AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE
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SUMÁRIO

PREFÁCIO

O vigésimo encontro da Sociedade de História do Direito Grego e Helenístico, o "Symposion", decorreu na Sala de S. Pedro da Biblioteca Geral da Universidade de Coimbra, Portugal, entre os dias 1 e 4 de setembro de 2015. Durante seis sessões, distribuídas ao longo de três dias e meio, foram proferidas quinze comunicações (sendo uma delas apresentada *in absentia*) e quinze respostas (num dos casos, com uma nota adicional), por investigadores provindos de doze países da Europa e do Norte da América. Como geralmente acontece nos encontros do "Symposion", não foi definido um tema geral para o evento, sendo concedida a cada conferencista a liberdade de expor os seus estudos mais recentes sobre um tema específico. Os contributos foram organizados, respetivamente, de acordo com o período, lugar e área de afinidade legal.

O programa científico foi complementado e amenizado por uma visita à Biblioteca Joanina e à antiga cidade romana de Conimbriga, bem como por um espetáculo de música barroca portuguesa, no Museu Machado de Castro.

O financiamento desta iniciativa beneficiou do generoso contributo da Fundação para a Ciência e Tecnologia (FCT), da Fundação Eng.º António de Almeida, do Centro de Estudos Clássicos e Humanísticos e ainda da Associação Portuguesa de Estudos Clássicos (APEC). Estamos também particularmente gratos ao Diretor da Biblioteca Geral, Prof. Doutor José Augusto Cardoso Bernardes, por nos ter facultado o acesso exclusivo à Sala de S. Pedro durante os dias do encontro. Agradecimentos são devidos igualmente à Elisabete Cação, ao Ricardo Acácio e à Joana Fonseca, da Faculdade de Letras, pelo apoio administrativo e logístico, durante a realização do evento e no período a ele subsequente.

A publicação do volume não teria sido possível sem o apoio financeiro da Fundação para a Ciência e Tecnologia e do excelente trabalho do Nelson Ferreira, do Centro de Estudos Clássicos e Humanísticos da Universidade de Coimbra, que formatou todos os contributos, segundo as orientações da Academia Austríaca das Ciências. Agradecemos finalmente aos dois árbitros anónimos, pela avaliação científica que, antes da publicação, fizeram das comunicações e das respostas apresentadas.

Coimbra e Viena, agosto de 2016 — Delfim F. Leão, Gerhard Thür

VORWORT

Die zwanzigste Tagung der Gesellschaft für griechische und hellenistische Rechtsgeschichte, das „Symposion", fand in der Sala de S. Pedro der Biblioteca Geral der Universität Coimbra, Portugal, vom 1. bis 4. September 2015 statt. In sechs Sitzungen wurden, verteilt über dreieinhalb Tage, fünfzehn Vorträge gehalten (einer *in absentia*) und eben so viele „Antworten" vorgetragen (in einem Fall noch eine zusätzliche Bemerkung). Vertreten waren Gelehrte aus zwölf Ländern Europas und Nordamerikas. Wie in den „Symposia" üblich, war kein Generalthema vorgegeben, sondern jedem Sprecher bzw. jeder Sprecherin war es freigestellt, ein spezielles Thema aus dem jeweils aktuellen Arbeitsgebiet vorzutragen. Die Vorträge waren in groben Zügen nach zeitlichen, örtlichen und sachlichen Zusammenhängen angeordnet.

Das wissenschaftliche Programm wurde ergänzt und aufgelockert durch einen Besuch der Biblioteca Joanina der Universität Coimbra, der römischen Ruinen von Conimbriga und einer Darbietung portugiesischer Barockmusik im Museum Machado de Castro.

Beiträge zu den Kosten der Tagung leisteten in großzügiger Weise die Portugiesische Stiftung für Wissenschaft und Technologie (FCT), die Stiftung Engº António de Almeida, das Zentrum für Klassische und Humanistische Studien und die Gesellschaft Portugals für Klassische Studien (APEC). Besonders dankbar sind wir dem Direktor der Biblioteca Geral dafür, Prof. José Augusto Cardoso Bernardes, dass er uns für die Tage der Veranstaltung exklusiven Zutritt zur Sala de S. Pedro gewährte. Ferner sei auch Elisabete Cação, Ricardo Acácio und Joana Fonseca von der Geisteswissenschaftlichen Fakultät für administrative und logistische Hilfe vor, bei und nach der Tagung gedankt.

Die Publikation des Bandes wäre ohne die finanzielle Hilfe seitens der Portugiesischen Stiftung für Wissenschaft und Technologie nicht möglich gewesen, ebenso wenig ohne die vorzügliche Arbeit von Nelson Ferreira vom Zentrum für Klassische und Humanistische Studien der Universität Coimbra, der die Beiträge nach den Vorgaben der Österreichischen Akademie der Wissenschaften druckreif formatiert hat. Schließlich danken wir den beiden anonymen Gutachtern, die vor der Publikation wertvolle Hinweise zu den Beiträgen gaben.

Coimbra und Wien, im August 2016 — Delfim F. Leão, Gerhard Thür

ROBERT W. WALLACE (EVANSTON, IL)

EQUALITY, THE *DÊMOS*, AND LAW IN ARCHAIC GREECE

Why did Archaic *poleis* enact laws?[1] Different reasons will have applied in different *poleis*, including inspiration from elsewhere,[2] the need for international colonies to establish their own laws,[3] or stress from a crisis, as for example in Athens where aristocratic violence after Kylon's attempt at tyranny led to Drakon's legislation in 621/0 (Plut. *Sol.* 12). A common view now, that early laws mainly aimed to regulate relations among the elite,[4] Michael Gagarin has criticized in *Writing Greek Law* (2008: 87-92). I also shall criticize it. I mention here that exhibit A in defense

[1] Many thanks to Delfim and his team for hosting the excellent Symposion XV. The following text necessarily abbreviates many issues. My concern is to lay out some of the framework for law's role in a more general reassessment of the origins of Greek egalitarian democracy.

[2] As we shall see, Spartan ideology partly inspired Solon's legislation. For Near Eastern influences on Greek law, as in the trial scene in *Il.* 18, see Westbrook 1992 (repr. in Westbrook 2015: 1-21, with D. Lyons' introductory comments, ibid. xii-xiii).

[3] For early lawgivers (Zeleukos, Charondas) in Greek colonies in Sicily and southern Italy, see Dreher 2012: 63-78.

[4] See e.g. Osborne 1996: 187; Papakonstantinou 2002: 135 but cf. 2008: 70 (where in the light of Raaflaub and Wallace 2007 he qualifies his position); Forsdyke 2005: 83; Hawke 2011 (law reflected the need of elites to limit intra-class competition, with no meaningful pressure from below [cf. Papakonstantinou's mixed review of this vol., *AHR* 118 (2013) 231]). Eder 1986 argued that the codification of laws secured the social and political predominance of elites in Greece and Rome.

of this proposition is our earliest Greek law, from Cretan Dreros, where "the *polis* has decided" that no *kosmos* may serve more frequently than once in ten years. It is usually thought that this law principally eased tensions for aristocrats by distributing the chief magistracy among them. Yet it also benefited the *polis*, by mitigating aristocratic competition or monopolies on power that could turn violent.

In *Early Greek Law* (1986: ch. 6, "The emergence of written law") and *Writing Greek Law* (2008: ch. 3, "Why the Greeks wrote laws"), Gagarin makes a good case that laws emerged in tandem with the growth of the *polis* and the increasing importance of the community. Laws provided stability especially as cities grew, and problems and their solutions became more complex (2008: 80-1). Lawgivers emerged at times of civic turmoil, to ensure that disputes did not endanger the community. Early laws were probably authorized by the community, and were inscribed in public spaces for all to see, often in large letters, sometimes with word divisions to aid reading. The point was to fix the rules and make them accessible to everyone: legal inscriptions were not simply monuments. Literacy varied but was reasonably widespread, and the illiterate could readily find people to read laws for them (2008: 65, 67-71; cf. Perlman 2002: 194-7, and her Table pp. 218-25).

How far were written laws intended to promote justice? Oddly, this view is now not in favor. According to Gagarin (1986: 123), no early evidence indicates that written laws were thought to be fairer than what preceded them. In 2008: esp. pp. 89-91, he does not mention injustice as a reason why the Greeks enacted laws. Arguing that literacy weakened oral traditions and so made writing laws necessary, Carol Thomas (1977: 455, 458) suggested that the perception that written laws meant equal justice arose as a result, not as the cause, of their publication.

If written laws were not intended to promote justice, *a fortiori* they were not intended to promote equal justice for all, and few scholars now seem to think this either, although Euripides' *Suppliants* and Perikles' Funeral Oration in Thucydides later identify equal justice as a main purpose of written law.[5] Of three arguments adduced against this idea, first, in the Archaic age the *dêmos* is not thought to have possessed the political clout to impose such changes on a powerful aristocracy. Second (and once again), scholars have questioned the importance of justice as a factor in early legislation. Finally, third, in a classic paper Kurt Raaflaub has claimed that the idea of equality (*isotês*, *homoiotês)* for all members of society is not attested before the late sixth century. In Athens, pre-510 mentions of equality

[5] In Euripides' patriotic *Suppliants* of the later 420s, Theseus states, "There is nothing more detrimental to a *polis* than a tyrant. First of all, when there are no public laws (*nomoi koinoi*), one man holds power by keeping the law all for himself, and there is no more equality (*ison*). When the laws are written down, the weak and the rich have equal justice (*dikê isê*)… The lesser man defeats the big man if he has justice on his side" (429-437). In Thucydides' Funeral Oration (2.37.1), Perikles praises Athens' democracy which favors the masses instead of the few, first because "the law secures equality for all (*pasi to ison*) in their private disputes."

apply mostly to equality among the aristocracy.[6] I discuss these three points in order.

(A) What was the social and political status of the *dêmos* in Archaic Greece? I begin by asking, where in Homer is the aristocracy? Homer knows the people — *dêmos* and *laoi*[7] — and its leaders, *basileis*, but is there an upper class? Homer and Hesiod never use birth or class words like *gennaios*, *eupatridai* or *eugeneis*; *esthlos* and *kakos* are only value words, "good" and "bad," not class words for noble or commoner, except twice in the *Odyssey*, harbinger of future developments.[8] Homer never calls the people *kakoi* as they are in later Archaic poetry (Donlan 1978: 102 with n. 12), most conspicuously by Solon who sympathized with them. Why? Snodgrass (1987: ch. 6) and Donlan (1985: 301; 1989) posit a Dark Age pre-*polis* social model lasting into the eighth century, of small, independent hamlets and villages of free and independent farmers, choosing leaders from among themselves *ad hoc* on the basis of ability, when leaders were needed.[9] As Raaflaub recently wrote to me (I add my comments in square brackets),

> I think the polis emerged as the result of the coalescing of neighboring hamlets and villages or similar processes, in which the village leaders became the groups of *basileis* and the landowning [and fighting: Raaflaub 1997] farmers the citizens. In Homer we see this process in an in-between-stage, with polis institutions and structures (assembly, army) clearly visible but not yet formalized. The elite too is still in formation: there clearly are leading families whose heads form the council and advise the leader who is primus inter pares [at Troy Agamemnon is a military leader, much despised, but did this apply in Greece?]. Their distance from the "commoners" is small, economically and ideologically, but it's there, even if the *basileis* need to earn and constantly reaffirm their position (see Glaukos and Sarpedon [*Il.* 12.310-28]).

While until recently the standard view has been that egalitarian community rule emerged only in the sixth century, in fact mass self-governments seem to have been there from the Dark Ages. Free and independent communities of field-toughened farmers were not distant from Homer, and in his poems despite their elite bias (cf.

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[6] See Raaflaub 1996: 143-5. His treatment of earlier references to equality (see esp. pp. 150-3) is conditioned by his down-dating the foundation of Athens' democracy to 462/1, a date which few other scholars share.

[7] See Donlan 1985: 298, that *dêmos* in Homer and Hesiod "signifies both an area of land and all free inhabitants of the area…, a single body with a common will." *Laos* or *laoi* means "men under arms following a *basileus*" (299).

[8] *Od*. 8.553, 17.381: see *Lexicon des frühgriechischen Epos* 734 l.43ff. Donlan 1968 argues that *aristos* never meant aristocrat.

[9] Morris 1996 and 1997: 100-1 thinks that egalitarianism emerged only in the eighth century, then to be replaced by class divisions from *ca*. 750-725. This disagreement has little consequence for my argument.

Thersites), the *dêmos* remains central, both in assemblies and in battle. Raaflaub 1997 (and elsewhere) has discussed the importance of mass warfare in the Homeric epics. As for governing, most often council meetings of *basileis* do not result in a consensus which the *basileis* together present to the *laoi*. Rather, in council each (local) *basileus* argues for his own ideas, which he then presents to the assembly, hoping to persuade them and thus be judged "best in counsel." *Peithômetha* means "let us be persuaded": now and later, Greek had no word for "obey." Aristotle (*Pol.* 1278b10-11) says that in every polity (except tyranny and monarchy) the assembly decides, although in oligarchies wealth criteria (more or less restricted) apply for participating in the assembly (*Pol.* 1291b7-13). The standard view that oligarchies are governments by powerful elite councils rests on no evidence (Wallace 2014).

As for the *basileis*, they are not necessarily hereditary but attain that status as best in counsel and battle. At sea Odysseus' *hetairoi*, his comrades (12.294), do not praise him because he is king or the son of Laertes, but because he is the strongest (12:279-80). They defy him by insisting on visiting the Island of the Sun (12.260) — Odysseus says, "you force me, as I am alone": 12.297) — and feasting on Helios' cattle. He is not their ruler. Telemachos in turn must prove that he is as able as Odysseus in stringing the bow, or someone else becomes top dog in Ithaka. The disguised Odysseus asks whether the *laoi* of the land hate Telemachos, and Telemachos says they do not (16.95-6, 114). Public approval matters. In Homer, status words and behavior are fluid. The same *hetairoi* of *basileis* are elsewhere called *therapontes*, followers (Raaflaub and Wallace 2007: 26). Odysseus returns home to Ithaka dressed as a beggar, and resides with a swineherd: not behavior anywhere associated with kings, and at a time when the Greek elite is emerging, we and surely Homer's audiences admire him, he's like us, shedding a tear when he sees his old dog lying on a dunghill, unlike the cocky suitors. The world of Hesiod and the world behind Homer, both panhellenic poets, is still that of small farmers of similar status who work, fight, and criticize their leaders when they think criticism is needed. As Christoph Ulf remarks (2009: 84), "The central theme [of *Iliad*] is: how should a leader behave in order to ensure the well-being of the community as a whole (*dêmos*)?" Johannes Haubold (2000: ch. 1) posits that *laos* occurs most often in the formulaic designation for a *basileus*, "shepherd of the people" (10, 17-20) whose responsibility is to ensure the survival of the group, although they often fail at this. Fostering the *dêmos* was an elite ideal, as when Agamemnon and Menelaos "fear lest the Argives suffer some hurt" (*Il.* 10.1-35).[10] In the world of Homer, the *dêmos* matters.

In passing legislation from the late eighth to the sixth centuries, did the community have a role? In addition to helping to resolve ever more complex problems as *poleis* grew, it is a central thesis of Gagarin 2008 chapter 3 that laws were enacted by the community. After examining early laws from Dreros, Gortyn, Chios, Eretria,

[10] See also Sarpedon at *Il.* 12.310-21. Compare Pindar *Pyth.* 10.110-11: "among the *agathoi* [= the nobility] lies the careful ancestral governing of cities."

Elis, Argos, Naupaktos, and Kleonai, Gagarin concludes (p. 92), "the ultimate authority behind archaic legislation was always the community, in whose interest and for whose use these texts were written down and displayed." To conclude this section, the *dêmos* had the clout to promulgate and inscribe legislation some of which regulated the behavior of elites.

(B) How far did (in)justice motivate seventh- and sixth-century legislation? In fact, complaints especially about elite injustice pervade Archaic sources. From *ca*. 750 down through the seventh century, amid a constellation of economic, social, political, and military changes transforming the Greek world, wealthy prestigious families (*oikoi)* became ever more powerful, designating themselves the "well born" (*eupatridai, eugeneis*, etc.), sometimes claiming lineages reaching back to gods or heroes. Seventh- and sixth-century poets voice frequent complaints against elite violence, arrogance, judicial abuse, and economic exploitation.[11] Despite its elite bias, *Iliad* takes as its theme Achilles' and Agamemnon's private quarrel over honor and booty, bringing death and destruction to their warrior community. Achilles calls Agamemnon a *basileus* who "feeds on his people" (*dêmoboros*: 1.231), the ranker Thersites lambasts Agamemnon for greed (2.225-34), Priam calls his surviving sons "shameful, boasters and dancers, the best men of the dancefloor, robbers of sheep and goats among their own people" (24.260-2, tr. van Wees). Around the same time as Homer and the emergence of written law, Hesiod laments,

> There is angry murmuring when right is dragged off wherever gift-swallowers choose to take her as they give judgment with crooked verdicts… Often a whole community together suffers in consequence of a bad man who does wrong and contrives evil… Zeus either punishes those men's broad army or city wall, or punishes their ships at sea… Beware of this, *basileis*, and keep your pronouncements straight, you gift-swallowers, and forget your crooked judgments altogether. (*Works and Days* 213-73, tr. West, adapted).

In a simile in *Il*.16.385-8, Zeus pours forth rain violently when he is angry against *andres* who "with violence in the *agora* judge (*krinousi*) crooked *themistas* and drive out justice, *dikê*." In Mytilene dominated by the Penthilid *genos,* Aristotle (*Pol*. 1311b) mentions that one night a certain Penthilos dragged out from beside his wife and beat a certain Smerdis, who killed him. In Corinth in the 650s Kypselos seized power from the Bacchiad *genos*. Contemporary evidence (Salmon 1984: 186-8) makes clear that social justice and adjudication were major issues. A contemporary Delphic oracle proclaimed that Cypselus would "bring justice" to Corinth (Hdt. 5.92b). Similarly, "Cypselus' Chest" at Olympia — written

[11] See also Stein-Hölkeskamp 1989 esp. part III "Die Aristokraten in der archaischen Gesellschaft."

(Pausanias notes) in archaic *boustrophedon* — depicted justice choking injustice (Paus. 5.18.2, 6). No one after his son and successor Periander would have dedicated such a chest, when tyranny was now discredited (see below). In Athens, Solon calls the ruling Eupatrids, "you who have pushed through to glut yourselves with many good things" (fr. 4c.2 West). "Out of arrogance many griefs must be endured," for Athens' rulers "do not know how to restrain their greed or to order their present festivities in the peacefulness of the banquet" (fr. 4.8-10). Eupatrid extravagance weighed especially on dependent farmers, some of whom were sold abroad into slavery (Solon fr. 4.23-5). Solon legislated against all these things. Sometime before 550, the elite poet Theognis mentions murderous civil strife (51) and aristocratic outrage: "Kyrnos, this polis is pregnant, and I fear that it will give birth to a man who will be a straightener of our base *hubris*" (39-40, tr. Nagy; cf. 41-52). He complains that the elite has yielded to the masses in administering justice: "Kyrnos, this *polis* is still a *polis*, but its people are different. Formerly they knew nothing of legal decisions or laws but wore goatskins around their flanks — wore them to shreds — and grazed like deer outside this *polis*. And now they are *agathoi* [elite], son of Polupaos, and those who were formerly *esthloi* [noble] are now *deiloi* [base cowards]" (53-60). Van Wees remarks that in aristocratic Megara, as elsewhere, "violence and greed were structural phenomena, rather than aberrations which could be blamed on 'the bad men'" (2000: 66).

Violent mentalities and behavior among the elite also leading to social strife persisted down through the fifth century: after Kylon's conspiracy which Drakon's lawcode did little to resolve, after 594/3 which Solon's legislation did little to resolve, and then after 510, which the Peisistratean tyranny did not eliminate. In Herodotos' constitutional debate probably written in the 430s, Darius states, "In an oligarchy, … violent personal feuds tend to arise, because every leader wants to come out on top and have his own views prevail. This leads them to become violently antagonistic towards one another, so that factions arise, which lead to bloodshed" (3.82.3). Thucydides notes that in oligarchies, "every single man, not content with being the equal of others, regards himself as greatly superior to everyone else" (8.89). Thucydides has Alkibiades (6.16) tell the Assembly that he is better than they are and so deserves more.

The emergence of powerful, arrogant rule by self-styled elites spawned four developments. First, written law, first attested by Aristotle with an Olympic date in later eighth-century Thebes, and then commonly from the first half of the seventh century. Thus, written law emerged shortly after the appearance of an arrogant and abusive aristocracy. If Homer does not know of crooked adjudication by *basileis*, on the mainland Hesiod does. We have already mentioned Greece's first extant inscribed law, *ca*. 650 at Cretan Dreros, as the *polis* restricted iteration for *kosmoi* as a source of elite contention which the *polis* wanted to control. When Solon legislated that elite magistrates' verdicts could be appealed to the *dêmos*, evidently in Attika too some verdicts by elite officials were seen as unjust.

Laws however soon showed their limitations in rectifying elite abuse. Anacharsis is said to have observed that laws were like spider webs, trapping the weak and poor while the rich and powerful tore through. Laws were useful and continued to be promulgated, but because they were ineffective in controlling abusive aristocrats, a new solution, tyrants, emerged, first as far as we know at Corinth *ca.* 655. A tyrant was a single aristocrat who stood up to defend the people against aristocratic abuse. Aristotle concluded that "a tyrant is set up from among the people and the masses to oppose the notables, that the people may suffer no injustice from them" (*Pol.* 1310b). Plato (*Rep.* 565cd) and Herodotos (1.96-100) say the same. The sources for tyrants are complicated because tyrants too became hereditary, and as Aristotle observes, sons were often not so talented as their fathers, and power corrupts: many later tyrants turned violent. A little after 600, we have seen, Solon said that he refused the violence of tyranny, our first attestation of hostility to tyranny, and hence even the early, good tyrants came to be represented badly, although we can show that these descriptions, for example of Kypselos and Periander, were not current in their lifetimes.

Yet by 600 tyranny had failed. A third remedy now appears, the *sophos* or *sophistês*, to mediate between commoners and elites. Pittakos was *aisumnêtês*, "umpire," Solon was *diallaktês,* "mediator," and boasts that he protected both sides in the civil strife. Both Solon and Pittakos wrote laws, and Pittakos also refused tyranny. Aristotle calls him "a craftsman of laws" and quotes one of them; he notes that like Drakon Pittakos did not change the constitution (*Pol.* 1274b). Diogenes Laertius says that Pittakos wrote a prose book "on laws for the citizens" (1.79). "When Croesus asked him what was the greatest rule (*archê*), he said the rule of the *poikilon xulon*, the shifting wood, by which he meant the law" (1.77, tr. Hicks). Much is legendary, but no classical laws were painted on wooden *axones*.

Finally, a fourth, barely-studied institution in reaction to elite abusive rule was the political constitution, formally apportioning various powers across the different elements of society, sometimes by means of laws, and according to Aristotle always stipulating that the assembly's *kratos* was *kurios*. Solon produced a famous *politeia*, with a council of 400, a popular assembly with powers to decide, and a popular court of appeal (or quite possibly of first instance).

(C) How far is social or civic equality or equal justice attested in Homer or the early *poleis* before the fifth century? In Homer equality is attested first in the distribution of booty, which is frequently brought *es meson* and distributed by the *laoi* (e.g., *Il.* 1.123-29) "so that nobody goes away without an equal *(isê)* share" (*Il.* 11.705), a formula recurring twice at *Od.* 9.42 and 549, although the *laoi* typically give some good stuff to worthy *basileis* (*Il.* 2.225-38).[12] In *Od.* 9.543-51, after escaping from

[12] See e.g. Detienne 1965: 430-4. Hainsworth 1993, ad loc., writes that *Il.* 11.705 was rejected by several ancient editors, because of the repetition of the verse and because of

the Cyclops, Odysseus and his *hetairoi* reach the island where the other ships were moored. They divide up the lambs of the Cyclops "so that no one on my [Odysseus'] account might be cheated of an *isê* share." Odysseus' *hetairoi* separately give him the ram, which he sacrifices and shares with them. In *Il.* 9.318-9, Achilles complains that an *isê moira* goes to everyone, however well he fights. Although Raaflaub and I wrote in *Origins of Democracy* that in Homer, "equality is not yet formalized or confirmed by law or ideology" (2007: 32), we were wrong. Equality is formalized in both custom and ideology in the distribution of common property.

Equal distribution of land is also frequently mentioned in later Archaic texts. First, two explosive bits, one by Solon in 594/3 after enacting reforms which the *dêmos* thought did not give them enough. "Nothing did it please my mind to accomplish by the force of tyranny, nor that, of our fatherland, the *esthloi* [the nobles, now a class term] have *isomoiria*, an equal sharing with the *kakoi"* — the people, now another class term and inherently pejorative although Solon did not use it that way. The *dêmos* apparently demanded equal land distribution, which Solon the "mediator" refused to grant. Especially striking is the abstract noun *isomoiria*, already a political concept and perhaps a slogan in 594/3.[13] Second, *Theognidea* 678-9 complains that no longer is there an *isos dasmos es to meson*: the "porters" i.e. "physical laborers" rule, and the *kakoi* are above the *agathoi*: again class words. Apparently, in Megara the masses deprived the upper classes of what the *agathoi* thought was their "equal" share. The concept is apparently used here for upper class protest: even the upper classes argued for "equality." This text dates sometime between 650 and 550.

Equal division of land was important also for Archaic Spartans, although explicit attestations are late (see above all Hodkinson 2000) and it is evident that equal land at best became more an ideology than the reality for ancient Spartans. In particular, scholars have questioned the chronology of Polybius 6.45.3, that all citizens must have *ison* of the *politikê chôra*. I add that in his abridgement of the Aristotelian *Politeiai*, the Greco-Egyptian statesman and historian Herakleides Lembos (in the second century BC) refers to the Spartans' *archaia moira* which they were forbidden to sell. Hence, Aristotle's *Politeiai* knew something of Spartan land arrangements. In *Politics* Aristotle writes that in the seventh century, "a poem of Tyrtaios called *Eunomia* [shows that] some people impoverished by war were demanding that the land should be distributed" (1306b37-7a2 = Tyrt. 2 West). We do not know when equal contributions to the *syssition* (common messes) were instituted, but the military basis of Spartan society was early. For a consensus view of these matters I summarize a page from Ober's recent Greek history book

"the unfairness of an equal distribution among varied creditors. If the line is retained, the important principle of 'fair share of booty' will have been embodied in a formula" — but he should say, an equal share of the booty.

[13] Raaflaub (1996: 170 n. 126) buries any importance of this term, in a discussion of fourth-century developments, in part on the grounds that Solon refused to grant it.

(2015: 140): "The Lycurgan order was premised upon equality among citizens... Each citizen was in principle the equal of every other citizen [in providing a fixed contribution of food to his messhall] … via a tract of land that may once have been given to his family… as conquered land." "Those who could not provide were demoted to the rank of Inferior."

Equal distribution of land in Greek foreign settlements from the eighth century seems to have been the rule, as among others John Graham conclude (1983: 58-59).[14] In Thuc. 1.27.1, oligarchic Corinth invites anyone to settle in Epidaurus on "equal and similar" terms, *isos kai homoios*. That same language is used in the Cyrene foundation decree of the 7th century reworked in the 4th century.[15] Joseph Carter has excavated equal plots of land at the Greek settlement at Metapontum in the second half of the seventh century. He calls this an egalitarian rural society, not a landed aristocracy.[16]

Even more intriguing is the argument in Morris 1996 that from *ca*. 750 BC or 700 although unevenly across Greece, burials which in the past could be spectacular in the case of important individuals (for example at Lefkandi) become consistently more egalitarian and undifferentiated, although, importantly, *ca*. 700 Athens itself reverts back to the older order, and lavish burials stop at Sparta only *ca*. 600 (Hodkinson 2000). Morris writes on uniform house designs in this period, and the increasing importance of civic rather than private constructions, above all temples and *polis* treasuries at Delphi and Olympia.[17] More than equal distributions of land and booty, these developments speak to Archaic Greeks' egalitarian vision of themselves.

So does a significant vein of Archaic poetry, although this was countered by poetry praising the elite. Already in the mid-seventh century Archilochos criticizes epic-heroic values; Tyrtaios proclaims that the citizenry must stand firm in the ranks, to benefit the community; Kallinos sees individual fame and glory in terms of approbation by the whole community for service to the community; Xenophanes criticizes the useless display, luxury, and arrogance of Samian aristocrats; Alkman prefers the food the *damos* eats to food luxuriously prepared; for Phokylides, wealth is a piece of good farmland. (For all sources, see Donlan 1973.)

One last point on Homer. A fundamental principle of classical Greek voting is that of the majority: even 51% of voters determine the *dêmos*' will, implying that everyone's vote was equal. As Alberto Maffi (2011: 22) and others have argued, in *Od*. 24.463ff., in a public debate after Odysseus killed the suitors, "more than half"

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[14] See also A. J. Graham, "The Colonial expansion of Greece," *CAH*[2] 3.3 (Cambridge 1982) 83-162, esp. 151-2; and Asheri 1966: 7-16.

[15] R. Meiggs and D. Lewis, *A Selection of Greek Historical Inscriptions* (Oxford 1969) no. 5.

[16] J. C. Carter, "Metapontum—Land, wealth, and population," in J.-P. Descoeudres, ed., *Greek Colonists and Native Populations* (Oxford 1990) 405-41.

[17] The latter were often constructed from stones transported from home: see I. Morris, "Framing the gift: the politics of the Siphnian treasury at Delphi," *CA* 20 (2001) 273-344.

(*hêmieôn pleious*) jumped up and armed themselves to avenge these men. While this is not a vote, the phrase suggests that Greeks already knew of the principle of the majority, with equal votes for all participants, in a proto-judicial setting.

Although our earliest attestations are once again late, the early Spartans are said to have called themselves themselves *homoioi*, "similars" (in the sense that no two people are exactly *isoi*: Cartledge 1996: 178-9). Our first express attestation of this notion is Xen. *Hell*. 3.3.5, but we may compare Herodotos 7.234.2: "Sparta is a *polis* of about 8000 men; all of these are *homoioi* to [the Spartans who fought at Themopylai]. The other Lakedaimonians [the *perioikoi*] are not *homoioi* with these, but they are *agathoi*."[18] Thucydides observes, "It was the Spartans who first began to dress simply and in accordance with our modern taste, with the rich leading a life that was as much as possible like that of the ordinary people" (1.7). Quite possibly from early on, Spartans ideally enjoyed an "equal" lifestyle as *isodiaitoi* (Thuc. 1.6.5), in their childhood upbringing and military training, in common meals in communal mess-halls that were "meant to be a democratic institution" (Arist. *Pol.* 1271a32-3), although over time disparities grew. Armed "similarly," Spartan hoplites were marshaled together in battle lines, fighting side by side and required to stay together, no room for individual heroics, "daring to stand fast at one another's side and advancing toward the front ranks in hand-to-hand combat" (Tyrt. 11.11-12), "let every *anêr* strive now to reach the pinnacle of this *aretê*, with no slacking in war" (ibid. 12.43-4). Hoplite fighting was adopted not for its military advantages but for community solidarity, all fighters equal whatever their personal status, fighting together for their community. When self-styled aristocrats emerged *ca*. 725, Sparta refused: Sparta had no aristocracy, and consequently no tyrannies.[19] Voting in Spartan assemblies was by mass shouting by the collective army. As Andrewes (1966) showed, as far as we can tell the assembled Spartiates made all important decisions. They also chose the members of the Gerousia, again by shouting, and those who judged the volume of these shouts could not see the identities of the candidates. Spartans skipped both laws and tyranny, moving straight to a democratic constitution (*kratos* to the *damos*) which two generations later inspired Solon.

One other telling datum on equality and the *dêmos*, linked with early (good) tyranny and political ideologies. At Sikyon, one Orthagorid who became tyrant *ca*. 600 had been given an interesting name some years earlier when he was born: Isodamos, "Equal-people" (Nic. Dam. *FrGHist* 90 F 61). Would not a supporter of the *dêmos* against rapacious and abusive elites be pleased to bear the name, "The people are

[18] See also Hdt. 3.142, when Maiandrios of Samos set up an altar to Zeus the Liberator, repudiated Polykrates' tyranny on the grounds that he ruled men who were *homoioi* to him, "put power in the middle (*es meson*) [for parallels, see Demonax, Hdt. 4.161, and Kadmos of Cos, acting out of justice, *dikaiosunê*: Hdt. 7. 164] and proclaimed *isonomia*."

[19] In *Pol.* 1270b28-31, Aristotle is critical that the ephors decided cases on their own judgment rather than by laws.

equal"?[20] Both the idea and the practice of civic equality are firmly attested in archaic Greece in our earliest evidence.

Finally, several testimonia link law and equality. Solon stated that he "wrote laws for base and noble (*kakoi*, *agathoi*) similarly *(homoiôs)*, fitting straight justice toward each" (36.16-17). Here equal law for all is directly attested and by the word *homoiôs*, which echoes Sparta's egalitarian reforms two generations earlier, just as Solon called his new public court Eliaia, a Doric word, and his great poem Eunomia, a word that Tyrtaios used at Sparta. Solon also uses the word justice, *dikê*, a word that appears everywhere in Archaic Greek history. Solon permitted anyone dissatisfied with an official's verdict to appeal to the *dêmos*, which will have included Athenians of all social levels and where surely the majority decided. (Aristotle called Solon's polity the beginning of democracy.) Finally, Solon boasts that under his polity, *pantas anthrôpous nikêsein*, "all people will win" (32.3-4).[21]

In conclusion, both the idea and the practice of civic and social equality are attested in Greece already in Homer, as are the power and voice of the *dêmos*. These fundamental and on-going civic and social values collided with the rise of a self-styled aristocracy, provoking civil strife. Four solutions were tried: written law, publicly displayed and equal for everyone, to help resolve disputes justly; then tyrants; wise mediators; and constitutions. The main elements missing from current explanations of the origins of law are notions of justice, equality, and the *dêmos*' role in opposing the greed of and calamitous conflicts between aristocrats that troubled Archaic societies from *Iliad* onward, as ordinary farmers hated the violent rivalries, greed, and crooked justice of the elite. Written laws addressed these problems, helping communities establish formal rules for adjudication and governance.

[20] For Isodemos' family tree, see V. Parker, "Tyrants and lawgivers," in H. Shapiro, ed., *Cambridge Companion to Archaic Greece* (Cambridge 2007) 21.

[21] The Code of Hammurabi could suggest that justice and fairness to all including the weak was a basic quality in ancient laws: then Anu and Bel called by name me, Hammurabi, the exalted prince, who feared God, to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak; so that I should rule over the black-headed people like Shamash, and enlighten the land, to further the well-being of mankind. (tr. L. W. King)

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SOME REMARKS ON EQUALITY IN HOMER AND IN THE FIRST WRITTEN LAWS. RESPONSE TO ROBERT W. WALLACE

With an original reading of the sources, and relying moreover on the archaeological evidence, Robert Wallace's paper argues interestingly against some traditional and well-established views about archaic Greek politics, society and institutions. To quote just a few examples, he challenges the dominant idea that the Homeric poems describe an aristocratic society, and that the people, both in Homer and more generally in archaic times, do not have any power over the governing aristocracy. Denying that the social and political idea of equality appeared in Greece quite late (namely towards the end of the sixth century), he maintains instead that the first written laws, as well as the appearance of tyrants, mediators or umpires, and the setting of constitutions, were remedies taken to fight the arrogant rise of a self-styled aristocracy, which had provoked civil strife.[1]

There is no doubt, I believe, that the development of the concept of equality in the Greek *poleis* in classical times has Homeric or more generally archaic roots,[2] and

[1] See also Raaflaub, Wallace 2007; Wallace 2009; Wallace 2014.

[2] Cf. Raaflaub, Wallace 2007, 32: "despite his elite focus and aristocratic bias, Homer already reveals some fundamental institutions, practices, and mentalities that would later form the core of Greek democracy"; in similar terms cf. also, *e.g.*, Ste. Croix 1981, 284: "the extraordinary originality of Greek democracy […] in the fundamental sense of taking political decisions by majority vote of all citizens, occurred earlier than in any other society we know about".

that equality is both an idea and a practice already in our earliest surviving evidence, as well as a recurring element of archaic laws in different cities. Although I generally agree with Wallace's thesis, I think there are some points on which my views are not as clear-cut as his. In my response I will consider mainly two topics: Homer's world and archaic laws.

First, however, I think it is worth wondering what 'equality' and what 'people' means. As for the former, obviously we cannot compare our absolute (at least theoretically) idea of equality with the idea of equality – *isotēs, homoiotēs* – that the ancient Greeks had, and that, moreover, was likely to be different from *polis* to *polis* and from time to time. Equality existed both in Sparta and in Athens, but the Spartan concept of 'equality' was clearly different from that of the Athenians; many anti-democratic Athenians (first of all, of course, the so called 'Old Oligarch' in his *Athenaion Politeia*) harshly criticized the model of their *polis*, which granted equality to everybody, instead praising the more restricted paradigm of the Spartan equality. As for the archaic notion of 'equality', a quick glance to the *Lexikon des frühgriechischen Epos* shows that already in Homer the adjective *isos* does not cover only the semantic field of the word "equal", but also that of the terms "equitable", "adequate/proportionate", "fair", "just" (cf., *e.g.*, *Od*. 20.293-4).[3] The same ambiguity concerns also the identity of the 'people'; it is not always easy, especially for the archaic age, to understand how wide the notion underlying this term is. In Homer, moreover, the people may be designated by two words*: dēmos* and *laoi*. But what do these terms mean exactly? Supposing – which in my opinion is not correct – that their meaning is always the same in each of their occurrences in the poems, are they synonyms?[4] If they are not, does *dēmos* have a broader ("all the free men who belong to a community") or a narrower meaning ("collective legal entity") than *laoi* ("warriors")?[5] And, in this case, does 'equality' apply only to the *laoi*, or to the *dēmos*, or to both?

Bearing these points in mind, we can turn to Homer and to the society he describes. Many passages undoubtedly confirm Wallace's thesis that it is hard to detect in the Homeric poems – as well as in Hesiod – a real, powerful aristocracy, composed by individuals who boast of belonging to an upper class, and hence of being entitled to be *basileis*.[6] Nobody can deny that mostly the *basileis*, far from being 'aristocrats

[3] *Lexikon des frühgriechischen Epos*, begründet von B. Snell, Göttingen 1991, *s.v. isos*.

[4] See, *e.g.*, Wolff 1946, 41-2; cf. also Bietenhard 2002.

[5] Pugliese Carratelli 1962 [1976], 137, thinks that already in the Mycenaean documents the terms have two clearly distinct meanings, and designate two different social classes: *laos* is "la nobiltà guerriera e fondiaria, la classe più vicina al ϝάναξ", whereas *damos* indicates the farmers and the artisans, the Homeric *dēmioergoi*. See also Myres 1927, 198-200. For the alternation *laoi/dēmos* in the trial scene on the shield of Achilles (*Il.* 18.496-504) cf. Westbrook 1992, 74-5, who follows Müllner 1976, 106; Fusai 2006, 40-3.

[6] For similar remarks connected with the "infrequency of birth words in the early archaic age", see Donlan 1978, 102-3; cf. also Calhoun 1934, 192-208.

by birth' or 'aristocrats by right', are instead chosen *ad hoc* because they are strong, or because they possess a special ability that fits particular circumstances. Accordingly, since their position is neither steady not hereditary, they need to constantly confirm their prestige, their honor (*timē*), and their leadership in order to keep their status.[7] Ithaca offers the most evident example: to reaffirm himself as the absolute leader when he returns on the island, Odysseus must prove to have enough strength and charisma. There is generally a very small difference – we might say quantitative, not qualitative – between the *basileis* that form the elite and their leader, who is nothing more than a *primus inter pares* (cf., *e.g.*, *Il.* 1.287-9), as well as between the *basileis* and the 'people'; the popular approval, the *dēmou phēmis*, is known to be vital for whomever wants to be considered a *basileus*. This explains why, usually at least, the *basileis* have no political power over the people; when the whole community gathers in the assembly, it is not the *basileis* who decide or impose their own decision on the people (cf., *e.g.*, *Od.* 16.380-2). 'Equal participation', as Wallace has so insightfully pointed out, is a recurrent theme in the poems: it applies to the assembly, one of the main features of the Homeric civilized society (it is noteworthy that the Cyclopes, symbol of an uncivilized community, do not have an *agorē*: *Od.* 9.112-114), to the division of the booty after a successful expedition (*Il.* 1.123-9; 11.705; *Od.* 9.42, 549; but there are some exceptions to the rule, as I will show later), and, possibly, to the voting process (*Od.* 24.463-4).

This is the general frame provided by the poems; beside it, however, I think that there are some other mechanisms that operate in the political world of Homer, the occurrence of which is likely to make things more complicated.

It is worth remembering, albeit unnecessarily, that the political system of the *Iliad* and the *Odyssey* has been described by modern scholars in many different ways. For example, according to some, it is "an artificial amalgam of widely separated historical stages".[8] Others differentiate between the Mycenaean kingship of the *Iliad* and the aristocratic kingship of the *Odyssey*.[9] Still others maintain that the poems refer to a specific historical moment – the tenth or the ninth century for some,[10] the eighth century for others.[11] Last but not least, it is worth mentioning the hypothesis, supported especially by Raymond Westbrook, according to which many aspects of the Homeric world can be fully understood only in the light of the legal and political system of the Near Eastern kingdoms.[12]

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[7] About the 'instability' of the regal status see Cantarella 2004 [2011] 204.

[8] Snodgrass 1971, 389; the 'historical stages' that, according to the author, can be identified are the Mycenaean one and the eighth century.

[9] See, *e.g.*, Nilsson 1933.

[10] See, *e.g.*, Finley 1962, 173-5; in his review of Finley's work, Catenacci 1993 suggested as a more fitting title *The Possible World of Odysseus*.

[11] See, *e.g.*, Sale 1994, part. 96-102 (whose position is however against the view that the poems reflect only a specific historical moment); Raaflaub 2006.

[12] Westbrook 1992; Westbrook 2005; cf. also Nagy 1997.

I generally follow the theory according to which in the political world of the Homeric poems there is a variety of institutions, habits, and customs from different ages[13]. A variety that cannot be explained in terms of "archaisms" or "heroic exaggeration",[14] but should be considered instead from a diachronic perspective; "the diachronic approach is needed to supplement the synchronic, as well as vice versa", wrote Gregory Nagy some years ago.[15] Hence, if it is unarguable that in many (probably most) passages of the poems equality is attested, there are also some other passages that may challenge this idea. I will try to justify my point of view by providing just a few examples.

One of the first occurrences (the second, to be correct)[16] of the adjective *isos* is in the first book of the *Iliad*; interestingly, in the same verse the verb *homoioō* occurs as well. After Agamemnon has changed his mind about the restitution of Chryses' daughter, he requires another *geras* and eventually decides to seize Achilles', remarking (*Il.* 1.185-7):

> […] ὄφρ' ἐῢ εἰδῇς
> ὅσσον φέρτερός εἰμι σέθεν, στυγέῃ δὲ καὶ ἄλλος
> ἶσον ἐμοὶ φάσθαι καὶ ὁμοιωθήμεναι ἄντην.
>
> "[…] so that you will understand how much mightier I am than you, and another may shrink from declaring himself my equal (*ison emoi*) and likening himself (*homoiōthēmenai*) to me to my face."[17]

The principles of *isotēs* and *homoiotēs* that inspired Achilles' reaction (cf. also *Il.* 16.53: Achilles considers himself *homoios* to Agamemnon) are firmly rejected by Agamemnon. He is the *Líder Máximo*, he is more equal than anybody else; the people, the Achaeans, clearly recognize it, since, after a successful battle, they always give Agamemnon a much greater *geras* (*poly meizon*), not equal (*ison*) to the one they bestow to others (for example to Achilles, who is talking in these verses: *Il.* 1.163-8). This happens not because Agamemnon is worthier (he does not even fight: cf. *Il.* 9.332), but because he is mightier. Even though Agamemnon states that the thing he mostly cares about is the safety of his people ("I would rather the people be safe than perish", *Il.* 1.117), he does not listen to what the Achaeans say and want; all the decisions rest with him alone.

This superiority seems to me to be justified by the fact that, whereas evidently in some passages of the poems power is grounded on a quantitative principle, in some

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[13] Cf., *e plurimis*, Cantarella 2001 [2011] 160-1 (similar remarks already in Cantarella 1979, 52-8; 129-40); Pelloso 2012, 76-81.

[14] Raaflaub, Wallace 2007, 24.

[15] Nagy 1996, 17.

[16] The first one is in *Il.* 1.163, discussed below in the text.

[17] The translation of this and other passages of the *Iliad* is by A.T. Murray, Cambridge Mass.-London 1924.

others it has a qualitative characterization; remember what Odysseus – after reminding many members of the *dēmos* that they are worthless in war and in council – says in his praise of kingship (*Il.* 2.204-6):

> οὐκ ἀγαθὸν πολυκοιρανίη· εἷς κοίρανος ἔστω,
> εἷς βασιλεύς, ᾧ δῶκε Κρόνου πάϊς ἀγκυλομήτεω
> σκῆπτρόν τ' ἠδὲ θέμιστας, ἵνά σφισι βουλεύῃσι.

> "no good thing is a multitude of lords; let there be one lord (*koiranos*), one king (*basileus*), to whom the son of crooked-counselling Cronos hath vouchsafed the sceptre and judgments (*themistas*), that he may take counsel for his people."

This statement, I think, can be compared with other passages where *timē* is not said to derive from a particular ability recognized by the *dēmou phēmis*, but rather from Zeus himself (*timē ek Dios*: cf., *e.g.*, *Il.* 2.197). It can also be compared with the fact that some *basileis* are such because of a divine investiture and a hereditary principle. Agamemnon got his scepter, symbol of power, from his ancestors, who had got it directly from Zeus (cf., *e.g.*, *Il.* 1. 278-9, where Nestor says Agamemnon obtained a *timē* not *homoiē*; 2.100-8; 9.98-9; cf. also *Il.* 1.238-9). Can this fact be assumed as a sign of a later development towards the power of wealthy prestigious families, typical of the seventh and sixth century? Many scholars have convincingly argued that such a characterization is rather a relic of the past, an echo of the Mycenaean idea of 'king', *wa-na-ka*.[18] Of course it is not my intention to confront here the much debated problem concerning the relationship between the Mycenaean age and Homer; my guess is simply that in the poems there are clear references to a previous, 'unequal' system, and that these references coexist, sometimes with unresolved contradictions, with more recently developed principles.[19]

The same conclusion, regarding both the diachronic development and the attribution of power, can be drawn if the administration of justice is considered.

[18] Cf. recently Pelloso 2012, 78 nt. 194, 81 nt. 197.

[19] Cf., *e plurimis*, Pugliese Carratelli 1962 [1976], part. 142-3, 148-54, who has convincingly outlined the steps that from the fall of the Mycenaean feudal civilization led, through Homer, to the birth of the *polis*. While the absolute ruler, *wa-na-ka* (*anax*), disappeared, the *gwa-si-re-wes* (*basileis*), heads of the family clans and members of the council (*geronsia*), survived; one of them, because of his merits or his authority, became their leader as *basileus skēptouchos*: "si attuava così il necessario presupposto per la nascita di quella che fu la πόλις vera e propria, la cui costituzione come organismo caratterizzato dalla ἰσότης dei πολῖται di pieno diritto […] non poté avvenire se non col superamento della fase monarchica o 'basilica' e l'insediamento di una aristocrazia" (148-9). This hypothesis is supported, *e.g.*, by Cantarella 2004 [2011], 197, 202-3 (and cf. also Cantarella 1979, 16-21); Pelloso 2012, part. 81 nt. 197. On the Homeric *basileis* and their attributions cf. also Mondi 1980; Yamagata 1997; Carlier 2006.

There are many scenes where the *basileus*, also called *dikaspolos*, is described as the one who keeps in his hands the *themistes* he has received directly from Zeus (*Il.* 1.237-9; 2.205-6; 9.98-9; cf. *Od.* 11.568-71). Invested by god and acting as a *iudex unus*, he embodies a more ancient model (once again, probably Mycenaean)[20] both than the 'secular' *andres* who give judgments in the *agora* (*Il.* 16.387-8; *Od.* 12.439), and than the elders (*gerontes*, to be identified with the *basileis skēptouchoi*: cf., *e.g.*, *Il.* 2.53-4, 84-6)[21] who participate as a body in the much debated trial of the shield of Achilles (*Il.* 18.497-508). Some scholars maintain that in this scene it is the people who effectively decide the dispute, so that, also as far as the administration of justice is concerned, "in Homer the origin of democratic judgments can already be seen",[22] but I doubt it. Even though the people (*laoi*, v. 497) are present, gathered in the *agorē*, they just seem to root for each litigant (*epēpuon, arōgoi*, v. 502), so that the heralds have to hold them back (v. 503); only the elders, standing up while holding their scepters, decide (*dikazon*, v. 504).

To sum up, beside a world where the people matter, where there is not much difference between the leaders and the people, where equality rules, Homer also represents a community where the leaders are such because they have got special authority and power from the gods, and where, consequently, the concept of equality is hard to detect. There is definitely a popular participation both in the administration of justice and in the assembly; but, in the first case, it is difficult to say how much this participation is effective, and, in the second, how far it is equal. Thersites' episode (*Il.* 2.212-77) is significant in this respect.

Something more should also be said about the division of booty. Wallace is absolutely right in stating that in this field equality is well attested; in fact it is true that the booty is a "common treasure" (*xynēioa*: *Il.* 1.124) that belongs to the *laoi*, so that only the *laoi* can replace it in the middle and distribute it again (*Il.* 1.124-6), normally in equal parts,[23] *mē tis hoi atembomenos kioi isēs* is the recurring formula

[20] Cantarella 2001 [2011], 162-5; further bibliography in Pelloso 2012, 82 nt. 198.

[21] For the identification see moreover Cantarella 2001 [2011], 166-7.

[22] MacDowell 1978, 21; cf. Wolff 1946, 40-2.

[23] According to a recent hypothesis (Macé 2014, 661-73), in Homer the booty was only partially distributed, since some of it remained undistributed as common good. Against this idea cf. Maffi 2014, 185-9.

(cf. *Il.* 11.705;[24] *Od.* 9.42 and 549).[25] Moreover, it is common practice for the *laoi* to award a special prize taken from the booty (*geras*) to some worthy warriors. Once again, however, this does not always happen; blaming Agamemnon while talking to Odysseus, Achilles remembers (*Il.* 9.330-4):

> τάων ἐκ πασέων κειμήλια πολλὰ καὶ ἐσθλὰ
> ἐξελόμην, καὶ πάντα φέρων Ἀγαμέμνονι δόσκον
> Ἀτρεΐδῃ· ὃ δ' ὄπισθε μένων παρὰ νηυσὶ θοῇσι
> δεξάμενος διὰ παῦρα δασάσκετο, πολλὰ δ' ἔχεσκεν.
> ἄλλα δ' ἀριστήεσσι δίδου γέρα καὶ βασιλεῦσι.
>
> "from out all these [cities] I took much spoil and goodly, and all would I ever bring and give to Agamemnon, this son of Atreus; but he staying behind, even beside his swiftships, would take and apportion some small part, but keep the most. Some he gave as prizes to chieftains and kings…"

These verses confirm that sometimes it is the leader who, while keeping most of the booty for himself, gives special prizes, *gera*,[26] not only to the best and worthiest warriors but also to the *basileis*, simply because of their status, and then proceeds with the distribution of a small part to the *laoi* (cf. also *Il.* 9.149, where Agamemnon promises to Achilles "seven well-peopled cities"; according to some, this power of distribution proves that he is not simply a political leader, but an 'absolute monarch').[27]

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[24] In this context, however, the formula is inserted in a situation (*Il.* 11.696-705) that does not imply an absolute equality; in fact the 'equal distribution' recurs after the *basileus* (Neleus) has himself taken (*heileto*, 697; *exeleto*, 704) part of the booty as compensation for a debt. Observes Hainsworth 1993, 301-2: "there is a certain confusion (doubtless also in practice) between forcible restitution of debt and simple pillage: Neleus is entitled to his four horses or their value and takes it, the δῆμος then makes assignments in language appropriate to the distribution of booty […]. Zenodotus (Did/AT) omitted 705, an explanatory expansion on 704, and Aristarchus (Arn/A) condemned the verse. The objection, in addition to the repetition of the verse, was to the unfairness of an equal distribution among varied creditors. If the line is retained, the important principle of 'fair share of booty' will have been embodied in a formula."

[25] Among the examples that prove equality in the division of booty Wallace quotes also *Il.* 9.318, where Achilles says that "an *isē moira* goes to everyone, however well he fights"; but in this context the phrase *isē moira* may designate death, which "cometh alike to the idle man and to him that worketh much" (*Il.* 9.320).

[26] According to Cantarella 2004 [2011], 207, the most common meaning of *geras* is "royal honor and privilege", as *Od.* 11.174-84 demonstrates.

[27] Sale 1994, 22. For interesting remarks about the 'distribution pattern' typical of many ancient societies (among which the Mycenean world), and about the strong connection between being the central figure in a (re)distributive scheme and possessing political power, see Rundin 1996, 182, who quotes as a clear example of this pattern the scene on the shield of Achilles that describes the harvesting in the *temenos basilēion* of a *basileus skēptouchos* (*Il.* 18.550-60).

Let's now turn to equality and the archaic laws. The reason why the first laws were written is known to be much debated, and many possible solutions have been advanced, each of them with pros and cons. Wallace adheres to the hypothesis, formulated by some eminent scholars many years ago,[28] and which he himself admits "is now not in favor",[29] according to which written laws, as a consequence of popular pressure, were intended to promote justice; in his opinion, seventh- and sixth-century legislation, emerging "shortly after the appearance of an arrogant and abusive aristocracy", was an attempt – not always successful – to counterbalance elite injustice and to provide – *rectius*, to re-establish – social justice. The arguments he uses to reply to the objections moved in the past against this position are quite convincing.

On the one hand, some important literary documents, cited by Wallace, confirm the existence of a strong social *stasis* caused by elite violence and prevarication that the first lawgivers tried to stem. On the other hand, in many of the most ancient laws preserved epigraphically the *dēmos* or the *polis* are mentioned. To quote just a few examples, the very first words of the earliest surviving Greek law, from Dreros (*Nomima* I.81, ca. 650 BC), state "the *polis* has decided", and then indicates the period of time (ten years) that had to elapse before the main magistrate of the city (the *kosmos*) could hold the office again. A law from Chios (*Nomima* I.62, ca. 575 BC)[30] contains so many references to the *dēmos* that the inscription is generally considered one of the milestones of ancient Greek democracy.[31] It indicates the necessity of protecting the *rhētrai* of the *dēmos*, refers several times to a *dēmarchos*, and mentions a *boulē dēmosiē* – composed, as the law itself indicates, of fifty men selected from each tribe, *phylē* –,[32] which administered justice, probably in appeal, with the power to inflict penalties. The *polis*, together with some other more restricted councils, appears again in the slightly later law from (possibly) Naupactus (*Nomima* I.44, end of the sixth century). Furthermore, it is noteworthy that "archaic laws were displayed in easily accessible public spaces, were often written in large clear letters suitable for reading, and almost always contained features like word-division markers that would make the text easier to read and understand".[33] But does all this necessarily mean that laws were first written to help the *dēmos* against the obnoxious aristocrats? Again, I think that the overall frame is less definite and more fluid than Wallace depicts it, as I will try to show by surveying a few points.

a. As far as the laws just quoted are concerned, the meaning of the 'democratic' terms mentioned in them has been questioned.[34] Some scholars, for example, have

[28] Cf. Bonner, Smith 1930, 67; Calhoun 1944, 20-1; Gerner 1950, part. 21.
[29] For the main objections see, *e.g.*, Gagarin 1989, 122-4.
[30] For the possible dating of the inscription see Robinson 1997, 91.
[31] See, *e.g.*, Wilamowitz 1909; further bibliography in Ampolo 1983, 404.
[32] We also know of the existence of *boulai dēmosiai* elsewhere in Ionia: cf. Hipp. 128 West.
[33] Gagarin 2008, 69.
[34] Cf., *e.g.*, Camassa 2011, 77, who strongly rejects the possibility that the word *dēmos* in the seventh century could indicate a community composed of the lower working class.

disputed the identification of the *polis* in the Dreros law with the *dēmos*, arguing instead that the term should refer more likely to a quite restricted group.[35] Moreover, since the law regulated the access to, and the iteration of, an office (the *kosmos*) that could be held only by those who belonged to the elite, its impact on ordinary citizens might have been little.[36] As for the law from Chios, it has been inferred both that the identification of the *dēmarchos* with a magistrate of the *dēmos*, opposed to the aristocratic *basileis*, is dubious,[37] and that the institution of the appeal to the *boulē dēmosiē* might not basically implicate a democratic form of government.[38] In fact, the adjective *dēmosios* does not mean "popular" (hence 'democratic'), but "public".[39]

b. The lack of information about the historical context in which the laws were enacted makes it difficult to understand how strong their impact was, or what kind of changes or innovations (if any) they produced.[40] Regarding Chios, "Aristotle (*Pol*. 1306 b 3-5) notes a revolutionary change in the Chian constitution from oligarchy to democracy (inspired because the oligarchs were too authoritarian, *agan despotikas*), but provides no indication of when it occurred. This offers a possible context for the fall of the traditional aristocratic regime and the initiation of the popular government. However, given the known cases of defeated oligarchies in Chios of the fifth and fourth centuries, concluding that Aristotle composed this passage for the late seventh or early-sixth century event remains no more than a possibility".[41] The causal relation between a historical event and the enactment of the first written law(s) is often hard to detect even for *poleis* about whose history more detailed information is available, like Athens. Draco's lawcode is understood by many scholars as a consequence of the Cylonian affaire, even though the data provided by the available sources (Hdt. 5.71; Thuc. 1.126.3-12; Plut. *Sol*. 12) never mention the existence of such a connection. When Aristotle (*Pol*. 1274 b 15-6) talks about Draco's laws, he just says the lawgiver "legislated for an existing constitution", noting moreover that "there is nothing peculiar in his laws that is worthy of mention" (the same remark [*Pol*. 1274 b 5-6] is made also regarding Charondas, one of the very first Greek lawgivers).

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[35] Cf. Davies 2004, 20 (and see also Camassa 2011, 83-5), according to which *polis* is possibly equivalent to the twenty men mentioned in the last sentence of the law, who are asked to swear an oath together with the *kosmos* and the *damioi*. Undoubtedly, however, this hypothesis clashes with the obvious objection (see Gagarin 2008, 78 and nt. 20) that it is difficult to identify the *polis*, without qualification, with the "twenty of the *polis*", probably a subsection of the group. Gagarin (*ibid*.) thinks that "most members are likely to have come from the middle segment of the population, neither the very rich, nor the very poor".

[36] Gagarin 2008, 77.

[37] Mazzarino 1947, 239.

[38] Jeffery 1956, 164-5, 167; Ampolo 1983, part. 408-9.

[39] Ampolo 1983, who quotes Chantraine 1933, 392.

[40] Furthermore, as Gagarin 2008, 90 puts it, the first written laws "are not necessarily responses to a crisis".

[41] Robinson 1997, 98-9.

c. One of the main sources used as evidence that written laws produced equal justice is the well-known passage in Euripides' *Suppliant Women* (vv. 433-4), where Theseus states that "when the laws are written, the rich and the weak have *dikēn isēn*". I do not think, however, that these verses mean that equal justice is the purpose of written laws; rather, as it has been noted, equal justice may have been the result of the written legislation.[42] Generally speaking, there is no reason to assume that written law is "in itself inherently democratic or egalitarian. […] And even if the laws are themselves just, the judicial machinery and political administration must correspond in order to transfer the equality of the laws to the society".[43] As I try to demonstrate in a forthcoming essay, Theseus' words cannot be extrapolated either from the context of the tragedy, or more generally from the Athenian political background of the fifth century. At that time, when the association between written laws and social justice became a democratic slogan, the phrase *nomoi gegrammenoi* did not simply indicate the material writing of the laws, but instead had a substantial meaning, that entailed a series of implicit connections.[44] A passage in Aristotle's *Politics* (1265 b 13-6) shows that the combination written laws - social justice was not the rule everywhere; one of the most ancient lawgivers, Pheidon of Corinth, "thought that the house-holds and the citizen population ought to remain at the same numbers, even though at the outset the estates of all were unequal (*anisous*) in size".[45] In this case at least, the writing of a law was useful to fix an existing inequality.[46]

Of course, these remarks are not intended to deny that the enactment of a written law could have been justified by the pressure of the lower class or by the general need to stop a *stasis* within the *polis*, and to promote justice and equality. Both the literary and the epigraphical evidence unambiguously show that non-elites had a great part in the lawmaking process, but their participation does not necessarily imply that written laws were meant to have a democratic effect.[47] "Rather than try to fit all archaic legislation into a single mold, we should recognize the diversity of archaic legislation and accept that it varied from place to place and, at some places, from law to law."[48]

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[42] Thomas 1977, 455 (also quoted by Wallace).

[43] Thomas 1995, 60.

[44] Pepe forth.; see also, more generally, Hölkeskamp 1992, 59-60: "it is not too far-fetched to argue that the general framework of notions and concepts applied to the history of early Greek law is to a great extent extrapolated from the sophisticated classical (and modern) ideas on law, justice and their origins, which are themselves the result of a long historical process."

[45] Translation by H. Rackham, Cambridge Mass.-London, 1944. On the genuineness of the law cf. Hölkeskamp 1992, 89; Camassa 2011, 88-9.

[46] Camassa 2011, 87.

[47] Gagarin 2008, 88.

[48] Gagarin 2008, 75-6.

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DIFFERENT EQUALITIES. ADDITIONAL NOTE ON ROBERT W. WALLACE

In this short commentary I will not discuss any details of Wallace's paper, nor will I enumerate the points which I agree upon with him. I will limit myself to two fundamental considerations which contain some critique of the author's views.

Wallace demonstrates that in some segments of the archaic society and in some different chronological situations equality had some importance.

My first point is that we must more strictly distinguish between three fields or spheres in which equality plays a certain role. These are economic equality, political equality, and legal equality.

Economic equality did not exist in antiquity, except in some philosophical concepts as the permanent basis of society. Maybe at some starting points, like the foundation of Sparta or the foundation of colonies, the land has been distributed in equal klaroi between the members of the community. We cannot be sure of this and personally I am doubtful. But anyway, within short times in all Greek poleis the possession of land was not equal. Everywhere from Homer to Solon we have poor and rich people, big landowners and small landowners and men without land at all. Even within the close class of the Spartiates there was, as scholars have shown from the 1960s on, an upper class of rich citizens dominating the polis. Greek poleis were fundamentally market societies with freedom of property, that could be sold or at least bequeathed, even in Sparta and even to women, as Aristotle complains.

In early Greek societies economic resources determined also the members' military and *political* participation in the common features of the polis (our second

form of equality). The basileis in Homer are mainly defined not by their origin, as Wallace rightly says, nor by their military ability, as he maintains, but by their wealth. And at the end of the archaic period Solon redefines the tax classes which are decisive for the political participation of their members. Basic political equality of all citizens, isomoiria or isonomia, begins with Athenian democracy, that is with the reforms of Cleisthenes at the end of the sixth century B.C. Even then there remained some restrictions on eligibility for some magistracies; moreover, we can see that de facto the demos elected exclusively rich and well respected citizens as the most responsible magistrates, especially the *strategoi*.

In our third form, *legal* equality, we must again distinguish between a) what I call *passive* legal rights, that is the right to be a citizen, and b) *active* participation as a magistrate or judge. All Greek citizens were indeed equal before the law, in that they all could bring an action or had to defend against an action in the same way. This reality does not affect our argument. This sense of citizenship was the very basis of the Greek polis; even the tyrants behaved, in some respect, as citizens.

Active participation as a magistrate or judge, however, belongs to the political sphere and was therefore, as we have seen, distributed unequally, except in some kinds of democracy like the Athenian one, but this only happened after the archaic period.

In my second consideration I want to distinguish between a theoretical or ideological and a real historical sphere of equality. It seems to me that Wallace's arguments remain not exclusively but mainly in the ideological sphere. In his view the Greek aristocrats violated the ideology of equality which he believes to be basically accepted in archaic Greece.

In reality the decisive point is not the more or less strong individualism of the aristocrats but the fact that about 700 B.C. they founded a political rule over the whole community, that is they made the polis a state. They transformed pre-state traditions into state institutions, and created councils (pace Wallace), magistracies, assemblies, and lawcourts. Within the decisive institutions the equality among the elite was an important principle as the laws of Dreros or Gortyn demonstrate by regulating the terms of office for the Cretan kosmoi. The ruling elite, despite their competition in many fields, acted basically unanimously, and there was, as far as we know, no resistance of the demos against the foundation of the state. I have disagreed with Wallace and other colleagues for a long time about the importance of the demos, which he in my opinion overestimates.

The state was, then, the new framework, within which conflicts were carried out and possibly settled. Formal votes with majority decisions, like in the Spartan gerusia, do take place only from now on. The state needs laws (Wallace's first point) to regulate conflicts (like Dracon's law, not mentioned by him) and to organize its institutions (Wallace's second point: the constitution [cfr. Dreros; Chios; the Spartan Rhetra; Solon]). Tyrants (Wallace's third point) occupy the polis and exercise a private

regime, as I will underline in a forthcoming article ("Die griechische Tyrannis als monarchische Herrschaftsform"). Wallace's view of the tyrant as champion of the demos has been justly dismissed since Berve's book from 1967 (and Aristotle is wrong in this respect). When conflicts arose among or between factions, classes or individuals, a mediator, aisymnetes, diallaktes or the like, could temporarily take the government in his hand, if the opponents agreed.

In short: I see less power for the demos and less equality; equality only existed with respect to passive citizen rights. About 700 B.C. the Greek aristocrats transformed the polis into a state, and from then on all existing forms of equality were connected with this institution.

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EPHESIS EIS TO DIKASTERION: REMARKS AND SPECULATIONS ON THE LEGAL NATURE OF THE SOLONIAN REFORM

Summary: 1) Introduction. - 2) The opinion considering the Solonian ἔφεσις a true appeal. - 3) The opinion considering the Solonian ἔφεσις a mandatory reference. - 4) The view that interprets the Solonian ἔφεσις as a remedy with negative effects. - 5) The basic information provided by the Aristotelian *Constitution of the Athenians* and by Plutarch. - 6) The ἀποδοκιμασία of the nine ἄρχοντες. - 7) Extraordinary and ordinary ἀποψηφίσεις. - 8) The arbitral γνῶσις. - 9) Some conclusions on the legal nature of the Solonian reform. - Bibliography.

1) *Introduction*.

What is the origin of the Solonian procedural remedy called ἔφεσις εἰς τὸ δικαστήριον? What is its legal nature and its political impact? What are its consequences under legal procedure, as well as under criminal, civil and administrative law (if I am allowed to make modern distinctions)? Both historians of political institutions and legal historians have proposed many different interpretations. The current *communis opinio* interprets the ἔφεσις εἰς τὸ δικαστήριον in terms of a 'right of appeal' and often repeats the views of earlier scholars, who analyzed the procedure at greater length.[1]

[1] Cf., for instance, Todd (1994: 100, nt. 2); Welwei (1998: 154); Schubert (2000: 53);

In recent years, a few scholars have maintained – albeit with some doubts – that from its introduction at the beginning of the sixth century, ἔφεσις was the 'transfer' of a case from the authority of a magistrate to the popular court rather than an 'appeal' to a court, which was instructed to retry a case already decided by the magistrate.[2]

2) *The opinion considering the Solonian ἔφεσις a true appeal.*

According to the traditional and nowadays predominant view, the Solonian procedure ἔφεσις is viewed as an actual 'appeal' (even many who hold this view do not use this noun as a *terminus technicus* and therefore do not appreciate all the legal implications of their use of this term). Indeed, a true appeal produces a 'suspensive effect' (i.e. it interrupts the enforceability of a judgment given at first instance). It directly produces a 'devolutive effect' (i.e. it is the private remedy that, once filed by the aggrieved party, brings about the introduction of the case before a new judge). It is characterized by a 'substitutive effect' (i.e. it involves a second instance procedure ending with a new judgment that entirely replaces the first judgment)[3].

3) *The opinion considering the Solonian ἔφεσις a mandatory reference.*

According to a different explanation, one could define ἔφεσις, in strictly legal terms, as a 'mandatory transfer' of a case from any political body (at first a single magistrate, but also a board of citizens or other political body) to the popular judges. From a legal perspective, this idea implies the following consequences. Ἔφεσις is the act of an official or an act of a public officer or public board, rather than a private and discretionary act, which initiated an appellate review. Consequently, after the Solonian reform, the ἡλιαία would have passed judgments exclusively as a court of first instance, and it would have been the only (or the main) court empowered to give final judgments. As a result, magistrates – depending on the interpretation – would have lost practically all or, at least, much of their judicial power.[4]

Almeida (2003: 66); Mirhady (2006); Rhodes (2006: 255); Noussia-Fantuzzi (2010: 26-27); Leão - Rhodes (2015: 67-68).

[2] Cf., in these terms, Gagarin (2006: 263-264).

[3] Cf., among those who describe the Solonian reform in terms of a true appeal, Hudtwalker (1812); Tittmann (1822: 219); Thalheim (1905: 2773); Lipsius (1905-1915: 27-30, 230, 440); Busolt - Swoboda (1926: 851, 1151, 1457); Ralph (1936=1941); Bonner - Smith (1930-1938: 1.231); Wade-Gery (1958: 192-195); Harrison (1971: 72-73); MacDowell (1978: 31); Rhodes (1981: 160-162); Ostwald (1986: 28, 12); Tamburini (1990). This view is mainly based on *Ath. Pol.* 9.1 and Plut. *Sol.* 18.2.

[4] Cf., among those who describe the Solonian reform in terms of 'transferal', Schöll (1875: 19, nt. 1); Pridik (1892: 111); Wilamowitz-Moellendorff (1893: 1.60); Ruschenbusch (1961); Ruschenbusch (1965); Hansen (1982: 37); Sealey (1983: 294-296); Hansen (1989: 260). This view considers the following *testimonia* unreliable because of strong influences played by Roman ideas: Plut. *Sol.* 18.2; Plut. *Publ.* 25.2; Poll. 8.62; Luc. *Bis acc.* 12.

4) *The view that interprets the Solonian* ἔφεσις *as a remedy with negative effects.*

A third view has received less attention in studies published in recent years.[5] This view denies that one can characterize ἔφεσις as either a right of appeal or a transfer of jurisdiction. According to this view, ἔφεσις is a 'claim' submitted by the citizen who has suffered some bodily harm, monetary damages, or personal disadvantages from an 'authoritative' order issued by a magistrate. Yet, such a procedural remedy either would bear a resemblance to a private 'veto', that formally blocks the issuing of a final ruling, or it would turn out to be the 'opposition to the enforcement of an authoritative act.'

It follows therefore that ἔφεσις produces only 'negative effects'; either halting the enforceability of a decision coming from an official, a body, or a board different from the people, or preventing the validity – if not practically the existence – of such a decision. Moreover, if ἔφεσις basically removes any proposed judgment and award, as well as any administrative measure – on the level of either effects, or validity, or existence – the popular judges neither amend, nor quash, nor approve a previous ruling. In other words, the δικαστήριον substantially plays the role of a court of first instance before which the case, after an ἔφεσις is submitted, must or can be *ex novo* introduced (παλινδικία).[6] In the present contribution, I will try to give some support to this neglected view.

5) *The basic information provided by the Aristotelian 'Constitution of the Athenians' and by Plutarch.*

Three important passages from the Aristotelian *Constitution of the Athenians*, together with some information from Plutarch's *Life of Solon*,[7] provide the following information.

Before 'ἔφεσις to the popular court' was introduced by Solon, ἀρχαί were both κύριοι (i.e. qualified to pass decisions that could not be amended or rescinded) and αὐτοτελεῖς (i.e. qualified to initiate *ex officio* legal procedures).[8] In other words, in the

[5] Yet, see Loddo (2015), who gives a hybrid view of the Solonian remedy, as she keeps on labeling it as 'appeal' and yet, at the same time, adheres to the thesis qualifying it in terms of 'veto'.

[6] Cf. Steinwenter (1925=1971); Paoli (1950); Lepri (1960); Just (1965); Just (1968); Just (1970).

[7] *Ath. Pol.* 9.1: τρίτον δὲ ᾧ καὶ μάλιστά φασιν ἰσχυκέναι τὸ πλῆθος, ἡ εἰς τὸ δικαστήριον ἔφεσις: κύριος γὰρ ὢν ὁ δῆμος τῆς ψήφου, κύριος γίγνεται τῆς πολιτείας; *Ath. Pol.* 3.5: κύριοι δ' ἦσαν καὶ τὰς δίκας αὐτοτελεῖς κρίνειν, καὶ οὐχ ὥσπερ νῦν προανακρίνειν; *Ath. Pol.* 4.4: ἐξῆν δὲ τῷ ἀδικουμένῳ πρὸς τὴν τῶν Ἀρεοπαγιτῶν βουλὴν εἰσαγγέλλειν, ἀποφαίνοντι παρ' ὃν ἀδικεῖται νόμον; Plut. *Sol.* 18.2: ὃ κατ' ἀρχὰς μὲν οὐδέν, ὕστερον δὲ παμμέγεθες ἐφάνη: τὰ γὰρ πλεῖστα τῶν διαφόρων ἐνέπιπτεν εἰς τοὺς δικαστάς. καὶ γὰρ ὅσα ταῖς ἀρχαῖς ἔταξε κρίνειν, ὁμοίως καὶ περὶ ἐκείνων εἰς τὸ δικαστήριον ἐφέσεις ἔδωκε τοῖς βουλομένοις. See Harris (2006: 3-28), on the aims of Solon and the early Greek lawgivers.

[8] Cf., *amplius*, Pelloso (2014-2015).

pre-Solonian legal system ἀρχαί were entitled to pass final judgments and to impose penalties on their own initiative (at least as far as the Greek perceptions of the fourth century on the Archaic age are concerned). If the magistrate enacted an 'unjust' judicial or administrative measure (for either procedural or substantive reasons), the citizen directly affected by the decision was only allowed to report it to the Areopagus (by filing – it is impossible to be more precise – a 'reipersecutory' claim or a penal one). The magisterial judgment was nevertheless final and directly enforceable.

Solon's procedural reforms had an immediate effect on the legal nature of the magistrates' acts, granting any Athenian citizen the right to have his case judged by a court of pairs. Indeed, any citizen – if dissatisfied by the magistrate's decision – was allowed to submit ἔφεσις to obtain a trial in a popular court. Accordingly, on the one hand, ἔφεσις can be labeled as a voluntary procedural remedy available to any party. On the other hand, Solon seems to have just 'strengthened' an existing body, that is, the Athenian people as a judicial court (through the attribution of new functions and powers, as well as through its renewed composition).[9] In *Constitution of the Athenians* Solon is said to have created a new procedure introduced by 'ἔφεσις' (rather than to have created the 'popular court' at the same time). Moreover, in Plutarch's account, from Solon on, the popular court judged the majority of legal disputes (but not all of them), 'even' those included under the jurisdiction of magistrates (i.e. all those proceedings started before a magistrate, alongside other, although not better identified, disputes).

Once the previous legal characteristics have been specified, one can go further, albeit cautiously. If one believes that the original Solonian remedy and its later applications shared the same and basic legal features, one can use this evidence to refine our interpretation of the data found in the *Constitution of the Athenians* and in Plutarch's *Life of Solon*. Indeed, other *testimonia* from the Classical period about later periods of Athenian history reveal further features and essential characteristics of

[9] On the new (Solonian) composition of the previous (pre-Solonian) ἡλιαιία, cf. Plut. *Sol.* 18.2 (οἱ δὲ λοιποὶ πάντες ἐκαλοῦντο θῆτες, οἷς οὐδεμίαν ἄρχειν ἔδωκεν ἀρχήν, ἀλλὰ τῷ συνεκκλησιάζειν καὶ δικάζειν μόνον μετεῖχον τῆς πολιτείας); *Ath. Pol.* 7.3 (τοῖς δὲ τὸ θητικὸν τελοῦσιν ἐκκλησίας καὶ δικαστηρίων μετέδωκε μόνον). See, moreover, Arist. *Pol.* 1273b35 - 1274a5 (Σόλωνα δ' ἔνιοι μὲν οἴονται νομοθέτην γενέσθαι σπουδαῖον: ὀλιγαρχίαν τε γὰρ καταλῦσαι λίαν ἄκρατον οὖσαν, καὶ δουλεύοντα τὸν δῆμον παῦσαι, καὶ δημοκρατίαν καταστῆσαι τὴν πάτριον, μείξαντα καλῶς τὴν πολιτείαν: εἶναι γὰρ τὴν μὲν ἐν Ἀρείῳ πάγῳ βουλὴν ὀλιγαρχικόν, τὸ δὲ τὰς ἀρχὰς αἱρετὰς ἀριστοκρατικόν, τὰ δὲ δικαστήρια δημοτικόν. ἔοικε δὲ Σόλων ἐκεῖνα μὲν ὑπάρχοντα πρότερον οὐ καταλῦσαι, τήν τε βουλὴν καὶ τὴν τῶν ἀρχῶν αἵρεσιν, τὸν δὲ δῆμον καταστῆσαι, τὰ δικαστήρια ποιήσας ἐκ πάντων). In this passage, the lawgiver is said both to have preserved the existing bodies, and to have founded the 'ancestral democracy' (rather than the 'popular court' itself) by opening the existing δικαστήρια (that is, plausibly, the articulations of the same institution, i.e. the ἡλιαία) to everybody (rather than creating *ex novo* the δικαστήρια): cf. Rhodes (2006: 255, nt. 60). On the importance of the judicial functions ascribed to the Athenian people by Solon, see Maffi (2004: 305-306); Mirhady (2006: 4); Loddo (2015: 99).

the ἔφεσις-remedy. The following paragraphs will deal with the ἀποδοκιμασία of the nine ἄρχοντες (§ 6), with the extraordinary and ordinary ἀποψηφίσεις of Athenian citizens (§ 7), and with the γνῶσις of arbitrators (§ 8). Finally, on the grounds of the data analyzed in this article, some speculative conclusions on the legal nature of ἔφεσις εἰς τὸ δικαστήριον – as far as the Solonian era is concerned – will be proposed (§ 9).

6) *The* ἀποδοκιμασία *of the nine* ἄρχοντες.

The main sources for the δοκιμασία (that is the 'vetting') of the nine ἄρχοντες (or, better, 'elected candidates to the nine magistracies')[10] are *Ath. Pol.* 45.3 and *Ath. Pol.* 55.2,[11] together with Dem. 20.90.[12] If I am not wrong, the following picture emerges from these three passages.

During a first phase (that is before the reform of the rules in force), if the elected ἄρχων (who had to undergo a scrutiny before the Council) was rejected, the procedure stopped and the citizen who failed the δοκιμασία was not entitled to file an action against the negative vote at all. On the contrary, if he passed this first scrutiny at the vote of the Council, he was examined once more before the popular court.

Sometime later a change in the previous arrangement occurred. During a second phase those who did not pass the first scrutiny of the Council exercised their own right to be 'newly judged' before the Athenian people by submitting ἔφεσις. The popular decision that – in practice – could either confirm or deny the vote of the Council was final. In the case of a positive vote at the scrutiny the procedure did not change. If this reading is exact, Demosthenes' interpretation is confirmed. It is correct to maintain that the θεσμοθέται (as well as any other major magistrate), once elected, were to pass a double δοκιμασία in order to enter office. This statement, directly confirmed by *Ath. Pol.* 55.2, is not inconsistent with the rules given at *Ath. Pol.* 45.3.

As a result, on the basis of these sources: 1. ἔφεσις is not a mandatory transfer, but a remedy to be used only by the rejected citizen against the vote of the Council (as

[10] Cf. Feyel (2009: 25-27, 148-197, 171-181, 363-370).

[11] *Ath. Pol.* 45.3: δοκιμάζει δὲ καὶ τοὺς βουλευτὰς τοὺς τὸν ὕστερον ἐνιαυτὸν βουλεύσοντας καὶ τοὺς ἐννέα ἄρχοντας. καὶ πρότερον μὲν ἦν ἀποδοκιμάσαι κυρία, νῦν δὲ τούτοις ἔφεσίς ἐστιν εἰς τὸ δικαστήριον; *Ath. Pol.* 55.2: δοκιμάζονται δ' οὗτοι πρῶτον μὲν ἐν τῇ βουλῇ τοῖς φ', πλὴν τοῦ γραμματέως, οὗτος δ' ἐν δικαστηρίῳ μόνον ὥσπερ οἱ ἄλλοι ἄρχοντες πάντες γὰρ καὶ οἱ κληρωτοὶ καὶ οἱ χειροτονητοὶ δοκιμασθέντες ἄρχουσιν, οἱ δ' ἐννέα ἄρχοντες ἔν τε τῇ βουλῇ καὶ πάλιν ἐν δικαστηρίῳ. καὶ πρότερον μὲν οὐκ ἦρχεν ὅντιν' ἀποδοκιμάσειεν ἡ βουλή, νῦν δ' ἔφεσίς ἐστιν εἰς τὸ δικαστήριον, καὶ τοῦτο κύριόν ἐστι τῆς δοκιμασίας. On the temporal scanning of the amendments of the rules at issue, cf. Wilamowitz-Moellendorff (1893: 2.189); Hignett (1952: 205); Rhodes (1972: 176-178, 205, 316, 538); Rhodes (1981: 616-617); Lepri Sorge (1987: 432-433).

[12] Dem. 20.90: τοὺς μὲν θεσμοθέτας τοὺς ἐπὶ τοὺς νόμους κληρουμένους δὶς δοκιμασθέντας ἄρχειν, ἔν τε τῇ βουλῇ καὶ παρ' ὑμῖν ἐν τῷ δικαστηρίῳ.

one can infer by considering the presence of the dative τούτοις and the persistent link existing between ἔφεσις and the verb ἀποδοκιμάζειν only); 2. the scrutiny before the people was a completely new one (which means that the popular court neither quashes, nor amends, nor approves a decision of 'first instance'); 3. the candidate must be evaluated *ex novo*, this implying that a new procedure – rather than the second instance of the same procedure – is commenced before the popular court; 4. the rejected ἄρχων does not play the role of appellant before the people; again, he is a 'candidate under scrutiny' before the people.

7) *Extraordinary and ordinary* ἀποψηφίσεις.

In 346/5 B.C., in order to remedy suspected infractions, the Athenians passed the proposal of Demophilus. It stipulated a general 'scrutiny of the adult citizens', referred to as a διαψήφισις τῶν ἐγγεγραμμένων τοῖς ληξιαρχικοῖς γραμματείοις.[13] If the demesmen voted under oath against a scrutinized citizen, the latter, once 'rejected by vote' (ἀποψηφισθείς), was entitled to submit ἔφεσις in the view of a popular judgment. If the popular court rejected the ἀποψηφισθείς, he had *de facto* to leave the city: if he lost, he was sold into slavery. If, on the other hand, the vote did not go against him, he remained a citizen (πολίτης) recorded on the deme's register. Our information about this special procedure mainly comes from Demosthenes' speech *Against Eubulides*. In this case, Euxitheus contends that he was unjustly deprived of his citizenship as a result of the maneuverings of one of his enemies, Eubulides (who happened to be either the demarch or the mere representative of the deme of Halimous). This source provides a considerable amount of data dealing with the legal effects of ἔφεσις.

At first, the final removal from the deme's register (ἐξαλείφεσθαι) is the result of the deme's ἀποψήφισις and, at the same time, the consent of the ἀποψηφισθείς.[14] In other words the vote of the deme (which substantially consists of an 'administrative act', whereas it formally resembles a 'judicial pronouncement') is not legally valid if the citizen does not ἐμμένειν (i.e. 'to abide by, to stand by, to be true to', or – that is to say – 'to agree, to accept').[15] Accordingly, the relationship between the mere citizen and the 'administrative body', resembling the relationship between two 'parithetic parties' based on their agreement, turns out to be completely different from our

[13] On the διαψηφίσεις, cf. Whitehead (1986: 99-109); Feyel 2009 (143-148).

[14] Liban. *hypoth.* Dem. 57: Γράφεται νόμος παρ' Ἀθηναίοις γενέσθαι ζήτησιν πάντων τῶν ἐγγεγραμμένων τοῖς ληξιαρχικοῖς γραμματείοις εἴτε γνήσιοι πολῖταί εἰσιν εἴτε μή, τοὺς δὲ μὴ γεγονότας ἐξ ἀστοῦ καὶ ἐξ ἀστῆς ἐξαλείφεσθαι, διαψηφίζεσθαι δὲ περὶ πάντων τοὺς δημότας, καὶ τοὺς μὲν ἀποψηφισθέντας καὶ ἐμμείναντας τῇ ψήφῳ τῶν δημοτῶν ἐξαληλίφθαι καὶ εἶναι μετοίκους, τοῖς δὲ βουλομένοις ἔφεσιν εἰς δικαστὰς δεδόσθαι, κἂν μὲν ἁλῶσι καὶ παρὰ τῷ δικαστηρίῳ, πεπρᾶσθαι, ἐὰν δὲ ἀποφύγωσιν, εἶναι πολίτας; cf., moreover, Dem. 57.12: … καὶ ὅ τι γνοίησαν περὶ ἐμοῦ, τούτοις ἤθελον ἐμμένειν. The source is reliable: cf. Rhodes (1981: 502) and Harris (2013: 76 and nt. 52), *pace* MacDowell (2009: 288).

[15] Cf. LSJ s.v. ἐμμένω.

conceptions in which any 'authority' vested with administrative functions is hierarchically superior and entitled to exercise *iure imperii* a power conferred by public law.

Secondly, since the ἐφιείς plays the role of κατεγορούμενος before the popular court, he is definitely not a real appellant.[16] As a result, the ἔφεσις, as an act filed by the dissatisfied ἀποψηφισθείς, results in a 'denial of consent' rather than in a 'claim' or in 'means tending to commence a procedure of second instance'. In other words, if an ἔφεσις is submitted, the demesmen are the only party interested in a new scrutiny, as well as in a popular vote on the same matter. They would therefore start a new procedure only if they remain convinced that the ἀποψηφισθείς must be removed from the register, without being compelled to file the case before the popular court. Since a super-individual interest is concerned, it is up to the administrative body to continue the procedure. Otherwise, given that the ἀποψηφισθείς does not ἐμμένειν, no change occurs. The final removal of the registered citizen cannot take place.

Mutatis mutandis, *Ath. Pol.* 42.1 confirms the previous legal framework.[17] This passage describes the ordinary 'scrutiny for citizenship' (or, better to say, the ordinary 'δοκιμασία to become ephebes').[18] The demesmen, acting like judges, voted on the candidates, assessing whether they were the right age and whether they were free and born according to the laws. If a candidate passed, he was immediately recorded. If he did not pass, he could submit ἔφεσις. Once the ἔφεσις is submitted, the demesmen must start the proceedings before the people. This case, in fact, involves a particular interest which it is impossible to satisfy without the 'public cooperation'. *Ath. Pol.* 42.1 (along with Dem. 57) provides the following information. If ἔφεσις is submitted by a rejected candidate, the decision of the deme (here consisting of a 'denial of registration', and not of a 'removal from the register') is not completed since an essential requirement is missing, i.e. the scrutinized young adult's consent. If ἔφεσις

[16] Dem. 57.1: πολλὰ καὶ ψευδῆ κατηγορηκότος ἡμῶν Εὐβουλίδου, καὶ βλασφημίας οὔτε προσηκούσας οὔτε δικαίας πεποιημένου, πειράσομαι τἀληθῆ καὶ τὰ δίκαια λέγων, ὦ ἄνδρες δικασταί, δεῖξαι καὶ μετὸν τῆς πόλεως ἡμῖν καὶ πεπονθότ' ἐμαυτὸν οὐχὶ προσήκονθ' ὑπὸ τούτου; Dem. 57.1: ἐπειδὴ τοίνυν οὗτος εἰδὼς τοὺς νόμους καὶ μᾶλλον ἢ προσῆκεν, ἀδίκως καὶ πλεονεκτικῶς τὴν κατηγορίαν πεποίηται, ἀναγκαῖον ἐμοὶ περὶ ὧν ἐν τοῖς δημόταις ὑβρίσθην πρῶτον εἰπεῖν; Dem. 57.17: νῦν δὲ τί δίκαιον νομίζω καὶ τί παρεσκεύασμαι ποιεῖν, ἄνδρες δικασταί; δεῖξαι πρὸς ὑμᾶς ἐμαυτὸν Ἀθηναῖον ὄντα καὶ τὰ πρὸς πατρὸς καὶ τὰ πρὸς μητρός, καὶ μάρτυρας τούτων, οὓς ὑμεῖς ἀληθεῖς φήσετ' εἶναι, παρασχέσθαι, τὰς δὲ λοιδορίας καὶ τὰς αἰτίας ἀνελεῖν; Liban. *hypoth.* Dem. 57: … ἐὰν δὲ ἀποφύγωσιν.

[17] *Ath. Pol.* 42.1: μετέχουσιν μὲν τῆς πολιτείας οἱ ἐξ ἀμφοτέρων γεγονότες ἀστῶν, ἐγγράφονται δ' εἰς τοὺς δημότας ὀκτωκαίδεκα ἔτη γεγονότες. ὅταν δ' ἐγγράφωνται, διαψηφίζονται περὶ αὐτῶν ὀμόσαντες οἱ δημόται, πρῶτον μὲν εἰ δοκοῦσι γεγονέναι τὴν ἡλικίαν τὴν ἐκ τοῦ νόμου, κἂν μὴ δόξωσι, ἀπέρχονται πάλιν εἰς παῖδας, δεύτερον δ' εἰ ἐλεύθερός ἐστι καὶ γέγονε κατὰ τοὺς νόμους. ἔπειτ' ἂν μὲν ἀποψηφίσωνται μὴ εἶναι ἐλεύθερον, ὁ μὲν ἐφίησιν εἰς τὸ δικαστήριον, οἱ δὲ δημόται κατηγόρους αἱροῦνται πέντε ἄνδρας ἐξ αὐτῶν, κἂν μὲν μὴ δόξῃ δικαίως ἐγγράφεσθαι, πωλεῖ τοῦτον ἡ πόλις: ἐὰν δὲ νικήσῃ, τοῖς δημόταις ἐπάναγκες ἐγγράφειν.

[18] Cf. Pélékidis (1962: 86-89); Scafuro (1994); Lape (2000: 191-198); Robertson (2000).

is submitted (if the young adult, interested in the record of his own name in the deme register, does not ἐμμένειν – abide by – the 'denial of registration'), the demesmen, in order to overcome the resulting stalemate, are to proceed by selecting the accusers, and by starting a new scrutiny-procedure before the people. Since the ἐφιείς plays the role of κατεγορούμενος (accused/defendant) before the popular court, he does not file any appeal neither in form, nor in substance.

On the contrary, Is. 12 shows a different and exceptional example of application of ἔφεσις[19]. In my opinion these are the facts.

Euphiletus, once removed from his deme's register, started a legal action for damages before the public arbitrators. The particular legal proceedings may make sense if one assumes that the demotic scrutiny takes place before the proposal of Demophilus is passed. Accordingly, as far as this time-phase is concerned, the citizen's consent is not an essential requirement for the removal from the registry and ἔφεσις cannot be submitted. The citizen suffering damages for an unjust removal is allowed to bring a δίκη βλάβης against the demesmen: this is the only procedural remedy provided by the Athenian legislator. After two years, Euphiletus wins the case.[20] It is only then that he submits an ἔφεσις to the people (conceivably by supporting an extensive use of the remedy, after the Athenians passed the proposal of Demophilus) and, therefore, sues the demesmen before the people[21].

In other words, in this case, the ἐφιείς formally plays the role of διώκων before the popular court. He indeed attacks an already existing, enforceable and binding 'administrative act of removal'. On the contrary, in Dem. 57 as well as is *Ath. Pol.* 42.1, in order to surpass the stalemate, the demesmen are to start a new legal procedure before the popular court, and only if they obtain a favorable popular judgment, the negative effects produced by the ἔφεσις are overridden. Yet, the dispute shows, from a substantive point of view, a dialectical structure in which the demesmen act as

[19] Cf., for a short introduction to the speech (and for its Italian translation), Cobetto Ghiggia (2012: 468-479); for different interpretations of the case, see Wyse (1904); Bonner (1907: 416-418), Ralph (1936=1941: 42); Paoli (1950); Just (1968); Hansen (1976: 64, nt. 26); Rhodes (1981: 500); Carey (1997: 213-216); Kapparis (2005).

[20] Is. 12.11: ἔλαχεν ὁ Εὐφίλητος τὴν δίκην τὴν προτέραν τῷ κοινῷ τῶν δημοτῶν καὶ τῷ τότε δημαρχοῦντι, ὃς νῦν τετελεύτηκε, δύο ἔτη τοῦ διαιτητοῦ τὴν δίαιταν ἔχοντος; Is. 12.11: τοῖς δὲ διαιτῶσι μέγιστα <ταῦτα> σημεῖα ἦν τοῦ ψεύδεσθαι τούτους, καὶ κατεδιήτησαν αὐτῶν ἀμφότεροι; Is. 12.12: ὡς μὲν τοίνυν καὶ τότε ὤφλον τὴν δίαιταν, ἀκηκόατε.

[21] Dion. Hal. *Is.* 14.19-20: ἡ ὑπὲρ Εὐφιλήτου πρὸς τὸν Ἐρχιέων δῆμον ἔφεσις; Dion. Hal. *Is.* 16.25-37: ποιήσω καὶ τοῦτο, προχειρισάμενος τὸν ὑπὲρ Εὐφιλήτου λόγον, ἐν ᾧ τὸν Ἐρχιέων δῆμον εἰς τὸ δικαστήριον προσκαλεῖταί τις τῶν ἀποψηφισθέντων ὡς ἀδίκως τῆς πολιτείας ἀπελαυνόμενος. ἐγράφη γὰρ δή τις ὑπὸ τῶν Ἀθηναίων νόμος ἐξέτασιν γενέσθαι τῶν πολιτῶν κατὰ δήμους, τὸν δὲ ἀποψηφισθέντα ὑπὸ τῶν δημοτῶν τῆς πολιτείας μετέχειν, τοῖς δὲ ἀδίκως ἀποψηφισθεῖσιν ἔφεσιν εἰς τὸ δικαστήριον εἶναι, προσκαλεσαμένοις τοὺς δημότας, καὶ ἐὰν τὸ δεύτερον ἐξελεγχθῶσι, πεπρᾶσθαι αὐτοὺς καὶ τὰ χρήματα εἶναι δημόσια. κατὰ τοῦτον τὸν νόμον ὁ Εὐφίλητος προσκαλεσάμενος τοὺς Ἐρχιέας ὡς ἀδίκως καταψηφισαμένους αὐτοῦ τὸν ἀγῶνα τόνδε διατίθεται.

κατήγοροι, whereas the ἐφιείς-προσκαλεσάμενος acts as a κατεγορούμενος.[22] This use of the ἔφεσις, once compared with the other cases, is revealed to be a fundamental precondition for the legal procedure before the people, rather than a kind of 'statement of claim' initiating the legal procedure before the people.

8) *The arbitral* γνῶσις.

As it is well recognized by the current *communis opinio*, during the fourth century the majority of δίκαι (in accordance with the principle of 'residuality') fell under the jurisdiction of the Forty. For private legal actions involving more than ten drachmai, these magistrates – obviously after a first summary decision at least concerned with the value of the matter at issue – referred the case to a board of public arbitrators. A stage of the procedure which partially resembled the ἀνάκρισις took place before them (even though evidence was not just presented, but also examined; the arbitrators made an attempt at conciliation; the δίκη was susceptible to end if the arbitrators, with the agreement of the disputants, passed a final decision).[23] Since the claimant and the defendant had to express their agreement about the substance of the γνῶσις suggested by the public arbitrators, such a decision cannot be easily defined as a 'binding award', or as a proper 'judgment'. It rather looks like a proposal submitted to the disputants.[24] If that is true, with regard to the legal procedure before public arbitrators, ἔφεσις is neither an appeal, nor a mandatory transfer. Aristotle, along with Demosthenes, presents it as 'the denial of consent' expressed by either party (if not by both parties), which is a 'negative requirement' of the binding force of the decision of the arbitrator.[25]

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[22] Is. 12.8: εἶτα, ὦ ἄνδρες δικασταί, εἰ μὲν οὗτοι ἐκινδύνευον, ἠξίουν ἂν τοῖς αὑτῶν οἰκείοις ὑμᾶς πιστεύειν μαρτυροῦσι μᾶλλον ἢ τοῖς κατηγόροις.

[23] Harrison (1971: 66-68, 73-74); MacDowell (1971); Biscardi (1982: 264); Todd (1993: 128-129); Scafuro (1997: 35-37, 383-391). On the features of ἀνάκρισις, see Harris (2013: 210-213).

[24] Steinwenter (1925=1971: 71); Wolff (1946: 79); Thür (2008: 56).

[25] Cf. *Ath. Pol.* 53.2: οἱ δὲ παραλαβόντες, ἐὰν μὴ δύνωνται διαλῦσαι, γιγνώσκουσι, κἂν μὲν ἀμφοτέροις ἀρέσκῃ τὰ γνωσθέντα καὶ ἐμμένωσιν, ἔχει τέλος ἡ δίκη. ἂν δ' ὁ ἕτερος ἐφῇ τῶν ἀντιδίκων εἰς τὸ δικαστήριον, ἐμβαλόντες τὰς μαρτυρίας καὶ τὰς προκλήσεις καὶ τοὺς νόμους εἰς ἐχίνους, χωρὶς μὲν τὰς τοῦ διώκοντος, χωρὶς δὲ τὰς τοῦ φεύγοντος, καὶ τούτους κατασημηνάμενοι, καὶ τὴν γνῶσιν τοῦ διαιτητοῦ γεγραμμένην ἐν γραμματείῳ προσαρτήσαντες, παραδιδόασι τοῖς δ# τοῖς τὴν φυλὴν τοῦ φεύγοντος δικάζουσιν; Dem. 23.59: οἱ δικασταὶ δ' ἀκούσαντες, εἰς οὓς ἐφῆκεν, ταὐτὰ καὶ τοῖς τούτου φίλοις καὶ τῷ διαιτητῇ περὶ αὐτῶν ἔγνωσαν καὶ δέκα ταλάντων ἐτίμησαν; Dem. 40.17: καὶ οὗτος συνειδὼς αὑτῷ ἀδίκως ἐγκαλοῦντι οὔτε ἐφῆκεν εἰς τὸ δικαστήριον, οὔτε νῦν περὶ ἐκείνων εἴληχέ μοι δίκην οὐδεμίαν; Dem. 40.31: ἔτι δὲ πάντες ὑμῖν οἱ πρὸς τῷ διαιτητῇ παρόντες μεμαρτυρήκασιν ὡς οὗτος παρὼν αὐτός, ὅτε ἀπεδιήτησέ μου ὁ διαιτητής, οὔτε ἐφῆκεν εἰς τὸ δικαστήριον ἐνέμεινέ τε τῇ διαίτῃ. καίτοι ἄτοπον δοκεῖ μοι εἶναι, εἰ οἱ μὲν ἄλλοι, ὅταν οἴωνται ἀδικεῖσθαι, καὶ τὰς πάνυ μικρὰς δίκας εἰς ὑμᾶς ἐφιᾶσιν, οὗτος δέ μοι περὶ προικὸς δίκην ταλάντου λαχών, ταύτης, ὡς αὐτός φησιν, ἀδίκως ἀποδιαιτηθείσης ἐνέμεινεν; Dem. 40.55: τούτοις δ', εἰ φασὶν ἀδίκως ἀποδιαιτῆσαί μου τὸν διαιτητὴν τὰς δίκας, καὶ τότ' ἐξῆν εἰς ὑμᾶς ἐφεῖναι καὶ νῦν ἐγγενήσεται πάλιν, ἐὰν βούλωνται, παρ' ἐμοῦ λαβεῖν ἐν ὑμῖν τὸ δίκαιον.

Obviously, if the claimant was dissatisfied by the proposal of the arbitrator, after submitting the ἔφεσις he had an actual interest in obtaining a binding and final judgment 'on the same matter'[26] passed by the popular court. On the other hand, if the dissatisfied defendant submitted the ἔφεσις and, accordingly, nullified *de facto* the decision of the arbitrators, he clearly had no interest in having the case heard again before a popular court. In other words, after the submission of the ἔφεσις, the claimant was the only litigant interested in starting a new procedure before the people and, thence, in a new popular judgment (whether he was the ἐφιείς or not). For such reasons, the case disputed before the arbiter – perhaps due to practice – was referred to the popular court by means of the competent magistrates.[27] This can be inferred from a literal interpretation of *Ath.Pol.*: the passage under consideration suggests taking the indicative present tense 'παραδιδόασι' (the subject of which in my opinion is 'the parties' and not the arbiters or the magistrates) on deontic value.

Despite this, ἔφεσις is completely different from a magisterial εἰσαγωγή and from a true appeal. It stands for 'absence of ἐμμένειν' ('the absence of consent') and, as a negative requirement, it prevents a final and binding award. It provokes the referral, but it cannot be identified with the latter itself (so that, in such cases, the devolutive effect is just an indirect and passing one). It is not a magisterial act (but, clearly, an act of a disputant). It is not a mandatory act (since its submission takes place only according with one party's will).

9. *Some conclusions on the legal nature of the Solonian reform.*

If one is allowed to extend to the original ἔφεσις the traits characterizing the more recent applications of this procedural institution, the following legal figure, though conjecturally, emerges. The Solonian ἔφεσις:

- is an 'act of any dissatisfied citizen' affected by a formal 'authoritative decision' pronounced by a magistrate (as well as by a public body or by an arbitrator, in later times); [28]

[26] Lex. Seg. s.v. ἔφεσις: εἴσοδος ἡ εἰς ἄλλο δικαστήριον ἐφιεμένη ὑπὲρ τοῦ κριθῆναι αὖθις τὸ αὐτὸ πρᾶγμα.

[27] This practice may be considered the ground for several lexicographic definitions: they seem to confuse the effect with the cause (probably influenced by the Hellenistic ἔκκλητος δίκη, a legal procedure which ended up overlapping with ἔφεσις: cf. Cataldi [1979]): Harp. s.v. ἔφεσις: ἡ ἐξ ἑτέρου δικαστηρίου εἰς ἕτερον μεταγωγή· τὸ δὲ αὐτὸ καὶ ἔκκλητος καλεῖται; Diogen. s.v. ἔφεσις: ἡ ἀπὸ τοῦ δικαστηρίου εἰς ἕτερον δικαστήριον μετάβασις; Etym. Mag. s.v. ἔφεσις: Ἡ ἐκ δικαστηρίου οἱουδήποτε ἐφ' ἕτερον δικαστήριον μεταγωγή· ἡ εἰς ἄλλο δικαστήριον ἐφιεμένη δίκη ὑπὲρ τοῦ κριθῆναι πάλιν (cf., moreover, Lex. Simeonis); Lex. Seg. s.v. ἔφεσις: εἴσοδος ἡ εἰς ἄλλο δικαστήριον ἐφιεμένη ὑπὲρ τοῦ κριθῆναι αὖθις τὸ αὐτὸ πρᾶγμα; Lex Byz. Jur.: Ἔφεσις λέγεται ἡ ἔκκλητος; Suda s.v. ἔφεσις: ἡ ἐξ ἑτέρου δικαστηρίου εἰς ἕτερον μεταγωγή. τὸ δὲ αὐτὸ καὶ ἔκκλητος καλεῖται. τὸ οὖν ἔφεσις ἀπὸ τοῦ ἐφεῖναι ῥήματος.

[28] Cf. *Ath. Pol.* 53.2; Dem. 40.17; Dem. 40.31; Dem. 40.55. See, moreover, *Ath. Pol.* 45.1-2: ὁ δὲ δῆμος ἀφείλετο τῆς βουλῆς τὸ θανατοῦν καὶ δεῖν καὶ χρήμασι ζημιοῦν, καὶ νόμον

- is a 'negative requirement', that prevents the binding force and the enforceability of the 'authoritative decision' (which is not necessarily a 'judicial ruling' only, but can also be an 'administrative and coercive measure');

- is a 'pre-condition of the popular procedure'; by blocking the previous decision, it does not introduce, from a strict procedural point of view, a '*revisio prioris instantiae*' or a '*prosecutio prioris instantiae*';

ἔθετο, ἄν τινος ἀδικεῖν ἡ βουλὴ καταγνῷ ἢ ζημιώσῃ, τὰς καταγνώσεις καὶ τὰς ἐπιζημιώσεις εἰσάγειν τοὺς θεσμοθέτας εἰς τὸ δικαστήριον, καὶ ὅ τι ἂν οἱ δικασταὶ ψηφίσωνται, τοῦτο κύριον εἶναι. κρίνει δὲ τὰς ἀρχὰς ἡ βουλὴ τὰς πλείστας, καὶ μάλισθ' ὅσαι χρήματα διαχειρίζουσιν: οὐ κυρία δ' ἡ κρίσις, ἀλλ' ἐφέσιμος εἰς τὸ δικαστήριον. ἔξεστι δὲ καὶ τοῖς ἰδιώταις εἰσαγγέλλειν ἣν ἂν βούλωνται τῶν ἀρχῶν μὴ χρῆσθαι τοῖς νόμοις: ἔφεσις δὲ καὶ τούτοις ἐστὶν εἰς τὸ δικαστήριον, ἐὰν αὐτῶν ἡ βουλὴ καταγνῷ (according to Lipsius [1905-1915: 198], if the Council voted against the denounced magistrate and condemned him to a fine within the τέλος of five-hundred drachmai, he was allowed to 'appeal' to the people; *contra*, cf. Bonner - Smith [1930-1938: 2.240-243], who believe that the verb εἰσάγειν and the noun ἔφεσις overlap and imply only a mandatory transfer when a fine exceeding five-hundred drachmai is at stake). On the contrary, Dem. 34.21, quoted by Ruschenbusch (1961: 389), is not relevant, if one reads ἀφῆκεν (cf., in this sense, Wade-Gery [1958: 193, nt. 4]). For ἔφεσις as a voluntary act of the dissatisfied party, even the following inscriptions are relevant. Cf. *IG* II^2 1128, 20 (regulations passed by Karthaia, Koresos and Ioulis on Kea in response to Athenian decrees concerning the export of ruddle), where the procedural remedy at issue is submitted by the dissatisfied accuser after a simple vote by the officials (and not as 'cause of replacement-procedure for the initial decision'): τὴν δὲ ἔνδειξιν εἶν]- // αι πρὸς τοὺς ἀστυνόμους, τοὺς δὲ ἀστυνόμους δοῦνα[ι τὴν ψῆφον περὶ αὐτῆς τριάκοντα ἡ]- // μερῶν εἰς τὸ δικαστήριον· τῶι δὲ φήναντι ἢ ἐνδείξαντ[ι (...) // (...) τῶν ἡμι]- // σ[έ]ων· ἐὰν δὲ δοῦλος ᾖι ὁ ἐνδείξας, ἐὰμ μὲν τῶν ἐξαγόν[των ᾖι, ἐλεύθερος // ἔστω καὶ τὰ τρ]- // [ί]α μέρη ἔστω αὐτῶι· ἐὰν δὲ ἄλλου τινὸς ᾖι, ἐλεύθερος ἔστ[ω καὶ (...) // (...) εἶν]- // αι [δὲ] καὶ ἔφεσιν Ἀθήναζε καὶ τῶι φήναντι καὶ τῶι ἐνδεί[ξαντι (cf., moreover, *IG* II^2 111,49; *IG* II^2 404, 17; *IG* II^2 179, 14); *IG* II^2 1183, 20-21 (regulation of the Deme of Hagnous concerning the duties of the demarch), where it is stipulated that, if the ten elected men condemn the demarch who is undergoing the *euthynai*-procedure, the latter is allowed to submit the decision to a vote by all the demesmen: τὴν δὲ ψῆφον διδότω [ὁ ν]-[έ]ος δήμαρχος καὶ ἐξορκού[τ]ω αὐτοὺς ἐναντίον τῶν δημο[τῶ]- // [ν]· εἶναι δὲ καὶ ἔφεσιν αὐτῶι [ε]ἰς ἅπαντας τοὺς δημότας· ἐ[ὰν] // [δ]έ τις ἐφῆι, ἐξορκούτω ὁ δήμα[ρ]χος τοὺ<ς> δημότας καὶ διδό[τω] // [τ]ὴν ψῆφον ἐὰν παρῶσιν μὴ ἐλάττους ἢ ΔΔΔ ἐὰν δὲ καταψη[φίζ]- // ωνται αὐτοῦ οἱ δημόται, ὀφειλέτω τὸ ἡμιόλιον ὅσου ἂν [τιμ]- // ηθεῖ αὐτῶι ὑπὸ τῶν δέκα τῶν αἱρ[ε]θέντων; *IG* II^2 1237, 29-40 (Athenian phratry decrees of Dekelea), where a provision allows anyone who is rejected by the phratry to submit ἔφεσις and, accordingly, to undergo a re-trial before the Demotionidai: ἐ- // ὰν δέ τις βόληται ἐφεῖναι ἐς Δημοτιων- // ίδας ὧν ἂν ἀποψηφίσωνται, ἐξεῖναι αὐ- // τῶι· ἐλέσθαι δὲ ἐπ' αὐτοῖς συνηγόρος τ- // ὸν Δεκελειῶν οἶκον πέντε ἄνδρας ὑπὲ- // ρ τριάκοντα ἔτη γεγονότας, τούτος δὲ // ἐξορκωσάτω ὁ φρατρίαρχος καὶ ὁ ἱερε- // ὺς συνηγορήσεν τὰ δικαιότατα καὶ ὀκ // ἐάσεν ὀδένα μὴ ὄντα φράτερα φρατρίζ- // εν. ὅτο δ' ἂν τῶν ἐφέντων ἀποψηφίσωντα- // ι Δημοτιωνίδαι, ὀφειλέτω χιλίας δρα- // χμὰς ἱερὰς τῶι Διὶ τῶι Φρατρίωι. Against my view, *IG* I^3 40 [= ML 52], 70 (amendment to the Athenian decree laying down rules for the people of Khalkis in Euboia; cf. Maffi [1984]; Dreher [2006]) is not decisive, since the legal terminology used in the inscription is quite imprecise. I would like to thank Edward Harris for pointing out these passages to me.

- brings about a new legal procedure before the people, without being neither a proper 'statement of claim' at first instance, nor a formal 'appeal' from a lower judge to a higher one;

- produces negative effects on the (proposed) 'authoritative decision'. This also means that the legal procedure before the popular court is a new one on the same matter and between the same parties playing the same role (παλινδικία), as well as that the popular ruling (by declaring the ἔφεσις founded or unfounded) neither quashes, nor amends, nor confirms the decision challenged by the ἐφιείς, but constitutes a final judgment given for the first time;

- is a 'denial of consent' which means that, from Solon on, the 'agreement' is conceived of as an essential element for any 'official act' both substantially determined by a public authority (different from the people) and directly affecting one member of the people[29].

[29] If this is true (i.e. if after Solon passed his procedural reform on ἔφεσις the 'agreement of the parties' was an 'essential element' for a final decision), on the basis of a well known passage from the *corpus Demosthenicum*, i.e. Dem. 43.75, one could suggest some further 'speculative considerations' (rather than 'historically grounded considerations', as Edward Harris *per epistulam* has pointed out to me, given that the document at issue is probably a forgery): ὁ ἄρχων ἐπιμελείσθω τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων καὶ τῶν οἴκων τῶν ἐξερημουμένων καὶ τῶν γυναικῶν, ὅσαι μένουσιν ἐν τοῖς οἴκοις τῶν ἀνδρῶν τῶν τεθνηκότων φάσκουσαι κυεῖν. τούτων ἐπιμελείσθω καὶ μὴ ἐάτω ὑβρίζειν μηδένα περὶ τούτους. ἐὰν δέ τις ὑβρίζῃ ἢ ποιῇ τι παράνομον, κύριος ἔστω ἐπιβάλλειν κατὰ τὸ τέλος. ἐὰν δὲ μείζονος ζημίας δοκῇ ἄξιος εἶναι, προσκαλεσάμενος πρόπεμπτα καὶ τίμημα ἐπιγραψάμενος, ὅ τι ἂν δοκῇ αὐτῷ, εἰσαγέτω εἰς τὴν ἡλιαίαν. ἐὰν δ' ἁλῷ, τιμάτω ἡ ἡλιαία περὶ τοῦ ἁλόντος, ὅ τι χρὴ αὐτὸν παθεῖν ἢ ἀποτεῖσαι (see, moreover, *Ath. Pol.* 56.7: ἐπιμελεῖται δὲ καὶ τῶν ὀρφανῶν καὶ τῶν ἐπικλήρων, καὶ τῶν γυναικῶν ὅσαι ἂν τελευτήσαντος τοῦ ἀνδρὸς σκήπτωνται κύειν. καὶ κύριός ἐστι τοῖς ἀδικοῦσιν ἐπιβάλλειν ἢ εἰσάγειν εἰς τὸ δικαστήριον). The νόμος stipulates that the ἄρχων – who had to take care of children without fathers, ἐπίκληρος, οἶκοι left destitute of heirs, and all pregnant women who remained in the οἶκοι of their deceased husbands – was entitled to prohibit 'anyone' (rather than only relatives or guardians) from committing ὕβρις to the protected individuals, as well as to punish the offender by giving a final decision, provided that the τέλος imposed by law was respected (i.e. the fine was imposed both *ratione materiae*, i.e. according to the ἄρχων's competence, and within a given value-limit). It is noteworthy to highlight that such rules do not make any allusion to 'ἔφεσις to the popular court'. They just deal with a 'magisterial referral' in terms of εἰσάγειν. They describe an archaic procedure and show an example of prosecutorial discretion of the ἄρχων; no mention to ὁ βουλόμενος occurs. The name ἡλιαία does not prove the post-Solonian origin of the rules. On these grounds, if one supposes that the νόμος reproduced in the document is (substantially) a Solonian one, but even repeating earlier provisions, the following diachronic shift appears (provided that the referral was always compulsory if the magistrate proposed penalties that were higher than a certain amount). Before Solon's reforms (cf. *Ath. Pol.* 4.4), the person aggrieved was entitled to take a new legal action before the Areopagus, denouncing the violation perpetrated by the ἄρχων (if he infringes his own competence *ratione materiae* or goes beyond the given value-limit: cf., *amplius*, Pelloso [2014-2015]). Once Solon introduced ἔφεσις, even if the fine was within the legal

By the time of Solon, one could hardly qualify the ἔφεσις εἰς τὸ δικαστήριον as an 'appeal to the people'; by the time of Solon, one could hardly qualify the ἔφεσις εἰς τὸ δικαστήριον as an 'obligatory reference'; by the time of Solon, one – albeit tautologically – could qualify the ἔφεσις just as ἔφεσις.

τέλος (i.e. if the magistrate 'proposed', rather than 'imposed', a fine both according to his competence and within a given value-limit), the decision could anyway be 'attacked' for any abuse of power or any lack of power (cf., for the conjectural 'Solonian kernel' of the Demosthenic passage, Scafuro [2006]).

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MARTIN DREHER (MAGDEBURG)

JENSEITS VON BERUFUNG UND ÜBERWEISUNG. ANTWORT AUF CARLO PELLOSO

Carlo Pelloso hat eine übersichtlich strukturierte und präzise formulierte Studie über das athenische Rechtsinstitut der Ephesis vorgelegt.[1] Er beschränkt sich darin nicht auf die solonische Einführung der Ephesis, sondern geht auch auf spätere Quellen ein, die er wiederum zum Verständnis der solonischen Ephesis heranzieht. Damit teilt er zumindest mit der jüngeren Forschung (gegen etwa Wilamowitz und Pridik)[2] die Ansicht, daß die überlieferten Fälle von Ephesis einem einheitlichen, oder zumindest weitgehend einheitlichen Grundtypus entsprechen.

Pelloso unterscheidet drei grundlegende Forschungspositionen, die er in den ersten Abschnitten vorstellt und beurteilt.

Er beginnt mit der Position, die Ephesis als Berufung versteht. Diese Position ist in der Forschung allerdings keineswegs so dominant, wie Pelloso (ital. Version) behauptet. Das gilt schon für die Gelehrten des 19. Jahrhunderts, denen Pelloso diese

[1] Um diese Antwort einigermaßen konsistent zu halten, sind manche Bezüge auf den ursprünglichen, auf Italienisch vorgelegten und erheblich längeren Vortrag Pellosos beibehalten. Sie sind mit „ital. Version" gekennzeichnet und sollen dem Leser die Spannweite des Themas vor Augen führen. Konkret verwiesen wird jedoch nur auf die nunmehr gedruckte englische Kurzfassung.

[2] Die Einheitlichkeit des Begriffs ist vor allem von Just 1965, 30ff., gegen Wilamowitz' „modifizierte Überweisungstheorie" postuliert worden. Pelloso spricht sich (ital. Version) zwar (abstrakt) gegen eine strikte Einheitlichkeit aus, aber seine konkreten Interpretationen der Quellen laufen doch auf eine einheitliche Auffassung der Ephesis hinaus.

Position zuschreibt (Anm. 3), während etwa Just (1965, 24f.) gezeigt hat, daß sie eigentlich nur von Hudtwalcker vetreten, von allen weiteren Autoren aber zugunsten der Überweisungstheorie abgelehnt wurde.

Aber besonders dann bei der Einstufung (ital. Version) von Lipsius als dem Kronzeugen der Berufungstheorie zeigt sich darüber hinaus die Problematik, daß der Begriff der Berufung oder Appellation nicht immer in seiner strikten juristischen Bedeutung mit den entsprechenden Konsequenzen verwendet wird, wie Pelloso es unterstellt. Denn Lipsius selbst sagt einschränkend: „Um Berufung, aber nicht von einer richterlichen Instanz, wohl aber von einem früheren Erkenntnis handelt es sich dann, wenn der, der von einem Beamten mit einer Ordnungsstrafe (ἐπιβολή) belegt war, Widerspruch gegen sie erhebt und auf richterliche Entscheidung anträgt, …“ (1905, 954). Das trägt Lipsius die Kritik des Juristen Just ein, er habe den Terminus ‚Berufung' besser vermeiden und stattdessen von ‚Beschwerde' oder ‚Rekurs' sprechen sollen.[3] Es ist nun damit zu rechnen, daß eine solch unscharfe Verwendung des Begriffs, die sich der Philologue Lipsius vorwerfen lassen muß, von weiteren, ebenso nichtjuristischen Autoren anzunehmen ist; ich nenne nur Kurt Raaflaub (S. 143) und Bob Wallace (S. 55), die in ihrem gemeinsamen Buch „Origins of Democracy“ beide die durch Solon geschaffene Möglichkeit ‚to appeal to the people' ansprechen. Ohne genauere Erläuterung jedoch, ob ein Autor mit ‚Berufung' oder ‚appeal' wirklich die Aufhebung eines erstinstanzlichen Urteils durch eine zweite gerichtliche Instanz meint, sollte dieser nicht einfach in die Schublade der Berufungstheoretiker gelegt werden.

Im dritten Abschnitt behandelt Pelloso die seiner Ansicht nach gegenteilige Position, nämlich die These, Ephesis bedeute „Überweisung von Amts wegen“, „mandatory referral“. Wie bei der ersten Position ist aber auch hier die Zuordnung weniger eindeutig, wie sich wiederum am vermeintlichen Kronzeugen (ital. Version), jetzt Wilamowitz-Möllendorf, zeigen läßt: Zwar stimmt es, daß Wilamowitz die solonische Ephesis aus Aristot. Ath. Pol. 9,1 als Überweisung des Amtsträgers an ein Dikasterion einordnet; in anderen Fällen wie der Dokimasie aber, die von Pelloso später besprochen werden, hat es sich nach Wilamowitz durchaus um eine Berufung gegen einen Magistratsentscheid gehandelt. Als Oberbegriff für beide Unterkategorien gilt Wilamowitz die Zulässigkeit des Rechtsweges zum Dikasterion.[4]

An der Terminologie von Wilamowitz, aber auch von Ruschenbusch und anderen, zeigt sich, daß auch der Begriff der Überweisung, ebenso wie oben der der Berufung,

[3] Just 1965, 34. Manche Autoren machen ihre Distanzierung zum strengen juristischen Gehalt der Berufung deutlich, indem sie den Begriff in Anführungszeichen setzen (so Thür 2005, 156: „appeal“) oder von „einer Art Berufungsverfahren“ sprechen (so Schubert 2012, 21; S. 20, wo die Ephesis mit der Popularklage gleichgesetzt wird, wird sie nur als „Berufung“ bezeichnet).

[4] Wilamowitz 1893 I, 60. 71; II, 188f.

in der Literatur nicht immer so zu verstehen sein muß, daß die Überweisung von Amts wegen, also auf Initiative und in Verantwortung des zuständigen Amtsträgers, erfolgte. Ohne nähere Erläuterung besteht durchaus die Verständnismöglichkeit, daß die Überweisung, die Übertragung oder der Transfer auch von einer der beiden Parteien ausgehen könnte.[5]

Im vierten Abschnitt stellt Pelloso die dritte grundlegende Forschungsrichtung vor. Er bezeichnet sie als These von der negativen Wirkung der Ephesis, womit gemeint ist, daß eine Partei die Entscheidung eines Amtsträgers oder eines Gremiums dadurch unwirksam machen konnte, daß sie im Anschluß daran das allein gültige Urteil eines Dikasterions einforderte. Diese von Steinwenter begründete Position wird von Just als „Einspruchstheorie" geführt, was mehr die aktive Handlungsweise der Parteien betont. Steinwenters Position hat gerade von juristischer Seite viel Zustimmung erfahren und ist insbesondere von Just weiter differenziert worden.

Dieser Forschungsrichtung folgt auch Pelloso. Seine Auffassung basiert auf einer erneuten Quellenuntersuchung, in der zunächst (Abschnitt 5) die beiden einschlägigen Stellen zur solonischen Ephesis, dann aber auch (Abschnitte 6-8) die allesamt dem 4. Jahrhundert v. Chr. entstammenden Belege über die Dokimasie der Buleuten und Archonten (Abschnitt 6), über die Überprüfung der Demenlisten (Abschnitt 7) und über die Vorschläge (γνώσεις) der Diaiteten (Abschnitt 8) analysiert werden.

Dazu sollen folgende Anmerkungen und Einwände in Stichworten vorgebracht werden:

ad 5): Die Aussagen unserer Quellen, also besonders der Atthidographen und daher auch der aristotelischen Athenaion politeia über das vorsolonische Athen halte ich für unzuverlässig. Sie sind aus den solonischen Gedichten abgeleitet.

ad 6): Im Unterschied zu Ath. Pol. 45, 3 werden die vorausgehenden Stellen 45, 1 und 2 von Pelloso nicht eigenständig analysiert. Gerade 45, 1, wo zwar der Begriff der Ephesis nicht fällt, aber sinngemäß eine Ephesis stattfindet, könnte jedoch für die Überweisung ex officio sprechen. Das Gesetz lautet: „Wenn der Rat jemanden wegen eines Unrechts verurteilt oder bestraft, sollen die Thesmotheten die Verurteilungen und die Strafen dem Gericht vorlegen (εἰσάγειν), und wofür die Richter stimmen, das soll rechtskräftig sein."

ad 8): Wenn der Entscheidungsvorschlag eines Diaiteten nicht angenommen wird, ist es meines Erachtens[6] nicht Aufgabe der Parteien, wie Pelloso meint, sondern des Diaiteten, die Dokumente in die Echinoi zu legen und diese den zuständigen Demenrichtern zu übergeben: Ath. Pol. 53, 2: παραδιδόασι hat die Diaiteten als Subjekt.

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[5] Vgl. etwa die Unbestimmtheit bei Gagarin 2006, 263: „ephesis was perhaps the transferal of a case from the authority of a magistrate to the court …".

[6] So z. B. auch Thür 2005, 135.

Trotz dieser Einwände im Detail stimme ich Pellosos Ergebnissen in den entscheidenden Punkten zu:

Erstens ist die Ephesis nirgends als Berufung im eingangs erläuterten Sinn zu verstehen. Zweitens sind es im allgemeinen die beteiligten Parteien, die das Interesse und die Möglichkeit haben, ein Dikasterion anzurufen. Allerdings scheint mir daneben auch eine Überweisung von Amts wegen wahrscheinlich. Drittens wird durch das Urteil des Dikasterions eine frühere Entscheidung nicht aufgehoben, sondern lediglich wirkungslos und hinfällig.

Diese Ergebnisse sieht Pelloso (Abschnitt 9) schließlich wieder mit der solonischen Ephesis im Einklang. Auch bei Solon war die Ephesis, so Pelloso, ein Akt eines privaten Bürgers gegen die Entscheidung eines Amtsträgers, die deren Wirkung blockierte und den Magistrat zwang, ein neues Verfahren vor dem Gericht über dieselbe Sache zu veranlassen. Die Ephesis hatte also ein neues privates Verfahren zur Folge, zwischen denselben Parteien und mit derselben Rollenverteilung.

Da Pelloso letztlich doch die gesamte Spannweite der athenischen Ephesis untersucht, sind meines Erachtens zwei Probleme zu kurz gekommen (auch in der ital. Version):

Zum einen fehlt eine Stellungnahme zu den lexikalischen Quellen. Da namentlich Pollux 8, 62 in den Augen einiger Forscher Quellenwert besitzt,[7] wüßte man gern, warum Pelloso diese Aussagen außer Acht läßt.

Zum anderen fehlt eine konsistente Meinung zur Verwendung des Begriffs und zum Verfahren der Ephesis in der athenischen Seebundspolitik. In der ital. Version zitiert Pelloso einerseits das sogenannte Röteldekret der keischen Polis Koresos aus dem 4. Jahrhundert als Beleg dafür, daß die Ephesis von den Parteien erhoben worden sei;[8] andererseits hält er die Terminologie des Chalkis-Dekrets von 446/5 v. Chr., in dem Ephesis an das athenische Dikasterion auch nach seiner Meinung „rinvio obbligatorio" bedeutet, für nicht genau vergleichbar mit derjenigen des innerathenischen Rechts.[9]

[7] Just 1965, 11ff. bestreitet allerdings sehr energisch die Zuverlässigkeit der Attizisten, Grammatiker und Lexikographen.

[8] Im Koresos-Dekret IG II^2 1128 (= Rhodes-Osborne Nr. 40), Z. 21 heißt es recht unbestimmt: ἔφεσιν Ἀθήναζε καὶ τῶι φήναντι καὶ τῶι ἐνδεί[ξαντι.

[9] IG I^3 40 (= Meiggs / Lewis Nr. 52). Zum ganzen Verfahren vgl. ausführlich Koch 1991, 141-155.

ZUSÄTZLICHE LITERATUR (NICHT IN PELLOSOS VERZEICHNIS)

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EVA CANTARELLA (MILAN)

GEROTROPHIA. A CONTROVERSIAL LAW

When I presented at "Symposion 2009" a paper entitled *Fathers and Sons in Athenian Law and Society,*[1] I was very puzzled by the fact that Solon had recourse to a law[2] in order to impose on the Athenians the duty to *trephein*[3] their father and mother, as well as their surviving forefathers/ancestors (within the sixth degree of kinship which defined the limits of *anchisteia*).[4] My puzzlement arose from observing how relatively mild paternal powers were in the Athenian system, if compared to other legal systems and in particular to the Roman one. As the Roman jurist Gaius writes in the second century CE "hardly any other peoples have the kind of power we hold over our children" (Gai 1.55),[5] and comparison between the condition of Athenian and Roman children shows how right Gaius was. In Rome the authority of fathers over their sons (unless the father decided to emancipate them) did not end when the children reached the age of majority but continued as long as the *paterfamilias*

[1] Cantarella (2010).

[2] For the law on *gerotrophia* see Demost., *C. Timocr.* 107; Diog. Laert., *Solon*, 1, 55; Aelian, *Nat. Hist*, IX,1. Cfr. Leão (2005*a*) and Leão & Rhodes (2015), particularly pp. 92-97.

[3] This verb refers to our law again in Arist, *Av.*, 1357; Isae., VIII, 32; Dem., XXIV, 107; Aisch., I, 13 e 28; Aelian, *Nat. Hist* IX.1.

[4] See Isae., VIII, 32, mentioning *goneis*. On the presence of female ascendants, inside a larger discussion of mothership, see also Damet (2015). On maternal rights see also the Latin rhetors (e.g. Sen., *Controv.*, VII, 4I), but on the difficulties about relating their typology to the Greek world see Rizzelli (2015), particularly p. 10 and n. 9.

[5] Interesting overview of different ancient systems in Pellizer, Zorzetti e Maffi (1983).

lived, whatever might be the age of his descendants. Furthermore, upon the death of a *paterfamilias* only his immediate descendants were released from *patria potestas*. All the others passed under the authority of the new *paterfamilias* (i.e. the surviving ascendant), who together with the personal powers over the descendants obtained the ownership of the family property. A *filiusfamilias*, no matter how old, could not own property until he himself became a *paterfamilias*. All he had was a certain amount of money, the *peculium*, given to him by his father, which he could administer freely and that was socially considered his own. But this fund legally belonged to the father, who could take it back whenever he wanted. Finally, a son couldn't even count on his father's inheritance, because the *patresfamilias* could disinherit their children and descendants without needing to state any reason.

As scholars such as Paul Veyne and Yan Thomas have demonstrated, the result of these rules was that the relationship between fathers and sons was so difficult, complicated and problematic that patricide was a frequent crime, which worried the political and legal authorities.[6] In the first century CE, under the emperor Vespasian (69-79 CE), the situation was such that, in the hope to avoid sons from killing long-lived fathers in order to finally inherit shares of the estate, a *senatusconsultum* (called *Macedonianum*) prevented a creditor who had lent a sum of money to a *filiusfamilias* from asking the restitution even after the death of his debtor's father.

But in Athens legal rules were very different: in the first place, the father's personal powers over his children were not perennial but ceased when the children reached the age of majority; secondly, they were sensibly softer than the Roman ones which included the *ius vitae ac necis,* nonexistent in Athens.[7] The strongest penalty that a father could inflict to his sons was *apokeryxis*, a controversial and scarcely documented institution, consisting in the possibility for a father to exclude his son from the *oikos*.[8]

According to Demosthenes it was introduced by a law that gave the fathers the power not only to name their sons at birth but also, if they wanted, to *apokeryxai*.[9] However he does not specify for what reason, and there are no further references in the ancient sources.

Aristotle, explaining why it would not seem suitable for a son to disown his father, whereas a father could disown his son, offers an interesting glimpse on the matter, comparing debtors and sons: a debtor must repay his creditors, but a son, whatever he may do, will never repay what he has received; therefore, as a creditor can remit a debt, a father can disown his son. But the conclusion of his reasoning

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[6] Sources and reference to the scholarly debate on the topic (especially between French and American scholarship) in Cantarella (2014).

[7] A more detailed elaboration on Athenian paternal powers and related bibliography in Cantarella (2010).

[8] I have treated in further detail *apokeryxis* in Cantarella (2016), which I was completing at the time I presented this paper, and was published a few months later. Cfr. Cantarella (2016) pp. 75-77 and 81-86.

[9] Dem., *c. Beot.*, 1, 39.

is that no father would disown his son unless the son "exceeded in perversity".[10] An opinion supported by other sources, namely some anecdotes which recount of fathers (or tutors) who considered and discussed the possibility to disown their son or pupil, but at the end avoided to resort to that penalty: the consequences would be too harsh for the culprit, whatever his bad behavior had been.[11]

From the scarce sources we can infer that the law on *apokeryxis* turned the ethic principle of the filial hierarchical subordination to fathers in a legal rule, even if its value was more ideological than real. According to the sources, not a single case when the law was applied is documented in the sources.

Besides, it is impossible to identify the extreme "perverse" cases in which, according to Aristotle, the sanction would have been applied. We can only imagine that the sons entailed such disgrace and shame for the family name that disowning the culprit would have been the only way to re-establish its honor (with the help of the the *keryx* whose intervention, as the name *apokeryxis* explicitly says, was necessary to the legal validity of the paternal decision).

To conclude, the theoretical existence of *apokeryxis* did not change the relatively mild character of the Athenian paternal power.

All in all nothing leads to imagine, in Athens, a generational conflict such as the one existing in Rome. The limits imposed to paternal powers and the tools given to sons to protect their inheritance expectations suggest that taking care of parents was an ethical duty sufficiently respected without having to be enforced by the threat of a criminal sanction.

But then why the necessity of a law on *gerotrophia*? Why did Solon decide to "resort by law" to impose the moral and social duty for children to take care of their elderly parents? This was the question I asked myself then, and since in later years I did not have the chance to return on the topic, this Symposion was the opportunity to think again over this issue and present some general consideration on *gerotrophia*, which I very briefly advance.

The father-son relations between Solon's age and the last decades of the fifth century seem to show that during this stretch of time *gerotrophia* took on a new function in addition to the ones it had when it was introduced. The new function was to contain the growth of a generational conflict linked to the progressive democratization of institutions, facilitated in the fifth century by the sophistic revolution, represented by the advent of a new *paideia* and of new teachers. The features of *gerotrophia* that suggested this idea are the following:

1) Some categories of persons were exempted from the duty of *gerotrophia*.
   a) According to Aeschines (*c. Tim.* 13) the children who had been forced by

[10] *Eth. Nic.*, VIII, 16.4 (1163b20-7).

[11] Very well known are the cases of Themistocles (Plut. *Them*., 2, 7-8; Val. Max. 6, 9 ex; Elian., *V.H.* 2,12) and Alcibiades (Plut., *Alc*., II) for his relationship with his tutor Pericles.

their father into prostitution (whose only duty was to provide burial);

b) According to Plutarch (*Sol*. 22,4, quoting Heraclides Ponticus) children born by *hetairai*;

c) Always according to Plutarch (*Sol*., 22,1), children to whom the father had not taught a *techne* (which consisted mainly in crafts,[12] but one cannot exclude agriculture).

2) The *graphe goneon kakoseos,* which could be exercised against those who violated this law, was not subjected to the penalties laid down for those who withdrew an accusation or did not reach 1/5 of the votes. As Aristotle writes in *Ath. Pol*. (56, 6), these trials were *azemioi to boulomeno diokein*, without fine for those who wanted to start them.

3) During the trials for *goneon kakosis* the time allowed to the speakers was not limited by the hourglass (Lys., 63, *de hered. Heges*.= fr. 127 Carey, and Harpocration, 167, s.v. *kakoseos*).

4) According to general opinion (based on Diog. Laert. 1,55) the penalty for *goneon kakosis* was *atimia*. Of *atimia* (in the species with conservation of property) also speaks And., *Myst*. 74. According to Lysias instead (*Agor.* 91), a *nomos kakoseos* inflicted the death penalty not only on the natural child who beat his parents but also on the child who denied them assistance, and on the adopted son who stole their property. But this passage is suppressed in most editions as spurious, and according to the general opinion the penalty was *atimia*. However, an important inscription coming from Delphi -that contains the only law on *gerotrophia* preserved epigraphically- brings further evidence concerning the issue of penalty that induces to open a parenthesis.

The (readable part of the) text of the Delphic inscription says:

1 [θε]ός. ἔδοξε τᾶι πόλι ἐν ἀγορᾶι [τ]-
[ελ]είωι σὺν ψάφοις τριακατίαι-
[ς π]εντήκοντα τρίεσσι, τὸν νόμ[ο]-
[ν ἀ]νγράψαι περὶ τῶν γονέων, βο[υ]-
5 [λευ]όντων Μελανώπο[υ, .]Φιλὺτα, Ἡ[ρ]-
[ακ]λείου, Φειδ̣ωρίδα, Ἀγήτορος· [ὅ]-
[στ]ις κα μὴ τρέφηι τὸν πατέρα κα
[ὶ τ]ὰν ματέρα, ἐπεὶ κα [π]οτανγέ[λ]-
[λη]ται πο[ὶ τ]ὰν βουλὰν, ἁ βουλὰ κατ-
10 [αδε]ίτω τὸν μὴ τρέφοντα καὶ ἀγ[έ]-
[το ἐ]ν τὰν δαμοσίαν οἰκίαν ἔντ[ε]
κα].[13]

[12] See Leão (2005*b*), 43-75 (particularly pp. 49-50 of the comment of the *Life of Solon* 24,4).

[13] IG transcribes the first seven lines, the following five are integrated from Lerat (1943). I accept the translation "until" proposed by Lerat of the three last letters of line 11 (*ent*)

(Zeus. The city decided in a plenary assembly, with 353 votes, to have the law on parents engraved. Members of the council were Melanopos, ..., Herkleios, Theudoridas, Hagetor. If someone does not provide for his father and mother, when he will be reported to the council, the council will have him who has not provided chained and led in a public jail until …)

Albeit it is impossible to determine the year in which the law on *gerotrophia* was proposed and approved in Delphi, as the text ordering to recopy it can be traced back to the period between the late 4th and early 3rd century BCE,[14] one can deduce that the requirement of *gerotrophein* had been established in previous times. How long before we cannot say. But we know that the person accused of having violated the law was chained and brought to the public prison. Why and for how long the text does not say. After the word "until" the document is unreadable.

Considering that in principle the prison in Athens and as far as we know in other *poleis* was not a penalty, but a place where criminals awaited the sentence or an execution, a question arises: if the Delphic penalty was *atimia,* as in Athens, why does the text consider preventive detention? The difficulty to find a convincing answer could suggest that the Delphic penalty was not *atimia,* but rather a monetary penalty, in which custody was aimed at obtaining payment.[15] If we take in account this hypothesis, we may suggest that perhaps also in Athens the original penalty was not *atimia* (which would be a very harsh penalty in the context of Solon's legislation), but, as in Delphi, a monetary penalty, substituted with *atimia* in post-Solonian age.[16]

Back to Athens and to the trial features of the actions linked to the *graphe goneon kakoseos* and to other actions (*graphe argias*, *graphe paranomon*) aimed at facilitating it or at avoiding the squandering of family property. Disregarding here the debate on the moment when *graphai* were introduced, on their nature and on the difficulty of identifying them with the actions we call "public actions",[17] just a few considerations

followed at line 11 by *ka*. According to Lerat *ent* can not be the preposition *en* followed by the indication of a place (given the fact that everybody knew where the public demosia was located), or by the indication of a delay imposed to the Council for providing to chain the condemned person: *ent* are rather the first three letters of *ente*, very frequent in Delphic language, followed by *ka* and the subjonctif present in the sense of "till", "until", "up to". Lerat (1943) 68.

[14] More on the subject in Lerat (1943) *loc. cit.*

[15] Interpretation and relevance of the manumission acts found at Delphi, where the owners subordinate the freeing of their slaves to the condition that they should, upon the death of the testator, assume their obligation to *trephein* his parents, in Lerat (1943) 81-83.

[16] On this see Leão (2011) and Leão – Rhodes (2015) 97.

[17] On these issues see (with bibliography) C. Pelloso, "Protecting the community. Public actions and forms of punishment in ancient Athens", in E. Harris- M. Canevaro (eds.), *Oxford Handbook of Ancient Greek Law,* forthcoming, that I have been able to read thanks to the courtesy of the author.

on their function.[18] In different ways one from another, the actions connected to *gerotrophia* offered a special protection to the interests of the *oikos,* preventing its patrimony from being dispersed, and guaranteeing to the elderly members of the group the rights of *gerothrophia*. The inclusion of the *graphe goneon kakoseos* in the *azemioi to boulomeno diokein*, as the exclusion for the speakers of the hourglass limitations, were clearly designed to encourage hesitant parents to sue, as well as to encourage strangers to intervene in turn of parents who for any reason did not wish to sue their children.

Why these facilitations? Is it possible that in addition to its original and fundamental ideological value, *gerotrophia* was aimed also at limiting the cases of abandonment of elderly ascendants? Or (even without considering similar cases) may these facilitations suggest that generational conflicts were stronger than the legal rules on paternal powers may suggest?

Some documents displaying behaviors and not legal rules (as the ones examined so far), possibly confirm this suspicion. Among these documents are anecdotes, which, together with the gossips that often inspire them, are always useful to reconstruct practices, social assessments, beliefs and mindset.[19]

Let us start from one of the many anecdotes regarding the private life of Pericles, who, thanks to his position and also to his unconventional personal choices, was one of the privileged targets of Athenian gossip.

One of Pericles' legitimate children, his eldest named Xanthippos, had –they said– an extravagant and lavish nature, and used to live above his possibilities. Since his father would give him little money and even that little by little, one day Xanthippos asked for a loan, using his father's name, and obtained it. But the debt was not paid on the due date, and when the lender turned to Pericles the latter didn't pay but denounced his son instead (Plut., *Per.* 36, 2-3).[20]

True or false, the episode offers a number of interesting considerations: obviously, father and son had from a very long time a strained relation. How could we explain, otherwise, Pericles' decision to transfer the confrontation on the city level, renouncing to impose on Xanthippos a penalty in his capacity of *kyrios*? The decision to sue his son suggests an exasperated father, who does not consider himself able or anyways does not wish to further face his son with the disciplinary means at his disposal. And the son's reaction to the father's initiative signals an equally exasperated attitude:

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[18] For example the *graphe argias,* once considered as safeguarding the entire community's interest. According to e.g. de Bruyn (1995), 80, its aim would have been to limit an increase of criminality due to idleness and consequent impoverishment. Different position in Leão (2001).

[19] As rightly noted by Hunter (1994) 96, at the beginning of chapter IV on gossip as social construct, quoting the authors who in the past couple of decades started to make use of this kind of documents. Among them recently, Schmitt-Pantel (2009).

[20] On the relationship Pericles/Xanthippos and the sociological and psychological consideration that the episode suggests see Cantarella (2016) 81-89.

far from repenting or attempting to recompose the confrontation, Xanthippos raises the tones ridiculing his father throughout Athens, telling about the talks that, he says, Pericles had with the Sophists. More specifically, he ridiculed a conversation of Pericles' with his friend Protagoras. The two had allegedly squandered an entire day discussing who was guilty of the death of a person hit by a javelin: the javelin, the one who hurled it, or the judges of the contest?

The generational problem, in Athens, did not depend on the strictness of the legal rules but rather on the gap between them: namely the theoretical possibility to possess at majority a personal patrimony and the fact that in reality usually this happened only after the death of the father, which usually happened a number of years after the son became of age. In short, before their father's death, the children who reached majority of age had, in terms of property, only hereditary expectations.[21]

Not surprisingly, therefore, the sources speak of many attempts of fathers who helped financially their children to start an activity. As for example did Sopeus, who –as we read in Isocrates' *Trapeziticus*– had started his son (Isocrates' client) to the family activity of wheat maritime trade, giving him ships laden with wheat and giving him money to entertain trade relations with the Greek cities, notably Athens, where apparently he was a metic.[22]

But there were also fathers who tried to solve the problem even in a more drastic and final way: to avoid that children should wait until their deaths, they divided their estate among them while alive, sometimes entrusting the management, sometimes transferring the ownership.[23]

Lysias, for example, speaking of the provisions taken by Conon and Nicophemus on their property, notes that "you have to consider that, even if a man had distributed among his sons what he had not acquired but inherited from his father, he would have reserved a goodly share for himself; for everyone would rather be courted by his children as a man of means than beg of them as a needy person" (Lys., *On the property of Aristophanes*, 36-37).

The Athenian fathers in short (or at least a number of them) tried to avoid trouble (for themselves and their children) by giving children part or all of their wealth. But as the just mentioned passage by Lysias shows, the fact of having transferred the estate to the children was not sufficient to assure parents that they would be provided for during their old age.

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[21] Matters were further complicated by the fact that Athenians could dread to inherit from their fathers much less than their due according to Solon's law. However, as time passed, the severity of the law relented and a new law established that also those who had sons could dispose of their estate *mortis causa*, provided they took arrangements in case these would die *prin dietes eban,* that is to say before two years since they had reached majority (Dem., *Steph.* 2, 24).

[22] Isocr., *Trapez*. 6-7.

[23] This custom was in use also outside Athens, and not only in the Ionian cities: the Gortinian code provides rules for the division of paternal as well as maternal estates (col. IV, at vv. 23-29). See Maffi (1997) 35-39.

Let us overlook, here, that in addition to financial problems between father and son there could also be a sexual rivalry for the young stepmother. When this kind of rivalry existed, it could have devastating effects (as demonstrated in Homer by the story of Phoenix and in the fifth century by Euripides' Hippolytus),[24] but –although serious when they exploded– those kinds of conflicts were certainly much less frequent than those related to financial dependency, which was in some way 'endemic' to the life of the *polis*, as confirmed by some interesting pages of Aristotle's *Politics*:[25] the age difference between father and children –writes Aristotle– should not be too large: those who have children when they are too old have no possibility to benefit from the gratitude of their children, and cannot be of help to them; but the age difference should not be too small: in this case sons have with their father a relationship too similar to the one they share with peers, and they do not respect him, as they should. On the basis of these previous statements (after claiming that men's ability to generate ceases around seventy and females' around fifty) Aristotle identifies the right age for marriage: 18 for women and 37 for men. In this case –he says– children will take their father's place at the time of their maximum strength, when the fathers will have reached the old age (70 years).

In his ideal world, therefore, children should have inherited when they were around 32 years old, but apparently they did not. According to the most widespread opinion the Athenians married younger, around twenty-five, became of age when their father was about fifty-five and when their father reached seventy they were already approximately forty-five: too many to endure financial dependency without serious problems.

Generational relations worried very much Aristotle, and not surprisingly.[26] In Athens, during the long years of the Peloponnesian War, the conflict between fathers and sons is a problem testified by all the sources, from historiography to tragedy to comedy, in which it continually comes back in the most diverse and different perspectives.

Let us limit to some examples, starting from tragedy: in *Oresteia*, and particularly in *Eumenides*, the conflict between the young gods (Apollo, Athena) and the old goddesses (the Furies); in *Antigone* the conflict between Haemon and Creon; in *Alcestis* the one between Admetus and his father Pheres, maybe the most interesting: Admetus could avoid death if someone were to die in his place, but only his wife Alcestis agreed to do that: Pheres had refused. After Alcestis' death, Admetus reproaches his father with harshness equal to his father's reply. "I have fed you and clothed you –replies Pheres– but I am not obliged to die for you, neither in our family customs or in the laws of Greece does it say that fathers must die to save their sons." Pheres speaks of *paidotrophia* as an existing law, which if respected –as he says he has

[24] See Cantarella (2016) 97-100.

[25] Aristot., *Pol.* 1335 a-b. Cfr. Cantarella (2016) 89-90.

[26] Interesting considerations on the relations between generations and the importance of different age groups in Athens in Golden (1990), and in Davidson (2006).

done– authorizes the father to expect his son to take care of him in return during his old age, and not to ask him to die.

Passing to comedy, in *Clouds* we assist both to the clash (also physical) between Strepsiades and his son, Pheidippides, and to the contest between the "Right Speech" and the "Wrong Speech", too well known to be recalled. In *Acharnians* the *gerontes palaioi* reproach the city: "so many are the victories we have gained for the Athenian fleets that we well deserve to be cared for in our declining life; yet far from this, we are ill-used, harassed with law-suits, delivered over to the scorn of stripling orators. Our minds and bodies being ravaged with age, Poseidon should protect us" (vv. 676-682).

The contrast between fathers and sons, rather than being confined within the *oikoi*, produced a strong conflict even in the public space, where young people were coming up with their own ideas, sometimes trying to influence the city's international policy. As it happened, with not irrelevant consequences, in 415, when Alcibiades (exponent of the *neoi*, favorable to the expedition in Sicily) confronted in the assembly the elder (*presbuteros*) Nicias, who wisely was listing the dangers of the expedition (the reconstruction of Nicias' speech in Thucydides, VI, 9-14, of Alcibiades' speech in VI, 16-18). Carried away by the enthusiasm and the eloquence of Alcibiades the youths were the most enthusiastic supporters of the expedition. Independently from the outcome, it was one of the moments, perhaps the moment in which the harshness of the contrast and the ability of the young people to have the best on their fathers had been stronger.

The circumstances that determined this phenomenon are complex: in Athens, simplistically, many thought it was an effect of sophistic education, considered to be cause of the destruction of old values. And it is indisputable that this education, as described in a caricature in Aristophanes' *Clouds* (presented in 423), beyond the excesses typical of comedy, reflects the opinions of part of the Athenians. But if it is true that conservatives who shared this analysis of the facts could have some reason to do so, it is also true that they did not realize, or did not want to realize, that the causes of the crisis had deeper and more ancient roots and more complex and diversified causes.

As a matter of fact these issues existed long before the arrival of the Sophists: in the *polis* there was, so to speak, a structural contradiction between the position of son and that of citizen, which had been increased by the progressive democratization. As a citizen, a son could and was used to express his will in the assemblies, just like his father (whose vote was equal to his). But as a son, even if he had reached majority, his duty was to respect and obey his father, a duty aggravated by the financial subordination in which he often lived. The conflict, in short, was a mental state that, even when it did not manifest in behaviors, served as a background to the relations between generations making delicate and complicated the interactions among family members belonging to different age groups.[27]

[27] To quote only one among many possible examples, in 472 BCE, in Aeschylus' *Persians*,

These problems in short existed from a long time, and around the mid fifth century alongside radical democracy, also the sophistic revolution increased the contrast and facilitated as a result actual conflicts. Although it would be excessive to talk, as some have done, of a generational conflict never seen up to that time, the opposition was strong on both the ideological and the practical level. And that might explain the revival, so to speak, of the law on *gerotrophia*.[28]

Returning to the law, to try to reach a conclusion, we can distinguish two moments in its history.

The first is obviously the moment of its birth, when *gerotrophia* was established in order to respond to diverse needs: in the first place a fundamentally ideological requirement of affirming the crucial value of respect and gratitude towards parents (and grand-parents). M. do Céu Fialho has rightly observed that *gerotrophia* is one of those ancestral laws aimed at transferring on the civic level the natural principles that were later called *agrapta nomina*, specifically that natural principle of reciprocity (essential for the survival of the species) between the time in which parents give birth to children and provide for their subsistence (*paidotrophia*) and the one in which the children take care of the elderly when the latter are no longer able to do so.[29] However important, it is important to recall that the Solonian law did not have only this ideological function: it had also a socio-economical aim, entrusted to the duty of teaching sons a trade or a craft. As Plutarch says (Plut. *Sol*., 22) at that time many abandoned the fields to move to town, and those who traded by sea did not want to import goods for those who had nothing to give in return. The law met also the needs of making the Athenians aware of the problem and of the importance of *technai*.

The second moment of the life of the law might be connected with the moment when, in the fifth century, at the time of the maximum juxtaposition between generations, it started to be seen as an instrument to contrast the increasing conflict between generations. The facilitations granted to those who filed the *graphe goneon kakoseos* and therefore the possibility for the transgressors of being condemned, could act, or at least one could hope would act as a deterrent, inducing children not to come short of their duties. Finally I must spend a word, again, on the law of Delphi: perhaps it is no coincidence that in that city the law on *gerotrophia* was republished between the last years of the 4th century BCE and the first of the 3rd. Perhaps it was considered necessary as a warning for young people, in order to

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the ghost of Darius puts the blame of the defeat of Salamis on his son Xerxes, who forgetting all caution and teachings of his predecessors had attempted to subdue Greece, attacking it from land and sea. To invade Greece he had arrived to lock up the Bosporus. Darius seeks an explanation of his son's endeavor in the fact that his son "in the folly of youth, forgot my advice" (v. 744).

[28] I do not go into the problem of youth groups and associations, which as important as certainly it is, has no relevance for the period I am discussing. On this subject I would just refer to Fröhlich & Hamon (2013).

[29] Fialho (2010).

remind them of the existence of an old and by then obsolete or perhaps never used law. Perhaps, also the Delphic legislator was worried about the effects of sophistic education.

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GEROTROPHIA. RESPONSE TO EVA CANTARELLA

1. Gerotrophia *and generation conflicts*[1]

Anchisteia conceded the important right of claiming the heritage of a deceased family member; in exchange, it implied as well certain obligations respecting the dead. If death were caused by homicide, it would be up to the *anchisteis* to assure that justice should be done; family members also had ritualistic obligations, particularly regarding the cult of those who were no longer among the living. However, even before the progenitor's death, there was another type of responsibilities that were to be provided by the *anchisteis*, especially by the son who would inherit the patrimony of his father and mother, as future *kyrios* of the *oikos*: to maintain his parents in old age, provide them shelter and food and take care of them in sickness. As is righty underlined by E. Cantarella, those obligations would fall under the concept of *gerotrophia* or *geroboskia*, and their effects would remain binding even after the parents' death, because a son should provide them a proper funeral ceremony and continue to honour their memory. At a time when the State was still far from creating a social security system, the possibility of granting protection in old age was, of course, a guarantee that parents

[1] I wish to thank Manuel Tröster, who read an earlier version of this paper and whose comments helped me to improve it, especially at the linguistic level. This work was developed under the project UID/ELT/00196/2013, funded by the Portuguese FCT – Foundation for Science and Technology.

would expect to receive from their children. On the other hand, it is reasonable to perceive *gerotrophia* as the natural counterpart of the effort that parents had made themselves by nurturing their young (*paidotrophia*).[2] Both attitudes are therefore directly interwoven by a principle of reciprocity: as a result, in a normal situation, a well-conducted *paidotrophia* represents a good investment and a security for the future. In fact, after coming to age, properly raised young adults can be expected to become responsible citizens and good parents in their turn, being receptive as well to the natural obligation of repaying what they have received, thereby protecting the older members of the *oikos*. Reality, however, does not always correspond to this idyllic portrait of life, and this is clearly visible in an author as early as Hesiod, who, in his Myth of the Five Ages, presents the lack of respect as a symptom of human degradation during the Iron Age (*Op.* 185-8):

> αἶψα δὲ γηράσκοντας ἀτιμήσουσι τοκῆας·
> μέμψονται δ' ἄρα τοὺς χαλεποῖς βάζοντες ἔπεσσι,
> σχέτλιοι, οὐδὲ θεῶν ὄπιν εἰδότες· οὐδέ κεν οἵ γε
> γηράντεσσι τοκεῦσιν ἀπὸ θρεπτήρια δοῖεν.
>
> Soon as they grow old people will show no respect to their elders;
> harshly upbraiding them, they use words that are horribly cruel,
> wretches who don't acknowledge the face of the gods, and who will not
> pay back ever the cost of their upbringing to their old parents.[3]

Although in poetic form, Hesiod's lines provide some (proto)legal snapshots on the problem under consideration: as soon as the parents get older (γηράσκοντας), their young start dishonouring (ἀτιμήσουσι) them. This means that it is the elders who suffer a kind of *atimia* because of the way they are exposed to public inconsideration, and not that *atimia* is the penalty for the offender. On the other hand, Hesiod makes quite clear that the obligation of *gerotrophia* is a form of reward that should be given as a return for the previous investment in the rearing of children (ἀπὸ θρεπτήρια). Failing to grant this is a complete annihilation of the basic principle of reciprocity behind this natural expectation. E. Cantarella is therefore right to argue that, when Solon enacted the law on *gerotrophia*, he was moving into the civic level the 'ideological function' of these old moral principles (later labelled "'unwritten laws', *agrapta nomima*, because they are primordial and prior to any specific regulation of society"[4]), to which the legislator added as well a socio-economic aim, by connecting

[2] On this see Leão (2011). Faraguna (2012), 134-5, rightly underlines that the principles of reciprocity implied by the concept of *eranos* could be applied as well to the image "del dare-avere che caratterizza il rapporto tra padri e figli". Cf. Euripides, *Supp.* 361-4; [Demosthenes], 10.40-41; Aristotle, *Pol.* 1332b35-41.

[3] The English version is taken from the translation of Daryl Hine, available at "The Chicago Homer" project (http://homer.library.northwestern.edu/).

[4] The quotation is taken from Fialho (2010) 108.

this law with the obligation of teaching a trade or a craft (a *techne*) as part of a well-conducted *paidotrophia*.

A very interesting aspect in E. Cantarella's paper is the presentation of an inscription from Delphi, which is the sole surviving epigraphic document dealing with *gerotrophia*. As she argues, the reference to the fact that the offender ought to be kept in chains at the public prison may suggest that the idea would be to keep him there until the payment of a monetary penalty was made. Even if this cannot be taken as certain (because unfortunately the inscription is illegible afterwards), it remains a pertinent suggestion that could be taken as an alternative to the usual understanding that the punishment for failing to comply with the duties of *gerotrophia* was a penalty of *atimia* (as sustained by Diogenes, 1.55: ἐάν τις μὴ τρέφῃ τοὺς γονέας, ἄτιμος ἔστω = Fr. 104b Leão-Rhodes). This may be true for classical times, but seems a penalty too heavy for the time of Solon, when *atimia* was a harsher punishment, equivalent to outlawry (and not simply to the loss of civic rights), applicable to crimes of extreme importance that could put in danger the entire community.[5] This is admittedly not the case of *gerotrophia*, which would essentially affect the domain of the *oikos*. It is therefore an interesting possibility to imagine that Solon may have fixed a fine for those who did not fulfil the duties respecting *gerotrophia*, because he did prescribe this kind of fines in other instances: e.g., one hundred drachmae for the man who seized a free women and raped her (Plutarch, *Sol.* 23.1 = Fr. 26 Leão-Rhodes), or twenty for the one who procured a free woman (also Plutarch, *Sol.* 23.1 = Fr. 30a Leão-Rhodes). If this were the case, the penalty of *atimia* would be a later development and could express a deeper involvement of the *polis* in the way the question of *gerotrophia* was dealt with at the private level of the *oikos*. At any rate, this is an argument *ex silentio* and cannot be taken as certain, although it favours Cantarella's pertinent suggestion that the apparent revival of this law during the final decades of the fifth century could be an attempt to contain the growing generational conflict deriving from the gradual democratization of institutions, stimulated by the sophistic education.

2. Is there a time limit to the obligations of paidotrophia *and* gerotrophia*?*

In a quick survey of literary works that approach the problem of confrontation between generations, E. Cantarella briefly evokes the case of Euripides' *Alcestis* (presented in 438, thereby being his earliest dated play[6]), where the tension between Pheres and his son Admetus explores very impressively the limits and contradictions of the reciprocity ties deriving from *paidotrophia* and *gerotrophia*. It is Apollo himself, who was compelled by Zeus to serve (v. 6: θητεύειν) in the house of a mortal, despite being a god, who presents the guidelines of the plot in his opening monologue, which corresponds to the prologue of the play[7] (vv. 1-28):

[5] See Leão & Rhodes (2015) 64 and 97.

[6] Parker (2007) xix.

[7] Besides the case of *Alcestis*, Euripides begins with a divine monologue in four other plays:

in order to escape immediate death, Admetus had to find someone willing to die instead of him, but his father and mother refused, and so it was only his wife, Alcestis, who volunteered for the sacrifice. Her decision was made when they were about to marry, but the gods allowed them some years of marital happiness and thereby *Thanatos* is about to claim her life when they have already had children, whom Alcestis wants to protect, before dying, from a would-be stepmother. The fact that they have descendants when the plot starts is an important point, often overlooked by commentators, because it undermines the argumentation of Admetus and Pheres, thereby exposing their selfish behaviour. In fact, if Admetus already has children, this means that the keeping of the *oikos* is now ensured and so he could in fact die himself instead of Alcestis without affecting the future of his house; on the other hand, even if Pheres highly praises his son's wife, the fact is that, in practical terms, she has already fulfilled her function of bearing him descendants, and up to a certain point is now expendable. In those circumstances, the arguments based on the need of safeguarding the *oikos*, or on the obligations deriving from the reciprocal ties of *paidotrophia* and *gerotrophia*, are simply outdated and used as an expedient to conceal the cowardice that they both represent.

Even so, it is legitimate to ask: is Admetus correct in demanding the sacrifice of his parents as an extension of *paidotrophia,* and does he have sufficient grounds to repudiate the duties of *gerotrophia*? On the other hand, is Pheres right in arguing that his obligations were complete at the moment when he succeeded in raising Admetus to be the master of the *oikos*, thereby not being obliged, in addition, to die for him? As he concisely concludes (vv. 703-4): νόμιζε δ', εἰ σὺ τὴν σαυτοῦ φιλεῖς / ψυχήν, φιλεῖν ἅπαντας.[8] To put it differently: is there a reasonable limit to the obligations of *paidotrophia* or *gerotrophia*?

As pointed out by E. Cantarella, some categories of people were exempted from the responsibilities of *gerotrophia*: sons prostituted by their fathers, children born from a *hetaira* (and therefore *nothoi* who because of this were not entitled to the right of inheritance) and also those who had not been taught a *techne* by their fathers.[9] Those restrictions have in common the idea that *paidotrophia* has not been well conducted by the father and hence that the descendants are not obliged to repay the progenitor's previous investment in their rearing. On the other hand, when comparing the prerogatives of the Roman *paterfamilias* with the Greek practices respecting the relations of fathers and sons, Dionysius of Halicarnassus mentions penalties that could be applied against sons by their fathers (*Ant. Rom*. II. 26. 2-3 = Fr. 142 Leão & Rhodes):

Hippolytus, Troades, Ion, and *Bacchae*. See Parker (2007) 49.

[8] 'Accept that, if you love your own life, everybody loves theirs.' English translation by Parker (2007) 191.

[9] For more details, see Leão & Rhodes (2015) 92-7.

οἱ μὲν γὰρ τὰς Ἑλληνικὰς καταστησάμενοι πολιτείας βραχύν τινα κομιδῇ χρόνον ἔταξαν ἄρχεσθαι τοὺς παῖδας ὑπὸ τῶν πατέρων, οἱ μὲν ἕως τρίτον ἐκπληρώσωσιν ἀφ' ἥβης ἔτος, οἱ δὲ ὅσον ἂν χρόνον ἠίθεοι μένωσιν, οἱ δὲ μέχρι τῆς εἰς τὰ ἀρχεῖα τὰ δημόσια ἐγγραφῆς, ὡς ἐκ τῆς Σόλωνος καὶ Πιττακοῦ καὶ Χαρώνδου νομοθεσίας ἔμαθον, οἷς πολλὴ μαρτυρεῖται σοφία· τιμωρίας τε κατὰ τῶν παίδων ἔταξαν, ἐὰν ἀπειθῶσι τοῖς πατράσιν, οὐ βαρείας, ἐξελάσαι τῆς οἰκίας ἐπιτρέψαντες αὐτοὺς καὶ χρήματα μὴ καταλιπεῖν, περαιτέρω δὲ οὐδέν.

In fact, those who established the constitutions for the Greeks determined quite a short time for sons to be under the rule of their fathers: some until they reach the third year after puberty, others during the time they remain unmarried, and others until they enroll their names in the public records, as I learned from the legislation of Solon, Pittacus, and Charondas, in whom much wisdom is shown. They determined punishments for the children, in the case they disobey their fathers, but not very heavy: they allow [the fathers] to expel them from their home and to exclude them from their inheritance, but nothing beyond that.[10]

The text has a vague reference to Greek law and to paradigmatic legislators (Solon, Pittacus, and Charondas), and therefore it is not clear in which *poleis* those norms were enacted or whether they existed at all, because Dionysius' goal is to underline that Greek practices were milder than those observed by the Romans, a fact that E. Cantarella points out as well in her opening considerations. Even so, in extreme circumstances a father could proclaim a separation (*apokeryxis*) from his son, expelling him from the *oikos* and even cutting off his part in the family property. This is probably what Dionysius has in mind, although sources suggest that *apokeryxis* was used only very seldom and more as a theoretical prospect than as a concrete reality.[11]

A similar ambivalence towards the duties of *paidotrophia* and *gerotrophia* is implied by a passage from the *Nicomachean Ethics* (1163b15-27) on the honours owed to gods and parents (καθάπερ ἐν ταῖς πρὸς τοὺς θεοὺς τιμαῖς καὶ τοὺς γονεῖς). As underlined by E. Cantarella in quoting this passage, a father could disown his son but not the opposite, because a son is always a debtor to his father and cannot ever pay him back enough for what he has received. Just after this section, Aristotle makes a supplementary statement that may shed new light on the question under consideration (*Eth. Nic.* 1163b22-27):

ἅμα δ' ἴσως οὐδείς ποτ' ἂν ἀποστῆναι δοκεῖ μὴ ὑπερβάλλοντος μοχθηρίᾳ· χωρὶς γὰρ τῆς φυσικῆς φιλίας τὴν ἐπικουρίαν ἀνθρωπικὸν μὴ διωθεῖσθαι. τῷ δὲ φευκτὸν ἢ οὐ σπουδαστὸν τὸ ἐπαρκεῖν, μοχθηρῷ ὄντι· εὖ πάσχειν γὰρ οἱ πολλοὶ βούλονται, τὸ δὲ ποιεῖν φεύγουσιν ὡς ἀλυσιτελές.

[10] The text and translation of Dionysius' passage are those of Leão & Rhodes (2015) 191.

[11] See Cantarella (2010) 1-14, especially 5-7 on the right of excluding a son from inheritance by *apokeryxis*. See also Strauss (1993) 62-6; Mélèze (2010); Leão & Rhodes (2015) 191-2.

> At the same time, no doubt it is unlikely that a father ever would abandon a son unless the son were excessively vicious; for natural affection apart, it is not in human nature to reject the assistance that a son will be able to render. Whereas a bad son will look on the duty of supporting his father as one to be avoided, or at all events not eagerly undertaken; for most people wish to receive benefits, but avoid bestowing them as unprofitable.[12]

With these remarks in mind, it is now time to return to the reasoning of Admetus and Pheres. The former argues that the bonds of *anchisteia*, the necessity to grant the continuity of the *oikos* and, above all, the duties of *paidotrophia* should have convinced his father or mother to sacrifice their lives for their own son. However, Pheres claims that he has the right to appreciate life just the same way Admetus does, and especially that he has reared his son well and passed him already the rule of the house — therefore, the duties of *paidotrophia* no longer applied to him and it was now his turn to receive the benefits for this investment, through *gerotrophia*. Despite the fact that Euripides presents Pheres as a despicable character, in ethical and legal terms, it is also true that, from Hesiod down to Aristotle, his argumentation has firmer grounds than that of Admetus, whose cowardice becomes increasingly evident and unbearable even for himself after his wife's death. There is, however, another important factor in the play which in fact ends up bringing the final solution: the importance of *philia*. Apollo and Heracles both emphasise the quality of the bonds of *philia* and *xenia* stimulated by Admetus; besides that, the intense harmony existing between him and Alcestis is also repeatedly underlined. But Apollo, Heracles, and Alcestis are characters alien to the original *oikos*, and therefore Euripides seems to be stating clearly that *philia* is, in the end, more important and especially much more effective than *anchisteia* in providing a solution to this impasse: Alcestis sacrificed herself for Admetus, and Heracles restored her to life, thus rebuilding the *oikos* of his host, as Admetus clearly recognises (*Alc.* 1138).[13]

Finally, a small provocation, to try to answer the opening question of this section: is there a precise time limit to the obligations of *paidotrophia* and *gerotrophia*? The answer to this problem is not easy to give,[14] neither in ancient Greece nor in modern

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[12] English version by H. Rackham, available at the *Perseus Digital Library*.

[13] As Fialho (2010), 117, rightly points out, the solution to Admetus' problems is brought by two foreigners whose *philia* is more effective and stronger than the blood ties. Cantarella (2015), 26-27, calls attention to the fact that Plato, in the *Symposion* (179b-c), gives preference to Alcestis over Orpheus, because, in giving her own life to save Admetus, she did more for her lover, and because of that the gods allowed her to come to life, whilst Orpheus failed to recover Eurydice. In the same passage, Plato also underlines clearly that the *philia* and *eros* of Alcestis were much stronger than the family ties of Admetus' parents.

[14] Fialho (2010), 116-17, building on the comments of the Chorus in Sophocles' *Electra* (1058-62), maintains that there is "an overlapping of both obligations, in a sort of timeless interaction".

times. In fact, recent years have shown this in a very bitter way, especially in those European countries severely castigated by the economic crisis: young people without stable jobs, who are unable to exert a *techne* and live on their own, constitute an open challenge to the general obligation to pay taxes for the *gerotrophia* of an increasingly older population. Some parents, on the other side, like Pheres, stand up against the pressure of keeping their grown-up children at home, extending beyond the reasonable the obligations of *paidotrophia* and preventing themselves from enjoying the benefits of a peaceful retirement. In the end, we can feel tempted to ask ourselves: would Admetus face the risk of being called a "mammone" by Pheres, had they lived in the 21st century?

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NOTE SUR LES *PHIALAI EXELEUTHERIKAI*

Trouvées pour la plupart sur l'Acropole et quelques unes aussi à l'Agora et au Nord de l'Aréopage, le groupe d'inscriptions enregistrant l'offre de *phialai* est composé de 33 inscriptions, parmi lesquelles certaines sont fragmentaires.[1] D'après la thèse dominante, à Athènes, pendant un court espace de temps, peu avant 330 et jusqu' en 317/316 av. J.-C., les affranchissements s'accompagnaient d'offrande au temple d'Athéna d'une coupe en argent d'une valeur de cent drachmes.

Wilhelm Koehler rapprocha les *phialai* en question à la mention de *phialai exeleutherikai* dans deux fragments d'inventaires de l'Acropole, qui étaient à l'époque inédits.[2] Mais, la dénomination *exeleutherikai* se justifierait, surtout, par la restitution de l'entête fragmentaire du *kymation* de l'inscription IG II^2 1578 (Meyer, p. 18 et 133, no 29), lignes 1-2, proposée par Wilamowitz, d'après laquelle les *phialai* seraient offertes à l'occasion de procès contre des affranchis qui n'ont pas respecté leurs engagements envers leurs affranchisseurs, les dites *dikai apostasiou*[3]:

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[1] *IG* II^2 1553-1578. D. M. Lewis, « Attic Manumissions », *Hesperia* 28 (1959), p. 208-238; *Idem*, « Dedications of Phialai at Athens », *Hesperia* 37 (1968), p. 368-380 ; *SEG* 21 (1965), 561. A. Kränzlein, « Die attischen Aufzeichnungen über die Einlieferung von φιάλαι ἐξελευθερικαί », *Symposion 1971,* p. 255-264. R. Zelnick-Abramowitz, *Not Wholly Free*, p. 83 et 282-290.

[2] IG II^2 1469, lignes 5-6: ἐκ τῶν φιαλῶ[ν τῶν ἐξελευθερ]ικῶν. Ibid., lignes 15-16: [ἐκ τῶν φ]ιαλῶν τῶν [ἐ]ξελευθ[ε]|[ρικῶν]. Ibid. 1480, lignes 9: ἐκ τῶν φιαλῶν τῶν [εξελευθερικῶν]. D'après R. Zelnick-Abramowitz, *Not Wholly Free*, p. 285-289, le mot *exeleutherikai* signifierait 'tout à fait libre" ("thoroughly free").

[3] U. Wilamowitz-Möllendorff, "Demotika der Attischen Metoeken I", *Hermes* 22 (1887), p.

1 [πολεμαρχοῦν]τος Δημοτέλους τοῦ Ἀντ[ι]μάχου Ἀλ[α]-
[ιέως δίκαι ἀπο]στασίου Ἑκατομβαιῶνος π[έμπτ]ει ἐπὶ [δ]έ[κα].

« *Dèmotélès fils d'Antimachos du dème des Alaiens étant polémarque, (*dikai apo*)* stasiou*, le 15 jour du mois Hékatombaiôn*. »

En 1971, lors du premier Symposion de droit grec et hellénistique, A. Kränzlein distinguait les documents en question en trois types particuliers.[4] Le premier, auquel appartient la majeure partie des actes, contient le nom de l'esclave au nominatif, l'indication de son domicile et de son métier, le participe *apophygôn* ou *apophygousa*, le nom du patron à l'accusatif accompagné de son démotique ou de son domicile s'il n'est pas citoyen et, enfin, la mention de la *phialè* offerte. Le verbe *apopheugein*, terme attaché à un contexte judiciaire,[5] indique que le défendeur, en l'occurrence l'affranchi, a eu gain de cause dans un procès, réel ou fictif, qui l'opposait à son ancien maître, et l'offre de la *phialè* revient à sa charge.

IG II^2 1553 (Meyer 1), lignes 16-21 :
Εὐτυχὶς καπηλὶς ἀποφυγ-
οῦσα Σώστρατον Ἕρ-
[μει]ον, Τιμαρχίδην Εὐωνυμέα, φιάλη σ-
[τα]θμὸν [Η]. Πλίννα
20 ἐμ Πειραι οἰκοῦσα ἀποφυγοῦσα Ἀστ-
ύνομον ἐξ Οἴου, φιάλη σταθμὸν Η.

« *Eutychis, marchande de détail, ayant gagné le procès avec Sôstratos (du dème) Hermeios et Timarchidès (du dème) Euvônymon, (a offert) une phialè (d'une valeur) de cent drachmes. Plinna, résidant au Pirée, ayant gagné le procès avec Astynomos d'Oios, (a offert) une phialè (d'une valeur) de cent (drachmes).* »

IG II^2 1569 (Meyer 19), lignes 3-8 :
[Μ]ανία ἐν Κολλυτῶι οἰκοῦ-
σα ἀποφυγοῦσα
5 Κηρυκίδην Θηβαῖον
καὶ Ἀριστοκλέα ἐν Κυδα-

110. Harpokration, *s.v.* : ἀποστασίου· δίκη τίς ἐστι κατὰ τῶν ἀπελευθερωθέντων δεδομένη τοῖς ἀπελευθερώσασιν, ἂν ἀφιστῶνταί τε ἀπ' αὐτῶν ἢ ἕτερον ἐπιγράφωνται προστάτην, καὶ ἃ κελεύουσιν οἱ νόμοι μὴ ποιῶσιν. Καὶ τοὺς μὲν ἁλόντας δεῖ δούλους εἶναι, τοὺς δὲ νικήσαντας τελέως ἤδη ἐλευθέρους. Pollux, *Onomastikon* 8.35 : ἀποστασίου δὲ δίκη κατὰ τῶν ἀφισταμένων ἀπελευθέρων. Hesychios, *s.v.* ἀποστασίου δίκη· ἡ κατὰ τῶν ἀπελευθέρων ὅτε ἀποστῶσιν τῶν ἐλευθερωσάντων.

[4] Ainsi A. Kränzlein, *loc. cit.*, p. 256.

[5] Par exemple *IDélos* 104 (26) C (milieu du IVe s. av. J.-C.), lignes 1-10 : - - - [Μν] |ησιθέου Ἰήτην. Οὗ|τος ἀπέφυγεν παρ|[ὼ]ν καὶ ἀπολογούμ||ενος. Τὸ δικαστήρ|ιον ἡ Στοὰ ἡ Ποικί|λη.

θηναίων οἰκοῦντα,
φιάλη σταθμὸν Η.

« Mania, résidant à Kollytos, ayant gagné le procès contre Kèrykidès Thébain et Aristoklès résidant au dème des Kydathènaioi, (a offert) une phialè (d'une valeur) de cent drachmes. »

Le deuxième type de *phialai exeleutherikai*, qui offre moins d'exemples que le précédent, se compose d'actes comprenant le nom du patron au nominatif et celui de son dème, le nom de l'esclave à l'accusatif, son métier, son domicile et, enfin, la *phialè* offerte.

IG II² 1558 (Meyer 9, p. 98), lignes 66-67 :
Μενίτης Μένωνος Κυδαθ Ἄταν
ὀσπριοπώλην ἐγ Κ οἰκ, φιάλ : Η.

« Ménitès fils de Ménôn du dème des Kydath(ènaioi), Atas vendeur de vesces, résid(ant) à K., une phialè d'une (valeur de) cent (drachmes). »

Le participe *apophygôn* ne figurant pas dans les documents de cette série, il est probable que les procès se soient achevés sans, à proprement parler, partie gagnante, l'affranchi revenant à l'état servile et la *phialè* étant offerte par le patron. Notons au passage que certaines des *phialai* de ce groupe utilisent des termes empruntés au vocabulaire de l'esclavage, tels *kyrios* et *paidion*.[6]

Enfin, une troisième variante est représentée par deux fragments (*IG* II² 1576 et 1578) sur lesquels apparaissent le nom de l'esclave au nominatif, son métier, son domicile, le verbe *apopheugen*, le nom du patron à l'accusatif. Dans ces deux documents il n'est pas question d'offre de *phialè*, soit parce que l'offre de *phialè* est sous-entendu,[7] soit, explication qui me semble plus plausible, parce que l'*apophygôn* avait déjà offert une *phialè* lors d'une phase précédente de la procédure de son affranchissement, voire au moment ou son maître lui accordait sa liberté et fixaient les obligations assumées

[6] *IG* II² 1558 B (Meyer 9, p. 98), lignes 109-110 : [Κ]λεόξενος καὶ κύριος Κτησωνί|δης Οἰῆθ. *IG* II² 1558 B (Meyer 9, p. 98-99), lignes 117-122 : Μενίτης Μένωνος Κυδαθ | Πλαγγόνα παιδίον ἐγ Κει οἰκ φι :Η| Μενίτης Μένωνος Κυδαθ|| Μόσχον παιδίον ἐγ Κει οἰκ φι :Η | Μενίτης Μένωνος Κυδαθη| Ἀριστονίκην παιδί ἐγ Κε οἰ φιά : Η. Le même mot *paidion* apparaît aussi dans ibid., lignes 238, 259, 341, dans lesquels le participe *apophygôn* y fait défaut. Ménitès fils de Menôn, du dème des Kydathenaioi, fut probablement maître de plusieurs esclaves impliqués dans un certain nombre de *phialai* et mentionnés non pas comme métèques ou affranchis, mais comme esclaves (*paidia*) qui n'ont pas pu échapper (*apophygontes*) de leur état servile.

[7] Contra E. Meyer (p. 136) : "Lewis and Kränzlein both constructed theories that assumed the absence of phialai in this (IG II² 1578) inscription (and in 1576, where they are clearly absent in the entries but **could** have existed in the heading, which does not survive […], but for 1578 this seems to be an over-hasty conclusion".

de part et d'autre, et non pas lors de la publicité de l'acte par quelque moyen que ce soit.

IG II^2 1576 (Meyer 27, p. 129-131), lignes 36-39 :

Ἀγαθοκλῆς [ἐ]γ [Κολλυτ
οἰκῶ ὑποδη[μα]το(ποιὸς) [ἀπ]έφ
Καταγώγιον ἐμ Μελίτ
οἰκοῦντα.

« *Agathoklès, résidant à Kollyt(os), fabriquant de chaussures, a gagné le procès avec Katagôgios résidant à Melit(è).* »

En dehors de l'absence de toute mention de *phialai*, ce dernier groupe présente deux particularités par rapport aux listes précédentes. À deux reprises, il est question de plusieurs affranchis d'un même maître (lignes 54, 62-63: ἀπέφυ οὗτοι πάντες). Certains parmi les affranchisseurs étant désignés par le lieu de leur domicile (ligne 35 : ἐμ Μελίτ οἰκοῦντα ; cf. *ibid*., lignes 38-39 et 57-58), il est, dès lors, possible de songer à d'anciens esclaves devenus, à leur tour, propriétaires de main-d'œuvre servile.

Le rôle des coupes consacrées à Athéna par des esclaves qui ont obtenu leur liberté n'est point évident : offrande à la divinité, taxe sur les affranchissements, droits pour l'enregistrement et la publicité de l'acte?[8] Encore moins évident est leur contexte juridique. D'après la thèse dominante, les *phialai* seraient offertes à la déesse par des affranchis qui ont triomphé dans une *dikè apostasiou* intentée par leur patron.[9] Plus particulièrement, l'offre de *phialai* serait occasionnée par le procès que l'ancien patron a intenté contre son affranchi qui n'a pas respecté les obligations assumées avec l'acte de son affranchissement. Si l'affranchi est débouté, il retombe dans l'état de servitude ; s'il gagne, sa liberté devient définitive et l'affranchi offre à la déesse une

[8] E. Meyer, *Metics and the Athenian Phialai-Inscriptions*, p. 23-24, n. 53-54.

[9] En 1897 déjà, L. Beauchet (*Histoire du droit privé* II, p. 510 suiv.) écrivait: « Parmi les nombreuses explications qui ont été données, il en est une d'après laquelle ceux qui auraient consacré ces phiales seraient des esclaves fugitifs, qui auraient trouvé asile dans un temple et obtenu leur liberté à la condition de consacrer à la divinité de ce temple une offrande d'une certaine valeur. Mais on ne peut admettre qu'il ait suffi à un esclave de s'enfuir et de se réfugier dans un temple pour que son maître fût forcé de l'affranchir. Dans une autre opinion, on considère ces phiales comme ayant été consacrées à Athéna par des esclaves affranchis, uniquement en reconnaissance de leur affranchissement, conformément à un usage qui aurait voulu que tout esclave nouvellement affranchi consacrât ainsi à la déesse protectrice de la cité une offrande de la valeur de cent drachmes. L'explication qui nous paraît la plus sûre est celle d'après laquelle les phiales en question auraient été offertes à la déesse par des affranchis ayant triomphé dans l'action en apostasie que leur avait intentée leur patron. C'est ce qui résulte, en effet, de l'expression ἀποφυγών qui est appliquée à l'auteur de l'offrande, car le mot ἀποφεύγω signifie "gagner un procès que l'on vous a intenté." Par le gain de leur procès, ces affranchis ont, en effet, été délivrés de toutes leurs obligations envers leur patron, et ils peuvent avoir un domicile propre, ce qu'ils indiquent, en ajoutant à la mention de leur nom la formule οἰκῶν ἐν ».

phialè, acte qui confirme son statut d'homme libre.[10]

Pour d'autres historiens, au contraire, les *phialai exeleutherikai* constitueraient une forme d'affranchissement propre au droit athénien de l'époque. L'affranchissement n'aurait pas été informel, mais aurait résulté d'un procès *apostasiou* fictif. Les parties au procès seraient l'affranchi, dont l'affranchissement a eu lieu de manière informelle, et l'ancien maître. Ce dernier intente contre son ancien esclave une *dikè apostasiou* demandant la nullité de l'affranchissement et la reconnaissance du statut servile du défendeur. Le procès étant complaisant, le défendeur, vainqueur du procès, est reconnu en tant que personne libre par décision du tribunal.[11]

Pour une partie de la doctrine moderne, au contraire, l'association des *phialai* à une *dikè apostasiou*, réelle ou fictive, ne peut être retenue. Car, en cas de doute concernant le statut de l'affranchi, sa comparution au tribunal, même pour un procès fictif, n'aurait pas été possible. En outre, le fait que parmi les anciens patrons de l'esclave se trouvent des métèques et des étrangers rend l'hypothèse d'un véritable procès insoutenable. Pour cette raison, estiment-ils, mieux vaut admettre que l'offre d'une *phialè* par l'affranchi représente la formalité par laquelle s'achève la publicité de l'affranchissement.[12]

Depuis le milieu du 19e siècle[13] et en dépit des interprétations variées qui ont été proposées, l'association des *phialai* à l'affranchissement n'a été remise en cause qu'en 2010 lorsqu' a paru l'ouvrage d' Elizabeth A. Meyer dont le titre même, *Metics and the Athenian Phialai–Inscriptions*, révèle la nouvelle interprétation que propose l'auteur.[14] N'acceptant pas la restitution [δίκαι ἀπο]στασίου, E. Meyer (p. 43) propose à sa place

[10] Pour le caractère réel du procès intenté contre l'affranchi, voir J. Andreau – R. Descat, *Esclave en Grèce et à Rome*, p. 243 suiv. et R. Zelnick-Abramowitz, *Not Wholly Free*, p. 285 suiv.

[11] Ainsi M. Guarducci, *Epigrafia Graeca* III, p. 271. R. Parker, « Law and Religion », p. 79 : « It is interesting that at Athens in the fourth century slaves secured freedom by a process that is not perfectly understood but that again involved a legal fiction (their victory in a sham *dike apostasiou*) and had a religious element, the requirement to dedicate a phiale worth 100 drachmai to Athena as a kind of registration. What this proliferation of legal fictions underlines is the extreme precariousness of the ex-slave's position, the constant threat of reinslavement, and the need to improvise whatever protection could be devided ».

[12] K.-D. Albrecht, *Rechtsprobleme in der Freilassungen*, p. 111 : « Bei dieser Betrachtungsweise wird auch am besten das gesetzliche Erfordernis der Weihe der Silberschale verständlich : darin ist dann nämlich nicht nur eine Registrierungsgebühr für die Zurverfügungsstellung des staatlichen Gerichtsapparates zur Publizierung der Freilassung vermittels Scheinἀποστασίου-Prozesses zu sehen (so Lewis, *Hesperia* 28 [1959], 237 ; Harrison, *The Law of Athens* I, 183), sondern infolge der damit verbundenen Aufzeichnung der Weihgaben erst die eigentliche Vollendung der Publizierung (ähnlich wohl Thür, *RIDA* 19 [1972], 166) ».

[13] E. Curtius, *Inscriptiones Atticae nuper repertae duodecim*, Berlin, 1843, p. 19 no VII (*IG* II^2 1553). A.R. Rangabé, *Antiquités helléniques ou repertoire d'inscriptions et d'autres antiquités découvertes depuis l'affranchissement de la Grèce* 2, Athènes, 1855, p. 572–577 nos 881–882 et p. 1000 no 2340.

[14] *Metics and the Athenian Phialai–Inscriptions. A Study in Athenian Epigraphy and Law*, Stuttgart 2010 (Historia Einzelschriften, Heft 208).

[δίκαι ἀπρο]στασίου, voire des procès intentés contre les métèques qui ne paient pas la taxe qui leur incombe ou qui n'ont pas de *prostatès* comme leur impose la loi.

Même si on n'est pas d'accord avec cette interprétation, on doit reconnaître à E. Meyer le mérite d'avoir réuni de façon systématique tous les documents attiques mentionnant l'offre de *phialai* dans un contexte judiciaire. La restitution proposée par E. Meyer a été vivement critiquée. Dans son compte-rendu de l'ouvrage d'E. Meyer, K. Vlassopoulos met l'accent a) sur la mention de *phialai exeleutherikai* des inventaires de l'Acropole; b) sur le fait que, dans la plupart des cas, ce sont les défendeurs, les *apophygontes,* plutôt que les demandeurs qui offrent des *phialai* ; c) sur la présence de mineurs et d'esclaves publics comme demandeurs ; et, enfin, d) sur la présence de mineurs comme défendeurs.[15] La restitution *dikai aprostasiou* a été également mise en cause par Mills McArthur.[16] N'étant pas convaincu par les arguments de Meyer, il refuse de remplacer l'hypothèse de *dikai apostasiou* par une autre hypothèse, tout aussi fragile, qui est celle de *dikai aprostasiou* contre des métèques, procès aussi peu connus que ceux contre les affranchis. En dehors des objections sur certains points de détail que l'on pourrait avoir contre l'interprétation de Meyer, il résulte que dans aucun document les *dikai aprostasiou* ne sont associées à des *phialai*, contrairement aux procès concernant des affranchis, pour lesquels la locution *phialai exeleutherikai* est inscrite sur les fragments de l'Acropole susmentionnés (*IG* II² 1469A 5-6, 15).

Outre le participe *apophygôn*, le contexte judiciaire de l'offre des *phialai* est confirmé par *SEG* XXV 180 (*Agora* inv. I. 5656 ; Meyer 30). L'inscription en question appartient au deuxième type de *phialai*, c'est-à-dire celles qui ne contiennent pas le participe *apophygôn*. Toutefois, contrairement aux autres documents, il est question en l'espèce d'un tribunal qui intervient dans des affaires qui donnent lieu à l'offre de *phialai*.

Agora inv. I. 5656; *SEG* XXV 180; Meyer 30, col. I, lignes 12-19:

[Μαιμ]ακτηριῶνο(ς)
[...]τηι ἐπὶ δέκα. δικαστή-
[ρι]ον μέσον τῶν καινῶν.
[ἐ]πὶ τὸ ὕδωρ Μενεκλῆς Εὐω-
νυμεύς. ἐπὶ τὰς ψήφους
Ἱεροφῶν Ἄθεν : Π[. 4-5.]
φης Ἀλαιεύς : Ἀριστολέων
Ἀλιμούσι : Ἱερώνυμος [ἐκ] Κοί

«Le dix---ème du mois Maimakterion, au tribunal (qui se trouve) au milieu des nouveaux (tribunaux ? bâtiments ?).[17] *Meneklès du dème d'Euvonymeia étant*

[15] K. Vlassopoulos, *Bryn Mawr Classical Review* 2011.02.48.

[16] Mills McArthur, "Secretaries in the Athenian Phialai Inscriptions", *ZPE* 193 (2015), p. 103-109.

[17] A. L. Boegehold, *The Lawcourts at Athens*, p. 8.

surveillant de l'eau (clepsydre), Hiérophon du dème d'Oa étant surveillant du scrutin ---phes du dème d'Halai, Aristoleon du dème d'Halimos, Hiéronymos du dème de Koi(lè). »[18]

Sur les registres des polètes athéniens, le tribunal *es méson tôn kainôn* paraît intervenir dans des affaires concernant le non paiement des sommes dues par les fermiers d'impôts et par leurs cautions. [19] Parmi ces taxes se trouve le *télos metoikiou* (ligne 471), mention qui, d'après E. Meyer (p. 38-39), montre bien que le procès qui se déroula devant le tribunal du "milieu des nouveaux (tribunaux), ne serait ni une *dikè apostasiou* ni une *dikè aprostasiou*, mais "a taxe-case ending in an *apographe* (a "writing-up" or denunciation of a man's property), followed by confiscation and sale of the written-up property". Toutefois, estime E. Meyer, les compétences du tribunal en question ne se limitaient pas aux seuls procès relatifs au paiement de taxes. Elles s'étendaient aussi à des affaires "involving metics charged with non-payment of the *metoikion* could have been heard here, "introduced" and presided over by the polemarch and handled by five men in "the middle of the new courts", where, it turns out, other tax-cases were also heard." Rapprochant l'inscription en question au témoignage d'Aristote,[20] Rachel Zelnick-Abramowitz estime que les procès en question seraient des *dikai emmenoi*, c'est-à-dire des procès qui doivent être jugés dans un délai d'un mois. Elle suppose, en outre, que les cinq personnages du tribunal *es meson tôn kainôn* ne seraient autres que les cinq *eisagôgeis* qui introduisent les *dikai*

[18] Meyer, p. 14:"*On the tenth-and- [-] day| of Maimakterion,| in the middle court of the new (courts),|Menekles of Euonymon was supervising the water- clock,|Hierophon of Oa was supervising| the ballots, P[…]|PHES of Halai, Aristoleon| of Halimous, Hieronymos from Koi(le)".* Cf. Aristote, *Constitution d'Athènes* 66.2: Ἐπε]ιδὰ[ν δ' ἕλ]θωσιν καὶ ν[ενεμημένοι ἐφ' ἕκαστον ὦ]σιν [οἱ δικα]σταί, ἡ ἀρχὴ ἡ [ἐφεστηκυία ἐν τ]ῷ δικαστηρίῳ ἑκάστῳ [ἔλκει ἐξ ἑκάστου τοῦ] κιβωτίου πινάκιον [ἕν, ἵνα γένωνται δέκα], εἷς ἐξ ἑκάστης φυ[λῆς, καὶ ταῦτα τὰ πινάκ]ια [εἰς] ἕτερον κενὸν κ[ιβώτιον ἐμβάλλει, καὶ] τούτ[των ε'] τοὺς πρώτους λα[χόντας κληροῖ, α΄ μὲν] ἐπὶ τὸ ὕδωρ, τέτταρας δὲ [ἄλλους ἐπὶ τὰς ψή]φους, [ἵνα] μηδεὶς παρασκε[υάζη]ι τὸν ἐπὶ τὸ ὕδωρ μήτε τοὺς ἐπὶ τὰς ψήφους, μηδὲ γίγνηται περὶ ταῦτα κακούργημα μηδέν.

[19] *Agora* XIX. P. 26, lignes 460-462:

460 Σκιροφοριῶ[νος δε]-
υτέραι ἱσταμένου δικαστήριον τὸ μέσ[ον τῶ]-
ν καινῶν κυρωτὴς παρὰ πρυτάνεων : Εὐθυκλ[ῆς]
Εὐκλέους ⟦ἐκ Κ⟧ Εὐθυκλῆς Εὐθυμενίδου Μυρρ [: ἀ]-
πέγραψεν συνοικίαν ἐμ Πειραεῖ ὑπὸ Μουνιχ-
465 ίαι : ἧι γ : βορ : Εὐθυκλέους : Μυρ : οἰκία : νοτό : δὲ Πρ-
ωτάρχου : Πειρ : οἰκία πρὸς ἡλίο ἀνίο : ἡ ὁδὸς ἡ ἀ-
στία δυομέ : δὲ Εὐθυμάχου Μυρ : οἰκία οὔσης τῆ-
ς συνοικίας ταύτης Μειξιδήμου Μυρ : ὀφείλο-
ντος τῶι δημοσίωι τῶι Ἀθηναίων ἐγγύην ἣν ἐ-
470 νεγυήσατο Φιλιστίδην : Φιλιστίδου : Αἰξ : μετ-
ασχόντα τέλους μετοικίου ἐπὶ Πυθοδότου ἄ-
ρχοντος

[20] Aristote, *Constitution d'Athènes* 66. 2: Cf. ibid. 67. 3.

emmenoi parmi lesquelles figureraient, aux dires d'Aristote, les *dikai andrapodôn*, c'est-à-dire des procès concernant des esclaves. [21]

Il est difficile d'accepter dans leur totalité les arguments et les conclusions d' E. Meyer. En fait, si les attributions du tribunal *es meson tôn kainôn* comprennaient, aux temps d'Aristote, toute une série de cas concernant des paiements envers la cité, rien ne semble exclure le fait que parmi ceux-ci se trouvent également des redevances occasionnées par des affranchissements, pourquoi pas l'offre d'une *phialè* par l'affranchi qui a eu gain de cause ou par l'affranchisseur qui a retrouvé la propriété de son esclave.

À Athènes, l'offre des *phialai exeleutherikai* se rencontre uniquement entre les années 330 et 317/316 av. J.-C. Cet espace limité permet de songer à une mesure de circonstances, prise pour faire face à une situation irrégulière concernant des affranchissements déjà réalisés. Les *apophygontes* en question semblent être des personnes déjà affranchies et, de ce fait, autorisées à ester en justice. D'autre part, le fait que ces vainqueurs du procès résident séparément de leurs « adversaires », indique que les affranchissements défectueux ne sont pas de très fraîche date et que les procès en question ne sont pas liés à la *paramonè*.[22] En règle générale, cette dernière, obligerait l'affranchi de résider auprès de son ancien maître afin de lui offrir ses services.

La question qui se pose alors est de savoir pour quelle raison ces affranchis ont dû confirmer leur statut par le biais d'une décision du tribunal populaire?

Contrairement à la pratique romaine, en Grèce, l'affranchissement ne fut pas attaché à une forme particulière. La déclaration informelle et unilatérale du maître suffisait pour faire sortir l'esclave de l'état servile, la présence de témoins ou la rédaction d'un écrit n'étant point nécessaires pour la validité de l'affranchissement. En ce qui concerne plus particulièrement le droit attique, il est généralement admis que les affranchissements laissent la cité tout à fait indifférente, ne nécessitant l'intervention d'une instance publique que pour le seul paiement de la redevance prescrite au sujet des libérations d'esclaves. [23] Toutefois, en tant qu'acte informel, l'affranchissement pouvait dès lors être mis en cause par un tiers et l'affranchi se trouver contraint de retourner à l'état de servitude. Afin d'éviter cette éventualité, les personnes impliquées dans l'acte cherchent à investir les affranchissements de la plus grande publicité possible, allant de l'exposition de l'acte dans un lieu public jusqu'à la publicité ou la

[21] Aristote, *Constitution d'Athènes* 52. 2-3. R. Zelnick-Abramovitz, p. 287-288.

[22] Dans la documentation papyrologique, la paramonè apparaît comme une clause des contrats de travail. B. Adams, *Paramonε und verwandte Texte. Studien zum Dienstvertrag im Rechte der Papyri* (« Neue Kölner Wissenschaftliche Abhandlungen » 35 ; Berlin 1964).

[23] L. Beauchet, *Histoire du droit privé* II, p. 472 : « L'État ne prescrit point, à Athènes, des formes spéciales et solennelles pour les affranchissements. Ce sont là, en effet, des actes qui le laissent indifférent, en principe, puisque les affranchis ne deviennent point des citoyens, et l'État n'a dans les affranchissements qu'un intérêt tout à fait indirect, en raison de la redevance qu'il perçoit à cette occasion». J. Velissaropoulos-Karakostas, *Droit grec d' Alexandre à Auguste* I, p. 451-452.

proclamation de l'acte au temple, au théâtre, ou devant un organe collectif de la cité, tel le tribunal.

La publicité des affranchissements au temple, dont nous possédons de nombreux exemples pour la Grèce Centrale,[24] n'a pas laissé de traces en droit attique. Quant à la proclamation au théâtre, au dernier tiers du IVe siècle, Eschine mentionne la loi qui l'a interdite, ce qui indique que jusqu'au moment de sa promulgation, l'annonce des affranchissements au théâtre était une pratique fréquente et licite.

Eschine, *Contre Ctésiphon* 44 :
Συνιδὼν δή τις ταῦτα νομοθέτης, τίθησι νόμον οὐδὲν ἐπικοινωνοῦντα τῷ περὶ τῶν ὑπὸ τοῦ δήμου στεφανουμένων νόμῳ, οὔτε λύσας ἐκεῖνον· οὐδὲ γὰρ ἡ ἐκκλησία ἠνωχλεῖτο, ἀλλὰ τὸ θέατρον· οὔτ᾽ ἐναντίον τοῖς πρότερον κειμένοις τιθείς· οὐ γὰρ ἔξεστιν· ἀλλὰ περὶ τῶν ἄνευ ψηφίσματος ὑμετέρου στεφανουμένων ὑπὸ τῶν φυλετῶν καὶ δημοτῶν, καὶ περὶ τῶν τοὺς οἰκέτας ἀπελευθερούντων, καὶ περὶ τῶν ξενικῶν στεφάνων, καὶ διαρρήδην ἀπαγορεύει μήτ᾽ οἰκέτην ἀπελευθεροῦν ἐν τῷ θεάτρῳ, μήθ᾽ ὑπὸ τῶν φυλετῶν ἢ δημοτῶν ἀναγορεύεσθαι στεφανούμενον, μήθ᾽ ὑπὸ ἄλλου, φησί, μηδενός, ἢ ἄτιμον εἶναι τὸν κήρυκα.

« *Considérant cette situation, un législateur porte une loi qui n'a rien de commun avec celle qui concerne les citoyens couronnés par le peuple ; il ne supprime pas d'ailleurs cette dernière. Aussi bien n'était-ce pas l'Assemblée qui était importunée, mais les spectateurs au théâtre* ; *et cette loi n'était pas en opposition avec les lois anciennes, – ce serait illégal – mais elle s'applique aux citoyens qui reçoivent des couronnes de leurs tribus et de leurs dèmes sans que vous l'ayez décrété, à ceux qui affranchissent leurs esclaves et aux couronnes données par l'étranger.*[25] *Elle défend formellement d'affranchir un esclave au théâtre ou d'y faire proclamer qu'on a reçu la couronne des tribus ou des dèmes, ou, ajoute-t-elle, de n'importe qui d'autre, sous peine, pour le héraut, d'être frappé de privation des droits civiques.* »[26]

Le texte rapporté par Eschine, n'est en fait ni une loi sur les couronnes décernées par l'assemblée, les dèmes ou les tribus ni une loi sur les affranchissements. Dans son analyse de la loi sur la proclamation des couronnes au théatre de Dionysos, M. Canevaro soutient, avec raison, que la loi dont parlent Eschine et Démosthène (18.120) n'est pas une loi sur l'Assemblée, mais plutôt une loi sur le théâtre de Dionysos,[27] ou, ajoutons-nous, d'une loi sur la publicité de certaines actes (couronnements et

[24] L. Darmezin, *Les affranchissements par consécration en* Béotie *et dans le monde hellénistique*, Paris 1999.

[25] Le sens du mot *xenikos* étant ambigüe, l'expression *xenikoi stephanoi* pourrait signifier des couronnes décernées soit par des cités étrangères soit celles que la cité décerne à des étrangers.

[26] Traduction V. Martin et G. de Budé.

[27] M. Canevaro, *The Documents in the Attic Orators*, p. 290-295.

affranchissements) par le biais du théâtre de Dionysos et du héraut public.

Il s'agirait plutôt d'une mesure tendant à limiter l'intervention du théâtre et des spectateurs dans la vie de la cité et dans le fonctionnement de ses institutions. Le décernement de couronnes décidé par une tribu ou par un dème ou même par une cité étrangère est un événement à portée territorialement et institutionnellement limitée.[28] Pour être opposable à/par l'ensemble du corps civique, la loi exige la promulgation d'un décret du peuple au moyen duquel une mesure décidée par les instances locales ou étrangères engagerait l'ensemble de la cité. Quant à l'affranchissement au théâtre, la loi dont parle Eschine l'interdit formellement (μήτ' οἰκέτην ἀπελευθεροῦν ἐν τῷ θεάτρῳ), sans pour autant prescrire des sanctions contre l'affranchisseur ou contre l'affranchi. Aussi bien dans le cas de couronnements par les dèmes et les tribus ou par des instances étrangères que dans celui de la libération d'esclaves devant les spectateurs du théatre, la sanction est infligée contre la personne chargée de la publicité de l'acte, à savoir le héraut qui a fait connaître l'acte (couronnement ou affranchissement) au corps civique. Or, en dépit de la déclaration μήτ' οἰκέτην ἀπελευθεροῦν ἐν τῷ θεάτρῳ, la transgression de cette disposition ne semble pas atteindre les rapports entre affranchisseur et affranchi et annuler l'affranchissement et les conditions sous les quelles il a été convenu entre les deux parties. Ce que la présente loi interdit c'est de faire connaitre aux citoyens, dans le théâtre de Dionysos et de proclamer par le héraut public, un affranchissement déjà réalisé. Cela dit, même si elle ne prescrit pas les formes d'affranchissement, la cité intervient dans la publicité de ces actes pour interdire certains formes qui pourraient nuire au fonctionnement des institutions civiques. Pour être opposable à l'égard de tous, la libération d'esclaves, de même que le décernement de couronnes par des organes autres que le conseil ou l'assemblée du peuple, nécessitent des preuves sérieuses, et la présence des spectateurs n'en est pas une. En revanche, l'offre d'une *phialè,* le paiement d'une taxe ou la parution devant le tribunal constituent des formes de publicité aptes de fournir la preuve irréfutable de l'affranchissement.

L'hypothèse de l'intervention du tribunal dans l'affranchissement athénien est renforcée par un fragment du discours d'Isée *Pour Eumathès*, écrit après 358/357 av. J.C.

> Isée, frg. 8, *Pour Eumathès en revendication de liberté* (discours) 3 :
> καὶ μετὰ ταῦτα ἄγοντος αὐτὸν Διονυσίου ἐξειλόμην εἰς ἐλευθερίαν, εἰδὼς ἀφειμένον ἐν τῷ δικαστηρίῳ ὑπὸ Ἐπιγένους.
>
> « *Après cela, quand Dionysios s'est emparé de lui, je l'ai revendiqué comme un homme libre,*[29] *car je savais qu'Epigénès l'avait affranchi devant le tribunal.* »

[28] Parmi les exemples de décrets de dèmes en l'honneur de personnes qui ne sont pas membres du dème: *IEleusis* 71 (milieu du IVe siècle, décret en l'honneur d'un Thébéen). Ibid. 70, 80, 96, 99. *IG* II^2 1204 et 1214.

[29] D'après R. Zelnic-Abramowitz, p. 284, il ne s'agirait pas d'un procès ayant comme objet

Le cas litigieux a nécessité l'intervention de deux instances judiciaires appelées à se prononcer sur deux affaires différentes concernant le même affranchi. La première concerne un certain Epigènes qui a affranchi son esclave devant le tribunal (ἀφειμένον ἐν τῷ δικαστηρίῳ). La deuxième concerne la main mise sur l'affranchi (ἄγοντος αὐτὸν) par un certain Dionysios et la *vindicatio in libertatem*, l'ἀφαίρεσις εἰς ἐλευθερίαν par le plaideur.

La proximité chronologique entre le texte d'Eschine et les décisions judiciaires qui ont donné lieu à l'offre des *phialai* permet de considérer ces procès comme une mesure visant à rendre les affranchissements proclamés au théâtre opposables à tous. Parmi les personnes impliquées dans les procès occasionnés par les affranchissements, certains ont pu obtenir la confirmation de leur statut par le tribunal, alors que d'autres, moins nombreux, ont été contraints de retomber en état de servitude. L'autre partie du procès, les affranchisseurs, est constituée par des citoyens, des métèques, des isotèles, auxquels s'associent souvent des associations qui ont contribué financièrement à l'affranchissement de l'esclave (*éranos*). Le fait que les membres de l'érane figurent à côté des affranchisseurs que l'affranchi a vaincu (*apephygen*) n'est pas sans signification profonde. L'affranchi a gagné le procès contre quiconque pouvait réclamer un droit de saisie sur sa personne, à savoir son ancien maître et les individus qui ont payé le prix de sa liberté.

L'offre de *phialai* ou autres biens par les affranchis n'est pas une particularité propre au droit athénien. La pratique est attestée dans d'autres parties du monde grec, comme en Macédoine, à Gortyne et dans l'île de Cos.

En Macédoine, cette pratique est attestée par une lettre de Démétrios, fils d'Antigonos Gonatas, écrite en 248-247 av. J.-C., Démétrios confirme le maintien de cet usage par les affranchis macédoniens jusqu'au milieu du IIIe siècle, lorsque les *phialai* ont été remplacées par d'autres objets destinés à couvrir des besoins du temple.

M. B. Hatzopoulos, *Cultes et rites de passage en Macédoine,* Athènes 1994, p. 102-104 (« ΜΕΛΕΤΗΜΑΤΑ » 19); Idem, *Macedonian Institutions Under the Kings* I-II, Athènes 1996, p. 28-30, nº 8 (« ΜΕΛΕΤΗΜΑΤΑ » 19); *EKM* I, 3; *SEG* 43 (1993), 379, lignes 9-13 :

Δημήτριος Ἁρπάλωι χαίρειν. ὃ [ἀπε]λευ[θ]ερο[ύ]-
μενοι πρότερον φαίνονται φιάλ[ας ἀνατίθεσθαι]
εἰς τὸ ἱερόν. ἐπεὶ οὖν [ἐστιν] πε[ριο]υσία εἰς τὴ[ν]
χρείαν τὴν τοῦ θεοῦ, ἀνατιθέτωσαν ἀντὶ
τῶν φιαλῶν κέρατα [κ]αὶ σκύφους.

« *Démétrios à Harpalos. Salut. Il semble que dans le passé, les affranchis consacraient au sanctuaire des phialai. Attendu qu'il s'agit de biens destinés aux besoins de la*

un affranchissement, mais d'une affaire relative à une *aphairesis eis eleutherian*.

déesse, qu'ils consacrent à la place des phialai *des* kérata *et des* skyphoi. »[30]

L'offre de *phialai* à l'occasion des affranchissements est aussi prévue par un décret de Gortyne, datant d'environ 150 av. J.-C., malheureusement très mutilé.

Ed. pr. A. Magnelli, « Un decreto sulla manomissione servile da Gortyna (Creta) (GO 352+IC IV 232) : edizione preliminare », *Sileno* 23 (1997), p. 165-173 ; *Idem*, « Una nuova epigrafe gortinia in materia di manomissione », *Dike* 1 (1998), p. 95-113 ; *SEG* 48 (1998), 1208, lignes 1-9 :

1 [Ἐπὶ] τῶν Αἰθαλέων κορμιόν[των τῶν] σὺν Ἀκρισίῳ τῶ Δορίῳ τάδ ἔϝαδε [- - - - - πρὸ ? τᾶς]
[Ἐλ]ευσινίας νεμονηίας τᾶς [*ca* 6 lettres]σας τὸ μὲν γιννόμενον τᾶι πόλι τᾶς λ[ύσεως ? - - -]
[ἐπ]ιτιθέτω δὲ ὁ ἀπολαγαθθὲνς [τᾶς ἀ]πολαγάξιος καὶ τᾶς χρηματίξιος· αἰ[- - - -- -]
[*ca 3 lettres*]ς φιάλαν ἀ[ργ]υρίαν εὔκονσα vac ιε. ἐ[ν ταῖ]δ δεκαδύο ἀφ' ἃς κ' ἁμέρας ἀπολαγα[θθῆι - -]
5 [τᾶ]ι Ἥραι τᾶι [Κ]υδίσται ἐν τῶι Ϝοίκωι κα[τὰ τ]αυτὰ καὶ παρι[στ]άτω ὁ ἀντιθένς τ[- -]
[*ca 3 lettres*] π̣ε̣δ̣ὰ κ[όρ]μω γένηται ἐλεύθερος [*ca 4 lettres*]ι μῆνα κ' ἁμέραν [*ca 3 lettres*] τὸν ἀπολαγάσα[ντα - - - -]
[*ca 3 lettres*] ἀπολαγαθθῆι καὶ τὰν χρημάτιξιν [διὰ τ]ῶ χρεοφυλα[κίω]· αἰ δέ τις μὴ ἀνθ[είη - - - - τὰν]
[χρ]ημάτιξιν· τὰ δ' ἄλλα ἦμεν τῶι τε ἀ[πολα]γάσαντι [καὶ] τῶι ἀπολαγαθέ[ντι - - -]
[ὁ ἀπ]ολελαγασμένος ἐλεύθερος μὴ - - - - (l*a suite de l'inscription est très mutilée*).

« Les Aithaleis étant cosmes sous la présidence d'Akrisios fils de Dorios. Voici la décision (de la cité). - - - avant le début (le premier jour ?) du mois Eleusinios - - (après avoir payé ?) la somme due à la cité - - - l'affranchi versera le prix d'affranchissement et celui de la chrèmatixis.[31] *- - - - (Que soit offerte) une phialè d'argent d'un poids*

[30] La pratique de l'offre d'un *skyphos* par les affranchis continue à être observée en Macédoine romaine ; *SEG* 46 (1996), 731 ; *ed. pr.* V. Allamani-Souri – E. Voutyras, « New Documents from the Sanctuary of Herakles Kynagidas at Beroia », dans : Ἐπιγραφὲς τῆς Μακεδονίας. *Γ' Διεθνὲς Συμπόσιο γιὰ τὴ Μακεδονία, Θεσσαλονίκη, 8-12 Δεκεμβρίου 1993* (Θεσσαλονίκη 1996), p. 15-16 et 26-28 ; *EKM* I, 31-33 (fin du IIe s. av. J.-C. – Ier s. ap. J.-C.). La contribution de chaque esclave pour le *skyphos* votif s'élève à 50 drachmes ; les onze esclaves affranchis ont versé un total de 550 drachmes.

[31] D'après l'éditeur A. Magnelli (*op. cit.*, p. 102), le mot *chrèmatixis* aurait probablement désigné le montant payé par l'affranchi pour l'inscription de l'acte sur stèle et son exposition en lieu public. La cité aurait ainsi perçu pour chaque affranchissement deux paiements différents (*to ginomenon* et la *chrèmatixis*), hypothèse peu probable. Pour le sens religieux

de 15 (statères ?),[32] *dans les douze jours qui suivent l'affranchissement, à l'oikos d'Hèra Kydista. De même devra assister le 'consacrant' – – – en présence du cosme, il deviendra libre – – le mois et le jour – – l'affranchi – – – qu'il a été affranchi et la chrèmatixis au bureau de la 'garde des dettes'. Si personne ne consacre – – – la chrèmatixis. Pour le reste, que l'affranchisseur et l'affranchi puissent – – l'affranchi libre de ne pas – – – »*

En dépit de son mauvais état de conservation, le décret gortynien nous fait connaître les différentes opérations financières auxquelles donnent lieu les affranchissements. Outre le prix que l'esclave verse à son maître pour obtenir sa liberté, tout affranchissement est précédé du paiement d'une somme (*to ginoménon*) à la cité ainsi que d'une autre prestation, la *chrèmatixis*, dont les destinataires ne sont pas mentionnés. Enfin, le décret gortynien prescrit l'obligation de consacrer une *phialè*, sans pour autant préciser à qui incombe cette charge (l'affranchi ? l'affranchisseur ? ou bien un tiers, garant de l'acte ?). Quoi qu'il en soit, laissant de côté les rapports des affranchis avec leurs anciens maîtres, le décret gortynien témoigne du souci de la cité de sauvegarder les droits à percevoir sur les affranchissements d'esclaves et de faire connaître au public l'accomplissement des différentes prestations associées aux affranchissements. [33]

En imposant l'obligation d'offrir une *phialè* ou un *skyphos*, ou encore des sacrifices, la cité permet aux affranchis d'obtenir une preuve irréfutable de leur libération. C'est ainsi qu'au cours du IIe s. av. J.-C., à Cos, les autorités refusent à l'affranchi toute preuve écrite de sa libération s'il n'a pas préalablement offert les sacrifices prescrits par la loi.

IG XII 4 (1) 318; M. Segre, *Iscr. di Cos*, ED 144, lignes 4-9 :
[κατὰ ταὐτὰ δὲ] θυέτω καὶ τῶν ἐπευθε[ρουμένων ἕκαστος κατὰ]
5 [τὰ γεγραμμέν]α, καὶ τοὶ ταμίαι (τὰς) δέλτο[υς μὴ διδόντω τοῖς ποι]-
[ευμένοις τὰν ἀ]πελευθέρωσιν μηδὲ ποιεί[σθων τὰν ἀναγραφὰν]
[τὰν δαμοσίαν τ]ᾶς ἀπολυτρώσιος αἴ κα μὴ ὁ ἱερ[εὺς ἐμφανίσηι τὰν]

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du terme χρηματίζειν-χρηματισμός (associé à un oracle), L. Robert, *Hellenica* I, p. 72, n. 1 ; *ibid.* II, p. 148 ; *ibid.* XI-XII, p. 455 ; *Idem*, N*oms indigènes dans l'*A*sie-*M*ineure gréco-romaine* (Paris 1963), p. 181, n. 2. Plus récemment, K. Buraselis, *Kos between Hellenism and Rome*, p. 19.

[32] Pour le poids des *phialai* offertes dans les différents sanctuaires du monde grec, voir A. Bresson, *Recueil des Inscriptions de la Pérée rhodienne (Pérée intégrée)* (« Annales Littéraires de l'Université de Besançon » 445 ; Paris 1991), p. 75, *ad* no 48 (inventaire d'un sanctuaire).

[33] A. Magnelli, *op. cit.*, p. 102 : « Una simile disposizione potrebbe far riferimento a un istituto giuridico esistente in età ellenistica e ben attestato negli atti di manomissione : mi riferisco alla *paramonè* ». Cf. les éditeurs du *SEG* 48 (1998), *ad* n° 1208 : « in addition to the amount paid for the manumission (L. 3 : [τᾶς ἀ]πολαγάξιος καὶ τᾶς χρηματίξιος), the slave had probably to deliver a *phiale* in order to be released (λύσις) from the obligation of the παραμονή. »

[τεταγμέναν θ]υσίαν ἐπιτετελέσθαι ἢ ὀφειλό[ντω ἐπιτίμιον δραχ] -
[μὰς] ἱερὰς Ἀδραστείας καὶ Νεμέσιο[ς.

« *De même devront sacrifier tous ceux qui seront affranchis, selon les prescriptions. Que les trésoriers ne donnent pas les attestations écrites aux affranchisseurs et qu'ils n'inscrivent l'affranchissement sur le registre public que si le prêtre confirme que le sacrifice prescrit a été réalisé* ; *sinon ils (les trésoriers) seront frappés (d'une amende de - -drachmes) au profit du sanctuaire d'Hadrastos et de Némésis.* »

Toujours à Cos, la loi sacrée sur la vente de la prêtrise d'Aphrodite Pandamos et Pontia, datant de 125-100 av. J.-C., impose aux affranchis une taxe supplémentaire, en plus de celle qu'ils paient déjà.

IG XII 4 (1) 319; R. Parker – D. Obbink, « Sales of Priesthoods on Cos I », *Chiron* 30 (2000), p. 415-449 ; *SEG* 50 (2000), 766, lignes 25-27 :
25 ἀπαρχέσθων δὲ καὶ τοὶ ἐλευθερούμενοι ἐν ᾗι κα ἐνιαυτῷ ἐλευθερωθῶντι σὺν τῶι πρότερον καταβαλλομένωι δραχμὰς πέντε, ποιούμενοι τὴν καταβολὰν ἐπὶ τὸς ταμίας.

« *Que les affranchis aussi versent, dans l'année qui suit leur affranchissement, en plus de la somme qu'ils payaient déjà, cinq drachmes, payables aux trésoriers.* »

L'enregistrement de l'acte d'affranchissement sur les registres publics et, dès lors, la confirmation par les autorités publiques du statut d'homme libre, nécessitent une prestation de la part de l'affranchi. Qu'il s'agisse de *phialai*, de *skyphoi*, de sacrifices ou (et) du paiement d'une taxe, l'esclave libéré devra les offrir afin d'avoir une preuve irréfutable de son nouveau statut. Une fois cette contribution réalisée, l'acte d'affranchissement figurera sur les registres officiels de la cité et l'affranchi sera éventuellement muni d'une attestation écrite confirmant son statut. En cas de non-versement de la prestation due à la cité (ou au temple), l'esclave affranchi par son maître jouit, certes, du statut d'homme libre, mais sa liberté n'est pas facilement démontrable.

Toutefois, ni à Cos, ni à Gortyne ou en Macédoine la valeur de l'objet ou le montant de la somme offerte à l'occasion de l'affranchissement ne semble s'élever à l'équivalent des cent drachmes des *phialai* athéniennes. Si l'hypothèse de procès occasionnés par des « affranchissements irréguliers » est correcte, les cent drachmes représenteraient soit le « prix de la liberté », sous forme d'offrande à la divinité, payé par l'affranchi qui a eu gain de cause, soit le « prix de l'esclavage » à la charge du patron qui a affranchi son esclave sans respecter les prescriptions de la loi rapportée par Eschine dont le témoignage pourrait venir à l'appui du fragment d'Isée.

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NOTE TO THE *PHIALAI EXELEUTHERIKAI*. RESPONSE TO VELISSAROPOULOS-KARAKOSTAS

J. Velissaropoulos-Karakostas has given us a new interpretation of the phialai inscriptions, the 33 fragmentary texts—now 34—that may have appeared on 17 (Lewis) or 18 (Meyer) stēlai.[1] She begins by combining an outline of the main features of these texts with a synoptic view of past interpretations—and there are a great many. It goes without saying that texts that elicit plentiful interpretations are difficult texts, and that the announcement of a new interpretation implies the inadmissibility or implausibility of previous ones. In such circumstances, where there has been no final consensus about what certain texts mean or what they represent, even to report their contents as a preliminary to further discussion is no easy task—and Velissaropoulos has carried it out with extraordinary skill—I note, for example, how careful she is in giving a designation to these texts: they are in the first instance and most often *phialai exeleutherikai*, but also more simply 'a group of documents' or 'inscriptions.' The first designation, however, is the most significant: for Velissaropoulos sees the texts as part of the manumission process and thus at the start we see that she has left behind the most recent detailed interpretation, that of Elizabeth Meyer.

Velissaropoulos begins with a concise depiction of prevailing views of the nineteenth and twentieth centuries (the twenty-first century is excluded as there is no 'prevailing view' at the moment); the most basic one is this: in Athens, from

[1] The newest fragment (discovered on the Acropolis in 1858, now lost) was edited by G. Malouchou 2013: 202-207.

approximately 330 to 317/16 BCE, the emancipations of slaves stemmed from a judicial process designated the *dikē apostasiou* (as restored by Wilamowitz in the heading of IG II^2 1578); the emancipations were accompanied by dedications of silver bowls weighing 100 drachmas each. Kränzlein provided a typology of the texts at the first Symposion meeting in 1971 and Velissaropoulos gives an artful selection of examples of each.

(1) The first and most numerous type supplies the fullest information about the parties: slave name in the nominative, then dwelling place, craft, and participle ἀποφυγών or ἀποφυγοῦσα; next, patron's name in the accusative with demotic or domicile, and finally the mention of the bowl and its weight.[2] The participle (ἀποφυγών or ἀποφυγοῦσα: an analogous example in *IDélos* 104 [26] C is offered in n. 5) appears in a judicial context and indicates that the defendant, victorious in a real or fictive trial against his master, dedicates a bowl that is paid for by the latter.

(2) The second type, fewer in number, differs from the first by changes in grammatical case: now the patron's name appears in the nominative and the slave's name in the accusative; additionally, no participle follows the slave's name (neither ἀποφυγόντα nor ἀποφυγοῦσαν); still, the bowl and its weight are mentioned. In this type, 'the processes were most likely completed without, properly speaking, a victorious party, the freedman returning to his servile status and the phialē being offered by the patron' (my trans. of Velissaropoulos).[3]

(3) The third type, represented by only two fragments (IG II^2 1576 and 1578), has the slave name in the nominative, then craft and domicile, abbreviations of the aorist of ἀποφεύγειν, followed by the patron's name in the accusative; in these, there is no mention of a bowl (contra Meyer 2010: 136), either because the bowl is to be inferred, or (more plausibly for Velissaropoulos) because the ἀποφυγών had already dedicated a bowl during an earlier phase of the procedure of his emancipation.[4]

Velissaropoulos then turns to variant nineteenth and twentieth century views of these documents: the bowls mentioned in them were offered to a divinity by a manumitted slave who had been acquitted in a *dikē apostasiou* brought by his master on the grounds that he had deserted him or had not fulfilled his final obligations; victorious now, the manumitted slave's status as a freed man was definitively confirmed. Further refinements evolved: the *dike apostasiou* was a collusive fiction

[2] Kränzlein 1975: 256 actually designates this as a 'Bürgername' and does not mention domicile here, thus ignoring at this point in his essay that the names of metics also appear in this position.

[3] Here we have (what seems to me to be) a blend of the prevailing twentieth century view for the first type and something of Kränzlein's for the second; the latter thought that the second type was simply a change of formula from the first: manumissions took place in the dikasteria and the former master paid a fee in the form of a bowl.

[4] Kränzlein (1975: 264) thought the bowl's absence indicated dedications of another sort resulting from a *dikē apostasiou*.

between master and a slave; victory over his master conferred total freedom on the slave. Consensus among scholars, however, remained elusive; some objected that a freedman whose status was in doubt would not be able to appear in court; moreover, the fact that metics and foreigners appear as the masters of slaves renders any trial, real or fictive, impossible; accordingly, some concluded that the offering of a bowl by the freedman was a formality that aimed at publicity for his freedom upon manumission—it was not the result of a trial.

When Velissaropoulos steps fully into the twenty-first century, she takes up Elizabeth Meyer's provocative thesis that the phialai inscriptions emerge from *graphai aprostasiou*, from trials against metics who did not pay the *metoikion* or who did not have a *prostatēs*. Velissaropoulos takes it up—but only to put it down quickly, for, understandably, due to time and space constraints, she relies upon Vlassopoulos' oft-cited negative critique of Meyer's explication of the judicial context.[5] She then focuses upon the brief period, 330-317/6, during which these inscriptions appeared and suggests they were a remedy for some unknown set of circumstances for 'affranchisements déjà réalisés':[6] the ἀποφυγόντες appear to have been freed earlier (they are already living apart from their 'adversaries') and by reason of their freedom, are able to sue in court; moreover, their residence apart from their 'adversaries' suggests that the process in question was not connected to *paramon*ē (by which Velissaropoulos implies that the phialai inscriptions have nothing to do with *dikai apostasiou*). She then asks—why should emancipated slaves have their status confirmed by a court decision?

Here Velissaropoulos enters upon the most interesting part of her argument. She first points out that because the emancipation procedure in Athens was informal and the city did not intervene except to exact a tax and require the former master to serve as *prostatēs*, the status of a freedman might easily be questioned as it largely lacked documentation and publicity. And while such publicity might be given by proclamation in a temple or theater, such proclamations of slave manumissions, as well as proclamations of 'foreign crowns' and individuals crowned by a tribe or deme in the theatre of Dionysos, had apparently at one time been so frequent and so noisome in Athens that a law (the 'Dionysiac law') was enacted, forbidding those very proclamations—unless 'the People vote' (Dem. 18.120-121; Aeschin. 3.32; 34, 36, 44; Canevaro 2013).[7] Velissarpoulos offers an original

[5] Vlassopoulos 2011.02.48.

[6] Velissarpoulos does not address Meyer's (2009: 67) argument, accepted by many scholars (including Vlassopoulos), that the bowls themselves may have been inscribed and dedicated as early as the 350s but began to be copied into inventories only in 330.

[7] Two laws are at issue in these passages, one regulating the awarding of honors by the Assembly and Council, the other regulating proclamations in the theatre of Dionysos. When Aeschines reports the latter law in 3.44, he omits the 'permission clause' (allowing proclamation if 'the People vote'). Modern scholars almost uniformly believe that the permission clause belongs to the Dionysiac law; thus: Goodwin 1904/2014: 262-64; Gwatkin

and interesting interpretation of this law— indeed, its meaning has largely been ignored by scholars who have mostly contented themselves with disentangling the 'Dionysiac law' from the 'Assembly law'. For Velissarpoulos, the law curtailed the intervention of the theatre and spectators in functions that properly belonged to the city's institutions; decreeing a crown in a deme or tribe provided an honor that was limited in scope, both territorially and institutionally; it was not to be enforceable by or before a civic body—it could not be so informally foisted upon the city's notice—except by a decree of the people. Velissarpoulos points out that Aeschines does not mention penalties in the law for the owner who frees the slave nor for the slave who has been freed—but only for the herald who makes the proclamation (he is to be *atimos,* 3.44), that is, only for the person who makes the act known to the people. Moreover, while the law apparently declared μήτ' οἰκέτην ἀπελευθεροῦν ἐν τῷ θεάτρῳ, it seems not to have nullified the emancipation itself—the freeing of the slave had taken place before the proclamation was made. Hence it was the act of making the emancipation public—to so large a public—that the law prohibited; this was viewed, Velissaropoulos argues, as injurious to the functioning of civic institutions. Not only a decree of the Council and Assembly was required for such public recognition, but also serious proofs and testimony that would permit the honor (the proclamation of an emancipation or of a crown conferred by deme, tribe, or foreign city) to be enacted in the first place. A theatre could not perform this function—not even the theatre of Dionysos; this is an important observation, for it suggests that a significant 'red line' was drawn between the activity of the theatre and that of the Pnyx and bouleutērion.

But what could furnish serious proof of an emancipation? Velissaropoulos answers: 'l'offre d'une *phialè,* le paiement d'une taxe ou la parution devant le tribunal constituent des formes de publicité aptes de fournir la preuve irréfutable de l'affranchissement.' She then chooses to focus on the dikastērion and bolsters her hypothesis of its intervention in emancipation with Isaios fr. 8 (= Thalheim XVI. fr. 15 = Dion. Hal. *Isaios* 5); here Dionysios, who preserves the fragment, reports that the Athenian citizen who had removed Eumathes into freedom and defended him in court had said: ἄγοντος αὐτὸν Διονυσίου ἐξειλόμην εἰς ἐλευθερίαν εἰδὼς ἀφειμένον ἐν τῷ δικαστηρίῳ ὑπὸ Ἐπιγένους. Velissaropoulos depicts the two instances of status determination here: the first concerns a certain Epigenes who had emancipated his slave Eumathes before the court (ἀφειμένον ἐν τῷ δικαστηρίῳ ὑπὸ Ἐπιγένους) and the second concerns the speaker's 'removal [of Eumathes] into freedom (ἐξειλόμην εἰς ἐλευθερίαν)' when Dionysios tried to enslave him (the subject of the current lawsuit). Without further discussion of the cases in Isaios, Velissaropoulos moves forward and connects the temporal proximity of Aeschines' speech with the court cases which ended with the dedications of phialai: the temporal proximity allows us

1957: 136-39; Canevaro 2013: 293-94; Harris 2013: 233. That the clause belongs instead to the 'first law': Blass 1887-98: iii/2, p. 213 (refuted by Canevaro 2013: 291, n. 142).

to consider the court cases (alluded to on the phialai) as actions that would replace the proclamations in the theatre and that would make the emancipations enforceable. She then adduces a number of inscriptions from other Greek cities in which the dedication of a bowl or the payment of a tax was required by law when emancipations took place; the inscribed bowl or official register of taxes would thereafter serve as proof of emancipation. Velissaropoulos concludes by arguing that the informality of the emancipation process in Athens may have often led to disputes that called for settlement in a court; apparently, these would be instances of the court's intervention and would produce, in the future, the irrefutable evidence of the freed person's status (like the inscribed bowl and tax registers in other cities): the Athenian phialai worth 100 dr. apiece might represent either the price of a slave's freedom in the form of a dedication to a divinity, paid by the emancipated person who won his case, or the price of enslavement, paid by the slave's owner who had emancipated his slave without respecting the Dionysian law reported by Aeschines.

There is much to commend here, especially the notion that the courts had stepped in to provide publicity for status and hence the enforceability that the Dionysiac law had curtailed; this is an important and stimulating argument about the active and evolving functioning of the Athenian *dikastastēria*. More might be said, however, of the fragment from Isaios: surely the earlier case depicted there (καὶ μετὰ ταῦτα ἄγοντος αὐτὸν Διονυσίου ἐξειλόμην εἰς ἐλευθερίαν εἰδὼς ἀφειμένον ἐν τῷ δικαστηρίῳ ὑπὸ Ἐπιγένους) needs some argumentation before one can claim persuasively that it shows 'un certain Epigènes qui a affranchi son esclave devant le tribunal'. Has an emancipation become a legal proceeding? How so? Or was Eumathes' status as a freedman disputed and was he then 'acquitted' (ἀφειμένον) through the agency of a certain Epigenes who had 'removed him into freedom' and then had spoken on his behalf in a *dik*ē *exaireseōs*, just as the speaker of the Isaios fragment is now doing? Or suppose Epigenes was being sued and his opponent had challenged him to hand over his slave Eumathes, could Epigenes have responded by freeing him then and there (cf. the conduct ascribed to Pasion in Isokr. 17. 14 and 49), and might that be the phraseology used in this passage, viz., 'Eumathes was released (sc. « as free ») in the court'?[8] Regarding the 100 dr. that might represent 'le « prix de l'esclavage » à la charge du patron qui a affranchi son esclave sans respecter les prescriptions de la loi rapportée par Eschine. . .', this is mere hypothesis; there is no evidence for such a penalty. Nonetheless, the notion that the lawsuits alluded to on the bowls could be of different types is appealing (e.g., a *dik*ē *exaireseōs*, *dikē apostasiou,* or even a *graphē aprostasiou*); this may not be what Velissaopoulos was arguing, but I think her argument leads in this welcome direction.

[8] Note that ἀφιέναι commonly means 'release' and as a 'legal' term commonly means 'acquit'. In contexts where an emancipation is meant, ἐλευθέρ- is added, thus meaning 'released as free': see Dem. 29.25-6; D.L. 3.41; 5.55; cf. [Dem.] 59. 30: ἀφιέναι οὖν αὐτῇ ἔφασαν εἰς ἐλευθερίαν χιλίας δραχμάς, πεντακοσίας ἑκάτερος..

David Lewis offered wise and often quoted comments at the end of his *Hesperia* article in 1959 (p. 239): 'The truth of the matter is that our evidence is inadequate. Another fragment of the law of IG II^2 1560 or another prescript would improve our position. At the moment we cannot do more than guess at the legal procedure involved, and in the absence of precise dates, speculation as to the political background of this large body of inscriptions is quite unprofitable.' Nonetheless, headway into dating has been made since 1959 by more refined prosopography and by a better understanding of the methods of inventorying; and scholars such as Velissaropoulos, Meyer, and Zelnick-Abrahamson have allowed us to reflect more deeply on the workings of legal and bureaucratic (inventorying) procedures even if these have not yet become certain or fully explained. While any solution should stand upon a thorough examination of all the problems in these texts, I should like at the end of this review to throw out some suggestions.

First, as intimated already, I do not think we should be led by the different restorations of the heading in the *cymation* of *IG* II^2 1578 (Meyer 29) to think that all the cases involved either *dikai apostasiou* as proposed by Wilamowitz or *graphai aprostasiou* as proposed by Meyer.[9] Perhaps different kinds of case or different sets of circumstances, all having to do with bowls depicted in inventories as *exeleutherikai,* led to the dedication of the bowls so designated: indeed, Velissaropoulos has set down important groundwork here for such a thesis—and such circumstances might even include the bowl as a tithe for a frivolous prosecutor in a *graph*ē *aprostasiou*.[10] Secondly, I think we should pay careful attention to Meyer's description of the inventory process by which she argues that the phialai texts were inscribed: namely, that they were copied from the bowls themselves; the inventory-writer himself may be responsible for the change in formulae mentioned earlier.[11] Surely we should keep this important figure in mind; and also the temporal distance between the inscribing of the inventory and the original inscribing of the bowl. Although the analogy may seem grossly inexact, still it may be helpful to think of other kinds of

[9] Wilamowitz' restoration (1887: 110 n. 1) was incorporated into IG II^2 1578.2.

[10] This may have been a time when prosecutorial penalties were being reconsidered: it was in the late 330s, as most scholars think, that *eisangelia* became a procedure that carried a penalty for a prosecutor; see, e.g. Phillips 2006: 275-277.

[11] Meyer 2009: 67, about the 'inventory-writer': while he has all the names from the phialai themselves, 'probably inscribed on the exterior circumferences of the vessels in small and squashed letters, he has no verb of dedication. Who—metic or prosecutor—had dedicated the phialē? It was argued above that the failed prosecutor tithed his fine, but the escaped metic actually made the dedication to Zeus Soter/Eleutherios; both names might have been inscribed on the phialē to give credit (in telegraphic fashion) for both acitivities. [Drawing] But the information on the phialē might have been too telegraphic for inventory-writer or mason, and his (or their) uncertainty resulted in two different formulae on the lists, as well as erasures changing the case of *phialē* from accusative to nominative in *IG* II^2 1569, and nominative to accusative in *SEG* XXV.180 (Agora inv. I.5656).'

original dedications that are extant today. I offer just one, of a common type: *IG* II^2 3201, an Attic base ca. 346/5, with three wreaths for an unnamed man; each wreath is inscribed inside as follows:

sinistra in corona:	media in corona:	dextra in corona:
ὁ δῆμος	ἡ βουλή.	οἱ φυ̣[λέται]
ταξιαρχή-		γυμν[ασι]-
σαντα		αρχή[σαν]-
ἐπὶ Ἀρχίο		τα Ἡφ[αί]-
ἄρχοντος.		στια.

inside first wreath:
'The *demos*: his service as taxiarch in the archonship of Archios.'
inside second wreath:
'The *boule*.'
inside third wreath:
'The *phyletai*: his service as gymnasiarch during the Hephaestia.'

There are no verbs; in each case we must supply, 'decrees a wreath for' or simply 'wreaths'. The etched wreath on the statue base serves as an icon that graphically depicts the missing word/s. For the inscriber of the bowl, the bowl itself may have similarly stood for missing words: 'dedicates the bowl'; for surely the inscriber of the bowl didn't write them (at least, not the word 'bowl')—the inscriber of the inventory did. If this is so, then the nominative subject in the *phialai* texts might not represent a court 'winner' but simply the provider of the bowl; or possibly the nominative represents 'X the one [freeing or releasing (possibly as a result of a trial, who knows?)] Y.' If so, then the verbal expressions may conceivably have been represented in thought as ὁ ἀπαλλάσσων or ὁ ἀπελευθερῶν; if written in abbreviation, surely the meaning will have confounded the inscriber of the inventory: X ἀπ Y. And it will be he, the inscriber of the inventory, who added the bowl or not, nominative or accusative, as the wind blew.

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MARIA NOWAK (WARSAW)

THE FATHERLESS AND FAMILY STRUCTURE IN ROMAN EGYPT[1]

I. Introduction – Terms and Sources

Illegitimacy has not been a popular subject among students of Graeco-Roman Egypt, and there are only a few rather brief (but important) articles devoted to this problem.[2] The number of documents containing direct references to extramarital

[1] I am greatful to dr Jesse Simon for correcting the English version of this article.

[2] Calderini (1953) approached this issue at the beginning of the 1950's: he noticed that terms describing people as 'illegitimate son/daughter', 'fatherless', 'bastard' appeared mostly in sources from the Roman period which, in his opinion, meant that 'illegitimacy' appeared in Egypt only in Roman times. Perhaps the best known work devoted to illegitimate children in Roman Egypt is an article by Youtie (1975), where he concluded that: children born out of wedlock were not socially stigmatised in Roman Egypt. Moreover, bastardy in Egypt was a Roman concept applied mostly to families of Roman soldiers. In an opening lecture at the 27th International Congress of Papyrology, Roger Bagnall discussed Youtie's statement and noticed that the group of illegitimate children could have not been limited to children born to Roman soldiers, as individuals recognised as illegitimate also appear in papyri dating from after the abolition of the marriage prohibition concerning soldiers (Bagnall [forthcoming]). Recently Myrto Malouta has approached the terms – ἀπάτωρ & χρηματίζων/χρηματίζουσα μητρός – which she recognised as a formal description of individuals born out of wedlock (Malouta [2007]; Malouta [2009]). In the most recent work devoted to illegitimate children Broux (2015) discussed both Malouta's and my statements (Nowak [2015]) concerning the social standing of people born out of wedlock and the origin of their descriptions; she rightly noted that, in some cases, being an illegitimate child had negative social, legal and administrative consequences. The specific aspects of illegitimacy in the Roman empire were approached more eagerly by students of the ancient world. One such popular topic was the families and children of Roman soldiers. Among

children, however, is abundant: the terms ἀπάτωρ ('fatherless', 'without father') and χρηματίζων/χρηματίζουσα μητρός ('officially known as son of such-and-such mother'), commonly recognised as descriptions of illegitimate children, are attested in over 300 documents,[3] while the number of individuals indicated by either of these terms is over 600, as Herbert Youtie has already observed.[4] Other descriptions, which appear less frequently in papyri, are: νόθος ('bastard'), *spurius*/σπούριος (a term derived from the Roman *praenomen* given as a patronym to illegitimate children – *Spurii filius/filia* – but used as a distinct term in the period discussed here), ὀθνεῖος, ἐκ μὴ νομίμων γάμων, παράνομος, *filius/filia naturalis, ex incerto patre,* and αλλότριος.[5]

Furthermore, there were other, less explicit ways of indicating individuals as having been born out of wedlock; for instance, if someone was not identified by a patronym, he or she was perhaps an illegitimate child (although this may also be the result of a scribal omission). At least three methods of describing people without using a patronym appear in documents from Roman Egypt: a personal name followed by the word μήτηρ (in the genitive) and a metronymic: (Χαιρήμων μητρὸς Θασῆτος); a personal name followed only by a female name in the genitive (Χαιρήμων Θασῆτος); a personal name not followed by any ancestral name (Χαιρήμων).[6] Any individual who had only the *nomina* of their mother must certainly have been illegitimate, as Beryl Rawson observed in inscriptions from Roman Italy.[7]

Among the descriptions in papyri which allow us to recognise illegitimate children (even if they do not necessarily indicate extramarital status) we find *origo castris*, which was given to the sons of soldiers born in *canabae*. It is possible that the name Castrensis (Greek Καστρῆσις) played the same role.[8] The term φῦσικός[9] may have also been an indication of extramarital status, but such a hypothesis can be neither proven nor disproven based on the current state of the sources.

Indeed, none of the terms and expressions listed in this section indicate illegitimacy with absolute certainty. Even if we assume that every person whose name was followed by ἀπάτωρ – a term which may also refer to an individual disowned by their father or orphaned[10] – was an illegitimate son or daughter, it would be methodologically unsound

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the recent works a monograph authored by Phang (2001) or the 24th volume of *Cahiers du centre Gustave Glotz* devoted entirely to the Roman army must be mentioned. The different aspects of everyday life as seen through ostraca and papyri from Egyptian military camps located in the Western Desert were studied by Cuvigny (2003).

[3] The provisional list of documents: http://marianowak.bio.wpia.uw.edu.pl/files/2014/06/Appendix.pdf.

[4] Youtie (1975) 731: about 340 texts and 640 individuals.

[5] For the discussion on those and other terms used to indicate someone's extramarital status see: Calderini (1953) 358.

[6] Calderini (1953) 362 n. 3.

[7] Rawson (1966).

[8] Sołek (2015) 104.

[9] Sometimes used as counterpart of the word *naturalis* in Byzantine doctrinal sources. Wolff (1945) 31.

[10] *TLG* s.v. ἀπάτωρ; *LSJ* s.v. ἀπάτωρ.

to claim that every person described solely with a personal name was an extramarital child; such occurrences may also have been the result of scribal omissions or, in some texts such as private correspondences, the patronym may simply have been irrelevant. Furthermore, as these descriptions were not formal categories, we should not expect them to appear in every papyrus mentioning an illegitimate child; conversely, even individuals identified with patronyms may have been illegitimate. In many cases, persons born out of wedlock were described in the same way as legitimate offspring, even in official documents such as the famous *P. Cattaui* or the *Gnomon of idios logos*.[11]

The chronology of the sources is also puzzling: the distribution of the three descriptions – ἀπάτωρ, χρηματίζων μητρός and the sole metronym – is limited almost exclusively to the second and third centuries AD.[12] The subsequent disappearance of these terms from papyri may have been the consequence of two phenomena: the first was Constantine's legislation on illegitimacy, intended to limit the rights of extramarital children,[13] and the second was the end of the Roman census in Egypt.[14] The source material thus represents only the first three centuries of Roman rule in Egypt, even though illegitimacy and illegitimate children must surely have existed in Egypt in the Hellenistic period, and would have continued to exist after the age of Constantine.[15]

Although the source material referring to individuals born out of wedlock is abundant from the period between the first and third centuries AD, it is conclusive only to a limited extent: the vast majority of evidence consists of lists and other documents connected with Roman taxation, such as census returns and tax receipts.[16] These documents usually provide only certain types of information, including the name of the person described as 'illegitimate', his or her family status indicated with one of the above listed descriptions, usually also the metronym; only on occasion do we find more detailed personal data such as age, occupation, or physical description.[17] Some documents also list the amount and type of tax paid, which allows us to determine the civic status of an individual. Compared to the lists, the census returns tend to contain more personal details, but these are also limited to information of particular type.

In fact, children born out of wedlock were not a homogenous group: the child of

[11] See Nowak (2015) 211–212.

[12] The detailed chronological data in: Nowak (2015) 214–215 & 217.

[13] On the legislation of Constantine, see Niziołek (1980).

[14] Census declarations are not represented in the source material after AD 257/258: Bagnall & Frier (1994) 9.

[15] Of course, this does not mean that collecting the material for illegitimacy in Ptolemaic and post-Constantine periods is impossible, but it must be based on careful case studies, as Roger Bagnall has demonstrated in his paper given at the XXVII International Congress of Papyrology, and the number of accessible attestations must be lower. Bagnall (forthcoming).

[16] Detailed data in: Nowak (2015) 115 & 118.

[17] See Malouta (2009).

an incestuous Roman couple[18] would not have had the same social and legal standing as a child born of a mixed union which was not recognised as a marriage in Roman Egypt – for instance, the child of an Egyptian and a Roman – or a son born to a Roman soldier by his concubine, sometimes even legally married before his military service.[19] The expressions we have discussed above, however, do not differentiate between categories of extramarital children; rather, in the vast majority of documents, they simply serve as equivalents or replacements for patronyms.

Although the body of source material is undeniably limited, it nonetheless provides important information regarding the problem of illegitimacy in Roman Egypt. The high number of documents containing one of the aforementioned expressions proves that illegitimacy in Roman Egypt was a widespread phenomenon, as observed by Aristide Calderini[20] and Herbert Youtie.[21] The fact that these documents contained information regarding illegitimacy – and that this information constituted part of an individual's identification – may be interpreted in two highly contradictory ways: either children born out of wedlock were highly stigmatised or, *vice versa*, they were not socially stigmatised at all. The latter supposition was offered by Herbert Youtie;[22] his assumption seems convincing but requires further proof. The question posed in the present study is whether blood bonds between illegitimate children and other people – apart from their mothers – can be detected in the papyri, and what this evidence might tell us about the family structure in Roman Egypt.

II. The Fatherless vs. Family Structure

Papyri relating to taxation help us reconstruct familial bonds; *inter alia* they reveal that individuals born out of wedlock had siblings. It is perhaps not surprising that one woman could have two or more children and no legal husband; however the recognition of blood bonds between such children in the documents is intriguing.

One such case is visible in a list from Theadelphia (AD 133) containing receipts for the payment of poll-tax and other burdens (published as *BGU* IX 1891). In line 73 we find the following entry: νς Φάσεις ἀπάτωρ μη(τρὸς) Θερμουθ( ) η χ(ωματικοῦ) σ(τατίωνος): '56, Phaseis fatherless whose mother is Thermouth() has paid 8 (drachmae) as a tax for the maintenance of dykes'. The next payer was: ε Ἁρφαῆσις ἀδελφὸ(ς) μη(τρὸς) τῆς α(ὐτῆς) η χ(ωματικοῦ) σ(τατίωνος): '5, Harphaesis (his) brother of the same mother has paid 8 (drachmae) on account of tax for the maintenance of dykes'.

The same pair occurs in another list from Theadelphia, dating from the following

[18] A number of children born of incestuous unions between Romans had to be rather insignificant in Roman Egypt, but it existed and continued even after the *constitutio Antoniniana*. See *P. Pintaudi* 42, a receipt for wet nursing, which openly states that a child given to a wet nurse was the son of a brother and sister (ll. 5-6).

[19] See Phang (2001) 296-324.

[20] Calderini (1953).

[21] Youtie (1975).

[22] Youtie (1975).

year (*P. Col.* II 1 *recto* 1a-b, col. 5, ll. 11–13). In line 11 Phaseis is noted as a payer of other public burdens: νγ Φάσ[ε]ις ἀπάτωρ μητ(ρὸς) Θερμούθε̣ω(ς) (ὁμοίως) η (χαλκοῦς β) μαγ(δωλοφυλακίας) δεσ(μοφυλακίας) ποτ(αμοφυλακίας) φυλ(ακίας): '53, Phaseis fatherless whose mother is Thermouthis (has paid) likewise 8 (drachmae) and (2 chalkoi) for the maintainance of the watch-tower, prison tax, river-guard tax and guard tax'. In the next line a man named Harsythmis, described with the expression ἀδελφὸς μητ(ρὸς) τῆς αὐτῆς ('his brother of the same mother'), is said to have paid the same amount of 8 drachmae and 2 chalkoi for the same public burdens while, in the following line (14), Harphaesis, the brother already known from *BGU* IX 1891, is listed as ἄλλος μητ(ρὸς) τῆς αὐτῆς ('another of the same mother').

Thanks to *P. Col.* II 1 *recto* 1a-b, it is possible to restore of the full name of the mother – Thermouthis – in *BGU* IX 1891; even more importantly, the papyrus reveals three men born of the same woman, all 'fatherless' but nonetheless recognised as brothers, not only by themselves but also by the community in which they lived. This and other similar cases[23] would seem to support Youtie's statement that children described as fatherless were in fact begotten by parents who could not be married for different legal reasons, but who still went on to form *de facto* marriages and families.[24]

More puzzling are those cases in which the familial and even civic status of siblings is not identical. Such a case occurs in the tax list from Theadelphia, mentioned above. In line 29 of the alphabetically-organised second column (*P. Col.* II 1 r.3, col. 2, l. 29) a man is recorded as Ἡρακλῆς Ἁ̣ρ̣φαήσεω[ς τοῦ Ἡρ]ακλή̣ο[υ] μ̣ητ(ρὸς) Ταψόιτος, 'Herakles son of Harphaes son of Herakleos, his mother being Tapsois'. In the next line another man is recorded as [Ἡρα]κ̣λ[ῆ]ς ἀπ̣ά(τωρ) μητρὸς [τῆς] αὐτ[ῆ]ς: 'Herakles fatherless of the same mother (i.e. Tapsois)'. It may be that Tapsois had two sons – one born in marriage, the other out of wedlock – who were recognised officially as brothers, at least by tax authorities. What is perhaps most striking is the fact that both brothers were named Herakles. Although the name of the second Herakles is reconstructed, the reconstruction is paleographically certain, and further supported by the fact that the list is organised in alphabetical order; indeed the section of the document in question lists only individuals named Herakles. Although it seems somewhat extraordinary that the two sons would have the same name, it was evidently the case; from the evidence of a tax list, however, one cannot be sure if the two men were sons of the same or of two different fathers.

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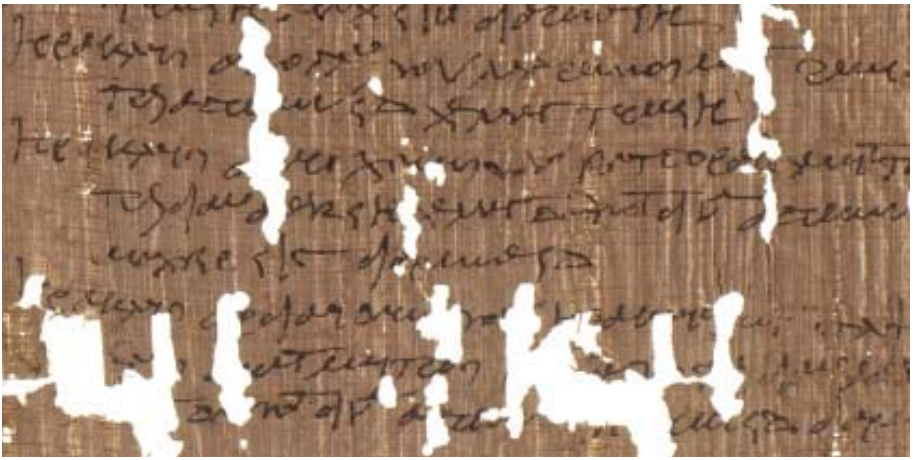
[23] In the above two lists at least six more pairs of 'fatherless' brothers could be distinguished: *BGU* IX 1891, ll. 83-84; *P. Col.* II 1 r. 1a-b, col. 7, ll. 9-10 (Psenobastis and Spartas sons of Heraklous), *BGU* IX 1891, ll. 115-116 (Nikias and Harphaesis sons of Tephorsais), *BGU* IX 1891, ll. 121-122 (Didas and Apollonios sons of Sarmasia), *BGU* IX 1891, ll. 186-187 & 566-567; *P. Col.* II 1 r. 1a-b, col. 5, ll. 20-21 (Pekusis and Orsenouphis sons of Herais or Heraklas: those could be two different pairs of brothers), ll. 261-262 (Ischeis Samba and Apynchis sons of Toreus), *P. Col.* II 1 r. 1a-b, col. 4, ll. 16-17 (Herieus and Harphaesis sons of Die…). The list of fatherless siblings in: Malouta (2009) 130 n. 50-51.

[24] Youtie (1975).



The fragment of the image was reproduced after http://wwwapp.cc.columbia.edu/ldpd/app/apis/item?mode=item&key=columbia.apis.p326

Myrto Malouta has noted an even more intriguing case: in *BGU* II 630, a list of people grouped according to their family bonds, we find a pair of brothers who are not of identical civic status.[25] Soterichos, the first of the two brothers is described as Σωτήριχος ἀπάτ(ωρ) (col. 4, l. 2), while Sotas, the second, is recorded as Σωτᾶς ἀδελφός δοῦλ(ος). It is possible that both brothers were born to a slave mother, but Soterichos was freed, while his brother Sotas remained in slavery. However another scenario is possible: Sotas was the son of a slave mother who was then freed and, afterward, gave birth to the second son, Soterichos. Interestingly, these two men – a slave and a free or freed man – were recognised as brothers by the community in which they lived.[26]

These and other similar documents prove that illegitimate children were described not only by their metronyms but also by their kinship; moreover, this method could be applied even to people of unequal social and familial standing, as in the case of Sotas and Soterichos from *BGU* II 630. Certainly these forms of recognition contained an element of self-identification, as well as an element of identification within the community. This conclusion, however, prompts the further question: did siblings presented in tax lists as 'fatherless' belong to a common household? Were they raised together either by both parents forming a *de facto* marriage, or by their mother (and sometimes a step-father)? What was their position within the family structure of Roman Egypt?

In *P. Oxy.* IV 728, a *karponeia* contract made in Thosbis, a village located in the Oxyrhynchite nome, two brothers are recorded as being a party of the deed:

[25] Malouta (2009) 124.

[26] The name of their mother remains unknown. Other people on the list were indicated either with their profession or patronym or both, hence the word ἀπάτωρ constituted an equivalent for the patronym, so the metronym was not necessary in this case.

Παθώτης καὶ Λ[ί]βιος ἀμφότεροι χρη[ματίζον]τ̣[ε]ς ἐκ μητρὸς Ἁρσεῖτο[ς] ('Pathotes and Libios both officially known as sons of Harseis'). Not only were the two men recognised as brothers for the sake of identification, but they were able to lease land jointly; in presenting themselves as a party of the contract, they acted as members of one family, and it seems possible that they would have belonged to a single household consisting of at least three members: the two brothers and their mother. Interestingly their mother had a Greek name, while one of the sons had typical Egyptian name and the second a Greek version of the Latin name Livius, rarely attested in Egypt. If the onomastics are any indication, the two men might have been of different fathers.

Census declarations allow for further analysis of the family structure in Roman Egypt, and they also shed some light on the actual familial status of people described as 'fatherless'; such individuals may have been openly declared as 'fatherless', although perhaps not by their fathers. In *BGU* II 447, a census declaration from second-century Karanis, the household recorded in the document consisted of several members, including Xanaris, fatherless daughter of Taon, perhaps a female relative of the head of this household,[27] ll. 10–11: καὶ τῆς Τα[ῶτος θυγατέρ]α Ξάṇαριν ἀπάτ(ορα) (ἐτῶν) ιβ.

In *BGU* I 117, a census return form second-century Ptolemais Euergetis, the situation is even more complicated. The document illustrates an intriguing family history: Dioscoros, the declarant and head of the family, records his children – who are born of two different wives – as well as his grandchildren;[28] at the end of the preserved text, however two more members of this household are listed: Sarapous, age 8, and Than[…] age 29 (ll. 19–20). The latter of these two would have been too old to be either a daughter[29] or a granddaughter of the declarant, and the document does not indicate the position of either woman within the structure of the family. It also seems probable that they were not slaves, as the term ἀπάτωρ only makes sense when applied to free individuals.[30] Yet whoever these women were – and the sources do not allow any more than speculation – it is certain that they belonged to the household.

Another example of a household including fatherless members is *BGU* XI 2018, a census return from second-century Karanis. The declarant, Petsorapis son of Hatres, records his 13-year-old daughter, Soeris, born of his wife Tapetheus – who may, herself, have been dead or divorced, as she is not declared in the text – as well as three sisters, ll. 10–12: Πτολεμαίδα ἀπάτορα (ἐτῶν) κε καὶ Τκολλ̣( )ν ἀδελ(φὴν) ἀπάτορα (ἐτῶν) ιε καὶ Θαῆσιν ἄλλ[η]ν ἀπάτορα (ἐτῶν) δ.

The relationship between these individuals and the declarant is puzzling and our interpretation must be based on the poorly preserved fragment of line 10, in which the familial status of the three women was indicated. The first editor, Herwig Maehler, proposed the reading τὰς ϙ̣[θ]υγ(ατέρας), and claimed that the women were daughters

[27] On this family see: Youtie (1974) 238–239; Bagnall & Frier (1994) 250–251.
[28] For the reconstruction of this family tree see: Bagnall (1992) 104.
[29] Bagnall (1992) 104.
[30] See, however, *SB* I 5124 after Malouta (2009) 124; and *SB* XVI 12334.

of Petsorapis' wife, who was the mother of their legitimate daughter, Soeris. The eldest and middle sisters would have been born long before the marriage of their mother and Petsorapis and the subsequent birth of Soeris, while the youngest may have been born after both the birth of Soeris and the divorce of her parents; these events, moreover, would not have stopped the couple from living in a common household and raising all four girls together. Such an interpretation is possible, but rather unlikely.

Youtie disagreed with this interpretation, choosing instead to read the missing word in line 10 as συγγενεῖς. He identified the three sisters as the daughters of Petsorapis' sister or brother, and suggested that their parents would have maintained an informal relationship lasting at least 22 years and ending with the death of either of the partners.[31] We can easily imagine that orphaned children of sisters – or other female relatives – could become the foster children of their uncle.

It is also possible that the girls were the declarant's daughters born of a slave woman and subsequently freed, or that they were born of a free woman whom the declarant did not want to marry; the lower status of their mother would explain why they were presented as ἀπατόρες by their own father. A similar situation is known from *BGU* I 326, the protocol of the opening of a Roman will, in which Gaius Longinus Kastor, veteran of *classis praetoria Misenensis*, freed and appointed his two slave-women as heirs, and their children as substitutes and legatees. Marcella and Kleopatra may have been Kastor's concubines whom he did not want to free and marry during his lifetime, although the children listed in the will were Kastor's offspring.[32] There is, however, a crucial difference between *BGU* I 326 and XI 2018: Gaius Longinus Kastor did not indicate that the children born of his freedwomen were 'fatherless' or 'illegitimate,' an observation to which we will return shortly. The evidence from other documents suggests that fathers presenting their own children as fatherless was not a common occurrence.

Individuals indicated as 'fatherless' or 'illegitimate' also appear in other census returns: there are, however, few examples and, in these cases, the declaring party is a woman. For instance, in *BGU* XI 2019, a second-century census declaration from Moithymis, Herakleia, a freedwoman, declared both of her daughters – Senamounis, age 20, and Tastoous, age 12 – to be 'fatherless', ll. 19–22: καὶ τὴν ἀπάτορά μου θυγατέρα Σεναμοῦνι(ν) Αβι[33] (ἐτῶν) κ, (hand 2) Ταστωοῦς ἀδελ(φὴ) (ἐτῶν) ιβ. The declarant in this example was relatively wealthy – she owned an entire house and a yard – and there are no men listed in her declaration, either as members of her household or as the father of her daughters.

A similar case is found in *P. Mil. Vogl.* III 193a (Tebtynis, AD 193), another census return from the Arsinoite nome: Kroniaine, an unmarried woman,[34] recorded

[31] Youtie (1972); Youtie (1975) 728.

[32] See Keenan (1994).

[33] Roger Bagnall ([1992] 114) claimed the second name with no other indication to be suspicious and suggested the reading ἀργ(ήν).

[34] Bagnall & Frier (1994) 19.

her 13-year-old daughter Hero as 'fatherless', ll. 10–13: εἰμὶ δέ· | Κρονιαινης (ἐτῶν) λη ἄσημος | καὶ τὴν θυγ[α]τέραν μου Ἡρῶ | ἀπάτωρα (ἐτῶν) ιγ ἄσημ(ον) ('I am Kroniaine, 39 years old, without distinguishing marks, and my daughter (is) Hero, fatherless, 13 years old, without distinguishing marks'). In this case the woman was not a freedwoman, but her family status was well known; she was described by her patronym, and she was assisted in her declaration by her brother who was also her *kyrios*. Although the statuses of Herakleia and Kroniane were different, they were both heads of households consisting of themselves and their extramarital daughters.

In *P. Flor.* I 5, a third-century census return from the Arsinoite nome, the declarant, Aurelia Thermoutarion daughter of Ammonios also called Herakleides, who was an owner of some real estate, recorded her extramarital children and identified them with the term σπουρίοι.[35] The text is not well preserved, but it is possible that she recorded two children, a son Kopreios, and another child of 6 , ll. 15–16: καὶ τὰ τέκνα μου Κόπρει[ον . . . . .] . . . ωνος (ἐτῶν) καὶ . . . . σπουρίους μὴ ἀνα[.]. The name of the illegitimate son, Kopreios, is an intriguing detail. Again, the conclusion that the head of this household was an unmarried woman and a single mother seems inevitable.

Household structures in which mothers raised their children on their own also occurred outside the Arsinoite nome. In *P. Oxy.* LXXIV 4989, a census return from second-century Oxyrhynchos, the declarant, Didyme, daughter of Plutarchos, recorded her three sons, and described each as χρηματίζων μητρὸς, ll. 12–15: Πλουτίων χρημα(τίζων) | μητρὸ(ς) Διδύμη(ς) ἄτ(εχνος) ἄσημ(ος) (ἐτῶν) λ | Ἀνδρόμαχος ἀδελ̣(φὸς) μητ(ρὸς) τῆς α(ὐτῆς) ἄτ(εχνος) ἄσημ(ος) (ἐτῶν) λδ | Ἁρμίυ̣σις ἕτ(ερος) μη[τ](ρὸς) τῆς α(ὐτῆς) ἄτ(εχνος) ἄση[(μος) (ἐτῶν) -1-2-], 'Ploution officially known as son of Didyme unskilled, without distinguishing marks, 36 years old, Andromachos, his brother of the same mother, unskilled, without distinguishing marks, 34 years old, Harmiusis, another brother of the same mother, unskilled, without distinguishing marks, […] years old'. Another man was added to the declaration, but his description is mostly reconstructed, ll. 16–18: Ἐπι .[.] .ος [Πλ] ουτίωνος χρη[μα(τίζοντος) μητ(ρὸς) Δι]δύμης, μητ(ρὸς) [- ca.8 -] ἀδελ̣(φῆς) τοῦ πα(τρὸς): 'Epi[…] son of Ploution officially known as son of Didyme, his mother being […] sister of his father'. Therefore, it seems that Didyme had at least four children, three of whom were extramarital; the fourth child was a daughter married to the son Ploution but, as she was not recorded in the document, she was perhaps already dead at the time when the census return was issued.

Didyme, much like the other women listed above, was the head of her household and, as there is no mention of a father, it may be assumed that she raised the four children on her own. As she had only a part of a house and so many children with no profession, Didyme may have been rather poor. This, however, is not the rule, as there are several papyri attesting wealthier families with members described as fatherless.

[35] Perhaps the description σπουρίος was applied in this document as the term ἀπάτωρ was already disappearing in this time.

One example is the will of Taarpaesis *alias* Isidora (*P.Köln* II 100), a lady from second-century Oxyrhynchos who, when appointing her three children as heirs, described them as τοὺς τρεῖς χρηματίζοντας μητρὸς ἐμοῦ. According to Herebert Youtie, the father of the children was Psenesis, who is also mentioned in the will of Taarpaesis *alias* Isidora; the testatrix bequeathed to him the use of her property until his death. It is certainly possible that Psenesis was Taarpaesis' life-partner, but the presumption that he was also the father of her children is based only on an onomastic argument. Youtie observed that Ptolemaios, the eldest son of Taarpaesis, had the same name as the father of Psenesis, and that her grandson – the son of her daughter Berenice – had the alternative name of Psenesis, Ision.[36] The name Ptolemaios, however, was one of the most popular names in Graeco-Roman Egypt; it is also easy to imagine that Berenice might have named her son after her step-father, especially if she did not know her actual father.

The above examples allow us to make further observations. Children indicated as ἀπάτορες or χρηματίζοντες μήτρος were declared by their mothers or relatives, but not by their fathers, which explains why many individuals born out of wedlock were not indicated as such, but nonetheless appear in a way similar to legitimate children. An example of this practice may be found in the famous Karanis tax roll:[37] in column 16, ll. 430–431, brothers Gaius Iulius Diodoros and Gaius Iulius Ptolemaios, sons of Tasoucharion, were listed as payers of the poll-tax. Their mother Tasoucharion was evidently an Egyptian woman who had had two sons with a Roman citizen. The sons, being Egyptians, bore their father's *nomina*. However, they were not described as *apatores* and, if they had not been listed as payers of *laographia*, we would not know that they had been illegitimate children.

The question is, what makes this case – along with a number of similar examples[38] – different from those in which people were described as fatherless. Both men had *tria nomina* and metronym, which were enough to distinguish them from other men named Diodoros and Ptolemaios. As none of the descriptions constituted a formal indication, it may not have been a necessary element of a presentation, even for someone born to parents who were not legally married. Indeed, it may have been the case that children who were actually raised by their fathers were not described as fatherless; this description may have applied only to those cases in which a father was not present. With this in mind, it is worth mentioning one further document.

P. Lond. II 324, p. 63 = *W. Chr.* 208 (Prosopite nome, AD 161) is a letter addressed from Anikos to Tamustha containing extracts from two census returns for the years AD 131–132 and 145–146. Anikos wrote to his sister describing her as his maternal fatherless sister: Ἄνικος Χενθνούφιος τῇ ὁμομ|ητρίῳ μου ἀδελφῇ Ταμύσθᾳ ἀπάτορι χαίρειν. ἀνα|δέδωκά σοι τὰ προκίμενα ἀντίγραφα τῶν ἀ|πογραφῶν, ὧν ἐπιδείξω τὰ ἴσα ἐν καταχωρι|σμῷ, ὁπ[ό]ταν χρεία ἦν εἰς ἀπόδειξιν τοῦ εἶναί με [ὁ]μομ[ήτ]ριόν σου

[36] Youtie (1975) 727.
[37] Youtie (1975) 737.
[38] See Nowak (2015) 210-212.

ἀδελφ[ό]ν, ('I, Anikos son of Chenthnouphis, to my maternal fatherless sister Tamustha, greetings. I have given to you the above copies of the registers, whose originals I will display in the register, if it is necessary to prove that I am your maternal brother.')

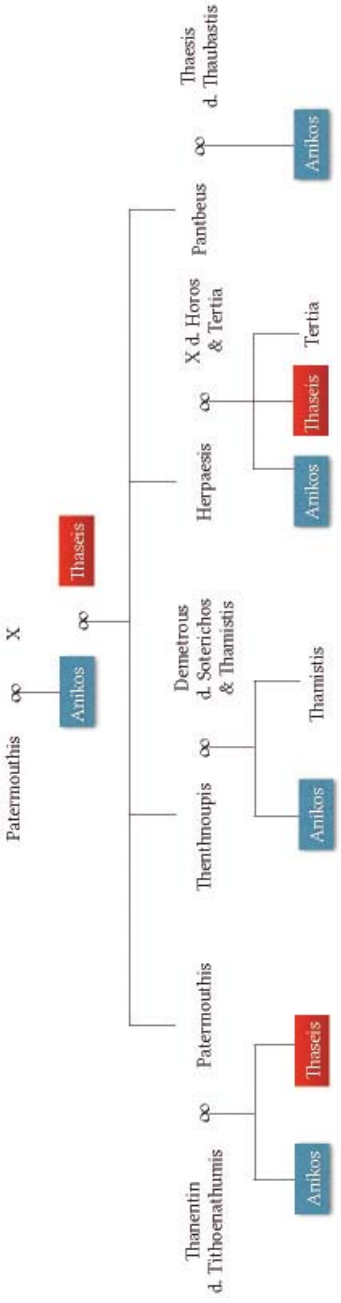
Tamustha is not, however, described as ἀπάτωρ in the extracts of the census returns copied in this very letter. Indeed, the copied extracts might lead us to the opposite conclusion: since she is recorded as the sister of her brother and the daughter of her parents, Tamustha may have been a legitimate daughter. In lines 9–13 we find a copy of census return from AD 131–132 recording the entire family as follows: Θενθνοῦπις Ἀνίκου τοῦ Παθερμουθίου | μη(τρὸς) Θάσειτος Ἑρπαῆσις (ἐτῶν) με. | Δημητροῦς Σωτηρίχου ἡ γυνὴ μη(τρὸς) Θαμίστις. | Θαμίστις ἡ θυγάτηρ (ἐτῶν) vac. ? | Ἄνικος ὁ ἀδελφὸς τῶν αὐτῶν γονέω(ν) ἀφῆλ(ιξ) (ἐτῶν) ς, ('Thenthnoupis son of Anikos son of Pathermouthios, his mother being Thaseis daughter of Herpaesis, 45 years old; his wife Demetrous daughter of Soterichos, her mother being Thamistis; daughter Thamistis [blank] years old; Anikos her brother of the same parents being a minor of 6 years old.') In lines ll. 25–28, text copied from the census return made in AD 145–146, the description appears as follows: Χεντμοῦφις Ἀνίκου τοῦ Παθερμούθιος | μη(τρὸς) Θάσ[ει]τος Ἑρπαήσιος μεταλικὸς (ἐτῶν) νβ. Ἄνικος ὁ υἱὸς | μη(τρὸς) Δημητροῦτος Σωτηρίχου (ἐτῶν) κ. Θαμίστις ἡ ἀδελφὴ | τῶν αὐτῶν γονέων (ἐτῶν) κδ, ('Chentmouphis son of Anikos son of Pathermouthis, his mother being Thaseis daughter of Herpaesis, miner, 52 years old; his son Anikos, his mother being Demetrous daughter of Soterichos, 20 years old, Thamistis his sister of the same parents, 24 years old.')

The returns were not copied carefully: names were misspelled – the name of the head of the family, for instance, appears in no fewer than three variants: Θενθνοῦπις, Χεντμοῦφις and Κενθνούπις – patronyms were written in the nominative, and the age of Kenthnoupis must have been entered incorrectly at least once, as he is listed as 45 years old in the census from AD 131–132, while in the census from AD 145–146 he is only 52 (perhaps the first number is correct). Finally, the name of the 'fatherless' sister of Anikos is recorded in two variants: in extracts of census returns the name is recorded as Thamistis (a name attested only in this document), while in the letter from Anikos to his sister she appears as Tamustha, which was a reasonably popular Graeco-Egyptian name. Although the part concerning Tamustha's status could be inaccurate, as Bagnall and Frier have claimed, it seems unlikely that the description was changed to such a degree.[39]

There are various possible interpretations of this document. Youtie claimed that 'something drastic must have taken place to effect so far-reaching a revision in the legal status of Thamistis *alias* Tamustha'. After the death of Kenthnoupis there may have been a problem with the succession. As Kenthnoupis was not her father, Thamistis *alias* Tamustha would not have been entitled to inherit anything from his estate: her brother would have been the sole heir.[40] The extracts from the census returns, however, would have proven the opposite: as a sister τῶν αὐτῶν γονέω(ν) she would have been entitled

[39] Bagnall & Frier (1994) 63.
[40] Youtie (1975) 724–725.

to inherit together with her brother; using the returns as evidence in such a case would not have strengthened Anikos' legal position. Sabine Huebner claimed that the girl may have been adopted by Kenthnoupis after he had married her mother.[41]



[41] Huebner (2013) 178.

A strong argument for the illegitimate status of Thamistis *alias* Tamustha comes from the onomastic habits cultivated within this family: Kenthnoupis, father of Anikos and Tamustha, had three brothers and each one, including Kenthnoupis, named his first-born son Anikos (ll. 8, 17 and 23) which was of course the name of their father. Moreover, two of the four brothers named their first-born daughters Thaseis (ll. 7 and 18), which was their mother's name. The youngest brother did not have a daughter, and Kenthnoupis recorded Thamistis *alias* Tamustha as his daughter. Interestingly her maternal grandmother appears also to have been named Thamistis (l. 11), and it is possible that Thamistis *alias* Tamustha was named after her. However it is also possible that Thamistis *alias* Tamustha had an elder sister, Thaseis, who was dead at the time of the first census.

Yet another interpretation of this document is possible: Thamistis *alias* Tamustha may have been a daughter of Kenthnoupis and Demetrous from before they had married. Her status would not have mattered during the lifetime of her parents, which would explain why she was described in the census as a legitimate daughter. This explanation would support Youtie's theory that illegitimate children were usually begotten by parents who had formed life-long relationships but could not marry because of various restrictions introduced by the Romans.[42]

Both interpretations suggest that the woman, declared as having been born of the same parents as her brother, became 'fatherless' at some point. Youtie claims that such a 'diminution' of familial status was quite common in Roman Egypt, as in *P. Bour.* 42 which lists Kastor son of Tapasmutis formerly known (as his real status was discovered during some kind of investigation) as son of Ision.[43]

In the case of *P. Lond.* II 324, however, such an explanation seems unlikely, as the text does not mention any procedure or investigation which would have resulted in a change of status. If the document had been written as a proof of Tamustha's illegitimate familial status, such a detail would have been essential.

Furthermore, since the woman was either an illegitimate daughter of either Demetrous alone or Demetrous and Kenthnoupis together, she would have had to be either adopted or officially recognised as his daughter. The former interpretation is improbable, because informing and providing proofs that an adopted sister was 'fatherless' would not make a lot of sense, especially so many years after the supposed adoption had taken place. Such an interpretation would only make sense if the adoption had been revoked; however this crucial fact would not, in my opinion, have been omitted in the document.

If one accepts the latter interpretation, one would have to agree that Anikos addressed his sister as 'fatherless' as a result of an investigation which had taken place before the document was written, and which had revealed his sister's real familial status. Consequently, we would have to accept that the legitimation of natural children was

[42] Youtie (1975) 238–239.
[43] Youtie (1975) 725.

forbidden among Egyptians: Tamustha *alias* Thamistis would have remained *apator* despite of the subsequent marriage of her parents. Indeed, Romans could not provide legitimacy for their children by marriage until late antiquity,[44] but our sources do not provide evidence that the same prohibition was applied to Egyptians. Reasoning *per analogiam* would not be justified in this case, as the institutions of Roman family law usually did not copy the local law applied to non-Romans in Egypt.[45]

For this reason, the supposed change of status of Tamustha *alias* Thamistis seems rather improbable. If the girl was indeed a daughter born to Demetrous of an unknown father before she married Kenthnoupis and gave birth to Anikos, it would mean that both children were raised together in the household of Kenthnoupis, and would have been declared as such in the census. When Demetrous died (she is not recorded in census return from AD 145–146) Tamustha remained in Kenthnoupis' household, but later perhaps moved out. After all, this woman was raised by Kenthnoupis and was recognised as his daughter or foster-daughter both by him and the community to which they belonged: her legal status did not matter in real life. At some point after her parents had died, Tamustha may have needed a copy of the census returns, and her brother fulfilled her request providing her with a proof that she belonged to the family of Kenthnoupis; in addressing her as 'fatherless', he may have been indicating her real status, but this would not have acted as proof of her legal status.

A further explanation is based on the various meanings of the Greek word ἀπάτωρ: it could also signify someone whose father had died.[46] Perhaps in addressing his sister, Anikos wanted to underline both the fact that their father had died and that they shared a common mother: τῇ ὁμομητρίῳ μου ἀδελφῇ. Such a presentation of the sister would be easily understandable, if the extracts were to serve as evidence concerning maternal estate, but the usual meaning of ὁμομήτριος is an obstacle.[47]

One final interpretation may be proposed, namely that Tamustha and Thamistis were two different women. Thamistis in this case may have been a legitimate sister of Anikos, while Tamustha was his maternal sister raised in another household (perhaps by relatives of her mother as in *BGU* I 117, II 447 and XI 1018). This would mean that the letter was sent to prove that Tamustha was not recorded in the census returns, and was therefore the maternal sister (not sister-german) of her brother. It is a common opinion that Thamistis is simply a variant or corrupted version of Tamustha; this reading, however, is not accepted by the authors of trismegistos.org, who treat the names as two separate entries. The changes of tau into theta, upsilon into iota and theta into tau are all plausible, but the change of declension is disturbing.

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[44] *Legitimatio per subsequens matrimonium*, by which an illegitimate child became legitimate through subsequent marriage of its parents, was introduced only just by Constantine. His constitution was not preserved, yet the text may be restored thanks to Zeno's constitution (C. 5.27.5 pr.), Niziołek (1980) 25–26.

[45] See Alonso (2013).

[46] See n. 9.

[47] Youtie (1975) 739.

III. Conclusions

The source material presented here may lead us to a number of conclusions. First, it would seem that only those individuals raised with no father or step-father were described as fatherless; this would imply that the social status of an 'illegitimate child' was flexible. However, this same conclusion cannot be applied to legal documents concerning illegitimacy, especially to those papyri in which the status of illegitimate children of Romans was concerned.[48] In other words, in the first three centuries of Roman rule in Egypt, illegitimacy seems to have been a legal problem, not a social one.

Second, it would seem that situations in which mothers of different social and economic standings raised their illegitimate children on their own were not uncommon. Perhaps girls and women were attested more frequently as fatherless in census returns, but sons raised by their mothers were not exceptional.[49] It also seems that, at least on a social level, these children belonged to a family network, as they could belong to households whose heads were their kinsmen.

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[48] See Nowak (2015).

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URI YIFTACH (TEL AVIV)

APATOR METROS: THE RISE OF A FORMULA IN BUREAUCRATIC PERSPECTIVE.[1] RESPONSE TO MARIA NOVAK

Maria Nowak bases much of her discussion of fatherless individuals on the terms ἀπάτωρ, and χρηματίζων μητρός. In her view, these terms designate an illegitimate child—i.e., a child born "out of illicit union."[2] I am not familiar with any document that states this explicitly, nor do I understand what the term "illicit union" means in the law of the papyri.[3] In any event, while I have dealt with the institution of marriage in the past, my interest on this occasion lies elsewhere—namely, the method of identification of persons in the papyri. I have discussed this on three different occasions. The first discussion focused on a unique text—*BGU* XIV 2367, a *diagramma* from the early part of the third century BCE—setting out the terms to be used by contracting parties in double documents.[4] In that paper, I considered the extent to which the rules documented in that papyrus managed to create an effective system of identifiers of the users of documents in practice. I later extended that study, with the

[1] The present paper was composed in connection with the project *Synopsis: Data Processing and State Management in Roman Egypt (30 BCE-300 CE),* sponsored by the German Israeli Foundation for Scientific Research and Development, run by the author in cooperation with Professor Andrea Jördens, University of Heidelberg.

[2] See Nowak's discussion here with further literature.

[3] See, in particular, Bagnall, forthcoming.

[4] Yiftach, 2014.

aim of understanding the guidelines for identifying individuals in various types of applications and legal documents in the early Roman period, and how they differed in form and in content from the identication method introduced by *BGU* XIV 2367.[5] A third paper—given at a conference in Vienna in 2014 on the *gnômôn* of the *idios logos*—was aimed at establishing the population categories applied in the *gnômôn* in the broader context of population categories listed in documentation applied by other branches of the provincial administration in the early Roman period.[6]

In the case of the latter paper, in particular, my focus was on the κατ' ἄνδρα reports—i.e., reports recording individuals.[7] Since the term ἀπάτωρ—which Nowak discusses at length—figures prominently and was possibly pioneered in those reports before spreading to other genres, this may be a good opportunity to ask: If indeed all the ἀπάτορες were illegitimate children—and I certainly do not rule out that they were—why not identify them by just their personal name, by their vocation or by some other non-specific forms of identification? The term ἀπάτωρ can only make sense in a documentary context where the father's name is deemed essential—or at least customary. So the emergence of the term ἀπάτωρ in the first century CE in the context of κατ' ἄνδρα reports may be indicative of a substantive change in the status of the patronymic in comparison with earlier periods, in that it has now become the norm. More generally, it may mark the introduction of new *Nomenklaturregeln* as a framework for such a change.

Creating *Nomenklaturregeln* for κατ' ἄνδρα reports would certainly fit in well with the *Zeitgeist*. The first century of Roman rule was noted for several terminological innovations, particularly with regard to population categories: the triad Ῥωμαῖοι - ἀστοί - Αἰγύπτιοι, used primarily by the procuratorial offices in Alexandria; the dichotomy δημόσιοι γεωργοί - κληροῦχοι, embracing the entire land–holding population in *sitologoi* reports from the western Arsinoite nome; and a range of terms concerning registration status, tax liabilities and occupations in census declarations and related material.[8] But is the introduction ἀπάτωρ really indicative of the formation of a new, standardized identification method in reports? I should point out from the outset that while I believe that the invention of the term ἀπάτωρ does mark a fundamental change in the *Nomenklaturregeln* of κατ ' ἄνδρα reports, I argue that searching for evidence of a change in the father's status is, in a sense, barking up the wrong tree.

Let us turn first to the Ptolemaic period: in one of the regulations of *BGU* XIV 2367, concerning the identification of soldiers in double documents, the use of the patronymic is consciously omitted—and surviving double documents of the third-century BCE, which were drafted following the rule of the said *diagramma*, show that the regulation was followed in practice.[9] But this is an exception: for all

[5] Yiftach, forthcoming, Gnomon.
[6] Yiftach, forthcoming, Flexible template.
[7] Cf. my edition of *P.Bagnall* 70 with further literature there.
[8] Yiftach, both forthcoming, Gnomon and Flexible; Reggiani, forthcoming, *Identifying*.
[9] *BGU* XIV 2367.5-8 (III BCE, Alexandria): οἱ μὲν ἐ[ν τῶι στρατι]|ωτικῶι τεταγμένοι

other categories of individuals listed in *BGU* XIV 2367, identification by the father's name is the general rule which is closely adhered to in the same double documents.[10] Identification by the patronymic is also prescribed in rules about other types of administrative documents, such as reports of the types dealt with in this response—namely, the papyrus of the revenue laws, the law on the sale of immovable property from third-century Alexandria (*P.Hal.* 1.242–259), the regulation on the registration of the owners of taxable and exempt cattle in Phoenicia and Syria in 261 BCE (*SB* V 8008) and others.[11]

The same picture emerges in the reports themselves: of the 175 Ptolemaic κατ᾽ ἄνδρα reports that I have reviewed, I have found several instances of erratic texts, where the patronymic is absent—either omitted entirely or replaced by other identifiers, such as physical features, occupation, etc.[12] But in no edition of Ptolemaic reports—such as *P.Count.*, *P.Tebt.* IV 1103–1150 and others—are these anything more than an eccentric exception. While we cannot always find an adequate explanation for these individual cases, their existence does not invalidate the rule that in the Ptolemaic period the patronymic was the only constant identifier—apart from the person's personal name—for all population groups, and in virtually all types of κατ᾽ ἄνδρα reports. In fact, so pervasive was the identification by the father's name, that over time it even extended to the identification of soldiers—the only clear deviation from the *Nomenklaturregeln* of *BGU* XIV 2367 in the Ptolemaic period.[13] With regard to the father, then, there was no drastic change under the Romans: the patronymic was always the most central identifier in Egyptian Greek papyri. So, what *did* change?

Most identifiers applied in the Ptolemaic period were "unit identifiers"—that is, a person was identified by his population unit: in *BGU* XIV 2367 these were his demos, *patris*, military unit, military rank and occupation. The patronymic was

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ἀπογραφέσθω[σαν τάς τε] | πατρίδας ἑαυτῶν καὶ ἐξ ὧν ἄν ταγ[μάτων ὦσι] | καὶ ἃς ἂν ἔχωσιν ἐπιφοράς· Yiftach (2014) 106-107.

[10] *BGU* XIV 2367.8-12 (III BCE, Alexandria): [ο]ἱ δὲ πολῖτα[ι τούς τε] | πατέρας καὶ τοὺς δήμους· ἐὰν δὲ καὶ ἐν τ[ῶι στρα]|[10]τιωτικῶι ὦσι καὶ τὰ τάγματα καὶ τὰς [ἐπιφοράς·] | οἱ δὲ ἄλλ[οι] τούς τε πατέρας καὶ τὰς πατ[ρίδας καὶ] | ἐν ὧι ἂν γένει ὦσιν· Yiftach (2014) 106-107.

[11] *P.Hal.* 1.246-249 (III BCE, Alexandria): [οἱ δὲ ταμίαι ἀναγρα]|φόντωσαν τὰς ὠνὰς κατὰ δήμους καὶ κατα[- ca.10 - τῶι τοῦ] | ἀποδομένου δήμωι, ἐγγράφοντες πρῶτομ μ[ὲν τοῦ ἀποδομέ]|νου τὸ ὄνομα πατριαστὶ καὶ δήμου, ἔπειτα [δὲ τὸ τοῦ πριαμένου] | κατὰ τὰ› αὐτά; *SB* V 8008.17-21 = *C.Ptol.Sklav.* I 3 (261 BCE, Unknown Provenance): ἀπογράφεσθαι δὲ καὶ τ[οὺς] με|μισθωμένους τὰς κ[ώμ]ας κα[ὶ] τοὺς κωμάρχας ἐν τ[ῶι] αὐτῶι | χρόνωι τ[ὴν] ὑπάρχ[ουσαν ἐν] ταῖς κώμαις λείαν ὑποτελῆ | [20] καὶ ἀτελῆ καὶ ὧν [ἐστ]ι πατρόθεν καὶ πατρίδος καὶ δι᾽ ὧν νέ|μεται. Cf. also *P.Par.* 65.12-14 = *UPZ* I p. 596 (146 BCE, Memphis); *P.Rev.* col. 7.3 (259/8 BCE, Arsinoitês).

[12] Cf., e.g., *CPR* XXVIII 9 (late III- mid II BCE Tebtynis); *P.Count* 34 = *CPR* XIII 30 (254-231 BCE, Trikomia); *P.Tebt.* IV 1144 = *P.Tebt.* I 171 descr. (after 116/5 BCE, Kerkeosiris), [in particular column 4]; *SB* XXIV 16272 (mid III BCE, Sakkara).

[13] Yiftach (2014) 108 n, 18.

an exception, in that it was genealogical. At the start of the Roman period things changed, as most of the former units ceased to exist. The patronymic persisted, but was left as the sole universal identifier apart from the personal name—but not for long. In the first century CE, two further genealogical identifiers were gradually added that had almost never appeared in the Ptolemaic period: the name of the paternal grandfather, and (especially in the latter half of the first century) that of the mother.[14]

The metronymic is common in some documentary genres, but rare in others.[15] Even where the metronymic is common, it is never a rule without exception: it appears in some κατ' ἄνδρα reports, for example, but not in others.[16] But even if the metronymic was kept out of a specific document, it always remained a viable option. Moreover, if there was no father, or the scribe chose to omit the father's name for some reason,[17] the mother's name was the only viable genealogical identifier, and was inserted—typically under the label μητρός—where the father's name normally appeared. This is where the term ἀπάτωρ is introduced. The term is first recorded in *P.Lond.* II 256 D (l. 18), dating to 11 CE[18] where it appears without the mother's name, and it still appears independently of the mother's name in later periods as well, but once the mother's name had become a routine identifier, the term ἀπάτωρ and the μητρός formula usually became one: X ἀπάτωρ μητρός Y.[19]

The close association between the designation ἀπάτωρ and the metronymic is also evident in reports where the scribe decides to abandon genealogical identifiers altogether, and identify the person solely by his occupation, or public position. Such is the case, for example, of in *BGU* II 392 of 208 CE Soknopaiou Nêsos. In this report (from the village *praktores argyrikôn* to the strategos), most individuals are recorded by their patronymic, but there is also one case of an ἀπάτωρ μητρός, and four—two stonemasons and two weavers—who are identified by their occupation.[20] Why the scribe decided to add these designations in the first place is not entirely clear—nor is the broader question why, in census declarations, some individuals are identified by their occupation, and others are not.[21] The main difference between the two sources is that in census declarations the designation of occupation is added to the father's

[14] Cf. in particular, M. Depauw 2010, Yiftach (2014) 114.

[15] References to the mother invariably appear in *epikrisis* applications, and are fairly common in census declarations, but almost entirely absent in other types of documents—especially declarations of camels, livestock and *abrochia*. For a detailed discussion, cf. Yiftach, supra n. 6.

[16] For discussion of rules, especially Depauw (2010) 127–128.

[17] E.g. *P.Bour.* 42.564 (166/7 CE, Hiera Nêsos). Perhaps also *P.Lond.* II 324 = *WChr* 208 (161 CE, Prosôpitês), but the formulation here (l. 7) is hardly unequivocal.

[18] I thank Dr. Nowak for providing me with a list of attestations.

[19] In the DDBDP, the nominative ἀπάτωρ is used in nineteen reports independently, and in 85 next to the μητρός formula.

[20] ἀπάτωρ: l. 10; weaver: ll. 29, 35; stonemason: ll. 40, 46. The professsion may have been recorded for tax purposes. Cf. Wallace (1938) 200-201, 204. This does not explain the omission of the patronymic, however.

[21] For the census, cf. Hombert—Préaux (1952) 104-105.

name,[22] while in *BGU* II 392 and other similar cases it is recorded in its stead. Why is this so? Is it because the person is fatherless? I do not think so. Rather, it appears that for some population categories the genealogical identifies may have been superseded by others, that were based on occupation. But even if the person were fatherless, the combination NN-ἀπάτωρ-occupation is never used in the papyri—rather, it was applied only with the metronymic when the scribe wished to stay within the sphere of designation by family—but could not, or would not, use the father's name.

I would like to stress, however, that I do not rule out other explanations. It may well have been the case that illegitimacy was a Roman, rather than Ptolemaic problem. But there is, I think, one useful lesson from this discussion: when we seek to explain ἀπάτωρ, our attention is focused on the absent father, but when we do the same with ἀπάτωρ μητρός —as I think we should—our attention is drawn to the mother, who is known and can in the Roman period, for the first time, be used for the purpose of identification in κατ' ἄνδρα reports, alongside the paternal grandfather. I accept the various socio-political explanations for this change, and that it probably did not happen overnight—but once it was in place, no later than the beginning of the second century CE, the provincial administration had at its disposal an effective and universal set of identifiers that could be applied to identify every inhabitant of the province. Above all, the creation of ἀπάτωρ embodies the triumph of genealogy as the principal means of identification in Roman Egypt.

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[22] Cf.. e.g., *BGU* I 115 = *WChr* 203 (Arsinoe, AD 189), col. i.

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JOSÉ LUIS ALONSO (SAN SEBASTIAN)

ONE EN PISTEI, GUARANTEE SALES, AND TITLE-TRANSFER SECURITY IN THE PAPYRI[1]

I. Real Security as Sale

One of the simplest ways to secure a debt is to surrender property to the creditor. Since the security is usually given when the debt is contracted, and the debt is usually contracted as a money loan,[2] the security may quite naturally appear as a sale, the money that we borrow acting as price for the property that we give in guarantee. Formalising the security as a sale, rather than resorting to a specific ad hoc type of transaction, is an example of how legal invention tends to build on previously existing institutions, as if following a law of simplicity that Rudolf von Jhering labelled 'juristische Ökonomie'.[3] Beyond this simplicity, the procedure is also extremely safe for

[1] Research financed by the National Science Centre of the Republic of Poland (Narodowe Centrum Nauki): Opus Project 2012/05/B/HS3/03819. These pages have greatly benefited from the discussion at the Symposion, at the division Documenta Antiqua of the Austrian Academy of Sciences, and at the Seminar of Ancient History of the University of Warsaw. I am grateful to the participants in these meetings for their interest and insight, to Thomas Kruse and Ewa Wipszycka for their kind invitations, and to Gerhard Thür for his generous involvement and a most fruitful dialogue. As always, I have received unfailing aid from Jakub Urbanik and from the Warsaw team of papyrologists. .

[2] Whatever the origin of the debt, its monetary nature is taken for granted in many legal traditions: for Roman law, cf. the term ‚pecunia debita' in the formula pigneraticia (Lenel 1927: 254) and Serviana (Lenel 1927: 490).

[3] Jhering 1865: 229-234. Most often, keeping the form of an act or -as in our case- its apparent cause, while changing its actual purpose. Rabel's category of the ‚nachgeformte Rechtsgeschäfte'

the creditor, who acquires, as a buyer, full rights on the property. It is not surprising that legal historians have tended to assume its presence in most legal traditions as a natural occurrence.[4] The German scholarship speaks here of Sicherungskauf or, more often and somewhat imprecisely, of Sicherungsübereignung.[5]

The purest expression of this phenomenon is the security formalised as a sale with immediate effect, so that the creditor acquires the property at the time of the contract, with the explicit or implicit agreement of returning it upon payment:[6] But the sale may also be explicitly or implicitly understood as suspended, effective only upon default.[7] Such suspended sale differs from forfeit-hypothec only in its

succeeded in finally fully dissociating this phenomenon from the category of the ‚Scheingeschäfte', tainted by the stigma of the simulation: Rabel 1906 and 1907. The question whether these were or not ‚simulated transactions' had been central in the tortous German path towards the admission of title-transfer security (Sicherungsübereignung): infra ad n. 254.

[4] Among innumerable examples, cf. Manigk 1909a: 2311: ‚Die Tatsache, daß in vielen ursprünglichen Rechten ein Eigentumspfand bekannt war, ohne daß an eine gegenseitige Beeinflussung dieser Rechte zu denken ist, muß in erster Linie betont werden. Es ist natürlich, daß jedes Volk das Institut des Eigentums, ehe andere Rechte geschaffen sind, zu allen möglichen Zwecken benützt', to which he adds references to the old Germanic tradition, the Frankish law, the Pre-Islamic Arab law and the Shia legal tradition. For the Lombard carta and contracarta, cf. infra n. 61. Manigk's emphasis is all the more remarkable given the controversies around title-transfer security in late nineteenth and early twentieth century Germany: infra XI ad n. 254.

[5] Infra nn. 23-24. Strictly speaking, the terms are not synonymous. In the late nineteenth century German legal discourse, the notion of Sicherungsübereignung arose in truth together with the so-called ‚Abstraktionsprinzip', for securities perfected by abstract cession, without the need to formalise the transaction as a sale and to turn the loan into its price. Once the term asserted itself, legal historians have tended to use it somewhat unscrupulously for any form of title-transfer security, even if under the traditional form of a guarantee sale.

[6] So, the Roman fiducia cum creditore; so also, possibly, the atypical (at the present state of our sources) BGU IV 1158 = MChr. 234 (9 BCE Alexandria), infra VI. Immediate acquisition is theoretically conceivable with automatic resolution upon payment, i.e., without the need for a re-transfer of the property: the Fayum sale-loan deeds have been commonly (although, in my opinion, wrongly) understood this way: infra III.

[7] Among suspended sales, a distinction is still necessary depending on whether default (a) is by itself sufficient to make the creditor acquire, or (b) merely allows him to take unilaterally the necessary steps to become owner (v.gr. registration or tax payment), or (c) just to compel the debtor to surrender his rights on the property. The dichotomy between ‚c' and ‚a'-b' can be expressed in terms of ‚ius in personam' vs. ‚ius in rem', but does not depend on these Romanistic notions. In the native Egyptian tradition, for instance, ‚c' was made possible by the Demotic distinction (Keenan, Manning & Yiftach-Firanko 2014: 53-58, with lit.) between document of sale („document for silver") and document of cession („document of being far"): and, indeed, it is possible that, in the absence of the latter, Spiegelberg's Thebaid ‚Kaufpfandverträge' (infra II) worked as in ‚c'. Yet another factor made such dichotomy possible: the Ptolemaic requirement of agoranomic katagraphê for land acquisition, that allowed for a distinction between ‚real' and merely ‚obligational' sale: cf. BGU XIV 2398 = BGU X 1974 (213 BCE Tholthis), and, on it, Keenan, Manning & Yiftach-Firanko 2014: 313-315.

formulation. Their effect, instead, is virtually identical:[8] after forfeit, the position of the creditor is that of a buyer. Hence some crucial stipulations common to sale and forfeit-hypothec: most notably, bebaiosis.

The common hypothesis that hypothecation may be genetically related to this type of suspended sale [9] is thus perfectly understandable. Even leaving aside such hypothesis, it is clear that the line between real securities and sale can easily be blurry - and, with it, also the legal situation of the object before default: who is the owner of something that has been, in a way, sold, even if conditionally?

In legal systems that tend to isolate the form of legal transactions from their economic context, the debtor would undoubtedly be still the owner, if the act is not formalised as a proper sale with immediate effect. That is certainly the case of the hypothecary debtor in classical Roman law. In legal systems that are, instead, more sensitive to the economic context than to form, it may seem natural to treat the creditor as owner from the beginning, since he has already paid for the object: this is Fritz Pringsheim's Surrogationsprinzip.[10]

In fact, we should not assume that both answers are incompatible. In some cases, the most accurate analysis may be that the owner's faculties are divided between debtor and creditor: the debtor may have lost some of them (the possession, the right to the produce, the right to sell, for instance); some may be merely suspended, some may correspond to the creditor, whose position may be in certain respects equated from the beginning to that of an owner. This is what, since Paul Koschaker, we call 'functionally divided ownership'.[11]

Different from this idea of functionally divided property, but related to it, is the notion of relative ownership.[12] Relative ownership exists in those legal systems where, in

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[8] Differences between suspended sale and hypothec may arise in the way forfeit is enforced, in those systems that require the creditor to go through a specific execution procedure: this was the case of the hypothecary creditor in Egypt (infra n. 15); we tend to assume that the suspended sales of the native Egyptian tradition (infra II-IV) did not require such execution procedure, but in truth the assumption is sustained only by an argument a silentio, and the tax equivalence of these sales and hypothecs might suggest otherwise: cf. in particular the case of P. Chic. Haw. 9, infra n. 41, where we have tax evidence of epikatabolê.

[9] An overview for different legal traditions already in Rabel 1907: 364-370.

[10] Pringsheim 1916. For Seidl's related ‚notwendige Entgeltlichkeit', Wolff 1975.

[11] Koschaker 1928: 130, 133-134, 146-147; Koschaker 1931: 46-61; Koschaker 1938: 255-266. Long before him, and usually forgotten, cf. already, for the Roman fiducia, Manigk 1909a: 2295 (‚beschränktes Eigentum für beschränkten Zwecken'). The idea was far from new: cf. the Medieval notion of dominium directum and utile. Since the late thirties (Kaser 1939), Max Kaser has championed the application of this construction to various archaic Roman institutions (overview in Kaser 1971: 38), particularly servitudes and real securities: Kaser 1971: 143-145, with lit; for real securities, Kaser 1976. The construction has been met with scepticism as far as Roman law is concerned, particularly in Italy: cf. Kaser 1971: 143-144 nn. 7-9, 18, Kaser 1976: 258 n. 158.

[12] On the necessity to neatly distinguish between both, cf., partially correcting himself, Kaser 1976: 258 n. 158.

order to obtain protection as owner against someone, it is enough to prove that one has a better right than him.[13] As a result, I may be protected as owner in front of A, even if I would not be acknowledged as such in front of B. This construction is also conceivable for real securities: the creditor may be treated as owner in front of the debtor, even though the debtor would be still protected as owner in front of a third party.

This constellation of ideas has marked the discussion of Greek real securities in the recent past: enough here to recall the debate within the Symposion on the relation between hypothec and πρᾶσις ἐπὶ λύσει, and on the question of who must be considered owner of the asset.[14] What I propose is to see now what the papyri can offer in this direction.

In Egypt, several concurring factors left little space for these phenomena of functionally divided and relative ownership, and, as far as hypothecation goes, for the Surrogationsprinzip itself. The Ptolemaic execution system, adopted also by the Roman administration, was open for all creditors directly upon default, and comprised a special, simplified version for hypothecary creditors.[15] These therefore claimed as creditors, not as owners, even though after default they became such through the s.c. epikatabolê.[16] Before default, the Surrogationsprinzip and the idea of a functionally divided ownership could have underlain the debtor's loss of potestas alienandi,[17] but this was quite clearly not the case in Egypt, for reasons connected to taxation and registration: the difference between the initial telos hypothêkês and the telos epikatabolês, required upon default for forfeit, was a perpetual reminder that the creditor did not in fact become owner in any way until the latter tax was paid; registration, required both for acquisitions and for hypothecs, made the distinction between both even neater.[18]

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[13] In Roman law, this was the case of the archaic vindicatio through sacramentum in rem: both litigants solemnly affirmed to be owners, and the judge was expected to condemn the one whose legitimation resulted more precarious, even if someone else had a better right than his opponent: cf. Kaser 1971: 124-125, with lit.

[14] Thür 2008; Harris 2008. Cf. also Harris 1993, 1988, 2012.

[15] On the execution procedure, still fundamental Jörs 1915, 1918, and 1919. A summary: Rupprecht, in Keenan, Manning & Yiftach-Firanko 2014: 259-265. On its application to real securities, Mitteis 1912a: 158-165, and Rupprecht 1997b, with lit.

[16] On epikatabolê, Schwarz 1911: 119-125; Mitteis 1912a: 163-165. The institution is attested only in Egypt, where it was performed, we read in a Ptolemaic contract, ‚according to the diagramma' (P. Tebt. III 1 817, 182 BCE Krokodilopolis, l. 19-20). A new study would be necessary.

[17] On the debtor's surrender of potestas alienandi in the papyri, Alonso 2010: 14-15, and infra nn. 93, 94, 153. For classical Roman law, Max Kaser has presented the limitations of the debtor's potestas alienandi as remnants of archaic functionally divided ownership: Kaser 1976: 29-55, passim.

[18] For the agoranomic registration of hypothecs, P. Enteux 15 = P. Lille II 31 (218 BCE Magdola); for the distinction between such registration and the sale katagraphê, cf. the public announcement in P. Köln V 219 (209 or 192 BCE Arsinoites). The distinction is absolutely neat also regarding the Roman bibliothêkê enktêseôn: cf. the 89 CE Edict of Mettius Rufus, in P. Oxy. II 237 VIII ll. 31-32: κελεύω οὖν πάντας τοὺς κτήτορας ἐντὸς μηνῶν ἓξ ἀπογρά|ψασθαι τὴν ἰδίαν κτῆσιν εἰς τὴν τῶν ἐνκτήσεων βιβλιοθήκην καὶ τοὺς δανειστὰς ἃς ἐὰν ἔχωσι ὑποθήκας.

This paper will not further consider ordinary hypothecation and its relation to ownership, but will instead concentrate on title-transfer security, on Sicherungsübereignung. My aim is to determine whether a Greek tradition of Sicherungsübereignung is at all attested in the papyri - leaving aside the later, Byzantine material.[19] This may seem unnecessary, even eccentric. For longer than a century nobody has doubted that such tradition existed: it figures at length in Mitteis' Grundzüge and Chrestomathie,[20] where it is illustrated with wealth of sources, most of which had already been presented in the same sense by Ernst Rabel;[21] the material was reviewed again by Hans-Albert Rupprecht [22] and, in his study on ὠνὴ ἐν πίστει in Symposion 1985, by Johannes Herrmann, whose conclusions confirm those of Rabel and Mitteis.[23] And yet, an unprejudiced study of the sources renders, in my opinion, a very different picture, as I will try to show in the following pages.

Before confronting the sources, a short remark is necessary about the term Sicherungsübereignung itself, and the way in which it has been used in our context. Strictly speaking, Sicherungsübereignung implies immediate transfer of ownership, formalised or not as a sale. Yet, legal historians have tended to use the term also for guarantees that are formalised as sales but lack immediate effect, i.e. for conditional sales.[24] This is unfortunate. There may be cases where our information is insufficient

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Evidence of the registration of hypothecs as such (n.b. τῆς ὑποθήκης κατοχὴν ποιήσασθαι, in P. Oxy. XVII 2134, after 170 CE Oxyrhynchos, l. 24) arrives to the late third century: cf. P. Oxy. LXI 4120 (287 CE Oxyrhynchos). Especially illustrative of the way in which hypothecs were registered throughout the different stages of their execution is the diastrôma fragment in P. Oxy. II 274 = MChr. 193 = FIRA III 104 (97 CE Oxyrhynchos). All these documents come from Oxyrhynchos, but there is no doubt that hypothecs were registered as katochai also elsewhere: cf., for the Arsinoites, the hypothec cancellation in PSI XII 1238 (244 CE Tamais), ll. 14-16: ἄκυρόν τε εἶναι τὴν δηλουμένην τοῦ δανείου [συν|χώρ(?)]ησιν καὶ τὴν πρὸς αὐτὴν γενομένην διὰ τοῦ τῶν ἐγτήσεων βιβλιοφυλακίου τῶν | [δι' ὑποθή]κης ὑπαρχόντων κατοχήν.

[19] For the late Byzantine practice, Urbanik 2013.

[20] Mitteis 1912b: 257-262 (nr. 233-236); Mitteis 1912a: 135-141, categorically: "Daß diese Verpfändungsform dem gräko-ägyptischen Recht geläufig gewesen sei, ist seit langem die herrschende Meinung unter den Papyrologen"; and then, on the basis of BGU IV 1158 = MChr. 234 (infra VI): "so wird die Existenz derselben … zur vollen Evidenz erhoben".

[21] Rabel 1907: 355-364. Sceptical regarding these sources -rather than the phenomenon itself-, albeit not always convincing in his detailed analysis, Manigk 1909b: 306-328; discussion and rebuttal in Mitteis 1912a: 136-139.

[22] Rupprecht 1995: 429-435.

[23] Herrmann 1989: 322: "Das Rechtsinstitut der Sicherungsübereignung ist inzwischen urkundlich hinreichend belegt, so daß Zweifel hinsichtlich seiner Existenz unangebracht sind". Hermann's study, however, ends with a remarkable final paragraph, strikingly disconnected from his previous conclusions, and pointing to some of the misgivings that have guided my own research: „Andererseits kann nicht übersehen werden, daß die Entwicklung der one en pistei under dem Einfluß demotischen Rechtsvorstellungen stand, deren Wirkung derzeit jedoch schwerlich einer konkreten Beschreibung zugänglich ist". One is left to wonder whether a non-posthumous publication of his work would have led him to a different position altogether.

[24] The exception is here Mitteis 1912a: 135-141, who prefers the expression fiduziarische

to decide whether the creditor's acquisition is immediate or not; one may even imagine contracts that treat the acquisition as retroactive, so that the difference is blurred ex post,[25] or legal cultures where a neat distinction is not possible between a creditor who acquires ab initio and one who acquires under suspensive condition - even though, as I have argued, this was not the case of Ptolemaic and Roman Egypt. But none of these possible uncertainties justifies the terminological inaccuracy of extending the term Sicherungsübereignung to something that is not an Übereignung, a title transfer. This inaccuracy conflates into one concept phenomena that are diverse and not necessarily related: security by immediate property transfer, in whatever way it may be formalised, on one hand, and securities formalised as suspended sales on the other. One of the guiding lines of this paper will be to keep them separate.

II. Demotic Guarantee Sales

Securities formalised as sales are not infrequent in the papyri.[26] Most of them, though, are not Greek, but Demotic or bilingual.[27] These documents are well known since Spiegelberg's studies at the beginning of the twentieth century.[28] They attest a strong native Egyptian tradition of guarantee sales. This has methodological

Eigentumsübertragung, and keeps it restricted to the cases where he believes there was immediate acquisition. Unfortunately less rigorous, Sethe-Partsch 1920: 680 (‚bedingte Sicherungsübereignung'), and Schwarz 1937: 251-253, passim (‚suspensiv bedingte Sicherungsübereignung'), even if he emphasises (251) the importance of distinguishing between this and the cession under resolutive condition. Within such tradition, it is only natural that Rupprecht 1995: 429-435, groups as Sicherungsübereignung cases (sub c) that he characterises as ‚aufschiebend bedingte Kaufvertrag' (precisely those that we will examine infra II-V). Cf. also Rupprecht 1997a: 874 n. 31. This unfortunate terminological choice is due to the trivial fact that modern German law -as most modern legal systems- knows no form of suspended guarantee sale: its potential niche is already taken by ordinary hypothecation. The closest institution, the so-called Eigentumsvorbehalt, is not a useful parallel: it is also a suspended sale, but under the condition that the buyer pays the price; in our case, instead, the price has been paid, and functions in fact as a loan, the sale being made under the condition that the seller returns it.

[25] An example: the Lombard ‚conditional investiture' when formulated under suspensive condition, cf. Brunner 1894: 621. Within our material, cf. the menein contract (infra V) P. Oslo II 40 A (150 CE Oxyrhynchos): the offspring that from the moment of the contract may be born to the slave given as security shall belong to the creditor, as if the slave had been sold to him with immediate effect (ll. 12-13: [δεσ]πόζειν αὐ[τ]ῆς καὶ τ[ῶν ἀ]πὸ τοῦ νῦν ἐσομέν[ω]ν ἐξ αὐτῆς ἐκγόνων ὡς ἐὰν πράσεώς | [σοι γε]νομένης), and yet, before the term arrives, both the slave and the possible offspring are treated as still belonging to the debtor, since he undertakes not to alienate them (ll. 15-18: οὐκ ἐξόν\|[τος] μοι, \ἐ/ὰν μὴ πρότερον ἀποδῶ τὰς δραχμὰς ἑξακοσίας καὶ τοὺς τόκους, πωλεῖν \| [οὐδὲ] ὑποτίθεσθαι οὐδ' ἄλλως καταχρηματίζειν τὴν δούλην Ἰσαροῦν οὐδὲ τὰ ἐσόμενα \| [ἐξ αὐ]τῆς ἔκγονα).

[26] An overview, from which the following pages will depart in crucial respects, in Rupprecht 1995: 430-435.

[27] On security for debt in the Demotic papyri, Pierce 1972: 110-132, Manning 2001; Markiewicz 2005. On the scarce traces of securities in the Pharaonic sources, Jasnow 2001.

[28] Spiegelberg 1909, 1913.

implications: when we confront the Greek materials, we must be particularly alert to distinguish, in the measure that the documents allow, between the Greek tradition and the mere continuation of the Egyptian practice in a new language.[29] For this very reason, we must briefly review the Demotic materials, despite the author's lack of linguistic competence: by a fortunate coincidence, much of the decisive information will actually come from the Greek subscriptions and tax receipts.

The Demotic tradition consists in combining a sale with a loan. This is done in a remarkably varied and ingenious array of forms (cf. also III-IV). The most straightforward we find in the Thebaid, in a group of documents that Spiegelberg baptised as 'Kaufpfandverträge'.[30] These documents begin as simple acknowledgments of debt, but to this a sale is immediately added, in the usual form of the 'document for silver', for the case that the borrower does not pay in time.[31] Consider, as an example, P. British Mus. inv. 10525 (284 BCE Thebes):[32]

> |1 ... You have a claim against me (in the amount) of 9 silver kite, making 4.5 statêrs you have given me, and I will repay you by the last day of year 22, third month of shemu. |2 If I do not pay you the silver kite, making 4.5 statêrs, mentioned above by the last day of the third month of shemu, you have caused my heart to agree to the price for (the sale of) my house that is built and roofed, which is in the northern district of Thebes ...

It seems quite clear that this is not a title-transfer security, but a suspended sale, effective only if the debtor defaults. Only then will the creditor be entitled to claim it as his own, as we read in ll. 3-4:

> |3 ... I have given it to you; it's yours, your house, which is built and roofed, as already specified above. I have no claim whatsoever |4 against you regarding it. No one at all including me will be able to exercise authority over it except you, from the first of the month of Mesorê, year 22 onwards.[33]

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[29] Cf. Rupprecht 1995: 430: ‚Wie kaum sonst in einem Bereich der Papyrologie verwischen sich hier die Grenzen zwischen griechischen und ägyptischen-demotischen Urkunden'.

[30] Spiegelberg 1909. Cf. also Rabel 1909: 79-81, and Partsch, in Spiegelberg 1913: 17-18.

[31] P. BM Glanville p. 10-14 = British Mus. inv. 10523 (295 BCE), P. BM Glanville p. 34-38 = British Mus. inv. 10525 (284 BCE), P. Phil. dem. 15 = Cairo inv. 89368 (259 BCE), P. Schreibertrad 14 + RevEg 5 = Louvre inv. 2443 (249 BCE), P. Phil. dem. 21 + SB VI 8968 = Cairo inv. 89372 (237 BCE), P. Phil. dem. 22 + SB vi 8970 = Cairo inv. 89373 (234 BCE), P. Phil. dem. 23 = Cairo inv. 89374 (230 BCE), P. Hauswaldt 18 = Berlin Äg. Mus. inv. 11337 (212-211 BCE), RecTrav 31 (1909) 95-98 + SB I 4281 = British Mus. inv. 10824 (159 BCE), all from Thebes, except the Edfu P. Hauswaldt 18.

[32] Tr. M. Depauw & J. G. Manning.

[33] The clause, in truth, formulates as merely postponed in time an acquisition that was intended and had been previously formulated as conditional. Incisively, Rabel 1909: 81: ‚Wir werden uns dies alles am besten so zurechtlegen, daß die beabsichtigte suspensiv bedingte Übereignung sich dem Urkundenverfasser als eine bloß aufschiebend befristete unbedingte

Even upon default, the creditor's acquisition seems to have formally depended on the debtor's issuing of a yet another document: the document of cession (so-called 'document of being far'), whereby sellers in general surrendered their rights over the property: cf. P. Hauswaldt 18, where the secured loan, at the right side of the papyrus, was followed upon default by a cession deed, written one year later on the left side of the same papyrus.

That the creditor acquires only upon default must have been clear to everyone involved also for fiscal reasons:[34] in the tax receipts for these contracts we see, in fact, that the rate was that of a hypothec, 2%, rather than the full sale enkyklion of 5%.[35] And, in fact, these tax receipts refer to the Demotic conditional sale purely and simply with the term ὑποθήκη.[36]

With the publication of the Chicago Hawara papyri in 1998, a different model of Demotic 'Kaufpfandvertrag' came to light, this time from Fayum. Here, instead of one document with a loan and a conditional sale, we have several separate documents. First, a sale, contracted as always through a 'document for silver', but this time seemingly formulated as immediately effective. Cf. as example P. Chic. Haw. 7 A (245 BCE):

> |1 ... You have caused my heart to agree to the money for my one-third share of this house ... |4 ... Yours is the one-third of this aforesaid house upon its southern part, below and above, together with the aforesaid one-third of my bench, |5 which is on its western (side), the measurements and neighbours of which are written above, from today onward. No one in the world, myself included, shall be able to exercise control over them except you from today onward ... You may make any alterations on them with your (work-)men and your materials in proportion to your aforesaid one-third share from today onward also. ...

The impression that the sale is here meant to be immediately effective is reinforced by the fact that in this case the 'document for silver' was allegedly given together with the document of cession. This second document has not survived in our case, but it is mentioned in yet a third document executed by the parties, P. Chic. Haw. 7 B, where the true nature of the transaction is disclosed:

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darstellt, von der aber der Gläubiger nur unter Bedingung Gebrauch machen darf'.

[34] Rightly underlined by Markiewicz 2005: 156. Cf. already Schwarz 1911: 35.

[35] Cf. P. Lond. III 1201 (p. 3) = MChr. 180 (161 BCE Hermonthis) and P. Lond. III 1202 (p. 5) = SB I 4281 (159 BCE Hermonthis). In the first case, for instance, the loan amounts to two talents and 1800 dr., that is, 13.800 dr. A 5% sale *enkyklion* would have been 690 dr., while the tax receipt is for 276, exactly the 2% imposed on hypothecations. The Demotic part of the papyrus reveals that the sale had been executed on Phaophi 2nd, and the loan had matured on the last day of Pachon, three months before the tax receipt: quite obviously, the hypothecary tax was paid only when the creditor needed to act against the debtor.

[36] P. Lond. III 1201 (p. 3) = MChr. 180 (161 BCE Hermonthis), l. 2; P. Lond. III 1202 (p. 5) = SB I 4281 (159 BCE Hermonthis), l. 2. Cf. already Rabel 1909: 81-82.

> |5 ... There are |6 a document of payment and a document of cession for the one-third of a house and a |7 bench in Hawara, so as to make two documents. I have put them in your hand |8 upon agreement because you have given to me 1 silver (deben) and 6 kite, in staters, 8 staters, |9 being 1 silver (deben) and 6 kite again. ... |12 ... They increase amounts in the aforesaid period |13 to 1 silver (deben) and 2 kite, in copper at the rate of 24 obols to 1 stater, making in all, |14 the principal and interest, 2 silver (deben) and 8 kite. ... |16 ... [I]f it happens that I have not given to you these 2 silver (deben) and 8 kite |17 aforesaid by the end of the two years aforesaid, I have no |18 claim in the world against you with respect to the aforesaid documents and the |19 legal rights which they convey. If, however, it happens that I have given to you these 2 silver (deben) and 8 kite aforesaid |20 by the end of the period aforesaid, you shall give back to me the aforesaid documents and the |21 legal rights which they convey. ... [37]

Only through this document we learn that the sale was not a simple sale, that the 'seller' was in fact borrowing money: he had received one silver deben and 6 kite to return in two years, at an interest rate of 37,5 % per year (1 further silver deben and 2 kite after the two years), and it was for this reason that he produced for the creditor the documents of sale and cession. Importantly for us: he accepts that, if he does not pay in time, he shall have no claim on those documents and the rights they convey; but, if he pays, he shall recover them, with the rights they convey. This would seem to confirm our first impression, that, unlike the Theban examples, this is a sale under resolutive, not suspensive condition.

The impression is misleading, though. There is another document to consider: P. Chic. Haw. 7 C, the Greek receipt attesting that the tax for the transaction on the house was paid by the creditor. There, a price of 20 drachmas[38] is taxed at 2 1/2 obols,[39] i.e. at the 2%,[40] which was the ratio of the telos hypothêkês, sales being taxed at a 5%. This means that, whatever the parties believed as to who was the owner in the

[37] Tr., as for 7A above, by G. R. Hughes & R. Jasnow, in their edition of P. Chic. Haw. A similar document: P. Mich. inv. 4526 (184 BCE Philadelphia)

[38] The amount poses a puzzling problem. There is no doubt that the receipt refers to the transaction in P. Chic. Haw. 7 A and B: the parties are the same (Sochôtês son of Pauês, in the receipt, is the Greek version of Sobekhetep [Sbk-ḥtp] son of Pawa [Pa-wꜣ], in the Demotic documents), the date is the same, and 7C was found rolled up within A and B (cf. the ed., p. 46). Yet, the sum declared for the tax, 20 dr., is substantially lower than the actual amount owed by the ‚seller' (2 deben and 8 kite, i.e. 56 dr.); lower, in fact, even than the amount formally received as ‚price' (the loan of 1 deben and 2 kite, that is, 32 dr.). The only possible explanation, that the tax was not calculated on the basis of the loan but of the estimated value of the security, goes against all the rest of our evidence: cf. for instance the already mentioned (supra n. 35) P. Lond. III 1201 and 1202, and also P. Oxy. II 243 (79 CE).

[39] The 1/4 obol ἀλλαγή added to that amount is the 10% agio added to the tax (calculated in silver) when the payment is made in copper.

[40] The exact 2% of 20 dr. being 2.4 obols.

meantime, it is certain that legally it was not the creditor: the creditor would acquire only upon default, once he paid the 5% of the telos epikatabolês.[41] This has such practical relevance, that it seems in general unlikely that the parties in these sales may not have been aware of it. That in our case they were aware, and excluded themselves an immediate acquisition by the creditor is suggested by the fact that the title deeds -those of the seller and those of his parents before him-, whose conveyance appears as essential in 7A l. 6, were in fact not given to the creditor: as we read in 7C ll. 5-7, he received only the document of payment and the document of cession, and it is only these documents that he promises to return upon payment (ll. 17-21). At any event, this sale was de iure as suspended as that of the Theban examples: again, not a title-transfer security, but, in effect, identical to a hypothec, and taxed accordingly.

III. Bilingual Fayum Sale-Loan Deeds

A different way of combining sale and loan is documented in a group of early Roman bilingual documents from Soknopaiu Nesos [42] and from the grapheion of Tebtynis.[43] The document is laid out in two columns: in the second, the loan contract;

[41] This is confirmed by P. Chic. Haw. 9, together with P. Carlsberg 34, 36, 46, 47 and 48. In P. Chic. Haw. 9 (239 BCE), the son of the debtor of our P. Chic. Haw. 7 concluded a similar transaction on the same property in favour of the mother of the previous creditor. The document would have seemed an ordinary sale, were it not for P. Carlsberg 34, dated to the same day, an annuity contract between the same parties, and P. Carlsberg 36, dated several years later (233 BCE), where the debtor forfeits the property to the creditor. Also in this case the tax receipts are preserved, and they confirm that these transactions were treated and taxed as hypothecations: P. Carlsberg 46 (239 BCE) is the receipt for the payment of the telos hypothêkês (2%), on the same day of the two initial contracts; P. Carlsberg 47 (237 BCE?) is the receipt for the payment of the telos ananeôseôs (2%) for the renovation of the mortgage two years later; P. Carlsberg 48 (236 BCE), one year later, is the receipt for the payment of the telos epikatabolês (5%). It is notable that the epikatabolê did not lead here to execution, but to the voluntary surrender of the property by the debtor, although with a puzzling three year hiatus between both.

[42] Most of them edited as P. Dime III by Sandra Lippert and Maren Schentuleit. More or less complete examples of this type of transaction are numbers 7 (= BGU III 911, 18 CE), 10 (27 CE), 11 (29 CE), 19 (= SB I 5109 = P. Ryl. II 160 d + P. Ryl. dem. 45, 42 CE), 22 (= BGU XIII 2337, 45 CE), 23 (= SB XII 10804, 47 CE), 27 (= P. Zauzich 39, 54 CE), 31 (= BGU III 910, 70 CE). The editors conjecture as securities also P. Dime III 8 (23 CE), where the loan part is missing (cf. infra n. 45), and P. Dime III 10 (27 CE), also without a loan, but with the sale cancelled by strokes. The same type of security is cancelled in P. Vind. Tandem 24 (50 CE). Also to this group belong P. Ryl. II 310 descr. (33 CE), P. Leconte 4 descr. (Pap.Congr. XV, 25) (41-54 CE), the Greek antigraphon P. Ryl. II 160 c (32 CE), and the entirely Greek PSI XIII 1319 = SB V 8952 (76 CE).

[43] Published in the fifth volume of the Michigan papyri and in the eighth of the Italian Society: P. Mich. V 328 (29-30 CE), P. Mich. V 329 dupl. 330 (40-41 CE), PSI VIII 908 (42-43 CE), P. Mich. V 332 dupl. PSI VIII 910 (before 48 Tebtynis), P. Mich. V 335 dupl. PSI VIII 911 (before 56 CE). All of them (as many other contracts from the Tebtynis grapheion published in P. Mich. V) are ‚incomplete', with most of the papyrus sheet left blank and only the subscriptions written at the bottom. On this phenomenon, infra in text sub ‚c'.

in the first, the sale; both without any mention of the other.[44] One could cut out the papyrus in two, and nobody would know anymore that the sale was connected to a loan, that it was a real security. This apparent oddity is perfectly understandable, if we assume the point of view of the creditor: if the debtor fails to pay, the creditor will have, in fact, as proof of his ownership, a perfectly independent, ordinary sale document. [45]

The bilingualism of these documents follows a constant pattern. The sale is typically drawn up in Demotic, and comprehends both the sale proper, in the usual form of 'document for silver', and the cession, whereby the seller surrenders all his rights on the property, as 'document of being far'. Under them, a Greek subscription summarising both the former (as prasis) and the latter (as apostasion). The loan, instead (also with subscription) is only in Greek. The reason for these language choices is not difficult to imagine: if the debtor defaults, the sale document is destined to the family archive, while the loan contract is destined to court.[46] This suggests that upon default, unlike in the older Demotic 'Kaufpfandverträge' (supra II),[47] the creditor could choose between keeping the property or claiming the loan, which carries the usual praxis-clause granting execution on the person and the entire property of the debtor.[48] And this in turn suggests that, despite the appearances —a sale contract formulated as entirely unconditional, and accompanied by a cession-apostasion—, the sale had no immediate effect, contrary to what is commonly assumed.[49]

In fact, our documents contain further information that confirms this impression:

a) Those that carry a label in the verso, are labelled as hypothecs.[50] In the anagraphic

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[44] For the overall structure, cf. Lippert-Schentuleit 2010: 11-12, and 12-58 for a detailed analysis of the clauses.

[45] This is the editors' hypothesis for P. Dime III 8 (23 CE), in its present condition just a sale, with the suspicious peculiarity that the papyrus was cut out at the right side, as betrayed by the lost ends of the lines of the Greek subscription.

[46] Similar phenomena are still common in bilingual societies where a language required or perceived as convenient for acts involving the administration coexists with another traditionally dominant in the family sphere. Thus, in the Basque country it is not infrequent that, while mortgages are drafted in Spanish, the property deeds for the same assets are executed in Basque. I owe this insight to my former student Xabier de la Mota.

[47] In those, forfeit appears as inexorable upon default, so that the creditor's right is reduced to the security. This seems true even when guarantors are given together with the security, as in P. Hauswaldt 18: cf. infra n. 151 i.f., and Sethe-Partsch 1920: 595.

[48] P. Dime III 7 = BGU III 911 (18 CE), ll. 21-24; P. Dime III 19 = P. Ryl. II 160d (42 CE), ll. 17-21; P. Dime III 31 = BGU III 910 (70 CE), ll. 26-27. A drastically shortened version of the praxis clause, in P. Dime III 27 = P. Zauzich 39 (54 CE), ll. 22-23, and PSI XIII 1319 = SB V 8952 (76 CE), l. 59.

[49] Cf. Markiewicz 2005: 156-157: ‚unconditional sale agreement that apparently immediately conveyed the security to the creditor'. Before him, in the same sense, Schwarz 1937: 252-253 (for P. Rylands II 160 c and d); Pierce 1972: 119-121.

[50] P. Mich. V 332 dupl. PSI VIII 910 (before 48 CE) ll. 31-32: ὑποθήκη Ὀρσεῦτος (πρὸς) Κ̣ρ̣ω̣νείω̣ν̣α̣. P. Mich. V 335 dupl. PSI VIII 911 (before 56 CE) ll. 18-19: ὑποθήκ(η) Πετεσούχ(ου) πρ(ὸς) Κρονί(ωνα) (δραχμῶν) υμη.

records of the grapheion also, where some instances of double transaction among the same parties refer unmistakably to our phenomenon, the contract that accompanies the loan is not designated as a sale, but as a hypothec or mesiteia [51] (the latter being the terminus technicus used by the grapheion instead of hypothêkê for ordinary hypothecations on catoecic land).[52] This phenomenon, as we have seen in the Demotic documents (supra II), strongly suggests that from the point of view of the grapheion, and certainly of the administration, also taxwise, these were not sales with immediate effect, but suspended sales akin to ordinary hypothecs.

b) In P. Mich. V 332 dupl. PSI VIII 910, bebaiosis secures the property from public debts not up to the date of the contract, but up to a later date: this later date, as one would imagine, and the right column confirms, coincides with the term set for returning the loan.[53] Only from that moment do public duties pass to the creditor: obviously, it is only from that moment that he is considered owner.

c) The documents from the Tebtynis grapheion are actually unfinished. The papyrus sheet was left blank, save for the subscriptions at the bottom: the subscription of the loan by the debtor, at the right; that of the sale, by the same debtor as seller, at the left. Missing are the contracts proper, the grapheion registration notes, and usually also the subscriptions of the creditor/buyer.[54] Three of the five extant sale-loan documents from Tebtynis have actually arrived to us in duplicate, both copies in the same unfinished state.

The phenomenon is not limited to our guarantee sales. Other forty-seven similar subscriptions from the archive, lacking the body of the contract, often in two or more copies, for all sorts of transactions, have been published in P. Mich. V and PSI

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[51] Cf. P. Mich. V 238 (46 CE) ll. 3-4: β ὁμο(λογία) Κρονίωνο(ς) πρὸ(ς) Ἀπολλώνιο(ν) μεσιτείας ἀρουρῶ(ν) β (δραχμαὶ) δ | δάνη(ον) Ἀπολλωνίου πρὸ(ς) τὸν αὐτὸ(ν) Κρονίωνα ἐπ' αὐτ̣ῆ̣ς ἀργ(υρίου) (δραχμῶν) τη (δραχμαὶ) δ. And later, in ll. 8-9: ὁμο(λογία) Θενκήβκιος πρὸ(ς) Παπνεβτῦνιν ὑποθή(κης) μέρο(υς) οἰκία(ς) (δραχμαὶ) δ | δάνη(ον) Παπνεβτύνε(ως) πρὸ(ς) Θενκῆβκιν ἐπ' αὐτ\ον/ ἀργ(υρίου) (δραχμῶν) ρ (δραχμαὶ) β. Only in the eiromena, where a fuller summary of the contracts is required, is the transaction described as ‚prasis kai apostasion': cf. the two first abstracts of P. Mich. V 241 (40-41 CE).

[52] This, for the same formal scruple that makes it more accurate to speak to speak of parachôrêsis instead of sale when it comes to catoecic land. A particularly clear confirmation of this double equivalence is the tetrad sale/parachôrêsis, hypothec/mesiteia in the models of P. Mich. II 122 (42 CE Tebtynis). On parachôrêsis, infra n. 115. For the fundamental identity between mesiteia and hypothêkê, cf. the sources collected by Manigk 1909b: 296-302.

[53] P. Mich. V 332 dupl. PSI VIII 910 (before 48 CE), col. 1, ll. 11-15: βεβαιώσω πάσῃ βεβαιώσι ἀπὸ μὲν δη|μοσίων τῶν ἐκ τῶν ἐπάνω χρόνων μέχρει μηνὸς Φαρμοῦθι <καὶ> αὐ|τοῦ τοῦ μηνὸς Φαρμοῦθι τοῦ εἰσιόντος ἐνάτου ἔτους Τιβερίου Κλαυδίου | Καίσαρος Σεβαστ̣ο̣ῦ̣ Γ̣ε̣ρ̣μ̣α̣ν̣ι̣κ̣ο̣ῦ̣ Α̣[ὐτοκ]ράτορος, ἀπὸ δὲ ἰδιωτικῶν καὶ | πάσης ἐνποιήσεως ἐπ̣ὶ̣ τ̣ὸ̣ν̣ ἅ̣π̣α̣ν̣τ̣α̣ [χρόν]ον. The month of Pharmouthi of the 9th year of Claudius is, as we read in col. 2, ll. 25-28, the term set for the loan: ἃς καὶ ἀποδώσωι ἐν μη|νὶ Φαρμοῦθι τοῦ εἰσιόντος ἐνάτου ἔτους Τιβερίου | Κλαυδίου Καίσαρος Σεβαστοῦ Γερμανικοῦ | Αὐτοκράτορος καθὼς πρόκιται.

[54] Out of the five preserved examples, the creditor's subscription figures only in PSI VIII 908 (42-43 CE), ll. 12-13, l. 23,

VIII.[55] The phenomenon cannot be addressed here in all its complexity.[56] Husselman's hypothesis,[57] that these original subscriptions were left at the grapheion ready to be completed upon request of any of the parties, as extra 'authentic' copies (ekdosima),[58] seems confirmed beyond any doubt at least for some of the documents by the annotation 'ekdosimon' at their top.

Many aspects of the phenomenon remain puzzling, though,[59] and it should not be excluded that different reasons may have operated in different cases. In our particular case, one may easily imagine how the grapheion could serve the interest of both creditor and debtor by initially keeping all, not just some of the copies of the

[55] Published in P. Mich. V and PSI VIII: together with our five cases of guarantee sale, there are thirty-seven ordinary sales, two leases, two divisions of property, a money loan, a dowry receipt, a receipt for rent, an apprenticeship contract, a contract for work and one for service.

[56] Depauw 2003: 105 and n. 239, connects it to the loss of legal value of the Demotic contract in early Roman times, so that ‚contractants may well have decided to omit it completely and just settle for the subscriptions only'. The hypothesis is untenable, taking into account that: a) the subsisting subscriptions were never collected by the parties; b) the main space on the papyrus was in any case reserved for the contract proper; c) the phenomenon is attested also for Greek contracts (cf. our own case, as far as the loan is concerned). Also untenable would be the hypothesis that these were transactions that the parties for some reason withdrew from: the subscriptions in P. Mich. V 273 dupl. PSI VIII 906 (46 CE) seem to correspond to what appears recorded two days later as a ratified sale in the anagraphic register P. Mich. II 123 recto (46 CE), col. 16, l. 17; and the subscriptions in P. Mich. V 325 (47 CE) correspond to the meriteia that has arrived to us complete in P. Mich. V 323, 324 and PSI VIII 903.

[57] P. Mich. V, pp. 3-11.

[58] BGU IV 1065 (98 CE Arsinoites), and P. Lips. I 3 = MChr. 172 (256 CE Hermopolis), as already noticed by Mitteis 1912a: 64 n. 1, are examples of such ‚authentic' copies, i.e. antigrapha with original subscriptions.

[59] Thus, for instance: sale documents are in general useful only for the buyer; no right comes from them to the seller, who declares to have already received the price; and yet, the greatest number of surviving copies, the quadruplicate P. Mich. V 269, 270, 217 and PSI VIII 907 (42 CE), concerns a sale with four sellers, for all of whom, it seems, copies had been prepared. It is true that when a sale is made by multiple sellers, each of them may be interested in having documentary evidence that the others consented, but such possible purpose seems here betrayed by the fact that two of the four copies (270-271) contain only the subscription of one of the sellers. For the same reason, it is puzzling that double unfinished copies survive of sales with only one seller and one buyer: cf. P. Mich. V 278-279 (30 CE); P. Mich. V 290 with PSI VIII 912 (37 CE); or P. Mich. V 267-268 (41-42 CE), and P. Mich. V 273 with PSI VIII 906 (46 CE), copies that, precisely because never completed, could not have been intended either for the catoecic register. It is unsurprising that these seemingly useless extra copies were never reclaimed, but one wonders why they were prepared in the first place. If such extra copies were made only when the parties paid for them, we would not expect to find them in cases where they are so patently useless. On the other hand, the hypothesis that the grapheion produced them in every case, raising the expense in papyrus and writing to at least twice of what would otherwise have been necessary, seems to make sense only if it was compulsory to do so, although our sources keep no trace of a Ptolemaic or Roman rule in that sense.

contract. The procedure would be the following: 1) until the term for the loan arrives, all copies are kept incomplete in the grapheion; 2) upon payment, there is no need to complete them: one wonders if this might not have been understood in the sense that no transaction had been made, so that there would have been no need to pay any sale or mortgage tax (although cf. 'a' supra); 3) upon default, the document can be completed without the cooperation of the debtor, who has already subscribed; 4) decisively: before the term arrives, the creditor does not have any copy, so there is no danger that he might cut out the sale part and try to enforce it:[60] the incompleteness of the document protects the debtor by literally suspending the sale.

All this is, at the present state of our sources, highly conjectural. We shall soon see, though (infra IV), that a similar practice of interrupted sales is actually attested in late Ptolemaic Pathyris. It is certain, in any case, in the light of 'a' and 'b' supra, that these Fayum double contracts were not sales with immediate effect, but suspended sales, akin to ordinary hypothecs. A sale that functions as conditional even if unconditionally formulated is a remarkable phenomenon, but not without parallel in legal history:[61] in our case, a clear precedent is the Demotic Fayum 'Kaufpfandvertrag' of the type attested in P. Chic. Haw. 7 (supra II i.f.).[62]

This exhausts the Demotic and bilingual material, and allows for a first conclusion: the native tradition of guarantee sales is no title-transfer security (Sicherungsübereignung) stricto sensu: these are merely forms of suspended sale,[63] analogous to a hypothec, labelled in Greek as such, and taxed (when ab initio) accordingly.

IV. Pathyrite Interrupted Sales

Yet another form of suspended guarantee sale would have gone unnoticed if Pieter Pestman had not paid attention to the oddities of a group of sale contracts

[60] Prima facie, this would seem to provide an explanation also for the mysterious notice written on the verso of P. Mich. V 328 (29-30 CE), l. 20: φύλαξον αὐτὸν ἕως Μεχὶρ εἵνα λάβῃς παρὰ τοῦ καταγεγραμήνου. Here, αὐτὸν seems referred, for αὐτὴν, to the document itself (οἰκωνωμία [sic], in the previous line). And the last word (largely conjectural) would seem to point to the moment when the sale is brought to katagraphê: one would think, after the debtor's default. Yet, the annotation cannot be understood in the sense that the document was to be kept in the grapheion until unpayment: the term for the loan, in fact, is Neos Sebastos (October-November) of the seventeenth year of Tiberius, while the document is to be kept only until Mecheir (January-February).

[61] Rabel 1909: 81, points as parallel to the Lombard contracarta supplementing a formally unconditional carta venditionis. In that case, though, the condition seems to have worked as resolutive: in the contracarta, the creditor declares that the carta venditionis shall be null and void upon payment, cf. Brunner 1894: 624-625.

[62] Also in the Theban model, cf. supra n. 33, the condition is reformulated as if it were a mere time clause.

[63] In the same sense, Markiewicz 2005: 155, rightly points to the rule in the Code of Hermopolis, according to which if a debtor tries to sell a pledged house (a pledging likely conceived as arising from a guarantee sale), the creditor would not claim as owner, but would need to resort to a ‚public protest': Seidl 1967.

executed at the agoranomeion of Krokodilopolis and Pathyris, in the Pathyrite nome of the Thebaid, in the turn of the 2nd to the 1st century BCE. [64]

One example will suffice to show what he found. In BGU III 994, a Tathôtis, daughter of Phibis, declares to have sold a vacant plot to Taelolous son of Totoêtis for 5000 copper drachmas. In the very brief scriptura interior, we read (col. I, l. 1) that the transaction was executed in the fourth year of Cleopatra (III) and Ptolemy (IX), Mesorê 11th, that is, 113 BCE, Aug. 26th. In the scriptura exterior, instead, the date is the 6th year of the same reign (col. II, l. 2), Pauni 11th (col. II, l. 9), that is, 111 BCE, June 27th, almost two years later. Editing the papyrus, Schubart noticed the anomaly, and concluded that this second later date had to be wrong ('falsch'), since the same scriptura exterior attests (col. III, l. 10) that the enkyklion tax was paid in 113 BCE, less than a month after the initial date.

In the same direction would prima facie seem to point yet another circumstance. The execution of the document on the later date is attributed to the agoranomos Hêliodôros (col. II, l. 9). Our information about the Krokodilopolis and Pathyris agoranomeion is enough to know that this cannot have been the case, because by then Hêliodôros had been replaced as agoranomos by Sôsos.[65] This would seem to confirm Schubart's diagnosis of the later date as a mistake, were it not for the fact that, at the end of the body of the document (col. III, l. 9), it is not to Hêliodôros, but to Ammônios acting for Sôsos[66] that the execution of the document is attributed. We have to accept, therefore, despite Schubart, that the 111 BCE agoranomeion of Sôsos did actually somehow intervene in the execution of the document. Most tellingly: in the earlier date the enkyklion was not effectively paid, but merely deposited at a bank in a blocked account (θέμα),[67] with the banker acting as sequestrarius.

These peculiarities are not confined to BGU III 994. They reappear in other sales of this group, and, as Pestman realised, they can only mean that the document was executed in two stages: initially left incomplete, with the tax unpaid or deposited

[64] Pestman 1985a: 32, and 1985b, with a list in p. 46; adde SB XX 14393 (100 BCE), published in Bingen 1989. The earliest preserved contract is BGU III 994 and 996 (113 BCE), the earliest reference possibly P. Adler 2 (124 BCE). Most of the surviving contracts are dated to the turn of the century, between 101 and 99 BCE. When Rupprecht 1995: 431 gives a timespan from 145 to 88 BCE, that is the result of a misunderstanding of Pestman 1985b: 45, who refers there to all preserved agoranomic acts from Pathyris and Krokodilopolis. There is no evidence of Pathyrite agoranomic deeds after 88 BCE, i.e. after the new Theban uprising.

[65] Pestman 1985a: 12.

[66] The notarial network of the Pathyrite nome (Pestman 1985a: 9) included an agoranomeion in Krokodilopolis and a slightly later one in Pathyris (infra n. 80): the latter was formally subordinated to the former, so that the heads of the Pathryis office (as our Ammônios) were formally deputy-agoranomoi, acting on behalf of their Krokodilopolis counterparts (as Hêliodôros and Sôsos).

[67] Col. 3, l. 1, integrated (cf. Pestman 1985a: 38 n. 26), but cf. for instance P. L. Bat. XIX 6 = BGU III 995 (110 and 109 BCE), l. 30.

in a blocked account; in some cases, never completed, as we know because other documents prove that the seller retained the property, or, more revealingly, because on a later date an explicit renunciation (apostasion) of the buyer is preserved;[68] in other cases, completed only later —between four months and six years later—, sometimes together with a second document of cession in favour of the buyer.[69]

These instances of eventual renunciation, and the holding of the tax, show that the sale was not intended initially as unconditionally definitive (Pestman called these 'provisional sales', 'ventes provisoires'), [70] that some later event decided whether the sale would be completed, whether the buyer would acquire at all. This later event could only be, as Pestman rightly guessed, the return to the buyer of the money documented as price. This money was, in fact, a loan, secured by the sale, as occasionally confirmed by other documents referred to the same affair.[71]

Leaving the document initially incomplete was the way to suspend the effect of the sale, until the term set for the return of the money: upon payment, the document would be definitively left incomplete, the sale's ineffectiveness confirmed by an explicit renunciation; upon default, it would be completed at the request of the creditor, presumably without the debtor's cooperation being necessary any more, and only then would the tax be effectively charged. The tax was the full the 10% [72]

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[68] Thus, P. Grenf. II 28 (103 BCE) cancels the sale of P. Lips. I 1 (104 BCE); BGU VI 1260 (101 BCE) cancels an unpreserved sale. Cf. also P. dem. Adler 19 and 20 (93 BCE) in connection with P. Adler 15 (100 BCE). In P. Amiens 5 (90 BCE), cf. Chauveau 2002: 45-48, almost eight years pass between the sale and its (Demotic) cancelation. The most notorious document of this group is the epilysis in MChr. 233 (111 BCE), on which infra VIII; on the others, ibid. ad nn. 177-181.

[69] Together with BGU III 994, cf. 995 (110 and 109 BCE), BGU III 996 (113-112 and 107 BCE), P. Grenf. II 32 (101 BCE), and BGU VI 1259 (100 and 99 BCE), all of them completed months to years after the initial date: Pestman 1985b: 48-51. In P. Adler 14 (100 BCE) the seller surrenders the land sold a year earlier in P. Adler 12 (101 BCE); the lapse of time suggests that the transaction belongs to our group, although in this case there is no complete certainty: cf. the discussion in Pestman 1985b: 52-53.

[70] On Pestman's classification of these contracts as ὠναὶ ἐν πίστει, using the problematic expression of P. Heid. inv. 1278 = MChr. 233 (111 BCE), cf. infra VIII ad n. 189.

[71] P. Amh. II 47 (113 BCE), for instance, is the daneion secured by the sale documented in BGU III 996 (113-112 BCE): Pestman 1985b: 48. Cf. also the cession of land of Harkonnesis to Nahomsesis, in P. L. Bat. XIX 7B = SB I 5865 = P. Baden II 3 (109 BCE), with simultaneous cancellation of Harkonnesis' debt by Nahomsesis in P. L. Bat. XIX 7A = P. Gen. I 20, both completing the ‚provisional sale' executed months before in P. L. Bat. XIX 6 = BGU III 995 (110 and 109 BCE). Most obvious are the cases of BGU VI 1260 (101 BCE), where the sale cancellation is documented together with the repayment of the loan, and P. dem. Adler 20 (93 BCE), cancelling the sale securing the loan in P. Adler 15 (100 BCE), upon the borrower's heirs oath that the loan had been paid (P. dem. Adler 19, 93 BCE). The debts were usually documented as wheat loans, although their cancellation must have required the return of the money that figured as price in the sale document: these seem therefore to have been wheat loans to be returned in money; equivalent, from the point of view of their economic function, to wheat sales on credit.

[72] Thus, for instance, in BGU III 994 (113 and 111 BCE), col. 3, l. 14, for a ‚sale' price of

required in this period for ordinary sales,[73] since it was paid only for the final forfeit of the property. If the sale was cancelled, instead, the tax, paid also only in this later date, was reduced to a half: that is, the 5% of hypothecations,[74] confirming once more that these suspended sales were treated by the administration as hypothecs. And, in fact, just as the Demotic Kaufpfandverträge and the bilingual sale-loan contracts,[75] they are explicitly characterised as hypothecations. [76]

Unlike ordinary hypothecations, that required to pay both the initial telos hypothêkês (at this time a 5%) and, upon default, the telos epikatabolês (at the rate of the full sale enkyklion, i.e. 10%),[77] the parties here were spared from paying the former: one of the most striking advantages of this procedure, and quite possibly one of the motivations behind its creation, in what appears to us as an remarkable instance of the notarial system helping the parties save taxes.

Pestman's interrupted sales were executed in Greek as agoranomic contracts, but there is little doubt that this practice belonged to the Egyptian, not to the Greek tradition. It is, in fact, quite manifestly an agoranomic version of the native Egyptian tradition of suspended guarantee sales (supra II-III). The documents come, as Spiegelberg's Kaufpfandverträge, from the Theban region: this time, from Pathyris and the nearby Krokodilopolis. This is a predominantly native Egyptian area, scenario

5000 copper dr., the tax is 500. The final amount of 600 documented by the banker (l. 15; cf. Pestman 1985a: 38 n. 26) points to an agio of 20%, common since the end of the 2nd cent. BCE, instead of the previous 10%: Milne 1925: 270-273, Maresch 93-95.

[73] The 5% is attested for the last time in 137 BCE (SB I 4010, l. 3); in 131 BCE (BGU X 1925, l. 41), it is already 10%. For an overview on the enkyklion in this period in the light of the Pathyrite documentation, Pestman 1978b.

[74] Cf. BGU III 999, where the sale is dated to September 99 BCE, but the tax is paid only in May 98, at a rate of 5% (100 dr. for a price of 2000). P. Amh. II 51, l. 25, confirms that the sale was cancelled, since the same house appears a decade later as owned by the son of the ‚seller': Pestman 1985b: 51-52.

[75] Supra II n. 36, III nn. 50-51.

[76] Cf. especially ὑπέ|θετο in P. Heid. inv. 1278 = MChr. 233 (111 BCE), ll. 4-5 (infra VIII). More conjectural, ὑπέ[θετο] in P. Bad. II 4 (107-98 BCE), ll. 2-3, cf. Pestman 1985b: 56, and ὑπ[οτεθειμένων], in P. Adler 2, l. 7.

[77] Contrary to what Mitteis 1912a: 151 n. 3 supposed, the telos epikatabolês was not limited to the difference between the hypothecation tax paid already by the creditor and the full sale enkyklion. At the time when the sale enkyklion was a 5%, therefore, the epikatabolê amounted to the same full 5%, not merely to the 3% that rested after paying the 2% of the hypothecation, as Mitteis imagined. This we learn through P. Carlsberg 46 and 48 (= SB XVI 12342 and 12344, already considered supra n. 41), two tax receipts referred to the same hypothecation (executed as a Kaufpfandvertrag): in 239 BCE, for a loan of 40 drachmas, 4 obols were paid as telos hypothekês (the exact 2% being 4.8); three years later (during which a further 2% over capital and accrued interest was paid as telos ananeôseôs for the renewal of the hypothec: P. Carlsberg 47 = SB XVI 12343) the debt had grown through unpaid interest and prostimon to 160 dr. and, on these, 8 drachmas were still paid as telos epikatabolês: the full 5%, despite the previous tax payments. On these documents, cf. Bülow-Jacobsen 1982, and Jasnow's commentary to P. Chic. Haw. 9.

from 206 to 186 BCE of the great Egyptian uprising against the Ptolemies:[78] still in the early 1st century BCE a last great revolt will be launched from the region, ending with the destruction of Thebes in 88 BCE. In our contracts, the parties are overwhelmingly Egyptian. Their supplementary documents, like the apostasion or the oaths, are often drawn up in Demotic.[79] Most decisively: Egyptians are also the bilingual agoranomoi of Pathyris and Krokodilopolis that resort to this peculiar notarial practice,[80] like the Ammônios alias Pakoibis who completed the sale in our BGU III 994, as we know not only from their names, but also through the information that other sources provide about them,[81] and through their conspicuous linguistic idiosyncrasies.[82] As Katelijn Vandorpe has emphasised, "where information is available ... the new, Greek notaries appear to be local people, members of Egyptian families with a scribal tradition, who are (re)trained as Greek notaries".[83] The general willingness of these notaries to devise Greek versions of native Egyptian practices is well attested: enough here to recall the

[78] Veïsse 2004. During the revolt, two indigenous pharaohs ruled from Thebes, cf. Pestman 1995.

[79] P. dem. Adler 20 (93 BCE), P. Amiens 5 (90 BCE): on these, infra VIII ad nn. 177-179. It is perhaps no coincidence that these Demotic documents are dated to the years (96-90 BCE) in which we have no evidence of agoranomic activity in Pathyris and Krokodilopolis: for this hiatus, Pestman 1985a: 10-11, passim.

[80] The agoranomeion had been introduced in Krokodilopolis and Pathyris ca. 141 and 136 BCE (Vandorpe 2002: 107), not long after the establishment of military garrisons in both towns: the institution of the agoranomeion intending no doubt to serve the interests of the soldiers (potential land buyers, because not kleruchs, but misthophoroi), and also as a further instrument of hellenisation in the problematic region: cf. Vandorpe 2011: 298-303; Monson 2012: 125-126. Yet, it was crucial for the function of those serving at the agoranomeion to be bilingual, which in practice meant Hellenised natives. Cf. Pestman 1978, with the eloquent title „un avant-poste de l'administration grecque enlevé par les Égyptiens", and his overview of their activity in Pestman 1985a. Cf. already Fogolari 1921, and, more in general, Messeri Savorelli 1980, Clarysse 1985 and 1993, Arlt 2009. For Pathyris' archives, Vandorpe and Waebens 2009, especially pp. 93-94, on the archive of the archeion.

[81] A well documented case is that of Hermias, agoranomos in Pathyris between 106 and 98 BCE, and, as far as the interrupted sales go, involved in BGU III 996, 997, 998, 999, BGU VI 1259, 1260, P. Adler 12, 14, P. Amh. II 47, P. Grenf. II 28, 32, P. Lips. I 1. Notorious for his limited command of the Greek grammar (infra n. 82), we ignore his Egyptian name, but we know that his father was a Patseous who would use in Greek the name Asklêpiades, and who appears in 127-126 BCE as agoranomos in Krokodilopolis. Hermias' cousin was our Ammônios alias Pakoibis, agoranomos in Pathyris between 114 and 109 BCE: among the extant examples of interrupted sales, he completed our BGU III 994, initiated and completed BGU III 995, and executed the cancellation (epilysis) preserved in MChr. 233, on which infra VIII. Ammônios' father, Areios alias Pelaias, was agoranomos in Pathyris between 131 and 113 BCE. A family tree in Pestman 1989: 148, cf. also Pestman 1985a: 12-13; for the roots of the family in the local scribal tradition, Vandorpe 2011: 300-301.

[82] For the grammatical anomalies of these notaries, cf. already Calderini 1921, and now, extensively, Vierros 2003, 2007, 2008, 2012: ‚phraseological transfers' from the Egyptian language.

[83] Vandorpe 2011: 300.

coexistence of the Greek diathêkê with the agoranomic version of the native Egyptian deeds of division (dosis, meriteia, synchôrêma), first attested precisely in the Pathyrite nome.[84] In the case of our sales, the singular notarial technique used to suspend their effect, leaving the execution of the document itself temporarily unfinished, is certainly alien to the Greek tradition, and has only Demotic parallels.[85]

Summarising: the Pathyrite phenomenon discovered by Pestman is a form of guarantee sale, but not of title-transfer security; leaving the sale deed initially incomplete and holding the payment of the tax served to effectively suspend the sale; through this notarial technique, the native bilingual agoranomoi of Krokodilopolis and Pathyris allowed the Egyptian population to keep, also in their Greek agoranomic transactions, the native tradition of suspended guarantee sales, reviewed supra in II and III. These suspended sales were taxed as such only upon default: upon payment, merely as hypothecs, confirming once more that the Ptolemaic administration (as later the Roman) viewed them as a mere form of hypothecation.

V. Menein *Contracts*

The native practices that we have reviewed are the main types of guarantee sales attested in the papyri for the Ptolemaic and Early Roman period. As a form of 'Sicherungsübereignung' is commonly mentioned a slightly later group of Greek contracts:[86] the so-called 'menein' contracts, a model of loan with security attested so far only in Oxyrhynchos, from the late first to the early third century.[87] This type of contract, very stable in its formulation, is distinguished by the peculiar way in which the security is introduced. As an example, let us consider P. Oxy. XXXIV 2722 (154 CE):

> ἐὰν δὲ μὴ ἀποδῶ καθὰ γέγραπται συν|[17] χωρῶ μένειν περὶ σὲ τὸν Θῶνιν Ἡφαιστᾶτος καὶ ἐκγόνους |[18] καὶ τοὺς παρὰ σοῦ μεταλημψομένους ἀνθ' οὗ ἐὰν μὴ ἀποδῶ |[19] μετὰ τὴν προθεσμίαν τὴν κράτησιν καὶ κυρείαν εἰς τὸν |[20] ἀεὶ χρόνον τῶν ἐπιβαλλόντων μοι μερῶν πάντων ... |[23] ... οἰκίας ...
>
> If I do not repay as is written, I |[17] concede that there shall remain to you, Thonis son of Hephaistas and to your descendants |[18] and sucessors, in exchange for

[84] Yiftach-Firanko 2002. The earliest preserved example comes from the agoranomeion of Hermonthis in the Pathyrites: BGU III 993 (127 BCE Hermonthis), cf. ll. 8-9. Misleading, the traditional Romanistic label ‚donatio mortis causa'.

[85] Pestman 1985: 46 n. 5. Cf., even if as a mere conjecture, supra III sub ‚c'.

[86] Cf. for instance Rupprecht 1995: 434-435, under the rubric ‚Sicherungsübereignung' (p. 429) together with ὠνὴ ἐν πίστει (infra VIII), Pathyrite interrupted sales (supra IV) and ‹Kaufpfandverträge› (supra II). Cf. already Schwarz 1937: 248-258, passim.

[87] Only six examples of this type of contract have been published to date: P. Oxy. Hels. 31 (86 CE), P. Oxy. III 506 = MChr. 248 (143 CE), P. Oslo II 40 A and B (150 CE), P. Oxy. XXXIV 2722 (154 CE), P. Coll. Youtie I 50 (2nd cent. CE). To these, two important documents must be added, that illustrate the execution of such guarantees: P. Oxy. III 485 = MChr. 246 (178 CE), and PSI XIII 1328 (201 CE).

whatever I may fail to return |[19] after the term, the power and dominion for |[20] all time over all the shares falling to me ... |[23] ... of a house ...

The clause is formulated in very similar terms in all preserved examples. Characteristic is the use of the verb μένειν. The term would seem to suggest that upon default the creditor merely keeps a position that he already had, i.e. that from the beginning the property was in his kratêsis and kyreia, that this is a title-transfer security agreement; an impression reinforced by the fact that the debt secured in this way is once referred to as ἐπὶ κυρίᾳ instead of ἐπὶ ὑποθήκῃ.[88] And yet, such conclusion would be wrong. The evidence against it is overwhelming:

a) If the debtor defaults, the creditor does not simply 'keep' the security: he needs to claim it, following the same execution procedure that would be necessary for a hypothec. In P. Oxy. III 485 = MChr. 246 (178 CE), in fact, such execution procedure, indistinguishable from that of a hypothec, is inchoated on the basis of a menein-contract:[89] an injunction for payment (diastolikon) is served upon the debtors "in order that they may be informed and may make repayment to me or else may know that I shall take the proper proceedings to which I am entitled for entry upon possession (embadeia), as is right".[90]

b) The use of the embadeia procedure reveals that, at least in the case of P. Oxy. III 485, the creditor was not in possession of the security.[91] For the other attested cases, the lack of antichretic arrangements makes such possession equally unlikely.[92]

c) All preserved menein-contracts include an explicit agreement that it shall be unlawful for the debtor to sell or hypothecate or otherwise dispose of the security:[93]

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[88] P. Oslo II 40 B (150 CE) ll. 63-69 (referring to 40 A [150 CE], a previous menein-contract over a slave between the same parties, copied on the same papyrus): μὴ ἐλαττουμένου σου | τοῦ Ἀπίωνος τοῦ καὶ Πετοσοράπιος ἐν | τῇ πράξει ὧν ἄλλων ὀφείλω σοι κάτ᾽ ἕτερον | χειρόγραφον δισσὸν δραχμῶν ἑξακοσίων | κεφαλαίου καὶ τῶν τούτων ἀπὸ τοῦ ἐξῆς | μηνὸ[ς] Θὼθ τόκων ἐπὶ κυρίᾳ δούλης | μου Ἰσαροῦτος ὃ καὶ εἶναι κύριον. Yet, see ἐφ᾽ ὑποθ(ήκῃ) in P. Oxy. XXXIV 2722, l. 69, infra n. 112.

[89] The contract is summarised in ll. 12-26; the security, in inequivocal terms, in ll. 19-23: δηλωθέντος (i.e. χρηματισμός) ἐὰν μὴ ἀπο|δῷ ἐν τῇ προθεσμίᾳ μένειν περὶ ἐμὲ καὶ τοὺς παρ᾽ ἐ|μοῦ μεταλημψομένους ἀντί τε τοῦ κεφαλαίου καὶ ὧν | [ἐὰ]ν μὴ ἀπ[ο]δοι τόκων τὴν κράτησιν καὶ κυρείαν | τῆς ὑπαρχούσης αὐτῇ δούλης Σαραπιάδος.

[90] Tr. Grenfell & Hunt, ll. 32-34: ἵν᾽ εἰδῶσι καὶ ποιήσωνταί μοι τὴν ἀπόδοσιν | ἢ εἰδῶσι χρησόμε[νόν με] τοῖς ἁρμόζουσι περ[ὶ ἐ]μβαδεί|ας νομίμοις ὡς κ[αθή]κει. The property in question is in this case the slave Sarapias, cf. n. 89.

[91] The executive nature of the embadeia procedure makes it unlikely that it could be used merely to manifest and formalise the creditor's choice to keep the security; such use is, in any case, never attested in the sources.

[92] This, in the contracts referred to immovable property: P. Oxy. Hels. 31 (86 CE), P. Oxy. III 506 (143 CE), P. Oslo II 40 B (150 CE), P. Oxy. XXXIV 2722 (154 CE), P. Coll. Youtie I 50 (2nd cent. CE). Even clearer is the situation in P. Oslo II 40 A (150 CE), where we would expect provisions concerning food and clothing if the slave had been taken by the creditor.

[93] P. Oxy. XXXIV 2722 (154 CE) ll. 34-38: καὶ μέχρι ἀποδόσεως οὐκ ἔξεσταί μοι τὰ αὐτὰ

a non alienation clause, like that of hypothec or hypallagma, revealing that, as in those cases, the debtor is still considered owner and therefore a priori in the position to alienate.[94]

d) In the case of immovable property, the contract typically includes a clause authorising the creditor to have a katochê recorded in the bibliothêkê enktêseôn.[95] Registration as owner is therefore out of the question: the creditor is not yet owner, but mere holder of a katochê on property that still belongs to the debtor, and it was on the folium of the debtor as owner that such katochai were recorded in the diastrômata kept by the bibliophylakes[96].

e) A constant feature of these contracts is the agreement that, if the debtor does not pay, the creditor can still choose between owning the security or executing the debt.[97]

μέρη | τῶν ἐνγαίων οὐδὲ μέρος πωλεῖν οὐδὲ ὑποτίθεσθαι οὐ|δ' ἄλλως καθαχρηματίζιν κατ' οὐδένα τρόπον οὐδὲ ἀπο|γράφεσθαι ἐπ' αὐτῶν οὐδένα ἢ πᾶν τὸ ὑπεναντίως πρα|χθησόμενον ἄκυρον εἶναι. Similar formulations in P. Oxy. Hels. 31 (86 CE), ll. 20-22, P. Oxy III 506 (143 CE), ll. 39-42, P. Oslo II 40 A (150 CE), ll. 15-18, P. Oslo II 40 B (150 CE), ll. 47-49. The fragmentary P. Coll. Youtie I 50 (2nd cent. CE) breaks at the point where the non alienation clause would follow. The formulation is close to that attested for hypothecs such as P. Strasb. I 52 (151 CE Hermopolis), ll. 9-10, P. Flor. I 1 = MChr. 243 (153 Hermopolis), ll. 8-9, P. Bas. 7 = MChr. 245 = SB I 4434 (117-138 Arsinoites), ll. 15-16, and P. Erl. 62 (2nd cent., unknown provenance), ll. 12-13, attested also in some Fayum hypallagmata (P. Vindob. Worp. 10 [143-4, Soknopaiu Nesos], ll. 13-16, P. Lond. II 311 [p. 219] = MChr. 237 [149 CE Herakleia], ll. 17-18) and hypallagmatic non alienation agreements (P. Mich. IX 566 [89 CE Hiera Nesos], ll. 14-19, P. Athen 21 [131 CE Karanis], ll. 17-18).

[94] The non alienation clause may be understood as an expression that the hypothecation itself deprives the debtor of his potestas alienandi, rather than as a stipulation without which he would retain it: cf. for each of these possibilities Rabel 1909: 79-86 (‚Erklärung aus dem Wesen des derivativ erworbenen Rechts'), 87-96 (‚Erklärung aus mangelhafter dinglicher Stellung des Gläubigers'). The first hypothesis is out of the question regarding hypallagma (this, in fact, consists merely in the non alienation agreement, which cannot therefore not be included), but would explain why the non-alienation clause is occasionally (infra n. 153 i.f.) missing in ordinary hypothecations. From this point of view, it may be of some significance that, unlike hypothecs, all preserved menein contracts include an explicit non-alienation agreement.

[95] P. Oxy. XXXIV 2722 (154 CE), ll. 38-41: ἐξόντος σοι διὰ σεαυτοῦ ἀπὸ τοῦ | νῦν ὁποτὰν αἱρῇ κατοχὴν τούτων ποιήσασθαι διὰ τῆς τῶν | ἐνχρήσεων βιβλιοθήκης ἄχρι ἀποδῶ σοι τὸ κεφάλαιον | καὶ τοὺς τόκους. In similar terms, P. Oxy. III 506 (143 CE), ll. 49-51, and P. Oslo II 40 B (150 CE), l. 50. Leaving aside P. Oslo II 40 A (150 CE), where the security is a slave, and the incomplete P. Coll. Youtie I 50 (2nd cent. CE), the clause is lacking only in P. Oxy. Hels. 31 (86 CE), an antigraphon that omits other typical elements, v.gr., the precise location of the house given as security.

[96] Wolff 1978: 235-238.

[97] P. Oxy. XXXIV 2722 (154 CE), ll. 41-50: αἱρέσεως καὶ ἐγλογῆς οὔσης περὶ σὲ τὸν | Θῶνιν Ἡφαιστᾶτος ἐὰν βούλῃ μετὰ τὸν χρόνον μὴ δι|καιοπραγμουμένου μου τῷ κεφαλαίῳ καὶ τόκοις κυρι|εύειν ἀντὶ τούτων τῶν αὐτῶν μερῶν τῆς οἰκίας | ἐπὶ τοῖς προκειμένοις ἢ τὴν πρᾶξιν ποιήσασθαι τοῦ τε | αὐτοῦ κεφαλαίου καὶ τῶν ὠνομασμένων καὶ τοῦ ὑπερ|πεσόντος χρόνου ἴσων δραχμιαίων τόκων ἑκάστης μνᾶς | κατὰ μῆνα ἕκαστον ἔκ τε ἐμοῦ καὶ ἐκ τῶν

This freedom of choice is formulated explicitly and with remarkable emphasis, and is in fact what most radically distinguishes these contracts from hypothec proper, where execution against the debtor is limited to certain cases (breach of contract regarding the asset, or its loss by accident or eviction). What we know about the execution of menein contracts confirm this free choice: fortune in fact has preserved for us an example of each possibility.[98] No such choice would be left for the creditor if he owned the security from the beginning.

f) Significant also is the fact that in P. Oxy III 506 = MChr. 248 (143 CE), l. 39, the debtor assures that the property shall be free from public burdens of all sorts not 'until now', but 'up to the time of the creditor's ownership': μέχρι τοῦ τῆς κυρείας χρόν[ου]. It is obvious from these words that such time has not arrived. Until then, public burdens and taxes fall upon the debtor, precisely because he still owns the land.

All in all, there is little doubt that the creditor did not acquire before the term arrived and the debtor defaulted.[99] How then can we account for the use of the verb

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μερῶν τῆς | οἰκίας καὶ ἐκ τῶν ἄλλων τῶν ὑπαρχόντων μοι πάντων | καθάπερ ἐγ δίκης. Similar formulations in the other contracts: P. Oxy. Hels. 31 (86 CE), ll. 23-26; P. Oxy. III 506 (143 CE), ll. 43-49; P. Oslo II 40 A (150 CE), ll. 18-22; P. Oslo II 40 B (150 CE), ll. 52-62. The clause is missing only in the incomplete P. Coll. Youtie I 50 (2nd cent. CE). Considering this freedom of choice, the simultaneous emphasis that the security is adquired ‚in lieu of capital and interest' (l. 44: ἀντὶ τούτων, already also in the pignoration clause, l. 18, ἀνθ' οὗ ἐὰν μὴ ἀποδῶ; similarly in all preserved contracts: P. Oxy. Hels. 31 [86 CE], l. 12 and -reconstructed- l. 24, P. Oxy. III 506 [143 CE], ll. 21 and 44, P. Oslo II 40 A [150 CE], ll. 9 and 19, P. Oslo II 40 B [150 CE], ll. 37 and 56, reconstructed in P. Coll. Youtie I 50 [2nd cent. CE], ll. 4-5) has been seen as a paradox, because generally understood to imply substitutive pledge (‚Ersatzpfand') and therefore to exclude any further debtor's liability (so-called ‚reine Sachhaftung'): Schwarz 1937: 258-259 and n. 1. In truth, this coexistence rather suggests that the traditional interpretation of the ἀντί-formula is misguided (also when it comes to hypothec, where it is equally ubiquitous): the formula is quite likely not meant pro debitore but pro creditore; it does not denote an ‚Ersatzpfand', but merely underlines the foundation of the creditor's right; it is, in this sense, one of the few remnants of the Surrogationsprinzip (supra I) in the hypothecarian practice of the papyri.

[98] P. Oxy. III 485 = MChr. 246 (178 CE) is a case of execution through embadeia, limited to the security, cf. supra in text sub ‚a'; in PSI XIII 1328 (201 CE), instead, also on the basis of a menein contract (cf. ll. 36-39: δηλωθέν|τ[ος, ἐὰ]ν̣ μὴ ἀποδοι, μένειν περὶ ἐμὲ καὶ τοὺς παρ' ἐμοῦ | [μ]ετ[αλη]μ̣ψ̣[ο]μένους τὴν κράτησιν κ[αὶ κ]υρείαν τοῦ ὑπάρ|[χ]οντ[ος α]ὐτῷ τρίτου μέρους ... ἀρουρῶν κτλ), the creditor chose the longer route of enechyrasia (that would yet require a second procedure of embadeia to be put in possession of the assets) in order to extend the execution beyond the land given as security, to the rest of the debtor's property: [β]ούλομαι τὴν πρᾶ|ξιν ἀ̣ν̣ύσασθαι καὶ δέον ἡγοῦμαι ἐπὶ [τοῦ] διαλογεισμοῦ σ̣υ̣ν̣|κρεῖναι γραφῆναι τοῖς τοῦ Ὀξυρυνχείτου στ[ρα]τηγῷ καὶ ξενικῶν | πράκτορι συντελεῖν μοι τὴν πρᾶξιν τοῦ προκειμένου κεφαλαίου | κ[αὶ] τ̣ῶ̣ν̣ τόκων ἐκ τῶν προκειμένων καὶ ἐξ ὧν ἐὰν ἄλλων | παρ[αδεικ]νύω τοῦ̣ ὑπ[ο]χρέου εἰς ἐνεχυρασίαν ἐπὶ τῶν τόπων | ὑ[παρ]χόντων καὶ ἑ[τ]έρων ἀπαραποδίστως (ll. 58-64). On this important document, in extenso, Schwarz 1937.

[99] This does not exclude agreements that add to the acquisition a certain retroactive effect: one such agreement, referred to the offspring of the slave given in security, in P. Oslo II 40 A

'menein'? The answer is, I believe, quite simple. Menein can refer to something that stays now as it was in the past, but also to something that from a certain moment will remain unchanged. In our case, the verb appears explicitly referred to the future: kratêsis and kyreia are to remain with the creditor for ever -εἰς τὸν ἀεὶ χρόνον- from the time when the payment falls due -ἀπὸ τοῦ τῆς ἀποδόσεως χρόνου, μετὰ τὴν προθεσμίαν-. Quite unequivocal in this respect, P. Oxy. III 506 = MChr. 248 (143 CE), ll. 19-23:

> εἰ δὲ μή, [σ]υνχωροῦσι ἥ τε Θατρῆς καὶ Τετεώ|[20]ρ[ιο]ν μένειν περὶ τὸν δεδανεικότα καὶ τοὺς παρ' αὐτοῦ μεταλημ|[21] ψομένους ἀντί τε τοῦ κεφαλαίου καὶ ὧν ἐὰν μὴ ἀπολάβῃ τόκων |[22] ἀπὸ τοῦ τῆς ἀποδόσεως χρόνου τὴν κράτησιν καὶ κυρείαν εἰς τ[ὸ]ν |[23] αἰεὶ χρόνον τῶν ὑπαρχόντων αὐταῖς ἐξ ἴσου περὶ τὴν αὐτὴν Πέλα (i.e. ἀρουρῶν)
>
> If they fail, Thatrês and Teteô|[20]rion concede that the lender and his assigns |[21] in place of the principal and of all the interest which he may not receive, |[22] shall from the time when the payment falls due keep the power and dominion, |[23] for ever, out of the land owned by them in equal shares near the said Pela ...[100]

These expressions, εἰς τὸν ἀεὶ χρόνον, ἀπὸ τοῦ τῆς ἀποδόσεως χρόνου or μετὰ τὴν προθεσμίαν, qualify μένειν in most preserved contracts.[101] Menein does not mean that the kratêsis and kyreia remain with the creditor *as before*, merely that they shall remain with him *from that time,* and *for ever.*

That menein, despite being in these contracts to all likelihood a present infinitive,[102] must be referred to the future,[103] i.e. to the moment when the debtor

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(150 CE), cf. supra n. 25.

[100] Tr. Grenfell & Hunt. Even if we chose to refer ἀπὸ τοῦ τῆς ἀποδόσεως χρόνου to the immediately precedent ἐὰν μὴ ἀπολάβῃ rather than to μένειν, it would still be true that the forfeit clause as a whole postpones μένειν to the moment of the unpayment.

[101] Together with P. Oxy. III 506 (143 CE), cf., for εἰς τὸν ἀεὶ χρόνον, P. Oxy. Hels. 31 (86 CE), l. 13, P. Oslo II 40 B (150 CE), l. 38, P. Oxy. XXXIV 2722 (154 CE), l. 20; ἀπὸ τοῦ τῆς ἀποδόσεως χρόνου, P. Oxy. Hels. 31 (86 CE), l. 12 (conjectural); μετὰ τὴν προθεσμίαν, P. Oslo II 40 B (150 CE), l. 37, P. Oxy. XXXIV 2722 (154 CE), l. 19 (although in this last case the expression seems rather referred to the preceding ἀποδῶ). Only the more concise P. Oslo II 40 A (150 CE) lacks both temporal references.

[102] Rightly edited as μένειν, and not μενεῖν: cf. the aorist and present infinitives of the forfeit clause, equally dependent on συνχωρῶ: καὶ τάξασθαί σε | διὰ σεαυτοῦ ἐὰν αἱρῇ τὰ ὑπὲρ τούτων τέλη καὶ δεσπόζ<ε>ιν | αὐτῶν ὡς ἂν πράσεώς σοι γενομένης καὶ τὰ περιεσόμενα | ἀποφέρεσθαι καὶ ἑτέροις πωλεῖν καὶ χρᾶσθαι ὡς ἂν αἱρῇ | μηδεμιᾶς μοι ἐφόδου καταλειπομένης (P. Oxy. XXXIV 2722, 154 CE, ll. 25-28).

[103] Leaving aside reported speech, the future form of the infinitive is rare if not with μέλλω, ἐλπίζω, etc. In our menein-contracts, the non-alienation clause too, unequivocally referred to the future, is built with present infinitive: οὐδὲ μέρος πωλεῖν οὐδὲ ὑποτίθεσθαι οὐ|δ' ἄλλως καθαχρηματίζ<ε>ιν κατ' οὐδένα τρόπον οὐδὲ ἀπο|γράφεσθαι ἐπ' αὐτῶν οὐδένα (P. Oxy. XXXIV 2722, 154 CE, ll. 35-37).

defaults, is confirmed by the subscription of the debtor in P. Oxy. XXXIV 2722 (154 CE): after promising to return interest and capital, the debtor proceeds: εἰ δὲ μή, κυριεύσει τῶν αἰπιβαλλώντων |[62] μοι μερῶν πάντων ... |[65] ... οἰκίας. The shift between contract and subscription from infinitive to personal form fully discloses the future meaning of the verb.

In fact, the same construction that singularises our contracts, μένειν εἰς τὸν ἀεὶ χρόνον τὴν κράτησιν καὶ κυριείαν, reappears, unequivocally referred to the future, in parachoretic sales of catoecic land,[104] and in applications to acquire public property:[105] all these are cases where the acquirer had no previous kratêsis or kyreia,[106] so that menein can mean nothing else but permanence in the future, and appears in fact connected to εἰς τὸν ἀεὶ χρόνον,[107] or, even more unequivocally, to ἀπὸ τοῦ νῦν.[108]

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[104] PSI VI 704 (2nd cent. CE, unknown provenance): the document is executed as a synchôrêsis, whereby a Sempronia Thermoutharion sells three arouras of catoecic land to a soldier, Marcius Iulius Sempronius, the price being paid by the half brother of the latter, Marcus Iulius Marianus. The effect of the parachôrêsis is formulated in the same terms of our menein contracts, in ll. 24-27: [με]|νιν οὖν περὶ τὸν Ἰούλιον Σεμπρώνιο̣ν [καὶ τοὺς παρ' αὐτοῦ] | πᾶσ̣α̣ν̣ τὴν κράτησιν καὶ κυρίαν ἀναφα[ιρέτως εἰς τὸν] | ἀεὶ χρόνον, διοικοῦντα περὶ αὐτῶν̣ [ὡς ἐὰν αἱρῆται]. For the nature of parachôrêsis, cf. infra n. 115.

[105] Cf. the application to acquire a house formerly belonging to Claudia Isidora, presented to the Idios Logos on behalf of the city of Oxyrhynchos in P. Oxy LXX 4778 (ca. 238 CE) ll. 25-29: the proposed amount shall be paid ἐφ' ᾧτε μένε̣ι̣ν̣ [τ]ῇ Ὀξυρυγ'χε̣[ιτῶν πόλει] | εἰς τὸν ἀεὶ χρόνον τὴν τούτων κρ[άτησιν] | καὶ κυρίαν ἀνα[φ]αίρετον καὶ ἐξέστω̣ [αὐτῇ χρῆ]|σθαι καὶ οἰκονο̣μεῖν περὶ αὐτῶν ὡ[ς ἐὰν βού]|ληται. A similar formula in P. Bub. I 1 (after 224 CE Bubastos) col. 13, ll. 6-7: καὶ μένει\ν ἐ/μοί \τε/ καὶ ἐκ'γόνοι[ς καὶ τοῖς παρ' ἐμοῦ μεταλημψομένοις τὴν |7 τούτων κράτησιν καὶ κυριείαν ἐπὶ τὸ]ν ἀεὶ χρόνον κυρίως καὶ βεβα[ίως].

[106] The same is true in PSI X 1115 (152 CE Tebtynis), where Kronios, on marrying his sister Tephorsais, receives in prosphora a third share of a slave from their mother Prôtarous: kratêsis and kyreia shall remain with Tephorsais (n.b. from now onwards, since the slave was her mother's), with Kronios the power to keep and administer it: οὗ τὴν κράτησιν καὶ κυρια μένιν περὶ τὴν | Τεφορ[σ]άιν [κ]αὶ [το]ὺς παρ' αὐτῆς καὶ ἐξουσίαν ἔχιν [ο]ἰκονομῖν περὶ αὐτοῦ | ὡς ἐὰν αἱρῆται (ll. 14-16). A similar formulation of the position of husband and wife over the prosphora, also granted by the bride's mother, in PSI X 1117 (after 138, Tebtynis), ll. 30-34: ὧν κ̣ρ̣ά̣τ̣η̣σ̣ι̣ν̣ | καὶ κυρεί(αν) μένειν παρὰ τῇ Θεναπύγχει | [καὶ το]ῖς παρ' αὐτῆς καὶ ἐξουσί(αν) ἔχι(ν) ἀπογρά(φεσθαι) | τ[α]ῦτα διὰ τῆ(ς) τῶ(ν) ἐγκτή(σεων) βιβλ(ιοθήκης) καὶ α.... |[.....] υτω( ). εαν αιρη( ): here, despite kratêsis and kyreia remaining with the wife, the husband has a right of registration in the bibliothêkê enktêseôn.

[107] Cf. supra in n. 104, PSI VI 704, ll. 26-27; in n. 105, P. Oxy. LXX 4778, l. 26, and P. Bub. I 1, l. 7.

[108] This, in P. Ross. Georg. II 30 (151-152 CE Memphis or Delta?), a fragmentary document that mentions a sum of money and a hypothec, and whereby some property is surrendered in these terms: ὥστε μένιν |8 περὶ αὐτὴν Ταθρῆν καὶ τοὺς παρ' α<ὐ>|9τῆς μεταλημψομένους τὴν τῆς |10 ἐξεσταμένης αὐτῇ κάθοτι πρόκ(ειται) |11 σιτικῆς κατοικικῆς ἀρούρης μιᾶς |12 κράτησιν καὶ κυρίαν ἀπὸ τοῦ νῦν δ[ι]ὰ |13 παντὸς οἰκονομοῦσαν περὶ αὐτὴν |14 ὃ ἐὰν αἱρῆται καὶ ἀποφερομένην εἰς |15 τὸ ἴδιον τὰ ἐξ αὐτῆς περιγεινόμ(ενα) |16 ἀπὸ τοῦ ἐνεστῶτος πεντεκαιδε|17κ[ά]του (ἔτους), ἀφ' οὗ καὶ τάσσεσθαι τὰ ὑπὲρ |18 αὐτῆς κατ' ἔτος δημόσια καὶ

All this confirms the general assumption[109] that the menein contracts did not bestow kratêsis and kyreia on the creditor until the debtor defaulted.[110] Since Schwarz, who first identified them as a special type of security, it has been common to present them as cases of suspended property gage, 'suspensiv bedingte Sicherungsübereignung'.[111] At this point, it is convenient to underline once more (supra I i.f.) the importance of avoiding this oxymoron, that extends the term 'Sicherungsübereignung' to something that is not an 'Übereignung', and confuses into one category two unrelated phenomena: securities by immediate property transfer, on one hand, and, on the other, suspended sales, whose effect is akin to that of an ordinary hypothecation, to the point that, as we have seen in the previous paragraphs (II-IV), they were tagged in Greek as hypothekai, and treated as such by the administration, also taxwise.

This equivalence between suspended sale and hypothec finds a manifestation also in the menein material. The contracts themselves seem to avoid the term hypothec (and depart radically from the hypothecary model in the sense explained supra sub 'e'); and yet, the best preserved example, P. Oxy. XXXIV 2722 (154 CE), is labelled on the verso as 'cheirographon ... under hypothec'.[112] On the other hand, the forfeit clause typically includes in these contracts an explicit analogy with a sale: καὶ δεσπόζ<ε>ιν αὐτῶν ὡς ἂν πράσεώς σοι γενομένης (P. Oxy. XXXIV 2722, l. 26-27).[113]

τελέσ|19ματα πάντα τῆς βεβαιώσεως ἐξα|20κολουθο[ύ]σης αὐτῷ τῷ ὁμολογοῦν|21τι πᾶσῃ [βεβ]αιώσει ἐφ' οἷς ἄλλοις περιέχ(ει). We ignore if this was a mere sale or a datio in solutum, and, in the latter case, whether it refers to property previously pledged, by hypothec or even menein agreement. In any case, the formulation of the cession echoes very closely that of the menein contracts.

[109] Cf., together with Schwarz infra in n. 111, Rupprecht 1995: 434-435 (‚Erwerb der vollen Rechtsstellung ... bedingt durch die Nichtrückzahlung').

[110] Less clear are the steps that allowed the creditor to acquire upon default, cf. Schwarz 1937: 256-257. An automatic acquisition does not seem compatible with the free choice between security and general praxis that the contracts emphasise (in text sub ‚e'): in this sense, Rupprecht 1997b: 300. Yet, the epikatabolê necessary for the hypothecary creditor (Schwarz 1911: 119-125; replaced by metepigraphê for catoecic land, Rupprecht 1997b: 294-295) is never mentioned in the menein-contracts. Rupprecht suggests that in its place the creditor's choice may have sufficed, as expressed in the diastolikon announcing execution through embadeia on the security, rather than through enechyrasia on the remaining property. This is unlikely: acquisition (by epikatabolê in the case of hypothec) was a pre-requisite for the diastolikon-inchoation of the embadeia procedure, and therefore could not result from it. In any case, the tax payment with which epikatabolê was associated must have had its equivalent in the menein contracts.

[111] Schwarz 1937: 250-255, passim.

[112] Ll. 68-70: σενπώθου Χ ἀδελφοῦ \Θώνιος/ <καὶ> Ἡφαιστᾶτος διὰ τραπέζης ἐφ' ὑποθ(ήκῃ) μερῶν οἰκιῶν. The contract is not only an unequivocal example of this menein group, but in fact the most complete and best preserved of them all.

[113] The full forfeit clause runs as follows: καὶ τάξασθαί σε | διὰ σεαυτοῦ ἐὰν αἱρῇ τὰ ὑπὲρ

The sale reference invites speculation that these contracts may be a last remnant of the old native Egyptian tradition of guarantee sales. The conjecture is all the more tempting since: a) the last incarnation of this tradition, the first century Fayum sale-loan contracts (supra sub III), quite likely allowed the creditor the free choice between security and loan execution that distinguishes menein contracts from ordinary hypothecs; b) these Fayum sales functioned in effect as suspended, but in such a way that it would have been completely reasonable to say that the creditor after forfeit 'keeps' the security, since he had received ab initio a property deed formally drafted as unconditional.

This is, at the present state of our knowledge, little more than an intriguing possibility. Important now, and absolutely certain, is the fact that the phrase μένειν ... τὴν κράτησιν καὶ κυρείαν indicates in these contracts, as in general in the practice of the papyri (supra nn. 104-108), permanence in the future; that the contracts themselves do not bestow kratêsis and kyreia on the creditor until the term arrives and the debtor defaults; that these contracts function therefore as a mere forfeit security, μετὰ τὴν προθεσμίαν, enforced through the same executive procedure applied to hypothecs (supra sub ‹a›); that they, in sum, are not instances of title-transfer security, no ‹Sicherungsübereignungen›.

VI. Title-Transfer Security in the Prôtarchos *Archive*[114]

The material reviewed in the previous sections exhausts what the papyri have to offer by way of well documented, typical contractual practices. Most, if not all of them, belong to the native Egyptian tradition (the roots of the menein contract remaining a non liquet: supra V i.f.), and none is a title-transfer security, a 'Sicherungsübereignung' proper: they are all suspended sales akin to hypothecations (or, in the case of the menein contracts, hypothecations likened to suspended sales).

At this point, only isolated documents remain to be considered. A quite remarkable one, and so far the closest that the papyri come to a true title-transfer

τούτων τέλη καὶ δεσπόζιν | αὐτῶν ὡς ἂν πράσεώς σοι γενομένης καὶ τὰ περιεσόμενα | ἀποφέρεσθαι καὶ ἑτέροις πωλεῖν καὶ χρᾶσθαι ὡς ἂν αἱρῇ | μηδεμιᾶς μοι ἐφόδου καταλειπομένης (P. Oxy. XXXIV 2722, 154 CE, ll. 25-29). In similar terms, including the sale reference, P. Oslo II 40 A (150 CE), ll. 11-14, P. Oslo II 40 B (150 CE), ll. 41-44. Uncertain, the very fragmentary P. Oxy. Hels. 31 (86 CE), ll. 15-18, and P. Coll. Youtie I 50 (2nd cent. CE), ll. 10-14. The entire clause is lost in P. Oxy. III 506 = MChr. 248 (143 CE), its place corresponding to the missing part of the document, that would connect fragments A and B.

[114] Prôtarchos was, in the time of Augustus, head of the Alexandrian tribunal to which contracts in form of synchorêsis, i.e. fictitious court agreement, were formally submitted. A sizeable number of synchorêseis addressed to him was found in the early twentieth century as part of the mummy cartonnage of Abusir el-Melek, and published in BGU IV (1050-1060, and 1098-1184; adde SB XX 14375 and SB XXIV 16073), cf. Schubart 1913. This archive is our best source of information for the legal practice in Egypt in the earliest Roman times.

security, is BGU IV 1158 = MChr. 234. This is a 9 BCE synchôrêsis whereby a Roman woman, Cornelia Tatia, agrees that upon payment of the 80 drachmas owed to her by her debtor, Aulus Cornelius Idaius, she shall retransfer (antiparachôrêsein) to him the five arouras that she had received from him in parachôrêsis (ll. 4-8).[115] The need to perform an antiparachôrêsis to redeem the security makes it clear that the debtor's initial parachôrêsis had not been a suspended cession, but had perfected a full transfer of title to the creditor.

The contract considers still two further scenarios: if Cornelia refuses to perform the antiparachôrêsis despite the debtor being ready to pay, he will be entitled, upon deposit of the sum at a bank to her name, to the κρατεῖν and κυριεύειν over the five arouras, undisturbed as before (ll. 21-24); if, instead, he does not pay within the term:

> ἐὰν δὲ τοῦ χρό(νου) ἐνστάντο(ς) ὁ Ὧλος μὴ ἀποδιδῷ |[13] τὰς τοῦ ἀργυ(ρίου) (δραχμὰς) π, μένε(ιν) περὶ ἑ̣ατ(ὴν) \Κορν(ηλίαν)/ τὴν ἐξουσία(ν) καὶ ἐγλογὴ(ν) ἑαυτὸν |[14] πράσσειν τὸ κεφά[λ]αιο(ν) ἢ ἀντὶ τούτου κρατ(εῖν) καὶ κυριεύε(ιν) τῶν παρα|[15]κεχωρη(μένων) αὐτῇ καθὼ[ς] πρόκειτ(αι) μὴ προσδεηθε(ῖσαν) μηδεμιᾶς |[16] διαστολῆ(ς) ἢ προσκλή(σεως)
>
> If when the time arrives Aulus does not return |[13] the eighty silver drachmas, the power and choice shall remain with the same Cornelia |[14] to exact from him the capital or in its stead to have power and dominion over the (arouras) |[15] transferred to her as aforesaid without the need for any |[16] notice of payment due (diastolê) or summons (prosklêsis).

Exemption of trial and notice is not uncommon in Roman times in ordinary hypothecations.[116] Agreements of this kind dispense merely, as here, with diastolê

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[115] In the papyri, parachôrêsis refers most often to a cession that cannot be properly styled as a sale, either because the cession is not made for a price (but as a donation, or as a transfer in lieu of payment), or, more typically, because its object is not strictly speaking susceptible of ordinary private property: thus, catoecic land, royal land, or temple land, are not properly ‚sold', but ‚ceded', even though this cession is to all practical purposes equivalent to a sale. On parachôrêsis in general, Rupprecht 1984, with lit. In our case, though, the term choice may not be due to the type of land or the cause of the transaction: the synchôrêseis in BGU IV, in fact, refer to every transfer as parachôrêsis, even when it is an ordinary sale of ordinary property: Schwarz 1911: 36 n.5.

[116] In the form μὴ προσδεομένοις ἀνανεώσεως ἢ διαστολικοῦ ἢ ἑτέρου τινὸς ἁπλῶς, it appears as an almost constant feature of the contracts from Hermopolis: P. Flor. I 81 (103 CE), l. 11, P. Strasb. I 52 (151 CE), l. 7, P. Flor. I 1 (153 CE), l. 6, but cf. P. Brem. 68 (99 CE), where the clause is not included. A similar clause, [χω]ρὶς διαστολῆς καὶ ἐπ̣ανγ̣ε̣λ̣είας, is attested in Fayum, in P. Bas. 7 = MChr. 245 = SB I 4434 (117-138 CE), l. 18; cf. also χωρὶς δ̣ι̣αστολῆς καὶ παρανγελίας καὶ [...], in SB I 5168 (after 143-144 CE, unknown provenance), l. 30.

(the notice of payment due that initiated execution), its notification to the debtor, and any summons to ordinary trial (epangelia, parangelia, prosklêsis), and often also with ananeôsis (the renewal of the security beyond the initial term). They do not dispense, instead, with execution as such: the usual embadeia procedure was still necessary in all these cases. For this reason, the inclusion of the clause in our document would seem to suggest that despite the property having been transferred to the creditor, the debtor still occupied the land: why would otherwise a simplified execution procedure be agreed upon?[117] And yet, such conclusion would be far from certain: P. Fouad I 44 (44 CE Oxyrhynchos), for instance, is a loan with enoikêsis where the general praxis covering for the breach of the enoiketic agreement as such is followed by a forfeit clause for the case of unpayment of the capital; the terms of this forfeit clause are quite close to those of the menein contracts, and they include, as BGU IV 1158, exemption of diastolê and prosklêsis, despite the fact that the creditor would be occupying the house.[118]

Intriguingly, some of the keywords and traits of the later menein contracts (supra V) are prefigured in BGU IV 1158: thus, the choice (ἐκλογή) between execution (πράσσειν) and the κρατεῖν καὶ κυριεύειν of the guarantee; thus, above all, the term μένειν itself, although referred here to this choice, and not to the property. Yet, only the language resembles that of the menein contracts. The legal situation is completely different, and at the present state of our sources, an unicum. It is the closest to the dynamic of a Roman fiducia cum creditore that we find in the papyri, and the fact that the parties are Romans might seem enticing, but the form of the document (a synchôrêsis) and many aspects of its content (parachôrêsis, diastolê) are peregrine, when not at odds with the Roman legal mentality: so, especially, the idea that upon depositing the sum the debtor is not merely entitled to claim back his property, but apparently resolves ipso iure the cession. This aspect of the agreement creates the paradox that the antiparachôrêsis, necessary to recover the property upon payment, becomes instead superfluous upon consignation; unanswered remains the question whether an antiparachôrêsis would be necessary if Cornelia chose, instead of the security, to proceed in execution for the capital.

Intriguing is also the fact, rightly underlined by Hans-Albert Rupprecht,[119] that our document was drawn up half a year after the initial parachôrêsis took place.[120] Clearly, that initial parachôrêsis deed (a synchôrêsis, as the present one) did not contain any provision as to the return of the property. This suggests that the initial

[117] In this sense, Schwarz 1911: 37-38.

[118] P. Fouad I 44 (44 CE Oxyrhynchos), ll. 24-27: [ἐ]ὰν δὲ τοῦ χρόνου ἐνστάντος μὴ κομίσῃ|[τ]αι ἡ Διδυμη τὸ π[ρο]κίμενον κεφάλαιον, κρατεῖν αὐτὴν καὶ κυρι|[ε]ύειν τοῦ σημαινομένου μέρους τ[ῆς] οἰκίας καὶ διοικεῖν περὶ αὐ|τοῦ ὡς ἐὰν αἱρῆται, χωρὶς διαστολῆς καὶ προσκλήσεως.

[119] Rupprecht 1995: 431.

[120] Whether the debt had been contracted at the same time, we do not know: in truth, we ignore even the cause and nature of the debt.

intention of the parties may not have been to secure a debt, but to perform a definitive cession, maybe as a datio in solutum, and that only now the creditor grants a new term for payment and, with it, a chance to redeem the property. If this were the case, the document would not attest an actual title-transfer security, but a completely singular occurrence, the result of a change of circumstances in this specific instance.

At any rate, the document is so far an unicum, insufficient to conjecture behind it a standard procedure of guarantee through parachôrêsis. None of the parallels conjectured by Schwarz within the same Prôtarchos archive resists scrutiny:[121]

a) BGU IV 1059 (undated), and 1130 (4 BCE) seem suspicious to Schwarz because they leave unspecified the amount that the seller declares to have received as a price.[122] Yet, this is hardly enough to conjecture that they are antiparachôrêseis as the one foreseen in BGU IV 1158 for the redemption of the property. Even if we accepted that the lack of a specific amount may hint to a lack of actual price, many other possibilities would remain open, a donation being the most obvious one.[123]

b) Schwarz mentions also BGU IV 1171 (10 BCE), where a certain Zamanos, to whose name a 1000 dr. loan had been assigned by parachôrêsis, restores the original creditor, almost a year later, to his full rights: in this case, not through antiparachôrêsis, but declaring ineffective the initial assignment: because, we read, it had been made κατὰ πίστιν.[124] Schwarz, as others before and after him,[125] saw here a form of pignus nominis: the loan had been assigned to Zamanos as a security, the original creditor being Zamanos' debtor; a year later, the latter paid his debt, and Zamanos returned the credit to him. The document, thus understood, would provide a striking parallel to BGU IV 1158: fiduciary guarantee would have been so common, at least in the early Roman Alexandrian practice, that it was applied to credit as well as property.

Tempting as this interpretation may seem, the document offers, in truth, little support for it. If it had been by paying his own debt that the lender recovered his rights, he would have wanted to have thus much acknowledged by Zamanos. Yet,

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121 Schwarz 1911: 37 n. 3, and 40 n. 1.

122 No argument in favour of a loan can be drawn, instead, from the term κεφάλαιον in BGU IV 1059, l. 6: κεφάλαιον, παραχωρητικόν, are the usual terms for the price in the parachôrêseis of BGU IV, instead of τιμή: Schwarz 1911: 36 n. 5 i.f.

123 Among the other peculiarities noticed by Schwarz in these documents, only the asphaleia in BGU IV 1059 l. 18, that the buyer somehow had before the sale, may carry some weight in support of his suspicion. Yet, it is difficult to imagine that a creditor would have secured the debtor against the loss of the pledged slave (here, by death or flight), when in all our documents the kindynos clause is invariably stipulated in favour of the creditor.

124 BGU IV 1171: ϙυν[χ]ω|7ροῦμεν ... |8 ... [εἶ]ναι \. . . ./ ἄκυρον ἣν ἀνήν[εγκεν] |9 εἰς αὐτὸν ὁ Στέ[φ]ανος ... |10 ... συνχώρησιν ... |12 ... παρα[χ]ωρήσεως δανείου ... |17 ... ἕνεκα τοῦ κατὰ πίστιν εἰ|18ς αὐτ[ὸ]ν Ζαμα[νο]ν ταύτην γεγονέναι |19 καὶ ἐξεῖναι αὐτῶι Στεφάνῳ πρά|20σειν τὸν ὑπόχρεον τὸ δάνειον καὶ |21 τοὺς ὀφειλομένους τόκους καθὼς |22 κα[ὶ] τὸ πρότερον.

125 Rabel 1907: 358-359; Mitteis 1912a: 136; Wolff 1940: 622; Schmitz 1963: 52-64.

the document contains no reference to any such payment, or, for that matter, to the supposed debt itself. The only hint to the purpose of the credit assignment are the words κατὰ πίστιν. The expression reappears in other first and second century papyri where a loan is documented to the name of someone else than the lender.[126] In all of them, as in our case, the lender eventually recovered his full rights: not through parachôrêsis (since he also had performed none), but through a document of disclosure, where the nominal creditor 'acknowledged the pistis', that is, the fiduciary nature of his position, and that the credit belonged in truth to the lender.[127] Significantly, none of these documents present the lender and the fiduciary as debtor and creditor: no debt between them is ever mentioned. When something about their relation is disclosed, they appear as relatives[128] or friends: as a friend of the lender, in fact, is the nominal creditor emphatically referred to in two occasions in the trial documented in P. Mil. Vogl. I 25 (127 CE Tebtynis).[129]

All this seems to point to a trustee, rather than a creditor: a trustee, as Gradenwitz suggested,[130] akin to a Roman adstipulator,[131] whom we allow to acquire full rights as creditor, so that he is fully entitled to act in all respects in our place. In truth, this practice is much more dangerous than the Roman adstipulatio (which was unsafe enough to induce a legislative intervention protecting the creditor from breach of trust):[132] here, we bestow our full rights on someone who appears formally as sole creditor, not just as creditor together with us. In the Roman Republic, adstipulatores

[126] SB III 6663 (6-5 BCE unknown provenance); P. Flor. I 86 = MChr. 247 (after 86 CE Hermopolites); P. Oxy. III 508 (102 CE Oxyrhynchos); CPR VI 1 (125 CE Ptolemais Evergetis), ll. 16-17; P. Mil. Vogl. I 25 (127 CE Tebtynis); PSI XV 1527 (after 161 CE Oxyrhynchos). For a more detailed discussion, Alonso 2012: 9-16, with lit.

[127] P. Flor. I 86 = MChr. 247 (after 86 CE Hermopolites), l. 9-12: ἀκολού|[θως] ... δ[η]μοσίῳ χρηματισμῷ ... | ... ἐξομολογουμένη τὴν πίστην τῶν αὐτῶν τριῶν συνγρα|[φῶν]. We have an example of such disclosure document in P. Oxy. III 508 (102 CE Oxyrhynchos): |5 ὁμολογεῖ Στέφανος ... |8 Ἡρακλᾶτι ... |10 ... γεγονέναι ἐπ' ὀνόματος τοῦ ὁμολο|11γοῦντος Στεφάνου κατὰ πίστιν δάνεια δύο.

[128] Two brothers, in CPR VI 1 (125 CE Ptolemais Evergetis), l. 17.

[129] In the first intervention of the plaintiff's advocate: ἐποίησεν τ[ὰ] τῆς παραθέ[σεως] γράμματ[α εἰ]ς ὄνομα [φί]λ[ο]υ | [ἑ]αυ[το]ῦ Ἀ[τρ]η[νοῦ] τινος γραφ[ῆ]ναι (col. II, ll. 16-17); and in one of the answers of the plaintiff himself: [ο]ὔκ ἐστ[ιν Ἀτρηνὸ]ς ἀλλὰ Δεῖος Ἀτρηνοῦ, φίλ[ος μου,] | [εἰς] ὃν ἐποίησα τὸ χε[ι]ρ[ό]γραφον [γραφ]ῆναι (col. III, ll. 19-20). The second φιλ[...] makes Vogliano's integration close to certain.

[130] Gradenwitz 1906.

[131] In Roman law, an adstipulator was a trustee of the creditor, invested (by receiving the same solemn promise as him) with full rights as a co-creditor, so that he could receive payment, and also claim the debt in his place. The figure is nowhere to be found in Justinian's compilation, since it had long before fallen into desuetude: our knowledge comes from Gaius' Institutions: Gai. 3.110-114.

[132] Such was the aim of the 3rd cent. BCE lex Aquilia in its second chapter, as we know through Gai. 3.215-216: a claim was granted to the creditor against the adstipulator who defrauded him by releasing the debtor without payment. Corbino 2004, with lit.

had been convenient as long as the legis actiones were in force, since this old procedure excluded representation in trial.[133] Why creditors would accept an even more exposed position in Roman Egypt, where representation was perfectly possible, also in court, and, in fact, through direct agency, we do not know. An incident in P. Mil. Vogl. I 25, though, shows how this practice could easily be made much less dangerous for the creditor: at a certain point, the strategos presiding over the trial wonders at the fact that the lender did not take the precaution to request from the beginning the document of disclosure where the creditor κατὰ πίστιν acknowledges to be a mere trustee.[134] This precaution, even though it was not taken in the case at hand, nor in others that have arrived to us,[135] would have been enough to safeguard the creditor's position, allowing him to enforce his rights at any time, while leaving the formal creditor in the position to act for him if it were necessary.[136] Crucially for us: the fact that the strategos, visibly familiar with this type of transaction, deems natural to obtain the document of disclosure from the beginning, confirms our impression that the lender merely commends his credit to a trustee, not to his own creditor in guarantee. This was most likely also the case in BGU IV 1171.

c) Despite Schwarz, it is quite certain that the misthoprasia in BGU IV 1157 (10 BCE Alexandria) is not a second instance of this type of 'Sicherungsübereignung'. The convoluted story documented in this papyrus[137] started with (a) a loan synchôrêsis received from three debtors by a certain Ammonios in 26 BCE (ll. 4-7), and (b) his

[133] Gai. 4.82; Inst. 4.10pr.; Ulp. 14 ed. D. 50.17.123pr. Kaser-Hackl 1996: 62-63, with lit. The later decadence of the adstipulatio was quite likely related to the admission of representation in trial under the formulary procedure.

[134] P. Mil. Vogl. I 25, col. III, ll. 30-33: ὁ στρατηγὸς Δημη|τρείῳ· διὰ τί οὐχ ἅμα [το]ῖς το[ῦ Γε]μελίνου γράμ[μ]ασιν καὶ παρὰ | τοῦ Δείου ἐξομολογουμένου τὴν πίστιν τὸ χιρόγραφον | εἴ̣λ̣ηφας;

[135] P. Oxy. III 508 is a document of disclosure issued in August 102 CE, regarding two loans that had been granted at the beginning of 99 CE and the end of 100 CE. In P. Flor. I 86 = MChr. 247, the document of disclosure was issued only in October-November 86 CE, regarding three loans that had been granted between February 82 CE and August 85 CE; the debtor had defaulted on all of them, the term for the last one being March-April 86 CE. The rest of the documents do not give enough chronological information. In the limited cases that have arrived to us, therefore, the course of events that the judge of P. Mil. Vogl. I 25 considers normal, i.e. the issuing ab initio of the disclosure document, is in truth never attested.

[136] In this sense, Gradenwitz's comparison to the Roman adstipulatio is particularly apt, since here too we find two people in the position to claim the debt: the nominal creditor, with the original loan document, and the true lender, with the disclosure document (and another copy of the original loan). BGU IV 1171 is exceptional in this respect, since this deed deprives the fiduciary of his entire legitimation as creditor, which until then corresponded solely to him: the fact that the debtor, Herod, acts as a consenting party both in the initial parachôrêsis (ll. 9-10: συ̣ν̣ε̣υ̣δ̣ο̣κ̣ο̣ῦ̣ν̣|τος τοῦ Ἡ̣ρ̣ώ̣δ̣[ου]) and in its later cancellation (ll. 4-5: παρόντος καὶ σ̣υ̣ν̣ε̣υ̣|δ̣ο̣κ̣ο̣ῦ̣ν̣τ̣ο̣ς [τῇ]δ[ὲ τῇ] σ̣υ̣ν̣χ̣ωρήσει Ἡ̣[ρώδου]) makes it further unlikely that the parties envisaged in practice a simultaneous legitimation of both lender and fiduciary.

[137] On the document, Rathbone 2007: 587-589, with lit.

reciprocal promise, in separate synchôrêsis, to grant them upon payment, the lease-sale (misthoprasia) of a skiff belonging to him (ll. 7-9). In 11 BCE, as documented in (c) a third synchôrêsis, part of the loan was paid by two of the debtors, and with their consent a third share of the skiff was given by Ammonios in misthoprasia to their co-debtor, son of one of them (ll. 9-13). BGU IV 1157 is (d) a fourth synchôrêsis (or draft thereof), whereby having received from the same two debtors the remaining capital and interest, Ammonios grants to them, from April 10 BCE, misthoprasia for fifty years on the remaining two thirds of the skiff, thus finally cancelling the two synchôrêseis that sixteen years before had created the reciprocal debt.

Schwarz understood the relation between the loan and the skiff misthoprasia as one between debt and security: as in BGU IV 1158, the creditor would have received the skiff from the debtors through fiduciary misthoprasia, promising in 'b' to return it to them upon repayment of the debt, as he eventually does in 'c' and 'd'. The hypothesis is untenable: a) unlike a parachôrêsis, a misthoprasia is not formulated as a definitive cession: the restoration of the debtor's position would have required cancelling the existing contract, not adding a new one in the opposite direction; b) BGU IV 1158 explicitly refers to the initial parachôrêsis - and to the future one, emphatically, as antiparachôrêsis; in 1157, instead, there is no trace of a previous misthoprasia by the debtors in favour of Ammonios; c) that there had been none is strongly suggested by the fact that the skiff is presented from the beginning purely and simply as belonging to Ammonios (τ[ῆ]ς ὑπαρχούσης αὐτῷ σκάφης, l. 8).

A much better explanation was proposed by Pringsheim[138] and is today generally accepted: the first synchôrêsis was not an actual loan secured by the skiff, but a fictitious loan allowing Ammonios to claim its price. The second synchôrêsis formalised Ammonios' reciprocal promise to grant misthoprasia upon receiving the money.[139] Together, their effect is equivalent to that of a purely executory lease-sale, where both parties make themselves reciprocally liable although no performance has yet taken place.[140] Unusual seems only the large amount of time that passed between this

[138] Pringsheim 1950: 262-265.

[139] Only this second synchôrêsis is referred to without a date: quite likely, as commonly assumed (Rathbone 2007: 588) because it had been executed together with the first one.

[140] Rathbone 2007: 589, as Vélissaropoulos before him, sees as ‚highly implausible' that ‚the purchasers ... accepted liability for a fictive loan if they did not gain any legal right to use the boat'. For this reason, he imagines the second synchôrêsis as an effective misthoprasia, not merely the promise of one. This is incompatible with the text. The second synchôrêsis, in fact, is unequivocally presented as an agreement to grant, in the future, upon repayment of capital and interest, a synchôrêsis peri misthoprasias: κατὰ \δὲ/ τὴν ἑτέραν ὡμολόγηκεν ὁ Ἀμμώνιος κομισάμενος ταύτας καὶ τοὺς τ̣ό̣[κους] | ἀνοίσειν εἰς τοὺς τρεῖς συνχώρησιν περὶ μισθοπρασίας (ll. 7-8). Rathbone's interpretation leads him to difficulties regarding the third synchôrêsis: why would one of the debtors receive misthoprasia on one third of the skiff in 11 BCE, if all three had already received it fifteen years before? His suggestion that the debtor in question ‚for reasons unknown, split from the other two', does not help: a share of 1/3 is what he would have had from the beginning if misthoprasia had been granted to all three; this

reciprocal contract, in 26 BCE, and its fulfilment, fifteen years later, between 11 and 10 BCE.

VII. Other Late Ptolemaic and Early Roman Documents

The remaining evidence from the Late Ptolemaic and Early Roman time is rather scant, and in some cases clearly related to the traditions already studied:

a) This is most likely the case of two Fayum documents where a sale is mentioned together with a loan, usually listed for this reason as evidence of a Greek title-transfer security: SB VI 9405, and P. Lond. II 358.[141]

In SB VI 9405 (75 BCE Ibion Eikosipentaruron), so-called P. Desrousseaux,[142] Petesouchos gives receipt to Onnôphris upon payment of a debt (in barley) contracted κατὰ συγγραφὴν δανείου ἐξαμάρτ[υρον] (l. 9), for which a cow had been hypothecated in a separate sale document: περὶ ὧν καὶ [ὑπ]έθεντο οἱ αὐτοὶ τῶι Πετεσούχωι καθ' ἑτέραν ἐξαμάρτυρον ὁμολογίαν πρά[σεως] βοὸς [θ]ηλείας πρὸς ἀσφ[ά]λειαν τοῦ δανείου (ll. 11-13). The formulation of the hypothec as a sale, and the execution of sale and loan as separate contracts points to the native Egyptian tradition attested in late Ptolemaic Pathyris and Krokodilopolis (supra IV) and in early Roman Fayum (supra III). As in the Pathyrite and Fayum examples, the parties in SB VI 9405 are unmistakably Egyptian,[143] even if both documents (and later the receipt itself) are

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new synchôrêsis would have been completely useless for him. Furthermore, the idea of a ‚split' behind the 11 BCE synchôrêsis is difficult to conciliate with the fact that precisely those other two (one of them his father, the other maybe his uncle) are the ones that pay for his share in that very same 11 BCE contract: Rathbone, aware of the difficulty, feels forced to conjecture that the drafter wrote their names by mistake ‚because they were uppermost in his mind as the two involved in the new contract'. Rathbone is led to this snowballing misinterpretation of the document by his impression that the debtors would not have accepted liability before gaining any right on the boat. The implausibility that Rathbone sees here is all imaginary. The transaction is not more unimaginable than a modern (or Roman) sale perfected by mere consent, without payment or delivery, whereby the buyer accepts to be bound to pay the price even though he has not yet received the item. Consensual sale being unavailable in the Greek tradition, the parties attain the same result through reciprocal synchôrêseis. Fictitious loans in exchange for a future performance are not unheard of in the papyri: cf. P. Dion. 11-12 (108 BCE, Hermopolites), on which infra X sub ‚g', in Alonso 2012: 17-30. Our document, in fact, shows how legal traditions that ignore consensual contracts may achieve a similar effect through reciprocal promise, as, since Jhering 1865: 190-192, is often suspected may have been the case in earlier Roman law.

141 The former is characterised as Sicherungsübereignung by Rupprecht 1995: 430; the second, with some hesitation, by Mitteis 1912a: 135 n. 1, Pringsheim 1950: 125 n.1, Herrmann 321, and Rupprecht 1995: 430 n. 51.

142 Jouguet 1937.

143 The creditor, Petesouchos son of Pekôsis; the payer (a relative of the debtors), Onnophris; the debtors, Pachratês, whose mother was a Tekôus daughter of Apollonios alias Hôros, and the wife of Pachratês, Thais alias Taêsis, daughter of Hermônis alias Petermou(this/thiôn).

executed in Greek form, as syngraphai hexamartyroi.[144]

Also the χειρόγραφον πράσεως [καὶ ὑ]ποθήκης κα(ὶ) δ[αν]είου mentioned in P. Lond. II 358 (p. 171) = MChr. 52 = Jur. Pap. 83 (150-154 CE Soknopaiu Nesos), that Stotoêtis was violently forced to draw up for his adversaries,[145] seems, in the terms it is described, a document of sale and loan in the native tradition still attested in Soknopaiu Nesos and Tebtynis in early Roman times (supra III).

b) Different is the case of BGU II 650 = WChr. 365 (46-47 CE Arsinoites). Here, a certain Potamiaina addresses the procurator usiacus in charge of the Imperial 'Petronian' domain. Her petition concerns the confiscated property of a misthôtês. She states that she had applied 'in the auction for the sale or hypothec' of some catoecic land belonging to him: ἐπεὶ προσῆλθον ἀγορασμῶι ἢ καὶ ὑποθήκῃ κλήρου | κατοικικοῦ ἀρουρῶν ἐννέα ἡμίσου[ς] τετάρτου (ll. 6-7).

The peculiar uncertainty between sale and hypothec that caught the attention of Rabel and Mitteis[146] is perfectly understandable if, as it seems quite likely, the property sold in certain auction sales was redeemable by the former owners, as it was probably the case when praedia subsignata were sold ex lege praediatoria by the aerarium or a municipium,[147] and certainly after execution of private debts in Egypt and maybe the East in general.[148] If redemption eventually takes place, it does not

[144] For the late Ptolemaic form of this type of document, with the inner text reduced to a brief summary of the transaction, and the body of the contract displaced to the outer text, Wolff 1978: 64-71. For the origin -in any case not native Egyptian- of the syngraphê hexamartyros, Wolff 1978: 59-63.

[145] The alleged aggressors were the father and brother of the woman in whose favour the document was given; as debtor/seller figured, we are told, the sister of Stotoêtis: ἐπανανκάσαι με μετὰ ὕβρεων | καὶ πληγῶν ἐγδόσθαι γράμματα χειρογράφου πράσεως [καὶ ὑ]ποθήκης κα(ὶ) δ[αν]είου δρα[χμῶ]ν | τετρακοσίων ἐξ ὀνόματος τῆς ἀδελφῆς μου, μὴ συνθ[εμέ]ν[η]ς αὐτῆς, ἀλλὰ καὶ ἀπούσης, εἰς | ὄνομα τῆς θυγατρὸς Σωτοῦ Σατυριαίνης (ll. 8-11).

[146] Rabel 1907: 359: ‚das Gesuch einer Frau, die einen Grundstücktanteil erwarb und selber nicht zu wissen scheint, ob es Kauf oder Pfand war'. Mitteis 1912a: 135.

[147] Ex lege praediatoria, as opposed to in vacuum, cf. leges Malacitana and Irnitana §63-65, Suet. Claud. 9. The difference is far from clear, but the connection between lex praediatoria, redemption (ex Cic. II Verr. 1.54-55.142), and usureceptio (ex Gai. 2.61), proposed by Mommsen 1855: 473- 477 (1905: 364-367), is still widely accepted: cf. Mentxaka 2001: 91-93, and n. 152, with lit.; Cuena Boy 2007-2008. Ample discussion in Sethe-Partsch 1920: 659-670.

[148] A right of redemption of the private debtor during and after execution is amply documented in the papyri, both for unsecured debts and for items that had been given in hypothec or hypallagma: cf. the trial before Volusius Maecianus, the Roman jurist, as prefect in P. Oxy. III 653 = MChr. 90 (ca. 161 CE Oxyrhynchos), and also SB XVI 13060 (187 CE Arsinoites), P. Ryl. II 176 (200-210 CE Hermopolis), and P. Lond. III 1164 D (p. 162) = SB XX 15188 (212 CE Antinoopolis). Different is the case of P. Ryl. II 119 (62-66 CE Hermopolis), where no execution seems to have taken place, but a mere embargo on the produce of the land. On this redemption, cf. Schwarz 1911: 112-113, Raape 1912: 81-84, Jörs 1918: 55-56. Gord. C. 8.27.7, and Diocl. C. 8.19.2, referred to hypothec with ius distrahendi, not to forfeit, flatly reject any redemption after execution.

seem far-fetched to compare them to hypothecations (with the buyer advancing the money owned by the debtor, virtually 'as a loan' to the latter, on the guarantee of the property). The analogy is quite natural, and does not imply a general practice of guarantee sales or title-transfer security in first century Egypt.

c) Close in certain respects to the menein contracts is the security in P. Oxy. II 270 = P. Lond. III 793 descr. = MChr. 236 = Sel. Pap. I 57 (94 CE Oxyrhynchos). In this document, on which much has been written,[149] a debtor gives safeguard to her guarantor that he will not be called in execution for her debt:[150] if she fails to pay to the creditor when the term arrives, she forfeits to the guarantor the same land that she had hypothecated to secure the loan:[151] κυριε[ύ]ειν αὐτὸν Σαραπίων[α] τὸν [καὶ Κ]λάρον τῶν προκειμένω[ν] ἀρουρῶν ... εἰς τὸν ἅπαντα χ[ρ]όν[ον ὡ]ς ἂν πράσεως [αὐτῷ γενο]μένης (ll. 31-34). Even though the term μένειν is not used, and κυριεύειν replaces the usual double reference to κράτησις καὶ κυρεία, we find

[149] Among the older lit.: Bortolucci 1905: 291-293; Rabel 1907: 363; Weiß 1909: 20-21; Manigk 1909b: 318-321; Schwarz 1911: 23-24; Raape 1912: 50-51, 58, 63-64, 71, 75, 93-94; Sethe-Partsch 1920: 592-597. Cf. now Schanbacher 2002a, and Wolff-Rupprecht 2002: 92-93.

[150] Among the parallels, BGU IV 1057 = MChr. 356 (13 BCE Alexandria), ll. 18-33, and P. Tebt. II 392 (134-5 CE Tebtynis), both equally formulated around παρέξασθαι ἀπαρενόχλητον καὶ ἀνείσπρακτον / ἀπερίσπαστον. The same safeguard, in the same terms, is invoked in P. Oxy. II 286, ll. 9-13: in this case, the petitioner seems to have functioned as a guarantor, but her formal role in the original loan document was that of a borrower, quite likely on behalf of the Heron against whom the petition is addressed (a similar practice of ‚privative' intercessio was often dealt with by the Roman jurisprudence in the context of the application of the senatusconsultum Velleianum: Ulp. 29 ed. D. 16.1.4, D. 16.1.8.14, Paul. 16 resp. D. 16.1.29pr.)

[151] In general, hypothecs are contracted in the papyri in such terms that the creditor accepts the security in lieu of payment: the hypothec absorbs the debtor's liability, and the creditor's praxis is limited to those cases where the hypothec is totally or partially lost, by accident or eviction. This is the so-called principle of ‚reine Sachhaftung'. In our case, the hypothec received by the creditor does not seem contracted along these lines: upon default, the creditor must have been able to choose freely between the hypothecated land and the praxis, also against the guarantor: if the latter possibility had existed only when the hypothec was useless, the security given to the guarantor for that case on the same property would have been utterly pointless. Such freedom of choice, unattested in hypothecs, distinguished instead (supra V sub ‚e') the menein-contracts: whether such had been the contract that secured the loan we do not know, since our document reproduces that security only in the part describing the land; ἐπὶ ὑποθήκῃ in l. 16 does not completely exclude it, cf. the same expression for a menein contract in P. Oxy. XXXIV 2722 (154 CE), l. 69 (supra n. 112). Partsch, in Sethe-Partsch 1920: 594, believes that the concurrence of guarantor and hypothec in P. Oxy. II 270 follows the Demotic model attested in P. Hauswaldt 18. This is unlikely. As Partsch himself underlines, the Demotic guarantors in P. Hauswaldt 18 seem to secure the debtor's duties as a seller regarding the land, rather than the repayment of loan: it is in direct connection with these duties that they are mentioned in the sale (ll. 8-9), and only regarding them that they reappear in the cession (ll. 13-14). Nothing suggests that the creditor had here free choice: as in all other preserved ‚Kaufpfandverträge', his right seems reduced to the security. No Demotic model seems to exist, therefore, for the free choice of the creditor in P. Oxy. II 270.

the same turn of phrase εἰς τὸν ἅπαντα χρόνον, ὡς ἂν πράσεως γενομένης characteristic of the menein contracts (supra V).

The sale analogy, in particular, caught the attention of Josef Partsch, for whom it was clearly modelled on the Demotic practice of guarantee sales. This cannot be excluded, but it is much less certain than in the case of the Pathyrite interrupted sales (supra IV) or the Fayum sale-loan contracts (supra III). The Pathyrite and Fayumic practice, in fact, attests a preference for the form of the suspended sale among native Egyptians, also in their Greek documents, in cases where an ordinary Greek hypothec would have been perfectly possible. In P. Oxy. II 270, instead, a hypothec would have been out of the question, because the property had already been hypothecated to the creditor:[152] multiple hypothecations are notoriously non-existent in the papyri, and this very likely because incompatible with forfeit, and for that reason usually excluded in the hypothec contracts themselves.[153] The suspended sale construction seems here less an option than a necessity:[154] and, in fact, as Rabel noticed, it reappears decades later in the exact same context, securing the position of the guarantor, in a case discussed by Cervidius Scaevola.[155] Multiple hypothecations being perfectly

[152] In this sense already Rabel 1907: 364 and n. 2.

[153] Cf. Rupprecht 1997a. Further hypothecation is in most cases explicitly excluded by a μὴ ἐξέστω-clause (μὴ ἐξέστω αὐτῇ πωλεῖν μηδ' ἑτέροις ὑποτίθεσθαι μηδ' ἄλλο τι περὶ αὐτῆς κακοτεχνεῖν ὑπεναντίον τούτοις τρόπῳ μηδενὶ ἢ τὰ παρὰ ταῦτα ἄκυρα εἶναι: P. Flor. I 1, 153 CE, Hermopolis, ll. 8-9), by a παρέχεσθαι-clause (παρέχεσθαι δὲ αὐτὸν τὴν [ὑπ]οθήκην καθαρὰν καὶ ἀνέπαπον καὶ ἀν[επι]δάνειστον ἄλ[λ]ου δαν[είου] καὶ πάσ[η]ς ὀφειλ[ῆς κ]αὶ μηδένα αὐτῆς ἐμπ[οιο]ύμενον τρόπ[ῳ μη]δεν[ὶ]: BGU III 741, 143 CE Alexandria, ll. 36-41; sometimes concurring with μὴ ἐξέστω, cf. P. Bas. 7, 117-138 CE Arsinoites, ll. 15-16, and 21-23), by an explicit authorisation to register the hypothec as katochê in the bibliothêkê enktêseôn (P. Oxy. XVII 2134, after 170 CE Oxyrhynchos, ll. 24-26), or by the hypothecated goods being deposited and sealed by both parties (so, the natron in the quite peculiar P. Genova II 62, 98 CE Oxyrhynchos). Among all preserved hypothecs, such arrangements are lacking only in P. Brem. 68 (99 CE Hermopolis), SB I 4370 (229 CE Herakleopolis); also, remarkably, outside of Egypt (cf. P. Babatha 11, P. Euphrates 13, and the general hypothecations in P. Dura 17, 18, 20-23).

[154] In truth, the sale construction provides a solution only if understood under condition of the guarantor paying or suffering execution for the debtor (as, significantly, in Scaevola's interpretation, infra n. 155), rather than literally as formulated in the document, under mere condition of the debtor's default: a literal interpretation, in fact, would lead upon default to a clash between the right of the creditor, if he chooses the hypothec, and the right acquired by the guarantor as a buyer.

[155] Scaev. 7 dig. D. 18.1.81pr.: Titius cum mutuos acciperet tot aureos sub usuris, dedit pignori sive hypothecae praedia et fideiussorem Lucium, cui promisit intra triennium proximum se eum liberaturum: quod si id non fecerit die supra scripta et solverit debitum fideiussor creditori, iussit praedia empta esse, quae creditoribus obligaverat. quaero, cum non sit liberatus Lucius fideiussor a Titio, an, si solverit creditori, empta haberet supra scripta praedia. respondit, si non ut in causam obligationis, sed ut empta habeat, sub condicione emptio facta est, et contractam esse obligationem. Cf. also Marcian. form. hyp. D. 20.5.5.1. On the text, Burdese 1949: 121-123; further lit. in Schanbacher 2002b, whose own conclusions cannot be followed. Scaevola's answer, as it has arrived to us, has long been a crux. The alternative ‚si not ut in

possible under Roman law, there is little doubt that Scaevola confronts here, as often, a non-Roman practice, probably not limited to Egypt, under which hypothec was avoided precisely because already granted to the creditor.[156]

P. Michael. 9 (ca. 92 CE Oxyrhynchites) is not, as it has been suggested,[157] another occurrence of the transaction attested in P. Oxy. II 270. The security is not given to a guarantor but to the creditor (a Roman, Gaius Annius Fuscus), and the main trait of P. Oxy. II 270, the sale analogy, is absent here. Most of the clauses regarding the security are lost, but the pignoration clause is close to that of the menein contracts, although without their characteristic μένειν: ἐὰν δὲ μὴ ἀποδοῖ τῇ προθε[σμίᾳ,] ἐξεῖναι τῷ Γαίῳ Ἀννίῳ Φούσκῳ καὶ τοῖς παρ' αὐ[τοῦ ἀντὶ] τοῦ π̣ρ̣ο̣κ̣ε[ιμένου] κεφαλαίου κρατεῖν καὶ κυριεύειν τοῦ ὑπάρχοντος [-ca.?-] μέρους πατρικῆς οἰκί̣ας (ll. 12-15).

d) P. Heid. II 219 = SB VI 9539 (100 CE Ptolemais Euergetis, Arsinoites) has been described as an 'apographê to the bibliothêkê enktêseôn for the acquisition of land in connection with a loan for 10 months', and thus a possible instance of

causa obligationis, sed ut empta habeat', is best understood as opposing sale to hypothecation: ‚obligatio' in the sense of ‚obligatio pignoris'. Problematic remains the final ‚contractam esse obligationem'. The obligatio fiduciae proposed by Rabel 1907: 363 n.1 would violate Roman law, by lack of mancipatio, as much as the will of the parties, adding to their suspensive condition an entirely unforeseen redemption right of the debtor. It is better to think, with Vangerow, that the obligatio contracta is that of the seller in the contract of sale (even though this requires us to accept that the same term, ‚obligatio', appears in the same sentence with two different meanings: a comparatively minor lapse in clarity in the usually cryptic Scaevola). This interpretation does not turn Scaevola's answer into a ‚sheer inanity' (Rabel): it underlines that, if the parties contracted a sale and not a hypothec, the guarantor (who is not in possession of the asset) does not have, once the condition of the sale is fulfilled, an actio in rem (as he would, if this had been a hypothec), but merely an actio empti against the debtor. Completely unrelated to the case in Scaevola and P. Oxy. II 270 are the jurisprudential texts and Imperial constitutions that discuss the position of the fideiussor as ‚emptor' of the pledges when he has paid for the debtor: Paul. 4 resp. D. 17.1.59.1 and D. 46.1.59, Marcian. form. hyp. D. 20.5.5.1, Sev. Ant. C. 2.20.1. The sale construction is here the mechanism through which the Roman jurisprudence avoids, pecunia soluta, the extinction of the actions to be transferred to the fideiussor: those in personam against the debtor, and those in rem on the securities. The same construction is applied when, despite the pledges, the creditor chooses to act against the fideiussor and is compelled to transfer the pledges to him (Pap. 2 resp. D. 20.5.2, Sev. Ant. C. 8.40.2pr.)

[156] Partsch's hypothesis that P. Oxy. II 270 is rooted in the native Egyptian tradition is far from finding confirmation in P. Berl. inv. 13528, published by Sethe as P. Bürgsch. 14 = P. Eleph. 6 (225 BCE Apollonopolis), despite Wolff-Rupprecht 2002: 92. The document is presented by Partsch merely as yet another Demotic instance of the guarantors receiving security, and, in fact, there is not much more in common with P. Oxy. II 270. In P. Bürgsch. 14, the security refers to the whole property of the debtor, not to specific property previously received as security by the creditor; it does not take the form of a sale; it is in fact not even granted by the debtor, but by the creditor, and therefore probably implies the surrender of the latter's execution rights; this means that, in truth, the declarants are not guarantors, but rather replace the debtor before a creditor who surrenders to them his execution rights against the the debtor.

[157] Wolff-Rupprecht 2002: 92-93.

title-transfer security.[158] The document is certainly an apographê, but referred to a mesiteia:[159] in first century Fayum, the term simply substitutes for hypothêkê in case of ordinary hypothecation of catoecic land, for the same scruple that, when such land is sold, makes it formally more accurate to speak of parachôrêsis instead of prasis.[160]

e) A much later document, P. Oxy. XIV 1703 (ca. 261 CE Oxyrhynchos), not traditionally taken into account in our context, contains a rather suspicious transaction: Aurelius Geminos cedes to Aurelius Apion a share on a house that the children in potestate of the former had bought through him from the same Apion to whom the property now returns:[161] ὁ[μ]ο[λογῶ] καταγεγραφέναι σοι ἀπ[ὸ] το[ῦ] |6 νῦν εἰς τὸν ἀεὶ χρόνον ὃ ἐώ[νη]ντε παρὰ σοῦ δι᾽ ἐμοῦ ο̣[ἱ ὑπο]|7χε̣[ίρι]ο̣ί μου υἱοὶ ... |12 ... [... τρί]τον μέρος οἰκίας διπυργιαίας. Unfortunately, only the beginning of the contract has survived, without any further information as to the nature of that first sale. The case may have just been that of someone forced by financial difficulties to sell, but fortunate enough that later, finding himself in a better economic situation, the buyer accepted his bid to buy the property back.[162] But a title-transfer security cannot be excluded, contracted ab initio with the agreement that the sold share would be redeemable by paying back the price. Some weight in this direction may have the seemingly premeditate replacement of the usual ὁμολογῶ πεπρακέναι by ὁμολογῶ καταγεγραφέναι, as if underlining that this redemption is not properly a sale.

VIII. Ônê en Pistei

Our search narrows now dramatically, leaving one main document to consider.[163]

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[158] Rupprecht 1995: 430.

[159] Ll. 8-9: π[ρ]ο̣ϙ̣α̣[πο]γράφομαι καὶ ἣν ἔσχον | μ̣ε̣[σι]τ̣είαν, instead of [εἰς ἀσφά]λ̣ειαν as in the original edition.

[160] For mesiteia, supra n. 52. On parachôrêsis, supra n. 115.

[161] Geminos and Apion are prominent members of the metropolitan elite: both bouleutai, Geminos furthermore agoranomos, Apion (on whom infra n. 162) son of a former kosmêtês and kosmêtês himself. The property, a two-winged house (διπυργία οἰκία), of which a third share is being sold, was a high status type of residence, probably flanked by two towers: Nowicka 1973; Alston 2002: 62, with lit. It is remarkable that the well known Oxyrhynchitan preference for the chirographic form (Wolff 1978: 112-113 and nn. 22-23) arrives to the point that a contract of this economic importance is not executed through the agoranomeion even when one of the parties is the agoranomos himself.

[162] In January 261 CE, Apion sold in advance 600 artabas of wheat from the coming harvest, in addition to other 500 that he had already sold to the same creditor: P. Ups. Frid. 5. It is tempting to assume that the possible financial difficulties behind these sales on credit are related to the sale of the house share, but this is far from certain, also because we ignore the date of the initial sale and of P. Oxy. XIV 1703: the date ca. 261 is merely based on P. Ups. Frid. 5, since Apion is also there in office as kosmêtês.

[163] None of the documents mentioned as dubious by Rupprecht 1995: 430 n. 51 resist scrutiny: (a) P. Bad. II 7 and 8 (2nd cent. BCE Latopolis), are merely payments of the telos hypothêkês; the mention of the enkyklion does not imply that the hypothecation is here a ‚Sicherungsübereignung': the term enkyklion is often used as generic, comprising also the hypothecation tax (cf. P. Köln V 219 [209 or 182 BCE] ll. 1-7: τοὺς βουλομένους ὠνὰς καταγράφειν ἢ [ὑ]ποθήκ[α]ς [ἢ] ἐπιλύσεις

One with such exceptional status, though, that it has been treated as the decisive proof of the existence in Egypt of a Greek form of title-transfer security, and the revelation of its technical name: ὠνὴ ἐν πίστει.

In 1903, a papyrus from the Heidelberg collection, inventoried as nr. 1278, caught the attention of Otto Gradenwitz. He prompted Gustav Adolf Gerhard to publish the document immediately. It appeared in Philologus in 1904, with a legal commentary by Gradenwitz himself.[164] Gradenwitz believed that the Heidelberg papyrus attested a new type of real security, the 'ὠνὴ ἐν πίστει', that had been the Hellenistic equivalent of the Roman mancipatio fiduciae causa (even in the name!) and of the old Greek πρᾶσις ἐπὶ λύσει. He hailed the text as the missing link between sale and hypothec in the Greek tradition, and even between this and the Roman fiducia cum creditore.

In securing ὠνὴ ἐν πίστει a place among the established forms of real security in the papyri, Grandewitz fully succeeded. To our day, no catalogue of real securities is deemed complete without it, its existence within the Greek tradition in Egypt as widely accepted as those of enechyron, hypothec and hypallagma.[165] All this, on the basis of just one document.

δ[ανείων] ἢ ἄλλας συγγραφὰς ποιεῖσθαι τῶν τῷι ἐγκυκλίωι ἀνηκοντῶν; cf. also P. Lond. III 1201 [p. 3] = MChr. 180, P. Lond. III 1202 [p. 5] = SB I 4281 [161 BCE Hermonthis]); (b) P. Oslo III 133 (2nd cent. Arsinoites) does not suggest that the sale (of a garlic harvest) has temporary character or depends in any way from the payment of the mentioned sums of money; (c) in BGU I 189 = MChr. 226 (7 CE Arsinoites), the fact that the summary at the verso unexpectedly mentions, together with the loan documented in the recto, the sale of a donkey, is best explained, as Mitteis suggested, understanding the loan document as fictitious, connected to a credit sale of the donkey: so also Herrmann 1989: 320-321; (d) on P. Lond. II 358 (150-154 CE Soknopaiu Nesos), supra VII sub ‚a'; on P. Oxy. II 472 and 486 (131 CE Oxyrhynchos), P. Tebt. III 1 816 (192 BCE Tebtynis), and P. Oxy. XIV 1644 (63-62 BCE Oxyrhynchos), all of them ‚pistis' documents, infra IX d, X f and h. As for the documents that Rupprecht discards: (a) P. Flor. I 55 (88 CE Hermopolites) and P. Flor. I 56 (234 CE Hermopolites), despite Vitelli's introduction, refer to the execution of hypallagma, not to any title-transfer security; (b) SB XX 14198 (104 BCE Pathryis) was edited by Messeri Savorelli 1990 as cancellation of the sale in P. Adler 7 dupl. P. Med. I 2 = SB III 6645 (104 BCE Pathyris), which would therefore have been a guarantee sale: the document is extremely fragmentary, and the reconstruction unclear, particularly the conjectured cancellation of the supposed security just days after having been contracted; in any case, it would not have been a title-transfer security, but a suspended sale of the Pathyrite group, vid. supra IV. For the rest of the documents commonly mentioned since Mitteis, i.e. those referred to ‚pistis' and to acquisitions made ‚en pistei', cf. infra IX-X.

164 Gerhard and Gradenwitz 1904; cf. p. 498 for the reasons behind the publication; Gradenwitz's commentary in pp. 577-583.

165 Cf., among the recent lit., Herrmann 1989; Markiewicz 2005: 156; Lippert 2012: 152; Urbanik 2013: 152. More cautious, Rupprecht 1995: 430, warning about the lack of contractual examples, and again in Keenan, Manning and Yiftach-Firanko 1914: 249-252, although ultimately accepting the category, cf. the glossary of technical terms, p. 558. For the initial (favourable, but cautious) reception of the document and of Gradenwitz' evaluation, cf. Rabel 1907: 355-364, and Mitteis 1912a: 135-141, the latter dismantling the objections advanced by Manigk 1909a: 2314-2315, and 1909b: 325-328.

The document, a 111 BCE Pathyris epilysis discharging debt and security, became immediately famous, and was included by Mitteis in the Chrestomathie as nr. 233:[166]

|[1] ἔτους Μεσορὴ κθ ἐν Παθύρει ἐπ' Ἀμμωνίου |[2] ἀγορανόμου. [vac. ca. 4] ἐπελύσατο Πανοβχοῦνις Τοτοέους |[3] ὠνὴν ψιλοῦ τόπου τοῦ ὄντος ἐν τῶ<ι> ἀπὸ νότου |[4] μέρει Παθύρεως πήχεις στερεοῦ β ὃν ὑπέ|[5]θετο Πατοῦτι Πελαίου \καὶ Βοκενο̣ύ̣π̣ε̣ι Πατο̣ῦ̣τ̣ος/ κατὰ συνγραφὴν |[6] ὠνῆς ἐν πίστει ἐπὶ τοῦ ἐν Παθύρει ἀρχείου |[7] ἐφ' Ἡλιοδώρου ἀγορανόμου ἐν τῶ<ι> ε (ἔτει) |[8] Μεσορὴ κζ χα(λκοῦ) (ταλάντου) α (δραχμῶν) Α [vac. ca. 3] ὃς καὶ παρὼν |[9] Πατοῦς \καὶ Βοκενοῦπις/ ἐπὶ τοῦ ἀρχείου ἀνωμολογήσατο |[10] ἀπέχειν καὶ μὴ ἐπικαλεῖν περὶ τῶν |[11] διὰ τῆς ὠνῆς γεγραμμένων πάντων |[12] τρόπω<ι> μηδενί. Ἀμμώ(νιος) κεχρη(μάτικα). Verso: |[13] ἐπίλυσις Πανοβχού(νιος)

|[1] In the sixth year, Mesorê 29th, in Pathyris, before Ammônios |[2] the agonoranomos. [vac. ca. 4] Panobchounis son of Totoeis has discharged |[3] a sale of a vacant plot located to the south of the |[4] division of Pathyris, two square cubits, which he had hypo|[5]thecated to Patous son of Pelaios and to Bokenoupis son of Patous according to a syngraphê |[6] of sale en pistei at the archeion in Pathyris |[7] before the agoranomos Hêliodôros in the fifth year, |[8] Mesorê 27th, for one talent 1000 bronze drachmae, [vac. ca. 3] which also |[9] Patous and Bokenoupis, present at the archeion, acknowledge |[10] to have received, and that they shall not claim about anything |[11] that was written in the sale contract |[12] in any manner. I, Ammônios, have drawn up the document. Verso: |[13] discharge (epilysis) of Panobchounis.

It is unquestionable that the security here cancelled is described simultaneously as a hypothec and as a sale:[167] ἐπελύσατο Πανοβχοῦνις ... ὠνὴν ψιλοῦ τόπου ... ὃν ὑπέθετο

[166] I reproduce here Mitteis' edition, with the small corrections by M. Vierros published in papyri.info, pointing to the short vacat after the date in l. 2 and after the amount in l. 8, and to the fact that the name of Bokenoupis as co-creditor in ll. 5 and 9 is in fact in both cases an interlinear addition.

[167] In a more careful translation, a ‚purchase': Pringsheim 1950: 111-126. It would be misguided to speculate why the act of the debtor redeeming the security is not presented as a cancellation of his ‚sale' but of the creditor's ‚purchase'. The reason is in fact quite simple, and clarified already by Pringsheim. The term πρᾶσις became dominant only in Roman times, in connection with a contractual model formulated as a πεπρακέναι-homologia of the seller (a Ptolemaic precedent, already noticed by Pringsheim, in SB VI 9405, supra VII sub 'a'): so, already, in the mid first century register of the Tebtynis grapheion, in P. Mich. II 121 verso and 123, where ὁμολογία πράσεως (as also πρᾶσις) is ubiquitous (cf. only the index in p. 238, s.v.), in application of the registration model set in P. Mich. II 122, and in correspondence with the πεπρακέναι homologia form of the sales (and subscriptions) executed at the same grapheion, and published in P. Mich. V (cf. index in p. 435 s.v.: notice the absence of the substantive ὠνή in the indexes of both P. Mich. II and V). In Ptolemaic Egypt, instead,

Πατοῦτι ... καὶ Βοκενϙούπ̣ε̣ι̣ ... κατὰ συνγραφὴν ὠνῆς ἐν πίστει. The debtor, we read, had hypothecated the land by means of a sale syngraphê. Alfred Manigk attempted an alternative explanation -the transaction would have been a sale on credit, secured by an ordinary hypothecation of the sold land itself-,[168] today remembered mostly due to Mitteis' two pages of categorical —and thoroughly convincing— rebuttal in the Grundzüge.[169]

Less remembered is the fact that Mitteis shared much of Manigk's reluctance to accept ὠνὴ ἐν πίστει as a terminus technicus. Manigk had observed[170] that ἐν πίστει does not necessarily qualify ὠνή: it may as easily refer to the whole syntagma συνγραφὴ ὠνῆς. And, in fact, if we pay attention to the structure of the sentence, everything after ἐν πίστει —‹ἐπὶ τοῦ ἐν Παθύρει ἀρχείου›, ‹ἐφ' Ἡλιοδώρου ἀγορανόμου›— refers to the sale deed: all these are adjuncts to συνγραφὴν ὠνῆς, as if through an implicit γενομένην, τελειωθεῖσαν, rather than merely to ὠνής. Assuming that the same is true for ἐν πίστει is quite natural, and, as Manigk saw, enough by itself to dispel the notion of ὠνὴ ἐν πίστει as a technical term: all we would have here is a συγγραφὴ ὠνῆς that happened to be executed ἐν πίστει, that is, as guarantee.[171] In Manigk's own words, "dann haben wir keine ὠνὴ ἐν πίστει mehr, sondern eine συγγραφὴ ἐν πίστει!». Mitteis insisted, unwarrantedly, that Manigk's

πρᾶσις was used (leaving aside private letters, etc.) for auction sales and for sales contracted in the Demotic form of the ‹document for silver›, cf. for instance BGU III 1002 (55 BCE Hermopolis), l. 1: ἀντίγραφον συνγραφῆς πράσεως Αἰγυπτίας μεθηρμηνευμένης κατὰ τὸ δυνατόν. This may have been also the sense of πρᾶσις, as opposed to ὁμολογία πράσεως, in the Tebtynis grapheion, cf. the distinction between both in the registration model of P. Mich. II 122, l. 22 and l. 24. Very frequent is the phrase πρᾶσις καὶ ἀποστασίον, referred to the Demotic 'document of silver' and 'of being far': cf., all in Fayum, BGU VI 1214 (185-165 BCE), PSB XXIV 16161 (85 BCE), SB XXIV 1612 (83 BCE), P. Ashm. I 14+15 = SB XIV 11408 (71 BCE), P. Ashm. I 16+17 = SB XIV 11409 (69 BCE). The Greek agoranomic sales, instead, are always labelled as ὠναί. This is also the case of the Pathyrites, where the term used for the contract of sale is invariably ὠνή: cf. already Pringsheim 1950: 115 n. 1; an overview of the documents in Pestman 1985a: 16-23. In the abundant material from the Pathyris-Krokodilopolis agoranomeion, the term πρᾶσις appears only once, and in connection with ὠνή, in P. Strasb. II 87 (107 BCE), l. 14: συνεπιγραφομένου τῆι ὠνῆι καὶ πράσει.

168 Manigk 1909a: 2314-2315; Manigk 1909b: 325-328.

169 Mitteis 1912a: 137-138: ‚sachlich unwahrscheinlich und sprachlich unmöglich'.

170 Manigk 1909b: 306-307.

171 Under this interpretation, ‚in guarantee' would be the most likely sense of ἐν πίστει, even if not the only possible one: thus, for those sharing Gradenwitz's theory of a redeemable sale, it would be also natural to translate ἐν πίστει as ‹in trust›, in the sense that the debtor accepts to issue a sale deed with immediate effect, trusting that the creditor will cancel it upon payment; if, instead, we understand the transaction, with Pestman, as a suspended sale (infra in text), ἐν πίστει may be understood as ‹in trust›, in that the creditor accepts to leave the transaction interrupted and without effect for the duration of the credit, cf. Pestman 1985b: 46: ‹Un seul texte de Pathyris indique cette situation, et se réfère à un acte incomplet en le nommant συνγραφὴ ὠνῆς ἐν πίστει›.

interpretation required connecting ἐν πίστει to ὑπέθετο, a much less likely reading, given the distance between them. In any case, Mitteis believed that extreme caution was advisable before accepting ὠνὴ ἐν πίστει as a terminus technicus, considering that the expression was not attested in any other document.[172] One century later, no other occurrence has yet appeared.[173]

This has led to a curious perversion, for which Mitteis, uncharacteristically, set the precedent himself. The expression ἐν πίστει has been uncritically understood as pointing to title-transfer security, and precisely to ὠνὴ ἐν πίστει, whenever it appears associated to a loan or a sale.[174] This is unfortunate. Πίστις is an extremely polysemic term.[175] In connection with loan and sale, ἐν πίστει, as the also frequent κατὰ πίστιν, commonly refers to phenomena that have nothing to do with securing a debt. Thus: (a) in the loans documented κατὰ πίστιν to the name of someone other than the lender (supra VI sub ‹b›), this third party is not the lender's creditor but his trustee; also a trustee, not a secured creditor, lies behind the cases of property acquired ἐν πίστει or κατὰ πίστιν to someone else's name in (b) P. Oxy. LX 4060 (161 CE Oxyrhynchos), (c) BGU IV 1047 (after 131 CE Arsinoites), and in the crucial (d) P. Oxy. III 472 and 486 (131 CE Oxyrhynchos); (e) P. Warr. 1 (164 CE Antinoopolis) may concern such a trustee or, more likely, a fideicommissum; (f) in P. Tebt. III 1 816 (192 BCE Tebtynis) there is no trace of a secured loan, merely an owner entrusting the sale of the property to her co-owners; (g) the συγγραφὴ ὑποθήκης given ἐν πίστει in P. Dion. 11-12 (108 BCE Hermopolites) is no fiduciary transfer, but a fictitious loan secured by ordinary hypothec; (h) a fictitious loan is also a likely explanation for the obscure P. Oxy. XIV 1644 (63-62 BCE); (i) in BGU III 993 (127 BCE Hermonthis) there is no real security, but to all likelihood an undocumented loan, described as given ἐν πίστει precisely because granted without a written deed; (j) in P. Oxy. VI 980 verso (3rd cent. CE Oxyrhynchos), ἐν πίστει does not refer to the sale, but to a partial payment, probably made in advance, as in P. Oxy. XII 1413 (272 CE Oxyrhynchos), and, quite likely P. Strasb. VII 603 (103-116 CE Tebtynis); (k) BGU II 464 (after 138 CE Arsinoites) is too fragmentary, the hypothesis of a title-transfer security in any case arbitrary and, in fact, not particularly likely.

This exhausts the material for ἐν πίστει and κατὰ πίστιν. Most of these documents have been paraded together with MChr. 233, with various degrees of certainty, as further examples of Sicherungsübereignung. A more detailed analysis of all of them will be presented infra in sections IX and X. Its results, as I have summarised

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172 Mitteis 1912a: 138.

173 For P. Adler 2 and BGU II 464, cf. infra nn. 190-191 and X sub ‚k'.

174 Rabel 1907: 355-364; Mitteis 1912a: 135-141; Pringsheim 1950: 124-125 and n. 1; Schmitz 1963: 33-64; Herrmann 1989. Sceptical only Manigk 1909b: 306-328, and now Rupprecht 1995: 430 and nn. 49-51: ‚Bislang ist kein Anhaltspunkt gegeben, der eine Zusammenfassung der im folgenden aufgeführten Formen unter den Begriff der ὠνὴ ἐν πίστει gestattete'.

175 Alonso 2012: 9 and n. 1, with lit.

above, are unambiguous: nothing justifies the assumption of a fiduciary title-transfer security behind these expressions in the papyri.

If we turn back our attention to the Heidelberg papyrus that prompted this feverish search for supplementary evidence of a Greek tradition of fiduciary guarantees in Egypt, the reason why the search was doomed to fail becomes glaringly obvious. In the Heidelberg document, the creditor is a Panobchounis son of Totoetis; the debtors, a Patous son of Pelaios, and a Bokenoupis son of Patous. All of them, quite obviously, not Greeks, but native Egyptians. The original συγγραφὴ ὠνῆς had been executed in Pathyris in 112 BCE before the agoranomos Hêliodôros; the ἐπίλυσις is executed also in Pathyris, in 111 BCE, before Ammônios (alias Pakoibis, well known member of a native notarial family: supra n. 82). This is the same Pathyris, the same Ammônios and Hêliodôros, and the exact same years of Pestman's interrupted sales (supra IV, also ὠναί, as all Pathyrite sales, supra n. 167, and συγγραφαί, as agoranomic deeds[176]): not instances of fiduciary transfer, but of suspended guarantee sale, taxed as hypothecs if the debt is satisfied, just as, significantly, our sale is described as a hypothecation (ὠνὴν ψιλοῦ τόπου ... ὃν ὑπέθετο). Far from its purported unique status as evidence of a Greek form of title-transfer security called ὠνὴ ἐν πίστει, the Heidelberg papyrus is just one among the many documents that illustrate the native Egyptian tradition of suspended sales in their Pathyrite agoranomic incarnation.

As we know (supra IV), although these sales were suspended by the very fact of the initial incompleteness of the deed (and the holding of the tax), it was common upon payment to document their cancellation. The Heidelberg papyrus is simply one example of such cancellation, and not without parallel. P. dem. Adler 20 (93 BCE), for instance, cancels a suspended sale that had secured the loan documented in P. Adler 15 (100 BCE).[177] The cancellation is formalised as a Demotic apostasion of the buyer/creditor: "we are removed from thee in regard to the right of that writing for silver which I made...".[178] A similar Demotic apostasion is P. Amiens 5 (90 BCE), acknowledging the payment of a loan of 4.5 wheat artabas, and cancelling the 96 BCE land sale that secured it.[179] Also in BGU VI 1260 (101 BCE) the cancellation is formalised as an apostasion of the buyer/creditor: this time in a Greek agoranomic document, where the 'buyers' acknowledge that the sum has been paid (ll. 11-13: ἀνομολογήσαντο Νεχθανοῦπις καὶ οἱ τού|του υἱοὶ ἀπέχειν τὴν λύτρα τῆς σημαινομένης | ἀρουραν μίαν), and accept to ‹remain far› from the land that had been <sold> to them (ll. 3-6:

[176] For the term συγγραφὴ in the papyri, Wolff 1978: 137-139; for the agoranomic syngraphê, 81-91.

[177] In this case, upon oath given by the children and heirs of the deceased borrower that the loan had been repaid: the oath is preserved in P. dem. Adler 19 (93 BCE). Of the initial transaction, only the loan has survived, in P. Adler 15 (100 BCE), but the Greek agoranomic suspended sale is mentioned in P. dem. Adler 20 (93 BCE), through which it is cancelled. On the whole affair, cf. Pestman 1985b: 54-55, sub ‚m'; Markiewicz 2005: 157-158.

[178] Tr. F. Ll. Griffith, from the edition.

[179] Chauveau 2002: 45-48.

| ἀφίσταται Νεχθανοῦπις ... | καὶ οἱ τούτου υἱοὶ ἀπὸ τῆς πεπραμένης αὐτοῖς | ὑπὸ Πετεαρσεμθεία ... γῆς σιτοφόρου | ἐν τῷ περὶ Παθύρειν πεδίωι ἄρουραν μίαν).[180] A close parallel, cancelling the sale in P. Lips. I 1 (104 BCE), although without explicit reference to the payment itself, is the Greek agoranomic apostasion in P. Grenf. II 28 (103 BCE): |[3] ἀφίσταται Σεννῆσις ... |[6] ἀπὸ τῆς ἐωνημένης υπ' αὐτῆς παρὰ Πετεαρσεμ|[7] θέως (τετάρτης) μερίδα ἀμπελῶ(νος) κτλ.[181]

MChr. 233 differs from these examples in that it is not formulated as the buyer's renunciation (apostasion) to the property but as the seller's cancellation (epilysis) of the sale. Yet, as Pestman observed,[182] this is merely one among many minor variations in notarial technique between the different Pathyrite agoranomoi: in this case, between Hermias, who executed P. Grenf. II 28 and BGU VI 1260 as a Greek adaptation of the Demotic form of the apostasion, and Ammônios, who a decade before had executed MChr. 233 as a simple epilysis. That the nature, function and effect of both documents was completely identical is confirmed by the verso of BGU VI 1260, where the document, even if formulated as an apostasion of the buyers, is labelled, exactly as MChr. 233, as an epilysis of the seller: ἐπίλυσις Πετεαρσεμθεία Πανοβχού(νιος) γῆς ἀρού(ρης) α ἧς πέπρα(ται) Νεχθανοῦ(πις) Πατσεοῦτος καὶ οἱ τούτου υἱοί (ll. 23-28).[183]

It would be a mistake to imagine, behind the term ἐπίλυσις, a connection between MChr. 233 and the Greek so-called πρᾶσις ἐπὶ λύσει.[184] This, already, because, as Edward Harris has proven beyond doubt,[185] the traditional distinction between πρᾶσις ἐπὶ λύσει and hypothec is completely unfounded: they are one and the same institution. Also, because ἐπίλυσις, in the papyri, is the ordinary term to refer to any debt cancellation, whether the debt is secured or unsecured: cf., without going

[180] On this transaction, Pestman 1985b: 54, sub ‚l'.

[181] The fact that the initial contract appears here as a ‚purchase' (τῆς ἐωνημένης υπ' αὐτῆς κτλ) while in BGU VI 1260 is described as a ‹sale› (τῆς πεπραμένης αὐτοῖς κτλ) may be just an immaterial phraseological oscillation. Yet, if we assume with Pringsheim (supra n. 167) a precise connotation of ὠνή and πρᾶσις in the Ptolemaic legal language, it may hint to BGU IV 1260 as cancellation of a Demotic πρᾶσις rather than a Greek ὠνή, as is instead the case of P. Grenf. II 28 (103 BCE), the cancelled ὠνή being P. Lips. I 1 (104 BCE).

[182] Pestman 1985b: 54.

[183] Beyond showing that there was no difference between the debtor's epilysis and the creditor's apostasion, this proves that the latter formulation does not imply that the creditor had acquired: as Pestman has shown (supra IV), these were all cases of suspended sale. In this sense, regarding BGU VI 1260, already Schwarz 1937: 253, with great lucidity: ‚ein Anspruchsverzicht auch hinsichtlich des blossen Anwartschaftsrechts am Platze war'.

[184] The term as such, as it is well known, is a modern invention on the basis of the πεπραμένου (-ης, -ων) ἐπὶ λύσει of the horoi. Such substantivisations are hardly ever harmless: even if we are well aware of their modern origin (Pringsheim 1950: 117-118), they ontologise a practice into a definite legal institution, with misleading effects that the case of the πρᾶσις ἐπὶ λύσει, for decades imagined as opposed to the ordinary hypothec, illustrates all too clearly.

[185] Harris 1988; further lit. supra n. 14.

beyond the Pathyris-Krokodilopolis agoranomeion, P. Grenf. I 26, P. Grenf. II 26, 30, 31.[186]

The revelation that MChr. 233 belongs with Pestman's interrupted sales suggests also a new interpretation for the crucial κατὰ συνγραφὴν ὠνῆς ἐν πίστει ἐπὶ τοῦ ἐν Παθύρει ἀρχείου κτλ. The kernel of the Pathyrite technique is the freezing of the deed's execution, to be completed only upon unpayment, at the request of the creditor. The most natural place to keep in the meantime the incomplete deed was the office of the agoranomos.[187] It is to the physical space occupied by the office that the term archeion refers.[188] In this context, a plausible meaning of ἐν πίστει is ‹in trust›, in the very simple sense of ‹in custody at the archeion›. Under this interpretation, Gradenwitz's ὠνὴ ἐν πίστει vanishes entirely: all we have is a συνγραφὴ ὠνῆς that had been executed before the agoranomos and kept in custody, while still incomplete, at the archeion.

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[186] P. Grenf. I 26 = P. Lond. III 622 descr. (109 BCE), ll. 2-3: ἐπελύσατ[ο] Ψενενοῦπις Ὀννώφριος δάνειον | πυροῦ ἀρ(ταβῶν) ν ; l. 11: ἐπίλυ(σις) Ψενενούπιος; P. Grenf. II 26 = P. Lond. III 660 descr. (103 BCE), ll. 27-28: ἐπίλυσις Πετεαρσεμθέως καὶ τους | ἀδελφους (i.e. τῶν ἀδελφῶν); P. Grenf. II 30 = P. Lond. III 663 descr. (102 BCE), ll. 4-7: ἐπελύσατο Πετεαρσεμθεὺς | καὶ Πετεσοῦχος τῶν (i.e. τοῦ) Πανοβχού(νιος) | τοῦ Το το ηοῦς καὶ τοῦς (i.e. οἱ) τούτων ἀδε(λφοὶ) | δάνειον χαλκοῦ (ταλάντων) β; ll. 31-33: ἐπίλυσις <πρὸς> Πετεαρσεμθέα | καὶ τοὺς ἀδε(λφοὺς) | δα(νείου) χα(λκοῦ) (ταλάντων) β ἃ ἐδά(νεισεν) αὐτῶι Πετεαρσεμθε(ὺς) Ἁλμα(φέως). P. Grenf. II 31 = P. Lond. III 673 descr. (104 BCE), ll. 19-20, ἐπίλυ(σις) Παοῦ το ς Ὥρου | παρὰ Χαιρήμω(νος). None of these epilyseis mention any security, as they certainly would if it had existed, cf. only P. dem. Adler 20, P. Amiens 5, BGU VI 1260, P. Grenf. II 28, and our own MChr. 233.

[187] P. dem. Adler 20 (93 BCE) cancels a sale executed in 100 BCE at the archeion „in the hands of Panebchounis, son of Pakoibis". As Pestman 1985b: 58 suggests, this Panebchounis, otherwise unknown, is quite likely the son of Ammonios alias Pakoibis, the (deputy-)agoranomos who had executed our own MChr. 233 a decade before. Since the 100 BCE sale deed was entrusted to Panebchounis when the Pathyris agoranomos was Hermias I, Pestman imagines that he custodied it -and possibly other similar deeds- privately. Yet, this Hermias was his father's cousin (supra n. 81), and Panebnouchis' father (whose own father had also been agoranomos) was agoranomos both immediately before and immediately after him. It seems obvious that Panebchounis received the documents precisely because he belonged to the family. Thus, his involvement does not exclude that the incomplete deeds were ordinarily kept at the archeion. In truth, it does not exclude it even in his own case: the archeion, in fact, was not necessarily a special, official building; it must often have been simply the house of the agoranomos; in this case, quite obviously, Panebchounis' own family's house. Where the extant interrupted sales were actually found is a different question: these, in fact, were not awaiting completion; they appear all either completed or cancelled. Pestman 1985b: 55, argues that the lack of the original sale cancelled in P. dem. Adler 20 in the archive of the family of Hôros (P. Adler) must be due to the fact that it was kept by Panebchounis even after its cancellation. The argument is far from compelling (presupposing as it does that the archive was complete and is entirely preserved), and, in any case, it is certainly not enough to conjecture (so Pestman 1985b: 57-58) that it was precisely to Panebchounis' archive that all extant interrupted sales belonged.

[188] Wolff 1978: 27 n. 80, with lit.

Pieter Pestman was of course aware of MChr. 233, and recognised that it belonged with his other Pathryite interrupted sales.[189] Unfortunately, he seems to have been less aware of the irreducible disparity in nature and background between these Pathyrite documents, a chapter in the native Egyptian suspended sale tradition, and the notion of ὠνὴ ἐν πίστει, conceived since Gradenwitz as a Greek institution, equivalent to the Roman fiducia cum creditore. For this reason, his discovery of the Pathyrite guarantee sales, and his recognition of MChr. 233 as one of them, did not lead him to question the received notion of ὠνὴ ἐν πίστει; quite the opposite, he extended the term to the other suspended sales, adding a further layer of confusion to an already entangled field.

It may not be useless, therefore, to emphasise once more: MChr. 233, far from attesting the existence of a Greek form of title-transfer security akin to the Roman fiducia cum creditore, is just the cancellation of one of Pestman's Pathyrite interrupted sales. These are not a case of fiduciary transfer, but mere suspended sales. They are not a Greek institution (certainly not a later counterpart of the πρᾶσις ἐπὶ λύσει, which was nothing else than the ordinary hypothec), but one of the various incarnations of the native Egyptian tradition of guarantee sales. As for the term ὠνὴ ἐν πίστει: in his Grundzüge, Mitteis advised caution before assuming its technical character, until further evidence might confirm it. Today, more than a hundred years later, the term has not yet reappeared in any other document.[190] It does not figure in any other of the Pathyrite sales,[191] and, it is worth noting, it is not used in BGU IV 1158 (supra VI) or P. Oxy. XIV 1703 (supra VII e), so far the most likely (even if not completely certain) instances of title-transfer security in the papyri. In truth, under a careful reading the term vanishes even from MChr. 233, best understood as merely describing the Pathyrite practice in terms of the execution ἐν πίστει, i.e. in guarantee, of a sale syngraphê, or, simply, of its keeping ἐν πίστει, i.e. in custody, at the archeion. It is time to recognise that ὠνὴ ἐν πίστει is not at technical term, but, at the present state of our sources, a phantom, as the Greek form of title-transfer security that it was believed to design.

IX. En Pistei *and* Kata Pistin*: Straw Creditors an Straw Owners*

For over a century, the universal belief in a Greek form of fiduciary title-transfer security called ὠνὴ ἐν πίστει was sustained, along with MChr. 233, by a whole series of documents where the expressions ἐν πίστει and κατὰ πίστιν appear associated to

[189] Pestman 1985b: 46 and n. 6. In p. 54 he includes P. Heid. inv. 1278 as ‚k' in his list of provisional sales.

[190] Cf. infra X sub ‚k', for τὴν [γ]ενομένην πρᾶ[σ]ιν [ἐ]ν πίστι in BGU II 464 (after 138 CE Arsinoites), l. 3.

[191] The integration κ[ατὰ συγγραφὴν ὠνῆς ἐν πίστει ἐν πίστει] in P. Adler 2 (124 BCE Pathyris), l. 8 is completely arbitrary: Pestman 1985b: 55.

a sale or a loan. In these texts, generations of legal papyrologists, from Mitteis and Rabel to our own times, have believed to find further examples of the ὠνὴ ἐν πίστει that Gradenwitz imagined behind MChr. 233. The ὠνὴ ἐν πίστει mirage cannot be fully dispelled without a careful consideration of this material:

a) In a group of papyri referred to loans documented κατὰ πίστιν to the name of someone else than the actual lender (supra n. 126), the position of this third party is very likely (supra VI sub 'b'), as Gradenwitz suggested when the phenomenon first came to light, that of a trustee,[192] rather than, as Rabel instead proposed,[193] that of a creditor who receives the loan as security for his own.

b) The same phenomenon, a right documented ἐν πίστει to the name of a mere trustee, is also attested for property. Thus, among the letters concerning fugitives addressed to the strategos of the Oxyrhynchites in P. Oxy. LX 4060 (161 CE Oxyrhynchos),[194] the second, in ll. 39-67, refers to a Herakleides, former lessee of a lentil tax,[195] whose property is to be sequestrated to the fisc together with its revenue and put up to auction: several strategoi are requested to check if he had acquired any other property in their nomoi, in his own name or in others' in trust: [ἀ]ν̣αζητῆσαι δὲ καὶ ε[ἴ τινα ἄ]λλον πόρον κέκ̣τ̣ηται παρ' ἡμεῖν | ἐπὶ τοῦ̣ ἰδ̣ί̣ο̣υ̣ ὀ̣ν̣ό̣[μα]τ̣[ος] ἢ ἑτέρων ἐν πίστ̣[ει] (ll. 50-51).[196]

The phrase κέκτηται ἐπὶ ὀνόματος ἑτέρων ἐν πίστει cannot refer to property transferred to Herakleides in guarantee: in such case he would not hold it to others'

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[192] Gradenwitz 1906; Alonso 2012: 10-16, with further lit. Despite the difficulties raised by Gradenwitz's interpretation (ibid. 14-15), the crucial P. Mil. Vogl. I 25 (127 CE Tebtynis) seems a conclusive confirmation that the person to whose name these loans were documented κατὰ πίστιν was a trustee, not a creditor who received them as security, in a sort of pignus nominis.

[193] Rabel 1907: 358-359.

[194] On the issue, Lewis 1996: 64-65; Jördens 2010: 347, passim. The papyrus is a copy from the tomos synkollêsimos collecting the original letters.

[195] Ll. 45-46: τέλος φακοῦ | ἐρείξεως. Cf. Coles, in the edition. Taxes on lentil farming are well known, cf. for instance BGU III 977 l. 2. For lentil cultivation in the Delta, and in particular in the Mendesian nome where the present affair originated, cf. Blouin 2014: 175-182. The tax was paid in kind, initially stored in the nome (P. Tebt. II 340, 206 CE, l. 14): the involvement of the Alexandrian procurator ad Mercurium (infra n. 196) shows that the produce, or part of it, was due to be sent to Alexandria.

[196] The request comes from a Domitius Peregrinus, whom the letter refers to as former procurator ad Mercurium (ὁ γεν[όμενος τοῦ] Ἑρμοῦ ἐπίτροπος, l. 41), presumably still in office when the request was issued. On this office, cf. Beutler-Kränzl 2007. In the letter, the strategos of Nesyt re-addresses the request to his Oxyrhynchite counterpart: ἵν' οὖν ε[ἰ] π̣αρὰ σοὶ πόρος τ̣ι̣ς αὐτῷ̣ | ὑπά[ρχ]ε̣ι̣ ἐπὶ τ[οῦ] ἰδ̣ί̣ο̣υ̣ ὀνόματ̣[ος] ἢ ἑτέρω̣ν̣ τ̣[ὸ ἀ]κόλουθον [το]ῖ̣ς̣ κ̣ε̣λ̣ε̣υ̣[σ]θ̣ε̣[ῖσ]ι | ποι[ήσ]ας δηλ̣ώ̣σ̣η̣ς̣ μοι ἔγρ[αψ]ά σοι (ll. 54-56). Crucially for us, this confirms the reading ὀνόματος in l. 51. The request is answered through subscription by the strategos of the Oxyrhynchite, in a negative sense: δηλοῦμεν̣ μηδένα π[όρ]ον ὑπάρχ(ειν) τῷ προγεγρ(αμμένῳ) [π]ερὶ τοὺς ὑφ' ἕ̣κ̣(αστον) | ἡμῶν τόπ̣ο̣υ̣ς̣ ἀλλ[ὰ καὶ] ἀγνοεῖν αὐτὸν̣ τ̣ῷ̣ κ̣α̣θ' [ὅλο]υ (ll. 66-67).

name but to his own. Neither can it refer to property transferred by him to others in guarantee, because then he would not own it (κέκτηται) at all. The binomial ἐπὶ τοῦ ἰδίου ὀνόματος versus ἐπὶ ὀνόματος ἑτέρων can only refer to two ways of holding property: to one's own name, and to the name of someone else. This 'someone else' must therefore be a person through whom we hold property: not our fiduciary debtor or our fiduciary creditor, but our strawperson. Evading confiscation, for those who are under fiscal duties as public lessees or as liturgists, may have been one of the reasons to hold property through such straw owners: a significant argument in this sense is the fact that all our attestations so far (cf. infra sub 'c' and 'd') come from the second century CE, when the expansion of the liturgical system and its associated financial liability started to overwhelm the population to the point of resorting to anachôrêsis.[197]

c) A similar situation is attested in BGU IV 1047 (after 131 CE Arsinoites).[198] One of the letters in this collection of official correspondence, reproduced without sender or addressee in col. III l. 10 to col. IV l. 18, concerns unpaid obligations of lessees of public (or, possibly, imperial)[199] land upon completion of their leases. A previous letter, we read, had requested a more active inquiry into the property belonging to the defaulters from the time they entered upon their leaseholds.[200] In compliance with this request, the writer of the present letter wrote to the keepers of the property record office so that they would report the property registered in their records by the sub-lessees listed in the attached libellus,[201] either in their name or in the name of others κατὰ

[197] Cf. the edict of Sempronius Liberalis in SB XX 14662 = BGU II 372 = WChr. 19 (154 CE Arsinoites), ll. 5-9: ἐτ[έ]ρους δὲ λιτουρ|[γεία]ς τινὰς ἐ[κφυγόντας] διὰ τὴν [τ]ότε περὶ αὐ|τοὺς ἀσθένειαν ἐν ἀλλοδαπῇ ἔτι καὶ νῦν διατρεί|βειν φόβῳ τῶν γενομένων παραυτίκα προ|γρ[α]φῶν, and Jördens 2010, with sources and lit.

[198] Rostowzew 1910: 183-185. A detailed analysis, in Kruse 2002: 1047-1052.

[199] The whole process seems to have been set in motion by a Cestus, when he was assistant to a procuratorial office (ll. 10-11: Κέστου [γε]νομέν|ου βοηθοῦ τῆς ἐπιστολῆς ἐπιτροπῆς); the office may have been that of the procurator usiacus, if there is any thematic connection between fragments, since the second concerns the Ἀγριππιανὴ οὐσία (Parassoglou 1978: 69-70 nr. 2). Cf. Kruse 2002: 1049-1050, also for a discussion of the possible identity of sender and addressee.

[200] Ll. 14-18: ἐκέ[λ]ευσας | τῇ ἀπαιτήσει τῶν κ[ανό]νων εὐτονώ[τερον ἔτι] ἐξετάσαι | περὶ τῶν ὑπ[αρχόντων] α[ὐ]τοῖς ἐξ οὗ χρόν[ου προσῆλθον ταῖ]ς μισθώ|σεσι τά τε κατ[ὰ πίστιν αὐ] τῶν ὑπάρχοντα κ[αὶ τὰ δια]κείμε|να κ[αὶ] ὅσας ἂν [...]. The integration κατὰ πίστιν, based on col. IV, l. 6 (infra in text), is here far from certain.

[201] The sudden shift from μισθωταί (col. III l. 12) to ὑπομισθωταί (col. IV l.5) is puzzling. In any case, despite Rostowzew 1910: 184-185, these ὑπομισθωταί do not appear as bound merely to the main lessees: they are clearly treated as public debtors, and reference is made -as Rostowzew himself underlines- to the conditions they offered when they made their bids (ll. 11-12), and to the property they subjected to hypallagma to secure their obligations (ll. 9-10), as we know other public debtors did: cf. P. Lips. II 132 (25 CE, Leukos Pyrgos, Hermopolites); P. Tebt. II 329 (139 CE Tebtynis); P Turner 23 (144-5 CE Arsinoites); P. Thmouis I (180-192 CE, Thmuis), col. 74, l. 19, col. 75, l. 3, col. 81, l. 11. In this same sense,

πίστιν, from the time they entered upon their leases, and also if anything turned out to have been alienated: ἐπ[έ]σ[τ]ειλα δὲ [καὶ τ]οῖς τῶν | ἐνκτήσεω[ν] βιβλιοφύλαξι Δείωι τῷ καὶ Ἀπολλωνίωι καὶ Ἡρώδῃ | τῷ καὶ Διογένει, ὅπως τῶν διὰ το ὑποτεταγμένου βιβλειδίου | ὑπομισθωτῶν τὸν διακείμενον παρ' αὐτοῖς πόρον ἤτοι ἐπ' ὀνο|μάτων αὐτῶν ἢ ἑτέρων κατὰ πίστιν ἐξ οὗ χρόνου προσῆλθεν ἕκα|στος τῇ μισθώσει κἄν τίνα ἦν ἐξοικονομημένα δηλώσωσι (col. IV, ll. 2-7).

Here again we find a dichotomy between property held -and registered- 'to their own name' and 'to that of others κατὰ πίστιν'. Once more, the latter cannot refer to property transferred in guarantee: not to the lessees by their possible debtors, since in that case it would be registered 'to their own name'; even less by them to their possible creditors, because alienations are explicitly referred to as a different case in l. 7. The ‹others› to whose name the property of the public debtors is registered κατὰ πίστιν must be again trustees, mere straw owners.

Less obvious is how the bibliophylakes could find and recognise such properties in their records, if they were not registered to the name of the debtors, but to someone else's. This would be possible only if the fiduciaries disclosed their position upon registration, and feasible in practice only if such disclosure left also a trace in the diastrôma of the person who owns through them. One might imagine a system where the pistis, i.e. the disclosure, would be registered to the name of the latter, together with the main registration of the item to the name of the former.[202] The fact itself of the disclosure, though, seems highly improbable: it is difficult to imagine any goal for hiding behind a strawperson that would not be compromised by disclosing that very fact at the record office. In our case, perhaps unsurprisingly, the bibliophylakes' enquiry yielded no results.[203]

Kruse 2002: 1051.

[202] A pistis, quite likely the document where the trustee acknowledges his position as such, is presented for registration, probably to the bibliophylakes enktêseôn, in PSI Congr. XI 9 = PSI XV 1527 (after 161 CE Oxyrhynchos), albeit in this case not referred to property, but to a loan: ἐξομολογοῦμαι καὶ ἀπογράφομαι ... ἣν ἔ[χ]ω ἐπ' [ὀνό]ματος Δ[ιονυ]||σίου ... πί̣[σ]τι̣ν ᾧ[ν ἐδ]άνε[ι]σ̣α ἐπ' ὀνόμ[α]||τ[ος αὐτ]ο̣ῦ̣ Πετοσείρει ... καὶ Ἑρμῇ ... ἀργυρίου δραχμῶν δισχειλίων τρι[α]||κοσ[ίω]ν κεφαλαί̣[ο]υ καὶ τόκων (ll. 4-13). Cf. supra sub ‹a› and VI b for this type of situation. Similar disclosure documents are likely for property, issued by the straw owners to the actual buyers. The Syro-Roman Law Book seems to mention them, curiously under the term katagraphai, cf. Selb-Kaufhold §62: «... hat er (der, in dessen Namen gekauft wurde) keinen Nachteil davon, daß jener für ihn keine Überschreibungsurkunde (καταγραφή) gemacht hat, der in seinem Namen gekauft hat». Despite Selb and Kaufhold's own commentary (III: 131), katagraphê cannot be here, as usual, the sale document issued by the seller: there is no mention of the seller in the whole paragraph, only of the actual buyer and the straw owner, and their own translation implies quite clearly that the katagraphê in question is issued by the straw owner. This is even more unequivocal in versions RII, D, and in the M manuscript, where Selb translates: «daß er ihm keine Überschreibungsurkunde für das auf seinen Namen Gekaufte macht».

[203] In P. Oxy. XXIV 2411 (after 170 CE Oxyrhynchos), a case of execution of fiscal debts, the very fragmentary first preserved column is an inventory of property, apparently issued

These strawpersons, whose name replaces that of the true buyers in the property documents, and who keep reappearing in the papyri (cf. also infra sub 'd'), were quite obviously a prominent fixture of legal life in second century Egypt. Later Roman sources show that the phenomenon lasted much longer and was not limited to Egypt or to the East. The fragments of the late third century Codex Gregorianus preserved in the breviarium Alarici (so-called epitome codicis Gregoriani Wisigothica) include a title on this practice, 'si sub alterius nomine res empta erit', Greg. 3.7.[204] A title of Justinian's code is also partially devoted to it: C. 4.50, *si quis alteri vel sibi sub alterius nomine vel aliena pecunia emerit*. Even such a tight compendium as the late fifth century Syro-Roman Law Book devotes a paragraph to the phenomenon.[205]

The Gregorian and Justinian titles comprise five third-century imperial constitutions: two of Valerian and Gallienus, and three of Diocletian and Maximian.[206] They all reassure those who have a sale documented to someone else's name, 'in whose fides they take refuge' (Greg. 3.7.1: *ad cuius fidem ipse confugeras*), very commonly their wives,[207] that theirs are all the rights on the property: a trustee, all these constitutions

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by the bibliophylakes enktêseôn (ll. 13, 19), comprising items registered to the name of the debtor's father: ἐπ᾽ ὀνόμ(ατος) τοῦ πα|[τρὸς αὐτοῦ], l. 8-9; [ἐπ᾽ ὀνό]μ(ατος) τοῦ πατρὸς αὐτοῦ, l. 11. In this case, though, precisely because it is not some unrelated person but the closest relative, it is quite possible that the bibliophylakes did not have any recorded evidence that the father was a mere straw owner, but nevertheless included ad cautelam all property registered to his name. On this important document, Purpura 1978, with lit.

[204] Krüger-Mommsen 1890: 228-229.

[205] Selb-Kaufhold §62 (= FIRA II §64). On the book, cf. precipue Selb-Kaufhold 2002 I.

[206] Valerian and Gallienus: Greg. 3.7.1; C. 4.50.4. Diocletian and Maximian: Greg. 3.7.2; C. 4.50.5 and 6. In three of the rescripts the addresses are Eastern Aurelii: an Auxonius in Greg. 3.7.1, a Cyrillus, in C. 4.50.4, a Dionysios, in C. 4.50.6. Nothing points to the East, instead, in Greg. 3.7.2 (Aelius Ingenuus) and C. 4.50.5 (Verus).

[207] That is the case in all the Diocletianic constitutions: Greg. 3.7.2, and C. 4.50.5 and 6. In Val. Gall. C. 4.50.4, the straw owner is the father in law; in Greg. 3.7.1 just a generic alter emptor. Of course, an acquisition to the wife's name may also be intended as a donation (which would be ipso iure void under Roman law as donatio inter virum et uxorem), and situations de facto ambiguous between both possibilities are perfectly imaginable. Uncertain seems, for instance, the situation in P. Tebt. II 407 (199 CE Tebtynis), where a husband treats as his own the property of his daughter and wife: ἀφ᾽ ὧν ἔ]χω ἐπ᾽ ὀνόματός | σου ὑ[π]αρχόντων (ll. 15-16), πά]ντα ὅ[σα] ἐποίησα | ἐπ᾽ ὀνόματός σου (ll. 22-23). This ambiguity is the theme of Diocl. C.4.50.6, where the crucial criterium (as in general: infra n. 208) is whether the wife is or not in possession: if so, there is forbidden donation (§1); if not, she is deemed a mere straw owner (§2). The Syro-Roman Law Book refers to a generic strawman (Selb-Kaufhold §62 = FIRA II §64: „Wenn ein Mann ein Landgut, einen Sklaven oder eine andere Sache im Namen eines anderes Mannes kauft ..."), and treats separately (Selb-Kaufhold §39a = FIRA II §43) the case of a purchase made to the name of the wife: for the latter, though, the possibility that she may be a straw owner is not even considered; the transaction is either void as a donatio inter virum et uxorem, if made at the husband's expense, or valid if made at hers - in the latter case, we must assume, becoming her actual property. In the papyri, property is often purchased by a father to the name of his children, but these appear as beneficiaries of a

assume, while figuring in the contract as buyer, does not receive possession; possession is ordinarily conveyed to the real buyer,[208] and it is on such traditio that the acquisition depends under Roman law.[209] The fact that this reassurance could only encourage a practice that, whatever its purpose, was in fact a hindrance for fisc and creditors, was apparently immaterial: for the imperial chancellery, it seems, these cases were just an opportunity to emphasise the importance of traditio and the Roman principle 'res gesta potior quam scriptura habetur' (Diocl. Max. C. 4.50.6.2).[210]

d) Also in the complex case of Dionysia in P. Oxy. III 472 = MChr. 235 and P. Oxy. III 486 = MChr. 59 (131 CE Oxyrhynchos), the fiduciary owner (Dionysia herself, in the version of her adversaries) is most likely a mere trustee, despite Mitteis' endorsement of these documents as conclusive evidence of title-transfer security.[211] To dispel this notion, a somewhat detailed analysis of these difficult texts will be necessary:

Dionysia's version of the facts is summarised in P. Oxy. III 486, her 131 CE petition to the epistrategos of the Heptanomis: in 126-127 CE, she had bought a vineyard and some corn-land from a certain Mnesitheus; the sale was executed by public deed, the price paid to Mnesitheus and to a creditor of his; some time later, a dispute arose with Mnesitheus' son, Sarapion, who claimed that she held the land

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donation, not as trustees: cf. P. Oxy. LI 3638 (220 CE), P. Oxy. LXXV 5058 (257-8 CE), P. Oxy. IX 1208 (291 CE), P. Oxy. XII 1470 (336 CE), all from the Oxyrhynchites. The practice was well known to the imperial chancellery -Alex. C. 4.50.2 (222 CE) and 3 (228 CE), Val. Gall. Greg. 3.8.2 (260 CE)- and quite certainly not restricted to the East (notice that none of the addressees of these constitutions bear Greek names).

[208] Greg. 3.7.1: cum dominium possessionis, quod habuisse te semper et adhuc habere proponis; Greg. 3.7.2: si ... ipse inductus es in possessionem; C. 4.50.4: si possessionem tenes; C. 4.50.5: te comparante possessionem; C. 4.50.6pr.: eique possessio tradita est ... C. 4.50.6.1: eique res traditae sunt ... C. 4.50.6.2: si ... tibi tradita possessio est ... C. 4.50.6.3: in dominii quaestione ille potior habetur, cui possessio tradita est. The same assumption that trustees do not receive possession, in the Syro-Roman Law Book (Selb-Kaufhold §62 = FIRA II §64: ‚aber der Besitz [νομή] des Landgutes, das er gekauft hat, oder der Sklaven, bei him ist'), and, crucially for us, in P. Oxy. III 472, ll. 23-27, cf. infra ‚d' sub 1 and n. 217. This confirms that such trustees were mere strawpeople, the ‚trust' akin to a modern bare, passive or ‚dry' trust, one imposing no duties on the trustee except being a passive holder of the legal title.

[209] Also in the papyri (P. Oxy. LX 4060, BGU IV 1047, in this and the preceding section) we see that, when it comes to confiscation, the administration treats the property held by these trustees as part of the estate of those who hide behind them: not because of the traditio principle, but merely because the title holders are accurately recognised, also through the lack of possession, as mere strawpeople.

[210] The 259 and 294 CE rescripts of the same emperors in C. 4.22 (plus valere quod agitur quam quod simulate concipitur), turn around the same principle: veritas potius quam scriptura; non quod scriptum, sed quod gestum est inspicitur; plus actum quam scriptum valet. Further sources and lit. in Meyer 2004: 279 nn. 86-87.

[211] Mitteis 1912a: 135. In the same sense, Preisigke, s.v. πίστις 4a (col. 309); Pringsheim 1950: 125 n.1; Schmitz 1963: 48-51; Herrmann 1989: 320. Before Mitteis, extensively, and with less certainty, Rabel 1907: 359-362. Dubious for Rupprecht 1995: 430 n. 51.

in question ἐν πίστει.[212] Sarapion brought the case before the epistrategos, Claudius Quintianus, who referred it to the prefect, Flavius Titianus; when Sarapion failed to appear before the prefect, Dionysia requested to be allowed to return to Oxyrhynchos, and obtain justice there. The prefect endorsed this petition, referring the trial back to the epistrategos, now Julius Varianus. Dionysia appends this endorsed petition, where the facts had been summarised with some additional detail: Sarapion had also accused Dionysia's mother, Hermione, of poisoning; the father's creditors (now in plural), to whom Dionysia partially paid the price, had a hypothec over the land;[213] and, regarding Sarapion's claim over the land, he held that it belonged to him, and had been documented as hers only κατὰ πίστιν.[214]

More about the nature of this pistis can be learned from P. Oxy. III 472, part of an advocate's speech defending Hermione and Dionysia from claims that correspond exactly to those made by Sarapion in the first trial before the epistrategos Claudius Quintianus.[215] Not everything is clear, because we are left to reconstruct Sarapion's

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[212] P. Oxy. III 486, ll. 3-8: ἐνστάσης μ[οι] ἀμφισβητήσε|ως πρὸς Σαραπίωνά τινα Μ[ν]η[σιθέ]ου ὅ̣στις ὃ ἠγόρασα κ[τῆ]μα ἀμπελι[κ]ὸν καὶ σειτικὰ | ἐδάφη παρὰ τοῦ πατρὸς αὐ̣τ̣[ο]ῦ ἔτι ἀπὸ τοῦ ια (ἔτους) Ἁδριαν[οῦ] Καίσαρος τοῦ κυρίου ἀριθμή|σασα αὐτῷ τε τῷ π̣α̣τ̣[ρ]ὶ̣ [καί τι]ν[ι] δανε[ι]στῇ αὐ[τοῦ τὴν σ]υμφωνηθεῖ[σα]ν τιμὴν | καὶ λαβοῦσα τὸν καθήκοντα τῆς ὠνῆς δημόσι[ον χρημα]τισμὸν ἔλεγεν ἐν πίστει | με ἔχειν αὐτά.

[213] When hypothecated property is sold, the buyer, unless fraudulently kept ignorant of the encumbrance, usually takes care to cancel it by paying the necessary part of the price directly to the creditors. The phenomenon is well attested also in the papyri: BGU II 362 (215 CE), ll. 15-24, P. Hamb. I 14 (209-210 CE), P. Hamb. I 15 and 16 (209 CE), and P. Gen. I 44 = MChr. 215 (259 CE), all from Arsinoites. Such a sale is also intended by the petitioner in P. Ryl. II 119 (54-67 CE Hermopolis). As far as Roman Egypt is concerned, the main questions are whether this sale required the consent of the creditor, or, as under Roman law, was effective without it, thanks to the authorisation (epistalma) of the bibliothêkê enktêseôn, and whether this authorisation was attainable when the sale was not meant to serve to the immediate cancellation of the debt. On these questions and these documents, Alonso 2010: 13-14, 25-26 sub ‚c' and n. 53, 36-54, passim.

[214] P. Oxy. III 486, ll. 20-26: Σαραπίων τις Μνησιθέου ἀπ[ὸ τ]ῆς αὐτῆς πόλεως ἐπ[ὶ] Κλαυδίου Κυιντ[ι]ανοῦ τοῦ | γενομένου ἐπιστρατήγου [τῶν] Ἑπτὰ νομῶν τῇ μητρί μου Ἑρμιόνῃ φαρμα|κείας ἐνκαλῶν καὶ περὶ ὑπα[ρχό]ντων τινῶν ἐλογοποιήσατο ὡς ὑποστελλόν|των αὐτῷ ὧν ἐγὼ ἡ Διονυ[σί]α κατὰ δημοσίους ἠγόρασα χρηματισμοὺς ἀρι|θμήσασα τιμὴν αὐτῶν τ[ῷ] π̣α̣τ̣ρὶ αὐτοῦ περιόντι καὶ δανειστᾶις τοῦ α[ὐ]τοῦ | πατρὸς παρ' οἷς ἦν τὰ δηλ[ο]ύμενα κτήματα ἐν ὑποθήκῃ κρατούμενα | φάσκων κατὰ πίστιν . .[. .]. ἐ̣γ̣γεγράφθαι. The only slight inconsistency between this and the initial account is that several creditors appear here instead of one.

[215] There is no doubt that the case is the same. Not only it concerns a Hermione (l. 2) and her daughter Dionysia (ll. 41, 46): the former is accused of poisoning (ll. 1-14), and against the latter some property is claimed on the grounds that she acquired it ἐν πίστει (ll. 14-29). Since we know that Sarapion was not present before the prefect, nor later before the epistrategos Julius Varianus, the absolute correspondence between the P. Oxy III 472 speech and Dionysia's summary of the initial trial before Quintianus makes it likely that it was prepared for that trial, rather than for a hypothetical one taking place after the petition in P. Oxy. III 482: a

alegations on the only basis of his opponent's reaction. But what we have is enough to discard the common assumption that Dionysia's acquisition ἐν πίστει was that of a creditor receiving a security:

1. Sarapion's claim on the property, we are told, resulted from a written pistis, that he alleges had been stolen by a slave. The advocate's speech naturally derides this convenient theft, and denies that Dionysia or Hermione could have drawn up such pistis, since they are illiterate.[216] To this, he adds the following: "moreover, the possession also helps to show that there never was any pistis: for those who acquire en pistei are merely allowed to have their name in the documents, but do not claim what has been thus acquired; and yet, the buyer has clearly claimed it, and has enjoyed it since she bought it, while he, since he sold it, has no longer been in enjoyment of it, but merely administering as curator the affairs of the mother and attacking my clients".[217]

This argument would have been utterly pointless regarding fiduciary security, which may be granted without but also with possession. It makes perfect sense, instead, referred to a trustee: someone who merely figures in the property deeds, in the

possibility radically excluded by the fact that the mother, who is the defendant in P. Oxy. III 472 (ἡ νῦν | ἐνκαλουμένη Ἑρμιόνη: ll. 18-19), had already died before the frustrated second trial before the prefect (P. Oxy. III 486, ll. 27-28). P. Oxy. III 482 also shows that the trial was initiated by Sarapion, not by his father, and therefore clarifies that Sarapion was the plaintiff in P. Oxy. III 472: it is likely that, as Mitteis assumes, his father had by then died; Hermione's alleged poisoning was quite likely presented by Sarapion as the cause of this death.

216 P. Oxy. III 472, ll. 14-22: ἐὰν λέγωσιν δοῦλον Σμάραγδον ἀνεύρετον | γε̣[γ]ονέ̣ναι αὐτὸν αἰτίαν ἔχοντα τοῦ τὴν πίστιν κεκλοφέναι | φη[σ]ὶ̣ν̣ δ' οὖν καὶ πίστιν γεγονέναι ἵνα κλεπῇ, οὐ δύναται γὰρ κεκλέ|φθαι τὸ μηδ' ἀρχὴν γενόμενον μὴ δυνατὸν δ' εἶναι μηδὲ | πίστιν γεγρ[ά]φθαι. οὔτε γὰρ ἡ ἀγορα<σα>σα γράμματα ᾔδει οὔτε ἡ νῦν | ἐνκαλουμένη Ἑρμιόνη, οὔτε ξένος οὐδεὶς ἄλλης καταγραφείσης | πίστ[ι]ν πα̣[ρ' ἑ]αυτοῦ δίδωσι. ὥστε καὶ παρὰ τίνος ἂν εἴποι τὴν πίστιν | ἐσχηκέναι; παρὰ παντὸς γὰρ ἄκυρος ἦν. εἰ δὲ ἀπέδρα δοῦλος | οὐδὲν δύναται τοῦτο κατὰ δεσπότου. The last remark makes it likely that the slave Smaragdus belonged to Hermione (or Dionysia).

217 P. Oxy. III 472, ll. 22-29: ἔτι μέντοι περὶ τοῦ | μηδὲ πίστιν εἶναι καὶ ἡ νομὴ συνβάλλεται. τῶν γὰρ ἐν πίστει | καταγραφέ̣ντων τὸ ὄνομα μ[ό]νον εἰς τοὺς χρηματισμοὺς | παρε[θ]έ̣ντ̣ων, οὐκετι δ' ἀντιποιουμένων ὧν κατεγράφησαν | ἡ μὲν ἀγορασα φανερά̣ ἐσ[τι]ν̣ καὶ ἀντιπεποιημένη καὶ ἀφ' οὗπερ | ἠγόρα[σ]ε [κ]αρπουμένη, ὁ δ' ἀφ' οὗπερ πέπρακε οὐκέτι ἀλλὰ καὶ | τῶν τῆς μητρὸς τὴν [οἰ]κονομίαν ὡς προνοητὴς ποιούμενος | τούτο̣ι[ς δ' οὐκ]ἐνχ[ει]ρῶν. Grenfell and Hunt, as later Mitteis and everyone since, translate ἐν πίστει καταγραφέ̣ντων as ‚those who acquire as fiduciaries'. I depart from them not only in that respect, but also, crucially, regarding their translation of νομή as 'division': the term refers here to possession (Preisigke s.v., 2), as in Hadrian's apokrima on iniusta possessio (νομὴ ἄδικος, l. 7) in P. Tebt. II 286 (121-138), l. 7, in Severus and Caracalla's rescript on longi temporis praescriptio, in P. Strasb. I 22 = MChr. 374 (3rd cent. CE Hermopolis), l. 3 (μακρᾶς νομῆς παραγραφὴ as 'praescriptio longae possessionis', cf. also P. Par. 69 = WChr. 41, 232 CE Elephantine, col. 3, l. 20), and still much later, in Justinian's legislation (cf. Nov. 53.4.1). Cf. also, in our very same context of straw owners, the Syro-Roman Law Book: Selb-Kaufhold §62 (= FIRA II §64), supra n. 208.

place of someone else, as his strawperson. It is, in fact, the exact same assumption that we have found in the imperial constitutions that deal with such situation (supra sub 'c' ad n. 208): the defining trait of these strawpeople for the imperial chancellery is that they figure in the documents, but the item is not conveyed to them. That such were the acquirors ἐν πίστει under discussion in the advocate's speech is confirmed when he characterises them as 'those who are allowed to have their mere name in the documents': τῶν γὰρ ἐν πίστει | καταγραφέντων τὸ ὄνομα μ[ό]νον εἰς τοὺς χρηματισμοὺς | παρε[θ]έντων (P. Oxy. III 472, ll. 23-25).

2. To this, the advocate still adds: if a pistis had been given to the seller, if he had sold only in appearance, the daughter would not have undertaken further liability knowing that she would be deprived of the property whenever he chose.[218] The nature of this further liability of the daughter is unclear, but two aspects of Sarapion's allegations result unequivocally from this retort: he claimed that the sale had been only apparent (πίστεως περὶ τούτων | οὔσης παρὰ τῷ δοκοῦντι πεπρακέναι ἑτέρῳ: ll. 37-38); and, if this had been the case, he would certainly have had complete freedom to deprive Dionysia of the property whenever he chose (μελλήσουσα ἀφαιρε|θήσε[σθαι ὁ]πότε ἐκείνῳ ἐδόκει: ll. 39-40). And, in fact, in P. Oxy. III 486 Dionysia summarises Sarapion's position as claiming that the properties belong to him (ἐνκαλῶν καὶ περὶ ὑπα[ρχό]ντων τινῶν ἐλογοποιήσατο ὡς ὑποστελλόν|των αὐτῷ: ll. 22-23).

All this -the sale as a mere semblance, the seller's freedom to reclaim his property at any time, the very idea that it still belongs to him- would be quite out of place in case of a title-transfer security. It makes perfect sense, instead, if Sarapion claimed that Dionysia was a mere trustee, on whom the property had been bestowed only nominally.[219] Dionysia's insistence that she paid the price becomes thus understandable:

[218] P. Oxy III 472, l. 37-40: ἀλλὰ μὴν ̣υτ̣ων πίστεως περὶ τούτων | οὔσης παρὰ τῷ δοκοῦντι πεπρακέναι ἑτέρῳ ἂν ἑαυτὴν γράμ|ματι ἡ θ[υγ]άτηρ κατηνγύα τ̣ῷ δημοσίῳ μελλήσουσα ἀφαιρε|θήσε[σθαι ὁ]πότε ἐκείνῳ ἐδόκει; The text is obscure: particularly unclear is the origin - γράμματι- and apparent public nature -τ̣ῷ δημοσίῳ- of Dionysia's liability, puzzlingly mentioned within the discussion of a contract that she concluded with her mother: in the advocate's version (ll. 45-57), an inheritance agreement whereby Dionysia's mother gave her one and a half talents, in exchange for an annual rent of 150 jars (a similar arrangement: BGU IV 1013, 41-68 CE Arsinoites); the rent, apparently in wine, seems connected to the produce of the vineyard acquired by Dionysia, and, in fact, the plaintiff used this agreement against her (ll. 29-33: ἐὰν κοινόν ὁμολόγημα λέγωσι γεγο|νέναι τῆς θυγατρὸς πρὸς τὴν Ἑρμιόνην ἑκατὸν πεντήκοντα | κεραμίω[ν] καὶ ἀπὸ τούτων ὧν ἠγόρασεν κτημάτων φαμὲν | τοῦτο [πᾶ] ν μηδὲν εἶναι πρὸς τὸν κατήγορον. οὐ γὰρ εἴ τι ἔπραξε | θυγάτηρ πρὸς τὴν μητέρα τοῦτο αὐτοῖς εἰς συκοφαντίαν εὕρημα): either arguing that it revealed the true nature of the sale, or because it would have constituted a fraud against him.

[219] Less certain is whose trustee is Dionysia supposed to be, in Sarapion's account. The simplest possibility (a) is that Sarapion claims that she acquired as a trustee of his father, Mnesitheus, who would have executed a deed of sale in her favour without receiving the price. But the advocate's speech seems to refer to the pistis -we ignore how accurately- as received

this would not defend her from the claim that she acquired the land to secure a credit (quite the opposite: such payment would have been the credit), but it is certainly enough to exclude that she acquired as a mere trustee.

3. If Sarapion had claimed that the property had been sold merely as a security, he would have needed to make his case arguing that whatever price Dionysia paid had in fact been a loan, or that a debt with her had predated the sale; and, most crucially, that Dionysia received her money back. A reply to these claims would have required to argue either that the secured debt had not been paid, or that there had been no loan, no debt to secure between the parties. All this is conspicuously absent from the advocate's speech.

All in all, it seems to me beyond doubt that in the case of Dionysia, as in P. Oxy. LX 4060 and BGU IV 1047 (supra 'b' and 'c'), the fiduciary who acquires ἐν πίστει is a mere trustee: none of these documents are compatible with the real security hypothesis. They attest, instead, a widespread phenomenon of property held through strawpersons, that spans across the papyrological and legal sources from the second to the sixth century, and so far has not received from romanists or papyrologists the attention it deserves.[220]

X. En Pistei *and* Kata Pistin*: other uses*

The remaining material for ἐν πίστει and κατὰ πίστιν, also commonly presented en bloc as evidence of ὠνὴ ἐν πίστει,[221] if examined more carefully rather bears witness to the versatility of the idea of πίστις in the legal practice of the papyri:

e) In P. Warr. 1 = SB IV 7472 (164 CE Antinoopolis), we have a petition draft of a Gaius Valerius Marinus, possibly a veteran,[222] unfortunately preserved only in

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by Sarapion himself (ll. 20-21: ὥστε καὶ παρὰ τίνος ἂν εἴποι τὴν πίστιν | ἐσχηκέναι; the third person referring, from l. 9 onwards, to the plaintiff, who was, as we know, not the father, but the son: supra n. 215); and, in fact, it is also possible (b) that he claims that Dionysia acted as his trustee, acquiring for him from his father (the choice of Dionysia as trustee arising perhaps from Sarapion's connection to her mother, as her προνοητής, ll. 10, 28, and, in the advocate's colourful story, as her ardent admirer). In any case, if Dionysia had indeed acted as strawperson, the transaction would have been made in fraudem creditorum (cf. ll. 5-8: εἶχεν μὲν οὖν αἰτίας τοῦ καὶ | αὐτὸς ἑ[αυ]τῷ προσενενκεῖν φάρμακον ἃς καὶ ἄλλοι πολλοὶ τὸν | θάνατον τοῦ ζῆν προκρείναντες, καὶ γὰρ ὑπὸ δανειστῶν ὤλλυ|το καὶ ἠπόρει), unless the creditors received their due (as she claims): a payment that Sarapion would have claimed was in truth made with (a) his father's or (b) his own money.

[220] Cf. most notably Selb and Kaufhold's commentary to LSR §62, completely unaware of the papyrological evidence: unsurprisingly, since it had been misinterpreted as ὠνὴ ἐν πίστει.

[221] Not usually mentioned in our context, and indeed for us irrelevant: a) P. Tebt. I 14 = MChr. 42 (114 BCE Kerkeosiris), ll. 9-10: τὰ ὑπαρχόντα συντάξαι θεῖναι | ἐν πίστει does not refer to a private real security, but to someone accused of murder, whose property has been inventoried and placed in bond; in P. Strasb. IX 898 (3rd cent. CE unknown provenance), πίστι καὶ γνώμῃ (l. 9), as Dioscoros' πᾶσαν πίστιν | καὶ γνώμην in P. Strasb. I 40 (569 CE Antinoopolis), l. 18-19, is merely a formulaic reference to (good) faith and (free) will.

[222] Wilcken 1932: 94. Together with his presumable Roman citizenship, Marinus seems to

its left half. What is left of each line is insufficient for a secure interpretation. There are references to an expulsion and a house, in l. 29, and to πίστις in l. 32 (πίστι ὑποστέλλειν) and in l. 20 (περὶ πίστεως). Inevitably, this has led to conjectures of a possible fiduciary gage.[223] Better grounded seems Hunt's hypothesis that the petition refers to a fideicommissum, involving Marinus and possibly a peregrine. A key term, in fact, in the line immediately after περὶ πίστεως, is ἐξομολογησάμενος,[224] used in Gnom. §18 for the professio of forbidden fideicommissa: in that case, of hereditates fideicommissariae between Romans and peregrines.[225] This would also account for the references to fiscal fraud in ll. 6 and 39.

Alternatively, ἐξομολογησάμενος could point to the disclosure by a trustee of his condition as such,[226] for which the usual expression is ἐξομολογέομαι τὴν πίστιν.[227] This would bring us back to the phenomenon studied supra sub IX. It is also compatible with the mentions of fiscal fraud (by holding property through strawpersons, avoided only by the professio of the pistis), and not excluded by κατήντησ[εν] in l. 23, which may refer to something acquired inter vivos as well as mortis causa. A hint that favours Hunt's fideicommissum conjecture, though, is the apparent qualification of the professio in l. 22 as κατὰ τὰ κελευσθέντα: professio fideicommissi was done in accordance to imperial law, [228] whilst for property kept through strawpersons there is no evidence of a compulsory disclosure.

f) In P. Tebt. III 1 816 (192 BCE Tebtynis), a certain Demaenetus, in whose favour (col. I) two witnesses attest that he is the heir of his mother's property, appears (col. II) together with other two people as addressee of a chirograph whereby they are

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have had that of Antinoopolis, cf. the editor's commentary to Μαρκιάνειος in ll. 3 and 18.

223 Already in the edition, as an alternative conjecture, following the advice of Leopold Wenger. Cf. also Rupprecht 1995: 430 n. 49.

224 Cf. also l. 30: κατὰ τὸ τῆς ἐξο[...], where κατὰ τὸ τῆς ἐξο[μολογήσασθαι], as the editors suggest, seems possible.

225 Gnom. §18 (BGU V 1210, ll. 56-58): τὰ\ς/ κατὰ πίστιν γεινομένας | κληρονομίας ὑπὸ Ἑλλήνω̣ν \εἰς/ [[ὑπὸ]] Ῥω|μαί[[ων]]<ους> ἢ ὑπὸ Ῥωμαίων \εἰς/ Ἕλληνας ὁ θεὸς Οὐεσπασιανὸς [ἀ]νέλαβεν, | οἱ μέντοι τὰς πίστεις ἐξωμολογησά[[ντες]]<μενοι> τὸ ἥμισ[υ ε]ἰλήφασι. Cf. Lenel-Partsch 1920: 14-15; Riccobono 1950: 135-137, with lit.

226 An example of this type of disclosure, referred to a credit, is P. Oxy. III 508 (102 CE): supra n. 127.

227 P. Flor. I 86 = MChr. 247 (after 86 CE Hermopolites) ll. 11-12: ἐξομολογουμένη τὴν πίστην τῶν αὐτῶν τριῶν συνγρα[φῶν]; P. Mil. Vogl. I 25 (127 CE Tebtynis), col. III, l. 31-33: διὰ τί οὐχ ἅμα [το]ῖς το[ῦ Γε]μελίνου γράμ[μ]ασιν καὶ παρὰ τοῦ Δείου ἐξομολογουμένου τὴν πίστιν τὸ χιρόγραφον ε̣ἴ̣λ̣ηφας; PSI Congr. XI 9 = PSI XV 1527 (after 161 CE, Oxyrhynchos), ll. 4-9: ἐξομολογοῦμαι καὶ ἀπογράφομαι ... ἣν ἔ[χ]ω ἐπ' [ὀνό]ματος Δ[ιονυ]|7σίου ... π̣ί̣[σ]τ̣ι̣ν ᾧ̣[ν ἐδ]άνε[ι]σ̣α ἐπ' ὀνόμ̣[α]|τ[ος αὐτ]ο̣ῦ̣ Πετοσείρει ... καὶ Ἑρμῆ. All these documents refer to credits (supra VI b and IX a), but a similar disclosure would have been necessary in case of property acquired ἐν πίστει by a trustee: cf. supra n. 202.

228 Call. 3 iur. fisc. D. 49.14.3pr.-4, Paul. 7 Iul. Pap. D. 49.14.13, among others. On professio fideicommissi and fideicommissum tacitum, Müller-Eiselt 1982: 263-283; Johnston 1988, chapter III.

authorised by one of the owners of a house to sell it as they please, without fear of any claim: τῆς ὑπαρχούσης ἡμῖν οἰκίας ἐν Ἡρακλέους | [π]όλει τῆι ὑπὲρ Μέμφιν πίστει κυ̣ρ̣ω̣θ̣ε̣[ίσ]ης ὑμῖν | [π]ωλεῖν ὡς ἂν βούλησθε, καὶ κου (l. οὐ) μὴ ἐπ̣έλ̣θ̣[ω] ἐπ' αὐτὴν | [ἡ] ἀγχιστεύουσα \οὔτε/ ἐφ' ὑμᾶς οὐδ' ἐπὶ τοὺς ἠγορακότας | [ο]ὐδ' ἄλλος ὑπὲρ ἐμοῦ παρευρέσει ἡιτινιοῦν (ll. 24-28).

In the edition, Hunt assumed that the house had been the security for a loan, and integrated in κυ̣ρ̣ω̣θ̣ε̣[ίσ]ης in l. 25 as referred to an auction sale in execution of the security: 'knocked down' is his translation. This would exclude Herrmann's hypothesis of a fiduciary transfer made by the woman who issued the chirograph:[229] execution through auction sale would be out of place in case of fiduciary transfer, and πίστει would anyway refer to the result of such auction, not to a transaction made by the woman. In truth, Hunt's interpretation is also dubious: πίστει κυ̣ρ̣ω̣θ̣ε̣[ίσ]ης can hardly mean 'knocked down in pledge', since that would turn the pledge into the result of the auction sale, rather than its cause; κυ̣ρ̣ω̣θ̣ε̣[ίσ]ης is extremely conjectural, and, even if correct, would not necessarily point to an auction: it could equally mean 'determined', 'confirmed', 'ratified'.

The key to the document may lie in an oddity that has so far attracted no attention: the contrast between the plural ἡμῖν, referred to the owners of the house, and the fact that the document is issued in first person singular by only one of them. This by itself suggests that the 'us' comprises the addressees of the chirograph —Demaenetus, Hyllus and Ptolemaeus—, i.e. that they are the co-owners. Such co-ownership would most likely have resulted from a common inheritance.[230] In the same direction points the otherwise inexplicable reference to the author of the chirograph 'being the next of kin' (ἀγχιστεύουσα, l. 27). This dispenses with the conjecture of a secured loan, of which there is no trace in the document: the chirograph is merely an authorisation to sell, issued by one of the owners of the house to her co-owners. And, in fact, the papyrus continues with the copy of a six-witness document —l. 35: (ἑξα)μαρτύρ[ου ἀ]ντίγραφον—, quite likely the sale that the chirograph authorised. The πίστις consists here in entrusting the co-owners with selling the house: πίστει κυ̣ρ̣ω̣θ̣ε̣[ίσ]ης ὑμῖν, if we stand to Hunt's integration, would here simply mean ‹entrusted to you›.

g) In P. Dion. 11 and 12 (108 BCE Hermopolites), we read that Dionysios issued a loan and a hypothec syngraphê in trust (ἐθέμην αὐτῶι ἐν πίστει ... συγγραφὴν ὑποθήκης: P. Dion. 11, l. 10). As I have argued elsewhere,[231] this refers to a fictitious loan secured by hypothec, rather than to a fiduciary transfer[232]. The pistis, the 'trust', consists here in issuing a hypothec syngraphê for the repayment of a sum that

[229] Herrmann 1989: 319. Cf. also Schmitz 1963: 44-46. Less certain, Rupprecht 1995: 430 n. 51.

[230] In any case, it would seemingly be a different inheritance from that of the first column, where Demanaetus is emphatically presented as sole heir of his mother.

[231] Alonso 2012: 17-30, with lit.

[232] So, tentatively, Rabel 1907: 357, cf. also Preisigke s.v. πίστις 4a (col. 309).

Dionysios had not actually received, in exchange for a counter-performance that has not yet been carried out.

h) In P. Oxy. XIV 1644 (63-62 BCE), the tree sons of the deceased Arsinoe release their nephew Moschion, son of their also deceased sister, from a loan that Moschion had made with Arsinoe, because, they declare, 'Moschion for various reasons had effected the renewal of the money agreement with Arsinoe in trust on account of their kinship': ἕνεκα τοῦ τὸν Μοσχίωνα διά τινας αἰτίας τὸν | καινο̣χωρισμὸν τῆς προειρημένης ἀργ[υ]ρικῆς συναλλάξεως | εἰς τὴν̣ Ἀρσινόην ἐν πίσ̣[τει] διὰ τὴν προγεγραμμένην | ἰδιότη[τ]α πεποιῆσθαι (ll. 18-21). The text has long been a crux.[233] Much in it is uncertain, starting with the meaning of expressions like καινοχωρισμός or διὰ τὴν ἰδιότητα. In any case, Herrmann's hypothesis that ἐν πίστει refers also here to a fiduciary security[234] does not seem compatible with the intriguing 'διά τινας αἰτίας' and 'διὰ τὴν προγεγραμμένην ἰδιότητα', and finds little support in a text where ἐν πίσ̣[τει], assuming it is rightly integrated, does not refer to any property being conveyed, but to a καινοχωρισμός, i.e. probably a 'contract renewal'.[235] The notion that receiving security is a contract renewal would be remarkable,[236] and an unicum in the papyri; even more so, the idea of releasing the debtor from all liability because he has secured the debt.

Much in the document points, instead, to the possibility that Moschion's loan was fictitious, as in P. Dion. 11-12 (supra sub 'g'). The loan is not referred to as a sum received by Moschion, but as a deed made by him for Arsinoe: ἔθετο ὁ Μοσχίων τῆι τῶν ὁμολογούντων μητρὶ ... δ[α]νείου (ll. 11-14).[237] The καινοχωρισμός was made 'for certain reasons', διά τινας αἰτίας, an expression strikingly close to the one we

[233] Meyer 1921: 263-264; Schwarz 1937: 251 n. 6. The wheat loan in P. Oxy. IV 836, maybe taken by one of Moschion's uncles (Schmidt 1999: 155 n. 3), would be, if indeed referred to the same person, a completely unrelated transaction, useless for the interpretation of P. Oxy. XIV 1644.

[234] Herrmann 1989: 319. Less certain, Rupprecht 1995: 430 n. 51.

[235] Less likely translations: taking into account the family context, one might think of a ‚new division' (χωρίζω as 'separate, divide'), i.e. of the estate; Preisigke s.v. suggests ‹deposit›, i.e. of the document with the grandmother. It is also unlikely that the hapax καινο̣χωρισμὸν is a false reading for καταχωρισμὸν.

[236] Traces of such idea can be found for novatio in the Roman legal tradition. In a constitution addressed to the Senate in 530 CE, Justinian mentions, among the cases in which ‚veteris iuris conditores introducebant novationes', also the addition of a real security: vel pignus acceperit. Of such possibility, though, there is little trace in the classical jurisprudence: Ulp. 58 ed. D. 42.1.4.4, that may seem to imply it, in fact deems the addition of a pignus (or a guarantor through fideiussio) rather an accessio than a novatio; and Gai. 3.177-178 mentions as novatio only the addition or detraction of a guarantor through sponsio, and only according to the Sabinian school. On the question, and on Justinian's constitution, Lambrini 2006: 7-22, with lit.

[237] In very similar terms, P. Dion. 11-12 (108 BCE), ll. 10-11: ἐθέμην αὐτῶι ἐν πίστει καθ' ὧν | ἔχω ψιλῶν τό̣π̣ων συγγραφὴν ὑποθήκης.

find for the issuing of the fictitious loan in P. Dion. 11-12.[238] If Moschion issued a fictitious loan for his grandmother, it is not difficult to imagine how this may be connected to their kinship. Contracts assigning to a child part of the family property with immediate effect in exchange for an annual rent are not unusual, especially in the female line;[239] in the Egyptian practice, on the other hand, the duty to pay such annuities was typically created through documents formulated as loans, often fictitious.[240] One such arrangement may have existed between Moschion (or already his mother, later renewed by him) and his maternal grandmother while she was alive, and is cancelled by his uncles now that she has died. All this is obviously conjectural, but in any case less arbitrary than the hypothesis of a fiduciary security.

i) BGU III 993 (127 BCE Hermonthis), executed at the Pathyrite agoranomeion of Hermonthis, is a συνγραφὴ δόσεως (col. I, l. 7) whereby a Psenthôtês distributes his property among his relatives for after his death (ἀπομεμερικέναι μετὰ τὴν ἑαυτοῦ τελευτὴν: col. II, l. 12): in fact, the earliest extant example of a Greek notarial deed adapting this distinctively native Egyptian form of arranging one's inheritance. Col. III, l. 11-12 refer to other assets that may belong to the inheritance, in the following terms: καὶ εἴ τι ἄλλο ὑπάρχον αὐτῶι ἐστιν ἤτ<ο>ι κατὰ συνβόλαια ἢ κατ' ἐπενέχυρον καὶ ἔν τισιν ἐν πίστει πυροῦ τε καὶ κριθὴν | ὄλυραν φακοῦ ἀράκου καὶ χαλκωμάτων καὶ ἱματισμοῦ.

Again, ἐν πίστει has been unanimously understood as referred to title-transfer security:[241] given to Psenthôtês rather than by him, we must assume, since it is included as part of his estate. The preceding κατ' ἐπενέχυρον would prima facie seem to invite this interpretation.[242] Yet, this leaves unexplained the final list of grain types: grammatically, these genitives (with the usual Pathyrite genitive/accusative oscillation: κριθὴν and ὄλυραν for κριθῆς and ὀλύρας)[243] must be somehow connected to

[238] P. Dion. 11-12 (108 BCE), ll. 4-5: διὰ τὰς ἐπὶ τοῦ πράγματος ὑπο|δειχθησομέ[ν]ας αἰτίας.

[239] Thus, between mother and daughter in P. Oxy III 472 (before 131 CE Oxyrhynchos), ll. 37-57, supra n. 218; between a mother and her three daughters in BGU IV 1013 (41-68 CE Arsinoites).

[240] The model was here the deed of maintenance of the husband for the wife in the native Egyptian tradition, usually called in Greek συγγραφή τροφῖτις: Pestman 1961: 32-50. For its assimilation to a loan, cf., among many examples, UPZ I 118 = P. Tor. 13 = MChr. 29 (ca. 140 BCE Memphis), ll. 8-10: δεδανεικέναι τῶι εὐθυνο|μένωι [κατ]ὰ συγγραφὴν τροφῖτιν τὴν ἀναγραφεῖσαν διὰ τοῦ γραφίου ἀργυ(ρίου) (δραχμὰς) φ ἐπὶ τῆι ἐξονομαζο|μένηι Θα[υ]ῆτι τῆι καὶ Ἀσκληπιάδι εἰς τὸ χορηγεῖν ταύτηι καθ' ἔτος ὀλυρῶν (ἀρτάβας) ξ, κτλ. On UPZ I 118, Pestman 1961: 45-46.

[241] Rabel 1907: 357; Mitteis 1912: 136; Schmitz 1963: 46-48; Herrmann 1989: 319; Rupprecht 1995: 430 n. 49.

[242] Mitteis 1907: 136 n. 2, invokes the parallel of Scaev. 16 dig. D. 32.101pr. The comparison is unfit: the praedia pignori data are not presented there as cases of Sicherungsübereignung, but merely of forfeit-pledge, cf. ‚si modo in proprium patrimonium (quod fere cessante debitore fit) non sit redacta'.

[243] For genitive/accusative oscillation in the Pathyrite agoranomic sales, Vierros 2012. More

the previous words, but one wonders why would Psenthôtês take for granted that if a title-transfer security were to be part of his estate at his death, it would consist in grain.

A better interpretation is possible. The passage begins by mentioning what may be due by virtue of a document, be it a simple loan deed or a real security: κατὰ συνβόλαια ἢ κατ' ἐπενέχυρον. The emphasis lays on the document, and this sheds light on the meaning of ἐν πίστει: whatever may be due by virtue of undocumented loans in grain.[244] There is no real security here: the πίστις is simply the trust of lending without a document, as is commonly done when it comes to minor grain loans.

j) P. Oxy. VI 980 verso descr. (3rd cent. CE), is a short fragment from a list of prices referred to houses. It contains simple entries like Ἄρειος ὀπωροπώλη[ς] τιμῆς οἰκίας (δραχμαὶ) φ, but the first one reads Κορνήλιος ποικιλτὴς τιμῆς οἰκίας ἐν πίστει ἰς ἣν τιμῆς (δραχμαὶ) Β. Here, ἰς (i.e. εἰς) ἣν τιμῆς points to a partial payment, and the phrase ἐν πίστει ἰς ἣν τιμῆς suggests that it is this payment, not the sale itself, as commonly assumed,[245] that is made ἐν πίστει. The phrase may thus refer to a partial payment made in advance. This is also the meaning of ἐν πίστει in the contemporary P. Oxy. XII 1413 (272 CE). The document records several debates in the senate of Oxyrhynchos. In the last one (l. 25 ss.), on the completion of a golden crown requiring 12 extra talents, the syndic promises to report any payments made in advance to the artificers: [εἴ τι τοῖ]ς τεχνείταις ἐν πίστι ἀναλίσκεται, παρατεθήσεται ὑμῖν (l. 33).[246]

k) BGU II 464 (after 138 CE Arsinoites), often mentioned as an example of ὠνὴ ἐν πίστει,[247] is in truth too fragmentary to allow any conclusion. Although the text refers to a specific affair, it is written in an almost literary upright hand fit for a bureaucratic text or a petition rather than a purely private document. The crucial lines are 3-5: [- ca.? - α]ὐτὰ τὴν [γ]ενομένην πρᾶ[σ]ιν [ἐ]ν πίστι γεγονέναι ὑπ[- ca.? -] | [. . . . Ἀρφ]αήσιος καὶ τῆς τούτων μη[τ]ρὸς τῆς Φανο[μγέως (?) . . . .] | οἰκίας καὶ αὐλῆς καὶ φοινικῶνος ἐν ἰ̈διοκτήτῳ [γῇ . . . .]. Undoubtedly, they refer to a sale concluded ἐν πίστει. It is not irrelevant, though, that ἐν πίστει seems an adjunct to the infinitive γεγονέναι rather than to πρᾶσιν: it is not evidence of an

lit. on the linguistic idiosincracies of the Pathyrite agoranomoi supra n. 82.

[244] The considerations on ἔν τισιν in Rostowzew 1910: 186-187 are not helpful for the understanding of our text. As I see it, ἔν τισιν refers to ἄλλο ὑπάρχον and is in turn qualified by πυροῦ κτλ: "if there is any other property belonging to him (i.e. to Psenthôtês), by virtue of a deed of credit or pledge, and also *consisting in some wheat, barley, etc.* given en pistei".

[245] Preisigke, s.v. πίστις 4a (col. 309); Pringsheim 1950: 125 n. 1; Rupprecht 1995: 430 n. 49.

[246] A similar sense is likely in the too fragmentary meriteia P. Strasb. VII 603 (103-116 CE Tebtynis), l. 15: [- ca.? -] πρεσβυτέρας ὄνομα ἐν πίστι. The lacuna must probably be integrated [- ca? - εἰς τὸ τοῦ Ἑλένης] (cf. Preisigke 1925, s.v. ὄνομα 2e, col. 185), in the likely sense that something is or had been granted to Helen the elder in advance for her share.

[247] Mitteis 1912: 136; Preisigke, s.v. πίστις 4a; Pringsheim 1950: 125 n. 1; Schmitz 1963: 51-52; Herrmann 1989: 321, 323; Rupprecht 1995: 430 n. 49.

institution called πρᾶσις ἐν πίστει, but of a sale that happened to be concluded ἐν πίστει in a specific case whose details we ignore. It might be, as generally assumed, a guarantee sale, but at this point it seems improbable: all the alleged instances of ἐν πίστει for guarantee sales have turned out to be misinterpretations of the evidence (supra ‹a› to ‹j›); the only remaining occurrence is MChr. 233 (supra VIII), which belongs to a very specific late Ptolemaic Pathyrite practice for which the abundant second century Fayum material offers no parallel:[248] a practice, in any case, of suspended sale, not of title-transfer security.

Much more likely seems that ἐν πίστει has here one of the meanings that we have found through our survey in this and the previous section. A possible hypothesis: after γεγονέναι in l. 3, the lacuna must be integrated with the names of the three brothers mentioned at the end of the fragment, [...]ι̣ος καὶ Ἀσκλᾶτος κα[ὶ Ἀ]ρφαήσιος (l. 8), together with their mother Φανο[μγέως (?)], preceded by a preposition that may be simply ὑπὸ but also ὑπὲρ; in this latter case, the sale would have been concluded on their behalf by someone else, and this would explain ἐν πίστει, in a sense analogous to the one we found supra sub ‹f›.

This exhausts the alleged evidence of ὠνὴ ἐν πίστει in the papyri. In retrospect, it seems a hodgepodge built with virtually every document linking ἐν πίστει to a sale or a loan. If each of these texts is carefully considered on its own, and not just as a piece in a hurriedly assembled puzzle, title-transfer security turns out never to be the only possible, or even the most likely interpretation.

XI. Guarantee sales and title-transfer security in the papyri: an overview

In the romanistic tradition, title-transfer security, shaped as fiducia cum creditore, was for centuries relegated to a marginal position within the received body of real securities. Long extinct by Justinian's times, like the mancipatio that it required, absent from the Corpus Iuris, its memory was reduced to scattered references in authors like Cicero and pre-Justinianic compendia like the Pauli Sententiae.[249] In the nineteenth century, fiducia had no proper place in the great pandectistic treatises,[250] precisely because absent from the Pandects.[251] All this changed towards the end of

[248] Guarantee sales are attested in Fayum only in the first century CE, in the form of double document examined supra sub III, but for these the expression ἐν πίστει is never attested.

[249] A list in Noordraven 1999: 12-14, sub 2 (legal pre-Justinianic sources) and 3 (literary sources).

[250] In the three volumes of Windscheid's Pandekten, for instance, only a footnote is devoted to fiducia and contemporary Sicherungsübereignung: §224 n. 2 (yet a fleeting mention in §226a n.2: Windscheid-Kipp 1900: 1005 n.2, 1018 n.2).

[251] The early nineteenth century discovery of the Veronese Gaius did not add much: Gaius' quadripartite system of the obligationes ex contractu allowed no place for fiducia, quite likely rather out of use already in Gaius' times, who mentions it only incidentally: Gai. 2.59-60 (usureceptio), 2.220 (legatum of a res fiduciae causa data), 3.201 (again usureceptio), 4.33 (actio fiduciae among actiones famosae), 4.62 (actio fiduciae as iudicium bonae fidei). Other

the century, in great measure due to the emerging historical approach to the sources. A turning point was an article by Otto Lenel in the Savigny Zeitschrift in 1882,[252] where he identified the sections of Ulpian's and Paul's commentaries ad edictum and of Julian's digesta originally devoted to actio fiduciae. In addition to this refound jurisprudential material, two pieces of documentary evidence appeared in 1867 and 1887: the formula Baetica and the so-called mancipatio Pompeiana.

The end of the century brought also unprecedented attention to title-transfer security in the German legal theory and practice. The dangers that non-possessory chattel pledge entailed, due to its lack of publicity, had led since the early eighteenth century to its progressive eradication. Around 1880, the so-called Faustpfandprinzip ('principle of the possessory pledge'), that limited hypothecation to real estate, had fully asserted itself in legislation, jurisprudence and legal science,[253] even though it imposed for movables a transfer of possession undesirable in most cases for both borrowers and lenders. The attempts to overcome this limitation through redeemable sales and through abstract Sicherungsübereignung were initially rejected by scholars as a circumvention of the law; and yet, a series of court decisions, starting in 1880, upheld their validity, making of fiduciary transfer the ordinary form of security on movable property in Germany, even though it eventually did not find a place in the BGB.[254]

In this context, a papyrus cancelling a sale described as contracted ἐν πίστει, and characterised as a hypothec, would inevitably attract a fair share of attention: it is completely understandable that Grandenwitz hailed P. Heid. inv. 1278 = MChr. 233 (supra VIII) as evidence of a Hellenistic form of title-transfer security, akin, even in its apparent name, ὠνὴ ἐν πίστει, to the Roman fiducia cum creditore. Unfortunately, the force of suggestion of this possibility, and the sense of certainty created by the semblance of a terminus technicus, drove even a scholar so cautious as Ludwig Mitteis to accept as further evidence documents that a dispassionate study easily shows to be completely unrelated: most egregiously, the case of Dionysia in P. Oxy. III 472 = MChr. 235, and P. Oxy. III 486 = MChr. 59. Far from being an example of fiduciary gage, Dionysia's affair is just one among many pieces of evidence for the phenomenon of straw owners in the Mid- to Late Empire (supra IX). The case for ὠνὴ ἐν πίστει has in truth been made by collecting all documents where ἐν πίστει appears in connection with a sale or a loan, assuming that they refer to fiduciary guarantees: if some attention is devoted to each of them individually, this turns out to be hardly ever the only or even the best interpretation (supra X).

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than this, only family law applications: 1.114-115b (coemptio fiduciaria), 1.166 and 1.172 (tutela fiduciaria).

252 Lenel 1882: 104-170, 177-180.

253 Hromadka 1971.

254 On the doctrinal debate, and the final affirmation of title-transfer security, Theisen 2001, Aschenbrenner 2014: 10-18.

This negative result for the ἐν πίστει documents is unsurprising: the συγγραφὴ ὠνῆς ἐν πίστει of MChr. 233 was a false lead; not the unknown Hellenistic form of fiduciary gage that Gradenwitz imagined, but the Pathyrite agoranomic version of the native Egyptian tradition of suspended guarantee sales. It was Pieter Pestman in 1985 (supra IV) who first paid attention to the oddities of a group of late second to early first century BCE Pathyrite agoranomic sales, executed in two stages, with an interval of some months to some years, or cancelled after a similar interval. Pestman realised that these sales functioned as securities for the return in money (documented as price) of wheat loans, as the rich available material often explicitly confirms (supra n. 71). The suspension of the sale was achieved by interrupting the execution of the deed, leaving it initially incomplete. The method may seem raw, but it entailed a remarkable advantage: taxes were paid only at the end, and, unlike in ordinary hypothecations, only once, either at the rate required for sales, if the debtor defaulted and the creditor wished the sale to be completed, or, otherwise, at the minor rate required for hypothecs. This latter rate confirms that the transaction was, also in the eyes of the administration, a mere surrogate for hypothecation: a sale with suspended effect, not a title-transfer security. Despite this, if the debtor repaid the loan and the sale deed was left incomplete, a document would usually be issued explicitly confirming the cancellation of the sale. These documents, drawn up in Demotic or Greek, were labelled as epilyseis, even when fashioned in the native form of the apostasion (cf. BGU VI 1260, 101 BCE, Pathyris). MChr. 233, dated in 111 BCE Pathyris, is, as Pestman recognised, just one such epilysis; the συγγραφὴ ὠνῆς ἐν πίστει under cancellation, just one of his Pathyrite interrupted sales, significantly characterised as a mere hypothecation (ὠνὴν ψιλοῦ τόπου ... ὃν ὑπέθετο).

These interrupted sales show the remarkable ingenuity of the Pathyrite notaries, bilingual natives like the Ammônios alias Pakoibis (supra n. 81) who executed MChr. 233, in pouring into Greek agoranomic form the legal traditions of the native Egyptian population. Suspended sales were, in fact, together with manual pledge, the main national form of real security. In Fayum, the extant examples span from the mid third century BCE Demotic P. Chic. Haw. 7 (supra II) to the first century CE bilingual sale-loan contracts from Soknopaiu Nesos and Tebtynis (supra III). Characteristic of this Fayum tradition, in its early Ptolemaic as in its early Roman incarnation, is that the sale deeds were formulated as unconditional, as for a fully perfected sale, the ‹document of being far› issued already ab initio together with the ‹document for silver›. Upon default, the creditor had thus a perfectly unconditional, ordinary property deed: in a separate papyrus, in the early Ptolemaic model; in a separate column that could easily be excised from the loan, in the early Roman one. And yet, these deeds were labelled as hypothecs and taxed as such: whatever the parties believed, the creditors were not owners ab initio, and would not become such until default, by paying the full telos epikatabolês. This requirement has such practical relevance that by itself makes it quite unlikely that the parties could have

believed otherwise. And, in fact, we have hints that they were perfectly aware of this suspended effect: the original property deeds were promised but not yet conveyed (supra II i.f.); in the later model, the Demotic sale deed was accompanied by a Greek loan deed that could only be meant for court, and would have been completely useless if the sale had been unconditional (supra III); the public duties were agreed to pass to the creditor only when the term arrived (III sub ‹b›).

In the Theban area, guarantee sales were quite explicitly suspended (supra II): the contracts are acknowledgements of debt to which a sale -as a mere ‹document for silver›, without the ‹document of being far›- is added for the case the borrower does not pay in time. These are Spiegelberg's Kaufpfandverträge, spanning from the very early Ptolemaic times to the mid second century BCE. Towards the end of the century, the Pathyrite agoranomoi, by interrupting the execution of a Greek sale deed, allowed the Egyptian population to keep, also in their Greek agoranomic transactions, this Theban tradition of suspended guarantee sales. It is to this native tradition that MChr. 233 belongs.

Whether the sale reference (ὡς ἂν πράσεώς γενομένης) in the so-called menein contracts (supra V) is a last echo of this same native tradition (ibid i.f.) must remain here an open question. Important for us is to emphasise that, despite a formulation (μένειν ... τὴν κράτησιν καὶ κυρείαν) that might suggest otherwise, these first and second century CE Oxyrhynchite contracts are not a form of fiduciary transfer but a type of hypothecation: the creditor acquires only upon default, and has to follow the same execution procedure he would use to enforce an ordinary hypothec. In truth, the only anomaly of these contracts seems to be that the creditor keeps his full execution rights on him and all his property, as if no security had been given, and may freely choose between this ordinary execution and the hypothec, as the documents underline, and the evidence for execution confirms.

In 1988, Edward Harris proved that the hypothec of the Athenian orators and the so-called πρᾶσις ἐπὶ λύσει of the horoi, long seen as two entirely different types of real security —the latter usually imagined as a transfer under subsequent condition—, were in fact one and the same institution:[255] an institution, that, despite the frequent use of the language of sale, did not make the creditor acquire until the debtor defaulted and the creditor distrained on the security (Harris 2012 and 2013). In Ptolemaic Egypt, manual pledge aside, the only Greek form of real security seems to be that same hypothec. Suspended sales are instead (supra II-III) the dominant form of real security in the native Egyptian tradition. When confronted with these native suspended sales, the Ptolemaic administration (as later the Roman) treats them and taxes them as hypothecs.[256] And, when in the late second century BCE a

[255] Harris 1988.

[256] Theban Kaufpfandvertrag, supra nn. 35 and 36; Fayum Demotic guarantee sales, n. 41 and text ad nn. 38-40; Fayum sale-loan contracts, nn. 50 and 51; Pathyrite interrupted sales, nn. 74 and 76. Taxation logic aside, this characterisation exemplifies a phenomenon

Greek agoranomic expression had to be found for them, there was quite obviously no available equivalent Greek institution to resort to: the result was achieved through the remarkably crude (even if fiscally advantageous) expedient of interrupting the execution of the sale deed (supra IV). All this points to one simple conclusion: in the Greek legal grammar as received in Egypt there were no suspended sales, only hypothec.

As for title-transfer security, a review of the alleged evidence (supra VI-VII) yields an astonishingly meagre result. The only likely, even if not completely indubitable case is an Augustan synchôrêsis among Romans, BGU IV 1158 = MChr. 234 (9 BCE Alexandria). Other than that, only a suspicious transaction among Oxyrhynchite Aurelii can be mentioned as a possible, but again not quite certain, occurrence (VII sub 'e'): P. Oxy. XIV 1703 (ca. 261 CE Oxyrhynchos). It would not be surprising if more and better examples appear in the future, but, taking into account how abundant the papyrological material for all other real securities already is, it is quite improbable that they will go beyond a handful of scattered occurrences. An assiduous practice is unlikely to emerge, let alone an institutionalised form comparable to the Roman fiducia cum creditore, as Gradenwitz imagined behind MChr. 233. As for ὠνὴ ἐν πίστει, the inconclusive BGU II 464 aside (supra X sub ‹k›), the expression has not reappeared for over a century, not even to describe any other of the Pathyrite suspended sales that MChr. 233 in truth exemplifies. Significantly, the words ἐν πίστει do not appear in BGU IV 1158 or P. Oxy. XIV 1703. In truth, under a more attentive reading the expression vanishes even from MChr. 233: a simple description of the Pathyrite practice in terms of the execution ἐν πίστει, i.e. in guarantee, of a sale syngraphê, or of its keeping ἐν πίστει, i.e. in custody, at the archeion. At the present state of our sources, the term ὠνὴ ἐν πίστει does not seem to be the terminus technicus that Gradenwitz imagined, but a phantom, as the institution it was supposed to name.

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often remarked by Ernst Rabel: in the legal language, the actual transaction often appears as secondary with respect to its cause, as a means to an end. This is true even in highly formalized legal cultures: Rabel recalled the German expression ‚Pfandfiduzia', which indeed offers a close parallel. And, in fact, ὑποθήκη, ὑποτίθημι are occasionally used in this sense, that we may call non-technical, referred to a function rather than a legal structure: for instance, for hypallagmata, despite the deep structural differences that separate them from hypothec proper, in SB I 5676 = PSI XIV 1411 (232-233 CE Hermopolis), l. 7 (ὑπαλλάξαι), ll. 8, 9, 13, 16 (ὑποθήκη), and P. Fam. Tebt. 40 = SB IV 7364 (173-174 CE Tebtynis), l. 5 (ἐπὶ ὑπεθέμην), l. 10 (ὑ̣πο[θήκ]ης), l. 17 (ὑπαλλαγῆ[ς]).

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ZU DEN SICHERUNGSRECHTEN IN DEN PAPYRI. ANTWORT AUF JOSÉ LUIS ALONSO

Kaum ein Gegenstand des griechischen Rechts hat unter Generationen von Juristen und Historikern so heftige Diskussionen hervorgerufen wie die Sicherung von Forderungsrechten, vornehmlich das Pfandrecht an Grundstücken. Der Beitrag von Alonso eröffnet für die Papyrologie eine neue Dimension. Seine in diesem Band abgedruckte Fassung weicht — unter Wahrung der Grundthese — vom mündlich gehaltenen Vortrag in vielen Details ab. Das ist die Frucht einer intensiv weiter geführten Diskussion, und dem gemäß setzt auch die Antwort andere Akzente. ‚Vortrag' und ‚Antwort' sind stets Momentaufnahmen und sollten, so wie hier geschehen, im Interesse der Sache erst kurz vor der Publikation der Akten in ihre endgültige Form gebracht werden. Der erste Teil der ‚Antwort' fasst die diffizile Argumentation und die Ergebnisse des Autors in deutscher Sprache kurz zusammen; im zweiten Teil folgt eine kritische Würdigung und der Versuch, eine Brücke zur inschriftlichen Überlieferung von griechischen Sicherungsgeschäften außerhalb Ägyptens zu schlagen.

In vollendeter Dramaturgie führt Alonso auf sein revolutionäres Ergebnis hin: Die *one en pistei* („Kauf auf Treue" oder „Sicherungsübereignung" analog der *mancipatio fiduciae causa*) ist ein juristisches Phantom. Sie zählt zwar seit 1904 in der juristischen Papyrologie neben *enechyron, hypotheke* und *hypallagma* zum Kanon der Sicherungsgeschäfte (siehe Alonso bei Anm. 165) — doch es hat sie nie gegeben! Die griechische Urkundentradition Ägyptens habe nur die drei letzten Formen gekannt; die allein in MChr 233 (Pathyris, 111 v.Chr.) mit

diesem Zusatz überlieferte *one* beziehe sich auf die nur im demotischen Bereich überlieferten Formen des „Garantieverkaufs“ (ähnlich der *prasis epi lysei*, Verkauf auf Lösung, in den Inschriften).

Ohne dieses Ergebnis vorweg zu nehmen klärt Alonso zunächst seine dogmatischen Grundlagen (I. Real security as sale): Verpfändung könne als ‚aufgeschobener Kauf’ konstruiert werden; der Darlehensgläubiger könne sich allenfalls in rein ökonomischer Sicht nach dem ‚Surrogationsprinzip’ bereits mit Zuzählung der Valuta sofort als Eigentümer des verpfändeten Grundstücks betrachten. Von ‚funktional geteiltem’ oder ‚relativem’ Eigentum zu sprechen verböten in Ägypten die klaren Vorschriften über Steuer und Registrierung. Eigentümer und Pfandgläubiger waren in diesen Bereichen stets klar geschieden. Der Terminus ‚Sicherungsübereignung’, der sofortigen Eigentumsübergang an der ‚verpfändeten’ Sache impliziert, sei streng vom ‚aufgeschobenen Kauf’ zu trennen.

Nach dem im Titel gebrauchten Terminus *one en pistei* ist der Leser etwas überrascht, in den folgenden Abschnitten ausführlich über Sicherungsgeschäfte in demotischen Urkunden belehrt zu werden. Doch auch der nicht Sprachkundige kann erkennen, dass dort die sedes materiae für die am Verkauf orientierten Sicherungsgeschäfte liegt. Die aus dem frühen 3. Jh. v.Chr. aus der Thebais überlieferten „demotischen Kaufpfandverträge“ (Abschnitt II) enthalten Darlehen und Sicherungskauf gemeinsam in einer Urkunde. Sie sind aus dem niedrigeren Steuersatz (2% statt der Kaufsteuer von 5%) und den Daten der Abstandsurkunden als suspensiv (durch nicht fristgerechte Rückzahlung des Darlehens) bedingte Kaufgeschäfte zu erklären. Im Fayum, ebenfalls noch im 3. Jh., werden zwei von einander formal unabhängige Urkunden errichtet, wobei der Verkauf nicht durch Rückzahlung resolutiv (zu vermuten eventuell aus der Klausel, die berechtigenden Urkunden zurückzustellen), sondern ebenfalls suspensiv bedingt ist; das belegt auch hier der Steuersatz. Die Steuerquittungen gebrauchen für diese Kaufgeschäfte den griechischen Terminus *hypotheke*.

Aus dem 1. Jh. n.Chr. ist eine weitere Variante dieses Geschäftstyps überliefert: „Bilingual Fayum sale-loan contracts“ (III). Die Urkundenschreiber in Tebtynis formulierten in der ersten Kolumne des Papyrus einen formal selbständigen demotischen Kaufvertrag (*prasis* in der griechischen *subscriptio*, doch *hypotheke* in gelegentlichen amtlichen Vermerken auf dem *verso*) und daneben einen Darlehensvertrag auf Griechisch. Der Gläubiger hatte somit die Wahl, vor den römischen Gerichten das Darlehen einzuklagen oder sich an das ‚verpfändete’ Grundstück zu halten. Die in den Archiven der ägyptischen Familien verwahrten Dokumente zum Nachweis des Eigentums waren demotisch abgefasst. Die auffällige Tatsache, dass manche Kaufurkunden nur die Subskription des Schuldners tragen aber (noch) nicht den Vertragstext, ist damit zu erklären, dass das *grapheion* die Urkunden zunächst treuhänderisch verwahrte und dem Gläubiger erst nach Verzug des Schuldners voll ausgefertigt übergab; so fiel die Steuer erst mit Verfall des Pfandes an. „Unterbrochene Käufe“ ebenfalls mit Steuer sparendem Effekt — der Betrag wird nur für einen

eventuell eintretenden Pfandverfall in einer Bank hinterlegt — treten im 2.–1. Jh. v.Chr. in Pathyris in der Thebais auf (IV). Sie sind zwar griechisch abgefasst, entstammen jedoch dem ägyptischen Milieu. Diese Praxis knüpft an die dort schon früh verwendeten demotischen „Kaufpfandverträge" an.

Gegenüber dem Vortrag wesentlich vertieft ist der Abschnitt über die „*menein*-Kontrakte" (V). Die in (griechischen) Darlehensverträgen vom 1.–3. Jh. belegte Klausel, *kratesis* und *kyrieia* über die Pfandsache „bleiben" bei Verfall des Pfandes beim Gläubiger, scheint auf den ersten Blick für Sicherungsübereignung zu sprechen. Durch Parallelstellen entkräftet Alonso überzeugend den simpler Logik entspringenden Einwand „Wie kann etwas bleiben, was nicht schon vorhanden ist?" — Gemeint ist: das volle Herrschaftsrecht „verbleibt" ab Verfall des Pfandes unantastbar. Die Urkunden vermeiden das *hypotheke*-Formular (diese Bezeichnung findet sich allenfalls auf dem *verso*) und gewähren dem Gläubiger manchmal Rechte „wie nach einem Kauf" — und zwar einem aufgeschobenen. In den Abschnitten VI und VII mustert Alonso in Einzelexgesen griechische Verträge, die bisher — zu Unrecht — als Belege für Sicherungsübereignung in Betracht gezogen wurden; allein eine *antiparachoresis* („Rückübereignung") in MChr 234 (9 v.Chr.) aus römischem Milieu könnte einer *fiducia cum creditori contracta* entsprechen.

Nach all den Vorarbeiten im Bereich der alternativen und indirekten Überlieferung holt Alonso im letzten Abschnitt *„one en pistei"* (VIII) zum Schlag gegen den einzigen direkten Beleg für diese Wendung aus, MChr 233 (Pathyris, 111 v.Chr.), von Gradenwitz 1904 als fiduziarische Übereignung gedeutet. Die Lösung ist verblüffend einfach: Das Wort *pistis* ist nicht auf den Kauf zu beziehen, sondern es geht um „die Kaufurkunde in Treuhand des Archivs von Pathyris". Mit Pathyris in der Thebais schließt sich auch der Kreis der demotischen „aufschiebend bedingten Sicherungsverkäufe". Sowohl die in der Urkunde genannten Parteien als auch die das Archiv verwaltenden Agoranomen gehören dem ägyptischen Milieu an. Der Schuldner bewirkte die *lysis* (Entkräftung) der Kaufurkunde (ἐπελύσατο ... ὠνήν, Z. 2/3) durch Zahlung an die beiden Gläubiger, denen er (zu ergänzen: durch *prasis*) das Grundstück ‚verpfändet' hatte (ὑπέ|θετο, Z. 4/5). Hinter der vorliegenden, von den Gläubigern ausgestellten Quittungs- und Abstandsurkunde steht also keine Sicherungsübereignung, sondern ein oben (IV) beschriebener ‚unterbrochener Kaufvertrag' (Garantieverkauf) ägyptischer Tradition. [Die Abschnitte IX–XI sind zur Absicherung des Ergebnisses — auch gegen die dem Autor vorweg mitgeteilte ‚Antwort' — neu eingefügt. Sie lagen bei Abfassung der ‚Antwort' noch nicht vor und werden auch nicht kommentiert.]

Alonso hat sein negatives Ergebnis durch unvoreingenommenen Blick auf den griechischen Text der einzigen Belegstelle und minutiöse Interpretation der angeblichen Parallelstellen gewonnen. Verdienstvoll hat er die Brücke von MChr 233 zu den demotischen Urkunden geschlagen und die Garantieverkäufe in eine klare dogmatische Linie gebracht. Dem allen ist zuzustimmen. Dass die Wendung *one en*

pistei in den seit Gradenwitz neu gefundenen Papyri auch nirgends mehr aufgetreten ist, bestätigt Alonsos These. Der Gedanke einer ‚Sicherungsübereignung' entsprang der pandektistischen Zivilrechtswissenschaft der Jahre um 1900. Das deutsche Bürgerliche Gesetzbuch übernahm (für bewegliche Sachen) aus der germanistischen Tradition das ‚Faustpfandprinzip'. Hat der Darlehensgläubiger die verpfändete Sache in der Hand, ist er vor weiteren Verfügungen des Schuldners sicher. Um aber Produktionsmittel des Schuldners (Maschinen, Warenlager) zur Sicherung von Darlehen heranzuziehen, die Sachen aber, damit dieser die Rückzahlung erwirtschafte, in seiner Hand zu belassen, erfand die Praxis die Figur der Sicherungsübereignung: Da das BGB für den Erwerb des Eigentums keine Einigung über eine *causa* verlangt, sondern nur Übergabe und „Einigung über den Übergang des Eigentums" (§ 929), konnte man das Faustpfandprinzip leicht aushöhlen. Der Gläubiger hat als Eigentümer formal mehr Rechte, als ihm zustehen, ist aber treuhänderisch gebunden. Gedankliches Vorbild war die ebenfalls ‚abstrakt' (unabhängig von einem Erwerbsgrund, einer *causa*) konzipierte römische *mancipatio*, die als *mancipatio fiduciae causa* zur Sicherung einer Forderung eingesetzt werden konnte. Dadurch wurde der Gläubiger Eigentümer des Sicherungsobjekts und musste dieses in der Regel nach Erlöschen der Schuld durch *remancipatio* wieder zurück übertragen. Diese *fiducia cum creditori* im griechischen Recht in Gestalt einer *one en pistei* zu sehen, war aber doppelt falsch: zum einen war besitzloses Pfandrecht an allen Sachen möglich und man bedurfte keiner Umgehungsgeschäfte, zum anderen gab es keine Formalakte zur Übertragung des Eigentums (‚Eigentum' und Sicherungsrecht wurden durch Hingabe der Geldsumme erworben; das Sicherungsrecht erlosch, sobald der Gläubiger sein Geld zurück erhielt). Alonso hat den gedanklichen ‚Teufelskreis' der *fiducia* kühn durchbrochen.

Obwohl in dem Beitrag die Dogmatik des Kaufs im Vordergrund steht, nimmt Alonso nebenbei auch zur Konzeption des Eigentums Stellung. Er lehnt ‚funktional' zwischen Sicherungsgeber und -nehmer geteiltes Eigentum im Recht der Papyri ab: Die unterschiedlichen Steuersätze für Verpfändung und Eigentumsübertragung sowie die Vorschriften, beides jeweils unterschiedlich zu registrieren, würden zeigen, dass man genau zwischen Pfandgläubiger und Eigentümer unterscheiden konnte (vor Anm. 18). Das sei unbestritten. Endgültig und nur sicherungshalber übertragene Rechte werden vom Ergebnis her in jeder Rechtsordnung unterschieden. Doch deutet bereits der Umstand, dass für die Verpfändung überhaupt schon eine in Prozenten berechnete Steuer — und nicht bloß eine Registrierungsgebühr — eingehoben wurde, darauf hin, dass man das Sicherungsrecht parallel zum vollen Herrschaftsrecht betrachtete. Ein weiteres Kriterium wäre die ‚Sachverfolgung': wie waren beide Rechte jeweils gegen unberechtigte Dritte durchzusetzen? Schließlich müsste man den Inhalt der Befugnisse prüfen: wer hat welche Verfügungsmacht über die verpfändete Sache? Alonso hat die Befugnis des Schuldners zur Veräußerung des Pfandobjekts sicherlich zu recht bejaht (Anm. 17), verneint aber die Möglichkeit der mehrfachen Verpfändung (Anm. 153). Für das Gegenteil scheint eher die Tatsache zu sprechen, dass die *hypotheke*-Urkunden (schon seit dem frühesten Beleg aus Athen,

Dem. 35, 10–13) dies in stereotypen Klauseln verbieten — warum sollte man etwas rechtlich gar nicht Mögliches auch noch verbieten? Wie man sich die Rechtslage zwischen den drei beteiligten Personen (im System des ‚Verfallspfands') vorstellen kann, habe ich in Symposion 2007, 184–86 (s. Bibliographie Alonso) skizziert. Abgesehen davon unterliegt die Aufteilung der Befugnisse der privaten Vereinbarung zwischen Pfandgläubiger und -schuldner (z.B. über ein von der verpfändeten Sklavin geborenes Kind, Anm. 99 und 25). All das war nicht unmittelbar Gegenstand des Beitrags. Es würde sich lohnen, die Dogmatik der Sicherungsrechte in einer Rechtsordnung neu zu durchdenken, welche die Figur des ‚beschränkten dinglichen Rechts an fremder Sache' nicht kannte.

Verdienstvoll hat Alonso über den Bereich der griechischen Papyrologie hinausgeblickt und programmatisch die „Fortsetzung ägyptischer Praktiken in einer neuen Sprache" (so bei Anm. 29) untersucht. Dabei hat er vielleicht die Einheit des griechischen Rechts etwas aus den Augen verloren. Wer die Diskussion der Sicherungsrechte in den klassischen und hellenistischen Inschriften vor Augen hat, sieht in den demotischen Texten viel Bekanntes. Fragt man (als Nicht-Papyrologe) naiv nach den von Alonso apostrophierten ägyptischen Praktiken, findet man keinerlei ägyptische Vorläufer der demotischen ‚Garantieverkäufe'. Sie setzen erst ein bis zwei Generationen nach Etablierung der ptolemäischen Herrschaft ein. Sie scheinen von der Idee her ein rein griechisches Konzept zu verwirklichen, nämlich die *prasis epi lysei*, allerdings im Gewand ägyptischer Urkundenformen. Diese Vermutung ist allerdings aufgrund der Quellenlage kaum zu verifizieren. Aus den griechischen Poleis ist nämlich keine einzige Urkunde eines ‚Verkaufs auf Lösung' überliefert, sondern nur Auszüge davon auf den Pfand-*horoi*, diese allerdings in großer Zahl. Wir wissen also nicht, ob nicht bereits in den Poleis Sicherungsgeschäfte durch aufschiebend bedingte Garantieverkäufe abgeschlossen wurden. Abgesehen von dem einzigen vollen Zitat eines Seedarlehens in Dem. 35, 10–13 liegt auch das Formular der *hypotheke* völlig im Dunkeln. Eine nicht mehr ganz neue Überlegung hilft vielleicht weiter. *Hypotheke* und *prasis epi lysei* sind keine unterschiedlichen Sicherungsrechte, sondern zwei Formulare für ein einheitliches Geschäft. Das beweist die Terminologie, die beides mit Formen von *hypotithenai* wiedergibt — was, wie oben gezeigt wurde, auch für die griechischen Bezeichnungen der ‚Garantieverkäufe' zutrifft. Nach dem Befund der *horoi* nennt die *prasis epi lysei* in der Regel einen Garanten (*bebaiotes*) für den Fall der Eviktion und wird für die Verpfändung von Grundstücken verwendet. Das einzige Beispiel einer *hypotheke* betrifft bewegliche Sachen und steht ohne Garanten, doch wäre es zu gewagt, dies zu verallgemeinern. Überträgt man den Befund, dass die beiden Formulare rechtlich zu demselben Ergebnis geführt haben, auf das ptolemäische Ägypten, könnte man die demotischen Garantieverkäufe als gautypische, regionale oder personale Ausprägungen des griechischen Geschäftstypus *prasis epi lysei* ansehen, während der griechische Teil der Bevölkerung sich des *hypotheke*-Formulars bediente. Ausgestattet mit der *bebaiosis*-Klausel leistete dieses jedenfalls dasselbe wie der Garantieverkauf.

Aus welchen Gründen das *prasis*-Formular keine allgemeine Verbreitung erfuhr, wäre zu überlegen. Vielleicht klammerte sich die Besteuerung allmählich (endgültig dann in römischer Zeit) an das Wort „Verkauf", weshalb die *menein*-Urkunden dann auf die Wendung „wie nach einem Kauf" auswichen (Anm. 113). Im Rahmen einer ‚Antwort' auf einen durch und durch soliden, originellen Beitrag können die soeben skizzierten Gedanken verständlicherweise nicht in ebenbürtiger Form ausgearbeitet werden.

Abschließend ist zu betonen, dass Alonso nicht nur mit dem vorliegenden Beitrag den Typus der Sicherungsübereignung, die *one en pistei*, aus dem Kanon der Sicherungsrechte ausgeschieden hat; er hat bereits früher das *hypallagma* entzaubert (JJP 38, 2008, 19–51). Dieses ist kein Sicherungsrecht mit Übergabe des Grundstücks, sondern ein Geschäft, welches durch Übergabe der Eigentumsurkunden an den Gläubiger („Austausch" gegen die Darlehensvaluta) den Schuldner zwar nicht rechtlich, jedoch rein faktisch wirksam daran hindert, die verpfändete Sache einem Dritten zu veräußern. Zieht man ein Resümee aus Alonsos Forschungen, verbleibt nach dem Befund der Papyrusurkunden neben dem Faustpfand (*enechyron*) ein einziger Typus von besitzlosen Sicherungsrechten übrig, die *hypotheke*, die auch in der Form des Garantieverkaufs abgeschlossen werden konnte. Das entspricht genau dem Standard der übrigen griechischen Überlieferung. Man sollte sich vielleicht hüten, vom „Recht der Papyri" zu sprechen. Wir haben in den auf Papyrus dokumentierten privatrechtlichen Beziehungen griechische Rechtseinrichtungen vor uns, die ihren Ausdruck in unterschiedlichen Geschäftsformularen fanden.

ALBERTO MAFFI (MILANO)

RIFLESSIONI SU *DIKAI EMPORIKAI* E PRESTITO MARITTIMO[1]

1. Benché restino molte incertezze, si potrebbe pensare che, in assenza di nuove fonti, sulle *dikai emporikai* si sia detto tutto.[2] Tuttavia mi sembra che esse siano state studiate prevalentemente come un istituto a se stante, di cui vengono esaltati gli elementi di novità e di progresso,[3] senza tentare di collocarle nel quadro più ampio della disciplina giuridica dei rapporti commerciali fra V e IV secolo. Le nostre informazioni sono fatalmente orientate dalle cinque orazioni del *corpus demosthenicum* (32, 33, 34, 35, 56), in quanto esse costituiscono in pratica la nostra unica fonte. Sappiamo che le *dikai emporikai* venivano considerate una specifica categoria di azioni giudiziarie perché in AP 59.5 esse sono classificate fra le cause di competenza dei Tesmoteti, fra cui rientrano però, si noti, anche le *dikai apo symbolon* (59.6). Vorrei anche far notare che l'aggettivo *emporikos* qualifica anche altri fenomeni attinenti al commercio, in primo luogo i συμβόλαια.[4] Le *dikai emporikai* erano certamente previste e disciplinate dai *nomoi*

[1] *Questo contributo intende rappresentare un omaggio a Julie Vélissaropoulos per i 35 anni del suo fondamentale libro sul commercio marittimo greco.*

[2] Le più recenti opere di riferimento restano Cohen 1973 (a cui si aggiungono Cohen 2004 e 2015) e Vélissaropoulos 1980.

[3] Mi riferisco in particolare ai contributi di Paoli 1930 e di Gernet 1955. Il Paoli considera l'istituzione delle *dikai emporikai* come un passo significativo verso la creazione di un diritto commerciale diverso dal diritto applicabile ai cittadini ordinari (lo sottolinea Todd 1993, p. 322-323, che tende invece ad attenuare gli elementi di novità apportati dalle *dikai emporikai*).

[4] Un'iscrizione di IV sec. a.C., l'iscrizione di Socle (IG II^2 411), oggetto di acceso dibattito fra

emporikoi, di cui si parla in Dem. 35.3. Benché le *dikai emporikai* non siano menzionate in altre città,[5] troviamo un riferimento ai *nomoi emporikoi* a Mileto.[6] Riesaminando alcune caratteristiche delle *dikai emporikai*, quali emergono dalle cinque orazioni del *corpus*, vorrei offrire qualche spunto di riflessione per tentare di comprendere le ragioni che spinsero i governanti ateniesi a inserire questo strumento giudiziario nel quadro giuridico ed economico dell'Atene del IV secolo.

2. Esaminiamo dapprima i soggetti che appaiono in qualità di attori e di convenuti nelle *dikai emporikai*. Benché si tratti di cause relative al trasporto di merci da Atene verso un porto straniero e/o viceversa, i soggetti interessati non devono essere necessariamente stranieri, anche se nelle cinque orazioni del *corpus* o l'attore o il convenuto lo sono. Da questo punto di vista le *dikai emporikai* si distinguono dalle procedure giudiziarie relative ai rapporti fra cittadini e stranieri, cioè dalle *dikai apo symbolon*, basate su accordi internazionali bilaterali che assicuravano tutela giudiziaria presso i propri organi giurisdizionali ai cittadini della città controparte.[7] Non sempre è facile stabilire se gli stranieri che compaiono nelle orazioni commerciali del *corpus* siano meteci, ossia stranieri residenti ad Atene, oppure stranieri di passaggio. A questo proposito sarebbe interessante capire se il soggiorno ad Atene per motivi processuali costringesse uno straniero a diventare meteco.[8] In ogni caso la presenza di stranieri in tutte le orazioni considerate giustifica l'inserimento delle *dikai emporikai* nel quadro dei rapporti fra cittadini e stranieri. Le *dikai emporikai* sono dunque considerate dalla dottrina prevalente come un progresso rispetto alle *dikai apo symbolon*. Infatti, mentre queste ultime consentivano l'accesso ai tribunali ateniesi solo ai cittadini della città controparte, le *dikai emporikai* avrebbero consentito a qualunque straniero (non soltanto di stirpe greca), indipendentemente dall'esistenza di un accordo giudiziario, di adire i tribunali ateniesi e di ottenere così giustizia nei confronti di un cittadino o di un meteco ateniese o anche di uno straniero appartenente a un'altra città, ma che avesse concluso con lui un contratto per il trasporto di merci da o verso Atene. Non solo agli stranieri, ma perfino agli schiavi sarebbe stato consentito essere parti in una *dike emporike*.[9]

La legittimazione a stare in giudizio in una *dike emporike* non dipende dunque dall'appartenenza a una determinata polis, quindi da una qualificazione giuridica, bensì

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gli studiosi, utilizza l'aggettivo, in un contesto purtroppo mutilo, apparentemente con riferimento alle *dikai*: v. Vélissaropoulos 1980, p. 240, e, da ultimo, Lambert 2010. Più avanti nel tempo, il decreto attico sui pesi e le misure – IG II^2 1013 – introdurrà la mina commerciale (*mna emporike*).

[5] C'è però chi ritiene che fossero in uso a Siracusa, a Marsiglia, a Bisanzio e forse in altre città: Cohen 1973, p. 69 ss.; Pébarthe 2007, p. 164

[6] Vélissaropoulos 1980, p. 240

[7] Sulle *dikai apo symbolon* resta fondamentale Gauthier 1972

[8] Cohen 1973, p. 54 ss., secondo cui i mercanti stranieri rimanevano a svernare ad Atene; *contra* Hansen 1983. Si veda anche Paoli 1930 a proposito del decreto a favore dei Sidonii (Syll.^{3} 185) che li esenta dall'obbligo di diventare meteci.

[9] Il riferimento è qui generalmente alla figura di Lampis, dal controverso statuto, che appare in Dem. 34.

da una qualifica socio-economica, quella di commerciante (*naukleros* o *emporos*). E' quanto risulta dal contenuto della legge regolatrice delle *dikai emporikai* riferito in Dem. 32.1:

> Οἱ νόμοι κελεύουσιν ... τὰς δίκας εἶναι τοῖς ναυκλήροις καὶ τοῖς ἐμπόροις τῶν Ἀθήναζε καὶ τῶν Ἀθήνηθεν συμβολαίων, καὶ περὶ ὧν ἂν ὦσι συγγραφαί.
>
> "Le leggi ordinano che i comandanti (*naukleroi*) e i commercianti (*emporoi*) abbiano la possibilità di agire in giudizio in relazione a rapporti obbligatori (*symbolaia*) che siano finalizzati al trasporto di merci da e per Atene e che siano documentati per iscritto (*syngraphai*)."

Tuttavia non esisteva un albo dei commercianti o qualche altro strumento ufficiale di attribuzione della qualifica di commerciante.[10] D'altronde le situazioni che ci vengono presentate nelle cinque orazioni del *corpus* non lasciano spazio per contestazioni di questo genere. Essendo il presupposto dell'azione un *daneion nautikon*, è chiaro che tutti i mutuatari sono commercianti. Occorre però tener conto di Lys. 17.5 (databile all'inizio del IV sec.), dove sono i soggetti convenuti in giudizio di fronte a un tribunale ordinario[11] ad eccepire (mediante *paragraphe*?) la loro qualifica di *emporoi*, costringendo così l'attore a intentare nuovamente l'azione presso i magistrati competenti per le cause commerciali, che in questo caso risultano essere i *nautodikai*. Non sappiamo se la dichiarazione di incompetenza fosse rimessa a una decisione del magistrato istruttore o se fosse necessaria una sentenza del tribunale.

3. Vediamo ora quali cause davano luogo a una *dike emporike*. Da Dem. 32.1, sopra citato, e da Dem. 33.1, in cui si dice che le azioni spettano a *emporoi* e *naukleroi*, qualora subiscano offesa nell'*emporion* (ἀδικῶνται ἐν τῷ ἐμπορίῳ), la dottrina ha ricavato tre diverse definizioni: a) inadempimento di rapporti obbligatori (*symbolaia*) relativi a un trasporto di merci da o per Atene,[12] purché l'attore faccia valere una pretesa basata su un contratto scritto (*syngraphe*); b) inadempimento di *symbolaia* relativi a un trasporto di merci da o per Atene, a cui si aggiunge qualsiasi altro rapporto obbligatorio purché basato su una *syngraphe*;[13] c) oltre alle ipotesi previste in a) e/o b) si possono far valere mediante *dike emporike* rapporti obbligatori nascenti da un illecito, da un delitto, di cui sia vittima

[10] Infatti Paoli 1930, p. 101, sostiene che il criterio di appartenenza era quello della "notorietà".

[11] Non sappiamo se si tratta di cittadini ateniesi o di meteci ad Atene. Secondo Gernet 1956, p. 179, sono cittadini.

[12] Si incontra anche la variante "ad Atene e verso Atene" (Dem. 34.4 e 42), che però deve ritenersi equivalente alla versione "da Atene o verso Atene". Se infatti fossero ammissibili solo controversie scaturite da contratti conclusi ad Atene e non altrove, la pretesa di Zenotemide in Dem. 32 non sarebbe stata ricevibile. Ma nessuno dei suoi avversari (Proto e poi Demon) solleva obiezioni su questo punto.

[13] E' la c.d. interpretazione disgiunta di Dem. 32.1, sostenuta in particolare da Gernet 1955, p. 187 ss., e ripresa da Vélissaropoulos 1980, p. 237

un commerciante.[14] Ritengo che l'ipotesi a) sia da condividere,[15] pur essendo consapevole che in questo modo la portata delle *dikai emporikai* risulta notevolmente limitata: infatti tramite queste azioni si potrebbero far valere in pratica soltanto pretese derivanti dall'inadempimento di un contratto di trasporto e di un contratto di prestito marittimo, purché documentato per iscritto. Se poi si accetta il punto di vista di Vélissaropoulos, secondo cui il contratto di trasporto non era normalmente riversato in un documento scritto,[16] rimane soltanto il contratto di prestito, come d'altronde confermano le cinque orazioni del *corpus*. E' vero che dalle medesime orazioni risultano intentate anche azioni che non sono strettamente finalizzate a far valere un inadempimento contrattuale, ma, a ben guardare, sono sempre connesse a un prestito originario.[17]

4. Consideriamo ora le *dikai emporikai* dal punto di vista dell'ordinamento processuale ateniese. A questo scopo è opportuno porsi in una prospettiva storica, tenendo conto anche del fatto che il *daneion nautikon*, con le sue peculiari caratteristiche, era probabilmente in uso ben prima della metà del IV secolo. Si deve quindi ritenere che le pretese da esso nascenti, prima della creazione delle *dikai emporikai*, trovassero riconoscimento soltanto attraverso le *dikai apo symbolon,* oppure che esistesse già una giurisdizione commerciale presso la quale avevano accesso anche gli stranieri indipendentemente dall'esistenza di un trattato di "assistenza giudiziaria"? Se prestassimo fede a Dem. 7.12,[18] uno dei passi più frequentemente citati in dottrina in quanto uno dei pochissimi che menziona le *dikai emporikai*, sembrerebbe che le *dikai emporikai* abbiano effettivamente sostituito le *dikai apo symbolon*. Ma sappiamo che così non fu, dato che in AP 59 i Tesmoteti sono competenti per entrambi i tipi di azioni; tuttavia si potrebbe ricavare dal passo demostenico che lo straniero non protetto da un trattato non potesse far valere ad Atene una pretesa derivante da un contratto di prestito marittimo (quindi dovesse aspettare che il suo debitore ateniese si recasse nella propria città, salvo ricorrere a quella sorta di rappresaglia chiamata *sylai*[19]). E' anche vero, però, che fin dal V secolo sono menzionate ad Atene delle magistrature dai nomi chiaramente riferiti alla giurisdizione commerciale, come i *nautodikai* sopra citati, che sarebbero quindi stati competenti a conoscere di cause in cui fossero parti anche stranieri indipendentemente dall'esistenza di un *symbolon* fra Atene e la loro patria. Non essendo questo il luogo per

[14] E' questa la tesi sostenuta in particolare da Paoli 1930, p. 104 s. e ultimamente da Harris (c.d.s.). Contra Cohen 1973, p. 105 n. 19.

[15] E' la tesi sostenuta dalla maggioranza della dottrina: Cohen 1973, Isager-Hansen 1975, Vélissaropoulos 1980

[16] Vélissaropoulos 1980, p. 237

[17] Non è qui possibile un esame dettagliato di tutti i processi documentati dalle cinque orazioni Non mi sembra certo, ad es., che l'azione intentata da Zenotemide contro Proto (Dem. 32. 29) rientri fra le *dikai emporikai*.

[18] V. Gauthier 1972, p. 170 s. Si noti come da Dem. 7. 11-12 risulti abbastanza chiaro che l'oratore pensa ai rapporti fra Macedonia e Atene nel V secolo, all'epoca dell'egemonia ateniese estesa anche all'Egeo settentrionale.

[19] Sulle *sylai* ancora fondamentale Bravo 1980, a cui si aggiunge da ultimo Bravo 2011.

riesaminare tutta la documentazione relativa a queste figure di magistrati giusdicenti,[20] mi limiterò a fare riferimento a due testi chiave per collocare le *dikai emporikai* nel contesto dell'ordinamento processuale ateniese più o meno contemporaneo alla loro apparizione. Mi riferisco ai *Poroi* di Senofonte, opera datata al 355, e alla legge di Nicofonte sulla moneta, datata secondo l'opinione dominante al 375.[21]

5. Iniziamo con Xen. *Poroi* 3.3:

> εἰ δὲ καὶ τῇ τοῦ ἐμπορίου ἀρχῇ ἆθλα προτιθείη τις ὅστις δικαιότατα καὶ τάχιστα διαιροίη τὰ ἀμφίλογα, ὡς μὴ ἀποκωλύεσθαι ἀποπλεῖν τὸν βουλόμενον, πολὺ ἂν καὶ διὰ ταῦτα πλείους τε καὶ ἥδιον ἐμπορεύοιντο.
>
> Or again, supposing prizes were offered to the magistrates in charge of the market for equitable and speedy settlements of points in dispute to enable anyone so wishing to proceed on his voyage without hindrance, the result would be that far more traders would trade with us and with greater satisfaction. (trad. Loeb)

Quel che ci interessa è la raccomandazione che la *arche tou emporiou* giudichi in modo più giusto e più rapido le controversie in cui sono parti i commercianti.[22] La legge di Nicofonte ha reso plausibile l'ipotesi che l'autorità portuale, indicata genericamente come *arche*, fosse identificata da Senofonte con gli *epimeletai tou emporiou* (menzionati alla l. 21-22 della legge), non con i *nautodikai*, come ancora riteneva Gernet che scriveva ovviamente prima che la legge di Nicofonte fosse scoperta.[23] Se dunque gli *epimeletai tou emporiou* erano per Senofonte la "magistratura dell'*emporion*", se ne ricava che, anche prima dell'istituzione delle *dikai emporikai*, esisteva una giurisdizione commerciale diversa da quella competente per le *dikai apo symbolon* (che fosse ancora il Polemarco, come probabilmente era nel V sec., oppure i Tesmoteti). Ammesso che così fosse, si pongono vari interrogativi. Chi aveva diritto di adire gli *epimeletai*? Oltre ai cittadini e ai meteci ateniesi qualunque straniero, come sarà poi nelle *dikai emporikai*? Possiamo pensare che questi commercianti stranieri venissero a cercare finanziamenti presso i cittadini e i meteci ateniesi? E quale tipo di procedura aveva in mente Senofonte auspicando una maggiore celerità da parte dei magistrati? Soffermandoci a considerare quest'ultima questione, va osservato prima di tutto che Senofonte non propone un mutamento nella procedura per rendere più spediti i giudizi (come sembra essere avvenuto grazie alle *dikai emporikai*), ma propone semplicemente dei premi secondo

[20] V. Cohen 1973 e Vélissaropoulos p. 271 ss.

[21] V. Stroud 1974.

[22] V. Gauthier 1976.

[23] Gernet 1955, p. 180 e 183 n. 7, riteneva che gli *epimeletai tou emporiou* fossero stati creati dopo l'introduzione nell'ordinamento attico delle *dikai emporikai*. Si potrebbe tuttavia ritenere che Senofonte indicasse con arche tutti i magistrati competenti per questioni legate al commercio, compresi quindi i *sitophylakes*. Una questione che non mi pare sia stata discussa in dottrina e che non è qui possibile approfondire, è se la legge di Nicofonte si applicasse anche alla restituzione del denaro ricevuto a mutuo da un *emporos* o da un *naukleros*.

una prassi comune ad Atene nel IV secolo. Se si prende alla lettera il testo di Senofonte, si direbbe che abbia in mente un modo di procedere diverso da quello attestato dalla legge di Nicofonte: "dirimere le cause più rapidamente e più giustamente" fa pensare che siano i magistrati a decidere, non il tribunale popolare, qualunque sia il valore della causa.[24] Tuttavia, se riteniamo che la magistratura portuale a cui pensava Senofonte fossero appunto gli *epimeletai*, la testimonianza della legge di Nicofonte induce a configurare un quadro diverso. Nella legge, infatti, la giurisdizione degli *epimeletai* si conforma a un principio che vale ancora per i Quaranta, stando alla testimonianza di AP 53.1: potere di decidere autonomamente per cause di valore inferiore a 10 dracme; al di sopra di tale somma la competenza passa al tribunale popolare, convocato dai Tesmoteti e presieduto dagli stessi *epimeletai*.

6. Se dunque, sulla base di Xen. *Poroi* 3.3 e della legge di Nicofonte, ammettiamo che una giurisdizione commerciale affidata agli *epimeletai tou emporiou* esistesse anche prima, dobbiamo chiederci quali siano state le novità introdotte con l'istituzione delle *dikai emporikai*.[25] Prima di tutto sembra che, rendendole "mensili", si sia realizzato l'auspicio di Senofonte che le cause commerciali fossero condotte con maggiore rapidità. Non siamo in grado di dire se a questa maggiore rapidità possa aver contribuito il passaggio ai Tesmoteti della competenza in materia di *dikai emporikai* (anche perché non sappiamo se tale competenza sia stata stabilita nel momento della istituzione delle nuove azioni o successivamente[26]). Di solito in dottrina la rapidità della nuova procedura viene fatta dipendere soprattutto dall'assenza della fase dell'arbitrato pubblico obbligatorio. Ma il fatto stesso che la competenza fosse passata ai Tesmoteti dovrebbe suscitare qualche dubbio sulla rapidità della nuova procedura. Intanto attribuire la competenza ai Tesmoteti significava, fra l'altro, indirizzare cittadini e meteci ateniesi a un magistrato che non era normalmente competente per le cause private che riguardavano questi soggetti. Iniziava quindi un'istruttoria, che possiamo supporre complessa e non breve:[27] si consideri, ad es., che, mentre l'*epimeletes* aveva presumibilmente il suo ufficio nel porto, e poteva quindi avere immediata e diretta conoscenza dei soggetti e dell'oggetto della controversia, nonché delle eventuali testimonianze (si pensi alla vicenda di Dem. 32), il tesmoteta, che conduceva l'istruttoria ad Atene, acquisiva solo in via indiretta, cioè attraverso le dichiarazioni delle parti e dei testimoni, gli elementi utili a impostare la causa. Senza contare che i tesmoteti erano competenti per molte altre cause di grande importanza, il che doveva rendere tanto più difficile rispettare il carattere mensile delle *dikai emporikai*. Da questo punto di vista, quindi, il fatto che non fosse previsto il ricorso obbligatorio all'arbitro

[24] Modalità di decisione diretta a cui sembra alludere l'uso del verbo *ekdikazein* in Lisia (17.5) con riferimento ai *nautodikai*. V. Cohen 1973, p. 22

[25] Secondo Gauthier 1972, p. 203, sarebbero state istituite perché dopo la guerra sociale risultava difficile creare nuovi symbola, ossia trattati di assistenza giudiziaria.

[26] Secondo Cohen 1973, p. 185 s. inizialmente la competenza era degli *eisagogeis* (AP 52.2) e solo dopo il 330 sarebbe passata ai Tesmoteti.

[27] Cohen 1973, p. 40, sostiene che non vi era *anakrisis,* ma non motiva questa affermazione.

pubblico non doveva realizzare un risparmio di tempo veramente significativo, come invece ritiene la dottrina praticamente unanime. A ciò si aggiunga naturalmente la necessità di convocare il tribunale popolare rispettando un calendario di udienze in cui erano certamente presenti molte altre cause di carattere non commerciale (non sembra plausibile infatti l'ipotesi, in passato discussa in dottrina, che i componenti del tribunale fossero scelti in base alla loro appartenenza al ceto commerciale[28]). Occorreva poi preparare il discorso da pronunciare dinanzi al tribunale.[29] Dunque un altro fattore che non doveva certo favorire la rapidità del processo (e d'altronde quale avrebbe potuto essere la sanzione se non fosse stato rispettato il termine di un mese per giungere alla sentenza? Forse i tesmoteti sarebbero stati chiamati a risponderne in sede di *euthynai*? Sembra improbabile).

7. A parte il mutamento di magistratura competente (dagli *epimeletai* ai Tesmoteti), la novità maggiore potrebbe essere consistita in una definizione legislativa, prima assente, dei presupposti per avvalersi della nuova procedura. La legge avrebbe così previsto misure a difesa soprattutto dei commercianti stranieri, come l'esigenza di basare le proprie pretese su un documento scritto, la possibilità di difendersi mediante *paragraphe* e i mezzi per respingere gli attacchi dei sicofanti.[30] In questo modo sarebbe stato realizzato l'altro auspicio di Senofonte, quello di assicurare una giustizia "più giusta" ai commercianti stranieri.

8. Per quanto riguarda il requisito del contratto scritto, mi sembra che si spieghi con il fatto che i contraenti possono provenire da *poleis* diverse o addirittura da paesi non greci, quindi fare riferimento ad ordinamenti giuridici anche molto diversi fra loro. E' perciò essenziale che le clausole contrattuali siano formulate in modo chiaro ed esauriente: la stessa dichiarazione che il contratto prevarrà su qualunque altra fonte del diritto (che leggiamo nel contratto della *c. Lacritos*) serve a evitare che contraenti appartenenti a stati diversi possano eventualmente appellarsi a norme peculiari al proprio ordinamento, sulla base delle quali avanzare pretese non riconosciute dall'ordinamento della controparte. Nello stesso tempo il contratto scritto (di cui, se del caso, veniva data lettura in dibattimento) doveva anche servire da guida ai giudici: se è vero infatti, come ha insegnato H.J. Wolff 1979, che i tribunali delle *poleis* applicavano esclusivamente il proprio diritto, tuttavia i giudici ateniesi non avranno potuto ignorare clausole contrattuali che non risultassero in evidente contrasto con le leggi ateniesi. Le stesse regole in materia di prestito marittimo dovevano essere basate su usi commerciali panellenici.

9. Con la *paragraphe*[31] si estendeva agli stranieri un istituto che era stato fino ad allora riservato ai cittadini (e probabilmente) ai meteci ateniesi. Con la *paragraphe* il commerciante straniero poteva difendersi più efficacemente contro pretese basate su un diritto di credito fin dall'inizio inesistente oppure venuto meno per estinzione

[28] Cohen 1973, p. 93 ss.
[29] Sul carattere più "giuridico" dei discorsi relativi a controversie commerciali v. Lanni 2006.
[30] Dem. 58.10: Gernet 1955, p. 184; Cohen 1973, p. 88
[31] Fondamentale in proposito resta Wolff 1966

dell'obbligazione. Nello stesso tempo, però, consentiva ad Atene di conseguire due vantaggi: da un lato rafforzava il suo potere finanziario e dall'altro aumentare il volume dei traffici facenti capo al suo porto. Consideriamo più da vicino queste due motivazioni. Per quanto riguarda la prima sappiamo che le *dikai emporikai* permettevano a qualunque straniero di far valere di fronte a un tribunale ateniese le pretese nascenti da un prestito marittimo stipulato ad Atene: in questo modo si rendeva più vantaggiosa, da parte di chiunque avesse a disposizione un certo capitale, la concessione di prestiti in uno dei maggiori porti greci di quel periodo. Personaggio emblematico in questo senso potrebbe essere il Bosporano, protagonista dell'incontro/scontro con Pasione nel *Trapezitico* di Isocrate, il quale probabilmente utilizzava almeno una parte del denaro depositato in banca per concedere prestiti marittimi ai commercianti che facevano capo al Pireo. Per quanto riguarda la seconda, il fatto che una *dike emporike* potesse essere intentata solo se le merci erano destinate a partire da Atene o ad arrivare ad Atene, tendeva a privilegiare i flussi commerciali da e verso Atene. Quindi incoraggiava i commercianti a prendere Atene come base per i loro traffici. La *paragraphe* doveva dunque servire a rafforzare sul piano giudiziario gli scopi che, secondo me, il legislatore ateniese si proponeva istituendo le *dikai emporikai*. Se ci poniamo in questa prospettiva, risulta forse più facile risolvere un altro problema che la dottrina si è posto. Nel caso in cui il convenuto risulti vincitore nel giudizio paragrafico, dimostrando quindi che non vi erano i requisiti per poter intentare una *d.e.*, era possibile per l'attore ripresentare la propria pretesa attraverso un'azione "non commerciale"[32]? Io credo che la risposta debba essere negativa, non solo per il principio del *ne bis in idem*, ma perché una simile possibilità avrebbe molto attenuato la tutela che si intendeva assicurare ai commercianti e agli uomini d'affari.

10. Se è indubbio che attraverso il regime delle *dikai emporikai* si favoriva la libertà di commerciare (come viene lucidamente riconosciuto in Dem. 7.12), è anche vero che Atene poneva a questa libertà un limite dovuto alla superiore esigenza di assicurare il rifornimento di grano (e forse anche di altre merci di prima necessità) alla città.[33] Nelle cinque orazioni del *corpus* ci si riferisce infatti ad almeno tre leggi che ponevano dei vincoli alla libertà commerciale.[34] Veniva cioè stabilito il divieto per cittadini e meteci ateniesi di trasportare grano in porti diversi da Atene; il divieto di prestare denaro per trasportare grano in luoghi diversi da Atene; l'obbligo di smerciare i due terzi di ogni carico di grano sull'agora ateniese.[35] Il rispetto di queste disposizioni di legge era assicurato mediante strumenti pubblicistici come la

[32] La questione è vivacemente dibattuta in dottrina: v. Vélissaropoulos 1980, p. 266 s.

[33] Sviluppo qui un punto di vista già espresso da Gernet 1955, p. 183 s, e ripreso da Vélissaropoulos 1980, p. 236 ss.

[34] V. Gernet 1955, p. 182; Migeotte 2010, p. 33

[35] E' merito di Gauthier 1981 (= 2011) aver chiarito che il terzo residuo era destinato al mercato del Pireo. Un punto da approfondire resta la relazione fra le regole a tutela dei finanziatori, in particolare per quanto riguarda l'esercizio della garanzia sul carico, e le regole, di carattere pubblicistico, relative allo smercio del grano sotto il controllo dei magistrati addetti.

phasis,[36] di competenza, secondo AP 51 (e Dem. 35.51 e 58.5-13), degli *epimeletai tou emporiou*. Tuttavia potevano anche fornire lo spunto per una *paragraphe* da parte di uno straniero nei confronti di un prestatore ateniese. Infatti la legge aveva come destinatari soltanto cittadini e meteci ateniesi (Dem. 35. 50-51).[37] Accanto alle misure destinate a provvedere la città di grano pubblico (egregiamente illustrate ora dalla legge di Agirrio[38]), Atene si avvaleva anche delle facilitazioni al commercio introdotte mediante le *dikai emporikai* per incrementare i rifornimenti di grano attraverso il commercio privato.

11. Attraverso una rinnovata analisi delle caratteristiche delle *dikai emporikai* ho cercato di congetturare quali potessero essere le ragioni di politica economica che spinsero il legislatore ateniese, verso la metà del IV sec., a introdurre le *dikai emporikai*. Il motivo principale mi sembra sia stato quello di attirare ad Atene non solo commercianti e proprietari di navi, ma anche finanziatori, aumentando così il giro d'affari del porto. Le *dikai emporikai* sono caratterizzate nelle fonti dalla rapidità della procedura. Tuttavia la scelta di un processo ordinario di fronte al tribunale popolare testimonia di un'esigenza concorrente, che è quella di mettere sotto il controllo del tribunale cittadino il commercio di alcuni prodotti di vitale importanza per Atene, in particolare il grano. Le caratteristiche delle *dikai emporikai* realizzano così due interessi potenzialmente contrastanti: da un lato attirare il maggior numero possibile di commercianti e di finanziatori, ma dall'altro sfruttare i canali del commercio privato per soddisfare esigenze pubbliche di primaria importanza.

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[37] Vélissaropoulos 1980, p. 238, sostiene che gli stranieri erano comunque tenuti a rispettare un'ulteriore legge ateniese che imponeva di condurre la nave alla destinazione stabilita dal contratto. A me pare, però, che Dem. 56.10 si riferisca alla legge sul grano, come sosteneva Gernet nel suo commento all'orazione, p. 139 n. 3.

[38] V. Magnetto, Erdas, Carusi 2010

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DIKAI EMPORIKAI. RESPONSE TO ALBERTO MAFFI

Prof. Maffi has taken up a topic that unfolds like complex origami to reveal a multitude of questions. The topic of *dikai emporikai* is a very narrow issue, but is a topic that contains mysteries of procedure and substance, as well as raising public policy issues that are critical to the economic power of Athens.

So what value can I add to this discussion? I will attempt to provide an interdisciplinary perspective that springs from my training as a lawyer and my work in other ancient legal systems, such as Islamic law. I will certainly not neglect the Greek text, but my comments will largely come from my work in comparative law and the modern practicalities of commercial practice (the underlying principles of which do not differ much from the ancient practicalities). Of course, I will do so fully aware of the dangers of projecting modern practice and perceptions onto ancient society. My time is limited and so my comments must be as well. I will address four issues. While the first part of my response is a direct reaction to Prof. Maffi's paper, the remaining parts will slowly turn toward my own particular interests regarding *dikai emporikai*. Here are the issues I will address in the second point:

1. *Why did Athens create a special commercial court?*

2. *Why was a written contract a requirement of the commercial court's jurisdiction?*

3. *What should we make of the Athenian impulse for the lender to share in the borrower's risk?*

I will first take up the general concept of commercial courts. Prof. Maffi opens his paper with the question of why a commercial action was created in Athens.

My starting point here will be to answer the question from a modern perspective. Commercial courts are not unique to ancient Athens. They exist today in many, if not all, of the fifty United States. The rationale for creating a special court for commercial matters is generally described as two-pronged. First, the speed of the proceedings benefits parties who need to continue with their business. Second, the expertise of judges who hear commercial cases repeatedly results in a more consistent and fair application of the law. These reasons for creating *dikai emporikai* have been raised by commentators repeatedly and evidence in support of these reasons can be found in the ancient texts. However, an additional motive for creating this special case existed in Athens: the need to open the courts to foreign traders. This is not an issue in U.S. or European courts where foreign parties can sue (provided certain minimal jurisdictional requirements are met).

Prof. Maffi makes the daring suggestion that speed was not a goal of *dikai emporikai*. He supports this conclusion by pointing, among other things, to the lack of any requirement to use an arbitrator to settle the dispute and the length of the investigations that would be undertaken by the Thesmothetai. If we accept this conclusion, why then was the commercial court created?

At this point, I would like to briefly take up a point that Prof. Maffi promises not to address, but still makes his opinion clear. The question is the meaning of *dikai emmenoi*, which can be translated either as "suits brought on a monthly basis" or "suits that must be decided within a month." Most famously, Edward Cohen argues for the first definition (that *lexeis*, or "complaints", can only be lodged one day every month and that these charges would be accepted during the winter). Prof. Maffi disagrees. He sees that the pressing need of merchants was to have their business disputes resolved immediately so that they can be made whole again and as soon as possible to continue their business in full force. I agree with this interpretation since it is the only interpretation that makes any sense from a practical perspective. We are not talking about multi-national corporations with resources that allow them to wait for redress. Small businesses can be ruined by a single dispute and need redress quickly in order to survive (and hopefully continue to trade while the summer weather is still conducive to sailing). I have meditated for some time on the following question: *How would it benefit merchants to have their complaints received one day a month during the winter long after the need for redress arises?* I cannot think of any benefit, but I welcome any light that my fellow participants can shed on this. On the other hand, if we accept that *dikai emmenoi* means that the case will be resolved within a month - just as the menstrual cycle (*menses emmenoi*) is finished within a month - then we can argue that speed was a motivation for creating the special court.

Let's turn now to another potential motivation for creating a commercial court. Was a special commercial court created in order to provide expertise regarding commercial matters? If we accept Prof. Maffi's point that jurors were unlikely to have been drawn from a special class of merchants, then such expertise in the court was unlikely.

If neither speed nor expertise motivated the creation of commercial courts, we are left with the need to create a special court to allow complaints from foreigners. While *metics* appeared to have the right to pursue private actions in Athenian courts (Todd: 194), non-metic foreigners did not. However, *dikai emporikai* could be initiated by non-metic foreigners. In fact, both parties could be foreigners. But why would Athens want to give foreigners the right to use their courts (and to sue Athenian citizens)? For the same reason that modern states provide investor-friendly laws, low taxes, lax regulations, and other enticements to businesses. In order to attract traders and businesses to their economy. Merely the right to sue (whether or not it was speedy or decided with expertise) would have been a reason to do business in Athens. Cohen argues (or argued some 42 years ago) that most merchants resided in Athens and that no special court was needed to resolve disputes involving a foreigner. With all due respect (Dr. Cohen's books are among my favorites), this I find hard to believe.

Written contracts are one of the jurisdictional requirements of the commercial courts. Why is this so? Cohen argues that a written contract alleviates the concern about choice of law. If the contract states the agreement clearly, the jury need not be concerned with whether Athenian practice and law or that of another state governs the transaction. This makes perfect sense and I believe that written agreements would make the jury's decision easier. But are there any other reasons for requiring written contracts? Might there be other benefits of requiring written agreements? I can think of at least two. First, like the common law Statute of Frauds (which exists still in the U.S. for the sale of goods, but has been qualified virtually out of existence in Great Britain and, as I understand, only exists for the sale of real property), the requirement for a written agreement protects against fraud. That is, requiring the showing of a written agreement prevents one party from wrongfully accusing another party of having entered into a contract. This requirement has fallen so far from common use in the modern world that I wonder whether it was a factor in ancient Athens. However, I do believe that written agreements assist with resolving disputes. If the parties agreed on certain provisions in writing, it is much easier for a court to reach a decision. The Athenian law granting supremacy to written contracts over law only adds to the benefits of entering into a written agreement.

The requirement of written agreements would have the additional benefit of increasing the practice of using written agreements in the Mediterranean. If a trader wanted swift justice in Athens, a written agreement was necessary. Written agreements were likely helpful in other parts of the Mediterranean world where traders did business.

Now I will take some liberties by pursuing an issue that is suggested by Prof. Maffi's paper, but only in the most subtle way. That is, this most peculiar rule that all lenders will suffer total financial devastation if a shipwreck occurs. This is peculiar from a Western modern perspective because lenders excuse payment from borrowers only under the most extreme and uncontrollable circumstances. And they don't always do that. To wit, here is a *force majeure* clause from a modern sales agreement:

> *Seller shall not be liable in damages for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its reasonable control including, but not limited to, Acts of God, natural disasters, government restrictions (including, but not limited to, the denial or cancellation of any kimport or export licenses), wars, insurrections, piracy, and terrorism. This clause shall in no way excuse the buyer from any payment obligations.*

Notice that it is only the seller that will not be liable if conditions for performance become impossible. The buyer still has to pay under any circumstances. But this was not the case in Athens. The lender would share this risk and sacrifice all profit (as well as the return of the capital investment) in the event of a shipwreck.

Why is this the case? Why would a creditor want to share in the risk of the borrower? And the situation grows more drastic. Not only does the creditor share in the risk of the borrower not paying at all in the case of shipwreck. The creditor also accepts the risk that the borrower pays late. The lender would share the risk of late payment (i.e. the credit risk) because *tokos* was not based on time, but was a set percentage of the loan (or "yield") regardless of how long it would take the borrower to repay.

So we have the creditor sharing the risk in multiple ways. This is very different from modern western practices, but it is very similar to medieval and modern Islamic financial practices**.** Islamic law despises interest and financial devices for funding businesses require the lender to share the risk of the transaction by, for example, taking equity in the company that is being financed. Why do we see this sharing of risk in Islam and ancient Greece? Is it a moral imperative to not place the risk entirely on the borrower? Or does it serve some other greater purpose? Perhaps to force the lenders to be more prudent in selecting their investments? An Athenian banker would never invest in a trading expedition that involved a rotting boat asail in the storming season. Money would only be spent where the risk of shipwreck or late payment was low. This would encourage wise investments and the most efficient placement of capital.

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DIE JURISDIKTION DER JÜDISCHEN GEMEINDE VON HERAKLEOPOLIS: NORMAL- ODER SONDERFALL IM HELLENISTISCHEN ÄGYPTEN?[1]

Im Jahr 2001 haben James M. S. Cowey und Klaus Maresch ein Papyrusarchiv publiziert, das sich aus zwanzig Texten zusammensetzt und Papyrologen unter der Abkürzung P.Polit.Iud. bekannt ist. Die Papyri datieren in die Jahre zwischen 144/3 und 133/2 v. Chr. und dokumentieren eine jüdische Gemeinde, die in Herakleopolis, der Hauptstadt des mittelägyptischen Gaues Herakleopolites,

[1] Diese Studie entstand im Rahmen des APART-Stipendiums, das mir am 21.03.2013 von der Österreichischen Akademie der Wissenschaften zur Abfassung meiner Habilitationsschrift, die unter dem Titel „Die ptolemäische Organisationsform *politeuma*. Ein kontroverser Aspekt jüdischer und hellenistischer Rechtsgeschichte" erscheinen soll, dankenswerterweise zuerkannt wurde. Die Beschäftigung mit der in P.Polit.Iud. dokumentierten Jurisdiktion wurde wesentlich duch eine „Membership" an der „School of Historical Studies" des „Institute for Advanced Study" in Princeton gefördert. Diesen Forschungsaufenthalt, dem das Projekt „The Jurisdiction of the Jewish πολίτευμα of Herakleopolis" gewidmet war, hat „The Herodotus Fund" durch seine Unterstützung möglich gemacht, für die ich ebenfalls zu Dank verpflichtet bin. Darüber hinaus sind Dankesworte an Angelos Chaniotis für seine mir gewährte Gastfreundschaft am „Institute for Advanced Study", an Ted Lendon für viele anregende Diskussionen über meine laufenden Forschungen, an Joseph Mélèze Modrzejewski für die Durchsicht des vorliegenden Manuskriptes und seine bereitwillige Unterstützung sowie, last but not least, an Delfim F. Leão und das gesamte Organisationskomitee der Konferenzreihe „Symposion" für die Einladung zur Teilnahme an der diesjährigen Veranstaltung zu richten.

beheimatet und als *politeuma* — also als eine besondere Art von Vereinigung — organisiert war. P.Polit.Iud. ist eine einzigartige Quelle für viele Aspekte des hellenistischen Judentums, und dementsprechend groß war auch das Interesse, das die Forschung diesen Texten entgegenbrachte: Es folgten zahlreiche Reaktionen, und die Flut an Literatur wird wohl noch lange nicht enden.[2]

P.Polit.Iud. ist unter anderem deswegen bedeutsam, weil dieses Archiv den ersten definitiven dokumentarischen Beleg für ein jüdisches *politeuma* in hellenistischer Zeit liefert.[3] Die mutmaßliche Existenz des prominentesten jüdischen *politeuma,* und zwar jenes von Alexandria, kann lediglich mit einer Bemerkung im Aristeasbrief verknüpft werden, die in ihrer Deutung aber umstritten ist.[4] Das gleiche gilt für die jüdische Gemeinde in Leontopolis, die als *politeuma* organisiert gewesen sein könnte: Ein einziges in seiner sprachlichen Auslegung ebenfalls fragliches Grabepigramm reicht nicht aus, um als solide Beweisgrundlage herangezogen zu werden.[5]

Aus den vielen Fragen, die man sich angesichts von P.Polit.Iud. stellen kann, sei in diesem Beitrag der Aspekt der Jurisdiktion herausgriffen. Und das ist keineswegs ein Thema, das bei der Beschäftigung mit dem jüdischen *politeuma* von Herakleopolis von untergeordneter Bedeutung wäre. Denn es stellt zweifellos ein inhaltliches Charakteristikum des Archivs dar, daß die Jurisdiktion oder Rechtspflege, die die Amtsträger dieser Gemeinde, und zwar die Archonten und der vorsitzende Politarch, ausübten, durch die in P.Polit.Iud. veröffentlichten Petitionen in wünschenwerter Deutlichkeit dokumentiert ist. Dieser Umstand ist von weiterer Tragweite, weil aus

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[2] Zum jüdischen *politeuma* in Herakleopolis siehe (abgesehen von Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 1–34) generell etwa: Falivene 2002; Honigman 2002; Kasher 2002; Maresch – Cowey 2003; Cowey 2004; Kruse 2008; dens. 2010 und 2015; Arzt-Grabner 2012. Gegen Ritter 2011, der die von der Forschung allgemein akzeptierte Existenz des besagten jüdischen *politeuma* in Abrede stellte, siehe Sänger 2014, 54, Anm. 7; dens 2016a, 29, Anm. 10; Kruse 2015, 74, Anm. 4.

[3] Aus römischer Zeit ist ein jüdisches *politeuma* aus Berenike in der Kyrenaika bekannt: CIG III 5362 = SEG 16, 931 = Lüderitz 1983, Nr. 70 (Augusteische Zeit?) und CIG III 5361 = Lüderitz 1983, Nr. 71 (24/25 n. Chr.).

[4] Aristeas 310; vgl. Ios. ant. Iud. 12,108. Zu dem Ansatz, in Alexandrien habe es ein jüdisches *politeuma* gegeben, existiert eine reiche Forschungsliteratur; siehe exemplarisch etwa die aktuellen, eine Reaktion auf die Veröffentlichung von P.Polit.Iud. darstellenden Untersuchungen von Honigman 2003; dies. 2009, 131–134; Kasher 2008; Gambetti 2009, 48–52; Arzt-Grabner 2012, 139–146; skeptisch hingegen Ameling 2003, 88–92.

[5] C.Pap.Jud. III 1530A = Horbury – Noy 1992, Nr. 39. Vor der Veröffentlichung von P.Polit. Iud. argumentierten Robert 1940, 18–24 und Kasher 1985, 123–132 für, Lüderitz 1994, 208–210 und Mélèze Modrzejewski 1996, 77 gegen die Existenz eines jüdischen *politeuma* in Leontopolis. Smallwood 1976, 226 hielt die erste Einschätzung für möglich. Honigman 2003, 65–66; Cowey 2004, 30–31; Capponi 2007, 140–142; Kruse 2008, 169–170; ders. 2010, 97 (vgl. auch dens. 2015, 77, Anm. 26) sahen die herakleopolitischen Papyri als Bestätigung für ein jüdisches *politeuma* in Leontopolis, und auch Sänger 2015 stellte dessen Existenz unlängst als wahrscheinlich heraus. Ameling 2008, 128–129 und Huß 2011, 300, Anm. 240 blieben diesbezüglich nach wie vor skeptisch.

dem hellenistischen Ägypten zwar bereits seit längerem weitere ethnisch kategorisierte *politeumata* bekannt sind, und zwar jene, die von Kretern, Böotiern, Kilikiern und Idumäern gebildet wurden.[6] Für keinen dieser Fälle verfügen wir aber auch nur annähernd über ein vergleichbares Quellenmaterial: Es handelt sich jeweils nur um einzelne epigraphische oder papyrologische Zeugnisse, die in sehr beschränktem Umfang über das Innenleben dieser Gruppen informieren. Der disparaten Überlieferung dürfte auch geschuldet sein, daß die Deutung der Organisationsform *politeuma* ein traditionell umstrittenes Themenfeld darstellt.[7] Deswegen könnte sich die Fragestellung, ob die Jurisdiktion der jüdischen Gemeinde von Herakleopolis als Normal- oder Sonderfall im hellenistischen Ägypten einzustufen sei, aus einer überlieferungsgeschichtlichen Perspektive als müßig darstellen. Denn niemand wird von vornherein in Frage stellen, daß die in P.Polit.Iud. zusammengetragenen Texte eine Sonderstellung einnehmen, weil nirgendwo sonst in der dokumentarischen Evidenz die Rechtspflege einer jüdischen Gemeinde und einer als *politeuma* konstituierten Gruppe Spuren hinterlassen hat.[8]

Die Editoren von P.Polit.Iud., Cowey und Maresch, haben den besonderen rechtshistorischen Quellenwert des Materials freilich erkannt und sich mit diesem Aspekt in gebührender Weise auseinandergesetzt, und den Grundzügen der von ihnen eingeschlagenen Interpretation ist, wie sich zeigen wird, generell nichts entgegenzuhalten. Der vorliegende Beitrag ist daher keineswegs als Kritik an den Editoren aufzufassen. Deren Hauptaufgabe war es zweifellos nicht, eine tiefgreifende Auswertung aller von P.Polit.Iud. aufgeworfenen rechtshistorischen Fragestellungen vorzulegen. Vielmehr sollen die folgenden Ausführungen dazu beitragen, bestimmte Interpretationsmuster zu verfeinern und kritische Überlegungen in die Diskussion einzubringen. Dabei beschränkt sich die Darstellung auf die Charakterisierung und Deutung des in P.Polit. Iud. dokumentierten Verfahrens und geht nicht auf den Inhalt der Texte ein.

Als Ausgangspunkt der Untersuchung soll die in der Edition anzutreffende Einschätzung dienen, daß „die Gerichtsbarkeit der Archonten mit einer kleinen Einschränkung als Sondergerichtsbarkeit unter Juden" einzustufen sei.[9] In der Tat

[6] Böotier: SEG 2, 871 = SB III 6664 (Xois). Kreter: P.Tebt. I 32 = W.Chr. 448 (Ars.). Idumäer: OGIS 737 = SB V 8929 = Bernand 1992b, Nr. 25 (Memphis); zur Identifikation dieses *politeuma* siehe Thompson 1984; dies. 2012, 93–96. Kilikier: SB IV 7270 = SEG VIII 573 = Bernand 1975, Nr. 15 = ders. 1992a, Nr. 22 (Ars.). Alle diese *politeumata* gehören in das 2. oder 1. Jahrhundert v. Chr. In hellenistischer Zeit sind *politeumata* außerhalb Ägyptens gesichert nur in der von den Ptolemäern kontrollierten Stadt Sidon am Ende des 3. Jh. v. Chr. nachgewiesen (siehe dazu Sänger 2014, 61–62 und dens. 2016a, 38–39), wo sie von Personen gebildet wurden, die aus den Städten Kaunos (in Karien), Termessos Minor nahe Oinoanda und Pinara (beide in Lykien) stammten (Macridy 1904, 549: Stele A; 551: Stele 2; 551–552: Stele 3). Eine Zusammenstellung und Diskussion der zu den *politeumata* vorhandenen Quellen hat jüngst Sänger 2014, 53–55; ders. 2016a, 28–32 unternommen.

[7] Vgl. weiter unten bei Anm. 19–21 und 29.

[8] Vgl. weiter unten bei Anm. 38.

[9] Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 13; vgl. auch S. 11: „Es handelt sich also um eine Form von Sondergerichtsbarkeit unter Juden."

wurden alle Petitionen von Juden — seien es Mitglieder des *politeuma* oder nicht — eingereicht. Und bei den Gegnern handelt es sich, abgesehen von drei Eingaben, die sich nicht gegen Juden zu richten scheinen (P.Polit.Iud. 1, 10, 11) — die angesprochene „kleine Einschränkung" —, ebenfalls ausschließlich um Juden.

Die Verwendung des Begriffs „Sondergerichtsbarkeit" ist problematisch, weil Cowey und Maresch nicht definieren, was sie genau unter „Sondergerichtsbarkeit" verstehen, ein derartiges Konzept in diesem Kontext aber kontrovers gedeutet werden kann. Von einem juristischen Standpunkt müßte es sich um eine Gerichtsbarkeit handeln, die außerhalb der ordentlichen Gerichtsbarkeit steht. Für den Fall, daß man dem Begriff „Sondergerichtsbarkeit" eine unscharfe Verwendung zugrunde legen würde, könnte dieser alternativ — und zweifellos überspitzt — auch als Hinweis auf eine gesonderte, interne jüdische Gerichtsbarkeit unter dem Dach eines *politeuma*, aber außerhalb staatlicher Strukturen aufgefaßt werden. Wollte man sich auf derartige Weise annähern, wäre man aber mit dem Problem konfrontiert, daß beide Zugänge unweigerlich zu der Schlußfolgerung führen könnten, es habe eine jüdische Rechtspflege gegeben, die neben den ordentlichen oder üblichen Formen der Justiz existierte: In dem einen Fall hätte man ein Gericht, das für jüdische Streitsachen zuständig war, in dem anderen Fall eine jüdische Gemeinschaft, die — in der Art einer Parallelgesellschaft — auf außerstaatlicher Ebene über ein entwickeltes System verfügte, Konflikte, in die Juden verwickelt waren, intern zu lösen. Wirft das jüdische *politeuma* von Herakleopolis demnach ein Schlaglicht auf einen Aspekt ptolemäischer Bevölkerungspolitik, der mit den Schlagworten *divide et impera* umschrieben werden könnte, oder ist es beispielhaft für einen willkürlichen Bottom-up-Prozeß, der darauf basierte, daß die Selbstverwaltung einzelner Gruppen innerhalb der Gesellschaft auf vollkommene Akzeptanz, Ignoranz oder Gleichgültigkeit der Ptolemäer stieß? Speziell im Kontext jüdischer Gemeinschaften könnten beide Ansätze als Ausdruck von Tendenzen zur Separierung bzw. einer gewissen Sonderstellung gedeutet werden. Ist das jüdische *politeuma* von Herakleopolis aber tatsächlich emblematisch für eine bewußte jüdische Absonderung im Bereich der Rechtspflege? Oder manifestiert sich hier eine ganz andere Entwicklung, die trotz des Umstandes, daß sie in ihrer Ausprägung speziell gewesen sein mag, nichts mit „Sondergerichtsbarkeit", sondern vielmehr mit administrativen Möglichkeiten zu tun hat, die die Konstituierung eines *politeuma* eröffneten? In den folgenden Ausführungen soll eingehend erläutert werden, wie sich die Rechtspflege des jüdischen *politeuma* von Herakleopolis zu dem Konzept der „Sondergerichtsbarkeit" verhält, welche theoretischen und historiographischen Probleme mit einer derartigen Auslegung verbunden sind und wie die Genese des dokumentierten Verfahrens in der Praxis zu erklären sein dürfte.

Zunächst sei die Frage geklärt, welche äußeren Charakteristika das durch P.Polit. Iud. dokumentierte Verfahren aufweist. Diesbezüglich haben Cowey und Maresch schon das Entscheidende festgestellt: Dokumentiert ist die von Hans-Julius Wolff

maßgeblich behandelte Beamtenjustiz.[10] Bittsteller wandten sich mittels Petitionen an Amtsträger und baten diese um exekutive Maßnahmen. Formal ging es also nicht um eine gerichtliche Rechtsfeststellung, die auf dem ordentlichen Prozeßweg zu erlangen war, sondern um die Einsetzung amtlicher Autorität, das Ansuchen des Petenten durchzusetzen. Greifbar wird diese Intention in den Petita der an die Archonten des jüdischen *politeuma* gerichteten Petitionen. Ein hervorragendes Vergleichsmaterial für die konstatierte Beamtenjustiz dieser Amtsträger bieten die Petitionen aus dem Archiv des Phrurarchen Dioskoros (P.Phrur.Diosk. [154–145 v. Chr. (?)]).[11] Kurz bevor das jüdische *politeuma* im Bereich des Hafenviertels von Herakleopolis dokumentiert ist, versah der genannte Dioskoros in genau diesem Viertel seinen Dienst als Kommandant der ebendort um die Mitte des 2. Jahrhunderts v. Chr. neu errichteten Festung.[12] Eine Gegenüberstellung der in beiden Archiven auftretenden Petita würde deutlich machen, daß die Archonten und der Phrurarch mit sehr ähnlichen Formularen um ihr jeweiliges Einschreiten gebeten wurden.[13]

Dementsprechend weist die äußere Form des in P.Polit.Iud. dokumentierten Verfahrens keine Besonderheiten auf; sie fügt sich in das bekannte Bild der ptolemäischen Beamtenjustiz. Streng juristisch genommen, könnte man allein aufgrund dieses Umstandes die Umschreibung „Sondergerichtsbarkeit" ablehnen. Diesbezüglich genügt ein Verweis auf Wolff und Joseph Mélèze Modrzejewski, die sich bereits vor mehr als fünfzig Jahren im Kontext amtlicher Rechtsverwirklichung gegen eine derartige Terminologie ausgesprochen hatten. Eine „Sondergerichtsbarkeit" von ptolemäischen Amtsträgern wurde an prominenter Stelle von Erich Berneker vertreten,[14] der damit die Jurisdiktion jener Amtsträger bezeichnete, die mit Aufgaben in administrativen Sondergebieten (etwa der Fiskalverwaltung) befaßt waren und denen per königlicher Anordnung bestimmte Personenkreise im Streitfall unterstellt wurden, die damit der ordentlichen Gerichtsbarkeit entzogen waren. Auch hier ging es, wie Mélèze Modrzejewski in Übereinstimmung mit Wolff formulierte, aber „um die administrative Gewährung amtlichen Schutzes und den Gebrauch rein disziplinärer Koerzitionsgewalt",[15] weswegen der Rechtsschutz, den die in besonderen Gebieten tätigen Funktionäre zu gewähren hatten, daher eher mit Ludwig Mitteis als juristische „Spezialkompetenz" zu umschreiben sei.[16] Wollen wir diese Definition übernehmen, wird ein Zusammenhang zwischen „Sondergerichtsbarkeit" und „Beamtenjustiz"

[10] Wolff 1962, 113–193; vgl. Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 13–15; Cowey 2004, 34–35; Kruse 2008, 170–171; dens. 2010, 98 und 2015, 74–75.

[11] Siehe auch Honigman 2003, 64.

[12] Siehe Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 12 und jüngst ausführlich Kruse 2011.

[13] Vgl. Jördens 2010, 252–254, die die Ähnlichkeit der in den Petitionen von P.Polit.Iud. und P.Phrur.Diosk. vorgebrachten Beschwerden betont.

[14] Berneker 1935.

[15] Mélèze Modrzejewski 1963, 67.

[16] Mitteis 1912, 11.

problematisch, weil letztere streng genommen nach Wolff gar keine „Gerichtsbarkeit", also die Rechtsprechung eines Gerichts, war.[17] Sollte hinter der Rechtspflege des jüdischen *politeuma* eine „Spezialkompetenz" der Archonten stehen, müßte ihnen dieser Aufgabenbereich von der ptolemäischen Regierung zugewiesen worden sein.

Würde man die von Cowey und Maresch konstatierte „Sondergerichtsbarkeit" der jüdischen Archonten dem Konzept der „Spezialkompetenz" unterwerfen, dann ließe sich vorliegender Untersuchungsgegenstand aus dem Blickwinkel rechtshistorischer Dogmatik unverfänglicher und in Einklang mit dem Konzept der Beamtenjustiz definieren bzw. typisieren. Und in der Tat scheinen die Editoren von P.Polit.Iud. sowie nachfolgende Bearbeiter des Archivs zu einem derartigen Ansatz zu tendieren. Sie vertreten nämlich die Auffassung, daß es eine wesentliche Aufgabe eines *politeuma* gewesen sei, eine autorisierte und (weitgehend) gruppeninterne Jurisdiktion auszuüben — daraus erklärten sich dann auch deren äußere Charakteristika, die an das ptolemäische Justizwesen erinnern.[18] Diese Herangehensweise ist zweifellos berechtigt, denn sie leitet sich präzise von den Grundmustern ab, die die Papyri hervortreten lassen: und das ist — um es noch einmal zu wiederholen — die Rechtspflege der Archonten, die in der Art der Beamtenjustiz erfolgte. Muß man deswegen aber in der Rechtspflege einen zentralen Aufgabenbereich eines *politeuma* erblicken, der von langer Hand geplant war, von der ptolemäischen Regierung also von vornherein gewünscht wurde? Ein Zitat aus P.Polit.Iud. (S. 26) mag genügen, um den Hintergrund für den als logisch erachteten Zusammenhang zwischen jüdischer Rechtsprechung und staatlicher Einflußnahme zu erhellen:

„Die jüdischen Politeumata in Alexandria und sicherlich auch in der Chora müssen ja dazu da gewesen sein, jüdischer Eigenständigkeit und Überlieferung ein Dach zu bieten und sie zu schützen."

Hier ist einzuwenden, daß die von Cowey und Maresch offenbar aufgegriffene Vorstellung, die Organisationsform *politeuma* hätte eine solche „Schutzfunktion" übernommen, überholt ist. Die Einschätzung, ein *politeuma* sei eine wesentliche Vorraussetzung dafür gewesen, daß ethnische Gruppen — Juden und andere — ihre

[17] Wolff 1962, 181.

[18] Siehe Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 11–13 mit dem weiter unten angeführten Zitat (S. 26); Kruse 2008, 170–172 („Zentrale Aufgabe des *politeuma* ist demnach offensichtlich die Ausübung einer Art von innerjüdischer Sondergerichtsbarkeit" [S. 172]; vgl. dens. 2010, 97, 98–99 und 2015, 75 und 79); Arzt-Grabner 2012, 129–139. Einen ähnlichen Ansatz verfolgte auch Sylvie Honigman, die im Gegensatz zu den zuvor genannten Ansätzen weder das Konzept einer intendierten (weitgehend) gruppeninternen Sondergerichtsbarkeit aufgriff, noch die Rechtsprechung der Archonten auf eine allgemeine Erwartungshaltung der Zentralgewalt zurückführte. Stattdessen engte sie letzteren Aspekt aber dadurch ein, daß sie die in P.Polit.Iud. in Erscheinung tretende Rechtsprechung als von der Regierung klar definierten und beschränkten Aufgabenbereich der Archonten betrachtete: „The competence of these *archontes* was apparently limited to enforcing rights stemming from legal contracts, in the case of a failure of one side to abide by contractual clauses" (2002, 252; vgl. dies. 2009, 126); siehe dazu genauer unten Anm. 47.

Traditionen in dem „fremden" Land Ägypten bewahren konnten (und dazu berechtigt waren), entnahmen die Editoren C.Pap.Jud.,[19] und tatsächlich geht die aufgegriffene Vorstellung im Wesentlichen auf den Herausgeber dieses Corpusbandes, Victor A. Tcherikover, zurück;[20] zu ihrer stärksten Ausprägung gelangte sie freilich in den umstrittenen Studien von Aryeh Kasher.[21] Tcherikovers einflußreiche Forschungen der 50er und 60er Jahre des 20. Jahrhunderts sahen sich aber bald zwei grundsätzlichen Problemen gegenüber. Zum einen zeigten Steuerdokumente, daß Juden im ptolemäischen Ägypten zu der privilegierten Bevölkerungskategorie der „Griechen" bzw. *Hellenes* gezählt wurden,[22] ein Status, der eine Person als „Immigrant" oder „ausländischen Siedler" kennzeichnete und eine geringfügige Steuererleichterung bewirkte.[23] Zum anderen gibt es guten Grund zu der Annahme, daß die Torah, das Gesetzesbuch des hellenistischen Judentums — die fünf Bücher Mose, griechisch Pentateuch — Teil der von der ptolemäischen Regierung anerkannten *politikoi nomoi*, also der „bürgerlichen Gesetze", war. Diese Verknüpfung geht ebenfalls auf Wolff[24] zurück und wurde von Mélèze Modrzejewski anerkannt; und auch Cowey und Maresch haben auf diese ganz wesentliche Beobachtung hingewiesen.[25] Die

[19] Siehe Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 26, Anm. 88.

[20] Auf dieses grundlegende Rezeptionsproblem hat bereits Honigman 2002, 265 und 266 hingewiesen.

[21] Siehe etwa Tcherikover, V. A. – Fuks, A., C.Pap.Jud. I, Prolegomena, S. 6–7; Tcherikover 1959, 298–305; Smallwood 1976, 225–226; Applebaum 1974a, 430 und 452; ders. 1974b, 465; und schließlich Kasher 1985 mit einer Zusammenfassung seiner Ergebnisse auf S. 356–357. Gegen den von diesen Gelehrten vertretenen Ansatz haben sich mit guten Gründen Mélèze Modrzejewski 1997, 80–83; ders. 2014, 153–157; Zuckerman 1985–1988; Honigman 1997, 62–65 und 89–90 gewandt; und er wird auch nicht durch P.Polit.Iud. und das darin dokumentierte jüdische *politeuma* in Herakleopolis gestützt: siehe Honigman 2003, 93–95; Sänger 2016b; Kruse 2015, 79 (vgl. Anm. 51).

[22] Siehe einschlägig Mélèze Modrzejewski 1983, 265–266; Clarysse – Thompson 2006, 147–148.

[23] Siehe Bagnall 2006, 3; Thompson 2001, 307–310; Clarysse – Thompson 2006, 138–147 und 155.

[24] Wolff 1939, 24, Anm. 86, 28, Anm. 96.

[25] Siehe Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 26–28, die die *politikoi nomoi* de iure lediglich als „subsidiäre Rechtsquelle" (vgl. S. 26 und 27) der jüdischen Archonten einstuften. Diese Sichtweise leitet sich von P.Petrie III 21g = P.Gur. 2 = C.Pap.Jud. I 19 (Ars., 226 v. Chr.) ab, einem Text, auf den weiter unten bei Anm. 30 zurückzukommen ist. In Z. 40–45 enthält er eine Anordnung (*diagramma*) Ptolemaios' II., die sich damit beschäftigt, wie das *dikasterion*, das Eigengericht der *Hellenes*, bei der Urteilsbildung vorzugehen habe. Daraus geht eine hierarchische Gliederung hervor, wonach das *dikasterion* zuerst gemäß der königlichen Gesetzgebung zu urteilen habe; für den Fall, daß dieser keine passende Regelung zu entnehmen sei, solle auf die *politikoi nomoi* zurückgegriffen werden; wenn auch diese keinen passenden Rechtssatz enthielten, sollen die Richter ihre eigene Urteilskraft (γνώμηι τῆι δικαιοτάτη[ι) walten lassen. Hätte diese Anordnung auch als Grundsatz für die Urteilsfindung der Archonten bzw. generell die Beamtenjustiz gegolten, dann hätte die ptolemäische Regierung der von Cowey und Maresch angenommenen „Schutzfunktion" der

politikoi nomoi hatte Wolff als Gesetze von Poleis — seien es nun die, die es in Ägypten gab, oder die Heimatstädte griechisch-makedonischer Einwanderer, die es in das Land am Nil gezogen hatte —,[26] Mélèze Modrzejewski als die dort geübte „gewohnheitsrechtliche Praxis der Hellenen" interpretiert.[27] Über eines scheint aber Einigkeit zu herrschen: Der jüdische *nomos*, die jüdische Religion, niedergelegt in der Torah bzw. ihrer griechischen Version, der Septuaginta, war von der ptolemäischen Regierung öffentlich als Rechtsquelle anerkannt worden.[28] Insofern gibt es kaum einen Anhaltspunkt, die rechtliche Anerkennung der Juden von dem Status ihrer Gemeinden abhängig zu machen, und zwar ob sie etwa Mitglied eines *politeuma* waren oder nicht. Grundlage ihres Status war vielmehr, daß sie zu den *Hellenes* gezählt wurden bzw. „Migrantenstatus" besaßen; und diese Kategorisierung war unabhängig von ihren einzelnen Gemeinden.[29] Damit stehen wir im hellenistischen Ägypten vor einem Judentum, das der Gruppe der *Hellenes* auf sozio-juristischer Ebene vollkommen zugehörig und generell nicht schutzbedürftig war.

Genauso wie es prinzipiell keiner mit speziellen Rechten ausgestatteten Organisationsform bedurfte, um jüdisches Recht sowie jüdische Traditionen und Glaubensvorstellungen zu bewahren, bedurfte auch die jüdische Rechtspflege keiner spezifischen Institutionen: weder ist die Existenz eigener sanktionierter (außerordentlicher) Gerichtshöfe für jüdische Angelegenheiten noch spezifischer ptolemäischer Amtsträger nachgewiesen, die auf verschiedenen Verwaltungsebenen für die jüdische Bevölkerung zuständig und Anlaufstelle für rechtsuchende Juden gewesen wären. Eine institutionalisierte jüdische Rechtspflege, die die Form einer „Sondergerichtsbarkeit" oder einer „Spezialkompetenz" angenommen hätte, hat es demnach — soweit wir momentan blicken können — auf übergeordneter Ebene nicht

Organisationsform *politeuma* (zumindest offiziell) deutliche Grenzen gesetzt. Entgegen den Editoren von P.Polit.Iud. ist es aber keinesfalls zwingend, daß besagte königliche Anordnung auch für die Justiz der ptolemäischen Amtsträger von obligatorischer Wirkung war. Und auch wenn diese Überlegung zutreffen würde, müßte man einräumen, daß die Amtsträger im Rahmen der Beamtenjustiz in ihren Handlungen und Entschlußfassungen weitgehend autonom waren (siehe Wolff 1962, 124–127, 154–160, 183–185; sowie Bauschatz 2013, 280). Demnach mag der jüdische *nomos* für die Archonten de iure eine „subsidiäre Rechtsquelle" dargestellt haben, de facto kann sich ihre Urteilsfindung aber allein an jüdischem Recht orientiert haben. Wenn Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 28 konstatierten, daß „die vorliegenden Papyri […] wenig oder nichts über den im Schatten bleibenden Teil jüdischer Traditionen" aussagen (vgl. auch Kruse 2015, 77–79), so wird man diese Feststellung auch für die Urteilsfindung der Archonten treffen dürfen.

[26] Etwa Wolff 1953, 39–44; ders. 2002, 55–58.

[27] Mélèze Modrzejewski 1988, 177; vgl. etwa dens. 1966; 1997, 107–112 und 2014, 151–169.

[28] Siehe die Literaturangaben in den beiden vorangehenden Anm.

[29] Zu dieser Communis Opinio siehe z.B. Mélèze Modrzejewski 1983; Thompson 2001; Clarysse – Thompson 2006; und mit einem Fokus auf die jüdische Bevölkerung Mélèze Modrzejewski 1997, 73–83; Honigman 1997, 62–65 und 89–90; sowie dies. 2002, 264–265 und 2003, 67–96.

gegeben. Da Juden zu den *Hellenes* bzw. der griechischen Einwanderungsgruppe gehörten, stand ihnen deren Eigengericht, das *dikasterion*, offen. Der vieldiskutierte Text P.Petrie III 21g[30] (Ars., 226 v. Chr.) beweist in diesem Zusammenhang, daß zwei jüdische Streitparteien vor dieses Gericht traten, um einen Konflikt beizulegen.[31] Wie allen anderen Einwohnern des ptolemäischen Ägypten wird Juden auch die im 3. Jahrhundert v. Chr. in Alexandria, im 2. und 1. Jahrhundert v. Chr. dann auch in den Gauen tätige königliche Gerichtskammer der Chrematisten nicht verschlossen gewesen sein.[32] Und es stand ihnen freilich ebenso offen, sich mit Anliegen an ptolemäische Amtsträger zu wenden, von denen sie sich Satisfaktion versprachen. Bei diesen konnte es sich, insoweit die Papyri Einblick gewähren, um den König sowie — im Sinn der Beamtenjustiz — um den auf Gauebene tätigen *epimeletes* und um lokale Amtsträger wie den *komogrammateus* handeln.[33] Demnach gab es für Juden eine Vielfalt an Möglichkeiten, Recht zu erlangen.

Vor diesem Hintergrund ist jeder Ansatz, der im Kontext eines *politeuma* einen Zusammenhang zwischen jüdischer Rechtsprechung und staatlicher Einflußnahme für gegeben hält, ernsthaft mit der Frage zu konfrontieren, ob derartige politische Akzente notwendig waren bzw. zu den allgemeinen Prinzipien des ptolemäischen Justizwesens passen würden. Zumindest einem System an *politeumata*, von deren Gewährung es abhing, ob ethnische Gruppen (darunter Juden) Rechte besaßen oder sich selbst verwalten durften,[34] scheint gemäß Constantine Zuckerman der Nimbus einer „historiographic legend" anzuhaften.[35] Dementsprechend müßte man angesichts des eben skizzierten Befundes konstatieren, daß es eher einem Sonderfall als einer strikten Fortführung ptolemäischer Herrschaftspraxis gleichkäme, wenn die Amtsträger des jüdischen *politeuma* von Herakleopolis gemäß eines konkreten Planes der Regierung eine (weitgehend) innerjüdischer Rechtspflege ausgeübt hätten. Ein derartiger Sonderfall ist freilich nicht kategorisch auszuschließen, bliebe aber äußerst erklärungsbedürftig. Die abschließenden Bemerkungen zielen darauf ab, den

[30] = P.Gur. 2 = C.Pap.Jud. I 19.

[31] Siehe dazu auch Wolff 1960, 213–214; dens. 2002, 58; Mélèze Modrzejewski 1997, 108–111; Honigman 2003, 95–96.

[32] So auch Wolff 2002, 58: „Die Berufung auf den νόμος πολιτικός der Juden war daher auch dann korrekt, wenn die Antragstellerin von *Ent.* 23 auf eine Verhandlung nicht vor dem Dikasterion, sondern vor den Chrematisten gezielt haben sollte." Zu P.Enteux. 23 siehe im Folgenden die folgende Anm.

[33] König: P.Cair.Zen. IV 59618 = C.Pap.Jud. I 16 (?) (Ars., Mitte 3. Jh. v. Chr.); P.Lille II 3 = P.Enteux. 59 = C.Pap.Jud. I 37 (222 v. Chr.); P.Enteux. 2 = C.Pap.Jud. I 38 (Ars., 218 v. Chr.); P.Enteux. 23 = C.Pap.Jud. I 128 (Ars., 218 v. Chr.); P.Lille II 35 = P.Enteux. 30 = C.Pap.Jud. I 129 (Ars., 218 v. Chr.); *epimeletes*: P.Ryl. IV 578 = C.Pap.Jud. I 43 (Ars., 159–158 v. Chr.); *komogrammateus*: P.Tebt. III.1 800 = C.Pap.Jud. I 133 (Ars., 153 v. Chr.); unbekannter Adressat: P.Tebt. III.1 793, Kol. II, Fragm. I, Recto II, 14–36 = C.Pap.Jud. I 130 (Ars., 183 v. Chr.).

[34] Auf den Aspekt der „Selbstverwaltung" wird eingehend in Anm. 44 eingegangen.

[35] Zuckerman 1985–1988, 184.

Aspekt der staatlichen Einflußnahme und die bislang vernachlässigte Überlegung, daß sich in P.Polit.Iud. — im Sinn einer terminologisch unscharfen Verwendung von „Sondergerichtsbarkeit" — ein Prozeß widerspiegelt, in dem jüdisches Eigenleben im Kontext eines *politeuma* zu völliger Entfaltung gelangte und parallel zu staatlichen Strukturen in der Nachbildung des Beamtenverfahrens gipfelte, in ein anderes Licht zu rücken und in gewisser Hinsicht in ein Gleichgewicht zu bringen.

Zunächst ist festzuhalten, daß — und zumindest hier wird ein „starker ptolemäischer Staat" postuliert — die jüdische Beamtenjustiz ohne staatliche Autorisierung kaum denkbar ist. Das bezeugte Petitionswesen fügt sich, wie erläutert, in das übliche Bild und ergibt eigentlich nur Sinn, wenn sich die zum Vorschein kommende Koerzitionsgewalt organisch in das ptolemäische Justizwesen einfügte. Ansonsten müßte man ein Spannungsverhältnis zwischen den Amtsträgern des *politeuma* und staatlichen Institutionen annehmen, und man müßte sich fragen, warum eine derartige Grauzone Schriftzeugnisse hinterlassen hat — damit hätte man nur einen Beweis für die Untergrabung staatlicher Autorität geliefert. Daß die Ptolemäer einer derartigen Entwicklung völlig gleichgültig gegenübergestanden wären, ist recht unwahrscheinlich, zumal das Hafenviertel aufgrund der dort errichteten Festung im Blickpunkt der Regierung stand. Was festgehalten wurde, spiegelte also sehr wahrscheinlich ein formelles Verfahren wider, das sich indessen klar von informellen Formen der Konfliktlösung abgrenzte. Hinweise auf letztere sind ebenfalls in P.Polit.Iud. enthalten. Einige Texte deuten nämlich darauf hin, daß die dörflichen jüdischen Gemeinden, die mit dem *politeuma* in Herakleopolis in Verbindung standen, über eine interne Rechtspflege verfügten. Diese wurde von Personen getragen, die als *presbyteroi* und *kritai* bezeichnet wurden;[36] letzterer Ausdruck könnte als deutlicher Hinweis auf eine schiedsrichterliche Tätigkeit aufgefaßt werden.[37] Daran sieht man, daß Juden bestimmte Konflikte eventuell auf Gemeindebasis mittels interner informeller Verfahren lösten.[38] Derartige Formen der

[36] P.Polit.Iud. 6, 12 und 19; 18, 2; 19, 1; 20, 2; vgl. Cowey 2004, 31–32; Kasher 2002, 261 und 265–266; dens. 2008, 124; Kruse 2008, 171; dens. 2010, 98–99 und 2015, 75; Thompson 2011a, 111. Gegen diese Darstellungen ist aber einzuwenden, daß es keinen Grund zu der Annahme gibt, die Strukturen der ländlichen jüdischen Gemeinden oder Vereinigungen seien den Amtsträgern des *politeuma* in Herakleopolis administrativ untergeordnet gewesen bzw. von diesen überwacht worden.

[37] Vgl. Wolffs (1962, 57–63) Interpretation der in PSI VI 551, 8 Rekto (Ars., 258–256 v. Chr. [?]) genannten *kritai*; zu Formen informeller — ohne staatliche Beteiligung vollzogene — Streitbeilegung vgl. dens. 1962, 19–21 sowie speziell zur Schiedsgerichtsbarkeit Mélèze Modrzejewski 1952; letztere erschließt sich auch aus den Satzungen von Vereinigungen; siehe San Nicolò 1927, bes. 299. Vgl. auch Honigman 2002, 252, die zu dem Schluß kam, die dörflichen *presbyteroi* „act as arbitrators", und auch Kruse 2008, 171; ders. 2010, 99 und 2015, 75 wählte die Bezeichnung „Schiedsrichter".

[38] Das ist eine entscheidende Erweiterung der Quellenlage, denn bis zur Veröffentlichung von P.Polit.Iud. hätte man Tcherikover, V. A. – Fuks, A., C.Pap.Jud. I, Prolegomena, S. 32–36 beipflichten können, die zwar eine interne jüdische Gerichtsbarkeit als gegeben erachteten, in

Konfliktlösung sind keineswegs singulär; man denke nur an die papyrologisch bezeugte Schiedsgerichtsbarkeit und an die Satzungen von Kult- und Berufsvereinigungen, die unter anderem Bestimmungen über eine gruppeninterne Gerichtsbarkeit enthalten.[39]

Da es eher wenig Plausibilität besitzen würde, den Aspekt der Beamtenjustiz von jenem der staatlichen Autorisierung zu trennen, kann das in Frage stehende Verfahren wohl kaum als Ergebnis eines isolierten Bottom-up-Prozesses hingestellt werden, der völlig außerhalb des staatlichen Systems stand. Hätte die ptolemäische Regierung die elaborierten, in Konkurrenz zu staatlichen Institutionen stehenden jüdischen Substrukturen nicht unterbinden wollen, dann hätte sie diese wohl zumindest sanktionieren müssen, und zwar genau deswegen, um die entstandene Konkurrenz aufzuheben; als Ergebnis dieser Sanktionierung könnte P.Polit.Iud. angesehen werden. Wie würde sich zu einem derartigen Vorgang aber die Organisationsform *politeuma* verhalten? Waren die Autorisierung der judiziellen Tätigkeit der Archonten und die Einrichtung des *politeuma* voneinander unabhängig oder fielen beide Vorgänge zusammen? Oder gab die Konstituierung als *politeuma* den Anstoß dazu, daß die Archonten eine Beamtenjustiz ausübten, wie sie in P.Polit.Iud. dokumentiert ist? Der historische Kontext des jüdischen *politeuma* von Herakleopolis und eine alternative Interpretation der Evidenz können helfen, sich einer Lösung anzunähern.

Es wurde in der Forschungsliteratur bereits mehrfach darauf hingewiesen, daß die Konstituierung des jüdischen *politeuma* von Herakleopolis mit der Zusammenballung jüdischer Soldaten zu erklären sein könnte, die nahe ihres Einsatzortes siedelten.[40] Das würde dazu passen, daß auch die Wurzeln anderer *politeumata* in der Ansiedlung ethnisch kategorisierter Gruppen von Soldaten liegen dürften.[41] Vor diesem Hintergrund drängt sich in Herakleopolis ein ursächlicher Zusammenhang zwischen der Gründung des *politeuma* und dem im Kontext des Phrurarchen Dioskurides bereits erwähnten, im Hafenviertel erfolgten Bau einer Festung freilich geradezu auf, zumal das Archiv des jüdischen *politeuma* chronologisch unmittelbar auf jenes des Phrurarchen Dioskurides folgt. Auf rein praktischer Ebene dürfte die in P.Polit. Iud. dokumentierte Beamtenjustiz bestätigen, daß die Archonten im Hafenviertel präsent und dementsprechend in der Lage sowie auch autorisiert waren, gegen die in den Petitionen belangten Personen vorzugehen. Die an staatliche Organe erinnernden Kompetenzen, die die jüdischen Amtsträger im Hafenviertel gehabt und sie dort zu einer Art allgemeinen Ordnungsmacht gemacht zu haben scheinen, legen im übrigen auch den Schluß nahe, daß es dieser Stadtteil war, in dem die Juden, die dem *politeuma* angehörten, konzentriert waren.[42] Man wird diesbezüglich

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der papyrologischen Evidenz davon aber keine Spuren fanden.

[39] Vgl. oben Anm. 37.

[40] Siehe Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 20–21; Honigman 2003, 64–67; Kruse 2008, 172–173; dens. 2010, 100–101 und 2015, 76 und 79.

[41] Siehe Launey 1987, 1077; Honigman 2003, 67; Thompson 2011a, 109–113; dies. 2011b, 21–22; Sänger 2014, 57–60 und ders. 2016a, 34–37; vgl. auch Kruse 2015, 76 mit Anm. 23.

[42] Vgl. Cowey, J. M. S. – Maresch, K., P.Polit.Iud., Einleitung, S. 11–12; Kruse 2008, 172;

von dem „Territorium" des *politeuma* sprechen dürfen. Deswegen ist es keinesfalls zwingend, die Beamtenjustiz der Archonten zu isolieren und als von der Regierung gewollten Aufgabenbereich eines *politeuma* zu betrachten.[43] Vielmehr könnte sie auch einfach nur als Hinweis darauf verstanden werden, daß die jüdische Gemeinde im Hafenviertel von Herakleopolis qua *politeuma* einen öffentlich-rechtlichen Charakter hatte: dementsprechend könnten die in Frage stehenden Kompetenzen der Archonten logische Konsequenz einer administrativ-rechtlichen Anerkennung gewesen sein, die auf die Gemeinde selbst bezogen war und dieser die Gestalt einer Verwaltungseinheit verlieh.[44] Diese Deutung würde nicht nur zu der ursprünglichen

dens. 2010, 99–100 und 2015, 75–76.

[43] Vgl. die oben in Anm. 18 angeführten Vertreter dieses Ansatzes.

[44] Zur Interpretation eines *politeuma* im Sinn einer Verwaltungseinheit siehe Sänger 2016a, 35–38, 44 und dens. 2016b. Ähnlich auch Honigman 2002, 264 (vgl. 2003, 94–95 und 2009, 126), die einem *politeuma* „relative administrative autonomy" zuerkannte, und Kruse 2008, 168–172; ders. 2010, 95–100 sowie 2015, 74–75, 77 und 79–80, der ein *politeuma* mit „Selbstverwaltungskörperschaft", „Selbstverwaltungsorganisation", „selbstverwaltende Gemeinschaft" oder „halbautonome Körperschaft" umschrieb und der auf diese Weise organisierten jüdischen Gemeinschaft in Herakleopolis Autorität über das Hafenviertel einräumte. In Anbetracht von Kruses Charakterisierung ist jedoch zu betonen, daß eine wie auch immer geartete Form der „Selbstverwaltung" oder „halbautonomen" Existenz von ethnisch kategorisierten (oder anderen Gruppen) freilich nicht von der Gewährung eines *politeuma* abhängig war; siehe dazu generell Sänger 2016b mit Verweis auf San Nicolò 1927, 287–291 und 299–300 hinsichtlich der „(Privat)Autonomie" gewöhnlicher Vereinigungen und auf Honigman 1997, 62–65 und 89–90 sowie dies. 2002, 264–265 und 2003, 67–96, die dafür argumentierte, daß jüdische Gemeindebildung unabhängig von der Konstituierung eines *politeuma* gewesen sei (vgl. weiter oben Anm. 29). Schließlich mußte auch Kruse 2008, 171 und ders. 2010, 98 den in P.Polit.Iud. dokumentierten, ländlichen jüdischen Gemeinden „Formen jüdischer Selbstverwaltung" zugestehen und daraus ableiten, „daß offenbar nicht jede jüdische Gemeinschaft in Form eines *politeuma* organisiert war" (vgl. auch dens. 2015, 79), obwohl er (2008, 168 und ders. 2010, 96; vgl. dens. 2015, 75) die *politeumata* — in Anspielung auf die kurz vor der Veröffentlichung von P.Polit.Iud. vorherrschende Forschungsmeinung (dazu maßgeblich Zuckerman 1985–1988 und Lüderitz 1994) — allein mit „Kultvereine[n] ohne irgendwelche administrativen und juristischen Selbstverwaltungskompetenzen" kontrastiert hatte. Hier bleibt schließlich hinzuzufügen, daß die Bildung gewöhnlicher Vereinigungen im ptolemäischen Ägypten offenbar nicht überwacht wurde, denn darauf gibt es keine Hinweise; siehe dazu San Nicolò 1915, 10 und dens. 1927, 299–300. Dies dürfte zu erkennen geben, daß die Ptolemäer generell kein großes Interesse daran hatten, Formen von Gruppenautonomie, wie sie in der Gründung von Vereinigungen, ihren Satzungen und Amtsträgern zum Ausdruck kommt, zu kontrollieren oder reglementieren. Die Eigenschaften „Selbstverwaltung" und „halbautonome" Existenz können daher weder überzeugend als logische Konsequenz öffentlicher — im Gegensatz zu nicht-öffentlichen („privaten") — Strukturen angesehen und damit bei einer Gegenüberstellung zwischen gewöhnlichen Vereinigungen und *politeumata* allein auf letztere beschränkt werden. Ferner gibt es auch — wenn man so weit gehen möchte — keinen Anhaltspunkt, die *politeumata* vor dem Hintergrund einer autoritären Politik der Ptolemäer zu betrachten, die in der Lage und darauf ausgerichtet war, die Gemeinschaftsbildung ihrer Untertanen zu steuern oder

griechischen Auffassung des Wortes *politeuma* — die einen Zusammenhang mit dem Gemeinwesen einer Polis impliziert[45] —, sondern auch dazu passen, daß im Streitfall auch Nichtjuden vor die Archonten zitiert werden konnten. Hier gilt es aber ergänzend zu betonen, daß das Element der Rechtsprechung nur einen Teil der Amtstätigkeit der Archonten dargestellt haben wird: Über das genaue Betätigungsfeld des jüdischen Amtes der Archonten — das für Diasporagemeinden von einiger Bedeutung gewesen sein dürfte — gibt es (abgesehen von P.Polit.Iud.) bislang keine positive Evidenz,[46] man wird dessen Funktion aufgrund der unspezifischen Bedeutung der Bezeichnung aber nur sehr schwer überwiegend auf die Rechtspflege einschränken können. Daher wäre es keinesfalls abwegig, wenn den Archonten die allgemeine Verwaltung und Beaufsichtigung des *politeuma* und dessen Gebietes oblegen hätte.[47]

Sollte die jüdische Gemeinde, die hinter dem *politeuma* stand, durch den Festungsbau und der damit verbundenen Ansiedelung von Soldaten im Hafenviertel von Herakleopolis ins Leben gerufen bzw. völlig neu gegründet worden sein, dann wäre die Überlegung gerechtfertigt, daß sich die Beamtenjustiz der Archonten als Teil der allgemeinen Amtsbefugnisse, die diese Amtsträger als Vorsteher einer Verwaltungseinheit erhielten, entwickelt hatte. Auch für den Fall, daß im Hafenviertel von Herakleopolis bereits vor dem Festungsbau eine gut organisierte

darüber zu entscheiden, welche Gruppe sich in irgendeiner Weise selbst verwalten und halbautonome Strukturen ausbilden durfte. Als wesentliches Unterscheidungsmerkmal zwischen gewöhnlichen Vereinigungen und *politeumata* wird man daher allein die letzteren vorbehaltene Einbindung in die Struktur ptolemäischer Landesverwaltung zu erachten haben. Diesen Aspekt rückte Kruse 2015 dann tatsächlich stärker in den Vordergrund, indem er konstatierte, daß durch die *politeumata* eine Eingliederung „in die administrative Hierarchie" durch „territorial beschränkte Ordnungsfunktionen" erreicht wurde (S. 77; vgl. auch S. 75).

[45] Zur Bedeutung des Wortes siehe z.B. Ruppel 1927; Biscardi 1984, 1205–1215; Zuckerman 1985–1988, 174; Lüderitz 1994, 183; Förster – Sänger 2014, 157–164.

[46] Zum jüdischen Amt siehe Claußen 2002, 273–278.

[47] Anders die Interpretation von Sylvie Honigman, die es in Betracht zog, daß die Kompetenzen der Archonten auf die Rechtsprechung beschränkt gewesen seien; vgl. oben Anm. 18. In Übereinstimmung damit konstatierte Honigman 2003, 94–95 (vgl. 2002, 264), daß „the members of the *politeumata* took advantage of this organisational framework to develop specific institutions", und hielt ferner fest, daß „they injected some specific ethnic colouring into the definition of the position held by the officials whom they were entitled to appoint at their head" (S. 94). Das würde bedeuten, daß ethnisch kategorisierten Gruppen — „from a royal point of view" (S. 94–95) — mit den *politeumata* ein kontrolliertes und planmäßiges Mittel an die Hand gegeben wurde, um öffentliche Strukturen zu gestalten und auszubilden. Demgegenüber erlaubt es die derzeitige Quellenlage aber nicht, eine Aussage darüber zu treffen, ob die Obrigkeit hinsichtlich der Einsetzung bestimmter Amtsträger, die innerhalb eines *politeuma* spezifische administrative Aufgabenbereiche abzudecken hatten, irgendwelche Vorgaben machte. Insofern muß es fraglich bleiben, ob die Einsetzung von Amtsträgern, die innerhalb eines *politeuma* im Rahmen eines *politeuma* allein dem Zweck der Rechtsprechung dienten, vorgesehen war und die jüdische Gemeinde in Herakleopolis — etwa, weil Bedarf an einer derartigen Institution bestand (?) — aus dieser Möglichkeit einen Vorteil ziehen konnte oder sich hier gar „a kind of opportunistic development" (S. 95) andeuten könnte.

jüdische Gemeinde vorhanden, die Autorität der Archonten schon über einen längeren Zeitraum hinweg (auf informeller Ebene) etabliert gewesen wäre und eine nachträgliche Autorisierung bestehender Tendenzen als Folge der militärischen Aufrüstung des Hafenviertels stattgefunden hätte, ließe sich diese nachträgliche Autorisierung gewiß nur mit der Einrichtung eines *politeuma* in Verbindung bringen: Vorläufig wissen wir nämlich nicht mehr, als daß die Archonten ihre Befugnisse als Amtsträger des jüdischen *politeuma* von Herakleopolis und eben nicht einer gewöhnlichen jüdischen Vereinigung oder Synagogengemeinschaft ausübten. Die in P.Polit.Iud. zum Vorschein kommende Beamtenjustiz der Archonten könnte also auch bei dieser Variante als Folge der Konstituierung des *politeuma* aufgefaßt werden.

Resümierend hat uns die von Cowey und Maresch konstatierte „Sondergerichtsbarkeit" der Archonten des jüdischen *politeuma* von Herakleopolis veranlaßt, die Charakterzüge der in P.Polit.Iud. hervortretenden Form der Rechtspflege zu bestimmen. Diesbezüglich war über die Ergebnisse der Editoren, die auf die ptolemäische Beamtenjustiz verwiesen, nicht hinauszugelangen. Die Konzeptualisierung des dokumentierten Verfahrens hat sich aber als problematisch erwiesen. In rein juristischer Hinsicht ist die Terminologie „Sondergerichtsbarkeit" abzulehnen. Auch bei einem ganz untechnischen Gebrauch des Begriffs kann keine „Sondergerichtsbarkeit" vorliegen, weil sie sich im Gewande der Beamtenjustiz präsentiert und daher kaum ohne staatliche Autorisierung denkbar ist. Die erkennbare Beamtenjustiz muß aber nicht auf staatliche Initiative hin „geschaffen" worden sein, sondern könnte sich auch als Teil der allgemeinen administrativen Kompetenzen entwickelt haben, die den Archonten in einem öffentlichen Rahmen zukamen. Diese Kompetenzen erhielten sie, weil sie Amtsträger eines *politeuma* waren. Es ist daher nicht zwingend, P.Polit.Iud. im Zusammenhang mit einer „Spezialkompetenz", mithin der bewußten Übertragung spezifischer judizieller Kompetenzen an die Archonten — um sie als „jüdische Richter" für (weitgehend) jüdische Angelegenheiten einzusetzen — zu betrachten, was im übrigen auch nur schwer mit den Grundzügen ptolemäischer Politik in Einklang zu bringen wäre. Eine alternative Erklärung könnte vielmehr lauten, daß ein staatlicher Eingriff, und zwar die Konstituierung eines *politeuma*[48] — etwa eine lokale Form von *divide et impera* —, jüdische Amtsträger zu Vorstehern einer Verwaltungseinheit gemacht und damit die Basis für die Herausbildung eines Verfahrens gelegt hat, das ein Abbild der üblichen Beamtenjustiz ptolemäischer Amtsträger darstellte und schließlich durch die im Rahmen von P.Polit.Iud. veröffentlichen Schriftstücke dokumentiert ist.

[48] Daß für die Genehmigung oder Einsetzung eines *politeuma* die Zustimmung der Regierung erforderlich war, scheint allgemein akzeptiert zu sein; vgl. Thompson 1984, 1075; Launey 1987, 1077 und 1079; Kruse 2008, 172; dens. 2010, 98 und 2015, 75; Fischer-Bovet 2014, 293–294; Sänger 2016a, 38; dens. 2016b.

Keiner jener Bearbeiter von P.Polit.Iud., die angesichts der Papyri von einer „Sondergerichtsbarkeit unter Juden" sprachen, wollte explizit den Eindruck erwecken, Juden hätten innerhalb des hellenistischen Ägypten eine Sonderstellung eingenommen oder die Existenz ethnisch kategorisierter Gruppen sei maßgeblich von der Bildung von *politeumata* abhängig gewesen;[49] zu dieser Einsicht könnte man implizit aber — vor allem in Unkenntnis der umfangreichen Debatten zu den sozio-juristischen Gegebenheiten jüdischen Lebens und der Funktion der *politeumata* im ptolemäischen Ägypten (bei letzteren scheint es sich aufgrund ihrer geringen Zahl tatsächlich um eine selektive Maßnahme gehandelt zu haben[50]) — angesichts der angezeigten Wortwahl und der damit verbundenen Darstellungsmuster durchaus gelangen.[51] Vorliegender Beitrag wollte auf diese Problematik hinweisen, und aus der hier eröffneten Perspektive ließe sich die Rechtspflege der Archonten allein deswegen in die Kategorie „Sonderfall" einreihen, weil sie uns einen bislang ungeahnten Aspekt ptolemäischer Verwaltung näherbringt; normal wären demgegenüber die administrativ-rechtlichen Rahmenbedingungen gewesen, die zu diesem Sonderfall geführt hatten — und zwar die Einrichtung eines *politeuma*, so daß hinter der angezeigten Beamtenjustiz nicht unbedingt eine Umsetzung eines Regierungsplanes vermutet werden muß.

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[49] Kritik, die Honigman 2002 in diese Richtung gegenüber den Editoren von P.Polit. Iud. geäußert hat, wurde von diesen (Maresch – Cowey 2003) in den wesentlichen Punkten relativiert.

[50] Vgl. Maresch – Cowey 2003, 310.

[51] Von der in Anm. 18 angeführten, das Konzept der „Sondergerichtsbarkeit" aufgreifenden Literatur grenzte sich alleine Kruse 2015, 79 gegenüber dem Kasher 1985 zugrundeliegenden Deutungsmuster der *politeumata* ab (siehe dazu oben bei Anm. 21).

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QUELLE JUSTICE À HÉRAKLÉOPOLIS ? RÉPONSE À PATRICK SÄNGER

Patrick Sänger aborde courageusement un vaste et difficile sujet : le *politeuma* dans le monde hellénistique. Je salue son courage et je tiens à lui apporter mon chaleureux soutien dans son entreprise qui aboutira, je l'espère, à réaliser un projet qui m'est cher, mais que je n'ai pas réussi à mener moi-même à bon terme. J'ai traité le dossier d'Hérakléopolis à mon séminaire de l'École pratique des Hautes Études pendant deux ans, en 2002-2003 et 2003-2004. J'en ai tiré deux articles[1], ainsi que quelques pages pour un manuel collectif[2] et pour un recueil de textes.[3] Je tiens aussi

[1] 1) « La fiancée adultère. À propos de la pratique matrimoniale du judaïsme hellénisé à la lumière du dossier du politeuma juif d'Hérakléopolis (144/3 – 133/2 av. n.è.) », dans Z. Służewska & J. Urbanik, Ed., *Marriage : Ideal – Law – Practice. Proceedings of a Conference held in Memory of Henryk Kupiszewski* (JJP Supplements v), Varsovie, Publ. de l'Université de Varsovie, 2005, p. 141-160 ; et J.-Chr. Couvenhes et B. Legras, Ed., *Transferts culturels et politique dans le monde hellénistique*. Actes de la table ronde sur les identités collectives (Sorbonne, 7 février 2004). Paris, Publ. de la Sorbonne, 2006, p. 103-118 = « Un peuple de philosophes », Paris 2011, p. 231-250 ; 2) « The Jewish Oath in Ptolemaic Egypt », dans *Studies in honor of Ranon Katzoff*. Wiesbaden, Harrassowitz (Philippika. Marburger altertumskundliche Abhandlungen) 2015, p. 164-172 (à paraître).

[2] « Judaism in Egypt », dans M. Sweeney & W. Adler, Eds., *The Cambridge History of Religion in the Ancient World,* vol. 2/7, New York 2012, p. 189-210.

[3] « The politeuma », dans J. G. Keenan, J. G. Manning, U. Yiftach-Firanko, Eds., *Law and Legal Practice in Egypt from Alexander to the Arab Conquest. A Selection of Papyrological Sources in Translation, with Introductions and Commentary*, Cambridge 2014, p. 466-476.

à la disposition des intéressés une version française du dossier élaborée au séminaire.

La question que pose Patrick Sänger est au cœur d'un questionnaire qui enchâsse la problématique du *politeuma*. Il servira de canevas à ma réponse.

Première question : qu'est qu'un *politeuma* ? Si on pose cette question à Paul de Tarse, qui utilise ce terme dans son Épitre aux Philippiens, on découvre la perplexité des commentateurs.[4] On y trouve « confédération », « cité », « bourgeoisie », « citoyenneté » en français ; « country », « commonwealth », en anglais, et même « conversation », traduction retenue par la King James Bible en 1611. Cette embarrassante polysémie s'efface dans les sources papyrologiques et épigraphiques qui permettent de saisir la réalité institutionnelle du *politeuma* : un groupement d'hommes d'une même origine et partageant le même culte religieux, doté d'une certaine autonomie administrative et judiciaire.[5] Il me paraît certain que la création d'un *politeuma* ne pouvait pas se faire spontanément, mais requérait une autorisation du pouvoir royal. Dans la législation ptolémaïque, une sévère protection légale encadre les composantes de l'identité personnelle : nom, patronyme, patrie d'origine (*ethnikon*), appartenance à une unité militaire. La loi royale, qui perpétue ainsi et durcit les sanctions dont la cité classique accompagnait la protection du nom propre et du statut civique, ne pouvait pas être indifférente à la formation de groupes aspirant à la gestion autonome de leurs affaires.[6]

L'édition, en 2001, d'une vingtaine de documents, éparpillés entre les collections de Cologne, de Munich, d'Heidelberg et de Vienne, *P.Polit.Iud.*, permet à présent d'observer de près la vie d'un *politeuma* juif, installé dans le nome Hérakléopolite, aux portes du Fayoum, dans la deuxième partie du règne de Ptolémée VIII Évergète II (144/4 à 133/2 av. n. è.).[7] Le politarque, chef du *politeuma*, et les archontes, « quasi-magistrats » qui l'assistent dans l'exercice de ses fonctions, sont sollicités par les membres du *politeuma* et d'autres personnes pour régler les différends qui surgissent dans leur vie familiale et sociale. Ils déploient une activité de type judiciaire. Est-ce un fait exceptionnel ou un cas d'application d'une règle générale, par rapport à d'autres *politeumata* et par rapport aux autres communautés juives d'Égypte ?

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[4] Ph 3:20-21.

[5] Article précité, p. 46. En grec moderne, *politeuma* se traduirait par « constitution » ou « régime politique ». Exemple récent : Athina Dimopoulou, *Lesbion Politeiai* : *Politeuma kai dikaio ton poleon tes Lesbou (archaikoi, klassikoi, ellenistikoi, romaïkoi chronoi)*, Athènes 2015.

[6] Détails dans ma contribution au 27e Congrès international de Papyrologie, Varsovie 2013 : « Modèles classiques des lois ptolémaïques », *JJP* 43, 2014, sous presse.

[7] L'hypothèse de Bradley Ritter, « On the «Politeuma in Heracleopolis» », *Scripta Classica Israelica* 30, 2011, p. 9-37, selon qui le *politeuma* dans le dossier d'Hérakléopolis ne serait pas une communauté juive mais le corps civique de cette ville, est irrecevable, Hérakléopolis n'étant pas une cité, mais une métropole ne possédant pas, contrairement à ce que pense cet auteur, de corps civique. Le fait que ce soit le *politeuma* « des Juifs à Hérakléopolis » est clairement indiqué dans nos documents : *to en Herakleou polei politeuma tōn Ioudaiōn* (*P.Polit. Iud.* 8.4-5, 133 av. n. è. ; cf. 20 v° 8-9, vers 143-132 av. n. è.).

Par rapport à d'autres *politeumata*, la situation paraît plus normale qu'exceptionnelle. On ne voit pas pourquoi le gouvernement ptolémaïque serait moins favorable aux Béotiens, aux Ciliciens ou aux Crétois qu'aux Juifs.[8] La différence, c'est que les archontes d'Hérakléopolis peuvent appliquer à leurs justiciables le droit juif dans des formes hellénisées, alors que nous n'avons pas de documents capables d'attester l'application de coutumes nationales crétoises ou béotiennes aux membres des *politeumata* crétois ou béotien. Le fait est que les Juifs ont importé en Égypte leur Loi, la Tora de Moïse, alors que les autres immigrants hellénophones vivent selon le droit hellénistique largement coutumier.[9]

En revanche, par rapport aux autres communautés juives d'Égypte, qui ne sont pas organisées en *politeuma,* la situation à Hérakléopolis peut paraître assez exceptionnelle. Ce que nous voyons ailleurs relève de l'arbitrage plutôt d'une activité judiciaire régulière. Tel est le cas de l'ethnarque qui, selon Strabon, gérait les affaires juives à Alexandrie et réglait des litiges par voie d'arbitrage (*diaitai kríseis*).[10] Cela pourrait aussi être le cas des décisions qu'évoque Philon d'Alexandrie dans son traité *Des lois spéciales*.[11] Il en va de même pour le *beith-din* mentionné dans les sources rabbiniques[12]. Mais le roi pouvait aussi confier à une communauté juive l'exercice de sa prérogative judiciaire comportant le pouvoir d'énoncer et d'exécuter des sanctions pénales, y compris la peine capitale, comme il la déléguait à ses fonctionnaires, tel

[8] Nous connaissons sept *politeumata* ptolémaïques dont le caractère ethnique soit clairement déterminé : 1) béotien (SB 6664) ; 2) cilicien (SB 7270) ; 3) crétois (P. Tebt. 32), 4) iduméen (OGIS 737) ; 5) lycien (SB 6025) ; 6) phrygien (OGIS 658) et juif (Hérakléopolis). L'existence d'un *politeuma* des Hellénomemphites, admise par U. Wilcken (*Urkunden der Ptolemäerzeit* I, Berlin-Leipzig 1927, p. 637), paraît douteuse pour l'époque ptolémaïque : voir A. Świderek, « Hellénion de Memphis – la rencontre de deux mondes », *Eos* 51,1, 1961, p. 57-63, particulièrement p. 60. Le dossier d'Hérakléopolis confirme aussi nos doutes quant à l'existence durable d'un *politeuma* juif à Alexandrie. En appliquant à Alexandrie la formule officielle utilisée à Hérakléopolis, on aurait dû entendre parler d'un « *politeuma* des Juifs à Alexandrie » (*to en Alexandreiai politeuma tōn Ioudaiōn*). Pareille formule ne figure dans aucune source connue. C'est à tort que certains historiens utilisent le terme de *politeuma* pour définir la communauté juive d'Alexandrie dans son ensemble.

[9] En dernier lieu, ma contribution au Colloque Henri Lévy-Bruhl, Paris 25-26 mars 2015 : « La coutume comme facteur de formation du droit : l'exemple de l'Égypte grecque et romaine », à paraitre.

[10] Strabon, cité par Flavius Josèphe, *Antiquités* 14, 117.

[11] L'existence des tribunaux juifs autonomes, postulée par E. Goodenough , *The Jurisprudence of the Jewish Courts in Egypt*, New York 1929; à partir de ce traité, relève d'un fantasme incompatible avec tout ce que nous savons de l'organisation judiciaire de l'Égypte grecque et romaine.

[12] Tosefta Ket. 3.1 = Peah 4.8 ; b.Ket. 25a., cf. y.Ket. 2.26d. Cf. V. Tcherikover, « Prolegomena », CPJud. I, p. 32 f., note 84, et p. 93 note 87. Après la conquête romaine de l'Égypte, l'administration de la justice devient un monopole du gouvernement provincial ce qui exclut toute autre juridiction autonome. Cf. Barbara Anagnostou-Canas, *Juge et sentence dans l'Égypte romaine*, Paris 1991, p. 17 sq. (partic. p. 18 n. 84).

le diœcète, son « ministre des finances », et sans doute aussi les stratèges de nome.[13] C'est ce qu'on voit dans le 3e Livre de Macchabées, où les Juifs alexandrins restés fidèles à leur Dieu sont autorisés à mettre à mort leurs coreligionnaires apostats.[14] Il s'agit là d'une fiction littéraire, mais cette fiction pourrait bien puiser dans la réalité judiciaire de l'Égypte ptolémaïque en l'adaptant à ses objectifs.[15]

Pouvons-nous dire alors que les archontes juifs d'Hérakléopolis représentent une forme de « juridiction nationale autorisée par le roi » (königlich autorisierte Eigengerichte, selon la formule de H.-J. Wolff), à l'instar les dicastères d'Alexandrie et des métropoles de la chôra au IIIe siècle av. n. è. ?[16] On ne saurait l'affirmer. Les dicastes sont confinés dans une activité exclusivement judiciaire ; les archontes, en revanche, associent cette activité à des fonctions administratives. De ce point du vue, ils sont assez proches des chrématistes royaux, juges et administrateurs à la fois. Le terme de « Sondergerichtsbarkeit » vient à l'esprit, mais comme le montre bien Patrick Sänger il pose plus de problèmes qu'il n'apporte d'éclairage.[17]

Au total, l'enquête engagée par Patrick Sänger, tout en aidant à approfondir notre connaissance du judaïsme hellénisé en Égypte, apporte une contribution non négligeable à l'image que nous nous faisons de l'administration de la justice dans le royaume des Lagides. Elle permet du nuancer la distinction sans doute trop tranchée entre la juridiction à proprement parler et l'activité coercitive des agents du pouvoir chargés des tâches judiciaires.[18] La justice ptolémaïque se déploie dans un tableau complexe et varié, sous diverses formes, complémentaires les unes des autres. C'est un progrès appréciable pour la papyrologie juridique comme pour l'étude du droit grec et hellénistique dans son ensemble. Bravo Patrick ! Go on !

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[13] Voir H.-J. Wolff, *Das Justizwesen der Ptolemäer*, Munich 1962 (2e éd. 1970), p. 126, 160 sq.

[14] M 3, 7 : 12. Traduction et commentaire, p. 67-69, dans mon *Troisième Livre des Maccabées*, Paris 2008 (La Bible d'Alexandrie 15.3).

[15] Pour une justification de cette hypothèse, voir mon art. « Le Troisième Livre des Maccabées : un drame judiciaire judéo-alexandrin », JJP 38, 2008, p. 157-180 (= « *Un peuple de philosophes* », Paris 2011, p. 217-230).

[16] En dernier lieu : Nadine Grotkamp, « The Ptolemaic Dikasterion », *Symposion 2013*, Vienne 2014, p. 347-360, avec ma réponse, « Dikasteria : A Panhellenic Project? », *ibid*., p. 361-364.

[17] Je pense bien entendu à Erich Berneker, *Die Sondergerichtsbarkeit im griechischen Recht Ägyptens, mit rechtsvergleichenden Ausblicken,* München, 1935 (Münch. Beitr. 22.)

[18] La différence entre « juridiction à proprement parler » et « pouvoir coercitif », est retenue par H.-J. Wolff, *Das Justizwesen der Ptolemäer,* München 1962 (2e éd., 1971), p. 113 sq. ; cf. mon article « Zum Justizwesen der Ptolemäer », *ZRG RA* 80, 1963, p. 42–82, partic. p. 60 et suiv.; réserves de M. Talamanca, *BIDR*., 3e s., 4 (65), 1962, p. 229-254.

ANDREA JÖRDENS (HEIDELBERG)

KEINE KONKURRENZ UND DENNOCH RECHT: ZUM UMGANG ROMS MIT DEN LOKALEN RECHTEN

Wiederholt hat sich Hans Julius Wolff mit dem „Problem der Konkurrenz von Rechtsordnungen in der Antike" befaßt, so auch in einer Abhandlung, die 1979 unter diesem Titel in den Sitzungsberichten der Heidelberger Akademie erschien.[1] Wie auch in der sonstigen reichen rechtshistorischen Literatur zu diesem Thema stand dabei stets die Frage im Zentrum, wie sich die Rechtsordnungen der Angehörigen verschiedener Völkerschaften im Konfliktfall zueinander verhielten, und genauer noch, warum es in der Antike offenbar nie zu der Ausbildung eines Internationalen Privatrechts kam. Einschlägige Auseinandersetzungen in der klassischen Poliswelt wie auch Rom waren dazu ausfindig zu machen und auf mögliche Ansätze in diese Richtung hin zu überprüfen, wobei sich als besonders ergiebig für Wolff namentlich das hellenistisch-römische Ägypten erwies, dessen „Faktoren der Rechtsbildung" er schon ein gutes Vierteljahrhundert früher nachgegangen war.[2] Denn durch die einzigartige Überlieferungslage ließen sich hier über 1000 Jahre hinweg, in denen Griechisch Amts- und Umgangssprache war, Einblicke in das Miteinander der Angehörigen verschiedenster Rechtskulturen und die Bewältigung allfälliger Konflikte zwischen konkurrierenden Rechtsordnungen gewinnen, wie es nirgendwo anders in gleicher Detailfreude möglich war.

[1] Wolff 1979; vgl. auch ders. 2002, 71 ff. § 5 sowie 113 ff. § 7.
[2] Wolff 1953.

In strengem Sinne sollte dies allerdings nur für das Ptolemäerreich gelten, da mit der Ankunft der Römer, die nurmehr das von ihnen selbst gesprochene und gesetzte Recht als verbindlich anerkannten, die bis dahin bestehende Konkurrenz von städtischen und staatlichen, ggf. auch nationalägyptischen Rechten ein rasches Ende fand.[3] Entsprechend grenzt auch Wolff in der eingangs genannten Abhandlung seinen Gegenstand noch genauer ab: „Hingegen wird trotz unleugbar vorhandener Berührungen nicht zur Sprache kommen der weit umfangreichere Fragenkomplex des Verhältnisses des römischen Reichsrechts zu den Rechtstraditionen und Institutionen der Provinzialbevölkerungen", falle er doch aus dem in Rede stehenden Thema – näherhin der „unter Umständen nötigen Auswahl zwischen Vorschriften *prinzipiell gleichrangiger* Rechtssysteme – genau genommen heraus".[4] Schließlich gehe es unter römischer Herrschaft „ja nicht um die Konkurrenz prinzipiell gleichgeordneter Systeme, sondern um die Duldung oder auch Beiseiteschiebung von – rechtstheoretisch gesehen – bloßen örtlichen Gewohnheiten durch die übergeordnete Macht",[5] was er in dem Abschnitt über Rom nochmals präzisiert: „Für das Ausmaß an Autorität, das man den Volksrechten zuerkannte, war letzten Endes allein maßgeblich der *Wille der römischen Behörden*, deren *freiem Ermessen* anheimgestellt war, ob und wieweit sie überkommenen Formen und Bräuchen der Provinzialbevölkerungen Beachtlichkeit zubilligten."[6]

Während Wolff sich aus diesem Grund in seiner Abhandlung bewußt auf die Rechtsprechung des *praetor peregrinus* in Rom selbst beschränkte, hatte er in seiner früheren Arbeit über die rechtsbildenden Faktoren in Ägypten wiederum die Frage der Anwendung römischrechtlicher Grundsätze und Institutionen seitens römischer Richter in den Mittelpunkt gestellt. Zwar seien mitunter schon vor der Verleihung des allgemeinen Bürgerrechts an sämtliche Einwohner des Reiches durch die *Constitutio Antoniniana* solche Fälle zu finden, doch habe sich Wolff zufolge „keinerlei Prinzip erkennen lassen, das die Beamten bei der Auswahl römischer oder volksrechtlicher Entscheidungsgrundlagen geleitet hätte",[7] und er kommentiert: „Wenn man die Formlosigkeit des Kognitionsverfahrens und die so gut wie unbegrenzte Ermessensfreiheit der Beamten einer- und ihr juristisches Laientum andererseits bedenkt, so ist das auch kein Wunder."[8]

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[3] Vgl. statt vieler erneut Wolff 1966, 32 ff. Auf die eingehende Auseinandersetzung mit diesem Konzept wie auch bes. mit der von J. Mélèze Modrzejewski entwickelten These einer grundsätzlichen Respektierung der lokalen Rechte als Gewohnheitsrecht, die soeben von Alonso 2013 [2015] vertieft wurde und mir erst im Nachhinein zur Kenntnis gelangte, ist hier nur hinzuweisen; einige Bemerkungen seien immerhin gegen Ende erlaubt.

[4] Wolff 1979, 11.

[5] Ebda., 13.

[6] Ebda., 66.

[7] So Wolff 1953, 53 mit Verweis auf Taubenschlag 1952 (= 1959).

[8] Ebda.

In seiner Bedeutung für die provinziale Rechtsprechung ist das Zusammenspiel dieser drei Faktoren zweifellos kaum zu unterschätzen, namentlich was die „so gut wie unbegrenzte Ermessensfreiheit" betrifft. Dennoch wird man nur ungern mit völliger Beliebigkeit, ja Willkür in der Rechtsprechung rechnen, zumal wenn man die zunehmende Professionalisierung des Reichsdienstes in Betracht zieht. Insofern stellt sich die Frage, ob es nicht doch eine Richtschnur für die Entscheidungsfindung gab, und sei sie auch nicht im streng rechtlichen Bereich zu verorten. Wenn die vorgefundenen Rechte grundsätzlich nicht als gleichrangig anerkannt waren, warum wurde ihnen dann überhaupt zur Geltung verholfen, wann konnten sie Bestätigung durch römische Richter erlangen, noch wichtiger aber: In welchen Fällen setzten sich die römischen Richter darüber hinweg? Läßt sich darüber im Abstand mehrerer Jahrzehnte von den Wolff'schen Arbeiten nunmehr Genaueres sagen?

Freilich geben die Quellen nur höchst selten Hinweise auf die Rechtsgrundlagen preis, derer sich die Richter für ihre Entscheidungsfindung bedienten, und noch einmal seltener ist ihnen etwas zu den etwa leitenden Motiven zu entnehmen. Immerhin wird in einigen wenigen Texten ausdrücklich Bezug auf lokale Rechtsvorstellungen genommen, denen man daher im kaiserzeitlichen Rechtssystem Ägyptens durchaus Bedeutung zuschreiben wird. Diesen üblicherweise als τῶν Αἰγυπτίων νόμοι, also 'die Gesetze' oder besser 'das Recht der Ägypter' eingeführten Fällen wurde auch bisher schon vielfach die Aufmerksamkeit der Forschung zuteil, wofür nur auf die neuesten, teilweise noch in Druck befindlichen Arbeiten von Silvia Strassi und Hans-Albert Rupprecht verwiesen sei.[9] Die rege geführte Debatte wurde dabei durchweg von der – noch immer nicht endgültig entschiedenen – Frage bestimmt, welches Recht nun genau hierunter zu verstehen sei, d.h. wie weit außer genuin ägyptischen Rechtsvorstellungen etwa auch griechisches Rechtsdenken eine Rolle spielte.

Wenn ich im folgenden erneut diese Texte ins Zentrum stelle, möchte ich stattdessen allerdings den Blick auf den Umgang der Römer mit derlei vor Ort vorgefundenen Rechtstraditionen lenken. In der Mehrzahl der Belege, die explizite Hinweise auf abweichende lokale Rechtsvorstellungen bieten, haben wir tatsächlich konkrete Beispiele für den vielgerühmten flexiblen Umgang mit den einheimischen Rechten vor uns – wobei daran zu erinnern ist, daß die hierin ersichtliche Flexibilität stets als hervorstechendstes Merkmal römischer Herrschaft und geradezu als Ausweis römischer Staatsklugheit galt. Besonderes Gewicht kommt daneben jedoch gerade solchen Fällen zu, in denen die Römer entgegen ihrer sonst so erfolgreichen und wohlbewährten Praxis jede Flexibilität vermissen ließen, ja so weit gingen, sich in vollem Bewußtsein des Sachverhalts brüsk über entgegenstehende Rechtsvorstellungen der Bevölkerung hinwegzusetzen.

Das Paradebeispiel für das Zusammentreffen verschiedener Rechtskulturen vor einem römischen Richter stellt fraglos das bekannte, leider nur fragmentarisch

[9] Strassi (2016); allgem. auch Rupprecht 2011, 49 ff. sowie zuletzt ders. (im Druck). Vgl. auch Jördens 2016a, wo – mit anderer Schwerpunktsetzung – die im folgenden angeführten Quellentexte jeweils mit ausführlichen Zitaten und Übersetzung geboten sind.

überlieferte Verhandlungsprotokoll vor einem Präfekten namens Lupus aus vespasianischer oder spättrajanischer Zeit dar, in dem um die Rechte des Freilassers gegenüber dem Freigelassenen gestritten wird.[10] Auch wenn der genaue Wortlaut nicht mehr vollkommen zu rekonstruieren ist, wird nach 'den Gesetzen der Ägypter' und 'den städtischen Gesetzen' differenziert; da die ersteren, wie die Beratung im *consilium* ergab, in der Sache schwiegen, wird das Urteil nach den letzteren und damit im Sinne des Freilassers gefällt.[11] Die lebhaft erörterte Frage, ob mit der 'Stadt' Alexandria oder eher die *urbs* schlechthin gemeint sei, ist mit Hans Julius Wolff wohl zugunsten Roms zu entscheiden, so daß hier tatsächlich lokales und römisches Recht einander gegenüberständen.[12] Allein schon der Umstand, daß der Prozeß vor dem Präfekten geführt wurde, läßt den hohen Rang dieses Vergehens in römischen Augen erkennen; daß der Präfekt dem pflichtvergessenen Freigelassenen im Falle weiterer Beschwerden obendrein eine Prügelstrafe androht, bestätigt dies nur.

Der Fall bietet sich durchaus an, allgemeinere Regeln daraus abzuleiten. Zum einen haben wir offenbar durchschnittliche Peregrine vor uns, zumindest weist nichts auf einen herausgehobenen Status – also alexandrinisches oder gar römisches Bürgerrecht – hin. Zum anderen werden die Parteien von einem römischen Richter gehört, der zunächst prüfen läßt, ob es traditionelle, möglicherweise sogar kodifizierte[13] lokale Rechtsnormen gibt, die von den Parteien als verbindlich angesehen werden. In einem solchen Fall, so wird man annehmen dürfen, hätte er wohl auf dieser Grundlage entschieden. Als sich jedoch herausstellte, daß es 'bei den Ägyptern' keine einhellige und allgemein akzeptierte Rechtsauffassung zu dem hier in Rede stehenden Tatbestand gab, zögerte er nicht, seine Entscheidung nach den ihm vertrauten Rechtsvorstellungen zu treffen und überdies mit zusätzlichen Sanktionen zu drohen, sofern der Verurteilte bei seinem Fehlverhalten blieb.

Mit Ausnahme eines einzigen, ebenfalls fragmentarischen Papyrus, der Fragen des Bau- und damit vielleicht Nachbarschaftsrechts betrifft,[14] sind alle anderen Fälle, die ähnlich explizite Verweise auf lokale Rechte enthalten, dem stets besonders

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[10] P. Oxy. IV 706 = M. Chr. 81 (73 [T. Iulius Lupus; = BL IX 181] oder 113-117 [M. Rutilius Lupus]); die letzte eingehende Erörterung bei Purpura 2000; vgl. auch den neuesten Überblick über die Forschungsdiskussion bei Mélèze Modrzejewski 2014, 264 ff.

[11] Vgl. nur P. Oxy. IV 706 = M. Chr. 81, 5-13; zu den verschiedenen Rekonstruktionsversuchen einschließlich der Frage, ob in Z. 11 νόμον oder νομόν zu akzentuieren sei, zuletzt Jördens (2016b, 148 f.), Anm. 171 f.

[12] Eingehend dazu zuletzt ebda. Anm. 173 f.

[13] So zuletzt nachdrücklich Yiftach-Firanko 2009, 551 f.; skeptisch hingegen Rupprecht (im Druck) mit Anm. 43 sowie aus grundsätzlichen Erwägungen jetzt auch Alonso 2013 [2015], 359 f.

[14] P. Tebt. II 488 descr. (121/22); erkennbar ist nurmehr der Bescheid, daß angesichts der bereits drei Jahre zurückliegenden Baumaßnahmen die üblichen Einspruchsfristen längst abgelaufen seien; die ergänzend hinzugefügten Bestimmungen des νόμος τῶν Αἰγυπτίων sind nicht mehr erhalten.

konservativen Erb- und Familienrecht zuzurechnen. Allem Anschein nach agierten die Römer hier vorsichtiger als sonst, jedenfalls zogen sie häufiger und vielleicht sogar regelmäßig im Landesrecht versierte Juristen bei. Die von solchen νομικοί erteilten Rechtsauskünfte sind zwar nur selten erhalten geblieben, doch läßt dies auf ein geschärftes Bewußtsein in diesen Fragen schließen. Das wohl bekannteste Beispiel hierfür liegt in einer Sammlung von Prozeßprotokollen vor, deren zweites einen im Jahr 72/73 vor dem Präfekten T. Iulius Lupus geführten Erbrechtsfall betrifft. Um Auskunft zu Gestalt und Inhalt von Testamenten gebeten, erklärt der νομικός Areios darin, daß es im Landesrecht keinerlei Vorschriften hinsichtlich Form oder Sprache gebe und die Enterbung der Kinder gestattet sei.[15]

Daß dies in der Tat der lokalen, genauer noch ägyptischen Rechtspraxis entsprach, bestätigen rund 40 Jahre spätere Protokolle von Verhandlungen vor dem Präfekten Ser. Sulpicius Similis. In dem ersten davon wird wohlwollend eine Rechtsprechung nach den 'Gesetzen der Ägypter' vermerkt, wonach auch nachträgliche Abänderungen des Testaments zulässig seien.[16] In den beiden folgenden Fällen, in denen zusätzlich zur Beratung im *consilium* der νομικός Artemidoros beigezogen wird, unterstreicht Similis zunächst die Testierfreiheit der Ägypter ganz allgemein[17] und äußert sich sodann zu dem besonderen Problem von Erbfolge und Testierfreiheit, wenn die durch eine frühere testamentarische oder ehevertragliche Regelung Begünstigten zwischenzeitlich verstorben waren.[18]

Wie wir aus einem Verfahren des Jahres 124 vor dem *praefectus alae* Blaesius Marianus erfahren, galt das Prinzip der Testierfreiheit allerdings nicht für Söhne, die aus einem ἄγραφος γάμος hervorgegangen waren. Denn anders als den einem ἔγγραφος γάμος entstammenden Kindern war es ihnen untersagt, zu Lebzeiten des Vaters ihr Vermögen Dritten zu vermachen; nach Auskunft des schon bekannten νομικός Artemidoros kehre es vielmehr an den Vater zurück.[19] Für den Nachweis, welche Art Ehe nun bestanden habe, räumt Marianus den Parteien eine Frist von 60 Tagen ein, während die streitige Immobilie solange zu versiegeln sei.

Überdies stand der Erbanspruch allein den Kindern zu, während Abkömmlinge vorverstorbener Kinder vom Erbe ausgeschlossen waren; zudem zeichnen sich

[15] P. Oxy. XXXVI 2757 col. II, mit den Ergänzungen von Lewis 1972, 59-61 # 90 = BL VII 152. Sicher nicht zutreffend ist die von Seidl 1974, 109 f. = BL VII 152 vertretene Auffassung, wonach es sich um römisches Recht und näherhin die Frage des Soldatentestaments handele, weswegen er in col. II, 5 auch σ[τρατιωτῶν ergänzt; zu recht abgelehnt jedoch von Mélèze Modrzejewski 1988 (= 1990) 390, vgl. auch Purpura 2004-2005, 277 Anm. 35; weniger überzeugend dagegen die von Modrzejewski 1988 (= 1990) Anm. 26 für Z. 6 erwogene Ergänzung χρόνος "délai" statt τύπος (= BL IX 197).

[16] P. Oxy. XLII 3015, 1-5 (o. D.).

[17] P. Oxy. XLII 3015, 5-12 (8. 5. 109).

[18] P. Oxy. XLII 3015, 13-27 (15. bzw. 16. 1. 108-112).

[19] CPR I 18 = SPP XX 4 = M. Chr. 84 = Jur. Pap. 89 (13. 4. 124); hierzu auch Purpura 2004-2005, 275 f. sowie zuletzt Mélèze Modrzejewski 2014, 269 ff.

Unterschiede je nach dem Geschlecht von Erblasser und Erben ab. Dies sollte sich im Jahr 124/25 grundlegend ändern, als Hadrian das Erbrecht der Abkömmlinge auch auf Ägypter ausdehnte.[20] Das abweichende Rechtsgefühl und nicht zuletzt die wohl recht allgemein gehaltene Form seiner χάρις zeitigten freilich wiederholten Klärungsbedarf. So suchten etwa die Brüder der Mutter Mitte der 130er Jahre dem Sohn den Anteil an dem Erbe zu verweigern, den der Großvater seiner vorverstorbenen Tochter testamentarisch zugedacht hatte, da 'bei den Ägyptern' Tochterkinder nicht neben Söhnen erbberechtigt seien.[21] Sicherheitshalber fragt der delegierte Richter daher nochmals bei dem Präfekten M. Petronius Mamertinus nach, doch gingen die von dem νομικός Dioskurides eingeholte Rechtsauskunft wie auch die Entscheidung verloren.

Rücksprache mit Mamertinus hatte im Jahr 135 auch der ehemalige Königliche Schreiber Menandros genommen. Zwar hatte bereits der Epistratege Gellius Bassus den Erbanspruch ägyptischer Abkömmlinge auch nach den Großmüttern bekräftigt, doch stellte sich hier das zusätzliche Problem, daß die Erblasserin noch vor dem hadrianischen *beneficium* und überdies intestat verstorben war. Mit Verweis auf die inzwischen maßgebliche Konstitution wird das Erbe gleichwohl der Enkelin zugesprochen, woraufhin ihr Anwalt umgehend Forderungen wegen ihr bislang entgangener Einkünfte erhebt.[22] In einem weiteren Verfahren aus demselben Jahr geht es unter anderem um die Herausgabe des doppelten Anteils an dem großväterlichen Erbe, da dem vorverstorbenen Vater als dem ältesten Sohn 'nach den Gesetzen' die διμοιρία gebühre.[23] Da der Umfang des Erbanspruchs als solcher nicht bestritten wird, gelte es nurmehr weitere Details zu klären, während in der Hauptsache erneut im Sinne der kaiserlichen Konstitution und damit zugunsten der Klägerin entschieden wird.

Die grundsätzliche Bereitschaft der römischen Richter zur Akzeptanz der lokalen Rechtsvorstellungen steht nach alledem außer Frage, wofür José Luis Alonso in seinem kürzlich publizierten gewichtigen Beitrag noch eine Reihe weiterer Belege aus Rechtsprechung und Vertragsrecht aufzuführen vermochte.[24] Ihr ernsthaftes Bemühen um die Aufrechterhaltung der vorgefundenen Rechtskultur wird nicht zuletzt daraus ersichtlich, daß sie bei Bedarf regelmäßig ausgewiesene Kenner der lokalen Rechte beizogen, die auch über solche Feinheiten wie die unterschiedliche Rechtsposition von Kindern aus einem ἄγραφος und einem ἔγγραφος γάμος aufklären konnten. Dieselbe Haltung treffen wir auch in der Rechtsetzung an,

[20] Vgl. bes. BGU I 19 = M. Chr. 85 col. I, 21 f. (nach 11. 2. 135). Zum Bezug auf das kaiserliche *beneficium* auch ebda. col. I, 7; col. II, 7 f. (hier auch das Datum); col. II, 15; vgl. auch BGU XX 2863, 13 ff. (nach 133).

[21] So nach dem kürzlich edierten BGU XX 2863 (nach 133), vgl. bes. – wenngleich in unklarem Zusammenhang – Z. 17.

[22] BGU I 19 = M. Chr. 85 (nach 11. 2. 135).

[23] BGU I 136 = M. Chr. 86 (nach 24. 3. 135).

[24] Vgl. nur Alonso 2013 [2015], 352 f. (Rechtsprechung) bzw. 354 (Vertragsrecht).

wofür nur auf das im Jahr 89 ergangene Edikt des Präfekten M. Mettius Rufus zu dem zur Sicherung des privaten Rechtsverkehrs geschaffenen Besitzarchiv, der sog. βιβλιοθήκη ἐγκτήσεων, verwiesen sei.[25] Da nur lückenlos geführte Akten verläßliche Auskunft über die Vermögensverhältnisse versprachen, hieß Rufus darin auch die Eigentumsvorbehalte von Frauen und Kindern eintragen, deren Vermögen 'nach irgendeinem landesüblichem Recht' zeitweilig an den Mann bzw. die Eltern übergegangen war.[26] Auseinandersetzungen um diese für ägyptische Eheverträge typische Verfangenschaft gab es jedoch nach wie vor, wie sich am Folgeedikt des Präfekten Ser. Sulpicius Similis aus dem Jahr 109 erweist, das mitsamt demjenigen des Rufus noch 80 Jahre später in einer Eingabe zitiert werden sollte.[27]

Die fragliche Petition bietet vielleicht sogar das berühmteste Beispiel für konkurrierende Rechte in den Papyrusquellen, da sich Dionysia gegen das Vorhaben ihres Vaters wehrt, sie gegen ihren Willen aus der Ehe herauszunehmen.[28] Hierfür hatte sich der Vater auf ägyptisches Recht berufen, doch mag dies bei einem Ex-Gymnasiarchen von Oxyrhynchos und also Angehörigen der provinzialen Oberschicht ein bloßer Schachzug gewesen sein. Denn Dionysia zufolge war sein einziges Ziel, dadurch Zugriff auf das ihr verfangene Vermögen zu erlangen, wogegen sie den nach höchstrichterlichem Urteil allein maßgeblichen Ehewillen der Frau geltend macht. Die hierfür angeführte Entscheidung des Epistrategen Paconius Rufus aus dem Jahr 133 nimmt wiederum auf einen Spruch des Präfekten T. Flavius Titianus Bezug, der im Einklang mit der hadrianischen Politik die – bei vom Vater erzwungenen Trennungen eben fehlende – *humanitas* zum Maßstab erhebt.[29]

Dieser Fall verdient insofern besondere Aufmerksamkeit, als er auf einen Grundzug der römischen Rechtsprechung in den Provinzen verweist. Lokale Rechte waren danach ohne weiteres zu respektieren, ja gegebenenfalls sogar zu unterstützen, was sich auch in der Aufnahme der Verfangenschaft in die vom Besitzarchiv geführten Akten zeigt. Dies aber nur so lange, als es sich um gewisse Eigenheiten handelte, die in römischen Augen unbeachtlich waren und denen man daher besser nicht entgegentrat. Solange alle Beteiligten sich darin einig waren, daß Kinder aus einem ἄγραφος und einem ἔγγραφος γάμος erbrechtlich unterschiedlich gestellt waren[30] oder daß das älteste Kind gegenüber den Geschwistern den doppelten Anteil am Erbe erhielt, waren römische Richter ohne weiteres gewillt, sich daran zu halten und nach

[25] So zuletzt Jördens 2010.

[26] P. Oxy. II 237 col. VIII, 27-43 = M. Chr. 192 = Jur. Pap. 59 = Sel. Pap. II 219 = FIRA I 60 (1. oder 31. 10. 89, zitiert nach 27. 6. 186), bes. Z. 34 ff.

[27] Vgl. P. Mert. III 101 (8. 11. 109), bes. Z. 33 ff. sowie das – aufgrund der hier eingetretenen Verluste insgesamt umfangreichere – Zitat in P. Oxy. II 237 col. VIII, 21-27 (nach 27. 6. 186).

[28] P. Oxy. II 237 (nach 27. 6. 186).

[29] Hierzu jetzt Kreuzsaler – Urbanik 2008, 133 ff. mit eingehender Erörterung der von ihnen angeführten Präzedenzfälle; zuletzt auch allgem. Mélèze Modrzejewski 2014, 261 ff.

[30] Zu den hiermit ebenfalls verbundenen eherechtlichen Implikationen bereits Wolff 1939, 60 ff.

Beweislage zu entscheiden. Hellhörig wurden sie jedoch, wenn sich jemand auf ein ihnen vertrautes Prinzip berief, wie der Freilasser auf die Dienste des Freigelassenen oder Dionysia auf den weiterbestehenden Ehewillen trotz angeblicher väterlicher Rechte.[31] Mit der grundsätzlichen Bereitschaft, das eigene Rechtsempfinden um des lieben Friedens willen zurückzustellen, war es in diesem Moment allem Anschein nach vorbei; ohne weiter auf die vorgebrachten Begründungen einzugehen, verkündete der Richter kurz und knapp seine Entscheidung.

Die bekannte Flexibilität wurde demnach nicht etwa aus Rücksicht auf die Bevölkerung oder gar um ihrer selbst willen praktiziert, sondern nur, um unnötige Konflikte zu vermeiden, wenn aufgrund eingewurzelter Rechtsvorstellungen lästige Diskussionen oder gar Widerstände drohten. Prinzipiell schreckten die Römer jedoch keineswegs davor zurück, sich über entgegenstehende Überzeugungen hinwegzusetzen, wie sich im Fall der Dionysia und der von ihr angeführten Präzedenzien zeigt. Für die von Wolff beschriebene grundsätzliche Bedenkenlosigkeit ließe sich zudem auf eine ganze Reihe massivster Eingriffe in das bestehende Rechtssystem verweisen, so insbesondere zu Beginn ihrer Herrschaft im öffentlichrechtlichen Bereich – erinnert sei nur an die Reform des Personenstandsrechts und überhaupt das hohe Gewicht, das alle Fragen zum Rechtsstatus für sie besaßen; die hieran anknüpfende Einführung der Kopfsteuer für die peregrine Bevölkerung mitsamt dem in 14jährigem Turnus stattfindenden Zensusverfahren; die Auflösung sämtlicher bis dahin tätigen Gerichte; die vielfältigen Vorgaben im Vertragswesen einschließlich der Neuordnung der Archive; die Klassifizierung des gesamten bebaubaren Landes als *ager publicus* oder *ager privatus* und dessen teilweise großflächige Überlassung an Landfremde aus der Umgebung des Kaiserhauses. Vieles hiervon mußte auf die einheimische Bevölkerung befremdlich, ja verstörend wirken, doch gab es darunter auch manch Willkommenes wie die Senkung des Höchstzinssatzes bei Gelddarlehen oder das Verbot der Schuldhaft bei privaten Schulden.

Vergleichbar tiefgreifende Maßnahmen, sowohl was den Umfang und die Menge wie auch ihre relative Gleichzeitigkeit betrifft, sind in späterer Zeit allerdings kaum mehr nachweisbar. In all diesen Fällen wurden die entscheidenden Weichen schon unter Augustus gestellt, woraufhin der Reformeifer alsbald erlahmt zu sein scheint. Von römischer Seite richtete man sich stattdessen zunehmend in den Verhältnissen ein und ging mehr und mehr zu einer geregelten Verwaltung über; allenfalls in bestimmten neuralgischen Punkten wurde gelegentlich noch nachjustiert wie mit der nahezu flächendeckenden Einführung des Liturgiewesens in trajanischer Zeit. Entsprechend ließ man auch lokale Rechtsvorstellungen weiterbestehen, ja ging so weit, sie den eigenen Entscheidungen zugrundezulegen, sofern Konsens der Parteien darüber bestand, um lediglich im Falle eines Dissenses dem eigenen Rechtsgefühl zu folgen.

[31] Auch in Rom war dies freilich erst Ergebnis einer längeren Entwicklung, vgl. schon Wenger 1938, 551 ff. sowie eingehend zuletzt Urbanik 2002 mit besonderer Berücksichtigung der römischrechtlichen Fragen.

Singulär muß insofern allerdings das zunächst von Domitian verhängte und von Hadrian nochmals verschärfte Beschneidungsverbot erscheinen. Angesichts des Umstands, daß diese schon bei Herodot erwähnte Praxis im Nilland nicht nur Jahrtausende alt,[32] sondern ähnlich wie bei den Juden für die ägyptische Priesterschaft aus rituellen Gründen gefordert war, hätte alles dafür gesprochen, die Bevölkerung auch in dieser Hinsicht in ihren altüberkommenen Traditionen zu belassen. Hier aber treffen wir bemerkenswerterweise eine genau umgekehrte Entwicklung an, da man anfangs daran offenbar keinerlei Anstoß nahm. Erst als sich in der römischen Gesellschaft die Überzeugung verfestigte, daß Beschneidung und Kastration mehr oder weniger dasselbe und daher als *contra naturam* gerichteter Eingriff zu unterbinden seien, vor allem aber *humanitas* unter dem Einfluß der Philosophie den Rang eines Rechtsgrundsatzes gewann,[33] sollte Hadrian ein grundlegendes Verbot aussprechen und jegliche Manipulation an den Geschlechtsteilen rigoros unter Strafe stellen.[34] Zwar vermochten die ägyptischen Priester deutlich rascher als die hiervon ebenfalls betroffenen Juden eine Ausnahmeregelung zu erlangen, doch hatten sie seither ein aufwendiges Prüfungsverfahren zu absolvieren, dessen strikte Kontrolle in der Hand eines eigenen neuen Prokurators in Alexandria lag.[35]

Kommen wir abschließend nochmals auf die eingangs zitierte Feststellung von Hans Julius Wolff zurück, wonach in den Verhandlungen vor römischen Richtern „keinerlei Prinzip" zu erkennen sei, „das die Beamten bei der Auswahl römischer oder volksrechtlicher Entscheidungsgrundlagen geleitet hätte",[36] bildeten sich demnach im Laufe der Zeit doch gewisse Grundzüge heraus. Denn mochten die einheimischen Rechte in den Augen römischer Juristen nach Wolff der Konkurrenzfähigkeit entbehren und nicht mehr als bloße Sitte und Gewohnheit sein, pflegte man sie doch als Grundlage der Rechtsprechung zu respektieren, bis dahin, daß hierin ausgewiesene νομικοί von nachgeordneten Instanzen ebenso wie vom Statthalter höchstpersönlich als Berater in Streitfällen beigezogen wurden. Von bloßem Gewährenlassen ist bei einer solchermaßen systematisierten Anerkennung volksrechtlicher Praktiken kaum mehr zu sprechen, so daß sein Bild alleiniger Geltung römischer Rechtsgrundsätze insoweit der Modifizierung bedarf.

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[32] Frühester Beleg ist das berühmte und vielfach abgebildete Relief aus der Mastaba des Anchmahor in Saqqara aus der VI. Dynastie (um 2300 v. Chr.); vgl. auch Hdt. II 37, 2 sowie 104, 2 ff. mit einer Reihe von Theorien über die Herkunft dieser Sitte, in denen die Ägypter durchweg eine führende Rolle spielen.

[33] So jetzt Kreuzsaler – Urbanik 2008.

[34] So nach dem in Dig. 48, 8, 4, 2 (Ulp. 7 de off. procons.) überlieferten Reskript, in dem er zugleich auf ein früheres Edikt in dieser Sache verweist; hierzu eingehend Mélèze Modrzejewski 2003, 121 ff. sowie ders. 2007, 5 ff., demzufolge das Edikt von 119/20, das Reskript von Ende 120 datieren dürfte.

[35] Hierzu jetzt Jördens 2014.

[36] S.o. Anm. 7.

Dem suchte namentlich Joseph Mélèze Modrzejewski mit der Annahme einer hierarchischen Ordnung zu begegnen, wonach die Römer den einheimischen Sitten und Gebräuchen immerhin den Rang von Gewohnheitsrecht zuerkannt hätten. Abgesehen davon, daß sich Überlegungen in diese Richtung frühestens in hochkaiserzeitlichen Juristenschriften finden,[37] sind die Einflüsse derartiger Konzeptionen auf die provinziale Rechtswirklichkeit freilich eher gering zu schätzen. Zudem bleibt ohnehin zu fragen, wie weit das Bemühen um eine solche wie auch immer geartete Systematik überhaupt mit den bekannten Prinzipien römischer Rechtsetzung und Rechtspraxis zu vereinbaren ist. José Luis Alonso hat daher zuletzt für eine durch magistratische Entscheidungen und Verlautbarungen anerkannte und auf dessen Autorität beruhende Fortgeltung lokaler Rechte plädiert, ob sie nun auf altüberlieferten Rechtsvorstellungen gründeten oder aus Anordnungen und Gesetzen der Ptolemäer erwuchsen[38] – ein Gedanke, der in der Tat einiges für sich hat.

Von grundsätzlichen Vorbehalten gegenüber der Anwendung lokaler Rechtsgrundsätze geben die römischen Richter zumindest in der hohen Kaiserzeit jedenfalls nichts zu erkennen. Nur bei so tief verankerten römischen Rechtsvorstellungen wie dem hohen Gut des freien Willens oder der Unversehrtheit des Körpers waren sie allem Anschein nach noch entschlossen, die eigene Position auch gegen erhebliche Widerstände durchzusetzen, nicht ohne in begründeten Fällen selbst hier – wohlgemerkt restriktiv gehandhabte – Ausnahmeregelungen zuzulassen. Wie immer sich eine solche Rechtspraxis im einzelnen entwickelt haben mag, wird man die in philosophischen Kreisen geführten Diskussionen keineswegs unterbewerten dürfen; schließlich standen sie nicht nur Pate bei dem hadrianischen Konzept der *humanitas*, auch Antoninus Pius und namentlich Marc Aurel ließen sich hiervon in ihrer Gesetzgebung bestimmen.

Besonderes Interesse verdient dabei der Umstand, daß gerade die Frage nach dem Geltungsanspruch der unterschiedlichen Rechtsvorstellungen heißumstrittenes Thema im hochkaiserzeitlichen Alexandria war, wofür nur auf Origenes' Streitschrift gegen den alexandrinischen Philosophen Kelsos verwiesen sei. Kelsos tritt uns darin als ferventer Fürsprecher der überkommenen Ordnung entgegen, wonach die Rechte und Bräuche aller Völker, ob religiöser oder sittlicher Art, als prinzipiell gleichrangig zu betrachten und damit jeder Kritik enthoben seien.[39] Dieser Auffassung pflichtet Origenes im großen ganzen bei, allerdings nur bis zu einem gewissen Punkt – daß nämlich verwerfliche Sitten und Gebräuche, auch wenn manche Völker sie seit alters praktizierten wie die Skythen den Vatermord oder die Perser den Inzest, unter keinerlei Umständen zu akzeptieren seien;[40] und als Gegenbild entwirft er die Idee eines auf

[37] So jetzt nachdrücklich Alonso 2013 [2015], zusammenfassend 403.

[38] Vgl. nur Alonso 2013 [2015].

[39] Zu dem kulturgeschichtlichen Konzept des Kelsos grundlegend Andresen 1955, 189 ff.

[40] So bes. Orig., c. Cels. V 27, noch ergänzt um die Selbsttötung mittels Strick oder Feuer sowie Menschenopfer – bei den Taurern der Fremden, bei den Libyern der Kinder; vgl. auch 34. 36 zum Kannibalismusvorwurf an Skythen und manche Inder.

der Vernunft basierenden natürlichen, da allen Menschen gemeinsamen und jedem Menschen zugänglichen, insoweit letztlich absoluten Rechts, auf dessen allgemeiner Geltung und Verbindlichkeit im Namen einer höheren Wahrheit zu beharren sei.[41]

Diese Auseinandersetzung ist nun keineswegs neu und hat ihre Wurzeln weit in vorchristlicher Zeit; auch die Beispiele sind klassisch.[42] Im Rahmen der aktuellen religiösen Auseinandersetzungen hatte sie jedoch erhöhte Brisanz gewonnen, insofern der christliche Gott Origenes zufolge als Garant dieses natürlichen Rechtes eines jeden Menschen, und zwar unabhängig von Volkszugehörigkeit, Geschlecht und sozialem Rang, zu verstehen sei, an welcher Auffassung sich die Geister bekanntlich noch lange Zeit schieden. Die gemeinsamen Züge mit der in den Papyri anzutreffenden Rechtsprechung sind gleichwohl nicht zu verkennen, so daß die von Origenes vorgetragene Argumentation geradezu als Kommentar dazu dienen kann: Respektierung fremder Sitten und Gebräuche ja, solange sie sich in bestimmten, allgemein akzeptierten Grenzen bewegten und grundsätzlich konsensfähig waren; nicht aber dann, wenn sie, jenseits aller Gesetze von Natur und Vernunft, jeder ethischen Überzeugung widersprachen.

Selbst wenn nach Wolffs Worten in der Rechtsprechung „letzten Endes allein maßgeblich der *Wille der römischen Behörden*" war und sie hierin „so gut wie unbegrenzte Ermessensfreiheit" besessen haben mögen,[43] lassen sich damit doch die von ihm noch vermißten Prinzipien greifen, wenigstens solche ethischer Art. Hiernach war man in der Regel zu größtmöglichem Entgegenkommen bereit, so daß zumindest faktisch durchaus von Rechtspluralismus zu sprechen ist. Die Grundbedingungen menschlichen Lebens standen hingegen nicht zur Disposition, wozu in den Augen der Römer eben der freie Wille sowie die Unversehrtheit des Körpers gehörten. Jeder Verstoß gegen diese von Natur wie Vernunft gesetzten Normen war daher zwingend zurückzuweisen – sofern man jedenfalls Kenntnis davon erhielt. Wie es mit Ehefrauen stand, die sich ohne den Gang vor Gericht dem väterlichen Willen zur Auflösung ihrer Ehe beugten, steht auf einem anderen Blatt, ganz zu schweigen von den Mädchen, die schon damals nach ebenso verbreiteter wie geheimer Sitte beschnitten wurden.[44]

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[41] Den Hinweis auf Origenes und seine Rechtsvorstellungen verdanke ich Alfons Fürst, näherhin seinen Ausführungen zum Römerbriefkommentar, die er auf Einladung von J. C. de Vos und H. Löhr auf der in Münster vom 26.-28. 3. 2015 veranstalteten Internationalen Fachtagung *Nomos zwischen Identität und Normativität am Beispiel Alexandrias im 1.-3. Jh. n. Chr.* unter dem Titel *Nomos und Naturrecht bei Origenes* vortrug; vgl. einstweilen – dort noch mit Schwerpunkt auf der Auseinandersetzung mit Kelsos – ders. 2007, 258 ff. = 2011, 460 ff.; vgl. auch schon, wiewohl eher beiläufig, Banner 1954, 72.

[42] Grundlegend hierzu Chadwick 1947, 35.

[43] Vgl. oben Anm. 6 bzw. 8.

[44] Vgl. nur Hübner 2009.

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LOKALES RECHT UND DAS RECHT ROMS. ANTWORT AUF ANDREA JÖRDENS

Rechtshistoriker und Althistoriker gingen in den letzten Jahrzehnten immer wieder der Frage nach, ob es eine Art internationales Privatrecht in der Antike mit Kollisionsregeln für den Konflikt verschiedener Rechtsordnungen gegeben habe. Hans Julius Wolff verneinte es entschieden: „Wird diese Frage aus heutiger Sicht gestellt, d.h. meint sie einen Bestand an formulierten Regeln, aus denen sich ergeben hätte, auf Grund welcher Rechtsordnung in einem Streit zwischen Angehörigen verschiedener Staaten ... zu entscheiden war ... so lautet die Antwort ohne Zögern: Nein."[1] Nach eingehender Untersuchung kam Wolff zu dem Schluss, dass weder die Griechen noch die Römer jemals Bestimmungen erließen, die mit den modernen Kollisionsnormen auch nur entfernt verwandt wären.

Eigentlich ist das internationale Privatrecht ein relativ junges Geschöpf: Der ausführlich ausgearbeitete Kodifikationsentwurf zum deutschen Internationalen Privatecht, vorgelegt von Gebhard, scheiterte am Ende des 19. Jahrhunderts noch an Unverständnis.[2] Die wichtigsten Grundlagen wurden dann doch in Art. 7-31

[1] Wolff 1979, 7. Die international-privatrechtlichen Vorschriften über vertragliche Schuldverhältnisse wurden in Art. 27-37 EGBGB komprimiert. 2009 wurden sie außer Kraft gesetzt und durch die Rom-I-Verordnung ersetzt.

[2] Erster Entwurf 1881, zweiter 1897; vgl. Niemeyer 1915, 7 f., 23 ff.

des Einführungsgesetzes zum Deutschen Bürgerlichen Gesetzbuch (EGBGB) festgehalten.[3]

Kollisionsnormen zur Konkurrenz der Rechtsordnungen sind in der antiken Welt schon deshalb schwer vorstellbar, weil auch grundliegende Begriffe wie Recht, Rechtssystem oder Rechtsordnung nur vage umrissen waren. Es reicht hier, auf die vorsichtige Definition von Gottfried Schiemann hinzuweisen, dem nach „Recht" in den antiken Kulturen vor allem Mechanismen zur Konfliktbereinigung bedeutete: „... die Ordnung einer größeren Gemeinschaft zur Bereinigung von Konflikten zwischen ihren Mitgliedern durch dafür zuständige besondere Einrichtungen, die nach einem überindividuellen ‚objektiven' Maßstab handeln."[4] Recht und Rechtsfindung waren schon immer mit der politischen und kulturellen Umgebung eng verbunden — wobei eine „internationale" Dimension im römischen Reich beinahe völlig fehlte.[5] Recht war eine durch und durch innenpolitische Angelegenheit; es war vor allem dazu berufen, zwischen den heterogenen gesellschaftlichen Gruppen Frieden zu schaffen.[6]

Es ist wohl kein Zufall, dass „Recht" (*ius*) — im Sinne von Rechtsordnung — in den Institutionen des Gaius auch von dieser Perspektive her dargestellt wird (Gai. Inst. 1,1):

> *Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur; nam quod quisque populus sibi ius constituit, id ipsius proprium est vocaturque ‚ius civile', quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud ones populos peraeque custoditur vocaturque ‚ius gentium', quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur; quae singula quia sint, suis locis proponemus.*[7]

Eine Rechtsordnung besteht hauptsächlich aus Gesetzen (*leges*) und Sitten, Gewohnheiten (*mores*), aus geschriebenem und ungeschriebenem Recht. *Mos, mores* — Sitten, Gewohnheiten, allgemeine Werte einer Gesellschaft — werden von

[3] Vgl. auch Wolff 1979, 7.

[4] Schiemann 2001, 805.

[5] Zu „political and cultural landscape" vgl. vor kurzem Ando 2011, 4: „The existence of rules of jurisdiction based on political geography."

[6] Ando 2011, 6: „... historians systematically misrecognize the principal challenge of Roman government maintaining order among population groups that were, always and everywhere, internally juridically, ethnically, and linguistically heterogenous."

[7] Gai. Inst. 1,1: „Alle Völker, welche durch Gesetze und Sitten geleitet werden, wenden zum Teil ihr Sonderrecht, zum Teil das gemeinsame Recht aller Menschen an. Was nämlich ein jedes Volk sich selbst als Recht gesetzt hat, ist sein eigenes Sonderrecht und heißt ‚bürgerliches Recht', sozusagen als das Sonderrecht der Bürgerschaft; was aber die natürliche Vernunft für alle Menschen festgesetzt hat, das wird bei allen Völkern in gleicher Weise beachtet und heißt ‚Völkergemeinrecht', sozusagen ein Recht das alle Völker anwenden." Übersetzung Manthe 2004, 37.

Gaius dem Gesetz gleichgestellt. Da die Gesetzgebung der antiken Völker niemals umfassend und erschöpfend war, traten moralische Grundprinzipien als Richtlinien der Rechtsfindung nicht selten hervor. Sie bestehen teils aus althergebrachten Traditionen, teils aus Auffassungen des jeweiligen sozialen Umfeldes. *Mores* wandeln sich mit dem Wandel der Zeit, sie sind höchst aufnahme- und anpassungsfähig.[8] Sie lassen sich auch aus der *ratio naturalis*, aus allgemeinen Vernunftregeln ableiten — auf dieser Basis werden sie meistens bei allen Völkern beachtet und befolgt. Das *ius gentium* enthält im römischen Recht teils konkrete Rechtsfiguren (etwa Arten des Eigentumserwerbs), teils Entscheidungsprinzipien (Haftungsmaßstab, Fiktion, Analogie). Fiktion und Analogie helfen oft die „gerechte Mitte" zu finden, wenn Gesetze schweigen.

Nicht einmal das stadtrömische Recht wusste Antwort auf alle Fragen: Das Rechtssystem der Römer setzte sich aus einer Vielfalt schwer zu überblickender Rechtsquellen zusammen, die etwa Gaius im 2. Jh. zu systematisieren suchte: Gewohnheitsrecht (*consuetudo*), gesetztes Recht (*lex*), Edikte der Magistrate, *Senatus consulta*, Entscheidungen der Juristen und kaiserliche Konstitutionen. Die Liste ist jedoch nicht vollständig: im geschäftlichen Alltag schloss man Verträge nicht nach gesetzlichen Vorschriften ab, sondern nach Formularbüchern, die in der Notariatspraxis entwickelt und tradiert wurden.

Das Recht hatte in antiken Gesellschaften unscharfe Konturen – es war die Aufgabe der zuständigen Rechtspflege, einen „objektiven Maßstab" zur Bereinigung der Konflikte zu finden. Die Aufgabe war schwieriger zu bewältigen, wenn (wie in Ägypten) unterschiedliche Rechtskulturen nebeneinander lebten.

Claire Préaux und Hans Julius Wolff formulierten es so, dass es sich im hellenistisch-römischen Ägypten um getrennte Rechtsmassen gehandelt habe, die in einem Rechtspluralismus existiert hätten, „die sich jede für sich und in der Hauptsache unbeeinflusst durch die andere entwickelten, wenngleich die Bevölkerung nach beiden Rechtssystemen zugleich lebte und sich bald die Möglichkeiten des einen, bald die des anderen zunutze machte."[9] Die in manchen Quellen belegten Wendungen *nomos tes choras* oder *nomos ton Aigyption* verwiesen wohl auf keine Kodifikation,[10] sondern höchstens auf eine „schriftliche Zusammenstellung von Grundsätzen des Landrechts" — wie es vor kurzem auch Mélèze Modrzejewski vertrat.[11]

Den Rechtspluralismus und dessen zwiespältiges Verhältnis zur römischen Obrigkeit analysiert Hans Julius Wolff im ersten Band seines Handbuchs auf hundert Seiten und in etwa 24 Themenkreisen[12] — daraus griff Andrea Jördens jetzt einen einzigen auf, die Rechtsprechung der römischen Behörden in Ägypten. Sie verneint

[8] Nörr 1974, 185 ff.
[9] Wolff 1953, 47.
[10] So noch Taubenschlag 1952, 117 (= 1959, 493).
[11] Wolff 1953, 43; Mélèze Modrzejewski 2014, 241 ff.
[12] Vgl. Wolff 2002, 113-200.

(mit Wolff) die Existenz eines internationalen Privatrechts und stellt die Frage: „Wenn die vorgefundenen Rechte grundsätzlich nicht als gleichrangig anerkannt waren, warum wurde ihnen dann überhaupt zur Geltung verholfen? ... und ... In welchen Fällen setzten sich die römischen Richter darüber hinweg?“[13]

Das Thema behandelten vor kurzem auch Joseph Mélèze Modrzejewski, Hannah Cotton, Hans Albert Rupprecht und José Luis Alonso; es würde den Rahmen dieses Beitrags sprengen, auf ihre Ergebnisse näher einzugehen.[14] Andrea Jördens kommt zu dem Schluss, dass die lokalen Rechtsvorstellungen nur dann berücksichtigt wurden, wenn die einheimischen Eigenheiten „in römischen Augen unbeachtlich“ gewesen seien.[15] Nach ihr diente die berühmte römische Flexibilität bloß dazu, Konflikte zu vermeiden. Und die einheimischen Rechte seien grundsätzlich nicht konkurrenzfähig gewesen.[16]

Im Folgenden möchte ich nur einige Aspekte aus dem umstrittenen Stoff ansprechen. Grundsätzlich ist Wolff zuzustimmen, dass in der Antike kein internationales Privatrecht im heutigen Sinne existierte — obwohl gewisse Grundsätze, die heute eine zentrale Rolle spielen, bereits in der Rechtsprechung der provinzialen Behörden anzuklingen scheinen. Man denke etwa an das Grundprinzip, dass jede einzelne Rechtseinrichtung auf ihren örtlichen Schwerpunkt geprüft werden soll, somit also jeder Tatbestand möglichst unter seiner rechtlichen Ordnung verbleibt. Die Folgerungen, die aus der Natur der zu bearbeitenden Tatbestände gezogen werden, haben Präzedenz-Charakter (die Eigenschaft eines im Zweifel geltenden Rechts), d.h. sie können die Bedeutung positiven Rechts beanspruchen, soweit nicht unmittelbar eine gesetzliche Vorschrift des betroffenen Staates eine abweichende Behandlung festlegt.[17] Es lohnt sich, auch einen Blick in die geltende europäische Regelung zu werfen, um das Wesen der Kollisionsnormen verständlich zu machen.[18] Die Verordnung des Europäischen Parlaments hebt insbesondere die Erwägungsgründe hervor, dass die Kollisionsnormen der Rechtssicherheit dienen; sie helfen Kompetenzkonflikte zu vermeiden und stärken die Vorhersehbarkeit des Ausgangs von Rechtsstreitigkeiten. Im Vordergrund steht die freie Rechtswahl der Parteien (das ist der „Eckstein des Systems“).[19] Es ist bemerkenswert, dass den

[13] Jördens oben bei Anm. 8.

[14] Mélèze Modrzejewski 2014; Cotton 2007; Rupprecht 2005; Alonso 2013; alle mit weiterer Literatur.

[15] Jördens oben, bei Anm. 9.

[16] Jördens oben, bei Anm. 10.

[17] https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

[18] Erwägungsgründe aus der Verordnung (EG) Nr. 593/2008 des Europäischen Parlaments und des Rates vom 17. Juni 2008 über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I).

[19] Ib.: „(6) Um den Ausgang von Rechtsstreitigkeiten vorhersehbarer zu machen und die Sicherheit in Bezug auf das anzuwendende Recht sowie den freien Verkehr gerichtlicher Entscheidungen zu fördern, müssen die in den Mitgliedstaaten geltenden Kollisionsnormen

Gerichten auch heute, im Zeitalter einer „Überregulierung" diese Ermessensfreiheit eingeräumt wird:

> „Die Kollisionsnormen sollten ein hohes Maß an Berechenbarkeit aufweisen, um zum allgemeinen Ziel dieser Verordnung, nämlich zur Rechtssicherheit im europäischen Rechtsraum, beizutragen. Dennoch sollten die Gerichte über ein gewisses Ermessen verfügen, um das Recht bestimmen zu können, das zu dem Sachverhalt die engste Verbindung aufweist."[20]

Zu beachten sind jedoch auch die Ausnahmen:

> Kapitel I, Art 1 Anwendungsbereich
> (2) Vom Anwendungsbereich dieser Verordnung ausgenommen sind: a) der Personenstand sowie die Rechts-, Geschäfts- und Handlungsfähigkeit von natürlichen Personen, unbeschadet des Artikels; b) Schuldverhältnisse aus einem Familienverhältnis oder aus Verhältnissen, die nach dem auf diese Verhältnisse anzuwendenden Recht vergleichbare Wirkungen entfalten, einschließlich der Unterhaltspflichten; c) Schuldverhältnisse aus ehelichen Güterständen, aus Güterständen aufgrund von Verhältnissen, die nach dem auf diese Verhältnisse anzuwendenden Recht mit der Ehe vergleichbare Wirkungen entfalten, und aus Testamenten und Erbrecht.

Diese Einschränkung zeigt eine weitere, bemerkenswerte Parallele zum römischen Ägypten, nämlich dass Rechtsstreitigkeiten, die Personenstand, Familienverhältnisse oder eheliche Güterstände betreffen, vom Anwendungsbereich der Verordnung ausgenommen sind.

Kehren wir jedoch in die antike Welt zurück. Die von Andrea Jördens angeführten Belege,[21] die Gerichtsprotokolle von Präfekten, die das Heranziehen lokaler *nomikoi* und das Nachschlagen in den *nomoi ton Aigyption* bezeugen, sind Indizien dafür, dass der „örtliche Schwerpunkt" der Rechtseinrichtungen oft berücksichtigt wurde.[22] Ein vollständiger Überblick über alle Gerichtsprotokolle könnte ein klares Bild darüber bieten, wie oft die lokalen Rechte formell oder materiell in der Rechtsprechung der Präfekten herangezogen wurden.[23]

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im Interesse eines reibungslos funktionierenden Binnenmarkts unabhängig von dem Staat, in dem sich das Gericht befindet, bei dem der Anspruch geltend gemacht wird, dasselbe Recht bestimmen. ... (11) Die freie Rechtswahl der Parteien sollte einer der Ecksteine des Systems der Kollisionsnormen im Bereich der vertraglichen Schuldverhältnisse sein."

[20] (16) Erwägungsgründe aus der Verordnung (EG) Nr. 593/2008 des EP und des Rates (17. Juni 2008) über das auf vertragliche Schuldverhältnisse anzuwendende Recht (Rom I).

[21] Ähnlich bereits bei Taubenschlag 1952, 103-116 (= 1959, 478-492); Wolff 1979, 69; Wolff 1953, 51-57, obwohl inzwischen einige neue Dokumente hinzu gekommen sind, s. etwa P.Oxy. XXXVI 2757 oder P.Oxy. XLII 3015.

[22] Zum Thema vgl. vor kurzem Mélèze Modrzejewski 2014, 241 ff., 277 ff.

[23] S. dazu etwa Dolganov 2016 (forthcoming).

Sowohl die herangezogenen Gerichtsprotokolle als auch der *Gnomon des Idios logos* bestätigen, dass den Römern ernsthaft daran lag, die konkreten Tatbestände im Rahmen der betroffenen Rechtskultur zu halten — das Personalitätsprinzip diente dazu als Hilfsmittel. Die relevanten Rechtsnormen knüpften nicht an die territorialen Grenzen eines Staates an, sondern überwiegend an den Status der Betroffenen.

Wenn der Präfekt seine Entscheidungen mit großer Ermessensfreiheit, aus der Natur der zu beurteilenden Tatbestände traf, ging er keineswegs anders vor, als seine Kollegen (die Prätoren) in Rom.[24] Entscheidungsgründe wurden weder im Urteil des *iudex privatus* noch in den *responsa* der Juristen angeführt. Niemand bemängelte jedoch, dass die Urteile willkürlich oder laienhaft gewesen wären. Große Ermessensfreiheit ist unentbehrlicher Bestandteil der Rechtsfindung, wenn kein systematisiertes, kodifiziertes Recht vorliegt. Dort spielt die Interpretation (Auslegung) der sporadisch vorhandenen Gesetze, sonstiger Rechtsquellen und des Parteiwillens eine entscheidende Rolle.[25]

Wenn es am gesetzten Recht fehlt, ist der Richter gezwungen, seine Entscheidungen aus Grundprinzipien durch Analogie, Fiktion oder aus den Methoden der Rhetorik abzuleiten.[26] Die Juristen Roms setzten sich mit der Problematik des „fremden Rechts" in ihren theoretischen Werken kaum auseinander.[27] Julians Kommentar, der eine gewisse Hierarchie festlegt, zählt als Seltenheit (D. 1,3,32 pr.):

> *De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appareat, tunc ius, quo urbs Roma utitur, servari oportet*.[28]

Salvius Julianus, der führende Jurist des 2. Jahrhunderts n.Chr., dem die authentische Fassung des prätorischen Edikts (ein Resultat der schichtenweisen Rechtsentwicklung von mehreren hundert Jahren) zu verdanken ist, fasst hier die Grundregeln der Rechtsfindung in einer organisch gewachsenen, nicht kodifizierten Rechtsordnung zusammen. Die Grundlage der Rechtsanwendung bildet immer das

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[24] Vgl. etwa Kelly 2011, 31 ff.

[25] S. etwa Kaser – Knütel 2014, 40-42; Knütel 2005, 457. Vgl. auch Schulz 1951, 13: „Fundamental for the classical law of actions is the distinction between *iurisdictio* and *iudicatio*. *Iurisdictio* (*ius dicere*) means within the sphere of the ordinary civil procedure the authority to decide whether a plaintiff in an individual case should be permitted to pursue his claim before a judge. *Iudicatio* (*iudicare*) means the authority to pronounce judgment."

[26] Ando 2011, 6-11.

[27] Chiusi 2011, 34 ff.; Gagliardi 2011, 64.

[28] D. 1,3,32 pr.: „In den Fällen, in denen wir keine geschriebenen Gesetze haben, ist das zu befolgen, was durch Sitte und Gewohnheit eingeführt ist, und wenn es dies in irgendeinem Fall nicht gibt, dann ist das zu befolgen, was dem am nächsten liegt und ihm entspricht. Und wenn auch das nicht klar sein sollte, dann ist das Recht zu befolgen, das in der Stadt Rom herrscht." Übersetzung aus O. Behrends – R. Knütel – B. Kupisch – H.H. Seiler (Hg.), Corpus Iuris Civilis, Text und Übersetzung, Heidelberg 1995.

„geschriebene Recht" in Form der Gesetze.[29] Wird der Richter mit einer Gesetzeslücke konfrontiert, soll er „Sitte und Gewohnheit" (*mos, consuetudo*) beachten und befolgen. Liegt der Sachverhalt immer noch außerhalb des abgesteckten Feldes, können eventuell Analogie und Fiktion weiterhelfen. Analogie und Fiktion sind wichtige Hilfsmittel, um Sachverhalt und Rechtsnorm einander näher zu bringen. „Und wenn auch das nicht klar sein sollte" — als letzte Hilfe (subsidiär) kann der Richter auf das stadtrömische Recht zurückgreifen.[30] Aus dem letzten Satz geht hervor, dass die davor erwähnte Argumentation und auch die angedeuteten Rechtsquellen nicht auf das römische Recht im engeren Sinne zu beschränken sind. In einer provinzialen Umgebung, in Verhandlungen vor dem Präfekten ist darunter das lokale (geschriebene oder ungeschriebene) Recht zu verstehen. Für Rechtsverhältnisse von Privatpersonen galt außerdem in erster Linie der Parteiwille: die Beweisurkunde musste herangezogen und ausgelegt werden.[31]

Zur Interpretation der einzelnen Dokumente empfiehlt es sich, den jeweiligen Kontext möglichst breit zu berücksichtigen. Im Folgenden möchte ich aus dem von Andrea Jördens herangezogenen reichen Quellenmaterial eine einzige Stelle hervorheben: P.Oxy. XXXVI 2757, Col. II. Der Text lautet:

Λούπου (hand 2) ι[ς -ca.?-]
(hand 1) ἔτους ε θεοῦ Οὐεσπασια̣[νοῦ -ca.?-]
Θαυήτιον δι᾽ ἐγδίκου Θαμου̣[. . . . πρὸς . . . . .]
ἐκ τῶν ῥηθέντων. Ἰούλιος Λοῦπ[ος πυθόμενος]
Ἀρείου τοῦ νομικοῦ τί περὶ τῶν .[. . . . . κελεύ-]
ουσιν οἱ νόμοι καὶ ἐπιγνοὺς ὅτι οὔτε .[- ca.12 -]
ἐν ᾧι δεῖ διατάσσεσθαι οὔτε γραμμα[- ca.12 -]
ναι, ἐξουσίαν δὲ τοῖς πατράσι δεδώκ̣[ασιν ἀποκληρο-]
νόμους ποιεῖν τῶν παίδων οὓς ἐὰν θ[έλωσιν . . . . .]
ἐξ ἁπάντων ἐπεγνωκὼς καὶ τὴν [διαθήκην(?) μὴ οὖσαν]
παρ̣άνο[μο]ν̣ καὶ τὸν πατέρα ἐξουσία[ν κεκτημένον]
[οὓς ἐὰν θέλῃ τ]ῶ̣ν πε̣ίδων ἀποκληρον̣[όμους ποιεῖν]
[- ca.13 -] .υ τετε̣λ[ε]υ̣τ̣ηκότ[ος (?) -ca.?-]

Lupus. Fifth year of the deified Vespasian, (month, day). Thauetion, through her representative, Thamon ..., versus Z. From the record. Julius Lupus, after inquiring from Areius, the *nomikos*, what the laws provide (in such cases) and

[29] Zu diesem Zeitpunkt versteht man darunter immer mehr die kaiserlichen Konstitutionen, vgl. Kunkel 1990, 117, 122.

[30] Darunter sind wohl die speziellen stadtrömischen Rechtsquellen, etwa die *leges*, *plebiscita*, Edikte der Prätoren und anderer Magistrate, die *Senatus consulta* usw. zu verstehen.

[31] Babusiaux 2006, 156-157.

> learning that they (prescribe) neither (a form) in which one must make a will nor the language (in which wills should be written), and give fathers power to disinherit whichever of their children they wish: ‚Since I have learnt from all (the facts) both that (the will is not) contrary to the law and that the father is possessed of the power to disinherit whichever of his children he wishes …'[32]

Der erste Teil der Urkunde fehlt, die Datierung ist nur brüchig erhalten. Das erhaltene Exzerpt aus dem Verhandlungsprotokoll des *praefectus Aegypti* wurde wahrscheinlich im Jahre 79 n.Chr. angefertigt.[33] Erhalten sind die Namen des Präfekten T. Iulius Lupus, der Klägerin Thauetion und ihres Prozessvertreters Thamon.[34] Im Statthalterarchiv wurde die Verhandlung offenbar nach dem Namen der Klägerin registriert, dieses Schriftstück enthält bloß die Entscheidung des Präfekten, während das Klagebegehren in einem separaten Dokument archiviert gewesen sein dürfte.[35] Dem entsprechend fehlt hier völlig die Schilderung des Sachverhalts, was die juristische Auswertung der Quelle erheblich einschränkt. Die relevanten Punkte der Argumentation der Parteien können einigermaßen aus dem Verdikt des Präfekten rekonstruiert werden.

Dem Gericht wurde der letzte Wille eines Erblassers vorgelegt; aus dem Verhandlungsprotokoll geht leider nicht hervor, ob das als Beweisurkunde vorgelegte Schriftstück in griechischer oder demotischer Sprache formuliert war.[36] Der Wortlaut der Entscheidung legt es nahe, dass die streitenden Parteien Geschwister, beide die Kinder des Erblassers waren. Thauetion, die Tochter des Erblassers, beruft sich auf das Testament und verklagt ihren Bruder (ihre Schwester?), der (die) das Vermögen des Verstorbenen vermutlich in Besitz nahm und sich weigerte, der Thauetion ihren Anteil herauszugeben. Das erhaltene Verhandlungsprotokoll ist nicht vollständig — man erfährt nicht einmal, zugunsten welcher Partei der Statthalter entschieden hat. Nicht einmal die Standpunkte der Parteien sind eindeutig identifizierbar: Es steht zwar fest, dass Thauetion die Klägerin ist, aber es ist ungewiss, ob sie oder ihr Gegner enterbt wurde. Man kann nur vermuten, dass das Urteil des Präfekten auf das Klagebegehren abstellt — die Klägerin dürfte behauptet haben, dass das Testament wegen seiner Formlosigkeit und wegen der Enterbung eines leiblichen Kindes unwirksam sei. Ob sie sich dabei auf die Normen des „demotischen", „griechischen" oder gar römischen Rechts berief, lässt sich nicht mehr feststellen.

Das knapp formulierte Verhandlungsprotokoll bestätigt jedenfalls, dass der Präfekt vernünftig, umsichtig und juristisch korrekt handelte. Die technische

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[32] Übersetzung von J.R. Rea.

[33] „Post A.D. 79". Es wird noch Oktober 69-78 erwähnt, vgl. BL X 197 (TM 16547).

[34] Vgl. P.Oxy. IV 706 (= M.Chr. 81), Z. 73 (BL IX 181).

[35] Haensch 1994, 487 ff.; s. auch Haensch 2013, 336-337.

[36] Zu Eigentümlichkeiten des Erbrechts in den griechischen Papyri aus Ägypten s. immer noch Kreller 1919, 178 ff., 204 ff.

Wendung in Z. 10 (ἐξ ἁπάντων ἐπεγνωκὼς) dürfte juristisch präzise gebraucht sein – es geht um *recitare*, um die Vorlesung von Rechtsnormen, wie es im provinzialen Prozess allgemein üblich war.[37]

Aus dem Sachverhalt wurden die juristisch relevanten Punkte hervorgehoben, die sich auf die Prüfung der lokalen Rechtsgepflogenheiten (und gleichzeitig auf die eventuellen Abweichungen vom römischen Recht) konzentrieren: Gibt es zwingende Vorschriften bezüglich der äußeren Form (des Schreibmaterials, Formulars, der Sprache) der letztwilligen Verfügung? Gibt es allgemein befolgte Einschränkungen bezüglich Enterbungen?

Der Präfekt beriet mit seinem *consilium* und zog auch einen Experten des lokalen Rechts, Areius, heran. Er ging also genau im Sinne der Grundprinzipien der Rechtsanwendung in provinzialer Umgebung vor, wie es zwei Generationen später von Julian formuliert wurde.

Das vom Statthalter untersuchte juristische Problem erfasst die wichtigsten Kriterien, die das römische Testament ausmachten: Strenger Formzwang — Abfassung des letzten Willens auf *tabulae* als *testatio*, in gut lesbarer Reinschrift, mit sieben Zeugen, die die Täfelchen mit ihren Siegeln verschließen und ihre Namen eigenhändig eintragen; Befolgung des alten lateinischen Formulars mit bestimmter Wortwahl; dazu galten strikte Einschränkungen bei Enterbung der Abkömmlinge (*sui heredes* in Rom, also Personen, die unmittelbar unter der *potestas* des Testators standen).[38]

Areius, der örtliche *nomikos* gab präzise Auskunft über die *nomoi* der Chora — und der Präfekt dürfte gemäß den lokalen Normen (und vom stadtrömischen Recht stark abweichend) entschieden zu haben. Das Dokument bestätigt erneut, was Ludwig Mitteis bereits 1891 festgestellt hat[39]: Im Bereich des Erb- und Familienrechts haben die römischen Behörden in Streitigkeiten unter Provinzialen die lokalen Rechtsvorstellungen beachtet und wenn möglich befolgt. Es handelt sich dabei um sensible Teile der jeweiligen Rechtskultur, die mit der sakralen und kulturellen Identität eng verflochten sind.

Dokumentarische Texte verkörpern einzigartige Quellen, die das Rechtsleben aus dem Blickwinkel eines Zweckschreibens reflektieren. Rechtsgeschäfte unter Privaten beschränken sich darauf, die wichtigsten Punkte einer Vereinbarung festzuhalten, während Auszüge aus Gerichtsprotokollen von Sachverhalt, Verfahren und Urteil in stark gekürzter Form berichten, um sie für das Archiv und eventuell auch als Richtlinie für die künftige Rechtsprechung festzuhalten. Zur Auslegung sollte deshalb der jeweilige Kontext möglichst umfassend geklärt werden.

Zusammenfassend kann festgehalten werden, dass die Diskussion, ob den Juristen Roms und den Präfekten in den Provinzen eine Art „Kollisionsregeln" vor

[37] Weiss 1912, 235; Kaser – Hackl 183-184, 189.
[38] Vgl. dazu Kaser – Knütel 2014, 395-397.
[39] Vgl. Mitteis 1891, 90, 102-110.

Augen schwebten, die mit den Normen des modernen internationalen Privatrechts vergleichbar sind, ist noch nicht abgeschlossen. Andrea Jördens streift in ihrem Beitrag die wichtigsten Quellen, bleibt jedoch eine umfassende, tiefgehende Interpretation schuldig. Die Rechtsvergleichung zwischen Rechtssystemen, deren Struktur und Denkweise so unterschiedlich ist, verlangt größte Vorsicht: „Some rules are characteristic of a given time and place and others are not. Thus even if an historian merely wanted to understand the law of a given time and place, he would need a comparative approach to see which rules are charcteristic or fit."[40]

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[40] Gordley 2008, 772

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DIMITRIS KARAMBELAS (ATHENS)

GREEK LAWS AFTER *CONSTITUTIO ANTONINIANA*: IDEOLOGY, RHETORIC AND PROCEDURE IN EUNAPIUS OF SARDIS

1. Introduction: An Arcadian Tale

Once upon a time, as the story goes – in an anecdote narrated, around 220 CE,[1] by Flavius Philostratus in his *Life of Apollonius of Tyana* –, a handsome young man from Messene in Arcadia arrived in Rome, sometime in the late 80s, where he was courted by many aspiring lovers and, most famously, by the emperor Domitian. According to the Severan biographer, the youth proved 'prudent' and resisted the emperor's attempts at seduction, this resulting in his imprisonment upon capital charges, by order of Domitian himself. In prison, the young Arcadian approached the Neopythagorian sage Apollonius of Tyana, who was also awaiting trial by Domitian, and their exchange revealed the true cause of the youth's misfortunes. Just as Hippolytus 'was destroyed by his father Theseus' in spite of his turning down the amorous advances of his stepmother Phaedra, thus, in like manner, this youth was destroyed by the omissions or decisions of his own father, who neglected to give him a proper 'Hellenic' education, sending him instead to Rome '*to study law*' (ἐνταῦθα ἔστειλε μαθησόμενον ἤθη νομικά):

> „καὶ οἱ ἐπὶ Θησέως," εἶπε „τὸν γὰρ Ἱππόλυτον ἐπὶ σωφροσύνῃ ἀπώλλυ ὁ πατὴρ αὐτός." „κἀμὲ" εἶπεν „ὁ πατὴρ ἀπολώλεκεν. ὄντα γάρ με Ἀρκάδα ἐκ Μεσσήνης

[1] Flinterman 1995, 26 (between 217-238 CE); Kemezis 2014, 297.

> οὐ τὰ Ἑλλήνων ἐπαίδευσεν, ἀλλ' ἐνταῦθα ἔστειλε μαθησόμενον ἤθη νομικά, και με ὑπὲρ τούτων ἥκοντα ὁ βασιλεὺς κακῶς εἶδεν."
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> "So did the laws in the time of Theseus," said Apollonius, "since Hippolytus's own father destroyed him because of his modesty." "I too," replied the youth, "have been destroyed by my father. Although I was an Arcadian of Messene, he did not give me a Greek education, but sent me here to study law. I came here for that, and I unluckily caught the emperor's eye."[2]

Despite this being a largely fictional episode,[3] this short moral parable probably reveals more than its author intended. In the first place, it can be read in the traditional way, as expressing the familiar opposition between a proper 'Hellenic' education (οὐ τὰ Ἑλλήνων ἐπαίδευσεν) and 'law' (ἤθη νομικά) conceived as 'legalism' – an attack on the perennial stereotype of the 'lawyer', and his legal tricks and well-performed lies, all too familiar in the intellectual climate of the time. And yet, this passage – particularly if one were to focus on the sharp and clear distinction between 'Greek culture' and 'Roman attitudes' – may reveal something about the hostility of certain Hellenocentric elite circles towards the young Greeks who travelled from their cities of origin to study law in Rome, in order to return and serve as 'νομικοί' in the service of the Roman governor of the province, or to provide to the famous rhetors of the age legal arguments during their presence in court.[4] It can also be characteristic of the dubious reception of the prevalence and study of Roman law by a leading Greek intellectual in the immediate aftermath – less than ten years having elapsed – of *Constitutio Antoniniana* and the generalization of Roman citizenship to all freeborn inhabitants of *Imperium Romanum*.[5] The 'ἤθη νομικά' could signify the new morals of Roman legal education – one could point to how the author implicitly associates the passage to Rome for the study of law with the dangers of 'corruption' and 'seduction', – in short, with moral or even physical destruction.

This interpretation falls naturally within the broader narrative strategy of Philostratus, who repeatedly favours Greek rhetoric over Roman justice. It is no coincidence that during the description of Apollonius' trial at the hands of

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[2] *Vit.Apoll*. vii.42.1-2 (translation: C.P. Jones 2005, Loeb Classical Library, with minor alterations).

[3] The reference (vii.42.6) to a lost letter by Apollonius, in which he described 'much more charmingly' the Arcadian youth's little adventure, makes it likely that there is a grain, or even nucleus, of truth in this episode. However, the issue of the authenticity of all surviving letters by Apollonius is complex: Lo Cascio 1978; Penella 1979; Flinterman 1995, 70-72. On Damis – the purported narrator of the episode: Anderson 1986, 155-173. An interesting recent essay on reality and fiction in the *Life of Apollonius*, is Gyselinck/Demoen 2009.

[4] The essential study is now Jones 2007 (with a detailed prosopography: 1346-1358). On the elevated status of professional 'νομικοί', Bryen 2012, 32-34, 65-66 on Roman Egypt.

[5] Swain 1996, 392. On *Constitutio Antoniniana*: Kuhlmann 1994; Burazelis 2007; Bryen 2016.

Domitian[6] – which follows on from the story of the Arcadian youth –, the legal issues and the serious risks besetting the philosopher are downplayed, with a shift in emphasis to the character of the trial as rhetorical display. Coming before the imperial court, Apollonius is convinced that he will deliver a speech '*rather than run for his life*' (διαλέξεσθαι ἡγουμένῳ μᾶλλον ἢ δραμεῖσθαί τινα ὑπὲρ τῆς ψυχῆς ἀγῶνα); the tribunal '*has been arranged as if to accommodate an audience for a rhetorical display*' (κεκόσμητο μὲν τὸ δικαστήριον ὥσπερ ἐπὶ ξυνουσίᾳ πανηγυρικοῦ λόγου).[7] As a strategy, the denial of reality and the reversal of judicial roles – where the Roman judge ceases to sit in judgement of the accused and becomes, rather, the latter's audience – as well as the narrative transformation of an unpredictable court experience into a theatre of rhetorical performance, has been recorded by other Greek *pepaideumenoi* of the Imperial age as well. As succinctly described by Aelius Aristeides, relating his trial before the proconsul C. Julius Severus in August 153 CE, the court proceedings had already been transformed into oratorical display: 'σχῆμα ἐπιδείξεως μᾶλλον ἦν ἢ δίκης'.[8]

Thus, the Philostratean tale may open a window upon the manner in which Greek elites of the early third century CE were coping with the increasing importance of Roman law immediately following 212 CE – without, in actual fact, feeling divided between a defence of hellenocentric identity and their political or administrative integration into the Roman administrative apparatus.[9] In this context, the distancing from a Greek identity could be rendered symbolically as 'seduction', or 'ruin' – at the same time when Greek rhetoric was attempting to incorporate or reverse its inevitable coexistence with Roman judicial discourse.

2. Greek Elites on Constitutio Antoniniana*: Ambiguities of the present tense.*

The issue of the manner in which the educated elite of the Greek East responded to the *Constitutio Antoniniana* is a complex one and, in the absence of adequate primary sources, difficult to resolve.[10] As is well known, the framework which has up today helped define -whether in a positive or negative light-, the terms of the debate concerning the social, legal and intellectual effects of the *Constitutio* is the schema proposed by the German lawyer and legal papyrologist Ludwig Mitteis, in his epoch-making work *Reichsrecht und Volksrecht in den Östlichen Provinzen des*

[6] Flinterman 1995, 147-157.

[7] *Vit.Apoll.* viii.2; viii.4.

[8] *Sacred Tales* 4.91; Cf. *Vit.Soph.*525.

[9] Philostratus himself was an Athenian sophist and magistrate (*Syll*[3] 878; Puech 2002, 200; hoplite general in 200/1 CE: Follet 1976, 101-102; cf. *Vit.Soph.* 526), member of the so-called 'circle' of Julia Domna, Septimius Severus' second wife and mother of Caracalla, and finally a member of Caracalla's *Consilium Principis.* On the circle of Julia Domna: Bowersock 1969, 101-109; Levick 2007, 113-118. *Amicus* and *comes* of Caracalla: *Vit.Apoll.* v.2; vii.31. Member of *Consilium Principis*: *Vit.Soph.* 626.

[10] On Christian elite attitudes towards Caracalla's edict: Inglebert 2016.

römischen Kaiserreichs (1891). Famously, Mitteis built his argument on the tension between 'Reichsrecht', the law of the ruling power – thus Roman imperial law –, and 'Volksrecht', the local law or law of practice, on the basis that state law was imposed over local legal systems, abolishing them in the process.[11] In the course of the twentieth century, the majority of scholars that addressed the issue, based on spectacular advances in juridical papyrology, using Roman Egypt as a model, underlined the distinction between substantive and procedural law, and argued that common Greek legal traditions did not cease to exist after 212 CE, but assumed, instead, at least in the field of private law, the form of custom.[12] In the awarding of justice, however, changes that had already taken place since the late Hellenistic period and throughout the High Empire,[13] famously described in Geoffrey de Ste. Croix's angry elegy (namely, the decline of popular democratic courts and their replacement by judicial councils controlled by the upper classes, as was also the case with civic offices, and, later, the more frequent recourse to the judicial conventus of the Roman governor)[14] were consolidated, at least in the case of mainland Greece and Asia Minor, through the concentration of all civil and criminal jurisdiction in the hands of the governor, within the framework of *cognitio*.[15]

In contrast, we are more familiar with the way in which Greek intellectuals of the Flavian and Antonine eras received, in general terms, Roman control on the political and legal affairs of their Greek cities. One need only refer to the classic, bitter yet penetrating, remarks by Plutarch – a restrained blend of pragmatism and nostalgia – in his work *Political Advice*, where the Boeotian philosopher warns Menemachus, while he is holding public office, not to have '*great pride or confidence*' in his crown, since he sees '*the boots of Roman soldiers*' just above his head – pointing out that there can never be true political freedom as long as '*a small edict by a proconsul may annul or transfer to another man and which, even if it lasted, has nothing in it seriously worthwhile*'.[16] We also know at least some of the psychological and social strategies worked out by the

[11] Cf. Amelotti 1999. Further bibliography and discussion in Scheibelreiter 2016, in the present volume, 4.1.

[12] Recent studies on Roman and local laws after 212 CE: Carrié/Rouselle 1999, 57-65; Garnsey 2004, 140-151; Honoré 2004, 115-116 on custom; Carrié 2005, 271-276; Humfress 2011, on the institution of 'customary' law; Ando 2012, 85-99; Alonso 2013, esp. 365ff; Kantor 2015, 17-19; Kantor 2016.

[13] Gauthier 1993, 223-225; Lintott 1993, 61-65 (discussing Cilicia, Asia and Cyrene); Fournier 2010.

[14] Ste Croix 1981, 315-317.

[15] On *cognitio*, see Sherwin-White 1963, 1-23; Buti 1982; Turpin 1999 (esp. 531-574); Harries 1999, 101, 118-122; 2007, 28-33; Roueché 1998, Humfress 2007, 46-51 on the governor's jurisdiction in the Late Roman Empire. On the survival of local laws and courts in Aphrodisias, in the case of the response of Gordian III to Epaphras (*IAph* 2007, no 8.100), see now Kantor 2016, 48-49 and the discussion in 52-54.

[16] *Moralia* 824e-f (translation: Fowler, 1936 Loeb Classical Library). Cf. Cartledge 2009, 124-30.

Greek *pepaideumenoi* in order to cope with, or reverse Roman reality. In the same work, Plutarch advises his young friend to '*imitate the actors, who, while putting into the performance their own passion, character, and reputation, yet listen to the prompter and do not go beyond the degree of liberty in rhythms and metres permitted by those in authority over them*.'[17] In the mid-second century CE, the famous sophist M. Antonius Polemo was urging the Smyrneans not to have their private disputes judged '*outside*' their city, and to '*settle*' them there, ensuring that jurisdiction in private disputes would remain with the local courts, which were controlled by the leading aristocratic families. On the contrary, Polemo suggested that the citizens of Smyrna '*take out of the city*' and transfer to the jurisdiction of the Roman governor, who held the *ius gladii*, disputes such as those concerning '*acts of adultery, sacrileges and homicides*'.[18] Polemo's command can be easily read as a defensive denial of reality, since Rome retained jurisdiction over capital crimes – an illusory belief that the transfer on of criminal jurisdiction to the Roman judge was a free choice of the Smyrneans and not an ineluctable necessity.[19]

However, we do not possess similar testimonies about the Greek intellectuals of the post-212 era, nor do we have access to the ways in which, more than a century later, the *pepaideumenoi* of the third and fourth centuries CE, reacted against a legal change which seems, at least to our understanding, that was even more drastic and, more importantly, all-encompassing. For our generation, the initiative studies on this stimulating question have been two highly influential papers of the 1970s, both by Joseph Mélèze-Modrzejewski: *Grégoire le Thaumaturge et le droit romain. À propos d'une édition récente* (1971), and especially *Ménandre de Laodicée et l'Édit de Caracalla* – presented in *Symposion* 1977, and published in 1982. Focusing, successively, on a passage from the valedictory speech of Gregory the 'Miracle-Worker', later to become bishop of Neocaesarea in Pontus, during his graduation, after eight years of study, from the school of Origen in 238 CE,– and then on a number of passages from a technical rhetorical treatise of the late third century CE (Διαίρεσις τῶν ἐπιδεικτικῶν), which has come down to us under the authorship of Menander of Laodicea in Phrygia,[20] Mélèze-Modrzejewski drew attention, among other things, to the cultural and legal context of these two texts in light of the *Constitutio*, delving, in essence, into the ambiguous signification of two famous 'νῦν': on the one hand, the 'νῦν' of Gregory, who finds Latin difficult to bear, yet necessary for the study of Roman law, which guides – as he writes – *in the present time,* ('νῦν') the fortunes of all those under Rome's power (οἱ θαυμαστοὶ ἡμῶν <νόμ>οι, οἷς νῦν τὰ πάντων τῶν ὑπὸ τὴν Ῥωμαίων ἀρχὴν

[17] *Moralia* 813e.

[18] *Vit.Soph.*532: τὰς γὰρ ἐπὶ μοιχοὺς καὶ ἱεροσύλους καὶ σφαγέας, ὧν ἀμελουμένων ἄγη φύεται, οὐκ ἐξάγειν παρεκελεύετο μόνον, ἀλλὰ καὶ ἐξωθεῖν τῆς Σμύρνης, δικαστοῦ γὰρ δεῖσθαι αὐτὰς ξίφος ἔχοντος.

[19] On the passage, Karambelas 2013, 96-98. *Contra* Kantor 2015, 8, who uses it as a proof that local capital jurisdiction had not been abolished under the Antonines.

[20] On the question of authorship of the treatise: Mélèze-Modrzejewski 1982, 337, n.9; Heath 2004, 127-131; Humfress 2013, 73-75.

ἀνθρώπων κατευθύνεται πράγματα)[21] – and on the other hand, the multiple 'νῦν' of Menander, who, enumerating the topics that could serve as objects of praise when composing the encomium of a city, excludes its *politeia* and laws, since all cities are *in the present time* ('νῦν') governed by one such [city] (ὑπὸ γὰρ μιᾶς αἱ Ῥωμαϊκαὶ ἅπασαι νῦν διοικοῦνται πόλεις).[22] Similarly, the praising of laws is '*in the present time*' (*ἐν τοῖς νῦν χρόνοις*) also pointless, since all legislative action is undertaken 'κατὰ γὰρ τοὺς κοινοὺς τῶν Ῥωμαίων νόμους' – although the possibility still remains of praising local custom (ἔθεσι δ' ἄλλη πόλις ἄλλοις χρῆται, ἐξ ὧν προσῆκεν ἐγκωμιάζειν).[23] In Gregory, the present time clearly refers to the time of writing and the reinforcement of Roman law in the period after 212 CE. By contrast, according to Mélèze-Modrzejewski's astute reading, Menander's 'present' is more expansive and covers, as we also know from the writers of the Second Sophistic, the entire period of the Roman rule of the Greek world, with the loss of autonomy of Greek cities, and not just the third century CE and the legal landscape formed by the *Constitutio*.[24]

The apostrophes of Gregory and Menander may offer us some hints about their stance towards the new world order, well-hidden behind the autobiographical style of the former and the icy rhetorical tropes of the latter. The tension between Hellenism and Roman Law, and the ambivalence on the part of educated elites vis-à-vis the ongoing Romanisation, are highlighted in a passage from Gregory, who, whilst characterising Roman Law as '*our*' law (οἱ θαυμαστοὶ ἡμῶν ≤νόμ≥οι,) and Roman Laws as '*wise, precise and varied and marvellous*' (σο≤φ≥οί τε ≤καὶ ἀκρ≥ιβεῖς καὶ ποικίλοι καὶ θαυμαστοί), concludes his encomium with the euphemism that the aforementioned attributes of Roman Laws render them '*in a word, most Greek*' (ὄντες μὲν αὐτοὶ καὶ συνελόντα εἰπεῖν Ἑλληνικώτατοι) – an adroit incorporation of Roman into Greek, the latter having the last word, as it were –as the author insists, all the while, in the difficulty of the "Ρωμαίων φωνή' (οὔτε καὶ ἐκμανθανόμενοι ἀταλαιπώρως), which voice, even though '*awesome, solemn and well suited to imperial authority*' (καταπληκτικῇ μὲν καὶ ἀλαζόνι καὶ συσχηματιζομένῃ ≤πάσῃ≥ τῇ ἐξουσίᾳ τῇ βασιλικῇ), requires great effort of learning (φορτικῇ δὲ ὅμως ἐμοί).[25] There exists also, in Gregory's speech, something of the *Zeitgeist* of an era when technical training in Latin and Roman law began to supersede the study of rhetoric.[26] On the other hand, the perfunctory remarks by

[21] Crouzel (1969), *Εἰς Ὠριγένην Προσφωνητικός*, 1.7.

[22] Menander *Rhet*., 360 (Spengel).

[23] Menander *Rhet*., 363 (Spengel).

[24] Recently, we notice a regression in the older hypothesis that Menander's observations refer to the post-212 CE era, although Mélèze-Modrzejewski 1982 is cited for support: Humfress 2013, 78-79, followed by Kantor 2016, 45. However, Mélèze-Modrzejewski 1982, 342-343, 345-346 argues explicitly for the exact opposite thesis, *contra* Talamanca 1971.

[25] Translation: Lane-Fox 1986, 525-526 – where also an alternative, more 'technical' reading of 'συνελόντα εἰπεῖν Ἑλληνικώτατοι' is to be found. Cf. 518-519.

[26] Palm 1959, 84-86. Libanius, *Or.* 1.151-154; 214-215; 243-246; 18.288; 62.21-23; 57.3.

Menander constantly recall the lost possibility of encomia of Greek laws and, with it, the weakening of the rich and elevated Greek rhetorical tradition itself.

The diagnosis of an ambivalence between past and present is, of course, fully compatible with contemporary sensibilities, – our 'νῦν' – in the same way that the construction of an up-to-date theoretical paradigm constitutes a projection, inter alia, of our own needs and preoccupations – especially since we address eschatological questions, such as when, or how, a form of legal life dies. In the same way that Mitteis built his arguments under the influence of the German Historical School or the Romantic 'Volk' of Herder, historians of the early twenty-first century are currently in the process of denying the binary schemes of integration/resistance and working out a theory of 'multiculturalism', 'legal pluralism' or legal 'hybridity'. Of course, the critique of the essentialist conception of 'Roman' and 'local' laws is an old one.[27] Yet today, academic discussion, as it runs its post-modern course, refuses with ever greater determination to reduce 'Roman law' and 'local laws' to isolated and self-sufficient 'essences' rather than relations.[28] Clifford Ando, in his general overview of the effects of the Antonine Constitution on citizenship and law, and summing up postwar epigraphic and papyrological research, exposes the functionality of legal pluralism both before and after 212 CE.[29] From another perspective, Caroline Humfress also focuses on legal pluralism in Late Antiquity and challenges the vocabulary and discourse of 'survival' or 'persistence' of local laws after 212 CE. Humfress denies that the transition from the normative dominance of Greek legal systems to that of Roman law assumed the nature of an 'imposition from above', in the sense of the normative enforcement of an obligation; on the contrary, the *Constitutio* broadened the scope for making use of Roman law, on the basis of multiple legal choices or alternatives of a non-conflicting nature – a practice which was widespread in late antique societies.[30]

The purpose of the present paper is to navigate the grey area between theory and historical testimony, or rather, the points of friction and resistance between the

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Liebeschuetz, 1972: 242-245; 342-355; Heath 2002, 431-437. Law School of Beirut: Kunkel 1966, 141.

[27] Cf. Schiller 1978, 540-541, who underlined that Romanization also occurred '*due to the voluntary reception of Roman legal institutions, including documentary forms, on part of notaries, local jurists and even lower local courts, by reason of the recognition of the superiority of the Roman law*'. Cf. the cautionary note by Sherwin-White 1973, 386-394, who stressed the '*paucity of contemporary evidence*' and the common perception that '*it remains in dispute whether the use of Roman legal notions and terms in provincial documents represents a total adoption of Roman law or its infiltration into and amalgamation with provincial usage*'.

[28] Cf. Carrié/Rouselle 1999, 57-65. On the post-212 era in Egypt, Yiftach-Firanco 2009, 553-555.

[29] Ando 2012, 95. According to Ando, the relationship between Roman and local law remained a substantially two-way affair: even though Roman officials '*across the third century* (…) *insisted in more and more strident tones on adherence to Roman norms*', at the same time '*certain non-Roman customs were* (..) *redescribed as Roman in legal literatures*'.

[30] Humfress 2013, esp. 73-90.

two – and revisit both the ideological stance of educated elites after 212 CE towards Roman law, as well as the core nucleus of questions concerning the continuity of Greek legal institutions in the fourth century CE, by adding another important text to the ongoing discussion: the description of a trial, narrated by Eunapius of Sardis in his *Lives of the philosophers and sophists*, which, to this day, has escaped the attention of legal historians, although it is best understood in its complex judicial context.

3. A trial in Eunapius' Lives*: Ideology, Rhetoric, Procedure.*

Sometime in the late 310s CE, in Corinth, the proconsul of the province of Achaia took his seat in court in order to pass judgement on – and with the ulterior motive of making an example of – one of the prominent teachers of rhetoric in Athens at the time, Julianus of Cappadocia, and a group of students supporting him, these having been arrested following a violent brawl with the pupils of another teacher, Apsines, son of the sophist Onasimus.[31] The events surrounding the trial did, however, leave its marks on the parties involved, circulated anecdotally in academia and was in the end preserved for posterity by the historian Eunapius of Sardis, in a series of biographies of rhetors and philosophers which he composed at the turn of the century (probably in late 399 CE).[32] The episode in question takes up the most part of Julianus' biography, but functions, essentially, as an introduction to the biography of Eunapius' teacher, the Armenian Prohaeresius, who followed a prominent career in rhetoric amid the political and intellectual upheavals of the Later Roman Empire.

As it is unanimously recognized, Eunapius' narrative constitutes a credible source and a reliable representation of court proceedings in the early fourth century CE.[33] Eunapius bases the description of Julianus' trial - except for whatever written sources

[31] The *terminus ante quem* is quite certain, since upon Libanius's arrival in Athens in 336 CE, the sophist Julianus, son of Domnus, of Caesarea in Cappadocia, active under Constantine the Great (306-337 CE) was already dead. On the dating of the trial: Karambelas, forthcoming. Traditional dating: Kennedy 1983, 9: *around 330*; Watts 2006, 51: between 325-335. However, this dating creates problems in the dating of Prohaeresius' life, and in reaching a convincing reading of the whole episode. Prohaeresius was born in 276 and was 86 years old in September 362 CE, when Eunapius arrived in Athens. If Prohaeresius became a pupil of Julianus' in the mid-310s and the trial took place around 330 CE, as the majority of the scholars argue, then Prohaeresius, oddly enough, must still have been a student in Julianus' school at the ripe old age of fifty-five. On this issue: Watts 2006, 51-52. Brown 1992, 44 does not address the inconsistency: he accepts the date of 330, yet, at the same time, describes Prohaeresius as a "*young…tall Armenian of striking demeanor.*" Thus, in his recent edition and commentary of Eunapius' biographies, Richard Goulet argues for a date earlier date, around 300 CE: Goulet 2014, II 539 (534-540). However, we must probably opt for a date in the late 310's, if we do not believe that the title 'proconsul'used by Eunapius is anachronistic: Constantine acquired the province of Achaia in 314 CE, which became again a proconsular province, governed by senators of consular rank. Jones 1971, I, 106-107; Davenport 2013, 233.

[32] Banchich 1984. For a biography of Eunapius: Penella 1990, 1-9; Becker 2013, 25-28; Goulet 2014, I 5-34.

[33] Cf. the commentaries in Penella 1990; Civiletti 2007; Becker 2013.

or oral traditions were available to him - on the first-hand account of an eye-witness, the co-defendant Tuscianus (ταῦτα δὲ πρὸς τὸν συγγραφέα Τουσκιανὸς ἐξήγγελλε παρὼν τῇ κρίσει, καὶ εἴσω τῶν κατηγορουμένων).[34] This Tuscianus recalled, not only the actual events, but even some of the rhetorical turns of phrase from the proem of Prohaeresius' speech in court [ὁ μὲν προοίμιόν τι ἔφη (οὐ γὰρ ἠπίστατό γε αὐτὸ Τουσκιανός, τὸν δὲ νοῦν ἔφραζεν)...εἰς δεύτερον προοίμιον ὁ Προαιρέσιος ἐντείνων τὸν λόγον (τοῦτο γὰρ ἐμέμνητο Τουσκιανός).[35] Eunapius distinguishes between what Tuscianus did or did not remember, and invokes the latter's testimony in order to highlight the rhetorical excellence of Eunapius' teacher, Prohaeresius; there is no reason to suppose that what legal information he does provide is an imaginary construction, given that such information does, in actual fact, arise neutrally and incidentally during the course of the narrative. In addition, the legal framework mapped out by Eunapius is corroborated, to the letter almost, by independent sources from the same period, such as the classic account by Libanius of the dreams cherished by a youth of Antioch concerning his future passage to Athens.[36] There is no reason to resort to the common sense argument that, even if the episode were fictional, it would, nevertheless, provide us with a useful insight into the stance of Greek intellectuals towards Roman law, on the basis of the ideological manipulations or preoccupations of its author.

The prosecution of Julianus and his students constitutes a stormy episode which is best understood within the context of physical violence in everyday student life in Late Antique Athens, not only between students, but also in the broader social milieu,[37] in a face-to-face microcosm, whose economy depended to a considerable extent on wealthy teachers and their international clientele.[38] The

[34] *Vit.Phil.* 484. On Tuscianus' identity: Watts 2005b, 350-352; Civiletti 2007, 558; Becker 419-420.

[35] *Vit.Phil.* 484.

[36] Libanius, 1.19: Ἀκούων ἔγωγε ἐκ παιδὸς, ὦ ἄνδρες, τοὺς τῶν χορῶν ἐν μέσαις ταῖς Ἀθήναις πολέμους καὶ ῥόπαλά τε καὶ σίδηρον καὶ λίθους καὶ τραύματα γραφάς τε ἐπὶ τούτοις καὶ ἀπολογίας καὶ δίκας ἐπ ἐλέγχοις πάντα τε τολμώμενα τοῖς νεοῖς, ὅπως τὰ πράγματα τοῖς ἡγεμόσιν αἱροιεν, ἀγαθούς τε αὐτοὺς ἐν κινδύνοις ἡγουμην δικαίους τε οὐχ ἧττον τῶν ὑπὲρ τῶν πατρίδων τιθεμένων τὰ ὅπλα εὐχόμην τε τοῖς θεοῖς γενέσθαι καὶ ἐμαυτῷ τοιαῦτα ἀριστεῦσαι καὶ δραμεῖν μὲν ἐς Περειᾶ τε καὶ Σούνιον καὶ τοὺς ἄλλους λιμένας νέων ἐφ ἁρπαγῆτῆς ὁλκάδος ἐκβάντων, δραμεῖν δὲ ὑπὲρ τῆς ἁρπαγῆς αὖτις εἰς Κόρινθον κριθησόμενον, δεῖπνα δὲ δείπνοις συνείροντα ταχὺ τῶν ὄντων ἀνηλωμένων εἰς δανείσοντα βλέπειν.

[37] Extensively discussed in Watts 2005a, 236-241, 248-24; Watts 2006, 42-47 (also on the central and provincial government's attempts to control student violence). See also Karambelas, forthcoming; Rousseau 1994, 28-34 (30 on the violence between rival student groups; 31-32 on Prohaeresius as teacher of Basil of Caesarea between 349-355 CE); and the older work of Walden 1912.

[38] Thompson 1959; Frantz 1988, 12-13; Gauville 2001, 52: Athens was a small fortified city, containing only the Acropolis and a small part of the agora, with a population of around 25,000.

reader is introduced to the successive stages of a trial, from prosecution to verdict. The scuffle between the pupils of the sophists Julianus and Apsines ended with the former beating up the latter – who, in spite of the fact that they got the better of their opponents by resorting to inordinately violent ways, thus putting the lives of their victims at risk, then proceeded, considering themselves hard done by, to bring charges against them. Eventually, the case was referred to the proconsul of Achaia, who tried it in Corinth:[39]

> ἔτυχον μὲν γὰρ οἱ θρασύτατοι τῶν Ἀψίνου μαθητῶν ταῖς χερσὶ κρατήσαντες τῶν Ἰουλιανοῦ κατὰ τὸν ἐμφύλιον ἐκεῖνον πόλεμον χερσὶ δὲ βαρείαις καὶ Λακωνικαῖς χρησάμενοι, τῶν πεπονθότων περὶ τοῦ σώματος κινδυνευόντων, ὥσπερ ἀδικηθέντες, κατηγόρουν. ἀνεφέρετο δὲ ἐπὶ τὸν ἀνθύπατον ἡ δίκη, καὶ ὃς βαρύς τις εἶναι καὶ φοβερὸς ἐνδεικνύμενος, καὶ τὸν διδάσκαλον συναρπασθῆναι κελεύει καὶ τοὺς κατηγορηθέντας ἅπαντας δεσμώτας, ὥσπερ τοὺς ἐπὶ φόνῳ κατακεκλεισμένους. ἐῴκει δὲ ὡς Ῥωμαῖός τις οὐκ εἶναι τῶν ἀπαιδεύτων, οὐδὲ τῶν ὑπ' ἀγροίκῳ καὶ ἀμούσῳ τύχῃ τεθραμμένων. ὅ τε γοῦν Ἰουλιανὸς παρῆν, οὕτως ἐπιταχθέν, καὶ ὁ Ἀψίνης συμπαρῆν, οὐκ ἐπιταχθέν, ἀλλ' ὡς συνηγορήσων τοῖς κατηγορηκόσιν.
>
> It so happened that the boldest of the pupils of Apsines had, in a fierce encounter, got the upper hand of Julian's pupils in the course of the war of factions that they kept up. After laying violent hands on them in Spartan fashion, though the victims of their ill-treatment had been in danger of their lives, they prosecuted them as though they themselves were the injured parties. The case was referred to the proconsul, who, showing himself stern and implacable, ordered that their teacher also be arrested, and that all the accused be thrown into chains, like men imprisoned on a charge of murder. It seems, however, that, for a Roman, he was not uneducated or bred in a boorish and illiberal fashion. Accordingly Julian was in court, as he had been ordered, and Apsines was there also, not in obedience to orders but to help the case of the plaintiffs.[40]

However, the foregoing passage gives rise to a series of legal problems, on which we will now turn. In the first place, Eunapius creates the impression that Apsines' pupils travelled from Athens to Corinth immediately following the scuffle, they filed charges, and then the proconsul tried the case. This is also the traditional view.[41]

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[39] Cf. Libanius, *Or.* 1.19: εἰς Κόρινθον κριθησόμενον. Cf. Kennedy, 9-10. Historians have been agnostic on the identity of the proconsul (cf. Jones 1971, I, 1013) given the debate on the chronology of the trial. If we accept a date around 330 CE, a possible candidate is Ceionius Rufius Albinus: Davenport 2013, 233-234; however, a chronology in the late 310s, as we have seen, is more probable.

[40] *Vit.Phil.* 484.

[41] A synopsis of which we find in Watts 2006, 50: "Apsines' group (…) traveled to the office of the proconsul and filed charges against Julianus's students". Compare Opelt 1969, 31-32.

However, if one pays attention both in the precise wording and in the context of the whole episode, he may find a hole in the sequence of events:
a) In his account, Eunapius clearly differentiates between 'κατηγόρουν' and 'ἀνεφέρετο δὲ ἐπὶ τὸν ἀνθύπατον ἡ δίκη'. The wording of 'ἀνεφέρετο ἐπὶ τὸν ἀνθύπατον' implies at least the original filing of charges (κατηγόρουν) with some other judicial authority in Athens and their referral from that authority to the Roman governor. The term 'ἀνεφέρετο' -even though not legally technical- indicates clearly the movement of jurisdiction from one authority to another. One is reminded of the relevant term 'ἀναπέμπω', which is well-attested in the papyrological sources.[42]
b) The existence of a first hearing, before the trial in Corinth, during which the two parties had delivered speeches of prosecution and defense, is clearly attested later in the narrative, when the Roman governor orders that the pleading for the prosecution be delivered 'according to Roman procedural rules' by the student that had delivered it *the first time around*. We also learn that the student who delivered the speech for the prosecution in the first trial was named Themistocles:

> "ἀλλ' οὐ τοῦτό γε" εἶπεν "Ῥωμαῖοι δοκιμάζουσιν, ἀλλ' ὁ τὴν πρώτην εἰπὼν κατηγορίαν κινδυνευέτω περὶ τῆς δευτέρας." (...) ἦν δὲ ὁ Θεμιστοκλῆς κατηγορηκώς.
>
> (the proconsul) said : " This procedure is not approved by the Romans. He who delivered the speech for the prosecution at the first hearing must try his luck at the second also." (…) Now Themistocles had made the speech for the prosecution before.[43]

Eunapius possibly suppresses the first hearing, although he eventually mentions it through the words of the proconsul, because he is only interested in the role of his teacher Prohaeresius in the 'Roman' trial. It is also probable that the Athenian judicial body which had conducted the first hearing, had ceased to function and did not interest Eunapius' perspective in the late 399 CE. Although we have solid knowledge of the movement of jurisdiction from the local courts to the provincial governor, or even to the emperor, in the High Empire, it comes as a surprise that in early fourth century CE, an Athenian court continued to try criminal cases in the first degree – or that, at any rate, had the legal responsibility of carrying out a criminal hearing to arrive at a precise legal determination of the offences concerned. The evidence of a complete first hearing runs also against the suggestion that some local authority had only the capacity to refer the case to the Roman judge, even if it eventually decided to do so. Philipp Scheibelreiter's objection, in his response to the present paper, that we do not need to suppose an initial exchange of both speeches of

[42] *SB* 5 7601 (135 CE); *BGU* 1 168 (around 170 CE) l.24.; *P. Col.* X 270 (3rd century CE) l.15; *P.Princ.* III 126 (around 150 CE) l.4; *P.Rainer Cent.* 68 (235-236 CE) l.23; *P. Kramer* 11 (299 CE) l.4.
[43] *Vit.Phil.* 484 ff.

prosecution and defense, but only a speech of prosecution,[44] is stimulating, but does not answer the question why Julianus' pupils would be deprived by a Greek court of the right to defend themselves. Later, Eunapius presents the Roman judge to urge 'anyone who could' to 'reply to the earlier speech of the prosecution', i.e. to the speech of the first hearing (ἀπολογεῖσθαι δὲ πρὸς τὴν προτέραν κατηγορίαν ὡς ἐκέλευσε τὸν δυνάμενον), but this comes as the result of Themistocles' inability to deliver his speech and the need for a precise refutation of the charges by the defendants, which could only be based in the initial procedure in Athens, since no speech for the prosecution was delivered in the second trial. Scheibelreiter argues that the reference, in the last stage of the trial, during Prohaeresius' second proem, to men who 'win belief for what they say, before the defense is heard' (καὶ λέγοντα πιστεύεσθαι πρὸ τῆς ἀπολογίας) proves that the accused did not defend themselves in the first trial. To our view, at that point Prohaeresius protested against the mistreatment of the accused by the Roman officials – they were arrested on the charge of homicide, put in chains e.t.c. – before they had the chance to defend themselves in a proper Roman trial before the proconsul, and did not refer to the Athenian procedure. Otherwise, why would Prohaeresius raise a complaint about a violation of legal rights during the Athenian procedure, to the Roman judge?

The most important question is, of course, before which body could have the first trial taken place. There is some evidence from Antioch and Africa where the *boule* or local magistrates still had jurisdiction.[45] In the case of Julianus' trial, our options include some Athenian magistrate responsible for minor criminal offences – or even the Areios Pagos. It is known that civic offices continued to operate in Athens until the fifth century CE.[46] Areios Pagos was functioning as late as the fourth century CE,[47] and we are certainly familiar with its jurisdiction earlier in the Imperial period.[48] It is also argued, on the basis of a passage from Lucian's *Timon* -a dialogue set

[44] Scheibelreiter in the present volume, 4.2.

[45] Libanius 11.139; *Codex Theodosianus* 12.1.174 (Emperors Valentinian and Valens to Eucharius, proconsul of Africa; 412 CE): *Duumvirum impune non liceat extollere potestatem fascium extra metas propriae civitatis* (Duumvirs shall not be allowed with impunity to extend the power of their fasces beyond the limits of their own municipalities – transl. Pharr 1952). On the very limited number of epigraphical sources: Feissel 2009, 99-102. Cf. the older views of Jones 1940, 150: '*The city courts seem by the end of the third century to have disappeared entirely, and all jurisdiction devolved upon the provincial governor, who was authorized to delegate minor cases to iudices pedanei (χαμαιδικασταί)*"; and Ste Croix 1981, 317: '*Before the end of the third century the local courts seem to have died out completely, and all jurisdiction was now exercised by the provincial governor or his delegates', with the reservation that 'no doubt many governors were glad to allow local magistrates to try minor cases*'. Cf., however, *IK Perge* II 323, II.5-6 (200-250 CE).

[46] *IG* II^2 5, 13293.

[47] Frantz 1988, 12; 17 (with 'reduced responsibilities'); *I.G.* II ^{2} 4222; Himerius *Or.* VII describes Areios Pagos as the body which '*now judges for the Athenians concerning freedom*'; Sironen 1997, nos 4 (p. 56), 12 (p. 67), 17 (p. 75) until the late fourth century CE.

[48] Geagan 1967, 60-61; Fournier, 142-156 (also a collection of the relevant sources). We may

in fifth-century BCE Athens- that, at least in the second/third centuries CE, Areios Pagos had jurisdiction over cases of assault (τραύμα).[49] However, it seems inprobable that Areios Pagos – who would probably issue a 'yes'/'no' verdict – would refer the case to the proconsul after the completion of the trial.

According to Eunapius' narration, the referral of the case to the Roman justice had two consequences. On the one hand, the governor ordered that Julianus also be arrested (καὶ τὸν διδάσκαλον συναρπασθῆναι κελεύει) – as instigator of his pupils' behaviour – and, on the other, that all of the accused be treated as arrested on the charge of homicide (τοὺς κατηγορηθέντας ἅπαντας δεσμώτας, ὥσπερ τοὺς ἐπὶ φόνῳ κατακεκλεισμένους). The logical consequence of Eunapius' phrasing is that Julianus' arrest was the Roman governor's idea – therefore the initial hearing only pertained to pupils, with the governor adding their teacher to the parties accused. In that case, the pupils had already been tried in Athens, following the original complaint, and the governor ordered at a later stage, when he took over the case, the arrest of the teacher as well (συναρπασθῆναι).[50] It is also possible that the proconsul transmuted the legal charges (iniuria)[51] and brought Julianus and his pupils to court on a charge of attempted homicide – hence their treatment "*like men imprisoned on a charge of murder.*" of this is the case, then there is the possibility that the charges had initially been filed with an Athenian magistrate who had tried the case in the first degree, but decided that he had no jurisdiction over criminal cases.

During the 'ἐξέτασις', Themistocles of Athens appears as κορυφαῖος[52] of the 'chorus' of plaintiffs and the two rival teachers are also present – Apsines as *synegoros,* in the technical sense, for his pupils. The defendants appear in a 'pitiable' state and the judge decides to appear pitiless and instill fear (βαρύς τις εἶναι καὶ φοβερὸς ἐνδεικνύμενος: 'showing himself stern and implacable')[53] – with his body language communicating his irritation at Apsines's presence. Similarly, the governor's silences function as a performative act, which keeps his psychic movements within bounds,

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also note Aelius Aristides' rhetorical praise of the continuity of Areopagus (writing in the present tense) in his 'Panathenaic' Oration, 47-48 (cf. also the references in 367; 385).

[49] Lucian, *Tim*. 46: τί τοῦτο; παίεις, ὦ Τίμων; μαρτύρομαι: ὦ Ἡράκλεις, ἰοὺ ἰού, προκαλοῦμαί σε τραύματος εἰς Ἄρειον πάγον. Geagan 1967, 61; *contra*, Fournier 2010, 147. Phillips 2007, 104 reads the passage as a testimony of Lucian's '*impressive knowledge of Classical Athenian law*'.

[50] When, at the start of the trial, Eunapius describes the physical state of the defendants – they entered the courtroom 'unfairly treated'; 'their hair was uncut'; 'they were in a great physical affliction,' resulting from their being remanded in custody for a fair length of time– he includes among their ranks their teacher as well (εἰσῄεσαν πάλιν οἱ δεσμῶται καὶ ἠδικημένοι, καὶ ὁ διδάσκαλος μετ' αὐτῶν, κόμας ἔχοντες καὶ τὰ σώματα κεκακωμένοι λίαν, ὥστε οἰκτροὺς αὐτοὺς φανῆναι καὶ τῷ κρίνοντι). Cf. Mommsen 1899, 330-331, n.5.

[51] On iniuria/τραύμα as the main charge against Julianus' students, see Scheibelreiter in the present volume, 4.1.

[52] Identity of Themistocles: Jones 1971, I, 894; Penella 1990, 81 n.9; Civiletti 2007, 561.

[53] *Vit.Phil.* 483.

so that the legal procedure is followed without impediment.[54] An unexpected 'crisis' during the hearing breaks out the moment Apsines tries to plead for the prosecution:

> δοθέντος δὲ τοῦ λόγου τοῖς κατηγοροῦσιν, ἤρξατο μὲν ὁ Ἀψίνης τοῦ λόγου, ἀλλ' ὁ ἀνθύπατος ὑπολαβών, "ἀλλ' οὐ τοῦτό γε" εἶπεν "Ῥωμαῖοι δοκιμάζουσιν· ἀλλ' ὁ τὴν πρώτην εἰπὼν κατηγορίαν κινδυνευέτω περὶ τῆς δευτέρας." ἐνταῦθα παρασκευὴ μὲν οὐκ ἦν πρὸς τὴν τῆς κρίσεως ὀξύτητα· ἦν δὲ ὁ Θεμιστοκλῆς κατηγορηκώς, καὶ λέγειν ἀναγκαζόμενος, χροιάν τε ἤλλαξε καὶ τὰ χείλη διέδακνεν ἀπορούμενος, καὶ πρὸς τοὺς ἑταίρους ὑπέβλεπεν καὶ παρεφθέγγετο τί πρακτέον· εἰσεληλύθεσαν γὰρ ὡς ἐπὶ τῇ συνηγορίᾳ τοῦ διδασκάλου μόνον κεκραξόμενοι καὶ βοησόμενοι. πολλῆς οὖν σιωπῆς καὶ ταραχῆς οὔσης, σιωπῆς μὲν καθ' ὅλον τὸ δικαστήριον, ταραχῆς δὲ περὶ τὸ τῶν διωκόντων μέρος, ἐλεεινόν τι παραφθεγξάμενος ὁ Ἰουλιανός, "ἀλλ' ἐμέ γε εἰπεῖν" ἔφη "κέλευσον·" ὁ δὲ ἀνθύπατος ἀναβοήσας· "ἀλλ' οὐδεὶς ὑμῶν γ' ἐρεῖ τῶν ἐσκεμμένων διδασκάλων, οὐδὲ κροτήσει τις τῶν μαθητῶν τὸν λέγοντα, ἀλλ' εἴσεσθέ γε αὐτίκα ἡλίκον ἐστὶ καὶ οἷον τὸ παρὰ Ῥωμαίοις δίκαιον. ἀλλὰ Θεμιστοκλῆς μὲν περαινέτω τὴν κατηγορίαν, ἀπολογείσθω δὲ ὃν ἂν σὺ ἀποκρίνῃς ἄριστον." ἐνταῦθα κατηγόρει μὲν οὐδείς, ἀλλὰ Θεμιστοκλῆς ὀνόματος ἦν ὕβρις.
>
> Then the plaintiffs were permitted to speak, and Apsines began to make a speech, but the proconsul interrupted him and said: "This procedure is not approved by the Romans. He who delivered the speech for the prosecution at the first hearing must try his luck at the second also". There was then no time for preparation because of the suddenness of the decision. Now Themistocles had made the speech for the prosecution before, but now on being compelled to speak he changed colour, bit his lips in great embarrassment, looked furtively towards his comrades, and consulted them in whispers as to what they had better do. For they had come into court prepared only to shout and applaud vociferously their teacher's speech in their behalf. Therefore profound silence and confusion reigned, a general silence in the court and confusion in the ranks of the accusers. Then Julian, in a low and pitiful voice said: "Nay, then, give me leave to speak". Whereupon, the proconsul exclaimed: "No, not one of you shall plead, you teachers who have come out with your speeches prepared, nor shall anyone of your pupils applaud the speaker; but you shall learn forthwith how perfect and how pure is the justice that the Romans dispense. First let Themistocles finish his speech for the prosecution, and then he whom you think best fitted shall speak in defence." But no one spoke up for the plaintiffs, and Themistocles was a scandal and a disgrace to his great name.[55]

The legal perplexities that arise from the above episode are linked to the antagonism between the litigants' rhetorical practice – different orators in the first and

[54] On all of the above, see Karambelas, forthcoming.
[55] *Vit.Phil.* 484.

second hearing; preparation of speeches before the trial – and the governor's imposition of Roman procedural rules, within the framework of *cognitio*.[56] The manner in which the governor forbade Apsines to speak, ordering that the pleading be made by the prosecutor who had done so in the first hearing, and also forbade all rhetors to deliver the speech they had prepared and their pupils to applaud the speaker, is charged with a reference to "Roman justice", as being the legal framework to be respected by the litigants – when one could expect that, in matters of procedure, a century after the *Constitutio Antoniniana* the direct tensions between Greek and Roman procedural rules would have disappeared. It is also clear that Eunapius illustrates the rhetorical practice of the teachers, their students and audience alike, as a challenge to the Roman rules of the legal game. We must particularly emphasize the governor's conviction that both the observance of procedural order and the prohibition of offering practical encouragement to the litigants by means of acclamations and applause, stem from the 'superiority' of Roman judicial system. When the proconsul tries to establish his prohibitions, by insisting that the 'Greek' rhetorical practice is not approved by the Romans (ἀλλ' οὐ τοῦτό γε [...] Ῥωμαῖοι δοκιμάζουσιν) and that all may be taught "how perfect and how pure is the justice that the Romans dispense" (ἀλλ' εἴσεσθέ γε αὐτίκα ἡλίκον ἐστὶ καὶ οἷον τὸ παρὰ Ῥωμαίοις δίκαιον), the 'charge' of his phrase preserves the effort by a Roman senator to deal with his duties, roles and identifications while enforcing his judicial authority. The governor confronts the Athenian teachers inside his courtroom at the level of legal procedure – imposing respect for Roman rules, invoked by him as their representative and violated by accusers and accused alike, and this he does by attacking the Greek rhetorical tradition, as concerns both the speeches of the prosecution and defense, and the involvement of their supporters in court. Of course, the proconsul is not presented as innocent of Greek *paideia* – the latter serving as a common tradition, a way of recognition and communication, not only for the local elites throughout the empire, but also between the governors and other Roman administrative officials and the provincial elites.[57] In Julianus's trial, however, *paideia* turns, at first, into a field of confrontation. The governor gives precedence to an enthusiastic identification with Roman legal culture – a mixture of pride and harshness, in the fight for symbolic power inside the courtroom.

In this context, Eunapius' narrative constitutes an important testimony, not only on the continued operation of Athenian judicial institutions at the beginning of the fourth century CE, but also to the ongoing antithesis between Greek rhetoric and Roman law as expressed by the Athenian teachers and the Roman judge respectively. This antithesis resonates within the framework both of the original trial of 310 CE

[56] Mitteis 1891, 141-142; Mommsen 1899, 375.

[57] Brown 1992, 35-58; esp. 40: '*even if they represented a far more intrusive imperial system than before, governors would still expect to meet, in the local elite, men who enjoyed the same paideia as themselves* (…) *they could set up a system of instant communication with men who were, often, total strangers to them*.'

and of Eunapius' work itself, at the end of the fourth century. The author reproduces the narration identifying himself with his teachers and acting as a representative of Greek classical heritage – a clear conflict between a past which ought to stay immutable, and the 'present time', the 'νῦν' of Roman justice, which is attacked and demands its own rights. Whether one reads the events taking place during the trial as a token of the ideological conflicts at the beginning of the fourth century CE, with the Athenian teachers of rhetoric as their vehicle, or as an expression of the biographer's ideological 'charge' at the end of the century, Eunapius' narrative challenges our oversimplification of a 'legal pluralism' following the *Constitutio Antoniniana* as being without conflicts, resistance or regression. Particularly in Athens, which stood as a guardian of the values of the classical Greek past, the contestation of the universal validity of Roman rules by Athenian rhetors was constant and obliged the governor to counter-attack, in order to impose and assert his authority. Within the same framework, the violent confrontations between students from different educational institutions could be seen as an acting-out of the same conflict, a challenge towards Roman authority, even if, in the end, it assumed the character of a rite of passage, before these very students would come of age and become subsumed into the Late Roman bureaucracy.

The outcome of the trial, as recounted by Eunapius, is, in this respect, quite typical. The governor ordered that whosoever of the defendants was capable of the task (τὸν δυνάμενον) should proceed to speak in his own defense, in answer to the earlier speech of the prosecution (ἀπολογεῖσθαι δὲ πρὸς τὴν προτέραν κατηγορίαν). Taking the floor, Julianus asked the governor to free Prohaeresius of his chains and then to test – having transformed Apsines into a Pythagoras (πεποίηκας Πυθαγόραν Ἀψίνην), by silencing him through the superiority of Roman law – whether Prohaeresius had been taught "the Attic manner or the Pythagorean" (δοκιμάσεις αὐτὸς πότερον ἀττικίζειν ἢ πυθαγορίζειν πεπαίδευται). Julianus' call was already transposing the conflict to the antagonism of Greek and Roman cultural demands, and Eunapius does not fail to mention Tuscianus' confirmation that "the proconsul granted this request very graciously" – proof of the fact that the governor had willingly accepted a loosening of the strict limits he had imposed earlier. Immediately after this, Julianus, raising the tone of his voice, urged his student, in a forceful manner, to proceed: «Speak, Prohaeresius! Now is the time to make a speech! ("λέγε, Προαιρέσιε, νῦν καιρὸς τοῦ λέγειν") – and with this command, the courtroom would be transformed into a theatre of rhetorical display, with the Roman governor now assuming the role of audience, rather than enforcer of the law. As already seen above, in the analogous examples from Philostratus' *Life of Apollonius of Tyana* and Aelius Aristeides' *Sacred Tales*, the conversion of the Roman governor from 'judge' to 'audience' of the accused was a commonplace among courtroom narrations by Greek *pepaideumenoi*. In Eunapius, the transformation was quite spectacular, according to Tuscianus' testimony (9.2.17-20):

> 'κάτω δὲ τοῦ ἀνθυπάτου νεύοντος, καὶ τόν τε νοῦν τῶν λεγομένων καταπεπληγμένου καὶ τὸ βάθος τῶν λέξεων καὶ τὴν εὐκολίαν καὶ τὸν

κρότον, καὶ πάντων μὲν βουλομένων ἐπαινεῖν, καταπτηξάντων δὲ ὥσπερ διοσημείαν, καὶ σιωπῆς κατακεχυμένης μυστηριώδους, εἰς δεύτερον προοίμιον ὁ Προαιρέσιος ἐντείνων τὸν λόγον (τοῦτο γὰρ ἐμέμνητο Τουσκιανός), ἐνθένδε ἤρξατο· "εἰ μὲν οὖν ἔξεστι καὶ ἀδικεῖν ἅπαντα καὶ κατηγορεῖν καὶ λέγοντα οὖν ἔξεστι καὶ ἀδικεῖν ἅπαντα καὶ κατηγορεῖν καὶ λέγοντα πιστεύεσθαι πρὸ τῆς ἀπολογίας, ἔστω, γινέσθω Θεμιστοκλέους ἡ πόλις." 'ἐνταῦθα ἀνά τε ἐπήδησεν ὁ ἀνθύπατος ἐκ τοῦ θρόνου, καὶ τὴν περιπόρφυρον ἀνασείων ἐσθῆτα (τήβεννον αὐτὴν Ῥωμαῖοι καλοῦσιν), ὥσπερ μειράκιον ὁ βαρὺς ἐκεῖνος καὶ ἀμείλικτος ἐκρότει τὸν Προαιρέσιον· συνεκρότει δὲ ὁ Ἀψίνης οὔτι ἑκών, ἀλλ' ἀνάγκης βιαιότερον οὐδέν· ὁ διδάσκαλος Ἰουλιανὸς ἐδάκρυε μόνον.

At this the proconsul bowed his head and was overcome with admiration of the force of his arguments, his weighty style, his facility and sonorous eloquence. Meanwhile they all longed to applaud, but sat cowering as though forbidden to do so by a sign from heaven, and a mystic silence pervaded the place. Then he lengthened his speech into a second proemium as follows (for this part Tuscianus remembered) : "If, then, men may with impunity commit any injustice and bring accusations and win belief for what they say, before the defense is heard, so be it! Let our city be enslaved to Themistocles!" ' Then up jumped the proconsul, and shaking his purple-edged cloak (the Romans call it a 'tebennos'), that austere and inexorable judge applauded Prohaeresius like a schoolboy. Even Apsines joined in the applause, not of his own free will, but because there is no fighting against necessity. Julian his teacher could only weep.

Already, with the first proem of Prohaeresius' defence, the proconsul 'bowed his head',[58] and with the second proem, which Tuscianus memorised and Eunapius thus quotes verbatim, the governor leapt from his throne and started applauding with enthusiasm; Apsines was forced to applaud as well, and Julianus had tears in his eyes. The biographer tactically presents the outcome of the trial as a radical reversal of judicial roles: the accusers turned into the accused and vice versa; the 'stern and inexorable' proconsul was transformed into a child (μειράκιον) full of enthusiasm; the prohibitions were violated in emphatic fashion by their own enforcer, and the applause received became the very essence of judicial decision.

From all the above, it is more than obvious that even in the late fourth century CE, the trial of Julianus and Prohaeresius was staged by Eunapius as a triumph of Greek judicial rhetoric over Roman law – with a spectacular reverse of the legal reality after 212 CE. Eunapius emphasizes the 'metaphysical' powers of Greek rhetoric which overturns Roman legal rules, even if the 'reality' of the Roman judge's conversion, and especially his motives, could be somewhat different. To take the governor's reaction at face value – solely as an acknowledgement of the justice of

[58] Goulet 2014, II 242 on alternative interpretations of the phrase.

Prohaeresius' claims – would constitute a very limited and limiting reading, if not an historiographically naïve one.[59] His symbolic language may even involve a carefully planned tactical move. The proconsul knew the rules of the game – and he was offering the Athenian elite what it wanted – a 'spontaneous', triumphant declaration of its victory, in order to reinforce his own authority.[60] The Roman governor may also have been using a body language which was already familiar: we are reminded of an analogous expression of enthusiasm by the emperor Caracalla, after a rhetorical display by the sophist Heliodorus the Arab in 213 CE.[61] A similar display of enthusiasm and joy can also be found in Libanius' autobiography, when describing Julian's self-proclamation as consul in 363 CE.[62] And, to be sure, the 'psychagogic power' of rhetoric remained undiminished in the Late Roman period[63] – given the survival of the classical rhetorical tradition and its dialogue with educated Roman officials.[64]

However, the purported intentions of the Roman governor, if any, as well as his eventual decision to go along with the Athenian elite – deeming that the latter had been taught its lesson – are of little importance, to the extent that the disposition of Greek intellectuals, both in the 310s and in 399 CE, and the giving of precedence to Greek rhetorical order over Roman law are presented in bold relief. The trial of Julianus and his pupils, as preserved by their faithful pupil Eunapius, indicates

[59] Penella 1990, 128: '*That this stern proconsul was overwhelmed by the eloquent pleading of Prohaeresius, one of the accused pupils of Julianus, was to his credit; Prohaeresius had right to his side.*'

[60] This is the view expressed in Brown 1992, 45: '*What mattered, of course, was that the proconsul had played the game correctly. Faced by a relatively trivial incident, he could allow himself to succumb to the 'spell' of Prohaeresius without losing face. To give way to such persuasion, indeed, heightened his authority in Athens. For paideia was not simply a skill in persuasive speech; it was a school of courtesy.*'

[61] *Vit.Soph.*626: ὡς δὲ ἔσω παρῆλθε καὶ θαρραλέον μὲν ἐς τὸν βασιλέα εἶδεν, καιρὸν δὲ ᾔτησεν ὕδατος, αὐτὴν δὲ τὴν παραίτησιν ἐντρεχῶς διέθετο εἰπὼν „καινόν σοι δόξει, μέγιστε αὐτοκράτορ, ἑαυτόν τις παραγραφόμενος μόνος ἀγωνίσασθαι τὴν δίκην ἐντολὰς οὐκ ἔχων" ἀναπηδήσας ὁ αὐτοκράτωρ ἄνδρα τε „οἷον οὔπω ἔγνωκα, τῶν ἐμαυτοῦ καιρῶν εὕρημα" καὶ τὰ τοιαῦτα ἐκάλει τὸν Ἡλιόδωρον ἀνασείων τὴν χεῖρα καὶ τὸν κόλπον τῆς χλαμύδος.'

[62] Libanius, *Or.* 1.129: οἱ μὲν δὴ ἀλλήλοις εἰς παραμυθίαν ἤρκουν, ὡς δὲ ἀπέδυν ὕστατος αὐτοῦ τοῦ βασιλέως, ὅπως ὅτι πλεῖστοι συνέλθοιεν, φροντίσαντος, τὸν Ἑρμῆν ἔφησαν τοῦ θεράποντος κηδόμενον τῇ ῥάβδῳ κινεῖν τῶν ἀκροωμένων ἕκαστον, ὅπως μηδ' ὁτιοῦν ὄνομα θαύματος ἄμοιρον ἀπέλθῃ. βασιλεὺς δὲ τὰ πρῶτα μὲν τῇ διὰ τῆς μορφῆς ἡδονῇ μηνυομένῃ συνετέλει, ἔπειτα τῷ μέλλειν ἀναπηδᾶν, ἔπειτα, οὐ γὰρ δὴ κατεῖχεν αὐτὸν καὶ σφόδρα πειρώμενος, ἅλατο μὲν ἐκ τοῦ θρόνου, τῆς χλαμύδος δὲ ὁπόσον ἐξῆν, ταῖν χεροῖν ἀνεπέτασεν, ὡς μὲν ἂν εἴποι τις τουτωνὶ τῶν ἀγγάρων, ἐκφερόμενος τοῦ σχήματος, ὡς δ' ἂν ἀνὴρ εὖ εἰδώς, οἷς ἂν σεμνὴ βασιλεία γένοιτο, ἆρα ἐν τοῖς προσήκουσι μένων· τί γὰρ δὴ βασιλικώτερον τοῦ βασιλέως ψυχὴν πρὸς κάλλη λόγων ἀνίστασθαι. Cf. Korenjak 2000, 89-91.

[63] Heath 2004, 327.

[64] Kennedy 1983, 10: '*In fact the governors of Achaea often seem to have sought their post because of cultural interests in the country, and it is likely that trials in Greece and in certain other places like Antioch preserved somewhat more of the old rhetorical tradition than elsewhere. The story indicates how much procedures depended on the inclination of the judge.*'

that the universal extension of Roman law, which followed on from the *Constitutio Antoniniana*, did not prevent the Athenian guardians of Greek cultural authority and tradition from confronting Roman justice in its own field. Instead, it did trigger symbolic conflicts and spectacular regressions, even if, at the level of harsh legal reality, the game for Greek law would very soon be lost, and irrevocably so.

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PHILIPP SCHEIBELREITER (WIEN)

EUNAPIOS VON SARDES, *VITA SOPHIST.* 9,2: EIN BELEG FÜR DIE GRIECHISCHE WAHRNEHMUNG DES RÖMISCHEN PROVINZIALPROZESSES NACH DER *CONSTITUTIO ANTONINIANA*?[1] ANTWORT AUF D. KARAMBELAS

1. Einleitung

Der Beitrag von Dimitris Karambelas greift die Debatte um Reichsrecht und Volksrecht nicht unmittelbar auf, sondern versteht sie als historischen und rechtlichen Rahmen für die von ihm exigierte Episode aus den Sophisten-Viten des Eunapios von Sardes. Den Ausführungen von Karambelas ist größtenteils zuzustimmen, dennoch sollen in dem vorliegenden *responsum* zur juristischen Bewertung des geschilderten Prozesses noch einige weitergehende Überlegungen angestellt werden. Auch ist hier nicht der Platz, die Rezeption der Thesen von Ludwig Mitteis' „Reichsrecht und Volksrecht" näher darzustellen, weshalb hier vorwiegend ergänzende Bemerkungen zur Literatur gemacht werden.

2. Rezeption von Reichsrecht und Volksrecht

So ist auf der Untersuchungen von Selb (1965)[2], Talamanca (1971)[3] und Wieling

[1] Viele Anregungen zu diesem Beitrag erhielt ich im Gespräch mit Prof. Peter E. Pieler / Wien, dem ich herzlich dafür danken möchte.

[2] Selb (1965) 43-46.

[3] Talamanca (1971) 433-461.

(1974)[4] zu verweisen. Letzterer spricht sich gegen Mitteis' These einer „brutalen Verdrängung" der lokaler Rechtstraditionen durch das römische Reichsrecht aus[5] und versteht dies vielmehr als indirekte Folge einer freiwilligen Rechtswahl der Neubürger[6]. Dass der römische Kaiser die Gesetze einer griechischen Stadt respektierte und ihre Anwendung sogar anordnete, zeigt eine *epistula* Kaiser Gordian III. an Aurelias Epaphras aus Aphrodisias (238-244 n. Chr.)[7]. Modrzejewski versucht – auf Grundlage des Beispiels der Geschwisterehe in Ägypten[8] – nachzuweisen, dass volksrechtliche Gesetze nach der *Constitutio Antoniniana* teilweise als Gewohnheitsrecht bestehen blieben[9]; dem schließen sich – entgegen der Ansicht Talamancas[10] – auch Wieling und Buraselis an[11]; vorsichtig skeptisch gegenüber dieser These äußert sich neuerdings Alonso[12].

Selb charakterisiert die Konfrontation des römischen Rechts mit lokalen Rechten als von wechselseitiger Einflussnahme gekennzeichnet: Einerseits zeigen kaiserliche Reskripte, dass bestimmte Praktiken unterbunden werden sollten[13]: Hartmut Wolff versteht die Umsetzung der *Constitutio Antoniniana* auch in einem stillschweigenden Tolerieren der Lokalrechte, „*soweit sie vom römischen Recht her begriffen werden konnten und römischen Rechtsanschauungen nicht zuwiderliefen*"[14]. Letzteres betrifft nach Buraselis Regelungen, welche „*klar mit wesentlichen römischen Rechtsgrundsätzen kollidierten*"[15] wie Bigamie[16], Kinderverkauf[17], Leviratsehe[18]

[4] Wieling (1974) 364.

[5] So auch Tuori (2007) 39-43.

[6] Vgl. dazu auch allgemein Pferdehirt / Kracker / Scholz (2012) 60.

[7] SEG 39,1106; vgl. dazu auch Buraselis (2007) 171-173 und Modrzejewski (1982) 348: „*… cette inscription à elle seule suffirait à écarter l'idée d'une abrogation générale des nomoi des cités grecques comme conséquence de l'Édit de Caracalla*".

[8] Grundlegend Modrzejewski (1964); ders. (1971) 322.

[9] Modrzejewski (1971) 322; Wieling (1974) 374; ebenso Tuori (2007) 43; Ando (2012) 98. Eine Zusammenfassung der These Modrzejewskis bietet Alonso (2013) 362-365.

[10] Talamanca (1971) 553.

[11] Buraselis (2007) 137.

[12] Alonso (2013) 388-389 vermerkt einerseits, dass der Begriff *consuetudo* im Zusammenhang mit dem Privatrecht kaum belegt ist. Andererseits hält er es für zweifelhaft, dass den lokalen Traditionen in Entscheidungen des Kaisers oder der Kanzleijuristen so einfach widersprochen worden wäre, wenn man sie als *mos regionis* qualifiziert hätte. Alonso beruft sich dabei auch auf schon ähnliche Ansätze bei Mitteis (1891) 161-165.

[13] Selb (1965) 38-43.

[14] H. Wolff (1976) 108.

[15] Buraselis (2007) 138 unter Verweisen auf Wieling (1974) 371 A. 50; vgl. auch Modrzejewski (1982) 348-349.

[16] C. 5.5.2 (Diocl. /Max., 285).

[17] C. 3.15.2 (Diocl. /Max., 294).

[18] CTh 3.12.2 (Constantius / Constans).

oder *apokeryxis*[19], oder auch das Erfordernis der Schriftlichkeit von Verträgen[20] und bestimmten Testamentsformen[21]. Modrzejewski spricht diesbezüglich von „… *peregrinischen Einrichtungen (…), die der öffentlichen Ordnung zuwiderliefen. Soweit die lokalen Praktiken harmlos waren, konnte man ihre Beachtung den Neubürgern neben dem jetzt allgemein verbindlich gewordenen römischen Recht gewiss zugestehen*."[22]

Selb zeigt andererseits, wie römisches Recht Eingang in die volksrechtliche Praxis gefunden hat oder mit ihr harmonisiert wurde: Als berühmtes Beispiel sei auf das (καὶ) ἐπερωτηθεὶς ὡμολόγησα verwiesen, die zur Abschlussklausel eines griechischen Vertragsformulars degenerierte Stipulations-Formel des römischen *ius civile*[23]. Dies haben bereits Hans Julius Wolff[24] und Dieter Simon[25] dargestellt. Etwas missverständlich gebraucht Humfress in diesem Zusammenhang die Metapher von „römischrechtlichen Kochbüchern" (*cookbooks*), aus dem sich die neuen Reichsbürger beliebig „Rezepte" zusammenstellten, um ein Ziel, sei es auf dem vertrauten lokalrechtlichen, sei es auf römischrechtlichem Weg zu erreichen[26]: Hinter dem Gebrauch der Stipulationsformel steht nämlich nicht etwa bloße Willkür, sondern vielmehr das Bedürfnis, einen nach griechischem Formular verfassten Vertrag auch in einem vor römischen Gerichten geführten Verfahren durchsetzbar zu machen. Allgemein vermerken Wolff[27] und Selb[28], dass auch nach 212 n. Chr. nicht jedermann nach römischem Recht leben, aber es sich gefallen lassen musste, dass sein Leben ab nun nach römischem Recht beurteilt werden konnte: „*Die in der Verleihung somit nur mittelbar liegende Erhebung des römischen Rechts zum allgemeinen Reichsrecht konnte sich daher zunächst nur in den Konsequenzen äußern, die römische Provinzialrichter aus der Tatsache zogen, dass nunmehr römische Bürger vor ihnen standen. Wenn ich recht sehe, ist es diese Situation vor allem, die die Grenzen der praktischen Auswirkung der Const.*

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[19] C. 8.46.6 (Diocl. /Max., 288). Wurm (1972) 82 sieht in dem „Verbot" der – im *Corpus Iuris Civilis* nur an dieser Stelle erwähnten – *apokeryxis* ein „*Zeugnis der bewusst romanisierenden Rechtspolitik Diokletians*", womit eine „*Unifizierung des Rechts*" erreicht werden sollte. Mit Pieler (1976) 175 ist allerdings einzuwenden, dass bereits Wurms Betitelung der Konstitution als „Verbot" der *apokeryxis* einer genaueren Erläuterung bedürfte.

[20] C. 4.19.4 (Severus Alex., 222); 7.32.2 (Severus Alex., *sine die et consule*).

[21] C. 6.23.9 (Diocl. / Max., 290).

[22] Vgl. dazu nur Gaius, Inst. 3,93. Nach Amelotti (1999) 214 taucht dieses Phänomen in orientalischen Dokumenten bereits zur Zeit Kaiser Hadrians auf, während es in ägyptischen Dokumenten erst nach 212 fassbar wird.

[23] Modrzejewski (1964) 76. Ähnlich Alonso (2013) 388, wenn er zusammenfasst: „ *(…) peregrine practices are either translated into Roman categories, or dismissed in the name of the Roman orthodoxy; compromises are infrequent, and always articulated through the categories of Roman law*."

[24] Wolff (1956) 12-13.

[25] Simon (1964); vgl. dazu auch Yiftach-Firanko (2009) 554.

[26] Humfress (2013) 86.

[27] Wolff (1956) 9 A. 20.

[28] Selb (1965) 46.

Antoniniana im Bereiche des Privatrechts verständlich macht."[29] Dieses Bild[30] vom teilweise um Aspekte des hellenistischen oder eines anderen regionalen Rechtes angereicherten römischen Recht[31] bzw. von dem Umgang römischer Juristen mit volksrechtlicher Praxis[32] bestätigt etwa der in D. 16.3.26.1 (Paul 4 resp.) dokumentierte Versuch des Spätklassikers Paulus, die *Hypographe* einer griechischen *Paratheke* zu interpretieren und das damit verbundene Zinsen-*pactum* einer Bewertung nach römischem Recht zu unterziehen[33]. Trotz zB. einiger weiterer griechischer Zeugnisse in den Digesten[34] ist bei Beurteilung dieses Quellenmaterials allerdings vor voreiligen Schlussfolgerungen zu warnen[35].

Thür zufolge liegt der eigentliche Antagonismus nach der *Constitutio Antoniniana* nicht so sehr im Gegensatz von Reichsrecht und Volksrecht als in dem Auseinanderfallen von der (theoretischen) römischen Rechtswissenschaft und der (römischen wie nichtrömischen) Rechtspraxis[36]. Beinahe trivial erscheint in diesem Zusammenhang die Forderung von Humfress[37] danach, die Quellen in ihrem jeweiligen lokalen, sozialen und historischen Kontext zu beurteilen – denn dies sollte natürlich auch die Aufgabe der Rechtsgeschichte sein; nicht immer leicht ist

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[29] Wolff (1956) 7.

[30] Vgl. dazu auch Selb (1965) 49: „*Es stehen also niemals, schon gar nicht kämpferisch, Institutionen gegen Institutionen wie feindliche Heere. Der römische Jurist wird gar nicht immer gebildet genug gewesen sein, die fremde Denkweise hinter dem Faktum oder der Urkunde zu erkennen, um sie entrüstet als unrömisch zurückzuweisen. Vielmehr steht ein aus fremdem Denken geprägter Lebenssachverhalt zur römisch-rechtlichen Beurteilung.*" Gegen einen „Kampf" Reichsrecht gegen Volksrecht argumentiert schon Schönbauer (1942) 332.

[31] So das Ergebnis von Buraselis (2007) 138; zustimmend Liebs (2009) 511 und Fündling (2012) 180-181.

[32] Die römischrechtliche Beurteilung von peregrinen Anfragen aus (östlichen) Provinzen wird vor allem anhand einer Vielzahl von Konstitutionen Diokletians, aber auch des Syrisch-Römischen Rechtsbuchs deutlich, vgl. dazu Selb (1964) 201-203.

[33] Zu diesem Fragment vgl. Scheibelreiter (2015).

[34] Vgl. zur Paratheke sonst noch Spina (2013).

[35] Dazu ein Beispiel: Ando (2011) 32-33 und Ando (2012) 98-99 etwa versteht die berühmte, beim Spätklassiker Ulpian tradierte Entscheidung aus D. 2.14.7 (Ulp. 4 ed.), wonach ein griechisches *synallagma* als Innominatkontrakt und damit als *obligatio civilis* nach römischem Recht durchsetzbar gemacht werden könne, als unter dem Einfluss der *Constitutio Antoniniana* getroffen und resümiert: „*Such was the world Caracalla made*" (99). Doch diese Schlussfolgerung ist allein schon aus chronologischen Gründen verfehlt: Wie die indirekte Rede (*hoc* συνάλλαγμα *esse et hinc nasci civilem obligationem*) erkennen lässt, referiert Ulpian hier bloß eine Entscheidung des älteren Juristen Titius Aristo sowie anschließend des Iunius Mauricianus; beide stammen aus dem 1./2. Jh. n. Chr. Mit der *Constitutio Antoniana* hat D. 2.14.7 folglich gar nichts zu tun.

[36] So Thür in einem Vortrag anlässlich des 33. Deutschen Rechtshistorikertages 2000 in Jena, vgl. dazu Meissel / Feldner (2000) 637.

[37] Humfress (2013) 83 spricht von „*broader questions concerning Roman private law and its ‚reception' in the provinces under the Early Empire. It also necessitates exploring what other alternatives – and limitations – existed on the ground, in specific localities, in terms of maintaining socio-legal order and handling conflict.*"

es freilich, diesem Postulat angesichts der Quellenlage gerecht zu werden[38]: Sowohl Kaiserkonstitutionen als auch dokumentarische Quellen beschränken sich zumeist auf ein konkretes Rechtsproblem oder Rechtsverhältnis, ohne dessen Kontext näher darzustellen.

3. Gregorius Thaumtourgos und Menandros von Laodikeia als Rechtsquellen?

Umso begrüßenswerter ist es, dass Karambelas eine literarische Quelle untersucht. Wie schwierig deren rechtliche Auswertung sein kann, beweist die Interpretation der Aussage des Gregorios Thaumatourgos, dass „*nun die Belange aller unter der römischen Herrschaft stehenden Menschen unseren bewundernswerten römischen Gesetzen unterworfen seien*" (οἱ θαυμαστοὶ ἡμῶν νόμοι, οἷς νῦν τὰ πάντων τῶν ὑπὸ τῆν Ῥωμαίων ἀρχὴν ἀνθρώπων κατευθύνεται πράγματα)[39].

Schönbauer versteht Gregors Worte als Beleg dafür, dass neben den Kaiserkonstitutionen (darauf bezieht er οἱ θαυμαστοὶ ἡμῶν νόμοι)[40] sehr wohl auch noch lokale Rechtstraditionen in Kraft waren[41]. Andererseits belege die Passage nach Hartmut Wolff nicht die ausschließliche Geltung des römischen Rechts[42]. Demgegenüber beziehen Nörr[43], Wieling[44] und Talamanca eine neutrale Position: „*Ho gia detto che effettivamente dal passo non si può ricavare la «prova provata» che Gregorio si prospettasse il vigore del diritto romano come esclusivo nei confronti dei diritti locali, anche se non è senza significato che, (…) non si accenni ad altro diritto in vigore se non a quello romano.*"[45] Selb wiederum spricht in Zusammenhang mit den Worten Gregors von „*einem der wenigen autoritativen Zeugnisse für das Dogma von der gelebten Rechtseinheit im römischen Reich des 3. Jh.*"[46], und Modrzejewski versteht sie trotz aller Übertreibung als Beleg dafür, dass das römische Recht eine Monopolstellung eingenommen habe und die lokalen Rechte durch das Edikt Caracallas in den Untergrund gedrängt worden seien. Keinesfalls aber würden sie ein Verschwinden[47] der hellenistischen Rechtssysteme[48] beweisen.

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[38] So auch Tuori (2007) 43.

[39] Greg. Thaum., In Origenem (Prosphonetikos) 7 (1,43).

[40] Ebenso H. Wolff (1976) 108.

[41] Schönbauer (1962) 128-129.

[42] H. Wolff (1976) 84.

[43] Nörr (1963) 595-596 bezieht die Worte des Gregorius weniger auf juristisch-technische Informationen denn auf die *pax Romana*. Immerhin gesteht Nörr hier dem römischen Recht eine Überordnung über die lokalen Rechte zu: „*Mit Sicherheit ergibt sich aus ihnen, dass die νόμοι τῶν Ῥωμαίων als übergeordnet galten; ob und wieweit die alten Volksrechte in Kraft waren, lässt sich aus ihnen nicht entnehmen*."

[44] Wieling (1974) 372 spricht von einem „*rhetorischen Topos, der auch vor der CA schon häufig verwendet wurde*".

[45] Talamanca (1971) 496 A. 79; ebenso 597 A. 79.

[46] Selb (1965) 44 A. 47.

[47] So etwa Mommsen (1899) 123 A. 4.

[48] Modrzejewski (1971) 320-323; vgl. dazu auch Buraselis 138-139.

Andererseits ist es in der Literatur unumstritten, dass die Aussage des Menandros von Laodikeia, wonach es schwierig sei, eine griechische Stadt anhand ihrer Gesetze zu preisen, da alle *Poleis* nun nach römischem Recht regiert würden (κατὰ γὰρ τοὺς κοινοὺς τῶν Ῥωμαίων νόμων πολιτευόμεθα) und sich somit nicht mehr voneinander unterschieden, juristischen Gehalt aufweist[49]: Menandros kontrastiert die Gesetze in Folge mit den Rechtsgewohnheiten, die allein eine Differenzierung zwischen den *Poleis* möglich machten (ἔθεσι δ' ἄλλη πόλις ἄλλοις χρῆται, ἐξ ὧν προσῆκον ἐγκωμιάζειν). Dies belegt die Änderung der Umstände und Subordination des lokalen Rechts unter das römische Recht[50]. Talamanca ging so weit, damit die Abrogation der Volksrechte als erwiesen ansehen zu wollen[51], wogegen Wieling[52] auf die Vielzahl der auch nach 212 n.Chr. noch erlassenen griechischen Gesetze verweist[53]. Wie Modrzejewski[54] gezeigt hat, belegt gerade der Gegensatz von νόμος und dem bei Menander mehrfach gebrauchten ἔθος eine Entwicklung, wonach aus alten lokalen Gesetzen (νόμοι) Gewohnheitsrecht geworden sei[55]. Dieser These hat sich zuletzt Fournier angeschlossen[56].

4. Der Prozess gegen Julian und seine Schüler

Es ist nun zu fragen, inwiefern auch der Bericht, den Eunapios von Sardes über den Prozess zwischen Schülern der Sophisten Julian aus Kappadokien und Apsines von Sparta gibt (Eunap., Vita Sophist. 9,2), einen historischen Sachverhalt abbildet und als juristische Quelle angesehen und ausgewertet werden kann. Das Sujet der rivalisierenden, einander prügelnden Philosophen ist schon in der sogenannten „Zweiten Sophistik" (2.-4. Jh. n. Chr.) beliebt[57] und wird etwa im Symposion des Lukianos von Samosata persiphliert[58]. Tatsächlich prägen – Berichten aus der ersten

[49] Menandros v. Laodikeia, Διαίρεσις τῶν ἐπιτηδευσέων 363-364 (Spengel).

[50] Talamanca (1971) 462. Zum Forschungstand vgl. Buraselis (2007) 139-140.

[51] Talamanca (1971) 501: „*I passi di cui qui già lungo si è discusso mostrano, secondo il mio parere a tutta evidenza, che Menandro si prospettava il cambiamento, di cui egli porta testimonianza, come qualcosa intervenuto da non molto tempo, e che, d'altra parte, non era stato causato da un lento processo evolutivo, sibbene da un fatto che il cambiamento stesso aveva introdotto in un dato momento della storia degli istituti sociali e giuridici cui esso si riferisce*."

[52] Wieling (1974) 372-374.

[53] Eine Liste gibt Nörr (1969) 23.

[54] Modrzejewski (1982) 349-350.

[55] Vgl. dazu bereits Modrzejewski (1971) 323: „… *les «lois romaines communes qui nous gouvernent» de Ménandre et nos «admirables lois qui actuellement dirigent les affaires de tous les hommes soumis au pouvoir des Romains» dans le texte de Grégoire s'attachent à la même réalité; nous sommes en présence d'un «Reichsrecht» général auquel sont subordonnés autant de «Volksrechte» locaux qu'il subsiste dans le cadre municipal de consuetudines civitatium*, ἔθη τῶν πόλεων *selon Ménandre, conservant les traditions pérégrines des provinciaux d'Orient*." Dagegen vgl. Talamanca (1971) A. 127.

[56] Fournier (2010) 10 A. 37; vgl. ferner Humfress (2013) 73-74.

[57] Vgl. dazu Lesky (1971) 932.

[58] Luk. Symp. 43-46.

Rede des Libanios[59] zufolge – Auseinandersetzungen und das gewaltsame „Werben" um Schüler, die gezwungen wurden, in Philosophenschulen einzutreten und dort den Treueid abzulegen[60], den Alltag Athens im 4. Jh. n. Chr. Auch der Sophist Himerios aus Bithynien erzählt von einer Verletzung, die er im Zuge solcher Straßenkämpfe erlitten hatte[61]. Der von Eunapios paraphrasierte Ausgangssachverhalt beschreibt also kein ungewöhnliches Szenario[62], sondern passt in das historische Sujet der Zeit.

Aus rechtshistorischer Sicht sind nun vor allem zwei Fragen zu stellen – jene nach dem Streitgegenstand und jene nach dem Verfahrenstyp.

4.1. Streitgegenstand: iniuria

Wie bei Eunapios zu lesen ist, gehen dem Prozess Prügeleien beider Studentenschaften voraus. Die Schilderung der physischen Gewalt gipfelt darin, dass die (topisch) rohen Spartaner gegen die Athener „*spartanische Hände gebrauchen*" (χερσὶ ... Λακωνικαῖς χρησάμενοι)[63]. Mit Opelt ist daher zu vermuten, dass das später bei dem Prokonsul verhandelte Delikt eine *iniuria* nach römischem Recht darstellt[64].

Dazu passt auch die Schilderung des Libanios von den Straßenkämpfen zwischen den Studenten verschiedener Lehrer in Athen – Libanios spricht „*von Verletzungen, von gerichtlichen Klagen deswegen, von Verteidigungen und Verurteilungen wegen Beweisverfahren*"[65] (Lib. or. 1,19):

> Ἀκούων ἔγωγε ἐκ παιδὸς, ὦ ἄνδρες, τοὺς τῶν χορῶν ἐν μέσαις ταῖς Ἀθήναις πολέμους καὶ ῥόπαλά τε καὶ σίδηρον καὶ λίθους καὶ τραύματα γραφάς τε ἐπὶ τούτοις καὶ ἀπολογίας καὶ δίκας ἐπ' ἐλέγχοις πάντα τε τολμώμενα τοῖς νεοῖς, ὅπως τὰ πράγματα τοῖς ἡγεμόσιν αἴροιεν, ἀγαθούς τε αὐτοὺς ἐν κινδύνοις ἡγούμην δικαίους τε οὐχ ἧττον τῶν ὑπὲρ τῶν πατρίδων τιθεμένων τὰ ὅπλα εὐχόμην τε τοῖς θεοῖς γενέσθαι καὶ ἐμαυτῷ τοιαῦτα ἀριστεῦσαι καὶ δραμεῖν μὲν ἐς Περειᾶ τε καὶ Σούνιον καὶ τοὺς ἄλλους λιμένας νέων ἐφ' ἁρπαγῇ τῆς ὀλκάδος ἐκβάντων, δραμεῖν δὲ ὑπὲρ τῆς ἁρπαγῆς αὖτις εἰς Κόρινθον κριθησόμενον, δεῖπνα δὲ δείπνοις συνείροντα ταχὺ τῶν ὄντων ἀνηλωμένων εἰς δανείσοντα βλέπειν.
>
> Von Kind an, ihr Männer, habe ich gehört von den Parteikämpfen der Philosophenschulen mitten in Athen, und von den Knüppeln, Eisen und Steinen, und den Verletzungen und den Klagen wegen dieser, von

[59] Vgl. auch Becker (2013) 424.

[60] Lib. or. 1,17. Libanios erörtert später (1,20), dass er sich an den Eid nicht gebunden fühlte, da er zu seiner Ableistung gezwungen worden war, also unter gewaltsamer Beeinträchtigung seines Willens geschworen hatte.

[61] Him. or. 69; vgl. dazu allgemein Penella (2007).

[62] Zum Sachverhalt vgl. den Kommentar von Becker (2013) und Goulet (2014) sowie Penella (1990) 81-83.

[63] Eunap., Vita soph. 9,2,8.

[64] Opelt (1969) 31 A. 9.

[65] Vgl. dazu auch die Übersetzung von Wolf (1967) 39.

> Verteidigungsreden und Verurteilungen nach Beweisverfahren, hatte erfahren, dass die Schüler alles wagten, um die Lage für ihre Meister zu verbessern. Ich betrachtete sie als Helden in Gefahren und Kämpfer in gerechten Angelegenheiten nicht minder als jene, die für das Vaterland die Waffen ergreifen. Ich betete zu den Göttern, dass es auch mir zuteilwürde, mich darin zu beweisen und in den Piräus oder nach Sounion oder zu anderen Häfen zu laufen zum Raubzug junger Männer, welche von dem Transportschiff stiegen, und dann wieder wegen dieses Menschenraubs nach Korinth zur Gerichtsverhandlung; zusätzlich Gelage an Gelage zu reihen und, wenn die Geldmittel aufgebraucht sein würden, mich nach Darlehen umzusehen.

Das von Libanios entworfene Bild von Klage, Prozess und Verteidigungsrede aufgrund studentischer Prügeleien deckt sich mit der des Eunapios. Libanios erwähnt γραφαί (wohl τραύματος[66] oder ὑβρέως[67]), doch soll aus chronologischen wie auch das *genus* betreffenden Gründen hier an Libanios kein allzu strenger Maßstab angelegt werden. Aus Libanios or. 1,19 können jedenfalls Parallelen zu Eunapios, Vita soph. 9,2 gezogen und daher geschlossen werden, dass auch die Klage gegen die Schüler Julians auf Körperverletzung lautete.

Libanios tradiert, dass diese Prozesse in Korinth stattfanden – so habe er gehofft, sich auch selbst einmal wegen seiner „Beutezüge" in Korinth verantworten zu müssen: δραμεῖν δὲ ὑπὲρ τῆς ἁρπαγῆς αὖτις εἰς Κόρινθον κριθησόμενον[68]. Auch bei Eunapios wird der Prozess vor dem Provinzstatthalter, dem Prokonsul der Provinz Achaia, geführt[69]. Eunapios orientiert sich hier an der Rechtslage seiner Zeit, denn die Zuständigkeit des Prokonsuls ergibt sich – neben der umfassenden

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[66] Zur Körperverletzung mit Waffengewalt (γραφὴ τραύματος ἐκ προνοίας) im klassisch-attischen Recht vgl. Phillips (2007) 79-82.

[67] Zum Tatbestand vgl. dazu Dem. 21,47: Ἐάν τις ὑβρίζῃ εἴς τινα, ἢ παῖδα ἢ γυναῖκα ἢ ἄνδρα, τῶν ἐλευθέρων ἢ τῶν δούλων, ἢ παράνομόν τι ποιήσῃ εἰς τινά, γραφέσθω πρὸς τοὺς θεσμοθέτας ὁ βουλόμενος Ἀθηναίων οἷς ἔξεστιν (…) – Wenn jemand jemanden tätlich beleidigt, sei es ein Kind oder eine Frau oder einen Mann, von Sklaven oder Freien, oder gegen jemanden rechtswidrig vorgeht, dann soll eine Klageschrift einbringen jeder der Athener, der dies möchte (…); vgl. dazu auch Thür (1998) 771-772. Dass es sich theoretisch auch um eine αἰκείας δίκη gehandelt haben könnte, ist daher schon aus Gründen des Wortlauts eher zu verneinen; auch setzte diese Klage voraus, dass „*die Misshandlung ohne den Vorsatz der Beschimpfung*" getätigt wurde; vgl. dazu Dem. 47,40 und dazu Thür (1996) 326.

[68] Tatsächlich ist es nie dazu gekommen, vgl. Lib. or. 1,23: Ἀλλ' ὅθεν ἐξέβην, ἐκείνων γε τῶν πολλῶν κακῶν διὰ τῆν Τύχην ἀπελελύμην, ὥστε τὴν Κόρινθον εἶδον οὐ φεύγων οὐδὲ διώκων, ἀλλὰ νῦν μὲν ἐφ' ἑορτὴν Λακωνικήν, τὰς μάστιγας, ἐπειγόμενος, νῦν δὲ εἰς Ἄργος τὰ παρ' αὐτοῖς μυησόμενος. – Aber, wovon ich (in meiner Erzählung) ausgegangen bin: Ich war erlöst von all jenen Übeln dank der Tyche, sodass ich Korinth weder als Ankläger noch als Verteidiger sah, sondern einmal auf der Reise zu dem spartanischen Fest der Auspeitschungen, einmal auf der Reise nach Argos, um an den dortigen Mysterien teilzunehmen.

[69] Vgl. so auch Panella (1990) 81; Goulet (2014) 240.

strafrichterlichen Kompetenz des Statthalters[70] – schon aus der Klage wegen *iniuria*, wie ein Reskript Diokletians besagt (C. 9.2.8, Diocl. / Max., *sine die et consule*)[71]:

> Si quis se iniuriam ab aliquo passum putaverit et querellam deferre voluerit, non ad stationarios decurrat, sed praesidalem adeat potestatem aut libellos offerens aut querellas suas apud acta deponens.
>
> Wenn jemand vermeint, dass er von einem anderen eine Injurie erlitten habe und er einen Prozess anstrengen will, dann soll er sich nicht an die *stationarii* wenden, sondern an den Provinzstatthalter, und er soll seine Amtsgewalt anrufen entweder durch Eingabe einer Klageschrift oder indem er seine Klage bei den eingereichten Unterlagen deponiert.

In Fällen von *iniuria* ist nach römischem Recht der Statthalter zu befassen und nicht bloß ein mit polizeilichen Aufgaben betrauter Militär (*stationarius*)[72]. Es kann daher aufgrund dieser Zuständigkeit[73] mit guten Gründen vermutet werden, dass der Prokonsul in Korinth und wegen *iniuria* zu entscheiden hatte[74].

4.2. Zum Verfahren vor dem Provinzstatthalter

Auch wenn in Achaia als senatorischer Provinz eine spätere Einführung der *cognitio extra ordinem* denkbar ist als in kaiserlichen Provinzen[75], so ist für das vorliegende Verfahren in den späten 310er-Jahren n. Chr.[76] von einem Kognitionsprozess auszugehen: Die Unterscheidung zwischen senatorischen und kaiserlichen Provinzen ist seit dem 3. Jh. n. Chr. nicht mehr von Belang[77], und 342 n. Chr. wird der Formularprozess endgültig aufgehoben[78].

Iniuria ist nach römischem Recht ein Privatdelikt und eröffnet Klagemöglichkeiten auch im Zivilrechtsweg. Theoretisch konnte die klagende Partei bei *iniuria* also zwischen einem Zivilprozess oder ein Strafverfahren wählen[79]. Den vorliegenden Prozess eindeutig zu qualifizieren wird allerdings dadurch erschwert, als im Kognitionsprozess die Grenzen zwischen beiden Verfahrensarten – wie auch

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[70] D.1.18.13 pr. (Ulp. 7 de officio proc.); vgl. dazu Nogrady (2006) 24-25.Der Prokonsul der Provinz Achaia war im 4. Jh. n. Chr. ordentliches Gericht der 1. Instanz, vgl. Kaser / Hackl (1996) 532-533.

[71] Vgl. dazu Pieler (1977) 396; Horstkotte (1999) 312.

[72] Vgl. dazu Krause (2004) 47-50; Nogrady (2006) 29 mit A. 66.

[73] So auch Fournier (2010) 25-40; Krause (2014) 25. 232.

[74] So auch Karambelas 11 mit A. 43.

[75] Umgekehrt belegt die *lex rivi Hiberensis* aus der Zeit Kaiser Hadrians die Bedeutung des Formularprozesses auch in (manchen?) Kaiserprovinzen, vgl. dazu Nörr (2008) 185.

[76] Karambelas A. 28.

[77] Vgl. Waldstein / Rainer (2014) 217.

[78] C 2.58.1 (342, Constantius et Constans, 342).

[79] vgl. Krause (2014) 232.

in papyrologischen Quellen dieser Zeit ersichtlich[80] – nicht immer leicht ausgemacht werden können[81]. Vielmehr folgen sowohl Zivil- als auch Strafverfahren einem „*ordine processuale*", einem gemeinsamen Verfahrenstyp[82]. Die Zuweisung eines Verfahrens zu Straf- oder Zivilprozessrecht könnte somit nur anhand des Prozessgegenstands und den damit verbundenen Klagezielen getroffen werden.

Im vorliegenden Fall ist allerdings der römische Magistrat erst in einer zweiten Verfahrensphase betraut: So ist es einer der Verdienste von Karambelas, dass er – im Unterschied zu anderen Kommentatoren dieses Textes[83] – erkannt hat, dass Eunapios von zwei Stufen des Verfahrens berichtet. Die Spartaner haben ja zuerst Klage in Athen erhoben (κατηγόρουν)[84], und erst hernach wurde der Prozess dem Prokonsul übertragen (ἀνεφέρετο δὲ ἐπὶ ἀνθύπατον ἡ δίκη)[85]. Obwohl sich schon Plutarch[86] – lange vor der *Constitutio Antoniniana* – darüber beklagt, dass die Griechen seiner Zeit sich lieber direkt an den römischen Magistrat gewandt haben und damit die lokale Gerichtsbarkeit umgangen seien[87], was die lange Tradition dieser Praxis belegt, ist dem Eunapios-Text nicht zu entnehmen, dass die Klage gleich beim Prokonsul eingebracht worden war[88]. Vielmehr kann von einem eigenen ersten Verfahren(sabschnitt) in Athen ausgegangen werden. Der römische Statthalter fungierte – wie es etwa Dion von Prusa berichtet – nicht nur in Rhodos als Appellationsinstanz für städtische Gerichte[89], sondern auch zuweilen für ein Urteil der athenischen Bule[90]. Ein solcher Rechtszug von (1) griechischem Gericht als erste Instanz und (2) dem Statthalter als *iudex ordinarius* in zweiter Instanz führte sukzessive zu einem Bedeutungsverlust der lokalen Behörden[91]: „*Vorher Ausdruck eines Restes städtischer Autonomie, verkörperte die eigene Gerichtsbarkeit*

[80] Vgl. dazu Orestano (1953) 59: „(…) *così ad es. dagli atti introduttivi del giudizio conservatici in documenti papirologici originali, non sempre è facile comprendere se l'attore desse inizio ad un giudizio civile o penale.*" In A. 2 verweist Orestano dann auf P.Oxy 8,1121 (295 n. Chr.).

[81] D. 47.1.3 (Ulp. 2 de officio proc.); vgl. dazu Orestano (1953) 58-69; Hackl (1976) 184-185; Kaser / Hackl (1996) 445.

[82] Orestano (1953) 62-63.

[83] Vgl. etwa Norman (1965) 153; Opelt (1969) 31.

[84] Eunap., Vita soph. 9,2,8.

[85] Eunap., Vita soph. 9,2,9.

[86] Plutarch, praec. rei publ. gerendae 19 (= mor. 815b): Νῦν δὲ ὅπως μὴ πολίταις καὶ φυλέταις οἴκοι καὶ γείτουσι καὶ συνάρχουσιν ἀνθυπείξωσι μετὰ τίμης καὶ χάριτος, ἐπὶ ῥητόρων θύρας καὶ πραγματικῶν χεῖρας ἐκφέρουσι σὺν πολλῇ βλάβῃ καὶ αἰσχύνῃ τὰς διαφοράς. – Nun aber, damit sie nicht gegenseitig den Mitbürgern und Phylengenossen, den Nachbarn und Amtskollegen aus Ehrerbietung und Dank nachgeben müssen, bringen sie ihre Streitigkeiten vor die Tore der Redner und in die Hände von Rechtspraktikern, zu großem Schaden und großer Schande für die Stadt.

[87] Vgl. dazu Nörr (1963) 597 A. 23; Staffhorst (2006) 315; Fournier (2010) 533. Nach Valgiglio (1976) 113 schafft Plutarch hier bewusst einen Gegensatz zwischen den lokalen (griechischen) Behörden und den (römischen) Rednern/Juristen.

[88] Karambelas A. 31.

[89] Dion v. Prusa 31,46; vgl. dazu Nörr (1963) 572.

[90] Vgl. Colin (1965) 74.

[91] Vgl. dazu auch Pieler (1980) 170 A. 14; 187-188; Krause (2014) 235.

im Dominat nur noch das unterste Ende der Skala staatlicher Gerichtsbehörden.“[92]

Es ist daher nur folgerichtig, zu überlegen, vor welcher Behörde dies geschehen ist. Da im Dominat lokale Behörden in manchen Bereichen über Strafrechtskompetenz verfügen[93], könnte man für Athen an den Areopag denken[94], der, glaubt man den Belegen bei Apuleius[95] und Lukian[96], noch im 2. Jh. für Klagen wegen Körperverletzung kompetent gewesen war. So heißt es etwa in Lukian, Timon 46 (…) προκαλοῦμαί σε τραύματος εἰς Ἄρειον πάγον – „(…) *ich werde dich wegen Körperverletzung vor den Areopag rufen*“[97].

Die Vorstellung, dass im vorliegenden, von Eunapios geschilderten Fall aus dem frühen 4. Jh. n.Chr. auch der Areopag solch eine erste Instanz gewesen sein könnte, ist jedoch insofern zu korrigieren, als der Text des Eunapios nicht von einem Rechtsmittel referiert, welches gegen ein Urteil in Athen erhoben worden war: In diesem Fall wäre etwa zu erwarten, dass Eunapios das Verb ἐπικαλεῖν – etwa in Übersetzung des lateinischen *provocare* oder *appellare*[98] – gebrauchte und nicht das Verb ἀναφέρειν. Karambelas betont zurecht, dass damit das „Weiterverweisen“, „Übertragen“ zum Ausdruck gebracht werde: „(…) *the terminus* ἀναφέρετο[99] *indicates clearly the movement of jurisdiction from one authority to another*“[100]. Es wurde also der Prokonsul mit dem Prozess betraut, der in Athen anhängig gemacht worden war. Da nach römischem Recht bei *iniuria*-Delikt der Provinzstatthalter für die Verhandlung kompetent war[101], wäre es aufgrund dieser Zuständigkeit möglich, die folgenden Verfahrensschritte zu rekonstruieren: Die Spartaner bringen in Athen bei einer ihrer Meinung nach kompetenten Behörde (wie zB. dem Areopag) eine Klage wegen Körperverletzung gegen die Athener ein (κατηγόρουν). Aufgrund des Deliktes erachtet sich diese Behörde als unzuständig und verweist den Sachverhalt an den Prokonsul in Korinth (ἀνεφέρετο δὲ ἐπὶ ἀνθύπατον ἡ δίκη).

Es bleibt zu fragen, wie dieses erste Verfahren in Athen, vor Weiterverweisung an den Prokonsul, ausgestaltet war. Karambelas[102] nimmt diesbezüglich einen Prozess an, „*during which the two parties had delivered speeches of prosecution and defense*“. Dies erscheint jedoch aus mehreren Gründen unwahrscheinlich.

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92 Pieler (1977) 426; ähnlich auch H. Wolff (1976) 108.

93 So Colin (1965); vgl. dazu Nörr (1967) 614-615; Luzzatto (1965); Thür (1977) 382-383; Horstkotte (1999) 313.

94 So auch Karambelas 9 A. 34-36.

95 Apuleius, Met. 10.8; vgl. dazu Horstkotte (1999) 307 (mit A. 32).

96 Luk. Timon 46; Luk. Bis acc. 24; zu beiden vgl. Fournier (2010) 145.

97 Allerdings bezieht sich diese Klage auf eine absichtliche schwere Körperverletzung mit Waffengewalt (γραφὴ τράυματος ἐκ προνοίας), vgl. Phillips (2007) 104.

98 Vgl. Kaser / Hackl (1996) 507 A. 46.

99 So notiert etwa auch das Lexikon von Preisigke s.v. ἀναφέρειν ἐπί: „bei einer Behörde einreichen“.

100 Karambelas A. 31.

101 C. 9.2.8, Diocl./Max., *sine die et consule*); vgl. dazu oben.

102 Karambelas nach A. 31.

(1) Der Prokonsul stößt sich daran, dass in dem Prozess in Korinth Apsines, das Schuloberhaupt, die Klage führen will; dies widerspräche römischrechtlichen Vorstellungen (ἀλλ᾽ οὐ τοῦτό γε Ῥωμαῖοι δοκιμάζουσιν)[103]. Diesen folgend verlangt der Statthalter vielmehr, dass derjenige sprechen solle, der dies auch im ersten Prozess getan habe (9,2,14): ἀλλ᾽ ὁ τὴν πρώτην εἰπὼν κατηγορίαν κινδυνευέτω περὶ τῆς δευτέρας – „*der aber, welcher die erste Anklagerede gehalten hatte, soll nun sein Glück hinsichtlich der Zweiten versuchen*". Daher muss in Korinth Themistokles sprechen und scheitert, da er unvorbereitet ist. Daraus ergibt sich, dass in Athen Themistokles gesprochen hat.

(2) Gerade angesichts des Hinweises auf römischrechtliche Prozessgrundsätze – etwa im Sinne eines Neuerungsverbotes[104] – wäre zu erwarten, dass nun andererseits auch derjenige die Verteidigungsrede halten müsse, der dies in Athen getan hatte. Doch dem ist nicht so: Der Prokonsul stellt es Julian sogar frei, wen er als Redner seiner Partei einsetzen wolle (9,2,18): ἀπολογείσθω δὲ ὃν ἂν σὺ ἀποκρίνῃς ἄριστον – „*die Verteidigung soll führen, wen du für den am besten Geeignetsten auswählst*". Weiter sagt der Prokonsul, dass die Verteidigung in Bezugnahme auf die erste Klagerede, also jene aus Athen hin, gehalten werden solle[105] (9,2,19): ἀπολογεῖσθαι δὲ πρὸς τὴν προτέραν κατηγορίαν ὡς ἐκέλευσε τὸν δυνάμενον, (...) – „*dass der Fähigste die Verteidigung auf die erste Anklage hin führe, wie er es angeordnet hatte*".

(3) Es widerspräche aber dem Grundsatz eines fairen Verfahrens nach römischem Recht und damit der *aequitas*, wenn der Prokonsul hier die Beklagtenseite gegenüber der (An-)Kläger begünstigte, indem er dieser die Auswahl des am besten geeigneten Redners freistellte, wogegen er jene diesbezüglich zur Kontinuität verpflichtete. Daraus ergibt sich, dass in Athen nur die Klägerseite gesprochen haben kann.

(4) Dies bestätigt auch Prohairesios, der von Julian ausgewählte Redner, in seinem *ex tempore* verfassten Plädoyer, wenn er sagt (9,2,24): εἰ μὲν οὖν ἔξεστι καὶ ἀδικεῖν ἅπαντα καὶ κατηγορεῖν καὶ λέγοντα πιστεύεσθαι πρὸ τῆς ἀπολογίας, ἔσθω, γινέσθω Θεμιστοκλέους ἡ πόλις. – *Wenn es aber nun möglich ist, in allen Belangen Unrecht zu tun und Anklage zu führen und dass dem Redner Vertrauen geschenkt werde, noch vor (dem Anhören) der Verteidigung, dann sei, dann werde die Stadt zu der des Themistokles!*"

Prohairesios spricht in seinem finalen Lamento davon, dass er und seine Mitstreiter dreifaches Unrecht erfahren hätten: ἀδικεῖν (a), κατηγορεῖν (b) und λέγοντα πιστεύεσθαι πρὸ τῆς ἀπολογίας (c). Sein Argument lautet: „Wenn alles erlaubt ist, dann übergebt den Klägern doch gleich die Stadt!" Dies setzt aber voraus, dass alle drei Unrechtstaten gegenüber den Schülern Julians bereits vorgefallen sind. Das verdient nähere Betrachtung. Im Einzelnen bezieht sich Prohairesios auf die folgenden Punkte:

[103] Eunap., Vita soph. 9,2,14.

[104] Allerdings ist es nicht möglich, hinter diesem vom Statthalter bemühten Prinzip eine konkrete römischrechtliche Bestimmung auszumachen, und es ist auch fraglich, wie sinnvoll es ist, dies zu versuchen.

[105] Vgl. Penella (1990) 82.

(a) Das *in allen Belangen Unrecht zu tun* (ἀδικεῖν ἅπαντα) bezieht sich auf die Körperverletzung (τραῦμα, *iniuria*) durch die Schüler des Apsines.

(b) Auch das *Klage führen* (καὶ κατηγορεῖν) bezieht sich auf die Spartaner, die als eigentliche Täter die Opfer ihrer Umtriebe dann auch noch wegen Körperverletzung geklagt haben.

(c) Schließlich erwähnt Prohairesios, dass *dem Redner Vertrauen geschenkt werde, noch vor (dem Anhören) der Verteidigung* (λέγοντα πιστεύεσθαι πρὸ τῆς ἀπολογίας)[106]: Das hier eingeforderte Prinzip ist sowohl dem römischen[107] als auch dem griechischen Prozessrecht[108] gemein: *audiatur et altera pars*. Prohairesios argumentiert damit, dass er und seine Partei Unrecht erfahren hätten, da nur aufgrund des Klagevortrags einer Partei Entscheidungen getroffen würden. Bezieht man diesen Vorwurf auf den gegenwärtigen Prozess in Korinth, so ist er unpassend: Der Prokonsul hat streng genommen noch gar keine (An-)Klagerede gehört, da Themistokles verschämt geschwiegen hatte. Folglich kann sich dieses λέγειν nur auf den Parteienvortrag in Athen beziehen – nur dort hatte Themistokles gesprochen. Das bedeutet, dass dort eine Verteidigung unterblieben sein muss. Folglich ist davon auszugehen, dass in Athen nur die Klage eingebracht und vorgetragen, aber keine Verteidigung gehört worden war[109].

4.3. Prügelstrafe?

Weitere rechtliche Probleme des Eunapios-Textes können nur kurz angesprochen werden: So bleibt offen, wie der Prokonsul entscheidet. Penella vermerkt: „*Eunapius is less than clear about the proconsul's judgement*"[110]. Wohl ist von einer Bestrafung der Spartaner auszugehen – doch hier ergeht sich der Prokonsul nur in Andeutungen der Geißelungsstrafe:

> ὁ δὲ ἀνθύπατος τὸ μὲν διωκόμενον μέρος ἐξελθεῖν κελεύσας, τοῦ δὲ διώκοντος τὸν διδάσκαλον μόνον, εἶτα ἀπολαβὼν τὸν Θεμιστοκλέα καὶ τοὺς Λακώνας, τῶν ἐν Λακεδαιμονίᾳ μαστίγων ὑπέμνησε, προσθεὶς αὐτοῖς καὶ των Ἀθηναίων.
>
> Der Prokonsul forderte die beklagte Partei auf, hinauszugehen, von der Klägerpartei aber nur den Lehrer (i.e. Apsines), und hierauf packte er den Themistokles und die Spartaner, und erinnerte sie an die Peitschen in Lakedaimon, indem er ihnen auch die der Athener vor Augen führte.

Nach Becker[111] könne sich diese Erwähnung der „*Peitschen in Sparta*" entweder auf die Geißelung im Rahmen der Erziehung junger Männer in Sparta[112] beziehen

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[106] Vgl. dazu die Übersetzung bei Karambelas 13 vor A. 45.
[107] Vgl. D. 48.17.1 pr (Marc. 2 public.) und dazu Wacke (1993) 389-397; Liebs (2007) 32.
[108] Vgl. dazu etwa Aisch. Eum. 428.
[109] Diesbezüglich sind die Ausführungen von Karambelas nach A. 31 etwas nachzuschärfen.
[110] Penella (1990) 82.
[111] Becker (2013) 429.
[112] vgl. dazu Xen. Res pub. Lac. 2,2; Luk. Anach. 39; Paus. 3,6,10; Philostr. VA 6,20.

oder auf das Ritual im Rahmen der Feiern für *Artemis orthia*[113]. Beides passt jedoch nicht in den Kontext einer Verurteilung oder Bestrafung. Doch dieser lässt sich leicht herstellen: So könnten damit ganz reale Strafen gemeint sein, die für die *actio iniuriarum* überliefert sind (D. 47.10.45, Hermog. 5 epit.)[114]:

> De iniuria nunc extra ordinem ex causa et persona statui solet. et servi quidem flagellis caesi dominis restituuntur, liberi vero humilioris quidem loci fustibus subiciuntur, ceteri autem vel exilio temporali vel interdictione certae rei coercentur.
>
> Wegen Körperverletzung pflegt im Kognitionsprozess und nach der Person geurteilt zu werden. Und Sklaven werden gegeißelt ihren Herren zurückgestellt, Freie aber von niederem Stand werden mit Stöcken geschlagen, die übrigen entweder mit zeitweiligem Exil oder dem Verbot eines bestimmten Gegenstandes bestraft.

Der wohl aus der Regierungszeit Diokletians stammende Jurist Hermogenian[115] berichtet hier davon, dass „nun“[116] in bestimmten Fällen von *iniuria* das Verfahren *extra ordinem* angewendet würde. Hinsichtlich der Strafe wird zwischen dem Status des Delinquenten unterschieden: Sklaven (*servi*) und Personen niederen Ranges (*humiliores*) wurden der Prügelstrafe (erstere mit Peitschen – *flagellae*, zweitere mit Knüppeln – *fustes*) zugeführt, alle übrigen – besser gestellten – Personen (*ceteri*) wurden ins Exil geschickt. Der Zusammenhang mit der vom Prokonsul den Spartanern zumindest angedrohten Strafe scheint offensichtlich, da es in beiden Texten um die Strafe für *iniuria* geht. Die Spartaner sollten nun gerade so bestraft werden, wie sie es für die Athener erhofft hatten, als sie diese beim Prokonsul der Körperverletzung angeklagt hatten. Hinter der Andeutung des Prokonsuls über die Auspeitschung – und hierbei, etwa um dies elegant zu umschreiben, kann er sich natürlich auch auf den Spartanern vertraute Sujets der Züchtigung berufen – könnte also die reale, römische Strafe aus einem Injurienprozess stehen[117].

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[113] Lib. or. 1.23.

[114] Vgl. dazu Krause (2014) 25. Stockschläge als Strafe für Delinquenten niederen Ranges werden auch in D. 48.19.29.2 (Call. 6 de cogn.) angeführt, vgl. dazu Atzeri (2015) 141 A. 58.

[115] Vgl. dazu auch Waldstein/Rainer (2014) 260.

[116] Raber (1969) zieht vergleichsweise D. 37.14.1 (Ulp. 9 off. procons.) heran, wonach Freigelassene, die sich ihren Herren gegenüber schändlich benommen hätten, ins *exilium temporale* geschickt werden konnten.

[117] Dieser Zusammenhang ist meines Wissens noch nicht beachtet worden. Natürlich ließe sich einwenden, dass die Strafe wegen *iniuria* eigentlich nur die Beklagten hätte treffen können, oder eben nicht, wenn sie – wie im vorliegenden Fall – sich freibeweisen konnten. Umgekehrt beschuldigt Prohairesios seinerseits in seiner Apologie die Ankläger der Körperverletzung, weswegen es der Statthalter gegenüber den Apsines-Schülern bei Androhung der Strafe für *iniuria* belassen könnte.

5. Epilog

Es hat sich gezeigt, dass der Bericht über den Prozess gegen die Schüler Julians sehr wohl einen realen juristischen Gehalt aufweist und sich diesbezüglich zumindest teilweise auswerten lässt. Karambelas hat dies deutlich gemacht und darüber hinaus bewiesen, dass diese Anekdote – selbst wenn sie in besonderer Weise literarischem Topos verpflichtet ist[118] – auch zum Verständnis für das Verhältnis von lokal-griechischem und römischen Recht beitragen kann.

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[118] Zu diesbezüglichen Einzelheiten ist auf die Ausführungen von Karambelas zu verweisen.

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EMOTION, LIFE HISTORY AND LAW: DEMOSTHENES AND THE ARCHITECTURE OF THE SPEECH *AGAINST MEIDIAS*

Demosthenes wrote the speech *Against Meidias* when he was approximately 37 years of age, in 347-6 BC.[1] Amongst the key ingredients of the discourse, which has become one of the most famous he wrote, lies an attempt to reveal public speaking experience and legal expertise in the media of the time, a strong desire to present himself as unscathed by events and a desire to become a credible public figure. The design of the speech apparently resulted from a study devoted to a presentation at the *ekklesia*. Whether it was or was not pronounced remains unclear.[2] The extent to which these factors contribute to a better understanding of the preparation of this speech, particularly with regard to its guidance and legal reasoning, is what will be discussed below.

1. Background Environment

Demosthenes' oratory and political career had previously expressed a promising brilliance. The themes of the speeches delivered until then mainly addressed matters of public interest with a view to safeguarding the *polis*. The first of Demosthenes'

[1] D. 21.154; D. 27.4; D. 30.15; Plu. *Eth.* 845d; Plu. *Dem*. 12.3. The *dokimasia* of Demosthenes, according to his own testimony, occurred in 366 (30.15). *Vide* MacDowell (1990: 18, 333).

[2] E.g. MacDowell (1990: 23-8) and (2008: 246); Mossé (1994).

political speeches reveal the tension surrounding various administrative policies that existed in Athens. At that time, public policies in force were aimed at heavy tax contributions in order to guarantee navy policy in the Aegean Sea. With a view to ensuring and preventing the maintenance of the territorial and collective strategic interests of the *demos* and of the polis' own resources, Demosthenes defended fairer and more balanced measures for the participation of the richest. In this sense, he presents diverse perspectives for the financial difficulties that had arisen since the beginning of the century. It is in this context of Athenian civic life – permeated by multiple interests – that the speaker intersects, from 364-63 to 354, with the proponents of other views: Leptines, Timokrates, Thrasylokhos, Euboulos, amongst others. Demosthenes distances himself from the political leaders of the time who, with their adventurous proposals, could have jeopardized the future of Athens, especially after the Third Sacred War, also called the War of Phocis (355-346 BC). He does not fear political animosities and antagonisms. Some of these characters would forever mark the course of his life. Demosthenes had an acute insight into the active participation of the richest citizens in the financing and defence of the *polis*. This participation was to be ensured by regular tax contributions made by the *symmoriai*, *eisphora* and *proeisphora*, which would provide a support, and a stable support at that, of financial resources. Demosthenes, as Isokrates had already previously defended (*On the Peace*, 20), was certain that war would make them poorer. Ensuing from this idea, he makes a personal commitment and discusses a division policy as well as a tax contribution from public activities, which would provide a living testimony through their active participation. According to his understanding, the richest had to honour their respective obligations and duties to the city, not shirking from the commitment to the popular collective, but rather encouraging all those who like them could and should subsidise the organisation and defence of the *polis*.

It is, therefore, in the context of public services, *leitourgiai*, and in the performance of civic duties that, in the spring of 348, Meidias struck the speaker with a blow to the face during the Dionysia, in the theatre itself and before the public, when Demosthenes held the position of chorus-producer.[3] The Dionysia festivals were part of the community experience; during this time of sharing and gifts, respect was to be assured to all those who participated in them: taxpayers, participants and spectators. Meidias' act of aggression questioned the entire community's respect for the festivals. Demosthenes willingly sponsored the expenses of a tragic chorus. Meidias did not respect the sacred character of the location, nor the role that Demosthenes played there.[4]

[3] Demosthenes does not speak too much about the blow itself. The scanty references to physical aggression (πληγή: 1, 6, 12, 71, 72) allow one to infer that this might have been more of a performance ingredient, which had previously and carefully been thought up, to produce an effect on the agents ἄνδρες Ἀθηναῖοι or ἄνδρες δικασταί who were to judge the case.

[4] The numerous references to ὕβρις (1, 17, 19, 23, 25, 28, 32, 35, 38, 42b, 45, 46b, 51, 65, 70,

What valid reason would Demosthenes have had to opt, in the first instance, for a *probole* (25-35) instead of a *dike aikeias*, a *hybreos graphe* or an *asebeia*? The variety of accusation procedures that Demosthenes was able to put together to address Meidias clearly reveals the accusation skills that the speaker intended to use against his enemy.[5]

What reason would he have had to pursue the matter to the *ekklesia*, instead of presenting the case before the smaller count of the *Thesmothetai*? This option is justifiable since the *ekklesia* allowed for a performance which was suited to its real purposes, whereas the space determined by a *dikasterion* limited the recreation of facts and restricted the possibility of a more meticulous and exciting presentation of the facts. The set of legal arguments, which are extensively presented in the speech, seems to present the causes and grounds that point to the *probole* proposal.

The lack of respect shown by Meidias in his act of aggression in the very theatre of Dionysia turned him into a trespasser of the social and religious norms accepted by the community. Prior to the public accusation, it would have been convenient for Demosthenes to have demonstrated how far Meidias had surpassed the limits of conventionally accepted behaviour. Physical aggression constituted a violation of those boundaries.

The presentation of a public indictment based on a crime related to religious festivals was, in itself, a justification that met the legal requirements of the time. Demosthenes sought to influence public opinion. The argument based on the *hybris* offence was more decisive than any other. On the one hand, it denigrated his opponent's respectability; on the other, it reinforced the image of moral integrity that the speaker wished to maintain. His reputation depended on this image.

Demosthenes reacts to the affront by resorting to a deliberate legal tactic, using the same characters and the same contexts. He simply repositions the terms. The public is no longer a theatre audience and becomes the judge. He himself is no longer the aggressor and takes on the role of the accused. He prepares himself for a grand scenario whose *leitmotiv* is slander. The *drama* would now become another. The first act of that incident was a physical *drama*; the second would be psychological. The first act takes place in a theatre, which is physically prepared for dramatic performances; the second would recreate the facts which had occurred previously through the construction of rhetorical imagery and legal flaws, embellished by incisive words made sharper by the existing rivalry between the two people. The first affects a specific subject, but one who

72 b, 74, 83, 92, 98, 99, 109, 115, 130, 135, 140, 143, 152, 177, 180, 181, 182, 195, 216, 217, 218) and to the verb ὑβρίζειν (1, 4, 6, 7, 11, 15, 18, 21, 25, 31, 32, 34, 36, 37, 38, 41, 45, 46, 48, 49, 56, 58, 67, 68, 71, 72, 74, 75, 76, 81, 82, 97, 98, 100, 105, 106, 108, 123, 126, 128, 131, 138, 146, 147, 159, 160, 169, 170b, 179, 183, 185, 187, 189, 204, 207, 209, 211, 219, 221, 222) allow for the hypothesis that the orator also intended to explore the defendant's accusation from this perspective.

[5] The variety of accusation procedures has been interpreted in relation to the fact that this speech was left incomplete. The persistent idea is that it was not subjected to a final review as it was not actually proffered.

represents a whole group of citizens through his performance of the duties of *khoregos*; the second aims to reach all those who do not respect everyday laws.[6]

The plot constructed is aimed at a form of public exposure which was highly damaging to the accused. No one remains indifferent to the constructed context. Personal interests are intermingled with political ones.

2. From the theatre to the probole

There was an old enmity between Meidias and Demosthenes since the days when the latter had initiated a lawsuit against the guardians who had squandered his inheritance (*Against Aphobos*, Orationes, 27 and 28). This enmity was transported to the political sphere, when the speaker opposed the Athenian intervention in Euboea, in defence of Ploutarkhos, tyrant of Eretria. At this point, Demosthenes already reveals autonomous thought and a separate strategic vision at a public level, both of which were supported by ideas that were independent and different from those that prevailed at that time, for example, that of Euboulos. The speech *Against Meidias* constitutes further testimony of the speaker's autonomy, independence and judicial wit. The main legal foundations are sustained and are shown in many chapters.

The citizen Demosthenes claimed that the attack was a public act of *hybris*, "insolence", permeated by the spirit of *aselgeia*, "aggressiveness and bullying", which had affected his *timê*. The charge is recorded during the first moment of the pronouncement of the speech. The victim was not a unique and random case; indeed, any one of those present in that assembly could have been the next target. His charge was only a proposal for a defence of everyone's interests, and was not an exclusively private matter.

> The bullying, men of the jury, and the insolence with which Meidias constantly treats everyone, are known to all of you and to every Athenian, I suppose. (1, transl. MacDowell, 1990: 89)

Demosthenes had revealed an irreproachable public conduct up to that point, and Meidias had damaged that image. Clearing this image implied a public condemnation of the citizen Meidias for the act he had committed in the theatre. This was carried out through a skilfully argued legal process; it also implied revealing the usual state of mind of Meidias the citizen, by presenting a set of situations and anecdotes to illustrate his human profile. The choice of location was crucial in demanding a repair for the attack he had been subjected to: the *ekklesia* (cf. 9, 193).

> [I]t specifies the convening of the Ekklesia in the precinct of Dionysos after the Pandia, and at this meeting the proedroi, after dealing with the arrangements made by the archon, are to deal with any offence or illegal act concerning the festival. That is a good and beneficial provision, men of Athens, as this very case

[6] Harris (1992: 73).

> proves; for when, in the face of this deterrent, people display insolence nonetheless. (9, transl. MacDowell, 1990: 93)

It was in the *ekklesia* that the citizens with collective responsibility gathered to attend, vote and speak. The *ekklesia* was the *demos* itself, the same *demos* that had witnessed an act of injury to one of its members. The location would provide a different approach to the case, and the subject dealt with there would affect the conscience of a large number of citizens. This reference to the place justifies the importance of the dispute, as well as the relevance of the case to the entire civic community.

Demosthenes could have led a private process, a *dike idia*, against Meidias based on a complaint for damages, *blabes*, or a charge of assault, *aikeias*. He could also have initiated a public procedure, *graphe*, based on the outrage that he had been the victim of *hybris*. Yet, it was on the basis of the blows and the offence he was subjected to, as chorus-producer during the Dionysia, that Demosthenes initiated a *probole* procedure, making it a public cause (1 and 25).[7] The plaintiff Demosthenes presented a preliminary charge before the *ekklesia* in the first instance which, in the case of judicial matters, could only be conducted after a court had considered it to have been proved. It is this legal device that Demosthenes uses to address the offence that he had been subjected to, leading the judges to reflect on the possible consequences for the *demos* of the blow that had struck him. This is how the Peania orator transformed a private matter into a public one. He was clearly trying to revive the memory of the judges, who had been spectators of the events, of what they had actually seen at the time of the incident. This would be a way of understanding why Meidias had resorted to such disrespectful behaviour (126-7).

In our view, the treatment of this cause generated an effect on the jurisprudence of the time. In *Against Konon* (D. 54) Demosthenes adopts the same type of strategy: it was crucially important to prove Konon and his friends' misconduct to his client Ariston. The mastery of the argument ensures that the essential ingredients for the denigration of his adversary are present (54. 3-6, 7-12, 14). Take, for example, the end of the speech *Against Konon*, wherein the speaker Ariston appeals to the judges and repeats ὕβρις and ὑβρίζειν on the stage of his craft very often in order to convince them of the seriousness of the narrative.[8]

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[7] §1 προὐβαλόμην ἀδικεῖν τουτονὶ περὶ τὴν ἑορτήν; § 25 δημοσίᾳ κρίνειν αὐτὸν καὶ τίμημα ἐπάγειν ὅ τι χρὴ παθεῖν ἢ ἀποτεῖσαι.

[8] This speech, whose date is unknown but which could be dated back to 355 or 341, was written by Demosthenes to be read by others. Ariston mentions several unfortunate encounters with the children of Konon, who often got drunk, one of which ended in a violent assault that was almost fatal to him (54.10-11). If one considers the date of 341, the complaint raised by Ariston, which was regarded unfavourably by the judges, could be justified by the fact that those judges recalled the case against Meidias. If one considers the first date, 355, then the Konon case may have influenced the case against Meidias in the sense that the judges could have shown more leniency to the Demosthenic cause.

However, he failed to convince the judges and did not win the case. The question one should ask is then what motivated the judges not to be convinced by his arguments and to disagree with him. One might think that the case *Against Meidias* left its mark on public opinion, and that the judges of the Konon case considered that such a lucid and lively discourse should be a cause for suspicion. At the height of the argument, and in order to captivate the emotion of the judges, some lies relating to Meidias could have been uttered and only later corrected, which meant that his case would serve as a model to similar cases. The result of the charge *Against Konon* showed that even in a clear argument, based on facts witnessed by many, there were doubts and suspicions. And, besides all this, the case of Meidias was not forgotten in the memories of men. It was enough to think about the words that Aeschines wrote in *Against Ktesiphon*, insinuating that Demosthenes would have agreed to suspend legal proceedings in exchange for thirty mines. However, one can also advance the hypothesis that Meidias himself felt guilty and tried to repair the offence committed by paying Demosthenes thirty mines, either privately or as a reparation to the State.

The private quarrel between Demosthenes and his enemy Meidias ceased to be an exclusively private affair between two prominent citizens of Athens in the fourth century, and was converted into a political issue of the greatest general interest. The mutual quarrel had led the speaker of Peania to present a complaint, alleging lack of respect and morality. It may suffice one to imagine the psychological effect that such an attitude would have caused to Meidias when he realized that his individual problem with the Peania orator had indeed become a fight against the Athenian *demos* present in the *ekklesia*. Incidentally, and in all likelihood, the *demos* consisted of a substantial number of citizens who had witnessed the assault he had directed against Demosthenes in that same place, but at a time when the location was not yet an *ekklesia*. Demosthenes could have chosen a penalty or monetary compensation for the damages caused by means of a *dike idia*; yet, any personal gain through a financial penalty, in his role as prosecutor and victim, does not appear to have been his purpose from the very start. The moral reward to be achieved was of greater value for Demosthenes than the material gain that the process could bring to him (25 and 28). Hence, he clearly opted for *probole*.

The *probole* appears as a legal and *media* procedure that is justified by *hybris*, a detail that could not be excluded. The offense at Dionysia, witnessed by many hundreds of people, favoured the concentration of several explosive ingredients that could have affected the susceptibility of any Athenian citizen.

The choice of this type of judicial conduct would allow him to recover a part of the public image that had been greatly shaken by Meidias's aggressive attitude. The purpose of undermining the spirit of everyone present in the *ekklesia*, by means of a sweeping argument, would have had a significant social effect: Demosthenes conquered social, political and judicial credibility. The latter would be fully achieved if his appeal, addressed to the *ekklesia*, was heard.

The speaker made it clear that his personal interest in that procedure was not one of mere private and monetary benefit, but rather that he was driven by altruistic and

selfless devotion with respect to the law (30 and 34-5). The laws were to be enforced and this was the time to show that the Assembly knew of their importance in such a case. The existence of the laws shows that there was effective judicial practice and that each citizen's spirit was influenced by them. Justice would only occur when the *ekklesia* wielded its executive power through the use of the laws (224).[9] They ensured each citizen´s exercise of freedom in the pursuance of his individual interests as well as in the collective equilibrium of the selfsame interests. This constitutes a fundamental feature of democratic life in the Athenian *polis*.

3. Serving Laws

Following E. M. Harris's lesson in Canevaro (2013: 209-236), the presence of five legal texts, in §§ 8, 10, 47, 94, 113, in *Against Meidias* is extemporaneous. His detailed study, providing a justification for each legal document which forms a part of *Midiana*, is based on *stichometries*. In this sense, and in our view, this study was taken into account since it seemed relevant and compelling, despite the fact that it was also innovative when compared to the editions available for the study of Demosthenes' discourse 21. Although our analysis was based on the textual body of discourse established by MacDowell (1990) and Leganés Moya and Hernández Muñoz (2008), we were unable to remain indifferent to the recent and proficient study undertaken by E. M. Harris.[10] This study allows one to present the hypothesis that Demosthenes would initially have designed his *Against Meidias* speech without the support of ostensive citations from the law texts. His purpose would not have been that of using a legal statement as a weapon against Meidias. It is understood that the argument and the

[9] The use of the dative or instrument cases confirms this idea.

[10] There is a clear disconnection between the argumentative information presented by Demosthenes and the law texts referred to in 21.8, 10, 47, 94 and 113. Through his detailed study, E. M. Harris (2013) points to some inconsistencies of a legal, religious, cultural and linguistic nature. This study by E. M. Harris had already begun to unfold when the *Review* by MacDowell (1990) appeared in *Classical Philology*, 87, 1, pp. 71-80. Thus, in 21.8 and 10, the laws are introduced at the time when Demosthenes reminds everyone of the vote of censure against Meidias, in the Assembly after the Dionysia. Meidias had verbally and physically assaulted Demosthenes during the festival, while the speaker was exercising his position as chorus producer. The purpose of the laws mentioned is that of highlighting the legal procedure to be followed after Meidias' acts. These steps point to Meidias' unacceptable behaviour which had to be considered as a public and not an individual act. Meidias' disrespectful behaviour did not merely affect Demosthenes, but rather the entire community when faced with a similar occurrence. In 21.47 the law stated relates to *hybris* and emphasizes the seriousness of the offence committed by Meidias; it is for this reason that the speaker defends a public indictment as *graphe hybreos*. In 21.94, one is presented with a discussion of the application of the procedure of public arbitration for a charge of slander, brought by Demosthenes against Meidias, since Meidias had not shown up for the arbitration. Demosthenes defends a public act due to the contemptuous occurrence he had been subjected to while carrying out a judicial role. In 21.113, the intervening parties discuss the benefits of the rich before the law; the latter believe they have a superior right to these when compared to the remaining citizens. This discussion is related to the bribe offered by Meidias.

mere allusion to the laws would have been sufficient for the orator; without the need to fully quote them, he would have presented his civic defence. The paraphrasing of the laws, which appears in the body of the discourse, intends to associate Demosthenes with the defence of just acts which respect common welfare. The speaker was a member of the Athenian community, not only when he took on the role of *khoregos*, but also when he defended himself publicly from Meidias. Metonymically speaking, his defence corresponded to a defence of the entire Athenian community.[11] Thus, the everyday use of the *nomoi* designation by Demosthenes may have confused later copyists, who linearly interpreted the Demosthenic text and inappropriately inserted legal extracts into the discourse thinking that they were contributing extensively to a complete exegesis of the text. E. M. Harris's study helps one to understand that the transmission process of this text inadvertently complicated the interpretation of the Demosthenic rhetorical strategy. Demosthenes wished to produce a psychological effect on the *auditorium*, which would be to his benefit, and not to substantiate all his judgement values by explicitly mentioning the established laws. This was simply a rhetorical and psychological strategy that the text transmitters would not have been aware of.

Demosthenes puts forward legal arguments, which are enriched by his paraphrase of some of the laws. The details of the argumentation, as well as the phraseology used by Demosthenes, leads one to suppose that these laws had already been added to the Demosthenic text in the Hellenistic period; they are not, therefore, wholly reliable. This discursive strategy not only reveals an interest in legally substantiating the demand, but it also stresses the mastery and knowledge that the speaker possessed of the current laws of his time. It was enough to simply mention the law, so that those who heard it knew that the laws bestowed a constructive character on the political, legal and moral organisation of the city.

The speaker stressed the idea that, in order for the legislative body to be effective, a guarantee of its application was necessary. Since the laws were everyone's heritage, and did not pertain to a select few, they were universal and comprehensive in character: «for, he thought, strength is possessed by a few men but the laws belong to all» (45, transl. MacDowell, 1990: 115).

Under the influence of Isokrates (*On the Peace*, 120), the speaker of Peania proposes the idea that, if the laws were not applied, the *polis* would be unsafe and would be subjected to the vices of men, so that every individual would find any private act acceptable. Isokrates claimed that it was the *politeia*, or constitution, that had the power to direct the *polis*.

> Car l'âme de la cité n'est rien d'autre que la constitution, qui a le même pouvoir que dans le corps la pensée. … C'est elle qui doit servir de modèle aux lois, aux orateurs et aux simples particuliers, et chacun obtient nécessairement des

[11] Wohl (2010: 181-188).

résultats conformes à la constitution qu'il possède. (Isokrates, *Areopagiticus*, 14, transl. Marie-Pierre Noël, 2012: 393)

Based on this topic, and in order to organize the *polis* well, a higher reality or a policy would be needed to guide its path. In view of a constitution, or an organisation of civic institutions, there had to be a driving force to make the constitution a model for the law, for speakers and for private individuals. Nothing is more important than having a policy at the service of the *polis*; on this depends the smooth functioning of the city-state, namely the laws.

4. Hybris*: «to be or not to be»?*

Meidias did not perceive his aggression towards Demosthenes to be so destructive and to merit the manner in which Demosthenes then answered him in court. There had been no abuse in the sense of having been destroyed Demosthenes' official props; moreover, Meidias' adversary did not become invalid in any way, for instance incapable of his motor skills (25-8). Meidias considered the adopted judicial procedure to be excessive when dealing with a simple quarrel between two individuals (29-35). There had been many other known cases of aggression, which had not been subjected to punishment at all (36-41).

The *hybris* emerges in this Demosthenic speech mainly as a form of moral violence which had affected the victim socially and psychologically. In itself, the single act of *hybris* had gathered the impudence, arrogance and pride of Meidias, a citizen who was the owner of vast wealth. He would have thought that any such behaviour would not have been contested and that he would go unpunished, as had previously occurred in the cases he had been involved in with Euaion and Straton (73-4 and 95-7).

The orator emphasises the particularity of his own function as chorus-producer and recalls the circumstances, normal as they were, in which the act took place.

I, on the other hand, was assaulted by an enemy, who was sober, in the morning, doing it from *hybris* and not from wine, in the presence of a large number of both foreigners and citizens; and it was in a sacred place, where it was very necessary for me to go because I was a chorus-producer. I think my decision was prudent, men of Athens, or rather it was fortunate, when I acquiesced at the time and wasn't induced to do anything disastrous. (74, transl. MacDowell, 1990: 133)

The act itself of aggression against the chorus producer, Demosthenes, and the very place where it had been committed confirmed the natural insolence of Meidias' character, combined with a profound lack of wisdom. Meidias proved himself to be indifferent, not only to the solemnity of the festivals but also to the great honour that the position of chorus-producer bestowed upon whosoever occupied it. Even the space where he had committed the violence increased the psychological effect on the victim: the *orchestra*. This was the site of the theatre where Demosthenes would have been, or very close to it, by virtue of being the chorus producer at the time. He would

most certainly have occupied a privileged place near the choir. Being responsible for the chorus of men for the dithyramb contest, the orator was notoriously exposed to the affront of being in a place full of men, ready to witness the shame of another who was a public figure. Demosthenes' idea was to combine all these ingredients in the legal tool that was the *probole*. The *aikeia*, the battery or wounding of a person (e.g. 35), does not fully address the profile of his complaint because it would only cover the physical aspect of the aggression.[12] The violation of the sacred character of space, as well as a disregard for the symbolism and task carried out by the chorus producer, would only be covered by the crime of *hybris*. Aeschines, in 1.17, adds that anyone who offended his fellow man was unable to participate in public life.

This speech is based on an extensive matter of legal definition, since Demosthenes explores various legal aspects that are not univocal. He gives the judges a set of plausible legal perspectives in order to overestimate the litigation act itself. First of all, there are those which are clearly displayed and labelled by the legal provisions contained in the text; there are then those which are subjacent to the text, which can be inferred from the evidence and details remaining in the text. In this argumentation, undertaken by paraphrasing the law on *hybris* (48-9), one is unable to find the definition of what *hybris* is.[13] It is as if it were part of the Athenian citizens' conscience and that there was no need to question it, as natural as going to a spring to collect water, something which was of need to the whole family. It was a cultural, social and religious fact, acquired and recognised by everyone and therefore accepted by all as something that was to be respected. The crime of *hybris* affected and harmed the state when there was any doubt as to its value.

> Consequently, for *hybris* too the legislator permitted everyone who wished to prosecute, and he made the penalty entirely payable to the state; for, he considered, the man who turns to insolence wrongs not only the victim but the city, and revenge is sufficient compensation for the victim, who ought not to make money for himself for matters of this kind. And in fact he went so far as to permit similar prosecution even for a slave treated insolently. He thought it right not to consider the identity of the victim but the character of the act committed; and since he found the act unacceptable, he ordered that it should not be permitted, either against a slave or at all. For there is nothing, nothing at all, men of Athens, more intolerable than insolence, or more deserving your anger. (45-6, transl. MacDowell, 1990: 115)[14]

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[12] There are other examples of *aikeia* in D. 47 (*Against Euergos and Mnesiboulos*, 45-7), D. 54 (*Against Konon*), and in Isok. 20 (*Against Lokhites*).

[13] The authenticity of the document is supported by López Eire (1985: 289) and MacDowell (2009: 240). However, E. M. Harris (*in* Canevaro 2013: 224-31) considers that the document «was inserted at a later date». The initial part of this document is also expressed in *Against Thimarkhos*, 15-17.

[14] Cf. Aristotle, *Rhetoric* 1374a13-15 and 1378b23-5.

The symbiosis of topics covered throughout the text reinforces the speaker's role as a defender of public interests.[15] This is a man who acts by thinking about the other men who hear him, and who are to judge what is being argued by him. His task is to touch the conscience of everyone present and make them doubt Meidias' ulterior motives. The chorus producers were protected by law or by habitual piety, so that an attack on a *chorus producer* had to be punished (56-61). This open reference is a sign of the respectability required of all who held the position.

The speech itself confirms the act of *hybris*, which had occurred earlier. If the act of *hybris* were not clearly recognized by the *ekklesia*, as a point of moral reference and respect for the city and all its institutions, its harmful effect could be caustic to society. The absence of this moral reference point would generate serious consequences, namely the laxity of morals and future offences against the dignity of the chorus producer's status. Demosthenes' text makes it quite clear that there is no definition for *hybris*; there is, however, a need to enforce the law, even a tacit law like the Greek concept of *hybris*. This was already a sign of the existence of a behavioural pattern in the spirit of the *demos*.

5. After all, what are the laws for?

> There's no point in having good humane laws to protect ordinary people, if those who disobey and violate them escape the anger of you who have authority to enforce them on each occasion. (57, transl. MacDowell, 1990: 123)

Demosthenes presents his own legal interpretation stating that the judges' responsibility is to ensure that the condemnation for an outrageous act is carried out by them and by the laws, even if the victim subjected to it does not voice himself. Similarly, the defence of a victim should not be carried out by himself (70-6).

As we approach the end of the speech, it is possible to clearly realise that Demosthenes managed to create a very negative image of Meidias and of his rich friends. These people were considered unfavourable to the future success of the city and, in particular, to its institutions and those who officially took part in them. Besides, when there was a failure of some campaign of sorts, Meidias hurriedly appeared in public to attribute responsibilities to the taxpayers for the unsuccessful expeditions (202-204). It is in relation to these occurrences that Demosthenes alerts the judges to the fact that Meidias participates actively in community life, but exercises a very particular *modus operandi*. Unlike Demosthenes, Meidias prepared himself to sow "seeds" in Athenian public life, not only through his immediate supporters but also through his children, who would follow in the footsteps of the parent who had taught them a total disregard for the law. Demosthenes senses that the moment has come to courageously put an end to Meidias' attitude because there is the danger that the money of people like Meidias could terminate the use of the laws, which are

[15] Cf. Wolff *in* Carawan (2007: 91-115).

dependent on men like Demosthenes. He tries, therefore, to hold all the members of the *ekklesia* responsible for the consequences to the proper functioning of society if the laws are not applied.

Demosthenes' exhortative appeal at the end of his argument clearly shows the fear that the speaker senses for the verdict of the court. Judges had to ensure that the decision of those present in the *ekklesia* would be implemented, and that they should not fear the pressure and threats from rich men who belonged to Meidias' faction of (205-18). Physical and insolent aggression in the abode of the theatre of Dionysus, an act of aggression that made him a victim during the exercise of common duties, should be punished so that others would not think of acting in the same way (219-22). What was at issue was an offence that concerned the whole community, and not strictly himself, as a unique individual. Demosthenes had not presented that accusation with a view to a political persecution, but rather on the grounds of a *hybris* offence. This had been committed by Meidias and, unlike other cases, e.g. Aristophon, could not be undone or withdrawn. It was not the mere fact of forgetting a physical assault in front of many citizens. It was an insurmountable moral issue (118). If the conviction of the judges were not favourable to him, he would perceive it as being shameful (117). Demosthenes' public image had begun to be constructed a few years earlier, and was respected by the Athenian community. He had become a legitimate representative of citizenship. The first and last vocative cases in *Against Meidias* are addressed to *dikastai*. The theatre of Dionysus (8, 10, 206; Aesch 2.61, 3.52) had once existed in the place where they were standing, in the Assembly. The session took place after the urban Dionysian festivals and was located next to the Acropolis. This, now a place of judgement and decision regarding the ignominious act that Demosthenes had been the victim of, had previously been a meeting place for citizens to honour the god Dionysus. Those who were there had the duty to enforce the stated facts and pass judgement on them. The *agon* was no longer dramatic; it was penal. The inappropriate behaviour associated to *hybris* corresponded to a moral offence that had befallen the orator, who had become the victim of Meidias' exaggeration, pride and insolence. The *hybris* committed by Meidias had impinged upon his honourability before the *demos*, who already knew him from the lectern at the Assembly and courts. Meidias' act had affected the public dimension of his person in such a way that his plea deserved an answer that would also affect his opponent's public dimension. His main purpose would only be fulfilled if Meidias were convicted. For this to occur, it is through the use of the word (224) that Demosthenes tries to persuade the judges and his fellow citizens to apply the laws. Demosthenes seems to want the jury to relate itself to his own case. A similar plea is made by Apollodorus in [D.] 59.110-11, and Lycurgus (*Against Leocrates*. 141), where the judges are invited to reflect on what they would say to their women when they returned home after the verdict of not having condemned Neaera.[16]

[16] *Vide* also Aesch., *Against Timarchos*, 186-7. For a full discussion of these passages, *vide*

In Demosthenes' final appeal, 224, which partly picks up from that mentioned in 118, the speaker emphasises that both the safety and autonomy of every citizen are dependent on the practice and performance of laws. It was thus up to the *ekklesia* to determine whether the law concerning the *hybris* was appropriate and should be applied to the case presented.

However, the laws would only be guaranteed if they were correctly executed without any constraint to the citizens and, concurrently, the judges.[17] Laws are instruments of power within the reach of any citizen. They are the regulators of the moral and legislative organisation of the city. If they are to become effective, they must be applied. Only the laws could rescue all the proceedings brought forward by Demosthenes. The laws had existed even before the problems; in their essence and content, they were exempt from pressure, from influence, from pity, from the exaggeration of human acts. They are what they are, regardless of the casuistry to which they apply.

The appeal to the judges' emotion, though rhetorically placed, is excessively long in the speech as a whole; yet the effect produced on a jury, by the references to the aggressor's *tropoi* on the victim Demosthenes, would have contributed to the gradual denigration of Meidias' image (72).[18]

It was the jury's responsibility to ensure the strict observance of the laws (224-25). Laws are not of worth simply because they are part of a collective heritage; they are of invaluable worth when they begin to contribute to the common good, with a direct application to specific situations. They should be applied regardless of each citizen's economic and social status.

The plot of this long speech by Demosthenes is full of colourful characters and episodes, which highlight Meidias' rather unorthodox profile. The characters who intersect with him are carefully mentioned and added to the argument of the speech, contributing to the representation of the intentions of a few rich people of Athens. Through these detailed stories, arranged along the course of the argument, those citizens who attended could witness these examples and understand many of the situations occurring in the city. It would be rather difficult to perceive the true intention of parading these episodes in the argument if it were not a case of denigrating Meidias' image.

And lastly, what would have persuaded Demosthenes to accept the thirty mines mentioned by Aeschines (3.52) and repeated later by Plutarch (*Dem*. 12.4; [Plut.] *Lives*

Curado (2008: 450).

[17] The alternation in the vocatives of the text *Against Meidias* should be noted. The vocatives used are *andres dikastai* and *andres Athenaioi*. The alternation between these could be interpreted as the orator's appeal to the civic or punitive conscience of the citizens in the *ekklesia*.

[18] The passage D. 21.72 was considered by Cicero (*Brutus*, 322) to be a model sentence, since it combined the modes of action, of which the orator should exercise full mastery.

of the Ten Orators, 844d)?[19] The mere satisfaction of having uttered a *probole* against Meidias in the Assembly – on the very location where the plays at the theatre of Dionysus had taken place, on the slope of the Acropolis, after the completion of the urban Dionysian festivals – would have been enough to satisfy his thirst for recognition. The passage by Aeschines points to the fact that the trial was not presented to the court for a verdict because Demosthenes had accepted the thirty mines. This fact would have defrauded the popular support that had sustained the speaker's cause.

The message transmitted by Demosthenes through the sentence «So the laws get their power from you, and you from the laws» (224) is nothing but a direct appeal to the common sense and citizenship of those present, ὦ ἄνδρες Ἀθηναῖοι. The laws are valid only if they are indeed applied, and particularly if those hearing the message do anything, *de facto*. In this sense, the last vocative proffered in this speech is directly aimed at the judges: ὦ ἄνδρες δικασταί, who are not just citizens of Athens, but also the judges in that particular cause.

Demosthenes plays the role of advisor and mentor to the *demos*, contributing with a *paideia* based on the defence of the correct application of the laws. The speech *Against Meidias* advocates a law of morality to the statesman, which should honour the services provided to all, because the *polis* serves everyone. *Against Meidias* contributes to the history of criminal investigation in the West, based on the study of biographical data collection and legal evidence.

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[19] And also in Souda δ 456. It is not clear why the mentioned amount is this and not another. Aeschines (3.52) used the moment to retaliate against the reference that Demosthenes himself had advanced in *On the False Embassy* (19.145), when he accused Aeschines of having been bought by Macedonia for thirty mines. This could be a justification that follows from a comparative reading of the sources. History recorded the enmity between the two speakers.

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DEMOSTHENES *AGAINST MEIDIAS*. RESPONSE TO ANA LÚCIA CURADO

Professor Curado has done a fine job showing the role law plays in Demosthenes' speech against Meidias, and I agree with her that the speech reveals Demosthenes' "legal expertise." In my view, however, she is rather too ready to accept at face value Demosthenes' account regarding the facts of the case. In what follows I wish to raise some concerns about his account that cast doubt on the strength of his case. This in turn may lead us to reassess the reasons for his extensive discussion of the laws.

I begin with the observation that we are told remarkably little about the central event, the (alleged) assault that, Demosthenes claims, amounted to *hybris*.[1] Demosthenes recounts past disputes between himself and Meidias at some length; he also describes at length Meidias' treatment of others like Strato, the arbitrator; and he presents witnesses to confirm many of these accounts. In addition he tells us about others who violated the Dionysiac festival and were punished for it, arguing that Meidias similarly ought to be punished, and he mentions others whose crimes were serious but nonetheless pardonable, unlike those of Meidias. But about the specific act of *hybris* that lies at the center of the legal case he is bringing, he tells us almost nothing.

[1] This observation seems to have eluded recent editors (Goodwin, Humbert, MacDowell); it was brought to my attention by Myrto Aloumpi in an unpublished paper on "Storytelling and hybris in Demosthenes 21 (Against *Meidias*)" delivered at a conference in London in 2013. I am grateful to her for providing me with a copy of her paper. Despite our overall arguments being different, we make a number of similar points, and nothing I say here should detract from the originality of her work.

Here is what he does say about this act: at the beginning of the speech (21.1) Demosthenes speaks of the "blows" (*plēgous*) he received at the Dionysia.[2] Later he asserts that Meidias "committed *hybris* against my body" (ἐμοῦ μὲν ὕβρισεν τὸ σῶμα).[3] Later in the speech we get a few peripheral details concerning the time and place of the alleged assault,[4] but nothing further concerning the actual act of *hybris*.[5] Years later, in referring back to the incident, Aeschines mentions knuckles (*kondylous,* 3.52), implying a blow with the fist, but Demosthenes does not specify this detail in his own speech. All he tells us is that the alleged act of *hybris* was physical; we have no further description of the act itself.[6] The attentive reader may begin to wonder whether Meidias' act of *hybris* was anything more than a slight push.[7]

It is also remarkable that although Demosthenes six times presents witnesses to testify concerning past crimes of Meidias,[8] he presents no witnesses to testify to the assault for which he is bringing this case. Instead, he disguises the lack of a witness by rhetorically including the entire jury as witnesses: "for those acts that occurred in the assembly or in the theater in the presence of the judges, you are my witnesses, all of you, men of the jury."[9] Demosthenes implies that because everyone was a witness, there is no need now to present a witness in court to the testify to those events. Obviously, there is some exaggeration here: not every juror would have been at the theater that day. But this sort of exaggeration would not have been considered deceptive, as forensic speakers often speak of all the jurors being present at an assembly meeting or other large public event. No, the deception lies elsewhere, and the exaggeration may even help conceal it.

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[2] Blows are also mentioned in 21.6, 7, and 12; see also the verb "strike" (*typtein*) in 21.61, 68 and 219.

[3] 21.18. The same expression, committing *hybris* against the body, recurs in 21.25 and 126. Demosthenes also mentions that his body (*sōma)* was attacked in 21.7, 69, and 106.

[4] "I was the victim of *hybris* at the hands of an enemy who was sober, early in the day, who acted out of *hybris* not influenced by wine, before many people, foreigners and citizens, in a shrine which, as a *chorēgos*, I was obliged to enter" (ἐγὼ δ' ὑπ' ἐχθροῦ, νήφοντος, ἕωθεν, ὕβρει καὶ οὐκ οἴνῳ τοῦτο ποιοῦντος, ἐναντίον πολλῶν καὶ ξένων καὶ πολιτῶν ὑβριζόμην, καὶ ταῦτ' ἐν ἱερῷ καὶ οἷ πολλή μοι ἦν ἀνάγκη βαδίζειν χορηγοῦντι, 21.74). These details reveal nothing about the assault itself.

[5] In a discussion of possible actions anyone who strikes someone might take, Demosthenes mentions as alternatives striking "with knuckles or on the cheek" (ὅταν κονδύλοις, ὅταν ἐπὶ κόρρης, 21.72), but this comment tells us nothing about the act of *hybris* against Demosthenes himself.

[6] All scholars assume that Meidias hit Demosthenes in the face, but there is no mention of this in the speech. The assumption may stem from Demosthenes' general remark in 21.72 (see preceding note).

[7] Of course, a juror, who only heard the speech once, would have had very little time to reflect on the presence or absence of details.

[8] 21.22, 82, 107, 121, 168, 174.

[9] ὅσα γ' ἐν τῷ δήμῳ γέγον' ἢ πρὸς τοῖς κριταῖς ἐν τῷ θεάτρῳ, ὑμεῖς ἐστέ μοι μάρτυρες πάντες, ἄνδρες δικασταί (21.18).

To understand this, consider the scene where the incident occurred: before the first play begins that day, Demosthenes enters the theater. Some spectators would still be outside the theater; others would already be seated; still others would be entering, finding their seats, talking with friends, etc. As *chorēgos* Demosthenes would be sitting down in front, but other dignitaries would also have been present: priests, other *chorēgoi*, various officials, and other notable public figures. Demosthenes gives the impression that every eye in the theater was carefully watching him from the moment he entered, but this seems highly unlikely. And even if many people were looking toward him, anyone who was more than a few rows back or more than a few seats away on either side would probably not have had a good view. Thus only very few of those present that day would have seen what happened. In other words, no matter how many people were present in the theater, there were probably very few close observers of the alleged crime.

When a fight breaks out in a crowd today, only a few observers who were very close to the participants can later say exactly what happened, and even these few are likely to disagree on details. In Demosthenes' case, he was likely accompanied by a few friends, and there may also have been a few other acquaintances nearby. Presumably, at least one of these would have been willing to testify about the actual assault, but Demosthenes does not call any of these to testify. Rather he conceals the absence of a witness with the claim that "you are all witnesses." Why does he not present a witness? The most obvious explanation is that Meidias' physical assault was not nearly so serious as Demosthenes suggests, so that a witness would have to choose either to tell the truth and expose the fact that the assault was trivial, or to lie about the facts and expose himself to a suit for false witness.

A different explanation for the scarcity of detail in Demosthenes' account and the lack of a witness, however, may be suggested later in the speech, when he remarks that *hybris* is hard to describe: "One who strikes might do many things when he commits *hybris*, some of which his victim would not be able to describe to someone else: his stance, his look, his tone of voice... No one reporting these matters, men of Athens, could present this terrible deed in a way that the true effect of the *hybris* on the victim and on those observing it could be made clear to his listeners."[10] Demosthenes never says that this is the reason why he presents no witnesses (in any case he would not want to admit openly that he is not presenting any); but he may be suggesting this as his reason, and some in his audience might have found such an explanation plausible.

Ariston's suit against Conon (Dem. 54.8-9), however, shows that a rather precise description of an act of *hybris* can easily be given.

[10] πολλὰ γὰρ ἂν ποιήσειεν ὁ τύπτων, ὦ ἄνδρες Ἀθηναῖοι, ὧν ὁ παθὼν ἔνι' οὐδ' ἂν ἀπαγγεῖλαι δύναιθ' ἑτέρῳ, τῷ σχήματι, τῷ βλέμματι, τῇ φωνῇ . . . οὐδεὶς ἄν, ὦ ἄνδρες Ἀθηναῖοι, ταῦτ' ἀπαγγέλλων δύναιτο τὸ δεινὸν παραστῆσαι τοῖς ἀκούουσιν οὕτως ὡς ἐπὶ τῆς ἀληθείας καὶ τοῦ πράγματος τῷ πάσχοντι καὶ τοῖς ὁρῶσιν ἐναργὴς ἡ ὕβρις φαίνεται (21.72).

> Conon here and his son and the son of Andromenes fell upon me. First they stripped me, then they tripped me, threw me in the mud, jumped on me and hit me so hard that my lip was split and my eyes were swollen shut. They left me unable to get up or say a word, but I heard them saying many terrible things, among which some were so awful that I would hesitate to say them in your presence. I will, however, tell you one thing that is evidence of the *hybris* of this man and an indication that the whole affair was his doing: he sang out like a victorious fighting cock, and the others urged him to flap his elbows against his sides like wings.[11]

This detailed description belies the argument that *hybris* is such a subtle offense that it cannot be described in words to those who were not present. Thus, we are left with the conclusion that Meidias' offense, whatever it was, was most likely physically trivial.

One other possible reason for Demosthenes' avoidance of detail, however, might be that, in the agonistic culture of the Athenian aristocracy, he did not want to acknowledge having been treated in such a shameful fashion. Any extended discussion of the details of the assault might, on this view, lead the jurors to judge him as someone unwilling to respond to an attack on his honor and therefore undeserving of their sympathy.[12] Even without providing details, however, by suing Meidias and implying that the attack was a serious one, Demosthenes has already made clear that he was shamefully treated. And he includes a forceful defense of his refusal to respond physically to the assault and his reliance on the jury and the rule of law to obtain redress for his sufferings.[13] Thus, it seems likely that the addition of more details to his account would not have made Demosthenes appear more shameful; but if they helped prove the serious of the assault, they surely would have increased his chance of securing a conviction. It thus seems unlikely that Demosthenes avoided giving details of the assault because this would have decreased his standing in the eyes of the jurors. Thus, once again we are left with only one possible explanation: the assault was physically trivial.

If this assessment is correct, then one line of argument Meidias would almost certainly have taken in response to the charge of *hybris,* is that any physical contact was trivial and that Demosthenes is trying to make a major crime out of what he

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[11] Κόνων δ' οὑτοσὶ καὶ ὁ υἱὸς αὐτοῦ καὶ ὁ Ἀνδρομένους υἱὸς ἐμοὶ προσπεσόντες τὸ μὲν πρῶτον ἐξέδυσαν, εἶθ' ὑποσκελίσαντες καὶ ῥάξαντες εἰς τὸν βόρβορον οὕτω διέθηκαν ἐναλλόμενοι καὶ ὑβρίζοντες, ὥστε τὸ μὲν χεῖλος διακόψαι, τοὺς δ' ὀφθαλμοὺς συγκλεῖσαι· οὕτω δὲ κακῶς ἔχοντα κατέλιπον, ὥστε μήτ' ἀναστῆναι μήτε φθέγξασθαι δύνασθαι. κείμενος δ' αὐτῶν ἤκουον πολλὰ καὶ δεινὰ λεγόντων. καὶ τὰ μὲν ἄλλα καὶ βλασφημίαν ἔχει τινὰ καὶ ὀνομάζειν ὀκνήσαιμ' ἂν ἐν ὑμῖν ἔνια, ὃ δὲ τῆς ὕβρεώς ἐστι τῆς τούτου σημεῖον καὶ τεκμήριον τοῦ πᾶν τὸ πρᾶγμ' ὑπὸ τούτου γεγενῆσθαι, τοῦθ' ὑμῖν ἐρῶ· ᾖδε γὰρ τοὺς ἀλεκτρυόνας μιμούμενος τοὺς νενικηκότας, οἱ δὲ κροτεῖν τοῖς ἀγκῶσιν αὐτὸν ἠξίουν ἀντὶ πτερύγων τὰς πλευράς.

[12] See Cohen 1990.

[13] "I think it was out of good sense, or rather good luck, that on that occasion I decided to hold back and not get carried away and take irremediable action. But I completely sympathize with Euaion [who struck back and killed his assailant]" (καὶ ἐμαυτὸν μέν γ', ὦ ἄνδρες Ἀθηναῖοι, σωφρόνως, μᾶλλον δ' εὐτυχῶς οἶμαι βεβουλεῦσθαι, ἀνασχόμενον τότε καὶ οὐδὲν ἀνήκεστον ἐξαχθέντα πρᾶξαι· τῷ δ' Εὐαίωνι . . . πολλὴν συγγνώμην ἔχω, 21.74; see also 21.76).

thought was an unfriendly look. This could have been a strong argument, especially if Meidias presented witnesses who testified that there was little or no contact or that whatever happened was initiated by Demosthenes. Interestingly, Demosthenes says nothing that might anticipate or refute this argument, even though he anticipates many other arguments that (he says) Meidias will make.

Anticipation of one's opponent's arguments is a common strategy in forensic pleading, and is especially frequent in Demosthenes' pleading.[14] In Dem. 21 he anticipates many arguments Meidias will allegedly make. Early in the speech he anticipates that Meidias will argue that he has used the wrong procedure (25-28), that the dispute is a private matter between him and Demosthenes, not a public concern (29-35), and that many others have been the victims of similar crimes without being punished (36-41). Later he anticipates that Meidias will argue that other alleged victims of his have not brought suit against him (141-42), and that, like Alcibiades, he should not be harshly punished because of his public service (143-74). And at the end he anticipates that Meidias' supporters will ask the jury to ignore the law (205-18). It seems to me unlikely that Meidias will make all these arguments (or any of them), and I even doubt Demosthenes truly thinks Meidias will argue in this way, but the anticipation of these arguments provides an opening for him to stress (e.g.) that factors like the public setting of the alleged assault make this a public crime of concern to the whole city, or that far from ignoring the law the jury must adhere to the rule of law, which is fundamental to the democracy.

In addition, the anticipation of arguments here serves another rhetorical purpose, to distract the audience into thinking about some of arguments Meidias might (or might not) make, and thus not thinking about others that he would be more likely to make. Demosthenes is happy to direct the audience's attention to the possibility that Meidias will introduce his public service in a plea for leniency because this allows him to present his own negative account of that service before Meidias has a chance to give his own more favorable account. At the same time, the audience is distracted from noticing a point Meidias would almost certainly raise, the paucity of detail in Demosthenes' account of the act of *hybris* itself. Meidias may try to provide more detail in his own speech, but he will be at a disadvantage from the beginning, as the audience will have in mind that the assault was an especially serious one and will not be thinking about the possibility that it was trivial.

We may conclude from all this that Demosthenes employed all the rhetorical skill he had to convince the jury that Meidias' physical assault was much more severe than it actually was. His strategy is not to manufacture false details about the assault, but rather by using vague but suggestive language about the assault itself, together

[14] Anticipation, of course, is a rhetorical strategy and usually involves misrepresenting whatever arguments the opponent will actually make. To my knowledge, the rhetorical use of anticipation in forensic pleadings has never been studied. The standard treatment of anticipation (Dorjahn 1935) is only concerned with how speakers might have learned of the arguments their opponents would or might make.

with extensive descriptions of Meidias' other offenses, both against Demosthenes and against others, to create the strong impression that this was one more in a long series of serious acts of aggression on the part of Meidias. At the same time, by bringing up several arguments that Meidias might make in response, he conceals the weakest part of his case which was much more likely to be attacked by Meidias, namely that the alleged assault was, in fact, physically trivial.

Seen against this background, Demosthenes' extensive explanation of the law against *hybris* and other laws and his emphasis on the importance of the laws and the necessity that everyone obey them become part of his overall rhetorical strategy, which is to draw attention away from the facts of the alleged assault and to focus the jurors' attention on Meidias' generally despicable character and his many past offenses against Demosthenes and others, both of which require that he be punished in order that the rule of law continue to be honored in the city. It is a strong rhetorical performance. Whether Demosthenes' rhetoric succeeded in persuading the jury, if in fact it was ever heard by a jury, is unknown.[15] But he has succeeded in persuading scholars ever since that he suffered a serious physical assault at the hands of his enemy Meidias.

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[15] Aeschines tells us (3.52) that Demosthenes sold his case against Meidias for thirty minas. Scholars dispute whether this means that he settled the case out of court and avoided a trial; see, e.g., MacDowell 1990: 23-28, Harris 2008: 84-86.

S. C. TODD (MANCHESTER)

DEATH AND RELIGION IN ATHENIAN LAW: IDENTIFYING POLLUTION?[1]

[A] Preliminaries

As the title indicates, the aim of this paper is both restrictive but also wide-ranging. It is restrictive in that I am not seeking to explore all aspects of religious pollution (hence nothing for instance on regulations about sex or childbirth),[2] nor indeed any aspects of environmental pollution.[3] By contrast, the absence of the phrase "homicide law" from my title indicates a breadth of intention, to consider not just the topic of homicide which has traditionally fascinated legal historians despite (or perhaps because of) its highly problematic history: as is well known, there is on the face of it very little sign of pollution in Homer or in the earliest Athenian homicide law; lots in tragedy, in

[1] My thanks are due to fellow-symposiasts (particularly to my respondent David Phillips) for ideas and discussion; to the organisers of the conference and the editors of this volume; and to various colleagues at Manchester and elsewhere for bibliographical and other suggestions: in particular Georg Christ, David Langslow, Peter Liddel, Stephen Mossman, Robin Osborne, and Jacqueline Suthren-Hirst.

[2] Both of which are found in the Cyrene Cathartic law (Sokolowski *LSS* no.115, e.g. at face A lines 11-20). There are to my knowledge no Athenian texts of this type: my initial suspicion had been that this might represent a primarily non-Athenian focus among the *leges sacrae* in the standard collections, but in fact the first 55 out of 181 texts in Sokolowski's *LSCG* vol. are from Attica, plus nos. 178 and 179.

[3] For which see Hughes (1994), whose focus is very much on issues such as "air pollution" and "water pollution" (16 and 11 index entries respectively), while mentioning ritual pollution only at pp.51-52.

Plato's *Laws,* and in the *Tetralogies* of Antiphon; but much less in the forensic speeches.[4] But homicide law is a vast topic, so rather than attempting and inevitably failing to present a systematic study even just of its religious aspects, I propose instead to be more selective about homicide but to set this within a broader context of what might be termed either "unnatural deaths" (specifically executions, to be explored from the perspective both of the victim and of the agent), or else "problematic deaths" (viz. regulations covering the disposal of stray bodies, as when people drop dead in the street).[5] Since each of these topics raises rather different research problems, the various substantive sections of this paper can be read as free-standing discussions. Overall, however, my aim is that bringing these topics together may not only enable a significant expansion in the range of this research field, but may also help to set agenda for future work within the field. To put it another way, my intention is that the combination of topics will enable a process of cross-fertilisation rather than contamination.

It is to avoid contamination, however, that I have restricted my scope deliberately to Athens: non-Athenian texts such as the Ioulis burial regulations,[6] or the Cyrene cathartic law,[7] or the newish Selinous lead tablet on purification,[8] will be cited here only peripherally and for comparative purposes. Such texts are undoubtedly important as representing ways in which Greek cities might conceptualise the problems of pollution, but in religious as in other legal matters it is unsafe to assume that every city solved its problems in the same way.

[B] Methodological considerations

Attempting to evaluate the rôle of death-pollution specifically within the law of homicide requires us to confront the methodological problem of how to identify

[4] Gagarin (2002: 109) presents a strong contrast between the prominence of pollution in the *Tetralogies* and its virtual absence from the forensic speeches ("Only one litigant in an actual case appeals directly to it [Ant. 5.82-84], and it is absent from most accusations of homicide, such as Lys. 13. It is most notably absent from Ant. 1, a prosecution speech alleging a familial homicide."), though his Antiphon commentary does acknowledge that a possible allusion could be read at Ant. 1.31 (Gagarin 1997: 121) and that other scholars have seen reference to pollution at Ant. 6.39 (1997: 242).

[5] This is not to deny the relevance of pollution even for deaths which occur at the right time and in the right place (i.e. at home, on your deathbed, in the fullness of your age, and with your children available to conduct the funeral), but attested Athenian regulations for burial focus overwhelmingly on expenditure (cf. the analysis in Garland 1989: 3-8), without any equivalent of the pollution-related clauses found in the Ioulis funerary law (*LSCG* no.97A lines 14-18 [purification of house] and lines 25-29 [restriction in number of relatives allowed to be polluted, cf. n.18 below]).

[6] Ioulis (cited at e.g. n.5 above, n.18 below): text at Sokolowski *LSCG* no.97, trans. Arnaoutoglou 1998 no.109.

[7] Cyrene (cited at n.2 above): text at Sokolowski *LSS* no.115; text and trans. Rhodes-Osborne 2003 no.97.

[8] Selinous: first published by Jameson, Jordan & Kotansky 1993; cf. also text and trans. at Lupu *NGSL* no.27 (cited at n.22 below).

and indeed how to conceptualise the phenomenon of religious pollution as a whole. Some sense of the difficulties involved here can be gained by comparing the very different treatments of this topic by MacDowell, Parker, and more recently Osborne. Of these, MacDowell's approach is the most specifically focused on legal problems, and is clearly articulated in the final chapter of his 1963 *Athenian Homicide Law*. It is based on a principle of differentiation between three possible motives for homicide legislation (vengeance or deterrence or cleansing from pollution), albeit the thrust of his argument (usually in response to claims by previous scholars that the obvious answer was "cleansing") is that in most cases the motive for particular regulations could be any one of the three.[9] Despite these uncertainties, however, there is in MacDowell's view little space for ambiguity: for instance, it is assumed as a datum that vengeance is necessarily an individual motive reflecting the anger of the deceased or of his family, but that pollution is something which necessarily affects the whole community.[10] The focus is very much on a search for the motives of the original legislators, rather than how the law could be persuasively presented to a fourth-century audience:[11] indeed, it is at one point suggested that since a legislator's thinking in such matters can be assumed to be consistent, the existence of provisions for which inconsistency of motives can be shown could potentially be used as a criterion to identify later additions to the legislation.[12] Those subsequent scholars who have studied pollution primarily from a legal perspective have generally followed MacDowell either in approach[13] or at least in

[9] For the three motives, see MacDowell (1963) at p.141. Aspects of homicide law which in his view could be any one of the three: death penalty for intentional homicide (p.141), exile as penalty for non-deliberate homicide (pp.141-142), court at Phreatto (p.142), justifiable homicide rules (p.143), obligation on family to prosecute (p.144). Aspects for which he sees two possible motives (vengeance as well as cleansing, p.145): religious jurisdiction of Basileus, homicide courts being held in the open air. Rules which he thinks can be safely attributed to one or other of his three motives: structuring of courts on principle of intent (deterrence, p.147), pardon by victim as irreversible commitment (vengeance, p.148), requirement for purificatory sacrifices by returning exile (cleansing, p.148). Rules which in MacDowell's view seem to ignore pollution: requirement for Basileus to carry out three *prodikasiai* (preliminary hearings) before bringing the case to trial, i.e. not to accept new cases in final three months of year (p.149), rules concerning *androlēpsia* (a form of extradition, p.149).

[10] MacDowell (1963), at pp.2-3 "it was necessary also to free the whole state from the pollution incurred by homicide", or at p.4 "The pollution affects the whole state and all who come into contact with the killer", albeit with some acknowledgment at p.3 (based on Ant., *Tetral*., 2.1.3) that "All citizens are polluted, but some are more polluted than others".

[11] Cf. for example the rule on holding homicide trials in the open air, discussed at n.37 below.

[12] MacDowell (1963): implausibility of internal contradiction in the work of a single legislator (p.149); hence "quite conceivable" that the purificatory sacrifice requirement for a returning exile is a later addition (p.150).

[13] E.g. the wide-ranging treatment by Arnaoutoglou, for whom the primary purpose of the law is vengeance and deterrence rather than cleansing (1993: e.g. p.131), though with some difference on points of detail.

overall conclusions,[14] though not universally.[15]

Whereas MacDowell's approach responds primarily to previous scholarship on the Athenian law of homicide, that of Parker (*Miasma,* 1983) focuses on pollution throughout the Greek world and represents a critical interaction with the work especially of the anthropologist Mary Douglas, for whom pollution regulations were fundamentally a way of imposing good order on "matter out of place".[16] Parker's tendency is to regard pollution as an incidental rather than an integral feature of Athenian homicide law,[17] but his conception allows for considerable nuancing. For instance, rather than treating pollution simply as a blanket threat to the community, he considers it also as something that may differentially affect e.g. close relatives, "more like going into mourning than catching a disease";[18] rather than the two being differentiated, he sees a close link between pollution and the victim's anger, "as just another way of expressing the same sense of disruption";[19] and rather than looking for a single explanation for each legislative provision, he emphases instead the ambivalence of terms like *katharos* (as meaning both "pure" and "not liable to punishment").[20]

By contrast, what deserves attention about the recent work of Osborne (2011) is that it does not so much interact with the "matter out of place" classificatory model of pollution proposed by Douglas and largely accepted by subsequent classical scholars, but instead seeks to construct an alternative model (taking account of anthropological criticisms of Douglas esp. by Valeri 2000) which stresses the function of publicity, i.e. that pollution combined with the requirement for purification may serve to bring

[14] E.g. Sealey (2006), focusing particularly on the problem of animal trials, with detailed analysis of mediaeval and early modern parallels, basing his discussion on the distinction drawn by von Amira (1891) between ecclesiastical sanctions against vermin for destroying crops (for which there seem to be no ancient parallels) and what the latter terms "secular" ("weltlich", von Amira 1891: e.g. 550) trials of domesticated animals for homicide.

[15] E.g. Harris (2013), who emphasises the distinctive and often religious elements of homicide procedure (unusual solemnity of oath imposed on witnesses as well as litigants, proclamation that accused must not enter sacred spaces, etc.), which he interprets as a function of balancing the interests of the state with those of the family, noting the uniqueness of homicide as a private procedure with criminal sanctions.

[16] For the phrase, itself taken from William James, see Douglas (1966), p.35, p.40, and esp. p.164. For the interaction with Douglas, see Parker (1983) esp. at pp.61-64, noting his view that her model works better for rites of passage such as death than as a general theory of pollution (Parker p.62: "not all pollutions can be seen as products of classificatory violations, and it is not clear that primitive societies are necessarily more disconcerted by classificatory anomalies than we are by, say, the ambiguous status of the tomato").

[17] Parker (1983) p.116: "a kind of shadowy spiritual *Doppelgänger* of the law.… Not just Draco's but all surviving homicide laws ignore it almost entirely."

[18] Parker (1983) pp.40-41, citing e.g. a provision in the Ioulis burial regulations limiting the number of relatives who are permitted to be defiled (*LSCG* no.97 face A lines 25-29).

[19] Parker (1983) p.121.

[20] Parker (1983), p.367, cf. p.114. Contrast the approach of Bonner & Smith (1930-38.ii: 206-207), who read the ambiguity here in terms of either/or.

problematic matters to public notice in areas where the law might find it difficult to intervene: e.g. in cases of homicide if there were no kin or if the kin were reluctant to prosecute, or as a means of publicising births and deaths in a society which lacked the bureaucratic apparatus to ensure official registration.[21] This is in some ways an attractive hypothesis, especially given the ease with which the new Selinous tablet appears to make available purification apparently for homicide without requiring a court hearing.[22] But I do have certain reservations, partly because Athens seems to make purification at least for involuntary homicide less readily available than at Selinous,[23] and partly because of a concern that Osborne may risk over-playing the claim that "because pollution may be incurred either voluntarily or involuntarily it carries in itself no judgment".[24]

[C] Homicide jurisdiction

Against the background of these methodological considerations, my first set of questions relates to an area of law that is not often considered when discussing homicide pollution, but which has in my view the potential to make useful contributions to the debate: that of jurisdiction, as a way of exploring how the Athenians thought about the relationship both between different types of homicide and between homicide and other types of religious offence.

Discussions of Athenian homicide law in sources from the fourth century onwards tend to place considerable emphasis on the division of labour between separate homicide courts, each of them responsible for different types of killing.[25] In this they differ significantly from our one earlier text, viz. the stele of 409/8 BC that (purportedly) re-inscribes the homicide law of Drakon from some two centuries earlier. For present purposes, what is most striking about the Drakon text is that it

[21] Osborne (2011), ch.6 "dirty bodies", esp. at p.177.

[22] Lupu *NGSL* no.27 face B, lines 1-7 (the reading of this as homicide purification depends on the interpretation of *autorhektas* at line 9), discussed by Osborne (2011), p.172.

[23] Purificatory sacrifices are certainly required on the part of an involuntary homicide returning to Athens from exile (Dem. 23.72), which could in itself be read as a requirement for publicity, i.e. advertising the fact of reconciliation between the involuntary killer and the family of the victim. But the implication of requiring such sacrifices at this stage is presumably that full purification would not have been available before his previous trial and exile, as it is on Osborne's reading (see n.22 above) of the Selinous text.

[24] Osborne (2011), p.180, seeking to distinguish between pollution and disgust.

[25] The earliest such passages are Dem. 23.65-79 (Areiopagos, Palladion, Delphinion, Prytaneion, Phreatto, continuing at 23.80-81 with a discussion of *apagōgē* as applied to homicide cases: given the discussion of Canevaro's work in §E of this paper, it is perhaps worth noting that this part of the speech does not contain any quoted texts) and *Ath.Pol.* 57.2b-4 (Areiopagos, Palladion, Delphinion, Phreatto, and evidently [though unnamed] Prytaneion). Later testimonia, which give a few extra details about jurisdiction (some of which are possibly reliable) and many additional mythological aetiologies, are collected, translated and discussed by Boegehold (1995: 126-150).

contains no reference (at least in the portions that can be read or reconstructed, which are probably enough to make the absence of such detail significant)[26] to the existence of multiple homicide courts,[27] though it does include language which may imply some of the doctrinal or conceptual distinctions familiar from later texts.[28]

Of the fourth-century texts, there is considerable overlap between Dem. 23.65-81 and *Ath.Pol.* 57.2b-4, but there are also some significant differences. The former text has of course a forensic purpose, in that Demosthenes is attacking the legality of a proposal to grant exceptional honours to the foreign mercenary commander Kharidemos, including a clause specifying that anybody who killed him would be *agōgimos* (subject to summary arrest, 23.11): it is therefore in Demosthenes' interest to maximise the range of proper homicide procedures that this proposal allegedly contravenes,[29] as well as emphasising the sanctity and unchanging antiquity of the homicide courts as illustrated above all by their mythological precedents.[30]

The *Ath.Pol.'s* version, by contrast, sets the whole account within its discussion of the responsibilities of the Basileus (57.1-4),[31] and emphasises much more clearly

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[26] The restorations by Stroud (1968) are based on comparison with [a] a text quoted in the manuscripts of Dem. 43.57 (albeit now athetised on stichometric grounds by Canevaro 2013: 30 n.63 [cf. §E of this paper]) which contains most of lines 13-23 of the inscription though with a different order of clauses, and [b] two texts quoted in the manuscripts of Dem. 23, at §37 and at §60, which contain lines 26-29 and lines 37-38 of the inscription respectively.

[27] Some scholars (e.g. Sealey 1983) have indeed argued that the Drakon text reflects a date at which all homicide cases were heard by the *ephetai* with no rôle for the Areiopagos and no differentiation between ephetic courts of the type envisaged by the fourth-century texts discussed below.

[28] E.g. the law focuses from the outset on one who has killed μὲ ’κ [π]ρονοί[α]ς (i.e. *mē ek pronoias,* "without forethought", line 11), and includes consideration also of one who has killed [β]ολεύσαντα (i.e. *bouleusanta*, "having instigated [a killing]", lines 11-12) and of one who has killed ἄκο[ν] (i.e. *akōn*, "unintentionally", line 17). There is also reference to a particular category of revenge killer being liable to the same penalties "as one who killed an Athenian" (line 28), which may imply that killers of non-Athenians are to be treated differently. (On this point, see further at n.50 below.)

[29] Hence perhaps his supplementary inclusion of an additional procedure that is not formally envisaged at the outset: at Dem. 23.63, he promises an account of how the proposal has breached ὁπόσοι νόμοι περὶ τῶν φονικῶν δικαστηρίων εἰσίν ("however many laws there are dealing with homicide courts"), which are specified as being five in number (ἐπὶ πέντε δικαστηρίοις, same §); at the end, however, he adds *apagōgē* for homicide (which nb is judged by an ordinary dikastic court) as a sixth numbered procedure, arguing that this too contains constitutional safeguards that are ignored by the proposal to honour Kharidemos (Dem. 23.80-81).

[30] So much so that he does not actually bother to specify which particular categories of homicide case are heard by the Areiopagos (Dem. 23.65-66), preferring to cite as mythological precedents Poseidon's case against Ares for the killing of his son Halirrhothios and Orestes' killing of his mother (both at Dem. 23.66); the latter myth promptly recurs in his account of the Delphinion (23.74).

[31] By contrast, the Basileus as an Athenian public official does not appear at all in Dem.

the distinction between his jurisdiction over cases of impiety or priesthoods (57.2a) and his jurisdiction over the whole range of *dikai phonou,*[32] which itself serves as an introduction to the list of homicide courts (57.3-4).[33]

It is worth here considering some of the details of these accounts, as they affect our topic of pollution. It hardly needs emphasising that all the responsibilities which *Ath.Pol.* attributes to the Basileus are religious,[34] but it is perhaps worth making explicit the contrast with family law, in which cases involving citizens were heard by the Arkhōn but those involving metics went to the court of the Polemarkh:[35] the fact that the Basileus had universal jurisdiction over both citizen and metic homicide victims – i.e. that the latter were not heard by the Polemarkh – suggests that in this respect, at least, the religious significance of homicide seems to take precedence over any distinctions based on the civic status of the victim.[36] Religion of course is a broader category than pollution, but details mentioned in *Ath.Pol.* which may be connected specifically with pollution include the statement at 57.4, which appears to relate only to homicide cases, that they take place "in a sanctuary and outdoors";[37] also the statement that the Basileus removes his garland

23 (the word *basileus* recurs repeatedly in this speech, but only with reference to Thracian dynasts).

[32] αἱ τοῦ φόνου δίκαι πᾶσαι: *Ath.Pol.,* 57.2b.

[33] A related set of problems which would merit further discussion than the space available in this paper is the question of how far the distinctive procedural elements (e.g. the special *diōmosia* oath imposed on witnesses as well as litigants, and the *exō tou pragmatos* rule restricting irrelevance, as well as the rules mentioned at n.37 and at n.39 below) were on the one hand general features of the Areiopagos, or on the other hand specific features of homicide trials (including the related category of *trauma ek pronoias* or "wounding with intent [sc. to kill]"). To the extent that they were specific, this could reinforce the argument of Harris (cf. n.15 above) for homicide being not just a distinctive but perhaps indeed a religiously distinctive area of law. A supporting argument – albeit one from silence – might be the absence of reference to the *diōmosia* in Lys. 7 (an impiety case), given its mention in Lys. 3.4 and Lys. 4.4 (both *trauma ek pronoias*); by contrast, the *exō tou pragmatos* rule is predicated of Areiopagos cases in Arist., *Rhet.,* 1.1.5 = 1354a23 (which should mean all Areiopagos cases, unless loosely worded), and there is a vague though very allusive hint at Lys. 7.41.

[34] Lipsius (1905-15.ii: 601) infers that the cases heard by homicide courts are being treated as a breach of divine as well as of human law.

[35] For a similar division of jurisdiction in other contexts, see Lys. 23.2-3, where a case (possibly for damages) is to be brought before the Polemarkh if the defendant is a metic and before sc. the Forty if he is a citizen.

[36] Thus Panagiotou (1974: 428). For the killing of non-citizens, see further n.52 below.

[37] *Ath.Pol.* 57.4: ἐν ἱερ[ῷ] καὶ ὑπαίθριοι. The sequence of thought is slightly confused (not least because of an uncertainty in the manuscript) because he appears to start §57.4 by saying that all these cases apart from the Areiopagos are judged by *ephetai,* but to end it by saying that cases sc. at the Prytaneion are not. The clause quoted in the text here comes immediately after the opening statement, which may mean that he is not thinking of the Areiopagos when he mentions sanctuaries, though Ant. 5.11 implies that the outdoor provision applies to homicide cases there as well. MacDowell (1963: 145) argues that the legislator's real motive

while presiding over such cases;[38] and that his previous proclamation (*prorrhēsis*) excluding the accused from sanctuaries, etc., is temporarily suspended for the day of the trial.[39]

One mildly puzzling feature of *Ath.Pol.'s* account is the way that he lists cases heard by the Areiopagos.[40] There is here a slight modification of the word-order of the law as quoted by Demosthenes, which may suggest a deliberate attempt by *Ath.Pol.* to enhance clarity,[41] partly by making explicit that the phrase about premeditation applies both to killing and to wounding, but also by changing the order of poisoning and arson. The oddity here – possibly an oddity in *Ath.Pol.'s* mind as well – is the inclusion of arson within a list of what are presented as homicide cases, unless what is

for holding such trials outdoors may be because sharing a roof is a sign of friendship (which is certainly one of the explanations proposed by Antiphon) rather than a risk of pollution, but it is worth noting that the latter is the orator's first explanation: οὐδενὸς ἄλλου ἕνεκα ἢ ἵνα τοῦτο μὲν οἱ δικασταὶ μὴ ἴωσιν εἰς τὸ αὐτὸ τοῖς μὴ καθαροῖς τὰς χεῖρας (trans. Gagarin "for the simple reason that the jurors won't be together with somebody with impure hands").

[38] For the suggestion that pollution is the explanation for this, see e.g. Rhodes (1981: 648). In addition to the evidence that he cites, it may be worth adding Lyk. 1.112 (where the *boulē* remove their garlands before lynching Lykidas/Kyrsilos: this could alternatively be because they are about to act in an unofficial capacity, but that seems less likely), and perhaps Aiskhin. 1.19 (if we posit a link between the reasons suggested for the ban on a former prostitute becoming Arkhōn [because this official wears a wreath: ὅτι οἶμαι στεφανηφόρος ἡ ἀρχή] and becoming a priest [because of impurity: ὡς οὐδὲ καθαρῷ τῷ σώματι]).

[39] *Ath.Pol.* 57.4: τὸν μὲν ἄλλον χρόνον εἴργεται τῶν ἱερῶν, καὶ οὐδ' εἰς τὴν ἀγορὰν ν[όμος] ἐμβαλεῖν αὐτῷ. τότε δ' εἰς τὸ ἱερὸν εἰσελθὼν ἀπολογεῖται. (Trans. Rhodes: "For the rest of the time the accused is excluded from the sanctuaries, and the law does not allow him to set foot in the Agora, but on this occasion he enters the sanctuary to make his defence.") On the basis that the Prytaneion is presumably a sanctuary, this would weaken the claim in Photios and the Souda (both s.v. *prodikasia*) that those awaiting trial for homicide were lodged there, though the suggestion of Phillips (2008: 75) that the safety of the killer pending trial might outweigh any risk of pollution is otherwise not unattractive. The religious significance of the exclusionary ban here ("kultische Reinheit") is discussed by Latte (1920: 61-62), albeit noting that a similar ban applies to women caught with an adulterer (Dem. 59.86). It is notable that the ban seems to apply only from the point where it is formally proclaimed by the Basileus: Arnaoutoglou (1993: 121, 129) sees the function more in terms of restricting the social interaction of the killer, but Mirhady (2008: 20) suggests in response that this may be the point at which "the assignation of the pollution to a single individual begins. Until then, the entire *polis* is tainted."

[40] *Ath.Pol.* 57.3: εἰσὶ δὲ φόν[ου] δίκαι καὶ τραύματος, ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ, ἐν Ἀρείῳ πάγῳ, καὶ φαρμάκων, ἐὰν ἀποκτείνῃ δούς, καὶ πυρκαϊᾶς· ταῦτα γὰρ ἡ βουλὴ μόνα δικάζει. (Trans. Rhodes: "The following are the suits for homicide and wounding. Trials are held at the Areopagus, when anyone intentionally kills or wounds; for poisoning, when anyone kills by this means; and for arson: these are the only charges tried by the council of the Areopagus.")

[41] Rhodes (1981: 641), quoting Dem. 23.24: τὴν βουλὴν δικάζειν φόνου καὶ τραύματος ἐκ προνοίας καὶ πυρκαϊᾶς καὶ φαρμάκων, ἐάν τις ἀποκτείνῃ δούς. (Trans. Vince: "the Council shall take cognizance of homicide, intentional wounding, arson, and poisoning, if a man kills another by giving him poison.")

being envisaged in the law is arson which causes death (but if so, there is no attempt to specify this, as there was with poisoning). It may be relevant here that although the etymology of *phonos* appears to denote hitting with an implement,[42] nevertheless there is evidence e.g. in Homer and other archaic poets for the word having already developed either an alternative or perhaps a secondary meaning of "blood when shed, gore".[43] On this basis, we could speculate that, presumably even in the time of Drakon, the terminology of [*dikē*] *phonou* would most naturally be thought to denote a case against a killer with blood on his hands,[44] such that it might seem desirable to specify the inclusion of other forms of killing in order to make clear that they too were actionable:[45] blood on the hands, however metaphorical or invisible,[46] is something that might be thought to require cleansing.[47]

Two final points about homicide jurisdiction seem relevant here,[48] since both relate to

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[42] E.g. Chantraine, *Dictionnaire Étymologique* (1999, ed.2), p.1221 s.v. *phonos*, with cross-ref. to p.425 s.v. *theinō:* "'frapper' … dit d'une arme qui abat l'adversaire, mais aussi d'un fouet, de coups de marteau, etc." Cf. Latte (1933, col. 278), who argues that the etymology implies external force and visible injuries.

[43] LSJ s.v. *phonos,* 4, citing e.g. *Iliad* 16.162 ἐρευγόμενοι φόνον αἵματος "[wolves] belching forth the gore of blood", *Iliad* 24.610 οἳ μὲν ἄρ᾽ ἐννῆμαρ κέατ᾽ ἐν φόνῳ ([of Niobe's slain children] "lay for nine days in their blood"), and Alcaeus fr. 153 Lobel καὶ Ἀλκαῖος ἐπὶ τῶν βελῶν τῆς Ἀρτέμιδος λέγει· † μὴ † φόνος κέχυται γυναίκων. (Trans. Campbell: "Alcaeus too talks of the shafts of Artemis: 'the blood of women has been shed'.") Cf. Frisk, *Etymologische Wörterbuch* (1960), vol.2 p.1035 s.v. *phonos*: "'Totschlag, Mord', poet. 'Blutvergießen, Mordblut'."

[44] I should perhaps emphasise here that I am not trying to suggest that a *dikē phonou* was restricted to cases where killing involved bloodshed, albeit there are some hints in Lys. 3.28 and Lys. 4.6 that one of the distinguishing factors of *trauma ek pronoias* may have been the use of a weapon such as broken pottery, which even if informal would have been capable of shedding blood (Todd 2007: 282-283); instead, my point is that the linguistic paradigm may have affected the Athenians' sense of the paradigm of homicide.

[45] Cf. e.g. the specification of one who has killed *bouleusanta* at *IG* i^3 104 lines 11-12, for which see n.28 above.

[46] Cf. perhaps Osborne (2011: 183) on the function of purification as making the fact of pollution visible.

[47] David Phillips draws attention in his response to the rule that a particular category of adulterer should be handed over in court to his opponent to treat as he wishes provided the latter does not use a an edged weapon (ἐπὶ δὲ τοῦ δικαστηρίου ἄνευ ἐγχειριδίου χρῆσθαι ὅ τι ἂν βουληθῇ, Dem. 59.66), which he plausibly interprets as being intended to prevent "the sacred space of the *dikastērion* [from being] defiled by blood" (Phillips, p.350 below).

[48] Space does not permit detailed discussion in this paper of the rules concerning justifiable homicide (tried in the Delphinion), but it may be worth briefly mentioning killings in wartime: MacDowell (1963: 147) is surely right to say that the use of the participle in the phrase ἐν πολέμῳ ἀγνοήσας (i.e. one who kills "in war without recognising", *Ath.Pol.* 57.3) must imply friendly fire (cf. Parker 1983: 67 for there being "no evidence that soldiers were ever polluted by the deaths of their colleagues"); but it is worth emphasising also that Athenians do not seem to have regarded the killing of an enemy in wartime as a source of pollution. Cf. Eck (2012: 72-73), who notes that occasional references to a Greek equivalent for the more common Roman ritual of *lustratio*

the seriousness of the offence, with possible implications for the seriousness of whatever pollution is associated with it. One is that scholars sometimes talk as if the distinction between Areiopagos cases and Palladion cases is based solely on the presence or absence of premeditation and/or intent,[49] but in fact the *Ath.Pol.* specifies also a distinction based on the status of the victim.[50] It is as if one were to say, borrowing the terminology of English law, that only a citizen can be murdered, and that even the deliberate killing of a non-citizen can never be more than manslaughter.[51] Given the structure of the courts, the inference would seem to be that the maximum penalty for the latter offence was exile rather than a death-sentence, and there is some direct evidence to this effect.[52] Harris has indeed argued that the extent of pollution will have varied depending on the extent of culpability:[53] such a reconstruction would imply that victims of lower status had less power to pollute.[54]

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exercitus (purification of the army) are always performed before campaign rather than afterwards; we may contrast William the Conqueror's foundation of Battle Abbey (1070-1094) apparently as penance for the deaths caused during his invasion of England, despite the fact that he had had papal sanction for the campaign.

[49] E.g. Thonissen (1875: 240), Adkins (1960: 99). There is continuing debate (summarised in Phillips 2013: 45-56) as to whether the distinction between premeditation and its absence (*ek pronoias/mē ek pronoias*) should be read as synonymous with the distinction between intentional and unintentional (*hekousios/akousios*), but all that needs to be noted here is that aspects of both terminologies are used at *Ath.Pol.* 57.3.

[50] Ath.*Pol. 57.3:* ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ, ἐν Ἀρείῳ πάγῳ ... τῶν δ' ἀκουσίων καὶ βουλεύσεως, κἂν οἰκέτην ἀποκτείνῃ τις ἢ μέτοικον ἢ ξένον, οἱ ἐπὶ Παλλαδίῳ. (Trans. Rhodes: "[trials are held] at the Areopagus, when anyone intentionally kills or wounds … For unintentional homicide, for planning homicide, and for killing a slave, metic or foreigner, the court at the Palladium is used.")

[51] Robin Osborne suggests to me that Athenians may have thought of everybody as belonging to two groups, one the community of which they are a citizen and the other the community in which they reside: on this hypothesis, even the deliberate killing of a non-citizen would require the Athenian court to act on behalf only of the group among which the victim resided, for which exile might seem a sufficient penalty, leaving it to the native community (if there was one) to exact further penalty if wished. In this context, it is worth noting the penalties imposed by fifth-century Athens for the killing of an Athenian in allied territory, and the assimilation of *proxenoi* to Athenians in the context of homicide.

[52] *Lex.Seg.* (*Dikōn onomata*) 194.11-12: Φονικόν· ἐὰν μέτοικόν τις ἀποκτείνῃ, φυγῆς μόνον κατεδικάζετο· ἐὰν μέντοι ἀστόν, θάνατος ἡ ζημία ("Pertaining to homicide: if someone kills a metic, he is condemned simply to exile; if however he kills a citizen, the penalty is death"), cited by Glotz (1904: 432 with n.2), Lipsius (1905-15.ii: 605 n.17), and Latte (1933: col. 288), with the latter noting that this is one of the more reliable lexicographers. For the hint at distinctions based on the victim's status as early as *IG* i^3 104 line 28, see n.28 above.

[53] Harris (2013: 20): "ineradicable" in the case of deliberate homicide; "that which could be removed by purification" in the case of unintentional homicide (he notes the timing of the purificatory sacrifices at Dem. 23.72, cf. n.23 above); "a way of expressing regret" in the case of a master who had killed his own slave, etc.

[54] Morris (1987: 192-193) has suggested the concept of pollution, and a "[hardening of] the boundaries between gods, men and the dead", as an explanation for the general abandonment

The second point is that there is little sign that particular categories of homicide were marked out procedurally as the subject of particular disgust. We do hear from Aiskhines of suicides being buried in a special way, with the hand cut off from the body,[55] and there is an odd reference in Plutarch which may also suggest special treatment for suicides but may refer to a later period.[56] But there is no clear evidence that killing of a master by his slave or of a father by his son was subject to special penalties:[57] a not always very reliable lexicographer does indeed claim that the rule permitting defendants before the Areiopagos to withdraw into voluntary exile after the first set of speeches did not apply to those who had killed their parents,[58] but even

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of intra-mural graves after 700 BC, with child graves being a significant exception to this rule (1987: 67, 184). Cf. R. L. Stevenson, *Treasure Island,* ch.32: "'Why, nobody minds Ben Gunn,' cried Merry [to the remaining pirates]; 'dead or alive, nobody minds him.' It was extraordinary how their spirits had returned and how the natural colour had revived in their faces."

[55] Aiskhin. 2.244 (ἐάν τις αὑτὸν διαχρήσηται, τὴν χεῖρα τὴν τοῦτο πράξασαν χωρὶς τοῦ σώματος θάπτομεν, trans. Adams: "when a man kills himself, the hand that did the deed is buried apart from the body"), glossed by Garland (1985: 98) as "a measure presumably adopted to render the spirit of the deceased harmless". It is however worth noting that Aiskhines' context links this regulation closely with the rules on casting out inanimate objects which have caused death, which may support the argument of Naiden (2015) that the hand here is being treated as an independent agent guilty of death.

[56] Plut., *Them*. 22.2: πλησίον δὲ τῆς οἰκίας κατεσκεύασεν ἐν Μελίτῃ τὸ ἱερόν, οὗ νῦν τὰ σώματα τῶν θανατουμένων οἱ δήμιοι προβάλλουσι καὶ τὰ ἱμάτια καὶ τοὺς βρόχους τῶν ἀπαγχομένων καὶ καθαιρεθέντων ἐκφέρουσιν. (Trans. Waterfield: "He built the shrine in Melite, near his house, on the site where nowadays the public executioners cast out the bodies of executed criminals and take the clothes and nooses of those who are strangled to death.") The implication of *nun* would seem to be significantly after Themistokles' own time (and possibly after it had ceased to be a sanctuary, unless there is something odd going on here about sanctuaries for transgressive acts); *apankhomai* could in principle be passive (i.e. execution victims, but hanging is not otherwise attested as a method of execution at Athens) or middle (i.e. suicide victims); it is not clear to me why clothes as well as nooses (but not specifically the corpses of those hanged, though the corpses of execution victims are specified) should receive this fate, unless the assumption is that clothing has been used as a makeshift noose and is therefore contaminated. For execution victims, see §D of this paper.

[57] Contrast the English feudal concept of Petty Treason, defined by the 1351 Statute of Treasons as occurring "when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience", with penalties based on those for High Treason rather than those for homicide, i.e. typically burning, since the most common cases were murders of husbands by wives (Lockwood 2013: 34). We do find special penalties prescribed in Plato, *Laws,* 9.872bc (flogging before execution for a slave who kills any citizen) and 9.872cd (execution, stoning of corpse at crossroads, and casting of body beyond the borders for the killer of any kinsman), but these seem to be Plato modifying rather than borrowing Athenian legal rules.

[58] Pollux, 8.117: μετὰ δὲ τὸν πρότερον λόγον ἐξῆν φυγεῖν, πλὴν εἴ τις γονέας ἀπεκτονώς, accepted by Lipsius (p.604 with n.13). For Pollux, see Dickey (2007: 96, "an epitome that has suffered interpolation as well as abridgment"), and Hansen (1976: 108, unreliable in matters

if true, this is a marginal departure from normal homicide procedures, and is a long way from the sack-in-the-Tiber rules for Roman parricides attested in Cicero.[59]

[D] Executions and executioners

My second set of questions is in one sense linked rather loosely to homicide, though in another sense it is the reverse side of the same coin. Any offence which in at least some circumstances carries the death penalty raises the question of who is going to carry it out, of how it is carried out, and of what is done with the body. What are the implications of this for pollution (and indeed for other related issues, such as blood-guilt)?

To take first the question of body-disposal: one of the things that I had been expecting, when I started to research the material for this paper, was that a person executed for homicide[60] would be denied burial within Attica. But in fact the evidence for such treatment refers overwhelmingly to other offences, namely treason and temple-robbery.

Of the references in our sources to denial of burial in Attica, a significant majority relates to those who are either described explicitly as traitors or else could be represented in those terms. For instance, we are told by Thucydides that it was illegal at Athens to repatriate and bury the bones of a dead traitor,[61] and we have several cases in which the language of treason is used explicitly, including sentences imposed on those convicted of this offence, such as Antiphon and Arkheptolemos following the fall of the first oligarchy in 411 BC.[62] Indeed, we are told by the later orator Lykourgos that an attempt presumably by oligarchic supporters to prosecute the assassins of Phrynikhos (another leader of the same oligarchic junta) had backfired so spectacularly that the restored democracy had resolved posthumously to put Phrynikhos himself on trial for treason, as a result of which his bones were dug up and cast out of Attica, with death and denial of burial being threatened also against anyone who might defend him in court.[63] It is presumably on the

of law unless independently confirmed).

[59] Cicero, *Pro Roscio Amerino*, 25-26.

[60] In practice this would mean the deliberate killer of an Athenian citizen, since the penalty for a non-deliberate killer or for the killer of a non-citizen would be exile, cf. at n.50 above.

[61] Thuc., 1.138 (οὐ γὰρ ἐξῆν [sc. ἐν τῇ Ἀττικῇ] θάπτειν ὡς ἐπὶ προδοσίᾳ φεύγοντος), explaining why Themistokles' relatives had had to do this in secret.

[62] [Plut.], *Lives of the Ten Orators, Antiphon,* 834ab (quoting the text of an inscription which may come from the collection by Krateros): convicted of treason (προδοσίας ὦφλον), with penalties for both defendants including execution (τοῖς ἕνδεκα παραδοθῆναι), confiscation of property with tithe paid to Athene (τὰ χρήματα δημόσια εἶναι καὶ τῆς θεοῦ τὸ ἐπιδέκατον), razing of house and erection of derogatory inscription (τὼ οἰκία κατασκάψαι αὐτῶν καὶ ὅρους θεῖναι <ἐπὶ> τοῖν οἰκοπέδοιν), denial of burial "at Athens or in territories which the Athenians rule" (μὴ ἐξεῖναι θάψαι Ἀρχεπτόλεμον καὶ Ἀντιφῶντα Ἀθήνησι, μηδ' ὅσης Ἀθηναῖοι κρατοῦσι – hardly a vast area of territory in 411), hereditary *atimia*.

[63] Lyk. 1.112-115, esp. at §113 τὸν μὲν νεκρὸν κρίνειν προδοσίας ... τά γε ὀστᾶ αὐτοῦ

basis of similar considerations that the death-sentence against Phokion included a clause specifying "that his body should be carried beyond the boundary and that no Athenian should light fire at his funeral".[64] Cases where the language of treason is not used explicitly but may be relevant by extension include the Charter of the Second Athenian Confederacy,[65] and perhaps also a couple of *eisangelia* speeches by Hypereides.[66]

A second offence for which denial of burial is clearly attested, at least in the provisions of a legal statute, is temple-robbery. Indeed, this is specifically linked with treason in Xenophon's account of the Arginousai trial, which presents the defence advocate Euryptolemos as proposing unsuccessfully that the defendants should be tried under the provisions either of the mysterious decree of Kannonos[67] or alternatively of "the following law, which applies to temple-robbers and traitors", and which specifies denial of burial in Attica as well as confiscation of property.[68]

It is by no means clear why a single law should cover both these offences, and there are to my knowledge no references to actual temple-robbers suffering this penalty at Athens (though we do hear occasional supporting statements elsewhere).[69] Certainly the penalty does not seem to apply in all cases of impiety, because Sokrates

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ἀνορύξαι καὶ ἐξορίσαι ἔξω τῆς Ἀττικῆς (sentence proposed when it was resolved posthumously to try him) and §115 τὰ τοῦ προδότου ὀστᾶ ἀνορύξαντες ἐκ τῆς Ἀττικῆς ἐξώρισαν (outcome of posthumous trial). There is however no suggestion that the body was brought into court, as in the posthumous trial of Pope Formosus in AD 897 (the so-called Cadaver Synod or Synod of the Corpse).

[64] Plut., *Phok*., 37.3: ἔδοξε καὶ τὸ σῶμα τοῦ Φωκίωνος ἐξορίσαι, καὶ μηδὲ πῦρ ἐναῦσαι μηδένα πρὸς τὴν ταφὴν Ἀθηναίων. For the charge of treason, see 34.4 (Polyperkhon's letter to Assembly): λέγοντος αὐτῷ μὲν ἐγνῶσθαι προδότας γεγονέναι τοὺς ἄνδρας, ἐκείνοις δὲ διδόναι τὴν κρίσιν, ἐλευθέροις τε δὴ καὶ αὐτονόμοις οὖσι.

[65] Rhodes-Osborne, no.22, lines 59-63: [ἐὰν] δὲ θανάτο τιμηθῆι, μὴ ταφήτω ἐν τῆ[ι Ἀττι]κῆι [μ]ηδὲ ἐν τῆι τῶν συμμάχων (penalty imposed on anybody who makes proposals that contravene the decree), perhaps on the premise that such proposals would constitute an act of treason.

[66] Hyp., *Lykophron* §20 ὑπὲρ τοῦ ἐξορισθῆναι καὶ ἀποθανόντα μηδὲ ἐν τῇ πατρίδι ταφῆναι; *Euxenippos* §18 μηδ' ἐν τῇ Ἀττικῇ δεῖ τεθάφθαι (cf. §14 for the death sentence): what unites both of these cases is the claim that the prosecution are using *eisangelia* for inappropriate matters (adultery in the *Lykophron*, having the wrong dream at *Euxenippos* §3), and there may be a suggestion that it is ridiculous for them to have presented the charge using the terminology of treason.

[67] Xen. *Hell.*, 1.7.20.

[68] Xen. *Hell.*, 1.7.22 (the death penalty is not specified but is implied by reference to burial): κατὰ τόνδε τὸν νόμον κρίνατε, ὅς ἐστιν ἐπὶ τοῖς ἱεροσύλοις καὶ προδόταις, ἐάν τις ἢ τὴν πόλιν προδιδῷ ἢ τὰ ἱερὰ κλέπτῃ, κριθέντα ἐν δικαστηρίῳ, ἂν καταγνωσθῇ, μὴ ταφῆναι ἐν τῇ Ἀττικῇ, τὰ δὲ χρήματα αὐτοῦ δημόσια εἶναι.

[69] E.g. Diod.Sic., 16.25.2: Lokrian refusal to return bodies from Philomelos' army on the grounds that "amongst all the Greeks there was a general law that temple-robbers should be cast forth without burial" (παρὰ πᾶσι τοῖς Ἕλλησι κοινὸς νόμος ἐστὶν ἀτάφους ῥίπτεσθαι τοὺς ἱεροσύλους).

assumes that his body will be returned to his family after death with no hint of any restriction on his obsequies.[70] There is however the famous counter-example of the Alkmaionid curse, where the original offence seems to be not so much the killing of Kylon's supporters but the fact that this was combined with the impiety of doing so in breach of sanctuary: we are told by Plutarch that this affair came to a head with a collective trial held a generation or so later at the instigation of Solon (it is unclear whether Plutarch envisages the defendants as being simply the original actors or as including also their descendants) at which those still alive were banished and those who were dead were dug up and cast out.[71]

The one text which does talk extensively – indeed obsessively – about refusal of burial as a penalty to be imposed on certain categories of homicide is Plato's *Laws,* which applies this penalty once to temple-robbers and once to atheists, but in the meantime attaches it to no fewer than five categories of killer (deliberate ones, murderers of kin, homicidal animals, inanimate killers, and unknown killers who subsequently become known), in contrast with one category for whom no such additional penalty applies (killer by planning) and two for whom there are additional penalties but not specified as this one (suicide, slave who kills citizen).[72] The use of Plato's *Laws*

[70] Plato, *Phaedo,* 115a. Other cases where the body was returned to the family include Polemarkhos (charge unspecified, though arguably treason against the oligarchic régime) at Lys. 12.18, though the Thirty are said to have deprived many other victims of burial (Lys. 12.21: πολλοὺς δ' ἀδίκως ἀποκτείναντες ἀτάφους ἐποίησαν). Aristophanes and Nikophemos are said to have been executed without trial, with nobody having a chance to see them after their arrest and the bodies not returned to their family (ἄκριτοι ἀπέθανον ... οὐδεὶς γὰρ οὐδ' εἶδεν ἐκείνους μετὰ τὴν σύλληψιν· οὐδὲ γὰρ θάψαι τὰ σώματ' αὐτῶν ἀπέδοσαν: Lys. 19.7), but it is not impossible that their execution took place on Cyprus.

[71] Plut., *Solon,* 12.1-4, speaks of Megakles and his supporters as ἐναγεῖς ("accursed"), and reports the trial and its outcome (Μύρωνος δὲ τοῦ Φλυέως κατηγοροῦντος ἐάλωσαν οἱ ἄνδρες, καὶ μετέστησαν οἱ ζῶντες, τῶν δ' ἀποθανόντων τοὺς νεκροὺς ἀνορύξαντες ἐξέρριψαν ὑπὲρ τοὺς ὅρους). By contrast, Thuc., 1.126.11-12, specifies that not only the killers but also their descendants were described as ἐναγεῖς καὶ ἀλιτήριοι τῆς θεοῦ ("accursed and transgressors against the goddess"), and speaks of several acts of exile and recall including at the time of Kleomenes the expulsion of the living (which by this date must mean descendants) and of the bones of the dead (τούς τε ζῶντας ἐλαύνοντες καὶ τῶν τεθνεώτων τὰ ὀστᾶ ἀνελόντες ἐξέβαλον), but without mention of a trial; he evidently regards it as conceivable that Perikles as a distant descendant could have been subjected to exile (1.127), but without any direct implication that the digging up of bones would affect dead descendants as well as dead perpetrators.

[72] Temple-robber: death plus ὑπὲρ τοὺς τῆς χώρας ὅρους ἀφανισθείς (Plato, *Laws*, 9.855a). Atheist: ἀποθανόντα δὲ ἔξω τῶν ὁρίων ἐκβάλλειν ἄταφον (10.909c). Deliberate killer: θανάτῳ ζημιούσθω καὶ μὴ ἐν τῇ τοῦ παθόντος χώρᾳ θαπτέσθω (871d). Murderer of kin: death plus stoning of corpse plus εἰς τὰ τῆς χώρας ὅρια φέροντες ἐκβαλλόντων τῷ νόμῳ ἄταφον (873c). Homicidal animal: death plus ἔξω τῶν ὅρων τῆς χώρας ἀποκτείναντας διορίσαι (873e). Inanimate killer: τὸ δὲ ὀφλὸν ἐξορίζειν (873e). Unknown killer who becomes known: death plus ἔξω τῆς τοῦ παθόντος χώρας ἐκβληθησόμενον ἄταφον (874b). By contrast, one who kills by planning can be buried at home (τῷ δὲ ὀφλόντι ταφῆς τῆς οἰκείας ἐξέστω τυχεῖν,

as evidence is problematic. Certainly we should not simply import his categories back into Athenian law, and hence it is dangerous to take this as evidence for the actual treatment of killers at Athens. That said, the reason why he chooses such categories might be revealing, either of distinctions with which he felt an Athenian audience might be familiar, or alternatively of distinctions that he thought they might find challenging (though the problem is that we cannot be sure which).

To my knowledge, there is only one non-Platonic passage which may imply denial of burial in some cases of homicide. This is where Demosthenes, having reported various attempts by Meidias to frame him either for refusing military service or alternatively for having been the plotter behind Aristarkhos' killing of Nikodemos, adds that such behaviour makes Meidias into Demosthenes' murderer (*autokheir*), on the basis that "had he succeeded in one of these plots, I would have been deprived of everything and would not even have been able to be buried at home."[73] Given the probability that the alleged charge would have been that of plotting the death of Nikodemos (i.e. presumably with a trial at the Palladion and a sentence of exile),[74] MacDowell reads this passage as evidence that "a person exiled for homicide could not be brought back to Athens for burial when he died";[75] this of course is not direct evidence that somebody executed by the Areiopagos for deliberate killing would be denied burial also, though it is not implausible that the body of a deliberate killer might have been felt to deserve a worse fate than that of a person exiled for homicide. But there are some puzzling things about this passage: the claim that Meidias' putative attempt to frame Demosthenes for murder makes Meidias himself into Demosthenes' murderer seems far-fetched if the sentence is indeed one of exile; and the phrase "at home" seems somewhat odd as a way of describing burial within Attica.[76]

872a); a slave who kills a citizen is flogged either to death or subsequently executed in sight of the grave but without specifying what is to be done with the murderer's corpse (872bc); and those who commit suicide without good cause get an unmarked grave on the internal borders but within Magnesian territory (ἐν τοῖς τῶν δώδεκα ὁρίοισι μερῶν τῶν ὅσα ἀργὰ καὶ ἀνώνυμα θάπτειν ἀκλεεῖς αὐτούς, μήτε στήλαις μήτε ὀνόμασι δηλοῦντας τοὺς τάφους, 873c).

[73] Details of plots at Dem. 21.103-105 (the names are from the hostile versions at Aiskhin. 1.171-172 and 2.148); quotation from Dem. 21.106: εἰ γὰρ ἓν ὧν ἐπεβούλευσε κατώρθωσεν, ἁπάντων ἂν ἀπεστερήμην ἐγὼ καὶ μηδὲ ταφῆναι προσυπῆρχεν οἴκοι μοι.

[74] See however the response by David Phillips, who explores (at pp.350-355 below) various possible ways in which the charge might have been liable to trial by the Areiopagos: if accepted, the passage could be read as evidence for denial of burial following execution at Athens, contrary to what is suggested below.

[75] Thus MacDowell (1990: 332), noting that it seems to be the only evidence for such a rule. Dem. 21.43 mentions "death, perpetual exile (*aeiphugia*) and confiscation" as penalties for premeditated homicide, but MacDowell (1990: 259) plausibly reads this as a formal sentence passed if the killer takes up the option to withdraw into exile after the first set of speeches (i.e. rather than the metaphorical fate of his body after execution).

[76] The nearest parallel would seem to be Plato, *Laws,* 872a (ταφῆς τῆς οἰκείας ἐξέστω τυχεῖν), cited at n.72 above. I have wondered whether Dem. 21.106 could be a deliberately

Given the tenuous nature of the evidence for denial of burial in cases of homicide, what are we to make of Aiskhines' claim that inanimate objects which caused death would be put on trial (sc. at the Prytaneion) and if convicted would be cast outside the boundaries of Attica?[77] One way of understanding this would be as an act of punishment, i.e. seeing it as modelled on the sentence of exile that is the penalty for a human convicted by the Palladion of non-deliberate killing: scholars who tend towards this explanation include Parker, who cites the parallel of mediaeval and early modern animal trials in societies which do not have a sense of blood-pollution.[78] This is not impossible, but there are I think two counter-arguments. One is that an explanation framed in terms of punishment might work better in the case of deaths caused by animals (precisely because animals have intentions) than those caused by inanimate objects,[79] whereas Aiskhines is

misleading reference back to the *antidosis* challenge at 21.78-80 (i.e. reading it as "not able to be buried on my family property"), but that seems a long way away. An alternative sequence of thought, suggested to me by Robin Osborne, is that Demosthenes is short-circuiting the possibility of cremation at the place of death with bones then brought back to Athens (as in the case of soldiers dying on campaign), and leaving his hearers to assume that a man who died in exile would in practice be interred abroad.

[77] Aiskhin. 3.244 εἰ τὰ μὲν ξύλα καὶ τοὺς λίθους καὶ τὸν σίδηρον, τὰ ἄφωνα καὶ τὰ ἀγνώμονα, ἐάν τῳ ἐμπεσόντα ἀποκτείνῃ, ὑπερορίζομεν. (Trans. Adams: "When sticks and stones and iron, voiceless and senseless things, fall on any one and kill him, we cast them beyond the borders.") Supporting statements in Pollux 8.120 τὸ ἐπὶ Πρυτανείῳ ... δικάζει δὲ καὶ περὶ τῶν ἀψύχων τῶν ἐμπεσόντων καὶ ἀποκτεινάντων. προειστήκεσαν δὲ τούτου τοῦ δικαστηρίου οἱ φυλοβασιλεῖς, οὓς ἔδει τὸ ἐμπεσὸν ἄψυχον ὑπερορίσαι ("The court at the Prytaneion … it also judges inanimate objects which have fallen on [a person] and killed him. The Phylobasileis preside over this court, and it is their task to cast out the fallen inanimate object."), and in Patmos scholion on Dem. 23.76 Ἐπὶ Πρυτανείῳ: ... ἐν τῷ αὐτῷ δὲ τούτῳ δικαστηρίῳ κἄν τι ἐμπεσὸν πατάξῃ τινὰ καὶ ἀνέλῃ τῶν ἀψύχων, δικάζεται τούτῳ καὶ ὑπερορίζεται ("At the Prytaneion … In this same court also, if any of the inanimate things strikes and kills anybody by falling on him, a trial is held for it (? in this [court]) and it is cast outside [the boundaries]").

[78] Parker (1983), pp.117-118. (For the parallel, cf. also n.14 above.) A similar view is taken by Arnaoutoglou (1993: 129-130): "the revenge for the dead person who was killed by an animal or by an inanimate object was taken at a symbolical level, by the punishment of the animal or object, as a form of retribution."

[79] There are admittedly contexts even today where people attribute certain characteristics of personhood to inanimate objects, particularly cars. (On this phenomenon, cf. Gell 1998: 18-19: "If, God forbid, my Toyota were to break down in the middle of the night, far from home, I should consider this an act of gross treachery for which I would hold the car personally and morally culpable, not myself or the garage mechanics who service it. Rationally, I know that such sentiments are somewhat bizarre, but I also know that 99% of car owners attribute personality to their cars in much the same way that I do, and that such imaginings contribute to a satisfactory *modus vivendi* in a world of mechanical devices.") But I am uncomfortable about the level of rationalisation entailed by MacDowell's comparison (1963: 89) of the Prytaneion to a coroner's court ("if someone was killed by an object, an animal, or an unknown person, it was desirable that the state

specifically talking about the latter; and although Plato proposes that animals which cause death should be cast outside the borders of Attica, this is not reliable evidence for a similar provision in Athenian law.[80] The second – though it would merit further investigation than is possible here, not least to cover a full range of literary genres – is that compounds in *-ḥorizō,* as used here by Aiskhines, seem more commonly to be applied at least in the Orators to the casting out of bodies rather than to the exile of living persons.[81]

The alternative, of course, would be to interpret the casting out of homicidal inanimate objects in religious terms, i.e. as an act of cleansing from pollution. The problem with this explanation is that (as we have seen) the category of offenders that we most often hear about in connection with denial of burial in Attica is not homicides but traitors, and although it is undoubtedly possible to represent treason as a religious offence (as is done most notably by Lykourgos),[82] it is a somewhat far-fetched argument. That said, the story of the Alkmaionid curse may provide evidence for a religious link (i.e. broader than just temple-robbers). It is possible, of course, that explanations might overlap.

The question of how Athens carried out death-sentences is one that I have discussed elsewhere;[83] so it is unnecessary for me to revisit that material in detail, but it is worth reiterating two points. The first of these relates to the nature of the evidence: what makes it difficult to draw firm conclusions about the relationship between available execution methods is that our sources characteristically use euphemisms, talking not of execution but of "the greatest of punishments" or of "handing over to the Eleven", etc.[84] The question arises, however, whether these euphemisms

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should take note of the manner of his death, and take any steps that were practicable to see that no one else died in the same way in future"): Aiskhines' language here is much more about attribution of blame than about accident prevention.

[80] Thus e.g. MacDowell (1963: 88): "here as elsewhere Plato's law may differ from Athenian law" – but even if not, the parallel here would be death and denial of burial rather than exile, because Plato specifies that the animal is to be killed and then cast out (*Laws* 873e, cf. text at n.72 above).

[81] *Exorizō* at Lyk. 1.112, 115 (text at n.63 above); Plut., *Phok.,* 37.3 (text at n.64 above); Hyp., *Lykophr.,* §20 (text at n.66 above); Plato, *Laws*, 873e (inanimate killer: text at n.72 above). *Diorizō* at Plato, *Laws*, 873e (homicidal animal: text at n.72 above). Naiden (2015: 89) translates ὑπερορίζομεν in Aiskhin's passage as "we exile", but this may be begging the question.

[82] Connor (1985: 92), on traitors as *alitērioi* at Lyk. 1.117, though cf. Martin (2009: 7-8) on the tendency of the Orators to use terms like *miaros* or *asebēs* as general terms of abuse, and the difficulty of determining the connotations in specific contexts. See also more generally Lyk. 1.97, 129, 147 for the religious significance of treason (depriving the gods of their cults, etc.).

[83] Todd (2000).

[84] Todd (2000: 36 n.22), citing e.g. Lys. 22.16 (δίκην τὴν μεγίστην), 28.17 (τὴν μεγίστην δίκην), Ant. 5.70 (παραδεδομένος ... τοῖς ἕνδεκα).

are motivated by social or by religious scruples. The second concerns a feature shared by the two methods of execution that are attested as being used during the period of the Orators, viz. the drinking of hemlock (as e.g. in Plato's account of the death of Sokrates) and *apotumpanismos* (analogous to crucifixion, but the body of the condemned appears to have been fastened to a plank by cramps rather than nails). It is notable that neither of these execution-methods involves direct bloodshed, and in neither of them does death result from the direct action of the executioner.[85] The difference in both respects between Athenian and Roman practice is so striking that it seems reasonable to posit as a motive either the avoidance of blood-guilt (i.e. on the part of agents of the Athenian state), or the avoidance of blood-feud, or a combination of both.

We do hear from an earlier period of "throwing into the *barathron*" (a sort of pit) as a method either of execution or possibly a place for disposing of the bodies of those executed.[86] The former interpretation would of course entail the direct causing of death, and there has been some discussion of whether it would entail leaving the corpse of the condemned exposed to the open air, and whether this would have implications for attitudes towards pollution. It is of course not necessarily the case that a body in the *barathron* (even if uncovered) is automatically polluting, because even on a "matter out of place" reading of pollution,[87] there could be the view that that is the proper place for him;[88] similarly, Parker has suggested that for traitors and temple-robbers, "one might even conclude that with their honour they lost the power to pollute".[89] It is of course possible that traitors are being conceptualised in the same way as enemies killed in wartime (noting that killing the enemy in war does not seem to pollute, cf. n.48 above), though such an explanation would not be so applicable to temple-robbers.

One other relevant feature about the practicalities of executions is that we hear very little in Athenian practice about the bodies of the condemned being kept on public view after death.[90] I have discussed elsewhere the possibility (though no more) that executions

[85] Hemlock is given to Sokrates to drink at any time he chooses during the night, while *apotumpanismos* seems to have placed the body in a position where death from exposure will supervene, rather than directly strangling. For the shedding of blood, contrast Roman executions by sword or by crucifixion (Todd 2000: 35 with n.17).

[86] No clear cases after the mid fifth century, though it is attested (possibly as an obsolete but not formally repealed penalty) in the context of Euryptolemos' proposal to deploy the decree of Kannonos (ref. at n.67 above).

[87] For which see at n.16 above.

[88] Cf. perhaps Visser (1996) at p.196: "removed from the city's sight by being pushed into a cleft in the earth" (the choice of the term "cleft" in place of the more usual translation "pit" for the *barathron* is an interesting if tendentious one).

[89] Parker (1983), at p.46.

[90] Contrast the 1750s-1830s English practice of gibbeting (i.e. leaving the corpse hanging in chains from the gibbet) for which see Gatrell (1994: 267-269), and the story of Crassus' execution of 6,000 slaves captured in the war against Spartacus (Appian, *Civil War*, 1.120):

by *apotumpanismos* may have taken place in public;[91] also a passage in Plato's *Republic* which speaks of Leontios son of Aglaion walking from Peiraieus along the outside of the north Long Wall and being simultaneously revolted and entranced by the sight of "bodies lying beside the executioner",[92] but it is not clear that the bodies here are on continuing display, as opposed to being in the process of disposal or even in the course of expiring.[93] It is only in Sophokles' *Antigone* that we have the body being displayed unburied in public and with guards being set to prevent burial; and although the *Widow of Ephesu*s story is set by Petronius in the context of a Greek city, the setting is explicitly under Roman rule, with the corpse that the soldier is required to guard being a crucifixion ordered by the Roman governor.[94]

In terms of personnel, it is here worth reiterating the point about avoidance of blood-guilt or avoidance of blood-feud. One of the things that is very striking about public order at Athens is the use of publicly-owned slaves, authorised at least on occasions to use force against citizens.[95] The use of public slaves by Athenian officials is of course widespread, with the slaves often carrying out jobs that are either technically skilled or physically unpleasant, and the officials making sure that such jobs are done (it is worth noting that officials will normally have no specialist experience, especially if appointed by lot).[96] In the case of the Skythian Archers, whose job was to maintain order, it has been suggested that the use of public slaves served to minimise situations in which ordinary citizens are manhandled by citizen officials, with all the risks e.g. of *stasis* or civil strife that that might entail.[97] But something similar applies with executions, where it is notable that the actual carrying out of the penalty

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the context of the latter may suggest a deliberate and unusual act of deterrence, but the guarding of crucified corpses as a routine act within Roman provinces is implied by the text quoted at n.94 below.

[91] We do have clear evidence for the prosecutor being allowed to watch (Dem. 23.69, cf. Aiskhin. 2.181-182), but, as noted in Todd (2000: 42, 48), there are reasons to be cautious about passages like Dem. 10.63 ("publicly execute by *apotumpanismos*") and about inferences from the public fate of Kēdestēs in Aristoph., *Thesmo.* (quite possibly a function of the plot).

[92] Plato, *Rep.,* 483e8-9: αἰσθόμενος νεκροὺς παρὰ τῷ δημίῳ κειμένους. Discussion in Todd (2000: 49 with n.64).

[93] By contrast, the story by Douris of Samos – which nb Plutarch disbelieves – of Perikles and the Samian trierarkhs refers to death being induced after ten days and followed by the casting out of the bodies without funeral rites (Douris ap. Plut., *Per.,* 28.2: ἐφ' ἡμέρας δέκα κακῶς ἤδη διακειμένους προσέταξεν ἀνελεῖν, ξύλοις τὰς κεφαλὰς συγκόψαντας, εἶτα προβαλεῖν ἀκήδευτα τὰ σώματα).

[94] Petronius, *Satyricon,* 111: *cum interim imperator provinciae latrones iussit crucibus affigi….*

[95] E.g. Aristoph., *Thesmo.,* 933-934 (instruction to use whip if anybody interferes with the execution of Kēdestēs).

[96] Technically skilled: e.g. the *dokimastēs* or public tester of silver coinage (Rhodes-Osborne, no.25), or the clerical duties alluded to at *Ath.Pol.* 47.5 and 48.1. Physically unpleasant: e.g. *Ath.Pol.* 50.2 (used by Astunomoi for collecting bodies of those who die in the streets, cf. n.103 below) and 54.1 (used by Hodopoioi for road-building).

[97] Thus e.g. Tordoff (2013: 13).

seems to be placed in the hands of public slaves, albeit acting under the instruction of public officials. Thus for instance the Eleven are present to remove Sokrates' chains on the morning of his execution, but it is their attendant who later provides the bowl of hemlock;[98] the execution of the Kēdestēs in *Thesmophoriazusae* is carried out on the instructions of the Prytanis but by the agency of the Archer;[99] and the executed corpses seen by Leontios are "lying beside the *dēmios* (public slave)".[100] It is not clear whether the motive for this is that being an executioner is a polluting task, or to avoid situations where the relatives of executed criminals feel under obligation to take out a contract on members of the Eleven (or a combination of both).

[E] Stray bodies

The final substantive section of this paper deals with what was described at the outset as "problematic deaths", i.e. those which are natural but happen in the wrong place, and specifically the problem of dealing with the bodies of those who drop dead on public land. My particular interest here is to explore the extent to which the terms of debate may need to be changed following Canevaro's recent athetisation of what had previously been seen as one of two key pieces of evidence.

The evidence that is unaffected is *Ath.Pol.* 50.2, which outlines the duties of the *Astunomoi* (City Magistrates) in Peiraieus and in Athens itself. Their responsibilities in this account cover aspects of social order (the price of hiring flute-girls), of hygiene (the activities of the *koprologoi* or "dung-collectors"),[101] alongside various building regulations (some of which are probably a matter of amenity while others may affect safety),[102] but conclude with the statement that "they pick up those who die in the streets, having public slaves [for the purpose]".[103]

A second and more detailed text – but nb this is the one athetised by Canevaro[104] – is quoted in the manuscript at Dem. 43.57-58. This begins with a set

[98] Plato, *Phaed., 59e6* "λύουσι γάρ," ἔφη, "οἱ ἕνδεκα Σωκράτη…" (the active verb "they are releasing" may at first sight seem surprising, given that the Eleven are presumably having their attendants remove his shackles, but the middle *luomai* tends to denote "ransom", which would have inappropriate connotations here); 116b8 ὁ τῶν ἕνδεκα ὑπηρέτης.

[99] Aristoph., *Thesmo.*, 923 (προσέρχεται γὰρ ὁ πρύτανις χὠ τοξότης), cf. 930-933.

[100] Text at n.92 above.

[101] On which see Owens (1983), arguing that these are private contractors rather than public slaves.

[102] Overhead drainpipes probably fall into the first category, but windows opening outwards (τὰς θυρίδας εἰς τὴν ὁδὸν ἀνοίγειν) may be the latter.

[103] *Ath.Pol.* 50.2: καὶ τοὺς ἐν ταῖς ὁδοῖς ἀπογιγνομένους ἀναιροῦσιν, ἔχοντες δημοσίους ὑπηρέτας.

[104] Canevaro (2013: 30 n.63) for the athetisation on stichometric grounds of the laws quoted at Dem. 43.57-58, and (2013: 329-330) for the argument that such non-stichometric texts "should not be used as evidence for the laws, decrees, and procedures that they allegedly preserve". It should be noted that such athetisation means that a quoted text is unlikely to have belonged to the early manuscript tradition: this does not necessarily preclude the possibility

of regulations that overlap substantially though not completely (and in a different order of clauses) with part of the Drakon homicide law, but then shifts suddenly into a set of regulations about those who die in the demes, when nobody collects them. The Demarkh is to give notice to those responsible that they must bury the body and purify the deme; if they fail to do so, he is to contract out the job and seek to recover the costs from them; there is repeated specification that the work is to be done on the same day, and at the lowest possible cost, and an explicit statement that purification of the deme is required at least if the relatives do not immediately collect the body. The text offers fairly detailed provisions to specify how those responsible are to be traced (the owner of a dead slave, or the person inheriting the property of the deceased, or the relatives of somebody who left no property), together with regulations specifying who is liable in case of non-fulfilment.[105]

Despite the athetisation, the second text does retain some value. In particular, the fact that it uses *tous apoginomenous* evidently to denote dead humans (cf. the details for tracing those responsible) may be taken to confirm the overwhelming likelihood that the word denotes humans in the *Ath.Pol.* passage also.[106] What the Dem. 43 text cannot any longer be used for (if the athetisation is accepted) is as independently reliable evidence for burial regulations, and the assumption of previous scholars that there is a responsibility on the Demarkh to contract for the burial of every person that dies in a deme.[107] So it would now be possible to argue for a position in which bodies which drop dead in built-up areas are the responsibility of the *Astunomoi* but that nobody is formally responsible for those who drop dead in the countryside.[108]

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that all or part of it was brought in late but is genuine (as is evidently the case with the first third of the text quoted at Dem. 43.57-58 [78 words out of 220], which can be restored with reasonable plausibility though a different order of clauses in the Drakon homicide inscription, cf. n.26 above); it does however leave a burden of proof on the deme burial regulations, which are not attested elsewhere, albeit the responsibilities laid on the Demarkh are not themselves implausible.

[105] Dem. 43 is not one of the speeches analysed by Canevaro for possible errors of legal understanding, and there is insufficient space here for detailed exploration of any oddities. It is notable that the Demarkh is liable to pay a fine to the state treasury (*dēmosion*) if he fails to contract for the burial of the body, in contrast e.g. to the Demotionidai decree (RO 5.91-92 and 5.100), where penalties are to be paid to Zeus Phratrios. But this may simply reflect the fact that the latter is for breach of the phratry's own membership rules, whereas the purported Dem. 43.58 law is about what the city requires of the Demarkh.

[106] To my knowledge, nobody has suggested that the *Ath.Pol.* passage includes dead animals also, for which we would I think have expected the inclusion of a neuter or a noun.

[107] This text has played an important part in discussions of burial regulations: e.g. Patterson (2006: 52 "one of the most important texts for the treatment of the dead in Athens"), using it e.g. against Morris as evidence for the responsibility to bury slaves; Osborne (2008: 54), etc.

[108] Aelian, *VH,* 5.14, claims that there was an Athenian law or custom (νόμος καὶ οὗτος Ἀττικός) that "anybody who came across an unburied body was obliged to cover it with earth, and to bury it facing west" (ὃς ἂν ἀτάφῳ περιτύχῃ σώματι ἀνθρώπου, πάντως ἐπιβάλλειν αὐτῷ γῆν, θάπτειν δὲ πρὸς δυσμὰς βλέποντας), but this is not the most independently reliable

We do, as it happens, have one entry in the accounts of the Eleusinian Treasurers for 329/8 specifying a payment made to a locally-based metic (Nikon, resident in Eleusis) for collecting a corpse (*nekus*) from the Rarian Field: it is presumably this sacred location that makes the matter into the special responsibility of the Eleusinian Treasurers, and we cannot be sure that a body on non-sacred land outside the built-up area would have been treated in an identical way, let alone who would have been responsible. But it is notable that the Treasurers' record continues with a payment to a second and city-based metic (Sotion, resident in Melite) for the price of a pig for cleansing the Rarian Field.[109]

Returning finally to *Ath. Pol.* 50.2: scholars have frequently interpreted regulations about the collection of bodies as being motivated primarily by considerations of hygiene.[110] But it is worth noting that human bodies are not simply left to the *koprologoi*; and (if we are right in reading *tous apoginomenous* as referring specifically to human bodies) there is no mention of the public slaves having to pick up dead animals, which would presumably be just as much a health hazard to the local community.

[F] (Preliminary) Conclusions

One of the aims of this paper has been to expand our understanding of the problem of death pollution by bringing together three sets of questions that are often considered separately. First, those relating to homicide jurisdiction (§C), particularly as an insight into how the Athenians conceptualised on the one hand the distinctiveness of homicide, and on the other hand the relative seriousness of different categories of homicide and their capacity to pollute. Secondly, those relating to executions (§D), both in terms of the rules on denial of burial and e.g. why we hear so little about this in contexts of homicide, and also in terms of the execution itself and its implications either for pollution or blood-guilt or even blood-feud. Thirdly and more briefly, those relating to the bodies of those who drop dead in a public place (§E), and the question of how widely there was a responsibility on public officials to deal with this, and how far such responsibility was restricted to human as opposed to animal deaths, with implications for pollution vis-à-vis hygiene.

A striking feature of this material, particularly but not only as it relates to homicide law, is the extent to which scholars disagree over what constitutes evidence for pollution. In part, this may be because, as Gagarin has remarked about another homicide debate,

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of authors.

[109] Clinton (2005-08), no.177, lines 181-182 (previously *IG* ii^2 1672.119-120). It is conceivable that the use of an Eleusis resident to remove the body implies greater urgency in the removal of the body than the subsequent purification involving a transaction with a resident of a city deme, but this may be to read too much into the text.

[110] E.g. Osborne (2008: 54), albeit primarily with reference to Dem. 43.57: "The pollution from which purification is required seems here to be very physical: rotting bodies are what the law is trying to avoid."

"the evidence is incomplete and difficult to evaluate (a common situation in the study of Athenian law)".[111] But there may in this case be more going on, and I have three suggestions that are intended as prompts to future work in this field.

In the first place, a lot depends on how far we see the study of Athenian law as being about the inferred intentions of the legislator (MacDowell's position, cf. at n.11 above) and how far we see it as being about ways in which the law could be presented and represented to a fourth-century audience (a view to which I would myself be more sympathetic); there is of course room for cross-fertilisation, as when talking about institutional structures.

A second consideration is the question of how far to look for single explanations for a given phenomenon, as opposed to multiple possibilities. This is often tied up with the question of what you are reacting against, and I suspect there may sometimes be a certain rhetorical sleight-of-hand here, e.g. in the way that MacDowell in particular moves from the proposition that many aspects of homicide law could reflect any one of three motives (revenge, deterrence, cleansing) to the proposition that the last of these plays only a peripheral rôle.

Thirdly, it is I think important for us as scholars to recognise where it is that we are each coming from. Harris, for instance, starts from the perspective (with seems to me important) that the institutions of Athenian homicide law were regarded as having uniquely religious solemnity, and reads many of the individual pieces of evidence in a very different way from MacDowell. Similarly, if you take as one of your focal points (as I have done) the question of how Athenians think about problematic deaths, then I suspect I would be inclined to see pollution in homicide law as being both more extensive but also less clear-cut than MacDowell does.

I would however end with one caution, that "religion" and "pollution" are not identical terms. In one sense this is so obvious as to go without saying, because the former is obviously a much broader category than the latter. But one of the things that struck me during the course of background reading for this paper was a book on status-tensions between members of trade-guilds and holders of degraded professions (including executioners) in sixteenth-century Augsburg: what seemed most interesting here is that there was a clear sense of contamination or contagion that arguably justifies the use of "defilement" and "pollution" in the book's title – but the terminology being used was that of *Unehrlichkeit* (absence of honour) rather than *Unreinheit* (uncleanness). This may be significant when evaluating some aspects of the material covered in this paper, for instance the attitude towards executions and executioners.[112]

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[111] Gagarin (1979: 301).

[112] An obvious direction in which to develop the comparative aspect of this paper would be the question of Indian Dalits (formerly "untouchables"): the link between some Dalit castes and hereditary occupations that are perceived as polluting is noted by Mendelsohn & Vicziany (1998: 7-8), but also the limitations of such an explanation.

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NOTES ON POLLUTION AND JURISDICTION IN ATHENIAN HOMICIDE LAW. RESPONSE TO STEPHEN TODD

To begin with, I would like to thank Professor Todd for drawing my attention to something I had always rather simplistically taken for granted; namely, the pollution occasioned by homicide (and, in this case, other unnatural or otherwise problematic death).[1] In his paper, Professor Todd raises a number of interesting questions and makes some important observations. In the comments that follow, I shall discuss some aspects of pollution where additional evidence supports Todd's argument, and some others where he and I may disagree.

1. On φόνος as physical, shed blood, which might necessitate cleansing (ritual or otherwise), and the temporary partial suspension of the *basileus*' proclamation (πρόρρησις: Ant. 5.88, 6.6, 34-36, 46) barring the accused killer from the places specified by law (including the lawcourts, purification by water, libations, mixing-bowls, sanctuaries, and the agora: Ant. 6.34-36; Dem. 20.158; cf. *infra* with n. 45)[2] on the day of his trial,[3] it is worth comparing the rule prohibiting the use of an edged weapon

[1] See the summary discussion in Phillips (2008) 62-63.

[2] On the injunction to the accused "to keep away from the places/things specified by law" (εἴργεσθαι τῶν νομίμων), cf. Ant. 3 α 2, 3 γ 11; [Arist.] *Ath. Pol.* 57.2; *Lex. Seg.* (*Lex. Rhet.*) p. 310 Bekker; Pollux 8.90 adds mysteries to the list of proscribed locations.

[3] It is worth observing that even though the ban is temporarily lifted with regard to the court where the *dikê phonou* takes place, the chances and severity of transmission are minimized by the homicide courts' locations in the open air rather than in roofed buildings,

(ἄνευ ἐγχειριδίου) by the victorious defendant in a *graphê adikôs heirchthênai hôs moichon* (for wrongfully having been detained as a seducer), who is otherwise empowered, "in the court, to do with [his vanquished prosecutor] whatever he wishes..., since he is a seducer" (ἐπὶ δὲ τοῦ δικαστηρίου ἄνευ ἐγχειριδίου χρῆσθαι ὅ τι ἂν βουληθῇ, ὡς μοιχῷ ὄντι, [Dem.] 59.66). Why may the vindicated defendant use a blunt instrument but not an edged weapon? Because the latter automatically entails that the sacred space of the *dikastêrion* will be defiled by blood, whereas the former does not.[4]

2. With regard to the killing of Nicodemus,[5] Todd notes the apparent inconcinnity between Demosthenes' hypothetical trial for *bouleusis* of intentional homicide at the Palladion and the denial of burial in Attica (*ataphia*) that would have capped his sentence of exile upon conviction, given that, as MacDowell observes, we have no other evidence for a bar on the repatriation of an exiled killer's corpse.[6] If this reconstruction is correct, do we then need to extrapolate a similar ban in the case of *autocheir* (own-hand) intentional killers of citizens? Would they too be denied burial in Attica following execution, or if they died in exile having absconded from trial and thus been sentenced to death *in absentia*?

On the assumption that Demosthenes is not simply exaggerating when he claims that "even if Meidias had succeeded in just one of his plots against me, I would have been robbed of all I had, and on top of that, I would not even have the right to be buried at home,"[7] there are two alternative reconstructions of the case, each of which

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and probably by the *basileus*' removal of his crown before presiding (Ant. 5.11; [Arist.] *Ath. Pol.* 57.4), which may reflect the desire to avoid pollution of the sacred (Parker (1996) 122 with n. 67, 159 n. 85; Rhodes (1993) 648). Cf. Aeschin. 1.19: 'ἐάν τις Ἀθηναίων,' φησίν, 'ἑταιρήσῃ, μὴ ἐξέστω αὐτῷ τῶν ἐννέα ἀρχόντων γενέσθαι' (ὅτι, οἶμαι, στεφανηφόρος ἡ ἀρχή) 'μηδ' ἱερωσύνην ἱερώσασθαι...' "'If any Athenian, [the lawgiver] says, 'prostitutes himself, he shall not be permitted to become one of the nine archons' (because, I suppose, it is a crown-wearing office) 'nor discharge a priesthood...,'" with Meinel (2015) 175; Dem. 21.16 on the sacrality of the gold festival crowns destroyed by Meidias.

[4] Phillips (forthcoming); cf. Harris (1990) 374; Cohen (1991) 115-18; Kapparis (1995) 114-15; Kapparis (1996); Kapparis (1999) 302, 309; Schmitz (1997) 76; Allen (2000) 214; Forsdyke (2008) 18-19. For the sacrality of the *dikastêria*, note their common (if not universal) location in (or adjacent to) the agora (Boegehold (1995) 151 with references to the sources), which was marked off by *horoi* (Agora inv. nos. I 5510, I 5675, I 3226, I 7039) and *perirrhanteria* (Aeschin. 3.176) as a sacred space (Wycherley (1957) 218; Thompson – Wycherley (1972) 117-19; Wycherley (1978) 33, 62; Camp (1986) 48-52; Parker (1996) 19, 153) and was forbidden to accused killers (cf. Dem. 23.80; Dem. 24.60 applies the ban to οἱ μὴ καθαρὰς τὰς χεῖρας ἔχοντες, "those with unclean hands"), along with the *dikastêria* themselves (*supra* with n. 2; see especially Ant. 6.34-36). The wearing of crowns by presiding officials in the *dikastêria* (Dem. 21.32-33 with MacDowell (1990) 240-41, 250-52; cf. n. 3 *supra*) likely had similar significance.

[5] This probably occurred in 348/7, the year before Demosthenes composed the *Against Meidias*: MacDowell (1990) 9.

[6] MacDowell (1990) 332-33.

[7] Dem. 21.106: εἰ γὰρ ἓν ὧν ἐπεβούλευσε κατώρθωσεν, ἁπάντων ἂν ἀπεστερήμην ἐγὼ καὶ μηδὲ ταφῆναι προσυπῆρχεν οἴκοι μοι.

places Demosthenes' hypothetical trial at the Areopagus, rather than the Palladion, and results in *ataphia* attaching to killers who have been sentenced to death, not exile.

(*a*) In introducing the episode, Demosthenes speaks of Meidias as urging the relatives of the decedent, Nicodemus of the deme Aphidna,[8] to prosecute him as Nicodemus' killer *in lieu of* Aristarchus son of Moschus,[9] who was eventually charged and fled into exile.[10] In this situation, Demosthenes would have been prosecuted for killing with his own hand, not for *bouleusis*; and since Nicodemus was an Athenian citizen, trial will have been held at the Areopagus, with a penalty of death upon conviction (including if Demosthenes absconded from justice after the manner of Aristarchus).[11]

(*b*) Most, but not all,[12] (approximately) contemporary sources use language indicating that the charge would have been *bouleusis* of intentional homicide.[13] And

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[8] *PA* 10868; not named by Demosthenes, but see schol. Dem. 21.104 (364 Dilts); Aeschin. 1.171-72 with schol. 339, 344, 345 Dilts; 2.148, 166 with schol. 363-365 Dilts; Din. 1.30, 47.

[9] So MacDowell (1990) 329-30.

[10] Dem. 21.104: after Aristarchus was accused of the killing, τὸ μὲν πρῶτον...κατὰ τὴν ἀγορὰν περιιὼν ἀσεβεῖς καὶ δεινοὺς λόγους ἐτόλμα περὶ ἐμοῦ λέγειν, ὡς ἐγὼ τὸ πρᾶγμ' εἰμὶ τοῦτο δεδρακώς· ὡς δ' οὐδὲν ἤνυεν τούτοις, προσελθὼν τοῖς ἐπ' ἐκεῖνον ἄγουσιν τὴν αἰτίαν τοῦ φόνου, τοῖς τοῦ τετελευτηκότος οἰκείοις, χρήμαθ' ὑπισχνεῖτο δώσειν εἰ τοῦ πράγματος αἰτιῷντο ἐμέ ("first [Meidias] went around the agora and had the gall to say impious and terrible things about me; namely, that I was the one who had perpetrated the deed. Then, when he had no success with that, he approached the people who were bringing the accusation of homicide against [Aristarchus] – the relatives of the decedent – and he promised to pay them money if they accused me of the deed"). At the end of the episode (Dem. 21.122), Demosthenes uses language that may imply a hypothetical joint trial of himself and Aristarchus: Meidias simultaneously maliciously accused Aristarchus and asked Aristarchus to bring about a settlement between himself and Demosthenes; καὶ ταῦτ' ἔπραττεν καὶ χρήματ' ἀνήλισκεν ἐπὶ τῷ μετ' ἐκείνου κἀμὲ προσεκβαλεῖν ἀδίκως ("and at the same time [Meidias] was doing this, he was spending money to get me expelled along with [Aristarchus], in violation of justice").

[11] Note also the allusion to *apotympanismos* at Dem. 21.105 (*infra*, n. 25) and the reference to Meidias as Demosthenes' *autocheir* (αὐτόχειρά μου, Dem. 21.106) – which, though the orator has Meidias use the same word of Aristarchus at §§116 and 119, should not be pressed too far.

[12] Aeschin. 2.148: Νικόδημον τὸν Ἀφιδναῖον...ὃν ὕστερον μετὰ Ἀριστάρχου συναπέκτεινας ("Nicodemus of Aphidna, whom later you killed in cooperation with Aristarchus").

[13] Aeschin. 1.172: τοιούτων εἰσηγητὴς αὐτῷ καὶ διδάσκαλος ἔργων ἐγένετο, ἐξ ὧν ἐκεῖνος μὲν φεύγει τὴν πατρίδα..., Νικόδημος δ' ὁ Ἀφιδναῖος ὑπ' Ἀριστάρχου τετελεύτηκε βιαίῳ θανάτῳ, ἐκκοπεὶς ὁ δείλαιος ἀμφοτέρους τοὺς ὀφθαλμοὺς καὶ τὴν γλώτταν ἀποτμηθεὶς ᾗ ἐπαρρησιάζετο πιστεύων τοῖς νόμοις καὶ ὑμῖν ("[Demosthenes] was [Aristarchus'] initiator and instructor in deeds of the sort that resulted in [Aristarchus'] being an exile from his homeland...while Nicodemus of Aphidna is dead at the hands of Aristarchus, having died a violent death, with both of his eyes gouged out, the poor wretch, and his tongue cut out, with which he used to speak freely, trusting in the laws and in you"). Din. 1.47: Demosthenes "in private gave Aristarchus frightful and unlawful counsels" (ἰδίᾳ δὲ συμβεβουλευκὼς Ἀριστάρχῳ δεινὰς καὶ παρανόμους συμβουλάς). Din. 1.30, οὐκ εἰς μὲν τὴν Ἀριστάρχου οἰκίαν εἰσελθών, βουλεύσας μετ' ἐκείνου τὸν Νικοδήμῳ θάνατον κατασκευασθέντα, ὃν ἴστε

the *Ath. Pol.* (almost) unequivocally assigns all cases of *bouleusis* to the Palladion court.[14] Yet according to Harpocration, the *Ath. Pol.*, while supported by Isaeus, is contradicted by Deinarchus, who identifies the Areopagus as the venue for *bouleusis* cases.[15] While *in vacuo* I would certainly take the combination of Isaeus and the *Ath. Pol.* over Deinarchus, in this instance I believe that the author of the *Ath. Pol.* made a

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πάντες, ἐξέβαλε τὸν Ἀρίσταρχον ἐπὶ ταῖς αἰσχίσταις αἰτίαις; ("Didn't [Demosthenes] enter the house of Aristarchus, plot with him the death of Nicodemus – which was thoroughly planned out, as you all know – and then expel Aristarchus on the most shameful charges?"), shades toward an allegation of *bouleusis* but is not incompatible with *autocheir* killing.

Among later sources that address the issue, Idomeneus, *FGrHist* 338 F 12 (early third century B.C.; *ap.* Athenaeus 592f), Demosthenes lacked all self-control in matters erotic: Ἀριστάρχου γοῦν τινος ἐρασθεὶς μειρακίου καὶ δι' αὐτὸ παροινήσας εἰς Νικόδημον ἐξέκοψεν αὐτοῦ τοὺς ὀφθαλμούς ("in one instance, he conceived a desire for a youth named Aristarchus, and for that reason committed a drunken assault upon Nicodemus and gouged out his eyes"), is so confused as to merit no credence, unless it represents an alternative theory of the crime propounded by Meidias. The relevant scholia support an accusation of *bouleusis*. Schol. Dem. 21.104 (364 Dilts): ὑπωπτεύθη ὡς πείσας νέον ὄντα τὸν Ἀρίσταρχον ἐπιθέσθαι τῷ Νικοδήμῳ καὶ διαφθεῖραι ("[Demosthenes] was suspected of having persuaded the youthful Aristarchus to attack Nicodemus and kill him"). Schol. Aeschin. 2.166 (363 Dilts, *ad* ταύτην [*scil.* τὴν οἰκίαν τὴν Ἀριστάρχου τοῦ Μόσχου] ἀπώλεσας): δηλονότι ὡς διδάσκαλος 'ταύτην ἀπώλεσας' διὰ τοῦ αὐτόν, τὸν Ἀρίσταρχον, ἀναπεῖσαι φονεῦσαι τὸν Νικόδημον καὶ διὰ τοῦτο φεύγειν ("i.e., as [Aristarchus'] instructor "you destroyed it," by persuading him, Aristarchus, to kill Nicodemus and go into exile on that account"). Schol. Aeschin. 1.171 (339 Dilts), δύο δὲ φόνους ἔδρασεν ὁ Ἀρίσταρχος, πρότερον μὲν Νικόδημον, αὖθις δὲ Εὔβουλον ἀνελών ("Aristarchus perpetrated two killings, first getting rid of Nicodemus, then of Eubulus"), and schol. Aeschin. 1.172 (344 Dilts, *ad* φεύγει τὴν πατρίδα), καθὸ ἐφόνευσε τὸν Νικόδημον ("because he had killed Nicodemus"), both speak of Aristarchus as the sole (*autocheir*) killer.

[14] [Arist.] *Ath. Pol.* 57.3: Εἰσὶ δὲ φόν[ο]υ δίκαι καὶ τραύματος, ἂν μὲν ἐκ προνοίας ἀποκτείνῃ ἢ τρώσῃ, ἐν Ἀρείῳ πάγῳ, καὶ φαρμάκων, ἐὰν ἀποκτείνῃ δούς, καὶ πυρκαιᾶς· [τ]αῦτα γὰρ ἡ βουλὴ μόνα δικάζει· τῶν δ' ἀκουσίων καὶ βουλεύσεως κἂν οἰκέτην ἀποκτείνῃ τις ἢ μέτοικον ἢ ξένον, οἱ ἐπὶ Πα[λ]λαδίῳ... ("Trials for homicide and wounding, if someone kills or wounds with intent, occur on the Areopagus; also for poisoning, if he kills by giving poison, and for arson. These are the only lawsuits the Council judges. For unintentional homicides and conspiracy, and if a person kills a slave, metic, or foreigner, the court at the Palladion [tries the lawsuit]"). For a review of the ingenious yet unconvincing efforts of Lipsius and Wilamowitz to circumvent the plain meaning of καὶ βουλεύσεως, see MacDowell (1963) 65-66, followed by Rhodes (1993) 642-44; *contra* Gagarin (1990) 85-87; Carawan (1998) 115, 116 n. 54.

[15] Harpo. s.v. βουλεύσεως (followed closely by *Suda* s.v. βουλεύσεως, β 429 Adler): ἐγκλήματος ὄνομα ἐπὶ δυοῖν ταττόμενον πραγμάτοιν· τὸ μὲν γάρ ἐστιν ὅταν ἐξ ἐπιβουλῆς τίς τινι κατασκευάσῃ θάνατον, ἐάν τε ἀποθάνῃ ὁ ἐπιβουλευθεὶς ἐάν τε μή...τοῦ μὲν οὖν προτέρου μάρτυς Ἰσαῖος ἐν τῷ Πρὸς Εὐκλείδην, ἐπὶ Παλλαδίῳ λέγων εἶναι τὰς δίκας, Δείναρχος δὲ ἐν τῷ Κατὰ Πιστίου ἐν Ἀρείῳ πάγῳ. Ἀριστοτέλης δ' ἐν τῇ Ἀθηναίων πολιτείᾳ τῷ Ἰσαίῳ συμφωνεῖ ("the name of a charge assigned to two actions. One is when a person contrives the death of another by plotting, whether the victim of the plot dies or not...Testimony for [this] first [type of *bouleusis*] is provided by Isaeus in the *Against Eucleides* [fr. 62 Baiter-Sauppe], who says that trials occur at the Palladion, and by Deinarchus in the *Against Pistias* [fr. XV.2 Conomis], [who says that they occur] on the Areopagus. Aristotle in the *Constitution of the Athenians* agrees with Isaeus").

mistake, something to which he was not immune.[16] For we have additional evidence that suggests (but does not prove) that lawsuits for *bouleusis* of intentional killing, like those for intentional own-hand killing, were tried by the Areopagus. From Draco[17] to Andocides,[18] we find no derivation from the rule that the conspirator and the *autocheir* killer receive equal treatment under the law. Among the possible instances of Areopagite jurisdiction over *bouleusis hekousiou phonou*,[19] the most likely (apart from Antiphon 1)[20] is the case of the father of the priestess of Artemis Brauronia, whom "the Council of the Areopagus expelled, although by all accounts he did not touch the man who died, because he urged the man who hit him to hit him" (τὸν γοῦν τῆς Βραυρωνόθεν ἱερείας πατέρα ὁμολογουμένως οὐχ ἁψάμενον τοῦ τελευτήσαντος, ὅτι τῷ πατάξαντι τύπτειν παρεκελεύσατο, ἐξέβαλεν ἡ βουλὴ ἡ ἐξ Ἀρείου πάγου, Dem. 54.25). To the arguments I made in 2007[21] in favor of identifying this as a case of *bouleusis* of intentional homicide in which the defendant fled into voluntary exile,[22]

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[16] E.g. (leaving aside the Draconian constitution, *Ath. Pol.* 4), Solon did not mint coins (10); the chronology of Peisistratus is confused and internally inconsistent (15-17); the author's characterization of the anti-tyranny law at 16.10 as "mild" seems to result from a misunderstanding of ἄτιμον as "disfranchised" rather than "outlawed"; Themistocles was ostracized in the late 470s, then banished from Attica for treason *ca*. 471/70, and never returned (at least while alive: Thuc. 1.138.6); therefore, he cannot have cooperated in Ephialtes' attacks on the Areopagus in 462/1 (25.3-4); it is not the case that all ten generals of 406/5 were recalled after the battle of Arginusae and condemned (34.1). Nor can all these (and other) errors be dismissed as later additions to the text. "The *Athenian Constitution* is not a masterpiece; its author was an average student" (Rhodes (1984) 33).

[17] *IG* I^3 104.11-13: δ]ικάζεν δὲ τὸς βασιλέας αἴτιο[ν] φόν[ο] ἓ...17...ἓ [β]ολεύσαντα, "the kings shall judge him guilty of homicide whether he [killed with his own hand] or conspired to kill." "Killed with his own hand" is the sense of the lacuna according to most editorial conjectures. See, *inter alios*, Wolff (1946) 73; Ruschenbusch (1966) F 5a (cf. now Leão – Rhodes (2015) fr. 5a with translation and commentary); Gagarin (1981) xiv-xv; Phillips (2008) 41 with n. 25; Pepe (2012) 11-13.

[18] Andoc. 1.94: καὶ οὗτος ὁ νόμος καὶ πρότερον ἦν <καὶ> ὡς καλῶς ἔχων καὶ νῦν ἔστι καὶ χρῆσθε αὐτῷ· τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον, "And this law was in existence in the past and also exists now, because it is a good law, and you use it: it states that the plotter shall bear the same liability as the person who acts with his own hand."

[19] For others, and for an excellent and even-handed treatment of the jurisdictional debate (with a conclusion opposite mine), see MacDowell (1963) 64-69. Among those who support Areopagite jurisdiction are Grace (1973) 23; Gagarin (1990) 90, 97-98; Carawan (1998) 116.

[20] On this identification of the procedure, see, e.g., Grace (1973) 23; *contra*, e.g., Gernet (1923) 34. Note, *inter alia*, Ant. 1.22: the jurors are βοηθοὶ...τῶν ἐκ προνοίας ἀποθνῃσκόντων. That Antiphon has his client address the jury as δικασταί (§23) poses no obstacle: if Aeschylus (*Eum*. 81, 483, 684, 743) can call the Areopagites δικασταί, so can Antiphon.

[21] Phillips (2007) 92.

[22] As opposed to the defendant's having been convicted of *bouleusis hekousiou phonou* and sentenced to exile (e.g., Sandys – Paley (1910) 210-11) or having been convicted of intentional wounding (τραῦμα ἐκ προνοίας, also under Areopagite jurisdiction) and sentenced to exile (MacDowell (1963) 67-68) or having been put on trial for *autocheir* intentional killing and having fled into voluntary exile (Carey – Reid (1985) 92-93).

I would add two points. First, the context requires that this case, cited by the speaker Ariston as precedent for his hypothetical death at the hands of Conon et al., have to do with homicide: note the use of γοῦν "in part proof"[23] of what precedes; *viz.*, καὶ μὴν εἰ παθεῖν τί μοι συνέβη, φόνου καὶ τῶν δεινοτάτων ἂν ἦν ὑπόδικος ("And in fact, if by chance something had happened to me [i.e., 'if I had died'], [Conon] would have been liable for homicide and the most fearsome charges"). Second, the objection that ἐξέβαλεν, used of the Areopagus, must refer to a *sentence* of exile[24] is untenable, given the appearance of the same verb in the strikingly similar context of Demosthenes 21.109 and 115 (ἐκβαλών τινα and ζητῶν με ἐκβαλεῖν ἐκ τῆς πατρίδος respectively, *infra*, n. 25: Meidias is not imagined as passing sentence of exile on Demosthenes), as well as Deinarchus 1.30 (*supra*, n. 13: that Demosthenes ἐξέβαλε τὸν Ἀρίσταρχον ἐπὶ ταῖς αἰσχίσταις αἰτίαις obviously cannot mean that he passed sentence of exile on Aristarchus) and Demosthenes 37.59 (see (*c*) *infra*; the victim's relatives have the power to pardon but not to exile: even in the first instance, sentence of exile is delivered by the Palladion court).

(*c*) Demosthenes' references to exile as the putative result of blame for Nicodemus' killing attaching to himself (including Dem. 21.122, *supra*, n. 10: Meidias χρήματ' ἀνήλισκεν ἐπὶ τῷ μετ' ἐκείνου κἀμὲ προσεκβαλεῖν ἀδίκως; see also §§105, 109, 115)[25] are no more dispositive as to the sentence he would have incurred upon conviction than they are for Aristarchus. The orator is simply saying that he, like Aristarchus, would have been driven out of Athens by a charge of intentional homicide (whether *autocheir* or *bouleusis*), not that he would have been sentenced to exile upon conviction.

Therefore, if Demosthenes' comment about being denied burial at home means anything, I believe the rule applied to those found guilty by the Areopagus of intentionally killing an Athenian citizen, whether by one's own hand or by plotting, and sentenced to death.[26] On this reconstruction, the bodies of executed killers would

[23] Denniston (1950) s.v. γοῦν I.1.ii.

[24] MacDowell (1963) 67-68.

[25] §105: Meidias' single goal is τοῦτον (i.e., ἐμέ) ἐξόριστον ἀνῃρῆσθαι καὶ μηδαμῇ παρεθῆναι, ἀλλὰ καὶ λιποταξίου γραφὴν ἡλωκέναι καὶ ἐφ' αἵματι φεύγειν καὶ μόνον οὐ προσηλῶσθαι ("to have [Demosthenes] cast beyond the borders and destroyed, and in no way be let off, but convicted in a *graphê lipotaxiou* [for desertion, carrying a penalty of *atimia*: Andoc. 1.74; Dem. 15.32; Aeschin. 3.175-76] and on trial for homicide [alternatively 'in exile for homicide': MacDowell (1990) 332] and all but nailed to the board" – a reference to execution by *apotympanismos*, which militates in favor of a prospective sentence of death, not exile). §109: how evil, shameless, etc. is a man who spends his wealth ἐν οἷς ἀδίκως ἐκβαλών τινα καὶ προπηλακίσας αὑτὸν εὐδαιμονιεῖ τῆς περιουσίας ("on efforts by which he can unjustly expel someone and drag his name through the mud, and then congratulate himself on his abundance [of wealth] [alternatively, 'the advantage he has gained']")? §115: οὐκοῦν ἐξελέγχεται τούτοις ἐναργῶς ὕβρει ζητῶν με ἐκβαλεῖν ἐκ τῆς πατρίδος ("Therefore, the preceding facts clearly prove that it was out of hubris that [Meidias] sought to expel me from the country").

[26] MacDowell (1963) 66, 125-26, followed by Rhodes (1993) 644, holds that the penalty for *bouleusis hekousiou phonou* of an Athenian citizen was death, but trial (as, in his view, all

be cast out of Attica, and those who elected exile over taking their chances with the death penalty in court would be refused repatriation upon death. This leaves open, then, the question of burial rights of those sentenced to exile for unintentionally killing a citizen, or for killing a non-citizen, regardless of intent. The only thing we can be sure of here is that if the qualified relatives of the victim pardoned the killer, allowing his return to Attica (*IG* I^3 104.13-19; Dem. 23.71-73; Dem. 21.43), they could not then revoke their pardon and re-exile his corpse when he died. Rather, pardon and readmission were absolutely binding: as Demosthenes writes elsewhere (37.59), ἐὰν ἑλών τις ἀκουσίου φόνου καὶ σαφῶς ἐπιδείξας μὴ καθαρὸν μετὰ ταῦτ' αἰδέσηται καὶ ἀφῇ, οὐκέτ' ἐκβαλεῖν κύριος τὸν αὐτόν ἐστιν ("if a person who has convicted another of unintentional homicide and has clearly proven that he is not *katharos* afterward pardons and releases him, he no longer has the power to expel the same man").

3. This description of the killer as "not *katharos*" brings us to the issue of pollution. First and most fundamentally, as a general rule, it seems to me, the pollution attaching to a killer results from (or corresponds to) his moral and legal guilt. Thus I am largely in agreement with E. M. Harris that "[w]hen [a] homicide was done in accordance with the law or justly, the killer was not considered guilty and could not be convicted in court.... Just as he was free of guilt, he was also free of pollution."[27] Hence the Demophantus decree of 410 explicitly specifies that the killer of the targeted individuals is not only legally blameless but ritually spotless,[28] and Demosthenes interprets the Arthmius decree and clauses of Draco's law on lawful

bouleusis trials) occurred at the Palladion; I find this reconstruction less plausible. On a related topic, the *Against Meidias* provides excellent evidence against the position that concerns over pollution waned in the Athens of the fourth century (Parker (1996) 126-28); see, e.g., Dem. 21.114-15, with Harris (2015) 18-19.

[27] Harris (2015) 21; see Hewitt (1910); Parker (1996) 113-14, 366-69; Meinel (2015) 114-15. Note, e.g., Dem. 20.158 (*infra*, n. 45).

[28] Andoc. 1.96-97 (*decretum*): Ἐάν τις δημοκρατίαν καταλύῃ τὴν Ἀθήνησιν, ἢ ἀρχήν τινα ἄρχῃ καταλελυμένης τῆς δημοκρατίας, πολέμιος ἔστω Ἀθηναίων καὶ νηποινεὶ τεθνάτω...ὁ δὲ ἀποκτείνας τὸν ταῦτα ποιήσαντα καὶ ὁ συμβουλεύσας ὅσιος ἔστω καὶ εὐαγής ("If a person subverts the democracy at Athens or holds any office after the democracy has been subverted, he shall be a public enemy of the Athenians and shall be killed with impunity.... The person who kills one who has committed these acts and the person who counsels the killing shall be pure of guilt and pollution"). Note that both the *autocheir* killer and the conspirator are explicitly mentioned. The oath that follows, to be sworn by all Athenians, includes the clause καὶ ἐάν τις ἄλλος ἀποκτείνῃ, ὅσιον αὐτὸν νομιῶ εἶναι καὶ πρὸς θεῶν καὶ δαιμόνων, ὡς πολέμιον κτείναντα τὸν Ἀθηναίων ("And if someone else kills him, I shall consider that person to be pure of guilt before gods and divinities, since he has killed a public enemy of the Athenians"). The decree is discussed at Lyc. 1.124-27. Cf. *SEG* 12.87 = Rhodes – Osborne (2003) no. 79 (law of Eucrates on tyranny, subversion, and the Council of the Areopagus, 337/6): if a person cooperates in a tyranny, actual or attempted, or subverts the people or the democracy, ὃς ἂν τὸν τούτων τι ποιήσαντα ἀποκ<τ>είνῃ ὅσιος ἔστω (vv. 10-11).

killing as meaning that the killer is free of pollution (Dem. 9.41-44).[29] In both cases, the collocation of "enemy of the state" and "pollution-free killing" corroborates the position, noted by Todd, that killing the enemy in war conferred no pollution.[30]

Speaking more generally, I concur with Harris and others[31] that purification was only mandatory (in the sense of being imposed as a requirement by outside authority) in the case of a homicide conviction; the man who killed lawfully and was acquitted by the Delphinion court possessed no pollution and required no purification – though he might desire and obtain one on his own initiative, especially if he belonged to the superstitious type (Theophr. *Char.* 16.7, 9; the polar opposite of Plutarch's Lycurgus).[32] This, I suspect, is the reason that Aeschylus' Orestes undergoes one or more purifications (certainly at Delphi, and possibly elsewhere: see below), while Sophocles' Oedipus never receives purification[33] – put otherwise, why even dogs have Erinyes[34] but Laius does not:[35] under Athenian law, Orestes is guilty, while Oedipus is innocent under both the ἐν ὁδῷ καθελών clause and the general self-defense provisions of Draco's law.[36]

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[29] Ἄρθμιος' φησὶ '{ὁ} Πυθώνακτος Ζελείτης ἄτιμος καὶ πολέμιος τοῦ δήμου τοῦ Ἀθηναίων καὶ τῶν συμμάχων αὐτὸς καὶ γένος' ... τοῦτο δ' ἐστὶν οὐχ ἣν οὑτωσί τις ἂν φήσειεν ἀτιμίαν... ἀλλ' ἐν τοῖς φονικοῖς γέγραπται νόμοις, ὑπὲρ ὧν ἂν μὴ διδῷ φόνου δικάσασθαι, ἀλλ' εὐαγὲς ᾖ τὸ ἀποκτεῖναι, 'καὶ ἄτιμος' φησὶ 'τεθνάτω.' τοῦτο δὴ λέγει, καθαρὸν τὸν τούτων τινὰ ἀποκτείναντα εἶναι. ("[The decree] states, 'Arthmius son of Pythonax of Zeleia shall be an outlaw [*atimos*] and public enemy of the Athenian people and its allies, himself and his descendants.' ... Now, this was not what one would call *atimia* in the ordinary sense... Rather, the meaning is as it is written in the homicide laws, concerning persons in whose cases no homicide trial is granted, but whose killing is sanctioned: 'and let him die an outlaw [*atimos*].' What this means is that the killer of one of these persons is free of pollution.") On the Arthmius decree (of the 460s or 450s) see Phillips (2013) no. 368 with references.

[30] Cf. Hewitt (1910) 104; Parker (1996) 113, 366.

[31] See especially Hewitt (1910); also Parker (1996) 113-15, 144, 367-68.

[32] Plut. *Lyc.* 27.1: Καὶ μὴν καὶ τὰ περὶ τὰς ταφὰς ἄριστα διεκόσμησεν αὐτοῖς. πρῶτον μὲν γὰρ ἀνελὼν δεισιδαιμονίαν ἅπασαν, ἐν τῇ πόλει θάπτειν τοὺς νεκροὺς καὶ πλησίον ἔχειν τὰ μνήματα τῶν ἱερῶν οὐκ ἐκώλυσε, συντρόφους ποιῶν ταῖς τοιαύταις ὄψεσι καὶ συνήθεις τοὺς νέους, ὥστε μὴ ταράττεσθαι μηδ' ὀρρωδεῖν τὸν θάνατον, ὡς μιαίνοντα τοὺς ἁψαμένους νεκροῦ σώματος ἢ διὰ τάφων διελθόντας.

[33] Parker (1996) 386.

[34] Εἰσὶ καὶ κυνῶν Ἐριννύες, *Paroemiogr. Graec.* Appendix 2.20 = Macar. 3.54 (von Leutsch – Schneidewin (1839-51) 1.397, 2.161).

[35] Parker (1996) 386.

[36] Ἐν ὁδῷ καθελών: Dem. 23.53 (*lex*). General self-defense provisions: *IG* I^3 104.33-36 with Stroud (1968) 56; Gagarin (1978) 119. For the innocence of Oedipus see, e.g., Vernant in Vernant – Vidal-Naquet (1972) 1.110; *contra*, e.g., Carawan (1998) 249 with n. 46 (for additional participants in the debate see Harris (2010) n. 10 with references). The argument of Harris (2010) 131-39 that the Oedipus of the *OT* is guilty but the Oedipus of the *OC* is innocent rests upon an unwarrantedly positivistic interpretation of Harpocration s.v. ὁδός (ἐν ὁδῷ = ἐν λόχῳ καὶ ἐνέδρᾳ) and the erroneous assertion of a bright-line distinction in a killer's state of mind between anger and self-defense. With regard to the latter, a better line is taken by Dawe (1982) 17: "Modern critics who feel that odds of five to one against should provoke

Tragedy also, however, complicates this seemingly neat categorization, in vividly demonstrating that pollution was in the eye of the beholder. In the *Eumenides*, when Orestes is accosted by the Erinyes upon his arrival at Athena's shrine, he asserts that Apollo has purified him of the slaying of Clytemnestra, and that the efficacy of the rite has been proven by subsequent harmless association. Yet the Erinyes, none deterred, insist that he remains defiled, and they hold their position at Orestes' trial, despite Athena's previous ruling in his favor and the testimony of Apollo himself.[37] In the *Oedipus at Colonus*, although Oedipus maintains his legal, moral, and ritual innocence in the killing of Laius,[38] and he praises Athens for its reception of him as the only city where he has

from the victim of an assault on a lonely road no more than a well phrased remonstrance suck in their breath as Oedipus unwittingly makes this damning admission." The only reason Oedipus has misgivings that may impinge upon his ritual status (*OC* 1132-35; *infra*, n. 39) is that his victim was his father (cf. Hewitt (1910) 109, on "the taint of kindred bloodshed, to which an exceptional degree of pollution long continued to be attached"). Moreover, Oedipus' self-blinding (*OT* 1268ff.) cannot serve as "the replacement of purification rites" (Meinel (2015) 70), because, *inter alia*, it is punishment, and it is self-administered. Nor am I convinced by Meinel's suggestion (Meinel (2015) 69) that Oedipus' exile is somehow (sufficiently) purifying in and of itself (although cf. A. *Eum*. 286: *infra*, n. 37).

[37] On the Acropolis, before the ancient wooden image of Athena: A. *Eum*. 281-86 (Orestes): μητροκτόνον μίασμα δ' ἔκπλυτον πέλει,/ποταίνιον γὰρ ὂν πρὸς ἑστίᾳ θεοῦ/Φοίβου καθαρμοῖς ἠλάθη χοιροκτόνοις./πολὺς δέ μοι γένοιτ' ἂν ἐξ ἀρχῆς λόγος,/ὅσοις προσῆλθον ἀβλαβεῖ ξυνουσίᾳ· χρόνος καθαίρει πάντα γηράσκων ὁμοῦ ("the pollution of mother-slaying has been washed away, for when it was still fresh, at the hearth of the god Phoebus it was driven out by piglet-slaying purification. It would be a long story, were I to tell it from the beginning, of how many people I have met in harmless encounters; time cleanses all things as they grow old with it"). He then calls upon Athena for succor ἀφ' ἁγνοῦ στόματος εὐφήμως (287). *Eum*. 313-20 (Erinyes, in response): τοὺς μὲν καθαρὰς <καθαρῶς> χεῖρας προνέμοντας/οὔτις ἐφέρπει μῆνις ἀφ' ἡμῶν,/ἀσινὴς δ' αἰῶνα διοιχνεῖ/ὅστις δ' ἀλιτὼν ὥσπερ ὅδ' ἀνὴρ/χεῖρας φονίας ἐπικρύπτει,/μάρτυρες ὀρθαὶ τοῖσι θανοῦσιν παραγιγνόμεναι/πράκτορες αἵματος αὐτῷ τελέως ἐφάνημεν ("When men extend clean hands cleanly, no wrath from us comes crawling after him, and he passes through life unharmed. But whenever a sinner like this man here covers up his blood-stained hands, we are present as righteous witnesses for the dead, avengers of blood, and with full authority we appear before him"). See Sommerstein (1989) 137; Meinel (2015) 124, 136. *Eum*. 470-74 (Athena): it is not *themis* for me to decide Orestes' case, ἄλλως τε καὶ σὺ μὲν κατηρτυκὼς νόμῳ/ἱκέτης προσῆλθες καθαρὸς ἀβλαβὴς δόμοις ("especially given that you have been lawfully disciplined and have come as a suppliant, clean and bearing no harm to [my and others'] house[s]"). At trial: *Eum*. 576-78 (Apollo): ἔστι γὰρ νόμῳ/ἱκέτης ὅδ' ἀνὴρ καὶ δόμων ἐφέστιος/ἐμῶν, φόνου δὲ τῷδ' ἐγὼ καθάρσιος ("for this man is a lawful suppliant who sat at the hearth of my home, and I purified him of homicide"). *Eum*. 654-56 (Erinyes): having spilled the kindred blood of his mother, ἔπειτ' ἐν Ἄργει δώματ' οἰκήσει πατρός; ποίοισι βωμοῖς χρώμενος τοῖς δημίοις; ποία δὲ χέρνιψ φρατέρων προσδέξεται; ("then, in Argos, will he dwell in his father's house? Using what public altars? And what lustral basin of *phrateres* will admit him?"). On the latter passage see Sommerstein (1989) 205. It is insufficient to conclude, as does Meinel (2015) 138, that Athena is simply right and the Erinyes wrong, and "the question of purity is precisely *not* at stake in the trial" (emphasis in the original).

[38] S. *OC* 545-48; νόμῳ δὲ καθαρός (548), "clean in the eyes of the law," is a rhetorical

found reverence for the gods (τό γ' εὐσεβὲς/μόνοις παρ' ὑμῖν ηὖρον ἀνθρώπων ἐγώ, 1125-26), immediately thereafter he refuses to touch Theseus, lest he communicate his pollution,[39] and his exile from Thebes remains in effect on the same grounds.[40]

The last issue I wish to discuss, which is adumbrated by Todd and addressed by Parker,[41] is the problem of multiple purifications (as perhaps in the case of Orestes),[42]

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crescendo and as such does not imply "but not otherwise" (cf. καθαρὸς ἐν τῷ νόμῳ, Pl. *Leg.* 874c6, with Hewitt (1910) 110-11; *contra*, e.g., Parker (1996) 124; Meinel (2015) 209-10). Cf. *OC* 270-72: καίτοι πῶς ἐγὼ κακὸς φύσιν,/ὅστις παθὼν μὲν ἀντέδρων, ὥστ' εἰ φρονῶν/ἔπρασσον, οὐδ' ἂν ὧδ' ἐγιγνόμην κακός; *OC* 974-77: εἰ δ' αὖ φανεὶς δύστηνος, ὡς ἐγὼ ᾽φάνην,/ἐς χεῖρας ἦλθον πατρὶ καὶ κατέκτανον,/μηδὲν ξυνιεὶς ὧν ἔδρων εἰς οὕς τ' ἔδρων,/πῶς ἂν τό γ' ἆκον πρᾶγμ' ἂν εἰκότως ψέγοις; *OC* 988-99: Oedipus will not be reviled for killing Laius; if someone came up to Creon and tried to kill him, would Creon ask whether his assailant was his father before retaliating? etc. This last is seconded by the Chorus' verdict, ὁ ξεῖνος, ὦναξ, χρηστός, "The stranger is a good man, King," at 1014; earlier, at 469-70, the Chorus had accepted Oedipus' claim to be ἱερὸς εὐσεβής τε (v. 287 with Jebb (1900) 81) in instructing him to fetch water for a libation δι' ὁσίων χειρῶν. For the circumstances of Laius' killing and Oedipus' lack of legal guilt cf. *OT* 752-53, 800-813, 842-47 (in that play, of course, Oedipus lacks the confidence in his righteousness that he displays in the *OC*: see, e.g., *OT* 821-23, 1287-91, 1340-46, 1377-85, 1436-37, 1449-54; but note his evident lack of anxiety regarding the transmission of pollution at *OT* 1413-15: ἴτ', ἀξιώσατ' ἀνδρὸς ἀθλίου θιγεῖν·/πίθεσθε, μὴ δείσητε· τἀμὰ γὰρ κακὰ/οὐδεὶς οἷός τε πλὴν ἐμοῦ φέρειν βροτῶν).

[39] S. *OC* 1132-35: καίτοι τί φωνῶ; πῶς σ' ἂν ἄθλιος γεγὼς/θιγεῖν θελήσαιμ' ἀνδρὸς ᾧ τίς οὐκ ἔνι/κηλὶς κακῶν ξύνοικος; οὐκ ἔγωγε σέ,/οὐδ' οὖν ἐάσω ("And yet what am I saying? How could I, born to misery, wish you to touch a man in whom every taint of evil resides? No, I shall not touch you, nor permit you to touch me"). On Oedipus' (potentially) liminal ritual status see Meinel (2015) 209-12.

[40] S. *OC* 599-601 (Oedipus): οὗτος ἔχει μοι· γῆς ἐμῆς ἀπηλάθην/πρὸς τῶν ἐμαυτοῦ σπερμάτων· ἔστιν δέ μοι/πάλιν κατελθεῖν μήποθ', ὡς πατροκτόνῳ. 944-50 (Creon): ᾔδη δ' ὁθούνεκ' ἄνδρα καὶ πατροκτόνον/κἄναγνον οὐ δεξοίατ', οὐδ' ὅτῳ γάμοι/ξυνόντες ηὐρέθησαν ἀνοσιώτατοι./τοιοῦτον αὐτοῖς Ἄρεος εὔβουλον πάγον/ἐγὼ ξυνῄδη χθόνιον ὄνθ', ὃς οὐκ ἐᾷ/τοιούσδ' ἀλήτας τῇδ' ὁμοῦ ναίειν πόλει·/ᾧ πίστιν ἴσχων τήνδ' ἐχειρούμην ἄγραν.

[41] Parker (1996) 387: "It is perhaps not impossible that a killer could be purified more than once, but such a repetition is unattested; if we reject this possibility, it will be necessary, in order to keep *Eumenides* consistent with Athenian practice, either to postulate a change between the time of the play and of Demosthenes, or to suppose that the killer already cleansed abroad was exempt from purification on return (cf. perhaps *Eum*. 235-43)."

[42] On the issue of Orestes' multiple purifications, (1) A. *Eum*. 448-52 (Orestes, offering proof of ritual purity): ἄφθογγον εἶναι τὸν παλαμναῖον νόμος,/ἔστ' ἂν πρὸς ἀνδρὸς αἵματος καθαρσίου/σφαγαὶ καθαιμάξωσι ν<ε>οθηλοῦ<ς> βοτοῦ·/πάλαι πρὸς ἄλλοις ταῦτ' ἀφιερώμεθα/οἴκοισι, καὶ βοτοῖσι καὶ ῥυτοῖς πόροις: the issues in this passage are (*a*) whether ἀνδρὸς αἵματος καθαρσίου is sufficiently generalizing to include the god Apollo [so Parker (1996) 386]) and (*b*) whether ἄλλοις οἴκοισι is plural for singular – and if so, whether it refers to Apollo's temple at Delphi – or a true plural referring to the houses of multiple human householders: cf. Sommerstein (1989) 124-25. (2) I am not at all certain that at *Eum*. 277 πολλοὺς καθαρμούς needs obelizing, as, *inter alios*, Page (1972) *ad loc*.; Sommerstein (1989) 130-31; West (1998) *ad loc*. (the MSS reading is retained by Paley (1855) *ad loc*. (his v. 266) with note; Sidgwick (1902) *ad loc*.; Weil (1910) *ad loc*.; Eleopoulou (1939) *ad loc*.; Mazon

which in my view is not a problem at all. Ritual purity is anything but indelible, and purification rituals do not always succeed.[43] The Erinyes do not question Apollo's performance of καθαρμοί for Orestes; they deny their efficacy. Orestes must assert subsequent harmless association as proof that the purification(s) actually worked,[44] and even then the Erinyes do not believe him. Now, what does this have to do with involuntary, non-mythological Athenian killers? Todd rightly remarks upon the obstacles to purification for the convicted unintentional killer before his pardon and return from exile; I would add here that the law paraphrased at Demosthenes 20.158, by my reading, actually prohibits purification,[45] which is further hindered (if hindrance was needed) by the requirement that after his conviction the killer must leave Attica within a stated time and by a fixed route (τὸν ἀλόντα ἐπ᾽ ἀκουσίῳ φόνῳ ἔν τισιν εἰρημένοις χρόνοις ἀπελθεῖν τακτὴν ὁδόν, Dem. 23.72). Understanding, I believe, lies in an acknowledgement of Athenian parochial pragmatism, in an attitude toward religious pollution that bears comparison to the much-reviled American sentiment summarized in the slogan Not In My Back Yard (NIMBY).[46] Even in the extreme case where the entire city and people of Thebes are wracked by the pollution whose Patient Zero turns out to be Oedipus, that pollution can be expunged, by order of Apollo, by *either* the exile *or* the death of the killer (S. *OT* 95-101; cf. 305-13, 658-59, 669-70). So too in historical Athens, even when the Alcmaeonids

(1949) *ad loc*.; Chatzianestis (1957) *ad loc*.). Lines 276-79 (Orestes), ἐγὼ διδαχθεὶς ἐν κακοῖς ἐπίσταμαι/πολλοὺς καθαρμούς, καὶ λέγειν ὅπου δίκη/σιγᾶν θ᾽ ὁμοίως· ἐν δὲ τῷδε πράγματι/φωνεῖν ἐτάχθην πρὸς σοφοῦ διδασκάλου, make sense as "Educated amid evils, I am familiar with many rites of purification, and [I also know] when it is right to speak and when to remain silent; in *this* matter, I was instructed to speak by a wise teacher [i.e., Apollo]").

[43] Parker (1996) 129, 387.

[44] For proof by harmless association cf. Ant. 5.82-83: the defendant cannot be the killer since he has enjoyed disaster-free sea voyages (barring, he does not say, the one during which he is accused of having killed Herodes) and his presence has not inhibited the successful performance of sacrifices. A similar argument appears at Andoc. 1.137-39. See Parker (1996) 129; Harris (2010) 127.

[45] The rule applied to all accused killers, and to all convicted killers unless and until they received pardon. Dem. 20.158: ἐν τοίνυν τοῖς περὶ τούτων νόμοις ὁ Δράκων φοβερὸν κατασκευάζων καὶ δεινὸν τό τινα αὐτόχειρα ἄλλον ἄλλου γίγνεσθαι, καὶ γράφων χέρνιβος εἴργεσθαι τὸν ἀνδροφόνον, σπονδῶν, κρατήρων, ἱερῶν, ἀγορᾶς, πάντα τἄλλα διελθὼν οἷς μάλιστ᾽ ἄν τινας ᾤετ᾽ ἐπισχεῖν τοῦ τοιοῦτόν τι ποιεῖν, ὅμως οὐκ ἀφείλετο τὴν τοῦ δικαίου τάξιν, ἀλλ᾽ ἔθηκεν ἐφ᾽ οἷς ἐξεῖναι ἀποκτιννύναι, κἂν οὕτω τις δράσῃ, καθαρὸν διώρισεν εἶναι ("In the laws concerning [homicide], Draco made it a fearsome and terrible thing for a man to kill another [lit., with his own hand]. He wrote that the killer was to be barred from lustral water, libations, mixing-bowls, sanctuaries, and the agora – going through everything else by which he thought he would especially deter people from committing such an act. Nonetheless, he did not rob justice of its place but established conditions under which killing was permitted, and if a person acted thus, he defined him as *katharos*"). On this passage see Sandys (1890) 111, citing Jebb (1893) 43-44 *ad* S. *OT* 240, who notes the similar language in Oedipus' proclamation against the killer(s) of Laius; Kremmydas (2012) 442-44; Meinel (2015) 177-78.

[46] See, e.g., American Bar Association Steering Committee on the Unmet Legal Needs of Children and Commission on Homelessness and Poverty (1999); Galster et al. (2003); Inhaber (1998).

were held responsible for combining homicide with sacrilege of the most shocking kind, banishing the family (including its deceased members) sufficed.[47] In standard cases of homicide, the execution of the intentional killer turned him from pollutant *qua* killer to pollutant *qua* corpse. And if it is correct that the corpses of executed intentional killers were denied burial in Attica, then the pollutant was removed, thereby ending the problem (for the Athenians). When a pardoned unintentional killer returned to Attica, he had to undergo purification, thereby preventing the problem. There is no evidence for Parker's hypothesis that an exemption applied to those who had been purified in exile (*supra*, n. 41). Rather, I imagine, the Athenian attitude corresponded roughly to the principle we sometimes find underlying modern airport security: just because you know foreigners do it doesn't mean you trust them to do it right. As for what happened when a killer passed beyond the borders of Attica, dead or alive, well, that was the Boeotians' problem.

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[47] On the trial and exile of the Alcmaeonids for slaughtering Cylon's partisans, despite the sanctuary sought by the victims with Athena and the *Semnai Theai*, see Hdt. 5.71; Thuc. 1.126.3-12; [Arist.] *Ath. Pol.* 1 with Heraclides Lembus, *Epit.* 2; Plutarch, *Solon* 12. Here, however, we might note the potential practical difficulties and moral scruples involved in executing the entire Alcmaeonid *genos*, which (depending on factors including the extent of the family and its adherents, and the resolve and strength of the other noble houses) might have sparked civil war. As it was, the Alcmaeonids' *aeiphygia* (perpetual exile) lasted less than two generations (see Hdt. 6.130-31).

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ATHENIAN LEGISLATION LIMITING MALE PROSTITUTES' POLITICAL RIGHTS

As a mercantile activity, prostitution was not untouched by Athenian antagonism toward commercial and manual pursuits, and numerous negative allusions toward prostitutes and prostitution are found in Greek sources — often implicitly, sometimes explicitly. However, a detailed study of the terminology of Greek prostitution finds that for prostitution "terms that imply moral shame are not widely attested before the second to third century CE" (Kapparis 2011: 228), a half-millenium and more after the classical period. Many other commercial activities did not fare as well: pursuits today not evoking negativity were often denigrated in classical Athens. Bankers were denounced as "most pestiferous."[1] Selling ribbons or serving as a wet-nurse evoked contempt [2] — as did auctioneering, cooking, inn-keeping, tax collecting, brothel-keeping and gambling.[3] Employment as an actor generated negativity similar to that engendered by operating a primary school.[4] Any form of hired day-labor, even agricultural work requiring personal effort, was seen by some as offensively inappropriate for an Athenian woman.[5] Some citizens so disdained Athenians working in retail trade that "sitting in

[1] Τοὺς τραπεζίτας· ἔθνος τούτου γὰρ οὐδέν ἐστιν ἐξωλέστερον. (Antiphanês Fr. 157 [K-A]).

[2] Dem. 57.29, 35.

[3] Theophr. *Khar.* 6.2-10: ὁ δὲ ἀπονενοημένος . . . δεινὸς δὲ καὶ πανδοκεῦσαι καὶ πορνοβοσκῆσαι καὶ τελωνῆσαι . . . κηρύττειν, μαγειρεύειν, κυβεύειν.

[4] See the ridicule heaped on Aiskhinês for his involvement in these activities: Dem. 19.70, 246, 249.

[5] Dem. 57.45: πολλὰ δουλικὰ καὶ ταπεινὰ πράγματα τοὺς ἐλευθέρους ἡ πενία βιάζεται

a brothel was no more despicable to the elite than working in the agora" (Glazebrook 2011: 35) — a contempt so virulent that a law had been passed prohibiting insults targeting business activity in the market (*agora*) by male or female citizens.[6]

In this paper, I will seek to show (1) that because even prominent citizens were far from invisible in meretricious activity, Athenian legislation limiting male prostitutes' political rights constituted a relevant and meaningful response to actual acts of prostitution by Athenian political leaders, and (2) that these laws should not be interpreted anachronistically as uniquely antagonistic to prostitution as a métier (*tekhnê*), but rather as an effort to discourage the transformation of traditional elite homoerotic sexual courtship into a culture of sexual purchase, and as an attempt to combat corruption in public life (which was believed to be pervasive) by denying political leadership to a broad grouping of persons --- not only or even principally "prostitutes" --- who had exhibited an excessive lust for money.

A. Citizens as Prostitutes

Although Athenian prostitution is often seen as "the special preserve of foreigners," [7] citizens allegedly functioning as courtesans are the focus of the only surviving materials dealing in detail with male prostitution (Aiskhinês 1 and Lysias 3),[8] and citizens, male and female (*politai*, *politides*), are explicitly characterized as prostitutes in many other contexts. For example, a prominent member of the *Boulê* under the rule of the Thirty, Epikharês, is charged by Andokidês with having been a promiscuously inexpensive male whore, compliantly and shamefully "taking small sums from any one inclined."[9] Aiskhinês claims that "one of the citizens" prominently involved in public affairs made idiomatic the phrase "whoring under contract" by working as a male prostitute under written covenants deposited with a third party.[10] The political leader Androtiôn is explicitly characterized as a prostitute by Diodôros.[11]

ποιεῖν . . . πολλαὶ καὶ τιτθαὶ καὶ ἔριθοι καὶ τρυγήτριαι γεγόνασιν . . . .

[6] Dem. 57.30: τοὺς νόμους οἳ κελεύουσιν ἔνοχον εἶναι τῇ κακηγορίᾳ τὸν τὴν ἐργασίαν τὴν ἐν τῇ ἀγορᾷ ἢ τῶν πολιτῶν ἢ τῶν πολιτίδων ὀνειδίζοντά τινι. See Wallace 1994: 116.

[7] Dover [1978] 1989: 34. The "'untouchability" of those members of "the privileged citizen class" and their right to "throw their weight around to intimidate *metics* and slaves" supposedly precluded for *politai* the demeaning dependence inherent in functioning as prostitutes (Winkler 1990: 49). But criticism of this theory as inconsistent with factual evidence is rising: see especially Davidson 2004, 2007; Hubbard 2014: 142-46; Thornton 1997: 193-202.

[8] For detailed discussion of these two cases, see E. Cohen 2000: 167-77.

[9] σὺ . . . ὅς ἐνὶ μὲν οὐχ ἡταίρησας (καλῶς γὰρ ἄν σοι εἶχε), πραττόμενος δ'οὐ πολὺ ἀργύριον τὸν βουλόμενον ἀνθρώπων, ὡς οὗτοι ἴσασιν, ἐπὶ τοῖς αἰσχίστοις ἔργοις ἔζης (Andok. 1.100).

[10] Aiskh. 1.165: πόθεν οὖν ἴσχυκε καὶ σύνηθες γεγένηται λέγειν, ὡς κατὰ γραμματεῖον ἤδη τινὲς ἡταίρησαν, ἐρῶ. ἀνὴρ εἷς τῶν πολιτῶν . . . λέγεται κατὰ συνθήκας ἡταιρηκέναι τὰς παρ' Ἀντικλεῖ κειμένας· οὐκ ὢν <δ>' ἰδιώτης, ἀλλὰ πρὸς τὰ κοινὰ προσιὼν καὶ λοιδορίαις περιπίπτων, εἰς συνήθειαν ἐποίησε τοῦ λόγου τούτου τὴν πόλιν καταστῆναι, καὶ διὰ τοῦτο ἐρωτῶσί τινες, εἰ κατὰ γραμματεῖον ἡ πρᾶξις γεγένηται.

[11] Dem. 22.29: Ἀνδροτίων, καὶ σὺ μὴ διὰ ταῦτ' οἴου σοι προσήκειν μὴ δοῦναι δίκην εἰ

While Aiskhinês identifies the influential Hêgêsandros as a "whore" (*pornos*) and as Laodamas' paid "woman," [12] Demosthenês makes allegations of prostitution against Aiskhinês' brother Aphobêtos and his brother-in-law Nikias.[13] In Lysias 3, Theodotos is the citizen-prostitute balancing lucrative compensation from two citizen-patrons.[14] In Demosthenes 22, the parents of two *politai* are alleged to have been prostitutes[15]: since the children were Athenian citizens, the two prostitutes were necessarily holders of Athenian citizenship under the Periklean law that restricted *politeia* to the offspring of two citizen parents.[16] In a letter attributed to Aiskhinês, prostitution is attributed to the mother of Melanopos (who had served as *thesmothetês*) and to Melanopos himself.[17] In Aiskhinês 1 a motley crowd of customers — "traders, other foreigners, *politai*" — is allegedly serviced by a young prostitute who is a *politês*. [18]

Athenian literature also records a number of examples of Athenian citizen-women working as prostitutes.[19] The prostitute Naïs is explicitly reported to have had a "*kyrios*," the household representative who controlled, at least formally, the affairs of a woman of the citizen class,[20] while another Athenian prostitute, identified as a "citizeness" (*astê*), is parodied by Antiphanês as having neither guardian nor kinsmen (and so presumably lacking a dowry).[21] In Demosthenes 59, Neaira is accused of having for decades improperly passed as an Athenian *politis* ("citizeness") while functioning as a whore — an improbable (and therefore unpersuasive) accusatory coupling if prostitution were truly incompatible with "citizenship."[22] Isaios alludes to the recurring phenomenon of

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γφράφεις ἡταιρηκώς . . . .

[12] See Aiskhin. passim and esp. 1.70, 111 (Hêgêsandros son of Hêgêsias: Osborne and Byrne 1994: 200-201; Fisher 2001: 188-89).

[13] Dem. 19.287: καὶ περὶ πορνείας ἔλεγεν . . . δυοῖν μὲν κηδεσταῖν παρεστηκότοιν . . . Νικίου τε τοῦ βδελυροῦ, ὃς ἑαυτὸν ἐμίσθωσεν εἰς Αἴγυπτον Χαβρίᾳ . . . καὶ τί ταῦτα; ἀλλὰ τὸν ἀδελφὸν ὁρῶν Ἀφόβητον.

[14] Lysias explicitly identifies Theodotos as a Plataian (§5), and hence an Athenian *politês* under the decree providing *politeia* to the Plataians (preserved at Dem. 59.104). For efforts to negate the "plain meaning" of the text, see E. Cohen 2000: 169-71.

[15] §61: τοῦ δὲ τὸν πατέρ' ἡταιρηκέναι, τοῦ δὲ τὴν μητέρα πεπορνεῦσθαι.

[16] See Aristot. *Ath. Pol.* 36.1, 40.2; Lys. 16.3, 30.15; Dem. 59.105. For variant formulations of the requirement, see Mossé [1962] 1979: 141-44. For the application of the "Citizenship Law" in actual practice, see Patterson 1990; E. Cohen 2000: 49-78.

[17] σοὶ δὲ τὸ μέχρι μὲν χθὲς καὶ πρώην θεσμοθετοῦντος ἤδη σοῦ προεστάναι τήν μητέρα . . . σὲ δὲ πραθέντα τρισκιλίων δραχμῶν τὴν ἀκμὴν ἡταιρηκέναι . . . . (7.3).

[18] § 40: ἐκάθητο ἐν Πειραιεῖ ἐπὶ τοῦ Εὐθυδίκου ἰατρείου, . . . πωλεῖν αὐτὸν προῃρημένος . . . .Ὅσοι μὲν οὖν τῶν ἐμπόρων ἢ τῶν ἄλλων ξένων ἢ τῶν πολιτῶν τῶν ἡμετέρων κατ' ἐκείνους τοὺς χρόνους ἐχρήσαντο τῷ σώματι Τιμάρχου, ἐκὼν καὶ τούτους ὑπερβήσομαι.

[19] By 1918, Hirzel had already gathered a portion of the evidence ([1918] 1962: 71, n. 1).

[20] Lys. Fr. 82 [Th.]: Ἔστιν οὖν γυνὴ ἑταίρα, Ναΐς ὄνομα, ἧς Ἀρχίας κύριός ἐστιν.

[21] Fr. 210 (K.A.) (=*Athên*. 572a): ἐν γειτόνων αὐτῷ κατοικούσης τινὸς | ἰδὼν ἑταίρας εἰς ἔρωτ' ἀφίκετο, | ἀστῆς, ἐρήμου δ' ἐπιτρόπου καὶ συγγενῶν . . . . On *astai*, see E. Cohen 2000: 50-63.

[22] Whether Neaira herself actually was a former prostitute is beyond our knowledge, but

Athenian men, influenced by passionate desire, entering into marriages with prostitutes: because Athenian law prohibited marriage between a male citizen (*astos*) and a foreign woman (*xenê*), these courtesans were necessarily Athenian citizens.[23] In Isaios 3, for example, the consort of a *politês* is accused of having been a prostitute, but "her citizen status is never brought into question in the speech" (Roy 1997:16). A well-known prostitute was reportedly the mother of the Athenian general Timotheos (whose father was the preeminent military leader, Konôn),[24] and a citizen *hetaira* was allegedly the consort of the wealthy Athenian Olympiôdoros.[25] The prostitute Theodotê (identified in antiquity as an Athenian [*Attikê*]) is queried concerning the real estate which she owns — in a community where only citizens could own landed property.[26]

Because of the partisan nature of Athenian private forensic presentations and the Athenian political orators' penchant for slandering opponents,[27] it would be unwise to assume the truthfulness of any of these individual charges of prostitution.[28] Accordingly, some scholars simply dismiss these assertions as mere vituperative slander endemic in Athenian agonistic presentations.[29] Such conclusions, in my opinion, are overly simplistic. Although Athenian forensic addresses are rhetorical contrivances that virtually always present evidence tendentiously (and often dishonestly), the presuppositions underlying litigants' claims are generally reliable: since forensic presentations were made to panels composed of hundreds of jurors, an allegation dependent on premises blatantly inconceivable would be inherently unpersuasive.[30] Advancing clearly incredible accusations would not have aided a speaker's effort at

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the speaker's presupposition (that such a woman could pass for decades as an "Athenian") is significant.

[23] Isai. 3.17-18. For the law forbidding Athenian men to marry foreign women, see Dem. 59.16.

[24] *Athên.* 577b: Τιμόθεος δ' ὁ στρατηγήσας Ἀθηναίων ἐπιφανῶς ἑταίρας ἦν υἱὸς Θρᾴττης τὸ γένος. Foreign birth is ascribed to the mothers of other preeminent Athenian political leaders and generals, including Kleoboulê, mother of Demosthenes. Because these leaders were necessarily Athenian citizens, their mothers must have been accepted as Athenian citizens: see E. Cohen 2000: 77, n. 184.

[25] Dem. 48.53-54. For her status as an Athenian, see McClure 2003:16.

[26] Xen. *Apom.* 3.11.4: ἔστι σοι ἀγρός; . . . οἰκία προσόδους ἔχουσα; Characterization as Athenian (Θεοδότην τὴν Ἀττικὴν ἑταίραν): *Athên.* 535c; see Cox 1998: 175, n. 37.

[27] See Worman 2008: 213-74; Wrenhaven 2012: 158, n. 101.

[28] Regarding "*hetaeras*... the orators fabricated characteristics or circumstances to serve their rhetorical ends" (McClure 2003: 41). See also Cooper 1995: 303, nn. 2-3, and Gagarin 2001.

[29] Garner, for example, alludes to the "outrageous" accusations "regularly" advanced by speakers in court (1987: 81-82).

[30] Although some scholars view Athenian litigation as largely "theatre" (Humphreys 2007) or as a venue for the venting of elite social animosities (D. Cohen 1995: 70, 82), with litigants sometimes seeking actually to lose their cases (E. Cohen [forthcoming]; Todd 2011: 138, 1994: 131, n. 180), I view Athenian litigation as essentially the effort of real people to prevail in actual conflicts by persuading a majority of jurors to vote in their favor (see Harris 2013: 12-13).

persuasion, and Athenian jurors would have been far more capable than ourselves to evaluate the plausibility of inflammatory charges against their own political leaders.

Aiskhinês insists that, in proscribing political leadership by those who had prostituted themselves, Athenian legislation was following a historical pattern of dealing with improper behavior that people actually did engage in.[31] Athenian litigants, in fact, frequently insist on a connection between the adoption of particular laws (or the absence thereof) and the prevalence (or absence) of the behavior in question. Lykourgos, for example, in the late fourth century claims that Athenian law made no provision for the punishment of persons abandoning the city in time of war only because such offenses had not occurred in earlier times.[32] Lysias similarly asserts that the Athenians did adopt legislation in response to crimes that actually were taking place but not against offenses whose actual occurrence was implausible.[33] Modern legal scholars have long noted the correlation between the adoption of proscriptive legislation and the prevalence (or perceived prevalence) of the objectionable behavior[34]: recent prohibitions of cyber-bullying and of corporate tax-motivated international "inversions" offer dynamic examples of legal responsiveness to practices not previously occurring — or at least not previously having come to the legislator's attention.

The enactment of two laws limiting the political rights of male citizens who had prostituted themselves suggests that such prostitution had occurred frequently enough and with significant enough import to have engendered a legislative response. According to Aiskhinês (speaking in the mid-fourth century[35]), any male citizen who had acted as a *hetairos*[36] was precluded from holding any governmental office or from offering any

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[31] 1.13: Νομοθετεῖ (sc. ὁ νομοθέτης) περὶ ἀδικημάτων μεγάλων μέν, γιγνομένων δ'οἶμαι ἐν τῇ πόλει· ἐκ γὰρ τοῦ πράττεσθαί τιν' ὧν οὐ προσῆκεν, ἐκ τούτου τοὺς νόμους ἔθενθ' οἱ παλαιοί.

[32] *Leôk.* 9: παρεῖσθαι δὲ τὴν ὑπὲρ τῶν τοιούτων τιμωρίαν συμβέβηκεν, οὐ διὰ ῥᾳθυμίαν τῶν τότε νομοθετούντων, ἀλλὰ διὰ τὸ μὴ ἐν τοῖς πρότερον χρόνοις γεγενῆσθαι τοιοῦτον μηδέν, μηδ' ἐν τοῖς μέλλουσιν ἐπίδοξον εἶναι γενήσεσθαι. On Lykourgos' argumentation here, see most recently Ober 2008: 183-190; Mossé 2007: 181-88.

[33] 31.27: ἀκούω δ'αὐτὸν λέγειν ὡς, εἴ τι ἦν ἀδίκημα τὸ μὴ παραγενέσθαι ἐν ἐκείνῳ τῷ καιρῷ, νόμος ἂν ἔκειτο περὶ αὐτοῦ διαρρήδην, ὥσπερ καὶ περὶ τῶν ἄλλων ἀδικημάτων . . . τίς γὰρ ἄν ποτε ῥήτωρ ἐνεθυμήθη ἢ νομοθέτης ἤλπισεν ἁμαρτήσεσθαί τινα τῶν πολιτῶν τοσαύτην ἁμαρτίαν;

[34] See, for example, Windlesham 1996: vii, 40, discussing the UK adoption of the Criminal Justice Act 1993 and the US adoption of Public Law 103-322. See also Heinz 1982; Fisher and Sloan, eds. 2013, discussing multiple laws passed in response to perceptions of an "epidemic" of peer-on-peer sexual assaults in American institutions of higher education. McGinn warns against the "attempt to read social practice" from the adoption of legislation even as he cites the US Congress's adoption of the Mann Act in response to perceived widespread trafficking in women (2014: 90).

[35] Attic year 346/5 (see Fisher 2001: 6-8).

[36] The word *hetairos* ("male companion") can mean "male prostitute" but appears relatively rarely in Greek in sexual context (see, however, Sêmon. 7.49; Aristoph. *Ekklês*. 912; *Athên.*

opinion whatsoever in the Council (*Boulê*) or in the Assembly (*Ekklêsia*),[37] a proscription enforceable by a *graphê hetairêseos* ("Prosecution for 'Companionship' "). Separately, Aiskhinês describes a process — *dokimasia rhêtorôn* ("Examination of Speakers") — through which the right to speak in the *Ekklêsia* might be denied to anyone who had acted as a prostitute (*hetairos* or *pornos*).[38] Much academic attention has in recent years been focused on elucidation of these laws — especially at prior Symposia in which Lanni, Todd, Gagliardi, Wallace, MacDowell and others have considered in detail the consequences, procedures and interaction of the *dokimasia rhêtorôn* and the *graphê hetairêseos*,[39] resulting in a consensus that posits the two procedures as essentially complementary, offering alternative procedural routes to limiting a male prostitute's participation in public life, but neither directly nor indirectly outlawing prostitution.[40] From an economic aspect, the legislation was of slight impact, for it had no effect on the vast majority of potential or actual male prostitutes — registered foreigners resident in Athens (*metics*), aliens visiting or unregistered, slaves, citizens who actually earned their living as prostitutes rather than as political leaders (*rhêtores*) and who easily could ensconce themselves among the mass of citizens refraining from political activity (the so-called *apragmones*).[41] Indeed, thousands of Athenian men, literally the majority of citizens, chose not even to attend Assembly meetings [42] — a right of attendance retained by male prostitutes. In any event, few Athenians ever reached the level of public activity targeted by the "Examination of Speakers" — that of *rhêtôr*, synonymous at Athens with "political leader." [43]

Still, for the democracy's chieftains, the legislation was not without impact. The

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571c); men's receipt of compensation for sex is often communicated through *hetairein*, the verbal cognate of *hetairos*.

[37] ἐάν τις Ἀθηναίων ἑταιρήσῃ, μὴ ἐξέστω αὐτῷ τῶν ἐννέα ἀρχόντων γενέσθαι . . . μηδ' ἱερωσύνην ἱερώσασθαι . . . μηδὲ συνδικῆσαι τῷ δημοσίῳ, μηδὲ ἀρξάτω ἀρχὴν μηδεμίαν μηδέποτε, μήτ' ἔνδημον μήτε ὑπερόριον, μήτε κληρωτὴν μήτε χειροτονητήν· μηδὲ κηρυκευσάτω μηδὲ πρεσβευσάτω (μηδὲ τοὺς πρεσβεύσαντας κρινέτω, μηδὲ συκοφαντείτω μισθωθείς) μηδὲ γνώμην εἰπάτω μηδέποτε μήτε ἐν τῇ βουλῇ μήτε ἐν τῷ δήμῳ .. . Aiskh. 1.19-20.

[38] Δοκιμασία ῥητόρων· ἐάν τις λέγῃ ἐν τῷ δήμῳ . . . ἢ πεπορνευμένος ἢ ἡταιρηκώς . . . τούτους ἀπαγορεύει μὴ δημηγορεῖν. ἐὰν δὲ τις παρὰ ταῦτα . . . λέγῃ . . . δοκιμασίαν ἐπαγγειλάτω Ἀθηναίων ὁ βουλόμενος, οἷς ἔξεστιν. Aiskh. 1.28-32. Aiskhinês explains ἢ πεπορνευμένος ἢ ἡταιρηκώς as referring to τὸν τὸ σῶμα τὸ ἑαυτοῦ ἐφ' ὕβρει πεπρακότα (Aiskh. 1.29). The fullest exegesis of *dokimasia* at Athens — in all its varied forms — is Feyel 2009.

[39] See Lanni 2010, (forthcoming); Todd 2006, 2010; Gagliardi 2005, 2006, 2010; Wallace 2006; MacDowell 2000, 2005.

[40] Prostitution lawful at Athens: among many others, see MacDowell 2005: 85; Foxhall 2013: 103; Robson 2013: 67; Lanni 2010: 55; Osborne 2004: 14.

[41] Lanni 2010: 45; D. Cohen 1991: 222-23; Halperin 1990: 98-99. On the *apragmones*, see Carter 1986: esp. 52-75; Lanni (forthcoming).

[42] Archaeological evidence reveals that the fourth-century Pnyx, even after renovation and slight enlargement from the fifth-century gathering site, could barely contain the 6,000 *politai* needed for a quorum. See Thompson 1982: 138-39.

[43] On the significance of *rhêtores* at Athens, see my discussion below pp. 375-76.

prosecution of Timarkhos (the subject of Aiskhinês 1) was far from unique[44]: actual prosecutions potentially targeting political activity by "prostitutes" are relatively well-attested.[45] Already in the fifth century, Aristophanês in *The Knights* makes allusion to successful actions depriving sexual malefactors (*kinoumenoi*) of citizenship rights, including specifically the capacity to act as *rhêtores*.[46] Fourth century sources include several explicit references to prosecutions for speaking, or attempting to speak, after engaging in acts of "prostitution." Thus when Androtiôn, a prominent political leader, complains in court that Diodôros has abusively accused him of having been a prostitute but has never brought a *graphê hetairêseos* against him, Diodôros assures Androtiôn that his cavil is unjustified: we will proceed to initiate such a prosecution for prostitution before the tribunal of the Thesmothetes.[47] Aristophôn of Azênia is reported to have gained victory in his personal "war" against Hêgêsandros by threatening to charge him with prostitution under the procedure of *dokimasia rhêtorôn* employed by Aiskhinês against Timarkhos.[48] In the early fourth century, Andokidês treats the legislation against political leadership by male citizen prostitutes as realistically relevant, arguing that one of his accusers, Epikharês, far from being in a position to make charges against others, does not — because of his own repeated acts of prostitution — have the right even to address a court in his own defense. Andokidês even claims that Epikharês, himself a whore, has had the audacity to bring charges against others for having been prostitutes! [49]

But what did it mean to term an Athenian political leader a prostitute? Although the legislation explicitly purports to apply to any citizen who has acted as a *pornos* or as a

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[44] In addition to the cases set forth in the text arising from charges of prostitution, a number of prosecutions are attested relating to other offenses which would have disqualified a would-be speaker, e.g. avoidance of military service (ἀστρατεία, λιποτάξιον: see Hyper. *Athen.;* Lykourg. *Leôkr.*, discussed below, pp. 376-77.

[45] The number of surviving examples is significant in the context of the extremely small amount of information now extant from the vast number of Athenian legal cases litigated over scores of years. Nonetheless, the absence of statistical material and the chance nature of testimonial survival mean that "it is impossible to say how frequently these laws were formally enforced" (Lanni 2010: 57).

[46] Lines 876-80: ΠΑ· ὅστις | ἔπαυσα τοὺς κινουμένους, τὸν Γρῦπον ἐξαλείψας. | ΑΛ· οὔκουν σε δῆτα ταῦτα δεινόν ἐστι πρωκτορηρεῖν | παῦσαί τε τοὺς κινουμένους; κοὐκ ἔσθ' ὅπως ἐκείνους | οὐχὶ φθονῶν ἔπαυσας, ἵνα μὴ ῥήτορες γένοιντο.

[47] Dem. 22. 21, 23: (21) Ἔτι τοίνυν ἐπιχειρεῖ λέγειν περὶ τοῦ τῆς ἑταιρήσεως νόμου, ὡς ὑβρίζομεν ἡμεῖς . . . καὶ φησὶ δεῖν ἡμᾶς, εἴπερ ἐπιστεύομεν εἶναι ταῦτ' ἀληθῆ, πρὸς τοὺς θεσμοθέτας ἁπαντᾶν . . . (23) ὅταν (sc. φῇ) δ' ὅτι πρὸς τοὺς θεσμοθέτας προσῆκεν ἐπαγγέλλειν ἡμῖν, ἐκεῖνο ὑπολαμβάνετε, ὅτι καὶ τοῦτο ποιήσομεν καὶ νῦν προσηκόντως περὶ τοῦ νόμου λέγομεν.

[48] Aiskhin. 1.64: ὁ Ἡγήσανδρος, ὅτε καὶ προσεπολέμει Ἀριστοφῶντι τῷ Ἀζηνιεῖ πρὶν αὐτῷ τὴν αὐτὴν ταύτην ἐν τῷ δήμῳ ἠπείλησεν ἐπαγγελίαν ἐπαγγελεῖν ἥνπερ ἐγὼ Τιμάρχῳ . . . . Cf. MacDowell 2005: 83-84.

[49] 1.100-101: σὺ (sc. Ἐπίχαρες) περὶ ἑταιρείας ἐμοὶ μνείαν ποιῇ καὶ κακῶς τινας λέγεις; ὃς ἑνὶ μὲν οὐχ ἡταίρησας (καλῶς γὰρ ἄν σοι εἶχε) πραττόμενος δ' οὐ πολὺ ἀργύριον τὸν βουλόμενον ἀνθρώπων . . . ἐπὶ τοῖς αἰσχίστοις ἔργοις ἔζης, . . . (101) Ἀλλ' ὅμως οὗτος ἑταίρων τολμᾷ κατηγορεῖν, ᾧ κατὰ τοὺς νόμους τοὺς ὑμετέρους οὐδ' αὐτῷ ὑπὲρ αὑτοῦ ἔστιν ἀπολογεῖσθαι.

hetairos, no definition of these terms is offered in the law.[50] It did not necessarily signify that the man was a "prostitute" in the sense of earning his primary income from selling his body for sexual purposes or of practicing this *tekhnê* as his principal occupation. McClure has shown that for Athenian males "prostitution is often represented as an activity, but not a state of being" (1983: 17). A man might appropriately be termed a *hetairos* or a *pornos* not because his métier was personal erotic commerce, but merely because he had at some point accepted something of value in the context of a sexual relationship. Gift-giving — pervasive in the male pederastic culture of Athens — left many male citizens vulnerable to charges of "prostitution." [51]

B. Elite Homoerotic Culture

In the context of an Athenian sexual relationship, it was not easy to differentiate appropriate from inappropriate gifts, a quandry that potentially imperiled many of the city's leaders. Thus Aiskhinês seeks to distinguish between "chaste" male sexual submission to a lover — "admirable" (*kalon*) — and the "contemptible" (*aiskhron*) self-prostitution motivated by compensation for service (*misthos*).[52] In contrast to the wanton sexual excesses of a youth hired for money (financial patronage that is characteristic of monstrously uncivilized men), romantic passion for upstanding and moral youths is the experience (*pathos*) of the "generous" (*philanthropos*) and charitable male soul.[53] Although the generosity conveyed by the adjective *philanthropos* carries a connotation of benevolence and humaneness, *philanthropos* in common usage often implies material benefit.[54] Accordingly, the gift-giving prominent in "chaste" male homosexuality was not devoid of tangible gain.[55] The female "companions" (*hetairai*) prominently present at male parties are paralleled by the young men who (in the phrase of Ephippos) paid with sex for the delicacies they enjoyed at male

[50] Nowak 2010: 183.

[51] Lanni 2010: 54; Hubbard 1998: 64; Fisher 2001: 49-50; Hindley 1991: 173 n. 29.

[52] Aiskhin. 1.137.5-7: καὶ τὸ μὲν ἀδιαφθόρως ἐρᾶσθαί φημι καλὸν εἶναι, τὸ δ' ἐπαρθέντα μισθῷ πεπορνεῦσθαι αἰσχρόν. "*Misthos*" is the term applied to cash received in exchange for labor: τοὺς καταισχύνοντας αὑτοὺς μισθούς φησι πράττεσθαι τοῦ πράγματος (Aiskhin. 1.94). Receipt of a salary (*misthophoria*) was the hallmark of a slave: when the Athenian state required coin-testers and mint-workers for continuing service, legislation explicitly provided for the payment of *misthophoriai* to the skilled public slaves (*dêmosioi*) who provided these services (SEG 26.72, lines 49-55; Figueira 1998: 536-47).

[53] Aiskhin. 1.137.1-5: ὁρίζομαι δ' εἶναι τὸ μὲν ἐρᾶν τῶν καλῶν καὶ σωφρόνων φιλανθρώπου πάθος καὶ εὐγνώμονος ψυχῆς, τὸ δὲ ἀσελγαίνειν ἀργυρίου τινὰ μισθούμενον ὑβριστοῦ καὶ ἀπαιδεύτου ἀνδρὸς ἔργον εἶναι ἡγοῦμαι·

[54] The term is frequently used in the context of endowment or gratuity: see, for example, BGU I 202.10; *Mon. Anc. Gr.* 9.10. Cf. UPZ 162.vii.21; OGI 139.20.

[55] Although the modalities of gift-giving in male courtship are alluded to in only a few literary passages (all in comedy: Aristoph. *Orn.* 705-7; *Hipp.* 904-9, 1104-1199, *Plout.* 153-57), courtship comprises more than half of the pederastic scenes surviving on ceramic representations: Lear and Cantarella 2008: 237, n. 38.

dinner parties.[56] Expensive animals are conventionally tendered as offerings in male courtship context.[57] Representations on ceramic material produced in Athens — although not transparently direct illustrations of actual life — frequently portray men proffering to youths a broad variety of valuable gifts.[58] *Eromenoi*,[59] "represented as if they were citizen youths," [60] are even portrayed on Athenian vases as receiving sacks of money: no apparent iconographic differentiation can be discerned between such deliveries of cash and other less explicitly mercenary gifts to youths who have been identified by modern scholars as recipients of presents from lovers.[61] This phenomenon is explained perhaps by the assertion of the characters Khremylos and Kariôn in Aristophanês' *Wealth* that there's no real difference between the *pornoi* who deliver sex "for money, and not for love," and the "noble" (*khrêstoi*) *eromenoi* who "being ashamed to demand cash" ask instead for a good steed or a pack of hounds.[62]

Aiskhinês does attempt to differentiate "males being pursued through modest courtship" from "males working as brothel whores" (*peporneumenous*, the category into which he places Timarkhos, the rival political leader whom he is accusing of having been a prostitute).[63] This Manichean distinction, however, in no way illuminates the line between "generous" benefits that enhance the recipient, and "uncivilized" benefits that prostitute the recipient — the central issue raised by the prosecution of Timarkhos (Aiskhinês 1.137). But like other aspects of Athenian behavior, gift-giving in an erotic context tends to be evaluated on whether it is appropriate to a free person, or suggestive of a servile relationship, a differentiation necessarily focused on the Athenian concept of *kharis* — a value often seen to lie

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[56] ὅταν γὰρ ὢν νέος | ἀλλότριον εἰσελθὼν ὄψον ἐσθίειν μάθηι | ἀσύμβολόν τε χεῖρα προσβάληι βορᾶι, | διδόναι νόμιζ᾽αὐτὸν σὺ τῆς νυκτὸς λόγον (Fr. 20 [K-A]). Cf. Alexis Fr. 244 (K-A).

[57] Dover 1978 [1989]: 92-93. Cf. Aristoph. *Ornith.* 707, *Plout.* 157.

[58] Lear 2014: 108; Lear and Cantarella 2008: 39.

[59] Plural form of "*eromenos*," the term used in ancient Greek for the person being courted, for whom the *erastês* ("lover") "has a passionate desire" (Dover 1978 [1989]: 16).

[60] Von Reden 1995: 198-99. The youths, as pictured, are usually of athletic build, crowned, wearing *himations* and often carrying spears. Cf. Bazant 1985: 41.

[61] See the representations on these vases: Copenhagen Nat. 3634, Bochum Univ. S 507, New York 52.11.4. Cf. Lear and Cantarella 2008: 78-86; Hubbard 2009: 11; von Reden 1995: 195-211; Meyer 1988. Even Ferrari, who asks "are there moneybags in these pictures?," recognizes that "current scholarship" uniformly believes that "the identification of the bag with a money pouch is a fact rather than a hypothesis" (2002: 14, 251, n. 21).

[62] ΚΑ: καὶ τούς γε παῖδάς φασι ταὐτὸ τοῦτο δρᾶν, | οὐ τῶν ἐραστῶν, ἀλλὰ τἀργυρίου χάριν. | ΧΡ. οὐ τούς γε χρηστούς, ἀλλὰ τοὺς πόρνους· ἐπεὶ | αἰτοῦσιν οὐκ ἀργύριον οἱ χρηστοί. ΚΑ. τί δαί; | ΧΡ. ὁ μὲν ἵππον ἀγαθόν, ὁ δὲ κύνας θηρευτικούς. | ΚΑ αἰσχυνόμενοι γὰρ ἀργύριον αἰτεῖν ἴσως | ὀνόματι περιπέττουσι τὴν μοχθηρίαν (ll. 153-59).

[63] Aiskh. 1.159: . . . χωρὶς μὲν τοὺς διὰ σωφροσύνης ἐρωμένους, χωρὶς δὲ τοὺς εἰς ἑαυτοὺς ἐξαμαρτάνοντας, ὑμεῖς ἤδη τοῦτ᾽ ἐρωτηθέντες ἀποκρίνασθε πρὸς ἐμέ, εἰς ὁποτέραν τὴν <τάξιν> Τίμαρχον κατανέμετε, πότερα εἰς τοὺς ἐρωμένους ἢ εἰς τοὺς πεπορνευμένους.

at the heart of Attic culture.[64] Athenians generally felt an obligation to help their friends, and an expectation of resultant gratitude (and an entitlement to future reciprocity).[65] Exchange based on money — in sexual context, "prostitution" — stood in stark and fundamental opposition to exchange based on reciprocal *kharis*.[66] In the modern world commercial services, for monetary payment, are increasingly supplying personalized labor (caring for children, the elderly, the disabled and the handicapped, and so forth) that was formerly provided at no monetary charge by relatives and friends motivated by personal feeling for and/or a sense of obligation toward the recipient. Similarly the new "monetised and money-using economy of fourth-century Athens," [67] a process manifestly coming to supersede a prior system based primarily on familial, social and political relations,[68] tended to convert every aspect of life — including the sexual — into monetary transactions.[69] And in both the modern world[70] and in fourth-century Athens this transformation has generated intense dissonance between persons attached to the older order and those utilizing the new. Traditional male homoerotic society, based on *kharis* rather than purchase, resisted the transformation of sexual courtship to sexual purchase.

Even in the fourth century, as Athens was increasingly becoming an exemplar of a monetary economy, Aristotle is still emphasizing reciprocity in sexual relations as a central distinction between free men and slaves. Through *kharis*, good deeds must be repaid (and bad likewise), and the free citizen when recipient of a benefit has the presumed opportunity, and the moral obligation, to repay that benefit — and to initiate a fresh contribution to his benefactor in the future. "Otherwise a free man's life would be like that of a slave."[71] Such an example of pure and exalted *kharis* Aristotle finds in the *eromenos*'s free offer of himself to the burning erotic need of his

[64] *Kharis* defined: Davidson 2007: 523, n. 1; Millett 1991: 58. For the importance of reciprocal relationships at Athens, see Missiou 1998; Herman 1998; Millett 1998.

[65] Millett 1991: 24-52 and various essays in Gill et al. eds. 1998.

[66] See von Reden 1997: 154; Kurke 1994: 42; Seaford 1994: 199. Cf. Seaford 1998; von Reden 1998; Steiner 1994; Kurke 1989.

[67] Shipton 2000: 14. Cf. Schaps 2004: 111-21; Shipton 1997; Gofas 1994; Kanellopoulos 1987: 19-22; Theokharês 1983: 100-14.

[68] Recent studies have demonstrated the extraordinary impact of the introduction in the sixth and fifth centuries of coined money, a phenomenon that culminated ultimately in the detached monetary transactions of fourth-century Athens. See Schaps 2008; Shipton 2001; Picard 2008: 147-51; Davis 2014: 347; von Reden 2010: 30-33.

[69] Aristot. *Pol.* 1258a10-14: ἀνδρείας γὰρ οὐ χρήματα ποιεῖν ἐστιν ἀλλὰ θάρσος, οὐδὲ στρατηγικῆς καὶ ἰατρικῆς, ἀλλὰ τῆς μὲν νίκην τῆς δ' ὑγίειαν. οἱ δὲ πάσας ποιοῦσι χρηματιστικάς, ὡς τοῦτο τέλος ὄν, πρὸς δὲ τὸ τέλος ἅπαντα δέον ἀπαντᾶν.

[70] Western antagonism to the sale of sex, long grounded in religious and moral beliefs, has been somewhat attenuated by the emergence of secular liberal societies but has been concomitantly intensified by feminist analyses and by the increasing (or at least increasingly more publicized) coercive aspects of commercial sex.

[71] Aristot. *NE* 1132b-1133a: ἢ γὰρ τὸ κακῶς ζητοῦσιν, εἰ δὲ μή, δουλεία δοκεῖ εἶναι εἰ μὴ ἀντιποιήσει· ἢ τὸ εὖ.

erastês — a gratuitous contribution, without direct recompense.[72] In The *Symposium* (in a discussion attributed to Pausanias) Plato explains that erotic *kharis* is present when an *erastês* is prepared to sacrifice dignity and self-importance in seeking to consummate his longing — to make servile sacrifices that no slave would bear — and when the *eromenos* in turn in his quest for wisdom and knowledge is likewise willing to be enslaved in every way (*hotioun hypourgôn*).[73] Ironically, in a society permeated by a profusion of true slavery, the highest amatory relationship of free men would, in this formulation, involve the mutual assumption of interactive servitude. But elite negativity toward cash and commerce remains a leitmotif: such obeisance if undertaken for monetary motivation would be contemptible.[74]

Sexual culture, expressed through moral considerations set in philosophical paradigm, is not, however, the sole justification for closing political leadership to those who have prostituted themselves. Some Athenians simply did not wish to entrust public process, in any way, to those excessively self-interested in money.

C. Erotic Greed

For the Athenians, management of the right to "address the people" (*dêmêgorein*) was a critical element of governance, not a jejune limitation on a theoretical freedom of speech. This significance reflected the unique importance of "speakers" (*rhêtores*) in the Athenian political process. Unlike conventional modern political arrangements, the Athenian constitution (*politeia*) did not provide for a relatively small number of high officials elected or appointed for a substantial period of time to head a government that would function more or less autonomously of the day-to-day will of the people. Instead on-going public affairs were administered by large numbers of short-term officers chosen by sortition. Accordingly, the true political leaders of Athens were the prominent *rhêtores* in the Assembly, a gathering of the People (*dêmos*) that met frequently and was the dominant organ of Athens' "pure democracy." [75] And in the Assembly individual speakers were often dominantly influential in the determination (and often in the implementation) of public policies: Thucydides observes that in the

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[72] *Rhet.* 2.7.2-3: ἔστω δὴ χάρις . . . ὑπουργία τῷ δεομένῳ μὴ ἀντί τινος, μηδ' ἵνα τι αὐτῷ τῷ ὑπουργοῦντι ἀλλ' ἵνα τι ἐκείνῳ· μεγάλη δὲ ἂν ᾖ σφόδρα δέομενος . . . δεήσεις δέ εἰσιν αἱ ὀρέξεις, καὶ τούτων μάλιστα αἱ μετὰ λύπης τοῦ μὴ γιγνομένου. τοιαῦται δὲ αἱ ἐπιθυμίαι, οἷον ἔρως . . . .

[73] 183b3-c4, 184d4-d7: τῷ δ' ἐρῶντι πάντα ταῦτα ποιοῦντι χάρις ἔπεστι . . . καὶ τὸ ἐρᾶν καὶ τὸ φίλους γίγνεσθαι τοῖς ἐρασταῖς. (184d4) ὁ μὲν χαρισαμένοις παιδικοῖς ὑπηρετῶν ὁτιοῦν δικαίως ἂν ὑπηρετεῖν, ὁ δὲ τῷ ποιοῦντι αὐτὸν σοφόν τε καὶ ἀγαθὸν δικαίως αὖ ὁτιοῦν ἂν ὑπουργῶν <ὑπουργεῖν>. . . .

[74] Pl. *Symp.* 184e5-185a5: γάρ τις ἐραστῇ ὡς πλουσίῳ πλούτου ἕνεκα χαρισάμενος ἐξαπατηθείη . . . οὐδὲν ἧττον αἰσχρόν· . . . ἕνεκα χρημάτων ὁτιοῦν ἂν ὁτῳοῦν ὑπηρετοῖ, τοῦτο δὲ οὐ καλόν. Cf. 183a2-8: εἰ γὰρ χρήματα βουλόμενος παρά του λαβεῖν . . . ἐθέλοι ποιεῖν οἷάπερ οἱ ἐρασταὶ πρὸς τὰ παιδικά, . . . ἐμποδίζοιτο ἂν μὴ πράττειν οὕτω τὴν πρᾶξιν καὶ ὑπὸ φίλων καὶ ὑπὸ ἐχθρῶν . . . . .

[75] Ober 1996: 95-96, 1989: 105-112; Hansen 1991: 143-45; Davidson 1997: 252.

fifth century Periklês' persuasive sway over the Assembly made Athens a democracy in name, but in fact a society ruled by a single speaker ("the leading man").[76] In the fourth century, private *rhêtores* and the popularly elected "generals" (*stratêgoi*) were frequently equated as the preeminent officers of the state,[77] and were dually recognized as the chieftains of the people.[78] In fact, the orators are sometimes explicitly spoken of as if they actually were the elected long-term high officials that Athens in fact did not have.[79] Yet these "speakers" — leading a society where bribery and embezzlement were believed to be commonplace [80] — received no salary or other public compensation. The Athenians not surprisingly were obsessively alert to the danger of destructive monetary influence on speakers' advocacy. "The man who had sold his own body outrageously would also readily vend the public interest of the state." [81]

Such sentiments argued for preemptive exclusion from the *bêma* of those who had demonstrated a predilection toward excessive financial self-interest. In discussing the *dokimasia rhêtorôn*, Aiskhinês identifies a variety of offenses — largely involving money-related behavior — that would deprive a citizen of the right to address the *Ekklêsia*: wasting ("consuming") family or inherited assets; receiving improper compensation for sex; not providing nourishment or housing for a (presumably elderly) parent; refusing military service for which a citizen has been conscripted (or acting in a cowardly way — "throwing away one's shield" — in combat).[82] Most of these offenses transparently involve monetary consideration, but even the act of avoiding military service is not without a peripheral financial dimension: those called up for duty would often suffer monetary disadvantage through their consequent

[76] 2.65.9: ἐγίγνετό τε λόγῳ μὲν δημοκρατία, ἔργῳ δὲ ὑπὸ τοῦ πρώτου ἀνδρὸς ἀρχή. Thucydides' leading expounder explains: "Perikles wielded such influence, and for a long period, as has been given to few men to wield over their fellow countrymen; but his constitutional powers were small, and he could only continue to keep his position through his direct influence with the ekklesia" (Gomme 1956: 194). Cf. Rhodes 2016: 10-11. During his ascendancy, Periklês was frequently elected as *stratêgos*.

[77] Hyper. 4.27, 5.24; Dein. 1.112, 3.19; Dem. 18.171, 23.184; Aristot. *Rhet*. 1388b17-18. Cf. Hansen 1983; Perlman 1963: 353-54.

[78] Dein. 1.71: καὶ τοὺς μὲν νόμους προλέγειν τῷ ῥήτορι καὶ τῷ στρατηγῷ . . . πάσας τὰς δικαίας πίστεις παρακαταθέμνον οὕτως ἀξιοῦν προεστάναι τοῦ δήμου. Cf. Dem. 18.212.

[79] See, for example, Lykourg. Fr. A.2.1 (Burtt)= V.1a (Conomis): Τρεῖς δοκιμασίαι κατὰ τὸν νόμον γίγνονται· μία μὲν ἣν οἱ ἐννέα ἄρχοντες δοκιμάζονται, ἑτέρα δὲ ἣν οἱ ῥήτορες, τρίτη δὲ ἣν οἱ στρατηγοί.

[80] Aiskhin. 3.173; Aristoph. *Hipp.* 438-44, 824-35, 930-33, 991-96, 1141-50, 1218-26, *Plout.* 377-79, 567-70, *Sphêk.* 669-77; Dein. 1.41, 1.77; Dem. 3.29, 19.275, 58.35; Lys. 19.57, 25.9, 25.19, 27.10-11, 28.9, 29.6, 30.25. Cf. Sinclair 1988: 179-86; Davies 1978: 319.

[81] τὸν γὰρ τὸ σῶμα τὸ ἑαυτοῦ ἐφ' ὕβρει πεπρακότα καὶ τὰ κοινά τῆς πόλεως ἡγήσατο (sc.ὁ νομοθέτης) ἀποδώσεσθαι (Aiskhin. 1.29).

[82] Aiskhin. 1.28-30: τούτους οὐκ ἐᾷ δημηγορεῖν . . . (τις) τὸν πατέρα τύπτων ἢ τὴν μητέρα, ἢ μὴ τρέφων, ἢ μὴ παρέχων οἴκησιν . . . ἢ τὰς στρατείας μὴ ἐστρατευμένος, ὅσαι ἂν αὐτῷ προσταχθῶσιν, ἢ τὴν ἀσπίδα ἀποβεβληκώς . . . ἢ πεπορνευμένος ἢ ἡταιρηκώς . . . ἢ τὰ πατρῷα κατεδηδοκώς, ἢ ὧν ἂν κληρονόμος γένηται .

inability to maintain income or to pursue business opportunities. Athênogenês, the target of a law-court presentation written by Hypereidês, is vilified by his opponent for dodging military service by leaving Athens and moving to Troizêne shortly before the war with Phillip. While other residents of Attika participated in the ground campaign ending in disaster at Chaironeia, Athênogenês prospered in exile, "with the intention of returning later to carry on his business when peace was established."[83] Similarly Leôkratês is accused of failing to report for military service when Athens was mobilizing to resist Philip after Chaironeia[84]: instead he allegedly left Athens in order to pursue business activities — trading in grain with capital that he had brought from Athens and engaging in other substantial financial transactions.[85]

In its battle against personal financial peccadilloes that might signal a propensity toward corruption in public affairs, Athens also deemed as unfit to address the Assembly those individuals who had "consumed" ancestral assets (*patrôia*), including property over which a would-be speaker had become, by inheritance, the titular owner (*klêronomos*).[86] Preservation of this property was critical to preservation of the *oikos*. A failure to preserve ancestral assets — in the language of the *dokimasia* law quoted by Aiskhinês, breach of a duty not to "consume" *patrôia* — reflected an individual's preference for his personal financial advantage over that of the prime constituent element in Athenian society — the *oikos* that at Athens was the fundamental element of society and the primary repository of wealth.[87]

Athens may not have wanted its political advisors and leaders to include individuals who gave an inappropriate priority to their personal material advantage. But the fact that prostitution remained lawful may have had a somewhat countervailing positive expressive effect on society's overall attitude toward providers of commercial sex.[88]

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[83] Hyper. *Athên*. 29-31: ἐν δὲ τῷ πολέμῳ τῷ πρὸς Φίλιππον μικρὸν πρὸ τῆς μάχης ἀπέ[λιπε] τὴν πόλιν· καὶ μεθ' ὑμῶν μὲν οὐ συνεστρατεύσατο εἰς Χαιρώνειαν, ἐξώκησε δὲ εἰς Τροιζῆνα . . . ἐργασόμενος ἐπεὶ εἰρήνη γέγονεν . . . εἰς Τροιζῆνα ἐλθὼν καὶ ποιησαμένων αὐτὸν Τροιζηνίων πολίτην, ὑποπεσὼν Μνησίαν τὸν Ἀργεῖον καὶ ὑπ' ἐκείνου κατασταθεὶς ἄρχων . . . . (Text and Translation: Burtt 1954).

[84] Lykourg. *Leôk*. 147: ἔνοχον ὄντα Λεωκράτην . . . λιποταξίου δὲ καὶ ἀστρατείας οὐ παρασχὼν τὸ σῶμα τάξαι τοῖς στρατηγοῖς. Cf. §16-17: ἐψηφίσατο ὁ δῆμος . . . τοὺς δὲ στρατηγοὺς τάττειν εἰς τὰς φυλακὰς τῶν Ἀθηναίων καὶ τῶν ἄλλων τῶν οἰκούντων Ἀθήνησι, καθ' ὅ τι ἂν αὐτοῖς δοκῇ. . . . τὴν φυλακὴν ἔρημον τὸ καθ' αὑτὸν μέρος κατέλιπεν.

[85] Lykourg. *Leôk*. 17, 26-27: μετὰ τῆς ἑταίρας Εἰρηνίδος προσέπλευσε καὶ ᾤχετο φεύγων . . . . οἷς παρ' ὑμῶν ἐξεκομίσατο χρήμασιν ἀφορμῇ χρώμενος, ἐκ τῆς Ἠπείρου παρᾶ Κλεοπάτρας εἰς Λευκάδα ἐσιτήγει καὶ ἐκεῖθεν εἰς Κόρινθον . . . ἔπειτα τὸν προδόντα μὲν ἐν τῷ πολέμῳ, σιτηγήσαντα δὲ παρᾶ τοὺς νόμους. . . . Cf. §22-23 (sale of slaves and generation of cash from refinancing).

[86] ἢ τὰ πατρῷα κατεδηδοκώς, ἢ ὧν ἂν κληρονόμος γένηται (Aiskhin. 1.30).

[87] See Ferrucci 2006; Cox 1998: 132-35.

[88] On the expressive effect of legislation, see Sunstein 1996; Lanni 2010, (forthcoming).

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MONEY ISN'T EVERYTHING. RESPONSE TO EDWARD E. COHEN

I find myself in an awkward position: I have been asked to respond to a paper that I suspect will be controversial, but with which I myself am largely in agreement. In a series of papers[1] and now a recent book,[2] Cohen has made a major contribution to our understanding of Athenian prostitution by examining this practice "as a business"—that is, by studying the economic aspects of both male and female prostitution, and by placing prostitution in the broader context of Athenian commercial activity. Cohen's current paper similarly seeks to treat prostitution—or rather homoerotic activity that might be characterized as *hetairesis*— as a business like any other in the eyes of the Athenians. When applied to the laws limiting male prostitutes' political rights, Cohen's economic lens highlights an underappreciated but important motivation for these laws. But in doing so he may also underemphasize other cultural factors specific to the practice of *hetairesis*.

Cohen's paper advances two specific arguments: (1) the practice of prostitution was not limited to foreigners and slaves, but was also routinely practiced by Athenian citizens, and even political leaders; and (2) the laws limiting the political rights of those who had engaged in prostitution should not be understood as uniquely antagonistic toward prostitution, but as part of a more general aversion to commercial activity and monetized relationships. I will discuss each in turn, suggesting some refinements to the argument.

[1] Cohen 2007; 2003; 2000.
[2] Cohen 2015.

Cohen builds an impressive case for the proposition that prostitution was practiced by male and female Athenian citizens as well as by foreigners and slaves. But the evidence for the further claim that Athenian political leaders committed prostitution is quite a bit thinner. Cohen argues that the laws limiting political rights of former prostitutes were enacted in "response to actual acts of prostitution by Athenian political leaders." It may be worth emphasizing that the passage from Aeschines 1.13 ("Our predecessors made laws to deal with improper behavior that people actually do engage in") refers to the laws prohibiting hiring out boys as escorts, not the laws excluding prostitutes from political leadership, and thereby suggests prostitution by citizens, but not necessarily by politicians. Moreover, our sources include only a handful of accusations of prostitution against politicians. As Cohen discusses, the line between the gift-giving of noble pederasty and *hetairesis* was a blurry one, making it possible to plausibly accuse political enemies of prostitution even where there was no evidence of money changing hands.[3] Most famously, Aeschines had no evidence that Timarchus ever took cash payment from his lovers.[4] Lawcourt speakers at times slander their opponent as a prostitute based only on evidence that he had been an *eromenos*.[5] Given this context, the accusations against elite litigants we meet in the sources may indicate that some elite *eromenoi* stretched the norms of noble pederasty by becoming promiscuous or overly dependent on their lovers' attention or gifts, not necessarily that they engaged in actual acts of prostitution. Once the laws limiting political rights for former prostitutes were enacted, likely sometime in the late fifth century, it would be reckless for anyone contemplating a future political career to take money payment or to accept gifts in a manner that might give the appearance of a simple quid pro quo. That is not to say that some elite *eromenoi* were not heavily influenced by gifts: modern politicians who avoid quid pro quo corruption charges while being effectively bought by campaign contributions may offer a parallel.

Cohen's second argument is that the laws limiting political rights for prostitutes were motivated by an attempt "to discourage the transformation of traditional elite homoerotic sexual courtship into a culture of sexual purchase, and as an attempt to combat corruption… by denying political leadership to persons—not only or even principally 'prostitutes'—who had exhibited an excessive lust for money." In other words, the laws were not concerned with prostitution per se, but with the lust for money that it suggested. If it is true, as Fisher has argued,[6] that pederastic behavior spread beyond the elite, it may well be that some citizens from ordinary families offered and accepted money as courtship gifts, particularly as the economy became

[3] For discussion of how the gifts, entertainment, and mentoring of homosexual pederasty could easily be construed as evidence of a mercenary relationship, see Dover 1989:107; Fisher 2001: 49-50; Lanni 2010.

[4] Aesch. 1.40, 41, 52-55, 70.

[5] Lys. 14.25-27; Dem. 22.21-22, 58.

[6] Fisher 2001: 60-62.

more monetized. This may explain what appear to be money bags in courtship scenes on some Athenian vases. Cohen's paper may point to an important and largely-overlooked motivation for these laws: anxiety about the introduction of more explicitly mercenary homosexual courtship patterns. While Cohen seems to suggest that the monetization of sex extended even to the elite political leaders, I would argue that these developments were limited to non-elites. Having provided sex for money or something else of value was deemed evidence of excessive concern for personal financial advantage inappropriate for a political leader. The rise of mercenary sex, even if largely limited to non-elites, may well have contributed to the desire to insure that former prostitutes could not become political leaders, especially as increased social mobility expanded the pool from which leaders were drawn.

As Cohen argues, concern about excessive lust for money must have been a factor in the exclusion of prostitutes from political leadership, just it was in the case some of the other grounds for exclusion such as wasting ancestral assets and failing to support one's elderly parent. But by focusing on the economic aspects of prostitution, Cohen may overlook features of this practice that made prostitution uniquely objectionable for potential politicians and set it apart from the common antagonism directed against other forms of commercial activity. The precise rationale for prohibiting those who had prostituted themselves from active political life eludes us, but it seems clear that concerns over such a man's independence, moral status, and self-control all played a part, in addition to worry about a lust for money emphasized by Cohen. A man who agreed to surrender himself to another man's sexual desires, particularly if those desires included anal intercourse, had adopted a position of submission more suited to a woman or slave than to citizen capable of leading others.[7] The notion that engaging in prostitution evinced an insatiable appetite for sex incompatible with the self-control required of a self-governing citizenry may also have played a role.[8] It has been pointed out, for example, that Aeschines insinuates throughout his speech that Timarchus' lifestyle is disgusting and feminine, quite apart from its mercenary character.[9]

In sum, Cohen's economic focus sheds new light on our understanding of Athenian prostitution, but we must add this perspective to other cultural interpretations of this practice rather than subsume it within the larger category of commercial activity.

[7] Xen. *Symp.* 8.34ff; Fisher 2001:44-53; D.Cohen 1991:181-201; Dover 1989:103-109; Halperin 1990: 95-97; Golden 1984:317-318; Davidson 1998:159-182.

[8] Davidson 1998:159-182; Winkler 1990:56-57.

[9] Aesch 1.110-111; Sissa 2002:156-157; Hubbard 1998:64-67.

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WATER RIGHTS IN ARCHAIC AND CLASSICAL GREEK CITIES: OLD AND NEW PROBLEMS REVISITED

1. In ancient Greek utopian thought the imaginary *polis* was always provided with an abundance of water. In Plato's Atlantis, the paradigm of the blessed state that had turned hybristic and dystopic, thus becoming a mirror image of thalassocratic and imperialistic Athens[1], the water flowing from two springs, one cold and the other hot (τοῦ ψυχροῦ…καὶ τοῦ θερμοῦ νάματος), was collected in cisterns supplying various baths, and the outflowing water was then partly carried to the grove of Poseidon for irrigation and partly conveyed by means of conduits to the outer circles (*Crit.* 117b: καὶ ἐπὶ τοὺς ἔξω κύκλους δι' ὀχετῶν…ἐπωχέτευον). As for the fertile plain, in Plato's description it was surrounded by a circular ditch which received the streams running down from the mountains and was crossed by wide canals (διώρυχες εὐθεῖαι) to the effect that «they gathered the crops from the land twice in a year, in winter having the benefit of rain from heaven, in summer bringing in the water which the land supplied from the canals» (*Crit.* 118d: καὶ δὶς δὴ τοῦ ἐνιαυτοῦ τὴν γῆν ἐκαρποῦντο, χειμῶνος μὲν τοῖς ἐκ Διὸς ὕδασι χρώμενοι, θέρους δὲ ὅσα γῆ φέρει τὰ ἐκ τῶν διωρύχων ἐπάγοντες νάματα).

The same concepts reappear in the *Laws* with regard to the functions of the *agronomoi*: they are to see to it that rainwater does not flood and damage the countryside and, by means of dams and ditches, can be used for agricultural purposes to make

[1] Vidal-Naquet 1964; cf. also Gill 1977; Naddaf 1994; Prandi 2015, 162-170.

even the driest spots abounding in good water (ὅπως…καὶ τοὺς αὐχμηροτάτους τόπους πολυύδρους τε καὶ εὐύδρους ἀπεργάζωνται). In the same way, the *agronomoi* were expected to take care of spring waters, whether streams or fountains (τά τε πηγαῖα ὕδατα, ἐάντε τις ποταμὸς ἐάντε καὶ κρήνη ᾖ), and render the land more fertile and the crop more plentiful by collecting them and conveying them into a system of underground channels (καὶ συνάγοντες μεταλλείαις, νάματα πάντα ἄφθονα ποιῶσιν) (761b-c).

2. Plato's passages are of interest in the first place because they introduce us to the technical terminology of water management, notwithstanding the fact that the precise meaning of these terms in the different contexts is often difficult to pin down. Plato, for instance, uses with some frequency the term νᾶμα, derived from νάω, «flow», sometimes with regard to both spring or fountain water[2] and to watercourses (*Crit*. 111d: ἄφθονα κρηνῶν καὶ ποταμῶν νάματα; cf. also *Leg*. 644a: ἐκ τῶν κοινῶν ναμάτων), but some others more narrowly with reference to either of them (*Crit*. 117a: ταῖς δὲ δὴ κρήναις, τῇ τοῦ ψυχροῦ καὶ τῇ τοῦ θερμοῦ νάματος; *Leg*. 761b: νάματα καὶ κρήνας ποιοῦσαι [in the first passage νᾶμα clearly refers to spring water, in the second to streams]). Likewise, the term ὀχετός means «water conduit», «water pipe», «aqueduct»[3] (cf. Plut. *Them*. 31,1: ὅτε τῶν Ἀθηναίων ἐπιστάτης ἦν, ἑλὼν τοὺς ὑφαιρομένους τὸ ὕδωρ καὶ παροχετεύοντας; for early attestations of the term see also *IC* IV 52 = Koerner 1993, 414-416 (no. 140) = van Effenterre-Ruzé

[2] The meaning of κρήνη is in turn not always clear-cut: cf. Tölle-Kastenbein 1985 (esp. 452: «Jene κρήνη stellt eine Wasserentnahmestelle dar, und diese ist dadurch charakterisiert, daß sie in irgendeiner Weise gefaßt, gemantelt, geschützt war – *arte factus*. Dabei kann die κρήνη unmittelbar über oder nahe der Quelle liegen, sie kann aber auch in gewisser Entfernung vom Wasserursprung erbaut sein, was dann eine kürzere oder längere Wasserleitung erforderlich macht»), with Hellmann 1992, 235-242, stressing that «la κρήνη est donc distincte de la πηγή, ou source naturelle, et en théorie du φρέαρ, le dispositif sans fond, qui va chercher l'eau dans la nappe souterraine ou nappe phréatique, alors que la kréné est de préférence l'aboutissement d'une source. Toutefois, par leur encadrement architectural, tous deux peuvent se confondre: une couverture peut exister dans les deux cas, et une kréné peut prendre l'eau à un niveau très bas» (237; cf. also 242: «Au total, on voit que les mentions épigraphiques de κρήνη ou de φρέαρ, à Délos, soulèvent de multiples questions. Elles montrent surtout que la traduction automatique de κρήνη et de φρέαρ par «fontaine» et «puits» n'est guère satisfaisante»); Moggi 1997, 196-200 (cf. esp. 199-200 with reference to Thuc. 2,15,5; Paus. 4,31,6 and 33,1: «[l]a mia impressione è che in epoca arcaico-classica…πηγή abbia univocamente designato le sorgenti, mentre κρήνη ha coperto talvolta anche questo significato oltre a quello di fontana; a partire da Tucidide, che distingue nettamente il significato dei due termini, anche se in un caso sembra conformarsi all'uso di κρήνη nel senso di sorgente, si assiste ad un processo di differenziazione semantica, non del tutto lineare, a conclusione del quale i due termini risultano specializzati e stabilizzati, rispettivamente, sul versante delle fontane (κρήνη) e su quello delle sorgenti (πηγή)».

[3] On the difference between ὀχετὸς μετέωρος and ὀχετὸς κρυπτός see Martin 1957, 66-72; cf. also Hellmann 1992, 103-104; Argoud 1983, 7-10.

1995, 322-324 (no. 90), and *SEG* 35,295 = Koerner 1993, 86-87 (no. 30), referring to a cistern [κενεάριον] and a ὀχετός [cf. *SEG* 42,289])[4] but the difference between a ὀχετός and a ὑπόνομος, a «channel» dug underground (see for instance Arist. *Meteor.* 350a: οἱ γὰρ τὰς ὑδραγωγίας ποιοῦντες ὑπονόμοις καὶ διώρυξι συνάγουσιν, ὥσπερ ἂν ἰδιούσης τῆς γῆς ἀπὸ τῶν ὑψηλῶν), is not always obvious *prima facie*[5].

The picture is moreover further complicated by the existence of other terms recurring with the same or a similar meaning: ἀγωγή (ὕδατος) is a case in point (see e.g. *IG* I^3 49, ll. 4-5; II^3 338, ll. 15-17: καὶ τὴν ἐν Ἀμφιαράου κρήνην ἐξωικοδόμησεν καὶ τῆς τοῦ ὕδατος ἀγωγῆς καὶ τῶν ὑπονόμων ἐπιμελεῖται αὐτόθι, and, above all, the deeds in the «register of sales» from Tenos quoted and discussed below). Another example is provided by a Hellenistic inscription from Corcyra (second century B.C.), recording the verdict in a dispute for damages between the *polis* and a Soterion, where κορχυρέαι is used to indicate underground channels draining water from a house (or possibly, according to G. Thür, from a public building, a σκευοθήκη) (*IG* IX, I^2, 4, 794, ll. 7-11: ἀνυπόδικον [δὲ εἶμεν Σω]τηρίωνα περὶ τᾶν κορχυρε[ᾶν τᾶν φερ]ουσᾶν ἐκ τᾶς οἰκίας εἰς τὸ να[ώριον καὶ τοῦ] ῥύματος τοῦ ῥέοντος ἀπὸ [τᾶς στέγας ἐ]πὶ τὸ ναώριον)[6]. In Hesychius' *Lexicon* (s.v.) γόργυρα is explained as a synonym of ὑπόνομος (ὑπόνομος, δι' οὗ τὰ ὕδατα ὑπεξῄει), and thus as an underground conduit for drainage.

3. Plato's above mentioned passage from the *Laws* (761b-c), which is not introduced in the context of his discussion of agrarian legislation (νόμοι γεωργικοί), and

[4] Arnaoutoglou 2013, 108-110.

[5] According to Knoepfler 2001, 53, «*ochétos* désigne normalement une canalisation (quel que soit le matériau utilisé) et non pas un canal creusé», in other words a ὑπόνομος. Saba 2012, 50, adds that «while *ochetoi* could rest on the surface, *hyponomoi* could not and…in general they must have had a greater capacity than *ochetoi*». One, however, wonders in what way the stone *ochetos* for the drainage of the men's bath in the sanctuary of Amphiaraos described in great detail in *I.Oropos* 292 (*IG* VII 4255; Argoud 1993, 41-44 (no. 3); Hellmann 1999, 59-61 (no. 16), ll. 2-27), differed from a *hyponomos*. On the technical term ὑπόνομος see also Chatelain 2001, 83-89. An Attic rock-cut inscription (*SEG* 35,140) attests the term διάνομος, which, according to Langdon 1985, 261, «denominates a conduit which runs above ground and is open to the sky. It is the counterpart of ὑπόνομος, a covered subterranean conduit» (this interpretation is however rejected by J. Tréheux, *BE* 1989, no. 377, who questions the usefulness of boundary markers for an open air conduit visible to all and suggests that «[l]e repère s'expliquerait mieux s'il était recouvert ou souterrain»).

[6] On this inscription see Hennig 1995, 257-258; Meier 2012, 235-237 (no. 18). Thür 2002 suggests that the mysterious σκευοθήκη of l. 12 must be identified with the οἰκία of l. 9 as the building from which damage originated and that «Soterion wurde folglich nicht als Hauseigentümer, sondern wahrscheinlich als Bauunternehmer in Anspruch genommen, und zwar wegen unsachgemäßer Arbeit». If this is the case, the inscription did not concern litigation between the *polis* and a private individual but between the city and a building contractor.

is for this reason rightly not considered to be part of his treatment of *Wasserrecht*[7], poses in its own right the unavoidable question of whether his legislation on water and water rights reflected contemporary legal practice or was, to the contrary, a facet of the philosophical dimension underlying the project of the «second city»[8]. On the one hand, as observed by L. Brisson and J.-F. Pradeau, the system of *public* irrigation, permanent and on a large scale, envisaged by Plato seems to be «plutôt ambitieux»[9] and, with some notable exceptions (cf. in the first place *IG* XII, 9, 191 [Dareste-Haussoullier-Reinach 1891-1904, I, 143-157 (no. IX); Pernin 2014, 281-290 (no. 134)], concerning the drainage of a marshy lake [λίμνη] at Ptechai in the territory of Eretria and the creation of a reservoir to collect water for irrigation [318-315 B.C.]; see below)[10], does not appear to have been the rule in the management of the Greek countryside[11].

On the other hand, although it is widely recognized that the legal institutions of Magnesia were to a large extent inspired by the Athenian model[12], this does not appear to have been the case for the functions of the rather plethoric board of *agronomoi*, the officials in charge of water management in the country (5 for each of the 12 tribes, 60 in total + 12 young assistants per tribe), who have no actual equivalent

[7] On the fundamental coherence between the four laws on water rights enunciated at 844a-d, 845d-e and the provisions concerning the competence of *agoranomoi* and *astynomoi* over κρῆναι at 764b-c (cf. 763c-d) see Klingenberg 1976.

[8] See e.g. Krasilnikoff 2002, 52: «It is important to accept that the majority of the provisions laid out by Plato were indeed to be found in various *poleis* throughout Greece, but only piecemeal, never all together in one location. This ambitious plan for the design and implementation of an advanced water supply did not have, as far as we are able to tell, a counterpart in any contemporary Greek society, and was never implemented in Athens».

[9] Brisson-Pradeau 2006, I, 412: «Platon décrit ici un système de retenue et de transport plutôt ambitieux. Les conduites d'eau souterraines n'existent en son temps que sur des distances réduites. Le projet des *Lois* est celui de leur extension à l'échelle de la ville; qui plus est, Platon conçoit une irrigation permanente».

[10] For a comprehensive treatment of the historical, legal and technical questions posed by the contract between the *polis* of Eretria and Chairephanes see Knoepfler 2001; Chatelain 2001. For the relationship between water resources and territorial organization in the *poleis* of Sicily and Magna Graecia see Collin-Bouffier 2009; Prestianni Giallombardo 2004-2005 and 2012. On marshes and wetland reclamation in ancient Greece cf. Fantasia 1999.

[11] Argoud 1987, 28-30 («Tous ces textes témoignent d'une bonne connaisance du rôle de l'irrigation et de sa pratique. En général, cette irrigation était pratiquée sur une petite échelle, au niveau du jardin, du champ ou du verger, et toujours au moyen de canaux de dérivation» (30)). On the relationship between water and farming and for the dominance of dry-farming in ancient Greece cf. also Krasilnikoff 2002, stressing that «[t]he evidence is…both meager and inconclusive about a general utilization in classical practices of the irrigation of fields proper, whereas the garden-*kepos* seems to be the location towards which water was led for the benefit of different levels of integrated production of various types of farm produce» (55).

[12] Piérart 1974, esp. 464-466 («En somme, mise à part une semplification des institutions, qu'expliquent les dimensions plus petites de la cité des Magnètes, Platon s'est contenté, pour l'essential, de demander à la constitution d'Athènes les matériaux dont il avait besoin»).

in Athens, where demarchs appear to have been, at a local level, the magistrates in charge of all matters concerning land administration[13].

The same question inevitably applies also to the five laws regulating water management and the use of water resources expounded in the eighth book of the *Laws* in the section focusing on νόμοι γεωργικοί (844a-d, 845d-e). They have been the object of an in-depth analysis by R. Koerner and, especially, E. Klingenberg[14] but several questions still escape clear definition and remain open for discussion.

One of the reasons lies in the nature of Plato's treatment of such *nomoi*: as he himself underlined by means of a clever «water» metaphor, while he was drawing from a tradition of «time-honoured and excellent laws from whose course it was not appropriate to deviate with (long) discussions» (844a: καὶ τῶν ὑδάτων πέρι γεώργοισι παλαιοὶ καὶ καλοὶ νόμοι κείμενοι οὐκ ἄξιοι παροχετεύειν λόγοις)[15], he deemed it sufficient to lay down, in a paradigmatic fashion, some of the underlying fundamental principles without going into much detail[16]. This is clearly shown by a comparison between Plato's law on the right to draw drinking water from a neighbour's well in the country (844b) with Solon's law concerning the same matter (Plut. *Sol.* 23,6 = F 63 Ruschenbusch: νόμον ἔγραψεν, ὅπου μέν ἐστι δημόσιον φρέαρ ἐντὸς ἱππικοῦ χρῆσθαι τούτῳ· ὅπου δὲ πλεῖον ἀπέχει ζητεῖν ὕδωρ ἴδιον· ἐὰν ὀρύξαντες ὀργυιῶν δέκα βάθος παρ' ἑαυτοῖς μὴ εὕρωσι, τότε λαμβάνειν παρὰ τοῦ γείτονος, ἑξάχουν ὑδρίαν δὶς ἑκάστης ἡμέρας πληροῦντας). Plato does not offer any provision with regard to distances from public wells (nor mentions them at all) and is less specific on how deep it was necessary to dig to ascertain that there was no water on the property in order to be legally entitled to draw from the neighbour's well. Similarly, his law is more «flexible» in not indicating a limit for the amount of water one could fetch per day and stating that one must only draw as much as necessary for the household (παρὰ τῶν γειτόνων ὑδρεύεσθαι μέχρι τοῦ ἀναγκαίου πώματος ἑκάστοις τῶν οἰκετῶν). A. Kränzlein suggested that Plato was intentionally taking a more favourable stance than Solon to the persons in need of water[17] but the most plausible explanation for

[13] Piérart 1974, 312: «Platon renonce à l'organisation municipale qui connaissait l'Attique. Il la remplace par une institution unique: un collège de soixante magistrats, répartis en équipes de cinq, qui occupent successivement les douze secteurs de la χώρα»; Papazarkadas 2011, 221-222, 233. On the duties of the Athenian demarchs see Osborne 1985, 74-79; Whitehead 1986, 121-139; Faraguna 1997; Georgoudi 2007. On the legal status and administration of public roads see Ficuciello 2008, 18-21, 52-55.

[14] Koerner 1974; Klingenberg 1976, 62-132. I have found Wörrle 1981 less helpful. For a useful overview of the problems see also Bruun 2000.

[15] Brisson-Pradeau 2006, II, 102: «il y a pour les agriculteurs de veilles et belles lois dont il n'est pas nécessaire de dévier le cours dans nos propos».

[16] Klingenberg 1976, 62-63 («Die Bindung an die παλαιοὶ καὶ καλοὶ νόμοι κείμενοι bedeutet keine wörtliche, ja nicht einmal unbedingt eine tatbestandliche Rezeption der alten Gesetze, sondern nur die Wahrung der ratio legis und die Übernahme alter Rechtsprinzipien»).

[17] Kränzlein 1963, 65-66 («Platon maß dem Anliegen des Grundeigentümers ohne eigenes Wasser ein stärkeres Gewicht bei. Er soll echter Mitberechtigter sein, sein Anteil mit dem

such differences is that «he is interested in presenting general principles rather than the very detailed ones that Solon established»[18].

4. The first principle emerging from Plato's discussion of *Wasserrecht* is the distinction between the supply of water for irrigation in the countryside, which, according to Klingenberg's definition, was «open» in so far as water from natural courses and artificial water basins was, with some limitations, freely available for those who needed it, and the supply of drinking water in the city, which was to the contrary «closed» and under the direct supervision of *polis* magistrates (*astynomoi* and *agoranomoi*)[19].

As for the «ownership» of water rights, on the one hand, and of wells, sources and conduits connected to the water supply system, on the other, the following classification can be proposed on the basis of Plato's model:

a) the ownership of water resources (and of the connected man-made structures, i.e. wells, fountains, cisterns, water channels, etc.) went hand in hand with the ownership of the land to which they pertained, whether public, belonging to an association or private. Water and water rights are, as a result, sometimes mentioned in sale or lease contracts either because they were, permanently or temporarily, alienated together with the property concerned or, more significantly, because they were in actual fact divorced from the property rights themselves.

In *IG* I^3 256, a regulation concerning the right to drink water from the Halykos in a sanctuary sacred to the Nymphs near Sounion, water could be freely consumed on the spot after paying the rather modest sum of one obol per year but could not be taken away from the sanctuary in amphoras. In this case the penalty was comparatively very high and, even if one had paid the obol fee, amounted to 50 drachmai per amphora, which became sacred to the Nymphs[20]. According to a clause of *IG* I^3 84, an Attic decree establishing the terms for the lease of the τέμενος of the sanctuary of Kodros, Neleus and Basile (418/7 B.C.), the tenant was given the right to unlimited use of the water from a ditch (καὶ τẽς τάφρο καὶ τõ ὕδατος κρατẽν τõ ἐγ Διὸς τὸν μισθοσάμενον) that collected the rainwater from an area, probably outside the Themistoklean Wall, in the southern part of the city (ll. 34-37)[21]. In the *Tabula Halaesina*, a cadastral inscription, unfortunately now lost, recording the result of a survey of public lands to be leased out by the *polis* (second century B.C.), one of the lots of the hilly territory of sector A is described as having rights both to the water of a spring, which was presumably located

Wachsen seines Haushalts ansteigen und ihm auch in Zeiten des Mangels die Entnahme nicht ganz verwehrt werden können»).

[18] Bruun 2000, 563; cf. Klingenberg 1976, 77-84.

[19] Klingenberg 1976, 64-65.

[20] For this interpretation of the provision at ll. 10-13 cf. Meyer 2004.

[21] For an extensive commentary on the inscription see now Pernin 2014, 32-42 (no. 2). For the topographical aspects see also D. Marchiandi-S. Savelli in Greco 2011, 421-423.

on the property itself, and to the waste water from a nearby bath, which in all likelihood was not (*IG* XIV 352 = Dubois 1989, 234-248 (no. 196), I, ll. 18-19: ἀκολουθεῖ τῷ κλάρῳ τούτῳ τὸ ὕδωρ τὸ ἐκ τᾶς κράννας καὶ τοῦ βαλανείου τὸ ἀπορρέον). While the water from the fountain must have been used for drinking, the grey water draining away from the bath must have been used for irrigation[22].

An interesting example is moreover provided by the «register of sales» from Tenos, a long inscription listing 47 transactions involving real estate under the archonship of Ameinolas, some time during the late fourth century B.C. (*IG* XII, 5, 872 = Game 2008, 104-145 (nos. 41-76), 172-190 (full text)). The deeds, whose structure follows a recurring pattern, record a detailed description of the properties with a remarkable variety of terms. Water resources pertaining to country estates are in particular mentioned in nine deeds, in the majority of cases concerning properties ranging among the most valuable ones[23]. Again, the terminology appears to be varied and somewhat bewildering, because it is in most cases difficult to reconstruct the concrete situations hidden behind it. R. Koerner argued that expressions such as ἐπρίατο τὴν οἰκίαν καὶ τὰ χωρία…καὶ τὰ ὕδατα τὰ προσόντα τοῖς χωρίοις, «and the water that is attached (or belongs) to the fields» at ll. 104-105, attested also by three Attic ὅροι (*IG* II^2 2657, ll. 2-7: ὅρο[ς] χωρίων καὶ οἰ[κ]ίας καὶ ὕδα[τ]ος τοῦ προσόντος τοῖς χωρίοις; 2655 [restored]; 2759, ll. 3-4: καὶ τῆς προσούσης [κρήνη]ς τῶι κηπιδίωι), cannot simply mean that there was a spring source on the property but rather, in the light of the terminology of (and the situation described by) other entries in the same inscription (l. 50: καὶ ὕδατος ἀγωγὰς ὅσαι εἰσὶν τῶν χωρίων τούτων; l. 56: καὶ ὕδατος ἀ[γω]γὰς τὰς οὔ[σ]α[ς] τῶν χωρίων τούτων; 113-114: καὶ ὕδατος ἀγωγὰς τὰς οὔσας τῶν χωρίων), that among the assets belonging to the property there were some water conduits used for irrigation and that the sale also included the right to draw water from a source (stream or spring) located *outside* the boundaries of the property itself (cf. Plat. *Leg.* 844a)[24].

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[22] See Prestianni Giallombardo 2012, esp. 382, emphasising the rational planning in the use of water resources.

[23] Étienne 1990, 27: «Or, plus du quart des domaines disposent de droit d'eau, et il s'agit là d'un élément important dans la valeur d'un bien-fonds, puisque sur huit mentions six sont faites à propos des plus grosses propriétés»).

[24] Koerner 1974, 158-162. The only parallel use of πρόσειμι in the inscription is provided by contract no. 17 (ll. 40-41), where Timokritos son of Timomachos purchases from a lady, Krynilion, «all the χωρία in Heristhos» ([τὰ] χωρία π[άντ]α τὰ ἐν Ἡρί[σθωι καὶ.....]ς) προσ[όν]τα τὰ Σίμου. The text is here uncertain owing to a lacuna but the meaning of the expression must in some way or the other be «(which) belonged (or had belonged) to Simos» (Simos cannot in this case be the neighbour whose name is indicated immediately thereafter [οἷς γείτων Μορυχίων Θεαινέτου [Δ]ονακεύς]; cf. Dareste-Haussoullier-Reinach 1891-1904, I, 71: «tous les terrains sis à Héristhos, [y compris] ceux appartenant à Simos»; Étienne 1990, 55: «On mentionne un propriétaire (l. 41, τὰ προσόντα τὰ Σίμου) qui n'est ni vendeur ni acheteur»; Game 2008, 187: «tous les terrains situés à Héristhos et..., qui avaient appartenu à Simos»).

Whether this explanation can be applied to *all* contracts where ὕδωρ is mentioned is, however, doubtful. In other deeds the possession of water rights is expressed with phrases such as καὶ τὰ ὕδατα ὅσα ἐστὶ τῆς γεωργίας (l. 94), καὶ τὰ ὕδατα ὅσα ἐστὶν τῶν χ[ω]ρ[ίω]ν τούτων (l. 79), where the verb προσεῖναι, «to pertain to», «to be attached to», is replaced by the simple εἶναι followed by the genitive, and it cannot be ruled out that what was meant in these cases was that the spring this time was actually *on* the property. The formulation of the deeds therefore aimed at stressing, against any possible claim, that such water was included in the transaction, in the same way as at ll. 94-95 the sale also involved assets such as «the existing roof and the fitted doors and the rest of the house-gear» (καὶ τὸν κέραμον τὸν ὄντα καὶ θύ[ρας τὰς] ἐπούσ[ας] καὶ τὰ ἄλ[λα] σκεύη), which surely stood on the property.

We must nonetheless admit that there are not sufficient elements to decide whether in the extensive document from Tenos the verb προσεῖναι has a specific technical meaning and regularly refers to a legal situation different from that reflected by the simple εἶναι.

b) Natural water courses, public springs, public cisterns and reservoirs, channels, underground conduits, aqueducts and public wells and fountains (cf. e.g. Plut. *Sol*. 23,6, referring to a δημόσιον φρέαρ) belonged to the *polis*. Consistently with the above mentioned distinction between drinking water and water for irrigation, outside the city water from streams and public reservoirs could be freely accessed. Some documents, however, contain provisions with a view to limiting the amount of water an individual was entitled to draw, being thus «designed to preserve and secure the public water supply, and at the same time to ensure that people in need had access to water»[25]. An early fifth-century law from Gortyn (*IC* IV 43 Bb = Koerner 1993, 401-402 (no. 133) = van Effenterre-Ruzé 1995, 253-257 (no. 70 Bb)), for instance, established the right to derive water from the middle of the river into one's own property but also set some limits to the amount of water that could be extracted by measuring it against the water level at the bridge at the agora (τõ ποταμõ αἴ κα κατὰ τὸ μέττον τὰν ῥοὰν θιθῆι ῥῆν κατὰ τὸ ϝὸν αὐτõ, θιθεμένοι ἄπατον ἥμην. τὰν δὲ ῥοὰν ὄττον κατέκει ἀ ἐπ' ἀγορᾶι δέπυρα ἢ πλῖον, μεῖον δὲ μή). In the *Tabulae Heracleenses* (end of the fourth-beginning of the third century B.C.), the συνθῆκαι concerning the emphyteutic lease of the sacred lands (χῶροι) belonging to Dionysos specify that the tenants were not allowed to deepen or divert the ditch or the stream running through their land nor were they allowed to build dams to stop the water from running in or running out (τὰς δὲ τράφως τὰς διὰ τῶν χώρων ῥεώσας καὶ τὼς ῥόως οὐ κατασκαψόντι οὐδὲ διασκαψόντι τῶι hύδατι οὐδὲ ἐφερξόντι τὸ hύδωρ οὐδ' ἀφερξόντι), whereas they had to clean them whenever it was necessary (ἀνκοθαρίοντι δὲ ὁσσάκις κα δέωνται τὰ πὰρ αὐτῶν χωρία ῥέοντα) (*IG* XIV 645, I, ll. 130-132)[26].

[25] Krasilnikoff 2002, 52.

[26] Dareste-Haussoullier-Reinach 1891-1904, I, 207: «Quant aux fossés et rigoles qui

c) According to Plato's *Laws*, farmers who needed to bring water to their own farm (ὁ βουληθεὶς ἐπὶ τὸν αὑτοῦ τόπον ἄγειν ὕδωρ), and had to do so by drawing it from public νάματα (natural streams or springs), had the automatic right to construct channels and lead the water by whatever way they wished as long as they did not tap it from the spring (or, it can be supposed, other water resources) of a private individual (μὴ ὑποτέμνων πηγὰς φανερὰς ἰδιώτου μηδενός) and they did not pass through houses, sacred precincts or graves. Damage caused by the laying down of water conduits (ὀχεταγωγία) moreover had to be kept to a minimum on penalty of a legal action for damages (μὴ βλάπτων πλὴν αὐτῆς ὀχεταγωγίας) (844a). As scholarly discussion has amply shown, there is no positive evidence to the effect that such «servitude» and limitation of ownership rights[27] in actual fact reflected Greek practice[28]. An early fifth-century law from Gortyn, as we have seen, made it lawful to derive water from a river (τõ ποταμõ αἴ κα…θιθῆι ῥῆν [κ]ατὰ τὸ ϝὸν αὐτõ) but we do not know whether it concerned all those who were in need of water or, as is more probable, only those whose property bordered the river. Another Gortynian law (*IC* IV 73a = Koerner 1993, 417-421 (no. 145) = van Effenterre-Ruzé 1995, 324-326 (no. 91), ll. 1-6) has been brought into this picture. According to H. van Effenterre and F. Ruzé, «[l]'inscription précise d'abord les conditions dans lesquelles peut s'exercer un droit de passage des eaux sur le terrain d'autrui». The crucial point, however, is that it cannot be established with sufficient certainty whether the focus of the law was water being channelled and brought in *over* a neighbour's field or water being drained off *into* a neighbour's property[29]. In the first scenario, we would have a concrete example

traversent les terrains, les preneurs ne devront ni les approfondir, ni les saigner, ni pratiquer de barrage soit pour accumuler les eaux soit pour les dériver; ils devront curer, autant de fois qu'il sera nécessaire, ceux qui longent leurs terrains respectifs»; Uguzzoni-Ghinatti 1968, 232: «Quanto ai fossati che scorrono attraverso i terreni e i ruscelli (gli affittuari) non li approfondiranno né vi praticheranno derivazioni per l'acqua né faranno delle dighe sia per accumulare sia per togliere l'acqua, ma ripuliranno, ogni volta che sia necessario, le acque lungo i loro poderi»; Pernin 2014, 465: «quant aux fossés qui traversent les terrains et les rigoles, ils ne pourront ni les détruire, ni les ouvrir, ni en retenir ni en détourner l'eau; ils cureront aussi souvent que nécessaire ceux qui coulent le long de leurs terrains». For a comprehensive study of the inscriptions see Uguzzoni-Ghinatti 1968; Pernin 2014, 459-481 (no. 259); cf. also Migeotte 2014, 165-167.

[27] Haliste 1950, 142-144; Kränzlein 1963, 66-67; Bruun 2000, 559-561.

[28] Klingenberg 1976, 66-77.

[29] Koerner 1974, 174-175, and 1993, 420-421, assuming, mainly on logical grounds, that «διαρρέω ist etwas anders als "hindurchfließen lassen" zu verstehen» (1993, 420) and that the preposition ἐς is to be understood as «süddor. für ἐξ» (1974, 175 n. 1), translated the beginning of the law with «[Wenn einer] Wasser aus (dem Grundstück) des Nachbarn ableitet…» and suggested that «[w]ahrscheinlich erlaubt die Regelung, daß ein Gründstücksbesitzer Wasser vom Feld seines Nachbarn herbeileitete, so fern dieser zustimmte und der Ableitende μὴ διαρεῖ. Das ist wohl so zu verstehen, daß er das Wasser nur für seine Ländereien benutzen und nicht auf die Felder eines zweiten, weiter abgelegen Nachbarn hindurchfließen lassen durfte» (1974, 174-175). Klingenberg (1976, 84 and 106-107), on the other hand, maintained that

of Plato's law; in the second scenario, the Gortynian inscription would provide further evidence on Greek legislation about damage caused by rain water running off onto a neighbour's lower lying property (cf. also *IC* IV 52 = Koerner 1993, 414-416 (no. 140) = van Effenterre-Ruzé 1995, 322-324 (no. 90)), which is illustrated by Plato's third law in his *Wasserrecht* section (844c-d) and by Demosthenes' speech *Against Kallikles*[30]. Since the question cannot be settled with sufficient confidence, I propose to leave it aside and move to the next point.

5. The view has sometimes been advanced in scholarship that «considering the great number of urban aqueducts crossing the countryside in the Greek world… cities would not have needed to buy the land, but could build an aqueduct regardless of the landowner's wishes»[31]. If I am not mistaken, it was P. Guiraud in his book on *La propriété foncière en Grèce* who first observed that «la Grèce était sillonnée d'une multitude de canaux généralement souterrains qui alimentaient les villes d'eau potable» and suggested that «les cités n'allaient pas jusq'à acheter toute la partie du sol sur leur parcours, d'autant plus qu'ils passaient presque tous sous terre»[32]. As proof of such public right of passage, Plato's law on the right of individuals to bring water to their property over their neighbour's land has sometimes been cited, and it is assumed that, if such right was valid for private citizens, it must have all the more applied to the *polis* (or its subdivisions)[33]. Considering that the status of Plato's law is in itself uncertain, the risk of running into a circular argument is thus apparent.

The evidence illuminating such legal questions is unfortunately very scarce. R. Koerner went as far as to suggest that the almost total lack of documentation was not due to an accident of survival but resulted from the fact that in Greek cities water was mainly supplied from wells, while the significance of water conduits and aqueducts

«ἐς…nicht als ἐκ sondern als εἰς und das διαρύειν nicht als δι-αρύειν, 'schöpfen', sondern als διερύειν, 'traducere', zu verstehen ist». The law would, as a result, deal with the «Ableitung des Regenwassers auf fremde Grundstücke». More recently, van Effenterre and Ruzé proposed (1995, 326) a sort of middle way solution observing that «[l]e verbe *diarréô* a deux sens très voisins bien attestés: "couler à travers" ou "se répandre". A l'aoriste, il s'agit de faire passer l'eau: il suffit d'une simple rigole, vite tracée, vite abandonnée ou oubliée. Au présent, il s'agit de ne pas inonder le terrain du voisin qui a permis le passage» (on this linguistic point cf. also Bile 1988, 227 n. 298). Their argument is therefore that the law dealt with the right of passage to lead water into one's own land, as held by Koerner, but that the ensuing situation was looked at from the point of view of the person who was in need of water.

[30] Klingenberg 1976, 85-108. For a discussion of the legal aspects of the dispute in Dem. 55 cf. also Harrison 1968, 249-252; Feraboli 1978; MacDowell 2009, with earlier literature.

[31] Bruun 2000, 566.

[32] Guiraud 1893, 192-193.

[33] Cf. Haliste 1950, 143-144, concluding on the basis of the parallel of Plat. *Leg.* 844a that «[e]s bestand vielmehr ein allgemeines Servitut der Wasserleitung, von der denn auch Private, wie es im platonischen Gesetz ausführlich erörtert wird, Nutzen ziehen konnten»

was quantitatively rather limited[34]. As demonstrated by recent archaeological investigation, such explanation is, however, clearly wrong as far as Athens is concerned, where several aqueducts constructed over a span of time ranging from the second half of the sixth century to Roman imperial times have been identified[35]. It has in particular been recognised that the area outside the Themistoklean Wall north-east of the city played a fundamental role in this respect as here water originating from Lykabettos, Imettos and Parnes was collected and conveyed by means of a complex distribution network branching into many underground water galleries and terracotta conduits. In the light of this, it is legitimate to assume that there must have existed some specific regulations on water conduits and the right of passage to lead them.

In the early classical law from Thasos known as «la stèle du port» (*SEG* 42,585 = van Effenterre-Ruzé 1995, 332-337 (no. 95)) the first paragraph records a provision to the effect that «in the street of the shrine of the Charites» it was forbidden «to draw water» and possibly, according to the reading proposed by the editor, «to establish wells» (ll. 2-6). The law set regulations to protect public property from encroachment and to keep the processional road clean[36], showing, on a general level, that the Greek city from an early time exerted administrative control and policed public infrastructure in the interest of the community[37]. It can be surmised that, within urban areas, water conduits of the public supply system tended to run along, or underneath, the course of roads or streets, although we are justified in wondering to what extent this proved to be a universal rule[38]. As for the *chora*, an interesting example is provided by the *Tabulae Halaesinae* where public interest was enforced in the provision that the strip of land along the water conduit (ὀχετός) fed by the κράνα Ἰπύρρα was to be left uncultivated for a width of 70 feet (*IG* XII 352 = Dubois 1989, 234-248 (no. 196), I, ll. 7-9: τὸ ὑπὸ τὸν ὀχετὸν ἄχρι τὰν κράναν [τὰν Ἰπύρ]ραν οὐκ ἐργαξεῖται καὶ περίστασιν ἀφησεῖτα[ι] πό(δας) ο᾽ παντᾷ, τὰ δὲ δένδρεα καρπευσε[ῖται]). It must, however, be observed that the *Tabulae* recorded the result of a survey of public lands to be leased out so that the *ochetos* was, technically speaking, located on public property. A similar case is offered by *IG* II^3 338, ll. 15-17, where Pytheas of Alopeke was praised for his activity as ἐπιμελητὴς τῶν κρηνῶν (cf. Arist. *Ath. Pol.* 43,1), and in particular because he τὴν ἐν Ἀμφιαράου κρήνην ἐξωικοδόμησεν καὶ τῆς τοῦ ὕδατος ἀγωγῆς καὶ τῶν ὑπονόμων ἐπιμελεῖται αὐτόθι (ll. 16-18). As clearly indicated by

[34] Koerner 1974, 185-186: «Das mag man so erklären, daß die Brunnen sehr zahlreich waren und in ersten Linie die Wasserversorgung sicherstellten, während nur relativ wenig Leitungen existierten».

[35] For a comprehensive survey of the archaeological evidence see D. Marchiandi in Greco 2014, 1, esp. 603-607, 642-646, 674-685, 819-821.

[36] Duchêne 1992, 41-42.

[37] In his survey of public property in the Greek city Lewis 1990 does not consider water management and infrastructure.

[38] Duchêne 1992, 21-22, 45-46.

the locative adverb αὐτόθι, the water line Pytheas had laid down was within the boundaries of the sanctuary of Amphiaraos at Oropos, and therefore on sacred land.

In order to make some progress in our discussion, a promising line of enquiry is represented by the possibility that in legal practice water rights and ownership of water conduits could actually be separated from the property rights themselves[39]. The most obvious model is offered by the exploitation of the Laureion silver mines: here the *polis* exerted a monopoly on mining rights regardless of who the owner of the surface ownership rights was and leased them to private individuals (or partnerships) for a number of years in exchange for a rent (Arist. *Ath. Pol.* 47,2)[40]. The situation with water rights is nonetheless not exactly the same because, as we have seen, we can rule out from the start the idea that the state had a monopoly of water (or underground water).

6. Two epigraphic documents (and, to be precise, in the second case, a group of documents) can be used to attempt to explore the legal questions arising from the construction of aqueducts and water lines, both underground and at the surface. The first text, the above-mentioned Chairephanes inscription from Eretria (*IG* XII, 9, 191 = Pernin 2014, 281-290 (no. 134)), is only partly relevant because it concerns water drainage rather than the supply of water. This notwithstanding, the contract (συνθῆκαι) between Chairephanes (together with his κοινωνοί, mentioned only at ll. 29-31) and the people of Eretria established that the former, on the one hand, undertook to carry out works at his own expense to drain the marshy lake (λίμνη) at Ptechai within four years[41], and, on the other, once such work was completed, was given the right to exploit the reclaimed land for ten years in exchange for a rent of three talents per year, thirty talents in total. In order to drain the λίμνη the contractors were entitled to dig wells in privately owned fields (ἐν τοῖς ἰδ[ι]ωτικοῖς χωρίοις) for the construction of the underground gallery (φρεατία[ς] ποεῖν τῶ[ι ὑπονόμωι]) on condition that they paid in advance the price ([ἀλλὰ ταύτας μὴ ποιείτω πλὴν διὰ τοῦ χωρί]ου οὗπερ καὶ πρότερον τὴν τιμὴν δῷ), whereas, if channels or ditches above ground were needed for the draining process[42], these were to be excavated on

[39] Knoepfler 2001, 52 n. 56; cf. also Kellogg 2013, 109.

[40] On the administration of the Laureion silver mines see Faraguna 2006; Thür-Faraguna (forthcoming).

[41] According to Knoepfler 2001, 49, «l'étang à assécher par Chairéphanès devait correspondre à une vaste étendue de terres cultivables, plusieurs centaines d'hectares, bref tout un canton de l'Éretriade».

[42] Knoepfler 2001, 51-52, suggests that what is recorded on the stele is not the detailed description of the works to be carried out (συγγραφαί) but mainly the provisions regulating the impact of Chairephanes' enterprise on farming, both while work was in progress and in the future when the reservoir (see below) was in place. Cf. also Pernin 2014, 287: «Tel qu'il a été gravé sur la pierre, il établit les clauses qui régissent la mise en chantier des travaux de drainage et les conditions de location des terres bonifiées, mais il ne contient ni la motivation,

uncultivated land (ἐξαγέτω ἀπὸ τῶν ἐργασίμων χωρίων δι[ὰ] τῶν ἀργῶ[ν]) in order to keep disruption to agriculture to a minimum (ll. 17-19)[43]. The drainage project also included the creation of a reservoir not larger than two square stadia ([πο(ι)ησάσθω δὲ] κ[α]ὶ δεξαμενὴν τοῖς ποταμοῖς μὴ μείζον[α] ἢ δύο σταδίους) with a gate (θύρα; a sluice gate?)[44], whose water could be used for watering crops by the farmers in spring. While the contract was in force, and for the future (καὶ εἰς [τ]ὸν ἔπε[ι]τα [χ]ρόνον πάντα), Chairephanes and his partners had moreover to guarantee the maintenance of the underground gallery (ὑπόνομος) and all the rest (ll. 22-24).

This rather complex contract in other words aimed at finding the right balance between Chairephanes and his partners' economic benefit and the interests of the community as a whole. Water from the λίμνη was a public asset and was ultimately to be stored and made available for the benefit of the local landowners (ll. 25-26). The reclaimed land was to become public property (as it had probably always been) and, as far as its use was concerned, we must construe the ensuing legal relationship between the *polis* of Eretria and Chairephanes as a lease contract[45]. As for the subsurface rights, the situation appears less easy to define. Although scholars have often noted that Chairephanes had to pay compensation for the damage caused by digging wells for the underground conduit, Guiraud was right in stressing that the contract simply states that he had to pay the *price* in advance (οὗπερ καὶ πρότερον τὴν τιμὴν δῷ). The transaction, as a result, looks like a sale by means of which Chairephanes acquired the underground rights that originally belonged to the landowners[46]. It is, however, legitimate to wonder to what extent such subtle legal definitions really mattered. The practical situation was clear: Chairephanes committed himself to construct the underground conduit and to ensure the

ni la description des travaux. Lorsqu'il est fait référence à ces derniers, l'inscription donne l'impression qu'ils avaient été prescrits et décrits ailleurs: on peut ici faire un parallèle avec les travaux de construction qui sont le plus souvent seulement évoqués dans les décrets décidant de leur exécution. Il sont plus amplement décrits dans un autre document, qui constitue le contrat d'entreprise à proprement parler. La préoccupation majeure de la cité était, dans ce document, de réglementer la cohabitation avec les paysans, riverains des travaux».

[43] On the technical aspects of the draining operation see Knoepfler 2001, 51-53; Chatelain 2001, concerning the heavily restored ll. 17-21 esp. 88-89, 106. Cf. also Hennig 1995, 265-266 with n. 102.

[44] Dareste-Haussoullier-Reinach 1891-1904, I, 153-154; Foxhall 2007, 70.

[45] Pernin 2014, 287: «L'objet du contrat est double: tout d'abord, Chairéphanès doit exécuter des travaux de drainage pour assécher l'étang de Ptéchai, puis, une fois ces travaux accomplis, Chairéphanès aura la jouissance des terres bonifiées pour les exploiter moyennant l'acquittement d'un loyer. Le texte d'Érétrie combine donc les deux aspects de documents que l'on connaît ailleurs dans le monde grec: à la fois des contrats d'entreprise…et des contrats de location pour des bien-fonds agricoles».

[46] For an interesting parallel, the contract between the *polis* of Athens and the non-Athenian Sokles in respect to ore prospecting (*IG* II^3 433), where, as restored by Wilhelm, Sokles was [κ]ύρ[ιον πάντων τῶν ἐδαφῶ]ν, ὅθεν φησὶν τὴμ πρόσ[οδον ἔσεσθαι τῶι] δήμωι (ll. 6-8), cf. Thür-Faraguna (forthcoming).

maintenance of the drainage system not only for the duration of the lease but also thereafter (καὶ εἰς [τ]ὸν ἔπε[ι]τα [χ]ρόνον πάντα)[47]. In one way or another, he can be thought as acting on behalf of the *polis* as a part of his agreement with the Eretrians so that, seen from this perspective, the operation turns out to be a striking example of the ways the *polis* could enforce its role as «the proprietor in chief of all landed assets within its boundaries»[48].

7. On a superficial level, five Athenian inscriptions, possibly belonging to the Lykourgan period, dealing with the legal arrangements for the «Acharnian aqueduct» (*SEG* 19,181, l. 8: Ἀχαρνικὸς ὀχετός) reflect a similar situation. The questions posed by these texts are nonetheless somewhat different. Two of them were discovered at the foot of Mount Parnes northeast of Menidi (in the territory of ancient Acharnai)[49] and published in 1960 (*SEG* 19,181 and 182). Typologically, they appear to be ὅροι, more precisely ὅροι ἐνναίας, ὅροι of the «spring», «underground source», and thus of the «water rights»[50], and of the rights of passage for the (construction of) the water conduit (καὶ ὀχετῶι διαγωγῆς) «sold» for all time (εἰς τὸν ἅπαντα χρόνον) by the owners of the properties concerned to the κοινωνοὶ τοῦ [Ἀχα]ρνικοῦ ὀχετοῦ, in one case (but presumably in all cases) for a substantial amount of money, 700 drachmai according to *SEG* 19,181, where the price is fully preserved.

Two more inscriptions have been known since the nineteenth century, *IG* II^2 2491 and 2502. They were found near the church of Aghios Nikolaos, c. 1.5 km. south-east of Menidi, and in Kokkynos Milos, 3 km. south of Menidi[51]. Despite their fragmentary state, they are longer documents, possibly contracts[52], recording more complex arrangements. The object of the transactions is clearly the same since the ἐνναία ἡ ἐκκ τ[ο]ῦ χωρίου ἅπαντος and ὑπόνομοι that could be laid down at whatever depth was needed are again mentioned. In *IG* II^2 2502, though a more

[47] Pernin 2014, 283: «tant que Chairéphanès lui-même exploitera la terre, qu'il entretienne la galerie et le réservoir (?), qu'il veille à ce que tout soit en bon état, *et ce pour toujours*». It is worth noting that both Dareste-Haussoullier-Reinach 1891-1904, I, 147 and Chatelain 2001, 83, omit to translate the temporal expression καὶ εἰς [τ]ὸν ἔπε[ι]τα [χ]ρόνον πάντα, thus partly altering the meaning of the sentence.

[48] Burford 1993, 16. Cf. also Guiraud 1893, 202-203, arguing that «[c]'est bien ici une expropriation véritable». Kränzlein 1963, 129, refers to *IG* XI, 9, 191, ll. 19-20, with regard to the power given to Chairephanes «fremden Grundbesitz anzukaufen» at a fixed price per foot (the restoration of the lacuna is, however, very uncertain here; cf. Hennig 1995, 265 n. 102 [«viel zu unsicher»]), but not in respect to the «purchase» of underground rights (ll. 18-19).

[49] On the territory of Acharnai see now Kellogg 2013, 7-34.

[50] On the meaning of ἐνναία, which Vanderpool 1965, 169-170, translated with «ground water», «water rights», see Theodoridis 1985, suggesting, on the basis of the «new» Photius' *Lexicon*, s.v. ἐνναίας, «Strömung, Quelle».

[51] D. Marchiandi in Greco 2014, 1, 819.

[52] Vanderpool 1965, 170: «detailed contracts»; Behrend 1970, 74-75 (no. 22): «Horoi und Fragmente umfangreicherer Vereinbarungen».

fragmentary document, a longer portion of the text is preserved and the term φρέαρ together with the verb ξηραίνω can be read. An entry in Harpocration's *Lexicon*, s.v. Παιανιεῖς καὶ Παιονίδαι, stating that μνημονεύουσι δὲ καὶ τούτων οἱ ῥήτορες, ὥσπερ καὶ Δείναρχος ἐν τῷ κατὰ Στεφάνου περὶ τοῦ ὀχετοῦ, is, moreover, possibly relevant to this context: as noted by Vanderpool, «Paionidai is a deme near Acharnai, and this speech "against Stephanos in the matter of the aqueduct" must surely concern our Acharnian aqueduct, which to judge from the care with which the contracts were let and the concessions staked out, must have involved a great deal of litigation»[53].

The fifth inscription belonging to the series was more recently found built into the wall of a Roman house at Monomati (*SEG* 54,237). Only seven words can be restored but the inscription seems to be almost identical to the others. The word ὀχετός significantly recurs twice in the partially preserved four lines of the text. According to A.P. Matthaiou the letter cutter of this text is the same as in *IG* II^2 2491 and 2502[54].

An illuminating similar legal situation appears to be reflected by three ruperstral *horoi* marking the boundary of an open-air water conduit (ὅρος διανό(μου))[55] on the western slope of Mount Hymettos published by M.K. Langdon (*SEG* 35,140)[56]. In his commentary Langdon notes that «[t]he existence of boundary inscriptions suggests that the water was not intended for the use of the landowner through whose land the conduit passed but was reserved for some other purpose…Here…the inscriptions define a zone upon which landowners could not encroach and from which they apparently could not freely draw water»[57].

Despite some disagreement[58], it is today the prevailing view, based on the discovery spots of the inscriptions, that the Acharnian aqueduct was not a local one but was primarily intended to supply Athens with water collected from springs located on the southern side of Parnes and conveyed to the city via a terracotta subterrenean conduit[59]. Assuming that the construction of the water line was a large-scale project managed on the initiative of the city (and not of Acharnai or any other demes in the region), the most intriguing problem becomes that of understanding who the κοινωνοὶ τοῦ Ἀχαρνικοῦ ὀχετοῦ were.

Following E. Vanderpool's suggestion, scholars have generally assumed that they were «a board of commissioners charged with the construction of the water system»[60].

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[53] Vanderpool 1965, 170-172.

[54] Matthaiou 2004-2008, 674.

[55] On the meaning of διάνομος see above n. 5.

[56] Langdon 1985, 260-263.

[57] Langdon 1985, 262-263. See above for the περίστασις, 70 feet wide, along the water conduit to be left uncultivated in *IG* XIV 352 = Dubois 1989, 234-248 (no. 196), I, ll. 7-9.

[58] Klaffenbach 1961, 121-126; Walbank 1991, 158; Platonos-Yiota 2004, 56-62.

[59] Vanderpool 1965; Camp II 1982, 11; Kellogg 2013, 107-108; D. Marchiandi in Greco 2014, 1, 819-821. Cf. also, with some doubts, Koerner 1974, 170-172; Bruun 2000, 566.

[60] Vanderpool 1965, 166 and 170; cf. also Kellogg 2013, 105-110 («105: «officials responsible for

In my opinion, this is, however, hardly credible. No other board of Athenian officials styled as κοινωνοί is, to my knowledge, attested. Leaving aside the κοινωνοί of Chairephanes in the inscription from Eretria, κοινωνοί are documented in the Demosthenic *corpus* with regard to commercial and business partnerships engaged in trade or maritime lending (32,7; 34,8, 12, 28, 29; 35,16, 33; 56,2, 5, 7, 9-10, 24, etc.) and to mining investors (37,10 and 38; 42,3; cf. Hyper. 3, *Eux*., 35-36)[61]. The context is, in other words, typically «chrematistic». In Arist. *Ath. Pol*. 52,2 the δίκαι κοινωνικαί feature in the list of δίκαι ἔμμηνοι. Even if we allow for the possibility that they generally concerned «associations»[62], as recently noted by P. Ismard «[l]es *dikai koinonikai* devaient certainement traiter les conflits relatifs à des affaires commerciales, qu'on qualifierait aujourd'hui "entre associés"»[63].

We could consequently surmise that the κοινωνοὶ τοῦ Ἀχαρνικοῦ ὀχετοῦ were a corporation of private contractors who were commissioned by the *polis* to create a system for collecting water and construct an aqueduct to convey it to Athens and, in doing so, «purchased» water rights εἰς τὸν ἅπαντα χρόνον. Seen in this perspective the Acharnian aqueduct could shed new light on the topic of public contracts in classical Athens but the many questions that are bound to remain unanswered should make us reflect. We could, of course, interpret the κοινωνοί as a kind of construction company that had undertaken to carry out the work for the ὀχετός. The picture is, however, complicated both by the fact that they had to purchase in turn the water rights from the landowners, in the same way as Chairephanes had to pay the price for underground rights in Eretria, and that in Athens, as shown by the epigraphic building accounts of the fifth and fourth century, construction works were not as a rule «sold» as a whole to building contractors (ἐργῶναι) but parceled out to a large number of μισθωταί who undertook to perform some specific job under the supervision of public commissioners (ἐπιστάται) and were generally paid by the day or by the piece work and only seldom, as in the case of architects, received a salary[64].

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its construction»; 109: «officials of the aqueduct»); D. Marchiandi in Greco 2014, 1, 819 («corpo di magistrati denominati *koinonoi* in merito alla realizzazione di un "Acquedotto di Acarne"»).

[61] Biscardi 1999, 36-38 (originally published in 1956, before *SEG* 19,181 and 182 were discovered); Cohen 1992, 128-129, 146-147, 152-153 with n. 176 («A single trader often was unable and/or unwilling to provide the equity necessary to support even a modest sea loan: partnerships or participations were frequently utilized for borrowing even relatively small amounts»; at n. 176 Cohen notes that «[t]he sole surviving written contract governing a maritime loan (Dem. 35.10-12) involves dual lenders and dual borrowers, as does the agreement purportedly quoted in Dem. 56. At least two borrowers appear in Dem. 32 (Protos and Fertatos, § 17) and Dem. 52 (Megakleides and Thrasyllos, § 20). None of these loans amounted even to a talent. Ships themselves were owned in partnerships: see the deposition of Apollonides, co-owner of the vessel in Dem. 35 (§ 33)»), 182-183. On the legal status of κοινωνίαι see further Harris 1989; Stroud 1998, 64-67.

[62] Rhodes 1981, 586.

[63] Ismard 2007, 62-64.

[64] Faraguna 2010, 129-133.

The only exception to this pattern I am aware of is represented by *Agora* XIX, L13, a lease document from Peiraeus, where four «entrepreneurs», defined πριάμενοι, rented the Peiraeus theatre for 3300 drachmai a year. They undertook at the same time to carry out at their own expense building works, and obtained in exchange the right to collect admission fees from the spectators, acquiring in this way a potentially profitable income source[65].

A possible line of enquiry would thus be to envisage some similar form of arrangement also for our «associates of the Acharnian aqueduct» and posit that they agreed to construct the water conduit in exchange for the right to draw an income once the aqueduct was in operation, as is the case in the Chairephanes inscription. What this income might have been is, however, a moot point. The idea that the κοινωνοί could have profited by selling the water itself seems to be ruled out because free access to water, especially drinking water, appears to have been a fundamental principle underlying Greek legislation on water rights and the few known examples attesting the sale of water invariably belong to the context of sanctuaries and show that the proceeds were used for cult purposes (cf., to quote an example, *IG* II^2 1361, ll. 8-10, a decree of the ὀργεῶνες of Bendis [330-320 B.C.], where the rent from a house and the income accruing from the sale of water are allocated to the refurbishing of the shrine and of the house itself: ὅπως δ' ἂν ἡ οἰκία καὶ τὸ ἱερὸν ἐπισκε[υ]άζηται, τὸ ἐν[οίκιον τῆ]ς οἰκίας καὶ τὸ ὕδωρ ὅσου ἂμ πραθῆι, ε[ἰς τὴν ἐ]πισκευὴν τοῦ ἱεροῦ [καὶ τῆς οἰκίας], εἰς ἄλλο δὲ μηδὲν ἀναλίσκειν)[66]. It is nonetheless worth observing that the extant inscriptions about the Acharnian aqueduct all concern special agreements between the κοινωνοί and private landowners. If we assume that the «Acharnian aqueduct» was a public operation, we must then conclude that the contractual arrangements between the κοινωνοί and the *polis* are not preserved and may not have been ever inscribed. It is therefore possible that this aspect of their activity was regulated elsewhere.

As an alternative approach, in his *Attische Pachturkunden* D. Behrend put forward the suggestion that the κοινωνοί were the syndicate of the aqueduct users («die Vielzahl der Benutzer der Wasserleitung»)[67], possibly a group of local landowners or entrepreneurs who pooled their money together in order to acquire permanent water resources for agriculture. On the one hand, such hypothesis is attactive in various respects since many of the legal and administrative problems I have highlighted above are connected to the assumption that the aqueduct was meant to supply the city of Athens. On the other hand, new problems, beginning with the rather high amounts of money involved and the remarkably unfavourable conditions to the «sellers», who

[65] For a comprehensive study of the inscription and of its legal terminology see Carusi 2014.

[66] Panessa 1983; Bruun 2000, 562. On the *orgeones* of Bendis see Ismard 2010, 261-274, discussing earlier literature.

[67] Behrend 1970, 74-75; cf. Wörrle 1981, 84: «die Interessengemeinschaft derer, die das Wasser aus der neuen Leitung benützen wollten und sich deshalb zu deren Planung, Finanzierung und Errichtung genossenschaftlich zusammengetan hatten».

were deprived of their water rights for ever (εἰς τὸν ἅπαντα χρόνον), are inevitably bound to arise and I will lay the question to rest. Should this second scenario prove acceptable, it would, however, cast new light on, and open unexpected perspectives into, Athenian rural society and economic life.

8. To conclude, this survey of problems related to water rights in ancient Greece must end with many questions left unanswered. The impression is that, moving from a set of traditional principles (irrigation of a field is already described in Hom. *Il.* 21,257-262), as social and economic relations within the cities became more complex, since the sixth century B.C. Greek *poleis* were in the course of time obliged to introduce new laws to regulate the use of water, both for drinking and irrigation, and the legal questions arising from the vital need to have access to it. It is doubtful, however, to what extent such *ad hoc* legislation developed into a coherent body of rules. In the case of Athens, there seems to be no equivalent of νόμοι μεταλλικοί with regard to water rights, or at least we do not hear of it. One aspect that can be expected to have increasingly become a source of legal disputes was represented by «servitudes». In this paper I have focused on those arising from the construction of aqueducts and drainage systems, both at the surface and underground. We have seen that some documents clearly reflect the concept of a divorce of underground rights from surface rights, as was the case also for the silver mines. How the relationships between landowners, private contractors responsible for the construction and maintenance of the water lines, and the *polis* were concretely defined in legal terms is an intriguing, and tantalising, problem for whose solution new evidence must be awaited.

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ATHINA DIMOPOULOU (ATHENS)

SOME REFLECTIONS ON WATER RIGHTS IN INSCRIPTIONS FROM BEROIA IN IMPERIAL TIMES. RESPONSE TO MICHELE FARAGUNA

The water management of ancient Greece is a topic drawing an ever-increasing academic interest. Hydraulic works, from the cosy bathtubs of the Mycenaean palaces to mechanical achievements like the Eupalinus tunnel in Samos, or the network of pipes exposed throughout the Athenian metro, have fuelled scientific discussion, several *ad hoc* congresses and numerous publications in the last years, especially among archaeologists and water systems specialists. Michele Faraguna's careful analysis of water rights in archaic and classical Greek cities has shown that the evidence on Greek water law is scattered and that no uniform set of rules seems to have existed, although we can derive some general principles on the basis of Plato's model. I would like to further extend some points raised in his paper, by focusing on three inscriptions relevant to water management from Beroia in Roman Macedonia,[1] a city rich in waters, and explore whether we can distinguish traces of evolution of Greek legal practice regarding water rights, on its crossroad with Roman law.

a) Public exploitation of water as a source of income

Raising somehow similar questions as the ones asked by Michele Faraguna on the possible commercial exploitation of the Acharnian aqueduct and of public water by contractors, exploitation of river water as a source of income for the city may be

[1] On archaeological remainings of water structures in Beroia, see Καϊάφα 2008, 286-292.

detected in the Edict[2] of the Proconsul Lucius Memmius Rufus addressed to the city of Beroia (dated in the 2nd c. AD). The Proconsul focuses on the poor finances of the local Γυμνάσιον,[3] due probably to mismanagement of public funds or the poor exploitation of the city resources. Lucius Memnius Rufus, on an angry tone, decides to secure a permanent income for the Γυμνάσιον. A capital of 100.000 denarii is to be formed (A-B l. 10-39), producing an interest of 6.000 denarii (A-B l. 40). This amount would come partly from foundations bequeathed by citizens and mainly by the income from the exploitation of mechanical systems moved by water, called ὑδρομηχαναί. This term[4] constitutes a unique epigraphic reference to machines operated by hydraulic power in Greece, attesting an unprecedented technological advancement. According to the editor's hypothesis,[5] these were watermills, such as the ones that continued to abound in Beroia till the early 20th century, in the river *Tripotamos*.[6]

In references in the papyri to water works, the term μηχανὴ is rather associated with inventions related to lifting and pumping water, either for irrigation purposes or for industrial use, as the water-screw invented by Archimedes during a visit to Egypt,[7] described by Vitruvius. In Beroia, where water sources for private irrigation of fields abound, public access to hydraulic machines generating an income insinuates a heavy usage destined for industrial purposes, such as milling, tanning or cloth production. In order to generate an income for the Γυμνάσιον, these machines must have been owned by the city, who was renting them to entrepreneurs or private parties. Both the river water as source of the hydraulic power and the pumping mechanisms are treated by the Proconsul as a *res publica*, thus confirming the Greek law precedent as set out by Michele Faraguna.

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[2] The inscription with commentary is edited by Γουναροπούλου –Χατζόπουλος 1998, no 7. See also Νίγδελης – Σουρής 2005, 57-58, 64-72.

[3] On the famous law regulating the Gymnasion of Beroia, see Gauthier – Hatzopoulos 1993.

[4] The inscription was found in four parts. The word "ὑδρομηχανές" appears six times, three in full (A28: "ἀπό τῶν ὑδρομηχανῶν ἐνιαύσια πεπτω[κότα δηνάρια]...", A50: "...ἐκ τῶν ὑδρομηχανῶν δη[νάρια----]...", A85: "....ἀπό τῶν ὑδρομηχανῶν χείλια ἑπτακόσια εἴκοσι ...") and three partially (B34-35: "... ἀπό (?) τῶν ὑδρομη]χανῶν...", Γ20: "[ὑδρομηχ(?)]ανῶν...", Δ17: "...ὑδρομη[χαν---]...").

[5] Νίγδελης – Σουρής 2005, 64-66, see also Καϊάφα 2008, 289.

[6] As many as 300 such mills are reported by the 17th century Ottoman traveler Evliya Çelebi in Beroia on the Tripotamos river in his narrative of travels *Seyahatnâme*. The river was previously named Bassilikos in Byzantine times and possibly Olganos in ancient times.

[7] Oleson 2000, 242. The pumping installation was termed μηχανοστάσιον in the papyri, Oleson 2000, 248, whereas the terms μηχανὴ ἀντλοῦσα and μηχανικὰ ὄργανα are also attested. This device, which Strabo (16.1.15) describes as lifting water to the Hanging Gardens of Babylon, spread throughout the Mediterranean as a device facilitating irrigation for culture, industrial use and mining. Pappus of Alexandria (VII 2), a fourth century A.D. mathematician, includes among the most useful practitioners with respect to human needs the μηχανοποιοὶ who design ἀντληματικά ὄργανα to raise water from great depth.

b) Ownership of water source

The first principle put forward by Michele Faraguna, that of ownership of water resources as going hand in hand with the ownership of the land, as well as the second principle, that of public ownership of aqueducts, are indirectly attested in a dedication from Beroia, dated in the late 1st/early 2nd c. AD. Claudia Ammia,[8] owner of a large estate, in memory of her deceased son, had channelled water "*from her own lands*" and financed the building of an aqueduct and water reservoir.

EKM 1. Beroia 40[9]
[— —] Κλ(αυδία) Πειερί[ω]-
νος θυγάτηρ Ἀμμία μετὰ τῶν τέκνων
Κλαυδί[ων] Λ[ου]κίας, Πειερίωνος, Ἀμύν-
του εἰς μ[νήμ]ην Κλ(αυδίου) Ἀερό[π]ου τοῦ ὑοῦ τὸ
ὕδωρ εἰσή[νεγκεν] ἐκ τῶν αὐτῆς χωρίων τό τε ὑ-
δραγώγιον καὶ τὸ ἐκτοχεῖον ἰδίοις ἀνα-
λώμασι κατασκευάσασα ἀνέθηκε[ν].

Throughout the centuries, a number of benefactors, including women in the Roman period, are honoured[10] by Greek cities for constructing or repairing different water-structures. An aqueduct, characteristic in the early Empire of the urban expansion and economic growth of cities under the *pax romana,* would have been one of the most onerous constructions. Aqueducts permitted to provide fresh water from distant water-sources, sometimes reaching close to 50 km long as in Mytilene[11] and Nicopolis,[12] acting also as symbols of achievement of Roman engineering, combined with the new imperial conception of public space as extending far beyond previous Greek city frontiers.

Claudia Ammia is a member of the wealthy family of the Claudii Pieriones established in Beroia. The private ownership of the water springs in the χωρία owned by her is in accordance both to Greek legal practice and to the general principle of Roman

[8] Καϊάφα 2008, 289-290. On Claudia Ammia, see Tataki 1988, 191, 457.

[9] Γουναροπούλου –Χατζόπουλος 1998, no 40, 140-141.

[10] See for example Ephesos 285 (dedication by Claudius Aristion and wife of a Nymphaeum of Trajan), IG VII 3099 (unknown benfactor, Boiotia — Lebadeia), Ephesos 1335 (honorary inscription for Gaius Laecanius Bassus, former proconsul, AD 80/81), IvO 610 (Elis, Olympia — *147-150 AD,* dedication by Regilla, wife of Herodes Atticus), Didyma 523 (inscription for Antigonos Apolloniou and his son Antigonos Antigonou, early imperial), Panamara 226 (honorary inscription by *demos*, *boulai*, and *gerousia* for Marcus Sempronius Clemens, *hiereus*).

[11] On the aqueduct of Mytilene see Lolos 1997, Kourtzellis – Pappa - Kakes 2016.

[12] On the aqueduct of Nicopolis see Doukellis – Dufaure-Fouache 1995, p. 231: "*En ce sens, l'aqueduc incarne les nouveaux rapports géopolitiques qui unifient des territoires d'anciennes cités dans l'espace extra-urbain et orientent la mise en valeur au profit du nouveau centre politique de l'Épire méridionale. En même temps, il est la preuve de l'éclatement des frontières entre les cités grecques, éclatement qui va dans le sens d'autres pratiques de la part du pouvoir centralisé de Rome*." On the water distribution system of Nicopolis, see also Παυλίδης – Κύρκου 2016.

law, that private water resources belonged to the owner of the land of their location.[13] In Roman law, water that was conveyed by means of an aqueduct also belonged to the person who had constructed the aqueduct,[14] but if the construction was serving a public initiative, the water was considered to be a *res publica,* as well as the infrastructure of the aqueduct itself.[15] The water channelled by Claudia Ammia is indeed considered a public commodity and so must have been the aqueduct and water reservoir she had financed, not though the χωρία where the water was originating from, which remained her own property.[16] Whether the land on which the aqueduct was built would have to be bought, even forcibly in case of reluctance of the owners, as in the rule of Roman law, is a point on which the inscription leaves us in the dark. According to Roman practice, the land over which an aqueduct was constructed was bought to the owner,[17] although in the early Empire, possibly in order to overcome the opposition of private landlords reluctant to give up their property, the State, for reasons of public interest, reserved its right to claim the property without the agreement of the owner.[18] We may assume that the acquisition of private lands, forced or not, as in Roman practice, was a necessary condition for such a work of large scale serving public welfare.

c) Right to draw water

Limitations to the free right of access to water, of a different kind than those of classical times put forward by Michele Faraguna, are illustrated in an inscription discovered in Beroia in 1996 during works in a central street of the modern city. The inscription, dated in the fist half of the first century AD probably erected in the context of a dedication, offers valuable information[19] regarding the administration of water works in a Greek city under the Roman Empire.[20] In the first line,

[13] Bruun 2000 (b), 576-581.

[14] *D.* 43.20.3.3: *Aqua, quae in rivo nascitur, tacite lucri fit ab eo qui ducit*. (The water which originates in a brook is tacitly considered to be for the benefit of him who conducts it from thence.)

[15] Maganzani 2012, 86.

[16] Remainings of the Roman aqueduct have been identified at a distance of 1,5 km from the city of Beroia, approaching the city from the south, its construction following Vitruvius' norms. See Καϊάφα 2008, 290.

[17] Frontinus, 124-125.

[18] Maganzani 2012, 88. In the Spanish colony of Urso, in the *lex coloniae Genetivae Iuliae*, is mentionned the *ius ac potestas* of the community over the areas destined to the disposition of the majority of the decuriones, for the conduit of *aqua pubblica*, Lex. Urs. 99: "... *per eos agros aquam ducere i(us) p(otestas)que esto* ...".

[19] The inscription contains a variety of terminology regarding public water installations, such as ἀμφοδικὰ ὕδατα, i.e., waters running ἀμφὶ τὴν ὁδὸν, in gutters on both sides of the street, κύθρῳ, the ionian version of χύτρος, a term probably here signifying a water reservoir, πολύκρηνον (an hapax, synonym of πολύκρουνον), a fountain with multiple spouts, ἐξαγωγὸς, a piper serving the outflow of water surplus.

[20] On dedication of waterworks see MAMA VIII 437 (Aphrodisias), *SEG* 27.145 (Opous), *IG* IX 1.47 (Styris), *Syll*^{3} 813C (Delphi).

the remaining letters ΑΝΘ probably belong to Ἀνθύπατος, identifying the Roman Proconsul and governor of Macedonia.[21]

EKM 1. Beroia 41— SEG 48.743
ἀπὸ τῆς Εὐιαστικῆς πύλης τὰ ἀμφοδικὰ ὕδα-
τα σωλῆσι καινοῖς καὶ τὴν πρὸς τῷ κύθρῳ μαρ-
μαρίνην κρήνην σὺν τῷ λοιπῷ αὐτῆς κόσμῳ
καὶ τὸ πολύκρηνον τὸ ἐν τῇ ἀγορᾷ καὶ τ[ὸ π]ολ[ύκρη]-
νον τὸ ἐν τῷ Ἀσκληπεί[ῳ] καὶ τὸν ἐν τῇ ἀγορᾷ ἐξαγω[γὸν ἐ]-
κ τῶν ἰδίων ἀποκατέστησεν [κ]αὶ τοὺς μερισμο[ὺς ὡς ἡ] πόλι[ς αὐτῷ] ἐνέ-
τυχε ἀνεμέτρησε, τὸ ἀπο[κεί]μενον ὕδωρ ἀνα[μετρ]ήσα[ς καὶ] ἐξ αὐ-
τοῦ τὸ λεῖπον τοῖς βουλευτα[ῖ]ς ἀποδούς, ὧν τὴ<ν> ἀ[ν]αγραφ[ὴν εἰ]ς τὸ
vac. γραμματοφυλάκιον ἀπέθε[το].

... (he channelled?) *with new pipelines the waters in the gutters on both sides of the street from the Eviastiki gate and he rebuilt the marble fountain near the reservoir, along with the rest of the decoration, and the multiple fountain of the Asklepios sanctuary and the drain in the agora by his own funds; according to an official request of the city, he also re-evaluated the allotments of water and after re-calculating the water stored, he gave the remaining quantity to the* βουλευταί*, a list of which he deposited in the public archives.*

The verb ἐντυγχάνω (l.6-7) is a *terminus technicus* signifying the submission of a petition. It shows that an official demand was submitted by the city of Beroia to the Proconsul, resulting in an administrative procedure, which involved a calculation of water volumes, a new division of water rights (μερισμὸς) among the city's dignitaries and record keeping of the beneficiaries. How does this procedure fit with what is known about the Greek or Roman administration of public water?

The provision of water from pubic wells was a necessity for every Greek city worthy of this name, according to Pausanias.[22] A system of distribution of public water may have existed in some Greek towns or sanctuaries,[23] as it is hinted by the Law of the Mysteries[24] of Andania from Messenia (92/91 BC),[25] where the *agoranomos* is, among other regulations regarding water use during the *panegyris,* responsible of securing "*that the water runs just as it is allotted and no one hinders those using it.*"

[21] Cf. *IEph* 695.
[22] Pausanias, 10.4.1.
[23] Bruun 2000(a), 564.
[24] Gawlinski 2012, 222-223.
[25] IG V,1 1390 , l. 101-105: "... ἐχέτω δὲ ἐπιμέλειαν ὁ ἀγορανόμος καὶ περὶ τοῦ ὕδατος, ὅπως κατὰ τὸν τᾶς παναγύριος χρόνον μηθεὶς κακοποιεῖ μήτε/[τὸ β]ήλημα μήτε τοὺς ὀχετοὺς μήτε ἄν τι ἄλλο κατασκευασθεῖ ἐν τῶι ἱερῶι χάριν τοῦ ὕδατος, καὶ ὅπως, καθὼς ἂν μερισθεῖ, ῥεῖ τὸ ὕδωρ καὶ μη/[θ]ε[ὶς ἀ]ποκωλύει τοὺς χρωμένους·". A testimony on μερισμὸς of water may be attested in a decree of Ephesos, Ephesos 145.

Evidence on sharing of water, by opening irrigation channels from perennial springs or aqueducts for a certain time during the day is attested from several areas of the Roman Empire, both in Africa and the Near East, but also from Dalmatia and Central Italy.[26] More relevant though to our case may be the Roman usage of official concession of public water to individuals.

Our principal source of knowledge on Roman legislation[27] on *cura aquarum* in the early Empire is the senator Sextus Julius Frontinus, author of the *De aquaeductu,* an official report to the Emperor of the state of the nine aqueducts of Rome at the turn of the 1st century AD. Latter, water legislation was included in the Digest (whose rules largely influenced modern water legislation), although there is no certainty that these rules reflect accurately earlier imperial law. According to Frontinus, concession of public water to individuals was a *beneficium,*[28] a personal imperial concession and privilege introduced under Augustus,[29] which had to be registered in the imperial archives. In Roman cities, access to public fountains was free, but those wishing to collect water had to bring portable receptacles of limited quantity. For larger quantities, a private conduit had to be connected to the public reservoir and, for such a permit an official water grant was needed. According to a *senatus consultum* mentioned by Frontinus, it was forbidden to any private party to draw water directly from the public conduits, but water had to be drawn only from the public reservoirs,[30] by pipes of fixed dimension. These were called *fistulae,* often bearing the name of the beneficiary of the water right and were running under public streets or private properties by right of servitude. Frontinus describes how, in case of such an application for a water grant, the appointed deputy, without discriminating according to the interest he may have in the parties, must carefully review the application and, after inspecting the location, allow the proper connection to the public reservoir of the lead pipes.[31]

This right to draw water was strictly personal, not to be inherited or sold,[32] and remained in force as long as the same proprietors continued to hold the ground for which they received the grant of the water.[33] Later, as attested by Ulpian in the Digest, this concession became transmissible with the land.[34] But in Frontinus' time, "*As soon as any water-rights are vacated, this is announced, and entered in the records, which are consulted, in order that vacant water-rights may be given to applicants.*

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[26] Bruun 2000(b), 580-581.

[27] On Roman water legislation, see Weiß 1925, Eck 1987, Bruun 2000(b), Taylor 2000, 52-129, Καϊάφα 2008, 106-112, Maganzani 2012(a), 2012(b), Arnaoutoglou 2013.

[28] Frontinus, 105.

[29] Bruun 2000(b), 578.

[30] Frontinus, 106.

[31] Frontinus, 105.

[32] Frontinus, 107.

[33] Frontinus, 108.

[34] *D.* 43.20.1.43.

These waters they formerly used to cut off immediately, in order that between times they might sell them either to the occupants of the land, or to outsiders even."[35]

Frontinus also informs us that when Marcus Agrippa was in charge of the water supply of Rome, he allotted the water first for public works and basins, and the remainder to private consumers.[36] The proconsul in Beroia must have proceeded to a similar allotment, calculating first the amount of water necessary for public use and dividing the rest (το λεῖπον) among the *bouleutai*. This must not be understood as a one-off distribution, but rather as a perpetual right of connection to the water reservoir for a certain quantity of water, a right *in personam* attributed to all the *bouleutai* whose names were registered in the public archives.

Following a general renovation of the city hydraulics,[37] which he personally financed, the Proconsul was asked by the city to review water rights, as the word ἀνεμέτρησε implies. This new allotment may have been made necessary due to the renovation of the pipes connected to the public container, or because previous beneficiaries of the privilege among the βουλευταί had died or been replaced. The new attribution of the privilege did not arise though out of individual requests, but from a petition by the city itself, in the best interest the local elite forming the council. These βουλευταί, at the time, may have formed a hereditary aristocracy, the lifestyle of which justified larger needs of water for private baths, gardens, fountains or irrigation purposes.[38] We do not hear though if, in exchange for the water grant, the βουλευταί had to pay a fee (*vectigal*), as in the case of other provincial communities, where this privilege was granted by local authorities.[39] The keeping of records of the names of the beneficiaries in the γραμματοφυλάκιον implies a procedure of control of legitimate access and of revision of such right, by submitting the list of said beneficiaries of the right of access to higher volumes of water to the city's public archive.

This inscription from Roman Beroia seem thus to preserve an official petition reproducing a procedure quite similar to the one described by Frontinus regarding access to water reservoirs, as a *beneficium* granted to individuals by official permission in Rome. The inscription may thus illustrate the operation of Roman water rights in a Greek city within a Roman *provincia*, where the Proconsul was acting as substitute for the imperial *permissio*, as part of his broad administrative duties. It is also a testimony to the quality of life enjoyed in Beroia in Roman times, including access

[35] Frontinus, 109: *Cum vacare aliquae coeperunt aquae, adnuntiatur et in commentarios redigitur, qui respiciuntur ut petitoribus ex vacuis dari possint. Has aquas statim intercipere solebant, ut medio tempore venderent aut possessoribus praediorum aut aliis etiam.*

[36] Frontinus, 98.

[37] On the hydraulic system of Beroia, including the distribution system of water by clay pipes under the main streets (*cardo, decumanus*), which coincide with streets of the modern city, see Καϊάφα 2008, 290.

[38] Bruun 2000(b), 586.

[39] CIL X 4842 (*Edictum Augusti de AquaeductuVenafrano*, for the Campanian town of Venafrum), CIL VIII 51 (Thysdrus in modern Tunisia).

to water on a large scale for the local elite, a personal privilege safeguarded by a legal framework of Roman provenance.

The three inscriptions from Roman Beroia examined show that water management in the Greek countryside has evolved in the first centuries AD along the lines set by Roman law and practice, which are though overlapping with these of the relevant previous Greek legal practice, as set out by Michele Faraguna. Access to water and exploitation of water resources, for personal or industrial use, were under close public scrutiny, in accordance also with the well known interest of the Romans to water management, which, overall, also raised water mechanics and aqueduct construction to new levels of achievement.

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REWARD AND DETERRENCE IN CLASSICAL AND HELLENISTIC ENACTMENTS

I. Introduction

The discussion in the present paper will focus on the use of financial rewards to volunteers in order to encourage their participation in the process of law enforcement. An invitation to volunteers to become involved as denouncers, prosecutors, and enforcers may in itself have had a considerable deterrent effect when included in a penalty clause of a law or decree. But the deterrence would almost certainly be considerably enhanced, if it was made clear that breaches of the regulation might be pursued not just by individuals who were motivated by personal enmity or a desire to increase their prestige but also by those whose overriding motivation was, quite simply, greed!

It is normally held that the Athenians made only sparing use of such financial incentives to motivate their volunteers. If this is correct, classical Athens appears to have differed in this respect from a number of other Greek communities that are known to have publicised such rewards very prominently in some of their penalty clauses. This in turn may suggest that this area was one in which the administration of justice differed significantly between Greek *poleis*, and that such differences may have been due to differences in the general political framework in which the laws and decrees were applied. However, it will be suggested that, despite the apparent differences, there were a number of recurrent features. Thus, the use of rewards for volunteers attested for Athens may in fact have differed after all that much from practices attested epigraphically for other Greek states.

It will also be suggested that several communities, including Athens, appear often to have built such rewards into their administration of justice in such a way that volunteer participation for pay would not have constituted a significant loss to the treasury. Sometimes we have information that judgement debts were doubled or, in some communities, incurred the *hemiolion*, once the debts had become overdue (see Table II). This would have allowed rewards to be paid to volunteers, while the entire amount of the original penalty would still find its way to its intended destination.[1]

The present discussion will take as its starting point the rewards attested for classical Athens; this in turn will lead to a presentation of the evidence for rewards attested in other Greek states in the classical and Hellenistic periods. This will be followed by a brief discussion of the possible similarities and differences that may be detected in our material.

II. Athens

When the scandal of the vandalising of the Herms broke in 415, one of the first responses by the Athenian *demos* was to announce that financial reward was be given for further information on the affair. The number of awards is debated,[2] and so is the question whether separate awards were promised for information on the *hermokopidai* and the profanation of the mysteries respectively, but this is not all that important here. For the purposes of the present paper, two things in particular are of interest. The first is that, according to Andokides (1.27-28) many people fell over themselves to provide information (some of it false, as it turned out), once they saw an opportunity for financial gain. The other is the fact that the Athenians provided a financial incentive for information as an *ad hoc* measure, and only after the crimes had in fact taken place.

If the Athenian decision to award money for volunteer information was an exceptional step, it is not difficult to explain why they resorted to it in 415. It seems to have been clear to them from the start that the vandalising of the Herms and the profanation of the mysteries involved people from the community's wealthiest and most well-connected families. In other words, these were people whom it might be very dangerous to cross. What made the investigation even more difficult was that the profanation of the mysteries had taken place in the homes of private individuals. Apart from the slaves attached to the households concerned, the persons who were most likely to be able to help the investigation were those with close personal ties of

[1] Contrary to my initial hopes when I began my systematic investigation, the surviving evidence does not suggest a link between the imposition of, respectively, the *duplum* and the *hemiolion*, and the types of rewards that amounted to half or one-third of the sum exacted from the perpetrator. Some communities, including Athens, seem in some contexts to have rewarded their volunteers with a third of the sum exacted, and with promises of half the penalty in other contexts. I have not been able to find a satisfactory explanation for that variation, either for Athens or for any other community included in this survey.

[2] See *e.g.* MacDowell (1962: 80-81).

friendship and kinship to the ring leaders, who would, for the most part, also have to incriminate themselves.

All this is of course well known; yet, it remains an interesting fact that the Athenians on this occasion shut the stable door only after the horse had bolted. The episode shows very clearly that they were aware of the difference that such a financial incentive might make to the process of investigation by motivating volunteers to come forward. Yet there is no evidence to suggest that they took the next logical step of turning such a financial incentive into a standard feature in their legislation concerning the most serious types of crime, such as treason, revolution, and offences against the divine.

This is in itself remarkable. We know of two classical *poleis*, fifth-century Thasos and fourth-century Abdera, which chose to make a financial reward of this type an integrated part of their legislation on treason and subversion.[3] What is more, the Athenians apparently did recognise that prospective criminals might be deterred by a perceived high risk of being caught and convicted, in the same way as they recognised the potential deterrent effect produced by the threat of severe penalties. This is clear from several comments made in surviving prosecution speeches on the importance of detection and prosecution for deterring other would-be criminals.

Yet, at least according to the general modern consensus, the Athenians relied mainly on their volunteer prosecutors being motivated first and foremost by a combination of personal enmity, political ambition and public spiritedness rather than by the prospect of a financial reward. The inference is that they tended to rely primarily on the deterrence created by the severity of their penalties. As has been argued by Scafuro (2014: 218-224), these may at times have been set so high as to suggest that the Athenians did not in fact expect them to be imposed in practice. However, there is also a general consensus that rewards for volunteers did play a part in some aspects of the Athenian administration of justice. The attestations of such rewards do show very clearly that the Athenians were not entirely blind to the part that financial rewards might play in the process of law-enforcement.

For the present purposes it may be useful to distinguish clearly between, first, rewards promised for information that might lead to the successful prosecution and conviction of lawbreakers, and, second, those rewards that were promised to volunteers who assisted in the enforcement of penalties already imposed by a court sentence or as summary fines issued by boards of officials or by the council of 500. The former are, as is well known, securely attested only in two surviving pieces of legislation, in addition to certain types of denunciations referred to as *phasis*. One relates to the unlawful cohabition between citizens and non-citizens, where the successful prosecutor was entitled to one third of the money raised from the sale

[3] ML 83 (Thasos); *I. Aeg. Thrace* 2 (Abdera). Note, however, that Aineias the Tactician 10.15 seems to take it for granted that rewards for information concerning conspiracies against the *polis* would be promised only as *ad hoc* measures during periods of crisis.

of the male non-citizen offender and his property ([Dem.] 59.16). Although doubts have been raised as to whether the document inserted in [Dem.] 59.16 contains the text of a genuine Athenian law, there is no decisive evidence against its authenticity.[4] If indeed the law is an authentic piece of fourth-century legislation, it may be envisaged that the process of enforcement almost certainly would have commenced immediately upon conviction with the seizure of the person of the defendant (on the assumption that he or she had been present in court rather than convicted in absentia). However, further action may well have been needed in order to identify and appropriate any property that was likewise liable to confiscation. Although the one-third share offered to the successful prosecutor may have been regarded as a perfectly acceptable cut of what was in any case a 'windfall', it did mean a reduction in the treasury's gain from the conviction. Thus, the promise of a reward can still be interpreted as a conscious investment in the policing and reporting of breaches of the law, which most likely increased the deterrent effect of the statute in its entirety.

The other is the text included in [Dem.] 43.71 which purports to be an Athenian law against the removal of olive trees. A reward of one hundred *drachmai* per tree is promised to the denunciator, while another hundred drachmai are destined for the public treasury, with a deduction of ten per cent as a sacred fine for Athena. As Scafuro has commented, 'the reward for the prosecutor is a mighty enticement to private citizens (in the absence of state prosecutors) to pursue those who dig out olive trees'.[5] In this instance, the reward was balanced by a risk for the person who took it upon himself to act as prosecutor, in that he was required to make a court deposit, the *prytaneia*, that appears to be proportionate with the reward to which he would be entitled if he won the case. Although apparently unparalleled in our surviving Athenian evidence,[6] this provision bears some resemblance to similar use of deposits to create a combination of risk and reward attested for other Greek communities, including third-century Delos[7] and fifth-century Thasos.[8]

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[4] See Canevaro (2013: 183-187).

[5] Scafuro (2011: 171 n. 144).

[6] The only possible Athenian parallel that I have been able to find is *IG* I (3) 41, 62-63. However, this inscription, must be treated with caution: the text itself is very lacunose, and Lewis' restoration seems to have been based precisely on the law text in [Dem.] 43.71 (note *e.g.* Cataldi's radically different restoration of the lacuna in *SEG* 34: 14).

[7] *ID* V 509 concerning the illegal sale of wood products: ἐὰν δέ τις παρὰ τὰ γεγραμμένα πωλεῖ, πεντήκοντα δραχμὰς ὀφειλέτω, καὶ ἐξέστω εἰσαγγέλλειν τῶι βουλομένωι τῶμ πολιτῶν πρὸς τοὺς ἀγορανόμους· οἱ δὲ ἀγορανόμοι εἰσαγόντων τὰς εἰσαγγελίας ταύτας εἰς τοὺς τριάκοντα καὶ ἕνα ἐν τῶι μηνὶ ἐν ᾧ ἂν εἰσαγγελθεῖ· τὸν δὲ μισθὸν τῶι δικαστηρίωι παραβαλλέσθω ὁ εἰσαγγείλας·

[8] *SEG* 38: 347 = Koerner (1993) no. 66: ---]ον ποιέτω ὅ τι ἄν τις τούτω[ν ------]α τοῖ οἴνο καὶ τὸ ὀχσέος στερέσ[θω -------]ντος· καὶ ἕκτην κατ' ἀμφορέα ἕκα[στον ὀφελέτω ἱρὴν τῆι Ἀθ]ηναίηι τῆι Πολιόχωι καὶ τῶι Ἀπόλλω[νι τῶι Πυθίωι κ]αὶ τῶι κατειπόντι ἑτέρην· ἀπενγυάτω ὁ [κατειπὼν τὴν ἀπενγύην] παρὰ τριηκοσίοισιν κατάπερ τῶν βιαίων·

Common to these two areas of legislation is the fact that the denunciation of the offences would have depended to a great extent on whistleblowers who were close to the offender's household. For them the social costs of making the denunciation were potentially very high, because their targets were most likely to be kin, (ex-)friends, and neighbours, and it is possible that the Athenians would have regarded a financial incentive in these particular contexts as one way of balancing the risks for potential volunteer prosecutors. Thus, although attestations of rewards for denunciations are rare in our Athenian material overall, their appearance in these two law texts is not in itself an indication that the documents in [Dem.] 43.71 and [Dem.] 59.16 are inauthentic.

On the other hand, there is a range of other offences that likewise depended for their detection on denunciations made by volunteers who had personal ties to the perpetrators, but for which we have no evidence for financial rewards being offered to the successful prosecutors. If the lack of evidence is a reliable guide, one may well wonder why precisely the offences of illegal cohabitation with aliens and removal of olive trees constituted exceptions to a general principle that volunteer prosecutors were not entitled to any financial gain in return for their participation.

Yet, rather disturbingly, the common assumption that the majority of public actions carried no financial incentive for the prosecutor is based mainly on an argument from silence. True, we know for a fact that neither the *graphe hybreos*, nor actions for the proposal of unsuitable laws (and possibly also unlawful decrees) offered the successful volunteer any monetary award.[9] The same may have applied to public actions arising in connection with religious festivals, depending on how we choose to label the procedure brought by Demosthenes against Meidias.[10] But as far as I can ascertain, this is as far as the surviving Athenian evidence will take us. Although it is not my aim to question the prevailing *communis opinio*, it has to be borne in mind that our generalisations on the limited part played by financial incentives in Athenian public actions rest on rather less solid foundations than is often acknowledged.

The one other area where rewards are known to have been offered is in relation to offences committed in connection with trade, initated by the act of 'showing', φαίνειν, for which the denunciator was entitled to 50% of the items 'shown'. The problems surrounding the terminology of *phasis* and its cognate verb *phainein* have been extensively discussed.[11] It is beyond the scope of the present paper to join that debate, except to suggest that some of its applications relating specifically to shipping and the market place may indicate that the act of 'showing' may sometimes refer to the enforcement of a summary penalty that amounted to the confiscation of the goods (or ship) in question. If so, it may be assumed that the application of this type of *phasis* was based on a

[9] Dem. 21.45, Dem. 24.3.

[10] Dem. 21.28 εἰ δ' ἐγὼ τὴν ἐπὶ τῶν ἰδίων δικῶν πλεονεξίαν ἀφεὶς τῇ πόλει παραχωρῶ τῆς τιμωρίας, καὶ τοῦτον εἰλόμην τὸν ἀγῶν' ἀφ' οὗ μηδὲν ἔστι λῆμμα λαβεῖν ἐμοί, χάριν, οὐ βλάβην δήπου τοῦτ' ἂν εἰκότως ἐνέγκοι μοι παρ' ὑμῶν.

[11] See above all Wallace (2003).

principle akin to the one attested also in other areas of Athenian legislation: the assets became liable to confiscation (and thus 'public property') from the very moment the legislation was breached. Thus, the scenario envisaged is one where the *phasis* would end up before the council or courts *only if* the confiscation itself was contested, by implication along with the claim on which it was based.[12] On this interpretation, the goods would simply have been appropriated and sold, with a 50% share handed over to the denunciator, unless the person in possession of the goods made a formal objection. There are several parallels to such confiscation procedures attested epigraphically for other Greek cities.[13] Although these do not constitute proof that the same principle applied at Athens, they do suggest that this model should be envisaged as a possibility. If this is indeed the case, some of the procedures that were initiated by the act of 'showing' are located in a grey area between initial denunciation of the offence and the act of enforcing the penalty stipulated in the relevant enactment.

It is precisely in the area of enforcement that the Athenians evidently relied to a significant extent on a financial incentive to encourage volunteers to come forward, that is in connection with the registration, *apographe*, of assets liable to confiscation, once the judgement debt had become overdue in the ninth prytany. Although the fraction offered to the denunciator cannot be established with certainty,[14] there is no doubt that the person offering information on moveable and

[12] This is suggested both by the incident reported in Isokr. 18.5-6 and by that reported in Isokr. 17.42. In both, the key verb is ἀμφισβητεῖν. In the former passage, the *phasis* brought by Patrokles is based on the assertion that the money had belonged to a certain Amphilochos who had joined the faction in the Peiraieus, and who had almost certainly sustained a conviction *in absentia* that involved property confiscation. When Kallimachos objected (Ἀμφισβητοῦντος δὲ τούτου), Patrokles proceeded to make his *phasis* to Rhinon, and the case was decided by the council (Ἐκεῖνοι δ' εἰς τὴν βουλὴν περὶ αὐτῶν ἀπέδοσαν· κρίσεως δὲ γενομένης ἔδοξε τὰ χρήματα δημόσι' εἶναι). In the latter episode, the speaker of Isokr. 17 appears to have contested the claim that the ship denounced was owned by a Delian (Αὐτὸν τοίνυν Πασίων' ἔργῳ παρέξομαι τούτοις συμμαρτυροῦντα. Ὁλκάδα γὰρ, ἐφ' ᾗ πολλὰ χρήματ' ἦν ἐγὼ δεδωκὼς, ἔφηνέ τις ὡς οὖσαν ἀνδρὸς Δηλίου. Ἀμφισβητοῦντος δ' ἐμοῦ καὶ καθέλκειν ἀξιοῦντος οὕτω τὴν βουλὴν διέθεσαν οἱ βουλόμενοι συκοφαντεῖν ὥστε <τὸ μὲν πρῶτον> παρὰ μικρὸν ἦλθον ἄκριτος ἀποθανεῖν, τελευτῶντες δ' ἐπείσθησαν ἐγγυητὰς παρ' ἐμοῦ δέξασθαι.)

[13] *e.g. Milet* I, 3 140A 20-29, *IK Erythrai und Klazomenai* 15.18-24. The Athenian law on coinage (*SEG* 26: 72) might likewise envisage a summary penalty in lines 16-18 (στερέσθω ὧν ἂμ [π]ωλῆ̣τ̣[αι ἐκείν]ῃ τῆι ἡμέραι), depending on whether we interpret ἐκείνῃ τῆι ἡμέραι as qualifying the verb στερέσθω in the main clause, or the verb πωλῆται in the relative clause. The latter interpretation is probably the more likely, however.

[14] Most scholars have followed Lewis' suggestion (1966: 191 n. 67) that the wording τὰ τρία μέρη in [Dem.] 53.2 should be emended to τὰ τρίτα μέρη with reference to *Agora* XIX P24 B41. The reason for the plural in the case of [Dem.] 53.2 is then that there were two slaves registered by Apollodoros as liable to confiscation. There is a further epigraphical parallel to τὰ τρίτα μέρη in the sense of 'a third' in *SEG* 39: 1285.

Unless emended, τὰ τρία μέρη in [Dem.] 53.2 most likely indicates an entitlement

probably also immovable items subject to confiscation was entitled to a part of the proceeds realised through public auction.

Despite the surviving speeches that pertain directly to the process of *apographe*,[15] there are many questions surrounding it that have yet to be answered, including whether the term referred to several different procedures or to different possible stages of the same procedure.[16] However, it is probable that if no-one stepped forward to stake a claim to the assets registered for confiscation after their due proclamation in the Assembly,[17] the assets would simply have been appropriated and sold without any formal court proceeding being required. In that respect, the process of *apographe* may have worked along similar lines as those suggested for some of the procedures referred to by *phasis* and *phainein*. After the sale, the persons responsible for the *apographe* of the individual items would subsequently receive their share of the proceeds.[18]

It seems reasonable to assume that the doubling of the debt in the ninth prytany was not intended as a potential further boost to the proceeds accruing to the treasury from the conviction. Rather, it may be taken as a reflection of the fact that, once the debtor had missed the deadline and it had become clear that he was not going to pay voluntarily, the 'services' of the volunteer were enlisted. The doubling of the debt can

amounting to three parts of *four*, something that is (so far) unparalleled in surviving literary and epigraphical sources.

[15] Lysias 9, 17, 18, 19, 29 and [Dem.] 53. Lysias 17 was delivered by a creditor who claimed a stake in the confiscated property, while Lysias 19 was delivered by the brother-in-law of the late Aristophanes, whose property was subject to confiscation. The speaker was apparently accused of possessing assets that had formed part of Aristophanes' estate. Lys. 29 was delivered against a certain Philokrates. As an associate of the late Ergokles, who had incurred a sentence of death and confiscation of property, Philokrates was accused of being in possession of some of the dead man's assets (29.8). Likewise, [Dem.] 53 was delivered in an *apographe* that seems to have arisen because the ownership of two slaves, whom Apollodoros had registered as liable to confiscation to meet a judgement debt incurred by Arethousios, had been contested by Arethousios' brother Nikostratos ([53].19). The case of Lysias 18 is more complicated. I have argued (in Danish) that the property liable to confiscation may have belonged to the speaker's uncle, Diognetos, and that the confiscation process may have been complicated by the fact that Diognetos and the speaker's father never seem to have divided their property formally (Rubinstein (2011)). Lys. 9 stands out as the only surviving speech that was delivered in a process challenging the justification of a summary fine.

[16] For the view that there were three types of *apographe*, see Osborne (1985: 44-47).

[17] *Ath. Pol.* 43.4.

[18] If this is correct, then that would also explain the rather curious fact, mentioned by Apollodoros in [53].1 that a risk of 1000 drachmai accompanied an *apographe*, even in the present case concerning two slaves valued at merely 250 drachmai. If this risk applied to all *apographai*, it is hard to see how it may have been effective at all as a method of penalty enforcement, in that the risk itself would have deterred denunciation of all but the most valuable assets. But Apollodoros' statement that his case was brought in response to a formal objection by the debtor's brother (ὡς αὐτὸς ὁ ἀμφισβητῶν τετίμηται αὐτά) permits the interpretation that the risk applied only in connection with *contested* claims.

thus be seen as a way of ensuring, as far as possible, that the sum of the original fine went to the treasury, while also allowing *ho apographon* his share.[19] It must be noted that the Athenians seem to have made no distinction between judgement debts and debts that were incurred as a result of a breach of a public contract. The Athenians seem mostly to have operated with the *duplum* for both types of debt, just as some other Greek states appear to have applied the *hemiolion* rather than the *duplum* to judgement debts.[20] The process of *apographe* was probably applicable to most or all types of debt to the state and its sacred treasuries, once the debt had been formally registered as overdue.

One reason why a reward was offered for the denunciation of assets liable to confiscation may well have been that, like the reporting of illegal cohabitation and offences connected with olive trees, the persons who were best placed to contribute to the process of law enforcement were those who possessed intimate knowledge of the debtor and his household. As demonstrated by for example Biscardi (1956) and Foxhall (1989), patterns of ownership inside the Athenian household were often complex. This meant that there may often have been considerable difficulties in distinguishing between assets owned by the debtor outright and assets to which a third party might have a legitimate claim. But in addition to such practical considerations, offering volunteers a share of the proceeds realised from the sale of confiscated items may also have been regarded by the Athenians as a way of increasing the deterrent effect of their penal legislation generally. In addition to the threat of a prosecution and conviction, the increased probability that the penalty would be exacted through a process of confiscation is likely to have had a considerable effect, even in those cases where the penalty itself was rather modest.

That having been said, it may still seem a paradox that the Athenians appear mainly to have prioritised information that might lead to the enforcement of penalties only *after* judgement debts had been incurred, while they apparently did not contemplate systematic financial incentives for the type of information that might lead to the offenders being caught in the first place, even when the crimes

[19] This would also explain the cases cited by Osborne (1985: 45) of property being sold for a price equal to the amount of the doubled debt; rather than interpreting these as cases where the *apographon* was left without his reward, one may consider the hypothesis that, once the sale had been completed, the *poletai* would pass on the money to the relevant *tamiai*, who in turn would be responsible for handing over the reward to the volunteer. A process on this model is attested for C3 Delos (*SEG* 23: 498) where it is the council that carries out *praxis* and subsequently passes on half the proceeds to the *hieropoioi* and the other half to the volunteer denunciator.

[20] See *e.g.* *IG* XII, 5 610 (Karthaia, C3) for an example of the *hemiolion* being applied to judgement debts: ἐπὶ Διοκύδους ἄ[ρχοντος τούσδε [ὀφλ]οντας δίκας ὑπὸ τοῦ Πετρησιάρχου κ[αὶ] οὐ[κ ἐκ]τείσαντας ἡ βουλὴ, οὐ δυναμένη πρᾶξαι, ἀνέγραψεν τὸ ἡμι[όλ]ιον κατα[δικάσασα?]. To my knowledge, the earliest possible instance is Minon (2007) no. 22 lines 6-8, where the reading ἐ]μιολίζοι seems certain, but so much of the text is missing that it is not entirely certain that it pertained to a judgement debt.

themselves were of a such a magnitude that they had the potential to endanger the very survival of the community. Moreover, when compared to the offences of treason and subversion of the *polis*' laws and constitution, the offences of citizen cohabitation with aliens and the felling of private olive trees for commercial gain appear rather less critical. It is, at first glance at least, striking that the Athenians increased the deterrent by encouraging denunciation for pay in their legislation on the latter, while relying mainly on their citizens' political rivalry, personal animosity and – perhaps – public spiritedness in regard to the former.

III. Rewards for volunteers outside Athens

Modern explanations normally focus on the wider constitutional, that is the democratic, context in which the Athenian administration of justice functioned. Thus, if we go on the assumption that the Athenians applied a financial incentive mainly in procedures relating to the enforcement of sanctions that had already been imposed, as well as to a limited number of offences that would be difficult to detect without the willing participation by individuals for whom the personal risks were very likely high, it remains to be asked to what extent this way of prioritising was a peculiarly democratic feature of the Athenian administration of justice. That question is notoriously difficult to answer. Our knowledge of the social context of the legislation preserved from other Greek states is often very limited, and we rarely have more than a few enactments with information on procedures and penalties from the same community. Worse still, when more than one enactment has survived from a single community, the texts are often dated very far apart, sometimes separated by more than a century. This obviously calls for caution.

Yet, a systematic survey of the rewards for information promised in the classical and Hellenistic inscriptions from other states may help to provide a context with which fourth-century Athenian practices and priorities may be compared and contrasted. To my knowledge, such a survey has not been undertaken since the publication of Ziebarth's article in 1897. Since then, the volume of published inscriptions has grown substantially. It is also worth noting that Ziebarth himself limited his discussion to a range of examples and did not aim to present the material known to him in full.

So far, my own survey of the epigraphical material has produced 80 non-Athenian examples of financial incentives offered in return for information concerning breaches of legislation, which I have set out in Table I appended to the present paper. The chronological range spans from the 6th century (Paros) to my, admittedly arbitrary, chronological cut-off point in the second century B.C. Geographically, the range spans from Tegea and Argos in the Peloponnese to Abdera, Makedonia and Lampsakos in the north; from Delphi, Elateia and Daulis in Phokis and Demetrias in Magnesia to several cities on the western seaboard of Asia Minor; and across a range of Aegean islands as well as a number of Cretan cities.

The material, when considered in its entirety, at first appears to be rather chaotic. It features a wide variety of procedural designations, and a financial incentive is applied to an equally wide variety of offences.[21] As far as the procedural designations are concerned, there are 24 (or 26) instances that use verbs of 'showing' ((ἐν)/(κατα)δεικνύειν,[22] (ἐμ)/(ἀπο)φαίνειν,[23]), and the use of the terminology suggests a similar loose application as that demonstrated by Wallace (2003) for classical Athens. Furthermore, a total of 15 instances employ verbs of 'reporting' or 'denouncing' (κατειπεῖν,[24] (εἰσ)/(προσ)αγγέλλειν,[25] (ἐξ)ἀγορεύειν,[26] πεύθειν,[27] μηνύειν[28]). A further six enactments use verbs that imply physical action by the volunteer, that is arrest[29] and/or seizure of the offender or his goods.[30]

Verbs that appear to imply that the reward was given in return for an actual prosecution are found in a total of 28 instances: γράφεσθαι,[31] δικάζεσθαι,[32] ἐγδικάζεσθαι,[33] καταγορεῖν,[34] δίκαν ἑλεῖν,[35] διώκειν,[36] μέμφεσθαι,[37] and μωλεῖν.[38]

[21] It must be emphasised at this point that the material represents only a part of a much larger database recording volunteer participation in different stages of law enforcement. As is the case for Athens, many enactments from other Greek cities appear to have offered no explicit financial reward for the volunteers. Others may have done so but have been incompletely preserved. Even in inscriptions that have been completely preserved, it is not always safe to assume that a volunteer denunciator would have gone without a financial reward for his service to the community. In several enactments, the invitation to the volunteer is followed by a cross reference to another enactment, and it cannot be ruled out that a possible reward was specified there. See, for example, *SEG* 33: 1039 (Kyme, C2) where the penalty clause runs: ἐὰν δέ τις τῶν ἐν τῷ ψη[φί]σματι τούτῳ κατακεχωρισμένων τι μὴ ποιήσῃ ἢ βλάψῃ τὴν πόλιν ἢ ἀδικήσῃ ὠτινιοῦν τρόπῳ εἶναι κατὰ τοῦ ἐναντίοϙ τι ποιήσαντος ἔ[ν]δειξιν κατὰ τὰ περὶ τῶν κατεχόντων τι ἢ ἀδικούντων τὸν δῆμον ἔγγραφα. Here one has to leave open the possibility that an *endeixis* for the embezzlement of public property or the more vague 'crime against the *demos*' would have carried a reward for the person carrying out the *endeixis*.

[22] nos. 4, 5, 17, 37, 43 (total 5).

[23] nos. 6, 27, 39, 40, 41, 42, 43, 45, 46, 50, 51, 54, 55, 56? (restored), 57? (restored), 62, 66, 67, 70, 75, 80 (total 19, or 21 if restorations are correct).

[24] nos. 1, 71, 75, 76.

[25] nos. 11, 12, 13, 19, 44, 49, 52 (total 7)

[26] nos. 3 (partly restored), 10.

[27] no. 35.

[28] no. 53.

[29] nos. 28, 47, 60.

[30] nos. 29, 47, 58, 59.

[31] no. 2.

[32] nos. 25, 38, 61, 68, 69, 73, 74, 78, 81 (total 9).

[33] nos. 7? (restored), 8, 18, 20, 21, 22, 23, 24, 26, 52? (restored) (total 10).

[34] nos. 14, 16.

[35] no. 15.

[36] nos. 30, 31.

[37] no. 32. Note, however, the interpretation proposed by Gagarin and Perlman (2016: 437-439). According to them, the complainant, who will be entitled to 50% of the doubled fine imposed on the *titai* for neglect of their duty, is the person who was originally unlawfully enslaved.

[38] nos. 34, 36.

Finally, a series of texts from Phokis that pertain to the intervention by a volunteer to prevent the appropriation of a slave who has been transferred to the protection of a sanctuary by sale or dedication employ the verb προιστάναι, 'to act as protector'. This almost certainly refers primarily to the physical intervention by the volunteer but it can also imply prosecution. That would presumably be required if the person who had appropriated the manumittee resisted or subsequently refused to pay the fine that had been stipulated in the manumission document as a penalty for the act of enslavement.[39]

The range of offences is wide: from the most serious crimes of revolution and treason to the everyday acts of washing one's animals, clothes or tools in a public fountain. There seems at first glance to be a noticeable difference between the use of financial incentives in Athens and in these other cities. But on closer inspection it may be possible to detect a pattern that may warn us against exaggerating the differences.

Especially the application of verbs of 'showing' and 'reporting' is suggestive. They are attested several times in contexts where rewards are used to encourage the reporting of unauthorised possession of objects belonging to the state, a sanctuary, or a foundation.[40] Verbs of 'showing' and 'reporting' are likewise used in connection with other acts involving physical objects or animals that can easily be 'pointed out', not least in the regulations that aim to protect sacred land and its vegetation.[41]

Common to most offences of these types is that they would be difficult to police effectively, that they were 'victimless' crimes in that they did not cause harm to any particular individual, and that each of them might come across as rather inconspicuous when considered on its own, yet had the potential to cause major damage if committed repeatedly. Moreover, the reporting in most of these cases was likely to have been based on a direct encounter between perpetrator and denunciator. I do not think it is too far-fetched to assume that, had it not been for the prospect of a financial reward, it must have been tempting for the latter to choose the path of least resistance and turn a blind eye in most of such instances. And all the more so, if the perpetrator was physically stronger or more powerful and well-connected than he was.

A combination of physical courage and personal knowledge was likely to be required also in connection with the enforcement of contracts relating to the consecration or sale of slaves into the protection of a sanctuary. Any volunteer who might consider intervening in an unlawful act of enslavement of such a manumittee would have to be sure of the latter's status, and this would have presupposed a level of personal knowledge of the manumittee him- or herself and of the household of his or her former master (or mistress). If the attempted act of re-enslavement was

[39] nos. 9, 25 (here combined with δικάζεσθαι), 63, 64, 65.

[40] nos. 27, 46, 62, and 70.

[41] nos. 4, 19, 39, 57; cf. 51 which prohibits the construction of an altar in any other place than the one prescribed (this, however, is probably aiming to protect the priest and his privileges from unwanted competition and unauthorised sacrifices).

perpetrated by a total stranger, such a connection between the volunteer and the manumittee's household may not have been a problem at all; it might, however, present far more serious complications, if the attempt at re-enslavement was made by a member of the manumittor's own family, who claimed, for example, that the manumittee was part of his inheritance.

A few of the regulations offering rewards to the volunteer appear to have shown little consideration for his personal safety. For instance, it must have required some courage and physical strength for a volunteer to assist in the enforcement of the regulation from third-century Kyme that prohibited the sale or hypothecation of arms donated by Philetairos to the city (*SEG* 50: 1195). For this enactment prescribed arrest of the offender by the volunteer, without apparently offering him the option of asking the relevant officials (the *phylarchoi*) to carry out the arrest in his place. The promise of a reward amounting to 50% of the fine of five *stateres* per item of weaponry was probably not overly generous, considering the possible circumstances.

A particular challenge, in regard to the social costs for the denunciator, may have been presented by a Teian regulation from C3 (*SEG* 44: 494). This enactment was passed in response to an especially severe crisis following an attack on the city by pirates, which had resulted in the city's being faced with a large demand for ransom. It seems that the Teians hoped that some or all of this might be met through public subscription, but the enactment further provided that all inhabitants were to register gold and silver jewellery and cups, minted silver and bullion, and various other luxury items in their private possession. The enforcement of the enactment depended in part on volunteer informants, and here it must be assumed that those who were likely to possess relevant knowledge would have been persons who had had close contact with the individual household and its members. Although the crisis itself may have motivated a higher level of public-spirited behaviour from the Teians generally than might normally have been the case, the lodging of information that would lead directly to a house search (line 56: ἐὰν δέ τ]ις φωραθῆι κεκτημένος τι τῶν ἀπειρημέ[νων...) cannot have been an altogether easy task in terms of the social costs potentially faced by the denunciator. This may well account for the offer to the volunteer (τοῦ φήναν[τος) of an award of half the proceeds generated by the sale of assets confiscated from the offender.

At the same time, the generosity shown towards the volunteer in these circumstances is all the more remarkable, precisely because the enactment itself, with its severe provisions, was passed in order to address a financial crisis. For that very reason, the Teian text is among the best examples of an enactment which clearly prioritises the deterrent effect that could be generated by the promise of a financial reward payable to the volunteer. The intention behind the offer must have been to motivate the inhabitants of Teos to part with their prized personal assets by conjuring up the very disturbing prospect that their house would be 'shown' and searched at the instigation of a volunteer motivated mainly by the prospect of financial gain.

For the most part, however, communities seem to have made only very limited financial sacrifices when it came to deterrence achieved though the promise

of rewards. In most cases, the reward payable to the volunteer was built into the enactment from the start. The fact that the informer would be entitled to a 50% cut may not have seemed such a bad deal if it was assumed that the offence would most likely not be denounced and fined at all, had it not been for this financial incentive. And in those cases where a summary fine would be doubled if contested (e.g. no. 68), the reward paid to the volunteer would not have affected the treasury's income in any significant way.

In those cases where a court case was envisaged either as a possibility or as an actual requirement, deposits to cover the costs was sometimes asked for, initially from the person who had lodged the denunciation.[42] Other factors than merely a desire to save the treasury money may have motivated such measures: among them may have been the desire to deter frivolous prosecutions by introducing an element of risk, in the same way as the Athenians appear to have applied a risk of the thousand drachmai fine in *apographai* in those cases where *ho apographon* wished to press ahead in spite of claims by a third party that the assets in question were not part of the estate liable to confiscation. The balance between risk and reward must have been a difficult one to strike, in so far as the risk itself, if the bar was set too high, may have constituted a hindrance to effective law enforcement. Yet, I have found only one secure example where the risk was off-set by an increase of the possible reward to two-thirds of the amount of the penalty to be imposed on the offender (no. 11).

In a few documents we find examples of the deterrent effects of exorbitant fines, similar to those discussed by Scafuro (2014), which are enhanced further by the added deterrent constituted by the promise of a reward for the volunteer. The most striking examples are found in documents pertaining to foundations, more precisely in their penalty clauses that aimed at deterring embezzlement as well as the diversion of funds away from the foundation itself. In two of these the penalties are set at an extremely high level. 60,000 drachmai are promised in *IG* XII, 9 236 from second- or first-century Eretria (no. 28), of which the volunteer was entitled to 1/3 upon successful arrest – and presumably conviction – of the offender, while *Syl.* (3) 578, 40-65 from second-century Teos (no. 68) prescribes what appears to be a summary fine of 10,000 drachmai. This fine is to be doubled if the offender contests the fine and is subsequently convicted, with half of the doubled fine going to the successful prosecutor. Rewards set at this level are, however, quite rare, except in some of the Phokian manumission documents where volunteers were promised 50% rewards of fines amounting to 300 *mnai* (nos. 24, 25, 63, 65) and even one talent (no. 26). For both types of documents, it must be considered a possibility that the high level of fines and rewards reflected the particular wishes of the individuals who had made the donations and dedications rather than general penal practice in the communities to which they belonged.

Even so, the Eritrean and Teian foundations both point to one area where reward practices attested in other Greek communities do appear to have differed from those

[42] Thus nos. 11, 45, 71.

attested for classical Athens. No fewer than a further 26 attested penalty clauses carrying rewards are directed against officials or priests who are found guilty of being in breach of the regulations pertaining to their office.[43] Six of these are found in Thasian enactments, which is in itself a warning that penal practices, and perhaps also epigraphic habits, may have varied considerably from one community to the next.

By contrast, the absence of attested rewards for prosecutions of officials at Athens may perhaps be taken as an indication that the Athenians did not consider incentives of this type necessary as an additional deterrent to keep their officials on the right side of the law, or, perhaps more importantly, to encourage ordinary citizens to act as whistleblowers against officials. In a less egalitarian *polis*, such as fifth-century Erythrai (nos. 30 and 31) and Thasos appear to have been, it may well have been the case that most ordinary citizens would have been too scared to come forward unless they could be tempted by a financial reward. A similar level of general apprehension may also have discouraged ordinary individuals from challenging decisions that had been made by personnel attached to the Makedonian military (nos. 52 and 53).

Thus, if it can be shown that, in the Athenian case, the absence of evidence for rewards in procedures against officials is also evidence of absence, then it is more than likely that this area is one that reflects a particularly democratic aspect of the Athenian administration of justice.[44]

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[43] nos. 5, 6, 7, 8, 14, 15, 18, 30, 31, 32, 34, 36, 37, 46, 48, 50, 52, 53, 56, 61, 72, 74, 77, 78, 79, 81.

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TABLE I

Epigraphical attestations of rewards for volunteers (until ca. 150 BC)

no.	**Reference**	**polis**	**date**
1	*I Aeg. Thrace* 2	Abdera	C3
2	*IG* XII,7 515	Aigiale (Foundation)	C2
3	*IG* IV 555	Argos	C5
4	*IG* XII, 7 62 = *RO* 4, 35-39	Arkesine	C4
5	*IG* XII, 7 62 = *RO* 4, 50-54	Arkesine	C4
6	*IG* XII, 3 168, I 8-9	Astypalaia	C2
7	*EKM* 1 A 47-50	Beroia	C2
8	*EKM* 1 B 32-35	Beroia	C2
9	*IG* IX, 1 66 = Darmezin no. 152	Daulis	C2
10	*ID* V 503	Delos	ca 300
11	*ID* V 509	Delos	C3
12	*SEG* 23: 498 = *LSCG Suppl.* 107	Delos	C3
13	*SEG* 48: 1037	Delos	C2
14	*CID* I, 9 = *RO* 1 A38-44 (reward inf. from C10-15)	Delphi, Labyadai	C5/4
15	*CID* I, 9 = *RO* 1 C 10-15	Delphi, Labyadai	C5/4
16	*CID* I, 3 = Koerner 45, *Nomima* II 97	Delphi	C4
17	*FD* III, 1 294	Delphi	C4
18	*CID* 2: 74	Delphi	C4
19	*SEG* 37: 449 = *IG* IX, 2 1109	Demetrias	C2
20	*IG* IX, 1 121	Elateia	C2
21	*IG* IX, 1 122 Darmezin 156	Elateia	C2
22	*IG* IX, 1 124 = Darmezin 156	Elateia	C2

type of offence	role of volunteer	reward
planning revolution	κατειπεῖν	1 talent
breach of entrenchment clause	γράφεσθαι	50%
not certain	ἀγ]ορεύειν?	50%
illegal herding on sacred land	ἐνδεικνύειν	50%
neglect by *neopoiai* (in regard to public auction)	ἐνδεικνύειν (to *masteres*)	50%
failure by official to register *proxenos*	φαίνειν (to *logistai*)	50%
failure by *praktor* and *epistatai* to enforce fine	ἐγδικάζεσθαι? (restored)	1/3
failure by *praktor* and *epistatai* to enforce fine imposed on *gymmnasiarchos*	ἐγδικάζεσθαι	1/3
vindication of manumittee dedicated to Athena	προιστάναι	50%
illegal herding on sacred land	ἐξαγορεύειν	50%
unauthorised sale of wood products and evasion of import tax	εἰσαγγέλλειν (to *agoranomoi*)	2/3
deposit of ashes or other rubbish in sanctuary	εἰσαγγέλλειν	50%
unauthorised herding in sanctuary	εἰσαγγέλλειν	50%
unauthorised receipt of *apellaia* by *tagoi*	καταγορεῖν	50%
any breach of stipulations in the enactment, prosecuted by volunteer	δίκαν ἑλεῖν	50%
removal of wine from *dromos*	καταγορεῖν	50%
lending at interest above the limit prescribed in enactment	καταδείκνυμι [46]	50% of debt? or of fine?
offences (lost) committed by *tamiai* of amphiktyony	ἐκδικάζεσθαι (prosecution apparently by volunteers among the 'well-behaved' *tamiai)*	100% (!)
illegal wood cutting (and perhaps also herding) on sacred land	προσαγγέλλειν	50%
vindication of manumittee	ἐγδικάζεσθαι	50%
vindication of manumittee	ἐγδικάζεσθαι	50%
vindication of manumittee	ἐγδικάζεσθαι	?50% (restored)

23	*IG* IX, 1 127 = Darmezin 159	Elateia	C2	
24	*FD* III, 2 120 = Darmezin 145	Elateia	C2	
25	Darmezin 206	Elateia	C2	
26	Darmezin 207	Elateia	C2	
27	*IG* IV(2), 1 45	Epidauros	C2?	
28	*SEG* 38: 875, *IG* XII, 9 236	Eretria	C2	
29	*IG* XII, 9 207, 42-47	Eretria (and other Euboian cities)	C3	
30	*IK Erythrai u. Klazomenai* I, 17	Erythrai	C5	
31	*IK Erythrai u. Klazomenai* I, 2	Erythrai	C5	
32	*IC* IV 78	Gortyna	C5	
33	*IC* IV 231	Gortyna	C3	
34	*IC* IV 165 - Chaniotis #71	Treaty Gortyna - Phaistos	C3	
35	*IC* 162 (*SEG* 28: 732)	Gortyna	C3	
36	*SEG* 46: 1229 = *IC* I xvi 1, Chaniotis #18, l. 31-36	Gortyna - Lato	C3	
37	*SEG* 46: 1222 = *IC* III iii 1 A	Hierapytna - Antigonos Doson	C3	
38	*IC* III iii 4 = Chaniotis # 28	Hierapytna - Priansos	C2	
39	*IG* XII, 5 2	Ios	C4	
40	*IG* II (2) 1128 = *RO* 40, 35-37	Ioulis	C4	
41	*SEG* 48: 1404	Kolophon	C3	
42	*SEG* 48: 1404	Kolophon	C3	
43	*IG* II (2) 1128 = *RO* 40, 16-21	Koresia	C4	
44	*IG* XII, 4 1 304, 19-28 (heavily restored)	Kos	C2	
45	*IG* XII, 4 1 100, 24-30	Kos	C2	

	vindication of manumittee	ἐγδικάζεσθαι	?50% (rest.)
	vindication of manumittee	ἐγδικάζεσθαι	50%
	vindication of manumittee	προιστάναι, δικάζεσθαι	50%
	vindication of manumittee	(ἐγ)δικάζεσθαι	50%
	removal of sacred equipment	ἐμ]φανίζεσθαι	50%
	breach of entrenchment clause (fine of 60,000 dr.)	ἀπάγειν	1/3
	failure by *technitai* to undertake work according to contract	ἀφαιρεῖν (πρᾶξις by confiscation of contractor's possessions)	50%
	serving as *syneleoros* or secretary more than once within 10 years	διώκειν	50%
	bis: breach of restrictions on eligibility for office (?) and withdrawal by volunteer prosecutor	διώκειν	50%
	failure by *titas* to enforce prohibition ag. enslavement (?)	μέμφεσθαι	50%
	offence is related to unlawful (re?) - enslavement	lost	fraction uncertain
	probably offence committed by *kosmoi*, perhaps in a judicial capacity.	μωλε῀ν	50%
	not preserved (Manganaro's restorations are very bold)	πεύθεν	50%
	failure by *kosmoi* to comply with regulations in enactment	μωλῆν	50%
	breach (by commanders and privates?) of regulation on military activity as defined in treaty	ἐνδεικνύειν	50%
	breach by official or *idiotes* of the treaty (*isopoliteia* agreement)	δικάζεσθαι	1/3
	failure by individual (tenant?) to swear oath pertaining to herding in sanctuary	φαίνειν	50%
	unauthorised export of ruddle	φαίνειν (to *astynomoi*)	50%
	unlawful contractual *telone* agreements or the aiding and abetting of these	φαίνειν	50%
	unlawful launching of *dike telonike* by tax farmers not registered in Kolophon and Notion	φαίνειν	50%
	unlawful export of ruddle	φαίνειν/ἐνδεικνύειν	50%
	sacrificing or initiating by unauthorised person	εἰσαγγέλλειν	50%
	?appropriation of funds belonging to foundation of Aristokreon?	φαίνειν to the *demarchos*[46]	50%

46	*IG* XII, 4, 1 319, 33-35	Kos	C2	
47	*SEG* 50: 1195	Kyme	C3	
48	*IK Kyme* 11	Kyme	C3	
49	*IK Lampsakos* 9	Lampsakos	C2	
50	*I. Magnesia* 100, 33-36 = *LSAM* 33	Magnesia Maiandros	C2	
51	*I. Magnesia* 99, 12-15 = *LSAM* 34	Magnesia Maiandros	C2	
52	*SEG* 49: 855, A 12-17	Makedonia	C3 or C2	
53	*SEG* 49: 855, A 26-31	Makedonia	C3 or C2	
54	*IPArk.* 30, 13-16	Megalopolis	C2	
55	*SEG* 25: 984	Minoa	C5 or C4	
56	*IG* XII, 3 87	Nisyros	C3	
57	*IG* XII, 5 108	Paros	C5	
58	*IG* XII, 5 107	Paros	C5	
59	*SEG* 51: 1071	Paros	C6	
60	Saba *The Astynomoi Law of Pergamon* = *SEG* 13:521	Pergamon	C2	
61	*IK Priene* 7	Priene	C3	
62	*IK Priene* 145, 23-27	Priene	C2	
63	*IG* IX, 1 36 = Darmezin 148	Steiris	C2	
64	*IG* IX, 1 34 = Darmezin 150	Steiris	C2	
65	*IG* IX, 1 42 = Darmezin 151	Steiris	C2	
66	*IPArk.* 3, 21-25	Tegea	C4	
67	*IPArk.* 3, 25-32	Tegea	C4	

	non-compliance by priestess with instructions in enactment on sacrifices to Aphrodite Pontia	φαίνειν	50%
	unlawful sale, hypothecation and purchase of weapons donated by Philetairos	ἐπιλαμβάνεσθαι and ἄγειν to *phylarchoi*	50%
	perhaps litigation in breach of a reconciliation agreement.[47]	not preserved	50%
	impossible to reconstruct, but probably related to sacrifices	καταγγέλλειν	50%
	failure by secretary to read aloud Diagoras' decree on specified date	φαίνειν	50%
	construction of altar to Serapis in unauthorised place	φαίνειν to *euthynoi*	50%
	offence related to registration of individuals in *pyrokauseis*	προσαγγέλλειν and ?ἐκδικάζεσθαι (restored)	1/3
	enrolment by *epistatai* and their secretaries of non-citizens in *pyrokauseis* without royal consent	μηνύειν	50%
	breach of entrenchment clause in enactment relating to archiving of contracts (?)	ἐμφανίζειν?	?
	unlawful carrying of arms in sanctuary	ἀποφαίνειν ? (partly restored)	50%? (partly rest.)
	failure by officials to enforce enactment against unlawful burials	not preserved; ed. restores φαίνειν	?
	unlawful wood cutting in sanctuary	?φαίνειν	50%
	unlawful deposit of *ekkatharmata*	?πράσσεσθαι	100%?
	deposit of coffin, ashes, or *mnema* in sanctuary	πράσσεσθαι	100%?[48]
	washing of animals, clothes or tools in public fountains (confiscation)	ἐπιλαμβάνειν, ἄγειν, ἐπιφέρειν	50%
	failure by *timouchoi* to introduce lawsuits for injured Maronitai within 30 days	δικάζεσθαι	100% to injured party
	failure by private individuals to return cult objects to sanctuary	φαίνειν	50%
	vindication of manumittee consecrated to Asklepios	προιστάναι	50%
	vindication of manumittee consecrated to Asklepios	προιστάναι	50%
	vindication of manumittee consecrated to Asklepios	προιστάναι	50%
	unlawful cartel formation by contractors	ἰμφαίνειν	50%
	contractors acquiring more than two contracts without consent from *haliastai*	ἰμφαίνειν	50%

68	*Syl.* (3) 578, 40-65	Teos	C2	
69	*Syl.* (3) 578, 66-69	Teos	C2	
70	*SEG* 44: 949	Teos	C3	
71	*SEG* 38: 347 = Koerner no. 66	Thasos	C5	
72	*SEG* 36: 792 = *IG* XII Suppl. 349	Thasos	C5 or C4	
73	*IG* XII Suppl. 347 = Koerner no. 68	Thasos	C5 or C4	
74	*IG* XII Suppl. 347 II = Koerner no. 69	Thasos	C5 or C4	
75	*ML* 83 = Koerner no. 70 = *LSAG* p. 412 no. 78	Thasos	C5	
76	*ML* 83 = Koerner no. 70 = *LSAG* p. 412 no. 78	Thasos	C5	
77	*SEG* 57: 820, 42-46	Thasos	C4	
78	*IG* XII,8 267, 13-16	Thasos	C3	
79	*IG* XII Suppl. 358	Thasos	C3	
80	*SEG* 17: 416	Thasos	C3	
81	*IG* XII Suppl. 362	Thasos	C2	

[45] The preserved part of lines I 17-20 and II 1-2 shows clearly that the penalty for breaching the restriction on interest means that the lender forfeits the debt (σταρέστω) and incurs a fine of 20 dr. The former, I think, is effectively a cancellation of the debt, and the beneficiary is the debtor, rather than the treasury. By contrast, the fine was shared between the volunteer and – presumably – a public or sacred treasury (no information on the destination of the fine has survived).

[46] Lines 33-36 shows that the volunteer denunciator has to make a court deposit of 20% (τὸ πέμπτον μέρος), and in line 35 there is mention of a further payment of 10% (τὸ δέκατον μέρος). The combination of *epipempton* and *epidekaton* is attested also in *EKM* 1 B 106-107 (here in connection with a successful appeal against fine imposed summarily by a *gymnasiarchos*). The exact rationale behind the Koan deposits, payable by ὁ φάνας prior to the hearing, cannot be reconstructed. However, what they do show is that the *phasis* brought by the volunteer must have concerned not only the sacred fine of 1000 drachmai mentioned in lines 26-27, but also the money unlawfully appropriated from the Foundation to which the 20% and 10% fractions must surely have pertained. It is most likely that the volunteer was entitled only to 50% of the fine, while the money for which the suit was brought was to be returned to the Foundation in full.

	virements of funds belonging to the Foundation or failure to comply with instructions in the enactment	δικάζεσθαι	50% of double penalty
	failure by *tamiai* to lend out money or pay teachers as prescribed	δικάζεσθαι	50% ?
	failure by private individuals to hand over objects of precious metal as prescribed	φαίνειν	50%
	offence against regulation of wine sale	κατειπεῖν	50%
	failure by *karpologoi* to administer oath (text is heavily restored, and involvement by volunteer is conjectural)	not preserved	50%
	purchase of wine on the vine	δικάζεσθαι	50%
	failure by *hoi epitetrammenoi* to enforce regulation on wine import (?)	δικάζεσθαι	50%
	plot to instigate revolution in Thasos	κατειπεῖν and φαίνειν	1000 stateres
	plot to instigate revolution in any Thasian *apoikia*	κατειπεῖν	200 stateres or 400 stateres
	non-compliance by officials with regulations concerning war orphans	not preserved	50%
	failure by *apologoi* to prosecute breaches of entrenchment clause	δικάζεσθαι	50%
	failure by *apologoi* to prosecute breaches of entrenchment clause ? (heavily restored)	not preserved	fraction lost
	possibly absenteeism by *dikastai*?	φαίνειν	50%
	failure by *apologoi* to prosecute breaches of entrenchment clause? (heavily restored)	?δικάζεσθαι	1/3

[47] The text is problematic. The ed. suggests that the *dikaskopoi* were entitled to 50% of the penalty, but a volunteer prosecutor seems more likely, since the *dikaskopos* is very clearly the convicted defendant in l. 6 (–––––]ον ὁ δικάσκοπος νενικαμ[).

[48] The two Parian enactments nos. 58 and 59 both invite volunteers to carry out *praxis*, but offer no information on whether the volunteer is required to pass some or all of the money on. Thus no. 58: μίαν καὶ πεντήκοντα δραχμ[ὰ]ς ὀφελέ[τ]ω τῶι θέ[λ]οντι πρ[ῆ]χ[σαι, (but the text may have been considerably longer), and no. 59: ho δὲ π[ο]ι̣έον π[αρ]ὰ̣ τὰ γεγρα[μ<μ>έ]ν̣α πεντακ[οσί]ας δραχ<μ>[έας] ὠφελέ<το> τῶ[ι ἐθ]έλωντι π[ρήχσ]ασθαι τῶ[ν φρη]τ̣έρον. This may suggest a 100% reward, which would certainly have increased the level of deterrence, and this interpretation certainly cannot be dismissed *a priori*. However, it is also possible that both texts imply a process similar to that prescribed in the decree of the Demotionidai (*IG* II (2) 1237, 40-44): ...ἐσπραττέτω δὲ τὸ ἀργύριον τοῦτο ὁ ἱερεὺς τῶ Δεκελειῶν οἴκο, ἢ αὐτὸς ὀφειλέτω· ἐξεῖναι δὲ καὶ ἄλλωι τῶι βολομένωι τῶν φρατέρων ἐσπράττεν τῶι κοινῶι.

TABLE II

Epigraphical attestations of the *hemiolion* (until ca. 150 BC)

(entries in bold indicate instances where the imposition of the *hemiolion* was not based directly on a contractual agreement)

polis	reference	date	context
Aigiale	*IG* XII, 7 515, 29-35	C2	Failure by borrowers of funds belonging to the foundation to pay interest on time.
Amos	*IK Rhod. Peraia* 351	C3 or C2	Failure by tenant of land to pay *misthoma* on time.
Amos	*IK Rhod. Peraia* 354	C3 or C2	Failure by tenant of land to pay *misthoma* on time.
Amos	*IK Rhod. Peraia* 24	C2	Failure by tenant of land to pay *misthoma* on time.
Amos	*IK Rhodian Peraia* 26	C2	Failure by tenant to pay *misthoma* on time.
Arkesine	*IG* XII, 7 62, 49-50	C4	Failure by tenant to pay *telos* (and perhaps also other dues) in the month of Thargelion.
Arkesine	*IG* XII, 7 67 B = Migeotte *L'emprunt public* no. 49, 11-13	C4 or C3	Failure by *tamiai* to hand over interest on public debt to creditor, exacted from residents of Arkesine.
Athens (probably deme of Myrrhinous)	*IG* II (2) 1183	C4	Appeal to entire *deme* of decision made by elected committee of 10.
Beroia	*IKM* 1, B 104-108	C2	From the context it appears that the *hemiolion* was imposed on those who claimed to have been wrongly subjected to summary fines by the *gymnasiarchos*. If they appealed successfully against him, he had to refund them the *hemiolion*.
Delos	*ID* 369, 40	C3	Receipt of *hemiolion* registered from tenants of sacred *temene*.
Delos	*ID* 503, 30-33	C3	Failure by tenants of sacred land to pay rent or hand over crops on time as specified.

	owing/paying verb	comments
	Council, *logistai* and *archon* πρασσέτωσαν παραχρήμα καθάπερ καὶ τὰ ἱερὰ χρήματα πρὸς τὸ ἡμιόλιον	Contract; *hemiolion* is calculated on the basis of interest owed.
	ἀποτεισάτω	Contract.
	σ̓πο[τεισάτω	Contract.
	ἀποτεισάτω	Contract.
	ἀπο[τεισάτω	Contract.
	πρακτὸς ἔστω τοῦ ἡμιολίου τοῖς [τα]μίαις	Contract.
	πρακτοὶ ἔστωμ Πραξικλεῖ οἱ μὴ ἀποδόντες ἡμιόλιον τὸ ἀργύριον ἐκ τῶν ἰδίων πράξει πάσηι	The *hemiolion* is incurred by *tamiai* personally, because of their official responsibility to honour the *polis*' contractual obligation to its creditor.
	ὀφειλέτω	The penalty is probably not based on a contract. The process relates to local procedure of accounting.
	ἀποτινέτω τῶι νικήσαντι	The original *hemiolion* appears to have been imposed for non-payment of summary fine.
	ἐπι]βαλόντων ἡμῶν τὸ ἡμιόλιον	Contract.
	ἀποτινόντων, εἰσπραξάσθων	Contract.

Delos	*ID* 503, 36-39	C3	Breach of contract by tenants, leading to reletting of contract.
Delos	*ID* 503	C3	The *hemiolion* is imposed on contractor for whom a guarantor has paid, and it is owed directly to the guarantor.
Delos	*IG* XI, 2 142, 8 and 12	C4	Entries in account of *hemiolion* incurred because of late payment of rent (land leasing contracts).
Delos	*IG* XI, 2 287, 139-142	C3	Failure by tenant to provide guarantors, leading to reletting of contract.
Delos	*IG* XI, 2 288	C3	*Hemiolion* incurred because of late payment by tenant of *enerosion*.
Delphi	*CID* 2, 1 I, 13-15	C4	It is uncertain what led to payment of the *hemiolion* entered in the account. The ed. suggests that this may have been a voluntary added contribution.
Delphi	*SGDI* II 2006	C2	Failure by sellers and *bebaioteres* to confirm sale of manumittee to the sanctuary.
Delphi	*SGDI* II 2012	C2	Failure by seller and *bebaioter* to confirm sale of manumittee to the sanctuary.
Delphi	*SGDI* II 2049	C2	Failure by sellers and *bebaioteres* to confirm sale of manumittee to the sanctuary.
Delphi	*SGDI* II 2072	C2	Failure by seller and his *bebaioteres* to confirm sale of manumittees to the sanctuary.
Delphi	*SGDI* II 2080	C2	Failure by seller and her *bebaioteres* to confirm sale of manumittee to the sanctuary.
Delphi	*Syl.* (3) 672, 72-77	C2	Failure by borrowers of funds belonging to the foundation to pay interest on time.
Delphi	*Syl.* (3) 672, 81-75	C2	Failure by *epimeletai* to pass on money exacted by them to the *polis*.
Delphi - Pellana	*FD* III 1: 486, II B 15-16	C3	Apparently related to the application of unlawful methods of exacting of judgement debt by victorious party in *dike*?
Elis	Minon *IED*22	C5	Apparently a penalty imposed for late payment of judgement debt or summary fine.

	ἐγγραφόντων αὐτοὺς καὶ τοῦτο ἡμιόλιον	The *hemiolion* is calculated on the basis of the difference between rent in old contract and rent in the re-let contract.
	ἐγγραφέτω ἡ βουλὴ κυρία οὖσα τῶι ἐγγυητῆι τὸν καταστήσαντα τὸ ἀποτεισθὲν ἀργύριον ἡμιόλιον καθάπερ τοὺς ὠφληκότας	This is clearly a penalty intended to deter contractors from shunting their contractual responsibilities onto their guarantors.
	Not applicable	Contract.
	ὀφείλουσι	The *hemiolion* is calculated on the basis of the loss incurred by reletting of the contract.
	ὀφείλουσι	Contract.
	Not applicable	Contract.
	πράκτιμοι ἐόντων τῶι θεῶι καὶ Σωτίωι καὶ τῶι (...) θέλοντι	Contract; the *hemiolion* is calculated on the basis of the purchase price.
	ἀποτεισάντων	Contract; the *hemiolion* is calculated on the basis of the purchase price.
	πράκτιμοι ἐόντων τῶι θεῶι καὶ Σατύρωι καὶ τῶι (...) θέλοντι	Contract; the *hemiolion* is calculated on the basis of the purchase price.
	πράκτιμοι ἐόντων τῶι θεῶι καὶ Ξένωνι καὶ Πειθολάωι καὶ τῶι (...) θέλοντι	Contract; the *hemiolion* is calculated on the combined purchase price of the two slaves.
	πράκτιμοι ἔστων αὐτῶν καὶ τῶν ἡμιολίων	Contract.
	πράκτιμοι ἔστωσαν τοῖς ἐπιμεληταῖς οὗ ἕκαστος φέρει τόκου τῶν δεδανεισμένων, αὐτοῦ καὶ τοῦ ἡμιολίου	Contract; the *hemiolion* is caluculated on the basis of interest owed.
	ἄτιμοι ἀπογραφέντω ὑπὸ τῶν ἐπικατασταθέντων ἐπιμελτᾶν ποτ' αὐτὸ καὶ τὸ ἡμιόλιον	Here the *hemiolion* is clearly a summary penalty, which is not based on a contract, but is simply imposed on the officials for withholding funds.
	Not preserved	The text is heavily restored; almost certainly a penalty *not* based on a contract.
	Not applicable; the surviving text runs κ' ἑ]μιολίζοι ἁ πόλις	Judgement debt?

Epidauros	*IG* IV (2) 1, 98	C3	Enforcement of contested summary fine imposed by *agonothetes* and *hellanodikai*.	
Karthaia	*IG* XII, 5 610	C3	*Hemiolion* incurred by individuals because of late payment of judgement debts: τοὐσδε [ὀφλ]όντας δίκας ὑπὸ τοῦ Πετρησιάρχου κ[αὶ] οὐ[κ ἐκ]τείσαντας ἡ βουλὴ, οὐ δυναμένη πράξαι, ἀνέγραψεν τὸ ἡμι[όλ]ιον κατα[	
Kolophon	*SEG* 48: 1404	C3	Unlawful pursuit of a *dike telonike* by a tax farmer not registered in Notion or Kolophon; probably (but not certainly) payable to injured party.	
Lebadeia	*IG* VII 3072, 37-40	C2	Failure by contractor to make good damage for which he has been responsible.	
Lebadeia	*IG* VII 3074, 1-7	C2	Breach of contract leading to new franchising process.	
Lebadeia	*IG* VII 3074, 15-18	C2	Failure by contractor to make good damage to stone(s).	
Mylasa, Ortokondeis	*IK Mylasa* 208	C2	Failure by tenant of land to pay *phor*os as specified in contract.	
Mylasa, Ortokondeis	*IK Mylasa* 212	C2	Failure by tenant of land to pay *phoros* as specified in contract.	
Mylasa, Ortokondeis	*IK Mylasa* 218	C2	Failure by tenant of land to pay *phoros* as specified in contract.	
Naupaktos	*IG* IX, 1 (2) 3: 640	C2	Failure by manumittee sold to sanctuary of Asklepios to abide by the *paramone* specified in contract.	
Oianthea - Chaleion	*IG* IX, 1 (2) 3: 717	C5	The *hemiolion* is imposed for the retention of unlawfully seized property or persons for more than ten days (αἰ δὲ πλέον δέκ' ἀμαρᾶν ἔχοι τὸ σῦλον, hεμιόλιον ὀφλέτο <h>ὅτι συλάσαι).	
Olymos	*IK Mylasa* 801	C2	Failure by tenant of land to pay *katabole*.	
Olymos	*IK Mylasa* 830	C2	Failure by tenant of land to pay *phoros*.	
Pergamon	Saba *Astynomoi Law* 82-87	C2	The *hemiolion* is imposed on individuals refusing to comply with instructions to cover up water channels, leading to work being contracted out.	

	ὀφείλει	Contract; penalty unsuccessfully contested.
	ἀνέγραψεν τὸ ἡμι[όλ]ιον	The *hemiolion* is incurred as a result of judgement debt.
	ὀφείλειν	The penalty is not based on a contract. It is uncertain precisely what the destination of the *hemiolion* is. The enactment provides that there is to be *praxis* καθάπερ ἐγ δίκης δεδικασμένης ἀδ<ι>κίου. In addition the offender is liable to a sacred fine of 1000 dr.
	ἀποτείσει	Contract; the *hemiolion* amounts to half the value of the price for letting the remedial work.
	ἀποτινέτω	Contract; the *hemiolion* is calculated in relation to expense of the new contract, as well as the original contract price.
	ἀποτείσει	Contract; the *hemiolion* is calculated in relation to cost of letting the remedial work.
	ἀποτείσει	Contract.
	δότω, ἀποτεισάτω	Contract.
	ἀποτείσει	Contract.
	Not preserved	The *hemiolion* is perhaps to be paid by οἱ τὰν ὠνὰν φυλάσσοντες.
	ὀφλέτο	This is clearly a penalty that is not based on a contract.
	ὀφιλήσι	Contract.
	ἀποτείσει, ὀφειλήσει	Contract.
	καὶ τὸ γενόμενον ἀνάλωμα πραξάτωσαν παρὰ τῶν ἀτακτούντων ἡμιόλιον	The penalty is not for breach of contract. The *astynomoi* themselves will incur it, too, if they fail to comply with the instructions.

Pergamon	Saba *Astynomoi Law* 7-14	C2	The *hemiolion* is imposed on individuals refusing to comply with instructions to remedy infrastructure, leading to the work being contracted out. Part of the money exacted is to be paid to contractors, the remainder (presumably the *hemiolion*) goes to the treasury.	
Stymphalos & Demetrias	*IP Ark*. 17. 79	C4	The text is lacunose, but, as suggested by Thür and Taeuber, it is very likely that the *hemiolion* was connected with the process of the enforcement of verdicts.	
Thespiai	*I Thesp*. 44	C3	Failure by tenant to pay fees due or to provide acceptable guarantors, leading to new letting process.	
Tyrrheion, Akarnania	*IG* IX, 1 (2) 2: 245	C3	Failure by tenant to pay rent on time.	
Zeleia	*Syl*. (3) 279	C4	The *hemiolion* is imposed on person who unsuccessfully contends that land claimed by committee to be public property has in fact been lawfully acquired by him.	

	τὸ διάφορον πράξαντες ἡμιόλιον παρὰ τῶν ἀπειθούντων	The penalty is not for breach of contract.
	Not preserved	Perhaps imposed on officials for neglect of responsibility to pass on information on verdicts.
	The debtor and his guarantors are to be registered by ἀρχά	Contract.
	Not preserved	Contract.
	τὴν τιμὴν αὐτὸν ἐκτίνειν ἡμιόλιον	The penalty is akin to those imposed on persons who unsuccessfully appeal summary penalties.

ILIAS ARNAOUTOGLOU (ATHENS)

REWARDS TO INFORMERS. RESPONSE TO LENE RUBINSTEIN

Lene Rubinstein's paper is part of her long, industrious and fruitful preoccupation with the legal roles individuals assumed in Athenian litigation and especially the figure of the public prosecutor[1]. In the latest sequel, she focuses on financial reward, that is a fixed amount of money or a percentage or a fraction of a penalty, usually set in advance for initiating legal proceedings. Therefore, she excludes i) honorary or symbolic rewards such as crowning, *sitesis*, *proedria*, etc., and ii) monetary rewards for enforcing the death penalty in cases of overthrowing the democratic regime, or installing a tyranny as in the third-century Ilion decree against tyranny, in which anyone killing the tyrant is rewarded among others with a considerable sum of money[2].

[1] See Rubinstein (2000); (2003a); (2003b) and (2005). Enforcement: Rubinstein (2007); (2009) and (2010). Her research impinges upon the wider question of law enforcement in classical Athens and the role of the *polis*.

[2] Enforcing death penalty on Diagoras of Melos and offering reward, Aristoph. *Birds* 1072-1087 (and the scholia on 1073, as well as Scholia on Aristoph. *Ran*. 320); *FGrH* 326 (Melanthios) F3 and 342 (Krateros) F16 and Diod. Sic. 13.6.7. Symbolic reward in *IK* 1 (Erythrai) 503 (3rd century BC, statue of Philites). Anti-tyranny law of Ilion: *IK* 3 (Ilion) 25, 19-28 (beg. 3rd century BC): *[ὃς δ'] ἂν ἀπ[οκτ]είνηι τ[ὸν τ]ύραννο[ν ἢ τὸν ἡ]/γεμόνα τῆ[ς] ὀλιγαρ[χ]ίας ἢ τὸν τὴν δ[ημοκρα]/τίαγ καταλύον[τ]α, ἐὰμ μὲν ἔναρχο[ς, τά]/λαντον ἀργυρ[ί]ου λ[αμβάνειν παρὰ τῆς πό]/λεως αὐθημερὸν ἢ τῆι δευτέραι, [κ]αὶ εἰκό[να]/ χαλκῆν αὐτο[ῦ στ]ῆ[σ]α[ι τ]ὸ[ν δῆ]μον· εἶναι δὲ/ αὐτῶι καὶ σίτη[σ]ιν [ἐ]μ πρυ[τα]νείωι, [ἕ]ως [ἂν] ζῆ[ι],/ καὶ ἐν τοῖς ἀγῶ[σι] εἰς π[ρο]εδρίαν [κηρύ]σσεσ/θαι ὀνομαστεὶ καὶ δύο δ[ρ]αχμὰς δίδοσθαι/ αὐτῶι ἑκάστης ἡμέρας μέχρι ἂν*

The paper traces the underlying relationship between the reward provided to volunteers when assuming a legal role, such as informer, denouncer or prosecutor, and the deterrent effect it may produce. She considers that deterrence could be enhanced once personal gain or pure greed entered into the equation of enforcement; in other words, financial inducement increased the likelihood of (succesful) prosecution of law breakers (but not their conviction). But such a premise presumes the existence of a weak central, hierarchical enforcement mechanism, or, to put it mildly, of a diffused enforcement[3]. To what extent and how the deterrent effect can be measured? Given that there can be no quantitative studies over a long period of time, we should rely on the frequency and intensity of references to rewarding the volunteer. But even these two correlates depend on other factors, such as the survival of evidence.

The paper is divided in two parts, the first focuses on classical Athens and in particular discusses reward to those providing information and to those enforcing the provision of a law as in *phasis* or a judgment as in the cases of *apographe*. The second part explores different aspects of the reward-payment provisions in enactments from other Classical and Hellenistic Greek *poleis*. Although I share most of Rubinstein's analysis, I would like to review the argument and express some reservations and counter arguments over her suggestion that the use of rewards for volunteers in Athens and in other Greek cities did not differ substantially (p. 419).

First of all, I think that we should distinguish between, on the one hand, the authority granted to any citizen (*ho boulomenos*) to bring a prosecution (with or without a reward, to enforce a law or a verdict) and, on the other hand, the award of a certain amount of money or percentage of a monetary penalty to an informer. The distinction between reward for informing and for enforcing penalties, espoused by Rubinstein (p. 420), seems to me quite restrictive even for Athens; the cases of [Dem.] 43 (*Against Macartatus*) 71 (uprooting olive trees) and 59 (*Against Neaira*) 16

ζῆι with Teegarden (2014). Similarly in Meiggs-Lewis 43 from fifth-century Miletos (470-440 BC), those who will kill Alkimos, Kresphontes and the son of Nympharetos, following probably a lawcourt decision or a decree, are awarded 100 staters drawn from the confiscated property of Nympharetos, *καὶ ὃς ἄν τινα τούτωγ κατακτείνει, ἑκατὸν στατῆρας αὐτῶι γενέσθαι ἀπὸ τῶν χρημάτων τῶν Νυμφαρήτο*… . In this respect see also inscription *SEG* 57.1409 A, 1-13 (Sagalassos, beg. 3rd century BC) in which the implicit but vague inducement to enforce the death penalty: *ἄκραν μὴ καταλαμβάνεσ/θαι μηθένα μηδὲ ἄλλο ὄρος μη/δὲν μηδὲ ἐκ τῆς πόλεως ἐγβάλλειν μηδέ/να μηδὲ στασιάζειν μηδένα μηδὲ ὅπλα ἐκ/φέρειν μάχιμα μηδένα· ὃς δ' ἂν ἁλῶι τούτω[ν]/ τι ποιῶν ἰδούσης τῆς πόλεως καὶ τῶν δικασ/τῶν ὅσοι ἂν βουλεύσωνται τεθνάτωσαν/ [ἀ]ποκτεινάτωσαν δ' αὐτοὺς ἡ πόλις καὶ οἱ δικαστα/[ὶ ὅ]σους ἂν δὲ μὴ δύνωνται ἀποκτεῖναι ἀλλὰ ἐχφύγω/{γω}σί που φυγαδεύσαντες ἔστωσαν πολέμιοι τῆ[ι]/ πόλει καὶ τοῖς θεοῖς ἕως ἂν ἀποθάνωσιν καὶ αὐτοὶ/ καὶ οἱ ἔγγονοι αὐτῶν καὶ ὃς ἂν τῶν πολιτῶν περιτυν/χάνηι που ἀποκτεινάτω καὶ ἔστ' αὐτῶι κομίζειν σκῦλα*.. In most cases, however, the killer is pronounced free of any guilt, *ὅσιος, μὴ μιαρός, εὐαγὴς καὶ καθαρὸς* (e.g. *IG* ii^3 320 (Athens); *SEG* 26.1306 (Teos); *IK* 5 (Kyme) 11).

[3] It is not the place the resume the whole debate whether the Athenian society was a society of feud or a society of law and order; see recently Harris (2007). It is important , however, and it should be stressed that it is the *polis* that concedes this means of prosecution.

(illegal cohabitation with a foreigner) do not concern enforcement of a verdict but initiative to prosecute law-breakers.

Reward to informers was not paid irrespectively of the reliability of the information; at least that is what inscriptions from late fifth-century Thasos and third-century Abdera explicitly state[4]. If this is true, then, the reward to volunteers can be regarded as an insurance against the risk they assume. Therefore, we have to take into account that a decision to inform or initiate voluntarily legal proceedings would have involved a cost-benefit analysis, in which the benefits should considerably outweigh any costs. Benefits would include any monetary reward, while costs would comprise not only expenses and monetary losses in case of defeat, but also fines imposed in case law compelled individuals to inform on transgressors[5]. But perhaps, this is too much of an economist's approach.

Part I. Rubinstein quite rightly emphasizes the exceptional character of reward to informers as it emerges from the case of the profanation of the Mysteries and the mutilation of the Hermae. Her analysis brings forward the rationale of employing extraordinary measures to combat an extraordinary situation involving close-knit groups operating in private spaces. She, also, judiciously identifies the political-ideological element of the Athenian choice not to employ systematically reward as part of the armour against delinquency, although she does not consider it as an adequate explanation (p. 420). I believe that we have to insist on that aspect and explore its repercussions. One of the cornerstones of the Athenian democratic legal system as understood and practiced in the fourth century BC, was the right of any Athenian (*ho boulomenos*) to bring a suit in defence of those wronged. In the handbook of Athenian constitutional history and law, *AthPol.* 9.1 this right is designated as one of the most popular initiatives of Solon[6]. This key element impinged both on

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[4] Meiggs - Lewis 83A, 1 and B, 8: *καὶ φανῆι ἐόντα ἀληθέα; I Aeg. Thrace* 2: *καὶ φανῆι ἀληθὴς οὖσα*. Reward in Hermokopidai case in Athens: And. 1 (*On the Mysteries*) 27-28, 40 and Thuc. 6.27.2.

[5] Legally enforced duty to inform on violations, Chios: *SEG* 61.700, 2-20: *[ἐν τ]/οῖς ἄλσεσιν μ[ὴ ποιμ]/αίνεν μηδὲ κοπρ[εόε]/[ν·] ἢν δὲ ποιμαίνῃ [ἢ ὑ]/φορβῆ ἢ βοκολῆι, [ὁ ἰ]/δὼν κατειπάτω πρ[ὸς]/ τὸς βασιλέας ἀγν[ῶς]/ πρὸς τὸ θεό· τῶι δὲ π[ο]/ιμαίνοντι ἢ ὑφορβέ/οντι ἢ βοκολέοντι ἢ/[μ]ίεκτον ἴθυνα ἔστω/ κατὰ κτῆνος ἕκαστο/ν· ἢν δὲ κοπρεόων ἁλί/σκηται, πέντε στατῆ/ρας ὀφειλέτω ἁγνῶς/πρὸς τὸ θεό· ἢν δὲ ὁ ἰδ/ὼν μὴ κατείπει, πέντ/ε στατῆρας ὀφειλέτ/ω ἱερὸς τῶι θεῶι* and ll. 27-30 similarly for equipment removed from the sanctuary: *ἢν δὲ μὴ κατείπει πέντε στατῆρας ὀφείλειν ἱερὸς τῶι θεῶι*. Delos: *SEG* 48.1037B (c. 180-166 BC), 22-24: *καὶ εἴ τις συνειδὼς/ [μὴ δηλώσει ἐν τοῖς ἀστ]υνόμοις, τοῖς αὐτοῖς/ [ἔνοχον εἶναι …]*; *IG* xi (4) 1296 (mid 3rd century BC), A 8-11: *καὶ ὅστις/ συνειδὼς μὴ δηλώσει ἐν τοῖς ἀ̣σ̣/τυνόμοις, τοῖς αὐτοῖς ἔνοχος ἔσ/τω·* and similarly in B 8-10). Paros: *SEG* 33.679, 17-24 (mid 2nd century BC): *καὶ εἴ τις συνειδὼς μὴ μη/νύσειεν πρὸς τοὺς ἄρχοντας καὶ τὸν ἀποδέ/κτην τὸν ἐπιμελόμενον τοῦ ἱεροῦ.*

[6] *Δοκεῖ δὲ τῆς Σόλωνος πολιτείας τρία ταῦτ'εἶναι τὰ δημοτικώτατα, πρῶτον μὲν καὶ μέγιστον τὸ μὴ δανείζειν ἐπὶ τοῖς σώμασιν, ἔπειτα τὸ ἐξεῖναι τῷ βουλομένῳ τιμωρεῖν ὑπὲρ τῶν ἀδικουμένων,* ... (The following seem to be the three most important, the ban on loans on the security of

the legal field and on ideology. Any Athenian of the classical period did not have to expect a financial inducement in order to bring a suit. Other motives, such as kinship (inheritance, homicide), friendship or comradeship, prestige, adherence to the dominant democratic ideology were equally if not more important[7]. In other words, Athenians had many more reasons to prosecute or initiate legal proceedings against fellow Athenians, as Rubinstein herself made it clear (p. 421). This array of motives relegated financial inducement to being undesirable (but not unacceptable), especially in ideological terms. It is at this level, that a good citizen never exercises (or appears to do so) his duties out of greed[8]. A citizen acting on that ground could easily be branded a sycophant. That sycophancy was associated, among other, with monetary gains is nicely depicted by Apollodoros in [Dem.] 53 (*Against Nikostratos*) 1-2, who underscores the lack of sycophancy as a motive in bringing an *apographe*[9].

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the person; next, permission for anyone who wished to seek retribution for those who were wronged; - transl. P.J. Rhodes - Penguin ed.) with commentary in Rhodes (1981: 159).

[7] Osborne (1985: 44). Athenians did not turn altruistic in bringing *graphai* with no other interest.

[8] On sycophancy see Harvey (1990), Osborne (1990) Wallace (2006) and Harris (1999) and (2013: 62-63).

[9] [Dem.] 53 (*Against Nikostratos*) 1-2: ὅτι μὲν οὐ συκοφαντῶν, ἀλλ' ἀδικούμενος καὶ ὑβριζόμενος ὑπὸ τούτων καὶ οἰόμενος δεῖν τιμωρεῖσθαι τὴν ἀπογραφὴν ἐποιησάμην, μέγιστον ὑμῖν ἔστω τεκμήριον, ὦ ἄνδρες δικασταί, τό τε μέγεθος τῆς ἀπογραφῆς, καὶ ὅτι αὐτὸς ἐγὼ ἀπέγραψα. οὐ γὰρ δήπου συκοφαντεῖν γε βουλόμενος ἀπέγραψα μὲν ἂν πένθ' ἡμιμναίων ἄξια ἀνδράποδα, ὡς αὐτὸς ὁ ἀμφισβητῶν τετίμηται αὐτά, ἐκινδύνευον δ' ἂν περί τε χιλίων δραχμῶν καὶ τοῦ μηδέποτε μηδένα αὖθις ὑπὲρ ἐμαυτοῦ γράψασθαι: οὐδ' αὖ οὕτως ἄπορος ἦν οὐδ' ἄφιλος ὥστε οὐκ ἂν ἐξευρεῖν τὸν ἀπογράψοντα: ἀλλὰ τῶν ἐν ἀνθρώποις ἁπάντων ἡγησάμενος δεινότατον εἶναι ἀδικεῖσθαι μὲν αὐτός, ἕτερον δ' ὑπὲρ ἐμοῦ τοῦ ἀδικουμένου τοὔνομα παρέχειν, καὶ εἶναι ἄν τι τούτοις τοῦτο τεκμήριον, ὁπότε ἐγὼ λέγοιμι τὴν ἔχθραν πρὸς ὑμᾶς, ὡς ψεύδομαι οὐ γὰρ ἄν ποτε ἕτερον ἀπογράψαι, εἴπερ ἐγὼ αὐτὸς ἠδικούμην, διὰ μὲν ταῦτα ἀπέγραψα. ἀπογράψας δὲ ἐὰν ἀποδείξω τὰ ἀνδράποδα Ἀρεθουσίου ὄντα, οὗπερ ἐγέγραπτο εἶναι, τὰ μὲν τρία μέρη, ἃ ἐκ τῶν νόμων τῷ ἰδιώτῃ τῷ ἀπογράψαντι γίγνεται, τῇ πόλει ἀφίημι, αὐτῷ δ' ἐμοὶ τετιμωρῆσθαι ἀρκεῖ μόνον. (I have no desire to bring a baseless and malicious charge; but I have filed this inventory of property because I have suffered wrong and indignity from these men and therefore thought it my duty to avenge myself upon them. Of this you will find convincing proof, men of the jury, in the amount of the valuation, and in my having filed the information in my own name. For, I take it, if I had wished to bring a malicious suit, I should not have listed slaves worth two minae and a half, the sum at which the claimant himself has fixed their value, and myself have run the risk of losing a thousand drachmae, and forfeiting the right ever again to indict anyone on my own behalf. Nor, again, was I so lacking in resources or in friends as to be unable to find some one to file the information; but I thought it the most outrageous thing ever seen among men, that I should myself suffer the wrong, but that another should lend his name on behalf of me, the one wronged; and that this would then serve as presumptive proof to my adversaries that I am lying whenever I speak to you of our enmity; for they would say that no other man would have filed the information, if I were myself the one wronged. It was for this reason that I filed the information. And now that I have done so, if I can prove that the slaves belong to Arethusius, to whom they are stated in the information to belong, I relinquish to the state the

Even if concealing or repudiating any sycophantic motivation is an often recurring rhetorical *topos*, the passage suggests the existence of strong undercurrents of similar inspiration in the logographic tradition. The best way to deal with such insinuations was to face them head on[10].

Against these taciturn currents, in some cases a strategy of carrot and stick was adopted. Reward for prosecutors was the sweetener as it may have enticed them to bring in the case and simultaneously deterred them from abandoning the case before it was introduced to the law court, while a rule according to which a litigant in a *graphe* procedure who did not get 1/5 of the votes had to pay a fine of 1,000 drachmas was the stick. If a legal system integrates the authority to any citizen to bring a *graphe* (something that would encourage accusations for vexatious litigation), then the regular provision of a financial reward to the voluntary prosecutor would be an open admission of inadequacy, unless extraordinary circumstances require unusual means.

Phasis/phainein procedure may be divided in two distinct phases. First, an individual provides information to a magistrate about violation of a law, e.g. in the market place, and second, following the intervention of the magistrate, the offender either admits his responsibility and suffers the prescribed penalty or denies any wrongdoing (for whatever reason). The individual who, originally, provided the information has the duty to bring the offender to court. This is consistent with the lack of *polis*-prosecution authorities. Scholars have attempted to pinpoint "distinguishing characteristics of the action" *phasis/phainein*[11]. But this relies on the untold presumption that *phasis/phainein* describes a legal action. Perhaps we can crack the nut if we assume that the terms do not describe only a legal action *stricto sensu*, but principally a legal remedy against offenders in cases in which collecting and assessing information and evidence remained beyond the potential of the *polis*-magistrates and their assistants. This suggestion seems to be corroborated by i) the fact that in cases when liability is not contested, there is not any legal hearing, but simply imposition of the prescribed penalty, and ii) the lack of any special procedural rules for *phasis*-initiated proceedings (apart from the reward to the successful plaintiff in some cases[12]). If this is right, then, *phasis/phainein* would have

three fourths which under the law are given to the private citizen filing the information; for myself it is enough to have taken vengeance.). Less explicit in Lys. 24 (*On the invalid*) 2; Isocr. 15 (*Antidosis*) 164; Isocr. 21 (*Against Euthynus*) 13; Is. 11 (*About Hagnias' estate*) 31; Dem. 19 (*On the false embassy*) 222; Dem. 21 (*Against Meidias*) 28; Dem. 24 (*Against Timokrates*) 3.

[10] Cf. Osborne (1985: 48): "Overall the evidence available to us does not justify the supposition that malicious litigation was either occasioned by or a particular problem in, actions in which the prosecutor was rewarded".

[11] So MacDowell (1991) and Wallace (2003). *SEG* 50.766, 35 (Kos, 2nd /1st century BC): *φαινέτω δὲ ὁ χρήζων κατὰ τὸν νόμον* with no further specification but possibly to include a reward.

[12] That reward was not one of the constituent elements of *phasis/phainein* procedure is indicated by the use of it in cases of administration of orphan's property and in certain inscriptions, *IG* xii (1) 762 B, 13-14 (Lindos); *IBeroia* 1 B, 29-33: *ἐὰν/ [δ]έ τινα ὁ γυμνασίαρχος ἐάσῃ ἀλείφεσθαι τῶν διασαφουμένων εἰδώς,/ [ἢ] ἐνφανίζοντός τινος αὐτῶι καὶ παραδείξαντος, ἀποτινέτω δραχμὰς/ χιλίας, ἵνα δὲ καὶ εἰσπραχθῆι, δότω ὁ προσαγγέλλων ἀπογραφὴν τοῖς ἐξε/[τ]*

been employed in cases of disputes in the *agora*, concerning both goods and persons, as well as in other cases to which magistrates did not have access and relied mainly on relatives[13], neighbours or bystanders.

In classical Athens, reward for providing information and initiating legal proceedings was explicitly designated in specific laws or decisions of the Council and it was limited to cases in which delinquency and perpetrators were not easily detectable.

Part II. Despite Rubinstein's healthy scepticism about the variety and fragmentation of the information provided by the epigraphic record, I think that interesting patterns and correlations emerge (with the caveat of the paucity of evidence), on several aspects, such as terminology. For example, in Delos, the verb εἰσαγγέλειν (an Athenian influence?) is regularly used to describe denouncing illegal activities such as evasion of import tax, deposition of rubbish or unauthorised herding in a sanctuary[14]. In the manumissions from Phokis (Daulis, Elateia and Steiris) the verb denoting the legal action to defend the freedman/freedwoman is either (ἐγ)δικάζομαι or in Steiris προΐσταμαι. However, the use of different forms of the latter verb is much more widespread in the manumissions of central Greece[15].

A cursory look at the table appended (p. 434-41) reveals that reward (which in most cases was equal to 50%) was offered predominantly in the following eight categories of cases:

1. threat to the constitution (*politeia*) [Abdera, Kyme, Thasos];

2. violation of magistrates' duties [Arkesine, Astypalaia, Beroia, Delphoi, Erythrai, Hierapytna, Kolophon? (*telonikai dikai)*, Magnesia on Meander, and Pergamon];

3. administration of sacred spaces [Arkesine, Delos, Demetrias, Epidauros, Ios, Kos, Lampsakos, Minoa, Paros, Priene] (to justify the intervention of individuals employed or attending ceremonies in there?);

4. administration of endowments [Aigiale, Eretria, Kos?, Kyme?, Teos];

5. manumissions [Daulis, Elateia, Gortyn, Steiris];

6. commercial activity [Delos, Delphoi, Thasos];

ασταῖς τῆς πόλεως, οὗτοι δὲ παραγραψάτωσαν τῶι πολιτικῶι πράκτορι'; *SEG* 50.766, 35 (Kos, late 2nd/ early 1st century BC).

[13] See Thür (2008a) and Thür (2008b).

[14] *Εἰσαγγέλειν* is associated in most cases with denunciation to the Council (all but one reference in the catalogue).

[15] See the participe *προϊστάμενος* in *FD* iii (3) 205 and *SGDI* ii 1726, 1938, 1951, 2145, 2261, 2275 all from Delphoi, and from Boiotia, Darmezin (1999: 27 nos 10-11, 30 no. 15, 98 no. 133). Even well into the imperial period (end of 1st – early 2nd century AD) in Phokis (Tithorea) the same cognates are used, see Rousset & Zachos (2012: 467-73 nos 1-3) (προστᾶμεν, προστάντος). A similar term (προστατευέτω) is attested in a manumission from third-century Messene, *IG* v (1) 1470, 5-6.

7. enforcement of a contract [Eretria, Ioulis, Koressia, Megalopolis?, Tegea].

Outside Athens, the epigraphic record cannot substantiate a widespread use of the reward strategy. In the eighty examples collected by Rubinstein, there are certain clusters either regional (e.g. in Thasos there are eight different inscriptions recording reward) or thematic - regional (e.g. in Elateia there are seven cases in which reward is offered, all in manumission documents). The remaining *poleis* do not display more than maximum four occurrences, sometimes dispersed or isolated.

Instead of regarding reward as a common strategy employed in various ways by the Greek *poleis*, including Athens, I suggest that reward, despite its obvious deterrent element, was not widely used; it was implemented rather sparingly in cases in which violations could have been easily concealed, either due to a closely delimited space, both physical (e.g. home, sanctuary, market place) and social (e.g. family, arrangements between partners) or to inefficiently policed context (market place, accountability of magistrates). Only in that sense Athens was not so dissimilar to other Greek cities.

Finally, it is interesting to notice that in the second century BC similar practices spill over the confines of *polis* enactments into the decrees of a private association in Delos and of a local *koinon* in Caria[16].

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[16] Delos: *IDelos* 1520, 81-89 (153/2 BC or later): *οἱ δὲ μὴ ποιήσαντές τι τῶν ἐν τῶιδε τῶι ψηφίσ/ματι κατακεχωρισμένων ἔστωσαν μὲν καὶ τῇ ἀρᾶι ἔνο/χοι, προσαγγελλέτω δὲ αὐτοὺς καὶ ὁ βουλόμενος τῶν θιασ[ι]/[τ]ῶν οἷς ἔξεστιν· ὁ δὲ ἀρχιθιασίτης ἀεὶ ὁ ἐν ἀρχ[ῆι ὢ]ν εἰσαγέτ[ω]/ τὸν κατήγορον καὶ τὸν ἀπολογούμενον καὶ ἀναδιδότω ψῆφον/ τοῖς θιασίταις ..ΕΝΑΔ[. τοῦ εὐ]θυνομένου ἔστω τῶι προσαγ/γείλαντι, κομισαμένου τοῦ [αὐ]τοῦ τὸ τρίτον μέρος τοῦ εἰσ/πραχθέντος· ἐὰν δέ τι [ὁ ἀρχιθιασ]ίτης μὴ ποιήσει, ἔστω κατ' αὐ/[τ]οῦ ἡ εἰσαγγελ[ία, ἐπειδὰν ἰδιώτ]ης γένηται, κατὰ τὰ αὐτά·* Caria: *SEG* 51.1499, 30-33 (honorary decree of the *koinon* of *Leukoideis* for Sopatros son of Theon of Rhodes, c. 107-100 BC): *ἐὰν δέ τινες μ[ὴ]/ στεφανώσωσιν, ἀποτεισάτωσαν ἱε[ρὰς] Διὸς Ὑπάτου κα[ὶ]/ κοινοῦ Λευκοιδέων δραχμὰς ἑκατὸν καὶ εἰσπρασσέτω/ αὐτοὺς ὁ χρήζων ἐπὶ τῷ ἡμίσει.* Survival into the imperial era, *ILindos* ii 419 (AD 22) and in numerous tombstones.

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