute Eratosthenes on the cross as a *kakourgos*, he took the law into his own hands and established a public for his private "execution" of the *moichos* in order to demonstrate to his friends his manliness and thus re-establish his reputation.[71]

To conclude: the Athenian system of law was fundamentally public. This publicity (or maybe publicality) underlines the democratic character of the Athenian legal system and ranges from the perpetration of crimes, to their ensuing definition and judgment in court, to parts of the penal system. Historically speaking, the hitherto unknown openness and theatrical character of illegal and legal social practices guaranteed the immediate accessibility of questions and negotiations of

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63 Schmitz 2004, 406.

64 Flaig 2006, 32–33, rightly observes that the citizens, by seeing slaves being tortured and hearing their cries, became acutely aware of the fundamental difference between slaves and free men.

65 Barkan 1936, 73–78. Cantarella 1991, 106–116, points out that, pace Barkan 1936, 81–82 (see below), the other forms of capital punishment did not become obsolete. Drinking hemlock was a last concession to political opponents, who were still respected as citizens and were granted a death outside the public limelight, if they could afford the expensive poison.

66 Barkan 1936, 41–53; Cantarella 1991, 73–87. Rosivach 1987 emphasizes that we only know of two cases of stoning in Athens, that of Lycides and his family and that of Alcibiades, cousin of the famous Alcibiades. In both cases, stoning was considered the appropriate capital punishment for treason. These instances shaped the perception of all ensuing authors, most of all the Attic orators.

67 Barkan 1936, 54–62; Cantarella 1991, 91–105.

68 Barkan 1936, 63–72; Cantarella 1991, 41–46.

69 Barkan 1936, 81.

70 Schmitz 2004, 406–407. The term was coined by Van Dülmen ^{2}1988.

71 According to Euphiletus, he "only" executed the laws of the city: Lys. 1.4; 26–27 (cf. Todd 2007 *ad loc.*); 29; 33–34; 47; 50.

substantive and procedural law. Although Athenians took the public character of their legal system for granted, we should not do so, but should continue to investigate what this public character actually meant. It seems safe to say that publicality fulfilled vital functions for and within the fabric of the Athenian cosmos in general. It not only guaranteed fairness (from the point of view of contemporaries) by the presence of many citizens at crucial junctions of the legal process, but also allowed the transmission of symbolic messages to all parties involved, and thus facilitated the resolution of conflicts by legal means in a political system that was based on a very high level of participation, compared to the standards of modern representative democracies.

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VICTOR BERS (NEW HAVEN, CT)

SPECTATORS AND PUBLICITY IN THE ATHENIAN LEGAL SYSTEM: A RESPONSE TO WERNER RIESS[1]

Prof. Riess has presented evidence for an Athenian legal system operating, we might say, in a fish bowl. A fish bowl does allow a close up view of what's swimming around inside, but cannot show us a whole lake.

I think it would be most useful if I concentrated on—and I promise this will be my last animal metaphor—Sherlock Holmes's dog who didn't bark and the fish we can't see. Both this lecture and Riess's impressive book, *Performing Interpersonal Violence*, have set me thinking about what we can only infer about the λεγόμενα and δρώμενα of Athenian law "in action," and the possibility that what we can at least inspect might still mislead us in assessing its atmosphere and preoccupations. These are questions of nuance. In principle it is certainly true, in Riess's words, that "Athenian culture was, in many aspects, a culture of public display," but I think it may be misleading to claim *tout court* that "legal proceedings were public" and "open for bystanders" to observe. To assess the extent of certain behaviors and investigate their mechanisms is not, in my opinion, quibbling around the edges.

In his book (22) Riess includes the judges among the spectators, but in his lecture bystanders are the particular issue. Enlarging on Adriaan Lanni's *erstling*, a study of the περιεστηκότες, Riess states (n. 43): "without onlookers no ritual was possible. It was the bystanders only that enabled the courtroom ritual to actually take place. The allotment and oath-taking procedure ritually framed the solemn ceremony of rendering justice." Spectators certainly *could* make a difference to the atmosphere of the trial, and *sometimes* to the trial's outcome when they were especially vociferous, but those περιεστηκότες were not subject to εὔθυναι to determine their status (free or slave), their gender, age, or citizenship, and they were not formally recognized by the court. The impact of literally and conceptually marginalized groups was, I think, of limited significance. And we must distinguish between friends and relatives of the litigants and random passersby, οἱ περιπατοῦντες in a literal, not philosophical sense, whose curiosity, piqued by what they saw and heard in and around a court, turned them into stationary περιεστηκότες.

I have no quarrel with Hannah Arendt's general assertion that "for us, appearance—something that is being seen and heard by others as well as by

[1] I thank Prof. Riess for his comments *in litteris* on my response. Although I have not in every instance been persuaded, he has helped me clarify my own views.

ourselves—constitutes reality"; and I acknowledge that for the Athenians the *vita activa* demanded seeing and being seen in a public space; but the *official* participants, that is, parties to the case, presiding officers, and the jury (or sometimes members of the βουλή of 500 or the ἐκκλησία sitting in a quasi-judicial capacity) were sufficient and they were numerous: a group of hundreds, sometimes thousands, saw, heard, acquiesced in the procedures, and voted. In Athenian practice there were hardly any *in camera* trials like the prosecution of Andocides for the profanation of the Mysteries. In that case, bystanders must have been kept away when the jury of initiates heard the case (*On the Mysteries* 3).[2]

As for Alcibiades carrying his wife home, we should remember that in our time paparazzi would have peered into his courtyard and the NSA recorded his e-mail, but sources for the private realm of Athenian life are exiguous. Euphiletus' self-report of his conversation with his wife in Lysias 1 has very few parallels. Even outside the speeches, it is surprising to read about Ischomachus' interactions with his wife in Xenophon's *Oeconomicus*. Since our evidence for what men on the streets made of violent acts spilling out onto the streets is slender and tendentious, I balk even at Riess's hedged remark (4) that "ideally [the public] would condone, if not legitimate, the violent act and, most of all, would immediately construct meaning and thus make sense of the violence perpetrated." Surely *some* spectators would just have been perplexed. Apollodorus' claim that an enemy tried to kill him at night in a remote location ([Dem.] 53.17f.) would certainly have outraged the jury if the attempt were made instead at high noon in the agora and the jury did not believe that this was an act of self-defense. As for that well-known cuckold Euphiletus, who, Riess (20) says, "established a public for his private execution"—true, but he did that just as much to have presumptively friendly witnesses to the supposed circumstances and to his pious and patriotic speech—"not I but the laws will kill you …" (Lysias 1.26).

The Athenian courts certainly had a heavy workload. Riess (3) points out that the courts were in session more often than the Assembly. But it is one thing to assert that legal proceedings were "accessible to a large and voluble audience," another to say that an audience of that description actually attended, and that where and when such an audience *was* present, that it made an important difference to the tenor and outcome of the process.[3]

Is the evidence available to us sufficiently representative? In *Genos Dikanikon* I have argued that the surviving forensic speeches, though impressive for their bulk

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[2] Riess comments: "To the Athenians, trials held behind closed doors, were invalid mock-trials. The death sentences the Thirty issued in the Boule were considered judicial murders, and not just because the Thirty had democrats executed, but also because to the Athenians, non-public trials were a *contradictio in adiecto*."

[3] Occasional swaying of the dicasts' vote by noisy spectators is a reasonable inference, but I acknowledge that Riess is correct in pointing out to me that he does "not [in his lecture] say anything about their potential influence on the judges."

by the standards of classical literary material, constitute a misleading sample. Many amateur litigants had to fend for themselves, and their speeches, even if they were written down, are now irretrievable. I think there were many small cases argued clumsily by amateur speakers. Riess cites some of the most familiar pieces of evidence for the hypertrophy of judicial business in Athens, including the Pseudo-Xenophon *Constitution of the Athenians* ("Old Oligarch") and Aristophanes' *Clouds* 206–208, where Aristophanes has Strepsiades dismiss a map of Athens as defective, since he saw no courts in session. Both passages, it should be noted, have to do with the quantity, not only the character, of trials adjudicated in the δικαστήρια—far too many cases, in my opinion, to be exclusively, or even predominantly, manifestations of the legal wrangling of a small elite.

Consider the initial stage in the procedure for private cases, official arbitration. The arbitration requirement must have been intended to reduce the number of cases that went to court; that is why service as an arbitrator was the only civil requirement imposed on male citizens by the city. The penalty for evasion of arbiter service is an impressive, if very rough, index of Athenian litigiousness. Riess could in fact have adduced arbitration as a procedure open to the public since, to my knowledge, there is no trace of public arbitration *in camera*, and speakers do sometimes refer to the process as open to spectators, for instance at Demosthenes 47.12.

If celebrities were involved as parties or as συνήγοροι, some neutral observers with time on their hands might stop to listen; at slack periods in the agricultural year, even poor men with time on their hands might look and listen in. But I find it hard to believe that more than a few arbitration hearings would attract the interest of random passers-by.

Say arbitration failed and the dispute came to trial, or if the process took the form of a γραφή and hence there was no arbitration. Riess asserts: "People knew what was going on before and during a trial." I ask: how *many* "people"? If the principals were prominent politicians, most likely quite a few male citizens. But if the litigants were obscure, the "people in the know" would only include family, close friends, and a handful of others. When the issues were routine, or technical, for instance a dispute over a bottomry loan, and the principals were, as often in the maritime courts, foreigners, only a few περιεστηκότες—if any.

Inheritance cases probably drew a respectable number of περιεστηκότες, since Isaeus often has a client call on the jury to imagine themselves standing in his sandals. One example: "I think you consider it your right to inherit, and to feel aggrieved if you don't" (1.44 trans. M. Edwards). But how many περιεστηκότες would sit—or rather *stand*—still for recitations of numbers or complex family trees? In that same speech Isaeus seems to have been dealing with jurors and spectators bored enough that they were rarely, if ever, moved to heckling: his corpus contains, to my knowledge, not a single word built on the root *thorub-*. At §48 of the same speech Isaeus calls on the jury to pay attention. Perhaps he anticipates that even some jurors were dozing off. Bored spectators could, of course, just walk away.

A word on the risk of metaphorical language in our descriptions of Athenian courts. Even when a fourth-century litigant or a συνήγορος delivered a *narrative* about men we can call *actors* as they "*play in a drama*" with a shocking *dénouement* which induces *weeping* and *horripilation*, even when a prosecutor tells us that a supposed victim was displayed to passersby in a market called "Display" (Lysias fr. 279.6 Carey), there was a real-life job to be done. The jurors were in court, having sworn by Zeus, Poseidon, and Demeter to *judge the case at hand*. It is not, I believe, naïve to think that the typical juror remembered what he was there to do—to do for and to real people, even if he sensed an occasional *resemblance* between the case and a tragedy, with victims rolled out on an ἐγκύκλημα before a large audience, and even if he reflected that the many steps of the judicial process were executed in public view, and that he might hear about some actions that were said—or denied—to have occurred in public view.

Last point: "The deposition of a curse tablet—that is, by secret burial—was," he says, "a highly *performative* act." To my eyes, it matters that judicial curse tablets were literally out of sight, buried in the soil. In Riess's *Performing Interpersonal Violence* these curses are the subject of a full, very informative chapter. Now, what I take to be the essential action, the burial of the tablet, requires no human audience other than the person or people doing the burying, i.e., litigants themselves and/or persons in the employ of litigants. To my knowledge, Athenians did not believe that the efficacy of the curse was crucially dependent on a human audience, organized or accidental, comprised of the general public. Concluding this chapter Riess remarks (231): "In the realm of magic, everything depended on one's point of view." I agree, and much the same can be said of the operations of Athenian justice, which to my eyes allowed, but did not crucially require spectators.[4]

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[4] Riess objects, perhaps rightly, to my introduction of material he discusses at length in the third chapter of his book, but did not include within his *Symposion* lecture. Moreover, he remarks that his "vocabulary is derived from [Victor] Turner's and [Richard] Schechner's theories of performance [which] … have found widespread acceptance in the humanities, also in Classical Studies." I continue to see a danger, to revert to some old-fashioned critical terminology, that a sharing of metaphorical vehicles from different spheres has lead to a misapprehension of radically disparate tenors.

LORENZO GAGLIARDI (MILANO)

LA LEGGE SULLA ὁμολογία E I VIZI DELLA VOLONTÀ NEI CONTRATTI IN DIRITTO ATENIESE*

1. Introduzione.

In questo scritto tratto di due temi collegati.

Il primo è quello della legge ateniese, in cui era stabilito che, in materia di contratti tra privati, ciò che i soggetti avessero fatto oggetto dell'atto di ὁμολογεῖν (letteralmente "dire la stessa cosa") doveva essere considerato κύριος. Ci si può riferire[1] a questo principio come al principio della "ὁμολογία κυρία," benché tale sintagma non si trovasse probabilmente nel testo della legge.[2] Sull'interpretazione della legge sussistono nella dottrina moderna profonde diversità di vedute, che mi sembra autorizzino un nuovo esame della materia.

Preciso che in due fonti, [Dem.] 56.2 e Plato *Symp.* 196c, si parla di "leggi" sulla ὁμολογία, al plurale. Come tenterò di dimostrare più innanzi,[3] è mia opinione che sia stata approvata ad Atene in un primo tempo una legge "generale,"[4] che affermò il principio per cui nei contratti tra privati la ὁμολογία era riconosciuta come κυρία. Successivamente, un'altra legge probabilmente precisò e limitò la portata di tale norma. La legge "generale" sarà quella cui d'ora innanzi farò esclusivo riferimento, salvo che non specifichi diversamente.

La legge sulla ὁμολογία κυρία deve essere a mio avviso studiata in connessione con il tema che nei sistemi di *civil law* è indicato con l'espressione di "vizi della volontà" nei contratti (errore, violenza, dolo, cui si deve aggiungere l'incapacità di intendere e di volere di un soggetto al momento dell'atto). Alcuni studiosi moderni

* Il testo che qui pubblico è una versione italiana ampliata della relazione da me presentata in inglese al Symposion 2013 presso la Harvard Law School. Ringrazio tutti i colleghi che parteciparono alla intensa discussione che seguì la mia esposizione. Ringrazio anche i colleghi che mi hanno messo a disposizione loro lavori non ancora pubblicati, che appaiono in bibliografia come "in corso di stampa" e il mio respondent Robert Wallace, per il tempo che ha dedicato a discutere con me su numerosi punti della mia trattazione e per i preziosi consigli che mi ha dato. È prevedibile che la ὁμολογία ateniese non mancherà di continuare ad attirare nel futuro l'attenzione degli storici del diritto greco.

1 Così Biscardi 1982: 140 ss.; Martini 1991: 106.

2 Il sintagma appare però, benché al numerale plurale, in Isoc. 18.24 e in [Dem.] 42.12. Le fonti sono raccolte *infra*, § 2.

3 *Infra*, § 4.4.

4 Phillips 2009: 92 parla di legge generale sui contratti. Io preferisco parlare di legge generale sulla ὁμολογία.

hanno negato che gli Ateniesi abbiano mai sviluppato un sistema organico in materia.[5] Altri hanno argomentato nel senso opposto.[6] Ritengo che la legge sulla ὁμολογία κυρία abbia dettato norme anche in tale ambito in relazione ai contratti.

2. La legge sulla ὁμολογία: le fonti.

La legge ateniese che affermava il principio della ὁμολογία κυρία si trova riportata, con varianti, da alcune fonti letterarie.

Una prima variante è l'espressione più semplice della norma (d'ora innanzi "variante semplice"): ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι. Essa occorre in tre fonti:

> 1) Hyp. *In Athenogenem* 13: ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης, ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι. τά γε δίκαια ὦ βέλτιστε· τὰ δὲ μὴ τοὐναντίον ἀπαγορεύει μὴ κύρια εἶναι.[7]
>
> 2) [Dem.] *In Evergum et Mnesibulum* 47.77: ἀνάγνωθί μοι τὸν νόμον καὶ τὴν μαρτυρίαν, ὃς κελεύει κύρια εἶναι ὅ τι ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ.[8]
>
> 3) Isoc. *In Callymachum* 18.24: τὰς μὲν ἰδίας ὁμολογίας δημοσίᾳ κυρίας ἀναγκάζετ' εἶναι; cfr. 25: ἀναγκαῖον εἶναι τοῖς ὡμολογημένοις ἐμμένειν.[9]

Altre tre testimonianze tramandano la seconda variante, che contiene l'aggiunta dell'aggettivo predicativo ἑκών (d'ora innanzi "variante ἑκών:" ὅσα ἂν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι). Vedremo successivamente [10] quale significato avesse l'aggettivo predicativo ἑκών nella variante in esame.

> 1) [Dem.] *In Dionysodorum* 56.2: τῷ οὖν ποτὲ πιστεύοντες καὶ τί λαβόντες τὸ βέβαιον, προϊέμεθα; ὑμῖν, ὦ ἄνδρες δικασταί, καὶ τοῖς νόμοις τοῖς ὑμετέροις, οἳ κελεύουσιν, ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι.[11]

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5 Pringsheim 1950: 498; Gernet (1937) 1955: 80.1; (1951) 1955: 220; (1957) 2002[2]: 229.

6 Beauchet 1897: 31 ss. (cfr. Huvelin 1907: 135); Simonetos (1943) 1968: 455 ss. (cfr. Biscardi 1982: 138); Cantarella (1966) 2011: 263 ss. In tema anche Lambrini (2013) 2013: 16 ss.

7 Trad.: «Atenogene vi dirà fra pochissimo che la legge afferma: "Ciò che una parte abbia convenuto con un'altra sia vincolante." Le cose giuste, amico mio; le cose che non lo sono la legge stabilisce invece che non siano vincolanti».

8 Trad.: «Leggimi la testimonianza e la legge, che dispone che sia vincolante ciò che una parte abbia convenuto con un'altra». La μαρτυρία era quella del depositario del documento contrattuale [cfr. Gernet (1957) 2002[2]: 224.2], come appare esplicitamente e più chiaramente in un caso analogo, [Dem.] 48.11, su cui *infra*, § 5.1.a.

9 Trad.: «24: sostiene che gli accordi privati sono vincolanti per mezzo della pubblica autorità; 25: eri necessariamente tenuto a rispettare gli accordi».

10 *Infra*, § 4.3.

11 Trad.: «In che cosa, dunque, riponiamo la nostra fiducia e quale garanzia abbiamo quando prestiamo il danaro? In voi, giudici, e nelle vostre leggi che ordinano che ciò che una parte abbia volontariamente convenuto con un'altra sia vincolante».

2) [Dem.] *In Olympiodorum* 48.54: πῶς γὰρ οὐ μαίνεται ὅστις οἴεται δεῖν, ἃ μὲν ὡμολόγησεν καὶ συνέθετο ἑκὼν πρὸς ἑκόντα καὶ ὤμοσεν, τούτων μὲν μηδ' ὁτιοῦν ποιεῖν... ;[12]

3) Plato *Symposium* 196c: πᾶς γὰρ ἑκὼν Ἔρωτι πᾶν ὑπηρετεῖ, ἃ δ' ἂν ἑκὼν ἑκόντι ὁμολογήσῃ, φασὶν "οἱ πόλεως βασιλῆς νόμοι" δίκαια εἶναι.[13]

Vi è poi un altro testo che fa riferimento alla legge *de qua*, definendola ὁ κοινὸς τῆς πόλεως νόμος e riferendosi al suo contenuto senza seguire nessuna delle due varianti espressive ora segnalate:

Din. *In Philoclem* 3.4: καὶ ὁ μὲν κοινὸς τῆς πόλεως νόμος, ἐάν τις [εἰς ἕνα τινὰ] τῶν πολιτῶν ὁμολογήσας τι παραβῇ, τοῦτον ἔνοχον εἶναι κελεύει τῷ ἀδικεῖν.[14]

In un caso ulteriore si parla di ὁμολογία κυρία in presenza di testimoni:

[Dem.] *In Phaenippum* 42.12: (νόμον) ... τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων.[15]

3. La legge sulla ὁμολογία: la dottrina.

Le discordanti opinioni della dottrina sulla ὁμολογία e sull'interpretazione della relativa legge possono raggrupparsi intorno a due poli: quello della teoria consensualista e quello della teoria della *Zweckverfügung*.

Secondo la prima,[16] la ὁμολογία era l'accordo delle parti contrattuali. La legge sulla ὁμολογία κυρία avrebbe consentito l'esistenza nel diritto ateniese dei contratti

[12] Trad.: «Non è forse pazzo chi pensa di non dovere fare nulla di quelle cose che ha convenuto e stipulato volontariamente con una controparte, che abbia manifestato una volontà conforme, e abbia prestato giuramento?».

[13] Trad.: «Ognuno infatti volentieri in tutto serve ad Amore e "le leggi regine della città" dicono che sono giuste le cose che le parti abbiano volontariamente tra loro convenuto».

[14] εἰς ἕνα τινὰ è correzione di H. Lloyd-Jones sulla base di *P.Ant.* II, 81 (ἐάν εἰς ἕνα τῶν πολιτῶν ὁμολογήσας τις). I codici riportano ἐναντίον. Altre correzioni proposte: ἑνί τινι (Lipsius); <ἑνὸς> ἐναντίον (Blass). Trad.: «La legge generale della città dispone che, se nei confronti di un cittadino si viola un accordo concluso, si è colpevoli di un atto ingiusto».

[15] Trad.: «(la legge) ... che dispone che sono vincolanti gli accordi reciproci che siano stati conclusi in presenza di testimoni». Ancora, un altro testo viene da alcuni studiosi (Pringsheim 1950: 35; Phillips 2009: 93) ricondotto al nostro tema, [Dem.] 44.7. In realtà esso non gli afferisce: si riconosce che l'adozione è valida se risponde ai requisiti legali. Il passo è relativo a un altro argomento e sarà qui trascurato.

[16] Beauchet 1897: 12 ss.; Huvelin 1907: 134; Vinogradoff 1922: 230 ss.; Gernet (1937) 1955: 78; Finley (1951) 1985[2]: 297.22; Gernet 1959: 402; Cantarella 1965: 549; Kußmaul 1969: 53 ss.; Biscardi (1971) 1999: 108 f.; (1978, 1979, 1982) 1999: 148 f.; Germain 1979: 471 ss.; Biscardi 1982: 149; Scafuro 1997: 128; Cohen 2005: 294; 2006: 73 ss.; Harris 2006: 149; Phillips 2009: 89 ss., 106; Barta 2010: 25 ss., 489 f.; Avilés 2011: 26 ss. [ma vd. poi, con notevole mutamento di opinione Avilés (in corso di stampa), ove si afferma che non sarebbe esistita un'unica legge o almeno una legge principale riguardante le ὁμολογίαι κυρίαι—su ciò cfr. *infra*, il § 4.4 della mia

basati sul consenso. Il consenso sarebbe stato fonte di obbligazioni. Si ritiene per lo più che tale legge avrebbe rappresentato il punto di arrivo di uno sviluppo durato diversi secoli. In origine i contratti non si sarebbero conclusi soltanto sulla base del consenso, ma sarebbe stata necessaria la consegna di cose o la prestazione di garanzie.[17]

La seconda teoria ha il suo campione in Hans Julius Wolff,[18] il quale ha sostenuto che ὁμολογεῖν non significherebbe "assumere (per il futuro) obbligazioni tramite il consenso," ma implicherebbe l'"accettazione da parte del debitore di un atto di disposizione da parte del creditore."[19] Wolff è partito dall'osservazione che nel diritto ateniese non esisteva un'azione generale per la risoluzione o per l'adempimento di contratti sorti in base al consenso. Tutti i contratti si sarebbero perfezionati con una prestazione, la *Zweckverfügung* ("disposizione compiuta per un determinato scopo"). Il soggetto che avesse ricevuto la *datio* e non avesse eseguito la prestazione, che da lui l'autore della *Zweckverfügung* si attendeva, sarebbe stato responsabile di un danno per il fatto di avere ricevuto determinati beni dal creditore e non averli impiegati nel modo previsto. Attraverso la ὁμολογία, il debitore avrebbe concordato e documentato con il creditore l'avvenuta *Zweckverfügung* e avrebbe riconosciuto il proprio debito. Compiendo la prestazione, il debitore avrebbe evitato la sanzione penale. L'azione giudiziaria impiegabile dal creditore sarebbe stata la δίκη βλάβης.[20] La tesi di Wolff è stata seguita da illustri autori.[21] Tra loro, Gerhard Thür,[22] in particolare, ha sostenuto l'esclusiva funzione procedurale dell'ὁμολογεῖν: ὁμολογίαι sarebbero state a suo avviso le asserzioni

trattazione—e in ogni caso le leggi riguardanti il principio della ὁμολογία κυρία non avrebbero avuto a oggetto i contratti consensuali]; Scafuro 2011: 333; Faraguna 2012: 367 ss.; Dimopoulou (in questo volume); Cohen (in questo volume). Anche secondo Pringsheim 1950: 40 s., la ὁμολογία sarebbe stata tutelata giudizialmente, ma sarebbe stata un accordo stretto alla presenza di testimoni, del quale il consenso non sarebbe stato che uno degli elementi costitutivi.

17 Per l'antichità dei contratti reali, Huvelin 1907: 134. Sull'origine dei contratti conclusi con la prestazione di una garanzia Cantarella (1988) 2011: 105 ss.

18 Wolff (1957) 1968, 483 ss.; 1966: 569 ss.; (1966) 1974: 123 ss.; 1983: 7 ss. Per il diritto dei papiri, ma con riferimenti al diritto greco in genere, Wolff 1946: 55 ss. Cfr. già Partsch 1909: 76 ss.

19 Wolff (1966) 1974: 131.

20 Sull'impiego della δίκη βλάβης per i casi di inadempimento contrattuale, Wolff (1943) 1961: 91; Mummenthey 1971: 70 ss. Cfr. *infra* nt. 86.

21 Rupprecht 1967: 57 f.; Behrend 1970: 16 ss.; Herrmann 1975: 331; Thür 1977: 152 ss.; Martini 1991: 105 ss.; Hamza 1991: 231; Jakab 1994: 191 ss.; Thür 1997: 706; Jakab 2006: 85 ss.; Thür 2007: 32; Carawan 2006: 339 ss.; Velissaropoulos-Karakostas 2011: 214 s., 218 (cfr. ead., 1994: 189; 1993: 163 ss.; 2002: 133); Thür (in corso di stampa). In forma sintetica in tal senso già Alliot 1954: 463. Un esame della teoria della *Zweckverfügung* e delle principali varianti con cui essa è stata accolta dalla letteratura moderna trovasi in Hamza 1989: 14 s., 18 ss.

22 Thür 1977: 152 ss.; Thür (in corso di stampa). Cfr. Mirhady 2004: 58; Carawan 2006: 350.18; Kästle 2012: 191.146, 192.149.

che le parti avessero compiuto in modo per loro vincolante nella fase pre-dibattimentale o in sede extra-processuale.[23]

4. La legge sulla ὁμολογία: tesi.

4.1. Teoria consensualista o *Zweckverfügung*?

Affrontando criticamente un esame delle testimonianze, osservo che vi sono due fonti che creano serie difficoltà alla teoria della *Zweckverfügung*.

La prima è il già citato passo di [Dem.] 42.12, in cui si parla di πρὸς ἀλλήλους ὁμολογίαι.

La seconda è Hyp. *Athenog.* 15, in cui si legge:

> μετὰ δὲ τ]αῦτα ἕ[τερο]ς νόμος [ἐστὶ περὶ ὧν ὁμολογοῦν]τες ἀλλήλοις συμβάλλουσιν, ὅταν τις πωλῇ ἀνδράποδον, προλέγειν, ἐάν τι ἔχῃ ἀρρώστημα· εἰ δ[ὲ μ]ή, ἀναγωγὴ τούτου ἐστίν.[24]

In entrambi questi testi, è fatto riferimento a ὁμολογίαι reciproche tra due soggetti. Nel secondo, la parola ὁμολογοῦντες è integrata dagli editori, ma l'integrazione sembra abbastanza sicura. [25] Orbene, dato che secondo la teoria della *Zweckverfügung*, come ho già ricordato, la ὁμολογία era l'atto con cui il debitore riconosceva l'esistenza a proprio carico di un'obbligazione sorta in seguito a un atto di disposizione da parte del creditore, è evidente che la ὁμολογία stessa era un atto unilaterale da parte del debitore e non vi era pertanto nessun atto corrispondente o speculare da parte del creditore. Come potevano quindi le fonti parlare di reciproche ὁμολογίαι fra debitore e creditore?

A questa mia osservazione i sostenitori della tesi avversa potrebbero controbattere che non vi è prova che [Dem.] 42.12 fosse relativo all'ambito contrattuale. Concordo che questo è vero. Ma rimane ineliminabile la testimonianza di Hyp. *Athenog.* 15, che è invece certamente relativa ai contratti di compravendita.

Potrebbe ancora astrattamente controbattersi, da parte dei sostenitori della teoria della *Zweckverfügung*, che, quand'anche l'affermazione di [Dem.] 42.12 fosse stata attinente a casi contrattuali, si dovrebbe ritenere che l'espressione plurale ὁμολογίαι πρὸς ἀλλήλους fosse riferita a contratti in cui le parti fossero tra loro reciprocamente creditrice e debitrice, sicché ciascuna parte, in quanto debitrice, avrebbe dovuto compiere una ὁμολογία e per questa ragione ci sarebbero state due ὁμολογίαι differenti contrapposte.

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[23] Pringsheim 1950: 13 ss. ha assunto una posizione intermedia. A suo avviso, la ὁμολογία, dapprima solo confessione in giudizio, poi confessione extragiudiziale, avrebbe infine portato ad attribuire valore vincolante alle mere convenzioni purché concluse in presenza di testimoni, ma non avrebbe riguardato, ad esempio, la compravendita, in quanto contratto reale.

[24] Trad.: «Dopo questa, c'è un'altra legge riguardante i contratti che le parti concludono d'accordo tra di loro: "Quando si vende uno schiavo bisogna preavvisare se ha qualche malattia; altrimenti abbia luogo la restituzione"».

[25] Così anche Carawan 2006: 346.

Anche questa osservazione, se mai può valere per [Dem.] 42.12, non è però applicabile a Hyp. *Athenog.* 15, che fa riferimento a una legge inerente ai vizi delle cose compravendute.[26]

Ora, come è ben noto,[27] il contratto di compravendita ateniese era concluso solo quando il compratore pagava il prezzo.[28] Dopo che il contratto era stato concluso, il compratore aveva il diritto di ricevere dal venditore il bene, che era a quel punto già suo in virtù dell'avvenuto pagamento del prezzo. Il venditore rispondeva di eventuali vizi a norma del contratto. Se il compratore non aveva danaro sufficiente per pagare il prezzo intero, le parti potevano, se volevano, concludere egualmente il contratto, e il venditore rimaneva creditore a titolo di mutuo per il resto della somma dovuta.[29]

Dal momento della conclusione del contratto mediante il pagamento del prezzo esisteva un solo debitore, che era il venditore (diverso era il caso se il compratore aveva prestato soltanto un ἀρραβών,[30] ma non è questo ciò a cui veniva fatto riferimento in Hyp. *Athenog.* 15).

Non si riesce quindi a comprendere quale ὁμολογία il compratore potesse ipoteticamente prestare al venditore dopo la conclusione del contratto, dato che da allora non aveva più alcun debito, ma soltanto un credito. Risulta quindi impossibile

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[26] Su questo tema, dei vizi delle cose compravendute, ritornerò, in relazione ad altri aspetti, *infra*, § 6.

[27] È stato dimostrato soprattutto da Pringsheim 1950: 89, 134 ss., 167 s. Cfr. quindi Jones 1956: 227 ss.; Cantarella 1975: 592 ss.; Kränzlein 1975: 190.14; MacDowell 1978: 138 ss.; Maffi 2005: 260. Cohen 2006: 74 f. nega che in diritto ateniese fosse necessario il pagamento del prezzo perché un contratto di compravendita potesse essere concluso.

[28] Si vd. soprattutto Theophr. Περὶ συμβολαίων fr. 97 Willets (= fr. 21 Szegedy-Maszak = 650 Fortenbaugh) § 4, testo che è peraltro riferito non solo al diritto ateniese, ma più generalmente ai diritti greci. Dalle leggi di Platone si trae attestazione di quanto descritto, segno che evidentemente egli aveva presente in linea di massima il diritto patrio. In *Leg.* 915d–e e 849e, egli prevedeva che nelle compravendite il danaro si desse e si ricevesse immediatamente (e cfr. anche Arist. *E.N.* 1162b25–31, 1164b12–15). In nessun caso per Platone si poteva comperare a credito: non sarebbero state previste azioni giudiziarie a tutela del venditore per ottenere il prezzo (ma ovviamente egli avrebbe potuto agire per recuperare il possesso della cosa, che sarebbe rimasta di sua proprietà: sul punto Pringsheim 1950: 139). Osservo che Platone, per la verità, nelle *Leggi* andava oltre quanto previsto da Teofrasto, e probabilmente dal vero diritto ateniese, in quanto prescriveva uno scambio contestuale tra cosa e prezzo (come nella romana *mancipatio*), mentre sembra che nella vendita greca fosse essenziale, per l'esistenza del contratto, il pagamento del prezzo, e la consegna della *res* potesse avvenire successivamente: cfr. Theophr. Περὶ συμβολαίων fr. 97 § 5; Pringsheim 1950: 142. Sulle fonti citate cfr. anche Gernet (1937) 1955: 77.

[29] Dem. 41.8; Lyk. *Leok.* 23. Cfr. Pringsheim 1950: 134; Scheibelreiter (in corso di stampa).

[30] Anche sul tema delle arre, si vd. Theophr. Περὶ συμβολαίων fr. 97 § 4. In letteratura Pringsheim 1950: 148 ss.; Jones 1956: 230; Cantarella 1975: 593; Millett 1990: 176.

che le controparti contrattuali di una compravendita recitassero reciproche ὁμολογίαι contrapposte, differenti tra loro.

Escluso che le reciproche ὁμολογίαι delle parti fossero atti speculari, in cui entrambe riconoscessero i propri debiti, non resta che pensare che, almeno nei contratti di compravendita (ma il discorso può estendersi ad altri contratti, di cui diremo), dal punto di vista del contenuto la ὁμολογία fosse una sola. Su quel contenuto unitario convergevano le parti, che manifestavano πρὸς ἀλλήλους le loro volontà, "dicendo la stessa cosa," ovvero concordando sul contenuto del contratto.

E qual era l'oggetto della ὁμολογία delle parti contraenti? L'unico modo per intendere Hyp. *Athenog.* 15 è che la ὁμολογία disciplinasse i rapporti contrattuali reciproci delle parti. La ὁμολογία riguardava il contenuto su cui le parti concordavano: era un atto di consenso in relazione al contratto. Nel caso della compravendita, la ὁμολογία doveva necessariamente precedere il pagamento del prezzo e riguardava l'oggetto del contratto (il bene venduto) e tutte le norme contrattuali consensualmente concordate tra le parti (prezzo, consegna, esistenza o inesistenza di eventuali vizi ecc.). Nelle fonti essa appare richiamata come manifestazione di volontà dei contraenti in relazione al compimento di atti obbligatori per il futuro.[31]

In due testi la ὁμολογία è posta espressamente in relazione con la συνθήκη, che era il documento contrattuale (detto anche συγγραφή),[32] che serviva a provare la ὁμολογία,[33] ma che per estensione indicava il contratto stesso. I testi cui mi riferisco sono il già menzionato [Dem.] 48.54 e inoltre il platonico *Crito* 52d–e:

> {ΣΩ.} «Ἆλλο τι οὖν,» ἂν φαῖεν, «ἢ συνθήκας τὰς πρὸς ἡμᾶς αὐτοὺς καὶ ὁμολογίας παραβαίνεις, οὐχ ὑπὸ ἀνάγκης ὁμολογήσας οὐδὲ ἀπατηθεὶς οὐδὲ ἐν ὀλίγῳ χρόνῳ ἀναγκασθεὶς βουλεύσασθαι, ἀλλ' ἐν ἔτεσιν ἑβδομήκοντα, ἐν οἷς ἐξῆν σοι ἀπιέναι, εἰ μὴ ἠρέσκομεν ἡμεῖς μηδὲ δίκαιαι ἐφαίνοντό σοι αἱ ὁμολογίαι εἶναι».[34]

In questo passo la legge sulla ὁμολογία non era esplicitamente citata, ma mi pare che a essa l'intero testo compisse un implicito riferimento. Possiamo notare che συνθήκαι e ὁμολογίαι appaiono quasi un'endiadi.

Nel più volte citato Hyp. *Athenog.* 15 la ὁμολογία era invece posta in relazione con il verbo συμβάλλειν.

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[31] Cfr. per esempio [Dem.] 48.54.

[32] Cfr. Bianchini (1978) 1979: 246, 248.

[33] Per l'importanza centrale della συγγραφή ai fini probatori (anche in base alla clausola κυριώτερον δὲ περὶ τούτων ἄλλο μηδὲν εἶναι τῆς συγγραφῆς; cfr. Dem. 35.39), vd. Velissaropoulos-Karakostas 2001: 103 ss.; Lanni 2006: 163 ss.; Dimopoulou (in questo volume).

[34] Trad.: «(Socrate:) "Che cosa altro prepari" potrebbero dire le Leggi "se non violare i contratti e gli accordi stabiliti con noi? quegli accordi che tu hai accettato non perché spinto da violenza o da inganno o da mancanza di tempo, ma in settanta anni in cui pur ti era possibile andartene se non ti piacevamo e non ti sembravano giusti gli accordi"».

Tutto questo induce in definitiva a ritenere improbabile che la rilevanza della ὁμολογία fosse ristretta al solo ambito processuale (al quale in certi casi era invece senz'altro riferibile).[35]

Una fonte, come detto, accenna alla necessità dei testimoni. L'attestazione di ciò in una sola fonte fa propendere per ravvisarvi un'esigenza meramente probatoria.[36]

Si può dunque fissare un primo punto: la ὁμολογία era l'accordo contrattuale. Il suo contenuto coincideva con il contenuto della συνθήκη.

È rilevante che lessicografi quali Arpocrazione, Esichio, Fozio, oppure lo scoliaste di Tucidide o ancora il lessico Suda considerino ὁμολογία sinonimo di συνθήκη.[37]

Ancora, contro la tesi della *Zweckverfügung*, e a favore della ricostruzione qui proposta, secondo la quale la ὁμολογία era l'accordo contrattuale, si può considerare, in via di comparazione, una disposizione di una legge di Efeso databile *post a*. 297 a.C. *I.Ephesos* 4 (= *Syll*.[3] 364), ll. 75–77:[38]

> ὅσοι μὲμ πρὸ μηνὸς Ποσιδεῶνος | τοῦ ἐπὶ Δη[μ]αγόρου ἐμβάντες εἰς κτήματα κατὰ πράξεις ἔχουσιν τὰ κτήματα καὶ νέμον|ται, εἶναι [αὐ]τοῖς κυρίας τὰς ἐμβάσεις, εἰ μή τι ἄλλο ἑκόντες πρὸς αὐτοὺς ὡμολογήκασιν.[39]

Al termine della guerra tra Lisimaco e Demetrio Poliorcete, erano insorti a Efeso problemi in relazione ai debiti ipotecari. In conseguenza del generale stato di povertà derivato dalla guerra, i beni immobili ipotecati potevano essere venduti solo per un prezzo inferiore a quello corrispondente al valore che essi avevano avuto nel momento in cui l'ipoteca era stata costituita. Pertanto, i debitori generalmente rischiavano di dover cedere ai creditori gli immobili ipotecati, benché il loro valore originario fosse stato normalmente superiore a quello dei debiti garantiti. La legge in questione aveva, nell'ambito di una serie complessa di disposizioni particolari, dettato il principio generale che gli immobili, dopo che ne fosse stata fatta da un collegio di giudici una valutazione equitativa, venissero divisi tra debitori e creditori. I creditori dovevano ottenere una parte dei terreni corrispondente in proporzione al

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[35] Cito, per limitarmi a un solo esempio, [Dem.] 49.34.

[36] In tal senso Biscardi 1982: 142 f.; Cantarella 1965: 549; Phillips 2009: 100. *Contra* Pringsheim 1950: 40 s.

[37] Harpocr. *s.v.* Ἀσυνθετώτατον; Hesych. *s.v.* συγκεῖσθαι (2165); Phot. *s.v.* Ῥῆτρα = *Suid. s.v.* Ῥῆτρα; *Schol*. Thuc. 1.87.4, κατὰ τὴν ξυνθήκην; *Suid.* s.v. συνθήκη (1588). Su queste fonti vd. già Cobetto Ghiggia 2011: 27 s.

[38] Simonetos (1943) 1968: 472 ss. ha portato l'attenzione su questa epigrafe in relazione alle nostre tematiche. Vd. quindi Kußmaul 1969: 36 s.; Avilés 2011: 27.29. Sul contesto storico della legge e per un'interpretazione generale di essa, Walser 2008: 47 ss., 197 ss. Sulle linee qui in esame anche Maffi 2009/2010: 345 s.

[39] Trad.: «Per tutti coloro che, avendo preso possesso di terreni prima del mese Posideone dell'anno della magistratura di Demagora, ora possiedono e coltivano i terreni, per loro siano validi tali impossessamenti, a meno che (le parti) non abbiano tra loro raggiunto volontariamente un diverso accordo».

valore dei crediti da essi vantati. Nella clausola su riportata si diceva che nondimeno, se un determinato creditore avesse preso il possesso dei beni ipotecati anteriormente a una certa data, quell'assegnazione sarebbe stata definitiva, a meno che le parti non avessero previsto una diversa statuizione con apposita ὁμολογία. La ὁμολογία consentiva alle parti di derogare alle disposizioni legislative.

Si parlava di una ὁμολογία assunta dalle parti ἑκόντες πρὸς αὐτοὺς: ovvero volontariamente e in modo reciproco. Colpisce la somiglianza lessicale con la norma che è riferita anche dalle fonti ateniesi: sia ad Atene, sia a Efeso la ὁμολογία era considerata κυρία.[40] La legge di Efeso mostra che in questa città la ὁμολογία non era un atto unilaterale di un creditore, ma un accordo contrattuale.

La comparazione può confermare quanto abbiamo dedotto in relazione alla natura della ὁμολογία ad Atene.

Se a un certo punto ad Atene fu necessaria una legge che riconoscesse che le ὁμολογίαι erano vincolanti per le parti, ciò significa che prima della sua entrata in vigore esse non lo erano. La legge che qui esaminiamo riconobbe validità alle ὁμολογίαι, rendendole fonte di obbligazioni.

4.2. Contratti consensuali e contratti reali.

Quanto detto induce ad affermare che la nostra legge dovette per la prima volta riconoscere validi nell'ordinamento giuridico ateniese contratti basati sul mero consenso, che possiamo chiamare consensuali.

Ritengo peraltro che la legge abbia ulteriormente stabilito che il consenso doveva essere considerato elemento essenziale in contratti quali il mutuo o il deposito, che si perfezionavano non con il semplice consenso ma, in aggiunta a esso, con la consegna di una *res* e che noi oggi chiamiamo contratti reali.[41] Questi contratti già esistevano nell'ordinamento giuridico ateniese allorchè la legge sulla ὁμολογία riconobbe la validità dei contratti consensuali.[42]

Preciso che, parlando d'ora innanzi di contratti consensuali e reali in relazione al diritto ateniese, non mi riferirò all'accezione romanistica di tali categorie.[43]

Il diritto romano[44] prevedeva come contratti consensuali solo compravendita, locazione, società e mandato. Ad Atene, invece, sembra che la legge sulla ὁμολογία, dato il suo contenuto generale, abbia ammesso come tali tutte le convenzioni, anche

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[40] Nel passo della legge efesina qui sopra riportato, per la precisione le ὁμολογίαι non erano dette κύριαι (erano dette tali solo le ἐμβάσεις compiute dai creditori ipotecari). Un riferimento all'oggetto delle ὁμολογίαι come κύριος si legge però alla l. 87 della legge (εἶναι αὐτοῖς τὰ ὡμολογημένα κύρια), che considererò *infra* (§ 4.3).

[41] Sulla rilevanza della ὁμολογία nei contratti reali vd. ciò che più ampiamente affermo *infra*, § 5.2.

[42] Sui contratti reali come anteriori ai contratti consensuali nel diritto ateniese, Huvelin 1907: 134. Per l'antichità, in particolare, del deposito nel mondo greco, Scheibelreiter 2010: 357 s.

[43] Su di essa, Gaius *Inst*. 3.89; Iust. *Inst.* 3.13. Cfr. D.44.7.1.1 (Gai. 2 *aur*.).

[44] Gaius *Inst*. 3.135 ss.; Iust. *Inst.* 3.22 ss.

atipiche, volte a costituire rapporti giuridici patrimoniali tra le parti, purché le convenzioni stesse non fossero contrarie alla legge[45] e purché dall'ordinamento non fosse richiesta per il loro perfezionamento la consegna di una *res*.

Anche per i contratti reali non farò riferimento alla categoria romanistica, per la quale erano reali soltanto contratti gratuiti tipici, che si perfezionavano con la consegna di una *res* (mutuo, deposito, comodato, pegno e poi fiducia).[46] Astraendo da ogni riferimento romanistico, intendo per contratti reali tutti quelli per il perfezionamento dei quali il consenso non è elemento sufficiente ma occorre in aggiunta anche la consegna. Possiamo definirli seguendo Francesco Messineo: nei contratti reali «l'elemento "consegna di una cosa," che, nel sistema contrattuale, attiene, di regola, alla fase esecutiva, assume un particolare rilievo: qui la consegna è richiesta addirittura per il perfezionamento del contratto».[47] E ancora: nei contratti reali «per effetto della consegna contestuale, si fondono in uno due momenti logici del contratto: il momento perfezionativo (o costitutivo) e il momento esecutivo *ex uno latere* (o, quanto meno nella maggior parte dei casi, la prima fase esecutiva del contratto) mentre, di regola, quei due momenti sono distinti e autonomi».[48] La riflessione di Messineo è stata proposta con riferimento al diritto italiano, ma è idealmente applicabile a qualsiasi altro ordinamento. Se si muove da siffatta concezione, non c'è ragione di limitare la categoria dei contratti reali solo a contratti gratuiti. Al contrario, potrà pensarsi anche a contratti sinallagmatici, sempreché l'esecuzione della prestazione di una delle parti sia elemento perfezionante il contratto in aggiunta al consenso.

Nel diritto ateniese erano contratti reali il deposito e il mutuo (questo anche quando non gratuito), ma lo era anche la sinallagmatica compravendita, dato che, come detto,[49] si perfezionava solo al pagamento del prezzo. Anche il prezzo, benché consistente in una somma di danaro, e non in cosa infungibile, può infatti essere considerato *res* ai fini della definizione di un contratto come reale: del resto nel mutuo la *res* consiste appunto in una somma di danaro. Possiamo pensare che ad Atene fossero reali solo i contratti per il perfezionamento dei quali l'ordinamento prevedesse espressamente la consegna della *res* e quindi è probabilmente corretto dire che essi erano tipici. Ebbene, la ὁμολογία fu considerata elemento essenziale (in aggiunta alla consegna della *res ex uno latere*) anche in tali contratti, come

[45] Come vedremo nel § 4.4 sulla base di Arist. *Rhet.* 1375b8–11.

[46] Gaius *Inst*. 3.90 s.; Iust. *Inst.* 3.14. Cfr. D.44.7.1.2–6 (Gai. 2 *aur*.). Cfr. Pastori 1997: 617 ss.; Roncati 2014: 541 ss.

[47] Messineo 1961: 883, ove si esamina anche il dibattito della dottrina giusprivatistica moderna sull'ammissibilità o meno della categoria "contratti reali" nel diritto italiano vigente. Cfr. anche Messineo 1972: 394. La definizione di Messineo è approvata anche da Di Gravio 1989: 1 e da Sacco in Sacco – De Nova 2004[3]: 864 s., ove importanti trattazioni sul tema.

[48] Messineo 1961: 884.

[49] *Supra*, § 4.1.

attestato dalle fonti implicitamente per il mutuo ed esplicitamente per la compravendita.[50]

4.3. Ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ oppure ὅσα ἂν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ? Il testo della legge e la rilevanza della volontà delle parti contrattuali.

Occorre considerare se la legge sulla ὁμολογία fosse espressa nella "variante semplice" o nella "variante ἑκών," nella quale sarebbe stata sottolineata l'importanza della volontarietà dell'atto negoziale.[51] Gli studiosi moderni che hanno indagato questo aspetto hanno dato risposte contrastanti.[52]

Si può osservare che la "variante ἑκών" ricorre in ben tre luoghi: due pseudodemostenici ([Dem.] 56.2 e 48.54) e uno platonico (*Symp.* 196c). Questo induce a due riflessioni. La prima è che pare inverosimile che il riferimento alla volontà delle parti in fonti diverse sia frutto di una casuale coincidenza. La seconda è che, tuttavia, tali fonti non sono sufficientemente rappresentative del panorama retorico ateniese per indurre a ritenere che gli oratori fossero in generale concordemente inclini ad affermare un'interpretazione uniforme della legge, che valorizzasse l'elemento volontaristico, benché la legge non contenesse "ἑκών."

È pertanto più logico che le fonti che riportano la "variante semplice" abbiano per brevità omesso il riferimento alla volontarietà della ὁμολογία, che invece era probabilmente contenuto nel testo della legge.[53]

Ἑκών aveva la funzione precisa di indicare che l'accordo contrattuale era fondato sulla volontà delle parti e quindi la norma prescriveva a mio avviso che la volontà, essendo elemento essenziale, doveva essere scevra da vizi. Ciò consente di affermare che la legge sulla ὁμολογία era, in ultima analisi, inerente anche ai vizi della volontà nei contratti. Sottolineo che, poiché la ὁμολογία fu ravvisata presente, come elemento fondamentale, anche nei contratti reali, la legge fu ritenuta applicabile anche a casi relativi a vizi della volontà in tali contratti.

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[50] *Infra*, § 5.2. Difettano fonti che documentino l'importanza della ὁμολογία, intesa come accordo delle parti, in relazione al deposito. Per questo contratto si trovano soltanto—nei papiri greco-egizi—attestazioni della ὁμολογία nel senso di riconoscimento da parte del depositario dell'avvenuto deposito. Vd. per esempio *P.Oxy*. 2677, 3–6 (del secondo secolo d.C.). Indicazioni di altri papiri in Scheibelreiter 2010: 349.

[51] In ogni caso, il participio ἑκὼν della legge sulla ὁμολογία non va posto in relazione con i συναλλάγματα ἑκούσια di cui si tratta, in opposizione agli ἀκούσια, in Arist. *E.N.* 1131a1–9, ove la contrapposizione è tra atti leciti e illeciti: vd. sulla distinzione aristotelica Maffi 1980: 13 ss.; Stolfi 2006: 153 ss.; Pelloso 2007: 3 ss.; 2011: 216.

[52] Per la prima Phillips 2009: 103. *Contra* Harris 2000: 49.

[53] Si può anche pensare che, essendo il principio della ὁμολογία κυρία affermato in più di una legge (come ho accennato *supra*, § 1, e come vedremo più ampiamente *infra*, § 4.4), potesse essere espresso in diverse varianti nelle diverse leggi e che pertanto gli autori antichi qualche volta abbiano citato tale principio omettendo l'aggettivo predicativo ἑκών, in realtà presente nella legge generale.

Il collegamento tra ὁμολογία e vizi della volontà nei contratti, si ricava del resto espressamente da una serie di fonti ateniesi. Abbiamo già considerato il passo di Platone, *Crito* 52d–e, che parlava di violenza e di dolo in connessione con le ὁμολογίαι relative a contratti in genere (οὐχ ὑπὸ ἀνάγκης ὁμολογήσας οὐδὲ ἀπατηθεὶς). Nel § 5 vedremo varie altre testimonianze che mettevano i vizi della volontà in relazione con le ὁμολογίαι di singoli contratti. Posso anticipare che le fonti attestano, tra i vizi della volontà, il dolo, la violenza e l'incapacità di intendere e di volere, mentre non ci sono attestazioni in materia di errore.[54]

Per ricorrere ancora una volta alla comparazione, notiamo che l'aggettivo predicativo ἑκόντες, riferito alle parti contrattuali, era presente anche nel tratto già in precedenza riportato della legge efesina.[55] Questo può costituire un indizio a favore delle riflessioni qui proposte circa il testo della legge ateniese.

Ancora la stessa legge efesina, in un luogo successivo a quello già citato, affermava che una ὁμολογία (con cui due soggetti derogavano a una disposizione normativa) era valida soltanto se la volontà di nessuna delle due parti era stata viziata da violenza.[56] In caso di controversia circa l'essersi o meno verificata la violenza negoziale, la decisione di merito era demandata a un collegio di giudici stranieri.

Anche la legge di Efeso documenta dunque il collegamento, ravvisabile nelle fonti ateniesi, tra la volontarietà della ὁμολογία e le norme in tema di vizi della volontà.

4.4. Quante leggi sulla ὁμολογία?

[Dem.] 56.2 e Plato *Symp.* 196c parlano di leggi sulla ὁμολογία al plurale.[57] Resta da comprendere quali e quante fossero tali leggi.

Consideriamo Aristotele, *Rhetorica* 1375b8–11:

> καὶ εἴ που ἐναντίος νόμῳ εὐδοκιμοῦντι ἢ καὶ αὐτὸς αὑτῷ, οἷον ἐνίοτε ὁ μὲν κελεύει κύρια εἶναι ἅττ' ἂν συνθῶνται, ὁ δ' ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον.[58]

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[54] Che era invece considerato dai filosofi: cfr. Simonetos (1943) 1968: 479 ss.

[55] *I.Ephesos* 4 (= *Syll.*[3] 364), l. 77.

[56] *I.Ephesos* 4 (= *Syll.*[3] 364), ll. 85–88. Il riferimento nella norma di specie era al fatto che il debitore avesse deciso di consegnare il terreno ipotecato al creditore, pur potendo evitarlo in base alle disposizioni della nuova legge e tuttavia l'accordo fosse stato viziato da violenza negoziale da parte del creditore.

[57] Non è invece rilevante al proposito Plato *Crito* 52d–e, contrariamente a quanto sostenuto da Phillips 2009: 101 f.

[58] Trad.: «E se per caso una legge contraddice un'altra legge molto apprezzata o contraddice se stessa: per esempio, accade che una legge dispone che siano vincolanti le convenzioni delle parti, mentre un'altra vieta convenzioni contrarie alla legge».

Lo Stagirita faceva riferimento a una legge, che affermava la validità delle convenzioni delle parti, e subito dopo a un'altra, che prescriveva che le convenzioni delle parti erano valide se non violavano la legge.

Il passo non è relativo alla ὁμολογία, ma alla συνθήκη (si parla di συντίθεσθαι). Tuttavia, se teniamo a mente il contenuto della legge sulla ὁμολογία, di cui abbiamo finora trattato, non possiamo non notare che la prima delle due leggi di cui parla il testo in esame sembra proprio essere la nostra legge generale sulla ὁμολογία κυρία. Questa ipotesi risulta avvalorata se si considera la già segnalata coincidenza sostanziale tra ὁμολογία e συνθήκη, che trova conferma anche nelle fonti lessicografiche.

Va sottolineato che non è sicuro che Aristotele considerasse in questo passo il diritto ateniese. È tuttavia probabile che, per formulare un esempio come quello di specie, egli attingesse al sistema giuridico che meglio conosceva e quindi è verosimile che egli si riferisse al diritto ateniese.

Se dunque la legge, che κελεύει κύρια εἶναι ἅττ' ἂν συνθῶνται, era la legge sulla ὁμολογία κυρία, è verosimile che anche l'altra legge menzionata, che ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον, fosse a sua volta una legge sulla ὁμολογία. E che cosa diceva questa seconda legge? Prescriveva che le συνθήκαι, ovvero—in base a quello che abbiamo detto—le ὁμολογίαι, non potevano essere contrarie alla legge.

In altre parole, una prima legge—generale—aveva introdotto la libertà contrattuale, riconoscendo la validità degli accordi raggiunti dalle parti. Tuttavia, una seconda legge aveva successivamente limitato tale libertà,[59] prescrivendo che gli accordi, per essere validi, dovevano comunque incontrare almeno un requisito, ovvero quello di non violare norme che oggi chiameremmo norme imperative dell'ordinamento giuridico.[60]

Si noti che Platone nelle *Leggi*[61] considerava il caso che due parti avessero tra loro concluso una ὁμολογία e tuttavia non potessero dare a essa esecuzione perché il loro accordo era vietato da leggi o da un decreto (πλὴν ὧν ἂν νόμοι ἀπείργωσιν ἢ ψήφισμα ... καὶ ἐὰν ἀπὸ τύχης ἀπροσδοκήτου τις ἄκων κωλυθῇ).[62]

Gaio (4 *ad leg. XII Tab.*) D.47.22.4 riporta il testo di una legge di Solone, che analogamente riconobbe validi gli statuti di varie associazioni, concordati dai rispettivi membri, purché non violassero norme pubbliche.[63]

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[59] Analogamente ritengono Pringsheim 1950: 39; Dimopoulou (in questo volume). *Contra* Gernet (1937) 1955: 61 ss.

[60] Cfr. Beauchet 1897: 80 ss., che parla di norme di interesse pubblico. Sul concetto moderno di norme imperative si vd. la definizione di Russo 2001: 585.

[61] Plat. *Leg.* XI, 920d.

[62] Su questo passo, torno più ampiamente *infra*, § 5.1.b.

[63] Arnaoutoglou 1998: nr. 34; Ruschenbusch 2010: F76a. Su questa fonte, in relazione al tema della ὁμολογία e anche in connessione con il passo di Aristotele, già Avilés 2011: 27, ove tuttavia sono sviluppate considerazioni differenti da quelle qui proposte. Vd. ora inoltre Dimopoulou (in questo volume). In dottrina sono stati prospettati dubbi

Appare dunque perfettamente concepibile che ad Atene potesse esistere, oltre alla legge che riconosceva valide le ὁμολογίαι, una legge che vietava le ὁμολογίαι contrarie a norme inderogabili dell'ordinamento.

A titolo di comparazione si può considerare l'art. 1321 del codice civile italiano, che definisce il contratto come l'accordo delle parti per costituire, regolare o estinguere un rapporto giuridico patrimoniale. Ebbene, un successivo articolo, il 1418, dispone che «il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente». Tra le due leggi citate da Aristotele sembra intercorrere lo stesso rapporto che sussiste tra gli articoli 1321 e. 1418 c.c. it.

Si può portare un esempio di contratti ateniesi che potevano essere basati su una ὁμολογία e tuttavia avevano—diremmo noi oggi—causa illecita, sicché era impossibile agire vittoriosamente in giudizio in caso di inadempimento contrattuale: mi riferisco ai contratti in materia di prostituzione maschile.[64] Essa comportava la sanzione automatica e implicita[65] dell'ἀτιμία totale[66] e il soggetto che si fosse prostituito avrebbe potuto essere perseguito, se avesse inteso partecipare o avesse effettivamente partecipato alla vita politica, rispettivamente con la δοκιμασία degli oratori o con la γραφὴ ἑταιρήσεως.[67]

Eschine, nell'orazione *Contro Timarco*, parla a più riprese di συνθήκαι di prostituzione e in relazione a esse fa riferimento proprio alla ὁμολογία.[68] Il dato interessante è che per l'inadempimento di tali contratti non sarebbe stato, secondo Eschine, conveniente per il prostituto o per il suo cliente agire in giudizio,[69] in quanto avrebbero soltanto rischiato conseguenze sfavorevoli a causa della prostituzione commessa.[70]

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sull'autenticità del testo legislativo di Solone, come riferito da Gaio. Il punto su questo tema in Ismard 2010: 44 ss.

64 Un altro esempio di ὁμολογίαι contrattuali che sarebbero state *contra legem* è portato da Avilés (2011): 20. L'autore ha considerato contratti che avessero violato il divieto di vendere all'estero il grano coltivato in Attica (Dem. 34.37; 35.50; Lyc. 1.27).

65 *Ipso iure*: così Paoli 1930: 307 ss. Cfr. Wallace 1998: 69 s.

66 Sul punto Hansen 1976: 61 ss.; Gagliardi 2005: 89 ss. Per la totale liceità della prostituzione maschile ad Atene si è pronunziato Cohen 2000: 115 e *passim*. *Contra* particolarmente Gagliardi 2006: 118 ss. La prostituzione maschile sarebbe stata «not in itself illegal» secondo Todd 2006: 95.

67 In tal senso Gagliardi 2005: 89 ss. Diversa interpretazione delle norme in MacDowell 2005: 79 ss. La prostituzione maschile poteva essere sollevata sia in una δοκιμασία degli oratori, sia probabilmente in una δοκιμασία dei magistrati: Gagliardi 2010: 103; 2011: 322 ss.

68 Cfr. Aeschin. 1.163: ὁ δ' οὐ ποιεῖ μοι τὰ ὡμολογημένα.

69 L'azione sarebbe stata probabilmente la δίκη βλάβης e avrebbe mirato all'ottenimento di un risarcimento dei danni verosimilmente determinato sulla base dell'interesse dell'attore all'adempimento. Su ciò *infra*, § 5.1.a.

70 Aeschin. 1.160–165.

La legge sulla ὁμολογία consentiva di fatto alle parti di concludere contratti di prostituzione maschile e tuttavia la legge successiva, che aveva limitato la legge generale, rendeva problematica la validità di tali contratti.

È possibile, poi, che il principio della ὁμολογία κυρία si trovasse ribadito in altre leggi ancora, relative a materie particolari.[71]

Lo spunto a questo proposito è ancora nella legge di Efeso in precedenza considerata. Abbiamo visto che alle ll. 75–77 tale legge aveva previsto per le parti concordi la facoltà di derogare a una norma dettata dalla legge stessa. Tale facoltà veniva espressa proprio ricorrendo al principio che era da considerarsi valida la ὁμολογία raggiunta dalle parti ἑκόντες πρὸς αὐτοὺς.

Si può pensare che lo stesso accadesse anche ad Atene: che in leggi riguardanti materie particolari si trovasse ripetuto il principio della ὁμολογία κυρία per affermare che alle parti di un determinato rapporto giuridico era consentito derogare a specifiche disposizioni normative.

L'uso dell'aggettivo κοινός nell'espressione ὁ κοινὸς τῆς πόλεως νόμος impiegata in Din. 3.4 e riferita alla legge sulla ὁμολογία κυρία può confermare il fatto che il principio in esame si trovasse affermato in (e fosse quindi comune a) varie leggi.[72]

La segnalata pluralità di leggi è però stata interpretata da una parte della dottrina moderna in modo differente. Precisamente, è stata proposta nel 1926 da Richard Maschke[73] e ora è stata nuovamente argomentata da Domingo Avilés[74] la tesi che non sarebbe esistita ad Atene in realtà alcuna legge generale, che avrebbe statuito la validità delle ὁμολογίαι (intese nel senso di accordi contrattuali), ma tale validità sarebbe stata prevista da singole disposizioni per singole fattispecie.

A questa impostazione obietto che difficilmente il principio della validità generale della ὁμολογία nei contratti avrebbe potuto essere surrettiziamente introdotto in leggi riguardanti specifiche materie. Inoltre, considerato che Solone emanò la legge che stabilì la validità degli statuti delle associazioni concordati dai loro appartenenti, non si vede perché non si sarebbe potuta approvare una legge *ex professo* introduttiva del principio della validità degli accordi nei rapporti contrattuali.

Ancora, Hyp. *Athenog*. 13 fa riferimento a una specifica legge riguardante la validità delle ὁμολογίαι contrattuali: è il segno che tale legge esisteva.

È ben vero che di essa—come osserva Avilés—non si dava durante l'orazione incarico al cancelliere di leggere il testo, ma nel corso dell'orazione *Contro Atenogene* questo non avveniva neanche per tutte le altre leggi citate.

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[71] Questo è ammesso anche da Simonetos (1943) 1968: 463 s. e da Pringsheim 1950: 39.

[72] Diversamente Avilés (in corso di stampa), secondo il quale l'espressione *de qua* sarebbe indizio dell'inesistenza di una singola legge sulla ὁμολογία κυρία.

[73] Maschke 1926: 165.

[74] Avilés (in corso di stampa).

Inoltre, l'ordine al cancelliere di leggere in processo la legge riguardante la ὁμολογία κυρία nei contratti è contenuto in ben due orazioni,[75] [Dem.] 47.77 e 48.11.[76] Questo prova definitivamente che la legge generale esisteva.

È impossibile dire a quando risalga la nostra legge. Vari studiosi moderni hanno proposto la fine del quinto secolo a.C., collegando l'origine del principio della ὁμολογία κυρία con la fine del dominio dei Trenta.[77] Ulteriori considerazioni sul punto rischiano tuttavia di essere inconcludenti, in assenza di altri riscontri. Possiamo solo dire che la legge è certamente attestata dall'età degli oratori. Il fatto che risalga a Solone la legge, conservata in D.47.22.4, che riconosceva la validità dei meri accordi in relazione agli statuti delle associazioni, potrebbe fare apparire come non inverosimile che anche il principio della ὁμολογία κυρία nei contratti potesse essere molto antica. Il fatto che nessuna fonte espressamente attribuisca a Solone la paternità della legge potrebbe però portare a escludere un collegamento tra la legge e quel legislatore.

5. Ὁμολογία, categorie contrattuali e vizi della volontà.

5.1. Ὁμολογία e contratti consensuali.

5.1.a. Esistenza dei contratti consensuali basati sulla ὁμολογία. La δίκη βλάβης come azione generale per l'inadempimento.

La parte della dottrina che sostiene la tesi della *Zweckverfügung* nega che ad Atene siano esistiti i contratti consensuali.[78] Ritengo pertanto necessario dedicare questo breve paragrafo a considerare una fonte che mi sembra dimostrare il contrario. Intendo in aggiunta sottolineare che la ὁμολογία era elemento necessario e sufficiente perchè venissero a esistenza tali contratti.

La prova della validità dei contratti consensuali ad Atene si trae a mio avviso dalla pseudodemostenica *Contro Olimpiodoro*, il cui titolo tramandato dai codici è Κατὰ Ὀλυμπιοδώρου βλάβης. Due uomini, Olimpiodoro e Callistrato (questo il marito della sorella del primo), avevano preso possesso della eredità di un certo Comone, loro parente, morto ricco, intestato e senza figli. In quella occasione si erano accordati tra loro nel senso di dividersi in parti eguali l'eredità e così avevano fatto. L'accordo (ὁμολογία: [Dem.] 48.54)[79] era stato oggetto di giuramento ed era stato versato in forma scritta; il relativo documento (συνθῆκαι) era stato depositato presso un terzo.[80] A un certo punto, tuttavia, altri parenti del defunto avevano promosso un'azione per l'eredità (διαδικασία). I due, Olimpiodoro e Callistrato,

[75] Come del resto lo stesso Avilés (in corso di stampa) ha notato.

[76] Per il primo di questi passi, *supra*, § 2; per il secondo, *infra*, § 5.1.a, nt. 81.

[77] Alliot 1954: 462; Carawan 2006: 339 ss.; Velissaropoulos-Karakostas 2002: 132.

[78] Si veda, per tutti, il confronto di opinioni esattamente opposte sul tema tra Cohen 2006: 73 ss. e Jakab 2006: 85 ss. al *Symposion* di diritto greco ed ellenistico tenutosi a Rauischholzhausen nel 2003.

[79] Il passo è riportato *supra*, § 2.

[80] [Dem.] 48.9–12. Il giuramento non era necessario *ad substantiam*; anche la forma scritta e il deposito avevano finalità probatoria.

stabilirono allora insieme le rispettive strategie processuali, mantenendo fermo l'accordo che, chiunque dei due avesse prevalso nella contesa giudiziaria, l'eredità assegnata a uno o a entrambi loro sarebbe stata tra loro stessi divisa in parti eguali. Al termine di una complessa vicenda processuale, Olimpiodoro ottenne l'intera eredità e non volle dividerla con Callistrato, che intentò l'azione penale privata della δίκη βλάβης cui è riferita l'orazione a noi pervenuta. Callistrato lamentò una violazione da parte di Olimpiodoro della legge sulla ὁμολογία.

La legge sulla ὁμολογία era citata una prima volta al paragrafo 11 dell'orazione e in quella occasione era dato ordine al cancelliere di darne lettura.[81] Essa era poi di nuovo citata nell'ambito del suo discorso da Callistrato al paragrafo 54 dell'orazione,[82] nel quale possiamo leggere—sia pur nel resoconto retorico—le parole del testo legislativo.

Questa orazione consente alcune deduzioni. La prima è che Olimpiodoro e Callistrato conclusero tra loro un contratto. La seconda è che non ci fu alcuna *Zweckverfügung* e ciò nonostante Callistrato poté agire βλάβης.[83] La δίκη βλάβης di Callistrato fu fondata sull'inadempimento da parte di Olimpiodoro di un obbligo sorto in capo a lui dalla ὁμολογία.

Alcuni autori [84] hanno visto nella fattispecie una collusione illecita tra Olimpiodoro e Callistrato. Osservo che si ha collusione quando due parti processuali si accordano tra loro a danno di una terza e l'accordo delle prime due ha effettivamente la conseguenza di danneggiare ingiustamente la terza parte. Ad esempio, nel diritto romano potevano verificarsi collusioni tra l'erede legittimo e l'erede testamentario a danno dei legatari.[85] Nel caso al quale è riferita l'orazione demostenica, però, tutte le parti delle διαδικασίαι erano sullo stesso piano processuale e non ci sarebbe potuto essere accordo tra due pretendenti all'eredità che avrebbe potuto avere conseguenze processuali sfavorevoli su altri pretendenti. La collusione, che alcuni moderni vedono nell'accordo tra Olimpiodoro e Callistrato, fu in realtà solo una strategia processuale. L'accordo, perfettamente lecito (forse un contratto di società? o una transazione?), diceva che i due si sarebbero divisi in parti eguali quello che dell'eredità uno di essi o entrambi avessero ottenuto a seguito della διαδικασία. La prova migliore della liceità del contratto in questione è nel candore con cui Callistrato ne parlò davanti ai giudici.

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[81] [Dem.] 48.11. Cfr. Pringsheim 1950: 35 e Gernet (1957) 2002[2]: 235.2.

[82] Riportato *supra*, § 2.

[83] Diversa la ricostruzione di Wolff (1957) 1968: 530 ss., secondo cui Callistrato avrebbe agito perché metà dell'eredità sarebbe stata già di sua proprietà. In realtà, al termine del processo l'eredità era ormai di Olimpiodoro e, in assenza della ὁμολογία relativa alla divisione dell'eredità al termine del processo, Callistrato non avrebbe potuto avanzare alcuna pretesa.

[84] Gernet (1957) 2002[2]: 228 f.; Scafuro 2011: 333.

[85] Sul tema vd. Mayer-Maly 1954: 242 ss.; Gagliardi 2002a: 232.

La δίκη βλάβης appare, da questa orazione, come l'azione intentabile in caso di inadempimento contrattuale (nella fattispecie, sorto da un contratto consensuale), per ottenere un risarcimento del danno.[86]

In assenza di informazioni precise ricavabili dalle fonti, possiamo presumere che in linea generale, e in assenza di una diversa previsione delle parti (per esempio, a meno che esistesse una clausola penale espressa nel contratto),[87] il risarcimento fosse commisurato all'interesse dell'attore all'adempimento (interesse positivo).

Se quanto fin qui osservato è corretto, possiamo affermare che nel diritto ateniese dalla ὁμολογία sorgevano contratti consensuali validi. Questo ancora nulla ci dice a proposito della legge sulla ὁμολογία come legge riguardante anche i vizi della volontà.

Su questo possiamo considerare un'altra fonte.

5.1.b. La legge sulla ὁμολογία come legge sui vizi della volontà nei contratti consensuali.

Platone, nelle *Leggi*, trattava diffusamente della ὁμολογία come accordo delle parti contrattuali e considerava il mero accordo fonte di obbligazioni attivabili per via giudiziaria (per mezzo di δίκαι). Plato *Leges* XI, 920d:

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[86] Beauchet 1897: 395; Lipsius 1912: 653, 657; Paoli 1933: 86; Gernet (1937) 1955: 73. L'impiego della δίκη βλάβης per controversie legate a inadempimenti contrattuali è stato recisamente negato da Pringsheim 1950: 51 ss. Diversa la prospettiva di Wolff (1943) 1961: 91 ss.; (1957) 1968: 530 ss. e di Mummenthey 1971: 70 ss. (cfr. Thür 1997), secondo i quali, in base alla teoria della *Zweckverfügung*, la δίκη βλάβης sarebbe stata impiegata anche per tali controversie, in quanto l'inadempimento avrebbe configurato un danno nel momento in cui una parte avesse ricevuto la prestazione della controparte e non avesse eseguito la propria (su ciò già *supra*, § 3). L'uso nelle fonti del verbo ἀποστερεῖν per indicare l'inadempimento sembra confermare la qualifica di esso in termini di danneggiamento (così Maffi 1980: 32; tra le fonti, [Dem.] 48.39, 50, e inoltre [Dem.] 32.5, 7; 33.24; 34.27; 35.42, 46, 47, 50; 49.2, 4, 21, 41, 45, 54, 61; Isoc. 1.6, 7, 9, 10, 16; 5.2, 9, 10, 35, 48, 50, 55; cfr. su questi passi Mummenthey 1971: 73 ss.). Il ricorso alla δίκη βλάβης per casi di inadempimento contrattuale è attestata anche dalla *Contro Callippo* [Dem.] 52.14 (orazione nella quale pure entra in discorso una ὁμολογία, che tuttavia è incerto se sia ricollegabile a un contratto e pertanto non è stata da me qui considerata) e dalla *Contro Dionisodoro* [Dem.] 56, il cui titolo tràdito è Κατὰ Διονυσοδώρου βλάβης (orazione su cui *infra* § 5.2.a; vero è che il sostantivo βλάβη nel titolo dell'orazione si trova solo nel cod. Bibl. Ox., mentre manca dei codd. A e S; tuttavia, l'analogia con la *Contro Olimpiodoro* e il fatto che la causa effettivamente sembra avere riguardato una richiesta di danni per un inadempimento contrattuale mi pare consentano di fare affidamento sul titolo completo; in questo senso Lipsius 1912: 652.60 e Gernet [1959] 2002[2]: 131.1; *contra* Pringsheim 1950: 53). È da precisarsi che secondo Wolff (1943) 1961: 91 ss. e Mummenthey 1971: 78, δίκη βλάβης era ad Atene il nome comune per indicare un gruppo di azioni specifiche: un dato che mi sembra non si possa affatto escludere.

[87] Come avviene invece in [Dem.] 56.38: lo vedremo *infra*, § 5.2.a.

> Ὅσα τις ἂν ὁμολογῶν συνθέσθαι μὴ ποιῇ κατὰ τὰς ὁμολογίας, πλὴν ὧν ἂν νόμοι ἀπείργωσιν ἢ ψήφισμα, ἤ τινος ὑπὸ ἀδίκου βιασθεὶς ἀνάγκης ὁμολογήσῃ, καὶ ἐὰν ἀπὸ τύχης ἀπροσδοκήτου τις ἄκων κωλυθῇ, δίκας εἶναι τῶν ἄλλων ἀτελοῦς ὁμολογίας ἐν ταῖς φυλετικαῖσιν δίκαις, ἐὰν ἐν διαιτηταῖς ἢ γείτοσιν ἔμπροσθεν μὴ δύνωνται διαλλάττεσθαι.[88]

La statuizione del filosofo sembra generale, ma egli la riferiva nel prosieguo a un singolo caso: quello di un committente che avesse dato incarico a un artigiano di compiere una determinata opera. Se l'artigiano non avesse portato a termine l'opera, per Platone avrebbe dovuto essere condannato a pagare il prezzo delle opere per le quali aveva ingannato il committente e poi avrebbe dovuto realizzare gratuitamente l'opera.[89] Se, viceversa, il committente avesse ricevuto il lavoro in anticipo, ma non avesse corrisposto il compenso all'artigiano e non avesse rispettato la "ἔννομος ὁμολογία," avrebbe dovuto essere condannato a pagare il doppio.[90] Apparentemente le obbligazioni nascevano in questo contratto dalla semplice ὁμολογία, dall'accordo.[91]

Il contratto in questione era un appalto, una μίσθωσις, che Platone concepiva come contratto consensuale. La ὁμολογία era fonte di obbligazioni.

Naturalmente ci si può domandare quanto questa norma corrispondesse al diritto ateniese vero e proprio e quanto invece fosse esposta da Platone *de iure condendo*.[92]

Sappiamo—ed è stato messo in evidenza da Gerhard Thür[93]—che la sanzione prevista da Platone per l'inadempimento dell'appaltatore non è corrispondente ai dati che si ricavano dai contratti di appalto noti: che l'artigiano inadempiente potesse essere giuridicamente costretto a compiere gratuitamente l'opera è chiaramente utopistico. Al massimo, gli si sarebbe potuto chiedere un risarcimento del danno mediante δίκη βλάβης.[94]

Altro discorso è quello da svolgere circa la struttura del contratto descritto da Platone come consensuale. È possibile che si tratti nel complesso di un'utopia, ma è

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[88] Trad.: «Se un tale, pur avendo convenuto su un contratto, non faccia ciò che secondo gli accordi doveva fare, a meno che non sia stato impedito da leggi o decreti, o sia stato costretto da un'ingiusta violenza a stipulare il contratto, o, ancora, sia stato ostacolato da una sorte imprevista contro la sua volontà, per tutti gli altri casi vi siano azioni giudiziarie per mancato rispetto dell'accordo, presso i tribunali delle tribù, se prima non si sia riusciti a risolvere la vertenza per arbitrato o nei tribunali dei vicini».

[89] Plat. *Leg.* XI, 921a.

[90] Plat. *Leg.* XI, 921b–c.

[91] *Contra* Thür 1984: 513 s.; Martini 1997: 53.

[92] Il dibattito sull'affidabilità delle *Leggi* di Platone per il diritto attico è noto ed è di quelli più consistenti nella giusgrecistica. In tempi recenti hanno espresso riserve sull'inaffidabilità delle *Leggi* platoniche per il diritto ateniese Todd 1993: 40; Phillips 2009: 95.20; Cohen (in questo volume). Un esame della materia in Klingenberg 1976; Nightingale 1999: 100 ss.; Gagarin 2000: 215 ss.

[93] Thür 1984: 488.

[94] Vd. Martini 1997: 55, secondo il quale il ricorso alla δίκη βλάβης per agire contro artigiani inadempienti in contratti di appalto sarebbe adombrato da Andoc. 4.17.

forse più probabile che Platone commentasse la realtà che aveva sotto gli occhi.[95] È noto che nei contratti di appalto di cui a noi è giunta notizia vi era sempre una prima *datio* dell'appaltante, il quale pagava con anticipo una parte di quanto doveva; tuttavia tali contratti conosciuti sono sempre contratti in cui appaltante era una città e l'appalto consisteva nella costruzione di edifici.[96] Il caso cui fa riferimento Platone era invece relativo a contratti per appalti di piccola entità, possiamo pensare all'artigiano che costruiva sandali su commissione.

Il passo è importante perché in esso si afferma che la ὁμολογία per essere valida non doveva essere affetta da vizi della volontà dei soggetti. Si afferma, in particolare, che le parti non dovevano avere contratto le obbligazioni perché costrette da violenza (ὑπὸ ἀδίκου βιασθεὶς ἀνάγκης).

Appare che, secondo Platone, i contratti consensuali erano validi se la volontà delle parti non era viziata. Il principio è collegato alla legge sulla ὁμολογία, benché non espressamente nominata.

5.2. Ὁμολογία e contratti reali.

5.2.a. Rilevanza della ὁμολογία nei contratti reali. Di nuovo la δίκη βλάβης per l'inadempimento contrattuale.

Troviamo un riferimento alla legge sulla ὁμολογία in relazione a un contratto reale nell'orazione pseudodemostenica *Contro Dionisodoro*, Κατὰ Διονυσοδώρου βλάβης,[97] [Dem.] 56. Se ne consideri in particolare il paragrafo 2.[98] La norma sulla ὁμολογία era citata qui in relazione a un contratto di mutuo marittimo. La causa fu intentata per inadempimento contrattuale, anche in questo caso mediante la δίκη βλάβης.

Panfilo e Dario avevano prestato a Dionisodoro 3000 dracme per un viaggio in Egitto e ritorno ad Atene. Dionisodoro tuttavia al ritorno si era fermato a Rodi e lì aveva venduto il grano: secondo lui perché la nave era in avaria, secondo Dario, l'attore del processo,[99] perché a Rodi il grano aveva un prezzo superiore ad Atene. Dario sosteneva che Dionisodoro aveva violato gli accordi e pretendeva mediante la δίκη βλάβης, a titolo di clausola penale prevista dalla συγγραφή, il doppio degli interessi pattuiti, [100] mentre Dionisodoro intendeva pagare gli interessi solo in proporzione al viaggio effettivamente compiuto.

È degno di nota che l'intero argomento giuridico su cui Dario fondò la sua δίκη βλάβης era che Dionisodoro aveva violato l'accordo delle parti, la ὁμολογία, relativa a un contratto reale.

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[95] Analogamente Martini 1997: 50.
[96] Beauchet 1897: 209 ss.; Thür 1984: 471 ss.
[97] Sul titolo cfr. *supra*, nt. 86.
[98] Riportato *supra*, § 2.
[99] Sulle ragioni per cui vi era un solo attore, essendo due i mutuanti, Gernet (1959) 2002[2]: 131 s.
[100] [Dem.] 56.38.

Più in generale, Fritz Pringsheim[101] ha mostrato che, nelle fonti oratorie, in relazione ai contratti di mutuo si sottolineava il rilievo che in essi aveva avuto l'accordo delle parti (rappresentato dalla richiesta del danaro da parte del mutuatario) poi seguito dalla consegna.[102]

Possiamo dunque così riassumere il ruolo da riconoscere alla ὁμολογία nei contratti reali del diritto ateniese: la ὁμολογία era necessaria per la conclusione dei contratti, ma ovviamente non era sufficiente, occorrendo anche la dazione della cosa.[103]

Se quanto visto può aver condotto all'individuazione di una prova del rilievo della legge sulla ὁμολογία per i contratti reali, nulla dice ancora sul rapporto tra la legge e i vizi della volontà in tali contratti.

5.2.b. La legge sulla ὁμολογία come legge sui vizi della volontà nei contratti reali. A questo proposito dobbiamo considerare le fonti riguardanti la compravendita, contratto che ad Atene, come detto,[104] si concludeva con il pagamento del prezzo e in base al sottostante accordo delle parti di realizzare la transazione. Possiamo quindi affermare che la compravendita ateniese era un contratto reale.

Ricaviamo la prova della relazione tra la legge sulla ὁμολογία e la compravendita dalla *Contro Atenogene* di Iperide, l'unica orazione superstite relativa a una lite sorta da tale contratto. In questo caso la compravendita fu conclusa a seguito di un dolo perpetrato da una parte.

Atenogene, un egiziano diventato meteco ateniese, era proprietario di tre profumerie. Una di queste era gestita dallo schiavo Mida e dai suoi due figli. Epicrate, un giovane cittadino, si era innamorato di uno dei figli di Mida. Aveva così proposto ad Atenogene di venderglielo ed egli l'avrebbe poi manomesso.

Atenogene lo convinse ad acquistare non solo lo schiavo che gli interessava, ma l'intera profumeria gestita dai tre schiavi, unitamente a questi ultimi. Il prezzo convenuto fu di 40 mine. Nel contratto fu previsto che il compratore si sarebbe accollato tutti i debiti gravanti sull'impresa, [105] che il venditore assicurò al compratore essere d'infima entità e ampiamente coperti dalle merci presenti nel magazzino;[106] furono elencati precisamente alcuni piccoli debiti e fu poi scritta una clausola, secondo la quale il compratore avebbe risposto anche di tutti gli altri debiti

[101] Pringsheim 1950: 66 ss.
[102] Si consideri ad esempio Lys. 17.2.
[103] Per questa osservazione cfr. già Pringsheim 1950: 138 s. (in relazione alla compravendita) seguito da Gernet (1951) 1955: 205.
[104] *Supra*, § 4.1.
[105] L'accollo dei debiti dipendeva dalla volontà delle parti ed era connesso con la vendita dell'azienda. Così, Cohen 1992: 94; Talamanca 2008: 226 f. Diversa opinione in Maffi 2008: 211 ss.
[106] Hyp. *Athenog.* 6.

non elencati.[107] Solo successivamente emerse che i debiti erano esorbitanti, nella misura di 5 talenti (300 mine). Epicrate agì quindi in giudizio contro il venditore.

Osservo che, dopo la narrazione dei fatti e dopo il riferimento al testo del contratto, ovviamente a noi non pervenuto, nel paragrafo 13 dell'orazione si trova la citazione da parte di Epicrate della legge sulla ὁμολογία,[108] sulla quale appare basata l'intera azione.[109]

Epicrate evidenziava che il suo avversario avrebbe cercato, nella sua difesa in giudizio, di fare valere il contratto di compravendita, sostenendo che esso era stato oggetto di una ὁμολογία, e che le cose concordate dalle parti erano κύρια, vincolanti (e che quindi Epicrate avrebbe dovuto pagare i 5 talenti di debiti che in base al contratto si era accollato). «Τά γε δίκαια·» osservava però Epicrate: «τὰ δὲ μὴ τοὐναντίον ἀπαγορεύει μὴ κύρια εἶναι». E quando si sarebbe potuto dire che le cose oggetto di una ὁμολογία erano δίκαια?

Possiamo ricordare ciò che abbiamo letto[110] nel passo 52d–e del *Critone* platonico: le cose oggetto delle ὁμολογίαι erano δίκαια solo se le ὁμολογίαι stesse erano state raggiunte senza violenza e senza dolo (οὐχ ὑπὸ ἀνάγκης ... οὐδὲ ἀπατηθεὶς).[111] Insomma, se la volontà delle parti non era stata viziata.

Questo spiega il «τά γε δίκαια» di Epicrate: le cose oggetto della ὁμολογία sottostante alla vendita della profumeria secondo Epicrate non erano δίκαια proprio in considerazione del fatto che la ὁμολογία stessa era stata viziata da dolo.[112] La previsione che τά μὴ δίκαια non erano κύρια non era probabilmente contenuta nella legge,[113] né ve ne sarebbe d'altronde stato bisogno. Per la legge era sufficiente affermare che erano κύρια soltanto le cose che le parti avessero concordato ἑκὼν ἑκόντι. Il riferimento legislativo alla volontarietà dell'atto negoziale era sufficiente a rendere l'atto invalido nel caso in cui la volontà fosse stata viziata.

Questo conferma la tesi, per cui la ὁμολογία era considerata alla base anche dei contratti reali e non doveva essere affetta da vizi della volontà delle parti.

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[107] Hyp. *Athenog.* 10.

[108] Cfr. già *supra*, § 2.

[109] In dottrina si è per verità sostenuto in modo più o meno netto (Pringsheim 1950: 498; Jakab 2006: 88; Phillips 2009: 115) che, poiché Epicrate citava, successivamente alla legge sulla ὁμολογία, altre leggi a sostegno della sua pretesa, l'azione non sarebbe stata effettivamente basata su una violazione della legge sulla ὁμολογία (secondo Phillips, *loc. cit.*, in particolare, l'azione di Epicrate sarebbe stata basata sulla legge sulla ὁμολογία solo *prima facie*). Questa opinione non è per me condivisibile. Le leggi che in seguito venivano nell'orazione citate (su di esse più ampiamente *infra*, § 6) servivano soltanto a rafforzare l'assunto ed erano richiamate *ad abundantiam* per analogia come leggi che in qualche modo tutelavano l'accordo o anche solo l'obbligo di buona fede delle parti nei rapporti contrattuali, ma non erano applicabili al caso di specie.

[110] *Supra*, § 4.1.

[111] Cfr. sul punto anche Paoli (1932) 1933: 205.

[112] L'argomento di Phillips 2009: 115, secondo il quale «unfortunately for Epicrates the letter of the law favors Athenogenes» non è quindi a mio avviso da condividersi.

[113] Così anche Avilés 2011: 28. *Contra* Harris 2000: 49.

Resta a questo punto da chiarire, per comprendere più a fondo la vicenda di Epicrate, con quale azione giudiziaria egli agì contro Atenogene. Dobbiamo preliminarmente domandarci quale fu l'oggetto della domanda attorea.

Nella dottrina sussistono incertezze. Harald Meyer-Laurin[114] e David Phillips[115] ritengono che Epicrate chiese l'annullamento del contratto per il dolo subito. L'esistenza di un'azione generale di annullamento dei contratti è stata ammessa anche da Arnaldo Biscardi.[116] Secondo Gerhard Thür, invece, tale azione ad Atene non esisteva: in ossequio alla teoria della *Zweckverfügung*, secondo Thür Epicrate avrebbe potuto soltanto chiedere indietro con l'azione penale privata della δίκη βλάβης la somma di 40 mine da lui pagata come prezzo della compravendita oltre a un'eguale somma a titolo di pena.[117] A quel punto, la proprietà della profumeria e dei tre schiavi sarebbe di fatto ritornata ad Atenogene (e quindi rilevo che, a parte la conseguenza della *poena dupli* per il condannato, l'esito finale sarebbe stato per Thür sostanzialmente quello di un annullamento del contratto). Altri studiosi hanno ritenuto che l'azione avrebbe mirato a un risarcimento dei danni.[118]

Ma come si potevano quantificare i danni subiti da Epicrate? Secondo la teoria della *Zweckverfügung*, i danni non avrebbero potuto essere individuati se non nelle 40 mine effettivamente pagate da Epicrate.[119] Alcuni autori hanno invece pensato ai 5 talenti di debiti ricaduti su Epicrate a seguito dell'acquisto della profumeria.[120]

Il paragrafo 13 dell'orazione, ora esaminato, potrebbe giustificare l'opinione che Epicrate intendesse sostenere che l'intero contratto doveva essere annullato in considerazione del dolo da lui subito. E in effetti esistevano nel diritto ateniese azioni specifiche miranti a ottenere l'annullamento dei contratti per dolo, come vedremo del paragrafo seguente, sicché non sarebbe in linea di principio inconcepibile che anche in questo caso l'attore avrebbe potuto perseguire tale risultato attraverso una qualche azione che non possiamo meglio individuare.

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[114] Meyer-Laurin 1965: 17.

[115] Phillips 2009: 91.8.

[116] Biscardi 1982: 138.

[117] Thür (in corso di stampa). Sul concetto di δίκη βλάβης secondo la teoria della *Zweckverfügung*, *supra*, nt. 86. Sulla *poena dupli* in conseguenza della δίκη βλάβης, Mummenthey 1971: 78 (secondo il quale essa sarebbe esistita in tempi più antichi, poi sostituita dalla stima dei danni effettivamente subiti dal soggetto leso) e lo stesso Thür 1997: 706; 2003: 238. Pringsheim 1950: 52, afferma che la δίκη βλάβης si basava su una distinzione tra risarcimento semplice in caso di danno non intenzionale e risarcimento doppio in caso di danno intenzionale. Non dissimile la prospettiva di Mummenthey 1971: 78 ss. (per il periodo successivo a quello in cui, a suo avviso, sarebbe stata applicata la regola stretta della *poena dupli*).

[118] Kästle 2012: 192 s.

[119] Thür (in corso di stampa). Analogamente Meyer-Laurin 1965: 17; Meinecke 1971: 348.

[120] Così Maschke 1926: 104, 166; Phillips 2009: 91.8. Almeno le 40 mine e forse anche i 5 talenti per Kästle 2012: 192.149.

Tuttavia, osservo che nell'orazione non c'è alcun indizio che Epicrate intendesse disfarsi della profumeria.[121] Ai paragrafi 20 e 21 dell'orazione si legge che egli pretendeva soltanto di non dover pagare i debiti. Si può quindi ritenere che egli intendesse mantenere la profumeria (e soprattutto lo schiavo che gli interessava).[122]

Da tutto ciò consegue che attraverso l'azione processuale Epicrate mirò a ottenere un risarcimento dei danni consistente nei 5 talenti di debiti che si era tramite il contratto accollati. Questo induce a ritenere che l'azione giudiziaria sia stata, come ritiene la dottrina maggioritaria,[123] la δίκη βλάβης.[124]

La richiesta di un risarcimento di 5 talenti da parte di Epicrate appare inaccettabile per i seguaci della teoria della *Zweckverfügung*, dato che egli non aveva mai pagato tale somma ad Atenogene.

Tuttavia, in diritto, in linea generale non è assurdo che taluno, che abbia concluso un contratto perché indottovi da qualche vizio della volontà causato dalla controparte o da mala fede della controparte nelle trattative, decida di agire soltanto per un risarcimento dei danni, mantenendo valido il contratto. Questo è espressamente previsto, per esempio, dal diritto italiano vigente, che, all'art. 1440 del codice civile, in materia di dolo incidente, prevede che «se i raggiri non sono stati tali da determinare il consenso, il contratto è valido, benché senza di essi sarebbe stato concluso a condizioni diverse; ma il contraente in mala fede risponde dei danni».[125] La giurisprudenza ha poi ammesso il diritto al risarcimento anche per il caso di mala fede nelle trattative precontrattuali, se il contratto è stato concluso e la parte che ha subito le conseguenze sfavorevoli della malafede altrui non intende annullare il contratto. In questi casi la giurisprudenza della Corte Suprema di

[121] Così anche Carawan 2006: 346.

[122] Nello stesso senso si vd. anche il paragrafo 36 dell'orazione, per quanto molto lacunoso.

[123] Da Kenyon 1893: xx, a Blass 1894[3]: liv, a Lipsius 1896: 43, fino a Cooper in Worthington-Cooper-Harris 2001: 96.27, a Phillips 2009: 91 (ove, nt. 8, ulteriori indicazioni bibliografiche), a Thür (in corso di stampa).

[124] È ben vero che nel paragrafo 18 dell'orazione si trova un riferimento a νόμοι che βουλεύσεως ὑμᾶς κελεύουσιν αἰτίους εἶναι, sempreché l'integrazione comunemente accolta della frase contenente tale espressione sia corretta (ὑ[πέρ ὧν οἱ νόμοι] β[ου]λεύσεως ὑμᾶ̣ς̣ κε[λεύουσιν αἰτίου]ς εἶναι [Trad.: «in un affare nel quale le leggi prescrivono che voi siate responsabili di *bouleusis*»]). Il cennato riferimento, tuttavia, non sembra sufficiente a far propendere [come invece ritengono Maschke 1926: 104, 166; Simonetos (1943) 1968: 476 s.; Maridakis 1963: 398 ss.; Dimopoulou 2012: 226; Dimopoulou (in questo volume)] per la possibilità di ricorso, nel caso di specie, a una δίκη βουλεύσεως, che è invero attestata da Arpocrazione (*s.v.* βουλεύσεως), ma in relazione a fattispecie diverse (cospirazione per un omicidio e ingiusta registrazione di un uomo come debitore dello Stato). Seguo su questo punto Meinecke 1971: 348.13; Whitehead 2000: 315 ss.; Phillips 2009: 91.8; Kästle 2012: 192.

[125] Diversa era la disciplina del diritto romano, ove l'*actio de dolo*, che consentiva di ottenere un risarcimento [da ultimo vd. Lambrini (2011) 2013: 77], non permetteva di determinarlo se non in base al criterio dell'interesse negativo, calcolato confrontando la situazione in cui si trovava l'attore in seguito alla conclusione del contratto e quella in cui si sarebbe trovato, se non l'avesse concluso (cfr. sul punto Talamanca 1990: 658).

Cassazione ha stabilito che i danni vanno commisurati al "minor vantaggio," ovvero al "maggior aggravio economico" prodotto dal comportamento tenuto in violazione dell'obbligo di buona fede.[126] Si può dire che il risarcimento è commisurato all'interesse c.d. "positivo differenziale," derivante dalla comparazione tra il contratto concluso e quello che sarebbe stato stipulato in assenza del contegno sleale di una parte.[127]

L'individuazione del risarcimento secondo il criterio del minor vantaggio e del maggior aggravio economico appare applicabile anche al caso di Epicrate, nella misura in cui si accoglie la ricostruzione secondo la quale egli intendeva mantenere in vita il contratto di compravendita, sfrondato delle conseguenze sfavorevoli a lui causate dalla malafede di Atenogene nelle trattative (anche se il dolo in quel caso certamente non era stato incidente, ma determinante).

La prova che anche nella compravendita ateniese, benché contratto reale, avevano rilievo i vizi della volontà, si trae anche da un'altra fonte, il passo di Teofrasto Περὶ συμβολαίων fr. 97 Willets[128] § 4. Dopo avere detto che la compravendita si perfezionava con il pagamento del prezzo, il filosofo affermava che il venditore non doveva avere operato essendo ebbro, iracondo, intenzionato a sopraffare la controparte o a farle un torto e aggiungeva che lo stesso valeva anche per il compratore:

> ἀλλὰ τοῦτο προσδιοριστέον ἐὰν μὴ παρὰ μεθύοντος μηδ' ἐξ ὀργῆς μηδὲ φιλονεικίας μηδὲ παρανομοῦντος ἀλλὰ φρονοῦντος καὶ τὸ ὅλον δικαίως, ὅπερ κἀκεῖ προσθετέον ὅταν ἀφορίζῃ παρ' ὧν δεῖ ὠνεῖσθαι.[129]

Benché la legge sulla ὁμολογία non venga espressamente citata, mi pare implicito il riferimento a essa.

Quindi: la norma sulla ὁμολογία rilevava in relazione alla compravendita, benché essa fosse un contratto reale, e rendeva la volontà delle parti un elemento essenziale del contratto. Tale volontà non doveva essere viziata. Che la legge sulla

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[126] Cass. Civ. 19024/2005; 5273/2007; 26724 e 26725/2007 (Sezioni Unite); 24795/2008; 5965/2012. Vd. anche Tribunale Firenze sez. III 18 ottobre 2005; Tribunale Padova 30 marzo 2006; Tribunale Bologna sez. II 7 aprile 2006; Tribunale Vicenza 7 marzo 2007 n. 5273 e 13 agosto 2007 n. 5734; Tribunale Bari sez. IV 28 giugno 2011 n. 2142 e sez. IV 9 novembre 2010 n. 3326. Secondo un più risalente orientamento giurisprudenziale l'intervenuta conclusione del contratto escludeva la configurabilità della responsabilità: Cass. Civ. 2820/1950; 1499/1971; 1842/1976.

[127] In dottrina Sagna 2004: 281; Franzoni 2006: 295 ss. (in relazione a Cass. 19024/2005); Solidoro 2008: 47.57 (con impostazione storica, ma riferimenti al diritto attuale); Vettori 2008a: 751 ss.; 2008b: 104 ss.; Bertonazzi 2010: 117 s.

[128] = fr. 21 Szegedy-Maszak = 650 Fortenbaugh.

[129] Trad.: «occorre altresì che (il venditore) non abbia operato essendo ebbro, nè per ira, né con la volontà di sopraffare la controparte, né di farle un torto, ma in modo assennato e giusto in tutto, e questo occorre che sia osservato anche quando si debba decidere da chi si debba acquistare».

ὁμολογία prescrivesse l'assenza di vizi della volontà anche nei contratti reali mi sembra, alla luce delle testimonianze esaminate, del tutto evidente.

6. Altre leggi sui vizi della volontà nei contratti.

A completamento del mio discorso, avendo illustrato come la legge sulla ὁμολογία fosse considerata ad Atene una legge generale riguardante anche i vizi della volontà in tutti i contratti, considero le altre leggi specifiche sui vizi della volontà nel diritto contrattuale ateniese.

Si possono individuare tre leggi.

1) Iperide/Epicrate nella *Contro Atenogene* citava una legge che genericamente vietava di frodare nell'agorà. Hyp. *Athenog.* 14:

> ὁ μὲν τοίνυν εἷ[ς] νόμος κελεύ[ει] ἀψευ[δ]εῖν ἐ[ν] τῆι ἀγ[ορᾶι], πάντων οἷμα[ι π]αράγ[γελ]μα κάλ[λιστο]ν παραγγέλλων. σὺ [δὲ ψε]υσάμενο[ς ἐν] μέσηι τῇ ἀγορᾷ συν[θήκα]ς κατ' ἐμο[ῦ ἕθ]ου· ἐπεὶ ἐὰν δ[είξῃς εἰπ]ὼν ἐμ[οὶ το]ὺς ἐράνους [ἢ καὶ ἐγγράψας ἐν ταῖς συν]θήκαι[ς], ὅσους [ἐπυθόμην, οὐδὲν ἀντιλέ]γω σοι, ἀλλ' ὁμολογ[ῶ ὀφείλειν.[130]

La legge è riportata anche da Demostene,[131] mentre Teofrasto[132] citava gli ἀγορανόμοι come magistrati[133] incaricati di impedire le frodi tra venditori e compratori nella piazza. Anche Platone[134] faceva un riferimento a questa legge.

Essa riguardava tutti i contratti conclusi nell'agorà,[135] ma solo quelli e pertanto possiamo dire che era una norma particolare. È incerto quale fosse la conseguenza per i contratti conclusi in violazione della legge.

Osservo che Epicrate portava questa legge a sostegno della propria posizione soltanto come argomento *ad adiuvandum*: la legge in realtà non lo riguardava direttamente, essendo il suo contratto con Atenogene stato concluso nella casa di una donna di nome Antigona e non nell'agorà.[136] La legge era dunque utile, semmai, soltanto in via analogica, in quanto anch'essa riguardava l'invalidità degli atti conclusi con dolo.

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[130] Trad.: «C'è dunque una prima legge che ordina di non frodare dell'agorà, dettando a mio avviso la migliore di tutte le prescrizioni. Ora tu, frodando in piena agorà, hai concluso un contratto contro di me; giacché se dimostrerai di avermi dichiarato o di avere scritto nel contratto i prestiti ricevuti, dei quali successivamente sono venuto a conoscenza, non ti controbatto nulla e riconosco di essere debitore».

[131] Dem. 20.9.

[132] Περὶ συμβολαίων fr. 97 Willets (= fr. 21 Szegedy-Maszak = 650 Fortenbaugh).

[133] Su di essi Millett 1990: 172; Jakab 1997: 70 ss.; Cantarella (2010) 2011: 421 ss.

[134] Plat. *Leg.* 917b.

[135] L'opinione di Harris 2000: 51 che la legge in questione non riguardasse i contratti non è convincente. Lo stesso autore ha tuttavia sostenuto in altra pubblicazione un'opinione opposta: Harris 2006: 149.

[136] Hyp. *Athenog.* 8.

2) Ancora Iperide nella *Contro Atenogene*,[137] tra gli ulteriori argomenti che apportava per rafforzare la posizione di Epicrate, citava la legge che abbiamo già considerato,[138] che diceva che se uno schiavo compravenduto aveva difetti non dichiarati dal venditore al momento del contratto, poteva avere luogo l'ἀναγωγή.[139]

In linea di principio, difetti dello schiavo potevano essere stati taciuti dal venditore oltre che per semplice ignoranza anche con dolo. Ebbene, la legge in questione riguardava probabilmente entrambi i casi. Se si era verificato un dolo, la legge finiva per riguardare in ultima analisi i vizi della volontà.

Questa legge era ripresa anche da Platone nelle *Leggi* ed è particolarmente interessante che egli scindeva espressamente i due casi: quello in cui i difetti dello schiavo fossero stati taciuti per ignoranza e quello in cui fossero stati taciuti per dolo del venditore. E le conseguenze erano più gravi nel secondo caso. Plat. *Leg.* 916c–d:

> ἐὰν δὲ ἀνδροφόνον ἀποδῶταί τίς τινι εἰδότι μὲν εἰδώς, μὴ τυγχανέτω ἀναγωγῆς τοῦ τοιούτου τῆς πράσεως, μὴ δὲ εἰδότι τὴν μὲν ἀναγωγὴν εἶναι τότε ὅταν τις αἴσθηται τῶν πριαμένων, ἐν πέντε δὲ τῶν νομοφυλάκων τοῖς νεωτάτοις εἶναι τὴν κρίσιν, εἰδὼς δὲ ἂν κριθῇ, τάς τε οἰκίας τοῦ πριαμένου καθηράτω κατὰ τὸν τῶν ἐξηγητῶν νόμον, τῆς τιμῆς τε ἀποδότω τῷ πριαμένῳ τριπλάσιον.[140]

Secondo il dettato della legge proposta da Platone, se le parti si erano accordate circa il difetto dello schiavo, la compravendita era inattaccabile, ma se il compratore non fosse stato posto a conoscenza del difetto avrebbe potuto procedere ad ἀναγωγή e, se in processo fosse risultato che il venditore gli aveva dolosamente taciuto il difetto dello schiavo, avrebbe avuto diritto a ottenere addirittura il triplo del prezzo pagato.[141] L'articolazione delle sanzioni previste da Platone era probabilmente utopistica, ma dimostra indirettamente che la legge citata nella *Contro Atenogene* atteneva implicitamente anche al dolo del venditore che avesse occultato i vizi della cosa venduta.

3) Infine, in [Dem.] 48.56 Callistrato citava una legge soloniana che rendeva nulli tutti gli atti—e quindi, per quanto a noi interessa, anche i contratti—compiuti dietro persuasione di donna:

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[137] Hyp. *Athenog.* 15.

[138] *Supra*, § 4.1.

[139] Vd. Jakab 1997: 86 ss.

[140] Trad.: «Se un tale vende uno schiavo omicida, e le due parti sono consapevoli di questa cosa, non ci sia restituzione per la vendita di tale schiavo; ma se il venditore non conosce la cosa, ci sia restituzione non appena lo viene a sapere e il processo abbia luogo davanti ai cinque custodi delle leggi più giovani; e se sia deciso che il venditore era a conoscenza della cosa, che egli purifichi le case del compratore secondo la legge degli esegeti e paghi al compratore il triplo del prezzo dello schiavo».

[141] Sul sistema di Platone, ampiamente Jakab 1997: 59 ss., 66 ss.

καὶ ἄκυρά γε ταῦτα πάντα ἐνομοθέτησεν εἶναι ὁ Σόλων, ὅ τι ἄν τις γυναικὶ πειθόμενος πράττῃ.[142]

Dobbiamo ricordare che sappiamo[143] che una norma, attribuita allo stesso Solone, prevedeva che non potessero compiere testamento-adozione[144] coloro che[145] fossero incapaci di intendere e di volere per alcune cause, tra cui la suggestione da parte di una donna.[146]

Si può ritenere che la legge citata da [Dem.] 48.56 fosse una legge diversa da quella soloniana in materia di testamento-adozione, oppure che si tratti della stessa legge citata a sproposito in [Dem.] 48.56 o ritenuta applicabile per analogia agli atti tra vivi.[147]

7. Conclusioni.

In un momento imprecisato, certamente non posteriore all'inizio del quinto secolo a.C., ad Atene entrò in vigore una legge, che stabilì che quello che le parti avessero convenuto volontariamente tra loro per regolare un rapporto patrimoniale avesse la forza vincolante di un contratto e fosse produttivo di obbligazioni. Ὁμολογία fu chiamato in tale legge l'accordo delle parti contrattuali. Nelle fonti attiche si trovano numerosi riferimenti alla legge in questione, che fu ritenuta un cardine dell'ordinamento giusprivatistico ateniese.

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[142] Trad.: «E Solone stabilì con legge la nullità di tutti gli atti, che qualcuno compia persuaso da una donna».

[143] La fonte principale è [Dem.] 14.46. Per le altre fonti vd. le note seguenti.

[144] La norma soloniana riguardò in origine il testamento-adozione e fu poi ritenuta applicabile per analogia anche alle adozioni *inter vivos*: in questo senso, Ruschenbusch (1962) 2005: 59 ss.; Gagliardi 2014: 23 ss. (con mutamento di opinione sul punto specifico rispetto a Gagliardi 2002b: 5 ss.).

[145] Oltre a non essere stati a loro volta adottati e non avere figli maschi legittimi.

[146] Si trattava della suggestione non solo da parte della moglie (come sostenuto da Paoli 1930: 304.1; 1971: 704), ma da parte di qualunque donna: vd., in tal senso, Biscardi (1970) 1999: 99; 1982: 128.37, 370; Karabélias 1992: 111.319; Cobetto Ghiggia 1999: 6.24. Le altre cause di incapacità cui accenno nel testo erano la pazzia, la demenza senile, gli effetti di un filtro, la malattia, la violenza in genere e il sequestro di persona. La suggestione di donna trovasi anche in Lys., Fr. 118, Thalheim (= *Suid*., *s.v*. διάθεσις καὶ διατίθεσθαι). La pazzia è menzionata anche in Isae. 4.14; unitamente alla vecchiaia e ad altre cause, in Isae. 4.16 e 6.9; unitamente alla suggestione muliebre in Isae. 2.1. Tutte le cause, tranne l'effetto di un filtro, sono ricordate anche in Hyper. *Athenog.* 17. Vd. anche Plut. *Sol*. 21.4 e *Aet. Rom. et Gr*. 265e.7–9.

[147] Così Scafuro 2011: 353. Simonetos (1943) 1968: 462 f. ha interpretato la vicenda di Olimpiodoro nel senso che il contratto sarebbe stato impugnato da Callistrato perché appunto Olimpiodoro avrebbe concluso il contratto in quanto persuaso da donna. Devo sottolineare che così non è: Callistrato muoveva a Olimpiodoro il rilevo che egli era pazzo in quanto, persuaso dalla sua etera, non intendeva dare esecuzione al contratto, ma era indubbio che egli l'avesse concluso senza essere stato persuaso da alcuna donna e pertanto, dal punto di vista del diritto ateniese, nella pienezza delle sue facoltà mentali.

Essa introdusse nell'ordinamento ateniese dei nuovi contratti, diversi da quelli fino allora esistiti. Nel passato i contratti si erano conclusi principalmente con la consegna di cose o con la prestazione di garanzie. Ora il consenso delle parti era sufficiente per l'esistenza dei contratti. Abbiamo qui chiamato, con terminologia ignota al diritto ateniese, per comodità e convenzione, i contratti che si perfezionavano con la consegna di *res* contratti reali e i più recenti consensuali.

Perché venissero a esistenza i contratti consensuali non era necessaria né la forma scritta, né il giuramento, né la presenza di testimoni, anche se spesso i soggetti ricorrevano a tale forma o a tali atti supplementari per meglio essere in condizione di provare, in caso di lite, l'esistenza dei loro contratti.

Istituendo i contratti consensuali, la legge elevò in essi l'accordo delle parti a elemento essenziale. E fu considerato elemento così importante che sostanzialmente fu ritenuto essere coincidente con il contratto stesso: il contenuto dell'accordo *era* il contenuto del contratto.

L'istituzione dei contratti consensuali avvenne peraltro senza la contestuale abolizione dei contratti reali, che continuarono a esistere.

La legge sulla ὁμολογία comportò quindi in campo contrattuale una maggiore libertà per i cittadini, che poterono in base a essa fare sorgere tra loro obbligazioni per atto lecito volontario senza particolari atti o formalismi.

La libertà così introdotta dalla legge sulla ὁμολογία venne in un secondo momento, che pure non è precisabile, limitata. Una legge posteriore, e ragionevolmente di poco posteriore, alla prima, stabilì che le parti non potevano concludere tra loro contratti consensuali contrari a norme imperative dell'ordinamento. In alcuni casi, di converso, la legge sulla ὁμολογία fu richiamata da altre leggi per consentire ai cittadini di derogare concordemente a determinate norme.

In caso di inadempimento contrattuale non esisteva alcuna azione né per la risoluzione, né per l'adempimento. Il creditore poteva agire con la δίκη βλάβης, con la quale otteneva un risarcimento commisurato al suo interesse all'adempimento (interesse positivo), a meno che non fosse prevista una clausola penale.

Oltre a introdurre i contratti consensuali, la legge sulla ὁμολογία diede rilievo al fatto che in essi la volontà non doveva essere viziata né da dolo né da violenza. In caso contrario, la parte lesa poteva agire con la δίκη βλάβης per ottenere un risarcimento commisurato all'interesse positivo differenziale, ovvero al minor vantaggio, o al maggior aggravio economico, che aveva subito a causa del dolo o della violenza, mantenendo tuttavia valido il contratto. È incerto se esistesse un'azione per l'annullamento del contratto. I vizi della volontà contrattuale erano peraltro disciplinati anche in alcune leggi specifiche.

La ὁμολογία fu ritenuta esistente e anzi elemento necessario (benché non sufficiente) anche nei contratti reali, nei quali pure assunsero di conseguenza rilievo i vizi della volontà.

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DID ATHENS HAVE CONSENSUAL CONTRACTS? A RESPONSE TO LORENZO GAGLIARDI

First, many thanks to colleague Gagliardi for looking again at questions regarding what others too call consensual and real contracts in classical Athens, tough problems that have challenged many legal scholars, yielding no consensus. [1] Contracts are of special interest to Roman legal historians and modern lawyers, for whom this Latinate word is weighty indeed. For Athens, forensic testimonia about "agreements," *homologiai*, are few, variable, and of uncertain significance. Without Roman and modern law, would anyone have described these *homologiai* as contracts in the Roman or modern sense? As *homologia* is not a technical word, could a law say that all *homologiai* are *kuriai*? And what does *kurios* mean? When Gagliardi translates these terms he uses "validi" and "vincolanti," but these are not synonyms. In considering alternative ways of looking at our meager Attic evidence, I avoid Roman or modern notions of contract in favor of Athens' less rigorous approach to legal issues, and I take particular care with our sources.

Gagliardi begins by quoting eight passages and then later a ninth from Plato, to document "the law [*la legge*] that affirms the principle [*il principio*] of *homologia kuria*" (a phrase which he acknowledges probably did not exist). Presented as such, these passages are intended to establish the existence of a law on contracts. However, they raise a number of questions, some of which Gagliardi addresses later in his essay. I go text by text, following Gagliardi's order, to consider what our evidence amounts to, reserving until later a discussion of the word *kuria*.

1) In Hypereides *Athenogenes* 13, the plaintiff says that Athenogenes "will presently tell you [*dikasts*] that the law (*ho nomos*) says that however many things one man agrees with (*homologein*) another are *kuria*. Yes my friend, just things; things that are not just it forbids to be *kuria*. From the laws themselves I will make this clear to you." The plaintiff then cites a number of laws, none mentioning *homologia,* which he says he has spent "night and day" searching out, for example a law against selling defective slaves in the market. There is general agreement that these other laws

[1] The scholarship on these questions is massive. It was not my assignment nor was there time to work through this material and provide fully researched answers to the many questions raised. I evaluate Gagliardi's contribution, and suggest possible answers to some principal problems.

which the plaintiff cites imply that, despite his claim, the first "law" he mentions (*ho nomos*), if it was a specific law, contained no stipulation that agreements be just, because he would have cited that particular clause from "the law" instead of desperately hunting for others. Hence in one way at least, the speaker has misrepresented this "law." He does not say what else the "law" mentioned. The puzzling shift from "the law" to various laws raises the question whether his phrase "the law" is here a general term for Athenian legislation, rather than designating a specific law, notwithstanding Gagliardi's insistence toward the end of 4.4. (Neither of Gagliardi's claims that [Dem.] 47.77 [see 2 below] and 48.11 prove the existence of a law of consensual contracts is compelling.)

In 5.2b, Gagliardi returns to *Ath*., arguing—after a lengthy discussion of modern Italian law—that "the whole action" of this case "appears to be based on the law of *homologia*." However, in the extant parts of this speech *homologia* occurs only in section 7 (without the article; cf. *homologema* in section 20). The speaker repeatedly refers to his written agreement with Athenogenes as *sunthēkai* (8 twice, 10, 12 twice, 14, 18), and uses the verb *sunthesthai* to describe his act of agreement (18). Why, if the whole action was based on the law of *homologia*? Gagliardi concludes by accepting the majority view that "the judicial action" brought by the plaintiff was a *dikē blabēs*. The evidence is insufficient to claim that it was based on a law of *homologia*. The plaintiff himself nowhere adduces such a law.

2) The speaker of [Dem.] 47.77 refers to "the law (*nomos*) and the deposition (*martyria*) that however many things one person agrees with (*homologein*) another shall be *kuria*," in order to challenge what he describes as Theophemos' disregard of their arrangements about a payment. After the law and the deposition are read out, the speaker discusses various witnesses' testimonies (47.78), but no law. It again remains unclear what this "law" was, why the speaker mentions it so briefly and so late in his account (the relevant story began in section 49), what else (if it was a specific law) it may have contained, and why the speaker juxtaposes the following *homologia* clause with "the deposition." Reflecting this problem, various editors print Dobree's emendation reversing these two words: "the deposition and the law that...."

3) In an aside, the speaker of Isokr. 18.24 mentions that the dikasts "require that private (*idias*) agreements must be publicly (*dēmosiai*) *kuriai*." What is the significance of *idias* and *dēmosiai*, "private" and "public"? Gagliardi does not mention this passage again. We shall return to it.

Gagliardi then quotes three other sources (texts 4–6) for "consensual contracts," which mention that people must agree voluntarily (*hekontes*). In 4.3 he will conclude on grounds of logic that texts 1–3 have probably omitted this stipulation from the text of the law. Here and later he thinks that such a stipulation implies that the object of agreement must be free of defects, a modern idea that we shall consider.

4) In [Dem.] 56.2 (a case also brought as a *dikē blabēs*), the plaintiff tells the dikasts that he relies on them and on "your *nomoi*" which bid that voluntary *homologiai* be *kuriai*. Why "laws" in the plural, a phrase repeated in the next section? In 4.4 Gagliardi will address this question by referring to a passage in Aristotle's *Rhetoric*, where (I argue below) there is no reason to suppose that two hypothetical laws are Athens' laws. In 5.2.a Gagliardi returns to [Dem.] 56. Although he asserts that the whole argument of this speech is that the defendants had violated a *homologia* (and section 1 mentions "a *homologia* to do *ta dikaia*, just things," and both *homologiai* and *sunthēkai* are mentioned in 6 and 11), the plaintiff states repeatedly (6 twice, 7, 10, 11, 12 three times, 14 twice, 15 twice, and so on) that he and the defendants made a *sungraphē*, stipulating the terms of the loan, the ship's route (3, 9 and *passim*), the interest rate (12), penalties (10, 27), and that the ship was collateral (4, 6, 38). In 37 the plaintiff orders the clerk to read this *sungraphē* out in court. He nowhere mentions the phrase "voluntary *homologia*." Moreover, after section 2 not only does he nowhere refer to Attic *nomoi* that voluntary *homologiai* are *kuriai*, in section 48 he tells the dikasts that on that very day, they are legislating (*nomothetein*) whether they "think that *sungraphai* and *homologiai* must be strong (*ischurai*)" rather than *akuroi* (50). This passage suggests that Athens had no such law. Gagliardi also does not bring to bear section 10, where the plaintiff mentions "your laws which order shipowners and supercargoes to sail to the port where they agreed (*sunthōntai*) or be liable to the severest penalties"; section 16, where the speaker demands "not to make *akuron* the *sungraphē* which they [the defendants] also agreed (*homologein*) was *kuria*" (here *kuria* should not mean "binding," because the defendants would never agree to that); section 26 where he says "nothing for us is more *kuria* than the *sungraphē*"; or section 27, where his challenge to the defendant to show that their *sungraphē* was not *kuria* may imply that some agreements were not *kuriai*. Also, section 14 makes clear that the plaintiff is not an Athenian. I shall return to these sections, and to the plural "laws."

5) [Dem.] 48.54 asks how a person is not mad who thinks he does not have to do what he agreed to (*homologein*) and voluntarily made an agreement (*suntithemai*) with someone also voluntarily, and swore. Gagliardi cites this text as attesting "the Athenian law which affirmed the principle of *homologia kuria*" (2). At the opening of the speech (48.9–11), however, Kallistratos says three times that he and Olympiodoros made not a *homologia* but written *sunthēkai* ("agreements") and swore oaths about sharing an inheritance; he names the witnesses to their *sunthēkai*; and he has the clerk read out in court "the *nomos* according to which we wrote up our *sunthēkai*." I agree with Gagliardi that these men's agreement was legal, and not wrongful collusion. Does section 54 refer to "the law on *homologia*"? It does not mention laws, but only *homologein*, *suntithemai*, and that both men were *hekontes*; it calls the offender mad but not a lawbreaker. In section 11 Kallistratos has the

nomos read out specifying how they were to write up their *sunthēkai*. Whether this law specified that such *sunthēkai* were *kuriai* is not indicated. It may be noted that in sections 10 and 22 Kallistratos could have used the verb *homologein* but instead says *koinēi bouleuomesthai*, of his arrangements with Olympiodoros, "we devised everything by mutual agreement." He often refers to what they "swore." The single use of *homologein* in 48.54 seems to be casual rather than legal language. This passage does not attest a law on *homologiai*.

6) In Plato *Symp.* 196c, arguing that all men voluntarily serve Erōs, Agathon quotes Alkidamas of Aiolis that "'our city's kings, the laws,' say that *homologiai* made voluntarily on both sides are just." Again we have plural laws which are not necessarily Athens'. Also, no other source calls voluntary agreements "just." Gagliardi does not discuss this passage again.

7) According to Dinarchus 3.4 (325 BC), "the common law (*koinos nomos*) of the city bids that if someone, having made an agreement (*homologēsas*) in the presence of (*enantion*) the citizens, breaks it, he shall be liable for wrongdoing." This sentence is an aside to the main issue in this case, Philokles' misconduct in the Harpalos affair. What is a *koinos nomos*? Could it (or the passage) imply that Deinarchos is citing no specific law? In 4.4 Gagliardi suggests that the expression may indicate that such provisions were included in various laws. This may (but need not) conflict with his earlier effort to recover the text of "the law on consensual contracts." He objects to the hypothesis of Domingo Avilés in a forthcoming essay, who argues, following Maschke, that Athens had no such general law but only various specific provisions. And why "in the presence of citizens"? *Enantion* has been variously emended. Gagliardi prints but does not explain Lloyd-Jones's emendation (*eis hena tina* for *enantion*), although the next text Gagliardi cites includes the phrase *enantion marturiōn*, "in the presence of witnesses." Why should "citizens" be specified, or is that a slip for "witnesses"? Deinarchos also does not mention *kuria.* Is this "common law of the city," mentioned in 325 BC, different from provisions seen in earlier sources?

8) The speaker of [Dem.] 42.12 (the speech is undated) mentions a law bidding that *homologiai* made "before witnesses" are *kuriai*, in this case an agreed-upon date for exchanging property. This could support (7), that by 325 citizens had to witness at least some types of agreements. Do either or both of these provisions reflect (later versions of?) what Gagliardi calls Athens' law on consensual contracts?

9) In Plato *Crito* 52d–e (first presented in 4.1), imaginary laws tell Sokrates in jail that by escaping he would transgress the *sunthēkai* and *homologiai* that he made with them, "not having been compelled by force, or deceived, or forced to decide in a short time," and that he could have withdrawn his agreement by leaving Athens at

any time over his seventy-year life. Gagliardi considers this an "implicit reference" to Athens' law on consensual contracts. The "not having been compelled…" clauses could but need not imply that under certain circumstances, *homologiai* in Athenian law might not be binding.

After quoting these passages, Gagliardi asks (3) whether they are explained by an Athenian law on consensual contracts, or else by Wolff's theory of *Zweckverfügung*, "disposition for a determined purpose." I agree with him (4.1) in rejecting the theory of *Zweckverfügung*, which he rightly shows will not fit a number of sources (although it does fit, e.g., [Dem.] 56). However, Hyp. *Ath*. 15, quoted at the start of 4.1 and a key part of his refutation of Wolff, expressly refers to a different law than Gagliardi's "contract law," and a special situation recorded from early Hellenistic Ephesos [also in 4.1] need have nothing to do with Attic law. Nonetheless, Wolff arrived at his theory after rejecting the idea that Athens had a law of consensual contracts. Rejecting *Zweckverfügung* will not automatically resurrect that alternative hypothesis, which here Gagliardi does not defend, simply concluding (after n. 25), "We can therefore fix a first point: *homologia* was a contractual accord," a conclusion he rephrases at the start of 4.2: "Attic law recognized the validity of contracts based on pure consent."

All this evidence makes clear that our sources for an Athenian law whose main provision was that whatever *homologiai* people made were *kuriai* are truly meager. Speakers mostly mention it once and in fairly minor contexts, sometimes as asides. [Dem.] 56.48–50 seems to deny that it existed. Litigants often speak not of *homologiai* but of *sunthēkai* or *sungraphai*, which they might not do if they were appealing to a law on *homologia*. We also are ignorant of the verdicts in these cases. In addition, as many scholars including Wolff and Thür have pointed out, as phrased such a law would be unlikely and even absurd. If I agree to buy my neighbor's donkey but the next day change my mind, am I legally bound by my agreement, especially if money and donkey have not changed hands? Gagliardi's first passage (from Hyp. *Ath.*) raises the further issue, what if an agreement is unjust? In 4.4 he will argue that two hypothetical conflicting laws mentioned by Aristotle in *Rhet.* 1375b8–11, one that whatever people agree on (*sunthōntai*) are *kuria*, the other forbidding making illegal agreements (*suntithesthai*), are probably Athenian laws. Yet if so, why would the speaker of Hyp. *In Ath.* 13ff. not have cited this second law, instead of many other less relevant laws which he says he has spent "night and day" searching out? The "law" or "laws" or "common law of the city" on *homologiai* to which various speakers refer, must have included other provisions or restrictions (although apparently not mentioning the justice or legality of agreements) or else been different altogether, which speakers seemingly do not want to go into. Before we can claim that anyone refers to Athens' "law affirming the principle of *homologia kuria*," we need to know what the other provisions of that law were. As Avilés asks in his forthcoming *Mouseion* essay, did any Athenian law

affirm general legal rules, instead of targeting specific issues? Several scholars have noted that in Athens, if you felt that someone had not honored an agreement, you could take him to court. This did not require a general law of contracts.

What then could the clause "however many things one man agrees with another are *kuria*" mean, and whence did it derive? We may consider at least four possibilities. First, very simply, the clause of the *homologia* provision most commonly quoted begins with the word *hosa*, "however many." Might this clause prohibit weaseling out of some part of an agreement? Second, this clause may have been used in various laws (compare the plural *nomoi* mentioned by several sources listed above; Maschke 1926: 165; Avilés, forthcoming) where agreements had to take precedence over other considerations, in particular the risk of foreign jurisdictions in shipping cases. In [Dem.] 56.47, the plaintiff, a non-Athenian, alludes to this problem: what if his case had been brought at Rhodes? Lenders in Athens would naturally be unwilling to take such risks. The plaintiff's frequent references to agreements as binding make sense in the context of the shipping loan that was the basis of this case; those provisos need not be extended to other types of agreements. Third, such a clause may also have been used in special circumstances, for example when people wanted to opt out of legal protections, as again Avilés mentions. The Ephesos inscription that Gagliardi refers to and which Avilés describes in detail, specifies that in the immediate crisis, agreements were to prevail over laws, and includes the clause "what they have agreed on (*hōmologēmena*) is *kuria*." Such uses would explain why most litigants only briefly mention this provision, without saying very much about it. It might seem to help them, without actually pertaining to their case.

Finally, fourth, what does *kuria* mean? Let us return to Isokrates 18.24 ([3] above]), that the dikasts "require that private (*idiai*) *homologiai* must be publicly (*dēmosiai*) *kuriai*" (or "*kuriai* by public authority"). Now, way back when polis institutions were forming, the question might well arise, should public authority enforce agreements made between private individuals? The measure quoted by Isokrates said, not that all private agreements were valid, but that private agreements could be enforced by public authority, a crucial step in the growth of public order. I suggest that *kuria* also had this meaning in Solon's famous law (*Digest* 47.22.4) that whatever demesmen, phratries, religious groups, sailors, dining or burial clubs, pirates or traders agreed on (*diathōntai*) among themselves, were *kuria* unless forbidden by public statute: here *kuria* cannot mean "binding." Classical Athenians rarely referred to this measure because its principle had long been established. But sometimes orators found it useful to mention, because it could look like a general law on agreements. Although not used in Solon's law, the word *homologein* may reflect a time when writing was uncommon and agreements were mostly oral.

Finally, the evidence cited for general legislation regarding real contracts (agreements where in addition, things change hands), specifying that these things must be free of defects, seems also inadequate. The laws cited in Hyp. *Ath*. , for

example that slaves must be free of defects, may imply that there was no such general legislation. In 4.3, having concluded that a "voluntary" provision was probably a part of Athens' legislation on consensual and real contracts, Gagliardi further deduces that this provision implies that objects of agreement must be free of defects. The problem is evident. If two people agree, why must it be said that they agree "voluntarily," what can this mean? However, Gagliardi's inference is not necessary, and would also imply vague and careless legislation. "Voluntary" could mean (for example) "not under compulsion." In the *Crito* passage, Plato specifies that those who agree must not be forced, or deceived or given too little time; the Hellenistic law at Ephesos mentions violence. However, these clauses need not reflect provisions in Attic law (cf. Plato's "too little time"). In case of defects, people could go to court and litigate, without the need for specific laws.

I am not the first to query experts in Roman and modern law about the dangers of introducing foreign concepts into ancient Athenian contexts. The Athenians had no jurisprudence, there was no *diritto attico*, no *dottrina*. Gagliardi often refers to "*il principio* of the *homologia kuria*," while doubting the phrase *homologia kuria*. I doubt the *principio* also. The Athenians did not conceive of *consenso* as a *fonte di obbligazioni*. While aware of these problems (4.2), Gagliardi's essay continues to approach Attic *homologiai* through Roman law (many pages use Latin legal terminology, cf. seven occurrences between notes 35 and 37 in 4.2), and modern civil law. *Homologiai, synthēkai* and the like require a careful, philological understanding of ancient Greek texts and of Greek sociology where law was embedded in social realities more important than it. Contract is a powerful word in Roman and modern law. Attic lawgivers and dikasts typically took a broader view of human relations than the legal formalisms of Roman or modern contracts.

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SECURED CREDIT IN ATHENS: REOPENING THE DEBATE

This paper takes up the topic of secured credit in ancient Athens in order to assess the state of scholarship in the field and make some proposals for gaining a better understanding of this fundamental aspect of the Athenian economy. Ultimately, I will propose that the academic debate regarding this topic be reopened where it has appeared to have gained some closure. I will also make some suggestions about the nature of secured credit in Athens by drawing on analogous models of secured finance and taking into consideration the economic motivations underlying such transactions.

Like the modern economy, the ancient Athenian economy relied on loans to finance commercial transactions. A loan can be unsecured or secured. If unsecured, the lender (or creditor) relies entirely on the ability of the debtor to repay the loan in order to recoup the money loaned (as well as any interest charged). However, if the loan is secured on the debtor's property, the lender has recourse to that property in the event that the debtor defaults. This "security interest" in the debtor's property gives the creditor an additional layer of protection that brings significant benefits to the debtor. First, the reduced risk to the creditor will enable the creditor to charge a lower interest rate. The rate of interest is inversely proportionate to the risk of repayment since the creditor must cover potential losses from some loans by charging higher interest on other loans. This relationship between risk and cost of financing is starkly illustrated by the high cost of maritime loan transactions in Athens.[1] Second, and perhaps more importantly, the creditor may issue a loan where a loan would not have been issued at all in the absence of the security arrangement (since the debtor's lack of creditworthiness creates unbearable risk to the creditor). Although the classic secured transaction is a loan secured on the debtor's collateral, a security interest over collateral can be granted to secure other types of credit (or to secure the performance of any obligation). For example, a manufacturer of shields could sell shields to a buyer on credit (under which arrangement the buyer would pay installments on the purchase price) and this obligation to make payments could be secured on the shields or on any other property of the debtor.[2]

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[1] Cohen 1992:53.

[2] That such financing was provided by vendors in Athens see *id.* at 14 (citing Dem.27.9 among other passages).

The evidence that we have regarding secured transactions in Athens includes Demosthenic speeches (primarily *Against Lacritus* and *Against Pantaenetus* to which I direct much of this paper),[3] *horoi* found in Attica and elsewhere,[4] certain other inscriptions (including a Poletai record), [5] and the comments of the lexicographer Pollux.[6] The speech *Against Lacritus* preserves within it a unique piece of evidence: a highly sophisticated contract documenting a loan transaction and related security arrangement.[7] The *horoi* were stones that were placed on real property in order to identify the property as collateral in a secured transaction (or in an asset-backed transaction of some nature). These *horoi* contain inscriptions that contain little information other than identifying the transaction (most typically with the phrase *prasis epi lysei*) and, in some cases, the parties involved and the amounts of the secured obligations. The problematical nature of this evidence is described further below. At this point, suffice it to say that the challenges presented by this evidence make the task of developing a cohesive theory of secured transactions in Athens such an interesting endeavor.

There were no significant statutes governing secured transactions in Athens.[8] This stands in stark contrast to modern legal systems, such as Article 9 of the Uniform Commercial Code which has been enacted in all fifty of the United States and consists of a complex system of laws that allow for the granting of "security interests" in almost any type of personal (as contrasted with "real") property. The system for the creation and enforcement of security interests provides (1) clear priority rules to resolve disputes among multiple creditors that have a security interest in the same collateral, (2) protections to the creditor in the event that the debtor disposes of the collateral without the creditor's consent, and (3) a panoply of remedies for the creditor to ensure the easy enforcement of security interests in the event of the debtor's default.[9] Under Article 9, once a debtor grants the creditor a security interest, all of the mechanisms and rules of the statute automatically apply to give the creditor a reliable and easily enforceable right to gain recourse to the identified collateral.

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[3] Other speeches that provide helpful evidence regarding secured transactions include *Against Apaturius, On the Estate of Dicaeogenes*, *Against Nicostratus* and Demosthenes' first two speeches against Aphobus.

[4] For the evidence provided by *horoi* see Finley 1952; Thür 2008; Lalonde 1991; and Shipton 2000.

[5] Crosby 1941:14–27.

[6] A comment by Pollux suggests that the terms *hypotheke* and *prasis epi lysei* could be used interchangeably. Poll.8.142. See also Harris 2012: 436.

[7] Dem.35.10–13.

[8] See Finley 1952:16 (stating that "there is no trace of a special body of legislation dealing with security transactions."). The only preserved statute relating to the field of secured transactions is paraphrased at Dem.41.7 and is narrow in its scope in that it merely prevents certain parties to an *apotimema* from bringing suit.

[9] Regarding secured transactions under the Uniform Commercial Code see Miller 2012.

The situation in Athens was quite different. In the absence of a law of secured transactions, the rights of the creditor could only be established by contract or by custom. Contracts were used extensively in Athens to document secured transactions and clarify the rights and obligations of the parties.[10] The frequency of contracts was no doubt increased by the requirement for a written contract for a *dike emporike*.[11] In addition to the contract preserved in *Against Lacritus*, a contract documenting the arrangement between Pantaenetus and his creditors is referred to in *Against Pantaenetus*, and a number of *horoi* also reference agreements. The contractual approach to creating a security interest can provide many of the elements that might otherwise be provided by a statute with one significant exception: a contract between the debtor and creditor does not bind third parties and therefore there are no priority rules that govern contests among multiple competing creditors.

One of the recurrent complications across history in the field of secured transactions is the multiplicity of forms that a secured transaction can take and the multiplicity of terms used to refer to such transactions. Under Roman law, there were three types of security: the *fiducia cum creditore*, the *pignus*, and the *hypotheca*. The *fiducia cum creditore* involved the transfer of possession and ownership of the collateral to the creditor until the underlying obligation was repaid, at which point possession and ownership would be restored to the debtor.[12] In a *pignus* transaction, the creditor would take possession of the collateral, but ownership would remain with the debtor.[13] Only upon the debtor's default would the creditor have the right to sell the collateral and keep the proceeds of the sale to discharge the underlying obligation (provided that certain requirements were met). Finally, a *hypotheca* allowed the debtor to retain both possession of and title to the collateral until default.[14] The variety of security arrangements under the common law in the U.K. and the pre-Article 9 United States was greater and more confusing. A survey of these devices reveals a long list of terms such as chattel mortgage, equitable mortgage, charge, pledge, lien, hypothecation, or conditional sale. Each of these devices had certain applications, strengths and limitations, but the complexity and resulting transactional costs inspired the drafting of Article 9 which created a single device, the "security interest," that replaced the collection of devices that had

[10] In fact, complicated security agreements are used in modern transactions as well despite the existence of statutes that provide for the rights and obligations of the debtor and creditor. Statutes generally allow parties to agree to additional terms that are not addressed by statute, such as what constitutes an event of default, warranties and representations regarding the quality of the collateral and the debtor's rights in the collateral, the duty of the debtor to insure the collateral, etc.

[11] For the requirement of a written contract for admissibility to the *dikai emporikai* see Cohen 1973: 56–57. See also Finley 1952:22 (explaining that the growth of maritime commerce gave rise to more contracts in the field of security).

[12] Mousourakis 2012:177.

[13] *Id*. at 178.

[14] *Id*. at 179.

existed before. This simplification of the law of secured transactions was a rare achievement in the history of commercial law. That said, the law of security is not perfectly unified in the United States despite the enactment of Article 9, since Article 9 only governs security interests in personal property. Transactions involving real property are subject to the laws of mortgage which vary from state to state.

The historical trend of multiple terms describing secured transactions is also found in ancient Athens. A secured transaction is termed in some cases a *hypotheke*, and the verb *hypotithenai* is used to denote the encumbering of collateral (*enechyron*). In other cases, the phrase *prasis epi lysei* is used.[15] And now we come to the heart of the scholarly debate regarding secured transactions in Athens. What was the nature of a *hypotheke*? And what exactly was a *prasis epi lysei*? It is clear that both were asset-backed transactions, but the precise features of these transactions have been debated over the years. Some of the issues that have been debated include the following:

- Which party maintained ownership of the property, the debtor or the creditor?

- Was there a true sale of the property in a *prasis epi lysei*?

- Was the nature of the security "substitutive" or "collateral"? That is, upon default, did the creditor take title to all of the hypothecated property regardless of the amount of the secured obligation (making the security "substitutive") or was the creditor only entitled to retain that portion of sale proceeds equal to the secured obligation with any surplus going to junior creditors or back to the debtor (making the security "collateral")?

- Could the debtor enter into multiple transactions backed by the same asset? If so, how was priority determined among competing creditors?[16]

- How were the rights of the creditor enforced?

- Why do almost all of the *horoi* reference a *prasis epi lysei* rather than a *hypotheke*?[17]

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[15] In the specialized case of securing the return of a dowry upon divorce or securing obligations arising in the context of the lease of an orphan's property, the term *apotimema* is used, but this paper will focus on the more general transactions described by *hypotheke* and *prasis epi lysei.* Regarding the nature of an *apotimema* see Harris 1993.

[16] Regarding the procedures for resolving disputes among competing creditors see Thür 2008:184–186. See also Harris 2006:239 regarding the possibility that the rule of *prior tempore potior iure* resolved priority contests between competing secured parties.

[17] Of the 154 stones that Finley studied, 102 refer to a *prasis epi lysei* (10 refer to a *hypotheke* and 42 to an *apotimema*). Finley 1952: 29. Could there perhaps be some reason why a *prasis epi lysei* was more amenable to transactions involving real property

• Why is the phrase *prasis epi lysei* never used in the extant speeches?

• Why do contracts seem to have been used more frequently in connection with a *hypotheke*?[18]

Twenty-five years ago, Edward Harris published his landmark article "When is a Sale Not a Sale? The Riddle of Athenian Terminology for Real Security Revisited."[19] In this article, Harris squared off against the two leading scholars at the time in the field of secured transactions in Athens, John Fine and Moses Finley, and proposed his innovative theory that the Athenians utilized a single form of security that could be described either as a *hypotheke* or as a *prasis epi lysei* (rather than accepting the traditional view that these terms described two distinct types of transaction). Before discussing Harris's theory, I will provide a brief synopsis of the approaches taken by Fine and Finley.

Fine supported the traditional view that the *hypotheke* was a security arrangement in which the debtor retained ownership of the collateral.[20] In contrast, he viewed the *prasis epi lysei* as a sale of certain assets of the debtor to the creditor with the sale price being the amount given as a loan.[21] The sale was subject to "release" when the debtor repaid the loan in full which resulted in title being transferred back to the debtor.[22] Fine believed that an asset could be subject to a *hypotheke* and then subsequently "sold" by the debtor in a *prasis epi lysei*—in which case the "buyer" would take the asset subject to the existing *hypotheke* (meaning that if the debtor defaulted on the creditor with the *hypotheke*, that creditor could enforce its *hypotheke* against the asset that was owned by the second creditor).[23]

Finley also viewed the *hypotheke* and the *prasis epi lysei* as two different transactions, but he was somewhat more circumspect in his description of the *prasis epi lysei*. His views on this are best represented by his own words:[24]

> Clearly *prasis epi lysei* was not a genuine, complete sale; it is significant that the literal meaning of the term is "sale on condition of release," not "sale with the right (or option) to re-buy" as in the French *vente à réméré*. Nor can it be described as a fictitious sale or a fiduciary sale, as some historians have suggested. Only a hybrid

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as opposed to personal property, *i.e.*, moveables? Might a comparison be drawn to the modern distinction between mortgages (applied to real property) and Article 9 security interests (applicable to personal property)? See Fine 1951:92–93 regarding his theory that *prasis epi lysei* evolved in connection with the use of real property as security.

18 See Finley 1952: 24 (proposing that "the *hypotheke* was somehow more flexible than the *prasis epi lysei* and lent itself more readily to special terms and conditions, hence the more frequent need to commit the agreement to writing.").

19 Harris 1988.

20 Fine 1951:94.

21 *Id.* at 148.

22 *Id.*

23 *Id.* at 150.

24 Finley 1952:35.

> category will fit, such as "security in the form of conditional sale.… The outward form, then, is sale, the essence hypothecation.

In another passage, Finley translates *prasis epi lysei* as "sale on condition of release," but then provides an expanded definition of the term that he believes more fully reflects its true meaning by describing it as a "sale on condition that the seller may release the property from the buyer's claim on it."[25] In other words, the sale of the property to the creditor is nullified when the debtor pays off the underlying obligation.

In his 1988 article, Harris rejected the bifurcated view of secured transactions in Athens and proposed that the terms *hypotheke* and *prasis epi lysei* were used interchangeably to refer to the same transaction. This view is concisely stated in the following passage:[26]

> Previously it was believed that the Athenians had at least two forms of hypothecation, one in which the borrower retained ownership of the security, the other where the creditor gained ownership …. We can now see that the Athenians did not have two or more forms of security, but essentially one type of security where the borrower and the creditor each considered himself the owner of the security.

His theory is further elucidated in this excerpt: [27]

> By hypothecating [a] piece of property the borrower temporarily lost his right to alienate it and the creditor gained the right to seize it if the borrower defaulted. But who owned it? … Without [procedures such as the Roman *mancipatio* or *in iure cessio*] … the Athenians, like Socrates' companions, were not capable of giving a definitive answer to this question. For them the ownership of the security remained in a legal limbo in which there reigned a sort of free-for-all with everyone guided only by his own self-interest, not by juristic precepts.

According to this theory, whether a party characterized a secured transaction as a "hypothecation" or a type of "sale" was a matter of choice and depended on which term best served the party's interests. The question of who owned the collateral could not be answered due to the primitive state of Athenian law regarding the transfer of ownership. This state of "legal limbo" resulted in rhetorical flexibility that allowed each party to the transaction to characterize it as he chose at any particular time. Harris arrives at this conclusion after an exhaustive and careful reading of the evidence which contains a number of instances where the chosen characterization of a transaction benefits the speaker. To restate his theory, the choice of terms when describing a secured transaction was an entirely rhetorical question (although the rhetorical choice was driven by the legal interests of the

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[25] *Id.* at 31.
[26] Harris 1988:370.
[27] *Id.* at 370.

party, i.e., whether it benefited the party to be considered the owner of the collateral or not). Thür made this same observation in his 2007 Symposion paper—an observation that was roundly rejected by Harris in his response.[28] However, I think that Thür's observation is an accurate interpretation of the theory put forth in Harris's article. That Harris sees the interests of the party dictating the choice of terms not only when speaking in court, but also when inscribing *horoi* is reflected in the following passage from his article:

> Since the creditor was the one who had the *horoi* set up, we should expect the inscriptions on them to serve the needs and to reflect his view of the transaction. What were the needs of the creditor? To warn other third parties that the hypothecated property could not be sold, to discourage others from accepting it as security for another loan, and to express his claim in the strongest possible language. All of these needs were well served by the expression [*prasis epi lysei*].

Harris's theory has been widely accepted by a number of scholars over the last twenty-five years, which has brought to some extent a sense of closure to this long-standing problem in Athenian law.[29] Although I cannot in the space of this paper disprove Harris's theory, I find it unsatisfying for a number of reasons. First, the uncertainty regarding ownership would likely be highly unpalatable to any creditor. If the debtor owns the collateral, the debtor would have the right to use the collateral, further encumber the collateral, or even sell the collateral. In contrast, if the creditor owns the collateral, the debtor would not have the right to use collateral without the creditor's consent—and would not have any power to encumber or sell the collateral (under the fundamental doctrine of property law *nemo dat quod non habet*). When a creditor has placed a large sum of money at risk and the creditor is protected only by the value of the collateral, clarity regarding the ownership of the collateral would be a significant issue. Second, while Harris emphasizes the need to rely on the evidence of the speeches, he resolves the complexities of the evidence by proposing a theory that, in effect, discounts the evidence. Rather than trying to explain that the terms *hypotheke* and *prasis epi lysei* refer to different transactions, Harris evades this challenging problem by saying that the language means nothing in a juridical sense and can be used interchangeably to refer to the same transaction. Third, as far as I am aware, the existence of a unified system of secured transactions that provides for a single type of security interest that encompassed all types of collateral is a feat that has not been accomplished by even the most sophisticated legal systems. As I discuss above, the historical tendency is for a variety of security devices rather than a single type. Those legal systems that did have a single device were primitive systems, such as Roman law in its early stage when only a *fiducia cum creditore* was utilized.[30] It could be argued that Athens was primitive in this

[28] See Thür 2008:175; Harris 2008:196n.22.
[29] See Harris 2006:189 for citations.
[30] Mousourakis 2012:177.

respect, but the complexity and sophistication that we see in the lending practices of Athens militates against primitivist arguments.[31] Fourth, there is at least one passage that is inconsistent with Harris's theory that speakers will characterize a transaction in a manner that benefits them. In *Against Lacritus*, the creditor Androcles, who is delivering the speech, uses the terminology of a *hypotheke* when discussing the maritime loan given to his debtors. Under Harris's theory, one would expect a creditor to use language of sale to strengthen his claim to the collateral. This would have been helpful to Androcles who faced competing creditors to whom the debtors subsequently hypothecated the same collateral (which Harris himself recognizes).[32] Moreover, why would Androcles (assuming he drafted the contract) allow for the language of hypothecation to be used in the contract if language of sale would have strengthened his claim to the collateral? Finally, the contention that creditors were free, when inscribing the *horoi*, to choose the language of sale when the language of hypothecation was also possible is hard to accept. Characterizing the transaction as a sale would put the debtor at a disadvantage by potentially preventing him from further encumbering or selling the property. Although creditors have power, debtors also have some leverage in the course of negotiating a transaction and it is hard to believe that debtors would leave this important matter to the discretion of the creditor in so many cases.

Harris may be correct in his theory—but rather than abandoning the Athenians to a primitivist system and diminishing the meaning of the language that they used, we should continue to explore how they may have had a more sophisticated system with multiple security devices that were denoted by different terms. However, before discussing how a more sophisticated system of secured transactions in Athens may have looked, I would like to briefly discuss the impact of Harris's 2012 article on hypothecation on the operation of his previously proposed theory.[33]

In 2012, Harris published a colloquium paper in which he compares Athenian security arrangements to secured transactions in ancient Rome. In this piece, Harris restates much of what he says in his 1988 article, such as explaining that the Athenians had only one form of secured transaction since the lack of "formal modes of conveyance … that would have made it possible to differentiate between different forms of real security."[34] However, Harris's view of secured transactions in Athens appears to have evolved between 1988 and 2012 in that rather than seeing the issue of ownership remaining in "limbo" (as he wrote in 1988), he explains in his 2012

[31] This complexity and sophistication is seen in the careful assessment of risk in landed and maritime transactions, the complexity of the terms of the contract in *Against Lacritus*, and the highly developed banking and lending industry. See, *e.g.*, Millett 1991:17 (saying of his landmark work on lending in Athens that "[o]ne of the main conclusions to emerge from this study should be the way in which a refined and extensive structure of credit can exist apart from developed or developing capitalist institutions.").

[32] Harris 1988:367.

[33] Harris 2012.

[34] *Id.* at 436.

paper that ownership remains with the debtor in both the *hypotheke* and the *prasis epi lysei*, as reflected in the following excerpt:[35]

> [T]he pledge of real security does not transfer ownership to [*sic*: from?] the borrower, who has the right to contract further loans on the same security. A pledge of security in Athenian Law gave the creditor a lien on the debtor's property, which he could exercise only in the event of default, but nothing more.

Again, at the close of the paper, Harris posits that "the Greek form of real security was in its essential features identical to *hypotheca* in Roman Law," i.e., the creditor took a security interest in the collateral while ownership and possession remained with the debtor.[36]

If Harris now views ownership as clearly remaining with the debtor in a *hypotheke* and *prasis epi lysei*, this undermines his 1988 explanation of why the language of hypothecation would be used in some cases and the language of sale in other cases. Harris's theory in 1988 was that the uncertainty of ownership allowed each party to characterize a given transaction as either a sale or a hypothecation depending on whether the party wanted to give the impression that he owned the collateral or not. If ownership clearly resided with the debtor, then the "legal limbo" that allowed for this rhetorical wordplay did not exist.

This state of affairs brings us full circle to a study of secured credit in Athens published in 1949—before Fine, Finley or Harris published their works on the subject—written by a Greek scholar, I. A. Meletopoulos.[37] In his article, Meletopoulos concludes, as does Harris in his 2012 paper, that in the case of both a *hypotheke* and a *prasis epi lysei* the debtor retained ownership of the collateral.[38] Fine raises two objections to this theory, which objections can be raised anew with respect to Harris's view of a unitary device of security with ownership remaining with the debtor. First, why would the language of sale ever be used if ownership was to remain with the debtor? Second, why would the same type of transaction be referred to by different terms? As a discipline, it seems that we stand not far from where we stood in 1951.

At this point, I hope to have provided reasons to reopen the debate regarding the nature of secured transactions in Athens. I will now make some observations about the evidence that has come down to us on this issue and propose some theories that may contribute to our understanding of this area of Athenian law.

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[35] *Id.* at 439. It makes no sense that "the pledge of real security does not transfer ownership *to* the borrower" since the borrower would own the collateral upon pledge, so I assume this is a typographical error and that the text should read "*from* the borrower," which is substantiated by the broader discussion in the paper.

[36] *Id.* at 440.

[37] Meletopoulos 1949.

[38] *Id.* at 66–67.

I will begin with Demosthenes's speech *Against Lacritus* which deals with a maritime transaction in which the creditors issued a 3,000 drachma loan on the security of the jars of wine to be purchased with the money (as well as on any other return cargo).[39] The language used in the agreement is the language of hypothecation[40] and the agreement provides, among other things, that (1) the debtors were not to borrow additional money secured on the cargo,[41] (2) the cargo was to be delivered to the possession of the creditors upon return to Athens,[42] (3) if the debtors defaulted, the creditors had the power to sell the cargo or give the cargo as security,[43] (4) if the proceeds of the sale following default did not discharge the loan obligation, the creditors had recourse to the debtors' other property in order to recover the deficiency,[44] and (5) if the ship was wrecked but the cargo was saved, the cargo would become the property of the creditors.[45]

The terms of this contract provide clear evidence that the Athenians could create security interests in collateral and that the debtor could maintain possession (unless otherwise agreed). The contract, as well as evidence from the body of the speech, indicates that ownership of the collateral is vested in the debtor unless otherwise agreed. In the contract, the ownership of the collateral only passes to the creditors in the event that the ship is wrecked and the cargo saved. This must mean that ownership otherwise remained with the debtor. Moreover, there would be no need for a prohibition on further hypothecating the cargo if the debtors did not own the cargo (since one could presumably only hypothecate one's own property).[46] However, the debtor's ownership of the collateral is somewhat clouded by the speaker's words in section 37 where he refers to the one hundred Cyzicene staters (which in the speaker's opinion constituted a portion of the return cargo) as "our property," i.e., the creditors' property.[47] However, this turn of phrase was likely a rhetorical ploy and does not outweigh the other evidence pointing to ownership remaining with the debtors.

Regarding the question of whether the security was substitutive or collateral in nature, the evidence is not as clear—although, on the whole, I think that the evidence weighs in favor of collateral security. On the one hand, the fact that multiple security interests could be created in the same assets indicates that the

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[39] Dem.35.10.
[40] Dem.35.11. See also Dem.35.18, 21.
[41] Dem.35.11.
[42] *Id.*
[43] Dem.35.12.
[44] *Id.*
[45] Dem.35.13.
[46] In the course of the speech, the speaker complains about the fact that the debtors violated the agreement by borrowing additional funds from a certain Aratus of Halicarnassus on the security of the cargo. Dem.35.22–23. This action is treated merely as a breach of agreement and not as a conversion of the creditors' property.
[47] Dem.35.37.

security was collateral. Substitutive security would strongly discourage multiple security interests since one creditor keeps all the collateral for himself upon default (rather than selling the collateral and keeping only those proceeds needed to discharge the outstanding obligation).[48] On the other hand, while the agreement provides for the recovery of a deficiency, it makes no mention of the return of any surplus to the debtors. Perhaps this was to be implied, whereas the right to seek the deficiency in the manner specified in the agreement could not be as easily implied.[49]

The richest speech regarding asset-backed financing in Athens is Demosthenes' speech *Against Pantaenetus*, a speech delivered in a *paragraphe* by a certain Nicoboulus.[50] The transactions are in the form of a *prasis epi lysei* and therefore this speech provides critical evidence regarding the nature of this transaction. The speech concerns the repeated sale of a workshop and the slaves who worked the shop to process silver ore extracted from a public mine. Pantaenetus leased the right to work the mine, but needed to acquire the use of the workshop and slaves to operate the venture. Rather than purchase the workshop (including the slaves) himself, he leased the workshop from other parties who owned the workshop. The first owner of the workshop appears to have been Telemachus, who sold the workshop to Mnesicles for 105 minas (with 45 minas of this amount contributed by Phileas and Pleistor).[51] Pantaenetus leased the workshop from Mnesicles and his partners while they were the owners. Mnesicles subsequently sold the workshop to the speaker, Nicoboulus, and his partner, Evergus, for the same amount previously paid, 105 minas (with Nicoboulus contributing 45 minas and Evergus 60 minas). Pantaenetus leased (*misthoutai*) the workshop from Mnesicles for 105 minas.[52] The speaker explains that in addition to the lease amount (which he explains was equivalent to the interest (*tokos*) accruing on the principal), the agreement provided that the workshop would be subject to "release" (*lysis*) to Pantaenetus at a stated time.[53] The speaker mentions that Mnesicles purchased the workshop "for Pantaenetus," which is also likely true of Nicoboulus's purchase as well.[54] With the result of causing some confusion for the reader, the speaker also characterizes the 105 minas paid for the workshop as a "loan" (*edaneisamen*) to Pantaenetus.[55]

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[48] That said, one might argue that the prohibition on prior or subsequent hypothecations could reference substitutive hypothecations since the creditor stood to lose the collateral in its entirety to prior secured parties and would face potential challenges from subsequent secured parties who believed they had the better claim.

[49] For differing views on whether security in Athens was "substitutive" or "collateral" in nature see Finley 1952:115; Thür 2008:173–174; Harris 2008:189–194.

[50] Dem.37.

[51] Dem.37.4.

[52] Dem.37.5.

[53] *Id.*

[54] *Id.*

[55] Dem.37.4.

When Pantaenetus failed to pay rent as it became due, he was ejected from the workshop by Evergus, which ejection Pantaenetus claimed was wrongful and resulted in various damages.[56] In the wake of this ejection, two new purported creditors came forward claiming that they had issued loans to Pantaenetus secured on the workshop.[57] The nature of the transactions entered into by these new creditors is uncertain. MacDowell suggests that they helped finance the purchase of the workshop from Telemachus by contributing 101 minas (which would have brought the purchase price to 206 minas).[58] However, whether the claim of these new creditors was valid at all is questionable since they are described, in the opinion of Nicoboulus, as "speaking all manner of falsehoods."[59]

Faced with this complicated situation, Nicoboulus was given the choice of either (1) paying off the new creditors by giving them the amounts owed to them by Pantaenetus or (2) accepting payment from the creditors for his and Evergus's interest in the workshop.[60] After choosing the latter, the new creditors demanded that when they paid Nicoboulus that this constitute a sale with Nicoboulus and Evergus being the sellers (*prateres*).[61] Nicoboulus and Evergus agreed with this and sold the property. The property was subsequently sold by these new creditors for three talents and 2600 drachmas (or 206 minas).[62]

In his 2012 paper, Harris argues that the transactions described in *Against Pantaenetus* are similar to a Roman *hypotheca*, which means that Pantaenetus maintained ownership of the workshop throughout and that the language of sale was merely a rhetorical device used by Nicoboulus.[63] He explains that Nicoboulus chose this language of sale because if this were a true lease transaction, the ejection of Pantaenetus by Evergus would have been lawful upon the failure to pay rent (whereas the failure to make interest payments did not permit ejection in a hypothecation).[64] The single inscription cited by Harris as a basis for this conclusion about the right to rejection only upon the failure to pay principal is not on its own

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[56] Dem.37.7.

[57] Dem.37.12.

[58] MacDowell 2004:174. MacDowell arrives at the sum of 206 minas because it is equivalent to the amount that the workshop was ultimately sold for at the end of the string of transactions. It is also possible that Pantaenetus himself contributed his own money to the purchase of the workshop and sought only partial financing from Mnesicles and his partners. Fine proposes yet another theory: that Pantaenetus was the original owner of the workshop and set this chain of events into motion by borrowing 105 minas from Telemachus to cover operating costs and secured the loan on the workshop by means of a *prasis epi lysei*. Fine 1951:147..

[59] Dem.37.12.

[60] *Id.*

[61] Dem.37.13.

[62] Dem.37.31. Nicoboulus tells us that the new creditors claimed that the workshop was worth far more than the 105 minas that Nicoboulus and Evergus had paid. Dem.37.12.

[63] Harris 2012: 437–38.

[64] *Id.* at 438.

particularly convincing. Moreover, although the word "interest" (*tokos*) is used to describe the monthly payment owed by Pantaenetus, it seems to have been something more than that. The arrangement was for Pantaenetus to make a monthly payment that would, at the end of the term of the lease, result in the transfer of ownership to Pantaenetus. The monthly payment therefore must have constituted something more than interest, otherwise Nicoboulus and Evergus would never have recouped their principal.[65] Harris also bases his conclusion that Pantaenetus owned the workshop on the fact that Pantaenetus granted a security interest in the workshop to the new creditors.[66] However, this presumes that Pantaenetus entered into the transaction with these new creditors after Nicoboulus and Evergus purchased the workshop. It is not clear that this is so. As discussed above, MacDowell, for one, proposes that these creditors gained their interest in the workshop as part of the financing involving Mnesicles.

One cause of confusion regarding the nature of the transaction arises when Nicoboulus states that Pantaenetus urged him to be the seller of the workshop since, he says, nobody would accept Pantaenetus as the seller. Finley takes this as evidence that either Nicoboulus or Pantaenetus could have sold the property—thus indicating uncertainty about who had ownership.[67] Finley theorizes that Pantaenetus urged Nicoboulus to be the seller because the seller provided a warranty of title and nobody would have faith in Pantaenetus's ability to stand behind such a warranty.[68] The idea that either Pantaenetus or Nicoboulus could act as seller is hard to accept. This once again requires that ownership was not clear and that either had the ability to transfer title. If, *per* Harris, ownership remained with the debtor, then it is not clear how the creditor could have possibly been the seller. One way out of this conundrum could lie in the analogue of the Uniform Commercial Code which allows the debtor to sell collateral free of the security interest with the consent of the creditor—and allows the creditor to sell the collateral upon the default of the debtor. Another solution, as Fine proposes, is the possibility that Pantaenetus urges Nicoboulus to sell the workshop because he (Pantaenetus) simply could not do so since he did not own the workshop.[69]

We have yet to resolve the question regarding the nature of the transactions described in this speech. To dispose of the language of sale that plays such a prominent role in this speech is a drastic step to take.[70] A more reasonable approach

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[65] Even if the arrangement were a loan secured by a *hypotheke*, interest-only payments would not have enabled the creditors to ever recapture the principal.

[66] Harris 2012:437.

[67] Finley 1952:34.

[68] *Id.*

[69] Fine 1951:148.

[70] That the language of sale was actually used by the parties in the course of the negotiation of these transactions is supported by Nicoboulus' statement that the "new creditors" demanded that Nicoboulus and Evergus be sellers (*prateres*). Dem.37.13. I do not believe

is to consider what types of transactions involving a sale best fit the evidence and the economic motivations of the parties. To assist in this task, it may be helpful to consider other models of asset-backed financing. Helpful analogues may be the sale-leaseback transaction and the financial lease, which are common tools used today to allow a company to realize the equity in property it owns and to assist a company in financing the use of capital-intensive equipment (such as aircraft). In a sale/leaseback transaction, the debtor is the original owner of the property and needs to raise money by selling the property to a bank, which then leases the property back to the debtor (with the title reverting back to the debtor upon the expiration of the lease term, either at no additional cost or at the payment of an agreed-upon price). A financial lease enables a company to acquire the use of an asset (such as an aircraft) by arranging for a finance company to purchase the asset from a third party for the purpose of leasing it to the debtor (and ultimately transferring title to the debtor). In addition to realizing financial benefits from these transactions, the lessee may also receive certain accounting or tax benefits.

How might these models of asset-backed finance involving leases shed light on the transactions described in *Against Pantaenetus*? If we adopt MacDowell's suggestion, that the "new creditors" were part of Mnesicles's financing syndicate (which is one of multiple ways in which they may have figured into the string of transactions), then the transactions could be described thus in terms of a financial lease: Pantaenetus needed financing to gain the use of the mining workshop because he did not have sufficient funds himself. At Pantaenetus's request, Mnesicles's syndicate purchased the workshop for 206 minas from the original owner, Telemachus, in order to lease the property (and ultimately transfer ownership of the property) to Pantaenetus. The members of the syndicate (Mnesicles, Phileas, Pleistor, and the "new creditors") would have owned the property in a sort of joint tenancy (each owning an undivided share of the property in proportion to their contribution to the purchase price). Nicoboulus and Evergus then purchased that ownership share held by Mnesicles, Phileas, and Pleistor (perhaps being led to believe by Mnesicles that they had purchased the total ownership rights). The purchase of the workshop would have been subject to the lease with Pantaenetus.[71]

But what were the terms of the ultimate transfer of title to Pantaenetus? Would the workshop be transferred to Pantaenetus at the end of the lease term for no additional cost? Or did Pantaenetus have an option (or obligation) to purchase the property at the end of the term? If so, at what price? If the lease payments were truly merely equivalent to interest on a loan (*tokos*), that would suggest that Pantaenetus

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that Nicoboulus is putting words in the mouths of the "new creditors," but is repeating what was actually said.

[71] That the successive purchasers of the workshop took title to the workshop subject to the lease to Pantaenetus is evidenced in Nicoboulus's statement at Dem.37.29–30 where he says that he sold the workshop to the "new creditors" on the same terms that he had acquired the property from Mnesicles.

would have to pay the purchase price to take title to the workshop (since the capital amount of the loan would never be paid off by the interest-only payments). If this were true, it would no longer look like a financial lease since the rent payments would not go toward the purchase of the workshop. If the lease payments included some amount that went toward the purchase price, then Pantaenetus may have been able to purchase the workshop at the end of the lease term for little or nothing. This makes more sense from an economic perspective, but runs contrary to repeated statements that the rent was equivalent to an interest-only payment.[72]

The many questions surrounding the nature of these transactions and the nature of secured transactions in Athens in general are not resolved in this paper. Nor was that the goal of this paper. I have merely attempted to reopen the debate about a fascinating aspect of the Athenian economy that I believe had been closed too soon. If a solution to these questions is to be found, not only must a new analysis of all the evidence be undertaken, but various models of asset-backed finance from various legal systems, both ancient and modern, should be considered in order to find an analogue that could shed light on Athenian practice. Consideration of the historical development of the Athenian economy and its attendant transactional devices could also help explain the eventual existence of different forms of secured transactions.[73] Finally, the economic costs and benefits to the parties should also be considered when determining the viability of a proposed solution. These benefits need not be limited to raising money for the debtor and facilitating the purchase or use of property, but may take other forms. For example, there may well have been tax benefits that flowed from participating in certain transactions. The sale and leaseback of property is frequently undertaken today in order to reduce tax liabilities. Perhaps tax advantages could have motivated similar transactions in Athens. For example, if an Athenian citizen wanted to avoid taxation or a liturgy, he could perhaps reduce his visible (*phaneros*) wealth by selling his property in a *prasis epi lysei*, concealing the money received in the sale, and then leasing the property from the buyer. The speaker in *Against Phaenippus* alleges that Phaenippus used this very ploy (or something similar) so that he would not be forced to exchange estates with the speaker in an *antidosis*.[74]

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[72] "Interest-only" loans are not impossible (having made an appearance in the recent history of the United States housing market), but are financially ruinous for the borrower.
[73] Fine uses a historical approach in the development of his theories. Fine 1951:90ff.
[74] [Dem.] 42.5,28.

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GERHARD THÜR (VIENNA)

OWNERSHIP AND SECURED CREDIT IN ATHENS: A RESPONSE TO MARK J. SUNDAHL

Concentrating on two court speeches Sundahl gave an excellent paper on secured credit in the fourth century BCE Athens. In an innovative way and using clear technical language, he combines legal and economic arguments. Nevertheless, I wouldn't say that he has reopened the debate. The debate over the nature of Greek ownership was never closed. And the nature of Greek security depends on how we understand Greek ownership. In my opinion ownership of and security on real property were protected in exactly the same way: by formal intruding and formal ejecting followed by a tort action against the intruder, a *dikē exoulēs*, resulting in a penalty of double the value of the property.[1] Based on this observation, in a short response I will focus mainly on one question, fundamental to Sundahl's paper: who was owner of the encumbered assets? I appreciate his conclusion that for the Athenians there was no 'legal limbo' about the debtor's or creditor's ownership. Nevertheless I should think the problem is not to be solved by adopting our modern category of absolute legal title. In Athenian legal thinking ownership was an elastic position, differentiated by function. So, quite correctly, both creditor and debtor might have called themselves 'owners'.[2] For the same reason the modern category of ownership seems not to be helpful in distinguishing *hypothēkē* and *prasis epi lysei* along the lines that in the former device ownership of the collateral remained with the debtor, while in the latter one it vested in the creditor. And because of the unitary procedure of enforcing possession by formal intruding and ejecting, either device was 'substitutive' in nature (Verfallspfand); but I willingly accept Sundahl's conclusion that *hypothēkē* and *prasis epi lysei* were open to wide variations towards 'collateral' devices (Verkaufspfand) by contractual agreements according to the economic aims of the parties.

As a preliminary remark I would warn against cursorily comparing Greek surety systems with the Roman ones as some scholars before Sundahl already have done. In the oldest type, *fiducia cum creditore contracta*, the debtor transferred ownership to the creditor but—*pace* Sundahl—frequently retained possession of the collateral,

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[1] Thür 1982, and 2003: 58–60 (and p. 60–77: according to Dem. 32 encumbered maritime cargo kept in a storehouse is treated like real property).

[2] See Thür 2008: 175 (and the response of E. M. Harris, p. 189–200, not meeting the point).

especially in the case of real property; this device was substitutive in nature and vested the debtor with much more benefits than he needed for security. So the parties had to achieve collateral compacts through additional agreements.[3] Out of these agreements Roman jurists developed the later types of *pignus* and *hypotheca*, which by definition finally became collateral in nature. In either type, according to economic interests, possession could remain with the debtor or not. However, our knowledge of this development is blurred because Justinian's lawyers systematically interpolated the word *pignus* for *fiducia* used in the classical legal texts. Nevertheless, the rules preserved in Justinian's Digest—along with traditional indigenous devices—provided models for the modern European statutes on real security up to the Uniform Commercial Code of the United States. Returning to ancient Greece I would stress that in my opinion *hypothēkē* and *prasis epi lysei* were not a single device of security, but rather different types of it, however governed by uniform—one may call them primitive—dogmatic principles, though fully adequate to a complex and sophisticated economic system.

I. Sundahl first deals with Demosthenes 35, *Against Lakritos*, a clear instance of *hypothēkē* securing a sea loan of 3,000 drachmai. Nowhere in the speech is a *prasis* for security interest mentioned. With good reason: no debtor can encumber unspecified and varying personal goods he will trade with in a future overseas enterprise by 'selling' them to the creditor in advance. For securing the sea loan only the *hypothēkē* form meets the economic situation: all goods bought with the credited money, sold at further stopovers and replaced by others, and at last safely arriving at the appointed port of destination will be bonded to the creditor. As Sundahl convincingly suggests, only real property was object to *prasis epi lysei* (n. 17), and only here terminology sometimes varied according to rhetorical purposes with *hypotithenai*.

Of more interest than the type of contract chosen by the parties is the juridical nature of the transaction. After recapitulating five core provisions of the sea loan contract put down in a *syngraphē*, entirely preserved in paragraphs 10–13 of the speech, Sundahl holds: 1) "that the Athenians could create security interests in collateral and that the debtor could maintain possession (unless otherwise agreed)," and 2) "that ownership of the collateral is vested in the debtor unless otherwise agreed;" and finally he is not sure about 3) "whether the security was substitutive or collateral in nature."[4]

1) The first is evidently correct. Due to the generally prevailing 'cash sale principle' (goods for money), an Athenian creditor became mortgagee by handing over the amount according to the particular *syngraphē* of the loan containing all further specifications on interest, risk, repayment and object of and agreements on

[3] For the *pactum fiduciae* see Kaser / Knütel 2014: 162–63.
[4] Sundahl, discussion at nn. 46–48.

security interests.[5] In our case, after payment, the 3,000 drachmai of the sea loan were incorporated into any personal property purchased overseas with this money wherever the property might have been located; and in this economic situation only the debtor and not the creditor could be possessor of the collateral. The crucial question of security interests in collateral is not whether the Athenians could create them or not, but rather how the creditor could enforce them. In the text of the *syngraphē* there are clear hints on how it worked, and in Demosthenes 32, *Against Zenothemis*, we can study the practice of such a case—each of these is neglected by Sundahl. The contract stipulates: "the debtors are to return the loan within twenty days after arriving at Athens and up to payment they will admit the creditors control over the collateral, which must not be liable to any (other) seizure."[6] At-risk creditors got control over a hypothecated ship immediately after entering port, and usually creditors whose loans were secured on cargo had it unloaded and kept safe in a storehouse under the parties' exclusively joint access during the first twenty days.[7] In case of any controversy between mortgagees the formal acts of seizure, with all their penal consequences, took place at the storehouse, and on the debtor's default the creditor simply could withdraw the assets in order to effectively sell or hypothecate them (Dem. 35.11–12).

2) When studying the question of who was 'owner' of the collateral one must keep in mind this kind of enforcement in the case of the successful end of the enterprise, strange enough to a modern lawyer. Challenging the category of 'absolute title' adopted by Sundahl I would suggest a different understanding of the passages, on which he bases his view that ownership was vested in the debtor. This is only partially correct. We have to reassess both types of situation: on the one hand when the merchant was trading on a safe voyage, and on the other hand after shipwrecking.

First, the provision prohibiting the taking of additional loans secured on the cargo (οὐδ' ἐπιδανείσονται, Dem. 35.11) seems to indicate debtor's ownership: "since one could presumably only hypothecate one's own property."[8] Since for both creditor and debtor the economic aim of a sea loan was to make profit on overseas trade, the merchant was permitted even to vest ownership in his customers; only by contract (and in his own interest) was he bound to replace the collateral he sold by purchasing other assets (and hopefully selling them at higher prices at his further stops). In this way, on board the vessel the financier's security interest was kept in balance. Just as selling the collateral, so too further hypothecating must have been lawful. However, security interest altered this balance, and at the port of destination

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5 Thür 2008: 173 with further discussion.

6 Dem.35.11: παρέξουσι τοῖς δανεισάσι τὴν ὑποθήκην ἀνέπαφον κρατεῖν, see also par. 24–25, 37; misleading Sundahl (text at n. 42): "the cargo was to be delivered to the possession of the creditors."

7 Dem. 32.14; Thür 2003: 60 n. 16, 64–5.

8 Sundahl, text at n. 46.

the financier was facing further creditors.[9] This was the reason why the provisions forbidding *epidaneizesthai* and requiring *anepaphon kratein* were inserted into the *syngraphē* (Dem. 35.11), so that the debtors at least were personally liable for transgressing them. Nevertheless, against the strong position of the debtors stood an equally strong one of the creditors: when the collateral arrived at Athens no formal act of conveying ownership to them was necessary. The creditors just kept the collateral in joint possession with the debtors for twenty days and on their default the creditors themselves were legally entitled effectively to sell or hypothecate it. Furthermore, disputes between competing creditors were carried out exactly in the same way as those between owners. Therefore, quite correctly the creditors could also speak of the collateral as of "their own."[10] On the sea voyage their strong legal position was just temporarily suspended.

Second, in the event that the ship is wrecked and some of the pledged cargo is saved, the *syngraphē* stipulates: ἐὰν δὲ τι ἡ ναῦς πάθῃ … σωτηρία δ' ἔσται τῶν ὑποκειμένων, τὰ περιγενόμενα κοινὰ ἔστω τοῖς δανείσασιν (Dem. 35.13). This doesn't mean: "ownership of the collateral only passes to the creditors in the event…" (of shipwreck and) "…otherwise remained with the debtor."[11] In fact, the clause belongs to risk management: if the ship with all her cargo gets lost, the creditor (financier) also loses all his money invested in that enterprise; according to the clause σωθέντων τῶν χρημάτων (par. 11) all provisions on returning the sea loan together with its high interest are voided when the ship and her cargo doesn't reach the port of destination. However, if at least some of the collateral has been saved, as anticipated by the clause of paragraph 13, the debtor (merchant) shall not be unjustly enriched. Therefore the value of the saved assets belongs to the financier; the assets themselves, far away from Athens, do not concern him; and the merchant—on a different vessel and perhaps headed to a different final destination—may continue his voyage in order to trade and seek profit from these and other assets. In the contract the clause created nothing other than a secured title for compensation up to a certain amount, and if the merchant was not ready to pay, the financier, through his agent, was permitted to seize and to sell the merchant's other property up to the value of the saved assets "wherever the Athenians have the

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[9] This was the case in Zenothemis *vs.* Demon, Dem. 32; here not Protos, the debtor, further hypothecated, but rather the *naukleros* Hegestratos encumbered Protos' cargo to Zenothemis (for details see Thür: 2003: 70). As I demonstrated in 2008: 185, irrespective of the question of ownership, the Greeks addressed the problem of further hypothecating real property by using the clause ὅσῳ πλείονος ἄξιον (however much more it is worth) conceded by the creditor. In our case, by forbidding *epidaneizesthai* the creditors expressively stated that they would not agree to such a transaction.

[10] Expressively said of the 100 Cyzicene staters (Dem. 35.36–39) representing a small part of the 3,000 Athenian drachmai paid down (a possible connection with shipwreck, par. 33, is concealed in par. 36).

[11] Sundahl, text after n. 45.

right of seizure."[12] In this way an agent could bring home the scraps of a miscarried business venture. In the clause the word κοινά means that our two co-financiers, Artemon and Apollodoros, jointly authorized only one agent to accompany the enterprise for controlling the debtors and interfering in his masters' favor.[13] If compensation was deferred until the merchant's return to Athens, the creditor could sue the latter for 'depriving' him of his goods by filing a *dikē blabēs*.[14] In any case, the assets themselves were not subject of the action.

Summing up, the modern term 'ownership' cannot delineate satisfyingly the legal situation. a) On the voyage, on the one hand the merchant was entitled to sell effectively the encumbered goods he had bought with the loan, on the other hand the agent of the financier had to agree to a jettison in a storm (both in par. 11). b) Collateral saved after shipwrecking was no more bound by the provisions on performance of the sea loan because the provision "if the goods arrive safely" (at the port of destination, par. 11) was unfulfilled. From the short 'ownership' clause (par. 13) and the specific circumstances of overseas enterprise one can infer, on the one hand that the merchant still could effectively convey ownership of the (former) collateral, and on the other hand that the agent of the financier could enforce a claim for the value of the saved objects. Depending on the merchant's facilities overseas the financier could enjoy his 'ownership' only in a very restricted way. c) Finally, when arriving at the port of destination the functional splitting of the ownership vanished without any legal act of conveying. During the first twenty days the debtor, who had brought the encumbered cargo in, was to enclose it in a storehouse under his and the creditors' exclusively joint access. When the debtor was solvent the creditor released the collateral against cash; otherwise the debtor had to find a purchaser for his goods. When he did so, one can imagine that the three involved persons met at the storehouse: the debtor cashed the price and settled his debt, and both debtor and creditor released the collateral to the buyer. There was not even one moment of insecurity remaining. According to the cash sale principle, the three participants conducted two acts of 'performance against counter-performance': the first one 'money for goods' between buyer and seller/debtor vesting ownership in the buyer conditional on the second one, 'money for release' between debtor and creditor vesting full ownership in the debtor—but more likely all three of them made these arrangements at the same effect with a banker in his office. Once again: modern ownership is a tool much too rough for explaining this most effective mechanism.

3) Regarding the next question—whether the security of the sea loan was substitutive or collateral in nature—I totally agree with Sundahl's conclusion. By

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[12] See the opposite clause in Dem. 35.13; for Athenian influence in international seafaring see Dem. 32.11, 14 (Cephallenia; Thür 2003: 69).

[13] Normally each creditor delegates one person (*epiplous*, or as in par. 11 *symplos*, par. 33 *symplein*) for accompanying the voyage; see Gofas 1989.

[14] See the crucial word ἀποστερεῖν in Dem. 35.42, 46, 50 (cf. 26).

agreeing upon the creditors' duty to sell the collateral at the market price and upon their right to recover the deficiency from the debtors, the parties created a practicable device of meeting collateral security. Sundahl is only worried about missing a clause about returning the surplus to the debtors. I don't think this was to be implied tacitly within the contract (text at n. 49). Rather, this situation would not occur when the collateral returned to Athens. Within the first twenty days the debtors by themselves would do their best to sell the goods at a profit and satisfy the creditors. Only if they couldn't manage to sell the goods at a price at least covering the amount of loan and interest would they default, and then no surplus would occur at all.[15]

Until now I have tried to demonstrate how skillfully, despite the 'primitive' juristic devices, Greek practice could meet the demands of a highly-developed economy. The 'cash sale principle' resulting in the consequences that on the one hand security was substitutive in nature and on the other the money lent was 'incorporated' in varying encumbered assets, provided the basis of sophisticated agreements. By concentrating on ownership Sundahl resolved only a minor part of the problems. In this response my additional considerations encompass only contracts securing sea loans; other types of *hypothēkai* remain outside my consideration.

II. The second speech Sundahl addresses is Dem. 37, *Against Pantainetos*, and he achieves most interesting and innovative results. In this response I cannot discuss the whole very complicated case.[16] Very confusingly the speaker, a financier named Nikoboulos, is referring to a chain of *praseis epi lysei* and maybe real sales of a workshop and slaves processing silver ore; for the listeners ownership always remains in the dark. Pantainetos, the debtor and his opponent, had leased a public mine from the state, which he exploited by digging ore and smelting silver. First I will roughly sketch my idea of the juridical background of the transactions and then bring forward an objection against Sundahl's astonishing interpretation that Pantainetos concluded a "financial lease"[17] with Euergos and Nikoboulos, who for exactly this purpose had bought the property from a syndicate around Mnesikles.

In order to run his risky business of exploiting and producing silver Pantainetos needed steady credit from a chain of capital providers. As surety he used the shop and the slaves—in my opinion continuously belonging to him—by selling them *epi lysei*, always on certain, sometimes probably overlapping time limits. The first creditor (mentioned in the speech as first and only "owner") was Telemachos, who in fact may have obtained only a surety by *prasis epi lysei* at a share of 12,000 drachmai (probably together with further creditors). Then followed Mnesikles,

[15] Only deficiency also in Syll.^{3} 672.70 (160/59 BC); for the first mentioned clause on surplus in a Greek sea loan document (P.Vind.Gr. 40.822, 2nd cent. AD) see Thür 1987.

[16] See also my note Thür 2006.

[17] Discussed by Sundahl after n. 71.

Phileas, and Pleistor. Next were Euergos and Nikoboulos, who bought, expressly mentioned "*epi lysei* on a certain time limit," a share of 10,500 drachmai together with the so called "new" creditors, and thereupon followed the persons who in a new deal bought the whole shop for 20,000 drachmai—I think this sale was *epi lysei* too because I cannot imagine that Pantainetos would have stopped his mining business at that point. From all these creditors Pantainetos leased back the shop for a rent of 1% per month (12% per annum) of their shares. This was the usual and modest interest of a loan and therefore called *tokos* (par. 5). Through these leases the creditors got additional securities because they could just expel the debtor, Pantainetos, from the shop when he defaulted on the monthly due rent.[18] That was what Nikoboulos' partner, Euergos, finally did. Against a simple 'buyer *epi lysei*' the creditors had no right to expel the debtor because of overdue interest; they would have had to wait until Pantainetos defaulted on the principal due at the fixed time limit.

The crux in understanding the case is that on the one hand, the speaker, Nikoboulos, never tells the whole story continuously; he isolates the facts and we have to put them together like a puzzle.[19] On the other hand, Nikoboulos uses the term πρατήρ (literally seller) ambiguously: one time as "seller" and another time as "warrantor for the sale,"[20] confusing us and an Athenian audience inexperienced in business life as well; his aim was to depict Pantainetos as an enormously rich and greedy man whose claim for compensation is completely inequitable. I think that the 'seller *epi lysei*' always was Pantainetos himself, and that the former creditors mostly acted as warrantors in regard of the shares they gave up to the new creditors as Nikoboulos did.[21] Providing a *pratēr* or *bebaiotēs* was an essential clause in any real sale contract, and this gave the creditor an additional security in a *prasis epi lysei* too.

This highly hypothetical reconstruction overall opposes Sundahl's analysis. Further discussion will go on. However, one single point explicitly seems to contradict his interpretation of the contract as "financial lease:" Pantainetos' monthly payment covered exactly the normal interest of a loan, 12% per annum (par. 5). If he was not owner of the shop, he never would have obtained ownership by this kind of transaction;[22] and a supposed "interest-only" loan[23] secured on this asset required Pantainetos' ownership. This discussion needs a broader basis; in securing credits Greek businessmen (and women) created most surprising resorts.[24]

[18] For expelling in land leasing see Behrend 1970: 131–2.

[19] It is not the place to do it here; for Dem. 32 see Thür 2003: 75.

[20] Ambiguously for example in Dem. 37.9, 13; warrantor in 11, 32.

[21] Dem. 37.32: γενέσθαι πρατῆρα καθ' ὃ συνέβαλον ἀργύριον.

[22] Admitted even by Sundahl, text at n. 72.

[23] Considered in n. 72

[24] See for example the discussion about a credit secured on a house in Corfu, *SEG* 53 503 (Korkyra, 200–150 BC), Vélissaropoulos-Karakostas 2006 and Harter-Uibopuu 2006 (see also *SEG* 54 572, and 56 614).

III. However these problems will be solved, the two court speeches studied by Sundahl indicate some differences between *hypothēkē* in overseas trading and *prasis epi lysei* in mining business: on the one hand a sea loan was secured only by the continuously varying assets that the merchant carried on board of a vessel the parties had agreed upon. No contract for encumbering (or even 'selling' *epi lysei*) each single piece of cargo to the creditor was necessary; through an accompanying agent the financier had control of the cargo and no guarantor was extending additional personal security to him against a third party's claim of ownership of the property.[25]

On the other hand, the loans for running a mining enterprise were secured on real property. Here the danger existed that third persons would claim ownership of the land and the creditor would lose his right of seizure. However, this problem existed in every sale transaction: the buyer took the risk of having paid the price—in vain—to a non-owner. Therefore when land was sold, additional personal security through a *pratēr* was stipulated and inserted into the standard form.[26] This form of *prasis*, developed into '*epi lysei*', was used for hypothecating real property too. Here the *pratēr* warranted that the creditor could successfully enforce his claim by seizing the land unopposed by any other person seizing it as owner or creditor.[27] The generally prevailing 'cash sale principle' (here: land for money) and the unitary procedure for owner and creditor to enforce possession enabled economically satisfying devices of land credit. The same principles governed credit on sea cargo too. Therefore my conclusion is: *hypothēkē* and *prasis epi lysei* do not differ in substance; nevertheless they are different types of security carefully attuned to specified economical needs.

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[25] In overseas trading the problem was not, that the assets for sale belonged to a third person, but rather that the debtor further hypothecated them; see above, n. 9.

[26] Thür 2008: 176.

[27] Thür 2008: 185–6.

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ATHINA DIMOPOULOU (ATHENS)

Ἄκυρον ἔστω: LEGAL INVALIDITY IN GREEK INSCRIPTIONS

In modern law,[1] invalidity clauses are frequent[2] in most areas of law: constitutional law, family law, successions, property, contracts, corporate law and procedural law.[3] In contract law, invalidity or nullity means that a contract, or a particular clause in it, is regarded as non-existent.[4] Legal invalidity in ancient Greek legal texts is expressed, among other terms, by ἄκυρος, ἄκυρον ἔστω, ἀτελὲς ἔστω.[5] Ἄκυρος, in Liddell-Scott, is the semantic opposite of κύριος or κυρία, translating as *without authority*. Regarding laws, decrees and sentences it means more particularly *invalid, uratified, obsolete*.[6] Ἄκυρον ποιεῖν or καταστῆσαι, is to *set aside*.[7] Νόμους ἀκύρους χρωμένη is understood as *not enforcing the laws*.[8] When the term is characterizing a person (ἄκυρον ποιεῖν/καθεστάναι τινά) it means *not having authority*.[9] The verb ἀκυρόω means to *cancel, set aside* and it is used with both ψήφισμα (decree)[10] and ἀποφάσεις (decisions).[11] However, several aspects of legal invalidity in the Greek legal sources still remain to be investigated. Was invalidity limited to contracts and to the protection of private parties or was the public interest also taken into consideration? Were some contracts *ipso facto nulli*, while others had to be declared null and void by a court of law? Was there a distinction equivalent to

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1 In modern law a distinction is made between absolute and relative nullity. Nullity is absolute when there is contravention of a rule of law relating to public order, i.e. involving matters of public policy; nullity is relative when the interest protected is only of a private nature. Where absolute nullity is concerned, anyone can allege nullity and the courts must automatically invoke nullity. Where relative nullity is concerned, only the person protected can invoke nullity.

2 The Greek Civil Code contains 168 references to the term "άκυρο" in the sense of invalid.

3 Greek Constitution, art. 14.9, 57.1.ε, 73.2.

4 As a general principle, an invalid contract is considered as not having taken place, according to article 180 of the Greek Civil Code.

5 IG V,1 1390.

6 And. 1.8 (ψήφισμα/decree), Pl. Lg. 954c (δίκη/trial), Lys. 18.15 (συνθῆκαι/agreements).

7 Is. 1.21 (διαθήκη/testament).

8 Th. 3.37.

9 X. HG 5.3.24.

10 Din. 1.63.

11 D.S. 16.24.

our notion of absolute and relative nullity? Could nullity have an *ex tunc* ("from the outset") effect, or were legal acts only rescinded *ex nunc* ("from now on")? Could nullity be used at court as either a sword or a shield? Was there an action available for annulment? And who could invoke nullity? Can we speak of the equivalents of a *lex perfecta, imperfecta* and *minus quam perfecta*[12] regarding Greek legal rules? The attempt to collect information on some of these questions proves a difficult task, taking into account not only the lack of a systematic and uniform Greek legal theory, but also that legal invalidity remained largely unspecified even by Roman law, posing several terminological and conceptual problems for the Roman jurists as well.[13]

In Greek inscriptions, statutory prohibitions invested with the sanction of invalidity concern a wide variety of cases, throughout periods and geographical areas.[14] Occurrences of the ἄκυρον clause can be broadly distinguished in three categories: a) judicial (or similar) decisions and rights, b) legal statutes (international agreements, laws, decrees, decree propositions, entrenchment clauses), c) private legal acts (bilateral contracts, testaments, manumissions). In absence of a clear doctrine on legal invalidity, the epigraphic instances of ἄκυρον may offer some indications on the concept and on the operation of legal invalidity in ancient Greek legal thought and praxis.

1. Nullity and Nullification of Judicial Decisions and Related Rights

Trials and Sentences

During a trial, the casting of valid votes[15] in a copper urn led to a (valid) judicial sentence.[16] The rule of majority[17] was considered an expression of the democratic

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[12] Jolowicz, H.F. 1932: 87, "A *lex perfecta* forbids an act and invalidates it if done; a *lex minus quam perfecta* does not invalidate the forbidden act but imposes a penalty on the person doing it; a *lex imperfecta* forbids the act but neither invalidates it nor imposes a penalty."

[13] See Zimmermann, R. 1990: 679, according to whom, about 30 different Latin terms survive in Roman sources to describe invalidity, such as *nullum*, *nullius momenti*, *non esse*, *invalidum*, *nihil agere*, *inutile*, *inane*, *irritum*, *imperfectum*, *vitiosum*. See p. 680: "All that one may perhaps say by way of generalization is that the label 'invalidity' usually implied that a transaction was denied its natural (or typical) consequences. As a rule, this type of 'civilian' invalidity could be invoked by anybody and at any time. But there were exceptions." On the evolution of the *quasi nullus* concept, see Quadrato, R. 1983: 79–107.

[14] This paper is far from exhaustive; it does not cover other terms and expressions that may denote invalidity, or the invalidity of contracts as a result of violence, mistake, duress, influence or fraud. On these see Biscardi, A., 1982:136–151.Velissaropoulos, J. 2011:220–222.

[15] Each judge had two tokens, one for conviction and one for acquittal. He cast one, the valid (*kyrios*) token in an urn made of copper, the invalid (*akyros*) one in an urn made of wood, according to the procedure described in the Athenaion Politeia 68.3–69.1.

principle applied in a court of law. In the absence of any right of appeal, invalidating judicial decisions was viewed as something highly irregular.[18] As Demosthenes (in a *graphe nomon me epitideion theinai*) states, "*I take it that everybody will agree that to invalidate judicial decisions is monstrous, impious, and subversive of popular government*" (24.152). The nullification of trials and sentences ex post should though be possible, according to Plato (Leg. 954b6), in case of a verdict obtained after obstructing by force the other party or his witnesses from attending the trial. Verdicts happened also to be overturned in cases of change of the political regime under which they had been rendered.[19]

The invalidity of irregularly obtained sentences was a clause included in some *symbolon* agreements by which two cities agreed upon the dispute resolution procedures among their citizens. The earliest epigraphic occurrence of an invalidity clause comes in fact from the *symbolon* agreement of Athens with the city of Phaselis in Lycia (IG I^3 10, SEG 35:2, dating from 469–450 B.C.), where it is stated that in case a trial is brought against any citizen of Phaselis, his conviction contrary to the terms of the jurisdiction agreement shall be invalid (ε]ἰ μὲν καταδικάσ[θέντι ηε δίκ]η ἄκυρος ἔστω [ἄν δέ τις παραβ]α[ί]νηι τὰ ἐψη[φισμένα).[20] In a decree of Miletos (Miletos 54, c.1, lines 5–13, dating from 228/7 B.C.) accepting the judgment of *synedroi* concerning the sharing of citizenship with Cretans, in view of the reconciliation that took place, it is forbidden for anyone to be brought to trial regarding past events and if so, the trial shall be invalid (ἡ δίκη ἄκυρος [ἔστω]).

Invalidating an otherwise binding judicial or arbitrary decision could come in two ways: *de iure,* if a different decision was reached on the same dispute and *de facto,* if one of the parties was allowed not to comply with the prior decision. In 164 B.C., after Sparta refused to comply with a decision regarding a territorial dispute with Megalopolis and appealed to the Achaean League, the latter imposed a fine on Sparta, which still refused to give up the contested territory and offered to submit to Roman arbitration.[21] In their decision,[22] the arbitrators stress that their aim is not to

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[16] On the use of κύριος and ἄκυρος in this process see Velissaropoulos-Karakostas J. 2001, 107–108.

[17] On the majority principle see Maffi, A. 2012: 21–31 and on judicial votes Todd, S.C. 2012: 33–48.

[18] The nullification of trials by citizens is considered by Plato as a sign of corruption of the city. See Crit. 50b4.

[19] Andocides (1.87–88) states that in the Reconciliation Agreement of 403/2 B.C. the legal decisions and arbitrations obtained under democracy were considered valid, official decisions under the Thirty, invalid.

[20] How such an annulment of a trial or sentence would take place is not clear. An (unorthodox) nullification of the Amphictyonic decisions by Philomelus is recorded by Diodorus (16.24): he simply erased the convictions he considered unjust from the *stele*. Destroying the publicly displayed sentences equaled to having them nullified by force, since without such record the decisions were practically nonexistent.

[21] Ager, S., 1996: no 137.

render previous judgments ἄκυρα, confirming thus the principle of *res iudicata* (i.e., a matter already judged). Invalidity is also mentioned as a *de facto* result the arbitrators wish to avoid, by not allowing the Spartans to invalidate previous decisions by bringing forth new accusations.[23] In another arbitration, between the cities of Melitaia and Narthakion (ca. 140 B.C.), regarding a long territorial dispute (which is uncommon, as Ager points out,[24] in being conducted by the Roman Senate itself), the senatorial decree regarding this conflict underlines that invalidating previous rulings, decided according to the law, is something that must not be done lightly.[25] A different kind of annulment concerning a Roman sentence is mentioned in an honorary decree from Kolophon (ca. 130–110 B.C.) for a benefactor named Ptolemy. The city is grateful, among many other reasons, because when one of its citizens was condemned in a Roman court in the province (of Asia), the benefactor undertook an embassy to the (Roman) general and managed to have the condemnation annulled (ἄκυρον ἐποίησεν),[26] saving thus both the citizen and the city's laws.

The annulment of prior decisions and pending accusations, as well as of debts, are extraordinary measures corresponding to times of crisis, in view of an imminent danger for the *polis*. In a law of the city of Ephesos, voted in preparation of an expected invasion by the King of Pontus Mithridates (86/85 B.C.), after the Ephesians pledge allegiance to the Romans, in order to rally the population, they decide, in what constitutes a complicated amnesty arrangement,[27] to cancel all debts of those registered by the sacred or public treasurers as debtors and *atimoi,* to waive accusations and penalties of those registered as accused for religious or public offences or any kind of debt, to proclaim void any execution against them[28] and,

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[22] IvO 47, lines 16–21: μήτε τὰ κεκριμένα ἄκυρα . . . αἵ τ' ἐν τοῖς Ἕλλασιν καὶ συμμάχοις γεγενημέναι πρότερον κρ[ί]σεις βέβαια[ι] καὶ ἀκήρατοι δ[ι]αμένωντι εἰς τὸν ἀεὶ χρόνον (not to invalidate the verdicts... so that the decisions rendered previously among the Greeks and their allies remain valid and non-reversed forever).

[23] IvO 47, lines 40–41: εἰ] τὰ κριθέντα παρ' αὐτοῖς μηκέτι γίνοιτο ἄκυρα δι' ἑτέρων ἐγ[κλημά]των (if the cases judged are not invalidated by new accusations).

[24] Ager, S., 1996: no 157.

[25] IG IX, 2 89, lines 28–32: ὅσα κεκριμένα ἐστὶν κατὰ νόμους, οὓς Τίτος Κοΐγκτιος ὕπατος ἔδωκεν, ταῦτα καθὼς κεκριμένα ἐστίν, οὕτω δοκεῖ κύρια εἶναι δεῖν, τοῦτό τε μὴ εὐχερὲς εἶναι ὅσα κατὰ νόμους κεκριμένα ἐστὶν ἄκυρα ποιεῖν. (... all the verdicts rendered according to the laws issued by the Consul Titus Quinctius, all of those will remain valid as they have been judged, in order not to facilitate the invalidation of verdicts rendered according to the law).

[26] SEG 39:1243, II.1, lines 51–58.

[27] Arnaoutoglou, I. 1998:105–107. Harter-Uibopuu, K. 2014: forthcoming.

[28] IEph 8, lines 29–33: καὶ ἠκυρῶσθαι τὰς κα[τ'] αὐτῶν ἐκγραφὰς καὶ ὀφειλήμ[ατα], τοὺς δὲ παραγεγραμμένους πρὸς [ἱερ]ὰς καταδίκας ἢ δημοσίας ἢ ἐπίτειμα ἱερὰ ἢ δημόσια ἢ ἄλλα ὀφειλήματ[α] ὠτινιοῦν τρόπωι παρεῖσθαι πάντας καὶ εἶναι ἀκύρους τὰς κατ' αὐτῶν πράξεις.

furthermore, to cancel and render void all religious and public prosecutions unless concerning boundary and inheritance disputes.[29]

Invalidity of Legal Action

Ἄκυρον ἔστω in international treaties sometimes refers to a limitation of the right to bring suit[30] which may be either absolute or occur after a set period of time, the equivalent of a statute of limitations. In the treaty of *sympoliteia* between Smyrna and Magnesia ad Sipylus (dated around 245–243 B.C.), the citizens of both of cities would swear an oath to abide by the treaty terms. The parties seal their peace agreement by also declaring a priori invalid any potential accusation among their citizens regarding war crimes.[31] In the decree of the city of Nagidos concerning the *isopoliteia* with Arsinoe (included in a letter of Thraseas to this city, dated after 238 B.C.), all trials among citizens of both cities must take place within the year following the crime, a period after the lapse of which they are declared invalid.[32] Equal to statute of limitations is also the sense of ἄκυρον in the treaty between Delphi and Pellana, where (according to the proposed reconstitution of the missing lines) the right of reference of a claimant to a third party (*anagoge*) is invalid if not exercised within the time limit set by the treaty.[33]

2. Legal Statutes and Invalidity Clauses

The second broad category of ἄκυρον clauses in inscriptions concerns the invalidity of legal statutes—that is, international treaties, laws, decrees and proposed decrees.

International Treaties

In general, international treaties remained valid as long as they were respected by all parties involved, in spite of the usual clauses aiming to secure the parties' adherence

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[29] IEph 8, lines 41–43: λελύσθαι δὲ καὶ εἶναι ἀκύρο[υς] τάς τε ἱερὰς καὶ δημοσίας δίκας, εἰ μή τινές εἰσιν ὑπὲρ παρορισμῶν χώρας ἢ δι' ἀμφ[ισ]βητήσεως κληρονομίας ἐζευγμέναι·

[30] On limitations of actions, see Jones, J. W. 1956: 233–234.

[31] Smyrna 14, lines 41–43: συντελεσθέντων δὲ τῶν ὅρκων τὰ μὲν ἐγκλήματα αὐ|τοῖς τὰ γεγενημένα κατὰ τὸμ πόλεμον ἤρθω πάντα καὶ μὴ ἐξέστω [μηδὲ] ἑτέροις ἐγκαλέσαι περὶ τῶγ κατὰ τὸν πόλεμον γεγενημένων μή[τε]| διὰ δίκης μήτε κατ' ἄλλον τρόπομ μηθένα· εἰ δὲ μή, πᾶν τὸ ἐπιφερόμε[ν]ον ἔγκλημα ἄκυρον ἔστω·

[32] SEG 39:1426, lines 49–52: ἔστω δὲ αὐτοῖς πάντων τῶν ἀδικημάτων [ἐξ οὗ ἂ]ν χρόνου γένηται τὸ ἀδίκημα προθεσμία ἐνιαυτός, ἐὰν δέ τις [διελθ]όντος τοῦ χρόνου γράψηται δίκην ἢ ἐγκαλέσηι, ἄκυρος ἔστω αὐ[τῶι ἡ δίκη]· (... and the statute of limitations for all crimes shall be one year starting from the time the crime was committed, and if someone after this period initiates a trial or accusation, this shall be invalid.)

[33] FD III 1:486 (Staatsverträge III 558), II, A.1, line 19: αἰ δέ [κ]α μὴ ἀνάγηι ἐν τῶι χρόνω[ι τῶι γεγραμμένωι ὁ ἔχων]|[ά ἀναγωγὰ ἀτελὴς καὶ ἄκυρ]ος ἔστω.

to their terms "forever."[34] Their annulment was rarely decided in legal terms,[35] but came as a consequence either of the lack of commitment of the contracting parties, or of their straightforward violation, or by concluding a new or conflicting treaty with a third party.[36] One rare example of annulment is included in the *isopoliteia* agreement between Messene and Phigaleia (dating from 240 B.C.), where, in case of non-abidance of the citizens of Phigaleia to the pre-existing agreements between Messene and the Aitolians, the current agreement shall also be invalidated.[37]

Invalidation of Official Decisions and of City Laws

An invalidation clause (although not using the word *akyros*) appears, already, in what is considered to be the earliest legal inscription from Greece, the law of Dreros in Crete limiting the iteration of the office of the *Kosmos.*[38] All actions of the *Kosmos* taken under the illegal tenure will be annulled (μηδὲν ἥμην) and he will also be subject to a fine.[39] This invalidity of official acts seems to have had an immediate effect. Invalidity thus aims, early on, to safeguard citizens from illegal decisions of public officials. Later on, the law against tyranny and oligarchy of Ilion (dated from 281 B.C.) forbids any manipulation of the city's legislation (κακοτεχνῶν περὶ τοὺς νόμους) "as in a democracy." The decisions obtained in this way, even if the city's highest authorities and the *boule* are involved, are declared a priori invalid and the person responsible for this shall be punished as the instigator of an oligarchy.[40]

Unenforced Laws as Invalid

According to Cleon, in one of the arguments advanced in the Mytilenean Debate (427 B.C.) in favor of the harsh punishment of the Mytileneans for their revolt against Athens, if laws are not properly applied they are rendered invalid.[41] Later,

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[34] On entrenched provisions regarding alliances and treaties, see Schwartzberg, M. 2004:315–318, 322–323.

[35] On the (different) question of annulment of older decrees as a result of treaties of alliance or other positive relationships, see Rubinstein L., 2008: 116.

[36] Lys. Περὶ τῆς δημεύσεως τῶν τοῦ Νικίου ἀδελφοῦ ἐπίλογος, 15.4.

[37] IPArk 28 = IG V,2 419: εἰ δέ κα μὴ ἐν]μένωντι οἱ Φιαλέες ἐν τᾶι φιλ[ίαι τᾶι πὸτ τὼς Μ]εσανίως καὶ Αἰτωλώς, ἄκυρος ἔ[σστω ἄδε ἀ ὁμολο]γία. In this instance, ἄκυρος ἔστω holds the sense of nullification of the agreement operating *ex nunc* (from now on) and concerns all contracting parties.

[38] Youni M., 2010:152–153.

[39] Nomima I.80: ἆδ' ἔϝαδε | πόλι· | ἐπεί κα κοσμήσει | δέκα ϝετίων τὸν ἀϝτὸν | μὴ κόσμην, | αἰ δὲ κοσμησιε, | ὀ(π)ῆ δικακσιε, | ἀϝτὸν ὀπῆλεν | διπλεῖ | κᾶϝτὸν ἄκρηστον | ἦμεν, | ᾗς δόοι, | κὸτι κοσμησιε | μηδὲν ἥμην. ὁμόται δὲ | κόσμος | κοῖ δάμιοι | κοῖ | ἴκατι | οἱ τᾶς πόλ[ιο]ς.

[40] IMT Skam|NebTaeler 182, I.1, lines 111–116.

[41] Th. 3.37. On citations regarding the laws rendered valid (κυρίους) only if actually applied by the courts, see Harris E. M. 2013: 99. On the reasons proposed on why the Athenians did not repeal unenforced laws, see Wallace, R.W. 2012: 117–123.

the verb ἀκυρόω is used of a law, in the meaning "to be disregarded," in the Greek transcription of the *lex romana de piratis persequendis*[42] found in Delphi (ca. 101–100 B.C.),[43] ordering the Roman Governors of the Provinces of Macedonia and Asia to take measures against pirates and to insure the collection of public revenues.

Conflicting Laws as Invalid

Direct invalidation of enactments referred to as νόμοι or θεσμοί are rare.[44] One such example is a law of Kyme (Aeol.), dating from the third century B.C., regarding a serious crime and judgments rendered by the *dikasopoi*.[45] If any other law included any clause contrary to this one, it is declared invalid.[46] This term did not aim at a particular statute, but resolved the matter of potential conflicts of laws by stating the supremacy of this legal rule over any conflicting one.

Invalidation of Decrees and Petitions

According to a law passed in Athens in 403/2 B.C., a decree was declared invalid if it conflicted with a law.[47] New legislation sometimes incorporated provisions that nullified previous or inconsistent statutes,[48] but, most often, this was done by giving instructions to physically remove or destroy the older *stele* containing the law.[49] This was the simplest method for invalidating a city's decision *de facto*. In an honorary decree of Priene for Euandros Sabyllou from Larisa in Thessaly (ca 300/290 B.C.),[50] the invalidity clause not only prohibits any proposal that would

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[42] Giovannini, A. – Grzybek, E. 1978: 33–47.

[43] FD III 4:37, C, lines 15–16.

[44] On this matter see Rubinstein L., 2008: 115.

[45] The law allowed the person guilty of the crime to be declared atimos and killed by anyone.

[46] IK Kyme 11, lines 10–13: αἰ δ[ὲ (μὴ) — — —]ι [ἄτιμος θνασ]κέτω, κτεινέτω δὲ αὐτὸν ὁ θέλων· ὁ δὲ ἀ[ποκτείναις]ι [εὐάγης ἔστω κ]αὶ καθαρός· αἰ δέ ποι ἐν νόμῳ τινὶ ἄλ[λο τι γράφηται]ι[ἐνάντιον τῷ ν]όμῳ τούτῳ, ἄκυρον ἔστω· (If not ... he may be killed with impunity and his killer shall be free from pollution and undefiled. If anything contrary to this law is written in another law, it shall be invalid.)

[47] Hyp. Ath. 3.22: καὶ ὁ μὲν Σόλων οὐδ' ὃ δικαίως ἔγραφεν ψήφισμά τις τοῦ νόμου οἴεται δεῖν κυριώτερον εἶναι. See MacDowell 1962: 128.

[48] In Athens, the decree of Isotimides, which barred anyone who had confessed to an act of impiety from entering the temples and the agora, invalidated a former decree guaranteeing indemnity for disclosures. This decree was the basis for Andocides' conviction and exile from Athens. When the Amnesty of 403 B.C. finally allowed Andocides to return home, he was put on trial in 400 for violating Isotimides decree; he won an acquittal with his defense speech *On the Mysteries*, proving that Isotimides' decree had been annulled, And. 1.8: ἢ περὶ τοῦ ψηφίσματος τοῦ Ἰσοτιμίδου, ὡς ἄκυρόν ἐστιν.

[49] For examples, see Sickinger, J. P. 2008:103, n. 21, 22.

[50] Priene 46, lines 7–10: [ἐὰν δέ τις περὶ τ]ού[το]υ τοῦ ψηφίσματος ἢ τῆς στή̣ι[λης τῆς νῦν ἀ]πο[κα]θισταμένης ἢι ἄρχων προτιθῆι[ἢ ἰδιώτης, συ]γ[κα]ταλύειν βουλόμενος τὴν δωρε[ὰν τοῦ δή]μου, ἄ̣[κ]υρα ἔ̣σ̣τ̣ω· (If anyone, magistrate or private person,

invalidate the current decree, but also guarantees the physical integrity of the *stele* containing it, which had been just re-erected.

In general, in decrees, *akyron* is used in the sense of nullifying the legal effects of an act.[51] The act is not "non-existent," but its effects are revoked. On one occasion, a petition to dedicate a statue in a public space is invalidated by a decree. The decree concerns the *temenos* of Asklepeios in Rhodes (date unknown); it prohibits anyone from submitting a petition to erect a statue or other dedication at a certain area of the *temenos*, in order not to obstruct the walks, and policemen are instructed to remove to another place any dedication erected in spite of the interdiction.[52] Sometimes, a specific action or proposal that may diminish the impact of a donor's benefaction may also be declared "invalid." In a dedication inscription from Cos (dated from the end of the first or beginning of the second century A.D.), a donor prescribes that no other statue may be erected on the same platform and that any attempt to contravene this shall be immediately "null and void."[53]

Entrenchment Clauses

The most frequent occurrence of the ἄκυρον term in decrees concerns entrenchment clauses, provisions that make decisions unamendable,[54] which, as Rubinstein has correctly noted,[55] can be read as "a *guarantee issued to a particular individual, group of individuals, or to another community*" regarding decisions that directly affect them.[56] The decree of the city of Nagidos concerning the *isopoliteia* with Arsinoe invalidates any proposal by an archon or a rhetor that contests the land

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makes a proposition regarding this decree or the stone which is now restored, aiming at undoing the demos' donation, this shall be invalidated.)

[51] Invalidity concerned actions. A judicial verdict could, although indirectly, annul a previous refusal to act, as it illustrated in the speech by Lys. 9.19. The speaker (Polyaeunus) had been fined by the generals for slander, a fine which was subsequently reported to the treasurers to collect as unpaid debt, the latter refusing to do so, on the grounds (if we are to believe the speaker) that it had been irregularly and maliciously imposed. The speaker is asking the jury not to "invalidate the decision of those who have acted on a better, and on a just, consideration" (μήτε τοὺς βέλτιον καὶ δικαίως βουλευσαμένους ἀκύρους καταστήσητε).

[52] Suppl. Epig. Rodio 1, lines 10–22.

[53] Iscr. di Cos ED 257, frg. bcd.1, lines 3–30.

[54] On entrenchment clauses in Athens, see Schwartzberg, M. 2004: 311–25, who maintains that "the Athenians used entrenchment in highly restrictive contexts: in certain financial decrees and in alliances and treaties. ... exclusively for narrow, strategic purposes in both the international and the domestic contexts, and did not extend them to laws regulating the democracy."

[55] See Rubinstein L., 2008:117–118, identifying and categorizing a total of 80 examples of entrenchment clauses.

[56] IC II v 35.

given to the Nagidians.[57] In Thasos of early imperial times, the same clause guarantees measures regarding the donation of lands.[58]

When a future decree proposal (γνώμη) is declared invalid, this invalidates the whole decree voting procedure.[59] Detailed terms in entrenchment clauses[60] often mention both private persons (ἰδιώτης) and city officials (such as ἄρχοντες, ῥήτορες, ἐπιμήνιοι) who may be involved, the bodies before which such propositions may take place (ἐμ βόλλα μηδὲ ἐν δάμω) as well as all the steps leading to the adoption of new decisions (such as εἴπηι ἢ πρήξηται ἢ προθῆι ἢ ἐπιψηφίσηι ἢ νόμον προθῆι), orally or in writing (ἢ ὑπογραμματεὺς ἀναγνῶι ἢ γραμματεὺς ἀναγράψηι) sometimes adding, for the sake of exhaustivity, the annulment of decisions "in any other possible way" (τρόπωι τινὶ ἢ παρευρέσει ἡιοῦν). The legislation process being an expression of the sovereignty of the demos, the invalidity clause attempts to act as a kind of limitation, for future times, of the operation of the majority principle,[61] in order to ensure that no valid decision shall be reached in the future regulating the same matter in a different way, although the extent to which this measure was indeed effective is dubious. Examples of rules that include a detailed enumeration of all possible ways of obtaining amendments, declared a priori invalid, include the law of Teos regulating the salaries of instructors for the youth[62] and a decree of Chios forbidding the use of funds for other purposes than the ones prescribed.[63]

In entrenchment clauses, invalidity is either explicit or may be implied, if (only) penalties or curses are directed against anyone who tries to annul the current provisions.[64] Because invalidity was apparently not always thought to be sufficient to deter citizens from introducing changes in the future, penalties were sometimes provided[65] in order to add a financial risk and ensure the effectiveness of the entrenchment clause. Combined sanctions (invalidation plus fine) are included in sacred laws[66] from the Asklepieion of Kos (dated from the end of the first century

[57] SEG 39:1426, lines 39–45.

[58] IG XII, Suppl. 364, lines 7–20.

[59] Cf. the use of ἄκυρον in the Athenaion Politeia, on the lack of sovereignty of the Boule to decide by itself. Arist. Ath.Pol. 45.4: τούτων μὲν οὖν ἄκυρός ἐστιν ἡ βουλή· προβουλεύει δ'εἰς τὸν δῆμον, καὶ οὐκ ἔξεστιν οὐδὲν ἀπροβούλευτον οὐδ' ὅ τι ἂν μὴ προγράψωσιν οἱ πρυτάνεις ψηφίσασθαι τῷ δήμῳ. κατ' αὐτὰ γὰρ ταῦτα ἔνοχός ἐστιν ὁ νικήσας γραφῇ παρανόμων.

[60] On entrenchment clauses and different measures aiming to preserve important resources and to guarantee compliance with relevant rules in late Hellenistic and imperial times, see Harter-Uibopuu, K. 2013 (forthcoming).

[61] The interdiction and nullity clause for future decree propositions may have constituted, in Athens, grounds for a *graphe paranomon*, although we have no such concrete example.

[62] Chios 27, lines 5–8.

[63] Teos 41, lines 40–46.

[64] On examples of such inscriptions, see Sickinger, J. P. 2008: 104, n. 24, 25.

[65] See Rubinstein, L., 2012:329–354.

[66] IK Kalchedon 10, lines 10–13.

B.C.), concerning the sale of the priesthoods of Aphrodite Pandamos and Pontia[67] and of Asklepios, [68] invalidating any decree proposing a different use of the *thesauros* of the sanctuary. The penalties are not linked to any concrete damage (βλάβη) that may be incurred by any party,[69] to any demand for restitution, or to any unjust enrichment or transfer of property, but rely upon the (implied) public interest and the collective (moral) damage of the community or the sanctuary, in case the current regulations are changed.[70] The combination of legal invalidation and penalties thus introduces to Greek law the concept of what latter would be defined by the Romans as a *lex perfecta,* namely, the inclusion of both a sanction and the nullity of anything contrary to a particular clause of the law, as well as the interdiction of future amendments of the statute. The earliest Greek occurrences of such provisions date from the early fourth century B.C., in an honorary decree from Athens for Sthorys the Thasian (dated 394/3), where invalidation combined with penalties is threatened against anyone "nullifying" these honors.[71] Where penalties are combined with invalidation, in some decrees concerning matters of particular importance for the city, the collection procedure for the fines was also defined ad hoc, as in a fourth century B.C. citizenship decree from Thasos[72] and in a decree of Miletus[73] (205/4 B.C.) instituting a public *eisphora* (contribution) for the citizens in order to cover public deficit.[74] The penalties associated with the invalidation clause may also be escalating according to the importance of the matter regulated or the person honored by the decree. A decree by the Nasiotai, bestowing honors to Thersippos (ca 315 B.C.) for his benefactions in connection with Alexander's campaigns, invalidates all future amendments in combination with severe penalties, such as fines, threats of *atimia* and treason charges for acting against the democracy, plus a curse against anyone proposing their abolition.[75]

Invalidity clauses may also be included in decisions issued by private associations, forbidding that any of the honors bestowed upon their benefactors may be "postponed or cancelled"[76] and this, as it is stated in one decree, "in view of the

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[67] SEG 50:766, back face.1, lines 20–24.

[68] SEG 51:1066, frg. ab, lines 31–35.

[69] On *blabe* initially limited in cases of damages included in the law, see Velissaropoulos-Karakostas, J. 1993:191.

[70] On the notion ἀδικεῖν τὴν πόλιν ("injure the polis"), see Velissaropoulos-Karakostas, J. 1993:91–94.

[71] IG II² 17, lines 31–33.

[72] IG XII 8, 267, lines 11–16. On this inscription see Fournier, J. 2012: 360–361. Cf. also, the invalidity clause in IG XII,8 264 from Thasos (beginning fourth century B.C.).

[73] See Migeotte, L. 1984: no 97.

[74] Miletos 41 Lines 24–29.

[75] IG XII,2 645, b.1: lines 32–58.

[76] Examples include an honorary decree from Rhodes (second century B.C.) of the κοινὸν τὸ Ἁλιαδᾶν καὶ Ἁλιαστᾶν for their benefactor Dionysodoros IG XII,1 155, face III.85, lines 95–100.

importance of making an example of the benefaction."[77] Invalidity in entrenchment clauses in relation to endowments is aimed at preventing any different use of the funds or of the property donated by the benefactor,[78] as in the testament of Epicteta (dated around 210–195 B.C.).[79] It also guarantees that no alteration of the exact terms of use of the donation[80] will take place and nullifies any transaction that may jeopardize the capital donated.[81] The invalidity clause prohibiting future decree proposals that differed was aimed at preserving the benefactor's instructions and will (κατὰ τὴν τοῦ ἀναθέντος βούλησιν), as is clearly stated in an honorary decree from Eretria (ca 100 B.C.).[82]

Invalidity of future decrees or deliberations was sometimes mentioned as having "immediate" effect.[83] The expression οὐδὲν ἔλασσον (no less), preceding in some decrees the invalidity clause, shows it was considered the last, but not least, necessary complement of entrenchment clauses.[84] In Roman times, in view of the change of political settings, invalidity is now sometimes aimed at the archons' orders or the city's *ekdikos* (who represented the city's interests) proposals (or anybody else's), and the fines are collected by the Roman *fiscus*.[85] In a decree from Miletus concerning the city's and the imperial cults, any different use of the funds

[77] Honorary decree (dated after 153/2 B.C., found in Delos) of the *koinon* of the Βηρυτίων Ποσ[ειδω]νιαστῶν ἐμπόρω]ν καὶ ναυκλήρων [καὶ ἐ]γδοχέων for their Roman benefactor, the banker Marcus Minatius Sextus, ID 1520, lines 57–61.

[78] A decree from Eresos in Lesbos (dating from the middle of the third century B.C.), on Agemortos' donation of some income to be used for sacrifices, forbids and invalidates any encumbrance or any other use of the income and any such proposal before the council or the assembly, IG XII,2, 529, lines 3–9.

[79] In the inscription recording the legacy she left to her daughter Epiteleia, Epicteta provided for the founding of a sanctuary to the Muses and her own deceased ancestors and for the establishment of an association dedicated to the worship of the Muses. Her will included an invalidity clause for future amendments by third parties, IG XII, 3 330, B1, lines 263–267.

[80] Decree of Didyma establishing annual distribution of food on the occasion of the birthday of Eumenes II (dated 159/8 B.C.), Didyma 13, lines 41–49.

[81] The decree of Delphi of 160/59 B.C. regulating the usage of a donation by king Attalos of an important amount of money to the city to be used for the children's education and for sacrifices, invalidates and punishes by fine any proposal or decision for a different use than the one prescribed by the decree, Syll.³ 672, lines 15–19.

[82] IG XII,9 236, lines 51–61.

[83] SE 241, frg. h.col. 2.1, lines 7–8.

[84] In one instance, in a decree of Mytilene instituting celebrations in the context of the imperial cult, the city threatens with invalidity all actions or proposals of private citizens or magistrates contravening the celebrations and relevant procedures, these being considered synonymous with the safeguard of the city's "liberty and democracy and *sympoliteia*," since the city had recently seen its status as an ally of Rome confirmed by Augustus, IG XII,2 59, lines 6–12.

[85] In an honorary decree of the boule and demos for Gaius Caninius Synallasson found at Iasos, regulating the foundation he established for the gymnasium of the *neoi* (ca. 117–138 A.D.), Iasos 21, lines 54–67.

and any act contravening the purpose "secured" by this statute (τοῖς διὰ τοῦδε τοῦ ψηφίσματος ἠσφαλισμένοι[ς]), would be invalid and the archon introducing such a proposal would be guilty of impiety against the gods and guilty ὡς ἐκ καταδίκης (as if sanctioned by a court of law) of the payment of a fine.[86] Three documents from Ephesus, all dating from A.D. 104, show how invalidity had become a standard term aiming to secure the proper execution of the will of the benefactor, which was ratified both by the Roman official's and by the city's decisions. The invalidity clause of future amendments is first mentioned in the letter of Caius Vibius Salutaris offering several benefactions to the boule and demos of Ephesus in form of a legal document,[87] second, the proconsul Gaius Aquillius Proculus, in his letter to the *archontes,* boule, and demos of Ephesus, approves the benefaction of Gaius Vibius Salutaris and ratifies the invalidity clause[88] and third, in the honorary decree of Ephesos for Gaius Vibius Salutaris, legal invalidity strikes any contrary decree proposal.[89]

3. Invalidation of Transactions and Private Legal Acts

In the third category, we will examine legal invalidation clauses in inscriptions that affected private transactions and legal acts, except for contracts, which will be examined in Section 4. First, transactions might be invalidated for being imposed upon individuals under a different political regime than the one currently in place. In the so-called "constitution" of Cyrene, imposed or accorded by Ptolemy I (before 321 B.C.), in a mutilated passage, the invalidation of sales of houses and fields is prescribed, most probably concerning sales forced upon the parties.[90]

The prescriptions of the law against tyranny and oligarchy of Ilion (dated from 281 B.C.) are quite explicit. They include a series of clauses invalidating several legal acts involving the collaborators of an undemocratic regime. Forbidden transactions include the sale and lease of land, houses, animals, slaves (or anything else), as well as the dowries, which benefitted any person who served under a tyrant or an oligarchy.[91] The acquisition of property through any transaction involving these persons, as it is (twice) stated in the law, will be invalid. Anyone who has suffered such an injustice can pursue the offender[92] and the property will be returned

[86] Miletos 15, lines 18–33.
[87] Ephesos 212, lines 315–325.
[88] Ephesos 213, lines 357–365.
[89] Ephesos 115, lines 106–116.
[90] SEG 18:726, lines 69–70.
[91] IMT Skam|NebTaeler 182, I.1, lines 53–70, 106–111. Archons include those having served as a *strategos*, or any other archonship subject to *logodosia* (the procedure of control after the end of their term) or who is responsible for registering on a public list the names of the citizens and metics.
[92] Clauses as the above may have followed solutions adopted on other occasions regarding the well-known problem of disposition of the properties the exiles under a previous

to its former owner. The invalidity clause was thus protecting the citizens and metics from transactions, which, in spite of having all the external elements of legality, may not have been freely negotiated and may have been a product of duress. The particular circumstances of any such transaction are considered irrelevant, as long as one of the contracting parties is a person involved in the undemocratic government.

Under different conditions, invalidation of a sale of land is threatened as a preemptive measure destined to secure compliance of the citizens with the city's settlement decisions with another community and constitutes part of the decision's implementation procedure. In the *symbolon* agreement between the cities of Stymphalos in Arkadia and Sikyon-Demetrias in Corinthia[93] (dated around 303–300 B.C.), regulating the process of adjudicating disputes between citizens, a procedure for reaching agreements between the parties is set out, which will be drafted in writing (σύνγραφον) in presence of three witnesses possessing property, whereas, any other agreement or transaction shall be invalid. In the decree of Miletus concerning the sharing of citizenship with Cretans, lands in the vicinity of Myous are granted to the new citizens and it is forbidden to sell these plots of land for twenty years. If any such sale takes place, it shall be invalid. A trial may also be brought by any citizen of Miletus against both the seller and the buyer for committing an injustice against the city, by following the same procedure as under the *xenikos nomos*.[94]

Although it does not target private transactions but possession of land by sovereign cities, it is worth mentioning that in the peace treaty between Miletus and Magnesia ad Maiandros (dating from 175 B.C.), the two cities, in order to avoid any potential future conflict regarding contested areas, mutually forbid any possession of the land, of the *peraia* and of the citadels belonging to each other, under any pretext, declaring invalid any "*bequest, dedication, consecration or possession, under any pretext or in any way, performed at any time by the contracting parties or through intermediaries*."[95]

The disputed occupation of public territory within a community was the object, in Roman times, of the decree of the Battynaioi[96] from Macedonia (144/145 or 192/193 A.D). Distinguishing three categories of inhabitants, the Battynaioi, the Orestes and the *Eparkhikoi*, the *ekklesia* of the Battynaioi decides to prohibit the sale of public land to the *eparkhikoi* (with one exception), imposing a fine in case of

regime, for which several solutions had been adopted in Greek cities, following the return of the exiles under Alexander.

93 IPArk 17, B, lines 102–108. Arnaoutoglou, I. 1998:133–137.

94 Miletos 54, e.1, lines 1–11.

95 Miletos 60 (Milet I 3, 148) lines 45–47. This clause takes care to enumerate all lands included in the cities' respective territories and to include reference to what must have been notorious and usual legal tricks in border conflicts, such as the declaration of an occupied territory as sacred, its dedication to a divinity, or the acquisition of lands through intermediaries.

96 Papazoglou, F. 1979:363.

transgression and invalidating all the sales already executed, the objects of which must be returned by the buyers.[97]

In other instances, private legal acts and contractual rights may be invalidated if one of the parties does not comply with the terms of an agreement. The earliest such occurrence is found in two inscriptions from Attica, dating from the end of the fourth century B.C., containing lease documents, by which the members of a religious association (*orgeon*) lease for an indefinite period of time a private sanctuary to an individual and to his descendants. In the first,[98] the lessees undertake several obligations, such as the payment of the rent at a set date each year and to maintain the sanctuary in a specific state regarding the cult. In case they fail to make the agreed use of the sanctuary, or if they fail to make payment, the lease will be annulled and the *orgeones* may claim back the *temenos*. In the second lease document,[99] the lessee may use the sanctuary and the houses built within it, but he must perform some maintenance work and he is allowed to make any construction he likes. He must pay the rent agreed upon on the set dates and to offer "open house" during the celebration of the *orgeones*'s rites. In case he fails to comply with any of these obligations, his lease shall be invalidated, he will lose all the materials that were added to the building and the *orgones* will be free to lease the property to anyone they like.

In a similar manner, at the end of a document from Mylasa concerning a lease of land, invalidation is threatened against any cession of the property to a third party.[100] In Mylasa again, a series of prohibitions regarding the lease of land to Thraseas by the *phyle* of Otorkondeis include, in case of nonpayment of the rent, the annulment of the lease and the invalidation of any "cession," by which perhaps a sub-lease is meant.[101] In such case, the current lease "will not exist anymore" (οὐχ ὑπάρξει αὐτῶι ἡ μίσθωσις), whereas any cession will be invalid (ἄκυρος ἔστω ἡ παραχώρησις).[102] Such invalidity clauses may have constituted a standard provision in lease agreements, aiming to protect owners from the frequent refusals of lessees to comply with the terms of the lease, thus permitting them to easily recover their property.

In other inscriptions, transactions forbidden by law may also be invalidated. A decree from Halasarna in Cos, dating from the middle of the third century B.C., prohibits the priest and the *timouchoi* from receiving or offering any loan by pledging the sacred vessels of the sanctuary of Apollo.[103] If any loan is granted

[97] EAM 186, lines 39–40.
[98] IG II² 2501.
[99] IG II² 2499.
[100] IMyl 221, lines 2–3.
[101] See also IMyl 218 l. 8.
[102] IMyl 208, lines 1–12.
[103] SEG 54:743. On this and other interdictions to give surety, see Velissaropoulos-Karakostas, 2011:153–156.

contrary to the terms of the decree, any such security shall be invalid. The debt would thus remain unsecured and both the lender and the debtor would receive, in addition to fines, the wrath of the god, so they may know better in the future and refrain from concluding loans contrary to the terms of the decree.

A particular case of invalidity is included in the law of Aegiale in Amorgos dating from the late second century B.C., regulating the administration of the endowment[104] of Kritolaos, who bequeathed a sum of 2000 drachmae to fund a festival to commemorate the heroisation of his deceased son, Aleximachos. The extraordinary terms on the lending of the capital prescribe that it will be lent in shares of up to 200 drachmae, with an interest of 10% and real securities provided by the debtors, worth 2000 drachmae (ten times the amount lent). Any repayment of the capital was forbidden and for any such payment received by any *archon*, he would be personally liable to pay a fine of 1000 drachmae to the city. In what constitutes a unique instance, such payments are declared "invalid," but the debtor's obligation remains valid. This complicated arrangement turned what were individual loans into perpetual payments of interests on a capital never returned, thus securing new sources of income and financing, in perpetuity, the scope of the foundation.[105]

Invalidity is also threatened in sepulchral inscriptions, by which the deceased reserves the right of use of a grave monument for himself and his family, forbids any selling of the grave, and declares invalid any such transaction, often also adding a fine for transgressors. Such terms are included in the *Mnemeion* inscription by Hermogenes Menodorou[106] in Aphrodisias, in a funerary inscription from Didyma[107] and in the inscription by Apollonios Symmacchou from Smyrna, who is reserving the *mnema* for himself and his relatives and forbids any future sale of the grave.[108] In another inscription from Thebes in Thessaly, forbidding any foreign corpse to be buried in the tomb under threat of a fine payable to the city of Thebes, the expression used is that "this *attempt* shall be invalid."[109]

Among private legal acts, testaments were the ones most likely to be nullified ex post. Obtaining the nullification of testaments by heirs claiming the inheritance was an issue often brought before the Greek courts, as illustrated, among others, by Isocrates' *Aegineticus*[110]:19 and Isaios' *Cleonymus*aeus1.[111] One late example of the

[104] Harter-Uibopuu, K., 2011:119–139, spec. 126.
[105] IG XII,7 515, lines 27–29.
[106] LW 1639, lines 6–12.
[107] Didyma 644*5, with penalty, line 3.
[108] Smyrna 347, line 9–15.
[109] AE (1929) 145,18, lines 3–7.
[110] Isocr. Aegin. 3.6:19.: Νῦν δ'αὐτῇ τοσούτου δεῖ μεταμέλειν ὧν εἰς ζῶντ' ἐξήμαρτεν, ὥστε καὶ τεθνεῶτος αὐτοῦ πειρᾶται τήν τε διαθήκην ἄκυρον ἅμα καὶ τὸν οἶκον ἔρημον ποιῆσαι. 15.8:19.: Καίτοι τίνος ἂν ὑμῖν ἀποσχέσθαι δοκοῦσιν, οἵτινες ζητοῦσι πείθειν ὑμᾶς ὡς χρὴ τὰς διαθήκας ἀκύρους ποιῆσαι τῶν μὲν νόμων οὕτως ἐχόντων, ὑμῶν δὲ κατ' αὐτοὺς ὀμωμοκότων ψηφιεῖσθαι; 44.4:19.44: Πολλοῦ <γ'> ἂν

testator wishing to avoid such post mortrem complications is the testament of Epikrates from Lydia (second century A.D.),[112] a long document in which the testator also curses anyone who may contravene or annul his will (μου τὴν ⌊προγεγραμμένην διάταξιν). On the other hand, a previous will could be nullified in vivo if the testator himself decided to change it. In an inscription from Lycia, dating before A.D. 43, bearing on one of its sides a testament by Artapates, the testator, who now wishes to leave all his immovables to the gods Leto, Apollo and Artemis to be "*sacred, inalienable, and not subject to serve as real securities*," starts by declaring null all testaments of his prior to this one, "*in any way these may have been drafted*."[113] Inheritances could also be invalidated if they were executed against the law. In an inscription from Thisbe in Boeotia, dating from in the third century A.D., regarding the grant of the right of *emphyteusis* (a long-term lease of land) regulated by the Roman authorities, it is stated that if any person, to whom such a right over the land is granted, bequeaths by testament the land to a third party, this so-called "donation" shall be null and the plot of land will revert to the city.[114]

Invalidity is also frequently attested in manumission inscriptions. In a "sacral" manumission by means of an *iera oni* from Delphi (dated 168 B.C.),[115] a fictive sale and consecration of a female slave to the god, Sostrata having entrusted her sale to Apollo, the next day the sale is declared revoked (ἠρμένη) and null (καὶ ἄκυρον). As a result, she gains her freedom and independence for life, and is now free to do and to go as she pleases. In other cases it is the manumission that will be invalidated and the *apeleutheros* (freedman) will revert to his former status of slavery if he does not comply with the terms set out in the manumission act by his former master, especially the *paramone* condition (the obligation sometimes imposed upon the freedman to remain close to his former master and offer him services),[116] or if he fails to pay back the *eranos*,[117] the loan that financed his manumission. Similar conditions included obligations such as not to move out of town and to seek the master's advice,[118] to stay at the master's house until the daughter of the family

δεήσειεν ἀχθεσθῆναι κατὰ τοὺς νόμους ὑμῶν ψηφισαμένων, ἀλλὰ πολὺ ἂν μᾶλλον εἰ τὰς τῶν παίδων διαθήκας ἀκύρους ἴδοι γενομένας.

[111] Is. 1.21aeus1.21.

[112] SEG 54 1221, lines 94–105.

[113] TAM II 261, face b.1, lines 7–10.

[114] IG VII 2226, frg. D.1, lines 5–9.

[115] SGDI II 1746, lines 4–6, καθὼς ἐπίστευσε Σωστράτα τῶι θεῶι τὰν ὠνάν, ὥστε τὰν προτερασίαν ὠνὰν ἀρμέναν εἶμεν καὶ ἄκυρον, ἐφ' ὧιτε ἐλευθέραν εἶμεν καὶ ἀνέφαπτον ἀπὸ πάντων τὸμ πάντα βίον, ποιέουσα ὅ κα θέληι καὶ ἀποτρέχουσα οἷς κα θέληι. See Zelnick-Abramovitch, R. 2005:86f.

[116] FD III l. 6; 3:6; 3:8; 6:87; 6:92; SGDI II 1689; 1702; 1721; 1747; 1804; 1811; 1819; 1832; 1884; 1944; IG IX,1² 3:640; 3:639,4 ; Darmezin, Affranchissements 100,135.

[117] SGDI II 1791; FD III 6:95

[118] Cf. invalidity in case of violation of the obligation to remain in Delphi, SGDI II 1830 and the case of a Syrian lady named Asia (ca. 170–157/6 B.C.), SGDI II 1718, lines 10–14.

came of age and got married,[119] to bury the masters when they die and to perform their funeral rites.[120] In one inscription from Beroia (ca 239–229 B.C.), it is the liberty of their women and children that is declared "invalid," if the former slaves do not comply with whatever the master ordered.[121] Property transfers by the *apeleutheroi* to third parties, other than the master, if they had no heir of their own, could also be invalidated.[122] On the other hand, in one case, the decree states that if the *apeleutheroi* are arrested and reduced to slavery by a third party, their enslavement would be "invalid" and the offender would be liable to pay a fine.[123]

4. Invalidity and Contracts in Athens

To what extent do the ἄκυρον clauses in inscriptions add to our understanding of contractual obligations, as referred to in Athenian literary sources? One point on which no consensus has been reached is whether contractual liberty could extend to include even agreements that were forbidden by the law. The basis of Athenian contractual commitment was agreement,[124] according to the commonly cited law ὅσα ἄν ἕτερος ἑτέρῳ ὁμολογήσῃ κύρια εἶναι (whatever one agrees with another is legally valid).[125] One part of the modern doctrine considers that "whatever" included even what was prohibited by law or by decree. The thesis of Gernet,[126] that contracts in Athens did not have to be in accordance with the laws, and that consensus could thus override the law, has, I think, rightly been criticized.[127] The argument in favor of total contractual liberty puts forth passages of Demosthenes, which seem to stress

[119] FD III 3:21, lines 17–20.

[120] IG IX,1 42, lines 8–17.

[121] EKM 1. Beroia 45, lines 24–27.

[122] SGDI II 1891, lines 26–33.

[123] Cf. also the same in IG IX,1 39, dated in the second century A.D.

[124] On this law, thought to have originated from judicial procedure, see Pringsheim, F. 1950:13–34; Thür, G. 1977:180–185. On *homologia* as contract, see Velissaropoulos-Karakostas, J. 1993:163–65.

[125] Hyp. 3.13: ἐρεῖ δὲ πρὸς ὑμᾶς αὐτίκα μάλα Ἀθηνογένης, ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι. τά γε δίκαια ὦ βέλτιστε· τὰ δὲ μὴ τοὐναντίον ἀπαγορεύει μὴ κύρια εἶναι. ἐξ αὐτῶν δέ σοι τῶν νόμων ἐγω φανερώτερον ποιήσω. Dem. 47.77: ἀνάγνωθί μοι τὸν νόμον καὶ τὴν μαρτυρίαν, ὅς κελεύει κύρια εἶναι ὅ τι ἄν ἕτερος ἑτέρω ὁμολογήση; 48.54: πῶς γὰρ οὐ μαίνεται ὅστις οἴεται δεῖν, ἃ μὲν ὡμολόγησεν καὶ συνέθετο ἑκὼν πρὸς ἑκόντα καὶ ὤμοσεν. 56.2: καὶ τοῖς νόμοις τοῖς ὑμετέροις, οἳ κελεύουσιν, ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι. Pl. Symp. 196c: ἃ δ' ἂν ἑκὼν ἑκόντι ὁμολογήσῃ, φασὶν "οἱ πόλεως βασιλῆς νόμοι, δίκαια εἶναι." Din. 3.4: καὶ ὁ μὲν κοινὸς τῆς πόλεως νόμος, ἐάν τις ἑνὸς ἐναντίον τῶν πολιτῶν ὁμολογήσας τι παραβῇ τοῦτον ἔνοχον εἶναι κελεύει τῷ ἀδικεῖν.

[126] Gernet, L. 1937: 111–44. See also Phillips D. D. 2009:89–112; Aviles, D. 2011:27–28, "all available evidence points to the wording of the general law of contracts not imposing any limitation on the validity of agreements and thus validating even such agreements that were obviousy at odds with justice."

[127] Cantarella, E. 1966:88–93.

the omnipotence of contracts concluded in the correct form,[128] in the presence of witnesses or sworn by oath. Contracts may have included the standard provision[129] "κυριώτερον δὲ περὶ τούτων ἄλλο μηδὲν εἶναι τῆς συγγραφῆς,"[130] mentioned in the speech of Demosthenes against Lacritos: "ἡ μὲν γὰρ συγγραφὴ οὐδὲν κυριώτερον ἐᾷ εἶναι τῶν ἐγγεγραμμένων, οὐδὲ προσφέρειν οὔτε νόμον οὔτε ψήφισμα οὔτ' ἄλλ' οὐδ' ὁτιοῦν πρὸς τὴν συγγραφήν."[131] The debate about the sense of the *kyria syngraphe* ("a contract is valid") is a long one.[132] One of the most plausible explanations is that it declares the written document to be the most valid instrument of proof before a court of law.[133] The document was meant to constitute the most authentic embodiment of the contracting parties' mutual obligations, against which no law or decree may serve as proof of different obligations;[134] it did not mean that this document could override legal rules and agree that something forbidden by law was valid.[135] Otherwise, it would suffice to introduce the οὐδὲν κυριώτερον (lit. "nothing is more valid") clause, for example, in private loan agreements, in order to set aside rules such as the Solonian *seisachtheia*,[136] if we are to presume that this law did not explicitly declare invalid all borrowing against one's liberty as security.[137] If absolute contractual liberty was in Athens set above the rule

[128] Dem. 42.12: τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων.

[129] Lanni, A. 2006: 163–164. Among the few similar references in pre-hellenistic times, see the loan inscriptions of Arkesine in Amorgos, cf. IG XII, 67; 69; 70.

[130] Dem. 35.13: And in regard to these matters nothing shall have greater effect than the agreement.

[131] Dem. 35.39: The agreement does not permit anything to have greater effect than the terms contained in it, nor that anyone should bring forward any law or decree or anything else whatever to contravene its provisions.

[132] For further references and a presentation of different views, see Velissaropoulos-Karakostas J. 2001:103–115.

[133] For this sense of the clause and relevant bibliography see Velissaropoulos-Karakostas, J. 1993:176–179.

[134] Beauchet, L. 1897:80–82, argues that the *syngraphe* could not override the laws of "public interest." On the *homologia* as a preparatory step of court proceedings, by which the parties are merely agreeing that the contents of a statement must not be denied to the dikasterion, see Thür, G. 1977:157.

[135] Cf. Wolff, H. J. 1966:575, "A partir de là, les contrats grecs se sont développés sous forme de «disposition destinée à des fins déterminées» (Zweckverfügung). Les parties contractantes étaient libres d'en fixer le but, à la seule condition de ne pas violer les dispositions légales." Pringsheim, J. 1950:497–500, also agrees that "A contract of sale is void if one of its essential elements is missing or if the sale is forbidden by law." See also Velissaropoulos-Karakostas J. 2001:108, "la renonciation à tout autre texte législatif ou contractuel dont le contenu se heurte à celui de la syngraphè n'a aucun effet lorsque le contrat est illicite."

[136] Ar. Ath. Pol. 6.1.

[137] Phillips D. (2009:107) argues that Solon's laws, such as the law banning the export of agricultural produce other than olive oil "presumably rendered contracts concluded for

of law, the whole edifice of the city's legislation would prove inefficient and inapplicable. Such a total contractual "laissez-faire" is incompatible with what we know about the respect for the rule of law,[138] as an expression of the will of the people and of democracy itself, particularly in a city where the "legality" even of decree propositions could be questioned by anyone, through the *graphe paranomon* procedure.[139] Plato in the *Laws* argues in favor of excluding from binding contracts those forbidden by law or decree (ὅσα τις ἂν ὁμολογῶν συνθέσθαι μὴ ποιῇ κατὰ τὰς ὁμολογίας, πλὴν ὧν ἂν νόμοι ἀπείργωσιν ἢ ψήφισμα),[140] and this cannot be a rule of his own devising. The invalidity clauses included in decrees and *symbola* agreements, as early as the mid-fifth century B.C., show that Plato's statement has been wrongfully dismissed as not corresponding to Athenian legal reality.[141] Further evidence in the same direction can be found in the statute attributed by Gaius to Solon, allowing contractual liberty to members of associations "*unless forbidden by public statutes*,"[142] in Demosthenes' statement that only adoptions which are conform to the law are valid,[143] and in Hyperides' argument that both betrothals and testaments were nullified if illegal.[144] We may also note that the various legal conditions for a valid sale and transfer of property described by Theophrastus[145]

such purposes invalid." This invalidity may have been rather implicit than *expressis verbis*.

[138] See Aes. 1.6, 3.6–7, where the rule of law is considered one of the characteristics of democracy.

[139] On the place of *nomos* in Athenian law and rhetoric, see Carey, C. 1996:33–46.

[140] Pl. Leg. 920d.: whenever a man undertakes and fails to fulfill his agreement—unless it be such as is forbidden by the laws or by a decree.

[141] Pringsheim, F. 1950:40, "Plato's descriptions, on the other hand, must not be taken as simply reproducing actual law," 42 "The texts of Plato … must not be taken as giving strict legal rules," Phillips D. 2009:89–122, who maintains that (p. 95) this law stated by Plato "is a measure of his own devising."

[142] D. 47.22.4 (Gaius 4 ad l. xii tab.): *Sodales sunt, qui eiusdem collegii sunt: quam Graeci hetaireian vocant. His autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant. Sed haec lex videtur ex lege Solonis tralata esse. Nam illuc ita est:* ἐὰν δὲ δῆμος ἢ φράτορες ἢ ἱερῶν ὀργιῶν ἢ ναύται ἢ σύσσιτοι ἢ ὁμόταφοι ἢ θιασῶται ἢ ἐπὶ λείαν οἰχόμενοι ἢ εἰς ἐμπορίαν, ὅτι ἂν τούτων διαθῶνται πρὸς ἀλλήλους, κύριον εἶναι, ἐὰν μὴ ἀπαγορεύσῃ δημόσια γράμματα.

[143] Dem. 44.7: ὁμολογοῦμεν δ'ἐναντίον ὑμῶν δεῖν τὰς ποιήσεις κυρίας εἶναι, ὅσαι ἄν κατὰ τοὺς νόμους δικαίως γένωνται.

[144] Hyp. 3.16: ἀλλὰ μὴν οὐκ ἀπέχρησε τῷ νομοθέτῃ τὸ ἐγγυηθῆναι τὴν γυναῖκα ὑπὸ τοῦ πατρὸς ἢ τοῦ ἀδελφοῦ, ἀλλ' ἔγραψε διαρρήδην ἐν τῷ νόμῳ, ἢν ἀνέγγυήσῃ τις ἐπὶ δικαίοις δάμαρτα ἐκ ταύτης εἶναι παῖδας γνησίους, καὶ οὐκ ἐάν τις ψευσάμενος ὡς θυγατέρα ἐγγυήσῃ ἄλλην τινά. ἀλλὰ τὰς μὲν δικαίας ἐγγύας κυρίας, τὰς δὲ μὴ δικαίας ἀκύρους καθίστησιν.

[145] Pringsheim J. 1950:156.

imply to the contrary that, if one of these conditions was not met, the sale would be invalid and that no agreement could override the law.[146]

On the other hand, in a legal system where legislation was far from exhaustive, leaving unregulated several aspects of private life and enterprise, a very large margin was left to contractual liberty. Whether the facts of a specific case corresponded to what was forbidden by the law was a question open to forensic debate and would, at the end, be subject to the jury's decision. Since all laws either prescribe some form of action or forbid some other, we may distinguish two forms of legal invalidity: invalidity for what is an illicit *causa* (the underlying legal motive),[147] in the general sense of anything contrary to public statutes (*ex publica lege* as Gaius puts it for Solon's law on associations)[148] and invalidity *expressis verbis*, as a sanction attested in some decrees (as the ones already mentioned in the sections above). In the first case, invalidity was implied, in the second, it was clearly stated. What was the utility of an *expressis verbis* invalidity clause? If we accept the definition of συμβόλαιον,[149] as an agreement that serves as the basis of legal action,[150] no (valid) legal action could arise from an agreement invalidated by law.[151] This principle is illustrated by the law on the interdiction regarding maritime loans not destined to serve the import of grain or other merchandise in Athens, which, in case of transgression, deprived the plaintiff of an action and prevented such action from being introduced to court.[152] Whether or not an agreement was prohibited by law and was to be non-effective remained though to be proven at court. If the invalidity of an act or agreement was not *expressis verbis* declared by law or by the terms of the agreement, such a proof may present a great degree of

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[146] St. Fl. 4.2.20: Κυρία δὲ ἡ ὠνὴ καὶ ἡ πρᾶσις εἰς μὲν κτῆσιν, ὅταν ἡ τιμὴ δοθῆι καὶ τὰκ τῶν νόμων ποιήσωσιν, οἷον ἀναγραφὴν ἢ ὅρκον ἢ τοῖς γείτοσι τὸ γιγνόμενον· εἰς δὲ τὴν παράδοσιν καὶ εἰς αὐτὸ τὸ πωλεῖν, ὅταν ἀρραβῶνα λάβηι· σχεδὸν γὰρ οὕτως οἱ πολλοὶ νομοθετοῦσιν·

[147] The notion of illicit *causa* had not though been isolated by the Greeks, as it would later be by the Romans, a point on which see Beauchet, L. 1897:38–39.

[148] This expression may imply a notion of *ius absolutum*, of certain laws of public interest, i.e., norms that cannot be dispensed with and against which no private agreement stands, contrary to *ius dispositivum*, which may apply only if the parties have not agreed otherwise, as known in civil-law systems. Aviles D., 2011:33 argues, correctly I think, that "there is little to suggest that Athenian lawgivers ever meant any statute they enacted to be only *ius dispositivum* rather than a fully binding norm expressing the will of the polis."

[149] On the sense of the word as "contract" see Mirhady, D. C. 2004:51–63.

[150] Todd S. 1993:265.

[151] In Rome, if someone had promised something contrary to the prescriptions of a *lex imperfecta*, he could not be successfully sued by the promisee, the praetor intervening with a *denegatio actionis* (refusal to grant a right to sue).

[152] Dem. 35.51. Beauchet, L. 1897:41 thinks that invalidity did not have to be clearly stated in the law, provided the law was "d'ordre public." It is doubtful though that this notion had been formulated in ancient Greek law.

difficulty. Thus, introducing the invalidity clause in decrees or contracts offered the advantage of facilitating the process of proof, since all one would have to do is read at court the relevant clause forbidding such agreements. The laws and contracts were, according to Aristotle,[153] two of the main "inartificial proofs" (ἄτεχναι πίστεις) properly belonging to forensic oratory. The law or the contract forbidding a particular agreement and declaring it invalid, read out in court by a clerk, left little room for forensic speculation on whether an act or obligation was indeed lawful or not.

On the other hand, in view of the lack of clear legal definitions in ancient Greek Law, if the legal invalidity of an act or of an agreement was not clearly stated in a law or contract and had to be proven only on the basis of the facts of the case applied to general legal principles,[154] the problems of interpretation that could arise in court may have been very complex. These problems are illustrated in the *Rhetoric*, when Aristotle, speaking both about laws and contracts, offers advice on argumentative technique.[155] He explains how their importance may be magnified or minimized, depending on the side for which one is arguing and advises to "*see whether the law is contradictory to another approved law or to itself; for instance, one law enacts that all contracts should be binding, while another forbids making contracts contrary to the law*."[156] Aristotle's mention of the second law has been criticized as not corresponding to an actual Athenian law,[157] in spite of the uncontested existence of the first law. Both of these laws may have existed in Athens without any statutory conflict,[158] since the one in fact complements the other,

[153] Arist. Rhet. 1375a 15.

[154] Such as illegality, conflict between different laws, a law being obsolete and the notions of fictitiousness, error, fraud, menace, immorality.

[155] On the argument that Aristotle's ideas "do not really correspond to the actual practice of law courts and forensic oratory in fourth-century Athens" see Aviles, D. 2011:22, 27. See also Phillips, D. 2009:93–106, who rules out philosophers' views as concerning hypothetical cases. On the contrary, the extant orator's forensic speeches illustrate Aristotle's arguments put, literally, to trial, showing how the laws and contracts were indeed being manipulated by the orators according to the side one was arguing for. This is exactly the point Aristotle is making in the Rhetoric, offering examples of arguments, rather than analyzing legal issues. On the other hand, as the orators are presenting their client's side of the story, their speeches offer only a partial view of the rules of law, limited to the ones favorable to their case.

[156] Arist. Rhet. 1375b: καὶ εἴ που ἐναντίος νόμῳ εὐδοκιμοῦντι ἢ καὶ αὐτὸς αὑτῷ, οἷον ἐνίοτε ὁ μὲν κελεύει κύρια εἶναι ἅττ' ἂν συνθῶνται, ὁ δ ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον.

[157] Pringsheim, J. 1950: 39: "For a general statute forbidding illegal agreements seems neither necessary nor adequate to the then prevailing legal thought."

[158] The real "contradiction" revealed by Aristotle is indeed one of arguments, not of laws. On the procedures that, in Athens, would secure there were no contradictions and inconsistencies among the laws see Sickinger, J. P. 2008, Canevaro M. 2013:139–160.

in the sense that "all contracts—that are not forbidden by law—are binding."[159] What Aristotle proposes is how to make the best of the worst case, by putting forth the argument "*the contract is a law, special and partial*" if the contract is on our side and the law is ambiguous. A different line of argumentation is to be followed if the contract is against us. "*In addition to this, we must examine whether the contract is contrary to any written law of our own or foreign countries, or to any general law, or to other previous or subsequent contracts. For either the latter are valid and the former not, or the former are right and the latter fraudulent; we may put it in whichever way it seems fit*."[160] What is apparent from Aristotle's argumentation is not that contracts could, in Athens, circumvent the law, but rather that a margin of forensic argumentation was always left to litigants and that legal validity or invalidity were subject, precisely, to an interpretation of the facts. Introducing ἄκυρον ἔστω in a decree limited this margin of argumentation and thus served the interest of legal security and judicial efficiency: since no further argument could be made on matters of law, this left only the facts to be proven.[161]

Why then did only some decrees include the invalidity clause, whereas other did not? Given Greek laws seldom present a similar structure and elements are often missing, invalidity may not have been included *expressis verbis* in many instances, but may have been a presumed consequence. The lack of the invalidity clause in some cases may be explained by the very perception of the law as being binding for all, without the need for the legislator to annul agreements contrary to its terms, such a sanction being considered superfluous and unnecessary. In other instances, the invalidity clause may have been included in matters considered of particular importance, in order to deter, ad hoc, future legal contestations as to which acts were valid or not. Or, more simply, the invalidity clause contained only in some decrees

[159] Beauchet, L. 1897:40, n. 4, tentatively suggests that Aristotle may be referring to the difference between "une loi formelle (ob iniustam causam)" and "une loi d'ordre public."

[160] Arist. Rhet. 1376a–b: περὶ δὲ τῶν συνθηκῶν τοσαύτη τῶν λόγων χρῆσίς ἐστιν ὅσον αὔξειν ἢ καθαιρεῖν, ἢ πιστὰς ποιεῖν ἢ ἀπίστους—ἐὰν μὲν αὐτῷ ὑπάρχωσι, πιστὰς καὶ κυρίας, ἐπὶ δὲ τοῦ ἀμφισβητοῦντος τοὐναντίον. ….· ἡ γὰρ συνθήκη νόμος ἐστὶν ἴδιος καὶ κατὰ μέρος, καὶ αἱ μὲν συνθῆκαι οὐ ποιοῦσι τὸν νόμον κύριον, οἱ δὲ νόμοι τὰς κατὰ νόμους συνθήκας, καὶ ὅλως αὐτὸς ὁ νόμος συνθήκη τίς ἐστιν, ὥστε ὅστις ἀπιστεῖ ἢ ἀναιρεῖ συνθήκην τοὺς νόμους ἀναιρεῖ. ἔτι δὲ πράττεται τὰ πολλὰ τῶν συναλλαγμάτων καὶ τὰ ἑκούσια κατὰ συνθήκας, ὥστε ἀκύρων γιγνομένων ἀναιρεῖται ἡ πρὸς ἀλλήλους χρεία τῶν ἀνθρώπων. … πρὸς δὲ τούτοις σκοπεῖν εἰ ἐναντία ἐστί τινι τῶν γεγραμμένων νόμων ἢ τῶν κοινῶν, καὶ τῶν γεγραμμένων ἢ τοῖς οἰκείοις ἢ τοῖς ἀλλοτρίοις, ἔπειτα εἰ ἢ ἄλλαις συνθήκαις ὑστέραις ἢ προτέραις· ἢ γὰρ αἱ ὕστεραι κύριαι, ἄκυροι δ' αἱ πρότεραι, ἢ αἱ πρότεραι ὀρθαί, αἱ δ' ὕστεραι ἠπατήκασιν, ὁποτέρως ἂν ᾖ χρήσιμον.

[161] Todd, S. C. (1993:264–268 and 1994:138) argues that the lack of a clear doctrine of contract together with the use of contracts as "persuasive supporting argument" would allow a court to distinguish which contractual agreements were legally binding. However, if a law explicitly declared such agreements invalid, proof of invalidity would have been rendered easier.

may be attributed to the diligence and forward thinking of the proposer of a specific decree and to the circumstances surrounding its vote. This does not mean necessarily that, in Greek law, the laws or decrees that did not include the invalidity clause were considered a kind of *lex imperfecta,* left on purpose without a sanction.[162] We cannot be sure, for example, whether the law on testaments setting some exceptions (πλὴν ἢ) to the general rule, explicitly declared invalid testaments obtained through improper influence or whether invalidity was only implied and further confirmed by a court of law, when such an inheritance case was brought to a hearing.[163] In case a legal act was executed contrary to the general terms of the law, it seems that its validity remained a matter open to interpretation, to be challenged before a court of law. This left a wide margin for maneuvering by litigants, who could support their claim that an act was valid or not, by interpreting both the law and the facts of the case.[164] The case of Hyperides' *Against Athenogenes*yperides[165] illustrates how difficult it was to overlook the terms of a written contract, if an *ad hoc* rule of law did not invalidate contracts concluded under dubious circumstances of honesty,[166] in view of the general law on contracts attributed to Solon (ὅσα ἄν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι).[167] Epikrates, who was fooled into taking over unspecified debts incurred by the perfume business of a slave he bought from Athenogenes,[168] argues that "unjust contracts" should not be binding (τά γε δίκαια, ὦ βέλτιστε: τὰ δὲ μὴ τοὐναντίον ἀπαγορεύει μὴ κύρια εἶναι), but in the absence of a specific

[162] On the explanation given regarding the Roman prototype of a *lex imperfecta*, the *lex Cincia de donis et muneribus* of 204 B.C., which prohibited donations exceeding a certain amount, without invalidating those exceeding the limit and not permitting an enrichment claim against the recipient, see Zimmerman, R. 1990: 699, "one did not want to embarrass the leading circles of society by exposing them to court proceedings and the concomitant publicity."

[163] Hyp. 3.17–18yperides: ἔτι δὲ καὶ ὁ περὶ τῶν διαθηκῶν νόμος παραπλήσιος τούτοις ἐστίν: κελεύει γὰρ ἐξεῖναι τὰ ἑαυτοῦ διατίθεσθαι ὅπως ἄν τις βούληται πλὴν ἢ γήρως ἕνεκεν ἢ νόσου ἢ μανιῶν ἢ γυναικὶ πειθόμενον ἢ ὑπὸ δεσμοῦ ἢ ὑπὸ ἀνάγκης καταληφθέντα. ὅπου δὲ οὐδὲ περὶ τῶν αὐτοῦ ἰδίων αἱ μὴ δίκαιαι διαθῆκαι κύριαί εἰσιν, πῶς Ἀθηνογένει γε κατὰ τῶν ἐμῶν συνθεμένῳ τοιαῦτα δεῖ κύρια εἶναι; καὶ ἐὰν μέν τις ὡς ἔοικεν τῇ ἑαυτοῦ γυναικὶ πειθόμενος διαθήκας γράψῃ ἄκυροι ἔσονται...

[164] On the method of interpretation, in this speech, of the few Athenian statutes regulating contracts, by examining other laws in order to discover general principles and the intent of the lawgiver, see Harris, E. 2000:47–54 [=2013(b):198–205].

[165] Cohen, E. 2012:213–224.

[166] Epikrates is accusing the defendant of trying to impose an unjust agreement to the detriment of the laws ([σὺ δὲ καὶ τ]ὰς ἀδίκους συνθ[ήκας ἀξιοῖς κρατεῖν πάντων] τ̣ῶ̣ν νόμων). In order to refute his adversary's expected argument on the law on contract attributed to Solon (ὅσα ἄν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι), he argues that "unjust contracts" should not be binding, Hyp. Ath.10.23yperides.

[167] Hyp. Ath. 6.5–6yperides.

[168] Cohen E. 2012:213–224.

law[169] vitiating agreements on account of fraud or concealment, he tries to establish that "unjust" equals "illegal," by referring to similar laws (ν[όμο]ς παρ[α]πλήσιος) that set a standard of "just" behavior expected in other transactions.[170] Investing statutory prohibitions with the sanction of invalidity may have come as a development dictated by such procedural incidents, in legal cases where the rule of law and general legal principles proved insufficient to effectively prohibit certain unjust transactions or behaviors, and thus would be intended to facilitate proof in a court of law. Plato is implying that agreements forbidden by law are to be non actionable: "*Touching agreements, whenever a man undertakes and fails to fulfill his agreement—unless it be such as is forbidden by the laws or by a decree, or one made under forcible and unjust compulsion, or when the man is involuntarily prevented from fulfilling it owing to some unforeseen accident,—in all other cases of unfulfilled agreements, actions may be brought before the tribal courts, if the parties are unable to come to a previous settlement before arbitrators or neighbors*."[171] Rendering thus legal acts already concluded against the terms of the law voidable[172] may have been an important legal development, although, in the absence of any direct evidence, the means of procedure and any specific legal actions by which this invalidation could be achieved or recognized are not clear. An example[173] of such an action may have been related to the above case of Epicrates in *Against Athenogenes*. Epicrates, who has not yet paid the perfume shop's creditors, but merely promised to Athenogenes to undertake these debts,[174] seems to be launching before an Athenian

[169] The fact that Epikrates, after stating that the law declares invalid the unjust agreements, proceeds to quote statutes that are not directly relevant to his case, has been interpreted as a proof that no statute of this wording existed (Kästle, D., 2012:193, 202, Aviles, D., 2011:28–29). But, the existence of a general legal principle forbidding illegal agreements (referred to also by Aristotle in Rhet. 1375b, ὁ δ' ἀπαγορεύει μὴ συντίθεσθαι παρὰ τὸν νόμον) is one thing; the (non) existence of a law forbidding an agreement as the one concluded with Athenogenes, where the fraud claimed by the plaintiff consisted in the lack of full disclosure by the seller of the amount of the slave's debts the buyer was fooled into promising to take over is something different. Even by contemporary legal standards, such a behavior would fall under general legal principles forbidding dishonesty and bad faith in transactions, even without a specific prohibition.

[170] Such as laws on the sale of slaves, on marriage and testaments.

[171] Pl. Laws, 920d: ὅσα τις ἂν ὁμολογῶν συνθέσθαι μὴ ποιῇ κατὰ τὰς ὁμολογίας, πλὴν ὧν ἂν νόμοι ἀπείργωσιν ἢ ψήφισμα, ἤ τινος ὑπὸ ἀδίκου βιασθεὶς ἀνάγκης ὁμολογήσῃ, καὶ ἐὰν ἀπὸ τύχης ἀπροσδοκήτου τις ἄκων κωλυθῇ, δίκας εἶναι τῶν ἄλλων ἀτελοῦς ὁμολογίας ἐν ταῖς φυλετικαῖσιν δίκαις, ἐὰν ἐν διαιτηταῖς ἢ γείτοσιν ἔμπροσθεν μὴ δύνωνται διαλλάττεσθαι.

[172] Such as the law mentioned by Epicrates, Hyp. 3.16yperides: ἀλλὰ τὰς μὲν δικαίας ἐγγύας κυρίας, τὰς δὲ μὴ δικαίας ἀκύρους καθίστησιν.

[173] For a discussion of the arguments concerning the invalidity of the agreement of Demosthenes' Against Olympiodorusemosthenes, see Carawan, E. M. 2006:361–374.

[174] Hyp.3.7yperides: εἰ δὲ πριαίμην ὠνῇ καὶ πράσει, ὁμολογήσας αὐτῷ τὰ χρέα ἀναδέξεσθαι, ὡς οὐθενὸς ἄξια ὄντα, διὰ τὸ μὴ προειδέναι, καὶ τοὺς πληρωτὰς τῶν ἐράνων ἐν ὁμολογίᾳ λαβών: ὅπερ ἐποίησεν.

court a preemptive legal action against Athenogenes,[175] the object of which may have been, not a *dike blabes* as the *communis opinio* has it, but a *graphe bouleuseos* for the annulment of the contract.[176]

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[175] Epikrates is claiming that he would have been liable for payment, only if he had been informed of the extent of the debts. Hyp. 3.14yperides: ἐπεὶ ἐὰν δείξῃς προειπὼν ἐμοὶ τοὺς ἐράνους καὶ τὰ χρέα, ἢ γράψας ἐν ταῖς συνθήκαις ὅσους ἐπυθόμην, οὐδὲν ἀντιλέγω σοι ἀλλ'ὁμολογῶ ὀφείλειν. 3.15yperides: ὅσα δ' οὐκ ἤκουσα παρὰ τοῦ πωλοῦντος ταῦτα οὐ δίκαιός εἰμι διαλύειν.

[176] On the nature of the action of Epikrates against Athenogenes as a *graphe bouleuseos* for the annulment of the contract, contra the *communis opinio* of a *dike blabes* (Osborne, R. 1985:57, Whitehead, D. 2004:268–269), see Maridakis, G. S. 1963:398–524, Cantarella, E. 1966: 88–93, Dimopoulou, A. 2012:226. Regarding the *graphe bouleuseos* see Harrison, A. R. W. 1972:78 "the main effect of which, if the defendant was convicted, was to release the plaintiff from bondage or from payment (though there may of course have been a penalty attached as well)."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] Gofas 1993: 167.

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

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

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

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

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

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

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

[22] Dem. 32.8–9.

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

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

APPENDIX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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LÉOPOLD MIGEOTTE (LAVAL)

L'ALIÉNATION DE BIENS-FONDS PUBLICS ET SACRÉS DANS LES CITÉS GRECQUES AUX PÉRIODES CLASSIQUE ET HELLÉNISTIQUE

Les réflexions que je présente ici ont comme point de départ un petit fragment d'inscription de la cité de Philippes, en Macédoine, dont la lecture et l'interprétation peuvent être améliorées et qui permet de revenir au problème du pouvoir des cités sur les propriétés publiques et sacrées.

I. Inscription de Philippes.

Daté de la seconde moitié du quatrième siècle avant J.-C. d'après son écriture, ce texte est connu depuis un quart de siècle et fut publié à plusieurs reprises.[1] Il est incomplet, car la pierre fut retaillée autrefois pour être utilisée dans la Basilique A de la ville: le début et la fin sont perdus et il reste peu de choses de la partie droite, qui est brisée. Il est en outre de lecture difficile, car la surface inscrite est très usée à plusieurs endroits, notamment au centre. J'ai pu examiner des photographies récentes de la pierre grâce à un envoi d'Angelos Zannis, que je remercie vivement. Pour la clarté de l'exposé, voici d'abord le texte des éditeurs précédents.

	— — — — — — — — — — — — —	— — — — — — — — — — — — —
	Φιλίππου Ε..ΦΙ.ΤΕ.....ΟΛ . Υ	— — Τ — — — — — — — — — —
	τῆς πελεθρια[ί]ας δραχμὰς — —	ΗΔ — — — — — — — — — — —
	χιλίας διακοσίας πεντήκοντα	— — ΑΥΡΟ — — — — — — —
4	καὶ ἐπώνιον δραχμὰς — — — —	ἐπώ[νιον — — — — — — — — —]
	εἴκοσι ὀβολὸν τεταρτημόριον·	— — — — — — — — — — — — —
	καὶ ἄλλου τεμένους Φιλίππου	— — Ο — — — — — — — — —
	χιλίας δέκα, ἐπώνιον [δραχμὰς]	ΔΡΑΣΗ — — — — — — — — —
8	εἴκοσι ὀβολὸν τεταρτημόριον·	ἐπών[ιον — — — — — — — —]
	Ἄρεως πεντήκοντα [δραχμὰς]	Ποσειδ[ῶνος — — — — — —]

[1] Cf. Ducrey 1988, avec une photographie; Ducrey 1990, avec la même photographie (*SEG* 38, 658); Hatzopoulos 1996-II, p. 98–99, nº 83, et pl. LXVII; Prestianni Giallombardo 1999, avec la même photographie (l'auteur n'a rien pu tirer de neuf de la lecture de la photographie envoyée par P. Ducrey ni de l'examen de la pierre au Musée de Philippes: cf. p. 926, n. 12 et 14); Game 2008, p. 103–104, nº 40bis; Pilhofer 2009, p. 193–195. Le texte sera repris dans le Corpus que prépare A. Zannis. D'après Psoma 2001, les drachmes mentionnées dans le texte ont probablement été frappées selon un étalon «thraco-macédonien» et les oboles et les quarts d'obole pourraient être les pièces de bronze des rois Philippe et Alexandre et de la cité de Philippes.

	ἐπώνιον δραχμὴν — — — —	ἐπών[ιον — — — — — — — —]
	Ἡρώων πεντήκοντα [δραχμὰς]	ΣΤΕ — — — — — — — — — —
12	[ἐπ]ώνιον δραχμὴν — — — —	ἐπώνι[ον — — — — — — — —]
	— — — — — — — — — — — —	— — — — — — — — — — — —

On voit que le texte était disposé en deux colonnes et qu'il contenait une liste, à savoir une liste de ventes comme le montre la présence répétée de la taxe de vente, *epōnion*. Celle-ci apparaît huit fois en tout et, dans la colonne de gauche, elle est chaque fois suivie de la somme payée par l'acheteur: il devait naturellement en être de même dans la colonne de droite. Le terme *temenos*, désignant un enclos sacré, apparaît seulement à la ligne 6, mais il doit évidemment être sous-entendu avant ou après tous les noms propres au génitif des lignes 1 (Φιλίππου), 9 (Ἄρεως) et 11 (Ἡρώων) à gauche et de la ligne 9 à droite (Ποσειδ[ῶνος]). On peut ainsi compter quatre *temenē* différents à gauche et probablement cinq à droite, donc neuf en tout, et l'on voit clairement à gauche que chacun était suivi de son prix de vente. On ne trouve aucun nom d'acheteur, mais on reconnaît quatre anciens propriétaires: d'abord, à deux reprises, le roi Philippe II de Macédoine, puis Arès et les Héros, et Poséidon à droite. La présence du roi aux côtés d'autres divinités ne doit pas étonner, car le culte qui lui fut rendu ne fait plus de doute aujourd'hui.[2]

À l'origine, puisqu'elle est incomplète, la liste énumérait peut-être une dizaine ou même une douzaine de ventes, mais le total est évidemment impossible à évaluer. Elle était certainement coiffée d'un titre, maintenant disparu, qui indiquait sa signification: par exemple, «voici les ventes effectuées par la cité» (*vel simile*). En effet, la gestion de ces biens sacrés relevait probablement du *dēmos* et seule l'Assemblée des citoyens pouvait décider de les vendre. Comme tous les éditeurs précédents l'ont admis, ces *temenē* n'étaient pas les lieux réservés au culte des divinités en question, dont la vente est difficilement concevable, mais sans doute des terres de la campagne environnante qui leur avaient été consacrées. Il est probable en outre que les *temenē* de Philippe II n'ont pu être vendus qu'après la mort du roi, alors que d'autres ont pu l'être auparavant. La rédaction du texte et sa gravure dans la pierre ont donc eu lieu après 336. La liste récapitulait une série de ventes échelonnées sur un certain nombre d'années antérieures.

Bien qu'on ne trouve dans le texte aucune trace du *kērykeion* ou droit de criée, chaque terre fut sans doute vendue aux enchères, selon la coutume, ce qui explique que tous les prix de vente ne soient pas des sommes rondes. Quatre de ces prix sont encore lisibles: les *temenē* du roi ont coûté le plus cher (1 250 et 1010 drachmes), sans doute parce qu'ils étaient les plus étendus, tandis que les terres d'Arès et des Héros n'ont rapporté chacune que 50 drachmes. Le total donne 2 360 drachmes, soit en moyenne 590 drachmes par *temenos*. Si l'on applique cette moyenne à une douzaine de ventes, par exemple, on constate que le tout a rapporté un peu plus de

[2] Cf. Prestianni Giallombardo 1999, avec la bibliographie antérieure, et les remarques de Hatzopoulos 2000.

7 000 drachmes, ce qui n'était pas considérable. La cité ne semble donc avoir vendu que des terres de dimensions modestes et peut-être peu productives.

Quant à la taxe de vente, on peut la calculer grâce aux lignes 6–8, qui sont bien conservées. En effet, la division de 1 010 drachmes (ou 24 240 quarts d'obole) par 20 drachmes 1¼ obole (ou 485 quarts d'obole) donne exactement 49,97: la taxe était donc d'un cinquantième (2 %) du prix de vente[3] et fut calculée au plus près avec les moyens de l'époque. Ce taux, nommé *pentēkostē*, était courant dans l'Antiquité grecque. Pour les *temenē* d'Arès et des Héros, en revanche, tous les éditeurs précédents ont indiqué une lacune à la fin des lignes 10 et 12, sans proposer de restitutions: ils ont donc supposé la présence d'un autre nombre, illisible aujourd'hui, après la mention de la drachme. De fait, comme le prix de vente était plus modique que le précédent, il se peut que le taux de taxation ait été supérieur: un quarantième ou *tessarakostē* (2½ %), par exemple, donnerait 1 drachme 1½ obole[4] et les mots ὀβολὸν ἡμιωβέλιον pourraient tenir, semble-t-il, dans les espaces disponibles après δραχμήν. Mais on observe que le graveur a respecté partout la coupe des mots, qu'il a changé de ligne pour chaque *temenos* et qu'il a même inscrit de petites lignes horizontales entre les lignes 8–9 et 10–11 de la première colonne pour séparer les rubriques. Or, d'après les photographies, on ne peut rien lire à la fin des lignes 10 et 12: la solution la plus logique est donc de supposer que chacune se terminait par un *vacat* après δραχμήν. On retrouve ainsi le taux du cinquantième: une drachme pour cinquante.

Reste le premier *temenos* du roi (lignes 1–5). Pour des raisons inconnues, l'auteur du texte a d'abord indiqué sa valeur par plèthre, dont le montant devait se trouver à la première ligne. En effet, la somme inscrite à la ligne 3, complète au début à cause de la coupe des mots, était certainement le prix de vente, car elle était comparable à celle du second *temenos* royal et précédait immédiatement la mention de l'*epōnion*, comme dans les autres cas. Or, si l'on continue à appliquer le même taux, comme la logique y invite, on observe d'une part que le cinquantième de 1 250 donne exactement 25, d'autre part que la présence de menue monnaie à la ligne 5 (1¼ obole) signifie que le prix de vente était légèrement supérieur à 1 250 drachmes. De fait, d'après les photographies,[5] les espaces disponibles permettent restituer πέντε καί à la fin de la ligne 4 et un nombre très court comme ἕξ à la fin de la ligne 3. On obtient ainsi un compte presque exact, compte tenu des moyens de calcul de l'époque: la division de 1 256 drachmes (30 144 quarts d'obole) par 25 drachmes 1¼ obole (605 quarts d'obole) donne exactement 49,82.[6] Je propose donc de présenter ainsi le texte de la colonne de gauche:

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3 Comme Ducrey 1988, p. 212, l'avait déjà noté.

4 50 drachmes (1 200 quarts d'obole) ÷ 40 = 1 drachme 1½ obole (30 quarts d'obole).

5 Et d'après la transcription en majuscules de Ducrey 1988, p. 208.

6 On pourrait certes supposer un taux inférieur, par exemple un soixantième (*hexēkostē*), et l'appliquer aux sommes lisibles sans aucune restitution, mais le résultat ne convient pas: 1 250 ÷ 60 = 20,83 (20 drachmes 5 oboles). Ducrey 1988, p. 212, a simplement divisé

— — — — — — — — — — — — —
Φιλίππου Ε..ΦΙ.ΤΕ.....ΟΛ . Υ
τῆς πελεθρια[ί]ας δραχμὰς *vacat*
χιλίας διακοσίας πεντήκοντα [ἓξ]
καὶ ἐπώνιον δραχμὰς [πέντε καὶ]
εἴκοσι ὀβολὸν τεταρτημόριον·
καὶ ἄλλου τεμένους Φιλίππου
χιλίας δέκα, ἐπώνιον [δραχμὰς]
εἴκοσι ὀβολὸν τεταρτημόριον·
Ἄρεως πεντήκοντα [δραχμὰς]
ἐπώνιον δραχμὴν *vacat*
Ἡρώων πεντήκοντα [δραχμὰς]
[ἐπ]ώνιον δραχμὴν *vacat*
— — — — — — — — — — — — —

II. Ventes de biens-fonds publics et sacrés.

On sait que, dans chaque cité grecque, différentes catégories de personnes et d'institutions se partageaient la propriété des biens-fonds de la ville et du territoire. La plupart étaient des particuliers, en majorité des citoyens, mais je m'en tiens ici à deux autres catégories de propriétaires: d'une part les dieux eux-mêmes, dont les biens étaient qualifiés de sacrés, *hiera*, d'autre part le Peuple des citoyens considéré dans son ensemble, dont les biens étaient habituellement appelés *dēmosia*, terme qu'on peut traduire par «publics». En outre, pour éclairer l'analyse, il me paraît utile de recourir à des notions modernes, même si ces dernières ne rendent pas compte de toute la réalité,[7] pour distinguer deux groupes dans chaque catégorie:

(1) les terres de culture et d'élevage, avec leurs bâtiments, les carrières de pierre, les forêts, les terres des confins (*eschatiai*) et, dans plusieurs cités, les mines d'or et d'argent appartenaient à ce que nous appelons aujourd'hui le «domaine privé de l'État»;

(2) les lieux, les édifices et les installations indispensables à la vie commune composaient ce que nous qualifions maintenant de «domaine public de l'État»: il s'agissait d'«infrastructures» comprenant d'une part les temples, les édifices et les monuments des sanctuaires, d'autre part les ports et les marchés avec leurs équipements, les ouvrages fortifiés et les arsenaux, les rues et les routes, les fontaines et les citernes, les théâtres et les gymnases, les lieux de réunion des assemblées, des conseils et des tribunaux, les édifices de fonction des magistrats, etc.

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ces sommes l'une par l'autre et est arrivé à un taux de 1,61 %, c'est-à-dire à environ un soixante-deuxième. Mais, dans de tels contextes, les Grecs utilisaient toujours des fractions rondes comme le sixième, le huitième, le dixième, le vingtième, etc.: cf. par exemple Migeotte 1984, p. 388 et n. 162.

7 Voir la réponse de M. Faraguna à la suite de ma contribution.

Comme on le sait également, le premier de ces deux groupes procurait aux cités des revenus réguliers, car son exploitation était généralement adjugée à des particuliers qui payaient des fermages, des loyers ou des droits: les Grecs les considéraient comme des *poroi* producteurs de *prosodoi*.[8] La situation du second groupe était évidemment différente, mais plusieurs de ces «infrastructures» pouvaient être elles aussi des sources de revenus, comme on va le voir.

Les cités tenaient évidemment à l'intégrité de ce double patrimoine, qui avait souvent des origines lointaines, et beaucoup d'études modernes le présentent effectivement comme inaliénable. Il est pourtant arrivé à de nombreuses cités de perdre une partie de leur «domaine privé» à cause d'usurpations par des particuliers qui profitaient de moments de crise pour empiéter sur des terres publiques ou sacrées, et même de perdre une partie de leur «domaine public» à la suite d'une défaite lors d'une guerre ou d'accaparements par des rois ou des autorités romaines. Mais ces moyens illégaux ou violents s'exerçaient contre leur gré et elles s'efforçaient naturellement de protéger leurs biens et de récupérer ceux qu'elles avaient perdus.[9] Or, on voit que la cité de Philippes a décidé elle-même de vendre plusieurs terres sacrées, donc une partie de son «domaine privé». C'était une décision d'une grande gravité. Selon toute vraisemblance, elle a dû s'y résoudre pour trouver de l'argent frais lors d'une crise financière, ou plutôt de plusieurs difficultés successives. En effet, même si elle a peut-être consacré les cinquantièmes aux dieux en question, elle a probablement encaissé elle-même l'argent tiré des ventes, car sa situation était comparable à celle des deux cas suivants.

(1) Dans le dernier quart du sixième siècle ou au début de la période classique, d'après l'auteur aristotélicien de l'*Économique*, «les Byzantins, manquant de fonds, vendirent les domaines sacrés relevant de la cité, les terres fertiles pour un certain temps et les terres stériles à perpétuité, et de la même manière les domaines sacrés relevant des thiases et des *patrai* et ceux qui se trouvaient parmi des terres privées, car les propriétaires de ces autres terres les achetaient à gros prix; (ils vendirent aussi) aux membres des thiases d'autres terrains, à savoir les terrains publics qui se trouvaient aux alentours du gymnase, de l'agora et du port».[10]

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[8] Sur cette distinction, cf. Gauthier 1976, p. 8–19.

[9] Cf. Robert 1945, p. 36; Robert 1969, p. 61–63; Debord 1982, p. 148–153; Corsaro 1984; Corsaro 1990.

[10] 2, 2, 3a: Βυζάντιοι δὲ δεηθέντες χρημάτων τὰ τεμένη τὰ δημόσια ἀπέδοντο, τὰ μὲν κάρπιμα χρόνον τινά, τὰ δὲ ἄκαρπα ἀεννάως, τά τε θιασωτικὰ καὶ τὰ πατριωτικὰ ὡσαύτως, καὶ ὅσα ἐν χωρίοις ἰδιωτικοῖς ἦν· ὠνοῦντο γὰρ πολλοῦ ὧν ἦν καὶ τὸ ἄλλο κτῆμα· τοῖς δὲ θιασώταις ἕτερα χωρία, τὰ δημόσια ὅσα ἦν περὶ τὸ γυμνάσιον ἢ τὴν ἀγορὰν ἢ τὸν λιμένα. Je ne reprends pas la suite de l'anecdote, dont tous les détails ne sont pas clairs, car les ventes s'appliquaient, non plus à des biens-fonds, mais aux droits d'emplacement de l'agora, à la pêche en mer et à la vente du sel: voir les commentaires de Van Groningen 1933, p. 57–60, Zoepffel 2006, p. 574–579, Carusi 2008, p. 197–199, Valente 2011, p. 151–152, et Lytle 2012, p. 32–33.

C'est donc la pénurie financière qui a poussé les Byzantins à vendre ces *temenē* et ces *chōria*. La situation devait être dramatique, car la cité a sacrifié un bon nombre de biens-fonds pour en tirer sans doute des sommes considérables. Les *temenē* étaient des terres, puisque les uns étaient cultivés et les autres stériles. Tous étaient des propriétés consacrées à des divinités, les unes administrées par la cité elle-même (les *temenē dēmosia*), les autres par des thiases et des phratries (les *temenē thiasōtika* et *patriōtika*).[11] Ils ont été achetés par des citoyens et peut-être par des étrangers résidents qui avaient le droit de propriété. Quant aux *chōria dēmosia*, tous publics d'après la lettre du texte, ils devaient être des espaces urbains, car ils se trouvaient aux alentours du gymnase, de l'agora et du port. Ils ont été vendus aux membres de thiases, *thiasōtai*, c'est-à-dire aux communautés elles-mêmes et non à leurs membres à titre individuel, semble-t-il, probablement pour compenser leurs pertes. Toutes les décisions ont été prises par l'Assemblée des citoyens, même celles qui concernaient la vente des *temenē thiasōtika* et *patriōtika*, selon un processus qu'on rencontre aussi à Athènes au quatrième siècle.

(2) En effet, dans les années 343–340 et 330–325, d'après seize fragments d'inscriptions qui appartenaient originellement à quatre stèles, semble-t-il, des centaines de terrains et des lieux d'usage communautaire comme des aires de battage ont été vendus par des dèmes, des villages, des phratries, des *genē*, ainsi que par des associations cultuelles comme des orgéons.[12] Aucun de ces biens n'était désigné comme sacré.[13] Toutes les ventes ont été effectuées en une vingtaine d'années et, si les dates sont exactes, en deux étapes très courtes et assez proches l'une de l'autre, dont la première a probablement servi de modèle à la seconde. Or, c'était l'époque où Euboulos, puis Lycurgue, avaient la haute main sur les finances d'Athènes et s'efforçaient d'augmenter ses revenus. On en a conclu avec raison qu'une opération aussi bien concertée devait découler d'une décision de la cité, qui semble même avoir fixé les prix de base des terrains. Selon toute vraisemblance, c'est donc la caisse publique qui a bénéficié des 200 ou 300 talents produits par les

[11] Cf. Migeotte 2006.

[12] Voir la nouvelle édition, les commentaires et la bibliographie de Lambert 1997, ainsi que les commentaires de Lewis 1973, Faraguna 1992, p. 328–336, et Ismard 2010, p. 167–179. Pour Rosivach 1993, les transactions étaient des locations et non des ventes, mais Lambert 1997, p. 257–265, a réfuté cette interprétation. Tout en admettant qu'il s'agissait probablement de ventes, Ismard 2010, p. 174–179, a envisagé l'hypothèse, gratuite à mon avis, que ces ventes aient pu être faites «sous condition de rachat», autrement dit que les terres aient pu servir de gages aux emprunts contractés par Lycurgue à cette époque (sur ces emprunts, cf. Migeotte 1984, p. 25–27).

[13] D'après Horster 2004, p. 156–158, les allusions au héros Alkimachos, aux thiases et aux hiéromnémons d'Héraclès évoquaient la présence de terres sacrées. Mais celles-ci n'appartenaient pas forcément au héros et au dieu plutôt qu'aux associations: cf. Lambert 1997, p. 201 (nº 45), 198 (nº 41) et 252.

ventes,[14] dont le centième (*hekatostē*) fut sans doute consacré à Athéna et aux autres dieux. En effet, les fragments d'inscriptions ont été retrouvés sur l'acropole et les textes ont manifestement été gravés pour enregistrer les versements de cette taxe—ou plutôt de cette consécration—et non les ventes elles-mêmes.

En d'autres termes, comme à Byzance, c'est l'Assemblée de la cité qui a pris la décision et imposé (ou demandé?) à diverses communautés civiques et privées de vendre certains de leurs biens-fonds pour renflouer la caisse publique. Ensuite, au niveau local, chaque groupe eut sans doute pour tâche de prendre les décisions concrètes, notamment de désigner les terres dont il acceptait de se départir. En pratique, les choses se sont donc déroulées de la manière suivante. Nous ne savons pas d'où l'idée est venue, mais elle a d'abord fait l'objet d'un débat au niveau de la cité: dès ce moment, plusieurs citoyens se sont probablement déclarés acheteurs et tous savaient qu'ils devraient appliquer la décision quand ils se réuniraient dans les assemblées locales. Or, tandis que la majorité des terres étaient de petite taille et plus ou moins inactives ou inutiles, la plupart des acheteurs étaient des citoyens riches, qui appartenaient souvent aux communautés vendeuses. En agissant ainsi, ils espéraient sans doute bonifier des terres ingrates et agrandir leur patrimoine, mais ils acceptaient également d'aider la cité, comme ils le faisaient par exemple lors des souscriptions publiques. De même, tout en conservant leurs terres les plus productives, les communautés ont fait preuve de dévouement en sacrifiant certaines de leurs propriétés.

Les témoignages de ce genre sont peu nombreux, ce qui invite à conclure que ce type de vente était rare. On en trouve un autre exemple à Délos, où les hiéropes ont inscrit dans leurs comptes de l'année 278 une recette spéciale de 180 drachmes tirée de la vente aux enchères d'une maison qu'un citoyen avait consacrée à Apollon et qui s'était écroulée.[15] Or, on peut lire dans la *Rhétorique à Alexandre*, œuvre aristotélicienne du début de la période hellénistique, une réflexion relative à la vente de biens-fonds patrimoniaux: «il nous reste à étudier les sources de fonds. Tout d'abord, il faut examiner si l'une des propriétés de la cité est négligée, si elle ne produit pas de revenu ou si elle n'est pas réservée pour les dieux. Je veux dire par exemple certains espaces publics négligés dont un revenu pourrait être tiré pour la cité s'ils étaient vendus ou loués aux particuliers».[16] Aux yeux de l'auteur, la vente de *topoi dēmosioi* était donc aussi naturelle que leur location, du moins s'ils étaient négligés ou improductifs ou s'ils n'étaient pas réservés aux dieux.

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[14] Rien ne permet cependant de supposer, comme l'a fait Lambert 1997, p. 278, n. 237, que la somme ait été encaissée par le *théōrikon* ou les *stratiōtika*.

[15] *IG* XI 2, 162A, lignes 42–43: καὶ τόδε ἄλλο εἰσήκει τῆς οἰκίας ἣς ἀνέθηκε Στησίλεως πεσούσης, τοῦ δήμου ψηφισαμένου τ[- - - - - - ἀπε]δόμεθα ἐν τῆι ἀγορᾶι ὑπὸ κήρυκος· (somme). L'Assemblée avait donc décrété la vente plutôt que la restauration.

[16] 2, 2, 2 (1423a): λείπεται δ' ἡμᾶς ἔτι περὶ πόρου χρημάτων διελθεῖν. Πρῶτον μὲν οὖν σκεπτέον εἴ τι τῶν τῆς πόλεως κτημάτων ἠμελημένον ἐστὶ καὶ μήτε πρόσοδον ποιεῖ μήτε τοῖς θεοῖς ἐξαίρετόν ἐστιν. Λέγω δ' οἷον τόπους τινὰς δημοσίους ἠμελημένους ἐξ' ὧν τοῖς ἰδιώταις ἢ πραθέντων ἢ μισθωθέντων πρόσοδος ἄν τις τῇ πόλει γίγνοιτο.

Se débarrasser de terres ingrates ou improductives et de maisons en ruine était somme toute une saine mesure de gestion. La vente de terres fertiles, en revanche, privait les cités d'un certain nombre de *poroi* et ne pouvait se justifier que par un urgent besoin d'argent frais. Mais la vente de biens appartenant à des divinités pose un problème particulier, car on connaît le respect des Grecs pour le sacré et leur souci de protéger les *temenē* contre les empiètements et les profanations.[17] En outre, d'un point de vue légal ou juridique, la décision d'aliéner des biens sacrés soulève la question du pouvoir des cités sur des biens qui, en principe, ne leur appartenaient pas. Cette question est discutée depuis longtemps et a reçu au fil du temps des réponses contradictoires.[18] Comme je l'ai abordée moi-même à plusieurs reprises, je rappelle simplement que, d'après moi, le pouvoir des cités n'était pas sans limites ni contraintes, même si plusieurs textes anciens semblent suggérer que les biens sacrés leur appartenaient en même temps qu'aux dieux: sur les *temenē* de leur territoire, elles exerçaient en fait un pouvoir de gestion, comme l'a montré l'anecdote relative à Byzance; lorsqu'elles puisaient dans les caisses sacrées pour assurer leurs propres dépenses, elles devaient normalement le faire sous la forme d'emprunts remboursables.[19]

Or, on observe qu'à Byzance la cité n'a «vendu» les *temenē* fertiles que pour un temps. Difficilement compréhensible pour nous, une telle restriction était possible en Grèce ancienne, car le droit de propriété n'y avait pas le caractère absolu qu'il possède aujourd'hui et pouvait être limité de différentes manières, notamment dans le temps: par exemple, les Grecs «vendaient» à des particuliers le droit de lever des taxes ou d'exploiter des mines, alors que de telles situations étaient temporaires par definition.[20] Après un délai sans doute convenu d'avance et selon des modalités qui nous échappent, Byzance a donc récupéré ces terres au nom des dieux. Les a-t-elle rachetées ou les a-t-elle reprises sans compensation après avoir laissé aux acquéreurs la jouissance de leurs revenus durant quelque temps? Le texte de l'*Économique* ne permet pas de répondre à cette question. Mais l'Assemblée a fait appel au dévouement des citoyens: il est donc assez probable qu'elle ait pris la seconde décision.

En d'autres termes, il semble que ces terres soient restées des propriétés divines. La situation serait alors comparable, *mutatis mutandis*, à celle des hypothèques sur des biens-fonds publics et sacrés dont il est question ci-dessous au point IV. Or, on peut se demander si le même raisonnement ne pourrait pas s'appliquer aux ventes

[17] Cf. Parker 1983, p. 160–166.

[18] Voir la discussion de Rousset 2013, qui a aussi abordé le problème de l'aliénation de biens publics et sacrés. On y trouvera la bibliographie antérieure.

[19] Voir ma dernière mise au point dans Migeotte 2014, p. 20–25, avec les références; sur les emprunts, cf. p. 212–213.

[20] Cf. Gauthier 1976, p. 148, avec plusieurs exemples. À propos de Byzance, Van Groningen 1933, p. 55, avait noté justement: «c'est donc littéralement une vente pour un certain temps, une cession temporaire du droit de propriété». Sur les limites du droit de propriété en Grèce ancienne, voir Migeotte 2014, p. 23, avec la bibliographie antérieure.

définitives, aussi bien à Philippes et à Délos qu'à Byzance, autrement dit si ces biens-fonds n'ont pas conservé eux aussi leur caractère sacré et si leur «acquisition» ne s'est pas limitée à la jouissance de leurs revenus. On peut même aller plus loin et se demander si, en privant ainsi les dieux de certaines ressources, les cités n'avaient pas ensuite l'obligation de les «rembourser», dans la mesure du possible, en leur consacrant de nouveaux biens-fonds quand elles en auraient les moyens. Aucun texte ancien ne fournit, à ma connaissance, de réponse à ces questions.

III. Vente et conservation de biens confisqués.

La situation était différente lorsqu'il s'agissait de terres, de maisons et d'autres biens confisqués à des particuliers pour des raisons politiques ou judiciaires. Les cités avaient en effet le choix entre deux solutions, qui pouvaient varier d'un cas à l'autre et être influencées par les circonstances. Elles pouvaient d'une part conserver ces biens et enrichir ainsi leur patrimoine, par exemple en mettant les esclaves à leur service ou en consacrant les objets de valeur aux dieux. Les exemples ci-dessous concernent tous des biens-fonds et, d'après les trois premiers, leur consécration excluait, semble-t-il, toute possibilité de vente.

(1) Au lendemain de leur réconciliation après des conflits internes, vers 360, les citoyens de Dikaia, sur le golfe thermaïque, ont menacé de confisquer et de consacrer à Apollon les biens de ceux qui ne prêteraient pas serment conformément aux prescriptions, puis (à deux reprises) de ceux qui autoriseraient l'introduction de procès malgré les décisions de l'Assemblée.[21]

(2) À la même époque, les Delphiens ont confisqué et consacré à Apollon les biens de treize citoyens pour des affaires regardant l'Amphictionie: on y trouve au moins dix-sept terrains, un jardin, onze maisons et une auberge.[22]

(3) À Delphes encore, en 191/0, le consul M. Acilius Glabrio a sévi contre quatre-vingt-dix étrangers environ, qui avaient pris parti contre Rome et possédaient des terres et des maisons à Delphes:[23] l'ensemble comprenait vingt-quatre terres, des bains et plus de quatre-vingt-dix maisons, que le magistrat a «donnés au dieu et à la cité»,[24] ce qui veut dire que ces biens ont enrichi le patrimoine d'Apollon sous la gestion de la cité.

(4) À la fin du quatrième siècle, Érétrie a honoré et récompensé le Macédonien Timothéos en lui offrant, en plus d'autres privilèges, «la maison qu'il voudrait parmi celles des exilés»: [25] la cité avait donc conservé ces maisons après les avoir confisquées.

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[21] Voutiras-Sismanidis 2007; Voutiras 2008 (*SEG* 57, 576), lignes 18–20, 34–36 et 43–45.

[22] Bousquet 1989, nº 67 à 72. Cf. Rousset 2002, p. 205–211.

[23] Cf. Rousset 2002, p. 250–269, avec le texte grec, sa traduction et les références aux éditions antérieures. Voir aussi le résumé de la p. 220.

[24] Cf. Rousset 2002, p. 262 et 267, et Rousset 2013, p. 128–130.

[25] *IG* XII 9, 196, lignes 23–25. Sur la date du décret (319/8) et le caractère extraordinaire du cadeau, cf. Knoepfler 2001, p. 175–184.

Mais il arrivait fréquemment aux cités de vendre les biens confisqués et de les retourner rapidement au domaine privé sans les intégrer à leur patrimoine. Il suffit de rappeler quelques exemples. Les deux cas les mieux documentés sont ceux d'Athènes et de Délos.

(1) À la période classique, Athènes vendait systématiquement les biens-fonds qu'elle confisquait en Attique. En effet, comme on l'a noté depuis longtemps,[26] elle ne possédait dans ce territoire, à de rares exceptions près,[27] ni terres ni maisons qu'elle aurait pu louer à des particuliers, alors que de telles propriétés existaient au niveau local, par exemple dans les dèmes, et dans des territoires extérieurs dont la cité s'est emparée à la période classique, notamment dans les îles égéennes. Les ventes étaient faites aux enchères par les *pōlētai*[28] et les comptes de ces magistrats montrent qu'elles étaient frappées de la taxe de vente, *epōnion*, et du «droit de criée», *kērykeion*, qui servait à rémunérer le héraut.[29]

(2) À Délos, d'après les nombreux comptes de la période hellénistique, la cité paraît avoir appliqué la même politique. En effet, elle ne possédait elle non plus, à titre public, aucune terre de culture ou d'élevage qu'elle aurait pu louer à des particuliers, alors que les trittyes et les phratries possédaient des terres, des jardins, des maisons et des ateliers. Cette situation était probablement liée au caractère sacré de l'île, où Apollon était le plus gros propriétaire foncier.[30]

(3) Dans la première moitié du quatrième siècle, Halicarnasse a saisi et vendu un grand nombre de biens de débiteurs insolvables d'Apollon, d'Athéna et de

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[26] Cf. Walbank 1991, p. 150–151; Lewis 1992, p. 287–300; Papazarkadas 2011, p. 212–236.

[27] Papazarkadas 2011, p. 212–236, et Rousset 2013, p. 119–120, ont analysé un bon nombre de cas et constaté que plusieurs témoignages sont trop elliptiques pour être concluants, notamment ceux qui pouvaient évoquer des lieux ou des édifices du «domaine public». Retenons ici les plus explicites, qui proviennent tous des *Poroi* de Xénophon. (1) En 4, 49, celui–ci a mentionné des maisons publiques, situées au Laurion, dont la cité tirait des revenus, ἀπ' οἰκίων περὶ τ' ἀργύρεια δημοσίων: pour Gauthier 1976, p. 187, il s'agissait de maisons confisquées que la cité louait aux concessionnaires des mines, pour le logement de leur main-d'œuvre, ou à des commerçants; pour Graham 1998, p. 33–37, suivi par Henry 2002, p. 219, c'étaient des maisons closes, bien que l'expression *oikiai dēmosiai* ne soit pas attestée dans ce sens. (2) En 4, 19, Xénophon a noté que les particuliers «prennent bien en location des domaines sacrés, des sanctuaires et des maisons», μισθοῦνται γοῦν καὶ τεμένη καὶ ἱερὰ καὶ οἰκίας: le contexte suggère de voir dans celles-ci des maisons sacrées (cf. Gauthier 1976, p. 147–148). (3) En 3, 12–13, Xénophon a proposé aux Athéniens de construire des auberges publiques, δημόσια καταγώγια, «en plus de celles qui existent», πρὸς τοῖς ὑπάρχουσι, et des lieux de résidence, οἰκήσεις, pour les commerçants (cf. Gauthier 1976, p. 105–107): la cité ne semble pas avoir suivi ce conseil et les auberges existantes pouvaient être privées plutôt que publiques.

[28] Cf. Aristote, *Constitution d'Athènes*, 47, 3.

[29] Cf. *IG* I^3, nº 421–430; Langdon 1991, nº P3, LA2, P5 (Institut Fernand-Courby 2005, nº 26; Rhodes-Osborne 2003, nº 36) et P53.

[30] Cf. par exemple Chankowski 2008, p. 279–295.

Parthénos: on y compte dix-neuf terres, quatorze maisons et un jardin, ainsi qu'un bras de mer (privé) où se pratiquait la pêche au thon.[31] La vente a rapporté plus de 40 000 drachmes, mais la liste n'est pas entièrement conservée.

(4) En 361/0, après avoir condamné trois citoyens qui avaient profané la statue d'Hécatomnos, père de Mausole, alors satrape de Carie, Mylasa a confisqué leurs biens et vendu leurs propriétés foncières; elle a fait de même en 355/4 à l'égard de deux citoyens qui avaient comploté contre Mausole.[32]

(5) À la même époque, Iasos a également sévi contre plusieurs citoyens qui avaient comploté contre Mausole: elle les a condamnés à l'exil, eux et leurs descendants, a saisi et vendu leurs biens, puis a fait graver dans la pierre deux listes des biens vendus, avec leurs prix.[33]

IV. Hypothèques.

Il reste à examiner le cas des hypothèques. En effet, lorsqu'elles étaient obligées d'emprunter de l'argent dans de mauvaises conditions, les cités hypothéquaient parfois des biens patrimoniaux et risquaient donc de les perdre si elles étaient incapables de payer leurs dettes. Les témoignages ne sont pas nombreux (une dizaine) et je les ai analysés dans un article publié il y a plus de trente ans.[34] Je ne reprends donc ici que les grandes lignes de l'argumentation, qui n'a pas été contestée depuis lors, en continuant à distinguer le «domaine public» du «domaine privé de l'État».

Calymna, vers 360, a hypothéqué des bosquets.[35] Acraiphia, au troisième siècle, et Sicyone, autour de 200, ont hypothéqué chacune une terre consacrée à Apollon.[36] Ces biens appartenaient au «domaine privé», mais les hypothèques pouvaient aussi s'étendre à une partie du «domaine public». Ainsi, à la fin du quatrième siècle, Lampsaque a hypothéqué son acropole.[37] Au début de la période hellénistique, Arkésiné est allée jusqu'à consentir à deux créanciers différents une hypothèque générale à la fois sur les biens privés des citoyens et des habitants et sur «tous les biens communs de la cité».[38] Dans la seconde moitié du troisième siècle, Chorsiai a hypothéqué son territoire, *chōra*.[39] À une époque inconnue, Kymé a fait de même

[31] Voir la nouvelle édition de Blümel 1993 (*SEG* 43, 713).

[32] *I. Mylasa*, nº 2 et 3 (Rhodes-Osborne 2003, nº 54).

[33] *I. Iasos*, nº 1.

[34] Migeotte 1980, article repris avec un *Post scriptum* dans Migeotte 2010, p. 49–59. J'ai aussi repris et commenté les textes dans Migeotte 1984: voir les notes suivantes.

[35] Cf. Migeotte 1984, nº 59; *I. Knidos*, 221; Ager 1996, nº 21; Magnetto 1997, nº 14. Dans Migeotte 1980, p. 165, et Migeotte 1984, p. 204 et 208, j'ai considéré ces bosquets comme sacrés en me fondant sur l'un des sens habituels du mot *alsos*, mais il pouvait s'agir de propriétés publiques.

[36] Cf. Migeotte 1984, nº 16B et 17.

[37] *Ibid.*, nº 76.

[38] *Ibid.*, nº 49 et 50.

[39] *Ibid.*, nº 11. Sur la date du texte, cf. Rigsby 1987.

avec ses portiques.[40] Après la première guerre de Mithridate, plusieurs cités d'Asie Mineure ont hypothéqué divers biens publics comme des portiques, des théâtres, des gymnases, des remparts et même des ports.[41]

La saisie par des créanciers de biens du «domaine privé» est compréhensible: Calymna a effectivement perdu ses bosquets.[42] Mais comment admettre que des cités aient pu perdre de cette manière des lieux et des édifices qui faisaient partie de leur «domaine public», voire leur propre territoire ou tous leurs biens? À Kymé et à Arkésiné, nous ignorons si des saisies ont réellement eu lieu. À Sicyone, d'après Polybe (18, 16, 1), le roi Attale a payé la dette et libéré la terre lors de son passage dans la cité en 198. Dans tous les autres cas, les cités ont échappé aux saisies parce qu'elles ont finalement payé leurs dettes, au moins en partie, souvent après avoir conclu des arrangements avec les créanciers. Mais que signifiaient de telles hypothèques? En fait, selon toute vraisemblance, elles ne menaçaient pas la propriété des cités et des dieux, car les créanciers ne saisissaient que les revenus de ces biens, par exemple les fermages et les loyers des terres et des maisons publiques ou sacrées ou les taxes prélevées dans les ports et les ateliers-boutiques installés sous les portiques des agoras ou aux alentours des théâtres, des gymnases et des remparts.[43]

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La plupart des ventes s'appliquaient donc à des biens récemment confisqués, tandis que celles de biens-fonds du patrimoine traditionnel étaient beaucoup plus rares, quoique possibles dans certaines limites: elles s'appliquaient alors aux biens du «domaine privé» et ne s'imposaient, en général, que dans des moments de difficultés financières. Il se peut en outre que, dans le cas des biens-fonds sacrés, les «acheteurs» n'aient acquis que l'usage de leurs revenus. Quant aux hypothèques sur des biens du «domaine privé» des cités, elles pouvaient entraîner de véritables saisies, alors que, dans le cas du «domaine public», les créanciers devaient se limiter à leurs revenus. Ces principes de droit étaient manifestement partagés par l'ensemble du monde grec, même si leur application variait selon les cités.[44]

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[40] *Ibid.*, nº 81.

[41] *Ibid.*, nº 114.

[42] Étant citoyens de Cos, les créanciers (ou leurs descendants) n'ont pas pu se les approprier, à moins qu'ils n'aient joui du droit de propriété à Calymna : la cité a donc pu les vendre à leur profit, comme je l'ai suggéré dans Migeotte 1984, p. 208 et n. 243.

[43] Cf. Migeotte 1980, p. 168–171.

[44] Je remercie vivement D. Rousset pour la lecture critique de mon texte et M. Faraguna pour la stimulante réponse des pages qui suivent.

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ALIENATION OF PUBLIC AND SACRED LANDED PROPERTIES IN GREEK CITIES: A RESPONSE TO LÉOPOLD MIGEOTTE

According to Aristotle's *Politics* (1267b33–37), in his tripartite scheme of the ἀρίστη πολιτεία Hippodamus of Miletus divided the civic territory into "three parts, one sacred, one public, and one private: sacred land to supply the customary offerings to the gods, common land to provide the warrior class with food, and the private land to be owned by the farmers" (διῄρει δ' εἰς τρία μέρη τὴν χώραν, τὴν μὲν ἱερὰν τὴν δὲ δημοσίαν τὴν δ' ἰδίαν· ὅθεν μὲν τὰ νομιζόμενα ποιήσουσι πρὸς τοὺς θεούς, ἱεράν, ἀφ' ὧν δ' οἱ προσπολεμοῦντες βιώσονται, κοινήν, τὴν δὲ τῶν γεωργῶν ἰδίαν). It is agreed that in expounding his theoretical ideas Hippodamus was not in this respect formulating new concepts but merely codifying preexisting practices. In fact, as shown by Léopold Migeotte in a variety of papers, some presented at earlier *Symposia*, the distinction between public and sacred revenues, and more generally between secular and sacred moneys, was conceptually and operationally one of the fundamental, and ubiquitous, tenets of Greek financial administration.[1] Based on these premises, N. Papazarkadas has recently provided a systematic analysis of the administration of sacred and public land, at both the central and local level, in Classical Athens.[2]

Narrowing the scope of his investigation, in his fine paper Migeotte has focused on a specific aspect of this broader topic, namely patterns in the alienation of real properties, both sacred and public. Although we tend to assume that Greek cities primarily aimed to preserve the integrity of their public and sacred landed assets—and on many occasions they indeed had to design procedures to regain them following encroachment and illegal seizure[3]—Migeotte's analysis has the merit of showing that this was not always necessarily the case and that public properties in

[1] Migeotte 2006a (with the observations of Dreher 2006), 2006b, 2009 and 2010. Cf. also Faraguna 2012d.

[2] Papazarkadas 2011. See, however, also Rousset 2013, providing an in-depth discussion of Papazarkadas' book. Rousset argues against a clear-cut distinction between sacred and public land and concludes that "[w]e should probably admit that there existed a relatively varied picture, in which there was room both for cases of separateness between the two spheres, for instance in financial matters, and for cases where sacred property was included within public property" (21).

[3] Corsaro 1990.

particular did not represent a fixed, unchangeable entity but could be enlarged as a result of confiscations and gifts, or reduced through regular or occasional public sales. Depending on the policies implemented by each city, different patterns in public land tenure thus emerge.

Another important distinction Migeotte has introduced concerns the different categories of public and sacred real properties. Functionally, they are not all on the same level and cannot therefore be considered together as a coherent group. One has in particular to distinguish between 'infrastructure', i.e., spaces and buildings used for core political and religious activities (*agorai*, monumental buildings, walls and fortifications, sanctuaries, etc.)[4]—in Migeotte's words, the "domaine public"—and revenue-generating possessions such as land, *eschatiai*, hilly and mountainous areas used for grazing and gathering firewood, quarries,[5] and mines—the "domaine privé." [6] Alienation, permanent or temporary, in normal circumstances only concerned this second category of realties.

With his typical document-based approach, Migeotte considers three different cases where public or sacred properties could be sold or offered as security. The first must be regarded as the exception rather than the rule and concerns the sale of τεμένη belonging to the gods. This was in all likelihood a very rare event, as is for instance shown by [Arist.] *Rhet. ad Alex*. 1425b19–21, where it is suggested, with regard to πόρος χρημάτων, that one way of increasing revenues was to consider whether there were some public properties that were neglected καὶ μήτε πρόσοδον ποιεῖ μήτε τοῖς θεοῖς ἐξαίρετόν ἐστιν, the implication being that the sale of sacred real properties was hardly an option to be considered. As far as inscriptions are concerned, it is documented by an important fragmentary text from Philippi (*SEG* 38,658) consisting of a list of sacred properties of Ares, the Heroes, Poseidon, the deified king Philip[7] (and presumably other divinities) sold at auction. Migeotte offers a new, improved reading of the inscription showing that the ἐπώνιον collected for each sale was a 2% tax irrespective of the value of the property. This apparently sets Philippi apart from Athens, where the sales tax was calculated not as a

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[4] For a review of public properties in Greek cities see Lewis 1990. Public 'political' buildings: Hansen-Fischer Hansen 1994. *Agorai*: Chankowski-Karvonis 2012. Cf. also Hansen-Nielsen 2004, pp. 138–143.

[5] The prevailing view is that quarries were normally owned publicly by corporate entities: the *polis*, subdivisions of the state, and sanctuaries; cf. Langdon 2000, pp. 244–245; Lolos 2002; Papazarkadas 2011, pp. 229–230. 'Private' ownership is now argued by Flament 2013.

[6] A more articulated classification was suggested by Lambert 1997, pp. 234–235, adding, at least at deme level, a third category, namely 'public service' properties, i.e., properties owned by the group for the common use and benefit of its members, such as threshing floors, theatres, *agorai*, *eschatiai*, etc. Cf. also Faraguna 2012a, p. 176, adding 'cemeteries' to the list.

[7] On the ruler cult in Macedonia see now Mari 2008.

percentage but on a sliding scale.[8] The only comparable documents are the Athenian *Rationes Centesimarum*, where, however, only few, if any, of the properties sold were sacred (see below).[9]

The second case is represented by the sale of properties confiscated either from public debtors or as a consequence of exiles and political events. The inscriptions from Athens, Halicarnassus, Mylasa and Iasos listed by Migeotte are all well known.[10] Another item, *DGE*[3] 688 (= Koerner 1993, no. 62), sides B, C and D, including registrations of confiscated estates and houses (τὰς γέας καὶ τὰς οἰκί<ε>α[ς] ἐπρίαντο) publicly sold in fifth-century Chios, can in my opinion be added to the list and possibly is the earliest text of the series.[11] It needs to be stressed that the decision for a *polis* to alienate confiscated properties and regularly avoid managing cultivable land often resulted from a precise strategy. Athens is a case in point. In Attica profitable communal estates were owned and administered by demes and not by the *polis*. N. Papazarkadas has in his recent book explored the reasons for the apparent paradox that, despite its fully developed democratic institutions, Athens had no publicly owned landholdings.[12] Other cities, however, behaved differently. Migeotte quotes as examples the cases of Dikaia, on the Chalkidic Peninsula, in a recently published inscription concerning measures for civic reconciliation and amnesty (*SEG* 57,576, ll. 18–20, 32–34, 42–45), Delphi, where together with the ἱερὰ χώρα Apollo was the owner of other landholdings that were leased out and provided revenues for the Amphiktyony, and Eretria. Further evidence is offered by a still unpublished honorary decree from Argos, whose contents were presented by Ch. Kritzas more than twenty years ago (*SEG* 41,282; cf. also 284). It refers to the ἱερὰ καὶ δαμοσία χώρα which had been divided into 'fields' (γύαι) and generated rents (δωτίναι) that were paid into the sacred and public treasuries.[13] More recently, Kritzas has suggested that Athena's treasury, for which we now possess an archive of ca. 134 (again still unpublished) bronze tablets recording financial transactions, acted as the state treasury of Argos. The incomes from the leases of the sacred and public land were to a large extent the source of its funds.[14]

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[8] Hallof 1990, pp. 408–410: "abgestufte Kaufsteuer." It appears that the tax was in fact in most cases computed at 1%; cf. also Stroud 1998, pp. 61–62.

[9] For the view that some of the land sold in the *Rationes Centesimarum* was sacred see Horster 2004, pp. 158–159. The question is left open by Papazarkadas 2011, pp. 198–200, who allows for the possibility that "some associations of orgeones did own secular, and therefore disposable property." Cf. also Rousset 2013, pp. 10–12.

[10] For a comprehensive study of these texts see now Delrieux 2013.

[11] Faraguna 2005; Delrieux 2013, pp. 228–231. Cf. also Matthaiou 2011, pp. 13–34, arguing that the text on all four sides (A–D) is a single inscription but accepting that the properties sold on C and D had been confiscated.

[12] Papazarkadas 2011, pp. 212–236.

[13] Kritzas 1992; cf. Piérart 1997, pp. 332–333. For the original meaning of δωτίνη cf. e.g. Hom. *Il*. 9.149–156 (= 9.291–297).

[14] Kritzas 2006, pp. 408–411. Cf. also *SEG* 54,427.

We must therefore reckon with the possibility that, unlike Athens, some cities possessed large tracts of cultivable public land and benefitted from rents and leases. Similarly, we can assume that the cultivated land resulting from the draining of a marsh (λίμνη) contracted out to Chairephanes in Eretria at the end of the fourth century (*IG* XII, 9, 191) was public property.[15] Moreover, especially during the archaic period, Greek *poleis* often kept land in reserve:[16] the distribution of τὰ ἀπότομα καὶ τὰ δημόσια of three specific districts and the κοῖλοι μόροι in the τεθμός inscribed on the 'Bronze Pappadakis' provide an interesting example to this effect (*IG* IX 1^2, 3, 609; Koerner 1993, no. 47).

The last, fascinating case concerns public properties as security in credit contracts. They included not only precious movable objects but also land and even theatres, *gymnasia*, *stoai*, walls and harbours, although, as convincingly argued by Migeotte elsewhere, if the city failed to pay its debts and defaulted, creditors did not acquire ownership of the secured properties but the right to draw revenue from them, in other words, in Greek terms, they did not obtain the πόροι but only the πρόσοδοι.[17]

Having thus highlighted the main points raised by Migeotte, in the observations that follow I would like to concentrate on a group of documents briefly but effectively examined in his paper, the Athenian *Rationes Centesimarum*. Their interest stems from the fact they can be used as a valuable heuristic tool to define the notion of public property in Athens and explore in what form and to what extent the *polis* retained control of those landholdings that were neither sacred nor private. To quote an example, in his recent book on *La cité des réseaux* P. Ismard argues, among other things on the basis of these epigraphic documents, that in Athens public land was administered by corporate groups ("associations" in his words) such as demes, *komai*, phratries, *gene*, *orgeones* that acted as "their only managers" ("les seules gestionnaires").[18] As a result, we are not justified in positing the existence of public property owned by the city conceived as a "subject of law" ("[d]ans l'Athènes classique, rien ne permet d'accréditer l'existence d'une propriété publique par une cité conçue comme sujet du droit").[19] In his view, it is therefore more correct to speak of 'collective' property as the notion of 'public', *demosion*, is not clearly defined but is diffracted, dispersed, and operates at different levels within the corporate groups. Public property was nothing more than an ensemble of the

[15] On this inscription see Fantasia 1999, pp. 100–107; Knoepfler 2001.

[16] Ruzé 1998.

[17] Migeotte 1980.

[18] Ismard 2010, pp. 167–185. See the reviews of Bubelis 2012 and Eidinow 2012.

[19] Ismard 2010, p. 183. Cf. also p. 181: "Rien ne permet notamment d'y voire un patrimoine dont la cite aurait été le propriétaire en droit, plutôt que des biens d'usage collectif dont les instances civiques auraient été les simples gestionnaires. De manière générale, la distinction entre patrimoine public et biens d'usage public n'a probablement jamais été explicitée en droit athénien."

property held by various associations.[20] As Ismard concludes at the end of his book, "la polis … n'est … une instance surplombante à l'égard de l'ensemble des associations qui composent la société athénienne; … elle est l'ensemble des intervalles dont le propre est de lier et séparer, de joindre et disjoindre une multiplicité de communautés."[21]

Ismard's overall argument is too complex to be dealt with here and I would like to scrutinize it only in so far as it concerns the *Rationes Centesimarum*. These inscriptions record the rather astounding operation of a massive sale of land and houses belonging to corporate groups between ca. 340 and 320 B.C. The 17 fragments have been recomposed as part of four stelai, the first two recording sales on the part of demes and *komai*, while stelai 3 and 4 include phratries and their subgroups (*gene* and *orgeones*).[22] Lambert, who has reedited the texts, believes that the stelai originally recorded 400–600 sales for a total value of 300 talents.[23] The transactions must have been coordinated centrally as a 1% tax, an ἑκατοστή on each sale was paid into the treasury of Athena and the Other Gods (most of the fragments came from the Acropolis where the stelai were presumably set up). The sales were therefore clearly of a unique character. The financial stratagem described by [Arist.] *Oec*. 1346b13–26, for instance, only partially resembles the operation of the *Rationes Centesimarum* because the θίασοι and πάτραι involved were compensated for the loss of their land with other public properties in the city.[24] This does not seem to be the case for the corporate groups in our inscriptions.

Whether we stress the economic or euergetic aspects of the sales programme,[25] the question remains on what legal ground the central authorities, namely the Athenian assembly, could impose such a massive sales operation on a large number of corporate groups. An answer is not easy because we do not know who was the beneficiary of the proceeds of the sales, whether they went to the *polis* and were allocated to some specific fund or purpose, or whether only the ἑκατοστή was paid

[20] For a similar approach cf. Karabélias 2005, esp. pp. 189–200: "Sous le vocable Cité nous comprenons évidemment les divers dèmes ainsi que les divers temples, dont les propriétés sont englobées dans la communauté civique."

[21] Ismard 2010, p. 411.

[22] Lambert 1997, pp. 183–206, 219–225 (cf. *SEG* 48,149).

[23] Lambert 1997, pp. 257–263, has conclusively shown that the inscriptions recorded sales and not leases. Ismard 2010, pp. 174–179, has now suggested that the properties listed on the four stelai were not sold but given by the city as security against loans from private individuals (cf. [Plut.] *Mor*. 841d and 852b, with Faraguna 2012b, pp. 355–356).

[24] On this stratagem attributed to Byzantion see Migeotte 2006b.

[25] For the economic aspects cf. Lambert 1997, pp. 280–291. On the purchasers as members of the wealthy class driven by an euergetic *ethos* and by *philotimia* see Chankowski 1999, pp. 368–369; Ismard 2010, p. 172, and Migeotte in his paper, drawing a parallel with public subscriptions.

into the sacred treasury and the selling groups received the other 99% of the price and managed it as a part of their budget.[26]

If we make an attempt to reconstruct the concrete context into which the sales transactions must be placed, demes, as the subunits of the *polis* on which information is more plentiful, are the most promising ground to explore. By the fourth century, demes already had well-defined boundaries, as shown by the rupestrial ὅροι which have been found in increasing numbers all over Attica.[27] As local, 'territorial' communities, demes benefitted from a variety of resources: agricultural land, *eschatiai*, houses, quarries, theatres.[28] They rented sacred properties and drew incomes which were then used for cultic purposes; they also owned non-sacral properties, including not only cultivable landholdings (*IG* II^2 2497) but also poor-quality land like the Φελλεῖς leased in *IG* II^2 2492[29] and pastures (ἐννόμια), as shown by *IG* II^2 1196.[30] The last point is of particular significance since it is generally maintained that the properties sold in the *Rationes Centesimarum* consisted of marginal, often unproductive land. In the lease document concerning the Aixonian Φελλεῖς there is moreover a clause barring the deme from selling the land before the forty-year lease had expired. It was thus not unconceivable for a deme, in the same way as for a *polis*, to dispose of some of its real properties.

In the light of this evidence, it can be surmised, as suggested by Migeotte, that, prompted by a law or a decree, each individual deme carried out a comprehensive survey of the landed assets it owned, in particular of the unproductive or idle ones, and then proceeded to sell a number of them generally to some of its wealthier members. S.D. Lambert and N. Papazarkadas have, however suggested an alternative explanation, namely that we should distinguish between two categories of non-sacral land administered by demes within their territory: the landed estates that belonged to the deme and were leased out to provide steady revenues, on the one hand, and communal properties, sometimes labelled as δημόσια in the ἑκατοστή-documents, which were as a rule located in marginal, non-agricultural areas and were open to common use for grazing and gathering wood, on the other. In particular, in Lambert's and Papazarkadas' view, the role of demes with regard to this type of properties was only that of agents, while the *polis* retained the last word over their administration, as reflected in the *Rationes Centesimarum*.[31] According to

[26] Lambert 1997, pp. 278–280, and Ismard 2010, p. 174, argue for the first option. Papazarkadas 2011, pp. 235–236, although following Lambert, is more cautious (at p. 203, however, he seems inclined to accept the other alternative).

[27] Papazarkadas 2011, pp. 156–160, with an updated review of the *horoi*.

[28] Papazarkadas 2011, pp. 111–162.

[29] Krasilnikoff 2008.

[30] On this document see Papazarkadas 2007, pp. 160–166, with a new edition and excellent commentary.

[31] Lambert 1997, pp. 234–240; Papazarkadas 2011, pp. 227–236.

Papazarkadas, in conclusion, "public realty did exist in Classical Athens … but it consisted of landed zones in mainly marginal areas, used, if at all, for the common benefit of members of the political community."[32] It was this marginal, unoccupied land, over which the *polis* notionally maintained some sort of control, that constituted Athens' public land. On the basis of a much later decree its existence can moreover be traced down to the Augustan period (cf. τὰ ὄρη τὰ δημόσια and αἱ δημοτελεῖς ἐσχατιαί which were to be restored and left open for grazing and wood-gathering in *IG* II^2 1035, as reedited in *SEG* 26,121, ll. 21–22).[33]

I am not sure what can be made of this hypothesis. My first reaction was that the distinction it makes is too subtle and speculative, but I also find it intriguing because it could for instance explain Solon's reference to ἱερὰ καὶ δημόσια κτέανα rapaciously "seized" by the δήμου ἡγεμόνες in fr. 3 G.-P. and confirm that the agrarian crisis in early sixth-century Athens revolved around access to, and the use of, common land.[34]

Leaving this question aside, it seems to me that both possible explanations offered for the sales of the *Rationes Centesimarum* tend to weaken (if not undermine) Ismard's network theory on the nature of the *polis*. Whether demes were selling their own land or unoccupied 'public' land, the *polis* was to a remarkable degree enforcing its role as "the proprietor in chief of all landed assets within its boundaries."[35] This becomes even more apparent, and more striking, when we consider that the selling agents included not only 'constitutional' subunits like the demes (and their subdivisions, the κῶμαι) but also 'non-constitutional' associations such as phratries and their subgroups.[36]

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[32] Papazarkadas 2011, p. 235.

[33] Culley 1977, pp. 287–291. On the inscription see also Schmalz 2007–2008 and 2009, pp. 10–11; Rousset 2013, p. 7.

[34] This was the theory proposed by Càssola 1964, and more recently revived by Rihll 1991 and van Wees 1999. For a critical review of recent works on Solon's economic reforms see Faraguna 2012c.

[35] Burford 1993, p. 16.

[36] The definition of 'constitutional' and 'non-constitutional' groups is taken from Papazarkadas 2011.

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AUCTIONS AND OWNERSHIP IN PTOLEMAIC EGYPT: A SOCIAL AND ECONOMIC APPROACH

The idea of ownership is one of the oldest legal concepts of mankind. In the ancient world, ownership or other types of control over agrarian land played an essential role in wealth and growth of individuals and of the whole community, the state. Legal institutions interacted and channeled the allocation of natural resources and the distribution of income; every type of interest in land really mattered.

The concept of property and especially of real property is a social fact. In societies throughout history, the definition of property rights is strongly influenced by social, political and economic phenomena. As Schmid recently stated: "Property is not simply a derivative of a physical fact, it also reflects a group choice about what kinds of effort are to count in creating an image in people's minds that acknowledges a person's rights."[1]

In ancient societies there was always a strong connection between legally protected property rights and economic rights. However, economic performances can be carried out without a proper legal framework, too. Therefore Barzel is right stating that "legal rights, as a rule, enhance economic rights, but the former are neither necessary nor sufficient for the existence of the latter."[2] Notwithstanding, economic choices can be made with more security—and at lower transaction costs—in an adequate legal environment. Furthermore, economic transformations and needs lead often to changes in the legal framework: the state, as the main decision maker, commonly interferes on behalf of economic growth.

Ownership is a complex and dynamic category embedded in its contemporary environment. Social, political and legal institutions have an important impact on economic performances.[3] The institutional environment "constitutes the framework within which human interaction takes place. It provides the so called 'rules of the game', which, in effect, are the institutional background constraints, under which individuals in society make choices."[4]

My present concern is primarily the institutional arrangements of ownership in a rural economy, together with the legal environment surrounding that economy and

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1 Schmid 2007: 83.
2 Barzel 2007: 263.
3 Mercuro – Medema 2006: 241–2.
4 Mercuro – Medema 2006: 247.

its connection to changing economic and social conditions. If one looks at how property rights functioned, one should consider also the tension between individual decision makers and collective interests (enforced mostly by the state). If a legal system considers ownership functionally, this leads soon to the solution—especially regarding agrarian land—that the owner is never entitled to enjoy exclusive or unlimited property rights. If people leave their land idle this decision will necessarily not be accepted by the social, political and legal environment. There is a higher priority than an individual's abstract title: natural resources (especially if scarce) should be exploited.

I approach the problem from the special point of view of auctions of land by state authorities and I restrict the present paper to Ptolemaic Egypt. First I deal with the rules of auctions and their legal nature. Then I return to the problem of defining ownership in Hellenistic Egypt.

I. Auctions in Ptolemaic Egypt

As an informative introduction to our topic, I have selected two petitions which can serve as case studies. The first is P.Ent 61, from the middle of the third century BCE, recording the application of a resident of the village Phanippos to the king for legal help (the name of the petitioner is lost with the first lines of the text):[5]

> ... [δέομαι οὖ]ν σου, βασιλεῦ, εἰ καί σοι δοκεῖ, προστάξαι | Ἀμμωνίωι τ[ῶι | ο]ἰκονόμωι γράψαι Γλαύκωνι τὴν ὠνὴν κατατάξαι μοι ἵνα τὸ κτῆμα | κατεργάζωμαι καὶ μὴ καταφαρῆι, καθάπερ καὶ Ἡρακλείδηι τῶι ἀγοράσαντι τὸν |[10] ὑπάρχον[τα ...] ̣ον ἐν τῶι Νέωνος κλήρωι κεχρημάτισται. ἐὰν δὲ ὁ Νικόδημος | ἀφεθεὶς [καὶ] παρα[γε]νόμενος ἐν ταῖς ξ ἡμέραις ἐπιλύσασθαι βούληται κατὰ τὸ διάγραμμα, | δίδωμ̣[ι] α̣ὐ̣[τῶι τὴ]ν ἐπίλυσιν ἀποδόντι τό τε ἀργύριον καὶ τὰ γινόμενα | κα ... [6]

According to lines 1–6 (not quoted), the claimant had purchased some land (*ktema*) that belonged earlier to a certain Nikodemos. From the terminology it seems likely that he acquired the land by way of auction (*poloumenon* line 1, *egorasa* line 3, *prosbole* line 5) and paid 200 drachmas for it. The papyrus is in a rather fragmentary condition, yet it is striking that it doesn't give any hint about the category of the land—whether it was registered as royal land, temple land or orchards.[7] The auction

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[5] P.Ent. 61, Ghoran, Arsinoite, BCE 246–40.

[6] P.Ent. 61.6–12: "Je te prie donc, o roi, si bon te semble, d'ordonner à Ammonios l'économe d'écrire à Glaucon qu'il enregistre la vente à mon nom, afin que je puisse cultiver le *ktema* et qu'il ne reste pas à l'abandon, et que l'on use envers moi de la procédure appliquée à Héracleidès, l'acheteur du [ ] contenu dans la tenure de Néon. Si Nicodémos, étant libéré, se présente dans les 60 jours et désire racheter son *ktema*, en vertu du règlement, je lui concède le droit de rachat, pourvu qu'il rembourse l'argent et …" (Guéraud)

[7] For land in Ptolemaic Egypt see Crawford 1971: 53–7; Préaux 1978: 188–9; Habermann – Tenger 2004: 297–8. Based on the commonly accepted thesis that only garden land

was led by Glaukon, an official in charge (line 5 and 8) but never finished. Glaukon suspended the usual process of auctioning: he neither had confirmed that the land was sold to the petitioner (after his highest bid) nor ordered that ownership be registered under his name. The reason might have been that Nikodemos, the former possessor, suddenly re-appeared and claimed his land back.

The phrase *ek ton ergon* (line 6) points to Nikodemos' longer involvement with public works. Obviously during his absence his land was confiscated by the state and put up for auction. There are two different possibilities why it came to a public auction: on the one hand Nikodemos might have had left debts (public or private) unpaid behind;[8] on the other hand it seems likely that his land fell into disuse and was promptly registered as *adespoton* and put up for auction.[9]

Anyway, after his return Nikodemos immediately filed a claim to redeem his land (*epilysis*); such a redemption was common within a time limit, usually of 60 days (according to a *diagramma*).[10] This very claim for redemption worried the petitioner and it led to the present document asking for royal help. He asks that Ammonios, the *oikonomos* supervising the auction, should write to Glaukon and order him either to finish the auction (*prosbole, katagprahe*) or to cancel the sale and return the money to him.[11] The complicated case demonstrates the daily practice of auctions in Ptolemaic Egypt. It points to important stages of the process (*prosbole, katagraphe* etc.) and to the officials usually in charge.

A second petition singled out was drawn up some decades later and refers to a similar case about losing and acquiring land:[12]

> ... ἀδικοῦμαι | ὑπ[ὸ Π]εμσάιος τ[οῦ] Φανούφιος· ὑπαρχούσης |[5] γὰρ [τῆ]ι ἐμῆι [γυν]αικὶ Τσενονπμοῦτι γῆς | ἠπείρου, ἥ ἐστιν ἐν τῆι κάτω τοπαρχίαι | τοῦ Περιθήβ[ας] (ἀρουρῶν) π, συνέβη ἐν τῆι | γενομένηι τ[αρα]χῆι πραθῆναι ἀπὸ τούτων | τῶι προγεγρ[αμμέ]νωι ἐν τοῖς ἀδεσπότοις|[10] (ἀρούρας) νγ, τῆς γυναικός μου ἔτι π[ε]ριούσης | ἐν τοῖς κάτω τόποις καὶ παραγεγενημένης | ἐπὶ τοὺς τόπους καὶ ὑπομενούσης | συνπληρῶσαι τὰς διὰ τῆς διαγραφῆς (ἀρούρας) νγ | οὐχ ὑπομέν̣ε̣[ι] [ἐ]ξεδιαζόμενος τὰς λοιπὰς |[15] (ἀρούρας) κ[ζ] παρὰ τὸ κ[αθ]ῆκον βιαζόμενος. | ἀξιῶ οὖν σε μετὰ πάσης δεήσεως, ἐάν σοι | φαίνηται, συντ̣[ά]ξαι γράψαι Ἰμούθηι | τῶι τοπογραμματεῖ προσανενεγκεῖν τὰ κατὰ | τὴν διαγραφὴν

(orchards) could be privately owned Armoni 2007: 228 completed *ampelonos*, vineyard, in line 1.

8 Armoni 2007: 229 prefers this solution.

9 Already supposed by O. Guéraud, the editor.

10 Cf. Pringsheim 1961: 295–6. Just because of the possibility of an *epilysis* (Lösungsrecht) I do not classify sales by public auctions as *prasis epi lysei*.

11 It is likely that the petitioner paid at least an earnest money (*arrabon*) at the auction; cf. Pringsheim 1961: 296.

12 SB V 8033, Diospolis Magna, BCE 182 (= P.Baraize). Edited by Collart – Jouguet 1933; later on Wilcken 1935: 292–4 and Wenger 1949 offered detailed legal interpretations.

τὸ πλῆ[θος] τῶν (ἀρουρῶν), ὅπ[ως] |[20] ἀπομετρήσω αὐτῶι [κα]ὶ παραλάβω τὴν | ὑπάρχουσάν μοι γῆν ἄ[πρ]ατον ...[13]

The Papyrus covers the text of a *hypomnema* of a certain Petearoeris,[14] a *georgos* (farmer) from the *chora*; it is addressed to the *strategos* and *diadochos* Daimachos.[15] *Adikoumai hypo Pemsaios*, "I am wronged by Pemsais," the applicant claims bitterly. Obviously, he mentions only facts serving his version of the events; it makes a proper reconstruction of the case rather difficult. As far as I can see, his wife Tsenonpmous possessed originally 80 *arourai*[16] of land in the *chora* but a revolt forced her to flee the country.[17] The land (either arable or vineyard)[18] fell into disuse, was registered as derelict (*en tois adespotois,* line 9), confiscated by the state and put up for auction.[19] In this official auctioning process, Pemsais acquired 53 *arourai* of her land and obviously has already paid its price (or at least the first installment) to the state (actually to the *Idios logos*).[20] Later on Tsenonpmous returned and tried to recover (repurchase) her estate; according to the petition she offered Pemsais (the purchaser by auction) the whole price and expenses paid by him, but she failed.[21] Subsequently Tsenonpmous died and her husband became her heir; the petition includes his claims against Pemsais.

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[13] SB V 8033.3–24: "Je suis lésé par Pemsais, fils de Phanouphis. Ma femme Tsénompmous possédait une terre de la vallée, sise dans la Toparchie d'aval du Périthèbes, et d'une contenance de 80 aroures. Il arriva dans la période de troubles qu'il en fut vendu au susdit 53 aroures, comme biens vaquants. Ma femme vivait encore dans le district d'aval, elle était venue sur les lieux et elle consentait à payer complètement les 53 aroures du bordereau de vente; lui n'y consent pas, et il s'approprie les autres 27 aroures par une violence illégale. Je te demande donc avec instance, s'il te parait bon, de faire écrire à Imouthès le topogrammate qu'il ait à fournir un rapport sur le bordereau de vente et le nombre d'aroures y mentionnées, pour que je lui (Pemsais) en paie le prix en nature et que je recoive de lui la terre qui m'appartient avant qu'elle soit vendue." (Collart – Jouguet)

[14] For prosopography see Kuntz 1933.

[15] For the official see Collart – Jouguet 1933: 27–30; to the administration of the region see Thomas 1975: 35.

[16] 1 *aroura* = c. 2756 m^2, cf. Pestman 1990: 49; Crawford 1971: 12.

[17] Wilcken 1935: 292–3 decided for the revolts of Dionysios 165 BCE; for a new dating see ZPE 107, 1995, 81.

[18] The category of the land remained unnamed in this petition, too. We learn only that the land was in the *chora* at Thebes. Anyway, 80 *arourai* were a considerable piece of land. Land surveys from Fayum record parcels from 10 to 50 *arourai*. Cf. P.Tebt. I 62 (119–118 BCE) and P. Tebt. 63 (116–115 BCE), see Crawford 1971: 22.

[19] Cf. Wenger 1949: 15–16; Swarney 1970: 26–28. Especially Wenger dealt with redeeming lost land (*epilysis*, Lösungsrecht).

[20] The price of land sold by auction had to be paid commonly to the royal bank, see Bingen 2007: 220.

[21] If the land turned unproductive (*hypologos*) as a consequence of ceasing cultivation the price was fixed commonly at a very low rate at public auctions, cf. Rowlandson 1996: 48–53.

As mentioned above, we are not able to reconstruct the exact facts.[22] Wilcken argued that the petitioner charged Pemsais with refusing to agree to his right of redemption and of having occupied much more territory by force. Therefore he asked for royal help and wished to draw the boundaries between the parcels sold and kept (the point may have been to choose the more fertile land).[23]

Both case studies demonstrate that state interference into ownership on agrarian land was a usual phenomenon in Ptolemaic Egypt. Regarding P.Ent. 61 and SB V 8033, the difference in times and places is a strong argument for the wide acceptance and unbroken continuity of a bureaucracy that intervenes.[24] Both deal with agrarian land and communicate the message that arable but abandoned land was soon noticed by officials, and was registered and sold by public auction to individuals who were eager to put it under cultivation. Since there is no hint as to the legal category of the land or to the title, these might have been of no relevance for the auction process. Both cases report sales of agrarian land and this characteristic seems to me of utmost importance.

There are many questions to be clarified in this complex field. For the present paper I single out especially two legal problems: a) What are the main rules of selling by auction in Ptolemaic Egypt? b) What conclusions can we draw from the documents of auctions about ownership over agrarian land?

First it seems useful to shed some light on the relevant sources. Modern databanks open a large scale of possibilities for checking papyri. However, for the present topic one has to consider the problem that an exact terminology for auctions did not exist. The typical phrases were *kata prokeryxin*, *dia kerykos, agorasmos, hypostasis, chersos, adespoton* etc. Looking at the databanks and checking the documents, one gets the impression that the papyri dealing with auctions refer mostly to public auctions in a double sense:[25] auctions were announced and carried out by state authorities and served mostly state interest (selling arable land, farming

[22] Pringsheim 1949: 323–4 takes the statements of the petitioner for facts—but one should consider that every petition delivers a rather subjective version of the story.

[23] For this interpretation see Wilcken 1935: 293 and especially Wenger 1949: 18; to the meaning of *apometreo*: "1. to measure corn, to pay, 2. To measure of, to find out by taking measure, to make me verify for him the precincts of the *arourai* by measuring them." Notwithstanding Pringsheim 1949: 323–4 argued that *apometreo* can mean only "paying in kind." At first glance paying in agrarian products instead of money seems to be strange; but there is evidence for it also at auctions, e.g. P.Hauswaldt 16.

[24] Centuries later, in Roman Egypt similar procedures can be observed for confiscating and selling abandoned land, e.g. the archive of Petaus, cf. Kruse 1999.

[25] In some sense all Ptolemaic auctions were public, for every auction was announced and controlled by state authorities. As stated by Pringsheim 1969: 330: "Ptolemaic private auctions do not seem to exist; their private character is almost absorbed by the co-operation of the state and its officials." Apart from these the economic content does matter: the auctions served public or private interests. Auctions for private interest are recorded in e.g. P.Cair.Zen. III 59371; P.Lond. VII 2016 and BGU XIV 2376.

out taxes or *apomoira*, executing tax debts etc.).[26] Furthermore it is really striking that the majority of the documents record selling agrarian land, especially the selling of abandoned land (*adespota* or *hypologos*), see P.Haun. 11; SB V 8033; BGU VI 1218 and 1219; P.Ryl. II 253 Kol. V; P.Eleph. 15–25; P.Köln. VI 268; SB I 4512 A and B; P.Tebt. III, 2853; UPZ I 114; UPZ II 220 and 221; P.Tebt. I 5 and 65; BGU XIV 2376 and 2377; P.Ent. 61 and probably P.Poethke 1.

Already this simple statistic shows that auctions could have aimed at some type of re-distribution of the most important natural resource, fertile land. This contradicts the traditional view of the economic purpose of auctions. For this, it is enough to quote Pringsheim's introduction to his first article to the topic: "Sale by auction played a more important part in Greece than in modern times. The lack of commercial intercourse and advertisement made a public announcement advantageous. The auction procedure secured the highest price; in Rome and Greece selling by auction took the place occupied today by agents and brokers."[27] Pringsheim (and modern scholarship) assumed that auctions served first of all private business and secured the best price in exchanging goods on private markets. Only a few scholars challenged the possible political and administrative background of land auctions.[28] Following this path and considering new evidence (papyri edited after Pringsheim) it seems necessary to undertake a re-thinking of the legal framework.

Looking at past research, its scarcity is striking. In the 1920s, Wilcken delivered valuable interpretations of papyri edited recently in his UPZ I and II.[29] Subsequently Pringsheim presented a comprehensive but a bit abstract legal analysis, according to private law theories of his time.[30] Soon afterwards, Talamanca showed up with a comparative approach.[31] Since Pringsheim (1961), no comprehensive legal treatment has been published about auctions in the Hellenic world. However, Wolff interpreted regularly and with critical eyes the documents published more recently.[32] Cantarella and Vélissaropoulos-Karakostas touched on the subject, dealing generally with sale in ancient Greek law.[33] In recent editions, some commentaries completed the old

[26] Examples for farming out public construction works are P.Petrie III 43; P.Petr. III 68a and b; for collecting *apomoira* and other revenues BGU 1917; P.Col. III 13; P.Köln. VI 260; P.Köln VI 263; SB V 8008; P.Heid. VIII 418.

[27] Pringsheim 1949: 284; similarly Pringsheim 1961: 262.

[28] Swarney 1970: 31–4; Manning 1999: 282.

[29] See Wilcken, to UPZ I and II, especially his commentary to UPZ II.

[30] Pringsheim 1949: 284–342; Pringsheim 1961: 270–82.

[31] Talamanca 1954: 35–104.

[32] Wolff 1961 and 1971.

[33] Cantarella 1967; Vélissaropoulos-Karakostas 2011: 271–81; cf. recently Ruffing 2013 to Roman sources.

model with new details.[34] But an overall picture is lacking even now—especially a treatment in context, with regard to the social and economic components.

In my view, Pringsheim depicted a rather abstract model of the Greek auction, based on Attic sources and papyri from Ptolemaic and Roman Egypt as well. His effort was to shape the general rules using documents from different periods and territories of ancient Greek legal culture. In this way, he could not consider all differences that can be discovered in the social, political or economic settling.

Approaching the documents in their context I suggest that we treat the Attic, Ptolemaic and Roman sources separately. For the sake of a more sophisticated analysis I restrict the present paper to Ptolemaic Egypt. As a good basis I use the results of Swarney and Manning although they dealt with the topic from special aspects, different from mine. Swarney took into consideration the Ptolemaic and Roman *Idios logos*—on the one hand shaping his topic narrower (treating only the *Idios logos*), on the other hand much broader in time. Depicting the Ptolemaic *Idios logos* he starts with the year 162 BCE[35]—but auctions are attested in the early third century BCE as well. Furthermore Swarney focuses merely on one aspect of public auctions—that of depositing the price *basilei eis ton Idion logon*, for the king, at the *Idios logos*.

Recently, Manning has dealt with Demotic papyri about auctions.[36] His main source is P.Hauswaldt 16, the only entire Demotic document of acquiring land at a public auction; four further sales just mention a public auction as a foundation of title.[37] The main stages of the procedure are documented in small fragments: public announcement, proclamation by a herald, bidding, knocking down (confirming the sale), transfer of goods and payment of the first installment to the royal bank.[38] It is of utmost interest that the model of public auctions in Demotic texts seems closely related to the Greek one; there is an obvious continuity. Manning argued that "the auction of pharaoh … is an institution that first appears in the Hellenistic period and its application as a method of disposing of derelict property is closely parallel to its use at Athens and elsewhere in the Hellenistic world."[39]

As already mentioned above, Pringsheim's concept of the "Greek sale by auction" has influenced scholarship up to now. Pringsheim's aim was to offer a general model of auctions that could be applied all over the Hellenic world. However it is well known that a strong effort to generalization and systematization

[34] First of all the commentaries of Armoni 2007: 228 and in P.Poethke 1 must be mentioned.
[35] BGU 992; Swarney 1970: 7.
[36] Manning 1999: 277–84.
[37] See Manning 1999: 277–8.
[38] See Manning 1999: 278–9.
[39] Manning 1999: 279; for a supposed political role of auctions see also Manning 2003: 160–1.

may dim the outlines. The historically shaped features of a legal institute may be neglected for the sake of a general rule.

In the following I try to offer a different approach with more interest in the social and economic context and daily practice.[40] Grouping the sources, it seems useful to distinguish between three different types of auctions:[41] a) auction of derelict land (this model can be applied also to redeeming former possession confiscated by the state); b) auction as part of an execution (whether initiated by private individuals or by the state); c) auction for farming out state contracts (letting and hiring of public land, tax farming, construction works, priest offices etc.).[42]

Concerning a), already Wilcken depicted convincingly the official way of auctioning *adespota* (derelict land). In the main I follow his thesis and base my survey upon his results. UPZ II 220 (Thebes, BCE 130) is a good illustration—and probably the key source—for the rules for selling *adespota* (derelict land) by auction:

Col. I

Διονύσιος Ἡρακλείδει χαίρειν. Ἑρμίου τοῦ Ἀ]μμωνίου τῶν ἀπὸ Διὸς πόλεως τῆς | [Μεγάλης δόντος ἡμῖν τὸ ὑποτεταγμένον ὑ]πό[μν]ημα, δι' οὗ [ὑ]φίστατο [δεκάτου μέρους] | [γῆς ἐν τῆι κάτω τοπαρχίαι κειμένης (ἀρουρῶν) κ ἀνὰ ζ χ(οινίκος) ἀπὸ <γῆς ἀδεσπότου> σφραγί[δων] β ἀναγρ[α]φομένης ε[ἰς] | [Σεμμῖνιν Πετεπ ... |[5] ἐγδοθείσης [αὐτῶι τῆς ἐκ βασιλικοῦ διαγραφῆς, τάξεσθαι] χα(λκοῦ) (δραχμὰς) Δ, καὶ Πχορχώνσιος τοῦ τοπογραμματέως | [πρὸς τοῦτο ἀνενεγκόντος διὰ τῆς προσκατακεχωρισ]μέ[νης ἀν]αφορᾶς, ἐξ ὧν Πετενεφώτης κωμ[ο]γραμμα(τεὺς) | [ἀνενήνοχεν, δι' ἧς ἐδήλωσεν (δεκάτου) μέρους τῶν ἀρουρῶν κ ἀνὰ ζ χ(οίνικος) ϛ, (ἀρουρῶν) δ' δ ή ἀνὰ δ ς, (ἀρουρῶν) δ δ ἀνὰ ε' χ(οίνικος) δ εἶν]αι τὴν ἀξίαν χα(λκοῦ) (τάλαντον) α Α, ἐξεθήκαμε[ν] | [εἰς πρᾶσιν ...] ι πρὸς τὸ [...]σταςίας καὶ | [...]νος κ[αὶ τ]οῖς ...[43]

[40] Already Pringsheim pointed out the desire for such a treatment: Pringsheim 1961: 263 n. 9: "Eine gründlichere Würdigung ihrer (der Auktion) wirtschaftlichen Bedeutung und eine Schilderung, die der von Mommsens für das römische Recht gegebenen entspräche, wäre sehr wertvoll."

[41] Rowlandson 1996: 48 argued for two types of auctions: "A distinction must be made between land sold at fixed price and that sold at auction to the highest bidder." However she focused only on land and approached the problem from the aspect of tenancy.

[42] Pringsheim 1961: 264–6 treated separately selling priest offices; in my view P.Eleph. 14 is a strong argument against this grouping. But I agree with Pringsheim that enforcement had its special rules and therefore should be treated separately.

[43] UPZ II 220 col. I 1–9: "Dionysios Herakleides Grüße. Nachdem Hermias, Sohn des Ammonios, einer der Bewohner von Diospolis Magna, mir die unten beigefügte Eingabe übergeben hatte, durch die er das Angebot machte, für den 10. Teil eines in der unteren Toparchie gelegenen Saatlandes von 20 Aruren zu 7 Artaben ½ 1/3 Choinikes von herrenlosem Land, das eingetragen wird auf Semminis Petep... wenn ihm ausgehändigt wäre die *diagraphe* aus dem Königsschatz, zahlen zu wollen 4.000 Kupferdrachmen, und nachdem Pchorchonsis, der Bezirksschreiber, zu dieser (Eingabe) durch den daran angeschlossenen Bericht aufgrund des Berichtes des Petenephotes, des Dorfschreibers,

Col. II

[Διονυσίωι τῶν ἀρχισωματοφυλάκων καὶ διαδεχομένωι τὰ κατὰ τὴν θηβαρχίαν] | π[αρὰ Ἑρμίου ... |[5] ὑφίσταμ[αι ἐκδοθείσης μοι τῆς ἐκ βασιλικοῦ διαγραφῆς τάξεσθαι χα(λκοῦ) (δραχμὰς) Δ]. | ἀξιῶ συν[τάξαι ...] | Πχορχώνσ[ιος ...] | ὑφίσ[τ]ατο [ἐκδοθείσης αὐτῶι τῆς ἐκ βασιλικοῦ διαγραφῆς τάξεσθαι χα(λκοῦ) (δραχμὰς) Δ]. |[10] ... [παρὰ Πετενεφώτου κωμογραμματέως τοῦ Περὶ Θήβας ... μετηνέχθη ἡμῖν] | [τὸ ἐπιδοθὲν] ὑπόμ[νημα ὑφ' Ἑρμίου ... τῶι διαδεχομένωι] | [τὰ κ]ατὰ τὴν θηβαρχίαν ὑπὲρ [(δεκάτου) μέρους γῆς (ἀρουρῶν) κ ἀνὰ ζ χ(οίνικος) ϛ ἀπὸ γῆς ἀδεσπότου τῆς ἀναγραφο-] |[15] μέν[η]ς εἰς Φῖβιν Ψεμμίνιος ἀ[πὸ βορρᾶ καὶ λιβὸς καὶ ἄλλης σφρα(γίδων) β (ἀρουρῶν) η' δ ή, μίαν μὲν δ δ ἀνὰ ε' χ(οίνικος) δ] | ἄλλην δὲ (ἀρουρῶν) δ' ή ἀν(ὰ) δ ς, ὁμοί[ως ἀδεσπότων τῶν ἀναγραφομένων εἰς Σεμμῖνιν Πετεπ ... ιος] | ὄντ[ω]ν πάντων (ἀρουρῶν) κη' δ ή, δι' οὗ [σημαίνει ἐκδοθείσης αὐτῶι τῆς ἐκ βασιλικοῦ διαγραφῆς] | [τά]ξ[εσθαι χα(λκοῦ) (δραχμὰς) Δ, π]αρεπιγραφὲν δ' ἡ[μῖν ἐπισκεψαμένους ἀνενεγκεῖν, παραθέντας καὶ τὴν ἀξίαν]. | ἐπισκοπο[ῦντε]ς εὑρίσκομεν δ[ιὰ τῶν φυλασσομένων ἡμῖν βιβλίων τὰς γᾶς ἀδεσπότους] |[20] καὶ ἀναγραφομένας εἰς τοὺς προγ[εγραμμένους. δέον ἐστὶν συντιμηθῆναι ἀξίας (δραχμῶν) Ε]. | [... (ἔτους) μ Μεχεὶρ ις.][44]

At the top of the papyrus (Col. I) we read the *diagraphe* of the vice-thebarch Dionysios. It is a notice to Herakleides, the banker (*trapezites*) of the royal bank at Thebes, to accept 8,000 drachmas, the price of *adespota* sold by auction and purchased by a certain Hermias. This *diagraphe* of Dionysios, a high official in the Ptolemaic administration,[45] was the last step in a long process of selling derelict land by auction. Actually it started with a *hypomnema* of Hermias to Dionysios which survived below in Column II, on the same sheet: Hermias, the son of Ammonios, resident of Diospolis Magna asks the authority to initiate an auction of a piece of

einen Bericht erstattet hatte, in dem er erklärte, dass der Wert des Zehntels der 20 Aruren zu 7 Artaben ½ 1/3 Choi., der 4 ½ 1/8 Aruren zu 4 1/6 Artaben, (und) der 4 ¼ Aruren zu 5 ½ Artaben 2/3 ¼ Choi. betrage 1 Talent 1.000 Drachmen, habe ich es zur Versteigerung ausgehändigt ..." (Wilcken)

[44] UPZ II 220 Col. II 1–20: "An Dionysios vom Range der Erzleibwächter und Vertreter der thebarchischen Geschäfte, von Hermias ... Ich biete, wenn mir ausgehändigt ist die *diagraphe* aus dem Königsschatz, zahlen zu wollen 4.000 Kupferdrachmen. Ich bitte anzuordnen." "Von Petenephotes, dem Dorfschreiber des Perithebischen Gaues. Es wurde uns zugesendet die von Hermias ... dem Dionysios, eingereichte Eingabe über den zehnten Teil eines Saatlandes von 20 Aruren zu 7 Artaben ... durch welche (Eingabe) er anzeigt, dass, wenn ihm ausgehändigt wäre die *diagraphe* aus dem Königsschatz, er zahlen wolle 4.000 Kupferdrachmen, für uns aber mit der Randbemerkung versehen 'Zu untersuchen und zu berichten, hinzufügen auch den Wert.' Bei der Untersuchung fanden wir in den von uns bewahrten Akten (die Saatländer) als herrenlos und eingetragen auf die oben Genannten. Sie müssen abgeschätzt werden auf 5.000 Drachmen Wert. Jahr 40 Mecheir 16." (Wilcken)

[45] It is worth to note that the thebarch or the vice-thebarch were the royal officials in charge of auctions in Demotic papyri from the Thebaid as well, cf. P.Hauswaldt 16; Manning 1999: 277.

land, named exactly in the papyrus, and offers to pay a price of 4,000 drachmas for it.[46]

It is remarkable that the very person who intended to purchase the land applied in a petition to the office of the vice-thebarch and asked him to put up for sale some derelict parcels. Furthermore the purchaser offered already a price he was ready to pay.[47] As we see, the public auction of *adespota* was set in motion by private initiative.[48] Subsequently the bureaucratic procedure was ordered and controlled by high administrative authorities. Through official channels, the vice-thebarch Dionysios asked for information about the same land. He ordered that the data be checked by the *topogrammateus* who forwarded the files to the *komogrammateus.*[49] The village scribe duly reported (although in Demotic) the names of the persons to whom the parcels were registered and that in fact they were derelict. He attached also an estimated market value of 5,000 drachmas. The *topogrammateus* translated his report for Dionysios into Greek and in his comment increased the price to 7,000 drachmas. Hereupon Dionysios announced the auction with a proclaimed price of 8,000 drachmas. In Thebes, the auctions were proclaimed by a herald and posted in writing at the *dromos* of the temple of Ammon.[50]

At first sight, the process seems to be complicated and lengthy. But looking at the files we notice that the reports of both scribes involved are dated the same day, sixteenth Mecheir.[51] Only three days later, the vice-thebarch drew up his *diagraphe* to the royal bank, notifying that the sale was concluded. All together it seems to have been a highly effective settlement.

Dionysios' *diagraphe* to the royal bank was necessary for the bank's accounting: the payment of Hermias must have been recorded properly in the archives. Swarney and Manning hold that it replaced also the sale contract in the hands of the purchaser (as evidence).[52] On this point, I disagree. Scrutinizing the *diagraphai* of royal and private banks, Drewes already underlined the difference between *diagraphai* written to a bank or by a bank.[53] Considering the usual wording of bank *diagraphai* I would assume that Hermias received a slightly different

[46] It was a common method in archival practice that all documents concerning the case were copied on one sheet, cf. Johnson 2004: 39–41.

[47] For the economic context see Criscuolo 1979: 94–8.

[48] Cf. Talamanca 1954: 38, who argued that the first step of the procedure was initiated by the *topogrammateus* or *komogrammateus*.

[49] The same communication with the *topogrammateus* and *komogrammateus* can be observed in Demotic auction documents, cf. Manning 1999: 277–8.

[50] Cf. UPZ II 220.

[51] The Egyptian month Mecheir run from January, 26 to February, 26; cf. Rupprecht 1994: 29.

[52] Swarney 1970: 40; Manning 1999: 280.

[53] Drewes 1970, 35.

version, a regular bank *diagraphe* drawn up at the bank as evidence of his fulfilled payment.[54]

Summing up, I classify this type of auction as an overwhelmingly administrative act. The process was never initiated by the seller (as one would expect), but rather by the purchaser. He also calculated and offered a reasonable price at once. In the course of the official procedure his offer was checked and eventually modified by state officials.

Receiving a purchase offer from an individual, the state bureaucracy reacted and set an administrative procedure in motion. The vice-thebarch (a chief official responsible for the entire administration) took care of Hermias' desire and turned to officials who were in charge of land and crop surveys. The papyrus is dated to the month Mecheir, the same month in which several other land surveys from the Fayum were drawn up.[55] Such surveys were prepared by the *komogrammateus* and controlled by the *topogrammateus*; they inspected the villages regularly and registered the holders of parcels. Such documents cover commonly all three main administrative categories of land (cleruchic, sacred and crown).[56] The reports were examined and probably headed by the *basilikos grammateus*. As we see the officials involved in the auction in UPZ II 220 are the same who were in charge of the administration of land and state revenues all around the *chora*.[57]

The usual devices of auctions were put into action only in the second part of the process—for securing transparency and avoiding corruption. In theory, the standard clauses of auction were fully applied. In practice, its essential elements (bidding, seeking and accepting the best price) never came into consideration.

In my view, these are strong arguments for denying the overall applicability of the legal terms which survived in these documents to other models of auctions (not concerned with *adespota*). Recalling our second case study (SB V 8033), we can suppose that the 53 *arourai* of Tsenonpmous, the wife of the petitioner, were sold as *adespota* to Pamseis according to this model.[58]

Concerning b), let us turn to the second model of auctions. As I already suggested above, I think public auctions resulting in enforcement should be treated separately.[59] In my view, there are substantial differences in carrying out the

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[54] For the usual wording and formula of such *diagraphai* see Drewes 1970.

[55] P.Tebt. I 24.52 (117 BCE) was drawn up on Mecheir 12; P.Tebt. I 32.2–3 records a crop survey from Mecheir; P.Tebt I 826 reports on uncultivated land dated Mecheir 18; further examples are P.Tebt. I 85.1–3 (113 BCE); P.Tebt. IV 1110 (116/115 BCE) etc.

[56] Cf. Crawford 1971: 10–24.

[57] It is remarkable that the *topogrammateus* and *komogrammateus* were concerned with the cession of 5 *arourai* catoecic land in P.Tebt. IV 1100 (114 BCE) as well; the procedure seems to be closely related in its administrative part; cf. Keenan – Shelton 1976: 29–33.

[58] Cf. above at note 11.

[59] Further examples for enforcement are P.Eleph. 15–25; P.Köln VI 268; SB I 4512 A + B; P.Tebt. III 2, 814; P.Tebt. III 2, 853; P.Tebt. III 2, 871; UPZ I 114; and probably BGU VI 1219 Col. II.

procedure. Probably the most important is the fact that the price was actually fixed through bidding. State officials or individuals could have initiated such auctions as well forcing unpaid debts to be fulfilled. A papyrus edited by Brashear some years ago can serve as a good illustration:[60]

> ... προσέβαλεν Μουσαῖος πράκτωρ | [ξενικῶν καὶ] νομοφύλαξ τοῦ δηλο[υ]μένου [νομ]οῦ Πτολεμαίωι Ἡρωίδου ἀφ' ὃν μετήνεγκεν ἐκ τοῦ κριτηρίου |[5] [τῆς δίκης χρημ]ατισμοῦ [οὗ χρόνος] τὸ διελ[ηλυ]θὸς [ις] τὸ καὶ α (ἔτος) Θωὺθ ι πρὸς ἣν συνεστήσατο ἔνκλησιν | [ἐπὶ τῶν ἐπὶ τῶν τόπων χ]ρηματι[σάντων χρηματιστῶ]ν καὶ Δωροθέ[ου εἰσα]γωγέως κατὰ Ἡρακλείδου τοῦ καὶ Ἀρθώτου | [τοῦ Ἡφαιστίωνος περὶ πράξεως ἀργ(υρίου) (δραχμαὶ) Γπ] καὶ βλαβεῶν καὶ δαπανημάτων χα(λκοῦ) (τάλαντων) ε τὸ κατὰ τὸ παρὸν παραδειχθὲν | ὑπ' αὐτοῦ εἰς [ἐνεχυρασ]ίαν ἔγγαι[ον τοῦ] ... κλείδου τοῦ καὶ Λόχου, μενούσης [αὐτῶι τῆς τοῦ] ἐνλείποντος | κεφαλαίου πραξέως ἔκ τε αὐτ[οῦ καὶ] ἐξ ὧν ἐὰν ἄλλων εὑ[ρί]σκῃ αὐτῶι ὑπαρχόντων, οὐ μόνον δὲ τῶν |[10] εἰς τὴν ἐνεχυρασίαν καὶ προσβολὴν ὡρισμένων ἡμερῶν διελη[λυθότων ἀλλὰ καὶ ἐπὶ [τ]ῶν ἐπιγεγονότων, | μηδενὸς δὲ ἐν τῶι ἀνὰ μέσον μήτε [πρὸς] ἐξωμοσίαν ἢ ἀφαίρεσιν τοῦ ἠνεχυρασμένου κατηντηκότος | ἀπὸ δὲ τῶν γραφέντων ὑφ' ἡμῶν τῶι βασιλικῶι γραμματεῖ ἀντιπεφωνηκότος ὡς καθήκει· ἐπικηρυσσομένου | τοῦ ἐνγαίου ἀγορᾶς πληθυούσης δι[ὰ] κήρυκος, Πτολεμαίου παρόντος καὶ τοῦ παρὰ τοῦ βασιλικοῦ γραμματέως | Ἡρακλείδου τοῦ Ἡρακλείδου, καὶ μηδενὸς προσπορευομένου μηδ' ὑπερβάλλοντος ἀλλὰ μηδὲ ὑφηγ̣ο̣μ̣ένου |[15] προσεβλήθ[η τῶι ἠνεχυρακότι] ...[61]

Wolff recognized at once the great importance of the text from a legal point of view, and I mostly follow his interpretation.[62] It is a (double) protocol about an enforcement that was carried out in 35 BCE in Herakleopolis, at Memphis. The document (drawn up in objective style) records that Mousaios, the *praktor xenikoon*

[60] BGU XIV 2376, Herakleopolis, BCE 35; remarkably it has a duplicate, BGU XIV 2377.

[61] BGU XIV 2376.3–15: "... Musaios, Praktor Xenikon und Nomophylax des genannten Gaus, hat dem Ptolemaios, Sohn des Heroides den Zuschlag auf das neulich von ihm für die Pfändung bezeichnete Grundstück des Isakleides (?), alias Lochos, gegeben. Dies hat er (Musaios) aufgrund des Pfändungsbeschlusses des Gerichts getan, das im vergangenen 16. und 1. Jahr getagt hatte. Vor diesem Gericht, den ortszuständigen Chrematisten und ihrem Geschäftsführer, Dorotheos, führte er Klage gegen Herakleides, alias Harthotes, Sohn des Hephaistion, auf Vollstreckung von 3080 Silberdrachmen und fünf Kupfertalenten bedingt durch Schäden und Aufwendungen. Er (Ptolemaios) hat wegen der restlichen Schulden weiterhin Anspruch auf die Vollstreckung, sowohl hinsichtlich dieses als auch eventuell anderer Vermögen. Dies gilt nicht nur für die bereits verstrichene Frist zwischen Pfändungsbewilligung und Zuschlag, sondern auch für die Zukunft, sofern kein Drittintervenient auftaucht, der nach unserer schriftlichen Mitteilung an den königlichen Schreiber in gehöriger Weise zwecks eidlicher Inanspruchnahme oder zur Inanspruchnahme des gepfändeten Vermögensstücks Einspruch erhebt. Da sich bei der Versteigerung nach Ausrufen durch den Ausrufer vor einem vollen Marktplatz in Anwesenheit von Ptolemaios und Herakleides, Sohn des Herakleides, dem Untergebenen des königlichen Schreibers, kein anderer um das Grundstück bewarb weder überbietend noch ..., erhielt Ptolemaios den Zuschlag für das Grundstück, für das zwei Kupfertalente erlöst werden könnten. Geschehen, wie die Verordnung vorschreibt ..." (Brashear)

[62] Wolff 1983: 444–7.

(and *nomophylax*),[63] held an auction of some orchards accepting the bid of Ptolemaios (lines 3–4). It is of great interest that auctions for enforcement were commonly led by a *praktor* (*xenikoon*); also the royal scribe took part in it and supervised the event (line 12).

One can reconstruct the facts as follows: some months earlier, Ptolemaios granted a loan to Herakleides, and Isakleides might have taken over personal surety for him. After Herakleides defaulted, Ptolemaios filed a lawsuit and the *chrematistai* passed a sentence.[64] Months later, Ptolemaios filed a claim for 3,080 drachmas and named some orchards of Isakleides as objects for enforcement (*paradeixis*). Thereupon the *praktor xenikon* impounded the land and put it up for auction.

It is of much interest that enforcement was filed pursuant to a sentence in a trial. Furthermore it is striking that the creditor (complainant) was the one who designated the object put up for auction. He communicated to Mouseios, the *praktor*, which land of the guarantor he wished to have sold (*paradeixis*).[65] Then the *praktor* secured the land (*enechyrasin*) and proclaimed the auction, obviously using the common procedure of public auctions.

Some detail steps of the procedure are preserved in other documents. Of much interest is a papyrus from the archive of Apollonios from the third century BCE with the wording of an auction proclamation:[66]

> τοὺς βουλομένους | ὠνεῖσθαι τ[ηv]\ο/ Κολήφιος | \[π .]/ τοῦ ἐγγυησαμένου | Πᾶσιν τὸν ζυτοποιὸν \Μέμφεως θεμέλιον καὶ/ [οἰκίαν τὴν οὖσαν]|[6a] οἴκημα καὶ αὐλὴν καὶ τὰ προσ|[6b]κύ(ροντα) τὰ ὄντα πη(χῶν) ι ἐπὶ πή(χεις) μ | ἐν Μέμφει διδόναι | τὰς ὑποστάσεις | Ἀπολλωνίωι τῶι | πρὸς τῆι οἰκονομίαι |[10] καὶ Μανρεῖ τῶι τοπο|γραμματεῖ ὡ[ς τῆς] | κυρώσεως ἐσ[ο]μέ[νης] | παραχρῆμα. [...] | εὑρίσκει δὲ [...][67]

This proclamation also concerns an auction for enforcement (line 3) but it differs from BGU XIV 2376 in that it was initiated by public officials.[68] In this document, some property of Kolephis was put up for auction, because he gave personal surety for Pasis, a brewer (very likely at a past public auction of the beer-making

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[63] For the official see Préaux 1978: 451.

[64] Fort he *chrematisthai* see Préaux 1978: 279 and 598; Méléze Modrzejewski 1975: 699.

[65] The land need not to belong to the debtor; see footnote 67 below.

[66] P.Köln VI 268, Arsinoite, second half of the third century BCE. Apollonios is a rather famous figure in government administration of this period, cf. Walbank 1982: 104.

[67] P.Köln VI 268.1–15: "Diejenigen, die das in Memphis befindliche Haus des Kolephis, der für den Brauer Pasis gebürgt hat, kaufen wollen ... Diejenigen, die Fundament, Haus, Hof und Dazugehöriges, befindlich in Memphis, 10x40 Ellen, aus dem Besitz des Kolephis, der für Pasis, Brauer in Memphis, gebürgt hat, kaufen wollen ... sollen ihr Gebot dem Oikonomos Apollonios und dem Topogrammateus Manres vorlegen, damit der Zuschlag unverzüglich erfolgen kann. Die Liegenschaft erzielte (bis jetzt) ein Gebot von [...] Drachmen." (Maresch)

[68] Enforcement against state debtor is recorded also in P.Tebt. III 2, 871 and 814.

monopoly). Pasis defaulted and the state official (probably the *oikonomos* Apollonios) impounded the guarantor's land in order to sell it by auction.[69]

Commonly, written announcements of this type are called *programma* in the sources;[70] they were posted in public places somewhere in the town.[71] It is really striking that the whole process was carried out in a written form, bidding as well. In P.Köln VI 268, the last line of the *programma* contains already the first offer.

Such *programmata* were kept posted for several days (six or ten days came down in other papyri).[72] During this period, any third party somehow involved could object to carrying out the auction.[73] Such an objection may be preserved in BGU XIV 2376: Isakleides could have obtained a delay because he—and not Herakleides—was the owner of the orchards impounded for execution. Already Wolff stated that obviously no proof of the debtor's title was required from a creditor by naming objects for execution.[74] I will underline that such a possibility of stopping the auction existed only in enforcement auctions.

If nobody objected within the time limit, the *praktor* had to announce the auction again. The process of bidding was carried out publicly, in our case (BGU XIV 2376) on a crowded market place in the presence of the *basilikos grammateus*, the *praktor xenikoon* and both parties. The involvement of an *oikonomos* or of a *trapezites* of a royal bank (as we have seen it above) was not necessary if the plaintiff was a private person. The auction was ended through confirming sale of the impounded items (here an orchard) to the highest bidder—or, in our case, to the creditor himself.

Despite some new papyri, even now it is unclear who was in charge of estimating the impounded object (and setting the lowest price). Also unclear is whether the protocol (as preserved in BGU XIV 2376) was sufficient for registering the land sold in the name of the purchaser. Could the debtor or the guarantor redeem the orchards within a certain limit (*epilysis*) as was possible after selling *adespota*, derelict land?

Concerning c), as a third model I classify auctions of tax farming, state monopoly or letting out public works. Some new papyri inform us about the stages of the process. In a business letter the *oikonomos* Metrodor announced his arrival at the village Oxyrhyncha on a certain date in order to be present at the coming auction

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[69] A similar case is depicted in SB III 7202.45–49.

[70] The editors, K. Maresch and Ch. Armoni p. 187 consider *programma* as a typical terminology of auctions. On this point I disagree. Every type of proclamation published by officials can be called *programma* in the papyri, cf. P.Bingen 28.

[71] According to P.Eleph. 14 e.g. on the *dromos* of the temple of Apollo, in other documents on the market place, cf. BGU XIV 2376.

[72] In BGU 992 I six days are announced, in P.Eleph. 14 ten days.

[73] See also P.Tebt. III 2, 871.1–3; 1071; probably in the recently published P.Poethke 1 as well.

[74] Wolff 1983: 448.

of state monopolies.[75] He asked businessmen who could be interested to assemble. It is very likely that the addressee, Apollonios, proclaimed the auction immediately on the very day; it is likely that the proclamation was made public through heralds and posters, as we have seen above.

Another papyrus reports careful preparations, too.[76] It is an *entole* (circular) of a *basilikos grammateus* to the *topogrammatoi*, ordering him to estimate the coming harvest in the vineyards. A herald travelled around in the district and handed over the document to every scribe. In a *hypographe* each scribe acknowledged that he had received the letter and promised to send the required lists soon. The higher administration collected the estimated data and upon this basis prepared to auction the *apomoira* on wine.

In the following papyrus we can see the main terms of an auction already in motion (P.Eleph. 14, Apollonopolis, BCE 223–2):

> ἐπὶ τοῖσδε πωλοῦμεν ἐφ' οἷ[ς ...] οἱ [κ]υρωθέντες διορθώσονται | εἰς τὸ βα(σιλικὸν) κατ' ἐ[ν]ιαυτὸν τῶν μὲν ἀμπελώνων τοὺς καθήκον|τας ἀργυρικοὺς φόρους καὶ τὴν γενομένην ἀπόμοιραν τῆι | Φιλαδ[έλφωι, τῆς] δὲ γῆς τὰ ἐπιγεγραμμένα σιτικὰ ἐκφόρια καὶ εἴ |[5] [τι ἄλλο καθήκει] πρὸς [τὴν] γῆν δίδοσθαι, τάξονται δὲ τὰς τιμὰς | [τῶν μὲν πιπτόν(?)]των εἰς τ[ὸ βα]σιλικὸν ἐπὶ τὴν βα(σιλικὴν) τρά(πεζαν) ...
>
> [21] κυριεύσουσιν δὲ | καθ' ἃ καὶ οἱ πρῶτον κύριοι ἐπέκτηντο· ἐξέσται δὲ τῶι βουλομένωι ὑπερβάλλειν, ἕως ἔτι ἐν τοῖς κύκλοις εἰσὶν ὅσωι ἂν |[25] βούλη[τ]αι, ὅταν δὲ ἀπὸ τῆς πράσεως γένωνται, τοῖς ἐπι|δεκ[ά]τοις, μέχρι τοῦ τὴν α ἀναφορὰν διαγραφῆναι· τὰ δὲ | πωλούμενα ἄπρατα ἐν ταῖς κὰ τὸ διάγραμμα ἡ(μέραις) ς.[77]

Most scholars (among them also Manning) held that this document contains a *programma*, a first announcement of an auction.[78] In my view, this doesn't really fit the text. On the contrary, lines 1 to 5 depict the objects of the auction so vaguely, that the lack of a *programma* seems to me striking. From this vagueness one may suppose that there must have been some separate *programmata* (formulated more

[75] P.Köln VI 268, Arsinoite, second half of the third century BCE.

[76] P.Heid. VIII 418, Herakleopolis, 155–144 BCE.

[77] P.Eleph. 14.1–6, 21–27: "We offer (the properties) for sale on the following terms. The successful bidders shall pay annually to the Crown in the case of the vineyards the appropriate money taxes and the *apomoira* due to (Arsinoe) Philadelphos, and for the arable land the rents in kind which have been imposed upon it and [whatever other payment is required] in respect of such land. They shall pay the price of that which [is due to] the Crown to the royal bank … They shall own the properties in the same way as those who formerly possessed them. Whoever wishes shall be permitted to raise the bid, by as much as he pleases while the auction-ring is still open, but only by ten per cent after the auction is ended and until the first installment has been paid; and (if there is no purchaser) the objects offered shall be classed as unsold after the 6(?) days prescribed by the ordinance." (Bagnall – Derow)

[78] Manning 1999: 280.

precisely and already earlier published) with an exact description—as we have seen in P.Köln VI 268 above. In my view, P.Eleph. 14 preserves rather the legal terms of a future sale that was just announced here: it specifies the rights and duties of the purchaser regarding payment and transfer of possession etc.

Scholars have interpreted P.Eleph. 14 in different ways: some thought of a decree, others of a concrete, completed sale by auction.[79] However, style and content remind me of contract formulas, commonly used in daily life. Looking at the text, we find fixed rates and taxes to be paid by the purchaser (line 1 to 5), the conditions for paying the price to the royal bank etc. A sales tax (1/60) and an auction fee (1/1000) have to be paid at once. Probably also the land sold was to be transferred immediately (*paradosis*).

In this text, the payment is provided in four installments. Therefore the editors took the transaction as a lease and not as a sale. However, later finds prove that payment in installments was very common in sale contracts and auctions as well. With the first payment, the purchaser acquired full rights for obtaining, using and getting income from the fruits. However, until the first installment was paid, anybody could bring in a better bid within the prescribed time limit (six days in our document) if he offered at least 10% more than the highest bid was. Only the first payment released the buyer from that risk. Here, bidding was required in a written form, too. As a trifling illustration I can quote P.Hal. 14 (third century BCE).

Summing up, it can be stated that a great many papyri record public auctions from Ptolemaic Egypt. Therefore the stages of the process can be reconstructed rather well. Since Pringsheim's treating the topic (1949 and 1961), a remarkable number of new papyri, really relevant to the topic, have been published. They allow a probable reconstruction of the daily practice of auctioning. Instead of a highly abstract definition that often neglects the political and economic environment, I suggest that we look at the legal content in its economic and social context. For this purpose, I have restricted my present overview to Ptolemaic Egypt.

According to the sources, almost all auctions were public in nature. Auctions were carried out by public officials and served public goals, as well. Especially our first model, that of selling derelict land, demonstrates state interference into individual activity. Simple statistics prove that in the papyri most sales by auction refer to agrarian land (arable, vineyards or orchards); this hints at a close connection with land surveys and administration of state revenues. Furthermore I classified three main groups of auctions: selling derelict land (*adespota*), enforcement, and farming state monopolies. Through the separate treatment of these groups, Pringsheim's abstract definition can be partly deconstructed.

[79] Literature discussed by Pringsheim 1961: 277 and Manning 1977: 279.

II. Ownership of land in Ptolemaic Egypt

Pringsheim delivered an entirely detailed and legally founded analysis of the Greek sale by auction. Nevertheless, he worked with sharply shaped dogmatic categories of German legal theory.[80] According to his main idea about the exclusive use of cash sale, he distinguished between the transfer of possession and that of ownership which he considers relevant at auctions, too. In his view, the purchaser acquired possession by paying the first installment.[81] Only later, with full payment of the price did he become owner of the items bought. Pringsheim pointed out that *kyrosis* and *prosbole* should have different meanings in the sources: "Probably they are two sides of the same act, the *prosbole* meaning exclusively the knocking down [confirmation of sale], the *kyrosis* emphasizing as a consequence of this knocking down the acquisition of title. This title does not mean ownership; for before the payment of the full price ownership does not pass; it means only the expectancy of acquiring ownership in the future."[82]

I wonder if this distinction fits the sources. One has to notice that Pringsheim's idea is based on a Roman law rooted, rather modern definition of ownership. It is well known that nineteenth-century Pandectists worked out this strikingly abstract concept. Probably its most typical articulation was formulated by Bernhard Windscheid:

> Eigenthum bezeichnet, dass Jemandem eine (körperliche) Sache eigen ist ..., dass nach dem Rechte sein Wille für sie entscheidend ist in der Gesamtheit ihrer Beziehungen. Dies zeigt sich nach einer doppelten Richtung: 1) der Eigenthümer darf über die Sache verfügen, wie er will; 2) ein anderer darf ohne seinen Willen über die Sache nicht verfügen ... das Eigenthum ist als solches schrankenlos.[83]

To him, ownership as such is absolute, unlimited and exclusive. This was the most important premise for the ongoing codification in Germany and other European countries. The owner should be entitled to an exclusive use of his property, without interferences by individuals or the state.

But can it be assumed that ownership was understood in this sense already in Ptolemaic Egypt? It is very likely that it was not. It is sufficient to remember the papyri dealt with above; in none of them can be found any traces of a distinction between possession and ownership. On the contrary, the concept of ownership itself

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[80] Pringsheim 1961.

[81] Pringsheim 1966: 277–8 explained also P.Eleph. 14 in this sense.

[82] Pringsheim 1949: 300; similarly in the German version, see Pringsheim 1961: 277: "Dieser Titel ist noch nicht Eigentum; denn vor der Zahlung des vollen Preises geht Eigentum nicht über: er bedeutet nur die Anwartschaft auf zukünftigen Eigentumserwerb. Der Höchstbietende hat einen Titel zum Erwerb endgültigen Eigentums durch Zahlung des vollen Preises."

[83] Windscheid 1900: 758. This definition was fully adopted by legal historians, see Kaser – Knütel 2014: 127–8 or Buckland 1939: 107: "Ownership (Dominium) is a *res* in the technical sense: it is the greatest of all rights over a *res* in the physical sense."

seems to be rather elastic and dimly shaped according to documentary sources. Especially focusing on ownership of land, one has the impression that the title for holding a parcel was closely related to the proper cultivation of it. To keep an estate one had to care about sowing and harvesting it properly year by year. Unoccupied land was promptly discovered, registered as *adespota* and put up for auction.

This phenomenon cannot be reasonably explained with an abstract and rigid definition of ownership. Long ago the applicability of such an ownership concept was questioned by some scholars. One has to consider that political and economic environment tends to shape the real content and the legal concept of property rights.

Recently Gerhard Thür has alluded to difficulties with modern ownership concepts in ancient context. He emphasizes that "the Athenians were not uncertain about their idea of ownership; rather, our modern concept of 'absolute and exclusive' title does not conform to Athenian legal thought. In their eyes, ownership was a position that was elastic and separated by function, one that could be modified by mutual agreements between different parties."[84] Because his paper focused on real security and *prasis epi lysei*, he just touched on the problem. Some scholars expressed doubts or caution even earlier. Indeed, already Kränzlein defined ownership carefully in his "Eigentum und Besitz im griechischen Recht." He underlined that the main feature of it may have been the right to a comprehensive use of the item owned; an abstract idea of an absolute title did not exist.[85] Some years later Wolff noticed more sharply: "Die Griechen haben sich niemals bemüht, die Sachherschaft in scharf definierte oder doch definierbare materiellrechtliche Begriffe zu fassen."[86] He criticized Kränzlein directly: "Hier nenne ich als Beispiel allzu romanistischer Betrachtungsweise noch im Schrifttum der letzten Jahre Arnold Kränzleins Versuch, griechische Formen der Sachherrschaft und ihres prozessuellen Schutzes unter Zugrundelegung der Kategorien vom Besitz und Eigentum zu interpretieren."[87]

Todd too has criticized Kränzlein's thesis, especially his distinction between ownership and possession: for Kränzlein "it is the latter and not the former category that is a doubtful starter at Athens."[88] Todd emphasizes that there are almost no

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[84] Thür 2008: 175. Notwithstanding Harris 2008: 195 defended the traditional doctrine.

[85] Kränzlein 1963: 33: "Diese Zeugnisse berechtigen zu der Feststellung, dass für die Griechen jener Zeit das Eigentum sich nicht in dem Recht, die Sache zu haben und zu beherrschen, in der Berechtigung zum Zugriff auf den Gegenstand erschöpfte ... Das Eigentum erscheint hier als das umfassende Recht zum Gebrauch. Nicht die Befugnis zur tatsächlichen Sachherrschaft oder zur Verschaffung derselben stand im Vordergrund, sondern das Recht zur Benutzung."

[86] Wolff 1971: 337. Nevertheless Wolff expressed his doubts already in earlier works, cf. Wolff 1961: 187. Cantarella and Vélissaropoulos-Karakostas have each offered an overall survey focused on Attic sources; cf. Cantarella 1967: 99 and Vélissaropoulos-Karakostas 2011: 70–3.

[87] Wolff 1967: 698.

[88] Todd 1993: 240.

traces of ownership (possession) in Attic speeches.[89] This can be explained by the peculiarities of our sources, as "the topics which interest the philosopher and the jurist are not necessarily those which concern the litigant or even (at least at Athens) the legislator."[90] To the definition of ownership he remarks that it is "dangerous to begin with modern doctrines, because this can too easily result in the game of trading definitions: having decided in the abstract the appropriate categories of analysis, it is easy enough to find ancient texts which can be accommodated to fit them."[91]

Discussing the terms of juristic papyrology, Rupprecht offered a rather careful treatment of the problem of ownership: "Zwar war dem griechischen Recht das Eigentum auch an Grund und Boden bekannt, aber es hat in seiner gesamten Entwicklung kein dem römischen Recht vergleichbares Institut wie *dominium* = Eigentum (als absolutes, gegenüber jedermann wirkendes dingliches Vollrecht) und *possessio* = Besitz (als rechtlich geschützte tatsächliche Gewalt) entwickelt."[92]

Investigating different types of legal control over arable land in Ptolemaic or Roman Egypt, some ancient historians give valuable hints of a simpler concept of property rights. Probably the most important feature of these works can be seen in the fact that institutions do matter: social and economic environment has a strong input on legal concepts. Some scholars argue for neglecting such sophisticated and artificial legal categories as possession and ownership at all. Manning, for example, states: "The distinction usually made by legal historians is that between the norm in Egypt of long-term 'hereditary lease' ('bail héréditaire', 'Erbpacht') and true individualized private property rights on land. But the practical difference between conveyance of rights in land and true sales was negligible, and, in terms of Egyptian law, it is important to note that the terms of such transfers of rights were couched as sale … The terms 'ownership' and 'possession' have caused much debate and considerable confusion when it comes to the interpretation of Egyptian evidence."[93] Rowlandson underlines the often dim borders between ownership, *emphyteusis* (long term tenancy) and short term tenancy in Roman Egypt.[94]

Up to now, the critical voices left only few traces in legal history. Nevertheless, new investigations and issues seem to me badly needed regarding the tensions sketched above. In the present paper, I can promise just some remarks but no comprehensive solutions. First of all I would stress that the concept of ownership of land (arable, agrarian land) and that of movables should be treated separately. I

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89 Todd 1993: 236–7.

90 Todd 1993: 241.

91 Todd 1993: 240. As a striking example he quotes Beauchet 1897: iii.45–6 who specified ownership as a right for *utendi, fruendi, abutendi*, and he found Athenian equivalents in the sources.

92 Rupprecht 1994: 132.

93 Manning 2003: 194; see also Vandorpe 2000: 173–4.

94 Rowlandson 1996: 55–61.

consider a generalizing abstract definition too rigid and not appropriate for ancient societies. The strictly outlined, highly systematized legal categories of civil law tradition seem mostly to fail in historical context. Dealing with the sources one should adhere more to the facts, to the reality experienced in every day legal life. Depicting legal phenomena in ancient societies one should seek for alternative modern theories (legal and social) with a more practice oriented approach.

Returning to our sources about auction, it can be stated that these reflect a striking uncertainty of property rights on agrarian land. Ownership of land seems to have been conditional: a person could hold a parcel as long as he was able to cultivate it properly. Ceasing cultivation led automatically to the loss of title: the land was confiscated by the state and re-distributed by auction. How can we explain this phenomenon?

Apart from the Civil law tradition, there are some modern theories approaching the complex problem of property rights in its political and ecological setting; one of them is the so called "New Institutional Economics" (NIE).[95] The premise of NIE can be seen in the issue that institutions should not be neglected: social, political and economical institutions—as environment—have an important impact on the legal framework, and vice-versa. Economic transformations and needs often lead to changes in the legal framework: the state, the main decision maker, interferes on behalf of economic growth.

Property is a social fact. In every society, the closer definition of property rights is influenced by social, political and economic phenomena. As Schmid states: "Property is not simply a derivative of a physical fact, it also reflects a group choice about what kinds of effort are to count in creating an image in people's minds that acknowledges a person's rights."[96] Ownership exists always in a certain social and economic context. With regard to property rights, in practice rising tensions between individual and public interests are unavoidable. In every society, the concept of property rights is considerably influenced by public choice. Therefore an abstract definition, isolated from its social and economic context can never work properly.

Property rights are outlined in NIE rather by their economic content. Barzel especially points out "an individual's ability, in expected terms, to directly consume the services of an asset, or indirectly consume it through exchange."[97]

Ownership and government and their interrelationships are important matters in every society throughout our history. Thinking of Ptolemaic Egypt, one should consider the strikingly high level of state investment in economy that was introduced and supported by the Ptolemaic kings. Fertile land was far the most important natural resource and its extent depended partly on the Nile flood, partly of human

[95] Kehoe 2010 has valuable research about tenancy in late antiquity using the methods of NIE.

[96] Schmid 2007: 83, quoted already at n. 1.

[97] Barzel 2007: 263. Remarkably, this approach awakens some reminiscences of Plato *Euthydemus* 301E; Aristot. *Rhet.* 1361a.; Aristot. *Pol.* 1257a.

innovation. By initiating irrigation or drainage and raising dykes the political regime had an important effect on the landscape. Just to give a hint to the extension of the high level of state interference I quote some examples. P.Tebt. III 703 (third century) records the duties of high royal officials inspecting canals, sowing and crops; P.Lille 1 (259 BCE) preserves a land reclamation project;[98] P.Yale 36 (232 BCE) reports the sowing schedule compiled by the bureaucracy; P.Hib. I 85 (261 BCE) depicts how seed-grain was issued by officials; in P.Ent. 60 (218 BCE) we can read about a trial resulting from accidents at flooding a field; P.Tebt. I 50 (112/1) claims the loss of water supply; SB XVIII 13881 (256 BCE) reports the transport of stones for irrigation works; P.Köln VIII 342 (232 BCE) is a letter to officials asking them to open canals for irrigation etc.[99]

Control of the Nile flood, with the irrigation and drainage work that this necessitates, has always been of crucial importance for whoever controlled the land of Egypt.[100] It is sufficient to mention here two important archives: the Petrie Papyri include documents of two famous engineers (Kleon and Theodoros) who worked on irrigation and drainage works in the Fayum in the middle of the third century BCE.[101] One learns a lot about the extent of state investment for reclaiming land from these texts. Also the Zenon archive includes many interesting details.[102] Zenon was engaged as chief manager for a large estate (of 10,000 *arourai*, or approximately 2.750 hectares) close to Philadelphia. The land belonged to Apollonios, a high official of Ptolemy II.[103]

Several papyri show a steady concern of the government with the development of the irrigation system of the Fayum basin.[104] Indeed the settlement and exploitation of the land so reclaimed stood in the centre of state interferences.[105] This state policy

[98] Cf. Thompson 1999: 118–20.

[99] Cf. Bagnall – Derow 1981: 131. Similarly SB I 5124; most of the papyri are coming from the Ghoran (Sorbonne Collection), others from Gurob (Petrie Papyri), cf. Thompson 1999a: 107–8; Walbank 1982: 106–12 also points out the strong state interference in economy.

[100] The contributions of the recently published volume *Agriculture in Egypt. From Pharaonic to Modern Times*, ed. by A. K. Bowman – E. Rogan, Oxford 1999, give a hint to the economic context.

[101] Cf. P.Petrie III 40; P.Petrie III 42 G (8); P.Petrie III 43 (1); P.Petrie III 43 (8); P. Petrie III 44 (2).

[102] P.L.Bat. 20; cf. Thompson 1999a: 111; PSI V 488 16–17 (257 BCE); SB XII 10844 (247 BCE); furthermore P.Cair.Zen. II 59256 (250 BCE); P.Cair.Zen. V 59816 etc.

[103] Thompson 1999a: 108 calls him the "finance minister" of Ptolemy II. See also Walbank 1982: 104–6.

[104] On the contrary, the Athenian state took almost no interest in the cultivation of agrarian land, cf. Todd 1993: 247 "indeed, what is perhaps most surprising about Athenian land law was the low level of state interference overall."

[105] Cf. Thompson 1999a: 108 and 112–5; Crawford 1971: 106–12; Manning 2003: 65.

required a rather high level of administrative organization, of state investment and control all over agricultural activities.[106]

Some further facts must be mentioned. After the Nile flood, arable land must have been measured every year, before the landholders began their work. Also the boundaries were set every year anew (at least partly).[107] Besides this, the fertility of the land was highly dependent on the extent of the flood. In fact, no proprietor could fully trust that the following year he would have a fertile plot for cultivation again. It means that not even the physical existence (or fertile quality) of a piece of land could have been taken for certain. Already this peculiarity explains the highly relative nature of property rights.

The unique political and economic environment—and the landscape itself—may have influenced the local understanding of ownership of agrarian land. *Adespota* and *hypologoi*, unoccupied arable land produced no revenue for the crown. Furthermore, abandoned parcels lost their value, which was costly to obtain, in a short time. Unrepaired dykes, channels not cleaned, or neglected drains damaged public investments and may have caused considerable damage to neighboring lands, too.[108]

All this justified the quick and merciless way in which the state interfered in property relations. Obviously, "public choice" ruled over the legal framework. The main interest of the community (realized by the political regime) was of greater account than any abstract private title.

Furthermore, not even the property rights were homogenous. Different forms of control (or title) over land obtained different forms of property rights—with public and private tasks of different extent. Ownership over land was never absolute, unlimited and exclusive. Just the contrary: as we have seen, ownership was an elastic and dynamic category with changing legal content according to the contemporary political and economic environment. Landscape and technology level, economic transformation and political changes were essential factors in the formation of property rights. Egypt can be characterized in every period of its history as having a very strong and decided state interference in property rights over land—for the sake of a better exploitation of the most important natural resource, fertile land.

Summing up, I will underline that this newly discovered concept of ownership—which is clearly reflected in our sources about auction—earnestly questions also Pringsheim's theory about the transfer of ownership in Greek law. How can a sharp distinction between possession and ownership be reasonable, if not even the physical extent and legal content of ownership could be taken for indubitable?

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[106] Thompson states that so much land was never under cultivation in the Nile valley as that time; cf. Thompson 1999a: 114; similarly Thompson 1999b: 124.

[107] Cf. Crawford 1971: 7.

[108] Cf. Crawford 1971, 106–7.

Working with a "soft" concept of ownership also makes the distinction between possession and ownership seem of less importance. Paying the first installment, the purchaser gets the land transferred. A distinction between obtaining income (fruits) and full rights doesn't seem to me to fit the sources. Acquiring full rights with full payment? And what about *epilysis*, confiscation of *adespota* and *hypologoi* and other forms of state interference? In Ptolemaic Egypt, landscape and political regime could never have lived with the abstract and rigid definitions of the Pandectists.

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J. VELISSAROPOULOS-KARAKOSTAS (ATHENS)

PUBLIC SALES AND PROPERTY RIGHTS: A RESPONSE TO EVA JAKAB

Contrary to her predecessors, Professor Eva Jakab has treated the institution of public sale in its socio-economic context, by pointing out the social and economic dimensions of the sale by auction and, more generally, of the right of real property in Egypt during the Ptolemaic centuries. Thus, her paper focuses on papyrological sources. The documentation is rich and eloquent, allowing us to trace the mechanisms of this specific kind of sale. We cannot say the same about information given by inscriptions coming from other parts of the Greek world, during both Classical and Hellenistic centuries. These include mostly catalogues, lists or simple allusions, which allow us only to see that a good has not been purchased in a usual transaction among private persons, but in a manner necessitating the intervention of the official authority.

As it appears from the papyrological documents, sale by auction was performed in three cases: first, in the case of a good without a master, the so called *adespoton*, second, as part of the compulsory enforcement procedure (Zwangvollstreckung) against an insolvent debtor and, third, for the public sale of tax farming, state monopoly goods, vineyards, cornfields and priesthoods.

The term *adespoton*, used in *P. Ent.* 61 and *SB* V 8033, documents quoted by Jakab, designates goods abandoned by their owners for reasons unknown to us. The terms *adespoton* and *eremos* attested by the sources do not designate identical situations. Contrary to *adespota* goods, whose master is unknown, things called *erema* constitute vacant properties that have no master, owner or even leaseholder.[1]

Beyond the documents included in Jakab's handout, the *adespota* are also mentioned in a royal letter to the Cyrenians, preserved on stone, by which the king Ptolemy (Evergetes II?) and the Queen Cleopatra (II?) ordered the people of Cyrene to include in their legislation the royal *prostagma* on the appropriation by officials of things qualified as *adespota*.

V. Arangio-Ruiz, "Una nuova iscrizione sul protettorato dei Tolemei in Cirenaica," *Rivista di filologia* 65 (1937), p. 266–277; *SEG* 9 (1938), 5; M.-Th. Lenger, *C.Ord.Ptol*. 46, ll. 16–26:

[1] As for example in *I. Delos* 1416 B, col. II, ll. 41–49. For more examples, see J. Velissaropoulos-Karakostas, *Droit grec* II, p. 41–43.

Βασιλέως καὶ βασιλίσσης προσταξάντων.
Ἐάν τινες τῶν ἐπὶ χρείαις τεταγμένων
ἢ τῶν ἄλλων τῶν ὑπὸ τὴν βασιλείαν
τασσομένων ἀδέσποτα αἰτήσωνται
ἢ κατητιαμένα, μὴ παρασφραγιζέσθωσαν
τὰ ὑπάρχοντα τῶν καταιτιωμένων μηδὲ
εἰς φυλακὴν παραδιδότωσαν μήτε αὐτοὺς
μήτε τοὺς οἰκέτας αὐτῶν ἄνευ τοῦ παρὰ
τῶν χρηματιστῶν κομίσαι χρηματισμοὺς
[καὶ π]ρὸς τοὺς ἐπὶ τῶν πόλεων τετα[γ]-
[μένους - - - - - - - - - - - - -

The *adespota* also appear in another case of sale by auction, probably by means of a public herald,[2] that took place during the second century B.C.

BGU VI, 1218, ll. 7–9:
ἀγοράσαι Δίδυ[μον τοῦ εὑρίσκοντος]
χαλκοῦ α κυριεύσει δὲ καθό[τ]ι [καὶ οἱ ἀρχαῖοι κύριοι]
γίνεται ἀδεσπότων.

The use of the term *epilysis* in *P. Ent.* 61 (240 B.C.) is of particular interest for the purpose of public sale. It is, I believe, the Ptolemaic equivalent of the well known *prasis epi lysei*, that is the sale with a clause of redemption, or, more exactly with a clause of termination (*lysis*) of the sale.[3]

P. Ent. 61 recto, ll. 1–13:
[Βασιλεῖ Πτολεμαίωι χαίρειν]νος πωλουμένου τοῦ Νικοδήμου
[τ]ὴν [[κωμ]] Φαιν[ί]ππου κώμην
[ἠγ]όρασα αὐτὸν σ', τοῦ δὲ κτήματος
[ ]ἐγλελειμμένου διὰ τὸ μηθένα προεστηκέναι
[Γ]λαύκων οὐχ οἷός ἐστιν τὴν προσβολὴν
[ ]μή ποτε ὁ {ο} Νικόδημος ἀφεθεὶς ἐκ τῶν ἔργων
ἐπ.[..]..α[Δέομαι οὖ]ν σου, βασιλεῦ, εἰ καί σοι δοκεῖ, προστάξαι
Ἀμμωνίωι τ[ῶι ο]ἰκονόμωι γράψαι Γλαύκωνι τὴν ὠνὴν κατατάξαι μοι ἵνα τὸ κτῆμα
κατεργάζωμαι καὶ μὴ καταφ<θ>αρῆι, καθάπερ καὶ Ἡρακλείδηι τῶι ἀγοράσαντι τὸν
ὑπάρχον[τα. . . . .]. ον ἐν τῶι Νέωνος κλήρωι κεχρημάτισται. Ἐὰν δὲ Νικόδημος
ἀφεθεὶς [καὶ] παρα[γε]νόμενος ἐν ταῖς ξ' ἡμέραις ἐπιλύσασθαι βούληται κατὰ τὸ διάγραμμα,
δίδωμ[ι] αὐ[τῶι τὴ]ν ἐπίλυσιν ἀποδόντι τό τε ἀργύριον καὶ τὰ γινόμενα
κα. . . . [

[2] The words διὰ κήρυκος (line 6) have been restored by W. Schubart.
[3] Especially E.M. Harris, "When a Sale is not a Sale?" p. 351–381.

The *epilysis* requested by virtue of the royal *diagramma* aims at the annulment of the sale and the restitution of the object to its former owner, the seller, because the latter exercised the right of redemption within the delay of sixty days following the sale of his real estate.[4]

In another papyrological document of the second century B.C., *P. Dura* 15, instead of *epilysis*, the parties have used the terms *apedoto lysima kata ton nomon* (l. 6). The document has been drawn up on the occasion of a sale, which—as the use of the word *kerykeion* (l. 6) indicates—was public. As we learn from the first lines of the document, the seller has borrowed from the purchaser a sum of 120 silver drachmas—an amount equal to the price he received for his land—under the clause of redemption.

P. Dura 15, ll. 1–8:

1 [— *ca* 12 lettres —] ἀ̣κ̣ροδρύοις καὶ ἐπικοίοι καὶ παρ̣α̣δείσοις κ[αὶ] τοῖς
συνκύρουσι πᾶσιν τὰ ὄντα ἐν τῆι Ἀρρύβου ἐκά̣δ̣ι ἐν τῶι Κόνωνος
[τοῦ δεῖνος ?] κλήρωι κατὰ τὰς προϋπαρχούσας γειτνία[ς πρὸ]ς ἀργυρίου
δραχμὰς ἑκατὸν εἴκοσι καὶ ἐπίτιμον τὸ ἴσον, ἃς ἔφη ὁ̣ Φ[ίλιππος ?]
[? δανεισθῆ]ν̣α̣ι̣ τῶι Ἀμυνάνδρωι ἐπὶ τῶι Ἀριστώνακτος τοῦ Ἀρίστωνος
Εὐρωπαίου ὀ̣νόματι κατὰ συγγραφὴ[ν γενομένην διὰ τοῦ]
[αὐτόθι χρεοφυλακίου [5] ἐν τ]ῷ̣ι̣ ἑ̣πτακαιδεκάτωι ἑκατοστῶι ἔτει μηνὸς
Πανήμου, χρήσαντος αὐτῶι τὸ ὄνομα [τοῦ Ἀριστώνακτος κατὰ]
5 [χρηματισμὸν – – γεγενημέ]ν̣ο̣ν̣ ὑπὸ τοῦ Ἀριστώνακτος ἐν τῶι τρίτωι
εἰκοστῶι ἑκατοστῶι ἔτει μ̣η̣ν̣ὸ̣[ς – – – – – – – –]
[– – – – – ὡσαύτως δὲ] κ̣α̣ὶ̣ [ἀ]παίτησιν καὶ κηρύκειον· ἀπέδοτο λύσιμα
κατὰ τὸν ν̣[όμον – – – – – – – –]
[παρόντων καὶ συμφωνούντων τοῦ συγγραφο]φ[ύλ]ακος Ἡλιοδώρου
λογευτοῦ καὶ μαρ̣[τύρων τοῦ δεῖνος καὶ τοῦ δεῖνος καὶ τοῦ δεῖνος]
[– – – – – – – – – – – – – – – –] ἐ̣πρίατο Ἀντί̣[γο]νος [

The Hellenistic equivalent of the *prasis epi lysei* seems to be the contracts called *oné en pistei*, also known as "reliance based purchase," attested by two papyri of the late second century B.C., examined by J. Herrmann in a previous Symposion.[6]

Redemption in an *one en pistei*, 112/111 B. C., *P. Heid*. Inv. G1278; Mitteis, *Chrestomathie* 233, ll. 1–11:

1 Ἔτους ς Μεσορὴ κθ᾽ ἐν Παθύρει ἐπ᾽ Ἀμμωνίου
ἀγορανόμου. Ἐπελύσατο Πανοβχοῦνις Τοτοέους
ὠνὴν ψιλοῦ τόπου τοῦ ὄντος ἐν τῶ<ι> ἀπὸ νότου

[4] O. Guéraud, *op. cit*., p. 150. Cf. *P. Eleph*. 27a, where the *epilysis* has to be operated within the delay of sixty days according to the royal *diagramma* and *P. Heid*. Inv. G1278 (Mitteis, *Chrestomathie* 233), *recto*. The *epilysis* is also mentioned in the *diagramma* of Alexander the Great for Tegea, A. Plassart, *BCH* 38 (1914), p. 101 ; *Syll*.[3] 306 ; Tod, *GHI* 202 ; A.-M. Vérilhac – Cl. Vial, *Le mariage grec*, p. 156–158. J. Velissaropoulos-Karakostas, *Droit grec* I, p. 245–248.

[5] For the restoration of lines 3–4, cf. *P. Dura* 18 (87 A.D.), l. 2–3; *ibid*. 20 (121 A.D.), l. 19; *ibid*. 25 (180 A.D.), l. 26–27.

[6] J. Herrmann, "Zur ὠνὴ ἐν πίστει," p. 317–324.

μέρει Παθύρεως πήχεις στερεοῦ β’ ὧν ὑπέ-
θετο Πατοῦτι Πελαίου καὶ Βοκενούπει Πατοῦτος κατὰ συγγραφὴν
ὠνῆς ἐν πίστει ἐπὶ τοῦ Παθύρει ἀρχείου
ἐφ’ Ἡλιοδώρου ἀγορανόμου ἐν τῶ<ι> ε’ ἔτει
Μεσορὴ κζ’ χα(λκοῦ) (ταλάντου) α’ (δραχμῶν) α’, ὃς καὶ παρὼν
Πατοῦς καὶ Βοκενοῦπις ἐπὶ τοῦ ἀρχείου ἀνωμολογήσατο
ἀπέχειν καὶ μὴ ἐπικαλεῖν περὶ τῶν
διὰ ὠνῆς γεγραμμένων πάντων
τρόπω<ι> μηδενί. Ἀμμώ(νιος) κεχρη(μάτικα).
Verso: Ἐπίλυσις Πανοβχού(νιος).

Redemption of an *one en pistei* (?), 124 B.C., *P. Adler* I, G2, ll. 7–8:
ἀφίστασθαι ἀπὸ τῶν ὑπ[οτεθειμένων σὺν Θάιβι]
Φίβιος τῆι τούτων μητρὶ κ[ατὰ συγγραφὴν ὠνῆς ἐν πίστει].

Since at least the time of Alexander the Great, the term *epilysis* is used to denote the right of a former owner to recover his property, presumably lost after a public sale. In his *diagramma* on the return of the exiles of Tegea, Alexander provides, among others, that the daughters of the exiles who, during the exile of their fathers, remained in Tegea and got married there, do not have to suffer any patrimonial consequence if they have "bought the *epilysis*" (l. 51: *epilysin onesanto*).[7] In other words, if they have redeemed the estates of their fathers and mothers, presumably sold by auction.

A. Plassart, *BCH* 38 (1914), 101; *Syll*[3] 306; Tod, *GHI*, 202; A.-M. Vérilhac – C. Vial, *Le mariage grec*, p. 156–158, ll. 48–57:
ὅσαι δ-
ὲ γυναῖκες τῶν φυγάδων ἢ θυγατέρες οἴκοι μίνονσ-
αι ἐγά[μ]αντυ ἢ φυγόνσαι ὕστερον ἐγάμαντυ [ἰ]ν Τεγέ-
αν κα[ὶ] ἐπίλυσιν ὠνήσαντυ οἴκοι μίνονσαι, ταννὶ μ-
ήτ’ ἀ[πυδοκ]ιμάζεσθαι τὰ πατρῶια μήτε τὰ ματρῶια μ-
ηδὲ τὸς ἐσγόνος, ὅσοι μὴ ὕστερον ἔφυγον δι’ ἀνάγκα-
ς καὶ ἰν τοῖ νῦν ἐόντι καιροῖ καθέρπονσι ἢ αὐταὶ ἢ
παῖδες ταννὶ, δοκιμάζεσθαι καὶ αὐτὰς καὶ τὸς ἐς τ-
αιννὶ ἐσγόνος τὰ πατρῶια καὶ τὰ ματρῶια κὰ τὸ διά-
γραμμα.

According to *P. Ent.* 61, the royal *diagramma* gives the seller the right to proceed to the redemption within 60 days following the sale. A similar provision, although providing a longer delay, is to be found in a tablet from Sicily (Morgantina) of the first century B.C., according to which, the seller (probably in a *prasis epi lysei* between private persons) has to proceed to the resale of the real property within a year or a year and a half.

Ed. pr. D. Comparetti, "Laminetta argentea iscritta di Aidone in Sicilia," *ASAA* 1 (1914), p. 113–118; *SEG* 4 (1929), 62; V. Arangio-Ruiz – A. Olivieri, *Inscriptiones*

[7] *Supra* note 4.

graecae Siciliae et infimae Italiae ad ius pertinentes (Milano 1925), p. 139–142, n° 17; G. Manganaro, "*Tavolette di piombo inscritte della Sicilia greca*," *ASNP* 7.4 (1977), p. 1342–1344; J. Game, *Actes de vente* 84, ll. 1–9:

1 [- - - - τ]ὰ ἐπόμενα π[άντα - - -]
[ἐ]πὶ λύσει· λύσασθαι δ' ἐνι[αυτῶι ἢ τῶι ἔξ]-
[αν ἐ]ξαμήνωι Δίωνος εἶμ[εν - - -].
Ἄμποχοι· Αἰσχρίων Στρατίου, Στρά-
5 τιος Αἰσχρίωνος, Φίλων, Ἀριστάρχ[ος]
Φιλιστίωνος. *vacat*
Ἄμποχοι· Αἰσχρίων Στρατίου - -
Σ(τράτιος) Αἰσχρίωνο(ς) <λτου>, Φίλων, Ἀριστα[ρχος]
Φιλιστίωνος.

In Ptolemaic Egypt, in Dura Europos and most probably in fourth-century Athens,[8] the sale with the clause of redemption seems in some cases to be prescribed by law, as for instance the public sale of real property belonging to an insolvent debtor.

Let me end my brief response to Jakab's paper with some short remarks on property rights. I totally agree with her in refusing to identify the Greek property with Roman *proprietas* or *dominium*. Nevertheless, I believe that Greeks knew very well that a person could, in some cases, have all powers available over a thing, being authorized not only to use it, but also to alienate or even abuse it. This plenary right is not the simple *kyrieia*, which can be recognized even to a lessee. In the few inscriptions mentioning such a right, it is described by the term *panktesia*, a word composed of the adjective *pan* and the verb *ktaomai*, to acquire.

The first of the two great laws of Ephesos, recognizes three particular kinds of real rights exercised by the beneficiary directly over the thing: first, the power of the person who is authorized "to *have* the thing and to receive the fruits" (*echein kai nemesthai*), in other words the usufructuary and tenant for life ; second, the owner who has been deprived of the right of usufruct over his property and, third, the person who has all possible powers over the thing, who is exercising the *panktesia*.

IEphesos Ia, 4; *Syll.*[3] 364; *RIJG* I, V, ll. 74–78:

Ὑπὲρ
75 τῶν δανε[ιστῶν] τῶν ἐμβεβηκότων εἰς κτήματα· ὅσοι μὲμ πρὸ μηνὸς Ποσιδεῶνος
τοῦ ἐπὶ Δη[μα]γόρου ἐμβάντες εἰς τὰ κτήματα κατὰ πράξεις ἔχουσιν κτήματα καὶ νέμον-
ται, εἶναι [αὐ]τοῖς κυρίας τὰς ἐμβάσεις, εἰ μή τι ἄλλο ἑκόντες πρὸς αὐτοὺς ὡμολογήκασιν· περὶ

[8] Athens, 367/6 BC, *Agora* 19, P 5, ll. 30–39: Αἰσχίνης Μελιτε<ὺ> καὶ κοινὸν ὀlργεώνων ἐνεπεσκήψαντο ἐν τῆι οἰκίαι ἣν ἀπέγραψlεν Θεόμνηστος Ἰωνίδης ἐνοφείλεσθαι ἑαυτοῖς :lΔΔΗΗΗ δραχμάς, πριαμένων ἡμῶν τὴν οἰκίαν ταύτlην παρὰ Θεοφίλου τούτο τοῦ ἀργυρίο ἐπὶ λύσει· ἔδllοξεν ἐνοφείλεσθαι. ὠνητής, Λυσανίας Παλαθίωνοls Λακι ΡΡΔΔΓ· τούτο τὴν προκαταβολὴν τὸ πέμπτον l μέρος ἔχει ἡ πόλις καὶ τὰ ἐπώνια καὶ τὰ κηρύκεια l καὶ Σμίκυθος Τειθράσιος τὰς πεντήκοντα καὶ ἑκlατόν· ἀθρόον κατὰ τὴν ἀπογραφήν.

δὲ τῆς π[αγ]κτησίας ἄν τινες ἀμφισβητῶσιν, κρίσιν εἶναι αὐτοῖς κατὰ τοὺς νόμους.

The second inscription mentioning the full property, the *panktetike kyreia*, is used by arbitrators from Pergamon called in order to resolve the dispute between Mytilene and Pitane, dating between 150 and 133 B.C.

IPergamon 245; *OGIS* 335; *IG* XII Suppl. 142; Sh. Ager, *Interstate Arbitrations* 146 III, ll. 125–143:

τῶν δὲ Πιταναίων ὁμοίως ἐκ τῶν ἱστ[οριογράφων - - - - - - - - - - - - - - - - - - -]
[- - - - - - -τὴν χ]ώραν ταύτην κατε[σχ]ηκότας ἑαυτοὺς - - - - - - - - - - - - - - -]
[- - - πολλὰς γ]ενεὰς πα[ρ'] αὐτοῖς τετηρημένον ἢ με - - - - - - - - - - - - - - - -]
[- - - - - - - ἐπρ]ίατο ταῖς μεταπτώσεσιν τ-]
- - - - ας ἐλη[λυ]θέν[α]ι κυρ[ε]ί[α -]
[- - - - - ἐν πολλαῖς γε]νεαῖς τῶν τόπων ἐ[π. κ]ρα[τη]σ[αν - - - - - - - - - - - - -]
- καὶ τεσσάρων ταλάντων καὶ μετὰ τα[ῦ]- - -
[τ]α Σελεύκο[υ τῆι πρὸς] Λυσ[ίμαχον μάχηι ἐπι]κρατήσαντος ὁ υἱὸς αὐτοῦ διαδεξάμενος
τὴν βασιλεὶαν [Ἀντίο]χος τὴν πεδ[ιάδα χώ]ραν αὐτοῖς ἐπώλησεν ταλάντων τριακοσίω[ν]
τριάκοντα καὶ π[ροσει]σέπραξεν ἄλλ[α τ]άλαντα πεντήκοντα καὶ περὶ τούτων τὰς πίστεις
ἐ[γγ]ράφους παρατιθέ[ασι]ν, δόντος [εἰς τ]αῦτα Πιταναίοις καὶ Φιλεταίρου τ[άλαντα - - - - -]
κοντα, καθότι ἐκ τῆς ἀν[αγεγραμμένης πα]ρ' ἡμῖν [ἐ]ν τῶι ἱερῶι τῆς Ἀθηνᾶ[ς ἐπιστώ]σα[ντο στή]-
λης, κ[α]ὶ ὡς ἡ παγκτητικὴ τ[ῆ]ς χ[ώρας κυρε]ία καὶ διὰ τῶν ἐγγράφω[ν ἐπὶ τῆς δια]νομῆς α[ὐ]-
τοῖς ὑπὸ τῶν κρατούντων παρεκε[χώρητ]ο, ἀναντηρ<ρ>ήτως δεικ[νύντες ἐκ τ]ῶν καθιερ[ω]-
μένων στηλῶν ἔν τε Ἰλίωι καὶ Δήλ[ωι καὶ Ἐφέ]σωι, ἐν αἷς ἡ γε[γραμμένη ὑ]πὸ Ἀντιό[χου]
[ἐ]πιστολὴ περὶ τῆς κατὰ τὴν χώραν τα[ύτην κυρ]είας κατετέ[τακτο, παρα]σχομένω[ν τε]
[κ]αὶ ὡς Εὐμένης παραλαβὼν τὰ πράγ[ματα τὴν Σε]λεύκου [ἐκύρωσεν ἐπ]ιστολὴν π[ρὸς]
[Π]ιταναίους, ἐν ἧι σὺν τοῖς ἄλλοις ἐγέγ[ραπτο κ]ατὰ λέ[ξιν ὧδε· "συγχωροῦμε]ν δὲ καὶ τ[ῆς χώ]-
[ρας εἰς τὸν ἀεὶ χρό]νον τὴν ἀναμφισ[βή]τη[τ]ον καὶ ὁμολογουμέ[νην κυρείαν τὴν παγκτητικ]ήν."

The *panktesia* is also mentioned in a decree of Colophon, dating after 120/119 B.C.

Ed. pr. L. et J. Robert, *Claros I. Décrets hellénistiques* (Paris 1989), p. 63–104; *SEG* 39 (1989), 1244, col. I, ll. 32–40:

πάσαις δὲ μετὰ τῶν συμπρεσβευτῶν κατωρθω-
κὼς καὶ κάλλιστα καὶ συμφορώτατα δόγματα παρὰ
τῶν κρατούντων ἐνηνοχώς, τῆς μὲν παραλίου
χώρας τὴν πανκτησίαν βεβαιοτέραν πεποίηκε τῶι
δήμωι, τῆς δὲ κατὰ τὰ Στενὰ καὶ τὸ Πρεπέλαιον

τοὺς πατρίους ὅρους τετήρηκεν, τοὺς δὲ κατοι-
κοῦντας τὴν πόλιν ἠλευθέρωσε κατεγγυήσεων
καὶ στρατηγικῆς ἐξουσίας, τῆς ἐπαρχείας ἀπὸ τῆς
40 αὐτονομίας χωρισθείσης.

Finally, in Roman times, in an inscription from Smyrna, the right of the owners on a tomb is specified as being *panktetikon*.

ISmyrna I, 193, l. 6:
[ἐχ]όν[τ]ων δίκαιον πανκτητικὸν ἐνσορίων.[9]

Unlike *panktesia*, the expression *es ta patrika*, attested by documents from Macedonia,[10] Skythopolis,[11] Mylasa,[12] Thessaly,[13] the island of Ikaros (Kyweit)[14] and Egypt,[15] does not imply total rights to property. Because *es ta patrika*, *en patrikois* or simply *patrika* are related in some inscriptions to the rights of an owner and in others to those of a lessee, W. Dittenberger and the editors of the *Recueil des inscriptions juridiques grecques*, followed by L. Robert,[16] M. Hatzopoulos[17] and others, identified it as the right to property, although M. Rostovzef estimated that the terms *es patrika* indicate the rights recognized as belonging to the tenant.[18]

Finally, I let me note the conclusion of the late Dieter Behrend, in his article on the leases *es patrika* of Mylasa.[19] According to Behrend, the lessee, as well as the beneficiary of a royal grant were authorized to behave "as an owner […] but not as the owner," "wie ein Eigentümer [...] aber offenbar nicht als Eigentümer." If the grant was made simply *eis ta patrika*, without further indications regarding the particular rights of the beneficiary, the full property remained the king's. All these situations of minor property rights will be elevated by the Romans (and accepted by the Moderns) to the status of specific rights, whereas for the Greeks they constituted different degrees of property rights, differing in the amount of power attributed to each of them.

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[9] Translation of G. Petzl *ad ISmyrna*: "*Das Recht zur vollen Inbesitznahme der Grabnischen haben.*"

[10] *RIJG* II, XXV A; *Syll.*[3] 332; M. Hatzopoulos, *Une donation du roi Lysimaque*.

[11] J. H. Landau, "A Greek Inscription found near Hefzibah," p. 54–70; T. Fischer, "Zur Seleukideninschrift von Hefzibah," p. 131–138; K. J. Rigsby, "Seleucid Notes," p. 248–254; F. Piejko, "Antiochos III and Ptolemy Son of Thraseas," p. 245–259; *SEG* 41 (1991), 1574.

[12] Among the lease contracts from Mylasa, 13 includes the clause *es ta patrika*. J. Velissaropoulos-Karakostas, *Droit grec* II, p. 105–118.

[13] *IG* IX 2, 234; L. Moretti, *Iscrizioni storiche* 96; J.C. Decourt, "Décret de Pharsale," p. 163–184; *SEG* 40 (1990), 486.

[14] K. Jeppesen, "A Royal Message to Ikaros," p. 153–198; *SEG* 20 (1964), 411, l. 30–33.

[15] *P. Tebt.* I, 5; M.-Th. Lenger, *C.Ord. Ptol.* 53, I, l. 10–13.

[16] *BullÉpigr*. 1970, 627.

[17] *Loc. cit.*

[18] M. Rostovzef, *Studien zur Geschichte des römischen Kolonates*, p. 252.

[19] D. Behrend, "Pachturkunden aus Mylasa," p. 145–168.

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THE PTOLEMAIC *DIKASTERION*

In Ptolemaic Egypt, *dikasteria* are attested just as anywhere in the Greek world, but in Egypt, they were obviously only one form of courts among many. The *chrematistai* and *laokritai*, and broadly speaking also the *strategoi* and the *komogrammatoi*, the assembly of the Jewish elders and many more institutions and persons traditionally summarized under special jurisdiction,[1] all these institutions and persons administered justice, too. Often people living in Egypt could appeal to many of them to have right restored.

Hans Julius Wolff's "Justizwesen der Ptolemäer" brought order into this jurisdictional chaos of Hellenistic Egypt.[2] Thirty years ago, Josèph Mélèze looked back at Wolff's masterpiece from 1962. Mélèze found that its results were still valid. He judged that no new papyri gave reason to alter any of Wolff's conclusions.[3] However, Wolff concentrated on the status of these tribunals. He left out many other interesting questions. In the past few years, several papyri were published that reveal many new details concerning procedure,[4] one of the questions with that Wolff was not overly concerned.[5] Thus for the purposes of this paper I will concentrate on the problem of procedure in Ptolemaic *dikasteria*. More precisely, my question is how to bring a lawsuit in the Ptolemaic *dikasterion*.

Compared to the other courts in Hellenistic Egypt, the *dikasterion* is of course a Greek type of court: it had a bigger number of judges than any other judicial

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1 Recent overviews: Lippert (2008), p. 179–183 and Manning (2003); fundamental: Wolff (1970a); about special jurisdictions still: Berneker (1935); *politeuma*: Cowey and Maresch (2001), p. 10–18.

2 Wolff (1970a).

3 Mélèze-Modrzejewski (1988). Nevertheless, it may be asked how to combine Wolff's overall theses of the king's supreme jurisdiction ('Justizhoheit') with the more recent concepts of Hellenistic monarchy proposed e.g. by Gehrke (1982), for an overview: Ma (2007).

4 Schubert (1996) n. 126 and 136; Kaltsas (2001); Hagedorn and Kramer (2010).

5 For questions of procedure, there are older studies which definitively need a revision. No one has tried so far to answer the question how to characterize the Egyptian institutions in the light of contemporary political theory (Wolff (1970a), p. 7), as the attempts to write a 'Hellenistisches Staatsrecht' were abandoned in the 1970s, Braunert (1968); Mooren (1983). Gehrke (1998) denies influences from philosophy on the political praxis.

authority in Egypt at that time or before, and its judges were appointed by lot.[6] However, did the Ptolemaic *dikasteria* significantly differ from their counterparts in the rest of the Greek world? The characteristics of the Greek population in Egypt and the remaining institutional environment suggest that this was indeed so.[7] First, the most influential people living in Egypt came from Macedon, a very specific part of Greece. Furthermore, a substantial part of the Greek population in Ptolemaic Egypt had a military background. Finally, *dikasteria* in Ptolemaic Egypt did not exist alongside other *polis* institutions. For example, the Egyptian countryside did not know *boulai*, that is, civic assemblies. In my paper, I will thus also outline some differences between a court called *dikasterion* in Egypt and a *dikasterion* in an ordinary Greek city-state at the same time.

What should be the basis for comparison though? A comparison between classical Athens and Egypt would be erroneous for many reasons as Athens itself is special. Nevertheless, several studies based on epigraphical evidence bring together many facts about the jurisdiction in Hellenistic cities. I am thinking of Gerhard Thür's work on the inscriptions of Arcadia, Aude Cassayre's recently published thesis, which is useful regardless of obvious shortcomings, and Victor Walser's article on Hellenistic *dikasteria* in an edited volume on democracy in Hellenistic times.[8] These works shall be the comparanda to highlight the specifics of the Egyptian *dikasteria* more precisely. Maybe we can imagine how the procedures that developed in the context of cities—which implies a certain closeness—were changed in the vast valley of the Nile River and its bordering regions, where it took days to travel from one center of settlement to the other.

Another aspect should not be omitted: It has been suggested for a long time that the *dikasterion* in Egypt was similar to the institution of foreign judges attested mainly in Hellenistic inscriptions.[9] I will argue that foreign judges were not a model for the Ptolemaic *dikasterion*. At the same time I would like to point out that as often as two cities invited foreigners to resolve outstanding disputes between them, they also completely transferred the case to a third city. In these third cities, probably the ordinary civic procedures or something similar then took place. These transferred trials and the courts that decided them seem to have more in common with the Ptolemaic *dikasteria* than the institution of foreign judges.

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6 Now well attested by P. Heid. VIII 412; about Egyptian courts and the thirty judges mentioned in Diod. I 75–76: Lippert (2008), p. 28, 44f., 77–79; Westbrook (2003), p. 105–108, 264–266, 302–307 (R. Jasnow).

7 Greater distances alone should not have been a reason for differences as the Fayoum (today 1827 km^2) is significantly smaller than Attika (today 3804 km^2).

8 Thür and Taeuber (1994); Cassayre (2010), which should be used together with Cassayre (2009); Walser (2012).

9 Thür (2003), p. 222, more general Mélèze-Modrzejewski (1988), p. 173.

I. Starting a Lawsuit

One of the most characteristic differences between the procedures at a *dikasterion* in any Greek city and at a *dikasterion* in Egypt is the absence of the part called *anakrisis*. As far as I see, it is generally agreed that in Greek *poleis* the hearing took place only if there had been an *anakrisis*, an examination of the case by an official before the hearing. Even if not everyone would describe the ordinary Greek trial as a two-phase procedure, this part is missing in no overview treatment.[10] Indeed, trials that did not require an *anakrisis* are thought to be special and exceptional.

According to the prevailing reconstruction of the procedures at the Ptolemaic *dikasterion*, one of the first things a plaintiff had to do was to go to the clerk of the *dikasterion* and hand in a piece of papyrus called *enklema*. This *enklema* took the form of a letter to the defendant. Recently, such a document was published from the collection at the University of Trier.[11] It is a letter from Aniketos, a Persian of the troop of Automedon to another member of the same troop called Ptolemaios. Aniketos wrote, omitting all the details:

> *"As you borrowed 2000 drachmae from me ... and did not pay it back, therefore I sue you at the dikasterion in Herakleopolis on behalf of this loan. ... You are summoned and I gave you the enklema in person on the fifth Audnaios of the 22nd year."*[12]

A second hand wrote the same date on the back, and then "*enkl(ema)* of Aniketos vs. Ptolemaios for 4160 dr."[13] Due to interests and fines, the sum in dispute is much higher than the original loan.

This is the first direct evidence for an *enklema* as a separate papyrus. The others known before were part of a list of *enklemata* found in El Hiba (P. Hib. I 30a–d) or were cited within the proceedings of a session as in the proceedings from Krokodilopolis (M.Chr. 21, 12–35 = P. Gur. 2, 12–35; M.Chr. 28, 1–14).[14] Therefore, it is not surprising that this is the only *enklema* where a physical description of the witnesses of the summons as well as a physical description of the

[10] Two-phase model: Thür (2003); preliminary proceedings: MacDowell (1978), p. 240–242; a special point: Harrison (1998), p. 94–105 and Lipsius (1905 (reprint 1984)) p. 829–844; for *anakrisis* and *diaitetai*: Ruschenbusch (1989).

[11] Hagedorn and Kramer (2010).

[12] Hagedorn and Kramer (2010) (Herakleopolis, 183 B.C.) l. 5–7: [...]. ὅτι τοῦ κ (ἔτους) Π[ανήμου] ι[.]ε...[..δα]νεισάμενος παρ' ἐμοῦ χαλκου ι̣ν̣[ο]μ̣ί̣σ̣μ̣α̣[τος] ὀφθαλμοφανοῦς (δρ) 'Β [details about the contract and the unwillingness of the defendant] l. 18–20 οὐ[κ ἀποδ]έδωκάς μ[οι] δι΄ ο̣ σοι δικάζομ[αι ἐν τῶι ἐν Ἡρα]ι̣κ[λέυ]ς πόλει τῆι ὑπὲρ Μέμφιν κληρ[ωτῶι] δ̣ικαστερίωι κατὰ τὴν τοῦ δανείου συγγρα̣[φὴν], [details and date] l.34–35 κέκλησαι δὲ καὶ τὸ ἔνκλημα δέδωκα σοι ἐνωπιωι ἔτους' κβ μηνὸς Αὐδναίου ε κλήτορες.

[13] l. 44–45 [date] ἔνκλημα Ἀνικήτου πρὸς Πτολεμαῖου δρ. 'Δρχ.

[14] Hagedorn and Kramer (2010) also list P. Lugd. Bat. XXV 20, a petition (P. Mil. Vogl. Inv. 1297) to be published as P. Mil Vogl. IX 322; and several unpublished fragments concerning lawsuits at the *dikasterion* in Herakleoplis in Trier.

plaintiff can be found.[15] We cannot be entirely sure that plaintiff and witnesses appeared together before the clerk of the *dikasterion*, but it is highly probable that they regularly did,[16] even if the clerk might have made the descriptions without looking at the witness in case he knew the person.[17]

If the procedure did indeed start with handing in such a letter to the defendant at the *dikasterion* itself, it would significantly differ from the sequence of actions in a *polis*. For in Greek cities, the first step was to make the infraction public by announcing it to the competent official or, if a case of public interest, at the general assembly.[18] The inscriptions regularly indicate which official.[19]

At the beginning of the twentieth century, scholars supposed that even in Egypt, the first step was to address an official, in most cases the *strategos*.[20] This assumption was based on the annotations of a *strategos* called Diophanes who referred several petitions 'to the competent court' (ἐπὶ τοῦ κα̣(θήκοντος) δι̣(καστηρίου)).[21] Today however, petitions to officials count as independent remedy, which had no necessary or even regular connection with trials before the *dikasterion* and the other courts.[22] Indeed, no known document directly connected with a trial at a *dikasterion* can be found that indicates that it was necessary to write a petition before approaching the *dikasterion*. The one exception might be the letter mentioned in the famous verdict of the *dikasterion* in Krokodilopolis P. Gur. 2. There, the *pros tei strategiai*, the 'appointed *strategos*' (as translated by Henderson) wrote to the clerk to seat all the judges except those challenged by either party in accordance with the regulations.[23] But this letter arose from the defendant's appeal to the *strategos*, not the plaintiff's.

Nevertheless, some documents suggest that also in Egypt writing an *enklema* and handing it to the clerk of the *dikasterion* after the summons was not the first step involving the aid of an official. Plaintiffs might also often have first had recourse to a *praktor,* a collector of debts. A first document is a papyrus from the Zenon-archive

[15] Hagedorn and Kramer (2010), p. 221—besides, it is the only *enklema* indicating the date of the hearing; P. Heid. VIII 412 has a description of the witnesses only. Those descriptions we know from other contexts namely the register of contracts at the *grapheion,* to mention only the most familiar example (cf. CPR XVIII). The reconstruction of the lower part of P. Hamb. II 168 may need a revision, as in Hagedorn/Kramer, only the plaintiff and the witnesses are described, not the defendant, as the reconstruction of P. Hamb. II 168 demands.

[16] Kaltsas (2001), p. 55.

[17] Kramer, CPR XVIII p. 99.

[18] Cassayre (2010), p. 225–235; Harrison (1998), 85–94.

[19] Cassayre (2010), p. 230f.

[20] Wilcken (1912), (p. 12–16) this view is preserved by Seidl (1962), p. 89 as a compulsory attempt of reconciliation.

[21] At the end of P. Enteux. 21, 32, 52, 56, 66 and 69 (Magdola, 218 B.C.).

[22] Wolff (1970a), p. 183, that the petition was no obligation: Semeka (1913), p. 9–12, 59, 188 f. ('Übergabefunktion'); Berneker (1930), p. 56.

[23] P. Gur. 2 = Sel.Pap. 256, l. 8–11 (Krokodilopolis, 225 B.C.).

that contains notes for the preparation of a lawsuit.[24] Its first column gives the contract, the second contains a calculation and the third one is the draft of a petition, which should have been handed over to Kraton, aid of the *praktor* Diogenes. At the bottom of the draft begins a kind of list of what had to be done before handing in the petition: "[You must] also make inquiries at the royal granary [and indicate] to the *praktor* the [money] value of the whole according to the contract. You must add that the execution is to be as in the case of debts of the crown (*pros basilika*)."[25] By writing that the debt was to be treated *pros basilika*, Zenon probably meant to indicate that it could be directly enforced.[26] Given that the lessees agreed to an eased enforcement, it is not surprising that Zenon went to the *praktor* first. However, maybe the *praktor* was regularly addressed first. For the list of summons from El Hiba also attests that a plaintiff went first to the *praktor* and afterwards to the *dikasterion*. There, the plaintiff wrote that he filed a suit at the *dikasterion* because the defendant did not recognize his debt in face of the *praktor*.[27]

The laws preserved in P. Hamb. II 168 confirm the role of the *praktor* as a preliminary measure. These laws contain rules for filing a suit.[28] The upper, better-known part of them demands that the *enklema* be handed over to an assistant of the *nomophylax* and explains which information about the persons involved is necessary: for soldier's *onoma, patris, tagma,* and so on. Hundreds of contracts and other documents conform to this way of identification.[29] Whereas this part seems to refer to trials in Alexandria,[30] the lower part refers to the countryside, as in line 17 we read about persons who sue in the *chora*. Two lines beneath, in line 19, we find the assistant of the *praktor* and some specifications about names.[31] It might be possible that the *praktor* and his assistants had similar duties as a *nomophylax* in Alexandria, supposing that this regulation is similar to the one of the upper part.

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[24] P. Col. III 54, l. 41–58 (Arsinoite, 250 B.C). This papyrus is widely cited because Zenon notes at the end that for specific cases or persons there would be no court (*kriterion*) in the Arsinoite *nome* at all. Therefore, the *strategos* should decide. This maybe supplies a *terminus post quem* for the permanent availability of *chrematistai* in the Arsinoite *nome,* as *kriterion* regularly referred to the *chrematistai*: Wolff (1970a), 71f.

[25] P. Col. III 54, l. 48: Κράτωνι ὑπηρέτηι Διογένους πράκτορος τῶν ἰδιωτικῶν, l. 52–55: ⟦Traces⟧ ἐπισκέψασθ[αι] δὲ καὶ ἐν τῶι βασι-|λικῶι. δεῖ πρ[ά]κτορι παραδε[ῖξα]ι τ[ὴν] τ[ιμὴ]ν [πα]ντὸς |κατὰ τὴν σ[υγγ]ραφ[ήν. προσθεῖνα(?)]ι τ[ὴ]ν [π]ρ[ᾶ]ξιν|[ε]ἶναι πρὸς βασιλικά.

[26] Rupprecht (1994), p. 147; Hagedorn (1981); Wolff (1970b).

[27] P. Hib. I 30 d (Herakleopolites, 282–274 B.C.), l. 18 f. οὔτε τῶι πράκτορι ἠβούλου ἐξομο|[λογήσ]ασθαι.

[28] It dates from the 3rd c., found probably in El-Hiba, Falivene (2010).

[29] On this and the similar BGU XIV 2367 (Alexandria (?), late 3rd c.): Thompson (2001), p. 305.

[30] Wolff (1970a), p. 23.

[31] P. Hamb. II 168 l. 17–20: [- ca.13 -]ς· οἱ δὲ κατὰ τὴν χώραν κρινόμενοι το |[- ca.18 -]... μέλλωσιν οἱ αἱρεθέντες διαιτηταὶ| [- ca.12 - ὑπηρέ]τῆς ὁ π[α]ρὰ τοῦ πράκτορ[ος] ὀνομα[α]ζ|[έτω - ca.15 -]... [...]ετω δὲ καὶ τοὺς ἀνιζ[....].

This would mean that in the *chora* the *praktor* made the identification. If this is correct, the the assistants of the *praktor* wrote the descriptions of the plaintiff and the witnesses in the Trier *enklema*.

Generally speaking, in the Egyptian context it sounds even more reasonable to head first to the *praktor* if you remember that the *dike* was not aimed at a verdict ordering the defendant to do something. Instead, the *dike*'s purpose was to justify the enforcement.[32] Announcing the intention to start a procedure of justification to the person who should do the work of enforcement therefore perfectly fits the image we have from the Greek form of trials. Whereas within a Greek *polis* the enforcement was a private matter of the claimant, in Egypt even in private cases a *praktor* could or had to be involved.[33]

As regards foreign judges, the involvement of the *praktor* after the trial might be parallel to some regulations attested for trials involving citizens of more than one *polis*. Following the treaty between Stymphalos and Demetrias,[34] the permission of enforcement by judges was not enough; the enforcement itself had to be announced to a local official in the city of the defendant. Maybe the reason was that the judgment was not in the same way publically known as if the *polis* itself had given judgment.[35] However, the court for trials between the citizens of these two cities was not a court of foreign judges.

Another question is whether in Egypt, the *praktor* was only addressed first for practical reasons—because it was highly probable that a debtor would recognize his obligation without a trial—or whether this was required by law. The question is, who actually wrote the *enklema*. The literature about Greek cities suggests that the written document is composed by the official or another person who receives the *enklema*.[36] For the Trier *enklema*, the different hands suggest that the *enklema* itself was not written by the same person who received it at the court.

Nevertheless, the involvement of the *praktor* before the summons does not replace an *anakrisis*. There are no indications that the *praktor* took oaths, asked questions, gathered evidence or structured the conflict to prepare the lawsuit. His task was collecting debts. Therefore one main difference between Ptolemaic and civic *dikasteria* remains.

II. The Judges

The hypothesis that the Ptolemaic *dikasterion* was formed after the model of the courts of foreign judges is partly based on a comparison of composition of these courts, namely the number of judges.[37] Following the more recent publications about

[32] Thür (1997); Rupprecht (1994), 103, 143, 147f.; Wolff (1957).
[33] Préaux (1955) ; on epigraphical sources: Rubinstein (2010).
[34] IPark 17 (Stymphalos, 303–300 B.C.) = IG V 2 357.
[35] Thür and Taeuber (1994), p. 247.
[36] Cassayre (2010), p. 234.
[37] Mélèze-Modrzejewski (1988), p. 174 f.

resolving disputes that went beyond a single *polis*, this comparison seems less convincing. However, the numbers as well as the way of selecting the judges and the possibility of rejecting particular persons as judges are not unique in the Hellenistic world.

It has been known since the first evidence was gathered at the beginning of the twentieth century that the *dikasterion* in Egypt regularly consisted of ten judges—therefore its alternative name 'Zehnmännergericht'. There are decisions of fewer than ten judges and even the selection of more than ten *dikastai* should not be ruled out,[38] but all the evidence suggests keeping the number of judges near to ten. Newly published papyri have not altered this assumption in principle. Compared to the huge numbers Aristotle reports for the Athenian courts, the *dikasterion* in Egypt obviously was something different. However, the Athenian numbers are not representative for other Greek cities, although sorting machines and tablets as well as notes in literature indicate huge courts in some places, too. Cassayre assumed that a *dikasterion* in many cities had only fifteen to thirty judges,[39] but she cannot give much direct evidence.[40] The problem is that the composition of tribunals is better attested for cases involving more than one *polis*. Referring to contracts between cities that require 9 to 15 judges, as Joseph Mélèze did,[41] therefore raises the question whether this reflects a specialty of inter-*polis* conventions or rather a customary feature of smaller or non-democratic *poleis*.

However, one thing is sure: No inscription giving a number of judges comparable to the Egyptian *dikasterion* is an example for the use of foreign judges.[42] There are eleven judges attested in the treaty concerning the Lokrian maidens[43] and the decree concerning judicial assistance between Delphi and Pellana.[44] In a quarrel about borders between two smaller Achaian cities, there were at least 21 judges. In a similar case, probably 30 men acted as judges, which a third city addressed by the two litigants had assigned.[45] By contrast, all tribunals of foreign judges were smaller in number than the *dikasterion* in Egypt: for most cases, three judges and a secretary

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38 Mélèze-Modrzejewski (1988), p. 173 discusses the fragmentary SB XVI 12858 as a possible beginning of a decision of a *dikasterion*. Only a date and parts of at least 12 names are left.

39 Cassayre (2010), p. 368.

40 Walser (2012), p. 83–93: huge courts in Hellenistic times are certain for Athens, Thasos, Rhodos and Delos; Harter-Uibopuu (1998), p. 141.

41 Mélèze-Modrzejewski (1988), p. 174f.

42 Harter-Uibopuu (1998), p. 139–148; about foreign judges in general Crowther (2008), Robert (1973).

43 IG IX $1^2$706 (Oiantheia, ca. 272 (?) B.C. = StV III 472 = SEG XXXII, 558 = Cassayre (2009) 9).

44 FdD III 1 486 = StV III 558 (Delphi, 1st half of the 3rd c. B.C).

45 Harter-Uibopuu (1998), p. 143; IPArk 22—Arbitration about Boura (Lousoi?, 3rd c. B.C., SEG XI,112 = Harter-Uibopuu (1998) 2), IPArk 26—Alipheira vs. Letreon (Alipheira, after 194/3 B.C., SEG XXV, 449 = Harter-Uibopuu (1998), 6).

are attested and in many others, only one person was called as judge.[46] Two, four or five judges are attested for a small number of cases, and never more than seven. This corresponds closely with the number of judges of another type of court in Egypt, the *chrematistai*, who acted in councils of three judges and an *eisagogeus* or clerk.

Concerning the second point, the selection of the judges, drawing the judges by lot had been suggested for the Ptolemaic *dikasterion* for a long time, and after the publication of documents from the *dikasterion* in Herakleopolis in which it is named "court sorted by lot" this is even more certain.[47] One of these documents will be discussed later on. Sortition by lot corresponds with the practices known from *dikasteria* in *poleis*, although there is evidence that in some places judges were elected at least on special occasions.[48] How the drawing was executed in Egypt is not known.

For Egypt, the possibility of challenging judges is well known from the above-mentioned P. Gur. 2 containing a judgment of the *dikasterion* in Krokodilopolis. In this case, the *eisagogeus* had seated all the judges except those challenged by one of the parties:

> *"Polydeukes, the clerk of the court, having constituted us in accordance with the order sent to him by Aristomachus, appointed strategos of the Arsinoite nome, of which this is a copy: 'To Polydeukes greetings. Heracleia has requested the king in her petition to form a court of all the judges ... except such as either party may challenge in accordance with the regulations. Year 21, Dystros 16, Pachon 19'"*[49]

At first, the possibility of challenging judges seems to be unique in the Greek world, but this might not be true.[50] Certainly, in the letter of the deputy *strategos* to the clerk of the *dikasterion* in Krokodilopolis, nothing is said about the reasons why certain persons should not be judges in this special case. This is why most commentators on this papyrus thought that the *diagramma* he refers to did not

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[46] Harter-Uibopuu (1998), p. 141; overview: Cassayre (2010), p. 131–154. The list contains 26 inscriptions with a single judge, 36 where three judges are certain. In 13 cases, two are named, on 7 inscriptions four judges, on 8 five judges. Six and seven judges appear only once.

[47] P. Heid. VIII 412.

[48] On the lot and its material evidence Walser (2012), 83–93; election: Cassayre (2010), p. 364, probably based on IMyl. 101, 127 and 141 and IEry. 114 (honorific decree for Kallikrates, ca. 2 c. B.C.)—on these exceptions also Walser (2012), 100–103.

[49] P. Gur. 2 (Krokodilopolis, 218 B.C.) l. 6–11, translation: Sel. Pap. 256: καθίσαντος ἡμᾶς Πολυδεύκου τοῦ εἰσαγω[γέως κατὰ τὸ] ⌊παρὰ Ἀριστο[μάχου το]ῦ πρὸς τῆι στρατ[ηγ]ίαι τοῦ Ἀρσινοίτου νο[μοῦ τεταγμένου] ⌊γραφὲν αὐτῶ[ι προστ]άγμα οὗ ἐστιν ἀν[τ]ίγραφον τόδε· Πολυ[δεύκει χαίρειν].⌊ἰὴξίωκεν τὸ[ν βασιλ]έα διὰ τῆς ἐντε[ύξ]εως ἡ Ἡράκλεια κα[θίσαι - ca.9 - ομο-]⌊[10] σαντας πάντ[ας δικ]αστὰς πλὴν ὧν [ἂν ἐ]κάτερος ἐξαναστή[σηι κατὰ τὸ διάγραμ]⌊μα. (ἔτους) κα Δύστρο[υ ις] Παχὼν ιθ.

[50] Mélèze-Modrzejewski (1988), 174 f. pointing at Plat. Nomoi 937a; the Delhi-Pellana treaty (FdD III 1 486 = StV III 558, 3rd c. B.C.) and an Oiantheia-Chaleidon-treaty from the 5th century B.C. (IG IX I^2 717 = StV 146).

require a reason, but gave the parties the right to challenge a certain number of men sorted as judge.[51] However, the text does not refer to a certain number either. Maybe the *diagramma* did give a certain number. But it is more probable that it named certain reasons for excluding specific persons, such as near relatives, because those were excluded according to some contemporary inscriptions,[52] such as the Nakona decree,[53] a treaty between Temenos and Klasomenos[54] and probably also in the treaty between Delphi and Pellana.[55] Another option is available if we assume a less formalistic way of forming the *dikasterion*: the *diagramma* might not have stated reasons or numbers at all, but only a general provision for forming a *dikasterion*, e.g. that the *eisagogeus* should draw ten judges by lot.[56] So comparing the Ptolemaic and the civic *dikasteria* from the angle of the deciding group, we have seen no fundamental difference.

III. Renew Actions

The reopening of a case was not very well attested until the publication of P. Heid. VIII 412, the motion to reopen the case after a *dike eremos*, a default judgment. The first time, the court had dismissed this case because the claimant did not appear. It may be asked how this could happen as the claimant summoned the defendant for a certain day and in some jurisdictions a case may not be heard if the claimant does not appear in court. However, remember that P. Gur. 2 is a decision with an absent plaintiff, too. There might have been a *diagramma* demanding the judges to decide even if the plaintiff was not present. Fragments of such a *diagramma* are cited at the end of P. Gur. 2 and in the more recently published P. Gen. III 136, which contains several quotes from legislation.[57]

To renew such an action, which had been dismissed for default, a claimant wrote in the first half of the second century this simple letter:

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[51] Wolff (1970a), p. 42; about the not very well-researched subject of excluding judges in general: Vollkommer (2001), 59–67.

[52] Cassayre (2010), p. 369–371.

[53] SEG XXX 1119 (Nakona, 254–241 B.C.?).

[54] SEG XXIX 1130bis (Klazomenai, first half 2nd c. B.C.), l. 37–47 = Cassayre (2009), 27.

[55] FdD III 1 486 = StV III 558 (Delphi, 1st half 3rd c. B.C.).

[56] Similar to the early modern period: Vollkommer (2001), p. 59–67.

[57] P. Gur. 2:l 46–49: ἐὰν δὲ] ἀμφοτέρων τῶν ἀντιδίκων [κληθέν-]|[των ἐν τῶι δικαστ]ηρίωι ἑκάτερος οὗν αὐτῶν μὴ βούλη[ται γραπ-]|[τὸν λόγον θέσθαι]..... ορην ἢ ἀποδέχ[ε]σθαι ἢ συθασθαι [.....] |[- ca.11 - κρινέ]τωσαν ἀδικῆσαι. The reading of the lines 46–49 is highly disputed: l. 46–47: Wolff (1970a), p. 25 n. 19 [τοῦ μὲν παρόντος, τοῦ δὲ μὴ παρόντος ἐν τῶι δικαστ]ηρίωι; Kaltsas (2001), p. 11 f. n.. 5; 6: ἐὰν δὲ] ἀμφοτέρων τῶν ἀντιδίκων [ἢ τοῦ ἑνὸς παρόν|τος ἐν τῶι δικαστ]ηρίωι ὁποτεροσοῦν; l. 48: Edgar/Hunt Sel.Pap.: κατηγορεῖν ἢ ἀποδέχ[ε]σθαι ἡσσ{θ}ᾶσηαι; Kaltsas (2001), p. 12 n. 8: ἢ συνθέσθαι. P. Gen. III 136, l. 8f: [-ca.?- συ]νεδρευόντων τῶν κριτῶν ὁποτεροσοῦν τῶν ἀντιδίκω[ν μὴ παρῇ],|[-ca.?-], καταδικαζέσθω ἢ ἀποδικαζέσθω ἡ δίκε ἔρημος. τῶν δ[ὲ -ca.?-].

> *"To Parmenion, clerk of the allotted court in Herakleopolis, from Megisteus, Macedonian, member of the troops of Automedos, Lochagos. I renew the action which had been dismissed for default for the first time in the allotted court in Herakleopolis and which I wrote against NN, son of Machatas, Macedonian tes epigones, on a contract of loan worth 100 artabas of wheat, 30000 drachmae, within the days according to the ordinance, and I summoned the opponent in the revision"*[58]

Names of the witnesses of the summons, the date and a physical description of the witnesses follow at the end of this well-preserved document. The word used for dismissing is *apodikazo*, which describes in its active form a decision of the judges against the plaintiff, so that is quite certain, how the court decided.[59]

For Athenian and other *polis*' law, the reopening of cases is discussed mainly for the *dike pseudomartyrion*, in case of false evidence.[60] Nevertheless, to renew the action after a default judgment is also known, although there are only a few sources.[61] Compared to them, the most interesting fact in this document is the absence of any explanation for the renewal of this action. In Athenian law, an excuse for someone's default was required. However, here, the plaintiff does not state why he was absent the first time, although the text itself is full of detail and formalistic remarks, which allows us to suppose that the plaintiff followed a standard form. A small hint may be the word *proton*—for the first time. It is possible that a decision of the court in absence of one party was not definitively binding if the party missed one session only.[62] However, it may also be possible that the party had to give a reason for missing the hearing in another document or verbally.[63] However, the simple fact of excluding certain persons from acting as judge is attested elsewhere in the Greek world as well. Maybe we see in Egypt only a simplified or generalized way of excluding them, if indeed no reason was necessary.

To sum up: We have seen a major procedural difference between Ptolemaic and civic *dikasteria*—the absence of a pretrial *anakrisis*, which could result from the

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[58] P. Heid. VIII 412, l. 1–18 (Herakleopolis, 186 B.C.). Παρμενίωνι, εἰσαγωγεῖ τοῦ| ἐν Ἡρακλέους πόλει κληρω|τοῦ δικαστηρίου, παρὰ | Μεγιστέως Μακεδόνος|[5] τῶν Αὐτομέδο[ντ]ος λοχαγοῦ.| τὴν ἀποδεδικ[ασμ]ένην| ἔρημον τὸ πρῶ[τον δίκην]|| ἐν τῶι ἐν Ἡρακλέου[ς πόλει]|| κληρωτῶι δικαστ[η]ρ̣[ίωι,]|[10] ἣν ἐγραψάμην.....[..]ι| Μαχάτου Μακεδόνι τ[ῆ]ς| ἐπιγονῆς κατὰ συγγραφὴν| δανείου τιμῆς πυρῶν ἀρ(ταβῶν) ρ,|[δ]ραχμῶν τρισμυρ[ί]ων,|[15] [ἀν]αδικῶ ἐν ταῖς κ[α]τὰ τ[ὸ]|| [δι]άγραμμα ἡμ[έρ]α̣ις| [κ]α̣λεσάμενος τὸν [ἀ]ντίδικον| [ε]ἰ̣ς τὴν ἀναδικίαν.

[59] LSJ p. 197; Arist. 1268b 18; 20.

[60] Cassayre (2010), p. 415–417 on the basis of the treaty between Delphi and Pellana, FdD III 1 486 = StV III 558, l. 13–14; for Athens: Todd (1993), p. 145 f., Harrison (1998), p. 190–99; Bonner and Smith (1930–38) II, p. 232–270; Lipsius (1905 (reprint 1984)), p. 953–964.

[61] Harrison (1998), p. 197. Sources are Dem. 32, 27 and Poll. 8,16.

[62] In Roman law, a party was summoned three times before a default judgment was entered (Ulp. Dig. 5,1,68–70)—but in this procedure the court summoned the parties.

[63] Such a document might be P. Princ. II 16.

absence of civic officials within the settlements in the countryside. However, some kind of official was addressed first in many cases even in Egypt, maybe for practical reasons. Other differences such as challenging judges have lost their singularity. Overall, the Ptolemaic *dikasterion* was one of several possible variants of this type of court rather than a fundamentally different thing. Characteristics of the foreign judges—small numbers and, this is the main point, a court present only a few days a year—correspond more closely to another type of court in Egypt, the *chrematistai*.[64] As did foreign judges, the *chrematistai* gained more importance from century to century. At the end of the second century, they alone survived beside the courts of Egyptian type.[65]

The question is, whether this development was specially Egyptian or part of a general Hellenistic trend. At present, the question how the jurisdiction within the Greek poleis evolved in Hellenistic times is under review, so that no reasonable answer can be given here. However, if there was a decline of democratic institutions in general, which went together with a decline of the democratic and participative form of giving justice and a decline of *dikasteria* everywhere,[66] the decline of the Egyptian *dikasteria* would be nothing special.

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[64] For them, even an inscription is preserved: OGIS 106 (Ghazi, 172 B.C.)—not a honorific inscription for *chrematistai* but an inscription set by a council of *chrematistai*.

[65] P. Tebt. I. 5, 207–220 (Kerkeosiris, after 118 B.C.), on this papyrus Thompson (2001); Pestman (1985); Mélèze-Modrzejewski (1979).

[66] Democratic jurisdiction in its pure form requires a compensation for the judges (Arist. Pol. 1294a 37–41, 1320a17–35, on this Walser (2012), 83 and 91; Cassayre (2010), 278–281), the payment of the *dikastai* in Egypt is nowhere attested while there are receipts for the payment of certain court fees (scribal and attorneys), e.g. UPZ II 172 (Thebes, 126 /125 B.C.).

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DIKASTERIA: A PANHELLENIC PROJECT? A RESPONSE TO NADINE GROTKAMP[1]

Fifty one years after the first edition of *Justizwesen der Ptolemäer*, [2] the reconstruction of the Ptolemaic judicial system elaborated by Hans Julius Wolff keeps all its freshness and continues to stimulate the curiosity of scholars, as Nadine Grotkamp's lecture has just shown. Obviously, as every innovative theory, neither was this one welcomed without some critical reactions; but altogether, it has become part and parcel of juristic papyrology in its current state. We may only regret that the results of this research were not incorporated into the first volume of Wolff's manual published by our colleague H.-A. Rupprecht ten years after the death of the author.[3] And even more so since—and this does not seem to be a merely superfluous remark—they could be used beyond the domain of judicial techniques to seek answers to the broader questions like the relations between Greeks and barbarians in the Hellenistic kingdoms or the prehistory of human rights. Our Symposion gives me the opportunity to display, in my response to Nadine Grotkamp, another aspect of this problem, namely the classic roots of the Ptolemaic judicial system.

The pioneers of legal papyrology favoured the Athenian model in the study of the Greek roots of Ptolemaic law. And so, for an eminent Greek scholar, "the Greek law in Egypt results from the Athenian law, as the common language, the *koinē*, results from the Attic dialect."[4] But the evidence called in support of this statement is not enough to make it credible. A scrupulous search reveals rather than a transfer (once termed as 'reception') of the Athenian laws towards Alexandria, a plurality of sources from which the Ptolemaic lawmakers were able to draw while constructing

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[1] The issues addressed in this response are dealt with in a broader approach in my contribution to the proceedings of the 27th International Congress of Papyrology held in Warsaw in 2013: J. Mélèze Modrzejewski, 'Modèles classiques des lois ptolémaïques' (forthcoming).

[2] H.-J. Wolff, *Das Justizwesen der Ptolemäer*, München 1962 (Münch. Beitr. 44); 2e éd. 1970. See my papers: 'Zum Justizwesen der Ptolemäer', *ZRG. RA* 80 (1963) p. 42-82; 'Nochmals zum Justizwesen der Ptolemäer', *ZRG. RA* 105 (1988) p. 167-179.

[3] H.-J. Wolff, *Das Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats*, I. *Bedingungen und Triebkräfte der Rechtsentwicklung*, ed. H.-A. Rupprecht, Munich 2002.

[4] G. Petropoulos, *Bibl. Orient*. 5 (1948), p. 90-93, review of R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri*, *332 B.C.-640 A.D.*, 1st ed., New York 1944.

legislation capable of ensuring adequate protection of the interests of the monarchy. Like was the case of the judicial organization.

Wolff's reconstruction of the system assumes the form of a diptych crowned by a capital. While the king reserved for himself the decisions in matters concerning his treasure, the *basilikon*, and those regarding possible threats to the kingdom security or economy, the administration of justice over the whole territory was entrusted to a double network of 'nationally specialized' courts: *dikastēria* designed for the Greek-speaking immigrants both in the cities and in the *chōra*, and the courts of laocrites, Egyptian priests, which were to consider the cases of the native population. Wolff showed that it was a coherent construction, organized towards 273 B.C.E. by means of an "organic law," a *diagramma*, which seems to have left numerous traces in the papyri.

Before Wolff, the attention of papyrologists was chiefly centred on the court of Krokodilopolis, the administrative centre of the Arsinoïte nome, known from a group of documents kept today in the Flinders Petrie's collection in Dublin. Among them there are the minutes of some cases heard by this court in 226/225 B.C.E. Two texts evidence a bench of nine *dikastai* presided over by a *proedros*, thus giving way to its denomination as the 'court of ten' (Zehnmännergericht), in an obvious splendid parallel to the Roman decemvirate or the decimal system of Cleisthenes. Yet another document of the same group preserving a complete list of the judges has only eight men, including the *proedros*. Ten, therefore, is not a prescribed composition, but an average, and the number of the *dikastai* may vary between eight and twelve. Clearly, the composition of the Ptolemaic dicasteries did not follow the example of the Athenian courts comprising either 201 or 401 members according to the Aristotelian testimony. A much more feasible model is provided by the inter-city treaties envisaging juries of variable number (of 9, 11 or 15) of jurors depending on the value of the dispute, chosen at random from restricted lists.

The Ptolemaic *dikastai* must have been also chosen from such lists, even if we do not have any direct proof thereof. The onomastics of the judges suggest a choice among the Greco-Macedonian elites of the nome or its capital. Let us recall, in alphabetical order, the names of the judges known from the dossier of *P. Petrie*: Andron, Diocles, Diomedes, Dionysodorios, Diotrephes, Dorotheos, Jason, Maiandrios, Menekrates, Polycles, Sonikos, Taskos, Theophanes, and Zenothemis. All Greeks, not a single Egyptian name. It does not mean, however, that the *dikastēria* were "purely Greek" courts, as we may still read in the treatise of my teacher R. Taubenschlag.[5] They were naturally the courts of the dominant minority of 'Hellenes', the descendants of the soldiers of Alexander and of Ptolemy Sôter and other Greek speaking immigrants, Greeks and Macedonians, but they also heard

[5] R. Taubenschlag, *The Law of Greco-Roman Egypt in the Light of the Papyri* (*332 B.C.-640 A.D.*), 2nd edition, revised and enlarged, Warsaw 1955, p. 484.

cases of the Hellenized barbarians like Jews or Thracians. The Greek continuity set itself into the framework of a new political and social reality.

What we have just noted about the judges, we may also say about the law therein applied. A Ptolemaic *diagramma* foresaw a hierarchy of the rules which were admitted in the administration of justice: the royal legislation, represented by *diagrammata*; the law of the parties designated as *politikoi nomoi*; and the "the most equitable opinion," *dikaiotatē gnōmē*, which came into play when the royal law and the *politikoi nomoi* remained silent. Likewise, a polis recognised a hierarchical layout of the legal rules which it was to respect. Demosthenes informs us that the Athenian heliasts committed themselves to try cases according to the laws of the city (*nomoi*), the decrees of the people (*psēphismata*), finally, just as in Egypt, according to the most equitable opinion. In the Ptolemaic monarchy, royal laws (*diagrammata*) replaced old laws of the city (*nomoi*), and "civic laws" (*politikoi nomoi*) of the immigrants took the place of the more recent decrees (*psēphismata*). The common recourse to *dikaiotatē gnōmē* as a means to fill in the gaps of the substantive law is epigraphically attested in the Greek world, and not only in Athens, from the 4th century B.C.E. onwards. In current research the Athenian model therefore is giving way to a pan-Hellenic project.

So much could also be said about the relationship between the written and the oral, which characterises the applicable law and the justice which applies it. In classical Greece, the written laws contrasted, as Michael Gagarin has shown, with the essentially oral legal proceeding.[6] In the Ptolemaic *dikastēria* this proportion is inverted: they apply the rules of usually not written law in a procedure which multiplies written procedural documents. This is a clear case of the so-called "inverted continuities" which are featured in the extension of the Greek law in Egypt.

Little by little, the Athenian model fades away for the benefit of a wider scheme. The Ptolemaic *dikastēria* are an original creation, not reproducing any specific model, yet abundantly borrowing from a vast judicial and institutional experience of the Greek world. In this sense, the justice dispensed by the Ptolemaic *dikastēria* fits in the Panhellenic programme aspiring to turn Alexandria into the cultural capital of the Greek world included in the borders of the *oikoumenē* by the conquests of Alexander the Great.

The introduction of Greek justice adapted to the needs of the time into a judicial system founded on the respect by the Ptolemies for the cultural and ethnic duality of the country brought about a practical solution to the problems which could arise from this very same pluralism which characterised the legal life of Egypt. At the same time, the Ptolemies strengthened the barrier which separated the Hellenes from the Egyptians: an independent system of justice for either group left no place left for—to use a termed coined by the late Jean Triantaphyllopoulos—a "nomocrasy"

[6] M. Gagarin, *Writing Greek Law*, Cambridge-New York 2008.

(*nomokrasia*), that is to say, for the formation of a 'Graeco-Egyptian' law, a phantom which still haunts the minds of the modern scholars. Diocles, Diomedes, or Zenothemis were at least as little inclined to apply the Egyptian law in proceedings before their court, as were the laocrites concerned with the Greek law before theirs. Both were invested with a mission of preservation and defence of their national heritage in the judicial domain. For that purpose, the laocrites found instructions in the collections of guidelines compiled by their predecessors, such as the famous "Demotic Law-Book" in its different versions. The *dikastai*, with an exception of rare cases in which royal law clearly told them which way to follow, had to stand by what they could find in the *dikaiomata*, pieces of evidence, which the litigants produced during trials, or follow their sense of justice to express "the most equitable opinion" (*dikaiotatē gnōmē*). By doing so these agents of the continuity of the Greek law after the conquests of Alexander the Great paved the way for the ambition of our Society to put the study of Greek legal history in the place it deserves because of its role in the construction of the Western culture.

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DECREES FOR FOREIGN JUDGES: JUDGING CONVENTIONS—OR EPIGRAPHIC HABITS?*

Introduction

Foreign judges, invited from one city to sojourn in another (and sometimes invited upon recommendation by a royal ruler), were often asked to reconcile citizens who were in dispute or else to settle their cases by law. They might also be asked by two cities, as arbitrators or judges, to resolve disputes between them. In this essay, I focus upon the first type, the judges who settled or decided cases between the inhabitants of one city. Our knowledge of the institution derives almost exclusively from inscriptions, especially from decrees of one city recording its request for judges from another (and sometimes from multiple cities) and now bestowing honors, both on the responding city for its goodwill and on its judges for their success.[1] The decrees are first attested in the last quarter of the fourth century, e.g., in a decree of Kyme for Magnesian judges sent "in accordance with the *diagramma* of Antigonos" (IKyme 1), in a Chian decree for judges from Naxos and Andros (SEG 12.390), and in a Samian decree for judges from Kos (IG XII 4,1 131). The practice as attested in the decrees appears with some regularity in eastern Greek cities in the Hellenistic period, especially in the third and more vigorously in the second centuries BCE and

* I am grateful to: V. Bardani for sharing information about an unpublished Smyrnaean decree honoring Messenian judges and allowing me to cite it here; P. Hamon, for making available his re-edited text of SEG 49.1171, a Smyrnaean decree honoring Thasian judges (forthcoming as no. 129 in *Corpus des inscriptions de Thasos: documents publics du IVe siècle et de l'époque hellénistique*) and allowing me to cite it here; L. Rubinstein, for sending me helpful essays not yet available; C. Crowther for making available some essays difficult to access, for reading an earlier draft, and making corrections and valuable comments; G. Thür, for calling my attention to IG XII 4, 1: 132 and his 2011 essay; E. Bathrellou, for sharing with me a close reading of the Smyrnaean dossier; D. Phillips, for his detailed comments post-Symposion; and finally, E. Cantarella, for her generous remarks during the Symposion meeting.

[1] L. Robert 1973; C. Crowther: see 'Works Cited'; K. Harter-Uibopuu 1998: 140–41; 2002. There is not, as yet (so far as I know), any published list of all attested decrees for foreign judges; A. Cassayre 2010: 131–54 tabulates a great many, setting known instances out in a geographical order, arranged by city who sends judges and city who receives them, and provides dates (where possible), circumstances, number of judges and secretaries, and references. Crowther 2006: 40–48 catalogues foreign courts in Thessaly, by regional and chronological distribution.

on into the first; it spread to mainland Greece, it seems, in the second century.[2] While the latest preserved decrees are dated to the turn of the first centuries BCE and CE, other inscribed texts indicate that foreign courts were used into the second half of the second century CE. [3]

Foreign judges were summoned, often, it seems, in times of crisis, when routines of civic life had been disrupted by warfare; when stasis emerged amidst cities whose inhabitants were beleaguered by debts and breached contracts (e.g., IPriene 8.4; IG XII 6,1 no. 95.3, 6, 10; IG IX.2, no. 1230.1–3 and 10–13); when bribery and corruption were rife (Gonnoi no. 91: 20–26: a citizen even tries to bribe the visiting judges from Skotoussa!); when cases had not been heard in a long time (IPriene 59.2–3 [SEG 43.850]). The number of judges varied: we find now one, now two, or three, or five—the odd number was preferable to break a tie when a decision was voted (e.g., ἔκριναν διὰ ψάφου, TC test. XVI).[4] However large or small, the tribunal (even of one) might be called a *dikasterion*. The Chian decree of the late fourth century that was mentioned earlier honors five judges from Naxos and five from Andros; the panel from each is spoken of as a separate *dikasterion* (SEG12.390.44–5). The court is occasionally designated a "*xenikon dikasterion*" (Syll.[3] 306, IPArk no. 5.24, 27, 32; IPriene 59); it differs from a "*politikon* (sc. *dikasterion*)," a court of a city empanelled by its own citizens, as mentioned in a decree of Erythrai, probably honoring one of its own judges (IErythrae 114; also Syll.[3] 306, IPArk no. 5.28 and pp. 65–7). Visiting judges stayed for extended periods; in regulations provided for Tegea (Syll.[3] 306, IPArk 5) apparently enacted after Alexander's Exile Decree, a foreign court is to decide cases for sixty days (τὸ δὲ δικαστήριον τὸ ξενικὸν δικάζεν ἐξήκ- ‖ οντα ἀμερῶν, 24–25); in other texts, we find that judges have asked to be sent home—the sojourn has apparently turned out longer than expected (SEG 12.390.4–5; 19.569.6–7; IG XII 4,1 no. 135.12–18; cf. Michel Recueil no. 542). On one occasion, the judges fell ill and a Samian doctor was called in to cure them (XII 6,1 no.12); presumably, their stay was protracted, too.[5]

In the decrees, foreign judges are almost always designated *dikastai* ('judges'), occasionally *diallaktai* ('mediators'). They are frequently said to have 'settled' some

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[2] N. Papadopoulou and A. Matthaiou (1992–98) 335–67 (summarized at SEG 48.260) published a decree of Mopsion for judges and a secretary from Atrax which they date to mid-third century; if correct, it is now the earliest such decree from the mainland. Crowther 2006: 37–8 is hesitant about the date for SEG 53.540, a Lamian decree for Opuntian judges that has been dated by its first editor, P. Bouyia, to the mid-third century on paleographical grounds.

[3] Crowther 2006: 35 provides references for texts.

[4] For different configurations of these tribunals, see Hamon 1999. For expanded consideration of circumstances involved in choosing the city or cities who are are asked to send judges, and circumstances involved in choosing judges, see Hamon 2012 [2013].

[5] IG XII 6, 1: 12.21–25, honorary decree of Samos for Diodoros, son of Dioskourides. See, generally, Massar 2001.

cases (διαλῦσαι, less frequently συλλῦσαι) and to have 'judged' or 'decided' others (δικάσαι, διαδικάσαι, κρῖναι, διακρῖναι); only rarely do they appear, strictly speaking, to 'arbitrate' (διαιτῆσαι).[6] In some texts, a judge is requested who will give 'a reasoned decision' (δικαστὴν τὸν δικῶντα μετὰ ἀποφάσεων, SEG 43.986.4); this has been interpreted as a decision in an arbitration after a failed reconciliation.[7] It is possible that on some occasions the same person will have served as *diallaktes*, *diaitetes*, and *dikastes* (see section 3b). In most instances, however, the decrees simply contrast 'reconciliation' with 'judging'; and in some few cases, judging alone is mentioned. Debt and breach of contract seem often to be a concern.[8] Special cases are sometimes noted: a decree of Erythrai honors a Prienian judge (IPri 50 and p. 310; IErythrai 111) who apparently was sent to decide one matter only, ἐπὶ τὴν δίκην τῆς μηνύσεως ("for the trial arising from the denunciation"); a decree of Alexandria Troas (IPriene 44.17–18) honors Prienian judges διότι τὰς δίκας ἴσως ‖ καὶ δικαίως ἁπάσας ἔκριναν τάς τε τῶμ παρανόμων καὶ τὰς τὼμ βιαίων ("because they judged fairly and justly all the trials for lawlessness [?] and violence"); and a decree of Antiocheia (IMagnesia 90) honors a judge from Magnesia who was zealous περὶ τῶν δικῶν καὶ παραγραφῶν κα[ὶ—] ("regarding the private cases and special pleas").[9] Louis Robert, whose 1973 essay on foreign judges remains of fundamental importance, thought that foreign judges became the regular tribunal for administering justice in many Hellenistic cities—that is, they replaced the standing courts; the view is hegemonic today.[10] Robert also introduced the notion that these visitors were judicial experts, experienced in dealing with laws of foreign legal codes and authoritative by virtue of

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[6] SEG 46.1481.10 (Crowther: IPriene 8: 1996: 234–37 with notes and translation); TC Test. XVI 43. Failed reconciliation followed by arbitral decision seems only to appear in the Kalymnian text. Such a procedure resembles official arbitration in Athens: private cases brought to the Forty worth over 10 dr. are handed over to official arbitrators οἱ δὲ παραλαβόντες, [ἐ]ὰν μὴ δύνωνται διαλῦσαι, γιγνώσκουσι (*Ath. Pol.* 53.2: "And these, after they take the cases over, if they are unable to bring about a settlement, give a decision"). Crowther proposes a verb for arbitration for SEG 26.677.36, Peparethos honors judges from Larissa [1997:352]). For the *diaitetai* in IEph 4 (Syll.[3] 364), the Ephesian law on war debt relief, see n. 44 *infra.*

[7] Bousquet-Gauthier 1993: 20–23 examines the phrase and interpret the ἀποφάσις in such phrases as "une 'sentence' motivée." Other examples appear in IErythrai 120.5; IMylasa 634.3. Possibly SEG 43.293 is an example of such a decision—but it is extremely fragmentary. Brief mention in Hamon 2012 [2013] 202 and n. 27.

[8] Public and private contracts: e.g., IPriene 8.4; Crowther et alii 1998: 308–9; IG XII 6, 1 95.

[9] Cf. IErythrai 117, another Antiochian decree, honoring judges from Erythrai who were eager περὶ τῶν δικῶν καὶ τῶμ [παρ]α- ‖ [γραφῶν καὶ τ]ῶν ὅρκων …).

[10] Robert 1973: 776 = *OMS V*. The view has been given vigorous reinforcement recently by Fröhlich 2011: 305; and also by Fournier 2010 who demonstrates the regular employment of foreign judges in Mylasa (esp. pp. 205–226) and persuasively argues that continuity of popular courts in Rhodes is anomalous (pp. 201–204).

their official positions in their own cities as well as by repeat performances as judges there and elsewhere. He pointed out that the visiting judges used the laws of the city they served in: while implicit in statements that "they judged κατὰ τοὺς νόμους," it is explicit in others: SEG 43.850 (Laodicea): οἳ παραγενόμενοι εἰς τὴμ πόλιν ἐδίκασαν τὰς δίκας δικαίω̣[ς]‖ κατὰ τοὺς ὑπάρχοντας ἡμῖν νόμους … ("[the judges] upon their arrival judged the cases justly in accordance with the laws current *for us*"); similarly at SEG 26:677.27: Peparethos honors judges from Larissa, part of whose charge apparently was τὴν τῶν ἡμετέρων νόμων τήρησιν ("the guarding of *our* laws").

Among the hundreds of published inscribed documents honoring foreign judges, only one so far has appeared that additionally provides the text of the settlement and decisions made by the judges: this is IG XII 4,1 no. 132, published in 2010 and dated ca. 300 BCE.[11] Here, the people of Telos (an island between Kos and Rhodes) had invited Koan judges to reconcile disputing parties; the original offences had been decided by the Telians' own judges years earlier; and the penalties they had meted out at that time had led to confiscation and disharmony among the citizens. The opisthographic stele records: (1) an incomplete decree of the people of Telos honoring the five men sent from Kos;[12] (2a) a text of the reconciliation (κ[ατὰ τά-] ‖ δε διέλ]υσαν, 40), worked out by *diallaktai*[13] and setting out obligations that must be fulfilled by the previously convicted men if they are to recover their property;[14] (2b) a text of the decisions (ἔγνωμες, 69), presumably of the *diallaktai*, setting out practicalities of restitution, including penalties for magistrates for not carrying out provisions as well as penalties for those acting against the agreement;[15] and (3) an oath to be sworn by the citizens, inter alia, to protect the democracy, to forget past wrongs (οὐ μνασικακησείν), and to abide by the agreement (125–138).[16] Detailed discussion of this unique document must be reserved for another occasion. Nonetheless, it is essential to point out that the reconciliation (37–65) effected by the

[11] The stele was discovered in two non-contiguous pieces, one in 1903 (the lower part *b*) and the other in 1904 (the upper part *a*) in the Asklepieion of Kos. See IG XII 4,1 132 (ed. K. Hallof) for details and bibliography, to which add Thür 2011.

[12] Ll. 1–16: the decree breaks off and perhaps 20 lines are missing before resumption.

[13] The Koan visitors are called *diallaktai* at [11], 140, 140–41.

[14] Ll. 37–65, broken off at the end. In the motivating clause of the decree, the Telian [δᾶμος], desiring δι]αλυθῆμεν with their opponents, voted ἐπιτράψαι their disputes with one another to the Koans; the agreement is referred to as διαλύσεις, 7, 119; as [δ]ιαλύσει, 122 and διαλύσει, 139; in the oath at 130: οὐδὲ πραξέω παρὰ τὰν διάλυσιν τάνδε; the verbal activity of the judges appears as διέλυσαν, 11; διαλῦσαι, 109. Cf. section 2b of the decree *supra*.

[15] Ll. 66–125, with gaps. The *dikastai* mentioned in l. 68 are a different set of men (as Crowther *per ep.* points out) from those who are the subject of the first person plural verb in l. 70; the latter are probably the Koan *diallaktai*; contra Thür 2011: 346. Is it possible that this segment of the document could be viewed as an *apophasis*, 'a reasoned judgment' in an arbitration? See n. 7.

[16] Ll. 125–138.

Koans was an equitable one: it provided the means for a release from the penalties and a means for the restitution of property for the sacred offenders in ll. 41–47, and it additionally, in the case of the public offenders in ll. 54–57, modified the original penalties that had been imposed by the Telians themselves.[17] Insofar as the Telians say of the Koans in the first section (the incomplete 'honorary decree') that "they reconciled [the people] fairly [and justly]" (διέλυσαν καλῶς ‖ [καὶ δικαίως τὸν δᾶμον, *vacat*], 11–12), we might conclude that their activities in the reconciliation have been accurately represented.[18]

The Telian text about the disputes settled and judged by the Koans is exceptional; the great mass of such decrees do not provide us with such rich detail about disputes and their settlements.[19] Nonetheless, what is there is worth looking at closely. As we shall see, decrees honoring foreign judges often provide assessments of the judging activity, recording that "the judges, upon their arrival, judged some cases *on x basis (criterion: e.g., 'in accordance with the laws') by acting thus (modality: e.g., 'with unrelenting perseverance')* and settled others *on y basis (criterion: e.g., 'fairly and justly') by acting thus (modality: e.g., 'with all the zeal they could muster'*)." In these accompanying formulations of the criteria and modalities of assessment used by judges, we find the way different cities characterized the judging conventions of their visitors. The simple expressions that they 'judged' and 'reconciled' on the same visit do at least inform us, as mentioned earlier, that two procedures (or one bipartite procedure) were used in bringing cases to a conclusion; this happens in IG XII 4,1 132 and elsewhere as well (section 3a *infra*). Often we find a higher and/or ideological priority for reconciliation, in emotive language that expresses modalities rather than criteria (sections 3b and c *infra*); some decrees even announce that judging is only to be resorted to when reconciliation fails.

On the other hand, we often find, I think, these expressions (of judging according to *x* and settling according to *y*, etc.) slipping away from any substantive meaning, not only because of their repetition, but also because they become messy: that is, the criteria and modalities that one logically associates with judging have somehow been transferred to reconciliation, or vice versa. On the simplest level, it is all very fine that the Bargylietans should praise the three judges from Priene οἵτ[ι]- ‖ νες τῶν δικῶν τὰς μὲν συνέλυσαν προσηκόντως, τὰς δὲ ἐδίκασαν ‖ δικαίως κατὰ

[17] Thür 2011: 343 interprets the agreement similarly (but in more detail); he differs, however, in viewing the previously convicted men as exiles on the basis of l. 136, and in his treatment of the penalties mentioned in ll. 54–57: he thinks these are for unidentified sacred offences. Other matters in the text on which we differ will be taken up elsewhere.

[18] The text is, of course, lacunose; the Telians may have added that the Koans also "judged according to the laws."

[19] Thür-Taeuber 1994: 268 with n. 7, "Der für das Prozessrecht relevante Inhalt steht oft in keinem Verhältnis zur Länge der Inschriften; erst in ihrer Gesamtheit gewinnen die Texte Aussagekraft." Also Dössel 2003:260–63. The observations of these authors predate, of course, the publication of IG XII 4,1 132.

τοὺς νόμους (IPriene 147.9–10: "who not only reconciled some of the cases in a fitting manner but also judged others justly in accordance with the laws"), and it is fine, too, that the Kolophonians should praise the three judges from Iasos who τὰς μὲν ἐδίκασαν ‖ [τῶν δ]ικῶν κατὰ τοὺς νόμους ὀρθῶς καὶ δικαίως, τὰς δ[ὲ] ‖ [διέλυ]σαν ἴσως καὶ συνφερόντως (IIasos 80.10–12: "who not only judged some of the cases in accordance with the laws rightly and justly but als[o reconcil]ed others impartially and expeditiously"); and that the people of Lebedos should honor a Samian judge ὃς παραγε[νόμενος τὰς μὲν διέλυ]-‖ σεν τῶν δικῶν, τὰς δὲ ἐ[δίκασεν ὀρθῶς καὶ δι]- ‖ καίως καὶ τοῖς νόμοις κα[ὶ τοῖς ψηφίσμασι ἀκολού]- ‖ θως (IG XII 6, 1 146.8–11: "who, upon arrival, not only settled some of the cases but also judged others rightly and justly and in accordance with the laws [and decrees]"); but it is slightly baffling to find that an unidentified Aiolian city should praise a judge from Lampsakos ὃς καὶ παραγενόμεν[ος ταὶς] ‖ δίκαις ἐδίκασσε, ταὶ[ς] δὲ καὶ διέλυσε ἴσως κ[αὶ δικαί]- ‖ ως καὶ κὰτ τοὶς νόμοις (ILampsakos 34.11–13: "who upon his arrival not only judged cases but also additionally settled others fairly a[nd just]ly and in accordance with the laws");[20] and it is disturbing to find that Wilamowitz (*apud* Hiller) restored the judgment clause in a decree of the Smyrnaeans so that the people praise the three Astypalaian judges οἵτινες [πα]- ‖ ραγενόμενοι ἃς μὲν ἐδ[ίκα]σ[αν] ἃ[ς δὲ διέλυ]σ[αν δικαί]- ‖ ως καὶ κατὰ τοὺς νόμους (IG XII 3 172 10–12: "who upon their arrival not only judged some cases but also reconciled others justly and in accordance with the laws"); and satisfying to see that Robert pointed out the error in no uncertain terms in 1924 and offered the following restoration in 1949 (p. 185), in the same essay in which he published the ed. pr. of the Smyrnaean-Kaunian dossier (see section 2):[21] these were judges:

οἵτινες π[α]- ‖
ραγενόμενοι ἃς μὲν ἐδ[ίκα]σ[αν] δ[ίκας καλῶ]ς κ[αὶ δικαί]- ‖
ὡς καὶ κατὰ τοὺς νόμους καὶ π[ᾶσαν κακοπαθίαν καὶ φιλοπονί]- ‖
αν εἰσενεγκάμε[νο]ι, [τὰς δὲ καὶ διέλυσαν καθ' ὅσον ἦν ἐν ἐαυ]- ‖
τοῖς, σπεύδοντες [τοὺς διαφερομένους τῶν πολιτῶν εἰς ὁ-] ‖
μόνιαν καταστῆ[σ]αι - - - - -

who upon their arrival not only j[udg]e[d] some c[ases fairl]y a[nd just]ly and in accordance with the laws, carrying on with g[reat tolerance for toil and and a love for labo]r, [but also reconciled others insofar as it was possible for the]m given that they were eager to bring [those of the citizens who were at variance into h]armony.

[20] Cf. ll. 24–25 of the same decree, which records the prearranged proclamation for the herald: now there is no mention of reconciling, only of the Lampsacene judge δικάσσαντα ταὶς δί- ‖ [κ]αις ὀρθῶς καὶ δικαίως καὶ κὰτ τοὶς νόμοις.

[21] Robert *OMS I*: 7 (= *BCH* 1924: 337), "Mais il est nécessaire que le mot δίκαι soit exprimé; de plus, lorsqu' ils s' appliquent à réconcilier les parties (διάλυσις), les arbitres n' agissent point κατὰ τοὺς νόμους; cette locution n' a d' emploi qu' à propos de la κρίσις. Il ne s' agit donc ici que de celle-ci. La 'conciliation' était sans doute mentionnée aux lignes suivantes."

In the course of this essay, I examine 'judging clauses' in decrees for foreign judges; these, with their criteria and modalities of assessment may provide us with a characterization of the judging habits of foreign *dikastai*. A number of methodological issues, however, must first be addressed.

1. Methodological Issues

The evidence used thus far and in the following discussion is for the most part drawn from decrees (occasionally, dedications) of cities from Asia Minor, the Aegean islands, and the Black Sea Coast. Since a city from one of these regions may request judges from a city elsewhere in Greece, (e.g., from Sparta or Larissa) or vice versa, the bounds between the two broadly conceived geographical areas (east and west) have not been strictly adhered to; nevertheless, the splitting of the evidence (and it will soon be narrowed further), allows a focus on the 'eastern' cities where the institution of foreign judges first manifested itself widely. Questions arise: can formulaic statements have any substantive meaning at all, e.g., regarding the criteria used by a judge when he reconciles disputants or decides a case? The characterization of the reconciliation in the Telian-Koan dossier as having been executed καλῶς ‖ [καὶ δικαίως is promising for a positive answer, but we have no other agreements (except perhaps for the fragmentary SEG 43.293) with which to compare the assessments of judicial actions. Questions nevertheless need asking: e.g., how far afield can formulaic expressions be taken? Can expressions that appear in the decrees of a requesting city be written into lacunose decrees of other requesting cities? This last question is not only a matter of proper epigraphical restoration but a question of Greek law: how widely shared in the Greek world, or from city to city, were the conventions surrounding foreign judges?

To take an example: Charles Crowther, who has provided us with many new and revised texts about foreign judges and has also helped us understand the evolution of the institution, has studied the formulae for *homonoia* that appear in many Iasian decrees that honor judges from elsewhere. IPriene 53, for example, is a decree of Iasos that records the city's request for a judge and secretary from Priene and now honors the people of Priene and the men they sent; the judgment clauses are as follows: τὰς μὲν συνέλυσε τῶν δικῶν οὐθὲν ἐλλείπων προθυμίας, ‖ ἀλλὰ πᾶσαν σπουδὴν ποιούμενος, ἵνα συλλυθέντες οἱ ἀντίδικοι τὰ ‖ πρὸς αὑτοὺς μεθ' ὁμονοίας πολιτεύωνται, τὰς δὲ διέκρινεν δικαίως (ll. 9–11: "showing no lack of zeal but making every effort to ensure that the disputants, having had their differences with one another resolved, *should live in the city in harmony*, he settled some of the cases through conciliation and gave judgments based on justice in the others," trans. Crowther, slightly mod.). Almost precisely the same words appear in IPriene 54, another decree of Iasos honoring the Prienians and judicial personnel.[22]

[22] IPriene 54.ll. 8–10: τινὰς [μ]ὲν σ[υνέλυσε τῶν δικῶν οὐθὲν ἐλλείπων προθυμί]- ‖ [ας, ἀλλὰ καὶ πᾶ]σα[ν] σπουδὴν ποιού[μενος, ἵνα συλλυθέντες οἱ ἀντίδικοι τὰ πρὸς αὐ]- ‖ [τοὺς μεθ' ὁμον]οίας [πολιτεύωνται, τὰς δὲ διέκρινεν δικαίως.

The Iasian formulation, moreover, may have been derived from an earlier decree of Kalymna that had been prominently displayed in Iasos; it records the Kalymnians' request to Iasos to send judges and then confers honors on the city and the judges that it sent; the latter, upon arrival: [πᾶσ]αν σπουδὰν ἐποιήσαντο {υ} τοῦ διαλυθέντ<α>ς τοὺς ‖ [πολ]ίτας τὰ ποτ' αὐτοὺς πολιτεύεσθαι μετ' ὁμονοίας, (TC test. XVI.37–8: "made every effort for ensuring that the citizens, having had their differences with one another resolved, *should live in the city in harmony*").[23] These and other similar instances of the *homonoia* formula in Iasian decrees might suggest a substantive meaning no more reflective of reality than the regular description of judges as καλοὺς κἀγαθούς; nonetheless, Crowther took up the gauntlet and examined the chronological (largely as prosopographical detail allowed) and historical context of the Iasian '*homonoia*' decrees and convincingly showed the stressful circumstances of warfare and earthquake that lie behind the common phraseology in Iasian decrees that can be placed in the early part of the third century. In his conclusion, he referred back to his great predecessor, Louis Robert, who had suggested that the courts of foreign judges gradually replaced native courts: "Robert characterised the role taken by foreign courts in maintaining judicial order in the Greek cities in the second century BC, when their use is best documented, as that of a safety-valve. This is a helpful metaphor. But it should not be taken to imply that the use of foreign courts had become a matter of routine. In the case of Iasos, it seems that the judges who came to the city in the early second century, in spite of the formulaic way in which their work was recorded, played a genuinely emergency role in resolving disputes and helping to restore *homonoia*."[24]

In what follows, I do not intend to offer the kind of rich historical contextualization that Crowther provided. Rather, I take his essay as an instancing of substantive meaning for formulaic expression and also of the spread of formulae from one city to another, as from Kalymna to Iasos, not (necessarily) as empty decoration or filler for commemorative text, but as indicative of common problems. But Crowther had not limited his scrutiny of chronological data to aid only in identifying shifts in phraseology, he also associated changes in judging conventions with chronological phases. Thus, IPriene 53 and 54, each being a decree of Iasos honoring a single judge from Priene and convincingly dated to the early 190s, could be paralleled by two decrees of Antiocheia-Alabanda (Caria) that are nearly contemporaneous with one another: these, too, honor a single judge (IErythrai 116, for an Erythrian judge, IMagnesia 90 for a Magnesian judge); yet another Antiocheian decree, by formulation arguably a little later than the two just mentioned, honors a group of *three* judges from Erythrai (IErythrai 117) and so

[23] The same words appear in another, slightly later, Kalymnian decree for Iasian judges; thus TC 61: οἱ πᾶ- ‖ [σαν σπουδ]ὰν ἐποιήσαντο τοῦ διαλυθέντα[ς <τοὺς πολείτας>] ‖ [τὰ ποθ' αὐτο]ὺς μεθ' ὁμονοίας πολιτεύεσθαι.

[24] Crowther 1995: 123 with n. 168 referring to Robert 1973: 775. The Koan judges seem also to have played a 'genuinely emergency role' in restoring *homonoia* on Telos.

suggests that a series of Iasian decrees (IIasos 75, 77, and SEG 41.929), each honoring three judges, may also belong to that slightly later time frame. While caution is due especially to the last argument with its hint of a later habit (viz., a panel of multiple judges of one city) spreading from one city to another, both that argument and the one for the spread of formulae suggest a method for treating the decrees of different cities: by locating specific networks of cities and their decrees, we may be able to isolate formulae and judicial conventions and so trace their development.

The decrees show that important exchanges in the realm of justice took place between Hellenistic cities (as also in agonistic games, dramatic performances, and festival pilgrimages); they show a reciprocity that is evident above all when city A asking for judges from city B has been a provider of judges for that city in the past, or becomes one for the first time, or will be so again, and again, in the future. Our knowledge of even such 'primary' reciprocity, however, depends on chance finds.[25] Nonetheless, such reciprocity offers a network of cities that allows the historian to combine pieces of evidence from different places in the Greek world. The type of network I am looking for, however, is not only that between requesting and answering city (i.e., the city supplying the court), but the outreaching tentacles of that primary reciprocating unit that connect the requesting city to all its answering cities, for City A may request judges from Cities B, C, and D on the same occasion—or from the same or different cities over a number of years ('Set Q Cities'); and secondarily, I am interested in the tentacles that connect all the cities ('Set R') to which 'Set Q Cities' have individually sent and received judges—and so on and on and on. As of now, for example, we know that Smyrna requested judges from seven cities (Astypalaia, Kaunos, Knidos, Thasos, Miletos, Messene, and probably Oropos), but we know only two cities to which it sent its own judges (Kos and Stratonikeia); it sent judges on another attested occasion, but the requesting city's name is not preserved (ISmyrna 584). We also know that the Smyrnaeans had arbitrated in a dispute between Miletos and Priene ca. the middle of the second century BCE or a bit later (IPriene 27) and that a Prienian citizen had arbitrated a dispute between Phokaia and Smyrna somewhat earlier (IPriene 65).[26] The cities from which Smyrna received judges (and arbitrators) and to which it sent them ('Set

[25] While Robert 1955: 298 (ref. *apud ep.* Crowther) had mentioned an unedited decree of Temnos for judges from Kolophon found in 1954, it was not until 1999, with the publication of the ed. pr. of three decrees, that we learned that Kolophon not only had asked for judges from other foreign cities (Priene, Iasos, and Methymna), it had also supplied its own judges for Aigai and Mylasa: Gauthier 1999b. See Hamon 2012 [2013] for a consideration of the criteria by which a city might choose a city from which to summon judges, and the criteria by which the chosen city might in turn choose the men to send as judges.

[26] Crowther *per ep*. provides the date for IPriene 27, comparing the lettering to that of IPriene 39, for which, he reports, a new fragment has turned up in the German excavations.

Q Cities') open up a wide network, not only because there are so many occasions for Smyrnaeans (if timeframe permits) to mingle with different sets of foreign judges, but those foreign judges themselves come from cities that have both requested foreign judges and sent their own elsewhere ('Set R cities'). If we track the first five cities listed here as supplying judges to Smyrna and add Kos as a sixth, to which it sent judges, we find that Astypalaian judges have also been sent to Priene (and Priene has sent judges to Parion, Alexandreia Troas, Chios, Kolophon, Laodikea, Bargylia, Iasos); Kaunian judges have been sent to Magnesia Mae. and the latter city has sent judges to Knidos; Thasian judges have been sent to Samos, Miletos, and Parion (and Thasos has used judges from Kos); Milesian judges have been sent to Methymna, Eresos, Iasos, and Byzantion; Koan judges have been sent to numerous cities—Naxos, Samos, Ilion, Erythrae, Mytilene, Thasos, and probably Kyzikos (as well as Smyrna).[27] Prienian and Koan judges (not so much unlike Koan doctors who, however, had a more exclusive allure for the cities that used them) as well as other less often attested dikasteria, are carriers of an important judicial exchange: for even if legislated to use the laws of the requesting city, they may very well bring along their own formulae for equity and their own emotive modalities to say nothing of their own opinions about laws and legal systems, politics, and the rest of their cultural and commercial baggage.

The reciprocity of asking and supplying as occasion or custom demands provides the judicial common currency that is fundamental for this essay. Delphoi, Gonnoi, Iasos, Demetrias (Magnesian *koinon*), Alabanda, and Smyrna are the cities most often attested as requesting judges; Messene, Kos, and Priene are attested as most often asked to supply judges, with Thasos, Miletos, Iasos and Erythrai following next in attested popularity—though of course new discoveries may re-order these lists or introduce new major players, such as Messene has recently become.[28] Some cities may have become renowned for their judges and such judges or their cities may have become popular recipients of requests; a judge may have distinguished himself for his service in his own city, as arbitrator (*diaitetes*) in inter-city disputes, as a repeat judge in the same or different cities (Theodoros Theodorou of Mylasa and, as I suspect, also Ouliades of the same city).[29] But judicial networking may have served or arisen from inspirations other than reputation; some requests will have been ordered by Hellenistic rulers; some cities will have requested their *koinon* to assign judges. Hamon, at the end of his study of ISmyrna

[27] I am grateful to Crowther for alerting me to Habicht's (2007) ascription of Kyzikos as a city (not Chios) for which Kos supplied judges.

[28] SEG 52 383 and 389 report (inter alia) the discovery, in P. Themelis' excavations, of Smyrna's decree in honor of Messenian *dikastai*. See text at n. 63 *infra*.

[29] Theodoros Theodorou: IMylasa 632–35; Ouliades: IMylasa 101. Heliodoros of Sardis is another highly reputed judge: SEG 39.1286 (ed. pr. Gauthier 1989 no 4: 113–14); so too is Akrisios (IG XII 5, 305, with Hamon 2012 [2013] 215–16); for discussion of these judges as *iuris periti*, see Gauthier 1989: 123–4.

582 in 1999 (providing a new text with an additional significant fragment: now SEG 49.1171), made an interesting observation about the Smyrnaean decrees requesting foreign judges: the cities that are asked to supply judges (Thasos, Miletos, Knidos, Astypalaia, and Kaunos) were port cities, most likely familiar to Smyrnaean merchants.[30] Trade connections, then, may have influenced judicial appointments.

After this prolegomenon, it may not be surprising to discover that I use Smyrnaean decrees to identify the matrix of conventions of judging that I discuss in this essay; nor should it be surprising that I have looked for comparative examples from a wide network of cities, indeed, from both 'Set Q' and 'Set R' cities as defined above, which allows for a larger pool of decrees than those few from Smyrna.[31]

2. Judging and Reconciling in the Smyrnaean Dossier: I.Kaunos 17–20

Before examining particular 'judging clauses', it will be helpful to consider the components of decrees that request a foreign judge and honor both him and his city. A dossier from Smyrna (I.Kaunos 17–20) will provide a template, not because all cities throughout Greece used the same one, but a good many cities did use variants (from wherever an Ur-text was derived, and if any one text can even thus be conceived). Smyrna herself used the template over and over again. Indeed, Robert on more than one occasion spoke of the 'calquing' technique of the Smyrnaean decrees that allowed for almost mechanical restoration of lacunose portions of one decree from another.[32] New finds of course change old statements; and Herrmann with good grounds suggested, when he offered new readings for the Smyrnaean decree for Knidos that had been published only in 1969, that this one was based on a different and earlier redaction than the other Smyrnaean decrees.[33] The dossier discussed here belongs, then, to a 'later' redaction of Smyrnaean decrees for foreign

[30] Hamon 1999: 194 with n. 81. Oropos and Messene were added to the list of cities sending judges to Smyrna after he composed his essay; Messene certainly had its own port.

[31] Six Smyrnaean decrees honor foreign judges from other cities; a seventh one is an answering decree; and an eighth decree (of Kos) concerns arrangements for Smyrnaean judges: *ISmyrna 578*: for judges from Knidos; *579*: for judges from Kaunos [two decrees about the judges, the second being an 'answering decree' = *IKaunos 17 and 19*]; *580:* again for judges from Kaunos [*IKaunos 21*]; *581*: for judges from Astypalaia; *582*: for judges from Thasos, with an additional and important fragment added = *SEG 49.1171*; *583*: Miletos. IG XII.4.1 59 is a Koan decree honoring a *dikastagogos* sent from Kos to Smyrna, to bring Smyrnaean judges to Kos.

[32] Robert 1924: 336 and 1929: 441–42 (*OMS I* 6 and 124–25, respectively) on the decrees for the people and judges of Thasos and Astypalaia. It was the decree for the Kaunian people and judges that really took first prize; on the occasion of his *editio princeps* (1949: 178–79), Robert used it as the springboard for his latest restatement, that in many parts of the Greek world, a city would rigorously calque its decrees for foreign judges, one on another, "seuls les noms des personnages honorés et de leur patrie changent."

[33] Herrmann 1971: 72.

judges, and may possibly be the first of that group, dated to the second century BCE, possibly to its first decade (190s)—but more likely to its fourth (160s).[34] It consists of four decrees inscribed on one stele and found in Kaunos: a decree of Smyrna honoring the people of Kaunos and the three judges it sent (1–45); a decree of Smyrna honoring the secretary of the judges (46–62), a decree of Kaunos answering and accepting the decrees of Smyrna (63–98), and a short decree of Kaunos pertaining to the erection of the stele (99–106). The uppermost portion of the inscribed face shows a row of five laurel wreathes; three lines inscribed in five columns appear above the wreathes, naming the demos of Smyrna and its honorands, viz., the demos of the Kaunians (wreath no. 1), the three *dikastai* (wreaths 2–4) and the secretary (wreath 5). The decree proper begins in line 4 with enactment clause and brief prescript followed by the motivation clause (in two parts, ἐπειδή and ὅπως) in lines 4–14; the motion formula follows, then the substance of the decree (lines 14–43); at the end, provision is made for the decree's implementation (payment for a herald and announcement of his selection; payment for the decree and publication clause, lines 43–45).

The motivation clause (4–14) and substance of the proposal (14–43) are of most relevance; a condensed version of the first runs:

> Since, when the people (of Smyrna) sent a *dikastagogos* to the Kaunians to request a court, (6) the people of Kaunos, . . . having made it their purpose (προαιρούμενοι) that the cases be heard in adherence to the highest standards, with a display of great earnestness and distinction in its selection of judges, sent as judges ὁ δεῖνα, ὁ δεῖνα, and ὁ δεῖνα, (9–11, abridged and in ital.:) *who, upon their arrival* (οἵτινες παραγενόμενοι)*, not only decided cases* (τὰς μὲν διεδίκασαν) *on the basis of x and y criteria by acting thus and thus, but also reconciled others* (τὰς δὲ καὶ διέλυσαν) *by acting thus, and they also brought into harmony those* (τοὺς δὲ διαφερομένους) *of the citizens who were at variance*, and in other matters conducted themselves worthily both of their own homeland and our city, and so that our people be manifest as conferring appropriate honor and thanks upon men who earnestly conduct themselves with good will toward us—(14) with good fortune: be it resolved …

The substance of the decree follows. Before turning to that, I note that the motivation clause is itself composed of multiple clauses that are found in many such decrees:

[34] Robert 1949: 176 dated it to the second century on the basis of its orthography and lettering; he had earlier assigned the Thasian and Astypalaian decrees to the first century BCE ('la même époque', 1924: 336 [*OMS I* 336). Marek 2006: 150 suggests a date after 167 BCE for the decrees honoring the Kaunians, when Kaunos was no longer a part of Rhodos; a date between 197 (after the defeat of Philip V and the beginning of the successes of Antiochos III) and 190/89 (after the battle of Magnesia), when Rhodos had not yet actually 'purchased' Kaunos (Marek ibid. 98), is less likely on the grounds of palaeography, orthography, and formulation: thus Crowther, *per ep*.

(1) A 'requesting clause': that someone (sometimes designated a *dikastagogos*, sometimes a herald, sometimes a named individual) be sent elsewhere to request a *dikasterion* or *dikastai* (τοῦ δή̣[μο]υ πέμψαντος πρὸς Καυνίους δικασταγωγὸν Ἀθηνόδωρον Μενεκράτου τὸν αἰτησόμεν̣[ον] ‖ [δικαστ]ήριον, ll. 5–6). The 'requesting clause' (here as often using a future participle for the verb of asking) abridges the original request made by the envoy or *dikastagogos*; the latter will have been given detailed instructions for the request, including not only the number of judges, but the expected length of the sojourn (and so probably, the number of disputes to be resolved), the type(s) of case to be judged and the method to be used (reconciliation, arbitration, or judging: all three, just two or one, by choice of the disputants or as mandated by the requesting city and its laws).[35]

(2) An 'arrival clause' (οἵτινες παραγενόμενοι): announcing the arrival of the judges and serving as harbinger of dikastic achievements (line 9).

(3) One or more 'judging clauses': these depict the methods (e.g., 'deciding' and 'reconciling') used by the judges (lines 9–11, ital.); usually but not nearly always, judging clauses appear in contrasting μέν and δέ sub-clauses, and usually but not always each is accompanied by criteria used in formulating decisions (e.g., 'by law') or in reconciling disputants (e.g., 'advantageously'). In this instance (IKaunos 17.10–11), however, and not infrequently in decrees of other cities as well, we find not so much *criteria* of assessment for the 'reconciling' clause as *modalities* of assessment (e.g., 'with all the perseverance they could muster'); sometimes, too, we find modalities of assessment replacing or in addition to criteria of judgment for decisions *in sensu strictiore* (e.g., 'acting with unrelenting perseverance'). A subset of modality clauses can be qualified as 'emotive': these emphasize the zeal and enthusiasm of the judges in carrying out their tasks, as in the modality clauses instanced here. I have abridged the detail of judging clauses for now and reserved them for discussion in section 3c.

The judging clauses appear again in the 'substance' of the decree (14–43). A slightly condensed version runs as follows:

> Praise the people of Kaunos for their policy of goodwill and for sending judges worthy of both cities who put the highest value on justice, and crown the city with a gold wreath during the Dionysia …; and the *agonothetes* is to supervise the

[35] We do not have full texts of the requests carried by the *dikastagogoi*, but the decrees honoring judges and *dikastagogoi* here and there provide instances of the data that can be inferred to have been part of them. Usually the judges are requested to carry out the activities of judging and reconciling; see text at n. 6 *supra*. For regulations regarding procedure in IEph 4 (Syll.[3] 364), see n. 44 *infra*.

> proclamation and the herald is to speak along the following lines (18): "The people of Smyrna crown the people of Kaunos for their excellence and distinctive dedication to carrying out the dispatching of the judges; and praise the judges who arrived, ὁ δεῖνα, ὁ δεῖνα, and ὁ δεῖνα, (21) for their course of action (τῆι αἱρέσει), principles of justice (δικαιοσύνηι), and distinctive dedication (φιλοτιμίαι) applied to the cases and for their sojourning abroad worthily of both cities, and crown each with a gold wreath at the Dionysia … for the excellence and principles of justice constantly manifested in their decisions." (25) And the *agonothetes* is to supervise the proclamation along the same lines. And so that there may also be a memorial to later generations of the excellence of these men and the thanks of our people, (26) there are to be these rewards [*omitted here*] for them and also others [*inter alia, citizenship, lines 26–32*]. And choose an envoy, too, who, upon reaching Kaunos, is to deliver the decree to the magistrates and, when he has come before the boule and demos, is to speak about the judges' (35) earnestness and distinctive dedication in regard to the cases, making it plain that the people (of Smyrna) praise these men both in all other matters as having been worthy of both cities *and because (36) on the basis of x and y criteria, by acting thus and thus …, (38) not only did they judge some of the cases* (ἃς μὲν ἔκριναν τῶν δικῶν)*, but also they settled others* (ἃς δὲ καὶ συνέλυσαν) *on the basis of z criterion (38)*; and ask the Kaunians to ensure that the wreaths that have been decreed both for them and for the judges be proclaimed each year (40) …; (41) and also ask them to find a visible spot on which a stele of white stone can be set up with this decree inscribed upon it, and make it clear [to them] that, if they do this, they will be obliging our people. [*Details of implementation and publication clause follow (43–45)*.]

In this long section of the decree, the judgment clauses together with their criteria or modalities of assessment appear once again (lines 36–38: abridged here), but this time in the speech of the envoy who is to deliver the decree before boule and demos (34–43); the herald who is to make the proclamation at the Dionysia is also given a speech (18–24), but it appears truncated (κατὰ τάδε 'along the following lines' [?], line 18) and the judging clauses are absent.

The next two decrees follow a similar pattern. I skip over the short decree of the Smyrnaeans honoring the secretary except to say that he is praised for some of the same qualities that are ascribed to the judges,[36] and I turn to the answering decree of the Kaunians. It follows the pattern of the first Smyrnaean decree, even quoting, almost verbatim, from that decree. The motivation clause, somewhat condensed, runs (64–86):

> (64) Since the Smyrnaeans … sent an envoy and a decree in which they write that, when they sent (66) us an envoy to request judges and a secretary, we, with concern for these matters, sent as judges … ὁ δεῖνα, ὁ δεῖνα, and ὁ δεῖνα, who, they tell us plainly, *(69) upon their arrival* (οὓς … παραγενομένους)*, not only have decided some cases* (τὰς μὲν δεδικακέναι τῶν δικῶν) *on the criteria of x and y, by acting*

[36] See IKaunos 18.50–52; 56; the secretary is to be praised and crowned at the same time as the judges; the same envoy to the Kaunians is to mention his praises and request that he be proclaimed on the same occasion as the judges and that the decree be inscribed on the same stele.

> *thus, but have also reconciled others* (τὰς [δὲ] συν<λ>ελυκέναι) *by acting thus, and* (καὶ) *brought into harmony those of the citizens who were at variance,* (72) for which reasons they both praise our people and crown them with a gold wreath … and (74) they also praise the judges ὁ δεῖνα, ὁ δεῖνα, and ὁ δεῖνα … (75) for their course of action and principles of justice which they applied to the cases … and (77) they praise also the secretary who was sent along with them … (79) and the envoy, having arrived from Smyrna, … delivered the decree and, upon appearing before the boule and demos, spoke in accordance with the provisions written in the decree, (81) excelling in earnestness and distinctive dedication, and requested that we (the Kaunians) implement the decree (*by proclaiming the wreaths annually, inscribing and setting up the decree: lines 82–83, abridged*) and that we make a plan so that the decree sent by them be inscribed and set up in the most visible place and [*sc. he said*] that in doing that we would be obliging them. (86) Be it resolved …

The Kaunians give their answer, quite manifestly by copying the words of the Smyrnaean decree, sometimes abridging them a bit, and combining the decree for the judges with the decree for the secretary. Nevertheless, the requesting clause (66), arrival clause (69), and judgment clauses (69–71) are all clearly visible.

The substance of the Kaunian decree follows (86–98): the Kaunians accept the honors decreed by the Smyrnaeans, agree to implement them, and end with praise for the envoy. (We can be grateful that at least on this occasion they do not iterate in detail the honors they accept and the reasons for which they were given!) A final brief decree of the Kaunians concludes the dossier, with details for implementing the Smyrnaean decree, including designating the temple of Apollo as the site for the honorary stele. The Kaunians' copying of large portions of the Smyrnaean decree can be duplicated in the decrees of other cities who have been asked to send judges; equally interesting, however, is the copying habit of the requesting city, here, Smyrna, and the way that it copies its own clauses from one portion of the decree to another. Naturally such a habit is helpful for epigraphists who need to restore one part or another of such a dossier (see n. 32). Occasionally, however, additions (or differences) in an answering or 'parallel' decree may be significant, as on a stele from Miletos inscribed with three decrees (Milet I 3 152 A–C). Two are decrees of Methymna (A–B) and one is of Eresos (C), concerned with *dikasteria* from Miletos, Aigai, and Samos that had arrived to settle cases between citizens of the two cities (see Robert OMS II 721–35). The second decree of Methymna honors the Milesian people and the two judges it sent, οἳ καὶ παραγενόμενοι ταίς τε δίκαις ἐδίκασσαν ‖ ὄρθως καὶ δικαίως καὶ κὰτ τὰ συγκείμενα τοῖς δάμοις καὶ τὰν ἀναστρόφαν ‖ [ἐ]ποιήσαντο{ν} … (32–33),[37] whereas the decree of Eresos honors the people and the same two judges οἳ καὶ παραγενόμενοι εἰς μέσσον ταὶς μὲν ἐδ[ί]- ‖ κασσαν τᾶν δίκαν ὄρθως καὶ δικαίως κατά τε τὰν συνθήκαν καὶ ἐπισυνθήκαν, τί- ‖ νας

[37] Milet I 3 152 B 32–33: "And these upon arrival both judged cases rightly and justly and in accordance with the agreements made by the people and conducted themselves …"

δὲ καὶ συνέλυσαν καὶ τὰν λοίπαν ἀναστρόφαν ἐποιήσαντο … (70–72).[38] The Milesian dossier serves as warning that a single decree may leave out details important to us: without the decree of Eresos, we would not know that the Milesian judges had both judged cases and brought about reconciliations.

3. Judging Clauses: Reconciliation and Judgment

Expressions for judging and reconciling in 'judging clauses' sometimes provide procedural instructions; occasionally they have a rhetorical emphasis; often they have an ideological message; and, especially as happens when criteria and modalities of assessment have been mixed so that what seems appropriate for 'judging' is now ascribed to 'reconciling' or vice versa, the mixture is either due to a corruption in the text produced, in the first instance, during its inscription, or else indicative of the achievement of formulaic and empty statement. Once that last stage has been reached, what was once a real judging habit has become a fossilized epigraphic one.

a. Procedural Priority of Reconciliation

It is often assumed, when reconciliation and judging are both mentioned in the decrees, that the visitors always tried to reconcile the cases first and only gave judgments if those conciliating efforts failed. In other words, there was a procedural priority for reconciliation in all cases.[39] Although that appears to have been so in the great majority of instances, especially when judges were called in to resolve disputes over contracts and debts, yet such a claim, as we shall see at the end of this section, cannot be maintained across the board.[40] Of first importance are those decrees that give procedural directions to reconcile the disputants first, and then, if that does not work, to give a judgment; this is explicit in two decrees of Kalymna for foreign judges from Iasos. In the requesting clause of the earlier one (Tit. Cal. Test. XVI.34–36, 39–40, 43–46 = IK I Iasos 82), from the second half of the third century BCE (Crowther 1994), the people of Kalymna are said to have sent an envoy and were asking the Iasians to send five men:

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[38] Milet I 3 152 C 70–72: "And these upon arrival at the sanctuary of Messon not only judged some of the cases rightly and justly in accordance with both the agreement and the additional terms, but also reconciled some of the others and conducted the remainder of their stay …;" for the location of εἰς μέσσον and the sanctuary, see Robert 1960: 300–308.

[39] E.g., A. Cassayre, 2010.

[40] A two-part procedure is of course well-known from Athens for those private cases heard by the Forty: *Ath. Pol.* 53.1–3 (see n. 6 *supra*): a litigant who was dissatisfied with the official arbitrator's decision could 'appeal' to the court. Not all Athenian cases, however, came before the Forty and their arbitrators! Elsewhere, a city's lawcode may have directed that some cases be subjected to arbitration and reconciliation and other cases to trial; that is the implication, for example, in the synoecism of Teos and Lebedos, RC no. 3 = Syll.^{3} 344.24ff.

> [οἵτι]νες παραγενόμενοι μάλιστα μὲν διαλυσεῦντι τοὺς ‖ [διαφ]ερομένους τῶν πολιτᾶν, εἰ δὲ μή, κρινεῦντι διὰ ψάφου, ‖ . . .
>
> *who upon arrival would devote themselves above all to reconciling those of the citizens who were disputing, but if unsuccessful, would give a judgment by vote ...*

The later decree provides for the priority of reconciliation in almost identical language.[41] As mentioned earlier (section 2), the report of instructions in such detail is unusual; but we can assume that such instructions (to judge with or without attempts at reconciliation first) would have been regularly included in the envoy's request (cf. IEph 4.85–88, quoted in n. 44 *infra*).

Procedural priority of reconciliation can be securely inferred in a decree of an unknown city honoring judges from Tenos (IG XII 5, 870):

> (7–9) τούς τε ἔχοντας τὰς δίκας τοὺς μὲν πλείστους συνέλυσαν ἀνεγκλήτως, οὓς [δ]ὲ̣ μ̣ὴ̣ ἠδ̣υ̣νήθη̣[σ]α̣ν διᾳ̣κούσαντες ἐδίκασαν ἴσ[ω]ς καὶ δι[κ]αί̣[ω]ς.
>
> *While they reconciled most of the litigants blamelessly, if they were unable to do that after hearing them out to the end, they judged them impartially and justly.*[42]

A Naxian decree for five Koan judges (SEG 49.1106) requests both *dikastai* and *diallaktai* who were to decide between opposing parties in disputed contract cases (το]ὺς διακρινοῦντας περὶ τῶν ἀμφι[σ]- ‖ [βητουμέ]νων συμβολαίων, 3–4). Procedural priority for reconciliation can once again be inferred here—and also, something of its method: upon arrival of the Koan *dikastai* and *diallaktai*:

> περί τε τῶν ἀπο- ‖ [γεγραμμέν]ων ἀμφισβητήσεων καὶ τῶν ἄλλων ‖ [τῶν ἐπιτρ]α[πέν]των αὐτοῖς ὑπὸ τῆς πόλεως ‖ [τοὺς μὲν π]λείστους τῶν διαφερομένων ἀνα- ‖ [καλεσάμ]ενοι πολλάκις ἐφ' αὑτοὺς διέλυον συμφ[ε]- ‖ [ρόντως], τοὺς δὲ διέκρινομ μετὰ πάσης δικαι- ‖ [οσύνης·
>
> *regarding both the registered disputes and other matters that had been entrusted to them by the city for settlement,*[43] *they reconciled advantageously most of the disputants by summoning them before them frequently, and they decided the remainder with all justice.*

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[41] Tit. Cal. 61. IK Iasos II T 55, ca. 210 BCE or a bit later: Crowther 1994. Again, the Kalymnians have asked the Iasians to send five men: (8–11) οἵτινες παραγενόμενοι εἰς Κά- ‖ [λυμν]αν μάλιστα μὲν διαλυσοῦντι τοὺς δ[ια]- ‖ [φερομέ]νους τῶν πολιτᾶν, εἰ δὲ μή, διακρινεῦ[ν]- ‖ [τι … (8–11).

[42] This bears some similarity to a Thessalian decree honoring judges from Teos (SEG 47.745): οἵτινες ἃς μὲν ἂν δ[ύ]- ‖ νωνται τῶν [δικ]ῶν συλλύσουσιν, τὰς δὲ ἄλλας [δι]- ‖ [κ]ῶσ[ιν κ]ατὰ [τοὺ]ς νόμους ἴσως καὶ δικαίως καὶ ἀξ[ί]- ‖ [ως] …; "who settle whatever *dikai they can*, and judge the rest according to the laws, fairly and justly and worthily …" Again, one can infer the procedural priority of reconciliation.

[43] It is not clear what 'the other matters' were; it is probably correct to interpret that all the disputes were registered and that all came before the *diallaktai* first (i.e., it is unlikely that disputants registered for reconciliation only); the 'registered cases' in TC *test*. XVI.39 were all subjected to reconciliation efforts first.

Here the visiting judges were most likely given instructions to try to settle the disputes first. Probably the same men acted first as *diallaktai* and then, if they failed to bring about settlements, as *dikastai*; it would be uneconomical for dikastai to do nothing as they waited for the *diallaktai* to hand over the cases of the few obstinate disputants who could not be reconciled (see n. 6). The manifold meetings (indicated by ἀνα- ‖ [καλεσάμ]ενοι πολλάκις) for pursuing reconciliation may not have been mandated to the *diallaktai*; their own experience may have dictated the method.[44]

In many of the decrees where the judges are depicted as both judging and reconciling, a mandate for the procedural priority of the latter can probably be inferred, but such a mandate cannot be inferred in *all* cases. In some decrees only judging is mentioned (e.g., SEG 12.390, IG XII 6 1 150, IErythrai 111, and 117). In these cases, it may be that the foreign visitors were instructed *only* to judge and not to reconcile (as appears to be the case in the Ephesian law on war debt relief [n. 44] and in the synoecism of Teos and Lebedos [n. 40 *apud fin*.]); possibly, the particular cases that came before the visiting judges did not permit reconciliation under the procedural law of the city that had invited them: this may have been the case in IErythrai 111, where the judge is present ἐπὶ τὴν δίκην τῆς μηνύσεως, and also in IErythrai 117 where specific kinds of case are cited (see n. 9). It should also be recalled, however, that the absence of either ‘judging’ or ‘reconciling’ in more or less entire decrees may be due to the original (ancient) editing of the text, as was apparent in the Milesian dossier (Milet I 3 152 A–C: see the end of section 2).

b. Rhetorical and Ideological Priority of Reconciliation

A priority for reconciliation appears in other decrees as well. In some, we might interpret it as a ‘rhetorical priority’ rather than only (?) a procedural one. Consider IPriene 8 (290s–280s), a decree of the Prienians who had requested *dikasteria* “for

[44] Cf. IEph 4 (Syll.[3] 364), the Ephesian law on war debt relief, provides for (internal, not foreign) *diaitetai* to settle matters about disputed loans or valuations of property; it seems that the titles (*diaitetai* and *dikastai*) refer to two sets of men (see esp. ll. 17–19). Some matters are reserved for a foreign court (ll. 85–88: εἰ δέ τινες μὴ ἐμβάντων τῶν δανειστῶν αὐτοὶ νεμόμενοι τὰ κτήματα ἑκόντες τι ‖ συνωμολόγηνται πρὸς τοὺς δανειστὰς μὴ βιασθέντες, εἶναι αὐτοῖς τὰ ὡμολογημένα κύρια· ‖ ἐὰν δὲ ὁ μὲμ φῆι βεβιάσθαι, ὁ δὲ μή, εἶναι αὐτοῖς κρίσιν περὶ τούτων ἐν τῶι ξενικῶι δικαστηρίωι, προ- ‖ διαιτᾶσθαι δὲ αὐτοὺς ἐπὶ τῶν διαιτητῶν κατὰ τόνδε τὸν νόμον ‖ (“If any have themselves willingly and without coercion come to some agreement with the lenders, although the lenders have not entered upon possession, their agreements are to be valid. If the one says that he was coerced and the other denies it, *they are to receive judgment about these matters in the foreign court, but they are first to submit to arbitration before the arbitrators in accordance with this law*” (trans. Bagnall and Derow 1981: 20–23). The provision here for a preliminary arbitration refers to arbitrators from Ephesos (as in l. 6) and not to foreign judges serving as arbitrators who will try to reconcile the disputants first. (Similarly, Crowther 1995: 122 and 1996: 227 and nn. 126–27; and Walser, more expansively, 2008: 258–68 esp. 264ff.)

the contracts, both the public and the private ones" (ἐπὶ τὰ συμβόλαια τά τε κοινὰ καὶ τὰ ἴδια) from Phokaia, Nisyros, and Astypalaia. The judges, upon their arrival:

> (ll. 7–12) πᾶσαν παρέσχοντο φιλοτιμ[ί]- ‖ [αν] πρ[ὸ]ς τὸ διαλύειν τοὺς ἐν τοῖς ἐγκλήμασιν ὄντας, [καὶ] ‖ [τὰ]ς μὲν ἐδίκασαν τῶν δικῶν τῆι ψήφ[ω]ι κατὰ τοὺς νό- ‖ [μου]ς, τὰς δὲ [δ]ιήιτησαν ἴσω[ς] καὶ δικαίως, εἰς ὁμόνοιαν ‖ [καὶφι]λίαμ προαιρούμενοι τ[ὸν δ]ῆμον τὸμ Πριηνέων κ[α]- ‖ [θιστάν]αι. .
>
> *aimed all their distinctive dedica[tion] at reconciling those who were involved in the disputes, [and] while they judged [som]e of the cases by vote according to the la[w]s, they [ar]bitrated the others fairly and justly, making it their purpose to r[estor]e t[he de]mos of the Prienians to harmony [and frie]ndship. (Greek text and slightly modified trans. of Crowther 1996)*

Here, the expression of the judges' "distinctive dedication" (φιλοτιμ[ί]- ‖ [αν) to reconciling the disputants, while appearing before any mention of judgment-giving, provides rhetorical emphasis rather than procedural directive to reconcile first and judge later. 'Rhetorical priority' here (note especially the προαιρούμενοι clause) and elsewhere easily turns into an ideological one. A near contemporary decree of Samos (SEG 1 363, IG XII 6,1 95, ca. 280 B.C.) confers honors on judges who had arrived from Miletos, Myndos, and Halicarnassos to deal with the "contracts that had been suspended" (τὰ μετέωρα συμβόλαια: l. 4: also ll. 6 and 10: defaulting loans?). The decree focuses on the Myndian judges.[45] Here the request for the judges came first from Philokles, a king of the Sidonians, who wanted the Samian people to be ἐν ὁμονοίαι, for the citizens were now disputing with one another; thus he wrote (a request) "so that the demos of the Myndians should send a *dikasterion* for reconciling the suspended contracts" (δικασ- ‖ τήριον τὸ διαλῦσον τὰ μετέωρα συμβόλαια, 8–9). The arrival of the Myndian judges and execution of Philokles' request is reported as follows:

> Μύνδιοι δὲ ‖ πᾶσαν εὔνοιαν καὶ προθυμίαν παρεχόμενοι εἰς τὸ ‖ διαλυθῆναι τοὺς πολίτας ‖ ἀπέδειξαν ἄνδρας καλοὺς ‖ κἀγαθοὺς καὶ ἀπέστειλαν εἰς τὴν πόλιν Θεοκλῆν ‖ Θεογένους, Ἡρόφαντον Ἀρτεμιδώρου, οὗτοι δὲ τὰς ‖ εἰσαχθείσας εἰς αὐτοὺς δίκας καλῶς καὶ δικαίως ‖ τὰς μὲν ἐδίκασαν, τὰς δὲ διέλυσαν, προαιρούμενοι ‖ τοὺς διαφερομένους τῶμ πολιτῶν διαλυθέντας ‖ ἐν ὁμονοίαι πολιτεύεσθαι ἀπαλλαγέντας τῶν πρὸς ‖ ἀλλήλους ἐγκλημάτων. … (9–17)
>
> *And the Myndians, displaying good will and enthusiasm to the fullest extent for achieving the reconcilation of the citizens, appointed good and excellent men, Theokles son of Theogenes and Herophantos son of Artemidoros, and sent them to the city, and these, in regard to the cases that were brought before them, not only judged some fairly and justly, but they also settled others, making it their purpose*

[45] Presumably separate decrees were enacted for the Milesians and Halicarnassians and sent to those cities; this is unlike the Prienian decree just cited: there the three judges from the three cities are honored in the one decree: see Hamon 1999: 190.

that the quarreling citizens who had been reconciled, rid of the complaints against one another, should conduct themselves in harmony.

Somewhat unlike the judges from Phokaia, Nisyros, and Astypalia who have absorbed the aim of the city requesting them, the Myndians have absorbed the aim of the king. The input of Hellenistic monarchical politics in institutionalizing the use of foreign judges has been convincingly traced by Crowther in numerous essays. There may be some added reason, then, for the Myndians' enthusiasm; but cities on their own could and did request foreign judges, perhaps only in times of crisis at first, but gradually, as a matter of course; and cities willingly sent judges, whether the directive was royal or not: stability was good, and providing it, honorable.

A problem or two of textual interpretation arises here: the προαιρούμενοι clause in both decrees appears to attach itself only to the sub-clause about arbitration or reconciliation (Priene: τὰς δὲ [δ]ιήιτησαν ἴσω[ς] καὶ δικαίως; Samos: τὰς δὲ διέλυσαν), so that the foreign judges serving in Priene and Samos have made it their purpose to restore the citizens to harmony—but only when they are arbitrating or reconciling and *not* when they are delivering verdicts 'according to the laws' (Priene) or 'fairly and justly' (Samos). Is it at all possible, however, that the προαιρούμενοι clauses somehow modify the judges serving in both capacities, so that both when judging and bringing about reconciliations, the judges made it their purpose to reconcile the citizens so as to live in harmony henceforth? Strictly speaking, the participle is *not* a floater and modifies only the judge when he *reconciles* (or arbitrates) the disputants;[46] the restrictive attachment of harmony to reconciliation puts a premium on that method—almost as if verdict-giving is bad for society. This rather harsh sounding result could have been avoided had the drafter of the decree begun a new clause with a connecting particle and a finite verb (e.g., "they judged some cases fairly, and settled others, and they made it their purpose to bring [or more simply, 'and they brought'] the citizens into harmony …"); indeed, this is how the clauses appear in the Smyrnaean decree for the Kaunians and their judges—to which I shall soon return. The phenomenon that I prefer to focus on here is this: the flip-side of prioritizing reconciliation, of making the conveyers of agreement into the makers of harmony, is to render verdict-giving into a provocative act, or at least one conducive to social unrest.

The potential danger of verdict-giving is also apparent in one of the Kalymnian decrees for the Iasian judges that was discussed in section 3a; there we found almost identical directives for the judges who were "above all to reconcile" (μάλιστα μὲν

[46] In the Prienian decree, the μέν clause of verdict-giving has both a modality (τῆι ψήφ[ω]ι) and criterion (κατὰ τοὺς νό- ‖ [μου]ς) of assessment that is neatly balanced in the δέ clause of arbitration with its equitable criteria (ἴσω[ς] καὶ δικαίως) and emotive modality clause; the Samian decree is also balanced but not so neatly. Nonetheless, the προαιρούμενοι clause in the latter decree is more intimately attached to the act of reconciliation: προαιρούμενοι ‖ τοὺς διαφερομένους τῶμ πολιτῶν διαλυθέντας ‖ ἐν ὁμονοίαι πολιτεύεσθαι ἀπαλλαγέντας τῶν πρὸς ‖ ἀλλήλους ἐγκλημάτων.

διαλυσεῦντι, TC test. XVI.34 and similarly TC 61.9). The judges did just that: "upon their arrival, they made every effort for ensuring that the disputants, having had their differences with one another resolved, *should live in the city in harmony*" (TC test. XVI. 37–38; cf. TC 61.9–13). In that same decree (ll. 39–46), however, we are given more detail of the judges' efforts:

> καὶ ἀ]πογραφεισᾶν δικᾶν εἰς τὸ δικαστήριον [πλει]όνων ‖ [ἢ τρι]ακοσιᾶν πεντήκοντα, τὰς μὲν πλείσ<τας> διέλυσαν ‖ [πείσ]αντες τοὺς ἀντιδίκους, ὅπως μὴ διὰ ψάφου τῶν πρα- ‖ [γμά]των κρινομένων εἰς πλέω ταραχὰν ὁ δᾶμος ‖ [καθισ]τᾶται, τινὰς δὲ καὶ διαίτασαν συμφερόντως ‖ [ἑκα]τέροις τοῖς ἀντιδίκοις, δέκα δὲ δικᾶν εἰσαχθεισᾶν ‖ [εἰς τὸ] <δι>καστήριον ἔκριναν διὰ ψάφου κατά τε τὸ διάγραμ- ‖ [μα τοῦ] βασιλέως καὶ τοὺς νόμους, ὄντες ἀνερίθευτοι. . .
>
> *Of the more than 350 (?250) cases that had been registered for the court, while they settled most by using persuasion on the litigants, so that the people did not become more disorderly [as they would have] had they been judged with a vote, they also arbitrated some of the cases advantageously to both parties,*[47] *and ten of the cases that were brought before the court they judged by a vote in accordance with the diagramma of the king and the laws, and all the time remaining impervious to bribery.*

The ὅπως clause is of great interest: it suggests that the compulsion of a verdict would have led to further distress for the city: there is a political push to settle and not to give a verdict. The disadvantages of rendering judgment are iterated in a number of decrees.[48] If we profile our visiting judges, then they are judges who are well prepared to use persuasion. Rhetorical skill may have been more important than a knowledge of the law.[49]

c. Emotive Clauses of Intention; a Return to the Smyrnaean Dossier

We often find that judges are described as being eager for this or that, or as having some very strong intention—as in the προαιρούμενοι clauses in the Prienian and

[47] The differences among the three activities signaled by the verbs ἔκριναν ('judged'), διέλυσαν ('settled'), and διαίτασαν ('arbitrated') are not set out; see n. 6. Here we might distinguish: settling is an agreement between the two contending parties that has been suggested or overseen by a judge acting as 'mediator'; if there is no agreement between the parties, then a decision is given by the same person, now acting as 'arbitrator'; and if that decision is not accepted a vote is taken by the board of five judges all together. This, of course, is similar to procedure in Athens for private cases that went before the Forty; see n. 40.

[48] Stepping outside our 'Q' and 'R' cities, we see similar prioritizing in a decree from Malla (IC I xix 3): so highly valued is reconciliation there, that the mention of judgment-giving may have been purposefully avoided (ll. 22–24). There may be similar euphemism in IMagnesia 90.12–15, with the μέν clause expressing the results of reconciliation and the δέ clause the results of judgment (the text is quoted and translated in the next section of the essay). Cf. IErythrai 122.24–6.

[49] Rubinstein 2013.

Samian decrees discussed in the last section; these emphasize the intention or purpose of the judges, in their reconciling or arbitrating activity, to bring the disputants into harmony. Such clauses appear so often that I have given them their own name: 'emotive'. These are often introduced by participles of σπουδάζειν or σπεύδειν and cognate forms—so frequently occurring that the emotive meaning may be missed; by the less frequent προαιρούμενοι or by the handier ἵνα or ὅπως; also by πρόνοιαν ἐποιήσαντο and ἐφρόντισαν. Thus, e.g., the Antiocheians in Caria honor a judge from Magnesia Maeander who ἐφρόντισεν ὅπως π[ά]ντες οἱ ἐν ταῖς φιλ[ονι]- ‖ [κίαις] ὄντες οἱ μὲν συλλυθέντες [ἀ]ποκαταστῶσιν εἰς [τὴν] ‖ [πρ]ὸς αὐτοὺς ὁμόνοιαν, οἱ δὲ τ[υ]χόντες τῶν ἴσων ἐν [τοῖς] ‖ [ἀγῶσ]ιν κατὰ μηθένα τρόπον ἐλ[α]σσωθῶσιν ("made it his care, that, regarding all who were in a state of contentiousness, those who had their differences resolved should be brought into harmony among themselves, while those who met impartiality in the hearings would in no way be disadvantaged," IMagnesia 90.12–15). Once again, an emotive clause that looks to harmony among the citizens characterizes the judge's conduct in reconciling the disputants, not in judging them. Crowther studied such clauses in Iasian decrees (section 1 above), as in IPriene 53: τὰς μὲν συνέλυσε τῶν δικῶν οὐθὲν ἐλλείπων προθυμίας, ‖ ἀλλὰ <u>πᾶσαν σπουδὴν ποιούμενος, ἵνα συλλυθέντες οἱ ἀντίδικοι τὰ</u> ‖ <u>πρὸς αὐτοὺς μεθ' ὁμονοίας πολιτεύωνται</u>, τὰς δὲ διέκρινεν δικαίως. Slightly different emotive formulae for 'bringing the citizens into harmony' appear in decrees from other cities, some of which we have seen already. These can be divided into two groups: those in which the urge for the harmonious cohabitation of citizens is directly linked to the judge's efforts at reconciliation[50] and those in which it is linked to the judge's efforts-at-large, that is, whether he is judging or reconciling.[51]

[50] To the first group belong both the two Kalymnian decrees for judges from Iasos (TC test. XVI.37–38; TC 61.11–13) and the Iasian decrees studied by Crowther (at least 6 decrees: IPriene 53.11 and 43 [answering decree of the Prienians]; IPriene 54.10; IIasos 75.11; IIasos 78.10; SEG 57.1046.18; SEG 41.929.11), also the Prienian decree for judges from Phokaia, Nisyros, and Astypalaia (IPriene 8.7–12, 290s or 280s); the near contemporary decree of Samos for the Myndian judges (IG XII 6.1.95, ca. 280 B.C); the Antiochean decree for the Magnesian judge (IMagnesia 90); probably another Antiocheian decree for an Erythaian judge (IErythrai 116) as well as a decree of Peparethos for judges from Larissa (SEG 26.677.32–35); and also, at least three Smyrnean decrees for foreign judges, discussed above.

[51] To this second group belong a decree of Kimolos for judges from Geraistos (SEG 44.710.24); a Magnesian decree for judges from Priene (IPriene 61.10–11); a decree of Kolophon for judges from Methymna (IG XII 2 509/658a 10–11); a decree of an unknown city for judges from Tenos, IG XII 5 870.9–11); a decree of Adramytteion for a judge from Andros (IG XII 5. 722 , 30–31); a decree of Larbenoi for judges from Magnesia Maeander (IMagnesia 101.13–14); a decree of Syros for a judge from Klazomenai (IG XII 4 1052.29–32); and two decrees of Smyrna, discussed above. See Robert *OMS I* 35, 38.

It is curious to find that Smyrna, alone of the cities from my eastern pool, enacted decrees for foreign judges that sometimes link an emotive clause for *homonoia* with reconciliation and at other times shun the link with reconciliation. That it is the only city preserving both formulations may very well be an accident of preservation (and/or evidence for the limits of my knowledge); moreover, that both types exist for one city might suggest that using one formulation or the other was a matter of indifference. Yet the carefulness of the master draftsman who composed IKaunos 17 (the decree discussed in section 2 of this essay)—or whatever master draftsman it was who first created the template for this Smyrnaean decree—suggests that it was not a matter of indifference at all: court decisions and settlements both had a role to play in promoting social cohesion.

Whether later changes in the template were initiated by textual corruption or impelled by social change, we can track the changes and suggest a sequence. The decrees under consideration are the Smyrnaean decree for Kaunos and the Kaunian answering decree (IKaunos 17 and 19: part of the 'dossier') and a second but lacunose Smyrnaean decree for Kaunian judges (IKaunos 21); the Smyrnaean decrees for judges from Thasos (SEG 49.1171, now IThasos 129)[52] and Astypalaia (SEG 49.1093 = ISmyrna 581, with Hamon's suggested restorations); and also the unpublished decree for judges from Messene.[53] The earliest decrees in this series are the first three (IKaunos 17, 19, and 21), belonging to the first half of the second century BCE (n. 34). Earlier (section 2), I presented the clauses pertaining to judgment in IKaunos 17 and 19 in an abridged fashion; it is time to fill in the blanks. In the motivation clause of IKaunos 17, the Kaunians are praised for having sent judges:

> οἵτινες παραγενόμενοι τὰς μὲν διεδίκασαν τῶν δικῶν καλῶς καὶ δικαίως καὶ κατὰ τοὺ[ς] ‖ [ν]όμους, τὴν πᾶσαν κακοπαθίαν τε καὶ φιλοπονίαν προσενεγκάμενοι, τὰς δὲ καὶ διέλυσαν σπουδάσ[αν]- ‖ [τ]ες καθ' ὅσον ἦν ἐ[φ'] ἑαυτοῖς, τοὺς δὲ διαφερομένους τῶν πολιτῶν εἰς ὁμόνοιαν κατέστησαν [καὶ] ‖ [ἐ]ν τοῖς ἄλλοις ἀνεστράφησαν ἀξίως τῆς τε ἑαυτῶν πατρίδος καὶ τῆς ἡμετέρας πόλεως·[54] (IKaunos 17.9–12)

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[52] Hamon 1999 combined two non-joining fragments of a stele: A (upper part, ll. 1–23) found in 1997; and B (lower part, ll. 26–52) found in 1904 and published as IG XII 8 269 and ISmyrna 582. SEG 49.1171 presents fragment A

[53] The decree for the Knidian judge is excluded as belonging to an earlier redaction: see text at n.33. The text of the decrees for Milesian (ISmyrna 583) and Oropian judges are too insecure for establishing precise templates. The possibilities for the decree for Oropos are presented by Crowther at 1999: 269, n 44. I discuss the Milesian fragment in n. 64. *infra*.

[54] Note the double hendiadys. First the criterion καλῶς καὶ δικαίως surely is the equivalent of 'equitably' when set next to καὶ κατὰ τοὺ[ς] ‖ [ν]όμους (the judges judged according to both equitable and lawful criteria); this is not 'messy' writing—the particles make clear that a distinction is made here, which might be between cases for which there is an assessment (e.g., of a penalty) by statute and cases for which the judge makes his own assessment in the absence of statute. Second, the τε καὶ in τὴν πᾶσαν κακοπαθίαν τε

> *who, upon their arrival not only decided cases* (τὰς μὲν διεδίκασαν) *both fairly and justly ('equitably') and in accordance with the laws, acting with unrelenting perseverance and dedication to labor, but also settled others* (τὰς δὲ καὶ διέλυσαν) *with as much zeal as they could muster, and they brought into harmony those* (τοὺς δὲ διαφερομένους) *of the citizens who were at variance, and in other matters conducted themselves worthily both of their own homeland and our city.*

The modalities (underlined in the translation above) express distinct emotive qualities for the judges both when they give decisions and when they reconcile disputants. Nevertheless, they depict judges who are just as seriously enthusiastic when they give decisions as when they reconcile; they are virtual workaholics with endless energy for each task. More importantly, it is neither specifically when they decide cases nor when they settle them that they bring the citizens into harmony: willy-nilly, that is what they do—reconciliation is not prioritized for promoting social cohesion. This consequence is not due to an accidental insertion of the particle δέ in the τοὺς δὲ διαφερομένους clause, along with an accidental use of the *finite* verb κατέστησαν: the independence of the τοὺς δὲ διαφερομένους τῶν πολιτῶν εἰς ὁμόνοιαν κατέστησαν clause is the purposeful composition of the master draftsman of the decree who meant to show that the judges, both in deciding cases and settling them, had the wonderful effect of bringing the citizens into harmony. While the ὁμόνοια clause does not appear in the later parts of the decree (neither in the message to be proclaimed by the herald at the festival in ll. 18–24, nor in the words to be delivered by the envoy to the Kaunians, ll. 34–43), criteria and modalities are kept distinct for judging and reconciling; thus, in the passage about the Smyrnaean envoy, directions are given him, that he is to arrive with the decree before the *boule* and demos in Kaunos and is to speak:

> περὶ τῶν δικαστῶν ἣν ἐποιήσαντο ‖ [σ]πουδὴν καὶ φιλοτιμίαν περὶ τὰς κρίσεις, ἐμφανίζοντα διότι ἔν τε τοῖς ἄλλοις πᾶσιν ἐπαινε[ῖ] ‖ [α]ὐτοὺς ὁ δῆμος γεγενημένους ἀξίους ἀμφοτέρων τῶν πόλεων, καὶ διότι μισοπονήρως ‖ τε καὶ δικαίως καὶ κατὰ τοὺς νόμους, φιλοπονίας τε καὶ κακοπαθίας οὐθὲν ἐλλείποντες, ἃς ‖ μὲν ἔκριναν τῶν δικῶν, ἃς δὲ καὶ συνέλυσαν συμφερόντως· … (17.34–43)

> *about the judges' earnestness and distinctive dedication in regard to the cases, making it plain that* (διότι) *the people (of Smyrna) praise these men both in all other matters as having been worthy of both cities and also because* (διότι) *both with hatred for the feckless and with justice ('equitably') and in accordance with the laws, while displaying the highest degree of endurance both for labor and for work without cessation, not only did they judge some of the cases, but also they settled others advantageously.*[55]

καὶ φιλοπονίαν προσενεγκάμενοι surely suggests that the two nouns are bedded together.

[55] The draftsman has maintained the double hendiadys (see the preceding note); the highly wrought rhetorical finish is also evident in the *oratio obliqua*: notice the different

The specificity of the draftsman's praise was not lost on the Kaunians: while, as we have just seen, the *homonoia* clause (17.11) does not appear in the envoy's speech (17.34–43) in the Smyrnaean decree (at least, not as it is copied onto the stele in Kaunos!), nevertheless, the Kaunians copied it into their own decree (19.68–72), either from the written copy of the Smyrnaean decree carried by the envoy or from the speech that he delivered. Thus the motivation clause of the Kaunian decree runs as follows: since the Smyrnaeans have sent a messenger and a decree in which they write that, when they had sent to them an envoy to request judges and a secretary, they (the Kaunians) sent them judges:

> οὓς διασαφοῦσιν ‖ παραγενομένους εἰς τὴν πόλιν αὐτῶν τὰς μὲν δεδικακέναι τῶν δικῶν καλῶς καὶ δικα[ίως] ‖ καὶ κατὰ τοὺς νόμους, τὴν πᾶσαν κακοπαθίαν τε καὶ φιλοτιμίαν προσενεγκαμένους, τὰς [δὲ] ‖ συν<λ>ελυκέναι [56] σπουδάσαντας, καὶ τοὺς διαφερομένους τῶν πολιτῶν εἰς ὁμόνοιαν κατα- ‖ στῆσαι … (19.68–72)
>
> *who, upon arrival in their city, (sc. the Smyrnaeans say), not only have decided some cases equitably and in accordance with the laws, having acted with both unrelenting perseverance and distinctive dedication, but also have reconciled others with eagerness* (τὰς [δὲ] συν<λ>ελυκέναι σπουδάσαντες)*, and* (καὶ) *brought into harmony those of the citizens who were at variance ...*

Such precision in copying the template, even within a dossier, is remarkable. We might, however, see the beginning of a corruption (or merely an abridgement?) in another, more lacunose decree of the Smyrnaeans for the Kaunians of roughly the same date or a little later, IKaunos 21. The extant text preserves words in only 15 or so lines, i.e., prescript and motivation clause, motion formula, and the first three or so lines of the substance of the new decree; it has been largely and 'mechanically' restored on the basis of IKaunos 17.[57] The motivation clause in IKaunos 21 is the same, word for word, as that in IKaunos 17, except for the personal name, the omission of the 'good conduct clause' (IKaunos 17.12), and slight change in the ὅπως clause.[58]

We might perceive a more radical change in SEG 49.1171, the Smyrnaean decree for Thasian judges (Hamon, IThasos no. 129), and its near twin, SEG 49.1093, the Smyrnaean decree for Astypalaian judges. Hamon, who has recently re-edited the text of the decree for Thasian judges, dates it to the last third of the second

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meanings that must be given to διότι in ll. 35 and 36: he is writing a speech that must be listened to carefully.

[56] The comma in the Greek text following συν<λ>ελυκέναι should be removed, as here; if felt necessary, it can be placed after σπουδάσαντας.

[57] Bean, ed. pr. 1953 no. 8.

[58] Crowther informs me *per ep.* that while the τε is omitted in l. 9 of the published texts (Bean's ed. pr. 1953 no. 8: ISmyrna 580, IKaunos 21), it appears in Bean's squeeze; Crowther thinks "it is desperate to read this text" and he "has no confidence in the formula in ll. 11–12."

century or even to the opening decades of the first on the basis of its orthography and letter forms; the Astypalaian decree belongs to the same period.[59] The texts, then, may have been inscribed as many as 30 or 50 years after the decrees for the Kaunian judges if those are dated ca. 160 BCE (see n. 34). The motivation clause of the first runs: since … the people of Thasos … sent judges … who, upon arrival (οἵ]τινες πα[ρ]αγενόμενοι):

> ἃς μὲν διε- ‖ [δίκ]αϲα[ν δί]κας [δι]καίως κατὰ τοὺς νόμους τὴν πᾶϲαν ‖ [κα]κ[ο]παθίαν κα[ὶ φιλο]τιμίαν προϲεν⟨εγ⟩κάμενοι, ἃς δὲ κα[ὶ ϲ]υνέ[λυϲαν] ‖ [καθ' ὅϲ]ον ἦν ἐ[φ' ἑαυ]το[ῖς ϲπε]ύδ[ον]τ[ε]ϛ τοὺς διαφερομένους τῶν [πο]- ‖ [λιτῶ]ν ε[ἰϛ] ὁμ{ΟΜ}όνοιαν καταϲτῆϲαι, οὐθὲν ἀναγκα[ιό]- ‖ [τερον δὲ οὐ]δὲ μᾶλλον ϲυνφέρ⟨ο⟩ν ν νομίϲαντεϛ εἶναι τῆι ‖ [πόλει ἐπειράϲ]αντο τὰϛ φιλονικίαϛ καὶ διαφορὰϛ ἀνα⟨ι⟩ρεῖν κα[ὶ] ‖ [ἐν τοῖϛ ἄλλοι]ϛ ἀνεϲτράφηϲαν ἀξίως {τῆϛ} τε ἑαυτῶν καὶ τῆ[ϛ] ‖ [ἑαυτῶν καὶ τῆϛ] ἡμετέρας πόλεως (lines 10–17)

> *not only decided some cases justly in accordance with the laws, having acted with unrelenting perseverance and distinctive dedication, but also settled other cases with as much zeal as they could muster to bring into harmony those of the citizens who were at variance, [and] in the belief that nothing is [more] compelling and more beneficial for the city, they [tr]ied to eradicate (their) quarrelsomeness and differences and in other matters they behaved in a manner worthy of themselves and of their city and of ours …*

The template used by the master Smyrnaean draftsman for the decrees for Kaunos is visible here, but so is corruption: not only has the καλῶϛ καὶ δικαίως καὶ κατὰ τοὺ[ϛ] ‖ [ν]όμους of IKaunos 17.9–10 been abridged to [δι]καίως κατὰ τοὺς νόμους (and notice how those particles so easily fly away!), but more importantly, the δέ has dropped out from τοὺς δὲ διαφερομένους and has caused the change in the clause's construction so that κατέϲτηϲαν becomes καταϲτῆϲαι and now supplements ϲπε]ύδ[ον]τ[ε]ϛ. The Smyrnaean decree for the judges from Astypalaia (ISmyrna 581) is even more lacunose, but can be restored so that it is basically the same as the decree for Thasian judges.[60] The meaning in both decrees has shifted away from that in the earlier exemplar: for now it is only when the judges act in their reconciling role that they are eager to establish *homonoia*. The corruption in meaning, however, was quite evidently felt (and eschewed!) by the redactor who created the pattern for these two decrees: for the redactor has *added* an emotive clause, '*[and] in the belief (*νομίϲαντεϛ*) that nothing is [more] compelling and more beneficial for the city, they [tr]ied to eradicate (their) quarrelsomeness and differences*…'[61] The added clause is independent: it is introduced by the restored

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[59] P. Hamon, unpublished text, n. 8; Robert *OMS I*: 6 had dated both decrees to the first century.

[60] See Hamon 1999: 184–87, replicated in SEG 49.1093. The decree for the Astypalaians retains the δ[ίκας καλῶ]ϛ κ[αὶ δικαί]- ‖ ὡς καὶ κατὰ τοὺς νόμους of the exemplar.

[61] Hamon (ibid. 187) nicely points out parallel phraseology in IG IX 2, 1230, a decree of Phalanna for a judge from Gyrton or Krannon in Thessaly: the judge (Glaukos

particle δέ and is dissociated from the preceding clause; accordingly, the finite (and restored) verb ἐπειράσ]ανˑτο is associated with the judges whether they are giving a decision or reconciling the disputants.[62] This is manifestly messy: for how is "bringing into *homonoia* those of the citizens who were at variance" different from "eradicating their differences and quarrelsomeness"—except that the latter is now the function of judges at all times, both when judging and when reconciling—and something the judges believe to be more compelling and beneficial than anything else?

Not only manifestly messy, the additional clause is manifestly a 'fix', for it returns the decree to its 'Kaunian' state, when judges were interested in restoring *homonoia* whether they were reconciling the parties or giving decisions. We must posit, then, an intermediary text between the template used for the Kaunian judges and that used for the Thasian, a text in which the δέ has dropped out from the τοὺς δὲ διαφερομένους clause and κατέστησαν has become a supplementary infinitive—but where the 'fix-it clause' (οὐθὲν ἀναγκαιότερον δὲ … νομίσαντες …) has not yet intruded. It so happens that we now have such a text, one that can be dated and so provide at least a *terminus ante quem* for the later formulation. The text is new—it was found on a stele that was excavated by Themelis in 2003.[63] The stele carries two Smyrnaean decrees, one for Messenian judges (lines 2–49) and the other for their secretary (50–67). Dr. V. Bardani, who will publish these and other Messenian texts in the near future, has kindly permitted me to speak of the contents and her dating of the decrees. For reasons of orthography, morphology, and similarity of lettering to a decree of the Demetrians for Messenian judges that is securely dated around the middle of the second century BCE (before rather than after), the new decrees can be roughly dated to the same pentad. As for contents, the decree for the Messenian judges uses the same typology and phraseology as IKaunos 17.1–45—except for some slight changes! In the portion of the decree that most directly concerns us, we find that, whereas the judges "decided" (διεδίκασαν) cases with the same criteria and modalities as in IKaunos 17.9–10 (except that φιλοτιμίαν has replaced φιλοπονίαν, as in the decree for the Thasians), they "settled other cases" (using συνέλυσαν as in the decree for the Thasians and not διέλυσαν as in the decree for the Kaunians) "with as much zeal as they could muster to bring into

Apolloni[ou?), in matters regarding debt and contracts, πᾶσαν προ- ‖ θυμίαν [ἐνδείξας] διέλυσεν πάντας ‖ ἀνεγκλήτως κ[αὶ σ]τάσιν ἀνελὼν εἰς ‖ ὁμόνοια[ν κα]τή[γαγ]εν (10–13: "[with a display of] absolute enthusiasm, reconciled all the cases irreproachably and *upon eradicating discord, restored (them) to harmony*")

[62] See Crowther 1999: 288–89 for restoration of SEG 49. 1115 A ll. 10–15 (decree of Chalkis for judges from Kos,) with [πε]πείρανται ("[of the cases] that were repor[ted before them], they have tried to [sett]le [most in an advantageous way] etc."); and now Bosnakis and Hallof in IG XII 4,1 168 also with πεπείρανται ("and of the cases [κρίσεων] that were reported before them, they have tried to bring most into an agreeable solution" etc.).

[63] The find was reported in SEG 52.383 and 389.

harmony those of the citizens who were at variance." We have here precisely the text that was posited as an intermediary, the Thasian template without the 'fix-it clause' (οὐθὲν ἀναγκαιότερον δὲ … νομίσαντες). We may translate this section of the Smyrnaean decree (ll. 7–13) as follows: "(the judges) who upon arrival (in Smyrna from Messene) not only decided some of the cases fairly and justly (i.e., 'equitably') and in accordance with the laws, having acted with unrelenting perseverance and distinctive dedication, but also settled others with as much zeal as they could muster to bring into harmony those [of the citizens] who were at variance, and in other matters conducted themselves worthily both of their own homeland and our city."[64]

We do not know when a Smyrnaean draftsman first formulated the intermediary text. It may have arisen by accidental corruption or by thoughtful alteration. If by the latter (as I think), then it may have been occasioned by stressful circumstances in Smyrna, so stressful that it was made incumbent upon judges to restore the citizens to harmony as they settled cases—harmony as a result of decision-making may have become inconceivable. Or, possibly the change was casuistic—e.g., perhaps it was based on the reputation of certain judges who were known to be absolute wizards of reconciliation. Is it possible that the Messenians had garnered such a reputation? It is tantalizing to learn, on the basis of new finds from the Messenian excavations as of now (for they are still underway), that during the period 160–120, twenty-two Messenian *dikasteria* had been sent to foreign cities. Surely the Messenian judges had something distinctively attractive about them![65] At some later point, however, the template that had been used for the Smyrnaean decree for Messenian judges was

[64] We may have another example as well: ISmyrna 583, the Smyrnaean decree for three judges from Miletos. This is a scrappy fragment; Petzl restored the judging/settling clauses so that the judges settle cases "with all the zeal they can muster to bring into harmony those of the citizens who were at variance" (ll. 9–11). The restoration thus accords with the decree for Thasian judges (IThasos 129), *except* that there is no space for the 'fix-it clause' (οὐθὲν ἀναγκαιότερον): if it had been included (as in the decree for the Thasians and Astypalaians), it would have preceded the ὅπως clause (and it clearly does not in the fragmentary text we possess: see ISmyrna II, 2 Tafel 2 for a photo of a squeeze of the fragment). Either the model for the decree is the same as the 'intermediary' one used for the Messenian judges, *or* the text should be restored differently, as in IKaunos 17.10–11: τὰς δὲ καὶ διέλυσαν σπουδάσαντες καθ' ὅσον ἦν ἐφ' ἑαυτοῖς, τοὺς δὲ διαφερομένους τῶν πολιτῶν εἰς ὁμόνοιαν κατέστησαν κτλ. Only a firm dating of the fragment might offer an initial basis for deciding between the one restoration and the other.

[65] Again I am grateful to Dr. V. Bardani for sharing this new information. Obviously, as these texts are published, we will learn much more about the habits of foreign judges and the widening networks of late Hellenistic cities, and the reasons why cities chose particular cities from which to request judges; see section 1, *apud fin*., where, for example, trade was suggested as a motive. There may of course be a more pointedly political reason for the Smyrnaean decision to use Messenian judges in the middle of the second century BCE, viz., the relations of both cities to Rome; this, however, is not the place to initiate that discussion.

altered. Whenever it was that the Thasian and Astypalaian redaction was first introduced, the *homonoia* clause had become fossilized, preserved as a matter of tradition and epigraphic habit; it remained in the text despite its redundancy when the new clause that repeated and expanded its meaning was added.

I have posited three redactions in the judgment clauses in the second series of Smyrnaean decrees for foreign judges and their cities (the decree for the Knidians belongs to the first series, see n. 33). In the first, exemplified by the decrees for the Kaunians (IKaunos 17, 19, 21), "the judges decided some cases according to the laws, working non-stop, and they settled other cases with as much zeal as they could muster and they restored the contentious citizens into harmony." In the second redaction, exemplified by the decree for the Messenians, "the judges decided some cases according to the laws, working non-stop, and they settled other cases with as much zeal as they could muster for restoring the contentious citizens into harmony." And in the third redaction (SEG 49.1171, for Thasian judges and ISmyrna 581, for Astypalaian judges), "they decided some cases by law, working non-stop, and settled others with as much zeal as they could muster for bringing the contentious into harmony and, in the belief that nothing is more compelling and more beneficial for the city, they tried to eradicate (their) quarrelsomeness and differences …"

Further investigation and new evidence may make possible more precise dating for these decrees and provide historical events to tie to the alterations in the templates. Juxtaposed study of the decrees from cities that present judges as reconcilers who aim to restore *homonoia* with those presenting judges-at-large who restore *homonoia* (nn. 50 and 51) may also yield new insights. As for concluding this essay with its focus on judging clauses with their criteria and modalities of assessment: I hope to have shown that the clauses can reveal real judging habits of foreign *dikastai*, but I also hope to have shown that judging habits, embedded in inscribed texts that are copied, generation after generation, are prone to transmutation (as in any transmitted text) by error or by purposeful alteration; and yes, judging habit becomes epigraphic habit, even as new judging habits (or new iterations of old judging habits) are formulated, and I daresay, put into practice.

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Standard collections of Greek inscriptions, particularly those in the IGSK series, are referred to as follows: e.g., IPriene, IIasos, ISmyrna
IKaunos = see C. Marek, *infra*.
IPArk: see G. Thür – H. Taeuber *infra.*
Gonnoi II: see Helly *infra*.
OMS = L. Robert, *Opera Minora Selecta* (7 vols., Amsterdam 1969–1991)
TC = Tituli Calymnii, ed. M. Segre, Annuario 6–7 (1944–45)

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"DECREES FOR FOREIGN JUDGES: JUDGING CONVENTIONS—OR EPIGRAPHIC HABITS?" A RESPONSE TO ADELE SCAFURO

We must thank Adele Scafuro for her paper on the decrees of foreign judges. Her analysis of the *dikasteria* composed by these judges in the Hellenistic world, beside the specific interest in the reconstruction of their judging procedures, has a more general interest for the study of Greek law, related to the solution of the old and still controversial problem of unity of Greek Law. Widely discussed with reference to the poleis of the classical age, this issue has only marginally attracted the attention of scholars of the Hellenistic world, except as concerns Ptolemaic law. The existence of a trend to legal *koine* determined by territorially-extended kingdoms has been recognized by many, but it is very difficult to find out whether and to what extent this *koine* existed outside of the Ptolemaic Kingdom, and if it involved areas of law other than private law and family law, to which research was mainly dedicated. In particular, can we think of a *koine* in the fields of public law and of procedural law, the latter of which works as a sort of link between private and public law? In these areas, can we or can we not find factors of unification?

Re-considering these problems, there is no need to insist on the emphasis Scafuro's paper dedicated to foreign judges in Hellenistic Greek cities, mainly in the eastern ones: namely (among the many occasions in which those judges were appointed) to decrees in honor of foreign *dikasteria* invited from a city to spend a period of time in its territory, in order to settle disputes and/or decide cases between local inhabitants. Reasoning from the suggestions offered by Louis Robert's still fundamental study,[1] Scafuro maintains that visiting judges, when they decided, had to do it *kata tous nomous* of the requesting city. But a problem arises when they were called not only to "judge," but also to "reconcile": must we believe, as is often said, that they only gave judgments if their conciliation efforts had failed? In other words, that there was a procedural priority for reconciliation? Scafuro excludes the existence of a general rule of that kind. However, there are some problems that in my opinion deserve further attention: when both reconciliation and judging were [possible], was the attempt to reconcile considered as the equivalent of a preliminary investigation (sort of *anakrisis*)? Did the *dikasterion* collect and assume proofs? In

[1] Robert, L. 1973. 'Les juges étrangers dans la cité grecque,' pp. 765–82 in Xenion, Festschrift für Pan. J. Zepos. Athens, Freiburg i.B., Köln, Repr. OMS 5, 137–54.

this case, if reconciliation failed, could the visiting judges take into account, in order to decide, the proofs collected and assumed during their own reconciliation attempt? The ambiguity of epigraphical terminology that tends to overlap reconciliation and arbitral activity complicates the problem. For modern scholars arbitration finds a model in the activity of public arbitrators in Athens after 403, who are, according to Aristot. *AP* 53.2 bound to try reconciliation. But in the case of foreign judges reconciliation was the first (chronologically) task of the appointed judges, a task that did not exist for Athenian judges. My first thought is that when judges tried to reconcile the disputants they did not collect proofs: if disputants reconciled, proofs were not necessary; if they did not reconcile, proofs were collected during the first part of the decision-making procedure. But these are only my first thoughts: as I said, in my opinion, the relation between the parts of procedure permitted for foreign judges deserves further deeper attention.

Let's now go to a very interesting and important part of the paper: "I take this essay," writes Scafuro, "as an instancing of substantive meaning for formulaic expression and also of the spread of formulae from one city to another." How to achieve such a goal? Scafuro follows suggestions offered by Crowther (who identified shifts in phraseology of the decrees and associated changes in judging conventions with chronological phases) and observes that "by locating specific networks of cities and their decrees we may be able to isolate formulae and judicial conventions and so trace their development." This method allows Scafuro to combine pieces of information coming from different places in the Greek world and to ascertain that the decrees show a reciprocity between requesting and receiving cities, and "the outreaching tentacles of that primary reciprocating unit" that connect the requesting cities not only to all its answering cities, but the cities to which these cities have sent and received judges. This chain of connections shows the existence of important exchanges in the realm of justice between Hellenistic cities and poses several problems. Particularly interesting in my opinion is the following question: how, that is, on the basis of which considerations or personal qualities, were foreign judges appointed? Were they judicial experts, experienced in dealing with foreign legal codes, as first assumed by Louis Robert? Were they famous for their rhetorical skill, whose importance in judicial procedures does not need to be underlined? Scafuro points out that some cities received more requests than others to send judges to other cities: Messene, during the period 160–120, sent to foreign cities twenty two *dikasteria.* Why were Messenian judges especially attractive for the requesting cities? Does that mean that in Messene there really existed specialists in legal problems? The growth of a class of "legal experts" in the Hellenistic world would be a further fascinating topic to discuss, as well as the consequences on the legislation of different cities of exchanges of judges, especially if they were legal experts. As I said, these consequences could be enlightening in discussing the existence of a *koine* in Hellenistic legal procedures. In addition, the fact that during the exchanges of judges between Smyrne and Messene at some point the template used for the decrees

was altered, is connected with one of the topics at the center of Scafuro's research, that is to say judging habits of foreign judges. These habits, as she writes, "embedded in inscribed texts that are copied, generation after generation, are prone to transmutation (as in any transmitted texts) by error or by purposeful alteration."

The suggestions coming from Scafuro's paper open the way to so many further points of important discussions, that, as I said, we must really thank her for her difficult work.

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BERNHARD PALME (WIEN)

DIE BILINGUEN PROZESSPROTOKOLLE UND DIE REFORM DER AMTSJOURNALE IM SPÄTANTIKEN ÄGYPTEN

Aus dem römischen Ägypten liegen weit über einhundert papyrologische Testimonien für Protokolle von Gerichtsverhandlungen vor, die vor Amtsträgern mit jurisdiktionellem Pouvoir geführt wurden: Der *praefectus Aegypti* sprach im Rahmen der *cognitio extra ordinem* recht; beim *iuridicus Alexandreae et Aegypti* (δικαιοδότης), beim Idios Logos, bei den Epistrategen und andere Finanzprokuratoren ist unklar, ob sie autonome Gerichtsbefugnis hatten oder als *iudices delegati* tätig waren. Die aus den Papyri ersichtliche Praxis zeigt einen weiten Spielraum in der Gestaltung des Verfahrens, wobei sogar die Grenzen zwischen Rechtsprechung und Verwaltungsverfahren verschwimmen. Die Protokollierung der Verhandlungen erfolgte im Rahmen der Amtstagebücher (*commentarii*, ὑπομνηματισμοί) des jeweiligen richterlichen Organs und verwendete ausschließlich die griechische Sprache.[1]

Diesen Schriftstücken stehen knapp 60 bilingue Prozessprotokolle aus dem spätantiken Ägypten[2] gegenüber, deren augenfälligstes Unterscheidungsmerkmal im Vergleich zu den älteren Protokollen die Verwendung eines lateinisch gehaltenen Rahmens für die weiterhin in Griechisch geführte Verhandlung ist. Der lateinische Rahmen umfasst die Angaben zu Datierung und Verhandlungsort sowie die Nennung der Parteien am Anfang des Protokolls, ferner jede Einführung eines Redners und die Äußerungen der Amtsträger. Für die Rechtspraxis, insbesondere die konkreten Fälle und die Verfahrensweisen bieten die Protokolle eine reiche – und von der Forschung bei weitem noch nicht ausgeschöpfte – Informationsquelle.[3] Im Folgen-

[1] Ὑπομνηματισμοί und das lateinische Äquivalent *commentarii* bezeichnen die Amtsjournale, in denen Tag für Tag die Handlungen und Entscheidungen der Amtsträger aufgezeichnet wurden. Immer noch grundlegend dazu: Wilcken, Ὑπομνηματισμοί 80–126; zur Terminologie: Bickerman, Testificatio 333–355, bes. 333–336.

[2] Ich verwende die spätestens seit Wilcken, Grundzüge 2 und 66 konventionelle Epochengrenze zwischen dem römischen und spätantiken (byzantinischen) Ägypten ab dem Regierungsantritt Diokletians (284). Die grundlegenden administrativen Ver-änderungen (s. u. Anm. 45) lassen diese Einteilung nicht nur praktisch, sondern aus verwaltungs- und rechtshistorischer Perspektive auch gerechtfertigt erscheinen.

[3] Natürlich wurden und werden die römischen Prozessprotokolle von der Forschung zum römischen Prozesswesen generell (etwa: Crook, Legal Advocacy; Bablitz, Actors and Audience) und im Speziellen in Ägypten (z.B. Foti Talamanca, Ricerche sul processo II.1 und II.2: L'introduzione del giudizio; Anagnostou-Cañas, Juge et sentence, und

den werde ich versuchen, sowohl die formale Gestaltung dieser Prozessprotokolle vorzustellen als auch der Frage nachzugehen, wie sich der Übergang von den Protokollen römischen Typs zu jenen des spätantiken Stils vollzogen hat. Meine Beobachtungen dürfen auf einer Studie von Rudolf Haensch aufbauen, der erstmals auch die außerägyptischen Aufzeichnungen von Gerichtsverhandlungen zum Vergleich herangezogen hat.[4] Sodann wird aufzuzeigen sein, dass der Übergang zum spätantiken Protokollstil weit mehr als eine Veränderung der äußeren Form brachte: er spiegelt eine tiefgreifende Reform der schriftlichen Dokumentation römischer Amthandlungen und Gerichtsverfahren wider.

Römische Prozessprotokolle als Teil der Amtsjournale

Die gesamte Prinzipatszeit hindurch waren die Protokolle der Gerichtsverhandlungen – auch jener vor dem *praefectus Aegypti* und den Prokuratoren ritterlichen Standes – zur Gänze in griechischer Sprache gehalten. Die papyrologischen Testimonien solcher Protokolle weisen vom frühen ersten bis zum späten dritten Jh. eine weitgehend gleichförmige Gestaltung auf. Eine erste Liste von „reports of proceedings in papyri" hat 1966 Revel Coles zusammengestellt, der auch die formalen Charakteristika, insbesondere die Verwendung der *oratio recta*, besprochen hat.[5] Ein aktualisiertes und kritisch gesichtetes Verzeichnis hat 2011 Benjamin Kelly vorgelegt, dessen Studie jedoch auf die Petitionen gerichtet ist und daher die Gerichtsprotokolle und ihre Eigenheiten nur am Rande berührt.[6]

Die von Coles und Kelly gesammelten Dokumente sind allerdings nur zum geringen Teil originale Gerichtsprotokolle; zum weitaus größten Teil handelt es sich um Zitate oder Auszüge von Protokollen. Oftmals lässt der fragmentarische Zustand des Papyrus nicht mehr erkennen, was der Kontext war oder welchem Zweck ein Auszug diente.[7] Häufig stammen die Auszüge aus Petitionen, wo sie als Präzedenzfälle oder im Rahmen der Vorgeschichte des Prozesses zitiert werden,[8] bisweilen

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dies., Documentation judicaire pénale 753–779) berücksichtig. Weil viele der relevanten Testimonien nicht ausreichend aufbereitet sind, konnte das bislang allerdings nur auf einer selektiven Quellenbasis erfolgen.

4 Haensch, Typisch römisch 117–126.

5 Coles, Reports of Proceedings, mit einer Liste der Belege auf S. 55–63. Allerdings haben auch etliche Protokolle, die mit den Gerichtsprotokollen zwar strukturell verwandt sind, aber nichts mit dem Prozesswesen zu tun haben – wie etwa Protokolle von Sitzungen der Bule – Aufnahme in diese Liste gefunden.

6 Kelly, Petitions, mit der Liste auf S. 368–380. Seither ist hinzugekommen: P.Köln X 414 (Oxy., 1. Jh. n. Chr.). Der Umstand, dass diese Liste nicht chronologisch oder nach inhaltlichen Kriterien, sondern in der alphabetischen Reihenfolge der Editionen geordnet ist, erschwert die Orientierung über Entwicklungen.

7 Einen knappen Überblick über das Material und ausgewählte Beispiele in Übersetzung bieten Palme, Roman Litigation 482–492 sowie Keenan, Criminal Procedure 502f., 508–516.

8 Solche knapp gehaltenen Zitate verweisen zumeist auf frühere Verhandlungen derselben Causa oder auf Entscheidungen in vergleichbaren Fällen, vgl. dazu Katzoff, Precedents

handelt es sich um Kopien aus amtlichem oder privatem Interesse. Originale ὑπομνηματισμοί, die ein Protokoll enthalten, sind kaum erhalten bzw. nicht eindeutig zu identifizieren (s. u. Anm. 14). Diese Eigenheit der papyrologischen Evidenz bedingt, dass wir nur eine vage Vorstellung haben, wie die originale Dokumentation der Prozesse ausgesehen hat. Rudolf Haensch hat plausibel vermutet, dass es neben den Niederschriften in den Amtsjournalen (aus denen wir die Exzerpte haben) auch ausführliche Einzelprotokolle zu einer Verhandlung gegeben haben könnte, welche für die Prozessparteien ausgegeben wurden. Freilich sind auch solche Einzelprotokolle in der fragmentarischen Evidenz zumindest des ersten und zweiten Jh. nicht eindeutig identifizierbar – und falls es sie gegeben hat, dann waren nicht sie, sondern die Niederschriften in den Amtsjournalen juristisch maßgeblich, denn nach diesen zitiert man die Präzedenzfälle.[9]

Die urkundentechnischen und formalen Aspekte der römischen Prozessprotokolle, die zumindest überblicksartig untersucht worden sind, lassen sich wie folgt zusammenfassen: Im wesentlichen ist der Text in vier Abschnitte gegliedert:[10] 1) die Einleitungsformel, 2) das eigentliche Corpus des Protokolls mit den wörtlichen Wiedergaben der Äußerungen des Richters und den Reden der Parteien bzw. der Advokaten, 3) das Urteil (κρίσις), das oft unmittelbar auf die Plädoyers der Parteien folgt, und 4) abschließende Vermerke der Aktenschreiber.

Die Einleitungsformel besteht aus Datum und Gerichtsort, gefolgt von der Nennung der streitenden Parteien und (eventuell) deren Anwälten. Das Corpus beginnt unmittelbar mit der ersten Wortmeldung. Die nachfolgenden Reden des Richters und der Parteien werden in *oratio recta* wiedergegeben und seit dem Ende des ersten Jh. jeweils mit εἶπειν, gelegentlich auch mit ἀπεκρίνατο, eingeleitet.[11] Die Wiedergabe der Wortmeldungen in direkter Rede erweckt den Eindruck, dass die Äußerungen wörtlich zitiert werden, was die Verwendung von Kurzschrift bei der Proto-

256–292, bes. 273–278; Anagnostou-Cañas, Documentation judicaire pénale 764–767 und 772.

9 Haensch, Typisch römisch 123f. und ausführlicher ders., Die Rechtsprechung der Statthalter Ägyptens in nachdiokletianischer Zeit, in: R. Haensch (Hg.), Recht haben und Recht bekommen. Die Gerichtspraxis im Imperium Romanum, im Druck (ich danke Rudolf Haensch für die freundlich gewährte Einsicht in das unveröffentlichte Manuskript). Auch in jenen umfangreicheren Protokollen, die nicht sofort als Exzerpt zu erkennen sind, finden sich Hinweise auf eine „Abschrift" aus den Amtstagebüchern, so etwa in P.Flor. I 61 = M.Chr. 80, 1 (85): ἀντίγραφ[ον ἐξ ὑπομνημα]τισμῶν; SB XIV 12139, II, 1 (2. Jh.): ἀντίγραφ(α) ὑπομνηματισμ(ῶν). In SB XVI 12555 = BGU XI 2071 könnte die Inhaltsangabe auf dem Verso (ὑ̣π̣ο̣μ̣ν̣η̣μ̣α̣τ̣ι̣σ̣μ̣ὸ̣ς̣ Ἰουλίου Ἀγριππίνου) ebenso gut auf eine private Abschrift wie auf ein amtlich ausgegebenes Einzelprotokoll deuten.

10 Zum Folgenden siehe Coles, Reports of Proceedings 29–54; Palme, Roman Litigation 485f. Dieselbe Gliederung spiegelt sich auch in Märtyrerakten wider und erlaubt daher Rückschlüsse auf die Form der römischen Amtsjournale: Bisbee, Pre-Decian Acts of Martyrs 33–64.

11 Dies stellt eine Neuerung gegenüber Protokollen der ptolemäischen Zeit dar, wo nur indirekte Rede verwendet wird: siehe schon Jörs, Erzrichter 230–339, bes. 287–290.

kollierung voraussetzt. Revel Coles hat mit stilistischen und anderen Argumenten plausibel gemacht, dass alle Äußerungen während einer Verhandlung zwar wörtlich mitstenographiert wurden, danach aber im Officium eine redigierte und gekürzte Fassung erstellt wurde, welche die in die ὑπομνηματισμοί aufgenommene (und später zitierte) war.[12] Dies erklärt sich daraus, dass die Prozessprotokolle im Grunde bloß ein Bestandteil der Hypomnematismoi sind, die vor allem dem Zweck dienten, jede Handlung des Amtsträgers zu dokumentieren. Dies bedeutet aber auch, dass in den Prozessprotokollen römischer Zeit nicht die wortgetreuen Mitschriften vorliegen, sondern die von den Kanzleien redigierten und komprimierten Fassungen für die Hypomnematismoi, die freilich als die einzig maßgebliche und zitierfähige, offizielle Dokumentation galten. Zu diesen Niederschriften in den Hypomnematismoi konnten freilich „zu Protokoll gegebene" Einzelerklärungen oder Dokumente hinzugefügt werden, die in der Prinzipatszeit *acta* bzw. ὑπομνήματα hießen.[13] Sie hatten offenbar den Charakter von Beilagen, Anhängen oder Attachments.

Eine Schwierigkeit, die Dokumentation der römischen Gerichtsverfahren exakt zu fassen, besteht also darin, dass die uns vorliegenden Protokolle kaum jemals aus solchen Hypomnematismoi selbst stammen,[14] sondern eben bloß Zitate oder Abschriften sind, die „aus den Amtsjournalen" gezogen wurden. Eine signifikante Eigenheit der römischen Belege – nicht zuletzt in Hinblick auf die späteren Protokolltypen – ist daher, dass vor der Einleitungsformel (mit der das eigentliche Protokoll beginnt) zumeist noch die Zitierformel (Coles: „extract phrase") steht, die festhält, dass das Protokoll ἐξ ὑπομνηματισμῶν eines Amtsträgers stammt.[15] Bisweilen

[12] Zur Redaktion der stenographischen Mitschriften s. Coles, Reports of Proceedings 10–21. Die redaktionelle Bearbeitung der Verhandlungsmitschriften und sogar der Richtersprüche durch den in der Kanzlei des *praefectus Aegypti* dafür zuständigen εἰσαγωγεύς (s. unten Anm. 31) bildet den anschaulichen Hintergrund für die bei Philo, In Flaccum 130–134 geäußerte Kritik an Lampon (frühes 1. Jh. n. Chr.), der diese Position dazu missbraucht habe, um gegen Bestechungsgelder die Ausformulierung zu manipulieren oder sogar den Sinn ins Gegenteil zu verkehren. Auch die – letztlich nur erschlossenen – stenographischen Mitschriften lassen sich in den Papyri nicht nachweisen. Möglicherweise wurden sie nach Erstellung der offiziellen, autorisierten Fassung in den Hypomnematismoi absichtlich vernichtet.

[13] Bickerman, Testificatio 333–336 und 344f.: Das von den ὑπομνηματισμοί zu unterscheidende ὑπόμνημα (stets im Singular) bezeichnet entsprechend den lateinischen *acta* einen privaten Schriftsatz (häufig eine Parteienäußerung), der als Erklärung zu Protokoll gegeben wird.

[14] Das Original solcher Hypomnematismoi eines Strategen ist in W.Chr. 41 = P.Par. 69 = Sel.Pap. II 242 (Elephantine, 4. Okt. 232) erhalten, wo in Kol. III 17–30 auch eine Verhandlung protokolliert wird. Für Coles, Reports of Proceedings 35f. war es mangels an Vergleichsbeispielen noch unklar, ob das hier erkennbare Originalprotokoll ohne ἐξ ὑπομνεματισμῶν-Formel die Regel oder eine Ausnahme war.

[15] Als typisches Beispiel darf P.Oxy. I 37 = M.Chr. 79, I 1–5 (Oxy., 49) gelten: Ἐξ ὑπομ[ν]ηματισμῶν Τι[βερίο]υ Κλαυδ[ίο]υ Πασίωνος στρατη(γοῦ), | (ἔτους) ἑνάτου Τιβερίου Κλαυδίου Καίσαρος Σεβαστοῦ Γερμανικοῦ | Αὐτοκ[ρά]τορος, Φαρμοῦθι γ΄. Ἐπὶ τοῦ βήματος, | [Π]εσοῦρι[ς] πρὸς Σαραεῦν. Ἀριστοκλῆς ῥήτωρ | ὑπὲρ Πεσούριος

setzt das Zitat dann sofort mit dem im neuen Kontext relevanten Passus ein, wodurch z.B. Datierung und Errichtungsort etc. weggeblieben sind, die im originalen Protokoll doch wohl regelmäßig vorhanden waren. Aus dieser Zitierweise lässt sich jedoch ersehen, dass die römischen Prozessprotokolle ausschließlich in den Hypomnematismoi der Amtsträger verzeichnet waren, wie alle anderen Amtshandlungen auch. Einen gesonderten Akt, der speziell für eine Causa angelegt und geführt wurde, gab es allem Anschein nach noch nicht. Das Ordnungs- und Archivierungskriterium war also das Amtsjournal mit seinen in chronologischer Reihenfolge verzeichneten Agenda. So kommt es, dass bei länger sich hinziehenden Rechtsstreitigkeiten nicht auf einen einzelnen Akt verwiesen werden konnte, sondern unter Umständen mehrere „Auszüge aus den Amtstagebüchern" von mehreren Amtsjahren und unterschiedlichen Beamten zitiert werden mussten. Bei komplexen oder lange andauernden Prozessen bewirkte das eine gewisse Umständlichkeit, die bisweilen noch in den uns vorliegenden (fragmentarischen) Dokumentationen sichtbar ist.

Ein gemeinsame Charakteristikum aller Protokolle aus der Prinzipatszeit ist, dass sie rein Griechisch abgefasst sind. Bei einigen inhaltlich verwandten Urkunden von Prozessen vor römischen Amtsträgern, die zur Gänze in Latein gehalten sind, handelt es sich um Aufzeichnungen von Fällen, bei denen römische Bürger, zumeist Soldaten, als streitende Partei involviert waren.[16] Bisweilen wird, wie in P.Wisc. II 48 = ChLA XLVII 1438, 42f. (nach 154–159), eine lateinische Urkunde im originalen Wortlaut zitiert.[17] Während solche Urkunden in den grundsätzlich anderen Kontext von Rechtsverfahren römischer Bürger gehören und somit nicht als Vergleichsbeispiele für Protokolle von Prozessen von Peregrinen heranzuziehen sind, sticht eine Ausnahme unter den römischen Prozessprotokollen hervor: In P.Ross. Georg. V 18 (= CPL p. 431) vom Jahre 213 liegt das sehr fragmentarische Protokoll einer vor dem *praefectus Aegypti* geführten Verhandlung vor.[18] Die Äußerungen des Präfekten werden in Latein eingeführt (Z. 2, 7 und 9: *Iuncinus d(ixit)*), während die Rede des Anwalts in Griechisch angekündigt wird (Z. 6: Ἡρακλείδης ῥήτωρ εἶπεν). Dies erinnert an das Schema der spätantiken Protokolle, von denen es sich jedoch

κτλ. Im Einzelnen gibt es natürlich kleinere Varianten, die den Inkonsequenzen der Schreiber zuzuschreiben sind.

[16] Beispielsweise P.Mich. III 159 = CPL 212 = ChLA V 280 = FIRA III 64 aus der römischen Armee; dazu Palme, Roman Litigation 492–494. Auch P.Oxy. XLII 3016 = ChLA XLVII 1418 gehört vermutlich in einen militärischen Zusammenhang, s. Haensch, Typisch römisch 119, Anm. 10.

[17] Mindestens vier *responsa* werden zitiert. Es geht um Übergriffe eines Soldaten (Z. 38), gegen die der Kläger mehrfach beim Präfekten durch Petitionen oder Klagen vorging. Die zahlreichen interlinearen Korrekturen sprechen dafür, dass ein Entwurf, kein gültiges Dokument, vorliegt.

[18] Über den Inhalt ist wegen des großen Textverlustes nichts zu gewinnen. Die Datierung lässt vermuten, dass dieser stark beschädigte Text im Zusammenhang mit Caracallas Aufenthalt in Alexandria stand.

insofern unterscheidet, als nicht der gesamte Rahmen lateinisch gehalten ist und auch die Worte des Verhandlungsleiters nicht in Latein sind. Da P.Ross. Georg. V 18 unmittelbar nach der Constitutio Antoniniana geschrieben wurde – die unter anderem zur Konsequenz hatte, dass die neuen Bürger alle rechtsrelevanten Schriftstücke (z.B. die *professiones liberorum natorum*, die Bitte um Einsetzung eines *tutor feminae*, die Niederschrift eines Testamentes) nun in Latein abfassen mussten – , ist in der lateinischen Redeeinleitung möglicherweise ein erster Versuch zu erkennen, Latein zumindest in rudimentärer Form auch im Prozess zu verankern.[19] Die zeitlich folgenden Protokolle des dritten Jh. zeigen jedoch – quasi unbeeindruckt von der Constitutio Antoniniana – wieder die gewohnte, rein griechische Form, so dass gegebenenfalls eine entsprechende Regelung sehr rasch zurückgenommen worden sein müsste.

Wie sehr das Griechische als Verwaltungssprache in Ägypten vorherrschte, zeigen nicht nur die griechisch zirkulierenden *responsa* des Septimius Severus,[20] sondern auch die fünf erhaltenen Protokolle kaiserlicher Gerichtssitzungen in Alexandria, die in späteren Dokumenten als Präzedenzfälle zitiert werden.[21] Sie treten uns in Griechisch gegenüber, aber verschiedene Indizien – vor allem die Erwähnung in P.Oxy. LI 3614, dass der Urteilsspruch des Kaisers in lateinischer Sprache verkündet wurde – geben zu erkennen, dass es sich bei den zitierten Auszügen dieser Protokolle um Übersetzungen handelt.[22] Unklar bleibt freilich, ob die kaiserlichen Protokolle zur Gänze in Latein waren, oder ob lediglich der Rahmen in Latein gehalten war, die Ausführungen der Parteien jedoch in Griechisch erfolgten. Wie groß in Ägypten das Bedürfnis an Übersetzungen selbst in den Kreisen des Militärs war, zeigt beispielsweise SB XII 11043 (152), die griechische Übertragung eines außerhalb Ägyptens abgefassten lateinischen Protokolls, in dem es um einen Veteranen geht.[23]

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[19] Dies überlegen Adams, Bilingualism 562 und Haensch, Typisch römisch 119f. Dagegen meint Coles, Reports of Proceedings 37, das Latein diente hier als stilistisches Mittel, um die Distanz zwischen dem Amtsträger und den Parteien hervorzustreichen, denn es tritt nur auf, um die Reden des Amtsträgers einzuleiten, nicht aber jene der Parteien.

[20] P.Apokrimata (200) mit den Überlegungen von W. L. Westermann, Introduction S. 10–14, ob es sich um Übersetzungen aus dem Lateinischen oder um original in Griechisch formulierte Texte handelt.

[21] P.Oxy. LXIV 4435 (199); P.Oxy. XLII 3019 (200); P.Oxy. LI 3614 (200); SB IV 7366 (200) und SB XIV 11875 (216); vgl. Haensch, L. Egnatius Victor Lollianus 289–302. Bei P.Oxy. 4435 und 3019 verraten die Datumsangaben nach dem römischen Kalender, dass eine Übersetzung vorliegt.

[22] P.Oxy. LI 3614, 2–3: Καῖσαρ σκεψάμε⟦νος μετὰ⟧ τῶν φίλων τῇ πατρίῳ φωνῇ ἀπεφήνατο. Mit τῇ πατρίῳ φωνῇ könnte bei Septimius Severus auch Punisch gemeint sein, doch viel wahrscheinlicher ist Latein, s. dazu Lewis, Michigan-Berlin Apokrimata 49–53. Zur Frage der Mehrsprachigkeit in der kaiserzeitlichen Verwaltung: Mourgues, Ecrire en deux langues 105–129.

[23] Dazu zuletzt Eck, Prokuratorenpaar 249–255.

Protokolle außerhalb Ägyptens

Der zuletzt genannte Text deutet schon an, dass in gräkophonen Provinzen außerhalb Ägyptens die lateinische Sprache bei Rechts- und Verwaltungsdokumenten sehr wohl schon in der Hohen Kaiserzeit anzutreffen ist. Unmittelbares Vergleichsmaterial zu den ägyptischen Prozessprotokollen sind vor allem epigraphische Aufzeichnungen von Gerichtsverhandlungen, die vor den Tribunalen römischer Amtsträger geführt wurden. Die Überlieferung hat bislang fünf solche Texte auf uns gebracht.[24]

Von kaiserlichen Gerichten stammt zum einen eine Inschrift aus Hyrgaleis (Phrygien), die einen Prozess vor Hadrian wiedergibt,[25] zum anderen die in Thelsea (Syrien) gefundene Inschrift mit der Cognitio des Caracalla *de Gohariensis*.[26] Ein lateinischer Rahmen gibt die normale Sprache der kaiserlichen *commentarii* wieder, während sämtliche Äußerungen – auch die des Kaisers – in Griechisch erscheinen (und wohl auch so gesprochen wurden). Aus Phrygien stammt auch eine umfangreiche bilingue Inschrift, die mehrere Verhandlungen *de angariis* vor den *procuratores Phrygiae* (und zugleich kaiserlichen Freigelassenen) aus den Jahren zwischen 200 und 237 festhält[27] und wiederum die lateinischen Einführungen der Sprecher, aber griechisch gehaltene Reden zeigt. Aus den Jahren nach 245 stammt eine weitere, fragmentarische Inschrift aus Thelsea in Syrien, die ein nach demselben Prinzip gestaltetes bilingues Prozessprotokoll vor dem *legatus Augusti pro praetore Syriae Coelae* überliefert.[28] Zu diesen epigraphischen Zeugnissen gesellt sich P.Dura 128 (ca. 245) mit den Resten eines zweisprachigen Protokolls von einem Prozess vor einem *dux ripae* in *Syria*.[29]

Die in diesen Protokollen als Richter fungierenden Amtsträger zeigen rangmäßig das weite Spectrum von Prokuratoren der Domänenverwaltung bis hinauf zu Statthaltern und Duces. Wenn Finanzprokuratoren in Phrygien ein zweisprachiges Protokoll führen, dann ist dies erst recht für alle höheren Amtsträger anzunehmen. Alle genannten Protokolle folgen demselben Gestaltungsmuster: Die lateinischen Angaben zu Datum, Gerichtsort und Amtsträger sowie die Sprecherangaben umrahmen die griechischen Reden des Richters und der Parteien. Diese Form ist sicher-

[24] Diese Evidenz hat erstmals Haensch, Typisch römisch 118, Anm. 5 zusammengestellt. Vgl. auch generell: Mourgues, Forme diplomatique 123–197.

[25] SEG LVIII 1536 (129).

[26] SEG XVII 759 (216) und SEG LIII 1806 mit weiteren Literaturangaben. Das antike Thelsea liegt beim heutigen Dmeir nahe Damaskus.

[27] SEG XIII 625; die kommentierte Erstedition findet sich bei Frend, A Third Century Inscription 46–56, bes. Z. 33–41. Die Inschrift wurde in Akroenos gefunden und gibt Z. 1ff. Verhandlungen aus dem Jahre 200 als Ausgangspunkt wieder. In Z. 30–33 folgt die Verhandlung eines anderen Prokurators aus dem Jahre 213, in Z. 34–41 die eines dritten Prokurators aus dem Jahre 237.

[28] SEG XLIII 1028 (nach 245).

[29] P.Dura 128 (Dura Europos): Die 16 Kleinstfragmente lassen zwar die bilingue Form erkennen, geben aber nichts mehr über den Gegenstand der Verhandlung preis.

lich authentisch und spiegelt den Usus der römischen Verwaltung im gräkophonen Osten wider, wo bedeutende Provinzen wie Syrien spätestens seit der Severerzeit die bilinguale Form der Protokollierung pflegten.

Dem gegenüber zeigen die Prozessprotokolle aus Ägypten, dass man dort die gesamte römische Zeit hindurch an den rein griechischen Protokollen festhielt. Wenn sogar die Urteilssprüche der Kaiser ins Griechische übersetzt wurden, so äußert sich darin die Dominanz des Griechischen in allen Bereichen der ägyptischen Verwaltung und Rechtsprechung, die nicht explizit römische Bürger oder Militärs betrafen. Auch die Ausweitung des Bürgerrechts auf alle Peregrinen durch die Constitutio Antoniniana hat an diesem Factum nichts verändert.[30] Selbst in der Kanzlei des *praefectus Aegypti* waren die für die Gerichtsprotokolle sowie den Zugang zum Statthaltergericht und die Erstellung der Gerichtstermine zuständigen Amtsträger vorwiegend griechischsprachig, was Rudolf Haensch überzeugend damit erklärt hat, dass in Ägypten bis mindestens ins dritten Jh. ein der städtischen Elite Alexandrias entstammender εἰσαγωγεύς diese Funktion versah, während in allen anderen Statthalterkanzleien ein der Armee angehörender *commentariensis* bzw. bei den Finanzprokuratoren ein aus der *familia Caesaris* entsandter *a commentariis* diesen Posten innehatte.[31]

Die bilinguen Protokolle der Spätantike

Die im römischen Ägypten übliche Form der griechischen Protokollierung in den Hypomnematismoi der Amtsträger wurde am Ende des dritten Jh. zugunsten jener bilinguen Form aufgegeben, die nach Ausweis der Inschriften in anderen Provinzen schon lange üblich war. Mit 298, dem Jahr der Anwesenheit Diokletians im Lande am Nil, beginnt die Serie der Protokolle mit lateinischem Rahmen, von denen bislang, wie gesagt, nahezu 60 publiziert vorliegen. Freilich ist die einschränkende Bemerkung zu machen, dass nur recht wenige davon vollständig oder in substantiellen Teilen erhalten sind. Die überwiegende Zahl besteht aus Fragmenten, die wenige Aussagen über die Gesamtgestaltung des Schriftstückes zulassen,[32] weshalb jede Auswertung der Prozessprotokolle noch mit erheblichen Schwierigkeiten zu kämpfen hat. Die Dunkelziffer der Protokolle düfte vermutlich hoch sein, weil viele Fragmente noch nicht korrekt identifiziert wurden. Zudem stehen in den *Chartae*

[30] Die dezidiert griechische Ausrichtung der Verwaltung in Ägypten betont Haensch, Typisch römisch 120–125 mit instruktiven Quellenbeispielen: Die vom Amtsinhaber mutmaßlich eigenhändig unter Edikte gesetzte Anweisung zur Proponierung erfolgt in Griechisch (nicht in Latein wie beispielsweise in *Asia*); ebenso sind die Kontrollvermerke und *subscriptiones* unter Petitionen in Griechisch.

[31] Haensch, Typisch römisch 121f. mit Verweis auf Philo, In Flaccum 126f. und Lukian, Apol. 12. Vgl. auch schon Haensch, A commentariis 267–284 und ders., Le rôle des officiales 259–276.

[32] Der fragmentarische Erhaltungszustand von P.Mich. VII 463 = ChLA V 293 muss – leider – eher als typisches Beispiel eines Prozessprotokolls gelten als der unversehrte P.Sakaon 34 = ChLA XLI 1204.

Latinae Antiquiores zwar viele Facsimile-Abbildungen zur Verfügung, doch häufig sind die Abbildungen nur von flüchtigen oder mangelhaften alten Transkriptionen begleitet.[33] Bisweilen ist die Deutungen der bruchstückhaften Texte unsicher, denn nicht jeder lateinische Papyrus, nicht einmal jede Bilingue ist automatisch ein Prozessprotokoll. Beispielsweise ist bei P.Oxy. XLI 2952 (315), wo zwanzig Mal unmittelbar untereinander der Name und Titel eines Amtsträgers geschrieben steht, keineswegs sicher, ob es sich um ein Protokoll oder um die Übung einer durchaus versierten Hand im Kanzleistil handelt (s. unten Anm. 41). Hier bleibt noch papyrologische Grundlagenarbeit zu leisten. Sehr wünschenswert wäre ein Corpus aller römischen und byzantinischen Prozessprotokolle mit revidierten Editionen auf der Basis einer gründlichen Autopsie der Originale.

Eine umfassende Besprechung haben die byzantinischen Protokolle bislang nicht erfahren,[34] doch David Thomas und Rudolf Haensch haben sie in übersichtlichen Listen zusammengestellt.[35] Diese Listen veranschaulichen, dass die erhaltenen Protokolle von den verschiedensten Gerichtshöfen stammen: Von *praefecti*, *praesides* der Teilprovinzen, von *iuridici*, *defensores* etc. Zu den Protokollen von zivilen Richtern treten weitere von Prozessen, die vor dem Gericht eines *comes rei militaris* oder *dux* geführt wurden und beweisen, dass die Protokolle der Militärgerichtshöfe in derselben Art verfasst waren wie jene der zivilen Gerichte.[36]

Die Einführung des bilinguen Protokolls

Die ältesten bislang bekannt gewordenen zweisprachigen Protokolle ergeben in chronologischer Reihung folgendes Bild:

Datierung	Edition	Richter	Ort	Beginn des Dokuments
298–300[37]	SB XVIII 13295 = ChLA XLI 1187	praeses Thebaidos	Antinoupolis ? (Fundort: Hermupolis)	Anfang verloren

[33] Als Beispiel wäre ChLA XLIII 1247 zu nennen, wo in Z. 4 und Z. 12 sogar die Statusdesignation Fl(avius) verkannt wurde.

[34] Eine knappe Besprechung bietet Coles, Reports of Proceedings 36–38, zuletzt auch Gascou, Procès-verbal 149, Anm. 1. Wichtige Beobachtungen zur diplomatischen Gestaltung finden sich bei U. & D. Hagedorn, P.Thomas 24, Einl. S. 217–222 sowie Zilliacus, P.Berl.Zill. 4, Einleitung.

[35] Thomas, P.Ryl. IV 654, 132f., wo auch verzeichnet ist, welcher Magistrat die Verhandlung geführt hat; Haensch, Die Rechtsprechung der Statthalter Ägyptens in nachdiokletianischer Zeit (o. Anm. 9) im Druck.

[36] P.Oxy. LXIII 4381 (Alex., 375); SB XXVIII 17147 (Lykopolites, Mitte 5. Jh.); P.Mich. XIII 660 + SB XVI 12542 (= P.Mich. XIII 661 + P.Palau inv. 70) = ChLA XLVII 1437 (Aphrodite, 1. Hälfte 6. Jh.), vgl. Palme, Römische Militärgerichtsbarkeit 375–408.

[37] Der Anfang des Protokolls ist verloren. Die Datierung ergibt sich durch die Person des Richters, Iulius Athenodorus, der 298–300 als *praeses Thebaidos* bezeugt ist (und wohl der erste *praeses Thebaidos* überhaupt war): s. F. Mitthof, P.Kramer 11, Einleitung S. 138f.

299	P.Kramer 11 = SPP I, S. 2, II	[praeses Thebaidos ?]	Antinoupolis ?	[D(ominis) n(ostris) Diocletiano A]ụg(usto) VII et Ṃạxim[iano] Aug(usto) VI co(n)s(ulibus) ḍị[e - -
19. 8. 299	P.Oxy. IX 1204 = Sel.Pap. II 294, 11–22	katholikos	Alexandria	griechische Übersetzung eines lateinischen Protokolls:[38] ἐπὶ τῶν κυρίων ἡμῶν Διοκλητιανοῦ Σεβαστοῦ τὸ ς καὶ Μαξιμιανοῦ Σεβαστοῦ τὸ ς ὑπάτων, πρὸ ιδ καλανδῶν Σεπτεμβρίων, ἐν Ἀλεξανδρείᾳ ἐν τῷ σηκρήτῳ
1. 2. 300–306[39]	CPR VII 21 = ChLA XLV 1335	praeses Thebaidos	?	Anfang verloren
301 – vor 13. 1. 304	P.Oxy. XVIII 2187, 24–32	praefectus Aegypti	Alexandria? (Fundort: Oxyrhynchos)	griechische Übersetzung eines lateinischen Protokolls:[40] Anfang nur verkürzt zitiert: Ἀθὺρ ια. Ῥωμαϊκά. Ἀντίδικον ἐν τόπῳ.
Ende 3. / Anf. 4. Jh.	SB XVIII 13296 = ChLA XLI 1189	[praeses] Thebaidos	Fundort: Hermupolis	Anfang verloren
23. 1. 310 (Jahr ?)	SB XVI 12581 = ChLA XII 522	?	Fundort: Arsinoe?	- -] praef(ectis) [pr]aeṭ(orio) ç[o(n)s(ulibus)] ḍie x. Ḳạl(endas) Feḅrar(ias). . . . . ¸ịṇ seç[retario]

[38] Das Protokoll erscheint als Zitat in griechischer Übersetzung in einer Petition an den Strategen. Die Datierung erfolgt nach Konsuln und römischem Kalender, was ein wichtiges Indiz dafür ist, dass das Original in Latein verfasst war, vgl. U. Wilcken, PapCongr. IV, 121, Anm. 1; Coles, Reports of Proceedings 34, Anm. 2 und Thomas, P.Ryl. IV 654, 134, Anm. 2.

[39] Der Anfang des Protokolls ist verloren. Zur Einschränkung des Datierungsrahmens s. BL VIII 109.

[40] Auszüge aus dem ursprünglich lateinischen Protokoll werden (neben anderen Dokumenten) in der Petition zitiert, vgl. das Ῥωμαικά am Beginn des Zitats, Z. 24. Der *termus post quem* ergibt sich aus der Erwähnung des Präfekten Clodius Culcianus, der nicht vor 301 im Amt war; der *terminus ante quem* ist das Datum der Petition, die das Protokoll zitiert.

ca. 314–325	P.Oxy. LI 3619 = ChLA XLVII 1423	praeses Aegypti Ioviae	Fundort: Oxyrhynchos	Anfang verloren
315 ?	P.Oxy. XLI 2952 = ChLA XLVII 1416	a(gens) v(ices) praef(ectorum) praet(orio)	Fundort: Oxyrhynchos	Möglicherweise eine Übung im Kanzleistil[41]
3. 6. 318 oder 319 oder 320	P.Sakaon 33 = P.Ryl. IV 653 = ChLA IV 254 = CPL Annexe 2	praeses Aegypti Herculiae	Arsinoe	D(ominis) n(ostris) Constantino Aug(usto) VI et Constantino [no]b(ilissimo) · Caes(are) · I · co(n)s(ulibus) · die III Nonas Iunias, Παῦνι θ, Arsinoit(um ciuitate), in secrę[tario]
12. 12. 321	P.Sakaon 34 = P.Thead. 13 = ChLA XLI 1204 = CPL Annexe 3	praeses Aegypti Herculiae	Arsinoe	D(ominis) n(ostris) Lici[n]io Aug(usto) VI et Licinio nob(ilissimo) Caes(are) II co(n)s(ulibus), die pridie Idus Dec[em]bres, Χοιὰκ ις Arsinoit(um civitate), in secret(ario)
14.–30. 8. 332	SB XXVIII 17044[42]	praeses Thebaidos?	Antinoupolis (Fundort Hermupolis?)	[Papio Pacatiano v(iro) c(larissimo) praef(ecto) p]raet(orio) [et] Maecili[o Hilar]iano v(iro) c(larissimo) co(n)s(ulibus), die [....] i Kal(endas) Septembr(es) Antinou(poli), in secręt(ario)

Die Serie der bilinguen Protokolle setzt sich mindestens bis in die Mitte des sechsten Jh. fort. Im Vergleich zur römischen Zeit fällt auf, dass die meisten spätantiken

[41] Auf dem fragmentarischen Blatt steht zwanzig Mal untereinander *Iulianus v(ir) p(erfectissimus) a(gens) v(ices) praef(ectorum) praet(orio)*, was aussieht wie eine Übung im Kanzleistil. Allerdings tragen die Zeilen 4–5, 14 und 22 griechische Schrift, was zu den Reden des *agens* oder einer Partei gehören könnte. Da mit jeder Nennung des Verhandlungsleiters eine neue Zeile beginnt (s. Anm. 63), ist es nicht auszuschließen, dass das Bruchstück doch den Passus eines Verhandlungsprotokolls überliefert, in dem der Amtsträger wie bei einem Verhör eine Reihe kurzer Fragen stellte, vgl. die Sequenz in P.Oxy. LI 3619, 10–21 (Oxy. 314–325) oder P.Lips. I 40 = ChLA XII 518 (Herm., vor 381).

[42] Neuedition von P.Harrauer 46 (= ChLA XLI 1188 + SPP XX 283 [= ChLA XLV 1325]) mit einem weiteren Fragment: Mitthof, Ein neues Fragment 205–211, bes. 207f.

Protokolle im Original erhalten sein dürften. Die Datierungen zeigen eindeutig, dass die neue, zweisprachige Art der Protokollierung mit 298 einsetzt und daher unmittelbar mit dem Aufenthalt Diokletians in Ägypten zusammenhängt.

Dies war eine für Ägypten höchst ereignisreiche Zeit. Um die Mitte des Jahres 297 war die Revolte des L. Domitius Domitianus und des Aurelius Achilleus ausgebrochen, vermutlich als Reaktion auf die neue Steuerordnung, die Einstellung der alexandrinischen Sondermünzen zugunsten der Reichsmünzen und die Einbeziehung Ägyptens in das reformierte System der Provinzialverwaltung.[43] Die gefährliche Revolte veranlasste Diokletian, die Kriegshandlungen gegen das Sassanidenreich vollständig seinem Caesar Galerius zu übertragen, um Anfang 298 mit seinem *comitatus* nach Ägypten zu gehen, wo er in einem achtmonatigen Feldzug sowohl Alexandria eroberte als auch (im September 298) nach Oberägypten zog, um den Aufstand niederzuschlagen und die Südgrenze des Reiches bei Philae einzurichten.[44] Anlässlich seines Aufenthalts in Ägypten hat der Kaiser nicht nur die Umsetzung der Steuerreform einschließlich einer Revision des Landzensus als Bemessungsgrundlage sowie die endgültige Umstellung der Münze von Alexandria auf die Reichswährung vollzogen, sondern auch die bislang ungeteilte Provinz *Aegyptus* in vier Teilprovinzen (*Aegyptus, Thebais, Libya superior* und *inferior*) durchgesetzt und die Munizipalisierung des Lands zum Abschluss gebracht, indem die alten Gaue als Verwaltungseinheiten abgelöst wurden von den *civitates* und deren Territorien.[45]

In dieses Bündel von weitreichenden Maßnahmen gehört auch die Umstellung der Prozessprotokolle auf die zweisprachige Form. Die Einführung des lateinischen Rahmens wird oft auf Diokletians – allerdings in keiner Quelle explizit belegte – Forcierung des Lateinischen als Amtssprache des Reiches zurückgeführt.[46] Wie der

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[43] Zu den Ereignissen und ihrer Chronologie s. ausführlich Kuhoff, Diokletian 184–199 mit Diskussion der kontroversiellen älteren Literatur. Während die literarischen Quellen nur Aurelius Achilleus als Gegner des Diokletian nennen, geht aus der numismatischen und papyrologischen Evidenz unzweifelhaft hervor, dass der eigentliche Usurpator Domitianus war, während Achilleus als (wohl vom ihm ernannter) *corrector* den Aufstand mittrug und nach dem Tod des Domitianus fortsetzte. Auslöser der Revolte dürfte unter anderem die Umsetzung der neuen Steuerveranlagung gewesen sein, die der *praefectus Aegypti* Aristius Optatus am 16. März 297 verkündet hatte (P.Cair.Isid. 1).

[44] Die papyrologische Evidenz spiegelt den Ablauf der Ereignisse wider: Zwischen dem 9. Aug. 297 und dem 11. Jan. 298 sind die Dokumente nicht nach Diokletian und seinen Mitregenten datiert; dafür treten im Zeitraum vom 14. Aug. bis 2. Dez. 297 Datierungen nach Domitianus auf, s. F. Mitthof, CPR XXIII 20, Einleitung S. 123 mit Anm. 10. P.Panop.Beatty 1 zeigt, dass für den September 298 die Ankunft Diokletians und seines *comitatus* im Panopolites erwartet wurde.

[45] Zu diesen tiefgreifenden Veränderungen s. Bowman, Some Aspects of the Reform of Diocletian 43–51; Adams, Transition and Change 82–108; Maresch, Vom Gau zur Civitas 427–437.

[46] Zur lateinischen „Amtssprache“ s. etwa Stein, Geschichte des spätrömischen Reiches 77 und Adams, Bilingualism 545–562. Die bilinguen Prozessprotokolle als Folge einer Förderung des Lateinischen: Zilliacus, Kampf der Weltsprachen 91; Kaimio, Latin in Ro-

Vergleich mit den Protokollen aus anderen Provinzen des griechischsprachigen Ostens gezeigt hat, bedeutete die Einführung des lateinischen Protokollrahmens jedenfalls für Ägypten lediglich eine Anpassung des bis dahin üblichen Beurkundungswesens an die sonst im Reich schon längst übliche Dokumentationsform – und steht insofern in einer Linie mit den anderen genannten Maßnahmen, Ägypten den generellen Regelungen und Verhältnissen des Reiches anzugleichen. Diese Anpassung brachte aber weit mehr als die Einführung eines lateinischen Rahmens, denn sie ging – wie die Protokolle zu erkennen geben – einher mit einer grundsätzlichen Reformierung der Dokumentationsweise und damit einer völlig neuen Orientierung in der Kanzleipraxis der Statthalter und anderer hochrangiger Amtsträger.

Zugleich mit den Prozessprotokollen römischen Stils verschwinden seit Diokletian das Wort ὑπομνηματισμός und seine lateinische Entsprechung *commentarii* aus dem Sprachgebrauch der römischen Amtsträger, weshalb zumindest die ältere Forschung davon ausging, dass Diokletian die Amtsjournale herkömmlichen Stils überhaupt abgeschafft habe und hier eine generelle Reform der Dokumentation römischer Amtshandlungen greifbar wäre.[47] In der Tat vermitteln die oben in der Tabelle angeführten Belege den Eindruck, dass mit dem Auftreten der bilinguen Protokolle die alte Form der Protokollierung nach Amtstagebüchern jedenfalls bei den statthalterlichen und prokuratorischen Amtsträgern abrupt verschwindet.[48] Dies deutet darauf hin, dass gleichzeitig mit dem bewussten Akt einer Neugestaltung eine gezielte Aufhebung der alten Form einherging. Als zweites Charakteristicum der neuen, spätantiken Protokolle darf (neben der Zweisprachigkeit) nämlich gelten, dass für jede Verhandlung ein eigenes Dokument angelegt wurde. Dies eben zeigt das gegenüber der römischen Zeit grundsätzlich andere Ordnungsprinzip: An die Stelle der chronologischen Reihenfolge in den Amtstagebüchern tritt die inhaltliche Einteilung nach einzelnen Rechtsfällen. Jedes Protokoll ist jetzt ein „Einzelprotokoll" (Bickermann), das jeweils eine Causa betrifft. Diese Einteilung, die in Ägypten spätestens seit 299 (ChLA XLI 1187; P.Kramer 11; P.Oxy. IX 1204) belegt ist, tritt beispielsweise auch in den Donatistenprozessen in Africa deutlich zutage.[49] In den spätantiken Protokollen stehen demnach nicht mehr die Amtshandlungen des Richters im

man Egypt 28, Anm. 2. Generell für das Römische Reich: Mourgues, Ecrire en deux langues.

47 In diesem Sinne vor allem Seeck, Zeitenfolge der Gesetze Constantins 1–43, bes. 10–12 und ders., Scrinium 893–904; auch Premerstein, Commentarii 726–759, bes. 747–753. Seeck führt die Veränderung darauf zurück, dass an die Stelle der stationären Kanzleien in den Kaiserresidenzen nun mobile Kanzleien im *comitatus* jedes reisenden Tetrarchen getreten waren, die nicht mehr das gesamte Archiv mit sich führen konnten.

48 Bei den lokalen Amtsträgern auf Gau-Ebene halten sich die *commentarii* noch länger: In P.Col. X 285, 29–52 (Ars., nach 6. Aug. 315) wird noch „aus den Amtsjournalen" (ἐξ ὑπομνηματισμῶν) des Strategen des Oxyrhynchites zitiert, siehe dazu im Folgenden.

49 Bickermann, Testificatio 346, Anm. 2. Vgl. Maier, Dossier du Donatisme, I–II; generell zu den Märtyrerakten als Quelle für das Prozessrecht und die Protokollierung s. die ausführlichen Diskussionen bei Lanata, Atti dei martiri; Bisbee, Pre-Decian Acts 33–64.

Mittelpunkt, sondern – typisch für *gesta* – die Fixierung der Verhandlung selbst. Bezeichnender Weise findet eine Verhandlung jetzt „vor" (*apud, coram*) einer Obrigkeit statt, nicht durch (*ab*) sie.[50]

Da die Gerichts- und Verwaltungsmitschriften nunmehr für jede Causa separat als Einzelprotokoll geführt werden, nennt man sie – in feiner Abgrenzung gegen die früheren ὑπομνηματισμοί – konsequent ὑπομνήματα (im *plurale tantum*), wie auch im Lateinischen die Niederschrift einer Verhandlung jetzt *acta* oder *gesta* (gleichfalls stets im Plural) heißt.[51] Der Terminus *acta* bzw. ὑπομνήματα, welcher in der römischen Zeit die „zu Protokoll gegebene" Einzelerklärung (zumeist einer Partei) bezeichnete (die 'Anhänge' oder 'Beilagen' s. oben Anm. 13), hat seine Bedeutung zunächst in „einzelne Niederschrift" gewandelt und ist ab Diokletian zur spezifischen Bezeichnung für „Protokoll eines einzelnen Falles," sozusagen den „Einzelakt," geworden. Diesem Umstand dürfte es zu verdanken sein, dass in den spätantiken Protokollen im Regelfall die originalen Dokumente (und keine Auszüge oder Abschriften) vorliegen.

Ihrem Inhalt nach unterscheiden sich die Protokolle mit lateinischem Rahmen nicht wesentlich von den römischen Protokolle; nach wie vor besteht das Corpus praktisch ausschließlich aus den Äußerungen des Verhandlungsleiters und der Parteien, die jeweils in *oratio recta* wiedergegeben werden. Die spätantiken Protokolle erscheinen im Allgemeinen umfangreicher als die der römischen Zeit, was aber bloß daran liegen könnte, dass uns letztere im Regelfall lediglich als Auszüge vorliegen. Einige der spätantiken Prozessprotokolle erreichen in ihrer Länge die verbosen Protokolle der Buleakten und geben den Gang der Verhandlung und Diskussion sehr lebendig wieder.[52] Dies erweckt den Eindruck, es seien wörtliche Mitschriften; doch ähnlich wie die römischen Protokollen dürften auch die spätantiken redigierte und verkürzte Fassungen der ursprünglichen, stenographischen Mitschriften sein.[53]

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[50] Vgl. Jörs, Erzrichter 275f.

[51] P.Oxy. XVII 2110 (370); M.Chr. 55; 65; 96; 97; P.Lips. I 34; 40 Kol. 2; 63 und öfter. Zu der Verschiebung der Bedeutung bei den Begriffen ὑπομνήματα und *acta* vgl. Bickermann, Testificatio 346f.

[52] Etwa P.Lips. I 40; vgl. auch Coles, Reports of Proceedings 22, Anm. 3 mit weiteren Quellenangaben.

[53] Wie schon Märtyrerakten des 2.–3. Jh. (s. Bisbee, Pre-Decian Acts 33–64), sprechen auch einige auf die Diokletianische Verfolgung rekurrierende Berichte über Einvernahmen von Christen durch römische Amtsträger von stenographischer Mitschrift und späterer Wiederschrift im (redigierten) Protokoll, vgl. dazu Barnes, Early Christian Hagiography 54–66 mit den relevanten Quellen. Für eine verbreitete und anhaltende Sitte, die Äußerungen während der Verhandlung stenographisch festzuhalten und danach in die Urkunde aufzunehmen, spricht der umfangreiche (524 Zeilen lange) Schieds-vergleich P.Petra IV 39 vom 8. Aug. 574, wo die Äußerungen der Parteien und Schiedsrichter – anders als bei den Dialysis-Urkunden aus dem byzantinischen Ägypten – in direkter Rede aufgezeichnet sind (Z. 88–449), s. dazu Bemerkungen in der Rezension von G. Thür, ZRG RA 130 (2013) 538–543, bes. 541.

Die Einführung des bilinguen Protokolltyps scheint bemerkenswert rasch und konsequent umgesetzt worden zu sein – jedenfalls in den Kanzleien der römischen Amtsträger. Einige noch rein griechisch gehaltene Protokolle aus dem vierten Jh. stammen von untergeordneten Gerichtshöfen auf der Ebene der *civitates* (s. im Folgenden). Völlig problemlos scheint die sprachliche Neuregelung aber dennoch nicht über die Bühne gegangen zu sein. P.Oxy. IX 1204 vom Jahre 299 und P.Oxy. XVIII 2187 vom Jahre 304 überliefern griechische Übersetzungen bilinguer Protokolle, und zwei ähnliche, überaus instruktive Beispiele liegen aus dem Sakaon-Archiv vor: Das vollständig erhaltene Schriftstück P.Sakaon 34 vom Jahre 321 protokolliert eine Verhandlung vor dem *praeses Aegypti Herculiae* in Arsinoiton Polis über ungerechtfertigte Steuerforderungen und Drangsalien der Erhebungsbeamten. Am Ende des Protokolls steht die lateinische Sentenz des Richters (Z. 11–13), doch im Anschluss an das eigentliche Protokoll wurde diese Sentenz noch einmal in griechischer Übersetzung angefügt (Z. 15–25: ἑρμηνία κτλ.). In ähnlicher Weise schließt sich auch in P.Sakaon 33 vom Jahre 318 an das lateinische Urteil (Z. 19–21) eine Übersetzung ins Griechische an (Z. 22–27). In späteren Protokollen finden sich keine derartigen Übersetzungen mehr.

Betrachten wir die formale Gestaltung der byzantinischen Protokolle etwas näher.[54] Bemerkenswert ist zunächst die Gleichförmigkeit der Protokolle, unabhängig von der Kanzlei, die sie abgefasst hat. Anhand der Form oder Diktion lassen sich jedenfalls nach den bislang vorliegenden Beispielen keine Spezifika der einen oder anderen Kanzlei feststellen. Die Gleichförmigkeit der Prozessprotokolle ist erstaunlich, weil als Verhandlungsorte neben Alexandreia auch Antinoupolis, Arsinoe und Oxyrhynchos sowie (nach dem in der obigen Tabelle dargestelltem Zeitraum) auch Hermupolis, Herakleopolis, Antaiopolis und Pelusium bezeugt sind.[55] Unabhängig vom Verhandlungsort und dem richterlichen Amtsträger befolgte man also überall einheitliche, wahrscheinlich vorgegebene Gestaltungskriterien. Dahinter dürfen wir das Bestreben vermuten, den Protokollen – wie jedem Schriftstück aus einer Statthalterkanzlei – durch stilisierte Schrift und auffälliges Layout schon optisch ein unverwechselbares Erscheinungsbild zu geben, das sogar Schreibunkundigen sofort ins Auge springt.

Der Text wird durch Sprache, Schrifttypen und Layout gegliedert. Charakteristisch ist insbesondere der lateinisch gehaltene Eröffnungsteil, der bei den Protokol-

[54] Zum Urkundstypus s. Coles, Reports of Proceedings 36–38; zur Gliederung s. schon H. Zilliacus, P.Berl.Zill. 4 Einleitung.

[55] Eine Übersicht über die Verhandlungsorte, die nur bei etwa einem Viertel der Urkunden bekannt sind, bietet die Liste bei Thomas, P.Ryl. IV 654, 132f. Alexandria ist aufgrund der Überlieferungslage in der Liste unterrepräsentiert; wahrscheinlich war es Schauplatz vieler Verfahren, die vor Amtsträgern mit Sitz in Alexandria stattfanden, also ab dem späten vierten Jh. auch dem *praefectus Augustalis*.

len des vierten und frühen fünften Jh. stets die folgenden Elemente in feststehender Reihenfolge anführt:[56]

Die Datierungsformel eröffnet die Urkunde: Die Angabe des Jahres erfolgt durch die Nennung der Konsulen, Monat und Tag zuerst nach dem römischen Kalender, sodann durch das Äquivalent nach ägyptischem Kalender.[57] Es folgt der Errichtungsort der Urkunde, wobei nicht nur die Stadt, sondern auch die genaue Lokalität, wo die Verhandlung stattgefunden hat, festgehalten wird. Diese Angabe ist nunmehr wichtig, weil der Gerichtsort nicht mehr aus dem Kontext der Hypomnematismoi ersichtlich ist. Häufig fanden die Verhandlungen *in secretario* statt.[58] Nach den Angaben zu Datum und Ort eröffnet die Nennung der Parteien und (gegebenenfalls) der sie vertretenden Advokaten das Corpus des Protokolls. In den Protokollen des frühen vierten Jh. ist dieser Passus sehr kurz gehalten und leitet unmittelbar zu der ersten Wortmeldung über: „in Anwesenheit von A und B sagte C.“[59] Nach der Mitte des vierten Jh. werden vor den Parteien noch die prozesseinleitenden Offizialen genannt. Danach beginnt das Corpus mit der Verlesung der Klageschrift (*ex officio recitatum est*) oder der Wiedergabe der Reden, wobei die Einführungen der Redner jeweils in Latein erfolgen. Sie strukturieren das Protokoll. Alle Äußerungen des Amtsträgers sind in lateinischer Sprache gehalten. Dagegen bedienen sich die verlesene Klageschrift und allfällige Plädoyes oder Zeugenaussagen nach wie vor der griechischen Sprache. Auch etwaige Kurzbeschreibungen des Schriftstückes auf dem Verso sind in Griechisch. Abgeschlossen werden die spätantiken Protokolle bisweilen mit der ἐξεδόμην-Formel oder deren lateinischem Äquivalent.[60] Diese Phrase bezeugt die Ausgabe der *authentica* oder offizieller Kopien.[61]

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[56] Ein anschauliches Beispiel bietet das vollständige Exemplar P.Oxy. LXIII 4381 = ChLA XLVII 1431 (Alex. / Oxy., 3. Aug. 375), vgl. die kritische Inhaltsangabe bei B. Kramer, Urkundenreferat, APF 43 (1997) 450 und Palme, Roman Litigation 499–502. Eine Abbildung des Papyrus findet sich in P.Oxy. LXIII, Plates VII und VIII; ChLA XLVII 1431, S. 66–68; Pap.Flor. XXXI, S. 32, Tav. 2 (Z. 1–10, linke Hälfte).

[57] Die Datumsangabe nach Konsuln stellt während der Tetrarchenzeit noch eine bemerkenswerte Abweichung gegenüber der sonst in Ägypten gepflegten Datierungspraxis nach den Kaiserjahren dar.

[58] Das *secretarium* ist in den Protokollen des öfteren als Ort der Verhandlung genannt, vgl. die Belegstellen bei U. & D. Hagedorn, P.Harrauer 46, Komm. zu Z. 2. Anscheinend war das *secretarium* der übliche Schauplatz von Gerichtsverhandlungen, denn in CGL III 336, 42 wird das Wort als Äquivalent zum griechischen δικαστήριον angegeben.

[59] Gut erhalten ist dieser Passus in P.Sakaon 34, 2 (321): *e praes(entibus) Sotarion et Horion d(ixerunt)*; und P.Abinn. 63, 2 (350): *[praesentibus] Ḥ[o]ṛo et Nonna et Dionu[s]io Gennadius d(ixit)*.

[60] P.Oxy. IX 1204, 25–26 (299): Γρηγόριος εἶπ(εν)· τὰ ὑπομνήματα κέλευσον ἐκδοθῆναι. Δόμνος ὁ διασημ[ό]τατο[ς καθ]ολικὸς εἶπ(εν)· ἐ[κ]δοθήσεται. Ὀλύμπιος κομενταρήσιος ὀφφικιάλιος ἐξέδωκα τὰ ὑπομνήματα. Ein lateinisches Beispiel: P.Oxy. XVI 1877, 10 (488).

[61] Steinwenter, Urkundenwesen der Römer 12–14.

Die Einführung der Sprecher erfolgt mit *dixit*, üblicherweise gekürzt *d()*.[62] Das *d(ixit)* erscheint schon in P.Ross.Georg. V 18 (213), in den oben zitierten Inschriften und auch in den Märtyrerakten zur Einleitung der Reden des Amtsträgers. Ein weiteres gestalterisches Merkmal ist typisch für die Stilisierung der Protokolle: Bei jeder Nennung wird der richterliche Amtsträger neuerlich mit seiner ausführlichen Titulatur angesprochen. Dieser umständliche Formalismus führt gelegentlich dazu, dass die Nennung des Verhandlungsleiters wesentlich länger ist als der kurze Formeltext, den er spricht. Zudem beginnt mit jeder Nennung des Verhandlungsleiters eine neue Zeile, auch wenn in den vorangehenden Zeilen noch reichlich Platz ist.[63] Man schreibt seinen Namen, Titel und Redetext deutlich größer als den Rest des lateinischen Textes und erst recht der griechischen Teile der Urkunde. Zudem sind diese Textteile durch den Schreibstil abgesetzt: Name und Titel des Verhandlungsleiters sind in einer durchstilisierten, gerade stehenden, deutlichen Kanzleischrift verfaßt, die sich auch gegenüber der hastigeren, nach rechts geneigten lateinischen Kursive anderer Passagen abhebt.[64] Diese Variation der Schriftgröße und des Schreibstils soll die Bedeutung des Verhandlungsleiters auch optisch hervorheben und die verschiedenen Rangebenen zum Ausdruck zu bringen.[65]

Die angesprochenen Charakteristika finden sich in allen Protokollen wieder – und sind deshalb wichtige Hilfen bei der Identifizierung und Rekonstruktion fragmentarischer Texte. Sie begegnen im übrigen schon in den ältesten bilinguen Protokollen (SB XVIII 13295 = ChLA XLI 1187 [298–300]; P.Kramer 11 [299]; P.Oxy. IX 1204 [299]) und sogar schon in P.Ross.Georg. V 18 (213) sowie in den inschriftlichen Zeugnissen außerhalb Ägypens. Dies zeigt, dass die spätantiken Protokolle auch in ihren formalen Gestaltungskriterien unmittelbar die römischen Usanzen fortsetzten, denn das beschriebene, in den Protokollen des späten dritten und frühen

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[62] Coles, Reports of Proceedings 45f. Das Wort kommt in fast allen Texten so gekürzt vor. Ein Ausnahme stellt jedoch die Gruppe der sogenannten Libellprozesse P.Oxy. XVI 1876–9 dar, wo weder der Amtsträger noch seine *officiales* ein *d()* haben.

[63] U. & D. Hagedorn, P.Thomas 24, Einl., S. 218f., Anm. 7. In Hinblick auf diesen Usus könnte das Fragment P.Oxy. XLI 2952 (o. Anm. 41) durchaus ein Protokoll sein, wenn der vom Richter gesprochene Text jeweils sehr kurz war.

[64] Diese große Kanzleischrift weist manche Anklänge an jenen stark stilisierten lateinischen Schreibstil auf, den. Wessely, Schrifttafeln 10, Nr. 25 und ebenso SPP XIV, S. 4 als „Kaiserkursive“ bezeichnet hat, der jedoch, wie die Forschung seither nachweisen konnte, auch in den Kanzleien anderer hochrangiger Amtsträger (z.B. des *praefectus praetorio* und des *praefectus Augustalis*) Verwendung fand: Feissel, Praefatio chartarum publicarum 441–447 und Kramer, Schreiben der Prätorialpräfekten 157f. mit der älteren Literatur in Anm. 3–7. Ein besonders ausgeprägtes Beispiel stellt das von Kramer neu edierte Schreiben des *praefectus praetorio* aus dem Jahre 399 dar: CPL S. 293, Nr. 183 = ChLA XLIV 1264.

[65] U. & D. Hagedorn, P.Thomas 24, Einl., S. 218 mit Belegen in Anm. 3. Auf die gezielte Anwendung der besonders stilisierten Kanzleischrift hat bereits Tjäder, La misteriosa „scrittura grande“ 173–221 aufmerksam gemacht; ebenda S. 199–207 zu diesem Schreibstil in den bilinguen Protokollen aus Ägypten.

vierten Jh. erkennbare Grundschema liegt allen Protokollen bis zum sechsten Jh. zugrunde.

Das Aufkommen der Einzelprotokolle

So deutlich sich die spätantiken Protokolle durch den lateinischen Rahmen und die beschriebenen Gestaltungsmuster von ihren römischen Vorgängern unterscheiden, ebenso klar zeigt sich auch, dass ein kennzeichnendes Element – die Niederschrift als Urkunde auf einem separaten Blatt – bisweilen schon im dritten Jh. auftritt, wenngleich noch im griechischen Gewande. Ein Blick auf die Protokolle bzw. auf Abschriften und Zitaten aus solchen zeigt, dass sich schon im dritten Jh. originale Protokolle finden, die als Einzelurkunde auf einem Papyrusblatt niedergelegt wurden. Sie beginnen mit dem Datum und der Nennung des Gerichtsortes, dann folgt unmittelbar die erste Äußerung des Verhandlungsleiters oder einer Partei. Sowohl der Text als auch die Diplomatik (Einzelblatt) zeigen, dass diese Schriftstücke niemals Bestandteile fortlaufender Amtsjournale gewesen sind, sondern als separate Urkunden aufgesetzt wurden. Ein solches Schriftstück kann als Einzelprotokoll (ὑπόμνημα) angesprochen werden, und die Art und Weise, wie man sie zitiert, bestätigen diesen Eindruck. Während im ersten und zweiten Jh. durchwegs nur Auszüge ἐξ ὑπομνηματισμῶν zitiert werden, zeigt sich, dass diese Sitte schon im frühen dritten Jh. aufhört, dafür aber zur gleichen Zeit Gerichtsprotokolle zitiert werden, die – losgelöst und ohne Bezug zu den Amtsjournalen – den neuen Einzelprotokollen entsprechen. Man beobachtet also, dass im Verlaufe des dritten Jh. die Protokollierung in den Amtsjournalen abgelöst wird von Einzelprotokollen, die nunmehr die zitierfähigen und daher rechtlich maßgeblichen Aufzeichnungen der Prozesse waren. Dafür spricht ferner, dass diese Einzelprotokolle (wie dann noch im vierten Jh.) als ὑπομνήματα (*acta*) – nicht mehr ὑπομνηματισμοί – bezeichnet werden. In den Quellen stellt sich die Entwicklung folgendermaßen dar:

Datierung	Edition	Richter	Ort	Beginn des Dokuments
6. 4. 218	P.Oxy. XLI 2955	praefectus Aegypti	Fundort: Oxyrhynchos	ἐξ [ὑ]πομνηματισμοῦ [Β]ασιλιανοῦ ἡγεμονεύ-σαντος. Ἔτους α Μάρ-κου Αὐρηλίου Ἀντωνί-[νο]υ, Φαρμοῦθι ια. Θέων ῥήτ[ωρ εἶπεν
22. 4. 229 oder 312	P.Col. VIII 235	procurator	Antaiopolis	Einzelprotokoll: [Ἔ]τους η Φαρμοῦθι κζ, ἐν Ἀνταιουπόλ(ει) πρὸ βήματος· Θεοφάνης ἐκέλευσεν τοὺς ἀπὸ κώμης Ἀφροδίτης

5. 7. 232 oder 233	SB I 5676, 11–19	praefectus Aegypti	Fundort: Hermupolis	Einzelprotokoll: Ἔστιν δ[ὲ το]ῦ ὑπομνή[ματος τὸ ἀντίγραφον - ca.? - ῥήτ]ωρ εἶπεν[66]
14. 6. 235	P.Oxy. XLIII 3117, 1–26	procurator	Oxyrhynchos	Ἔτους α Παῦνι κ, ἐν Ὀξυρυγχείτῃ πρὸ βήματος. vac.? Δημήτριος ῥ(ήτωρ) εἶ(πεν)
ca. 250	P.Strasb. I 41 = M.Chr. 93	iudex delegatus (strategos oder epistrategos?)	Antinoupolis	Einzelprotokoll: Ἔ[τους ..] Φαρμοῦθι κη, ἐν Ἀ[ν]τινόου πόλει πρὸ βήματος. Ἀμμόνιος ῥήτωρ εἶπ(εν)
260/1	P.Oxy. XII 1502 r	διέπων τὴν ἐπιστρατηγίαν	Oxyrhynchos	Fragment
14. 8. 262	P.Strasb. I 5, 7–17	archidikastes	Hermupolis	Zitat eines Einzelprotokolls: - -] δὲ τοῦ ὑπομνήματος· (Ἔτους) θ τοῦ κυρίου ἡμῶ[ν] Γαλλιηνοῦ Σεβαστοῦ Μεσορὴ κα, ἐν Ἑρμοῦπόλει Μεικρᾷ πρὸ βήματος. Ἕρμων ἔναρχος ἀρχιδικαστὴς ῥήτωρ εἶπεν[67]
23. 5. 266	P.Giss. I 34, 9–16 = M.Chr. 75	archidikastes	Fundort: Oxyrhynchos	Zitat eines Einzelprotokolls: (Ἔτους) ιγ τοῦ κυ[ρί]ου ἡμῶν Γαλλιηνοῦ Σεβαστοῦ Παχὼν κη τοῦ δὲ ὑπομνήματος· [ὁ δεῖνα ὑπὲρ Αὐρηλίου Σαβείνου ε]ἶπ(εν)[68]

[66] Zitat eines Protokolls, eingebettet in die Anweisung eines Strategen (?) an die Bibliophylakes. Die Ergänzung το]ῦ ὑπομνή[ματος scheint wegen des Singulars sicher gegenüber ὑπομνή[ματισμῶν, das stets im Plural vorkommt. Dies ist als Hinweis zu werten, dass bei dem Gericht des Präfekten bereits Einzelprotokolle erstellt wurden und nicht mehr nach den ὑπομνηματισμοί zitiert wurde.

[67] Der Text des Protokolls wird zitiert im Rahmen eines umfangreicheren Verhandlungsprotokolls vor dem *praefectus Aegypti*.

[68] Der Text des originalen Protokolls (Z. 9ff.) wird im Rahmen einer Petition an den Strategen zitiert; in Z. 4–9 wird auch ein Schreiben eines Archidikastes zitiert. Bemerkenswert ist hier wieder die Bezeichnung des Protokolls als τοῦ δὲ ὑπομνήματος. Das könnte an-

280/1	P.Sakaon 31 = P.Thead.15 = Sel.Pap. II 262	epistrategos	Arsinoe	Einzelprotokoll: Ἔτ[ο]υς ς τοῦ κυ[ρίο]υ ἡμῶν Μάρκ[ο]υ Αὐρηλίο[υ Π]ρόβου Σεβα[στοῦ, ἐν τῷ Ἀρσι]νοίτῃ, πρὸ βήματος. Ἰσίδωρος ἀπὸ συνηγοριῶν εἶ(πεν)·
288/9	P.Oxy. XII 1503	praefectus Aegypti	Oxyrhynchos	Einzelprotokoll: Ἔτους [ε] καὶ ἔτους δ τῶν κυρίων ἡμῶν Διο[κλητιανοῦ καὶ Μαξιμιανοῦ Σεβαστῶν - ca.? -] Σαραπίω(νος) ἐξ ἐπ[ι]πέδου προσελθόντων [- ca.? -] Γυμνάσιος πρ(ύτανις) εἶπ(εν)·
spätes 3. Jh.	P.Oxy. XII 1504	praefectus Aegypti	Oxyrhynchos	Fragment eines Einzelprotokolls?

Dieser Überblick über die Protokolle des dritten Jh. aus den Gerichten römischer Amtsträger zeigt, dass der letzte derzeit vorliegende Nachweis für die Zitierweise ἐξ ὑπομνηματισμῶν (P.Oxy. XLI 2955) aus dem Jahre 218 stammt. Dem gegenüber könnte das früheste Beispiel für ein Einzelprotokoll P.Col. VIII 235 sein, dessen Datierung ins Jahr 229 jedoch nicht gesichert ist (Alternativdatierung: 312). Die zeitlich nächsten Belege für original erhaltene Einzelprotokolle sind P.Oxy. XLIII 3117, 1–26 (235) und M.Chr. 93 (ca. 250), sodann P.Sakaon 31 (280/1) und P.Oxy. XII 1503 (288/9). Bei allen genannten Urkunden liegen mit Sicherheit keine Auszüge, sondern separat gestaltete Dokumente vor, die – abgesehen von lateinischen Rahmen – große Ähnlichkeit mit den bilinguen Protokollen aufweisen.

Im selben Zeitabschnitt manifestiert sich auch der Wechsel in der Zitierweise. Während P.Oxy. XLI 2955 (218) noch ἐξ ὑπομνηματισμῶν zitiert, verweist man in SB I 5676 vom Jahre 232 auf die Abschrift des Protokolls bereits mit dem Terminus ὑπόμνημα (Einzelakt). Definitiv außer Gebrauch erscheint das ἐξ ὑπομνηματισμῶν-Zitat im Jahre 262 (P.Strasb. I 5, 7–17), als vor dem Richterstuhl des Präfekten ein früherer Spruch des Archidikastes eben nicht mehr danach, sondern aus einem Einzelprotokoll zitiert wird: Z. 7 - -] δὲ τοῦ ὑπομνήματος. Der nächst folgende Beleg, die Eingabe an den Strategen P.Giss. I 34 = M.Chr. 75 vom Jahre 266, bestätigt dies, denn auch hier wird das in Z. 9–16 zitierte Protokoll als ὑπόμνημα bezeichnet. Es scheint demnach, dass zwischen 218 und 232 jedenfalls bei den prokuratorischen Kanzleien und beim Präfekten nicht mehr die Protokolle in den Amts-

zeigen, dass das Hypomnema, also das Einzelprotokoll, bereits die übliche Form der Protokollierung war; vgl. o. Anm. 66.

journalen, sondern die neuen Einzelprotokolle die zitierfähigen Prozessniederschriften waren. Allerdings bleibt zu bedenken, dass aus dem dritten Jh. noch etliche fragmentarische Protokolle vorliegen, bei denen der signifikante Passus am Beginn des Protokolls fehlt – weshalb nicht zu entscheiden ist, ob sie schon dem Typus des Einzelprotokolls angehören oder vielleicht doch noch Auszüge aus den Hypomnematismoi sind.[69] Dies betrifft die folgenden Verhandlungen vor einem Präfekten: P.Amh. II 67 (Herm., 231–237), SB V 7697 (Arsinoe, 28. 8. 250 oder 251),[70] PSI XV 1549 (Oxy., 249–250),[71] P.Wash.Univ. I 5 (Oxy., Mitte 3. Jh.) und P.Ant. II 87 (Ende 3. Jh.)[72]; ferner P.Oxy. XX 2280 (Oxy., 2. Hälfte 3. Jh.) vor dem Archidikastes[73] und PSI Cong. XXI 17 (Oxy.?, Ende 3. Jh.) vor einem συνήγορος ταμείου (Z. 10).

Nur mit Vorbehalt sei deshalb die Arbeitshypothese formuliert, dass der Übergang vom ἐξ ὑπομνηματισμῶν-Protokolltypus zum Einzelprotokoll, welches für jede einzelne Causa separat angelegt wird, nicht erst unter Diokletian, sondern bereits unter den Severern stattgefunden hat. Ein weiteres Indiz dafür könnte sein, dass auch in den beiden inschriftlichen Zeugnissen aus Kleinasien und Syrien, bei denen der Anfang des Protokolls erhalten ist (SEG XIII 625, 30–33 [213] und 34ff. [237]; SEG XVIII 759 [216]), schon der Typus des Einzelprotokolls vorliegt.

Protokolle von Amtsträgern der Gaue und Civitates

Die bisherigen Untersuchungen haben sich ausschließlich auf die Protokolle der Jurisdiktion römischer Amtsträger bezogen. Bei den Protokollen aus den Gerichten der lokalen Amtsträger – der Gaustrategen und (ab dem vierten Jh.) der *exactores*

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[69] Abgesehen von den im Folgenden angeführten Protokollen gibt es einige, die so bruchstückhaft sind, dass nicht mehr zu erkennen ist, wer Verhandlungsleiter war, z.B.: P.Laur. III 65 (Herk. unbek., Mitte 3. Jh.); SB V 8945 (Herk. unbek., Ende 3. Jh.). Da somit unklar bleibt, ob solche Protokolle überhaupt von römischen Amtsträgern stammen, bleiben sie für die Argumentation außer Betracht.

[70] Die Überschrift „Aus den hypomnematismoi des Präfekten Appius Sabinus“ in SB V ist irreführend, denn aus dem zwar umfangreichen Text, dessen Anfang aber fehlt, geht nicht hervor, um welchen Typus von Protokoll es sich handelt. Die Ersteditoren des Textes, Skeat und Wegener, Trial 224–247, sprachen auch nicht von *hypomnematismoi*, sondern von einem „trial before the prefect of Egypt.“

[71] Obwohl vor der ersten Zeile kein Text steht, setzt die Z. 1 unmittelbar ein mit: Σαβῖνος ἔπαρχος Αἰγύπτου αὐτῷ εἶπεν: So bleibt ungewiss, welche Art von Protokollierung vorliegt.

[72] Der Titel des Verhandlungsleiters ist zwar verloren, aber der Umstand, dass offenbar Folter angeordnet wird, spricht gegen einen Strategen, der nicht die Befugnis dazu hatte.

[73] Unter den bruchstückhaften Text, welcher die Form der Protokollierung nicht mehr erkennen lässt, schreibt eine zweite Hand: - -] προσαντέβαλον τὸν δηλούμε̣[νον ὑπομνηματισμόν. - -]: Das entscheidende Wort ist jedoch ergänzt.

sowie der *defensores* und anderer Organe der nunmehr in den Rang von *civitates* erhobenen Metropoleis – verlief die Entwicklung offensichtlich anders.[74]

Für Revel Coles galt P.Mert. I 26 vom Februar 274 als das späteste bekannte Protokoll römischer Art, das ἐξ ὑπομνηματισμῶν zitiert wird.[75] So stellte sich für ihn die Entwicklung einfach und linear dar: Bis Diokletian gab es die Amtstagebücher, in denen auch die Prozesse protokolliert wurden und aus denen man zitierte; danach seien sie von den bilinguen Einzelprotokollen ersetzt worden. Dagegen ist jedoch einzuwenden, dass P.Mert. I 26 nicht von einem römischen Amtsträger, sondern von einem *exegetes* des Oxyrhynchites, also von der lokalen Ebene stammt. Mittlerweile sind weitere, noch wesentlich später entstandene Protokolle bekannt geworden, die aus Amtstagebüchern zitieren und somit beweisen, dass zum einen diese Tagebücher bei den Strategen und den Organen der *civitates* nach wie vor geführt wurden, und zum anderen bei diesen lokalen Behörden die Gerichtsverhandlungen immer noch in ihnen protokolliert wurden. Dies geht klar hervor aus Dokumenten wie CPR XVII A 18 (Herm., 24. Juli 321), wo in Z. 2 ein Protokoll des Strategen als [ἀντίγραφον ὑπομνη]ματισμῶν zitiert wird,[76] oder P.Panop. 30 (Panopolis, 5. Aug. 332) mit einem Protokoll aus den Amtsjournalen eines *exactor*[77] und SB XVI 12692 (Karanis, 17. Mai 339) mit einem Protokoll aus den Amtsjournalen des *defensor* des Arsinoites.[78] Auch P.Oxy LIV 3767 (Oxy., 30. Dez. 329 oder 330) aus dem Gericht eines *logistes* gehört vielleicht in diese Gruppe, doch fehlt die erste Zeile. Die Organe von Gau bzw. *civitas* führten also noch Amtstagebücher der alten Form, die Hypomnematismoi; nach wie vor zitierte man aus ihnen.

Bei den Belegen aus dem vierten Jh. fällt allerdings dennoch eine kleine Veränderung gegenüber der römischen Form auf: P.Panop. 30 und SB XVI 12692 zitieren zwar ἐξ ὑπομνηματισμῶν, danach folgt aber die Datierung nach Konsuln, bevor die

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[74] Diese Unterscheidung wurde bislang nicht wahrgenommen, vermutlich deshalb, weil sowohl die Liste der Belege bei Coles, Reports of Proceedings, als auch jene bei Kelly, Petitions, die Protokolle beider Gruppen unterschiedslos zusammenstellten.

[75] P.Merton I 26 (Oxy., 8. Feb. 274): Ἐξ ὑπομνηματιμῶν Αὐρηλίου Ἀγαθοῦ Δαίμονος Ποταμῶνος ἱερέως ἐνάρχου ἐξηγητοῦ Ὀξυρυγχίτου καὶ Μεικρᾶς [Ὀ]άσεως.

[76] CPR XVII A 18, 1–3: [Ὑπατείας τῶν δεσ]ποτῶν ἡμῶν [Λικινίου Σε]βα[στοῦ τὸ ς] καὶ Λικινίου ἐπιφανεστά[το]υ Κ[α]ίσαρος τὸ β | [ἀντίγραφον ὑπομνη]ματισμῶν Σω-[στ]ράτου Αἰλιανοῦ στρατηγοῦ ἤτοι ἐξάκτ[ο]ρος Ἑρμοπολείτου. Ἐπεὶφ λ, πρὸς τῇ βορινῇ πύλῃ τῇ ἐπὶ τὴν δημοσίαν στράταν | [- ca. 15 -] Θεοφάνης [γυ]μνασίαρχος βουλευτὴς Ἑρμοῦ πόλεως εἶπ(εν). Der Stratege Sostratos Ailianos ist auch in anderen Papyri für die Jahre 320 und 321 bezeugt (s. K. A. Worp, Einleitung zum Text, S. 49).

[77] P.Panop. 30 = SB XII 11223, 1–3: Ἐξ ὑπο[μ]ν[ημ]ατισμῶν [Φ]λαυ[ί]ου Κυιν[τιλιανοῦ διὰ Σερή]νου ἐξάκτορος Παν[ο]πολεί[του] | ὑπατί[ας] Παπίο[υ] Πακατιανοῦ [τοῦ] λαμ[πρ]οτάτ[ο]υ ἐπ[άρχου τοῦ ἱεροῦ] πραιτωρίου καὶ Μεκιλίου Ἱλαρ[ιανο]ῦ τ[ο]ῦ λαμπ[ροτάτ]ου | Μεσορὴ ιβ ἐν τῷ δημοσίῳ λογ[ιστη]ρίῳ κτλ.

[78] SB XVI 12692 = P.Col. VII 175, 1–5: [Ἀντίγραφον ὑπομνηματισμοῦ· ἐξ ὑπομ]νη-ματισμῶν | [....]... μίωνος συν[δίκ(ου) Ἀρσ(ινοίτου)] | [ὑπατείας τῶν δεσποτῶν] ἡμῶν Κωνσταντίου τὸ β καὶ | Κώνσταντος τὸ α Αὐγούστων, Παχὼν [κ]β. | [Παρόντων - - .

Parteien genannt werden. Dies entspricht dem Anfang eines Einzelprotokolls, und das bedeutet, dass auch die Verhandlungen vor den Gauorganen numehr durch Einzelprotokolle dokumentiert wurden, aber diese dann als Urkunden in die Hypomnematismoi aufgenommen wurden – wohl in ähnlicher Weise, wie man auch bislang Dokumente „zu Protokoll" gegeben hat (s. o. Anm. 13). So zeichnet sich ab den 30er-Jahren des vierten Jh. auch auf der lokalen Ebene dieselbe Entwicklung ab, die bei den Dokumentationsformen der römischen Amtsträger bereits hundert Jahre früher Fuß gefasst hatten. Das instruktivste Beispiel dafür, wie die bei den Statthaltern längst üblich Form im frühen vierten Jh. übergreift auf die Dokumentationsweise der Gauebene, ist wohl das oxyrhynchitische Protokoll P.Col. X 285 vom Jahre 315:

29 Ἔστι δὲ τοῦ [ὑ]πομνήματος τὸ ἀ(ντίγραφον)·
30 Ἐξ [ὑ]πομνηματισμῶν Α[ὐρ]ηλίου Ἀπολλωνίου τοῦ καὶ Εὐδαίμ[ονος στρα(τηγοῦ) Ὀξ(υρυγχίτου). Ὑπατείας τῶν δεσποτῶν ἡμῶν Κωνσταντίνου]
31 καὶ Λικιννίου Σεβαστῶν τὸ δ Μεσορὴ ιγ. Ἐν τῷ λογιστ[ηρίῳ - ca.? -] ἀπὸ κώμης Σέσφθα τοῦ αὐτοῦ νομοῦ ἐγτυγχάνει κατὰ Παπνου[θίου - ca.? -]
32 ὁ στρατηγ(ὸς) εἶπ(εν)· κτλ.

Hier zeigt sich klar, dass beim Strategen die Amtsjournale immer noch in Gebrauch waren und auch die Prozesse darin protokolliert wurden (ἐξ [ὑ]πομνηματισμῶν, Z. 30). Das Prozessprotokoll hatte allerdings bereits die Form des Einzelprotokolls, das mit den Konsulsdatum beginnt (Z. 30 Ὑπατείας κτλ.). Die Abschrifte, die dann aus dem Amtsjournal genommen wird, heisst τοῦ ὑπομνήματος τὸ ἀντίγραφον (Z. 29), wobei der Terminus ὑπόμνημα zu erkennen gibt, dass die Gesamtdokumentation bereits als Einzelakt vorlag oder als solcher gesehen wurde.[79]

Gegen die Mitte des vierten Jh. verschwindet dann diese Form des Zitats auch aus den Schriftstücken der Strategen und Exaktoren, und zugleich verschwindet auch der Terminus „Amtsjournal," ὑπομνηματισμός, der bis dahin auch noch für die Sitzungsprotokolle der Bulai verwendet wurde,[80] gänzlich aus unserer Evidenz. Die lokalen Dokumentationsformen hatten mit jenen der statthalterlichen Kanzleien gleichgezogen.

So manifestiert sich in der Einführung der bilinguen Protokolle unter Diokletian die administrative Gleichschaltung Ägyptens mit den anderen Teilen des Römischen

[79] Ein vergleichbarer Sprachgebrauch liegt wahrscheinlich auch schon in P.Sakaon 32 = P.Thead. 14 (Ars., 254–268) vor, wo in Z. 17–18 das Zitat aus einem älteren Gerichtsprotokoll eingeleitet wird mit den Worten: [- ca.? - ἀνα]γνωσθέντος ⏐ ὑπομνήματος γενομένου ἐπὶ τοῦ διασημοτάτου Σεπτιμίου Ἀπολλωνίου κοσμήλσαντος τὴν δι[οί]κησιν.

[80] So beispielsweise in P.Oxy. XLIV 3187, 1–2 (24. Juli 300): ἐξ ὑπομνηματισμῶν τῆς κρατίστης βουλῆς τῆς λαμπρᾶς καὶ λαμπροτάτης Ὀξυρυγ'χ(ιτῶν) πόλεως. Plausibel ergänzt auch in SB XX 15026, 3 (Herm., 18. April 322): [ἐξ ὑπομνηματισμῶν τῆς κρατίστης βουλῆς Ἑρμοῦ πόλεως].

Ostens, in dem Aufkommen des Einzelprotokolls seit der Severerzeit eine grundsätzlich neue Form und Organisationsweise der amtlichen Dokumentation. Eine neue diplomatische Gestaltung spiegelt zumeist juristische Änderungen wider: Im spätantiken Prozess ist die unter Ausschluss der Öffentlichkeit *in secretario* stattfindende Verhandlung von der öffentlichen Urteilsfällung abgesondert. Deshalb wird auch das Urteil (in der ersten Person formuliert) nun getrennt ausgefertigt.[81] Die Aufzeichnungen werden nach Fällen, nicht chronologisch, angelegt. Eine andere Konsequenz des Einzelprotokolls ist, dass die bis ins spätere dritten Jh. häufig geübte Praxis, auf Präzedenzfälle zu verweisen, in der Tetrarchenzeit aufgegeben wurde.[82]

Die Entwicklung der Protokollordnung war freilich mit der Diokletianischen Neuregelung keineswegs abgeschlossen. Bereits ab der Mitte des vierten Jh. finden sich in den Prozessprotokollen Beispiele für einen Verfahrenstyp,[83] der in der Forschungsliteratur gemeinhin als „Libellprozess" bezeichnet wird und erst in der justinianischen Epoche seine endgültige Ausgestaltung erhalten hat.[84]

Ergebnis

– Der Übergang von der Gerichtsprotokollierung in den Amtstagebüchern hin zum Einzelprotokoll hat nicht erst unter Diokletian, sondern bereits unter den Severern stattgefunden;

– Der Übergang dokumentiert zugleich eine neue Form der Aktenführung, die nicht mehr an den chronologisch geordneten Amtsjournalen ausgerichtet ist, sondern an der einzelnen Causa; für jede Causa wird ein separater Akt angelegt;

– Die Einführung des bilinguen Protokolls vollzog in Ägypten nur die Angleichung an eine Protokollform, die in anderen Gebieten des gräkophonen Ostens bereits seit Generationen etabliert war;

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81 Vgl. etwa P.Münch. I 6 (Syene?, 538), dazu Bickermann, Testificatio 348.

82 Haensch, Typisch römisch 120 geht davon aus, dass die früher so weit verbreitete Praxis durch Präfektenentscheidung außer Kraft gesetzt wurde.

83 SB XVIII 13769 = ChLA XLV 1337 (Herm., 345–352?); P.Oxy. LXIII 4381 (Alex., 375); SB XXVIII 17147 (Antin., Mitte 5. Jh.); P.Oxy. XVI 1876–1879 (Datierungen von 434 bis 480), s. dazu Steinwenter, Neue Urkunden zum byzantinischen Libellprozesse 36–51; Wenger, Neue Libellpapyri 325–334, bes. 327 und Palme, Militärgerichtsbarkeit 375–408.

84 Collinet, La procédure par libelle 428–431. Ausführliche Darstellungen finden sich danach bei Zilletti, Studi sul processo civile giustinianeo bes. 23–29 und Simon, Justinianischer Zivilprozeß bes. 37–63; s. weiterführend Kaser, Hackl, Zivilprozeßrecht 570–576.

– Dieser Schritt steht in dem größeren Zusammenhang der administrativen Angleichung Ägyptens an die anderen Reichsteile im Zuge der Diokletianischen Reformen um 298;

– Die Einführung des bilinguen Protokolls geht einher mit einem veränderten Umgang mit Präzedenzfällen: sie werden seit ca. 300 nicht mehr herangezogen;

– Die neue Form der Protokollierung betraf zunächst nur die Kanzleien der römischen Amtsträger. Auf der untergeordneten Ebene der Gaue bzw. Civitates blieben sowohl die Führung der Amtsjournale (*hypomnematismoi*) als auch die herkömmliche formale Gestaltung und die griechische Sprache der Protokolle von Gerichtsverhandlungen bis mindestens in die Mitte des vierten Jh. erhalten.

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THE GENESIS OF BYZANTINE BILINGUAL REPORTS OF PROCEEDINGS: A RESPONSE TO BERNHARD PALME

Bernard Palme's paper "die Genese der bilinguen Prozessprotokolle im byzantinischen Ägypten" focuses on one of the most intriguing and as yet (at least until recently) understudied types of documentary genres that have come down to us on papyri from Greco-Roman Egypt: proceedings of hearings by judges in Roman and Byzantine Egypt. The corpus of court proceedings (my own list consists of nearly 500 items) sheds light on innumerable issues relating to the administrative, social and even cultural history of Egypt.[2] The subject matter discussed in the hearings included property and hereditary rights, taxation, the liturgical system and many others.[3] The proceedings also address procedural issues, the different stages of the hearing, types of evidence admitted in court, and the delegation of the case to subordinate officials, thus forming an irreplaceable piece of evidence on the essence and working of the *cognitio extra ordinem* of the early and late Roman period in Egypt and throughout the empire.[4] The proceedings are, or at least should be, of interest to students of ancient texts and their key literary genres: the dialogue, which is applied as a literary medium in Greek poetry, philosophy and historiography, is also widely attested in court proceedings, in the section recording the interrogation of the litigants and the witnesses by the judge.[5] Yet unlike in the case of the above-mentioned examples, the dialogue in the proceedings is not fictional: the text of the proceedings is meant to convey the dialogue that took place between the judge and

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[1] The present paper was composed in connection with the project *Synopsis: Data Processing and State Management in Roman Egypt (30 BCE–300 CE)* sponsored by *the German-Israeli Foundation for Scientific Research and Development*, conducted in collaboration with Professor Andrea Jördens of the University of Heidelberg. All dates reported are naturally CE. If the location of the court is not stated in the text, the provenance of the papyri reported below is that of the document's place of excavation.

[2] Cf. also B. Kelly, *Petitions, Litigation, and Social Control in Roman Egypt* (Oxford 2011) 368–380, and Palme, in this volume, n. 5.

[3] Cf., e.g., *BGU* I 15 col. 1 = *WChr* 393 = *Sel.Pap*. II 246 (194, Arsinoitēs): liturgies. *BGU* I 361 = *MChr* 92 = *FIRA* III 57 (184, Arsinoitēs): testamentary disposition. *P.Fam.Tebt*. 19 = *SB* VI 9252 (118, Arsinoitēs): credit-related. *P.Rein*. I 44 = *MChr* 82 (104, Hermopolis): property rights.

[4] Cf. M. Kaser, K. Hackl (ed.), *Das römische Zivilprozessrecht* (Munich 1996) 468–470.

[5] Cf., e.g., *SB* XXIV 16258 = *BGU* I 163 (108, Soknopaiou Nēsos) and Kelly (supra n. 2) 181–183.

the litigants during the litigation. We rarely get closer, in any ancient source, to hearing 'real people' conversing. At the same time, despite the great potential treasure for the study of these questions and many others to be gleaned from an exhaustive investigation of the proceedings, such an investigation has never, as far as I know, been undertaken. With Palme's contribution, as well as with various research projects recently launched and colloquia recently held that focus on court proceedings and the administration of justice in the Roman empire,[6] we may anticipate much progress in the study of court proceedings in the very near future.

As for the time-frame, students of Roman Egypt mark different significant breaks in the history of the province: the Roman occupation, the reigns of Nero and Vespasian, the reorganization of the procuratorial offices by Hadrian, the municipal reform of Septimius Severus of 200 CE are some of the more significant ones. At the same time, hardly any of these changes surpasses in intensity and consequences the administrative reforms undertaken by the emperor Diocletian and his successors. Those reforms, which left their mark on almost all types of documentary genres, did so also in the case of the court proceedings.[7] As Palme demonstrates, the formal and most obvious manifestation of the change is the choice of the language. Court proceedings from earlier times are monolingual, that is Greek. Greek is also maintained after Diocletian, with one major exception: the title of the judge and his comments are now given in Latin, with or without a Greek translation. In addition, while in earlier times the court hearing was recorded alongside the remaining activity of the judging official in the chronological account of his daily activities, now it is recorded in an independent and separate file.[8]

Palme is also able to contextualize both aspects of the reform. As for the partial Latinization of the reports, Palme shows that Diocletian was introducing into Egypt with his reform what had already been a common practice in other Greek provinces for decades. This pattern, of Egypt catching up in what had already been a common practice in other provinces for decades and centuries, is exemplified in various other spheres of documentary activity: take consular dating for example, a practice already attested in documents from early second-century Arabia.[9] Palme also shows that the

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[6] R.Haensch, *Recht haben und Recht bekommen im Imperium Romanum. Das Gerichtswesen der römischen Kaiserzeit und seine dokumentarische Evidenz: Ausgewählte Beiträge einer Serie von drei Konferenzen an der Villa Vigoni in den Jahren 2010 bis 2012* (forthcoming). I thank Professor Haensch for discussing with me the forthcoming publication.

[7] Cf., in general, J. Lallemand, *L'administration civile de l'Égypte de l'avènement de Dioclétien à la création du diocèse (284–382). Contribution à L'étude des rapports entre L'Égypte et l'Empire à la fin du III^e siècle et au IV^e siècle* (Brussels 1964) 34–40 et passim.

[8] Palme, text accompanying notes 34–48. The recognition goes back to E.Bickermann's seminal article, '*Testatio actorum*: Eine Untersuchung über antike Niederschrift "zu Protokoll" ', *Aegyptus* 13 (1933) 333–355 at 346–348.

[9] *P.Yadin*, pp. 27–28.

reform was not implemented across the board for all types of judges. It is restricted to high-ranking officials: the governor, *praesides*, the *rationalis*, and the *comites*, while proceedings of hearings held by officials ranking lower hold on to the earlier format. This is also the case with the second aspect of the reform, the shift from the documentation of the proceedings in the chronological account of his activities (*hypomnematismoi*) to a separate and independent document. The change here, which may take place in the case of high-ranking officials even before Diocletian, is not evident in the case of lower-ranking judges until later in the fourth century.

Palme discusses changes in particular in the outer framework of the document, not however in the account of the various stages of the hearing as manifested in the structure of the proceedings. In this respect, Palme argues that the sections evident in early Roman proceedings are also found in their fourth-century counterparts: the introductory clause, the body of the proceedings, the sentence and a concluding note by the scribe.[10] While this is certainly the case, when we look into the second section of the text, the body of the proceedings, fourth-century texts exhibit what seem, at least *prima facie*, to be a new element. The text opens with a detailed account, by the plaintiff, or his or her representative or advocate, of the contents of the plea. The text of the account is extremely long, sometimes taking almost the entire body of the document[11] and resembles in contents and formulation that of petitions to officials from Greco-Roman Egypt.[12] The account seems to be common in proceedings of cases heard by high-ranking officials, the governor of Egypt, the *praesides*, the

[10] Palme, text accompanying notes 52–57.

[11] Cf., e.g., *P.Ryl*. IV 654 = *ChLA* IV 255 (302–309 (?), Oxyrhychitēs): [-ca.?-]ruṣṣ[. . . . . .. I]an[ua]r(ius) [Τῦβι . (.)] Oxuruncho | [2] Paulo [e]x ci̱vitat[e Oxur]unch[i]tarum [A]polinar[i]us dix(it): | [3] [λινόυφο]ς τὴν τέχνην ἐστίν, σύνδ[ικον] δὲ εἶναι δεῖ τοῦ τὴν ἐργασίαν πληροῦνl[4][τος· ἔσ]τ̣ιν γὰρ αὐτῷ συνεργὸς Παῦλο̣[ς] οὗτος μαθητὴς μὲν τυγχάνον (read τυγχάνων), εἰς | [5] [ἄσκησι]ν δὲ τῆς τέχνης ἀφ{ε}ικόμενος. οὗτοι δὴ καθ' ἑαυτοὺς ὡς οὐκ ὀλίγα | [6] [ταῖς δημ]ο̣σίαις τυγχάνουσ{ε}ι χρείαις χρήσιμοι ⟦ο⟧ καὶ σὺ οὐμὸς δεσπότης συνl[7][οῖδας. τ]ᾧ̣ γὰρ ἀναβολικῷ πλ‹ε›ῖστα συντελοῦσ{ε}ιν καὶ ὅσαπερ ἀπὸ τούτων ἀπερl[8][γασθῆνα]ι δεῖ. ἀλ‹λ›' οἱ οἰκόδομοι δικουσει (read δικαιοῦσι (?)) τῆς τοσαύτης ἐπειγούσης χρείας | [9] [ἀεὶ κατ ' α]υτοὺς μόνον συνορᾶν. τὸν γὰρ δὴ βοηθούμενον οἰκ[ό]δομο̣ν | [10] [ποιῆσ]αι (?, cf. BL 4.75) σπουδά{σ}ζουσ{ε}ιν λινόυφον τυγχάνοντ' ἀπράγμονα τολμοῦσ̣τ̣ες (read τολμῶντες) | [11] παρα[ν]ομ̣ότατον (read παρανομώτατον). τῆς μὲν γὰρ τέχνης ἣν μεμάθηκεν ἀποσπῶσ{ε}ιν, | [12] ἑτέρα[ν] δὲ τὴν τῶν οἰκοδόμων ἐκδ‹ε›ιδάξαι βούλονται. ἐπὶ γυναίου (?, cf. BL 11.191) τῇ οἰκ{ε}ίᾳ | [13] φυλαχθῆναι δεῖ αὐτὸν {προσήκει} {ε}ἵνα μηδεμίαν ὑπὸ τῶν οἰκο⟦.⟧δόμων πάσl[14]χοι βίαν. προνοεῖσθαι τούτου τὸν στρατηγὸν καὶ τὸν λογιστὴν ἀξ{ε}ιοῖ. | [15] Maximiaṇụ[s] v(ir) p(erfectissimus) iuridicus Aeg(ypti) dix(it): | [16] ὁ λογιστὴς καὶ σ[τ]ρατηγὸς προνοήσονται εἰς τὰ ὑπ[ὸ τού]τ̣[ου κατηγορημένα εἰ τὴν] | [17] τέχνην ἐκμημάθηκεν (read ἐκμεμάθηκεν) καὶ ἤδη ἐν ταύ̣τ̣ῃ τῇ ἐργασίᾳ ἐσ̣τ̣ὶν̣ εἰς ἑτέραν μὴ | [18] μεταφέρεσθαι τέχνην.

[12] Note in particular in the case of *P.Oxy*. LXIII 4381 = *ChLA* XLVII 1431 (375, Oxyrhynchos) the routine *captatio benevolentiae* (ll. 4–6), and the concluding act of appeal (ll. 8–10). Cf. also, in general, Kelly (supra n. 2) 173–174.

rationalis and the *comites*, that is the very officials whose reports become semi-Latinized with the reform of Diocletian.[13] This is not, on the other hand, the case in the extant proceedings of hearings held by a *logistēs*, nor in the one instance each in which the case is heard by a bishop, *hypomnematographoi,* a *stratēgos* and by a *defensor*.[14]

One could provide two, not necessarily mutually-contradictory, explanations for the incorporation of that account in fourth-century court proceedings. It cannot be ruled out that the reform of Diocletian involved some internal restructuring of the proceedings: such a restructuring left its mark, if not in the general division of the proceedings, than at least in the contents and style of the individual sections.[15] This interpretation is supported not only by the court proceedings themselves, but also by the emphasis, in late Roman legal sources, on the importance of that account for the introduction of a litigation,[16] as well as by seven additional contemporary documents that seem to contain the litigant's account as it is to be pleaded in court by his

[13] *P.Berl.Zill*. 4 = *ChLA* X 463 (ca. 350, Hermopolis) [*praeses Thebaidos*] ? ; *P.Harrauer* 46 = *ChLA* XLI 1188 + *SPP* XIV, p. 4 (332, Hermopolis) [*praeses Thebaidos* ?]; *P.Kramer* 11 = *SPP* I p. II (299, Antinoopolis (?)) [*praeses Thebaidos* ?]; *P.Lips*. I 33 = *MChr* 55 = *ChLA* XII 525 = *FIRA* III 175 (368, Hermopolis) [*praeses Thebaidos*]; *P.Lond*. III 971 p. 128 = *MChr* 95 (IV, unknown provenance) [uncertain]; *P.Oxy*. IX 1204.11–29 = *Sel. Pap*. II 294 (299, Oxyrhynchos) [*rationalis*]; *P.Oxy*. LXIII 4381 = *ChLA* XLVII 1431 (375, Oxyrhynchos) [*comes Aegypti*]; *P.Ryl*. IV 654 = *ChLA* IV 255 (302–309 (?), Oxyrhynchitēs) [*iuridicus*]; *P.Sakaon* 33 = *P.Ryl*. IV 653 = *ChLA* IV 254 (320 (?), Ptolemais Euergetis) [*praeses Aegypti Herculiae*]; *P.Sakaon* 34 = *P.Thead*. 13 = *ChLA* XLI 1204 (321 CE—Ptolemais Euergetis) [*praeses Aegypti Herculiae*]; *SB* XVIII 13769.7–23 = *ChLA* XLV 1337 (345–352 (?), Hermopolis) [governor] (?). In *SB* XIV 11615 = *P.Mich*. XX 812 (373, Oxyrhynchos or Pelusion) [*Praeses Augustamnicae*], the introductory formula is relatively short, and the text is Greek in its entirety. The introductory account is not applied in *P.Lips*. I 38 = *ChLA* XII 520 = *FIRA* III 174 = *MChr* 97 = *Jur.Pap*. 91 (390, Hermopolis) [*praeses Thebaidos*] and in *SB* XVI 12581 = *ChLA* XII 522 (310 (?), Arsinoitēs (?)) [*praeses* (?)], perhaps because the hearings focus on procedure rather than on matters of substance. It is also absent in *P.Abinn*. 63 = *MChr* 96 = *P.Bour*. 20 (350, Alexandria) where the case is heard by a *iuridicus*.

[14] Bishop: *P.Lips*. 43 = *MChr* 98 = *FIRA* III 183 (IV, Lykopolis (?)), and Lallemande (supra n. 7) 151–152. *Defensor*: *SB* XVI 12692 = *P.Col*. VII 175 = *SB* V 8246 (part.) = *FIRA* III 101 (part.) (339, Karanis). *Hypomnematographoi*: *P.Herm*. 18 (323, unknown provenance). *Logistēs*: *P.Oxy*. XVIII 2187 (304, Oxyrhynchos); LIV 3757 (325, Oxyrhynchos); 3758 I (325, Oxyrhynchos); 3758 III (325, Oxyrhynchos); 3759 (325, Oxyrhynchos); 3767 (329 or 330, Oxyrhynchos); 3775 col. II (342, Oxyrhynchos). *Stratēgos*: *P.Col.* X 285, col. 2 (315, Oxyrhynchitēs).

[15] Cf., in general, Kaser-Hackl (supra n. 4) 592–594.

[16] *CJ* 3.9.1 (202 CE, but perhaps interpolated): *Lis enim tunc videtur contestata, cum iudex per narrationem negotii causam audire coeperit*, and, e.g., P. Bonetti, 'La *litis contestatio* in uno scolio dei Basilici', in *Studi in onore di B. Biondi* (Milan 1965) 467–484.

advocate and eventually incorporated into the text of the proceedings itself.[17] But there is also another explanation, which may fit well with Palme's observations.

Let us start with earlier, that is second-century CE, texts: an introductory account by the plaintiff or his representatives is not an innovation of the fourth century CE. Among nearly 150 second-century court proceedings surveyed by me, such an account is incorporated in as many as thirty-seven cases.[18] *CPR* I 18 (124,

[17] *P.Col*. VII 174 (342 (?), Karanis); *CPR* VII 13 (III/IV, unknown provenance) ? ; *Lips*. I 41 = *MChr* 300 (late IV, Hermopolis); *P.Panop*. 31 = *SB* XII 11224 frag. B (ca. 329, Panopolis); *P.Sakaon* 35 = *P.Thead*. 16 (ca. 332 (?), Theadelphia); *SB* XII 10989 = *P.Princ*. III 119 (ca. 325, unknown provenance); *SB* XIV 11717 (mid IV, Hermopolis). The texts have been the focus of scholarly attention primarily due to a monogram in the shape of a slashed N which opens the account. One view, represented primarily by legal historians up to the 1970s, proposed the resolution *n*(*arratio*), and studied the phenomenon in connection with role of the *narratio* in the postclassical *cognitio extra ordinem* as discussed by contemporary, and later legal sources. Cf., e.g., A.A. Schiller, Legal Commentary in N.Lewis, A.A. Schiller, 'Another 'narratio' document', in A. Watson (ed.), *Daube Noster. Essays in Legal History for David Daube* (Edinburgh 1974) 191–200. This view has later been discarded. A good overview is provided by N.Lewis, 'The symbol ℕ', in *Festschrift zum 100-jährigen Bestehen der Papyrussammlung der österreichischen Nationalbibliothek (P.Rainer.Cent.)* (Vienna 1983) 121–126.

[18] *BGU* I 82 (185, Arsinoitēs) [*archiereus*]; 136 = *MChr* 86 (135, unknown provenance) [*archidikastēs*]; 347 col. II (171, Arsinoitēs) [*archiereus*]; III 969 (139, Arsinoitēs) [delegation]; XI 2058 (164, Alexandria) [*praefectus Aegypti*]; XIII 2216 (156, Soknopaiou Nēsos) [*archiereus*] ?; *MChr* 372 col. 1, l. 14–col. 3, l. 10 (117, Coptos) [delegation]; *CPR* I 18 = *SPP* XX 4 = *MChr* 84 = *Jur.Pap*. 89 (124, Ptolemais Euergetis) [*praefectus alae*]; *P.Cair.Preis*. 1 = *P.Fay*. 203 descr. (after 148, Arsinoitēs) [not clear]; *P.Fam.Tebt*. 15.131–146 (109, Arsinoitēs) [*stratēgos*]; 19 = *SB* VI 9252 (118, Arsinoitēs) [*stratēgos*]; 24 with partial copy in *SB* IV 7404 (124, Arsinoitēs) [*stratēgos*]; *P.Fouad* I 23 (145, Alexandria (?)) [*praefectus Aegypti* (?)]; *P.Mich*. VI 365 (194, Karanis) [*epistratēgos*]; *P.Mil.Vogl*. I 25 col. 2–col. 4 l. 17 (126/7, Arsinoitēs) [*stratēgos*]; col. 4 l. 15–col. 5, l. 20 (127, Arsinoitēs) [*archidikastēs*]; 27 col. 3 (129, Tebtynis) [*stratēgos*]; II 98.4–24 (138/9 (?), Tebtynis) [*praefectus Aegypti*]; 98.25–64 (after 138/9, Tebtynis) [*eklogistēs*]; *P.Münch*. III 67.4–12 (110 or 129, Arsinoitēs) [unknown]; *P.Oslo* II 17 = *Pap.Choix* 7 (136, Prosōpitēs) [*stratēgos*]; III 81 (197, Arsinoitēs) [*stratēgos*]; *P.Oxy*. I 40 = *Pap.Choix* 16 = *Sel.Pap*. II 245 (143, Oxyrhynchos) [*praefectus Aegypti*]; II 237.7.19–29 (128, unknown provenance) [*praefectus Aegypti*]; XXII 2340.1–24 (192, Alexandria) [unknown]; XLII 3016 = *ChLA* XLVII 1418 (148, Oxyrhynchos) [*praefectus Aegypti*]; *P.Phil*. 3 (123, Arsinoitēs) [*stratēgos*]; *P.Ross.Georg*. II 24 (157–159, Memphitēs) [*stratēgos*]; *P.Tebt*. II 287 = *WChr* 251 (161–167, Tebtynis) [*iuridicus* (?), *praefectus Aegypti* (?)]; *PSI* IV 281^{r}.41–48 (118, Oxyrhynchos) [*epistratēgos*]; *SB* V 7558.12–41 = *FIRA* III 30 = *Sel.Pap*. II 260 (148, Karanis) [*epistratēgos*]; V 7601 frag. c col. II (135 CE—Hērakleopolitēs) [*stratēgos*]; XIV 12139 col. 2–col. 4, l. 14 (146, Xois) [delegation]; col. 4 l. 15–col. 5, l. 20 (146, Alexandria (?)) [*archidikastēs*]; XVI 12555 = *BGU* 245 (1–9, 24–32) = *P.Alex*. 5 (ll. 10–23) = *BGU* XI 2071 (ll. 10–23) (138–144, Alexandria) [*iuridicus*]; XXIV 16258 = *BGU* I 163, with a second copy in *SB* XXIV 16257 col. 2 (108, Arsinoitēs) [*stratēgos*]; *SPP* XXII 51 (153, Soknopaiou Nēsos) [*archiereus*].

Ptolemais Euergetis) provides a good example: the representative of the plaintiff gives succinctly and lucidly the key elements of his client's argument, which is then followed by a reply by the antagonist, and then eventually also by the ruling.[19] In this particular case the exposition is much shorter than in the fourth-century counterparts, apparently indicating some form of processing and abbreviation vis-à-vis the speech as delivered in court, abbreviation that is evident in other parts of the text as well,[20] though other contemporary court proceedings seem to exhibit a more detailed account.[21] Yet the main difference between the second-century material and that of the fourth-century lies in the accumulation of second-century cases in which the detailed introductory account, or other elements that are regularly inserted into the text of the proceedings, are omitted or drastically abbreviated. This is the situation in as many as fifty cases in all. Among these fifty cases, the proceedings stem from all possible courts, even from the office of the emperor itself.[22]

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[19] *CPR* XVIII 18.5–15 = *SPP* XX 4 = *MChr* 84 = *Jur.Pap*. 89: π[αρ]ό[ν]τος Κλαυδίου Ἀρ[τεμ]ιδώρου νομικοῦ Ἀφροδείσιος Ἀπολλω|[6]ν[ίο]υ πρὸς Ἀμμώνιον Ἀ[π]ίωνος τοῦ Ἀ[φ]ροδεισίου διὰ Σωτηρί|[7]χου ῥήτορος εἰπόντος [σ]υνελθόντα ἑαυτὸν ἀγράφως Σαραποῦτί | [8] τινι ἐσχηκέναι ἐξ αὐ[τ]ῆς Ὡριγένην ὃς ἐτελεύτησεν καὶ | [9] ἄλλους· τοῦ νόμου καλοῦντος τοὺς πατέρας ἐπ[ὶ] τὰ[ς] κληρονομίας | [10] τῶν ἐξ ἀγράφων παίδων τὸν ἀντίδ[ι]κον θέλειν κατὰ δια|[11]θή[κ]ην κληρονόμον ⟦ειν⟧ ε[ἶ]ναι τοῦ Ὡριγένους, οὐκ ἔχοντος ἐκεί|[12]νου ἀπὸ τῶν νόμων ἐξουσίαν περιόντος πατρὸς εἰς ἄλλον τινὰ | [13] γράφειν δ[ια]θήκην, παραξίου [π]αρ[α]νόμο[υ] οὔσης [τ]ῆς εἰς τὸν ἀντίλ|[14]δικον δι[α]θήκης ἀντιποιεῖσθ[α]ι τῶν ὑπὸ τοῦ υἱοῦ καταλειφθέν|[15][των·

[20] The piece of evidence brought forward by the antagonists to corroborate their case, a will written seven months before the present trial, is not quoted in full. Instead the scribe records (ll. 21–22) its date formula only.

[21] Cf., in particular, *P.Fam.Tebt*. 24 (124, Arsinoitēs), and R.A. Coles, *Reports of proceedings in papyri* (Papyrologica Bruxellensia 4) (Brussels 1966) 17–18.

[22] *BGU* I 15 col. 1 = *WChr* 393 = *Sel.Pap*. II 246 (194, Arsinoitēs) [*epistratēgos*]; 19 = *MChr* 85 (135, Arsinoitēs) [delegation]; 168.20–24 = *MChr* 121 (169, Arsinoitēs) [*basilikos grammateus*, filling in for the *stratēgos*]; 288.14–23 (144–147 CE, Arsinoitēs) [*praefectus Aegypti*]; II 587 (141, Arsinoitēs) [unknown]; IV 1085.11–15 (165, unknown) [unknown]; *MChr* 372 col. 1, ll. 5–13 = *BGU* I 114 = *FIRA* III 19 = *Jur.Pap*. 22 a (117, Alexandria?) [*praefectus Aegypti*]; col. 3, ll. 10–22 (114, Alexandria?) [*praefectus Aegypti*]; col. 4, ll. 1–15 (115, Alexandria?) [*praefectus Aegypti*]; col. 4.16–col. 5 passim (142, Alexandria?) [*praefectus Aegypti*]; col. 6 (135, Alexandria?) [*idios logos*]; *P.Amh*. II 64.1–9 (107, Hermopolis) [*praefectus Aegypti*]; *P.Bacch*. 20 = *SB* VI 9329 (171, Bacchias) [*archiereus*]; *P.Bingen* 78 (late II, Oxyrhynchos) [*stratēgos* ?]; *P.Bon*. 16 (II–III, Unknown) [unknown]; *P.Fam.Tebt*. 42.9–32 (180, Antinoopolis) [*praefectus Aegypti*]; *P.Harr*. I 67.5–12 (ca. 150, Unknown) [*praefectus Aegypti*]; *P.Lips*. II 147 (189, Antinoopolis (?)) [*epistratēgos*]; *P.Oslo* II 17 = *Pap.Choix* 7 (136, Prosōpitēs) [*stratēgos*]; *P.Oxy*. II 237.7.29–38 (133, unknown provenance) [*epistratēgos*]; II 237.7.39–8.2 (87, unknown provenance) [*iuridicus*]; II 237.8.18–21 (151, unknown provenance) [*praefectus Aegypti*]; VIII 1102 (ca. 146, Oxyrhynchos) [*hypomnematographos*]; XVII 2111.1–12 (ca. 135, Oxyrhynchos) [*praefectus Aegypti*]; 2111.13–19 (ca. 135, Oxyrhynchos) [*praefectus Aegypti*]; 2111.20–50 (ca. 135, Oxyrhynchos) [*praefectus Aegypti*]; XLII 3015.6–12 (109, Oxyrhynchos); 3015.13–27

How can we explain these fifty cases? As stated by Palme, in the early Roman period the proceedings were recorded in the *hypomnematismoi* of the different officials, yet as far as I know none of the second-century protocols that have come down to us stems from the *hypomnematismoi* themselves.[23] In all cases we are dealing with copies, made mostly by private persons. The level of detail and the sections copied vary: the text sometimes encompasses the entire hearing, sometimes just the verdict, and most frequently something in between. This variety can best be explained if we assume that the copyists of the reports were at liberty to take from the *Vorlage* only those elements that would best serve their case and leave out the rest. Sometimes, but by no means always, the text omitted is replaced by the formula μετ᾽ ἄλλα, μετ᾽ ἕτερα, ἐκ τῶν ῥηθέντων *vel sim.*[24] And, in general, an omission may be assumed in all cases in which the details of the individual case can no longer be reconstructed with ease.[25] My assumption is that an introductory account, by the

(107–112, Oxyrhynchos) [*praefectus Aegypti*]; *P.Rein*. I 44 = *MChr* 82 (104, Hermopolis (?)) [delegation]; *P.Ryl*. II 75.1.1–12 = *Sel.Pap*. II 259 (150, unknown provenance) [*praefectus Aegypti*]; 75.1.13–20 (150, unknown provenance) [*praefectus Aegypti*]; 75.2 (174, unknown provenance) [*praefectus Aegypti*]; 77.32–47 (192, Hermopolis) [*stratēgos*]; *P.Stras*. III 146 = *SB* V 8261 (156–159, Arsinoitēs) [*praefectus Aegypti*]; *P.Tebt*. II 286 = *MChr* 83 = *FIRA* III 100 (131, Tebtynis) [emperor]; *PSI* IV 281^{r}.23–25 (107–112, Oxyrhynchos) [*praefectus Aegypti*]; 281^{r}.39–41 (107–112, Oxyrhynchos) [*praefectus Aegypti*]; *PSI* X 1100 = *Sel.Pap*. II 143 (161, Arsinoitēs) [*epistratēgos*]; *SB* VI 9016 col. 1.1–5 (Koptos, 160) [*archiereus*]; 9050 = *P.Amh*. II 65 col. 1 (100, unknown) [*praefectus Aegypti*]; 9050 col. 2.11–col. 3.8 (112, Naukratis) [*praefectus Aegypti*]; 9050 col. 3.10–col. 4 passim (105, Memphis) [*praefectus Aegypti*]; 9315 = *P.Wisc*. II 81 (143, unknown provenance) [*praefectus Aegypti*]; XII 10967.19–28 (155 CE, Memphis) [*praefectus Aegypti*]; 10967.29–37 (150 CE, unknown provenance); XIV 11379 (156, Tebtynis) [*praefectus Aegypti*]; 12087 = *P.Oslo* II 18 Frag. A l. 18 – Frag. B passim (152, Arsinoitēs) [*stratēgos*]; XIV 12139 col. 1 (155, unknown provenance) [*praefectus Aegypti*]; XVI 12749 = *P.Stras*. IV 179 (partially) (176–179, Arsinoitēs) [*praefectus Aegypti*]; XXII 15782.11–15 (150/1, unknown provenance) [*praefectus Aegypti*].

[23] A view shared by Coles (supra n. 21) 17, 36.

[24] Cf., e.g., *P.Oxy*. XLII 3015.6–12 (109, Oxyrhynchos): (ἔτους) ιβ θεοῦ Τραιανοῦ Παχὼν ιγ. Ἄρειος καὶ Σαραπίων | [7] ἀμφότεροι Πτολεμαίου πρὸς Ἀθηνόδωρον καὶ | [8] Ἀπολλώνιον· **ἐκ τῶν ῥηθέντων**· Σουλ(πίκιος) | [9] Σίμιλις πυθόμενος Ἀρτεμιδώρου τοῦ ἐξη|[10]γουμένου το[ὺς] νόμους περὶ τοῦ πράγματος | [11] καὶ συνλαλήσας τοῖς συμ[β]ούλοις ἔφη· Αἰγύ|[12][π]τιος εἶχεν ἐξουσίαν καθὼς βούλεται διαθέσθαι, and in the same document, ll. 13–15 (117–112, Oxyrhynchos): [13] [(ἔτους)] θεοῦ Τρα[ι]αν[ο]ῦ Τῦβι κ ἐπὶ τῶν κατὰ Τρύφωνα | [14] [πρὸ]ς Διδ[. . . . .] **μεθ᾽ ἕ[τερα]**· Σουλ[πίκι]ος Σίμιλις | [15] [συνλ]αλή[σας κτλ.

[25] Note, for example, *P.Amh*. II 64 (107, Hermopolis): δεκάτου ἔτους Τραιανοῦ Καίσαρος τοῦ κυρίου Φαμενὼθ λ. | [2] ἀναγνωσθέντος περὶ δαπάνης εἰς τὸ ἐκ καινῆς κατασκευαζόμενον | [3] βαλανεῖον καὶ τὴν πλατεῖαν τάλαντα δέκα ἕξ , κα[ὶ] προσειπόντος | [4] Ἡρακλείδου στρατηγοῦ καὶ ἄλλα μετοξὺ (sic!) δεδα[π]ανῆσθαι, Οὐίβιος | [5] Μάξιμος· προσεκρίθη τῆι πόλει παρὰ Θέωνος πεν[τ]ήκοντα τάλαντα | [6] καὶ ἐκ τῶν τῆς γυμνασιαρχίδος ἄλλα δοκῶ μοι εἴκοσι . ἐκ τῶν προσ|[7]κριθέντ[ων] τῆι

plaintiff or his representatives, was always incorporated into the proceedings, that is the original text of the proceedings as produced at the judge's bureau, and if the introductory clause has not come down to us (as was the case with the above mentioned fifty cases) the blame is with the copyist, who deemed its introduction immaterial for his personal purposes.[26] What is especially interesting is that the aforesaid compilation was undertaken regardless of the identity or rank of the judge. Be it the emperor, the governor, or the *iuridicus*, the copyists showed no hesitation in omitting any parts of the *Vorlage* they wished.

Let us now return to the fourth century: the accumulation of cases in which the proceedings open with a detailed account by the plaintiff of his plea, may point to a real, substantial change in the structure of court proceedings in late antiquity. I do not dismiss this explanation. But the explanation I am going to present here is different, and perhaps more methodologically intriguing for the student of any documentary material that is used as evidence for any practical purpose, be it in the *dikastēria* of fourth-century BCE Athens or the courts of the Roman officials in fourth-century CE Egypt.[27] When a litigant wishes to present a text in a court of law, be it for example, a law, would it be sufficient to quote the absolute minimum that will warrant the authenticity of the cited passage, or is he required to bring forward the entire text? In second-century CE Egypt, I suspect, the former was the case. The text needed to give the identity of the official from whose proceedings the text was taken, and the accurate date, but then the copyist was perfectly free to add just the elements conducive to his case.

What changed in the fourth century was that now, at least according to the evidence discussed by Palme and by myself, one was inclined to bring forward the whole thing *verbatim*, so it seems.[28] Does this change derive from particular circumstances, relating to the preservation methods or terms of applicability of the particular genre? This is not unlikely. One should note that by bringing forward a selection the copyist may tend to distort, advertently or not, the contents of the original. Citing the entire text would certainly solve this problem. Or perhaps the change in the proceedings is symptomatic and indicative of a more profound change in the attitude towards *Vorlage*, and if so, is the change evident in other spheres of intellectual activity?[29] All these questions I am naturally not able to answer. Be that

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πόλει ἀποκαταστ[αθ]ήτω. Ἡρ[α]κλείδης· τίνος καὶ | [8] τίνος ὑπαρχόντων; Οὐίβιος Μάξιμο[ς]· ἔχε[ι]ς ἐν τοῖς ὑπομνημα|τισμοῖς μου.

[26] R.Haensch, 'Typisch römisch? Die Gerichtsprotokolle der in Aegyptus und den übrigen östlichen Reichsprovincen tätigen Vertreter Roms. Das Zeugnis von Papyri und Inschriften', in H. Börm, N. Ehrhardt, J. Wiesehöfer (eds.), *Monumentum et instrumentum inscriptum : beschriftete Objekte aus Kaiserzeit und Spätantike als historische Zeugnisse : Festschrift für Peter Weiss zum 65. Geburtstag* (Stuttgart 2008) 117–126 at 124.

[27] Cf., e.g., M.Gagarin, 'Abuse is in the Eye of the Beholder', (forthcoming). I thank Professor Gagarin for allowing me to consult the text before its publication.

[28] Bickermann (supra n. 8) 346–347, Coles (supra n.21) 24.

[29] This question is also discussed by Haensch (supra n. 26) 124 with n. 43.

as it may, in the case of court proceedings of high-ranking officials in Roman Egypt, what seems at first sight to be a profound transformation of their structure may in fact derive from changing conventions regarding their quotation, and transmission by second-hand users. With this, not entirely insignificant observation, I end my response.

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KAJA HARTER-UIBOPUU (WIEN)

RECHTSHISTORISCHE ÜBERLEGUNGEN ZU DIO CHRYSOSTOMUS' REDE AN DIE RHODIER*

Einleitung

Die 78 Reden und Essays des bithynischen Philosophen Dio Chrysostomus liefern ein buntes und abwechslungsreiches Bild aus dem Leben griechischer Städte in der frühen Kaiserzeit und sind eine wichtige Quelle für sozial- und kulturgeschichtliche ebenso wie für politische Aspekte. Auch für Rechtshistoriker sind die Texte von großem Interesse, da Dio immer wieder von Institutionen und der Administration der Poleis seiner Zeit berichtet und Vergleiche zu früheren Epochen anstellt. Wenn diese Informationen auch nicht unkritisch als Quellen zum jeweils geltenden materiellen Recht oder Prozessrecht herangezogen werden können, ist es doch möglich, durch Vergleich mit anderen Autoren und vor allem mit epigraphischen Zeugnissen Aussagen zum Recht in griechischen Städten unter römischer Herrschaft zu tätigen.[1] Gerade die 31. Rede an die Rhodier eignet sich für eine rechtshistorische Analyse in besonderem Maße. Der Text wird in vespasianische oder trajanische Zeit datiert und fällt damit in eine politisch unruhige Zeit der Insel. Das Privileg der *libertas* wurde im ersten Jh. n.Chr. zumindest zweimal aberkannt, wenn auch jeweils kurze Zeit später wieder zugesprochen.[2] Es besteht kaum ein Zweifel daran, dass Dio bei einem Besuch der Insel auf seinem Weg nach Alexandria wirklich dort gesprochen hat, zumal die Stadt von Reisenden am Weg nach Ägypten häufig besucht wurde. Die heute vorliegende Version der Rede ist aber wohl von ihm selbst überarbeitet und möglicherweise erweitert worden. Sie umfasst 165 Kapitel, der Vortrag vor der Volksversammlung hätte in dieser Form damit gut zweieinhalb Stunden gedauert.[3] Der Aufbau der Rede zeigt wohl deutlich, dass es sich nicht um eine wortgetreue

* Die schriftliche Version des vorliegenden Beitrages wurde während eines Forschungsaufenthaltes am Institute for Advanced Study in Princeton ausgearbeitet. Ich danke dem „Fund for Historical Studies" für die Unterstützung und Christopher P. Jones für wertvolle Anregungen.

1 Zur Analyse der dionischen Reden unter dem Blickwinkel der städtischen Verfassung siehe im besonderen die Biographie des antiken Autors von Jones 1978 und die Bewertung dieser Studie durch Swain 2000, 40–43.

2 Varianten der Datierung: 70–75 n.Chr., A. Momigliano 1951, 149–153; Jones 1978, 133, von Arnim 1898, 210–218. In der jüngeren Forschung hat sich die Spätdatierung der Rede durchgesetzt, 98–117 n.Chr. (nach Dios Exil): Sidebottom 1992, 407–419, ihm folgen Swain 1996, 428–429 und Salmeri 2000, 77 Anm. 115.

3 Jones 1978, 26–35; Platt 2007, 257.

Niederschrift des Vortrages handelte. Gegenstand dieser Überarbeitung ist meines Erachtens vor allem der zweite Teil, in dem sich Dio intensiv mit der demosthenischen Rede gegen Leptines und damit mit einem Werk seines Vorbildes auseinandersetzt.[4]

Das Thema der Rede ist die Umbenennung und Wiederverwendung von Ehrenstatuen, in Dios Augen ein Missverhalten der Rhodier, auf das der Redner nach einer kurzen Einleitung sehr direkt eingeht. Die Rhodier, so vermerkt er mehr als einmal, täten gut daran, sich die Kritik, die er im folgenden ungefragt äußert, zu Herzen zu nehmen und ihr Verhalten umgehend zu ändern.[5]

> (9) ὅταν γὰρ ψηφίσησθε ἀνδριάντα τινί· ῥᾳδίως δὲ ὑμῖν ἔπεισι τοῦτο νῦν ὡς ἂν ἄφθονον ὑπάρχον· ἐκεῖνο μὲν οὐκ ἂν αἰτιασαίμην, τὸ χρόνον τινὰ καὶ διατριβὴν προσεῖναι· τοὐναντίον γὰρ εὐθὺς ἕστηκεν ὃν ἂν εἴπητε, μᾶλλον δὲ καὶ πρότερον ἢ ψηφίσασθαι· συμβαίνει δὲ πρᾶγμα ἀτοπώτατον· ὁ γὰρ στρατηγὸς ὃν ἂν αὐτῷ φανῇ τῶν ἀνακειμένων τούτων ἀνδριάντων ἀποδείκνυσιν· εἶτα τῆς μὲν πρότερον οὔσης ἐπιγραφῆς ἀναιρεθείσης, ἑτέρου δ' ὀνόματος ἐγχαραχθέντος, πέρας ἔχει τὸ τῆς τιμῆς, ...
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> *Wenn ihr für jemanden eine Statue beschließt – und zur Zeit kommt ihr rasch auf diese Idee, denn euch stehen genügend zur Verfügung – kann ich euch kaum vorwerfen, dass ihr Zeit braucht oder Verzögerungen eintreten. Ganz im Gegenteil: Sofort wird derjenige aufgestellt, für den ein Antrag gestellt wurde, beinahe noch bevor der Beschluss gefasst wurde. Es geschieht aber Unziemliches: Der* strategos *deutet auf diejenige der bereits aufgestellten Statuen, die ihm ins Auge fällt. Nachdem die ursprüngliche Inschrift entfernt wurde, wird der Name eines anderen eingeschlagen, und die Ehrung ist fertig.*

Wenn also in Rhodos in einem Volksbeschluss zur Ehrung eines Wohltäters eine Statue beschlossen wurde, so trat nicht die übliche Verzögerung ein, die das Fertigen oder Errichten einer Statue normalerweise bedingte. Auf Anweisung des Strategen wurde die Inschrift von einer bereits aufgestellten Statue entfernt, diese mit einer neuen versehen und als Ehrenmal verwendet. Diese Praxis erscheint nach den archäologischen und epigraphischen Quellen durchaus gängig für den späten Hellenismus und die Kaiserzeit. H. Blanck unterscheidet in seiner Untersuchung der Wiederverwendung alter Statuen vier verschiedene Verfahrensarten: Die inschriftliche Bezeichnung einer Statue, die bislang keine Inschrift trug, die Aufzeichnung einer neuen Inschrift auf einer Statuenbasis, mit oder ohne Entfernung des alten Texts (*metagraphe*), das Abmontieren des Porträtkopfs und Anbringen eines neuen Kopfes

[4] Der Exkurs in Kapitel 128–138 mag in der ursprünglichen Version gefehlt haben oder wesentlich kürzer gehalten gewesen sein. Er richtet sich mit seinen Anspielungen auf die athenische Geschichte wohl mehr an den gebildeten Leser als an den Rhodier in der Volksversammlung. Zur Vorbildwirkung des Demosthenes s. Jones 1978, 35. Vgl. auch Philostr. Vit. Soph. 487–488.

[5] 31,1–3; der Redner übt auch am Verhalten anderer Städte offen Kritik, so etwa in der Rede an Alexandreia (Dio 32, Jones 1978, 36–44), an Apameia in Phrygien (Dio 41, Jones 1978, 65–70) und an Tarsos (Dio 33 und 34, Jones 1978, 71–82).

(*metarrhythmesis*) sowie schließlich die Verwendung einzelner Elemente aus Statuengruppen in neuer Zusammenstellung.[6] Für alle Arten führt er zunächst literarische und archäologische Beispiele an.[7] In weiterer Folge stellt er die epigraphischen Quellen vor, die zumeist von der Basis der jeweiligen Ehrenstatue(n) stammen. Nicht immer lässt sich dabei einwandfrei feststellen, ob lediglich die Basis einer anderen Verwendung zugeführt wurde, oder aber damit auch die Statue „umbenannt" wurde, die darauf stand. Ersteres Vorgehen nimmt Blanck dort an, wo der Stein einfach gedreht und eine andere Seite beschriftet wurde, letzteres, wo die alte und die neue Inschrift auf der gleichen Seite des Steins angebracht und zudem keine Spuren der Verwendung einer anderen Statue vorhanden waren.[8] Aus Rhodos selbst sind lediglich drei Inschriften erhalten, die von einer Wiederverwendung einer Statuenbasis zeugen.[9] Darunter zeigt wohl Tit. Cam. 96 das von Dio kritisierte Vorgehen deutlich: der graue rechteckige Marmorblock trägt auf der Rasur einer älteren Inschrift ein kurzes Ehrendekret der Kamireier für Athanodotos, Adoptivsohn des Damagetes, das – den Buchstabenformen zufolge – aus der frühen Kaiserzeit stammt.[10] Die meisten Belege für wiederverwendete Basen stammen allerdings aus Athen – der Stadt, die Dio den Rhodiern als leuchtendes Beispiel vor Augen hält, weil sie sich von der Unsitte der Umbenennung von Ehrenstatuen eben nicht habe anstecken lassen. Dio spart nicht mit Kritik am Verhalten der Athener seiner Zeit und wirft ihnen die Freigiebigkeit vor, mit der sie Ehrungen auch an unwürdige Personen vergeben (116ff.). Er hebt aber andererseits hervor, dass eine Geringachtung von einmal gewährten Ehren durch Wiederverwendung der Statuen bei ihnen

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6 Blanck 1969, 23–24; siehe auch Platt 2007, 252–266 mit einer Analyse des Verhältnisses von *metagraphe* und Identität. Das Thema wurde ausführlich auch auf einer Tagung in Zürich 2011 behandelt, deren Ergebnisse jüngst als Kongressakten vorgelegt wurden: Leypold – Mohr – Russenberger 2014.

7 Die meisten literarischen Quellen berichten von Kaiserstatuen, einige wenige aber auch von der Wiederverwendung von Ehrenstatuen privater Personen, Blanck 1969, 14–22. So wußte Plutarch, dass aus der Gruppe der Ehrenstatuen für die Familie des Isokrates, die zur Zeit des Redners auf der Akropolis aufgestellt war, die Statue seiner Mutter zu Plutarchs Zeit bei der Hygieia zu finden und mit einer neuen Inschrift versehen war (Plut. X orat. Isokr. 839D). Cicero schreibt seinem Freund Atticus, dass er zwar gerne mit einer Statue in Athen geehrt werden würde, aber sich gegen eine Inschrift auf der Statue eines Fremden verwehre (Cic. ad Att. 6,1,26). Schließlich kennt auch Pausanias einige Beispiele umbenannter Statuen: 1,2,4 und 1,18,3 (Athen); 2,9,8 (Sikyon); 2,17,3 (Mykene). Zur 37. Rede im Corpus des Dio, die inzwischen unzweifelhaft seinem Schüler Favorinus zugerechnet wird, siehe unten bei Anm. 34.

8 Blanck 1969, 65–66.

9 I.Lindos 447 bezeugt die Wiederverwendung einer Domitiansstatue zur Ehrung des Nerva (Blanck 1969, 88, B54), I.Lindos 427 diejenige einer Platte aus dem ersten Jh. n.Chr., die den Ehrentitel „Priester der Athena Lindia und des Zeus Polieus" vermerkte und im dritten Jh. n.Chr. durch weitere Priestertitel erweitert wurde (Blanck 1969, 89, B59).

10 Blanck 1969, 86, B43; Ausmaße des Steins: 0.92 – 0.49 – 0,23, Clara Rhodos II, 204 Nr. 37 mit Photographie des Steins.

undenkbar sei (105 und 123). Das Gegenteil belegt unter anderem IG II^2 3850/4159, eine Basis für die Statuen von Lysidemos und seiner Mutter Sostrate, deren Beschriftung aus dem Anfang des dritten Jh. v.Chr. stammt. Das Denkmal wurde um die Wende des ersten Jh. v.Chr. zum ersten Jh. n.Chr. mit zwei neuen Inschriften versehen, die zeigen, dass es aufgrund eines Volksbeschlusses zu Ehren von L. Valerius L.f. Catullus und Terentia Cn.f. Hispulla, wohl seiner Mutter, weiterverwendet wurde. Die ältere Inschrift blieb in diesem Fall auf der Basis erhalten, die jüngere wurde ebenso in zwei Kolumnen nebeneinander gesetzt wie die ältere. Die Ehrung der Mutter – jeweils in der rechten Kolumne – beginnt im jüngeren Text eine Zeile oberhalb der Ehrung des Sohnes, da auch der hellenistische Ehrentext für die Mutter eine Zeile kürzer ist: der Steinmetz passte bewusst den neuen Text an den Stein an.[11] Zu den wiederverwendeten Ehrenstatuen aus Athen hat J. Shear überzeugend festgestellt, dass der Hintergrund dieser „sparsameren" Ehrungen von römischen Würdenträgern nicht nur in der wirtschaftlichen Lage Athens zu sehen sei. Ihrer Meinung nach handelte es sich dabei vielmehr auch um eine besondere Form der Aufnahme der Römer in die athenische Gemeinschaft.[12] Es ist davon auszugehen, dass Dio das Vorgehen der Athener gut bekannt war und das Argument den Rhodiern gegenüber ein gutes Beispiel für eine rhetorisch begründete Verfälschung der Realität ist, ein Kunstgriff den der Rhetor immer wieder anwendete.

Dio kritisiert die Vorgehensweise der Rhodier unter verschiedenen Gesichtspunkten, wobei das Hauptargument die Schädigung des Geehrten und seines Ansehens durch „Aberkennung" der Ehre und die Schädigung des Ansehens der Rhodier durch dieses beschämende Verhalten bilden. Das Vorgehen werde der *philotimia*, der Freigiebigkeit und dem Streben nach Ehre (und Ehrung) der Wohltäter nicht gerecht und sei eine Schande für die Rhodier, die gerade unter Fremdherrschaft stets zu den herausragenden Städten unter den Griechen gehört hätten (27f.; 57; 100; 113; 134; 153ff.). Nicht zuletzt werde es den Rhodiern zum Schaden gereichen, weil niemand mehr der Stadt Wohltaten erweisen werde, wenn er den gerechten Lohn dafür nicht erhalte (29; 65). Dieser Lohn würde – so Dio – zumindest in einem neuen Standbild bestehen, das vor Weiterverwendung geschützt sein müsse (16; 20ff.; 59). Ethische ebenso wie politische Bedenken hält der Rhetor den Rhodiern vor

[11] Shear 2007, 238–241; Blanck 1969, 78 Nr. B26. Ähnlich ist der Befund zu IG II^2 4149 (Blanck 1969, 83 Nr. B35) ist ein Ehrendekret, das ebenso um die Zeitenwende zu datieren ist. Auch hier handelt es sich um eine Doppelstatuenbasis, der Text steht auf einer Rasur einer älteren Inschrift, von der nur mehr wenige Spuren erhalten sind. Ein ähnliches Beispiel ist IG II^2 3792 (Blanck 1969, 85 Nr. B40) aus dem ersten Jh. n.Chr., wiederum sind Spuren einer eradierten Inschrift erhalten. Zum Vergleich zwischen Rhodos und Athen s. Jones 1978, 31–32.

[12] „The monuments further suggested that the Romans were, in fact, Athenians of some sort and the Acropolis setting should have reinforced this identity." (Shear 2007, 254–246). Hierzu auch Platt 2007, 254–256.

Augen und versucht damit, sie zum Umdenken zu bewegen und ihnen nahezubringen, dass sie ihr Verhalten ändern sollen.[13]

Im Folgenden möchte ich eine Reihe von juristischen Argumenten analysieren, die Dio zur Qualifizierung des rhodischen Fehlverhaltens heranzieht. In Analogien geht er scheinbar auf das in der Polis geltende Recht ein, nennt Tatbestände und beschreibt deren Rechtsfolgen. Es bleibt zu erörtern, ob sich diese Angaben verifizieren lassen, oder ob ein sichtlich gebildeter Rhetor mit vorgeblichem Fachwissen seine Zuhörerschaft beeindrucken will. T. Whitmarsh nennt Dio einen „slippery and ironical writer,"[14] entsprechend schwierig – aber auch spannend – ist die Suche nach dem rechtshistorischen Kern der Argumentation in der rhodischen Rede. Verschiedene Vergleiche mit Straftatbeständen aus dem Recht griechischer Poleis, die Dio in seiner Rede anstellt, sollen einer näheren Untersuchung unterzogen werden. Dabei wird zunächst die Argumentation des Redners vorgestellt, bevor anhand vergleichbarer literarischer und vor allem epigraphischer Quellen überprüft werden kann, ob in den griechischen Poleis der Schutz der Statuen und damit auch der Ehrbezeugungen wirklich in der von Dio geschilderten und geforderten Weise geregelt war. Dio setzt die Wiederverwendung von Statuen zunächst einem Eingriff in das Eigentum des Geehrten gleich, dann der *hierosylia* und/oder *asebeia* und schließlich den Vergehen gegen den Staat.[15]

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[13] An verschiedenen Stellen der Rede macht Dio seinen Auftrag der Umerziehung der Rhodier deutlich. (1): ὥστε ἐπειδὰν αἴσθησθε τῶν ὑμετέρων τι κοινῶν ἐγχειροῦντα ἐπανορθοῦν, δυσχερανεῖτε ἴσως, εἰ μήτε πολίτης ὢν μήτε κληθεὶς ὑφ' ὑμῶν ἔπειτα ἀξιῶ συμβουλεύειν, ... *Wenn ihr nun merkt, dass jemand versucht in einer Angelegenheit, die euch alle betrifft, zu berichtigen, werdet ihr es vielleicht nicht ertragen, wenn ich, weder ein Bürger noch von euch gerufen, dennoch wünsche, euch Rat zu erteilen ...*; (35): τὸ δὲ πρᾶγμα εἰ τοιοῦτόν ἐστιν ὥστε πάναισχρον δοκεῖν ἐξεταζόμενον, τοσούτῳ προθυμότερον ὑμᾶς ἀκούειν δεῖ τοῦ λέγοντος, ὥστε ἀπηλλάχθαι τὸ λοιπὸν τῆς αἰσχύνης. *Wenn die Angelegenheit bei näherer Prüfung äußerst schändlich erscheint, so müsst ihr umso aufmerksamer dem Redner zuhören, damit die Schande für die Zukunft abgewendet werden kann.*; (72); (85): μὴ τοίνυν ἀχθεσθῆτε τῷ νῦν αὐτὸ δοκοῦντι εἰρηκέναι· τοῦ γὰρ μηκέτι μηδ' ἀεὶ λέγεσθαι γένοιτ' ἂν ὑμῖν αἴτιος. *Seid nun nicht ungehalten mit demjenigen, der glaubt, euch dies erklärt zu haben. Denn er ist vielleicht dafür verantwortlich, wenn dies nicht mehr oder nicht mehr für immer von euch gesagt werden kann*. Ebenso 129; 143 und der eindringliche Appell am Schluss der Rede.

[14] Whitmarsh 2001, 161.

[15] Dio vergleicht das Umbenennen der Statuen und Aufheben der Ehren auch noch mit weiteren Tatbeständen: Täuschung und Betrug (13, 38–39); Hybris (14); Münzfälschung (24, 33); Vergehen gegen Waisen (73); Beantragen eines Schuldenerlasses oder einer Landaufteilung (66–70). Eine nähere Erörterung dieser – vor allem rhetorischen – Vergleiche ist nicht zielführend, da aus den literarischen und epigraphischen Zeugnissen an keiner Stelle eine Gleichsetzung des Entfernens einer Inschrift oder der Aufhebung von Ehren mit einem dieser Vergehen gefunden wurde.

1. Wiederverwendung von Statuen als Eingriff in das Eigentum des Geehrten

Gerade die erste Analogie zeigt deutlich Dios Kunst- und Redefertigkeit: Den Ausgangspunkt für die Frage nach dem Eigentum an Statuen liefert der hypothetische Einwand der Rhodier, dass die Ehrungen mit immer neuen Statuen einen zu großen finanziellen Aufwand für die Stadt darstellten.[16] Aber – so Dios drastischer Vergleich – wenn die Stadt mit den Kosten Probleme habe, könne sie dann auch in anderen Situationen auf die Habe ihrer Bürger zurückgreifen, etwa wenn ein Mauerbau oder die Ausrüstung eines Schiffes anstehe? Man müsse doch nur Bürgern oder Fremden ihr Land, ihr Geld oder ihre Häuser wegnehmen (45). Das allerdings, so weiß der Redner die Antwort der Rhodier vorwegzunehmen, würde man nie tun. Die Rhodier erwidern, dass es sich mit den Statuen ganz anders verhielte und die Situation nicht zu vergleichen sei, denn die Statuen gehörten ja der Stadt.

(47) ἴσως οὖν ἐρεῖ τις ὡς οἵ γε ἀνδριάντες τῆς πόλεώς εἰσιν. καὶ γὰρ ἡ χώρα τῆς πόλεως, ἀλλ' οὐθὲν ἧττον τῶν κεκτημένων ἕκαστος κύριός ἐστι τῶν ἑαυτοῦ. καὶ κοινῇ μὲν ἐὰν πυνθάνηταί τις τίνος ἐστὶν ἡ νῆσος ἢ τίνος ἡ Καρία, φήσουσι Ῥοδίων. ἐὰν δὲ ἄλλως ἐρωτᾷς, τουτὶ τὸ χωρίον ἢ <τόνδε> τὸν ἀγρόν, δῆλον ὅτι πεύσῃ τοῦ δεσπότου τὸ ὄνομα. <οὕτως> καὶ τὰς εἰκόνας ἁπλῶς μὲν πάσας Ῥοδίων εἶναι λέγουσιν, ἰδίᾳ δὲ ἑκάστην τοῦ δεῖνος ἢ τοῦ δεῖνος, ᾧ ἄν ποτε ᾖ δεδομένη. καίτοι τὰ μὲν χωρία καὶ τὰς οἰκίας καὶ τἄλλα κτήματα οὐκ ἂν εἰδείης ὧν ἐστιν, εἰ μὴ πυθόμενος· ἡ δὲ εἰκὼν ἐπιγέγραπται, καὶ οὐ μόνον τὸ ὄνομα, ἀλλὰ καὶ τὸν χαρακτῆρα σῴζει τοῦ λαβόντος, ὥστ' εὐθὺς εἶναι προσελθόντα εἰδέναι τίνος ἐστίν.

Nun sagt aber vielleicht jemand, dass die Standbilder der Stadt gehörten. Aber auch das Land gehört der Stadt, und doch hat um nichts weniger jeder einzelne die volle Verfügungsmacht über seine Besitztümer. Oder wenn jemand ganz allgemein fragt: Wem gehört die Insel, oder wem gehört Karien, sagt man: Den Rhodiern. Wenn aber die Frage anders gestellt wird, nach diesem Grundstück oder jenem Acker, so ist es klar, dass man den Namen des Eigentümers nennt. So kann man auch von den Standbildern sagen, dass sie alle einfach den Rhodiern gehören, jedes einzelne für sich aber diesem oder jenem, wem es eben gegeben wurde. Bei Ländereien und Häusern und anderen Besitztümer kann man nicht wissen, wem sie gehören, wenn man nicht fragt. Das Standbild aber ist beschriftet, und bewahrt nicht nur den Namen sondern auch die Züge des Betreffenden, sodass man gleich beim Hinzutreten sieht, wem es gehört.

Zunächst beschäftigt Dio – und damit auch den Leser – die Frage nach der Terminologie. In dem fiktiven rhodischen Einwand wird für die Besitzanzeige das Verb εἶναι mit dem Genitivus possesionis verwendet. Der Begriff lässt sich im Deutschen mit dem – juristisch ebenso schwammigen – „gehören" wiedergeben. Genau darauf

[16] Dio baut seine Rede rund um die möglichen Argumente der Rhodier zu ihrer Verteidigung auf. Immer wieder lässt er einen oder mehrere von ihnen „zu Wort kommen" und ein Argument einbringen, das er als Redner dann sofort und eloquent entkräften kann. Nicht alle Argumente und Vergleiche werden gleichwertig behandelt, einigen widmet er ausführlichere Antworten, andere beseitigt er sofort.

zielt Dios Gegenargument ab: Ebenso wenig, wie die Insel Karpathos oder Karien öffentliches Eigentum des rhodischen Staates seien, da die einzelnen dort befindlichen Grundstücke ja im Privateigentum Einzelner ständen, wären also Statuen öffentliches Eigentum der Stadt, da sie ja „*dem einen oder dem anderen gegeben worden seien*" (ἰδίᾳ δὲ ἑκάστην τοῦ δεῖνος ἢ τοῦ δεῖνος, ᾧ ἄν ποτε ᾖ δεδομένη). Durch die Gegenüberstellung „Staat–Privatbürger" im Fall des Landes in der Peraia und im Fall der Statuen erweckt Dio bewusst den Eindruck, dass die Statuen Eigentum der Geehrten seien, auch wenn er konsequent nur die Konstruktion mit dem Genitivus possessionis anwendet. Noch dazu sei der Status der Statuen klarer ersichtlich, als derjenige eines Grundstückes, da diese ja beschriftet seien und nicht nur den Namen, sondern auch die Züge des Besitzers zeigten (47).[17]

Kurz darauf relativiert Dio sein Argument allerdings und gibt zu, dass die Geehrten ihre Statuen nicht in der gleichen Art und Weise erworben hätten (κτήσασθαι) wie andere Güter:

> (49) ὅλως δὲ οὐκ εἰ μὴ τοῦτον τὸν τρόπον ἕκαστος τὴν εἰκόνα ἔχει τῶν τιμηθέντων, καθάπερ ἂν ἄλλο τι κτησάμενος, διὰ τοῦτο ἂν ἔλαττον αὐτῷ προσήκειν λέγοιτο ἢ μηδὲν ἀδικεῖσθαι διδόντων ὑμῶν ἑτέρῳ τὴν ἐκείνου. μυρίους γὰρ εὑρήσετε τρόπους, καθ' οὓς ἑκάστου τί φαμεν εἶναι, καὶ πλεῖστον διαφέροντας, οἷον ἱερωσύνην, ἀρχήν, γάμον, πολιτείαν· ὧν οὔτε ἀποδόσθαι τι ἔξεστι τοῖς ἔχουσιν οὔτε ὅπως ἄν τις ἐθέλῃ χρῆσθαι.
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> *Alles in allem ist es nicht so, dass jeder von den Geehrten das Standbild auf die Art und Weise hat, auf die er etwa etwas anderes erworben hat, trotzdem kann man nicht sagen, dass es ihm weniger zukomme oder dass ihm nicht Unrecht getan werde, wenn ihr seine (Statue) einem anderen gebt. Denn ihr werdet tausende Arten finden, nach denen wir sagen, dass etwas jemandem gehört, und höchst unterschiedliche, so wie etwa ein Priesteramt, ein Amt, eine Ehe, ein Bürgerrecht. Von diesen nun steht es denen, die sie haben, nicht zu, sie etwa zu verkaufen oder auf beliebige Art zu gebrauchen.*

Auch wenn die Statuen also nicht „erworben" wurden, stünden sie jedem Geehrten zu (αὐτῷ προσήκειν) und es sei Unrecht, sie wegzunehmen. Ein wichtiger Grundsatz sei ja, dass jedermann ungestört besitzen könne (βεβαίως ἔχειν, 50) und dass ihm nichts genommen werde (ἀφαιρεῖσθαι, 50).[18] Auch wenn sich Dio also nicht durchgehend für die These des Privateigentums entscheidet, zieht sie sich weiter durch die Rede und wird immer wieder angedeutet. Eine weitere Schwierigkeit, die Dios Text bietet, lässt sich gerade an diesem Argument gut zeigen: Der Redner vermengt immer wieder die Statuen selbst, also die materielle Form der Ehrungen, und die Ehren, die dem Wohltäter insgesamt zugedacht werden und auch wesentli-

[17] Zum Verhältnis zwischen ὄνομα und χαρακτήρ an dieser Stelle siehe Platt 2007, 259–261.

[18] An dieser Stelle wird einmal mehr deutlich, dass Dio das Rechtsempfinden der Rhodier anspricht, auch ohne jeweils geltende Normen dafür zitieren zu müssen, und damit der Argumentation der Gerichtsredner, die *agraphoi nomoi* heranziehen, folgt.

che immaterielle Elemente enthalten. Natürlich ist die Aufstellung einer Statue die sichtbarste und sicher eine der wichtigsten Formen einer Ehrung, aber wenn schon das Privateigentum an dieser materiellen Form schwer zu argumentieren ist, geht es mit den immateriellen Ehrungen noch schwerer. Um sein Argument zu untermauern, vergleicht Dio an der vorliegenden Stelle den Besitz an Statuen mit dem „Besitz" eines Amtes, einer Ehe oder des Bürgerrechts, also mit weiteren immateriellen Gütern (wiederum durch den Gen. possessionis ausgedrückt). Es ist nicht immer leicht zu entscheiden, ob Dio gerade von den ἀνδριάντες oder εἰκόνες oder aber allgemeiner von den τιμαί spricht, und wo innerhalb eines Arguments der Wechsel stattfindet.[19]

Zwei weitere Argumente für das öffentliche Eigentum an Statuen werden von den fiktiven Rhodiern angeführt und von Dio verworfen. Zunächst weist er die Überlegung, alles, was auf öffentlichem Grund stehe, sei auch öffentliches Eigentum, als „lächerlich" zurück, mit dem gleichen Argument könne man ja sagen, alle Waren auf dem Markt oder alle Schiffe im Hafen gehörten der Stadt.[20] Trotzdem hat er das Argument vorgebracht, um auch die anderen, wesentlich vernünftigeren, Einwände gegen das Privateigentum an Statuen in ein schlechtes Licht zu rücken. Die zweite Entgegnung beschäftigt ihn ein wenig länger: Statuen würden in Rhodos „öffentlich registriert" und stünden daher im Eigentum der Stadt (48). Sofort folgt wieder der Vergleich mit dem Land an der Festlandküste und Karpathos: auch dieses sei, wie vieles andere, öffentlich registriert und dennoch unter Einzelnen aufgeteilt. Zunächst erläutert Dio, dass nicht alles, was in öffentlichen Listen verzeichnet sei, auch Eigentum der Stadt oder des Tempels sei.[21] Von der Existenz derartiger

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[19] Dass Dio zwischen den Begriffen unterscheidet und τιμή oft nicht synonym für Statue verwendet, wie dies in kaiserzeitlichen Texten durchaus vorkommen kann (Jones 1978, 28 mit Anm. 22), zeigt unter anderem (16) οἱ δὲ ἄνθρωποι δέονται καὶ στεφάνου καὶ εἰκόνος καὶ προεδρίας καὶ τοῦ μνημονεύεσθαι. καὶ πολλοὶ καὶ διὰ ταῦτα ἤδη τεθνήκασιν, ὅπως ἀνδριάντος τύχωσι καὶ κηρύγματος ἢ τιμῆς ἑτέρας καὶ τοῖς αὖθις καταλίπωσι δόξαν τινὰ ἐπιεικῆ καὶ μνήμην ἑαυτῶν. *Die Menschen aber brauchen Kränze, Standbilder, Ehrensitze und ehrendes Gedenken. Viele sind auch gestorben, um eine Statue zu erhalten und vom Herold ausgerufen zu werden, oder eine andere Ehrung, und damit der Nachwelt den gebührenden Ruhm zu hinterlassen und eine Erinnerung an sie*.

[20] (48) οὕτω μὲν γὰρ ἐξέσται λέγειν καὶ τὰ ἐν μέσῳ τῆς ἀγορᾶς πιπρασκόμενα τοῦ δήμου εἶναι, καὶ τὰ πλοῖα δήπουθεν οὐχὶ τῶν κεκτημένων, ἀλλὰ τῆς πόλεως, ἐπείπερ ἐν τοῖς λιμέσιν ἕστηκεν. *Denn so wäre es erlaubt zu sagen, dass die Waren, die mitten auf der Agora zum Verkauf angeboten werden, dem Staat gehören und die Schiffe auch nicht jeweils den Eigentümern sondern der Stadt, in deren Häfen sie liegen.*

[21] Einen Hinweis darauf, dass Standbilder in Verzeichnissen erfasst sind, liefert auch I.Eph 23, ein Reskript der Kaiser Marcus Aurelius und Lucius Verus aus dem Jahr 162/3 n.Chr. Auf Anfrage des *logistes* der Gerousia von Ephesos, Ulpius Eurykles, ob alte silberne *eikones* (wohl Statuetten), die in der Gerousia vorhanden sind, eingeschmolzen und für neue Kultbilder der Kaiser verwendet werden dürften, antworten die Kaiser, dass man zunächst auf jede erdenkliche Weise versuchen müsse, festzustellen, um welche Statuet-

staatlicher Listen ausgehend findet er ein neues Argument für seinen Standpunkt: Alle Transaktionen, die öffentlich beurkundet seien, seien sicherer (κυριώτερα) als Verträge, die bloß unter Privatpersonen geschlossen würden (51). Umso mehr müssten also die beschlossenen Ehrbekundungen sicher sein und es sei unverständlich, warum ein städtischer Beschluss lediglich auf Anordnung eines Einzelnen, des *strategos*, aufgehoben werden könne (52). An dieser Stelle findet sich auch einer der vorher angesprochenen Wechsel zwischen den Statuen und den Ehrbezeugungen: Dios Argument beginnt mit den Statuen, dann spricht er allgemein über Ehrenbeschlüsse, um im letzten Satz wieder mit der Aufstellung in der Öffentlichkeit zu den Statuen zurückzukehren.

Der Hinweis auf die öffentlichen Listen und die exponierte Aufstellung, bringt Dio zu einem weiteren Vergleich, der zu den bekanntesten Stellen der Rede gehört: Das Heiligtum der Artemis in Ephesos genieße unwidersprochen höchstes internationales Ansehen, Ephesier ebenso wie Bürger anderer Staaten, Könige ebenso wie Privatleute hinterlegten dort ihr Geld.

> (54) οὐκοῦν [ὡς] ὅτι μὲν ἐν κοινῷ κεῖται τὰ χρήματα δῆλόν ἐστιν· ἀλλὰ καὶ δημοσίᾳ κατὰ τὰς ἀπογραφὰς ἔθος αὐτὰ τοῖς Ἐφεσίοις ἀπογράφεσθαι.
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> *Es ist offensichtlich, dass die Gelder öffentlich hinterlegt sind.*[22] *Nach den staatlichen Listen ist es Brauch, dass diese bei den Ephesiern in Listen erfasst werden.*

Trotzdem, so Dio, würden es die Ephesier nie wagen, diese Gelder anzurühren oder auch nur Darlehen aus diesen Mitteln zu nehmen. Meines Erachtens ist gerade dieser Vergleich nicht zielführend: Auch wenn Dio ausdrücklich darum bittet, die Ähnlichkeit der Fälle anzuerkennen (56), besteht doch ein deutlicher Unterschied zwischen Geldern, die vom Eigentümer unter vertraglich genau geregelten Bedingungen in einem Heiligtum deponiert werden, und Statuen, die auf Anweisung der Stadt für jemanden auf öffentlichem Grund aufgestellt werden, selbst wenn beide in irgendeiner Art von staatlichen Listen erfasst sind. Zwar räumt der Deponent dem Aufbewahrer der von ihm hinterlegten Summe nach griechischem Recht wesentlich weiterführendere Befugnisse ein, als nach römischem Recht, er hat aber zu jeder Zeit das Recht, sein Geld herauszuverlangen.[23] Die Stadt entsprechend dazu als Verwahrer der Ehrenstatuen zu qualifizieren, die sie selbst beschlossen hatte, ist dem realen Rechtsleben wohl fremd. Dennoch wird gerade an dieser Stelle das rhetorische Ge-

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ten es sich dabei handle. Dazu müssen man auch die βιβλία, wenn es solche gebe, heranziehen (I.Eph 23, Z.20). Im übrigen wünschen die Kaiser, dass die *eikones* in jedem nur möglichen Fall erhalten bleiben sollen, eine Erneuerung der Ehrungen sei einem Einschmelzen der Statuen vorzuziehen.

[22] Folgt man dem Beispiel aus Thuk. 1,80, könnte man „ἐν κοινῷ" auch mit „*in der Staatskasse*" übersetzen, vgl. LSJ s.v. κοινός II 2 d, Hdt. 9,87 und Thuk. 6,6.

[23] Vgl. zum Tempeldepositum Scheibelreiter 2012, 233–235, und Walser 2008, 177–178, sowie allgemein zum Heiligtum der Artemis in Ephesos in seiner Funktion als Tempelbank Bogaert 1968, 245–254.

schick des Philosophen deutlich: Er zieht Vergleiche, die nicht passend sind, gesteht das ansatzweise auch ein und hat doch ein Bild in den Köpfen der Zuhörer erzeugt, das bleibenden Eindruck gemacht haben muss.

So postuliert Dio schließlich auch, dass er die Eigentumsfrage gar nicht klären muss, denn selbst wenn man sich über die tatsächlichen juristischen Gegebenheiten nicht im Klaren sei, sei doch ersichtlich, dass das Vorgehen der Rhodier „unziemlich" (ἄτοπος) sei (57). T. Whitmarsh konnte feststellen, dass ἄτοπος einer von Dios bevorzugten *termini* war, unter den 73 Verwendungen in den Reden finden sich alleine 14 in der Rede an die Rhodier.[24] Damit gelingt es Dio, seinen Vorwürfe die juristische Schärfe zu nehmen: Auch wenn er keine Beweise für „Unrecht" anführt und das Vorgehen somit auch nicht als ἄδικος qualifiziert, sei das Verhalten der Rhodier allemal „unziemlich."[25]

Bei einer Betrachtung der zahlreichen epigraphischen Zeugnisse zur Aufstellung von Standbildern im Rahmen von Ehrungen muss man feststellen, dass die Frage nach etwaigem privatem Eigentum an den Standbildern sichtlich nie gestellt, oder zumindest in den öffentlich angebrachten Texten nicht thematisiert wurde.[26] Jüngst beschäftigt sich J. Ma in einer Monographie zu den Ehrenstatuen in hellenistischen Städten ausführlich mit der Sprache der Ehrendekrete. Er kann feststellen, dass der Name des Geehrten im Nominativ als Beschriftung der Statue selten verwendet wird. Ebenso selten ist bei privaten Ehrenstatuen der Dativ, indem der Geehrte als Empfänger der Ehren angesprochen wird. Der typische Fall ist die Erwähnung des Geehrten im Akkusativ im Rahmen der „dedicatory formula" oder der „honorific formula." Die Inschrift auf der Statuenbasis ist im ersten Fall als Weihung des Geehrten (oder seines Abbildes) durch die Stadt oder eine andere Gemeinschaft an einen bestimmten Gott oder die Gemeinschaft aller Götter stilisiert. Im zweiten, selteneren Fall berichtet die Gemeinschaft von der Ehrung desjenigen, dessen Statue errichtet wurde. Der Genitiv findet sich bei privaten Statuen nie zur Angabe des Geehrten oder etwa seines Anrechts auf die Statue, sondern ist allgemein Inschriften vorbehalten, die göttliches Eigentum etwa einer Weihegabe oder eines Altars bezeichnen.[27]

Den privaten Anspruch auf ungestörten Besitz der Ehren und dazu gehörenden Statuen untermauert Dio zusätzlich mit einem weiteren Argument. Er vergleicht das Vorgehen mit einem entgeltlichen Rechtsgeschäft, in dem der Geehrte für seine Ehrungen bereits im vorhinein einen hohen Preis entrichtet habe. Dieser Preis gehe

[24] Whitmarsh 2001, 161.

[25] In der gleichen Art und Weise argumentiert Dio auch in (64).

[26] Zur Frage, ob Götter Eigentümer der Statuen sein konnten, siehe Abschnitt 2.

[27] Ma 2013, 18–24; zur „dedicatory formula" mit zahlreichen Beispielen 24–30, zur „honorific formula," die besonders typisch für rhodische Ehreninschriften ab dem zweiten Jh. v.Chr. ist, 31–38. Beispiele für diese Formel finden sich etwa in Lindos (I.Lindos 123, ca. 225 v.Chr.; 125, ca. 225 v.Chr.; 169, 2. Jh. v.Chr.; IG XII 1, 846; 847; 848, alle 1. Jh. v.Chr.) oder in Rhodos (IG XII 1, 90, 1. Jh. v.Chr.).

weit über das hinaus, was ein Standbild im Normalfall koste, und sei in den wenigstens Fällen in Geld übergeben worden. Wenn die Stadt nun die Ehrungen wieder aufheben wolle, so müsse sie zumindest für den „Kaufpreis" Ersatz leisten, was in einigen Fällen natürlich unmöglich sei, wenn etwa der „Kaufpreis" in der Rettung der gesamten Stadt bestanden habe (59–60). Diesem Argument des Rhetors ist nur entgegenzuhalten, dass aus keinem der zahlreich erhaltenen Ehrendekrete der Charakter eines Rechtsgeschäftes oder Vertrags, möglicherweise gar mit einem Anspruch des zu Ehrenden, zu erschließen ist.[28] Natürlich steht das Standbild mit der Ehreninschrift stellvertretend für das Verhältnis zwischen dem Wohltäter, der sich um das Wohl der Gemeinschaft oft auch in materiellem Sinn verdient gemacht hatte, und der ihn ehrenden Gemeinschaft, aber juristische Bedeutung ist diesem Phänomen nicht beizumessen.[29]

Wir erfahren häufig, wer die Kosten für die Statue oder die Errichtung des dazugehörenden Monuments trägt. Zunächst war es zumeist die Stadt selbst, die für die Ehrung aufkam, ab dem Hellenismus aber wurde es immer üblicher, dass der Geehrte noch einmal tief in seine Taschen griff und die Kosten aufbrachte – oder vielmehr aufbringen durfte, wie der Tenor der Texte lautet. Wem aber die Statue in weiterer Folge gehörte, bleibt eine Frage, die offenbar nicht gestellt wurde. Dios Argumentation führt also in eine Sackgasse, trotzdem hat er über mehr als zehn Kapitel hinweg die Umbenennung von Statuen als Eingriff in das Privateigentum diskutiert und damit das Verhalten der Rhodier angeprangert.

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[28] (56) καὶ μὴν ὧν γέ τις τὴν τιμὴν κατέβαλε τοῖς κυρίοις, οὐδ' ἀμφισβητεῖ δήπουθεν οὐδεὶς ὡς οὐ δίκαιόν ἐστιν ἐᾶν ἔχειν αὐτόν, τοσούτῳ μᾶλλον ὅσῳπερ ἂν πλείονα ᾖ δεδωκώς. οὐκοῦν ἅπαντες οὗτοι δεδώκασι τιμὴν ἕκαστος τῆς εἰκόνος τῆς ἑαυτοῦ, καὶ ταύτην οὐδὲ μετρίαν, οἱ μὲν στρατηγάς λαμπρὰς ὑπὲρ τῆς πόλεως, οἱ δὲ πρεσβείας, οἱ δὲ καὶ τρόπαια ἀπὸ τῶν πολεμίων, οἱ δέ τινες καὶ χρήματα ἴσως, οὐ μὰ Δία χιλίας δραχμὰς οὐδὲ πεντακοσίας, ὅσων ἔστιν εἰκόνα ἀναστῆσαι. *Wovon nun jemand den Preis den Eigentümern gezahlt hat, davon wird man nicht bestreiten, dass es rechtmäßig sei, wenn er es in seinem Besitz habe, umso sicherer, je mehr er etwa gegeben habe. All jene haben nun einen Preis gezahlt, jeder für sein eigenes Standbild, und zwar nicht wenig: Die einen herausragende Feldzüge zum Schutz der Stadt, die anderen Gesandtschaften, wieder andere Siegeszeichen, die Feinden abgenommen wurden, nicht zuletzt einige auch Geld, aber bei Zeus nicht nur 1000 oder 500 Drachmen, um wieviel man etwa ein Standbild errichten könnte.* I.Rhod.Per. 402, 9–16 (175–150 v.Chr., auch ediert als I.Pér.rhod. 45) überliefert einen interessanten Volksbeschluss aus Bybassos in der rhodischen Peraia, in dem festgehalten wird, dass die Kosten für die Ehrung (Kranz, Statue und Inschrift) 2100 Drachmen nicht übersteigen dürfen. Dazu sowie zu den Kosten für Ehrenstatuen, die bereits in hellenistischer Zeit nach den Zeugnissen deutlich über den von Dio genannten Zahlen liegen Ma 2013, 264–265.

[29] Zur Bedeutung von Ehrenstatuen und zur Kommunikation zwischen Stadt und Bürgern, die sich in ihnen ausdrückt, siehe die überzeugenden Ausführungen von Ma 2013, 45–62 mit weiterführender Literatur. Vgl. auch Platt 2007, 250–251.

2. Wiederverwendung von Statuen als *hierosylia* oder *asebeia*

Nachdem Dio dieses erste Argument erschöpfend behandelt hat und zu keiner Lösung der anstehenden Frage gekommen war, versucht er es auf einem anderen – dem eben vorgestellten diametral entgegenstehenden – Weg: Statuen seien Eigentum der Götter, daher sei konsequenterweise ihre missbräuchliche Verwendung ein Akt der *hierosylia*.

> (88) ἀλλ' ἐὰν μὲν θυμιατήριόν τις ἀλλάξῃ τῶν ἔνδον κειμένων ἢ φιάλην, ἱερόσυλος οὐχ ἧττον νομισθήσεται τῶν ὑφαιρουμένων· ἐὰν δὲ εἰκόνα ἀλλάξῃ καὶ τιμήν, οὐθὲν ἄτοπον ποιεῖ; (89) καίτοι καὶ τοὺς ἀνδριάντας οὐχ ἧττον ἀναθήματα εἴποι τις ἂν εἶναι τῶν θεῶν <ἢ> τοὺς ἐν τοῖς ἱεροῖς; καὶ πολλοὺς ἰδεῖν ἔστιν οὕτως ἐπιγεγραμμένους, οἷον, ὁ δεῖνα ἑαυτὸν ἀνέθηκεν ἢ τὸν πατέρα ἢ τὸν υἱὸν ὅτῳ δήποτε τῶν θεῶν. ἐὰν οὖν ἀπὸ τῶν ἄλλων ἀναθημάτων ἀφελών τις τοῦ θέντος τὸ ὄνομα ἄλλον ἐπιγράψῃ, μόνον τοῦτον οὐκ ἀσεβεῖν φήσομεν;
>
> *Denn wenn jemand ein* thymiaterion *von den darin aufgestellten oder eine Schale verändert, so wird er um nichts weniger für einen Tempelräuber gehalten werden, als diejenigen, die sie entfernen. Wenn aber jemand ein Standbild verändert und die Ehrung, soll er nichts Unziemliches tun? Könnte etwa jemand behaupten, die Statuen gehörten als Weihgaben weniger den Göttern als diejenigen, die in Heiligtümern (aufgestellt sind)? Man kann viele sehen, die solcherart beschriftet sind, etwa: Soundso weiht sich selbst oder den Vater oder den Sohn als Weihegabe einem bestimmten Gott. Wenn nun jemand von den anderen Weihegaben den Namen des Aufstellenden entfernt und einen anderen darauf schreibt, soll nur von diesem gesagt werden, dass er nichts Gottloses tue?*[30]

Grundsätzlich scheinen also die Veränderungen von εἰκόνες oder ἀνδριάντες nicht als *hierosylia* verfolgt worden zu sein, da es sich eben um Abbilder von Menschen handelte, die nicht automatisch ἱερά, aber den Göttern geweiht, waren. Hier zitiert Dio die typische Inschrift für Standbilder, die von Menschen bewusst den Göttern geweiht wurden, und setzt diese Weihungen den ἀναθήματα in Heiligtümern gleich. Derartige Texte finden sich auch in Rhodos, wie das folgende typische Beispiel einer Statueninschrift aus dem zweiten Jh. v.Chr. zeigt.

IG XII 1, 106

Κλεύστρατος Κλευχάριος
Κλείτωνα Εὐφράνορος
θεοῖς.
vacat
Βότρυς Λευκανὸς ἐχαλκούργησε.

[30] In Folge (89) erinnert Dio an eine Episode aus der Geschichte von Kyme, die auch bei Herodot 1, 159 überliefert ist. Aristodikos aus Kyme wollte – um mit Apollon über die Auslieferung des schutzflehenden Paktyas zu argumentieren – die jungen Spatzen aus ihren Nestern entfernen und wurde vom Gott sofort aufgehalten. Dieser gab an, alle Kreaturen in seinem Heiligtum schützen zu wollen.

Kleustratos, Sohn des Kleucharis, (weiht) Kleiton, Sohn des Euphranor, den Göttern. Botrys, Lukanier, hat (sie) gegossen.[31]

Neben den Angaben zum Weihenden und dem mit einer Statue Geehrten findet sich die Weihung an die Götter und die Angabe zum Künstler, die für die rhodischen Statuen üblich ist. Die Nennung des Geehrten im Akkusativ lässt auch bei Inschriften, die eine Weihung an die Götter nicht explizit nennen, den Schluss zu, dass die Statue „geweiht" wurde, also in weiterer Folge dem Gott oder den Göttern gehörte.[32] In diesen Fällen hat Dio mit seiner Analogie also durchaus Recht und die Ehrenstatuen werden durch drohende Sanktionen wegen *hierosylia* ebenso geschützt gewesen sein, wie andere Weihegaben. Bereits kurz vorher hat der Rhetor den Versuch unternommen, alle privaten Ehrenstatuen in irgendeiner Art und Weise unter göttlichen Schutz zu stellen, um die *metagraphe*, die Umbenennung, unter *hierosylia* und in weiterer Folge *asebeia* subsumieren zu können.

(80) ὅτι τοίνυν οὐδὲ ἀσεβείας ἀπήλλακται τὸ γιγνόμενον μάλιστα, ὃν οὗτοί φασι τρόπον, κἂν ὑπερβολῆς ἕνεκα δόξω τισὶ λέγειν, οὐχ, ὡς πρότερον εἶπον, ὅτι πάντα ἁπλῶς ἀσεβήματά ἐστι τὰ περὶ τοὺς τεθνεῶτας γιγνόμενα, ἀλλὰ ὅτι καὶ πάντες ἥρωας νομίζουσι τοὺς σφόδρα παλαιοὺς ἄνδρας, κἂν μηδὲν ἐξαίρετον ἔχωσι, δι' αὐτὸν οἶμαι τὸν χρόνον. τοὺς δὲ δὴ σεμνοὺς οὕτως καὶ τῶν μεγίστων ἠξιωμένους, ὧν ἔνιοι καὶ [τὰς] τελετὰς ἐσχήκασιν ἡρώων, τοὺς τοσαῦτα ἔτη κειμένους, ὥστε καὶ τὴν μνήμην ἐπιλελοιπέναι, πῶς ἔνι τῆς αὐτῆς τυγχάνειν προσηγορίας ἧς οἱ τεθνηκότες ἐφ' ἡμῶν ἢ (81) μικρὸν ἔμπροσθεν, ἄλλως δὲ μηδενὸς ἄξιοι φανέντες; καὶ μὴν τά γε εἰς τοὺς ἥρωας ἀσεβήματα οὐδ' ἂν ἀμφισβητήσειεν οὐδεὶς ὡς οὐχὶ τὴν αὐτὴν ἔχει τάξιν ἣν τὰ περὶ τοὺς θεούς. τί οὖν; οὐκ ἀδίκημά ἐστι τὸ τὴν μνήμην ἀναιρεῖν; τὸ τὴν τιμὴν ἀφαιρεῖσθαι; τὸ ἐκκόπτειν τὸ ὄνομα; δεινόν γε καὶ σχέτλιον, ὦ Ζεῦ. ἀλλ' ἐὰν μὲν στέφανόν τις ἀφέλῃ τὸν μίαν ἴσως ἢ δευτέραν μενοῦντα ἡμέραν, ἢ κηλῖδά τινα τῷ χαλκῷ προσβάλῃ, τοῦτον ἡγήσεσθε ἀσεβεῖν· τὸν δὲ ὅλως ἀφανίζοντα καὶ μετατιθέντα καὶ καταλύοντα τὴν δόξαν (82) οὐδὲν ποιεῖν ἄτοπον; ἀλλ' ἐὰν μὲν δοράτιον ἐξέλῃ τις ἐκ τῆς χειρὸς ἢ κράνους ἀπορρήξῃ τὸν λόφον ἢ τὴν ἀσπίδα τοῦ βραχίονος ἢ χαλινὸν ἵππου, τῷ δημοσίῳ τοῦτον εὐθὺς παραδώσετε, καὶ τὴν αὐτὴν ὑπομενεῖ τιμωρίαν τοῖς ἱεροσύλοις, ὥσπερ ἀμέλει καὶ πολλοὶ τεθνήκασι διὰ τοιαύτας αἰτίας, καὶ πλέον οὐδὲν λέγουσιν αὐτοῖς ὅτι τῶν ἀνωνύμων τινὰ καὶ σφόδρα παλαιῶν ἐλωβήσαντο εἰκόνων·

*Dass das, was nun passiert, besonders in der Art, wie diese Leute es schildern, nicht frei von Frevel (*asebeia*) ist, (will ich darlegen), auch wenn ich bei einigen den Eindruck erwecke, als redete ich nur der Übertreibung willen. Denn nicht nur ist – wie ich bereits sagte – alles, was in Bezug auf die Toten geschieht, bereits ein* asebema*,*

[31] DNO 3510. In gleicher Art und Weise sind in römischer Zeit auch Statuen beschriftet, die von Volk und Rat beschlossen wurden, vgl. etwa IG XII 1, 65: ὁ δᾶμος ὁ Ῥοδίων καὶ ἁ βουλὰ | Τίτον Φλαύιον Φανόστρατον | Διοκλέους τὸν ἱερῆ τοῦ Ἁλίου|[4] τὸν καὶ ἀδελφὸν ἱερέως Ἁλίου | καὶ υἱὸν ἱερέως Ἁλίου | θεοῖς. *Volk der Rhodier und Rat (weihen) Titus Flavius Phanostratos, Sohn des Diokles, den Priester des Helios, Bruder eines Priesters des Helios und Sohn eines Priesters des Helios, den Göttern.*

[32] Ma 2013, 24–30.

sondern die Männer der Vorzeit gelten alle als Heroen, auch wenn sie nichts Außergewöhnliches an sich hatten, einfach wegen des zeitlichen Abstandes. Diese vornehmen Männer wurden der höchsten Ehren für würdig gehalten, und für einige von ihnen werden auch die Riten für Heroen abgehalten, die so viele Jahre begraben liegen, dass die Erinnerung an sie verblasst ist. Wie können sie die gleiche Ansprache erhalten wie diejenigen, die in unseren Tagen oder knapp vor unserer Zeit verstarben, vor allem wenn diese nicht würdig irgendwelcher (Ehren) erscheinen? (81) Niemand wird bestreiten, dass asebemata *gegen die Heroen den gleichen Rang haben, wie diejenigen gegen die Götter. Wie aber nun? Ist es nicht ein Unrecht, die Erinnerung auszulöschen? Die Ehrung aufzuheben? Den Namen auszumeißeln? Schrecklich und frevelhaft ist es, bei Zeus! Wenn jemand einen Kranz fortnimmt, der einen oder zwei Tage hält, oder einen Fleck auf ein Standbild macht, dann haltet ihr das für einen frevelhaften Akt. Derjenige aber, der den Ruhm zur Gänze unkenntlich macht, überträgt oder auflöst, der begeht etwa nichts Unziemliches? Wenn jemand einer Statue den Speer aus der Hand nimmt, den Busch vom Helm oder den Schild vom Arm oder den Zügel vom Pferd bricht, übergebt ihr ihn auf der Stelle dem Henker, und ihn erwartet dieselbe Strafe wie die Tempelräuber. Gewiss sind schon viele wegen eines solchen Vergehens hingerichtet worden. Da nützen ihnen ihre Beteuerungen nichts, sie hätten sich nur an einer uralten Statue von einem ganz unbedeutenden Mann vergriffen.*

Die Argumentation Dios lässt sich wie folgt skizzieren: Männer, die vor langer Zeit gestorben waren, würden ohne Widerspruch mit Heroen gleichgesetzt, auch wenn sie vielleicht nichts Außergewöhnliches geleistet hatten. Taten, die sich gegen Heroen richteten, seien aber gleich zu werten, wie Taten, die sich gegen Götter richteten. Wohltäter der Stadt seien nach ihrem Tod wohl um nichts weniger als Heroen zu ehren als diejenigen Rhodier, die vor langer Zeit verstorben waren. Also sei das Vorgehen gegen Wohltäter eigentlich das Gleiche, wie das Vorgehen gegen Götter. Ob jeder Rhodier dieser Argumentation folgte, sei dahingestellt, sicher ist aber, dass Dio hier nun auch die Möglichkeit geschaffen hatte, auf die drastischen Rechtsfolgen der *hierosylia* hinzuweisen. Aus Athen ist bekannt, dass *hierosyloi* mit dem Tod bestraft wurden, und auch Dio schildert an dieser Stelle die Übergabe des Täters an den Henker.[33] Überspitzt kann er also festhalten, dass die Rhodier todeswürdige Verbrechen durch die Umbenennung der Statuen begingen.

[33] Auch in (36) wird die *hierosylia* als schwerstes Verbrechen qualifiziert. Zur *hierosylia* umfassend und immer noch grundlegend Cohen 1983, 93–115, der mit gutem Grund die Ausführungen von Latte 1920, 83–86, kritisiert. Da entsprechende Hinweise in der epigraphischen Evidenz fehlen, kann über die „übliche" Strafe für derartige Vergehen keine Aussage getroffen werden. Eine Inschrift aus Dyme aus der ersten Hälfte des zweiten Jh. v.Chr. berichtet von einem Todesurteil gegen Personen, die *hiera* gestohlen und Falschmünzen erstellt hatten (Achaïe III 2, vgl. Thür – Stumpf 1989). In diesem Fall wäre es aber auch möglich, dass die Falschmünzerei alleine schon Grund für die Verhängung einer Kapitalstrafe gewesen sein könnte. Die übrigen Texte verweisen für bestimmte Taten lediglich auf die Rechtsfolgen der *hierosylia*, welche sie dann nicht näher ausführen. Der Text aus Delos, ID 1523, der eine Zahlung von 500 (?) Drachmen erwähnt, sieht diese wohl zusätzlich zu einer Anklage wegen *hierosylia* vor, siehe unten bei Anm. 38. In ähn-

In das Corpus der dionischen Reden wurde ein zweiter Text aufgenommen, der sich mit dem gleichen Problem beschäftigt, wie die Rede an die Rhodier. Heute ist man sicher, dass der Verfasser der entsprechenden Rede an die Korinther nicht Dio selbst sondern sein Schüler Favorinus war (Rede Nr. 37).[34] Auch dieser erklärt, dass Statuen, die von der Stadt aufgestellt wurden, sofort einen geweihten Status erhielten und dementsprechend so wie Weihegaben geschützt werden müssten.

[Dio Chrys.] 37, 28
διὰ τί; ὅτι ἕκαστος τούτων τῶν παὰ ὑμῖν ἀνακειμένων, εἴτε βελτίων εἴτε χείρων ἐστίν, ἤδη τὰ τῆς ὁσίας περίκειται, καὶ χρὴ τὴν πόλιν αὐτοῦ προεστάναι ὡς ἀναθήματος.

Warum? Da jede von diesen Statuen, die bei euch aufgestellt werden, sei es eine von den besseren oder den schlechteren (Geehrten), schon zu diesem Zeitpunkt von Heiligkeit umgeben wird und es notwendig ist, dass die Stadt für sie eintritt, so wie für eine Weihegabe.

Die epigraphische Evidenz zeigt, dass die Gefahr der Umbenennung von Weihegaben oder Statuen nicht nur von Dio und Favorinus kritisiert wurde, sondern durchaus auch von Personen gesehen wurde, die Denkmäler errichten ließen. Aus Hypata in Thessalien ist eine weiße Marmorbasis erhalten, auf der die Weihenden explizit festhalten, dass die *anathemata*, die für die *thea Rhome* und die *Augusti* aufgestellt wurden, ἀμετάθετα „unverrückt" oder „unverändert" und ἀμετεπίγραφα „ohne Umschreibung" bleiben sollten. Welche Gestalt die Weihegaben hatten und ob es sich dabei möglicherweise – unter anderem – um eine Büste oder Statue des Amphias, des Sohnes der Weihenden, handelte, ist nicht klar. Das Verbot des „Umschreibens" bezog sich wohl auf den Text auf der Basis selbst.[35]

IG IX 2, 32
[– – – – – – – – – – – – – – – καὶ θεᾷ]
[Ῥ]ώμῃ δὲ κα[ὶ] θεοῖς Σεβαστοῖς
οἱ γονεῖς Ἀμφία Δαμοίτας
4 [κ]αὶ Ἄβροια [ἡ] καὶ Νεικοστράτα
παρέθεντο τὰ ἀναθήματα

licher Weise wird auch Diebstahl aus dem Gymnasion im Gymnasiarchengesetz von Beroia (Anf. 2. Jh. v.Chr.) mit *hierosylia* gleichgesetzt und soll vor dem entsprechenden Gericht verhandelt werden (I.Beroia 1, 99–101). Zu einer entsprechenden Regel in der Stiftung des C. Vibius Salutaris in Ephesos siehe unten bei Anm. 40.

[34] Zur Überlieferungsgeschichte und Zuordnung der Rede siehe Amato 1995, 3–12 und Amato 1999.

[35] Bei dem Stein hanedelt es sich um eine vierseitige Basis (0.87 – 0.56–0.64 – 0.55), die an der Oberseite eine runde Einlassung aufweist, möglicherweise für eine Plinthe. Wilhelm 1898, 248–249 datiert den Text auf das erste Jh. n.Chr. und sieht darin die Fortsetzung von einer weiteren, nicht erhaltenen Basis. Kern (IG) geht nur von einer Basis aus und nimmt eine verlorene erste Zeile an. Sekunda 1997, 216 und 220, argumentiert überzeugend für das zweite Jh. n.Chr.

φυλάττεσθαι ἀμετάθετα
καὶ ἀμετεπίγραφα.

... der thea Rhome und den Augusti vertrauten die Eltern des Amphias, Damoitas und Habroia, die auch Nikostrata genannt wird, die Weihegeschenke an, damit sie unverändert und ohne Umschreibung bewahrt werden sollen.

Über die Rechtsfolgen einer Missachtung dieses Wunsches informiert der Text nicht. Detaillierter ist zu diesen ein Volksbeschluss aus Chios für den Euergeten L. Nassius aus Chios aus dem ersten Jh. v.Chr., durch den dessen Stiftung von der Polis angenommen wurde. Als Dank der Gemeinde wurde ihm unter anderem das Recht eingeräumt, eine Ehrenstatue auf dem Marktplatz aufzustellen (Z.9–11). Diese wurde allerdings auf Ersuchen des Geehrten selbst und mit Genehmigung des *demos* schließlich in eine Exedra gebracht, in der auch die inzwischen beschlossenen Ehrenstatuen seiner Söhne aufgestellt werden sollten (Z.12–14). Den Abschluss des Textes bildet eine Klausel zum Schutz der Kultstatuen und der Statuen der Familie des Nassius.[36]

IGR IV 1703 Z.14–20

... ὅπως ταῦτά τε τὰ ἀγάλματα καὶ τὸ
[ἀ]νασταθὲν ὑπὸ Ῥωμαίων ἐν τῇ ἐξέδρᾳ, ᾗ αὐτὸς κατεσκεύασεν ἐν τῷ πρεσβυτι-
16 [κ]ῶι, καὶ οἱ ἀνδριάντες οἱ ἀνασταθησόμενοι Λευκίου τε καὶ τῶν υἱῶν αὐτοῦ μὴ μεταρθῶ-
[σιν] μηδὲ μετεπιγραφῶσιν, συντηρῆται δὲ εἰς τὸν ἀεὶ χρόνον ἥ τε τοῦ δήμου χάρις καὶ ἡ
μ̣ν̣ήμη τῶν ἀνδρῶν, εἶναι τὰτὰ ἀπαγορεύματα καὶ πρόστειμα, ὅσα γέγραπται καὶ πε-
[ρὶ τῶν] ἀγαλμάτων τῶν ἐν τῇ ἐξέδρᾳ ἐν Πανήμωι τῶι ἐπὶ Ἀρίστωνος· εἶναι δὲ
20 [αὐτοὺ]ς ἐνόχους ἱεροσυλίᾳ καὶ ἐν ἐπαρῇ.

... damit sowohl diese Weihbilder und dasjenige, das von den Römern in der Exedra aufgestellt wurde, die er selbst im presbytikon *errichtete, als auch die Standbilder, die von Lucius und seinen Söhnen aufgestellt werden sollen, weder verrückt noch mit einer anderen Inschrift versehen werden, sodass die Dankbarkeit des* demos *und die Erinnerung an die Männer gemeinsam bewahrt werden, sollen dieselben Verbote und Strafen gelten, die vorgeschrieben wurden über die Götterbilder in der Exedra im Monat Panemos unter Ariston. Sie (die dagegen verstoßen) sollen schuldig der* hierosylia *sein und verflucht werden.*

Gerade dieser Fall zeigt aber deutlich, dass ein Vergehen an den privat gestifteten *andriantes* und *agalmata* – der Begriff bezeichnet ab dem späten Hellenismus auch Statuen von Menschen, nicht nur Götterbilder[37] – eben nicht von vorneherein als *hierosylia* galt, sondern dass es unter diesen Tatbestand erst durch den entsprechen-

[36] Wilhelm 1941, 89–109; Keil 1943, 121–126.
[37] Pekáry 1978, 729–733; Koonce 1998, 108–110; Ma 2013, 2.

den Volksbeschluss (wohl gemeinsam mit der Ehrung) subsumiert werden musste. Erst der Rechtsfolgenverweis, den das Ehrendekret enthält, schützt die privaten Statuen auf die gleiche Art und Weise wie die Götterbilder.

Auch ID 1523, das Ehrendekret einer nicht näher benannten Vereinigung (*synodos*) auf Delos vom Ende des zweiten Jh. v.Chr. für einen römischen Wohltäter, sichert mit einer Strafklausel die Aufrechterhaltung der Ehren, zu denen auch die monatliche Reinigung und Bekränzung des Standbildes (εἰκών) gehört.[38]

ID 1523, Z.7–13

μηθενὶ δὲ [ἐξέστω]
τῶν συνοδιτῶν ἐναντίον μηθὲ[ν πρᾶ]-
ξαι ταῖς προγεγραμμέναις τιμαῖς· [ἐὰν δὲ πράσ]-
σηι, [ἔ]νο[χο]ν αὐτὸν εἶναι τῆι ἱεροσυλ[ίαι]
καὶ π[ροσ]αποτεισάτω δραχμὰς πεντ[α]-
κ[οσίας? καὶ ἐξέ]στω τῶι [β]ουλομένωι ἐνε[χυ]-
[ράζειν <αὐτόν>·]

Keinem der Mitglieder der synodos *ist es gestattet, etwas den festgelegten Ehrungen Entgegenstehendes zu tun. Wenn aber jemand (etwas Derartiges) unternimmt, soll er schuldig sein der* hierosylia *und zusätzlich 500 Drachmen bezahlen und es soll jedermann freistehen, ein Pfand von ihm zu nehmen.*

Der Terminus προσαποτίνειν (Z.11) verdeutlicht zunächst, dass die Zahlung der 500 Drachmen zusätzlich zu einer Verfolgung wegen *hierosylia* festgesetzt war. Das Verb findet sich in der Kaiserzeit regelmäßig in den Grabinschriften von Aphrodisias, wo demjenigen, der die Anordnungen des Grabherrn missachtet, neben einer Verfluchung auch die zusätzliche Zahlung einer Geldbuße angedroht wird.[39] Möglicherweise war die Geldstrafe in Delos an die *synodos* zu entrichten, wohingegen eine Verfolgung wegen *hierosylia* in anderen Rechtsfolgen, wie etwa dem Ausschluss vom Heiligtum oder der Verfluchung münden konnte.

Die Vorschriften über die Stiftung des C. Vibius Salutaris in Ephesos aus dem Jahr 104 n.Chr., die in voller Länge am Eingang zum Theater publiziert waren, werden von Heberdey ebenfalls in eben diesem Sinne ergänzt: das Umbennen oder Einschmelzen war als *hierosylia* zu verfolgen.

[38] Homolle 1884, 121–122, berichtet, dass der Stein vom M. Stamatakis ins Museum von Mykonos verbracht worden sei, aber wohl aus dem Serapeion stammen müsse. Möglicherweise handelt es sich um ein Dekret der *melanephoroi*, die sich selbst auch als *synodos* bezeichnen (ID 2075 und 2082). Der Geehrte könnte mit Decimus Aelius in ID 2628 III Z.34 identisch sein.

[39] Etwa IAph 2007, 11.12. Z.9; 12.107, Z.12; 12.524, Z.15. Vgl. auch TAM III 1, 379, Z.9 und 780, Z.8 (Termessos, kz.), wo die Geldstrafe zusätzlich zu den Flüchen verhängt wird, ebenso TAM II 520, Z.8–9 (Pinara, 3. Jh. v.Chr.).

I.Ephesos 27 B 215–220

μηδ]ενὶ δὲ ἐξ[έστω]
216 [μετοικονομῆσαι ἢ τὰ ἀπεικονίσματα τῆς θε]οῦ ἢ τὰς εἰκόνας πρὸς τὸ
[μετονομασθῆναι ἢ ἀναχωνευθῆναι ἢ ἄλλωι] τινὶ τρόπωι κακουργηθῆνα[ι,]
ἐπ<ε>ὶ
[ὁ ποιήσας τι τούτων ὑπεύθυνο]ς ἔστω ἱεροσυλίᾳ καὶ ἀσεβείᾳ καὶ οὐδὲν
[ἧσσον ὁ αὐτὸς ἐπιδεικνύσθω στα]θμὸς ἐν τοῖς προγεγραμμένοις
ἀπεικονίσ-
[μασιν καὶ εἰκόσιν λειτρῶν] ρια΄, ἔχοντος τὴν περὶ τούτων ἐκδικίαν ἐπ᾽
ἀνάν-
220 [κῃ – – – .]

Niemandem ist es erlaubt, die Statuen der Göttin oder die Standbilder einer anderen Verwendung zuzuführen, indem sie etwa anders benannt oder eingeschmolzen oder auf eine andere Weise beschädigt werden. Wenn jemand dieses tut, soll er verantwortlich sein der hierosylia *und der* asebeia *und nichts desto weniger soll das Gewicht der vorher genannten Statuen als 111 Pfund nachgewiesen werden, wobei das Anklagerecht darüber notwendigerweise ...*

Wenn man sich vor Augen führt, mit welchem Aufwand die einzelnen Statuen in der Stiftungsanordnung beschrieben werden, welchen hohen Stellenwert sie für Salutaris haben und unter welch guter Bewachung sie jeweils vom Artemision in das ephesische Theater und zurück gebracht werden, erscheint eine Vervollständigung des Textes nach Heberdey durchaus nachvollziehbar.[40] Parallelen zum Verbot, eine Inschrift zu verändern, finden sich in Ephesos auch in etwa 30 Grabinschriften aus der Kaiserzeit: Hier bildete wohl nicht nur die Angst vor einer Unkenntlichmachung der Vorschriften in den Texten sondern vor allem vor dem Auslöschen der *memoria* den Hintergrund der Anordnungen des jeweiligen Grabherrn.[41]

Dio zieht – ebenso wie C. Vibius Salutaris und die Polis Ephesos – auch die *asebeia* als möglichen Rahmen für die rechtliche Bewertung der Umbenennung von Statuen heran. Wiederum erweist sich eine detaillierte Analyse als schwierig, denn er erklärt zunächst (13), dass das Vorgehen der Rhodier eben kein *asebema* darstelle. Diese Bezeichnung verdienten eigentlich nur Vergehen gegen die Götter.

(13) διαφέρει δ᾽, ὅτι τὰ μὲν περὶ τοὺς θεοὺς γιγνόμενα μὴ δεόντως ἀσεβήματα καλεῖται, τὰ δὲ πρὸς ἀλλήλους τοῖς ἀνθρώποις ἀδικήματα. τούτων τὴν μὲν ἀσέβειαν ἔστω μὴ προσεῖναι τῷ νῦν ἐξεταζομένῳ πράγματι· τὸ λοιπὸν δέ, εἰ μὴ δοκεῖ φυλακῆς ὑμῖν ἄξιον, ἀφείσθω. (14) καίτοι καὶ τὴν ἀσέβειαν εὕροι τις ἂν ἴσως τῷ τοιούτῳ προσοῦσαν· λέγω δὲ οὐ περὶ ὑμῶν οὐδὲ περὶ τῆς πόλεως· οὔτε γὰρ ὑμῖν ποτε ἔδοξεν οὔτε δημοσίᾳ γέγονεν· ἀλλ᾽ αὐτὸ σκοπῶν κατ᾽ ἰδίαν τὸ

[40] Heberdey (FiE II Nr. 27) vermerkt zu den Ergänzungen: „Z.214ff. im Wortlaute nur vermutungsweise (vgl. Nr.23) herzustellen." Ein Vorbild für seine Restitution der Stelle ist I.Eph 23, dazu oben Anm. 21. Zu den einzelnen Statuetten und der Prozession siehe Rogers 1991, 83–86.

[41] In der Form μετεπιγράψαι etwa in I.Ephesos 2519, Z.7–8; 2299B, Z.7, vgl. auch I.Kibyra 308.

πρᾶγμα. τὰ γὰρ περὶ τοὺς κατοιχομένους γιγνόμενα οὐκ ὀρθῶς ἀσεβήματα κέκληται καὶ τῆς προσηγορίας ταύτης τυγχάνει παρὰ τοῖς νόμοις, εἰς οὓς ἄν ποτε ᾖ. τὸ δ' εἰς ἄνδρας ἀγαθοὺς καὶ τῆς πόλεως εὐεργέτας ὑβρίζειν καὶ τὰς τιμὰς αὐτῶν καταλύειν καὶ τὴν μνήμην ἀναιρεῖν ἐγὼ μὲν οὐχ ὁρῶ πῶς ἂν ἄλλως ὀνομάζοιτο·

Es gibt aber den Unterschied, dass all das, was in Bezug auf die Götter nicht so, wie es sich gehört, geschieht, asebema *genannt wird, das, was bei den Menschen gegeneinander getan wird,* adikema*. In Bezug auf diese ist es nun aber so, dass die hier untersuchte Tat nicht als* asebeia *qualifiziert werden kann. In weiterer Folge soll dieses Argument, wenn es nicht euch würdig des besonderen Schutzes erscheint, fallen gelassen werden. Und doch könnte jemand finden, dass dieses Vorgehen trotzdem als* asebeia *angesprochen werden kann, wobei ich nicht über euch und (eure) Stadt spreche, denn bei euch wurde dies niemals beschlossen, noch geschah es öffentlich. Ich aber betrachte die Vorgehensweise aus privater Sicht. Wird nicht das, was an Unrecht in Bezug auf Verstorbene geschieht* asebema *genannt und unterliegt dieser Klage nach den Gesetzen, gegen wen auch immer es sich richtete? Sich an trefflichen Männern und Wohltätern der Stadt zu vergehen und ihre Ehren aufzulösen und die Erinnerung an sie zu rauben: ich kann nicht sehen, wie man dies anders bezeichnen könnte.*

Man könne, so Dio, auch das Argument der *asebeia* verwenden: Jedes Vergehen gegen Tote ziehe eine Anklage wegen *asebeia* nach sich, um so mehr müsse man auch die Aberkennung der Ehren und ähnliches Vorgehen gegen Wohltäter der Stadt darunter erfassen. Zwar gesteht er ein, dass dieses Verhalten bei den Rhodiern nicht vorkomme, da es ja niemals beschlossen oder in der Öffentlichkeit geschehe, diese Einschränkung hebt der Rhetor im weiteren Verlauf seiner Rede aber wieder auf und argumentiert in (80) für die Gleichsetzung der Umbenennung mit *asebeia*. Auch in (87–89) nennt er die Umbenennung der Statuen ganz direkt eine *asebeia* und bemüht noch einen weiteren Vergleich aus dem religiösen Bereich: Wie jeder Rhodier wisse, seien viele Statuen in unmittelbarer Umgebung der Götterbilder aufgestellt. Wenn man nun jedermann, und sei er noch so schlecht, Asyl in einem Heiligtum gewähre, warum schütze man dann nicht die Wohltäter der Stadt, die Herausragendes geleistet hatten und deren Personifikation die Statuen seien?[42] Wiederum ist die rhetorische Taktik des Philosophen deutlich. Er bringt den brisanten Tatbestand der Gottlosigkeit ins Spiel und auch wenn er gleich relativiert und die Rhodier zunächst

[42] (87) ... τινὲς δ' οἶμαι καὶ σφόδρα ἐγγὺς παρεστῶτες τοῖς θεοῖς. (88) εἶθ' ὅποι μηδὲ τοὺς κακὸν δράσαντας ἐάνπερ καταφύγωσιν ἔθος ἐστὶν ἀδικεῖν, τοὺς εὐεργέτας οὐ δεινὸν ἐὰν φαινώμεθα ἀδικοῦντες; καὶ τὴν ἀσυλίαν, ἣν παρέχουσι τοῖς φαύλοις οἱ τοιοῦτοι τόποι, μόνοις, ὡς ἔοικε, τοῖς ἀγαθοῖς οὐ δυνήσονται παρέχειν; ... *darunter einige, so meine ich, die ganz nah bei den Göttern aufgestellt waren. Ist es nicht schrecklich, wenn wir den Anschein erwecken, Unrecht an Wohltätern zu tun, gerade an dem Ort, wo es Brauch ist, nicht einmal den Übeltätern, wenn sie Zuflucht suchen, Schaden zuzufügen? Die Unverletzlichkeit, die diese Orte den Schlechten gewähren, sollen sie, wie es scheint, den Guten nicht gewähren können?*

davon ausnimmt, steht der Vorwurf doch im Raum und wird in weiterer Folge immer wieder aufgegriffen.

Unter dem Begriff *asebeia* werden traditionell verschiedene Tatbestände aus dem religiösen Bereich erfasst. Er ist schwierig zu definieren und einzugrenzen. Jedenfalls scheinen die Missachtung von vorgeschriebenen Riten, die nachlässige Durchführung von Opfern oder die Übertretung von religiösen Vorschriften und Verboten darunter zu fallen, wobei jeweils eine Überschneidung mit anderen Tatbeständen wie etwa der *hierosylia* möglich ist. R. Parker formuliert überspitzt, aber durchaus zutreffend: „Impiety is merely what on a given day a prosecutor can make it seem to be."[43] Auf Rhodos finden wir den Tatbestand in zwei Inschriften, zunächst bereits um 300 v.Chr. in einem Beschluss über den heiligen Bezirk der Alektrona in Ialysos.[44]

IG XII 1, 677, Z.27–30
ὅ, τι δέ κά τις παρὰ τὸν νόμον
ποιήσηι, τό τε ἱερὸν καὶ τὸ τέμενος
καθαιρέτω καὶ ἐπιρεζέτω, ἢ ἔνοχος ἔστω τᾶι ἀσεβείαι·

Was immer jemand entgegen diesem Gesetz tut, er soll das Heiligtum und den heiligen Bezirk reinigen und dazu opfern, oder er soll verantwortlich sein für asebeia.

Nach den Publikationsvorschriften für die drei Kopien des Beschlusses der *mastroi* und Ialyseer (Z.1–18) finden sich die strafbaren Handlungen: In das Heiligtum und *temenos* der Alektrona dürfen verschiedene Tiere nicht gebracht werden. Ein Verstoß gegen diese kultischen Reinheitsvorschriften wird als *asebeia* qualifiziert und zieht entsprechende Verfolgung nach sich. Der zweite rhodische Text, der die *asebeia* als Tatbestand nennt, ist ein Beschluss aus Lindos aus dem Jahr 22 n.Chr. über die künftige Finanzierung des Kultes für die Athena Lindia.[45] An insgesamt fünf Stellen werden die Entfernung von Statuen (Z.40–42), Nichterfüllung einer *epange-*

[43] Parker 2005, 135. Es würde an dieser Stelle zu weit führen, den Begriff ἀσέβεια in all seiner Breite zu diskutieren, lediglich auf seine Verwendung im Rahmen der Verfolgung von Unrechtstaten soll im folgenden näher eingegangen werden. Allgemein dazu zuletzt Leão 2004, 202–205 und Delli Pizzi 2011.

[44] LSCG 136 mit Verweisen auf ähnliche Texte; vgl. Delli Pizzi 2011, 68–69, dessen Überlegungen, dass der Text kein Verfahren wegen *asebeia* vorsehe, sondern die Rechtsfolgen unmittelbar mit Begehung der Tat und ohne Möglichkeit auf eine Rechtfertigung einträten, ich nicht folgen kann. Z.33–35 sehen eine Anzeige jedes beliebigen Rhodiers bei den *mastroi* vor, die ich im Unterschied zu Delli Pizzi nicht nur auf den letzten Paragraphen beziehen möchte, der das Mitführen von Kleinvieh in das Heiligtum mit einer Geldstrafe bedroht. Zuzustimmen ist Delli Pizzi aber in jedem Fall zur Überlegung, dass *asebeia* und die dazu gehörenden Sanktionen nicht nur im verfahrensrechtlichen Rahmen sondern auch als Formen der sozialen Kontrolle zu verstehen sind.

[45] Näheres zu dieser Inschrift I.Lindos II 419 unten bei Anm. 57. Eine prozessrechtliche Analyse des Textes liegt in Harter-Uibopuu 2012, 51–60, vor. Vgl. auch Kajava 2003, 72–78, und Delli Pizzi 2011, 63–65.

lia (Z.67–69), die ungenügende Ausführung eines Priesteramtes nach Adoption (Z.86–91), der Antrag auf Abänderung des vorliegenden Dekrets (Z.119–126) sowie ein weiteres, auf dem Stein nicht erhaltenes, Vergehen (Z.117–119) mit *asebeia* gleichgesetzt und auch als solche bestraft. Meines Erachtens deutet die separate Erwähnung einer hohen Geldstrafe (Z.117–119 und Z.125–126) darauf hin, dass die Rechtsfolgen der *asebeia*, die an keiner Stelle ausgeführt werden, wohl im Ausschluss aus dem Heiligtum und ähnlichen Maßnahmen zu sehen sein werden. Sichtlich waren die Möglichkeiten, *asebeia* zu verfolgen und die drohenden Sanktionen gut genug bekannt, so dass der im griechischen Recht übliche Rechtsfolgenverweis genügte, um einen Verstoß gegen die beiden eben genannten Beschlüsse darunter zu erfassen. Ähnliches wird man für Ephesos annehmen müssen, wo in dem bereits erwähnten Beschluss über die Stiftung des C. Vibius Salutaris auch ein Verweis auf *hierosylia* und *asebeia* genügte, um Verfahren und Sanktionen zu verdeutlichen.[46]

Wenn Dio also die Umbenennung von Statuen als *hierosylia* und *asebeia* qualifiziert und damit in den Bereich sakraler Vergehen setzt, tut er dies vor dem Hintergrund realer Rechtsvorschriften, wie die epigrapischen Zeugnisse zeigen. Der Eingriff in die Ehrungen privater Wohltäter konnte durchaus als *hierosylia* verfolgt werden, allerdings musste dies erst durch einen entsprechenden städtischen Beschluss sanktioniert werden. Die beiden Tatbestände umfassten wohl nicht automatisch den Schutz von Statuen, wie ihn Dio gerne gesehen hätte.

3. Wiederverwendung von Statuen als Vergehen gegen den Staat

In Kapitel 86 seiner Rede vergleicht Dio das Ausschlagen der Inschriften auf Ehrenstatuen mit dem gleichen Vorgehen gegen staatliche Urkunden, seien sie auf Stein publiziert oder im Archiv hinterlegt. Ein Angriff auf diese Texte sei als Vergehen gegen den Staat zu qualifizieren und der Rhetor hebt besonders hervor, dass damit ja die Ehrung als Gesamtes aufgehoben würde und der Täter in einen Staatsbeschluss eingreife. Damit wird die „staatsrechtliche" Seite des Vergehens deutlich gemacht: Das Ausmeißeln bedeute gleichzeitig das Verwerfen des staatlichen Beschlusses über die Ehren.

> (86) καὶ μὴν ἐάν τις ἓν μόνον ἐκχαράξῃ ῥῆμα ἀπὸ στήλης τινός, ἀποκτενεῖτε αὐτόν, οὐκέτι ἐξετάσαντες ὅ,τι ἦν ἢ περὶ τίνος, καὶ εἰ δή τις ἐλθὼν οὗ τὰ δημόσια ὑμῖν γράμματά ἐστι κεραίαν νόμου τινὸς ἢ ψηφίσματος μίαν μόνην συλλαβὴν ἐξαλείψειεν, οὕτως ἔξετε ὥσπερ ἂν εἴ τις ἀπὸ τοῦ ἅρματός τι καθέλοι. οὐκοῦν ὁ τὴν ἐπιγραφὴν ἀναιρῶν εἰκόνος τινὸς ἧττόν τι ποιεῖ τοῦ τὴν στήλην ἀποχαράττοντος; καὶ μὴν ὅλον γε ἐξαλείφει τὸ ψήφισμα, καθ' ὃ τὴν τιμὴν ἐκεῖνος ἔλαβε, μᾶλλον δὲ ἄκυρον ποιεῖ γεγραμμένον.

[46] Mein Dank gilt (nicht nur an dieser Stelle) meiner Kollegin und Freundin Lene Rubinstein, deren Ideen zu den „cross-references" im Hellenismus meine eigenen Arbeiten zur Kaiserzeit nachhaltig beeinflusst haben. Zu den cross-references zuletzt Gagarin 2008, 142–143.

> *Wenn jemand auch nur ein Wort von irgendeiner Stele auskratzt, werdet ihr ihn töten, ohne zu überprüfen, welches Wort es war oder worauf es sich bezog. Und wenn jemand in das öffentliche Archiv bei euch eindringt und einen Strich eines Gesetzes oder eine Silbe eines Dekrets tilgt, werdet ihr ihn behandeln, als ob er etwas von eurem Wagen genommen hätte. Begeht nun der, der die Inschrift von einem Standbild beseitigt, etwas Geringeres, als der, der etwas von einer Stele ausschlägt? Dabei tilgt dieser doch den ganzen Beschluss, gemäß dem jener die Ehrung empfang, und macht mehr noch das Geschriebene ungültig!*

Staatliche Dekrete werden in der Antike nicht nur vor inhaltlicher Abänderung geschützt, auch eine Veränderung der Inschrift als Publikation der jeweiligen Texte wird unter Strafe gestellt. Deutlich tritt dieses Phänomen bereits in den bekannten *dirae Teiorum* im fünften Jh. v.Chr. auf, in denen jeder, der die Inschrift unkenntlich macht, mit dem staatlichen Fluch bedroht wird. Auch ein Kultgesetz aus Iasos und ein Dekret aus Argos sehen schwerste Strafen für denjenigen vor, der die Inschrift ausschlägt.[47] In diesem Sinne trifft Dios Vergleich durchaus zu, denn wer die auf Stein publizierte Version eines Gesetzes veränderte, wurde dafür zur Verantwortung gezogen. Auch der zweite Tatbestand, den Dio an dieser Stelle beschreibt, nämlich das Eindringen in ein städtisches Archiv, um dort Texte zu verändern, ist in anderen Quellen erhalten.[48] Am eindrücklichsten ist hierzu wohl der Brief des römischen

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[47] Zu den Flüchen aus Teos (Syll.^{3} 37 und 38, 5. Jh. v.Chr.) siehe Koerner 1993, Nr. 78. (vgl. auch GHI^2 30). B Z.35–41 ὃς ἂν ταστήλι[36]ας : ἐν ἧισιν ἡπαρὴ : γέγραπται : ἢ κατάξει : ἢ φοινικήια : ἐκκόψε[ι :] ἢ ἀφανέλας ποιήσει : κῆνον ἀπόλι[40]λυσθαι : καὶ αὐτὸν : καὶ γλένος [τὸ κένο.] *Wer die Stelen, auf die der Fluch geschrieben ist, zerstört oder die Buchstaben ausschlägt oder sie unleserlich macht, der soll zugrunde gehen, sowohl er selbst als auch seine Familie.* I.Iasos 220 (Kultgesetz, 5./4. Jh. v.Chr.), Z.7–8: ἢν δέ τις [ἐκκόψηι ἢ] ἀφαν[ίσηι τὰ γεγραμμένα,] πασχέτω | ὡς ἱερόσυλος· *Wenn jemand das Geschriebene ausschlägt oder unleserlich macht, soll er (das Gleiche) erleiden, wie ein* hierosylos. IG IV 506 (Argos, M. 6. Jh. v.Chr.) sieht in Z.1–4 Verfluchung, Vertreibung und Konfiskation des Besitzes desjenigen vor, der die Inschrift unkenntlich macht und damit wohl versucht, das Gesetz außer Kraft zu setzen. Für Texte auf Bronzeplatten wird konsequenterweise nicht das Ausschlagen (ἐκκόπτειν), sondern das Einschmelzen (συγχεῖν) unter Strafe gestellt. Vgl. auch Syll.^{3} 45, Z.32–36 (Halikarnassos, 5. Jh. v.Chr.); CID I 9, Z.25–29 (Delphi, 4. Jh. v.Chr.), IvO 9, Z.7–9 (Vertrag zwischen den Eleiern und Euaiern, Olympia, 500 v.Chr.) und IvO 16, Z.19–20 (Skillous, M. 5. Jh. v.Chr.) sowie weitere Beispiele bei Rubinstein 2008, 117 Anm. 10. Schließlich bestätigen literarische Zeugnisse wie etwa Hdt. 7, 136 und Thuk. 5, 39, 3, dass συγχεῖν nicht nur das Zerstören der Inschriften sondern im übertragenen Sinn auch das Brechen von Gesetzen oder Vereinbarungen bedeuten konnte. Aus der Kaiserzeit sind nicht zuletzt auch Grabinschriften erhalten, in denen der Schutz der Inschrift vom Grabherrn ebenso vorgesehen ist wie der Schutz des Grabes selbst vor unberechtigter Bestattung und Veräußerung. Ἐκκόπτειν etwa in Ephesos (I.Ephesos 2212, Z.3–8; 2202 A, Z.5–6; 2216, Z.2; 2222, Z.4–5; 2226, Z.2); Aphrodisias (IAph 2007, 12.526, Z.9–10; 12.908, Z.9), Thyateira (TAM V 2, 1113, Z.9–11; 1129, Z.11–12; 1157, Z.2–3) und Xanthos (TAM II 357, Z.10–11 und 14). Ἀφανίζειν: I.Miletoupolis 47, Z.4; I.Mylasa 476, Z.6–7.

[48] Dio vergleicht an dieser Stelle das Eindringen in das Archiv mit dem vorher besprochenen Tatbestand der *hierosylia*, wenn sich der Hinweis auf den „Wagen“ wie allgemein

römischen Proconsuls Q. Fabius Maximus Servilianus an die achäische Stadt Dyme aus dem ausgehenden zweiten Jh. v.Chr. Nach einer Revolte in Dyme werden die Anführer vor den Statthalter gebracht und wegen Brandstiftung am Archiv angezeigt und verurteilt. Der Text macht deutlich, dass in unmittelbarer Folge der Zerstörung der öffentlichen und privaten Urkunden neue Gesetze verfasst werden sollten und stellt damit ebenso einen Zusammenhang zwischen der physischen Existenz der Abschriften der Gesetze und ihrer Gültigkeit her, wie Dio in der vorliegenden Passage. In diesem Fall war als Strafe die Hinrichtung der Rädelsführer vorgesehen.[49] In den inschriftlich auf uns gekommenen normativen Texten der hellenistischen und römischen Poleis fehlt allerdings die Todesstrafe als angedrohte Sanktion.

Das Problem des Schutzes von Ehren, die Wohltätern verliehen wurden, wird in den inschriftlich erhaltenen Ehrendekreten immer wieder aufgegriffen. Dabei handelt es sich allerdings ausschließlich um Klauseln, die nicht nur die Ehrenstatue betreffen, sondern die Ehrung als einen Komplex von Belobigungen, Vergünstigungen und anderen Dankesbezeugungen der Städte gegenüber ihren Wohltätern. Zumeist entschieden sich die Poleis dafür, die Abänderung eines von ihnen gefassten Beschlusses unter Strafe zu stellen und damit seinen Bestand zu sichern.[50] Als erstes Beispiel sei ein Dekret von der Insel Nasos vor der Küste Mysiens, aus dem ausgehenden vierten Jh. v.Chr. angeführt: Der Bürger Thersippos war wegen seiner guten Beziehungen zum makedonischen Königshof „Urheber bedeutender Wohltaten für den Staat" geworden (A Z.8, μ[εlγάλων ἀγά]θων αἴτιος γέγονε τῶι πόλι·). Ihm und seinen Nachkommen wurden in Anerkennung seiner Verdienste zahlreiche Privilegien gewährt: Freiheit von allen Abgaben, Speisung im Prytaneion, ein Anteil an allen städtischen Opfern, Proedrie, Bekränzung, öffentliche Ausrufung der Ehren bei den Agonen sowie die Durchführung einer Panegyris.[51] Der entsprechende Beschluss sollte – und das stellt einen wichtigen Teil der Ehrung dar – auf einer steinernen Stele publiziert werden, welche an einem Ort, den Thersippos auswählen konnte, aufgestellt werden sollte. Ein zweiter, davon getrennter Volksbeschluss (B

angenommen auf das Abbild des Helios auf einem Viergespann bezieht, das Lysippos für die Rhodier erzeugte (93). Dass *hierosylia* ein todeswürdiges Verbrechen ist, hat Dio auch in Kapitel 82 ausgeführt, vgl. oben bei Anm. 33.

[49] Achaïe III 5, Z.6–8 und 16–23 zur Zerstörung der Archive. Vgl. Kallet-Marx 1995, 146–152, mit einer Diskussion der älteren Literatur. Zum Schutz von privaten Dokumenten in städtischen Archiven siehe Lambrinoudakis – Wörrle 1983 und Wörrle 1975.

[50] Dazu ausführlich Harter-Uibopuu 2013b.

[51] Harter-Uibopuu 2013a, 245–247, der Text ist auf einer Stele aus weißem Marmor erhalten, die *stoichedon* auf der Vorderseite und der linken Schmalseite beschrieben ist (SGDI 304; IG XII 2, 645; OGI 4). Sie trägt den Ehrenbeschluss für Thersippos auf der Vorderseite, der mit den Durchführungsbestimmungen für die Panegyris auf der Schmalseite fortgesetzt wird. Der zweite Volksbeschluss ist ebenfalls auf der Schmalseite angebracht. Eine nützliche Zusammenstellung der in der griechischen Antike möglichen Ehrbezeugungen und Privilegien findet sich bei Larfeld 1907, 508–527.

Z.20–23) enthielt die Maßnahmen, die zur Sicherung des Ehrenbeschlusses getroffen wurden.

I.Adramytteion 34 B 17–65

vacat π[ερὶ]
[ὧ]ν <Κ>ρέων Π[...]
[..]αρχ̣ειο[ς εἶ]-
[πε, δᾶ]μος ἔ[γνω]
[..]Λ̣Λ̣ατριο[..]
[ἐ]γ κυ[ρ]ία ἐκ[λ]-
[ησί]α· ταὶς δῳ̣[ρ]-
[έαι]ς παίσαι[ς]
[τα]ὶς δεδομέ[ν]-
[α]ις Θερσίππ[ω]
[ὑ]πὸ τῶ δάμω κα-
[ὶ] ἐκγόνοισι δ-
[ια]μ̣ένην εἰς τ-
[ὸν π]ά̣ντα χρόν-
[ον] κἀθ[ά]περ ὀ δ-
[ᾶμ]ο[ς] ἔδωκε κα-
[ὶ μὴ ἔ]μμεναι [π]-
[ὰρ τ]αῦτα μήτε
[ἄ]ρχοντι προθ-
[έ]μεναι μήτε ῥ-
[ή]τ̣ορι εἶπαι μ-
[ή]τε ἐπιμηνί[ω]
[ἐ]σένικαι· αἰ δ-
[έ] κέ τις ἢ ῥήτω-
[ρ] εἴπη ἢ ἄρχων
[ἐσ]αγάγη ⟦ΕΣ..⟧[ἢ]
[ἐπ]ιμήνιος ἐσ-
[εν]ίκη, ἄκυρά τ-
[ε] ἔστω καὶ ὀφε-
[λ]ὲ̣τω ἔκαστο-
[ς] σ̣τ̣άτηρας τρ-
[ια]κοσίοις ἴρ-
[οι]ς τῶ Ἀσκλαπ-
[ίω] καὶ ἐπάρατ-
[ος] ἔστω καὶ ἄτι-
[μος] καὶ γένος
[ε]ἰς τὸν πάντα
[χρ]όνον καὶ ἐν-
[..] ἔστω τῶ νόμ-
[ω π]ερὶ τῶ καλλ-
[ύο]ντος τὸν δᾶ-
[μον]· τὸ δὲ ψάφι-
[σμ]α τοῦτο ἀνά-
[γρ]αψαι τοὶς [ἐ]-
[ξ]ετάσταις εἰ-
[ς] ταὶς στάλλα-
[ις] ταὶς ὑπὲρ τ-
[ῶν δ]ωρήταν, κα-
[ὶ τὸ] ἀνάλωμα
– – – – – – – – – – –

Dazu stellte Kreon P(..archeios) den Antrag, das Volk hieß es gut ... in der regulären Volksversammlung. Alle Ehrungen, die Thersippos und seinen Nachkommen vom Volk verliehen wurden, sollen Bestand haben auf alle Zeiten, so wie es das Volk beschloss. Dass man sich – entgegen diesen (Vorschriften) – nicht daran zu halten habe, soll weder ein Amtsträger vorlegen, noch ein Redner (Antragsteller) beantragen, noch ein epimenios *einführen. Wenn aber irgendein Redner (etwas Derartiges) beantragt, oder ein Amtsträger einbringt oder ein* epimenios *einführt, soll es ungültig sein und jeder soll 300 Statere schulden, die dem Asklepios geweiht sind, und er soll verflucht und* atimos *sein und ebenso sein Geschlecht auf alle Zeiten. Er soll verfallen dem Gesetz über die Auflösung des* damos*. Diesen Beschluss sollen die* exetastai *aufzeichnen lassen auf den Stelen für die Wohltäter, und die Aufwendung...*

Der Schutz der Ehren wurde in Nasos sehr ernst genommen. Zunächst wurde eine Strafe von 300 Stateren ausgesetzt, die an das Heiligtum zu zahlen war. Durch die zusätzlich angedrohte Atimie konnte der Täter aus der Staatsgemeinschaft ausgeschlossen werden, durch die Verfluchung wohl ebenso auch aus der Kultgemeinschaft. Überdies wird festgehalten, dass der Ehrenbeschluss durch einen eventuell entgegenlautenden Antrag in keiner Art und Weise beeinflusst werden konnte, denn

der Antrag oder die Beschlussvorlage waren automatisch ungültig.[52] Der daran anschließende Rechtsfolgenverweis wäre wohl ganz im Sinne Dios gewesen: Wer versuchte, die Ehrung außer Kraft zu setzen, gegen den sollte nach dem Gesetz über die Auflösung des *damos* vorgegangen werden und der galt als Hochverräter. Leider fehlen weiterführende Informationen aus Nasos, um die Schwere der Strafe genau einschätzen zu können, es handelte sich aber mit Sicherheit um eines der ernstesten öffentlichen Delikte. Beachtenswert ist auch, dass Stelen erwähnt werden, auf denen die Ehrenbeschlüsse wohl gesammelt publiziert waren (Z.61–64): möglicherweise handelte es sich dabei um „öffentliche Listen" (*apographai*) wie sie auch Dio in dem fiktiven Argument der Rhodier vor Augen hatte.[53]

Auch aus dem ersten Jh. v.Chr. ist eine ähnliche Regelung erhalten: ein umfangreiches Dossier aus Kyme beschreibt die Taten der Bürgerin Archippe für ihre Stadt, die dafür ebenfalls die höchstmöglichen Ehren erhielt.[54] Am Ende des Textes sicherte eine allgemeine Klausel die ordnungsgemäße Durchführung aller Vorschriften, die in dem Dekret erlassen worden waren und band damit alle Amtsträger an ihre Verpflichtungen der Wohltäterin gegenüber:

SEG 33, 1041, Z.88–90
88 ἐὰν δέ τις τῶν ἐν τῷ ψη̣[φί]σματι τούτῳ κατακεχωρ̣ισμένων τι μὴ ποιήσῃ ἢ βλάψῃ
τὴν πόλιν ἢ ἀδικήσῃ ᾠτινιοῦν τ̣ρ̣όπῳ, εἶναι κατὰ τοῦ ἐναντίο̣ν τι ποιήσαντος ἔ[ν]-
δειξιν κατὰ τὰ περὶ τῶν κατεχόντων τι ἢ ἀδικούντων τὸν δῆμον ἔγγραφα·

Wenn aber jemand etwas von dem, was in diesem psephisma *beschlossen wurde, nicht ausführt oder der Polis schadet oder auf irgendeine Art und Weise Unrecht tut, soll gegen denjenigen, der etwas (derartiges) Entgegenstehendes unternahm, eine Anklage gemäß den aufgezeichneten (Beschlüssen oder Gesetzen) betreffend diejenigen, die den* demos *hindern oder ihn schädigen, möglich sein.*

Wiederum wird die ungenügende Ausführung der Ehren einem Verhalten gleichgesetzt, das weitreichende Folgen hatte: Der Schädigung des Demos. Auffallend ist, dass die meisten Klauseln zum Schutz von Ehrungen die Tat mit einer Bußzahlung bedrohen, die an die Stadt oder ein Heiligtum gerichtet ist, oder andere schwere Strafen aussprechen. An eine Entschädigung des Geehrten wird nur in wenigen Fällen gedacht, mir sind lediglich drei Beispiele aus Mantineia in Arkadien aus dem ersten Jh. v.Chr. und dem ersten Jh. n.Chr. und ein Ehrendekret der Poseidoniasten

[52] In dieser Art schützt etwa auch ein Abänderungsverbot ein Ehrendekret der Haliadai und Haliastai (IG XII 1, 155 III Z.101–104, Rhodos, 2. Jh. v.Chr.). Vgl. kaiserzeitlich I.Ephesos 27 B 320 (Stiftung des Salutaris, 2. Jh. n.Chr., oben bei Anm.40). Zur entsprechenden Technik in den Abänderungsverboten und Bestandsklauseln Harter-Uibopuu 2013b, bei Anm. 15, 25 und 92. Zur Atimie und ihren Folgen zuletzt Dimopoulou 2010, 232–237.

[53] Vgl. oben bei Anm. 21.

[54] Siehe vor allem van Bremen 2008 mit weiterführender Literatur.

aus Delos bekannt.[55] Auch Dio, der in seiner Rede – wie eingangs ausgeführt – ausführlich auf die Schädigung von Privatpersonen durch das rhodische Verhalten eingeht, sieht keinerlei Schadenersatz vor, der in Geld bemessen werden kann. In Kapitel 60 unternimmt er allerdings ein Gedankenspiel, das die Unmöglichkeit und Absurdität derartiger Regresszahlungen zeigen soll. Er erläutert, dass derjenige, dem Besitz genommen werde, üblicherweise zumindest für den einfachen Wert entschädigt werde. Daher müsse man also einem Wohltäter, der die ganze Stadt gerettet hat, zumindest die Stadt ausliefern.[56]

Zusammenfassend lässt sich also festhalten, dass auch Dios Vergleich der Aberkennung einst vom Staat beschlossener Ehren mit Vergehen gegen den Staat bei seinen Zuhörern Zustimmung finden musste und in verschiedenen griechischen Poleis gut belegt ist.

4. Ein Dekret aus Lindos über die Möglichkeit der Umbenennung von Statuen (I.Lindos II 419)

Ein letzter Vorwurf aus Dios Rede führt schließlich noch zu einer interessanten Inschrift aus Lindos. Mehrfach hat der Rhetor den Strategen der Stadt als Urheber des Übels angegriffen (etwa in Kap. 52, 71, 132, 134). Ihm alleine schiebt er die Schuld an dem Vorgehen zu und hält den Rhodiern zugute, dass das kritisierte Vorgehen nicht nur gegen die guten Sitten sondern auch in keiner Weise durch die Verfassung der Rhodier gedeckt sei.[57] Allerdings wird in diesem Zusammenhang nie davon gesprochen, dass der Amtsträger etwa im Rahmen seiner Rechenschaftsablage belangt oder auf andere Weise zur Rechenschaft gezogen hätte werden können, wenn sein Vorgehen wirklich den Gesetzen der Stadt widerspräche. Diese Möglichkeit, die kollektive Verantwortung auf Einzelpersonen abzuwälzen, lässt Dio die fiktiven Rhodier nicht ergreifen. Schließlich fragt er:

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[55] IG V 2, 265 (IPArk Nr. 11); IG V 2, 266 (IPArk Nr. 12); IG V 2, 269 (IPArk Nr. 13); es handelt sich jeweils um Ehrendekrete für Priesterinnen. Zu diesen Texten siehe auch Taeuber 1994, 199–219. Aus Delos stammt ID 1520 Z.68–81: Wer von den *boutrophoi* seinen Pflichten nicht ordnungsgemäß nachkam, musste nicht nur 1000 Drachmen dem Poseidon geweiht, zahlen, sondern war auch dem Geehrten für den Schaden verantwortlich, Harter-Uibopuu 2013a, 251–254.

[56] (60) τί οὖν; οὐχὶ νενόμισται παρά γε τοῖς μὴ παντάπασιν ἀδίκοις τὸν ἀποστερούμενόν τινος κτήματος ὃ γοῦν κατατέθεικε κομίζεσθαι παρὰ τῶν εἰληφότων; ἆρ' οὖν ἐθέλοιτ' ἂν ἀποδοῦναι τὰς χάριτας, ἀνθ' ὧν ἐψηφίσασθε ἐκείνοις τοὺς ἀνδριάντας; λυσιτελεῖ γοῦν ὑμῖν ἐκτίνουσιν, ἐπειδὴ τὸ λυσιτελὲς οἴονται δεῖν τινες ὁρᾶν ἐξ ἅπαντος. *Was nun? Ist nicht festgehalten, sofern man nicht gänzlich außerhalb des Rechts steht, dass demjenigen, dem etwas von seinem Besitz genommen wurde, von denen, die es nahmen, das erstattet wird, was er damals bezahlt hat? Wäret ihr bereit, ihnen das zu bezahlen, wofür ihr damals bereit wart, sie zu ehren?*

[57] Zu den Kompetenzen der rhodischen *stratagoi*, die jedenfalls als Kollegialorgan auftraten, Gelder 1900, 253–255. Er zieht IG XII 1, 2 als Beleg für die Rolle dieser Amtsträger bei der Aufstellung von Statuen in der Kaiserzeit heran und vergleicht damit die Nachrichten bei Dio.

(139) ἀλλ' ἔγωγε ἀπορῶ τί δήποτε οὐχὶ καὶ νόμον τίθεσθε ἐπὶ τούτῳ, καθ' ὃν ἔσται τὸ λοιπόν, εἴπερ ὑμῖν ἀρέσκει. νὴ Δί', αἰσχύνην γὰρ οὐ μικρὰν ἔχει νόμος τοιοῦτος ἐν τῇ πόλει κείμενος.

Ich bin aber ratlos, warum ihr darüber nicht ein Gesetz erlasst, gemäß dem in Zukunft (gehandelt werde), wenn es euch gefällt? „Bei Zeus, das wäre keine geringe Schande, ein solches Gesetz in der Stadt festgelegt zu haben!"

Dem entsetzten Ausruf der Rhodier als Antwort auf Dios Ansinnen wurde stets eine Inschrift aus Lindos gegenüber gestellt, die in das Jahr 22 n.Chr. zu datieren ist, also etwa zwei Generationen vor Dios Rede.[58] I.Lindos II 419 enthält ein Dekret, das die Wiederherstellung der Finanzierung des Kults der Athena Lindia nach einer Periode größerer Schwierigkeiten zum Inhalt hat. Dazu wurde ein Fonds (*parakatatheka*) eingerichtet, aus dem die künftigen Ausgaben bestritten werden sollten. Einkünfte des Fonds waren einerseits aus der Zeichnung freiwilliger Beiträge durch die Bürger der Stadt vorgesehen (Z.44–58), andererseits aus der liturgischen Belastung von Amtsträgern und Priestern der Athena Lindia, die auf bestimmte Gelder verzichten sollten (Z.58–92). Eine dritte Quelle war der Verkauf von Metallgegenständen aus dem Heiligtum (Z.21–27), den Dio sicherlich als *hierosylia* qualifiziert hätte. Zudem wird die Veräußerung des Rechts auf Beschriftung von Ehrenstatuen in dem Dekret im Detail geregelt:

I.Lindos II 419 Z.34–43
τοὶ αὐτοὶ ἐπιστάται μ[ισθω]σάντω ἑκάστου ἀνδριάντος τὰν
[ἐ]πιγραφάν, ...
... [ἀ]πὸ τού[τ]ων καταβαλόμε-
[ν]οι λ[όγ]ον π[ό]σου ἑ[κ]ά[σ]το[υ ἀ] ἐπιγραφ[ὰ ἀπε]δόθ[η] παραδόντω ἱερὸν
[ἤ]μ[ειν εἰς] πα[ρ]ακα[τ]α[θ]ήκαν τᾶς Ἀ[θ]άνας τ[ᾶ]ς Λινδίας καὶ τ[οῦ]
40 [Διὸς τοῦ Πολιέ]ως· [τοὶ δὲ] ὠνησά[μ]ε[ν]οι τὰς ἐπιγραφὰς μὴ
[ἐχόντων ἐξουσίαν ἀπ]ε[νε]νκεῖ[ν] ἐκ τᾶς ἄκρας ἀνδριάν[τας]
[τρόπῳ μηδ]ενὶ μηδὲ παρευρέσει μηδεμιᾷ ἢ ἔνοχοι ἐόντ[ω]
[ἀσεβεί]ᾳ·

Die selben epistatai *sollen die Aufschrift jedes Standbildes vergeben, ... Sie bringen eine Abrechnung über diese (Beträge) ein, um wie viel jeweils die Aufschrift veräußert wurde, und übergeben das geweihte Kapital für die* parakatatheke *der Athena Lindia und des Zeus Poleos. Diejenigen, die die Aufschriften ersteigert haben, haben nicht das Recht, die Standbilder von der Höhe fortzutragen, auf welche Art und Weise und unter welchem Vorwand auch immer, oder sie sollen der* asebeia *schuldig sein.*

Das Vorgehen, das hier für Lindos beschrieben ist, entspricht fast genau demjenigen, das Dio in der Nachbarstadt Rhodos so tadelt. Statuen – in Lindos allerdings ausschließlich unbeschriftete (Z.30–32) – konnten und sollten nun mit einer neuen

[58] So etwa Blinkenberg in seinem Kommentar zu I.Lindos II 419; Blanck 1969, 101–103; Jones 1978, 29; Platt 2007, 254–255.

Inschrift versehen werden. Dazu wurde das Recht auf Beschriftung im Rahmen einer Versteigerung vergeben, wobei die Volksversammlung allerdings eine Einspruchsmöglichkeit hatte.[59] Außerdem durften die nunmehr beschrifteten Standbilder nicht von ihrem Platz entfernt werden. Dass nun eine Statue „umgewidmet" wurde, war also kein „gottloser Akt," das Entfernen eines derartigen umbenannten Ehrenmals aus dem Heiligtum wurde in Folge aber sehr wohl als *asebeia* eingestuft und verfolgt.[60] Was Dio den Lindiern vorgehalten hätte, lässt sich nur erahnen.

* * *

Dios Rede, die im vorliegenden Beitrag nur in Auszügen vorgestellt und interpretiert werden konnte, zog den antiken Zuhörer und Leser wohl ebenso in ihren Bann, wie den modernen Leser. Die Argumente des Rhetors wirken auf den ersten Blick stets überzeugend, und sind – was die moralische Bewertung des rhodischen Vorgehens betrifft – sicher der Zeit entsprechend und zutreffend. Erst eine genauere Analyse des Textes ermöglicht dem Rechtshistoriker Einsprüche, etwa gegen die These, dass die Ehrenstatuen den Geehrten gehörten. Mangelnde Kenntnis der Vorschriften und

[59] Ausführlich bespricht Kajava 2003, 72–78, den Text, der davon ausgeht, dass das Recht auf Beschriftung einer Statue nicht verkauft sondern verpachtet wurde. Der Pachtzins sei aber nicht in regelmäßigen jährlichen Raten erfolgt, sondern lediglich einmal in einer größeren Zahlung nach der in der Inschrift angesprochenen Versteigerung. Der Grund für dieses ungewöhnliche Rechtsgeschäft sei der Wunsch der Lindier gewesen, das Eigentum an den Statuen nicht aufzugeben und sie bei Bedarf einer anderen Verwendung zuführen zu können. Wenn auch μισθοῦν üblicherweise für Verpachtung oder die Vergabe von Arbeiten verwendet wird (vgl. LSJ s.v. μισθόω) vermag ich im Lichte der bislang zitierten Rechtsvorschriften zum Schutz von Ehrenmalen nicht an ein zeitlich begrenztes Rechtsgeschäft, wie es die Pacht wohl ist, zu glauben. Durch die einmalige Zahlung sollte meines Erachtens ein dauerhaftes Recht erworben werden. Allerdings zeigt gerade auch dieser Text, dass hierbei nicht von „Eigentum" im strengen Sinne gesprochen werden kann, die ἐπιγραφά also auch nicht „gekauft" wurde. Der genaue Charakter des Rechtsgeschäftes kann nicht mit klassischen Kategorien definiert werden. Die Lindier waren sichtlich bestrebt, einen bestimmten Zustand durch ein von ihnen als passend angesehenes Rechtsgeschäft zu erreichen, eventuelle spätere Einsprüche sollten ausgeschlossen werden. Auf eine Vergabe im Rahmen einer Versteigerung deutet das Einspruchsrecht der Volksversammlung nach dem μισθοῦν durch die *epistatai* hin; ὠνέομαι ist in diesem Zusammenhang nicht ungewöhnlich.

[60] Harter-Uibopuu 2013a, 256–258. Die Lindier sind nicht die einzigen Griechen, die ihre Weihegaben einer anderen Verwendung zuführen. I.Iasos 220 (5./4. Jh. v.Chr.) enthält Vorschriften über die Rechte und Pflichten des Zuspriesters, vor allem über die Aufteilung der Opfertiere. Z.8–10 sehen vor: τῶν δὲ ἀναθ[η]μάτων ὅσα μὲν ἀργ[ὰ ἢ ἄχρηστα αὐ]τῶν, ἔστω τοῦ ἱέρεω, | τὰ δὲ ἄλλα ἀναθήματα τοῦ θεοῦ ἔστω· ἐπιμέ[λ]εσθαι δὲ τῶν ἀναθημάτων | τοὺς νεωποίας κατὰ τὸν νόμον. *Von den Weihegeschenken sollen alle diejenigen, die ungenutzt und unbrauchbar sind, dem Priester gehören, die anderen Weihegeschenke aber gehören dem Gott. Um die Weihegeschenke kümmern sich die* neopoioi *gemäß dem Gesetz.* Diese Zusage bot sicherlich einen gewissen Anreiz, das Priestertum zu übernehmen.

Gebräuche griechischer Poleis wird man dem Redner keinesfalls vorwerfen können. Dort, wo seine Argumente im juristischen Sinn in die Leere gehen, versucht er meines Erachtens bewusst, in die Irre zu führen, oder er relativiert in einem kurzen Einwurf seine Ausführungen selbst. Der Schlüssel zur rechtshistorischen Analyse derartiger literarischer Texte liegt jedenfalls in der Einbeziehung der epigraphischen Quellen, die einen Blick auf das Rechtsleben in den griechischen Poleis unter römischer Herrschaft erlauben. Sie enthalten zwar nur dürre, aber dafür offizielle und staatliche Informationen und ermöglichen es, die Rede auch aus diesem Blickwinkel zu würdigen.

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LAW IN DIO CHRYSOSTOMUS' *RHODIAN ORATION*: A RESPONSE TO KAJA HARTER-UIBOPUU*

I. The speeches of Dio Chrysostom, like the extensive oeuvre of Plutarch of Chaeronea, reflect the viewpoint and culture of eminent members of the Greek upper classes who, despite taking pride in their Hellenic past, had to deal with the contingency of living under Roman domination. Those circumstances turn their work into a very rich source of information about political and social life, as well as cultural phenomena like the so-called Second Sophistic and its aim to emulate great models of the classical period—like Plato and Xenophon, in the case of Dio. In her paper, Kaja Harter-Uibopuu (henceforth H.-U.) rightly starts by stressing those same aspects, although making clear that she intends to show that those texts are also important for a 'Rechtshistoriker', taking as reference the longest of Dio's extant speeches, the *Rhodian Oration* (number 31 of the *corpus*). In its present form, the speech has 165 chapters and would have taken around two and a half hours to be entirely delivered—an extension that has aroused the suspicion that the speech was not actually presented in public, but simply written. This argument is not necessarily fatal, because, as H.-U. states in the opening paragraph of her paper, there is little doubt that the "die heute vorliegende Version der Rede ist aber wohl von ihm selbst überarbeitet und möglicherweise erweitert worden," and therefore that Dio may have delivered a much shorter version. Even accepting this possibility, it remains a fact that the way he spoke before the Rhodian Assembly has several peculiarities, which shall be discussed in section III of this response.

In fact, Dio claims (31.1) that the oration was presented before the Assembly—even if he was not a citizen of Rhodes and had not been formally invited to give his advice (εἰ μήτε πολίτης ὢν μήτε κληθεὶς ὑφ' ὑμῶν ἔπειτα ἀξιῶ συμβουλεύειν), in order (and yet more surprisingly) to discuss a subject that was not under consideration in the meeting of that day (καὶ ταῦτα ὑπὲρ οὐδενὸς ὧν σκεψόμενοι συνεληλύθατε). The speaker is relying on the expectation (31.3) that the Rhodians are so prone to improve their behaviour that they will be ready to receive a good piece of advice (*symbouleuein*) even from a foreigner or a metic (ξένος ἢ μέτοικος), if he succeeds in proving that his assistance is given in the best interest of the city. In

* I want to thank Manuel Tröster and Adriaan Lanni, who read an earlier version of this response and whose comments helped me to improve it, especially at the linguistic level.

order to underline this perspective, Dio provides some information concerning the way 'popular sovereignty' was put into practice in Rhodes (31.4 and 6):

> (4) δῆλον γὰρ ὅτι τούτου χάριν **σύνιτε βουλευόμενοι καθ' ἡμέραν**, καὶ οὐ καθάπερ ἄλλοι δυσκόλως καὶ διὰ χρόνου καὶ **τῶν ἐλευθέρων τινὲς εἶναι δοκούντων**, ὅπως ὑμῖν ᾖ σχολὴ περὶ πάντων ἀκούειν καὶ μηδὲν ἀνεξέταστον παραλίπητε. […] (6) ὁποῖοι γὰρ ἂν ὦσιν οἱ πλείους **ἐν δημοκρατίᾳ**, τοιοῦτον φαίνεται καὶ τὸ κοινὸν ἦθος· τὰ γὰρ τούτοις ἀρέσκοντα ἰσχύει δήπουθεν, οὐχ ἕτερα.
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> *(4) For evidently the reason that you* ***come together to deliberate every day*** *and not, as other people do, reluctantly and at intervals and with only a few of you who are* ***regarded as free-born being present****, is that you may have leisure to hear about all matters and may leave nothing unexamined. […] (6) For* ***in a democracy*** *the character of the majority is obviously the character of the state, since it is their will, surely, and no one else's, that prevails.*[1]

If, when speaking about democracy, Dio was taking as reference the Athenian model of the classical period, it becomes quite obvious that he could not have addressed the Rhodian assembly in as informal a manner as he claims. But quite apart from the evident *captatio* he is developing here, this passage contains important details about the way the democratic organs were functioning under Roman domination. Even if this has more to do with a political and historical approach, this passage shall be taken up again in the final considerations. For now, it is enough to stress that, according to Dio, the Rhodian assembly was apparently quite receptive to this kind of spontaneous intervention by a non-citizen speaker.

The subject of the speech is introduced by Dio soon after those preliminary considerations (31.9) and concerns the Rhodian practice of reusing old statues by renaming them, even if this involved erasing the names of the honorands previously engraved in them. The speaker strongly condemns this bad habit, both on ethical and legal grounds. H.-U. recalls only those arguments that deal with legal issues and compares them with epigraphic records, in order to establish whether Dio is simply exhibiting his rhetorical skills or, on the contrary, bases his arguments on existing laws of the late Hellenistic and imperial Greek *poleis*. It is from the balance of those two perspectives that H.-U. seeks to define the degree of the speaker's reliability as a legal source.

The first string of arguments adduced by Dio (31.47; 49; 54) aims at proving the point that the statues are, in fact, private property of the honorands and not of the city. As a direct consequence of this reasoning, the practice of renaming and reusing the statues would correspond to an interference with those private belongings. Although Dio concedes that the possession of a statue is not equivalent to the possession of other things (see also 31.115), he nevertheless argues that the correlative honours of having been given a statue do belong to the honorands, who

[1] All English translations provided are taken from the Loeb Classical Library.

therefore suffer a loss if the public proof of this *time* is transferred to a different person, even if that *time* corresponds to a kind of "immaterielle Ehrung." H.-U. says that the ownership of a statue was never addressed in public texts, but recognises that some epigraphic texts (see H.-U. text accompanying fn. 55 for examples from Mantinea and from Delos) demonstrate that the denial of honours owed to private persons could result in the payment of a fine to the person who had been damaged (together with his family) by that crime. Apart from the legal implications of denying the due tribute to a honorand, the public recognition of excellence was, in fact, deeply rooted in Greek mentality, right from Homeric times, as Thetis makes clear before Zeus, after Agamemnon has decided to take from Achilles his slave-concubine Briseis (*Il.* 1.503–10):

> Ζεῦ πάτερ εἴ ποτε δή σε μετ' ἀθανάτοισιν ὄνησα
> ἢ ἔπει ἢ ἔργῳ, τόδε μοι κρήηνον ἐέλδωρ·
> **τίμησόν** μοι υἱὸν **ὃς ὠκυμορώτατος ἄλλων**
> **ἔπλετ'**· ἀτάρ μιν νῦν γε ἄναξ ἀνδρῶν Ἀγαμέμνων
> **ἠτίμησεν**· ἑλὼν γὰρ ἔχει **γέρας** αὐτὸς ἀπούρας.
> ἀλλὰ σύ πέρ μιν **τῖσον** Ὀλύμπιε μητίετα Ζεῦ·
> τόφρα δ' ἐπὶ Τρώεσσι τίθει κράτος ὄφρ' ἂν Ἀχαιοὶ
> υἱὸν ἐμὸν **τίσωσιν ὀφέλλωσίν τέ ἑ τιμῇ**.
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> *"Father Zeus, if ever amid the immortals I gave you aid by word or deed, grant me this prayer: do* ***honour*** *to my son,* ***who is doomed to a speedy death beyond all other men****; yet now Agamemnon, king of men,* ***has dishonoured*** *him, for he has taken and keeps his* ***prize*** *by his own arrogant act. But* ***honour*** *him, Olympian Zeus, lord of counsel; and give might to the Trojans, until the Achaeans* ***do honour*** *to my son, and* ***magnify him with recompense****."*

The meaning of the passage is self-evident: by taking Briseis, Agamemnon deprives Achilles also of his prize (γέρας), which served as a public recognition of his *arete*—whose value as "immaterielle Ehrung" was much higher than the 'material value' of any slave, and worked also as a guarantee that the warrior, despite the contingency of dying young, would have a long-lasting reputation among the living. A similar logic is sustained by Dio when he establishes a direct connection between the act of recognising the *time* of exceptional people and the need to keep the memory of their deeds in the future (31.7): "of all other actions there is nothing nobler or more just than **to show honour** to our good men and **to keep in remembrance** those who have served us well" (τῶν λοιπῶν οὐδέν ἐστι κάλλιον οὐδὲ δικαιότερον ἢ **τιμᾶν** τοὺς ἀγαθοὺς ἄνδρας καὶ τῶν εὖ ποιησάντων **μεμνῆσθαι**). It is therefore understandable that the speaker considers the practice of reusing statues a severe kind of *atimia*, especially injurious to the former honorand (31.79): "the **dishonour** is greater, since the victims are being deprived of a **very ancient honour**" (ἡ **ἀτιμία** μείζων τοῖς **σφόδρα παλαιᾶς τιμῆς** ἀφαιρουμένοις).[2]

[2] Later in the speech (31.130), Dio says that people deprived of their statues are left with nothing "except the insult and the dishonour" (δίχα γε τῆς ὕβρεως καὶ τῆς ἀτιμίας).

In another line or reasoning, Dio argues (31.86) that a person who expunges an inscription from a statue commits a crime not inferior to that of someone who intends to invalidate a decree by erasing certain words from an official tablet. As H.-U. shows (commenting on two documents: I. Adramytteion 34 B 17–65; SEG 33, 1041, Z.88–90), the epigraphic evidence supports this argument by putting the annulment of a honorific decree on the same level as treason or an attempt to harm the *demos*. Towards the end of the speech (31.139), Dio asks the Rhodians the reason why they do not approve a law regulating the reuse of statues—an inquiry that is rhetorically answered by his interlocutors with the putative observation that such a law would bring "no little shame" (αἰσχύνην γὰρ οὐ μικρὰν) to the city. Even if this remark enables the speaker to stress that the renaming of statues is a bad habit, Dio concedes nevertheless that the existence of such a law would prevent more easily the risk of abuse. As H.-U. pertinently argues, there is in fact a law from Lindos (I. Lindos II 419 Z.34–43) of roughly the same period that regulates exactly this practice. It is also particularly meaningful that the same inscription clearly states that disregard of the law could be considered a crime of *asebeia*. Even if it is not clear whether or not Dio knew this law from Lindos, it is undeniable that the idea of a religious crime connected with the practice of misusing old statues is a very strong argument in his line of reasoning, and so it should be dealt with more in detail.

II. Throughout the whole speech, there are frequent hints in Dio's argumentation that the misuse of statues was considered an impious act, and thereby could be punished in the same way as *asebeia* and *hierosylia*.[3] In order to put the honorific statues under the same protection that the *polis* must grant to the statues existing in sanctuaries and to those dedicated to the gods, the speaker argues (31.80–82) that the honorands who have died a long time ago are seen as 'heroes' by the community and, because of that, offences against them should be considered *asebemata* and suffer the same penalties as those committed against the gods. H.-U. argues that this line or argumentation must have looked quite plausible to Dio's audience, and several epigraphic texts show that the misappropriation of statues was considered an impious act, which would lead to a specific legal prosecution (see IGR IV 1703 Z.14–20; I. Ephesos 27 B 214–219).

[3] The crime of *asebeia* could include offences such as the disrespect of mysteries, sacrifices and suppliants, the violation of ritual prohibitions or limitations to the right to visit sacred sites, the looting of temples and the mutilation of sacred objects. For more details, see Cohen (1991) 205–206. However, it is not unlikely that some of these crimes were also covered by other categories, as happened with the subtraction of sacred objects (*hierosylia*), which is a special category among cases of theft precisely because it is an offence affecting the religious sphere. As is underlined by Todd (1995), 307 and n. 19, the fact that there is a public action for these specific offences (*graphe hierosylias*) shows the gravity of the crime, although the examples of cases of this nature provided by the sources are often ambiguous.

The religious and legal realm of *asebeia* is one of the most controversial and slippery concepts in Greek law, and it is completely beyond the aims of this comment to discuss that problem in detail.[4] At any rate, I would like to recall one of the passages analysed by H.-U. and compare it to another literary testimony (Dio Chrys. 31.13–14):

> (13) διαφέρει δ', ὅτι τὰ μὲν περὶ τοὺς θεοὺς γιγνόμενα μὴ δεόντως **ἀσεβήματα** καλεῖται, τὰ δὲ πρὸς ἀλλήλους τοῖς ἀνθρώποις **ἀδικήματα**. τούτων τὴν μὲν **ἀσέβειαν** ἔστω μὴ προσεῖναι τῷ νῦν ἐξεταζομένῳ πράγματι· τὸ λοιπὸν δέ, εἰ μὴ δοκεῖ φυλακῆς ὑμῖν ἄξιον, ἀφείσθω. (14) καίτοι καὶ τὴν **ἀσέβειαν** εὕροι τις ἂν ἴσως τῷ τοιούτῳ προσοῦσαν· λέγω δὲ οὐ περὶ ὑμῶν οὐδὲ περὶ τῆς πόλεως· οὔτε γὰρ ὑμῖν ποτε ἔδοξεν οὔτε δημοσίᾳ γέγονεν· ἀλλ' αὐτὸ σκοπῶν κατ' ἰδίαν τὸ πρᾶγμα. τὰ γὰρ περὶ τοὺς κατοιχομένους γιγνόμενα οὐκ ὀρθῶς **ἀσεβήματα** κέκληται καὶ τῆς προσηγορίας ταύτης τυγχάνει παρὰ τοῖς νόμοις, εἰς οὓς ἄν ποτε ᾖ. τὸ δ' εἰς ἄνδρας ἀγαθοὺς καὶ τῆς πόλεως εὐεργέτας **ὑβρίζειν** καὶ τὰς **τιμὰς** αὐτῶν καταλύειν καὶ τὴν **μνήμην** ἀναιρεῖν ἐγὼ μὲν οὐχ ὁρῶ πῶς ἂν ἄλλως ὀνομάζοιτο.
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> *(13) But there is this difference, that unseemly actions in what concerns the gods are called **impiety**, whereas such conduct when done by men to one another is called **injustice**. Of these two terms let it be conceded that **impiety** does not attach to the practice under examination; and henceforth, unless it seems to you worth guarding against, let this matter be dropped. (14) And yet even **impiety** might perhaps be found to attach to such conduct—I am not speaking about you nor about your city, for you have never formally approved nor has the practice ever been officially sanctioned; I am considering the act in and of itself from the private point of view—for is it not true that wrong treatment of those who have passed away is rightly called **impiety** and is given this designation in our laws, no matter who those are against whom such acts are committed? But to commit an **outrage** against good men who have been the benefactors of the state, to annul the **honours** given them and to blot out their **remembrance**, I for my part do not see how that could be otherwise termed.*

Dio starts by conceding that crimes against gods are called 'impieties' (*asebemata*) while those against men are 'injustices' (*adikemata*), but this distinction could harm his reasoning, because he would be forced to admit (as he first does) that the practice in question could not be considered *asebeia*. That is why he intends to argue—with success, as has been seen in the first part of this section—that the misuse of statues devoted to great men of the past corresponds as well to a crime of *asebeia*.

In fact, there are hints in the literary tradition from the classical period that could be interpreted as pointing in the same direction. This applies to a passage from a text attributed to Aristotle, although probably not by him (*De virtutibus et vitiis*, 1251a30–1251b2):

[4] Lipsius (1905–1915), II.359–360, was the first great promoter of the idea that *asebeia* is a vague and elastic concept. A different perspective is adopted by Rudhardt (1960), who thinks, on the contrary, that *asebeia* had a clear legal incidence and was applicable only to certain types of crimes. On the main lines of the debate, see Leão (2012) 131–138.

> **ἀδικίας** δ' ἐστὶν εἴδη τρία, **ἀσέβεια πλεονεξία ὕβρις**. **ἀσέβεια** μὲν ἡ περὶ θεοὺς πλημμέλεια καὶ περὶ δαίμονας ἢ καὶ περὶ τοὺς κατοιχομένους, καὶ περὶ γονεῖς καὶ περὶ πατρίδα· **πλεονεξία** δὲ περὶ τὰ συμβόλαια, παρὰ τὴν ἀξίαν αἱρουμένη τὸ διάφορον· **ὕβρις** δέ, καθ' ἣν τὰς ἡδονὰς αὐτοῖς παρασκευάζουσιν, εἰς ὄνειδος ἀγαγόντες ἑτέρους. [...] ἔστι δὲ τῆς **ἀδικίας** τὸ παραβαίνειν τὰ πάτρια ἔθη καὶ τὰ νόμιμα, καὶ τὸ ἀπειθεῖν τοῖς νόμοις καὶ τοῖς ἄρχουσι, τὸ ψεύδεσθαι, τὸ ἐπιορκεῖν, τὸ παραβαίνειν τὰς ὁμολογίας καὶ τὰς πίστεις.
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> *Of **unrighteousness** there are three kinds, **impiety, greed, outrage**. Transgression in regard to gods and spirits, or even in regard to the departed and to parents and country, is **impiety**. Transgression in regard to contracts, taking what is in dispute contrary to one's desert, is **greed**. **Outrage** is the unrighteousness that makes men procure pleasures for themselves while leading others into disgrace [...] And it belongs to **unrighteousness** to transgress ancestral customs and regulations, to disobey the laws and the rulers, to lie, to perjure, to transgress covenants and pledges.*

According to this passage, *asebeia* is presented as a form of 'unrighteousness' (*adikia*), along with other expressions of unjust behaviour, like 'greed' (*pleonexia*) and 'outrage' (*hybris*). This means that, contrary to Dio, [Aristotle] does not make the basic distinction between 'impieties' (*asebemata*) and 'injustices' (*adikemata*), thus favouring from the beginning a confluence in both fields. But even if, from a conceptual perspective, Dio would seem more accurate, the text under analysis says that *asebeia* applied to *adikiai* committed against the gods, but also against the dead, the parents and the fatherland—i.e., areas that (despite the ambiguity of the last sentence) would fall under the protection of 'ancestral customs and regulations' (τὰ πάτρια ἔθη καὶ τὰ νόμιμα), whose origin is lost in time and therefore tend to be considered sacred. Taking together these data, one may conclude that *asebeia* is an expression of reprehensible behaviour in the light of divine and social morality, because it constitutes an affront in areas that are crucial to ensuring stability to the human existence and to community life: the protection of the gods, the family hierarchy (and its memory), and the awareness of a long-lasting political identity. Accepting that Dio's audience shared, in general terms, this same religious and cultural background in what concerned the notion of *asebeia*, it is not difficult to imagine that, in the end, the Rhodians could be sensitive to the idea of seeing their practice of misusing statues as an impious act, of which they were formerly not aware.

In fact, it is quite clear that Dio was counting on this result, when, in the opening chapters of the speech, he expresses the moral obligation of addressing the Rhodian assembly (31.4):

> εἰ μὲν οὖν περί τινος τῶν προκειμένων ἔλεγον, οὐθὲν <ἂν> ὑπ' ἐμοῦ τηλικοῦτον ὠφελεῖσθε· εἰκὸς γὰρ ἦν καὶ καθ' αὑτοὺς ὑμᾶς τὸ δέον εὑρεῖν σκοποῦντάς γε ἅπαξ· ἐπεὶ δὲ ὑπὲρ οὗ μηδὲ ζητεῖτε τὴν ἀρχὴν ὅπως ποτὲ ἔχει, τοῦτό φημι δείξειν αἴσχιστα γιγνόμενον, πῶς οὐκ ἂν εἴην παντελῶς ὑμῖν χρήσιμον πρᾶγμα πεποιηκώς, ἐὰν ἄρα μὴ φανῶ ψευδόμενος;

> *Now if I were speaking about one of the questions which are before you, you would not be so greatly benefited by me, for you would be reasonably sure to arrive at the proper conclusion by yourselves if you were once to consider the problem. But since, in discussing the matter concerning which you are not even making any attempt at all to ascertain what the situation is, I assert that I shall prove that it is being most disgracefully managed, shall I not have done you an altogether useful service—that is, if I shall, indeed, prove not to be misrepresenting the facts?*

As has been argued in the first section of this response, it becomes rather obvious that Dio is here making a *captatio benevolentiae* to the Rhodian assembly, but he is also preparing the ground for the development of the idea of *asebeia* as one of his most insistent arguments. As a final proof that this was his strategy, it is worth recalling one of his closing chapters, in which he describes the reasons for the greatness of the city of Rhodes (31.146–7):

> (146) ἀξιῶ δ' ὑμᾶς ἐκεῖνο ἐνθυμηθῆναι μᾶλλον, ὅτι πολλῶν ὄντων κατὰ τὴν πόλιν, ἐφ' οἷς ἅπασιν εὐλόγως σεμνύνεσθε, **πρῶτον μὲν τῶν νόμων** καὶ **τῆς εὐταξίας τῆς περὶ τὴν πολιτείαν**, ἐφ' οἷς καὶ μάλιστα φιλοτιμεῖσθε, ἔπειτα οἶμαι καὶ τῶν τοιούτων, ἱερῶν, θεάτρων, νεωρίων, τειχῶν, λιμένων· <ὧν> τὰ μὲν πλοῦτον ἐμφαίνει καὶ μεγαλοψυχίαν καὶ τὸ μέγεθος τῆς πρότερον δυνάμεως, τὰ δὲ **καὶ τὴν πρὸς τοὺς θεοὺς εὐσέβειαν**, οὐθενὸς ἧττον ἥδεσθε ἐπὶ τῷ πλήθει τῶν ἀνδριάντων, εἰκότως· (147) οὐ γὰρ μόνον κόσμον φέρει τὸ τοιοῦτον, ὥσπερ ἄλλο τι τῶν ἀναθημάτων, ἀλλὰ καὶ **τὴν ἰσχὺν τῆς πόλεως** οὐχ ἥκιστα ἐπιδείκνυσι καὶ **τὸ ἦθος**.
>
> *(146) I ask you to bear in mind, rather, that, although there are many things about your city on all of which you have a good right to pride yourselves—your **laws in the first place**, and **orderliness of your government** (things of which you are wont to boast most), and, in the second place, I imagine, such things also as temples, theatres, shipyards, fortifications, and harbours, some of which give evidence of your wealth and high aspirations and the greatness of your former power, **others of your piety toward the gods**—you rejoice no less in the multitude of your statues, and rightly; (147) for not only do such things do you credit just as any of your other dedicated monuments do, but they also more than anything reveal the **strength of your city and its character**.*

It cannot be innocuous that, at the closing of the speech, Dio decides to underline the excellence of the *nomoi* and of the *politeia* of Rhodes, together with the patent preoccupation of the Rhodians to show *eusebeia* to the gods.[5] And because the Rhodians are so proud of the multitude of their statues, as a clear mark of the city's *ethos*, the obvious step to take next would be to avoid the risk of *asebeia*, by regulating the right reuse of statues dedicated to former 'heroes' and benefactors of the *polis*—just like the city of Lindos had already done.

III. As a final observation, it is pertinent to recall a quotation presented in the first section of this response (Dio Chrys. 31.4 and 6), where the speaker is praising the

[5] On a similar strategy adopted by the apostle Paul in Athens, see Leão (2012) 141–142.

receptiveness of the Rhodians to any good counsel in their assemblies, even if it comes from a *xenos* or a *metoikos* (cf. also 31.2–3). According to Dio, they do that because "in a *demokratia* the character of the majority is obviously the *ethos* of the state." In 31.146, he says that the Rhodians were particularly proud of the 'orderliness' of their 'government' (τῆς εὐταξίας τῆς περὶ τὴν πολιτείαν) and throughout the speech he makes clear that this *politeia* is equivalent to popular sovereignty (e.g. 31.46; 58). Those remarks, together with the information that the Rhodian assembly used to meet on a daily basis (31.4 σύνιτε βουλευόμενοι καθ' ἡμέραν), suggest, at a first sight, that Rhodes was living under a particularly dynamic and advanced democracy, but the fact is that even Dio insinuates—perhaps unwillingly—that the real situation was quite different. In actual fact, he complains (31.9; 52) that, even if it was the community who decided in the past to dedicate a statue to a honorand, it is now a *strategos* who decides by himself whether to annul a previous decision of the *polis*. This is certainly a sign of the limitations that a Greek *polis* had to face under Roman domination. Besides, Dio complains also about the fact that the Rhodians could not dare to refuse a statue to the Romans aiming at that public honour, because of the risk of losing their freedom (31.43; 105; 112).

As happened before with the Athenians and other Greek *poleis*, the keeping of the democratic apparatus was not equivalent to real sovereignty of the *polis*. It is worth quoting a passage from Plutarch (who faced the same dilemma of being a Greek under Roman domination) where the biographer describes the political (and soon after physical) death of Phocion—one of last true Athenian *politai*. Accused of treason shortly after he had negotiated the terms of an agreement with the Macedonian dominator, the statesman suffers personally the consequences of a new era marked by the collapse of the ideals of the *polis*. The composition of the assembly that was to dictate his death sentence represents mimetically a clear sign of this emerging reality. In fact, everybody was allowed to take part in it, irrespective of status or gender (Plutarch, *Phoc.* 34.3):

> ἐκεῖ γὰρ αὐτοὺς προσαγαγὼν ὁ Κλεῖτος συνεῖχεν, ἄχρι οὗ τὴν ἐκκλησίαν ἐπλήρωσαν οἱ ἄρχοντες, **οὐ δοῦλον, οὐ ξένον, οὐκ ἄτιμον ἀποκρίναντες, ἀλλὰ πᾶσι καὶ πάσαις** ἀναπεπταμένον τὸ βῆμα καὶ τὸ θέατρον παρασχόντες.
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> *[Straight to the place of judicature], where Clitus secured them till they had convoked an assembly of the people, which was open to all comers,* ***neither foreigners, nor slaves, nor those who had been punished with disfranchisement, being refused admittance, but all alike, both men and women****, being allowed to come into the court, and even upon the place of speaking.*

One must not exclude the hypothesis that the biographer is here highlighting the irregular nature of the assembly meeting to emphasise, in a way, the illegality of the

condemnation that resulted from it.[6] At any rate, the legal framework described by the author clearly points to an environment of widespread decay of the *polis*, at a time when the taking over of the old democratic organs is merely the external expression of a far darker reality: the growing inability of those same organs to make policy decisions that are truly relevant, going beyond the mere basic and immediate impulse of popular revenge. Dio's high praise of the Rhodian *politeia* apparently implies that his audience lives in different circumstances, but the reality is probably not very dissimilar from that of Athens after the Macedonian conquest.

As a global analysis of the *Rhodian Oration* from a legal perspective, I would agree with the conclusions of Kaja Harter-Uibopuu: Dio presents his own perspectives and, in order to decide whether they are merely rhetorical or, on the contrary, reliable as legal sources, the comparison with epigraphic material, if available, is very instructive. As for my contribution, I have tried to demonstrate that the cultural and literary tradition, too, is certainly very useful in this regard.

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[6] Diodorus, 18.66.4, suggests that it was a regular meeting, though hostile to Phocion. Fialho (2010), 202, calls attention to the idea that, in Plutarch, the trial of Phocion is a democratic farce re-created by the Macedonian ruler: "For true citizens, the staged trial denounced the farcical democracy that was being acted out, making them aware of danger and demise—the 'shipwreck' of the city, in fact." For a more detailed analysis of Athens at the time of Phocion, see Leão (forthcoming).

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