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(Hamburg, 26.–28 August 2019)

herausgegeben von

Kaja Harter-Uibopuu
Werner Riess

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VORWORT

Vom 26. bis 28. August 2019, an den heißesten Tagen des Jahres, fand an der Universität Hamburg, im Center for the Study of Manuscript Cultures das 22. Symposion der Gesellschaft für griechische und hellenistische Rechtsgeschichte statt. Wie stets wurde — um die neuesten Forschungsergebnisse in unserem kleinen Fach präsentieren zu können — davon Abstand genommen, das Symposion unter ein Generalthema zu stellen. Dennoch ließen sich die eingereichten Themen der Referenten drei Forschungsschwerpunkten zuordnen, die ineinandergreifen und sich gut ergänzen.

Das Recht Athens: Durch die hohe Dichte an literarischen und epigraphischen Quellen stand das Recht der Stadt Athen stets im Mittelpunkt der wissenschaftlichen Beschäftigung, wie auch die bisherigen Bände der Symposien deutlich zeigen. Im vorliegenden Band ist das zunächst die kulturhistorisch aktuelle Frage nach der Gewalt in der Gesellschaft. David Phillips (Los Angeles) und Laura Pepe (Mailand) betrachten die eingeschränkte Selbsthilfe des betrogenen und in seiner Ehre gekränkten Ehemanns nicht nur in Athen, sondern auch darüber hinaus und werfen dabei von neuem die Frage nach der „Unity of Greek Law“ auf. Schon hier wird deutlich, dass das Symposion bei aller Betonung des Athenischen nicht athenozentrisch sein möchte. Auch Emiliano Buis (Buenos Aires) und Werner Riess (Hamburg) widmen sich im weitesten Sinne der Gewalt und analysieren die Komödien des Aristophanes unter dem kulturhistorischen Aspekt der „physicality of justice“. In beiden Vorträgen stehen jeweils ein Historiker und ein/e Jurist/in einander gegenüber und stellen neue Erkenntnisse zu literarischen Quellen und Fluchtafeln vor. Michael Gagarin (Austin) beleuchtet einmal mehr die Funktion von Zeugen im athenischen Rechtsystem, ihm respondiert Eva Cantarella (Mailand). In den Hellenismus und die Epigraphik führt Nikolaos Papazarkadas (Berkeley), der mit einem Kleroterion, das eine Inschrift trägt, einen Neufund aus hellenistischer Zeit präsentiert und die Quelle zum Anlass für grundsätzliche Bemerkungen zu Gerichten, Amtsträgern und den Losverfahren nimmt. Respondentin ist Adele Scafuro (Providence). Einen Übergang zum zweiten Schwerpunkt stellt der Beitrag von Christina Carusi (Parma) zur Vergabe von Bauaufträgen und der Anwerbung und Bezahlung von Arbeitern im öffentlichen Bauwesen Athens dar. Die inschriftlich erhaltene Rechnungslegung der städtischen Baukommissionen und verantwortlichen Amtsträger rückt seit einigen Jahren vermehrt in den Fokus der Forschung.

Öffentliches Recht und Administration in den griechischen Poleis: Zu den aktuellen Entwicklungen der rechtshistorischen Forschung jenseits von Athen und dem Privatrecht trägt der Band bei, indem Verfassung und Verwaltung anderer griechischer Poleis intensiv diskutiert werden. Den Auftakt macht Winfried Schmitz (Bonn) mit einem Beitrag zur frühesten Verfassung Spartas und der Rolle Lykurgs,

auf welchen Martin Dreher (Magdeburg) antwortet. Der Vortrag von Emily Mackil (Berkeley) nimmt die notwendigen rechtlichen Schritte nach der Beilegung innerstaatlicher Probleme und der damit verbundenen Rückkehr von Verbannten in den Blick. Die Rückabwicklung von Konfiskationen und die Klärung von Eigentumsverhältnissen an Immobilien sowie Entschädigungen stellen Staaten bis in die heutige Zeit vor große Herausforderungen. Respondentin ist Maria Youni (Komotini). Die Pflichten und Verantwortlichkeiten der Gremien in griechischen Poleis lassen sich — wie Michele Faraguna (Mailand) zeigt — nicht nur den normativen Texten entnehmen, sondern auch den Abrechnungen über öffentliche Ausgaben, die vielfach auf Inschriften öffentlich aufgestellt wurden. Einen wirtschaftsgeschichtlichen Blick wirft Georgy Kantor (Oxford) in seiner Antwort auf dieses Phänomen. Ilias Arnaoutoglou (Athen) stellt den Einfluss des antigonidischen Herrschers Demetrios Poliorketes auf die Institutionen Athens in den Mittelpunkt, ihm antwortet Thomas Kruse (Wien). Dieses Zusammenwirken beleuchtet den Übergang von der spätklassischen zur frühhellenistischen Entwicklung Athens. Pierre Fröhlich (Bordeaux) widmet sich verfassungsrechtlichen Fragen, wenn er sich mit der Vertretung von abwesenden Amtsträgern in Iasos beschäftigt (Respondentin ist Athina Dimopoulou, Athen). Éva Jakab (Budapest) behandelt aus Sicht der Rechtswissenschaft das manchmal schwierige Zusammenleben verschiedener Bevölkerungsgruppen und führt mit ihrem Beitrag zum Recht im provinzialen Kontext in das römische Ägypten. Die weit verbreiteten Einflüsse des griechischen Rechts und die Möglichkeiten der Koexistenz verschiedener Rechtsordnungen an einem Ort werden anhand erbrechtlicher Dokumente aufgezeigt (Respondent Bernhard Palme, Wien). Kaja Harter-Uibopuu (Hamburg) widmet sich am Beispiel eines kaiserzeitlichen Testaments aus Lydien der Verwaltung privater *donationes sub modo*, ihrem Beitrag folgen Überlegungen von Andreas Viktor Walser (Zürich).

Sklaverei und Freilassungen: Unfreiheit und ihr mögliches Ende werden sowohl in literarischen als vor allem auch in epigraphischen Quellen der klassischen und hellenistischen Zeit vielfach thematisiert. Dabei geht Paulin Ismard (Paris) auf das Phänomen des (Ver)mietens von Sklaven in der griechischen Welt ein. Es respondiert Philipp Scheibelreiter (Wien), der auch Vergleiche zum römischen Recht zieht. Ausgehend von statistischen Überlegungen zur Anzahl der weiblichen Freilasser ebenso wie derjenigen der weiblichen Freigelassenen stellt Lene Rubinstein (London) Überlegungen zur Unterstützung bedürftiger Familienangehöriger durch Freilassungen mit *paramone*-Klausel an. Es antworten Rachel Zelnick-Abramovitz (Tel Aviv) sowie Edward Cohen (New York). Den zeitlichen Rahmen der griechischen Rechtsgeschichte bewusst weit ausdehnend, legt Gerhard Thür (Wien) eine neue Interpretation der *dediticii* (Unterworfenen) in der Bürgerrechtsverleihung durch den römischen Kaiser Caracalla (212 n. Chr., P. Giess. 40) vor. Ihm antwortet Patrick Sänger (Münster).

Die Tagung wäre ohne die finanzielle Unterstützung verschiedener Institutionen nicht möglich gewesen. Wir sind der Deutschen Forschungsgemeinschaft ebenso zu Dank verpflichtet wie der Fakultät für Geisteswissenschaften der UHH, dem Center for the Study of Manuscript Cultures und dem Europäischen Hansemuseum in Lübeck, welches den Teilnehmern im Rahmen des Ausfluges einen Einblick in die Geschichte, aber auch das Rechtswesen, der Hanse ermöglichte. Darüber hinaus waren es zahlreiche Kolleginnen und Kollegen, die dem Symposion und seiner Drucklegung hilfreich zur Seite standen und denen an erster Stelle unser Dank gilt. Die Mitarbeiterinnen und Mitarbeiter des Arbeitsbereichs Alte Geschichte unterstützten uns in jeder Phase der Vorbereitung und trugen die Verantwortung für die Betreuung der Gäste während des Symposions. Die Herausgeber der Reihe „Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte“ sowie Michael Gagarin (Austin, TX) und Gerhard Thür (Wien) begleiteten die Vorbereitung der Tagung, Letztere auch die Drucklegung des Bandes. Ihnen allen sind wir zu Dank verpflichtet. Philip Egetenmeier leistete ebenso kundig wie geduldig die Formatierung des vorliegenden Bandes und trug damit eine der Hauptlasten, Justine Diemke erstellte den Index. Dem Verlag der ÖAW sind wir für die Unterstützung bei der Drucklegung dankbar.

Es war uns eine Freude, die Referentinnen und Referenten und die Gäste an unserer Wirkungsstätte, der Universität der Freien und Hansestadt Hamburg, begrüßen zu können und mit ihnen gemeinsam intensive Tage der Forschung, aber auch des persönlichen Austausches verbringen zu können. Der vorliegende Band vermag einen Teil der produktiven Atmosphäre in Hamburg zu vermitteln.

Hamburg, im Februar 2021
Kaja Harter-Uibopuu und Werner Riess

DAS RECHT ATHENS

DAVID D. PHILLIPS (LOS ANGELES, CA)

MOICHEIA AND THE UNITY OF GREEK LAW*

Abstract: This paper proposes *moicheia* (seduction) as an instance of the unity of ancient Greek law. Part I examines the sources that state or imply such unity. Part II analyzes the treatment of *moicheia* in specific sources and places. Part III concludes that the most compelling evidence for unity lies in the detention for ransom of the seducer caught in the act and in the humiliation of the seducer and/or his paramour.

Keywords: Greek law, *moicheia*, seduction, adultery, sexual offenses

Prohibitions and sanctions against illicit consensual sex between a man and a woman are as old as law itself. The world's oldest extant legal code, the Laws of Ur-Nammu (r. 2112-2095), ordains the death penalty for some cases of adultery (§4(7)) and the river ordeal for others (§11(14)). The Decalogue forbids adultery (οὐ μοιχεύσεις, Ex. 20:13 = Dt. 5:17)[1] and coveting another's wife (Ex. 20:17 = Dt. 5:21). When Horace (*Sat*. 1.3.99-110) imagined the evolutionary journey from bestial vegetarianism to human civilization, the lawgivers' first concerns were theft, robbery, and adultery. And the Greeks were no exception. On Homer's Olympus, the gods enforce remedies for *moicheia* (no. **7** *infra*); among the earliest Greek lawgivers, Zaleucus (no. **16**) possibly, and Draco (no. **9**) certainly, wrote laws dealing with *moicheia*. Employing the criteria I have previously advocated for the investigation of unity in ancient Greek law,[2] I propose to demonstrate that a

* I thank the organizers of the Symposion for inviting me to participate, and the participants, especially Laura Pepe, for their comments. Earlier versions of parts of this paper were delivered in Edinburgh (November 2017), Los Angeles (March 2018), and Albuquerque, NM (April 2018); I thank those organizers and audiences as well.

[1] References to the Old Testament are to the Septuagint version. Elaboration of the rule: Lev. 20:10-12; Dt. 22:21-24.

[2] Namely, (1) significant similarity in the laws of multiple independent *poleis*; (2) the legal phenomena of communities—permanent, temporary, virtual, or fictional—that comprise Greeks from different *poleis*; and (3) evidence spanning a significant period of time as well as a significant sample of communities for which evidence exists (Phillips 2014, esp. 75-83; see also Phillips 2016*b*: 49-54). Within category (2), for virtual communities, see esp. nos. **3** and **7**; for actual communities, nos. **5**, **13** (?Heracleia Pontica), **20**. Among the regulations governing the Panhellenic cult site of Zeus at Olympia, *moicheia* will have come under the No Fornicating In The Sanctuary Law (*IvO* 7.1-3, end of the sixth

substantive category of *moicheia* (seduction, including, but not limited to, adultery)[3] existed across sufficiently broad space and time to qualify *moicheia* as a concept of "Greek" law. To this end, I will first address the sources that state or strongly imply such unity (Part I), and then test the resulting hypotheses against the evidence for the treatment of *moicheia* in discrete sources and places (Part II), in order to arrive at conclusions (Part III).

I. General statements asserting or implying unity

1. Sometime between 403 and *ca*. 380, Euphiletus stood trial by an Athenian *dikê phonou* for killing Eratosthenes. His preserved speech (Lysias 1) argues that the killing was lawful because he caught Eratosthenes in the act of *moicheia* with his wife (cf. D. 23.53 (*lex*), no. **9**). Euphiletus maintains that the killing of a *moichos* apprehended *in flagrante* is a right recognized not only in Athens but throughout Greece (ἐν ἁπάσῃ τῇ Ἑλλάδι), regardless of constitutional type and the standing of killer and victim (§2). This is an obviously partisan and tendentious statement, especially given the total lack of supporting proof elsewhere in the speech; but before we dismiss it out of hand, we must consider the other available sources.

2. Partial confirmation of Euphiletus' claim is offered by Xenophon, *Hiero* 3.3, where Hiero asserts that "many cities practice the killing with impunity of seducers alone" (μόνους γοῦν τοὺς μοιχοὺς νομίζουσι πολλαὶ τῶν πόλεων νηποινεὶ ἀποκτείνειν; we are presumably to infer that the seducer must be caught in the act). Leaving aside the hyperbolic "alone,"[4] this statement carries a higher presumption of credibility than Euphiletus' more sweeping claim: Xenophon and his Hiero have no particular motive for special pleading, and Xenophon's service with the Ten Thousand Greeks had afforded him an ideal opportunity to learn about the laws and practices of numerous *poleis*.[5] Such knowledge may also be reflected in *Cyr*. 1.2.2-3, which contrasts Persian law with the laws of the majority of Greek cities, including those concerning *moicheia*; but since Xenophon specifies neither cities nor penalties, this passage provides better evidence for the prevalence of *moicheia* laws than for their content.[6]

century: αἰ δὲ βενέοι ἐν τἰαροῖ, βοΐ κα θοάδοι καὶ κοθάρσι τελείαι καὶ τὸν θεαρὸν ἐν ταὐτᾶι).

[3] *Moicheia* as "seduction" of a woman irrespective of her marital status: Latte 1932: col. 2446; Cantarella 1976: 153-54; MacDowell 1978: 124-25; Schmitz 1997: 132; Patterson 1998: 114-25; Omitowoju 2002: 73-95; Harris 2004; Phillips 2014: 78-79; *contra* Lipsius 1905-15: 429; Cohen 1991: 98ff.; Todd 1993: 277-78.

[4] Cf. Lys. 1.2: περὶ τούτου γὰρ μόνου τοῦ ἀδικήματος κτλ.

[5] Phillips 2014: 81. Xenophon will have gained additional knowledge during his subsequent exile from Athens, service with Sparta, and settlement at Scillus (X. *An*. 5.3.7-13) and then at Corinth (D. L. 2.53).

[6] With Xenophon's ensuing comment on the efficacy of Persian law contrast his report (albeit with distancing ἐλέγετο) of Cyrus the Younger's committing *moicheia* with Epyaxa (*An*. 1.2.12).

3. In his division of obligations (συναλλάγματα) into the voluntary (ἑκούσια) and the involuntary (ἀκούσια), Aristotle includes *moicheia* in the latter category:

> Among the involuntary obligations, some are secret (λαθραῖα), such as theft, seduction (μοιχεία), poisoning, pandering, enticement of slaves from their master, murder (δολοφονία), and bearing false witness; others are violent (βίαια), such as battery, imprisonment, homicide (θάνατος), rape [or "kidnapping": ἁρπαγή], maiming, defamation, and insult. (*EN* 1131a5-9)

On multiple occasions, especially in the *Nicomachean Ethics* and the *Rhetoric*, *moicheia* recurs as a paradigmatic legal offense and/or moral vice.[7] Particularly valuable, given Aristotle's expertise in the laws of the various Greek states and his Panhellenic intended readership,[8] are several passages in the *Rhetoric* that concern definitions and arguments relevant to the hypothetical construction of laws and the actual litigation of cases. At *Rh*. 1372a21-23, Aristotle asserts that "people are likely to escape detection (λαθητικοί) when their persons contradict the offenses (ἐγκλήμασιν), such as a weak man in the matter of battery and a poor or ugly man in the matter of *moicheia* (ὁ πένης καὶ ὁ αἰσχρὸς περὶ μοιχείας)." Like the *topos* of the weak man accused of battery (Pl. *Phdr*. 273b3-c4; Arist. *Rh*. 1402a17-19; *Rh*. *Al*. 1442a28-29), that of the poor or ugly man accused of *moicheia* will have not only abetted concealment but also served in court as an argument for innocence, and the juxtaposition argues for its frequency. *Topoi* for the prosecution included the argument from consequence that the accused dressed finely and wandered about at night (*Rh*. 1401b23-25; cf. *Rh*. 1416a23-24; *SE* 167b9-11).

The frequency of a different sort of argument is explicitly stated at *Rh*. 1373b38-1374a9:

> 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," or "having intercourse" (συγγενέσθαι) but not "committing *moicheia*" (μοιχεῦσαι)...for these reasons concerning these matters too it must be determined what is theft, what is hubris, what is *moicheia* (τί μοιχεία), so that, whether we wish to demonstrate that such is the case or not, we are able to make clear our claim to right.

Aristotle's *desideratum* of an explicit substantive definition of *moicheia* implies that this was generally lacking in relevant laws. The missing criteria, in his opinion, deal

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7 See esp. *EN* 1129b19-22, 1132a2-5; *Rh*. 1373b23-24; also *EN* 1107a8-17, 1117a1-2, 1130a24-30, 1134a17-23, 1137a6-26, 1138a24-26; *MM* 1186a36-b1, 1196a18-22; *Rh*. 1391a18-19.

8 Phillips 2014: 82, 2016*b*: 37. *EN* 1181b15-23 refers to the collected *Politeiai* (numbering 158: D. L. 5.27) and looks forward to the *Politics*; see Rhodes 1993: 1-2. For *moicheia* in the various *Politeiai* and in the *Politics*, see nos. **9**, **13**, **14**, **15**, **16**.

with *mens rea*:[9] they are adumbrated in the surrounding argument[10] and specified at *EE* 1221b23-25: accused *moichoi* “dispute the charge, asserting that they had intercourse (συγγενέσθαι) but did not commit *moicheia* (μοιχεῦσαι), because they acted in ignorance [i.e., of the status of the woman in question] or under compulsion (ἀγνοοῦντες γὰρ ἢ ἀναγκαζόμενοι).”

4. Two centuries later, Polybius states as self-evident the rule that *moichoi*—presumably, those caught in the act—may be killed with impunity: “the killing of citizens is considered an impiety of the greatest magnitude and deserving of the most severe penalties; and yet clearly the killer of a thief or seducer goes unpunished (καίτοι γε προφανῶς ὁ μὲν τὸν κλέπτην ἢ μοιχὸν ἀποκτείνας ἀθῷός ἐστιν), and the killer of a traitor or tyrant receives honors and preferential treatment among all men” (2.56.15).

Polybius’ strict standards of accuracy and his diplomatic and other travels suggest a level of credibility meeting or exceeding that of all the preceding sources except Aristotle, and further support for the presumptive validity of his statement about *moichoi* consists in its status as a virtual *obiter dictum*.[11] But while Polybius has no motive to lie, he equally cannot be presumed to rest his assertion on any specific evidentiary inquiry. The right to kill the seducer caught in the act must have applied in Polybius’ native Megalopolis; in all probability it also applied in some (and perhaps even in all) of the rest of the contemporary Achaean League, which included virtually the entire Peloponnese and possessed common federal laws and courts (Plb. 2.37.10-11). But beyond this, absent specific attestation, we pass into the realm of conjecture.

5. Philo of Alexandria (*ca*. 25 B.C.-*ca*. A.D. 50) goes even further than Lysias in having Joseph assert the universal right to kill the *moichos* caught in the act:

> “For this who among mankind does not yearn to kill? For while in other matters they are accustomed to differ, this alone all men everywhere by common consent consider deserving of countless deaths, surrendering without trial those who are caught in the act to the men who have discovered them (ἀκρίτους ἐκδιδόντες τοὺς ἁλόντας τοῖς πεφωρακόσι).” (*Ioseph*. 44)

Despite the hyperbole, we may confidently infer that this right applied in contemporary Alexandria, for Philo would not present as ubiquitous a rule that did

[9] But, significantly, not with the marital status of the female party, which may corroborate *e silentio* the position that *moicheia* in Greece generally, and not just, for example, in Athens (no. **9**) and Gortyn (no. **11**), did not require the woman to be married. Ignorance as to status (see *infra*) does not necessarily concern marital status; the issue might be whether the woman was free or slave, or whether she was a prostitute (cf. Lys. 10.19; [D.] 59.67; Plu. *Sol*. 23.1, no. **9**).

[10] *Rh*. 1373b33-36, 1374a9-18; cf. *EN* 1135a23-33, 1135b8-27, 1109b30-1114b25, 1134a17-23; *Rh*. 1368b9-12, 1374b4-10, 1375a7.

[11] Polybius may refer to Roman as well as Greek treatment of *moicheia* (cf. Walbank 1957-79: 1.263, and see n. 12).

not obtain in his own city.[12] This is all the more important in light of Alexandria's status as the consummate Panhellenic city, with inhabitants originating by immigration or descent from Macedonia and from *poleis* throughout the Greek world.[13]

6. In stark contrast, Josephus alleges that most (Greek and other non-Mosaic) lawgivers have treated *moicheia* with leniency:

> I omit at present to discuss penalties (τιμωριῶν)—all the types of settlement (διαλύσεις) that from the beginning the majority of lawgivers have granted to bad actors, legislating monetary fines for *moicheia* (ἐπὶ μοιχείας μὲν ζημίας χρημάτων) and even marriage for corruption [of a virgin] (φθορᾶς)... (*Ap*. 2.276, *post* A.D. 93)

Although Josephus is aware of the traditions concerning Greek lawgivers such as Draco, Solon, Lycurgus, Zaleucus, and Minos (*Ap*. 1.21; 2.154, 161-62, 225-27; cf. 2.273), he presents no evidence to support his claim. Moreover, he has abundant motive to minimize the severity of Greek laws, in accordance with his theme of the unique inflexibility of the law of Moses, which punishes *moicheia* with death (*Ap*. 2.215).[14] Even so, the contrast between the leniency alleged by Josephus and the

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[12] Goodenough 1929: 78-80. The Alexandrian *Dikaiomata* (*PHal* 1, mid-third century B.C.) contain no law on the subject. There was no necessary conflict with Roman law, for the self-help remedies attested in Plautus (e.g., *Bac*. 842-924; *Mil*. 1394-1427), Terence (*Eu*. 949-963), Horace (*Sat*. 1.2.41-46 *et alibi*; 2.7.56-82), and Catullus (15.18-19)—binding, beating, cudgeling, whipping, castration, sodomy, radishes, mullets, and death—were in all likelihood, under certain circumstances, countenanced (though not in most cases specifically ordained) by Roman law not only before but, with some restrictions, under and after the *lex Iulia de adulteriis coercendis* (*ca*. 18 B.C.), which treated *adulterium* (with a married woman) and *stuprum* (with an unmarried woman) together. See *inter alia* *D*. 48.5.13(12); 48.5.6.1; 48.5.25(24) *pr*.; 48.5.21(20); 48.5.23(22).2-3 (cf. Quint. *IO* 5.10.88; *Coll*. 2.5.1 ≈ *Inst*. 4.4 *pr*.); 48.5.24(23) *pr*. (*infra*, n. 27); 48.5.26(25).1-3; *Inst*. 4.18.4; Paul. *Sent*. 2.26.1 ≈ *Coll*. 4.12.1, with Cantarella 1976: 162-204; Crawford 1996: 781-86; Robinson 1995: 58-67; Frier—McGinn 2004: 110-20, 205-9; Treggiari 1991: 262-319, 507-10; Scafuro 1997, esp. 216-31; Richlin 1983: 215-19; Bauman 1996: 32-34; Watson 1971: 23. The provisions of the *lex Iulia* concerning self-help represent an encroachment of state criminal jurisdiction upon an older private domestic jurisdiction that had previously enjoyed greater latitude: cf. *Coll*. 4.8.1; D. H. *Ant. Rom.* 2.25.6; Cat. Mai. *De dote ap.* Aul. Gell. 10.23.5. Many of the aforementioned practices have Greek parallels or antecedents, including the radish (nos. **9**, **17**).

[13] Fraser 1972: 1.38-92; Phillips 2014: 79-80; Str. 17.1.12 = Plb. 34.14: "even granted that they were all mixed together, they nonetheless were Greeks by descent and preserved the common custom of the Greeks (ἐμέμνηντο τοῦ κοινοῦ τῶν Ἑλλήνων ἔθους)."

[14] Cf. *Ap*. 2.201, 292. With *Ap*. 2.276 cf. ?Philo, *Hypothetica* 1 fr. *ap*. Eus. *PE* 8.7.1: "Does any of these things or anything similar to them exist among [the Jews]—anything that appears mild and tame and that involves the bringing of lawsuits, and excuses and delays and penal assessments (τιμήσεις) and counter-assessments (ὑποτιμήσεις)? No; everything is simple and clear: if you commit pederasty, if you commit *moicheia*...the penalty is death."

severity posited by Lysias, Xenophon, Polybius, and Philo does not amount to outright contradiction. In fact, all the preceding sources might be taken together as creating a rebuttable presumption that the various Greek states commonly granted the right to kill the seducer caught in the act, while simultaneously offering less drastic remedies. To test this presumption and its constituent elements, we shall now examine the treatment of *moicheia* in specific sources and places.

II. Specific sources and places

7. Pride of place for both precedence and influence goes to Homer's Lay of Ares and Aphrodite, sung by Demodocus at *Od*. 8.266-369.[15] Informed by Helios that the adulterous couple has sullied his house and bed (μίγησαν ἐν Ἡφαίστοιο δόμοισι/λάθρῃ...λέχος δ' ᾔσχυνε [*sc*. Ἄρης] καὶ εὐνὴν/Ἡφαίστοιο ἄνακτος, 268-70), Hephaestus lays a trap in his bedroom, forging unbreakable, inescapable, and invisible chains which he places all around the posts of the bed and suspends from the central rafter of the roof. He then feigns departure for Lemnos, and Ares and Aphrodite take the bait, mount the bed, and are caught. Alerted again by Helios, Hephaestus returns, announces the capture to Zeus and the other gods, and calls them to witness ('Ζεῦ πάτερ ἠδ' ἄλλοι μάκαρες θεοὶ αἰὲν ἐόντες,/δεῦθ', ἵνα ἔργα γελαστὰ καὶ οὐκ ἐπιεικτὰ ἴδησθε,/ὡς ἐμὲ χωλὸν ἐόντα Διὸς θυγάτηρ Ἀφροδίτη/αἰὲν ἀτιμάζει, φιλέει δ' ἀΐδηλον Ἄρηα...ἀλλ' ὄψεσθ' ἵνα τώ γε καθεύδετον ἐν φιλότητι,/εἰς ἐμὰ δέμνια βάντες· ἐγὼ δ' ὁρόων ἀκάχημαι,' 306-9, 313-14). The chains, he declares, will not be loosed until Zeus refunds the bride-price he paid for the faithless Aphrodite ('ἀλλά σφωε δόλος καὶ δεσμὸς ἐρύξει,/εἰς ὅ κέ μοι μάλα πάντα πατὴρ ἀποδῷσιν ἔεδνα,/ὅσσα οἱ ἐγγυάλιξα κυνώπιδος εἵνεκα κούρης,' 317-19). The gods who rally to Hephaestus' summons break out in laughter at the skill of the hare who has caught the tortoise and adjudge Ares liable to a penalty as a seducer caught in the act ('τὸ καὶ μοιχάγρι' ὀφέλλει,' 332). Poseidon entreats Hephaestus to release Ares, offering to stand surety (evidently *corpore suo*, as a potential hostage, given Hephaestus' response) for Ares' payment, the amount of which is at Hephaestus' discretion provided that he does not exceed propriety ('Λῦσον· ἐγὼ δέ τοι αὐτὸν ὑπίσχομαι, ὡς σὺ κελεύεις,/τίσειν αἴσιμα πάντα μετ' ἀθανάτοισι θεοῖσι,' 347-48);[16] but Hephaestus balks at the prospect of imprisoning Poseidon in the event that Ares defaults ('μή με, Ποσείδαον γαιήοχε, ταῦτα κέλευε·/δειλαί τοι δειλῶν γε καὶ ἔγγυαι ἐγγυάασθαι./πῶς ἂν ἐγώ σε δέοιμι μετ' ἀθανάτοισι θεοῖσιν,/εἴ κεν Ἄρης οἴχοιτο χρέος καὶ δεσμὸν ἀλύξας;' 350-53).[17] Then Poseidon offers a guaranty for the fine itself ('"Ηφαιστ', εἴ περ γάρ

[15] On this episode see Forsdyke 2008: 10-11.

[16] Varying interpretations of ὡς σὺ κελεύεις and αἴσιμα πάντα: Cantarella [1964] 2011*a*: 5-7.

[17] Δειλαί...ἐγγυάασθαι is best interpreted as "Pledges given on behalf of worthless men [i.e., Ares] are worthless things to hold." See scholl. E, P, Q, V, M, T *ad loc*.; Merry—Riddell 1886 *ad loc*.; Stanford 1965 *ad loc*.; Garvie 1994: 309.

κεν Ἄρης χρεῖος ὑπαλύξας/οἴχηται φεύγων, αὐτός τοι ἐγὼ τάδε τίσω,' 355-56); Hephaestus accepts and releases Ares and Aphrodite.

The date of composition of the *Odyssey* (*ca*. 700),[18] the authority of Homer, and the Olympian status of the *dramatis personae* combined to provide the ideal aetiology for the practice of detaining for ransom the *moichos* caught in the act that we find in many later sources and places. Characteristic elements include Hephaestus' rights as husband and householder to apprehend and detain Ares; the humiliation of Ares (here by being displayed in chains to the mockery of the witnessing gods); and Ares' release on the security proferred by Poseidon. Most likely the practice preceded the aetiology:[19] by *ca*. 700 the practice obtained in enough parts of Greece that the *hapax* μοιχάγρια (penalty for a seducer caught in the act) would be immediately understood by those audiences at least,[20] and that thenceforth adoption of the practice elsewhere would be facilitated by the Olympian precedent enshrined in Homer.[21]

8. Pausanias 9.36.6-8 quotes and interprets a fragment of the Hesiodic Μεγάλαι Ἠοῖαι (fr. 257 Merkelbach—West = fr. 15 Hirschberger) concerning the reception of the hero Hyettus:

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[18] Date: *inter multos alios*, Rosen 1997: 465; Raaflaub 1997: 625; West in Heubeck—West—Hainsworth 1998: 33-35. Ancient critics and the scholiasts were divided as to the genuineness of this passage (see Merry—Riddell 1886 *ad loc*.), and a few moderns have rejected it (e.g., Blass 1904: 269-74). The athetizers have relied on the immorality and irreverence of the episode and/or its linguistic peculiarities. The tone of the episode (as commentators frequently observe: e.g., Merry—Riddell 1886: 332-33; Hainsworth in Heubeck—West—Hainsworth 1998: 363-64) presents no bar to authenticity. Independent proof of authenticity includes (1) the correspondences between [Hom.] *h. Ven.* 58-64, 234 and *Od*. 8.362-66, 298; (2) Hesiod's familiarity with the episode, demonstrated by *Op*. 328-29, promising divine vengeance against ὅς τε κασιγνήτοιο ἑοῦ ἀνὰ δέμνια βαίνῃ/κρυπταδίῃς εὐνῇς ἀλόχου: in addition to the substance of the offense, note the verbal coincidence with *Od*. 8.314, εἰς ἐμὰ δέμνια βάντες (cf. Straubel *ap*. West 1978: 239); and (3) Xenoph. frr. 11.3, 12.2 D—K, which take Homer and Hesiod to task for ascribing to the gods κλέπτειν μοιχεύειν τε καὶ ἀλλήλους ἀπατεύειν. The episode's linguistic peculiarities may indicate a relatively late date at which it entered the oral tradition (Finley 1978: 49; Hainsworth in Heubeck—West—Hainsworth 1998: 364; cf. Garvie 1994: 293-94, 296; West 2014: 135, 194). In any case, the earlier the story entered the tradition, the more likely it was to influence broader Greek practice; the later it entered the tradition, the more likely it was to reflect broader Greek practice.

[19] Cf. Carey 1995: 417, who considers it "possible, particularly in the light of...*Odyssey* 8.266-366, that ransom and perhaps abuse were already established practice in pre-Solonian Athens."

[20] Cf. μοιχοληπτία "(the act of) catching a seducer [in the act]" (Phryn. Arab. *PS* (*Lex. Seg*.) s.v. ἀνοητία). Homer as historical evidence: Finley 1978: 48-50, 142-58; Cantarella [1988] 2011*b*: 108, 116.

[21] The episode continued to possess precedential value even for Juvenal (2.29-33; 10.311-17).

> While this Orchomenus was king, Hyettus arrived from Argos, in exile for the killing of Molurus son of Arisbas, whom he had killed upon catching him [*in flagrante*] with his wedded wife (ἐπὶ γυναικὶ ἑλὼν γαμετῇ). Orchomenus granted Hyettus a share of his country, the vicinity of the present village of Hyettus and the adjoining territory. Hyettus was mentioned by the composer of the epic poem that the Greeks call the *Great Ehoeae*:
>
> And Hyettus, after killing Molurus son of Arisbas in his house for bedding his wife (κτείνας ἐν μεγάροις εὐνῆς ἕνεκ' ἧς ἀλόχοιο), left his home far behind and fled horse-pasturing Argos, and came to Minyan Orchomenus; and there the hero took him in and granted him a portion of his possessions, as was fitting.
>
> This Hyettus, then, was clearly the first man to exact punishment for seduction (δίκην μοιχείας λαβών);[22] later, when Draco served as *thesmothetês* for the Athenians, it was established on the authority of his laws that he wrote during his term of office that there was to be immunity (ἄδειαν) for all other acts for which it was necessary, and in particular for the punishment of a seducer (καὶ δὴ καὶ τιμωρίας μοιχοῦ).

While (this fragment of) the *Great Ehoeae* in all probability postdates the *Odyssey*,[23] the legal world it describes is of at least equal, and likely greater, antiquity. For Hyettus' self-imposed exile for the killing of Molurus comports with the principle, observed consistently in Homeric and Hesiodic epic, that homicide is a strict-liability offense. Extenuating circumstances may mitigate the killer's moral liability but have no effect on his legal liability: in order to avoid being killed in retaliation, the killer must either go into exile or pay compensation to his victim's relatives.[24]

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[22] This is the sole occurrence of the killing of a *moichos* in the act in surviving Homeric or Hesiodic poetry; the closest comparandum is Proetus' unsuccessful attempt to have Bellerophontes killed due to a false accusation of attempted *moicheia* brought by Anteia (*Il*. 6.157-95).

[23] Hirschberger 2004: 84 places the composition of the fully-developed Μεγάλαι 'Ηοῖαι in the first half of the sixth century; West 1985: 136 proposes *termini* of 580-520. But the gradual agglomeration and rearrangement of material will have been facilitated by the catalogic form of the poems; West's conclusion that "most of the genealogies contained in [the *Ehoeae*] had evolved by stages from local genealogies constructed not later than the eighth century" (West 1985: 164) presumably holds true for the *Great Ehoeae* too, but the latter is far too fragmentary to permit the sort of reconstruction that is possible for the *Ehoeae* (West 1985: 3, 167). Regarding Hyettus and Orchomenus, note West's argument (1985: 144-53) that the establishment of close mythical genealogical connections between Argos and Boeotia can be traced to *ca*. 750-700.

[24] For the rule of exile, compensation, or death, see esp. *Il*. 9.632-36; *Od*. 23.118-20; 3.193-98. The arbitration scene on the Shield of Achilles (*Il*. 18.497-508) shows that accepting compensation was not mandatory. Strict liability is best illustrated by the case of Patroclus (*Il*. 23.85-90), who had to flee Opus even though he had killed the son of Amphidamas νήπιος, οὐκ ἐθέλων, ἀμφ' ἀστραγάλοισι χολωθείς. Reception of the killer by a powerful foreigner is the norm (*Il*. 24.480-84); for examples, in addition to Patroclus, see *Il*. 15.430-40; [Hes.] fr. 195.8-21 Merkelbach—West = fr. 91.8-21

Both the consistency of early epic and the inherent probability of a time before the rise of the Greek lawgivers when the killer's *mens rea* was not considered[25] point to the conclusion that these epics reflect actual Greek practice at least shortly before and/or at the time of their composition; that is, roughly speaking, in the ninth, eighth, and/or early seventh century (and, for all we know, even earlier).[26]

9. The Athenian law of *moicheia* begins with the Draconian provision referenced by Pausanias, which immunized the killer of a man caught *in flagrante* with the killer's wife, mother, sister, daughter, or concubine kept for the procreation of free children (ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ, D. 23.53 (*lex*)).[27] But besides Lysias 1 (no. **1**), the only known case of such killing is the legend of king Hippomenes, who caught his daughter with a *moichos*, dragged the latter to his death behind his

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Hirschberger (Ἠοῖαι) = *Scut*. 1-14. Homicide in early epic: Bonner—Smith 1930: 15-21; Cantarella 1976: 15-75; Gagarin 1981: 5-18; Hirschberger 2004: 366; Phillips 2017: 55-56.

[25] As late as the twelfth century A.D., the *Leges Henrici Primi* (compiled 1114-1118) could assert no fewer than three times as a principle of English law that "he who transgresses involuntarily shall make amends voluntarily" (*Legis enim est qui inscienter peccat scienter emendet, et qui* [i.e., originally, *se þe*] *brecht ungewealdes betan* [*lege bete*] *gewealdes*, §90.11a; cf. §§70.12a-12b, 88.6a). The contemporary Icelandic *Grágás* (whose written codification began in 1117-1118) declares, "It is prescribed that there shall be no such things as accidental acts" (*Þat er mælt at engi scolo verða vaða verc*, Konungsbók §92).

[26] See Finley 1978: 29, 31, 33-34, 48-50, 77, 92, 94-95, 101, 110, 117-18, 153-54; Gagarin 1981: 5-6, 18-19; Raaflaub 1997: 625-28, 630, 643-48; Schmitz 1997: 53-54.

[27] Draco enacted his laws in 621/0 ([Arist.] *Ath*. 4.1); by the fourth century (and presumably much earlier), these clauses were understood as providing a self-help remedy against the *moichos* caught in the act (μοιχὸν λαβών, [Arist.] *Ath*. 57.3). Cf. Lys. 13.66: ἐλήφθη μοιχός· καὶ τούτου θάνατος ἡ ζημία ἐστίν. Additional laws of Draco and/or Solon addressing *moicheia per se* may have included clarifying language, but the evidence is weak. (1) According to Ulpian, *D*. 48.5.24(23) *pr*., *Pomponius scripsit in ipsis rebus Veneris deprehensum* [*sc. adulterum*] *occidi; et hoc est quod Solo et Draco dicunt* ἐν ἔργῳ (cf. n. 12). But without corroboration, we cannot assume that Solon or Draco anywhere wrote ἐν ἔργῳ; Ulpian may be using "Solon and Draco" as fourth-century Athenians did, to refer summarily to the totality of Athenian law. (The phrase is, however, used in the required sense by Lucian, *DDeor*. 21(17).1, and Solon uses ἔργα of sex in the elegiac fr. 26.1 West.) (2) Lucian, *Eun*. 10 has Lycinus report a third party's courtroom statement against the title character that if the stories about him are true, καὶ μοιχὸς ἑάλω ποτέ, ὡς ὁ ἄξων φησίν, ἄρθρα ἐν ἄρθροις ἔχων. The *Eunuch* is set in Athens (of the later second century A.D.), and Lucian was a skilled Atticist who knew his Attic orators, but it is scarcely credible that either Draco or Solon explicitly specified a requirement of genital-to-genital contact. For summary discussion, see Leão—Rhodes 2015: 43-44 (frr. 28b-c); a more positivist reading is given by Cantarella 1976: 197-201, [1991] 2011*c*: 349-50, [2002] 2011*e*: 381. See further Schmitz 1997: 55-64, on proposed reconstructions of a Solonian law on *moicheia per se*.

chariot, and immured the former with a horse until it ate her.[28] Moreover, we do not know the outcome of Euphiletus' trial, and it is quite possible that by that time the ἐπὶ δάμαρτι κτλ clauses were a dead letter.[29]

By the time of the orators, too, three additional remedies were available against the seducer apprehended *in flagrante*. The first of these was *apagôgê* (Aeschin. 1.91).[30] Under the second, the seducer's captor had the right to detain him and subject him to physical abuse by means including the forcible insertion of a large radish (or, possibly, an axe handle or a scorpion fish) into his anus and the depilation of his genitals and buttocks using heated ash.[31] In this situation, the captor may in

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[28] Heraclid. Lemb. *Epit. Ath. Pol.* 1 Chambers = *Ath. Pol. fr. part. prim. deperd.* 7 Gigon; Aeschin. 1.182 with schol. 367b Dilts; cf. Nic. Dam. *FGrHist* 90 F 49 ≈ *Suda* s.v. Ἱππομένης, ι 573 Adler. Note that Aeschines states, and Heracleides implies, that Leimone was unmarried. It is entirely possible that one of the last Athenian kings was named Hippomenes (and thus probably lived in the late eighth century); the tale of his daughter and the horse will have been created (with the daughter, "Meadow," aptly named) to justify the fall of the monarchy. Rhodes 1993: 78-79; Fisher 2001: 331-34; Phillips 2013: 103, 2017: 52.

[29] Phillips 2017: 51-54; on the general peril, cf. Arist. *EN* 1117a1-2; cf. Riess 2012: 43. Euphiletus asserts that killing the *moichos* is a recognized remedy throughout Greece, yet he cites no precedent from Athens or anywhere else to justify this claim. Xenarch. fr. 4.22-24 K—A (fourth century), ἃς πῶς ποτ', ὦ δέσποινα ποντία Κύπρι,/βινεῖν δύνανται, τῶν Δρακοντείων νόμων/ὁπόταν ἀναμνησθῶσι προσκινούμενοι; is arguably funnier if the Draconian sanction is no longer a likely threat; cf. Men. fr. 267 K—A: οὐκ ἔστι μοιχοῦ πρᾶγμα τιμιώτερον·/θανάτου γάρ ἐστιν ὤνιον. Lycophron's prosecutors accuse him of being a repeat offender (Hyp. 1.12). Pausanias' awareness of Draco's law (no. **8**) does not necessarily imply that it was still enforced, and Tertullian's hearsay allegation that Speusippus (d. 339), Plato's successor as head of the Academy, "perished in the act of adultery" (*Apol.* 46) merits no credence (contrast D. L. 4.3). On Draco's law and *moicheia*, see further Schmitz 1997: 49-55.

[30] See Schmitz 1997: 66-69.

[31] Ar. *Nu.* 1083-84 with schol. *ad* 1083 (radishing and depilation); *Pl.* 168 (depilation) with schol. (radishing and depilation); *Th.* 536-38 (depilation); Hsch. s.vv. Λακιάδαι, ῥαφανιδωθῆναι (radishing; cf. Hsch. s.v. στειλέαν); *Suda* s.vv. ῥαφανιδωθῆναι καὶ τέφρᾳ τιλθῆναι, ρ 55 Adler (radishing and depilation); ὦ Λακιάδαι, ω 62 Adler (radishing and axe handles); Zen. 73 Miller, *Mélanges* pp. 357-58, s.v. Πλακίαδαι [*sic*] καὶ στέλαιον = Posidipp. fr. 4 K—A (radishing and axe handles: third century); Philonid. fr. 7 K—A (depilation: fifth century); Cratin. fr. 129 K—A (depilation: fifth century); Pl. Com. fr. 189.22 K—A (fifth or fourth century) = Ath. 5d (scorpion fish): *A*. ... σκορπίος αὖ– *B*. παίσειέ γέ σου τὸν πρωκτὸν ὑπελθών. See Kapparis 1996; Kapparis 1999: 302-3; Schmitz 1997: 91-107; Phillips 2016*b*: 50-52 with nn. 91-93, 96-97. According to *Suda* s.v. ὦ Λακιάδαι and Zenobius, axe handles were employed in default of radishes. Kapparis 1996: 67-70 doubts that a scorpion fish (σκορπίος: *Scorpaena porcus* or *Scorpaena scrofa*, Thompson 1947 s.v. σκόρπαινα) could substitute for the radish (*contra* Schmitz 1997: 100) on the grounds that upon removal its poisonous spines would cause agonizing pain if not death, and he argues that after the passage of the law discussed at n. 32 *infra* (which he attributes to Solon), "unless the *kyrios* killed the adulterer on the spot, he could not put him to death afterwards or inflict upon him lethal

fact have been entitled by law to "do with" the *moichos* "whatever he wishes," perhaps on condition that he not penetrate the *moichos* with an edged weapon.[32] The third, which could be employed in combination with the second, was to detain the seducer for ransom.[33] A man who alleged unjust detention could bring a *graphê adikôs heirchthênai hôs moichon*; if the captor was convicted, the detainee was set free and his sureties released from their obligation, while if the captor was acquitted, he was permitted, on the spot (ἐπὶ τοῦ δικαστηρίου), to do whatever he wished with the detainee, provided that he not use an edged weapon (ἄνευ ἐγχειριδίου χρῆσθαι ὅ τι ἂν βουληθῇ, [D.] 59.66).[34] The sole attested instance of this *graphê* ([D.] 59.66-71) never made it to trial. The alleged *moichos* Epaenetus, we are told, admitted to having sex with Phano but asserted that Stephanus had wrongfully detained him, since Stephanus was not Phano's father and since he was immunized

punishments." The latter hypothesis is not provable; this may have been the intent of the lawgiver, but determining how soon after capture a *moichos* was killed will often have been impossible (and what if the captor could demonstrate that the scorpion fish was his punishment of first resort?). In any event, the man who has determined to shove a poisonous fish into another man's anus might well view the latter's survival as being of little concern. The Romans borrowed the radish from the Greeks (cf. no. **17**; Roman adoption is an additional argument for the spread of the practice in Greece beyond Athens: on the unity of Greek law as a key factor in its influence upon Rome, see Mitteis 1891: 61-62), but the mullet (Catull. 15.18-19; Juv. 10.317 with schol.; cf. Hor. *Sat.* 1.2.133)—specifically, the gray mullet, *Mugil cephalus or Mugil capito* (Thompson 1947 s.vv. κεστρεύς, κέφαλος)—was a Roman innovation (unless it served as a substitute for the scorpion fish). Ar. *Ach.* 849, characterizing Cratinus as "always having his hair cut *moichos*-style, with a single blade [i.e., a razor]" (ἀεὶ κεκαρμένος μοιχὸν μιᾷ μαχαίρᾳ), may indicate that Cratinus' head resembles the depilated genitals and/or buttocks of a *moichos* caught in the act; that *moichoi* might have their heads as well as other areas depilated; or that very short haircuts were associated with *moichoi* (Sommerstein 1992: 199; Schmitz 1997: 93-101; Phillips 2016*b*: 51 n. 92). In the first two cases, reference to a blade is interesting, given the ban on the use of edged weapons by the captor who has prevailed in a *graphê adikôs heirchthênai hôs moichon* (see *infra*). Presumably the solution is that blades might be used for shaving but not for penetration (cf. Phillips 2016*a*: 351-52). On the humiliation of *moichoi* and their partners at Athens by these and other means, see Forsdyke 2008: 8-26.

[32] The statement at Lys. 1.49 that the laws "command that if a person catches a *moichos*, he may do with him whatever he wishes" (ἐάν τις μοιχὸν λάβῃ, ὅ τι ἄν οὖν βούληται χρῆσθαι) is plausibly interpreted as the paraphrase of a law on *moicheia* by Kapparis 1995: 114-16 (cf. the treatment of the female party who violates the restrictions on her clothing or movements, *infra*; and note the parallel language in the Great Code of Gortyn, no. **11**). Kapparis also tentatively imports the ἄνευ ἐγχειριδίου proviso from the paraphrased law governing the *graphê adikôs heirchthênai hôs moichon* (see *infra*).

[33] Lys. 1.25, 29; [D.] 59.41, 64-71; Callias fr. 1 K—A (440s-430s; cf. *Suda* s.vv. μοιχός, μ 1360 Adler; ἕλκει μοιχὸς εἰς μοιχόν, ε 880 Adler, with Kassel—Austin 1983: 41; Schmitz 1997: 75); Cratin. fr. 81 K—A (*ca*. 430).

[34] The captor was thus presumably empowered to employ the non-lethal punishments that he might have employed within his house: Phillips 2016*b*: 53; Schmitz 1997: 76-77.

under a law "forbidding the seizure of a man as a *moichos* in the company of those women who are located in a brothel or go about in public" (τὸν νόμον...ὃς οὐκ ἐᾷ ἐπὶ ταύτῃσι μοιχὸν λαβεῖν ὁπόσαι ἂν ἐπ' ἐργαστηρίου καθῶνται ἢ πωλῶνται ἀποπεφασμένως, §67).[35] Nowhere do we find an objection that Epaenetus could not be guilty of *moicheia* because Phano was unmarried; this provides our best evidence that in Athens *moicheia* did not require the female party to be married.[36]

At least when she had been caught in the act, the female party was prohibited from attending public religious rites and from wearing adornment, on pain of being stripped and beaten (but not killed or maimed); and if she was married, her husband had to divorce her ([D.] 59.87 (*lex*, under the rubric νόμος μοιχείας); Aeschin. 1.183).[37] According to Plutarch, *Sol*. 23.2, Solon permitted a man to sell his unmarried daughter or sister into slavery if he caught her having had sex with a man;[38] but we have no evidence for the enforcement of this provision in the time of the orators, by which it was presumably a dead letter (note its absence from Aeschin. 1.183).

Still more remedies against the *moichos* were available that did not require capture in the act: a dedicated *graphê moicheias* (Hyp. 1.12; [Arist.] *Ath*. 59.3; ?Lys. fr. XXVII Carey κατ' Αὐτοκράτους μοιχείας: penalty unattested);[39] the *graphê hybreôs* (Isoc. 20.2; D. 21.45, 47 (*lex*); D. 37.33; Hyp. 1.12; Lys. 1.25; D. 45.3-5),[40] an *agôn timêtos* without penal limit (Lys. fr. 178 Carey = Phot. s.v. ὕβρις = *Suda* s.v. ὕβρις, υ 16 Adler; D. 21.47 (*lex*)); and, employed at least once (and evidently for the first time) at some time between 333 and 330, *eisangelia* (Hyp. 1).[41]

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[35] Cf. Lys. 10.19 (cf. Harpo. s.v. πεφασμένης, π 64 Keaney = Lyc. fr. X-XI.9 Conomis; similarly *Suda* s.v. πεφασμένος, π 1417 Adler); Plu. *Sol*. 23.1. Lysias' version presumably replicates actual statutory language, of which Apollodorus offers an expanding paraphrase (cf. Harpo. s.v. ἀποπεφασμένον, α 198 Keaney; similarly *Suda* s.v. ἀποπεφασμένον, α 3475 Adler).

[36] Cf. Men. *Sam*. 589-91: Zeus ἐμοίχευσεν the unmarried virgin Danae. The story of Hippomenes, Leimone, and her lover might be taken as supporting evidence (Schmitz 1997: 101, 130).

[37] See Kapparis 1999: 354-60; Schmitz 1997: 89-91. The arguments of Canevaro 2013: 190-96 against the authenticity of the law are not, to my mind, dispositive; I think the law is most likely genuine but incomplete (*pace* Canevaro, I do not believe a forger would have invented the otherwise unattested mandatory divorce clause). As to public religious rites, analogous concerns about the pollution posed by *moicheia* (by women) are evident at Aeolian Cyme (no. **19**, with Cole 1984: 107 n. 46) and in a Messenian *lex sacra* of 92/1 (Dittenberger, *Syll*.^{3} 736 = de Prott—Ziehen, *Leges Graecorum sacrae* II 58, vv. 7-10).

[38] Cole 1984: 107; Phillips 2013: 104, 105; 2017: 51 n. 18. See also Schmitz 1997: 88.

[39] Cf. Phot. s.v. πέμπτῃ φθίνοντος = *Suda* s.v. πέμπτῃ φθίνοντος, π 960 Adler = Men. fr. 403 K—A; Poll. 8.40. Hypotheses regarding the penalty: Harrison 1968: 35; Harris 1990: 374; Schmitz 1997: 77, 79-85; Cantarella [2002] 2011*e*: 386; Omitowoju 2002: 107-9; Phillips 2006: 384 n. 26.

[40] See Phillips 2016*b*: 34 with n. 39, 36.

[41] Date: Phillips 2006: 376-81.

10. An intriguing fragment of Hipponax (fr. 41 Degani), who was active in Ephesus and Clazomenae in the mid- to late sixth century, reads:

οὔ μοι δικαίως μοιχὸς ἁλῶναι δοκεῖ

Κριτίης ὁ Χῖος ἐν †τῷ κατωτικῷ† δούμῳ

Wrongfully, in my opinion, was Critias the Chian caught as a seducer in...house[42]

Besides the inference that at the time of composition, in Ephesus or Clazomenae or Chios, there was a right under some circumstances to apprehend a seducer in the act, no secure conclusions can be drawn from these lines; a parallel with the Athenian known-prostitute exception (no. **9**)[43] may be tempting but is not provable.[44]

11. The clauses of the Great Code of Gortyn (*IC* IV 72; Willetts 1967; Gagarin—Perlman 2016, no. G72) dealing with seduction, attempted and actual (col. II vv. 16-45), provide as follows:

If a person attempts to have sexual intercourse with (ἐπιπερε̑ται οἴπεν) a free woman who is under the oversight of a relative (ἀκεύοντος καδεστᾶ), he shall pay ten staters, if a witness should testify. If a person is caught in the act of

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[42] Or "building," "room," "chamber"; alternatively, "religious association" and/or "association of women" (LSJ[9] Suppl. s.v. δοῦμος). Various emendations of the *locus desperatus*: Degani 1983 *ad loc*.

[43] Latte 1932: col. 2448; cf. Degani 1983 *ad loc*.

[44] Anacr. fr. 43.7-9 Page describes Artemon as "having often placed his neck on the wood [i.e., the *kyphôn* or something like it: cf. no. **13**] and often on the wheel, having often had his back scourged with a leather whip, his hair and beard plucked out." Schmitz 1997: 94 conjectures that the depilation is punishment for *moicheia*; if so, then the preceding punishments might apply as well, and we would have evidence roughly contemporary with Hipponax for the treatment of *moichoi* in Artemon's city of residence (Teos? Abdera? Samos? Athens? somewhere in Thessaly?). *Moicheia* was a standard element in mime (Aristocles fr. 8 Müller, *FHG*; cf. Aristoxenus fr. 58 Müller, *FHG* (fourth century B.C.); Headlam—Knox 1922: xlv; Cunningham 1971: 5, 148; Zanker 2009: 140). Herodas 5 (270s-260s, perh. Alexandria or Cos: Headlam—Knox 1922: ix, xxvii; Cunningham 1971: 2-3, 2004: vii; Zanker 2009: 1) is a comic travesty of the apprehension and punishment of a *moichos*: note in particular χρῶ ὅτι βούλῃ <μοι>, v. 6 (cf. [D.] 59.66, χρῆσθαι ὅ τι ἂν βουληθῇ, no. **9**; κρε̑θθαι ὄπαι κα λείοντι, no. **11**; Xen. Eph. 2.5.4 with Headlam—Knox 1922: 233; Cunningham 1971: 149) and the proposed public shaming both temporary (exposure in the agora: Headlam—Knox 1922: 249-50; Cunningham 1971: 154; cf. nos. **13**, **15**, **18**, **19**) and permanent (tattooing: Headlam—Knox 1922: 256; Cunningham 1971: 152; Zanker 2009: 145). See also the "Adulteress mime" (*POxy* 413 verso, coll. 1-3; Cunningham 2004: fr. mim. pap. 7; Cunningham 1971: 8-9; Zanker 2009: 140, 155) and (perhaps, if [μ]οιχ[ο]ῦ *vel sim*. is restored at v. 24) Cunningham 2004: fr. mim. pap. 10 (*PLitLond* 97). A tragic inversion of the capture and killing of the *moichos* may be discerned at A. *Ag*. 1380-92: note in particular the ἄπειρον ἀμφίβληστρον in which Clytemnestra ensnares Agamemnon (v. 1382), which Fraenkel 1962: 649-50 compares to Hermes' comment upon witnessing the capture of Ares (no. **7**), δεσμοὶ μὲν τρὶς τόσσοι ἀπείρονες ἀμφὶς ἔχοιεν...αὐτὰρ ἐγὼν εὕδοιμι παρὰ χρυσέῃ Ἀφροδίτῃ (Hom. *Od*. 8.340-42).

seducing (μοικίον αἰλεθε̂ι) a free woman in the house of her father, brother, or husband, he shall pay 100 staters; if in the house of another, fifty. If she is the [daughter, sister, or wife] of an *apetairos* (τὰν τô ἀπεταίρο), ten. If a slave is caught in the act of seducing a free woman, he shall pay double; if she is the [daughter, sister, or wife] of a slave (δόλο), he shall pay five staters. The captor shall, in the presence of three witnesses, make a proclamation to the relatives of the man caught that they must ransom him within five days; if it is a slave, they shall make a proclamation to his master in the presence of two witnesses. If he is not ransomed, it shall be in the power of his captors to do with him however they wish (ἐπὶ τοῖς ἐλόνσι ἔμεν κρε̂θθαι ὄπαι κα λείοντι). If he declares that he was taken by treachery (δολόσαθθαι), his captor shall swear, in a case involving 50 staters or more, along with four others, each calling down curses upon himself [should he lie], and in the case of an *apetairos* with two others, and in the case of a serf the master and one other, that he caught the man in the act of seduction and did not take him by treachery (μοικίοντ᾽ ἐλέν, δολόσαθθαι δὲ μέ).

Inscribed around the middle of the fifth century,[45] the Code is generally assumed to incorporate or amend a significant amount of earlier legislation.[46] At Gortyn, *moicheia* did not require the female party to be married. In the attempted-seduction clause, she is certainly unmarried (as indicated by ἀκεύοντος καδεστα̂; if she were married, this role would be performed by her husband), and in the clauses dealing with the seducer caught in the act, specification of the home of the woman's father or brother implies that she is presumed to be unmarried.[47] The captor may hold the seducer for ransom; as opposed to the situation in the *Odyssey* and in Athens, the ransom amount is fixed, and some details of procedure vary, according to the status of the seducer and his paramour and the location of the offense. If ransom is not paid, the captors may "do with [the seducer] however they wish" (κρε̂θθαι ὄπαι κα λείοντι). A similar power is granted to the victorious captor in an Athenian *graphê adikôs heirchthênai hôs moichon* (ἄνευ ἐγχειριδίου χρῆσθαι ὅ τι ἂν

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45 E.g., van Effenterre—Ruzé 1994-95: 2.292 (*Nomima* II 81); Gagarin—Perlman 2016: 334; Osborne—Rhodes 2017: 132, 142 (no. 125).

46 See esp. van Effenterre—Ruzé 1994-95: 2.297 ("Toutefois les vieux usages relatifs aux mariages et aux adultères ont encore laissé des traces dans le *Code*"). In all probability, the requirement of proclamation, the fixed amounts of ransom, the specified period for its payment and corresponding moratorium on captors' power to treat the seducer "however they wish," and the exculpatory oath required in cases of alleged entrapment are all innovations developed at one or more times that limited captors' previous rights (cf. Schmitz 1997: 111-12). Cf. the list of *adulteri* whom the *lex Iulia de adulteriis coercendis* permitted a Roman husband to kill (*D.* 48.5.25(24) *pr.*), which raises the presumption that before the *lex Iulia* he was allowed, by custom if not by statute, to kill any adulterer.

47 Cf. Gagarin—Perlman 2016: 349, 350; *contra* Guarducci 1950: 154; Willetts 1967: 28, 40.

βουληθῇ, [D.] 59.66, no. **9**); but the Gortynian law has no limiting condition, and so we should assume that κρεῖθθαι ὄπαι κα λείοντι means exactly what it says. In Gortyn, as in Athens, the law provides a remedy for wrongful seizure, though the remedies themselves differ greatly.

According to Aelian (*VH* 14.46a Dilts, early third century A.D.), "a seducer caught [in the act] at Gortyn was brought before the magistrates, interrogated, and crowned with [fillets of] wool" in order to signify his effeminacy and his facility with women, and "was sold at public auction, dishonored completely from that day forth, and deprived of all civic rights."[48] These measures (if genuine) cannot be reconciled with the Code and so must have arisen later,[49] while Aelian's use of the imperfect tense marks them as obsolete.

12. In both the *Life of Lycurgus* (15.16-18) and the *Spartan Apophthegms* (*Mor*. 228b-c, *Apoph*. *Lac*. Lycurgus 20), Plutarch contrasts the Spartans' current laxity with their continence under the Lycurgan regime, when the very idea of *moicheia* was inconceivable. To illustrate his point, he relates an anecdote about Geradas (Geradatas in the *Apophthegmata*), a Spartiate of days of yore (τῶν σφόδρα παλαιῶν), who was asked by a foreigner how seducers were punished at Sparta (τί πάσχουσιν οἱ μοιχοὶ παρ' αὐτοῖς) and responded that they did not exist. When the foreigner asked what would happen if a seducer arose, Geradas replied that he would be fined a bull so large that it could extend its head over Mt. Taygetus and drink from the Eurotas. The shocked foreigner asked, "How could there could be a bull of such size?"; Geradas rejoined, "How could there be a *moichos* at Sparta?"

In the *Apophthegmata*, the foreigner cites his inability to find any Lycurgan legislation on *moicheia*. This is not surprising, since according to Spartan tradition Lycurgus did not record his laws in writing (*Lyc*. 13.1) and prohibited the use of written law (*Lyc*. 13.4). At most, therefore, the absence of "Lycurgan" *moicheia* law may indicate that no written law of evident antiquity governing *moicheia* existed in Plutarch's time. But evidence from the Archaic period to Plutarch himself indicates the presence of unwritten law. As early as 706, a bumper crop of "immaculate conceptions"—the Partheniai, actually produced by illicit sex between helot men and Spartiate women during the First Messenian War—was dispatched to found Taras.[50] The controversy over the paternity of Demaratus, deposed in 491, involved his mother's current and former husbands, the hero Astrabacus, and the household's

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[48] A doublet appears at *VH* 12.12 Dilts, which has the seducer not sold into slavery but fined 50 staters payable to the state.

[49] See Latte 1931: 156-57 with n. 3. *Contra* Kapparis 1996: 74; Schmitz 1997: 71, 112-14.

[50] Antiochus, *FGrHist* 555 F 13; Ephor. *FGrHist* 70 F 216; Theopomp. *FGrHist* 115 F 171; Arist. *Pol*. 1306b29-31. The various claims these authors make about the paternity of the Partheniai can all be diagnosed as attempts to redeem some part of Spartan and/or Tarentine honor. For differing interpretations of the tradition, see the papers by W. Schmitz and M. Dreher in this volume.

helot donkey-keeper (Hdt. 6.63-69).[51] The specific term and concept of *moicheia* surely existed in Sparta long before 406, when Callicratidas warned Conon that he would make him stop fornicating with the sea (Κόνωνι δὲ εἶπεν ὅτι παύσει αὐτὸν μοιχῶντα τὴν θάλατταν, X. *HG* 1.6.15: note that Xenophon preserves the Spartan Doric form μοιχῶντα). Qualifying the Spartan practice of a married woman's having sexual relations (with a view to procreation) with a man other than her husband was the requirement that the latter obtain the husband's consent.[52] It is inconceivable that no remedy existed for the case where the husband—or, say, the father of an unmarried woman—had not given his consent.[53] What this remedy may have been we can only guess; the extreme example, the death warrant issued for Alcibiades in 412 for seducing Timaea, the wife of Agis II, and impregnating her with the supposititious royal heir Leotychidas,[54] is clearly a special case.[55]

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[51] Herodotus has Demaratus assure his mother that if any of the accusatory rumors is correct, she would have plenty of company (6.68.3). Cf. E. *Andr*. 590-604, partially quoted by Plu. *Comp*. *Lyc*. *Num*. 3.6, who reports the stereotype of Spartan women as ἀνδρομανεῖς; Arist. *Pol*. 1269b12-1270a15. From Astrabacus' supposed role as the patron hero of donkey-keepers and muleteers (cf. ἀστράβη, a backed saddle used normally by women or disabled persons for riding mules or donkeys: e.g., D. 21.133, with MacDowell 1990: 351) commentators conclude that some Spartans cynically responded to the rumor of Astrabacus' paternity by positing the donkey-keeper in his stead (Rawlinson 1858-60: 3.461-62; Macan 1895: 1.326-27; How—Wells 1928: 2.90-91); but the donkey-keeper could just as well have been replaced by Astrabacus in an effort to ennoble the liaison and its result. Donkeys and *moicheia*: nos. **18**, **19**.

[52] X. *Lac*. 1.7-8, paraphrased by Plu. *Lyc*. 15.12-13; Plb. 12.6b.8; MacDowell 1986: 82-86; Cartledge 2001: 123-25.

[53] Nor should we assume, with Plutarch, that Spartans of earlier antiquity (or any period) obviated *moicheia* by always obtaining the requisite permission: as Xenophon has Socrates note, *moichoi* are irrational actors insofar as they assume the risks of seduction despite the wide range of licit sexual activity (X. *Mem*. 2.1.5, with Phillips 2017: 52-53). MacDowell 1986: 87 hypothesizes that "[t]he rule about μοιχεία, observed in the early period but not later, must have been that a man might not have sexual intercourse with another man's wife unless the husband gave permission, nor with an unmarried woman unless, being unmarried himself, he carried her off to keep her in his own house (which would constitute marriage)." I would not rule out the continuation of this rule into later Sparta (except insofar as in Plutarch's day the Spartans no longer engaged in marriage by abduction (ἐγάμουν δὲ—note the imperfect—δι' ἁρπαγῆς, *Lyc*. 15.4)), and I would qualify the second category by positing that the father or other guardian of an unmarried woman would have to consent to the marriage by abduction (on which see Hdt. 6.65.2; Plu. *Lyc*. 15.4-7, with MacDowell 1986: 77-81; Cartledge 2001: 121-23) either (before and) during or after the fact.

[54] Th. 8.12.2, 45.1; X. *HG* 3.1.1-4; Plu. *Alc*. 23.7-9; *Lys*. 22.6-13; *Ages*. 3, citing Duris (*FGrHist* 76 F 69); *Mor*. 467f, *De tranq. an.* 6; cf. Paus. 3.8.7-10.

[55] At Sparta, *moichoi* caught in the act may have been subject to summary execution: one might argue that the Laconophile Xenophon would not have Hiero present the right to kill as obtaining in "many cities" (no. **2**) if those cities did not include Sparta.

13. Aristotle, *Pol*. 1306a36-b2, presents two cases in which a judgment on a charge of *moicheia* sparked civil strife:

> Lawcourt verdicts resulted in the civil strife at Heracleia and at Thebes, with the Heracleotes procuring against Eurytion and the Thebans against Archias a penalty on a charge of *moicheia* (ἐπ’ αἰτίᾳ μοιχείας) that was just but motivated by factionalism: their enemies were so determined to get the better of them that they were bound in the pillory (κυφῶνι) in the agora.

Archias was one of the polemarchs killed by assassins in drag as the first strike in the liberation of Thebes in 379/8 (X. *HG* 5.4.2-7); the episode Aristotle describes presumably belongs to the period shortly preceding the Spartan occupation of Thebes (382), when rival factions led by Ismenias and Leontiadas divided the citizenry (X. *HG* 5.2.25). If Heracleia is Heracleia Pontica, Eurytion’s trial may be connected with the *stasis* that led to the establishment of tyranny by Clearchus in 364/3 (Diod. 15.81.5). Here we have evidence in both named cities for *moicheia* as a specific offense that is tried by a court and can result in a penalty of public binding in the *kyphôn*, an instrument named for its resemblance to the bent yoke of a plow and thus presumably featuring a crossbeam with manacles or other fastenings for the neck and wrists.[56]

In Thebes, prosecuting the *moichos* was probably not the only option. In his description of the city, Heracleides Criticus ([Dicaearch.] fr. 1.22 Müller, *GGM*; third century)[57] quotes two lines of the contemporary comic poet Laon (fr. 2 K—A) that allegedly commemorate Laon’s capture and ransom:

> Laon’s lines [about the Boeotians are as follows] (he writes in praise of them rather than telling the truth, for he was caught as a seducer but released (μοιχὸς γὰρ ἁλοὺς ἀφείθη) upon buying off for a small sum the man he wronged): “Love a Boeotian man, and do not shun (the woman of) Boeotia (τὴν Βοιωτίαν μὴ φεῦγ’): for he is good and she is lovely.”[58]

Whether these verses belong to Laon speaking in his own voice or to one of his characters,[59] it is entirely plausible that Boeotians detained seducers for ransom (and perhaps for self-help punishment)—and that in the third century this was no novelty but a venerable custom—given the similar practices we have seen elsewhere, especially among the Boeotians’ Athenian neighbors.

14. According to the lost Aristotelian *Constitution of the Tenedians* (fr. 593 Rose = fr. 610.1 Gigon), a king of Tenedos enacted a law whereby the person who caught a *moichos in flagrante* was to kill both the *moichos* and his paramour with an

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56 Schmitz 1997: 109; *Suda* s.v. κύφωνες, κ 2800 Adler; LSJ[9] s.v. κύφων. Ael. *VH* 11.6 (Schmitz 1997: 109-10) tells a similar story about Thespiae but offers no details and is therefore of questionable value.

57 Identification and date of the author: Müller 1855: li-liii; Daebritz 1912; Walbank 1957-79: 3.72.

58 I take τὴν Βοιωτίαν as a pun (*sc*. either γυναῖκα or γῆν).

59 Meineke *ap*. Kock 1880-88: 3.382.

axe (βασιλεύς τις ἐν Τενέδῳ νόμον ἔθηκε τὸν καταλαμβάνοντα μοιχοὺς ἀναιρεῖν πελέκει ἀμφοτέρους, Steph. Byz. s.v. Τένεδος).[60] As the story goes, this king enforced this law against his own son, which explains why Tenedian coins bear an axe on one side and the heads of a man and a woman on the other. Of course, this alleged law is immediately suspect as a later numismatic aetiology; but if such a law ever existed (and the sources as we have them neither assert nor deny that the law was in force in the fourth century), it is plausible that the use of the axe and the requirement that the female party as well as the *moichos* be killed were intended to prevent premeditated entrapment (cf. the remedies at Athens, no. **9**, and at Gortyn, no. **11**).[61]

15. Much more inherently plausible is the report derived from the lost Aristotelian *Constitution of the Lepreans* and preserved in Heracleides Lembus (Arist. fr. 611.42 Rose = tit. 143.1, no. 14 Gigon = Heraclid. Pont. fr. XIV Müller, *FHG*):[62]

> When the Lepreans catch (λάβωσι) seducers (μοιχοὺς) [in the act], they lead them around the city in chains (δεδεμένους) for three days and deprive them of civic rights (ἀτιμοῦσι) for life; as for the woman, they make her stand in the agora for eleven days ungirt and wearing a transparent chiton and inflict indignities upon her (ἀτιμοῦσι).

Shaming, public or private, of the *moichos*, his paramour, or both, was evidently a common practice in the Greek world generally (cf. nos. **7**, **9**, **11**, **13**, **18**, **19**, **20**).[63]

16. Heracleides Lembus also provides the earliest surviving evidence (presumably derived from an Aristotelian *Constitution of the Epizephyrian Locrians*) of a law on *moicheia* attributed to Zaleucus, lawgiver of Locri Epizephyrii (*fl*. Ol. 29 = 664-661):[64]

> If a person is caught [in the act]/convicted[65] as a seducer, he has his eyes gouged out (ἐὰν ἁλῷ τις μοιχός [κλέπτων *aut nihil* MSS],[66] τοὺς ὀφθαλμοὺς

60 Similarly Phot. s.v. Τενέδιος ξυνήγορος (Arist. fr. 610.2 Gigon); cf. Apostol. 16.26 (Arist. fr. 610.3 Gigon). Heracleides Lembus (Heraclid. Pont. [*sic*] fr. VII.3 Müller, *FHG* = Arist. fr. tit. 143.1, no. 7 Gigon) states only that the *moichos* was to be killed in this manner; cf. Diogenian. 8.58; Macar. 8.7.

61 Latte 1931: 132; Schmitz 1997: 54, 85.

62 See Schmitz 1997: 107-8; Forsdyke 2008: 3-4, 12-16, 22-23.

63 Latte 1931: 154-56, 1932: coll. 2448-49; Forsdyke 2008: 3-26. The Greeks were not the only people in antiquity to inflict shaming punishments upon offenders of this class. Mesopotamia: e.g., Driver—Miles 1955-56: 1.281. Egypt: Diod. 1.78.5; cf. the defendant's repeated disavowals in ch. 125 (Introduction and Negative Confession) of the *Book of the Dead*: *n*(*n*) *nk·ỉ*, "I have not copulated"; *n*(*n*) *d3d3*(*ỉ*)*·ỉ*, "I have not copulated"; *nn nk·ỉ ḥmt ṯ3*(*y*), "I have not copulated with the wife of a man." Germans: Tac. *Germ*. 19.2. Romans: n. 12.

64 Eus. *Chron*. 2 coll. 363-64 Migne; Graham 1982: 191.

65 Although the phrasing suggests apprehension *in flagrante*, we may posit (if the law is genuine) that a conviction in court, or at least some formal confirmation of the claim of seduction, was required; otherwise we must envision a scenario in which such a drastic

ἐξορύττεται). Zaleucus' son was so caught/convicted and the Locrians were ready to let him off, but Zaleucus would have none of it: he plucked out one of his own eyes and one of his son's. (Arist. fr. 611.61 Rose = tit. 143.1, no. 31 Gigon = Heraclid. Pont. fr. XXX.3 Müller, *FHG*)

The anecdote about the lawgiver's son we may dismiss as yet another instance of the trope of the lawgiver hoist with his own petard (cf. no. **14**), but the law itself may be genuine. While skepticism is warranted, outright dismissal is not.[67] The later tradition of Zaleucus' legislative severity possesses no more intrinsic value than that concerning Draco,[68] but the well-attested law mandating that the proposer of novel legislation speak with a noose around his neck that is drawn tight if the proposal fails (D. 24.139; Plb. 12.16.9-14) and another law that prescribed the literal retribution of an eye for an eye (D. 24.140)[69] bespeak a community that would probably not blanch at the blinding of a seducer. If genuine, Zaleucus' seduction law would possess especial value as the first written law on *moicheia* in Greek history.[70] In this case, moreover, we might hypothesize that Zaleucus set the fixed penalty of blinding in part in order to obviate variations in self-help punishment and ransom.[71]

17. An anonymous mock epitaph (*Anth. Pal.* 9.520) for Alcaeus of Messene, a contemporary and enemy of Philip V of Macedon, reads:

This is the grave of Alcaeus, who was killed by the broad-leaved punisher of seducers (τιμωρὸς μοιχῶν), Earth's daughter, the radish.

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and irreversible punishment might be available to the householder on his sole authority, while leaving the alleged seducer alive to contest his guilt.

66 The emendation, proferred by Müller, must be correct: cf. Val. Max. 6.5 ext. 3 (*adulterii crimine damnatus*); Ael. *VH* 13.24 (τὸν μοιχὸν ἁλόντα... ἁλοὺς ἐπὶ μοιχείᾳ).

67 See Latte 1931: 145-46; Dunbabin 1948: 71-72; Schmitz 1997: 114-15 raises the possibility, based on the story of the blinding of Daphnis, which originated with the Himeraean Stesichorus (fr. 102 Page = fr. 279 Davies), that "die Blendung des moichos eine in den griechischen Städten Süditaliens und Siziliens verbreitete Strafe war."

68 Zen. 4.10; Diogenian. 4.94; Apostol. 8.27; Dunbabin 1948: 72; Gagarin 1986: 66-67.

69 According to D. 24.140-41, the only new law that the Locrians, who generally enforce their old laws strictly, have reputedly passed in over two centuries was motivated by the case in which a man threatened to strike out the eye of a one-eyed enemy. The latter allegedly proposed and carried a law ordaining that if a two-eyed person struck out the eye of a one-eyed person, he should lose both eyes.

70 Written laws of Zaleucus: Arist. fr. 548 Rose = fr. 555 Gigon, with Gagarin 1986: 58 with nn. 22-23; Graham 1982: 191. Zaleucus was credibly reckoned as the first of the (historical) Greek lawgivers (Ephor. *FGrHist* 70 FF 138b, 139; Graham 1982: 191; Willetts 1982: 236).

71 Polybius castigates Timaeus for alleging that Aristotle had audaciously slandered Locri Epizephyrii as a colony of runaways, slaves, seducers (μοιχῶν), and slavers (Plb. 12.8.2 = Timae. *FGrHist* 566 F 156 = Arist. fr. 547 Rose = fr. 554.2 Gigon); the only value in this excursus is found in Timaeus' entirely credible (cf. Walbank 1957-79: 2.331) assertion that in contemporary (late fourth- to early third-century) Locri Epizephyrii, seduction was a punishable legal offense (ἐπιτίμια τετάχθαι...τοῖς μοιχοῖς, Plb. 12.9.6).

Presumably composed by Philip or a member of his court between 215 and 179,[72] this epigram, its satirical tone notwithstanding, indicates that the use of the radish to punish seducers was not limited to Athens.[73]

18. Nicolaus of Damascus, in his *Collection of (Strange) Customs* (*ante* 4 B.C.), notes that in Pisidia, "when a seducer is caught (and/or 'convicted': ἁλῷ), he is led around the city on a donkey with the woman for a fixed number of days" (Nic. Dam. *FGrHist* 90 F 103(l) = Arist. fr. tit. 143.4 F 11 Gigon).[74] The donkey was presumably selected as the vehicle for this public humiliation due to its status as a proverbially hubristic animal.[75]

19. In his *Greek Questions*, Plutarch explains a similar custom in Aeolian Cyme, evidently obsolete by his time, that applied specifically to women (Plu. *Mor*. 291e-f, *QG* 2; cf. Hsch. s.v. ὀνοβάτιδες):[76]

> "Who is the 'donkey-rider' (ὀνοβάτις) at Cyme?" When a woman was caught in *moicheia*, they brought her to the agora and had her stand on a rock so that she was visible to all. Then, without further ado, they placed her on the back of a donkey; after being led in a circle around the city, she had to take her place back on the same rock and then live the rest of her life in shame (ἄτιμον), being called a "donkey-rider." The rock they consequently deemed unclean and held in abomination.

Significant here is the double entendre in ὀνοβάτις, which means "donkey-mounter" (*sensu obscoeno*) as well as "donkey-rider": ὀνοβατεῖν describes a donkey's

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72 Gow—Page 1965: 2.7-8, 591.

73 According to D. L. 2.128, the philosopher Menedemus (*ca*. 339-*ca*. 265) once "asked a brazen *moichos*, 'Don't you know that it's not just cabbage that has a pleasant taste, but radishes too?'" The significance of this anecdote (if authentic) depends on where it took place: in Menedemus' native Eretria or during one of his residences in Athens, Elis, or Macedonia. In Lucian, *Peregr*. 9 (*post* A.D. 165), Peregrinus, as a young man (*ca*. 120), "in Armenia, was caught in the act as a seducer (μοιχεύων ἁλούς), received an enormous number of blows, and finally jumped off the roof and made his escape with a radish plugging up his anus (ῥαφανῖδι τὴν πυγὴν βεβυσμένος)." Farcical though this is, again, an alleged radishing in Armenia would seem to indicate that the practice was fairly widespread in the Greek world. See also Alciphr. 3.26(62).4. On the persistence of the *topos*, along with the concision of Aristophanes' jokes, the proverbial status of the phrase ὦ Λακιάδαι (the deme was famed for its radishes), and the predictable lack of specificity offered by authors such as Xenophon (*Mem*. 2.1.5) and Isaeus (8.44; cf. 46) as evidence for the reality of the practice, see Kapparis 1996: 65-67; Schmitz 1997: 97-103; Forsdyke 2008: 8. The Egyptian use of the radish as a purgative (Hdt. 2.77.2; Ar. *Pax* 1254 with schol.; *Th*. 857), including in mummification (Hdt. 2.88), is probably merely coincidental.

74 See Schmitz 1997: 107; Forsdyke 2008: 3-4; Schmitt-Pantel 1981.

75 X. *An*. 5.8.3; Pi. *P*. 10.33-36; Hdt. 4.129; Ar. *V*. 1303-10; Phillips 2016*b*: 21 with n. 6; cf. Schmitz 1997: 107 n. 195; Forsdyke 2008: 46; Schmitt-Pantel 1981: 119.

76 See Schmitz 1997: 107; Forsdyke 2008: 3-4, 13-16, 22; Schmitt-Pantel 1981.

mounting a mare, from the point of view of either the donkey or the person supervising the copulation.[77]

20. In second-century A.D. Thurii, *moichoi* were denied the protection of the law against being mocked in comedy (εὖ δὲ καὶ ὁ τῶν Θουρίων νομοθέτης· κωμῳδεῖσθαι γὰρ ἐκώλυσε τοὺς πολίτας πλὴν μοιχοὺς καὶ πολυπράγμονας, Plu. *Mor*. 519b, *De curios*. 8).[78] The purpose of these exceptions was to maximize the offender's exposure to public ridicule, as with the donkey-riders of Pisidia (no. **18**) and Cyme (no. **19**); in later Gortyn (no. **11**); in Heracleia and Thebes (no. **13**); in Lepreum (no. **15**); and in the case of the seducer who lost a *graphê adikôs heirchthênai hôs moichon* at Athens (no. **9**).[79]

III. Conclusions

The preceding survey significantly complicates the claim for a Panhellenic right to kill the *moichos* caught in the act,[80] at least in the most extreme and absolute version advanced explicitly by Lysias (no. **1**) and implicitly by Philo (no. **5**). The license to kill is specifically attested at Athens (no. **9**) and can be securely presumed at Megalopolis (and elsewhere in the Achaean League: no. **4**) and at Alexandria (no. **5**). At Gortyn, under the Great Code, it applied only if the seducer was not ransomed (no. **11**); and the alleged Tenedian *moicheia* law (no. **14**) is of questionable authenticity. By contrast, apart from the cases of Ares (no. **7**) and Molurus (no. **8**), the evidence from Lepreum (no. **15**) and later Gortyn (no. **11**), and perhaps Locri Epizephyrii (no. **16**) and Pisidia (no. **18**), appears to rule out self-help killing. It remains possible, though, that such a right obtained commonly (according to Xenophon, no. **2**) or even generally (as implied by Polybius, no. **4**) in the Greek world; and this possibility deserves serious consideration, in light of the experiences of Xenophon and Polybius and the Alexandrian origins of Philo (no. **5**). In those places that permitted self-help killing, less drastic remedies must have been available, including, in at least some cases, the fines decried by Josephus (no. **6**), whether exacted as ransom or under judicial sentence. While we cannot assume that the laws of other cities featured the wide range of procedural options at Athens or

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[77] Donkey: Poll. 5.92. Breeder: X. *Eq*. 5.8. Cf. the curse in the Adoption Papyrus from New Kingdom Egypt, "[As for any who shall contest their rights]—may a donkey copulate with him and a donkey with his wife" (quoted in translation from Jasnow in Westbrook 2003: 1.347). For Egyptian views on donkeys, cf. the nickname "the Donkey" given to Artaxerxes III Ochus (Plu. *Mor*. 363c, *I. et O*. 31 = Deinon, *FGrHist* 690 F 21; Ael. *VH* 4.8), presumably with a pun on the Persian title "Great King": Egyptian *'3* "great" and *'3* "donkey" were at least partial homophones, differentiated in hieroglyphic spelling by the determinatives depicting a phallus and a donkey appended to the latter (Gardiner 1957: 456, 459, 557).

[78] See Schmitz 1997: 108.

[79] Cf. Phillips 2016*b*: 53-54; Schmitz 1997: 134-36; Forsdyke 2008: 8-26.

[80] Scholarly opinion on this issue is divided: see Cantarella 1976: 151, 196-97; Schmitz 1997: 55, 111; Carey 1995: 414-15; Todd 2007: 89-90.

the total discretion granted by the Great Code to Gortynian captors after a five-day moratorium, it is scarcely conceivable that in any Greek city the only two options available to the captor were to kill the seducer or forgo all punishment.

Regardless of the means and limits of redress, *moicheia* clearly constituted a specific substantive offense at law in numerous Greek cities (note especially the attention devoted to the topic by Aristotle, no. **3**; cf. X. *Cyr*. 1.2.2-3, no. **2**; J. *Ap*. 2.276, no. **6**), including (at least) Athens (no. **9**), Gortyn (no. **11**), Heracleia (no. **13**), Thebes (no. **13**), Lepreum (no. **15**), Locri Epizephyrii (no. **16**), and one or more of the cities of Pisidia (no. **18**), with the *moichagria* incurred by Ares (no. **7**) indicating a similar status on Homer's Olympus. The most compelling evidence for unity in the treatment of *moicheia*—predictable local variation notwithstanding—lies in the practice of detaining for ransom the seducer caught *in flagrante* and/or humiliating, physically or otherwise, in private and/or in public, the seducer and/or his paramour, with various reflections of and variations upon the Homeric *exemplum* (no. **7**) attested at Athens (no. **9**), in Hipponax (and possibly Anacreon; cf. the comic inversion in Herodas and elsewhere: no. **10**), at Gortyn, both under the Great Code and later (no. **11**), at Heracleia (no. **13**), at Thebes (and perhaps elsewhere in Boeotia, no. **13**), at Lepreum (no. **15**), in the mock epitaph of Alcaeus (cf. D. L. 2.128; Lucian, *Peregr*. 9: no. **17**), in Pisidia (no. **18**), at Aeolian Cyme (no. **19**), and at Thurii (no. **20**).[81]

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[81] In this area, as we have seen, Greek practice—specifically, the use of the radish—directly influenced that of the Romans. Other influences were less direct but more lasting. The right, under the laws of Draco and of Solon (at least insofar as he left Draco's homicide laws intact: [Arist.] *Ath*. 7.1), to kill the seducer apprehended *in flagrante* was cited by Ulpian (d. A.D. 223) as precedent for the corresponding requirement ('*in filia adulterum deprehenderit*') in the *lex Iulia de adulteriis coercendis* (*D*. 48.5.24(23) *pr*., n. 27). The *lex Iulia*, in turn, influenced the treatment of adultery and related offenses not only in the Continental civil law tradition (*Lex Rib*. 80(77); *Lex Burgund*. (*Lib. Const*.) 68 (cf. *Lex Rom. Burgund*. 25); *Lex Visigoth*. 3.4.4-5 (cf. 3.2.2, 6; 3.3.11; 3.4 *passim*); see Cantarella 1976: 182, [1992] 2011*d*; cf. Treggiari 1991: 311-19) but in the Anglo-American common law as well (*Leis Willelme* 35, with Liebermann 1903-16: 1.514, 2.365, 3.291). Finally, Greek terminology—mediated through centuries of Roman colloquial usage—survives in the laws of the Salian and Ripuarian Franks (*Lex Sal*. 'A' 15.2-3; 25; *Lex Rib*. 39(35).2).

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LAURA PEPE (MILAN)

MOIXEIA, UNITY, AND UNIQUENESS OF GREEK LAW: RESPONSE TO DAVID D. PHILLIPS

David Phillips's essay, *Moicheia and the Unity of Greek Law*, is the second contribution devoted by the American scholar to the unity of Greek law (or at least of the law of the πόλεις), with the aim of showing that such unity may be found not only within the field of procedure – according to the well-known thesis by Michael Gagarin –[1] but also within the substantive field. He presented an earlier study on this topic, concerning ὕβρις (*Hybris and the Unity of Greek Law*), at the *Symposion* held at Harvard Law School in 2013.[2] I think that it is important to revisit briefly that contribution, since Phillips starts out, correctly, by addressing a methodological issue, asking what criteria need to be fulfilled in order to speak with good reason of the unity of Greek law.

By making good use of the arguments brought forward by Moses Finley against said unity,[3] and after making it clear that in order to demonstrate said unity it may not be enough to identify those "basic principles, shared by otherwise differing legal systems", mentioned by Biscardi,[4] Phillips wrote that "in order to discover meaningful unity in Greek law, we must be able to demonstrate instances in which these common basic principles […] are specifically manifested in actual law, whether substantive or procedural".[5] His conclusion was that, to this end, it was necessary to apply three criteria. The first of these is "the attestation of a significant similarity in the laws of two or more independent *poleis*. […] Obviously, the greater the number of *poleis* that exhibit a common legal principle, the stronger the argument for unity".[6] The second criterion lies in the "presence of a substantive or procedural phenomenon in a community composed of Greeks from different *poleis*" (in those colonies, for example, or in other communities, including "fictitious" or "virtual" ones, made up of individuals coming from different πόλεις).[7] A final criterion is to be found in "evidence that spans both a significant sample of communities for which evidence exists and a significant period of time".[8]

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1 Gagarin 2005.
2 Phillips 2014.
3 Finley 1966.
4 Biscardi 1982, 8-9.
5 Phillips 2014, 77-78.
6 Phillips 2014, 78.
7 Phillips 2014, 79-82; an example of a "virtual or fictitious community" – as explained by the author – is to be found in Plato's *Laws*.
8 Phillips 2014, 83.

Indubitably, the bulk of sources collected by Phillips, first in his essay on ὕβρις and now in the present one on μοιχεία – sources which largely meet the three abovementioned criteria, even though they are not always equivalent in terms of their reliability –,[9] on a par with the learned and erudite analysis of them offered by this scholar, brings a considerable, undeniable contribution to the arguments in favor of the unity of Greek law. As regards specifically the study on μοιχεία, evidence demonstrates without a doubt that in all city-states for which documents are available μοιχεία was sanctioned; these sanctions are linked by Phillips to a relatively stable model, albeit an indubitably heterogeneous one arising from the presence of several local varieties. All the same, although in general terms I share the main thesis underlying Phillips's line on μοιχεία as an argument in support of unity, I think it is necessary to shed more light on some of the issues touched upon by Phillips.

As mentioned above, the profusion of sources presented by Phillips proves that μοιχεία was considered an offense in many πόλεις, and as such was subject to more or less uniform repression. One must wonder, however, whether all this is sufficient to demonstrate the unity of Greek law, since Phillips himself, at the very beginning of his essay, remembers that "prohibitions and sanctions against illicit consensual sex between a man and a woman are as old as law itself".[10] In trying to answer this question, I think it appropriate to add, to the criteria singled out by Phillips, further, equally fundamental guidelines, which had already been suggested by Finley at the time and were later reconfirmed by Michael Gagarin in his essay on procedural unity and again by Adriaan Lanni, in her *response* to Phillips's essay at the 2013 *Symposion*. Firstly (see *infra*, § 1), the question arises as to what should or may be considered a "source" of Greek law; in other words, whether only laws should be numbered among "sources", or customary law[11] as well. Moreover: assuming that customary law may also have contributed to forming the notion of Greek law, it is necessary to verify whether the various sanctions for which there is evidence for the repression of μοιχεία – whether they are prescribed by law or by social custom – may be considered negligible, that is to say, such that they do not invalidate the idea of unity (see *infra*, § 2). Finally, one must establish whether the repression of

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[9] In addition to the well-known debate regarding the existence, in Athens, of the practices known as ῥαφανίδωσις and παρατιλμός – for which see, among others, CAREY 1993; KAPPARIS 1996, 65-67; SAUNDERS 1991, 82 – Phillips himself marks as dubious Aelianus' testimony in relation to Gortyn (Ael. *VH*. 12.12); the same may be said with regard to the aetiological anecdote referring to Tenedos (Arist. fr. 593 Rose), as well as to Zaleucus (Arist. fr. 611.61 Rose), whose legislation is known only through indirect and very late sources (on this, see PEPE 2006, part. 26-27, and the bibliography cited there).

[10] For a bibliography and sources on the repression of illicit sex in the ancient world, see COHEN 1991, 98 and nt. 1.

[11] As to what may count as a "source" of law, at least in the *corpus* of orators, see TALAMANCA 2008.

μοιχεία in the Greek world is "distinctive in some interesting or important way", that is, "different from at least some other legal systems in a way that tells us something about the Greeks"[12] (see *infra*, § 3).

1. In an attempt to demonstrate a number of flaws in the conviction – never before then in dispute – held by Ludwig Mitteis with regard to the unity of Greek law,[13] Finley highlighted how non-chalantly Mitteis moved "from *Recht* to *Sitte*", something certainly made easy and in part justified by the ambivalence of the Greek term νόμος, which, as is well known, "may mean 'law', or even more narrowly 'statute'", but may also mean "'custom' or 'institution' in the broadest and vaguest possible sense".[14] This tendency may be noted also, in fact, in Phillips's essay: a few examples relating to the payment of the ransom that was demanded of the μοιχός in many πόλεις will suffice to demonstrate it.

When Homer, in the *Odyssey* (*Od*. 8.266-369) tells about the capture of Ares, caught by Hephaestus *in flagrante* with the latter's wife, Aphrodite, he is obviously describing a practice that was, in all likelihood, widespread in many parts of Greece, at a time when written laws were still unheard of. A practice that stayed alive, however, for a long time in several cities. For example, it must have been – as admitted by Phillips himself – "a venerable custom" in Boeotia, if we are to believe the comic poet Laon (Laon, fr. 2 K.-A., quoted by Phillips). The same may be said for Athens. In Lysias' first speech, Euphiletos claims to have acted on the basis of those laws – first of all Draco's law on homicide – granting the wife's κύριος the right to kill the μοιχός caught *in flagranti delicto*. It is true that it was definitely no longer habitual in fifth and fourth-century Athens to kill a μοιχός (to such an extent that not only did many μοιχοί caught *in flagrante* survive, they did not think twice about continuing in their wicked ways: see Is. 8.44). However, those laws, albeit obsolete, were still in force, given that Euphiletos can refer to them as τοὺς... κειμένους νόμους (Lys. 1.48), and consider them at the same time more stringent, hierarchically superior (κυριώτερον), compared to the monetary compensation (τίμημα) offered by the μοιχός Eratosthenes (Lys. 1.29). Without a doubt Lysias' speech represents a tendentious source, in the light of Euphiletos' aim of bringing grist to his mill thereby procuring an acquittal at all costs in a trial where he was risking his life.[15] All the same, since we are not aware of any law in Athens

[12] Lanni 2014, 100.

[13] Mitteis 1891.

[14] Finley 1966, 129.

[15] The relatives of the man killed, Eratosthenes, accused Euphiletos of φόνος ἐκ προνοίας, not so much because he had plotted the killing – the defendant himself had confessed to a plan to catch his own wife's μοιχός in the act, highlighting the fact that under Athenian laws the culprit's killer was allowed to go scot-free ᾧτινιοῦν τρόπῳ, regardless of the circumstances in which the culprit had been caught: cf. Lys. 1.37-38 –, but rather because, as they claimed, he had put the make on Eratosthenes as a μοιχός, by dragging him from the street into his home (Lys. 1.27), so that he could, in this way, eliminate a

providing for a financial penalty against the seducer,[16] we may rightfully believe that, in Athens also, the payment of a ransom price was simply the result of a custom,[17] a voluntary agreement between the parties, to which the μοιχοί caught *in flagrante* would willingly agree in order to avoid a likely trial that could end very badly –[18] and this, provided they had not been killed on the spot by the woman's κύριος: the specific suit for μοιχεία, the γραφὴ μοιχείας, was indeed an ἀγὼν τιμητός in which the prosecutor could definitely ask for a capital sentence.[19] The

political enemy. As regards the reconstruction of the case for the prosecution, see also PEPE 2012, 210-211, 223-224.

[16] It is true that Euphiletos ends his speech by pointing out that the laws "command that whosoever catches a μοιχός may do with him anything he wishes" (κελεύουσι μέν, ἐάν τις μοιχὸν λάβῃ, ὅ τι ἂν οὖν βούληται χρῆσθαι, Lys. 1.49). In "doing anything they wish" may well for sure be included a request for a ransom price. As to the authenticity of those laws which Euphiletos generically refers to as he ends his speech, one may, however, raise serious doubts (*pace* COHEN 1991, 115, who holds that Euphiletos is referring to the first of the laws he has mentioned in his speech). It is, at the very least, singular that they should not be held as evidence in the βεβαίωσις, where they may have helped in promoting the defendant's case; one must also rule out – *pace* PHILLIPS 2016, 50 note 90 – the possibility that they are to be identified precisely with those laws mentioned by Euphiletos at that point, in particular with Draco's law, which does not at all provide for the lawfulness, for one who catches the μοιχός, of doing with him whatever one wishes; in fact, it merely sets down that it is lawful to kill a man caught in the act with the woman. The law Euphiletos is here referring to may well be the law relating to the μοιχός who is unsuccessful in his suit as a result of the γραφὴ ἀδίκως εἰρχθῆναι ὡς μοιχόν, which he, however, only mentions in part. On the basis of [Dem.] 59.66 we know that the law, by allowing the κύριος to do with the seducer whatever he wished, also added that he should have acted "in court and without a knife" (ἐπὶ τοῦ δικαστηρίου ἄνευ ἐγχειριδίου). Even assuming that the law mentioned by Euphiletos is genuine, it still does not prescribe payment of ransom money: this would have been simply one of the possible consequences; another, as mentioned by PHILLIPS 2016, 50, consisted in subjecting the seducer to humiliating treatments, among which the so-called ῥαφανίδωσις or depilation by ashes (assuming, for argument's sake, that the sources from Comedy relating to such treatments are reliable; for this, see *supra*, note 9).

[17] The term "custom" is also used by COHEN 1991, 118.

[18] On the contrast between written law and custom which Lysias, by way of Euphiletos' words, intends to highlight, see PEPE 2012, 216-218. It is noteworthy that not even [Dem.] 59.65 – which relates the sting operation by Neera and Stephanos against Epenetos, caught in the act with the former's daughter, Phano – mentions any law requiring the μοιχός to pay ransom money.

[19] On γραφὴ μοιχείας, see HARRISON 1968, 35 and (with a less dramatic and more plausible hypothesis) HARRIS 1990, 374. I am not convinced – unlike Phillips – that in Athens further suits could be brought against the μοιχός. As regards the inclusion of the μοιχοί in the category of the κακοῦργοι, who were liable to ἀπαγωγή (cf. COHEN 1984, 157-158), I refer the reader to the doubts raised by HARRIS 1990, 376-377. Recourse to a γραφὴ ὕβρεως is likewise dubious, since in the passages mentioned by Phillips μοιχεία is never referred to as ὕβρις; in particular, from Lys. 1.25 (ἠρώτων διὰ τί ὑβρίζει εἰς τὴν οἰκίαν τὴν ἐμὴν εἰσιών; cf. also Lys. 1.4: [Ἐρατοσθένης] ἐμὲ αὐτὸν ὕβρισεν εἰς

payment of compensation was, instead, laid down by the law, as is well known, in the Law Code of Gortyn, which established its amount on the basis of the identity of the seducer and of the victim, as well as (at least in a few cases) of the place where the crime had been perpetrated (*IC* IV 72 col. II 20-45). Now, it is remarkable that, when Phillips compares the situation in Gortyn to that in Homer or in Athens, he should confine himself to highlighting that "as opposed to the situation in the Odyssey and in Athens, the ransom amount is fixed", passing over in silence the fact that only in the Cretan city was the penalty fixed by a written law.

2. Let us assume, however, that it may not be necessary to lay down too fine a line between written law and custom. The latter may, indeed, also provide useful information relating, if not to "law" itself, at least to the culture and the juridical experience of Greek cities. Let us try and understand whether the evidence presented by Phillips in his essay actually proves the existence of a uniform treatment of μοιχεία in Greece. Let us go back briefly to his conclusions: "The most compelling evidence for unity in the treatment of *moicheia* – predictable local variation notwithstanding – lies in the practice of detaining for ransom the seducer caught *in flagrante* and/or humiliating, physically or otherwise, in private and/or in public, the seducer and/or his paramour". I shall start by emphasizing that in itself such a list appears to be rather multifarious, as it highlights differences in treatment of no small weight,[20] and which may largely be traced back, once again, to the dichotomy *law* vs. *custom*.

Be that as it may, out of Phillips's own review there arise some local variants that do not fall in any way under the general overview, but which should not, however, be neglected on this account. One may think of Lepreum, where seducers were supposed to be deprived of their civic rights (Arist. fr. 611.42 Rose); this, if we are to believe Claudius Aelianus, must also have been the case at Gortyn (Ael. *VH* 12.12). Well then, the μοιχός being sentenced to ἀτιμία is something without parallel elsewhere (in fact, it differs significantly from what, for example, happened in Athens, where the ἄτιμος was not so much the μοιχός, but rather the man who continued to live with his wife after discovering her unfaithfulness: cf. [Dem.] 59.87). This detail is of no small importance, in view of the fact that ἀτιμία is a sanction that may not be subsumed under the category of "public humiliation". Furthermore, a significant exception is represented by the law that was presumably in force on Tenedos, under which both the μοιχός and the woman, if caught *in*

τὴν οἰκίαν τὴν ἐμὴν εἰσιών), it is clear that it consists in the act of trespassing. Lastly, as to εἰσαγγελία, Hyperides himself, in his speech for Lycophron, demonstrates that it was inappropriate to make recourse to it in μοιχεία cases (Hyp. *Lyc*. 12).

[20] One is reminded here of the *caveat* in Finley 1966, 132, not to take into consideration that which lies outside the rule, seeing it as a trifle, a *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 anyway".

flagrante, were to be killed (Arist. fr. 593 Rose). In fact, if this was the case, such a treatment of μοιχεία would make Tenedos much more similar to Augustan Rome than to the other Greek cities for which we have documents, where the killing of the woman was explicitly forbidden, and where – but I shall return to this later – men and women were subject to a different treatment. If we exclude custom and take into consideration the laws alone, it seems to me that there exists considerable distance between Athens and Gortyn. In the former, as is well known, the μοιχός could lawfully be killed under Draco's law, or – if we assume that in the fifth and fourth centuries the section of Draco's law relating to taking the law into one's hand against the μοιχός was dead letter – could be sentenced to death as a consequence of a γραφὴ μοιχείας (obviously if the prosecution had suggested a death sentence as punishment and judges had voted in its favor instead of the sanction proposed by the μοιχός defendant). In Gortyn, instead, the situation was very different; even if we concede that the sentence "it is incumbent on those that caught [the μοιχός] to do with him as they wish" (ἐπὶ τοῖς ἐλόνσι ἔμεν κρε̂θθαι ὄπαι κα λείοντι, ll. 35-36) "means exactly what it says" – as Phillips comments, rightly – it is significant, however, that the death of the seducer in the Cretan city should be represented only as a last resort.

3. Let us, all the same, assume that the abovementioned variants are exceptions confirming the rule, and let us move to the third question. In what way can the common denominator encountered in the treatment of μοιχεία in the various πόλεις reveal a characteristic feature of Greek law – something, that is to say, distinguishing it from other legal systems? In fact, by virtue of the very fact that unlawful sexual relationships are punished everywhere, and not only in the ancient world, one may well come across marked similarities even in widely differing places or times, and yet this does not imply any "unity". To say nothing of the fact that the lawfulness of killing the seducer (under certain conditions),[21] or to detain him in order to inflict humiliating punishment on him, is also demonstrably found in the *lex Iulia de adulteriis coercendis*: *sed qui occidere potest adulterum, multo magis contumelia poterit iure adficere* (D. 48.5.23.3 Pap. 1 *de adult.*).

This being the case, rather than in the sanctioning customs present in the various πόλεις, the unity and at the same time uniqueness of Greek law may stand out more markedly if further elements are taken into consideration. In my view, three aspects are particularly relevant.

Firstly, the documents collected by Phillips demonstrably show – albeit with a few exceptions – the tendency in Greece, both as a legal rule and as a social custom, to punish first and foremost the μοιχός, or to punish him in a more serious way than the woman with whom he commits the offence; to such an extent that, unlike what happens elsewhere, "nel diritto greco la μοιχεία era commessa solamente dall'uomo

[21] See, *infra*, note 26.

(μοιχός): la donna, infatti, era sempre considerata μεμοιχευμένη".[22] In other places, instead, this tendency is not present: either the sanction is the same for both, or it is the woman that is punished more severely. Once again, I shall confine myself to a few examples, purposefully taken from very distant situations, in space and time. In *Deuteronomy* adulterous people (a man and a married woman) or lovers (a man and a betrothed woman)[23] were sentenced to death by stoning. In Republican Rome – or according to tradition ever since the times of Romulus – the main concern was with the woman's *pudicitia*: had the woman been found *impudica*, she could be put to death by her *paterfamilias* or by her husband (who could, in any case, also lawfully kill the seducer)[24]. In later times – in particular when, under Augustan legislation, adultery was made a *crimen* – both the man and the woman were sentenced to the *relegatio in insulam*, while part of their wealth was subject to confiscation[25] (unless the two lovers had been killed, which could only take place under specific circumstances).[26] Abandoning both lovers (not just the man) to the mercy of the betrayed husband is a frequently recurring *cliché*, also in more recent times. For example, in sixteenth-century Spain, the adulterous couple was *in potestatem mariti*, who could "do with them what he wished", up to and including killing the culprits or imposing on them any *offensa vel iniuria*, including the cutting off of a limb. The public or private humiliation of the lovers and especially of the woman, sometimes with more or less severe physical abuse, is well attested in the *ius commune*: a particularly widespread custom was that of cutting off the nose of the adulterous woman, or exposing her with a shaved head and her garments rent.[27]

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[22] Thus CANTARELLA 1976, 154.

[23] *Deuter*. 22.22-24.

[24] Cf., *e.g.*, Dion. Halic. 2.25.6; Gell. *N.A.* 10.23.4-5. As for the lawfulness of also killing the woman's accomplice, see Hor. *Sat*. 1.2.41-46; 2.2.61. For a detailed treatment of all these cases, see CANTARELLA 1976, 175-183.

[25] Paul. *Sent*. 2.26.14.

[26] In particular, it was lawful for the father to kill the seducer and the daughter, provided that: the daughter was *in potestate* (D. 48.5.21 Pap. 1 *adult.*); the lovers had been caught in the act (*in ipsa turpitudine, in ipsis rebus Veneris*) in the father's home or in that of the father-in-law (D. 48.5.23.2 Pap. 1 *adult*. e D. 48.5.24 *pr*. Ulp. 1 *adult.*); that the killing of both was immediate, *uno icto et uno impetu* […] *aequali ira adversus utrumque sumpta* (D. 48.5.24.4 Ulp. 1 *adult.*), since the killing of only one of the adulterous pair would have consisted in a homicide (*Coll*. 4.2.6). As for the woman's husband – whose *ius occidendi* was decidedly more limited compared to that of the father –, he was allowed to kill the seducer alone, not the wife (cf. *Coll*. 4.10.1; Paul. *Sent*. 2.26.4 = *Coll*. 4.12.3), provided that the seducer was of a lowly condition (D. 48.5.25 pr. Macer 1 *publ*.; *Coll*. 4.2.1-4), and that he had been caught in the husband's home; after killing the seducer he had to repudiate his wife, and, had he not done so, he was accused of proxenetism (D. 48.5.25.1 Macer 1 *publ*.). The literature on this is, understandably, very extensive; I shall confine myself to CANTARELLA 1976, 163-175 (and 183-189 for developments later than the *lex Iulia*); CANTARELLA 1992 [2011], 557-562; RIZZELLI 1997, especially 9-35.

[27] For sources relating to these and other customs, see MASSETTO 1994, 98-99 and notes. For non-restrictive interpretations of the *lex Iulia de adulteriis* in the *ius commune*, and,

The second aspect that I feel the need to highlight in order to explain the differences between the Greeks and the "rest of the world" lies in the very meaning of the term μοιχεία. Phillips follows – to my mind correctly – the theory according to which the term does not indicate adultery,[28] but, in a wider sense, the "seduction of a woman, irrespective of her marital status" (thus in his note 3); this is evident – as is well known – especially in Athens and Gortyn.[29] However, though he makes his thought manifest in several circumstances – albeit mostly incidentally –, the author never states that it is precisely the concept of μοιχεία that distinguishes the culture and the law of the Greeks.[30] Let us think once again of the Old Testament. *Deuteronomy* distinguishes between the offense committed with a married woman, with a betrothed virgin or again with a virgin not betrothed, providing different penalties for different types of crime. In the first two cases the lovers were sentenced to death; in the third case, unlike the other two, the man was to pay a fine to the father of the woman and take her as his wife, without the option of repudiating her (*Deut*. 22: 28-29). One may think, again, of the Romans, who cut a very clear line between *adulterium* and *stuprum*; even though these two terms are often used interchangeably in sources (both in literary works and in juridical ones, as well as in the very *lex Iulia de adulteriis*),[31] the well-known definition by Modestinus clarifies that they were two distinct crimes: *adulterium in nupta admittitur; stuprum in vidua vel virgine vel puero committitur* (D. 48.5.35[34] Mod. 1 *reg*.; cfr. D. 48.5.6.1 Pap. 1 *adult*.).[32] The two crimes, at least after Augustan legislation, were subject to two separate treatments:[33] the *lex Iulia de adulteriis* – which definitely also dealt with

in particular, for an extension of the lawfulness of the killing of the woman, see CANTARELLA 1992 [2011], 562-571.

[28] In accordance with the well-known thesis in COHEN 1984 (cf. also COHEN 1991, 98-109).

[29] With regard to Sparta, see MACDOWELL 1986, 82-88.

[30] As is well known, Cohen used precisely the argument of similarity with other ancient societies to show that, for the Greeks too, μοιχεία could be an offense only if perpetrated with a married woman: COHEN 1991, 102-103.

[31] Cf., *e.g.*, D. 48.5.6.1 Pap. 1 *de adult*.; D. 50.16.101 Mod. 9 *diff*. On the relationship between the two terms, see, among others, RIZZELLI 1997, 171-183; TORRENT 2002, 128.

[32] Said distinction lies, of course, at the basis of subsequent developments. Within the *ius commune*, as regards adultery, secular law restricts the canon law notion (on the basis of which adultery takes place any time a man or a woman has intercourse with someone other than their spouse), by presupposing that the woman is in any case married; therefore, a man having intercourse with a married woman is adulterous, as well as a woman having intercourse with a person other than her own husband; as a result, carnal congress between a married man and an unmarried woman does not constitute adultery either for the man or for the woman and, consequently, the penalties for it are not applicable (this is, at least, the *communis opinio*; in this regard, and for divergent opinions, see MASSETTO 1994, 93-94 and note 147). Intercourse with a virgin, with a widow, or also with a child, constitutes, instead, the crime of *stuprum* (on which see, again, MASSETTO 1994, 208).

[33] As regards the Republican age, it is plausible that the *stuprum*, as well as of course the *adulterium*, was also punished within the *familia*, which could sentence the guilty woman

stuprum – allowed, under certain conditions, for the killing of the man and of the woman guilty of *adulterium*, which was not instead possible in the case of *stuprum* (punishable only by the *relegatio in insulam* and the confiscation of half of their wealth).[34] It goes without saying that such a distinction perpetuated and radicalized itself in the following age.[35]

Moreover, there is a third detail that may further corroborate the idea of the unity of Greek law within the scope of the repression of sexual crimes. According to the documents available, in Greece μοιχεία was considered on a par, at least from the point of view of sanctions, with sexual violence. This appears very clearly from Draco's law on homicide, which considered lawful the killing of anyone found with (*rectius*: ἐπί) a woman from the οἶκος, whether it was a wife, a mother, a daughter, a sister, a free-status concubine (Dem. 23.53). The proviso – we need not return to this subject here in too much detail – refers therefore not only to consensual intercourse, to μοιχεία (as seemingly understood by Phillips, when he holds Demosthenes' passage on a par with a similar one, though not entirely identical, in *Ath*. *Pol*. 57.3), but also to an act committed with violence.[36] In the Athens of later times – for which reference should be made to Harris's essay of a few years ago – those guilty of sexual violence continued to be punished by Athenian laws with the same severity as the μοιχός (and not more mildly, *pace* Euphiletos who so purports: cf. Lys. 1.32-33).[37] It is significant that also in the Code of Gortyn the (financial) penalty should

to death; it is also plausible, on the basis of D. 47.10.94 Ulp. 57 *ad ed*., that before the *lex Iulia* the *stuprum* could be prosecuted as *iniuria*, for the offence of *adtemptata pudicitia* (Molè 1957, 583 e nt. 13).

[34] On this, see Cantarella 1992 [2011], 557-558.

[35] Still within the *ius commune*, adultery continued to be punished more severely compared to intercourse with an unmarried woman. The former, at least in principle, provided for capital punishment (and, in other respects, the dictate of the *lex Iulia de adulteriis* allowed the father having the woman *in potestate* to kill the seducer and, *eodem impetu*, the daughter, provided that the lovers were caught *in flagrante* in the father's home or in that of the father-in-law), although later statutory legislation quite often provided for different penalties, sanctioning the man with financial penalties, and the woman with the *detrusio in monasterium* or with corporal punishment (typically flogging and nose-cutting, above all). However, in the case of intercourse with an unmarried woman, whereas canon law prescribed the provision of a dowry and, if appropriate, marrying the virgin, civil law mostly provided financial penalties (confiscation of property), and sometimes *relegatio* (in accordance with prescriptions already in *Inst*. 4.18.4). On this, as regards both documents and doctrine, reference is once again made to Massetto 1994, 95-104 and 208-212.

[36] As for the content of the passage (Dem. 23.53), relating the text of Draco's Law (whosoever kills ἢ ἐπὶ δάμαρτι ἢ ἐπὶ μητρὶ ἢ ἐπ' ἀδελφῇ ἢ ἐπὶ θυγατρί, ἢ ἐπὶ παλλακῇ ἣν ἂν ἐπ' ἐλευθέροις παισὶν ἔχῃ may go scot-free) and in respect of which *Ath*. *Pol*. 57.3 must be taken as a summary (since there the long periphrasis is replaced by the phrase οἷον μοιχὸν λαβών), see Harrison 1968, 34, and, on the basis of that, Harris 1990, 372.

[37] Harris 1990, openly polemicizing with the conclusions in Cole 1984.

be the same for the rapist as for the seducer, as shown by the comparison between col. II 2-10 (dealing with rape) and col. II 20-45 (on μοιχεία).[38] The similarity in treatment in two city-states which in many other respects presented quite significant differences leads us to believe that, as far as sexual crimes were concerned, the other πόλεις acted in the same way. This too may be a characteristic distinguishing Greece from other legal systems, where a consensual relationship is punished in a different way from one committed with violence.[39] In Roman law, for example, sexual violence – apparently regulated at first by the *lex Plautia*, subsequently by the *lex Iulia de vi* – fell under the *crimen vis*, a crime which provided for capital punishment (let us remember that, in accordance with the *lex Iulia de adulteriis*, the adulterous man – that it to say someone guilty of *stuprum* without violence – was instead sentenced to the *relegatio in insulam*).[40] Within the *ius commune*, the difference in treatment for the rapist and for the seducer, respectively, continued to be striking: the former still risked capital punishment, which was mostly not applied in regard of the latter.[41]

The foregoing, evidently, cannot but corroborate, on the strength of the above additional arguments, the correct hypothesis underlying Phillips's work. I have no doubt that my clarifications will only reinforce, and in no small measure, his claim that "*moicheia* clearly constituted a specific substantive offense at law in numerous Greek cities".

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38 On this, see MAFFI 1997, 21-29.

39 On the possible reasons for this equality of treatment, see COHEN 1990.

40 On this, see especially D. 48.6.3.4 Marc.14 *inst*. (*praeterea punitur huius legis* [*scil. Iuliae de vi publica*] *poena, qui puerum vel feminam vel quemquam per vim stupraverit*), as well as D. 48.5.30.9 Ulp. 4 *adult*. (*eum autem, qui per vim stuprum intulit vel mari vel feminae, sine praefinitione huius temporis accusari posse dubium non est, cum eum publicam vim committere nulla dubitatio est*). On this, see BOTTA 2004, 21-79 and, in particular, for an analysis of the passages quoted and a discussion of previous doctrine, 29-38.

41 For this, *supra*, note 35.

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THE PHYSICALITY OF JUSTICE IN ARISTOPHANES' *WASPS*: BODIES, OBJECTS AND THE MATERIAL STAGING OF ATHENIAN LAW

Abstract: The aim of this paper is to study legal references in Aristophanes' *Wasps* from a perspective based on the importance of the bodies and objects involved in litigation. Since comedy as a genre is pervaded by bodily contact and sensory experiences, I am interested in exploring the materiality of subjects and things, their relationship and the potentiality of human and non-human contact when legal activities are performed on stage. All these physical displays suggest that a study of gestures and expressive actions in the play may contribute to a more comprehensive understanding of the non-verbal dynamics involved in the Athenian judicial machinery.

Keywords: Aristophanes, *Wasps*, physicality, performance, material culture

Introduction

The 'performative turn' in legal studies has provided interesting theoretical tools for a better examination of the practice of justice in specific societies across history. This is particularly true for Athenian law, taking into consideration both its agonistic and rhetorical nature and the preeminence of procedure over substantive norms. In spite of the centrality of performance, however, little attention has been given so far to the concrete *physical* elements involved in the praxis of Athenian law.

My intention here is to study Aristophanes' references to law from a perspective based on the importance of the bodies and objects involved in litigation: since comedy is pervaded by bodily contact (i.e. punches and blows) and emotional involvements, I am interested in exploring the materiality of subjects and things related to justice, the affections and senses involved in their relationship and the potentiality of human and non-human contact (what I will call the 'physicality' of law).

As far as emotions are related, feeling anger or claiming compassion seem to be part of the physical experience of Athenian justice, and comedy seems to subvert the expected pattern in order to produce laughter. Concerning gesture and body attitudes, glaring at the litigants with hostility, grabbing witnesses by the hand, dragging accused citizens to the court, lowering the head, prostrating oneself in front

of the jurors or crying to defend a close relative are some of the many examples of non-verbal behavior alluded to in Old Comedy. Taken as a whole, these comic physical displays (which imply an internal and an external embodiment) suggest that a study of comic gestures and expressive actions may contribute to a more comprehensive understanding of the subjective dynamics involved in the Athenian judicial machinery.

In order to provide an introduction to a larger research agenda, I will deal here with Aristophanes' *Wasps*, produced at the Lenaia festival in 422 BCE. The reasons behind this choice are self-evident. Although it is of course not the only Aristophanic play dealing with law,[1] *Wasps* is particularly focused on the problems of the administration of justice, and remains one of the few sources allowing us to understand the functioning of Athenian *dikasteria* in the 420s. If its comic vein is properly assessed with methodological care, the play can stand as an invaluable source for legal historians of ancient Greece. By paying attention to non-verbal behavior and to the visual nature of the comic performance, I will focus on the physical movements of jurors, litigants and witnesses, an aspect on which, for several reasons, contemporary or later written sources are silent.

The first part of my paper (section 1) will deal with the manipulation of legal emotions in *Wasps*. As I have explained elsewhere, Aristophanes plays with the emotional script of his audience by exaggerating the normal affective expectations involved in legal proceedings, relating to the role of jury members, accusers and defendants. In the second part (sections 2 and 3) I will pay closer attention to the bodies of jurors, litigants and witnesses, their relationship to others and to the space and things that surround them. Again, comedy will show how objects and places are manipulated, taken out of their context and used to stage a heavy criticism against the contemporary democratic performance of court trials.

1. The Physicality of Emotions

Legal interactions in ancient Athens were guided by a complex "affective" machinery that resorted to rhetorical arguments on the basis of endorsing "shared" emotions.[2] In Athenian trials empathy between the speaker and the jurors was rhetorically created on the basis of (culturally) accepted and rejected emotional experiences. The example of Wasps is useful to show to what extent common emotions such as pity (*eleos*) and anger (*orge*) could be reframed in front of an

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[1] As discussed in Buis 2019.

[2] For the purposes of this paper, I will refer to the concepts of "emotion" or "affection" as synonyms. Against this perspective, see Damasio 1994. For the complexities surrounding the concept of "emotions" and the terminology related to them, see Cairns/Fulkerson 2015: 1-11.

audience which was capable of understanding judicial rituals and the affections involved in law.[3]

On the basis of cognitivist approaches, neuropsychologists have concluded that emotions, far from being opposed to rationality, are grounded on cultural and interpersonal processes.[4] As a result of their mental and social implications, emotions play an essential role in the realm of law,[5] as they can explain the non-verbal behavior of legal actors involved in litigation and the emergence of the rules that frame their actions.[6] The ancient Greeks already knew that emotions were symbolic constructions which had great value in political terms and could be created and manipulated.[7] As the sources from classical Athens seem to confirm, the public display of emotions responded to social patterns which turned them into cultural constructions under social evaluation and control.[8]

In this sense, I take as my point of departure in this first section the argument that the so-called affective turn, which has made its way into the legal sphere, can provide a basis to understand judicial physicality on the Athenian stage. The comic embodiment of pity and anger in *Wasps* –two emotions that have been traditionally related to the functioning of courtrooms in Athens– shows that the affective background of justice and its physical expression can be efficiently manipulated.

1.1. Embodying Judicial Pity

In Aristotle's *Rhetoric*, pity (*eleos*) is described as "a feeling of pain caused by the sight of some evil, destructive or painful, which befalls one who does not deserve it, and which we might expect to befall ourselves or some friend of ours, and moreover to befall us soon" (*Rhet.* II.8.2-5, 1385b13-16).[9] This conception of pity implies

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[3] In this section 1, I reproduce in short some previous thoughts on comic emotions presented in Buis [in print].

[4] Oatley/Keltner/Jenkins 2006: 259-260 have argued that emotions are rational to some extent, since they inform cognitive processes that help people to function in a social environment.

[5] Bandes 1999: 1. See also Bandes/Blumenthal 2012; Lange 2002. On the importance of cognitivism in modern studies of emotions and law, see the detailed study by Deigh 2008: 39-71.

[6] Frijda 1986.

[7] Konstan 2006: xiii.

[8] As suggested in Buis [in print], it might be possible to identify a legal "emotional community" in classical Athens, in terms of the definition offered by Rosenwein 2006: 2. For the applicability of this expression to ancient times, see Chaniotis 2016: 94-95.

[9] The Greek edition here and elsewhere corresponds to Ross 1959. For the purpose of this paper, I will use interchangeably here the words "pity", "compassion", and "mercy" to translate both the Greek words *eleos* and *oiktos*. For subtler considerations on the semantic nuances of these expressions, see Sternberg 2005: 23-24.

unworthiness, since only those who are good citizens and have fallen into a situation of vulnerability are considered to be unjustly affected.[10]

In legal speeches, where appeals to pity are a common *topos*, compassion for a person who behaved correctly is frequently distinguished from the pity claimed by those defendants who want to get rid of their guilt in spite of reprehensible civic behavior.[11] The latter can be identified as those litigants who try to generate pity in the jurors as a rhetorical strategy when they cannot come up with stronger arguments to support their case.[12]

Old Comedy seems to deal with this last legal appeal to *eleos* through the comic technique of exaggeration, since there is a significant insistence on the deplorable and pathetic situation of those who make a plea for mercy. Unlike the scarce information given in forensic oratory, comedy provides a great deal of detail. A passage of *Wasps* is relevant in this sense, because it provides us with information about a juror's opinion (553-558):

> Then, as soon as I approach, he puts his soft hand in mine, the hand that's been stealing some public money; and they bow down and supplicate me, pouring forth their plea in a piteous tone: "Have mercy on me, father, I beg you, if ever you yourself have nicked anything when you were holding some office or buying food for your mess on campaign." And this is a man who wouldn't have known of my existence if it hadn't been for his acquittal that previous time![13]

Philocleon overemphasizes the negative aspects involved in a supplication for mercy by a litigant who does not deserve to be saved from conviction. In fact, the accused was not only guilty of the charges brought against him (as references to corruption confirm, 556-557) but is also depicted as a frequent defendant at court, as shown in the fact that he was acquitted in the past (558).[14] If appeals to pity were "designed rather to make vivid to the jury the consequences of condemning an innocent person",[15] it follows that Aristophanes is describing a vicious abuse of *eleos*.

Soon afterwards Philocleon will mock the plangent style of pity-arousing speeches and the presence of relatives forced to display persuasive gesticulations for the sake of the defendant (568-574):

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[10] KONSTAN 2005: 51 describes pity —following Aristotle— as a response to "undeserved hardship". A similar idea can be found in the *Rhetorica ad Alexandrum* 34.4-6.

[11] See, for example, Lysias 20.34-35 and 14.40; cf. KONSTAN 2001: 41.

[12] See, for example, Demosthenes 19.310, 21.99 and 21.186-188.

[13] Translations used here and elsewhere correspond to SOMMERSTEIN 1983. Whenever the Greek text of the play is quoted, I follow the edition of BILES/OLSON 2015.

[14] He is "evidently a habitual thief" (MACDOWELL 1971: 208).

[15] KONSTAN 2001: 43.

> And if we're not persuaded by these means, straight away he drags his little children, the girls and the boys, by the hand up to the platform, and I listen while they all hang their heads and bleat in unison, and then their father beseeches me on their behalf, trembling as if I were a god, to acquit him on his audit: "If thou delightest in the voice of the lamb, I pray thee take pity on my son's cry" —and on the other hand if you enjoy *pork* he asks me to heed the voice of his daughter. And then we lower the pitch of our anger a bit for him.

Litigants beg Philocleon, treating him as a god (ὥσπερ θεὸν, 571) for their own personal interest. They drag forward their young children by the hand, who are compared to bleating lambs.[16] This depiction will be brought to life later in the play in the domestic trial where the dog Labes is sued for corruption.[17] Philocleon will be asked to have pity on the accused (οἰκτίρατ') and Labes' puppies will be brought to the court to whimper (κνυζούμενα) and weep (δακρύετε) begging for mercy (975-978).[18]

As I will develop in the next section of the paper, excessive gestures, cries, and theatrical displays of feelings are heavily criticized as contrary to the norms of forensic conduct. In Philocleon's words, affective behavior is seen as highly inappropriate in the context of a public trial. The suffering and trembling of the accused, who approaches the bench in fear, shows a futile appeal for compassion that reveals an exaggerated gap between the defendant and the civic body of the jurors.[19] The animalization of the litigant and his family, which is a contrast to the juror's self-image as a god and parallels the dog trial, is a way of breaking down the *isonomia* among citizens by installing a hyperbolic world in which citizens may be as unequal as divinities and sheep.

Exaggeration then, as a comic technique, transforms pity —and the desperate need to claim it— into a comic enterprise. The democratic importance of preserving the innocent from unjust accusations is altered as soon as the logic underlying the rhetorical construction of pity is transformed. The basic structure of supplication is subverted in *Wasps* for the sake of humor: the ritual involving *hiketeia* is placed here not as a means to reestablish a lost balance between a person who suffered unjustly

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[16] For this image, see MacDowell 1971: 209.

[17] I have studied this scene in Buis 2016.

[18] Sanders 2016a: 15. On children and relatives being dragged to the courtroom to produce empathy with the jurors, see Lysias 20.34, Andocides 1.148, Plato, *Apology* 34c.

[19] Of course, litigants subordinated and humbled themselves before the dikasts every time they addressed the jury claiming for mercy. However, as Johnstone 1999: 123-125 asserts, these appeals for pity dramatized democracy: the attitude of inferiority and self-abasement was uncomfortable and degrading for a citizen but was useful because it managed to assert the jurors' superiority. As I will argue, it was a matter of reestablishing balance among fellow-citizens.

and the society, a way of recovering from inequality.[20] Far from building a democratic empathy or a *com-passionate* attitude, the manipulation of the emotion of pity here does not involve a shared feeling of injustice but an individual claim to escape from justice.

Aristophanes stages a claim for pity that in fact hides a political operation that could lead to the destruction of equality among citizens: by means of a hyper-emotivity, the defendant (who is a thief and behaved improperly when he was a public officer) becomes prey to his uncontrolled passion, something very far from the expected caution and discretion of self-controlled *politai*. Aristophanes illustrates that resorting dramatically to pity could amount to a ridiculous strategy and be considered inappropriate behavior.[21]

The wildness of animals, tyrants or unjust members of the society is therefore comically contrasted to the correct restraint (*enkrateia*, 'self-possession') of vigilant and circumspect men who offer rational arguments rather than uninhibited emotions. This destabilizes the *sym-pathetic* balance that should prevail within the *demos* and its principle of *isonomia*.[22] Comic *eleos* breaks with the expectations of an audience that is used to listening to orators defending their case, since it implies an imprudent (and therefore laughable) exaggeration of physical performance in the courtroom that real-life jurors might want to reject.

1.2. Embodying Judicial Anger

In classical Greece, *orge* was directly linked to the democratic exercise of citizen power, as it implied a common emotion that could be triggered in defense of political institutions.[23] Indeed, if the administration of the judicial system deals with the punishment of those behaviors affecting the community and the restoration of

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[20] On the steps of supplication and their relevance in Greek law, see NAIDEN 2006: 171-217.

[21] In fact, whereas it could have been a common hallmark of amateur speech, this sort of emotional demonstration seems to have been absent from professional oratory, as explained by BERS 2009: 90-91. A skillful litigant would generate affect among the jurors without casting doubts on his manly and civic personality. See, for instance, Lysias 7.41. In Aeschines 2.179, the speaker carefully asks for pity but, in contrast to his own masculinity, considers his opponent Demosthenes to be "of unmanly and effeminate temperament" (ἀνάνδρῳ καὶ γυναικείῳ).

[22] SISSA 2009: 287-290 describes this sort of "pathetic apparatus of Democracy". Aristotle himself thinks of *eleos* as an emotion produced between "equals" (*homoioi*) in *Rhet.* II.8.13, 1385b16-19.

[23] On Greek anger, cf. ALLEN 2000; HARRIS 2001; BRAUND/MOST 2003; KONSTAN 2006: 41-76, especially on its relationship with democracy (2006: 75-76). The specific contributions of ALLEN 2003; RUBINSTEIN 2004, 2013 and SCHEID-TISSINIER 2007 are also useful to understand its implications.

social bonds, then it follows that prosecutors would carry their cases before the courts by appealing to the jurors' indignation and collective anger.[24]

According to Aristotle again, *orge* is "a longing, accompanied by pain, for a revenge due to a real or apparent insult affecting a man or one of his friends, when such an insult is undeserved" (*Rhet.* II.2.1, 1378a30-32). The Aristotelian view is that it is only possible to be angry at particular individuals. *Orge* entails certain pleasure, he says, since it is gratifying to imagine inflicting a penalty on a person who deserves it. This relationship to revenge has led several authors to consider that anger in Athens was an emotion closely related to the democratic body, a collective emotion that can be unleashed when citizens are called to defend the *polis* and its institutions. This is done by retaliating against a specific individual who acts unjustly.

The status of public anger is in fact ambiguous.[25] Even if self-restraint was much valued (as we examined when discussing appeals for pity), in some cases inflaming anger was thoroughly accepted. In fact, anger is a manly emotion, one that "buttresses martial valor"[26] and that could be justified when speaking about the need to punish grave crimes.

Anger was therefore an efficient tool for creating, according to HARRIS,[27] a common emotion set in place to exclude the outlaw from the *polis*. This feature explains the frequent reference to the verb *orgizein* in the ancient sources related to the functioning of Athenian lawcourts.[28] In *Wasps*, *orge* is frequently mentioned.[29] Throughout the play, getting angry and being a juror represent two sides of the same coin: if disturbed, *heliastai* are said to sting (223-227):

> But you, silly fool, if anyone angers that tribe of old men, it's just like a nest of wasps. They've even got a very sharp sting sticking out from their rumps, which they stab with, and they shout and jump about and strike you like sparks of fire.

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[24] ALLEN (2000: 50) shows the importance of anger as an ethical basis for the construction of citizen ideology.

[25] HARRIS 2001: 183-187; BERS 2009: 93-94.

[26] BERS 2009: 97.

[27] HARRIS 2001: 189.

[28] See, for example, Isocrates 20.6 and Demosthenes 18.274. Judicial anger was sometimes encouraged; see also Isocrates 18.4, Demosthenes 9.31, 9.61, 18.18, 18.138, 19.7, 19.265, 19.302, 21.57, 21.123, 54.42, [Demosthenes] 45.7 and Dinarchus 1.2. Of course, manipulating the emotions of the jurors by getting them angry could be risky, as indicated by RUBINSTEIN 2004.

[29] See, for example 223, 243, 404, 424, 425, 431, 560, 574, 646, 727, 883 and 1083. On the vocabulary related to anger and rage in the play, see KONSTAN 2010: 44.

Similarly, the chorus mentions its collective reaction when provoked (403-407):

> Tell me, why do we hesitate to awaken that wrath which we awaken when someone provokes our wasp-nest? Now that sharp, now that sharp sting of anger wherewith we chastise is braced (for battle).

When inflicting punishment, the sting represents the material and physical symbol of anger. The close relationship between *orge* and *timoria* had already been presented not long before, when the old men claimed that Cleon had ordered them to come with a terrible three-day-old anger (ὀργὴν … πονηρὰν) with the purpose of punishing Laches for his crimes (242-244):

> So yesterday our protector Cleon ordered us to come in good time, with three days's rations of filthy anger against him, so as to punish him for his crimes.

The solidarity that can bind the group of old jurors becomes even more noticeable when they openly oppose the character of Bdelycleon: to the proud *dikastai* —who support the demagogic policy of their time, enshrined in Cleon— anger is the emotional expression of *isopoliteia* and of unhindered participation in democratic affairs. Bdelycleon's proposals and ideas, therefore, are considered both a tyrannical move (417, 487) and an act of conspiracy (483, 488-489), namely an attempt to overthrow democracy in order to establish a one-ruler government (463-469).[30] The chorus will refer to him explicitly as an enemy of the people and a lover of monarchy: σοὺς λόγους ὦ μισόδημε καὶ μοναρχίας ἐραστά (474).

There is a twist however to this political dynamic. The comic effect is achieved thanks to an interesting "inversion", a movement that goes from the *demos* as a collective agent, as an emotional community, to a specific individual, the offender. In other words, there is a visible displacement from the chorus of wasps —representing the citizens— to the comic hero, acting on his own. Philocleon, the main character of the play, finds his way to becoming the leader of the action: in 430-432, for instance, he splits away from the chorus when he uses the imperative mood to give orders to his fellow jurors (*xyndikastai*), behaving almost as a *strategos* pushing his subordinated soldiers to the battle:

> Try it now, my fellow-jurors, sharp-spirited wasps! Some of you fly enraged on the arses, others sting their fingers and all round their eyes!

These lines are far from being an isolated example. The differences between Philocleon and the other old jurors are exploited throughout the play.[31] Whereas the

[30] See Loscalzo 2010: 150.

[31] Schere 2012: 49, following Konstan 1995: 21-22.

chorus, for instance, is composed of elderly poor countrymen, the play shows that Philocleon holds a comfortable economic situation, and enjoys the act of judging independently of the pay he gets. And, also unlike the old *dikastai*, the comic hero loves imposing the greatest penalties because of his bad temper (106-108):

> He's so cross-grained (ὑπὸ δυσκολίας), when assessing penalties he scores the long line for everyone, and he comes home plastered with wax beneath his finger-nails, like a honeybee or a bumblebee.[32]

Dyskolia was considered a trait of inappropriate anger in Athens, different from institutionally accepted *orge* as it only reflects private expectations and does not take into account the other.[33] Described as a *dyskolos*, then, Philocleon becomes isolated from the other jury-members. Moreover, superlative forms contribute to showing how particularly different he is. In 276-280, he's described as the most terrible of them all (δριμύτατος)[34] and the only one (μόνος) who is incapable of being persuaded:

> Truly, he was far the fiercest of those in our place, the only one who couldn't be talked around; when anyone begged for mercy he'd lower his head like this, and say "You're trying to cook a stone".

Since, in his case, we are told that anger could never have been removed (τὴν ὀργὴν ἀπομορχθεὶς, 560), Philocleon feels good when condemning everyone. There is exaggeration here, for sure, but also inversion, since anger —as a codified social emotion— happens to be taken out of its expected legal context: it is no longer shown as a positive political affection that can be useful and satisfying when it helps to take action against a criminal, but rather an individual emotion that is only founded on personal advantage and selfish pleasure.[35] As expressed by RIESS 2012: 288, unlike the democratic anger endorsed by the chorus, Philocleon's exaggerated wrath in the play is unjustified.

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[32] Since wax tablets were used to trace with the nails the sanctions derived from a vote of accusation, the image suggests that Philocleon was accustomed to punishing the hardest way; cf. MACDOWELL 1971: 146; BILES/OLSON 2015: 121.

[33] When discussing *dyskolia*, KALIMTZIS 2012: 43 considers that "anger has become hardened into a permanent disposition which is at the ready to inflict harsh *chalepos* retributive punishment to protect his social irritability".

[34] Aristophanes frequently uses the adjective *drimys* to refer to a relenting juror: *Knights* 808; *Peace* 349. Cf. MACDOWELL 1971: 151; PADUANO 1974: 168-170; LENZ 2014: 91.

[35] Creating indignation for selfish purposes was rejected in Athenian trials. Several testimonies from forensic speeches show well that going to court for personal profit or to get an individual advantage produced a negative reaction in the jury. See, for instance, Aeschines 3.3, 3.4; Demosthenes 18.278.

If in the real Athens anger means that the many can decide a case, after a procedure, against a single accused, on the comic stage it helps the comic hero, alone, to decide beforehand against all defendants. This implies an inversion of the political value of judicial anger which is typical of wise citizens, because his anger seems more related to that of a king, quite far from the civic equality granted by a democratic regime (548-549):

> Yes, right from the start I'm going to prove as far as our power is concerned that it's equal to that of any king.[36]

In the figure of Philocleon, Aristophanes embodies the dangers of individual *orge* and alerts about the risks involved in the tyrannical seizure of emotions. Since laughter can only be explained by a common understanding of people sharing similar knowledge and values,[37] the existence of persistent jokes in Old Comedy demonstrates that the Athenian public could in fact be perceived, at least from Aristophanes' perspective, as a community of people who were expected to feel the same emotions (positive and negative) towards law and its practitioners. If so, then we can understand why sycophants were repeatedly despised on stage; there was probably a common lack of sympathy in the audience towards them.[38] If my reading of *Wasps* is not incorrect, then it means that the play relies on the fact that the administration of justice in classical Athens was heavily dependent on a network of circulating emotions that run a high risk of being manipulated for personal reasons.

The comic manipulation of emotions that I have described leads us now to a complementary aspect of legal physicality in *Wasps*: the way in which Aristophanes deals with legal spaces and objects in order to reinforce his criticism to the practice of law in contemporary Athens.

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[36] They are even compared to Zeus when he uses his thunderbolt in court (620-624). According to PADUANO/FABBRO 2012: 182, this comparison shows absolute power: "sovranità al vertice di ogni gerarchie autoritaria, e come tale indipendente da ogni controllo".

[37] "Pour comprendre le rire, il faut le replacer dans son milieu naturel, qui est la société ; il faut surtout en déterminer la fonction utile, qui est une fonction sociale. Telle sera, disons-le dès maintenant, l'idée directrice de toutes nos recherches. Le rire doit répondre à certaines exigences de la vie en commun. Le rire doit avoir une signification sociale" (BERGSON 1900: 515).

[38] Arguing that Aristophanes resorted to special emotions should not be surprising, since the comic genre played with the affective background expected by citizens. I concur with KONSTAN 2014: 103 when he suggests that, contrary to the emotions provoked in tragedy (pity —*eleos*— and fear —*phobos*—, according to Aristotle's definition in *Poetics* VI, 1449b 24-28), old comedy would arouse boldness (*tharsos*) and indignation (*nemesis*), emotions which were considered opposite to the tragic ones.

2. The Physicality of Space and Objects

As we have just seen, when Philocleon describes his attitude as a juror, he seems proud of his own anger but seems to reject pity when it comes from a defendant who pleads for mercy. Accepting or rejecting emotions, however, depends on the circumstances. Philocleon will happily make use of compassion when he feels the need to generate sympathy himself (389-395):

> O Lord Lycus, thou Hero who art my neighbor, forasmuch as thou delightest in the same things as I, in the tears and lamentation of each day's defendants —at least you went and set up home there on purpose to hear them, and you are the only Hero who has chosen to take his seat near a crying man— O take pity now on me who dwell close to thee, and save me, and I vow never to piss or shit beside your wicker fence.

Philocleon feels like a god and here he shows that he shares common interests with Lycus, but he vows and asks for pity acknowledging his subordination to divine power. This contradiction becomes even more interesting since the externalization of his emotion is related here to a specific location: Lycus's shrine, which is considered to be a sacred space related to the law courts. The manifestation of gestures and emotions strongly depends on the physical environment. In 800 Philocleon claims that, according to a prophecy, in the future lawsuits will be tried in every home, and therefore every house will need to have a little courtroom (δικαστηρίδιον) built in the porch before the entrance, "like a shrine of Hecate" (ὥσπερ Ἑκάταιον).[39] He had already expressed his will to be buried after his death "under the courthouse floor" (ὑπὸ τοῖσι δρυφάκτοις, 386).

The importance of legal space, which becomes a new religion for Philocleon, is related to the identification of those structural elements that identify the place. The promise not to maculate the wall in the future (395) represents a comic reference to the humorous manipulation of objects related to the administration of justice by the comic characters. Material elements are ambiguously subject to appropriation and mistreatment by Philocleon: he cherishes legal paraphernalia and, at the same time, he channels his own physical impulses through those objects that represent law, even wishing for his body to be dropped next to the tribunal.[40]

The misuse of legal spaces becomes more noticeable when Bdelycleon decides that his father will only decide on cases at home. Common objects are being brought

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[39] During the domestic trial, a prayer will be offered to Apollo Agyieus, whose altar will be also placed in front of the door of the house (ἔμπροσθεν οὗτος τῶν θυρῶν, 871 and ὦ δέσποτ' ἄναξ γεῖτον ἀγυιεῦ προθύρου προπύλαιε, 875).

[40] This is not unlike what happens in *Birds*, where the protagonist Peisetairos believes in Athenian law and creates his own physical location to place the new city and its institutions, whereas simultaneously he acknowledges that he used to defecate on the stone where decrees were inscribed: "Do you recall those evenings when you used to crap on the inscription?" (*Av.* 1054).

on stage in order for the tribunal to be erected. Things are re-signified in legal and sacred terms. Before even starting to act as a juror, Philocleon is concerned that there are no railings for the courtroom and therefore no suit can be called (ἄνευ δρυφάκτου τὴν δίκην μέλλεις καλεῖν, 830). The fence is described as "the first of all the sacred objects" (ὃ πρῶτον ἡμῖν τῶν ἱερῶν) that are revealed when one enters the court.

The description of the domestic court as well as details added elsewhere in the play are rich in the vocabulary of the material components of legal space.[41] The physical furniture of the tribunal includes not only the railings of the court that we just mentioned (δρύφακτος, 830) and that Bdelycleon will bring from inside the house (ἔνδοθεν, 833),[42] but also all the other necessary elements for the trial to be performed. To allow for the transaction of legal business, Philocleon's son needs to fetch the notice boards,[43] the voting-urns and the water-clock for the timing of speeches (848-859), which constitute the necessary equipment for the tribunal to work. Domestic objects play the role of judicial items. Instead of urns (καδίσκους, 853-854) two ladling cups are employed (ἀρυστίχους, 855), and the chamber pot (ἀμίς), mentioned in 807, is identified (ἡδὶ, 858) and used to replace the judicial κλεψύδρα (856-859).[44] All these objects are brought on stage, as made clear by spatial deixis: ταῦτα δή (851).

The importance of all these objects, including all the relevant items for vote counting,[45] is such that it is precisely because of them that a tribunal can be erected in the middle of a domestic landscape. The relationship between all these objects (urns, boards, water-clocks, stones) and the performance of justice, in my opinion, has not been properly studied so far and, as comedy shows, deserves detailed attention because these things do not only define the legal space, but also empower legal subjects, such as jurors or litigants. In a context in which judicial affairs are part of everyday political activity, an old citizen such as Philocleon can become an obsessive juror precisely because of the nature of the objects that surround him.

Based on the pioneering works focused on the so-called 'material culture' (which seek to emphasize the ability of objects to materialize relationships),[46]

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41 See BOEGEHOLD 1967 and 1995.

42 Cf. also 386 and 552. The play also made reference before to the access barrier (κιγκλίς, 124, 775) and the front bench (ξύλον, 90).

43 Cf. also 349. These σανίδες were used to hang the notices of forthcoming trials. The pillars on which legal cases were posted were also mentioned before (κίων, 105).

44 Cf. also *Ach.* 693.

45 Apart from the urns (καδίσκοι, 321-322; τὰ κάδω, cf. *Av.* 1032; κημός: *V.* 756; ἐκ κιθαρίου: *V.* 674) there are references in the play to the penalty tablet (πινάκιον, 167) and the stone used to count votes or where the speakers had to stand in (λίθος: 332-323; cf. *Ach.* 683; βῆμα: *Ec.* 677; *Pl.* 382).

46 MILLER 2005: 5, for example, spoke of "material culture" to account for the phenomenon by which what we are, as human beings, exceeds by far the limits of our body. We are actually framed by a series of material "externalities" that end up shaping our own

several texts have claimed that it is essential to take into account those objects — often linked to social practices or cultural symbols— which are handled by characters on stage. These "things" significantly complement the movement of bodies, as they are used, delivered, hidden or unveiled, seen and touched. Far from being mere accessories, they are an integral part of the action because they can be manipulated, as SOFER (2003) has shown. The power of the circulation of objects cannot be underestimated because, in fact, it allows us to appreciate the physical interaction of the characters in the play. Possessing, transporting or giving objects are meaningful activities because they are often the result of power strategies. They reveal how individuals struggle for domination. In addition, objects that can be reached are often elements that, as instruments or utensils, metonymically serve as paraphernalia to materialize abstract values, embody emotions and visually translate experiences and sensations that would otherwise be impossible to reflect before the spectators.[47]

It is essential to mention here the actor-network theory, developed by the sociologist LATOUR (2005), who considers that, for a better understanding of collective dynamics, at the community level it is necessary to incorporate objects as part of the social framework: in fact, in his opinion, the role of humans needs to be completed by all those external elements associated to them which also take part of the agency scheme.

Theater becomes an adequate ground to think about this interaction between subjects and objects, insofar as the things displayed on stage are fully meaningful: they are serving as focal points that translate historical and cultural values which are relevant for the public attending the representation.[48] And in the case of Athenian comedy, the abundance of dramatic objects that transmit contextual information is key for the development of dramatic action.[49] In spite of the overwhelming presence

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existence. In short, "things" and "objects" (terms which I will use interchangeably for the sake of clarity here) end up affecting the subjects. Objects are constitutive elements of our individual and collective identity; cf. MILLER 2008. For an introduction to the concept of "material culture", see JULIEN/ROSSELIN 2005.

[47] A recent issue of the French journal *Mètis* has been devoted to the role of objects and the function of artifacts in Greek antiquity. In the introduction of the volume, BROUILLET/CARASTRO 2019: 11 explicitly refer to the role of things and their cultural importance as elements of agency: "L'objet est alors vivant, présent, tant qu'il and une puissance générative, non pas pour pointer ailleurs, tel un *sêma* au sens strict, mais pour créer quelque chose qui ne lui préexiste pas". On the sense of objects and their material and immaterial value in classical Greek culture, see GERNET 1968.

[48] This is an aspect already explored, from the field of anthropology, in the collective volume edited by APPADURAI 1986. Objects respond to symbolic practices, as studied by the so-called "Thing Theory"; cf. BROWN 2001, 2004 and 2015 in the context of the *Object Cultures Project* of the University of Chicago.

[49] Regarding tragedy, the works on theatrical props by CHASTON 2010 and MUELLER 2016 deserve to be cited, as well as the articles by NOEL 2012, 2013 and 2014. In the case of comic drama, the role of "things" has been studied especially in relation to Old Comedy,

of dramatic props in Athenian public spectacles, the importance of objects in courtroom trials has not been examined, probably because the traditional sources which are taken into account to reconstruct the administration of justice (i.e. legal oratory) are scarce in information related to the physical environment of *dikasteria* and other tribunals.[50]

In *Wasps* the manipulation of objects is ubiquitous as it serves the purpose of criticizing the omnipresence of law and excessive litigiousness.[51] Since all domestic items available at home can be turned into 'legal' material, justice can be rendered everywhere. The complementarity between persons and things is so significant in the play that the boundaries between subjects and objects are diluted. Things behave like people, and human beings are often manipulated as lifeless elements. This is what happens with the witnesses (*kleteres*) who are brought on stage by litigants such as Myrtia and the second accuser and are introduced as mere possessions. When Myrtia comes onto the stage in order to indict Philocleon on the charge of damage to the bread she was selling in the agora, she "has" Chaerephon as her witness (κλητῆρ' ἔχουσα Χαιρεφῶντα τουτονί, 1408). The demonstrative pronoun is indicative of his silent presence in front of the audience. Similarly, Bdelycleon soon observes that another accuser is about to arrive with a witness, using the same verb: τον γέ τοι κλητῆρ' ἔχει (1416). The objectivation of witnesses becomes even more notorious when Bdelycleon acknowledges that, if he does not carry his father out of there, "there soon won't be enough witnesses for the people serving summonses" (κλητῆρες ἐπιλείψουσι τοὺς καλουμένους, 1445). The reference to Philocleon's previous fear that he might run out of voting pebbles because of his excessive love for trials (109-110) allows here for an analogy between *kleteres* and *psephoi*.[52]

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a genre in which the presence of all sort of objects is ubiquitous. In this regard, Poe 2000 has noted the excessive quantity of objects in Aristophanes and Revermann 2013 has analyzed their semantic condensation. However, English 2000 and 2005 believes that objects progressively lost their importance on the comic scene. The specific contributions on *Acharnians* offered by English 2007 and the excellent work on *Birds* by Fernández 1994 also deserve special attention.

[50] In fact, literature on objects in law is still very much insufficient. A recent collective volume, edited by Hohmann/Joyce 2019, on the importance of objects in international law has been very well received among experts, who praised its original approach. Concerning the Greek world, a recent paper by Fernández 2019 has focused on the relevance of "democratic objects" in Aristophanes, paying some attention to the material culture related to judicial performance (80-83).

[51] As presented by Telò 2016, the "vibrant materiality of objects" in the play —especially concerning clothes, rugs and fabric— can be pointing metonymically to questions of comic intertextuality as well.

[52] In *Nu.* 1218, when the first creditor appears on stage he tells a fellow citizen that he is dragging him to be a witness (ἕλκω σε κλετεύσοντα). In spite of a second person which would suggest an interaction between the litigant and his witness, the verb "drag" (ἕλκω) —frequently used in comedy to refer to legal summons— places both individuals in

At the same time, objects sometimes overcome their immobility and come to life. In Labes' trial, kitchen objects are introduced as witnesses to the defense (936-939):[53]

> Take it down yourself. I'm calling the witnesses. Will these attend as witnesses for Labes: Bowl, Pestle, Cheese-grater, Brazier, Pot, and the other utensils scalded to give evidence.

Whereas objects become human beings in order to take part in a lawsuit, persons involved in courtroom activities are defined because of the objects they manipulate. These objects often show the intersection of different cultural experiences. For example, the wax tablet which is used to establish penalties is assimilated to a weapon in Philocleon's hand (166), suggesting that the act of judging and the act of fighting share common features. It should be recalled, as already explained, that throughout the play punishment is seen as a wasp bite (224-225) and that stings frequently play the role of swords (424).[54] Under the same pattern of analogy, verdicts are therefore conceived as armed attacks, and legal documents are understood as means of warfare. When describing the monstrosity of the politician Cleon, for instance, the chorus-leader explains that those demagogue-demons attack peaceful citizens by sticking together "affidavits, summonses and depositions" (ἀντωμοσίας καὶ προκλήσεις καὶ μαρτυρίας, 1041).

As a spin-off of this analogy, a victory at a trial is compared to a sporting triumph: when describing his most mettlesome activity, Philocleon confesses that he took on Phayllus, a famous runner, and beat him "by two votes, on a charge of using abusive language" (1206-1207). The overlap between litigation and physical competition shows that objects can be useful to identify the material activities that define citizenship. If Athenian democracy is represented by the material culture that helps to define the actions performed by its citizens, it is not surprising that those items which are mentioned by the chorus are closely related to the field of masculine civic performance. In 1081-1082, political participation is described as holding "shield and spear in hand" (ξὺν δορὶ ξὺν ἀσπίδι). As the chorus recalls, the manly and strong citizens who took part in the battle of Marathon in the past are opposed to youngsters, who do not carry spears but wear rings in their hair instead (1068-1070).[55]

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different roles of activity and passiveness. A verb based on the same root had been employed by Aristophanes when he was complaining in *Ach.* 377 that he had been "dragged" by Cleon to the *bouleuterion* because of the staging of his previous comedy: εἰσελκύσας γάρ μ' ἐς τὸ βουλευτήριον.

53 Griffith 1988.

54 Like wasps, *dikastai* move around legal spaces as if courtrooms were hives (1106-1109).

55 In 1091-1094, the old men in the chorus make reference to their past aggressiveness at sea by referring to the pulling of oars. Just like swords, oars are used as a metonym for

If things *make* subjects, the sexualization of certain legal objects in *Wasps* can be seen as a way of strengthening the masculinity of those who deal with judicial business. In 97, for instance, a voting urn's slot is defined as "beautiful" (καλός) and explicitly compared to a young *eromenos*. Similarly, the physical action of Philocleon embracing the notice board from behind with the voting pebble in his hand has also clear sexual connotations (347-348): "so much do I crave to go round past the notice-boards, mussel-shell in hand" (οὕτω κιττῶ διὰ τῶν σανίδων μετὰ χοιρίνης περιελθεῖν).[56]

The erotic nature of judicial procedures cannot be underestimated in Philocleon's attitude. Since he was described as a compulsive lover of trials (φιληλιαστής, 88), there seems to be a strong emphasis on the passion of judging and the satisfaction of sexual desire and appetites. From an object-centered perspective, justice is therefore related to the fulfillment of human needs, and comedy takes advantage of this to exploit its close association with the imagery of consumption. Since women and food have been described as essential objects of desire on the comic stage,[57] we should not be surprised to see that legal items are also presented in *Wasps* as delicious meals. Trials are compared to cooked meat ("just give me a nice juicy lawsuit, stewed and seasoned", 513), in 525 jury pay is presented as a drink, and even factual evidence becomes efficiently related to ingestion ("the proof of the pudding is in the eating,", it is possible to "chew the facts" and make your rivals "eat their words!", 781-783).

Coming back to the possible sexual innuendo in this emotional manipulation of objects on stage, Aristophanes seems to suggest that the act of holding firm of a voting pebble was part of Philocleon's typical behavior as a juror: he woke up every morning with his fingers pressed together from the habit of grabbing his voting-pebble with the hand (94-95).[58] In my view, there is another layer to add here when

military courage. Their visual image represents political engagement and national pride. Once again objects here define the personality of those who use them. In 694-696, another male activity is mentioned. Litigants are presented as a couple of lumberjacks sawing down a tree, one pulling the case his way, the other yielding and letting it go (694-696). In material terms, legal arguments are assimilated to axes used to fell trees and cut them into logs.

[56] The fact that in 348 the pebble is referred to as a person (with μετὰ and genitive), which is unparalleled in our sources (BILES/OLSON 2015: 201) can contribute to our interpretation. He holds his pebble as if it were a human peer. In 105 a similar reference to a close attachment to the noticeboard can be found. Philocleon is described by the slave Xanthias as sleeping at night right outside the front of the court, "clinging to the pillar like a limpet". TELÒ 2016: 64 considers that Philocleon's wakeful nights and his fear of "drying up" if acquitting are elements that point to sexual potency and erotic distress.

[57] DAVIDSON 2011.

[58] Objects such as pebbles are thus able to change the body of those who manipulate them. The interaction between things and individuals goes far beyond the material use of the former by the latter.

analyzing this material reference. The physicality of voting relies on the comic use of a pebble as a sexual organ and this explains how Philocleon himself 'materializes' legal violence.[59]

In his prayer to Zeus the protagonist asks to be transformed into several objects (i.e. a puff of smoke or a creeping vine), the last of them being the stone on which the juror's votes are counted (332-333). The strong identification of Philocleon with voting stones is a common landmark throughout the play. It should be recalled here that, when his emotions were discussed above, I explained that his individual *orge* was often connected to an extreme hardness that did not soften in the face of pity. This toughness made him look like a stone (λίθον), which could never be persuaded (278-280).

In his assimilation to voting pebbles and stones, Philocleon is once again separated from the members of the chorus and left alone as a comic character.[60] His isolation, which is essential for the purpose of the comedy, can be also examined through the exploitation of the legal material culture. According to the text, the same pebbles used to cast a vote can be used to shoo away wasps (221-222). The opposition between Philocleon and his fellow jurymen, which has been dealt with in the previous section, is then reinforced when references to objects are considered: unlike the other wasps-jurors, he is as hard as a rock and represents a threat and a danger to the group of *dikastai* who behave like wasps being chased.

After being convinced by Bdelycleon, the old men of the chorus will ask Philocleon to be persuaded and overcome his stiffened manhood and hardness: "Hearken, hearken to his words, and be not foolish nor too unbending and too hard a man" (πιθοῦ πιθοῦ λόγοισι, μηδ' ἄφρων γένῃ / μηδ' ἀτενὴς ἄγαν ἀτεράμων τ' ἀνήρ, 729-730). Once again, Philocleon's judicial role is illustrated with a physical comparison: he is compared to a solid stone which can be thrown aggressively and, at the same time, he is attributed an excessive masculine rigidity which cannot be bent. As I will discuss in the following section, the physical display of straight or curved bodies as presented in *Wasps* is also relevant here for an examination of the role of physicality in Athenian law and its comic possibilities.

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59 The erotic nature of other legal objects can be seen elsewhere in the play. When discussing the legal decision of granting an *epikleros* to the claimant, Philocleon explains that jury-members can give her to anyone who persuades them, without caring for the dead father's will or the shell over the seals. By comparing this judicial decision to rape, Bdelycleon will remind his father in highly sexual terms that "it is wrong to unshell the heiress against her will" (589).

60 Paradoxically, the pebble and the urn will be used by Bdelycleon to trick his father and make him acquit the defendant against his will (986-993). Their dramatic status as meaningful objects is very clear here as well.

3. The Physicality of Movement and Gestures

From the very beginning of the play, Philocleon's body is in constant physical movement. In the description of his five attempts at evasion (136-225), the spatial dimension is frequently referred to in order to show his forced return to the house (εἰς τὴν οἰκίαν, 196). When his intention of escaping is described — be it like smoke through the chimney (143), forcing the entrance door (152), slipping out the window after gnawing the net (164), clutching the belly of a donkey (179) or through the ceiling (202) — several verbal forms related to his shifts and displacements are present, such as ἐκδύσεται (141), ἐξέρχομαι (145), ἐκφρήσετε (157), ἐκφεύξεται (157), εἰσιών (177), ἐξάγειν (177), ὑποδυόμενος (205) or ἐκπτήσεται (208), as well as adverbs such as ἐνταῦθα (149, 153) or ἔνδον (198). Together with other objects related to the identification of physical boundaries, such as the ceiling, the chimney or the window, the door in particular (mentioned in 142, 152, 199) embodies the communication between the inside and the outside.

Philocleon moves. He gets off the bed (ἐξ εὐνῆς, 552), walks to the tribunal (εὐθὺς προσιόντι, 553), gets into the courtroom (εἰσελθὼν), stays inside (ἔνδον, 560-561) to convict and then comes back home (ὅταν οἴκαδ' ἴω, 606) with his pay, in order to be worshipped by his children and wife. Inside the courtroom, he also goes in circles from his seat to the voting-urns and back to his place (987-991). These recurring movements respond to the physical attitude of an insane *dikastes* who insists on judging every day. Philocleon's circular whereabouts are significant because they complement his speech and differentiate him from the other characters in the play. Being a juror requires behaving like one, and *Wasps* illustrates the importance of that coherence between the status of citizen and the physical display of the body. When Philocleon is "cured" of his disease, his son will stop his recurring movements in order to take him "everywhere" (πανταχοῦ, 1004) and teach him the good life of aristocratic pleasures. An important part of the training in this new role as a rejuvenated citizen is learning how to walk in an affected way, showing "some style, sophistication, and sensuality" (1168) and how to lounge at a banquet (1210 ff.).[61] The effeminacy of the gestures presented by the *kalokagathoi*, typical of symposiasts and socialites, is clear. Philocleon needs to learn how to "recline" (κατακλινεῖς, 1208), a disposition of the body which is drastically opposed to the manly severity of citizens who stand up for their *polis*.[62]

In a groundbreaking contribution in the field of social sciences, GUIRAUD 1986 explained the symbolic value of body language and communication. Gestures such as the position of hands, the inclination of the head or the movement of the eyes are significant ways of expressing intention. They convey important evidence on

[61] Clearly these elegant and exaggerated movements that Philocleon will learn from his son are opposed to the subtle performances by the members of the chorus in the old days, when they showed the same prowess in choruses and in battles (1060-1061).

[62] BREMMER 1991: 25.

attitudes.[63] A number of recent contributions have attempted to offer some insights into the role of gestures and their meaning in antiquity.[64] However, in spite of its social and political importance, the relevance of gestures has also been neglected in studies focusing on Athenian law, perhaps as a consequence again of the biased nature of our sources.[65] Following the line of thought I have been taking so far, I believe that, here again, the information that can be grasped from the identification and observation of different gestures and corporal postures can greatly contribute to our knowledge of the physicality of justice.

In the first part of *Wasps*, the dynamics of Philocleon's body language as a juror cannot be underestimated. As previously stated, he is shown as hard and stiff, in opposition to the softness of those defendants who try to convince him to acquit them through mercy and compassion. In the protagonist's own words, his corporal attitude of walking straight into the *dikasterion* is opposed to the womanly gestures of the litigants (552-553): "As I walk past, one of them places his soft hand in mine". Philocleon's hardness is opposed to the softness of those who ask for his favor, and this becomes important in legal and political terms.

It is well known that reciprocal positions and distance between bodies are indicative of the intentions of those who interact.[66] Philocleon acknowledges that his body gets in contact with the bodies of the defendants, but this touching experience is not depicted proxemically as an interaction between equals, as it could be expected in a physical contact between citizens.[67] Whereas he stands up, the defendants bend in front of him and beg after fawning and crawling: "they bow

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[63] According to THOMAS 1991: 1, gestures include any kind of bodily movement or posture (including facial expression) which transmits a message to the observer. This definition (as well as others, presented by KENDON 1981: 28-40) seems to presuppose the existence of at least two bodies interacting with each other: one of them performing the gesture, and the second one decodying its explicit or implicit significance. On the cultural importance of gesture and its relationship to speech, cf. KENDON 1997. NEUMANN 1965: 10-12 uses the expression "rhetorische Geste" to indicate the "geformte und schlagkräftig pointierte Geste". According to HAHNEMANN 2003: 55, rhetorical gestures include any motion of head and hand that accompany a speech-act. These gestures are extremely relevant in the context of legal proceedings.

[64] Cf. CORBEILL 2004, CAIRNS 2015.

[65] An interesting contribution by CORBEILL 2015 has discussed the importance of gesture and body contact in early Roman law considering that, far from being symbolic elements, they were features constitutive of legal actions. Another exception is the recent book by O'CONNELL 2017 which, although focused on the importance of sight, refers to the relevance of non-verbal expressions and physical movements in classical Greek forensic oratory.

[66] GUIRAUD 1986: 94 considers that the interpretation of this "connection of bodies" is part of proxemics, since it is related to the physical communication between people in a specific spatial environment.

[67] The sense of touch implies a much closer connection between bodies than other senses, such as sight, which has been explored much more in recent bibliography (cf. O'Connell 2017).

down and supplicate me" (ἱκετεύουσίν θ' ὑποκύπτοντες, 559). The participle ὑποκύπτοντες, 'bowing down', clearly shows the distance between the superiority of the juror and the humility of the beggars.[68] The whole scene comes close to a sexual offer by the litigant, who gives his entire body to the juror for him to do with as he pleases.[69] Employing the same verb, in 277 Philocleon explained that when defendants begged him for mercy, "he'd lower his head" (κάτω κύπτων), delivering a stern glare of displeasure and hostility.[70]

A physiognomic interpretation of this antithesis can shed some light on the corporal representation of jurors and offenders in court.[71] The opposition between a body that stands, keeps firm and looks down, on the one hand, and a soft body that twists and curves, on the other, reproduces the legal inequality that Aristophanes is fond of criticizing in judicial interactions. Far away from *isonomia*, in Philocleon's perception his straight attitude of superiority is clearly different from the crooked bodies of those who implore. Whereas he is like a Zeus, who flashes verdicts as a lightning from above, the accused shake in fear. They bend, as if defecating (619-627):

> Do I not wield great power, in no way inferior to that of Zeus —seeing that the same things are said of Zeus and of me? For example, if we get noisy, every passer-by says: "What a thunder's coming from the court! Lord Zeus!" and if I make lightning, the rich and the very grand all cluck and shit in their clouds from fear of me.

The political implications of the position of bodies are relevant for understanding the representation of justice in *Wasps*. Here again Aristotle becomes a useful source, as he discusses the symbolic value arising from the difference between straight and crooked bodies. In his *Politics*, the unbent body represents the ideal physical support of the male citizen, whereas crooked or curve figures are useless for civic activities, and become therefore associated to slaves (1254b 27-31):[72]

> The intention of nature therefore is to make the bodies also of freemen and of slaves different—the latter strong for necessary service, the former erect and unserviceable for such occupations, but serviceable for a life of citizenship.[73]

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[68] Biles/Olson 2015: 259. On this verb, see Diphilus fr. 42, 23-24 and Herodotus 1.130.1, 6.25.2 and 109.3.

[69] Paduano/Fabbro 2012: 185-186.

[70] Biles/Olson 2015: 185-186. On the significance of this physical gesture of lowering the head, see Bremmer 1991: 22-23.

[71] Hesk 1999: 220-226 has coined the expression "physiognomic interpretation" in order to describe the ways in which orators match some physical traits to specific character types in their speeches.

[72] Vázquez 2020 has recently worked on the political implications of the female image of crooked bodies in Aristophanes' *Ecclesiazusae*.

[73] The translation has been taken from Rackham 1944.

Bodies which are erect (ὀρθά) seem prepared for a life devoted to the *polis*. Body language helps to understand the relationship between social status and physical disposition, since curved anatomies mean submission as opposed to self-sufficiency and autonomy.[74] Significantly, then, the portrait of defendants offered by Philocleon shakes the founding basis of democratic equality. His claim that jurors are standing up whereas litigants bend their bodies to ask for favors, as if they were free men and slaves, hides a harsh criticism against the lake of balance and symmetry in court proceedings.

It is interesting that in Bdelycleon's words there is also an inequality between jurors and litigants, but contrary to Philocleon he will argue that *dikastai* are in fact placed by demagogues in an inferior position, like slaves or encircled animals (698 ff.), in order for them to take advantage of their role. When explaining to his father that he is in fact a *doulos* and not a king, Bdelycleon criticizes the relationship between jurors and demagogues and compares it to the treatment of masters and slaves (515-517):

> More than that, you don't understand that you're being made a fool of by men whom you all but worship. You're a slave, and you're not aware of it.

The verb which is used to indicate the superiority of politicians, προσκυνεῖς, refers to *proskynesis*, a form of veneration involving abasement by prostration and hand gestures which is frequent in prayers to the gods. It is a gesture which, when applied to human beings who bend their knees in front of other individuals, results in an inadequate submission which would not be considered appropriate among decent citizens. Curving the body in front of another *polites* would imply affecting one's own *time*.[75]

The opposition between straight and curved bodies is not only relevant in biological and political terms, but also regarding the administration of justice. It materially reproduces the difference between rightness and corruption which archaic sources attributed to judicial decision-making.[76] The antithesis between upright and

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74 Guiraud 1986: 38-39.

75 According to Aristotle's *On the Parts of Animals*, human beings are the only creatures with straight bodies (656a 12-13). In his *Timaeus*, Plato had considered that an "upright" attitude is a consequence of the human attempt to reach the gods (90b1), whereas wild animals have curved bodies because they dragged their front limbs and their head down to the earth (91e 6-8).

76 In the famous depiction of the trial in Achilles' shield in Book XVIII of the *Iliad*, in the middle of the sacred circle of elders there stood two talents of gold to be given to that person who "would render the most righteous judgment" (δίκην ἰθύντατα εἴποι, *Il.* 18.508). In a similar vein, in *Il.* 16.384-388, Zeus is said to show his anger against men who give "crooked" judgments (σκολιὰς κρίνωσι θέμιστας) in the place of gathering, driving justice out. In his *Theogony*, Hesiod explains that people praise those kings who settle causes with "upright" decisions (84-86). In *Works and Days* 37-39, Hesiod

twisted positions of the body becomes an efficient way of denouncing the inequality of litigants and jurors, an inequality which breaks the ideal democratic balance of those who are involved in civic activities. A similar idea concerning a lost symmetry between judicial actors was present in the parabasis of *Acharnians*, where the chorus of old charcoal-burning poor men complained that they were mistreated in judicial affairs (676-682):

> We old men, we ancients, have a complaint against the city. You do not care for us in our old age in a manner worthy of the naval battles we have fought; instead you treat us disgracefully. You throw elderly men into criminal trials and let them be made game of by stripling orators —old men who are nothing any more, as silent as a worn-out flute, men for whom the Poseidon "who will not suffer their foot to be moved" is the stick they lean on.[77]

The physical dimension is clear in these verses of the epirrhema. In 679, the old defendants are said to be dragged into proceedings, ἐμβαλόντες εἰς γραφὰς. The immobility of their bodies and their lack of senses transform them into objects: they are nothing by themselves (οὐδὲν, 681)[78] and they can see *nothing* relating to justice (οὐχ ὁρῶντες οὐδὲν). Thus in 683-684:

> We stand by the stone, so old we speak in a mumble, seeing nothing but the gloom of justice.

The situation of these confused old men in the chorus of *Acharnians*, standing next to the stone (again a relevant material object) is made evident through the contrast with the young man who forces them to appear before the jurors, who is described as a skillful connoisseur of the judicial bureaucracy and the new trends in forensic pragmatics (685-691):

> Then the young man, who has intrigued to speak for the prosecution against him, rapidly comes to grips and pelts him with hard round faces; then he drags him up and questions him, setting verbal man-traps, tearing a Tithonus of a man in pieces, harrying and

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proposes his brother to solve their controversies with "straight" decisions, which, coming from Zeus, are the best. Among men there are corrupt judges (considered "gift-eaters", δωροφάγους) who are determined to pronounce a verdict after being flattened. These outrage Dike when they take "crooked" decisions (*Op.* 220-221), while good rulers give just sentences to foreigners and allow the city to prosper and the people to flourish (*Op.* 225-227). As opposed to past generations, the wicked will hurt the worthy man, speaking "crooked" words against him (194) and swearing a false oath.

[77] I follow here the Greek text edited by OLSON 2002 and the English translation made by SOMMERSTEIN 1980.

[78] OLSON 2002: 246 understands the whole expression "οὐδὲν ὄντας" as 'useless', following other comic passages such as *V.* 1504, *Ec.* 144 and Eup. fr. 237.

> worrying him. The defendant replies in a mumble, so old is he, and then off he goes convicted. Then he sobs and weeps, and says to his friends, "The money that should have paid for my coffin, I leave the court condemned to pay it as a fine!"

The smart youngsters are always qualified by means of their physical activities and gestures: when young people drag their opponents to court (ἀνελκύσας)[79], they employ a polished and deceptive style (686-687), whereas elders can only babble to defend themselves. Their bodies and gestures seem even more static when compared to the quick nimbleness of the attackers. Whereas a coordination of present participles shows the vigor and freshness of the attitude of young prosecutors (ξυνάπτων, σπαράττων καὶ ταράττων καὶ κυκῶν, 686, 688), the elders cannot even control their own bodies, and they sob and cry. The heavy criticism behind the proposal by the chorus to allow only young people to prosecute young people and old men to indict old men (717-718) relies on the need to reestablish a balance which had been lost, as expressed in their different physical attitudes.

In sum, the ways in which bodies are presented provide us with interesting information on the relationship between accusers and defendants and between litigants and jurors. A study of their corporal language allows us to discover their perceptions of the other and their subjective modes of dealing with adversaries. Taking advantage of the importance of visual representation in comedy, the physicality of the movements of the actors on stage and their body-to-body contact is relevant for understanding the material dynamics of judicial procedure in classical Athens.

Conclusion

The public which was present in the theater of Dionysus during the performance of comedies were used to law; either as litigants, jurors or spectators they often attended the spectacle of justice in popular courts. Characters involved in legal business are a frequent landmark of Old Comedy, and Aristophanes makes fun not only of them, but also of their anxieties, emotions and gestures. Humor requires complicity, and therefore Aristophanes' staging of affections and body language involving litigants and jurors tells us much about the perception of judicial emotions and gestures among the Athenians.[80]

In the first part of this paper I argued that the comic techniques employed by Aristophanes when presenting characters on stage (legal subjects such as litigants,

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[79] "Nel linguaggio giudiziario il verbo indica l'atto di trascinare imputati o testimoni sul βῆμα dinanzi ai giudici" (OLSON 2002: 248). See also IMPERIO 2004: 152.

[80] Speaking for example of the references to the arousal of pity in *Wasps*, SANDERS (2016a: 15) acknowledges that "while this could be dismissed as comic fantasy, the fact that it could be staged in front of an Athenian audience suggests it is unlikely they would find such behaviour unrecognizable". This statement could be expanded to understand the manipulation of other emotions and gestures.

speakers, sycophants, jurors or witnesses), are not only applied to their speech but also to the emotions they claim to endorse or reject.[81] The identification of this emotional rhetoric is useful to understanding the ways in which Aristophanes criticizes the manipulation of public *pathe* in classical Athens and, it also sheds a brighter light on the occurrence of legal emotions in sources related to forensic oratory.[82] If we can laugh at trembling children whining to have their father acquitted or at a juror like Philocleon who will not control his anger and acts accordingly, that is because emotions —as normative constructions— can be subject to a laughable treatment by means of exaggeration or inversion. Such a treatment, in a safe environment like comic drama, can reproduce the political handling of emotions that demagogues might put in place to mislead the community.

In the second part of the paper I focused my attention of the physicality of space control and the manipulation of objects. An object-focused approach has revealed a different perspective for assessing the functioning of Athenian tribunals. The tangibility of items which are there for the characters to take, physically or metaphorically, becomes useful for perceiving the physical construction of a legal territory and for describing the imagery of a judicial environment. Following some ideas from the actor-network theory, we are necessarily drawn to rethink the idea of opposing active subjects and passive objects. From the analysis of legal scenarios in *Wasps* it is possible to infer that the exhibition of objects and the new ontology based on the entanglement of material elements and human beings gives a more comprehensive picture of the nature of trials. Paying attention to the preoccupation with materiality and its importance, as comedy shows, can contribute to discuss the construction of legal subjectivity. Being in possession of legal paraphernalia, especially when related to masculine activities and compared to the consuming passions of sex and food, gives power to the citizen-individual who controls those objects. At the same time, the transformation of everyday 'things' into judicial items by the will of comic actors serves the purpose of denouncing the conventional nature of jurisdiction and the manipulation of legal issues. Litigiousness is so pervasive in the Athenian mind that, according to Aristophanes, wherever the relevant courtroom objects are displayed it seems that justice can be rendered.

The third part of the paper paid special attention to the importance of the carriage and deportment of those bodies which are related to the judicial activity. The corporal interaction of Philocleon with other bodies by means of gestures is indicative of the importance of physical control. The opposition between upright and curved bodies, between stiffness and softness, represents a clear difference in personal status and becomes useful on stage for showing how the democratic

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[81] I studied Aristophanes' comic strategies related to the representation of legal characters elsewhere; cf. Buis 2014.

[82] Even if his contribution did not deal specifically with comic sources, Sanders 2016b: 163 was aware that "appeals to emotions were common enough to be satirized in Aristophanes' *Wasps*".

equality of the parties to a legal conflict can be subverted. Body contact becomes a symbol of social relations, so corporal language can be read politically as it expresses group relationships. Through different relative positions, the physical communication between actors represents power by placing some bodies over others to oppose male and female, free men and slaves. By reproducing superiority and inferiority, body postures also show the risks involved in the lack of balance in judicial proceedings.

The importance of behavior, corporal attitudes and material agency in political and legal terms cannot be ignored.[83] If *Wasps* can focus on the comic consequences of misplacing or exaggerating emotions, managing objects and playing with gestures and corporal postures during a trial, it is because the performance of physicality dramatizes social control and influences the perceptions of what justice ultimately is and how it can be achieved. Philocleon's hilarious references to the arousal of emotions, the appropriation of material culture and the manipulation of body language are a political warning. Aristophanes' appeal to the legal emotional community of the Athenians deserves to be taken seriously as an example of the efficacy of non-verbal rhetoric in judicial procedures.

The evidence of *Wasps*, which may complement what we know of Athenian law from other contemporary and later sources, helps to conclude that the affective, material and physical turn might provide us with new insights on the democratic risks of demagogic empowerment in popular courts. Beyond comedy, thinking of the connection between bodies, objects and space and exploring the emotions which are involved in these relationships might shed some interesting light on many neglected aspects concerning the legal imagery of the Athenians and their subjective perceptions regarding the physical representation of trials and the embodiment of justice.

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[83] Non-verbal behavior represents a highly affective and focused form of human expression, as explained by LATEINER 1995.

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ATTISCHE RICHTER ZWISCHEN *RULE OF LAW* UND EGOISMUS: DAS ZEUGNIS DER KOMÖDIE UND DER FLUCHTAFELN. ANTWORT AUF EMILIANO BUIS

Die Einschätzung athenischer Gerichtsprozesse als Rituale, die sich durch ein hohes Maß an Performanz auszeichnen, hat in den letzten Jahren unser Verständnis der athenischen Gerichtskultur erheblich bereichert. Emiliano Buis erweitert unsere Quellenbasis für die athenische Gerichtsbarkeit, indem er, über die Redner hinausblickend, die *Wespen* des Aristophanes unter kulturwissenschaftlicher Perspektive erschließt: Den Parametern der Körpergeschichte folgend ergibt die Untersuchung der Körpersprache in Verbindung mit dem „emotional", „spatial" und dem „material turn" ein glückliches Amalgam, das neue Perspektiven auf die affektiven Seiten der athenischen Rechtskultur zu eröffnen vermag. Um es vorweg zu sagen: Ich teile alle Grundannahmen von Emiliano Buis und halte die Kombination der methodischen Ansätze und ihre Anwendung auf Aristophanes nicht nur für erkenntnisfördernd, sondern für notwendig, um unser Material unter veränderten Fragestellungen neu zu erschließen. Die folgenden Anmerkungen seien daher weniger als Kritik als vielmehr als Ergänzungen zu verstehen, welche die hier vorgestellten Thesen zu untermauern helfen sollen. Meine Bemerkungen stellen die fiktionale Figur des Hauptprotagonisten Philokleon in den Mittelpunkt und mögen Wege aufzeigen, wie Buis' Ansatz durch Ausweitungen in thematischer und quellenmäßiger Hinsicht uns zu einem vertieften Verständnis nicht nur dieser dramatischen Persona, sondern auch der höchst agonalen Mentalität, die dem attischen Gerichtswesen zugrunde lag, verhelfen kann. Zunächst zu Einzelbeobachtungen:

So wichtig die Erregung von Zorn (*orge*) bei den Richtern gegenüber dem Gerichtsgegner war, so sehr ist doch zwischen den Prozessarten zu differenzieren: Wie Lene Rubinstein nachweisen konnte, wird überwiegend in *graphai* Zorn evoziert (24 von 29 belegten *graphai* erwähnen Zorn), da der Sachverhalt die gesamte Gemeinschaft der Bürger betraf, während er in *dikai* fast keine Rolle spielt (nur in drei *dikai* ist von Zorn die Rede)[1]. Im Gegenteil sind die Kontrahenten in *dikai* bemüht, ihre Streitlust und damit ihre Emotionalität herunterzuspielen.

Aristophanes' Charakterisierung von Protagonisten über ihre Körpersprache sollte unbedingt zur Portraitierung des Timarchos durch Aischines in dessen erster

1 Rubinstein 2005, 138.

Rede in Beziehung gesetzt werden, wo Timarchos durch sein unkonventionelles Auftreten vor der Volksversammlung ebenfalls als Außenseiter gezeichnet wird (Aischin 1.25-26).

Wenn Buis bemerkt, dass in den *Wespen* der „hero as isolated figure" konstruiert wird, „who does not have any share in common beliefs", so verdient diese Beobachtung einer Vertiefung[2]. Auch die Körpersprache, der ganze Habitus kennzeichnet Philokleon als *hybristes*, was am Ende des Stücks im *komos* überaus deutlich wird, in dem der Held wahllos Passanten schlägt und ganz in dionysischer Manier mit stierähnlicher Virilität, mehrere Prostituierte am Arm, ekstatisch aus dem Theater in die Nacht hinaustanzt. Generell erstaunt, dass die Hybris in Buis' Betrachtung keine Erwähnung findet, sondern nur implizit aufscheint. Viele somatische und auch habituelle Besonderheiten des komischen Helden evozieren die Hybris, so wie etwa sein Überlegenheitsgefühl gegenüber dem um Gnade flehenden Angeklagten, der ihn wie einen Gott anruft (571: ὥσπερ θεὸν). Angeklagte spricht Philokleon in der Regel eben nicht frei, sondern demütigt sie bewusst und mit Freude. Trifft schon David Cohens umfassende Definition von Hybris, die physische Gewalt, Beleidigungen sowie sexuelle Verfehlungen beinhaltet[3], auf Philokleon zu, so gilt dies in besonderem Maße auch für die von mir vorgeschlagene performative Definition von Hybris: „In brief, *hubris* was the open and performative display of an excessive attitude that transgressed the flexibly defined domain of good behavior. The way in which this arrogance was performed, with or without a victim, was secondary to the definition. It comes as no surprise that the rich and young were especially prone to *hubris*, because they were eager to show off their superiority (cf. Arist. *Rh.* 1389a)."[4] Nun ist Philokleon nur wohlhabend, nicht reich, entscheidend ist jedoch sein Alter. Hybris brachten die Athener eher mit reichen Jugendlichen und jungen Männern in Verbindung. Vom erwachsenen Bürger erwartete man Selbstkontrolle (*enkrateia*) und eine Art rationale Mäßigung des Gefühllebens (*sophrosyne*). Umso schwerer wiegen die Transgressionen des Philokleon, der sich also weit außerhalb des kulturellen und sozialen Erwartungshorizontes befindet. Dass er die für sein Alter in besonderer Weise geltenden gesellschaftlichen Konventionen nicht einhalten kann, macht ihn zwar problematisch, aber auch höchst sympathisch für das wohl überwiegend männliche Publikum, das sich wohl z.T. mit ihm identifizieren konnte. Hier ordnen sich Buis' Beobachtungen zwanglos ein: Philokleon führt seine exzessive und in vielerlei Hinsicht normverletzende Überschussenergie auf der Bühne so offensiv auf, dass sein Verhalten von den Zuschauern als lächerlich und komisch empfunden werden konnte.

Wo jedoch der Hybristes wirkt, ist der Tyrann nicht weit. Auch er figuriert in Buis' Text kaum, obwohl Philokleon seine Macht (und die seiner Richterkollegen)

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[2] Zur Außenseiterposition der grundsätzlich ambivalenten aristophanischen Helden vgl. v. Möllendorff 2002, 4, 66-70.

[3] Cohen 1991, 185.

[4] Riess 2012, 125.

als königlich beschreibt (*Wespen* 548-549: καὶ μὴν εὐθύς γ᾽ ἀπὸ βαλβίδων περὶ τῆς ἀρχῆς ἀποδείξω τῆς ἡμετέρας ὡς οὐδεμιᾶς ἥττων ἐστὶν βασιλείας, „gleich zu Beginn werde ich beweisen, dass es keine Königsherrschaft gibt, die mächtiger ist als die unsrige“). Speziell unter dem Eindruck der Schreckensherrschaft der Dreißig Tyrannen (404/3 v. Chr.) geriet der Tyrann im Diskurs der Rhetorik des 4. Jhs. zur Verkörperung der Hybris, eine Verbindung, die der Figur des Tyrannen aber schon seit jeher anhaftete. Dieser zögert nicht, soziale Schranken, ja Tabus zu brechen und eignet sich an, was ihm gefällt. Er setzt seinen Vorteil und sein Wohlbefinden über die Bedürfnisse und Wünsche anderer Menschen. Die Figur des Tyrannen wurde von den Griechen von Anfang an verachtet, aber auch bewundert. In dieser grundsätzlichen Ambivalenz des rücksichtslosen Außenseiters liegt eine deutliche Parallele zu Philokleon, die weiterer Untersuchungen bedarf.

Weiterführend ist ebenfalls Buis’ Beobachtung der *dyskolia* Philokleons, seiner zunehmenden Isolation nicht nur von den anderen Richterkollegen, sondern auch von seiner sozialen Umgebung, insbesondere seinem Sohn Bdelykleon. Hier wird der Vergleich zum *Dyskolos* Menanders anhand der gezeigten Emotionen leicht durchzuführen sein. Auch die Figur Knemons, des Misanthropen par excellence in der Neuen Komödie, wird in vielfacher Weise über seine Gesten charakterisiert[5], so dass die von Buis vorgeschlagene Methode sich bestens auf Menanders Komödie anwenden lässt.

In meinen Augen ließe sich das methodische Instrumentarium gewinnbringend um zwei weitere Überlegungen erweitern:

Zum einen wäre die Sprechakttheorie anzuführen. Sprechakte, denen die Erkenntnis zugrunde liegt, dass Sprache auch Handlung sein kann[6], gehören intrinsisch zur Performativität von Ritualen. Wie uns die Ritualtheorien gelehrt haben, sind *dromena* (rituelle Tätigkeiten) und *legomena* (rituell gesprochene Worte) untrennbar miteinander verbunden[7]. Wer also den Blick auf die Gesten, die *dromena*, legt, kommt gar nicht umhin, sich auch die *legomena*, sprich die Sprechakte anzusehen. Wo handeln Philokleon und Bdelykleon also mit und durch die Sprache, die sie verwenden? Eine sprechakttheoretische Untersuchung der attischen Komödien hat noch nicht einmal begonnen, sie könnte jedoch zwanglos mit ebensolchen Untersuchungen bei den Rednern verbunden werden, konkret: Wie ähnlich oder unterschiedlich sind das sprachliche Handeln eines Gerichtsredners und das des (fiktionalen) Hautprotagonisten in den *Wespen*? Zugegebenermaßen ist ein Redner vor Gericht entweder Ankläger oder Beschuldigter (oder *synegoros*, Unterstützer[8]), und

5 So z. B. Men. *Dysc.* 110ff.: Pyrrhias erzählt, wie er vom alten Knemon vertrieben wurde, der mit Birnen, Erdstücken und Steinen nach ihm geworfen hatte (vgl. dazu Blume 1998, 80); *Dysc.* 500: Der Koch Sikon wird von Knemon verprügelt, weil er es gewagt hatte, ein zweites Mal an seine Tür zu klopfen (vgl. dazu Blume 1998, 89).

6 Die Begründer der Sprechakttheorie sind Austin ^{2}2010 und Searle 1971.

7 Zusammenfassend Riess 2012, 178-188.

8 Zu den *synegoroi* vgl. Rubinstein 2000.

Philokleon will als Richter dienen, doch konnte ein und dieselbe Person in der athenischen Realität innerhalb kurzer Zeit all diese Rollen einnehmen. Wer heute als Richter fungierte, konnte morgen von einem Gegner angeklagt werden. Wir wissen genügend über den Hintergrund des attischen Gerichtswesens, um die Sprechakte Philokleons im breiteren Rahmen der im Gerichtswesen verwendeten Sprache zwar nicht direkt mit Sprechakten in einem Prozess vergleichen, aber durchaus einordnen zu können. Sprechakte sind zu ihrem Verständnis und Gelingen in erheblichem Maße auf die Pragmatik angewiesen, also auf ihren konkreten Kontext, in dem sie geäußert werden. Die Berücksichtigung der Umstände, in denen sprachliche Äußerungen getätigt werden, führt zu verfeinerten Interpretationen bestimmter Szenen. So ist es richtig, wie Buis schreibt, dass unter Einsatz der Gerichtsparaphernalia überall ein Prozess stattfinden kann, eben auch in einem Privathaus. Die Frage ist jedoch, ob die Sprechakte im häuslichen Kontext wirklich so funktionieren wie vor Gericht. Der Prozess gegen den Hund Labes (*Wespen* 900ff.) zeigt auf, dass genau dies nicht der Fall ist. Die Sprechakte wirken völlig deplaziert, ein „mock trial" ist die Folge, der (versehentliche) Freispruch des Hundes gerät zur Farce, weil die Sprechakte eben nicht im richtigen Kontext gesprochen werden. Dies lässt sich allein über die Untersuchung der Körpersprache und der in der Gerichtsszene verwendeten Objekte nicht eruieren, sondern nur über die Frage nach der Kontextualisierung und damit der Funktionalität von Sprechakten. Das Gelingen eines Sprechakts lässt sich also aus seiner Perlokution, d.h. seiner jeweiligen Wirkung, ableiten. Ein Beispiel für einen gelungenen Sprechakt in einem rechtlichen Kontext sehen wir in Menanders Komödie *Epitrepontes*. Zwischen dem Hirten Daos, der ein ausgesetztes Kind mit wertvollen Erkennungsgaben gefunden hat, und dem Sklaven Syros, dem er das Kind in Obhut gegeben hat, entbrennt ein heftiger Streit, wer nun die Erkennungszeichen behalten darf. Beide einigen sich für ein privates Schiedsverfahren auf den alten Smikrines als Schlichter, der, ohne zu wissen, dass er der Großvater des Babys ist, über sein eigenes Enkelkind entscheidet. Die Szene wird von einem deutlichen Sprechakt beendet (*Epitrepontes* 354: τοῦτο γινώσκω, „so entscheide ich"). Damit ist der Streit beendet, der Sprechakt hat in diesem Fall also funktioniert. Die Umstände, unter welchen jurisdiktionelle Sprechakte in der Alten und Neuen Komödie gelingen, sind noch nicht ansatzweise erforscht.

Zum anderen muss in Zukunft eine weitere Quellengattung bei fast allen Untersuchungen zum attischen Gerichtswesen zwingend herangezogen werden, nämlich das Zeugnis der attischen Fluchtafeln, die mehrheitlich aus Gerichtsflüchen bestehen. Beide streitenden Parteien, also Kläger und Beklagte[9], schrieben meist vor dem Gerichtsgang Flüche gegen ihre Gerichtsgegner, aber auch gegen die Geschworenenrichter, auf kleine Bleitafeln und überstellten sie chthonischen Gottheiten, um ihren Gegnern zu schaden. Diese kleinen Bleilamellen sind also Primärquellen

[9] Dreher 2018a, 297-301 weist nach, dass Kläger wie Beklagte Fluchtafeln gegen ihre jeweiligen Gerichtsgegner schrieben.

ersten Ranges, in denen wir die authentischen Stimmen von Streitparteien hören, und zwar in der ritualisierten Form von Sprechakten. Diese sind noch nicht mit Sprechakten in Gerichtsreden und schon gar nicht mit Sprechakten in Komödien verglichen worden, eine große Forschungsaufgabe für die Zukunft. Doch im Folgenden soll es um thematische Fragen gehen. Wie wir aus zwei sich im Druck befindlichen Büchern, von Zinon Papakonstantinou[10] und Sara Chiarini, lernen, changierte zwar die Wortwahl der Schadenszauber zwischen Formelhaftigkeit und persönlicher Prägung, hatte aber immer die individuelle, subjektive Rechtsdurchsetzung zum Ziel[11]. Mit diesem egoistischen Ziel, die eigenen Wünsche und Vorstellungen auch auf Kosten der Gegner, ja der Allgemeinheit durchzusetzen, stehen die Verfasser der Fluchtäfelchen dem Egomanen Philokleon, der sich als Hybristes und Möchtegern-Tyrann gebärdet und für den die gesellschaftlichen Normen und Konventionen am Ende keine Gültigkeit haben, erstaunlich nahe.

Die Fluchtäfelchen geben jedoch nicht nur Auskunft über die Mentalität der streitenden Parteien, sondern auch über ihre Einschätzung der charakterlichen Qualitäten der Geschworenenrichter und damit über das Maß ihres Vertrauens in das attische Gerichtswesen. Welchen Werten, ja normativen Vorgaben sich die Geschworenenrichter verpflichtet wissen mussten, war in einem berühmten Heliasteneid festgeschrieben, der uns auszugsweise u.a. im Corpus Demosthenicum überliefert ist[12] und hier selektiv zitiert werden soll:

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[10] Papakonstantinou 2020.

[11] Vgl. Chiarini 2021, 287-299. Dazu zusammenfassend auch Dreher 2018b, v.a 240: „Die zentrale These lautet, dass sich die Autoren *berechtigt* gesehen haben, ihre individuellen Interessen auch mit Mitteln, die geächtet oder verboten waren, durchzusetzen. Diese Durchsetzung konnte nicht im Rahmen der öffentlichen Rechtsordnung geschehen, da diese entweder dem entsprechenden Interesse entgegenstand bzw. es durch ein Gerichtsurteil zu vereiteln drohte (wie z. B. bei Flüchen gegen Zeugen und Richter), oder im konkreten Fall versagt hatte bzw. man sich von ihr nichts versprach […]. Es ist daher klar, dass das hier gemeinte *Recht* der Durchsetzung nicht als allgemein anerkanntes Recht zur öffentlichen Ordnung gehört, sondern dass es vielmehr ein subjektives, persönliches, individuelles Recht ist, in welches die zur Verfluchung greifenden Personen ihre Interessen transformierten. Sie hielten ihr Interesse, ihr Bedürfnis oder ihren Anspruch für so gewichtig, dass sie bereit waren, es neben der gültigen Rechtsordnung, im Zweifelsfall auch gegen sie, zu verfolgen und dazu die Hilfe überirdischer Mächte in Anspruch zu nehmen."

[12] Zum Heliasteneid, vgl. Mirhady 2007, der, wie Michael Gagarin in diesem Band, betont, dass die Richter sehr wohl um die Fakten bemüht sein mussten und v.a. Canevaro 2013, 173-180, der den gesamten Eid bis auf die beiden hier zitierten Sätze für nicht authentisch hält. Sommerstein 2013, 79 versucht den Text des Eides im 5. Jh. v. Chr. zu rekonstruieren und datiert die Einführung der Eidstätte am Heiligtum des Heros Ardettos auf 403 v. Chr.

D. 24.149-151:
149 ψηφιοῦμαι κατὰ τοὺς νόμους καὶ τὰ ψηφίσματα τοῦ δήμου τοῦ Ἀθηναίων καὶ τῆς βουλῆς τῶν πεντακοσίων. [...]. 151 καὶ ἀκροάσομαι τοῦ τε κατηγόρου καὶ τοῦ ἀπολογουμένου ὁμοίως ἀμφοῖν, καὶ διαψηφιοῦμαι περὶ αὐτοῦ οὗ ἂν ἡ δίωξις ᾖ.

149 I shall cast my vote according to the laws and the decrees of the Athenian people and of the Council of the Five Hundred. [...]. 151 And I will give hearing to the accuser and defendant alike, and I shall give my judgment strictly on what the prosecution is concerned with.
(übersetzt von Canevaro 2013, 174)

Es besteht also kein Zweifel, dass die Geschworenenrichter den Prinzipien der Unparteilichkeit und größtmöglichen Objektivität eidlich verpflichtet waren. Dazu gehörten selbstverständlich auch die Unbestechlichkeit sowie das Fällen rationaler Urteile auf Basis der Gesetze und Dekrete Athens. Schon an diesem Punkt erheben sich erste Zweifel, ob die Richter diesen hehren Ansprüchen gerecht werden konnten. Sie wurden im 4. Jh. jeden Morgen neu mittels des Zufallsprinzips einer Losmaschine auf die diversen Gerichtshöfe verteilt und wussten also selbst unmittelbar vor einem Prozess noch nicht, über welchen Fall sie zu urteilen haben würden. Es war ihnen also unmöglich, sich durch die Lektüre der entsprechenden Gesetze und Statuten auf einen spezifischen Fall vorzubereiten. Und selbst wenn sie die Zeit dazu gehabt hätten, so war es nicht leicht, die relevanten Gesetzestexte und Dekrete an diversen Orten in Athen aufzufinden (Agora, Akropolis, Metroon, Stoa basileos).

Zweifelt also schon der moderne Betrachter an der Erfüllbarkeit der anspruchsvollen Aufgabe, der sich die Richter zu stellen hatten, so kann der Wert der Fluchtäfelchen in diesem Bereich gar nicht überschätzt werden. Sie bilden ein „Kontrollgenre“ jenseits der normativen Quellen der Gerichtsreden und auch der Komödie, wo die Angeklagten den gesellschaftlichen Erwartungen entsprechend demütig und flehend vor den Richtern auftreten (bei Aristophanes im übertriebenen Maße, sehr zur Freude Philokleons: *Wespen* 554-575).

Die Fluchtafeln sprechen jedoch eine ganz andere Sprache: Die Neueditionen von DTA 65, 67 und 124 sowie SEG LI 328 durch Jaime Curbera und Zinon Papakonstantinou zeigen, dass die Gerichtsparteien sich nicht nur gegenseitig aufs Korn nahmen, sondern gerade auch die Geschworenenrichter, also Gestalten wie den fiktiven Philokleon. In DTA 65 (= Curbera – Papakonstantinou 2018, no. 5) werden die Zeugen des Kallias oder die Geschworenenrichter verflucht (Z. 4: Καλλίου μ̣άρτυ̣ρ̣ες ἢ δικ̣α̣στα̣[ί]). Die Konjunktion „oder“ ist hier wohl inklusiv zu verstehen[13]. Der Verfluchende geht offenbar von einem parteiischen oder vielleicht sogar einem bestochenen Gerichtshof aus. Auf jeden Fall war er für den *defigens* auf irgendeine Art und Weise kompromittiert, wurden die Richter als in Komplizen-

13 Papakonstantinou 2018, 230-231.

schaft mit den Zeugen des Gerichtsgegners Kallias gesehen. Der *defigens* hat womöglich Angst vor dem sozialen Netzwerk des Kallias-Clans und fürchtet vor Gericht dessen rhetorische und generell manipulative Mittel[14]. In DTA 67 (Curbera – Papakonstantinou 2018, no. 3) versucht der Verfluchende neben dem Hauptgegner Krates all diejenigen, die zu ihm stehen sowie die Geschworenenrichter in ihren kognitiven Fähigkeiten einzuschränken (Z. 10-11: καὶ τῶν μετ' ἐκ[είνου] / [πάντων] καὶ τῶν δικα[στῶν μν]ήμην ἐν – –)[15]. In DTA 124 (Curbera – Papakonstantinou 2018, no. 6) wird in Z. 5 ein *dikastes* verflucht. Man wird von einem ähnlichen Hintergrund wie in DTA 65 ausgehen dürfen[16]. Ebenfalls werden Geschworenenrichter erwähnt in SEG LVIII 266, wo der Gott Palaimon bewirken soll, dass der Gerichtsgegner vor den *dikastai* falsch (ungerecht) aussagen soll[17]. Curbera und Papakonstantinou haben kürzlich ebenfalls SEG LI 328 neu ediert (2018, no. 1), wo in der dritten Kolumne nicht nur alle Zeugen des Gerichtsgegners, sondern auch der Polemarch samt seinem Gerichtshof verflucht werden (Z. 9-12: ω {δεω} δὲ καὶ τὸς μάρτυ / ρας αὐ̣[τ]ῶν ἅπαντας καὶ / τὸν [πολ]έμαρχον καὶ τὸ / δικαστ̣[ήρι]ον τὸ τô πολεμάρχο). Da der Polemarch für Ausländerangelegenheiten zuständig war[18], müssen wir also davon ausgehen, dass auch Metöken gerichtlich aktiv waren und nur einen begrenzten Glauben an das attische Gerichtssystem hatten[19]. Zusammenfassend sei hier Papakonstantinou zitiert:

> Athenian legal binding curses form a sounding board against which to evaluate claims to justice, the pursuit of the rule of law, and attitudes towards jurors articulated by litigants in extant forensic orations. The professed primacy of justice over expediency as well as the attitudes of expressed trust and concealed suspicion towards juries that emerge from forensic orations are largely challenged by legal binding curses. The frustration, skepticism, and even open hostility towards jurors and other court officials articulated in legal curse tablets are indicative of notions of dispute-resolution and use of the legal system

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[14] Vgl. ebd. und 232 sowie Curbera – Papakonstantinou 2018, 221 zur Prosopographie des Kallias-Clans.

[15] Papakonstantinou 2018, 231-232.

[16] Papakonstantinou 2018, 232 kann sich auch vorstellen, dass der Term *dikastes* hier lediglich als Identitätsmarker dient.

[17] Papakonstantinou 2018, 232; Curbera – Papakonstinou 2018, 216.

[18] Vgl. zu dieser Tafel Dreher 2018a, 303-304, der anmerkt, dass aus diesem Text eindeutig hervorgeht, dass der Polemarch einem Dikasterion vorsaß.

[19] Vgl. Curbera – Papakonstinou 2018, 213-214 zum sozialhistorischen Hintergrund. Dreher 2018a, 305-306 wirft in Bezug auf diese Tafeln die wichtige Frage auf, was die *defigentes* mit dem Fluch konkret bewirken wollten. Die Bedeutung des Wortes *katadeo* (ich binde) sei in diesem Kontext noch weiter zu fassen als bislang angenommen. Es kann nicht um eine konkrete Schädigung der Richter gegangen sein, sondern sie sollten vielmehr dazu gezwungen werden, den Beklagten zu verurteilen bzw. den Verfluchenden, der angeklagt war, freizusprechen. Die Bindeformel wurde also zur Manipulation der Richter eingesetzt.

> that go beyond the conventional picture of adjudication depicted in Athenian forensic oratory. Legal spells suggest a much wider, inclusive, and conceptually malleable perception of "law" and "litigation" on the part of Athenians, a perception driven primarily by utility and self-interest that extended far beyond the strict confines of formal legal proceedings and the courts. Hence social networking practices and acts of magic that frequently involved individuals of inferior legal standing appeared to have, in the mind of the agents of binding curses, equal and at times greater clout in deciding the outcome of a dispute than statutory rules and court proceedings. In this context, expediency and mistrust towards civic institutions often overrode the desire, professed by many litigants in court, to reach a fair resolution to disputes.[20]

Es lässt sich also ein deutlicher Gegensatz zwischen der offiziell so vielfach beschworenen *rule of law* und der tatsächlichen Einschätzung des Gerichtswesens durch die Streitparteien konstatieren. Trotz der eidlichen Verpflichtung der Richter zu Objektivität und Neutralität vertraute man dem Gerichtssystem nicht; man konnte sich gerade nicht darauf verlassen, dass dem eigenen, subjektiven Rechtsanspruch Genüge getan würde. Zwar hatten alle Geschworenen den oben auszugsweise zitierten Richtereid geschworen, doch weder hören wir von Philokleon, dass er sich dem hehren Ziel der Durchsetzung athenischen Rechts verpflichtet fühlte – er agiert stets intuitiv und ganz auf die Befriedigung seiner persönlichen Bedürfnisse bedacht, wie das Ausleben seiner Machtgelüste und seines Wunsches nach Überlegenheit gegenüber den Angeklagten – noch zeigen die die Geschworenenrichter Verfluchenden das geringste Vertrauen in die Moral der Richter, die in Bälde ein Urteil (womöglich gegen sie) fällen würden. Komödie und Fluchtafeln ergänzen sich in diesem Fall und vermitteln kein wirklich positives Bild von der sog. *rule of law*. Aus dieser Perspektive scheint die fiktionale Figur des Philokleon also gar nicht mehr so fiktional zu sein. Ein auf seinen Vorteil und die Befriedigung seiner persönlichen Machtgelüste fixierter alter Mann, der das flehentliche Bitten um Gnade der Angeklagten in vollen Zügen genießt, die er grundsätzlich und irrational erbarmungslos aburteilt, mag in der Komödie etwas überzeichnet sein, doch die *defigentes* müssen beim Verfassen ihrer Flüche durchaus ähnlich disponierte Geschworenenrichter vor Augen gehabt und ihnen entsprechend misstraut haben. Die *rule of law* musste zwar von allen Prozessbeteiligten offiziell zur Schau gestellt und bekräftigt werden; in der Alltagspraxis des attischen Gerichtswesens scheint sie jedoch eine eher untergeordnete Rolle gespielt zu haben. Das verstärkte Heranziehen der Evidenz der Fluchtafeln in den nächsten Jahren wird unser Bild von der athenischen Gerichtsbarkeit und der ihr zugrundeliegenden Mentalitäten grundlegend verändern und die in der Forschung z.T. verfestigte Dogmatik von der *rule of law* erschüttern.

Einen profunden Vergleich zwischen der Wertewelt der Fluchtafeln und der der Komödie auf breiterer Basis anzustellen, muss zukünftigen Forschungen vorbehal-

[20] Papakonstantinou 2018, 233.

ten bleiben, denen Emiliano Buis mit seiner körper- und performanzgeschichtlichen Studie wichtige Impulse gegeben hat.

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THE FUNCTION OF WITNESSES IN ATHENIAN LAW COURTS

Abstract: In this paper I challenge the view that the main function of Athenian witnesses was to show support for the litigant for whom they were testifying. I argue that (like today) witnesses were called to confirm facts in the case and there is no evidence that they only lent their support to the litigant. I also argue that witnesses were not required to use "formulaic" expressions in their testimony.

Keywords: witnesses, Athenian, law, formulaic, formalism

There are several very obvious differences between witnesses in the courts of classical Athens and witnesses in our own courts today.[1] First, because an Athenian litigant could not compel anyone to testify, he necessarily had to rely on witnesses who were either his supporters or disinterested observers. This means that most of the witnesses in Athenian courts are supporters of those for whom they testify. Litigants did occasionally call for a witness who was a supporter of his opponent to confirm a deposition that the litigant had prepared for him, but in such cases the person called to testify could, and usually did, swear an oath of exemption (*exōmosia*), allowing him to avoid testifying. Second, witnesses in Athenian courts were not cross-examined; they simply delivered a prepared statement orally in court or, after the first quarter of the fourth century, they simply confirmed the truth of a prepared statement that a clerk read out to the court.[2] Third, the Athenians made more use of formal witnesses – witnesses who testified to an event for which they were summoned beforehand – than we do today, when almost all witnesses are accidental witnesses – witnesses who just happened to be present at an event. The Athenians summoned formal witnesses for many events, such as births, weddings, or financial transactions, which today we generally confirm with written documents. In Athens, formal witnesses were normally friends or family members and would thus

[1] By "our own" I mean specifically the courts in the US common law system, though the function of witnesses does not differ much among all the modern Western legal systems. Thür 2005 provides a good survey of the main features of witness testimony in Athens, though I will challenge one of his points at the end of this paper.

[2] It appears that before 400 BCE a litigant could question his own witness (Andoc. 1.14), but we have no evidence that a litigant could question his opponent's witness.

almost always be supporters of the litigant.[3] Certain types of cases, such as those concerning inheritance, relied quite heavily on formal witnesses who were mostly family members, because they would be the ones who knew the relevant facts about family matters, such as births, marriages, and adoptions.

In addition to these differences, many scholars have argued that the main function of witnesses in Athens was different from today: whereas modern witnesses are called to establish the facts, "witnesses in Athenian lawsuits appear as supporters of the litigant rather than offering independent corroboration of his account of the facts of the case."[4] This approach has been disputed,[5] but most scholars accept that it is at least partially valid. Todd claims, for example, that "Athenian witnesses fulfill two rôles. One of these roughly corresponds to that of a modern witness: his job is to tell the truth, and the court is interested in what he says. But the second rôle is to us a more alien one: the function of a witness is to support the litigant for whom he appears, and the court is interested in who he is."[6] And in the most recent discussion of witnesses Siron, like Todd, accepts that both functions are valid: "les témoins apparaissent à la fois pour confirmer une affirmation et pour soutenir l'un des deux plaignants."[7]

My own view, as I shall argue in what follows, is that all Athenian witnesses, even formal witnesses, were summoned in order to confirm certain facts of the case as presented by the litigant for whom they were testifying. In no case was a witness summoned merely in order to provide support for the litigant. Litigants rarely show any interest in the identities of their witnesses except for information indicating that the witness was in a position to know the facts about which he was testifying, and in their depositions witnesses say little or nothing about the litigant for whom they are testifying. This makes it very unlikely that "the court is interested in who he is," as Todd claims.

My argument depends in part on the witness depositions that are preserved in some of our manuscripts, the authenticity of which in many cases is uncertain. Most

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[3] See Isaeus 3.19: "You all know that whenever we are embarking on a matter which we are aware must take place in front of witnesses, we usually take our closest friends and most intimate acquaintances with us to business of this kind, whereas with unforeseen matters that occur on the spur of the moment we all procure as witnesses anybody we chance to meet." (Translations of the orators are taken from *The Oratory of Classical Greece*, University of Texas Press, 1998-2017, with occasional modifications.)

[4] Humphreys 1985: 322.

[5] Carey comments that although "there is much of value" in an approach like Humphreys', "it would be a mistake to conclude that the identity of the witness is more important than the testimony itself," since "witnesses are always required to attest a fact" (1994: 183-84). Mirhady, whose main interest is showing how witnesses serve the needs of Athenian democracy, also asserts that the "function of Athenian witnesses … was indeed to tell the truth, to report what they knew" (2002: 256).

[6] Todd 1990: 27.

[7] Siron 2019: 267.

scholars, however, accept that the depositions in Demosthenes 35, 43, 45, 46, 54, and 59 are likely to be authentic, and so I base my arguments on the evidence of these speeches together with three depositions that are quoted by the speaker in the course of his pleading and are thus almost certainly authentic (Aes. 2.67-68, Dem. 29.31 and 54.31). All these depositions are given in full in the Appendix (and referenced below by D followed by the number).

The first point to note is that litigants generally show little interest in who their witnesses are or whether they are formal or accidental. In introducing the depositions listed in the Appendix, litigants identify the witnesses by name in 40% of all depositions (16/40), but in introducing witnesses in other cases the percentage is far smaller (about 10%).[8] In almost all the cases where litigants name their witness, moreover, they say nothing about them except for their name and often their patronymic and/or demotic.[9] The one exception is Dem. 45.8 (D23) where the testimony of Stephanus from a previous trial is read to the court in a case in which Stephanus is the defendant, charged with giving false testimony in the earlier case; obviously much is said about him in the prosecution speech.[10] In the other 60% of depositions listed in the Appendix the speaker only says something like "read the depositions," occasionally adding some qualification such as "of those who were present" or "of those who were on the ship." Moreover, we often cannot even tell whether a witness is formal or accidental. The words used to summon the witness are no sure guide,[11] and a witness may be both formal and accidental, if he testifies both about an event that he was asked to attend and then about another event that he accidentally happened to observe, as in Dem. 45.60 (D27).[12]

Of course, even if the litigant does not identify his witnesses, the jury would usually know their names because witnesses regularly state their names at the beginning of their testimony.[13] In a few cases, such as the fellow envoys who testify

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8 Much of this difference is due to the large number of named witnesses in Dem. 59 (see next note).

9 Most examples where the witness is named (10/16) come in Dem. 59 (59.23, 25, 28, 32, 34, 40, 47, 48, 54, 84); the others are Dem. 35.33, 35.34 (2x), 45.8, 45.19, 45.55.

10 This deposition should probably not be included since in this case Stephanus is not a witness but a litigant.

11 Even when a litigant says "I will present those who were present as witnesses," we cannot be certain that these are formal witnesses. The speaker of Lysias 3, for example, describes a fight that broke out between him and Simon and then adds (3.14), "I will provide those who were present as witnesses." It seems very unlikely that the speaker brought formal witnesses with him to observe the fight, which according to his account was unanticipated.

12 Even when we have the deposition, we may not know if the witness is formal or accidental. In Dem. 35.33 (D8), for example, it is possible that Apollonides learned of the loan accidentally, but more likely he was present at the transaction because he had been summoned as a witness.

13 Some of the preserved depositions (e.g. D11) begin with the verb "testify" (*martyrei*, *martyrousi*) with no subject expressed, but the original depositions almost certainly

for Aeschines and Demosthenes in the trial on the embassy (e.g. Aes. 2.107, Dem. 19.176), witnesses may have been public figures, known to many members of the jury. But in most cases, very few jurors would know anything about a witness after hearing just his name, patronymic, and demotic, and thus would have no basis for judging the value of his support for the litigant. If the litigant's purpose in calling a witness was to benefit from that witness's support, then one would expect the litigant to tell the jury as much as possible that would make his witness seem important and trustworthy to the jury. That litigants generally show little or no interest in the identity of their witnesses is a strong indication that they do not consider the identity of their witnesses important. Humphreys' analysis of the categories of witnesses in terms of more or less trustworthy is most interesting, but nothing in it suggests that any litigant considered it important to indicate which category of witness he was summoning.[14]

My second point is that witnesses never tell us anything about the litigant's character, except to the extent that by confirming the litigant's account of certain facts they may be indicating that he is the sort of person who tells the truth. Fewer than half (18/43) of all depositions even mention the litigant, and with one exception those that do mention him only do so because their testimony concerns events in which the litigant was directly involved.[15] Witnesses certainly never say anything about the litigant's character or "the social context from which the litigant has been detached."[16] Nor is there any evidence in the forensic speeches to show that the litigant's witnesses "had an important role to play in showing what kind of man he was."[17] Humphreys cites a fragment from Euripides' *Phoenix* in support of this last claim, but these lines say only that the speaker (perhaps Chiron) has judged many arguments and has learned that witnesses often give conflicting testimony about the same incident; he himself reasons that to discover the truth one must examine a person's nature and the life he lives. Then after a gap of one or more lines the speaker adds that he has never questioned someone who keeps company with bad men because he knows that this person is like those whose company he enjoys.[18]

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began with the name(s) of the witness(es). Presumably these were deleted by a copyist at some point in the manuscript tradition.

[14] Humphreys 1985: 325-49.

[15] The exception is trivial: in Aes. 2.67 (D1) the witness's first words are "Amyntor testifies for Aeschines" (the litigant).

[16] Humphreys 1985: 316.

[17] Humphreys 1985: 323.

[18] ἤδη δὲ πολλῶν ᾑρέθην λόγων κριτὴς
καὶ πόλλ᾽ ἁμιλληθέντα μαρτύρων ὕπο
ἐναντί᾽ ἔγνων συμφορᾶς μιᾶς πέρι.
κἀγὼ μὲν οὕτω χὤστις ἔστ᾽ ἀνὴρ σοφὸς
λογίζομαι τἀληθές, εἰς ἀνδρὸς φύσιν
σκοπῶν δίαιτάν θ᾽ ἥντιν᾽ ἐμπορεύεται
(one or more lines lost)

Nothing in these verses suggests that the litigant's witnesses provide information about him or the life he leads.[19]

Now, if litigants show little or no interest in the identity of their witnesses, and if witnesses say nothing about the character of the litigant or his social background, in what way could a witness lend his support to the litigant for whom he is testifying other than by confirming facts that the litigant has introduced in his pleading? Humphreys and others may mean that a witness indicates support for the litigant simply by agreeing to testify on the litigant's behalf. Humphreys notes that some litigants summon numerous witnesses to testify to the same facts again and again, and concludes from this that "what matters is to show that the litigant is solidly supported by a large body of kin."[20] She refers to examples like the five depositions in Dem. 43.35-37 (D12-D16), all of which emphasize the important facts that Polemon had a sister Phylomache with the same father and same mother and never had a brother. And the speaker's own explanation for calling so many witnesses (43.39) is that his opponents have claimed that Polemon never had a sister. Now that he has presented all these witnesses to the existence of Polemon's sister, he "knows" that no witness will be so reckless as to testify to the contrary (43.40-41). Despite this confident prediction, it is quite likely that Macartatus presented witnesses to the contrary, and that there would thus have been family members testifying on both sides, as was very likely the case in almost all inheritance cases, where one part of a family was usually set against another part of the family.

In fact, the five witnesses in Dem. 43.35-37 are all testifying to a crucial fact in the case, and this is what the speaker tells us is important. If the witnesses were testifying simply to show that the litigant had the support of many family members, we ought to see many examples of witnesses testifying to trivial matters, just to show their support for the speaker. For example, a witness could say "X is my neighbor" or "X is my uncle," and assuming that these statements were true, he would be showing his support for the speaker without being at risk of a *dikē pseudomartyriōn*. If the witness's support was so important, then we would expect many witnesses to testify to uncontroversial matters so as to show their support for the speaker. But in all the examples we have, the facts affirmed by a witness are facts that the speaker emphasizes in his pleading, many of which were likely disputed by his opponent. We never find a deposition affirming a trivial fact simply in order to show support for the litigant.

ὅστις δ᾽ ὁμιλῶν ἥδεται κακοῖς ἀνήρ,
οὐ πώποτ᾽ ἠρώτησα, γιγνώσκων ὅτι
τοιοῦτός ἐστιν οἷσπερ ἥδεται ξυνών.
(Fr. 812. Collard and Cropp 2008: 416-17.)

[19] Euripides' verses are cited by Aeschines (1.152), who draws from them the lesson that a person should be judged by the company he keeps, a lesson he then applies to Timarchus.

[20] Humphreys 1985: 324.

My third point is that if witnesses were called to testify only or primarily in order to show their support for the speaker, litigants would call many more witnesses than they do, and if both sides called many witnesses in order to demonstrate their support, as they surely would do, then the net effect would be an equal advantage for both sides, which would be no advantage for either. One would also think that successful logographers would include many witnesses in the speeches they wrote, but Lysias, one of the most successful logographers (we are told) calls no witnesses at all in about half of his speeches (15/31). And Aeschines, after calling eleven witnesses in his winning plea in the case on the embassy (Aes. 2) calls no witnesses at all a few years later in his unsuccessful prosecution of Ctesiphon (Aes. 3). None of this makes any sense if the role of witnesses was to support the speaker.

Humphreys discusses only one specific example of a witness who, she argues, is called primarily to show that the litigant has the witness's support. This is Dem. 45.55 (D26) where Apollodorus summons his father-in-law Deinias, the uncle of the defendant Stephanus, to testify "to show that what I am saying is true." Humphreys argues that "as factual testimony this [Deinias' testimony] counted for little; but it was significant that Deinias was prepared to support his son-in-law against another member of his own family."[21] Siron similarly argues that calling Deinias as a witness "viendrait seulement montrer qu'il appuie l'orateur plutôt que Stéphanos, un autre membre de la famille."[22] In this case, however, Deinias did not actually testify but instead swore an oath of exemption, as Apollodorus tells us right after he has the clerk read out "Deinias' deposition": "How like Stephanus, men of the jury, is Deinias! Because of kinship he is unwilling to give even true testimony against this fellow on behalf of his daughter and his daughter's children and me his son-in-law" (45.56).[23]

This statement has been interpreted in different ways. Humphreys argues that Deinias did deliver the fairly meaningless testimony presented in 45.55 but was unwilling to give some other "positive testimony" on Apollodorus' behalf,[24] and others have reached a similar conclusion.[25] But when Apollodorus says that Deinias "is unwilling to give even true testimony" against Stephanus, he must be referring to the testimony that he, Apollodorus, has prepared for him, which is true (according to Apollodorus' version of events). Thus, I think Apollodorus must mean exactly what he appears to mean, namely that Deinias refuses to testify even to the true statement that Apollodorus has written. I might add that if the important point about Deinias

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[21] Humphreys 1985: 324.

[22] Siron 2019: 267.

[23] ὅμοιός γ' ὁ Δεινίας, ὦ ἄνδρες δικασταί, τούτῳ, ὃς ὑπὲρ τῆς θυγατρὸς καὶ τῶν θυγατριδῶν καὶ ἐμοῦ τοῦ κηδεστοῦ διὰ τὴν συγγένειαν οὐδὲ τἀληθῆ μαρτυρεῖν ἐθέλει κατὰ τούτου.

[24] Humphreys 1985: 359 n.36.

[25] E.g. Scafuro 2011: 255 n.112.

potential testimony was simply which side of the family he was supporting, then Apollodorus would be foolish to call him as a witness when he knew that by calling him and making clear to the jury that he refused to testify, he would be helping demonstrate Deinias' support for Stephanus. Even on Humphreys' interpretation, Apollodorus would be making clear that Deinias supports both sides – Apollodorus on some trivial matter and Stephanus on some other matter – and in this case Apollodorus would have no reason to call him as a witness.

One further point in Humphreys' article requires examination, namely her conclusion that "The Athenians preferred witnesses who had had many dealings with the litigants, in the course of which they had developed feelings of loyalty or hostility, to impartial witnesses who had only encountered the litigants occasionally. They also preferred a witness who had been deliberately invited to a meeting to observe and remember what took place, to the casual passer-by who arrives *in medias res* and puts his own interpretation on what he sees."[26] I can find no evidence supporting this assertion, Rubinstein has questioned it with regard to public cases; in a comparison of witnesses in public cases and private cases, she concludes that "In public actions in general it seems to have been perceived as a positive advantage that the witnesses introduced could be represented as individuals only distantly connected or indeed wholly *unconnected* with the main litigant, and whose duty it was to confirm what they knew rather than to offer him their personal support."[27] This conclusion can, in fact, be extended to private cases, as is clear from Demosthenes' speech against Conon when the speaker Ariston cites a deposition in which witnesses for his opponent Conon "testify that they were returning from dinner along with Conon and came across Ariston and Conon's son fighting, and Conon did not hit Ariston" (54.31, D30). Ariston then comments (54.31-32):

> —as though you would simply believe them and would have no regard to the truth of the matter that first, Lysistratus and Paseas and Niceratus and Diodorus [Ariston's own witnesses], who have expressly testified that they saw me being beaten by Conon, stripped of my cloak, and suffering all the other forms of brutal outrage I experienced – men who were unknown to me and who happened on the affair by chance—that these men would never have been willing to give testimony which they knew to be false, if they had not seen me suffering these things.

Ariston's point is clear: his witnesses did not know him and had no reason to lie for his sake; thus they are telling the truth. It seems clear from this that even in private cases accidental witnesses previously unknown to the speaker were preferable to those who were his close friends and associates.

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[26] Humphreys 1985: 353-54.

[27] Rubinstein 2005: 115.

Further support for this and other conclusions I have reached can be found in the *Rhetoric to Alexander*,[28] which begins its discussion of witnesses with a clear definition: “Witness testimony is the corroboration by someone who knows and is willing.”[29] Clearly this means that the witness is confirming what the litigant has just said on the basis of his knowledge of what happened, not simply because he knows the litigant. Shortly after this the author advises, “You must examine whether the witness is a friend of the person for whom he is testifying, or if he has some interest in the case somehow, or if he is an enemy of the person against whom he is testifying, or if he is poor. For some people are suspected of giving false testimony because of favor, others for revenge, and others because of profit.” The *Rhetoric to Alexander* thus confirms the conclusions we have reached, that the function of Athenian witnesses was to confirm the facts in the case, and that their relationship to the litigant was not an issue except that the testimony of a close friend might be suspect.

The view that Athenian witnesses testified in order to show support for the litigant rather than to confirm facts in the case reflects the theory that classical Athenian law developed out of an earlier system of so-called “irrational” proofs in which judgments were determined by, among other things, formal witnesses and “oath-helpers,” who swore their support for a litigant. I have argued elsewhere that this general view is mistaken,[30] and the theory that witnesses in classical Athens were not interested in the facts of the case is one more mistaken consequence of that general view.

Another supposed feature of classical witness depositions that has its origin in the same view of early law is that these depositions were constrained by formalistic requirements. This view has been advanced by Thür, who has argued that “almost throughout the wording [of depositions] adheres to a set formula,” and that witnesses presented a “formulaic statement” using “formulaic words.”[31] It is true that many depositions begin with the name of the witness or witnesses followed by “testifies that he knows” for an accidental witness or “testifies that he was present” for a formal witness; a third possibility in cases of hearsay evidence, which was not allowed unless the source of the testimony was either deceased or unable to be in court, was “testifies that he heard.” This last expression is found only in Dem. 43, an

[28] Aristotle’s *Rhetoric* is unhelpful. He begins his discussion of witnesses (1.15.13-19) with ancient witnesses like Homer and then simply lists possible characteristics of witnesses who testify in person and their testimony: “some testimonies are about the speaker, others about his opponent, some are about facts others about character,” and so on. As usual, Aristotle’s analysis is driven by a logical schema and bears little or no relation to what witnesses in the forensic speeches actually say.

[29] [Aristotle] *Rhetoric to Alexander* 15.1: μαρτυρία δ’ ἐστὶν ὁμολογία συνειδότος ἑκόντος.

[30] E.g. Gagarin 1990: 219-23.

[31] Thür 2005: 152-55. Quotations from pp. 153, 155.

inheritance case in which events of the distant past are at issue. Examples of these three categories can be found in D11, D12, and D14.

D11: … testify *that they were present* before the arbitrator in the archonship of Nicophemus, when Phylomache the daughter of Eubulides prevailed against all the other claimants for Hagnias' estate.

D12: … testify that they are fellow-demesmen of Philagrus the father of Eubulides and of Polemon the father of Hagnias and *that they know* that Phylomache the mother of Eubulides was considered to be the sister of Polemon the father of Hagnias by the same father and the same mother ….

D14: … testifies that he is a relative and in the same phratry and deme as Hagnias and Eubulides, and *that he heard* from their father and other relatives that Polemon the father of Hagnias never had any brother but had a sister born of the same father and the same mother ….

Now, although these three expressions are used in a majority of the cases in the speeches collected in the Appendix, a substantial minority of witnesses in these speeches (17/43) do not use these expressions.[32] Consider the following examples of witnesses (a) confirming a fact without using the verb "knows," (b) testifying that he was present without using the verb "was present," and (c) relating what he heard without using the verb "heard."

D3: Dem. 35.14: Archenomides son of Archedamas of Anagyrus testifies that a written agreement was deposited with him by Androcles of Sphettus, Nausicrates of Carystus, and Artemon and Apollodorus, both of Phaselis, and that the agreement is still in in his keeping.

D22: Dem. 43.70: … testify that they were summoned by Sositheus and accompanied him to the deme Araphen to the fields of Hagnias, after Theopompus was awarded Hagnias' estate, and that Sositheus showed them the olive trees being rooted up from Hagnias' land.

D16: Dem. 43.37: … testifies that his wife's father Callistratus was a cousin of Polemon the father of Hagnias and of Charidemus the father of Theopompus, their fathers having been brothers, and that his mother was the daughter of a first cousin of Polemon, and that their mother often said to them that Phylomache the

[32] Here a complete list of depositions by category. If a deposition includes both formulaic and non-formulaic expressions, I have listed them only in the formulaic category. Thus the imbalance is somewhat less than the total numbers might indicate.

A. Formulaic (26). "Knows" (9): Dem. 35.20, Dem. 35.20, Dem. 35.33, Dem. 35.34, Dem. 43.35, Dem. 43.43, Dem. 59.23, Dem. 59.24, Dem. 59.34. "Was present" (10): Dem. 29.31, Dem. 35.14, Dem. 43.31, Dem. 45.8, Dem. 45.24, Dem. 45.60, Dem. 45.61, Dem. 46.21, Dem. 59.32, Dem. 59.123. "Heard" (7): Dem. 43.36, Dem. 43.36, Dem. 43.37, Dem. 43.42, Dem. 43.44, Dem. 43.45, Dem. 43.46.

B. Non-formulaic (17). Knows without "knows" (15): Aes. 2.67-68, Dem. 35.14, Dem. 35.23, Dem. 35.34, Dem. 45.19, Dem. 45.55, Dem. 54.31, Dem. 59.28, Dem. 59.40, Dem. 59.47, Dem. 59.48, Dem. 59.54, Dem. 59.61, Dem. 59.71, Dem. 59.84. Was present without "was present" (1): Dem. 43.70. Heard without "heard" (1): Dem. 43.37.

mother of Eubulides was sister of Polemon the father of Hagnias born of the same father and the same mother ….

The significant number of depositions without a formulaic expression makes it clear that a witness could use whatever words he wished when testifying and that he was not required to use only certain words. Many witnesses did testify that they knew or had heard or were present because these were natural ways of expressing the information they were providing. But they could also give the exact same testimony using different words if they wished, and when testifying to something they knew, they were more likely (15/24) not to use the verb "knows."

To conclude, I have argued that the function of witnesses in Athens was to confirm facts and events that the litigant had presented and that they could do so in whatever words they wanted. This means that despite the obvious differences mentioned at the beginning of this paper, Athenian witnesses were not so different from witnesses today. I would also argue more generally that attempts to introduce formal or "irrational" elements into the Athenian legal system should be resisted. Athenian law was different from modern Western law, but it was not nearly so different as some scholars have suggested.

APPENDIX OF DEPOSITIONS THAT ARE LIKELY TO BE GENUINE

Names in **bold face** are those of the litigant who summoned the witness.

D1. Aes. 2.67-8 (in the litigant's speech): Amyntor testifies for **Aeschines**: when the people were deliberating about the alliance with Philip in accordance with the decree of Demosthenes in the second assembly meeting, when it was not allowed to address the people, but when the decrees concerning the peace and alliance were being put to a vote, at that meeting Demosthenes was sitting next to him and showed him a decree, drafted in Demosthenes' name and asked him whether he should hand it to the presiding officers (*proedroi*) to put to a vote. This decree contained the terms on which Demosthenes proposed that peace and alliance be made, and these terms were identical with the terms that Philocrates had proposed.

D2. Dem. 29.31 (in the litigant's speech): They were present before the arbitrator Notharchus when Aphobus acknowledged that Milyas was a freeman, having been set free by Demosthenes' father.

D3. Dem. 35.14: Archenomides son of Archedamas of Anagyrus testifies that a written agreement was deposited with him by **Androcles** of Sphettus, Nausicrates of Carystus, and Artemon and Apollodorus, both of Phaselis, and that the agreement is still in in his keeping.

D4. Dem. 35.14: Theodotus, a privileged alien (*isotelēs*), Charinus son of Epichares of Leuconoeum, Phormio son of Ctephisophon of Peiraeus, Cephisodotus of Boeotia and Heliodorus of Pithus testify that they were present when **Androcles**

lent three thousand drachmas in silver to Apollodorus and Artemon, and that they know they deposited the written agreement with Archenomides of Anagyrus.

D5. Dem. 35.20: Erasicles testifies that he was the pilot of the ship of which Hyblesius was the owner, and he knows that Apollodorus was conveying four hundred and fifty jars of Mendaean wine in the ship and no more, and that Apollodorus conveyed no other cargo in the ship to the Pontus.

D6. Dem. 35.20: Hippias son of Athenippus of Halicarnassus testifies that he too sailed in Hyblesius' ship as commander (*diopeuōn*) of the ship and that he knows that Apollodorus of Phaselis was conveying four hundred and fifty jars of Mendaean wine and no other cargo in the ship from Mende to the Pontus.

D7. Dem. 35.23: Aratus of Halicarnassus testifies that he lent Apollodorus eleven minas in silver on the security of the merchandise which he was conveying in Hyblesius' ship to the Pontus, and of the goods purchased there as return cargo, and that he did not know that he had borrowed money from **Androcles**, or he would not have lent Apollodorus the money himself.

D8. Dem. 35.33: Apollonides of Halicarnassus testifies that he knows that Antipater, a Citian by birth, lent money to Hyblesius for a voyage to the Pontus on the ship that Hyblesius owned and on the freight to the Pontus, and that he himself was part-owner of the ship with Hyblesius, and that his own servants were passengers on the ship. When the ship was wrecked, his own servants were present and reported this to him, and also that the ship was empty when it was wrecked and was sailing along the coast to Theodosia from Panticapaeum.

D9. Dem. 35.34: Erasicles testifies that he sailed with Hyblesius as pilot of the ship to the Pontus, and when the ship was sailing along the coast to Theodosia from Panticapaeum he knows that the ship was empty and that Apollodorus, the man who is now defendant in this suit, had no wine on board the ship, but that about eighty jars of Coan wine were being conveyed for someone from Theodosia.

D10. Dem. 35.34: Hippias son of Athenippus of Halicarnassus testifies that he sailed with Hyblesius as commander (*diopeuōn*) of the ship, and that when the ship was sailing along the coast to Theodosia from Panticapaeum, Apollodorus put on board the ship one or two bags of wool, eleven or twelve jars of salt fish, and some goat-skins—two or three bundles—but nothing else.

D11. Dem. 43.31: … testify[33] that they were present before the arbitrator in the archonship of Nicophemus, when Phylomache the daughter of Eubulides prevailed against all the other claimants for Hagnias' estate.

D12. Dem. 43.35: … testify that they are fellow-demesmen of Philagrus the father of Eubulides and of Polemon the father of Hagnias and that they know that Phylomache the mother of Eubulides was considered to be the sister of Polemon the father of Hagnias by the same father and the same mother, and that they never heard from anyone that Polemon, the son of Hagnias, had a brother.

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[33] See above n.13.

D13. Dem. 43.36: … testify that Oenanthe the mother of their grandfather Stratonides was the cousin of Polemon the father of Hagnias their fathers having been brothers, and that they heard from their own father that Polemon the father of Hagnias never had a brother but had a sister born of the same father and the same mother, Phylomache the mother of Eubulides who was the father of Phylomache wife of **Sositheus**.

D14. Dem. 43.36: … testifies that he is a relative and in the same phratry and deme as Hagnias and Eubulides, and that he heard from their father and other relatives that Polemon the father of Hagnias never had a brother but had a sister born of the same father and the same mother, Phylomache the mother of Eubulides who was the father of Phylomache wife of **Sositheus**.

D15. Dem. 43.37: … testifies that Archimachus was his grandfather and adopted him as his son, and that he was a relative of Polemon the father of Hagnias and that he heard from Archimachus and his other relatives that Polemon the father of Hagnias never had a brother but had a sister born of the same father and the same mother, Phylomache the mother of Eubulides, who was the father of Phylomache wife of **Sositheus**.

D16. Dem. 43.37: … testifies that his wife's father Callistratus was a cousin of Polemon the father of Hagnias and of Charidemus the father of Theopompus, their fathers having been brothers, and that his mother was the daughter of a first cousin of Polemon, and that their mother often said to them that Phylomache the mother of Eubulides was sister of Polemon the father of Hagnias born of the same father and the same mother, and that Polemon the father of Hagnias never had a brother.

D17. Dem. 43.42: … testifies that he is a relative of Polemon the father of Hagnias and that he heard from his father that Philagrus the father of Eubulides, and Phanostratus the father of Stratius, and Callistratus the father of the wife of Sosias, and Euctemon, who was king, and Charidemus the father of Theopompus and Stratocles were cousins of Polemon, their fathers all having been brothers, and that Eubulides with reference to his father Philagrus stood in the same degree of relationship as the sons of these men and Hagnias, while with reference to his mother Phylomache he was recognized as a cousin of Hagnias on his father's side, since he was the son of Hagnias' paternal aunt.

D18. Dem. 43.43: … testify that they are relatives of Polemon the father of Hagnias and of Philagrus the father of Eubulides and of Euctemon, who was king, and that they know that Euctemon was a brother by the same father to Philagrus the father of Eubulides and that when Eubulides put in a claim against Glaucon in the adjudication of the estate of Hagnias, Euctemon was still alive, being a cousin of Polemon the father of Hagnias, their fathers having been brothers, and that Euctemon did not dispute with Eubulides his title to the estate of Hagnias, nor did anyone else on the basis of kinship on that occasion.

D19. Dem. 43.44: … testify that their father Strato was a relative of Polemon the father of Hagnias, and of Charidemus the father of Theopompus, and of

Philagrus the father of Eubulides, and that they heard from their own father that Philagrus took for his first wife Phylomache the sister of Polemon the father of Hagnias, born of the same father and the same mother, and that Philagrus had a son Eubulides by Phylomache, and that after Phylomache's death Philagrus took a second wife Telesippe, and that a brother to Eubulides was born, Menestheus with the same father but not the same mother; and that when Eubulides made a claim to the estate of Hagnias by reason of kinship, Menestheus did not dispute the estate of Hagnias, nor did Euctemon the brother of Philagrus, nor did anyone else dispute the title of Eubulides by reason of kinship at that time.

D20. Dem. 43.45: … testifies that his father Archimachus was a relative of Polemon the father of Hagnias, and of Charidemus the father of Theopompus, and of Philagrus the father of Eubulides, and that he heard from their father that Philagrus took for his first wife Phylomache the sister of Polemon the father of Hagnias, born of the same father and the same mother, and that he had a son Eubulides by Phylomache, and that after Phylomache's death Philagrus took a second wife Telesippe, and that Philagrus had a son by Telesippe, Menestheus a brother to Eubulides, of the same father but not of the same mother; and that when Eubulides made claim to the estate of Hagnias by reason of kinship, Menestheus did not dispute his claim to the estate, nor did Euctemon the brother of Philagrus, nor did anyone else dispute the title of Eubulides by reason of kinship at that time.

D21. Dem. 43.46: … testifies that his mother's father Callistratus was the brother of Euctemon, the king archon, and of Philagrus the father of Eubulides, and that these men were cousins of Polemon the father of Hagnias, and of Charidemus the father of Theopompus, and that he heard from his mother that Polemon the father of Hagnias had no brother but had a sister Phylomache, born of the same father and the same mother, and that Philagrus married this Phylomache, and they had a son Eubulides the father of Phylomache the wife of **Sositheus**.

D22. Dem. 43.70: … testify that they were summoned by **Sositheus** and accompanied him to the deme Araphen to the fields of Hagnias, after Theopompus was awarded Hagnias' estate, and that **Sositheus** showed them the olive trees being rooted up from Hagnias' land.

D23. Dem. 45.8: Stephanus son of Menecles of Acharnae, Endius son of Epigenes of Lamptrae, Scythes son of Harmateus of Cydathenaeum testify that they were present before the arbitrator Teisias of Acharnae when Phormio proposed to **Apollodorus** that if he denies that the document which Phormio put into the *echinos* was a copy of Pasio's will, he should open Pasio's will which Amphias the brother-in-law of Cephisophon submitted to the arbitrator; and that **Apollodorus** was unwilling to open it, and that this document is a copy of Pasio's will.

D24. Dem. 45.19: Cephisophon son of Cephalion of Aphidna testifies that a document was left him by his father, on which was written "Pasio's will."

D25. Dem. 45.24 (repeated in 45.25): … testify that they were present before the arbitrator Teisias when Phormio proposed to **Apollodorus** that if he denies that the document is a copy of Pasio's will …

D26. Dem. 45.55: Deinias son of Theomnestus of Athmonon testifies that he gave his own daughter to **Apollodorus** to have as his wife according to the laws, and that he was never present when **Apollodorus** released Phormio from all claims, nor did he even know that he had done so.

D27. Dem. 45.60 (followed by *exōmosia*): … testify that they are close friends of Phormio, and that they were present before the arbitrator Teisias when his decision was revealed in **Apollodorus**' suit against Phormio, and that they know that Stephanus stole the deposition which **Apollodorus** charges him with having stolen.

D28. Dem. 45.61: … testify that they were present when **Apollodorus** proposed that Stephanus hand over his slave attendant to be interrogated under torture concerning the theft of the document, and **Apollodorus** was ready to write down the terms under which the interrogation was to take place. And that when **Apollodorus** made this proposal, Stephanus refused to give up the slave, but replied to **Apollodorus** that he should sue him, if he wished, if he claimed that he was being wronged by him in any way.

D29. Dem. 46.21: … testify that they were present when **Apollodorus** made a proposal to Phormio, asking him to hand over his female slaves for the interrogation under torture, if Phormio denied that he had seduced my mother before the time when he says that he married her after having been betrothed to her by Pasion. And when **Apollodorus** made this proposal, Phormio refused to surrender his female slaves.

D30. Dem. 54.31 (in the litigant's speech, quoted as testimony of his opponent's witnesses): "Diotimus son of Diotimus of the deme Icaria, Archebiades son of Demoeles of the deme Halae, Chairetius son of Chairimenes of the deme Pithus testify that they were returning from dinner along with **Conon** and came across Ariston and **Conon**'s son fighting, and **Conon** did not hit Ariston."

D31. Dem. 59.23: Philostratus son of Dionysius of Colonus testifies that he knows that Neaira was a slave of Nicarete, who also owned Metaneira, that they lived in Corinth and stayed at his house when they came to Athens for the mysteries, and that a close friend of his, Lysias the son of Cephalus, established them in his house.

D32. Dem. 59.25: Euphiletus son of Simon of Aexone and Aristomachus son of Critodemus of Alopece testify that they know that Simus the Thessalian came to Athens for the great Panathenaea, and that Nicarete and Neaira, the present defendant came with him; and they stayed with Ctesippus son of Glauconides and Neaira drank with them as if she was a *hetaira*, and that many others were present and joined in the drinking at Ctesippus' house.

D33. Dem. 59.28: Hipparchus of Athmonon testifies that in Corinth Xenocleides and he hired Neaira, the present defendant, as a *hetaira* for hire, and that in Corinth Neaira would drink with him and Xenocleides the poet.

D34. Dem. 59.32: Philagrus of Melite testifies that he was present in Corinth when Demochares' brother Phrynion paid Timanoridas the Corinthian and Eucrates the Leucadian twenty minas for Neaira, the present defendant; and that when he had paid the money, he left for Athens taking Neaira with him.

D35. Dem. 59.34: Chionides of Xypete and Euthetion of Cydathenaeum testify that they were invited to dinner by Chabrias, when he celebrated his victory in the chariot race, and that the banquet was held at Colias; and they know that Phrynion was present at the banquet with Neaira, the present defendant and that they themselves and Phrynion and Neaira lay down to sleep; and they themselves observed that some men got up in the night and went to Neaira, including some of the attendants, who were slaves of Chabrias.

D36. Dem. 59.40: Aeetes of Ceiriadae testifies that when he was polemarch, Neaira, the present defendant, was required by Demochares' brother Phrynion to post bonds, and that Neaira's sureties were Stephanus of Eroeadae, Glaucetes of Cephisia, and Aristocrates of Phalerum.

D37. Dem. 59.47: Satyrus of Alopece, Saurias of Lamptrae, and Diogeiton of Acharnae testify that when they were arbitrators in the dispute over Neaira, the present defendant, they reconciled Stephanus and Phrynion, and that the terms on which they reconciled were as **Apollodorus** presents them.

D38. Dem. 59.48: Eubulus of Probalinthus, Diopeithes of Melite, and Cteson of Cerameis testify that when Phrynion and Stephanus were reconciled in their dispute over Neaira, they frequently ate and drank together with Neaira, the present defendant, both when she was at Stephanus' house and when she was at house Phrynion's house.

D39. Dem. 59.54: Phrastor of Aegilia testifies that, when he learned that Stephanus had given him Neaira's daughter in marriage, representing her as his own daughter, he indicted him before the Thesmothetai in accordance with the law and drove the woman from his house, and ceased to live with her any longer; and that after Stephanus had brought suit against him in the Odeum for support, he reconciled with him, he withdrawing his indictment before the Thesmothetai and Stephanus also withdrawing his suit for support.

D40. Dem. 59.61: Timostratus of Hecale, Xanthippus of Eroeadae, Evalces of Phalerum, Anytus of Laciadae, Euphranor of Aegilia, and Nicippus of Cephale testify that they and Phrastor of Aegilia are members of the clan called Brytidae and that when Phrastor asked to introduce a son of his into the clan, since they knew for themselves that Phrastor's son was born of the daughter of Neaira, they prevented Phrastor from introducing his son.

D41. Dem. 59.71: Nausiphilus of Cephale and Aristomachus of Cephale testify that they became sureties for Epaenetus of Andros, when Stephanus claimed that he

had caught Epaenetus committing unlawful sex (*moichos*); and that when Epaenetus left Stephanus' house and regained his autonomy, he brought an indictment against Stephanus before the Thesmothetai for entrapment; that they were appointed as arbitrators, and reconciled Epaenetus and Stephanus, and that the terms of the reconciliation were those that **Apollodorus** presented.

D42. Dem. 59.84: Theogenes of Erchia testifies that when he was archon basileus, he married Phano believing that she was the daughter of Stephanus, and that when he found out that he had been deceived, he threw the woman out and ceased to live with her, and that he removed Stephanus from his board of assessors and no longer allowed him to serve as an assessor.

D43. Dem. 59.123: Hippocrates son of Hippocrates of Probalinthus, Demosthenes son of Demosthenes of Paeania, Diophanes son of Diophanes of Alopece, Deinomenes son of Archelaus of Cydathenaeum, Deinias son of Phormides of Cydantidae, and Lysimachus son of Lysippus of Aegilia, testify that they were present in the agora, when **Apollodorus** made a proposal, asking Stephanus to hand over his slave women for interrogation under torture about Stephanus' accusations against **Apollodorus** concerning Neaira, and that Stephanus refused to hand over the slave women: and that the proposal was the one that **Apollodorus** presents.

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EVA CANTARELLA (MILAN)

THE LEGALITY PRINCIPLE IN ATHENIAN LAW: RESPONSE TO MICHAEL GAGARIN

As Michael Gagarin recalls in the first lines of his paper, several decades ago Sally Humphreys challenged the idea which considers Athenian witnesses as persons called to establish the facts, like modern witnesses. In her opinion in Athens they were acting as "supporters of the litigant, rather than offering independent corroboration of his account of the facts of the case",[1] and in the following years her approach was, at least in part, accepted by many scholars, among them S. Todd (1990), D. Mirhady (2002), and very recently N. Siron, in whose opinion in Athens "les témoins apparaissent à la fois pour confirmer une affirmation et pour soutenir l'un des deux plaignants".[2]

The topic needed revisiting, and Gagarin has done this, reaching the conclusion that "by far the most important function of witnesses in Athens, like witnesses today, was to confirm the facts of the case as presented by the speaker for whom they were testifying, in support of the view".

Given that the place allotted to a response does not allow me to re-evaluate the sources that M. Gagarin discusses, and furthermore the fact that I fully share his analysis and his conclusions, I will only highlight the importance of his paper beyond the specific topic of the role of witnesses, for the discussion of the nature and the function of judicial litigation.

As I do not need to restate, the traditional view of civic litigation as the reaction to a behavior contrary to the legal rules has been questioned, following David Cohen's path,[3] by part of the academy, highlighting the tension between Athenian competitive values and the egalitarian spirit of the rule of law, and maintaining that the function of trials was not to obtain the recognition of one's own rights, but rather a competition between persons animated by the desire for revenge, and/or who wanted to show and obtain a public recognition of their own superior strength and social status (see among the others M. Christ 1998; A. Lanni, 2006; and S. Todd, 1993). Within that line of thought has since emerged a radical stance that denies the existence of a conceptual distinction between civic punishment and revenge, shared

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1 Humphreys 1985, 322.

2 Siron 2019, 267.

3 Cohen 1995, 82-83 and 2005. Against Cohen's conclusions see Harris 2005, 125-141, part. 126-131 (= Harris 2013, 60-98, part. 61-66).

by among others in similar albeit not identical positions, Danielle Allen and some year later by David Phillips, whose arguments I happened to discuss extensively during the meeting held in Austin in occasion of Mike's retirement.[4] Suffice it therefore to recall here a few aspects of one of their main points of argument, that is the say the role of emotions in judicial procedures.

According to Allen "punishment in Athens was not coolly distant from anger." It was not "a dispassionate, disinterested, wholly legal affair, carried out by state agents removed from the private passions and anger of those who had been wronged by a fellow member of the city".[5] Trials were the reaction to a behavior considered a personal offence, involving emotions like anger and resentment that, as she writes "provided the *only* (italics mine) truly legitimate basis for an attempt to punish someone".[6] As the function of punishment was to restore their offended honor and reassert their social status, prosecutors needed to, and were expected to show anger (albeit displayed in a proper way). The only difference between pre-civic punishment and revenge therefore consisted in the "forms of judicial proceedings".[7]

In David Phillips' view, the prosecutor's anger or enmity could be an emotion at the basis of trials, considered as the instrument that facilitated respect of the rules governing *echthra*, in his definition "a socially recognized state of private active mutual hostility, with established norms governing its proper and expected conduct", an "institution" which included characteristics of the institution of the feud in paradigmatic feud cultures[8] and that was not abolished by Draco's law that sought to transfer that role to the courts, making them the "*primary locus*" (italics mine) for the satisfaction of the desire and social necessity to pursue the politics of *echthra*. As a consequence, in his opinion we should not "see the pursuit of *echthra* and the goal of law as opposing principles."

While it is not easy to summarize my own reasoning in a few lines, I must confess that I disagree with both Allen and Phillips' theses. Of course, I do not deny that the desire of the prosecutors to condemn was often inspired by their goal/objective to seek redress and that the manifestation of these emotions is present and important in their oratory. Centuries after Draco's law that prohibited revenge and criminalized homicides (with the exception of the so called "legitimate" ones), competitive values still co-existed and were shared by part of the Athenians, who were far from embarrassed to express them in front of the judges but were constrained by the desire to show that the main motivation of the trial was not the satisfaction of a private passion, but the civic desire to see the law respected and applied.

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[4] Cantarella 2018.
[5] Allen 2000, 20.
[6] Allen 2000, 35.
[7] Allen 2000, 20-21.
[8] Phillips 2008, 15.

As Edward Harris has demonstrated years ago the expression of the anger or enmity of the prosecutors is often accompanied by their statement that they are acting in defense of the laws, as demonstrated, among others, by a pair of speeches (namely *against Meidias* and *against Aristocrates*), where Demosthenes distinguishes between the personal motivation of the accusers and the role of the judges, whose institutional function was to decide the case according to the laws.[9]

In the speech *against Meidias* he does it by praising his capacity to control his anger in spite of the public hubristic behaviour of his enemy (*echthros*) and to have sought redress from the judges:

> ἐγὼ μὲν οἶμαι παρ' ὑμῶν καὶ τῶν νόμων, καὶ παράδειγμά γε πᾶσι γενέσθαι τοῖς ἄλλοις, ὅτι τοὺς ὑβρίζοντας ἅπαντας καὶ τοὺς ἀσελγεῖς οὐκ αὐτὸν ἀμύνεσθαι μετὰ τῆς ὀργῆς, ἀλλ' ἐφ' ὑμᾶς ἄγειν δεῖ, ὡς βεβαιούντων ὑμῶν καὶ φυλαττόντων τὰς ἐν τοῖς νόμοις τοῖς παθοῦσι βοηθείας (Dem. 21.76)

> I think that you should establish a precedent for all to follow, that no one who want only assaults and outrages another should be punished by the victim himself in hot blood, but must be brought before your court, because it is you who confirm and uphold the protection granted by the laws to those who are injured.

Exactly the same concept is expressed in *against Aristocrates*, in order to maintain the illegality of the decree introduced by Aristocrates in favor of Charidemus, that allowed an individual in certain cases to kill an *androphonos*. As only the Areopagus could convict an individual on the charge of *androphonia*, says Demosthenes, only a person convicted on this charge could be seized and killed with impunity.

To conclude, forensic speeches express a sharp distinction between the personal motivation of the accusers and the institutional role of the judges. The fact that personal motivations could be and were often expressed in the courts does not mean that the judges would take them into account: as is well known the Athenian judges were bound by the "heliastic oath" to judge according to the laws and the decrees of the city (and if no law existed according to the *gnome dikaiotate*). Of course, this did not mean (and I do not intend to suggest) that Athenian litigants based their cases strictly on the letter of the law and that the social status of the parties, their private lives, previous behavior and emotions were irrelevant. Unfortunately, we cannot determine to what extent strategies based on agonistic values influenced the decisions of juries. The lack of evidence does not permit speculation, and nothing authorizes us to exclude the possibility that jurors shared non-agonistic and violent values. But the fact that the "heliastic oath" might not be respected does not mean that the principle of legality did not exist.

9 Harris 2005, 129-138.

David Cohen's valuable highlighting of the competitive and agonistic nature of Athenian culture, is often considered one, if not the main reason for the identification between jurisdiction and revenge, although Cohen did not (in spite of the widespread appreciation of his work) include that identification: as Cohen writes, in the forensic speeches "the rational of punishment is expressed as advancing the public interest in deterring from committing wrongs",[10] and even more explicitly, he denies that "litigation was no more than feud, or that Athenians were unaware of the values associated with the rule of law". Albeit convinced that "the ideology of the rule of law was just that: an ideology of equality, impartiality, and justice that existed in tension with countervailing values ... of conflict and judgment", Cohen believes in the existence of the rule of law and recognizes the conceptual difference between punishment and revenge.[11]

There is no need, at the end of this summary recollection of the debate about the legality principle, to highlight once more the importance of Michael Gagarin's paper for the solution of the debate on the controversial existence of the legality rule. His conclusion, if shared (and as I said I totally share them), represents a further confirmation of the conceptual distinction of civic procedures from revenge, and require all of us to re-think and re-evaluate a topic that is central to our own research. As I said, we have many reasons to thank Mike for this paper.

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[10] Cohen 1995, 221-222.
[11] Cohen 1995, 88.

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COURTS, MAGISTRATES AND ALLOTMENT PROCEDURES: A NEW INSCRIBED KLEROTERION FROM HELLENISTIC ATHENS[1]

Abstract: A marble allotment machine (*kleroterion*) recently discovered in Athens (inv.no. ΠΛ 2176) is here published for the first time. This is the fourth example of a *kleroterion* inscribed with the name of the Treasurer of the *prytaneia* Habron, son of Kallias, of the deme Bate. The office seems to have been a creation of the 2nd century B.C. After revisiting the extant *kleroteria*, I propose to lower their date to the 160s.

Keywords: Allotment, court fees, law courts, sortition, treasurer

Students of ancient political theory are well aware of a tenet that almost unfailingly bewilders newcomers to the field. The salient feature of ancient democracies, first and foremost of Athens' paradigmatic democratic system, was not election, but sortition. With very few exceptions, magistrates and judges, the human agents of ancient polities, were determined by the contingencies of fortune rather than by the will of the people.[2] For the modern viewer, nothing exemplifies the ubiquitousness of sortition in Classical democracy in a more tangible manner than that archetypal

[1] I would like to express my gratitude to the organizers of the Symposion, especially Prof. Harter-Uibopuu, for their kind invitation and for tolerating my last-minute schedule changes. For financial and institutional assistance, I am grateful to Professor Nagy and Harvard's Center for Hellenic Studies, where I held a fellowship back in 2011, on which occasion I started work on the *kleroterion* under consideration. I received substantial help from Adele Scafuro and Angelos P. Matthaiou, with whom I was able to carry out autopsy of *IG* II^3.4.106. Ryan Culpeper carefully proofread my text. Evangelos Kroustalis generously shared with me his unpublished dissertation on the topography of the area to the north of the Acropolis. My warmest thanks go to my old friend and erstwhile colleague Dimitris Sourlas, who discovered the artifact I am presenting here. Our original plan was to produce a joint publication, but Dimitris very kindly allowed me to proceed by myself with the publication at hand.

[2] Some scholars have recently problematized this picture (e.g. Demont 2001), rightly showing that oligarchies also used sortition, but the matter of fact remains that Classical thinkers, like Aristotle (e.g. *Politics* 1294b7-9, λέγω δ' οἷον δοκεῖ δημοκρατικὸν μὲν εἶναι τὸ κληρωτὰς εἶναι τὰς ἀρχὰς τὸ δ' αἱρετὰς ὀλιγαρχικόν), did stress the link between sortition and democratic constitutions.

democratic device, the κληρωτήριον (allotment machine). Numerous fragments of allotment machines have been found in excavations throughout Athens. Archaeology, it will appear, offers incontrovertible evidence in support of the ancient literary sources. Yet this neat picture is marred by a paradox that is hardly, if ever, acknowledged. Most of the allotment machines that have come to us from Athens date to the Hellenistic era.[3] Unbeknownst to scholars, democratic Athens is garbed in fabric borrowed from its humbler offspring.

In my contribution I intend to show that this paradox is more perspectival than real; that Hellenistic Athenian democracy per se is a respectable research subject. I first present a new inscribed *kleroterion* discovered in the early 3rd millennium. Subsequently, I revisit a series of similar contemporary *kleroteria* and I explore select historical aspects emerging from this analysis.

In 2003, the Greek Archaeological Service undertook an investigation of an old building located at 98b Adrianou Street. This is a location in the old district of Plaka, in the heart of modern and, most importantly, ancient Athens. The excavation in question brought to light several artifacts, all of them in secondary use. Amongst them, one can single out two important epigraphical documents. The first is a partly preserved marble stele with two Hellenistic decrees of the Athenian Council, one of them, unfortunately, very fragmentary. I had the opportunity to publish the stele in question in 2017. Although I will be returning to this inscription later, let me state in advance that the second, better preserved, decree, dating to the end of the archontic year 103/2 B.C., proved to be of great importance. Amongst others, it showed that the rather enigmatic 'Supervisors of the Lawcourts' (ἐπιμεληταὶ τῶν δικαστηρίων) were active already in the 2nd century B.C. Most importantly, it offered the first attestation of the trials known as 'monthly trials' (ἔμμηνοι δίκαι) in the Hellenistic era, whereas it was previously thought that this type of trial had ceased after the end of the Classical period.[4]

The second inscribed monument found at 98b Adrianou Steet was a fragmentary allotment machine, a *kleroterion*, that is now kept in the storeroom of the Library of Hadrian with the inv.no. ΠΛ 2176. This inscription will be the starting point and focus of my study.

Description. Uppermost part of a white Pentelic marble *kleroterion* of the common 'aedicula' type (figure 1). Traces of a vertical rounded groove that widens at the top can be seen on the badly damaged left side of the monument. They belong to the funnel, which is easier to make out if one looks at the *kleroterion* from above (figure 2). Of the two pilasters, only the left one is partly preserved on the left side of the *kleroterion* (figure 3). The horizontal cornice of the Doric entablature is broken along the front, but the *taenia* underneath is better preserved. It is decorated

[3] Cf. Demont 2010; Papazarkadas 2011.
[4] Full analysis in Papazarkadas 2017.

with *regulae*, of which the left is missing, the central is complete, having a length of 0.07m and a total number of 6 *guttae*, whereas the right one is broken and only preserves 3 of its *guttae*. The 0.07m-high architrave bears a fragmentary two-line inscription.[5] In the main body of the *kleroterion* there is a slightly recessed frame that seems to have been intended to receive an unidentified object (see below). The depression has a width of 0.10m, whereas its preserved height is 0.065m. To the left it is formed into a tab-like border. No slots are preserved. Height (preserved): 0.22m; width (preserved): 0.50m; thickness: 0,195m; letter height: 0.010m (omicron: 0.006m)

[τ]αμιεύοντος ἐπὶ τὰ πρυτανεῖα
[Ἅβρω]νọς τοῦ Κ̣[αλ]λ̣ίου Βατῆθεν

When Habron, son of Kallias, of the deme Bate
was Treasurer in charge of the *prytaneia*.

The text of the inscription is laconic and hardly new: in fact, this is the fourth example of the same text inscribed on a similar monument. The previous three were lumped together by Kirchner in *IG* II[2] 2864, but properly published by Sterling Dow in his monumental 1937 monograph.[6] The three texts have now been re-edited by Jaime Curbera in the new *Inscriptiones Graecae* Attic series as *IG* II[3].4.106, 107, and 108. The better-preserved specimen, *IG* II[3].4.106, was found on the Acropolis, something that Dow took as an indication that the *kleroterion* was dedicated there; I suspect that this is simply a *pierre errante*. Regardless, *IG* II[3].4.107 and 108 were found in the area of the now demolished church of Saint Demetrios Katephores. Of the three monuments, it is *IG* II[3].4.107 that resembles the most the new *kleroterion* from Adrianou Street, especially because of the very similar roughened depression. Dow, by the way, believed that the depression would have been used to attach a papyrus showing the name of the tribe controlling the *kleroterion* or the court associated with the machine.[7] On my part, I would not discount the possibility that some thin wooden or metal plaque was attached to the depression, but this is no more than an educated guess.

First, a word about the *prytaneia* of line 1: readers of the proceedings at hand will hardly need to be told that the term has nothing to do with the prytanies, the tribal contingents that were so important for Athenian administration. The term simply designates court fees deposited ahead of trials.[8] The standard definition is

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[5] The lettering of ΠΛ 2176 resembles that of the 'Cutter of Agora I 247', who produced his work from 194/3 to 148/7 B.C. (Tracy 1990, 99-109); see also note 29 below.

[6] Dow 1937, 203-205 nos. II-IV.

[7] Dow 1937, 204.

[8] In the following two paragraphs, I synopsize what I presented in detail in Papazarkadas 2017, 338-340. To the bibliography cited there, add Cassayre 2010, 276-278.

given by Pollux, *Onomastikon* 8.38: "The *prytaneia* were specified, how much the plaintiff and the defendant respectively had to deposit prior to the trial; if they did not, the Introducers cancelled the trial. Whoever was defeated (at the trial) would pay up the amount given by both sides; the jurors received that (amount)."[9] *Prytaneia* appear fairly frequently in decrees of the 5th century B.C., starting already with the Hekatompedon inscription (*IG* I³ 4). In a famous passage from Aristophanes' comedic court drama *Wasps*, they are enumerated amongst the city's revenues.[10] Writing at roughly the same time, the Old Oligarch implies that such *prytaneia* were regularly paid by citizens of members of the Delian League, who were legally obliged to present themselves to the Athenian courts ([Xen.] *Ath. Pol.* 1.16). Recently, Scafuro dealt with such court fees in her comprehensive article on the economics of the court, in which she demonstrated that, at least in the Classical period, the *prytaneia* would not have sufficed to cover the jurors' salary.[11]

How different were, however, the *prytaneia* of the Hellenistic period? In order to gauge this question, we have to turn our attention to the magistracy of the Treasurer of the *prytaneia*. The office is not attested in the Classical period. In the Hellenistic period, however, it is known not only from the three published *kleroteria* of Habron, to which we must now add the new one, but from other epigraphical sources too. I start with *IG* II² 971 of 140/39 B.C., a rather otiose honorary decree in which the honorand, Telesias of Xypete (a naturalized citizen of Troizenian origin), was awarded an impressive array of crowns for numerous offices he had held throughout his career. Among others, Telesias received a crown from the Athenian Council for his service as Treasurer of the *prytaneia* (ll. 36-39: ἡ βουλὴ | ταμιεύσ|αντα πρυ|τανείων). Later, towards the end of the 2nd century B.C., Charias, son of Charias of the deme Aithalidai, contributed 70 drachmas during his tenure of the treasureship of the *prytaneia* (*SEG* XXIV 194). The monetary sum may look modest, but the same man served on other occasions as gymnasiarch of the Hermaia, priest, and *agoranomos* at Delos, as general in charge of the navy (στρατηγὸς ἐπὶ τὸ ναυτικόν), and as official for the safekeeping of the sacred monies at Delos (ἐπὶ τὴν φυλακὴν τῶν ἱερῶν χρημάτων).[12] Overall, such evidence

[9] Pollux, *Onomastikon* 8.38: τὰ μὲν πρυτανεῖα ὡρισμένα, ὅ,τι ἔδει καταβαλεῖν πρὸ τῆς δίκης τὸν διώκοντα καὶ τὸν διωκόμενον· εἰ δὲ μή, διέγραφον τὴν δίκην οἱ εἰσαγωγεῖς. ὁ δ' ἡττηθεὶς ἀπεδίδου τὸ παρ' ἀμφοτέρων δοθέν, ἐλάμβανον δ' αὐτὸ οἱ δικασταί.

[10] Arist., *Vesp.* 656-659: καὶ πρῶτον μὲν λόγισαι φαύλως, μὴ ψήφοις ἀλλ' ἀπὸ χειρός, | τὸν φόρον ἡμῖν ἀπὸ τῶν πόλεων συλλήβδην τὸν προσιόντα | κἄξω τούτου τὰ τέλη χωρὶς καὶ τὰς πολλὰς ἑκατοστάς, | πρυτανεῖα μέταλλ' ἀγορὰς λιμένας μισθοὺς καὶ δημιόπρατα ("First of all, calculate roughly, not with counters but on your fingers, how much tribute we receive altogether from the allied cities. Then make a separate count of the taxes and the many one-percents, court dues, mines, markets, harbors, rents, proceeds from confiscations"; translated by Henderson 1998).

[11] Scafuro 2015, 367-370, 389.

[12] Papazarkadas 2017, 338.

strongly suggests that the office of the Treasurer of the *prytaneia* was held by distinguished citizens.

Three further pieces of evidence can be added to this small assemblage. First, there is a rather overlooked catalogue of officials, first published by Peek in 1942.[13] This seems to be a list of Athenian, mostly military, magistrates receiving honours of a sort, to judge from the consistent use of accusative forms. In line 9 of the *editio princeps* Peek restored [τὸ]ν ταμίαν τῶν πρ[υτάνεων]. However, as I have already argued elsewhere, this cannot be correct. We do know of treasurers of prytanies (πρυτανίαι), but these were tribal officials, whereas the magistrates of Peek's inscription are without exception state officeholders.[14] I am therefore more than confident that the correct restoration in line 9 is [τὸ]ν ταμίαν τῶν πρ[υτανείων].[15] Here some chronological comments are imperative. *SEG* LXI 151 was roughly dated by Peek to the first half of the 2nd century B.C., but Tracy suggested a date in the late 3rd century B.C. on paleographical grounds.[16] I would like to note, however, that the rather strange office of the tarantinarch, which appears in the document under consideration, is firmly attested for the first time in 153/2 B.C. and, in general, it is considered to be a 2nd-cent. B.C. invention.[17] Most importantly, the prosopographical evidence strongly points towards the middle of the 2nd century B.C. First, the Treasurer of the Military Fund Polycharmos of Azenia (ll. 5-6) has been identified with the homonymous proposer of an ephebic decree of 127/6 B.C.[18] Second, the Treasurer of the Grain Fund Dositheos of Myrrhinous has been identified with the homonymous *hieropoios* of the Delian festival of Apollonia of 143/2 B.C.[19] I would be therefore willing to push the date of Peek's catalogue towards the middle of the 2nd century B.C., if not after 150 B.C.

The second piece of evidence is yet another overlooked inscription, a list of offices discovered at the American excavations of the Athenian Agora. The document in question provides, in the words of its first editor, "a partial record of constitutional procedure in the middle of the second century B.C."[20] Amongst

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13 Peek 1942, 22-24, no. 25; see now *SEG* LXI 151.

14 We find, for instance, the peripolarch (*SEG* LXI 151, l. 4), the treasurer of the military funds (*SEG* LXI 151, l. 6), the tarantinarch (*SEG* LXI 151, l. 14), and the secretary of the *demos* (*SEG* LXI 151, l. 16).

15 See Papazarkadas 2017, 338-339 n. 62.

16 More specifically, Tracy 1990, 49, ascribed this catalogue to his 'Cutter of *IG* II^2 1706' (fl. 229/–ca. 203 B.C.)

17 Bugh 1988, 197; Camp 1996, 257-258; Bugh 2011, 292-293; Couvenhes 2011, 305.

18 See Traill, *PAA* nos. 782240 (Polycharmos the treasurer) and 782245 (Polycharmos the proposer); the identification goes back to Reinmuth 1955, 233.

19 Traill, *PAA* nos. 379260 (Dositheos the treasurer) and 379265 (Dositheos the *hieropoios*).

20 The inscription was first published by Meritt 1934 42-43 no. 31, who dated it shortly after 167/6 B.C., on the basis of the lettering and a reference to the Athenian cleruchy of Myrina. A slightly improved edition was provided by Crosby 1937, 460-461 no. 8, line 1:

various magistracies, many of them obscure, to say the least, one finds a plausibly restored reference to the Treasurer of the *prytaneia*. Incidentally, a striking feature of the list is that many officials, albeit not the Treasurer of the *prytaneia*, are designated as allotted (εἰληχώς), another indication of the ubiquity of allotment procedures in Hellenistic Athens. The date is also worth keeping in mind: this is a document issued after 167 B.C.

The latest attestation of the Treasurer of the *prytaneia* is to be found in the aforementioned Council decree of 103/2 B.C. In a nutshell, a certain Antipatros passed legislation concerning the *emmenoi dikai* and called for the publication of his decree in two stelai, at the expense of the Treasurer of the *prytaneia*: τὸ δὲ γενόμενον ἀνάλωμα με[ρ]ίσαι τὸν ταμίαν τῶν πρυτανείων̣ [– – –]ιαν Παλληνέα (Decree B, ll. 10-11). In the *editio princeps*, I suggested that the Treasurer might have been Deinias of Pallene, who around the same period served as Official in Charge of the Sacred Affairs. One could criticize the argumentation behind this tentative identification as circular; that is, I tried to fit in the gap the name of someone of high social status, thus making a point about the elevated status of the Treasurer of the *prytaneia*. Yet the very fact that the Treasurer of the *prytaneia* is explicitly named is a prime indication of his high standing. The practice of recording in decrees the personal names of serving treasurers first appeared in 181/0 but never became the norm, so much so that it is generally believed, rightly in my opinion, that it marks the distinction of the holder of said office.[21] Not "name and shame", but "name and claim fame", if I am allowed an easy pun.

At any rate, the cumulative evidence unequivocally shows that the Treasurer of the *prytaneia* was a Hellenistic invention, and a relatively late one at that. Moreover, the occurrence of the Treasurer of the *prytaneia* in the new Council decree of 103/2 B.C. is important for a further reason: it confirms, if confirmation were needed, that the office was indeed related to the lawcourts, which is why he, rather than the commonly evoked Treasurer of the Military Fund, was invited to cover the cost for the publication of legislation pertaining to trials.[22]

I now move to the man who served as the Treasurer in charge of the *prytaneia* in the new *kleroterion* from Plaka as well as in *IG* II^3.4.106-108. Habron, son of Kallias, of the deme Bate, was a scion of an illustrious family that could trace its origins back to the 4th century B.C., if not earlier.[23] Until fairly recently, it used to

[ταμίας ἐπὶ τὰ πρυτα]νεῖα. I am grateful to Adele Scafuro for bringing this piece of evidence to my attention, which I did not consider in Papazarkadas 2017.

21 Papazarkadas 2017, 338-339.

22 Papazarkadas 2017, 340.

23 See Davies' superb analysis in *APF* no. 7856, Καλλίας (II) Ἅβρωνος (II) Βατῆθεν (with stemma of the early members of family in table IV). In Davies' *APF* our man in Ἅβρων (III) Καλλίου (III) Βατῆθεν. A full stemma of the family, from the 4th down to the late 2nd century B.C., can be found in Tréheux and Charneux 1998, 249 fig. 2, where the Habron of the *kleroteria* is Habron I, son of Kallias I. See also *Athenian Onomasticon* s.v. Ἅβρων (12); *PAA* s.v. Ἅβρων nos. 101533, 101540, 101545, 101547, 101549);

be believed that Habron was active around the middle of the second century B.C. This picture has been slightly modified in recent years, wrongly as I will be arguing presently. Now, Habron's family played a prominent role in the political and social life of the 2nd century B.C. Of Habron's various activities, I should mention that he was a *proxenos* at Delphi in 189/8 B.C.[24] and that he served as a *hieropoios*, sacred-doer, for the Athenaia in 156/5 B.C.[25] I also note that in 183/2 B.C. Habron made a contribution towards a public loan on behalf of his wife Aristoboule and his sons Kallias and Ophelas.[26] This, it has long been understood, means that both of Habron's sons were still minors. Habron may well have been between 35 and 55 years of age at the time.

These are then the three incontestable dates in Habron's career: showing up for the first time in 189/8 B.C., Habron was still active at an advanced age in the mid-150s. Now, Stephen Tracy, the indisputable master of Athenian lettering, claimed some years ago, on epigraphical grounds, that the *kleroteria* bearing Habron's name should be dated around 180 B.C.,[27] a chronological suggestion that has now been endorsed by Curbera in the new *IG* fascicle.[28] It goes without saying that when it comes to the issue of dating by letter-forms Tracy's opinion carries extra weight. On the other hand, Tracy himself has never ceased to state that dating by letter-forms is always a delicate, sometimes even treacherous, affair. And both Tracy and other prominent epigraphists have time and again emphasized that historical context should always take precedence over formulaic criteria. This is an avenue I would like to explore, and further argue that, for once, Tracy's chronological suggestion should be treated with caution.[29]

Rolando 2004, 153 no. 1, gives a misleading impression of Habron's career (189/8-183/2 B.C.)

24 *Syll.*[3] 585 ll. 106-107 (= no. 41).

25 *IG* II[2] 1937, l. 9. The document is dated by virtue of the eponymous archon Kallistratos, for whom see Meritt 1961, 237. The identification of the festival has long been a problem. Mikalson 1998, 275 with note 90, thinks of the Delian Athenaia, contra Habicht 1982, 177, who thinks of the Chalkeia. Parker 2005, 462-463, is non-committal, but draws attention to the festival's 'elaborate scale'.

26 *IG* II[2] 2332, 189-193, Ἅβρων Βατῆθεν | καὶ ὑπὲρ τῆς [γυ]ναικὸς | Ἀριστοβούλ[η]ς Δ | καὶ ὑπὲρ τῶν ὑ[ῶν] Καλλ[ίο]υ | καὶ Ὀφέλου Δ, with Tréheux and Charneux 1998, 250.

27 Tracy 1990, 247.

28 The high chronology has also been endorsed by Tréheux and Charneux 1998, 253; Rolando 2004, 153; Lopez-Rabatel 2019, 64.

29 To be fair, Tracy himself phrased his observations in his typical careful manner. He assigned the lettering of two of the *kleroteria*, *IG* II[3].4.106 and 108 to 'the school of I 247'. This means admittedly 'no more than a general similarity to the hand in question' (Tracy 1990, 6), but note that the 'Cutter of Agora I 247' had a very long career from 194/3 down to 148/7 B.C. (Tracy 1990, 99-109). Regardless, as I have already indicated, the lettering of the new *kleroterion* does resemble that of the 'Cutter of Agora I 247'.

The four *kleroteria* recording Habron are not the only examples of inscribed allotment machines to have come to us. Another similar *kleroterion* has long been known. It too was recently re-edited by Jaime Curbera, as *IG* II^3.4.109:

– – – – – – – – – – ? – – – – – – – – – –
[ἐ]πὶ Ποσειδωνίου ἄρχοντος ἀνέθηκαν

An obvious question arises: what is the subject of the verb ἀνέθηκαν? Strangely, in his detailed study of the object, Sterling Dow did not venture an answer, even though he speculated, by comparison to *IG* II^2.4.106 (see below) that an extra line would have been once inscribed on the damaged cornice.[30] I will set the question aside for the time being. What really matters at this point of my discussion is the date of the *kleroterion* in question. For once we do have a date, namely the archonship of Poseidonios, that is the year 162/1 B.C. One has to keep in mind that *IG* II^3.4.109 is the only *kleroterion* that provides a firm date. All other examples should be dated with regard to the *kleroterion* from the year 162/1 B.C.

But this is not the end of the story. When Sterling Dow brilliantly solved the riddle of the function of the *kleroteria* he did so helped by two important examples, *Agora* XV 220 and 221.[31] These are two prytany decrees that were inscribed on the rear side of two *kleroteria* in the archontic year 164/3 B.C. The re-use of the *kleroteria* as stelae is explicitly mentioned in the partly, but plausibly, restored publication clauses of the two texts.[32] Dow and subsequent scholars assumed that these were antiquated *kleroteria* that had once been used by the entire Council. Indeed, *Agora* XV 220 contains a total of 300 slots,[33] which, assuming that this was one of two identical *kleroteria*, would suggest an original use at the time of the 12

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[30] Dow 1937, 202.

[31] First published by Dow 1937, 142-147 nos. 79-80 (also 206-207 nos. VI-VII).

[32] *Agora* XV 220 ll. 26-29: ἀναγράψαι δὲ τόδε] τὸ ψήφισμα̣ [τὸγ γρ^v|αμματέα τὸν κατὰ πρυτανε]ίαν εἰς κληρ̣[ωτήρι^v|ον λίθινον καὶ στῆσαι αὐ̣]τὸ ἐν τῶι τεμ[ένει ἐν | ὧι ὁ κλῆρος ἐκρίθη]; *Agora* XV 221 ll. 10-12: ἀν]αγράψαι δὲ τόδε^v| [τὸ ψήφισμα τὸν γραμματέα τὸν κατὰ πρυτανείαν εἰς] κληρωτήριον λίθι|[νον καὶ στῆσαι αὐτὸ ἐν τῶι τεμένει ἐν ὧι ὁ κλῆρος ἐκρ]ίθη. The expression ἐν τῶι τεμένει ἐν ὧι ὁ κλῆρος ἐκρίθη, which has been reconstructed from the few extant letters that survive on the two stelae, has been translated by the editors of *Agora* XV as "the sanctuary in which the selection by lot was consummated". This is a unique phrase that has not drawn scholarly attention, with the exception of Demont 2003, 32-33, who understandably found it difficult. On the other hand, as Demont pointed out, the reference to the *temenos* seems secure. The *temenos* in question might have been the shrine of Theseus: see infra note 56.

[33] Thus explicitly Dow 1937, 207. The assertion of the editors of *Agora* XV, p. 182 ("A reasonable restoration of No. 220 shows room for a full 600 slots") is erroneous, as Adele Scafuro pointed out to me; however, their tentative attribution of both *Agora* XV 220 and 221 to the period of the 12 tribes seems reasonable; see next note.

tribes,[34] in other words at some point between 307/6 and 224/3, or after 200 B.C. No one seems to have wondered why a decision to withdraw these *kleroteria* from circulation was taken in 164/3 B.C.,[35] but in view of the *kleroterion* from 162/1 B.C., I strongly suspect that something major was going on in the 160s with regard to allotment procedures.

In fact, it is very likely that in 164/3 B.C. the Athenians removed from circulation some of the earlier *kleroteria*, precisely because a decision had been made to produce new ones, like those inscribed with Habron's name. That this was a central decision of the Athenian state can be seen in another small, yet important detail. In 1937, in his publication of the *kleroterion* from the Athenian Acropolis (now *IG* II^3.4.106), Dow noticed traces of letters on the cornice, even though he was unable to produce a meaningful text.[36] Several years ago, I had the opportunity to inspect the stone in the Epigraphical Museum along with Dimitris Sourlas, the archaeologist who brought to light the new *kleroterion* from 98b Adrianou Street. The Acropolis *kleroterion* is on display in the permanent exhibition of the Epigraphical Museum, and we were therefore unable to use charcoal or any other aid, but the letter traces were clear (figure 4).[37] The opening formula on the cornice reads:

ἡ̣ β̣[ο]υλὴ ἡ ἐπ[ὶ – – – – – – ἄρχοντος – – – – – –]

Unfortunately, the eponymous archon's name cannot be retrieved, but I would strongly favor an archon from the late 160s. In any case, in light of the new reading offered above there can be no doubt that the Athenian Council was heavily involved in the making of the new *kleroteria*. This observation might also help us solve the aforementioned enigma of the missing subject of the *kleroterion IG* II^3.4.109. On present evidence, the most likely agent of dedication of that *kleroterion* would be the

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34 Cf. Demont 2010: "Pourquoi le *klèrôtèrion* sur lequel figure l'inscription n° [220], tel qu'il est reconstitué par les archéologues, est-il un appareil à six colonnes, correspondant donc à un appareil utilisable pour le tirage au sort d'un Conseil à l'époque où Athènes a comporté douze tribus… ?"; Lopez-Rabatel 2019, 64: "Le klèrôtèrion n° 3, daté par l'inscription de 164/3 est pourvu de six colonnes. À supposer qu'on ait utilisé conjointement un klèrôtèrion jumeau, on avait un total de 12 colonnes, ce qui correspond aux douze tribus qu'Athènes a connues de 200 à 127 [ap. J.-C]."

35 To be sure, Dow 1937, 210 with note 2, put forward some interesting ideas, albeit in the most concise and hesitant manner ("For none of these propositions is there any evidence"). Of these, Dow's first theory (abandonment of allotment on a large scale) should be rejected on the evidence of *Agora* XVI 305 (see below). The other two theories are of a utilitarian character, and, with some modification, tally well with my own interpretation below.

36 Dow 1937, 203-204 no. II.

37 Curbera, in his description of *IG* II^3.4.106, notes "Tit. in epistylio exaratus", but the inscription is worn, rather than deliberately erased.

Councilors, οἱ βουλευταί. In turn, the evidence of *IG* II^3.4.109 allows us to restore the verb ἀνατίθημι in what now becomes line 1 of *IG* II^3.4.106:[38]

ἡ̣ β̣[ο]υλὴ ἡ ἐπ[ὶ – – – – – – ἄρχοντος ἀνέθηκεν]

Finally, I would like to draw attention to another feature of Habron's *kleroteria* that has passed unnoticed. In all four examples, we encounter the construction of the genitive absolute ταμιεύοντος. The present tense emphasizes that the *kleroteria* were constructed while Habron was still serving as a Treasurer.[39] For contextual reasons I have analyzed above, his tenure of office almost certainly belongs to the 160s, late in his career. He was probably the main disbursing authority for the manufacturing of the *kleroteria* that bear his name.[40] What emerges then from this evidence is a systematic attempt to highlight the agents involved in this major administrative overhaul of the 160s.

In order to explore the question of what might have triggered this interest in *kleroteria* in the 160s, I will indulge myself in a brief digression on the previous state of judicial affairs in Hellenistic Athens. I will pass over the first period of Demetrios Poliorketes, which is explored by Ilias Arnaoutoglou elsewhere in the volume at hand, who shows that Athens' return to democracy in 307/6 B.C. was accompanied by a resuscitation of the judicial system.

Allotment, for instance, one of the salient features of radical democracy according to a famous Aristotelian extract, was certainly being used for the manning of lawcourts, and in fact it was considered important enough to warrant explicit reference in a decree of 284/3 B.C. (*IG* II^2 1163). In that document a certain Phyleus was honored, amongst others, for having supervised the allotment of the courts justly and in compliance with the laws, no doubt as a *thesmothetes* representing his tribe.[41]

In fact, ill-informed as we are about numerous aspects of Hellenistic lawcourts, we know of at least one sector of public life in which lawcourts played an important role, namely naturalization procedures. Throughout the Hellenistic era, the *thesmothetai* routinely introduced grants of citizenship to courts consisting of 501

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38 Attic epigraphy has produced several examples of the formula ἡ βουλὴ ἡ ἐπὶ τοῦ δεῖνος ἄρχοντος followed by the verb ἀνέθηκεν; see, e.g. *IG* II^3.1.306, ll. 1-2: ἡ βουλὴ ἡ ἐπὶ Πυθοδότου [ἄρχοντο]ς ἀν[έ]θ[ηκεν] | Ἡφαίστωι στεφανωθεῖσ[α ὑπὸ] τοῦ δήμο; *IG* II^2 1425, ll. 313-315: ἡ β[ουλὴ] | ἡ ἐπὶ Χαρισάνδρο ἄρχον[τος] | ἀνέθηκεν; *IG* II^2 2797, l. 1: [ἡ βο]υλὴ ἡ ἐπὶ Τηλοκ[λέου]ς ἄρχοντος ἀνέθ[ηκεν], etc.

39 Cf. Goodwin 1867, 16.

40 Kroustalis 2018, 117.

41 *IG* II^2 1163, ll. 3, 8-13: ἐπειδὴ Φυλεὺς... ἐπιμελεῖται δ|ὲ καὶ τῆς κληρώσεως τῶν δικαστ[η|ρ]ίων καὶ τῶν ἄλλων ὧν αὐτῶι οἵ τ[ε] | νόμοι καὶ τὰ ψηφίσματα προστάτ|τουσιν δικαίως καὶ κατὰ το[ὺ]ς νό|μους (Inasmuch as Phyleus... is superintending the allotments of the law-courts and other things that the laws and decrees enjoin honestly and in accordance with the laws...).

jurors. In his *opus magnum*, Michael Osborne firmly associated the judicial scrutiny with the democratic periods of Athenian administration, demonstrated that it only became a regular feature of citizenship decrees after 229, and concluded that it probably replaced the *graphe paranomon*, the erstwhile public prosecution process par excellence.[42] If so, far from being a decorative element, Hellenistic lawcourts suddenly turn out to be an important component of Athens' political life.

Archaeology tells a similar story of vigorous judicial activity. Several bronze ballots have been found in Athens, of which most are associated with the courts rather than with other state institutions. In particular, some of the class III examples, a class comprising uninscribed ballots of relatively small diameter, have been found in good 3rd-century B.C. contexts, and it is generally believed that the latest examples may well reach into the 2nd century B.C.[43] Lead ballots, which seem to have replaced bronze ones in an attempt to economize, also seem to belong to the late Hellenistic period.[44]

Likewise, lead tokens dating to the third century have long been recognized as dikastic equipment: the jurors used them either to be allocated seats in designated areas or as pay-vouchers in order to receive their payment.[45] As aptly noted by Boegehold, a dikastic joke preserved in a 3rd century B.C. fragment of the comic poet Machon is only meaningful within the context of a fully operating court system.[46] All in all, the Hellenistic period was not one of decline of juridical institutions.

However, the inscribed *kleroteria* of the 160s analyzed above evince some extraordinary, newly acquired dynamics. Nor does this evidence stand alone. A strangely overlooked piece of evidence is *Agora* XVI 305, a fragmentary decree dating to the archonship of Lysiades, probably 148/7 B.C. Enough text survives to make it clear that this is not yet another formulaic decree, yet not sufficiently enough to establish what is the exact issue at stake. Arguably, the most striking feature of *Agora* XVI 305 is the triple repetition of the word κλήρωσις. The term appears in line 10, where the grammatical case cannot be established, in line 19, in the genitive κληρώσεως, and finally in line 21, in the nominative, i.e. ἡ κλήρωσις. Woodhead, the editor of *Agora* XVI, thought that the term might have referred to some kind of territorial allocation. However, I am in agreement with Stephen Tracy that the word here has its primary meaning, sortition, although whether it refers to the courts or to non-judicial boards of magistrates is more difficult to determine.[47] At any rate,

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[42] Osborne 1983, 164-167.

[43] M. Lang, in *Agora* 1995, 86, 89 nos. B35 and B36.

[44] See especially M. Lang, in *Agora* XXVIII no. B52.

[45] A. Boegehold in *Agora* XXVII, 68.

[46] A. Boegehold in *Agora* XXVII, 239.

[47] For the record, Tracy 1990, 152-154, believed that the text did not refer to lawcourts but to the allotment of the board of the archons mentioned in ll. 35-66 ([τῶν ἐν]|νέ' ἀρχόντων).

Agora XVI 305 is a good reminder that sortition mattered a lot around the middle of the 2nd century B.C.

Is there a wider picture then? Let me begin with a topographical observation. Two of Habron's old *kleroteria* were discovered in the (now demolished) Church of Saint Demetrios Katephores. The new *kleroterion* ΠΛ 2176 was found in the very same area, less than fifty meters north of the erstwhile church. Along with it, was found the new decree that concerns the *emmenoi dikai*. Moreover, the allotment machine dedicated in the archonship of Poseidonios was found in the area of the Library of Hadrian, about 150 meters west of 98 Adrianou Street. Finally, the small *kleroterion*-fragment published by Boegehold in 1995 was found at the excavation of the so-called Diogeneion, hardly 30 meters south of 98 Adrianou Street. The geographical pattern is clear enough: with the exception of the Akropolis kletorerion, the others come from a rather well defined area north/northeast of the Sacred Rock. To cut a long story short, in my *Hesperia* article I argued that it is in that area of Athens where we should seek the Athenian courts, at least those of the Hellenistic period.[48]

One can be excused for believing that all lawcourts were in the area of the Athenian Agora. Several were certainly there, but not all. It is true that the only buildings securely identified as courts were located on the eastern side of the Agora.[49] They were succeeded by the so-called Square Peristyle, a building thought to have been designed with the aim of bringing under the same roof all the separate heliastic lawcourts.[50] But the Square Peristyle itself, which by the way was never completed, was dismantled in the early 2nd century B.C, and around 150 B.C. the whole area was occupied by a building all too familiar to the modern visitor of Athens, the impressive Stoa of Attalos. In other words, the late Hellenistic lawcourts should be sought elsewhere.[51]

The evidence I have adduced above points towards the area to the east of the Library of Hadrian, along and south of Adrianou Street. As I have argued elsewhere, this might well have been the area that was known in late Hellenistic Athens under the generic name τὰ δικαστήρια, "the lawcourts", a collocation attested in the publication clause of a decree dating circa 100 B.C.[52]

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48 Papazarkadas 2017, 350-352.

49 R. F. Townsend, in *Agora* XVIII, 104-108.

50 See R. F. Townsend, in *Agora* XVIII, 108-113.

51 Recently, this point was duly observed by Dickenson 2017, 154-157, but his topographical suggestion fails to convince.

52 *IG* II^2 1062, lines 6-8: ἀναγράψαι [[δὲ]] τόδε τὸ ψήφ[ισμα ἐν στήληι λιθίνηι τὸν γραμματέα] | τὸν κατὰ πρυτανείαν καὶ στῆσ[αι ἐν ἀκροπόλει καὶ ἐν τοῖς δικασ]|τηρίοις ('let the Secretary of the Council inscribe this decree on a stone stele and set it up on the Acropolis and in the lawcourts'). See Papazarkadas 2017, 351 with note 120, where I pointed out that in the ensuing disbursement clause (ll. 8-9), the restoration μερίσαι δὲ αὐτῶ[ι τὸν ταμίαν τῶν πρυτανείων τὸ γενό]|μενον ἀνάλωμα, is epigraphically tenable and conceptually more cogent than the traditional [τὸν ταμίαν τῶν

Interestingly, about 200 meters south of 98 Adrianou Street probably lay the Prytaneion,[53] the most reverent civic space of ancient Athens, and a site closely linked with judicial activity. Indeed, various sources identify the Prytaneion as a homicide court, and more specifically as a court for cases of murder committed by an unknown perpetrator, an animal, or an inanimate object. After all, this oft-forgotten judicial aspect of the Prytaneion must be the reason why the court-fees I discussed earlier were known as the *prytaneia*. This tentative association is not new: it was proposed a long time ago by Bonner and Smith in their 1930 monograph on Greek judicial administration.[54]

Nor should we associate *kleroteria* exclusively with the courts. Selection by lot was a salient feature of Athens' civic administration. There is, in fact, a site that in our sources is habitually associated with sortition, namely the sacred precinct of Theseus.[55] Although the Theseion has not been found, most scholars believe that it was located exactly in the area where most of the inscribed *kleroteria* have been found. Incidentally, I consider it likely that this was the *temenos* mentioned in the publication clauses of the two reused *kleroteria*, *Agora* XV 220 and 221.[56] At any rate, here I can only repeat what I have already stated in my *Hesperia* article: overall, there are many indications that the whole area to the east of the Library of Hadrian, all the way to the Prytaneion, might have been a hub of allotment procedures and judicial activity.

My second point is of a historical nature. Habron's *kleroteria*, the allotment machine dedicated in the archonship of Poseidonios, the allotment decree *Agora* XVI 305, and most —arguably all— the epigraphic attestations of the Treasurer of the *prytaneia*, all belong to the mid-2nd century B.C. or slightly later. Besides one can hardly fail to notice that the new Council decree of 103/2 B.C. attests to *emmenoi dikai*, a type of trial usually associated with commercial transactions. To take up a question that has been pending for some time: what triggered Athens' newly discovered obsession with sortition in the 160s and how are we to account for the intensive juridical activity in the second half of the 2nd century B.C., as emerges from our epigraphical sources? Running the risk of offering a monolithic simplistic

στρατιωτικῶν]; if so, we gain yet another attestation of the Treasurer of the *prytaneia*. In his important unpublished dissertation, Kroustalis 2018, 115-119, is in agreement with my proposal that we should look for the late Hellenistic lawcourts near the findspot of the new *kleroterion*, and in fact he provides further evidence in support of this theory. He would prefer, however, to place the complex of the lawcourts north, rather than south, of Adrianou Street.

53 For the location of the Prytaneion, see Kroustalis 2013 and, in more detail, Kroustalis 2018, 89-115.

54 Bonner and Smith 1930, vol. I, 63-65; cf. Papazarkadas 2017, 352.

55 Daverio Rocchi 2001, 97-101.

56 *Agora* XV 220 ll. 26-29 (supra note 32), esp. ἐν τῶι τεμ[ένει]. It is noteworthy that, as Daverio-Rocchi 2001, 97 note 6, has aptly observed, the shrine of Theseus is routinely called a *temenos* in the ancient sources.

interpretation, I believe that chronological and historical considerations point towards one direction: Delos and its return under Athenian control in 167 B.C. Athens' reacquisition of Delos brought about unexpected financial prosperity. Besides, Athens reacquired some of its erstwhile cleruchies, the revenue-producing islands of Lemnos, Skyros, and Imbros.[57] After 167 B.C., the wider Athenian economic zone experienced intensive activity not seen since the end of the Classical period. But increased commercial and other financial transactions inevitably resulted in an increasing number of disputes, whose expeditious adjudication must have become a priority for the Athenian state. It is this financial prosperity, evident also in the numismatic evidence, which accounts for the rejuvenation of the courts and the proliferation of allotment procedures, which, after all, had never really died out, but which acquired extra impetus after 167 B.C.[58]

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[57] Habicht 1997, 217-218.

[58] For further details, see Papazarkadas 2017, 352-354. It is worth noting that fragments of marble *kleroteria* very similar to those from Athens have been found in Delos. Moretti 2001, 142-143, provisionally dated them to the period of Delian independence, but it is not impossible, in fact it is historically more plausible, that they should be linked with Athens' occupation of Delos after 167.

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FIGURES

Figure 1: The new *kleroterion* ΠΛ 2147
(copyright: Ephorate of Antiquities of Athens)

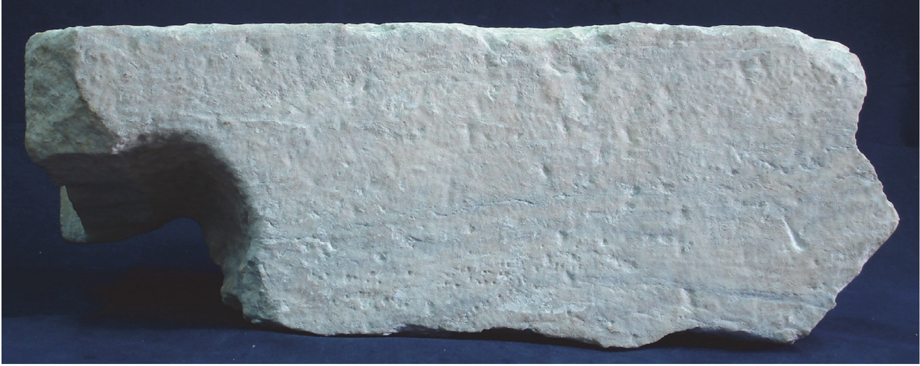

Figure 2: Upper side of ΠΛ 2147 (copyright: Ephorate of Antiquities of Athens)

Figure 3: Left side of ΠΛ 2147 (copyright: Ephorate of Antiquities of Athens)

Figure 4: *IG* II^3.4.109 (Epigraphical Museum);
detail of the newly read inscription
(photo: Adele Scafuro)

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A NEW INSCRIBED *KLEROTERION* FROM HELLENISTIC ATHENS: RESPONSE TO NIKOLAOS PAPZARKADAS

Nikolaos Papazarkadas continues his examination of court monuments, initiated in his 2017 *Hesperia* article, where he presented the *editio princeps* of ΠΛ 2148, a decree of the Athenian Council dated by archontic year to 103/02. The decree (via Papazarkadas' excellent text and commentary) contributes substantially to our knowledge of legal procedure and personnel in late Hellenistic Athens: it attests to the existence of the monthly trials (ἔμμηνοι δίκαι)—perhaps recently revived from disuse with additions suitable for current administrative needs; to the activities of the 'Supervisors of the Lawcourts' (ἐπιμεληταὶ τῶν δικαστηρίων); and to a new and extremely important datum concerning the duties of the ταμίας τῶν πρυτανείων, viz., the first attestation of his 'carrying out the task of allocating money for the erection of stelai' (2017, 338). The office of the treasurer of the *prytaneia* drew particular attention in the *Hesperia* article; Papazarkadas associated it with a series of *kleroteria* all carrying the same brief but not equally preserved text: ταμιεύοντος ἐπὶ τὰ πρυτανεῖα | Ἅβρωνο̣ς τοῦ Καλλ̣ίου Βατῆθεν. If the title of the magistrate in ΠΛ 2148, in conjunction with the task assigned to him (B9-10, to allocate funds for publishing a decree connected with the monthly lawsuits), was not sufficient to tie this particular treasurer to the lawcourts, then the inscribing of the name of the treasurer of the *prytaneia* on a series of *kleroteria* made that connection ironclad.

In Papazarkadas' new essay, the treasurer of the *prytaneia* and the series of *kleroteria* once again are given a spotlight—for now he is publishing a second monument from the same findspot as the *stele* with the decree about the monthly trials; this is another *kleroterion*, and it bears exactly the same text as the *kleroteria* mentioned in the last paragraph, ταμιεύοντος ἐπὶ τὰ πρυτανεῖα | Ἅβρωνο̣ς τοῦ Καλλ̣ίου Βατῆθεν. Papazarkadas carefully contextualizes the series of four *kleroteria* with Habron's name and persuasively argues for a date in the 160s in three steps. First, he considers all the biographical data available for Habron and his family from inscriptions and then pinpoints Habron's publicly documented career as running from 189/8 to the 150s; this suggests to him that Tracy's recommendation of a date ca. 180 (based on letter forms) for the texts on Habron's *kleroteria* may be too early and that a historical contextualization of the series may suggest a later one. Towards this end, he next considers texts inscribed on three *kleroteria* outside the

'Habron series'. One (*IG* II^3.4.109) is dateable to 162/1, thanks to the presence of the archon's name. The two other *kleroteria* (*Agora* XV 220 and 221) are inscribed on the 'reverse' sides (i.e., on the backs that do not carry the slots) with texts that at first were only dateable inside a span of eleven years, between 166/5 and 155/4, because the named herald, Eukles of Trinemeia, and *aulos*-player, Kallikrates of Thorikos, are attested as active in that period (Dow 1937, 17-18 and 145); later that span was narrowed to 164/3, with the appearance of more prosopographical evidence and the persuasive restoration of Euergetes' name as archon (Meritt 1957, 74-77). These two *kleroteria* will have been 'retired' from use as allotment machines when their reverse sides were inscribed with the decrees in 164/3. The *kleroteria* that bear the texts, however, cannot be dated with such precision: they may have been in use as allotment machines either between 307/6 and 224/3, or after 200, because the number of slots in *Agora* XV 220 (300 slots) is suitable for original use in the period of the 12 tribes; the important point to which Papazarkadas has given recognition is the date they were retired. Finally, Papazarkadas returns to the four *kleroteria* belonging to the 'Habron series', still in search of a date for them that may be later than Tracy's date ca. 180; Papazarkadas now shrewdly points out that the present tense of the genitive participle ταμιεύοντος 'emphasizes that the *kleroteria* were constructed while Habron was still serving as a Treasurer'; he then concludes, 'For contextual reasons […], his tenure of office almost certainly belongs to the 160s, late in his career. He was probably the main disbursing authority for the manufacturing of the *kleroteria* that bear his name' (p. 114).

Contextualization does not end here: Papazarkadas continues with a depiction of a broader canvas of lawcourt activity without losing sight of the significance of the retirement of some *kleroteria* in the 160s (e.g., *Agora* XV 220 and 221); as for the latter, he proposes that the Athenians purposely removed *kleroteria* in 164/3 so as to replace them with new ones (e.g., the 'Habron series'). In the end, he puts together a cornucopia of court-related documents, artifacts, and topographical considerations of the late Hellenistic era and concludes that all signs point to 'Delos and its return under Athenian control in 167/6 B.C.'; from this point, financial prospects bloomed; business activity increased; Athenian cleruchies were established once again—and financial and commercial disputes (note the 'monthly suits' that are prominent in the *editio princeps* of ΠΛ 2148 in *Hesperia* 2017) arose in proportion. The courts, for better or worse, were rejuvenated; and rejuvenation calls for new equipment and perhaps also (I may add), for rich citizens such as Habron, to fill some of the more burdensome and probably elective magistracies.[1]

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1 A [ταμίας ἐπὶ τὰ πρυτα]νεῖα appears in a list of (apparently) 11 magistracies and two boards of magistrates in Crosby 1937, 460-61, no. 8 (see Papazarkadas' essay in this volume, n. 20); six of the magistrates' titles are followed by the past participle εἰληχώς, 'allotted'; should we infer, then, that the other magistrates were elected? Kahrstedt (1936, 51) made such an argument for a similar list; Crosby suggested it for this text when she re-published it in 1937. The magistracy, then, belongs to that tier of officials who were

This is an attractive, thoughtful, and economical contextualization. Papazarkadas' date for the Habron texts is simultaneously a date for Habron's holding the office of *tamias* of the *prytaneia*, for producing new *kleroteria* (such as the ones bearing his name) and for the retirement of some older ones (such as *Agora* XV 220 and 221 in 164/3). The dating of Habron's texts is compelling; Tracy's competing date, ca. 180, seems too early in Habron's career for such a distinguished and probably elective office. But is the tying together of the two events (the production of new *kleroteria* and the retirement of others, the 'economical' aspect of Papazarkadas' argument) likewise persuasive? As I have just pointed out in the case of the 'retired *kleroteria*' (*Agora* XV 220 and 221), the date for the texts does not automatically coincide with the date for the *kleroteria* themselves. So now the question arises for Habron's *kleroteria*: did he order new *kleroteria* while he was *tamias*—does the date of the texts match the date of the production and acquisition of the objects themselves—or perhaps the date of their distribution to a different or new court site or even a sanctuary (i.e., were the *kleroteria* already available)? The number of slots will not be helpful here—for where they can be estimated with some confidence, they will simply belong to the 'period of the 12 tribes'—i.e., they cannot pinpoint a date within that long period. We must once again turn to the texts inscribed on the principal face of the *kleroteria* (both the 'non-Habron' text, *IG* II³.4.109, that was dateable to 162/1 by the archon's name, and the four Habron texts that have something to do with his tenure as *tamias* of the *prytaneia* in 164/3.

In the course of his argument, Papazarkadas offered two modest and convincing suggestions for the texts of *IG* II³.4.106 and *IG* II³.4.109. For the first (a 'Habron text'), he argued that the traces of letters that were observed by Dow in its cornice (but viewed as 'erasures' by Curbera in the lemma to *IG* II³.4.106), could be read as β̣[ο]υλὴ ἡ ἐπ[ὶ – – – – – – ἄρχοντος – – – – – –]; moreover, on the basis of *IG* II³.4.109, the verb ἀνατίθημι could be restored in *IG* II³.4.106 as ἡ̣ β̣[ο]υλὴ ἡ ἐπ[ὶ – – – – – – ἄρχοντος ἀνέθηκεν]. Additionally, the visible letters on the cornice of *IG* II³.4.106 appear to be of the same hand that carved the two-line text on the architrave.[2] As for *IG* II³.4.109, – – – ? – – – ι[ἐ]πὶ Ποσειδωνίου ἄρχοντος ἀνέθηκαν, a subject could be suggested for ἀνέθηκαν: 'the most likely agent of dedication of that *kleroterion* would be the Councillors, οἱ βουλευταί'. Here we must consider the meaning of ἀνέθηκεν in *IG* II³.4.106 and ἀνέθηκαν in *IG* II³.4.109; as Papazarkadas implies in the words I have just cited from him, each means 'dedicated'—in the one case, 'the β̣[ο]υλὴ . . . dedicated', and in the other, '[οἱ βουλευταί] . . . dedicated'. But if these two *kleroteria* (one issued by Habron)

not democratically allotted but elected for their skill set and expertise. In regard to the 'Supervisors of the Courts', Papazarkadas in *Hesp*. 2017 348 with n. 105 noted 'the happy coincidence of elected (κεχειροτονημένοι) officials being asked to disburse funds for expenses in both *IG* II² 1023 and the new inscription from Plaka.'

[2] Papazarkadas *per ep.* and confirmed during our autopsy of the *kleroterion* in the Epigraphical Museum on December 30, 2019.

are ‘dedications’, then probably these two *kleroteria* were also put out of use as allotment machines.

Here we enter some muddy epigraphical/archaeological territory. Curbera has included all the ‘Habron *kleroteria*’ as ‘dedications’ in the *IG* fascicle titled ‘*Dedicationes Publicae*’. Dow (1937, 209-10) appears to have thought that only *IG* II^3.4.106 (= Dow no. II) and *IG* II^3.4.109 (= Dow no. I) were dedications, the latter (presumably) because of ἀνέθηκαν, and the former because it was found on the Acropolis;[3] he thought that their dedication ‘probably means that these two machines were then retired from use.’ Papazarkadas, on the other hand, thinks that the circumstances of dedication in the Hellenistic period were different from those in the Classical and offers as one example:

> ‘Λεωνίδης Πρωτέου Ἁλικαρνασσεὺς τὴν στοὰν καὶ τὰ οἰκήματα τὰ ἐν τῆι στοᾶι πάντα ἀνέθηκεν | τῆι πόλει” (*BCH* 59 (1935) 514, VIII), which shows that by the Hellenistic period the verb ἀνέθηκεν might have ceased meaning exclusively “dedicate to gods”. But even if it didn’t in the case of Athens, it is clear that one dedicates something new, like a stoa.’[4]

According to Papazarkadas’ thinking, none of Habron’s *kleroteria* were retired. I am not so sure. A *kleroterion* is not so much like a stoa or a room (no matter that earlier scholars thought that *kleroteria* were rooms—we are way beyond that now!) that can be dedicated to a city; it is more like a *stele* or statue base or even a *phiale*. Not all dedications of the fourth and third centuries mention the dedicatee, whether god, goddess, or city;[5] the same holds true in the second century;[6] most likely, a divinity dedicatee is to be inferred from the location of the dedicated object—unless the name of the dedicatee in the dative case has dropped out of the text.[7] How then are we to explain the ‘dedication’ of the two *kleroteria* in question, the text of one dated definitely to 162/1 (*IG* II^3.4.109) and the other (*IG* II^3.4.106), convincingly dated to 164/3—and both possibly ‘retired’ to a sanctuary?

I suggest we consider the texts of the ‘Habron *kleroteria*’ once again: ταμιεύοντος ἐπὶ τὰ πρυτανεῖα | Ἅβρωνος̣ τοῦ Καλλ̣ίου Βατῆθεν. Rather than reading the string of genitives as a genitive absolute as Papazarkadas does, I suggest

[3] Papazarkadas makes the attractive proposal that *IG* II^3.4.106 is a *pierre errante*; this makes sense against the collective background of findspots that he localizes in fine detail; however, the fact that the one ‘Habron *kleroterion’* that was found apart from the others, on the Acropolis, seems also to have been inscribed with a dedicatory notice, suggests otherwise.

[4] I am grateful to Papazarkadas for supplying this and other examples *per ep.* and for citing Noah Kaye’s 2016 *Hesperia* essay on the Stoa of Attalos, and especially his treatment of the Pharsalian decree for Leonides of Halicarnassus.

[5] E.g., *IG* II^3.4.7, 26, 28, 29, 31, 32, 41, 49, 56, 68, 73, 74, 76, 79.

[6] E.g., *IG* II^3.4.104, 105.

[7] In the case of the text of the *kleroterion IG* II^3.4.1.106, Papazarkadas has suggested to me, *per ep.*, e.g.: ἡ̣ β[ο]υλὴ ἡ ἐπ[ὶ – – – – – – – ἄρχοντος ἀνέθηκεν τῶι Θησεῖ *vel sim*].’ For the significance of the Theseion, see Papazarkadas 2017, 351-2.

we understand them as 'possessive': '[the kleroterion] of Habron son of Kallias of Bate serving as *tamias* of the prytaneia'.[8] The *kleroteria* 'belong' to Habron because as *tamias* of the *prytaneia*, he was responsible (so it seems) for supplying some court equipment which included *kleroteria*; and it also seems that he did so from his own pocket (thus Dow 1937, 212; Papzarkadas, this volume, p. n. 39).[9] If this is so, then Papazarkadas is right that the four *kleroteria* were probably produced and acquired at the same time, during Habron's term as treasurer of the *prytaneia* in the late 160s, perhaps as part of a new policy of augmenting court equipment such as *kleroteria* during a period that was seeing a rise in the number of court cases; however, either while Habron was in office or shortly thereafter, one of the new *kleroteria* (*IG* II^3.4.106) was retired and dedicated, either for a malfunction or for some other reason unknown to us.[10] Another *klerotrion* (*IG* II^3.4.109), outside the 'Habron series', was retired and dedicated in 162/1.

Papazarkadas has made a fine contribution to our understanding of the activity of lawcourts in late Hellenistic Athens. His *editio princeps* of ΠΛ 2176, a fragmentary allotment machine, has taken us well beyond the eight words inscribed on its architrave, to other contemporary and near contemporary documents and monuments relevant to the courts, and then all the way to Delos which he has conjectured as a source for the rejuvenation of law court activity. Back in Athens, a careful study of the findspots, moreover, has allowed him to conjecture the location of the late Hellenistic lawcourts away from the Agora, 'towards the area to the east of the Library of Hadrian, along and south of Adrianou Street'. Scholars in the coming years will have to mull over these new perspectives for the Athenian courts provided by Papazarkadas' work;[11] indeed, the continued activity of the lawcourts may go some way to explaining the near absence of decrees celebrating foreign judges for coming to the city and solving local disputes for the Athenians.[12]

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[8] For 'serving as *tamias* of the *prytaneia'*, one might use, 'who is [or was] *tamias* of the *prytaneia'*. For such 'stand-alone' genitives, one might look to Attic *horoi*; see Lalonde 1991, 17 and as samples, H 1 ([sc. *horos*] of the goddess) and H 8 ([sc. *horos*] of the sanctuary).

[9] The *kleroteria* are like the cups that Langdon 1991, 60 n. 16 supposes the polis commissioned (rather than extracted from confiscated property) for public use—except that Habron and not the polis has purchased the *kleroteria*.

[10] That the 'dedicatory' text in the cornice appears to be of the same hand as that in the the two-line text naming Habron (see text at n. 2), of course does not mean that both texts were carved at the same time; nevertheless, the dedicatory text will not have been carved too much later.

[11] Walser 2012 is important for this topic; and we look forward to hearing more from Ilias Arnaoutoglou and L. Rubinstein as well.

[12] Gauthier 1999.

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THE RECRUITMENT AND REMUNERATION OF CONSTRUCTION WORKERS IN CLASSICAL ATHENS

Abstract: In Classical Athens, there was not a preference for hiring workers directly rather than contracting out work for the completion of public building projects. In reality, a close analysis of the epigraphic evidence reveals that several systems of labor recruitment and remuneration, including business partnerships, coexisted and overlapped, with public officials taking advantage of all available legal instruments to deal with the fragmented and complex structure of the labor market.

Keywords: public building, building contracts, construction workers, craftsmen's workshops, business partnerships

The goal of this article is to ascertain through which legal instruments Athenian magistrates of the Classical Age recruited and remunerated construction workers for the completion of public building projects. By construction workers, I mean several types of skilled, specialized craftsmen, not only stonemasons, but also carpenters, metalworkers, brick makers, sculptors, painters, and so on. Contrary to the traditional viewpoint, I intend to show that in Athens there was not a preference for hiring workers directly rather than contracting out work. In reality, several systems of labor recruitment and remuneration coexisted, intersected, and overlapped in both the fifth and fourth centuries as a consequence of the fragmented and complex structure of the Athenian labor market.[1]

1. Our knowledge of building contracts in the ancient Greek World is based on the evidence provided by epigraphic documents, mostly building specifications, contracts, and accounts, coming from different cities and sanctuaries – the most important ones being Athens, Epidaurus, Tegea, Delos, Delphi, and Lebadeia – and dated from the fifth to the second centuries. This evidence shows that building contracts were binding and formal agreements between two parties – in this case,

[1] This article is a preliminary and concise version of several arguments discussed in my in-progress book on public building and the Athenian democracy. I am grateful to the organizers of the 2020 Symposion conference, Kaja Harter-Uibopuu and Werner Rieß, for the opportunity to present this text in front of the expert audience gathered in Hamburg and to all the participants for their valuable feedback. Naturally, I take full responsibility for the final version. All dates are BC unless otherwise stated.

public officials and private contractors – in which the specifications for the contracted-out job, and the terms and conditions according to which said job was to be completed, were set forth. The types of provisions usually included in building contracts throughout the Greek world are strikingly similar to each other. The most common of these provisions concerned the method of payment (usually in installments, including an advance payment), the appointment of guarantors by the contractor, a precise deadline for the completion of the works, and the possible enforcement of fines for delayed, incomplete, or poorly executed jobs.[2] The similarity of these provisions must not be considered the result of the application of a general form of contract shared by all Greek cities, but, more likely, the result of similar solutions devised by different cities to answer the same needs – solutions that probably developed and grew closer over time through contact and exchange between city-states.[3]

In her work on temple builders at Epidaurus, dated to the 1960s, Alison Burford argues that the contracting out of building works as opposed to the direct hiring of workers developed primarily in remote places such as Delphi, Epidaurus, and Delos, where the lack of locally available skilled workers and building materials was a serious obstacle to the completion of large-scale building projects. In such situations, the use of building contracts developed as the most convenient and efficient device to attract skilled labor with the promise of long-term jobs and, at the same time, to ensure that jobs were adequately completed according to the requirements of public officials. By contrast, in fifth-century Athens, where the ambitious projects of the Periclean age and the lively economy attracted per se a large number of skilled workers, the use of building contracts was unnecessary and sporadic. Thus, public officials would hire craftsmen directly and pay them through a daily rate system or a piecework system. This practice resulted in an extreme fragmentation of building projects, usually split in many small portions assigned to many different workers. Only later, in the fourth century, magistrates tended more and more to recruit and remunerate construction workers through the legal instrument of building contracts, or, in other words, to contract out entire building projects, or large portions of them, through public auctions.[4]

More recently, in his study of craftsmen employed by Greek sanctuaries of the Classical and Hellenistic Age, Christophe Feyel observes that jobs assigned to contractors were usually more complex and expensive or more quality-oriented than jobs assigned to craftsmen paid through a daily rate system or a piecework system.

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[2] For a thorough analysis of the content of building contracts and discussion of the available evidence, see Beauchet 1897, 209-220; Davis 1937, 114-120; Burford 1969, 91-109. See also Maier 1961, 17-18. On the framework agreement for public building contracts from Tegea (*RO* 60), see Thür 1984. For Athenian building specifications, see Carusi 2006 and 2010.

[3] See Davis 1937, 110-114; Burford 1969, 88-90.

[4] See Burford 1969, 109-113.

In his opinion, since craftsmen were extremely mobile and most sanctuaries could not offer constant employment, magistrates used building contracts as a means to attract and keep hold of the most qualified and dependable craftsmen with the promise of substantial and long-term jobs. Unlike Burford, Feyel does not evoke any historical evolution of the use of building contracts. Yet, he implies that in Athens the need to resort to building contracts was less compelling than in other areas of the Greek world and, when occurring, was usually motivated by the size and complexity of the jobs to be performed.[5]

In my opinion, both these reconstructions must be revised, since the Athenian epigraphic evidence reveals a far more complex picture than a simple dichotomy between directly hired workers and contractors, including a further possibility, i.e. business partnerships, which so far have been only marginally considered by the scholarly community.

2. First and foremost, it is important to stress that in Athens building contracts, despite marked by a different terminology, are attested at least since the second half of the fifth century. As is well known, in most of the Greek world, the action of private individuals undertaking building works, usually called ἐργῶναι, was indicated by the verb ἐργωνέω, the consensus among scholars being that the sale-related terminology (ὠνή i.e. "sale") developed from the practice of awarding public contracts through auctions.[6] By contrast, in Athens the actions of public officials awarding building works and of private individuals undertaking them were indicated respectively by the active and middle voices of the verb μισθόω and its compounds. Accordingly, individuals undertaking building works were called μισθωταί or μισθωσάμενοι.[7] The reason for this terminological preference remains elusive. However, it is essential to clarify that nothing in the available sources supports the idea that the Athenian terminology concealed an original propensity for hiring workers directly rather than contracting out building projects, as the link with the lexical sphere of μισθός/μίσθωσις ("hire/lease") would seem to imply.[8] In reality, the first occurrence of both the noun μισθωτής and the active voice of the verb

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[5] See Feyel 2006, 441-457, 485-510.

[6] See, e.g., at Tegea, *RO* 60, l. 2; at Troizen, *IG* IV 823, l. 52; at Epidauros, *IG* IV².1.103, l. 12 (Prignitz, *Bauurkunden von Epidauros*, nr. II, l. 144); at Lebadeia, *IG* VII 3074, l. 6-7; at Delphi, *CID* II 79A, l. 23; at Delos, *IG* XI.2.144, l. 24, and *I.Délos* 502, l. 5. When the non-Attic terminology departs from the idea of "sale", it never opts for the idea of "hire/lease" but instead for ἐργολαβεῖν, literally "work undertaking" (see, e.g., *IG* IV².1.100, l. 4; *IG* XI.2.161, l. 45). For the idea that the "sale" terminology developed from the practice of awarding public contracts through public auctions, see Thür 1984, 506 n. 98.

[7] See references in n. 13 below.

[8] This is the opinion of Remo Martini (1997a and 1997b). His (implicit) line of reasoning seems to be that when the city of Athens shifted from hiring workers directly to contracting out work, the terminology remained somewhat linked to the old practice.

μισθόω in contexts related to public building projects show clearly that these terms were used to indicate a contractor and the contracting out of building works respectively.

In the Erechtheum accounts dated to 408/7 (*IG* I³ 476), during the sixth prytany, the encaustic painter Dionysodoros, called μισθωτής, received 30 dr. for painting the molding on the inner epistyle at 5 ob. per foot, having appointed Herakleides of Oa as guarantor (l. 46-54). Then, in the eighth prytany, he received 44 dr. 1 ob. as balance payment for painting a total surface of 113 feet, "in addition to what he had received before" (l. 270-280).[9] Since the cost of painting the 113-foot surface amounted to 94 dr. 1 ob., and in the two recorded payments Dionysodoros received 74 dr. 1 ob., we reckon that he was paid in installments, with at least two advance payments following the progress of the work and the final balance when the job was completed. It is highly probable that the second installment of 20 dr. was paid in the seventh prytany (and registered in a section now lost in a lacuna). Both the appointment of guarantors and payment in installments are typical features of building contracts. This means that Dionysodoros was performing his job within the legal framework of an agreement in every respect analogous to a building contract.

In the decree of the Athenian people providing for the construction of gates, a *neos*, and a stone altar in the sanctuary of Athena Nike (*IG* I³ 35), dated probably to the 440s, the *poletai*, i.e. the "public vendors", were ordered to award works (ἀπομισθôσαι) within a specific deadline (l. 8-9). Similarly, a coeval decree (*IG* I³ 45) ordered the *poletai* to award works (ἀπομισθôσαι) for the erection of a palisade on the acropolis as rapidly as possible (l. 10-14).[10] Since in both cases the grammatical subject of the verb ἀπομισθῶσαι is the "public vendors", this means that also in Athens, despite a different terminology, this transaction – i.e. the

[9] *IG* I³ 476, l. 46-54: hενκ|αυταῖς, τὸ κυμάτιον hενκέα[ν]|τι τὸ hεπὶ τôι hεπιστυλίο[ι τ]|ôι hεντός, πεντόβολον τὸ[ν πό]|δα hέκαστον, μισθοτὲς Δι[ονυ]|σόδορος ἐμ Μελίτει hοικ[ôν, h]|εγγυετές hερακλείδες Ὀ[ε͂θε]|ν ⁝ΔΔΔ⁝ κεφάλαιον hενκαυτ[αις]| ⁝ΔΔΔ⁝ κτλ. "To painters in encaustic, for painting the cymatium on the inner epistyle, at 5 ob. per foot, contractor Dionysodoros living in Melite, guarantor Herakleides of Oa, 30 dr. Total to painters in encaustic, 30 dr., etc.". L. 270-280: ἐνκαυτε͂ι τὸ κυμάτι|ον ἐνκέαντι τὸ hεπὶ τôι hεπι|στυλίοι τôι hεντός, πεντόβο|λον τὸν πόδα hέκαστον, πόδας| hεκατὸν δεκατρε͂ς, μισθοτε͂ι| προσhαπέδομεν πρὸς hôι πρό|τερον εἶχε, Διονυσοδόροι ἐμ| Μελίτει hοικôντι, hεγγυετὲ|ς Ηερακλείδες Ὀε͂θεν, ΔΔΔΔΗΗ|ΗΗΙ⁝ κεφάλαιον hενκαυτε͂ι ⁝ΔΔ|ΔΔΗΗΗΙ⁝ κτλ. "To a painter in encaustic, for painting the cymatium on the inner epistyle, at 5 ob. per foot, 113 feet, to the contractor Dionysodoros living in Melite we gave in addition to what he had received before, Herakleides of Oa being the guarantor, 44 dr. 1 ob. Total to the encaustic painter, 44 dr. 1 ob., etc.".

[10] *IG* I³ 35, l. 8-9: ἀπομισθôσαι δὲ τὸς πολετὰς ἐπὶ τ|ε͂ς Λεοντίδος πρυτανείας κτλ. "The *poletai* are to sell the contract within the prytany of Leontis, etc.". *IG* I³ 45, l. 10-14: ἀ̣π̣ομισθôσα|[ι] δὲ τὸ[ς] πολετὰ̣ς⁝ hό|[π]ος ἂν⁝ ἐντὸς hεχσέ|[κ]οντα⁝ ἑμερôν⁝ ἐπισκ|[ε]υασθε͂ι⁝ κτλ. "The *poletai* are to sell the contract so that works are ready within sixty days, etc.".

awarding of construction works – was perceived as a sale (regardless of whether or not several bidders participated to the auction).[11]

The same terminology makes its appearance in Herodotus' narrative concerning the rebuilding of Apollo's temple at Delphi by the Athenian aristocratic family of the Alcmaeonids. Herodotus used the verb μισθωσάντων to describe the action of the Amphictyons who awarded the job for 300 t. and the verb μισθοῦνται to describe the action of the Alcmeonids who undertook it (Hdt. 2.180; 5.62).[12] Given the historical context of this narrative, i.e. the late sixth century, we cannot posit that the Alcmaeonids operated under an agreement having all the features that building contracts had in the Classical Age. Yet, it is difficult to believe that Herodotus intended to depict the Alcmaeonids as simple workers hired by the Amphictyons to rebuild the temple. Instead, he probably meant to signal that the Alcmaeonids, against the payment of 300 t., undertook in their own hands the entire rebuilding of the temple, providing material and labor. In all probability, Herodotus, writing in the third quarter of the fifth century, and describing a procedure that could be equated to the contracting out of building works, employed the verbs μισθοῦν and μισθοῦσθαι because that was the reality evoked by the terminology in question.

3. Having established that contracting out work was not an unknown procedure to fifth-century Athenians, is it correct to argue, as Burford does, that building contracts were still sporadic in fifth-century Athens and then became more common in the fourth century? Mentions of *misthotai* and *misthosamenoi* become admittedly more frequent in the fourth-century epigraphic record. The conditions under which these workers were recruited and remunerated are registered in several building specifications. They are similar to those attested in building contracts throughout the Greek World and make it clear, if proof were needed, that *misthotai* and *misthosamenoi* were nothing else than contractors.[13]

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[11] Burford (1969, 160-161) observes that even when then competitive element was missing, and a candidate was asked to undertake a job, the final decision still laid with the auctioneering officials, who were always at liberty to accept or reject bidders as in other kinds of auctions.

[12] Hdt. 2.180: Ἀμφικτυόνων δὲ μισθωσάντων τὸν ἐν Δελφοῖσι νῦν ἐόντα νηὸν τριηκοσίων ταλάντων ἐξεργάσασθαι (ὁ γὰρ πρότερον ἐὼν αὐτόθι αὐτόματος κατεκάη), τοὺς Δελφοὺς δὴ ἐπέβαλλε τεταρτημόριον τοῦ μισθώματος παρασχεῖν. "When the Amphictyons had awarded for 300 t. the rebuilding of the temple that now stands at Delphi (that which was formerly there having been burnt by pure mischance), it fell to the Delphians to provide a fourth part of the cost". Hdt. 5.62: ἐνθαῦτα οἱ Ἀλκμεωνίδαι πᾶν ἐπὶ τοῖσι Πεισιστρατίδῃσι μηχανώμενοι παρ' Ἀμφικτυόνων τὸν νηὸν μισθοῦνται τὸν ἐν Δελφοῖσι, τὸν νῦν ἐόντα τότε δὲ οὔκω, τοῦτον ἐξοικοδομῆσαι. "Then, the Alcmaeonids, in their desire to use all devices against the sons of Pisistratus, undertook from the Amphictyons the rebuilding of the temple at Delphi which exists now but was not there yet then".

[13] *Misthotai* in building specifications: *I.Oropos* 290, l. 74; *I.Oropos* 292, l. 36; *I.Délos* 104-4, l. 29; *I.Eleusis* 141, l. 17, 21, 63; *I.Eleusis* 152, l. 32; *I.Eleusis* 153, l. 26; *I.Eleusis*

However, this apparent increase in the number of contractors is strictly linked to the nature of the epigraphic evidence, which changes significantly from the fifth to the fourth centuries. In the fifth century, evidence for public building projects consists mainly of building accounts that list receipts and expenditures in a tabular and rather concise way, with collective entries lumping together the sums of money that magistrates spent on different categories of craftsmen and types of jobs. For instance, in the first year of the Parthenon accounts (*IG* I^3 436), dated to 447/6, public officials registered expenses "for quarrymen from Pentelikon" (l. 23: λιθοτόμοις Πεντελε̂θεν), "for carpenters" (l. 26: τέκτοσι), or "for the transport of stone from Pentelikon" (l. 24: λιθαγογίας Πεντελε̂θεν). Only later, starting with the Erechtheum accounts, magistrates began to offer a detailed list of the individual craftsmen involved in the project, each of them registered with his own name, type of job performed, and payment received. It is not by coincidence, then, that the "first" *misthotes* of Athenian history is found in these accounts. In the fourth century, building accounts, though more detailed, tend to become scarce and are superseded, in the epigraphic record, by building specifications, i.e. documents that, as said above, describe in detail the technical content of the work and some of the conditions by which contractors had to abide.[14] Given this change in the epigraphic habit, it is not surprising that most of the evidence concerning building contracts dates to the fourth century, when building accounts are more detailed, and building specifications allow us a glimpse into the system of labor recruitment and remuneration. By contrast, evidence remains sporadic in the fifth century, when most building accounts are extremely concise. In short, I strongly suspect that the historical evolution from direct hiring to contracts outlined by Burford depends largely on the different nature of the epigraphic evidence available for the fourth rather than the fifth century.

In previous scholarship, the Erectheum accounts (*IG* I^3 475-476) have been erroneously indicated as evidence that in Athens, by the last decade of the fifth century, construction workers were mostly daily workers, remunerated through a daily rate system and receiving 1 dr./day regardless of their job or skills.[15] However,

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157, l. 31-32; Maier, *Mauerbauinschriften* nr. 11, l. 122. *Misthosamenoi* in building specifications: *IG* II^2 1668, l. 94-95; *IG* II^3 429, *passim*. The term *misthotai* was used in the same sense in fourth-century building accounts: Maier, *Mauerbauinschriften* nr. 2-3, 7-9, *passim*; *SEG* 32.165, l. 4; *I.Eleusis* 159, *passim*; *I.Eleusis* 177, *passim*; *IG* II^2 1669, l. 18, 22.

[14] For this change in the Athenian epigraphic habit, see Carusi 2020a.

[15] See Himmelmann 1980, esp. 149-150; Gallo 1987, esp. 44-48; Stewart 1990, 66; Loomis 1998, 117-119. This conviction has been fueled by the parallel that Plutarch's Pericles draws between soldiers and sailors receiving payment for their service and construction workers being equally rewarded from public money (*Per.* 12.4-7). However, no mention is made in this passage of any standard wage for construction workers or, worse, of any state pay common to soldiers, sailors, and construction workers. Ironically, Richard Randall's article is often quoted as a reference work for the existence, in the Erechtheum

the epigraphic evidence does not support this conviction.[16] In reality, the only workers paid 1 dr./day in these accounts belonged to the category of the hυποργοί ("helpers"), who performed heavy odd-jobs, such as placing beams, taking down and reassembling scaffolding, moving paints-pots, and operating the block-and-tackle equipment.[17] In a few cases, carpenters were also paid through a daily rate system, but only when they were hired for repetitive jobs like sawing, making and truing up straightedges for the coffered ceiling, laying rafters, etc.[18] In all other cases, as Richard Randall had already pointed out, craftsmen were paid through a piecework system, and though the label of *misthotes* is applied only to the encaustic painter Dionysodoros, there are good reasons to believe that other jobs paid through a piecework system, though not explicitly stated in the accounts, were in reality let out on contract.[19] In fact, the two systems are not mutually exclusive: even Dionysodoros, while being the recipient of a contract, was paid by the unit, i.e. at 5 ob. per foot of painted surface (*IG* I³ 476, l. 46-54).

This situation is similar to that attested in the Eleusinian accounts (*I.Eleusis* 159 and 177), dated respectively to 336/5 or 333/2 and 329/8. In these accounts, where thirty-three contracts are attested, and the majority of jobs are paid through a piecework system, the use of the daily rate system is limited to the remuneration of the οἰκόσιτοι, i.e. private slaves whom the officials of the sanctuary hired in teams for all sorts of jobs. Again, the general characteristic of all these jobs – assembling scaffolding, carrying bricks, sifting earth, laying tiles, sawing wood, polishing doorposts, and so on – seems to be that they were repetitive and best done by a

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accounts, of a standard 1 dr./day wage for constructions workers, whereas he clearly denied that this was the case and rather claimed that methods of payment varied according to the job in hand (Randall 1953, 207-208).

[16] The following discussion is based on a close analysis of the Erechtheum and Eleusinian accounts that is part of my in-progress book. In classifying workers mentioned in these accounts, I profited enormously from the previous, excellent works of Randall (1953) and Feyel (2006), and the detailed commentaries of Caskey (1927) and Clinton (2008). For more data stemming from this analysis see Carusi 2020b.

[17] *Hyporgoi* placing beams: *IG* I³ 476, l. 718; taking down scaffolding: *IG* I³ 476, l. 18-25, 134-140; assembling scaffolding: *IG* I³ 476, l. 25-28; moving paint-pots: *IG* I³ 476, l. 28-31; operating the block-and-tackle equipment: *IG* I³ 476, l. 124-134.

[18] Carpenters sawing: *IG* I³ 475, l. 54-57; *IG* I³ 476, l. 33-46; making a pipe: *IG* I³ 475, l. 65-67; making and trimming straightedges: *IG* I³ 475, l. 67-69; truing up straightedges: *IG* I³ 475, l. 70-71; laying rafters: *IG* I³ 475, l. 252-256; doing some unspecified carpentry job: *IG* I³ 475, l. 287-291; *IG* I³ 476, l. 104-109 (here at 5 ob./day).

[19] The verb μισθοῦν is used at *IG* I³ 476, l. 109-123, thus implying that public officials contracted out to the carpenters Manis and Kroisos the gluing of moldings at the price of 2 dr. per edge. For other possible contracts, including the carving of rosettes and fluting of columns, see Caskey 1927, 412-413; Randall 1953, 207-209. Conversely, there is no evidence that the appliqué figures for the frieze cost 60 dr. per piece because sixty days of work were needed to carve each of them, nor that the fluting of each column cost 350 dr. because it took it 350 man/days to complete it (see Loomis 1998, 117-119). More likely, these specialized jobs were remunerated through a piecework system.

team.[20] Moreover, no standard daily wage existed, since *oikositoi* labeled as μισθωτοί ("hired workers") received 1 dr. 3 ob./day to perform heavy and unskilled jobs, while *oikositoi* performing more specialized, though still repetitive jobs received wages fluctuating from 1 dr. 1.5 ob./day to 2 dr. 3 ob./day.[21] Apparently, daily wages concerned only a small and peculiar category of workers (the *oikositoi*), and even among them rates varied in accordance with the type of job and other factors that we are not able to establish.[22]

As Feyel rightly points out, there is no evidence that in Athens the cost of labor was preferably estimated on the basis of time. For projects carried out both in the fifth and fourth centuries, building accounts show that no uniform system of labor recruitment and remuneration was applied. Instead, the choice of magistrates must have depended merely on the different requirements of each job and the capacity for negotiation that some craftsmen were certainly able to exercise.[23] This explains why the same type of job could be remunerated in different ways. For example, the same carpenter, Rhadios, was paid for sawing wood first at the daily wage of 1 dr., then by measure, with each cut paid first 2 ob. and then 1 dr., and finally by piece, with 1 dr. 2 ob. for cutting a single wooden pipe (*IG* I³ 475, l. 54-65).

4. In this context, where different systems of labor recruitment and remuneration coexisted both in the fifth and fourth centuries, can we agree with Feyel that in Athens the use of building contracts was usually linked to jobs that were more

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[20] Three *oikositoi* building bricks into a wall and assembling a scaffolding (*I.Eleusis* 177, l. 26-28); six *oikositoi* carrying bricks, making mortar, and transporting wood and clay (*I.Eleusis* 177, l. 28-30); two *oikositoi* dressing and plastering a wall (*I.Eleusis* 177, l. 31-32); ten *oikositoi* working (?) in the sanctuary (*I.Eleusis* 177, l. 32-34); thirty *oikositoi* removing and breaking bricks (*I.Eleusis* 177, l. 44-46); ten *oikositoi* breaking up earth and sifting it (*I.Eleusis* 177, l. 60-62); three *oikositoi* removing tiles and laying beams (*I.Eleusis* 177, l. 172-173); two *oikositoi* sawing wood (*I.Eleusis* 177, l. 221-222); four *oikositoi* polishing doorposts (*I.Eleusis* 177, l. 239-240).

[21] The term *misthotoi*, though used to indicate hired workers, did not imply that such workers were hired and paid on a daily basis. In fact, teams of *misthotoi* who were not *oikositoi* were paid through a piecework system (*I.Eleusis* 159, l. 4, 44-45; *I.Eleusis* 177, l. 220-221). In previous scholarship, there seems to be some confusion concerning *misthotoi*. Burford (1969, 112) claimed that in the Erechtheum accounts "μισθωτός represents something in the scale of contract even if he is not a full contractor" (sic). However, *misthotoi* are not attested in the Erechtheum accounts, where we observe only *hyporgoi* remunerated through a daily rate system. According to Feyel (2006, 437-438), in the Eleusinian accounts *misthotoi*, which he translates as "handymen", were workers paid through a daily rate system. However, as we just saw, *misthotoi* were not paid through a daily rate system unless they were *oikositoi*.

[22] Given what the Eleusinian accounts actually reveal, it is improper to claim that "in 329/8 skilled workers were paid 1 ¼ dr. to 2 ½ dr./day and unskilled workers 1 ½ dr./day" (quoted from Loomis 1998, 120). This statement applies to *oikositoi* only.

[23] See Feyel 2006, 402-404.

complex, expensive, and quality-oriented than others? Again, the epigraphic evidence does not point univocally in this direction.

The job performed by the only craftsman explicitly labeled as a contractor in the Erechtheum accounts, the encaustic painter Dionysodoros, does not stand out in terms of cost and complexity. Dionysodoros' remuneration, amounting to 94 dr. 1 ob., is among the highest wages attested in the accounts but does not reach the upper tier of the earnings achieved by other Erechtheum workers. For example, Phalakros of Paiania placed three sets of different stone blocks on the north wall and dressed their top surface with the aid of an assistant. Even though he was paid separately for each of these concurrent operations, the entire job yielded him a payment of 117 dr. 4 ob. (*IG* I^3 475, l. 28-34). In the same way, a metic living in Melite took care of a section of the coffered ceiling by making, smoothing, and gluing two wooden frames and completing them with moldings. Again, he was paid separately for each operation and made a total of at least 111 dr. (*IG* I^3 475, l. 206-224).[24] These jobs were not less expensive than Dionysodoros' and there is no reason to assume that they were less complex and quality-oriented than the painting of the molding on the inner epistyle.

Similarly, the contracts attested in the Eleusinian accounts do not seem to stand out in terms of size and cost of the jobs. Half of them (fourteen out of thirty-three) yielded more than 100 dr. and, among these, six yielded between 200 and 500 dr. However, these figures are in line with the individual wages of other craftsmen who were not labeled as *misthotai* and were paid through a piecework system. Among these, for example, an unknown stonemason who provided for the quarrying, transport, and placement of 155 blocks of conglomerate stone for 490 dr. 5 ob. (*I.Eleusis* 177, l. 21-22), and Euthyas of Eleusis, who made 9,000 1.5-foot bricks for 360 dr. (*I.Eleusis* 177, l. 56-57). Even the most lucrative contract – 2,631 dr. 3 ob. to Agathon living in Alopeke for quarrying, transporting, and placing 831 stone blocks for a retaining wall (*I.Eleusis* 177, l. 17-19) – does not match the top earner of the Eleusinian accounts, i.e. the metalworker Sosidemos, who performed some work to the block-and-tackle equipment for 3,560 dr. 1/5 ob. (*I.Eleusis* 177, l. 267-268). Moreover, the other half of the contracts yielded less than 100 dr., with some *misthotai* making quite small sums. For example, Mys of Phaleron undertook a contract for the transport and possibly dressing of twenty stone blocks at 16 dr. 4 ob. (*I.Eleusis* 159, l. 5-6), Sikon living in Skambonidai for some unknown job, perhaps involving the transport of wood, at 9 dr. 3 ob. (*I.Eleusis* 159, l. 10-11), and a carpenter named Karion for the sawing of Makedonian woods for lintels and door panels at 23 dr. (*I.Eleusis* 177, l. 66-67). Not even the complexity of the job can draw a clear distinction between contracted and non-contracted jobs, since the same

[24] Other examples: Phyromachos of Kephisia (sculptor), for delivering four appliqués figures for the freeze, earned 260 dr. (*IG* I^3 476, l. 144-147, 158-178); Stasianax living in Kollytos (woodcarver), for delivering eleven rosettes for the ceiling, earned 154 dr. (*IG* I^3 476, l. 335-338).

types of jobs, such as the quarrying and transport of stone and the making of doors, could be assigned to both contractors and non-contractors.[25] Moreover, one-third of the contractors attested in the Eleusinian accounts operated also outside the framework of building contracts. For example, Mnesilochos living in Kollytos undertook a contract for some work concerning the assemblage of a wagon (*I.Eleusis* 159, l. 31-34) and performed several other jobs, including the sharpening of iron tools, as non-contractor (*I.Eleusis* 159, l. 36-38, 42-44, 51-52). Pamphilos of Otryne made doors as a contractor (*I.Eleusis* 177, l. 227-228, 234-235) and performed some work to the *himatiotheke* and the block-and-tackle equipment as non-contractor (*I.Eleusis* 177, l. 357-358, 364).

Finally, it does not seem that at Eleusis public officials used contracts to attach craftsmen to the sanctuary, as it may have happened at Epidauros, Delos, and Delphi. In fact, out of thirty-three craftsmen who make more than one appearance in the accounts, only nine were contractors, while the others were paid through a piecework system. Out of five craftsmen attested in the accounts of both 336/5 (or 333/2) and 329/8, only a stonemason called Moschion was the recipient of a contract for 50 dr. (*I.Eleusis* 159, l. 40; *I.Eleusis* 177, l. 247-248). All the others, including two haulers, a metalworker, and a supplier, remained attached to the sanctuary without being the recipients of any contract.[26]

On the basis of the available evidence, it is not possible to claim that in Athens building contracts were consistently linked to jobs that were more complex, expensive, and quality-oriented than jobs paid through a piecework system nor that they were used to retain the services of the most qualified and reliable craftsmen.[27] In reality, what building accounts reveal is that each building project, be it large or small, was often divided into many portions and carried out by several different craftsmen, usually through various systems of labor recruitment and remuneration, both in the fifth and fourth centuries.

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[25] Quarrying, supplying, and transport of stone by contractors: *I.Eleusis* 159, l. 5-6; *I.Eleusis* 177, l. 8-9, 17-19, 247-248; by non-contractors: *I.Eleusis* 177, l. 21-22, 48-50, 53-54, 191-195, 236-237, 265-266. On-site stone-related jobs by contractors: *I.Eleusis* 177, l. 19, 19-21, 23-25, 46-47, 51, 54-55, 74-75, 76-77, 77-78, 159-160, 195-196; by non-contractors: *I.Eleusis* 177, l. 51-52, 52-53, 237-238, 251-252, 362. Making doors by contractors: *I.Eleusis* 177, l. 225-226, 227-228, 234-235; by non-contractors: *I.Eleusis* 177, l. 67-68.

[26] These are: the haulers Sosias (*I.Eleusis* 159, l. 18; *I.Eleusis* 177, l. 259) and Kyprios (*I.Eleusis* 159, l. 20; *I.Eleusis* 177, l. 58-59), the metalworker Hephaistion living in Eleusis (*I.Eleusis* 159, l. 36-38; *I.Eleusis* 177, l. 183-184), and Ameinias of Kydathenaion, who sold baskets to the sanctuary (*I.Eleusis* 159, l. 45; *I.Eleusis* 177, l. 65-66, 229-230).

[27] Even Feyel (2006, 442-445), though claiming that jobs executed within the framework of building contracts were usually more complex and expensive or more quality-oriented than jobs paid through a piecework system, is forced to admit that in the Athenian evidence it is sometimes difficult to uphold this distinction.

This fragmentation is particularly remarkable in the Erechtheum accounts. For example, the task of shaping ten pediment blocks of the east gable, for a total of 79 dr., was divided among five stonemasons, each one in charge of only one or two blocks of different size, paid through a piecework system (*IG* I^3 475, l. 97-117). In the same way, the scraping of 388 cross-pieces for the roof, costing 1.5 ob. per piece, was assigned to five carpenters, each one responsible for a variable number of pieces, for a total of 97 dr. (*IG* I^3 475, l. 240-248). The laying of the same cross-pieces was assigned to three *hyporgoi*, each one paid 1 dr. per day, and working respectively for six, three, and five days, for a total of 14 dr. (*IG* I^3 475, l. 252-256).

However, fragmentation is not a peculiarity of these accounts. At Eleusis as well, magistrates tended to divide each project into several portions and assign them to workers recruited and remunerated in different ways. The most evident example is the rebuilding of the so-called “old fallen tower”.

System of labor recruitment and remuneration	**Worker(s)**	**Job**	**Cost**
Daily Rate (1 dr. 3 ob./day)	30 anonymous *oikositoi* working for four days	Removing old bricks and earth from the tower and breaking them (l. 44-46)	180 dr.
Contract	Daos living in Kydathenaion	Removing and clearing the old tower’s foundation down to bedrock (l. 46-47)	48 dr.
Business partnership Piecework rate (1 dr. per block)	Demetrios, Ergasion, Kyprios, Euarchos, and Milakos	Quarrying 304 blocks of conglomerate stone for the new foundation (l. 48-50)	304 dr.
Business partnership Piecework rate (1 dr. 3 ob. per block)	Philonikos, Euxippos, Archias, and Pherekleides from Boeotia	Transporting the 304 conglomerate blocks to the sanctuary (l. 50-51)	456 dr.
Contract Piecework rate (1 dr. per block)	Neokleides of Kephisia	Placing the 304 conglomerate blocks (l. 51)	304 dr.
Business partnership	Pistias of Sphettos and Douriktonides from Kolonos	*Exagoge* (dressing?) of the conglomerate blocks (l. 51-52)	270 dr.
Piecework rate (1 dr. per block)	Neokleides of Kephisia	Laying 34 blocks of Aeginetan stone on the top of the conglomerate blocks (l. 52-53)[28]	34 dr.

[28] These blocks must have been quarried and transported to the sanctuary in a previous year.

Business partnership	Ergasion and Daos	Quarrying and transporting blocks of Eleusinian stone (l. 53-54)	78 dr.
Contract Piecework rate (4 dr. 3 ob. per unit of length)	Neokleides of Kephisia	Laying the blocks of Eleusinian stone (l. 54-55)	48 dr. 3 ob.[29]
Piecework rate (36 dr. per 1,000 bricks)	Euthymides living in Kollytos	Making 14,000 1.5-ft. bricks from the old bricks and clay taken from the tower (l. 55-56)	504 dr.
Piecework rate (40 dr. per 1,000 bricks)	Euthias of Eleusis	Making 9,000 1.5-ft. bricks (l. 56-57)	360 dr.
Unspecified	Unknown hauler	Transporting 1,500 bricks leftover from the previous year (l. 57-58)	25 dr. 3 ob.
Business partnership Piecework rate (25 dr. per 1,000 bricks)	Karion, Artimas, Kyprios, Eukles, and Konon	Transporting the 9,000 bricks made by Euthias to the sanctuary (l. 58-59)	225 dr.
Contract Piecework rate (17 dr. per 1,000 bricks)	Demetrios living in Alopeke	Laying all the bricks above (10,500 plus 14,000 for the wall) (l. 59-60)	416 dr. 3 ob.[30]
	Number of workers: 52	Number of portions: 14	Total cost: ca. 3,200 dr.[31]

Table 1. The rebuilding of "the old fallen tower" in the Eleusinian accounts (*I.Eleusis* 177)

As shown in Table 1, the project, costing ca. 3,200 dr., was divided into at least fourteen portions, assigned to fifty-two workers through different systems of labor recruitment and remuneration (contracts, daily rates, and piecework rates). Moreover, the example shows that portions assigned to contractors were not necessarily costlier or more complex than jobs assigned to business partnerships or to craftsmen who apparently were non-contractors. Finally, the same craftsmen (e.g. Daos and Neokleides) could perform more than one job within the same project both

[29] Possibly a mistake for 49 dr. 3 ob., given that 48 dr. 3 ob. cannot be evenly divided by the unit price of 4 dr. 3 ob.

[30] Some of these bricks were used for the wall, so this money figure does not include only bricklaying for the tower.

[31] It is impossible to establish the exact total given that the rest of the construction expenses (e.g. for roofing and plastering) are lost in a lacuna.

within and outside the framework of a building contract. Incidentally, one may note again that contractors were sometimes paid by unit.[32]

In earlier accounts, the tabular form has probably obscured the presence of several systems of labor recruitment and remuneration. As seen above, concise entries merely stating that a certain sum of money was spent "for carpenters" or "for the transport of stone" do not reveal how many workers were involved and under what kind of agreement they were recruited and remunerated. However, nothing prevents us from assuming that within the general category of "carpenters" or "transport of stone" magistrates collected all expenditures made towards that category, regardless whether some of the workers were remunerated through a piecework system, a daily rate system, or even operating within the framework of building contracts – exactly as later accounts show us to be the case.

5. A close and careful analysis of the evidence reveals that in Athens building contracts were more widespread than traditionally thought since the second half of the fifth century and were not necessarily linked to the size and complexity of the tasks involved. No significant change in the system of labor recruitment and remuneration occurred from the fifth to the fourth centuries. Throughout the Classical Age, the fragmentation of each project in many portions assigned to many different workers, recruited and remunerated in different ways, was probably the rule. Some scholars see in the fragmentation of building projects, and the relatively small size of construction firms that it entails, a clear indication of the primitive character of the Athenian construction industry – a condition apparently confirmed by the lack of evolution in the composition of the Athenian labor market throughout the Classical Age.[33] In reality, however, this situation was the product of technological constraints and strictly economic dynamics, as the recent analysis of Peter Acton shows.[34]

According to Acton, in antiquity as well as today, once a workshop has reached the optimum number of workers required for the most efficient production of the final artifact, it can grow only by winning a larger market share than its competitors, i.e. by earning some advantage in terms of profitability over its competitors. Due to technological constraints, ancient workshops did not have the possibility to obtain the same advantages as in modern business practice. They could not, for example,

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[32] The same fragmentation and variety of recruitment and remuneration systems seem to have characterized the wall-building program of the late 390s, according to some short accounts (Maier, *Mauerbauinschriften* 1-9; *SEG* 19.145; *SEG* 32.165), and the construction of the fourth-century Portico of the Telesterion, as attested by several specifications and accounts (*I.Eleusis* 151; 152; 157; 165; 166; 159, l. 64-100).

[33] See, e.g., Francotte 1900, 94; Mossé 1962, 96-100.

[34] The following discussion is based on Acton 2014, 28-46; Acton 2016 (see also Harris 2002, esp. 70-71; Bresson 2016, 187-190). For a survey of previous scholarship's claim concerning the primitive character of the Athenian manufacturing sector, see Acton 2014, 22-28.

improve labor productivity with the use of machinery or foster a more efficient use of assets through technological innovation. Since the investment to run a workshop consisted almost exclusively in the purchase of raw materials and slave labor, and both these assets had more or less the same cost for all competitors, there was not much room to cut production costs and gain an advantage over competitors in this way.[35] The only competitive advantage available to an ancient workshop was product differentiation, i.e. when a craftsman could achieve a reputation in his job that allowed him to differentiate his product from others so as to command the customers' preference and even ask for a higher price.

When this potential for product differentiation existed, the manufacturing sector tended to structure in several niche businesses, each one represented by a single craftsman working with a few assistants. Depending on the reputation of the craftsman, the workshop could make pretty high returns. Still, there was no basis for expansion as long as the reputation of the product was linked exclusively to the skills of the owner. On the other hand, when skills and reputation were transferable to a larger number of workers, there was room for expansion. In this case, a workshop could grow if it had access to capital for buying more slaves and raw material and if it could maintain its brand strength. If competitors did not have the same access to capital nor the same brand strength, they were barred entry to the market or knocked out of it. In this scenario, the manufacturing sector tended to structure in a smaller number of larger workshops, which grew by winning larger market shares at the expense of their competitors. In the construction sector, most businesses belonged to the former category, with a few stonemasons and carpenters probably belonging to the latter and being the owners of larger workshops employing teams of slaves.

Given these premises, it is clear that even in Athens, where the building sector was extremely lively, and the demand for construction workers was ordinarily substantial and consistent, workshops tended to remain relatively small and the labor market quite fragmented, with no significant change from the fifth to the fourth centuries. In this context, the fragmentation of building projects into many small tasks assigned to many different workers, recruited and remunerated in different ways – possibly depending on the requirements of each job and the capacity for negotiation of said workers – was not a sign of underdevelopment but the most logical strategy to take advantage of the structure of the labor market. From the viewpoint of public officials, it would have been pointless to assign a larger portion, or more portions, to the same worker or contractor when he and his workshop did not have the productive capacity to perform the job at the same pace as multiple

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[35] As is widely known, in Athens free men were unavailable to work as employees in someone else's business for an extended period of time (the exception being when the state was the employer). When repetitive service on a regular basis was required, slave labor was the only solution. On this, see Cohen 2000, 141-143.

workers and contractors operating simultaneously at different parts of the same project.

6. In this scenario, where the demand for construction workers was usually substantial and the labor market fragmented, there were certainly moments when the higher density of public building projects created some periods of peak demand, as, for example, during the Periclean and Lykourgan administrations.[36] What happened in these situations? Probably, some craftsmen were attracted to Athens from abroad, while the owners of local workshops might venture to buy or rent more slaves – obviously, only in those cases in which, as said above, adding slave labor could increase the productivity without losing brand strength. Interestingly, the Eleusinian accounts, dating to the Lykourgan age, reveal another possibility, which allowed overcoming the limitations set by the fragmentation and small size of businesses, i.e. the establishment of business partnerships.

Workers	Job	Wages
Demetrios, Ergasion, Kyprios, Euarchos, and Milakos (**5**)	Stonemasonry Quarrying 304 blocks of conglomerate stone for the foundation of the old fallen tower (l. 48-50)	304 dr.
Philonikos, Euxippos, Archias, and Pherekleides from Boeotia (**4**)	Hauling Transport to the sanctuary of the conglomerate blocks above (l. 50-51)	456 dr.
Pistias of Sphettos and Douriktonides from Kolonos (**2**)	Stonemasonry On-site dressing of the conglomerate blocks above (l. 51-52)	270 dr.
Daos living in Kydathenaion and Ergasion (**2**)	Stonemasonry and hauling Quarrying and transport of blocks of Eleusinian stone for the old fallen tower (l. 53-54)	78 dr.
Kyprios, Karion, Artimas, Eukles, and Konon (**5**)	Hauling Transport to the sanctuary of the 9,000 bricks made by Euthias for the tower and walls (l. 58-59)	225 dr.
Artimas and Manes (**2**)	Supplying Straw for the construction of the wall, the house of the priestess, and the *epistasion* (l. 73-74)	180 dr.
Bion of Paiania and Diokleidas the Megarian (**2**)	Hauling Job in lacuna (l. 157)	14 dr.
Archias and Aristokrates (**2**)	Stonemasonry Some stonework to the sacred threshing floor (l. 362)	23 dr.

Table 2. Business partnerships in the Eleusinian accounts (*I.Eleusis* 177)

[36] For a survey of the building activities undertaken during the Periclean and Lykourgan administrations, see Camp 2001, 72-117, 137-160.

As shown in Table 2, eight business partnerships are attested in the Eleusinian accounts. Eight of the individuals involved in these partnerships are attested elsewhere in the accounts as working on their own. Some of them, i.e. Pherekleides, Archias, Daos, Kyprios, Bion, and Diokleidas, were active in the same field of the joint venture in which they took part. Others operated in different fields: Ergasion was an encaustic painter, while Karion was a carpenter. Moreover, three individuals, Artimas, Archias, and Ergasion, were involved in two different partnerships each. Artimas sold (and possibly delivered) straw in partnership with Manes and transported 9,000 bricks with four other partners; Archias did some stonework with Aristokrates and participated in the transport of blocks of conglomerate stone; Ergasion participated in the quarrying of conglomerate stone and the quarrying and transport of Eleusinian stone. Arguably, then, these partnerships were not permanent arrangements but were established expressly for the purpose of completing a particular job, after which everyone was free to return to work on his own or join other partners in a new venture. Thus, nothing prevented foreigners from participating, as was the case for Pherekleides from Boeotia and Diokleidas from Megara. Finally, most of the jobs undertaken by these partnerships yielded sums of money located in the upper tier of the earnings attested in the Eleusinian accounts and concerned jobs requiring logistics and resources that could go beyond the capacity of a single craftsman. The same phenomenon can be observed in the accounts from Epidauros, Delphi, and Delos, where ad-hoc partnerships tend to concern large and lucrative jobs.[37] Apparently, most of the craftsmen involved did not have the productive capacity or could not bear the financial risks of undertaking such large jobs on their own. In fact, since jobs were paid when completed and delivered, it is possible that a lone craftsman might need associates not only to overcome issues of logistics and expertise but also to meet the financial requirements of completing rather burdensome tasks.[38]

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[37] See Davies 2001, 223; Feyel 2006, 457-464.

[38] In those cases in which we can observe how craftsmen involved in partnerships fared on their own, we can conclude that in joining partnerships they usually increased their productive capacity, i.e. undertook jobs that they could not have achieved on their own, at least as far as we can judge from their wages. Among these, there are Ergasion, Archias, Kyprios, and Karion, who, on their own made, 40, 10, 4, and 23 dr. respectively (*I.Eleusis* 159, l. 20; *I.Eleusis* 177, l. 66-67, 248, 265-266), as compared to the joint ventures in which they took part yielding 304, 456, and 225 dr. Even Pherekleides from Boeotia, who arranged on his own the transport of bricks for 390 dr. (*I.Eleusis* 177, l. 22-23), might not have had the capacity to arrange on his own the transport of stone for 456 dr. On the other hand, Daos living in Kydathenaion made 115, 48, and 169 dr. working on his own (*I.Eleusis* 177, l. 19, 46-47, 195-196), while his job with Ergasion was paid only 78 dr. It is possible, however, that in this particular case, the necessity of joining forces concerned a different set of expertise: when working alone, Daos did only on-site stonework, while with Ergasion he arranged the quarrying and transport of stone. Nothing we can tell of the hauling job that Bion of Paiania undertook with Diokleidas

In the case of building contracts, as said above, usually contractors received advance payments. In addition, if they defaulted their duties, the appointed guarantors had to step in to complete the job or provide financially for it, also paying possible fines. In this respect, a guarantor may be considered a sort of business partner, so much so that there was often a professional connection between a contractor and his guarantor. This seems to be the case not only for the arrangements attested in the Epidaurian and Delphian accounts but also for the encaustic painter Dionysodoros and his guarantor, Herakleides of Oa, who was probably a carpenter working on the Erechtheum building site as well (*IG* I^3 475, l. 234).[39] In general, by looking at the evidence on the use of guarantors in Athenian public and private transactions of all sorts, one gets the impression that being a guarantor could be a sort of profession, a way of investing money that could result, if everything went well, in a financial gain.[40] Since only Athenian citizens could act as guarantors, though, this option was not available to everyone.[41] On the other hand, the eight business partnerships attested in the Eleusinian accounts do not appear to involve the undertaking of contracts, as such not needing guarantors and being open to the participation of not only citizens but also metics, foreigners, and, possibly, autonomous slaves. In this respect, they may be considered an alternative form of recruitment and remuneration as compared to building contracts.

What was the advantage for the city of Athens in allowing such partnerships? As far as we know, partnerships are attested in Athens for other types of public contracts, such as the exploitation of mines and tax collection. In both these cases, however, it seems that partnerships, though their existence was well known to everyone, were officially represented by a single team leader vis-à-vis the state, while other partners remained behind the scene and did not have any official role.[42]

from Megara for 14 dr., the former making 60 dr. as a solo hauler (*I.Eleusis* 177, l. 195) and the latter 7 dr. 3 ob. (*I.Eleusis* 177, l. 15-16).

[39] Though Herakleides himself is not attested in the extant portions of the Erechtheum accounts, a slave belonging to him is attested as making one of the square frames of the coffered ceiling (*IG* I^3 475, l. 234). Since all slaves attested in these accounts belong to craftsmen working on the building site, we must assume that this was the case for Herakleides as well. For craftsmen acting as guarantors at Epidaurus and Delphi, see Feyel 2006, 464-466.

[40] For the role of guarantors in Athenian transactions, see Erdas 2010, esp. 196-197, for the "professional" aspect of this role. Unfortunately, the available evidence (courtroom speeches, *poletai* records, etc.) tend to report cases where the transactions went wrong rather than instances where transactions were successful and both contractors and guarantors benefitted from the partnership.

[41] For this rule, see Walbank 1991, 163; Erdas 2010, 194-195.

[42] For partnerships in mining operations, see D. 40.52; Hyp. 4.35; Bissa 2008, 272, for the possibility that groups of investors might be behind a single leader. For cartels in tax collection, see the famous cases involving Agyrrhios and Andocides (And. 1.133-134) and Alcibiades (Plu. *Alc*. 5); Migeotte 2001, 168-169; Fantasia 2004, 523-524. For four *priamenoi* renting together the Piraeus theatre, see *Agora* XIX L13 with Carusi 2014.

This was probably the case for tax farmers' cartels, such as the one famously headed by Agyrrhios, which aimed at keeping the bidding for tax collection at a low level by eliminating all competition, with a clear loss for the city's revenues. Although we may assume that usually public officials tried to discourage the formation of such cartels, the grain-tax law of 374/3 (*SEG* 48.96) seems to go in the opposite direction. Here a seemingly innovative clause was introduced (l. 31-36), which allowed a group of six tax farmers to bid jointly for collecting a portion of the tax six times as large as the portion allowed to a single farmer. Since Attic law lacked the notion of partnership or corporation, it was stated explicitly that in case of default, the city was permitted to extract the tax output both from the six men jointly and from each of them individually.[43] As Ronald Stroud points out, the likely goal of this provision was to attract a broader range of possible tax farmers who could enter into the business with different levels of investment and different sets of skills and expertise. However, unlike unofficial cartels, here business partners had to take responsibility for a larger share of the city's revenues rather than splitting among themselves a smaller share, and their obligations towards the city were formally and officially spelled out.[44]

Unfortunately, building accounts, unlike laws and draft contracts, do not allow us to reconstruct the precise working of these arrangements in the building sector. Despite this, we can posit that, for the city of Athens, allowing the formation of such partnerships had a similar benefit as in the case of the grain-tax law. The idea was to put to work as many craftsmen as possible and combine their different sets of expertise and productive capacity so that they could contribute to the completion of tasks that under normal conditions they might not be able to undertake on their own. For the city, this resulted in a more effective and efficient use of the available resources, especially in moments when building activities were more intensive and construction workers more in demand than usual. As for the absence of guarantors in business partnerships, it is possible that members of these partnerships were asked to guarantee each other vis-à-vis the state. In alternative, we may recall that in particular circumstances, officials could loosen the reins on this form of security in exchange for expanding the pool of possible contractors. This is what happened in fourth-century Macedonia when the auction for collecting harbor dues was opened to those who could present guarantors for only one-third of the sum ([Arist.] *Oec.* 2.22.1350a). This measure, which was recommended by the Athenian Callisthenes,

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[43] *SEG* 48.96, l. 31-36: συμ[μορ]|ία ἔσται ἡ μερὶς τρισχίλιοι μέδιμ̣[νοι]|, ἓξ ἄνδρες· ἡ πόλις πράξει τὴν συμμορ[ία]|ν τὸν σῖτον κ<α>ὶ παρ' ἑνὸς καὶ παρ' ἀπάν[τω]|ν τῶν ἐν τῆι συμμορίαι ὄντων, ἕως ἂ̣ν τ[ὰ α]|ὑτῆς ἀπολάβηι κτλ. "A *symmoria* will consist of a portion of 3,000 *medimnoi*, six men. The *polis* will exact the grain from the *symmoria*, both from one man and from all who are in the *symmoria*, until it recovers what belongs to it, etc.".

[44] See Stroud 1998, 64-67, with Harris 1989; Migeotte 2001, 168-169; Fantasia 2004, 525-527.

Agyrrhios' nephew, yielded to the state an amount twice as large as the usual tax output.[45]

Famously, the regulations on public building contracts issued at Tegea in the fourth century (*RO* 60) limited to two individuals the number of joint contractors for any work, and to two pieces of work the number of contracts that the same individual could undertake at the same time (l. 21-31).[46] The goal was probably to avoid the formation of cartels and prevent contractors from overstretching their resources to the detriment of the city. We do not know if similar regulations were ever issued in Athens and whether or not Athenian officials had the same concerns as their colleagues in Tegea. It is clear, in any case, that the Athenians were flexible enough to take advantage of all the opportunities that the market offered and to use the legal instruments that better suited their interests and needs in any specific circumstance. By fragmenting projects in many tasks and providing for each of them in different ways – from direct hiring to contracts and business partnerships – Athenian magistrates did not betray, as some scholars believe, the inadequacy of their office, caused by time and financial limitations or lack of expertise.[47] On the contrary, they implemented the most effective and efficient strategy to deal with the fragmented and complex structure of the labor market.

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[45] [Arist.] *Oec.* 2.22.1350a: Καλλίστρατος ἐν Μακεδονίᾳ πωλουμένου τοῦ ἐλλιμενίου ὡς ἐπὶ τὸ πολὺ εἴκοσι ταλάντων, ἐποίησεν εὑρεῖν τὸ διπλάσιον. κατιδὼν γὰρ ὠνουμένους τοὺς εὐπορωτέρους ἀεὶ διὰ τὸ δεῖν ταλαντιαίους καθιστάναι τοὺς ἐγγύους τῶν εἴκοσι ταλάντων, προεκήρυξεν ὠνεῖσθαι τὸν βουλόμενον καὶ τοὺς ἐγγύους καθιστάναι τοῦ τρίτου μέρους καὶ καθ' ὁπόσον ἕκαστος δύνηται πείθειν. "Kallistratos, when in Macedonia, caused the harbor dues, which were usually sold for 20 t., to produce twice as much. For noticing that only the wealthier men used to buy them because it was necessary to present guarantors for the 20 t., each one worthy 1 t., he proclaimed that anyone might buy the dues on presenting guarantors for one-third of the amount and getting their consent for as much as each of them could (pledge)".

[46] *RO* 60, l. 21-31: μὴ ἐξέστω δὲ μηδὲ κοινᾶνας γενέσθαι| πλέον ἢ δύο ἐπὶ μηδεν̣ὶ τῶν ἔργων· εἰ δὲ μή, ὀφλέτω| ἕκαστος πεντήκοντα δαρχμὰς· ἐπελασ̣άσθων| δὲ οἱ ἁλιασταί, ἰμφαίνεν δὲ τὸμ βολόμενον ἐ̣πὶ τοῖ| ἡμίσσοι τᾶς ζαμίαυ, κὰ τὰ αὐτὰ δὲ καὶ εἴ κάν τ̣ις| πλέον ἢ δύο ἔργα ἔχη τῶν ἱερῶν ἢ τῶν δαμ[ο]σίων| κατ' εἰ δέ τινα τρόπον, ὅτινι ἂμ μὴ οἱ ἁλιαστα[ὶ]| παρατάξωνσι ὁμοθυμαδὸν πάντες, ζαμιώ[σ]θ̣ω| καθ' ἕκαστον τῶν πλεόνων ἔργων κατὺ μῆνα̣| πεντήκοντα δαρχμαῖς, μέστ' ἂν ἐ̣πιτ̣[ελέση]| τὰ ἔργα τὰ πλέονα κτλ. "It is not to be permitted for more than two people to contract jointly for any of the works. In case of any breach, each is to be fined 50 dr., and the *haliastai* are to enforce this; anyone who wishes may make an exposure (*imphainein*) for a reward of half the penalty. In the same way, if anyone has contracts for more than two pieces of work, either sacred or public, in any way, to whom the *haliastai* have not given express and unanimous permission, he is to be penalized 50 dr. a month for each work over two until he completes those supernumerary contracts, etc.".

[47] On the limitations inherent to the office of construction overseers, see Feyel 2006, 469-484.

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ÖFFENTLICHES RECHT UND ADMINISTRATION IN DEN GRIECHISCHEN POLEIS

WINFRIED SCHMITZ (BONN)

DIE RHETREN DES LYKURG UND DIE ENTSTEHUNG DES SPARTANISCHEN KOSMOS

Abstract: Quellen aus dem späten 5. und dem 4. Jh. zeigen, dass antike Autoren bereits in klassischer Zeit Lykurg eine grundlegende Neuordnung des spartanischen Kosmos zugeschrieben haben. Die Ziele seiner Maßnahmen waren, nach dem verlustreichen Messenischen Krieg die Zahl der Spartiaten zu steigern, die vielen Kriegswitwen zu versorgen und durch Ansiedlung der im Krieg freigelassenen Heloten in Messenien die Herrschaft über diese Landschaft zu sichern.

Keywords: Sparta, Lykurgos, *Lakedaimonion politeia*, spartanischer Kosmos, Heloten

In zwei Aufsätzen, publiziert in den Jahren 2017 und 2018, habe ich den Nachweis zu führen versucht, dass Lykurg von Sparta als historischer Gesetzgeber anzusehen ist und seine Gesetze, *rhḗtrai* genannt, auf eine bestimmte historische Situation reagierten.[1] Bei jeglichem Versuch, die Entstehung des spartanischen Kosmos, der in den antiken Quellen Lykurg zugeschrieben wird, zu erklären, stellt sich das Problem, dass zeitgenössische Quellen weitestgehend fehlen. Erst in der zweiten Hälfte des 5. Jahrhunderts entstanden die historiographischen Werke Herodots und Antiochos' von Syrakus, die Informationen zur Geschichte Spartas im 7. und 6. Jahrhundert bieten. Mit dem 4. Jahrhundert werden die Nachrichten mit der *Verfassung der Lakedaimonier* von Xenophon, den *Politika* des Aristoteles und den Fragmenten des Ephoros von Kyme reichhaltiger. Universalgelehrte und Biographen augusteischer Zeit und der Kaiserzeit fußen auf solchen früheren Quellen, lassen im Einzelnen aber oft nicht erkennen, wie weit die von ihnen herangezogenen Quellen zeitlich zurückreichen und wie somit ihre Zuverlässigkeit einzuschätzen ist. Um dem Einwand zu begegnen, die in den oben genannten Aufsätzen vorgelegte Rekonstruktion und die darauf aufbauenden Hypothesen stützten sich auf Quellen ganz unterschiedlicher Zeitstellung, soll hier dargelegt werden, welche Informationen auf die klassische Zeit, also das 5. und 4. vorchristliche Jahrhundert, zurückgehen und welche auf spätere Zeit. Um die Validität der Überlieferung einschätzen zu können, sei aber vorweg die von mir vertretene historische Rekonstruktion in ihren Grundzügen skizziert.

[1] Schmitz 2017; Schmitz 2018.

1. Der Messenische Krieg und der Parthenieraufstand

Vermutlich ausgelöst durch einen Grenzkonflikt in der Landschaft Denthelaïtis und den Tod des spartanischen Königs Teleklos im Heiligtum der Artemis Limnatis war es zum Krieg zwischen Spartanern und Messeniern gekommen. Wie aus den Kriegsliedern des Tyrtaios hervorgeht, waren es über viele Jahre hinweg geführte Kriegszüge, die Sparta das Äußerste abverlangten. Die Spartaner mussten alle Kräfte mobilisieren: Schwerbewaffnete Kämpfer mit Brustpanzer, Helm und Schild, mit Schwert und Lanze sollten sich – so mahnt Tyrtaios eindringlich – ebenso dem Feind entgegenstellen wie Leichtbewaffnete (γυμνῆτες), die Speere und Steine auf den Feind schleudern sollten, junge Kämpfer ebenso wie alte und erfahrene.[2] Trotz aller Anstrengungen drohten die Spartaner zu unterliegen. Iustin beschreibt in seiner Kurzfassung des Werks von Pompeius Trogus, dass die Spartaner nach drei erlittenen Niederlagen so verzweifelt gewesen waren, dass sie zur Verstärkung ihrer Schlachtreihen Sklaven freiließen und ihnen die Ehefrauen der gefallenen Spartaner versprachen (Iust. 3,5,6).[3] Ziel dieser Maßnahme sei es gewesen, die Freigelassenen nicht nur der Zahl, sondern auch dem Range nach (*dignitati*) an die Stelle der gefallenen Spartaner treten zu lassen (Iust. 3,5,7).[4]

Nachdem die Spartaner im Messenischen Krieg den Sieg errungen und die zentrale messenische Pamisos-Ebene erobert hatten, brachen offenbar Konflikte um die rechtliche Stellung und die Integration der freigelassenen Heloten und der Kinder, die aus Verbindungen mit den Ehefrauen der gefallenen Spartiaten hervorgegangen waren, aus. Von diesen Konflikten berichten Antiochos von Syrakus (FgrH 555 F 13) und Ephoros von Kyme (FgrH 70 F 216) und – teilweise auf diesen Autoren beruhend – auch zahlreiche weitere antike Gewährsmänner.[5] Alle Autoren stimmen darin überein, dass der in den Quellen so genannte ‚Aufstand der Parthenier' an das Ende des Messenischen Krieges anschloss und es dabei um den rechtlichen Status dieser Gruppe ging.[6] Die Spartaner sahen sie als Ehrlose (ἄτιμοι) an, wohingegen die *partheníai* für ihre Rechte als gleichberechtigte Bürger eintraten. Da der Anschlag noch rechtzeitig aufgedeckt wurde, konnte eine Vermittlung erreicht werden: Die aufstandsbereiten Parthenier wurden unter der Führung des Phalantos und auf Anraten eines Orakels aus Delphi nach Unteritalien gesandt, wo sie in einer

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2 Tyrtaios fr. 11 (γυμνῆτες in Z. 35-38), 12 West.

3 … ut servos suos ad supplementum exercitus manumitterent hisque interfectorum matrimonia pollicerentur.

4 …, ut non numero tantum amissorum civium, sed et dignitati succederent. Die Zusammenfassung der Ereignisse in Iustin 3,4 stimmt mit dem Bericht des Ephoros (FgrH 70 F 216; Strab. 6,3,3, 279f. C) überein. Ob auch Iustins Bericht über den Zweiten Messenischen Krieg auf Ephoros zurückgeht, ist zu bezweifeln, da Ephoros offenbar nur von einem Messenischen Krieg ausging. Auch Pausanias erwähnt in seiner Beschreibung des Messenischen Krieges die Freilassung von spartanischen Heloten (Paus. 4,16,4).

5 Zur Überlieferung und der gegenseitigen Abhängigkeit der Quellen siehe Schmitz 2017, 421-428.

6 Antiochos und Ephoros sprechen von einer ἐπιβουλή der παρθενίαι.

Apoikie eine neue Heimat finden sollten. Die Historiographen des späten 5. und des 4. Jahrhunderts hatten offensichtlich keine verlässlichen Informationen darüber, wer die *partheníai* waren. Antiochos von Syrakus fasst sie als Spartaner auf, die nicht an den Feldzügen gegen die Messenier teilgenommen hatten, deswegen zu Sklaven erklärt und Heloten genannt worden seien. Die von ihnen während des Krieges geborenen Söhne seien *partheníai* genannt und für ehrlos erklärt worden. Ephoros gibt an, dass die *partheníai* die Söhne von jungen Spartanern gewesen seien, die von den messenischen Kriegsschauplätzen zurückgeschickt worden seien, um „mit sämtlichen Jungfrauen" Kinder zu zeugen, um so die Kriegsverluste auszugleichen. Da sie in rechtlich nicht anerkannten Verbindungen geboren worden waren, hätten ihnen die Spartaner nicht die ihnen zukommende Ehre erwiesen.[7] Beide Erklärungen sind in dieser Form unglaubwürdig und als nachträgliche Deutungsversuche des Namens *partheníai* aufzufassen. Eine plausible Erklärung kann sich daher allein auf den Namen *partheníai* stützen. Wer aber waren die von „nicht verheirateten Frauen geborenen Kinder"?

In der späten, kaiserzeitlichen Überlieferung präsentiert Plutarch einen angeblich auf Lykurg zurückgehenden merkwürdigen spartanischen Hochzeitsbrauch (Plut. Lykurg. 15,4-9): In Sparta seien die Bräute – reifere Frauen – geraubt worden. Eine Brautbedienerin hätte sie in Empfang genommen, ihnen die Haare geschoren und ihnen ein Männergewand und Schuhe angezogen.[8] Heimlich sei dann der Mann zu ihr gekommen und hätte ihr beigewohnt, sei nach dem Geschlechtsverkehr aber wieder zu seinen Altersgenossen zurückgekehrt. Diese Art der Zusammenkunft hätten sie längere Zeit praktiziert, auch über die Geburt von Kindern hinaus. Stellt man diese Beschreibung der athenischen Praxis der Eheschließung gegenüber, bei der das Eheversprechen des Vaters oder des Bruders (*engýe*), die Übergabe der Braut in die Hausgewalt des Ehemannes (*ékdosis*), der Hochzeitszug und das gemeinschaftliche Zusammenleben der Eheleute (*synoikeín*), das mit dem Geschlechtsverkehr in der Hochzeitsnacht begann, konstitutiv für eine rechtmäßige Ehe war, so wird deutlich, dass in Sparta alles dies strikt vermieden wurde. Und dies kann nur bedeuten, dass die durch das merkwürdige ‚Hochzeitsritual' geschlossene Verbindung gerade keine rechtmäßige Ehe begründen sollte.[9] Die in solchen

7 Antiochos von Syrakus FgrH 555 F 13 (= Strab. 6,3,2, 278 C); Ephoros FgrH 70 F 216 (= Strab. 6,3,3, 280 C): οὐχ ὁμοίως τοῖς ἄλλοις ἐτίμων ὡς οὐκ ἐκ γάμου γεγονότας – Die Spartaner hätten ihnen „nicht die gleiche Ehre erwiesen wie den anderen, weil sie nicht aus einer Ehe hervorgegangen waren".

8 Die Frau wird als Mann verkleidet und damit eine homoerotische Beziehung imitiert. Zur Verkleidung von Frauen als Männer vgl. auch Aristophanes' *Ekklesiazusen*: die Frauen ziehen sich die Gewänder ihrer Männer und Schuhe an und kleben sich falsche Bärte an, bevor sie sich mit dem Stock ihrer Männer zur Volksversammlung begeben (ekkl. 501-513).

9 Dass dies die hinter diesem angeblichen Hochzeitsritual liegende Zielrichtung war, bestätigt die Anekdote über Geradas, wonach es in Sparta keinen Ehebruch gab. Wenn die

Verbindungen geborenen Kinder waren also „Kinder unverheirateter Frauen“, *partheníai*. Zugegebenermaßen beruht dieses Argument auf einer späten Quelle aus der römischen Kaiserzeit. Doch Xenophon (Lak. pol. 1,5-6) nennt in seiner *Verfassung der Lakedaimonier* einige Eigenarten der von Lykurg bestimmten Eheverbindungen, die sich mit den Angaben Plutarchs und der Intention, der Verbindung keine Rechtsgültigkeit zukommen zu lassen, decken: Zum Geschlechtsverkehr geht der Mann zur Frau, wohingegen sonst bei einer rechtsgültigen Ehe die Frau stets in das Haus des Mannes wechselte. Und der Besuch des Mannes sollte heimlich und mit Scham geschehen.[10] Außerdem sollten die Verbindungen erst in höherem Alter eingegangen werden, in der Zeit der körperlichen *akmḗ*.[11]

Auch wenn im antiken Quellenmaterial keine direkte Beziehung hergestellt wird, bin ich der Ansicht, dass sich drei Elemente aus den angeführten Quellen sehr gut zusammenfügen, nämlich erstens die Überlieferung, dass die Spartaner im Messenischen Krieg wegen der hohen Verluste in den eigenen Reihen Heloten freigelassen und ihnen die Ehefrauen gefallener Spartaner versprochen haben (um mit ihnen Kinder zu zeugen) und dass Lykurg zweitens bestimmt habe, die Verbindungen von Mann und Frau sollten keine rechtsgültigen Ehen sein und Kinder unter dieser Bedingung geboren werden. Diese Kinder wären als „Kinder von nichtverheirateten Frauen“ *partheníai*, folgten in ihrem Status der Mutter, da sie im rechtlichen Sinne keinen Vater hatten. Bezieht man dies auf die freigelassenen Heloten, so wird die Sinnhaftigkeit unmittelbar einsichtig: Denn bei einer rechtmäßigen Verbindung von freigelassenen Heloten und spartanischen Kriegswitwen übernahmen die in diesen Verbindungen geborenen *partheníai* nicht vom Vater den rechtlichen Status eines Freigelassenen, sondern von der Mutter den Status eines spartanischen Bürgers.[12] Nach dem erfolgreich abgeschlossenen Krieg wollten die Spartaner den freigelassenen Heloten und den aus den Verbindungen mit Kriegswitwen gezeugten Kindern so weit reichende Zugeständnisse aber dann doch nicht mehr gewähren, wie drittens Antiochos und Ephoros berichten, und erklärten sie – entgegen der getroffenen

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Verbindung keine rechtmäßige Ehe war, konnte es Ehebruch als rechtliches Delikt nicht geben (Plut. Lykurg. 15,17-18).

[10] Xen. Lak. pol. 1,5: ἔθηκε γὰρ αἰδεῖσθαι μὲν εἰσιόντα ὀφθῆναι, αἰδεῖσθαι δ’ ἐξιόντα.

[11] Xen. Lak. pol. 1,6: ἔταξεν ἐν ἀκμαῖς τῶν σωμάτων τοὺς γάμους ποιεῖσθαι.

[12] Nach Hdt. 1,173,4-5 hat es bei den Lykiern Matrilinearität gegeben: Hinsichtlich der Herkunft hätten sie den Namen der Mutter genannt und die weiblichen Vorfahren aufgezählt. Denn Kinder aus Verbindungen einer lykischen Mutter und eines unfreien Vaters hätten als rechtmäßig (*gennaía*) gegolten (wären also lykische Bürger), wohingegen Kinder aus Verbindungen eines lykischen Vaters mit einer fremden Frau oder einer Nebenfrau als ehrlos gegolten hätten (173,5: καὶ ἢν μέν γε γυνὴ ἀστὴ δούλῳ συνοικήσῃ, γενναῖα τὰ τέκνα νενόμισται· ἢν δὲ ἀνὴρ ἀστός, καὶ ὁ πρῶτος αὐτῶν, γυναῖκα ξείνην ἢ παλλακὴν ἔχῃ, ἄτιμα τὰ τέκνα γίνεται). Geht man davon aus, dass in beiden Fällen eine solche Verbindung nicht als rechtmäßige Ehe anerkannt wurde, ist diese Praxis nicht verwunderlich. Bei nicht rechtmäßiger Ehe folgen die Kinder jeweils dem Status der Mutter.

Vereinbarung – zu Ehrlosen. Dagegen lehnten sich die „Kinder der nicht verheirateten Spartiatinnen“ auf.[13]

Aus der Nachricht, die Spartaner hätten während des Messenischen Krieges Heloten freigelassen, wenn sie loyal auf Seiten Spartas kämpften, und ihre Verluste an Spartiaten dadurch ausgleichen wollen, dass sie die Kinder aus den Verbindungen von Freigelassenen und Witwen gefallener Spartiaten mit allen Rechten in ihre Reihen aufnahmen, ergibt sich ein in sich stimmiges Bild, das sich mit dem für Sparta überlieferten merkwürdigen ‚Hochzeitsbrauch‘ verbinden lässt. Lykurg hätte demnach bestimmt, dass die freigelassenen Heloten Verbindungen mit Witwen gefallener Spartiaten eingehen sollten; wenn diese Verbindungen ohne formelle *engýe* eingegangen wurden und die Frau nicht formell von ihrem Vater oder Bruder in die Hausgewalt des Freigelassenen übergeben wurde, dann konnten die Kinder, weil der biologische Vater nicht auch der rechtliche war, als Kinder von Spartiatinnen in die Bürgerschaft aufgenommen werden.[14] Dass dabei die unverheirateten Frauen in einen dunklen Raum gesperrt wurden und sich unverheiratete Männer eine der Frauen griffen, wie Hermippos (bei Athen. 13,555b-c) beschreibt, oder die Frauen als Männer ausstaffiert wurden und in der ‚Hochzeitsnacht‘ ein gleichgeschlechtlicher Verkehr zwischen *erastḗs* und *erómenos* imitiert worden sei, wie Plutarch berichtet, werden, ebenso wie die Anekdote des alten Geradas, Ausschmückungen späterer Zeit und keine gelebte Praxis gewesen sein.

Wenn also die freigelassenen Heloten mit den Witwen gefallener Spartiaten Kinder zeugten, ohne eine rechtmäßige Ehe eingegangen zu sein, dann konnten sie erreichen, dass ihre Kinder unter die Spartiaten aufgenommen wurden.[15] Sie selbst blieben im Status von Freigelassenen. Aristoteles nennt in den *Politika* (2,9, 1270a

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[13] Zu diesem Konflikt siehe auch Servius, comm. in Virg. Aen. 3,551.

[14] Darauf werden die Ausführungen von Aristoteles zu beziehen sein, dass die Spartaner unter ihren früheren Königen Fremden das Bürgerrecht gegeben hätten, so dass trotz der „langen Kriege“ kein Menschenmangel entstanden wäre (pol. 2,9, 1270a 34–36). Eine solche Verbindung zieht auch Plutarch in den *Instituta Laconica*, wonach „einige behaupten, dass der von den Fremden, der sich dieser Lebensweise der *politeía* unterwirft, nach dem Willen Lykurgs an der anfangs durchgeführten Verteilung [der Landlose] seinen Anteil erhalte; nur verkaufen durfte er ihn nicht“ (Plut. inst. Lac. 22, mor. 238e: Ἔνιοι δ’ ἔφασαν, ὅτι καὶ τῶν ξένων ὃς ἂν ὑπομείνῃ ταύτην τὴν ἄσκησιν τῆς πολιτείας κατὰ τὸ βούλημα τοῦ Λυκούργου μετεῖχε τῆς ἀρχῆθεν διατεταγμένης μοίρας· πωλεῖν δ’ οὐκ ἐξῆν).

[15] Auch in anderen Fällen, auswärtigen Kriegen und Bürgerkriegen, wurden Sklaven freigelassen, aber in der Regel nicht in die Bürgerschaft aufgenommen. So überliefert z.B. Diodor hinsichtlich einer *stásis* in Kerkyra im Jahre 411/10, dass die *dēmotikoí* den Sklaven die Freiheit verliehen und die Metöken zu Bürgern gemacht hätten (Diod. 13,48; möglicherweise handelt es sich um eine Dublette zu dem von Thuk. in 3,70-85 und 4,46-48 beschriebenen Bürgerkrieg von 427-425 v. Chr.). Nur den Metöken wurde also, weil sie bereits Freie waren, das Bürgerrecht verliehen, nicht den Sklaven.

40) diese *rhḗtra* Lykurgs ein „Gesetz über die Kinderzeugung“,[16] und genau darum ging es. Denn ohne eine spezielle Regelung wären die Kinder freigelassener Heloten und Witwen gefallener Spartiaten, wenn sie in einer rechtmäßigen Ehe geboren wären, im Status von Freigelassenen ohne Partizipationsrechte geblieben. Sollten sie zu Spartiaten werden, mussten sie im Rechtsstatus der Mutter folgen, nicht wie bei der Patrilinearität üblich dem Vater.

Von diesem Ausgangspunkt her wirken die Gesetze Lykurgs alles andere als paradox und merkwürdig, sondern als zwingend und gut nachvollziehbar. Mithilfe dieses Ansatzes können viele der für Sparta überlieferten, ungewöhnlichen, dem Lykurg zugesprochenen Gebräuche plausibel erklärt werden, nicht nur die Umgehung von *engýe*, *ékdosis* und *synoikeín*, sondern auch das in den Quellen belegte Verbot von Mitgiften; denn auch eine Mitgift konnte als Beweis einer rechtsgültigen Ehe gelten.[17]

Doch allein die fehlende Rechtmäßigkeit der eheähnlichen Verbindung reichte noch nicht aus, damit die Kinder Spartiaten wurden. Um die von freigelassenen Heloten mit spartanischen Kriegswitwen gezeugten Kinder zu freien Spartiaten heranzuziehen, wurde eine außerhäusliche Erziehung und Ausbildung geschaffen, die diese Kinder an der Seite derjenigen Kinder zu absolvieren hatten, die als Freie von einem spartanischen Vater und einer spartanischen Mutter geboren waren. In den antiken Quellen werden die Kinder, die Spartiaten auswählten und den eigenen Kindern beigaben, *móthakes* bzw. *móthones* genannt.[18] Hatten diese die spartanische Erziehung bis zum Ende durchlaufen, wurden sie in die spartanische Bürgerschaft aufgenommen. Lykurg verfolgte mit seinem Gesetz über die Kinderzeugung (von freigelassenen Heloten) zwei Ziele: die Zahl der Spartiaten konnte nach den Kriegsverlusten wieder erhöht und die Witwen gefallener Spartiaten konnten in eheähnlichen Verbindungen versorgt werden, und dies, ohne frühere Sklaven unmittelbar unter die Spartiaten aufnehmen zu müssen.

Als Lebensgrundlage erhielten die neugeborenen ‚Anwärter auf das Bürgerrecht‘ von den Phylenältesten eine Landparzelle zugewiesen. Dies war notwendig, weil die für die Aufnahme unter die Spartiaten vorgesehenen ‚Neubürger‘ kein Erbe von ihrem (biologischen) Vater, einem freigelassenen Heloten, erwarten konnten. Erforderlich war die Übergabe eines Landloses unmittelbar nach der Geburt, damit die ‚Familie‘ (der freigelassene Helot, die Kriegswitwe und deren Kinder) eine Lebensgrundlage hatte. Die Landparzelle wurde nicht den freigelassenen Heloten zugesprochen, weil nur Spartiaten Land besitzen konnten. Die zugewiesene Landparzelle lag in der Pamisos-Ebene im Zentrum der neu eroberten Landschaft Messenien. Der ursprünglichen Bevölkerung war das Land nach Spartas Sieg im Messeni-

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16 Aristot. pol. 2,9, 1270a 40: ὁ περὶ τὴν τεκνοποιίαν νόμος. Vgl. Xen. Lak. pol. 1,3: περὶ τεκνοποιίας; ebenso 1,10.

17 Hermippos F 87 Wehrli (= Athen. 13,555b-c; FgrH 1026 F 6); Ail. var. 6,6; Plut. apophthegmata Lac. Lyc. 15 (mor. 227f-228a); Iust. 3,3,8.

18 Phylarchos FGrH 81 F 43 (Athen. 6,271e-f); Ail. var. 12,43. Dazu Schmitz 2018, 120f.

schen Krieg entrissen und – ähnlich wie bei der römischen *limitatio*, der Zenturiation des *ager occupatorius* – in gleich große Parzellen aufgeteilt worden.[19] Die freigelassenen Heloten erhielten, gleichsam als Wehrbauern, die Landgüter mit der Maßgabe, das neu eroberte Land gegen aufständische Messenier zu verteidigen und die Herrschaft über Messenien zu sichern.[20] Dies erklärt auch das bei Herakleides Lembos und Plutarch überlieferte Verbot, die Landgüter „der alten Aufteilung" zu veräußern.[21] Durch die Zuteilung gleich großer Parzellen konnten die Angesiedelten

[19] Von einer Aufteilung des Landes in gleich große Parzellen berichten Plat. leg. 3,684d; Pol. 6,45,3; Plut. apophthegmata Lac. Lyc. 2 (mor. 226b) und Paus. 4,24,4 sowie (als relativ frühe Quelle!) Ephoros in FgrH 70 F 216 (= Strab. 6,3,3, 279-280 C). Mit Berufung auf Ephoros, Xenophon, Kallisthenes und Platon nennt Polybios als Eigenart der spartanischen Verfassung, dass hinsichtlich des Grundbesitzes keiner auf mehr Anspruch habe als der andere, sondern alle Bürger nur das Gleiche „von dem öffentlichen Land" (oder: „von dem zur Polis gehörenden Land") besitzen durften (6,45,3 [= Ephoros FgrH 70 F 148]: τῆς μὲν δὴ Λακεδαιμονίων πολιτείας ἴδιον εἶναί φασι πρῶτον μὲν τὰ περὶ τὰς ἐγγαίους κτήσεις, ὧν οὐδενὶ μέτεστι πλεῖον, ἀλλὰ πάντας τοὺς πολίτας ἴσον ἔχειν δεῖ τῆς πολιτικῆς χώρας; vgl. Pol. 6,45,6-9).

[20] Vermutlich blieben die aus den Verbindungen von freigelassenen Heloten und Kriegswitwen geborenen Kinder in Sparta, unter der Aufsicht von Ammen und anschließend als *móthakes* in der Ausbildung, und wurden erst nach Abschluss der außerhäuslichen Erziehung in das noch unsichere Messenien geschickt.

[21] Aristot. fr. 611,12 Rose (Heraclid. Lemb. 12 Dilts): πωλεῖν δὲ γῆν Λακεδαιμονίοις αἰσχρὸν νενόμισται. τῆς ἀρχαίας μοίρας οὐδὲ ἔξεστι. Ähnlich Plut. inst. Lac. 22 (mor. 238e): Ἔνιοι δ' ἔφασαν, ὅτι καὶ τῶν ξένων ὃς ἂν ὑπομείνῃ ταύτην τὴν ἄσκησιν τῆς πολιτείας κατὰ τὸ βούλημα τοῦ Λυκούργου μετεῖχε τῆς ἀρχῆθεν διατεταγμένης μοίρας· πωλεῖν δ' οὐκ ἐξῆν. Plutarch nennt dieses Verbot im Zusammenhang mit dem Verbot, das Land zu verlassen, mit der Ausweisung von Fremden und dem Ausschluss derjenigen, die sich nicht der *agōgḗ* unterzogen hatten, von der politischen Partizipation (inst. Lac. 19-21, mor. 238d-e). Die antiken Quellen zu dem bei Herakleides Lembos und Plutarch überlieferten Verbot, die Landlose der *archaía moíra* zu verkaufen, diskutiert Lazenby 1995, dessen Schlussfolgerungen ich indes nicht teile. Er bringt die Überlieferung in Verbindung mit Zeugnissen über die Ernteanteile, die *apophoraí*, die die Heloten ihren Herren abzugeben hätten. So wie der Text bei Herakleides überliefert sei, werde er mit der *archaía moíra* zwar Land gemeint haben, doch werde es sich um ein Missverständnis beim Exzerpieren der aristotelischen *Lakedaimonion politeia* handeln: „In conclusion, it seems possible that the original passage in the Aristotelian *Lakedaimonian Constitution* had something to do with the definition of Spartan citizenship, and have said something about the admission of foreigners in ancient times. This could have led to the statement that they were given land, since giving or bequeathing it was allowed, but that there was a ban on selling the produce from the land". Geht man indes davon aus, dass den in Messenien angesiedelten freigelassenen Heloten und deren Kindern bei der Zenturiation des eroberten Landes ein Landlos zugewiesen wurde, erklärt sich das Verkaufsverbot des „Landes aus der alten Verteilung" ohne weitere Vorannahmen. Bei einem solchen Verständnis leuchtet auch der in Plut. inst. Lac. 22 (mor. 238e) hergestellte Zusammenhang mit der Aufnahme von ‚Fremden' in die Bürgerschaft unmittelbar ein (vgl. demgegenüber Lazenby 1995, 88: wonach das Verkaufsverbot von Land „does not

untereinander als *hómoioi* gelten, ähnlich den Freigelassenen aus Gortyn, die in Latosion „unter dem gleichen und gleichartigen (Recht)“ angesiedelt wurden.[22]

Plutarch spricht in seiner Biographie Lykurgs ausdrücklich von einer zweiten und einer dritten *rhḗtra*, denen sich zahlreiche Bestimmungen zuweisen ließen, die sich vor dem Hintergrund einer solchen Besatzungssituation in feindlichem Umland verstehen lassen. Als vor Ort angesiedelten ‚Wehrbauern‘ war es ihnen verboten, das Land zu verlassen, und war ihnen verboten, statt landwirtschaftlicher Arbeit einem Handwerk nachzugehen. Um die Gemeinschaft zu stärken, mussten sie ihre Mahlzeiten bei den Gemeinschaftsmählern einnehmen. Nachts durften sie nicht mit einer Fackel umhergehen, um Aufständischen kein leichtes Angriffsziel zu bieten. Kriegszüge von der Pamisos-Ebene in noch unruhige Gebiete sollten nie auf denselben Feind ausgerichtet sein, was diese von einem spartanischen König angeführten Feldzüge hätte berechenbar machen können. Die angelegten Marschlager sollten häufig gewechselt werden, wie Xenophon in der *Verfassung der Lakedaimonier* ausführt. Da es sich in der Zeit des frühen 6. Jahrhundert noch um ein ‚nichtbefriedetes‘ Gebiet handelte, wurden alle Fremde dieses Gebietes verwiesen. Sparta duldete also in dem jüngst erst eroberten Messenien keine Eleier oder Arkader, die die Messenier zum Aufstand hätten aufstacheln können.[23]

Stellt man also die lykurgischen Gesetze und die lykurgische Ordnung in den Kontext des Messenischen Kriegs und Spartas Eroberung eines wichtigen Teils von Messenien, verlieren die Bestimmungen ihren oft paradox scheinenden und unverständlichen Charakter. Nachvollziehbar wird unter diesen Prämissen auch, wie es Sparta gelang, die Herrschaft über die jenseits des Taygetosgebirges liegende Landschaft Messenien dauerhaft zu sichern.

Lykurg ist meiner Ansicht nach ein historischer Gesetzgeber, der in einer Zeit einer äußeren und inneren Krise – nach dem sieg-, aber sehr verlustreichen Krieg gegen Messenien und dem in letzter Minute vereitelten Aufstand der Parthenier –

really fit the previous sentence, which has nothing to do with buying and selling, and this makes the whole passage, as it stands, suspect“).

22 ICret 4,78 (Koerner Nr. 153): καταϝοικίζεθαι Λατόσιον ἐπὶ τᾶι ϝίσϝαι καὶ τᾶι ὀμοίαι. Die Freigelassenen (und ihre Kinder) verblieben allerdings unter der Aufsicht des *xénios kósmos*, der dafür Sorge zu tragen hatte, dass sie nicht wieder versklavt oder beraubt würden.

23 Dazu Schmitz 2018, 125-131. Ganz ähnlich war die Situation in Argos: Nach der schweren Niederlage bei Sepeia (vermutlich 494 v. Chr.) hatten die Argiver die Sklaven (nach Aristoteles die Periöken, womit er ‚Halbfreie‘ bezeichnet) freigelassen. Da die Kriegswitwen sie nicht als den Bürgern gleichwertig geachtet hätten, hätten sie beim Geschlechtsverkehr falsche Bärte getragen. Auch diese Verbindungen sollten also nicht rechtmäßige Ehen sein, damit die Kinder im Status den Müttern folgten und unter die Argiver aufgenommen wurden. Als die Söhne der alteingesessenen Argiver die *doúloi* vertrieben und diese für sich Tiryns eroberten, wiegelte der aus Phigalia in Arkadien stammende Kleandros die Vertriebenen zu einem Angriff auf Argos auf, woraus ein langandauernder Krieg entstand. Angesichts solcher Vorgänge ist verständlich, wenn die Spartaner Fremde aus Messenien vertrieben.

Gesetze gab, mit denen drei Probleme gelöst werden sollten: die Zahl der Spartiaten wieder zu steigern, die vielen Kriegswitwen zu versorgen und die Herrschaft über Messenien dauerhaft zu sichern. In der Überlieferung der lykurgischen Gesetze war dieser Kontext und waren diese Ziele nicht tradiert worden – so wie auch die so genannte Große Rhetra ohne einen historischen Kontext überliefert ist –, und so erschienen den Kommentatoren und späteren Historikern viele der Bestimmungen als eigenartig und denen der anderen griechischen Städte entgegengesetzt. Dies führt mich zu der Frage, über welche Informationen die frühesten Quellen zu den lykurgischen Gesetzen verfügten, und ob die Angaben in späten Quellen, die der spätrepublikanischen Zeit oder der Kaiserzeit zuzuordnen sind, aus einer Analyse der lykurgischen Ordnung ausgeschieden werden sollten. Um aber eine methodisch abgesicherte Einschätzung vornehmen zu können, sollen zunächst allein die Quellen des 5. und 4. Jahrhunderts berücksichtigt werden.

2. *Lakedaimonion politeiai* (5. und 4. Jahrhundert v. Chr.)

„Die Verfassung der Lakoner (*Lakṓnōn politeía*) und die bei ihnen erfolgten Veränderungen (*metabolaí*) kann man wegen ihrer Bekanntheit größtenteils übergehen".[24] Der frühkaiserzeitliche Strabon, aus dessen *Geographika* (8,5,5 – 365 C) diese Worte stammen, beschränkt sich in seinem kursorischen Überblick über die Geschichte Spartas auf wenige ausgewählte Aspekte. Vorangegangen waren Erläuterungen dazu, wie die Herakliden Eurysthenes und Prokles Lakonien in sechs Bezirke aufgeteilt und Städte angelegt hatten. Eurysthenes' Sohn Agis habe die Städte innerhalb Lakoniens als Periökenstädte in Abhängigkeit gebracht und nach Eroberung des widerspenstigen Helos dessen Einwohner versklavt, zu Heloten gemacht.[25] Der Aufstieg Spartas aber zur griechischen Hegemonialmacht zu Land und zu Wasser sei begründet worden, so berichtet Strabon mit Berufung auf den Historiker Ephoros, „als die Spartaner ihre Verfassung dem Lykurgos anvertraut hatten".[26] Erst die Thebaner und anschließend die Makedonen hätten den Spartanern diese Vorherrschaft entrissen. Ephoros kritisiert den Historiker Hellanikos für dessen Darstellung der spartanischen Geschichte, in der Lykurg keine Erwähnung finde und auch die

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[24] Strab. 8,5,5 – 365 C (= Ephoros FgrH 70 F 118): Περὶ δὲ τῆς Λακώνων πολιτείας καὶ τῶν γενομένων παρ' αὐτοῖς μεταβολῶν τὰ μὲν πολλὰ παρείη τις ἂν διὰ τὸ γνώριμον. Der Hinweis nicht nur auf die Verfassung der Lakoner, sondern auch die *metabolaí* könnte darauf hindeuten, dass Strabon sich auf die *Lakedaimonion politeia* des Aristoteles bezieht (vgl. Aristot. Ath. pol. 41,2).. Die vielen unterschiedlichen Darstellungen über den Gesetzgeber (*nomothétēs*) Lykurg und seine Tätigkeit bezüglich der Gesetze und der Verfassung (ἡ περὶ τοὺς νόμους αὐτοῦ καὶ τὴν πολιτείαν πραγματεία) bemerkt auch Plutarch (Lykurg. 1,1).

[25] Strab. 8,5,4 – 364-365 C (= Ephoros FgrH 70 F 117).

[26] Strab. 8,5,5 – 365 C (= Ephoros FgrH 70 F 118): ἐπεὶ δ' οὖν Λυκούργῳ τὴν πολιτείαν ἐπέτρεψαν. Dass Lykurg mit seinen Gesetzen die Grundlage für die spartanische Hegemonie gelegt habe, führen auch Diodor 7 fr. 12,8 und Nikolaos v. Dam. FgrH 90 F 56,3-4 aus.

Verfassung Spartas fälschlicherweise den Herakliden Eurysthenes und Prokles zugesprochen werde. Schließlich sei, so argumentiert Ephoros, nur dem Lykurgos ein Tempel erbaut und nur ihm ein jährliches Opfer dargebracht worden.[27] Ephoros hätte sich mit dieser Erwiderung auf Herodot berufen können, der – anders als sein etwas jüngerer Zeitgenosse Hellanikos – bereits im 5. Jh. die Gesetzgebung und die militärische Ordnung dem Wirken Lykurgs zugeschrieben hatte.[28]

An der Stelle, an der Herodot in seinen *Historien* Sparta einführt (Hdt. 1,65-66) – und er ist für den Gesetzgeber Lykurg die früheste antike Quelle[29] –, präsentiert er dem Leser bzw. Zuhörer gleich einen kontroversen Standpunkt. „Einige“ (οἱ μὲν τινες) behaupteten nämlich, die Pythia habe ihm „die noch jetzt bei den Spartiaten bestehende Ordnung (*kósmos*)“ verkündet.[30] Möglicherweise geht das unmittelbar vorausgehende, wörtlich von Herodot übernommene Orakel auf die „ältesten Aufzeichnungen“ zurück, die nach Plutarchs *Adversus Colotem* das Orakel über Lykurg enthielten. Auf welche Zeit diese παλαιόταται ἀναγραφαί zurückgehen, lässt sich freilich nicht bestimmen.[31] Die Spartaner selbst aber behaupteten, so fährt Herodot (1,65,4) fort, Lykurgos habe den *kósmos* als Vormund seines Neffen

[27] Strab. 8,5,5 – 366 C (= Hellanikos FgrH 4 F 116; Ephoros FgrH 70 F 117): μόνῳ γοῦν Λυκούργῳ ἱερὸν ἱδρῦσθαι καὶ θύεσθαι κατ᾽ ἔτος. Zum Tempel für Lykurg und dem jährlich dort dargebrachten Opfer auch Nikolaos v. Dam. FgrH 90 F 56,2; Plut. Lycurgus 31 (= Aristot. fr. 534 Rose^3, 544 Gigon), ähnlich Paus. 3,16,6.

[28] Bei dem Widerspruch zwischen den Angaben des Hellanikos und denen des Herodot und des Ephoros ist allerdings zu berücksichtigen, dass Lykurg tatsächlich den Spartanern keine Verfassung gegeben hat, sondern *rhḗtrai* hinsichtlich der Integration der freigelassenen Heloten und ihrer Ansiedlung in Messenien.

[29] Plutarch zitiert in Lykurg. 1,8 allerdings den „Dichter Simonides“, wonach Lykurg und Eunomos Söhne des Prytanis seien (fr. 123 Page). Nach Athen. 14,37 p. 635e-f hat Terpander als erster von allen bei den Karneien den Sieg errungen; dies berichte Hellanikos in seinem Werk *Sieger an den Karneien* (FgrH 4 F 85). Die Einrichtung dieses Fests fand in der 26. Olympiade statt; Hieronymos bemerkt im 5. Buch seines Werks *Über Dichter*, dass Terpandros zur Zeit des Gesetzgebers Lykurg lebte.

[30] Hdt. 1,65,4: οἱ μὲν δή τινες πρὸς τούτοισι λέγουσι καὶ φράσαι αὐτῷ τὴν Πυθίην τὸν νῦν κατεστεῶτα κόσμον Σπαρτιήτῃσι ... (s.u. Anm. 32). Vgl. Aristot. fr. 535 Rose^3, 540 Gigon (= Ephoros FgrH 70 F 174); Diod. 1,94,1; 7 fr. 12,1-2; Plut. Lykurg. 5,4. Dass Lykurgs *kósmos* vom delphischen Orakel verkündet worden sei, beruht möglicherweise auf der (irrtümlichen) Zuschreibung der sog. Großen Rhetra an Lykurg; denn diese stamme vom pythischen Apollon her (Tyrtaios fr. 3 a-b Diehl, 4 West).

[31] Plut. adv. Colot. 17 (mor. 1116f): φορτικώτεροι δὲ Λακεδαιμόνιοι τὸν περὶ Λυκούργου χρησμὸν ἐν ταῖς παλαιοτάταις ἀναγραφαῖς ἔχοντες. Die „lakonischen *anagraphaí*“ konnten sich aber auch auf spätere Zeit beziehen, also später entstanden sein (siehe Plut. Agesilaos 19,7-11). In ihrem Streit um die Ansprüche auf den Tempel der Artemis Limnatis argumentierte die Gesandtschaft der Spartaner vor Kaiser Tiberius damit, dass der Tempel von ihren Vorfahren und auf ihrem Gebiet geweiht worden sei, wie es die „geschichtliche Überlieferung“ (*annalium memoria*) und „Lieder der Dichter“ (*vatum carmines*) bewiesen. Die Messenier beriefen sich demgegenüber auf in Stein gehauene Urkunden und alte Bronzetafeln (*monimentaque eius rei sculpta saxis et aere prisco manere*) (Tac. ann. 4,43,1-3).

Leobotes nach kretischem Vorbild geschaffen. Er habe alle bestehenden spartanischen Gewohnheiten (*nómima*) verändert und darauf geachtet, dass die neuen eingehalten würden. Anschließend (μετὰ δὲ) habe Lykurg alles hinsichtlich des Krieges geregelt, nämlich die Schwurgemeinschaften, die Dreißigschaften und die Syssitia, und außerdem noch die Ephoren und Geronten eingesetzt.[32] Den kurzen Ausführungen Herodots lässt sich entnehmen, dass bereits um das Jahr 425 v. Chr. unter den Spartanern selbst strittig war, ob der spartanische *kósmos* auf kretische Vorbilder oder auf den delphischen Apollon zurückging.[33] Auch eilte offenbar bereits in dieser Zeit Kreta der Ruf voraus, sehr alte – dem König Minos zugeschriebene – Gesetze zu haben, mit Einrichtungen, die in manchem der spartanischen Ordnung glichen. Bemerkenswert ist auch, dass Lykurgos alle Gewohnheiten (*tá nómima pánta*) verändert und „anschließend" alles hinsichtlich des Krieges geregelt habe. Dies stützt die sehr viel spätere Darstellung Plutarchs, wonach Lykurgos zusätzlich zu einer ersten Rhetra noch eine zweite und eine dritte gegeben habe. Wenn Herodot abschließend erwähnt, dass Lykurg die Lakedaimonier durch diesen Umschwung zu einer guten gesetzlichen Ordnung gebracht habe[34] und ihm nach dem Tod ein Heiligtum errichtet und die Spartaner ihn sehr verehrt hätten,[35] wird davon auszugehen sein, dass sich Ephoros (und mit ihm Strabon) auf Herodot bezog, als er seinen Einwand gegen die Darstellung des Hellanikos formulierte.

Inhaltlich geht Herodot an einer weiteren Stelle auf Gesetze Lykurgs ein, allerdings ohne ihn namentlich zu nennen.[36] Wenn er hinsichtlich der ägyptischen Gaue ausführt, dass von den Hermotybiern keiner ein Handwerk ausübe, sondern sie sich nur der Kriegskunst widmeten, auch die Kalasirier kein Handwerk trieben, sondern ausschließlich Krieger seien und der Sohn jeweils vom Vater diese Tätigkeit übernehme und besonders die Spartaner unter den Griechen die Ansicht übernommen hätten, die Handwerker und deren Nachkommen geringer zu achten als die übrigen Bürger und nur der als edel galt, der sich der Kriegskunst widmete,[37] so

[32] Hdt. 1,65,5: μετὰ δὲ τὰ ἐς πόλεμον ἔχοντα, ἐνωμοτίας καὶ τριηκάδας καὶ συσσίτια, πρός τε τούτοισι τοὺς ἐφόρους καὶ γέροντας ἔστησε Λυκοῦργος. Nach Aristot. fr. 532 Rose[3], 539 Gigon, habe als erster Timomachos bei den Lakedaimoniern sämtliche Kriegsdinge geregelt (Τιμομάχῳ, ὃς πρῶτος μὲν πάντα τὰ πρὸς πόλεμον διέταξε Λακεδαιμονίοις).

[33] Von einer Übernahme einiger Gesetze aus Kreta berichtet auch Plutarch in Lykurg. 4,1, von einer Übernahme von Gebräuchen aus Ägypten Diod. 1,98,1 (vgl. 1,96,2). Alle drei Traditionen (Gesetze aus Kreta, Ägypten und vom delphischen Apollon) nennt Ephoros FgrH 70 F 149 (= Strab. 10,4,19).

[34] Hdt. 1,66,1: οὕτω μὲν μεταβαλόντες εὐνομήθησαν. Ähnlich äußerte sich vermutlich Aristoteles, da Herakleides Lembos in der *Epitome* ausführt, Lykurg habe eine große Gesetzlosigkeit (πολλὴ ἀνομία) vorgefunden und Charillos wie ein Tyrann geherrscht; deswegen habe er Änderungen durchgeführt (μετέστησε).

[35] Hdt. 1,66,1: τῷ δὲ Λυκούργῳ τελευτήσαντι ἱρὸν εἱσάμενοι σέβονται μεγάλως.

[36] Hdt. 2,164-167. Vgl. dazu Plut. Lykurg. 4,7; 9,4.

[37] Hdt. 2,167,1-2: ἀποτιμοτέρους τῶν ἄλλων ἡγημένους πολιητέων τοὺς τὰς τέχνας μανθάνοντας καὶ τοὺς ἐκγόνους τούτων, τοὺς δὲ ἀπαλλαγμένους τῶν χειρωναξιέων

nimmt Herodot (2,167,1-2) damit Bezug auf das Verbot Lykurgs, ein Handwerk auszuüben, eben weil sich die im gerade eroberten Messenien angesiedelten Freigelassenen und ihre in die spartanische Bürgerschaft aufgenommenen Nachkommen der Kriegskunst widmen sollten, denn nur so ließ sich die Herrschaft über Messenien militärisch sichern.

Die spartanische Art, sich abweisend gegen Fremde zu verhalten und keinen Verkehr mit ihnen zu pflegen (Hdt. 1,65,2), wird allerdings von Herodot (wohl irrtümlich) bereits auf die Zeit vor Lykurgos bezogen, als Sparta noch eine schlechte Ordnung hatte.[38] Wir können also den Belegen bei Herodot entnehmen, dass bereits um 425 v. Chr. die Gesetze Lykurgs in Sparta kontrovers ausgedeutet wurden, er ihm aber eine umfassende gesetzgeberische Tätigkeit und eine grundlegende Neugestaltung des spartanischen Kosmos zusprach. Eine genaue Verortung dieser Neugestaltung in einen spezifischen historischen Kontext fehlt indes.

Über Kenntnisse lykurgischer Gesetze verfügte offenbar auch Kritias, der gegen Ende des 5. Jahrhunderts – er fiel als Rädelsführer unter den Oligarchen im Kampf gegen die Demokraten im Jahr 403 – in seinen *Metrischen Verfassungen* (*politeíai émmetroi*) (VS 88 B 6) auf die Symposien in Sparta und die dabei vorherrschende maßvolle Ernährungsweise eingeht, die befähige, Mühen zu ertragen. An *keinem* Tage erlaube man sich, den Körper durch unmäßigen Weingenuss zu beeinträchti-

γενναίους νομιζομένους εἶναι, καὶ μάλιστα τοὺς ἐς τὸν πόλεμον ἀνειμένους. μεμαθήκασι δ’ ὦν τοῦτο πάντες οἱ Ἕλληνες καὶ μάλιστα Λακεδαιμόνιοι, …

[38] Hdt. 1,65,2: τὸ δὲ ἔτι πρότερον τούτων καὶ κακονομώτατοι ἦσαν σχεδὸν πάντων Ἑλλήνων κατά τε σφέας αὐτοὺς καὶ ξείνοισι ἀπρόσμικτοι. μετέβαλον δὲ ὧδε ἐς εὐνομίην. Die in Sparta vollzogenen *xenēlasíai* nennt Thukydides in 2,39,1. – Auf einer eigenständigen Überlieferung beruhen die Ausführungen Herodots zum spartanischen Königtum (Hdt. 6,56-59); auf dieselbe Quelle wird Xen. Lak. pol. 15 zurückgehen, der aber über die Informationen Herodots hinaus über weitere verfügte, die er direkt der uns unbekannten Ursprungsquelle entnommen haben muss. Herodot nennt bei den Rechten und Pflichten des spartanischen Königs Lykurg nicht als Urheber dieser Regelungen, und dies wird durch Xenophons *Lakedaimonion politeia* bestätigt. Bereits in Kap. 11 hat Xenophon einen Exkurs zum Kriegswesen in Sparta eingefügt, der sich auf die zeitgenössische Kriegsführung in Sparta bezieht. Die dort genannten Taktiken werden Lykurg auch nicht zugeschrieben; Xenophon betont lediglich, dass derjenige auf solche Manöver gut vorbereitet sei, der Lykurgs Erziehung durchlaufen habe. In Kap. 13 bietet Xenophon Informationen über die vom spartanischen König angeführten Kriegszüge, die der König in Messenien geleitet haben wird. Darauf folgt ein Fazit Xenophons mit Hinweisen darauf, ob die Gesetze Lykurgs noch eingehalten würden (Kap. 14). Angehängt ist daran der nicht mehr auf Lykurg bezogene zweite Exkurs über die *synthḗkai* zwischen König und Polis in dem abschließenden Kap. 15. Diese Informationen decken sich weitgehend mit Hdt. 6,56-58. Bei Herodot fehlen allerdings alle in Xen. Lak. pol. 13 ausgeführten Informationen zum spartanischen König. Dieser Befund zeigt, dass es gesetzliche Bestimmungen Lykurgs über die Kriegsführung der Könige (in Messenien) gab, die Xenophon in Kap. 13 heranzog, und darüber hinaus eine davon unabhängige Überlieferung zu den Rechten und Pflichten der Könige, die Herodot in 6,56-59 und Xenophon in Kap. 15 verwendete.

gen.[39] Dies trifft sich in der Sache mit Platons Äußerung (leg. 1,637a-b), dass in Sparta Trinkgelage verboten gewesen seien, sogar an den Tagen der Dionysien. Sollte sich dieses Verbot auf eine militärische Besatzung im gerade erst eroberten Messenien beziehen, in dem die spartanische Herrschaft noch keineswegs gefestigt war, erscheint eine solche für eine griechische Stadt ungewöhnliche Regelung durchaus plausibel. Eine zweite Schrift des Kritias, die *Verfassung der Lakedaimonier* – die früheste Schrift dieser Gattung –, beginnt möglicherweise mit Ausführungen zur Geburt, ein für eine Verfassungsbeschreibung ungewöhnlicher Auftakt (VS 88 B 32).[40] Es ist also durchaus möglich, dass Xenophon in seiner *Verfassung der Lakedaimonier* (1,3-10) diesem Vorbild beziehungsweise unmittelbar dem Gesetz Lykurgs folgte, wenn er ebenfalls mit Bestimmungen über die Kinderzeugung beginnt. Auf die Frage, wie man seinen Körper am besten stärken könne, gibt Kritias die Antwort, durch gymnastische Übungen desjenigen, der ihn erzeugt (*ho phyteúōn*), sowie durch stärkende Nahrung und körperliche Anstrengungen; auch die Mutter (*mḗtēr*) sollte körperlich stark sein und trainieren (γυμνάζεσθαι).[41] Aus Lykurgs „anschließend" (Hdt. 1,65,5) erlassenen Regelungen hinsichtlich des Krieges könnte der Hinweis des Kritias (VS 88 B 37) über Vorkehrungen für einen möglichen Aufstand der (messenischen) Heloten herrühren: Der Spartiat würde aus Misstrauen gegenüber den Heloten im Hause den Riemen aus dem Schild nehmen; außerdem gehe er immer mit dem Speer herum, um dem Heloten überlegen zu sein, falls dieser allein mit dem Schild einen Aufstand versuchen sollte. Durch spezielle Türriegel seien die Häuser gesichert. Diese Anweisungen könnten zwar auf Heloten in Lakonien bezogen sein, doch käme ihnen in Bezug auf messenische Heloten auf Gütern der freigelassenen Messenienkämpfer größere Plausibilität zu. Aufgrund der nur wenigen Fragmente lässt sich bei Kritias allerdings nicht zweifelsfrei sichern,

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[39] Kritias VS 88 B 6 (Athen. 10,432d): ἡ Λακεδαιμονίων δὲ δίαιθ᾽ ὁμαλῶς διάκειται, / ἔσθειν καὶ πίνειν σύμμετρα πρὸς τὸ φρονεῖν / καὶ τὸ πονεῖν εἶναι δυνατούς· οὐκ ἔστ᾽ ἀπότακτος / ἡμέρα οἰνῶσαι σῶμ᾽ ἀμέτροισι πότοις. – „Die Lebensform der Spartaner ist gleichmäßig, Essen und Trinken sind nach dem Denken bemessen und damit sie fähig sind, Mühen zu ertragen. Es gibt keinen Tag, der aus der Reihe fiele, den Körper durch unmäßiges Trinken mit Wein durchzuspülen" (Übersetzung Th. Schirren, Th. Zinsmaier). Zu den Symposien siehe auch die fr. B 33 und B 34.

[40] Kritias VS 88 B 32 (Clemens strom. 6,9): ἄρχομαι δέ τοι ἀπὸ γενετῆς ἀνθρώπου – „Ich beginne mit der Zeugung des Menschen".

[41] Kritias VS 88 B 32 (Clemens strom. 6,9): πῶς ἂν βέλτιστος τὸ σῶμα γένοιτο καὶ ἰσχυρότατος; εἰ ὁ φυτεύων γυμνάζοιτο καὶ ἐσθίοι ἐρρωμένως καὶ ταλαιπωροίη τὸ σῶμα καὶ ἡ μήτηρ τοῦ παιδίου τοῦ μέλλοντος ἔσεσθαι ἰσχύοι τὸ σῶμα καὶ γυμνάζοιτο. Verwendet Kritias – so wie später Plutarch in Lykurg. 16,1 (ὁ γεννήσας) – die Bezeichnung „Erzeuger", weil der biologische Vater nicht auch der rechtliche war? Zur sportlichen Betätigung von Frauen in Sparta siehe auch Aristoph. Lys. 78-83 (s.u. Anm. 45).

dass er mit diesen Ausführungen unmittelbar auf Bestimmungen Lykurgs rekurriert.[42]

Eine erneut intensivere Debatte über die lykurgischen Gesetze löste möglicherweise der spartanische König Pausanias aus, der nach der Schlacht von Haliartos 395 v. Chr. wegen des als schmachvoll angesehenen Friedensvertrags aus Sparta geflohen und in Abwesenheit zum Tode verurteilt worden war. Nach dieser Verbannung aus Sparta soll er eine Rede *Gegen Lykurgos* (FgrH 582) verfasst haben, weil dieser der Urheber des Gesetzes war, aufgrund dessen er verbannt worden war.[43] In diese Jahre wird auch die Schrift des Thibron (FgrH 581) über den Gesetzgeber Lykurg gehören, wenn es sich dabei um den spartanischen Politiker und Strategen Thibron handelt, der 400/399 als Harmost nach Kleinasien entsandt wurde, dort glücklos agierte und im Jahr 391 fiel.[44] Details sind aus beiden Schriften nicht überliefert. In der im Jahr 392 in Athen aufgeführten Komödie *Ekklesiazusen* karikiert Aristophanes Eigenarten des spartanischen *kósmos*, wie ihn Lykurg geschaffen haben soll. Die als Männer verkleideten Frauen haben in der athenischen Volksversammlung den Vorschlag der Praxagora zum Volksbeschluss erhoben (ekkl. 583-727): Danach sollte aller Besitz Gemeingut sein, so dass es weder Arme noch Reiche gäbe. Den Ackerbau würden die Sklaven verrichten. Land und Sklaven, Gold und Silber, aber auch alle Nahrungsmittel sollten Gemeingut aller sein, ja selbst die Frauen, mit denen jeder verkehren könne. Die geborenen Kinder sollten alle Älteren als gemeinsame Väter respektieren. Knabenchöre würden Lieder singen zu Ehren der Tapferen im Kampf und Spottlieder auf die, die sich als feig erwiesen hatten. Als erste Maßnahme im Rahmen der neuen Ordnung lässt Praxagora alle Bürger zu einer gemeinsamen Mahlzeit, zu Syssitien, laden.[45] Dass die Komödie *Ekklesiazusen* diese Charakteristika der lykurgischen Ordnung aufgreift, könnte ein Reflex auf die in Sparta wieder intensiver geführten Diskussionen über die Gesetze des Lykurg in den späten 390er Jahren sein – natürlich auch ein Reflex auf die allerdings erfolglosen Bemühungen um einen Frieden mit Sparta zur Beendigung des Korinthischen Kriegs und das Agieren von Lakonerfreunden, *Lakōnizontes*, in Athen.

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[42] Plutarch zitiert in seiner Biographie als Quelle zu Lykurg neben Kritias auch Hippias von Elis, allerdings ohne konkrete Hinweise inhaltlicher Art (Lykurg. 23,1).

[43] Strab. 8,5,5 – 366 C (Ephoros FgrH 70 F 118): λόγ[ος] κατὰ τῶν Λυ[κούρ]γου νόμων. Der Text ist allerdings lückenhaft und unsicher in der Lesung. Vgl. Aristot. pol. 5,1, 1301b 20f.; 7,14, 1333b 34f.; Paus. 2,9,1. Zu Lysanders λόγος περὶ πολιτείας FgrH 583 T 1-2.

[44] Genannt ist die Schrift bei Aristoteles (pol. 7,14, 1333b 18-21).

[45] Schon in der im Januar/Februar 411 aufgeführten Komödie *Lysistrate* ist auf eine sportliche Betätigung spartanischer Frauen angespielt (Aristoph. Lys. 78-83). Zum Programm der Praxagora Aristoph. ekkl. 583-727; Respekt der Kinder gegenüber den gemeinsamen Vätern v. 635-643; Ackerbau verrichtende Sklaven v. 651; Lieder von Knabenchören zu Ehren der Tapferen und Spottlieder auf die Feigen v. 678-680; Syssitien v. 715; 1128-1183. Vgl. dazu Xen. Lak. pol. 6; 9.

Jedenfalls wurde die Diskussion weiterhin geführt: Auch Dioskurides, ein Schüler des Isokrates, soll eine Schrift *Lakṓnōn politeía* verfasst haben (FgrH 594 F 1). Summarisch sind in den *Politika* des Aristoteles und in einem vermutlich auf die aristotelische *Verfassung der Lakedaimonier* zurückgehenden Fragment weitere Autoren solcher Schriften genannt.[46] Erhalten haben sich aus dem mit Kritias und Thibron beginnenden reichen Schrifttum über die Verfassung der Lakedaimonier nur die Schrift Xenophons – der allerdings nicht namentlich auf frühere Autoren verweist –, die auf der spartanischen Ordnung basierenden theoretischen Überlegungen Platons in der *Politeia* und in den *Nomoi*,[47] die Kommentare des Aristoteles in dessen *Politika* und die Fragmente und Auszüge des Herakleides Lembos aus der aristotelischen *Verfassung der Lakedaimonier*.[48] Für das 4. Jahrhundert sind darüber hinaus das Geschichtswerk des Ephoros, einige Verse des Komödiendichters Antiphanes und für die Wende vom 4. zum 3. Jahrhundert das Werk des Timaios von Tauromenion zu nennen.[49]

3. *Lakedaimonion politeiai* (hellenistische Zeit und römische Kaiserzeit)

Was *frühe* Schriften über die Verfassung der Lakedaimonier anbelangt, hatte Plutarch offenbar keine wesentlich besseren Informationen, als uns heute zumindest in Fragmenten vorliegen. Er zitiert in der Biographie Lykurgs einige Verse von Alkman, Terpander und Tyrtaios, außerdem Pindar; einige seiner Informationen treffen sich mit denen Herodots; zur Fremdenvertreibung verweist er auf Thukydides (Thuk. 2,39,1). Hinsichtlich der Gesetze beruft er sich auf Kritias und Hippias von Elis, auf Xenophon – allerdings ohne ihn ausgiebig zu verwenden – und mehr-

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[46] Aristot. pol. 7,14, 1333b 18-21; fr. 543 Rose, 549 Gigon.

[47] Der delphische Apollon, der Lykurg die Gesetze verkündet habe, ist z.B. in Plat. leg. 1,624c und 632d genannt. Lykurg wurden alle *nómima* zugesprochen, insbesondere die hinsichtlich des Krieges (leg. 1,630d). Zu Sparta in Platons *Nomoi* siehe Morrow 1960, 40-63 (zu seinen Quellen ebd. 40-45).

[48] Dazu Hose 2002, 44-51 (fr. 532-545 Rose[3], 539-551 Gigon), 91-92 (Herakleides), 187-201 (Kommentar). Aristoteles kannte die Schrift Thibrons sowie die Kritik von Pausanias und Lysander (pol. 5,1, 1301b 7ff.; 7,14, 1333b 18-21) und vermutlich auch Xenophons Schrift über die Verfassung der Lakedaimonier (Hose 2002, 188). Zu den Bezügen der *Politik* auf Sparta Hose 2002, 189; zu Aristoteles' Kritik an Sparta (pol. 2,9, 1269b 30ff., 1271a 40ff.; 7,14, 1333b 12ff.) Schütrumpf 1991, 283-329.

[49] Bei Ephoros sind es die Fragmente FgrH 70 F 117-118, 148 und 149 (bes. Strab. 10,4,17-19). Antiphanes als Vertreter der Mittleren Komödie ist in das 4. Jh. zu setzen. Er wird in Athen. 4,21, p. 142f-143a mit einigen Versen aus dem Stück *Árchōn* zitiert, worin er auf die in Sparta gültigen Gesetze (*nómoi*) verweist, wonach man zu den Gemeinschaftsmählern (*phidítia*) gehen, Brei (ζωμός) essen müsse und die „alten Gebräuche" achten solle (ἐν τοῖς δ' ἐκείνων ἔθεσιν ἴσθ' ἀρχαικός) wie den, einen Lippenbart zu tragen. Möglicherweise handelt es sich bei dem Brei um das auch heute in Griechenland beliebte Fava (siehe Hesych. β 371 s.v. βαφά· ζωμός. Λάκωνες). Nach Aristot. fr. 539 Rose[3], 545,1-3 Gigon, hätten die Ephoren den Bürgern beim Amtsantritt verkündet, den Schnurrbart zu scheren.

fach auf die *Lakedaimonion politeia* des Aristoteles. An einzelnen Stellen sind auch die *Politika* des Aristoteles und Platons *Gesetze* genannt.

Ausgiebiger hat Plutarch die einschlägigen Schriften hellenistischer Zeit konsultiert, angefangen von Timaios, Theophrast (vermutlich seine Schrift *Über die Gesetzgeber*) und Demetrios von Phaleron, aber auch zahlreiche weitere Autoren: Apollothemis, Aristoxenos, Aristokrates (aus Sparta), Dioskorides, Eratosthenes, Hermippos von Smyrna, Philostephanos von Kyrene, Sosibios und Sphairos von Borysthenes.[50] Zahl und Umfang der erhaltenen Fragmente dieser aus hellenistischer Zeit stammenden Schriften sind aber so gering, dass sich keine Bezüge zur Geschichte Spartas in archaischer Zeit herstellen lassen. Wie Strabons eingangs zitierte Äußerung erkennen lässt, lagen tatsächlich in augusteischer Zeit viele Schriften über die *Verfassung der Lakedaimonier* vor, doch die darin heute noch erhaltenen Nachrichten sind mehr als spärlich.[51]

Erst mit dem Übergang von der römischen Republik zur Kaiserzeit fließen die Informationen wieder reichlicher: Noch die späten *Exzerpta* aus der Schrift *De virtutibus* des Konstantinos Porphyrogenetos zeigen, dass dem Nikolaos von Damaskus (FgrH 90 F 56 und 103z) in seiner in augusteischer Zeit entstandenen Universalgeschichte und in seinen *Völkersitten* Schriften über die lykurgischen Gesetze und die spartanische Ordnung vorlagen, aus denen er Informationen zusammenstellte. Einen knappen Überblick über die Gesetze bietet auch Iustin in seiner Kurzfassung des Werks von Pompeius Trogus. Neben Gehorsam gegenüber den Amtsträgern nennt er Genügsamkeit, das Verbot von Münzen und von Gold und

[50] Auffällig ist, dass in den Kapiteln, in denen Plutarch auf den Gesetzgeber Lykurg eingeht, keine Autoren als Quellen genannt sind. Auf Xenophons *Lakedaimonion politeia* beruhten diese Ausführungen jedenfalls nicht. Plut. Lykurg. 1,2 (Aristoteles); 1,3 (Eratosthenes und Apollodoros); 1,4 (Timaios); 1,5 (Xenophon); 1,8 (Simonides); 4,8 (Aristokrates); 5,7 (Hermippos); 5,10 (Platon leg. 3,691e); 5,12 (Aristoteles fr. 537 und Sphairos); 6,4 (Aristoteles fr. 536); 9,7 (Kritias fr. 34 Diels); 10,2 (Theophrast); 11,9 (Dioskurides); 14,2 (Aristoteles); 21,3-6 (Terpander, Pindar und Alkman); 23,1 (Hippias von Elis und Philostephanos); 23,2 (Demetrios von Phaleron); 23,3 (Hermippos); 25,4 (Sosibios); 27,7 (Thuk. 2,39,1); 28,2 und 7 (Aristoteles fr. 538; Plat. leg. 1,633b); 31,4 (Aristoteles fr. 534); 31,7 (Apollothemis, Timaios, Aristoxenos); 31,10 (Aristokrates).

[51] In Felix Jacobys FgrH sind die Schriften über die Verfassung Spartas mit den Titeln Λακωνικὴ πολιτεία (Proxenos [ca. 280 v. Chr.] FgrH 703 F 5; Persaios von Kition [ca. 307-243] FgrH 584 F 1-2; Sphairos von Borysthenes [ca. 280-210] FgrH 585 T 1 und F 1; Dioskurides [um 100 v. Chr.?] FgrH 594 F 1), Λακώνων πολιτεία (Aristokles FgrH 586 F 1; Hippasos FgrH 589 T 1), Λακωνικά (Polykrates FgrH 588; Aristokrates FgrH 591 F 1; Pausanias FgrH 592 T 1) und Λακεδαιμονίων πολιτεία (Molpis [ca. 150-50] FgrH 590 F 1) zusammengestellt. Sphairos von Borysthenes hat zusätzlich zu seiner Λακωνικὴ πολιτεία auch drei Bücher Περὶ Λυκούργου καὶ Σωκράτους (bzw. je ein Buch über die lakonische Verfassung, Lykurg und Sokrates), Pausanias zusätzlich zu seinen Λακωνικά eine Schrift Περὶ τῶν Λάκωσιν ἑορτῶν verfasst. Mehrere Schriften des Sosibios (FgrH 595) befassen sich mit der Geschichte und den Gebräuchen in Sparta. Dikaiarch hat sich mit den Verfassungen Spartas, Korinths und Athens möglicherweise in seiner Schrift *Tripolitikos* beschäftigt (Wehrli ^{2}1967, F 67-72).

Silber (Iust. 3,2). Im folgenden Kapitel (3,3) fügt er die Aufteilung des Bodens in gleich große Landlose, die verpflichtende Teilnahme an den gemeinsamen Mahlzeiten und die Beschränkung auf ein einziges Gewand im Jahr an. Die Knaben sollten sich nicht auf dem Markt aufhalten, ohne Unterlage schlafen und auf Fleisch als Zukost verzichten. Die Mädchen sollten ohne Mitgift heiraten, die Alten mehr als sonst geehrt werden. All diese Bestimmungen habe Lykurg durch ein Abrogationsverbot gesichert. Auf welche Quellen Nikolaos und Pompeius Trogus zurückgriffen, lässt sich nicht mehr ermitteln. Wie Strabon konnten diese Autoren aus den zahlreichen Schriften über die spartanische Verfassung schöpfen, die beginnend mit dem späten 5., frühen 4. Jahrhundert bis in ihre Zeit reichten, ebenso wie kaiserzeitliche Autoren, unter ihnen Plutarch, Diogenes Laertios und Athenaios.[52] Viele der in Athenaios' *Gelehrtengastmahl* überlieferten Zitate und Paraphrasen aus Schriften hellenistischer Autoren befassen sich allein mit spartanischen Bräuchen bei Gastmählern, insbesondere mit den *epáïkla*, den nach dem Mahl gereichten Speisen.[53] Athenaios' Zitate aus Xenophons *Agesilaos* und *Hieron* zeigen aber, dass die Gastmähler der Spartaner den Griechen schon im 4. Jh. v. Chr. Gesprächsstoff boten.[54]

4. Fazit

Die Übersicht über die frühen Quellen zur Gesetzgebung Lykurgs macht deutlich, dass bereits im letzten Viertel des 5. und in der ersten Hälfte des 4. Jahrhunderts dem Gesetzgeber eine grundlegende Neuordnung der spartanischen Gebräuche und

[52] Vgl. auch Dion Chrysost. 25,3. Auch die Schrift *Instituta Laconica* Plutarchs (mor. 236f-240b) kann als eine Art *Lakedaimonion politeia* gelten, denn Plutarch verweist in ihr mehrfach auf Lykurg (22, mor. 238e; 41, mor. 239d und 42, mor. 239f) und behandelt die Speisegemeinschaften, die Erziehung, die Bestattung, das Verbot zu reisen, die Ausweisung von Fremden, die Aufnahme von Fremden, die sich den Einrichtungen der *politeía* unterwarfen und die dann einen Anteil an den Landlosen erhielten, die gemeinschaftliche Nutzung von Sklaven, Jagdhunden und Pferden, Verhaltensweisen bei Kriegszügen sowie religiöse Eigenheiten und das Verbot handwerklicher Tätigkeiten. Wie Xenophon endet Plutarch mit Ausführungen darüber, dass viele der Gebote Lykurgs nicht mehr eingehalten würden (inst. Lac. 42, mor. 239e-240b). Diese Ausführungen legen nahe, dass Plutarch alle in dieser kurzen Schrift zusammengestellten Regeln und Einrichtungen auf Lykurg zurückführte.

[53] Dikaiarchos (Wehrli fr. 72; = Athen. 4,19, p. 141b-c); Proxenos (FgrH 703 F 5); Persaios (FgrH 584 F 1-2); Sphairos (FgrH 585 F 1); Aristokles (FgrH 586 F 1); Nikokles (FgrH 587 F 1-2); Polykrates (FgrH 588); Hippasos (FgrH 589 F 1); Molpis (FgrH 590 F 1-2); Polemon (Athen. 4,17, p. 140c); Dioskurides (FgrH 594 F 2-3); Sosibios (FgrH 595 F 3-7). Phylarchos (3. Jh. v. Chr.) bezieht die Angaben im 25. Buch seiner *Geschichte* auf die Gastmähler zu den Zeiten der Könige Areus und Akrotatos sowie Kleomenes III. (FgrH 2a, 81 F 44; Athen. 4,20-21, p. 141f-142f).

[54] Athen. 4,24, p. 144b-e. In der Lak. pol. widmet sich Xenophon in 5,1-6,4 der Lebensweise, der *díaita*, der Spartaner. Zur *díaita* aber auch schon Kritias VS 88 B 6 (s.o. Anm. 39).

eine umfangreiche Gesetzgebung zugeschrieben wurden. Der Anlass für diese Neuordnung und die zugrunde liegende historische Situation ließen sich aus den Quellen, die Herodot, Kritias, Aristophanes, Xenophon und Ephoros sowie Platon und Aristoteles verwendeten, nicht mehr entnehmen, vermutlich weil lediglich die Gesetzestexte selbst die Zeit zwischen ca. 600 und 425 v. Chr. überbrücken konnten. Die Gesetze als solche ließen sich aber in relativ großer Breite rezipieren, wenn Herodot das Verbot handwerklicher Tätigkeiten (und die Vertreibung von Fremden), Kritias Einzelheiten der Syssitien, Aristophanes die merkwürdig erscheinenden Gebräuche bei Ehe und Kindern kannte, die er – wie später Platon – zu einer Gemeinschaft von Frauen und allen gemeinsamen Kindern ausdeutete. Hinzu kommen bei Aristophanes die Verspottung derjenigen, die sich im Kampf als feige erwiesen hatten, und die für alle verbindlichen Syssitien. Bei Platon, Xenophon und Aristoteles ist dann endgültig das ganze Spektrum spartanischer Lebensweise, der *díaita*, greifbar: Ehe und Geburt, Polyandrie und das Verbot, die zugewiesenen Landlose zu veräußern, die Erziehung der Kinder und die Ausrichtung der Lebensweise auf Genügsamkeit und Mäßigung, die Orientierung auf das Militärische, die Krypteia, das Verbot, ins Ausland zu reisen, und die Ausweisung von Fremden, das Verbot von Gold und Silber und die Einschränkung der Grabsteinsetzung.[55] Aus hellenistischer Zeit liegen uns – trotz zahlreicher (verlorener) Schriften über die Verfassung der Lakoner – kaum Nachrichten über die Gesetze Lykurgs vor. Doch die Ausführungen bei Pompeius Trogus, Nikolaos von Damaskus und Strabon und letztendlich auch bei Plutarch zeigen, dass sich viele Informationen über die lykurgischen Gesetze bis in die römische Kaiserzeit erhalten haben.[56]

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[55] Zur Krypteia Aristot. fr. 538 Rose[3], 543 Gigon, und Herakleid. Lemb. 10 Dilts sowie Plat. leg. 1,633b-c; das Verbot, ins Ausland zu reisen Aristot. fr. 543 Rose[3], 549,1-2 Gigon (mit Hose 2002, 199); das Verbot von Gold und Silber Aristot. fr. 544 Rose[3], 550,1-2 Gigon. Herakleides Lembos hat der aristotelischen Verfassung der Spartaner Informationen über die Trauer um den verstorbenen König (10 Dilts), das Verbot, die Landlose aus der alten Verteilung zu veräußern (12 Dilts), und über die Erziehung und den Grabkult (13 Dilts) entnommen. Der in den Aristotelesfragmenten (fr. 545 Rose[3]) überlieferte Waffenstillstand nach einer *stásis* ließe sich auf die Befriedung des Partheneraufstands beziehen (nach Phlegon von Tralles' *Chronik* ist die Peloponnes zu dieser Zeit von Bürgerkriegen heimgesucht worden; FgrH 257 F 1,1/2, Hose 2002, 191). Terpander soll in einer Zeit innerer Spannungen auf Anweisung eines Orakels nach Sparta geholt worden sein und mit seiner Musik der *stásis* ein Ende bereitet haben (Hose 2002, 200f.). – Allerdings wurden auch schon früh dem Lykurg Gesetze und Einrichtungen zugesprochen, die nicht auf ihn zurückgehen können, so z.B. die deutlich früher anzusetzende sog. Große Rhetra, die ihm Aristoteles in fr. 536 Rose[3], 542,1 Gigon, zuspricht. Auch die Angabe, auf Lykurg gehe die gesamte politische Ordnung Spartas (Λακεδαιμονίων πολιτεία) zurück (Aristot. fr. 537 Rose[3], 541,1-2 Gigon; Herakleid. Lemb. 9 Dilts), trifft nicht zu.

[56] Herangezogen werden können nicht nur Plutarchs Biographie Lykurgs und seine Ausführungen in den *Instituta Laconica* und den *Apophthegmata Laconica*, sondern auch die Biographien von Agis IV. und Kleomenes III., die auf die ‚Reformen' Lykurgs zur Legi-

Angesichts dieses Befundes halte ich es für methodisch zulässig, für eine Rekonstruktion der Tätigkeit und der Ziele Lykurgs als eines historischen Gesetzgebers nicht nur die Quellen des späten 5. und 4. Jahrhunderts heranzuziehen, sondern auch die diese ergänzenden und die früheren Quellen vielfach bestätigenden Angaben kaiserzeitlicher Autoren. Selbstverständlich sind dabei die methodischen Prämissen einer Quellenkritik zu berücksichtigen, doch sollte in Rechnung gestellt werden, dass sich insgesamt ein sehr konsistentes Bild einer lykurgischen Gesetzgebung ergibt, die in einen spezifischen historischen Kontext gestellt werden kann und auf daraus entstandene Erfordernisse reagierte. Ich bin mir dessen bewusst, dass meine Rekonstruktion der inneren Ordnung Spartas, so wie sie uns in den antiken Quellen entgegentritt, der in der Forschung vielfach vertretenen Ansicht, sie sei im Laufe des 6., 5. und 4. Jahrhunderts sukzessiv entstanden, diametral entgegensteht. Ich gehe stattdessen davon aus, dass viele Elemente des spartanischen Kosmos auf Gesetze Lykurgs zurückgehen, die am Ende des 7. oder am Anfang des 6. Jahrhunderts erlassen wurden. Schriften wie Xenophons *Verfassung der Lakedaimonier* sind Ausdruck einer Auseinandersetzung mit tradierten Gesetzestexten und nicht Abbild einer zeitgenössischen sozialen Ordnung. Dabei hat der ungewöhnliche Charakter der lykurgischen Gesetze nicht nur Xenophon zu einer Stellungnahme und dem Versuch einer historischen Deutung veranlasst, sondern auch zahlreiche andere Autoren, die damit den ‚Mythos Sparta' geschaffen haben.

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timation ihrer Bodenreform zurückgriffen: Agis IV. versuchte, eine Neuverteilung des Landes in 4.500 Landgüter für Spartiaten und 15.000 für waffenfähige Perioken durchzusetzen, nach Plutarch angeblich, um die ursprünglich vorhandene ‚Gleichheit' (*isótēs*) wiederherzustellen; es wären dies genau halb so viele, wie Lykurg (in der messenischen) Ebene eingerichtet haben soll (Plut. Agis et Cleomenes 8,1; 2,10; 5,2; 6,1; 9,4; Lyk. 8). Auch die alle Bürger umfassenden Tischgemeinschaften sollten die Lebensweise der Vorfahren aufgreifen (Agis et Cleomenes 8,2-4). Rückgriffe auf Gesetze Lykurgs auch in Plut. Agis et Cleomenes 11,2. Kleomenes III. versuchte dann erneut mit Rückgriff auf Lykurgs Reformen, eine Neuverteilung des Bodens und eine Wiederherstellung der Gleichheit durchzusetzen (Plut. Agis et Cleomenes 28(7),1).

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MARTIN DREHER (MAGDEBURG)

DIE GESETZE LYKURGS UND DIE SPARTANISCHEN PARTHENIER. ANTWORT AUF WINFRIED SCHMITZ

Zu den vieldiskutierten spartanischen *partheníai* und ihrer Verbindung mit der Gründung der Apoikie Taras gibt Winfried Schmitz unkonventionelle und faszinierende Erläuterungen und verbindet damit auch eine Neuinterpretation von sozialen und rechtlichen Verhältnissen des frühen Sparta.[1]

Der vorliegende Beitrag von Schmitz ist eingebettet in einen Komplex von Publikationen zu dieser Thematik. In einem Beitrag in der Klio 2017 hat der Autor seine Thesen zur Gründung von Tarent und den Gesetzen des Lykurg grundlegend entfaltet. Der Aufsatz im Chiron 2018 dehnt die Thesen auf weitere dem Lykurg zugeschriebene Regelungen aus. Im folgenden werden diese beiden Beiträge einbezogen, weil sie die Grundlage für den ersten Teil des aktuellen Beitrags bilden.

Kern von Schmitz' Rekonstruktion sind Aussagen der beiden Autoren Pausanias (2. Jh. n. Chr.) und Iustinus (3. Jh. n. Chr., der Pompeius Trogus aus augusteischer Zeit exzerpiert). Beide erwähnen im Rahmen ihrer Schilderungen des Zweiten Messenischen Krieges lapidar, daß die Spartaner nach herben Niederlagen ihre Gefallenen durch die Aufnahme von Heloten in ihre Schlachtreihen ersetzt hätten. Nur Justin setzt hinzu, daß man den Heloten die Freilassung, die Heirat mit den Kriegerwitwen und das volle Bürgerrecht versprochen habe.[2]

Schon dieser Ausgangspunkt ist nicht unproblematisch, weil er von den Gesamtschilderungen der Messenischen Kriege, die allgemein und in der meisten Hinsicht auch von Schmitz, sowohl bei den beiden zitierten als auch bei allen weiteren Autoren, als unhistorische, spätere Ausschmückungen angesehen werden, eine einzelne Aussage als historisch glaubwürdig ausnimmt.[3] Freilassungen von Heloten

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[1] Ich danke Winfried Schmitz für die vorbildliche Kooperation und die fruchtbare Kommunikation sowohl bei der Vorbereitung des Symposion-Vortrags als auch bei der Ausarbeitung der Druckversion. Ebenfalls danke ich Alberto Maffi für einen Kommentar zum Beitrag von Schmitz, aus dem ich manche, im folgenden nicht immer explizit ausgewiesene Argumentation übernommen habe.

[2] Paus. 4, 16, 4; Iust. 3, 5, 6f.

[3] Schmitz selbst (2017, 429 A. 31) weist darauf hin, daß Welwei 1974, 117-119, die Darstellung des Justin als nachträglich konstruiert ablehnt. Thommen 1996, 52, folgt Welwei und nimmt an, daß die bei Tyrtaios (fr. 8 G-P vv.35-38) als Kampfteilnehmer genannten Leichtbewaffneten (*gymnétes*) nicht als Heloten, sondern als minderberechtig-

aus klassischer Zeit, die man in Situationen großer Bedrängnis für den Kriegsdienst requirierte, sind zuverlässiger bezeugt und werden von Schmitz als Stütze für die angenommene Historizität angeführt,[4] mögen aber eher umgekehrt die späteren Autoren erst dazu veranlaßt haben, eine solche Maßnahme in anachronistischer Weise für den Messenischen Krieg anzunehmen. Es erhöht die Glaubwürdigkeit der justinschen Darstellung nicht, daß das Bürgerrecht den solchermaßen Freigelassenen nicht einmal in den späteren Fällen versprochen oder gar verliehen wurde.

Mit den zitierten Aussagen verbindet Schmitz eine von Athenaios übernommene Stelle aus Theopomps *historíai* (also 4. Jh. v. Chr., ähnlich auch Diodor, 1. Jh. v. Chr.), nach der im Krieg freigelassene Heloten als *epeúnaktoi* die Betten der gefallenen Spartaner belegen sollten und dafür dann zu Bürgern gemacht worden seien.[5] Obwohl in den bisher genannten Quellen nicht von Partheniern die Rede war, wie Schmitz selbst einräumt, sieht er die Kinder, die aus den Verbindungen der Freigelassenen mit den Kriegerwitwen entsprangen, als die *partheníai* („Söhne unverheirateter Frauen")[6] an, die uns in den Darstellungen des Antiochos von Syrakus (5. Jh. v. Chr.) und Ephoros von Kyme (4. Jh. v. Chr.), beide zitiert bei Strabon (augusteische Zeit), begegnen.[7] Die Erklärungen dieser beiden Autoren, nach denen die Väter Spartaner gewesen seien, verwirft der Autor.[8] Aber auch eine Aussage des Aristoteles, die wohl auf eine andere Quelle als diejenigen von Antiochos und Ephoros zurückgeht, bescheinigt den Partheniern eine respektable, ja sogar vornehme Herkunft: „Insbesondere aber muß dies (d.h. die Stasis) geschehen, wenn es irgendeine Gruppe von Leuten gibt, die sich anmaßen, im Hinblick auf Tugend gleich zu sein, wie in Sparta die sogenannten Parthenier (denn sie stammen ja von den ‚Gleichen' ab), die man als Besiedler Tarents fortschickte, nachdem man sie bei einem Anschlag ertappt hatte …".[9] Zur Zeit des Aristoteles hat man unter den *homoioi*, den Gleichen, nur die spartanischen Vollbürger, die Spartiaten, verstanden. Aristoteles hat den Parthenier-Aufstand in die Reihe aristokratischer Staseis eingeordnet, wie

te Bevölkerungsgruppen Spartas anzusehen seien. Möglicherweise hätten sie durch ihren Einsatz das Bürgerrecht erlangt: Thommen 1996, 49.

4 Schmitz 2017, 433ff.

5 Theop. FGrHist 115 F 171 (= Athen. 6, 271 C-D); bei Diodor 8, 21, 1-3, heißen diese Männer in leichter Abweichung *epeunaktaí*. Schmitz 2017, 431, übersetzt den Begriff mit „Hinzugebettete", „Bettgenossen".

6 Die übliche, auch von Schmitz in den früheren Aufsätzen verwendete Übersetzung „Jungfrauensöhne" ist mißverständlich.

7 Antiochos von Syrakus FGrHist 555 F13; Ephoros von Kyme FGrHist 70 F216, beide aus Strabon 6, 3, 2f. 278-280 C. Die von Diodor vorgenommene Gleichsetzung von Epeunakten und Partheniern, die von manchen modernen Autoren übernommen wird, hält Schmitz für unzutreffend, da ihm die Parthenier als Kinder der Epeunakten gelten.

8 Es handele sich um die Söhne von Spartanerinnen mit solchen Spartanern, die entweder nicht am Feldzug teilgenommen hätten und zu Heloten degradiert worden seien (so Antiochos), bzw. aus dem Krieg speziell zur Zeugung nach Hause geschickt worden seien (so Ephoros).

9 Aristot. pol. 1306b27-30, Übersetzung von Meier 1998, 127.

sie auch für andere archaische griechische Poleis belegt sind. Der zu seiner Zeit schon nicht mehr erklärbare Name ‚Partheníai' muß daher die Bezeichnung für eine Hetairie, eine politische Gruppe mit der Absicht, Führungsaufgaben in der Polis wahrzunehmen, gewesen sein.[10] Demgegenüber will Schmitz die *homoioi* als die in den anderen Quellen genannten freigelassenen Heloten verstehen, die gleichgroße Landparzellen in Messenien erhalten hätten und deshalb ‚Gleiche' genannt worden seien.[11] Damit wäre allerdings der Aristoteles-Stelle eine Selbstreferenzialität bescheinigt, die keinen sinnvollen Zielpunkt mehr besitzt: Denn was hätten die Parthenier gewonnen, wenn sie den Status ihrer freigelassenen Väter erreicht hätten?

Gegen den Vorwurf, „die vorgelegte Rekonstruktion und die darauf aufbauenden Hypothesen stützten sich auf Quellen ganz unterschiedlicher Zeitstellung",[12] wehrt sich Schmitz im zweiten und längeren Teil seines Vortrags, indem er sämtliche Quellen zur Verfassung der Lakedaimonier durchmustert, um aufzuzeigen, daß schon seit Herodot, unserer frühesten Quelle, dem Gesetzgeber Lykurg eine umfangreiche Neuordnung der spartanischen Gebräuche zugeschrieben wurde. Diese Replik ändert allerdings nichts daran, daß es gewagt erscheinen muß, die unterschiedlichen Aussagen von Autoren von der klassischen bis in die hohe Kaiserzeit miteinander zu kombinieren, um die in den frühen Texten fehlenden Motive für die Gesetze aus späten Autoren zu ergänzen.

Seine rekonstruierte Entstehung der Parthenier identifiziert Schmitz dann mit einem Gesetz des Lykurg „über die Kinderzeugung", das von wieder anderen Autoren genannt werde. In der Tat erwähnt Aristoteles einen ὁ περὶ τὴν τεκνοποιίαν νόμος (pol. 1270a40). Aber erstens schreibt er ihn nicht dem Lykurg zu, obwohl diese Zuschreibung auch für spätere Gesetze durchaus üblich war.[13] Zweitens nennt

[10] Ich folge darin Meier 1998, 127-136. Thommen 1996, 16, hält zwar die Annahme einer Stasis durch Aristoteles für anachronistisch, geht aber auch von Spannungen unter den führenden Familien Spartas aus, die zur Gründung von Tarent führten.

[11] Schmitz 2018, 58. 128. So auch im Symposion-Beitrag ohne und in nachträglicher schriftlicher Mitteilung mit Bezug auf das Aristoteles-Zitat.

[12] Das Zitat findet sich in der Einleitung des Beitrags. Damit verbunden ist das Problem, daß Schmitz einen Teil der Gründungsgeschichten Tarents für historisch zuverlässig hält, während ein guter Teil der Forschung, dem ich mich auch selbst anschließe, die Fiktionalität dieser späteren Rekonstruktionen betont, vgl. beispielhaft Nafissi 1999, 251ff. mit weiterer Literatur in A.50.

[13] Schmitz meint (schriftliche Mitteilung), dass Aristoteles das Gesetz ans Ende der Messenischen Kriege datiere, weil er diese etwas weiter oben erwähne (1270a3, wo aber zuvörderst die Kriege gegen die Arkader genannt sind), und sie dem Lykurg zuschreibe, weil dieser nicht viel später (a7) als Gesetzgeber erscheine. Allerdings liegen zwischen dieser Passage und dem Hinweis auf das Gesetz über die Kinderzeugung einige Erläuterungen über die längerfristigen Folgen der, nach Aristoteles, fehlerhaften Gesetzgebung Lykurgs, mit denen er den zunehmenden Mangel an Spartiaten erklären will. Den Tiefpunkt dieser Entwicklung malt er sogar als Untergang der Polis aus, die er auf ebendiese *oliganthropia* zurückführt (a33-34: μίαν γὰρ πληγὴν … διὰ τὴν ὀλιγανθρωπίαν): statt früher angeblich 10.000 hätte es dann nur noch 1.000 Spartiaten gegeben. Dieses Szena-

er ihn nicht *rhetra* (wie Schmitz suggeriert), sondern eben *nomos*. Drittens galt das Gesetz offenbar nur für Spartiaten.[14] Viertens geht Aristoteles davon aus, daß das Gesetz zu seiner Zeit noch in Kraft war und nennt fünftens dessen konkreten Inhalt, daß nämlich Spartiaten mit drei oder vier Kindern von bestimmten Pflichten befreit seien, was in den anderen, von Schmitz herangezogenen Quellen keine Entsprechung hat.[15] Xenophons Verfassung der Spartaner, auf die Schmitz des weiteren verweist, beginnt sogar mit Gesetzen (*nomoi*) zur Kinderzeugung, die zwar Lykurg zugeschrieben werden, aber vielfältige Maßnahmen umfassen, insbesondere die körperliche Ertüchtigung der spartanischen Frauen, so daß auch diese Angabe schwerlich auf die von Schmitz ins Auge gefaßte spezifische Situation eingeschränkt werden kann.[16]

Die postulierte Erzeugung der Parthenier durch freigelassene Heloten wird also von keiner Quelle mit Lykurg in Verbindung gebracht. Gleichwohl will Schmitz nicht nur dieses vermeintliche Gesetz, sondern weitere spartanische Regelungen, die schon in der Antike als eigenartig und von anderen Poleis abweichend galten,[17] als Werk eines historischen Gesetzgebers Lykurg anerkennen und aus der konkreten Situation am Ende des Messenischen Krieges erklären. Die Beschränkung all dieser Vorschriften auf die freigelassenen Heloten und deren Kinder sei jedoch mit der Zeit in Vergessenheit geraten, so daß nur die „puren“ Gesetze ohne ihren ursprünglichen Zusammenhang überliefert und in klassischer Zeit als verbindlich für alle Spartaner wiederaufgegriffen worden seien.[18] Es ist jedoch nicht gerade wahrscheinlich, daß alle späteren Autoren der Illusion aufsaßen, daß die auf eine bestimmte Situation

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rio bezieht sich zweifellos auf die schwere Niederlage Spartas gegen die thebanische Streitmacht unter Epameinondas im Jahr 362 (1269b37 ist bereits ein Einfall der Thebaner erwähnt). Und ebendiese Entwicklung habe auch das Gesetz über die Kinderzeugung eher gefördert als verhindert.

[14] Daher müßte Schmitz zumindest annehmen, es sei irgendwann auf alle Spartiaten übertragen worden, nachdem es, wie er meint, nur ursprünglich für die freigelassenen Heloten gegolten habe.

[15] Aristot. pol. 1270a40-b4. Angesichts der *oliganthropia*, die Aristoteles für seine eigene Zeit intensiv beklagt, paßt ein solches Gesetz am besten in die Zeit ab dem 4. Jahrhundert.

[16] Xen. Lak. pol. 1, 3-10. Plutarch hingegen kennt kein solches Gesetz, obwohl er von sehr ähnlichen Ehebräuchen erzählt.

[17] Durchgespielt wird diese These noch an der sogenannten zweiten und dritten Rhetra, die von Plutarch (Lyk. 13) überliefert werden, Schmitz 2018, 125ff. Dabei ist durchaus plausibel, daß viele der ausgewählten Regelungen in den von Schmitz angenommenen Rahmen einer Garnison in Messenien passen würden. Andererseits ist es weder zwingend, daß diese Garnison aus freigelassenen Heloten bestand, noch daß diese Regelungen nur direkt nach dem Ende des Messenischen Krieges sinnvoll waren. Sie konnten vielmehr zu jeder Zeit zwischen dem Kriegsende und der klassischen Zeit entstanden sein.

[18] Schmitz 2018, 132f. Mit der Beschränkung des Gesetzes auf die freigelassenen Heloten löst Schmitz seine frühere Vorstellung ab (Schmitz 2002), nach der die Hochzeitsrituale nach dem Zweiten Messenischen Krieg für alle Spartaner als Teil einer „kommunitären Gesellschaftsform“ eingeführt wurden.

und eine bestimmte Personengruppe bezogenen Regelungen die dauerhafte und allgemeingültige Verfassung Spartas gebildet hätten. Autoren wie besonders Xenophon, der die spartanischen Verhältnisse aus eigener Anschauung kannte, hätten zweifellos bemerkt, daß zumindest ein Teil dieser Regelungen vor ihrer eigenen Zeit oder auch noch zu ihrer eigenen Zeit nicht mehr gültig gewesen sind bzw. auf eine nicht mehr gegebene historische Situation gemünzt gewesen wären.[19]

Von den zahlreichen Konsequenzen, die Schmitz aufgrund seiner Grundthese zieht, können im folgenden nur noch einige ausgewählte, insbesondere rechtlich relevante, kritisch betrachtet werden.

- Die meisten Gesetze, die wir aus der archaischen Zeit kennen, sind in einer sehr knappen, lapidaren Sprache formuliert. Das zeigen gerade die Gesetze der kretischen Poleis,[20] die ja wie die spartanischen im dorischen Dialekt verfaßt sind, und die der Tradition nach auch inhaltlich mit den spartanischen verwandt sein sollen, auch wenn wir heute den Quellenangaben über angebliche direkte Übertragungen nicht folgen.[21] Diese äußerst kompakte Ausdrucksweise gilt als besonders charakteristisch für die Spartaner im allgemeinen, bis dahin, daß sie einen festen Platz im dortigen Erziehungswesen eingenommen haben soll.[22] Bis heute verwenden wir daher die Bezeichnung „lakonisch“ dafür. Es wäre also verwunderlich, wenn die spartanischen Gesetze, ob lykurgisch oder nicht, dieser Charakteristik nicht entsprochen hätten. Doch ist davon in den hellenistischen und römischen Texten, welche die angeblich lykurgischen Gesetze überliefern, nichts mehr zu spüren. Vielmehr ranken sich deren nicht selten weit hergeholte ausgeschmückte Ausführungen um einzelne, nicht mehr verstandene Begriffe, die man zu erklären versucht.[23]

- Nach Schmitz hatte das Gesetz über Kinderzeugung mit all seinen Bestimmungen über die merkwürdigen Hochzeitsbräuche vor allem den Zweck, eine rechtsgültige Ehe zwischen den freigelassenen Heloten und den Kriegerwitwen zu

[19] Das hier nachgezeichnete Schicksal nimmt Schmitz jedoch nicht für alle lykurgischen Gesetze gleichermaßen in Anspruch. Insbesondere die befremdliche Form der Abschließung von Pseudo-Ehen, aber auch das lykurgische Verbot von handwerklicher Tätigkeit und des Besitzes von Gold und Silber seien später nicht als verbindlich für alle Spartaner angesehen worden (2018, 133f.). Widersprüchlich erscheint die Einordnung der *agogé*, des spartanischen Erziehungssystems, in diese Entwicklung. Während sie 2018, 132, in der Reihe der Gesetze steht, die nur für einige Jahre oder Jahrzehnte nach dem Messenischen Krieg gültig gewesen seien, soll sie, eine Seite später, als „unmittelbare Rückwirkung“ für alle Kinder der Spartaner (im Sinn von Spartiaten) übernommen worden sein.

[20] Die kretischen Gesetze nimmt Schmitz 2018, 133, seinerseits für seine Argumentation in Anspruch: Sie seien insofern lapidar, als sie auf keinen Anlaß oder Kontext verwiesen.

[21] Vgl. u.a. Hdt. 1, 65, 5; Aristot. pol. 1271b22-30; Plut. Lyk. 4, 1.

[22] Die ‚Brachylogia‘ als Erziehungsinhalt erwähnt auch Schmitz 2018, 122.

[23] Auch Schmitz 2018, 451, nimmt an, daß die ursprünglichen Gesetze einen anderen, „nüchterneren“ Wortlaut hatten, und daß die Version Plutarchs anekdotenhaft ausgeschmückt ist. Andererseits nimmt er an, daß die Gesetze doch schriftlich tradiert worden seien (ebd.), so daß eine engere Anlehnung an den Wortlaut zu erwarten wäre.

vermeiden. Dadurch seien die so gezeugten Parthenier dem Status der Mutter statt dem des Vaters gefolgt und hätten deren Bürgerrecht geerbt. Ein solches Prinzip, daß ein Kind aus einer nicht rechtmäßigen Ehe dem Status der Mutter folgt, kennen wir zwar aus Rom,[24] aber im antiken Griechenland existierte es nicht. Die vermeintliche Parallele aus dem Gesetz von Gortyn greift nicht, weil die Kinder einer freien Frau mit einem *woikeús* eben nicht gemäß der Rechtmäßigkeit der Ehe, sondern gemäß dem Lokalitätsprinzip eingestuft wurden und außerdem nur die Freiheit, nicht explizit auch das Bürgerrecht zugesichert bekamen.[25] Die Aussage des Aristoteles, daß man „in einigen Demokratien" als Bürger gelte, wenn nur die Mutter Bürgerin ist,[26] kann nicht auf das frühe Sparta bezogen werden, was Schmitz auch nicht tut, der die Passage nur als Beleg für Konflikte um das Bürgerrecht in Anspruch nimmt.

- Die Spartaner hätten den Zweck, nur die Kinder, nicht aber die freigelassenen Väter in die Bürgerschaft aufzunehmen, viel einfacher erreichen können als durch die Aufstellung so vielfältiger und umständlicher Regeln, wie sie von Plutarch und ansatzweise Xenophon als lykurgische Bestimmungen geschildert werden.[27] Wenn man Schmitz' Voraussetzung akzeptiert, nach der die Kinder das Bürgerrecht der Mutter geerbt hätten, dann hätte ein einfaches Zusammenleben der Freigelassenen mit den Kriegerwitwen für die Gewinnung des Bürgerstatus genügt.[28] Falls man die Voraussetzung nicht akzeptiert, könnte man sich einen einfachen Beschluß des zuständigen Gremiums, wohl der Gerusia, über die Aufnahme der Parthenier in die Gemeinschaft vorstellen. Der von Schmitz vorausgesetzte (spätere) politische Streit um die Realisierung des Bürgerrechts der Parthenier setzt ja ebenfalls voraus, daß es solche Entscheidungen auf der politischen Ebene gegeben hat. Die in den Quellen geschilderten Rituale, sofern sie überhaupt, zumindest im Kern, historisch sind, sind

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[24] Schmitz 2017, 439 A.59, zitiert die entsprechende Digesten-Stelle Dig. 1, 5, 24.

[25] Schmitz 2017, 449, macht einerseits genau diese Aussage, nimmt im Satz danach aber doch an, daß eine Verbindung am Wohnort der freien Frau nicht, eine am Wohnort des halbfreien Mannes aber doch als Ehe aufgefaßt worden sei. Dieser Unterschied besteht nicht, da das Gesetz in beiden Fällen das Verb *opuien* verwendet. Für diese Hinweise danke ich Alberto Maffi.

[26] Aristot. pol. 1278a27-34, zitiert bei Schmitz 2017, 440.

[27] Plut. Lyk. 15, 4-9; Xen. Lak. pol. 15, 16-18, beide zitiert bei Schmitz 2017, 437-438.

[28] Schmitz teilt mir im Nachgang mit, daß genau dies sein Modell sei, und daß die Vorstellung, man habe die jungen Männer und Frauen in einen dunklen Raum gesperrt und die Bräute wie *erómenoi* geschoren, lediglich den Gedanken der späteren Autoren entsprungen seien. Das hatte ich seinen Aufsätzen (insbesondere 2017, 436-438) und dem Symposion-Beitrag nicht entnommen.
Greift man die von Schmitz ins Spiel gebrachte Analogie zum Gesetz von Gortyn wieder auf, allerdings ohne die von Schmitz angenommene Differenzierung der Eheform zu übernehmen (s.o. mit A. 25) dann hätten die Freigelassenen auch eine normale Ehe schließen und sich ins Haus der Witwe, d.h. in deren väterliches Haus, begeben können, um das Bürgerrecht ihrer Kinder zu sichern. Allerdings wäre diese Parallele nicht präzise, da in der Bestimmung von Gortyn die Ehe einer Bürgerin mit einem Halbfreien, nicht mit einem Freigelassenen geregelt ist.

daher weiterhin eher als gewachsene Hochzeitsbräuche denn als einmalige Gesetzesbestimmungen erklärlich.[29]

- Nach Schmitz erhielten die neugeborenen Parthenier einen Kleros, der die Lebensgrundlage für die Mutter und den biologischen Vater bilden sollte. Wovon aber lebte dieses Paar bei Kinderlosigkeit, bei der Geburt nur von Mädchen oder auch nur bis zur Geburt eines Sohnes?[30]

- Schmitz berücksichtigt nicht, daß die Witwen vor dem Tod ihrer Ehemänner bereits Söhne, mithin direkte Erben, geboren haben konnten, in welchem Fall seine erbrechtliche Konstruktion ins Leere liefe.[31] Hätten diese Witwen trotzdem mit Freigelassenen eine „Lebenspartnerschaft" geschlossen, und hätten sich diese Pseudo-Ehemänner an dem angenommenen Aufstand beteiligt und wären mitsamt ihren neuen Familien nach Taras ausgewiesen worden,[32] so hätte Sparta (zukünftige) Bürger verloren, statt deren Zahl zu vergrößern, worin ja nach Schmitz das Ziel dieser Maßnahme bestand.

- Schmitz geht mehrfach davon aus, daß es die freigelassenen Heloten waren, die einen gewaltsamen Aufstand planten, weil man ihnen bzw. ihren mit Kriegerwitwen gezeugten Kindern die Integration in die Bürgerschaft verweigerte, und die deshalb das Land verlassen mußten und sich in Taras ansiedelten. Damit stützt er sich einseitig auf die Aussagen von Theopomp und Diodor. Wie Schmitz selbst feststellt, setzt Diodor beide Gruppen fälschlicherweise gleich. Es wäre also leicht möglich, daß der Sizilier lediglich für die als eigentliche Gründer von Taras überlieferten Partheniai auch die Bezeichnung Epeunaktoi verwendet hat. Bei Theopomp erscheinen die Epeunakten nicht im Zusammenhang mit der Besiedlung Tarents. Daß die Gründer von Taras ursprünglich nur als Parthenier galten, wie es die anderen Quellen überliefern, bleibt daher die wahrscheinlichere Annahme.[33] In der Konstruktion von Schmitz müßte es also eher die nächste Generation sein, die er für Söhne der Epeunaktoi hält, eben die Parthenier, die sich in Sparta erhoben und Tarent gründeten.

- Nicht zuletzt wirft Schmitz' Rekonstruktion chronologische Probleme auf. Schmitz selbst will auf die Frage der chronologischen Einordnung der von ihm

[29] Der Brautraub ist im übrigen eine Form der Verheiratung, die in vielen Gesellschaften vorkam und daher keine spartanische Besonderheit darstellt, so daß gerade dieser Brauch nicht als spätere Phantasie gelten muß.

[30] Schmitz 2018, 115, geht selbst davon aus, daß die Frau eines gefallenen Spartiaten dessen Landgut verlassen mußte, weil es im Zuge der patrilinearen Erbfolge an dessen männliche Verwandte fiel.

[31] Das ist wiederum ein Hinweis von Alberto Maffi.

[32] Das scheint Schmitz 2017, 442, anzunehmen; es wäre jedenfalls ein mögliches Szenario.

[33] Vgl. zu den Quellenstellen oben A. 5. Zur Position von Schmitz vgl. besonders Schmitz 2017, 420. 440-442; Schmitz 2018, 117f. Meier 1998, 124 A.8, folgt Jacoby in der Annahme, daß die Epeunaktoi erst mit dem Historiker Timaios in die Überlieferung eingegangen seien.

rekonstruierten Ereignisse erklärtermaßen nicht näher eingehen.[34] Allerdings nennt er mehrfach das Datum „um 600 v. Chr.“ für die Gesetze Lykurgs, die er als Reaktion auf den Aufstand der freigelassenen Heloten versteht, den er wiederum nach dem spartanischen Sieg im Messenischen Krieg ansetzt.[35] Da der Aufstand wiederum die Voraussetzung für die Ausweisung seiner Urheber war, wäre die Apoikie Taras kurz nach 600 v. Chr. von den Epeunakten gegründet worden. Wenn man erst die nächste Generation, die Parthenier als Söhne der Epeunakten, als Gründer annimmt, wäre das Gründungsdatum frühestens 575 v. Chr. anzusetzen.[36] Demgegenüber hat die Gründung von Taras, die in der gesamten Überlieferung mit der Parthenier-Geschichte verknüpft ist, nach allen unseren Informationen erheblich früher stattgefunden. Der Chronist Eusebius gibt als Gründungsdatum 706/05 v. Chr. an. Die Zeit gegen Ende des 8. Jahrhunderts wird von einigen archäologischen Indizien gestützt und daher von vielen modernen Forschern akzeptiert.[37] Schmitz selbst verweist zunächst ohne Widerspruch auf diese Position,[38] ohne auf die Diskrepanz zu seiner eigenen Datierung einzugehen. Kurz darauf erklärt er die Datierung für umstritten, zitiert aber wieder nur einen Befürworter.[39] Im weiteren Verlauf der Argumentation eröffnet er schließlich eine Alternative: Da in Taras lakonische Keramik vom Ende des 8. Jahrhunderts gefunden wurde, aus dem folgenden 7. Jahrhundert nicht, aber dann wieder um 600 v. Chr., schließt er: „Die Auswanderung der Aufständischen aus Sparta ließe sich also nach den archäologischen Funden sowohl um 700, als auch um 600 v. Chr. ansetzen“.[40] Ganz so gut passen die archäologischen Befunde aber doch nicht zur Rekonstruktion von Schmitz, denn die in Tarent gefundene lakonische Keramik datiert wohl nicht erst um 600 v. Chr., sondern beginnt im letzten Viertel des 7. Jahrhunderts.[41] Nähme man mit einem Teil der (späteren) Quellen, dem ein Gutteil der modernen Forschung

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[34] Schmitz 2017, 439 A. 58.

[35] Reformen „um 600 v. Chr.“: Schmitz 2017, 420f. 457. Nach dem Messenischen Krieg: Schmitz 2018, 117, und mehrfach im vorliegenden Beitrag. Das Datum 600 v. Chr. als Ende des Krieges beruht auf der Aussage, die Plutarch (mor. 194 B) dem Epameinondas in den Mund legt, daß die Kriege 230 Jahre vor der Befreiung Messeniens (370/69 v. Chr.) geendet hätten. Zustimmend z. B. Clauss 1983, 19f.; Parker 1991; Thommen 1996, 31; Welwei 2004, 70.

[36] Schmitz 2018, 117, setzt für diesen, für ihn unwahrscheinlicheren Fall den „Aufstand frühestens zwanzig oder dreißig Jahre nach dem Ende des Messenischen Krieges” an.

[37] Vgl. z. B. Baltrusch 1998, 39. 87; Lupi 2017, 59f.; Thommen 2017, 26.

[38] Schmitz 2017, 421 A. 1, mit Verweis auf Cartledge.

[39] Schmitz 2017, 422 A. 7, mit Verweis auf Malkin.

[40] Schmitz 2017, 439 A. 58. Aber nach 600 v. Chr., wohin die Rekonstruktion von Schmitz führt, datiert meines Wissens niemand die Gründung von Tarent. Schmitz könnte, in Abweichung von den Quellenberichten, die Auswanderung der Parthenier nicht als Gründung, sondern allenfalls als Zuzug in eine bereits bestehende Apoikie auffassen. Eine solche Grundidee erwägt auch Meier 1998, 137-141.

[41] Vgl. die Verweise von Meier 1998, 140f., den auch Schmitz als Zeugen anführt. Meier setzt daher die Parthenier-Geschichte um 660/50 v. Chr. an.

folgt, zwei voneinander getrennte Messenische Kriege an, so würde die Konstruktion von Schmitz in sich stimmiger werden, wenn er die Parthenier-Episode ans Ende des sogenannten *Ersten* Messenischen Krieges setzte, sei es, daß man dieses auf ca. 715 v. Chr., sei es auf ca. 670 v. Chr. setzt.[42] Diese Möglichkeit bleibt Schmitz jedoch versperrt, weil er die Aufteilung der Eroberung Messeniens in zwei getrennte Krieg nicht mitmacht, sondern konsequent von nur einem, von *dem* Messenischen Krieg spricht, den er, wie manche anderen Forscher auch, als eine langandauernde Serie von Kämpfen um das messenische Land auffaßt.[43] Das Kriegsende, das Schmitz als Voraussetzung für die Parthenier-Geschichte sieht, kann also für ihn nur gegen 600 v. Chr. gelegen haben.

Zusammenfassend läßt sich feststellen: Die komplexe Rekonstruktion von Winfried Schmitz ist auf den ersten Blick sehr ansprechend, da sie tatsächlich in vieler Hinsicht auf die angenommene spezifische Situation Spartas am Ende der Messenischen Kriege passen würde. Bei näherem Hinsehen ergeben sich jedoch sowohl methodische Bedenken gegen die Kombination der Quellenaussagen, als auch inhaltliche und chronologische Unvereinbarkeiten und Unwahrscheinlichkeiten. Eine wirkliche Überlegenheit über die, zugegebenermaßen oft ebenfalls hypothetischen, Überlegungen der bisherigen Forschung dürften sie daher kaum erringen können.

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[42] Diese Annahme findet sich auch in der Forschung, sie wird zitiert von Schmitz 2017, 426 A. 18; Schmitz 2018, 109 A. 5.

[43] Antiochos, unsere früheste Quelle für die Parthenier-Geschichte, hält noch keine zwei Messenischen Kriege auseinander (dennoch meint Meier 1998, 122 A. 6, zu der Zeitangabe „nach dem Messenischen Krieg" ohne Begründung: „Gemeint ist der 1. Messenische Krieg"). Ähnlich ist es bei Ephoros (so auch Schmitz 2017, 429), dessen Angaben meist auf den 1. Krieg bezogen werden, von Nafissi 1999, 254, zum Beispiel jedoch auf den 2. Krieg. Nur einen Krieg kennt auch Aristoteles, pol. 1306b36-1307a2. Gegen eine klare Trennung in zwei Messenische Kriege z.B. Clauss 1983, 19; Luther 2004, 69. Diese Position wird auch von mir selbst vertreten, vgl. Dreher 2012, 37.

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CONFISCATION, EXILE, AND RETURN: THE PROPERTY PROBLEM AND ITS LEGAL SOLUTIONS

Abstract: This paper examines the evidence for legal solutions to the problem of returning exiles who demanded the return of their property in the Classical period. Fifth-century laws prioritize the interests of the political regime in power over the private economic interests of individuals, whereas in the fourth century they began to prioritize lasting peace and reconciliation, which entailed a new commitment to recognizing and protecting the property claims of returnees.

Keywords: property, *stasis*, exile, confiscation, reconciliation

On the island of Samos in 412, a popular uprising led to the execution of two hundred oligarchs and the exile of four hundred more; the land and houses of the victims of this purge became the property of its perpetrators (Thuc. 8.21). Eight years later the Samian democrats, besieged by the Spartan admiral Lysander, were driven out with nothing but the cloaks on their backs; Lysander then "gave control of the city and everything in it" to the exiled oligarchs, who must once again have claimed property on the island (Xen. *Hell*. 2.3.6-7). The events on Samos at the end of the Peloponnesian War are by no means unusual, but they highlight the dramatic impact of *stasis* on the ownership of private property.[*]

In the event of large-scale expulsions like those on Samos in the late fifth century, hundreds of families lost their land, their houses, and their movable property. When Thucydides (8.21) says that the Samian democrats "themselves took the land and houses" of the exiled oligarchs, he is certainly reporting in a compressed fashion a process well known from Athens in particular: the victors in the *stasis* confiscated the exiles' property, declared it public, and then auctioned it, publicly, to the highest bidder.[1] The proceeds from the sale were a source of revenue

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1 *E.g.* Hdt. 6.121.1-2; OR 172; Walbank 1982; *Ath.Pol.* 43.4 with Rhodes 1981, 525–26.

for the *polis*, but cash rarely appears to have been the motive.[2] This entire process was founded upon the recognition—indeed the insistence—that property ownership was a significant form of power within the *polis*, a power bestowed upon citizens and snatched away from those who were being expelled. The ownership of land and houses, restricted to citizens, was thus both carrot and stick. This underlying logic to the evidently universal association of exile with property confiscation provides the background to the story of how Greek *poleis* dealt with the problem of returning exiles who wanted their property to be restored to them.

The Samian oligarchs who returned in 404 were lucky: the democrats who had confiscated their property and reallocated it to others eight years before had now been driven out. When Xenophon says that Lysander "gave control of the city and everything in it" to the returning exiles, he leads us to imagine that they did not face any challenges from existing owners as they sought to reclaim their property. Yet it was precisely this challenging dynamic that many *poleis* faced when they had reached a reconciliation agreement with exiles who were then allowed to return. For the competing claims of buyer and returning former owner of confiscated property had the potential to disrupt hard-won settlements and incite further dispute and violence.

There were three tangled sets of problems. The first was the obvious *political* problem, that disputes of any kind between returning exiles and those who had stayed in a *polis* had the potential to rekindle *stasis*. The second was a set of *economic* problems. Rampant property confiscations, even in contexts of *stasis* and exile, must have undermined the trust that citizens had in the security of their property claims, and more profoundly in their states' willingness to protect their property claims despite having the power to overawe them through indiscriminate seizure. What is more, if those who purchased confiscated property at auction from the *polis* were not confident of the security of property claims they would make over the goods they purchased, they would not buy. And while this would deprive the state of some revenues, more importantly it would create another political problem, because it would undercut the efficacy of the strategy, adopted by *poleis* across the Classical Greek world, of using property ownership as both a privilege of citizenship and a means of punishment. Additionally, creditors who had made loans to exiles would expect to be repaid through the process of confiscation and auction, but if they had not been they are likely to have pressed their claims against returnees. The third set of problems was *legal*. If trials over property disputes were to be conducted, how could an unbiased jury be composed, when most citizens within the *polis* had either been involved or made a commitment of loyalty to one side or the other in *stasis*? Finally, those who purchased confiscated property at auction became the

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[2] Lys. 30.22 alleges that the Athenian *boule* is willing to accept *eisangeliai* and confiscate the property of citizens when it needs funds (and, he implies, only for that purpose). This allegation appears exceptional.

legal owners; if they were forced to return the property, how could they be justly compensated?

Time after time, Greek states enacted legislation and had recourse to trials to settle disputes arising over property in the aftermath of confiscations and the return of exiles. And while the documentation of the legal procedures set in place to cope with this problem are rarely as detailed as we would like, there is in fact a robust set of more than a dozen cases across the period c. 450-300 that shed light on the problem of how Greek states used legal institutions to address the intractable problem of property disputes following the return of their citizens from exile. In 1991 Raoul Lonis published an important paper on this topic, but he focused largely on the fourth century and studied the problem primarily from a political perspective, side-stepping both the legal procedures and the question of how legal remedies related to political priorities.[3] In what follows I consider the surviving evidence for this problem in the Classical period, highlighting in each case both the legal institutions utilized by states struggling with this ferociously difficult problem, and what the surviving evidence reveals about the priorities of the regimes that enacted these decrees and deployed these legal strategies. Chronological developments in both of these areas will suggest that responses became markedly more judicious and balanced over time, a sign not only that the Greek states learned from their own mistakes and the mistakes of others, but that during the fourth century property claims, which originated in a political bargain between possessors and would-be ruling elites, became somewhat more secure as states recognized the complex, deleterious impact of property insecurity.[4]

The Fifth Century

In the surviving evidence one of the most common legal strategies for dealing with the anticipated demands for property restoration from returning exiles was to delegate responsibility for resolving the disputes to particular officials, courts, or a specially commissioned body. Such delegated authority was sometimes chronologically bounded, creating a window of opportunity within which all disputes had to be heard and trials conducted.

Our first insight into an attempt at this problem is at Halikarnassos in the mid-fifth century. The so-called Lygdamis inscription records a decision (ὁ ἅδος, l. 19) or law (ὁ νόμος, ll. 19, 32, 34-35) that resulted from deliberation in the *syllogos* of the Halikarnassians and the Salmakians and Lygdamis, generally believed to be the same Lygdamis who was the tyrant of Halikarnassos.[5] Although the law never

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3 Lonis 1991.

4 See further Mackil 2017, Mackil 2018.

5 OR 132; Maffi 1988; Koerner and Hallof 1993, 84. For the identity of Lygdamis see most recently Osborne and Rhodes 2017, 184. Although efforts seem to be made to recognize Salmakis as a separate entity with at least some of its own officials and political representatives, it appears here to be subordinate to Halikarnassos (its *mnemones*

explicitly mentions exiles and deals at least superficially only with property disputes in general terms, there are several reasons to believe that a period of civil strife, leading perhaps to exile, confiscation, and return lay behind its passage. First, our scant literary sources for Lygdamis suggest that he faced significant hostility, leading to both violence and exile; the late *Suda* tells us that Herodotos went into exile because of his tyranny, and that his uncle Panyassis was killed by him.[6] The late fourth-century author of the pseudo-Aristotelian *Oeconomica* reports that Lygdamis had exiled some citizens and confiscated their property, but found no buyers for their land, so he sold it back to the exiles themselves.[7] As one of many accounts in the treatise of semi-devious strategies adopted by rulers and dynasts for the generation of revenue, it is somewhat suspect, but it clearly derives from an otherwise lost Classical-period tradition of hostility toward Lygdamis and memories that he was responsible for the exile of his political opponents; it is natural that the confiscation of their property would have been a part of that process. Lygdamis clearly presides over the council of the Halikarnassians and Salmakians; if the property disputes that the law anticipates are brought by returning exiles, they must be his erstwhile opponents. Second, as Alberto Maffi and Edwin Carawan have both shown, the *mnemones* who are named in the law and whose term in office constitutes a temporal marker for those with a property dispute appear to have served at least part of their term prior to the passage of the law.[8]

Carawan also demonstrated convincingly that the *mnemones* were not archivists at this early date but rather rememberers, officials in charge of keeping track of property ownership within the community, perhaps among other things.[9] They appear in a related context in a document from nearby Iasos about a century later, where they are the μνήμονες συνεπώλησαν, the *mnemones* who were partners (of the *polis*) in the sale.[10] The point of their partnership was certainly to make them witnesses. The *mnemones* of Halikarnassos and Salmakis probably played a similar role. As witnesses to the confiscation and auctioning of the private property of

cease to be mentioned after ll. 13-16). Osborne and Rhodes (2017, 185) remark that “Salmacis was a community very close to Halicarnassus” while noting that in the fourth century it was fully incorporated. Piñol-Villanueva 2017 suggests that it had been absorbed by Halikarnassos in a *sympoliteia* by the time the law being discussed here was passed.

6 *Suda* s.v. Ἡρόδοτος (Adler η 536), Πανύασις (Adler π 248).

7 [Arist.] *Oec*. 1346b7-13 with van Groningen 1933, 41–44 and van Groningen and Wartelle 1968, xiii for the date.

8 Maffi 1988, 71–77; Carawan 2007, 168–9.

9 *Mnemones* as registrars, working with written documentation: Arist. *Pol*. 1321b34-40. For a critical discussion of the archivist view of the *mnemones* (Maffi 1988 *inter alios*) and a compelling argument in favor of viewing the *mnemones* as rememberers, see Carawan 2007, 166–76 with Thomas 1996, 19–25.

10 *I.Iasos* 1.32, 35, 41, 45.

exiled citizens, they became a source of authority in the disputes that arose when those exiles returned.

The section of the law most important for my purpose is this:

16 ἢν δέ τις θέληι δικάζε-
σθαι περὶ γῆς ἢ οἰκίων, ἐπικαλ[έ]-
τω ἐν ὀκτωκαίδεκα μησὶν ἀπ’ ὅτ[ε]
ὁ ἅδος ἐγένετο· νόμωι δὲ κατάπ[ε]-
20 ρ νῦν ὁρκῶ{ι}σ<α>ι τὸς δικαστάς· ὅ τ[ι]
ἂν οἱ μνήμονες εἰδέωσιν, τοῦτο
καρτερὸν ἐναι. ἢν δέ τις ὕστερον
ἐπικαλῆι τούτο τõ χρόνο τῶν
24 ὀκτωκαίδεκα μηνῶν, ὅρκον ε̃ναι τ-
ῶι νεμομένωι τὴν γῆν ἢ τὰ οἰκ-
[ί]α, ὁρκõν δὲ τὸς δικαστὰς ἡμί-
[ε]κτον δεξαμένος· τὸν δὲ ὅρκον εἶ-
28 [ν]αι παρεόντος τõ ἐνεστηκότος. κ-
αρτερὸς δ’εἶναι γῆς καὶ οἰκίων οἵτινες
τότ’ εἶχον ὅτε Ἀπολλωνίδης καὶ Πανα-
μύης ἐμνημόνευον, εἰ μὴ ὕστερο-
32 ν ἀπεπέρασαν.

But if anyone wishes to bring suit regarding land or buildings, let him make his claim within eighteen months from the date of this decision. In accordance with this law as it is now, the *dikastai* shall administer the oath: whatever the *mnemones* know shall prevail. But if someone should bring suit after this eighteen-month period, the person in possession of the land or houses is to take an oath, with the *dikastai* receiving half a *hekteus* per oath. The oath is to be taken [by the possessor] in the presence of the one who has initiated the suit. They are to be owners of the land and houses who were in possession of them at the time when Apollonides and Panamyes were *mnemones*, unless they sold them later.

These lines establish distinct rules that will govern property disputes between current possessors and former owners, depending on the period of time in which they are brought. The first (lines 16-22) is the period of eighteen months from the passage of this law. During this time, the knowledge of the *mnemones* in lines 21-22 is to be authoritative at a trial presided over by *dikastai*. As Maffi showed, Apollonides and Panamyes were *mnemones* not at the time the *syllogos* was inscribed but at some time in the past, and it was presumably during their tenure that the strife arose from which confiscations (and possibly exile) were at least one

outcome.[11] Whether they themselves would testify before the *dikastai* in a trial during the initial eighteen-month period, or whether current holders of that office whose responsibility would have included knowledge of past transactions would do so is unclear. In either case, the current possessor is under no special obligation; he must only comply, like all others, with the implications of the testimony of the *mnemones*.

A different rule applies to the adjudication of disputes brought after the initial eighteen-month period (lines 22-32). In these cases, the current possessor must take an oath in the presence of the one who has initiated the suit, ὁ ἐνεστηκώς (*viz*., the claimant, likely the former owner), and is to pay the *dikastai* half a *hekteus*.[12] Both components—the oath and the payment—merit careful consideration but have received little attention in recent treatments of the text. There is no mention of a payment in the procedures to be followed in the first period, and its significance in the second period depends on our assessment of the value of a *hekteus*. Reinach assumed that the *hemiekton* was a court fee or judge's salary, but several scholars have insisted that this must have been an electrum coin, which would give it a dramatically higher value.[13] In this case, the function of the required payment would have been to place additional pressure on the current possessor, to dissuade him from pressing his claim to the property against the former owner. A *hekteus* is simply one-sixth of a stater, whether that coin was of gold, electrum, or silver. Yet hoard evidence and studies of coins minted within Karia in this period show that they were overwhelmingly silver and minted on the Aiginetan silver standard, with a 12.2g stater.[14] If this is indeed the standard referred to in the inscription, the *hemiekton* would be equivalent in value to roughly 1g of silver. Several examples are known of silver coins weighing 1.2g that are attributed to Halikarnassos in the early fifth century, and these are likely to be the *hemiekton*.[15] We are dealing, then, with a court fee or judge's salary, rather than a deterrent fine.

The role of the oath sworn in this period also seems to differ. In the first period, the oath is administered by the *dikastai*, presumably to everyone in the court, litigants and defendants alike, to recognize the principle that "whatever the *mnemones* know shall prevail" (ll. 19-22). In the second period, the oath is sworn

[11] Maffi 1988, 72–76, followed by Carawan 2007, 168–69 and Osborne and Rhodes 2017, 185.

[12] Maffi 1988, 111 recognizes that the payment must be closely connected to the swearing of the oath, and notes that it seems to have a decisive effect.

[13] Reinach 1888, 42–43. Newton 1862, 3:682–86 argued that the *stater* in use at Halikarnassos in this period (which appears in our text in l.38) was an electrum stater, and he is followed by Melville-Jones 2007 no. 316, who assumes that the staters referred to were Kyzikene electrum staters, and that the hemiekton was one-twelfth of this high-value coin.

[14] *IGCH* 1180, 1186; Kraay 1976, 274. The Kyzikene staters were struck to the Phokaic standard, which was narrowly restricted in regular use to the northeastern Aegean.

[15] *BMC Caria* p. 102, 1-2; *SNG Kayhan* 755-758.

only by the current possessor. Sommerstein suggests that this oath functioned as an assertion of ownership that would be the sole basis for a decisive judgment by the *dikastai*.[16] But the oath of the current possessor at Halikarnassos is not decisive. The following sentence (ll. 28-32) provides the rule that *dikastai* must follow.[17] The oath, in other words, will not have been decisive but the requirement of a current possessor to swear one, given the rule that follows, must have been intended to put pressure on current possessors and diminish their willingness to press their claims. If the payment was too small to do so, the oath might have been more effective.

In disputes pursued in this second period, the person who is recognized by the *mnemones* as having been the owner at the time of the mnemonship of Apollonides and Panamyes is granted possession again. The current possessor is at a disadvantage, and the text gives no indication as to how he might be compensated. Nor, however, does it state what "the one who has initiated the suit" must do to reclaim his property. We might assume that he would need the recognition of the *mnemones*, but the text does not say so. I shall return to this point below.

At the end of the decree (lines 43-45) there is a reference to oaths sworn and written down in the past. Carawan follows Maffi in taking lines 43–45 to be a reference to some kind of reconciliation agreement that preceded this document, and to which the decree is supplementary.[18] His inference is that without the decree the normal procedure would have been for the *mnemones* to simply recognize the original owners, a process he calls "summary reclamation."[19] Instead, the new law requires that all such cases be heard by a jury; the role of the *mnemones* is effectively reduced to that of providing expert testimony. Why was the change necessary? Carawan suggests that "a more public recognition of rights was needed to forestall divisive recriminations. By replacing the presumptive procedure with a court decision, this decree creates a more secure arrangement for the future, giving a stronger title to those who held property in the 'base year' established by the settlement."[20] In other words, the reason for the trial was publicity and transparency, the goal of which was to head off the possibility of a renewed cycle of dispute and violence.

There is, however, no parallel for any procedure like Carawan's "summary reclamation" without a regime change and the expulsion of those who had been responsible for the earlier round of confiscation and exile, as happened at Samos in

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16 Sommerstein 2013, 62–63, citing Hom. *Il*. 23.581-85

17 Its significance depends on the correct reading of the imperfect indicative verbs in lines 30–31 (εἶχον, ἐμνημόνευον). Sommerstein misconstrues the impact of the oath-taking here because he relies on the view of Meiggs and Lewis (ML 32) that Apollonides and Panamyes were just entering their term of office as *mnemones*, or that it had just begun; cf. Maffi 1988, 71–77; Carawan 2007, 168–69.

18 Maffi 1988, 68–70; Carawan 2007, 178–79.

19 Carawan 2007, 179.

20 Carawan 2007, 179.

408. That is clearly not the case here. Summary reclamation by the former owners would also have wreaked havoc within Halikarnassos if the confiscated property had been sold and become the legal property of new owners. But Carawan's argument that the public trial gave stronger title to those who won their suit is certainly correct.

The nature of the jury to be used in these trials might help us understand who was likely to win their suits. If it is correct that property disputes are anticipated because some exiles have been allowed to return, we want to understand what efforts were made to ensure a fair trial for claimants. Lygdamis clearly rules Halikarnassos and Salmakis; the *syllogos* with which he deliberated must have served at his pleasure or been the outcome of tense inter-elite negotiations. The *mnemones* may include representatives from both sides of the dispute, but even this is uncertain.[21] The law is strikingly silent on the composition of the jury, a matter that becomes a major preoccupation of later legislators dealing with this problem throughout the Greek world. The inscription is profoundly elusive. This silence may imply that the composition of the *dikastai* for these trials was to be consistent with then-standard practice at Halikarnassos. Or it may imply that Lygdamis and his regime were simply using the veneer of legal process to stave off otherwise inevitable charges of injustice from returning exiles who sought to recover their property.

A further possibility emerges from the peculiar silences of this text regarding the steps to be taken by ὁ ἐνεστηκώς, "the one who initiated the suit" (l. 28), to regain his property. We hear only that καρτερὸς δ'εἶναι γῆς καὶ οἰκίων οἵτινες τότ' εἶχον, "he is to be the owner of land and houses who held them at the time" of the mnemonship of Apollonides and Panamyes. The text makes no mention of compensation for the person who will be dispossessed. The two silences, both about payment, raise the possibility that the text, inscribed perhaps as much for propagandist as for archival purposes, intentionally glosses over at least one crucial step. Is it possible that [Aristotle] was right when he claimed (*Oec*. 1346b7-13) that Lygdamis allowed former owners to buy back their own property, even if it was not because he had no other buyers for the confiscated property? This suggestion is hypothetical but I see nothing in our text to preclude the possibility that what ὁ ἐνεστηκώς had to do to become καρτερός once again over his former property was to pay Lygdamis' regime for it. The veneer of reconciliation would be preserved, and Lygdamis would profit handsomely. As comparandum we can look to the provision in the Athenian reconciliation agreement of 403 that allowed returning

[21] One of the *mnemones* is a son of Lygdamis (ll. 10-11) but, as Reinach noted, another is a son of Panyassis (ll. 15-16); if that Panyassis were Herodotos' uncle, his son might be taken as a representative of the opposition to Lygdamis, a sign that the *mnemones* were constructed as a bipartisan board. In fact, both Lygdamis and Panyassis are rather common names in Karia (*LGPN* V.B s.v.), and we cannot be confident about either inference.

exiles to buy back their own moveable property if it had been sold after their departure.[22]

Whether or not that hypothesis is correct, in the absence of a total regime change that would have put the victims of the confiscation and exile, and their partisans, in power and expelled their opponents, it is unlikely that this law worked to ensure in any straightforward or genuine manner the restoration of all property confiscated during the *mnemonship* of Apollonides, with the possible exception of cases in which their return was swift enough that the confiscated property had not yet been sold to new buyers. I say this for two reasons. First, in the Greek world of the Archaic period, property rights were the outcome of a negotiation between individual possessors and nascent states seeking arenas for the generation of power. And the terms of that negotiation were that the state would recognize private ownership, impose obligations to the community on the owner, and commit to protecting the property claims of its citizens in a profoundly qualified sense.[23] The use of property confiscation by states as a means to punish their citizens was very much a product of this historical process. When confiscation became closely bound to exile, the punishment was institutionalized, and the threat of it thereby also formed an incentive to citizens. Even if Lygdamis and the Halikarnassians had recalled their exiles and implicitly or explicitly recognized the injustice of the original exile, it was not in their interest to recognize the injustice of the property confiscation by restoring what had been lost because they would have undermined both their own ability to reward partisans with new property, and their ability to threaten potential malefactors with loss. The second reason for scepticism is that, in the broader context of legislation to solve this problem, widespread and straightforward restoration is otherwise unattested.

Roughly contemporary with the Lygdamis inscription is a document from Chios that, despite some uncertainties, is nevertheless more straightforward, thanks largely to the meticulous work of Angelos Matthaiou.[24] The text, inscribed on all four sides of a marble stele that is broken at the top, begins on side A with what must be the end of a long delimitation of the boundaries of land, with a summary report that there are "seventy-five *horoi* in all" (A.6-7). The land thus delimited is called "Dophitis," a name that has puzzled commentators and inspired alternative restorations. It is curious and distinctive enough to have inspired a moniker for the text—the Dophitis inscription—but its meaning is ancillary to my purposes.[25] The delimitation is followed by a prohibition against the removal of *horoi*, with a harsh penalty of a one hundred stater fine and *atimia* for those who do so anyway. The

22 Lysias, *Against Hippotherses* fr. 165 (Carey) lines 38-48; Rubinstein 2018, 123–24.

23 Mackil 2017.

24 Matthaiou 2011, 13–35 (OR 133). The inscription has been studied since the nineteenth century; see Malouchou and Matthaiou 2006, 204 and Matthaiou 2011, 13–14 for a complete bibliography of earlier scholarship.

25 Matthaiou 2011, 24–27.

prohibition is to be enforced by the *horophylakes*; should they fail to act, the Fifteen are authorized to enforce the law.[26]

The text at the top of side B is lost; what survives begins with an order that the Fifteen are to bring something to the council within five days (B1-6). Given what comes next, it is presumably notice of a dispute over property. This is the crucial part of the text for my purposes:

Side B

τὸς δὲ κή-
ρυκας διαπέ-
8 μψαντες ἐς τ-
ὰς χώρας κη[ρ]-
υσσόντων κα-
ὶ διὰ τῆς πόλ̣-
12 εως ἀδηνέως
γεγωνέοντε-
ς, ἀποδεκνύν-
τες τὴν ἡμέ[ρ]-
16 ην ἣν ἂν λάβω-
ισιν καὶ τὸ π̣-
ρῆχμα προσκ-
ηρυσσόντων
20 ὅ τι ἂμ μέλλη-
ι πρήξεσθαι·
κἀγδικασάν-
των τριηκοσ-
24 ίων μὴλάσσο-
νες ἀνηρίθε-
υτοι ἐόντες.

[The Fifteen] are to send heralds off in different directions to the lands and have them make a clear and loud announcement, also throughout the city, without malice, indicating the date on which they will receive [the property in dispute], and let them also announce the matter that is going to be dealt with. Let no fewer than three hundred uncorrupted men decide the case.

My translation is necessarily an act of interpretation, and several words are troubling. πρῆχμα in lines 16-17 was taken by Buck to mean a lawsuit; Koerner embraced the indeterminacy of the word and translated it *Gegenstand*.[27] Matthaiou, noting the wide range of meanings for the word in ancient as in modern Greek, suggests that it means "public sale," with the passive πρήξεσθαι in line 21 the

[26] Koerner 1987, 473, accepting the original "correction" of the territory name to Λοφῖτις, suggested that these officials were *orophylakes*, mountain-guards; cf. Osborne and Rhodes 2017, 193–94 who leave open the possibility that these might be *orophylakes*, noting that the words are indistinguishable in Ionic. The context, however, clearly demands that they be "boundary-guards," and Matthaiou (2011, 15) has correctly accentuated the text: τὸς ὁροφύλακας.

[27] Buck 1955, 187–9 no. 4; Koerner and Hallof 1993, 231.

related verbal form.[28] πράσσω is frequently used in later inscriptions and literary texts to describe the confiscation and sale of property, making this an attractive suggestion. Yet because this clause is immediately followed by one that indisputably references a trial, it is difficult to understand the logic if we take πρῆχμα (16-17), with Matthaiou, to mean a public sale or auction. The difficulty is compounded by the recurrence of πρῆχμα on side C line 5, in a clause that once again, and more clearly, references a trial. Before turning to the text on that side, however, it is important to note the role of the heralds in this procedure. At Athens they seem to have been responsible for announcing the public auctions of confiscated property and serving as auctioneers, so it is logical that at least at Chios they should also have announced disputes over that property, which could challenge the right of the buyer to continue to own what he had purchased.[29] And if at Halikarnassos the *mnemones* were expected to remember the detailed history of ownership, the Chians appear instead to be relying on a large, uncorrupted jury and on the knowledge of the public.

The lacuna at the top of Side C hinders our understanding of how the first part of the text on this side relates to that on side B, but it appears to address the procedure for handling a special type of dispute.[30]

Side C

	[. .]Η̣Δ̣Ι̣Ι̣[. . . 14 . . .]	… the *polis*, having received …
	[.]ι̣ομενος ἡ π̣[ό]λις δεξαμ[έ]-	shall bring a case, and if it loses
	[ν]η δικαζέσθω, κἂν ὄφληι, [ὑ]-	the trial, let the *polis* pay on
4	περαποδότω, τῶι δὲ πρια[μ]-	their behalf. There is to be no
	ἐ̣νωι πρῆχμα ἔστω μηδέν· [ὃ]-	lawsuit against the buyer.
	ς̣ ἄν τὰς πρήσις ἀκρατέα[ς]	Anyone who makes the sales
	ποιῆι, ἐπαράσθω κατ᾽ αὐτ[õ]	invalid, the basileus shall make
8	ὁ βασιλεός, ἐπὴν τὰς νομ̣[α]-	a curse against him when he
	ίας ἐπαρὰς ποιῆται.	makes the customary curses.

δικαζέσθω in line 3 assures us that we are dealing here with a lawsuit, but the verb must be understood as a middle imperative, which seems to have escaped notice in recent editions and commentaries. In the passive it means “to have actions brought against one” (*LSJ s.v.* I.6) and this is not consonant with the phrase that follows. In

[28] Matthaiou 2011, 19.

[29] The earliest evidence is Hdt. 6.121.2, describing the sale by auctioneer/herald of the property of Peisistratos after one of his exiles in the mid-sixth century. The role of heralds in the sales of confiscated property at Athens are inferred from the mention of herald’s fees, κηρύκεια, in the records of the *poletai* (Agora XIX P3 lines 4-5, P5 line 37, P45 line 3, P53 line 46). The evidence is carefully evaluated by Langdon 1991, 57–58; Langdon 1994, 262–63.

[30] See Matthaiou 2011, 20 with references to the full history of restorations of lines 1-2.

the middle, δικάζω means "to plead one's case, go to law" (*LSJ s.v.* II). In other words, the *polis* must be the plaintiff here. The defendant is the man who brought whatever the *polis* received (ἡ π̣[ό]λις δεξαμ[έ|ν]η); because of the lacuna at the top of side C, we cannot be sure what it was. Matthaiou supposes that what the *polis* will have received is a claim that a property that has been sold by the city properly belongs to another.[31] He seems to envision exiles who have returned and are demanding the restoration of their property.[32] But there is another possibility. The detailed records of the *poletai* from fourth-century Athens reveal that before the state could claim its revenue from the sale of confiscated property, creditors to whom the victim of confiscation owed money had to be satisfied; it was the *polis* that paid them.[33] It seems possible that in fifth-century Chios these creditors were the people whose claims were received by the *polis*. The *polis* then "went to law" with them, but if their claim was susbstantiated, and the *polis* lost its suit, then the *polis* had to pay the creditors on behalf of the debtors whose property it had confiscated; this may be the sense of ὑπεραποδότω in lines 3-4.[34] πρῆχμα appears again in line 5, and Matthaiou also understands it as a reference to a lawsuit here. ὁ πριάμενος is not, on this reconstruction, the defendant but rather the person who bought the property at auction; he is indemnified from any obligation to pay the outstanding debts of the man whose property was confiscated, as was demonstrably true at Athens in the fourth century.

The text on side C continues with a clause cursing "anyone who makes the sales invalid," and then records purchases of land and houses in a list that continues onto side D.[35] The need to repay creditors, apparently addressed in C.2-5, is only a small part of this complicated process. The provisions made on side B for the handling of disputes, likely between former owners and buyers, and on side C for the claims of creditors, are anticipatory. The Chians make no promises that confiscated properties will be returned to their former owners; if it is indeed returning exiles who make the

31 Matthaiou 2011, 21, seemingly followed by Osborne and Rhodes 2017, 194.

32 Asheri 1966, 47 suggested that a history of exile, confiscation, and return lay behind this law. Koerner and Hallof 1993, 236–38 reject this background and suggest instead that the previous owners were forced to sell their properties (in a *Zwangsverkaüfe*) to enable a land redistribution. But as Matthaiou 2011, 29 notes, this "explanation does not accord well with the very small number of the preserved properties and purchasers." Karabelias 2005, 214–24 studies the four attested cases in which private property was expropriated for public purposes; none align with the kind of event Asheri hypothesized here.

33 See, for example, the very detailed and complete *Agora* XIX P5 (RO 36) lines 14-35 with a list of four creditors (both individuals and groups) making claims on the property of Theosebes son of Theophilos of Xypete in 367/6.

34 I follow Matthaiou (2011, 20–21) in understanding the rare ὑπεραποδιδόναι, attested only here and at *IOSPE* I2 32 A.18 (Olbia, third century BCE), to mean "pay on behalf of someone."

35 The question of whether or not the confiscated properties were all within the territory delimited as "Dophitis" on side A (Faraguna 2005, 97–98; Matthaiou 2011, 28–29) is not relevant to my current purpose.

kinds of claims anticipated in B.6-26, the legal measure provided to deal with this challenging problem is trial before a large jury of "three hundred uncorrupted men." The Chian *polis* likewise commits to repaying those who can prove that they were owed money by the dispossessed at the time of confiscation, and forestalls the possibility that such creditors might demand money from the buyers of the confiscated property by prohibiting them from filing suit (τῶι δὲ πρια[μ]|ένωι πρῆχμα ἔστω μηδέν, C.4-5). The legal solutions here are both positive and negative: both the proper and improper uses of litigation are delimited by the *polis*. The goal here appears to be avoiding the erosion of public trust, both in the security of the property rights of the buyer of confiscated property, which would seriously threaten the ability of the *polis* to use property as both punishment and reward for its citizens, and of the creditor, which might discourage lending in future on the expectation that confiscations might occur at any time and eradicate the claims of the creditor. The same goal lies behind the final clause of the law on side C (lines 5-9): the *basileus*, evidently a public official, is to curse anyone who attempts to invalidate the sales. In sum, the Chian *polis* seeks to protect the efficacy of confiscation as a penalty in future, while also using the courts to deal fairly with the claims of those impacted by the practice.

For further insight into the legal procedures adopted to deal with this problem we have to jump to Selymbria in the last decade of the fifth century. And thanks to literary evidence for related events, our interpretation of what occurred is more straightforward than in the cases of Halikarnassos and Chios. In 408, Selymbria was one of the cities brought back over to the Athenian side, along with Chalkedon and Byzantion, by Alkibiades.[36] Among our sources, Diodoros (13.66.4) reports an important detail: καὶ μετὰ πάσης τῆς δυνάμεως ἀναζεύξας πρῶτον μὲν Σηλυβρίαν διὰ προδοσίας εἷλεν, ἐξ ἧς <u>πολλὰ χρήματα πραξάμενος</u> ἐν μὲν ταύτῃ φρουρὰν κατέλιπεν, "setting out again with his full force [Alkibiades] first took Sely(m)bria by betrayal, and *after exacting much property* from it he left a garrison behind in the city."[37] In the following year, the Athenians ratified the treaty that Alkibiades made with the Selymbrians. The stele that records the agreement, *IG* I[3] 118, survives in five fragments and much of the upper left part of the stone is lost.[38] After some reference (lines 8-9) to hostages, plausibly restored as a clause committing the Athenians to return any hostages they held and not to take any from Selymbria in future, the text turns to the problem of confiscated property.

From the surviving text we have the impression not that people were formally exiled, but rather that in conditions of hostility property was confiscated—I believe

[36] Xen. *Hell*. 1.1.21, 1.3.10; Diod. Sic. 13.66.4; Plut. *Alc*. 30.

[37] Cf. Plut. *Alc*. 30.5: ἀλλὰ <u>χρήματα λαβὼν</u> καὶ φρουρὰν ἐγκαταστήσας ἀπῆλθεν. In both cases χρήματα might be (and indeed often is) translated "money." I opt however for the more general translation, "property," in light of the documentary evidence.

[38] EM 6603. *IG* I[2] 116 (Cataldi 1983, 315–48 no. 12; ML 87). OR 185 reproduce the text of *IG* I[3] 118.

by partisans on both sides. Lines 12-17, unfortunately lacunose in key places, deal with what to do ε̣ἴ το [χ]ρέματα ἐδεδέμε|[υτο], "if anybody's property had been confiscated" (lines 14-15) and then mentions Selymbrian exiles. With the texts of Diodoros and Plutarch as background, it seems likely that this clause dealt with restoration of or compensation for property that had been confiscated from Selymbrians, either by the Athenians themselves or by their partisans within the city, when they took the place in the previous year.[39] Unfortunately the legal remedy is not preserved, nor does it seem like there is much space on the stone for anything detailed.

The next clause turns to the problem of how to resolve claims to damaged or confiscated property previously held by Athenians and their allies.

[. . . 14 . . .] ἃ̣ δὲ ἀπόλετο ἐν τôι πολέμοι
[χρέματα Ἀθεναί]ον ἒ τôν συμμάχον ἒ εἴ τι ὀφελ-
20 [όμενον ἒ παρακ]αταθέκεν ἔχοντός το ἔπραχσα-
[ν οἱ ἄρχοντες], μὴ ἒναι πρᾶχσιν πλὴγ γε̂ς καὶ οἰ-
[κίας·

With regard to any property of the Athenians or the allies which has been lost in the war, or anything that may be owed or deposited and which [the *archons*] exacted from the one who had it, there shall be no exaction except for land and house.[40]

We have to infer that when Selymbria revolted from Athens and went over to Pharnabazos and the Peloponnesians around 410, they confiscated the property of at least some Athenians and their allies at Selymbria. The generally conciliatory tone of this decree has been long noted; Osborne and Rhodes remark that, among other things, this treaty that restores Selymbria to the Athenian alliance "limited the Athenians' rights to reclaim property."[41] The final clause, however, should give us pause: "except for land and houses." The Athenians appear to have conceded the right to reclaim moveable goods that they lost in the upheaval, but they pointedly reserve the right to exact—πρᾶχσιν—from the Selymbrians the land and houses that they lost.[42] We do not learn from the treaty about any legal remedies for the disputes

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[39] So too Cataldi 1983, 325. Plut. *Alc*. 30.2-3 reports a pro-Athenian faction within Selymbria that sought to hand the city over to Alkibiades when it was still under the control of Pharnabazos and the Peloponnesian forces; Diod. Sic. 13.66.4 implies as much when he says that Alkibiades Σηλυβρίαν διὰ προδοσίας εἶλεν. On the internal conflict see Gehrke 1985, 145–46.

[40] Trans. Lambert and Rhodes at https://www.atticinscriptions.com/inscription/IGI3/118, preferable for its clarity to the translation of Osborne and Rhodes 2017, 519.

[41] Conciliatory tone: ML 87; Papazarkadas 2013, 226. Osborne and Rhodes 2017, 521.

[42] I follow Gauthier 1972, 162, who understands πρᾶχσις here to mean "saisie pour recouvrement, c'est-à-dire saisie légale." The most familiar comparandum for the ownership of landed property by Athenians in *poleis* subordinated to Athens in the fifth

that might arise, a sign I suspect that the Athenians intended simply to "exact" the land and houses that had been taken from them, with no legal recourse for the current possessors of the property. Other disputes, we learn, are to be resolved in lawsuits ἀπὸ χσυμβόλον, in accordance with a convention between Athens and Selymbria that is otherwise unattested.[43] It is curious that disputes over property appear to have been excluded from that convention. Rachel Zelnick-Abramowitz has noted that the land owned by Athenians in Selymbria appears to have been acquired by individuals, in contravention of Greek legal norms but apparently without the political framework of a cleruchy; it is precisely the sort of abuse that the decree of Aristoteles later sought to forswear.[44]

The Selymbria treaty differs formally from the other texts considered here; while it is an interstate treaty that restores Selymbria to the Athenian alliance and imposes some conditions, it nevertheless exposes dynamics similar to those arising from *stasis*, exile, and return. Former property owners are returning to Selymbria; those who had achieved their expulsion are making choices about what concessions to make to ease tensions. Crucially, however, the Athenians have the upper hand. If the treaty that they ratify in this decree is the outcome of negotiations between Alkibiades, as representative of the Athenian state, and the Selymbrian *demos*, we may read the clause πλὴγ γε̂ς καὶ οἰ[κίας as a concession made by the Selymbrians to Athenian demands. The Athenians who had been expelled and are now returning do not differ significantly from citizens who were returning from exile; their right to own the property is not called into question. It is only the method by which they regain it that differs. Whereas citizens returning from exile would have to rely on negotiations with the regime in power to regain their property, the Athenians could utilize πρα̂χσις. Their interest in achieving a peaceful and long-lasting settlement with Selymbria is tempered by their desire to protect their economic interests in this strategically located allied community.[45]

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century comes from the so-called Attic stelai, the records of the property of the Hermokopidai confiscated by the Athenian state and auctioned by the *poletai*: *IG* I[3] 426 frag. C col. 2 line 45 (Thasos); IG I3 428 lines 4, 6 (Oropos); IG I3 422 col. I lines 90, 218, 376, IG I3 424 lines 17-21 (Euboia); *IG* I[3] 427 col. 1 line 78 (Abydos). Zelnick-Abramovitz 2004, 328 rightly notes that for all their limitations these documents do reveal that "the Athenians acknowledged the legal ownership of these individuals and sold the lands as their legitimate property." In the fourth century the practice persisted at least in the Attic cleruchies: a record of the *poletai* from 370/69 records the auctioning of property confiscated from an Athenian citizen on Lemnos (*Agora* XIX P4; *SEG* XIX.133.)

[43] The Athenian *symbolon* with Phaselis from the mid-fifth century (*IG* I[3] 10; OR 120) likewise references a more detailed convention that governs lawsuits, but which does not survive. Cataldi 1983, 99–143; Gauthier 1972, 162–63, 177–81, 184–86.

[44] Zelnick-Abramovitz 2004, 329.

[45] The restoration of Alkibiades himself is not instructive for the question pursued in this paper. Our sources suggest that the restoration was effected by political means: the *demos* itself voted "gifts" (Lys. 14.31; Isocr. 16.11) for Alkibiades upon his return, and in

In the tumultuous final years of the Peloponnesian War, the return of large numbers of exiles, both democratic and oligarchic, resulted in a ferociously complicated set of claims for restoration. Lene Rubinstein has suggested that the return of those who had been exiled by the democracy (including those, like Alkibiades, who were condemned *in absentia*) must have brought a high number of demands for the restoration of their property. The sources for the terms of the peace negotiated by the democratic regime in 405, before the installation of the Thirty, are extremely scant; while no mention is made of provisions for the restoration of property to returning exiles, it cannot be ruled out.[46] And Rubinstein has suggested that the coup of the Thirty, and their notorious confiscation of the property of citizens and metics alike, may have been motivated by a desire to restore the wealth of those who had been attacked by the democracy following their exile.[47] When the Thirty were defeated and democracy restored in Athens, the property of the Thirty Tyrants was confiscated and auctioned.[48] Democratic exiles, in turn, streamed back into the city, demanding the return of their property. Athenian law normally held that returning exiles would not be compensated for property that had been confiscated from them by legal procedures, and it also prohibited them from lodging claims against the purchasers of their estates; sales made by the *poletai* were unconditional.[49] Yet, according to Lysias, our only source for the question, the Athenian democrats utilized the political settlement to override that law, invalidating all trials conducted

a speech written by Isokrates Alkibiades' own son, returning from his own brief exile in 403, complained that he had been stripped even of "that land, which the *demos* gave to us in compensation for the confiscated property," τὴν γῆν, ἣν ἡμῖν ἀπέδωκεν ὁ δῆμος ἀντὶ τῶν δημευθέντων χρημάτων (Isocr. 16.46). The gifts were compensatory (Rubinstein 2018, 134); the impression given by later authors in breathless accounts of his glittering return in 407 are misleading in their claim that the *demos* simply "gave back his property" (Diod. 13.69.2; Plut. *Alc*. 33.3). The fact that the Attic stelai (*IG* I^3 421 col. i frag. 1 lines 12-25) record only moveable goods confiscated from Alkibiades and sold might be taken to imply that his land was never sold and could have been restored, but the testimony of Isokrates argues against this hypothesis and it is most likely that the stele on which the sale of his landed property was recorded has not survived. It is only a good reminder that compensation rather than restoration was sometimes practiced (and attested again at Tegea in the late fourth century, which will be discussed below), and that the whole matter was both profoundly political and highly complex.

46 Rhodes 1981, 430–31 lists the sources. Usteri 1903, 143–44 rejects the possibility that it had any provision for the return of property; Seibert 1979, 91 regards it as "sehr wahrscheinlich."

47 Rubinstein 2018.

48 Walbank 1982. The discovery of a large new fragment of this record at Acharnai has been recently reported; the new text is to be published by Maria Platonos.

49 Langdon 1991, 59, citing Usteri 1903, 119–127. Prohibition on lawsuits against buyers of confiscated property: Dem. 24.54; Pollux 8.99. Canevaro 2013, 138–142 notes that although the law as quoted here appears to have been the work of "someone who was well versed in the Demosthenic corpus" rather than of Demosthenes himself, he allows that it has "no blatantly incorrect provisions."

under the Thirty and reversing the confiscation of immovable property and unsold movable goods.[50] With no evidence for the question of whether or how buyers were to be compensated, it is difficult to understand what the new democracy intended here; Rubinstein's suggestion that the provision of Eleusis as a settlement for willing oligarchs might have eased the tensions that flared between recent buyers, former owners, and unsatisfied creditors over property disputes in this complex and volatile suggestion is highly attractive. What is clear is that the new democracy was as intent as ever on protecting its ability to determine who would own property and who would not. The concern to provide property for the oligarchs in Eleusis was motivated by a desire to segregate opponents and maintain the political settlement, not by any sense that they as individuals had a right to property that the state could (or should) not override.

The fifth-century evidence suggests, on the whole, that in this period Greek states viewed property as largely epiphenomenal to political participation. The right to hold it was a reward for citizens and supporters of the regime in power. And its confiscation by the state represented an almost natural punishment for those who sought to undermine the regime. Thus at Halikarnassos and Selymbria we see legislation enacted to deal with property disputes between returning exiles, the purchasers of their property, and the state that sold it. In neither case do we find certain evidence for recourse to fair trials to resolve the disputes nor any mention of compensation for the dispossessed on either side. At Chios a more careful balance is struck, with the appointment of a jury of 300 "uncorrputed men" to judge cases evidently related to property disputes, probably between returning exiles and the buyers of confiscated property, and a commitment from the *polis* to use public funds to repay creditors who had made outstanding loans to those who lost their property. No rules, or lines of interpretation, are provided in the text for the jury of 300 to implement in deciding the cases brought before it, and without them we cannot be certain about the priorities of the *polis*.[51] The *polis* seems genuinely open to the possibility that some returning exiles will be victorious in their suits, but we do not hear what would happen next. The commitment of the *polis* to pay creditors, and to protect the buyers of confiscated property against lawsuits brought by them, reveals its collective desire to protect both the political practice of using confiscation as a penalty and the willingness of individuals to extend credit to others. The Athenians' solution after 403, by contrast, was neat from an economic and bureaucratic standpoint, but hardly met the demands of justice: some would have been lucky and others unlucky. Again here law was merely an instrument for achieving the political

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[50] Lys. frag. 165.38-48 Carey (*P.Oxy.* 13.1606 frag. 2) with Sakurai 1995; Medda 2003, 123.

[51] It seems to me possible that this rather unusual measure can be explained by hypothesizing that some other context than full-blown *stasis* lay behind the measures described in the decree.

goal of an end to *stasis*; but the logic of expulsion and confiscation still applied to the Thirty and their most devoted adherents.

The Fourth Century

In the fourth century a few *poleis* became remarkably more innovative in dealing with this problem, most notably but not exclusively in response to the shifting politics of the eastern Aegean in the early years of Alexander's reign and to his Exiles Decree of 324. Their innovations, certainly driven by the political risks inherent in the old approach, contributed significantly to a transformation of Greek thinking about property and with it an increased commitment, by the end of the Classical period, to rooting individual rights to private property in law rather than in politics. Given limitations of space, a few case studies will serve to illustrate my argument.

At the start of the Corinthian War, a pro-Spartan faction was exiled from Phleious, which struggled to protect its autonomy in the turbulent conditions of the time.[52] After the King's Peace, when Spartan policies in mainland Greece had been largely vindicated, the Phleiasian exiles made an appeal to Sparta for help. The Spartans made a rather gentle request to Phleious that its exiles be restored; the Phleiasians, under pressure,

> voted to receive back the exiles, to return any visible property (τὰ ἐμφανῆ κτήματα), and to compensate from the public treasury any of those who had previously purchased the exiles' property (τοὺς δὲ τὰ ἐκείνων πριαμένους ἐκ δημοσίου τὴν τιμὴν ἀπολαβεῖν). And if a dispute were to arise between the two parties, the matter would be decided in court.[53]

We have here, then, the promise of a neat solution to the problem: land and houses would be returned to their original owners, based probably on written property registers and on documents recording the original confiscation (and perhaps auction), while buyers of the confiscated property would be compensated by the *polis* and the returning exiles would surrender any claims to "invisible" property they had lost.[54] Any disputes that could not be resolved by these three principles were to be heard in court.

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52 Xen. *Hell.* 4.4.15 records the Phleiasians' decision in 391 to seek a Spartan garrison to protect the city from attacks by Iphikrates, despite their anxiety that the Spartans would ask them to restore the pro-Spartan faction which they had previously exiled. The original exile has been dated to 395 (Pièrart in Hansen and Nielsen 2004, 614) or 394 (Gehrke 1985, 128).

53 Xen. *Hell*. 5.2.10. Marincola incorrectly translates τὰ ἐμφανῆ κτήματα as "undisputed property" (*The Landmark Xenophon's Hellenica* 189). On the ἀφανῆς-ἐμφανῆς distinction see Gernet 1956 and, from a tax-law perspective, Cohen 2005.

54 On property registers see now Zelnick-Abramovitz 2015; Harris 2016. Zelnick-Abramowitz emphasizes the exceptional nature of the inscribed registers of land sales that survive, and argues persuasively that they are to be explained by the desire of

The Phleiasians were, however, not eager to make good on this commitment, and evidently deployed one of the standard weapons of the weak: they simply did nothing, or did nothing very quickly.[55] Xenophon (*Hell.* 5.3.10) reports that in 381 the exiles

> had demanded that any disputed matters be resolved before an impartial court (οἱ μὲν γὰρ δὴ φυγάδες ἠξίουν τὰ ἀμφίλογα ἐν ἴσῳ δικαστηρίῳ κρίνεσθαι), but the men in control of the city compelled them to have their cases decided in the city itself, where they paid no attention to the complaints of the returned exiles, who wondered what sort of justice could result where those who had committed the crimes were sitting in judgment.

So the exiles went to Sparta to complain, and they were accompanied by other citizens "who felt that the exiles were not receiving justice" (5.3.11). The Phleiasians then fined these citizens who went to Sparta to complain on behalf of the exiles. Those fined became reluctant to return and complained in Sparta "that the men in the city who were now acting high-handedly were the very ones who had driven out the exiles, closed their gates to the Spartans, and acquired the exiles' property and were now acting with violence so as not to give it up" (οὗτοι δὲ οἱ πριάμενοί τε τὰ σφέτερα καὶ βιαζόμενοι μὴ ἀποδιδόναι) (5.3.12). The number of exiles was clearly not insignificant; even if Xenophon's report of 1,000 is inflated, they must have been numerous to motivate the Spartans to besiege Phleious, where the defenders held out for twenty months before their surrender.[56] Agesilaos, empowered by the Spartans to arrange matters, established a commission of one hundred men, "fifty from the men who had returned and fifty from the men in the city, to judge who should live and who should die. Then they were to establish laws by which they would be governed."[57] Although Xenophon tells us nothing about how the property disputes were ultimately resolved, several important legal developments emerge from this episode. In 381 the exiles, frustrated by what they saw as a biased legal process within which they were being forced to seek restoration of their property, asked instead for an *ison dikasterion*, an impartial

individuals to increase the security of their property claims. On compensation note Seibert 1979, 112. Lonis 1991, 95–96 rightly observes the implicit resignation over "invisible property" and hints that this decision may have contributed to establishing a norm when he notes that in Hellenistic *asylia* decrees it is only "visible property" that is protected. In his treatment of the *stasis* at Phleious and its aftermath, Gehrke 1985, 129 implicitly dismisses the significance of the struggle over property restoration when, after citing Xen. *Hell*. 5.2.10, he remarks that "Gerade dabei nun kam es zu ernsten Differenzen," as though the property dispute was not a "serious difference."

[55] Scott 1985.

[56] Xen. *Hell*. 5.3.21-25; cf. Isocr. 4.126 and Diod. Sic. 15.19.3. On the population of Phleious see Legon 1967, 326–7; Pièrart in Hansen and Nielsen 2004, 613.

[57] Xen. *Hell*. 5.3.25.

court.[58] The commission that was eventually established, despite having far broader powers than the court which the exiles had hoped for, might have been the sort of thing they had in mind.[59] It certainly foreshadows a solution that became more widespread in the late fourth century.

Three inscriptions from Chios, belonging to the last third of the fourth century, help to illustrate the development. The letter of Alexander the Great to the *demos* of the Chians, a well known text, calls for the return of exiles and the establishment of a democratic constitution following the expulsion of Persian rulers and their supporters in 334.[60] He establishes himself as the arbiter of any disputes "between those who have returned and those in the city" (15-16). A second document, widely recognized as a second letter of Alexander to Chios, written in the aftermath of the first, urges the Chians to restore an individual whose name is lost, on the grounds that "he is a friend of mine" and tried to restore the exiles and free Chios from oligarchy.[61] He therefore asks "[that the city should invalid]ate what was voted against his fa[th]er, and give back to him first of those who have come back [*sc.* from exile] what it took away (ὅσ' ἀ[φεῖλεν] ἡ πόλις ἀποδ|οῦναι πρώτωι τ̣[ῶν] <ἡκ>όντων)" (ll. 22-24). We see here only that Alexander is intervening in what must otherwise have been an internal process for restoring the exiles' property, seeking priority for his *philos*. A highly fragmentary decree, probably belonging just a few years later, in 332/1, appears to record something of that internal process.[62] The entire left half of the stone is lost and it is impossible to make continuous sense of what survives. But with mention of τῶμ φυγαδικῶν κτή[- (8), χρήματα (2, 3), disputes (3-4), a concern for justice (4), and forms of ἀποδίδωμι (5-6) and ἀπολαμβάνω (7), it is clear that the document addresses the restoration of the property of exiles who have returned to Chios. Georgia Malouchou, the editor of the text, recognizes two possibilities here: either the returning exiles were to have their property restored to them, if they could prove that they had been the rightful owners before their exile, while the buyers of the confiscated property would be compensated by the city; or if the confiscated property could not be returned to the

58 Compare Pl. *Leg*. 957c where a δικαστὴς ἴσος is one who will be governed by all existing laws and learn all existing written expositions about the laws. Dem. frequently (29.1, 18.7, 7.36) expresses hope for an ἴσον δικαστήριον, an "impartial court."

59 I thus disagree with Legon 1967, 328 who takes this to mean the establishment of a narrow oligarchy, "government by a body of 100 men."

60 RO 84A; Heisserer 1979, 79–95. On the historical background see Rhodes and Osborne 2003, 415–417.

61 RO 84B, following Heisserer 1979, 96–117; early editions utilized four fragments, of which two have since been lost.

62 *Ed.pr.* Malouchou 2000 (*SEG* 51.1075), with Kholod 2012 for a detailed discussion of the date. It is worth noting here that the letter forms on this fragmentary decree are very similar to those on RO 84A-B, suggesting a close association with those documents Malouchou 2000; Bencivenni 2003, 15–38.

exiles, they would be compensated by the city.[63] There is mention of houses (line 10) and a Board of Ten who order or arrange something (οἱ δέκα τάξωσ[ι], line 11). Malouchou suggests that the Ten were a commission appointed to manage the process of restoration; with the Phleious episode in mind it is possible that the board was comprised equally of returning exiles and of those who had remained.[64]

That is exactly what happened at Mytilene in the same period. A fragmentary decree of Mytilene records a reconciliation agreement after *stasis* and the re-establishment of democracy.[65] The agreement upholds the decisions of lawful courts that resulted (during the *stasis* or the previous regime) in the exile or execution of citizens. But it allows for the possibility that people were exiled ἄλλον τινα τρόπο[ν, in any other way, and then seems to turn to the problem of their property (χρήματα ṭ[ού]των τινί) before the stone breaks off. A second decree, which seems to follow closely from this one, provides further procedural details for how the reconciliation is to be carried out.[66] Restoration of the property of returning exiles, we learn, is to be conditional upon their adherence to the terms of the reconciliation agreement (ll.2-6); should they fail to abide by the agreement, their property is to be possessed by those who had remained in the city, and the duty of effecting this allocation is assigned to the *strategoi* and the *basileis* (ll. 6-11). Appeal by an exile who has violated the agreement to a court of law for the restoration of his property is expressly prohibited (ll. 11-12). The Mytileneans, then, are relying on the text of their agreement and upon the officials whose duty is to enforce it; no regular legal procedure for resolving disputes over property is allowed. Instead, they appoint a board of twenty arbitrators, "ten [from those who have returned, and te]n from those who were previously in the city" (ll. 21-22), responsible for ensuring fair treatment of both sides and a just settlement "regarding the disputed property" (καὶ περὶ τῶν ἀμφισβατημένων κτημάτων) (ll.25-30).[67]

But the internal commission may have been inadequate in some cases. A final inscription from Chios honors ten foreign judges, *dikastai*, five from Naxos and five from Andros, who had come to Chios at the city's request.[68] They stayed for a long time (πολύς) and are praised for having "tried the cases well and justly" ([κ]ạḷῶς καὶ δικαίως ἐδίκαζον τὰṣ [δίκας]). This inscription was initially (and rather casually) dated circa 300, but Heisserer placed it circa 320 by identifying its carver with the mason of another text of that date.[69] There is no mention of the nature of the

63 Malouchou 2000, 283–4.
64 Malouchou 2000, 285–6.
65 RO 85A.
66 RO 85B (*IG* XII.2.6) with Heisserer and Hodot 1986.
67 Lonis 1991, 107 rightly recognizes this commission as "la principale originalité de leur dispositif … une véritable commission de conciliation, apte à désamorcer les conflits."
68 *Ed.pr.* Hunt 1940 (*SEG* 10.390); independent of Hunt, Condoléon 1949, 9–13 edited the same text, and gives slightly different readings. *SEG* 18.334 reports several emendations and restorations by Dunst.
69 *Circa* 300: Hunt 1940. Circa 320: Heisserer 1979, 111–17, comparing to *Syll.*³ 283.

disputes that these foreign judges heard, but given the series of three documents belonging to the late 330's that are overwhelmingly preoccupied with the challenge of responding to the demands of returning exiles for the restoration of their property, it seems to me not at all unlikely that this was the issue behind the Chians' request. Indeed, as Malcolm Errington has suggested, the difficulty of this problem was so overwhelming to the court system of a small *polis*, where it would be difficult to find an impartial jury—an ἴσον δικαστήριον in Xenophon's terms—that the solution may have been to bring in foreign judges.[70]

This was also the solution at Tegea, where in response to a *diagramma* of Alexander—probably a reference to his infamous Exiles' Decree of 324—the *polis* laid out in great detail a set of regulations for the process of restoring property to returning exiles.[71] The text begins with the lofty promise that "their paternal property, from which they went into exile, shall be conveyed (κομίζεσθαι) to the exiles who are returning, and the maternal property to women who were unmarried and did not have brothers" at the time of their exile (ll. 4-9).[72] But it quickly becomes clear that conveyance actually means monetary compensation by the *polis* for house and garden at a fixed price established by the *polis* (ll.9-21). We then learn that a foreign court, a δικαστήριον ξενικόν (ll. 24, 27), will hear cases for sixty days; after that time, the city court, the δικαστήριον πολιτικόν (ll. 27-28), will process claims made by returning exiles for another sixty days. If any of those claims are contested, however, the case will be heard by a court in Mantineia.[73] The

70 Errington 2006, 139–40. Compare *IG* XII.4.132 (*SEG* 63.663), a decree of Telos c. 300 in honor of foreign judges from Kos, which remarkably includes the (fragmentary) text of the reconciliation agreement itself; whatever the nature of the original offences, they had led to exile and confiscation; the victims later returned to Telos and demanded the restoration of their property, which at least in some measure the foreign judges ordered in the reconciliation agreement. See Thür 2011; Scafuro 2014. Crowther 1999 discusses decrees of foreign cities for Koan judges, mentioning the Telos inscription, which was then unpublished.

71 *Syll.*[3] 306; Tod 1948 no. 202; Buck 1955 no. 22; Heisserer 1979, 204–29, follwed by RO 101. The text was dated to 324 or shortly after by the *editor princeps* Plassart 1914, but Heisserer 1979, 219–20 noted that Polyperchon proclaimed a restoration of exiles in 319, and that Kassandros besieged Tegea but came to terms in 317, both episodes that might have engendered this text as a response. Ultimately, however he supports Plassart's original date and it remains widely accepted (Worthington 1993; Rhodes and Osborne 2003, 530). For my purposes the precise date does not matter.

72 On the meaning and significance of τὰ ματρῶια in this decree see Maffi 1994.

73 The choice of Mantineia is perhaps not especially odd. Although Tegea and Mantineia were on opposite sides of the schism that led to the collapse of the ephemeral Arkadian *koinon* (Xen. *Hell.* 7.5.5; Diod. Sic. 15.82.2), that was four decades before our decree was passed. Not much is known of the internal history of Arkadia in the second half of the fourth century, but there are hints that Mantineia remained a regional leader (Diod. Sic. 15.94.1-3, 16.39.1-3 with Nielsen in Hansen and Nielsen 2004, 519). If it did play a role of that kind, however informal, it would have been natural enough for the Tegeans to

Tegeans thus attempted to utilize both a foreign court and a court in a neighboring *polis* to forestall the possibility of bias among jurors from harming the claims of returning exiles to their property; they were also committed to utilizing public funds to compensate those who had been expelled, a means of preventing the bitterness and recrimination that would arise from counter-seizure, while implicitly recognizing the *polis*' own debt to those whom it had exiled and then allowed to return. This in itself reveals an increasing recognition by the *polis* of the property rights of individuals and of its own obligation to uphold them.

Conclusion

There is a striking shift in the way *poleis* handled the problems created by the demands of returning exiles for the restoration of their property from the mid fifth to the late fourth century. The Lygdamis inscription from Halikarnassos is very difficult to interpret, but suggests more than anything that the oligarchic-tyrannical regime in power sought to protect both its own supporters and the appearance of legal process and the pursuit of justice; in reality, I have suggested, the returning exiles may have been required to buy back the property they had lost if their claim to prior ownership was recognized by the *mnemones*. The Athenian treaty with Selymbria protects the property claims of Athenian owners of land and houses at Selymbria, a variation on the theme of using legal process to recognize the claims of supporters of the regime in power regardless of the justice of claims made by their opponents. In this approach we should recognize property ownership not as an individual right protected by law in an unbiased way, but rather a privilege bestowed upon individuals by the community with a strong set of implicit conditions. If I have read the Dophitis inscription correctly, it represents a slight departure from this approach, by specifying that a large and uncorrupted jury would hear cases regarding disputed property. It is impossible to say how well this intended departure worked, but if we are in fact dealing with a group of returning exiles it is difficult to imagine that the Chians could find 300 unbiased jurors. We also see the *polis* making itself responsible for compensating creditors who held outstanding loans that had been secured on property now confiscated, an important step to protect its own ability to utilize property confiscation as a penalty without undermining the availability of credit within the community. The Athenian amnesty agreement of 403 is not a significant departure: the democrats agreed to allow those (oligarchs) who had remained in the city to keep moveable goods that were unsold, but as at Selymbria land and houses were to be restored to returnees. The real compromise in that agreement, with respect to the property problem, lay in the provision of Eleusis as a settlement for oligarchs, which itself must have entailed a significant compulsory sale of properties by democrats who owned land in that deme (*Ath.Pol.*

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rely on a Mantineian court as a kind of neutral, third-party arbiter. Lonis 1991, 108 compares it to the institution of the *ekkletos polis*, on which see Gauthier 1972, 308–38.

39.3). Small wonder that tensions and violence continued between Athens and Eleusis, requiring a new reconciliation agreement in 401.[74]

But we detect the beginnings of a major shift toward reliance on foreign courts or tribunals of foreign judges with the demands of the Phleiasian oligarchic exiles in the late 380's. Their request for an "impartial court," and the Spartans' ultimate establishment of a bipartisan commission to resolve matters between exiles and those who had remained, may have set a precedent for a new legal solution to an old and intractable problem. The idea certainly took hold, as we can see from the cluster of inscriptions at Chios, Mytilene, and Tegea in the 330s and 320s. Along with the shift in legal procedure that we can document, there occurred also a shift in the way both individual citizens and *poleis* thought about property, and this to my mind is where the real significance of this problem lies. In place of a conception of property as an instrument of power in the relationship between state and individual, a tacit agreement hedged about by conditions and mutual obligations, there began to emerge a conception of property as an individual right, an instrument for the maintenance of individuals and families, that needed to be protected from the inconsistency of the *polis* that had promised to protect it. Insofar as property owners were still obligated to use some of their wealth for the good of their *polis*, in the form of liturgies, *eisphorai*, and acts of euergetism, the notion of property that underpinned the evolving laws governing ownership remained distant from the modern individual notion of a right. But it had also, by the end of the Classical period, traveled far from its point of origin.

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[74] Xen. *Hell*. 2.4.43 with Just. *Epit*. 5.10.8-11; *Ath.Pol*. 40.4; Lys. 25.9. See also Hansen in Hansen and Nielsen 2004, 637.

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MARIA S. YOUNI (KOMOTINI)

PROPERTY, LAW AND POLITICS: RESPONSE TO EMILY MACKIL

How to reunite the community in the aftermath of a stasis? How to achieve peace and reconciliation in a city divided by political and personal enmities? How to reintegrate returning exiles in the new regime, and how to deal with claims over confiscated property? These questions, faced again and again by the Greek poleis, were addressed by enacting new legislation which had to take into consideration the political and financial stakes. The usual practice was to draw a reconciliation agreement containing the main guidelines for *homonoia*; commitment to apply and implement the terms of the reconciliation had to be prompted on the community and enforced by a solemn oath taken by all citizens. Along with the agreement, a set of specific laws *ad hoc* was enacted, which addressed issues of both substantive law, for example, the principle according to which a person should be recognized as the owner of the confiscated property, and court procedure, for example, which courts were to adjudicate the relevant cases. Significantly, the responses to all these delicate matters were often heavily influenced by the intervention of third parties, such as cities allied to one of the factions, or were even imposed by an external force, such as the Macedonian kings.

Disputes about confiscated property could be very complicated for a number of reasons, not least because apart from returning exiles and purchasers of their property, third persons could be involved who disputed or had claims on the property, such as testamentary heirs, relatives claiming inheritance rights or dowry rights, creditors with real security[1], or simple usurpers who were exploiting the confiscated properties.

In her paper, Emily Mackil discusses a number of sources from the fifth and fourth centuries, upon which she bases her assumption that from the mid-fifth to the end of the fourth century there was "a major shift in legal procedure towards reliance on foreign courts, and a shift in the way both individual citizens and poleis thought about property". She concludes that in place of "a conception of property as an instrument of power in the relationship between state and individual", there began to emerge in the fourth century "a conception of property as an individual right, that needed to be protected from the inconsistency of the polis".

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[1] Cf. Faraguna 2005: 94-95.

To trace such an evolution of the Greek perception of ownership, in the absence of theoretical treatises on property and ownership, we must turn to law, both substantive and procedural, and search for indications of change. As Mackil bases her argument on procedural change (the use of foreign courts instead of the city's ordinary tribunals), in what follows I discuss first procedure and then substantive law, checking for changes in the concept and application of confiscation. In the third section, I discuss the response given by the laws to the crucial question of establishing the principle to determine who was to own the confiscated property, and political and legal implications of these responses.

Procedure

According to Mackil, the shift in the perception of ownership is detected in the claims for impartiality in property trials, first attested in the Chian inscription (Matthaiou 2011) and more clearly so in the demand the Phleiasian exiled oligarchs made to Sparta for an equitable court to judge their property claims (Xen. *Hell.* 5.3.10); this, in turn, would be an indication of "a major shift toward reliance on foreign courts or tribunals of foreign judges".

The demand for impartiality, fairness and transparency at trials was at issue since the origins of the Greek poleis. Hesiod in *Works and Days* attacks injustice, partiality and corruption in courts personified by *dorophagoi* magistrates who administered justice according to the gifts they received and stresses the necessity of uncorrupted and impartial judges[2]. Numerous laws from Cretan cities of the sixth and fifth century put an emphasis on equality and fairness in court procedure[3]. The establishment of large juries composed of hundreds of citizens in democratic cities, and the sophisticated system of ballot for the designation of each jury at Athens aimed at eliminating the possibility of corruption and partiality. So did the dicastic oath and the laws against corruption, attested in many cities.

The Lygdamis inscription (*OR* 131), dated to the mid-fifth century, is an early attestation of the importance attached to court procedure. In the same manner as many archaic and classical statutes from different Greek poleis, the key concern of this law is to establish the procedure to be followed in court and in particular to determine the nature of proof to be accepted by the court. As is generally accepted, a period of civil strife, exile, confiscation of properties and return of the exiles lay behind this law; after an unsuccessful rise, Lygdamis' opponents were eventually accepted to return to Halikarnassos, and a reconciliation agreement was made. The reconciliation agreement is alluded to in the last lines of the law (43-45). In the light of the extensive treatment of the inscription since the 19th century, the content of the law presents no great difficulty[4].

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2 Hes. *Works and Days* 27-39; 213-285.

3 Youni 2011: 135-154; Gagarin & Perlman 2016: 136-139; 141-142.

4 Reinach 1888; Maffi 1988; Koerner 1993, no 84, with full bibliography.

The first part (ll. 8-16) sets a ban on the four mnemons in office to transfer any public land upon the expiration of their duties to the next mnemons[5]. Clearly, the administration – including renting and selling at auction – of any land that became public was among the duties of the mnemons. At the end of their term of office they probably accounted for their administration and handed on the list of public lands to their successors. The prohibition set by the law here suggests that the city (in other words, the assembly of the Halikarnassians and the Salmakitans in concert with Lygdamis) had decided to do away with pending private claims on confiscated land, and to proceed to a speedy solution of such relevant problems as had occurred.

Next, the law regulates court procedure: it distinguishes two different periods of time for the lawsuits to be filed and establishes the kind of proof to be binding for the court in each period. Lines 16-22 refer to suits filed within the eighteen months following the publication of the law[6] and lines 22-28 to suits filed after that period[7]. In lines 28-32 the principle for the recognition of ownership is set, according to which the person who owned the disputed real property in the year the present law was passed prevailed[8]. The fact that there is no hint to the composition of the jury implies that in both periods the cases were referred to the city's regular courts and were tried in accordance with the ordinary procedures.

Concerning suits on property filed during the first eighteen months, it is established that the testimony of the mnemons who were in office when the law took force was binding for the court (ὅ τ[ι] ἂν οἱ μνήμονες εἰδέωσιν, τοῦτο καρτερὸν ἒναι)[9]. If the *mnemones* testified that a citizen had bought the confiscated property at auction during their term of office, his ownership was confirmed by the court and no further claim would be accepted[10]. If, by contrast, the land had not been sold, it would be returned to the claimant. During these eighteen months, the city courts were to hear property disputes according to the existing laws, as they did before; the

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[5] Ll. 8-16: Τ]ὸς μνήμονας μὴ παρ[α]/διδό[ναι] μήτε γῆν μήτε οἰκ[ί/α] τοῖς μνήμοσιν ἐπὶ Ἀπολλω/νίδεω τõ Λυγδάμιος μνημονε/ύοντος καὶ Παναμύω τõ Κασβώ/λλιος καὶ Σαλμακιτέων μνη/μονευόντων Μεγαβάτεω τõ Ἀ/φυάσιος καὶ Φορμίωνος τõ Π[α]/νυάσσιος.

[6] Ll. 16-22: Ἢν δέ τις θέληι δικάζε/σθαι περὶ γῆς ἢ οἰκίων, ἐπικαλ[έ]/τω ἐν ὀκτωκαίδεκα μησὶν ἀπ' ὅτ[ε]/ ὁ ἅδος ἐγένετο· νόμωι δὲ κατάπ[ε]/ρ νῦν ὁρκῶ{ι}σ<α>ι τὸς δικαστάς· ὅ τ[ι]/ ἂν οἱ μνήμονες εἰδέωσιν, τοῦτο/ καρτερὸν ἒναι.

[7] Ll. 22-28: Ἢν δέ τις ὕστερον/ ἐπικαλῆι τούτο τõ χρόνο τῶν/ ὀκτωκαίδεκα μηνῶν, ὅρκον ἒναι τ/ῶι νεμομένωι τὴν γῆν ἢ τὰ οἰκ/[ί]α, ὁρκõν δὲ τὸς δικαστὰς ἡμί/[ε]κτον δεξαμένος· τὸν δὲ ὅρκον εἶ/[ν]αι παρεόντος τõ ἐνεστηκότος.

[8] Ll. 28-32: Κ/αρτερὸς δ' εἶναι γῆς καὶ οἰκίων οἵτινες/ τότ' εἶχον ὅτε Ἀπολλωνίδης καὶ Πανα/μύης ἐμνημόνευον, εἰ μὴ ὕστερο/ν ἀπεπέρασαν.

[9] If the *mnemones* belonged to the opposing factions, as it has been suggested, this would provide for a guarantee of an impartial testimony.

[10] There is no mention to any compensation to the former owners, although we cannot exclude the possibility that such a provision was made elsewhere, e.g. in the reconciliation agreement.

new element introduced by the present law is that the mnemons' testimony was now binding proof[11].

At trials during the first period, the *dikastai* were to administer the oath to the litigant(s) according to the law in force. The content of the oath is not, as Mackil thinks, "to recognize the principle that 'whatever the *mnemons* know shall prevail'". Such an oath would be superfluous, since anyone going to court had to abide by the laws in force; in addition, only citizens who had sworn the oath of reconciliation were granted the right to file suits for recovering their property (ll. 41-45 below), which indicates that they had already formally accepted the validity of all relative legislation. The oath of a litigant in the courts of the Greek cities refers to the truth and validity of his claim and serves as proof – however different it may be regarding its binding force, the magistrate who administers the oath, the process, the stage of the procedure in which it takes place, the party who swears it, and so on[12]. What a litigant had to swear in the Halikarnassos law was that his claim was true and valid (cf. the oath of the parties in Athenian *anakrisis*).

Concerning lawsuits filed after the end of the eighteen months, a shift in the burden of proof is introduced by the law. Whereas in trials judged during the first period the plaintiff and the defendant, if there was one, had to swear the oath in the usual way, past this period, the oath was to be taken by the defendant (the person in possession of the property) in the presence of the plaintiff. It seems that the mnemons' testimony was no longer required, and was replaced by the oath of the defendant, who had to swear that "he had possession of the properties when Apollonides and Panamues were mnemons". If the defendant took this oath, this was binding proof for the court, and the defendant's ownership was confirmed (*pace* Mackil who believes the defendant was in a disadvantage).

Apart former owners/returning exiles and purchasers/persons from Lygdamis' entourage, usurpers might also be involved who were exploiting confiscated land during the owner's absence. In such cases, previous owners had prevalence over usurpers[13]. During the first eighteen months, the mnemons' testimony on whether the land had been sold or not was the only binding proof and the judges were compelled to give their verdict accordingly. After that time, it was up to the defendant to prove that he had acquired lawful ownership of the land in the year of mnemons Apollonides and Panamues, but if he swore that he had, this oath was binding for the judges and the purchase was sanctioned and valid. In both periods, before and after the eighteen months, the cases were heard by the city's ordinary courts.

[11] The phrasing of the law rejects Carawan's (2007) hypothesis that the previous procedure consisted in a summary reclamation.

[12] Mirhady 1991; Thür 1996; Gagarin 1997; Gagarin 2007.

[13] Reinach 1888.

After setting a ban on changing the law's dispositions in ll. 32-41[14], the final part of the law (ll. 41-45) specifies the persons allowed to file lawsuits on property[15]. This right was accorded to all citizens of Halikarnasos, on condition they had sworn the oath imposed by the reconciliation agreement, which was deposed in written at the sanctuary of Apollo.

At Halikarnassos, it was Lygdamis' political choice to refer disputes over confiscated property to the city's courts, visibly a choice his political opponents were not able to oppose. In other instances, occurring in different contexts and under different political circumstances, the returning exiles were able to negotiate judgment by a more disinterested authority, often due to the intervention of an external power. At Phleious, the Assembly decreed that disputes over property were to be δίκῃ διακριθῆναι by the city's courts, as at Halikarnassos. After the Spartan army besieged and took the city, Agesilaos appointed a commission composed equally from both sides with absolute power to decide and impose the conditions of the new regime, including decisions on who was to stay in the city and who was to be punished by death, and to enact the laws according to which the new regime was to govern; in the meanwhile, a Spartan garrison was left at Phleious for six months[16]. At Mytilene, resorting to the ordinary courts was forbidden by Alexander's *diagramma*, and all cases of disputed property were referred to arbitration by twenty arbitrators chosen by the demos from both sides equally. The arbitrators were to reconcile the parties amicably, and if this was not possible, they were to issue their decision according to Alexander's ordinances[17]. At Tegea, on the other hand, the

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[14] Ll. 32-41: Τὸν νόμον τοῦτον/ ἤν τις θέληι συγχέαι ἢ προθῆτα/[ι] ψῆφον ὥστε μὴ εἶναι τὸν νόμο/ν τοῦτον, τὰ ἔοντα αὐτõ πεπρήσθω/ καὶ τὠπόλλωνος εἶναι ἱερὰ καὶ α/ὐτὸν φεύγεν αἰεί· ἢν δὲ μὴ ἦι αὐτ/ῶι ἄξια δέκα στατήρων, αὐτὸν [π]/επρῆσθαι ἐπ' ἐξαγωγῆι καὶ μη[δ]/αμὰ κάθοδον εἶναι ἐς Ἁλικαρν/ησσόν.

[15] Ll. 41-45: Ἁλικαρνασσέων δὲ τῶς σ/υμπάντων τούτωι ἐλεύθερον ε[ἶ]/ναι, ὃς ἂν ταῦτα μὴ παραβαίνηι κατό/περ τὰ ὅρκια ἔταμον καὶ ὡς γέγραπτ/αι ἐν τῶι Ἀπολλω[νί]ωι, ἐπικαλε̃ν.

[16] Xen. *Hell.* 5.3.25: ἐπεὶ δὲ ἧκον ἐκ τῆς Λακεδαίμονος ἀπαγγέλλοντες ὅτι ἡ πόλις ἐπιτρέποι Ἀγησιλάῳ διαγνῶναι τὰ ἐν Φλειοῦντι ὅπως αὐτῷ δοκοίη, Ἀγησίλαος δὴ οὕτως ἔγνω, πεντήκοντα μὲν ἄνδρας τῶν κατεληλυθότων, πεντήκοντα δὲ τῶν οἴκοθεν πρῶτον μὲν ἀνακρῖναι ὅντινά τε ζῆν ἐν τῇ πόλει καὶ ὅντινα ἀποθανεῖν δίκαιον εἴη: ἔπειτα δὲ νόμους θεῖναι, καθ' οὓς πολιτεύσοιντο: ἕως δ' ἂν ταῦτα διαπράξωνται, φυλακὴν καὶ μισθὸν τοῖς φρουροῖς ἓξ μηνῶν κατέλιπε.

[17] *IG* XII 2 no 6, ll. 21-31: [διαιτάτας δὲ ἔλεσθ]αι τὸν δᾶμον ἄνδρας εἴκοσι, δέκα/ [μὲν ἐγ τῶν κατελθόντων, δέκα] δὲ ἐκ τῶν ἐν τᾶι πόλι πρόσθε ἐόντων·/ [οὗτοι δὲ πρῶτον μὲν φυλάσσ]οντον καὶ ἐπιμέλεσθον ὡς μηδὲν ἔσ/[σεται διάφορον τοῖς κατε]λθόντεσσι καὶ τοῖς ἐν τᾶι πόλι πρόσ/[θε ἐόντεσσι μηδετέρως]. καὶ περὶ τῶν ἀμφισβατημένων κτημάτων/ [ὡς οἱ ....]αι πρὸς τοὶς ἐν τᾶι πόλι ἔοντας καὶ πρὸς/ [ἀλλάλοις μάλιστα μ]ὲν διαλυθήσονται, αἰ δὲ μή, ἔσσονται ὡς δικ/[αζόμενοι καὶ ἐν τα]ῖς διαλυσίεσσι ταὶς ὁ βασίλευς ἐπέκριννε/ [καὶ ἐν τᾶι συναλλάγ]αι ἐμμενέοισι πάντες καὶ οἰκήσοισι τὰμ πό[λιν καὶ τὰγ χώραν ὁ]μονόεντες πρὸς ἀλλάλοις. καὶ περὶ χρημάτων/ [ὡς ἔσται εἰς τὸ θέσ]θαι ταὶς διαλύσις ὡς πλεῖστα. Disputes over movables were also subject of arbitration where possible.

negotiations of the city with Alexander resulted in the establishment of a foreign court, which was to adjudicate property disputes for sixty days, after which claims were to be addressed to the city's tribunals[18].

We see, then, that a variety of means was applied by the cities for solving claims on property and other legal problems that derived from confiscation. The question to be asked is whether these various means were new and specifically devised to be employed in solving claims over confiscated property previously owned by exiles.

Submitting a dispute to arbitration was a means as old as Greek history[19]. Entrusting critical disputes to the arbitration of a third party, whose lack of involvement in the case guaranteed impartiality, is a well-attested practice in Greek international law since the archaic period[20]. And the laws of Classical Athens contained detailed regulations on both private and public arbitration, two procedures that were amply used as shown by the evidence[21].

The practice of using μετάπεμπτοι δικασταί is first attested in the last quarter of the fourth century in some cities of Asia Minor and the Aegean coast and gained more popularity from the third century on[22]. Initially encouraged – or imposed – by Hellenistic kings on cities under their sovereignty undergoing a situation of political crisis[23], this practice later spread from the East into mainland Greece and survived in some cases until the late second century CE[24]. It was usually times of crisis and division in the city that led to the invitation of a foreign court, as a guarantee of impartiality and fairness in trials[25]. But was this expedient reserved for trials over confiscated property, which would justify Mackil's assertion that the concept of property had changed, or was it a general tendency of the epoch towards the establishment of a new practice in the administration of justice in the Greek poleis? Although mention of the exact circumstances that led to the need for a *xenikon dikasterion* or of the kind of cases it was assigned is not usual among the hundreds of preserved decrees honoring foreign judges, there is, however, clear evidence that

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18 *IPArk* 5, ll. 24-28: τὸ δὲ δικαστήριον τὸ ξενικὸν δικάζεν ἑξήκ/οντα ἁμερᾶν· ὅσοι δ' ἂν ἰν ταῖς/ ἑξήκοντα ἁμέραις μὴ/ διαδικάσωντοι, μὴ ἦναι αὐτοῖς δικάσασθαι ἐπὲς τ/οῖς πάμασι ἰν τοῖ ξενικοῖ δικαστηρίοι, ἀλλ' ἰν τοῖ/ πολιτικοῖ αἴ.

19 Harter-Uibopuu 2002.

20 For sources from c. 740 to 338 see Piccirilli 1973; from 337 to 90 BCE see Ager 1996. Aesch. 1.89 speaks of trial at an *ekkletos polis* as of a familiar option: Εἰ μὲν τοίνυν ἦν ὁ ἀγὼν οὑτοσὶ ἐν πόλει ἐκκλήτῳ, ὑμᾶς ἂν ἔγωγε ἠξίωσα μάρτυράς μοι γενέσθαι, τοὺς ἄριστα εἰδότας ὅτι ἀληθῆ λέγω. Εἰ δ' ὁ μὲν ἀγών ἐστιν Ἀθήνησιν, οἱ δ' αὐτοὶ δικασταί μοι καὶ μάρτυρές ἐστε τῶν λόγων.

21 Private arbitration: Dem. 21.94. Public arbitration as a mandatory preliminary stage in most *dikai*: *Ath. Pol.* 53.1-6.

22 Crowther 1992; Crowther 1993; Crowther 1994; Walser 2008: 258-272; Scafuro 2014: 365-6.

23 Gauthier 1974.

24 Crowther 2006; Crowther 2007; Fournier 2010: 537-542.

25 Hamon 2012.

foreign judges were summoned to judge (or settle) a variety of cases, both private and public, for example cases arising from debt and breached contracts (συμβόλαια)[26], violent crimes (παρανόμων καὶ βιαίων)[27], denunciations (μήνυσις)[28], and unconstitutional decrees (υπέρ ψηφίσματος ώς παρανόμου κεκ[ριμένου])[29].

Clearly, recourse to arbitration or to foreign judges was not restricted to disputes over confiscated property. According to the prevailing view, first stated by Louis Robert in his 1973 seminal work, the use of foreign judges replaced the city's ordinary courts and became the regular institution for the administration of justice in many Hellenistic cities[30]. Employing foreign judges to decide private and public lawsuits was a long-lasting expedient that strengthened the prestige of and guaranteed impartiality and fairness in the administration of justice in the Hellenistic poleis, rather than a testimony of a transformation of Greek thinking about property.

Substantive law

Although there is no specific indication in procedural law of a shift in the way individual citizens and poleis thought about property from the fifth to the fourth century, we may still examine whether such a shift is reflected on the way substantive law treated property. A new perception of ownership would imply a change in the way the laws treated private ownership, and the best way to examine that is the concept and application of confiscation of property. One would expect an evolution in the conception of property to result primarily in the abolition or at least the restriction of confiscation, both as a regular penalty for criminals and as a means of punishment for political opponents. However, no substantial change of this

[26] For example, a decree of Samos honors the *dikastai* from three cities who were summoned to judge cases on breached contracts (*IG* XII 6,1 no 95, l. 3: ἐπὶ τὰ μετέωρα συμβόλαια; ll. 8-9: δικασ/τήριον τὸ διαλῦσον τὰ μετέωρα συμβόλαια). A decree of Priene honors the *paragenomenoi dikastai* from three cities who adjudicated cases relating to private and public contracts (*IPriene* 8, ll. 4-5: αἰτησαμένων ἡμῶν δικαστήριον ἐπὶ τὰ συμβόλαια τά τε κοινὰ καὶ τὰ ἴδια). Contracts and debts are also a concern in a decree of Phalanna in Thessaly (*IG* IX 2 no 1230), which bestows honors on a foreign judge who was successful in τὴν ἐ[ν]σ[τᾶ]/[σ]αν δ[ιαφ]ορὰν καὶ ταραχὴν ἐν τοῖ[ς]/π̣ολίταις [δι]α̣λῦσαι, ll. 1-3), and "settled each case of contract" (καθ' ἕ̣κ̣ασ[τον] τῶ[ν σ̣υ]μβολαίων) by taking into consideration the necessity of each debtor ([κ]ατὰ μ̣[ηθὲν τῆς] μ̣ὲν ἑκάστου τῶν/[ὀ]φειλό[ντων χρείας] καταλειφθείς, ll. 6-9). A decree from Cos honors a *dikastagogos* who stood by the two judges from Smyrna with vigilance ἕως οὗ διεξάχθη τά τε δαμόσια καὶ ἰδιωτικὰ συμβόλαια: *IG* XII 4,1 no 59 ll. 21-23.

[27] A decree of Alexandria Troas honors Prienian judges because "they judged fairly and justly all the trials τὰς τε τῶν παρανόμων καὶ τὰς τῶμ βιαίων (*IPriene* 44, ll. 17-18).

[28] A judge is summoned to decide one specific case, arising from a denunciation: *IErythrai* 111. *dikai* and *paragraphai* in general. Scafuro 2014: 367.

[29] Helly 1971: 555.

[30] Robert 1973: 776; Fournier 2010: 201-226; Frölich 2011: 305; Scafuro 2014: 367.

perception is supported by the evidence. As in the fifth century, total confiscation of property continued to be imposed by the laws and to be inflicted by the courts of the Greek cities in the fourth century and later. Abundant evidence from Athens shows that confiscation of property was inflicted by the courts either as the main penalty or along with the penalties of death, exile and *atimia*.[31] When it comes to political crime, detailed laws were promulgated time after time by the Greek cities, or by powerful rulers on behalf of a city, which imposed the death penalty or, alternatively, proscription, along with confiscation of property on tyrants, leaders of oligarchies, and anyone who attempted to overthrow the constitution. Among many examples of laws imposing confiscation of property on political criminals from the fourth and third century, I shall briefly discuss four well known examples, from Amphipolis, Eretria, Athens, and Ilion.

In 357 the government established by Philip at Amphipolis[32] enacted a decree against two democratic leaders, Philon and Stratocles, imposing perpetual exile against them and their children, along with confiscation of their property[33]. Anyone who attempted to annul the decree or gave shelter to Philon and Stratocles was also to be punished with confiscation of property and perpetual exile.

A law of Eretria dated to c. 340 inflicted deprivation of citizenship, confiscation of property and prohibition of burial in Eretria on magistrates or citizens who attempted to abolish the constitution[34]. Another clause in the law rewarded the

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[31] *Ath. Pol.* 67.5. *Apographe* procedure: *Ath. Pol.* 43.4; 52.1; Dem. 59.7; Dem. 49.45-7; Dem. 53.1-2; Independent penalty: Dem. 24.50; Dem 24.40; Dem. 21.152. With death: Dem. 24.7; Dem. 21.43; Lys.1.50; *IG* II² 125:10; Hdt. 6.121; Xen. Hell. 1.7.20-2. With exile: Lys. 3.38; Lys. 4.18; Dem. 40.32; Dem. 23.45. With *atimia*: Dem. 59.52; Dem. 23.62; *IG* I³ 46: 20-5; *IG* II² 43:51-7; *IG* I³ 71:31-3. State debtors: Dem. 59.7; Dem. 49.24-7.

[32] For the expulsion by Philip of the opposing Amphipolitans see Diod. Sic. 16.8.2: μετὰ δὲ ταῦτα τῶν τὴν Ἀμφίπολιν οἰκούντων ἀλλοτρίως πρὸς αὐτὸν διατεθέντων καὶ πολλὰς ἀφορμὰς δόντων εἰς πόλεμον ἐστράτευσεν ἐπ' αὐτοὺς ἀξιολόγῳ δυνάμει. (...) παρεισελθὼν δ' εἰς τὴν πόλιν διὰ τοῦ πτώματος καὶ τῶν ἀντιστάντων πολλοὺς καταβαλὼν ἐκυρίευσε τῆς πόλεως καὶ τοὺς μὲν ἀλλοτρίως πρὸς αὐτὸν διακειμένους ἐφυγάδευσε, τοῖς δ' ἄλλοις φιλανθρώπως προσηνέχθη. Isocr. 5.2; Aeschin. 2.21, 70, 72, Aeschin. 3.54; *IG* II² 127; Dem. 2.6; 7.27-28.

[33] *RO* 49: ἔδοξεν τῶι δήμωι. Φί/λωνα καὶ Στρατοκλέ/α φεόγειν Ἀμφίπολι/ν καὶ τὴγ γῆν τὴν Ἀμφ/ιπολιτέων ἀειφυγί/ην καὶ αὐτὸς καὶ τὸς παῖδας καὶ ἤμ πο ἁλί/σκωνται πάσχειν αὐ/τὸς ὡς πολεμίος καὶ/ νηποινεὶ τεθνάναι,/ τὰ δὲ χρήματ' αὐτῶν δ/ημόσια εἶναι, τὸ δ' ἐπ/ιδέκατον ἱρὸν τοῦ Ἀ/πόλλωνος καὶ τῶ Στρ/υμόνος, τὸς δὲ προστ/άτας ἀναγράψαι αὐτ/ὸς ἐστήλην λιθίνην·/ ἢν δέ τις τὸ ψήφισμα/ ἀναψηφίζει ἢ καταδ/έχηται τούτος τέχν/ηι ἢ μηχανῆι ὁτεωιõ/ν, τὰ χρήματ' αὐτõ δημ/όσια ἔστω καὶ αὐτὸς/ φεογέτω Ἀμφίπολιν/ ἀειφυγίην.

[34] *IG* XII, 9, 190 with Knoepfler 2001 and Knoepfler 2002. B ll. 6-10: Καὶ ἐὰν τις τήνδε τὴν πο[λ/ιτείην ἐπιχειρε]ῖ καταλύειν [τὴν νῦν] οὔρην ἢ λέγων ἢ ἐπιψηφίζ[ω/ν ἂν τε ἄρχων ἂν τε] ἰδιώτης, ἄτιμος ἔστω καὶ τὰ χρήματα αὐτοῦ δ[ημ/[όσια ἔστω καὶ τῆς] Ἀρτέμιδος τῆς Ἀμαρυρίης ἱερόν τὸ ἐπιδέκατ[ο/[ν καὶ ταφῆναι μὴ ἐ]ξέστω ἐν τεῖ γεῖ τεῖ Ἐρετριάδι.

Eretrians who opposed tyrants or oligarchs and fought for the resurrection of democracy with part of the property of the supporters of a tyranny or oligarchy[35].

A clause in the Athenian law of Eucrates of 336 imposed hereditary *atimia* and confiscation of property against members of the Areopagus who would collaborate in any way in subverting the democracy[36].

In 281, the city of Ilion enacted a law against tyranny and oligarchy to protect the newly established constitution[37]. The law treats in detail all possible aspects of threats coming from tyrants, oligarchs, subverters of the democracy in general, and their accomplices. All such persons were to be proscribed and their property confiscated. Purchases made by them or by another citizen who collaborated with them or by a third person in their name are declared null and void and the property in question is to be returned to its original owner[38]. Citizens who had suffered injustice were to be compensated from the confiscated property. Furthermore, any acquisition or transfer of property, whether by sale, mortgage or dowry, made by accomplices to the subversion is declared null and void, and whoever has been wronged may seize the property in question whenever he wishes[39]; the rest is to be confiscated to the profit of the city. Prosecution is open to any citizen, and the law expressly establishes no time limit to the lawsuits, until democracy is restored. The same liability applied to anyone who received public property as a gift under a tyranny or an oligarchy.

The connection of private property with political priorities and motives is clearly imprinted not only on Hellenistic law-making, but on documents concerning

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[35] *Ibid*. ll. 32-36: ὁπόροι] δ' ἂν Ἐρετριῶν καταλαβόντες τι τῆς χώ/[ρης τ αὐτόνομον (?) και ἐλεύθ]ερον ποιήρωρι τόν δῆμον τὸν Ἐρετριῶ/[ν, τούτοις (?) μέρος τι διαδιδ]όσθω τῆς γῆς καὶ τῆς οὐσίης τῶν ὑπομε/[ινάντων ἄρχεσθαι τεῖ τυρα]ννίδι ἢ ἄλλει τινὶ πολιτείει ἀλλ' ἢ β/[ουλεὶ ἐκ πάντων κληρωτεῖ].

[36] *SEG* 12.87; *RO* 79, ll. 11-23: μὴ ἐξεῖναι δὲ τῶν βουλευ/τῶν τῶν τῆς βουλῆς τῆς ἐξ Ἀρείου Πάγου καταλ/ελυμένου τοῦ δήμου ἢ τῆς δημοκρατίας τῆς Ἀθ/ήνησιν ἀνιέναι εἰς Ἄρειον Πάγον μηδὲ συνκα/θίζειν ἐν τῶι συνεδρίωι μηδὲ βουλεύειν μη/δὲ περὶ ἑνός· ἐὰν δέ τις τοῦ δήμου ἢ τῆς δημοκρ/ατίας καταλελυμένων τῶν Ἀθήνησιν ἀνίηι τῶ/ν βουλευτῶν τῶν ἐξ Ἀρείου Πάγου εἰς Ἄρειον Π/άγον ἢ συνκαθίζηι ἐν τῶι συνεδρίωι ἢ βολεύη/ι περί τινος ἄτιμος ἔστω καὶ αὐτὸς καὶ γένος/ τὸ ἐξ ἐκείνου καὶ ἡ οὐσία δημοσία ἔστω αὐτοῦ/ καὶ τῆς θεοῦ τὸ ἐπιδέκατον.

[37] Dössel 2003: 197-202, transl. 202-205, commentary 205; *IK* 3, 25.

[38] III 106-111: ἐ/ὰν δέ τις τύραννος ἢ ἡγεμὼν ὀλιγαρχίας ἢ ὅσ/τις Ἰλιέων ἀρχὰς συ[ν]αποδεικνύηι μετὰ τού[των]/ ἢ ἄλλος πρὸ τούτων πρίηται γῆν ἢ οἰκίαν ἢ κτήν[η]/ ἢ ἀνδράποδα ἢ ἄλλο ὁτιοῦν, ἀκύρως ἐωνήσθω κα[ὶ]/ ἐπανίτω εἰς τοὺς ἀποδομένους.

[39] III 53-71: ὃς ἂν ἐπὶ τυράννο<υ> ἢ/ ὀλιγαρχία<ς> στρατηγήσηι/ ἢ ἄλλην τινὰ ἀρχὴν ἄρξηι/ [ἡν]τιναοῦν, δι' ἧς ἀργυ[ρί/ου λ]όγον ἔρχεται, ἢ ἐπιγρ[α/[φὴν ἐ]πιγράψηι Ἰλιέων [τ]ινὶ ἢ/ [τῶν με]τοίκων, π[αρ]ὰ μηδε/νὸς τούτων ὠν]εῖσθαι μηδὲ/ [παρατίθεσθαι μ]ήτε γῆν μή/[τε οἰκί]α[μ μήτ]ε κτήνη μήτε/ [ἀνδ]ράποδα [μή]τε ἄλλο μη/[δ]ὲν μηδὲ φ[ερν]ὴν δέχεσθαι·/ ὃς/ δ' ἂν παρὰ [τού]των τινὸς πρί/ηταί τι ἢ/ παρ[αθ]ῆται ἢ φερ[ν]ὴν/ λάβηι ἢ ἄλλ[ως] πως κτήση/ται, ἄκυρον ε[ἶνα]ι τὴγ κτῆσιν/ καὶ τὸν ἀδικ[ηθέ]ντα ἰέναι εἰς/ τὰ τοῦ ἀδικήσ[αν]τος ἀτιμη/τεί, ὁπόταν θ[έλ]ηι.

trials of political exiles as well. One famous example is the series of documents from Eresos on Lesbos reporting the trials of Eurysilaos and Agonippos, the tyrants established by Persia in 333[40]. In 332 Lesbos was reconquered by Alexander, who issued a *diagraphe* instructing the people of Eressos to put the tyrants on trial; if found guilty, they were to be executed and their property was to be confiscated[41]. Both were found guilty and sentenced to death and confiscation of their property. From the surviving details on Agonippos' case we learn that the trial was conducted at the assembly; eight hundred eighty three citizens voted by secret ballot; all but seven found Agonippos guilty; any citizen who publicly supported the return of Agonippos or the restitution of his property was to be accursed[42]. In 324/3, after Alexander's decree for the return of exiles to the Greek cities[43], the grandsons of some earlier tyrants appealed to the king asking to be reinstated and offered to stand trial[44]. A court was convened at Eresos in accordance with a *diagraphe* sent by Alexander to decide the matter. The court decided that the law against the tyrants should be valid and that their descendants were not allowed to return[45]. The same persons made another unsuccessful plea to be restored in 319, after Philip Arrhidaeus' decree for the return of the exiles[46]. Finally, between 306 and 301 the sons of the tyrants Eurysialus and Agonippus made an appeal to king Antigonus, who reported the case to the Eresians. Once again, the Eresians resolved that the laws against the tyrants and the earlier sentences of the courts should remain in force[47]. As Athina Dimopoulou remarked[48], after half a century's diplomatic, political, and judicial developments, old tyrants and their deeds had not been forgotten at Eresos. Alexander established himself as an arbitrator of property claims of exiles, and in his *diagrammata* he dictated in detail the procedures to be followed. There is no sign in Alexander's *diagrammata* or in the decrees issued by the cities to implement Alexander's measures that property was perceived as an individual right which was protected against political upheavals.

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40 Dimopoulou 2015: 218-50; Heisserer 1980: 27-78; *RO* 406-18, no 83.

41 *IG* XII 2 no 526 a ll. 15-26: κρῖνα[ι]/ [μ]ὲν αὖτον κρύπται ψάφιγγι ὀμόσσαντας περ[ὶ]/ [θ]ανάτω· αἰ δέ κε καταψαφίσθη θάνατος, ἀντιτ[ι]/μασαμ[έ]νω Ἀγωνίππω τὰν δευτέραν διαφόραν/ ποήσασθαι, τίνα τρό[πο]ν δεύει αὖτον ἀποθά/20νην· αἰ δέ κε καλλάφθε[ν]τος Ἀγωνίππω τᾶ δίκα/ κατάγη τίς τινα τῶν Ἀγωνίππω ἢ εἴπη ἢ πρόθη/ περὶ καθόδω ἢ τῶν κτημάτων ἀποδόσιος, κατά/ρατον ἔμμεναι καὶ αὖτον καὶ γένος τὸ κ<ή>νω.

42 Ll. 30-32.

43 Diod. Sic. 17.109.1.

44 *IG* XII 2 no 526 a 33-41.

45 *IG* XII 2 no 526 d 4-39.

46 *IG* XII 2 no 526 c 21-28.

47 *IG* XII 2 no 526 c 29-43.

48 Dimopoulou 2015: 249.

Establishing a principle of ownership

As I suggested above, in the aftermath of a civil strife involving exile and confiscation, it was crucial for the polis to establish a principle that determined who was to own confiscated property, and to regulate eventual compensation for lost properties. Different responses to these issues are attested in the evidence from the classical and Hellenistic periods[49].

Turning to Mackil's examples, the evidence from the fifth-century Chian inscription (Matthaiou 2011) is inconclusive. It is dubious whether the trials mentioned on side C concern returning exiles claiming back their property, and even if confiscations are implied, it is unclear whether they involved political exiles or state-debtors or sanctions imposed for other offenses. Nor are there any indications of the potential parties to the trials; Mackil herself seems to embrace the assumption proposed by Faraguna (2005: 95-96) that the trials concerned creditors of previous owners. Similarly, the fourth-century inscription from Chios (*SEG* 51.1075) is too fragmentary to provide any insight on the actual regulations it contained.

In the remaining examples, in which the rule on who is to be the owner can be safely adduced, it appears that in all but one (Halikarnassos) confiscated real estate was to be returned to the original owners. This is true of Selymbria in 408/7[50], Athens in 403[51], Phleious in 391[52], and Mytilene after 324, where the reconciliation agreement (*dialysis*) provided that the returning exiles were to recover their real property on condition they abided by the agreement[53]. At Tegea in 324, following negotiations with Alexander, the city had to amend its original decree according to the objections raised in the king's *diagramma*.[54] The principle of restoring their land to returning exiles was established by the law[55] but restitution was only partial: each

[49] Lonis 1991: 109.

[50] *IG* I³ 118, 18-22: ἃ̣ δὲ ἀπόλετο ἐν τôι πολέμοι/ [χρέματα Ἀθεναί]ον ἒ τôν συμμάχον ἒ εἴ τι ὀφελ/[όμενον ἒ παρακ]αταθέκεν ἔχοντός το ἔπραχσα/[ν οἱ ἄρχοντες], μὴ ἐ̂ναι πρᾶχσιν πλὴγ γε̂ς καὶ οἰ/[κίας·

[51] Lys. 70 *Against Hippotherses* frg. 165 (Carey): οὗτος οὔτε γῆν [οὔ]τ' οίκίαν κεκτημένος [ἃ] καὶ αἱ συνθῆκαι τοὶς κα[τε]λθοῦσιν ἀπεδίδοσαν. Sakurai 1995; Rubinstein 2018.

[52] Xen. *Hell.* 5.2.10: τοιαῦτα μὲν δὴ φοβηθέντες, ἐψηφίσαντο καταδέχεσθαι τοὺς φυγάδας, καὶ ἐκείνοις μὲν ἀποδοῦναι τὰ ἐμφανῆ κτήματα, τοὺς δὲ τὰ ἐκείνων πριαμένους ἐκ δημοσίου τὴν τιμὴν ἀπολαβεῖν: εἰ δέ τι ἀμφίλογον πρὸς ἀλλήλους γίγνοιτο, δίκῃ διακριθῆναι.

[53] *IG* XII 2 no 6, ll. 2-7: [αἰ δέ κέ τις/ [τῶν κατεληλυθόν]των μὴ ἐμμένη ἐν ταῖς/ διαλυσί[ε]σ̣σι ταύτ̣[αισι],/ [μὴ …7… ἐφ]εζέσθω πὰρ τᾶς πόλιος κτήματος μήδενος μη[δὲ στ/ειχέτω ἐπὶ μῆ]δεν τῶμ παρεχώρησαν αὔτωι οἰ ἐν τᾶι πόλι πρό[σθε]/ [ἔοντες, ἀλλὰ σ]τείχοντον ἐπὶ ταῦτα τὰ κτήματα οἰ παρχωρήσαν̣[τ/ες αὔτωι ἐκ τῶν] ἐν τᾶι πόλι πρόσθε ἐόντων. Dimopoulou 2015: 256-265.

[54] *IPArk* 5 ll. 1-4: ...Βασι/λεὺς Ἀλέξ]ανδρος τὸ διάγρ[α]μμα, γραφῆναι κατὺ τὰ ἐ/[πανωρ]θώσατυ ἁ πόλις τὰ ἰν τοῖ διαγράμματι ἀντιλ/εγόμενα.

[55] *IPArk* 5 ll. 4-9: τὸς φυγάδας τὸς κατενθόντας τὰ πατρῶια/ κομίζεσθαι, ἐς τοῖς ἔφευγον, καὶ τὰ ματρῶια, ὅσαι ἀ/νέσδοτοι τὰ πάματα κατῆχον καὶ οὐκ ἐτύνχανον

returnee was to take back one house and one garden according to the detailed prescription of the law[56], whereas those who owned more landed property were to receive a compensation for the rest[57] (despite Mackil who thinks that all the returnees actually received “monetary compensation by the polis for house and garden at a fixed price established by the polis”).

From the above regulations, there is not much we can conclude about the way these cities or their individual citizens thought about property. On the other hand, they reveal a lot about the political background to these laws. The treaty between Athens and Selymbria was an unequal treaty where Athens, as the strong party, dictated the conditions to the treaty. At Phleious it was the intervention of Sparta that imposed restitution of the returnees’ property and compensation of purchasers, whereas the Phleiasians were reluctant to apply Sparta’s conditions. Again, diplomacy and negotiations were involved in Alexander’s interventions in Chios, Mytilene, and Tegea, where the cities were struggling to modify the conditions imposed by the king[58], although they were finally compelled to submit to his orders. When instructing the Greek cities to accept the exiles and restore their property, or when ordering the Chians to restore “his friend”[59], Alexander was implementing his politics, not considerations of fairness and impartiality, nor was he adopting a new concept of ownership.

The opposing forces within the city and the correlations of the city’s ruling class with a powerful ally or a sovereign king form the complex political background to these laws. Specific circumstances, such as the time that had elapsed between the purchase at auction of the property and the claim of its previous owner, the number of confiscations that had taken place, and the percentage of confiscated properties that had been sold at auction were also significant. Legal problems, as inheritance rights, dowries, debts, and real securities that had occurred in the interim, had also to be considered. And, last but not least, the state of public finances was a very important consideration when dealing with compensation of purchasers or previous

ἀδ/ελφεὸς πεπαμέναι· εἰ δέ τινι ἐσδοθένσαι συνέπεσ/ε τὸν ἀδελφεὸν καὶ αὐτὸν καὶ τὰν γενεὰν ἀπολέσθα/ι, καὶ τανὶ ματρῷια ἦναι, ἀνώτερον δὲ μηκέτι ἦναι.

56 *IPArk* 5 ll. 9-16: <u>ἐ/πὲς δὲ ταῖς οἰκίαις μίαν ἕκαστον ἔχεν κατὺ τὸ διά/γραμμα· εἰ δέ τις ἔχει οἰκία κᾶπον π̣ὸς αὐτᾶι, ἄ<λλ>ο̣ν μ/ὴ λαμβανέτω</u>· εἰ δὲ πὸς τᾶι οἰκίαι μὴ πόεστι κᾶπος, ἐ/ξαντίαι δ’ ἔστι ἰσόθι πλέθρω, λαμβανέτω τὸν κᾶπον·/ εἰ δὲ πλέον ἀπέχων ὁ κᾶπός ἐστι πλέθρω, τωνὶ τὸ ἥμι/σσον λαμβανέτω, ὥσπερ καὶ τῶν ἄλλων χωρίων γέγρα/πται.

57 *IPArk* 5 ll. 16-21: τᾶν δὲ οἰκιᾶν τιμὰν κομιζέσθω τῶ οἴκω ἑκάστ/ω δύο μνᾶς, τὰν δὲ τιμασίαν ἦναι τᾶν οἰκιᾶν κατάπε/ρ ἁ πόλις νομίζει· τῶν δὲ κάπων διπλάσιον τὸ τίμαμ/α κομίζεσθαι ἢ ἐς τοῖ νόμοι. τὰ δὲ χρήματα ἀφεῶσθα/ ι τὰν πόλιν καὶ μὴ ἀπυλιῶναι μήτε τοῖς φυγάσι μήτ/ε τοῖς πρότερον οἴκοι πολιτεύονσι.

58 E.g. the amendations invoked in the Tegean law.

59 *RO* 84B.

owners for loss of property; at Tegea, for example, a large part of the exiles' property had been given away as guarantee for loans contracted by sanctuaries[60].

In shaping the reconciliation agreement and the laws on the destinies of confiscated property, the ruling classes had to take into consideration issues of fairness, impartiality, and justice, but the final solutions were determined by ideologies, political strategies, and symbolisms. After all, the laws embodied the city's formal narrative about amnesty and conciliation, and reflected the place attributed to the returning exiles by the rulers of the polis.

Conclusion

Private property had been recognized as a privilege closely attached to citizenship and was protected by law since the earliest times of the Greek poleis. From Lycurgus of Sparta to Pheidon of Corinth, the early legislators employed different methods to achieve a fair distribution of land. (cf. Arist. *Pol*. 1265 b 12). Laws on theft and damage of property for the protection of owners existed in every Greek polis. In the sixth century, Solon enacted elaborate measures for the protection of neighboring estates (Plut. *Sol*. 23.6-8). Each year, the Athenian *dikastai* took a solemn oath "not to allow the invalidation of private debts or the redistribution of the land and the houses of the Athenians" (Dem. 24.149). While the law protected property, as well as citizenship and life, it also had the authority to deprive citizens of their property, citizenship or life by imposing pecuniary penalties and total confiscation of property, or *atimia* or the death penalty on offenders. The evidence of substantive and procedural laws from the Greek cities does not indicate that a change in the perception of ownership had taken place in the fourth century – or, for that matter, later, during Greco-Roman antiquity. It indicates, however, that in circumstances of stasis and civil strife the legal responses did not cease to be connected to politics, and suggests that law-making, including laws about property, was still conditioned by political motives and strategies.

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[60] *IPArk* 5 ll. 37-48: ἐπὲς δὲ τοῖς ἱεροῖς χρήμασιν .ΛΩ…Ν τ/οῖς ὀφειλήμασι, τὰ μὲμ πὸς τὰν θεὸν ἁ πόλις διωρθώ/σατυ, ὁ ἔχων τὸ πᾶμα ἀπυδότω τῶι κατηνθηκότι τὸ ἥμ/ισσον κατάπερ οἱ ἄλλοι· ὅσοι δὲ αὐτοὶ ὤφηλον τᾶι θ/εοῖ συνινγύας ἢ ἄλλως, εἰ μὲν ἂν φαίνητοι ὁ ἔχων τὸ/ πᾶμα διωρθωμένος τᾶι θεοῖ τὸ χρέος, ἀπυδότω τὸ ἥμ/ισσον τῶι κατιόντι, κατάπερ οἱ ἄλλοι, μηδὲν παρέλ/[κ]ων· εἰ δ' ἂν μὴ φαίνητοι ἀπυδεδωκὼς τᾶι θεοῖ, ἀπυδό/τω τοῖ κατιόντι τὸ ἥμισσον τῶ πάματος, ἐς δὲ τοῖ ἡμ/ίσσοι αὐτὸς τὸ χρέος διαλυέτω· εἰ δ' ἂν μὴ βόλητοι δ/ιαλῦσαι, ἀπυδότω τοῖ κατιόντι τὸ πᾶμα ὅλον, ὁ δὲ κο/μισάμενος διαλυσάτω τὸ χρέος τᾶι θεοῖ πᾶν. Worthington 1993.

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MAGISTRATES' ACCOUNTABILITY AND EPIGRAPHIC DOCUMENTS: THE CASE OF ACCOUNTS AND INVENTORIES

Abstract: Magistrates' *euthynai* were one of the legal procedures in the Greek city designed to ensure political stability by enforcing accountability and the rule of law. This paper focuses on a problematic class of inscriptions, namely accounts and inventories, which were clearly produced in connection with the end-of-year accounts, and looks into their potential in providing information for the mechanisms of *euthynai*.

Keywords: Athenian democracy, accounts and accountability, *polis* officials, archives, judicial procedure

1. It is well recognized that εὔθυναι, the magistrates' scrutiny at the end of their term of office, belonged to the broad set of legal procedures that, not only in the Athenian democracy but, more generally, in the Greek *poleis*, were designed to create a system of «checks and balances» and ensure political stability by enforcing accountability and the rule of law (Aesch. 3.1-23)[1]. In a passage of the sixth book of *Politics* Aristotle underlines that «since many offices, even though not all, handle large amounts of public property, there must be of necessity a different office that receives accounts and also audits them, an office that manages nothing else itself. Some people call these officials *euthynoi*, others *logistai*, *exetastai*, or *synegoroi*» (*Pol*. 1322b7-12: ἐπεὶ δὲ ἔνιαι τῶν ἀρχῶν, εἰ καὶ μὴ πᾶσαι, διαχειρίζουσι πολλὰ τῶν κοινῶν, ἀναγκαῖον ἑτέραν εἶναι τὴν ληψομένην λογισμὸν καὶ προσευθυνοῦσαν, αὐτὴν μηθὲν διαχειρίζουσαν ἕτερον· καλοῦσι δὲ τούτους οἱ μὲν εὐθύνους οἱ δὲ λογιστὰς οἱ δ' ἐξεταστὰς οἱ δὲ συνηγόρους)[2].

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[1] For a valuable survey of the ample range of procedures established by the Greek *poleis* to enforce the accountability of public officials and prevent individuals from acquiring too much political power within the community see Fröhlich 2013; cf. also Efstathiou 2007, 113-124. The fundamental study on public control over magistrates' activity is Fröhlich 2004. On the distrust of magistrates as reflected by many archaic epigraphic laws throughout the Greek world cf. Harris 2006.

[2] On Aristotle's passage see the commentary by M.E. De Luna in Bertelli – Moggi 2016, 637-640.

Having stressed that the supervision over the conduct of magistrates was to be included among the *archai* that were not only indispensable «but of higher rank, and requiring great experience and fidelity» (1322a29-33: ταύτας μὲν οὖν τὰς ἀρχὰς ὡς ἀναγκαιοτάτας θετέον εἶναι πρώτας, μετὰ δὲ ταύτας τὰς ἀναγκαίας μὲν οὐθὲν ἧττον, ἐν σχήματι δὲ μείζονι τεταγμένας· καὶ γὰρ ἐμπειρίας καὶ πίστεως δέονται πολλῆς)[3], Aristotle insists on the principle that, whatever the form of government, the power to elect and scrutinize the officials (τὸ τὰς ἀρχὰς αἱρεῖσθαι καὶ εὐθύνειν) was to rest within the *demos'* sphere of competence (1274a15-17, with reference to Solon's choice «to give the *demos* only that power which was absolutely necessary» [τὴν ἀναγκαιοτάτην ἀποδιδόναι τῷ δήμῳ δύναμιν])[4]. To what extent such line of thought is compatible with Aristotle's statement in the *Constitution of the Athenians* (8.4) to the effect that the Areopagos «watched over most and the greatest of the city's affairs» and «corrected (ηὔθυνεν) wrongdoers with full authority both to fine and to punish» (καὶ τοὺς ἁμαρτάνοντας ηὔθυνεν κυρία οὖσα καὶ ζημιοῦν καὶ κολάζειν), and, in the affirmative, what were respectively the precise functions of the *demos* and of the Areopagos, and in what way they interacted, remains a debated issue[5].

Regardless of the origins of *euthynai*[6], the system, as we know it from the classical period, was already in operation in the early fifth century. A recently published fragmentary Athenian decree pertaining to «regulations concerning the *prytaneis* and the *prytaneion*», and possibly connected to the reforms of Ephialtes, twice refers to *euthynai*, either because a magistrate (the *euthynos*?) was to examine

[3] Cf. Arist. *Pol.* 1270b35-1371a6 (and 1272a33-39) where the power of the Spartan *gerousia* is criticized for being ἀνυπεύθυνος.

[4] See also 1281b32-34: διόπερ καὶ Σόλων καὶ τῶν ἄλλων τινὲς νομοθετῶν τάττουσιν ἐπί τε τὰς ἀρχαιρεσίας καὶ τὰς εὐθύνας τῶν ἀρχόντων; 1282a12-14, 26-27: αἱ δ' εὔθυναι καὶ αἱ τῶν ἀρχῶν αἱρέσεις; 1298a3-7: κύριον δ' ἐστὶ τὸ βουλευόμενον... καὶ περὶ ἀρχῶν αἱρέσεως καὶ τῶν εὐθυνῶν; 1317b17-28; 1318b21-22: τὸ κυρίους εἶναι τοῦ ἑλέσθαι καὶ εὐθύνειν ἀναπληροῖ τὴν ἔνδειαν, εἴ τι φιλοτιμίας ἔχουσιν, «they have the power of electing magistrates and calling them to account; their ambition, if they have any, is thus satisfied».

[5] The question revolves around the meaning of ηὔθυνεν in Arist. *Ath. Pol.* 8.4 (καὶ τοὺς ἁμαρτάνοντας ηὔθυνεν κυρία οὖσα καὶ ζημιοῦν καὶ κολάζειν), whether it is to be interpreted in a technical sense with regard to magistrates or merely refers to the «correction», «punishment» of «wrongdoers» in general. For a review of recent scholarship on this issue see Zelnick-Abramovitz 2011, 104-106; Poddighe 2014, 195-197; Loddo 2018, 105-113. Cf. also Wallace 1989, 53-55; Braun 1998, 41-49. For a recent analysis of Arist. *Ath. Pol.* 2.2-8.4 see Wallace 2014. For a skeptical approach to the reform of Ephialtes cf. Zaccarini 2018; Harris 2019a, 389-406.

[6] Hignett 1952, 203-205, argues that «[t]he government of Peisistratos was probably the first which was strong enough to enforce on the magistrates respect for the laws. Peisistratos is more likely to have been responsible for the institution of the εὔθυνοι than Solon» but his view is hardly plausible in light of the many clauses that threaten officials with penalties in early laws; see Harris 2006.

the conduct of the *prytaneis* or «if the infinitive or imperative is in the middle voice he himself will be fined a certain amount of money if he fails to exercise his duties» (*SEG* 64.29)[7]. An almost contemporary (if not earlier) document preserving a statute (θέσμια) of the Attic deme Skambonidai contains on side B the text of an oath according to which some official (or officials) undertook to preserve the common funds (τὰ κοινά) and hand over (ἀποδόσο) «what they ought to» (τὸ καθε͂κον) in front of the εὔθυνος (*IG* I³ 244 = OR 107, B, ll. 3-21). A further clause stated that, should he (or they) not carry out such duty, some penalty would then ensue (B, ll. 15-21: hó τι ἂν τõ[ν] κοινõν ⁝ μὲ ἀποδιδõσιν ⁝ παρὰ τὸν εὔθυνο[ν π]ρο[– – – – –])[8].

Although the text unfortunately breaks off, the law from Skambonidai provides an explicit statement of what is otherwise implied by a fairly large number of fifth-century Athenian decrees (beginning with *IG* I³ 4, the «Hekatompedon inscription», B, ll. 15-17, of 485/4: [ἐὰν δέ τις τ]ούτον τι δρᾶι ⁝ εὐθύνε[σθαι hεκατὸν] ⁝ δραχμε͂[σι καὶ] τὸς ταμίας ⁝ ἐὰν ἐõσ[ι εὐθύνεσθαι] hεκατὸν δραχμε͂[σι][9]), where the verb εὐθύνω appears in the passive voice and it is enjoined that magistrates neglecting the provisions of the decree «are to be penalised» (εὐθύνεσθαι), with the use of the verb but no mention of the *euthynoi*. Nevertheless, as maintained by A. Scafuro in a recent study of the documents, «appearances of the verb εὐθύνεσθαι in these different decrees imply the presence of the *euthynos*» and «[ε]ὐθύνεσθαι is not simply "to be penalized" but "to be condemned at one's end of term *euthynai*"»[10]. In other words, it can be assumed that, behind the formulaic language of the decrees, the procedure of *euthynai* as a two-stage process taking place at the end of the year and involving the *euthynos* and – whether only in charges where the penalty exceeded a certain amount of money or in all charges is a matter of dispute[11] – the court is in these cases always implied.

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7 (Kavvadias) – Matthaiou 2014, 58-63.

8 The inscription is dated *ca*. 460 in *IG* I³ and OR 106, while, according to the entry in AIO 1020, n. 1, it is datable «to the decades between the Persian Wars and *ca*. 450». Cf. Piérart 1971, 572: «La présence d'εὔθυνοι dans la loi du dème des Scambonides, qui est antérieure à 460, permettait d'affirmer à coup sûr que les euthynes existaient déjà dans la constitution d'Athènes à cette époque. L'emploi formulaire de εὐθύνεσθαι permet de remonter avec certitude, jusqu'en 485/4, peut-être jusqu'à l'extrême fin du VIᵉ siècle».

9 On the date of the Hekatompedon decrees cf. Stroud 2004.

10 Scafuro 2014, building on the fundamental work by Piérart 1971.

11 Compare the opposing views of Piérart 1971, 529-530, 549-551 and 572 («Les euthynes condemnent les infractions aux lois et aux décrets, les injustices privées et publiques commises par les magistrats dans l'exercice de leurs fonctions. Si elles excèdent un taux déterminé, ces condamnations sont remises aux thesmothètes qui les introduisent alors devant le tribunal»); Rhodes 1981, 564, with Harrison 1971, 30-31, 208-211, and, especially, Scafuro 2014, 318-320 («Now we may hypothesize that *euthynoi* and *paredroi*... received information and accusations from volunteers, claiming that the magistrate had not carried out a task assigned by decree; then, if the *euthynos* decided that the charge was suitable, the evidence demonstrable, and the magistrate likely to be guilty, he assessed the statutory penalty and sent the case forward to court. This is a

When we consider the literary sources, fifth-century testimonies concerning the workings of the end-of-year *euthynai* are not plentiful. A passage in Antiphon's *On the Chorus Boy*, delivered in 419/8 BC, reveals that any citizen could challenge a magistrate (the *basileus* in this case) when he underwent his «accounts» and that this could also concern his behaviour in office in matters other than the management of finances (6.43: καὶ ὅτι οὐκ ἀδικεῖ αὐτούς, μέγιστον σημεῖον· Φιλοκράτης γὰρ οὑτοσὶ ἑτέρους τῶν ὑπευθύνων ἔσειε καὶ ἐσυκοφάντει, τούτου δὲ βασιλέως, ὅν φασι δεινὰ καὶ σχέτλια εἰργάσθαι, οὐκ ἦλθε κατηγορήσων εἰς τὰς εὐθύνας, «the strongest evidence that he did them no wrong is that Philokrates here shook down and blackmailed other officials when they presented their accounts, but despite accusing the Basileus of terrible crimes, he brought no charges against him during his accounting»). Lysias is barely relevant in this context since his career as an orator is not attested to have begun before the democratic restoration in 403/2[12]. Several speeches from the Lysianic *corpus* nonetheless can in all likelihood be connected to *euthynai* procedures, not only *Against Eratosthenes* (12)[13], *In defense of Polystratos* (20; certainly not Lysias' work and generally dated to 410/09)[14], *On the charge of taking bribes* (21)[15], *Against Epikrates* (27), but also *Against Nikides*, possibly concerning a γραφὴ ἀργίας, a prosecution for «idleness» (or negligence), initiated at the *euthynai* of a demarch (fr. 249 Carey; cf. 246)[16]. As recently

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plausible hypothesis that fits the evidence. One does not need to hypothesize that fines were imposed on the spot, or by *euthynoi* during *euthynai*, without a courtroom hearing»), 325; Canevaro – Harris 2016-2017, 27.

[12] Todd 2007, 5-17.

[13] Dover 1968, 8: «XII and XIII accuse Eratosthenes and Agoratos respectively of murder... Neither is a δίκη φόνου. Eratosthenes was one of the Thirty Tyrants, who were entitled to present themselves for εὔθυναι after the democratic restoration..., and XIII is most easily interpreted as a complaint made in that connection»; Bearzot 1997, 33-42; Todd 2007, 13-17.

[14] Todd 1993, 301-302, who includes *Against Polystratos* among the speeches resulting from «*euthynai* at the end of a candidate's term of office»; cf., however, Medda 1995, 167-168, connecting the speech to an *eisangelia*.

[15] Kapellos 2014, 31-39.

[16] Loddo 2015, 114-117. On the νόμος ἀργίας see Schmitz 2004, 190-202, arguing on the basis of rather thin evidence for an original competence of the Areopagos in such charges. Loddo's argument implies that the second stage of the *euthynai* of demarchs, following the financial accounts, took place not locally but in front of the Athenian *euthynoi* since demarchs were not only local magistrates but also acted in many respects as «agents of the state» (cf. Whitehead 1986, 130-138). This is, however, highly speculative if not doubtful and seems to be at variance with the epigraphic evidence, where deme *euthynai* appear to be a local business (Whitehead 1986, 116-119; Fröhlich 2004, 346-355). On *IG* II^2 1183 (from the deme of Myrrhinous or, more probably, Hagnous; cf. Wilson 2011, 79 n. 1), a key document in the discussion, see Magnoli 2004-2005. According to this inscription, the *euthynos*, having presumably conducted a preliminary assessment of the outgoing demarch's administration (cf. Arist. *Ath. Pol.* 54.2), was to introduce the case in front of the ten «elected men» (οἱ αἱρεθέντες) who

suggested by A. Efstathiou, «*euthyna* can be viewed as a preliminary investigative procedure comprised of the stages of the *logistai* and the *euthynoi*» to the effect that any complaint that arose during the second stage «was then pursued in court by a separate legal action (*dike*, *graphe*, *eisangelia*) depending on the nature of the allegation»[17].

Another early intriguing example is possibly provided by a dramatic episode related by Antiphon in his speech *On the murder of Herodes* (5.69-70): in the 450s or 440s the *Hellenotamiai* were tried on a charge of embezzlement (περὶ χρημάτων αἰτίαν ποτὲ σχόντες) and all but one treasurers were condemned and executed, whereas Sosias, the tenth member of the board, was still awaiting execution when the true facts were revealed and it became clear «in what way the money had been lost» (τῷ τρόπῳ ἀπωλώλει τὰ χρήματα). Unlike the others who had died οὐδὲν αἴτιοι ὄντες, he was rescued from the Eleven by the demos (καὶ ὁ ἀνὴρ ἀπήχθη ὑπὸ τοῦ δήμου τοῦ ὑμετέρου παραδεδόμενος ἤδη τοῖς ἕνδεκα)[18]. Antiphon is the only source recording this episode and his narration is too vague (and, surely, too overstated) to make sense of the facts and the procedural aspects leading to the death penalty for all members of the board of *Hellenotamiai*[19]. Recently S.V. Tracy has suggested that the serious mishandling of the common money of the league alluded to in Antiphon's passage should be connected to the missing list of the *lapis primus*

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had to vote in a secret ballot (ll. 16-18: τ[ῶ]ι δὲ εὐθύ[ν]ωι μὴ ἐξεῖναι ἐξελεῖν τὴν εὔθυναν ἐὰν μὴ τοῖς [π]λέοσι δ[ό]ξει τῶν δέκα τῶν αἱρ[ε]θέντων διαψηφιζομένοις [κ]ρύβδην). If he was «condemned», the official had nonetheless the right of appeal [ε]ἰς ἅπαντας τοὺς δημότας and was to be judged by the deme assembly provided that at least thirty *demotai* were present (ll. 20-22: ἐὰν παρῶσι μὴ ἐλάττους ἢ ΔΔΔ). Here it is clear that the entire procedure was carried out locally in the deme. Some possible exception could be represented by a decree of Acharnai, dated *ca*. 315 BC (*SEG* 43.26A), where a ταμίας of the deme is honoured for having taken care of the Dionysia together with the demarch καλῶς καὶ φιλοτίμως and on account of the fact that he λόγον ἀπενήνοχεν ἁπάντων ὧν δι[ῴκησ]εν πρός τε τὴν πόλιν καὶ πρὸς τοὺς δημότας ἐ[ν] τοῖς χρόνοις τοῖς ἐκ τῶν [νόμων] τῶν τῆς πόλεως καὶ τῶν δη[μ]οτῶ[ν] (A, ll. 9-12). The apparently unusual control exerted by the city over deme finances has generally been explained with the financial administration of Demetrios of Phaleron (Fröhlich 2004, 353-355). It needs in any case to be observed that in this decree «central» control seems to have been confined to the financial accounts (λόγος), whereas it is not mentioned with regard to the second stage of the accounting procedure, namely the εὔθυναι (A, ll. 15-18: καὶ τὰς εὐθύνα[ς] δέδωκεν δ[ό]ξας δικαίως τεταμιευκέναι καὶ τῶν [ἄλλων] ἁπάντων [ὧν] αὐτῶι προσέταξαν [Ἀ]χαρν[εῖς ἐπιμεμέλη]ται καλῶς καὶ φιλοτ[ίμ]ως).

17 Efstathiou 2007, 113-124; cf. also Rhodes 1979, 108-110. For an analysis of some fifth-century cases of εἰσαγγελία initiated by raising an objection at a magistrate's εὔθυναι see Oranges 2013, 2016.

18 See the commentary *ad. loc.* in Gagarin 1997, 209-210.

19 On references to prior trials in court speeches see Harris 2019b (p. 54 for Antiphon's passage).

of the Athenian Tribute Lists[20]. Nonetheless, it can be surmised that the charge, being περὶ χρημάτων, arose at the end-of-year *euthynai* of the board and that, since the trial ended up with conviction and death penalty, it did not merely concern the management of finances (cf. Arist. *Ath. Pol.* 54.2)[21] but some more serious crime. It becomes as a result plausible that the procedure used by the prosecutors when they accused the ten *Hellenotamiai* was *eisangelia* and that the treasurers were also accused of treason or some other crime against the *demos*[22].

My final example concerns Perikles and the charge he was targeted with again on account of the λόγοι τῶν χρημάτων (Plut. *Per*. 32.3-4). In exactly the same way as in the procedure described by Aristotle in *Ath. Pol.* 54.2 (cf. also Hyp. 5.24; Din. 1.60)[23], he was to be tried by a court (of 1500 *dikastai*) and the prosecution could

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[20] Tracy 2014, arguing that «[t]he conclusion appears to be inescapable that the list could not be inscribed because the money or the records of that year (or both) were lost and could not be recovered» (9 n. 42). For a lucid *status quaestionis* of the epigraphic evidence see OR 119, esp. 102-105.

[21] Arist. *Ath. Pol.* 54.2: καὶ λογιστὰς δέκα καὶ συνηγόρους τούτοις δέκα, πρὸς οὓς ἅπαντας ἀνάγκη τοὺς τὰς ἀρχὰς ἄρξαντας λόγον ἀπενεγκεῖν. οὗτοι γὰρ εἰσι μόνοι <οἱ> τοῖς ὑπευθύνοις λογιζόμενοι καὶ τὰς εὐθύνας εἰς τὸ δικαστήριον εἰσάγοντες. κἂν μέν τινα κλέπτοντ᾽ ἐξελέγξωσι, κλοπὴν οἱ δικασταὶ καταγιγνώσκουσι καὶ τὸ γνωσθὲν ἀποτίνεται δεκαπλοῦν· ἐὰν δέ τινα δῶρα λαβόντα ἐπιδείξωσιν καὶ καταγνῶσιν οἱ δικασταί, δώρων τιμῶσιν, ἀποτίνεται δὲ καὶ τοῦτο δεκαπλοῦν· ἂν δ᾽ ἀδικεῖν καταγνῶσιν, ἀδικίου τιμῶσιν, ἀποτίνεται δὲ τοῦθ᾽ ἁπλοῦν ἐὰν πρὸ τῆς θ′ πρυτανείας ἐκτείσῃ τις, εἰ δὲ μή, διπλοῦται. τὸ δὲ δεκαπλοῦν οὐ διπλοῦται, «[They appoint by lot] also ten auditors, and ten advocates for them, with whom all men who have held office are required to deposit their accounts. These are the men who check the accounts of those subject to examination, and who introduce the examination into the court. If they prove that a man is an embezzler, the judges convict him of embezzlement and the sum determined is repaid tenfold; if they prove that a man has taken bribes and the judges convict him, an assessment for bribery is made and this sum is also repaid tenfold; if a man is convicted of misdemeanour, an assessment for misdemeanour is made, and here the simple amount is repaid if a man discharges the debt before the ninth prytany of the year, or if he fails to do that it is doubled. Tenfold payments are not doubled». For a commentary on Aristotle's *locus* see Rhodes 1981, 597-599.

[22] Rhodes 1979, 110; Efstathiou 2007, 118-119: «The charge may be of different types; it could be either misuse of power or negligence in discharging people's instructions». Hansen 1975, 67 with n. 7, is non-committal and merely observes that «the information is too scanty to allow of any description». Todd 1993, 303, underlines that «[t]his story may be apocryphal» as «Antiphon's account is surprisingly short on detail, and the wording of the phrase quoted may suggest that he is hiding something», and, having posed the question of whether this was «a case of embezzlement but by somebody other than Sosias, or (as he may wish us to infer) of money being innocently mislaid by the confused presentation of accounts», notes that «[a]t any event, this is a striking further illustration of the two points that we have observed...: the severity, or one might almost say savagery, of penalties meted out; and the peculiar concentration of the courts on questions of public finance».

[23] For Aristotle's passage see n. 21.

result in a charge for emblezzlement (κλωπή), bribery (δώρων) or misdemeanour (ἀδίκιον).

The evidence, scanty though it is, thus clearly shows that *euthynai* already in the fifth century was a two-stage process focusing both on the audit of the financial accounts and the examination of the conduct of the magistrate while in office. The only apparent difference is that during the fifth century the *euthynoi* seem to have been competent for both stages of the procedure (cf. And. 1.77-79, the decree of Patrokleides, which, however, both on the ground of language and contents is in all likelihood not genuine[24]; Lys. 20.10), while in the fourth century the financial review became the responsibility of the λογισταί who had previously had different tasks and duties[25].

2. I have so far stressed that *euthynai* was a two-stage process and, from a technical point of view, this is certainly true. We must, however, allow for the fact that there was also a third stage involved, namely the yearly «transfer» (παράδοσις) of money, objects or equipment from the magistrate (or board of magistrates) demitting office to the incoming magistrate (or board of magistrates)[26]. We must assume that both notionally and operationally this «third» stage was tightly interconnected with the other two steps of the *euthynai*[27]. To quote an example, this clearly emerges from a

[24] Canevaro – Harris 2012, 100-110, esp. 105-106, whose analysis has been followed by the majority of scholars (cf. Canevaro – Harris 2016-2017, 10 n. 3 [add Dilts – Murphy 2018, VI and 140-141, *ad loc.*]). For an attempt to defend the authenticity of the decree cf. Hansen 2015, 891-892, whose arguments have been countered by Canevaro – Harris 2016-2017, 10-33, esp. 24-27.

[25] Piérart 1971; Scafuro 2014, 302-304, 320, pointing, however, to *IG* I³ 52 (= OR 144), A, ll. 24-29, where the Treasurers of the Other Gods indeed have to hand in their accounts to the *logistai* («members of a board of thirty who served as accountants for the treasury») and suggesting that this «may have been restricted to those magistrates who handled imperial coffers».

[26] For a recent enlightening study of the παράδοσις see Fröhlich 2011, with a thorough analysis of the fourth-century and early-Hellenistic documentation from Oropos and Thespies.

[27] Fröhlich 2004, 413-414: «Pour les magistrats ayant responsabilité de fonds publics, comme pour ceux qui ont la garde de biens publics (par example d'objects consacrés dans un sanctuaire), la *paradosis* faisait partie des obligations dont ils devaient s'acquitter à leur sortie de charge». In Kallias' decree, the newly established Treasurers of the Other Gods, after «taking over» (παραδεχσάσθων) from the officials in a *paradosis*-operation the treasures of the gods in the presence of the *boule*, were to «inscribe everything on a single stele, god by god», and for the future (τὸ λοιπόν) «inscribe on a stele and give an account of the treasures in hand and the income of the gods and anything expended during the year to the *logistai*, and undergo their *euthynai*» (ἀναφραφόντον hοι αἰεὶ ταμίαι ἐς στέλεν καὶ λόγον διδόντον, τôν τε ὄντον χρεμάτον καὶ τôν προσιόντον τοῖς θεοῖς καὶ ἐάν τι ἀ[π]αναλίσκεται κατὰ τὸν ἐνιαυτὸν, πρὸς τὸς λογιστάς, καὶ εὐθύνας διδόντον (*IG* I³ 52 = OR 144, A, ll. 18-27). Although this is

honorific decree from the deme Acharnai in Attica where the ταμίας Phanomachos is praised for having rendered the accounts for his financial administration both to the *polis* and to his fellow *demotai* (καὶ λόγον ἀπενήνοχεν ἁπάντων ὧν δι[ώικησ]εν πρός τε τὴν πόλιν καὶ πρὸς τοὺς δημότας) and for having deposited with the Acharnians the balance of his financial administration (διοίκησις), namely 329 drachmai (καὶ τὸ περι[ὸν] ἀργύριον παρ' ἑαυτῶι ἐκ τῆς διοικήσεως κατ[αβέ]βληκεν Ἀχαρνεῦσ[ι]ν), so that it appeared that he had correctly carried out his duties as ταμίας (καὶ τὰς εὐθύνα[ς] δέδωκεν δόξας δικαίως τεταμιευκέναι) (*SEG* 43.26, A, ll. 8-15).

We do not know on what account the drafter of the decree used in this particular case the verb καταβάλλω, but it is clear that it was a synonym of the more technical term παραδίδωμι and that the act of «depositing» the surplus of the *dioikesis* must in actual fact have corresponded to a *paradosis* of the funds from one magistrate to his successor[28]. It must moreover be underlined that in the succession of public acts performed by Phanomachos the «trasmission» of the funds (*paradosis*) comes after the λόγος as a result of the operation of presenting the accounts. The two operations, both being a legal obligation – though probably separate and distinct from a formal and technical point of view –, in other terms went hand in hand and, at least when they concerned the management of money only, were carried out before the more general *euthynai*, which thus become the third stage in the sequence of public actions[29].

3. Keeping in the background what has so far emerged with regard to the institutional organization of the end-of-term demittal of office, it is now time to bring into the picture some inscriptions recording lists and accounts that are clearly the epigraphic reflection of the procedures we have briefly examined. The body of epigraphic documents from Athens, Delos, Delphi, Rhodes, Boeotia and a number of cities in Asia Minor bearing lists, accounts and inventories, as is well known, is massive and extremely varied in form, style, contents, nature and purposes[30].

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not explicitly stated, the yearly inventory list compiled by the treasurers must have been in turn functional to the *paradosis* of the gods' properties to the new incoming board.

[28] On the verb καταβάλλω and its implications in this decree see Chr. Feyel, *BE* 2011, 342-344 (no. 222).

[29] Fröhlich 2004, 413-414; 2011, 206 and 224-227 («Il y a donc un lien, temporal et technique, entre *paradosis* et reddition de comptes. Toutes les deux s'appliquent à des magistrats sortis de charge, portent sur les responsabilité, notamment financière. Les magistrats sont déchargés de leurs responsabilités après s'être soumis tant à la reddition de comptes qu'à la *paradosis*»), with some qualifications with respect to the handing over of objects or other goods to be stocked before being sold and turned into money.

[30] For a broad overview of the many questions posed by the *corpus* of epigraphic accounts and inventories in respect to their nature, purposes and functions see Knoepfler 1988 and Boffo 1995, 115-123. Among the more recent works I have found useful insights in Dignas 2002 and Scott 2011, 240-242, the latter stressing the «impasse of functionality

Moreover, it extends over a long span of time from the fifth century to the late Hellenistic period and beyond, so that its use turns out to be extremely problematic and the documents difficult to handle. In his fundamental book on *Le contrôle des magistrats* in the Greek cities, for instance, P. Fröhlich justified his choice to use epigraphic accounts and inventories only sparingly with the fact that the extant inscriptions, besides forming an immense body of texts from a quantitative point of view and being «les sources les plus délicates à utiliser», raise a number of methodological problems in as much as «il n'est pas evident que tout compte gravé doive être consideré comme un document issue d'une reddition de comptes», and it is never sufficiently clear whether such accounts were, as a rule, comprehensive documents aiming at offering an accurate and as much as possible detailed overview of the magistrates' administration or rather mere extracts with no pretence to completeness, in other words whether they were meant to be legal documents or primarily had a symbolic or religious character[31].

The fundamental questions therefore revolve around the «relationship between the procedures for enforcing accountability and the extant documents» and were lucidly asked by J.K. Davies some twenty years ago: «Who decided which sets of accounts should be cut in stone for permanent display? By what criteria?...What relation do the texts cut on stone bear to the texts on *grammateia* or *pinakes* or *sanides* which we hear of from *Ath. Pol.* or the orators? Indeed at the extreme, how sure can we be that the inscribing of *stelai* was a functional act rather than one driven by ornamental or ritual or symbolic reasons?»[32]. At the end of his essay, Davies' answer to the question was to suggest that our documents «had very little to do with public accountability» and «far more to do with affirming the principles on which the Athenian public administrative system was based» since they are extremely seldom referred to in the speeches of the orators and there is hardly any

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vs. symbolism» in recent scholarship. For a discussion of some of the problems and further bibliography see below.

[31] Fröhlich 2004, 5-6, 325-329.

[32] Davies 1994, 201-202; cf. also Hamilton 2000, 3-5, 345-348, stressing the lack of system in the Delian and Acropolis inventories, though also noting that, from a practical point of view, this «must not have mattered: the auditors apparently were able to manage despite the chaos». For a more nuanced position see R. Osborne-P.J. Rhodes, *Greek Historical Inscriptions, 478–404* BC, Oxford 2017, XV: «Though in theory the purpose of a published text is that it should be available to be read, some texts were published in such a way that they were not easy to read, and the purpose of a lengthy inventory of items received by one board of treasurers from its predecessors and transmitted to its successors may have been to serve a symbolic demonstration that the board had done its duty as much as to furnish material for an investigator who wanted to check that none of the items had disappeared. Nevertheless, some other texts were laid out in ways designed to aid intelligibility; and we think that it would be a mistake to make too much of the symbolic aspect of inscription and too little of the notion that texts were published so that they could be read».

proof that they were actually used: «it was the *Gestalt* which mattered, not the minute and barely legible details»[33].

Against this background, it is undeniable that the effort of bringing the evidence of epigraphic accounts into the picture may appear overambitious. There is no question that the extant body of texts is far from being coherent and, sometimes, not even congruent[34], suffice to compare the extremely elegant, but remarkably brief accounts for Pheidias' statue of Athena Parthenos (*IG* I³ 453, 455-460 = OR 135) or for the building of the Parthenon (*IG* I³ 436-451; cf. OR 145)[35] with the *poletai*-records (*Agora* XIX, P 1-56) or the very long and detailed records of the overseers of the dockyards (ἐπιμεληταὶ τῶν νεωρίων; *IG* II² 1604-1632) or the *rationes operum* of the Eleusinian *epistatai* (IG II² 1666, 1670-1683; cf. Clinton 2005, nos. 143, 145-166, 169-174, 177-178) or the strikingly extensive records from the sanctuary of Apollo in Delos spanning from the fifth century (the earliest document going back to 434-432 BC [*I.Délos* 89 = *IG* I³ 402 = OR 147]) to *ca*. 140 BC. From the point of view of this paper, the fact however remains that some series of the preserved public accounts do seem to incorporate records of trials and other institutional transactions which unquestionably have a legal character and which it would be incorrect to neglect or leave aside. The boundaries between what is «legal» and what is «symbolic» or «religious» thus turn out to be blurred.

4. The only possible solution to the «functionality vs. symbolism» conundrum is, in my opinion, consequently to explore the potential of epigraphic accounts in providing information for the mechanisms of *euthynai*. In what follows I will in particular use two sets of documents as case studies, namely the accounts of the Athenian amphiktyons and *naopoioi* from Delos, and the Athenian navy records (*IG* II² 1604-1632). My approach is in particular inspired by the conclusions of a recent article by V. Chankowski on the accounts of the Delian *hieropoioi*, where the author convincingly argued that the relationship between records written on perishable materials, such as wooden tablets (δέλτοι, λευκώματα, πέτευρα), papyrus and lead, and the texts «published» on stone must be conceived in different terms from what had been previously assumed: the former were not only, or not primarily, used to produce draft or short-lived, temporary documents to be, at a later stage,

[33] Davies 1994, 211-212.

[34] On the lack of uniformity within the same series of the accounts from Delphi see, for instance, Bousquet 1988, 34-35, 145-153, emphasizing that «[i]l faut avoir manié et relu les pierres elles-mêmes pour se rendre compte que la série n'est pas uniforme et que sa publication sur pierre est due à des décisions prises à des moments différents, pour des "dossiers" divers, et avec quelque arbitraire, pour ne pas dire capricieusement» (34).

[35] For a review of the preserved epigraphic fragments related the building programme on the Acropolis in fifth-century Athens cf. Marginesu 2010, 28-35, which needs to be integrated by Pitt 2015 and Foley – Stroud 2019. For the relationship between building accounts and *euthynai* see Epstein 2013.

«monumentalized» on a *stele* and discarded[36], but represented in the first place registers containing separate records for the different funds and chapters of the complex administration of the sanctuary, in some cases designed to be publicly displayed in the agora[37]. *Leukomata* were thus used to record outlays from the κατὰ μῆνα fund, in other words from the fund for the monthly current expenses, while *peteura* were used as registers for accounts, lists of contracts, lists of assets offered as security as well as for lists of offerings handed over at the *paradosis* (*I.Délos* 372, A, ll. 114-116: κα[ὶ] τῶι γράψαντι τὸν λόγον καὶ τὰς παραδόσεις τῶν ἱερῶν ἀναθημάτων καὶ τὰς μ [[––]] ισθώσεις τῶν ἱερῶν τεμένων ΗΗ𐅄· μόλυβδο[ν] Δ⊢⊢· δέλτου κυπαρίσσης Δ· καὶ τῶι γράψαντι ΔΓ· πέτευρα τῶι λόγωι καὶ ταῖς συγγραφαῖς καὶ τ[ε͂]ι παραδόσει ⊢IIII; 442, A, l. 204: πέτευρα ταῖς π]αραδόσεσιν ΓIII). The mention of records on πέτευρα, «tablets», for the παράδοσις is of particular interest as it again shows that *euthynai* and *paradosis* were operationally parts of the same integrated process. The inscribed accounts published on the *stelai* were thus drawn up by assembling diverse sets of documents in order to produce a summative balance-sheet of all the financial activities and transactions (revenues, expenses, contracts, loans, leases) carried out in the sanctuary.

5. The relationship between documents on perishable media and inscriptions did not in conclusion only work in one direction: wooden tablets (or, alternatively, papyrus) could be used for safekeeping as archival records, as notices for posting and public display, as copies of the inscribed accounts for storing in a repository or as draft copies for the documents to be inscribed and these different types of documents interacted in the context of a complex administrative system[38].

What is, moreover, important in our perspective is, as we have seen, that the inscribed annual accounts in some cases contain records of trials connected with the administrative functions and areas of responsibility of the magistrates[39]. It can be surmised that before being incorporated in the end-of-year final λόγος of the outgoing board they were in turn kept on file in a separate register alongside the other categories of documents and records. An interesting example to this effect is provided by the accounts of the amphiktyons of Delos of 377-373 BC (*I.Délos* 98 = RO 28 = Chankowski 2008, no. 13; cf. pp. 194-195 for the date). It is clearly a financial document recording the «actions» (l. 2: τάδε ἔπραξαν Ἀμφικτύονες Ἀθηναίων) carried out by the board while in office. On the side of the revenues, together with interest payments on loans to cities and individuals, rents for the lease of sacred estates (μισθώσεις τεμενῶν) and buildings (οἰκιῶν μισθώσεις), are also

36 Davies 2003, 325.

37 Chankowski 2013.

38 On writing media and their different uses in the Greek world see also Faraguna 2015, 1-3.

39 For records of trials in the literary and epigraphical sources see Harris 2013b; Faraguna 2015, 8-12.

listed receipts from legal proceedings, i.e. collections from confiscated estates following some denunciation and pledges seized from «those who have lost court cases» (A, ll. 25-27: εἰσεπράχθη μηνυθὲν παρὰ Πύθωνος Δηλίο ΧΗ· ἐκ τῶν ἐνεχύρων τῶν ὠφληκότων τὰς δίκας, τιμῆς κεφάλαιον ΧℙΗΗΗΔΔΔΓ), while on side B, following a catalogue of cities and individuals in arrears with the payment of interests for their loans, an entry concerns the exaction of substantial fines (10.000 drachmai each) imposed, together with perpetual exile (ἀειφυγία), on seven individuals who had been condemned for impiety (ἀσέβεια) having dragged the Athenian amphiktyons from the temple of Apollo Delios and beaten them up (B, ll. 24-31)[40]. The expression τ[ίμημα] τὸ ἐ[π]ιγε[γ]ραμμένον most probably alludes to the amount of the penalty proposed in the plaint (γραφή) (cf. Dem. 58,43: φανερῶς ἀφῆκε τῆς γραφῆς, ἐφ' ῇ δέκα τάλαντ' ἐπεγράψατο τίμημα, «[Theocrines] then openly released him from the *graphe* for which he had designated a ten-talent fine»)[41]. It can therefore be inferred that the amphiktyons kept in their archive the records of the trials for which they had been responsible and then used them for their financial implications in connection with their *euthynai*. The accounts they presented on leaving office appear then to have been the result of the assembling of different sets of records pertaining to their various activities.

Likewise, the tasks of the board of ναοποιοί, created around 360 to oversee the construction of a new temple of Apollo Delios, often caused them to be involved in legal proceedings, primarily arising from the supervision they exerted on the work of the contractors and on the building operations, in connection to which they are several times attested as imposing fines[42]. The few inscriptions preserved are all dated to the mid-340s and seem to refer to a period of disruption of their normal activities[43]. In particular, *SEG* 51.1001 (= Chankowski 2008, no. 55), a fragment published in 2001 which was recognized by V. Chankowski as joining the accounts of the secretary of the *naopoioi* of 345/4 (*I.Délos* 104-24), relates the case of a judicial dispute for the embezzlement of sacred money (χρήματα) belonging to

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[40] On this episode see Chankowski 2008, 249-253.

[41] On the meaning of ἐπίγραμμα cf. Bertrand 2002, 175-177; Scheibelreiter 2017, 233-235, listing other examples of the use of the term in connection with δίκαι.

[42] On the functions of the *naopoioi* and the distribution of tasks between the three members of the board cf. Chankowski 2008, 238: «Les actes des années 346/345-345/344 suggèrent une répartition des tâches entre les naopes et leur secrétaire. L'acte 54 (*ID* 104-22) distingue les amendes infligées par les naopes des amendes infligées par le secrétaire (*a*, l. 12-13). Cette distinction se retrouve dans 55 (*ID* 104-24, l. 15-17). En 345/344, le secrétaire Philistidès était manifestement chargé d'inspecter les pierres posées. Le amendes qu'il a infligées aux entrepreneurs ne se rapportent qu'à des défauts de pose. Mais il existait d'autres types de contestations, dont les comptes des hiéropes de l'Indépendance fournissent des exemples. Il est donc possible que les naopes aient veillé au respect de toutes les règles des contrats, tandis que le secrétaire inspectait les matériaux».

[43] Chankowski 2001, 179-183; 2008, 237.

Apollo[44]. The reconstruction of the succession of events recounted in the report of the secretary Philistides is uncertain in the details owing to the fragmentary state of the text: according to the editor, Philistides himself was accused at the *euthynai* by the *naopoioi* of the year before (346/5) of having misappropriated the property of Apollo of which they claimed they had transferred possession to him (or to the entire board) as recorded on the *stele* (ll. 47-48: γ]ράφουσιν ἔχοντας εἰς τὴν στ[ήλην....]; cf. *IG* II[2] 1622, ll. 444-456, where it is noted that Euthymachos, being ταμίας ἐς τὰ νεώρια, had received equipment from the trierarchs καὶ οὐκ εἰσήνενκε γρά[ψας] ἐν τῆι στήληι). He then countered the charge by bringing a παραγραφή (l. 45: [πα]ρεγρα[ψ]άμην)[45] and succeeded in the ensuing trial to prove that the person responsible for the theft was someone else, possibly one of the members of the board of *naopoioi* who had accused him. In particular, it can be surmised that following the successful *paragraphe*[46] the culprit was introduced before the *boule* and then

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44 Chankowski 2001, 183-191.

45 On παραγραφή see Harrison 1971, 106-124; Harris 2015; Maffi 2017, discussing earlier bibliography.

46 Harrison 1971, 119: «We can then say with some confidence that argument and voting on a παραγραφή were quite distinct from argument and voting on the issue of substance»; Harris 2015, esp. 17-19 and 32-34, who examines the role of the legal procedure of *paragraphe* in the context of an analysis of the meaning of *symbolaion* in the law about maritime suits and again makes a strong case for the *paragraphe* and the maritime suit being two separate trials, concluding his argument in the following way: «If a plaintiff brought a maritime case, and the defendant did not dispute the admissibility of the case, both the substantive issue... and the amount of the damages would be discussed and decided at one trial. If a plaintiff brought a maritime case, and the defendant denied the admissibility of the suit by bringing a *paragraphe*, there would first be a trial about the *paragraphe*. One of the issues that might be discussed would be whether an actionable liability (*symbolaion*) existed on the part of the defendant... If the defendant who brought the *paragraphe* won his case, the plaintiff's case was ruled inadmissible, and that was the end of the dispute. If the court rejected the *paragraphe*, another trial would have taken place about the original suit... At this trial, the plaintiff would have cited the verdict at the previous trial to prove that liability existed and possibly reviewed the main points of his case, then concentrated on proving the exact amount of the damages owed by the defendant»; Maffi 2017, XIII-XVII, holding the view that «il fatto che, a fronte di un'unica istruttoria, nel dibattimento il convenuto parli per primo sembrerebbe un indizio che rafforza la tesi, come si è visto autorevolmente sostenuta in dottrina, secondo cui la sentenza che chiudeva il processo paragrafico non decideva nel merito, ma statuiva soltanto sull'ammissibilità o meno della *paragrafe*». *Contra* Talamanca 2017, arguing that there was only one trial and that after litigants had delivered their speeches the court had to choose between the *enklema* of the plaintiff and the *paragraphe* of the defendant (116-17: «mi sembra che si debba trovare qui lo spunto per una diversa ipotesi sulla struttura del processo paragrafico... nel senso di considerare l'*agon* nel giudizio paragrafico come quello che si instaura fra l'*enklema* dell'attore e la *paragrafe* del convenuto. In questo modo il tribunale eliastico era posto dinanzi all'alternativa o di accogliere l'*enklema* dell'attore, e condannare così il convenuto al *timema* in quello

judged by a *dikasterion*, [παρὼν κ]αὶ ἀπολογούμενος, being sentenced to a fine of 1000 drachmai.

Such reconstruction of the events remains highly speculative, especially because, as is well known, no other instance of the use of *paragraphe* in a *public* charge is attested (the editor nonetheless maintains that «[l]e *rhô* en début de ligne est certain» and no other restoration appears to be possible)[47]. I am therefore quite surprised to see that this new fragment seems to have received little scholarly attention[48]. Assuming that the restored text is plausible, we can at any rate infer that the question of the missing «sacred property» surfaced at the *euthynai* of Philistides and of the board for which he was the secretary, and after the person responsible for the act of embezzlement was finally identified and it turned out that it was a public official, he was charged before the Council by means of an *eisangelia*. Since the proposed penalty exceeded the limit for which the Council was competent, the case was referred to the court (cf. [Dem.] 47.43: καὶ ἐπειδὴ ἐν τῷ διαχειροτονεῖν ἦν ἡ βουλή, πότερα δικαστηρίῳ παραδοίη ἢ ζημιώσειε ταῖς πεντακοσίαις, ὅσου ἦν κυρία κατὰ τὸν νόμον, «and when the Council was at the stage of voting by a show of hands, whether to refer the case to the court or to penalize Theophemus with five hundred drachmas, as much as it was authorized by law to impose»). Moreover, the formula παρὼν καὶ ἀπολογούμενος, signalling that the convicted *naopoios* (?) was present and defended himself before the court, and the note on the amount of the penalty (*I.Délos* 104-22 = Chankowski 2008, no. 54, b, ll. 3-10; 104-26 = Chankowski 2008, no. 29, C, ll. 1-10), in some other documents also supplemented by the name of the court where the charge was adjudicated and by the number of votes against the defendant and in his favour (Chankowski 2008, no. 29, C, ll. 2-10; *I.Délos* 104-26bis = Chankowski 2008, no. 30, C': [ψήφω]ν αἱ [τ]ε[τρυπημέ]ναι Η, αἱ δὲ πλ[ή]ρε[ις] ΗΗ]Η𐅄ΔΔΔΓΙΙΙΙ), are a strong indication that the information on this judicial dispute came from an archival record about the trial and it was then incorporated and merged into the λόγος presented by Philistides[49].

The inscription of the final accounts rendered by the Athenian *naopoioi* in Delos in the fourth century thus appears in a new light: our analysis has shown that, far from having a merely «symbolic» significance, the accounts turn out to be remarkably accurate and detailed financial records combining together various

espresso, o di far propria la *paragrafe* del convenuto stesso, e conseguentemente dichiarare irrecevibile l'azione»).

47 Chankowski 2001, 178 and 183-184. The term could, however, be used in the inscription without a technical meaning: for some instances see Thür – Koch 1981, 84, with notes, incorrectly quoted by Chankowski to the opposite effect.

48 For an exception see Ph. Gauthier, *BE* 2002, 686 (no. 309), expressing some doubts: «V. Ch. note que ce texte offre le premier témoignage épigraphique sur la *paragraphè* à Athènes et que ce témoignage est tout à fait original dans notre documentation... En effet, ici il s'agit d'une action publique, mettant en cause des magistrats à propos de fonds sacrés. C'est pourquoi on eût aimé que cet *unicum* reposât sur des bases plus sûres».

49 Stumpf 1987; Faraguna 2006, 200-201.

information drawn from different registers, presumably on perishable material (as suggested by *I.Délos* 104-24 = Chankowski 2008, no. 55, ll. 8-10: εἰς σανίδ]ια ἐν οἷς οἱ λόγοι, τὸ μὲ[ν] ἐν τῶι Δηλίωι, τὸ δ' ἐν [πόλει ἀνά]λωμα *v* Γ[τ], «pour les planchettes portant les comptes, l'une à Délos, l'autre sur l'Acropole, depense: 5 drachmes ¼ d'obole»), bearing on different aspects of their administration. In this perspective, they offer valuable insights into the mechanisms underlying the procedure of *euthynai*.

6. It remains to compare the picture emerging from the classical Delian documentation, limited though it is, with the evidence offered by the yearly *tabulae* of the Athenian overseers of the dockyards (ἐπιμεληταὶ τῶν νεωρίων), spanning in time over more than fifty years from 377/6 to 323/2 (*IG* II^{2} 1604-1632)[50]. Although the beginning of the series is clearly to be connected with the establishment of the Second Athenian League, some much briefer and less detailed lists of triremes and, in one case, of crews, organized again by trireme, are preserved already for the second part of the fifth century (respectively *IG* I^{3} 498-500 [*ca*. 435-410] and 1032 [dated «towards the end of the fifth century or the beginning of the fourth»])[51].

Formally (and typologically), the naval lists are *paradosis*-documents providing an updated register of all triremes and gear (wooden and hanging) possessed by Athens, with information concerning their condition and rating, which the outgoing *epimeletai* were handing over and officially «transferring» to their successors. This clearly appears from *IG* II^{2} 1607, ll. 1-3 ([ἐπὶ Ἀστείου ἄρχοντος τάδε παρέδοσαν οἱ ἐπιμεληταὶ οἱ ἄρχοντες ἐ]ν τοῖς νεωρίοις [the names of the ten members of the board are then recorded]), and 1611, ll. 1-2 ([τά]δε ἀν[έγραψαν] νεωρίω[ν ἐπιμεληταὶ– – – – – – – – – – –]ν ὄντα ἐν τοῖς νεωρίοις καὶ [τ]ὰ ἐκπε[π]λευκότα καὶ τὰ ὀ[φειλόμενα]), where, although with some significant variation in the *restored* formulaic structure, the headings are at least partly preserved (cf. also 1627, ll. 46-48: [τ]άδε *παρελάβομεν* καὶ ἀπολάβομεν σκεύη κρεμαστὰ ἐν νεωρίοις, and *passim*). *IG* II^{2} 1611, to quote an example, thus first comprises a section where

[50] For a number of fragments of naval records found in the Athenian agora after the publication of the volume containing the *tabulae magistratuum* of *IG* II^{2} by Kirchner in 1927 cf. *SEG* 45.145-148 with Gabrielsen 1999. As shown by Laing 1968, 245 n. 4 (cf. 253), many of the fragments published by Kirchner as separate inscriptions in fact belong together: thus 1604 and 1605 «are very probably two parts of the same stele»; similarly 1613 and 1614 «form the upper and lower parts respectively of a stele 1.91 m. in height» bearing the records for the year 353/2 (or 352/1). The same applies to 1615, 1617, 1618 and 1619 which «are four parts of a single document». 1620 and 1621 in turn «are from a single stele and should be dated together, probably in 348/7». On the contrary, in *IG* II^{2} 1611 and 1612 «the separate stocktaking of equipment in the dockyards in both 1611.42-46 and 1612.47-84 is a good indication that they are records from different years» (Gabrielsen 1994, 232 n. 31). For a study of *IG* II^{2} 1622 see Simonsen 2008.

[51] On *IG* I^{3} 1032 and the procedures for the recruiting of crews by trierarchs at the end of the fifth century see Bakewell 2008, esp. 146-157.

overall numbers of hulls and equipment (the so-called *arithmos*-formula) taken in stock by the board were given, and then offered a detailed and analytical inventory of ships and, separately, individual items of equipment, one by one, arranged according to the harbour and «class» to which they belonged, starting from those which happened to be at hand in the dockyards (νεώρια) and in the storehouse (σκευοθήκη). This section was then followed by a list of the triremes that were already at sea when the board took office and, finally, a register of «debts», i.e. items of equipment that trierarchs had not returned and, as a result, were still «owed» (τὰ ὀφειλόμενα; ll. 2 and 15-16)[52].

It needs emphasizing that the totals given by the *epimeletai* in the *arithmos*-formula often also include ships and equipment that only existed «on paper», in so far as not all vessels were effectively usable (and some had possibly even been lost) and not all the equipment was really in stock and some was, for instance, either «owed» or, again, had been damaged or lost. As noted by V. Gabrielsen, the summative numbers provided in the accounts are, in other words, «gross totals for bookkeeping purposes», thus expressing potential and not net figures. Some ships or items of equipment are indeed recorded only because they had been involved in various legal cases[53]. This fact is of crucial importance since it illuminates the rationale underlying the documents: as in the case of the Athenian *naopoioi* in Delos, the information incorporated in the registers was selected with the purpose of providing a breakdown of all administrative transactions undertaken by the board of the *epimeletai* during their term of office, especially for their financial consequences and the ensuing legal obligations. Even triremes and gear that could not be physically returned had to be registered in the books, and this because they were part of *diadikasiai* and court judgments. The inference is thus inescapable that the *tabulae* of the overseers of the dockyards were drawn up with a view to accountability and in connection with the end-of-year *euthynai*.

Again, it can be assumed that the catalogues were compiled drawing information from different sets of documents. It may well be that in some cases the overseers used the records of the previous year and simply copied *verbatim* the entries drawn up by their predecessors but the information ultimately rested on the διάγραμμα, the «*central register* of all naval material delivered by the *epimeletai* to trierarchs», from which the copy recording the materials assigned to each trierarch was compiled ([Dem.] 47.36: ἀπῄτουν αὐτὸν τὸ διάγραμμα τῶν σκευῶν, «I demanded [from the syntrierarch Theophemos] the inventory of the equipment»), and «a primary list of equipment belonging to each hull containing also detailed specifications about the 'value' (τιμή) related to each of them»[54]. It presumably noted the ships with their name, rating and naval architect, the items of equipment

[52] For the structure of the inventory see J. Kirchner, *ap. IG* II^2 1611, 200-202; Gabrielsen 2013, 64-66.

[53] Gabrielsen 1994, 126-128, 146-149.

[54] Gabrielsen 1988, 73-77.

issued, and the monetary value of the hull and gear, i.e. «the sums to be paid in case compensation was claimed by the state»[55]. V. Gabrielsen has for instance brilliantly observed that in *IG* II[2] 1629, ll. 945-948 (ταύτης κατέβαλε Φαίαξ τὸ ἁπλοῦν : 𐅇𐅅 : ἀποδέκταις τοῖς ἐπὶ Χρέμητος ἄρχον), as a part of the naval lists for 325/4, the entry, which is repeated almost *verbatim* from the document of the year before (326/5), cannot have been copied directly from the *stele* because the amount there inscribed is 1500 drachmai (X𐅅; 1628, ll. 424-427). The *epimeletai* must have therefore used as their master copy another document (in all likelihood the διάγραμμα) written on perishable material[56].

Besides using the διάγραμμα as the basis for their accounts, the overseers of the dockyards also incorporated in their inventories information they found in other registers. In their records there are for instance references to a remarkable number of decrees, both of the *boule* and of the assembly, 20, excluding repeated references, and 46 in total if multiple mentions are included: decrees assigning triremes to generals; decrees granting triremes and various gear to trierarchs; decrees ordering the sale of gear; a decree proposed by Demades about trierarchs in debt benefitting from voluntary contributions to the «grain fund» (σιτωνικά) to reduce the amount of their debt, etc.

The accounts also frequently refer to trials and legal cases concerning matters within the responsibility of the *epimeletai*, who thus acted as the εἰσάγουσα ἀρχή (cf. [Dem.] 47.26: ὡς δὲ τοῦτό μου εἴποντος οὐκ ἀπεδίδου, ὕστερον αὐτῷ περιτυχὼν περὶ τὸν Ἑρμῆν... προσεκαλεσάμην πρός τε τοὺς ἀποστολέας καὶ πρὸς τοὺς τῶν νεωρίων ἐπιμελητάς· οὗτοι γὰρ εἰσῆγον τότε τὰς διαδικασίας εἰς τὸ δικαστήριον περὶ τῶν σκευῶν, «but in as much as he refused to give it up at my request, later when I chanced upon him near the Hermes..., I summoned him before the dispatchers and the overseers of the dockyards. For these were the magistrates who at that time were introducing the adjudications concerning ship's equipment into court»). Revealingly, δικαστήρια are repeatedly mentioned in the naval catalogues: *IG* II[2] 1608, *a*, l. 18 (the context is lost); 1613, ll. 166-239, esp. 166-170; 1623, ll. 6-13, 26-34, 65-71, 98-123; 124-143, etc.; 1628, *passim*.

The legal disputes settled in court generally arose from the obligation imposed on the trierarchs to hand over the trireme seaworthy and the naval equipment in a proper state of repair and, ideally, in the same condition as they had received it. The overseers of the dockyards, together with a *dokimastes*, inspected the triremes and reported their findings to the *boule*, which was «the principal judicial authority in naval matters»[57]. If there was damage to the trireme or it was lost, the trierarch could be held financially responsible. In case of damage or loss at sea, the trierarch in turn

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[55] Gabrielsen 1994, 136.
[56] Gabrielsen 1988, 74.
[57] Rhodes 1972, 117-121, 153-158 (the quotation is from p. 154); Gabrielsen 1994, 136-139.

could claim that this had occurred owing to a storm (or in battle) and present an excuse (σκῆψις) demanding to be exonerated from liability[58].

The matter was then treated at a hearing in court in a διαδικασία: *IG* II² 1629, ll. 746-749: αἵδε τῶν τριήρων καὶ τετρή τῶν σκηφθεισῶν κατὰ χειμῶνα ἔδοξαν ἐν τῶι δικαστηρίῳ κατὰ χειμῶνα διαφθαρῆναι («the following triremes and quadriremes that have been adjudicated for storms were found by the court to have been lost in a storm»; cf. 771-780, 796-799: ἐν τῷ δι[κα]στηρίωι κατὰ χειμ[ῶν]α ἀπολωλέναι; 1613, ll. 202-206; 1631, ll. 116-120, 141-143, 148-152). In 1620, ll. 32-74, the διαδικασία concerning the trireme Δημοκρατία is styled as «concerning some injustices» (περὶ ἀδικημάτων) and was adjudicated between the two trierarchs and the board of ἐπιμεληταὶ τῶν νεωρίων. If the restorations in ll. 58-74 are correct, the decision may have gone against the trierarchs who are recorded as owing naval equipment. If the trierarch was convicted he had to formally accept by means of an ὁμολογία the obligation to replace the ship or pay compensation for it, while retaining in the latter case the old hull, with the exception of the prow (1623, ll. 6-13, 26-34; 1628, ll. 610-615: τῶν ὁμολογησάντων ἐν τῶι δικαστηρίωι καινὰς ἀποδωσειν τριήρεις καὶ τοὺς ἐμβόλους ὀφείλουσι τῆι πόλει, τὰς δὲ τριήρεις ἀποδεδώκασι[ν]).

Since the *corpus* of the *tabulae curatorum navalium* is very substantial and a discussion of even a small number of these documents would exceed the limits of this paper, I would like to examine more in detail an extensive entry from *IG* II² 1613 (which formed a single *stele* together with 1614)[59], in particular the section from ll. 166 to 239, which may provide some insights into the nature and purposes of the naval records in relationship to εὔθυναι and which, as far as I am aware, has not been analysed in depth since an article by U. Köhler published in 1881[60].

The entire section concerns seven vessels (*Syntaxis*, *Thraseia* [*Epicharidou*], *Eutyches* [*Lysikleidou*], *Logche*, *Kallist*[*to*]), *Eutychia* [*Epigenous*], *Strategis* [*Amyntou*]) and is arranged in three subsections signalled by three headings. The *arithmos*-formula at ll. 224-226 ([ἀριθ]μὸ[ς] τριήρων καὶ [σκευῶ]ν τῶν διαδεδικασ[μένω]ν· τριήρεις ΓΙΙ) offers the clue for understanding what the three subsections have in common, namely the fact that the seven triremes and their equipment were all made the subject of a *diadikasia* because they had been severely damaged (or lost). Concerning the first four triremes in the list (*Syntaxis*, *Thraseia*, *Eutyches*, *Logche*), their trierarchs had been acquitted in court and «they had handed over on the *stele*» (ll. 166-170: [ἀπὸ] το[ύ]των [τούσδε] ἐν τῶι δικαστη[ρίωι ἀποπε]φευγότας καὶ πα[ραδόντας] ἐν τῆι στήληι [παρέ]δομεν). Two among the seven ships (*Eutychia*, *Strategis*) were adjudicated in a *diadikasia* in a prior year (under the archonship of Diotimos, probably in 354/3) as having been utterly

[58] For the legal implications of this procedure with regard to the notion of ἐπιείκεια cf. Harris 2013a, 274-301, esp. 298-300.

[59] See above n. 50.

[60] Köhler 1881.

damaged in a storm, with their trierarchs consequently being exonerated from any responsibility (ll. 203-206: [δ]ιεδικάσθησαν κα[ὶ ἔδοξαν] κατὰ χειμῶνα δ[ιαφθαρῆναι]), while the remaining one (*Kallist*[*to*]) had been «payed off» (ἐξετείσθησ[αν]; the plural, clearly not congruent with what follows, remains somewhat puzzling) and we must assume that the trierarch had fulfilled the obligation to pay compensation for its loss.

The meaning of the first heading ([ἀπὸ] το[ύ]των [τούσδε ἐν] τῶι δικαστη[ρίωι ἀποπε]φευγότας καὶ παρα[δόντας] ἐν τῆι στήληι [παρέ]δομεν) is to some extent problematic but the interpretation must be that the overseers in charge had handed over to their successors the «file» pertaining to the four triremes, although such «surrender» was merely on paper because the four hulls and their gear could not have been physically transferred nor received in a παράδοσις-παραλαβή transaction since, as we have seen, they had been badly damaged (and perhaps even no longer existed; cf. ll. 224-226: [ἀριθμ]ὸ[ς] τριήρων καὶ [σκευῶ]ν τῶν διαδικασ[μένω]ν· τριήρεις ΓΙΙ). Notwithstanding the fact that the trierarchs are described as «in possession» (ἔχουσι) of the equipment, this must also again be true only nominally[61], so that the expression πα[ραδόντας] ἐν τῆι στήληι cannot refer to the σκεύη being concretely returned to the dockyards but rather to their still being registered in the books as a part of the administrative praxis of the *epimeletai*. It can as a result be suspected that the magistrates who drew up the accounts mechanically repeated the entry of their predecessors who had originally issued the material to the trierarchs. Similarly, the entries in *IG* II[2] 1622, ll. 448-452 ([ὧν] ἔλαβε παρὰ [τῶν] τριηράρχων [καὶ οὐκ] εἰσήνενκε γρά[ψας] ἐν τῆι στήληι) and 1631, ll. 410-415 (τάδε ὀφείλουσιν οἱ τῶν νεωρίων ἐπιμεληταὶ οἱ ἐπ' Ἀντικλέους ἄρχοντος καὶ ὁ γραμματεὺς αὐτῶν τῶν σκευῶν, ὧν γράψαντες εἰς τὴν στήλην οὐ παρέδοσαν ὄντα ἐν τοῖς νεωρίοις) make a note of the fact that the naval officials had recorded on the *stele* that they had «transferred», returned the equipment to the dockyards, but this, in actual fact, had not happened since they had refused to hand it over and held on to it. The *paradosis* was evidently only nominal, on paper, but for this very reason it still needed to be recorded in the books.

It thus emerges that the accounts of the *epimeletai* were not meant to provide a register of the effective force of the Athenian navy. Rather, the information collected in their catalogues was selected in order to show that they had performed their administrative duties in a correct manner, regardless of the fact that such information was at times clearly redundant, if not unnecessary. The accounts were in other words drawn up with a view to accountability. We may wonder why the *epimeletai* did not simply cross out the ships lost in a storm from the διάγραμμα but the answer is probably that they had been involved in legal proceedings and this needed to be noted in case somebody should raise an exception at their εὔθυναι.

[61] I would like to thank Professor Vincent Gabrielsen for pointing this out to me (*per ep.*) and for generously sharing with me his thoughts about this inscription.

7. In conclusion, tying up the threads of the argument, the analysis of the accounts of the Athenian *naopoioi* in Delos and the overseers of the dockyards in Piraeus has revealed that these were complex documents constructed by assembling information drawn from various registers and records from the magistrates' archives. The focus was primarily on financial administration since such documents were produced for the purpose of presenting the end-of-year accounts (λόγοι). It remains unclear how selective they were in relationship to the accounts of the day-to-day administration written on perishable material but they certainly were accurate documents, hardly with a merely symbolic significance. We have seen that in one revealing case an entry was not mechanically copied from the *stele* of the year before but surely from the διάγραμμα, the «central register» of ships and naval equipment kept and, we must presume, periodically updated by the naval overseers (*IG* II^2 1629, ll. 945-948). *SEG* 51.1001 (= Chankowski 2008, no. 55) refers to the *stele* of the previous board of *naopoioi* in the context of a trial for misappropriation of sacred property. The inscribed records of the ἐπιμεληταὶ τῶν νεωρίων frequently mention διαδικασίαι concerning damage or loss of triremes and equipment. As underlined by E.M. Harris, in case of acquittal these records ensured «protection against any further legal action»[62]. In [Dem.] 47.18 and 22 Theophemos is chastised for defying the decrees and the laws and for «weakening confidence in the magistracies and in the words inscribed on the *stelai*» (ἀπίστους δὲ τὰς ἀρχὰς κατέστησεν ὑμῖν καὶ τὰ γράμματα τὰ ἐν ταῖς στήλαις) by not returning naval equipment, while he, together with his syntrierarch Demochares of Paiania, «had had their names inscribed upon the *stele* as owing equipment to the city» (γεγραμμένους οὖν αὐτοὺς ἀμφοτέρους ἐν τῇ στήλῃ ὀφείλοντας τὰ σκεύη τῇ πόλει). The records engraved on the *stelai* clearly were not devoid of legal value and could be quoted as proof of an obligation. They were thus not mentioned simply for symbolic or rhetorical purposes but as evidence to be used in judicial proceedings.

On the other hand, it must be noted that the picture emerging from the naval lists is to some extent less clear-cut. Here, as we have seen, references to the *stele* occur mostly in relationship to a «nominal» *paradosis* of equipment which, in actual fact, had not been returned and, from the point of view of the overseers of the dockyards, was still outstanding (and the matter therefore still pending). In administrative terms, they nonetheless still needed to be accounted for in the magistrates' books. Although such references do not seem to make sense if the purpose of the records was to provide a complete inventory of the material effectively available to be used for military purposes, they are also highly revealing since they cogently show that the *tabulae curatorum navalium* were designed as documents first and foremost functional to be presented as accounts of the magistrates' administrative actions on the occasion of their *euthynai*.

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[62] Harris 2013b, 156-157.

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INVENTORIES AND OFFICIAL RESPONSIBILITY: RESPONSE TO MICHELE FARAGUNA

The relation of monumental inscribed texts to the practice of law and government, addressed on the example of classical Athens and Delos in Michele Faraguna's careful analysis, is a long-standing problem both in Greek and in Roman legal history. As my own specialism lies in a much later period, I shall, in this response piece, work back from some comparable later evidence to the particular examples discussed in his paper, focussing more on these broader methodological issues than on the light thrown by his study on the Athenian institutional context.

A wide range of approaches to this issue has been tried, not all of them equally convincing. Few Roman legal historians, for instance, would fully follow Callie Williamson's provocative suggestion to wholly disregard the practical value of the publication of Roman statutes and decrees on permanent media, above all bronze, for all the problems with their readability and with interpreting their relation to the wooden tablets.[1] It is clear, nevertheless, that a range, or perhaps better to say a continuum, of possibilities exists: from ritual practices and what Angelos Chaniotis has recently termed 'creation of memory', to the more immediately practical uses, with a variety of possibilities in between, often exhibiting features of both.[2]

So, for instance, the famous dossier of the city privileges of Aphrodisias on the end-wall of the stage building in the city's theatre operates through preserving and advertising (a very selective version of) memory of a unique city status in the increasingly unstable political environment of the mid-third century AD. It would be rash to deny its usefulness, or its connection with the civic archive, but, as rightly pointed out by Chaniotis, the designation of it as an 'archive wall' is prone to lead

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1 Williamson 1987; Williamson 1995. Contrast Crawford 1988.

2 'Creation of memory': Chaniotis 2014, and his note to *SEG* LXI 679. For a classic case-study of the ritual use, see Beard 1985 on the *acta fratrum Arvalium* at Rome. These interpretative problems are, of course, not limited to the monumental records: a powerful, though far from indisputable, case has been made for even the Roman government, the largest producer of documentary records in the ancient Mediterranean history, using documents primarily as part of the civic ceremony and a branch of elite literary activity (Purcell 1986). Contrast, for the argument for 'the immense administrative knowledge wielded by the Roman state', Dolganov (forthcoming 2021).

into error.[3] Perhaps the best known Greek inventory from the period of the Roman dominion, a list of dedications to the sanctuary of Athena Lindia on Rhodes, forms part of what is somewhat misleadingly known as the 'Lindian temple chronicle'. It is undoubtedly a work of literature, moving considerably further from the documentary record than the texts from Aphrodisias, let alone the inventories from the classical period discussed here by Michele Faraguna.[4] On the other hand it is, as pointed out by Alain Bresson, based on a comprehensible documentary principle, that of recording the gifts to the sanctuary which had been lost by the date of composition (which serves as a better explanation for the absence of any gifts from the Romans than an ideological exclusion).[5] Indeed the decree of the Lindians preceding the list of dedications and the chronicle of epiphanies makes an explicit reference to letters and public records among other types of available evidence.[6]

On Delos, where the accounts of the *naopoioi* form one of Faraguna's two case studies, the much later texts from 156/5 BC, in the period of the second Athenian domination, include with the temple inventories a set of leases of sacred land, expressed in precise juridical language (*I.Délos* 1416 and 1417).[7] At the same time, however, the sanctuary-by-sanctuary inventories, while careful and (if a document similar to what we have on the stone could be used in checking the contents) not written in a useless way, are not entirely consistent. The regular appearance of items that have not been weighed, have their weight reported from an inscription, or are listed as a group in particularly striking. At the Isideion, for instance, we are given a long list of unweighed silver items, which includes some that have their weight

[3] Chaniotis 2014, 142: 'Die Bezeichnung dieser Sammlung als "Archivwand" ist irreführend'. See now on these documents and the context of the inscription Kokkinia 2015-16, who stresses that it is impossible 'to classify the dossier in terms of any known type of archival storage, public or private' (quotation from p. 10).

[4] *I.Lindos* 2 (revised edition in Higbie 2003), sections B and C. See on it now the contributions to Ampolo, Erdas and Magnetto 2014.

[5] Bresson 2006, 543–4; deliberate exclusion of Roman gifts: the view of Higbie 2003, 168. For a methodologically perceptive exploration of both ritual and practical aspects of temple inventory stelae (focussing on Lindos, but with comments on the practice elsewhere), see also Shaya 2015, who argues for 'a deliberate selection of objects as an integral grouping in order to convey a story' (quotation from p. 30).

[6] *I.Lindos* 2,A, lines 6–7: ἔκ τε τᾶν | [ἐπ]ιστολᾶν καὶ. τῶν χρηματ[ισμῶν καὶ τῶν ἄλλων μαρτυρί]ων. The best text of this part of the inscription in Bresson 2006, 535–6.

[7] See now Pernin 2014, 255–9 nos. 123–126 for the leases only, and for a legal commentary on select passages of *I.Délos* 1416, Vélissaropoulos-Karakostas 2011, II. 19, 42, 358, and 474–5. On the exact status of one of this properties, 'the plot of the Pyrrhakidai' (*I.Délos* 1416, B1, ll. 57–63 = Pernin 2014, 255 no. 123), see Papazarkadas 2011, 186–7 and 294–5. It seems possible to me that by that date it is rather a traditional name of that plot of land from the name of former owners; compare e.g. the involved description of an estate in *IG* IX.1 61, A, ll. 20–21 (with a full discussion of the legal aspects in Girdvainyte 2019). This seems to be also the solution implicit in Pernin's translation of the document.

reported from an inscription (in one case, 1 drachm and 3 obols, hardly a difficult one to ascertain), ten silver models on a board, listed as group, and a golden, rather than silver, wreath, the weight of which is again reported from an inscription, as 1 drachm 1 obol.[8] These inconsistencies do not, of course, in any way demonstrate the lack of practical purpose or that these inventories could not be used for bringing officials to account: no one who had to deal with the modern university or college accounts in any detail could possibly think that. They do, however, raise important questions, particularly when we consider that the readability of *I.Délos* 1417 leaves much to be desired.[9] Demands on readability need not be put unrealistically highly: when talking about *euthynai* or similar procedures we are of course dealing with a highly literate segment of the population. Nevertheless, an undifferentiated list, not making a serious effort to visually emphasize its rubrics (occasional vacats are used entirely inconsistently), would not have been a convenient tool to use for anyone.

These later records bring me back to the methodological point brought up at the beginning of Faraguna's paper, when discussing the relationship of extant documents to legal procedures, and in particular, in this case, to the procedures for accountability. Insofar as we follow him in adopting the case-by-case approach advocated by Peter Rhodes and Robin Osborne – which seems to be the only way to account properly for the variability of the available evidence both in content and in presentation – we need to be thinking very hard about the limitations of what particular case studies may be telling us. The two cases of the Delian *naopoioi* and of the *epimeletai* of the Athenian dockyards, which he revealingly discusses, are not only distinct from later documents, but also, as he points out, exhibit certain important differences between themselves. Notably, the naval records do not appear to be an inventory of the equipment that was actually present at the dockyards, and, in his words, 'do not seem to make sense if the purpose of the records was to provide a complete inventory of the material effectively available to be used for military purposes'. Such delays in the accounting record would not, of course, in and of themselves rule out their use as an instrument of accountability. To provide just

8 *I.Delos* 1417 = Prêtre 2002, 199–238, face B, col. I, ll. 74-82: ἐν τῶι Ἰσιδείωι· ἀργυρᾶ ἄστατα· φιάλην λείαν [ὀμ]|φαλὸν ἔχουσαν ἐμ πλινθείωι, ἀνάθεμα Ὀλύμπου Καρυστίου, ὁλκὴ [ὡς ἡ] | ἐπιγραφὴ ΔΔ ἄστατον, ἐφ' ἱερέως Φιλοκράτου· [ἄλλην] ἐμ πλινθείωι, πρώσωπα|ἔχουσαν τρία, ἀνάθεμα Δαφνίδος, ἐπὶ σανιδίου· δακτύλιος χρυσοῦς [ἐπὶ] | σανιδίου λίθον ἔχων, ὁλκὴ ὡς ἡ ἐπιγραφὴ ⊢III· φιάλιον ἀργυροῦν [ὡς δακτύ]|λων [ἕξ], ἐπιγραφή· Εὔτυχο[ς Δά]ζου Τερ…τινος ἄστατον· λαμπάδα, | ἀνάθεμα vac. Βερενίκης, ἄστατον· τύπια ἐπὶ σανιδίου ἀργυρᾶ δέκα· στέφ[ανον χρυ]|σοῦν, ἀνάθεμα Νικομένους Ἐλεάτου ἄστατον, ὁλκὴ κατὰ τὴν ἐπιγραφὴν | ⊢Ị, ἐφ' ἱερέως Σαραπίωνος· καὶ ἐπὶ σανιδίου ὀφθαλμοὶ δύο. For modern attempts at the valuation of the Delian treasuries based on epigraphic evidence, Migeotte 2014, 615–6, with further references.

9 See Prêtre 2002, Plate XIII, for a good image of the side A. Cf. also Shaya 2015, 26, for a lively discussion of the practical difficulties presented by the Delian inventory inscriptions.

one comparison from another historical period, the classic exposition of the workings of the twelfth-century English Exchequer by Reginald Lane Poole abounds in irregularities and procedural delays of this kind, but it would be hard to doubt that the Exchequer was used by the Angevine Kings to bring sheriffs to account.[10] Faraguna's exploration of the role of naval records in the *diadikasia* of *IG* II^2 1613, ll. 166–239, shows one possible mechanism that could work in the Athenian navy case.

They do, however, raise questions about our ability to generalise from individual cases either about the processes of accountability or about the role of the inscribed record in it. It is, for instance, not altogether implausible that, in the case of the sanctuaries of Delos, which, for obvious reasons, was both a more 'static' one than that of the dockyards of Piraeus, and had significant sacral meaning for the officials and the *demos* of Athens, permanent record played a considerably more central role in accountability, even if not necessarily a very successful one in practical terms.[11] This would, indeed, seem to be the implication of Richard Hamilton's attempt to 'map' the temple inventories on Delos and the Acropolis, and particularly of his persuasive conclusion that the inscribed inventory was primary to the board (*peteura*) of the Delian accounts, based on the evidence for payments to scribes who were copying from the stele onto a board. He provides an important parallel from Athens itself, where in the detailed description of how the checking of the accounts of the Treasurers of the Goddess in 362/1 BC will be conducted, the inscribed stelai before the Chalkoteke precede the making of the copies by the secretary of the Council.[12] Against this, though, as Hamilton emphasizes, 'the inventories were not systematic' and 'the decree's requirement that gold and silver be separated was unheeded', which does not prevent him from accepting a basic fiscal function for at least the Acropolis, if not the Delian, inventories.[13] If that is so, the differences with the dockyard records are perhaps less pronounced than I have suggested above, even if the irregularities compared to the actual state of affairs are inevitably less obvious to us.

To return now from treasury inventories to revenues and expenditure, and to the case of the accounts of the amphictyons and *naopoioi* discussed by Faraguna: making an exact assessment of the role of the inscribed record in their case becomes even more problematic if we follow Faraguna in accepting and extending Véronique Chankowski's convincing argument that the *hieropoioi* stelae are compilations from

[10] Poole 1912; see now for the sheriffs' accountability at the Exchequer, Sabapathy 2014, 83–134, particularly the observations on 'the culture of accountability' at pp. 93–4.

[11] It is arguably important that, as noted by Migeotte 2014, 678, the city finances, compared with the sanctuary finances, 'ont laissé peu de traces' on Delos.

[12] Delos: *I.Délos* 287, A, l. 197; 399, A, l. 97; Athens: *IG* II^2 120, ll. 8–33, with Hamilton 2000, 347–8.

[13] Hamilton 2000, 347.

a number of preceding accounts.[14] The demonstration that the inscribed accounts of the *naopoioi* incorporated trial records, in particular the compelling detective story of *SEG* LI 1001 (= Chankowski 2008, no. 55), undoubtedly shows, as Faraguna argues, the close relationship of the inscribed record to documents on perishable materials. It also, however, raises questions about the mix of different documentary genres in the emerging monumental record, the timing of the inscription relative to the trial, and the practicability of referring to the record of a trial once the accounts were rendered and the scrutiny hearings complete.[15]

Faraguna's study makes a convincing argument both for a role of accounts in the process of *euthynai*, and for a close relationship of his two types of monumental records to it. What, to my mind, remains as a further problem, is where exactly within the continuum between the symbolic and practical we need to place the surviving inscribed stelae. Elements of both practical and ceremonial aspects can be discerned, and some of the practical aspects may have been more relevant to the perishable version.[16] Rhetoric of civic accountability is expressed by reproducing actual documents, and that makes the stelae a valuable source of evidence for the *euthynai* process, a conclusion of undoubted comparative significance in showing the possibility (and power) of such reproduction. Athenian and Delian accounts seem to stand in a much closer relation to the archival practices than the Aphrodisian privileges dossier or the 'Lindian Chronicle' from which we started our discussion. The practical use of monumental inscriptions remains a more intractable question,

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[14] Chankowski 2013, 942: 'La stéle de compte faisait ainsi la synthèse de la situation de plusieurs comptes: le compte courant de caisse sacrée mais aussi, communiquant avec celui-si, l'état des avoirs de la caisse sacrée'. Compare the discussion about the publication of the *senatus consultum de Pisone patre* of AD 20, described in the publication clause both as *haec senatus consulta* in the plural and as *hoc senatus consultum* in the singular (*SCPP*, ll. 168–73, emphasis mine: *placere uti oratio quam recitasset princeps noster, | itemq(ue) haec senatus consulta, in aere incisa, quo loco Ti. Caes. Aug. vide|retur, ponere<n>tur, utiq(ue) hoc s(enatus) c(onsultum) in cuiusque provinciae celeberruma{e} | urbe eiusque{i} urbis celeberrimo loco in aere incisum figere|tur, itemq(ue) hoc s(enatus) c(onsultum) in hibernis cuiusq(ue) legionis at signa figeretur. censu|erunt*). While there is no doubt that the surviving inscription is related to the actual decree(s) of the Senate, the exact nature of this relationship remains elusive and controversial; for the two main views, Eck, Caballos and Fernández 1996, 257–62, and Mackay 2003.

[15] Chankowski 2013, 930: 'la synthèse de ces différents registres'. See also Chankowski 2013, 923, for the display and recycling of the stelae. The monumental effect of the multiple account stelae would have been considerable, but we may perhaps compare the visual effect of the countless bronze tablets with grants of citizenship to auxiliary soldiers on the Capitol from the principate of Claudius on (Williamson 1987, 166): those undoubtedly had a practical function too, as the surviving provincial *diplomata* amply confirm. (For an attempt at quantification, see further Eck 2008.)

[16] The persuasive argument of Chankowski 2013, 933 (with further references), for different hierarchical levels of accounts is significant here, but in a way bypasses the problem: was her 'grand livre de compte' still a practical document in this form?

and could (as later evidence from Delos may suggest, and as Faraguna himself acknowledges at the end of his paper) differ somewhat even between these two types of records.

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RESURRECTING DEMOCRACY? LAW AND INSTITUTIONS IN EARLY ANTIGONID ATHENS (307-301 BC)

Abstract: In this paper I investigate the legal and institutional reforms or innovations that were introduced in the period 307-301 BC, a period recorded as the restoration of democracy, the rationale behind them and the tensions that developed when royals were involved in the day-to-day administration of public affairs in an independent, autonomous *polis*.

Keywords: Athenian democracy and legislation, Demetrios I Poliorcetes, Stratokles of Diomeia, Demochares of Leukonoe, tribes (*phylai*)

In 2018 a book with the provocative title *How democracies die* made the headlines. Its authors, political scientists Steven Levitsky and Daniel Ziblatt, explore how modern representative democracies can be slowly eroded from within, with the gradual but systematic undermining of the system of checks and balances, enshrined in their constitution and institutional make up. Inspired by the American example in the post-2016 presidential election period, it offers useful insights pertaining to how a militant, nationalistic, and populist rhetoric may dismantle democratic institutions and practices[1]. Although not immediately relevant to ancient history, I found it stimulating food for thought. On this occasion I would like to move a step further and examine how, in the best documented case from Greek antiquity, Athenian democrats re-asserted and re-instated their *patrios politeia*, notwithstanding, of course, the experience of 403[2].

Before embarking on the investigation, two methodological premises are in order: i) the study of post-322 Athens requires a deep knowledge of its pre-322 political and legal system; this does not necessarily imply a sense of continuity but it

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[1] Levitsky, Steven & Daniel Ziblatt (2018) *How democracies die*, New York.

[2] In the history of classical Athenian democracy there were two periods that *dēmokratia* suffered a considerable setback, i) twice in the last decade of the fifth century (411-403), thoroughly investigated by modern scholars, e.g. Wolpert (2002), Shear (2011), Carawan (2013), Teegarden (2014) and Simonton (2017) and ii) twice in the last quarter of the fourth century (c. 325-300) for which see Poddighe (2002), O'Sullivan (2009), Banfi (2010), and Bayliss (2011). It is significant that in both cases regime changes were triggered by Athenian military defeats.

provides vital information to assess the adaptation of the Athenian polity to new realities, and ii) the impact of shifting 'international' relations in the Successors' Mediterranean on the *poleis* was absolutely crucial to understanding changes in their institutional setup; the fluidity of the 'international' scene made adjustments indispensable for their survival.

The period from 322 down to 307 in Athenian history was marked by two Macedonian-backed oligarchic regimes, although with a lot of nuances. There was a brief lapse back to democracy in 318-317 BC, but it was due, once more, to Macedonian interference. These regimes (variously described as moderately democratic or oligarchic) focused on limiting citizen participation either by severely restricting the political franchise (322-319)[3] or by combining a less severe restriction with the introduction of a magistracy supervising the activity of the Council and the Assembly (*nomophylakes*, 317-307)[4].

These tumultuous fifteen years ended with the appearance of Demetrios I Poliorketes' 250 ships-strong fleet in the early summer of 307 (in June or 26th of Thargelion according to Plu. *Demetr*. 8.3-4) in Peiraieus. The imposing view of the fleet took by surprise both Athenians and the Macedonians stationed on the fortified hill of Mounychia[5]. Delegated by his father, Antigonos I Monophthalmos, to establish a bridgehead in mainland Greece and to 'free' the Greek cities from Kassandros, Demetrios I was welcomed by the Athenians; at the same time he delivered simultaneously a heavy blow at a soft spot of Kassandros' realm and opened a second theatre of confrontation, closer to Kassandros' heartland. Athens remained in the lion's mouth, especially during the period of the Four-year war (307-304), when Kassandros' forces twice reached the walls of the *polis*, only to be repelled thanks to the intervention of the Aitolians (306) and Demetrios I (304)[6].

Having the royal blessing to restore their *patrios politeia*, the Athenians followed a two-pronged policy aiming to i) ensure the punishment of those

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[3] See Poddighe (2002: 59-74).

[4] See O'Sullivan (2009: 72-85), Banfi (2010: 136-55), Bayliss (2011: 86-87).

[5] Plu. *Demetr.* 10 [Fortenbaugh & Schütrumpf 2000: F18 & 29]: Ἐπεὶ δὲ πάλιν ἐπανελθὼν πρὸς τὴν Μουνυχίαν καὶ στρατοπεδεύσας ἐξέκοψε τὴν φρουρὰν καὶ κατέσκαψε τὸ φρούριον, οὕτως ἤδη τῶν Ἀθηναίων δεχομένων καὶ καλούντων παρελθὼν εἰς τὸ ἄστυ καὶ συναγαγὼν τὸν δῆμον ἀπέδωκε τὴν πάτριον πολιτείαν, καὶ προσυπέσχετο παρὰ τοῦ πατρὸς αὐτοῖς ἀφίξεσθαι σίτου πεντεκαίδεκα μυριάδας μεδίμνων καὶ ξύλων ναυπηγησίμων πλῆθος εἰς ἑκατὸν τριήρεις. (Coming back again to Munychia and encamping before it, he drove out the garrison and demolished the fortress, and this accomplished, at last, on the urgent invitation of the Athenians, he made his entry into the upper city, where he assembled the people and gave them back their ancient form of government. He also promised that they should receive from his father a hundred and fifty thousand bushels of grain, and enough ship timber to build a hundred triremes. – transl. Loeb modified). See also Plu. *Demetr*. 8.3-4.

[6] Historical account in Habicht (1997: 74-77).

responsible for the overthrow of *dēmokratia*, and ii) to strengthen the restored democracy.

I. Shielding the resurrected democracy

According to Plutarch, Demetrios I upon his arrival declared Athens free, removed the garrisons, and restored the laws and the ancestral constitution. Following a negotiated settlement, Demetrios of Phaleron was whisked off to Thebes and then to Egypt, to Ptolemy's court[7], but his supporters either fled (among them the orator Deinarchos) in exile or remained in Athens to be tried for abolishing democracy. The information for a wave of prosecutions against Demetrios of Phaleron's supporters rests on a fragment from Philochoros' *Atthis*[8]. What is striking in the otherwise reliable pro-democratic Philochorean account is, a) the concerted effort to prosecute by *eisangelia* Demetrios of Phaleron and his supporters, and b) the *en bloc* acquittal of those who were impeached and stood trial. Even if we assume that the term *eisangelthentōn* does not have the technical meaning of introducing a denunciation in the Council or in the assembly, the only means to prosecute someone for overthrowing the democratic regime was *eisangelia*, according to Hyper. 4 (*In defence of Euxenippos*) 7-8. The problem with Philochoros' account is not procedural but one of substance; by virtue of which legal provision were the individuals involved either convicted *in absentia* or exculpated? One possible candidate would be the law of Eukrates (*IG* ii[3] (1) (2) 320), passed thirty years earlier (337/6). According to this law, anyone who attempts to install a tyranny or overthrows (or attempts to overthrow) the democratic regime (ll. 7-11) could have been killed with impunity, while the members of the Areios Pagos who take part in deliberations when democracy was abolished would be severely punished (ll. 11-22)[9]. The perpetrators of the abolition of democracy were out of reach, and only by analogy the latter provision could have been applied on those individuals who

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7 D.S. 20.45; Plu. *Demetr*. 9.

8 *FGrHist* 328 (Philochoros) F66 [*apud* D. H. *De Dinarcho* 3.44-5; Dinarchus T1 (Conomis); Wehrli (1968: F56); Fortenbaugh & Schütrumpf (2000: F31)]: τοῦ γὰρ Ἀναξικράτους ἄρχοντος, εὐθὺ μὲν ἡ τῶν Μεγαρέων πόλις ἑάλω. ὁ δὲ Δημήτριος [ὁ] κατελθὼν ἐκ τῶν Μεγάρων κατεσκευάζετο τὰ πρὸς τὴν Μουνυχίαν καὶ τὰ τείχη κατασκάψας ἀπέδωκε τῷ δήμῳ. Ὕστερον δὲ εἰσηγγέλθησαν πολλοὶ <τῶν> πολιτῶν, ἐν οἷς καὶ Δημήτριος ὁ Φαληρεὺς. Τῶν δ' εἰσαγγελθέντων οὓς μὲν οὐχ ὑπομείναντας τὴν κρίσιν ἐθανάτωσαν τῇ ψήφῳ, οὓς δ' ὑπακούσαντας ἀπέλυσαν. (For right at the beginning of Anaxicrates' archonship, the city of the Megarians was captured; then Demetrius [i.e. Poliorcetes] upon returning from Megara began military preparations against Munychia and, having razed the walls, restored it to the people (*demos*). But later, many of the citizens were impeached, Demetrius of Phalerum also among them. And of the impeached, those who did not await the verdict of a trial they condemned to death by a vote, but those who submitted they acquitted. – transl. Shoemaker (1971: 397)).

9 For the provisions of this law see the most recent account in Teegarden (2014: 85-112).

staffed the Athenian administrative mechanism during the pro-Kassandrean regime of Demetrios of Phaleron[10].

Undoubtedly this movement was part of a well-orchestrated political initiative to demonstrate to the Athenians but also to other Greeks and Alexander's successors the return to the pre-322, democratic regime. The employment of *eisangelia* proved the continued strength of the anti-Macedonian faction, despite the physical extinction of its leaders in 322, and its dedication to democratic legitimacy and the rule of law. At the same time, the settlement constituted an interesting example of what is called today "transitional justice" or the employment of law to guarantee the bloodless transition from one regime to another, usually from a form of totalitarian regime to liberal democracy[11]. Whether the "many citizens" (*polloi tōn politōn*) of the Philochorean passage did include several hundred serving in the various Athenian magistracies or only the members of the Areios Pagos, we cannot know; what is worth noting, however, is that with this process there was no need to grant amnesty and to formulate a clause *me mnesikakein*, as it happened in 403[12]. Those who fled could not be put to death (although they may have been killed by any Athenian with impunity), while those who stayed were tried and acquitted. The reported mass acquittals create the impression of a quick fix, but this is largely the result of interpreting the situation with hindsight; probably not all individuals who collaborated with the regime could be held responsible for the overthrow of democracy, and perhaps not everyone was indicted unless he was involved in some sort of legal wrangle or he was seeking appointment to a magistracy.

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[10] The only relevant legal provision is included in the law reported in And. 1 (*On the Mysteries*) 96: ἐάν τις δημοκρατίαν καταλύηι τὴν Ἀθήνησιν, ἢ ἀρχήν τινα ἄρχῃ, καταλελυμένης τῆς δημοκρατίας, πολέμιος ἔστω Ἀθηναίων καὶ νηποινεὶ τεθνάτω ... (if anyone overthrows the Athenian *demokratia* or exercises any magistracy while *demokratia* has been suppressed, he shall be considered an enemy of the Athenians and he shall be killed with impunity); but that law was superseded by the law of Eukrates see Teegarden (2014: 15-53). For the question of authenticity see the discussion by Canevaro, M. & E. M. Harris (2012) "The documents in Andocides' *On the Mysteries*" *CQ* 62, 98-129; Sommerstein, A. H. (2014) "The authenticity of the Demophantus decree" *CQ* 64, 49-57 and Harris, E. M. (2015) "The authenticity of the document at Andocides *On the Mysteries* 96-98" *Tekmeria* 12 (2013-2014) 121-53.

[11] See Lanni, A. (2010) «Transitional justice in ancient Athens: A case study» *University of Pennsylvania Journal of International Law* 32, 551ff.

[12] It is noteworthy that the imposition of the pro-Kassandrean regime was largely bloodless, in stark contrast to the Thirty tyrants regime, thus removing one of the main reasons to exact revenge. For the clause *mē mnēsikakein* see Carawan, E. M. (2002) "The Athenian amnesty and the 'Scrutiny of Laws'" *JHS* 122, 1-23; Carawan, E. M. (2012) "The meaning of *mê mnêsikakein*" *CQ* 62, 567-81; Carawan (2013), an interpretation rebuked by Joyce, C. J. (2008) "The Athenian amnesty and scrutiny of 403" *CQ* 58, 507-18 and Joyce, C. J. (2014) "*Me mnesikakein* and 'all the laws' (Andocides, *On the mysteries* 81-2)" *Antichthon* 48, 37-54.

Apart from the collaborators, Athenians attacked those they regarded as instigators of the latest oligarchic regime. They issued a law against philosophers moved by Sophoklēs, son of Amphikleidēs of Sounion. Sophoklēs' enactment was introduced, it is assumed, soon after the democratic restoration of 307. Three late sources of the second and third century AD refer to it[13]. Even a cursory reading of these passages makes clear their unequal value to understanding the details of the case; it is also crystal clear the different agenda each author follows, so Athenaeus focuses on the banishment of philosophers, Pollux on the name for the place of instruction and Diogenes Laertios on Theophrastos. Focus in all the three is not Sophoklēs' law *per se*, but it serves as an illustration of banishment, of place of instruction or of Theophrastos. With these caveats, Athenaeus' excerpt owes a great deal to Alexis' passage (see below) but it is the least informative: we are told that sometime after the death of Aristotle and Demosthenes (both in 322), Athenians

[13] Sophoklēs' law against philosophers: i) Pollux 9.42 (composed before AD 178) in providing synonyms for the places of instruction quotes the term *diatribē*: ἔστι δὲ καὶ νόμος Ἀττικὸς κατὰ τῶν φιλοσοφούντων γραφείς, ὃν Σοφοκλῆς Ἀμφικλείδου Σουνιεὺς εἶπεν, ἐν ᾧ τινὰ κατὰ αὐτῶν προειπὼν ἐπήγαγε μὴ ἐξεῖναι μηδενὶ τῶν σοφιστῶν διατριβὴν κατασκευάσασθαι. (There is an Attic law (*nomos*) drafted against those indulging in philosophy (*philosophountōn*), moved by Sophocles son of Amphicleides of Sounion, in which, after denouncing them, he brought forward the proposal that no sophist will be allowed to establish a school), ii) Athen. 13.610e-f (Marasco (1984: T5), dated c. AD 200) in the context of his anti-philosophy tirade quotes, after Alexis' passage from Hippeus,: καὶ Σοφοκλῆς δέ τις ψηφίσματι ἐξήλασε πάντας φιλοσόφους τῆς Ἀττικῆς, καθ' οὗ λόγον ἔγραψε Φίλων ὁ Ἀριστοτέλους γνώριμος, ἀπολογίαν ὑπὲρ τοῦ Σοφοκλέους Δημοχάρους πεποιηκότος τοῦ Δημοσθένους ἀνεψιοῦ. (And a certain man named Sophocles, passed a decree (*psēphisma*) to banish (*exēlase*) all the philosophers from Attica. And Philo, the friend of Aristotle, wrote a speech against him; and Demochares, on the other hand, who was the nephew of Demosthenes, composed a defence for Sophocles – transl. Loeb modified), and iii) D. L. 5 (*Theophrastos*) 38 (Fortenbaugh et al. (1992: F1), composed in the beginning of the 3rd cent. AD): Τοιοῦτος δ' ὤν, ὅμως ἀπεδήμησε πρὸς ὀλίγον καὶ οὗτος καὶ πάντες οἱ λοιποὶ φιλόσοφοι, Σοφοκλέους τοῦ Ἀμφικλείδου νόμον εἰσενεγκόντος, μηδένα τῶν φιλοσόφων σχολῆς ἀφηγεῖσθαι, ἂν μὴ τῇ βουλῇ καὶ τῷ δήμῳ δόξῃ: εἰ δὲ μή, θάνατον εἶναι τὴν ζημίαν. ἀλλ' αὖθις ἐπανῆλθον εἰς νέωτα, Φίλωνος τὸν Σοφοκλέα γραψαμένου παρανόμων. ὅτε καὶ τὸν νόμον μὲν ἄκυρον ἐποίησαν Ἀθηναῖοι, τὸν δὲ Σοφοκλέα πέντε ταλάντοις ἐζημίωσαν κάθοδόν τε τοῖς φιλοσόφοις ἐψηφίσαντο, ἵνα καὶ Θεόφραστος κατέλθοι καὶ ἐν τοῖς ὁμοίοις εἴη. (Even though he was of such (repute), he nevertheless went away for a little while, both he and all the other philosophers, after Sophocles, the son of Amphicleides, introduced a law (*nomos*) that none of the philosophers be in charge of a school (*aphēgeisthai*) if it were not approved by the council and the people. Otherwise, death was the penalty. But they returned again the next year after Philon indicted Sophocles for proposing an illegal measure (*paranomōn*). The Athenians rendered the law invalid (*akuron*) and fined Sophocles five talents, and they voted for the return of the philosophers, in order that Theophrastos, too, might come back and be in the same circumstances (as before) – transl. Fortenbaugh et al. (1992: 23)).

banished the philosophers by virtue of a decree of a certain Sophoklēs; subsequently Philōn had challenged it and Dēmocharēs defended Sophoklēs. The names of the protagonists suggest that this is not fabricated, but the contours of the whole affair remain vague. On what legal ground(s) were philosophers banished? How was the law challenged? What was the result of the challenge? Was Dēmocharēs successful? Answers to some of the above questions can be found in Pollux's passage. There we have the full name of the mover, the enactment is called a law (*nomos*) and its content is explained, philosophers were not allowed to establish schools. However, even in this account the legal challenge and its outcome is missing. Undoubtedly, the fullest account is provided by Diogenes Laertios and his sources. He provides not only the names of individuals involved in the whole affair but also an account of the content of the enactment and the penalty provided there, of the legal challenge against it, the outcome of the challenge and the penalty imposed on the mover of the law (*nomos*). This passage displays a considerable terminological consistency and betrays at least some knowledge of Athenian law in the late fourth century. For example, the author of an unconstitutional proposal was personally penalized, only if the challenge was launched in the year following the decree's introduction[14]. Nevertheless, there is a serious inconsistency, all the more troubling given the awareness of legal technicalities displayed earlier. In particular, in pre-322 Athens, a proposed decree (*psēphisma*) was challenged through a *graphē paranomōn*, while a law (*nomos*) was challenged with a *graphē nomon mē epitēdeion theinai*. In other words, in the passage preserved by Diogenes Laertios there is a confusion of the law and the challenge to it; in pre-322 Athens, there was no way to indict a law with a *graphē paranomōn*. Therefore, either the designation of Sophoklēs action as a law (*nomos*) is wrong or the procedural means to challenge it is misunderstood. It would not have been difficult for a later author with no first-hand experience of the *nomos-psēphisma* distinction and unaware of its importance for the working of Athenian democracy to mix-up the terms[15]. Whatever the truth, Athenians were never renowned for their terminological assiduity, therefore one may argue that at the time the distinction between law and decree was rather loose. The same is true for a confusion between the terms *graphē paranomōn* and *graphē nomon mē epitēdeion theinai*. However, in contemporary Athenian practice the distinction between *nomoi* and *psēphismata* is maintained; in the annual catalogues of *prytaneis* we read about

[14] D. 20 (*Against Leptines*) 144 with Kremmydas, Chr. (2012) *Commentary on Demosthenes against Leptines*, Oxford. See also Harrison (1968-71: ii 78), Hansen, M. H. (1974) *The sovereignty of the people's court in Athens in the fourth century B.C. and the publication against unconstitutional proposals*, Odense and Canevaro, M. (2015) "Making and changing laws in ancient Athens" in *The Oxford handbook of ancient Greek law*, Oxford. http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199599257.001.0001/oxfordhb-9780199599257-e-4 with earlier bibliography.

[15] Canevaro (2011: 75-76) contemplates the likelihood of confusion attributed not to antiquarian tradition but to genuine confusion generated by a mismatch between reality and legal rules.

individuals responsible for the laws (*hoi epi tous nomous*) and the decrees (*hoi epi ta psēphismata*) [16].

What was the ban about? This is a vital question since an assessment of the challenge depends on an understanding of the ban. Pollux speaks of *diatribēn kataskeuasasthai*, i.e. to build or organize a place to frequent, while Diogenes Laertios speaks of *scholēs aphēgeisthai*, that is leading or in charge of a school. The semantic variation is very thin to have been perceptible to ordinary Athenians, especially as founders organized the schools and were in charge of them while alive.

The discrepancy is due most probably to a vague, open-ended, original normative text and to the efforts of later authors to interpret it. The core element of the rule introduced by Sophoklēs was that the Athenian *dēmos* aimed to, at least, lay a hand on the operation of both the *Akadēmia* and the *Peripatos*, if not to retain a say on the persons appointed in charge of both of them, thus diluting the exclusive right of the current head to appoint his successor. By 307 both the *Akadēmia* and the *Peripatos* had a long pedigree of philosophical training and their respective founders were dead, therefore the measure could not have turned against founding a school *per se* but rather against running a school without the approval of the council and the assembly. The reaction of the philosophers in voting with their feet against Sophoklēs bill suggests that the *polis'* intervention was intended to affect directly and dramatically their control over the schools; therefore, I would be inclined to give credence to Diogenes Laertios' account of the decree, i.e. as intervention in the everyday running of the schools. Behind that attitude lurks an understandable but not justified process of vilification. The target is more than clear; philosophical schools were the breeding ground of anti-democratic thinking and practice, openly challenging the Athenian *politeia*. That much can be inferred from the fragments of the speech attributed to Dēmocharēs, defending Sophoklēs against Philon. They suggest that a significant part was devoted to the side effects of Platonic (and not only Aristotelian!) instruction for the body politic and openly challenged the utility of similar schools for the upbringing of democratic citizens in Athens[17].

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[16] See *Ag*. 15, 58 (305/4), *Ag*. 15, 62: 200-202 and 235-6 (303/2).

[17] Athen. 9.508f-509b (= Marasco (1984: F1)): "Εὐαίων δ' ὁ Λαμψακηνός, ὥς φησιν Εὐρύπυλος καὶ Δικαιοκλῆς ὁ Κνίδιος ἐνενηκοστῷ καὶ πρώτῳ Διατριβῶν, ἔτι δὲ Δημοχάρης ὁ ῥήτωρ ἐν τῷ ὑπὲρ Σοφοκλέους πρὸς Φίλωνα, δανείσας τῇ πατρίδι ἀργύριον ἐπὶ ἐνεχύρῳ τῇ ἀκροπόλει ἀφυστερήσας τυραννεῖν ἐβουλεύετο, ἕως συνδραμόντες ἐπ' αὐτὸν οἱ Λαμψακηνοὶ καὶ τὰ χρήματα ἀποδόντες ἐξέβαλον. Τίμαιος δ' ὁ Κυζικηνός, ὡς ὁ αὐτὸς Δημοχάρης φησίν, χρήματα καὶ σῖτον ἐπιδοὺς τοῖς πολίταις καὶ διὰ ταῦτα πιστευθεὶς εἶναι χρηστὸς παρὰ τοῖς Κυζικηνοῖς, μικρὸν ἐπισχὼν χρόνον ἐπέθετο τῇ πολιτείᾳ δι' Ἀριδαίου. κριθεὶς δὲ καὶ ἁλοὺς καὶ ἀδοξήσας ἐν μὲν τῇ πόλει ἐπέμενε παλαιὸς καὶ γεγηρακώς, ἀτίμως δὲ διαζῶν. τοιοῦτοι δ' εἰσὶ καὶ νῦν τῶν Ἀκαδημαϊκῶν τινες, ἀνοσίως καὶ ἀδόξως βιοῦντες. χρημάτων γὰρ ἐξ ἀσεβείας καὶ παρὰ φύσιν κυριεύσαντες διὰ γοητείαν νῦν εἰσιν περίβλεπτοι: ὥσπερ καὶ Χαίρων ὁ Πελληνεύς, ὃς οὐ μόνῳ Πλάτωνι ἐσχόλακεν, ἀλλὰ καὶ Ξενοκράτει. καὶ οὗτος οὖν τῆς πατρίδος, πικρῶς τυραννήσας οὐ μόνον τοὺς

Philosophical schools were represented by Dēmocharēs as a viper's nest of anti-democratic sentiment and as hotbeds of potential tyrants[18]. In this way, Sophoklēs' piece of legislation cannot be seen as targeting exclusively the Peripatos under Theophrastos' leadership then. The normative range of it was much wider than originally intended and included any kind of establishment providing philosophical instruction. The ten-year long regime and exile of Demetrios of Phaleron provided a welcome context to introduce it.

In two of the three accounts about Sophoklēs' enactment we hear of a certain Philōn[19], an Athenian acquaintance of Aristotle, successfully challenging the proposal; what remains unclear is on what grounds the challenge was based. Scholars influenced by the authority of U. von Wilamowitz and his assessment of philosophical schools as *thiasoi Mousōn*, argued that Sophoklēs' piece of legislation contravened the "Solonian" law on the binding character of the agreements struck among associates (as reported in *Dig*. 47.22.4 = Gaius, *Ad legem duodecim tabularum* 4)[20]. Despite the crippling criticism of Lynch (1972: 112-6), philosophical schools are still regarded as associations, although they hardly have

ἀρίστους τῶν πολιτῶν ἐξήλασεν, ἀλλὰ καὶ τοῖς τούτων δούλοις τὰ χρήματα τῶν δεσποτῶν χαρισάμενος καὶ τὰς ἐκείνων γυναῖκας συνῴκισεν πρὸς γάμου κοινωνίαν, ταῦτ' ὠφεληθεὶς ἐκ τῆς καλῆς Πολιτείας καὶ τῶν παρανόμων Νόμων. (Then there was Euaion of Lampsakos, as recorded by Eurypylos and Dicaiocles of Knidos in the ninety-first book of his *Discourses*, also by the orator Demochares in his speech as advocate in the case of Sophocles versus Philon. He (Euaion) lent money to his native city, taking as security the acropolis, which he retained with the design of becoming tyrant, until the people of Lampsakos combined to resist him, and after paying back his money they threw him out. Then, Timaios of Kyzikos, as Demochares again says, after bestowing a largess of money and grain upon his fellow-citizens, thereby winning confidence among the Kyzikenoi that he was a good man, a little while afterwards attacked their constitution through the agency of Aridaios. He was tried, convicted, and disgraced, and although he remained in the city, old and worn with age, he passed his life in dishonour. Some of the Academic philosophers of to-day are like that, living as they do wickedly and disgracefully. For after gaining possession of a fortune by sacrilege and by unnatural courses through trickery, they are now looked up to with admiration, just like Chairon of Pellene, who attended the lectures not only of Plato but also of Xenocrates. He too, as I was saying, ruled his native city with bitter tyranny and not only drove out its best citizens, but also bestowed upon their slaves the property of their masters, and forced the masters' wives into wedlock with the slaves; these were the beneficial results he derived from the noble *Republic* and from the lawless *Laws*. – transl. Loeb)

[18] A remote parallel in the late fifth-century context is the ban introduced during the regime of the Thirty tyrants by Kritias and reported by X. *Mem*. i.2.31: … καὶ ἐν τοῖς νόμοις ἔγραψε λόγων τέχνην μὴ διδάσκειν (He inserted a clause which made it illegal "to teach the art of words").

[19] For what little is known see *Athenian Onomasticon* s.v. (35) (http://www.seangb.org/Phi-Omega.html last consulted 18/1/2020).

[20] von Wilamowitz-Moellendorff, U. (1881) *Antigonos von Karystos*, 263-91, Berlin.

any of the features usually attributed to associations[21]. Philosophical schools as an organization were neither a *koinon* nor an aggregate of individuals but rather occupied an ambiguous middle ground with some sort of basic structure. That ambiguity may have led Sophoklēs to attack them, given the portent climate of rampant anti-Macedonianism running through the Athenian society. This atmosphere provided the context for settling old grudges and taking revenge for the previous two decades of imposed oligarchic rule.

Therefore, the argument against Sophoklēs' law could not have included an assumed violation of 'corporate' freedom. Other crucial features of the Athenian democratic regime are undermined by such a piece of legislation. One of them was its presumably retroactive character, since the schools already had an individual in charge; was he to be removed and replaced? The concerted reaction and departure of philosophers implies clearly this eventuality. In addition, the law comes dangerously close to *ad hominem* legislation since there were only two philosophical schools at the time. Finally, it is not far-fetched to argue that the law imposed an implicit restriction on the freedom of expression and more importantly that it curtailed the freedom of people to dispose of their property as they saw fit. Of course, the counter argument would have been that these restrictions are justified in the name of the polis' safety and integrity (*raison d'état*). However, the democratic principle of the rule of law prevailed.

II. Increasing the stakes for democracy, retaining its distinct features

The leaders of the pro-Antigonid faction in order to express their gratitude to Demetrios I, prompted the Athenians to interfere with the constitutional make-up of the *polis*. For the first time after Kleisthenes and with no divine consultation, they decided to increase the number of the *phylai* (tribes) and to reform the size of the Council. Two new *phylai* were created, Antigonis and Demetrias, and put at the head of the official enumeration[22]. The idea of reforming the number of tribes was definitely home grown (apparently that was a proposal moved by Stratoklēs son of

[21] See lately Harland, Ph. A. (2019) "'The most sacred society (*thiasos*) of the Pythagoreans:' philosophers forming associations" *Journal of Ancient History* 7, 207-32 who argues that "there are clear signs that some gatherings of philosophers might be better understood in relation to the analytical category of "associations" as defined here, which encompasses the specific ancient designation "societies".

[22] *AthPol* 21 with Rhodes (1981: 251-60). See the latest account in Weber, G. (2018) «'200 Jahre Phylenreform des Kleisthenes' – die Neuorganisation von Athen und Attika (307/06 v. Chr.). Kontext, Umsetzung, und Folgen» *Klio* 100, 125-52. New *phylai* order in an ephebic decree: *IG* ii^2 478 (305/4) col. I 32-34: [Ἀντ]ιγονίδο[ς]/ [σω(φρονιστὴς) Ἀρκ]εσίλας Φίλωνος – – – and col. II 32-34: [Δημητ]ριάδος/ [σω(φρονιστὴς) Φιλ]αῖος Φίλωνος Ξυπε/. For the Athenian *ephebeia* see now Friend, J. L. (2019) *The Athenian ephebeia in the fourth century BCE*, Leiden.

Euthydēmos of Diomeia[23]) although we cannot be sure about the rationale. Did it aim to flatter in an unprecedented way the Antigonids, liberators and saviours, or to counter the consolidation (i.e. reduction) of magistracies and magistrates, especially during the pro-Antipatrean regime (322-319) by increasing the pool of potential citizen candidates? The number of councilors increased to 600 (12x50 *bouleutai*). The mechanics of this exercise have been explored and explained by Traill (1975: 26-28) who concluded that the new *phylai* were created by taking away on average three demes out of the existing *phylai* with the exception of Aiantis (smaller) compensated by Aigeis and Leontis (largest) who contributed more than three demes. The impact on the *quota* of councilors seem to have been marginal[24]; most *phylai* provided a number of councilors roughly proportional to their population.

That reform had an enormous impact on the everyday working of the Athenian democracy, usually underestimated in modern accounts, in favour of its religious undertones. To illustrate the point, let me enumerate the major and minor magistrates appointed on a tribal affiliation according to *AthPol: bouleutai* (43.2), *tamiai Athēnas* (47.1), *polētai* (47.2), *apodektai* (48.1), *euthynoi* (48.3), *katalogeis* (49.2), *episkeuastai hierōn* (50.1), *eisagogeis* (52.2), Forty (53), *epimelētai tōn Dionysiōn* (56.4), members of *Hēliaia* (59.7); military officers (*taxiarchoi*, *phylarchoi*, *hipparchoi*, 61.3-5) and perhaps all the ten-member strong colleges of officials (like *agoranomoi, metronomoi, sitophylakes, epimelētai emporiou* 51; *logistai*, 54.1; *hieropoioi*, 54.6). Allowing for merging or abolishing some of these magistracies, it remains still a significant number of appointments to be made. I do not claim that there was a linear correlation between the increased number of tribes and appointments, but I do argue for an increased likelihood for the average Athenian to exercise a *polis*-function at some point in his lifetime. The increased number of tribes led to an increased number of magistracies to be filled, thus augmenting the chances of male Athenian over thirty years of age, to be allotted to one of them.

This point is illustrated by the Forty; it was thought that this body was abolished in the period 322-307, since we do not hear anything about these *dikastai* after *AthPol.* 53.1-2[25]. They were formed by panels of four *dikastai* for each tribe (other than their own), allotted from among the members of the *phylē*. Each *dikastēs* heard

[23] For this prolific personality see Paschidis, P. (2008) *Between city and king. Prosopographical studies on the intermediaries between the cities of the Greek mainland and the Aegean and the royal courts in the Hellenistic period (322-190 BC)*, Athens, 78 no. A19 and 80 for a list of the decrees moved by him.

[24] Bouleutic quota, Traill (1975: 31-33 & 58-60).

[25] See Rhodes (1981: 587-8). For the lists of *diaitētai* see Liddel, P. (2007) *Civic obligation and individual liberty in ancient Athens*, 196, Oxford, Zanaga, Cl. (2017) “Alcune considerazioni in merito di cataloghi arbitrali ateniesi” *Historika* 7, 83-117, and Berti, Irene & P. Kató (2017) “Listen im öffentlichen Raum hellenistischer Städte” in Berti, Irene, Bolle, Katharine, Opdenhoff, Fanny & F. Stroth (eds) *Writing matters. Presenting and perceiving monumental inscriptions in Antiquity and Middle Ages*, 91-94, Berlin.

disputes worth less than ten drachmas individually (otherwise the dispute was referred to a public arbitrator). The defendant's tribe determined which *dikastēs* heard the case. Given that the property census had been lifted and the number of tribes increased, there would have been increased demand for tribal *dikastai*, as they rose from Forty (4x10) to Forty-eight (4x12).

In adjudication still, some scholars have argued that public arbitrators (*diaitētai*) did not survive the constitutional reform of 322. Apart from *AthPol* 53.4-6, we hear of *diaitētai* erecting a dedication on completing their annual duty and honoured by the Athenian *dēmos*[26]. However, a tentative reference to the *diaitētai* occurs in the accounts of the treasurers of Athena *IG* ii^2 1472A, 21 (after 319/8), *IG* ii^2 1487A, II, 47-49 (306/5) and *IG* ii^2 1489, 15-16; these cannot be private arbitrators as it may be the case with *diaitētēs* in the *defixio* Audollent, *DT*, 49, 16-22 (dated in c. 300) [27]. The disappearance of dedications from the epigraphic record should not necessarily imply the abolition of the office; it could be lack of a collegial spirit, of funds, or drop in their number, especially in the periods of an imposed property census (322-319 and 317-307), something that made the financial burden of a dedication difficult to carry.

It was also claimed that *polētai* are not attested after 307/6[28]; inscriptions *Ag*. 19, P41-42 and P50-51 dated in the closing years of the fourth or in the early years of the third century, although in a poor fragmentary condition, contain, nevertheless, key terms and collocations like, τάδ' ἐπράθη ἐδά[φη – – –], [– – – μέ]ταλλα, [– – – εἰσ]ήνενκε μέταλ[λον – – –], καινοτομίαν, suggesting that the exploitation of mines continued in the same way as in the pre-322 period, unaffected by political upheavals. Therefore, we have to assume that the whole system of administering public revenues including the auction of confiscated properties, leases of public lands and mines remained largely unaffected from the successive waves of reforms[29].

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[26] The first such dedication dates in 371/70 [*IG* ii^3 (4) (1) 24] and their last in 325/4 [*IG* ii^3 (4) (1) 35].

[27] *IG* ii^2 1472A, 10-22: [τὰ]/[δε π]ροσπαρέδοσαν [ταμίαι οἱ ἐπὶ Χ]/[ρέμη]τος ταμίαις το[ῖς ἐπὶ Ἀντικλέ]/[ους· φι]άλιον ἀργυροῦ[ν – – – ἀνέθ]/[ηκεν Ν]ικ[α]γόρα Φιλισ[τίδου Παιαν]/[ιέως] γυνή· [τ]άδε παρέδοσ[αν ταμίαι]/ [οἱ ἐπὶ] Φιλοκλέους ταμί[αις τοῖς ἐ]/[πὶ Ἀρχ]ίππου· ὀφίδιον μι[κρόν ….]/ [… π]ρὸς τῆι παραστά[δι – – –]/ ….α χρυσῆ πρὸς τῆ[ι – – –]/…. μεγάλη [ἀ]ργυρ[ᾶ – – –]/ [ο]ἱ διαιτηταὶ [ο]ἱ ἐ[πὶ Ἀπολλοδώρο]/[υ?] ἄρχοντος ἀνέθ[εσαν – – –].
IG ii^2 1487 A II, 47-49: πρὸς [τῆι παραστά]/δι τῆ[ι δ]εξιᾶ[ς] εἰσιόν[τι ..5.. φι]/άλη ἀρ[γ]υρ[ᾶ ἐπί]χρυ[σος ἣν οἱ διαιτ?]/ηταὶ [ἀνέθεσαν – – –].
frg. b. face B. col. II. 50: [– – –]Θ[– – –] / [– – –]ΗΜ[– – –] / [– – –]ΙΣΗΓΟ[– – –] / ἐπ' Ἀναξικρ[άτους ἄρχοντος – – – – Γ]–
Audollent, DT, 49, 16-19 (= IG iii (3) 10): τούτους ἅπαντας/ καταδῶ ἀφανίζω κατορύττω καταπαττα/λεύω καὶ ἐπὶ δικαστηρίου καὶ παρὰ/ διατητεῖ …

[28] Canevaro (2011: 79).

[29] *Ag*. 19, P42: [τ]άδ' ἐπράθη ἐδά[φη – – –]/ ἀτίμητα ὄντα [– – –]/ Ξενοκλέους Ἀντιγένους Σημ[αχίδου – – –]/ Πολυκλέους Τεισίππου Εὐω[νυμέως – – –]/

The restoration of pre-322-democracy is usually interpreted as abolition of some, at least, of Phalereus' reforms and return to the pre-317 and pre-322-regime. That would mean that the *nomophylakes* and *gynaikonomoi* were abolished (explicitly or tacitly by not filling the posts) and the *graphē paranomōn* was reactivated. However, the sumptuary legislation was preserved, as far as archeological evidence testifies, and liturgies such as *chorēgia* and *triērarchia* were not re-instated. We also observe a flurry of epigraphically attested activity of the council and the assembly voting mainly honorary decrees; the main agent of the new order and prime mover was Stratoklēs.

Some scholars think that the whole process was not an uncoordinated affair of piecemeal abolition and/or reform of legal rules. Instead, they argue that there is convincing evidence of a revision and republication of laws by a body of *nomothetai*. Most prominent among them William Scott Ferguson (1911a: 103-4) who was the first, to my knowledge, to suggest it and subsequently it became the new orthodoxy; Mirko Canevaro's article published in 2011 is the latest, most comprehensive and well-argued sample of this tendency and moves along the same broad lines. Ferguson probably thought that the existence of *nomothetai* inferred from Plb. 12.13.7-14.1, the fragment from Alexis' comedy *Hippeus*, and *IG* ii^2 487 was an eloquent proof of his thesis and it did not require any further argumentation.

The acephalous decree *IG* ii^2 487[30] is usually dated in 304/3 due to the reference to the archonship of Pherekles in l. 7, therefore we have to assume that the decree was issued either in the last months of the archon year 304/3 or early in 303/2. What is, however, more important is that the Council honours Eucharēs, son of Euarchos of Konthylē for his benevolence (*eunoia*) towards the Council and the people of Athens. In particular, Eucharēs was praised because "he took care of inscribing the laws, so that all those passed during Phereklēs' archonship will be displayed, in order to be available for close scrutiny by anyone wishing to do so and nobody will claim to ignore the laws of the city". The passage reports both an initiative and the rationale guiding it; the decree taking care to inscribe the laws (at least, two or more), passed in 304/3 was dictated by the need for the citizens to consult them (to read or to have read to them). This is not an unusual designation of the legislator's intention. However, this testimony is usually considered as adequate evidence for a

Λυσιστράτου Ἁλαιέ[ως – – –]/ Θεοδώρου Λυσανίου Λουσι[έως – – –]/ Κλεοχάρους Κλεοστράτου Λ̣[– – –]/ [Ἀ]ρχεστράτου Ξανθιππί[δου – – –]/ Τιμαρχίδου Φ[– – –]/ [Ὀ]φέλου [– – –]/ [..]Τ[– – –]

30 *IG* ii^2 487, 4-10: [ἐπε]/μελήθη δὲ καὶ τῆς [ἀναγ]ρ[αφῆς τῶν ν]/όμων ὅπως ἂν ἐκτε[θῶσι] πά[ντες οἱ ν]<εν>/ομο[[μο]]θετημένοι [ἐπὶ] Φερε[κλέους]/ ἄρχοντος σκοπεῖν [τῶ]ι βουλο[μένω]/ι καὶ μηδὲ εἷς ἀγν[ο]εῖν τοὺς τῆς [πό]/λεως νόμους· (he took care of inscribing the laws, so that all those passed during Pherekles' archonship will be displayed, in order to be available for close scrutiny by anyone wishing to do so and nobody will claim to ignore the laws of the city). See also *IG* ii^3 (1) (2) 469, 13-15 (c. 330): ἐπειδὴ ὁ ἀναγραφεὺς Καλλικρατίδης καλῶς καὶ δικαίως ἐπιμεμέληται τῆς ἀναγραφῆς τῶγ γραμμάτων ...

wholesale re-inscription of Athenian legislation. The argument rests on the use of the present perfect participle *nenomothetēmenoi* of the verb *nomothetoumai*, implying that a board of *nomothetai* was in place. One can object to this assumption on three grounds, a) it is not at all certain that the legislative intervention of Demetrios of Phaleron was as extensive and all-encompassing to require a wholesale reform; from what we know it looked like a piece-meal introduction of amendments, b) *nomothetai* as a *terminus technicus* in the fourth-century Athenian democracy is never used in a massive codification or legal reform program, but designates the officials involved in the process of scrutinizing the introduction of a new law, c) the participle *nenomothetēmenoi* does not necessarily suggest a wholesale reform or codification. The initiative of an individual to propose a new enactment and steer it successfully through the necessary channels, was described with the same verb, *nomothetō* (νομοθετῶ), or a similar collocation like *eispherō* (εἰσφέρω) or *tithēmi nomon* (τίθημι νόμον). Therefore, I consider the information of *IG* ii[2] 487 at this point insufficient to sustain any theory of a major legislative shake-up.

The text of the inscription quite clearly refers to the laws introduced in the year of the archon Phereklēs (304/3) and only to them. Given the propensity in pre-322 Athens to issue only a few laws, it is more likely that only a handful of new laws were introduced to counter these reforms of Demetrios of Phaleron that could not have been neutralized otherwise (e.g. to fall in disuse). The specific initiative for which Eucharēs was honoured was the erection of copies of laws, for consultation by the citizens[31]. Therefore, we may assume with a certain degree of probability that Eucharēs' post included that responsibility and therefore, he was delegated to oversee that job. But what was exactly the position of Eucharēs in the Athenian administration at this juncture? There are three possible answers (not mutually exclusive), i) he was a member of the Council of that year, exercising a minor office like *anagrapheus* or *antigrapheus*, ii) he was a member of a hypothetical board of *nomothetai* for that year, iii) he was appointed by lot as *grammateus kata prytaneian*; obviously not true since Epicharinos son of Dēmocharēs of Gargettos is attested as secretary[32]. In order to answer the above question, we have first to answer another one, perhaps more crucial; why the Council decided to honour him for the performance of such ordinary even, one may say, trivial duties? To my mind, it is a powerful hint at the democratic nature (and credentials) of Eucharēs' initiative. Eucharēs practiced the democratic process of consultation in cases a new law or laws were introduced. Implicitly, the decree suggests that not all previous office-holders (including those after the democratic restoration of 307!) bothered to have the laws inscribed on perishable material for consultation by the citizenry. Two

[31] See Hedrick, Ch. W. Jr. (2001) "For anyone who wishes to see" *AncWorld* 31, 127-35 and most recently Lasagni, Chiara (2018) «"For anyone who wishes to read up close…" A few thoughts revolving around the formula σκοπεῖν τῶι βουλομένωι in Attic inscriptions» *RFIC* 146, 334-80.

[32] *IG* ii[2] 483, 3-4 (304/3).

further facts re-enforces the above impression, i) the stele with the honorary decree is to be erected outside the Council house (l. 20) and ii) the recipient of Eucharēs' virtue and fairness was the Council (l. 17). So, we have to see the Council as the original source of new legislation in this period, put in the form of *probouleuma* (recommendation) to the assembly for discussion and approval. Eucharēs was most probably an *anagrapheus* or an *antigrapheus*, like the *anagrapheus* Kallikratidēs son of Kallikratēs of Steiris honoured in c. 330 for taking care to have the documents properly and lawfully inscribed[33].

The comic fragment from Alexis' *Hippeus*[34] does not contain a specific reference to the pre-322 system of *nomothesia*, *in extenso* treated by Mirko Canevaro[35], and hence to *nomothetai* or to a special board of *nomothetai* instituted to manage the transition from Phalereus' regime to 'democracy'[36]. Canevaro's main point relies on this passage, itself severed of its original context, thus bypassing the fact that the use of the term *nomothetai* may not be technical, but an ordinary utterance of an ordinary person, a *paidagōgos* or father, mixing the purpose of the ordinance with its result, the political sovereign (Demetrios) and the organ (*nomothetai*). What is praised in the passage is not the law, but its end-result, the removal of the philosophers from Attic soil. But from what we know this was never the intention of the proponent, desertion of Athens was the reaction of the philosophers. However, Alexis credits Demetrios and the *nomothetai* with their expulsion, as a deliberate policy, re-interpreting the legislative initiative to suit his play's dramatic needs. These *nomothetai*, therefore may be a general, abstract term

33 *IG* ii³ (1) (2) 469.

34 *PCG* ii Alexis (*Hippeus*) F99 (K-A) (*apud* Athen. 13.610d-f; Marasco (1984: T5)): ὁ Μυρτίλος ἔφη: εἶτ' οὐκ ἐγὼ δικαίως πάντας ὑμᾶς τοὺς φιλοσόφους μισῶ μισοφιλολόγους ὄντας; οὓς οὐ μόνον Λυσίμαχος ὁ βασιλεὺς ἐξεκήρυξε τῆς ἰδίας βασιλείας ἀπελαύνων, ὡς ὁ Καρύστιός φησιν ἐν Ἱστορικοῖς Ὑπομνήμασιν, ἀλλὰ καὶ Ἀθηναῖοι. Ἄλεξις γοῦν ἐν Ἱππεῖ φησίν

τοῦτ' ἔστιν Ἀκαδήμεια, τοῦτο Ξενοκράτης;
πόλλ' ἀγαθὰ δοῖεν οἱ θεοὶ Δημητρίῳ
καὶ τοῖς νομοθέταις, διότι τοὺς τὰς τῶν λόγων,
ὥς φασι, δυνάμεις παραδιδόντας τοῖς νέοις
ἐς κόρακας ἐρρίφασιν ἐκ τῆς Ἀττικῆς.

(and Myrtilos said: then, do I unjustifiably hate all of you philosophers who hate the philologists? Philosophers who not only the king Lysimachos denounced and expelled from his kingdom, as Karystios says in his *Historika Hypomnemata* but also the Athenians. Alexis in *Hippeus* says "Is this Akademia, is this Xenokrates? May the gods provide many goods to Demetrios and the legislators, since, as it is said, they have sent to crows (i.e. sent to hell) those who hand over to the youngsters the power of speech" – transl. Loeb).

35 Similarly noted by Canevaro (2011: 72 n.58). See also Canevaro, M. (2013) "*Nomothesia* in classical Athens: what sources should we believe?" *CQ* 63, 139-60 and Canevaro (2016).

36 For a non-technical use of the term *nomothetai* see among others, Aeschin. 1 (*Against Timarchos*) 16, Din. 2 (*Against Aristogeiton*) 16 and Aristot. *EN* 1103b, 1128a, 1155a.

for those individuals proposing new laws as members of the Council and in the assembly. Therefore, I am not inclined to accept Alexis' *testimonium* as a reliable testimony for the existence and operation of a special constituted board of magistrates called *nomothetai*. It would have been more economical to consider *nomothetai* as referring to individuals putting forward bills of laws and decrees, with no official capacity.

Another change to be associated with a possible concerted introduction of reforms in 304/3 is one concerning the *polis'* honorary discourse[37], and in particular a change in the wording referring to awarded crowns. Up to 304/3 the value of an awarded crown was expressed in monetary terms, the expression χρυσῶι στεφάνωι ἀπὸ : (e.g. πεντακοσίων) : δραχμῶν is attested in decrees of the *polis* or its subdivisions[38]. In *IG* ii^2 488, 2-3 (304/3) there is a linguistic shift, the honorary crown is awarded according to the law (στεφάνωι κατὰ τὸν νόμον) and the same expression occurs in the honorary decree *SEG* 36.164 passed in the twelfth prytany of the year 304/3; so the introduction of the reform should be dated either earlier in the same year or even in the previous year. But does the expression *kata ton nomon* refer to the value of the crown or to the procedure awarding the crown or perhaps include both the value of the crown and the proper award procedure? Should one associate this change with the laws introduced in the year of the archon Phereklēs? On top of that, Harris (2017), in the context of clarifying the legal basis of the dispute between Aischines and Demosthenes in 330s, has suggested one more alteration in the mode of awarding of golden crowns, which he also dates in 304/3. In particular, before 304 the award of a golden crown to a serving magistrate was always conditional on the successful completion of rendering his accounts (ἐπειδὰν τὰς εὐθύνας δῶι). After 304, the award of a golden crown to a serving magistrate takes place after his term in office was scrutinized (εὐθύνας ἔδωκε/ δεδώκασιν)[39].

[37] To what extent that required legislative initiative is not clear; see *IG* ii^2 466, 27-32 (307/6): γνώμην δ[ὲ ξυμβάλ]/λεσθαι τῆς βουλῆς εἰς τὸν δῆμον ὅτι δο[κεῖ τῆ]/ι βο[υ]λῆι ἐπαινέσαι τὸν δῆμον τὸν Τηνίων [καὶ]/ στεφανῶ[σ]αι χρυ[σ]ῶι στεφάνωι ἀπὸ ⁝X⁝ δραχμῶ/ν ἀρετῆς ἕνεκα καὶ εὐνοίας τῆς εἰς τὸν δῆμον/ τὸν Ἀθηναίων· (and the Council shall bring a recommendation to the assembly that the Council proposes to commend the people of Tenos and to grant a golden crown (worth) 1000 drachmas because of the virtue and the benevolence towards the people of Athens) with *IG* ii^2 488, 2-5 (304/3): [καὶ] στεφανῶσαι ἕκα[σ]τον αὐτῶν χρυσ/[ῶι στ]εφάνωι [κατ]ὰ [τ]ὸν [ν]όμον, ἐπειδὴ δι/[καίω]ς ἄρξαντες [τ]ὰ[ς εὐ]θύ[ν]ας δεδώκασ/[ιν κατ]ὰ τὸν νόμον ... (and crown each of them with a gold crown according to the law, since having fulfilled their office justly, they have rendered their accounts according to the law).

[38] *Polis* decrees: *IG* ii^2 466, 29-31 (307/6), 467, 27-28 (306/5), 553 (c. 307), 555 (post 307); *polis* subdivisions: *IEleusis* 99 (319/8?).

[39] Compare *IG* ii^3 (1) (2) 469 II, 23-28 (c. 330 BC): γνώμην δὲ ξ/[υμβάλλεσθ]αι τῆς βουλῆς εἰς τὸν δῆμ[ο]/[ν, ὅτι δοκεῖ] τῆι βουλῆι ἐπαινέσαι Καλ/[λικρατίδην Καλλικράτους Στειριέα/ [ἀρετῆς ἕ]νεκ̣α̣ καὶ δικαιοσύνης τῆς εἰ/[ς τὴμ βο]υλὴν̣ [κ]αὶ τὸν δῆμον καὶ στεφαν/[ῶσαι αὐ]τὸν χ[ρ]υσῶι στεφάνωι ἀπὸ ⁝ (500)⁝/ [δραχμῶ]ν, ἐπε[ι]δὰν τὰς εὐθύνας δῶι·... (and the Council shall bring a recommendation to the

That shift would have sent a signal of a tightened *polis*-control over the award of honours and the enforcement of the official scrutiny of officials, a feature of a democratic regime.

There is further evidence for the existence and operation of popular courts in the honorary decree for the Tenian ambassadors[40]. The validity of the judicial agreement (*synbola*) between Athens and Tenos depended upon its ratification by the *thesmothetai* when they fill the courts "for the first time". It remains, nevertheless, unclear whether the expression means the first session of the courts for the year or, what I believe more likely, the very next sitting of popular courts. The same courts were endowed, possibly in 318 for the first time, with the scrutiny of proposed awards of *politeia*[41].

The council of the Areopagos continued to operate retaining its jurisdiction and it was encumbered with some sort of supervisory duties over sacred property as *IG* ii[2] 1492 B testifies. In lines 124-131 there is probably a reference to five of its members (among them Xenophilos of Alopeke (l. 94, ll. 129-30) and Eupolemos of Hermos (l. 93, ll.128-9)) who in 305/4, according to a decree moved by Dēmocharēs of Leukonoe, together with *tamias stratiōtikōn* Philippos of Acharnai handed over several talents to the treasury of Athena[42].

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assembly that the Council proposes to commend Kallikratides son of Kallikrates of Steiris, because of his virtue and fairness towards the Council and to the people and crown him with a golden crown (worth) of 500 drachmas, when his terms in office is successfully scrutinized ...) with *IG* ii[2] 488, 1-5 (304/3): [– – –]κων τῶν ἐπὶ Φ[ερ]ε[κλέ]ου[ς] ἄρχοντο/[ς καὶ] στεφανῶσαι ἕκα[σ]τον αὐτῶν χρυσ/[ῶι στ]εφάνωι [κατ]ὰ [τ]ὸν [ν]όμον, ἐπειδὴ δι/[καίω]ς ἄρξαντες [τ]ὰ[ς εὐ]θύ[ν]ας δεδώκασ/[ιν κατ]ὰ τὸν νόμον... (of the --- in the archonship of Pherekles (304/3) and crown each of them with a gold crown according to the law, since having fulfilled their office justly, they have rendered their accounts according to the law (followed by names of eleven individuals not in a strict tribal order) – transl. AIO). Note that in *IG* ii[3] 884 II, 35 (280/79 Bc), an honorary decree for the hipparch *Komeas*, the pre-304/3 formula survives.

40 *IG* ii[2] 466, 32-35: ὅπως δ' [ἂν κα]ὶ τὰ σύνβολα κύρια ἦ/ι τὰ πρὸς Τηνίους κα[ὶ Ἀθην]αίους, τοὺς θεσμοθ/έτας ἐπικυρῶσαι τὰ [σύνβ]ολα, ὅταν πρῶτον δικ/ασ[τήρι]α πλ[η]ρῶσιν· (so that the judicial agreement between the Tenians and the Athenians shall be valid, the *thesmothetai* shall certify the agreement when they next convene the lawcourts).

41 Osborne (1981-83) and *IG* ii[2] 398b. See *IG* ii[2] 496, 27-32 (303/2*):* δοῦναι δὲ καὶ τὴν ψῆφον περὶ [α]/ὑτοῦ τοὺς πρυτάνεις εἰς τὴν πρώτη/ν ἐκκλησίαν καὶ τοὺς θεσμοθέτας [τ]/οὺς ἐπὶ Νικοκλέους ἄρχοντος προ[γ]/ράψαι αὐτῶι τὴν δοκιμασίαν ἐν τῶ[ι]/ Μεταγειτνιῶνι μηνί, (and the presiding councilors shall put to vote the recommendation about him in the next assembly and the *thesmothetai* in the archonship of Nikoklēs shall write first the scrutiny (of his award) in the month of Metageitniōn (August/ September).

42 *IG* ii[2] 1492 B, 124-131 (305/4): ἐπ' Εὐξενίππου ἄ[ρχ]οντος ἐπὶ τῆς [Ἀ]ντι[γο]/[νίδ]ος πρώτης πρυτανείας [τε]τράδι ἐπὶ δ[έκα χρήμ]/[ατα ἀ]νεκόμισεν κατὰ ψήφισμα δήμ[ου, ὃ] ἔγ[ραψε Δη]/[μοχ]άρης Λευκονοεύς, Ἀ[ρ]ε[ο]παγ[ι]τ[ῶ]ν οἵδε· Γ – – –/[....

While the transition from the idiosyncratic oligarchic rule of Demetrios of Phaleron to the revived pre-322 democracy involved several interventions in the political and legal fabric of Athens, in areas regulated by private law there was hardly any change. The usual terminology of private law continued to be employed in leases, in contracting out the rebuilding of the Long walls[43], and the exploitation of the mines of Laurion and the leasing out of public property[44] continued as before. Three securely dated *horoi* inscriptions on properties testify to the continued use of *apotimēma* to secure dowries and property of orphans[45].

III. New international context, new challenges

The joy and contentment of the Athenians with the ousting of Demetrios of Phaleron did not last. The everyday presence of Demetrios I and his entourage in Athens and particularly in the Parthenon (when he was not on any expedition to enlarge the Antigonid zone of influence in mainland Greece) brought about discontent and disagreements among the members of the ruling democratic, pro-Antigonid faction. The culmination was reached with the incident of Kleainetos, son of Kleomedon reported in Plu. *Demetr*. 24.3[46]. This not only reflects Plutarch's interest in

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Κ]ολλυτεύς, Φιλοκήδης Ἀ[χα]ρνεύ[ς], Ε[ὐπόλ]εμος [Ἑρ]/[μειος], Σωσίστρατος Μυρ[ρι]νού[σιο]ς, Ξεν[ό]φι[λο]ς Ἀλωπε[κ]/[ῆ]θεν κα]ὶ ὁ ταμίας τῶν στ[ρα]τιωτι[κ]ῶν Φ[ίλιπ]πος Ἀ[χα]ρ[νεὺ]ς/ [ἀργυρίου] Ἀττικοῦ τάλαντα (15 and 4000 dr.) κ[αὶ χρυ]σοῦ[ς …] (When Euxenippos was archon, in the first prytany, that of Antigonis, on the fourteenth day; these members of the Areopagos have brought back money according to a decree of the people moved by Demochares of Leukonoe: G--- of Kollytos, Philokedes of Acharnai, Eupolemos of Hermos, Sosistratos of Myrrhinous, Xenophilos of Alopeke and the treasurer of the stratiotic fund Philippos of Acharnai, 15 talents and 4000 drachmas and golden ---). For the jurisdiction of Areopagos see Wallace, R. W. (1989) *The Areopagos council to 307 B.C.*, Baltimore and de Bruyn, O. (1995) *La compétence de l'Aréopage en matière de procès publics. Dès origines de la polis athénienne à la conquête romaine de la Grèce (vers 700-146 avant J.-C.)*, Stuttgart.

[43] *IG* ii^2 463+Ag. 16, 109+Walbank, *Fragmentary decrees* no. 30.

[44] *Ag*. 19, L14-15 and possibly *Ag*. 19, LA 5-8.

[45] Finley (1951: no. 162) [*RIJG* I (8) 16; *IG* ii^2 2678; *SEG* 32.226; 43.54] (305/4): ὅρος οἰκί[ας]/ ἀποτιμήμ[α]/[τ]ος ἐπ' [Ε]ὐξεν/[ίπ]που ꞉XX. Finley (1951: no. 132) [*RIJG* I (8) 17; *Syll*^{3} 1187; Michel 1367; *IG* ii^2 2679; *SEG* 43.54] (305/4): ἐπὶ Εὐξενίπου ἄρ[χ]/οντος ὅρος χωρίων/ καὶ οἰκιῶν ἀποτιμη/μάτων προικὸς Ξεναρ/[ί]στει Πυθοδώρου Γαρ/γηττίου θυγατρί. τ/[ὸ] κατὰ τὸ ἥμυσυ καὶ τ[ὸ]/ ἐκ τούτου γιγνόμεν/ον αὐτεῖ εἰς Λεώσ/τρατον ἄρχοντα (303/2)/ (2700 dr). Finley (1951: no. 116) [*RIJG* I (8) 5; *Syll*^{3} 1186; Michel 1365; *IG* ii^2 2657; *SEG* 43.54] (302/1): [ἐ]πὶ Νικοκλέου/ς ἄρχοντος ὅρο/[ς] χωρίων καὶ οἰ/[κ]ίας καὶ τοῦ ὕδα/[τ]ος τοῦ προσόν/[τ]ος τοῖς χωρίοι/[ς κ]λήρων δυεῖν/ [ἀπ]οτετιμημέν/[ων π]αισὶν ὀρφα/[νοῖ]ς τοῖς Χαρί/[ου ἰ]σοτελοῦς Χ/[αιρ]ίππωι καὶ Χ/[αρί]αι.

[46] Plu. *Demetr*. 24.2-4: τὰ μὲν οὖν ἄλλα σαφῶς ἀπαγγέλλειν οὐ πρέπει διὰ τὴν πόλιν, τὴν δὲ Δημοκλέους ἀρετὴν καὶ σωφροσύνην ἄξιόν ἐστι μὴ παρελθεῖν. ἐκεῖνος γὰρ ἦν ἔτι παῖς ἄνηβος, οὐκ ἔλαθε δὲ τὸν Δημήτριον ἔχων τῆς εὐμορφίας τὴν ἐπωνυμίαν κατήγορον: ἐκαλεῖτο γὰρ Δημοκλῆς ὁ καλός. ὡς δὲ πολλὰ πειρώντων καὶ διδόντων

moralizing stories. The erotic element underlies the narrative, contrasting the virtuous Dēmoklēs who preferred to die to the shameless Kleainetos. What is important are the methods employed to cancel the hefty fine of fifty talents Kleomedon was sentenced to pay, which meant that he was subsequently declared a public debtor. His son, Kleainetos brought a letter from Demetrios I to release the detained public debtor; that gesture led Athenians to decree that no letter from any king in the future would interfere in the dispensation of justice. If the story is accurately reported by Plutarch and his source, Demetrios' letter constitutes *prima facie* intervention and violation of the Athenian system of justice. It also reveals that tensions may arise between king and *polis*, a useful precedent for later Hellenistic developments. But the incident was not a novelty in early Hellenistic Athens; with

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καὶ φοβούντων ὑπ' οὐδενὸς ἡλίσκετο, τέλος δὲ φεύγων τὰς παλαίστρας καὶ τὸ γυμνάσιον εἴς τι βαλανεῖον ἰδιωτικὸν ἐφοίτα λουσόμενος, ἐπιτηρήσας τὸν καιρὸν ὁ Δημήτριος ἐπεισῆλθεν αὐτῷ μόνῳ. καὶ ὁ παῖς, ὡς συνεῖδε τὴν περὶ αὐτὸν ἐρημίαν καὶ τὴν ἀνάγκην, ἀφελὼν τὸ πῶμα τοῦ χαλκώματος εἰς ζέον ὕδωρ ἐνήλατο καὶ διέφθειρεν αὑτόν, ἀνάξια μὲν παθών, ἄξια δὲ τῆς πατρίδος καὶ τοῦ κάλλους φρονήσας, οὐχ ὡς Κλεαίνετος ὁ Κλεομέδοντος, ὃς ὠφληκότι τῷ πατρὶ δίκην πεντήκοντα ταλάντων ἀφεθῆναι διαπραξάμενος καὶ γράμματα παρὰ Δημητρίου κομίσας πρὸς τὸν δῆμον οὐ μόνον ἑαυτὸν κατῄσχυνεν, ἀλλὰ καὶ τὴν πόλιν συνετάραξε τὸν μὲν γὰρ Κλεομέδοντα τῆς δίκης ἀφῆκαν, ἐγράφη δὲ ψήφισμα μηδένα τῶν πολιτῶν ἐπιστολὴν παρὰ Δημητρίου κομίζειν. ἐπεὶ δὲ ἀκούσας ἐκεῖνος οὐκ ἤνεγκε μετρίως, ἀλλ' ἠγανάκτησε, δείσαντες αὖθις οὐ μόνον τὸ ψήφισμα καθεῖλον, ἀλλὰ καὶ τῶν εἰσηγησαμένων καὶ συνειπόντων τοὺς μὲν ἀπέκτειναν, τοὺς δὲ ἐφυγάδευσαν, ἔτι δὲ προσεψηφίσαντο δεδόχθαι τῷ δήμῳ τῶν Ἀθηναίων πᾶν, ὅ τι ἂν ὁ βασιλεὺς Δημήτριος κελεύσῃ, τοῦτο καὶ πρὸς θεοὺς ὅσιον καὶ πρὸς ἀνθρώπους εἶναι δίκαιον. (Now, to give all the particulars plainly would disgrace the fair fame of the city, but I may not pass over the modesty and virtue of Democles. He was still a young boy, and it did not escape the notice of Demetrius that he had a surname which indicated his comeliness; for he was called Democles the Beautiful. But he yielded to none of the many who sought to win him by prayers or gifts or threats, and finally, shunning the palaestras and the gymnasium, used to go for his bath to a private bathing-room. Here Demetrius, who had watched his opportunity, came upon him when he was alone. And the boy, when he saw that he was quite alone and in dire straits, took off the lid of the cauldron and jumped into the boiling water, thus destroying himself, and suffering a fate that was unworthy of him, but showing a spirit that was worthy of his country and of his beauty. Not so Cleaenetus the son of Cleomedon, who, in order to obtain a letter from Demetrius to the people and therewith to secure the remission of a fine of fifty talents which had been imposed upon his father, not only disgraced himself, but also got the city into trouble. For the people released Cleomedon from his sentence, but they passed an edict that no citizen should bring a letter from Demetrius before the assembly. However, when Demetrius heard of it and was beyond measure incensed thereat, they took fright again, and not only rescinded the decree, but actually put to death some of those who had introduced and spoken in favour of it, and drove others into exile; furthermore, they voted besides that it was the pleasure of the Athenian people that whatsoever King Demetrius should ordain in future, this should be held righteous towards the gods and just towards men. – transl. Loeb).

or without a letter several individuals were honoured at the implicit or explicit request of Antipatros, Polyperchon and Kassandros[47]. The whole agenda of honouring is revealed by the political affiliations of those honoured by the regime; they are all associated, closely or not so closely, with Demetrios I. I think that such developments brought about a rift between the leading figures of the faction, Stratoklēs and Dēmocharēs, something that led the latter to exile. We cannot say whether it was a self-imposed exile or the result of a prosecution for a grave offence; *asebeia* perhaps, since challenging the *dictum* of a god (i.e. Demetrios I) may have been construed as impiety. However, even if Dēmocharēs' exile was imposed by a democratic regime in a legally impeccable manner (though I cannot find any piece of evidence for that), the shadow of Demetrios I and his man Stratoklēs may have been the ultimate cause of Dēmocharēs' exile[48].

Resurrecting democracy was not an easy task especially in the world of Alexander's successors. It was fraught with unintended and unexpected complications. But, in the end, Athenians restored most of their *patrios politeia* and strengthened citizen participation by increasing their chances to participate in the running of the *polis*. They also improved certain aspects of the highly symbolic system of honours, clearing out inconsistencies. The institutional arrangements and reforms introduced by the faction supporting Demetrios I turned out to be not so comprehensive or radical; it remains unclear whether they had a clear impact on Athenians or served only as window-dressing for the pro-Antigonid faction. In certain respects, the rules of the pre-322-democracy were re-invigorated, but not to the absolute extent that Dēmocharēs of Leukonoē would wish. What is more important is that the scenario of a difficult cohabitation between polis and king was confirmed once more, even if the king was not cruelly interventionist as Antipatros and Kassandros were. Rules regulating private relations and commerce were left untouched and most of the energy was devoted to reversing some of Demetrios of Phaleron innovations.

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[47] See for example *IG* ii^2 387 (319/8) and *IG* ii^2 486 (304/3).

[48] A possibility envisaged even by Bayliss (2011: 176).

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THOMAS KRUSE (VIENNA)

NOT JUST A RETURN TO THE *PATRIOS POLITEIA* – OR HOW TO TURN TEN INTO TWELVE: RESPONSE TO ILIAS ARNAOUTOGLOU

In considering the restoration of the democratic constitution of Athens prompted by Demetrios Poliorketes in 307 BC after the expulsion of Kassandros and the termination of the semi-oligarchic regime of Demetrios of Phaleron, one of the most striking features in the course of these events is the tribal reform which consisted in the addition of two new *phylai* – named Antigonis and Demetrias – to the already existing ten tribes of Athens, described by Plutarch in his "Life of Demetrios" as follows: "they (*sc*. the Athenians) also created two new tribes, Demetrias and Antigonis; and they increased the number of the senators, which had been five hundred, to six hundred, since each of the tribes must furnish fifty senators".[1] Of the various aspects of the Athenian constitution after 307 BC presented by Ilias Arnoutoglou in his paper I thus want to focus briefly on the tribal reform, since in my opinion this measure exceeded considerably a simple return to the *patrios politeia*, which in Plutarch's account of Demetrios' arrival in Athens is described as the primary reason for the Antigonid intervention: "he (*sc*. Demetrios) proclaimed by the voice of the herald at his side that he had been sent by his father …, to set Athens free, and to expell her garrison and to restore to the people their laws and their ancient form of government (καὶ τοὺς νόμους αὐτοῖς καὶ τὴν πάτριον ἀποδώσοντα πολιτείαν).[2] Later, as we are told by the same author, Demetrios "assembled the people and gave them back their ancient form of government" (καὶ συναγαγῶν τὸν δῆμον ἀπέδωκε τὴν πάτριον πολιτείαν).[3]

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1 Plut. Demetrios 10,4: ταῖς δὲ φυλαῖς δύο προσέθεσαν, Δημητριάδα καὶ Ἀντιγονίδα, καὶ τὴν βουλὴν τῶν πεντακοσίων πρότερον ἑξακοσίων ἐποίησαν, ἅτε δὴ φυλῆς ἑκάστης πεντήκοντα βουλευτὰς παρεχομένης; cf. Diod. 20,46,2 (referring the proposal of Stratokles to bestow various honours on Antigonos and Demetrios): πρὸς δὲ τὰς δέκα φυλὰς προσθεῖναι δύο, Δημητριάδα καὶ Ἀντιγονίδα, καὶ συντελεῖν αὐτοῖς κατ' ἐνιαυτὸν ἀγῶνας καὶ πομπὴν καὶ θυσίαν "to add to the ten tribes two more, Demetrias and Antigonis, and to hold annual games in their honour with a procession and a sacrifice"; see also Poll. 8,110; Steph. Byz. s.v. Ἀντιγονίς. The two new *phylai* are also often mentioned in Athenian and Attic inscriptions of the period from 307/6 to 201/0 BC.

2 Plut. Demetrios 8,5: κήρυκα παραστησάμενος ἀνεῖπεν ὅτι πέμψειεν αὐτὸν ὁ πατὴρ ἀγαθῇ τύχῃ τοὺς Ἀθηναίους ἐλευθερώσοντα καὶ τὴν φρουρὰν ἐκβαλοῦντα καὶ τοὺς νόμους αὐτοῖς καὶ τὴν πάτριον ἀποδώσοντα πολιτείαν.

3 Plut. Demetrios 10,1.

However, the result of the introduction of the two new *phylai* constituted no less than a revision of the Kleisthenic order, approximately 200 years after its establishment.[4] A revision which meant a shift in the system of picking membership for the *boule*, the law courts and the magistracies from a decimal to a duodecimal basis.

To give only a few important examples: since the number of demes was not increased[5], the reform required a redistribution of several demes of the old *phylai* to the two new *phylai* which were to consist of 15 demes each, thus resulting in the loss of three, four or five demes for nine of the ten old *phylai* – the old *phyle* Aiantis (being smaller) remained unaffected by the reform which was compensated by a greater loss of demes of the two largest phylai Aigeis and Leontis.[6] Also as a result of the reform the number of councilors in the *boule* was increased from 500 to 600 – a consequence of the reform which was already noted by Plutarch in the passage quoted above – and the business-calendar of the council was now divided into 12, instead of the former 10 prytanies, within which the two new *phylai* Antigonis and Demetrias from now on occupied the first and second ranks in the fixed sequence of the prytanising *phylai*[7] which (necessarily) now had shorter terms of office; the two new *phylai* and their respective prytany necessitated also a redistribution of the required 40 days of session of the *ekklesia* during the year corresponding to the now 12 (instead of the former 10) prytanies; also the number of many of the minor and major magistracies of the city had to be increased[8]; membership in the Heliaia and other lawcourts rose from 6000 to 7200; the hoplite army had to organize two new military contingents; – all these measures also bore considerable consequences for the city's finances, since more people than before were now entitled to receive allowances for attending the sessions of the various constitutional bodies.[9] And – last but not least – the conspicuous monument of the eponymous *phylai*-heroes on the Athenian *agora* had to receive two new statues.[10]

To put all this into effect undoubtedly must have meant some considerable bureaucratic hassle. The literary sources for the tribal reform, namely Diodorus and Plutarch, report on the establishment of the two new *phylai* in the context of their

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4 For the tribal reform of 307/6 BC see especially the most recent contribution by Weber 2018 citing all the relevant previous studies on the issue.

5 It was only in 224/3 BC, when the now 13th *phyle* Ptolemais (named in honour of Ptolemy III. of Egypt) was introduced, when the Athenians also added a new *demos* named Berenikidae after queen Berenike II., the wife of Ptolemy III., see Traill 1975, 29–31; Pritchett 1942/43; Weber 2018, 128–129.

6 For the details see Traill 1975, 26–28; Weber 2018, 131–141; and also Arnoutoglou at the beginning of section II of his paper.

7 This becomes evident from the epigraphic record see e.g. *IG* ii^2 478 (305/4) quoted by Arnaoutoglou in footnote 22.

8 See also Arnaoutoglou in section II of his paper.

9 See e.g. Weber 2018, 143–145.

10 See esp. Shear 1970, and also Weber 2018, 141–143.

account of the divine and other honours which the city of Athens bestowed upon the Antigonids. Taking into account the consequences of this reform, its rather complex implementation, and its impact of the daily routine in the working of the Athenian democracy, it seems, however, difficult to explain this action simply by the wish of the Athenians to honour their new hero – and god! – Demetrios Poliorketes and his father for having restored the city's freedom; apart from – of course – naming the two new subdivisions of the citizenry after the two Antigonid dynasts. One may also regard the fact that the two *phylai* Antigonis and Demetrias outlived the revolt of the Athenians against the now king Demetrios in 287 BC – in contrast to all the other divine honours bestowed upon Demetrios Poliorketes in 307 and 304 BC respectively, – as an indication that the creation of the two new – so to speak "Macedonian" – *phylai* was not only – and perhaps not even primarily – motivated by the wish to flatter the liberators and saviours of the city. In fact, the Athenians kept their two new Macedonian *phylai* for more than a century and also in times of independence of the city from Macedonian hegemony between 287 and 262 BC and again between 229 to 200 BC. It was only in 200 when the two *phylai* Antigonis and Demetrias were finally abolished and their names erased from public inscriptions, because Athens' entering into the war against Macedon as allies of the Romans had fundamentally changed the rules of the game.[11] This long duration of the reform seems to indicate also that its effects must have enjoyed some popularity among the Athenian citizens.

Not everything, of course, was affected by the *phylai*-reform of 307/06. The number of the *strategoi*, for example, remained stable and there were not appointed two additional *strategoi* representing the two new *phylai* Antigonis and Demetrias. This may be due to the fact that already some years before 307 the requirement that each of the ten *phylai* had to be considered in the nomination of the candidates for the election of the *strategoi* had been abandoned and the *strategoi* were now elected from all Athenian citizens, perhaps because the former requirement had too severely limited the selection of suitable candidates.[12]

Concerning the increase in the number of the *bouleutai* from 500 to 600, Gregor Weber in a recent article on the tribal reform of 307 entertained the idea that a theoretical alternative was to keep the council of the 500 even with the two new *phylai* by reducing the number of the councilors from 50 to an average of 42, but this was presumably rejected because it would have resulted in a reduction of the seats in the *boule* for the demes.[13] There is, however, also a practical issue which may be raised against this assumption, since one does not get a council of 500 if one wants to give 12 *phylai* an equal number of councilors. It works well with ten, but not with 12; with 12 one would have to allot, for example, 42 *bouleutai* each to eight

[11] See Byrne 2010.

[12] See Bleicken 1994, 245.503.

[13] Weber 2018, 133.

phylai (in total 336 *bouleutai*) and 41 councillors each to another four *phylae* (in total 164 *bouleutai*). But to allow for such an unequal distribution of *bouleutai* on the *phylai* would have presumably contradicted the democratic principle of equality in the representation of the *phylai* within the *boule*.

It is, though, beyond doubt that the increase in the number of councilors which was due to the creation of the two new *phylai* considerably enhanced the possibilities for democratic participation for a greater number of Athenian citizens than before 307.

It has also been very correctly argued by Ilias Arnaoutoglou in his paper that the increase in major and minor magistracies which was due to the reform had a considerable impact on the routine bureaucratic business of Athenian democracy, because there was now, "an increased likelihood for the average Athenian to exercise a polis-function at some point in his lifetime. The increased number of tribes led to an increased number of magistracies to be filled, thus augmenting the chances of every Athenian male, over thirty years of age, to be allotted in one of them."[14]

Returning to the increase in the number of councilors as a result of the reform and their distribution by demes, it is striking that for the two new *phylai* there is no balance between the three *trittyes* of a single *phyle*, since in Antigonis and Demetrias altogether 44 *bouleutai* out of 12 demes come from the town, 24 *bouleutai* out of 7 demes come from the inland and 34 *bouleutai* out of 11 demes come from the coastal region. The attribution of 13 *bouleutai* to their relevant demes remains unclear and six demes in Antigonis and Demetrias cannot be located. However, the distribution of demes in the two new *phylai* also resulted in changes in the other *phylai* from which those demes had been taken away to fill up Antigonis and Demetrias. In total, about 50 demes were affected by the modification of the councilors quota because they had to send more councilors each to the new council of 600 than before to the council of 500.[15] In discussing this phenomenon, some scholars have quite plausibly linked the modifications in the number of councilors with demographic and economic factors, assuming that the increase in the number of the *bouleutai* may reflect the increased prosperity and economic success of several families whose origins can be traced back to the demes whose quota changed.[16] Since, however, we do not know the mode and rationale underlying the selection and the distribution of the demes on the two new *phylai* of 307/6 one has to be cautious in drawing too far-reaching conclusions.

To sum up: It seems obvious that the *phylai*-reform of the year 307/6 BC. cannot be explained solely by the desire on the side of the Athenians to honour the Antigonid liberators of their city in an outstanding way. Rather, the Athenians used

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[14] Arnaoutoglou in section II of his paper.

[15] See Traill 1975, 28 and 59; Weber 2018, 134–135.

[16] See e.g. Oliver 2007, 103 and 105; see also Weber 2018, 135–136 with footnote 49.

the tribute to the Antigonids in introducing two new *phylai* named after them as a vehicle for a significant extension of the opportunities for the Athenian citizens for democratic participation.

Looking back to the most recent past, this action may, of course, be regarded as an immediate and adequate response to the restrictions of such opportunities for participation during the regime of Demetrios of Phaleron with – *inter alia* – its imposed property census.[17] In a broader historical perspective, however, this first revision of the Kleisthenic order since its introduction 200 years earlier, may have provided also a good opportunity for taking into account socio-economic and demographic shifts in the population of Athens and Attica which were not anymore adequately represented in the composition of the existing *phylai*. In this sense the enhancement for democratic participation resulting from the introduction of the two new *phylai* Antigonis and Demetrias went well beyond a mere restoration of the *patrios politeia*, and may be understood as an expression of the desire of the Athenians to strengthen their ancestral constitution, and to reinforce their democracy at the threshold of an age in which Athenian democracy was to be seriously challenged by the Hellenistic rulers.

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[17] For the property census of 1,000 drachmae as qualification for Athenian citizenship associated with the regime of Demetrios of Phaleron (Diod. 18.74.3) see e.g. van Wees 2011.

van Wees 2011: H. van Wees, Demetrius and Draco: Athens’ Property Classes and Population in and Before 317 CE, JHS 131, 2011, 95-114.

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PIERRE FRÖHLICH (BORDEAUX)

LES PRYTANES D'IASOS, L'*ÉPITROPOS* ET LA QUESTION DU REMPLACEMENT DES MAGISTRATS EN POSTE DANS LES CITÉS HELLÉNISTIQUES*

Abstract: The article examines the replacement of absent officials, in particular temporary replacement. The case of the Prytanes of Iasos, who were able to be replaced by another citizen in the 3rd-2nd c. BC, is the best documented and most difficult. With the help of some parallels, an attempt is also made to elucidate the role of an *epitropos* (representative) who sometimes intervened in this process.

Keywords: Officials, boards of officials, election, replacement, representation, Boule, Iasus, Athens, prytaneis

Les cités grecques des époques classique et hellénistique ne pouvaient fonctionner que grâce au volontariat de dizaines, et plus souvent de centaines de citoyens qui, chaque année, se dévouaient pour exercer une fonction « exécutive », une magistrature, ou la charge de bouleute. Ce dévouement avait apparemment ses limites : on sait ainsi que les collèges des trésoriers de la déesse à Athènes n'étaient pas tous complets, et il en allait de même pour les hiéropes déliens de l'époque de l'indépendance. Cela arrivait pour d'autres collèges de magistrats, même si nos renseignements sont très fragiles[1]. La collégialité palliait en partie ces difficultés.

Mais comment pouvait-on pallier la défaillance – permanente ou temporaire – d'un magistrat régulièrement élu ? Cette intéressante question pose de nombreux problèmes institutionnels, comme le mode de désignation du remplaçant, les personnes pouvant être éligibles ou encore la nature de la responsabilité du

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[1] Voir, pour Athènes, Kahrstedt (1936), 32-33, 155-156, Hansen (1993), 271, Bleicken (1995) 276 et 609, avec la bibliographie antérieure et Lafont 2016, 30-33 ; pour Délos, Vial (1984), 172-181. Pour un cas hypothétique à Thespies, Fröhlich (2004), 176.

remplaçant, surtout s'il s'agit d'un remplacement temporaire. Sur tous ces points, nous disposons de fort peu d'informations. Pour l'Athènes classique, nos sources sont rares et souvent ambiguës ; pour les autres cités, on peine à glaner çà et là les très rares exemples de remplacement de magistrats (défaillants ou décédés). Il vaut néanmoins la peine de les évoquer, avant de se concentrer sur le seul cas documenté et apparemment très original, celui des prytanes d'Iasos à l'époque hellénistique. En effet, dans cette cité, les intitulés des décrets nous ont conservé plusieurs cas de prytanes remplacés dans leur charge par un autre citoyen, selon des modalités qui ont suscité des interprétations variées et que l'on tentera d'éclaircir ici, en faisant appel aux rares parallèles disponibles.

1. Remarques préliminaires

La question du remplacement des magistrats a été assez rarement abordée. L'étude la plus détaillée est celle qu'U. Kahrstedt a consacré à Athènes, qui demeure utile, même s'il a tendance à surinterpréter une documentation très lacunaire[2]. Le problème se pose en des termes différents s'il s'agit d'un collège ou d'un magistrat unique.

Dans le cadre d'un collège, il paraît difficile que l'on ait pu procéder à une élection partielle. Il est probable que l'on devait répartir les tâches entre les membres du collège restés en place : c'est assez clair pour les stratèges athéniens, moins sûr pour les autres magistrats, même si l'existence de collèges incomplets va dans ce sens[3]. Pour les magistrats athéniens qui avaient des parèdres, tels les archontes et les euthynes, la vacance était de toute façon palliée par le parèdre, fonction obéissant aux mêmes règles qu'une magistrature classique[4]. En l'absence de parèdre, on pouvait prévoir l'élection d'un remplaçant. C'est ce que préconise Platon dans ses *Lois*[5] et il semble que, dans certains cas, à Athènes, l'on pouvait ainsi tirer de nouveau au sort un remplaçant, ἐπιλαχών. Certaines sources suggèrent même qu'on tirait au sort ainsi un remplaçant pour chaque bouleute, en cas de défaillance (dès la dokimasie), mais c'est loin d'être certain et le caractère systématique de la procédure suscite des doutes : il aurait fallu mobiliser ainsi mille citoyens chaque année[6]. Nous

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[2] Kahrstedt (1936), 124-134.

[3] Kahrstedt (1936), 129-132.

[4] Cf. Kahrstedt (1936), 124-126, avec les nuances de Rhodes (1981), 621-622.

[5] Platon, *Lois*, VI, 766 C : ἐὰν δέ τις δημοσίαν ἀρχὴν ἄρχων ἀποθάνῃ πρὶν ἐξήκειν αὐτῷ τὴν ἀρχὴν πλεῖον ἢ τριάκοντα ἐπιδεομένην ἡμερῶν, τὸν αὐτὸν τρόπον ἐπὶ τὴν ἀρχὴν ἄλλον καθιστάναι οἷς ἦν τοῦτο προσηκόντως μέλον, « si une personne exerçant une charge publique décède plus de trente jours avant le terme de sa propre magistrature, que ceux dont c'est le devoir établissent selon les mêmes modalités un autre (titulaire) pour cette charge ». Sans doute faut-il comprendre cela ainsi : les prytanes (« ceux dont c'est le devoir ») font procéder à une nouvelle élection (« de la même manière ») : cf. Piérart (1974), 106 et 146-147.

[6] Kahrstedt (1936), 123 et n. 5, 126 et surtout Rhodes (1972), 7-8 (dont je suis les doutes légitimes) ; Lafont (2016), 28.

n'avons pratiquement pas d'information sur la façon dont on procédait en cas de décès, mis à part un discours inséré dans le corpus démosthénien, qui suggère que la pratique prônée par Platon pouvait bien avoir été en vigueur à Athènes. Dans le *Contre Théocrine*, l'orateur accuse ce dernier d'avoir assumé la charge de hiérope de son frère après le décès de celui-ci, sans avoir été désigné :

> καὶ τὴν μὲν ἀρχὴν ἣν ἐκεῖνος ἄρχων ἐτελεύτησεν, ἱεροποιὸς ὤν, παρὰ τοὺς νόμους ἦρχεν οὗτος, οὔτε λαχὼν οὔτ' ἐπιλαχών, « la magistrature que celui-ci (son frère) exerçait lorsqu'il mourut, la charge de hiérope, cet individu (Théocrine) l'a exercée illégalement, sans avoir été tiré au sort comme titulaire ou comme suppléant »[7]

Il faudrait en conclure que, pour la charge de hiérope au moins, le décès d'un titulaire imposait le choix d'un remplaçant – ce qui n'est pas sans poser question, car les hiéropes sont plutôt constitués en collèges à Athènes[8]. Il serait surprenant que la règle n'ait pas valu pour d'autres magistrats.

U. Karhstedt suggère même que certains magistrats, lorsqu'ils devaient s'absenter, pouvaient se choisir *d'eux-mêmes* des aides ou des remplaçants, le titulaire assumant seul la responsabilité juridique de la charge[9]. C'est très clair pour les magistrats militaires en campagne, qui pouvaient dans certaines conditions désigner un de leurs subordonnés. Pour les autres magistrats, la documentation ne peut soutenir une telle hypothèse. Les exemples disparates invoqués par Kahrstedt associent :

a) selon lui, un thesmothète employant son propre frère (Théocrine déjà évoqué[10]) : en réalité, Théocrine paraît avoir été une sorte de conseiller influent, sans aucun pouvoir légal, mais, selon l'orateur, assez nuisible pour valoir au thesmothète d'être déposé.

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[7] Ps-Dém., 58 (*C. Théocrine*), 29.

[8] Cf. Rhodes (1972), 127-130. Pour le prêtre des Dionysastai du Pirée, la règle (*nomos*) voulait en cas de décès que le fils succède au père, après un vote de l'Assemblée (*IG* II^2, 1326, 29-31), mais c'est un cas très particulier.

[9] Kahrstedt (1936), 127-129. Dans ce qui suit, j'écarte un autre exemple, invoqué par l'auteur p. 130 pour affirmer que (je traduis) « quand un proèdre manque, chaque membre de sa prytanie peut le remplacer », après tirage au sort : c'est un contresens (sur le grec) et une interprétation abusive (on ne parle de pas de prytanie) de Dém., 24 (*C. Timocrate*), 50 : ἐὰν δέ τις τῶν προέδρων δῷ τινι τὴν ἐπιχειροτονίαν, ἢ αὐτῷ τῷ ὠφληκότι ἢ ἄλλῳ ὑπὲρ ἐκείνου, πρὶν ἐκτεῖσαι, ἄτιμος ἔστω, « et si l'un des proèdres accorde de mettre aux voix (la question), soit pour la personne débitrice, soit pour une autre agissant en son nom, avant qu'il n'ait payé (l'amende), qu'il soit privé de ses droits civiques ». Si cette loi est authentique (c'est peut-être le cas, cf. Canevaro [2013], 132-138), elle se contente d'interdire aux proèdres de faire voter une proposition illégale (cf. Rhodes [1972], 27) qui concernerait le condamné ou une autre personne agissant à la place de celui-ci. Écartons aussi *IG* II^2 1622, 420-422 : le personnage exceptionnellement désigné comme αἱρεθεὶς ἐκ τῆς βουλῆς n'est pas, *pace* Kahrstedt, le remplaçant d'un commissaire défaillant : cf. Rhodes (1972), 119.

[10] Ps.-Dém. 58 (*C. Théocrine*), 27.

b) Lycurgue, agissant en sous-main de son successeur dans la charge financière qu'il ne pouvait plus exercer[11].

c) à l'époque hellénistique, un agonothète, le fils de Phaidros de Sphettos, qui emploie son père : καὶ ὕστ[ερον] τοῦ ὑοῦ Θυμοχάρου ἀγωνοθέτου χειροτονηθέντος [εἰς τὸ]ν ἐνιαυτὸν τὸν ἐπ' Εὐβούλου ἄρχοντος συνεπεμελήθη καὶ τούτων πάντων, « et, par la suite, son propre fils Thymocharès ayant été élu agonothète pour l'année de l'archonte Euboulos, il y prit part (avec lui) en tout point »[12].

d) Euryklès qui, dans la deuxième moitié du IIIe siècle (le décret a été voté vers 215 a.C., mais les charges ont été assumées auparavant, après *ca* 247), agit comme trésorier des fonds militaires par l'intermédiaire de son fils, puis de nouveau avec lui comme agonothète : ἐπιμέλειαν [κα]ὶ τὴν τῶν στρατι̣[ωτικῶν – – *ca* 10 – – διε]ξήγαγεν διὰ τοῦ ὑοῦ καὶ προανήλωσεν̣ [κ]αὶ [ἐκ τῶν ἰδίων οὐ]κ ὀλίγα χρήματα καὶ ἀγωνοθέτης ὑπακούσα[ς προς?ανήλω]σεν ἑπτὰ τάλαντα καὶ πάλιν τὸν ὑὸν δοὺς [εἰς ταύτην?] τὴν ἐπιμέλειαν καὶ καλῶς τὴν ἀγωνοθεσ[ίαν ἐκτελέσας] προσανήλωσεν οὐκ ὀλίγα χρήματα, « (ayant assumé ?) aussi la charge (de trésorier ?) des fonds militaires, il la géra par l'intermédiaire de son fils, il avança sur ses fonds propres des fonds importants ; comme agonothète, obéissant (aux demandes ?), il avança (?) sept talents, donnant de nouveau cette responsabilité (?) à son fils, et il accomplit la charge d'agonothète d'une belle façon, en avançant des fonds importants »[13].

Dans ce dernier exemple, on a pu qualifier Mikiôn, le fils d'Euryklès de « remplaçant », *Stellvertreter*, et la formulation du texte montre bien que l'on considérait que, derrière la fonction du fils, il y avait le père. On ne doit pas pour autant interpréter la situation comme le fait Kahrstedt : Mikiôn devait avoir été élu régulièrement à ces fonctions que son père avait exercées bien auparavant (la chose est certaine) et pour lesquelles ce dernier n'était plus éligible, selon l'hypothèse très vraisemblable de Chr. Habicht[14]. C'est donc une situation analogue à celle de Lycurgue. De fait, ces exemples montrent bien que les magistrats, outre les subordonnés habituels (secrétaires, sous-secrétaires, serviteurs divers, esclaves publics) pouvaient s'entourer de façon informelle de proches, qui les conseillaient et qui, parfois, avaient l'expérience de la même magistrature ; que parfois même ces conseillers, des notables de premier plan, étaient considérés comme les véritables

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11 Ps.-Plut., *X Or.*, 841 C. Cf. Rhodes (1972), 107.

12 *IG* II^3, 985, 56-60.

13 *IG* II^3, 1160, 2-7. Le texte est incertain dans le détail, mais le sens en est clair. Je garde pour le sens quelques restitutions écartées par la dernière réédition des *IG* ; cf. Habicht (1982), 118-119 et Knoepfler (2013), 430. Les charges susmentionnées se situent entre la charge de trésorier des fonds militaires exercée par Eurykleidès seul (248/7) et le vote du décret, mais de préférence pas avant les années 220, sans que l'on puisse être précis (cf. Habicht [1982], 121, 123 et les *IG, ad loc.*).

14 Habicht (1982), 123 (avec 119 pour le terme *Stellvertreter*) et Habicht (2000), 325.

personnes agissantes et que les titulaires pouvaient sembler être des hommes de paille. De telles pratiques ne peuvent pas surprendre, tant on les retrouve à d'autres époques. Mais la place de ces personnes, toute tolérée qu'elle semble avoir été, n'avait pas de fondement légal. Ces exemples n'ont en fait rien à voir avec le remplacement des magistrats défaillants, absents ou décédés.

Comme il fallait s'y attendre, dans le reste du monde grec, en dehors de l'exemple d'Iasos dont il sera question plus loin, nos informations sont encore plus minces. Pour les collèges, nous ne disposons d'informations fiables que pour Délos indépendante, qui constitue par ailleurs un cas particulier. Dans cette cité, lorsqu'un magistrat aux compétences financières (notamment les hiéropes, gestionnaires de la fortune du dieu) mourait en charge, son ou ses fils devaient le remplacer (en portant le même titre), y compris dans la reddition de comptes et dans la transmission des fonds et des responsabilités, la *paradosis*[15]. Mais c'est le seul cas connu et il concerne des magistrats maniant des fonds importants, choisis pour leur fortune, dans des très petits collèges : 2 à 4 pour les hiéropes ; 1 à 3 pour les trésoriers comme pour les trictyarques, les trois magistratures pour lesquelles la pratique est attestée. Qu'il s'agisse d'une obligation légale ne fait guère de doute : dans certains des textes on précise qu'un des magistrats occupe cette place comme héritier de son père ; on peut aussi relever le cas d'enfants mineurs, représentés à cette place par leur tuteur[16].

Mais certaines magistratures étaient dévolues à un titulaire unique, comme, souvent, les éponymes ou, dans la plupart des cités, les magistrats chargés de l'éducation, gymnasiarques et pédonomes. Pour ces *archai*, nos informations sont d'une tout autre nature. Lorsque ces charges se sont rapprochées du modèle de la liturgie, à la fin de l'époque hellénistique et surtout sous le Haut Empire, et que, parfois, leurs titulaires pouvaient être des femmes voire des enfants, de toute évidence incapables d'exercer, par exemple, la fonction de gymnasiarque, on désignait alors des épimélètes, des préposés faisant fonction à la place des « magistrats-liturges »[17]. D'une certaine façon, il s'agissat de remplacer un titulaire légalement désigné mais incapable d'exercer réellement sa charge. Un seul exemple nous permet de remonter plus haut dans le temps (*ca* 240 *a.C.*) et d'aborder notre sujet : le grand bienfaiteur Boulagoras de Samos a lui-même exercé la charge d'épistate du gymnase, suite à la défaillance du titulaire :

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[15] Cf. Vial (1984), 60, 180 (*paradosis*) et 199-200, avec les exemples.

[16] Cf. *e.g.* *ID* 203 B 24 ; 442 A, 11-12 (héritiers) ; 442 B, 113 et 443 Bb, 37 (tuteur), avec Vial (1984), 60. Voir aussi une autre formule *ID* 442 B, 19-20 (avec Vial [1984], 32).

[17] Voir les exemples rassemblés par L. Robert : Robert (1935a), 449-450, et (1967), 43 et n. 6 ; aussi Dmitriev, (2005) 120. La présentation que j'en fais est par nécessité rapide, car cette évolution ne fut pas non plus systématique.

τοῦ τε γυμνασίου χειροτονηθεὶς κατὰ τὸν νόμον | ἐπιστάτης ὑπὸ τοῦ δήμου διὰ τὸ ἐγλιπεῖν τὸν γυμνασιαρχοῦντα ἴσως κ[αὶ] | καλῶς προέστη τῆς τῶν ἐφήβων καὶ τῶν νέων εὐκοσμίας· « élu ensuite à main levée par le peuple, conformément à la loi, comme préposé au gymnase, parce que celui qui exerçait la gymnasiarchie avait fait défaut, il a fait régner avec une parfaite équité la discipline chez les éphèbes et les jeunes gens »[18].

Nous ignorons tout de la nature de cette défaillance, ou de cette incapacité. Nombre de commentateurs l'ont comprise comme la défaillance du titulaire d'une charge devenue une liturgie trop coûteuse, y voyant le premier exemple (à Samos) de l'évolution de la fonction de gymnasiarque évoquée plus haut et le signe de graves difficultés qu'aurait rencontré la cité[19]. Le texte ne dit précisément rien des dépenses qu'aurait eu à assumer Boulagoras comme épistate du gymnase, contrairement aux autres parties du décret, toujours précises sur ces aspects financiers : on dit simplement qu'il veilla à l'*eukosmia*, la discipline des éphèbes et des jeunes gens (l. 24-25). C'est conforme à ce que l'on sait de la gymnasiarchie, qui n'est en général pas une liturgie à cette époque[20]. D'autres ont compris que le gymnasiarque était décédé, selon une acception bien connue du verbe ἐκλείπω[21]. Cependant, on attendrait le complément τὸν βίον[22] et l'on ne voit pas alors pourquoi l'on n'aurait pas élu un nouveau gymnasiarque. Surtout, ἐκλείπω est aussi largement attesté au sens de « abandonner », « quitter » et aussi « être défaillant »[23]. On peut donc aussi comprendre ce passage autrement : pour une raison qui n'est pas précisée, le gymnasiarque régulièrement élu s'est révélé incapable d'exercer sa charge –

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18 *IG* XII 6, 11, 23-25, trad J. Pouilloux modifiée (Pouilloux [1960], n° 3).

19 Ainsi (avec des nuances) Ziebarth (1924), 360-361 ; Pouilloux (1960), 32 ; Transier (1984), 76.

20 Cf. Schuler (2004) ; Fröhlich (2009) et Curty (2015).

21 Klaffenbach (1961), col. 314 ; Kl. Hallof, *IG* XII 6 *ad loc.* (p. 15) ; dans le même sens : Chankowski (2010), 168 ; Forster (2018), 134. Le parallèle (établi par Klaffenbach et repris par Hallof) avec le décret d'Olbia pour Protogénès (*IOSPE* I^2 32) ne porte pas : ici, le sens est clairement celui de « fuir » ou « d'abandonner » la cité : l. 11-13 : καὶ διὰ ταῦτα πολλῶν ἐχόντων ἀθύμως καὶ παρεσκεασμένων ἐγλείπειν τὴμ πόλιν, « et que, pour ces raisons, beaucoup étaient désespérés et se préparaient à abandonner la ville… » et 20-22 : ἐγλελοιπέναι δὲ πολλοὺς μὲν τῶγ ξένων, οὐκ ὀλίγους δὲ τῶμ πολιτῶν, ὧν ἕνεκεν συνελθὼν ὁ δῆμος διηγωνιακῶς, « et que de nombreux étrangers avaient fui, ainsi qu'un nombre substantiel de citoyens, raisons pour lesquelles le peuple s'était réuni dans l'angoisse » (trad. Chr. Müller : Müller [2010], 397).

22 Cf. *e. g. I. Magnesia* 92b, 3 ; *Milet* I 3, 147, 48-49.

23 Cf. *LSJ*, *s.v.* ἐκλείπω et les abondants exemples dans le *DGE*, *s.v.* ἐκλείπω (et *supra* n. 21). Ce dernier signale un parallèle dans le vocabulaire juridique, où le verbe substantivé peut désigner l'abandon, le refus (ici d'un testament), Justinien, *Nov.*, I,1 : ἕως ἂν ὁ τελευταῖος ἐκλιπὼν | χώραν ποιήσῃ καὶ τῶν ἔξωθέν τινι... soit dans le latin de l'Authenticum *ita de cetero, donec ultimus relictus locum faciat etiam alicui exterius venientium*, mais qui est traduit par le latin *deficiens* dans la version modernisée : *et sic deinceps, donec ultimus deficiens locum faciat etiam extraneorum alicui* (éd. Schöll-Kroll).

absence, grave maladie, raisons familiales, etc. – et ce dernier était légalement considéré comme « défaillant ». Néanmoins, quel que soit le sens exact de ἐκλείπω, une chose est sûre : comme la loi le prévoyait[24], il a fallu alors procéder à une élection en bonne et due forme, en cours d'année. Néanmoins, l'on n'a pas réélu un gymnasiarque, mais un simple épistate, pourtant un personnage considérable, si l'on en juge par ce que le décret nous dit de l'action de Boulagoras au profit de Samos. Il faut croire que, légalement, il n'y avait qu'un gymnasiarque. Cet exemple est malheureusement très isolé, même s'il se rapproche à certains égards des cas athéniens évoqués plus hauts.

Un autre cas particulier, parfois invoqué, de remplacement de magistrat décédé, est celui d'un secrétaire à Priène au Ier siècle a.C. Dans cette cité, le grand bienfaiteur Zosimos a exercé la charge de secrétaire dans de semblables circonstances, peut-être dans les années 70-60 :

> γραμματεὺς μὲν γὰρ χειροτονηθεὶς τῆς βουλῆς καὶ τοῦ δήμου ἐπὶ στεφανηφόρου Δημέου μηνὸς Βοηδρομιῶνος διὰ τὸ τὸν μὲν προκεχειροτονημένον ἐν ἀρχαιρεσίαις γραμματέα μεταλλάξαι, μηδένα δὲ τὴν χρείαν ὑπομένειν ἐκ τοῦ καιροῦ διὰ τὸ τῆς λειτουργίας βάρος ,« élu secrétaire du Conseil et du peuple sous le stéphanéphore Dèméas, au mois de Boèdromion, en raison, d'une part, du décès du secrétaire préalablement élu lors de l'Assemblée électorale, et, d'autre part, du fait que personne n'assumait cette fonction en raison de la circonstance, à cause du poids de cette liturgie… » [25].

La charge de secrétaire semble avoir été lourde, ce que confirme la suite du décret pour Zosimos, non reproduite ici. Le secrétaire élu avait dû mourir très peu de temps après les élections, puisque Zosimos a été élu pour le remplacer dès le premier mois de l'année : dans ce cas, on ne désignait pas à Priène un faisant fonction, mais l'on élisait un nouveau magistrat et l'on désignait sans périphrase la cause de la nouvelle élection, le décès du titulaire.

2. Les prytanes remplacés à Iasos : les données du problème

De la modeste cité d'Iasos provient une substantielle série de décrets d'époque hellénistique (plus d'une centaine), riches de détails institutionnels. Cette série a

[24] Il n'est pas possible d'identifier la loi en question : il peut s'agir soit d'une loi gymnasiarchique, ce qui serait vraisemblable (la seule loi gymnasiarchique connue, celle de Béroia, *I. Beroae* 1, ne contient aucune clause sur le sujet, ce qui ne signifie malheureusement rien), ou bien une loi d'un régissant les magistratures, voire les élections des magistrats : là encore, nous ne disposons pas de parallèles.

[25] *I. Priene*², 68, 20-22. Boèdromion est le premier mois de l'année, comme le montrent les décrets *I. Priene*², 19, 46-48 ; 22, 18-20 ; 41, 3 ; 65, 176-177 et 69, 53-54. Signalons un décret de Mylasa qui semble régler le problème posé par le décès d'un prêtre, trop fragmentaire pour pouvoir être utilisé : Marek et Zingg (2018), n° 7 (Ier s. a.C.-Ier s. p.C.).

bénéficié d'un groupe d'études de Roberta Fabiani, couronnés par son maître livre, *I decreti di Iasos* (2015). L'auteure a reclassé les documents et procuré une étude d'une minutie unique, aux résultats souvent probants, et dont certaines hypothèses touchent au sujet précisément abordé ici[26].

À Iasos, les intitulés des décrets des IIIe et IIe siècles sont développés, au point de donner régulièrement la liste des prytanes qui présidaient aux réunions du Conseil et de l'Assemblée, lorsqu'ils sont enregistrés en tant qu'auteurs de la proposition formelle du décret, la *gnômè* (πρυτάνεων γνώμη + noms des prytanes au génitif). On ne sait exactement si ces prytanes, dont le nombre varie, la plupart du temps de 6 à 8, étaient une commission du Conseil (semestrielle) ou un collège de magistrats (également renouvelé chaque semestre), comme le pense R. Fabiani[27]. Mais le rôle de bureau, chargé de mener l'ordre du jour, d'introduire les décrets passés par le Conseil, est assez clair[28]. La situation est néanmoins rendue plus obscure par le décret d'une tribu pour un phylarque, récemment publié, qui se conclut ainsi :

> πρυτάνεις προέθηκαν καὶ ἐπεχειροτόνησαν Σάτυρος Διοδώρου, Ἱπποκράτης Ἱεροκλείους, « Les prytanes qui ont mis en délibération et ont mis aux voix (sont) Satyros fils de Didôros, Hippokratès fils de Hiérokès. »[29]

La présence de deux prytanes, chargés de présider l'Assemblée de cette tribu, intrigue. R. Fabiani semble considérer qu'il ne s'agit pas des mêmes magistrats que les prytanes qui président l'Assemblée de la cité. P. Hamon suggère au contraire que les deux prytanes présidant l'Assemblée de la tribu auraient pu constituer également le bureau de l'Assemblée de la cité, avec ceux envoyés par les autres tribus. Mais, comme il le reconnaît, l'hypothèse se heurte au caractère insolite d'une cité où des magistrats interviendraient tant au niveau infra-civique que civique et, d'autre part, au fait que l'existence de cinq tribus aboutirait à un total de dix prytanes, chiffre jamais atteint dans les listes de prytanes dont nous disposons[30]. Dans l'état actuel de la documentation, il est difficile de trancher entre les deux hypothèses. Néanmoins, l'existence de magistrats portant le même nom au niveau civique et infra-civique n'est pas impossible : c'est le cas des magistrats contrôleurs de l'Athènes classique, euthynes et logistes, qui se retrouvent dans certains dèmes[31].

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26 Surtout Fabiani (2012) et Fabiani (2015).

27 Cf. Fabiani (2012), 154 et Fabiani (2015), 281.

28 Le développement de Rhodes et Lewis (1997), 338-340, qui était utile, est désormais périmé comme les listes de Carlsson (2010), 296-307, et sa mise au point (173-174) également (sur ce livre, cf. Hamon [2009]). Cf. Fabiani, (2010), 476-477 ; (2012), 124-25 ; (2015), 297-299.

29 Texte dans Fabiani (2017), 167, l. 18-19.

30 Cf. respectivement Fabiani (2017), 185 ; P. Hamon, *BE* 2018, 408. Pour le nombre des tribus à Iasos, cf. Fabiani (2010), 477-480 ; (2017), 169-171.

31 Cf. Fröhlich (2004), 346-353.

Or, dans un petit nombre de textes, situés entre le milieu du IIIe et le début du IIe siècle, certains prytanes sont désignés comme ayant été remplacés par une autre personne, installée par le prytane normalement désigné, κατασταθείς (quand il s'agit de l'épistate, au nominatif) *uel* κατασταθέντος (dans la liste des prytanes ayant présenté la *gnômè*) ὑπὸ τοῦ δεῖνος[32]. Pour donner un exemple bien conservé, voici l'intitulé d'un décret pour de juges venus de Clazomènes (années 220-210 a.C.) :

> Ἐπὶ στεφανηφόρου Ἱεροκλέους τοῦ Ἰάσονος, | γρ[α]μματέως δὲ Στησιόχου τοῦ Θεοδότου· | [ἔδοξ]ε τῆι βουλῆι καὶ τῶι δήμωι, ἕκτηι | [ἱστ]αμένου· Ἀπολλώνιος Νυσίου τοῦ | {[το]ῦ} Ἀπολλωνίου ἐπεστάτει κατασταθεὶς ὑπὸ Λαμπίτου τοῦ Μητροδώρου· πρυτάνεων | γνώμη Ἀπολλωνίου τοῦ Νυσίου τοῦ | Ἀπολλωνίου κατασταθέντος ὑπὸ | Λαμπίτου τοῦ {τοῦ} Μητροδώρου, | Στράτωνος τοῦ Μητροδώρου, Ἀναξικλέους | τοῦ Παρμενίσκου, Ἰάσονος τοῦ Μενεδήμου, | Ἀρκεσίλα τοῦ Μένητος, Ἀρχιδήμου τοῦ | Σαραπίωνος, Δημέου τοῦ Ἀσκληπιάδου·| περὶ ὧν ἐπῆλθεν Ἀνάξανδρος Ἑρμα[ί]σκου...
> « Sous le stéphanèphore Hiéroklès fils de Iasôn, étant secrétaire Stèsiochos fils de Théodotos ; il a plu au Conseil et au peuple, sixième jour du mois commençant ; Apollonios fils de Nysios (lui-même) fils d'Apollonios, mis en place par Lampitès fils de Mètrodôros, était président ; proposition des prytanes Apollonios fils de Nysios (lui-même) fils d'Apollonios, mis en place par Lampitès fils de Mètrodôros, Stratôn fils de Mètrodôros, Anaxiléos fils de Parméniskos, Iasôn fils de Ménédèmos, Arkésilas fils de Ménès, Archidèmos fils de Sarapiôn, Dèméas fils d'Asklépiadès ; au sujet de ce qu'a exposé Anaxandros fils d'Hermaiskos…[33] »

Ici, l'un des prytanes normalement en charge, Lampitès, s'est fait représenter par Apollônios fils de Nysios, lequel est par ailleurs devenu président. C'est un cas très original de remplacement d'un magistrat (s'il s'agit bien de magistrats) *à l'initiative du titulaire*, victime d'un quelconque empêchement. Il n'y a donc pas d'élection formelle : il faudrait supposer que c'est à Iasos un empêchement temporaire. L'explication de cette pratique qui, de prime abord, semble n'apparaître dans aucune autre cité, n'est pas aisée. La variation du nombre de membres de ce collège pourrait faire penser qu'il s'agissait d'une mesure destinée à pallier une absence, afin que ce collège soit complet, soit au nombre de 8 prytanes (le chiffre le plus élevé dans nos listes). Cependant, le tableau de la documentation disponible (cf. tableau 1) montre que le remplacement des prytanes peut affecter des collèges tant de 8 que de 6 ou 7 membres et même concerner le président de l'Assemblée, l'épistate, issu de ce collège. Si le but de la mesure était de porter obligatoirement le collège à 8

[32] *I. Iasos* 25, 4 et 7 ; 26, 3 ; 82, 2-3 et 5 ; *SEG* 41, 930, 5 et 8 ; 41, 931, 19 et 22 ; 932, 27 ; 933, 5 ; 57, 1046, 6 (cf. Fabiani [2015], 320-321) ; 1077, 6 et 10 ; 1081, 5 ; 1082, 2 (liste déjà dans Maddoli [2007], 323).

[33] *SEG* 41, 930, l. 1-32. Pour la date, cf. Fabiani (2015), 265.

membres, elle a globalement échoué. Autrement dit, cette pratique ne semble pas être liée directement à la nécessité d'atteindre le nombre de 8 prytanes.

Une autre piste pourrait être explorée, celle de la procédure et du calendrier : le remplacement des prytanes serait-il lié à un moment donné du calendrier comme, par exemple, une obligation de présence lors *archairesiai*, des assemblées électorales ? C'est une question assez difficile, car il n'est à l'heure actuelle pas possible de reconstituer le calendrier d'Iasos et il faut mettre en relation tant la nature des décrets votés, que le mois, le jour, la place éventuelle du mois dans l'année et bien entendu le nombre de prytanes. Or, R. Fabiani a également proposé une subtile reconstitution du calendrier du travail des assemblées en relation avec la taille du collège, qui aurait correspondu au nombre de séances de l'Assemblée (de 6 à 8), avec une obligation de présence, afin que le collège soit toujours complet, du moins à partir du milieu du IIIe siècle. Le raisonnement repose sur les bases suivantes[34] :

1) Le décret réglementant la distribution des fonds de l'*ekklesiastikon* pour la participation aux assemblées (début IIIe s. ?), attribue aux néopes la responsabilité de mesurer le temps pendant lequel les citoyens pouvaient recevoir leur jeton de présence au début des assemblées, par le biais d'une clepsydre : τοὺς δ[ὲ νεωποίας] ἑκάστου μηνὸς ἕκτηι ἱσταμένου καὶ ταῖς *vacat* [ἀρχαιρ]ẹσίαις (?) ἐκτιθέναι ἅμα τῆι ἡμέραι κεράμιον μετρητιαῖον [ὕδατο]ς πλήρες, « que les néopes, le sixième jour de chaque mois, et lors des *archairesiai* (?), exposent au point du jour un récipient de la contenance d'un métrère, rempli d'eau… ». Ce texte montre bien ce qu'indiquent les autres inscriptions, à savoir qu'il y avait une assemblée mensuelle à Iasos, qui se tenait le 6 du mois, plus l'assemblée destinée à l'élection des magistrats[35]. R. Fabiani en conclut qu'il y avait normalement 13 réunions de l'Assemblée à Iasos, 6 pour un semestre et 7 pour le semestre des élections.

2) Le nombre de prytanes par collège semble être déjà fixé à 6 avant le milieu du IVe siècle, mais ce chiffre n'est pas vraiment atteint dans les listes du dernier tiers du IVe siècle. À partir de réformes institutionnelles du début du IIIe siècle, si le chiffre varie, il est toujours au moins de 6 membres et jamais supérieur à 8[36]. Il y a une seule exception, les deux décrets *I. Iasos* 39 et *SEG* 57, 1057 (années 270-260), qui doivent avoir été votés le même jour (ils ont le même épistate), mais le premier enregistre 5 prytanes et le second 7 prytanes. G. Maddoli et R. Fabiani supposent

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[34] Cf. Fabiani (2015), 281-282 (nombre de prytanes), 297-299 (lien avec le calendrier). Pour les besoins de la démonstration, je reprends néanmoins ses arguments dans un ordre différent.

[35] Gauthier (1990), 431-432, à propos du texte restitué dans le même article (*SEG* 40, 959), l. 6-9 (trad. Gauthier), et Fabiani (2015), 298.

[36] 6 prytanes figurent dans le décret confisquant les biens des adversaires de Mausole, *I. Iasos* 1, 12-14, peut-être à placer à l'époque de la « guerre des alliés », cf. Fabiani (2015), 14 et, pour la reconstitution des évolutions institutionnelles, 289-291 et, pour les références, *infra* le tableau 2.

que les *probouleumata* de ces deux décrets ont été rédigés lors de deux journées différentes[37].
3) Ce nombre de 6 par semestre correspondrait étroitement au nombre d'Assemblées à présider : l'épistate jouant ce rôle est en effet membre du bureau des prytanes. Il faudrait alors supposer que tous les membres de ce collège devaient à tour de rôle assumer cette présidence, sans exception. Par conséquent, il fallait disposer chaque année de 7 + 6 prytanes, soit au minimum de 13 prytanes.
4) Un très grand nombre de décrets, la plupart des décrets honorifiques, sont votés lors du mois d'Aphrodision[38], dont nous savons qu'il se place au second semestre de l'année. Mais – du moins à partir du IIIe siècle – ce vote a lieu le 6 du mois : l'Assemblée pendant laquelle on votait les honneurs pour les étrangers n'était donc pas l'Assemblée « électorale », contrairement à une pratique attestée dans bien des cités.
5) Si, à partir du milieu du IIIe siècle, le nombre de prytanes par collège oscille entre 6 et 8, ce dernier chiffre n'apparaît jamais pour Aphrodision, où on en compte 6 ou 7. Par conséquent, il n'y avait jamais 8 prytanes au second semestre. Le chiffre de 8 prytanes ne pouvant correspondre qu'à un semestre à assemblée électorale, celle-ci devait se tenir au premier semestre.
6) S'il y parfois 8 prytanes, c'est qu'il devait y avoir 2 jours nécessaires pour la tenue des élections, comme à Samos[39].
7) Il subsiste des collèges à 7 membres pour le second semestre (en Aphrodision) : ils s'expliquent par l'existence d'un mois intercalaire.
8) Il y a un assez grand nombre d'attestations de collèges à 7 prytanes pour le second semestre : il faut alors supposer que le système calendaire d'Iasos comportait fréquemment des mois intercalaires.
Pour résumer le système ainsi détaillé : le chiffre normal du collège était de 6 membres pour un semestre ordinaire à 6 assemblées, 7 le semestre des *archairesiai*, chiffre respectivement porté à 7 en cas d'introduction de mois supplémentaire dans le calendrier (semestre II), ou à 8 dans le semestre des *archairesiai* (semestre I) s'il y avait besoin de deux jours d'élections. Tous ces collèges ne devaient fonctionner qu'au complet, d'où l'obligation de se faire remplacer pour un prytane absent. Ce système ingénieux donne une cohérence remarquable à une situation embrouillée, et semble lever toutes les incohérences et bizarreries de la situation des prytanes d'Iasos, puisqu'il explique tant l'oscillation du nombre de prytanes (liés au nombre de réunions de l'Assemblée) que la nécessité d'effectuer un remplacement, selon les

[37] Maddoli (2007), 261 ; Fabiani (2015), 206. R. Fabiani me suggère *per ep.* qu'un des deux décrets contient la liste des prytanes présents lors du Conseil et l'autre la liste de ceux ayant présidé l'Assemblée. Cela paraît peu probable, car il s'agit de décrets analogues (décrets honorant des étrangers) et l'on ne voit pas la nécessité d'enregistrer deux listes de deux étapes différentes pour le résultat d'un processus identique.

[38] Voir le tableau de Fabiani (2015), 298, et *infra* le tableau 2.

[39] Cf. Gauthier (2001), 221-222.

cas, quand il fallait un bureau de 6, 7 ou de 8 membres, et ce, pour la période où apparaît notre phénomène, à partir du milieu du IIIe siècle. Pour autant, ce schéma me semble se heurter à un faisceau d'obstacles. On peut en effet soulever les réserves suivantes :

1) La situation évoquée par le règlement de l'*ekklesiastikon* vaut pour le début de l'époque hellénistique. Ces règles ont-elles été immuables ? N'ont-elles pas pu changer entre le début du IIIe siècle et la seconde moitié du même siècle, époque pour laquelle R. Fabiani reconstitue le système institutionnel qui vient d'être décrit ? Le calendrier a pu aussi être réformé, comme ce fut le cas à Samos et dans d'autres cités[40]. On pourra formuler la même observation à propos du nombre de 6 pour le collège de prytanes dans *I. Iasos* 1, document antérieur au milieu du IVe siècle.

2) Les *archairesiai* sont attestées à Iasos par deux décrets du IVe siècle, où elles sont précisément l'occasion du vote d'honneurs accordés à des étrangers[41]. Il y a eu une nette évolution, puisque, par la suite, ces mêmes *archairesiai* ne sont apparemment plus l'occasion des votes d'honneurs pour les étrangers. Cette évolution était effective au plus tard au début du IIIe siècle ; cela ne nous indique malheureusement pas le mois où se tenaient ces *archairesiai*. Le terme réapparaît bien plus tard, puisque c'est l'occasion du vote des honneurs pour le pédonome C. Iulius Capito, probablement au Ier s. p.C. (*I. Iasos* 99).

3) Iasos n'est pas une grande cité : il serait surprenant que, dans cette seule cité, les assemblées électorales se fussent tenues 6 mois avant la fin de l'année, occupant de surcroît deux jours[42].

4) Le raisonnement repose sur des documents dont certains sont incomplets : par exemple, pour le décret *I. Iasos* 82 (à 8 prytanes), le mois n'est pas connu, comme c'est le cas de 14 des 30 décrets enregistrés dans le tableau 2. Le nombre de prytanes est souvent incertain (pour près de 10 décrets)[43]. Les incertitudes sont donc trop grandes pour que l'on puisse raisonner sur une base solide.

5) Nous ne savons pas si le nombre de prytanes enregistrés dans la *gnômè* correspond à celui présent lors des séances du Conseil ou de l'Assemblée. Nous avons vu que, dans les années 270-260 (soit avant les évolutions aboutissant à l'obligation de remplacement), deux décrets votés lors de la même séance comportaient, l'un, une liste de 5, l'autre, de 7 prytanes[44]. Il est invraisemblable que

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40 Cf. Gauthier (2001), 219-220 et le bilan, 226-227.

41 *SEG* 36, 982 B, 2 et 983, 2-3. Pour les datations (respectivement années 380-370 et années 360), cf. Fabiani (2015), 253.

42 Ph. Gauthier juge par exemple impossible que les Samiens aient pu procéder ainsi : Gauthier (2001), 220.

43 Dans le second décret pour des juges de Cnide *SEG* 57, 1046 III, dont nous n'avons que des bribes de la liste des prytanes, R. Fabiani (Fabiani [2015], 320-321 n° 26) restitue l. 3-4 : πρυτάνεων [γνώμη – – – – – – | τοῦ – – – – – – κατασταθέντος ὑπὸ – – – – – –].τίδου, ce qui donnerait un collège à 6 prytanes : mais la restitution de κατασταθέντος ὑπό est gratuite et l'on pourrait tout autant trouver la place pour 7 prytanes.

44 *I. Iasos* 39 et *SEG* 57, 1057 (*supra* p. 298).

2 prytanes aient quitté l'Assemblée en cours de séance. Faut-il imaginer une simple négligence du secrétaire ? Ce n'est pas impossible en soi, mais c'est surprenant pour deux décrets issus de la même séance. On peine aussi à croire que 2 prytanes aient refusé de s'associer à une des deux propositions. Il paraît donc préférable de suivre l'opinion de G. Madddoli et de R. Fabiani, pour qui le nombre des prytanes enregistrés dans la *gnômè* est celui de ceux qui étaient présents lors de la séance du Conseil où furent rédigées les deux propositions[45]. Dans ce cas, le nombre de prytanes de la *gnômè* des décrets d'Iasos n'est pas celui de ceux présents à l'Assemblée, mais lors des séances du Conseil. Or, on constate que, dans les deux décrets déjà évoqués, non seulement le nombre de prytanes est différent, mais aussi l'ordre dans lequel ils sont cités. Dans les cas parallèles de décrets votés lors d'une même séance, les prytanes sont à chaque fois énumérés dans le même ordre[46]. Cela soutiendrait l'interprétation Maddoli-Fabiani, Il faudrait donc en conclure que les prytanes énumérés dans la mention de la *gnômè* des prytanes n'étaient pas nécessairement présents lors de l'Assemblée, puisque leur nom correspondrait à la rédaction de la proposition en amont. La conséquence en serait que le nombre de prytanes présents dans les listes de la *gnômè* n'a aucun rapport avec le nombre de séances de l'Assemblée, du moins avant le milieu du IIIe siècle.
6) Le postulat selon lequel le nombre de prytanes correspond aux nombre d'épistates et donc au nombre d'assemblées est la clef de voûte du système. Cela suppose que, au moment de l'élection des prytanes, en fonction pour un semestre, le nombre de séances était connu et fixe. Mais comment faisait-on lorsque la nécessité imposait la réunion d'une assemblée extraordinaire ? Si le principe invoqué par R. Fabiani est juste, il n'y avait qu'une possibilité, qu'un des prytanes soit épistate à deux reprises. Ce serait en contradiction avec le principe que l'on suppose comme présidant à la nature de ce collège (un épistate-une séance, avec une rotation égalitaire entre les membres du collège), et, encore une fois, sans parallèle dans d'autres cités – même si nos connaissances sur les présidents de séance sont bien minces[47]. Or, ce n'est pas un problème théorique : vers 195, recevant lors du mois d'Élaphébolion une lettre de la reine séleucide Laodice, les prytanes convoquent une assemblée extraordinaire pour faire voter des honneurs pour la reine (et son époux Antiochos III) en réponse aux générosités de la reine : Ἐλαφηβολιῶνος· [πρυτ]άνεων ἐκκλησίαν συναγαγόντων τριακάδι, « mois d'Élaphèboliôn, les prytanes ayant réuni l'Assemblée le trente (du mois) »[48]. Certes, une assemblée extraordinaire n'était pas prévisible, mais la convocation de telles réunions devait être fréquente, dans un monde où la guerre était incessante, ses aléas innombrables et la correspondance

[45] *Supra* p. 298 et n. 37.
[46] Respectivement *SEG* 930, 1-32 + 931, 14-57 ; *SEG* 41, 932, 15-42 + 933; *I. Iasos* 37 et 53 (cf. tableau 2).
[47] C. Rhodes et Lewis (1997), 482-484 (qui serait à reprendre).
[48] *I. Iasos* 4 (Ma [2004], 26 A), 3 (datation de l'arrivée de la lettre) ; 34-35 (Ma [2004], 26 B, 2-3) (décret cité ici).

avec les souverains intenses, pour ne prendre que deux exemples de motifs pour une réunion d'une assemblée extraordinaire[49]. En d'autres termes, si la date et le nombre ne pouvaient en être prévus dans la routine institutionnelle, leur existence était certaine.

7) En réalité, il n'y a aucune nécessité à ce que le nombre de prytanes soit fixé par le nombre de présidences de séances qu'ils devaient assumer. Il est certes par exemple possible (mais non certain) que, à Kymè, le collège des stratèges, dont la présidence comportait un « stratège mensuel », ait comporté 12 membres[50], mais cela correspondait au nombre de mois, pas des séances de l'Assemblée (dont le rythme nous est inconnu), et par ailleurs aussi au nombre de tribus. De fait, pour les raisons évoquées ci-dessus, ce postulat me semble intenable. Or, c'est sur lui que repose tout le système.

8) À partir des années 270-260, l'épistate est toujours membre du collège des prytanes auteurs de la *gnômè*. Il n'est pas sûr que ce soit le cas auparavant ; dans les documents antérieurs, malheureusement extrêmement mutilés (cf. tableau 1), on ne retrouve jamais le nom de l'épistate dans les fragments de la liste des noms des prytanes. Ce peut bien entendu être un hasard, car presque aucune séquence de nom-patronyme n'est conservée intégralement. Mais ce serait un singulier hasard, alors que les collèges sont précisément ceux qui sont les moins étoffés (de 3 à 5 membres). Si donc l'épistate était alors enregistré à part, y a-t-il eu ensuite un simple changement de rédaction, alors qu'il aurait toujours été membre de ce collège[51] ? On aurait d'abord évité de mentionner parmi les auteurs de la *gnômè* le prytane devenu président, puis on aurait choisi malgré tout d'écrire une deuxième fois son nom. Ou était-il d'abord choisi en dehors de ce collège, avant qu'une réforme n'intervienne, qui fasse que l'épistate était choisi parmi les prytanes ? Dans tous les deux cas de figure, l'épistate est bien choisi pour la séance de l'Assemblée, au début de celle-ci, sur le modèle athénien[52], et non pas dès la rédaction de la *gnômè*. Des évolutions dans la façon de sélectionner les informations dans les décrets mis en forme par les secrétaires et gravés sont toujours possibles ; la première solution me semble néanmoins peu vraisemblable : les auteurs de la *gnômè* voient leur responsabilité légale engagée et il serait difficilement compréhensible d'en affranchir un membre du collège, sous prétexte de l'exercice de la présidence de l'Assemblée. L'hypothèse d'une réforme est préférable. Elle pose la question de savoir parmi qui l'épistate était choisi avant d'être pris parmi les prytanes : on ne voit guère que les bouleutes, selon une pratique proche de l'Athènes du IVe siècle. Si cette hypothèse était juste, elle rendait probable que les prytanes aient été eux-aussi pris parmi les conseillers.

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49 Pour les assemblées extraordinaires, cf. les remarques de Rhodes et Lewis (1997), 13-14 (Athènes), 505-506 (autres cités).

50 Cf. Hamon (2008), 64.

51 Rhodes et Lewis (1997), 339 et Fabiani (2015), 26, affirment que l'épistate est toujours membre de ce collège.

52 Cf. Hansen (1993), 171-172 ; Bleicken (1995), 193-195, 231-232.

Mais trop d'incertitudes demeurent sur la nature de cet épistate et la documentation est trop lacunaire pour que l'on puisse dépasser le stade de la conjecture.
9) Enfin, il existe au moins un décret d'Aphrodision qui n'est pas voté le 6 du mois, mais le 10 : le décret pour les épimélètes de l'*archeion*, donc des citoyens[53]. À la différence d'*I. Iasos* 4, ce décret honorifique ne pouvait avoir motivé la réunion d'une assemblée extraordinaire. Iasos a fait graver très peu de décrets pour des citoyens, mais nous avons vu que, l'un d'entre eux, certes tardif pour notre propos (Ier s. p.C.) a été adopté lors des *archairesiai*[54]. L'hypothèse la plus économique est que les *archairesiai* pouvaient alors avoir lieu en Aphrodision, en plus de la séance régulière du 6 et après celle-ci. Depuis le début de l'époque hellénistique (au plus tard le milieu du IIIe siècle), l'assemblée du 6 était celle où l'on votait d'ordinaire les honneurs pour les étrangers, ou plus exactement où on leur accordait la proxénie et la citoyenneté, réservées à un second vote après les « délais légaux »[55]. En revanche, l'Assemblée électorale aurait été la réunion à l'occasion de laquelle on aurait pu concéder des honneurs aux citoyens ayant exercé une charge publique, à la fin de l'année, vote dont le lien avec les élections fait sens[56]. On pourrait envisager qu'Aphrodision ait été le mois régulier pour les élections, mais l'on ignore s'il s'agit du douzième mois de l'année et l'on ne peut exclure que les *archairesiai* aient pu parfois se tenir un autre mois, celui d'après, si Aphrodision est l'avant-dernier mois[57].

Quoi qu'il en soit, il me semble que la composition du collège des prytanes n'était pas liée au calendrier des séances de l'Assemblée et que la variation du

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[53] *SEG* 57, 1081, 1-2 : [Ἐπ]ὶ στεφανηφόρου Ἀνθ[έως] τοῦ Δράκοντος, μηνὸς Ἀφρ[οδισι]ῶνος, γραμμα[τέως δὲ – – – – – – – τοῦ] Ἀριστοκράτου, δ[ε]κ[άτηι]. Dans *BE* 2009, 451, j'avais émis des doutes sur la lecture du nom du mois, attendant une date au 6 du mois. Sous réserve d'une autopsie (qui me semble toujours nécessaire), ces doutes n'ont plus lieu d'être. Il reste encore trois décrets votés en Aphrodision, dont le jour n'est pas conservé (cf. tableau 2).

[54] *I. Iasos* 99. Pour les décrets pour les citoyens, cf. Fabiani (2015), 9 (mais, dans cette liste, *I. Iasos* 82 ne ressortit pas vraiment à cette catégorie : c'est un décret qui répond à une demande de Kalymna et, qui, à cette occasion, décerne l'éloge aux juges iasiens honorés par Calymna) et Forster (2018), 205. Le décret pour l'éphébarque Mélaniôn, *I. Iasos* 98, n'a pas d'intitulé gravé.

[55] Sur ces délais et les deux types de décrets qui en résultent, cf. *BE* 2009, 446 et Fabiani (2015), 292-293, 302.

[56] Cf. Gauthier (1998), 73 n. 31.

[57] Au IIIe s., la plupart des décrets accordant proxénie et citoyenneté, dont on peut supposer qu'ils ont été adoptés lors du second vote (au scrutin secret), l'ont été en Aphrodision (cf. tableau 2). Font exception deux décrets votés dans la même assemblée, dont celui pour un Calymnien (*SEG* 57, 1057), en Élaphébolion. Faut-il supposer qu'il s'agit là aussi d'un mois de la fin de l'année, au moins du second semestre, en raison des délais légaux et des pratiques susmentionnées ? Si la restitution (l. 2 : [χειμερινῆς ? ἐ]ξαμήνου) est juste, il s'agit d'un mois du semestre d'hiver, qui serait alors le second semestre de l'année. La conséquence en serait que l'année iasienne commencerait au solstice d'été. Mais il s'agit d'une simple conjecture, étant donné l'état de la documentation.

nombre de prytanes demeure difficile à expliquer. Il me semble aussi que les élections se tenaient à la fin du second semestre, en Aphrodision ou à un mois proche, et qu'elles devaient avoir été l'occasion des votes pour honorer des magistrats. Ph. Gauthier avait émis l'hypothèse que cette assemblée « avait gardé, tout au long de l'époque hellénistique, son caractère propre et qu'on n'y votait donc pas de décrets, notamment de décret honorifiques ensuite gravés »[58]. Malgré l'existence d'un décret pour des magistrats (les épimélètes de l'*archeion*), la remarque demeure valable, dans la mesure où à Iasos (comme dans la plupart des cités), les décrets gravés pour des magistrats sont des plus rares à la haute époque hellénistique.

Cette situation nous permet-elle d'émettre une hypothèse sur le remplacement des prytanes ? Certes, les cas sont nombreux en Aphrodision (cf. tableau 1), mais ce mois est surreprésenté dans les décrets que nous avons conservés. Par ailleurs, le phénomène apparaît également dans un décret voté en Thargélion et un autre en Gèphorion[59]. On ne peut donc dire qu'une obligation de remplacement des prytanes aurait affecté seulement les séances des élections et des votes de confirmation d'honneurs pour les étrangers : il est peu probable qu'elles aient pu être fixées sur trois mois différents. Du reste, si, comme c'est possible, les listes enregistrent le nombre de prytanes présents lors des séances du Conseil et non de l'Assemblée, il n'y aurait aucune explication à chercher dans le calendrier *des assemblées*.

La question de la représentation des prytanes est encore plus complexe. En effet, dans deux documents, une formule plus originale apparaît, selon laquelle on installe un prytane par le biais d'un *épitropos* (cf. tableau 1). On y a traditionnellement vu un représentant légal, pour une autre forme d'empêchement[60], sans chercher la signification institutionnelle de cette pratique sans parallèle apparent, ni à expliquer la complexité de l'usage d'un double vocabulaire. Rompant avec la *communis opinio* (comme W. Blümel il est vrai[61]), R. Fabiani a été la première à étudier de près ces formules à en proposer un schéma interprétatif, que je tente de refléter maintenant[62]. Elle se fonde sur le décret pour des juges de Chios *SEG* 41, 932, où on lit l. 27-30 : Λεοντ[ί]σκου τοῦ [..]ο[....]ο[υ] κατασταθέντος ὑπὸ Ἀρχιδήμου τοῦ Σαραπ[ίων]ος δι' ἐπιτρόπου [α]ὑτοῦ Εὐκτιμένου τοῦ Ἰατροκλέους. Comme W. Blümel, R. Fabiani pense qu'*épitropos* signifie ici tuteur (*guardian*, *Vormund*) : Archidémos devait donc se faire représenter par son tuteur légal, car il devait être

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58 Gauthier (1990), 432.

59 *I. Iasos* 26 et 25 (avec Fabiani [2015], 24 n.8).

60 Gschnitzer (1973), col. 795 (cela aurait été un moyen – je traduis – « de se dérober à cette pénible obligation de présence », appréciation négative qui témoigne d'une singulière conception de la charge) ; L. Robert, *BE* 1971, n° 621 (p. 504) ; Ph. Gauthier, *BE* 1987, n° 18 (p. 273).

61 Dans *I. Iasos*, p. 40 (*ad* n° 4).

62 Fabiani (2012), 143-145 ; (2015), 213.

mineur et orphelin. Il faudrait alors traduire : « Léontiskos fils de – –, installé par Archidémos fils de Sarapiôn, par l’intermédiaire de son tuteur [celui d’Archidémos] Euktiménos fils de Iatroklès ». De fait, elle fait remarquer qu’une formule voisine apparait dans un autre document typique d’Iasos, les listes de contributions aux chorégies : dans une chorégie du IIe siècle (peu après 156/5 a.C.), on lit en effet :

> παιδία Ἱ̣π̣π̣ο[κ]λείδου το̣ῦ [Ἡ]ρακλείδου δι’ ἐπιτρόπων Μιννίωνος τοῦ Μεν̣ί[ππ]ου, Παυσανίου τοῦ Ἡρακλείδου, ἃς ἐπέδωκεν ὁ πατὴρ αὐτῶν, δραχμὰ[ς δια]κοσίας· « les enfants d’Hippokleidès fils d’Hèrakleidès, par l’intermédiaire de leurs tuteurs Minniôn fils de Ménippos, Pausanias fils d’Hèrakleidès, ce qu’a souscrit leur propre père, deux cent drachmes[63]. »

Les enfants d’Hippokleidès, par l’intermédiaire de leurs tuteurs, ont versé la somme que leur père avait promis de verser. Ce texte donnant alors le sens d’*épitropos* dans les décrets de la cité, cela impliquerait donc que nous aurions à faire à des titulaires de charges mineurs. Dans le décret pour les juges de Chios, la situation serait la suivante : un prytane désigné (Archidèmos), mineur, s’est fait remplacer par Léontiskos, mais n’a pu agir pour ce faire que par l’intermédiaire de son tuteur Euktiménos. R. Fabiani renvoie aux parallèles montrant des familles investissant ainsi des charges publiques par le biais de mineurs – certes guère antérieurs au Ier siècle a.C.[64]. Ce serait en quelque sorte un « exemple avant la lettre », très précoce dans le temps. Il a pu s’agir d’une exception, mais le fait serait néanmoins révélateur de l’amorce d’une évolution à venir, annonçant les mutations de la basse époque hellénistique. Notons que ce même personnage, Archidémos, prytane mineur dans le décret déjà cité, put (apparemment) par la suite être un prytane adulte, d’après deux décrets qui nous sont conservés[65]. Ce devait être de toute façon une exception. Selon R. Fabiani, la charge de prytane était alors dévolue par l’élection, sans condition de sens, mais malgré tout *de facto* réservée à cette époque aux plus riches, ce qui pourrait expliquer le manque de titulaires adultes. Une étude proposopographique montre par ailleurs l’existence de liens entre frères parmi certains prytanes ainsi que deux cas d’itération. À partir de l’ensemble de ces observations, R. Fabiani formule, non sans prudence, l’hypothèse d’une réforme qui, vers 230, aurait renforcé à Iasos le rôle institutionnel des prytanes (apparaissant systématiquement dans les intitulés des décrets), qui auraient joué le rôle de *probouloi*, élus. Les formules de

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[63] *I. Iasos* 184, 5-7. Pour la complexe datation des listes de chorégies iasiennes, cf. *BE* 2009, 455, avec la bibliographie antérieure.

[64] Fabiani (2012), 144-145, avec renvoi à la bibliographie antérieure.

[65] Le décret pour des juges de Clazomènes *SEG* 41, 930, 1-32 (l. 12-13) et celui pour Alexandros de Téos *SEG* 41, 931, 14-57 (l. 25), votés lors de la même séance. Pour la chronologie, cf. Fabiani (2015), 265, qui utilise ce fait pour proposer de placer ces deux décrets un peu plus bas dans le temps (années 220-210) que le décret pour des juges de Chios (années 230).

remplacement évoquées ici seraient l'aboutissement d'un processus visant, d'une part à combattre une forme « d'absentéisme » que l'on distingue au début de l'époque hellénistique (résultat atteint dans la première moitié du IIIe siècle), d'autre part à stabiliser la composition du collège de prytanes au moment où celui-ci prenait une importance plus grande dans la vie publique de la cité, en particulier dans le processus de décision, par une ferme obligation pesant sur eux. Ils seraient aussi devenus un filtre entre les citoyens ordinaires et la prise de décision[66]. En somme, si l'oligarchisation de la cité ne serait pas intervenue dès le IIIe siècle a.C., car la participation au Conseil demeurait étendue, le processus s'y serait progressivement enclenché. Dans ce schéma très cohérent, l'interprétation de la représentation des prytanes (y compris l'existence de prytanes mineurs, représentés par un tuteur, même si ce n'est qu'un indice parmi d'autres), joue un rôle central.

Le schéma présente des difficultés sérieuses, d'abord d'ordre général[67] : a) un tel processus, si précoce, ne connaît de parallèle dans aucune cité, même pour celles qui offrent une documentation aussi importante pour le IIIe siècle (Priène, Athènes, Délos, Cos, Thasos, etc.) ; b) les prytanes et les autres magistrats (ou commissions) de ce type ne paraissent dans aucune autre cité avoir été soumis à une contrainte, qui, en forçant le trait, pourrait presque apparenter leur charge à une sorte de liturgie[68] ; c) les réformes institutionnelles que R. Fabiani croit tirer de l'étude du formulaire relèvent plutôt d'évolutions dans les formules de rédaction, pour des décrets (pour des juges étrangers) très stéréotypés[69] ; d) itérations et présence de membres d'une même famille ne doivent pas surprendre dans une cité de taille assez modeste, dotée d'un Conseil d'une centaine de membres : il devait être difficile d'y effectuer une rotation totale, sur un modèle athénien.

Cela étant dit, le problème de la représentation reste entier et R. Fabiani a raison de souligner que les deux façons de désigner un prytane remplaçant ne sont pas

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[66] Fabiani (2012), 155-157 (p. 157 : « A vantaggio di coloro che venivano designati a rivestire la carica di pritani fu poi, a mio avviso, anche l'altra novità introdotta con la riforma, la prassi della sostituzione in caso di assenza dalla riunione: nominare un sostituto – la cui scelta non sarà avvenuta completamente a capriccio del titolare ma all'interno di una lista di possibili candidati già determinata dalla città – era infatti certamente meno gravoso che non versare una multa. ») ; Fabiani (2015), 295-301. De fait, on voit bien dans le tableau 2 que, jusqu'au premier tiers du IIIe siècle, le nombre de prytanes est parfois inférieur à 6. Après lors, il est supérieur à 6 : cf. Fabiani (2015), 295.

[67] Voir mes brèves remarques, *BE* 2013, 379 (p. 563) et P. Hamon, *BE* 2016, 35.

[68] En le formulant ainsi, je vais au-delà de ce que pense R. Fabiani, qui m'écrit *per ep.* qu'elle ne pense ni à une forme de contrainte et encore moins à une liturgie. Cependant, si, comme elle le suppose, on a résolu d'abord (au début du IIIe s.) le problème des collèges de prytanes incomplets par une amende pour les absents (cf. Fabiani [2015], 289-290), puis par l'obligation de trouver un remplaçant, il s'agit bien d'une contrainte – légale – pesant sur les prytanes. Par ailleurs, si l'on peut (certes dans un cas unique et rien n'indique qu'il s'agit d'argent) en venir à permettre à un mineur d'exercer la charge, on n'est pas loin du modèle de la liturgie (sans les obligations financières).

[69] Cf. P. Hamon, *BE* 2016, 35.

équivalentes, d'autant plus qu'elles sont combinées dans le décret pour des juges de Chios[70]. Il faut donc expliquer cette différence de vocabulaire et tenter le d'expliquer rôle de cet *épitropos* auprès des prytanes.

3. L'*épitropos* et la représentation des citoyens absents

Le mot *épitropos* signifie souvent « tuteur » (d'orphelins), mais, tous les dictionnaires le disent, il a des sens variés : c'est ainsi qu'il peut désigner un intendant, un gouverneur, qu'il traduit logiquement le latin *procurator* et qu'il peut d'une manière générale désigner une personne agissant à la place d'une autre[71]. De même ἐπιτρέπω signifie-t-il aussi transmettre, investir quelqu'un d'une mission ; au passif, être investi d'une mission[72]. C'est un mot qui n'a pas forcément de sens juridique étroit et qui peut sans problème recevoir des acceptions différentes dans la même cité. Un faisceau de documents, de toute sorte, provenant de cités variées, oriente assez clairement l'interprétation pour les deux décrets iasiens.

On peut parfois hésiter sur la nature d'un *épitropos* et il faut examiner chaque attestation avec prudence. Par exemple, dans une liste de souscription de Smyrne (IIe-Ier s. a.C.), qui enregistre des familles de souscripteurs, où les pères agissent fréquemment aussi au nom de leur(s) fils, et où apparaît l. 27-28 une formulation isolée : Δημόκριτος Μητροδώρου ὁ νεώτερος δι' ἐπιτρόπου Διονυσίου τοῦ Φανείους τοῦ νεωτέρου *vacat* ρʹ, « Dèmokritos fils de Mètrodôros le jeune, par l'intermédiaire de son *épitropos* Dionysios fils de Phanès le jeune : 100 ». On ne sait si Dèmokritos est un mineur qui a souscrit par l'intermédiaire de son tuteur, ou un citoyen empêché qui a souscrit par l'intermédiaire d'un représentant, un *épitropos*, qu'il a mandaté pour le faire[73]. La seconde hypothèse se défendrait d'autant plus si l'on examine un cas parallèle dans une liste de souscription de Milet :

> [Φ]ιλῖνος Μηδείου μετ' ἐπιτρόπων Νέωνος τοῦ Μηδείου καὶ Ἐρωτίωνος | τοῦ Λεωκέστορος. Πολυάλκης Δημητρίου. Ἰφικλῆς Ἱέρωνος. Ἀριστόδημος | Φιλίσκου. Πελληνεὺς Προκρίτου μετ' ἐπιτρόπου Ζευξίλεω τοῦ Προκρίτου.[74]

Il y a deux cas, avec une formulation légèrement différente. Les personnages ont souscrit avec (*meta*) leurs tuteurs (pluriel) et non *dia* et l'on pourrait être tenté de penser que *meta* signifie bien la présence de l'*épitropos*, aux côtés des mineurs, alors

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70 Fabiani (2012), 143-144 ; (2015), 213, contre Carlsson (2010), 173 et Ph. Gauthier, *BE* 1987, 18 (p. 273).

71 *LSJ*, *s.v.* ἐπίτροπος : « one to whom the charge of anything is entrusted, steward, trustee, administrator » (et des exemples de gouverneurs, puis, bien sûr, de tuteurs).

72 *LSJ, s.v.* ἐπιτρέπω ; Chantraine (1968-1969), *s.v.* τρέπω, p. 1132 : « celui à qui quelqu'un ou quelque chose est confié ».

73 *I. Smyrna* 690, 27-28. Pour la date, cf. Migeotte (1992), n° 65. L. Wenger penche plutôt pour un mineur agissant via son tuteur : Wenger (1906), 170 n. 4.

74 *Milet* I 3, 147, 99-101.

que *dia* indique qu'il est un intermédiaire. En réalité, la situation est loin d'être aussi schématique[75]. Quoi qu'il en soit, Philinos est ici bien un mineur qui agit sous la tutelle de son frère aîné – tout comme Pelleneus un peu plus bas – et sous celle d'un autre personnage, inconnu par ailleurs[76]. Regardons une autre liste de Milet :

> Αὐτοκλῆς καὶ Πάμφιλος οἱ Αὐτοκλεί̣[ους] | μετὰ ἐπιτρόπου Φιλίτιδος τῆς Παμ̣[φίλου], | ἧ̣ς κύριος Δημήτριος Ἀρτέμωνος, [– – –], « Autoklès et Pamphilos fils d'Autoklès, avec l'*épitropos* Philitis fille de Pamphilos, dont le tuteur est Dèmètrios fils d'Artémôn… »[77]

On voit ici que l'*épitropos* est une femme, probablement la mère des deux frères, mais qu'elle a aussi un *kyrios*, qu'elle doit mentionner pour souscrire au nom de ses enfants, alors qu'elle doit être veuve[78]. Le tuteur peut-il être une femme ? Ou agit-elle malgré tout en tant que représentant ? La formulation suggère pourtant la première solution : l'*épitropos* a toutes les chances d'être la tutrice, mais rien n'indique que c'est une situation permanente (à l'instar de la *kyreia*) : ce peut être simplement pour l'opération de paiement. Cela signifie en tout cas d'une part que le *kyrios* ne peut agir à sa place et, inversement, que, même pour agir au nom de ses enfants, non seulement elle doit mentionner son *kyrios* mais que sa qualité de mère ne lui confère aucune capacité juridique, il faut qu'elle soit désignée comme *épitropos* de ses enfants. On pourrait trouver dans les papyrus des situations analogues[79].

D'autres documents sont plus éclairants. Ainsi une série de trois documents des transactions financières de Mylasa (les *Pachturkunden*, environ IIe-Ier s. a.C. ?). Un document d'entrée en possession (*embasis*) mentionne les voisins des domaines faisant l'objet de la transaction. Parmi eux, on note :

> καὶ ἐκ τῶν ἄλλων μερῶν Δημητριάδος τῆς | [Δη]μητρίου μετὰ κυρίου τοῦ πατρὸς Δη<μη>τρίου τοῦ Ἑρμίου τοῦ Ἀντιπάτρου κατὰ δὲ υἱοθεσίαν | [Αἰν]έ̣ου, τῶν ἐπιτρόπων, αὐτοῦ ὄντος ἀποδήμου, Αἰνέου τοῦ Δημητρίου ἱερέως Ἀπόλ|[λωνος]

75 Les papyrus permettent de montrer que si *dia* a souvent un sens juridique plus fort, c'est loin d'être toujours le cas : cf. Wenger (1906), 9-12.

76 Cf. Günther (2017), respectivement 605 et 511.

77 *Milet* I 3, 151, 4-6 (vers 190-180 a.C.). Pour la date, cf. Habicht (1991), 328.

78 Cf. Migeotte (1992), n° 71 (p. 228) ; L.-M. Günther (2014), 36-39 ; Günther (2017), 132.

79 Cf. Wenger (1906), 185 : des femmes qui peuvent jouer le rôle de représentant (ou agir via un *épitropos* qui n'est pas leur « tuteur »). Depuis ce livre, la bibliographie sur le rôle du *kyrios* et la situation juridique des femmes en Égypte lagide et romaine est devenue considérable : cf. en dernier lieu Veïsse (2011), avec la bibliographie antérieure. D'une manière générale, les sens de *kyrios*/*épitropos* sont assez plastiques. À partir d'exemples cycladiques, Cl. Vial note : « que dans les nombreux textes où des tuteurs (*épitropoi*) agissent eux-mêmes "au nom de" leurs pupilles, le terme *kyrios* n'est jamais employé », Vial (1995), 343.

> Πυθίου κα[ὶ Ἀντιπάτρου] τοῦ Ἑρμίου τοῦ Ἀντιπάτρου καὶ Ἀττίνου τοῦ Ἑρμίου τοῦ | [Ἀντιπάτρ]ου, ...[80]

La dernière éditrice, I. Pernin, comprend ce passage ainsi : « (en sa présence, comme témoins, des voisins) des autres côtés, Démétrias, fille de Démétrios avec comme représentant légal son père Démétrios fils de Hermias, petit-fils d'Antipatros, fils adoptif d'Ainéas, et ses tuteurs, son père étant en voyage, Ainéas fils de Démétrios, prêtre d'Apollon Pythien, Antipatros fils de Hermias, petit-fils d'Antipatros, Attinas fils de Hermias, petit-fils d'Antipatros… ». S'appuyant sur Cl. Vial, elle traduit *kyrios* par « représentant légal » et *épitropos* par « tuteur ». Pour elle, « Démétrias a pour tuteurs son frère et ses deux oncles paternels »[81]. En réalité, comme l'a bien vu un autre éditeur, W. Blümel[82], la construction impose que c'est le père qui se fait représenter (certes comme *kyrios*) par des *épitropoi*, son fils, ses deux frères. On traduira ainsi : « (il les a mis en possession, en présence, comme témoins, des voisins) des autres côtés, Démétrias, fille de Démétrios avec comme tuteur (*kyrios*) son père Démétrios fils de Hermias, (lui-même) fils d'Antipatros, fils adoptif d'Ainéas, et ses représentants (*épitropoi*), lui-même étant en voyage, Ainéas fils de Démétrios, prêtre d'Apollon Pythien, Antipatros fils de Hermias, (lui-même) fils d'Antipatros, Attinas fils de Hermias, petit-fils d'Antipatros… » C'est assez intéressant sur la puissance de l'obligation légale de la *kyreia*, mais cela nous montre bien, ici, le lien entre l'absence d'un citoyen et sa représentation par un ou des *épitropoi*. Dans un document analogue d'Olymos, sensiblement contemporain, un autre témoin est représenté par un *épitropos* (Λαρίχου τοῦ Δημητρίου οὗ ἐπίτροπος Λάριχος Λαρίχου) son père – dans ce cas l'*épitropos* est le tuteur – ou son fils[83]. Le sens est ici ambigu. Enfin, dans un autre document (contemporain) de Mylasa, relatant des achats effectués pour le compte de la tribu des Otôrkondeis, on retrouve ce terme dans un passage mutilé et plutôt obscur :

> ἐπρίαντο Μένιππ[ος Ὑβρέ]|ου ἱερεὺς Θεῶν [Σαμ]οθ[ράικων Μαυ]ν̣νίτης ὁ εἰρημένος κτηματώνης [ὑπὸ τῆς] | Ὀτωρκονδέων φυλῆς [μετὰ – – τοῦ Νι]κ̣οδήμου, Γλαύκου τοῦ Ὑβρέου ἱε[ρέως Διονύσου], | Διονυσίου τοῦ [– – καὶ αὐτοῦ εἰρημ]ένου κτηματώνου ἀπολελειμμέ̣ν[α παρὰ] | τοῦ ἐπιτρό[π]ο[υ, ὁ μὲν Μένιππ]ος Ὑβρέου ἱερεὺς Θεῶν [Σαμ]οθράικων Μαυννίτη[ς παρὰ] | Ἰάσονος τοῦ Διονυσίου Ὀγονδέως μετὰ κυρίου

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80 *I. Mylasa* 204 ; Pernin (2014), 140, l. 16-20.

81 Pernin (2014), p. 300 avec les n. 24 et 25 (elle s'appuie sur Dém., C. *Stéphanos* II, 18). Cf. Vial (1995), 342-344.

82 W. Blümel, *I. Mylasa*, I, p. 79 (*ad* 204, l. 17 *sqq*., je traduis) : « Comme Démétrios, père de Démétrias, est en voyage, il s'agit de ses mandataires (*Beauftragten*), à savoir ses frères et son fils Ainéas, qui le représentent en tant que *kyrios* de sa fille Démétrias ». Un cas analogue se trouve dans l'acte Marek et Zingg (2018), n° 14, où apparaît sans doute un autre *épitropos* représentant un voisin, dans un passage mutilé (l. 20), mais qui est clairement à distinguer d'un *kyrios*-tuteur (l. 16).

83 *I. Mylasa* 814 ; Pernin (2014), 179, 18.

> τοῦ πατρὸς Διονυσίου [τοῦ – –] | καὶ [– – – – – – – – – – – – τῶι Διὶ] τῶι Ὀτωρκονδέων κατὰ τὸ τῆς φυλῆς ψή[φισμα][84].

I. Pernin comprend que les biens (abandonnés) ont été achetés « au tuteur », non nommé, mais qui devait être connu. Mais l'achat suivant des biens de Iasôn se fait auprès de son *kyrios*, « représentant légal » selon la même commentatrice. L'application mécanique de la terminologie dégage par Cl. Vial pour d'autres régions amène de la confusion entre ces acceptions. Ici, le *kyrios* exerce manifestement une tutelle sur Iasôn, qui doit être mineur, alors que l'*épitropos* du premier achat était chargé de biens abandonnés, pas de personnes. Il s'agit plutôt d'une sorte d'intendant, si l'on doit choisir de traduire cette acception qui semble bien recouvrir un usage très spécifique[85]. De ces observations, on déduira que, dans une même cité, ce terme, comme d'autres, peut recevoir des acceptions fort différentes tuteur, intendant, représentant d'un citoyen adulte absent.

Mais le parallèle décisif vient d'un décret d'Halasarna (« des tribus qui ont part aux affaires sacrées d'Apollon et d'Héraklès à Halasarna »), alors dème de Cos[86] :

> ἀπογράφεσ|θαι τὸς μετέχοντας | τοῦ ἱεροῦ, τὸς μὲν ἐνδά|μος ἀρξαμένος ἀπὸ τᾶς | τρίτας τοῦ Ὑακινθίου | ἔστε καὶ τὰν τριακά|δα τοῦ Ἀλσείου, τὸς δὲ ἀ|ποδάμος ἀπογραφόν|τω τοὶ ἐπίτροποι, εἰ δὲ | μή, ἀπογραφέσθων αὐ|τοὶ ἐπεί κα παραγένη̣|ται ἐν τριμήνωι τὸ ὄνο|μα πατριαστὶ ποτὶ τὸς | ναποίας, ἐξαγευμέ|νος καὶ τὰν φυλὰν καὶ | τᾶς ματρὸς τὸ ὄνομα | καὶ τίνος τ̣ῶν πολιτᾶν | θυγάτη̣ρ̣ ὑ̣πάρχει· οἷς | <δὲ> δέδοται ἁ πολιτεία, κα|τὰ τίνα νόμον ἢ δόγμα | κοινὸν τοῦ παντὸς δά|μου, ποταπογραφέσ|θων δὲ καὶ τὰν πατρίδα | καὶ τίνος θ̣[υγ]ά̣τηρ καὶ | ἁ μάτη[ρ γέγον]ε,
> « que soient inscrits ceux qui participent au culte, ceux qui sont présents en commençant le trois du mois de Hyakinthios jusqu'au trente du mois d'Alseios, que leurs représentants inscrivent les citoyens absents ; dans le cas contraire, qu'ils s'inscrivent eux-mêmes lorsqu'ils reviennent, dans un délai de trois mois, en donnant nom et patronyme, devant les naopes, précisant aussi la tribu, le nom de leur mère et le nom du citoyen dont elle est la fille ; pour ceux à qui a été concédée la citoyenneté, (qu'ils

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84 *SEG* 42, 999 ; Pernin (2014), 156 (avec la p. 325).

85 Je traduirais alors : « Ménippos fils d'Hybréas, prêtre des dieux de Samothrace, des *Manunnitai*, le commissaire à l'achat des terres désigné par la tribu des Otôrkondeis, avec Untel fils de Nikodèmos, Glaukos fils d'Hybréas, prêtre de Dionysos, Dionysios fils d'Untel, lui-même désigné commissaire à l'achat des terres, ont acheté les biens laissés à l'abandon, auprès de l'*épitropos* ; Ménippos fils d'Hybréas, prêtre des dieux de Samothrace, des *Maunnitai*, a lui-même acheté auprès d'Iasôn fils de Dionysios, des *Ogondes*, avec comme *kyrios* son père Dionysios fils d'Untel et [---] à Zeus des Otôrkondeis conformément au décret de la tribu… »

86 *IG* XII 4, 103, 20-44. Vélissaropoulos (2011), I, 136-139, et Müller (2014), 773, attribuent par erreur ce texte à « la cité d'Halasarna ». Voir plutôt Paul (2012), 196-203. Je n'entre pas dans la discussion sur la nature des tribus ayant voté le décret : voir Parker et Obbink (2001), 263-265 ; Paul (2012), 201-203.

précisent) selon quelle loi ou quel décret commun du peuple entier (ils l'ont reçue), en ajoutant aussi leur patrie et de quelle fille leur mère est née. »

Il s'agit de dresser une liste des citoyens ayant droit de prendre part à ce culte local dédié à Apollon, alors que la liste existante n'était plus visible. Les citoyens doivent s'inscrire, en donnant soit l'identité de leurs parents, soit le décret leur ayant octroyé la citoyenneté coéenne[87]. On lit l. 27-28 que ceux qui sont absents (τὸς ἀποδάμος) doivent s'inscrire via des *épitropoi* (ἀπογραφόντω τοὶ ἐπίτροποι). Il s'agit de citoyens mandatés pour agir à la place d'un citoyen absent. Tel doit être le sens du mot *épitropos* dans les décrets d'Iasos. Il faut donc comprendre que les prytanes désignés s'étaient fait remplacer en faisant agir à leur place un représentant, *épitropos*. Comme pour Mylasa, il n'y a pas à s'étonner de ce que ce mot puisse recevoir dans les inscriptions d'une même cité des acceptions différentes (tuteur de mineur, représentant d'un citoyen) : la situation est analogue dans l'Égypte lagide et romaine[88]. Les exemples rassemblés ici montrent qu'un citoyen s'absentant de la cité avait la possibilité, sinon l'obligation légale, de désigner un *épitropos* pour le représenter dans divers actes officiels le concernant, ce qui ne surprend pas, l'absence d'un citoyen étant aussi un sujet de droit[89].

Il reste malgré tout à expliquer la formulation des décrets iasiens, qui varie un peu. Il y a trois cas de figure, comme nous l'avons vu :

a) un prytane installé par un titulaire, κατασταθέντος *uel sim.* (cf. tableau 1) ;

b) un prytane en place δι' ἐπιτρόπου (*I. Iasos* 4) ;

c) l'association des deux formules, dans le décret pour des juges de Chios : Λεοντ[ί]σκου τοῦ [..]ο[....]ο[υ] κατασταθέντος ὑπὸ Ἀρχιδήμου τοῦ Σαραπ[ίων]ος δι' ἐπιτρόπου [α]ὑτοῦ Εὐκτιμένου τοῦ Ἰατροκλέους[90].

La procédure devait spécifier qu'un prytane désigné devait se trouver un remplaçant pour prendre sa place en cas d'empêchement ; le remplaçant devait être *installé*, καθίστημι, sans doute par un acte officiel (cas *a*). On rapprochera de cette situation l'usage de ce même verbe pour désigner le fait qu'un administrateur a été désigné

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[87] Pour Müller, *ibid*, le fait de demander aux nouveaux citoyens de donner le décret d'octroi ainsi que leur cité d'origine est « stigmatisant », car ils devaient figurer sur les registres locaux (le commentaire de J. Vélissaropoulos, *op. cit.*, est plus judicieux). Il n'en est rien, car ils ne pouvaient, comme les personnes nées de parents citoyens, apporter la même preuve de leur légitimité civique. Ce décret de naturalisation est la seule preuve de leur statut de citoyen et il s'agissait ici de prouver son identité civique, fondant le droit à participer à ce culte, à avoir une part des sacrifices. Dans la liste afférente, *IG* XII 4, 104, on trouve la mention de deux décrets d'octroi de la *politeia* coéenne (l. 740-744, 773-775), sur plus de 250 noms.

[88] Pour la coexistence de ces acceptions d'*épitropos*, cf. Wenger (1906), 250-251.

[89] Cf. Maffi (2009).

[90] *SEG* 41, 932, l. 27-30.

par une autorité supérieure, bien souvent un souverain, parfois une cité[91]. Dans un autre registre, mais qui va dans le même sens, le même verbe est utilisé dans les actes d'affranchissements de Delphes et de Grèce centrale pour désigner les garants institués officiellement par le maître (γέγονα βεβαιωτὴρ κατασταθεὶς ὑπό…)[92]. Fr. Gschnitzer suppose à juste titre que le remplaçant devait être pris parmi les conseillers[93]. Il s'agit de cas où l'absence était prévisible assez longtemps à l'avance, pour des réunions du Conseil et/ou des Assemblées régulières. Lorsque le prytane désigné ne pouvait être présent pour cette « installation », il déléguait un mandataire (*épitropos*) pour le faire (cas *c*), selon un modèle bien connu dans le droit privé[94], et sur lequel on peut tenter de trouver quelques parallèles (*infra*, 4). Je croirais volontiers que le prytane « installé » devait l'être pour une durée assez longue, en tout cas pour une absence prévisible, alors que la désignation d'un *épitropos* pouvait avoir eu une motivation plus ponctuelle, pour une absence (en-dehors de la cité, comme le suggèrent les parallèles évoqués ci-dessus), voire une incapacité qui ne pouvait avoir été anticipée. On comprend bien ce qui s'est passé au moment de l'adoption du décret *I. Iasos* 4 (cas *b*) : il s'agit d'une assemblée exceptionnelle, réunie le 30 du mois, et l'un des prytanes s'est retrouvé empêché, sans avoir pu prévoir à l'avance l'installation d'un représentant. Ainsi s'explique-t-on facilement le double vocabulaire, qui, en effet, ne désigne pas la même procédure, même s'il s'agit à chaque fois d'un mode de représentation. Le décret pour des juges de Chios est issu d'une situation complexe et totalement isolée, due à l'incapacité du titulaire d'être présent au moment de l'installation officielle de son représentant. Les motivations d'une absence imprévisible peuvent être nombreuses, comme la maladie, le décès de proches, un séjour à l'étranger qui se prolonge, etc. Cela peut paraître surprenant pour des prytanes. Mais, dans une cité peu importante comme Iasos, avec en général une réunion de l'Assemblée par mois, plus quelques réunions du Conseil, le citoyen qui occupait cette charge n'était peut-être pas actif comme prytane chaque jour du semestre. On trouvait en tout cas possible de lui

[91] Cf. *e.g.* *Choix Delphes*, 106 (épimélète étolien), 46 : ἐπειδὴ Φιλλέας Μίκκου Ναυπάκτιος (…) κατασταθεὶς ὑπὸ τῶν Αἰτωλῶν ἐπιμελητὰς τοῦ τε ἱεροῦ καὶ τᾶς πόλιος ; *Syll.*[3] 642, 3 (agent attalide installé à Égine) : ἐπειδὲ Ἱκέσιος Μητροδ[ώρου] Ἐφέσιος ὁ κατασταθεὶς ἐπ' Αἰγίνας ὑπ[ὸ τοῦ βασ]ιλέος Εὐμένεος ; *I. Labraunda* 43 (agent lagide à Labraunda) : ἐπειδ̣ὴ Ἀπολλώνιος Δ̣ι̣ο̣δ̣ό̣τ̣[ου? – – –]ς̣ κ̣ατασταθεὶς ο̣ἰ̣κ̣ο̣[νό]μ̣ο̣ς̣ ὑ̣π̣ὸ̣ βασιλέως Πτο̣λ̣ε̣[μαίου] ; *Milet* I 2, 10, 4 (agent royal) : ἐπειδὴ Ἱππόστρατος Ἱπποδήμου Μιλήσιος φίλος ὢν τοῦ βασιλέως Λυσιμάχου καὶ στρατηγὸς ἐπὶ τῶν πόλεων τῶν Ἰώνων κατασταθεὶς… ; *I. Mylasa* 116 (magistrat civique) : μετὰ ταῦτα κατασταθεὶς ἐ<κ>λογι[στής] (très nombreuses attestations dans cette acception), etc.

[92] Très nombreux exemples : *e. g.*, pour Delphes (époque impériale) : *FD* III 1, 138, 8-9 ; *FD* III 4, 502B, 28-30 ; *FD* III 6, 6, 10-11 et 23-24 ; *SEG* 34, 396, 25-26 ; 34, 398, 28-30 ; Physkeis (basse époque hellénistique) : *IG* IX,1[2], 683, 16-18.

[93] Gschnitzer (1973), col. 795. Pour d'autres arguments, cf. *supra* p. 302.

[94] L'étude la plus complète demeure celle de Wenger (1906).

confier d'autres missions : dans le décret pour des juges de Cnide le proposant du décret (II) est aussi prytane et même président. Il est enfin désigné comme ambassadeur auprès de Cnide[95], ce qui ne surprend pas : dans le cas des décrets pour des juges étrangers, il arrivait souvent que le proposant fasse également office d'ambassadeur[96]. Ce prytane devait donc être absent immédiatement après la réunion de l'Assemblée, alors qu'il devait avoir été encore prytane. Voici un bel exemple de raison possible de l'absence d'un prytane en fonction (pour une mission officielle), qui ne posait apparemment pas de problème[97].

4. Le remplacement des magistrats à l'initiative du titulaire : un petit ensemble de parallèles

Il peut paraître surprenant qu'un magistrat se choisisse lui-même et officiellement un représentant, sans que les organes civiques n'aient part à ce choix. Le fait est singulier, rare, mais pas totalement isolé. Il revient à E. Ziebarth et à L. Robert d'avoir procuré des parallèles (largement oubliés, sauf de Ph. Gauthier), qui, il est vrai, ne sont guère nombreux[98]. Tous n'ont naturellement pas la même portée, mais ils apportent un faisceau d'indices. À Milet, la fondation scolaire d'Eudèmos (206/5 a.C.)[99] prévoit qu'un pédotribe absent temporairement (pour accompagner un *pais* concurrent d'une concours) puisse désigner son replaçant, en accord avec les pédonomes :

> ἐξεῖναι δὲ τοῖς χειροτονηθεῖσιν παιδοτρίβαις, ἐὰν ἄγοντες ἀθλητὰς ἐπί τινα τῶν στεφανιτῶν ἀγώνων ἐκγδημεῖν βούλωνται, παραλυσαμένοις τοὺς παιδονόμους καὶ καταλιποῦσιν ἀνθ' αὐτῶν τὸν ἐπιστατήσοντα τῶν παίδων ἀρεστὸν τοῖς παιδονόμοις ἐκγδημεῖν, « qu'il soit permis aux pédotribes élus qui veulent accompagner des athlètes pour un des concours stéphanites de quitter la cité, après avoir obtenu l'autorisation des pédonomes et avoir laissé, pour s'occuper des garçons en leur absence, celui qui aura paru le meilleur aux pédonomes… »[100]

Certes il s'agit de maîtres, et non de magistrats et, par ailleurs, l'accord de magistrats en charge, les pédonomes, est indispensable. Ce n'est donc pas un parallèle proche des pratiques évoquées ici, sauf sur un point : l'initiative appartient à la personne absente (de façon temporaire) et l'on ne procède pas à une nouvelle élection pour la

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95 *SEG* 57, 1046, l. 3-7 : Φιλήμων Φιλώτου ἐπεστάτει· πρυτάνεω[ν γνώμη – – – – – –, τ]οῦ Παυσανίου, Φιλήμονος τοῦ Φιλώτου, Ἀριστείδ̣ου το[ῦ – – – – – –, Θ]ε̣οδώρου τοῦ Λυσῆνος, Ἑρμοφάντου τοῦ Με̣ν̣εστράτου, [– – – – – – – τοῦ Λυ?]σικλέους, Μελαινέως τοῦ Μελανιτ̣[.]ου, Κ̣ύρο̣υ τοῦ Ἀρτ[– – – – – – –· π]ερὶ ὧν ἐπῆλθεν Φιλήμων Φιλώτου ; l. 41 : πρεσβευτὴς ἡιρέθη Φιλήμων Φ[ιλώτου].

96 Cf. Hamon (2012), 217 et n. 88.

97 Voir *infra* la réponse d'A. Dimopoulou.

98 Ziebarth (1914), 20 ; Robert (1935b), 479. Cf. Ph. Gauthier, *BE* 1987, n° 18 (p. 273).

99 *Milet* I 3, 145 (qui motive le parallèle fait par Ziebarth [1914], 20).

100 *Milet* I 3, 145 (*Sylloge*³, 577), 54-58.

remplacer. On voit aussi qu'il s'agit d'une absence liée à la fonction exercée, et non pour un motif strictement privé. Dans la même cité, la loi sur la prêtrise de Rome (ap. 130 a.C.) prévoit que l'acheteur de la prêtrise puisse se faire remplacer dans la fonction :

> ὁ πριάμενος τὴν ἱερωσύνην τοῦ Δήμου τοῦ Ῥωμαίων καὶ τῆς Ῥώμης ἱέρεω ἀπογράψει παραχρῆμα πρὸς τοὺς ταμίας καὶ βασιλεῖς ἄνδρα μὴ νεώτερον ἐτῶν εἴκοσι· ὁ δὲ ἀπογραφεὶς ἱερήσεται ἔτη τρία καὶ μῆνας ὀκτὼ ἄρχοντος μηνὸς Μεταγειτνιῶνος τοῦ ἐπὶ στεφανηφόρου Κρατίνου ἢ ἄλλον παρέξεται τὸν ἱερησόμενον ἀνθ' ἑαυτοῦ κατὰ ταὐτά, τελεσθεὶς Διὶ Τελεσιουργῷ... « Que l'acheteur de la prêtrise du peuple des Romains et de Rome fasse enregistrer immédiatement auprès des trésoriers et des rois comme prêtre un homme qui ne soit pas âgé de moins de vingt ans. Que celui qui aura été enregistré exerce la prêtrise pendant trois ans et huit mois, en commençant au mois de Métageitniôn de l'année du stéphanèphore Kratinos, ou bien, après avoir effectué une offrande à Zeus Télésiourgos, qu'il présente un autre individu pour exercer la prêtrise à sa place aux mêmes conditions. »[101]

Ici, la pratique est triplement différente. Il s'agit en premier lieu d'une prêtrise et non d'une magistrature – mais cela pourrait ne pas constituer une objection réelle, dans la mesure où les règles de fonctionnement de nombre de prêtrises étaient proches de celles des magistratures. Par ailleurs, dans le cadre de l'achat d'une prêtrise, le choix d'un remplaçant pourrait être assimilé à la situation d'un entrepreneur devant fournir des remplaçants (certes parmi ses garants) dans le cadre de contrats de travaux publics[102]. Enfin, il s'agit de se faire remplacer de façon permanente, par une sorte de faisant fonction. En revanche, on notera l'existence d'une pratique, qui consiste à ce qu'un citoyen investi d'une charge publique, certes particulière, puisse à son initiative choisir lui-même une personne qui accomplira l'office qui lui a été confié.

Même s'il ne s'agit pas d'une magistrature ou d'une charge publique, évoquons un autre cas de remplacement d'un citoyen dans le cadre d'une procédure officielle : à Éphèse, le décret pour le gymnasiarque Diodôros (Ier s. a.C.) est pris à l'initiative des *néoi*, qui ont délégué trois d'entre eux pour effectuer la proposition de décret :

> Ἔ̣δοξεν τῆι βουλῆι καὶ τῶι δήμ̣ω̣ι̣· Μ̣ίθρης Ἀστέου εἶπεν· προ|[γραψαμέ]νω̣ν ε̣ἰ̣ς τ̣ὴ̣ν β̣ουλὴν τῶν ἀποδεδειγμένων ὑπὸ | [τῶν νέων] Ὀνη[σα]γόρου τοῦ Ἀρτεμιδώρου, Ἑρμ[οκρ]άτου τοῦ | [-- κ]αὶ ὑπὲρ Ἀστυάνακτος τοῦ Χαρμολάου Ἀπο|[- -]ο[.] ὑπὲρ τ̣ιμῶν Διοδώρωι Μέντορος κτλ. « Il a plu au Conseil et au peuple, Mithrès fils d'Astéas a fait la proposition : les personnes désignées par les jeunes gens, Onèsagoras fils d'Artémidôros, Hermokratès fils d'Untel et, au nom d'Astyanax fils de Charmolaos,

[101] *Milet* I 7, 203 (Sokolowski [1955], 49), 1-13.
[102] Cf. *e.g.* Feyel (2006), 464-466.

Apo[--], ayant présenté une proposition de décret devant le Conseil au sujet des honneurs (à accorder) à Diodôros fils de Mentor… »[103].

Mithrès, le proposant, devait être un bouleute, car le Conseil a repris à son compte la proposition des *néoi*. Ce sont eux qui en ont eu l’initiative et sur leurs délégués devait certainement reposer une responsabilité légale. Empêché, pour une raison non précisée, de se présenter devant le Conseil alors qu’il avait été désigné pour le faire par les *néoi*, l’un des délégués s’est fait représenter par une autre personne. Le cas de figure est comparable au précédent.

Toujours en Ionie, à Samos, dans la loi sur la vente de la prêtrise de Poséidon Hélikonios (1re moitié du IIIe s. a.C.)[104], où il est question du rôle des *épimènioi* envoyés par les subdivisions civiques que sont les *chiliastyes* pour participer aux cérémonies religieuses. Ils peuvent se faire remplacer lors des celles qui se tiennent à l’Hélikôn, s’ils sont absents :

[*vacat* τάδε] εἰσήνεγκαν οἱ αἱρεθέντ̣[ες νομο]γράφοι περὶ τῆς ἐν Ἑλικωνίωι [θυσίας· τοὺ]ς ἀποδεικνυμένους ὑπὸ τῶν χιλιαστήρων ἐπιμηνίους τῆς [θυσίας καὶ τ]ῆς συνόδου τῆς ἐν Ἑλικωνίωι γινομένης ἐπιμηνιεύειν ἐὰν [ἐνδημῶσιν, ἐ]ὰν δὲ ἀποδημῶσιν, οὓς ἂν καταλίπωσιν <ἀνθ’> αὑτῶν κυρίους κατὰ [ταὐτά...], « Voici ce qu’ont introduit les nomographes au sujet du sacrifice (effectué) à Hélikôn : que les *épimènioi* désignés par les membres des *chiliastyes*, lorsqu’il y a un sacrifice et une réunion à l’Hélikôn, s’ils sont présents, exercent leur fonction mensuelle ; s’ils sont absents, que ce soient ceux qu’ils laissent à leur place pour avoir cette responsabilité... »[105].

L’inscription de cette absence et du remplacement à l’initiative du titulaire de la charge montre qu’il s’agissait d’une pratique normale. On voit aussi que la situation du gymnasiarque défaillant remplacé par Boulagoras (*supra*, p. 294-295) devait relever d’un tout autre cas de figure.

Il reste enfin à évoquer un texte important, un décret de la cité de Démétrias concernant l’oracle d’Apollon Coropaios (fin IIe s. a.C.)[106]. Le texte vise à réglementer le déroulement de la consultation de l’oracle à Koropè, pour laquelle se déplaçait une importante délégation de la cité, et où l’on se souciait de mieux maintenir l’ordre. Les décisions débutent ainsi :

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[103] *I. Ephesos* Ia, 6, 1-5, avec le commentaire de Robert (1967), notamment 10, et de Curty (2015), 151-155, n° 27.

[104] *IG* XII 6, 168, point de départ des parallèles de L. Robert (1935b).

[105] *IG* XII 6, 168, 1-5. Arnaoutoglou (1998), 108, comprend que les *épimènioi* sont désignés « by the magistrates of a *chiliastys* ».

[106] *IG* IX 2, 1109 (Deshours [2011], n°17). Voir le commentaire important de Robert (1948), 16-28.

> ὅταν συντελῆται τὸ μαντῆον, πορεύεσθαι τόν τε ἱερέα τοῦ Ἀπόλλωνος τὸν εἰρημένον ὑπὸ τῆς πόλεως καὶ τῶν στρατηγῶν καὶ νομοφυλάκων ἀφ' ἑκατέρας ἀρχῆς ἕνα καὶ πρύτανιν ἕνα καὶ ταμίαν καὶ τὸν γραμματέα τοῦ θεοῦ καὶ τὸν προφήτην· ἐὰν δέ τις τῶν προγεγραμμένων ἀρρωσστῇ ἢ{ι} ἐγδημῇ, ἕτερον πεμψάτω... « lorsque l'oracle fonctionne, que l'on envoie le prêtre d'Apollon désigné par la cité, ainsi que, des stratèges et des nomophylaques, un membre de chaque collège de magistrats, ainsi qu'un prytane, un trésorier, le secrétaire du dieu et le prophète ; si l'une des personnes susdites est malade ou absente, qu'elle envoie une autre personne. »[107]

L'on donne comme obligation à des magistrats, en général un membre de chaque collège impliqué, d'être présents lors des périodes où l'oracle fonctionnait. Le point intéressant est la précision ἐὰν δέ τις τῶν προγεγραμμένων ἀρρωσστῇ ἢ ἐγδημῇ, ἕτερον πεμψάτω, « si l'une des personnes susdites est malade ou absente, qu'elle envoie une autre personne » (l. 22-23). Nous voyons bien ici, que pour une mission ponctuelle, un prêtre ou un magistrat pouvait désigner de lui-même une personne pour le remplacer. Mais il devait s'agir de missions de plusieurs jours[108]: Koropè se situe à environ 35 km de Démétrias et, aux deux jours de consultation, il fallait ajouter une journée de voyage aller et une journée pour le retour. En outre, à Démétrias, les collèges des stratèges et des nomophylaques, qui doivent ici détacher un magistrat chacun, sont les plus importants de la cité, comme le montre bien, entre autres, l'ensemble de ce décret : ils sont co-responsables de la proposition (l. 2-7), désignent les rhabdouques chargés du maintien de l'ordre (l. 23-25), inscrivent comme débitrices les personnes frappées d'une amende (l. 29-30), etc.[109]. Notons bien aussi les motivations des absences : la maladie ou une absence (de la cité), ce qui ne signifie pas pour autant que les membres de ces collèges pouvaient s'absenter à leur gré.

Au total, nous disposons d'assez peu de parallèles, mais en nombre suffisant pour comprendre que, dans bien des cités, pour certaines fonctions, le titulaire pouvait se choisir un remplaçant s'il était absent, au moins pour une mission temporaire – le cas du remplacement du prêtre à Milet semblant trop particulier.

Conclusion

S'agissant d'Iasos, on doit supposer que les prytanes d'Iasos étaient contraints, en cas d'empêchement, de désigner eux-mêmes et *d'installer* officiellement une personne devant exercer la fonction à leur place, du moins de façon temporaire, lorsque cette absence pour les réunions du Conseil et de l'Assemblée était prévisible. Dans certains cas, pour une absence ponctuelle, voire imprévue, les citoyens

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[107] *IG* IX 2, 1109, 18-23.

[108] Cf. Robert (1948), 22-23.

[109] Ils sont également chargés de la correspondance officielle de la cité : *IG* V 2, 367, III, l. 24-29.

passaient par un *épitropos*, mot valise, polysémique, qui désignait ici un individu mandaté par le prytane absent pour, soit le remplacer dans l'acte officiel d'installation de son remplaçant (cas du décret pour des juges de Chios, celui d'une assemblée régulière, dont la date était connue à l'avance), soit le remplacer dans sa fonction (cas du décret pour les souverains séleucides, adopté dans une assemblée extraordinaire). Cette obligation devait s'expliquer par la petite taille du collège, assez fragile s'il fonctionnait sur un seul semestre, ainsi que, peut-être, par des contraintes pesant sur certaines assemblées, sans que l'on puisse avancer d'explication plus précise. Cela s'accorderait bien avec l'hypothèse selon laquelle les prytanes étaient membres du Conseil, dont on sait, grâce à la mention, en fin de certains décrets, du nombre de votants au Conseil, la variabilité des effectifs (de 68 à 111 votants, cf. tableau 3). S'il n'était pas trop gênant que tous les conseillers ne soient pas là, cela aurait été dangereux pour un collège peu étoffé comme celui des prytanes, même s'il apparaît que l'on n'a jamais réussi à le maintenir à un nombre fixe de membres. L'état de la documentation suggère cependant, comme le suppose R. Fabiani, que, à partir du IIIe siècle, l'on a cherché à obtenir un chiffre minimum de 6 membres du bureau des prytanes présents, au moins aux réunions du Conseil où était élaboré une *gnomè*, présentée à l'Assemblée suivante. Il ne s'agissait pas d'obtenir la réunion d'un « collège parfait », obligatoirement complet, de 6, 7 ou 8 membres (comme le pense R. Fabiani), mais plutôt de réunir une sorte de quorum, assurant une collégialité plus efficace, avec un minimum de 6 membres sur les 8 que pouvait compter un collège semestriel.

La conséquence de ces observations est de rendre aux prytanes d'Iasos à l'époque hellénistique une certaine banalité : il s'agit d'un bureau du Conseil et de l'Assemblée, aux fonctions comparables à ceux de bien d'autres cités, composé de citoyens adultes. Leur rôle était certes fondamental dans la procédure de décision, mais il ne leur conféra pas une place extraordinaire dans la cité. De ce point de vue, les institutions iasiennes du IIIe et du début du IIe siècle ne me semblent pas amorcer les mutations de la basse époque hellénistique. La démocratie iasienne fonctionnait selon un modèle assez répandu, avec certes quelques particularités, comme le remplacement des prytanes, mais elle n'a eu ni un destin ni un modèle institutionnel hors normes.

Cela étant, la documentation iasienne permet de mettre en lumière un phénomène encore largement méconnu, celui du remplacement des titulaires de charges publiques. Mettons à part le remplacement définitif d'un magistrat, pour cause de décès ou défaillance définitive : si l'on en juge par les cas d'Athènes, de Samos et d'Éphèse, l'on devait procéder à l'élection d'un remplaçant. À Samos, il ne portait néanmoins pas le titre du magistrat qu'il remplaçait, car ce dernier était encore en vie. Il est impossible d'en dire plus, tant les documents font défaut.

Le second cas de figure est celui de l'absence temporaire de titulaires d'une charge importante, notamment au sein d'un collège, pour cause de maladie, ou de séjour à l'étranger pour une raison donnée, etc. Pour les cas que nous connaissons,

on ne procédait pas à une élection, mais, à Iasos, comme à Démétrias et dans d'autres cités, le titulaire désignait de lui-même une personne devant le remplacer. Dans l'état actuel de la documentation, cela semble constituer une originalité, mais qui s'explique assez bien dans un système démocratique grec d'époque hellénistique. L'absence d'un citoyen dans sa cité, qui était juridiquement définie, mais avec des conséquences variées selon les contextes[110], était prévue dans bien des lois, comme nous l'avons vu à propos d'Halasarna de Cos. C'est bien compréhensible à l'époque hellénistique, où la mobilité des individus semble s'être accrue, et l'est d'autant plus pour des cités portuaires tournées vers l'extérieur comme Cos et dans une moindre mesure Iasos. Néanmoins, les exemples rassemblés ici montrent qu'il était admis qu'un titulaire d'une charge publique pouvait s'absenter quelques jours et être incapable d'assumer à ce moment la responsabilité pour laquelle il avait été désigné. Cela peut surprendre les modernes, mais c'était peut-être aussi une des caractéristiques des démocraties grecques. Un citoyen chargé d'une mission publique demeurait un citoyen et non un professionnel de la politique, et l'on se demande dans quelle mesure il pouvait réellement mettre entre parenthèses durant son mandat toutes ses obligations familiales et ses affaires personnelles. Les sources font défaut, mais il n'est pas difficile de trouver des raisons valables de l'absence ou de l'incapacité d'exercer une fonction (en dehors de la maladie du titulaire), comme les problèmes d'héritage[111], de veille auprès de proches malades, de funérailles dans la famille, etc. De même le titulaire d'une magistrature ou le bouleute ne se voyaient pas interdire de demeurer un citoyen actif comme les autres : nous avons vu qu'à Iasos, les prytanes pouvaient proposer des mesures et aller en ambassade au nom de la cité. Dans une cité relativement modeste comme Iasos, on comprend bien que ces prytanes (voire d'autres titulaires de fonctions publiques) pouvaient ainsi être envoyés en ambassade. C'est pour cela aussi que je me garderais bien d'employer le terme d'« absentéisme » pour les collèges incomplets du début de l'époque hellénistique. Les prytanes peuvent avoir été absents pour des missions officielles. Or, pendant une ambassade, même de courte durée (comme le cas évoqué plus haut, à Cnide), un imprévu pouvait intervenir, qui obligeait par exemple à la réunion en urgence d'une assemblée extraordinaire. Inversement, les aléas de la navigation et les dangers des missions pouvaient faire que l'ambassade se prolongeât au-delà de ce qui était prévu : pour en rester à l'exemple d'Iasos, le prytane en mission pouvait alors être *de facto* absent pendant une autre réunion du Conseil ou de l'Assemblée. La collégialité devait pallier en partie ces absences temporaires. Elles devaient au contraire constituer une souplesse nécessaire pour permettre une large rotation des charges au sein du corps civique.

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[110] Cf. Maffi (2009).

[111] On rapprochera cela de l'interdiction faite aux éphèbes athéniens de s'absenter pendant l'éphébie, entre autres pour l'héritage d'une fille épiclère – mais il est vrai qu'il s'agit de leur éviter de passer devant les tribunaux (*Ath. Pol.*, 42, 5). Même situation pour les éphèbes d'Amphipolis : *SEG*, 65, 420, 133-136.

Il reste que ce fait pose d'intéressantes questions de droit, en particulier celle de la responsabilité des « représentants », « remplaçants » ou « suppléants » (aucun terme ne convient parfaitement) des magistrats les ayant désignés pour les remplacer. Nous n'avons guère d'information sur cette question. Nous avons cependant vu que la responsabilité légale du titulaire d'une magistrature pouvait être assez lourde pour qu'elle puisse avoir pesé sur ses héritiers en cas de décès, si l'on en juge par l'exemple des hiéropes de Délos indépendante[112]. Mais qu'en allait-il pour la responsabilité d'un « remplaçant » temporaire ? Si un citoyen avait à s'en plaindre au point d'engager une action judiciaire, devait-il le faire contre le « remplaçant » ou le titulaire ? La logique institutionnelle suggère que la responsabilité légale pesait sur le titulaire (qui a choisi son représentant, lequel n'avait pas été désigné par la cité), mais il n'est à l'heure actuelle pas possible de le démontrer. En droit attique, dans un procès, un témoin absent, qui avait (obligatoirement) déposé par écrit, était responsable, s'il le déclarait ainsi, ou alors la responsabilité incombait à ceux qui attestaient qu'il avait bien déposé ainsi[113]. C'est un cas assez complexe, qui montre aussi ce que notre ignorance des procédures judiciaires nous interdit d'avancer en-dehors d'Athènes. Plus éclairant est peut-être le cas des esclaves : à Athènes au moins, leurs actes étaient toujours placés sous la responsabilité du maître, même (par exemple) s'il les avait loués : on a pu parler de ce point de vue « de la non existence en droit du représentant, qui n'est que le prolongement du représenté »[114]. Il serait peut-être hardi d'étendre ce principe aux « représentants » étudiés ici, d'autant plus que la question est rendue plus complexe par la responsabilité collective devant peser sur les magistrats d'un collège[115].

Enfin, ce phénomène éclaire d'un nouveau jour le fonctionnement des magistratures des démocraties grecques, qui doit être la conséquence directe de cette forme de responsabilité. La pratique des remplacements de titulaires à leur initiative montre l'existence d'une souplesse : si le titulaire assumait seul la responsabilité de sa fonction, il pouvait (du moins dans certaines cités et pour certaines charges) momentanément en déléguer les missions à une personne de son choix. De même, si l'on en juge par les exemples tirés d'Athènes, un magistrat pouvait s'entourer de personnes pour le conseiller et l'aider dans certaines tâches, sans que ces citoyens fussent officiellement investis par la cité d'une quelconque mission. Il ne faut pas s'imaginer un entourage pareil au *consilium* des hauts magistrats ou promagistrats romains, tant les institutions sont différentes et l'échelle des responsabilités sans commune mesure. Mais cela montre que, tout en laissant peser une lourde responsabilité sur les titulaires de magistratures, certaines démocraties grecques leur

[112] Cf. *supra* p. 293.
[113] Ps.-Dém., 46 (*C. Stéphanos* II), 7, avec Siron (2019), 171-172.
[114] Cf. Ismard (2019), chap. II et « incise III » (citation p. 187), qui offre d'utiles réflexions sur la notion de représentation.
[115] Cf. Rubinstein (2012) et Fournier (2012).

laissaient la capacité de s'entourer d'autres personnes pour agir, et parfois se faire remplacer par elles.

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Tableau 1 : tableau des prytanes remplacés à Iasos

Inscription	Mois de vote du décret	Nombre de prytanes	Épistate remplacé ou non	Prytanes remplacés	Formule
I. Iasos 82 (c. 250)	?	8	non	2	καταστaθέντος
SEG 57, 1076 (c. 250 ?) (M22)	Aphrodision (6e jour)	6	non	1	καταστaθέντος
SEG 57, 1077 (c. 250 ?) (M23.1+ *I. Iasos* 66)	Aphrodision	6	non	2	καταστaθέντος
SEG 57, 1082 (230') (M25B)	?	?	?	1 +?	καταστaθέντος
SEG 57, 1046 III (230')	Aphrodision	6 ?	non	1 et ?	καταστaθέντος
- *SEG* 41, 932, 15-42 - *SEG* 41, 933 (230-220)	? (6e jour)	6	non	1	καταστaθέντος ὑπὸ Ἀρχιδήμου τοῦ Σαραπ[ίων]ος δι' ἐπιτρόπου [α]ὐτοῦ Εὐκτιμένου τοῦ Ἰατροκλέους
I. Iasos 26 (220')	Thargéliôn	3+	oui	Président et ?	καταστaθείς
I. Iasos 25 (220-210)	Gèphorion (cf. F 2015, 24 n. 28)	8?	oui	Président + 1	καταστaθείς/ καταστaθέντος
- *SEG* 41, 930, 1-32 (220-210) ; - *SEG* 41, 931, 14-57	Aphrodision ? (6e jour)	7	oui	Président	καταστaθείς/ καταστaθέντος

SEG 57, 1081 (fin IIIe s.) (M25A.2)	Aphrodision (10e j.)	7	non	1	καταστaθέντος
I. Iasos 4 (c. 195)	Élaphébolion (30)	7	non	1	δι' ἐπιτρόπου

NB : pour plus de commodité, j'ajoute au *SEG* 57 la référence à l'édition de G. Maddoli (Maddoli 2007, ici simplement « M »), à laquelle renvoie R. Fabiani (2015), abrégé ici « F 2015 » ; de même Bl.2007 renvoie à W.Blümel, *Ep. Anat*. 40 (2007), 42-46. Autres abréviations : DH = décret honorifique ; – prox. = proxénie. – cit. = citoyenneté. – pdt = président. Les décrets votés lors de la même assemblée figurent dans la même case.

Tableau 2 : tableau des décrets avec listes de prytanes à Iasos

Inscription	Nature du décret	Mois de vote du décret	Semestre	Nombre de prytanes	Épistate remplacé	Prytanes remplacés
SEG 57, 1051 (M6) (320'-310')	DH Dynnis Naukratis (prox. + cit.)	A----		4 ? + pdt ?	non	non ?
SEG 57, 1052 (M7) (320'-310')	DH étranger (prox. + cit.)	? (6)		5 + pdt ?	non	non ?
SEG 57, 1053 (M8) (320'-310')	DH étranger (prox. + cit.)	?		4 ? + pdt ?	?	non ?
SEG 57, 1054 (M9) (320'-310')	DH citoyen Chalcédoine (prox. + cit.)	Apollonios 6e j.		3 ? + pdt ?	non	non ?
SEG 57, 1055 (M10) (320'-310')	DH étranger (prox. ?)	Élaphébolion ?		5 + pdt ?	non	non ?

- *I. Iasos* 37 (début IIIe s.) - *I. Iasos* 53 (début IIIe s.)	- DH Antiochos Halicarnasse (prox. + cit.) - DH Théodôros Rhaukos (prox. + cit.)	?		6 6	? ?	non non
SEG 57, 1056 (M11 A) (début IIIe s.)	DH Agépolis Samos (prox. + cit.)	Aphrodision ?	II	4 + pdt ?	non	non
SEG 57, 1060 (M12B) (début IIIe s.)	DH Déméas Alabanda (prox. + cit.)	?		3+	?	?
- *SEG* 57, 1057 (M11B) (270'-260') - *I. Iasos* 39 (270'-260')	- DH citoyen Calymna (prox. + cit.) - DH Antipatros Milet (- ?)	Élaphébolion ? Élaphébolion	Semestre hiver ?	7 dont pdt 5 dont pdt	non non	non non
I. Iasos 82 (c. 250)	DH réponse DH Kalymna	?		8	non	2
SEG 57, 1076 (c. 250 ?)	DH Drakôn Sicyône (prox. + cit.)	Aphrodision (6e .)	II	6	non	1
SEG 57, 1077 (c. 250 ?)	DH Mélanthios, étranger (prox. + cit.)	Aphrodision	II	6	non	2
I. Iasos 35 (c. 240-220)	DH Olympichos (240'-210') (couronne)	?		6+	?	?
SEG 57, 1082 (230')	DH Nausilas Sparte (prox. + cit.)	?		?	?	1 +?
SEG 57, 1046 II (Bl.2007II) (230')	DH juges Cnide (phase 1)	Anthestérion	I	8 dont pdt	non	non
SEG 57, 1046 III (230')	DH juges Cnide (prox. + cit.)	Aphrodision	II	6 ?	non	1 et ?

- *SEG* 41, 932, 15-42 - *SEG* 41, 933 (230-220)	- DH juge Chios (prox. + cit.) - DH juges Clazomènes (- ?)	? (6e jour)		6	non	1
I. Iasos 26 (220')	?	Thargéliôn		3+	oui	Président et ?
SEG 57, 1074 (M20B) (220' ?)	DH Hékatomnos prêtre Zeus Labrandeus (couronne)	?		2+	?	?
SEG 57, 1083 (M26) (220' ?)	DH Timogénès, étranger	?		5+ ?	?	?
I. Iasos 25 (220-210) (cf. F 2015, 24 n. 28)	?	Gèphorion		8?	oui	Président + 1
- *SEG* 41, 930, 1-32 (220-210) - *SEG* 41, 931, 14-57	- DH juges de Clazomènes (prox. + cit.) - DH Alexandros de Téos (prox. + cit.)	Aphrodision ? (6e jour)	II	7	oui	Président
I. Iasos 77 (fin 210' ?)	DH juges de Mylasa (1re phase ?)	? (6)		5+	?	?
SEG 57, 1081 (fin IIIe s.)	DH épimélètes de l'*archeion*	Aphrodision (10e j.)	II	7	non	1
I. Iasos 4 (c. 195)	DH Antiochos III et Laodice (suite lettre Laodice)	Élaphébolion (30)		7	non	1
I. Iasos 76 (180' ?)	DH juges de Rhodes (? déc. 1re phase)	Posidéôn (6)		8 ?	non	?

Tableau 3 : votes au scrutin secret à Iasos

	Document	Conseil	Assemblée
SEG 57, 1046 (Bl.2007II), 42-46 (230’)	DH juges de Cnide	111	[110]2 ou [102]2
SEG 41, 932 (220’?)	DH juges de Chios	68	841
SEG 57, 1074 (M20B) (220’ ?)	DH Hékatomnos	83	1011
SEG 41, 929 (fin IIIe s.)	DH juges de Myndos	83	758 ou 858

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APPOINTING A REPLACEMENT WHILE IN OFFICE IN IASOS: DIFFERENT APPROACHES TO DIFFERENT NEEDS: RESPONSE TO PIERRE FRÖHLICH

The question investigated by Pierre Fröhlich in his paper, namely the replacement of magistrates in Hellenistic cities, is a delicate and interesting one, which has been rarely dealt with. Pierre Fröhlich, after reviewing the few instances of replacement of magistrates known from Athens, focuses on a small number of Hellenistic decrees from Iasos, part of a corpus of more than a hundred, where a handful of πρυτάνεις are substituted by a person appointed by them – the formula used being «κατασταθεῖς ὑπὸ». In two among the relevant documents the replacement πρύτανις is furthermore designated by an ἐπίτροπος, an apparently unique practice. In *SEG* 41, 932, a decree concerning foreign judges coming from Chios (l. 27-30: Λεοντ[ί]σκου τοῦ [..]ο[....]ο[υ] κατασταθέντος ὑπὸ Ἀρχιδήμου τοῦ Σαραπ[ίων]ος δι' ἐπιτρόπου [α]ὐτοῦ Εὐκτιμένου τοῦ Ἰατροκλέους), the replacement πρύτανις is nominated through an ἐπίτροπος. Whereas in I. Iasos 4 (l. 40-41: Πινδάρου τοῦ Σωστράτου δι'ἐπιτρόπου Διονυ|[σίο]ụ τοῦ Μενεκλείους), the ἐπίτροπος himself acts as the replacement of the πρύτανις. The understanding of these intriguing instances of replacement of πρυτάνεις is further challenged by the double meaning of the term ἐπίτροπος, both as a tutor acting on behalf of minors (a usage attested in Iasos inscriptions too), and as an agent acting in one's place. So, was it possible, in Iasos, to have an elected official, member of a body consisting of several persons, replace himself while in office? Furthermore, what is the exact meaning and function of the ἐπίτροπος in the two above instances?

Pierre Fröhlich, in order to answer these questions, proceeds to a thorough investigation of the parallels, in terms of replacement, in Hellenistic sources and inscriptions, examining and refuting, with solid arguments, interpretations previously advanced. His detailed analysis of the instances of the replacement of the πρυτάνεις in different months of the calendar of Iasos fully supports his thesis that there is not enough evidence indicating that such replacements concerned only the election assemblies or the assemblies for the attribution of honors to foreigners. I think that he is also right in questioning the interpretation offered by Roberta

Fabiani[1] that the ἐπίτροπος mentioned in the Iasos inscriptions was acting as a tutor of a minor and orphan, relying on the presumption that the πρυτάνεις were exercising, so early on, a form of liturgy, which would have attested to an oligarchic turn of the city's affairs around 230's B.C.. As he points out, the term ἐπίτροπος has indeed several meanings, the exact one being a matter of interpretation, which must be done cautiously. He is correctly objecting, to the above hypothesis, among others, that liturgic charges are never connected with the exercise of the πρύτανις. I would add that the appointment of someone to act as πρύτανις in place of a minor, through an ἐπίτροπος, would present further complications, considering the nature and obligations of the function of tutor, namely that he would have to give account of the management of the minor's affairs and be held personally liable for the administration of his fortune. This of course, if we consider that appointing someone as substitute entailed a double responsibility, a question very difficult to answer, as Pierre Fröhlich has correctly pointed out.

The explanation offered by the Pierre Fröhlich, that in Iasos, a πρύτανις (probably selected by lot), prevented for whatever reason to attend his functions, could name someone else to act in his place (referred to by the formula κατασταθέντος ὑπὸ) is the most plausible. Pierre Fröhlich also considers that the appointment of the replacement probably had to be confirmed by official act and that if the πρύτανις appointed would be absent at the moment of his installment in office, he could ask an ἐπίτροπος to represent him to this purpose. The replacement πρύτανις would remain in place over a longer period, whereas the presence of an ἐπίτροπος was related to absences or incapacities which could not have been predicted. I would rather suggest that, inversely, the «κατασταθέντος ὑπὸ» formula may designate a case where the πρύτανις had to be replaced ad hoc, in instances where he was present in Iasos but for some reason he could not participate in this particular meeting of the Assembly. Whereas in the second case, where an ἐπίτροπος is acting in the name of the πρύτανις, the πρύτανις, knowing he would be absent for a longer period of time, had appointed someone to act as his ἐπίτροπος on all matters, the powers of which included the right to appoint a third party for a specific duty, including his replacement in a particular Assembly by another member of the Council.

Regarding the question of replacement itself, even though the relevant examples are not ample, the texts presented by Fröhlich offer some parallels of persons acting as replacements at the execution of various duties. In the case of a private institution, such as the educational Foundation of Eudemos of 206/5 B.C. (Milet I 3, 145), the παιδοτρίβαι who wish to accompany the athletes in their competitions are allowed to do so, after leaving a replacement of their duties during their absence, approved

[1] R. Fabiani, « *Dedochthai tei boulei kai toi demoi*: protagonisti e prassi della procedura deliberativa a Iasos », in Chr. Mann et P. Scholz (éd.), *« Demokratie » im Hellenismus. Von der Herrschaft des Volkes zur Herrschaft der Honoratioren?*, Mayence (2012), 143-145, idem, *I decreti onorari di Iasos. Cronologia e storia*, Munich (2015), 213.

by the παιδονόμοι. In the case of a sacred law, the regulation of Miletos on the cult of Rome (Milet I 7, 203), the priest may designate his replacement. These instances show that, in principle, in Ionia, the replacement of a person acting in an official capacity was possible, as long as the regulations of the relevant institution allowed, or even prescribed such a replacement, in case of one's absence or impediment to serve. The 3rd c. B.C. law on the sale of the priesthood of Poseidon Helikonios from Samos (*IG* XII 6, 168), as noted by P. Fröhlich, is particularly eloquent on this instance: … τοὺ]ς ἀποδεικνυμένους ὑπὸ τῶν χιλιαστήρων ἐπιμηνίους τῆς| [θυσίας καὶ τ]ῆς συνόδου τῆς ἐν Ἑλικωνίωι γινομένης ἐπιμηνιεύειν ἐὰν| [ἐνδημῶσι, ἐ]ὰν δὲ ἀποδημῶσιν, οὓς ἂν καταλίπωσιν <ἀνθ'> αὑτῶν κυρίους κατὰ |[ταὐτά. …"*The persons designated by the members of the Chiliastyes to be epimenioi (monthly magistrates), when a sacrifice and assembly is held at Helikon, if they are present, they will fulfill their function in person, and if they are absent, it will be those who they will have left responsible in their place who will officiate in the same way*."

In the above instance though, the reason behind the replacement is evident: the young left at home, in the case of the παιδοτρίβαι of Miletos, need to be looked after, while, in absence of the priest or magistrate to perform the sacrifices, the rituals would be neglected, possibly risking the wrath of the god. It is less evident though to see a reason for the existence, in Iasos, of a compulsory replacement of one among several πρυτάνεις, a body of peers of variable numbers, given that, contrary to the principle of collegiality of the Roman magistrates, the collective bodies of Greek magistrates had no obligation to act in unanimity and, indeed, the numbers of the πρυτάνεις present in different Assemblies in the Iasos inscriptions vary. A possible explanation for the various numbers of πρυτάνεις may be that their replacement was allowed, but it was not compulsory and that some of them chose to be replaced in particular instances where they could not attend their duties and some others did not. We may thus suppose that, in Iasos, a person selected to act as πρύτανις who would not be able to fulfill his duties was allowed to nominate someone to replace him.

The mechanism of replacement of officers in duty still raises several institutional questions. How and when such a replacement took place? Was it provisional of permanent? Why a *prytanes* was nominated by the person in office and not re-elected? Was the presence of the appointer necessary during the act of official installment of the appointee in office? A critical point for the answer of these questions is the hypothesis advanced by Fr. Gschnitzer («Prytanis», *RE Suppl.* XIII, 1973, col. 785) and supported by Pierre Fröhlich, that the appointee had to be a member of the Council. This hypothesis is also supported by the assumption that the person chosen as replacement, while being of the choice of the πρύτανις, must have fulfilled the same criteria of eligibility to the office of πρύτανις as the person replaced.

Regarding the particular issue of the replacement of a πρύτανις through an ἐπίτροπος, it is a fact interesting in itself that, in the Iasos inscriptions, such appointments, even if only two such cases are known, are mentioned casually, as something unexceptional, which indicates that these instances correspond to a usual state of affairs. When and why would an ἐπίτροπος intervene in place of the πρύτανις? A hint to the solution to this puzzle may be given by the inscriptions discussed by Pierre Fröhlich. In a document recording a private transaction from Mylasa (I. *Mylasa* 204) the explanation given for the presence of the ἐπίτροποι in place of the party concerned (l. 18) is "αὐτοῦ ὄντος ἀποδήμου", him (Antipatros) being absent, presumably far away from his country (this being the meaning of ἀπό-δημος). As P. Fröhlich points out, this case shows the link between the absence of a citizen and his representation by one or more ἐπίτροποι. In the decree of Halasarna (IG XII 4, 103, l. 27-28), it is also stated "τὸς δὲ ἀ|ποδάμος ἀπογραφόν|τω τοὶ ἐπίτροποι, εἰ δὲ| μη, ἀπογραφέσθων αὐ|τοὶ ἐπεί κα παγένη|ται ἐν τριμήνωι" (all those absent will be inscribed by the ἐπίτροποι, or else, they will inscribe themselves upon their return, within three months). These references indicate that appointing an ἐπίτροπος, acting as the equivalent of the Roman procurator, was a common practice for those who planned to be absent abroad over a long time. As Cicero will later explain in the *Pro Caecina*,[2] "*the one who is given the title of procurator according to the law, (is someone who) namely takes care of all the affairs of the one who does not live in Italy or who is absent for a public service, almost as if it would be the master himself, that is to say the substitute for the right of others…*".

I would therefore add to the hypothesis presented by Pierre Fröhlich the following suggestion: that the ἐπίτροποι mentioned in the decrees of Iasos might have been appointed by those who, while acting already as πρυτάνεις, were called during their term of office to leave the city on some official duty, such as in the case of an embassy, or to act as a foreign judge to another city, as a θεωρός, or on other official mission, which would mean that they would be absent over a longer period of time and needed someone to look after their affairs and duties while they would be gone. Therefore, the reason for the existence of two different cases, this of a πρύτανις being replaced directly by the appointee (κατασταθέντος ὑπὸ) and this of being replaced through an ἐπίτροπος of the appointor, may be that, in the first case, a πρύτανις who was not in a position to participate in a particular Assembly appointed directly, ad hoc, someone to replace him. Whereas, when he was to be – predictably – absent over a longer period of time, especially on official duty, he would appoint an ἐπίτροπος as his general agent, who would have (among others) the capacity to choose who would be designated to act in his place in each

2 Cicero, Pro Caecina 20.57: *is qui legitime procurator dicitur, omnium rerum eius qui in Italia non sit absitve rei publicae causa quasi quidam paene dominus, hoc est alieni iuris vicarius*, ...

Assembly, subject to the availability of suitable substitutes. This interpretation of the system of substitution in Iasos relies on the assumption of a temporary, *ad hoc* nomination of a replacement πρύτανις for each Assembly. Such a system of replacement would present the interest of preserving the official appointment of the original πρύτανις, throughout his term of office, and have him be replaced in his duties, by his own initiative, only for certain Assemblies and votes which he could not attend in person.

I would be skeptical though as to whether an official nomination, by the city itself, of the person acting as a one-time replacement of the πρύτανης would have to take place in such cases, if of course we are correct in assuming that the appointee was already a member of the Council and therefore possessed all the necessary legal prerequisites in order to sit as πρύτανης. Καθίστημι has indeed the meaning of appointment by official act, but, in Iasos, we have no trace of any such official confirmation procedure. As it is pointed out by Pierre Fröhlich, the same verb is also used in the appointment of guarantors by private acts, in several manumission inscriptions from Delphi and central Greece. Although some form of official nomination of his replacement, by the πρύτανης being replaced, certainly would have been needed, this could have been done by a simple declaration: the πρύτανις may have publicly named (orally with witnesses? by written document registered in the city archives?) another βουλευτής as authorized to act in his place as πρύτανης in a particular Assembly. Pierre Fröhlich is bringing forth several examples of replacement of city officials, where the initiative and choice of replacement could be taken by the officer himself, instead of the city. For the πρύτανης who could not attend a meeting of the Assembly, choosing himself the person who would replace him in a particular vote presented the interest of allowing him to exercise, through his replacement, his own policy, as he would certainly appoint someone close to his own views and political affiliations. This would also explain why the numbers of the πρυτάνεις vary in different inscriptions: some may have chosen to be replaced in decisions of importance to them, but not in some others which did not matter that much. On the other hand, assuming that each πρύτανης would have to designate a priori a potential substitute, and this person, when the time would come for him to serve (when the original πρύτανης was not able to execute his duties for whatever reason), would have to be confirmed in his office by an official act of the city, seems an unnecessarily complicated procedure.

The same goes for the hypothesis that, if the replacement πρύτανης could not be present for his «appointment», he authorized an ἐπίτροπος to do it in his place. Having someone named as one's ἐπίτροπος, in the sense of a person mandated to represent a party absent for all matters and administrate his affairs, created a legal bond requiring an official nomination by the mandator, acceptance by the mandate and entailed broader legal obligations. Again, this seems too complicated if the role of the ἐπίτροπος would be to assist the person replaced only in one official act. A simpler explanation would be that ἐπίτροπος in the two inscriptions of Iasos is

acting as agent of the original πρύτανις, and not as this of his replacement. Therefore, in *SEG* 41, 932, l. 27-30 (the Λεοντ[ί]σκου τοῦ [..]ο[....]ο[υ] κατασταθέντος ὑπὸ Ἀρχιδήμου τοῦ Σαραπ[ίων]ος δι' ἐπιτρόπου [α]ὐτοῦ Εὐκτιμένου τοῦ Ἰατροκλέους) the ἐπίτροπος (Euktimenos) appointing the replacement πρύτανις (Leontiskos) would be this of the original πρύτανις (Archidemos) and not this of the appointee Leontiskos, ([α]ὐτοῦ referring to the immediately preceding name of Archidemos). The question that arises is why the ἐπίτροπος would not act directly as the replacement of the πρύτανης in this case, as he appears to do in the case of the decree of I Iasos 4, l. 40-41 (Πινδάρου τοῦ Σωστράτου δι'ἐπιτρόπου Διονυ|[σίο]ụ τοῦ Μενεκλείους). A simple explanation to this would be that the ἐπίτροπος Euktimenes, in the first above case, was not at the time a βουλευτής himself, therefore he had to nominate a third person (Leontiskos), who was a βουλευτής, to act in place of the absent πρύτανης (Archidemos).
The above mechanism of replacement would be simple, efficient and require little in terms of administrative procedure. If we may venture so far as to illustrate a modern equivalent, it would resemble the instance where a member of the board of directors of a legal entity, who cannot participate in a particular meeting of the board, appoints – usually by a simple letter of authorization – as his proxy another of the members of the board and instructs him to vote in his place. Whereas also, a member of the board of directors who expects to be absent over a longer period of time abroad, can appoint – usually by notarial deed – someone to act as his general proxy, with a more or less broad scope of duties, authorizing him also to appoint third parties as further proxy with regards to specific duties, including his vote in the said board.

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LAW AND IDENTITY. CONSIDERATIONS ABOUT CITIZENSHIP AND SUCCESSION IN PROVINCIAL PRACTICE

Abstract: There is evidence to assume that legal intercourse between different classes of provincial populace was more intensive than commonly assumed in scholarly literature. Focused on the period before the *Constitutio Antoniniana*, a response of Scaevola will be introduced regarding a Greek *parakatatheke* inter vivos but employed in inheritance context (D. 32.37.5 18 *dig*.). Upon the paradigmatic case it can be argued that the 'choice of law' was not only based on status, but also on personal considerations, even among Roman citizens in a provincial environment.

Keywords: Roman law and indigenous law, principle of personality, inheritance, *parakatatheke*, Gnomon of the Idios logos

Most authors engaged in the topic of "Reichsrecht" and "Volksrecht" in the Roman Empire took a close look at the period after the *Constitutio Antoninana* in order to trace with Mitteis the "fortschreitende Romanisierung" of provincial populace. Mitteis even spoke of a "struggle of two worlds": although "Volksrecht" persisted for a long time, "Reichsrecht" (the law of Rome) penetrated into the provinces, until the antagonism between local and Roman law ended up in the victory of the last one.[1] My contribution is focused on the period before 212, when Romans were still clearly separated (according to their status) from the large masses of *peregrini*. It is generally believed that Romans lived under Roman law while *peregrini* settled their transactions under their indigenous law. For this phenomenon, Wolff developed the concept of "getrennte Rechtsmassen… die sich jede für sich und in der Hauptsache unbeeinflusst durch die andere entwickelten."[2]

I raise the question whether the strict separation between the classes (set out by public law) is established by documents of everyday legal life. Was there really no 'tightrope walk' between these very different legal cultures? Were the "separate legal masses" really completely isolated and unaffected by each other?

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[1] Mitteis 1891, 151–4.

[2] Wolff 1979, 47; see also Mélèze Modrzejewski 2014, 241–5; Rupprecht 2005, 18–20; Alonso 2015, 351–6.

Recently, I considered sales documents from this point of view.[3] The detailed investigation led to the result that the choice of law (preserved in sales formulas) was not necessarily based on citizenship. However, sales documents are strongly linked with trade, and trading was a highly 'globalized' phenomenon in the Mediterranean world, too.

Inheritance poses new challenges. While trade was largely left to private autonomy, status, family and succession always meant instruments of political power. Targeted state interventions shaped the legal norms epoch by epoch. First of all, strict orders set the limits of capacity, of making wills and undertaking a will.[4] Wills of the Greek-speaking populace were very different from those of Romans[5]: 'local' wills followed Greek-Hellenistic patterns, while the 'Roman' ones had to fulfill the rigorous formal and internal prescriptions of *ius civile*. It is a common view, that the 'principle of personality' determined the choice of law: Romans and *peregrini* acted within the scope of their own laws, respectively.

1) Greeks and Romans in the Roman Empire

In the ancient world, basically the principle applied that "Angehörige einer *civitas* … das von deren Bürgern als für sich maßgeblich angesehene Recht als ihr Personalstatut besaßen".[6] Wolff underlined that originally it was a consequence of the "personal und gentilizisch bestimmten Struktur des politischen Gemeinwesens"; it prevailed not only in Greek poleis but also in Republican Rome. This principle was undoubtedly valid and also well documented even in the golden age of the Roman Empire, in the first and second century AD. A valuable source from Roman Egypt confirms that Roman authorities mercilessly opposed any intercourse between the classes, especially in succession. This brings to mind the *Gnomon* of the *Idios Logos*, whose prohibitions and commands show a tendency that can also been transferred to other eastern provinces.[7] The *Gnomon* reflects provincial life as viewed by Roman fiscal administration. The text, edited by Wilhelm Schubart in 1919[8], is a presumably incomplete copy, written down on the verso of a list of accounts from the small village of Bernikis. It is a collection of guidelines, closely related to imperial orders and provincial precedents.[9] The text itself traces the records back to Augustus; but later constitutions and other legal sources have also been carefully inserted.[10] Of the 114 preserved paragraphs of the *Gnomon* 34 (about

[3] Jakab 2018, 493–505.
[4] Kreller 1919, 328–36; Strobel 2014, 18–54; Nowak 2015, 19–41.
[5] Kreller 1919, 313–28; Voci 1963, 64–73; Amelotti 1966, 111–22; Migliardi-Zingale 1997, 305–7.
[6] Wolff 2002, 148.
[7] For dating see Schubart 1919, 3–5 and 8; recently also Dolganov 2020 (forthcoming).
[8] Schubart 1919; Plaumann 1919; Lenel, Partsch 1920; Reinach 1920; Riccobono 1950; Mélèze-Modrzejewski 1977, 520–57.
[9] Recently Babusiaux 2018, 109–15.
[10] See e. g. P.Oxy XLII 3014; with Jakab 2020 (forthcoming) at n. 7.

30%) relate to inheritance (§§ 3–36). This special guide has been collected, copied, distributed within the province and applied by the Imperial fiscal administration.[11]

The significant differences in status (so typical for ancient societies) are particularly apparent in the *Gnomon*. Romans, Alexandrians, Egyptians and foreigners made up the mixed populace of the Roman province of Egypt. As mentioned above, family and inheritance law were strongly linked to status[12] and the *Idios Logos* interfered to enforce the special needs of taxation (BGU V 1210, l. 35–37, § 8):

> η ἐὰν Ῥωμαικῇ δια[[κ]]θήκῃ προσκαίηται ὅτι ὅσα δὲ ἐὰν διατά|[ξ]ω κατὰ πινακ̣ί̣δας Ἑλληνικὰς κύρια ἔστω, οὐ παραδεκτέα | [ἐ]στίν, οὐ γὰρ ἔ[ξ]εστιν Ῥωμαίῳ διαθήκην Ἑλληνικὴν γράψαι.[13]

The authorities made sure that Romans write their wills exclusively under the formal and internal rules of *ius civile*.[14] According to § 7 (l. 33–34), Roman wills must follow the strict rules laid down by public law. § 8 extended these prescriptions also to codicils: if supplements in Greek were added to a regular Roman testament, they should remain ineffective.[15] In their last wills, Romans must strictly observe *ius civile* as developed in the city of Rome. The severe rules of capacity excluded many persons whom a testator might wish to benefit.

The partly archaic formalities of *ius civile* were to some extent relaxed with recognizing *fideicommissa*, especially since Augustan times. It became a common practice to order a reliable person (by will or in a separate document called *codicillus*) to hand over some property to a beneficiary. Anyone could be benefitted by *fideicommissum*, even if he or she belonged to a different status group.[16] At the beginning, the limitations of *incapacitas* (laid down in Augustan marriage laws) or that of the *lex Falcidia* did not apply for *fideicommissa*. Gaius emphasized that originally *fideicommissa* were mostly used for the benefit of *peregrini* (2.285): *ut ecce peregrini poterant fideicommissa capere et fere haec fuit origo fideicommissorum*. The jurist saw the aim of recognizing this free-form type of disposals as being exactly the special assistance that Romans often wanted to benefit *peregrini* or vice verso.

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[11] Swarney 1970, 77–81 underlined that the *Idios Logos* acted as sales agent, administrator, investigator and judge.

[12] As already pointed out by Mitteis 1891, 102–10.

[13] “8: If to a Roman will is added a clause saying, “whatever bequests I make in Greek codicils shall be valid,” it is not admissible, for a Roman is not permitted to write a Greek will.” Translation A. S. Hunt.

[14] Rüfner 2011, 1–26; see already Kreller 1919, 328–37; Riccobono 1950, 119–23.

[15] Riccobono 1950, 35–6; Reinach 1920, 52–4; Strobel 2014, 30–1; Nowak 2015, 194–9.

[16] Kaser, Knütel, Lohsse 2017, 423.

However, the initial generosity was soon curtailed. Under Vespasian and Hadrian, *Senatus consulta* prohibited every form of acquisition on death between different classes.[17] The new regulations soon appeared in the provincial guide of the *Gnomon*. § 18 quoted the Vespasian rule extending the limits of capacity for *fideicommissa*; any type of last will against the law had to be sanctioned with confiscation (BGU V 1210, l. 56–58, § 18):

> ιη τὰ\ς/ κατὰ πίστιν γεινομένας κληρονομίας ὑπὸ Ἑλλήνῳν̣ \εἰς/ [[ὑπὸ]] Ῥω|μαίους ἢ ὑπὸ Ῥωμαίων \εἰς/ Ἕλληνας ὁ θεὸς Οὐεσπασιανὸς̣ [ἀ]νέλαβεν, | οἱ μέντοι τὰς πίστεις ἐξωμολογησάμενοι τὸ ἥμισ[υ ε]ἰ̣λήφασι.[18]

The restrictions imposed by *Senatus consulta* also for alternative forms of final disposals between *peregrini* and Romans must have been observed. In the case of violations, the *Idios Logos* confiscated the entire estate; the only exception was a voluntary self-disclosure.[19] However, the need for such bans on writing Greek wills and on trusts for *peregrini* gives the impression that local forms of disposals must have been used in everyday life. Since contracting parties were free to choose between Roman and local custom, the strict formalities in succession must have been rather unpopular.

While Roman authorities were generous and compliant in the law of commerce they took strict, consequent actions in matters of status and inheritance. Public interest, such as transparency in citizenship and protection of family structures, required mandatory standards. The so-called *testamenti factio*, the capacity to make wills and to take under a will, became strictly linked to status: any type of succession was forbidden between Romans and *peregrini*.[20]

It was a desirable aim to test the effectiveness of the hard guidelines of the *Gnomon*. For this, one should re-analyze all Roman and local wills, including also the alternative forms of disposals on death. Not merely the documentary texts, but also literary evidence should be considered. Among them, also *responsa* of Roman jurists include valuable testimonies about the wording of wills, Roman and local as well. Especially the evaluation of this group of sources seems to me largely neglected.

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[17] Gai. 2.285; see for it Mélèze-Modrzejewski 1977, 526; Riccobono 1950, 135; Johnston 1988, 19–20; Babusiaux 2018, 142–3. Recently to enforcing *fideicommissa* Babusiaux 2019, 149–55.

[18] "18: Inheritance left in trust by Greeks to Romans or by Romans to Greeks were confiscated by the deified Vespasian; nevertheless, those acknowledging their trust have received the half." Translation A. S. Hunt.

[19] Johnston 1988, 19–20.

[20] There were exceptions and privileges for some social groups; see for reference recently Jakab 2020 (forthcoming) at n. 19; Lovato 2011, 162–3; Stagl 2014, 130–1.

Such a comprehensive study is beyond the scope of this article. Not even all texts, which can demonstrate a regular intercourse between the different classes (confirming a kind of 'Hellenization' of Romans living in the provinces) can be scrutinized here. Therefore, I restrict my analysis to one single legal dispute preserved from the 2nd century AD. In my opinion, it sheds a new light on the possibility of mutual influences between Roman law and local custom of the provinces. As a working hypothesis I would like to put forward that 'principle of personality' was not even fully applied in succession.

2) A remarkable case

The complexity of the problem requires special analyses, really detailed exegeses of the relevant sources. That is why I concentrate merely on the interpretation of a central text, delivered in D. 32.37.5 Scaevola (18 dig.):

> *Codicillis ita scripsit*: "Βούλομαι πάντα τὰ ὑποτεταγμένα κύρια εἶναι. Μαξίμῳ τῷ κυρίῳ μου δηνάρια μύρια πεντακισχίλια, ἅτινα ἔλαβον παρακαταθήκην παρὰ τοῦ θείου αὐτοῦ Ἰουλίου Μαξίμου, ἵνα αὐτῷ ἀνδρωθέντι ἀποδώσω, ἃ γίνονται σὺν τόκῳ τρὶς μύρια, ἀποδοθῆναι αὐτῷ βούλομαι· οὕτω γὰρ τῷ θείῳ αὐτοῦ ὤμοσα." *Quaesitum est, an ad depositam pecuniam petendam sufficiant verba codicillorum, cum hanc solam nec aliam ullam probationem habeat. respondi: ex his quae proponerentur, scilicet cum iusiurandum dedisse super hoc testator adfirmavit, credenda est scriptura.*[21]

Q. Cervidius Scaevola discussed a rather unique disposal on death. The testator directed his heirs to hand over a certain amount of money to a beneficiary; his order was recorded in an informal document, probably a letter, not in a formal will.[22] The testator began with a *kyria*-clause: "I wish all that is written below to be valid." Such a clause was widespread in notary practice, drawing up legal transactions in Graeco-Egyptian documents both *inter vivos* and *mortis causa*.[23] Therewith, the testator wanted to emphasize that his heirs should follow his will without any delay or contradiction.

The legal dispute which Scaevola had to settle flared up between the heirs of the testator and the beneficiary. The case became even more complicated because the

[21] D. 32.37.5 Scaev.: "Someone wrote in a codicil: "I wish all that is written below *kyria einai* (to be valid). To my *kyrios* Maximus I wish to be restored the fifteen thousand denarii which I received as *parakatatheke* from his uncle Julius Maximus with the agreement to give to him on his reaching puberty. These with the interest come to thirty thousand. I made this promise on oath to his uncle." The question was whether the words of the codicil are adequate for a claim for the deposited money, when the claimant has this proof only and no other. I replied: Upon the case as put, since the testator in addition declared that he had sworn an oath, the writing must be believed." Translation A. Watson, with some modifications.

[22] Actually just the Roman jurist called it codicil.

[23] Wolff 1978, 155–62.

testator's request referred to a past transaction in which three people were involved: the testator, a certain Maximus whom the testator calls his *kyrios*[24], and his uncle, Julius Maximus. That Julius Maximus made an agreement with the testator during his lifetime; it is called *parakatatheke* in the Greek text. Julius Maximus handed over 15,000 denarii to the testator's custody and agreed that it should not be paid back to himself but to a third party. This third person was young Maximus, the depositor's nephew. In addition, the depositary's obligation was conditional: the money was only due when young Maximus came of age (the age of maturity with full ability to act on his own account). Additionally, it was agreed that the 15,000 should be paid with interest. The writing quoted mentions 30,000 denarii (this was double the amount deposited), it is obvious that the interest had already been set in advance; in my view, it was agreed as a flat rate.[25] In this sense, the testator instructs his heirs to pay young Maximus 30,000 denarii from his estate. In the end, there was also a hint to an oath: concluding the *parakatatheke* with Julius Maximus in the past, the testator stated (guaranteed) to him his fair future behavior in an oath.

In all likelihood the uncle died long before and the testator was probably also on his deathbed. Quintus Cervidius Scaevola, the leading lawyer of the Emperor Mark Aurel[26] was asked whether this evidence could be used in a lawsuit brought for the 30,000 denarii.

It is obvious that young Maximus (named as beneficiary in the *parakatatheke*) wanted to file a lawsuit against the heirs of the testator. It is also certain that Maximus could not provide any evidence of his claim other than this *scriptura*. Apparently, the peculiar legal transaction left no traces neither in Julius Maximus' will nor in his documents and accounts.

Scaevola decided the case in favor of young Maximus. He judged that there should be a possibility to claim against the heirs. However, as basis of a future trial he did not propose any *actio* based on the Greek *parakatatheke* (as described by testator), nor on *depositum* (its closest Roman pendant), and not even on the codicil; he suggested to claim merely on the oath mentioned incidentally by the (deceased) depositary.

Most scholars interpreted the transaction between Julius Maximus and the testator as a *depositum* under Roman law (known as 'open depositum' or *depositum irregulare*).[27] The text even served as vital evidence to support the fact that 'open

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[24] Some scholars assume that the depositary must be the freedman of Julius Maximus or of his young nephew; e.g. Spina 2012, 244–5 and 248. However, the word *kyrios* could also denote an undefined proximity to the family.

[25] Spina 2012, 249–50 meant that the interest rate was exactly calculated in advance for the whole period. In my opinion, the round amount indicates rather that the interest was fixed at a flat rate.

[26] Kunkel 2001, 217–8; Liebs 1976, 294–6; Spina 2012, 13–22; Parma 2007, 4024–5.

[27] The treminology *depositum irregulare* comes from the Middle ages, cf. Scheibelreiter 2015, 354–5; idem 2017, 443 n. 2.

custody' was already recognized in Rome in the 2nd century AD.[28] Only a few studies approached the case concerning Greek contractual practice.[29]

Recently, the main theories were summarized by Spina. She also underlined that Scaevola's case is an important proof for the existence of the open *depositum* in Roman law, and that interest could be charged as an integral part of the transaction.[30] Spina also recognized the provincial origin of the case: "Si potrebbe pensare che le fattispecie sottoposte a Scevola si riferissero a figure contrattuali tipiche dei diritti greci, sconosciute al mondo romano."[31] From all this, however, she drew the conclusion that Rome's lawyers absorbed this Greek type agreement into Roman law–and Scaevola gave also in the present case an *actio depositi* with a formula *in ius concepta ex fide bona*.[32]

However, this opinion can be opposed by the fact that Scaevola (if I understand the case properly) did not award the beneficiary with any claim from a *depositum*. Although he transferred the Greek terminology of the document into the narrative of Roman law (*ad depositam pecuniam, codicillis*), he spoke nowhere of an *actio depositi*. Most scholars (and also Spina) overlooked that Scaevola switched elegantly from *depositum* to *iusiurandum*! Nevertheless, the scholars did not attach any importance to the depositary's oath.

Some scholars considered also the possibility of filing a *petitio fideicommissi*.[33] In fact, Scaevola dealt with *fideicommissum* in the neighboring texts, in his extensive books *De legatis et fideicommissis*. Despite this, in the present case he did not suggest to bring any action from the testator's disposal on death.

A few years ago, Bürge assumed guardianship as the key point in background.[34] His main argument was the depository's obligation to pay interest on the deposited money. In his opinion, to pay interest could not be charged at that time for an 'open *depositum*' under Roman law. Therefore, the depositary's task of returning 30,000 (instead of the deposited 15,000) should be explained with a fiduciary mandate for money administration. In my view, however, merely the agreement of paying interest cannot convincingly prove a guardianship relation. Through shifting the case to *tutela*, Bürge completely excluded any provincial context (any possibility of non-Roman ideas).[35]

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28 Litewski 1974, 242; idem 1975, 308; also Walter 2012, 133 and Spina 2012, 246–9.

29 Kübler 1907, 188; Frezza 1956, 151; Simon 1965, 66. De Churruca 1991, 322 emphasized that the text deals with a Greek *parakatatheke*. Recently, Scheibelreiter 2015, 359–364; idem 2017, 451–458 demonstrated that several decisions of the Roman lawyers, preserved in the Digest, discuss actually Greek transactions.

30 Spina 2012, 247–53.

31 Spina 2012, 251.

32 Spina 2012, 251–2. But later, also Spina 2015, 253–6 and eadem 2013, 562–3 underlines the Greek character of the transaction.

33 Spina 2012, 253.

34 Bürge 1987, 540.

35 Followed by Häusler 2016, 431–2; Walter 2012, 446.

An obligation to pay interest can be attributed to a variety of *causae*. Of these, first of all the concrete agreement (*lex contractus*) comes into consideration as it also appears in the letter (codicil) of the depositary. Scaevola seems to have respected the agreement among the parties (recognizing private autonomy). In any case a *lex contractus* like this sufficed for filing a lawsuit–and put aside the principles of *bonae fidei iudicia*.[36]

Without any doubt, Julius Maximus is called the uncle of young Maximus; there was a relationship between them. However, I cannot see any hint of the uncle's being the nephew's tutor. The only link to *tutela* could be the condition of future maturity. In my opinion, the phrase ἵνα αὐτῷ ἀνδρωθέντι marked only the future deadline of ἀποδώσω (repayment of the deposited amount with interest), without any guardianship relation.[37]

In summary, it can be concluded that Scaevola's case was always considered controversial in modern scholarly literature. The Greek language of the codicil, the peculiar *parakatatheke* and the surprising decision of the lawyer make a smooth interpretation under Roman law hardly possible. In my view, these obvious tensions move the case into a provincial context.[38] Just as a reminder, Johnston has already assumed a provincial origin due to the *kyria*-clause: "as for Roman practice, there appears to be no evidence that clauses of the sort were ever used."[39] Trying a new exegesis, the link to provincial (Greek) practice must be taken into account as suggested already by Kübler.[40]

3) Some considerations of the context

Scaevola's case can be interpreted as an attractive example for regular intercourse between Roman law and local custom as practiced in everyday business connections in the provinces of the Roman Empire. Scaevola's response was affirmative but legally evasive; it gives the impression that the case seemed to him rather problematic. The technical words *codicilli* and *testator* indicate that Scaevola translated the Greek terminology of the depositary's final disposal into the narrative of Roman law. Nevertheless, the original document was faithfully included in his summary of the case. This is a sign of his respect for peculiar legal ideas coming from a province even if it partly contradicts Roman legal norms.

The depositary, who drew up the document for his heirs, was undoubtedly brought up in Greek (legal) culture. He lived very likely in one of the eastern provinces. However, it remains uncertain whether Julius Maximus and young Maximus were also based in the same province. Indeed, they seem to have been

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[36] The principles of *bonae fidei iudicia* belonged to dispositive law, which only took effect if there was no *lex contractus*.

[37] Not even Scaev. D. 32.37.5 can substantiate Bürge 1987, 545.

[38] Frezza 1956, 143; and carefully also Spina 2012, 247 and 251.

[39] Johnston 1985, 260.

[40] Kübler 1907, 183–4.

Roman citizens (if one can rely on anonymized stock names as prosopographical evidence).[41] The *nomen gentile* Julius probably indicates that the uncle (or one of his antecessors) was a freedman; however the high amount at stake suggests an upscale in social class. The protagonists must have belonged somehow to a provincial elite.

Although uncle and nephew seem to have been Romans, they obviously conducted their affairs (at least partly) according to local legal and notarial custom. The fact that their legal dispute was brought to Scaevola (the leading jurist of the Emperor) can be seen as evidence of their wealth and their *de iure* affiliation with Roman law.[42]

Scaevola quoted a Greek document (most probably a letter[43]) referring to a *parakatatheke*. Anyway, this was a contract *inter vivos*. I see no reason to doubt this phraseology and to replace the highly technical Greek terminology with the very Roman institution of a *depositum irregulare* or 'open *depositum*' as it was mostly done by scholars. A well-founded exegesis, taking into account the provincial context could expose new facets of the case that have until now remained hidden in forced interpretations under Roman law.

4) Parakatatheke, a Greek legal institution and its way to Rome

Simon has convincingly argued that the *quasi-parakatatheke* is by no means equal with the *depositum* of Roman law. The words παρακατατίθεσθαι, παρατίθεσθαι, παρακαταθήκη, παραθήκη mark a fiduciary handing over into custody, "den Vorgang des Anvertrauens zur Obhut, die treuhänderische Übergabe".[44] Handing over of goods into possession or ownership of the taker is a common feature of loan and deposit, in Greek and Roman law as well. The economic element of usage ("Nutzen, Gebrauchmachen") was present in each of these legal transactions.[45] However, there were no clear boundaries between *daneion*, *chresis* and *parakatatheke* in Greek law. If fungible things were provided, a legal classification can only be based on the special economic interest that prevailed in the specific legal transaction. If money was handed over in the interest of the debtor, the *daneion*-formula was used to record the key points of the agreement. If money was provided to custody (trust), the *parakatatheke*-formula was taken.

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41 For their Roman citizenship argued Talamanca 2000–2001, 550. Kübler 1907, 184 considers them Romans of 'Greek nationality'.

42 The writing of the depositary (testator) was classified by the Roman lawyer as *fideicommissum*. According to Gaius 2,278 *fideicommissa* could be prosecuted before the prefect in the provinces. For the high costs of litigation see Haensch 2015, 255–7.

43 The classification of the document as *codicillus* took place only in the course of the interpretation by the lawyers of Rome.

44 Simon 1965, 44. Scheibelreiter 2020, 42–74; my sincere thanks to the author for providing the manuscript. See also Scheibelreiter 2010, 349–352; idem 2015, 359–364; idem 2017, 451–8; Rupprecht 1994, 121.

45 Scheibelreiter 2020, 43; Simon 1965, 41, see Kübler, 1908, 196–9.

No Greek source ever contested the depository's right of use.[46] If the entrusted objects consisted of consumable items, particularly in money, the depositary was always allowed to use it; even temple deposits were economically used in the Greek world.[47] Additionally, *parakatatheke* agreements covered a much wider circle than the Roman or modern concept of *depositum*. Simon emphasized that the depositary's right to use resulted from the type of the objects deposited, and not from contractual considerations.[48]

Nevertheless, the differentiation between the Roman contracts of loan (*mutuum*), *depositum*, and "open depositum" (*depositum irregulare*) was based on the clearly defined boundaries between ownership and possession. A similar differentiation was unknown to Greek law.[49] Our modern terminology is largely unsuitable for capturing the legal nature of *parakatatheke*, because it had "no unchangeable substantive structure" ("keine unveränderliche materiellrechtliche Struktur").

Parakatatheke agreements were applied for various purposes, such as transferring dowry, relinquishing money into custody, and disposing on death. In all these transactions, the fiduciary aspect prevailed. Interpreting Greek *parakatathekai*, one should be aware of the blurred lines of the contract.[50] This is why even the recovery at any time was not considered an essential element of every *parakatatheke*. The classification of a transaction took place according to a "Phänotyp", even if essential parts were excluded in a specific agreement. Therefore, money entrusted for security reasons was always called *parakatatheke* even if the depositor stipulated a deadline or granted usage for interest.[51]

Amazingly, Scaevola did not question the validity of the *parakatatheke* in D. 32.37.5, although it was based on Greek legal concepts. Instead, he looked for suitable procedural tools to make the consent of the parties enforceable even under Roman law.

Several passages of the Digest confirm that Cervidius Scaevola was familiar with *parakatathekai*, these omnipresent transactions of Greek legal practice.[52] Also these parallel cases illustrate his consistent efforts for recognizing legal institutions of provincial local custom under Roman law.

Recently, Spina and Scheibelreiter have dealt with some of these sources; I rely on their results.[53] Scheibelreiter emphasized that depositing fungible things with a

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[46] Simon 1965, 46 and 55.

[47] Jakab 2003, 506–7; Scheibelreiter 2020, 97–9.

[48] Simon 1965, 46: "Die Nutzungsbefugnis sei ‚in erster Linie eine Funktion der hingegebenen Sachart' und nicht des 'schuldrechtlichen' Geschäftstyps."

[49] Kränzlein 1963, 89–90; Simon 1965, 47.

[50] Simon 1965, 52–3.

[51] Simon 1965, 64–5.

[52] D. 46.3.89 pr.; D. 13.5.26; D. 14.3.20.

[53] See first of all Scheibelreiter 2020, 42–74; idem 2015, 353–385; idem 2017, 443–65; Spina 2013, 562–3; eadem 2015, 248 and 253–6.

permission to use them was already well known in Republican Rome; the comedies of Plautus, and also legal texts of Alfenus Varus provide sufficient evidence for it.[54] The second typical element of Greek *parakatathekai*, the depositor's claim for interest became much later an integral part of a *depositum irregulare*.[55]

The disagreements amongst Roman lawyers for and against the enforceability of interest will be omitted from this paper. It is sufficient, with regards to the current topic to emphasize that Rome's leading jurists knew and regularly discussed *parakatatheke* deeds, seeking to enforce their terms also under Roman law.[56]

Scheibelreiter has already stressed that the problem of handling with *parakatathekai* fits also into a "larger context" because such legal transactions laid "at the intersection between Greek and Roman law". Scaevola and his colleagues were confronted with the problem of "foreign law", they frequently tested if certain Greek type agreements could be enforced even under Roman law.

Not only Scaevola but also Papinian and Paulus responded repeatedly to inquiries with *parakatatheke* background. Sometimes also the wording of the agreements was quoted in the original Greek, sometimes it was translated into Latin but the essential element of *parakatathekai*, trust for security, was always an essential element. As Simon has already shown, the depositary's right to use the things depended on the nature of the objects deposited. In the case of fungibles, such as money, an equivalent (not the same things) was returned; from this resulted the duty to pay interest.[57]

To summarize, *parakatatheke* agreements originated in Greek law, but in the 2nd century AD, they had been for long recognized also in Rome. Scaevola was familiar with such kind of transactions when he delivered his response in D. 32.37.5. Occasional controversies among the lawyers were limited to the problem whether interest is owed even if an explicit clause was missing. From this point of view, the transaction between Julius Maximus and the anonymous testator seems unproblematic, since the interest clause was explicitly included in the deed and confirmed also in the codicil of the depositary.

5) Conflicts with the third person

In concluding the *parakatatheke* Julius Maximus agreed that repayment should not be made to him (the depositor) but to his nephew. Contracts in favor of third parties were mostly ineffective under classical Roman law,[58] but it was rather common in

[54] Plaut. *Bacch*. 249–75 bzw. 327–41; Alfenus Varus in D. 19.2.31; Scheibelreiter 2015, 355–6.

[55] Scheibelreiter, 2015, 356.

[56] Scheibelreiter 2017, 451–2.

[57] In the same sense Scheibelreiter 2017, 460.

[58] Finkenauer 2018, 248–54.

Greek *parakatathekai*. Such transactions are well documented in Attic oratory; they mostly concern money deposits with bankers (*trapezitai*).[59]

Among others, also the pseudo-Demosthenic speech against Kallipos (or. 52) is focused on a *parakatatheke* with a banker.[60] Apollodoros, whose father Pasion ran a well-known bank in Athens, defends himself as Pasion's heir against the claims of a depository's heirs. One of Pasion's customers, Lykon from Herakleia, deposited 1,640 drachmas with him before embarking on a long sea voyage to Libya. The deposit was made on the condition that the amount would be paid to his business partner, Kephisiades, as soon as he returns to Athens.[61] Lykon even named a witness who would identify Kephisiades for the banker.[62] The speech quotes the entry in the accounts of the bank (52.6):

> 'Λύκων Ἡρακλεώτης χιλίας ἑξακοσίας τετταράκοντα·Κηφισιάδῃ ἀποδοῦναι δεῖ· Ἀρχεβιάδης Λαμπτρεὺς δείξει τὸν Κηφισιάδην.'[63]

Apollodoros' defense speech refers as evidence to Pasion's correct bookkeeping and emphasizes that it properly answered commercial custom of his time (52.4):

> εἰώθασι δὲ πάντες οἱ τραπεζῖται, ὅταν τις ἀργύριον τιθεὶς ἰδιώτης ἀποδοῦναί τῳ προστάττῃ, πρῶτον τοῦ θέντος τοὔνομα γράφειν καὶ τὸ κεφάλαιον τοῦ ἀργυρίου, ἔπειτα παραγράφειν 'τῷ δεῖνι ἀποδοῦναι δεῖ.[64]

We learn from Apollodoros' reasoning that cash deposits with bankers were quite common in Greek business practice. It also seems commonplace that a third person was entitled to withdraw the money, and this third party was designated by the depositor. The bank's records and entries in its account books were called *grammata*; such *grammata* registered the name of the depositor, the amount

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59 See IPArk. 1 (5th cent. BC) with money deposit at the temple of Tegea, in case of death in favor of third parties; cf. Thür, Taeuber 1994, 1–11. Repayment to a third person is also recorded in literary sources: e.g. Herodot 6.86; cf. Scheibelreiter 2020, 47–49; Mitteis 1889, 244–8.

60 Bogaert 1983, 212–5; Bogaert 2000, 221.

61 Scheibelreiter 2020, 65; Mitteis 1889, 244–5; Rabel 1937, 213–4.

62 Rabel 1937, 214–5.

63 Dem. 52.6: "Lykon of Heraclea. Sixteen hundred and forty drachmas. To be paid out to Kephisiades. Archebiades of the deme Lamptrae will introduce Kephisiades." Translation V. Bers.

64 Dem. 52.4: "All bankers have a fixed procedure, whenever some private citizen deposits money with them and directs that it be given to a representative, first to write down the name of the man making the deposit and the sum of the account and then to write next to it 'To be paid to so-and-so.'" Translation V. Bers.

deposited, and the person authorized to withdraw (and possibly also somebody else to identify the beneficiary).[65]

Apollodoros claims that Lykon expressly ordered that the amount should be paid to Kephisiades, and not to his heirs, even after his death.[66] In our modern terminology we would say that the transaction was carried out in a three-person relationship. Such money transfers seem to have been part of everyday commercial life among Greeks; the legal transaction fits the loose structure of *parakatathekai*.[67] It must be said that this structure remained constant over the centuries: it was widely used even in Greek papyri of Roman Egypt.[68]

However, one should consider the ownership issue of such transactions. Although there was no clear theoretical distinction between property and possession in Greek legal thought, still a certain differentiation can be made in sharing property rights among the parties. In a *parakatatheke*, the depositary (recipient) is considered *kyrios* of the objects given. Indeed, his *kyrieia* is a necessary requirement (and legal ground) for his right to dispose of them.[69] Although *kyrieia* (as a right to dispose of and use) is handed over in a *parakatatheke*, the depositor still keeps the so-called *kratesis*, the right of access ("Zugriffsrecht"); he even has the better title.[70]

Simon emphasized that the enjoyments of property rights among the contracting parties were considered "from the aspect of their procedural enforceability", whereby the "Beweisbarkeit einer beanspruchten Berechtigung" came to the fore. The changes "in der dinglichen Zuordnung der Sachen" are understood as "Verlust oder Gewinn von Beherrschungsbefugnissen und nicht als Übertragung abstrakt vorgestellter materieller Rechte".[71] If the depositor appointed a third person as beneficiary to withdraw the money, through his act he also assigned his right of access to this third party; thereby the deposited money was attributed to the property of the appointed party.

This information significantly contributes to our topic with additional observations. In the Greek world, it was common practice to conduct *parakatathekai* in a three-person relationship. By appointing a third person to withdraw, the deposited money was actually parted from the assets of the depositor: with this disposal, access and title passed to the third party.

Furthermore, the difficult proof that Apollodoros had to master as Pasion's heir draws attention to the fact that *parakatathekai* were a matter of trust; and they could be poorly documented.

65 Thür 1986, 126. Wolff 1957, 46.
66 Rabel 1937, 214.
67 Jakab 2003, 507–8.
68 Kübler 1908, 193–4; Scheibelreiter 2017, 453–4; idem 2020, 100–2.
69 Simon 1965, 48.
70 Simon 1965, 49. Wolff 1957, 44–5; Pringsheim 1916, 35–7; Kränzlein 1963, 90.
71 Simon 1965, 49.

Monetary transactions in 4th century Athens B.C. seem far away from 2nd century AD deposits in the Roman Empire. Nevertheless, the gap could be filled through papyrological evidence. After examining the documentary sources, Wolff came to the conclusion that the terminology known from Athens had not changed in Egypt during the first three centuries of Roman rule; scribal practice kept "die hergebrachten Termini κράτησις und κυριεία".[72] In a few official documents of the Roman authorities a hesitation with converging genuine Roman terminology can be noted. Scattered amongst documents there can be found translations equating *possessio* with νομή and *dominium* with δεσποτεία.[73] However, a legal language like this became established not before the end of the 3rd, under Diocletian and later under Constantine.

In D. 32.37.5, Scaevola reports of a *parakatatheke* in favor of a third party; the transaction was styled according to the patterns of Greek money deposits. The question arises whether similar transactions (money deposits with repayment to a third party) could be effective under Roman law. Checking the scripts of the classical Roman jurists in the Digest one has the impression that the problem was rarely addressed by them. The few sources preserved were based on different facts.[74]

Actually, only a single constitution from the end of the 3rd century seems to deal with a similar case (C. 3.42.8 pr.-1): *Si res tuas commodavit aut deposuit is, cuius precibus meministi, adversus tenentem ad exhibendum vel vindicatione uti potes.* § 1 *Quod si pactus sit, ut tibi restituantur, si quidem ei qui deposuit successisti, iure hereditario depositi actione uti non prohiberis*.[75] In 293, a response was addressed by the Emperors Diocletian and Maximian to a certain Photinus. It concerned a deposit in which three persons were involved: according to the starting statement, someone deposited objects belonging to Photinus but without being commissioned by him. In my view, the constitution considers three different versions of the same case.[76] In the first, somebody deposited objects which belonged to Photinus (*si res tuas deposuit*). In this version, Photinus can claim upon his ownership: he has an *actio ad exhibendum* and also a *rei vindicatio*. However, he cannot file a lawsuit based on *depositum* because he was not a party to the *depositum*.[77] In the second

72 Wolff 2002, 193.

73 Wolff 2002, 192–5, e.g. P.Strasb. I 22 (MChr. 374, FIRA I 85), P.Tebt. II 286 (MChr. 83, FIRA III 100), BGU I 267 (FIRA I 84).

74 PS 2 Coll. 10.7.8 and D. 16.3.16.

75 C. 3,42,8 pr. –1: "If the person whom you mentioned in your petition has loaned or deposited your property, you can bring either the *actio ad exhibendum*, or the *rei vindicatio* against whomever has possession of it. § 1 But if an agreement was made that the deposited things should be restored to you, and you have succeeded him who deposited it, you cannot be prevented from filing the *actio depositi* on the ground of hereditary right."

76 Finkenauer 2018, 248–9; Walter 2012, 430.

77 Finkenauer 2018, 249 pointed out that the *actio depositi* could only have used if he had explicitly instructed the person to deposit it. See also Walter 2012, 430–4.

version, somebody deposited some objects (of which Photinus was not owner) and agreed to return them to Photinus.[78] The facts of this version correspond to the structure of the *parakatatheke* which we are discussing upon D. 32.37.5. For this state of facts, the Emperors considered two possible options: a) although Photinus was not the owner at the time of deposit, he later became heir to the depositor and thereby also inherited the *actio depositi*; b) Photinus was neither owner nor heir, just a beneficiary; if so, he could not claim with any action based on *depositum*. The Emperors (and their lawyers) insisted on the relative structure of *obligationes* and refused to give an *actio depositi* to somebody who was not party to the contract.[79] Nevertheless, the case still had a happy end: the response proposed a just (though strictly speaking unlawful) decision upon equity, promising an *actio depositi utilis propter aequitatis rationem* [§ 1].

C. 3.42.8 pr.–1 is an important piece of evidence which testifies that the Greek structure of deposit in favor of a third party was not even recognized at the end of the 3rd century in Roman law.[80] In some other cases in the Digest, deposits for a third person have been acknowledged also under Roman law as fiduciary disposals on death[81]; but this interpretation cannot apply for D. 32.37.5 because the facts are different.

As an interim issue it can be stated that the agreement between Julius Maximus and the depositary about returning the deposited money (with its interest) to young Maximus should be considered ineffective under Roman law. Among others, also the imperial constitution preserved in C. 3.42.8 pr.–1 confirmed that young Maximus could never have obtained his money with an *actio depositi*. Despite this, Scaevola seems not really concerned with this problem; he made rather a wide circle around it and looked for alternative possibilities to enforce Maximus' claim. It seems, that Rome's skilled lawyer did not want to attack a commonly used Greek type contract with strict arguments based on procedural and material rules of the *ius proprium Romanorum*. On the contrary, he highly tolerated private autonomy, even expressed in a '*lex contractus*' of a Greek transaction. He also looked for legal tools to make the depositor's disposal by will valid, even before a Roman court.

6) Scaevola's responsum

I have already stressed above that Scaevola did not consider to base his response on the rules of a Roman *depositum*-contract or on those of a Roman *fideicommissum*. As a suitable basis for enforcement, he proposed (rather surprisingly) the depositary's oath. Indeed, Julius Maximus took an oath on the deposit of the 15,000

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78 I would like to emphasize that this agreement can only be assumed in the second version.

79 See Finkenauer 2018, 248–54; Walter 2012, 429 ff.

80 The communis opinio finds the *actio depositi utilis* interpolated, see Walter 2012, 429–37.

81 Walter 2012, 441–8.

denarii, stating in it the depositary's obligation to repay the doubled amount to his nephew at a future date.

Before we think about Scaevola's possible arguments, we should consider why he did not want to grant young Maximus an *actio* from the codicil cited. At first glance, it is really surprising because the fragment is in the middle of a longer, coherent textile in Lenel's Palingenesia surrounded with cases of *fideicommissa*.[82] In several other fragments, Scaevola responded to inquiries which were based on deeds in Greek, rooted in local legal tradition of the provinces. We should take a closer look at one of them, D. 32.37.6:

> *Titia honestissima femina cum negotiis suis opera Callimachi semper uteretur, qui ex testamento capere non poterat, testamento facto manu sua ita cavit:* "Τιτία διεθέμην καὶ βούλομαι δοθῆναι Καλλιμάχῳ μισθοῦ χάριν δηνάρια μύρια": *quaero, an haec pecunia ex causa mercedis ab heredibus Titiae exigi possit. Respondi non idcirco quod scriptum est exigi posse in fraudem legis relictum.*[83]

The jurist was confronted also in this case with a Greek document which contained an unusual disposal. It is about the last will of a *testatrix* who was, without any doubt, a Roman citizen. This Roman lady also employed provincial legal tradition to leave some money to her long-time servant, a certain Kallimachos. Obviously with an intent to evade the strict inheritance provisions of Roman law, the *testatrix* ordered the heirs in her codicil to hand over the sum as *misthos* (*merces*), as if it were an unpaid debt for previously done services.

I see a common feature with D 32.37.5 because a legal transaction *inter vivos* is applied (pretended) as a basis for the heirs' obligation to provide benefits. In the Kallimachos-case, already the stock names indicate that the protagonists did not belong to the same status group (class). The *testatrix* called Titia was obviously a Roman citizen with *testamenti factio*[84], while the beneficiary with the Greek name Kallimachos did not have capacity under Roman law. In this case, Scaevola shows

[82] E.g. D. 32.32 Scaev. 14 dig.; D. 32.33 pr.–2 Scaev. 15 dig.; D. 32.34 pr.–3 Scaev. 16 dig.; D. 32.35 pr.–3 Scaev. 17 dig.; D. 32,36 apud Scaevolam libro octavo decimo digestorum Claudius notat; D. 32.37 pr.–7 Scaev. 18 dig.; D. 32.38 pr.–8 Scaev. 19 dig.; D. 32.39 pr.–2 Scaev. 20 dig.; D. 32.40 pr.–1 Scaev. 21 dig.; D. 32.41 pr.–14 Scaev. 22 dig.; D. 32.42 Scaev. 23 dig.; by Lenel 1889, 227–59 all under the title *De legatis et fideicommissis.*

[83] D. 32.37.6: "Titia, a lady of the highest respectability, had in her business affairs always made use of the services of Kallimachos, who was not entitled to take under will. When making her will she provided in her own handwriting as follows: 'I, Titia, have made this will, and wish that Kallimachos be given ten thousand denaria as *misthos*.' Question: Can this money be exacted from Titia's heirs as wages? I replied that this being in writing does not make it possible to exact what was left in fraud of the law." Translation A. Watson.

[84] Scheibelreiter 2014, 258–61.

no understanding towards provincial custom adopted in the Greek codicil of the honorable lady. He stressed the compliance with mandatory regulations prohibiting any succession between Romans and *peregrini*.[85]

Despite the controversial history of Scaevola's works[86], certain points of intersections, even a certain symmetry, can be discovered in these two cases (D. 32.37.5 and D. 32.37.6). In both, Greek style wills were presented to the lawyer with considerable interpretation difficulties. The troubles arose from a clash of different legal traditions: everyday provincial practice was confronted with prohibitions and prescriptions of Roman law. In both cases, a testator/testatrix imposed an obligation on his/her heirs; but as a legal ground (*causa*) a real or fictional contract *inter vivos* was specified.

However, the two legal transactions also differ in some (not insignificant) ways. In D. 32.37.6, the *testatrix* stated that a *misthosis* (service or work contract) existed between her and Kallimachos. Kallimachos was said to have made a "Vorleistung" which consisted of certain services. In D. 32.37.5, the testator declared that Julius Maximus had deposited with him some money (*parakatatheke*) for a third party. I see the striking difference in the fact that in D. 32.37.5 the advance payment ("Vorleistung mit Zweckbestimmung") consisted of money; the testator held possession of third-party money.

Remembering the peculiar real effects of Greek *parakatatheke*-agreements (sharing *kyrieia* and *kratesis*), one wonders whether any recourse to Greek legal thinking could have influenced Scaevola's decision. Julius Maximus undoubtedly owned the 15,000 denarii as he handed over the sum to the depositary. Through relinquishing them into custody, he transferred also *kyrieia* (the right to use and dispose of it) to the depositary. The outlines of his transaction were marked by the commonly applied *parakatatheke*-formula: his "entrusting" was limited in time and subject to repayment. The depositary became *kyrios* of the money, but the *kratesis* (title to access) remained with Julius Maximus though he assigned it to young Maximus by appointing him as beneficiary.[87]

Let us briefly return to the comparison of the two cases (D. 32.37.6 and D. 32.37.5)! The juxtaposition of similar though slightly diverging facts seems to indicate a certain symmetry–with consequences also for the interpretation of our case, D. 32.37.5. Taking Scaevola's stock names as evidence[88], we find in D. 32.37.6 an honorable Roman lady who wanted to leave something by will to Kallimachos, a peregrine. The protagonists belonged to different status groups, Kallimachos lacked capacity, therefore the codicil violated *ius cogens*. In D. 32.37.5, we have the Greek codicil of a depositary, favoring young Maximus, a Roman

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[85] Although, according to Gai. 2.281, a *legatum* in Greek was void, however a *fideicommissum* was initially valid.

[86] S. Liebs 1997, 113–4; idem 2017, 594–6; Lamberti 2007, 2736–42; Samter 1907, 154–5.

[87] Simon 1965, 52; Wolff 2002, 192–5; Kränzlein 1963, 90–2.

[88] Scheibelreiter 2014, 258–61.

citizen. Maximus was having trouble with his claim against the depositary's heirs. The Greek language of the document could hardly have been the problem because Scaevola declared in other cases that codicils in Greek were also valid under Roman law.[89] In all likelihood (and also confirmed through the symmetry with D. 32,37,6), the depositary of our case lacked capacity, he was not a Roman citizen. This constellation would explain why Scaevola did not support any inheritance lawsuit.

Indeed, the problem of capacity was addressed in both cases although the technical phrase is not present in D. 32.37.5. A further argument can be found in the circumstance that Scaevola did not award an inheritance *actio* neither to Kallimachos nor to Maximus. In D. 32.37.6, he judged the codicil's *misthosis* a mere circumvention, *in fraudem legis relictum*. Indeed, in D. 32.37.5 he finally supported Maximus' claim although a third-party effect was void under Roman law (maybe upon the Greek concept of shared *kyrieia* and *kratesis*).

Scaevola's decision is amazing, since neither a deposit for a third party nor the depository's will could be valid under Roman law. However, the lawyer looked for an enforceable plea and found it in the depositary's oath. The Greek codicil served as sufficient evidence for this, although the very codicil failed to have any effect as a disposal on death. Anyway, an oath, a solemn promise to fulfill the last will of somebody was respected and enforceable also under Roman law.[90] The depositary's oath confirmed that 30,000 denarii were owed, Scaevola admitted it as evidence (and avoided to consider openly any strange provincial ideas regarding deposit and atypical last wills, rooted in Greek law).[91]

7) To conclude

Scaevola's complicated case introduced a peculiar legal transaction. It is characteristic for the legal life of the Roman Empire where Roman citizens and *peregrini* lived side by side, enjoying the advantages of a flourishing economy in the provinces. Not only documentary texts (*tabulae*, papyri or inscriptions) inform us about "law in action" but also cases discussed by Roman jurists provide valuable information about law and custom. Scaevola's response symbolizes that Roman lawyers were fundamentally open to foreign legal ideas; they often provided a creative approach for the judgments of the Emperors, governors or other magistrates.

The case discussed in D. 32.37.5 deals with a Greek legal document, likely a will which was drawn up in an eastern province. Persons of different status groups are involved in it. Obviously, the plaintiff wanted or maybe needed a decision under Roman law. The facts summarized by the jurist relate to two transactions: an inheritance case which is explicitly discussed by Scaevola and another one, a Greek

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[89] E.g. D. 31.88.15; D. 32.37.6; D. 32.101 pr.; D. 33.4.14; D. 33.8.23; D. 34.4.30.1; D. 34.4.30.3; D. 40.4.60; D. 40.5.41.1. See Häusler 2016, 426–39.

[90] Gai 3.96; Cic. Verr. 2.1.123-4; to oaths cf. Kübler 1907, 185–6; Gröschler 2002, 145–52.

[91] For interpolations see Kübler 1907, 186–187. *Scriptura* reminds *grammata* in Greek sources, see Kübler 1908, 198–9.

type deposit concluded previously. A Roman citizen wanted to leave some money to his nephew upon his death; he happened to apply a locally widespread Greek formula for realizing his intention. Since the beneficiary was also a Roman citizen, the litigation seems to have been brought before a Roman court. The uncle's primary transaction was a conditional Greek deposit called *parakatatheke* in favor of a third party, his nephew. However, the beneficiary could not provide any evidence to support the past agreement except the depositary's letter (called a codicil by Scaevola). Depositary and beneficiary may have belonged to different status groups (classes) because Scaevola apparently did not consider any inheritance lawsuit (such as a *actio fideicommissi*) to be admissible. Not even from the basic transaction (*parakatatheke*) between uncle and the depositary could an action be brought before a Roman court because neither *ius civile* nor *ius honorarium* knew of a deposit in favor of third persons. However, Scaevola managed to master the difficult task. He proposed enforcement on the ground of the depositary's oath; just this fiduciary promise made it possible to file an action upon the strictly speaking void disposal under Roman law.

Putting it into context, it can be stated that formal wills (*diathekai*) were merely one of the possible types of *mortis causa* disposals in provincial local tradition.[92] People from the provinces (Greeks, Egyptians or of other nations) used numerous alternative forms to determine the fate of their assets after death. The choice made by the testator was based not only on legal considerations, but also on the notarial infrastructure within reach.[93] The principle of personality did not seem to be always decisive in personal choices.

In fact, Wolff has already resisted the restrictive view of hermetical separation between Romans and *peregrini*: "Eine frühere Meinung, die in der Bindung der *cives Romani* an das Recht der eigenen Gemeinde in der dieser an sich nicht unterworfenen Provinz einfach ein doktrinäres *Personalitätsprinzip* am Werk sah, wurde ihrem soziologischen, geistigen und juristischen Hintergrund allerdings ebensowenig gerecht wie eine entsprechende Lehre das verwandte Phänomen der Koexistenz ägyptischen und griechischen Rechts zu erklären vermochte."[94] However, Wolff was referring mainly to 'Romanisms', of legal institutions of Roman law taken up by *peregrini*. He assumed that Roman type legal transactions were already applied early by local people, long before the *Constitutio Antoniniana*, although Roman law still represented at that time a "Sondergut einer auch nach Generationen überdauernder Ansässigkeit noch landfremden oder wenigstens, soweit sie aus eingebürgerten Peregrinen, vornehmlich Veteranen und deren Abkömmlingen, bestand, rechtlich und sozial abgehobenen Oberschicht".[95]

[92] Kreller 1919, 202–3.
[93] *Diathekai* were used mostly in large cities, while villages preferred alternative models, Yiftach-Fíranko 2002, 149–64.
[94] Wolff 2002, 149–50.
[95] Wolff 2002, 151.

Following Wolff and perhaps even supplementing his arguments, I drew attention to the fact that legal intercourse between Romans and *peregrini* was much more intensive than commonly thought. Roman citizens, whether genuine or new, did not seem always ready to use their "Sonderrecht" when drafting their legal transactions. On the contrary, there is sufficient evidence even in the law of succession (although it was mainly ruled by *ius cogens*) that Romans applied local legal formulas. Apparently, they followed provincial legal traditions, too.

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GRIECHISCHE RECHTSGESCHÄFTE FÜR RÖMISCHE BÜRGER. ANTWORT AUF EVA JAKAB

Seit der Pionierzeit der juristischen Papyrologie gehört das komplexe Verhältnis zwischen 'Reichsrecht' und 'Volksrecht' zu den immer wieder – und oftmals kontrovers – diskutierten Themen[1]. Wie gestaltete sich das Verhältnis zwischen römischem Recht und indigenen Rechtsformen in den Provinzen in Theorie und praktischer Anwendung? Wie verlief die Entwicklung, die vor allem seit der *Constitutio Antoniniana* zur Durchsetzung des römischen Rechts führte? Dank der papyrologischen Evidenz steht Ägypten im Mittelpunkt der Debatten, die freilich grundsätzliche Fragen der institutionellen und jurisdiktionellen Rahmenbedingungen im Imperium Romanum aufwerfen[2].

Während die meisten Beiträge sich auf die Zeit nach der *Constitutio Antoniniana* konzentrieren, richtet Eva Jakab ihren Blick auf die Zeit vor 212, als die Römer durch ihren juristischen und fiskalischen Status scharf unterschieden waren von den Peregrinen. Anliegen ihres Artikels ist es, die These von Hans Julius Wolff, nach welcher die normative Trennung der Bevölkerungsgruppen zu parallelen Rechtskulturen und einem Nebeneinander von römischem und einheimischem Recht als „getrennte Rechtsmassen" geführt habe, anhand der Papyrusdokumente aus der Rechtsrealität zu überprüfen. In einem früheren Artikel[3] hatte Jakab bereits nachgewiesen, dass beim Kauf die Wahl der Vertragsform nicht vom Personenstatus, sondern von der Geschäftsintention abhängen konnte; im Warenverkehr durften die Parteien – nach dem Prinzip der Privatautonomie – wählen, ob sie ein Geschäft nach römischem oder lokalem Recht abschließen wollten. Im gegenwärtigen Artikel wendet sich Jakab dem Erbrecht zu, das seit Augustus ein zentrales Instrument zur Steuerung und Kontrolle des sozialen und rechtlichen Status gewesen ist[4]. Da die lateinische Testamentsurkunde eines römischen Bürgers streng nach den formalen

[1] Zum Forschungsstand s. Yiftach-Firanko 2009, 541–561, bes. 553–557, der auf Argumenten von H. J. Wolff aufbauend den Einfluss des römischen Rechts vor der *Constitutio Antoniniana* gering einschätzt. Für eine stärkere Präsenz römischer Rechtsformen plädiert überzeugend Dolganov 2019, 27–60.

[2] Den Einfluss der römischen Rechtsprechung auf die Ausgestaltung der römischen Herrschaft untersuchen u.a. Ando 2011, und die Beiträge in Hekster & Verboven 2019.

[3] Jakab, 2018, 474–526, bes. 493–505.

[4] Dolganov 2020.

Richtlinien des *ius civile* verfasst sein musste und sich grundsätzlich von den griechischen Testamenten der Peregrinen unterschied[5], meinte die bisherige Forschung gerade hier ein striktes Personalitätsprinzip und damit „getrennte Rechtsmassen“ fassen zu können — und in der Tat zeigen Bestimmungen im *Gnomon des Idios Logos* (etwa § 7, 8 und 18), dass die römische Herrschaft gerade beim Erbrecht die strikte Trennung der Statusgruppen einforderte. Selbst Kodizille (ergänzende Anhänge) zu einem römischen Testament wurden nicht anerkannt, wenn sie in griechischer Sprache verfasst waren. Eine zeitweilige Lockerung der strengen Vorschriften stellte das *fideicommissum* dar, mit dem seit Augustus auch Personen einer anderen Statusgruppe bedacht werden konnten; doch selbst diese Ausnahme wurde durch *senatus consulta* unter Vespasian und Hadrian verboten (Gaius, *Institutiones* 2,285), Überschreitungen mit Konfiskationen sanktioniert. Anders als beim Warenverkehr richtete sich die Testier- und Erbfähigkeit strikt nach dem Status.

Wie konsequent diese Regelungen in der alltäglichen Rechtspraxis des kaiserzeitlichen Ägypten umgesetzt wurden, müsste eine systematische Prüfung aller Testamentsurkunden sowie der literarischen Belege und Juristenschriften klären – die freilich nur in einer Studie monographischen Umfangs zu leisten wäre[6]. Im vorliegenden Artikel konzentriert sich Jakab auf die Analyse eines Falles aus dem 2. Jh. n. Chr. und formulierte die Arbeitshypothese, dass das „‘principle of personality’ was not even fully applied in succession“ (S. 339). Die analysierte Quelle ist D. 32,37,5 Scaevola (18 dig.), die in der Romanistik schon öfter – meist im Zusammenhang mit dem *depositum* – diskutiert worden ist: In einem griechisch geschriebenen Kodizill verfügt ein Testator, dass 15.000 Denare an seinen *kyrios* Maximus auszuzahlen sind, die er von dessen Onkel Julius Maximus als *parakatatheke* erhalten hatte. Die damalige Abrede hatte bestimmt, dass die hinterlegte Summe samt Zinsen (die zusammen 30.000 Denare betragen) an Maximus zu übergeben sei, sobald dieser mündig geworden ist[7]. Die Abrede war durch Eid und *kyria*-Klausel bekräftigt worden. Auf die Frage, ob das (griechische) Kodizill genüge, um das Geld zu verlangen, entschied Scaevola, dass das Kodizill aufgrund des Eides (!) Glauben verdiene: Die Erben haben dem Willen des Erblassers Folge zu leisten und 30.000 Denare an Maximus zu bezahlen. Als Klagegrund führt Scaevola jedoch weder die *parakatatheke* noch das Kodizill an, sondern ausschließlich den Eid des Verwahrers.

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5 Literatur bei Jakab, Anm. 4 und 5.

6 Dieser Aspekt steht nicht im Focus der beiden jüngsten Bücher zum Thema: Strobel 2014 und Nowak 2015.

7 *Parakatathekai* haben stets eine Nutzungsbefugnis für den Verwahrer des Geldes. Anders als beim römischen Darlehen (*mutum*), *depositum* und *depositum irregulare* ziehen griechische Rechtsvorstellungen keine scharfe Grenze zwischen *daneion*, *chresis* und *parakatatheke*, weshalb das *parakatatheke*-Formular sowohl für Mitgiftbestellung als auch Geldverwahrung oder letztwillige Verfügungen gebraucht wurde.

Aus römischer Sicht ist der Fall kompliziert, weil drei Personen involviert sind: Julius Maximus (der Onkel) hatte dem Testator 15.000 Denare anvertraut, die dieser dem jungen Neffen namens Maximus bei Erreichen der Mündigkeit samt Zinsen (die wohl bereits im Grundgeschäft pauschal vereinbart waren) auszahlen soll. Vor diesem Zeitpunkt war der Onkel jedoch gestorben und auch der Verwahrer des Geldes war entweder verstorben oder nahe dem Tode. Deshalb taucht bei seinen Erben die Frage auf, ob die in einem Kodizill zu seinem Testament befohlene Auszahlung zu erfolgen habe, denn andere Urkunden lagen nicht vor.

Der geschilderte Fall wurde in der Forschung wiederholt als Beleg dafür angeführt, dass die *parakatatheke* bereits im 2. Jh. mit dem offenen *depositum* (dem sog. *depositum irregulare*) gleichgesetzt wurde und die römischen Juristen die fremdartige Praxis rezipiert hätten. Doch Scaevola hat – wie Jakab zu Recht gegen die in diversen Studien zum *depositum* vertretene Interpretation (die Scaevolas Entscheidung als Zulassen der *actio depositi* oder der *petitio fideicommissi* sieht) einwendet – zwar die griechische Terminologie in die Sprache des römischen Rechts übertragen, aber keine Klage auf das *depositum* gebilligt. Vielmehr sieht er nur das *iusiurandum* ausschlaggebend für die Anerkennung der Urkunde und der Gültigkeit des testamentarischen Willens. Die griechische Sprache des Kodizills, die *kyria*-Klausel und die *parakatatheke* als zugrunde liegendes Rechtsgeschäft deuten auf eine griechische Praxis und daher ein Rechtsgeschäft im provinzialen Milieu. Scaevola transponiert ein ursprünglich nach griechisch-hellenistischen Rechtsvorstellungen und in griechischer Sprache abgeschlossenes Geschäft in die technische Terminologie und Narrative des römischen Rechts. Wenn man die Blankettnamen Julius und Maximus als Indiz nehmen darf, dann sollte damit angedeutet werden, dass Onkel und Neffe römische Bürger waren (deshalb gelangt der Fall bis in die kaiserliche Kanzlei zu Scaevola), die im griechischsprachigen Osten des Reiches lebten und „obviously conducted their affairs (at least partly) according to local legal and notarial custom“ (S. 343). Gegen die ältere Forschung (zitiert in Anm. 26 und 27) zeigt Jakab, dass die generalisierende und in sich höchst kontroversielle römischrechtliche Auslegung des Falles die Sicht auf die technische griechische Terminologie, hellenistische Rechtsvorstellungen und den provinzialen Kontext verstellt hat. Anstelle des problematischen römischrechtlichen Ansatzes verfolgt Jakab eine Auslegung des Falles nach griechischer Geschäftspraxis. Überzeugend zeigt sie (S. 345): Scaevola nimmt weder Anstoß an der *parakatatheke* als Rechtsform, noch versucht er, die als *parakatatheke* getroffene Vereinbarung nach römischen Rechtsregeln auszulegen. Er rüttelt nicht an den griechischen Rechtsvorstellungen und Vertragsformen, sondern sucht nach prozessualen Wegen, um den Willen des Erblassers auch im Rahmen des römischen Rechtes durchsetzbar zu machen. Seine Entscheidung in D. 32,37,5 steht in einer Linie mit anderen

Entscheidungen des Scaevola[8], die sein Bemühen erkennen lassen, Rechtsgeschäften nach griechischer Praxis auch vor einem römischen Gericht gelten zu lassen[9].

Ein weiteres Argument sieht Jakab in der Rückzahlung, die nicht an den Hinterleger, sondern an dessen Neffen Maximus gehen soll. Bei griechischen *parakatathekai* war dies geläufige Praxis, sowohl im klassischen Athen als auch im römischen Ägypten. Hingegen konnte die Rückzahlung hinterlegten Geldes an Dritte nach römischem Recht sogar noch in der Tetrarchenzeit (CJ. 3,42,8 pr.-1) nicht wirksam vereinbart werden. So musste auch in der Vereinbarung zwischen Julius Maximus und dem Testator, die hinterlegte Geldsumme samt Zinsen an den Neffen auszuzahlen, nach römischem Recht unwirksam bleiben. Dies dürfte der Grund sein, warum Scaevola nach alternativen Möglichkeiten suchte, den Willen des Hinterlegers und die Anordnung des Testators umzusetzen.

Jakab führt sodann gute Gründe an, die Julius Maximus bewogen haben könnten, der griechischen *parakatatheke* den Vorzug vor römischen Formen der Vermögensverschiebung zu geben: Hätte er in einem römischen Testament dem Neffen einen Geldbetrag als Legat vermacht, dann hätte der Neffen den Betrag sofort nach Ableben des Onkels (nicht erst beim Erreichen der Mündigkeit) bekommen. Falls der Neffe zu diesem Zeitpunkt noch minderjährig sein sollte, würde das Geld entweder seinem Vater (wenn er noch unter dessen *patria potestas* stand) zufallen oder in die Vermögensverwaltung des Vormundes (wenn er bereits *sui iuris* unter Vormundschaft stand) eingehen. Bei einer Hinterlegung als *fideicommissum* hätte das Problem der Begünstigung eines Dritten auftreten können, zumal die Zahlungspflicht nicht beim Tode des Hinterlegers (*mortis causa*), sondern mit Mündigkeit des Dritten eintreten sollte. Ein weiteres Motiv des Julius Maximus für die Wahl dieser Vereinbarungsform dürfte in den Zinsen gelegen sein, die bei der *parakatatheke* durch die Nutzungsbefugnis des Verwahrers den Betrag verdoppelt haben, während eine Verfügung *mortis causa* die verwahrte Summe als zinslose *certa pecunia* nicht hätte wachsen lassen. Schließlich hatte die Möglichkeit, dem Neffen Maximus einen Teil des Vermögens noch durch ein Rechtsgeschäft *inter vivos* zuzuführen gegenüber einer Zuwendung *mortis causa* den Vorteil, dass nicht die Erben des Onkels alle Ansprüche des Maximus unter dem Prätext der *lex Falcidia* (welche die Erben vor Überschuldung schützte) abwehren konnten, falls die 15.000 Denare einen wesentlichen Anteil des Nachlasses ausmachten.

Scaevola gründet seine Entscheidung weder auf die römischen Normen des *depositum*, noch auf die des *fideicommissum*, sondern einzig auf den vom Verwahrer geleisteten Eid, der ihn zur Auszahlung an den Neffen verpflichtete. Für Scaevola war zudem der Umstand entscheidend, dass sowohl der Onkel (Erblasser) als auch der Neffe (Begünstigter) römische Bürger waren, wie die gleichfalls von Scaevola

[8] Zitiert bei Jakab, Anm. 52.

[9] Dies wiederum steht in einer bis in die Republik zurückreichenden Tradition, nach griechischen Normen und Formen abgefasste Urkunden möglichst anzuerkennen.

getroffene Entscheidung zeigt, die in D. 32,37,6 unmittelbar auf unsere Stelle folgt: Eine Römerin möchte ihrem Helfer mit dem griechischen Namen Kallimachos in einem griechisch geschriebenen Kodizill Geld hinterlassen; hier hält Scaevola die Vermögensverschiebung für unwirksam, weil ein Erbgang zwischen Römerin und Peregrinen nicht gestattet ist. Der Unterschied zwischen den beiden Fällen besteht abgesehen vom Bürgerrecht auch darin, dass in D. 32,37,5 der Testator fremdes Geld verwahrt und gemäß der *parakatatheke* mit Julius Maximus an dessen Neffe weitergeben will. Der Hinterleger (Julius Maximus) hatte sein Zugriffsrecht an seinen Neffen abgetreten. Dieser kann die Nutzungs- und Verfügungsbefugnis (*kyrieia*) für sich in Anspruch nehmen. Da weder das Verwahrungsmodell (*parakatatheke* mit Auszahlung an einen Dritten) noch die letztwillige Verfügung des Verwahrers (wegen der Standesunterschiede) mit römischem Recht konform waren, sieht Scaevola einen ausreichenden Grund für die Auszahlung der geschuldeten Summe allein in dem Eid, der eine einseitige Obligation darstellte, die auch nach römischem Recht anerkannt war. Die vom Erblasser (dem Verwahrer) zu Lebzeiten nicht erfüllte Pflicht zur Auszahlung trifft seine Erben.

Die Entscheidung des Scaevola zeigt einerseits, dass die Juristen gegenüber nicht-römischen Rechtsformen offen waren, andererseits führt der Fall vor Augen, wie Römer in den Provinzen nach den ortsüblichen Rechtsvorstellungen und Vertragsmustern ihre Geschäfte tätigten. Für Julius Maximus war nicht das Personalitätsprinzip für die Wahl der Rechtsform bestimmend gewesen, sondern die Überlegung, auf welchem juristischen Wege er am ehesten die gewünschte Transaktion umsetzen konnte. Dieser Fall zeigt, dass sich Römer sogar in den heiklen Erbschaftsregelungen lokaler Formulare und Verfügungsmodelle bedienten, um ihren Willen zur Geltung zu bringen. Der umgekehrte Fall, nämlich dass Peregrine in der Provinz auf typische Grundsätze und Normen des römischen Rechts rekurrierten, wenn es zu ihrem Vorteil war, ist aus zahlreichen papyrologischen Beispielen gleichfalls bekannt[10].

Durch ihre vorsichtige und penible Analyse erzielt Jakab demnach zwei Ergebnisse: a) eine neue, überzeugende Erklärung des konkreten Falles (D. 32,37,5), indem sie nachweist, dass Scaevola die Rechtsfrage nicht vor dem Hintergrund des *depositum* (*irregolare*) und damit des römischen Rechts, sondern vor der griechischen *parakatatheke* beurteilt; b) diese Erklärung als Rechtsgeschäft eines

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[10] Hier muss der Hinweis auf die zwei berühmtesten Fälle genügen: In P.Oxy. IV 706 (114–117) klagt der *patronus* Herakleides seinen Freigelassenen Damarion wegen unterbliebener Leistungen. Vor dem *praefectus Aegypti* argumentiert er mit der römischen Vorstellung, dass ein Freigelassener lebenslang seinem ehemaligen Herrn verpflichtet ist: s. Purpura 2001, 465–483; Dolganov 2018, 243–254. — In P.Oxy. II 237 Col. VI 12–20 (186) klagt Chairemon seine Tochter Dionysia und argumentiert vor dem *praefectus Aegypti* unter Anspielung auf die *patria potestas*, dass es ihm wegen unziemlichen Verhaltens der Tochter zustünde, die Scheidung von ihrem manipulativen Ehemann herbeizuführen, s. Dolganov 2018, 261–278.

römischen Bürgers in griechischer Vertragsform erhellt, dass nicht nur die Gerichte der Provinzstatthalter, sondern auch die Rechtsexperten der kaiserlichen Zentrale mit der Frage konfrontiert waren, wie die dadurch entstandenen juristischen Sachlagen sinnvoll zu handhaben wäre, ohne gegen geltende Normen zu verstoßen. Die bisherige Ansicht von „zwei getrennten Rechtsmassen" muss demnach deutlich modifiziert werden. Jakab zeigt, dass vielmehr Durchlässigkeit gegeben war – und zwar durchaus in beiden Richtungen. Das Verdienst ihres Artikels liegt also (über die neue Lösung der Scaevola-Stelle hinaus) in dem Nachweis, dass in der Rechtspraxis der hohen Kaiserzeit 'Reichsrecht' und 'Volksrecht' in den Provinzen keineswegs zwei gegensätzliche Rechtsmassen waren, die sich konkurrierend gegenüber standen, sondern römisches Recht und indigene Rechte eher als 'kommunizierende Gefäße' funktionierten, die sowohl von Römern als auch Peregrinen ohne Rücksicht auf ein Personalitätsprinzip genutzt wurden. Dass römische Bürger auch schon vor 212 mit geschickt eingesetzten griechischen Vertragsformen und Urkunden sogar im rigiden Bereich des Erbrechts bei den höchsten Kompetenzen des römischen Rechts in der kaiserlichen Zentrale durchdringen konnten, ist ein besonders wichtiges Ergebnis dieser Studie.

Dieses Ergebnis hat weitreichende Konsequenzen, denn die offensichtliche Vertrautheit der Hofjuristen mit lokalen (im vorliegenden Fall griechischen) Formen und Rechtsvorstellungen dürfte in der langfristigen Entwicklung kaum ohne Einfluss auf das römisches Rechtsdenken und seine Dogmatik geblieben sein. Scaevolas Entscheidung kann auch als Indiz dafür gewertet werden, wie Rechtsvorstellungen aus den Provinzen von den juristischen Experten in Rom wahrgenommen, akzeptiert und rezipiert wurden – und damit allmählich ins römische Recht wanderten[11].

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[11] Dieses Ergebnis steht in Übereinstimmung mit der wichtigen Beobachtung von Humfress 2011, 23–47, die auf anderer Quellenbasis eine fortschreitende gegenseitige Beeinflussung von römischem Recht und lokalen Rechtsvorstellungen konstatiert.

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DIE *DIATHEKE* DES EPIKRATES AUS NAKRASON. EIN BEITRAG ZUR VERWALTUNG PRIVATER *DONATIONES SUB MODO*

Abstract: The *diatheke* of Epicrates is a complex document that brings together several legal transactions in one document serving as the basis for entitlements as well as for indicating potential misconduct and its sanctions. Like other documents, the deed cannot simply be pressed into one legal category but bears witness to the diversity of forms in Hellenistic and Roman Greece. Its aim is clear: maintenance and use of the *heroon* of Diophantos and of the family tomb of Tertia and Secundus, provision for Laevilla and Cestia beyond the death of Epicrates, inalienability of at least certain parts of Epicrates' lands. This way the everlasting commemoration is guaranteed for him and his family.

Keywords: *donatio sub modo*, testament, funerary regulations, commemoration, sanctions

I. Einleitung

Bereits mehrfach wurde in der Forschung darauf hingewiesen, dass antike Stiftungen keinen eigenen *terminus technicus* kennen, der unmissverständlich das Rechtskonstrukt bezeichnet und es von anderen unterscheidet. Die in den literarischen und epigraphischen Quellen verwendeten Begriffe beziehen sich zumeist auf die Kapitalerrichtung, etwa ἀνατιθέναι, καθιεροῦν oder διδόναι für „stiften" zu Lebzeiten, oder καταλείπειν und ἀπολείπειν für „stiften" durch eine letztwillige Verfügung. Diesen Verben entsprechen verschiedene Substantive, die — unter anderem — auch den Stiftungsakt bezeichnen können: κατάλειψις, ἀνάθεσις, ἀνιέρωσις, δόσις oder διάταξις.[1] Was der antiken Stiftung im Vergleich zur modernen, öffentlichen Stiftung fehlt, ist die Rechtspersönlichkeit. Daher kann sowohl der deutsche Begriff „Stiftung" als auch der englische „foundation" und der französische „fondation"

[1] Vgl. Ziebarth 1903, 310-312; Laum 1914, 116-126. Arnaoutoglou 2011-12 führt am Beispiel zahlreicher epigraphischer Zeugnisse die breite Vielfalt an verwendeten Begriffen näher aus, erläutert das Konzept des *endowment sub modo* (dazu sogleich) und verweist auf die Möglichkeit und Notwendigkeit, zwischen Rechtsgeschäften unter Lebenden und *mortis causa* zu unterscheiden.

vielfach irreführend sein, da er vor allem unter Rechtshistorikern eben diese Assoziation evoziert.[2]

Sophia Aneziri unternimmt es derzeit, das Standardwerk von Bernhard Laum (1914) durch eine neue Monographie zu den hellenistischen Stiftungen zu ersetzen, und nähert sich dabei einer neuen Definition an. Sie definiert die Einrichtung als *donatio sub modo*, Zuwendung unter Auflagen. Dies wurde bereits von J. Modrzejewski angedacht, der auf die unterschiedlichen Möglichkeiten verweist, dem Willen des Stifters sowohl *inter vivos* als auch *mortis causa* Durchsetzungskraft zu verleihen. Dabei könne auch die Annahme durch den Empfänger durchaus verschiedene Formen haben: ein Dekret, dort wo es sich um eine Stadt handelte, oder eine vertragliche Bindung, dort wo private Vereinigungen begünstigt werden.[3] Mit der Schenkung hat das Rechtsgeschäft also die tatsächliche Übergabe des Kapitals an den Begünstigten gemeinsam; die Bedingungen, die daran geknüpft sind, werden zumeist durch entsprechende Strafklauseln gesichert und entsprechen dort, wo sie auf das dauerhafte Funktionieren der Einrichtung angelegt sind, der modernen Stiftung.[4] Zumeist betreffen sie die Vermehrung des Kapitals in Geld oder in Grundstücken und die Verwendung der Zinsen. Diese angedrohten Konsequenzen der Missachtung der Bedingungen, die an die Transaktion geknüpft waren, gehen von hohen Strafen bis zur Rückgabe des ganzen Kapitals an den Stifter oder der Weitergabe an eine dritte Person oder Organisation. Dies bedeutet natürlich das Ende der *donatio sub modo*.[5] Derartige Zuwendungen mussten also von ihren Empfängern verwaltet werden, was sie erneut von den einfachen Schenkungen unterscheidet, die — solange es sich um Geldkapital und nicht um Immobilien handelte — wenn überhaupt, dann lediglich als Eingang in den Kassenbüchern verzeichnet wurden. In den zahlreichen Fällen, in denen die *donationes* an Städte, Heiligtümer oder Vereine gerichtet waren, ist dieses Vorgehen eindeutig und unstreitig. Die Empfänger sind klar definiert und können — anhand der entsprechenden Auflagen — zur Verantwortung gezogen werden. Wie werden aber diejenigen *donationes sub modo* verwaltet, die keinen institutionalisierten Empfänger haben, und worin liegt ihre Rechtsgrundlage? Mit dieser Frage soll sich der folgende Artikel im zweiten Teil am Beispiel einer *donatio* aus dem kaiserzeitlichen Lydien auseinandersetzen. Im ersten Teil kann anhand

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2 Zuletzt Harris 2015, 71-77, der die Verwendung des modernen Begriffes als irreführend und anachronistisch ablehnt (77).

3 Aneziri 2020, 9, näher ausgeführt in der im Druck befindlichen Studie. Ebenso Arnaoutoglou 2011-12, 84-85. In diese Richtung weisen bereits Ziebarth 1903, 250 und Modrzejewski 1963, 87-90.

4 Im Weiteren wird der Begriff *donatio* synonym für *donatio sub modo* verwendet, wenn es sich aus dem Zusammenhang ergibt. Die klassische Schenkung wird im Unterschied dazu mit dem deutschen Begriff bezeichnet.

5 Zu Recht verweist A.V. Walser in seiner Antwort auf diesen Vortrag darauf (in diesem Band, 404), dass nicht jede *donatio sub modo* auch eine Stiftung war, allerdings ist der Aspekt der „ewigen Dauer“ zumeist durch die Bedingungen, an die die Zuwendung geknüpft war, gesichert. Zu den Abänderungsverboten vgl. Harter-Uibopuu 2013a.

einer öffentlichen Stiftung aus Delphi erläutert werden, wie eng das Stiftungsgeschäft mit anderen Verfügungen verbunden sein konnte.

Analysiert man die zahlreichen Texte, die zu den *donationes sub modo* seit dem 3. Jh. v. Chr. überliefert sind, so wird deutlich, dass für eine Einteilung von zwei unterschiedlichen Punkten ausgegangen werden kann: Auf der einen Seite stehen die rechtlichen Regelungen, die die Grundlage für die Einrichtung und Durchführung bilden, auf der anderen Seite der Zweck, der damit verfolgt wird. Zunächst kann man unterscheiden zwischen öffentlichen Stiftungen einerseits, also denjenigen, die als Empfänger des Kapitals die Polis, eine ihrer Unterteilungen oder eine Gottheit und ihr Heiligtum vorsehen, und privaten Stiftungen andererseits, die sich an Vereine richteten. Als Zweck der *donatio* sind in den Quellen Beispiele für ein weites Spektrum zwischen öffentlichen Angelegenheiten, etwa Festen und Opfern im Rahmen des städtischen Kults, Finanzierung von Ämtern oder Unterstützung der schulischen Ausbildung, und privaten Wünschen, wie zum Beispiel dem Erhalt der Erinnerung an verstorbene Familienmitglieder, finden. Allerdings sind diese Unterteilungen viel mehr eine moderne Hilfe bei der Analyse des umfangreichen Quellenmaterials als eine antike Kategorisierung. Wichtig war den Stiftern, dass der von ihnen intendierte Zweck erreicht wurde, auf diesen zugeschnitten wurden die geeigneten Organisationsformen gewählt.

An den Anfang sei eine kurze Charakterisierung des Rechtsgeschäfts gestellt, wie es aus den zahlreichen „öffentlichen Stiftungen“ hervorgeht, die an die Polis im weitesten Sinne oder ein Heiligtum gerichtet waren. Ein Stifter versprach der Stadt, einer ihrer Unterorganisationen oder einer Gottheit Kapital, mit der Auflage, dass es angelegt werden müsse, um den Ertrag daraus für einen von ihm festgelegten Zweck zu verwenden. Als Grundstockvermögen konnte dabei sowohl Geld als auch Land eingesetzt werden, wobei zunächst die Stiftung von Immobilien und erst ab dem 2. Jh. v. Chr. die Stiftung von Geld überwog. Charakteristisch ist hierbei die Einbeziehung der Polis und ihrer Verwaltungseinheiten. Die Stifter erstellten einen Vorschlag, entweder alleine oder in vielen Fällen wohl bereits beraten durch ihre *peers*, Amtsträger oder Einrichtungen wie etwa die *archeia*. In diesem waren zumindest das Kapital, der Zweck der *donatio* und die Auflagen für die Übergabe definiert. Dieser Vorschlag, der als Versprechen durchaus bindend sein konnte, wurde in den städtischen Gremien diskutiert und eventuell noch einmal mit dem Stifter nachverhandelt.[6] Dort erfolgte dann schließlich der Beschluss über den Vorschlag, der die Rechtsgrundlage für die Einrichtung bildete. Durch diesen Beschluss wurden die Vorstellungen des Stifters in städtisches Recht umgewandelt, hinter dessen angedrohten Sanktionen natürlich die Polis selbst stand.[7] Die Quellenlage zu den Stiftun-

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[6] Vgl. Wörrle 1988, 22-31: Die Inschrift, die die Einrichtung der Stiftung des Demosthenes von Oinoanda bezeugt, enthält eine detaillierte *epangelia* und den Bericht über ihre Behandlung im Rat.

[7] Harris 2015, 72-74 mit Anm. 83-88 hält fest, dass die Stiftung auf der einen Seite aus einem einseitigen Rechtsgeschäft des Stifters bestehe, einer „dedication to a shrine“ als

gen ist vor allem durch diesen Schritt bedingt: Zumeist ist das Dekret erhalten, also der Text des Volksbeschlusses, in dem die Einzelheiten festgehalten waren. Dieses Dekret diente gleichzeitig als Grundlage für Ehrungen der Stifter. Vielfach sind die Bedingungen der Stiftung nicht zuletzt auch in den Ehrendekreten beschrieben.

Neben den öffentlichen *donationes sub modo*, die einen großen Teil der erhaltenen epigraphischen Quellen ausmachen, gibt es auch zahlreiche Stiftungen an Vereine, die in den letzten Jahren deutlich in das Interesse der Forschung gerückt sind. Hier sei auf die Arbeiten von Sophia Aneziri und Ilias Arnaoutoglou verwiesen, die sich nicht nur epigraphischen Neufunden, sondern auch allgemeinen Darstellungen der Verwaltung von Stiftungen widmen.[8] Es ist möglich, zwischen *donationes* zu unterscheiden, die einem bereits bestehenden Verein zugedacht wurden, und denjenigen, für die ein Verein eigens ins Leben gerufen wurde. Zur ersten Gruppe gehörten vor allem Berufsvereinigungen, die sich nach dem Tod des Stifters um sein Grab kümmern sollten. Ein gutes Beispiel sind etwa die zahlreichen Berufsvereine aus dem kaiserzeitlichen Hierapolis, die ein *stephanotikon*, also ein „Kranzgeld“, empfingen und dafür Verpflichtungen eingingen. Gerade hier sieht man bereits die enge Verbindung zur Graberrichtung, auf die im Weiteren noch eingegangen wird.[9] Zur zweiten Gruppe zählen *donationes* wie diejenige der Epikteta aus Thera. Die reiche Bürgerin der Kykladen-Insel errichtete wohl zwischen 210 und 195 v. Chr. ein Testament, mit dem sie einen Familienverein gründete, der jährlich eine Gedächtnisfeier ausführen sollte und dafür 3000 Drachmen unter verschiedenen Auflagen erhielt. Die umfangreiche Inschrift enthält nicht nur das Testament der Epikteta in seinem Wortlaut, sondern auch den Beschluss des „Männervereins“, die *donatio* zu den genannten Bedingungen anzunehmen, und zeigt damit am deutlichsten die Parallele zu den eben angeführten öffentlichen Stiftungen.[10]

„general religious category“, die in die „legal category“ Schenkung falle; auf der anderen Seite aus einem Dekret der Stadt, in dem diese sowohl das Kapital als auch die damit verbundenen Bedingungen akzeptiere (*nomos* oder *psephisma*), dieses Dokument sei dann in die Kategorie „Law (*polis*) about religious matters“ einzuordnen. Dazu ist zunächst anzumerken, dass jede Schenkung ein zweiseitiges Rechtsgeschäft ist (*pace* Harris 2015, 73 „It is unilateral.“). Auch wenn man nicht davon ausgehen muss, dass Stiftungen Verträge zwischen Stifter und Stadt sind, sind die beiden Akte, formelles Angebot und Versprechen des Stifters und Annahme durch die Stadt doch so eng miteinander verbunden, dass sie sich einer modernen Einteilung in zwei verschiedene Kategorien entziehen.

8 Ausführlich und überzeugend Aneziri 2020; Arnaoutoglou 2012, 211-215 analysiert eine Stiftung aus Lykien; dazu auch Parker 2010. Arnaoutoglou 2016 bietet einen umfassenden Überblick über die Berufsvereinigungen des phrygischen Hierapolis und ihre Rolle im Bewahren der *memoria* ihrer Mitglieder, die oftmals durch *donationes* finanziell unterstützt wurde.

9 Arnautoglou 2016, 290-291 vermerkt, dass in Hierapolis auch die ausgesetzten Geldstrafen nach unvorschriftsmäßiger Verwendung des Grabes für die Durchführung von Ritualen zur Erinnerung an Verstorbene verwendet wurden.

10 IG XII 3, 330 (Laum 1914, Nr. 43); Wittenburg 1990; Stavrianopoulou 2006, 292-302. Der umfangreiche Kommentar in Campanelli 2016 geht unter anderem auch auf die ma-

II. Das Dokument des Alkesippos aus Kalydon, Delphi

Wie einleitend angesprochen, konnten *donationes* auch in enger Verbindung mit anderen Rechtsgeschäften erfolgen. Manchmal haben sie als öffentliche Stiftungen zu gelten, auch wenn sie wie im folgenden Beispiel in den Rahmen privater Verfügungen gestellt waren und so publiziert wurden. Die letztwillige Verfügung des Alkesippos aus Kalydon aus dem Beginn des 2. Jh. v. Chr. fällt zunächst durch ihren Publikationsort auf: Die Inschrift stammt aus Delphi (SGDI 2101, jetzt auch CID V 1, 128), ist auf der Polygonalmauer eingemeißelt und damit — aus der Sicht des zugrundeliegenden Rechtsgeschäfts — ein Fremdkörper unter den Kauffreilassungen.[11] Die Fläche, die zur Anbringung geglättet worden war, bot mehr Platz als notwendig und wurde erst 158/7 v. Chr. für eine Proxenie-Verleihung an Menedamos, S.d. Damaretos aus Hypata verwendet. Mulliez's Plan der angebrachten Freilassungsinschriften zeigt, dass die ersten Freilassungstexte in der unmittelbaren Umgebung aus den Jahren 151/50 stammen, in weiterer Folge wurde der Platz auf der Mauer mit ähnlichen Inschriften gefüllt. Zumindest für 25 Jahre hatte also das folgende Dokument alleine gestanden und die *archontes* waren damit wohl der ihnen auferlegten Aufzeichnungspflicht (Z.8-9) nachgekommen.

ἄρχοντος Δαμοσθένεος, μηνὸς Ποιτροπίου, ἐπὶ τοῖσδε ἀνέθηκε Ἀλκέσιππος
Βουθήρα Καλυδώνιος τῶι θεῶι καὶ τᾶι πόλει τᾶι Δελφῶν χρυσοῦς ἑκατὸν τρι-
άκοντα καὶ ἀργυρίου μνᾶς εἴκοσι δύο στατῆρας τριάκοντα, εἴ τί κα πάθῃ
Ἀλκέσιππος, ὥσστε θυσίαν καὶ δαμοθοινίαν συντελεῖν τὰν πόλιν τῶν Δελφῶν
5 τῶι Ἀπόλλωνι τῶι Πυθίωι κατ' ἐνιαυτόν, ποτονομάζοντας Ἀλκεσίππεια, ἀπὸ
τῶν τόκων τοῦ τε χρυσίου καὶ ἀργυρίου· συντελεῖν δὲ τὰν θυσίαν ἐν τῶι Ἡραίωι
μηνί, πονπεύειν δὲ ἐκ τᾶς ἅλωος τοὺς ἱερεῖς τοῦ Ἀπόλλωνος καὶ τὸν ἄρχοντα
καὶ τοὺς πρυτάνεις καὶ τοὺς ἄλλους πολίτας πάντας· ἀναγραψάντω δὲ οἱ ἄρ-
χοντες ἐν τῶι ἱερῶι, καὶ ἀνάθεσις κυρία ἔστω· καὶ τὰ ἄλλα πάντα τὰ ἴδια {α}
10 ἀνατίθητι, εἴ τί κα πάθῃ, τῶι θεῶι καὶ {και} τᾶι πόλει, καὶ Θευτίμαν τὰν ἰδίαν
θεράπαιναν ὥστε ἐλευθέραν εἶμεν αὐτὰν εἴ τί κα πάθῃ· θαψάντω δὲ Δάμιππος
καὶ Θευτίμα καὶ Ἀγέας καὶ Πισίλαος ἀπὸ τῶν χαλκῶν τῶν καταλιμπάνει πα-

teriellen Aspekte der erhaltenen Inschrift ein. Vgl. http://ancientassociations.ku.dk/assoc/1645 (S. Skaltsa, CAPInv 1645, Copenhagen Inventory of Ancient Associations, abgerufen am 1.9.2020) mit einer detaillierten Analyse des Vereins.

[11] Bewusst wird hier auf eine sogenannte „testamentarische Stiftung" zurückgegriffen, um im weiteren Parallelen zur *donatio* des Epikrates aufzeigen zu können. Der Text ist auf einer geglätteten Fläche der Polygonalmauer in Delphi in *stoichedon* eingeschrieben, wobei der Steinmetz trotzdem auf die Silbentrennung nicht verzichtete und so die Zeilenlängen nicht einheitlich sind (Mulliez 2019 = CID V,1, Nr. 128: Grand mur polygonal, section 61/62). Die Proxenie-Verleihung: SGDI 2678. Die zeitlich nächsten Freilassungsinschriften sind CID V 1, 550 und 556 (151/50 v. Chr.); 567, 573, 574 und 578 (144-142 v. Chr.); 639 (136/6 v. Chr.). Erst später wurde der Platz zwischen diesen Texten und dem Dokument des Alkesippos gefüllt (Mulliez 2019, Plan der Grand mur polygonal).

ρ' αὐσαυτόν, καὶ λόγον ἀποδόντω τᾶι πόλει. μάρτυροι· ...
16 ... τὰς διαθήκας φυλάσσει Ἄθαμβος, Ἀγέας, Πεισίλαος.

Unter dem Archon Damosthenes, im Monat Poitropios, widmete unter folgenden Bedingungen Alkesippos, Sohn des Boutheras, Kalydonier, dem Gott und der Stadt der Delpher 130 Goldstücke und aus Silber 22 Minen und 30 Statere, für den Fall, dass Alkesippos etwas erleide (seines Todes), damit die Stadt ein Opfer und eine Volksbewirtung für Apollon jedes Jahr ausführen kann, welche Alkesippeia genannt werden, von den Zinsen des Golds und des Silbers. Sie sollen das Opfer im Monat Heraios durchführen, die Priester des Apollon und der Archon und die Prytanen und alle anderen Bürger sollen in einer Prozession von dem „runden Platz“[12] aus ziehen. Die Archonten sollen in dem Heiligtum (dieses Dekret) aufschreiben, und die Widmung soll gültig sein. Auch seinen übrigen Besitz hinterlässt er, für den Fall seines Todes, dem Gott und der Stadt, und Theutima, seine eigene Sklavin, damit sie im Fall seines Todes frei sei. Damippos, Theutima, Ageas und Pisilaos sollen ihn bestatten aus den Bronzemünzen, die sich bei ihm finden, und dann der Stadt Rechenschaft darüber ablegen. (Vierzehn) Zeugen: … Das Testament hüten Athambos, Ageas, Pisilaos.

Alkesippos, ein Kalydonier, weihte im Jahr 183/2 v. Chr. dem Gott Apollon und der Stadt der Delpher 130 Goldstücke, sowie 22 Silberminen und 30 Statere. Die Einleitung ἐπὶ τοῖσδε ἀνέθηκε entspricht genau dem Muster der Definition der Stiftung als *donatio sub modo*: „unter folgenden Bedingungen weihte“. Die Bedingungen gelten der Bindung des Kapitals: Aus den Zinsen sollen jährlich Opfer für Apollon und eine Speisung für das Volk veranstaltet werden können, die den Namen Alkesippeia tragen sollen. Schwierig ist die Zuordnung der Formel εἴ τί κα πάθῃ, „wenn er etwas erleide“ (auf den Todesfall) in Z.4-5. Sie könnte auf die direkt zuvor genannte Weihung zu beziehen sein, welche dann erst im Todesfall Rechtsgültigkeit hätte; dem widerspricht aber die Vergangenheitsform von ἀνατίθημι.[13] Meines Erachtens ist die Formel vielmehr auf den danach stehenden Zweck der *donatio sub modo* zu beziehen, die Einrichtung der Alkesippeia. Die Opfer und der Festumzug unter diesem Namen würden also erst nach dem Tod des Alkesippos beginnen.[14] Dieser weist aber in Z.9 gesondert auf die Rechtsgültigkeit der ἀνάθεσις hin, nachdem er die *archontes* zur Aufzeichnung auffordert.

Zwei Szenarien sind möglich: Entweder hatte Alkesippos das Kapital bereits übergeben und der Hinweis auf die Rechtsgültigkeit diente vor allem der Bindung

[12] Der runde Platz (*halos*) wird auch als Ausgangspunkt einer Prozession im Rahmen der Eumeneia und der Attaleia 159/8 v. Chr. genannt (FD III 3, 238, Z.8-11 und SGDI 2642, Z.58-61). Jacquemin – Laroche 2014, 742-744.

[13] Von dieser Zuordnung geht die Forschung dort aus, wo eine „testamentarische Stiftung“ angenommen wird.

[14] Diese Interpretation liegt auch der Übersetzung von Mulliez (CID V 1, 128), zugrunde, der deutlich zwischen der abgeschlossenen *donatio* und dem Beginn der Feiern trennt.

der Stadt an die Bedingungen, oder er hatte zwar das Stiftungsversprechen abgegeben, welches wohl auch von der Stadt angenommen worden war, die Übergabe sollte aber erst später erfolgen. Damit wäre das Stiftungskapital zunächst bei Alkesippos verblieben und die Erklärung, dass das Rechtsgeschäft κυρία sein solle, würde in diesem zweiten Fall vor allem den Stifter betreffen.[15] Dennoch waren in jedem Fall beide Seiten waren Verpflichtungen eingegangen. Alkesippos war an sein Versprechen gebunden und die Summe konnte auch bei seinen Erben eingetrieben werden. Die Stadt, die ja zur Publikation aufgefordert wurde, konnte ebenfalls von ihrer Annahme der *donatio* und damit auch der Bedingungen nicht mehr zurücktreten, auch wenn die Alkesippeia nicht unmittelbar begonnen wurden.

Der übrige Besitz des Kalydoniers sollte ebenfalls dem Gott und der Stadt Delphi — nicht etwa seinem Heimatort — gehören. Hier ist ein relevanter Unterschied zum vorherigen Teil des Dokuments zu erkennen. Während die erste *donatio* im Perfekt als abgeschlossen beschrieben wird, verwendet Alkesippos nun das Präsens: ἀνατίθητι (Z.10). Die ursprüngliche Weihung des Kapitals war also unter den hier angegebenen Bedingungen der jährlichen Feier bereits vorgenommen worden und auch rechtsgültig, selbst wenn die Übergabe noch nicht erfolgt sein sollte. Alkesippos referiert sie lediglich im vorliegenden Dokument. Die zweite Weihung, jetzt des restlichen Vermögens, stand noch aus und erfolgte auf den Todesfall. Sie erlangte also erst dann Gültigkeit. Alkesippos nahm sie daher in sein Testament auf. Übergeben werden sollte zweierlei: zunächst der „übrige Besitz" (τὰ ἄλλα πάντα τὰ ἴδια) und dann eine Sklavin, Theutima. Zumindest für den ersten Teil handelt es sich hier in meinen Augen nicht um eine *donatio sub modo*, denn es sind keinerlei Bedingungen vermerkt.[16] Ob zusätzlich zum Haus und dem darin enthaltenen Barvermögen noch weitere Güter vorhanden waren, lässt sich nicht mehr eruieren.[17] Der zweite Teil, die Übergabe der Sklavin, erfolgte zwar unter einer Bedingung (ὥστε), es handelt sich aber ebenso wenig um eine Stiftung: Theutima erlangte mit dem Tod des Alkesippos automatisch die Freiheit, hier liegt eine testamentarische Freilassung vor, die der Anlass für die Wahl der Polygonalmauer als Publikationsort gewesen sein kann. Sie wird in weiterer Folge gemeinsam mit drei Männern beauftragt, das Begräbnis zu organisieren und aus den Bronzemünzen im Haus zu finanzieren, wobei die vier Personen der Stadt Rechnung legen müssen, die ja konsequenterweise auch das Geld im Haus geerbt hatte.

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[15] Auch wenn versprochenes Geldkapital nicht als unveräußerlich gekennzeichnet werden konnte, gibt es durchaus Parallelen für *donationes sub modo*, die ohne tatsächliche Übergabe des Geldes bei der Einrichtung auskommen, dazu siehe unten bei Anm. 31.

[16] Die Aufforderung an Theutima und drei namentlich genannte Männer, aus dem Bronzegeld im Haus zunächst die Bestattung zu finanzieren und dann der Stadt Rechenschaft abzulegen, ist keine Bedingung, da sie keine Verpflichtung für die Stadt selbst darstellt. Sie ist vielmehr als Verfügung über einen Teil des Vermögens zu definieren, die ehemalige Sklavin wird zur Ausführung bestellt.

[17] Dies ist eine klassische Dedikation an ein Heiligtum, wie Harris 2015, 73 sie definiert.

Ἀνατίθημι hat hier also durchaus unterschiedliche Bedeutungen: mit dem Zusatz ἐπὶ τοῖσδε (Z.1) das Einrichten einer Zuwendung unter Auflagen, also einer Stiftung; in der Verbindung mit ὥστε (Z.10/11) die Freilassung einer Sklavin und ohne nähere Bestimmung (Z.10) die Weihung von Gütern an Heiligtum und Stadt im Rahmen der letztwilligen Verfügung, also eine schlichte Vermögenszuwendung an beiden politischen Einheiten.[18] So sind mit dem gleichen Verb in einer Urkunde drei verschiedene Rechtsgeschäfte bezeichnet, die allerdings alle als gemeinsame Grundlage die Übereignung eines Objekts und die Bindung an den Todesfall haben. Während das erste Rechtsgeschäft bereits abgeschlossen war, erlangten die beiden anderen erst mit dem Tod des Alkesippos Rechtskraft und bildeten somit den eigentlichen Kern der Urkunde, die in Z.16 διαθήκη „letztwillige Verfügung" genannt wird. Diese Funktion scheint Alkesippos also am wichtigsten gewesen zu sein. Die Zahl der Zeugen, die er für die Errichtung benennt, ist für eine letztwillige Verfügung sehr hoch, hat aber Parallelen in den Freilassungsinschriften. Es müssen nicht zuletzt mehrere Ausführungen des Dokuments vorhanden gewesen sein, da drei Männer mit der Obhut beauftragt wurden.

Unsere Kenntnis des Textes verdanken wir der Tatsache, dass er — für Testamente ungewöhnlich — als Inschrift publiziert wurde. Eine Publikation wurde ohnehin für die erste Stiftung und die Begründung der Alkesippeia vom Stifter selbst gefordert. Sicherlich war auch dem Kalydonier — wie jedem anderen Stifter — daran gelegen, seine großzügige Einrichtung einer besonderen Feier für die Delpher und das Heiligtum des Apollon und damit auch seine *memoria* der Nachwelt publik zu machen.[19] Ob es sich dabei um die nun uns vorliegende Inschrift handelt, der doch wesentliche Teile der Stiftungsverwaltung fehlen, oder ob es eine gesonderte Aufzeichnung an einem anderen Ort gegeben hatte, lässt sich heute nicht mehr bestimmen. Die Publikation der gesamten letztwilligen Verfügung auf der Polygonalmauer wird wohl im letzten in ihr erwähnten Rechtsgeschäft, der Freilassung, begründet sein. Als Testament und Stiftung bildet die Urkunde einen Fremdkörper an dieser Stelle, bezogen auf die darin enthaltene Freilassung der Theutima ist ihre Aufnahme allerdings im Rahmen der Möglichkeiten der Selbstdarstellung des Freilassers verständlich.[20] All dies zeigt deutlich, dass — fern von dem Zwang, bestimmte Kategorien an Rechtsgeschäften eindeutig definieren zu wollen — der Zweck der Verfügung und die Mittel, ihn zu erreichen, im Zentrum des Rechtsdenkens standen.

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[18] Einen Erben, der die Persönlichkeit des Verstorbenen fortsetzte, gab es nicht, dazu Wolff 1971.

[19] Zu den möglichen Intentionen der Freilasser ausführlich Lepke 2019.

[20] Nur wenige Texte auf der Polygonalmauer verweisen nicht auf Freilassungen, dazu gehört u.a. das Proxenie-Dekret SGDI 2678 direkt unterhalb der Inschrift des Alkesippos. Ich danke Andrew Lepke, Münster, für die stete Diskussionsbereitschaft zu diesen Themen und die Informationen aus seiner in Publikation befindlichen Dissertation.

III. Das „Testament“ des Epikrates, S.d. Epikrates aus Nakrason

Um im Folgenden die Anweisungen des lydischen Stifters Epikrates in seiner *diatheke* einzuordnen, sollen die verschiedenen Rechtsgeschäfte, die in dem Dokument vereint sind, zunächst einzeln analysiert werden. Am Anfang stehen die Vorschriften zur *donatio sub modo*. Dabei muss zunächst die Frage nach dem Eigentum an den gestifteten Grundstücken beantwortet werden, bevor die Rechte und Pflichten der beiden Freigelassenen Eunomos und Telesphoros und der Nachkommen des Telesphoros untersucht werden (III 1).[21] Darauf folgen — wie im Text der Inschrift — die Belegungsvorschriften für das *heroon* (III 2 a), die ein Zwischenergebnis zum Vergleich zwischen Testament, Grabsatzung und Stiftung erlauben (b), und Nutzungsrechte für die Ehefrau und die Enkelin des Epikrates (III 3). Am Ende verdient die abschließende Sanktion genauere Betrachtung (III 4).

1969 publizierten Peter Herrmann und Kemal Ziya Polatkan eine Reihe von Inschriften aus dem Museum von Manisa, darunter eine eindrucksvolle Giebelstele aus hellgrauem Marmor, die auf Vorder- und Rückseite beschrieben ist. Erhalten sind insgesamt 116 Zeilen (82 Zeilen vorne, 34 hinten) in sehr sorgfältig ausgearbeiteten Zeichen, die besonders tief eingemeißelt wurden.[22] Die Herausgeber datieren die Inschrift — vor allem aus paläographischen Gründen — in das erste Jh. n. Chr. Der Text beginnt in der Mitte eines Satzes, setzt sich mithin also von einer anderen Stele her fort und enthält in der ersten Person Singular gehaltene Vorschriften über Nutzungsrechte an verschiedenen Grundstücken, eine *donatio sub modo* und ihren Schutz, ein Bestattungsverbot und die Vorkehrungen für einen unterirdischen Grabteil, ein umfangreiches Abänderungsverbot mit Fluch und schließlich die abschließenden Worte Ἐπικράτης Ἐπικράτους διατέθειμαι. Herrmann und Polatkan folgern — nicht nur aus diesem Detail — dass hier der zweite Teil eines Testaments vorliege. Auf dem Originaldokument müsse also mit diesen Worten die eigenhändige *subscriptio* des Testators gestanden haben. H.J. Wolff nennt die Inschrift „reichlich geschwätzig“, was aus dem Blick des Erbrechts durchaus zutreffend ist. Im Vergleich mit Testamenten, die auf Papyrus erhalten sind, folgert Wolff, dass die

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[21] Eine differenzierte Analyse der sogenannten „Vereinsstiftungen“ unter rechts- und verwaltungshistorischen Aspekten würde den Rahmen dieses Beitrags bei weitem sprengen, auf einige Spezifika wird im Folgenden hingewiesen. Ein Blick auf die erhaltenen Texte zeigt, dass diese keineswegs so einheitlich gestaltet waren, wie es die Forschung vermuten lässt, sondern durchaus Eigenheiten in Rechten, Aufgaben und Pflichten der Vereine festzustellen sind.

[22] Herrmann – Polatkan 1969, 7-8: Die große Stele ist von einem Giebel und Akroteren geschmückt, auch der Zapfen zum Einlassen in den Boden ist erhalten (siehe die Abbildung am Ende des Beitrags). Maße: H: 2,58 m. – B: 0,59-0,69 m. – D: 0,29-0,35 m. Buchstabenhöhe: 1-1,2 cm; Zeilenabstand 0,5-0,7 cm. Die Rückseite der Stele ist, obwohl sie Text trägt, nicht weiter ausgearbeitet. Siehe die Abbildung am Ende des Beitrags. Der Stein war 1965 im lydisch-mysischen Grenzgebiet im Stadtgebiet des antiken Nakrason (nahe des heutigen Dönertaş) gefunden worden und befindet sich heute im Museum von Manisa. Siehe die Abbildungen am Ende des Beitrags.

Rechtsvorstellungen, die den Verfügungen des Epikrates zugrunde liegen, griechisch waren. Er sieht darin ein typisch hellenistisches Legatentestament.[23] Auffallend sei allerdings, dass die Verfügungen vielfach im Aorist festgehalten seien und damit auf Geschäfte verwiesen, die bereits in der Vergangenheit abgeschlossen wurden. Wolff möchte sich nicht festlegen, ob hier ein „lokaler oder gar persönlicher Stil" des Testators vorliege, der trotzdem den Rechtserwerb der Bedachten *mortis causa* vorsieht, oder ob auf „ein der Errichtung der Testamentsurkunde vorangegangenes sakrales Weihegeschäft" Bezug genommen werde.[24] Die Parallelen zur *donatio* des Alkesippos (s.o.) sind damit jedenfalls deutlich. Im Mittelpunkt der folgenden Überlegungen soll auch die Frage nach dem Charakter des Dokuments stehen, das hier auf Stein festgehalten worden war. Handelte es sich um ein Testament, eine Grabsatzung oder eine Stiftung? Waren die Verfügungen erst mit dem Tod des Epikrates oder bereits vorher rechtswirksam? Ein Vergleich mit ähnlichen Inschriften soll die typische Praxis im hellenistischen und kaiserzeitlichen Griechenland und Kleinasien erläutern.

Da der umfangreiche Text hier nicht zur Gänze wiedergegeben werden kann, mag das folgende Regest der Orientierung dienen. Der erhaltene Text setzt mit der Zuwidmung von Grundstücken an das Heroon ein, das Epikrates für seinen verstorbenen Sohn Diophantos errichtet hatte.

> Z.1-3: Ende der Abgrenzung und Zuwidmung eines Landstücks — Z.3-11: Abgrenzung und Zuwidmung von Weinland „Kyllina" — Z.11-14: Abgrenzung und Zuwidmung eines Olivenhains „des Maximus" — Z.14-21: Abgrenzung und Zuwidmung zweier Grundstücke, „Pteleon" und „Kormos" — Z.21-25: Steuerpflicht desjenigen, der die Ländereien in Besitz hat und als Weide nutzt oder die Einkünfte daraus erhält — Z.26-38: Ermahnung des Erben und seiner Nachfolger, Gründe für die Einrichtung der *donatio*, Vermeidung von künftigem Fehlverhalten – Z.38-40: Vorbehalt der Verfügungsmacht für Epikrates — Z.41-51: *epimeleia* der Freigelassenen Telesphoros und Eunomos für das *mnemeion* und die zugewidmeten Grundstücke, Verwendung des Ertrags für die Instandhaltung, Bekränzung des *mnemeion* mit Rosen im Rahmen des Kults für den *heros* – Z.52-63: Nachfolgeregelung nach Telesphoros und Eunomos, Veräußerungs- und Abänderungsverbot – Z.63-69: detaillierte Publikationsvorschrift — Z.69-74: Strafklau-

[23] Wolff 1971, 332-333, weist darauf hin, dass zwar der Erbe immer im Singular und ohne Personalisierung als ὁ κληρονόμος bezeichnet und von sonstigen Bedachten unterschieden werde, es aber trotzdem nicht zwingend sei, hier römische Rechtsvorstellungen zugrunde zu legen. Parallelen aus Oxyrhynchos zeugten davon, dass sich damit die Vorstellung von der Fortsetzung des Hauses verbinde (etwa P.Oxy I 105, 3-4). Im vorliegenden Beitrag bezeichnet „Testament" daher auch nicht das römische *testamentum*, sondern die griechische letztwillige Verfügung.

[24] Wolff 1971, 330 und 334-335 scheint trotzdem eher die zweite Variante in Betracht zu ziehen. Behrend 1971, 620 geht — in meinen Augen überzeugend — von einer Stiftung aus, die bereits eingerichtet worden war, und widerspricht Herrmanns Vorstellung einer „testamentarischen Stiftung".

sel zum Veräußerungsverbot, Bestandsgebot für die *donatio* — Z.74-76: Schutz des Baumbestandes im Hain – Z.76-80: Belegungsvorschriften für das *mnemeion*, Strafklausel — Z.80-87: Vorschriften über das Nutzungsrecht der Cestia — Z.87-94: Vorschriften über einen Acker und eine Grabanlage in Pataktibeiai, Nutzung durch Laevilla und Nachfolgeregelungen — Z.94-105: allgemeine Strafklausel (Verweis auf *tymborychia*, Fluch) —Z.105-108: Belegungsvorschriften für das *katageion mnemeion* — Z.108-112: Fürsorge für die Ehefrau Laevilla — Z.112-115. Fürsorge für den Stiefsohn Metras[25] — Z.116: Unterschrift

Bereits diese erste Gliederung zeigt, dass das Dokument nicht insgesamt einer der oben genannten Gattungen zugeordnet werden kann. Es ist nicht nur ein Testament, da die *donatio sub modo* zum Erhalt des Grabes wohl bereits im Vorfeld eingerichtet worden war und in großen Teilen des Dokuments nicht nur auf sie verwiesen, sondern auch aus ihr zitiert wird. Zudem ist nicht zu eruieren, ob die Bestimmungen am Anfang des Dokuments, die nicht mehr erhalten sind, Verfügungen über das wohl nicht unbeträchtliche Vermögen des Epikrates enthielten. Es ist nicht nur eine Grabsatzung, da verschiedene andere Bereiche geregelt werden, die nicht unmittelbar mit dem Grab zu tun haben, etwa die Vorsorge für die Ehefrau und den Vorfahren. Es ist aber auch nicht nur eine *donatio sub modo* für das Familiengrab, da die Regelungen und auch die Strafvorschriften deutlich darüber hinaus gehen. Es empfiehlt sich also daher, die verschiedenen Elemente zunächst getrennt voneinander zu untersuchen, um dann eine Würdigung des gesamten Dokuments vornehmen zu können.

III 1. Die *donatio sub modo*

Das Kapital der donatio besteht aus verschiedenen Grundstücken, die unter Nennung ihres Namens und mit der genauen Bezeichnung der jeweiligen Nachbarn erfasst (und abgrenzt) werden. Sie wurden dem *mnemeion* zugewidmet, resp. mit ihm gemeinsam gewidmet. Regelmäßig wird die Beschreibung mit den Worten eingeleitet: ὁμοίως ἀφώρισα καὶ συνκαθωσίωσα τῷ μνημείῳ „in gleicher Weise habe ich abgegrenzt und dem *mnemeion* hinzugeweiht (Z.3-4; Z.11-12; Z.14-15). Worin die spezifische „Weise" bestand, auf die sich Epikrates bezieht, mag im ersten Teil des Textes, wahrscheinlich bei der Erwähnung der ersten Grundstücke gestanden haben.[26] Möglicherweise bezieht sich die Referenz auch auf die Bedingungen, unter

[25] Den Hinweis darauf, dass πρόγονος in Lydien als Bezeichnung als Bezeichnung für den Stiefsohn und die Stieftochter geläufig ist, verdanke ich P. Thonemann, Oxford, der mir vorab Einsicht in sein neues Buch gewährte (Kinship and Society in Roman Lydia). Als Vergleichsbeispiele nennt er u.a. TAM V 1, 682 (Charakipolis, 161/2 n. Chr.); 702 (Ioulia Gordos, 36/7 n. Chr.); 812 (Dağdere, 132/3 n. Chr.). Herrmann – Polatkan 1969, 35–36 mit Anm. 54 interpretieren Metras als Vorfahren.

[26] Campanelli 2012, 78 erläutert die Abgrenzung praktisch durch das Setzen von Grenzsteinen (*horoi*), das gleichzeitig eine Weihung und eine Markierung der entsprechenden Gebiete bedeute. Sie sieht darin den Akt, der in Z.31 als σεσημείωμαι ὅρων bezeichnet wird (ebenso Campanelli 2016, 165-166). Zu einer anderen Deutung siehe unten bei

denen die Grundstücke übereignet wurden. Während das *mnemeion* hier wohl als Bezeichnung für das Grabmal, resp. die Grabanlage aufzufassen ist, verdeutlicht die Zusammenfassung der Grundstücksübereignungen in der Ermahnung an den Erben und die weiteren Nachfolger (Z.27-33), dass als neuer Eigentümer der *heros* Diophantos zu gelten habe. Ich schließe mich hier gerne den Bemerkungen meines Respondenten Andreas V. Walser nach meinen mündlichen Ausführungen am Symposion in Hamburg an.[27] Somit entspricht die Übereignung durchaus derjenigen, die Alkesippos an den Gott von Delphi vornimmt, und die auch in zahlreichen anderen Stiftungen überliefert ist. Campanelli erläutert die Bindung der Grundstücke an das Grabmal als „consacrazione alla tomba di famiglia", die dazu gedient habe, sie dem Rechtsverkehr zu entziehen und gleichzeitig ein eindrucksvolles Monument der Familie auf ihrem Land zu erzeugen.[28] Deutlich wird jedenfalls, dass weder die Familie noch ein etwaiger Verein die Eigentümer sind, sondern der *heros*. Es ist Epikrates daher ein besonderes Anliegen, das Stiftungskapital dem Erben und seinen Nachfolgern im Testament noch einmal im Detail vor Augen zu führen, da jedweder Missbrauch, etwa durch Verpfändung oder Veräußerung, ein Vergehen gegen die Götter und damit auch *asebeia* darstellen würde (Z.36-38). Die Klausel ist auf der anderen Seite bereits ein Vorgriff auf die Strafandrohungen, die das umfangreiche Dokument beschließen, und unter denen sich ein ausführlicher Fluch findet (dazu sogleich). Die letzten Zeilen der Verfügung über das Kapital (die Grundstücke) sind schwer verständlich:

Z.38-40

… ὅθεν τού-
των τῶν ἀφωρισμένων καὶ συνκαθωσιωμένων τῷ μνημείῳ καὶ ἥρωι
Διοφάντῳ μόνην ἐμαυτῷ τὴν συνκεχωρημένην διάταξιν ἐπέτρεψα.

Daher habe ich an diesen abgegrenzten und dem *mnemeion* und dem *heros* Diophantos hinzugeweihten (Grundstücken) nur die mir selbst eingeräumte Verfügungsmacht übertragen.

Anm. 60. Das Gebiet habe nach der Zuweihung den Status eines *temenos* oder eines *locus religiosus* erhalten. Gegen die Annahme, dass alle genannten Grundstücke ein *temenos* gebildet hätten, spricht m.E. deren Größe und Lage: Sie waren eben wohl nicht das direkte Umfeld um das *heroon* des Diophantos sondern bildeten die landwirtschaftliche Grundlage für die Einkünfte, aus denen dieses erhalten werden sollte. Ob das klassisch römische Prinzip der Ausnahme eines Grabgrundstückes aus dem Rechtsverkehr als *locus religiosus* jemals in den Provinzen in dieser Strenge eingeführt worden war, ist zweifelhaft. Selbst wenn man aber von diesen Vorstellungen ausgeht, wäre damit erst recht nur der unmittelbare Grund unterhalb des *heroon* betroffen gewesen, nicht weitere Grundstücke. Vgl. dazu jüngst und umfassend Domisch 2018, 115-118.

[27] Siehe in diesem Band 410-411.

[28] Campanelli 2012, 79-83. Den Anstoß zur Einrichtung der *donatio* gab ein Traum (Z.34-36), dazu Robert, BE 1970, 512; Jones 2010, 53.

Epikrates versichert, dass die *diataxis* ihm selbst in einer *synchoresis* zugestanden worden war. Auch wenn in den folgenden Zeilen das *nomen* διάταξις stets seine eigene Anordnung, also den vorliegenden Text, meint, muss diese Bedeutung hier ausgeschlossen werden. So wie die Herausgeber Herrmann und Polatkan sehe ich an dieser Stelle eine „Verfügungsmacht", von der Epikrates angibt, dass sie ihm übertragen worden war und er nur sie (und nicht etwa das Eigentum an den Grundstücken) übergebe. Damit scheint er jedenfalls einerseits die Rechtmäßigkeit seiner Verfügungen über die Grundstücke außer Streit stellen zu wollen und andererseits auszuschließen, dass ein anderer Rechte an den Grundstücken anmelden könnte. Ein Blick in die Grabinschriften, die Regularien für die Einrichtung und Verwendung von Familiengräbern enthalten, kann den möglichen Hintergrund verdeutlichen. Einerseits bezeichnet *synchoresis* die unentgeltliche Übertragung des Rechts auf Bestattung, welche oftmals von den neuen Inhabern eines Grabes gesondert in der Inschrift vermerkt wurde, um sich gegen Einsprüche abzusichern, gerade weil das Eigentum am Grab streng genommen bei anderen Personen lag.[29] Andererseits versichern Grabherren im Rahmen von allgemeinen Bestattungsverboten, dass die einzig mögliche Ausnahme zu diesen Verboten ihre eigene Verfügung in der Zukunft sei.[30] Vielleicht hatte Epikrates also in einem ersten Schritt die Grundstücke dem Heros Diophantos übereignet („zugewidmet") und — quasi in Vertretung des neuen Eigentümers — sich selbst aber die Bewirtschaftung und damit die Einnahmen aber auch die Pflichten eingeräumt (ἡ μονὴ ἐμαυτῷ συνκεχωρημένη διάταξις). So wollte und konnte er zunächst selbst für das *heroon* sorgen. Diese Verfügungsmacht, die eigentlich ein Nießbrauch unter Auflagen war, übergab er nun im Rahmen der vorliegenden Urkunde nach den genannten Bedingungen der *donatio* (ἐπέτρεψα) und schuf damit Rechtssicherheit für die Zeit nach seinem Tod.

Damit würde er sich in eine Gruppe von Stiftern einreihen, denen es wichtig war, vor ihrem Tod noch die *donatio* selbst kontrollieren zu können. So verfügt etwa C. Iulius Demosthenes von Oinoanda in seiner *epangelia* zur Einrichtung eines Agons, dass er und seine Erben solange 1000 Denare pro Jahr zahlen würden, bis sie Ländereien anwiesen, die diese Summe als Rendite erbrachten.[31] Auch die Euergetin Lalla in der lykischen Stadt Tlos, die um 150 n. Chr. die Summe von 12.500 Dena-

29 Harter-Uibopuu 2019 mit weiterführender Literatur und Beispielen.

30 Etwa I.Iasos 385; I.Mylasa 470; TAM II 951. 955. 956 (Termessos), Harter-Uibopuu 2019, 167 mit Anm. 44. Eine Parallele im Rahmen einer *donatio sub modo* findet sich in Akmonia in Phrygien (IGR IV 661, SEG 13, 542, 95 n. Chr.): T. Praxias hatte sechs Freigelassene zur Aufsicht über sein Grab eingeteilt und ihnen und dem Rat der Stadt umfangreiche Bedingungen für die Ausrichtung einer διανομή auferlegt. Vom Abänderungsverbot ist lediglich er selbst ausgenommen (Z.17-19).

31 Der Text datiert in die Jahre 124-125/6 n. Chr.: SEG 38, 1462, Z.14-15 und 28-30; dazu Wörrle 1988, 152-154, der auch auf D 50,12,10 verweist: Modestinus schildert in den *responsa* eine *donatio sub modo* einer Septicia, die 30.000 *aurei* für die Einrichtung eines *agon* versprochen hatte, diese aber bei sich behielt und unter Stellung geeigneter Sicherheiten die Zahlung der Zinsen übernahm.

ren für das Gymnasion der *neoi* verspricht, verpflichtet sich, die Zinsen an die Stadt zu zahlen. Sie begründet diesen — wohl nicht so ungewöhnlichen — Schritt damit, dass sie der Stadt ersparen wolle, *ekdaneistai* und *anapraktai* zu wählen. Der Wortlaut der Urkunde spricht dafür, dass sie das Kapital nicht übergab sondern von Anfang an nur die Zinsen zahlte.[32] Am deutlichsten ist der Abstand zwischen dem Versprechen des Kapitals und der eigentlichen Übergabe aber in der *donatio* des C. Vibius Salutaris in Ephesos (103/4 n. Chr.). In der detaillierten Vorschrift (*diataxis*) nehmen zwar die Statuetten, die Salutaris für die Prozession der Artemis versprochen hatte, den größten Raum ein, aber auch Kapital für die Finanzierung einer umfangreichen Verteilung ist vorgesehen. Diese 20.000 Denare, die in Z.220 als καθιερόμενα bezeichnet werden und damit denselben Status haben wie die Grundstücke des Epikrates, behält er zunächst zurück und verpflichtet sich zur regelmäßigen Leistung der Zinsen. Sollte er sterben, bevor er das Kapital übergeben oder aber entsprechende Ländereien für die Einkünfte zur Verfügung stellen konnte, müssen seine Erben das Geld und die eventuell aufgelaufenen Zinsen unter Strafandrohung übergeben (Z.304-311). In der Einleitung wird allerdings spezifiziert, dass Salutaris sich einverstanden erklärt hatte, der Stadt bei Bedarf die Gelder auszuzahlen (Z.70-72). So konnte der Stifter sicher gehen, dass auch mit geringerem Aufwand seine Wünsche umgesetzt wurden und sich gewisse Rechte vorbehalten.[33]

Nachdem so in der Urkunde des Epikrates die Eigentumsverhältnisse am Kapital, den ausführlich beschriebenen Grundstücken, geregelt waren, folgen konsequent in Z.41-74 Angaben zur Verwaltung der *donatio* und zu dem daraus erwachsenden Gewinn. Während in zahlreichen anderen Stiftungen Erhalt, Pflege und regelmäßiger Schmuck des Heiligtums oder des Grabes Vereinen übertragen werden, geht Epikrates einen anderen Weg.[34]

Z.41-51
βούλομαι τοιγαροῦν τούτου τοῦ μνημείου καὶ τῶν προσκυρούντων
πάντων τῷ μνημείῳ τὴν ἐπιμέλειαν καὶ τὴν ἐξ αὐτῶν πρόσοδον εἶ-
ναι Τελεσφόρου καὶ Εὐνόμου τῶν ἀπελευθέρων μου, ἐφ’ ᾧ μέχρις οὗ
ζῶσιν τὴν ἐκ τῶν προγεγραμμένων πρόσοδον βαστάζοντες προνοήσου-

[32] SEG 27, 938, Z.2-7: [ὑ]ποσχομένη ἀντὶ γυμνασιαρχίας νέλων (δηνάρια) μ(ύρια) βφ ἅτινα καὶ ὑποσυνγέγρ[α]|πται αὐτῇ τοκοφορεῖν εἰς τὸ καὶ ἐ[ν] | τούτῳ τὴν πόλιν ὠφελεῖσθαι ἐκ | τοῦ μήτε ἐκγδανειστὰς αἱρεῖσθαι | μήτε ἀναπρακτὰς, … „Nachdem sie für die Leitung des Gymnasiums der *neoi* 12500 Denare versprochen hatte, verpflichtete sie sich auch vertraglich, Zinsen zu entrichten, damit in dieser (Angelegenheit) die Stadt davon profitiere, weder *ekdaneistai* (Ausleiher) wählen zu müssen, noch *anapraktai* (Eintreiber).“ Harter-Uibopuu 2015, 185-186.

[33] I.Ephesos 27, Z.62-73; Wörrle 1988, 152-153.

[34] Aneziri 2020, 18-19, mit weiterführender Literatur, nennt als Beispiele u.a. IG X 2,1,259, die Stiftung des C. Julius Besartes in Thessalonike (1. Jh. n. Chr.; Kloppenbourgh – Ascough 2011, 352-356, Nr. 76); IG X 2,1,260, die der Priesterin Euphrosyne in Thessalonike (3. Jh. n. Chr., Kloppenbourgh – Ascough 2011, 370-374, Nr. 81).

45 σι<ν> τῶν οἰκοδομημάτων καὶ τῆς διαμονῆς αὐτῶν καὶ θεραπείας πάντων
καὶ τοῦ ἄλσους καὶ τῶν ἀνειμένων καὶ συνκαθωσιωμένων τῷ μνημεί-
ῳ. ἐὰν δέ τι πέσῃ τῶν οἰκοδομημάτων ἢ τῶν περικειμένων τοίχων
τῷ μνημείῳ καὶ τῷ ἄλσει, τοῦτο ὀρθώσουσιν ὁ Τελέσφορος καὶ ὁ Εὔνο-
μος ἐξ ὧν βαστάζουσιν προσόδων. ῥοδίσουσιν δὲ ὁ Τελέσφορος καὶ ὁ Εὔνο-
50 μος ἐπὶ τὸ μνημεῖον μὴ ἔλασσον δαπανῶντες εἰς ῥόδα δηναρίων εἴκο-
σι πέντε, ποιοῦντες τοῦτο ἐπάνανκες εἰς τὴν τοῦ ἥρωος θρησκείαν.

Ich wünsche also, dass die Fürsorge für dieses Grabmal und für alles, was zum Grabmal gehört, und ebenso die daraus anfallenden Einkünfte meinen Freigelassenen Telesphoros und Eunomos zustehen, unter der Bedingung, dass sie, solange sie leben, Ertrag aus den oben erwähnten Grundstücken erzielen und sich (damit) um die Baulichkeiten kümmern, sowohl um ihren Erhalt als auch um die Obsorge für sie und den Hain und den zugunsten des Grabmals geweihten und zugewidmeten Besitz. Wenn aber etwa einer der Bauten oder eine der das Grabmal und den Hain umgebenden Mauern einstürzt, sollen Telesphoros und Eunomos sie mit Hilfe der Erträge, die sie erzielen, wiederaufrichten lassen. Weiters sollen Telesphoros und Eunomos die Grabanlage mit Rosen schmücken, indem sie für die Rosen nicht weniger als 25 Denare aufwenden und dieses als eine verpflichtende Leistung im Hinblick auf den Kult des Heros übernehmen.

Auf den ersten Blick scheint hier die Durchführung des Zwecks nur für die Lebzeiten der beiden Freigelassenen geregelt zu sein: Die beiden Freigelassenen bewirtschaften entweder die Grundstücke selbst, oder verpachten sie. Die daraus erzielten Einkünfte verwenden sie für die Pflege der Bauten, anfallende Reparaturen und für den Schmuck der Grabanlage mit Rosen, der als besonderer Dienst hervorgehoben wird (dazu sogleich). Die nächsten Zeilen enthalten weitere Verfügungen, die die Dauerhaftigkeit der Heiligtums- und Grabpflege sichern. Sichtlich rechnete Epikrates damit, dass Telesphoros ohne Erben versterben würde, möglicherweise war dieser schon so alt, dass das absehbar war. Eunomos sollte nach seinem Tod die Rechte und Pflichten alleine übernehmen und diese schließlich auf alle seine Nachkommen, seien sie weiblich oder männlich vererben können (Z.52-59). Lediglich die Wendung ὥστε προβαίνειν τὴν διαδοχὴν εἰς αἰεὶ ἀπὸ ὀνόματος τοῦ Εὐνόμου καὶ ὀνομάζεσθαι (Z.58-59) könnte man möglicherweise als Gründung eines regelrechten Familienvereins — allerdings natürlich der Familie des Freigelassenen, nicht des Epikrates — interpretieren. Herrmann und Polatkan gehen sichtlich davon aus und übersetzen „… so daß die Nachfolge für alle Zeiten vom Namen des Eunomos fortschreitet und nach ihm benannt wird.“ In diesem Fall wäre aber, angesichts der Ausführlichkeit der Regelungen durch Epikrates an anderer Stelle, ein weiterer Hinweis auf den Verein zu erwarten gewesen. In der Strafklausel in Z.69-73 (dazu sogleich) fehlt jeder Bezug zu einer Organisation, die Nachfolger des Eunomos werden vielmehr als Einzelpersonen angesprochen, von denen bei jedem die Gefahr bestehe, dass er sein Anrecht aus der *donatio* entgegen den Vorschriften veräußert.

Wir haben es in diesem Fall wohl mit einer Erbengemeinschaft zu tun, die lediglich durch den gemeinsamen Erblasser, Eunomos, verbunden ist, aber keinerlei differenzierte Strukturen aufweist.[35] Auffallend ist allerdings, dass die Nachkommen des Eunomos weder die Immobilien noch anderes Kapital erben. Nur das Recht zur anteiligen Nutzung der Ländereien des Heros und die Pflicht zur Fortführung der Betreuung des *mnemeions* gehören — soweit es Epikrates bestimmen kann — zur Erbschaft, die sie nach Eunomos antreten.[36]

In der Zusammenschau ist hier meines Erachtens eine der wenigen *donationes sub modo* zu sehen, in denen weder städtische Gremien oder Amtsträger noch organisierte Vereine, sondern ausschließlich Privatpersonen mit der Administration des Kapitals und der Ausführung des Zwecks beauftragt sind. Telesphoros, Eunomos und dessen Erben erhalten den Gewinn aus dem Stiftungskapital, den Grundstücken. Sie sorgen für die Durchführung des Stiftungszwecks, den Erhalt des Familiengrabs. Ob ein Überschuss aus den Ländereien erzielt wurde, der ihnen auch als Lebensgrundlage dienen konnte, lässt der Text nicht erkennen. Sollten alle Miterben gegen die Vorschriften verstoßen, ist es an den Familienangehörigen des Epikrates, neue Verwalter unter denselben Bedingungen einzusetzen. Auch diese Konstruktion unterscheidet die Vorschriften des Epikrates von anderen Vereinsstiftungen. Interessant ist in diesem Fall der Vergleich mit einer hellenistischen Stiftung aus Kos: Im späten 4. Jh. v. Chr. weihte Diomedon auf Kos ein *temenos* sowie Gästehäuser, einen Garten und weitere kleine Gebäude dem Herakles Diomedonteios und begründete damit einen Familienkult (IG XII 4, 348, A Z.1-6.).[37] Teil der Weihung waren auch ein Sklave Libys und seine Nachkommen, allerdings unter der Bedingung, dass sie frei und als Pächter eingesetzt würden (A Z.4-6 und 11-15). In der Folge gab es einen Kultverein, der aus den Familienmitgliedern des Diomedon bestand, den Priester des Herakles stellte und für die Opfer und die Einhaltung der Regelungen zuständig war. Die Opfer wurden aus den Einkünften bezahlt: der Pacht, die Libys und seine Nachkommen jährlich entrichten mussten. Eine Mitgliedschaft im Verein war für den Freigelassenen nicht vorgesehen. In ähnlicher Weise stehen einander die

35 Weder das Copenhagen Associations Project (https://ancientassociations.ku.dk/CAPI/, abgerufen am 1.9.2020) noch die Sammlung von P. Harland, Associations in the Greco-Roman World (http://philipharland.com/greco-roman-associations/, abgerufen am 1.9.2020) führen die hier behandelte Urkunde als Beleg für einen Verein.

36 Wolff 1971, 336 führt sogar aus, dass den Freigelassenen keine „echte, technische Rechtsposition“ verliehen werde, er sieht in den Rechten keine *chresis*, wie sie etwa später Laevilla und Cestia zugedacht wird. Dieser Einschätzung der Festschreibung ihrer Aufgabe in „farbloser Redeweise“ stünden aber die großen Vermögenswerte gegenüber, die ihnen zugewiesen wurden. Nach Wolff müssten die Einkünfte aus den Ländereien die Aufwendungen für den Graberhalt bei weitem übersteigen. Es besteht natürlich die Möglichkeit, dass die Nachkommen des Eunomos weiteres Vermögen erbten, das dieser erworben hatte. Dies würde natürlich in den Anordnungen des Epikrates keine Rolle spielen.

37 Aneziri 2020, 10 mit weiterführender Literatur.

Familie des Epikrates und der Erbe des Eunomos als getrennte Einheiten gegenüber.[38]

Da nun das Kapital der *donatio sub modo*, also die einzeln benannten Grundstücke, Eigentum des *heros* wurde und auch für die Durchführung weder eine öffentliche noch eine private Institution verantwortlich war, ist festzuhalten, dass in diesem Fall wohl keine förmliche Annahme der Stiftung durchgeführt worden war. Somit scheint sie — im Unterschied zu den eingangs skizzierten öffentlichen *donationes* und denjenigen, die Vereine begünstigten — ein einseitiges Rechtsgeschäft gewesen zu sein, was sie natürlich in die Nähe des Testaments und der Vorschriften zur Nutzung des Grabes rückt (dazu sogleich).

Unter die Pflichten der Freigelassenen und ihrer Nachfolger fallen einerseits die Fürsorge für die Baulichkeiten, deren Pflege und deren Reparatur, wenn dies notwendig wird. Andererseits sind sie aber durch den Schmuck des Grabes mit Rosen auch an der *threskeia*, der Durchführung des Kults für den Heros beteiligt. Da das *mnemeion* gleichzeitig auch als Grab der Familie genutzt wird — wie gleich zu zeigen ist — übernehmen sie damit auch zumindest anteilig die Obhut am Grab. Dieses Phänomen wiederum ist in den kaiserzeitlichen Grabinschriften Kleinasiens gut belegt. Besonders reiche Informationen dazu bieten die Inschriften aus der Stadt Ephesos, wo es scheinbar zur lokalen Tradition gehörte, Angaben zur Obhut und Pflege des Grabs auf den Epitaphien zu vermerken.[39] Vermutlich war mit der κηδεία nicht nur die Sicherung des materiellen Bestands der Gräber verbunden, sondern auch die Aufsicht über die Einhaltung der Vorschriften aus der Grabsatzung. Dabei wurden einerseits Privatpersonen eingesetzt, die vielfach in einem besonderen Verhältnis zum Grabherrn standen, z.B. seine Freigelassenen. Andererseits wurden gerade in dieser Funktion immer wieder verschiedene *collegia*, vor allem Berufsvereine, tätig.[40] Dies sollte die Dauerhaftigkeit und Effektivität des Grabschutzes garantieren, im Gegenzug wurden die Vereine als Empfänger der Strafzahlungen eingesetzt oder direkt mit finanziellen Zuwendungen bedacht, die ihrerseits an Bedingungen geknüpft sein konnten. Gerade diese, oft zu beobachtende, Nähe zwischen Vereinen, Bestattungen und Stiftungen bildet den Hintergrund

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[38] Vgl. hierzu die entgegengesetzte Meinung von A.V. Walser in diesem Band, der die Erben des Eunomos als Verein auffasst, siehe 409-410.

[39] Herrmann – Polatkan 1969, 29. Zu den Rosalia im Speziellen Kokkinia 1999. Zahlreiche Grabinschriften enthalten Vorkehrungen für die Pflege und die Obhut über das Grab (ἐπιμέλεια, θεράπεια, κηδεμονία): SEG 30, 1387F (Hypaipa); SEG 57, 1207 (Thyateira – Hierokaisareia); in Ephesos ist die Erwähnung der Obhut besonders oft anzutreffen und zeugt von der Wichtigkeit, die Instandhaltung des Grabes und die regelmäßige Durchführung der notwendigen Riten auch über den Tod hinaus zu sichern: I.Ephesos 2202 A (Obhut in einem Testament verfügt); 2211 (Obhut durch einen Freund des Grabherrn); 2531 (Obhut durch Sklaven), et al.

[40] Die Grabinschriften stellen einen großen Teil der Evidenz für derartige Vereine und sind in der Forschung gut untersucht, vgl. van Nijf 1997, 55-68; Dittmann-Schöne 2001, 85-91; Rohde 2012, 294-298 (zu Ephesos).

für entsprechende Interpretationen des vorliegenden Dokuments. Aus der Umgebung von Ephesos stammt aber auch eine Inschrift, in der Erben von Privatpersonen zur Obhut eingesetzt werden. Auf einem Sarkophagkasten ist nach der Nennung des Grabherrn und eines Verbots der Fremdbestattung mit angedrohter Strafzahlung vermerkt, dass Außenstehende, die Brüder Iunius Alexandros und Iunius Potamon sowie ihre Erben Obsorge für das Grab tragen (I.Ephesos 3215, Z.3-5). Diese Möglichkeit verbindet die beiden oben genannten Varianten, indem einerseits Privatpersonen zum Einsatz kommen, andererseits die Obhut für die Zukunft durch die Übertragung der Pflicht an deren Erben gesichert ist.

Dem Stifter Epikrates war allerdings bewusst, dass seine Anordnungen zur Nachfolge nach den beiden Freigelassenen möglicherweise für Verwirrung sorgen könnten. Daher verbindet er mit der in Z.63-68 eingeschobenen Publikationsklausel die Aufforderung, auf der aufzustellenden steinernen Stele jeweils anzugeben, wer die Nachfolge übernimmt: ὥστε τῶν βασμῶν τὴν διαδοχὴν μήκει τοῦ χρόνου μὴ ἀ|μαυρωθῆναι „… damit die Abfolge der Stufen nicht durch die Zeit verdunkelt werde“.[41] Diesem Gebot wurde nicht Folge geleistet, wie der Stein deutlich zeigt. Weder sind Einmeißelungen noch etwa Spuren von Farbe, die auf entsprechende Einträge in der Form von Dipinti schließen ließen, zu erkennen.

Zur Sicherung der Bestimmungen des Epikrates folgen umfangreiche Verbote und Sanktionen. Zunächst handelt es sich dabei um ein Abänderungsverbot, wie wir es in *donationes sub modo* zahlreich finden. Dabei ist für diejenigen Stiftungen, die von Poleis oder einem ihrer Gremien verwaltet werden, deutlich festzustellen, dass einerseits die Stifter umfangreiche Anordnungen trafen, andererseits aber auch die Poleis in diesen Fragen ihre eigene Autonomie wahrten und bewusst Regelungen erließen, die möglicherweise nicht von den Stiftern vorgesehen waren. Verboten werden dabei stets jegliche Maßnahmen, die dazu geeignet erscheinen, das Kapital zu einem missbräuchlichen Zweck zu verwenden oder aber auch die Erträge und Zinsen nicht zu den Bedingungen des Stifters einzusetzen. Zumeist werden die Verbote durch hohe Strafzahlungen gesichert, die von der Polis verhängt und wohl auch eingetrieben werden. Andererseits drohen die Stifter das Kapital einzuziehen, wenn Vertreter der Polis für die Abänderung verantwortlich gemacht werden können.[42]

Ähnlich verhält es sich in den Vorschriften des Epikrates, wobei sich der erste Paragraph an die beiden Freigelassenen Telesphoros und Eunomos und ihre Erben richtet:

Z.59-63

μηδενὸς ἔχοντος ἐξουσίαν τὴν ἐπι-
60 βάλλουσαν αὐτῷ πρόσοδον ἐκ τῶν καθωσιωμένων τῷ μνημείῳ καὶ τῷ ἥ-

[41] Herrmann nennt die syntaktische Konstruktion „eigenwillig“ und hielte τοὺς βασμοὺς τῆς διαδοχῆς für klarer, Herrmann – Polatkan 1969, 31 Anm. 44.

[42] Dazu ausführlich Harter-Uibopuu 2013a, 66-85.

ρωι μήτε ἀλλάξαι μήτε μεταδιατάξαι ἢ μισθῶσαι ἢ ὑποθέσθαι ἢ ἀνθ' ἑαυ-
τοῦ ἕτερον κακοτέχνως εἰσαγαγεῖν εἰς τὸ δίκαιον τῆς προσόδου ἢ τῆς κυ-
ριήας τῶν συνκαθωσιωμένων τῷ μνημείῳ.

Niemandem steht es zu, den ihm zufallenden Ertrag aus den dem *mnemeion* und dem *heros* geweihten (Grundstücken) zu verändern, einem anderen Zweck zuzuführen, zu verpachten oder zu verpfänden oder statt seiner einen anderen in schlechter Absicht in das Recht des Ertrags oder der *kyrieia* über die dem *mnemeion* hinzugewidmeten (Grundstücke) einzusetzen.

Jegliche Zweckentfremdung des Ertrags wird ebenso untersagt, wie die Gefährdung der Durchführung des Stiftungszwecks durch Veräußerung oder Belastung der Rechtsposition. Die Gefahr geht hier für Epikrates von den Verwaltern aus und nicht von seiner eigenen Familie, denn der Gegenstand des Verbots sind die Erträge aus dem Stiftungskapital, nicht etwa die Grundstücke selbst. Diese stehen im Eigentum des *heros* und sind damit ohnehin unveräußerlich. Weiteres Vermögen, dass von Eunomos eventuell vererbt werden sollte, würde nicht unter die Stiftung, die Epikrates regelt, fallen und wird daher nicht erwähnt. Das in Z.74-76 nachgeschobene Verbot, in dem Hain Bäume zu fällen oder fortzubringen, unter welchem Vorwand auch immer, gehört wohl direkt zu dieser Klausel und sollte bewirken, dass die Erträge aus der Bewirtschaftung nicht geringer ausfielen und damit wiederum nicht genügend Geld für Erhalt und Reparaturen oder den Schmuck des Grabes zur Verfügung stünde. Die hier im Detail aufgeführten Möglichkeiten, den Ertrag zu gefährden oder zu verringern, werden in der folgenden Sanktionsklausel unter dem Begriff ἐξαλλοτριῶσαι „veräußern" (Z.70) zusammengefasst.

Wer von den Berechtigten dem Verbot zuwiderhandelt, sollte das ihm zustehende Recht verlieren, wie die Sanktionsklausel verdeutlicht:

Z.69-74

ἐὰν δέ τις ἐπιχειρήσει τὸ ἴδιον μέρος τῆς προσόδου καθ' ὁνδήπο-
70 τε οὖν τρόπον ἐξαλλοτριῶσαι, στερέσθω μὲν τοῦ ἐπιβάλλοντος αὐτῷ δι-
καίου· τὸ δὲ δίκαιον αὐτοῦ ἔστω τῶν μὴ ἐξαλλοτριωσάντων. ἐὰν δὲ πάντες
ἀπαλλοτριώσουσίν μου τὴν διάταξιν ἄλλως τέ τι γένηται ἢ ὡς διατέτακ-
χα, τότε οἱ ἔνγιστά μου γένους ἐνχειρισάτωσαν ἐπὶ τοῖς αὐτοῖς δικαίοις,
οἷς διέταξα, οἷς ἂν νομίσωσιν ἐπιτηδείοις εἶναι.

Wenn aber jemand es versuchen sollte, seinen eigenen Anteil an dem Ertrag auf welche Weise auch immer zu veräußern, so soll er das ihm zufallende Recht verlieren. Sein Recht soll denjenigen zukommen, die nicht veräußerten. Wenn aber alle veräußern und sich in Bezug auf meine Anordnung etwas anders entwickelt, als ich es angeordnet habe, so sollen meine nächsten Verwandten zu denselben Rechten (sc. Bedingungen), die ich angeordnet habe, diejenigen einsetzen, die sie für geeignet halten.

In einem ersten Schritt ist vorgesehen, dass das Recht desjenigen, der die Verbote übertritt, denjenigen zufallen soll, die sich daran halten. Die Quote am Ertrag wird also auf die übrigen Berechtigten aufgeteilt.[43] Es ist auffallend, dass Epikrates stets vom „Recht auf den Ertrag“ spricht und die Pflichten, die mit dem Erbe nach Eunomos verbunden waren, unerwähnt lässt. Für den Fall, dass alle Berechtigten sich in der gleichen Weise fehl verhalten und das *dikaion* niemandem aus der Nachfolge des Eunomos mehr zufallen kann, ist nun die Familie des Epikrates zum Handeln aufgefordert. Es ist an denjenigen aus der Familie, die ihm am nächsten stehen (im Sinne der Erbfolge), eine neue Gruppe von Personen zu bestimmen, die sie für geeignet halten, die *donatio* unter den damit verbundenen Bedingungen weiterzuführen.[44]

Das Motiv des Verfalls des Kapitals als Sanktion für die Missachtung der Bedingungen kennen auch andere *donationes*, wie etwa die Ölstiftung der Phaenia Aromation in Gytheion (ebenfalls aus dem 1. Jh. n. Chr.). Dort ist vorgesehen, das Kapital zunächst an die Stadt Sparta — wohl unter denselben Bedingungen — zu übertragen, falls auch die Spartaner die Gabe der Phaenia geringschätzen, geht es an den lokalen Kaiserkult.[45] Die Option, den Stiftungszweck nicht aufrecht zu erhalten, konnte Epikrates nicht zulassen, da es sich um den Erhalt des Grabes seiner Familie und den Heroenkult für seinen verstorbenen Sohn Diophantos handelte. Eine Nachfolge für die Verwalter der Grundstücke, die den entsprechenden Ertrag abzuliefern hatten und sich um die Anlage kümmerten, musste auf jeden Fall gefunden werden. P. Herrmann weist auf eine Inschrift aus Kollyda in Nordostlydien hin, die ähnliche Vorschriften aus einer *donatio sub modo* enthält (TAM V 1, 423). Auch in diesem Fall geht es um den Schutz eines Grabmals und um die als notwendig erachteten Feiern (Z.1-2). Wiederum wird zunächst Einzelpersonen, dann aber auch der ganzen Gruppe der Verlust eines als Privileg empfundenen Rechts angedroht. Gesichert ist die Maßnahme zusätzlich durch einen Fluch: Die römischen Götter, männlich und weiblich, seien für die Bestrafung zuständig.[46] Auffällig ist, dass Epikrates an dieser Stelle seiner Urkunde weder von Strafzahlungen noch von anderen Sanktionen spricht.

[43] Als ein im griechischen Bereich durchaus übliches Phänomen definiert Behrend 1971, 620 diese Vorschriften und zitiert auch die oben (Anm.30) angeführte *donatio* des T. Praxias aus Akmonia.

[44] LSJ s.v. ἐγγίων.

[45] IG V 1, 1208: Harter-Uibopuu 2004.

[46] Herrmann – Polatkan 1969, 32. Später ediert Herrmann den Text in TAM V 1, 423 (Laum 1914 II, Nr. 78a). der Text ist leider zu fragmentiert, als dass man die Konstruktion der *donatio* genau erkennen könnte.

III 2. Die Grabsatzungen

a) Die Belegungsvorschriften

Ab Z.76 ändert sich der Charakter der Vorschriften: Es geht nicht mehr um die *donatio* an und für sich, also die Verwendung der Einkünfte aus dem Kapital, den Grundstücken, sondern um das Grab und die relevanten Belegungsvorschriften:

Z.76-80

ὁμοίως μηδ' ἐξουσίαν τις ἐχέτω εἰς τὸ μνημεῖον τοῦτο ἢ εἰσενεν-
κεῖν νεκρὸν ἢ θεῖναι ἢ θάψαι ἢ ὀστᾶ τινος εἰσενενκεῖν πέρα ἐμοῦ τοῦ Ἐπικρά-
τις καὶ Λαιουίλλης τῆς γυναικός μου καὶ Τερτίας τῆς θυγατρός μου καὶ Κεσ-
τίας τῆς θυγατριδῆς μου. ἐὰν τις τις παρὰ ταῦτα ποιήσῃ, ὑπεύθυνος ἔστω τυμ-
80 βωρυχίᾳ.

In gleicher Weise hat niemand das Recht, in dieses *mnemeion*, entweder einen Leichnam einzubringen oder beizusetzen oder zu begraben, oder die Gebeine von jemandem einzubringen außer von mir, Epikrates, und meiner Frau Laevilla und meiner Tochter Tertia und meiner Enkelin Cestia. Wenn aber jemand entgegen diese (Anordnungen) etwas unternimmt, soll er schuldig sein der *tymborychia*.

Wiederum leitet ὁμοίως auf die neue Klausel über, die nunmehr den zahlreichen Grabvorschriften aus dem kaiserzeitlichen Kleinasien entspricht, die die Benutzung einer Grabstätte regeln sollen. Es werden die Berechtigten genannt, weitere Bestattungen werden verboten und als Sanktion wird auf die Rechtsfolgen der *tymborychia*, des Grabfrevels, verwiesen.[47] Die verwendeten Formulierungen haben enge Parallelen in anderen Grabinschriften aus Lydien und zeigen damit die Einbettung des umfangreichen Textes in den lokalen Kontext.[48] Epikrates sieht vor, dass in dem Grabmal, das wohl bereits den Leichnam seines Sohnes enthält, lediglich er selbst, seine Frau Laevilla, seine Tochter Tertia und seine Enkelin Cestia bestattet werden dürfen. Weder ist von einem Schwiegersohn noch von möglichen weiteren Kindern oder noch zu erwartenden Enkelkindern, oder gar von einer vierten oder weiteren Generation von Berechtigten die Rede. Allerdings sorgt Epikrates für die Bestattung der potentiellen Verwalter aus der Familie des Eunomos vor, die sich um das Grab kümmern sollten. Sie finden ebenso wie seine anderen Freigelassenen (Z.104ff.) in einem unterirdischen Grabbau, κατάγειον μνημεῖον Platz, der ebenfalls im Hain lag und in dem sie wohl auch ihre Verwandten bestatten durften. Meines Erachtens muss man hier von zwei verschiedenen Grabbauten ausgehen.

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[47] Allgemein zu den epigraphisch erhaltenen Grabsatzungen: Harter-Uibopuu, Funerary Epigraphy (im Druck).

[48] Εἰσενενκεῖν νέκρον: Malay, Manisa Mus. 421 (Frg.), SEG 42, 1086 (hellenist. Fluch); SEG 57, 1207: Thyateira – Hierokaisareia, röm.; TAM V 2, 1284: Hierokaisareia.

Z.104-107

εἰς δὲ τὸ κατάγειον μνημεῖ-
ον τὸ ἐν τῷ ἄλσει ἐχέτωσαν ἐξουσίαν οἱ ἀπελεύθεροί μου καὶ
οἱ ἀπ' Εὐνόμου καταγόμενοι καὶ προσεδρεύοντες τῷ μνη-
μείῳ ὀστᾶ τιθέναι τῶν καμόντων.

Meine Freigelassenen und die Nachfahren des Eunomos, die sich auch um das *mnemeion* (*sc. das des Epikrates*) kümmern, sollen die Berechtigung haben, in das unterirdische *mnemeion* in dem Hain die Gebeine der Verstorbenen beizusetzen.

Wenn man davon ausgeht, dass Gräber ebenso wie andere Teile des Vermögens im Rahmen einer Erbschaft an die nächste Generation übergeben wurden, so sind diese detaillierten Vorschriften des Grabherrn eine Beschränkung der Rechte des potentiellen Erben. Sie sind Auflagen, in der gleichen Art und Weise wie die Auflagen, die auch im Rahmen von *donationes sub modo* erlassen werden. Gerade die Tatsache, dass in vielen Grabsatzungen die Begriffe διατάσσω und βουλεύω ebenso verwendet werden, wie in Testamenten, zeigt die enge Verwandtschaft der beiden Rechtseinrichtungen. Manchmal sind die Vorschriften für Gräber Teile eines Testaments oder als letztwillige Verfügungen eigenständig formuliert, wesentlich öfter sollen die Regelungen aber — wie die Texte ausweisen — bereits zu Lebzeiten des Grabherrn Geltung haben. Man kann daher nicht von einer automatischen Gleichsetzung der beiden Rechtsgeschäfte ausgehen. Sicher ist aber, dass die in einer Grabsatzung genannten Personen aus der Vorschrift das Recht auf Bestattung ableiten konnten.

b) Die Geltungsgrundlage der Vorschriften im Vergleich mit Testament und *donatio sub modo*

Während die Vorschriften für ein Grab eine eigenständige, einseitige Anordnung sein können, liegt der Grund für die Geltung der Bestimmungen im vorliegenden Fall wohl in dem Testament, in das sie eingebettet sind. In beiden Fällen kann der Grabherr durch ein einseitiges Rechtsgeschäft, also ohne sich mit jemandem einigen zu müssen, im Rahmen der Verfügungsgewalt über sein Eigentum Auflagen über das weitere Schicksal der Gegenstände bestimmen. Hier ähneln Graberrichtung und *donatio* einander insofern, als bei beiden die Auflagen oder Bedingungen einen wesentlichen Bestandteil des Rechtsgeschäfts bilden, und die jeweiligen Urheber sich Gedanken über die Rechtsfolgen ihrer Nichteinhaltung machen. Dabei dienen zunächst — bereits in den epichorisch-lykischen Texten des 4. Jh. v. Chr. — Flüche in hohem Maß der Abschreckung vor Straftaten, ebenso aber auch ihrer Ahndung, auch wenn sich niemand finden sollte, der diese rechtlich verfolgt. Auch Epikrates entscheidet sich in der Generalklausel am Ende seines Textes (dazu sogleich) für einen Fluch, der umfangreich die üblichen Folgen des Fehlverhaltens beschreibt: unversöhnlicher Zorn der Götter sowie der Heroen, Vernichtung des Übeltäters und seiner Familie. Dieser Fluch ist in seiner Ausführlichkeit besonders und meines

Wissens nach der einzige, der ein privates Testament schützt. Gerade darin zeigt sich wieder der enge Zusammenhang zwischen dem eigentlichen Testament und der Grabgründung, die durchaus auch ohne diesen Rahmen erfolgen konnte.[49] Daneben sind in den Grabvorschriften ebenso wie in den *donationes* vor allem Geldstrafen, die an den *fiscus*, an die Polis oder eine ihrer Einrichtungen oder aber auch an den Verein gezahlt werden sollten, die häufigsten anzutreffenden Sanktionen. Diese werden von interessierten Mitbürgern eingetrieben, seien es in ihren Rechten verletzte Verwandte oder — durch einen Anteil an der Strafsumme als „Ergreiferprämie" angelockt — Popularkläger.[50]

Die Grabsatzung im vorliegenden Dokument schließt mit einer weiteren Klausel, die für das griechische Prozessrecht typisch ist, dem Rechtsfolgenverweis. Wer auch immer den Anweisungen des Epikrates zuwiderhandelt, also Personen bestattet, die nicht zum engen Kreis der Berechtigten gehören, sei der *tymborychia* schuldig. In klassischen und hellenistischen staatlichen Rechtstexten genügte oftmals der Verweis auf geltendes materielles oder Verfahrensrecht, um die Rechtsfolgen einer Handlung deutlich aufzuzeigen. Das gleiche System wird auch in römischer Zeit in den griechischen Poleis angewendet.[51] Auch in den Grabvorschriften drohen die Verfügenden entsprechend oft zusätzlich zu einer Geldbuße Verfolgung wegen einer Straftat an, ohne weiter auf Details einzugehen. Regelmäßig ist so in den Texten aus Termessos in Pisidien eine Anklage wegen *tymborychia* oder *asebeia* vorgesehen, auch das kaiserzeitliche Milet hat einige Beispiele dafür.[52]

Warum konnte ein Grabherr als Privatmann für die Übertretung seiner Ge- und Verbote Geldbußen festsetzen, zumal noch in der Höhe von bisweilen mehreren tausend Denaren, in der dies überliefert ist? Während bei einer *donatio* — wie eingangs erwähnt — der Annahmebeschluss durch die Polis selbst oder auch durch einen Verein den Androhungen die notwendige Rechtsgrundlage verschaffte, ist dies bei einer derartigen einseitigen Anordnung nicht auf den ersten Blick einsichtig.

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[49] Vgl. Harter-Uibopuu, Funerary Epigraphy (im Druck), bei Anm. 57. Zu den Grabflüchen allgemein immer noch Strubbe 1997.

[50] Eine umfangreiche Sammlung der Grabstrafen (allerdings ohne differenzierte Analyse) bietet Iluk 2013, 165-313. Vgl. Harter-Uibopuu, Funerary Epigraphy (im Druck), ab Anm. 58.

[51] Gagarin 2008, 142-143 zur langen Tradition dieser Vorgehensweise; vgl. auch Harter-Uibopuu 2013a, 91-92. Ich danke an dieser Stelle meiner Freundin Lene Rubinstein für die großzügige Einsicht in ihre umfangreichen Materialsammlungen zum hellenistischen Prozessrecht sowie für die gemeinsamen Diskussionen zu seinen Instrumenten.

[52] Auf einen νόμος τυμβωρυχίας verweist TAM V 2, 1142 (CIJud 2,752) aus Hierokaisareia, die Grabinschrift des Fl. Zosimus. In Termessos etwa TAM III 1, 418. 443. 596. 784. Zu Milet s. Harter-Uibopuu – Wiedergut 2014, 159-160: I.Milet VI 2, 564. 602. 642. 649 et al. Einen allgemeinen Überblick über die *tymborychia* in Grabinschriften gibt Gerner 1946, bes. 230-234 und 244-247. Allerdings geht er davon aus, dass die jeweils genannten Verbote Tatbestandsmerkmale des Grabfrevels seien und übersieht, dass es sich lediglich um einen Verweis handelt.

Kehren wir zunächst zurück zur Anordnung des Epikrates für seine *donatio*: Wenn die Verwalter nicht entsprechend seinen Wünschen handelten, sollte ihnen das Recht auf Nutzung der Grundstücke, die ja erst die Einkünfte ermöglicht, entzogen werden. Zur Klage legitimiert und wahrscheinlich auch dazu verpflichtet waren wohl diejenigen, die in so einem Fall besser berechtigt waren, also die anderen Verwalter, deren Quote sich vergrößern würde. Sie werden darauf geachtet und — ebenso wie in anderen Testamentsfragen auch — die Möglichkeit gehabt haben, ihre Rechte gerichtlich durchzusetzen. Ebenso verhält es sich mit den Personen, die Epikrates als die „seinem Geschlecht am nähesten stehend" (Z.73, οἱ ἔγγιστά μου γένους) bezeichnet.[53] Sie waren dazu legitimiert, einzuschreiten, wenn alle Verwalter die Bedingungen nicht erfüllten. An ihnen lag es, das Recht im Interesse des verstorbenen Epikrates durchzusetzen, indem sie neue Verwalter bestimmten. Der Kreis der Interessierten ging also über die Person des Erben hinaus, allerdings hatten sie alle aus ihrem Einschreiten keinen materiellen Vorteil.

Hingegen kann man die Empfänger der Geldstrafen in den kleinasiatischen Grabvorschriften durchaus als Begünstigte sehen, die im Fall eines Vergehens gegen die Auflagen des Graberrichters tätig werden konnten. Die Zahlungen an die Gemeinde, Vereine und besonders an den *fiscus*, verbunden mit der „Ergreiferprämie" sollten das nicht immer vorhandene persönliche Interesse ersetzen, den Willen des Verstorbenen zu bewahren. Sie wären damit ebenso wenig Schadenersatz — denn geschädigt wurden im Grunde genommen der Graberrichter und seine Erben — wie echte Strafzahlungen, sondern vielmehr ein Anreiz zum Einschreiten. Vielleicht führt dieser Ansatz auch in der Beantwortung der Frage nach der Geltungsgrundlage derjenigen Grabvorschriften weiter, die keinen Bezug zu Testamenten oder *donationes* aufweisen.

Eine Parallele zwischen bestimmten Stiftungen, Testamenten und den Grabvorschriften wird damit evident: Wenn man davon ausgeht, dass die *donatio sub modo* des Epikrates ein einseitiges Rechtsgeschäft war, weil sie eben nicht von einer Annahme durch eine Institution wie etwa eine Polis oder einen Verein abhing — was allerdings im erhaltenen Quellenmaterial eine Ausnahme bildet — so ist dies die gemeinsame Basis. Es handelt sich bei den drei genannten Typen von Rechtsgeschäften um die einseitige Übertragung von Rechten an eine vorab bestimmte Einzelperson oder Gruppe von Personen, die unter Auflagen vorgenommen werden konnte. Bei Verstoß gegen diese Auflagen gab es entweder gesetzlich (im Erbrecht) oder vom Verfügenden *ad hoc* geregelte Sanktionen. Dritte Personen oder außenstehende Gruppen sollten Strafzahlungen einheben oder möglicherweise in die übertragenen Rechte und Pflichten eintreten oder diese weiter übertragen. Die prozeduralen Vorschriften dafür bestanden in gleicher Weise entweder in den Gemeinden bereits, oder wurden neu festgelegt. Testament, Stiftung und Grabvorschrift sind mithin mehr als bloße Veräußerungsgeschäfte. Der Verfügende ge-

[53] Siehe oben bei Anm. 44.

staltet privatautonom künftige Rechte und Pflichten. Man kann dieses Bündel an Gestaltungsrechten am besten jeweils als „Satzung“ zusammenfassen: Für Testament und Stiftung ist das evident, die Bezeichnung „Grabsatzung“ wird dem rechtlichen Charakter der vom Grabherrn erlassenen Vorschriften über Belegung und Schicksal des Grabes gerecht.[54] Die umfangreichen privaten Verfügungen des Epikrates sind ein herausragendes Beispiel für die enge Verbindung und einheitliche Grundlage der genannten Rechtsgeschäfte.

III 3. Weitere Nutzungsrechte

Den Vorschriften zur Belegung des Grabes schließen sich zwei Abschnitte an, in denen Nutzungsrechte geregelt werden und die durchaus Parallelen in anderen Testamenten haben. Z.87-94 betreffen einen Acker, den Epikrates seiner Frau Laevilla zur Nutzung überlassen hat.

ἀγρείδιον τὸ ἐν Πατακτιβεαις τῆς Να-
κρασειτῶν, ὃ Λαιουίλλῃ τῇ γυναικί μου ἔδωκα εἰς χρῆσιν,
μετὰ τὴν χρῆσιν αὐτῆς προϋπεξῃρημένου καὶ καθωσιωμέ-
90 νου κήπου, ἐν ᾧ τέθαπται Τερτία μου ἡ μήτηρ καὶ ὁ πρὸς μητρὸς
θεῖος Σεκοῦνδος, ἐχέτω τὴν χρῆσιν καὶ τὴν ἐπιμέλειαν οἷς
ἂν ὁ κληρονόμος μου θελήσῃ δοῦναι ἐπὶ τοῖς αὐτοῖς δικαί-
οις οἷς καὶ τοῖς προσεδρεύουσιν τῷ τοῦ υἱοῦ μου Διοφάν-
του μνημείῳ δέδωκα.

Betreffend den kleinen Acker in Pataktibeiai, im Gebiet der Nakrasier, den ich meiner Frau Laevilla zur Nutzung gegeben habe: nach ihrem Nutzungsrecht, mit Ausnahme des geweihten Gartens, in dem Tertia, meine Mutter und der Onkel mütterlicherseits, Secundus bestattet sind, soll die Nutzung und die Obsorge denen zufallen, denen es mein Erbe geben will zu denselben Rechten (unter den gleichen Bedingungen), die ich auch für diejenigen festgelegt habe, die sich um das *mnemeion* meines Sohnes Diophantos kümmern.

Das kleine Grundstück, das als Acker bezeichnet wird (ἀγρείδιον, Z.87) enthält trotz der wohl eher geringen Größe einen Garten und ein Grabmonument, in dem die Mutter und der Onkel des Epikrates bereits beigesetzt sind.[55] Es war Epikrates ein Anliegen, die Verhältnisse für die Zeit nach dem Tod seiner Frau Laevilla bereits im Vorhinein zu bestimmen. Er rechnete sichtlich damit, vor seiner Frau zu sterben (das

[54] Den *terminus* schlägt bereits Thür 2021, ab Anm. 54ff. vor, der im Rahmen einer umfassenden Analyse der *praxis kathaper ek dikes*, des privilegierten Eintreibungsverfahrens auch Grabsatzungen und ihr Verhältnis zum Recht der Polis behandelt.

[55] Ein Stemma der typisch griechisch-römischen Familie des Stifters findet sich bei Herrmann – Polatkan 1969, 19 Anm. 14. Allerdings muss der „Vorfahre“ Metras nun als Sohn der Laevilla und damit Stiefsohn des Epikrates aufgeführt werden (vgl. oben bei Anm. 25).

ergibt sich auch aus der Bitte zum Schluss des Dokuments, siehe sogleich) und sah erneut die Einrichtung einer *donatio sub modo* vor. Nach dem Ende der *chresis*, also wohl mit dem Tod der Laevilla, hatte der Erbe des Epikrates die Möglichkeit, einen neuen Nutznießer zu bestimmen, der auch die Obsorge über das Grab der Tertia und des Secundus übernehmen musste. Allerdings musste dies unter denselben Bedingungen geschehen, die auch für diejenigen Personen galten, die als Nutznießer des Heroons des Diophantos eingesetzt waren. Der Erbe durfte weder Anpassungen vornehmen noch die Auflagen abändern. Somit wusste Epikrates einerseits seine Frau versorgt, an deren *chresis* der Erbe nichts ändern durfte, und hatte andererseits durch die Einrichtung einer erneuten *donatio sub modo* für die Pflege des Grabes seiner Mutter — die wohl bis zu ihrem Tod von Laevilla übernommen wurde — vorgesorgt. Möglicherweise war auch das *agreidion* dem Heros Diophantos geweiht und übereignet worden.

Auch der Nachtrag im „Testament", der auf die Generalklausel mit dem umfangreichen Fluch folgt, zielt auf die Versorgung Laevillas ab, wenn sie einmal Witwe ist. Sie soll im Haus des Erben wohnen bleiben, wenn sie das möchte — also wohl, wenn sie nicht noch einmal heiratet – und wird, davon ist Epikrates überzeugt, ihm Hilfe und Unterstützung sein. In gleicher Weise legt Epikrates dem Erben auch seinen Stiefsohn Metras ans Herz, um dessen Wohlergehen er sich kümmern solle. Es ist bezeichnend, dass hier keine Auflagen festgehalten werden und keine verbindlichen Verpflichtungen entstehen. So wie die reiche Gytheatin Phaenia Aromation verwendet Epikrates hier das Bild der *paratheke* oder *parakatatheke*, der Übergabe einer Sache zur Aufbewahrung.[56] Die Pflicht zur Obsorge, die den Verwahrer trifft, soll auch den Erben des Epikrates oder die Vertreter der Polis Gytheion treffen, wenn sie sich um die Witwe oder die Freigelassenen kümmern müssen. Wenn auch der einleitende *terminus* παρακαλῶ an das römische *fideicommissum* erinnert, hat die Bitte keine umittelbare rechtliche Wirkung, da es sich nicht um den Auftrag einer Zuwendung aus dem Erbe handelt. Der moralische Druck ist aber keinesfalls zu unterschätzen, denn die Inschrift stand vor der Grabanlage, wie Epikrates gefordert hatte, in deutlich lesbarer Schrift, und die Bewohner des kleinen Nakrason werden gewusst haben, wer der Erbe ist und ob er der Bitte des Erblassers nachgekommen war.

Vor der Bestimmung über das *agreidion* für Laevilla steht ebenfalls eine Vorschrift für ein Nutzungsrecht (Z.80–87), das Cestia, der Tochter des Epikrates eingeräumt wurde.[57]

Z.80-87[58]

80 ἐὰν δέ τις τῶν ἐκ τῆς χρήσεως τῆς εἰς Κεστίαν ἐλθούσης τῶν ὑ-

[56] IG V 1, 1208, Laum 1914 II, Nr. 9, ausführlich dazu Harter-Uibopuu 2004, bei Anm. 47.

[57] Ich danke Robert Porod, Graz, für die Hilfe bei der sprachlichen Interpretation der schwierigen Stelle.

[58] Ab Z.83 steht der Text auf der Rückseite der Stele.

παρχόντων μοι καὶ καταλελειμμένοις τοῖς ἀπελευθερωθεῖσιν ἢ ἀλλά-
ξῃ τι ἢ μεταδιατάξῃ
ἢ ἀπαλλοτριῶσαι θελήσῃ ἢ ὑποθέσθαι ἢ κακοτέχνως τι
ποιῆσαι ὥστε ἐξαλλοτριωθῆναί τι τῶν ἐλθόντων εἰς αὐτόν,
85 τὸ τοῦ θελήσαντος ἀπαλλοτριῶσαι ἔστω τῶν μὴ ἀπαλλοτριω-
σάντων, ὥστε μένειν αὐτοῖς καὶ ἐγγόνων αὐτοῖς ἀνεξαλλοτρί-
ωτον εἰς αἰεὶ τὴν χρῆσιν.

Wenn aber ferner einer von denen, die aufgrund des auf Cestia übergegangenen Nutzungsrechts (zum Zug gekommen sind) von dem, was mir und den hinterlassenen Freigelassenen zusteht, etwas verkauft oder verändert haben sollte, oder die Bereitschaft gehabt haben sollte, etwas zu veräußern oder zu verpfänden oder arglistig zu handeln, damit etwas von dem, was ihm zukommt, veräußert werde, so soll dass, was er veräußern wollte, denen zufallen, die nicht veräußerten, damit ihnen und ihren Nachfahren[59] unverändert auf ewig das Nutzungsrecht zukomme.

Das Verständnis dieser Klausel ist schwieriger, da der Gedankengang des Epikrates einen Bruch aufzuweisen scheint und wohl die Kenntnis der Vorkehrungen für das Vermögen des Erblassers im ersten — nicht erhaltenen — Teil des Dokuments voraussetzt. Die Herausgeber vermuten, dass aus dem Nutzungsrecht, das Cestia zukomme, dem Erblasser Epikrates und den hinterlassenen Freigelassenen etwas zur Verfügung stehe, das in weitere Folge nicht vertauscht etc. werden dürfe. Sie nehmen an, dass die Vermögensanteile zunächst dem Epikrates und den Freigelassenen zu eigen seien, und dann in weiterer Folge Cestia das Nutzungsrecht eingerichtet werde.[60] Die Stelle hat auch die Aufmerksamkeit der beiden rechtshistorischen Rezensenten, Hans Julius Wolff und Diederich Behrend erregt. Wolff meint, die *chresis* solle zuerst nach dem Tod des Epikrates an Cestia gehen und nach deren Tod das Vermögen „in der hier bestimmten Weise gebunden sein“, wobei der Übergang von Großvater auf Enkelin zeitlich eingängiger scheint.[61] Allerdings ist dagegen einzuwenden, dass die von Epikrates Freigelassenen (wohl Telesphoros und Eunomos) kaum nach dem Tod der Cestia begünstigt werden können. Behrend sieht eine Gruppe von Berechtigten aus der *chresis* (Cestia und die Freigelassenen) und

[59] Bereits Herrmann – Polatkan 1969, 34, Anm. 50 vermuten, dass es sich in Z.86 um eine offensichtliche Verschreibung für ἐγγόνοις αὐτῶν handeln müsse. Der Steinmetz arbeitet ansonsten sehr korrekt, während bisweilen die Formulierungen, die Epikrates wählt, eigenwillig sind. Letzteres konstatiert auch Wolff 1971, 331 Anm. 6.

[60] Herrmann – Polatkan 1969, 15 in der Übersetzung des Textes und 33.

[61] Wolff 1971, 331 Anm. 6 übersetzt: „wenn einer von meinem, aus der an Cestia gehenden Nutzung an die von mir Freigelassenen fallenden, Vermögen etwas vertauscht, etc.“ und bezieht den Artikel τῶν in A80 auf ὑπαρχόντων in A80/81.

schlägt eine entsprechende Änderung im Text vor.[62] Richtig erkennt er das Ziel der Maßnahme: Die Vermögensanteile (wohl Immobilien) sind dem Zugriff des Erben auf immer entzogen, da jedwede Veräußerung verboten wird. Die Existenz einer weiteren Stiftung, auf die sich das Abänderungsverbot beziehe, auch aufgrund der Ähnlichkeit zur Regelung des Nutzungsrechts der Laevilla, vermutet er vorsichtig. Von einer derartigen Einrichtung gehe ich in jedem Fall aus. Meines Erachtens überträgt Epikrates seiner Enkelin Cestia das Nutzungsrecht an bestimmten Grundstücken, die aber — zunächst noch — von ihm und dann den „hinterlassenen" Freigelassenen, also wohl den für die Hauptstiftung eingesetzten Telesphoros und Eunomos, sowie den Nachfolgern des Eunomos kontrolliert werden. Nach dem Tod der Cestia fällt das Nutzungsrecht an diese Verwalter, denen es in weiterer Folge „auf ewig" zustehen solle. So wie in Z.69-71 wird ihnen verboten, zu veräußern oder zu vertauschen. Auffallend ist im Paragraphen zur *chresis* der Cestia die detaillierte Schilderung der möglichen Veräußerung: nicht nur die Tat selbst, sondern bereits der Versuch sind strafbar. Darüber hinaus wird ausgeführt, dass jedwede Veränderung (wohl der Bedingungen), ebenso wie Verkauf, aber auch Belehnung oder arglistiges Handeln mit dem Ziel der Veräußerung, geahndet würden. In Z.69/70 hatte Epikrates sich mit der summarischen Formel καθ' ὁνδήποτε οὖν τρόπον begnügt, aber wohl dasselbe gemeint. Damit wären die Grundstücke, aus denen Cestia Einkünfte bezieht, wohl der Hauptstiftung zuzurechnen, die — im Unterschied zur *donatio* zugunsten des Grabes der Tertia mit *chresis* der Laevilla — von den Freigelassenen verwaltet wurde. Dass die *chresis* an den Grundstücken des Heros Diophantos ihnen zusteht, verdeutlichen auch Z.41-44 und 52-63, wo stets von πρόσοδος gesprochen wird. Epikrates wusste somit einerseits seine Enkelin aus unveräußerlichen Grundstücken versorgt, andererseits das Sachkapital der *donatio sub modo* vergrößert, wenn sie diese Versorgung nicht mehr benötigte. Somit ist auch die Reihenfolge der Nutzungsrechte logisch: Während die Regelungen für Cestia die Hauptstiftung betreffen, wird aus dem Grundstück, auf dem das Grab der Mutter und des Onkels des Epikrates liegt, nach dem Tod der Laevilla eine eigene *donatio sub modo* eingerichtet, für die der Erbe Verwalter nach seinem Willen suchen kann.

III 4. Die abschließende Sanktion

Z.94-105

ἐὰν δὲ οἷς γέγραπφα ἢ διατετάκχα
95 ὑπεναντίον τι γένηται {τι} ἄλλως τέ τι γένηται ἢ ὡς διατέτακ-
[χ]α, ὁ ὑπεναντίον τούτοις τι ποιήσας ὑπόδικος ἔστω τυμβωρυ-

[62] Behrend 1971, 620: τῶν beziehe sich auf die Berechtigten, die dann in der Sanktion als Begünstigte bei widerrechtlichem Verhalten eines Mitglieds der Gruppe angeführt sind. Z.81 verbessert er in καταλελλειμμέν{οι}⟨η⟩ς τοῖς.

[χί]α̣, καὶ οὐδὲν ἧσσον θεοὺς σχοίη ἐπουρανίους τε καὶ ἐπιγεί-
ους καὶ ἐναλίους καὶ καταχθονίους καὶ ἥρωας κεχολωμέ-
νους. καὶ ἀνεξειλάστους καὶ μήτε αὐτῷ μήτε γενεᾷ μήτε γέ-
100 νει ἀὴρ καθαρὸς ἢ ὑγιεινὸς μήτε γῆ κάρπιμος ἢ βάσιμος μήτε
ἐφικτὴ χώρα ἢ θάλασσα πλωτὴ μήτε οἶκος ἑδραῖος μήτε ἔγ-
γονοι ἢ διάδοχοι γνήσιοι, πρόσρειζα δὲ καὶ πανόλεθρα ἀρθεί-
η καὶ ἀφανισθείη πάντα τοῖς παραβᾶσι καὶ ἀκυρώσασίν μου τὴν
προγεγραμμένην διάταξιν. κεῖνται δὲ καὶ ἕτεραι ἀραὶ τοῖς πα-
105 ραβᾶσι τὴν διάταξίν μου ταύτην.

Wenn aber etwas entgegen den (Vorschriften) geschieht, die ich aufgeschrieben und festgehalten habe, oder etwas auf andere Weise, als ich es verfügt habe, so soll derjenige, der ihnen zuwiderhandelt, verantwortlich sein wegen *tymborychia* und um nichts weniger soll er sich auch den unversöhnlichen Zorn der Götter im Himmel und auf der Erde, im Meer und auf dem Lande, sowie der Heroen zuziehen. Und für ihn selbst wie für seine Familie und sein Geschlecht soll weder die Luft rein oder gesund sein, noch die Erde fruchtbringend oder begehbar, noch das Land erreichbar oder die See schiffbar, noch das Haus fest gegründet, noch soll er rechtgeborene Nachkommen oder Nachfolger haben, sondern von der Wurzel an und mit vollem Verderben soll für diejenigen, die meine oben angeführte Vorschrift übertreten oder ungültig machen, alles zugrunde gehen und verschwinden.

Eine allgemeine Strafklausel zum Schluss der Vorschriften für den Erben und die Verwalter der *donatio sub modo* soll die Einhaltung der Wünsche des Epikrates absichern. Während gegen jedwede Form des Missbrauchs von Kapital oder Einkünften aus den Stiftungen und Nutzungsrechten bereits vorher an zwei Stellen Verbote erlassen wurden (Z.69-74 und Z.80-87) wird hier jedwedes Vorgehen gegen die Vorschriften der Urkunde unter Strafe gestellt. Dabei gibt es zwei Sanktionen: einerseits soll ein umfangreicher Fluch potentielle Täter abschrecken, andererseits droht eine Strafverfolgung wegen *tymborychia*. Der Fluch wird in *donationes sub modo* immer wieder bewusst eingesetzt, um — wie in zahlreichen anderen Fällen privat und öffentlich — die Hilfe der Götter bei der Entdeckung, Verfolgung und Bestrafung einzubinden.[63] Auch der Rechtsfolgenverweis findet sich regelmäßig, wobei normalerweise auf *asebeia* und *hierosylia* als relevante Tatbestände hingewiesen wird, unter denen auch die Abänderungen des Stiftungskapitals oder der Einkünfte subsumiert werden konnten. Gerade im Fall der *hierosylia* ist dies eingängig, da dort, wo *donationes* an Gottheiten errichtet wurden, deren Eigentum ja geschädigt wurde.[64] Der Verweis auf die *tymborychia* ist in Z.79-80 des Dokuments des Epikrates nachvollziehbar, da es um die Benutzungsvorschriften des Grabes

[63] Laum 1914 I, 205-206; Harter-Uibopuu 2013a, 92-95 (insbesondere zu I.Kibyra 43).
[64] Harter-Uibopuu 2013a, 82-85 zu I.Eleusis 489.

geht.[65] In der hier abschließenden allgemeinen Strafklausel betrifft der Verweis aber alle Anordnungen aus dem Text. Also ist auch ein Vergehen gegen die Vorschriften der *donatio sub modo*, etwa die Missachtung der Anordnung zur Pflege des Grabes oder aber eine ausgebliebene Zahlung der notwendigen Steuer hiermit als *tymborychia*, also ein in den Städten Kleinasiens wohl gut regulierter Straftatbestand qualifiziert.[66] An dieser Stelle ist die Rechtsgrundlage schwieriger, denn man würde einer Privatperson das Recht zugestehen, Verfehlungen unter Tatbestände zu subsumieren ohne — offensichtlich — die Zustimmung der Polis zu diesem Vorgehen eingeholt zu haben. An dieser Stelle scheinen die Grenzen der Privatautonomie überschritten.

Dieses Problem beschäftigt in der Analyse der Grabvorschriften bereits seit längerem. Michael Wörrle vermutet, dass die Kommunikation zwischen Privatpersonen und städtischer Verwaltung in Grabangelegenheiten in den Archiven stattfand, die nicht nur als Aufbewahrungsstätten für private und öffentliche Dokumente, sondern als städtische Gremien zu gelten haben.[67] In vielen Texten wird vermerkt, dass die Vorschriften zur Grabnutzung *dia ton archeion* festgesetzt wurden. Archive kommen auch bei der Errichtung von Testamenten, bei Freilassungen in manchen Fällen bei der Errichtung von Stiftungen zum Einsatz. Natürlich musste nicht jedes Testament notwendigerweise im Archiv hinterlegt oder gar beglaubigt werden, ebenso wenig wie jede Anordnung zur Belegung und Nutzung eines Grabes oder jede Freilassung. Aber dort, wo in die Kompetenzen der Polis eingegriffen wurde, kann man vermutlich von einem derartigen Vorgehen ausgehen.[68]

Nun enthält das Testament des Epikrates auf den ersten Blick keine direkten Erwähnungen einer Mitwirkung von Archiven. Betrachtet man den Text genauer, denke ich, dass sich in Z. 31 dennoch ein Hinweis findet: Es geht immer noch um die Bestimmung der Übertragung von Grundstücken, die dem Grabmal „zugeweiht“ werden. Epikrates fasst die Regelungen zusammen und ermahnt — wie bereits angesprochen — den Erben, dass er selbst die Verfügungsgewalt über die Grundstücke habe.[69] Die Grenzen der Grundstücke habe er „angezeigt“: σεσημείωμαι ὅρων. Parallelen zum Verb σημειόω finden sich unter anderem in Magnesia am Sipylos und im pisidischen Termessos, in denen die Einrichtung von Gräbern mit den zugehörigen Vorschriften im Archiv so bezeichnet werden.[70] Auch das Edikt des Q. Veranius in Tlos, das Maßnahmen zur Reform des Urkundenwesens enthält und von Wörrle umfangreich kommentiert wurde, kennt eine *semeiosis* im Archiv, hinter

65 Siehe oben S. 387-388.

66 Umgekehrt ist die Qualifikation des Einbringens eines Leichnams in ein Grab entgegen den Vorschriften des Grabherrn nicht auf den ersten Blick als *hierosylia* zu erkennen, wie es die Verweise in Hierapolis und Lykien vorsehen: Alt.v.Hierapolis 270, Z.3-4. TAM II 221. 228 (Sidyma); 247 (Perdikiai?); 521 (Pinara).

67 Wörrle 1975, 269-272; C.

68 Harter-Uibopuu 2013b, 294-302.

69 Siehe oben S. 379.

70 TAM V 2, 1403; TAM III 1, 750.

der Wörrle die Anordnungen des Eigentümers über die Benützung der Grabstätte vermutet.[71] Die Beschreibung der Grundstücke am Beginn des erhaltenen Textes passt meines Erachtens gut zu einem Grundstückskataster, wie er in der griechisch-römischen Antike durchaus belegt ist. Möglicherweise war das Dokument des Epikrates, das ja eine *donatio* enthielt und Grundstücke umwidmete, in das lokale Archiv aufgenommen und dadurch bestätigt worden? Diese Bestätigung könnte wiederum die Grundlage für die Anerkennung der Rechtsfolgenverweise durch die lokalen Gerichte gebildet haben, die sich ja letztendlich mit möglichen Klagen daraus auseinandersetzen mussten.

IV Schlussbetrachtungen

Was liegt also hier im sogenannten „Testament des Epikrates“ vor? Der Anfang des Textes ist nicht erhalten, muss aber — wenn man von einer ähnlichen Stele ausgehen will — sehr umfangreich gewesen sein. Im überlieferten Text finden sich Angaben zu einer *donatio sub modo* für den Heros Diophantos, zur Errichtung eines Grabes und der Festsetzung von Belegungsvorschriften sowie zur Einräumung von Nutzungsrechten mit anschließender *donatio*. Diesem schließt sich eine Bitte an den Erben um Betreuung der potentiellen Witwe an. Dabei sind die zeitlichen Aspekte durchaus von Bedeutung: Die Grundstücke, die das Kapital der *donatio* ausmachen — soweit wir das sehen können — wurden bereits vorab „hinzu geweiht“, was bedingt, dass das Heroon für den Sohn Diophantos schon eingerichtet war. In diesem Sinne ist die Erwähnung im Testament lediglich eine Bestätigung, eine Verdeutlichung eines Rechtsakts, der bereits in der Vergangenheit liegt. Dieser Teil ist also keinesfalls eine echte testamentarische Stiftung. Anders mag man die Verfügung über die Nutzungsrechte für Laevilla und Cestia sehen, deren Übergang in eine *donatio* erst in der vorliegenden letztwilligen Verfügung geregelt ist. Daher ist auch der Verweis des Epikrates notwendig, dass er sich selbst die Verfügungsgewalt über die Grundstücke übertragen habe, die dem *heroon* zugeweiht wurden, um eventuell notwendige Änderungen vornehmen zu können. Andererseits scheint die Verwaltung der *donatio* auf den ersten Blick erst im Testament geregelt worden zu sein, da die *epimeleia* im Rahmen einer Klausel ausgeführt, die — mit dem Begriff βούλομαι eingeleitet — durchaus erst für die Zukunft Geltung haben sollte. Bis zu seinem Tod wollte Epikrates wohl die Einkünfte aus den Grundstücken selbst verwalten, ein Vorgehen, das in anderen *donationes* durchaus Paralellen hat.

Wer ist das „Gegenüber“ der *donatio*? Festzuhalten ist jedenfalls, dass weder die Polis noch ein Verein mit Aufgaben bedacht werden, sondern die Verwaltung alleine bei den beiden Freigelassenen liegt, von denen wohl nur einer selbst mit Erben versehen sein würde. Der neue Eigentümer der Grundstücke ist der *heros*, der nach dem Tod des Epikrates von den beiden Freigelassenen als Verwalter unter strengen Auflagen vertreten wird. Weder Telesphoros noch Eunomos und seine

[71] Wörrle 1975, 269-272; Harter-Uibopuu – Wiedergut 2014, 162-164.

Erben scheinen eine besondere Zustimmung zu den Regelungen, die Epikrates vorschreibt, erteilt zu haben. Man wird wohl in dieser speziellen *donatio sub modo* einen einseitigen Willensakt des Stifters Epikrates zu sehen haben. Gesichert sind die Vorschriften durch die Androhung des Verfalls der Einkünfte aus der Stiftung. Sollten die Erben der Freigelassenen sich nicht an die Bedingungen halten, kann ihr Recht auf diese Einkünfte — verbunden allerdings mit der Pflicht zur Pflege des *heroons* — von den engsten Familienangehörigen des Epikrates erneut vergeben werden. Weiters ist ein umfangreicher Fluch geeignet, jegliche Verfehlung (nicht nur gegen die Belegungsvorschriften des Grabes) zumindest gefährlich zu machen. Nicht zuletzt gibt es die Möglichkeit, Verstöße mit einer Klage wegen *tymborychia*, Grabfrevel zu ahnden. Derartige Strafklauseln sind in echten Testamenten eine Seltenheit, in der umfangreichen papyrologischen Evidenz Ägyptens finden sich weniger als eine Hand voll Fälle. Und doch endet der Text mit den Worten: „Ich, Epikrates, Sohn des Epikrates, habe dies (als letzten Willen) verfügt".

Es liegt also — wieder einmal — ein komplexes Dokument vor, das verschiedene Elemente von Rechtsgeschäften in einer Urkunde zusammenführt, die letztlich als Grundlage für Berechtigungen ebenso dient wie für das Aufzeigen von Fehlverhalten und mögliche Ahndungen desselben. Damit weist es enge Parallelen zu dem eingangs zitierten Testament des Alkesippos auf, das ebenso unterschiedliche Rechtsakte vereint. Wie andere Texte auch lässt sich die Urkunde nicht einfach in eine Kategorie pressen, sondern ist Zeugnis der Gestaltungsvielfalt in der hellenistisch-römischen Welt. Ihr Ziel ist klar: Erhalt und Pflege des *heroons* des Diophantos, Erhalt und Pflege des Familiengrabes der Tertia und des Secundus, Versorgung der Laevilla und der Cestia über den Tod des Epikrates hinaus und Unveräußerlichkeit zumindest bestimmter Teile der Ländereien des Epikrates, sodass für ihn und seine Familie ein bestehendes Andenken gewährleistet ist.

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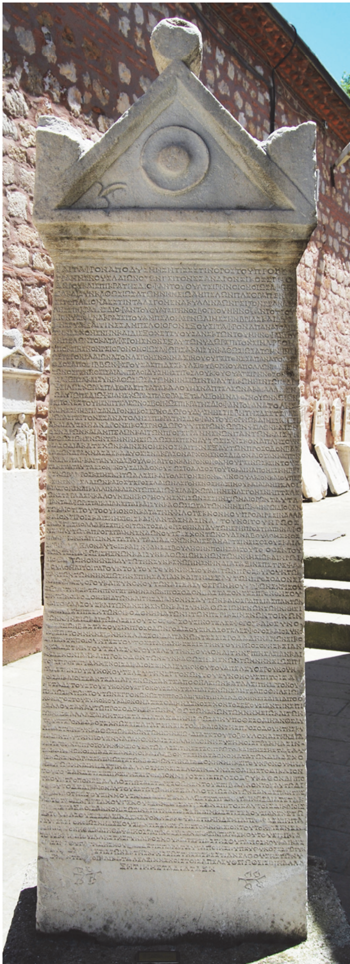

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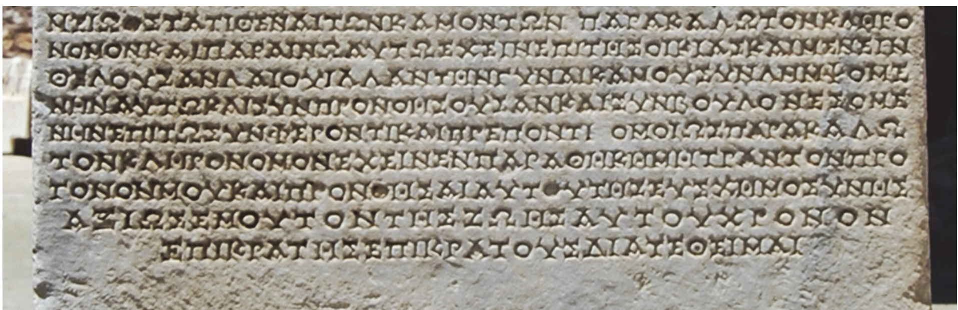

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ANDREAS VICTOR WALSER (ZÜRICH)

MENSCHEN UND GÖTTER – ZU DEN RECHTSGRUNDLAGEN GRIECHISCHER STIFTUNGEN. ANTWORT AUF KAJA HARTER-UIBOPUU

Kaja Harter-Uibopuu widmet sich in ihrem Beitrag den Rechtsgrundlagen des griechischen Stiftungswesens. Ausgehend von der *diatheke* des Epikrates aus Nakrason analysiert sie insbesondere die Verwaltung von Stiftungen, die keinen institutionalisierten Empfänger haben, das Stiftungskapital also nicht von einer Polis oder einem Verein, sondern von Privatpersonen verwaltet wird. Die Stiftung des Epikrates liefert dafür eines der wenigen, wenn nicht das einzige Beispiel.

Harter-Uibopuu hat die Diskussionen über ihren Vortrag beim Symposion fruchtbar gemacht und ihre Überlegungen in der schriftlichen Fassung vielfach weiterentwickelt. Ich möchte meine Antwort hier dazu nutzen, mir besonders wichtig erscheinende Punkte zu akzentuieren und auf noch nicht vollständig gelöste Probleme hinzuweisen. Dabei wird es weit eher darum gehen, hoffentlich weiterführende Fragen zu formulieren als abschließende Antworten zu liefern. Sofern meine Überlegungen überhaupt einen Wert haben, so ist dieser den Anregungen aus dem Beitrag von Harter-Uibopuu zu verdanken, der nicht nur das komplexe Testament des Epikrates, sondern die Rechtsgrundlagen griechischer Stiftungen im Allgemeinen mannigfach erhellt.[1]

Jede Beschäftigung mit Stiftungen im griechischen Recht hat sich zunächst terminologischen Fragen zu stellen. Wie Harter-Uibopuu aufzeigt, ist längst erkannt worden, dass die Anwendung des deutschen Begriffs der Stiftung mit Blick auf antike Verhältnisse problematisch ist, da damit einerseits nach modernem juristischen Verständnis untrennbar die Vorstellung der eigenständigen Rechtspersönlichkeit verbunden ist, der Begriff andererseits in der Umgangssprache denkbar lose verwendet wird. In seiner für den griechischen Raum nach wie vor fundamentalen Studie über Stiftungen in der Antike ist B. Laum dem Problem damit begegnet, dass er zwar am Begriff der Stiftung festhielt, ihn aber unter Verweis auf zwei Merkmale eigenständig definierte: Zum Wesen einer Stiftung gehört nach Laum zum einen ein „von einem menschlichen Willen bestimmter dauernder Zweck“, zum anderen ein

[1] Diese Antwort hat nicht den Anspruch, für sich allein zu stehen; auf die Wiederholung bereits genannter Literaturverweise wird weitgehend verzichtet.

„bestimmter Vermögenskomplex, den der Stifter hergibt und der die Verwirklichung des dauernden Zweckes sichert".[2]

Verschiedene jüngere Studien haben einen anderen Weg gewählt, indem sie nicht nach einem gegebenenfalls neu zu definierenden Begriff, der die Gesamtheit der von Laum in den Blick genommenen Rechtsgeschäfte bündeln könnte, suchten, sondern vielmehr den die Stiftung konstituierenden Rechtsakt möglichst exakt zu fassen versuchten. Harter-Uibopuu schließt an den Vorschlag von S. Aneziri und I. Arnaoutoglou an, die Einrichtung einer Stiftung als „Zuwendung unter Auflagen" („endowment sub modo") zu fassen und spricht ihrerseits von einer *donatio sub modo*. So sehr die damit gewonnene juristische Präzision zu begrüßen ist, ergeben sich doch auch Bedenken: Zunächst stellt sich grundsätzlich die Frage, ob es ratsam ist, das griechische Recht (wieder) in der Terminologie des römischen Rechts fassen zu wollen, oder ob nicht gerade dabei die Gefahr, irreführende juristische Assoziationen zu wecken, als besonders groß angesehen werden muss. Davon abgesehen liegt auf der Hand – und wird von Harter-Uibopuu auch eingeräumt –, dass nicht jede *donatio sub modo* auch eine Stiftung im Sinne Laums darstellt. Wichtiger scheint mir allerdings die Frage, ob die Einrichtung *jeder* Stiftung im Sinne Laums tatsächlich als *donatio sub modo* exakt und angemessen beschrieben ist. Darauf wird im Kontext des Testaments des Epikrates zurückzukommen sein.

Auch wenn sie das Rechtsgeschäft als *donatio sub modo* bezeichnet, hält Harter-Uibopuu an der Verwendung des Begriffs der Stiftung mit guten Gründen dennoch fest. Jede Beschreibung eines historischen Sachverhalts in einer modernen Sprache läuft Gefahr, anachronistische Assoziationen zu wecken. Solange wir Rechenschaft darüber abgeben, wie wir die Begriffe verwenden und gegebenenfalls irreführende Vorstellungen explizit ausräumen – wie es Laum gemacht hat –, müssen solche Assoziationen einer exakten Erfassung der Sachverhalte nicht im Wege stehen. Zu bedenken ist auch, dass der Verzicht auf eine auch in der Alltagssprache anschlussfähige Begrifflichkeit die Verständigung über die engen Fachgrenzen der Rechtsgeschichte hinaus erschwert und seinerseits „Übersetzungsleistungen" erfordert.[3]

Um die Besonderheiten der Stiftung des Epikrates im Kontrast besser herausarbeiten zu können, wendet sich Harter-Uibopuu in Abschnitt II. zunächst einer öffentlichen Stiftung zu. Sie arbeitet luzide heraus, dass in der Urkunde des Alkesippos aus Kalydon in Delphi (CID V 1, 128) in einer für das griechische Rechtsdenken durchaus charakteristischen Weise drei unterschiedliche Rechtsgeschäfte miteinander verbunden sind, und klärt, wie sie aufeinander bezogen sind.

[2] Laum 1914, 2.

[3] Ob die Begriffe „foundation" im Englischen oder „fondation" im Französischen eher als „Stiftung" im Deutschen dazu geeignet sind, Verwirrung zu stiften, kann ich nicht beurteilen.

Der Text steht, wie Harter-Uibopuu ausführt, als eigentlicher Fremdkörper auf der großen Polygonalmauer, auf der ansonsten zu Hunderten die Freilassungsinschriften aufgezeichnet wurden. Harter-Uibopuu bezeichnet die Urkunde zunächst und in der Abschnittsüberschrift unspezifisch als Dokument, dann – mit der Mehrheit der früheren Forschung –[4] als „letztwillige Verfügung", διαθήκη. Diese Bezeichnung rechtfertigt sich damit, dass in der letzten Zeile der Inschrift auf die Personen verwiesen wird, die die διαθήκη verwahren. Dass der auf der Polygonalmauer aufgezeichnete Text mit dem an dieser Stelle genannten Testament identisch ist, scheint denkbar, ist aber nicht zwingend. Klar ist jedenfalls, dass die Urkunde eine für ein Testament ungewöhnliche Form aufweist. Diese ist, wie schon H. Pomtow beobachtete, in ihrer Form erheblich von den als Kaufvertrag (ὠνά) stilisierten Freilassungsinschriften beeinflusst.[5] Dies gilt nicht nur für Formularelemente wie die Datierung am Anfang und die Nennung der Zeugen und der Verwahrer der Kopien am Ende, sondern auch für die unmittelbar auf die Nennung des Eponymen folgende Einleitung. Diese lautet in den Freilassungsurkunden formelhaft ἐπὶ τοῖσδε ἀπέδοτο ὁ δεῖνα und war zweifellos das Vorbild für die Wendung ἐπὶ τοῖσδε ἀνέθηκε Ἀλκέσιππος, mit der der Kalydonier sein Stiftungsgeschäft beschrieb. Auch sonst scheint die Alkesippos-Urkunde vielerorts aus Versatzstücken aus den Freilassungsurkunden konstruiert zu sein, zu denen etwa auch die auf den Todesfall verweisende Formel εἰ τί κα πάθη gehört.[6]

Wie Harter-Uibopuu überzeugend aufzeigt, dürfte die eigentliche Stiftung, die die Ausrichtung der Alkesippeia ermöglichen sollte, bereits zu einem früheren Zeitpunkt erfolgt sein, ohne dass zu entscheiden wäre, ob die Kapitalübergabe bereits stattgefunden hat. Eine Besonderheit dieser Stiftung liegt darin, dass Alkesippos den Gott und die Polis *gemeinsam* als Empfänger der Schenkung benennt, wofür es ansonsten unter den Stiftungsurkunden keine Parallelen gibt. Damit entzieht sich die Stiftung der Taxonomie Laums, der zwischen Gottheiten und Verbandspersönlichkeiten, zu denen er Vereine und den Staat rechnet, als Empfänger unterscheidet.[7] Harter-Uibopuu trifft diese Schwierigkeit nicht, da sie die „Schenkungen unter Auflagen" an eine Gottheit ebenso wie jene an eine Polis als „öffentliche Stiftungen" klassifiziert. Die Frage, in welcher Form eine Gottheit aus rechtlicher Sicht als Eigentümer von Landbesitz und Geld gelten kann und in welchem Verhältnis Gott und Polis als gemeinsame Eigentümer stehen, hat die

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[4] Z. B. H. Pomtow, Syll.[3] 631; R. Dareste, B. Haussoullier, Th. Reinach, I. jur. gr. II, p. 72-75; Laum 1914, Nr. 27 spricht zweifellos unpräzise von einer Stiftungsurkunde.

[5] Syll.[3] 631 p. 178: „manumissionum dictionem imitatur".

[6] Parallelen für die Formel, die in den Freilassungsurkunden in der Regel als εἰ δὲ τι κα πάθη erscheint, sind leicht zu finden und müssen hier nicht aufgeführt werden. Zu den Formulareigenheiten der Freilassungsurkunden gehört auch die in der Urkunde des Alkesippos wiederkehrende Vermischung von Verbalkonstruktionen im Aorist und im Präsens, einschließlich der Infinitive in prospektiver Bedeutung. Vgl. dazu Sosin 2015, 333f.

[7] Laum 1914, 155-168.

Forschung in den letzten Jahren intensiv beschäftigt und im Kontext des Testaments des Epikrates wird darauf zurückzukommen sein.[8] M. Dreher und D. Rousset arbeiteten dabei heraus, dass der Empfänger einer Schenkung und in der Konsequenz der Eigentümer sakralen Besitzes stets die Gottheit ist, nie aber das Heiligtum.[9] Entgegen der Auffassung von Laum ist die Unterscheidung zwischen Gott und Heiligtum juristisch nicht irrelevant,[10] so dass die bei Harter-Uibopuu wiederholt erscheinende Kategorie der „öffentlichen Stiftung an ein Heiligtum" unpräzise ist und besser vermieden werden sollte.[11]

Eine weitere Besonderheit der Urkunde stellt die Anordnung zur Aufzeichnung und damit verbunden die Erklärung der Rechtsgültigkeit der Weihung dar (Z. 8f.: ἀναγραψάντω δὲ οἱ ἄρχοντες ἐν τῶι ἱερῶι, καὶ ἀνάθεσις κυρία ἔστω·). Diese fällt zunächst durch ihre merkwürdige Stellung in der Mitte des Textes und nicht wie zu erwarten an seinem Ende auf, so dass sich die Publikationsbestimmung streng genommen nur auf das am Anfang genannte Stiftungsgeschäft, nicht aber auf die folgenden testamentarischen Anordnungen bezieht. Harter-Uibopuu hält zu dieser Bestimmung fest: „[Alkesippos] weist ... gesondert auf die Rechtsgültigkeit der ἀνάθεσις hin, nachdem er die *archontes* zur Aufzeichnung auffordert."[12] Es ist nun allerdings kaum vorstellbar, dass Alkesippos selbst in dieser Form die städtischen Bouleuten zur Aufzeichnung hätte „auffordern" noch dass er selbst seine Dedikation für rechtsgültig hätte erklären können. E. Harris sah wohl richtig, dass diese Anordnung nur auf einen formellen Beschluss zurückgehen kann, mit dem die Polis die Schenkung des Alkesippos mitsamt den daran geknüpften Bedingungen akzeptierte und damit die ἀνάθεσις als κυρία bestätigte.[13] Mit Harter-Uibopuus

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[8] Vgl. etwa Horster 2004; Migeotte 2006; Papazarkadas 2011; sowie besonders die Beiträge von Dreher 2005; Rousset 2013; Dreher 2014; Scheibelreiter 2014. Zuletzt hat D. Rousset 2015 der Problematik hauptsächlich in Auseinandersetzungen mit den Positionen Migeottes einen ebenso feinfühligen wie überzeugenden Beitrag gewidmet, der die ganze Komplexität der Thematik ausleuchtet und in dem er 388f. auch auf die hier diskutierte Urkunde eingeht. Unnötig weit geht Rousset m.E. ebd. 390, wenn er die Verwendung des Eigentumsbegriffs mit Blick auf das griechische Recht prinzipiell ablehnt. Vgl. zum Eigentumsbegriff im griechischen Recht nur etwa die knappen einleitenden Bemerkungen und Verweise bei Thür 1982, 55.

[9] Rousset 2013, 124; Dreher 2015.

[10] Laum 1914, 156 Anm. 3; dagegen Rousset 2015, 386 mit Anm. 64.

[11] Ebenso handelt es sich bei den im zweiten Teil der Inschrift genannten testamentarischen Schenkungen streng genommen nicht um „klassische Dedikationen an ein Heiligtum" (so Harter-Uibopuu Anm. 17), sondern um solche an den Gott und die Polis.

[12] Harter-Uibopuu nach Anm. 13.

[13] Harris 2015, 72-74, hier 73. Harris' Kommentar trägt im Übrigen jedoch dem von Harter-Uibopuu herausgearbeiteten Umstand zu wenig Rechnung, dass die Urkunde mehrere Rechtsgeschäfte dokumentiert. Entgegen der Auffassung von Harris sieht außerdem Alkesippos keine Opfer an Hera vor, sondern solche im Monat Heraios; die in Z.11f. mit der Bestattung beauftragten Damippos (nicht Damasippos), Theutima (nicht Theudippa), Ageas (nicht Agias) und Pisilaos (nicht Pisalaos) werden zwar mit der

Analyse der in der Urkunde dokumentierten Rechtsgeschäfte ist dies m. E. bestens in Einklang zu bringen:[14] Alkesippos hatte zu einem früheren Zeitpunkt dem Gott und der Polis Kapital überlassen, um nach seinem Tod die Ausrichtung von Feiern zu ermöglichen. Die Polis hatte die Schenkung – auch im Namen des Gottes – in einem Beschluss formell angenommen, für gültig erklärt und zugleich ihre Publikation angeordnet. Aus diesem Beschluss übernahm Alkesippos die Bestimmung in das aufgezeichnete Dokument, sei dieses nun sein Testament oder ein aus verschiedenen Urkunden konstruierter Komposittext. So oder so wirken die Bestimmungen zur Übertragung der übrigen Vermögenswerte auf den Gott und die Polis, zur Freilassung der Sklavin und zur Bestattung, die nach Harter-Uibopuus überzeugender Darstellung den eigentlichen Kern des Testaments ausmachen, in der Urkunde wie ein Nachtrag. Ein Verweis darauf, dass auch diese weitere ἀνάθεσις rechtsgültig sein soll, findet sich in der Urkunde nicht, was vermuten lässt, dass ein entsprechender Beschluss durch die Polis noch nicht gefasst worden war, sofern ein solcher denn bei einer Schenkung, an die keine Auflagen geknüpft waren, überhaupt notwendig war.

Im III. und längsten Teil ihres Beitrags wendet sich Harter-Uibopuu dem Testament des Epikrates und damit einer Stiftung zu, die im Gegensatz etwa zu derjenigen des Alkesippos, deren Verwaltung der Polis obliegt, als privat zu klassifizieren ist, da mit ihrer Verwaltung keine öffentlichen Institutionen, sondern nur Privatpersonen betraut sind. Was die Stiftung des Epikrates nun nach Auffassung von Harter-

Ausrichtung der Bestattung beauftragt und erhalten dafür Geld, können aber nicht die Erben des Alkesippos sein, da dieser sein gesamtes Vermögen an den Gott und die Polis überträgt.

[14] Harter-Uibopuu, Anm. 7, lehnt Harris' an der Alkesippos-Urkunde entwickelte Unterscheidung des Stiftungsgeschäfts in die Schenkung auf der einen Seite, einen als „law“ zu qualifizierenden Annahmebeschluss auf der anderen Seite ab, „sind die beiden Akte, formelles Angebot und Versprechen des Stifters und Annahme durch die Stadt doch so eng miteinander verbunden, dass sie sich einer modernen Einteilung in zwei verschiedene Kategorien entziehen.“ Ich teile die Auffassung, dass das Stiftungsgeschäft grundsätzlich als Einheit zu betrachten ist. Gleichzeitig ist aber Harris zuzugestehen, dass seine Differenzierung nicht auf einer modernen Kategorisierung beruht, sondern von zwei Rechtsakten – dem Versprechen des Stifters und dem Annahmebeschluss des Empfängers – ausgeht, die im Quellenmaterial als getrennte, wenn auch nicht unabhängige, Rechtsakte überliefert sind. Die Kontroverse darüber, ob die Schenkung „unilateral“ erfolgt oder als „zweiseitiges Rechtsgeschäft“ aufzufassen ist, lässt sich mit dem Hinweis auf die moderne juristische Definition der Schenkung als *zweiseitiges* Rechtsgeschäft, das auf einem *einseitigen* Vertrag beruht, vielleicht vermittelnd lösen: Die Schenkung setzt in ihrer Entstehung – anders als das bloße Schenkungsversprechen – den Konsens zwischen Schenker und Beschenktem voraus und ist mithin zweiseitig ist, verpflichtet in ihren Rechtswirkungen aber nur einseitig den Schenker, jedenfalls solange sie eben nicht *sub modo* erfolgt. Harris 2015, 73 Anm. 88 hält selbst fest, dass das Stiftungsgeschäft bilateral ist und damit einem Vertrag gleicht, betont aber auch zu Recht, dass griechische Stiftungen nicht vertraglich konstituiert wurden.

Uibopuu aber besonders, wenn nicht gar einzigartig macht, ist nicht ihr privater Charakter, sondern die Tatsache, dass ihre Verwaltung keiner organisierten Körperschaft, also einem Verein, sondern nicht weiter organisierten Privatpersonen, zunächst zwei Freigelassenen des Stifters und später deren Nachkommen, überantwortet wird.

Während die Unterscheidung zwischen „öffentlichen" und „privaten" Stiftungen anhand der vorgeschlagenen Kriterien klar ist, fällt es m. E. wesentlich schwerer, die Stiftung des Epikrates scharf von *donationes* an Vereine[15] abzugrenzen, insbesondere an sogenannte „Familienvereine". Die Zahl der bekannten Stiftungen zugunsten von Familienvereinen ist klein, lediglich drei sind einigermaßen gut bezeugt:[16] Die Stiftungen der Epikteta aus Thera,[17] des Poseidonios aus Halikarnassos[18] und des Diomedon aus Kos[19]. Bei der Stiftung der Epikteta tritt der Vereinscharakter des von der Stifterin explizit ins Leben gerufenen „Männervereins", der sich selbst eine komplexe Satzung gibt, die die Mitgliedschaft im und die Tätigkeit des κοινόν detailliert regelt, klar vor Augen.[20] Sehr viel weniger deutlich als Verein erscheint hingegen jener Familienverband, den Poseidonios in seiner Stiftung bedenkt. Seine Organisation bleibt denkbar einfach: Als Priester des eingerichteten Kultes soll der jeweils älteste männliche Nachkomme fungieren, zur Verwaltung der Gelder sollen die Nachkommen jährlich drei Personen aus ihrer Mitte bestimmen. Die rudimentäre Satzung weist sich aus als Beschluss des Poseidonios, der Nachkommen des Poseidonios und derjenigen, die von diesen Frauen (?) genommen haben. Dazu bemerkte F. Poland in seiner Untersuchung des griechischen Vereinswesens: „Wie wenig aber gerade hier zunächst ein fester Verein vorliegt, kann man daraus ersehen, wie der Stifter gelegentlich noch vor seinen Genossen im Beschlusse ausdrücklich genannt wird."[21] Die Verwaltung der Stiftung des Diomedon von Kos ist in einer wesentlich komplexeren, wenn auch schlecht erhaltenen Satzung geregelt. Auch hier fehlt allerdings eine Benennung für den „Familienverein", auf dessen Mitglieder in immer wieder verschiedenen Bezeichnungen – als Kultteilhabende (τοὶ τῶν ἱερῶν κοινωνεῦντες bzw. οἷς μέτεστι τῶν ἱερῶν) oder als Nachkommen des Stifters (τοὶ

[15] Für die hier nicht grundsätzlich zu behandelnde Frage nach dem Rechtscharakter griechischer Vereine vgl. Harris 2015, 70f. und v. a. Ustinova 2005.

[16] Aneziri 2019, 15-19 bespricht die drei sicher bezeugten und drei zu erschliessenden Fälle; siehe auch Campanelli 2016, die von „family cult foundations" spricht.

[17] IG XII 3, 330 (Laum, Stiftungen, Nr. 1); vgl. Harter-Uibopuu vor Anm. 10 (mit weiterer Literatur).

[18] Syll.³ 1044; Laum, Stiftungen, Nr. 117; Sokolowski, LSAM 72 sind jetzt ersetzt durch die Neuedition von J.-M. Carbon in Carbon – Pirenne-Delforge 2013, 99-114.

[19] IG XII 4, 1, 348; Laum, Stiftungen, Nr. 45.

[20] Z. 22-24: συναγαγὲν κοινὸν ἀνδρείου τῶν συγγενῶν καὶ δόμεν τῶι κοινῶι τοῦ ἀνδρείου δραχμὰς τρισχιλίας; die leicht variierenden Bezeichnungen des Vereins stellt Laum 1914, 158 zusammen.

[21] Poland 1909, 87f.

ἐγ Διομέδοντος ... γεγενημένοι καὶ τοὶ ἔγγονοι αὐτῶν vel sim.) –,[22] nie jedoch als Kollektiv verwiesen wird. Wie für Poseidonios gilt auf für Diomedon, „dass dem Stifter … der Begriff eines Verbandes oder einer Körperschaft offenbar fehlt“[23]. Es ist gar nicht in Abrede zu stellen, dass sich die Satzungen dieser „Vereine“, die ja überhaupt nur „um der Stiftung willen ins Leben gerufen werden“,[24] in Form und Inhalt an Regelungen der Polis orientieren. Dennoch wird man sich fragen müssen, ob denn die „Vereinsversammlungen“ nicht eher den Charakter von Familientreffen hatten, bei denen man vor dem Essen darüber beriet, wer denn die nächste Feier organisieren sollte.[25]

Es soll nun nicht im Gegenzug behauptet werden, dass Eunomos und seine Nachkommen, denen Epikrates in seinem Testament die Verwaltung seiner Stiftung auferlegt, einen „regelrechten Familienverein“ bilden. Harter-Uibopuu betont zu Recht, dass keine differenzierten Vereinsstrukturen erkennbar werden und die Nachfolger des Eunomos als Einzelpersonen, nicht als Kollektiv angesprochen werden. Letzteres gilt wie ausgeführt aber eben genauso für die „Familienvereine“ des Poseidonios und des Diomedon. Hinzu kommt, dass Epikrates mit der eigentümlichen Formulierung ὥστε προβαίνειν τὴν διαδοχὴν εἰς αἰεὶ ἀπὸ ὀνόματος τοῦ Εὐνόμου καὶ ὀνομάζεσθαι in Z. 58f. nicht nur die beabsichtigte ewige Dauer der Stiftung betont,[26] sondern – wie man mit Herrmann wohl verstehen muss – auch festlegt, dass sie künftig unter dem Namen des Eunomos laufen muss.[27] Damit erfüllt die διαδοχή des Eunomos im Gegensatz zu den „Familienvereinen“ des Poseidonios und des Diomedon mit der Existenz eines Namens zumindest ansatzweise ein Kriterium, das nach Poland für die Identifikation eines Verbandes als Verein entscheidend ist,[28] und lässt vermuten, dass Epikrates jener „Begriff eines

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22 Vgl. die Auflistung bei Laum 1914, 159.

23 So schon Ziebarth 1896, 10, aufgegriffen von Poland 1909, 87.

24 So richtig Laum 1914, 224.

25 Ustinova 2005, 182 hatte zur Stiftung des Poseidonios aus Halikarnassos bemerkt, dass die Forderung des Poseidonios, dass die Epimenioi ihre Abrechnungen dem Volk zur Prüfung vorzulegen hätten, sehr stark an moderne juristische Konzeptionen von (eingetragenen) Vereinen bzw. Korporationen erinnert. Die Prüfung des Textes durch Carbon hat nun freilich diese Bestimmung als Phantom erwiesen und gezeigt, dass an der Stelle (Z. 45f.) nicht von einem Rechenschaftsbericht „vor dem Volk“ (πρὸ τοῦ δήμου), sondern „vor dem Essen“ (πρὸ τοῦ δείπνου) die Rede ist.

26 Vgl. die grundsätzliche Feststellung von Ustinova 2005, 181: „The idea of eternal (εἰς τὸν ἀεὶ χρόνον) honors to be paid to benefactors of some corporations could appear only if the belief that the associations continue to function for generations to come was taken for granted, that is, the association was conceived as a unity beyond a mere assembly of the living members.“

27 Herrmann – Polatkan 1969, 30.

28 Poland 1909, 7: „Festzuhalten ist, daß jeder Verein einen Namen haben muß, der in der Regel doch in der vollständigen Urkunde genannt sein wird; daher sind solche Inschriften, wo sichtlich eine deutliche Bezeichnung derart fehlt als Genossenschaftinschriften von vornherein verdächtig.“

Verbandes oder einer Körperschaft", den Ziebarth und Poland bei anderen „Familienvereinen" vermissten, gerade nicht fehlte.

Wenn die in der jüngeren Forschung mehrheitlich vertretene Sicht zutrifft, dass griechische Kultvereine so wenig wie Stiftungen über eine Rechtspersönlichkeit verfügten, verliert die Frage, ob ein Personenverband wie die Nachkommen des Poseidonios oder des Eunomos als „regelrechter Verein" oder lediglich als „Erbengemeinschaft" zu klassifizieren ist, an Bedeutung. Abzuwägen gilt dann, inwieweit sich der Status der jeweiligen Personenverbände – wenn nicht *de jure* dann *de facto* – einer Körperschaft im modernen Sinne annähert.[29]

Unberührt von dieser Diskussion bleibt die Tatsache, dass sich die Stiftung des Epikrates von der öffentlichen, durch die Polis verwalteten des Alkesippos aus Delphi durch ihren privaten Charakter grundlegend unterscheidet. Was die beiden Stiftungen zugleich aber verbindet, ist ihr kultischer Charakter. In beiden Fällen ist der Empfänger des Kapitals eine Gottheit: In Delphi ist es Apollon gemeinsam mit der Polis, in Nakrason ist es der Heros Diophantos, der heroisierte Sohn des Stifters, allein. All die im Detail beschriebenen Parzellen sind „abgegrenzt und geweiht und gestiftet zugunsten des Grabmals und des Heros Diophantos." (Z. 32f.: ταῦτα πάντα ἀφώρισται καὶ ἀνεῖται καὶ συνκαθωσίωται τῷ μνημείῳ καὶ ἥρωι Διοφάντῳ). Der Heros allein wird damit Eigentümer der Güter, wie Epikrates unmissverständlich klar macht.

Was aber bedeutet das nun? Was ist die rechtliche Relevanz dieser Übertragung an die Gottheit? Der Stifter ergänzt seine eigene Zusammenfassung des Stiftungsgeschäftes in den Z. 26-33 mit Ausführungen zu seiner Motivation: Nicht allein die Liebe zu seinem Kind veranlasste ihn zur Stiftung, sondern der Heros drängte ihn regelrecht dazu. Oft und deutlich ist der Heros dem Epikrates in Träumen, Zeichen und Erscheinungen entgegengetreten und hat ihn angehalten, ihm die entsprechenden Parzellen zu weihen (Z. 34f.: καὶ ὀνείροις καὶ σημείοις καὶ φαντάσμασιν αὐτοῦ μοι τοῦ ἥρωος ἐναργῶς πολλάκις ἐπιφοιτῶντος ἀφορισθῆναι αὐτῷ μέρη). Diese Ausführungen mögen für den rechtlichen Inhalt des Testaments zunächst völlig belanglos erscheinen, sie rücken aber den Heros als handelnden Akteur oder, wenn man so will, als Rechtssubjekt ins Zentrum. M. Dreher hat unterstrichen, dass die zentrale Besonderheit der Rechtsstellung der Götter darin bestand, dass sie physisch nicht greifbar waren und ihre Rechte folglich auch nicht wahrnehmen konnten. Entscheidungen in Rechtsfragen konnten sie allenfalls über Orakelsprüche treffen, allerdings auch nur auf Anfrage hin.[30] Wie Epikrates in seinem Testament glaubhaft machen wollte, hatte der Heros Diophantos in seinen Epiphanien trotz

[29] Vgl. die oben Anm. 8 genannte Literatur. Ustinova 2005, 190 hält in ihrem Fazit fest: „Greek voluntary cult associations existed *de facto*, rather than *de jure*. The law almost ignored this phenomenon. … [I]n the absence of the basic notion of juristic person, as well as clear-cut distinction between private and public spheres, the legislation on corporations remained underdeveloped until the Imperial period."

[30] Dreher 2014, 2.

seiner nur immateriellen Existenz seine Rechte einzufordern gewusst – und entsprechend ernst sollten Erben und Nachfolger diese nehmen.

Dennoch – oder umso mehr – muss man sich fragen, ob sich aus dem Eigentum des Gottes an den gestifteten Parzellen rechtlich relevante Folgerungen ergeben – faktisch liegt das Land ja in den Händen der Freigelassenen, die für die Verwaltung des Stiftungskapitals und die Erfüllung des Stiftungszwecks verantwortlich sind. An zwei Punkten werden die Rechtsfolgen in der Tat deutlich: Zu den zahlreichen Verboten, die das Testament den Freigelassenen im Umgang mit den gestifteten Grundstücken auferlegt, gehört ausgerechnet die Veräußerung der Grundstücke – zunächst vielleicht erstaunlicherweise, tatsächlich aber eben folgerichtig – nicht. Da die Freigelassenen nicht Eigentümer sind, braucht es auch keine diesbezüglichen Auflagen. Vielleicht noch auffälliger ist, dass unter den Sanktionen, die den Freigelassenen und deren Nachkommen als Verwalter drohen, der Verfall bzw. Rückfall des Kapitals ebenso folgerichtig nicht vorgesehen ist, da die Freigelassenen darüber ja eben gar nie als Eigentum verfügten.

Wie im Kontext der Stiftung des Alkesippos ausgeführt, hat sich die Forschung in den letzten Jahren intensiv mit dem Rechtsstatus von heiligem Land und finanziellen Mitteln in göttlichem Eigentum auseinandergesetzt. Der Blick war dabei in aller Regel wie im diskutierten Fall aus Delphi auf göttliches Eigentum gerichtet, das durch die Polis und ihre Institutionen verwaltet wurde, meist im Rahmen von Poliskulten. Als zentrale Frage stellte sich dabei, in welchem Verhältnis das Eigentum des Gottes zum Eigentum der Polis stand. Ist das Eigentum des Gottes von jenem der öffentlichen Hand strikt abzugrenzen oder bilden die sakralen Güter vielmehr eine Unterkategorie innerhalb des in der Verfügungsgewalt der Polis stehenden Eigentums?

Mit Blick auf die Stiftung des Epikrates und das aus der Weihung hervorgehende Eigentum des Heros Diophantos stellt sich das Problem anders, da sein Kult nicht öffentlich war, sondern ganz in privaten Händen lag. Soweit ersichtlich hatte der Akt der Weihung nicht zur Folge, dass die Landparzellen einen in irgendeiner Form als öffentlich zu charakterisierenden Status erhielten, der dem des Heiligen Landes vergleichbar gewesen wäre, das von den städtischen Heiligtümern verwaltet wurde.[31] Analog zum durch die Polis verwalteten heiligen Land stellt sich hier die Frage, in welchem rechtlichen Verhältnis der Gott und die mit der Verwaltung betrauten Privatpersonen stehen, im konkreten Falle also der Heros Diophantos und die Freigelassenen des Epikrates und ihre Nachkommen. An diese überträgt Epikrates recht unspezifisch die Fürsorge, ἐπιμέλεια[32] (Z. 42), um das Grab und das zugehörige Land, die Pflege, κηδεμονία (Z. 53), sowie konkret das

[31] Mit der Weihung von Land im peloponnesischen Skillous an die ephesische Artemis liefert Xenophon hierfür das bekannteste Beispiel (Anab. 5, 3, 7-9); dazu ausführlich Purvis 2003, 61-116, der die rechtlichen Verhältnisse jedoch nur teilweise erhellt.

[32] Zum Begriff als Bezeichnung für die Verwaltung göttlichen Eigentums Migeotte 2006, 240 („un sens pratique“).

daraus anfallende Einkommen, πρόσοδος (Z. 53). Das an die Freigelassenen gerichtete Verbot, etwas zu veräußern, zu vertauschen, in Pacht zu geben oder hypothekarisch zu belasten, bezieht sich deshalb ganz explizit nur auf „den einem jeden zufallenden Anteil am Einkommen“, τὴν ἐπιβάλλουσαν αὐτῷ πρόσοδον (Z. 59f.) und nie auf die Grundstücke. Zusammenfassend bezeichnet Epikrates die an die Freigelassenen übertragenen Rechte schließlich als „das Recht auf die Einkünfte oder die Rechtsvertretung der zugunsten des Grabmals vorgenommenen Stiftung“, τὸ δίκαιον τῆς προσόδου ἢ τῆς κυριήας τῶν συνκαθωσιωμένων τῷ μνημείῳ (Z. 62f.). Mit der κυριήα bringt Epikrates hier eben jenen Begriff ins Spiel, der M. Dreher am geeignetsten schien, um das Verhältnis zwischen den göttlichen Rechtssubjekten und ihren menschlichen „Rechtsvertretern“ zu beschreiben: Wie Frauen und Kinder, die über ihr Eigentum nicht selber verfügen konnten, benötigte auch die Gottheit einen κύριος – die Polis, einen Verein, die Freigelassenen –, der sie in der Wahrnehmung der Rechte vertritt, ohne damit einen Anspruch auf das Eigentum zu erwirken.[33]

Die Stiftung des Epikrates entzieht sich m. E. in ihrer Komplexität einer einfachen Beschreibung als *donatio sub modo*: Der Vermögenskomplex, der die Erfüllung des Stifterwillens ermöglichen soll, ist das Land. Es ist der eigentliche Gegenstand der *donatio*, deren Empfänger die Gottheit ist. Diese Schenkung erfolgt nicht *sub modo*, denn der göttliche Heros kann selbstverständlich nicht an Auflagen gebunden werden.[34] Von einer *donatio sub modo* kann allenfalls bezogen auf das Recht zur Nutzung der Erträge und die Übertragung der Verantwortlichkeit an die Freigelassenen gesprochen werden, doch wird auch damit das Konzept wohl eher strapaziert.[35] Der Blick auf die Rechtsverhältnisse im Stiftungsgeschäft scheint mir jedenfalls hier, möglicherweise aber auch bei anderen religiösen Stiftungen, durch den Versuch, sie als *donatio sub modo* zu beschreiben, eher verstellt als geschärft zu werden. Über den Nutzen des Konzeptes bei der Analyse jener Stiftungen, bei denen das Rechtsgeschäft nicht durch das Hinzutreten einer Gottheit als Rechtssubjekt kompliziert wird, ist darüber wohlgemerkt nichts gesagt.

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[33] Dreher 2014, 21, der auf die Analyse der Verwendung des Begriffs κυριεία bei Migeotte 2006, 240-242 verweist. Rousset 2015, 81f. greift Drehers Vorschlag zur Beschreibung des Verhältnisses zwischen Gottheit und Polis zustimmend auf. Vgl. auch schon die wichtigen Überlegungen zur Bedeutung der κυριεία bei der Stiftung des Epikrates, die Wolff 1971, 337f. anstellt.

[34] Ob aus Epikrates’ eigener Perspektive überhaupt von einer Schenkung gesprochen werden kann, ist fraglich, da die Zuwendung ja nach seiner eigenen Darlegung nicht aufgrund seiner freien Willensbildung erfolgte, sondern der Stifter durch die wiederkehrenden Erscheinungen des Heros dazu veranlasst wurde (Z. 34-36: αὐτοῦ μοι τοῦ ἥρωος ἐναργῶς πολλάκις ἐπιφοιτῶντος ἀφορισθῆναι αὐτῷ μέρη προετράπην ἀφορίσαι αὐτῷ τὰ προγεγραμμένα).

[35] Harter-Uibopuu (oben nach Anm. 38) scheint sich der Schwierigkeiten bewusst zu sein, wenn sie die *donatio* im vorliegenden Fall – in einem gewissen Widerspruch zu der von ihr in Anm. 7 vertretenen Sicht – als „einseitiges Rechtsgeschäft“ charakterisiert.

Mit der Deutung der letzten Zeilen der Anordnungen über die dem Heros geweihten Landparzellen (Z. 38-40) hatte schon Herrmann Schwierigkeiten, und Harter-Uibopuu bezeichnet sie mit guten Gründen als schwer verständlich. Herrmann übersetzte die Stelle folgendermaßen: „ich (sc. Epikrates) wollte ihnen (sc. meinen Nachfolgern) klar und deutlich machen, weshalb ich über diese abgegrenzten und zugunsten der Grabanlage und des Heros Diophantos gestifteten Grundstücke mir die alleinige Verfügungsgewalt vorbehalten habe." (μόνην ἐμαυτῷ τὴν συνκεχωρημένην διάταξιν ἐπέτρεψα). Nach Herrmanns Auffassung ging es Epikrates darum, seine Erben zu ermahnen, „dass die Grundstücke künftig ‚tabu' sind und niemand das Recht habe, in irgendeiner Weise über sie zu verfügen." Als offene Fragen fügt er jedoch hinzu: „Was bedeutet aber die Bezeichnung der διάταξις als συγκεχωρημένη, wer hat die Verfügung „eingeräumt" oder gestattet?"[36]

Harter-Uibopuu erwägt daran anschließend nun: „Vielleicht hatte Epikrates also in einem ersten Schritt die Grundstücke dem Heros Diophantos übereignet (‚zugewidmet') und … sich selbst aber die Bewirtschaftung und damit die Einnahmen aber auch die Pflichten eingeräumt (ἡ μόνη ἐμαυτῷ συνκεχωρημένη διάταξις). … Diese Verfügungsmacht, die eigentlich ein Nießbrauch unter Auflagen war, übergab er nun im Rahmen der vorliegenden Urkunde nach den genannten Bedingungen der *donatio* (ἐπέτρεψα) und schuf damit Rechtssicherheit für die Zeit nach seinem Tod." Sie übersetzt folglich: „Daher habe ich an diesen abgegrenzten und dem *mnemeion* und dem *heros* Diophantos hinzugeweihten (Grundstücken) nur die mir selbst eingeräumte Verfügungsmacht übertragen."[37] Diese Übersetzung und Interpretation ist mit dem Text der Inschrift schwer zu vereinbaren. Epikrates spricht nicht von „der nur mir selbst eingeräumten Verfügungsmacht", ἡ μόνη ἐμαυτῷ συνκεχωρημένη διάταξις, die er nun überträgt (ἐπέτρεψα). Vielmehr ist μόνην ἐμαυτῷ bewusst τὴν συνκεχωρημένην διάταξιν emphatisch vorangestellt: allein sich selbst hat Epikrates die Verfügungsgewalt übertragen. Weshalb Epikrates von einer συνκεχωρημένη διάταξις spricht, ist damit zugegebenermaßen noch nicht erklärt. Vielleicht könnte man darunter ein „abgeleitetes Verfügungsrecht" verstehen, und als Sinn könnte gemeint sein, dass er niemandem außer sich selbst eine Abtretung von Nutzungsrechten mittels Synchoresis erlaubt. Einen Hinweis, dass Epikrates zu irgendeinem früheren Zeitpunkt einen Vorbehalt bezüglich der Nutzungsrechte gemacht hätte, wäre höchstens dieser kryptischen Junktur, nicht aber der Klausel als solcher zu entnehmen.[38]

[36] Herrmann – Polatkan 1969, 29.

[37] Harter-Uibopuu, in diesem Band S. 379.

[38] Vgl. Wolff 1971, 334 Anm. 17, der aufgrund der Wendung τὴν συνκεχωρημένην διάταξιν in Betracht zog, dass Epikrates „bei Gelegenheit eines etwa vorangegangenen Sakralgeschäfts" einen Vorbehalt gemacht hatte, der nun im Testament wiederholt würde. Im Verständnis der Klausel folgt Wolff ebd. 330 indes Herrmann, wonach hier betont wird, „dass niemandem als dem Testator ein Verfügungsrecht zustehe".

Harter-Uibopuu unternimmt im Weiteren vertiefende Analysen einer ganzen Reihe schwieriger Passagen der Inschrift, in denen sie besonders die Begräbnisvorschriften und die Vorgaben zu weiteren Nutzungsrechten überzeugend erhellt. Abschließend geht sie auf die schwierige Frage ein, auf welcher Rechtsgrundlage Epikrates als Privatperson Sanktionen verfügen konnte, die eigentlich unter die Hoheit der Polis fallen, offenbar ohne deren Zustimmung eingeholt zu haben. Harter-Uibopuu vermutet, dass die Polis die Vorgaben des Testaments zumindest indirekt dadurch bestätigte, dass sie die Urkunde in das offizielle städtische Archiv aufnahm. Dieser Vorgang ist in manchen Grabsatzungen, auf die Harter-Uibopuu verweist, bisweilen dokumentiert, so dass der Vorschlag durchaus plausibel erscheint. Einen Hinweis darauf, dass dies im Falle des Testaments des Epikrates tatsächlich so geschehen ist, sieht sie in der Feststellung des Testators, dass er „die Grenzen angezeigt habe“, σεσημείωμαι ὅρων, in Z. 31. Harter-Uibopuu zeigt anhand von Parallelen auf, dass das Verb σημειόω bisweilen als regelrechter *terminus technicus* für die Registrierung eines Rechtsaktes im Archiv mittels einer σημείωσις verwendet wird. Sie zieht davon ausgehend in Betracht, dass sich die Angabe im Epikratestestament auf eine Registrierung in einem Grundstückskataster beziehen könnte.

Nach der Vermutung von M. Wörrle ist unter der σημείωσις wie der συγγραφή oder dem χειρόγραφον eine bestimmte Urkundenform zu verstehen, deren Anwendungsbereich neben Anordnungen zum Grabwesen ganz im Sinne Harter-Uibopuus auch „testamentarische und andere Anordnungen und Verfügungen vielfältiger Art einbegriffen haben kann“.[39] Genauer erlauben die Quellen dies nicht zu fassen, doch muss man fragen, ob auch die Registrierung in einem Kataster noch mit dieser Urkundenform in Verbindung zu bringen wäre. Der Vorgang der Registrierung wird nach Wörrle, der die Belege zusammengestellt und analysiert hat, etwa in Wendungen wie ὁ δεῖνα ἐσημιώσατο ἐπὶ τοῦ χρ(εωφυλακίου) (TAM III 590) oder διὰ τῶν ἀρχείων σεση[μείωται] (TAM V 2, 1403) ausgedrückt. Im Gegensatz dazu wäre die Formulierung, die Epikrates gewählt hat, stark verkürzt, da gerade der Hinweis auf das Entscheidende, das Archiv, fehlte. An dieser Stelle der Inschrift, die H. J. Wolff als „reichlich geschwätzig[…]“ charakterisierte,[40] wäre für einmal mit wenigen Worten sehr viel gesagt. Der Kontext legt m. E. eine andere, wesentlich unspektakulärere Interpretation der Anweisung im Testament nahe. Epikrates zählt in der Passage die vorher im Detail beschriebenen Grundstücke noch einmal summarisch auf, „der Hain und das an den Hain im Süden angrenzende Land etc.“ und spezifiziert die Aufzählung mit dem abschließenden Hinweis, μέχρις ὧν σεσημείωμαι ὅρων, „bis zu den Grenzen, die ich angezeigt habe“. Das lässt sich am einfachsten als ein Verweis auf die vorangehenden Beschreibungen verstehen, wo die Grenzen im Detail beschrieben wurden, etwa wenn es heißt „dieses Weinland

[39] Wörrle 1975, 270.
[40] Wolff 1971, 330.

soll im Osten als Grenze haben den Graben, der das aus dem Weingarten des Menophantos herabfließende Wasser aufnimmt etc." (Z. 8-10: αἵτινες ἄμπελοι ὅρον ἕξουσι τάφρον ἀπ' ἀνατολῆς τὴν δεχομένην καὶ διεξοχετεύουσαν ἐκ τῶν τοῦ Μηνοφάντου ἀμπέλων τὸ καταφερόμενον ἐξ αὐτῶν ὕδωρ). Wenn hier überhaupt an einen Bezug jenseits des Textes zu denken ist, dann vielleicht noch eher an eine Markierung der Grenzen im Gelände als an eine Registrierung im Archiv.[41] Um es nochmals zu betonen: Dass eine solche erfolgte, muss man gar nicht ausschließen, aber sie ist m. E. nicht in der Inschrift erwähnt. Auf welcher Rechtsgrundlage Epikrates seine Strafandrohungen aussprach, ist nach meiner Auffassung noch immer nicht sicher geklärt und mit H. J. Wolff[42] ist vielleicht doch zu fragen, ob Epikrates nicht schlicht den Rahmen seiner Befugnisse sprengte, als er jeden Verstoß gegen die Vorschriften der Urkunde als Grabfrevel geahndet sehen wollte.

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[41] Einen Verweis auf die Setzung von Horoi im Gelände sieht hier Campanelli 2012, 78.
[42] Ebd. 335.

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SKLAVEREI UND FREILASSUNGEN

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RENTING SLAVES IN CLASSICAL ATHENS: ANATOMY OF A LEGAL FORM

Abstract: This article focuses on the legal forms organizing slave labour, and more specifically on the leasing of slaves in classical Athens, whose scale has been largely under-estimated by historians. The recruitment of rented slaves primarily took place in a clearly defined location, the sanctuary of the Anakeion. Leasing slaves had probably been subjected to taxation, and there may have existed a procedure to settle disputes connected to this legal transaction. One may finally reconstitute the form of such leasing-contracts by referring to a passage of Xenophon's *Poroi*.

Keywords: labour, slavery, leasing, liability, contract

In 1992, Alain Supiot, appointed by the European Commission, wrote a report on the harmonization of European rights regulating labour contracts. Curiously, this text began with a reference to Ancient Greece[1] – one which offered this legal expert a point of reference from which to analyse, in contrast to modernity, the whole series of legal systems structuring labour relations in Europe right up to the Industrial Revolution. Supiot based himself on the work of Jean-Pierre Vernant, when he focused on the "psychological aspects" of labour in Ancient Greece[2], and aimed to demonstrate that labour had never adopted the abstract form of a "homogeneous social function". Labour as an abstract entity, as defined by Marx – something therefore likely to be counted, isolated, and possibly exchanged, basically work as a

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[1] Supiot 1992: 1: « On ne peut comprendre la manière dont a été juridiquement conceptualisée la relation de travail salarié dans les pays membres de la Communauté sans se remettre rapidement en mémoire les formes préindustrielles d'organisation du travail. Les notions de travail et de relation de travail dans leur définition actuelle ne sont pas en effet immanentes et éternelles. Il semble bien que l'Antiquité grecque les ait ignorées. Dans la pensée grecque, le rapport de travail était conçu comme un lien personnel de dépendance, un rapport de service liant directement le travailleur et l'usager ; il en résultait que le travail n'était jamais envisagé que sous son aspect concret, c'est-à-dire rapporté à l'objet qu'il s'agissait de fabriquer ou au service qu'il s'agissait de rendre. Voilà pourquoi ces tâches concrètes de production étaient jugées incompatibles avec l'idéal de liberté : l'homme libre était celui qui agissait pour son propre compte, et non pas pour satisfaire les besoins d'autrui. Cette manière de penser se retrouve en Europe jusqu'à la révolution industrielle ».

[2] Vernant 1965.

commodity, as expressed through our modern relationship to labour and employment – would never have been a category, or even an aspiration of Greek thought, whose conception was centred around the product itself, highlighting its user to the detriment of its producer[3].

It is a well-known fact that what we understand by the term wage-labour did not exist as such in the Greek world. Even at the heart of the classical era, the term *misthos* retains "the sense of remuneration which is casual and honorific, without ever adopting the wholly regular and purely economic aspect of a modern salary"[4]. In the accounts of major building sites, it also appears that calculating remuneration for a task was accomplished most of the time according to the product created – the wide majority of workers were paid by the piece and taking working hours into account was extremely rare[5].

Walking in the footsteps of Marx, for many years, Finley and other historians attributed the absence of such a conception of labour (as a general concept) to the slave mode of production in classical Antiquity[6]. They followed the words of Marx according to whom, for abstract work to emerge "the owner of money must meet in the market with the free labourer, free in the double sense, that as a free man he can dispose of his labour power as his own commodity, and that on the other hand he has no other commodity for sale, is short for everything necessary for the realisation of his labour power."[7] Basically, slavery would have prevented the emergence of labour as an abstract category.

I believe however that such a paradigm ignores the complexity of legal forms organizing slave labour, and especially the importance of one practice: the leasing of slaves. In a thought-provoking article, Yan Thomas insisted on its importance in Roman legal thought. The "detachment" of labour from the actual worker, explained Thomas, far from founding the relationship of capitalist production, was primarily thought out and elaborated at the very heart of Roman law structuring slavery. By conceptualizing the servile *operae* and their hiring, Roman jurists would finally have isolated and objectified labour in its abstract dimension[8]. This operation did in fact imply the dismembering of slave ownership, thus divided between rights over the actual person, in the hands of the slave owner, and over the slave's labour, in the hands of the person hiring the slave. The latter did not hire the slave as one would benefit from an absolute transfer of property rights, but merely contracted the right to use slave labour – this right being subdivided into *usus* and *fructus* of slave

[3] Vernant 1965: 43: « Dans ce système social et mental, l'homme "agit" quand il utilise les choses, non quand il les fabrique. L'idéal de l'homme libre, de l'homme actif, est d'être universellement usager, jamais producteur ».

[4] Will 1975.

[5] Feyel 2006: 402-418.

[6] See for instance Burford 1993: 191-193.

[7] Marx 1996 (1867): 179.

[8] Thomas 1997.

labour. Temporarily removed from the master's *dominium*, but alienable in the name of *fructus*, labour was therefore isolated from a body which was to be protected as a property. Separating the actual body of the person accomplishing a task from its result, it therefore potentially catapulted labour into the category of "commercial commodities, freely alienable". Yan Thomas' proposal suggests that it is paradoxically within the very bond of slavery (and not labour relations between free men) that labour, as an independent object, became a commodity.

Whatever the actual case, his work encourages us to focus on a major phenomenon in Greek *poleis*: the renting of slaves. Let's take classical Athens. Slave labour was exploited in two ways. The first is direct exploitation – a slave works under the direct orders of his master or one of his *epitropoi*. This configuration belongs to the archetypical model of slavery, where the profits of slave labour is not separable from the property rights that dominated the slave as a whole. The second covered instances of indirect management – a master gets a regular income from the labour of his slave. This form of organisation took on an exceptional scope in classical Athens, to the extent that the Old Oligarch specifically condemned this practice, since citizens would therefore become the slaves of their own slaves (Ps.-Xenophon, *Athenaion Politeia* 1.11). The transformation of the slave from property into a producer of capital likely to provide regular income does in fact constitute a crucial turning point in the history of Athenian slavery. In fact, Max Weber remarked that slaves were no longer "a means of production from which profit could be acquired", but instead "functioned as a source of rents rather than labour"[9]. This indirect management of slaves took on two forms. A master could put one of his slaves at the head of a shop or workshop, in exchange for which, he was provided with a regular income (*apophora*)[10], but he could also directly rent out a slave to another master for a certain amount of time in exchange for a *misthos*.

1. Leasing slaves in classical Athens: a large scale practice

I believe that the scope of this practice, namely the renting out of slaves, has been largely under-estimated by historians and before addressing the legal forms regulating this practice, I would like insist on its scale. When it has been possible to access the detailed contents of property involved in legal disputes, rented slaves often constituted a non-negligible part the assets concerned. The property of Kiron probably included five *andrapoda* hired out to other free men (Is. 8.35)[11]. Aeschines explains that his opponent's father hired a dozen slaves for his workshop (Aesch. 1.97). The slaves Demosthenes put to work for several years in this workshop belonged to a certain Therippides (Dem. 27.18-20; Dem. 28.12). Beyond the mention of rented slaves in the Athenian workshops, two sectors, at least, relied

[9] Weber 1976 (= 1924): 54.
[10] See recently Ismard 2017.
[11] See the corrections from Edwards 2008: 117.

almost exclusively on the hiring of slaves, the mining exploitation of Laurion and the prostitution. The rights to exploiting the mines were granted by the *polis* and these rights took the form of concessions. The purchaser then rented slaves from Athenian masters to exploit them[12]. A very large number of slaves were involved: whilst Nicias is said to have rented no less than 1000 slaves, Hipponicos and Philomenides allegedly put 600 and 300 of their slaves to work in these mines (Xen., *Poroi* 4.14-17; Plut., *Nicias* 4.2; And. 1.38; Dem. 37.4, 5, 26, 28; C. Nep., *Cimon* 1.3). S. Lauffer also estimated that 35 000 slaves worked in the Laurion mines in 340 B.C.[13], a credible figure since Xenophon, in *Poroi*, suggests that the *polis* recruit three times as many slaves as there are citizens – so, between 60 and 90 000 slaves – to rent them out to mine operators (Xen., *Poroi* 4.17; see also Hyp. fr. 29 Jensen ed.).

Edward Cohen recently considered that the prostitution contract in classical Athens could offer a model of contractual relations formally exempt from any relationship of statutory subordination. His analysis belongs to what we may call a contractualist approach to the phenomenon, one which considers that what a prostitute has to sell is not the usage of their body as such, but sexual services – prostitution could therefore be structured by a labour contract like any other service. I am clearly in disagreement with this perspective: one cannot conceive of the commercial exploitation of sex in classic Athens outside of the institution of slavery, which defined its legal forms. While it is true that prostitution among free citizens was not the object of a formal ban on the part of the city-state, two laws punished it severely (see Aesch. 1.19-20, 28-32)[14]. Free citizens probably did sell the sexual usage of their bodies on occasion, but the vast majority of male and female prostitutes were slaves[15].

However, prostitution provides us with a glimpse of a regular structure applied to the organisation of labour, one bringing together a pimp, a brothel owner and prostitutes, resting upon the principle of hiring slave labour (see Is. 6.19). This form of labour organisation seems by the way to resemble the overview we have of the

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[12] See Lauffer 1979² and Faraguna 2006.

[13] Lauffer 1979²: 160-165.

[14] On those two laws, see the remarks of Lanni 2010: 55-57.

[15] Cohen 2016. An element central to this discussion may be found in Lysias' *Against Simon*. It's true that here, a contract (*synthêkê* or *symbolaion*) is mentioned, one between Theodotos and Simon. Yet Theodotos, qualified several times as a *pais*, is actually a slave, potentially submitted to *basanos*, in opposition to Cohen's assertions (see also the comments of Todd 2007: 280). Cohen especially defends the idea that a slave could claim their rights before a tribunal based upon a prostitution contract. Such a reading rests upon a misunderstanding, according to which there existed, in Athenian law, a legal procedure allowing slaves to assert their rights. But the fact that such a claim could be filed against a slave did not in any way signify the recognition of responsibility (see *infra*, *conclusion*). For a critical analysis of this contractualist approach of prostitution, on a very general level see Pateman 1988, and, about ancient Rome, Flemming 1999.

banking sector in this era, founded on a form of internal promotion via which a former slave could end up acquiring, whether freed or still enslaved, a relative form of autonomy under the control of a master who transferred the handling of part of his activities to others. The managers of the *porneia* were often, in effect, former *pornai*. From a legal point of view, the presence of a *kurios* nonetheless seems to have been the rule – Antigone ran her activities under the guidance of Athenogenes, as did Nicarete under that of Hippias ([Dem.] 59.18). Everything seems to indicate that the *kurioi* were basically the owners of the slaves exploited in the *porneia*. In all cases, prostitution was organised according to the model of a servile *misthôsis*. When Neaira worked in Corinth under the orders of Nicarete, "among her lovers were Xenoclides the poet and Hipparchus the actor, who had her on hire (μεμισθωμένοι)" ([Dem.] 59.26, 28), up until the moment when the last two men who hired her services, Timanoridas of Corinth and Eukrates of Lefkada, decided to purchase her, "to have full ownership of her as a slave (καθάπαξ αὐτῶν δούλην εἶναι)" ([Dem.] 59.29), before finally setting her free. The papyrus of Didymus also refers to situations of monthly rental (*kata mênan*) of prostitutes[16]. The Aristotelian *Athenaion Politeia* indicates that the practice of hiring *hetairai* for banquets was under the legal control of the *polis*, since the *astynomos* was to "be sure that the flute, lyre and cithara players not be rented for more than two drachmas" ([Arist.], *Athenaion Politeia* 50.2) and a speech by Hypereides refers to an *eisangelia* filed against two metics who would have rented their flute players "for more than the law permits" (Hyp. 4.3). Once again, we must imagine a hiring contract between a master and renter whose objective was control over the prostituted slave.

What is the role played by hired slaves among the workers in building sites of Attica? It is difficult to determine the legal frame of servile labour through documentation whose main object was to register payments made by magistrates[17]. During the construction of the Erechtheion, slaves generally worked by their master's side, thus directly exploited by them. Certain cases nonetheless suggest specific acts of leasing, particularly when the slave worked without their master for a certain period of time[18]. The accounts of the sanctuary at Eleusis, in 329/328 include many workers qualified as *oikositoi*, and Kevin Clinton has suggested that they were slaves who were rented out and that their masters received a daily *misthos*

[16] See Cuvigny éd. 2012, n° 382 (A. Büllow-Jacobsen), l. 10-12; n°390, l. 3-6. On the tax *hetairikon* in ptolemaic Egypt, Legras 1997: 262-263, based on a suggestion of U. Wilcken.

[17] See Epstein 2013; see also Carusi in this volume.

[18] See for instance Sôklês, slave of Axiopeithês, metic registered in Meliteus, working on the site in 409/408, but absent the following year as his own slave is still working, or Antidotos, slave of Glaucos, working far from his master (*IG* I³ 476, l. 202-203, l. 239; *IG* I³ 476, l. 210-211, l. 247).

for their work on the site[19]. We can assume that rented slaves must have contributed to regulating the supply and demand of unqualified labour. Alongside a free and mobile labour force, circulating according to demand, rented slaves were used by entrepreneurs who, faced with variations in demand, did not have the possibility of purchasing or supporting slaves.

Another sector could have resorted to the renting of slaves, the civic navy. It is now admitted that the participation of slaves in the Athenian triremes was a common phenomenon[20]. At first glance, this practice could seem akin to hiring out slaves. The problems posed by the mobilization of those slaves were similar to the rented slaves: who was liable in case a slave died or ran away? Who received the *misthos*?[21]

2. The Economy of Leasing Slaves

The development of leasing slaves is part of the evolutions of the economy of Attica in the Vth century. The aristotelian author of the *Economics* distinguishes three types of *prosodoi*, deriving from the land, the *ktêmata* of the *oikos* and moneyed funds. The slave, who is "most necessary, best and most profitable to the domestic economy (ἀναγκαιότατον τὸ βέλτιστον καὶ οἰκονομικώτατον)" ([Arist.], *Oeconomicus* 1344a) of all commodities[22], belongs to the second category. Here, the author is not only referring to the benefit the master can get from the labour of his slave, but also to all rent permitted by the optimization of a commodity, represented by the slaves themselves, within a property-based economy centred around rental income. More generally, the development of leasing slaves was typical of the economy of Attica which began, over the course of the Vth century, to distinguish fixed from active assets, as we see in particular with accounts of the treasures of local sanctuaries (Rhamnous or Ikarion)[23]. Slaves were profitable not only because of the fruits of their labour, but also as a source of active capital which, due to the

[19] See *IE* (= K. Clinton, *Eleusis. The Inscriptions on Stone*) 177, l. 28, l. 29, l. 32, l. 33, l. 46, l. 62, l. 173, l. 222, l. 240; *IE* 177, l. 28, l. 32-33, l. 45, l. 60 with Clinton 2008, vol. II: 184.

[20] See Graham 1992 and Hunt 1998. Some historians even suggested to interpret that way the link established by Ps.-Xenophon, *Athenaion Politeia* 1.10-11, between the Athenian thalassocracy and the system of the *apopophora* would refer to the rent provided to the masters for the leasing of their slaves to the athenian float (which seems to me disputable): see Jordan 1969: 204-205.

[21] *IG* I^3 1032 offers the best case to explore the problem. This inscription is a fragmentary list of four triremes of 200 men, from the end of fifth-century. The last of those four triremes should register 93 *therapontes*, sailing without their own masters. On historical event which is the background of this record and its function (obituary ? honorific inscription ? mobilization list ?), see Funke 1983, Hunt 1998, Robertson 2008 and Bakewell 2008.

[22] [Aristotle], *Oeconomicus*, 1344a.

[23] See Ismard 2010: 294-300.

actual act of hiring, produced income. The slave was therefore divided between the fixed capital it represented and the profit his hiring generated.

Some individuals could earn a great fortune from the leasing of slaves, as suggested by a fragmentary speech by Hypereides (Hyp. 1.1-2)[24]. The situation is complex, as it involves three characters. Though Dionysios rents slaves out from Ariston, these slaves belonged to Theomnestus. Theomnestus was therefore described as the owner of numerous slaves that he hired out and he gets a considerable profit from this practice. Part of the revenue derived from the leasing of these slaves could be transferred to the person who allowed their acquisition to take place: Ariston. It is exaggerated to consider that this fact proves the existence of a class of slave labour entrepreneurs in the classical city, yet this passage proves that benefits procured by hiring slaves were perfectly assimilated by a part of the Athenian elite. This is also the reason why Xenophon, in the *Poroi*, believes that the *polis* could ultimately hire public slaves which it would have acquired with a view to exploiting the mines of Laurion: what mattered was applying a practice of private origin which had become central to Athenian economic life, to generate profit for the city-state within a public structure[25].

3. A Road to Freedom?

To what extent did this structuring of slave labour provide a degree of autonomy to some slaves? This idea has been put forward by historians of slavery in the Americas. They considered that the renting of slaves made inroads into the insularity of the master-slave relationship by bringing into play a twofold domination, one permanent, that of the owner, the other temporary, that of the hirer, and that *de facto*, this "fragmented ownership"[26] offered spaces of emancipation to slaves likely to play one master against the other[27]. The Athenian life of private associations probably constitutes the best meter of observation to put this hypothesis to the test. In this respect, four dedicatory inscriptions discovered in Sounion, and dating back to the middle of the IVth century, come to mind. One of them is presented as emanating from a group of Eranists made up of eleven members, who worshipped

[24] Hypereides, 1, 1-2: Ἀρί]στωνος δὲ ἀνδράποδα εἶχεν ἐν τοῖς ἔργοις: καὶ ταῦτα αὐτὸς ὑμῖν ἐμαρτύρησεν ἐπὶ τοῦ δικαστηρίου, ὅτ᾽ ἦν τούτῳ ὁ ἀγὼν πρὸς Ἀ[ρχε]στρατίδην.Τοιοῦτο γὰρ ἐστι τὸ Ἀρίστ[ωνος] τουτουὶ πρᾶγμα: [οὗ]τος προσκαλεῖται μὲν περιὼν πάντας ἀνθρώπους, τῶν δ᾽ ὅσοι μὲν ἂν μὴ διδῶσιν αὐτῷ ἀργύριον, κρίνει καὶ κατηγορεῖ, ὁπ[όσοι] δ᾽ ἂν ἐθέλωσιν [ἀπο]τίνειν, ἀφίησιν, τὸ δ᾽ ἀργύριον Θεο[μνή]στῳ δίδωσιν: ἐκεῖνος δὲ λαμβάνων ἀνδράποδα ἀγοράζει, καὶ παρέχει ὥσπερ τοῖς λῃσταῖς ἐπισιτισμόν, καὶ δίδωσι τούτῳ ὑπὲρ ἑκάστου τοῦ ἀνδραπόδου ὀβολὸν τῆς ἡμέρας, ὅπως ἂν ᾖ ἀθάνατος συκοφάντης.

[25] See Ismard 2017b.

[26] Gross 2000: 33. This wording seems to me problematic, because on a legal point of view, the property does not seem fragmented.

[27] See for instance Martin 2004: 190.

Herakles or Men[28]. The onomastics suggest that part (if not all) of these men had a servile status (with all the cautiousness this kind of generalization requires). Several of these names are also to be found on three dedicatory inscriptions dating back to the same era and discovered in the same place[29]. The mention of the term *eranistai* is no coincidence as it seems to indicate the existence of financial solidarity between group members, and the representation of the *philia* that connected them. These inscriptions bear witness to non-negligible forms of autonomy and are probably connected to the exercise of labour under the form of hiring, removing them from the power of the masters.

4. A Market for Renting Slaves?

Yet the most interesting point to observe, in this respect, concerns the legal framework binding the leasing of slaves. The recruitment of rented slaves primarily took place in a clearly defined location, the sanctuary of the Anakeion situated on the Northern slopes of the Acropolis, close to the archaic Theseion. According to the lexicographic tradition, the Anakeion was the "sanctuary of the Dioscuri, where, at that time, the hiring of slaves took place" (I. Bekker *Anecdota Graecae*, I, 212: Ἀνάκειον: Διοσκούρων ἱερόν, οὗ νῦν οἱ μισθοφοροῦντες δοῦλοι ἑστᾶσιν). It was therefore up to the twin figures that were the Dioscuri to welcome these slaves shared between two masters. The hiring of slaves and recruitment of free men for temporary activities were situated in two highly different locations, one far removed from the other. In the Anakeion, situated close to the Theseion, on the Northern slopes of the Acropolis, anyone could come and hire slaves for a determined amount of time[30]. To the West of the Agora, in the Deme of Colonus, one could also find a specific place that named the *misthôterion*: all free men could come and sell their labour force there, for a day or a month[31]. The division, into two specific places, of labour supplies which in practice probably constituted a single (embryonic) labour market, is significant in itself. Whereas, from the point of view of those doing the hiring, these two groups of workers formed but one body, the variations of price in these two markets were probably correlated; their distance, within the Athenian urban landscape acted as proof of their statutory division.

Moreover, the role played by the renting of slaves in the training of servile labour force is a crucial issue in Athenian economic life but about which our information is scarce. Apprenticeship contracts involving slaves are well attested by the papyrological documentation of Ptolemaic Egypt. It is often stipulated that the

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[28] *IG* II² 2940 (with *SEG* 42, 152) - Kadous, Manes, Attas, Maes, Sosias, Tibeios.

[29] *IG* II² 2937, *IG* II² 2938 et *SEG* 54, 236. See Lauffer 1979: 177-192.

[30] On the location of the Anakeion, near the old Agora, see Luce 1998: 12.

[31] See Fuks 1951. Souda, *kolônetas*, mention that *Kolônetai* are « those who receive a *misthos*, because they gather around the *Kolonos*, near the agora ». Some places are known outside of Athens: see in Paros the location to regulate conflicts between employers and *misthôtoi*: *IG* XII 5, 129, l. 16-20 (IInd cent. BC).

trainer will pay wages as long as he benefits from the work of the slave apprentice. The latter received remuneration, which obviously belonged to the master, and his work was subject to taxation. One may wonder whether renting was not one of the legal ways by which a master came to have his slave trained for a given period with another master, in a workshop or on a farm, before taking possession of the slave.

5. Leasing Slaves: a taxed transaction

Leasing slaves was probably also subjected to taxation. Prostitution was the object of a special tax, the *pornikon telos*, which was in the hands of the *pornotelônai* (Pollux 7.202; Aesch. 1.119). However, one does not quite know how this tax was collected. Must one imagine, like Edward Cohen, that the *Boulê* made a list of all the prostitutes in order to collect tax on their income? Or, following Léopold Migeotte, should we interpret this as "exploitation rights collected from brothel owners"[32]? We could also conceive that this tax collection concerned the act of hiring the slaves who were in fact *pornai*.

This practice of taxing rented slaves was not unknown to Athenians. Xenophon (*Poroi* 4.25) refers to such a tax collected before the war of Decelea which concerned slaves:

> Ὅτι δὲ δέξεται πολλαπλάσια τούτων μαρτυρήσαιεν ἄν μοι εἴ τινες ἔτι εἰσὶ τῶν μεμνημένων ὅσον τὸ τέλος ηὕρισκε τῶν ἀνδραπόδων πρὸ τῶν ἐν Δεκελείᾳ. Ὅσον τὸ τέλος εὕρισκε τῶν ἀνδραπόδων πρὸ τῶν ἐν Δεκελείαι.
> But the city will receive far more than that, as anyone will testify who is old enough to remember how much the charge for slave labour brought in before the trouble at Decelea.

Unlike Gauthier and Descat, I think that this tax did not apply to the selling of slaves, but rather their hiring for the exploitation of mines at Laurion[33]. It is in fact in this way that one may interpret the situation described by Xenophon, on Sosias, who paid Nicias one obol per day per slave and *atelê*, that is to say without any tax deduction (Xen., Poroi 4.14). In fact, there are also a few traces of this system outside of Athens, possibly in IVth century Teos[34] and also in IInd century Cos. A long Coan inscription actually mentions several farms which were taxed, and in particular farm labourers in vineyards as well as slave women (ἀμπελοστα<τ>εύντων καὶ τῶν γυναικείων σωμάτων)[35]. Vreeken considered this to be a taxation concerning agricultural workers and he supposed, because of the

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[32] Cohen 2000; Migeotte 2014: 245.

[33] *Contra* Gauthier 1976: 157 and Andreau-Descat 2009: 67-68; see also Pleket 1980: 194-195.

[34] *SEG* 26, 1305, l. 6-8.

[35] *IG* XII, 4, 293, l. 8-9.

mention of γυναικεία σωμάτα, that they were slaves[36]. The mention of the professional activity of the slaves concerned suggests that it really is their work that this tax applied to. It is highly probable that it concerned the hiring of these slaves.

6. A Legal Procedure: the *dikai andrapodôn*

There also may have existed a specific procedure to settle disputes connected to the hiring of slaves. Amongst the *dikai emmenoi*, the aristotelian *Athenaion Politeia* mentions the existence of *dikai andrapodôn* ([Arist.] *Athenaion Politeia* 52.2). A fragment of a speech by Dinarchus, which has been given the title Λυσικλείδῃ κατὰ Δάου ὑπὲρ ἀνδραπόδων may have been the account of such a dispute (Din. fragt. 73, ed. N. Conomis–Teubner; see also the frgt. 52). Lipsius considered that here, disputes concerning slave ownership were settled[37]. Yet there is little reason to imagine any procedures besides the existing ones regarding the *andrapodistai* aiming to protect the ownership of slaves[38]. The focus of this procedure may become clearer in relation to the *dikai hupozugiôn*, mentioned subsequently. I would suggest that there existed only one case concerning *andrapoda* as well as *hupozugia*. Slaves and cattle used for heavy duty work were connected by the fact that they were frequently leased and it is in this way that they are associated by the Old Oligarch (Ps.-Xen., *Athenaion Politeia* 1.18). In this case, it could more explicitly be a question of a case concerning conflict relative to leasing slaves or cattle.

7. The Leasing Contract

One may finally reconstitute the form taken by such contracts by, once again, referring to a passage of Xenophon's *Poroi*. The latter speaks of the following event:

> Νικίας ποτὲ ὁ Νικηράτου ἐκτήσατο ἐν τοῖς ἀργυρείοις χιλίους ἀνθρώπους, οὓς ἐκεῖνος Σωσίᾳ τῷ Θρᾳκὶ ἐξεμίσθωσεν, ἐφ' ᾧ ὀβολὸν μὲν ἀτελῆ ἑκάστου τῆς ἡμέρας ἀποδιδόναι,τὸν δ' ἀριθμὸν ἴσους ἀεὶ παρέχειν.
>
> Nicias son of Niceratus, once owned a thousand men in the mines, and let them out to Sosias the Thracian, on condition that Sosias paid him an obol a day per slave atelê and filled all vacancies as they occurred.

In its very wording, Xenophon's proposal is probably inspired by a common formulaic model thanks to which hiring contracts were secured. Adolf Wilhelm, then Claire Préaux, suggested a link between this passage and contracts of the papyrological documentation which were applied to leasing herds with the clause

[36] Vreeken 1953: 62.

[37] Lipsius 1905-1915: 640 n.14; Harrison 1971: 22 n.10; Rhodes 1981: 586 consider that the procedure must address the damages caused by slaves and cattle, but why would only draught animals (and not sheeps and goats) be mentioned ?

[38] On the procedure against *andrapodistai*, see Scafuro 1997.

athanatos. The expression meant that they had to be returned in exactly the same numbers, “the owner of the herd therefore turned properties which were essentially perishable into immutable capital”[39]. The rights of the owner therefore survived the destruction of the rented properties by imposing on the renter the replacement of goods in case of loss or destruction. Here, the person hiring had to return the slaves in identical numbers, and potentially replace any slave that had died.

8. Leasing Things and leasing Men

One must nonetheless determine to what extent this practice was conceptualized in Athenian law during the classical period. To address Yan Thomas’ hypothesis, I would start off by saying that the term *misthôsis* designates just as much the hiring of objects as of labour, and it is in vain that one may search for a conceptualisation of this leasing expressed as a form of labour separate from the body of the actual slave. But a famous law mentioned in Hypereides and supposedly from the Solonian era, could have defined the respective liability of the person renting the slave out and actual renter:

> Ὡς εἰδὼς ὅτι πολλαὶ ὠναὶ γίγνονται ἐν τῇ πόλει, ἔθηκε νόμον δίκαιον, ὡς παρὰ πάντων ὁμολογεῖται, τὰς ζημίας ἃς ἂν ἐργάσωνται οἱ οἰκέται καὶ τὰ ἀδικήματα διαλύειν τὸν δεσπότην παρ' ᾧ ἂν ἐργάσωνται οἱ οἰκέται.
>
> Knowing that many sales are transacted in the polis, he laid down a law – whose fairness is universally acknowledged – to the effect that ‘crimes committed by slaves, and expenses they incur, shall be the responsibility of the master for whom the slaves are working. [when they committed said act] (Hyp. 3.22)[40].

This law, which probably concerned slave labour, notably in the case of co-ownership, could also set the liability of the master in the context of rented slaves. In this case, the who had rented the slave was responsible for actions he committed. The lease was planned out according to a system of transfer, admittedly temporary, yet complete, of the rentor’s liability.

One final question still needs to be examined. One must not confuse, of course, labour accomplished on one’s own behalf and that performed on behalf of someone else. Leasing remained a transaction between two free men concerning a slave. But the hypothesis of direct work on another’s behalf, on the part of slaves hiring themselves voluntarily for the benefit of another master, has been put forward, mainly on the basis of one text. In *Against Nicostratus*, the orator presents the work that two slaves of Arethousios allegedly accomplished in the following terms:

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[39] Préaux 1966: 161; see also Christophilopoulos 1950.

[40] On the wording of the law, see Whitehead 2000: 323-325 (I borrow the translation); see also Phillips 2009: 113.

> Τὸν μὲν γὰρ Κέρδωνα ἐκ μικροῦ παιδαρίου ἐξεθρέψατο: καὶ ὡς ἦν Ἀρεθουσίου, τούτων ὑμῖν τοὺς εἰδότας μάρτυρας παρέξομαι.[Μάρτυρες] Παρ᾽ οἷς τοίνυν ἠργάσατο πώποτε, ὡς τοὺς μισθοὺς Ἀρεθούσιος ἐκομίζετο ὑπὲρ αὐτοῦ, καὶ δίκας ἐλάμβανε καὶ ἐδίδου, ὁπότε κακόν τι ἐργάσαιτο, ὡς δεσπότης ὤν, τούτων ὑμῖν τοὺς εἰδότας μάρτυρας παρέξομαι.
>
> He has raised Kerdon since his earliest childhood: I will produce witnesses for you proving he belongs to Arethousios. [Witnesses] He worked for such and such; Arethousios perceived misthos on his behalf; defended him and was responsible in the event of a misdemeanour, acting as a master, I shall produce witnesses who know all of this (Dem. 53.19-20).

Then he adds:

> Ἔτι τοίνυν καὶ ἐκ τῶνδε γνώσεσθε, ὦ ἄνδρες δικασταί, ὅτι εἰσὶν Ἀρεθουσίου οἱ ἄνθρωποι. Ὁπότε γὰρ οἱ ἄνθρωποι οὗτοι ἢ ὀπώραν πρίαιντο ἢ θέρος μισθοῖντο ἐκθερίσαι ἢ ἄλλο τι τῶν περὶ γεωργίαν ἔργων ἀναιροῖντο, Ἀρεθούσιος ἦν ὁ ὠνούμενος καὶ μισθούμενος ὑπὲρ αὐτῶν.
>
> There is still for you, judges, another means of knowing that these men belong to Arethousios: whenever the slaves bought the fruits of a harvest or contracted to harvest a crop or took up some other agricultural work, it was Arethousios who negotiated the purchase or arranged for their hire (Dem. 53.21; transl. V. Bers)[41].

If we are to believe the speaker, there is no doubt that the slaves in question often worked for other free men, but that Arethousios was always designated as their master. In that sense, at first glance, we seem to be faced with a form of hiring. But the employment of the middle voice (*misthoomai*) is intriguing, and seems to open two possible interpretations: firstly, one may understand that the slaves had hired themselves, and then been faced with a form of labour at another's expense achieved upon the initiative of a slave. In other words, this leasing would no longer be a leasing of things (*louage de choses*), as stated by Gernet[42]. However, we can also assume that employing the middle voice, always used in a transitive and non-reflexive form when it comes to the Demosthenian corpus, aimed to indicate that the slaves hired themselves but acted on behalf of someone else, their own master[43]. The

41 Dem. 53. 20-21.

42 Gernet 1950: 160: « L'esclave est un intermédiaire, il n'est pas un simple instrument: de la part du maître, il ne s'agit plus d'un louage de choses » ; see also Harrison 1971: 175 n.1.

43 Kazakevitch 2008: 379. See also Perrotti 1976: 185 and Valente 2012: 88.

demonstrative logic of the orator seems to indicate that this second alternative is closer to the truth. The purchase and act of leasing are placed at the same level, both performed by a slave on behalf of his master – this seems to make more sense than attributing the act of purchase to the hiring of one's own body. Whatever the solution, the point consists in asserting that the responsibility for the acts committed by these slaves was attributed to Arethousios.

9. Conclusion

Labour of free men and free labour (as a concept) made up two completely different realities in ancient Greece, on that we all agree. Several studies have shown that a large part of the work accomplished by those benefitting from the status of free citizens relied on the exercise of legal constraints. Debt servitude (which existed in classical Athens), like the work of freedmen executed alongside their former masters, represented forms of bond labour that one could not assimilate to slavery[44]. Considered from the vantage point of slavery, the legal forms structuring slave labour are no less diverse if one thinks of the indirect forms of slave management. The legal organisation of labour in the classical city-state could therefore be seen as a *continuum* of forms of constraint encompassing the majority of workers beyond the distinction between free men and slaves.

Though the renting of slaves could offer actual spaces of autonomy to some of them, leasing was regarded as a temporary transfer of the essential share of property rights (and liability they implied). From a legal point of view, one could not see the recognition, even embryonic, of responsibility attributed to the slave, or even a distinction, as expressed by Roman jurists, between leasing slaves as commodities and leasing their labour.

It is a somewhat parallel question, here, but I would conclude by briefly touching upon the way I conceive the highly disputed issue (especially in the *Symposion*) of the liability more or less limited of the master[45]. I do not think that slaves themselves had the slightest responsibility within the legal framework. Athenian law did allow a citizen to file a case against a slave, but this accusation was only the preliminary phase of a process which ultimately targeted the master, the person fully responsible for the slave. In *Against Pantenetus*, the orator explicitly indicates the necessity of disassociating the two actions – one could not directly attribute the actions of a slave to his master, even if the latter was the only party responsible (Dem. 37.51). The identification of the agent of a specific action is crucial in this respect, and this is actually the reason why, in Hypereides 3 (*Against Athenogenes*) the debt contracted by Midas was done so in his name, and not in that of his master Athenogenes. That is also the reason why there must have existed

[44] See for instance Zurbach 2014.

[45] See specially Maffi 2008, Cohen 2012, Dimopoulou 2012. For a more developed argumentation, see Ismard 2019.

some public documents registering slaves as property[46]. The procedure distinguished two agents but confered the liability to only one of them, the master - exactly as in the procedure described in the famous *Papyrus de Lille*, from the Alexandria of the end of IVth cent. B.C., there is a clear distinction between the *epiklêsis*, or the imputation, to the slave, and the *praxis*, or the execution, to the master[47]. By separating the responsibility for an action from the identity of the individual who executed this action, the procedure deferred the manifestation of responsibility. But one cannot detect the recognition of any legal personality concerning a slave, even limited. The slave merely constitutes, within the procedure, the focus of allocating an action – and in that sense, he was an *actor* of the law without being a person – but his master was the only party held responsible.

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[46] See Ismard 2019.

[47] *Pap. Lille* I, 29, (1) l. 28-33 = Scholl 1990, 1, l. 28-33.

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DIE ΜΙΣΘΩΣΙΣ DES THEODOTOS (LYS. 3). ZUGLEICH EIN BEITRAG ZUR TERMINOLOGIE DES „VERDINGUNGSVERTRAGES“ IM GRIECHISCHEN RECHT. ANTWORT AUF PAULINE ISMARD*

1. Vertragstypen und Aktionenrecht in Athen?

Im römischen Recht der Klassik beschreiben die Klageformeln des prätorischen Ediktes bestimmte Tatbestände. Klagen aus Rechtsgeschäften etwa werden so inhaltlich mit bestimmten Leistungsinhalten, aber auch Spezifika, welche die Haftung einer Partei des Vertrages betreffen, verknüpft und benannt. Dies alles bildet die Grundlage für eine unter Mitwirkung der Jurisprudenz einsetzende Definition vertraglicher Verhältnisse im römischen Recht nach materiellen Gesichtspunkten[1]. Im griechischen Recht fehlt grundsätzlich eine solche Entwicklung, auch das attische Recht kennt insofern keine „Vertragstypen“.

Nur im weitesten Sinne lässt sich das attische Recht als aktionenrechtlich charakterisieren[2]. Zwar fallen „Recht und prozessualer Schutz des Rechts (…) in der Weise zusammen, dass die Existenz des Rechts nur unter der Bedingung seiner prozessualen Durchsetzbarkeit vorgestellt werden kann“[3]; zwar muss auch jede Klageschrift auf einem Tatbestand beruhen, dessen Verwirklichung vom Kläger behauptet und dem Beklagten zur Last gelegt wird[4]. Ein wesentliches Charakteristikum des Aktionensystems aber, die namentliche Bezeichnung von Klagen, ist im attischen Recht nur ansatzweise und unsystematisch umgesetzt: So leiten sich die Klagenamen zwar auch von einem Tatbestand her wie dem Diebstahl (δίκη κλόπης), dem Prozessgegenstand wie der Vormundschaft (δίκη ἐπιτροπῆς) oder dem Klageziel wie der Gewährung von Unterhalt (δίκη σίτου); doch haben diese Bezeichnungen keine begriffliche Verfestigung erfahren[5].

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[1] Vgl. dazu etwa die Studie von Scheibelreiter (2017).

[2] So etwa Wolff (1965) 2; Behrend (1970) 23.

[3] Wolff (1954) 405.

[4] Ausführlich dazu Scheibelreiter (2018).

[5] Wolff (1965) 2; Mummenthey (1971) 34. Manche Klagenamen sind weniger rechtstechnischen als rhetorischen Gepräges oder werden erst von den Lexikographen etabliert, vgl. Mummenthey (1971) 25-34.

Indizien für Ansätze von Typenbildung ergeben sich allerdings bei Verträgen: In der Rechtspraxis werden bestimmte Inhalte einer Vereinbarung typischer Weise mit der in diesem Zusammenhang verwendeten Begrifflichkeit verknüpft. Das, was in der Papyrologie das „Formular einer Urkunde“ bezeichnet, welches standardisierte Klauseln etwa zur Gefahrtragung oder Gewährleistung für ein konkretes Rechtsgeschäft enthält, die den diese Bestimmungen anerkennenden Vertragspartner der πρᾶξις seines Gegenübers unterwerfen, macht zwar materiellrechtlich gesehen noch keinen „Vertragstyp“ aus; allerdings werden diese Formulare mit bestimmten, typischen Inhalten verbunden und unter einem Namen zusammengefasst, der die Assoziation zu diesen Charakteristika herstellt[6]. Dies gilt in gewissem Ausmaß in papyrologischen Zeugnissen[7] auch für den weiten Begriff der μίσθωσις, die „Verdingung“. Anhand eines speziellen Verdingungsvertrages[8], der μίσθωσις eines ἑταῖρος, soll dies in der vorliegenden Studie auch für das attische Recht näher untersucht werden.

2. μίσθωσις

Sprachlich leitet sich die μίσθωσις vom Nomen μισθός[9], „Lohn“ / „Preis“ her[10]. In den Quellen des 5./4. Jh. v. Chr. ist dabei zumeist die sozial stärkere Partei, die eine Leistung zur Verfügung stellt, der μισθῶν, und diejenige, welche diese Leistung annimmt, der μισθούμενος[11]. Synonym werden die ebenfalls eine bereits erfolgte Verfügung beschreibenden Termini ἐκδιδόναι und ἐκλαμβάνειν gebraucht[12]. Nur bei der Pacht im öffentlich-rechtlichen Kontext werden mit den Verben πιπράσκειν / πωλεῖν – ὠνεῖσθαι, ähnlich dem römischen Recht, kaufrechtliche Begriffe verwendet[13].

Dem „Verdingungsvertrag“ des römischen Rechts, der *locatio conductio*, lassen sich gleich mehrere Leistungsinhalte subsumieren: Die weitere Untergliederung in *locatio conductio rei*, *operis* und *operarum* ist allerdings wohl erst im Humanis-

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6 Vgl. zu alledem nur Simon (1965) 52-53.

7 Vgl. etwa die unterschiedliche Bezeichnung des Bestandsentgelts als μισθός bei der Miete und φόρος bei der Pacht von Vieh, auf die bereits von Bolla (1969) 4-6 hingewiesen hat: Hier kann aus dem Begriff für die Leistung des Bestandnehmers auf die genauere Ausgestaltung des μίσθωσις-Verhältnisses geschlossen werden.

8 Aus der Fülle der von Ismard behandelten Probleme soll nur eines, nämlich: die Verdingung von Liebesdiensten im attischen Recht und ihre rechtliche Qualifizierung, herausgegriffen werden.

9 Vgl. dazu Ismard A. 4.

10 Behrend (1970) 29 spricht von einem denominativen *nomen actionis* zu μισθός; vgl. auch Biscardi (1989) 90: „*Das Wort μίσθωσις stammt von μισθός iSv Lohn für freie Arbeit.*“

11 Kaufmann (1964) 277; Behrend (1970) 42; Müller (1985) 8.

12 Vgl. dazu Wolff (1946) 59.

13 Lipsius (1912) 752; Kaufmann (1964) 278.

mus[14] getroffen worden[15]. Gemeinsam ist all diesen Unterarten des Verdingungsvertrages, dass eine Partei eine Leistung anbietet, und die andere diese in Anspruch nimmt: Für die *locatio conductio* ließe sich dies etwa aus der Sklavenmiete oder dem Dienstvertrag herleiten: Der *locator* „stellt die Arbeitskraft des Sklaven“ oder „seine Arbeitskraft“ zur Verfügung, der *conductor* „führt den Sklaven mit sich fort“, um ihn vereinbarungsgemäß und gegen Entgelt einzusetzen[16] oder „nimmt die Arbeitsleistung in Anspruch“. Sachenrechtlich[17] bleibt der *locator* Besitzer des Sklaven, der *conductor* aber hat ein vertragliches Fruchtziehungsrecht an dem vom eingesetzten Sklaven erwirtschafteten Ertrag[18]. Die Tagewerke eines Sklaven (*operae*) werden als Früchte (*fructus*) angesehen[19].

Wörtlich haben *locare* und *conducere* im μισθοῦν und im μισθούσθαι keine Entsprechung[20], es lässt sich aber auch für das attische Recht[21] festhalten, dass unter

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[14] Zum Fehlen dieser Trichotomie in den Quellen des klassischen römischen Recht vgl. etwa Mayer-Maly (1956) 18: „*Theoretisierende Kategorienbildung lag den römischen Juristen – auch den Autoren der Elementarliteratur – so fern, daß sie nicht daran Anstoß nahmen, dogmatisch verschiedenen Rechtsgeschäfte um terminologischer und aktionenrechtlicher Gemeinsamkeiten willen zu einem nicht weiter differenzierten Kontrakt zusammenzufassen.*“

[15] So etwa Mayer-Maly (1991) 117. Torrent (2012) 381 mit A. 8 lässt Iohannes Voet, *Commentarius ad Pandectas. In quo praeter Romani iuris principia ac controversias illustriores, ius etiam hodiernum et praecipue Fori quaaestiones excutiuntur*, Leiden 1698 für die Schaffung dieser Trichotomie verantwortlich zeichnen. Kaser / Knütel / Lohsse (2021) 322 sprechen davon, dass erst das gemeine und das moderne Recht eine Dreiteilung vollzogen hätten.

[16] Gegen diese Interpretation von *conducere* aber v. Lübtow (1957) 232: „*Der Mieter führt doch den gemieteten Sklaven nicht zusammen*!“ Vielmehr erklärt v. Lübtow das *conducere* als das „Bündeln“ der Arbeitskraft von freien Dienstnehmern, die von der Gemeinde gedungen worden seien, um öffentliche Arbeiten auszuführen. Hier deckt sich die Lehre mit jener von Biscardi (1971) und (1989), wonach als Ausgangsfall der μίσθωσις ebenfalls der Dienstvertrag anzunehmen sei.

[17] Ismard bei A. 7.

[18] Ismard bei A. 7. Thomas (1997) ist aus sachenrechtlicher Perspektive missverständlich, wenn es dort heißt (zitiert in der Paraphrase von Ismard bei A. 8): „*The latter did not hire the slave as one would benefit from an absolute transfer of associated property rights, but merely contracted the right to use the slave labour* ...” Der Sklave bleibt jedenfalls in Besitz und Eigentum des *locator* (wenn dieser Eigentümer ist, was für die Wirksamkeit des Pachtvertrages prinzipiell irrelevant ist), der *coductor* erwirbt nur das Recht, den Sklaven innezuhaben, zu nutzen und Früchte aus ihm zu ziehen.

[19] Vgl. Kaser (1971) 384. So ist etwa zu verweisen auf D. 22.1.52.2 (Iul. 7 dig.), wo Julian den Erwerb durch einen fremden, gutgläubig besessenen Sklaven mit dem Eigentumserwerb von Früchten durch den gutgläubigen Besitzer einer fremden Muttersache vergleicht, welcher ab Entstehen der Früchte, also ihrer Trennung von der Muttersache eintritt.

[20] Vgl. so auch Kaufmann (1964) 277-278.

[21] Ebenso im Recht der Papyri, vgl. etwa Hengstl (1972) 120; Rupprecht (1994) 122-123.

einer μίσθωσις sowohl entgeltliche Gebrauchsüberlassung als auch Werk- oder Dienstleistung gemeint werden konnten[22].

Und dies wird gerade anhand des Einsatzes von Sklaven besonders deutlich: So konnte man, um sich die Arbeitskraft eines fremden Sklaven zunutze zu machen, diesen Sklaven von seinem Eigentümer mieten oder aber mit dem Sklaven selbst einen Vertrag über eine Arbeitsleistung schließen: Beides wäre eine μίσθωσις, wenn auch mit unterschiedlichen Vertragspartnern, und in beiden Fällen wäre es der Eigentümer des Sklaven, dem das Entgelt zukäme – sei es der Mietzins oder der Arbeitslohn[23]. Diese Thematik hat Ismard deutlich und mehrfach angesprochen, wenn er sich um eine grobe Kategorisierung der Sklavenarbeit im klassischen Athen bemüht. Wie schwer die Grenzen zwischen Sklavenmiete und Arbeitsvertrag (mit dem Sklaven oder seinem Herren) im attischen Recht[24] abgesteckt werden können, soll nun anhand eines konkreten Beispiels nachgezeichnet werden, das auch Ismard anspricht: Der μίσθωσις des Theodotos in Lysias' Rede gegen Simon[25].

3. Der Vertrag des Simon in Lys. 3

In der 3. Rede des Lysias, jener gegen Simon, verteidigt sich der anonyme Sprecher gegen den Vorwurf absichtlicher schwerer Körperverletzung (τραῦμα ἐκ προνοίας)[26] vor dem Areopag, die er im Zuge von Auseinandersetzungen mit dem Kläger Simon diesem zugefügt haben soll. Grund für die Straßenschlachten, die hier nicht *en detail* nachgezeichnet werden können[27], ist die Rivalität um den jungen Theodotos. Dieser sei nach der Darstellung des Redners lieber bei ihm geblieben als bei Simon. Das Sujet der Rede ist jenes in Athen etablierte Modell der Liebesbeziehung zwischen einem jungen Mann (ἐρώμενος) [28] und seinem älteren Liebhaber (ἐραστής)[29]. Dennoch hat die Darstellung nicht nur diese soziale Implikation, dennoch geht es hier nicht nur um Macht und Eifersucht, sondern – in der Darstellung des Redners – auch um vertragsrechtliche Probleme. Ob Theodotos mit Simon einen Vertrag über sexuelle Dienstleistungen geschlossen hat, wird vom Sprecher dreimal andiskutiert:

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[22] Vgl. so auch von Bolla (1969) 4 A.1. Zum Verhältnis von μίσθωσις und *locatio conductio* vgl. auch Jördens (1990) 165-167.

[23] Vgl. Biscardi (1971) 360-361.

[24] Zum römischen Recht und der Einordnung des *mercennarius* (Lohnarbeiter) vgl. die Studie von Bürge (1990).

[25] Ismard bei A. 15.

[26] Vgl. Lys. 3, 14.18.40.42. Simon beschuldigt den Sprecher, ihm mit einem Stein am Kopf eine schwere Verletzung zugefügt zu haben.

[27] Vgl. dazu etwa Harris (2007) 160; Phillips (2007) 83-88; Riess (2012) 49-50.

[28] Ein ἐρώμενος war typischer Weise um die 20 Jahre alt.

[29] Ein ἐραστής war zumeist älter als Ende 20; der Sprecher scheint viel älter zu sein, was seine Beschämtheit erklärt, mit der er seine bisherige Passivität, in der Angelegenheit tätig zu werden, rechtfertigen soll (Lys. 3,4;6;9); vgl. Todd (2007) 277-278.

Einmal zitiert der Sprecher eine Behauptung des Simon (Lys. 3,22): ἐτόλμησε γὰρ εἰπεῖν ὡς αὐτὸς μὲν τριακοσίας δραχμὰς ἔδωκε Θεοδότῳ, συνθήκας πρὸς αὐτὸν ποιησάμενος, ἐγὼ δ' ἐπιβουλεύσας ἀπέστησα αὐτοῦ τὸ μειράκιον. – „Denn er (i.e. Simon) wagte zu behaupten, dass er selbst dem Theodotos 300 Drachmen gegeben habe, indem er einen Vertrag mit ihm / über ihn[30] abschloss, dass ich aber gegen ihn sinnend ihm den Jüngling abspenstig machte."

Die Phrase συνθήκας πρὸς αὐτὸν ποιησάμενος wird gängiger Weise mit „einen Vertag mit diesem eingehen" übersetzt[31]. Die Präposition πρός mit dem Akkusativ kann aber nicht nur „mit"[32], sondern auch „über" oder „hinsichtlich" heißen. Dies lässt zumindest Raum für eine Variante, wonach Theodotos nicht Vertragspartner gewesen ist, sondern Vertragsobjekt[33].

Der Sprecher bezichtigt Simon diesbezüglich der Lüge – wenn sich dies wirklich so verhalten hätte, dass er den Theodotos abspenstig macht, dann hätte Simon schon längst rechtliche Schritte gegen ihn ergreifen müssen. Welche Klage hier angesprochen wird, ist unklar – wenn sie sich gegen den Sprecher richten hätte sollen, welcher das Ziel des Vertrags zwischen Simon und Theodotos hintertrieb, indem er den Jüngling von Simon weglockte, so könnte hier die δίκη βλάβης gemeint sein[34]: Der vom Redner kurz darauf erhobene Vorwurf, dass er dem Simon das Geld „rauben" (ἀποστερεῖν[35]) wolle, stützt diese These.

Der Sprecher suggeriert, dass sich Simon keinen Liebhaber gedungen habe (Lys. 3,24): καίτοι θαυμαστὸν εἰ τὸν ἑταιρήσοντα πλειόνων ἐμισθώσατο ὧν αὐτὸς τυγχάνει κεκτημένος. – „Aber es wäre verwunderlich, wenn er den zu Liebesdiensten Bereiten um mehr Geld gedungen hätte als er selbst gerade besitzt."

Zwar meldet der Sprecher auch hier Zweifel an einer Behauptung des Simon an, diese beziehen sich aber nicht auf die Möglichkeit einer μίσθωσις des Theodotos insgesamt, sondern auf die Vermögensverhältnisse des Simon, der gegenwärtig nur 250 Drachmen besitze, aber 300 für den Theodotos aufgewendet haben will. Lysias bzw. der Redner gebraucht das Verb μισθοῦσθαι in juristischer Konnotation und

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30 Zur Übersetzung von πρὸς αὐτόν siehe sogleich.

31 So Lamb (1976) 83; Todd (2000) 47; Huber (2004) 55; vgl. auch Todd (2007) 280 und 326.

32 Nur indirekt damit vergleichbar ist etwa die Formulierung, „dass wir Verträge nur wegen des gegeneinander [bestehenden] Misstrauens abschließen" (ὅτι τὰς συνθήκας τῆς πρὸς ἀλλήλους ἀπιστίας ἕνεκα ποιούμεθα) in Aischin 1,161: Das πρὸς ἀλλήλους bezieht sich zwar nur auf das Misstrauen und nicht den Vertragsschluss, implizit wird dieser aber auch als zwischen den einander Misstrauenden geschlossen angedeutet.

33 Neutraler übersetzen Medda (2012) 163 „aveva dato trecento dracme a Teodoto in base a un regolare accordo".

34 So auch Todd (2007) 330.

35 Lys. 3,25: καιτοὶ πῶς εἰκός ἐστι τότε μὲν ἡμᾶς τοιαῦτα ἐξαρμαρτάνειν οἷα κατηγόρηκεν οὗτος, ἀποστερῆσαι βουλομένους τὰς τριακοσίας δραχμάς (…). – „Und jetzt, wie ist es glaublich, dass wir damals das, wessen dieser uns anklagt, begangen haben, nämlich die 300 Drachmen ihm gewaltsam abzunehmen zu planen, (...)."

nicht etwa so allgemein, wie es Übersetzungen der Passage unterstellen, die das τὸν ἑταιρήσοντα μισθοῦσθαι mit „*einen Geliebten anschaffen*“[36] oder „*avesse pagato per un amante*“[37] wiedergeben. Nur kurz zuvor hatte der Sprecher etwa von einem Haus, welches Simon im Piräus gemietet hatte als einer οἰκία, ἧς οὗτος ἐμεμίσθωτο gesprochen[38]. Das Verb ἐμισθώσατο also bedeutet, dass sich Simon „die Dienste des Theodotos vertraglich zusichern ließ“.

Es ist augenscheinlich, dass der Sprecher in Lysias 3 den „Vertrag“ des Simon als dessen Erfindung enttarnen will. Der Wahrheitsgehalt der Aussagen des Simon oder ihre Verzerrung durch den Sprecher sind hier aber nicht von Belang. Wesentlich ist, dass nach den beiden eben angeführten Passagen[39] ein Verdingungsvertrag über oder mit Theodotos möglich war[40] und diese so Einblick in die Praxis eines solchen Prostitutionsvertrages geben. So ist zu lesen von συνθῆκαι[41] und einem συμβόλαιον[42]: (…) καὶ δοῦναι μέν φησιν, ἵνα μὴ δοκῇ δεινὰ ποιεῖν, εἰ μηδενὸς αὐτῷ συμβολαίου γεγενημένου τοιαύτα ἐτόλμα ὑβρίζειν τὸ μειράκιον. – „Er sagt, dass er Geld gezahlt habe, damit er nicht als jemand erscheine, der Unerhörtes tue, wenn er, obwohl kein Vertrag vorläge, auf diese Weise den Jüngling zu verletzen wage.“ Es ist auffällig, dass hier von einem unter freien Bürgern sonst kaum belegten Vertrag über Liebesdienste zu lesen ist[43].

Die Übergabe des Geldes wird zweimal unmittelbar in Zusammenhang mit dem Eingehen der μίσθωσις gestellt. In Lys, 3,22 ist das Zahlen der 300 Drachmen (τριακοσίας δραχμὰς ἔδωκε Θεοδότῳ) mit dem Vertragsschluss (συνθήκας πρὸς αὐτὸν ποιησάμενος) gleichzusetzen. Die Übergabe der 300 Drachmen erfolgt also nicht etwa in Erfüllung der μίσθωσις[44], sondern zu ihrer Begründung[45]. Auch in

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[36] Huber (2004) 55: „Da ist es doch erstaunlich, dass er sich einen Geliebten angeschafft haben will für mehr Geld, als er besaß.“

[37] Medda (2012) 163: „Ebbene, ci sarebbe davvero da stupirsi se egli avesse pagato per un amante piu di quanto lo stesso possedeva.“

[38] Lys. 3,11.

[39] Lys. 3,22 und 24.

[40] Vgl. so auch Carey (1989) 87.

[41] Lys. 3.22; vgl. dazu Cohen (2000) 129; Gagliardi (2006) 118; Todd (2007) 326; vgl. dazu auch die Rede des Aischines gegen Timarchos, wo in Zusammenhang mit dem Mietvertrag zur ἑταίρησις davon zu lesen ist, dass dieser übertreten (Aischin. 1,164: ὑπερβαίνειν τὰς συνθήκας) bzw. erfüllt worden sei (Aischin. 1,165: κατὰ συνθήκας ἡταιρηκέναι).

[42] Lys. 3,26. Als dritter Terminus ist etwa in Aischin. 1,160 belegt, dass ein ἑταῖρος nur sein könne, wer „vertraglich gedungen worden ist“ (κατὰ συγγραφὰς ἐμισθώθῃ).

[43] Vgl. Aischin. 1,160, der ausführt, dass auch die einschlägigen Gesetze (οἱ περὶ τῆς ἑταιρήσεως νόμοι) über solche Verträge (συνθῆκαι) schweigen würden.

[44] Dies suggerieren etwa die Übersetzungen von Lamb (1976) 83: “He had the audacity to state on his part he had given three hundred drachmae to Theodotos under an agreement made with him …”.; und von Medda (2012) 163: „Infatti ha avuto il coraggio di dichiarare che aveva dato trecento dracme a Teodoto in base a un regulare accordo.”

Lys. 3,26 lässt sich das Argument des Simon nur so lesen, dass ein Vertrag vorliege, weil er gezahlt habe: Mit der Behauptung, Geld gegeben zu haben (δοῦναι), soll eine vertragliche Grundlage für die kränkende Behandlung des Theodotos begründet werden und zumindest als weniger ungerechtfertigt erscheinen, als wenn es keinen Vertrag gegeben hätte[46]: δοῦναι (sc. ἀργύριον) und μηδενὸς αὐτῷ συμβολαίου γεγενημένου markieren Vorliegen und Nichtvorliegen eines Vertrages. Die Zahlung erfolgt also nicht in Erfüllung eines „consensual agreement for sexual services“[47], sondern als Vorleistung der Bestellerseite bei Begründung des Rechtsgeschäftes, der μίσθωσις dessen, der als ἑταῖρος agieren würde (τοῦ ἑταιρησῶν)[48]. Ähnlich berichtet etwa Aischines davon, dass Freier dem Timarchos Geld als Vorleistung (ἀργύριον προαναλίσκειν) für sexuelle Dienste[49] übergeben hatten[50].

Mit ἑταιρεῖν als Gegenstand des Vertrags wird auf ein „Dauerschuldverhältnis“ abgestellt[51], eine Art Escort-Service[52]: In der Tat lassen die wenigen Hinweise, die allerdings der Sprecher über sein Verhältnis zu Theodotos gibt, darauf schließen, dass zu dessen üblichen Leistungen nicht nur sexuelle Dienste gehörten, sondern

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[45] Vgl. so etwa auch die Übersetzungen von Todd (2000) 47 und Todd (2007) 297: „He has dared to claim that he himself gave Theodotos 300 drachmas, that he made an agreement with him, and that I turned the young man against him by means of a plot“ oder Huber (2012) 55: „Er wagte zu behaupten, er habe dem Theodotos 300 Drachmen gegeben und sei einen Vertrag mit ihm eingegangen, …“

[46] Das zielt wohl auf eine Verwirklichung des im νόμος ὑβρέως unter Strafe gestellten Verhaltens ab, welche die Verletzung eines Knaben durch denjenigen regulierte, der diesen gedungen hat, vgl. Aisch. 1,15: ἐάν τις ὑβρίζει εἰς παῖδα (ὑβρίζει δὲ δή που ὁ μισθούμενος). Allerdings ist das ὑβρίζει – μισθούμενος wohl als Zusatz des Aischines zu deuten, der das Gesetz zu seinen Zwecken interpretiert, vgl. Fisher (2001) 141.

[47] So etwa Cohen (2000) 131; ähnlich Carey (2002) 103. Cohen (2000) 130 verweist auch auf das „*agreement*“ zwischen Neaira und Phrynion bzw. Stephanos aus Dem. 59, 45-46, wonach sie sich verpflichtete, abwechselnd mit jedem der beiden Männer zu schlafen. Allerdings handelt es sich hierbei um einen Schiedsspruch (γνώμη) für die beiden Männer, der einen Vergleich ermöglicht. Die Abänderungsklausel in [Dem.] 59, 46 (ἐὰν δὲ καὶ ἄλλως πως ἀλλήλους πείθωσι ταῦτα κύρια εἶναι) legt nahe, dass Neaira hier nicht Vertragspartnerin, sondern Objekt ist.

[48] Vgl. so etwa auch Behrend (1970) 44; Wolff (1998) 121; dagegen aber Biscardi (1989) 85-86. Herrmann (1975) 324-325 wiederum versteht die Zahlung des Entgelts bei der μίσθωσις als Erfüllen einer Auflage für die Ermächtigung zur Verfügung über das Bestandsobjekt; auch nach Herrmann stehen die Leistungen der Vertragsparteien daher nicht in „konsensualem Austauschverhältnis“.

[49] Aischin. 1,41 umschreibt diese einschlägig konnotiert mit τὸ πρᾶγμα ὃ προῃρείτο ἐκεῖνος μὲν πραττειν, οὗτος δὲ πάσχειν – „den Akt, welchen jener treiben, dieser aber erdulden wollte.“

[50] Aischin. 1,41; 75.

[51] Eine Definition des Unterschieds zwischen ἑταίρησις zur πορνεία gibt Aischin. 1,52, wenn er letztere als „mit vielen gegen Lohn verkehren“ (πρὸς πολλοὺς πράττων καὶ μισθοῦ) charakterisiert, wogegen erstere sich auf eine Person konzentriere. Zur Unterscheidung vgl. ferner Cohen (2000) 114 A. 5; Fisher (2001) 41; Todd (2007) 328-329.

[52] Vgl. so auch Fisher (2001) 41.

allgemein die „Begleitung“ des Freiers: So werden er und Theodotos beim „Nachtmahlen“ (ἐδειπνοῦμεν)[53] gestört, so begleitet Theodotos den Redner auf eine Reise[54], und „lebte bei mir (= ihm)“ (παρ᾽ ἐμοί δ᾽ ἐτύγχανε διαιτώμενον)[55]. Alles das gehört zum typischen Vertragspflichten eines „Begleiters“ / einer „Begleiterin“[56], und alles das ließe sich sowohl mit Miete als auch Dienstvertrag vereinbaren[57].

Was nun im Fall des Theodotos vorlag und wer der Vertragspartner eines Freiers wie Simon war, ist anhand des Textes kaum zu beurteilen. Die bei Lysias gebrauchte Terminologie ist hier wenig aufschlussreich, da er generell in seinen uns erhaltenen Reden das Verb μισθοῦσθαι zwar einerseits in Zusammenhang mit Miete von Häusern[58] und Pacht von Liegenschaften[59] verwendet, andererseits aber – wenn auch nur im Kontext des Anheuerns von Söldnern – bei Dienstverträgen[60]. Es wurde bereits oben angesprochen, dass die Formulierung συνθήκας ποιεῖν πρὸς αὐτόν ebenso als Dienstvertrag mit Theodotos selbst (sei er nun frei oder Sklave) oder als Mietvertrag mit dessen Herren interpretierbar ist[61] wie die Feststellung, dass Simon ihn „als künftigen *hetairos* … gedungen hat“ (τὸν ἑταιρήσοντα … ἐμισθώσατο): Wie ausgeführt, beschreibt die medio-passive Verbalform μισθοῦσθαι jene Vertragspartei, welche eine Leistung in Anspruch nimmt, also den Mieter oder den Dienstnehmer.

In diesem zweiten Sinne gebraucht wird die Phrase etwa von Demosthenes[62], wenn der Redner an Phormio die rhetorische Frage richtet: ἀλλὰ τιν᾽ … τῶν πολιτῶν ἑταιρεῖν … μεμίσθωμαι – „aber welchen der Bürger (…) habe ich gedungen, *hetairos* zu sein (…)?“ Ebenso heißt es in Aischines‘ Rede gegen Timarchos: ἐμισθωσάμην … Τίμαρχον ἑταιρεῖν ἐμαυτῷ[63] bzw. ἐμισθώσατό με ἑταιρεῖν αὐτῷ

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[53] Lys. 3,7. Zu den Aufgaben der Neaira in [Dem.] 59 gehörte auch συμπίνειν (24. 25 u. 28) und συνδείπνειν (24); an Symposien durften umgekehrt verheiratete Frauen nicht teilnehmen, vgl. dazu Kapparis (1999) 217-221.

[54] Lys. 3,10.

[55] Lys. 3,31.

[56] Vgl. dazu etwa auch Aischin, 1,165, wo es diesbezüglich aus der Sicht des Gedungenen heißt: κἀγὼ μὲν ἅπαντα καὶ πεποίηκα καὶ ἔτι καὶ νῦν ποιῶ κατὰ τὸ γραμματεῖον, ἃ χρὴ ποιεῖν τὸν ἑταιροῦντα. – „Ich aber habe alles gemacht und mache auch jetzt alles vertragsgemäß, was ein *hetairos* tun muss.“

[57] Todd (2007) 326 behandelt diese Frage nicht weiter, beschreibt den Vertragsinhalt aber als „*exclusive contract for Theodotos to live with Simon and provide sexual services in return for 300 drachmas*“.

[58] Lys. 3,11; 12,18; 32,23.

[59] Vgl. auch Lys. 7,10.11.17; 17,5.8.

[60] So nennt Lys. 19,21.22 und 43 den „Dienstvertrag mit Leichtbewaffneten“ ἡ μίσθωσις τῶν πελταστῶν; vgl. ferner auch Lys. 12,59.60.

[61] Vgl. dazu oben.

[62] Dem. 45,79: ἀλλὰ τιν᾽, ὦ Φωρμίων, τῶν ποιλτῶν ἑταιρεῖν, ὥσπερ σύ, μεμίσθωμαι; – „Aber welchen der Bürger, o Phormion, habe ich gedungen, *hetairos* zu sein so wie du?“

[63] Aischin. 1,163: ἐμισθωσάμην, ὦ ἄνδρες Ἀθηναῖοι, Τίμαρχον ἑταιρεῖν ἐμαυτῷ κατὰ τὸ γραμματεῖον τὸ παρὰ Δημοσθένει κείμενον. – „Ich, o athenische Männer, habe den

ἀργυρίου[64]. Von dem athenischen Bürger Timarchos heißt es ferner, dass er sich gegen Entgelt verdungen hat für alles, was das Gesetz[65] zu tun verbietet (μισθαρνῶν ἐπ'αὐτῷ τούτῳ ὃ ἀπαγορεύει ὁ νόμος μὴ πράττειν)[66].

All diese Formulierungen bei Demosthenes bzw. Aischines beziehen sich jedenfalls auf einen Dienstvertrag mit einem Freien: Daraus, dass das eben angesprochene Gesetz diejenigen mit „bürgerlicher Zurücksetzung“ (ἀτιμία)[67] bedrohte, welche für sexuelle Dienstleistungen einen athenischen Bürger anwerben oder sich selbst verdingen[68], könnte es sich erklären, warum diese wenigen Angaben zu solchen Verträgen unter freien Männern so kryptisch bleiben, etwa, dass Aischines keine Namen nennt[69]. Demgegenüber konnte ein Sklave sowohl selbst seine Dienste verdingen als auch von seinem Eigentümer verdungen werden[70]. Das in Zusammenhang mit Prostitution und möglicher Weise sogar im normativen Kontext bei Aischines zweimal belegte Kompositum ἐκ-μισθοῦν[71] würde da vielleicht eindeutiger auf die Vermietung zu Liebesdiensten hinweisen[72], es wird in Zusammenhang mit der μίσθωσις des Theodotos aber nicht gebraucht[73].

Timarchos gedungen, um mit mir als *hetairos* zusammen zu sein gemäß dem Schriftstück, das bei Demosthenes verwahrt liegt.“ Zu dieser „Spitze“ gegen den Prozessgegner Demosthenes vgl. Carey (2000) 77 A. 168.

64 Aischin. 1,164: ἄνδρες δικασταί, ἐμισθώσατό με ἑταιρεῖν αὐτῷ ἀργυρίου ὁστισδηποτοῦν. – „O Richter, mich hat gedungen irgendwer, um mit ihm zusammen zu sein für Geld.“

65 Dies bezieht sich auf das in Aischin. 1,20 angesprochene und in 1,21 vielleicht zitierte Gesetz – vgl. dazu aber Fisher (2001) 145, Carey (2003) 31 A. 25 und indirekt auch Harris (2013) 364, wonach es sich um einen späteren Einschub handeln könnte –, demzufolge Personen, die sich prostituiert hatten, von öffentlichen Ämtern ausgeschlossen waren; vgl. dazu auch Harris (1995) 102.

66 Aischin. 1,40; ebenso in Aischin. 1,52: μισθαρνοῦν ἐπὶ τῳ σώματι.

67 Andok. 1,43; vgl. dazu Fisher (2001) 39-40; MacDowell (2000) 22; Gagliardi (2006) 119; Scheibelreiter (2019) 700.

68 Aischin. 1,72: ἐάν τις μισθώσηταί τινα Ἀθηναίων ἐπὶ ταύτην τὴν πρᾶξιν, ἢ ἐάν τις ἑαυτὸν μισθώσῃ (...).

69 Aischin. 1,160-165; dazu Davidson (1999) 120.

70 Vgl. dazu auch Carey (2002) 103; Todd (2007) 324.

71 So in der Paraphrase eines athenischen Gesetzes bei Aischin. 1,13 über die Kuppelei mit jüngeren Verwandten bzw. Schutzbefohlenen: διαρρήδην γοῦν λέγει ὁ νόμος, ἐάν τινα ἐκμισθώσῃ ἑταιρεῖν πατὴρ ἢ ἀδελφὸς ἢ θεῖος ἢ ἐπίτροπος ἢ ὅλως τῶν κυρίων τις ... – „Wörtlich besagt das Gesetz, wenn irgendjemanden als *hetairos* vermietet ein Vater, Bruder, Onkel, Vormund oder einer der Gewalthaber (…).“ Das Gesetz sieht Strafverfolgung gegen den ἐκμισθῶν vor: ὅτι ἐξεμίσθωσε, gegen den μισθούμενος: ὅτι ἐμισθώσατο.

72 Vgl. aber auch Aischin. 3,146, wo die Überlassung von Söldnern gegen Entgelt mit ἐκμισθοῦν bezeichnet wird; zum ähnlichen Phänomen im römischen Recht, wo (freie) Söldner mit dem ansonsten auf Sklavenarbeit hinweisenden Terminus *mercennarius* bezeichnet werden, vgl. Bürge (1990) 109.

73 Lysias gebraucht ἐκμισθοῦν in Zusammenhang mit dem Verpachten einer Liegenschaft in Lys. 7,4.

Die Frage nach der näheren Ausgestaltung der μίσθωσις des Theodotos ließe sich eindeutig beantworten, wenn Theodotos ein freier athenischer Bürger wäre wie etwa Timarchos: Dann nämlich kann es sich nur um einen Dienstvertrag handeln[74]. Wenn er hingegen ein Sklave ist, so könnte er ebenfalls selbst als Vertragspartner agieren[75] – Sklaven galten diesbezüglich als geschäftsfähig[76] –, aber auch von seinem Eigentümer „zum Gebrauch überlassen" worden sein.

Diese Situation ist bei der Sklavin Neaira in der nach ihr benannten, pseudodemosthenischen Rede[77] zu beobachten, wenn es dort mehrfach heißt, dass sie der Nikarete gehört hat (ὡς δὲ Νέαιρα αὑτηὶ Νικαρέτης ἦν)[78] und als solche „arbeitete mit dem Körper[79], indem sie gegen Entgelt tätig war für diejenigen, die ihr beiwohnen wollten": καὶ ἠργάζετο τῷ σωμάτι μισθαρνοῦσα τοῖς βουλομένοις αὐτῇ πλησιάζειν[80], bzw: ὅτι Νικαρέτης ἦν καὶ ἠκολούθει ἐκείνῃ καὶ ἐμισθάρνει τῷ βουλομένῳ ἀναλίσκειν[81]. Die Kunden wie der Dichter Xenokleides oder der Schauspieler Hipparchos „hatten diese als gemietet inne" (εἶχον αὐτὴν μεμισθωμένοι[82]), da sie „eine Hetäre ist, eine von denen, die gegen Entgelt arbei-

[74] Für Davidson (1999) 120 ist der Vertrag zwischen Simon und Theodotos der einzige sichere Beleg für einen solchen Dienstvertrag mit einem freien ἑταῖρος.

[75] Aus der Geschäftsfähigkeit lässt sich umgekehrt also kein Hinweis auf den Status des Theodotos ableiten, wie Todd (2000) 43 es überlegt, vgl. dazu sogleich.

[76] Vgl. dazu Thür (2018) 227: „*Soweit Handel und Gewerbe es erfordern, sind Unfreie, die oft selbständig wirtschaften, auch geschäftsfähig und haben Parteifähigkeit im Prozess. Die Vollstreckung kann freilich nur gegen und über den Eigentümer betrieben werden*."

[77] [Dem.] 59, Gegen Neaira.

[78] Erst später kann Neaira sich freikaufen (vgl. [Dem.] 59,31) und arbeitet ab ca. 373/72 v. Chr. als „selbständige Hetäre", vgl. dazu Brodersen (2004) 32-34 und auch Paoli (1953) 69.

[79] Zur Bedeutung von ἐργάζεσθαι τῷ σώματι (auch in [Dem.] 59, 22 u. 108) vgl. Busin (2009) 210.

[80] [Dem.] 59,20: ὡς δὲ Νέαιρα αὑτηὶ Νικαρέτης ἦν καὶ ἠργάζετο τῷ σώματι μισθαρνοῦσα τοῖς βουλομένοις αὐτῇ πλησιάζειν, τούθ' ὑμῖν βούλομαι πάλιν ἐπανελθεῖν. – „Dass diese Neaira da der Nikarete gehört hat und arbeitete, indem sie gegen Entgelt ihren Körper zur Verfügung gestellt hat für diejenigen, die ihr beiwohnen wollten, dies will ich euch noch einmal ausführen."

[81] [Dem.] 59,23: ὡς οὖν ἀληθῆ λέγω, ὅτι Νικαρέτης ἦν καὶ ἠκολούθει ἐκείνῃ καὶ ἐμισθάρνει τῷ βουλομένῳ ἀναλίσκειν, τούτων ὑμῖν αὐτὸν τὸν Φιλόστρατον μάρτυρα καλῶ. – „Dass ich aber wahr spreche, dass sie der Nikarete gehörte und ihr gehorchte und sich gegen Entgelt verdingte jedem, der wollte, dafür werde ich euch als Zeugen Philostratos selbst aufrufen."
In der Folge bezieht sich die Zeugenaussage des Philostratos aber nur darauf, dass Neaira der Nikarete gehört habe und dass sie von Lysias untergebracht worden war.

[82] [Dem.] 59, 26: ἐρασταὶ γίγνονται καὶ Ξενοκλείδης ὁ ποιητὴς καὶ Ἵππαρχος ὁ ὑποκριτής, καὶ εἶχον αὐτὴν μεμισθώμενοι. – „Freier waren der Dichter Xenokleides geworden und der Schauspieler Hipparchos, und sie hatten diese als gemietet inne." Vgl dazu auch [Dem.] 59,28 und 29.

ten“ (ὡς ἑταίραν οὖσαν τῶν μισθαρνουσῶν[83]). Aufgrund der Verwendung des Verbs μισθαρνοῦν, wörtlich „gegen Entgelt zur Verfügung stellen“ oder „gegen Entgelt arbeiten“[84], könnte man konstruieren, dass (1) Nikarete die Vertragspartnerin eines Freiers gewesen ist und Neairas Körper vermietet wurde, oder dass (2) die Sklavin Neaira, so wie es der Bürger Timarchos getan haben soll[85], selbst den Vertrag mit ihren Kunden schloss.

Es lässt sich also auch hier nicht eindeutig ermitteln, ob Freier wie Hipparchos und Xenokleides einen Lohn oder einen Mietzins zahlten und an wen unmittelbar die Zahlung erfolgte. Sicher scheint bloß, dass das Geld an Nikarete geflossen ist, der die Neaira ja gehörte[86]. Hinsichtlich eines Miet- oder Dienstvertrags kann hier nicht differenziert werden, da Ausdrücke wie μισθοῦν, μισθαρνεῖν oder μίσθωσις dies auch nicht tun. Vielmehr hat es den Anschein, dass diese Unterscheidung zumindest im Kontext auch der Rede gegen Neaira nicht von Belang ist, da sich diese lediglich in der Frage manifestierte, wer Vertragspartner des jeweiligen Freiers gewesen ist: Neaira oder Nikarete. Die Einnahmen aus der μίσθωσις flossen aber jedenfalls an letztere.

Doch zurück zur μίσθωσις und dem Status des Theodotos: Dafür, dass Theodotos ein freier athenischer Bürger ist, wurde der Hinweis ins Treffen geführt, dass er aus Plataia stammt[87] – seit 427 v. Chr. hatten die Plataier das athenische Bürgerrecht[88]. Allerdings drohte dem athenischen Bürger, der sich prostituierte, gemäß dem oben zitierten Gesetz die ἀτιμία[89]. Folglich wurde konstruiert, dass Theodotos ein freier Plataier, aber kein Athener gewesen sei, und daher den Verlust der bürgerlichen athenischen Rechte nicht riskierte[90].

Doch die Rede enthält Hinweise darauf, dass Theodotos ein Sklave war: Lysias nennt Theodotos zumeist neutral ein μειράκιον[91], also einen „bartlosen jungen

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83 [Dem.] 59, 28: Ἵππαρχος Ἀθμονεὺς μαρτυρεῖ Ξενοκλείδην καὶ αὑτὸν μισθώσασθαι Νέαιραν ἐν Κορίνθῳ τὴν νῦν ἀγωνιζομένην, ὡς ἑταίραν οὖσαν τῶν μισθαρνουσῶν, καὶ συμπίνειν ἐν Κορίνθῳ Νέαιραν μεθ’ αὑτοῦ καὶ Ξενοκλείδου τοῦ ποιητοῦ. – „Hipparchos aus Athmonon bezeugt, dass Xenokleides und er selbst Neaira, welche nun prozessiert, in Korinth gemietet hatten, weil diese eine Hetäre war, eine von denen, die gegen Entgelt arbeiten, und dass Neaira mit ihm und Xenokleides in Korinth gefeiert habe.“

84 Als „sich verdingen“ gebraucht etwa auch bei Soph. Ant. 302.

85 Aischin. 1,40 und 52 gebraucht ebenfalls das Verb μισθαρνόω, vgl. dazu oben.

86 So auch ausdrücklich [Dem.] 59,21 hinsichtlich der Ausgaben, die Lysias (wohl der Redner) für Metaneira, eine Kollegin der Neaira, machte; vgl. dazu Paoli (1953) 66-67; Kapparis (1999) 211.

87 Lys. 3,5.

88 Dem. 59, 104; vgl. dazu Todd (2007) 279 A. 20.

89 Andok. 1,43; vgl. dazu oben.

90 Todd (2007) 280-281 mit Literatur und leichter Sympathie für diese Theorie; Todd (2000) 43.

91 Lys. 3,4.5.6.10.11.12.15.18.27.29.31.32.35 und 37 (zweimal).

Mann“[92]. Dies ist auf das Alter des Theodotos zu beziehen und damit auf seine Eignung zum ἐρώμενος. Neben dem noch unspezifischeren Ausdruck „junger Mann“ (νεανίσκος[93]) gebraucht Lysias auch einmal das möglicher Weise auf den Sklavenstatus hinweisende[94] Wort παίς[95], und einmal, in Lys. 3,33 bezeichnet der Redner den jungen Mann als παιδίον, das der Folter zugeführt werden konnte – ὃ … ἱκανὸν ἦν βασανιζόμενον. Wenn Theodotos also geeignet war, um zur βάσανος herausgefordert zu werden, so ist damit indiziert, dass es sich um einen Sklaven handelte[96]: Denn nur diese konnten einer Folter zur Zeugenbefragung unterzogen werden[97]. Das Argument, dass der Redner damit einen anderen Sklaven gemeint habe als Theodotos[98], wirkt da etwas gekünstelt; und auch, dass die Charakterisierung des Theodotos als παίδιον vor allem deshalb erfolge, um Mitleid heischend glaubhaft zu machen, dass sich dieser als „Kind“ gegen Angriffe von Simons Männern gar nicht hätte verteidigen können[99], schließt nicht aus, dass dieses παίδιον ein Sklave gewesen ist, worauf das βασανιζόμενον ja hinweist[100]. Schließlich lässt sich die „faktische Freiheit“ eines gemieteten ἑταῖρος, wie etwa auch durch den Fall der Neaira belegt[101], problemlos mit dem Sklavenstatus vereinbaren.

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92 Todd (2007) 277 definiert das mit: „*male, in his later teens*”.

93 Lys. 3,10;17 (zweimal).

94 Vgl. so Liddel / Scott / Jones (1968) s.v. παίς (III) mit Belegen; vgl. auch Todd (2007) 333.

95 In Lys. 3,40 wird dies angedeutet, wenn der Redner von seinen Auseinandersetzungen mit Simon als Kämpfen περὶ παίδων spricht; diese wenn auch generelle Feststellung ist auf den gegenständlichen Streit um Theodotos zu beziehen. Zum Text vgl. Todd (2007) 333 A. 42.

96 Thür (1977) 20 A. 43. Genau umgekehrt schließt Winkler (2002) 79, dass hier ein Beleg dafür vorliege, dass auch freie Nichtbürger bei Zeugenbefragung gefoltert werden durften, doch das passt nicht auf eine mögliche βάσανος des Theodotos. Freie Nichtbürger (Fremde und Metöken) konnten aber nur in bestimmten Fällen vermuteter Delikte gegen den Staat oder wegen Asebie gefoltert werden, um ein Geständnis oder die Angabe von Mittätern zu erzwingen; dieser Folter wurden also beschuldigte unterzogen und keine Zeugen, vgl. Thür (1972) 101.

97 Thür (1977) 22; Carey (1989) 87. Anders vermuten Cohen (2000) 128 A. 63, gestützt auf Gagarin (1996) 2, dass βάσανος hier nur „Befragung“ bedeute und nicht technisch im Sinne von „Folterung von Sklaven“ zu verstehen sei; dagegen Todd (2007) 333-334: Wenn dieser metaphorische Gebrauch auch für das Substantiv βάσανος gelten möge (vgl. etwa Andok. 1,30; 2,25; Lys. 12,31; 26,17), so ist dies für das Verb βασανίζειν zweifelhaft, vgl. Isokr. 17,15, wo dies mit λόγῳ πυνθάνεσθαι umschrieben wird, und dazu Thür (2018a) 230.

98 So etwa Blass (1887) 586 A. 3. Viel spricht dafür, das demonstrative τοῦτο (τὸ παίδιον) auf den eben als Begleiter des Redners ausgewiesenen Theodotos zu beziehen; ähnlich argumentiert Todd (2007) 333.

99 Lys. 3,33: παίδιον, ὃ ἐπικουρῆσαι μέν μοι οὐκ ἂν ἐδύνατο.

100 Vgl. dazu auch Carey (1989) 87; Todd (2000) 49 A. 8; Todd (2006) 103 A. 48, der als weiteres Indiz dafür die Verwendung des Begriffs μενοῦσαι anführt.

101 Vgl. so auch Thür (1977) 22 A. 42.

Daher scheint die Meinung Ismards, dass Theodotos ein Sklave gewesen ist[102], mit guten Gründen vertretbar.

Aufgrund des terminologischen Befundes und der Analyse der wenigen Belege aus Lysias' Rede gegen Simon, welche die μίσθωσις behandeln, ist es nicht möglich, eine eindeutige Qualifikation des Vertragsverhältnisses vorzunehmen und definitive Aussagen darüber zu treffen, ob Simon einen Dienstvertrag mit Theodotos abgeschlossen hat oder einen Mietvertrag mit dessen Herrn. In Zusammenschau mit den Reden gegen Neaira und Timarchos ergibt sich, dass auch spezifisch konnotiert wirkende Begriffe wie ἐκμισθοῦν oder μισθαρνοῦν sich terminologisch nicht ausschließlich der Miete oder dem Dienstvertrag zuordnen lassen. Der für das attische Vertragsrecht eingangs skizzierte Gedanke einer mangelnden Typenbildung findet hier Bestätigung, wobei daran zu erinnern ist, dass eine Schaffung von Subkategorien der „Verdingung" etwa auch im klassischen römischen Recht vorerst unterblieben war[103]. Eine Unterscheidung zwischen der μίσθωσις als Mietvertrag und der μίσθωσις als Dienstvertrag wäre für die Frage danach, wer denn Vertragspartei des Simon in Lysias 3 gewesen war, relevant, scheint aber für den Prozess wegen τραῦμα ἐκ προνοίας von nachrangiger Bedeutung zu sein. Es genügt, festzustellen, dass sich Simon (nach dem Sprecher unrichtiger Weise) als Partner eines Vertrages geriert, aus dem er Verfügungsmacht über die Dienste des Theodotos ableiten möchte; und dies wäre ihm nach beiden hier zur Wahl stehenden Modellen der Verdingung des Theodotos möglich, sei es als dessen Mieter, sei es als dessen Dienstnehmer.

Von einem Herrn des Theodotos ist nichts zu lesen, vielleicht auch eben deshalb, da aus der μίσθωσις τοῦ Θεωδότου sich keine Probleme der Haftung des μισθῶν ergeben[104]. Überlegungen wie jene, ob gegen Theodotos wegen Ausbleibens der Gegenleistung auch eine δίκη χρέως zur Diskussion stünde[105], sind daher rein akademischer Natur.

Doch auch hier würde der Herr des Theodotos als Eigentümer des vermieteten Sklaven zur Haftung herangezogen werden[106]. Dies ergibt sich aus dem bei Hypereides erwähnten, vielleicht solonischen[107] Gesetz, das die Haftung der Sklaveneigen-

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[102] Ismard bei A. 15.

[103] Vgl. dazu oben unter 1. und nochmals Mayer-Maly (1956) 18-19.

[104] Der Vorwurf richtet sich gegen den Sprecher selbst, vgl. Lys. 3,22 und dazu oben.

[105] So etwa Todd (2007) 330.

[106] Vgl. Carey (2002) 103. Ismard, Conclusion folgert auch daraus: „*The slave merely constitutes, within procedure, the focus of allocating an action whose master is, definitively, the only party held responsible – the slave is but an actor or an agent of the law, not a seperate legal entity.*"

[107] Während allerdings Ruschenbusch (1966) 116 dies als fr. 119 noch als mögliches solonisches Gesetz anführt, hat Ruschenbusch (2014) 11 dieses Testimonium nicht mehr bearbeiten können, weswegen nicht sicher ist, ob Ruschenbusch es in letzter Konsequenz auf Solon zurückgeführt hätte.

tümer für von diesen auferlegte Strafen[108] und begangene Delikte[109] (ζημίαι καὶ ἀδικήματα) vorschreibt[110]. Hypereides stellt die Passage – vielleicht etwas gekünstelt – in den Kontext des Kaufrechts[111]; ob diese Stelle für das – immerhin deliktisch konzipierte[112] – griechische Vertragsrecht auswertbar ist[113] und auf „*l'activité commercial des esclaves*“ insgesamt bezogen werden kann[114], müsste freilich näher untersucht werden[115].

Selbst also wenn Theodotos den Simon im Zuge seiner Leistungen Schaden zugefügt hätte – und davon ist nichts zu lesen –, selbst dann würde es hinsichtlich der Verantwortlichkeit keinen Unterschied ausmachen, ob der Sklave Theodotos vermietet worden war oder sich selbst zur Dienstleistung zur Verfügung gestellt hatte. Diese letzte Überlegung macht deutlich, dass sich zumindest die μίσθωσις des

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[108] Die Phrase ζημίαν ἐργάζεσθαι (ebenfalls belegt in Isai. 6,20) lässt sich am ehesten mit „Strafe einhandeln“ übersetzen, vgl. Liddel / Scott / Jones (1968) s.v. ζημία (1.2.) unter Verweis auf Hyp. 3,22 von „to be guilty of a delict“. Burtt (1954) 447 A.b. spricht diesbezüglich von „*an old legal phrase*“ und erwägt alternativ die Übersetzungen „eine Strafe erleiden“ oder „einen Verlust erwirtschaften“. In letzterem Sinne auch Liddel / Scott / Jones (1968) s.v. ζημία (1.1.) und vor allem Dimopoulou (2012) 230. Cooper in Worthington / Cooper / Harris (2001) 90 übersetzt hier zu frei mit „damages and losses“ und geht damit am Problem vorbei.

[109] Die Lesart von ἀδικήματα ist umstritten, da die erhaltenen Buchstaben ἀ[....]ατα sich auch zu ἀναλώματα, „Aufwand“ ergänzen ließen; dazu und zum Forschungsstand vgl. Meyer-Laurin (1979) 264 A.10 und Whitehead (2000) 323-325.

[110] Hyp. 3,22: ὃς εἰδὼς ὅτι πόλλαὶ ὠναὶ γίγνονται ἐν τῇ πόλει ἔθηκε νόμον δίκαιον, ὡς παρὰ πάντων ὁμολογεῖται, τὰς ζημίας ἃς ἂν ἐργάσωνται οἵ οἰκέται καὶ τὰ ἀδικήματα διαλύειν τὸν δεσπότην παρ' ᾧ ἂν ἐργάσωνται οἱ οἰκέται. – „Dieser, im Wissen darum, dass in der Stadt viele Käufe getätigt werden, erließ das gerechte Gesetz, dass bei allen anerkannt sei, dass der Eigentümer, bei dem die Sklaven arbeiten, die Verluste, welche die Sklaven erwirtschaften, auslösen müsse und die Delikte.“ Zum Kontext vgl. Scheibelreiter (2019a) 41 A. 53.

[111] Zur Taktik des Redners Epikrates vgl. zuletzt Scheibelreiter (2019a) 37-43.

[112] Vgl. statt aller Wolff (1957); vgl. so auch Dimopoulou (2012) 230, wonach das Gesetz im weitesten Sinne vertrags- und deliktsrechtliche Verantwortlichkeit des Herren eines Sklaven erfasse, welche rein dogmatisch gar nicht geschieden wurde, da auch aus einem Vertrag nur Schadenersatz und damit: deliktischer Anspruch resultieren konnte. Zur Diskussion, ob sich etwa auch die Haftung des Eigentümers für eine Schädigung (βλάπτειν) Dritter durch seine Sklaven aus Plat. Leg. 936d auch auf Vermögensschäden im vertraglichen Kontext beziehen ließe, vgl. die Diskussion von Klingenberg (*pro*) und Meyer-Laurin (*contra*) bei Meyer-Laurin (1979) 281-282.

[113] So auch Ismard nach A. 40: „*This law, which probably concerned slave labour, notably in the case of co-ownership, could also set the liability of the master in the context [of?] hired slaves*.”

[114] Dimopoulou (2012) 228-231.

[115] Dagegen, dass ein Sklavenhalter noxal für Schulden seines Sklaven haftete, spricht etwa, dass „*der Sprecher das Gesetz nicht direkt, sondern analog und noch dazu an letzter Stelle einer Reihe von mühsamen Analogieschlüssen herangezogen*“ hat, vgl. Meyer-Laurin (1979) 265 A. 10.

Theodotos und vergleichbare Verträge aus dem Corpus der attischen Redner aufgrund des uns überlieferten Quellenbestandes nicht genauer als Miet- oder Dienstvertrag definieren lassen. Eine solche Kategorisierung nach dogmatischen Gesichtspunkten scheint gar nicht möglich zu sein, lassen sich doch die für den Rechtshistoriker essentiellen „Unterschiede auf begrifflicher Ebene“, welche „Auswirkungen auf die dogmatische Erfassung“ des Vertrages haben[116], hier auf Grundlage der gebrauchten Terminologie nicht ausmachen. Indizien dafür, wie ein Vertrag von den Parteien ausgelegt worden ist, ergäben sich vielmehr einerseits aus konkreten Haftungsfragen und ergeben sich andererseits jedenfalls aus dem Status desjenigen, der zu Liebesdiensten gedungen worden ist.

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PENALTIES IN DELPHIC *PARAMONE* CLAUSES: A GENDER PERSPECTIVE*

Abstract: This paper discusses the legal capacity and motivations of female manumittors in Hellenistic Delphi, and the penal authority bestowed on female beneficiaries appointed in *paramone* clauses. These suggest that women enjoyed similar penal authority to that of male beneficiaries, depending on the stipulations in each contract. Manumissions appointing female beneficiaries of *paramone* may reflect the need to reduce the risk of claims asserted by heir or creditors of the beneficiary's male kin, whom it would often have been difficult for a woman to fend off through the courts.

Keywords: *paramone*, penalty clauses, corporal punishment, contracts, women's legal capacity

I. Introduction: the case of Polya

In the archonship of Dexondas, Polya daughter of Philinos sold a girl, Kallo, to Pythian Apollon for the price of two silver *mnai*. The sale was publicised in the sanctuary of Apollon at Delphi (*SGDI* 2269), and the inscription runs as follows:

> *In the archonship of Dexondas, in the month Boukatios. On these terms did Polya daughter of Philinos, with the endorsement of both her daughter, Herais, and her sons Megartas, Polytimidas and Philokrates and of his son, Erasippos, sell to Pythian Apollon a female person, a girl, Kallo by name, born in the household, for the price of two silver* mnai. *And she is in possession of the entire purchase price, according to the terms on which Kallo entrusted the purchase to the god, on condition that she should be free and not to be claimed as a slave by anyone. Kallo must stay with Polya as long as Polya is alive, carrying out every practicable instruction. If Kallo does not obey, Polya shall be authorised to punish Kallo as a free woman, in the way she wants. If anyone lays hands on Kallo with a view to enslaving her, any bystander shall be authorised to seize her back as a free woman, with impunity and with immunity from any legal action or penalty. Guarantor according to the laws of the city: Peisistratos son of Boulon. Witnesses: the priests of Apollon Andronikos, Praxias and the officials Alkinos, Praochos, and the lay*

* I am grateful to Dr D.J. Thompson for her comments and suggestions. All remaining errors are my own.

persons Peisistratos, Menes, Eukleidas, Philokrates, Theoxenos, Mnasias, Agathokles, Antichares.[1]

According to this record, Polya was in possession of money entrusted by Kallo to Apollon, so that the god could buy her from her owner. From the terms on which Kallo had entrusted her money to Apollon, it might be inferred that Kallo was from now on to be regarded as free. Yet, according to the terms of the sale, she was not free to leave the household of her former owner, nor to decide on her own day-to-day activities. She had to obey Polya's orders, and if she failed to do so, Polya was authorised to punish her (κυρία ἔστω Πολύα ἐπιτιμέουσα). Kallo's obligation to stay and serve her former owner was apparently open-ended, lasting until Polya's death. On the other hand, the terms of the sale offered Kallo a certain level of protection. Polya's commands were not to exceed the girl's capabilities, and, more importantly, when deciding on how to punish Kallo, Polya had to treat the girl as free (ὡς ἐλευθέραι).

At first glance, this text reads as a typical Delphic document pertaining to this kind of sale. Most of the clauses are formulaic and familiar, occurring time and time again in the Delphic records over the course of more than three centuries. On closer reading, though, several features stand out as interesting, and the text offers precious information about some of the individuals involved in the transaction.

Polya was in many respects a fortunate woman when she sold Kallo to Apollon. She had been blessed with no fewer than three sons (Megartas, Polytimidas and Philokrates), a grandson (Erasippos), and a daughter (Herais). She was probably advanced in years, and the fact that only her children and grandchild are explicitly recorded as supporting her decision suggests that she was a widow. But with four surviving children and a grandson into the bargain, she probably had less to worry about than most other elderly women in her position in regard to her chances of receiving care and support in her old age. As for Kallo, she had been born in Polya's household (τὸ γένος ἐνδογενῆ), and to judge from the designation of her as a 'girl'

[1] ἄρχοντος Δεξώνδα μηνὸς Βου[κα]τίου, ἐπὶ τοῖσδε ἀπέδοτο Πολύα Φιλίνου, συνευδοκεούσας καὶ τᾶ[ς] θυγατέρος Ἡραΐδος καὶ τῶν υἱῶν [α]ὐτᾶς Μεγάρτα, Πολυτιμίδα καὶ Φιλ[οκρ]άτεος καὶ τοῦ υἱοῦ αὐτοῦ Ἐρασίππου, τῶι Ἀπόλλωνι τῶι Πυθίωι σῶμα γυναικεῖο[ν] κοράσιον ἆι ὄνομα Καλλὼ τὸ γένος ἐνδογενῆ, τιμᾶς ἀργυρίου μνᾶν δύο, καὶ τὰ[ν] τιμὰν ἔχει πᾶσαν, καθὼς ἐπίστευσε Καλλὼ τῶι θεῶι τὰν ὠνάν, ἐφ' ὅτωι ἐλευθέραν εἶμεν καὶ ἀνέφαπτον ἀπὸ πάντων. παραμεινάτω δὲ Καλλὼ παρὰ Πολύαν ἕως κα ζώη Πολύα, ποιοῦσα τὸ ποτιτασσόμενον καὶ δυνατὸν πᾶν. εἰ δὲ μὴ πειθαρχοῖ Καλλώ, κυρία ἔστω Πολύα ἐπιτιμέουσα Καλλοῖ τρόπωι οἷ θέλοι ὡς ἐλευθέραι. εἰ δέ τις ἐφάπτοιτο ἐπὶ καταδουλισμῶι Καλλοῦς, κύριος ἔστω ὁ παρατυγχάνων συλέων ὡς ἐλευθέραν οὖσαν Καλλὼ ἀζάμιος ὢν καὶ ἀνυπόδικος πάσας δίκας καὶ ζαμίας. βεβαιωτὴρ κατὰ τοὺς νόμους τᾶς πόλιος· Πεισίστρατος Βούλωνος. μάρτυροι· τοὶ ἱερεῖς τοῦ Ἀπόλλωνος Ἀνδρόνικος, Πραξίας καὶ οἱ ἄρχοντες Ἀλκῖνος, Πράοχος, ἰδιῶται Πεισίστρατος, Μένης, Εὐκλείδας, Φιλοκράτης, Θεόξενος, Μνασίας Ἀγαθοκλέος, Ἀντιχάρης.

(κοράσιον) she was probably still quite young when she was sold to the god. The text does not mention who her parents were, nor whether they or anyone else had helped Kallo to furnish the purchase sum. Nor do we know if she was fortunate enough to outlive Polya, subsequently taking her life into her own hands.

Polya and her family appear also in *SGDI* 1686 that relates to a transaction carried out in the archonship of Soxenos, probably a few years later. In this document Polya is selling a female slave, Kastalia, to the god, with no specification of any obligations to be imposed on Kastalia. On this occasion, too, Polya's transaction was supported by her daughter Herais, her grandson Erasippos, and her son Polytimidas.[2] However, Megartas and Philokrates are both missing from the list. Perhaps they had been absent abroad when Polya sold Kastalia, or otherwise prevented from endorsing her transaction in person, or both may have died.

The text yields one further detail about Polya's family. She had had another daughter, Aristo, who is recorded as the mother of Polya's grandson Erasippos, son of Philokrates. Aristo herself is absent from both lists of Polya's descendants endorsing her transactions, and it is likely that Aristo had died. As for her son Erasippos, he had probably been adopted by his maternal uncle Philokrates before or after her death. This type of adoption is well attested also for classical Athens;[3] and it may in turn suggest that Philokrates himself was quite advanced in age.

The absence of three of Polya's five children from *SGDI* 1686 alerts us to the precarious position of elderly people in a world where mortality levels were high, and where adult men may regularly have spent extensive periods of time abroad, for example as soldiers or traders. Polya's circumstances will be considered again later, but first it is worth taking a closer look at the contract relating to the sale of Kallo, and the way it fits into a wider pattern of sales or dedications with *paramone*, as attested in inscriptions from Delphi.[4] The discussion will focus primarily on the Delphic manumission records as an important type of evidence for the authority that could be exercised by women, *de facto* as well as *de jure*, over other men and

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[2] *SGDI* 1686.3-4: συνευδοκεούσας καὶ τᾶς θυγατρὸς αὐτᾶς Ἡραΐδος καὶ τοῦ υἱοῦ Πολυτιμίδα καὶ Ἐρασίππου τοῦ τᾶς θυγατέρος υἱοῦ Ἀριστοῦς καὶ Φιλοκράτεος...

[3] *pace* Cromme (1962: 211) who identifies Philokrates as Aristo's husband. For Athenian adoptions by maternal uncles, see *e.g.* Isaios 3.1, 6.3, 11.49. A less likely explanation is that Philokrates and Aristo were uterine half-siblings, but the evidence for such unions is tenuous, except in Hellenistic Egypt. See *e.g.* Vérilhac and Vial (1998: 93-99) and, for a less sceptical approach, Vélissaropoulos-Karakostas (2011: 295).

[4] For the purposes of the present paper, the definition of *paramone* is broad, encompassing the conditions discussed under the heading 'deferred manumissions' by Zelnick-Abramovitz (2005: 222-234): it includes obligations that could be met even when it was not specified that the person sold or dedicated had to remain physically in the beneficiary's household. See *e.g.* *SGDI* 1791 and *FD* III 6: 95 (the persons sold are obliged to pay off *eranos* loans, but it is not specified that they must remain with their former owners).

women whose services had been assigned to them by the terms of their sale or dedication.

II. Female vendors and beneficiaries in the Delphic documents

It has often been noted that the number of female slaves sold or dedicated to Pythian Apollon far outnumber the number of males.[5] In 328 documents that impose obligations on the persons dedicated or sold, unfree females outnumber men nearly 3:2, as can be seen from Table 1 below. Scholars have also long noted the large number of female *vendors* in the Delphic texts,[6] a phenomenon which is particularly conspicuous in the documented sales with *paramone*.

Altogether 156 of the 328 documents involve women as designated vendors on their own or jointly with men, while 147 documents involve men as vendors, either alone or jointly with other men. 106 of the 156 contracts relate to transactions carried out by women who were acting alone or jointly with other women. In most of them the beneficiaries of the *paramone* clauses were the female vendors themselves, sometimes along with other designated male and female kin. In the 50 transactions in which women appear as joint vendors with men, most female vendors are acting jointly with their husbands, but there are also several transactions involving females acting jointly with their fathers, sons, grandsons, or brothers.[7] Here, too, it is most often the case that the joint vendors are also the joint beneficiaries of the *paramone* clauses, but it must be noted that some contracts designate the female vendor alone as beneficiary of the obligations imposed on the person(s) sold.[8]

Polya's position as sole vendor of Kallo, and as the beneficiary of Kallo's services during the period of *paramone*, thus conforms to a wider pattern observable in the Delphic documents. That is true also in a further respect: as can be seen from Table 1, female vendors tend to sell unfree females far more often than they sell males. Moreover, persons designated as 'children', especially as 'girls' (*korasia* or *koridia*), figure very prominently among the persons sold by women. The ratio of persons designated as 'children' to adults is far lower in transactions conducted by male vendors who acted alone or as joint vendors with other men. Table 2 shows a similar pattern for beneficiaries: the vast majority of the female beneficiaries are

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5 *e.g.* Tucker (1982).

6 *e.g.* Foucart (1867: 5-6), Bloch (1914: 13-14), Rädle (1969: 125-127).

7 See *e.g. FD* III 3: 26 (sister and brother), 6: 31 (father and daughter), *SGDI* 1792 (a grandmother, her daughter-in-law, and two grandsons; see Kränzlein (2010: 6-7 n.33)).

8 *e.g. SGDI* 1755 (two females sold by Kallis and Polytas of Lilaia, with Kallis as sole beneficiary), *FD* III 3: 300 (girl sold by Stephanos s. of Damokrates and Euklea d. of Dionysios, with Euklea as sole beneficiary), 4: 496 (woman sold by Polyxenos s. of Archon, represented by his *phrontistes*, and Harmodika d. of Harmodios, with Harmodika as sole beneficiary).

assigned the services of women and 'girls', while the ratio of persons designated as 'children' is conspicuously lower for male beneficiaries.

It is widely agreed that the Delphic evidence testifies to women enjoying considerable authority in matters of property, both in Delphi itself and in several of its adjacent regions, especially in relation to property consisting of enslaved human beings.[9] They were recognised not only as owners in their own right but also as entitled to administer and dispose of their property, without having to secure the consent of a male representative. There has long been a broad scholarly consensus that the persons recorded as endorsing or approving the transactions, as Polya's children and grandchild did, were not acting in a capacity as the women's *kyrioi*, but that their endorsement was recorded in order to prevent them or their future heirs from laying claim to the person(s) transferred into divine ownership.[10]

It is thus an uncontroversial observation that the women appearing in the texts from Delphi and elsewhere could and regularly did act independently, on their own authority, as vendors or dedicators. However, there has been far less discussion of the extent to which these women's entitlement and authority may have influenced the day-to-day relationships between female owners and their slaves, let alone a female beneficiary appointed in a *paramone* clause and the person who was obliged to serve her. Often penalty clauses were added to the specification of obligations in the *paramone* clause, to be applied by the beneficiary as punishment for non-compliance. The authority conferred on the beneficiary to administer punishment may throw some interesting additional light on questions pertaining to female authority inside and outside the household.

III. Female beneficiaries, penalty clauses, and female agency

Far from all *paramone* clauses were accompanied by penalty clauses, but the latter were frequently included in the inscribed texts: of 328 documents with *paramone* stipulations 256 add a penalty clause, while 72 do not. The contract relating to Polya' sale of Kallo is among the former, with its express permission for Polya to

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9 See *e.g.* Foucart (1867: 5-6), Bloch (1914: 13-14), Albrecht (1978: 301-305), Kränzlein (2010: 3-5). For an overview of the debate on the evidence from Phokis and adjoining regions along with other regions of Hellenistic Greece, see *e.g.* Zelnik-Abramovitz (2005: 130-147), Calero-Secall (2004: 86-92), Stavrianopoulou (2006: 188-196, mainly on Thera). Vérilhac and Vial (1998: 185-186) count 40 women acting alone without any recorded consent of kin, but they include only those examples for which the civic identity of the female vendors is known. For the Boiotian documents relating to consecrations, in which it is usually, but not always recorded that a female consecrator had been assisted by a male representative, see Darmezin (1999: 196-202).

10 In several documents, women endorse the transaction of both women and men, as mothers, daughters, wives, and sisters. For a range of examples of different permutations, see Cromme (1962: 195-201) and Albrecht (1978: 225-229). For a discussion of the purpose and function of the endorsement, including a critique of Cromme's interpretation, see Kränzlein (2010: 1-8).

discipline Kallo. It might be tempting to infer that the inclusion of a penalty clause would have been deemed desirable to prevent Polya's penal authority from being questioned because of her gender.

However, in combination the figures in Table 2 and Table 3 strongly indicate that neither the gender of the beneficiary nor the gender of the person bound by *paramone* were factors that had influenced the decision whether or not to include an explicit penalty clause. Penalty clauses are included in ca. 83% of the documents that designate females as beneficiaries of the *paramone*, and in 75% of the documents with male beneficiaries. Nothing suggests that it was regarded as more problematic for a female beneficiary to dispense punishment than for her male counterpart.

A related question is whether the methods and severity of punishment that could be administered by female beneficiaries were more restricted than those available to men. As mentioned earlier, by the terms of Polya's contract Polya was authorised (κυρία ἔστω) to punish Kallo (ἐπιτιμέουσα) as a 'free person' (ὡς ἐλευθέραι). This may mean that she had to refrain from administering corporal punishment, and in particular flogging,[11] opting instead for other types of punishment such as reduction of food rations, verbal chastisement, assignation of particularly unpleasant or onerous tasks, and monetary penalties.[12]

A parallel to the specific clause defining Polya's authority is found in only one other Delphic text, *SGDI* 1714, which is roughly contemporary with Polya's sale of Kallo. The text records the sale of a 'girl' (*korasion*) Sophrona by three joint vendors: a married couple, Bakchios son of Agron and Xenaina daughter of Theophrastos, and Dromon son of Dromon, whose relationship with the married couple cannot be determined. Dromon was appointed the sole beneficiary of the *paramone*, and like Polya he was allowed to choose only such punishment as would be suitable for a free person.[13] It is thus most unlikely that Polya's choice of punishment had been restricted because of her gender.

A further 30 documents confer penal authority on female beneficiaries by use of the punishment verb *kolazein*, rather than *epitimein*. Like *epitimein*, *kolazein* has a broad semantic range: in both literary and epigraphical sources it often encompasses

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[11] In Kallo's case, the issue is complicated by the fact that Kallo was designated as a 'girl' (κοράσιον): in some Greek communities it was permitted to impose corporal punishment on free children as well as on slaves (*e.g. IG* XII, 5, 569, Karthaia, C3). See further Klees (1998: 183-184).

[12] The verb *epitimein* itself is vague. In the Attic orators it can mean anything from a verbal reproach to a fine imposed by a court as punishment for embezzlement (Aisch. 1.113), or a financial penalty in the context of a contractual relationship (Dem. 56.10, *cf. ID* 366.16, Delos 207 B.C.). Its cognate noun, *epitimion*, is sometimes used with reference to far more severe punishment, including the death penalty (*e.g.* Lyk. 1.8).

[13] παραμεινάτω δὲ Σωφρόνα παρὰ Δρόμωνα ἕως οὗ κα ζώη Δρόμων ποιέουσα τὸ ποτιτασσόμενον καὶ δυνατὸν πᾶν· εἰ δὲ μὴ πειθαρχέοι Σωφρόνα, κύριος ἔστω Δρόμων ἐπιτιμέων Σωφρόνα τρόπωι ὧι θέλοι ὡς ἐλευθέρα.

corporal punishment, including the death penalty, as well as monetary penalties. In 22 of these documents, the women are sole beneficiaries of the *paramone*,[14] while in the remaining eight they share their penal authority jointly with male fellow beneficiaries.[15] In only one instance, *SGDI* 2202, do we find the authority to punish bestowed exclusively on the male beneficiary, Aristion, who otherwise shares the services of the *paidarion* Apollonios with a joint female beneficiary, Niko (perhaps his wife or daughter). In the Delphic inscriptions, this is the exception that proves the rule. As such it strongly indicates that the penalty clauses bestowing joint penal authority to be shared by male and female beneficiaries were more than just the result of careless drafting or unthinking replication of a standard formula.[16]

Indeed, other documents confirm that it was not at all unthinkable for female beneficiaries to administer corporal punishment. A number of penalty clauses permit the female beneficiaries to resort to flogging and other types of physical chastisement, including binding or confinement in addition to whipping and beating. The feminine participles leave the reader in no doubt that the women in question were allowed to administer the punishment in person.[17]

Moreover, several of the penalty clauses include a further stipulation that permits the beneficiary (or beneficiaries) to delegate the punishment for a third party to administer according to the beneficiary's instructions. This permission is given to both male and female beneficiaries, and it occurs both in penalty clauses that use the verb *epitimein* and in those which employ the verb *kolazein*.[18] In two further instances the delegation clause refers explicitly to punishment in the form of flogging and binding.[19] Such delegation would make only limited sense, unless the

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[14] *SGDI* 1748, 1752, 1755, 1767, 1775, 1799, 1823, 1830, 1836, 1852, 1855, 1924, 1925, 1945, 2015, 2034, 2066, 2229, 2233, *FD* III 2:169, 3:3, 3:337.

[15] *SGDI* 1707, 1708, 1717, 1757, 1890, 1942, 1944, *FD* III 3:6.

[16] If the restoration of lines 11-12 is correct, Darmezin 1999: 80 no. 113 (Orchomenos, C2 B.C.) may provide a parallel to *SGDI* 2202: here only the male beneficiary Hierokles is authorised to punish, while his female fellow beneficiary Ithippina is not.

[17] See *e.g.* *FD* III 3: 337 (κολάζουσα καὶ πλαγαῖ]ς καὶ [δ]εσμοῖς), 3: 351 (μαστιγοῦσα Σωτηρὶν καὶ ἐπιτιμέουσα), 3: 174 (ἐπιτιμέουσαι Ὀνασιφόρωι τρόπω ὧ[ι] κα θέ[λωντι] καὶ μαστιγοῦ[σα]ι καὶ διδέουσαι πλὰν μὴ πωλέουσα[ι]), *SGDI* 2171 (ἐπιτιμέουσα καὶ διδέουσα τρόπωι ὧι κα θέληι πλὰν μὴ πωλέουσα), *SGDI* 2216 (μαστιγοῦσα καὶ διδεῖσα καὶ ἄλλο ὅ κα θέληι ποιοῦσα).

[18] With the verb *epitimein*: *SGDI* 2163, *FD* III 1: 303, *BCH* 88 388 (male beneficiaries), *SGDI* 2092, *FD* III 2: 233, 2: 242, 3: 140, 6: 117, *BCH* 110 438,4 (female beneficiaries), *SGDI* 2159, *FD* III 2: 172 (joint male and female beneficiaries); with the verb *kolazein*: *SGDI* 1719, 1723, 1729, 1776, 1784, 1788, 1796, 1807, 1819, 1829, 1882, 1979, 2014, 2065, 2126, 2186, 2227, 2274, 2288 (male beneficiaries), *FD* III 3: 127, 3: 3, *SGDI* 1748, 1752, 1755, 1767, 1775, 1799, 1823, 1830, 1836, 1924, 2034, 2066, 2229, 2233 (female beneficiaries), *SGDI* 1708, 1757, 1890 (joint male and female beneficiaries).

[19] *FD* III 3: 127: παραμινάτω δὲ Σωτηρίδας Εὐπορία ποιῶν [τὸ ἐπιτασσόμ]ενον πᾶν. εἰ δὲ μὴ παραμείναι ἢ μὴ ποιῆ πᾶν [τὸ ἐπιτασσόμενον, κ]υρία ἔστω Εὐπορία διδεῖσα καὶ ψοφέο[υσα Σωτηρίδαν καὶ ἄλλ]ος ὑπὲρ Εὐπορίαν ὅν κα κελεύσ[η; SGDI 2216: εἰ

form of punishment permissible included physical chastisement, in addition to measures such as verbal reproach and monetary penalties. Indeed, it is striking that of the 51 documents containing a delegation clause, 24 pertain to cases of *paramone* imposed on males, including those designated as 'boys' (*paidaria*).[20] By contrast, the delegation clause occurs in only one single instance where the *paramone* is imposed on a female referred to as a 'girl' (*korasion*).[21] The distribution of the delegation clause makes good sense if the punishment envisaged included physical chastisement. The permission to delegate corporal punishment would have constituted an important additional deterrent in cases where men and teenage boys were to serve women or elderly, frail beneficiaries of both genders.

That the delegation clause was more than just a component of a fixed template is clear from two instances where the beneficiaries (both of them women) were explicitly *denied* the option of delegating their penal authority to a third party.[22] Thus, the inclusion of a delegation clause most likely depended on the individual circumstances of the beneficiaries in relation to the men, women and children who were obliged to serve them according to the terms of the contracts.

From the point of view of the persons bound by *paramone*, the most serious deterrent against breaching the terms of the contract would in many cases not have been the threat of corporal punishment. Far more menacing would be the prospect of a cancellation of the contract and subsequent sale to a third party, with the threat of hypothecation coming a close second. There are several instances where contracts authorise female beneficiaries of *paramone* to administer also these types of punishment; these texts thus provide additional evidence for the legal capacity of the women in question.

The apparent conflict between those texts that include an express prohibition against selling the person in *paramone* and the texts that permit punitive sale and hypothecation has given rise to a long and on-going scholarly debate. The documents that prohibit the sale or hypothecation of the persons sold have been taken by some scholars as an indication that the person in *paramone* was legally regarded as free, despite the restrictions on their activities and movement imposed

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δὲ μὴ παραμένηι Λαμία παρὰ Νικασώ, κυρία ἔστω Νικασὼ καί ἄλλος ὅν κα Νικασὼ θέληι Λαμίαν μαστιγοῦσα καὶ διδεῖσα καὶ ἄλλο ὅ κα θέληι ποιοῦσα.

[20] Delegation clause in texts imposing *paramone* on men (sometimes sold along with women): *SGDI* 1723, 1729, 1776, 1784, 1796, 1799, 1819, 1823, 1836, 1882, 1979, 2065, 2092, 2159, 2229, 2288, *FD* III 2: 172, 3: 127, *BCH* 88, 388; delegation clause in texts imposing *paramone* on 'boys' (sometimes sold along with women): *SDGI* 2163, *FD* III 1: 303, 304, 2: 233, 6: 117.

[21] *SGDI* 1708. This is all the more remarkable, because the girl's services are assigned to her own natural parents, who appear to have remained in the ownership of the vendor (for parallels, see Mulliez (2016 with n. 48-51)). See further Zelnick-Abramovitz (2005: 166).

[22] *FD* III 3: 303, 4: 504 (heavily restored).

by the terms of the contracts.[23] Others have emphasised the documents that expressly permit sale and/or hypothecation as a possible penalty for breach of the terms of the *paramone*, which may suggest that the persons in *paramone* remained unfree until the end of their term of service.[24] A third position is the one adopted by Zelnick-Abramovitz, who considers these conflicting stipulations as important evidence for the ambiguous attitudes towards persons in *paramone* and for the ambiguity of their status.[25]

We find express prohibition against selling the person in *paramone* in 36 of the 256 documents with penalty clauses. There is no discernible differentiation along gender lines: the prohibition is imposed on 11 female, 14 male, and 10 joint male and female beneficiaries.[26] In one case, the restriction is even accompanied by a clause that invites any bystander to seize back the person in *paramone* 'as free' (ὡς ἐλευθέραν), if the beneficiary were to violate the prohibition. Not only is this a powerful warning to any potential buyer who might be tempted to strike a deal; it also testifies to an awareness that a beneficiary might be tempted to sell the person in *paramone* even when this was expressly forbidden by the contract.[27]

By contrast, explicit permission for the beneficiaries, male and female alike, to resort to punitive sale or hypothecation is found in only four (possibly five) documents. In one instance punitive sale was permitted only if the person sold to Apollon failed to remain altogether, but not as punishment for failure simply to carry out instructions.[28] In another two documents punitive sale was available as punishment for both types of offence and seems to have been entirely at the discretion of the beneficiaries.[29] The fourth contract stops short of expressly

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[23] See *e.g.* Zanovello (2016: 70-71), Lewis (2018: 71-72).

[24] *e.g.* Bloch (1918: 27-28); see more recently Sosin (2015) esp. pp. 335-341.

[25] (2005: 234), further elaborated and supported in Zelnick-Abramovitz (2018: 390-398).

[26] Female: *FD* III 2: 233, 242, 3: 45, 174, 346, 364, 4: 504, *SGDI* 1799, 2140, 2158, 2171; male: *FD* III 2: 243, 247, 3: 12, 27, 434, 4: 71; *SGDI* 1723, 2019, 2163, 2186, 2190, 2274, 2288, *BCH* 68/69 111,22; joint: *FD* III 3: 32, 130, 306, 369, 374, 411, 6: 118, *SGDI* 2156, 2159, 2225.

[27] SGDI 2019: κύριος ἔστω Ἀριστόφυλος κολάζων οἷ κα θέληι τρόπωι, πλὰν μὴ πωλησάτω{ι} μηθενί. εἰ δὲ ἀποδοῖτο, ὁ παρατυχὼν κύριος ἔστω συλέων Λαδίκαν ὡς ἐλευθέραν.

[28] *FD* III 3: 175 (εἰ δὲ μὴ παραμένοι, κύ[ριο]ς ἔστω Ἀβρόμαχος καὶ πωλέων Ἀγαθοκλῆ καὶ ὑποτιθείς. εἰ δὲ μὴ ποιέοι τὸ ἐπιτασσόμενον πᾶν τὸ δυν̣[α]τόν, κύριος <ἔσ>τω Ἀβρόμαχος ἐπιτιμέων τρόπω ὧ κα θέλη, πλὰν μή <πωλέων>)

[29] *FD* III 3: 337 (εἰ δέ τι τῶν προγεγραμμέ]νων σωμάτων μὴ πειθαρχέ[οι] [ἢ μὴ π]οιέοι τὸ ἐπι[τασσ]όμενον ὑπὸ Μενεκρατείας, ἐξουσίαν ἐχέτω Μενεκράτεια εἴτε κα θέλη̣ πωλεῖν τῶν προγ[εγ]ραμμένων τι σωμάτων [πωλέουσα εἴτε κολάζουσα καὶ πλαγαῖ]ς καὶ [δ]εσμοῖς καθώς κα θέλη̣), 3: 329 (εἰ δὲ μὴ παραμ[ένοι Εἰσιὰς ἢ μὴ π]οιέοι [τὸ] ἐπιτασσόμεν[ον], ἐξουσίαν ἐχέτω Κλεόμαντις ἐπιτειμέων τρόπ[ω̣ ᾧ κα θέλη̣ καὶ ψο]φέων καὶ διδέ[ων] καὶ πωλέων).

permitting sale, but it does authorise the female beneficiary (κυρία δὲ ἔστω) to resort to hypothecation as a form of punishment for insubordination.[30]

Although the number of express permissions to resort to punitive sale or hypothecation is dwarfed by the number of prohibitions against this type of punishment, it is important to note that an additional 23 documents stipulate that the sale to the divinity is to be void, if the person sold fails to comply with the terms of the *paramone*.[31] Bloch (1914: 28-29) treats these as a variant of the penalty of punitive sale. This makes sense in so far as the latter would necessarily have presupposed a cancellation of the contract, even when this is not stipulated explicitly.[32]

Just as in the cases of contracts permitting punitive sale or hypothecation, there is considerable variation when it comes to the types of transgression that might lead to cancellation of the contract. These include active embezzlement of the beneficiary's property,[33] failure to remain in the beneficiary's household or city,[34] failure to carry out reasonable orders satisfactorily,[35] and a range of other offences of omission or commission.[36] In these cases too, there seems to be no clear

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[30] *FD* III 2: 242 (κυρία δὲ ἔστω Κρατησίπολις κ[αὶ] ὑποτιθεῖσα Ζωΐλαν, εἴ [κα μὴ Ζωΐλα π]οιῇ αὐτὰ τὰ δίκαια.) See also *FD* III 2: 233; here hypothecation may have been permitted to the female beneficiary not only as punishment but also in case of financial hardship (*cf. FD* III 6: 39 with Zelnick-Abramovitz (2018: 386-387) permitting the sale πρὸς ἔνδειαν of children – otherwise defined as free, ἐλεύθερα – born during their mother's *paramone*).

[31] *SGDI* 1867, 1832, 1759, 1804, 1819, 1747, 1721, 1718, 1878, 1854, 1702, 1884, 1791, 1811, 1830, *FD* III 3: 6, 3: 8, *SGDI* 1689, 1944, *FD* III 3: 21, 6: 92, 6: 87, 6: 95.

[32] The converse does not always apply. In some cases where the beneficiary was a third party rather than the vendor(s), cancellation of the contract most likely resulted in the slave being returned to his or her former owner, while the consequences for the beneficiary may have varied, depending on his/her relationship with the vendor. One example of such a case is that of Thrakidas (*SGDI* 1884). He is obliged to stay with the vendor Alexon until the latter's death and, after that, to provide for Dorkas, who may have been Thrakidas' mother (Mulliez: 2016), and whom Alexon had sold to Apollon in *SGDI* 2062.The sale will be void if Thrakidas fails to support her, with the likely result that he will become the property of Alexon's two sons.

[33] *SGDI* 1819: the male beneficiary Maraios may punish (κολ[ά]ζειν) Komikos and Ionis as he wishes and may delegate the punishment to a third party (καὶ ἄλλωι ὑπὲρ Μαραῖον ὅγ κα Μαραῖος κελεύῃ) with immunity for both himself and the third party from any penalty or lawsuit (ἀζαμίοις ὄντοις καὶ ἀνυποδίκοι[ς π]άσας δίκας καὶ ζαμίας). This punishment can be imposed if Komikos and Ionis fail to carry out orders to the best of their ability (εἰ δέ τί κα μὴ ποιήσῃ Κωμικὸς ἢ Ἰωνὶς τῶμ ποτιτασσομένων ὑπὸ Μα[ρ]αίου καθὼς γέγραπται δυνατοὶ ἐόντες). However, if either of them is caught in embezzlement, the sale itself is declared void (εἰ δέ τι νοσφίξαιντο Κωμικὸς ἢ Ἰωνὶς τῶμ Μαρα<ί>ου καὶ ἐξελεγχθείη{ι}σαν, ἄκυρος ἔστω αὐτῶν ἁ ὠνὰ καὶ ἀτελής).

[34] *FD* III 3: 21, 6: 87, 6: 92, *SGDI* 1702, 1718, 1721, 1747, 1830, 1832, 1944.

[35] *FD* III 3: 6, 3: 8, *SGDI* 1689, 1854, 1811, 1884.

[36] The most common offence leading to cancellation is failure to honour financial obligations specified in the contract: *FD* III 6: 95, *SGDI* 1718 (punishment for selling

distinction between the authority that could be exercised by female and male beneficiaries respectively: six of the cancellation clauses are found in contracts with female beneficiaries, while a further three pertain to contracts where men and women jointly are assigned the services of the person(s) sold to the god.[37]

An important question is whether these beneficiaries, male or female, were authorised unilaterally to cancel the contract as a form of punishment. In two instances the answer is clearly no: the contracts explicitly prescribe a process of arbitration for settling disputes between the persons in *paramone* and the beneficiaries, including over complaints that the former were not complying with their contractual obligations.[38] This kind of stipulation indicates a certain parity in standing between the beneficiaries and the persons in *paramone*; this is all the more interesting since *SGDI* 1689 pertains to a relationship between a male beneficiary and the woman and her son who are obliged to serve him. Yet, in the remaining 21 cases, it cannot be inferred that arbitration would invariably be required before the contract could be declared void. Indeed the two cases just mentioned may even have been exceptions to a more general rule that the beneficiaries, whether male or female, would be authorised to cancel the contracts unilaterally by formally declaring that the persons in *paramone* had failed to comply with their contractual obligations.

As for the arbitration clauses more generally, it must be noted that such a clause is included in only nine of the inscribed contracts from Delphi. From its distribution it can be categorically ruled out that arbitration was regularly prescribed so as to restrict the penal authority of female beneficiaries in particular: only one of these contracts (*SGDI* 1696) nominates a female beneficiary, while another seven nominate male beneficiaries,[39] and one contract a married couple (*SGDI* 2049).

It is hard to tell from these nine instances how frequently the contracts provided for arbitration and thus afforded protection to the person(s) in *paramone* against the unilateral imposition of not only punitive sale, mortgaging and cancellation of the contract, but also other types of penalty, including corporal punishment. As has

any produce that the woman in *paramone* has made outside the household of the beneficiary or his heirs), 1791, 1804, 1867, 1878. *SGDI* 1759 and 1878 prescribe cancellation of sale as punishment if the persons in *paramone* make a gift of their own property during their lifetime.

[37] Female beneficiaries: *FD* III 3:8, 3:21, 6:92, *SGDI* 1721, 1830, 1867; joint male and female beneficiaries: *FD* III 3:6, *SGDI* 1884, 1944.

[38] *SGDI* 1832 (εἰ δὲ ὁ μὲν φαίη ἀνενκλήτως παραμένειν καὶ μηθὲν κατὰ Ἀμύντα κακὸν πράσσειν μηδὲ κατὰ τοῦ υἱοῦ Ἀμύντα, Ἀμύντας δὲ εἰ ἐνκαλέοι ἢ ὁ υἱὸς αὐτοῦ Ἀμύντας Σωτηρίχω, κριθέντω ἐν ἄνδροις τρίοις οὓς συνείλοντο, Διοδώρω Μνασιθέου, Κλευδάμω Κλέωνος, Ἀρχελάω Θηβαγόρα· ὅ τι δέ κα οὗτοι κρίνωντι ὀμόσαντε[ς], τοῦτο κύριον ἔστω·) and 1689 (εἰ δὲ μὴ ποιέοιν Νικαία καὶ Ἰσθμός, μὴ ἔστω βέβαιος αὐτοῖς ἁ ὠνά, ἀλλὰ ἄκυρος ἔστω. εἰ δέ τι ἐνκαλέοι Σωσίας Νικαία ἢ Ἰσθμῷ, ἐπικριθέντω ἐν ἄνδροις τρίοις· ὅ τι δέ κα οὗτοι κρίνωντι, κύριον ἔστω).

[39] *SGDI* 1689, 1694, 1832, 1858, 1874, 1971, 2072.

often been emphasised in the modern debate, the inscribed texts were clearly redacted versions of the original contracts written on perishable material.[40] Therefore, the absence of an arbitration clause from the inscribed version does not *eo ipso* permit the inference that arbitration was not envisaged: it may simply have disappeared from our records as the result of a process of redaction and abridgement.

Yet, it is striking that not a single one of the nine contracts providing for arbitration contains a regular penalty clause that authorises the beneficiary to punish the person in *paramone*. This points to the arbitration clause constituting an *alternative* rather than a complement to the penalty clauses. That in turn invites the conclusion that arbitration or judgement by a third party was not a regular, let alone mandatory, requirement that might otherwise have tempered the penal authority of the beneficiary and the scope for unjustified or disproportionate punishment. That scope was most likely wide: in many instances the decision to punish would have rested on the beneficiary's subjective judgement of what would have constituted satisfactory or 'irreproachable' (*anenkletos*) compliance with orders and assignments that were regarded as within the capabilities (*dynaton*) of the person in *paramone*.

The penalty clauses themselves contain a number of further indications that the beneficiaries, female and male alike, would often be authorised to impose even very severe penalties unilaterally and summarily. The vast majority of the surviving penalty clauses use procedural vocabulary that was regularly deployed in other types of contracts as well as in legal enactments which authorised officials or private individuals to impose summary punishment and to carry out its execution (*praxis*).[41] A large number of the penalty clauses define the beneficiary as authorised (*kyrios*/*kyria*) to punish, or state that the beneficiary shall have licence to impose a punishment (ἐξουσίαν ἐχέτω or ἐξέστω *c. dat.*).[42] The authorisation clause is frequently combined with a 'tropos clause', *i.e.* a stipulation that the beneficiary may punish 'in whichever way he/she wishes', occasionally tempered by restrictions such as a prohibition against sale as mentioned earlier.[43] Most importantly, the

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[40] *e.g.* Bloch (1914: 11-12), Kränzlein (2010: 113-114), Mulliez (1992: 34-37), (2014: 59-60), Harter-Uibopuu (2013: 287-291).

[41] For a discussion of the vocabulary deployed in *praxis* clauses in classical and Hellenistic Greek inscriptions, see Rubinstein (2010: 200-209); for a discussion of the very similar terminology associated with the imposition of summary penalties, see Rubinstein (2018: 116-122).

[42] For penalty clauses designating female beneficiary as authorised, *kyria*, to punish *see e.g.* *SGDI* 1799, 1823, 1852, 1924, 1925, 1945, 2015, 2034, 2140, 2269; *FD* III 2:169, 223+224 = *SEG* 22:485, 242, 3: 45, 289, 364, 6:117.

[43] For the combination of authorisation clause and *tropos* clause applied to female beneficiaries see *e.g.*, in addition to the texts in n. 41, *SGDI* 1748, 1752, 1755, 1757, 1767, 1775, 1830, 1836, 2066, 2158, 2192, 2199, 2208, 2229, 2233, 2267; *FD* III 1:566, 2:172, 3:3, 280, 296, 311, 313, 346, 347, 4:504, 6:33, 34, 58 etc.

authorisation and *tropos* clauses are sometimes accompanied by an immunity clause which exempt the beneficiary from any penalty or prosecution relating to the punishment dispensed by them or by a third party whom they had instructed to carry out the punishment on their behalf.[44]

The authorisation clause on its own, or even in combination with the *tropos* clause, does not entirely rule out that the beneficiary's decision to punish might require prior approval from a board of arbitrators. Nor does it rule out that the person in *paramone* might subsequently appeal to a third party with a complaint about unjustified or excessive punishment. However, whenever a penalty section contains an immunity clause, it is safe to infer that the involvement of arbitrators was *not* envisaged either before or after punishment. In these cases the decision on when and how to punish rested with the beneficiary alone and could be administered unilaterally with few or sometimes even no specific restrictions.

The frequent inclusion of authorisation, *tropos*, and immunity clauses in contracts nominating female beneficiaries is again noteworthy. It provides another strong indication that there was no significant differentiation made on the basis of gender in regard to the beneficiary's penal authority, which was often very considerable indeed. These contracts thus offer an important extra dimension to the modern discussion of the legal standing and agency of women in Hellenistic Delphi and adjacent regions.

IV. Penalty clauses, *paramone*, and the problem of redaction

The heterogeneity of the penalty clauses in the Delphic *paramone* provisions has been highlighted by Zelnick-Abramovitz (2005: 234-235), along with its implications for the broader question of the legal standing of a person in *paramone*. The many variations even in documents that are roughly contemporary with each other suggest that the individuals who negotiated and drew up the contracts had considerable discretion even on matters that so fundamentally defined the future relationship between the person in *paramone* and the beneficiary. In reality, it would probably most often have been the vendor(s) who had the whip hand, as argued by Zelnick-Abramovitz (2018: 394-398). As far as the penalty stipulations are concerned, there seem to have been few, if any, legal restrictions on the procedures and types of punishment that could be permitted to the beneficiary.

Yet even if there were only few formal legal limitations on the discretion exercised by the parties to such a contract, it is still an important question what would have been regarded as the norm. Likewise it has to be asked to what extent we can detect any development over time of the social and moral conventions that

[44] For examples of immunity clauses, combined with authorisation and *tropos* clauses, that protect female beneficiaries and occasionally third parties acting on their instructions, see *e.g. SGDI* 1748, 1752, 1755, 1757, 1767, 1775, 1799, 1823, 1830, 1836, 2034, 2066, 2229, 2233; *FD* III 1:566, 2:169, 172, 3:3, 347.

may have influenced the way in which the contract and their *paramone* stipulations were drawn up and their terms negotiated.

Those questions are particularly important for our approach to penalty clauses that do not contain provisions either permitting or forbidding punitive sale or hypothecation. The same applies when a contract does not contain any clause that would allow us to decide if penalties could be imposed summarily, unilaterally and without accountability by the beneficiary, or whether the decision might be subject to arbitration. And what of the documents that explicitly permit the whipping and binding of the person in *paramone*? Can it be assumed *e contrario* that such corporal punishment was not permissible, unless this was expressly stated in the contract? And is it safe to assume *e silentio* that delegation of punishment was forbidden in those cases where the contract did not explicitly permit it?

Here the Delphic documents are extremely treacherous. As mentioned earlier, it is widely recognised that the documents inscribed on stone were redacted versions of contracts written on perishable material, and also that archival practices changed over time.[45] For each Delphic document, then, a fundamental question has to be what relation the inscribed text bears to the original papyrus document. Above all, it has constantly to be borne in mind that the redacted document may not have included all the provisions and features set out in the papyrus – not even those that were most salient to the future relationship between the person in *paramone* and the beneficiary.

The sale by Philon son of Telesarchos of Histio in 175/4 B.C. may illustrate the methodological challenges presented by the inscriptions. For some reason, the text of the original contract was twice inscribed on stone – or, to be precise, parts of it were. As noted by Mulliez (2016: n. 17), the inscriptions are not just two copies, but two different versions of the same contract. The two documents run as follows.

> *SGDI* 1807:
> *In the archonship of Archelaos son of Damosthenes in the month Poitropios. On these terms did Philon son of Telesarchos sell to Pythian Apollon a female person, Histio by name, for the price of two silver* mnai*. Warrantor according to the law: Dromokleidas son of Agion of Delphi. Histio must stay with Philon for as long as Philon is alive, carrying out every instruction in so far as it is possible. If Histio does not do this or if she does not stay, then it shall be permitted for Philon, or for someone else on Philon's behalf, to punish her as they wish, without being subject to penalty or lawsuit. When Philon dies, Histio shall be free both being her own mistress and running away to wherever she wishes, according to the terms on which she entrusted the purchase to the god. If anyone lays hands on Histio after Philon has died, the warrantor must warrant*

[45] See recently Harter-Uibopuu (2013: 281-294) and Mulliez (2014). The grave methodological problems presented by the omission from the inscriptions of clauses and stipulations in the papyrus documents were also highlighted by Kränzlein (2010: 154-156).

the purchase for the god. Likewise, the bystanders, too, shall be authorised to seize her back as a free woman without being liable to penalty and with immunity from any lawsuit or fine. Every month at the New Moon and on the seventh day she must crown Philon's statue with a plaited wreath of laurel. Witnesses: the priests of Apollon Athambos, Amyntas and the officials Boulon, Melision, Xenon; lay persons: Mantias son of Kleudamos, Xeneas son of Babylos, Kallieros, citizens of Delphi. [46]

SGDI 2085:

In the archonship of Archelaos son of Damosthenes in the month Poitropios. On these terms did Philon son of Telesarchos sell to Pythian Apollon a female person, Histio by name, for the price of two silver mnai. *Warrantor according to the law: Dromokleidas son of Agion of Delphi. Histio must stay with Philon for as long as Philon is alive, carrying out every instruction in so far as it is possible. If Hestio* (sic!) *does not do this or if she does not stay, then it shall be permitted for Philon to do whatever he wants. If anything happens to Philon, Histio shall be free and protected from seizure by anybody, being her own mistress, according to the terms on which she entrusted the purchase to the god. It shall not be permitted for Histio to live anywhere except from in Delphi. Every month at the New Moon and on the seventh day she must crown Philon's statue with a plaited wreath of laurel. Witnesses: the priests Athanbos, Amyntas and the officials Boulon, Melission; lay persons: Mantias son of Kleudamos, Xeneas son of Babylos, Kallieros, citizens of Delphi.*[47]

[46] ἄρχοντος Ἀρχελάου τοῦ Δαμοσθένεος μηνὸς Ποιτροπίου, ἐπὶ τοῖσδε ἀπέδοτο Φίλων Τελεσάρχου τῶι Ἀπόλλωνι τῶι Πυθίωι σῶμα γυναικεῖον ἆι ὄνομα Ἱστιώ, τιμᾶς ἀ[ργυ]ρίου μνᾶν δύο. βεβαιωτὴρ κατὸν νόμον· Δρ[ο]μοκλείδας Ἁγίωνος Δελφός. παραμεινάτω {ι} δὲ Ἱστιὼ παρὰ Φίλωνα μέχρι κα ζώ[η Φ]ίλων, ποιέουσα πᾶν τὸ ποτιτασσόμεν<ον> τὸ δυ[ν]ατόν· εἰ δέ κα μὴ ποιῆ Ἱστιὼ ἢ μὴ παραμ[ε]ίνη, ἐξέστω Φίλωνι ἢ ἄλλω ὑπὲρ Φίλωνα κολάζειν ὥς κα θέλωντι ἀζαμίοις ὄντοις κ[α]ὶ ἀνυποδί[κ]οις. εἰ δέ τί κα πάθη Φίλων, ἐλευθέρα [ἔ]στω Ἱστιὼ κυριεύουσά τε αὐτοσαυτᾶς κα[ὶ] ἀποτρέχουσα οἷς κα θέλη, καθὼς ἐπίστευσε τῶι θεῶι τὰν ὠνάν. εἰ δέ τίς κα ἅπτηται Ἱστιοῦς ἐπεί κα [τε]λευτάση Φίλων, βέβαιον παρεχέτω ὁ βεβαι[ω]τὴρ τῶι θεῶι τὰν ὠνὰν κατὰ τὸν νόμον. ὁμο[ί]ω[ς] δὲ καὶ οἱ παρατυνχάνοντες κύριοι ἐόντων συλέοντες ὡς ἐλευθέραν οὖσαν ἀζάμιοι [ἐ]όντες καὶ ἀνυπόδικοι πάσας δίκας καὶ ζαμίας. στεφανούτω δὲ κατὰ μῆνα νουμηνία καὶ ἑβδόμα τὰν Φίλων[ο]ς εἰκόνα δαφνίνω στεφάνω πλεκτῶ. μάρτυρες· τοὶ ἱερεῖς τοῦ Ἀπόλλωνος Ἄθαμβος, Ἀμύντας καὶ οἱ ἄρχ[ο]ντες Βούλων, Με<λ>ισίων, Ξένων, ἰδιῶται Μαντίας Κλευδάμου, Ξενέας Βαβύλου, Καλλίερος Δελφοί.

[47] ἄρχοντος Ἀρχελάου τοῦ Δαμοσθένεος μηνὸς Ποιτροπίου, ἐπὶ τοῖσδε ἀπέδοτο Φίλων Τελεσάρχου τῶι Ἀπόλλωνι τῶι Πυθίωι σῶμα γυναικεῖον ἆι ὄνομα Ἱστιώ, τιμᾶς ἀργυρίου μνᾶν δύο. βεβαιωτὴρ κατὰ τὸν νόμον· Δρομοκλείδας Ἁγ<ί>ωνος Δελφός. παραμεινάτω δέ Ἱστιὼ παρὰ Φίλωνα μέχρι κα ζώη Φίλων ποέουσα πᾶν τὸ ποτιτασσόμενον τὸ δυνατόν· εἰ δέ κα μὴ ποιῆ Ἑστιὼ ἢ μὴ παραμείνη, ἐξέστω Φίλωνι ὅ κα θέλη ποε<ῖ>ν. εἰ δέ τί κα πάθη Φίλων, ἐλευθέρα ἔστω Ἱστιὼ καὶ ἀνέφαπτος οὖσα ἀπὸ πάντων, κυριεύουσα αὐσωτᾶς, καθὼς ἐπίστευσε τῶι θεῶι τὰν ὠνάν. μὴ ἐξέστω δὲ Ἑστιὼ ἀλλαχᾶι κατοικε<ῖ>ν, ἀλλ' ἢ ἐν Δελφο[ῖ]ς. στεφανούτω δὲ κατὰ μῆνα νουμηνίαι καὶ ἑβδόμα τὴν Φίλωνος εἰκόνα δαφνίνωι στεφάνωι πλεκτῶι.

In both texts Philon appears both as vendor and beneficiary of the *paramone* provision, but the two versions differ quite significantly from each other in regard to their specifications of Philon's penal authority and of Histio's obligations after Philon's death. While *SGDI* 1807 permits Philon not only to punish Histio in whichever way he wants, but also to delegate the punishment with full immunity for himself and his representative, *SGDI* 2085 states simply that Philon shall be allowed 'to do whatever he wants', if Histio fails to stay or obey his orders. And while *SGDI* 1807 contains an elaborate formula that aims to protect Histio from seizure and enslavement by granting immunity from prosecution to volunteers who intervened, *SGDI* 2085 employs a shorthand that simply makes her 'protected from seizure by anybody'.

Above all, the differences between the two texts show conclusively that *SGDI* 2085 was not just an abridged version of the longer and more detailed *SGDI* 1807: both texts oblige Histio to crown Philon's statue twice a month, but only *SGDI* 2085 demands explicitly that she must continue indefinitely to reside in Delphi. This provision is a serious qualification of the formula included in *SGDI* 1807 that she is to be free to 'run away to wherever she wishes' – a provision that is entirely absent from *SGDI* 2085.

The wider methodological implications for our use of the Delphic documents are as clear as they are serious. Arguments from silence are extremely dangerous, even when the documents in question are rich in detail. The rarity of arbitration clauses does not *in itself* permit the inference that arbitration provisions were exceptional; similarly, the absence of an authorisation, *tropos* and immunity clause does not in itself show that the beneficiary had no power to impose penalties summarily. Likewise, when a given document neither forbids not permits punitive sale, hypothecation, or cancellation of the contract, we have to content ourselves with a *non liquet*, unless further information is available. As is clear from *SGDI* 1807 and 2085, such clauses may have been included in the papyrus original, but subsequently sacrificed in a process of abridgement.

Who would decide what was to be included or omitted in the inscribed version – the vendor, the person sold to the god, or the sanctuary personnel? Although it is widely assumed that it would be the person sold who stood to gain most from having the sale publicised durably and authoritatively as a protection of him or her against re-enslavement, strong arguments have been made in favour of the vendor being responsible for having the sale inscribed on stone and for the associated costs.[48] Philon's case lends further support to this conclusion, and it further suggests that Philon himself may have had a significant influence on the process of redaction.

μάρτυρες· τοὶ ἱ<ε>ρεῖς Ἄθανβος, Ἀμύντας καὶ οἱ ἄρχοντες Βούλων, Μελισσίων, Ξένων, ἰδιῶται Μαντίας Κλεοδ[ά]μου, Ξενέας Βαβύλου, Καλλίερος Δελφοί.

48 See recently Mulliez (2014: 56-57).

As mentioned above, the penalty clause in *SGDI* 2085 permits Philon, *tout court*, to 'do whatever he wants' (ὅ κα θέλη ποεῖν), a formula that is attested in only three other Delphic documents: *SGDI* 1731, 1743 and 1801. *SGDI* 1801 pertains to a sale made by the very same Philon of another female slave, Leaina:

> *In the archonship of Sosinikos in the month Ilaios. On these terms did Philon son of Telesarchos sell to Pythian Apollon a female person, Leaina by name, for the price of five silver* mnai. *Warrantors: Athambos son of Athanion, Menestratos son of Eucharidas, citizens of Delphi. Leaina must stay with Philon for as long as Philon is alive, working and obeying Philon. If she does not do any of these things, it shall be permitted for Philon to do whatever he wants to Leaina. When something happens to Philon, Leaina shall be free and protected against seizure by anybody for all time, being her own mistress and doing whatever she wants, according to the terms on which she entrusted the purchase to the god on condition that she shall be free; and she shall stay wherever she wants, but she must live in Delphi and she must crown Philon's statue twice a month with a plaited wreath of laurel at the New Moon and on the seventh day. Witnesses: the priests Athambos, Amyntas and the officials Alkeinos, Andromenes; lay persons: Taranteinos, Herys, Deinon, Polykrates, Kallieros, Lykidas, Echekles.*[49]

It is worth noting the meticulous inclusion in both *SGDI* 2085 and 1801 of provisions relating to the crowning of Philon's statue, in stark contrast to the very brief provisions offering protection to Histio and Leaina respectively. Clearly, Philon's priorities take pride of place in these two inscriptions.

We do not know what later happened to Histio, or why Philon sold Leaina with roughly the same obligations a year later. As for Leaina, she obtained release, *apolysis*, from her daily chores some six years later (*SGDI* 1751):

> *In the archonship of Kleon, in the month Poitropios, the second, did Philon son of Telesarchos sell to Pythian Apollon a female person, a girl Philokrateia by name, according to the terms on which Philokrateia entrusted the purchase to the god, on condition that she shall be free and protected against seizure by anybody for all time, for*

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[49] ἄρχοντος Σωσινίκου μηνὸς Ἰλαίου, ἐπὶ τοῖσδε ἀπέδοτο Φίλων Τελεσάρχου τῶι Ἀπόλλωνι τῶι Πυθίωι σῶμα γυναικεῖον ἆι ὄνομα Λέαινα, τιμᾶς ἀργυρίου μνᾶν πέντε. βεβαιωτῆρες· Ἄθαμβος Ἀθανίωνος, Μενέστρατος Εὐχαρίδα Δελφοί. παραμεινάτω δὲ Λέαινα παρὰ Φίλωνα ἄχρι οὗ κα ζώη Φίλων ἐργαζομένα καὶ ἀκούουσα Φίλωνος· εἰ δέ κά τι τούτων μὴ [π]οιῇ, ἐξουσία ἔστω Φίλωνι ποεῖν Λέαιναν ὅ κα θέλη. ἐπεὶ δέ κά τι πάθη Φίλων, ἐλευθέρα ἔστω Λέαινα καὶ ἀνέφαπτος ἀπὸ πάντων τὸμ πάντα χρόνον κυριεύουσα αὐσαυτᾶς καὶ πράσσουσα ὅ κα θέλῃ, καθὼς ἐπίστευσε τὰν ὠνάν τῷ θεῷ Λέαινα ἐφ' ᾧτε ἐλεύθερον εἶμεν, καὶ ἐγδαμείτω οἷς κα θέλη, κατοικείτω δὲ ἐν Δελφοῖς καὶ στεφανοέτω τὰν Φίλωνος εἰκόνα καθ' ἕκαστον μῆνα δὶς δαφνίνω στεφάνω πλεκτῶ νουμηνίαι καὶ ἑβδόμαι. μάρτυρες· οἱ ἱερεῖς Ἄθαμβος, Ἀμύντας καὶ οἱ ἄρχοντες Ἀλκεῖνος, Ἀνδρομένης, ἰδιῶται Ταραντεῖνος, Ἧρυς, Δείνων, Πολυκράτης, Καλλίερος, Λυκίδας, Ἐχεκλῆς.

the price of two mnai. *Warrantor: Dion son of Alexon. If anyone lays hands on or enslaves Philokrateia, the bystander shall be authorised to seize her back into freedom, and the warrantor shall warrant the purchase for the god. In the same way did Philon being of sound mind and in good health give his consent that Leaina should be released from her* paramone *and work [...] from himself, according to what stands written in the contract of sale, and she shall be free, not belonging to anyone in any way. Witnesses: the officials Kallias, Herys, Pasion; lay persons: Hippon, Damon, Kleon, Aiakidas son of Bablylos, Archias.*[50]

What we cannot tell is whether Philon's decision to release Leaina also relieved her of her obligation to stay in Delphi and crown his statue twice a month.[51]

At the same time as Philon granted Leaina her release from at least the day-to-day work in his household, he also sold to the god a 'girl' (*korasion*), Philokrateia, for two *mnai*. It is tempting to assume that Philokrateia was now to take over Leaina's obligations, especially her obligation to remain with the elderly – and probably childless – man and attend to his daily needs until he died. However, it is striking that the inscription does not mention that Philokrateia was to be bound by the kind of obligations that were imposed on her predecessors Histio and Leaina. If we take the text at face value, it looks as if Philon in this instance decided to grant Philokrateia unconditional freedom. The question is whether it would be safe to infer *e silentio* that Philokrateia, alone of the four women sold to the god by Philon, was not bound by *paramone*.[52]

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[50] ἄρχοντο[ς] Κλέωνος μηνὸς Ποιτροπίου τοῦ δευτέρου, ἀπέδοτο Φίλων Τελεσάρχου τῶι Ἀπόλλω{ι}νι τῶι Πυθίωι κοράσιον ἆι ὄνομα Φιλοκράτεια, καθὼς ἐπίστευσε Φιλοκράτεια τῶι θεῶι τὰν ὠνάν, ἐφ' ὅτωι εἶμεν ἐλευθέρα καὶ ἀνέφαπτος ἀπὸ πάντων τὸν πάντα χρόνον, τιμᾶς ἀργυρίου μνᾶν δύο. βεβαιωτήρ· Δίων Ἀλέξωνος. εἰ δέ τις ἐφάπτοιτο ἢ καταδουλίζοιτο Φιλοκράτειαν, κύριος ἔστω συλέων ἐπ' ἐλευθερίαι ὁ παρατυγχάνων καὶ ὁ βεβαιωτὴρ βεβαιού<τω> τῶι θεῶι. τὸν αὐτὸν δὲ τρόπον εὐδόκησε Φίλων νοέων καὶ φ[ρ]ονέων καὶ ὑγιαίνων καὶ Λέαι{ι}ναν ἀπολελυμέναν εἶμεν τᾶς παραμονᾶς καὶ ἐργασία[ς .. ἀ]π' αὐτοσαυτοῦ, καθὼς ἐν τᾶι ὠνᾶι γέγραπται, καὶ ἔστω ἐλευθέρα, μηθενὶ μηθὲν προσήκουσαν. μάρτυρες· τοὶ ἄρχοντες Καλλίας, Ἧρυς, Πασίων, ἰδιῶται Ἵππων, Δάμων, Κλέων, Αἰακίδας Βαβύλου, Ἀρχίας.

[51] As noted by Zelnick-Abramovitz (2005: 236), the phrase asserting that Philon was of sound mind resembles the expression typically used in wills. The fact that he is attested as vendor of a female slave more than twenty years earlier (*SDGI* 2014) further suggests that he may by now be quite advanced in age. *SGDI* 2014 relates to the sale of an Illyrian woman, Ana, who is obliged to remain with Philon for the rest of his life. The penalty clause in this document includes *tropos*, delegation, and immunity clauses.

[52] It has been debated if Delphi and other communities in the neighbouring regions operated with a concept of *paramone ex lege*. That this did not apply may be suggested by several inscriptions that sell multiple slaves to Apollon, but which explicitly impose *paramone* on some of them while exempting others. See *e.g. SGDI* 2126 and *FD* III 3: 413.

The answer to that is, quite disturbingly, a resounding 'no', since we cannot rule out that even the *paramone* clauses themselves were sometimes sacrificed in the process of redaction and abridgement. One example is *SGDI* 2271. The only evidence for the obligations imposed on the person sold is a clause forbidding him from selling any of his assets and designating his former owners as his heirs, if he died childless.

The implications are potentially serious: unless there are positive indications to the contrary, it can not be inferred *e silentio* in this or any other case that a sale or dedication was unconditional on the grounds that the inscribed document fails to include a *paramone* clause. This adds a dimension of uncertainty to, for example, Roscoe's and Hopkins' discussion of slave prices, which is based on a systematic distinction between sales with and without *paramone*.[53] It affects also the calculations of the ratio between male and female vendors and male and female beneficiaries in the tables appended below, since they are based only on documents that explicitly refer to conditions imposed on the persons sold. In reality, *paramone* obligations may have been far more widespread than suggested by the redacted documents that have survived on stone in Delphi.

On the other hand, this does not prevent discussions of patterns and variations in the texts that do refer to conditions imposed in connection with the sales. Very likely, when *paramone* clauses were included in the inscribed version, this may have reflected the importance attached to it by the vendors and by the beneficiaries, suggesting that the obligations imposed on the person sold were a high priority. Moreover, when it comes to the interpretation of penalty clauses that explicitly bestow very considerable penal authority on a female beneficiary, there is all the more reason to take these clauses seriously. Their inclusion is probably a result of their function as real and important deterrents, rather than a result merely of mechanical reproduction of a standard formula.

V. Epilogue

The often harsh conditions imposed on men, women and children sold or dedicated to divinities have generated a long discussion of what may have motivated the parties to the transactions. For the men, women and children who were transferred from human to divine ownership, the answer may in many instances have been relatively straightforward: the sale meant that they would acquire their freedom, even if its full realisation would often have been only a distant prospect that they might not live long enough to experience. As suggested by numerous modern scholars, a particular attraction of a recorded transfer into divine ownership may have been the relatively high level of publicity surrounding the transaction, as well as the clauses that permitted volunteer bystanders as well as sanctuary personnel to intervene with impunity to prevent unlawful seizure and enslavement of the person sold or dedicated to the god. Even in those cases where conditions were imposed in

[53] Hopkins (1978: 158-163); *cf. e.g.* Duncan-Jones (1984: 206-207).

connection with the sale, the person sold would in principle also be protected against seizure by his or her former owner's creditors and against being sold to a third party, at least as long as he or she fulfilled their obligations specified in the contract. And after the beneficiary's death, he or she would be protected against seizure and enslavement by the heirs of the beneficiary and/or former owner.

As for the owners who sold or dedicated their slaves, modern scholars have often suggested a range of motives, from cold and calculated financial motives, sometimes downright predatory,[54] to personal affection felt by numerous owners towards unfree members of their households.[55] The latter has received particular attention in discussions of the many male owners who are recorded as the vendors of women with whom they very clearly had a sexual relationship and of children who were born to them from such unions.

However, while such sexual relationships and the resulting ties of blood may well account for a large number of the sales by male vendors, they do not account for the numerous sales of especially women and children by female vendors. Although deep personal affection and generosity should not be underestimated as possible motives, I suggest that a third motive should also be taken into account, especially in connection with sales that nominated women as sole or joint beneficiaries of a *paramone* clause. Women who transferred their male and female slaves into divine ownership may have been motivated by fear that their ownership might be challenged by their own kin or by creditors.

A passage from Aischines' *Against Ktesiphon* (3.21) testifies to an Athenian awareness that a debtor might try to place his assets beyond the reach of his creditors by consecration or dedication. For that reason, Aischines claims, it was not permitted for an official to dedicate or consecrate any of his property, until he had successfully accounted for his term of office in his *euthynai*.[56] To be sure, there is not sufficient evidence from classical Athens to permit an assessment of how often dedication or consecration of assets were used in order to protect assets from being seized by creditors in satisfaction of a debt.[57] Still, it is important to bear in mind

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[54] See *e.g.* Hopkins (1978: 146-149).

[55] See *e.g.* Zelnick-Abramovitz (2005: 147-153), Mulliez (2006), Kamen (2014).

[56] Καὶ οὕτως ἰσχυρῶς ἀπιστεῖ τοῖς ὑπευθύνοις ὥστ' εὐθὺς ἀρχόμενος τῶν νόμων λέγει· «ἀρχὴν ὑπεύθυνον» φησὶ «μὴ ἀποδημεῖν.» Ὦ Ἡράκλεις, ὑπολάβοι ἄν τις, ὅτι ἦρξα, μὴ ἀποδημήσω; ἵνα γε μὴ προλαβὼν χρήματα τῆς πόλεως ἢ πράξεις δρασμῷ χρήσῃ. Πάλιν ὑπεύθυνον οὐκ ἐᾷ τὴν οὐσίαν καθιεροῦν, οὐδὲ ἀνάθημα ἀναθεῖναι, οὐδ' ἐκποίητον γενέσθαι, οὐδὲ διαθέσθαι τὰ ἑαυτοῦ, οὐδ' ἄλλα πολλά· ἑνὶ δὲ λόγῳ ἐνεχυράζει τὰς οὐσίας ὁ νομοθέτης τὰς τῶν ὑπευθύνων, ἕως ἂν λόγον ἀποδῶσι τῇ πόλει.

[57] One such alleged instance of consecration as a way of protecting one's assets may be what is alluded to in Isaios 4.9: Πύρρος δὲ ὁ Λαμπτρεὺς τῇ μὲν Ἀθηνᾷ ἔφη τὰ χρήματα ὑπὸ Νικοστράτου καθιερῶσθαι, αὑτῷ δ' ὑπ' αὐτοῦ ἐκείνου δεδόσθαι. For other ways in which especially the wealthy inhabitants of Athens could and did conceal their assets, see *e.g.* Cohen (2005).

that similar considerations may have informed some of the decisions by slave owners – particularly women – in Hellenistic Delphi and elsewhere to sell or dedicate their slaves to a divinity, while ensuring as far as possible that the persons sold or dedicated would continue to be available to serve them and/or other vulnerable members of their households.

As suggested by Kränzlein (2010: 127-128), further supported by Zelnick-Abramovitz (2005: 243-244) and (2018: 396-398), the transfer of a slave by sale or dedication to a divinity made it considerably harder for a third party, whether creditor or heir, to advance a claim on the slave in question, and this observation is especially relevant when we consider the numerous sales of especially women and children whose services are assigned to female beneficiaries.

Although the female vendors in the Delphic inscriptions appear to have enjoyed considerable authority in regard to the administration and alienation of their assets, they might not have found it quite as straightforward to assert and prove their title in court. A woman would have been particularly vulnerable if her title were to be contested by a third party who claimed a. that he was the creditor of, say, her deceased husband or temporarily absent son and b. that the asset in question was not hers but belonged to her late husband or absent son. It may have been particularly difficult to fend off such claims when the contested slave had been born in the household, since the kind of documentation that would normally have accompanied a sale at auction or on the open market – contracts, warrantors, and witnesses – would not have been readily available.

A married woman might have been able to count on her husband to fend off creditors on her behalf, and a widow with adult sons might similarly have been able to rely on them. But if we return to Polya and her family, discussed in Section I, her situation may serve to remind us of the precariousness of the lives of women and of the elderly of both genders. Polya, as noted, was accompanied by a daughter, three sons, and a grandson in *SGDI* 2269, but by only her daughter, one son and her grandson in *SGDI* 1686. Why two of her sons were not present on this occasion is an open question, but it is a distinct possibility that they were either dead or absent abroad, perhaps for military reasons or for purposes of trade.

Because she was surrounded by her daughter, a son and a male grandchild, Polya's situation was probably safer than most. By contrast, a childless, elderly widow, a widow whose only son was absent abroad, or an elderly spinster would have been in a much more precarious position, especially if her male kin had died in debt or leaving heirs who would not have felt any scruples in contesting her entitlement. For a woman in this position, the formal transfer of one or several slaves into divine ownership may have provided the best protection against the hardship and helplessness of old age.

Indeed, it is a distinct possibility that in many such cases it may have been the women designated as the beneficiaries in the *paramone* clauses who themselves had provided the money that was subsequently passed on by their slave to the god, and

then from the god back to themselves. This is a model discussed *e.g.* by Zelnick-Abramovitz (2005: 219-220). Her discussion relates to sales that involved third-party beneficiaries of the *paramone* clauses, who had clearly themselves provided the money with which the god subsequently purchased the slave from his or her owner. The scheme makes equally good sense when the female vendor herself was the beneficiary.

Sales or dedications of this type may likewise have been attractive options for elderly, childless couples and for childless old men. Their mental or physical frailty would have made it an unrealistic prospect for them to hold their own in court, let alone to resist *physical* attempts by a third party to appropriate the servants on whom they depended for sustenance and practical support. And while the sale or dedication may have reduced the potential threat from a third party, the deterrent offered by the penal authority granted to female and elderly male beneficiaries of the *paramone* clauses may have offered them critical protection against neglect, abuse, and abandonment by the persons who were contractually obliged to serve them.

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TABLE 1 Gender distribution of vendors (328 contracts with *paramone*)

Owners	women	girls	men	boys	total	M-F ratio	adult-'child' ratio
Female 106	70	38	24	10	142	**24:76**	66:34
Male 147	104	13	69	15	201	42:58	**86:14**
Joint 50	28	14	16	15	73	56:44	60:40
Unknown 25	16	3	7	4	30	37:63	77:23
Total 328	218	68	116	44	446	36:64	75:25
M:F 58:42							
M:F+J 49:51							

TABLE 2 Gender distribution, beneficiaries (328 contracts with *paramone*)

Beneficiaries	women	girls	men	boys	total	M-F ratio	adult-'child' ratio
Female 110	74	41	21	12	148	**22:78**	64:36
Male 138	96	9	62	17	184	42:58	**86:14**
Joint 71	42	16	31	15	104	44:56	70:30
Unknown 9	6	2	2	0	10	20:80	80:20
Total 328	218	68	116	44	446	36:64	75:25
M:F 56:44							
M:F+J 43:57							

TABLE 3 Gender distribution of beneficiaries in texts with penalty clauses (256)

Beneficiaries	women	girls	men	boys	total	M-F ratio	adult-'child' ratio
Female 91	61	36	17	12	126	**23:77**	62:38
Male 104	68	7	51	13	139	46:54	**86:14**
Joint 57	28	14	26	12	80	48:52	77:33
Unknown 4	2	0	1	0	3	34:66	100:0
Total 256	159	57	95	37	348	38:62	73:27
M:F 53:47							
M:F+J 41:59							

TABLE 4 Gender distribution of beneficiaries in texts without penalty clauses (72)

Beneficiaries	women	girls	men	boys	total	M-F ratio	adult-'child' ratio
Female 19	13	5	4	0	22	**18:82**	77:23
Male 34	28	2	11	4	45	33:67	**87:13**
Joint 14	14	2	5	3	24	33:67	79:21
Unknown 5	4	2	1	0	7	14:86	71:29
Total 72	59	11	21	7	98	29:71	82:18
M:F 64:36							
M:F+J 51:49							

RACHEL ZELNICK-ABRAMOVITZ (TEL AVIV)

WOMEN AND CHILDREN IN DELPHIC PARAMONE-CLAUSES: RESPONSE TO LENE RUBINSTEIN

Lene Rubinstein has thoroughly examined the penalty and *paramonē*-clauses in the Delphic manumission inscriptions. This is one of the most intriguing corpora of inscriptions in the ancient Greek world and a rich (although often frustrating) source of information on manumission in its form as fictitious sale-contract or consecration of slaves to Apollo. As Rubinstein demonstrates, these inscriptions (dating from the second century BCE to the early second century CE) were summaries or versions of the original written arrangements, which were deposited in public archives and/or in private hands. This corpus has received scholarly attention for more than a century. But, as Rubinstein's paper shows, there is always something new or less explored or a new angle from which to look at a long-debated topic.

Rubinstein's paper contributes to the study of women's status and their place in legal transactions in general, and in manumission in particular—as manumittors; as spouses, mothers or daughters, consenting to manumission done by their husbands, sons or fathers; as beneficiaries of *paramonē*-obligations; and as manumitted slaves. Consequently, we also learn about women's agency in initiating, effecting and negotiating such transactions. Although some studies discuss women as manumittors[1] and as manumitted slaves,[2] not enough has been written on the topics offered by Rubinstein.

Rubinstein's most significant contribution is the light she casts, in the context of *paramonē*-clauses, on the condition of vulnerable persons: widows, spinsters, or small girls, but also old men, left without care or fearing such a prospect. Rubinstein highlights the little-explored topic of fending for the "weak",[3] discussed only briefly in the context of manumission despite its great social and cultural significance.[4] Her

[1] Mainly in general studies on slavery, e.g. Cabanes 1976; Hopkins 1978; or in studies on familial property, e.g. Babakos 1962, 1964, and 1966.

[2] E.g. Tucker 1982; Kamen 2014a, 2014b.

[3] See Finley 1981, citing (p. 167) *Ath. Pol.* 55. 2–3 on the *dokimasia* of candidates for the archonship, who were asked whether they treat their parents well, and Isaeus 4.30 on adoption as a means taken by old childless men to ensure that someone performs the funeral rites for them. See also Rubinstein (1993, esp. chap. 4) on adoption in fourth-century BCE Athens, and Rupprecht 1998, 228–229.

[4] E.g. Hopkins, 1978, 167; Zelnick-Abramovitz 2005, 152, 158.

suggestion that the *paramonē*-clauses served as a means to secure practical and sometimes financial support for these people is persuasive and deserves further attention; and, as I will show, stipulating that manumitted slaves take care of their manumittors or other persons was quite widespread. Yet we should note that in most cases we have no information regarding the familial position of manumittors who inserted *paramonē*-clauses. Rubinstein also suggests that women who sold or consecrated their slaves to divinities, while obligating them by *paramonē*-clauses, may have been motivated by fear that their ownership might be challenged by their kin or by creditors. This seems a reasonable hypothesis, but perhaps not so in other, not "sacral", forms of manumission involving *paramonē*.[5]

In response to Rubinstein's paper I wish to refer to female manumittors and manumitted slaves:

1) Women's capacity to transact on their own is testified by the high number of female owners manumitting without a *kyrios* and sometimes even without the consent of family members. Also significant is women's consent to sales made by their kin.[6] Evidence comes from other regions as well.[7] Rubinstein associates women's control over family property with their capacity to punish or delegate to others the punishment of manumitted slaves who violated their *paramonē* obligations, and correctly concludes that this capacity was not determined by gender. Comparing the Delphic evidence with other regions, it has been suggested that in some places in central and northern Greece in the Hellenistic period women enjoyed a better standing than, for instance, in Attika and Boiotia.[8] Nevertheless, we should be cautious in inferring that the absence of *kyrieia* in many manumission inscriptions is a sure sign that women were exempted from it by law. It is possible that such cases conceal special circumstances or that the involvement of *kyrioi* or the consent clauses were, for some reason, omitted from the inscribed texts.[9]

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5 Such as in Kalymna and Thessaly, where Babakos 1963 (esp. 40–41, for Kalyman) and 1966 (79–88, for Thessaly) wrongly postulates *paramonē ex lege* (see Kränzlein 1964a for criticism).

6 E.g. *SGDI* 1855, Delphi, 176 BCE: Agēsō from Amphissa sold a slave to Apollo (with *paramonē*), without a *kyrios* or family's consent; *SGDI* 1836, Delphi, 170–157/6 BCE: Nikō sold to Apollo, without a *kyrios* or family's consent, two males and one female girl (with *paramonē*); *SGDI* 2106, Delphi, 100–50 BCE: a woman sold to Apollo a female slave and a girl (mother and child?), with the consent of her daughter (no *paramonē*).

7 E.g. *I.Beroia* 145–146, no. 45 = *SEG* 12 314 (Beroia, 235 BCE): Attina manumitted, without a *kyrios* or consent, three slaves with their wives and children and another female slave (with *paramonē*); *I.Buthrotos* 40 = *SEG* 38.499, col. I (Bouthrotos, after 163 BCE): Aristodika manumitted alone, by consecration to Asklepios, two slaves.

8 See Babakos 1966 (on Thessaly); Vatin 1970, 243–252; Cabanes 1976, 408–13, and 1981 (on Epiros); Albrecht 1978, 242–244; Schaps 1979, 49–51; Stavrianopoulou 2006, 188–196 (Cyclades).

9 For women as manumittors see Zelnick-Abramovitz 2005, 131–135.

2) In Epiros and Thessaly women also served as witnesses to acts of manumission or as guardians (*epitropoi*) of their children.[10] Antonis Babakos argues—but on the basis of only three inscriptions—that male guardians in Thessaly were usually appointed in wills, whereas women had this right *ex lege*, in addition to their legal competence to alienate property without a *kyrios*.[11]

3) Besides manumission jointly made by spouses, collective manumissions—primarily by family groups—are attested in central, western and northern Greece.[12] Women appear as equal members in such groups, sometimes even heading them.[13] It seems that economic and legal considerations were at play, and households acted to protect their property.[14] This corroborates the conclusion that slaves were considered

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[10] E.g. *SGDI* 1354 (Dodona, 350–250 BCE): Pheidyla witnessed a manumission together with five men; see also Cabanes 1976, 580–581, no. 55, and Meyer 2013, 137–138, no. 2. In late third-century Phoinikē (in Epiros), three women and two men witnessed the manumission-consecration of the slave Dazos (*SEG* 23 478 = Cabanes 1976, 569–573, no. 47; Darmezin 1999, 154–155, no. 192; however, Meyer 2013, 163–164 no. 30, and Cabanes 2016, 40–43, no. 8, punctuate this text differently, thus excluding the women and men mentioned from the witnesses-list. In late first-century BCE or early first-century CE Gonnoi (Thessaly), Orthopolis daughter of Dikaiokrates acted as a co-manumittor and as the guardian of her two sons, although her husband's brothers were still alive (*IG* IX(2) 1040 b, ll. 11–15).

[11] Babakos 1962, 316–319. Many Macedonian inscriptions, dating from the second to the fourth century CE, show Roman influence combined with Greek practices: Roman female manumittors, consecrating slaves to Greek gods, describe themselves as having "the right of (three) children (ἔχουσα (τριῶν) τέκνων δίκαιον)", that is, Augustus' *ius trium liberorum*, which gave mothers of at least three children the right to transact without a *kyrios* (e.g. *I.Beroia*, 153–6, nos. 51, 52, 53; Petsas 2000, e.g., nos. 6, 27, 52). In Leukopetra, the only occurrence of a female manumittor who is aided by a *kyrios* (Petsas, no. 51, ll. 1–5) is that of a Roman woman, who may have been too young to transact by herself (Petsas, 41, 118).

[12] Husbands and wives: e.g., *IG* VII 2228 (Thisbe), 3315 (Chaeronea); *SGDI* 1448, ll. 3–6 (Thessaly); *CIRB* 74 (Pontikapaion); Cabanes 1974, no. I, ll. 38–39 (Bouthrotos). Parents and children: e.g., *IG* VII 3330 (Chaeronea); *IG* IX(1) 36 (Stiris), 120 (Elatea), 624e (Naupaktos); *IG* IX(2) 109a, ll. 67–9 (Halos in Thessaly); *SGDI* 1359 (Dodona); Cabanes 1974, no. I, ll. 42–43 (Bouthrotos). Siblings: e.g., *SGDI* 1777 (citizens of Amphissa manumitting in Delphi); *IG* VII 3198 (Orchomenus), 3363 (Chaeronea); *CIRB* 1125 (Bosporus Kingdom). Cousins and nephews: e.g., Cabanes 1974, no. XVI, ll. 30–31 (Bouthrotos); *IG* VII 3199 (Orchomenos); *IG* IX(1) 188 (Tithora). Larger family groups: e.g., *IG* IX(2) 109a, ll. 21–22, 25–27, 109b, ll. 63–5 (Halos); Cabanes 1974, no. V, ll. 8–9; no. XIX, ll. 25–28 (Bouthrotos). Babakos 1966 argues that the participation of family members in the manumission in Thessaly was intended to ensure they waive their right to *paramonē*.

[13] Cabanes 1976, 409–410; 1981, 79–82.

[14] See Hamphreys 2019, 168: "The frequency of joint manumission, noticeable even in Athens … may be partly due to this tendency to leave it unclear whether divisions of property were provisional or final. The freedman or freedwoman would prefer to be sure that all possible claimants had committed themselves to the manumission." For other

an important part of the patrimony and that safeguards were taken to forestall challenges by heirs or—as Rubinstein persuasively argues—by creditors.

4) As for the manumitted slaves, note that *korasion*, *paidiske*, *paidarion*, *paidiskon* etc. do not necessarily describe children. For instance, an inscription from Susa, of the first half of the second century BCE (*SEG* 7 15), records the manumission by consecration to the goddess Nanaia of the female slave Mikra. According to Louis Robert's emendations, Mikra was "about 30 years old" ([ὡ]ς ἐτῶν τριά[κοντα, l. 8), although she is described as *paidiske*.[15] Yet, the low prices paid by Kallō (*SGDI* 2269), by Sōphrona (*SGDI* 1714), and by Philokrateia (*SGDI* 1751)—cases discussed by Rubinstein—may indicate that these *korasia* indeed were little girls.[16]

5) It seems that many of the children manumitted in Delphi (especially those described as *oikogeneis*, home-born) were their male owners' biological children, or were raised as such (as *threptoi*). Many were adopted or recognized as heirs. For instance, in Delphi, in 172 BCE, Nikōn manumitted his slave girl (*koridion*) Hēdyla and stipulated that she be considered the daughter of Dōrēma and do for her all that is customary to do for parents (*SGDI* 1803, ll. 3–5). In 157 BCE, Dōrēma sold to Apollo a slave girl, with the consent of Hēdyla, here described as her *daughter* (*FD* III 3.8). The inscription that records Hēdyla's manumission (*SGDI* 1803) also contains the manumission of the woman Iōnis (ll. 1–3), with no *paramonē*-clause; possibly, Iōnis was Hēdyla's mother and Nikōn her father.[17] Very probably, Dōrēma

interpretations of joint manumissions and consent by family members, see Cromme 1962; Kränzlein 1964b.

15 Robert 1969, 1216–1227. The slave's name, Mikra ("small") was probably given to her when she was small, or was she of a small stature? In *SGDI* 1954 (Delphi, 156–151 BCE), a man sells to Apollo, with the consent of his four sons, a female slave and also "her small suckling (ὑποτιτθίδιον) boy" (ll. 6–7); here the description of the *paidarion* as ὑποτιτθίδιον reveals his age. Another *korasion*, manumitted at Beroia (*I.Beroia*, 153–154, no. 51), was also "about 30 years old". In *FD* III 6.137 (Delphi, end of the second century CE) the age of the *korasion* has not been preserved (ὡς ἐτῶν…).

16 On lower prices paid by children see Hopkins 1978, 159.

17 For *SGDI* 1803 see Hopkins 1978, 167–168; Tucker 1982, 230; Zelnick-Abramovitz 2005, 162. See also *FD* III 3.333 (Delphi, undated): Kleomantis son of Diōn releases from *paramonē* his former female Eisias, adopts the son born to her while in *paramonē* and gives him his name; *SGDI* 1348, Dodona, 237–234 or 297–232 BCE (= Cabanes 1976, 464, and see now Meyer 2013, 149–151, no. 15): the manumitted slave Kanthara is to be considered the daughter of Krateros, in all probability the manumittor. In Epiros, manumitted female slaves often entered the familial group and appeared later as manumitting together with their manumittors; Cabanes 1976, 411, suggests that these cases indicate adoption. Also, manumittors in Bouthrotos, described as "childless" (ἄτεκνοι), seem to have acted to ensure that someone to performs the funeral rites for them (Cabanes 1974, 201). In SGDI 1723 (Delphi, 170–157/6 BCE), the *paramonē*-clause requires the manumitted slave to fend for the old man (γηροτροφεῖν), who paid the slave's female-owner for his manumission (ll. 5–10). Cf. *SGDI* 1803 (ὅσα νομίζεται τοῖς γονέοις), 1806 (ποιέουσαν ὡς πατέρι): manumitted children are required to do what

herself was Nikōn's daughter, for the female manumittor in SGDI 1945 (150–140 BCE) is called Dōrēma daughter of Nikōn. These examples, I suggest, show a motivation analogous to that attributed by Rubinstein to *paramonē*-clauses made to the benefit of vulnerable persons. One such motivation may perhaps be inferred from *SGDI* 1751 (discussed by Rubinstein), where Philōn sells to Apollo the *korasion* Philokrateia. I fully agree with Rubinstein's *caveat* about arguing *ex silentio*; yet the girl's name might suggest that she was Philōn's daughter—which, if true, may explain why she is not obligated by a *paramonē*-clause. Moreover, some eighteen or twenty-eight years later, between 150 and 140 BCE, a woman named Leaina sold to Apollo a female slave with the consent of her *daughter* Philokrateia (*SGDI* 2021, 150–140 BCE, ll. 5–6); there is no *paramonē*-clause. Again, speculations are dangerous; but it is very tempting to surmise that these are Leaina and Philokrateia of *SGDI* 1751 and 1801. And if I am not too wide off the mark, such relationship can also explain Leaina's *apolysis*: as the mother of his daughter, Leaina was granted by Philōn full freedom, and we note that no payment is required of her. Later, Leaina herself became a slave-owner and, having no kin except her daughter Philokrateia, had to attain the latter's consent to a manumission act. Another hint is found in these texts: Leaina was sold to Apollo for the relatively high price of five mnae; her *paramonē* agreement (*SGDI* 1801) obligates her to stay with Philōn for the rest of his life and work and obey him (ἐργαζομένα καὶ ἀκούουσα Φίλωνος). In her *apolysis* document (SGDI 1751), Leaina is released from the *paramonē* and from "work" (ἐργασίας). It has been argued that the verb ἐργάζομαι and the noun ἐργασία, especially in connection to wool-work, were used euphemistically for prostitution,[18] and a link between prostitution and manumission has been suggested by some scholars.[19] Whether Leaina was a prostitute or a professional wool-worker, this may explain the high price she paid for her freedom.

6) Finally, the fact that small children were manumitted under the condition of *paramonē* helps accentuate an important issue: being minors and often lacking family, the obligation to further serve the beneficiaries meant that they had to stay at the latter's homes. This is also true of adults: in *SGDI* 1807, 2085, and 1801, Histiō and Leaina are required to crown Philōn's statue twice a month and their choice of residence is restricted—a stipulation also found elsewhere.[20] In fact, the very order

children properly do for their parents. See also *FD* 6:38 (20–46 CE): two manumitted female slaves are obligated by *paramonē* to their female manumittor for as long as she lives, and required to give her son and grandson(?) little children when she dies; cf. *FD* III 6:57. On adoption in Kalymna see Babakos 1963.

[18] Kamen 2014a on Delphi; and cf. *FD* III 2.169, ll. 23–25. Kamen (2014a, 151) points out that Leaina was a common name of *hetairai*.

[19] E.g. Ed Cohen 2006, and Wrenhaven 2009, on Athens.

[20] Cf. *SGDI* 1718 (170–157/6 BCE), where the manumittor, a man from Lilaia, forbids his manumitted slave Asia (of Syrian origin) to live anywhere outside Lilaia for the rest of *her* life (ll. 10–11: μὴ οἰκησάτω δὲ Ἀσία ἔξω Λιλαίας μηδὲ πολιτευσάτω ἄνευ τᾶς Ἐπιχαρίδα γνώμας). This inscription has no explicit *paramonē*-clause.

to παραμείνειν ("to stay by the side of, or with someone") denied freedom of movement despite manumission. The recurrent phrase, which gave manumitted slaves the right to go wherever they wished, was meant to be implemented only after the end of the *paramonē*, and sometimes not even then. This point cannot be overstated, seeing that it has been argued that slaves manumitted with *paramonē* obligations were free both *de jure* and *de facto*.[21]

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[21] E.g. Canevaro and Lewis 2014, 109; Lewis 2018, 71–72.

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LEGAL CONTEXT OF PARAMONÊ PROVISIONS: RESPONSE TO LENE RUBINSTEIN

In her paper on penalties in *paramonê*-clauses in Delphic manumission inscriptions, Lene Rubinstein points out that the documents inscribed on stone in the sanctuary of Apollon were (merely) "redacted versions of contracts written on perishable material."[1] Throughout her study, Rubinstein refers to these agreements as "contracts," and in Sections III and IV explores issues of "legal standing" and possible "legal restrictions."[2]

Lene's attention to these juridical matters is welcome. Although it has long been recognized that the Delphic manumission inscriptions do raise "intricate and important questions of a legal and social nature,"[3] relatively little attention has been given to the "legal," as opposed to the "social" questions raised by these *testimonia*. In fact, scholarly attention has been focused in recent years largely on the "status" of persons conditionally manumitted,[4] "legal distinctions notwithstanding."[5] It seems to me appropriate, however, in this *Symposion* series devoted to *Rechtsgeschichte*, that we not ignore "legal distinctions." Were these arrangements between master and slave truly "contracts" for juridical purposes? Or were they actually informal arrangements of convenience, giving rise to no legal obligation? Could they really be enforced or confirmed by court procedures or in some other meaningful fashion?

I will here support the correctness of Rubinstein's characterization as "contracts" of manumission arrangements between original master and original slave. I also think that she has correctly identified as juridically important the provisions for arbitration between master and slave that are explicitly set forth in SGDI 1689 and 1832, clauses that are quite possibly a formulaic feature of Delphic conditional manumissions.[6]

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1 Rubinstein, page 466. The "manumission inscriptions were only summaries of the original documents which were deposited with private persons and/or in sanctuaries" (Zelnick-Abramovitz 2018: 380). Cf. Mulliez 2014; Harter-Uibopuu 2013; Kränzlein 2010: 154-56; Zelnick-Abramovitz 2005: 208, n. 52, 214.

2 See especially Rubinstein, p. 467.

3 Zelnick-Abramovitz 2018: 377.

4 See Lewis 2018(a), 2018(b): 70-92; Canevaro and Lewis 2014; Sosin 2015; Kränzlein 2010.

5 Zelnick-Abramovitz 2018: 377.

6 Rubinstein, pp. 465-467.

In this paper, I will utilize both Greek and Roman legal materials. Despite our lack of detailed knowledge of the extent and process of juridical Romanization in the Greek world during the late Republic and early Empire,[7] Delphi did lie under the control of Rome during the entire three centuries from which the manumission inscriptions date, and Roman material does offer important insights into issues relating to *paramonê*.

Scholars have long noted the frequent dissonance between "law in action" (the actual handling and disposition of juridical issues) and "law in the books" (the dogmatic expression of legal precepts).[8] Extensive evidence and multiple studies, however, have demonstrated that legal systems invariably develop mechanisms to close significant gaps that may arise between changed societal reality and traditional juridical principles[9] (although these modalities may not be transparently reflected in the most formal, and conservative, doctrinal presentations of "the law"). For both Greek and Roman slavery, a chasm did separate "law in action" from theoretical legal principles which could not tolerate even the suggestion of a slave's possession of a legal *persona*. Even the great Roman jurisprudent Ulpian admits that since "a slave cannot really owe or be owed anything, when we (Roman jurists discuss a 'slave's debts' and) misuse this term, we are recognizing reality rather than referencing a formal obligation under civil law."[10] Principally through the mediation of legal fictions (*fictiones*), at Rome dogmatic statements of juridical principles came to coexist with an explicit variant portrayal of social and economic reality preserved for us in these same sources. This Roman variant reality (*factum*) acknowledges the legal efficacy of contracts between master and slave, including understandings relating to manumission.

Athens provides confirmation of the classical world's juridical recognition of agreements between slaves and masters. The Athenian economy was dependent on unfree persons (*douloi*), including many who functioned as independent businessmen, "undoubtedly" playing a "primary role" in Athenian commercial matters.[11] Because traditional Athenian concepts of manliness (*andreia*) valorized only cultural, military and political pursuits, condemned all commerce as inherently servile, and insisted that farming alone provided a proper economic arena for the

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[7] See Sirks 2018: 56-60; Pölönen 2016: 15; Humfress 2013, 2014; Matthews 2006: 482; Richardson 2016:119-21.

[8] Watson 2007: 35; Aubert 2002; Abel 1982.

[9] See most recently the Introduction and various essays in Black and Bell 2011; Smith 2007. Cf. R. Grillo *et al.* 2009; Nelken and Feest, eds. 2001.

[10] *Dig.* 15.1.41 (Ulp.): nec seruus quicquam debere potest nec seruo potest deberi, sed cum eo uerbo abutimur, factum magis demonstramus quam ad ius ciuile referimus obligationem.

[11] "In Grecia il ruolo degli schiavi è indubbiamente primario nel mondo degli scambi commerciali" (Maffi 2008: 207). In agreement: Gernet 1950:164 ("une économie commerciale où l'élément servile tenait une grande place"). Cf. Garlan 1988: 60-69; Bitros and Karayiannis 2006: 11-24.

"free man" (*anêr eleutheros*), Athenian society was highly receptive to slave enterprise.[12] The Athenian institution of "slaves living independently" (*douloi khôris oikountes*) permitted unfree persons to conduct their own businesses, establish their own households, and sometimes even to own their own slaves — with little contact, and most importantly, virtually without supervision from their owners.[13] This concatenation produced the paradox of an Athenian economy dependent on slave entrepreneurs operating within a legal system that supposedly treated slaves as nullities — and necessitated Athenian juridical acceptance of agreements between masters and slaves, including those relating to manumission.

By both Roman and classical Greek legal shibboleth, slaves supposedly were legally nullities who could not enter into legally-enforceable agreements. Yet in the Graeco-Roman world, *douloi* seem often to have done so.

At Athens, for example, despite slaves' supposedly total deprivation of legal rights,[14] unfree persons still made arrangements with their owners providing for a sharing of revenues generated by slaves' autonomous business activities (*apophora*), and in some cases even for their manumission as part of these agreements.[15] Roman slaves appear autonomously to have operated workshops in a variety of commercial areas, including leather-crafting, wool-working, baking, and the production of bricks, lamps, and terra-sigillata[16] — paying a portion of their income to their owners and retaining the rest. Roman sources confirm the existence of agreements between slaves and masters, including written agreements governing the terms of voluntary entry into slavery.[17]

These agreements were not chimerical.[18] Because slaves at Athens and at Rome were generally unable to initiate lawsuits,[19] some scholars have deemed meaningless

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12 See Bitros and Karayiannis 2008: 219; Cohen 2003; Hanson 1995: 214-19.

13 See Cohen 2018; 2000: 130-54. The overwhelming majority of scholars identify the *khôris oikountes* as slaves (Kamen 2013: 44; Valente 2012; Tordorff 2013: 8; Ferrucci 2008: 525-26; Vlassopoulos 2007: 37), but a few believe that the term, depending on context, can refer to both present slaves (*douloi*) and freed slaves (*apeleutheroi*) (Fisher, 2006, 2008: 126-27; Zelnick-Abramovitz 2005: 215-16). Canevaro and Lewis opine that "although some slaves in Athens did fall in this position" (i.e. were *douloi khôris oikountes*), "their number and significance has been somewhat exaggerated" [2014: 95]).

14 Slaves' legal nullity at Athens: Harrison 1968: 163-72; Ferrucci 2012: 99; Rihll 2011: 51-52; Klees 1998: 176-217. Slaves' only entitlement was perhaps the right not to be murdered: Antiph. 5.47, 6.4. Cf. Isok. 18.52, Dem. 59.9.

15 See Dem. 36.13-14, 37; Aisch. 1.97; Andok. 1.38; Men. Epitrep. 376-80. Cf. Cohen 1992: 76, 80-82; Randall 1953; Burford 1963; Webster 1973.

16 See *Dig.* 33.7.19.1 (Paul.); *Dig.* 2.13.4.2 (Ulp.); Artem. 3.41. Cf. Wiedemann [1987] 1997: 33; Prachner 1980; Harris 1980; Tapio 1975.

17 See Dio Chry. 15.23; *Dig.* 40.1.6 (Alf. Uarus); *Dig.* 40.1.5 (Marcianus); *Dig.* 1.12.1.1 (Ulp.); RMO Leiden EDCS-58700011 (see Koops 2020). Cf. Silver 2016: 85; Cic. Epist. *Ad Quint. Frat.* 3.1.5-6; *Cato Mai.* 21.7.

18 On the legal implications of agreements between master and slave, see Jacota 1966 and Knütel 1993.

a master's commitment to free a slave upon mutually-agreed terms.[20] In both classical Athens and classical Rome, however, special exceptions allowed some agreements between master and slave to be enforced through the courts, explicitly including at Rome agreements for manumission through a slave's own monies (*Dig.* 40.1.55 [Marcianus], *Dig.* 1.12.1.1 [Ulp.]). Moreover, slaves involved in mercantile matters could rely upon so-called "soft law,"[21] the informal sanctions of commercial exclusion and ostracism that discouraged violation of the moral expectations of the universe of parties engaged in business[22] — deterrence reinforced where relevant by social (and sometimes religious) pressures. In fact, legal science increasingly has been recognizing that access to the court system is not the sole factor reifying a business commitment.[23] At Athens, and in early Republican Rome, an interplay of commercial and communal values provided strong impetus to compliance with obligations, "whatever (the parties') respective social, economic and legal status."[24]

Moreover, Athenian arbitration often provided a channel for resolution of disagreements for those unable or unwilling to use formal juridical procedures.[25] As Lene suggests, arbitration may have served the same function at Delphi. At Athens, and likely at Delphi, the actual terms of an agreement governing entry into, or departure from, slavery were likely to vary on the basis of such factors as the parties' initial relative negotiating strength and/or skill, anticipated future benefits, individual access to reliable and useful information, and so forth.[26]

At Athens, in fact, the courts had come to accommodate commercial needs arising from the creation in the fourth century BCE of businesses (*ergasiai*) operated

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[19] Athens: Plato, *Gorg.* 483b; Dem. 53.20. Roman slave unable to enter into a contract or be a party to a civil lawsuit: Metzger 2014; Bürge 2010; Burdese 1981; Biscardi 1975.

[20] Mouritsen's formulation is not atypical: "a slave could enter an agreement, *pactio*, with his owner concerning his manumission, but it was not binding for the master" (2011: 171). Cf. Hopkins 1978: 126 ("not a legal contract . . . could not be enforced by individual slaves").

[21] On the function and presence of "soft law" in ancient Greece, see Vélissaropoulos-Karakostas 2018; Barta 2011, *passim.*

[22] For the application of such sanctions among Roman artisans, see Hawkins 2012, 2016: 51-52.

[23] Vélissaropoulos-Karakostas 2002: 131, 136, 138 (note 16); Karabélias 1997: 148; Scafuro 1997: 31-42, 129-31 (*pace* E. Harris 2018: 224, n. 38 and related text).

[24] Aubert 2013: 192, alluding to archaic Roman experience and discussing Athenian agreements between masters and slaves.

[25] Scafuro 1997: 117-41, 34-42; Lanni 2016: 44-46.

[26] Rubinstein 465, 467, 470: "This kind of stipulation indicates a certain parity in standing between the beneficiaries and the persons in *paramone* … The many variations even in documents that are roughly contemporary with each other suggest that the individuals who negotiated and drew up the contracts had considerable discretion … Who would decide what was to be included or omitted in the inscribed version – the vendor, the person sold to the god, or the sanctuary personnel?"

by slaves with little if any involvement by their masters.[27] Thus, fourth-century tribunals did accept slaves and free non-citizens as parties and witnesses in commercial litigation — in contravention of the general rules allowing access to *polis* courts only to citizens of that *polis* and allowing servile testimony only when obtained through torture.[28] Athenian courts also recognized slaves' responsibility for their own business debts[29] and accepted mercantile "agency" as a mechanism to overcome slaves' remaining business incapacities.[30]

At Rome, several studies have demonstrated how the law made similar adaptations to business reality, progressively extending in the second and third centuries CE slaves' rights independently to access the law courts in commercial situations.[31] Although the "letter of the law" continued into the High Empire to treat as unenforceable agreements between slave and master,[32] at about the same time Hermogenianus alludes to a number of situations in which slaves exceptionally have the right to sue masters, explicitly citing those cases where individuals redeemed through their own monies have not been manumitted "contrary to their reliance on an agreement" with the master providing for liberation *suis nummis*.[33] Marcianus even earlier had confirmed the Roman courts' availability for suits in which a slave was seeking to enforce an agreement for manumission against a master on whose "good faith" the slave had relied in arranging a purchase "with his own monies."[34] Ulpian, citing Julianus, even extends this right of suit retroactively to permit suit against his former master, seeking return of the monies advanced by a former slave who had self-funded his manumission: these funds must be repaid by the master if it could be established that the putative slave had actually been a free man "serving in good faith," for example as a result of a misunderstanding of his true status.[35] But if

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27 Cohen 1992: 90-101.

28 See Thür 2005: 150-62, esp. 151, and 1977; Humphreys 2007.

29 See Cohen 2012; Dimopoulou 2012; Maffi 2008; Talamanca 2008.

30 See Cohen 2017: 132-33 (*pace* E. Harris 2013).

31 See, for example, Jacota 1966; Guarino 1967: 295; Morabito 1981: 109-11.

32 See, for example, *Cod.* 7.16.36: post certi temporis ministerium ancillae liberam eam esse cum ea paciscendo conuentionis obtemperandi legi domina nullam habet necessitatem (294 CE). Cf. *Cod.* 7.14.8, 7.16.10.

33 uix certis ex causis aduersus dominos seruis consistere permissum est: id est . . . si qui suis nummis redemptos se et non manumissos contra placiti fidem adseuerent . . . sed et si quis fidem alicuis elegerit, ut nummis eius redimatur atque his solutis manumittatur, nec ille oblatam pecuniam suscipere uelle dicat, contractus fidem detegendi seruo potestas tributa est (*Dig.* 5.1.53 [Hermogenianus]). Similarly Ulpian: qui se dicit suis nummis redemptum, si hoc probauerit . . . compellendus erit manumittere eum qui se suis nummis redemit (*Dig.* 5.1.67).

34 *Dig.* 40.1.5: si quis dicat se suis nummis emptum, potest consistere cum domino suo, cuius in fidem confugit, et queri, quod ab eo non manumittatur . . . On this passage, see Kleijwegt 2011: 113-15.

35 *Dig.* 12.4.3.5: si liber homo, qui bona fide seruiebat, mihi pecuniam dederit, ut eum manumittam, et fecero: postea liber probatus an mihi condicere possit, quaeritur, et

a slave had sued his master, and had failed to prove that he had been "redeemed through his own monies," he not only lost the case, but could be sent to the mines in servitude if his master preferred not to have him returned in chains.[36]

Legal opinions carefully protected both a slave's right to sue his master in the event that he had received the slave's own money and nonetheless refused to manumit — but also protected the slave's money if it had been improperly alienated. In an opinion that Ulpian endorses as "elegant," Julianus opines that a slave who had deposited monies with a third party to be paid out to his master for his freedom could recover the deposit from the fiduciary if the third party had disbursed the monies as though they belonged to the depositary. But if the depositary had indicated the source and purpose of the money in paying it out, and had so notified the slave, the depositary was not liable.[37] (The slave, if not liberated, could still sue the master in a *causa liberalis* or other appropriate action, but the jurisprudents' structuring of the legal question implies that this was not a plausible remedy [in this particular case] for some factual reason, such as the slave's sale by an insolvent owner to a purchaser without knowledge of the anticipated *redemptio suis nummis*.)

Although even former masters, as "patrons" of former slaves, could not normally be sued by ex-servi, in the case of slaves manumitted through their own funds, this prohibition did not apply: here, if a former master "broke faith," he could be sued by the person freed *suis nummis*.[38] In Paul's words, "liberty can be wrung even from a resistant owner" if that freedom has been purchased with the slave's own money.[39]

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Iulianus scribit competere manumisso repetitionem. Cf. the similar case of the female dancer Paris, *ibid*.

[36] *Dig.* 48.19.38.4 (Paul): qui se suis nummis redemptum non probauerit, libertatem petere non potest: amplius eidem domino sub poena uinculorum redditur uel, si ipse dominus malit, in metallum damnatur.

[37] *Dig.* 16.3.1.33 (Ulp.): eleganter apud Iulianum quaeritur, si pecuniam seruus apud me deposuit ita, ut domino pro libertate eius dem, egoque dedero, an tenear depositi. Et scribit, si quidem sic dedero quasi ad hoc penes me depositam teque certiorauero, non competere tibi depositi actionem, quia sciens recepisti, careo igitur dolo: si uero quasi meam pro libertate eius numerauero, tenebor. Quae sententia uera mihi uidetur: hic enim non tantum sine dolo malo non reddidit, sed nec reddidit: aliud est enim reddere, aliud quasi de suo dare.

[38] *Dig.* 2.4.10.pr (Ulp.): sed si hac lege emi ut manumittam, et ex constitutione diui Marci uenit ad libertatem: cum sim patronus, in ius uocari non potero. Sed si suis nummis emi et fidem fregi, pro patrono non habebor.

[39] *Dig.* 40.1.19: si quis ab alio nummos acceperit, ut seruum suum manumittat, etiam ab inuito libertas extorqueri potest, licet plerumque pecunia eius numerata sit . . . qui suis nummis redemptus est.

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THE *DEDITICII* IN *P.GISS.* 40 I 7–9*

Abstract: The paper holds that the *dediticii* ([δε]δειτίκιοι) mentioned in the famous *Constitutio Antoninina* (P.Giss. 40 I 9) are to understand as slaves who were severely punished by their masters and afterwards manumitted. The *lex Aelia Sentia* excluded these freedmen of any kind of Roman citizenship (Gaius, *Inst*. I 26). This view, so far advanced only by a minority of scholars, seems to be backed now by Macedonian manumission inscriptions. Therefore, the attempt to restore the lacunae in the papyrus according to the *tabula Banasitana* seems to be misleading.

Keywords: *Constitutio Antoninina*, Roman citizenship, manumission, *ius civile*, *tabula Banasitana*

Questions of personal status were an important topic in elementary literature of classical Roman legal science, reflecting their importance in everyday life during the Principate. In this paper I will address the thorny problem of the *dediticii* mentioned in the *Constitutio Antoniniana* and present a possible solution based on the classical status distinctions determined by the time-honored Roman *ius civile*, the *lex Aelia Sentia*; not at all an original or new solution — already Wolfgang Kunkel pointed to it in a footnote in his textbook of Roman law[1] — however, to my mind, it is now indirectly corroborated by Macedonian manumission inscriptions.[2] As far as necessary, I have to deal also with the *Constitutio* itself.

Undecayed by alterations due to Byzantine law in Justinian's *Corpus Iuris* the Institutes of Gaius, written about 160 AD, provide the most comprehensive picture of the *dediticii*'s position within the contemporary status distinctions. For better understanding my following analysis I quote some of Gaius' most relevant remarks on this topic coherently (*Inst*. I 9–17, 25–27[3]):

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* A preliminary German version of this paper has been published by Thür 2018. I thank Michael Gagarin for checking the English and Thomas Kruse for further discussion. All mistakes are mine.

1 Kunkel 1935/1949, 58 n. 10, as far as I know, differently from all views before him (see below n. 39). Generally, if authors discuss this topic they deny explicitly any connection between *lex Aelia Sentia* and *Constitutio Antoniniana*.

2 Petsas et al. 2000 (*I.Leukopetra*).

3 Manthe 2004.

> [III. De condicione hominum.] 9. Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut serui. 10. Rursus liberorum hominum ali*i* ingenui sunt, ali*i* libertini. 11. Ingenui sunt, qui liberi nati sunt; libertini, qui ex iusta seruitute manumissi sunt. 12. Rursus libertinorum *‹genera tria sunt: nam aut cives Romani aut Latini aut dediticiorum›* numero sunt. de quibus singulis dispiciamus; ac prius de *‹de›*diticiis. [IIII. De ded*i*ticiis vel lege Aelia Sentia.] 13. Lege itaque Aelia Sentia cavetur, *ut*, qui servi a dominis poenae nomine vincti sunt quibusve stigmata inscripta sunt deve quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse convicti sunt quive, *ut* ferro aut cum bestiis depugnarent, traditi sint, inve ludum custodiamve coniecti fuerint et postea vel *ab eodem* domino vel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini deditici*i*. [V. De per*e*grinis ded*i*ticiis.] 14. Vocantur autem ‘peregrini dediticii’ hi, qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde victi se dediderunt. 15. Huius ergo turpitudinis servos quocumque modo et cuiuscumque aetatis manumissos, etsi pleno iure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero constitu*i* intellegemus. 16. Si vero in nulla tali turpitudine sit servus, manumissum modo civem Romanum modo Latinum fieri dicemus. 17. Nam in cuius personam tria haec concurrunt, ut maior sit annorum triginta et ex iure Quiritium domini et iusta ac legitima manumissione liberetur, id est vindicta aut censu aut testamento, is civis Romanus fit; sin vero aliquid eorum deerit, Latinus erit. – – – 25. Hi vero, qui dediticiorum numero sunt, nullo modo ex testamento capere possunt, non magis quam quilibet peregrinus; [quia] nec ipsi testamentum facere possunt secundum id quod magis placuit. 26. Pessima itaque libertas eorum est, qui dediticiorum numero sunt; nec ulla lege aut senatus consulto <u>aut constitutione principali</u> aditus illis ad civitatem Romanam datur. 27. Quin etiam in urbe Roma vel intra centesimum urbis Romae miliarium morari prohibentur, et si qui contra ea fecerint, ipsi bonaque eorum publice venire iubentur ea condicione, ut ne in urbe Roma vel intra centesimum urbis Romae miliarium serviant neve umquam manumittantur, et, si manumissi fuerint, servi populi Romani esse iubentur. Et haec ita lege Aelia Sentia conprehensa sunt.

By the procedures of ancient *ius civile*: *manumissio vindicta*, *censu* or *testamento*, Roman citizens were able to manumit their slaves — if they were free of *turpitudo* — directly to Roman citizenship (§§16–17). By other forms of manumission, additionally recognized by the *praetor*, the freedmen got only the citizenship of *Latini* according to the *lex Iunia* of 19 AD (§17).[4] In accordance with the *lex Aelia Sentia* of 4 AD, freedmen, who as slaves had been punished — by their masters (!) — e.g. by being confined or fighting with wild beasts in the arena (and survived), were excluded from every Roman kind of citizenship (§§13 and 15). They were counted among the *peregrini dediticii*, enemies[5] “who, having formerly taken up

[4] For manumissions under *ius honorarium* see Kaser 1971, 285–6.

[5] Kaser 1971, 282 is using the descriptive term “Kriegsfeinde.”

arms and fought against the *populus Romanus* afterwards have been conquered and have surrendered at discretion" (§14). That means, dishonorable freedmen were classed *dediticiorum* *numero* (§15). They suffered serious disadvantages in inheritance law (§25).[6] Furthermore (§26): *Pessima itaque libertas eorum est qui dediticiorum numero sunt; nec ulla lege aut senatusconsulto aut constitutione principali aditus illis ad civitatem Romanam datur.* (The worst kind of freedom is given to them who count among the *dediticii*; nor is any way afforded to them of obtaining Roman citizenship either by a law, by a Decree of the Senate, or by an Imperial Constitution.) Surprisingly for us, still in the high Principate the civic status of freedmen was completely at the discretion of their former masters (*domini*, §§13 and 16), the 'independent' Roman citizen (being *persona sui iuris*, *paterfamilias*).

In the Greek East of the Roman empire the *peregrini* numerically prevailed. As hundreds of inscriptions and papyri demonstrate, since pre-Roman times peregrine people have used special sacral or private forms of manumission. In contrast to Roman rules these freedmen never received the citizenship of their former masters' home-poleis,[7] not to mention the Roman one. Roman and local freedmen were neatly distinguished. This is demonstrated by two second century inscriptions from Syllion in Pamphylia honoring a lady Menodara for distributing donations to the general public, including οὐινδικτάριοι καὶ ἀπελεύθεροι (*manumissi vindicta*, that means freedmen who were *cives Romani*, and simple non-citizen freedmen).[8] Thus, Roman and peregrine manumissions were two different worlds, and the Roman administration had to face this problem.

The so-called *Fragmentum Dositheanum*[9] shows how Roman magistrates managed the problem of peregrine manumissions (§12): *Peregrinus manumissor servum non potest ad Latinitatem perducere, quia lex Iunia, quae Latinorum genus introduxit, non pertinet ad peregrinos manumissores, sicut et Octavenus probat. At praetor non permittet manumissum servire, nisi aliter lege peregrina caveatur.* (A peregrine *manumissor* cannot provide *Latinitas* for a slave because the *lex Iunia* that introduced the kind of *Latinitas* does not refer to peregrine *manumissores*, which also Octavenus approves. However, the *praetor* will not allow that a freedman will serve as slave unless otherwise stipulated in a *lex peregrina*. — Octavenus wrote under Domitian and Hadrian.)

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[6] For this topic see Kaser 1971, 682. 684. 701.

[7] Ricl 2001, 143 n. 63; Zelnik 2005, 301–306; Youni 2010, 313. At the Symposion Lene Rubinstein generously communicated to me three Delphic inscriptions where manumitted women were entitled to *politeuein* (SGDI 1718, 170-157/6 BC; 1844, 186 BC, and 2133, 182 AD). She conjectures that the first two had been enslaved in connection with an armed conflict. So, their former civic status may have been restored (after being ransomed?).

[8] *IGRR* III 801, 20–21, cf. 802, 25–6; see Kantor 2016, 51 (where Menodora is misunderstood as male).

[9] Its pattern is dated in the second century, Wieacker 2006, 119.

Just as manumissions by peregrines did not result in the citizenship of a polis, they did not result in the Latin one, not to mention the Roman. However, the *praetor* (Gaius I 28 refers also to the *praeses provinciae*) protected the peregrine freedmen from services requested by their former masters, unless stipulated by a *lex peregrina*. This *lex* is not a peregrine statute but rather a contract clause, *lex contractus*, referring to the variously shaped *paramonē* clauses in the Greek manumission documents. The services inflicted on the freedmen (scilicet: freedpersons) are sometimes so onerous that prominent scholars seriously question the effect of freedom.[10] Thus, disputes were inevitable, and the Roman authority decided according to the Greek documents. Anyway, the freedmen's peregrine status was beyond doubt.

Important for my further analysis are the manumission inscriptions from the sanctuary of the "Mother of the Autochthonous Gods" in Leukopetra in Macedonia.[11] They date from 141 to 313 AD and contain excerpts from documents of sacral manumissions kept safe in the temple archive. The manumissions took place through fictitious dedications or donations of slaves to the goddess (ἀνατίθημι or δωροῦμαι, χαρίζομαι). On the one hand the deed provided safety against re-enslavement. On the other hand it guaranteed the manumittor's or third persons' claims against the former slave for complying with his or her *paramonē* duties; all this was additionally reinforced through the public display of the inscription on the temple wall. Luckily, most of them are dated by year and month.[12] So, we can see that even before the year 212 Roman citizens made extensive use of this peregrine kind of manumission.[13] At most these acts could have brought Latin citizenship about. Surprisingly, exactly with the date of 212/13 in the form of the Leukopetra documents a modest variation occurred that seems important for understanding the *dediticii* mentioned in the *Constitutio Antoniniana*.

At this point, to continue my analysis I have to sketch my personal view of Caracalla's *edictum* itself. It is impossible even to summarize all the interpretations proposed for *P.Giss.* 40 col. I since its *editio princeps* in 1910.[14] Due to the changing Zeitgeist, in more than a century, one can observe two general lines of thought. German scholarship at the beginning of the 20th century was guided by the recently enacted Civil Law Code, Bürgerliches Gesetzbuch. After centuries this law code

[10] Ricl 2001, 143; Zelnik-Abramovitz 2005, 339.

[11] Petsas et al. 2000 (*I.Leukopetra*).

[12] Dating is mostly according to the Augustan era, which starts 32 BC, and/or to the Macedonian one starting 148 BC, the year of the conquest of Macedonia by L. Aemilius Paulus; see Youni 2010, 318.

[13] Meyer 2002, 138 counted 23 out of a total of 52 instances previous to 212.

[14] A most useful summery gives Kuhlmann 1994, 217. Concerning more recent literature I rely foremost on Buraselis 2007 (in modern Greek already 1989), Kantor 2016 and van Minnen 2016. [Among many others, in my oral Symposion paper I omitted Weber 2009; since this article is a basic argument of my respondent, I will add now some comments on it, see below n. 38.]

unified the civil statutes that had been until then completely splintered amongst the former sovereign German territories. The ideology was that one empire was ruled by one comprehensive civil law. This was realized within the Deutsches Kaiserreich, established 1870, when, in the year 1900, the Civil Law Code entered into force. This law code followed the *ratio scripta* of the classical Roman jurists in the shape that the 'Pandektenwissenschaft' had enucleated from Justinian's *Corpus Iuris*. Consistently — and anachronistically — *P.Giss.* 40 I was interpreted in the sense that Caracalla's intention was to unify law within his empire. However, more than one hundred years later we know that in the Roman empire such a uniform, comprehensive civil law, "Reichsrecht" in the sense of Ludwig Mitteis (1891), had never existed. Concerning Roman Egypt already Hans Julius Wolff remarked: "Die Bevölkerung bediente sich weiterhin (after 212, G.Th.) der altvertrauten Rechtsformen und Formulare,"[15] and recently Georgy Kantor (2016) painted a highly differentiated picture of Asia Minor. Regrettably this view is not yet communis opinio. 'Unity of law' prevails, in private and public matters, and the *dediticii* are understood in the sense of conquered external enemies due to Gaius' historical explanation inserted in §14.

A turning point against 'unity of law' approach has been the book *Theia Dorea* by Kostas Buraselis, after a Modern Greek version from 1989 published in German 2007 in the series of the present acts. In *BGU* II 655 (215 AD) the *Constitutio Antoniniana* is casually called "divine gift" (θεῖα δωρεά) and this was how common people felt. Proudly they accepted the name *Aurelii* and the elevation of their status. Caracalla's ambition was not to achieve abstract unity of law or increase public finances, but rather to consolidate the Severan dynasty, and his own position during the crisis resulting from murdering his brother Geta. To found an empire like that of Alexander the Great he wanted to assemble a great mass of free inhabitants personally grateful to him and his dynasty. The tenor of the *constitutiones* preserved in *P.Giss.* 40 is highly rhetorical, religious and political, and in no way bureaucratic. Furthermore, Buraselis has observed that on the one hand one can neglect the financial loss through shortfall of the poll tax and on the other hand that in the 3rd century the legal value of Roman citizenship had already decreased. Then, the decisive distinction was *splendidiores* or *honestiores* versus *humiliores*.[16] When ordering the rebellious non-resident Egyptian mob out of Alexandria in a *constitutio* of 215/16, Caracalla himself disregarded his act of granting *politeia* by rebuking the "un-civic behavior" of these lower-class people.[17] Awarding Roman citizenship does not mean granting civil rights in the modern sense.[18] Generally, I think one should

[15] Wolff, Rupprecht 2002, 125.

[16] Buraselis 2007, 120–136.

[17] *P.Giss.* 40 col. II 28–29: ἐναντία ἤθη | ἀπὸ ἀναστροφῆς [πο]λειτικῆς; "totally different from civic behavior;" translation by van Minnen 2016, 209, see also his p. 207 n. 11 and 216 n. 47.

[18] Bryen 2016 made a good point of this but neglected the *humiliores*.

follow Buraselis, albeit questioning his — and many others' — opinion that Caracalla's *dediticii* were conquered barbarian enemies.[19] Who else could they have been?

To get one step closer to an answer I propose to have another look at the papyrus itself, not at its reading, but rather at the most probable restorations of the text lost in the lacunae of lines 8 and 9 of the first column. I quote some prominent examples (*P.Giss.* 40 I 7–9):

Meyer, *Jur.Pap.* 1 (1920)
(7) Δίδωμι τοί[ν]υν ἅπα-
(8) [σιν ξένοις τοῖς κατὰ τὴ]ν οἰκουμένην π[ολιτ]είαν Ῥωμαίων [μ]ένοντος (54 lett.)
(9) [παντὸς γένους πολιτευμ]άτων χωρ[ὶς] τῶν [δε]δειτικίων.

Wilhelm 1934, 180 (1984, 218; Buraselis [1989] 2007, 10)
(7) Δίδωμι τοί[ν]υν ἅπα-
(8) [σιν τοῖς κατοικοῦσιν τὴ]ν οἰκουμένην π[ολιτ]είαν Ῥωμαίων [μ]ένοντος (55 lett.)
(9) [οὐδενὸς ἐκτὸς τῶν πολιτευμ]άτων χωρ[ὶς] τῶν [δε]δειτικίων.

Kuhlmann 1994, 222
(7) Δίδωμι τοῖς συνάπα-
(8) [σιν κατὰ τ]ὴ̣ν οἰκουμένην π[ολειτ]είαν Ῥωμαίων μένοντος
(9) [τοῦ δικαίου τῶν πολιτευμ]άτων[20] χωρ[ὶς] τῶν [..]δειτικίων.

All these (and many other) authors insist on πολιτευμ]άτων (political communities) and hold that in the [μ]ένοντος | [–]άτων clause, in addition to the grant of citizenship and to the exclusion of some [..]*diticii* Caracalla had disposed a further basic constitutional order. Magie disputed the context with political communities and restored a word in close connection with the grant of citizenship, indicating its consequences: δικαιωμ]άτων ("exceptional rights," privileges):

Magie II 1950, 1556
(8) [μ]ένοντος
(9) [οὐδενὸς ἄνευ τῶν δικαιωμ]άτων[21] χωρ[ὶς] τῶν [δε]δειτικίων.

Because the left edge of *P.Giss.* 40 is broken away, to restore the text in the lacunae of the first column a problem arises with the length of lines. The prevailing opinion

[19] Buraselis 2007, 7.
[20] Apparently well based on the "reservation clause" in the so-called *tabula Banasitana* (lines 12, 18–19, 35–37, quoted below, at n. 30). However, see the following discussion.
[21] Magie referred to *P.Oxy.* VIII 1119.15 (Antin. 253 AD; WChr 397): ... τῶν ἐξαιρέτων τῆς ἡμετέρας πατρίδος δικαιωμάτων ("... the exceptional rights claimed by our native city," transl. *P.Oxy.*; in Latin: *privilegia*).

has been that *P.Giss.* 40 contains three edicts: the first one extending citizenship, the second allowing exiles to return and the third ordering the rebellious Egyptian mob out of Alexandria. Recently Peter van Minnen contested this view, holding that there are only two *constitutiones*, one *edictum* running from column I to II (containing both citizenship and amnesty) followed by an *epistula* to the *praefectus Aegypti* (about the rebellious mob) in column II, separated by a blank line and beginning in line 16 of col. II with the heading ἄλλο in ecthesis.[22]

Already Joseph Mélèze demanded an analogous heading at beginning of the first line in column I,[23] and van Minnen reconstructed, without abbreviations, a line length of 80 letters.[24] He (and Mélèze) assume different line lengths for columns I and II. However, an additional heading "ἀντίγραφον διατάγματος" (even abbreviated) does not seem necessary because λέγει (*dicit*) in the first line of col. I clearly points to an *edictum*. I cannot imagine that the scribe used different line lengths in copying one and the same document over two columns — if van Minnen is right about that; and he has good arguments.

Therefore, depending on the line lengths supposed by van Minnen his restoration of lines 8–9 is too copious:

van Minnen 2016, 209. 217 (tentatively)

(7) ……δίδωμι τοῖς συνάπα-

(8) [σιν ξένοις Ἕλλησι τε καὶ βαρβάροις τοῖς κατὰ τὴ]ν οἰκουμένην π[ολειτ]είαν Ῥωμαίων μένοντος (76 lett.)

(9) [τοῦ δικαίου τῶν πόλεων – – καὶ ἐθνῶν καὶ δήμων καὶ – –]άτων χωρ[ὶς] τῶν [δε]δειτικίων.

Here, in no way does "the text get down to business".[25] On the contrary, taking the *edictum* on the whole — with van Minnen running over to column II — the language continuously remains rhetorical. Thus, for line 9, the sample of the bureaucratic *Monumentum Ephesenum* enumerating "the various categories of communities recognized by Roman law"[26] is misleading here. Van Minnen is unnecessarily demanding juridical precision. Therefore, also in line 8 I would prefer a short restoration with about 55 letters like the earlier authors have suggested, and one should easily find the proper wording.

22 Van Minnen 2016, 209–15.

23 Mélèze Modrzejewski 2011, 482 restores the beginning of *P.Giss.* 40 col. I line 1: [ἀντίγρα(φον) διατά(γματος)· = 12 letters, followed by Caracalla's official titulature, in abbreviated form (not to be discussed here) of 59 letters, that makes 71 letters (in ecthesis). The lines of col. II have between 57 and 64 letters.

24 Van Minnen 2016, 209 restores tentatively, not abbreviated: [ἀντίγραφον διατάγματος· = 21 letters in addition to the 59 of the titulature, that makes 80 letters (in ecthesis).

25 To quote van Minnen 2016, 217 n. 55.

26 So van Minnen 2016, 218.

The main problem is the lacuna in line 9. I am following the restoration [δε]δειτικίων against [ἀδ]δειτικίων, *dediticii* and not *additicii*, and hold with Mélèze[27] and van Minnen[28] that in line 9 the phrase χωρ[ὶς] τῶν [δε]δειτικίων goes with δίδωμι … | … π[ολειτ]είαν Ῥωμαίων (l. 7–8): the *dediticii* (whoever they may be) are excluded from the gift of Roman citizenship. Since Kuhlmann scholarship has agreed that the phrase μένοντος ... [– – –]άτων in line 8–9 means a 'reservation clause'[29] that now generally has been restored after the *tabula Banasitana*[30] (l. 35–7): *civitatem Romanam de|dimus salvo iure gentis sine diminutione tributorum et vectigali|um populi et fisci* (we granted Roman citizenship free of the legal status of the *gens*, without any decrease in *tributa* and *vectigalia* for the *populus* and the *fiscus*); summarily and stylishly expressed in the Greek restoration: μένοντος | [τοῦ δικαίου τῶν πολιτευμ]άτων.[31] Anyway, the following phrase excluding the *dediticii* from citizenship seems odd because χωρ[ίς] linguistically goes with μένοντος (l. 7) and not — as logically required — with δίδωμι (l. 8). Mélèze remarks: "La construction est lourde, mais elle est parfaitement acceptable; les rédacteurs de lois, dans l'Antiquité comme de nos jours, ne sont pas tous d'irréprochables stylists."[32] He quotes a single instance of a poll tax receipt of 40 *drachmai* paid in the year 248.[33] This seems to back the reservation clause in Caracalla's *edictum*. However, to solve this problem a general study of the imperial financial policy in the Severan time would be necessary, that I cannot provide.[34] Following Buraselis[35] I hold that poll tax collection from non-Roman population had lost its importance. Meanwhile the emperors had learned to exploit their Roman citizens too.

Therefore, in the same way as the *Monumentum Ephesenum* seems misleading for restoring line 8 the sample of the *tabula Banasitana* "*salvo iure gentis*" (μένοντος | [τοῦ δικαίου τῶν πολιτευμ]άτων) — as tempting as it may be — is not conducive to restoring line 9. The reservation clause in the *tabula* stands in the tradition of granting Roman citizenship to single persons or small groups since

27 Mélèze 2011, 487.
28 Van Minnen 2016, 219.
29 Kuhlmann 1994, 229–232, "Salvationsformel," p. 229.
30 *AE* 1971, 534 (Banasa, Mauretania, 177 AD).
31 However, the — alleged — Greek translation in *P.Giss.* 40 is missing the addition *sine deminutione tributorum et vectigali|um populi et fisci*, that makes clear that *ius gentium* encompasses foremost the communities' and their members' obligations toward the Roman state. Indeed, this is the case in *tab. Ban.* lines 12 and 18–19, too, but should not occur in a general provision.
32 Mélèze 2011, 487.
33 Mélèze 2011, 491: P.Batav. (= Pap. Lugd. Bat. XIX) 14 (248 AD, Ars.), with general reference to (Mélèze) Modrzejewski 1989 (=1990); see also Mélèze 2014, 323 n.11.
34 [Also the additional source quoted by my respondent in his note 14 cannot substitute detailed economic investigations.]
35 Buraselis 2007, 143–54.

republican and Augustan times. Mélèze gives a good overview.[36] Also the tablet from Banasa concerns just the family of a notable Berber, chief of a tribe, and not the whole *gens*.[37] Here, the 'reservation clauses' — granting citizenship without fiscal privileges — originated from republican foreign and fiscal policy.[38]

By no means did Caracalla tread this path. Aiming for a monarchy like that of Alexander the Great he intended to allure "his people" (col. I 6) by a splendid gift: Roman citizenship (and receiving personal gratitude vice versa). Therefore, it is hardly plausible that he inserted a fiscal reservation clause in his *edictum* immediately after the generous δίδωμι … π[ολειτ]είαν Ῥωμαίων phrase. More likely the next phrase, ending with χωρ[ὶς] τῶν [δε]δειτικίων is dealing exclusively with a status question — flattering the broad mass by excluding outsiders. In his *edictum* Caracalla had no need of going into bureaucratic details about financing his empire. At the most, for such a provision there would have been space enough within the following lines 10–27 of col. I, where only a few letters at the right edge are preserved. By adjusting most of his people's legal status Caracalla consequently, by unification, created subjects to his empire.

To sum up: linguistic and historic doubts speak against the prevailing restorations of lines 8–9 of the first column. It does not seem helpful creating a linguistical odd text by adopting an out-of-time clause — at least at an improper place. In the following I will try to propose — hypothetically as any previous attempt — a restoration that might satisfy on both counts.

After this long introduction, at last, I come to the question: who are the *dediticii* in Caracalla's *edictum*? Looking again at Gaius, we see that in the 29 lines of his section on *libertini* (comprising *cives Romani aut Latini aut dediticiorum numero*,

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36 Mélèze 2011, 489–91.

37 So erroneously van Minnen 2016, 217.

38 [Out of the huge literature on *P.Giss.* 40, in my oral presentation I did not deal with Ekkehart Weber especially referred to by my respondent. Weber 2009, most inventively, considers the reservation clause of lines 8–9 a reminiscence to the *lex Plautia Papiria* of 89 BC that after the Social War granted Roman citizenship to nearly all inhabits of *Italia* (see now Lavan 2019, 26; Laffi 2019, 171). Correctly he holds that this statute was the first general award of Roman citizenship. However, its text is not preserved; and audaciously Weber suggested a restoration based on the — most hypothetically restored itself — *Constitutio Antoniniana*, owing to the reservation clause, well documented indeed in the *tabula Banasitana*. Weber 2009, 161 conjectured for the *lex Plautia Papiria*: *... concedit omnibus hominibus per Italiam ceivitatem Romanam salvo iure ceivitatum exceptis dediticieis*. Thus, allegedly, in the third century AD the imperial chancellery took the *dediticii* somewhat "nonsensically" (p. 162) from the republican *lex* — then really indicating conquered enemies (cf. Gai. inst. I 14); for this topic see the following discussion. Furthermore, the *Italici* had to be registered within 60 days with the *praetor* in Rome (Cic. *Arch.* 7), and *tab. Ban.* documents the complicated bureaucratic procedure for becoming Roman citizens in the Principate; after 212 AD nothing like that is preserved. My conclusion is that Caracalla composed his text without republican models.]

§12) only three lines deal with the conquered barbarians (§14), and — due to Gaius' antiquarian interests — only as historical digression. From the beginning, these three lines blurred our view of the *Constitutio Antoniniana*. Only Wolfgang Kunkel[39] held that the edict concerns freedmen, who were *dediticiorum numero* under the *lex Aelia Sentia*. However, one cannot go with his further statement "*dediticii* im eigentlichen Sinne, d.h. mit Waffengewalt unterworfene Feinde des römischen Staats, denen jede bessere Rechtsstellung verweigert wurde, gab es im 3. Jh. schwerlich noch." In this regard, already Herbert W. Benario, who follows Kunkel's main thesis, corrects Kunkel by referring to an inscription from 232 AD that mentions *dediticii Alexandrini*, troops garrisoned at the *limes Germanicus*,[40] discussed also by van Minnen[41]; already Mélèze had added some more instances belonging to the Roman army.[42] In my opinion, it is to be questioned whether the military organization was relevant at all to Caracalla's general citizenship policy. His army and the status of the soldiers were directly subject to his *imperium*. Extending the imperial favor personally to all free inhabitants was a civilian affair and a matter of mutual goodwill. There was neither reason nor need for Caracalla to mention *peregrini dediticii* in his *constitutio*.

One wonders why — contrary to Gaius' Institutes — in Justinian's Digest no manumission cases concerning *libertini dediticiorum numero* are preserved from classical times. Obviously, we cannot find them in the Digest because Justinian completely extinguished this feature in a reform constitution, *Codex Iustinianus* 7.5 (a. 530 AD). Under the rubric *De dedititia libertate tollenda* he directed: *Dedititia conditio nullo modo in posterum nostram rempublicam molestare concedatur, sed sit penitus deleta ...* This does not prove that there was still a practical problem with *dediticii* in the 6th century; Justinians *quinquaginta decisiones* intended nothing but a reform of academic law studies.[43] At least, *C.* 7.5 admits indirectly that earlier there were a lot of controversies. And one can find them, beside Gaius, in other pre-Justinianic legal sources. The widespread *Pauli Sententiae* finally composed about 300 AD[44] are the best example. In the whole title *De manumissionibus* (IV 12) six of the nine paragraphs (§§3–8) deal with *iusta libertas*; and also *dediticium facere* (§6) and *dediticiorum numero non efficitur* (§7) sound like an immediate answer to the problems effected by Caracalla's *edictum*.[45] Significantly, the *Codex Theodosianus*

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39 Kunkel 1935/1949, 58 n. 10.

40 *CIL* XII 6592 (*Dessau* 9184; *ILS* 9184; 232 AD, Germania Superior: Walldurn /Frankfurt); Benario 1954, 194 n. 21 holds that such *dediticii* in no way were excluded from becoming Roman citizens (for the inscription see already Magie II 1950, 1556).

41 Van Minnen 2016, 220 n. 69.

42 Mélèze 2011, 487–8.

43 See also *Inst. Iust.* I 5.3, III 7.4.

44 Wieacker 2006, 172–4.

45 For the content of PS IV 12 see Liebs 1993, 106–7.180–81 (^{2}2005, 125). For example: a slave confined by command of a *dominus furiosus* or a *pupillus* will not become *dediticiorum numero* (§7).

from 438/9 does not mention *dediticii* at all; in contrast to the second and third century, already in the fourth century they were of no more importance.[46]

This result, obtained thus far from well-known sources, backs Kunkel's opinion that the core of Caracalla's *dediticii* is not to be found at the extreme edges of the empire but rather in its center, in the personal status of the inhabitants: harmonizing Roman and peregrine, primarily Greek, ways of manumission. The emperor opened his goodwill to all free inhabitants of the *orbis Romanus*. Freedmen were included. From ancient times different kinds of citizenship were acquired by Roman manumissions, but in no way a polis citizenship by a Greek manumission — so far, there was no problem of *turpitudo* for peregrine freedmen. Now, peregrine manumissions got the same impact as a Roman one. Therefore, also the exception through *lex Aelia Sentia* and *ius civile* had explicitly to be extended to peregrine manumissions: no dishonorable freedman, no person *dediticiorum numero*, should become Roman citizen. No unworthy person should be among the people honored to receive the privilege of the θεία δωρεά. In this regard I would call Caracalla a 'conservative revolutionary.'

To these findings, I should think, one can add a new and maybe decisive piece of evidence. As I mentioned at the beginning, in the year 212/13 in the form of the manumission documents from Leukopetra a modest variation occurred, beyond doubt caused by Caracalla's edict. At that time *proconsul* Marcus Ulpius Tertullianus Aquila was appointed governor of Macedonia.[47] In his term of office an inscription was published that the herewith documented manumission took place according to his 'order': κατὰ κ[έ]λευσιν τοῦ | κρατίστου ἡγ[εμό]νος μου Τερ|τυλλιανοῦ Ἀκ[υλάο]υ (*I.Leukopetra* 63, 3–5). From the next 40 years 18 inscriptions are preserved, containing the phrase κατὰ τὴν ἀπόφασιν of Tertullianus. Probably Maria Youni is right in translating ἀπόφασις as *edictum*.[48] Unfortunately, the content of Tertullianus' order is never explicitly quoted; the phrase is placed at different positions in the text and does not refer automatically to the clause immediately preceding it. Definitely one innovation has been introduced: all manumissions had to be preceded by public notification, by means of a document containing all the required information, which was displayed in public 30 days prior to manumission. The time-limit is mentioned in *I.Leukopetra* 100;[49] other details were the slave's 'nation' — this was also an essential entry in any sale contract[50] —,

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46 From *manumissio in ecclesia* indistinctively results *civitas Romana* (*CTh.* IV 7.1pr., a. 321); where one would expect *dediticii* one reads *victi hostes* (*CTh.* IV 8.5.5, a. 322) or *servi poenae* (*CTh.* X 12.2.5, a. 368/370/373).

47 For Tertullianus see Ricl 2001, 142; Youni 2010, 328.

48 Youni 2010, 337. Beside the usual term διάταγμα also ἀπόφασις occurs, for instance, in *I.Eleusis* 489.32: ἀπόφασις ἐπάρχου (169/70 AD).

49 Lines 10–13: ... κατα|χθείσης τριακονθημέ|ρου, κατὰ τὴν ἀπόφασιν | Τερτυλλιανοῦ Ἀκύλα (244 AD).

50 Jakab 1997, 140–141; *D.* 21.1.31.21 (Ulp. 1 *aed. cur.*)

the kind of acquisition: by birth in the house or purchase, in the last case preceding owner and guarantors. A particular place at the Caesarium, the temple of the imperial cult, was assigned for exhibiting such documents.[51] A good example is *I.Leukopetra* 93[52] (239 AD):

> Ἔτους ΑΟϹ τοῦ | καὶ ΖΠΤ, μηνὸς | Δείου ΗΙ· Ἀυρήλιος |[4] Οὐαλέριος ὁ πρὶν | Ποσιδωνίου, Δρο|γεάτης οἰκῶν | ἐν Βάρῃ Νικίο, χωρί|[8]ῳ τῷ γεγενομένῳ | Κλαυδίου Μαρκέλλ|ω, χαρίζομαι παι|δάριον Μητρὶ Θεῶν |[12] Αὐτόχθονι ὀνόμα|τι Μαξιμιανόν, ὡς | ἐτῶν Ν?, γένι Μακε|δονικόν, ὃν ἠγόρα|[16]σα ἐν Πελεγονικῇ | παρὰ Αὐρελίας Ἰου|λίας ἐπὶ βεβεωτῇ | Αὐρηλίῳ Οὐαλερί|[20]ῳ τῷ πρὶν Φιλίππου·| ἔστω δὲ ἔπειτα καθὼς | ἡ ὠνὴ περιέχι, ἥντι|να ὠνὴν τῇ αὐτῇ |[24] ἡμέρᾳ ἔθκα εἰς τὰς | ἀνκάλας τῆς θεοῦ,| κατὰ τὴν ἀπόφασιν τὴν | Τερτουλλιανοῦ Ἀκύλα·|[28] ἐπιμελομένου Ἰουλι|ανοῦ Ἐνδήμου, είερω|μένου Εἰουλιανοῦ Δη|μητρίου.

There has been some discussion about the reason for Tertullianus' edict. Ricl supposes that the governor was protecting the slave against abuses through re-enslavement, financial liabilities, or bailment.[53] However, this does not explain the thirty-day deadline. Reasonably the editors hold that the deadline should enable the raising of objections.[54] More precisely Youni states that the thirty days, starting from the first day of the display, were provided for anyone who wished to claim ownership of or any right to the slave.[55] Juridically this makes good sense. However, this problem existed already before the year 212 and the governor didn't care about these private matters. Rather, the coincidence with the *Constitutio Antoniniana* suggests another explanation: immediately responding to Caracalla's edict the governor took measures to avoid freedmen *dediticiorum numero* becoming Roman citizens. This was, as the cases in the *Pauli Sententiae* demonstrate, of utmost public interest. The best way of surveillance was public announcement, posting the intended manumission up for thirty days like the marriage bans "Eheaufgebot" in canon law to find impediments to marriage. It was not the government that was

[51] *I.Leukopetra* 103 (253 AD).

[52] *I.Leukopetra* 93 "In the year 271 which is also year 387, on the 18th of the month Dios, I, Aurelios Oualerios formerly son of Poseidonios, originating from Droga, living in the Tower of Nikias, a farm belonging to Claudius Marcellus, donate (χαρίζομαι) a slave to the Mother of the Gods, by the name of Maximinianos, about fifty years of age, born in Macedonia, whom I bought in Pelagonia from Aurelia Julia with Aurelios Oualerios formerly son of Philippos acting as guarantor. From now on, let everything be according to the contents of the document of manumission (ὠνή!!!), which I deposited on the same day in the arms of the goddess. (The manumission took place) in accordance with the edict of Tertullianus Aquila. Curator of the temple Ioulianos Endemos, priest Ioulianos Demetrios." Translation follows Youni 2010, 333–4; for the dates see above n. 12.

[53] Ricl 2001, 142.

[54] Petsas et al. 2000, 162.

[55] Youni 2010, 332.

responsible for checking whether the slave was without *turpitudo* and worthy to become Roman citizen, but rather one counted on social control. Therefore, specifying nation and way of acquisition was ordered so that every concerned or interested person could make inquiries.

What happened when someone, for instance in Leukopetra after 212 AD, had manumitted a slave being under *turpitudo*? In no way the *manumissio* was void. As the *Pauli Sententiae* show, the freedman didn't get 'lawful freedom,' *iusta libertas* (§3), but rather the worst status of freedom as *dediticius* (§6) or more correctly he was *dediticiorum numero* (§7). This makes clear that even after 212 these free underclass inhabitants did exist all over the *orbis Romanus*. Because Justinian extinguished the respective juristic sources, we do not know whether all the civil restrictions enumerated by Gaius, who wrote about 160 AD, were still in force in the third century. In any event, in the fourth century the *dediticiorum numero* gradually merged into the *humiliores*[56] and definitely did not exist anymore in Justinian's time.

By the way, the edict of Tertullianus opens also a view to the character of Roman law in the provinces. We have learned from the Leukopetra inscriptions that Roman citizens used peregrine manumissions before and after the *Constitutio Antoniniana* as well.[57] And the *Fragmentum Dositheanum* demonstrated how Roman authority came to terms with it.[58] When Tertullianus enacted his *edictum* he did not transfer a peregrine institution into Roman provincial law.[59] The Leukopetra manumissions didn't change their character after 212, and there was no need to do so. Given the extension of citizenship also to peregrine freedmen, the governor just countered a possible misuse: no dishonorable slave, being under *turpitudo* (Gai. 1.16), should advance to a co-citizen by this peregrine kind of manumission. *Lex Aelia Sentia* about excluding freedmen *dediticiorum numero* from any kind of Roman citizenship belonged also for Caracalla to the Roman 'ordre public,' to the 'red line' that even the emperor was afraid of transgressing, as Gaius I 26 writes: *nec ... constitutione principali aditus illis ad civitatem Romanam datur*.

Finally, I hazard to add my own, very simple, restoration of *P.Giss.* 40 col. I lines 7–9 to the dozens of attempts that already exist:

(7) Δίδωμι τοῖς συνάπα-
(8) [σιν ἐλευθέροις καθ' ὅλην τὴ]ν οἰκουμένην π[ολειτ]είαν Ῥωμαίων μένοντος (58 lit.)
(9) [οὐδενὸς ἄνευ τῶν δικαιωμ]άτων χωρ[ὶς] τῶν [δε]δειτικίων.

(Comments see next page)

[56] No more mentioned in the *constitutiones* of the 4th century, see above n. 46.
[57] See above n. 13.
[58] See above n. 9.
[59] So Youni 2010, 337.

The Latin text could have read as follows:

Cunctis liberis per totam oecumenen civitatem Romanam dono ne quo manente sine privilegiis praeter dediticios.[60]

Some comments:[61]

Δίδωμι — the Latin text could have run (*civitatem*) *dono*, not as the official *do*; see θεῖα δωρεά "divine (= imperatorial) gift" in *BGU* II 655, 6 (215 AD); Buraselis 2007, 115. With *dono* also the Latin prose sounds smoother.

[ἐλευθέροις] — already Kuhlmann 1994, 228 considered ἐλευθέροις as possible restoration; it corresponds with my view of the *dediticii*. *Liberi* designates both *ingenui* and *libertini* (Gai. I 10), so that Caracalla had to exclude from the freedmen expressively the *libertini dediticiorum numero*. It is evident that the *edictum* did not concern persons who were already Roman citizens (see Weber 2009, 157 and 159 n. 20 for the *Latini Iuniani*).

μένοντος — above I have excluded the phrase *salvo* (*iure gentium*) for the Latin text of Caracalla's *edictum*. Here, such a 'reservation clause' is linguistically odd and the use of μένοντος for *salvo* in private papyrus contracts (Kuhlmann 1994, 229–31) is irrelevant for an official Roman *constitutio*. With Wihelm, Magie and Buraselis (quoted in the text above, between n. 19 and 21) I consider the whole clause as a somewhat wordy but linguistically correct 'exclusion' of the freedmen *dediticiorum numero*. The position of [οὐδενὸς] after instead of before the verb μένοντος emphasizes the close connection with χωρ[ὶς]. The Latin equivalent of μένοντος should be *manente*. In juristic texts *manere* mainly means 'remain *in suo statu*,' e.g. *D.* 17.2.3pr. (Paulus 32 *ed.*): *manent in suo statu*, *D.* 8.2.7 (Pomponius 26 *Quint. Muc.*): *quia non ita in suo statu et loco maneret*, *D.* 2.14.47 (Scaevola 1 *dig.*): *ceteras obligationes manere in suas causas*; similar: *civis* or *in civitate manere* (*D.* 49.15.5.1, 28.3.9, 34.5.19(20)).[62]

[ἄνευ] — for *manere* with modal preposition *sine* see *Nov.Iust.* 22.22pr.: *si igitur sine filiis manserit* (*Authenticum*; Greek: εἰ μὲν οὖν ἄπαιδες μείναιεν); generally Columella 12.38.7: *morbi sine febri manent*, Ovid *Met.* 3.62: *serpens sine vulnere mansit.*

δικαιωμ]άτων — s. *P.Oxy.* VIII 1119.15 (Magie, above, at n. 21). Mason 1974, s.v., translates *ius* (Dio Cassius 5.2.6. and 38.12.2).

[δε]δειτικίων — the full terminology *dediticiorum numero* have Gai. I 11, 15, 25, 26, III 74, also Epitome Ulpiani (*UE*) I 5, 11; VII 4; XX 14; XX 2, Sententiae Pauli (*PS*) IV 12.7 and *Inst.Iust.* I 5.3. Without *numero* already *PS* IV 12.6 and also *Inst.Iust.* 3.7.4. Thus, Caracalla's chancellery could easily have omitted *numero*.

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60 "I donate every free person all over the (Roman) world Roman citizenship so that nobody shall remain without the privileges except dishonorable freedmen."

61 Only if divergent from Kuhlmann 1994, 228–37.

62 For more examples see Heumann, Seckel 1971, s.v. *manere*, and generally for juristic use *VIR* III 2, s.v. *maneo* (columns 1764–77).

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DAS PROBLEM DER „SCHUTZKLAUSEL" IN P.GISS. I 40 KOL. I, 8–9. ANTWORT AUF GERHARD THÜR

Gerhard Thür hat ein Thema aufgegriffen, das kontroverser nicht sein könnte; ist es doch der wahrscheinlich berühmteste und aus althistorischer Perspektive wichtigste Papyrustext, den er einer erneuten Prüfung unterzieht: und zwar die durch P.Giss. I 40 überlieferte, in einer griechischen Abschrift vorliegende *Constitutio Antoniniana*.

Grob zusammengefasst, geht es Thür in seinem Beitrag im Wesentlichen darum, für eine alternative Interpretation der Semantik des in Z. 9 besagter Konstitution anzutreffenden Begriffs *dediticius* bzw. *dediticii* — dessen Lesung wohl kaum in Zweifel zu ziehen ist — zu argumentieren. Mit Rückgriff auf Gaius 1, 12–17 und 26 schlägt er vor, die *dediticii* als freigelassene Sklaven bzw. *libertini* zu verstehen, die gemäß der *lex Aelia Sentia* aufgrund von schwerwiegendem Fehlverhalten während ihres Sklavendaseins von der Erlangung des römischen Bürgerrechts ausgeschlossen wurden.[1] Der Status, den sie nach ihrer Freilassung aufgrund ihrer *turpitudo* anhaftenden Vergangenheit innehatten, wird mit *peregrini dediticii* oder *dediticiorum numero* wiedergegeben. Formal wurden sie also den „unterworfenen Kriegsfeinden" Roms gleichgestellt, als die man die in der *Constitutio Antoniniana* genannten *dediticii* üblicherweise verstanden hat. Durch seinen Hinweis auf die *dediticii Alexandrini* deutet Thür an — und hat dies an anderer Stelle auch genauer dargelegt[2] —, dass derartige militärisch eingesetzte *dediticii*, anders als die Freigelassenen *numero dediticiorum*, nicht von der Erlangung des römischen Bürgerrechtes ausgenommen gewesen sein dürften.

Die angezeigte Deutung der in der *Constitutio Antoniniana* genannten *dediticii* untermauert Thür, ausgehend von § 12 des *Fragmentum Dositheanum*, durch ein leicht verändertes Verfahren, das die Freilassungsinschriften aus dem makedonischen Leukopetra aus dem Jahr 212/3 zu erkennen geben. Durch die neu eingeführte Regelung, die Freilassungsurkunde solle 30 Tage vor dem Freilassungsakt öffentlich

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[1] Dieser Ansatz stellt kein völliges Neukonstrukt dar. Thür verweist diesbezüglich auf Wolfgang Kunkel (1935/1949), und man kann in der Forschungsgeschichte noch weiter zurückgehen. Bereits Bickermann 1926, 14, 20–22 und 23 hatte die Identifikation der in der *Constitutio Antoniniana* anzutreffenden *dediticii* mit Freigelassenen thematisiert (aber ausgeschlossen), und auch bei Weber 2009, 159 und 162 findet dieser Gedankengang Erwähnung.

[2] Thür 2018, 350.

ausgehängt werden, sei ein Kontrollmechanismus geschaffen worden, um Sklaven, die den Makel der *turpitudo* aufwiesen, in jedem Fall als solche zu erfassen und diesen ihren rechtmäßigen Status als Freigelassene *dediticiorum numero* zukommen zu lassen.

Thürs Beitrag enthält auch die wertvolle Anregung, die *Constitutio Antoniniana* nicht als Maßnahme zu sehen, um (gemäß dem Mitteis'schen Ansatz) „Reichsrecht" zu schaffen — was auch aus der in den Freilassungsinschriften von Leukopetra dokumentierten Verfahrensänderung nicht herauszulesen sein dürfte. Vielmehr sei hinsichtlich ihrer Intention im Gefolge von Kostas Buraselis' Theorie der Aspekt des „göttlichen Geschenkes" (θεία δωρεά) zu fokussieren, welches zwecks Herrschaftssicherung der Severerdynastie günstig auf die religiöse Sphäre einwirken sollte; insofern sei es nicht der Bereich des Rechts — genausowenig wie jener des Fiskus —, den man als Gradmesser für die Bedeutung der *Constitutio Antoniniana* heranzuziehen habe. Aus diesen Überlegungen heraus verwirft Thür die gegenwärtig durch Peter Kuhlmann (1994 = P.Giss.Lit.) etablierte Lesart jenes Passus,[3] der sich an die auf die Verleihung des römischen Bürgerrechtes Bezug nehmende Formulierung anschließt: statt μένοντος | [τοῦ δικαίου τῶν πολιτευμ]άτων χωρὶς τῶν [δε]δειτικίων (Kuhlmann: [..]δειτικίων) spricht sich Thür, basierend auf David Magie (1950) — und aufbauend auf Adolf Wilhelm (1934) und Buraselis (1989/2007) — für μένοντος | [οὐδενὸς ἐκτὸς τῶν δικαιωμ]άτων χωρὶς τῶν [δε]δειτικίων aus (Wilhelm/Buraselis: πολιτευμ]άτων).

Was an Thürs Argumentation Schwierigkeiten bereiten kann, nimmt ihren Ausgang in der — so unterstelle ich — Erfordernis, Buraselis' Deutung der *Constitutio Antoniniana* kennen und konsequent weiterdenken zu müssen, um sich auch die vorgeschlagene Ergänzung des in Z. 8–9 niedergelegten Textes schlüssig erklären zu können. Konkret kann an der vorliegenden, von Buraselis' Deutungsansatz ausgehenden (und auf deren Verfeinerung abzielenden) Methode problematisch erscheinen, dass diese dazu führt, an einer Stelle, an der ein präzisierender Einschub angeraten wäre, eine überbrückende Formulierung einzubauen, und ferner dort, wo es eigentlich nicht auf semantische Genauigkeit ankommt, einen exakten Wortsinn anzunehmen. Was meine ich damit?

Vorwegzunehmen ist, dass fraglos auch meine Überlegungen nicht beanspruchen können, auf die aufgeworfenen Fragen eine letztgültige Antwort zu finden, denn vorläufig ist es — zu einem guten Teil aufgrund des fragmentarischen Zustandes des Papyrus — nicht möglich, diese zu finden.[4] Es müssen also Wahrscheinlichkeiten gegeneinander aufgewogen werden, die zumindest in einem Punkt, so meine Einschätzung, eher gegen als für Thürs Theorie sprechen dürften: es geht, wie bereits angedeutet, um die Ergänzung μένοντος | [οὐδενὸς ἐκτὸς τῶν δικαιωμ]άτων. Mag Thür die gesamte, durch δίδωμι in Z. 7 eingeleitete und χωρὶς

[3] Siehe Anm. 5.
[4] Zu den Interpretationsproblemen vgl. generell Anm. 19.

τῶν [δε]δειτικίων beendete Konstruktion durch diese Auflösung „glätten“,[5] scheint schon allein sprachlich bzw. syntaktisch nichts Grundsätzliches gegen den Einschub einer zusätzlichen, als Genitivus absolutus gestalteten Bestimmung zu sprechen.[6] Rein inhaltlich ist gegen Thürs Ergänzung vorzubringen, dass, auch wenn Caracalla sich mit seiner Bürgerrechtsverleihung auf einer religiösen Mission befand, er oder diejenigen, die den Rechtssatz tatsächlich formulierten, wohl gewiss nicht riskieren wollten, diesen missverständlich zu gestalten; und missverständlich wäre es wohl gewesen — und zwar im Hinblick auf die Frage, welche Auswirkung die Ausweitung des römischen Bürgerrechtes auf die lokale Rechtssphäre hatte —, wenn man nicht erwähnt hätte, dass die freien Einwohner des römischen Reiches römische Bürger μένοντος τοῦ δικαίου τῶν πολιτευμάτων, „unbeschadet des Rechtes ihrer Gemeinden“,[7] würden. Es führt meiner Meinung nach zu weit, die wohlbekannte *imitatio Alexandri* Caracallas als Argument dafür heranzuziehen, dass ein derart elementarer Einschub entfallen konnte, der das administrative Rückgrat des römischen Reiches, die Gemeinden (*politeumata*/*civitates*)[8] und ihre verschiedenen Rechtsstellungen, berührte — auch wenn ein derart bürokratischer Ton vielleicht nicht der Grundintention entsprach, die Caracalla mit seiner Bürgerrechtsverleihung verfolgte.[9] Insofern kann die immer wieder in die Diskussion um das Verständnis der in Rede stehenden Passage eingebrachte *Tabula Banasitana* aus dem Jahr 177[10] nicht ohne erhebliche Bedenken übergangen werden; neben anderen Gelehrten hat auch Joseph Mélèze Modrzejewski keinesfalls zu Unrecht die Formulierung *salvo iure gentis sine diminutione tributorum et vectigalium populi et fisci* (Z. 37–38) herangezogen, um einen inhaltlichen Vergleich mit der *Constitutio Antoniniana*

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[5] Kuhlmann 1994, 229–237 bestätigte zwar nicht, dass sich χωρίς syntaktisch auf δίδωμι beziehe, aber unter Gegenüberstellung aller vorgebrachten Ergänzungsvorschläge (und unter Verweis auf die *Tabula Banasitana*) wenigstens die Auflösung μένοντος τοῦ δικαίου τῶν πολιτευμάτων — gegen die von Wilhelm und Magie sowie schlussendlich Thür präferierte Variante wandte er (S. 231) ein: „Negative Salvationsklauseln mit nachgestellter Negation (μένοντος οὐδενὸς …) hat noch niemand gefunden.“

[6] Siehe nur die sprachliche Interpretation von Weber 2009, 158; Mélèze Modrzejewski 2011, 488–492; dems. 2014, 319–323.

[7] Übersetzung nach Weber 2009, 158.

[8] Zu der Bedeutung der Begriffe siehe Anm. 18.

[9] Buraselis 2007, 91–92, der von der Ergänzung μένοντος | [οὐδενὸς ἐκτὸς τῶν πολιτευμ]άτων ausging, folgerte, dass „dieser allgemeine Grundtenor des Edikts gut die anderenfalls überaus problematische Leichtigkeit zu erklären [vermag], mit der eine derart bedeutsame Maßnahme ohne spezielle rechtliche Untermauerung in Gestalt von Detailregelungen hinsichtlich ihrer Anwendungsweise geblieben ist.“ Thürs Ergänzung unterstützt diesen Ansatz, indem sie das sprachliche Verständnis des hier angenommenen unspezifischen Inhalts der Lücke zweifelsohne fördert; unweigerlich mag man nämlich die Sinnhaftigkeit des Plurals πολιτευμ]άτων hinterfragen (siehe Thür 2018, 349, Anm. 13 basierend auf Kunkel 1949, 58, Anm. 10).

[10] AE 1971, 534 = Euzennat – Marion – Gascou 1982, Nr. 94.

herzustellen.[11] Zwar wurde in letztere die Bestimmung *sine diminutione tributorum et vectigalium populi et fisci* offenbar nicht aufgenommen, worunter die allgemeine Verständlichkeit aber wohl kaum gelitten hat. Denn wenn die Bürgerrechtsverleihung nichts an dem Recht der Gemeinden ändert, dann ändert sich auch nichts an den fiskalischen Verpflichtungen, die der Einzelne gegenüber Rom hatte, weil sich ebenjene Verpflichtungen aus dem jeweiligen Rechtsstatus ergaben, der dem Einzelnen innerhalb dessen Gemeinde zukam; hier mag man mit Thür festhalten: „Caracalla had no need of going into bureaucratic details about financing his empire." Betraf die *Tabula Banasitana* nur die Bürgerrechtsverleihung an einen Fürsten der Berber und seine Familie und könnte diese daher für einen Vergleich mit der *Constitutio Antoniniana* als kaum adäquat erachtet werden, so hat Ekkehard Weber in diesem Zusammenhang in einem im Jahr 2009 erschienenen Artikel einen weiteren Rechtssatz ins Spiel gebracht, der in der Tat einen breiteren Adressatenkreis aufwies: es handelt sich um die in den Kontext des römischen Bundesgenossenkrieges gehörende *lex Plautia Papiria* des Jahres 89 v. Chr., mittels der denjenigen Italikern (zusammen mit den *adscripti*) die unmittelbare Verleihung des römischen Bürgerrechtes in Aussicht gestellt wurde, wenn diese in Italien wohnhaft waren, sich ergaben und innerhalb von 60 Tagen in Rom vorstellig wurden. Weber folgerte diesbezüglich programmatisch: „Die ursprünglichen Rechtsverhältnisse der Neubürger zu ihren Heimatgemeinden sind also aufrecht geblieben, wobei es sich nicht nur um die Verpflichtung zur Steuerleistung und sonstigen Liturgien handelt, sondern vor allem konkret um deren ursprüngliches Bürgerrecht, das ihnen trotz dieser Bürgerrechtsverleihung erhalten bleiben sollte — die Verleihung des zusätzlichen römischen Bürgerrechtes erfolgte also tatsächlich μένοντος τοῦ δικαίου τῶν πολιτευμάτων."[12]

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[11] Siehe die Literaturangaben in Anm. 5 und 12.

[12] Weber 2009, 161, dessen Interpretation der Schutzklausel offensichtlich von jener abweicht, die diesbezüglich von Mélèze Modrzejewski vorgebracht wurde. Für letzteren (2011, 488–492; 2014, 319–323 — gestützt auf Euzennat – Marion – Gascou 1982, 87) habe Caracalla das Fortbestehen der lokalen Rechte nach der Promulgation der *Constitutio Antoniniana* durch den Einschub μένοντος τοῦ δικαίου τῶν πολιτευμάτων nicht garantiert, sondern es sei wie bei der in der *Tabula Banasitana* zu findenden (ausführlicheren) Formulierung darum gegangen, „les droits du fisc à la charge des pérégrins naturalisés romains" (2011, 492; 2014, 323) weiterhin gewährt zu wissen. Weber (2009, 158, Anm. 17) hingegen deutete *sine diminutione* etc. nicht — wie Mélèze Modrzejewski — als Präzisierung von, sondern als Zusatz zu *salvo iure gentis*, was sich in seiner Interpretation von μένοντος τοῦ δικαίου τῶν πολιτευμάτων niederschlägt, welche, wie das Zitat zeigt, sich allein auf das Recht der Gemeinden beschränkt. Letzteres kann, wie ich oben dargelegt habe, aber auch Implikationen für die Verpflichtungen oder Privilegien gegenüber Rom haben, so dass mir *sine diminutione* etc. mit Mélèze Modrzejewski eher eine Präzisierung als ein Zusatz zu sein scheint. Was Webers grundsätzliche Deutung von μένοντος τοῦ δικαίου τῶν πολιτευμάτων anbelangt, der mit dieser Formulierung die lokalen Rechtsverhältnisse angesprochen sah, so möchte ich diese Sichtweise Mélèze Modrzejewskis Ansatz vorziehen; die Schutzklausel nur auf das Vorrecht des römischen

Wie die angezeigte Schutzklausel bzw. Salvationsklausel in der Praxis umgesetzt wurde, zeigt die Evidenz aus Ägypten. Erwähnung fand in Thürs Ausführungen die letzte überlieferte Kopfsteuerquittung aus dem Jahr 248 (P.Batav. 14 [Ars.]). Sie ist aber nicht das einzige Zeugnis, das zeigt, dass die Kopfsteuererhebung nach der *Constitutio Antoniniana* für einige Jahrzehnte den überkommenen, auf Augustus zurückgehenden Prinzipien folgte. In einer in das Jahr 267 datierten Petition aus dem Oxyrhynchites stolpert man über den Begriff *laographia*, mit dem üblicherweise die Kopfsteuer bezeichnet wurde, wobei in diesem Fall auch allgemeiner das Bevölkerungsregister gemeint gewesen sein könnte (P.Oxy. XLIII 3114, 15).[13] Wie dem auch sei, in Ägypten versiegen die Hinweise auf das althergebrachte System der Kopfsteuererhebung vor dem Jahr 271/2, in dem gemäß dem 14-jährigen Zyklus ein Provinzialzensus abzuhalten gewesen wäre. Dies zeigt, dass mit der *Constitutio Antoniniana* für diejenigen, die zuvor kopfsteuerpflichtig waren, diese Verpflichtung zumindest bis in das dritte Viertel des 3. Jh. weiterbestand. Auch für diejenigen, die vor der *Constitutio Antoniniana* von der Kopfsteuerpflicht befreit waren oder zumindest eine verringerte Rate zu entrichten hatten, galt dieses Privileg weiterhin: Der Sammelquittung P.Vind.Sal. 14 (Herakl., 243 [?]) ist ohne Zweifel der Jahressatz der Kopfsteuer zu entnehmen, und dieser deutet auf eine reduzierte bzw. privilegierte Rate hin.[14]

Angesichts dieses Befundes konnte es also durchaus Sinn machen, der Bevölkerung die „konservative Revolution“ Caracallas zu erläutern: Römisches Bürgerrecht unter Beibehaltung der Rechts- und Sozialordnung, die in den Gemeinden vorherrschten; entscheidender Parameter für die Position, die man in der sozialen Pyramide des römischen Reiches einnahm, wurde — um hier wieder Thür aufzugreifen —, ob man zu den *honestiores* oder *humiliores* gehörte.

Lassen Sie mich kurz noch zu den *dediticii* kommen. Der diesbezüglich von Thür vertretene Interpretationsansatz, der durch die Freilassungsinschriften aus Leukopetra zweifellos mustergültig untermauert wird, verliert genauso wie dessen Ergänzung von Z. 8–9 an Substanz, wenn man die religiöse Rhetorik, mit welcher Buraselis die *Constitutio Antoniniana* in Verbindung bringt, nicht zum allgemeinen Leitmotiv der Rekonstruktion und semantischen Interpretation des Textes erhebt. Und auch wenn man eine religiöse Rhetorik unterstellen möchte, erhebt sich meiner Meinung nach die Frage, warum sich ein an die „Oikumene“ (P.Giss. I 40, 8: κατὰ τ]ὴν οἰκουμένην) gerichteter Erlass auf die zivile Ebene beschränken muss, zumal Caracallas große militärische Operationen — die aufeinander folgenden Feldzüge gegen die Germanen und das Partherreich — in dem Jahr, in dem die *Constitutio*

Fiskus zu beziehen, erscheint doch recht konstruiert bzw. künstlich, zumal Mélèze Modrzejewski selbst die Auffassung vertrat, das lokale Recht habe im Zuge der *Constitutio Antoniniana* unter Beibehaltung der Vorrangstellung des römischen Rechtes als römisches „provinziales Gewohnheitsrecht“ gegolten (2014, 311–318).

[13] Siehe dazu Bagnall – Frier 1994, 10–11.

[14] Siehe Reiter 2002, 129–130.

Antoniniana erlassen wurde, noch bevorstanden,[15] und der junge Kaiser in Anlehnung an Alexander den Großen glorreiche Unterwerfungsszenarien im Kopf gehabt haben mag. Vielleicht sind es gerade die *dediticii*, deren Verständnis nicht exakt sein muss,[16] weil hier nichts von einer semantischen Präzision abhängt und diese von dem breiten Adressatenkreis des Erlasses wohl auch nicht erwartet wird. Dass die in militärischem Dienst stehenden *peregrini dediticii* das römische Bürgerrecht erlangen konnten, muss kein Ausschlusskriterium sein, sie an dieser Stelle — neben den Freigelassenen *numero dediticiorum* — ebenfalls mitzudenken: War es nach Mommsen nicht wesentliches Merkmal eines *dediticius*, die Stellung eines „des örtlichen Bürgerrechts entbehrenden [peregrinen] Reichsangehörigen" zu haben, der also *nullius civitatis* war?[17] Wenn man diese allgemeine Semantik zugrunde legt, mag das Vorhandensein einer μένοντος τοῦ δικαίου τῶν πολιτευμάτων lautenden Schutzklausel aus stilistischen und inhaltlichen Gründen recht plausibel erscheinen. Denn dann ergäbe sich eine Gegenüberstellung der Masse jener Peregrinen, die durch eine Zugehörigkeit zu einem *politeuma* bzw. einer *civitas* — einer „Gemeinde" — gekennzeichnet sind, mit denjenigen, die aufgrund ihres Status eine solche Gemeindezugehörigkeit nicht aufweisen und die von der Bürgerrechtsverleihung ausgenommen sind. Dabei hat man die angesprochenen „Gemeinden" im weitesten (sozialen und rechtlichen) Sinne als an Zentralorte gebundene administrative Grundstrukturen des römischen Reiches zu verstehen,[18] deren lokale Rechtsverhältnisse gemäß dem Erlass bestehen blieben.

Sollte der in der Lücke vor χωρίς verlorene Passus aber tatsächlich einen anderen Inhalt aufgewiesen und Thür mit seiner Interpretation recht haben, dann könnte man Caracalla — wie zu erwarten (?) — als völlig abgehobenen und selbstherrlichen Kaiser betrachten, der eine ganze Zeile seines Ediktes (möglicherweise gegen den Rat seines juristischen Beraterkreises) einer Konstruktion opferte, die allein zum Ausdruck brachte, dass Freigelassene *numero dediticiorum* von seiner Bürgerrechts-

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[15] Zu den Schwierigkeiten, die Datierung der *Constitutio Antoniniana* auf das Jahr 212 festzulegen, und die damit verbundene Frage, ob diese vor, während oder nach dem schlussendlich siegreich beendeten Germanenfeldzug erlassen wurde, siehe Buraselis 2007, 1–2, Anm. 1. Sollte diese militärische Operation tatsächlich in einem unmittelbaren zeitlichen Bezug zu Caracallas Bürgerrechtsverleihung stehen, hätte die für die erwähnten *dediticii* erwogene Bedeutung als „unterworfene Kriegsfeinde" einen sehr konkreten Bezugspunkt.

[16] Auch Weber 2009, 162 lässt die exakte Definition der *dediticii* offen.

[17] Zitat nach Mommsen 1910, 168; zur Interpretation siehe etwa auch Schönbauer 1931, 311; Berger 1953, 427 (s.v. *dediticii*).

[18] Zu den Bedeutungsebenen „Bürgerschaft", „Stadtgemeinde", „Gemeinwesen" oder „Staat", die dem Wort *politeuma* ohne spezifischem Bezug zukommen kann, siehe Biscardi 1984, 1212–1213; Jonnes – Ricl 1997, 20 (Komm. zu Z. 20); Sakellariou 1989, 108 mit Anm. 1 (allgemein zur Wortbedeutung von *politeuma* Sänger 2019, 3–7 und 179–180 mit weiteren Literaturhinweisen). Zu der analog dazu zu betrachtenden Semantik des lateinischen Begriffs *civitas* vgl. etwa Berger 1953, 389 (s.v. *civitates* [*civitas*]).

verleihung ausgenommen waren. Was stand im Vordergrund: die religiöse Mission Caracallas, welche die Formulierung einer Konstitution von großer Tragweite bis ins letzte Detail beherrschte, oder die Unmissverständlichkeit und Klarheit des Textes für die Untertanen? Vielleicht sollten wir letzteren Aspekt — bei dem auch die Adaptierfähigkeit der *Constitutio Antoniniana* an die jeweilige Lebenswelt der Rezipienten mitschwingt — in den Vordergrund rücken und das, was wir heute in den Text hineininterpretieren können bzw. wollen, vor diesem Hintergrund abwägen.[19]

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[19] Weber 2009, 155 hat das ursächliche Problem jeglicher Auseinandersetzung mit dem Text der *Constitutio Antoniniana* trefflich folgendermaßen formuliert: „Alle Übersetzungs- oder Interpretationsversuche leiden daran, dass entscheidende Begriffe in den Lücken vorausgesetzt werden müssen, und jeder Forscher bei ihrer Annahme natürlich von seiner Vorstellung des Textes ausgeht.“ Dem ist wahrlich nichts hinzuzufügen.

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