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AKTEN DER GESELLSCHAFT FÜR GRIECHISCHE UND HELLENISTISCHE RECHTSGESCHICHTE

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IN MEMORIAM
HENRI VAN
EFFENTERRE

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PREFACE

The sixteenth Symposion of the Gesellschaft für griechische und hellenistische Rechtsgeschichte took place at University College of Durham University from 2 to 6 September 2007. Previously the Symposion had met in Italy, France, Austria, Germany, Spain, Greece, and the United States; this was the first time the Symposion met in the United Kingdom. The advice, encouragement, and support of Eva Cantarella and Joseph Mélèze Modrzejewski helped us to ensure the success of the meeting. We were also lucky to obtain the cooperation of the notoriously fickle weather of Northern Britain, which supplied us with four bright and rainless days. Thirty-eight participants came to Durham from Continental Europe, Israel, the United States, and the United Kingdom to present papers and responses. For the first time two Japanese colleagues joined the discussion. The papers ranged from Greek Law in the Archaic period to the law of Roman Egypt. Specialists from several different disciplines (Law, Ancient History, Classical Philology, Rhetoric, Epigraphy, and Papyrology) contributed to the Symposion and enriched the lively debate. Fritz Mitthof could not attend for reasons of health but sent his paper to be read. We have published it in this volume.

The sixteenth Symposion was hosted by the Department of Classics and Ancient History, Durham University. We would like to express our gratitude to the Department for their warm welcome and to the Faculty of Arts and Humanities of Durham University for their generous support provided to help defray the costs of publication. For the editing process we were fortunate to have the help of Eva Schellnast of the University of Graz. Without her skill, patience, and efficiency this volume would never have appeared so soon after the Symposion. In proof-reading the entire volume and preparing the index, I have received valuable assistance from David Lewis of Durham University. Finally we would like to thank all of the participants for the prompt submission of the final versions of their papers and responses.

1 November 2008

Durham, Edward M. Harris
Graz, Gerhard Thür

I. ARCHAIC AND CLASSICAL GREEK LAW

RAYMOND WESTBROOK (BALTIMORE)

DRAKON'S HOMICIDE LAW

Introduction[1]

In 409/8 B.C. the Athenian government commissioned the transcription of Drakon's law of homicide onto a marble stele, to be erected in the Agora. The original, dating from the seventh century, had been inscribed on *axones*, which appear to have been four-sided rectangular wooden beams set horizontally in an oblong frame that could be rotated in order to read each surface (Stroud 1979: 41). The *axones* have of course long since perished, but a part of the marble stele that had survived in secondary use was recovered in 1843. It contains a preamble describing the commission to copy the law, the heading "first *axon*" and the first 60 or so lines of the text, although only the first third thereof is more than fragmentary and much of that is heavily restored. The heading "second *axon*" has been deciphered towards the end of the extant text (Stroud 1968: 16-18, 58-60).

The main body of the recoverable text reads as follows (lines 1-20):

Secretary: Diognetes of the Deme Phrearrioi

Archon: Diokles

Decree of the Council and the People, the prytany of Akamantis, Secretary: Diognetes, Chair: Euthydikos, motion of ...

Let the Registrars of the Laws transcribe the law of Drakon regarding homicide, after receiving it from the Basileus, with (the assistance of) the Secretary of the Council, on a marble stele, and let them place it before the Stoa Basileia. Let the Poletai subcontract in accordance with the law. Let the Hellenotamiai pay the money.

First Axon

And if without premeditation someone kills somebody, he is to be exiled.

The Basileis shall find guilty of homicide either ... or the one who plots. The Ephetai shall render a verdict.

---

[1] Earlier versions of this study were presented as lectures to the Classics and Near Eastern Studies Departments of the Johns Hopkins University, the Institut für Römisches Recht of the Karl-Franzens-Universität Graz, and to the 2007 Symposion at Durham University. I am grateful to all the participants for their useful comments, criticisms, and suggestions. Responsibility for the ideas expressed in this text remains, as always, with the author.

Pardon is to be granted, if there is a father or brother or sons, by all, or the one who opposes it shall prevail. And if these do not exist, pardon is to be granted by those as far as the degree of cousin's son and cousin, if all are willing to grant it; the one who opposes shall prevail. If not one of these exists, and he killed unintentionally and the Fifty-One Ephetai find that he acted unintentionally, let ten members of the phratry admit (him) if they wish. Let the Fifty-One choose the latter according to their rank. And let those who killed previously be bound by this law.

The Problem

The focus of this article is on the first sentence of the law itself (line 11 of the text): "And if without premeditation someone kills somebody, he is to be exiled." And our concern is with the first word of the first sentence, the Greek *kai*, here translated literally "and." This simple conjunction has given rise to an immense amount of scholarly commentary, for the obvious reason that laws, or any other rational prose, for that matter, should not in logic begin with a copula.

Early commentators presumed that the law as copied was incomplete. Another law preceded it in the original, most probably the section of Drakon's code that covered intentional homicide. The obvious difficulty with this assumption is why it was not copied with the rest of the law. The explanation requires a further assumption, namely that the law on intentional homicide was abolished between the time of Drakon and republication on the marble stele. As Stroud points out, there is no evidence whatsoever for such an assumption (1968: 35).

It is true that the emphatic position of the phrase "without premeditation" at the beginning of the sentence naturally suggests contrast to a preceding sentence emphasizing premeditation. In a thorough study of the use of *kai* in Greek laws, however, Gagarin has shown that it denotes continuity or new matter ("moreover"), not contrast. The appropriate designation of contrast between two rules is the far more common *de* (1981: 80-95).

A different approach, proposed by Stroud and followed by most recent scholars, is to translate the troublesome *kai eam* as "Even if." Thus the original law did not begin with a provision regarding intentional homicide at all. Rather, its opening provision, the one before us, equated the punishment for unintentional homicide with that of intentional homicide. A provision on intentional homicide either came later, in that part of the stele now lost (Stroud), or not at all, being sufficiently covered by the ellipsis in the opening provision (Gagarin).[2]

This interpretation raises as many difficulties as it resolves. Firstly, it is inherently unlikely that a law would begin with the statement "even if." That kind of extreme ellipsis is simply not the way that legislative prose is drafted, in any legal system on earth, ancient or modern. Gagarin has diligently searched the Greek

[2] Stroud 1968: 34-40, summarizing the earlier literature; Gagarin 1981: 65-144; see Schmitz 2001: 20-22 for a recent summary.

corpus and managed to come up with only one dubious example, taken indirectly from a citation by Demosthenes (1981: 93-94).[3]

Secondly, it requires further assumptions regarding Drakontian homicide law, primarily that the most severe penalty for intentional homicide was exile, not death. The purpose of the law would have been to extend the harshest possible punishment, exile for murder, to unintentional killing. The death penalty, however, was certainly imposed for murder in later Athenian law, so a hardening of attitudes between the seventh and the fifth century would have to be presumed. It may well be that Drakon's reputation as a harsh lawgiver, whose laws were written in blood, was a fantasy concocted by later generations. But it is equally unlikely that Drakon was so far inclined in the opposite direction that he could not bear to contemplate the thought of the death penalty.[4]

The principle objection to this interpretation, however, is that it is a rationalization. It seeks to make an illogical sentence into something that could pass as a law, however awkward the result and however many distortions it introduces into the overall fabric of the legal system.

The Context of Drakon's Law

Our intention is to approach the problem from a completely different angle. We take the opening *kai* to be a simple connective, which means that there was a provision that preceded the law on unintentional homicide in the original document and that provision was omitted in the extant copy, for good reason.

To identify the missing provision, it is necessary to place Drakon's law in its historical context, not only within Greek law but also in the world from which ancient Greek law developed. It is necessary, to borrow a phrase from the grammarians, to discover the deep structure of Drakontian jurisprudence.[5]

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[3] Dem. 24.39, where, as Lateiner points out, "its probable meaning emphasizes the retroactive nature of the law in question. In this quotation, *kai ei* does not assume a previous law or subsume a current one" (1983: 406).

[4] A distinction between execution and vengeance (or self-help), as made by Gagarin (1981: 119) and Schmitz (2001: 28-29) is specious. Vengeance was not lawless feud; it was a legal right supported and regulated by the law. Whether the killer was killed by a public authority or by a private individual in pursuit of a legal right, it amounts to execution of the death penalty.

[5] Failure to recognize historical depth is a conspicuous feature of the "historical" approach, whereby some contemporaneous political event is sought out as the cause and focus of the legislation. Thus Humphreys (1991) tries to link Drakon's law to a putative political dispute arising out of the wrongful execution of Kylon's supporters some 15 years earlier. Inevitably, the law's universal provisions are tied to a Procustean bed to make them fit the specific circumstances of the event. For example, "non-intentional" homicide is hardly appropriate to the deliberate execution of a rebel, but Humphries stretches the term to cover self-defense, lack of personal animosity, and acting under orders (p. 22). For further criticisms of Humphreys' thesis, see Gagarin 2007: 4-5.

The style and content of the present excerpt from Drakon's legislation reveals it to belong to a well-known literary legal genre: the law code. Within Greece, early examples are found in inscriptions from Crete, the most complete being the Great Code of Gortyn.

The genre, however, has a long ancestry in the Mediterranean basin and the Near East. The most famous example dates back to the 18th century BCE, namely the law code of king Hammurabi of Babylon. Codex Hammurabi (CH) is in fact only one of seven codes in cuneiform script that have so far been recovered from the Near East. Two Sumerian codes from southern Mesopotamia are earlier: Codex Urnamma (CU) from the city of Ur and Codex Lipit-Ishtar (CL) from the city of Isin date to the 21st and 19th centuries respectively. A code in Akkadian from Eshnunna (CE), a city to the north of Babylon, dates to about thirty years before CH. Moving forward in time to the Late Bronze Age, the Middle Assyrian Laws (MAL) from Assyria are thought to have been written between the 14th and 11th centuries and the Hittite Laws (HL) from the Hittite capital Hattusha in Anatolia are preserved in several versions covering a slightly earlier time span. Finally, a small excerpt of a code, the Neo-Babylonian Laws (NBL), comes from sixth-century Babylonia.[6]

In the first millennium, the Hebrew Bible furnishes us with three law codes. They appear as discrete clusters of laws that have become embedded in the Pentateuchal narratives: the Covenant Code, a block of laws in Exodus 21 and 22: 1-16, the Deuteronomic Code, a similar block in Deuteronomy chapters 21 and 22, and the Priestly Code, which consists of a few fragments found scattered in the books of Leviticus and Numbers. The Deuteronomic Code is generally dated to the reign of king Josiah in the 7th century and the Priestly Code to the Babylonian Exile of the sixth century or the subsequent Persian period. There is no consensus on the date of the Covenant Code, with opinions ranging from the 9th to the 4th century. The final member of this genre is the Roman Twelve Tables, traditionally dated to 450 BCE.[7]

The characteristics that mark these sources as belonging to a single genre, notwithstanding the immense distances of time and space that separate them, lie in both their form and content. The predominant form employed by all of the law codes is the *casuistic* sentence, namely a conditional clause stating the circumstances of a hypothetical case, followed by a clause stating the legal consequences. For example: "If a man knocks out the eye of a man, his eye shall be knocked out" (CH 196).

The predominant subject-matter of all the codes is everyday law as would be practiced in the courts. Their similarity in content, however, runs much deeper. Many of the same cases keep recurring in different codes, not always with identical

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[6] A convenient edition and translation in English of the extant cuneiform law codes is available in Roth 1997.

[7] The following discussion summarizes a series of published studies by the author, in particular Westbrook 2003: 9-10, 16-24, reviewing the nature of the Near Eastern codes and the relationship between them, and Westbrook 1998a, which discusses their connection with the Greek and Roman codes.

facts or with the same solution, but close enough to show that they drew upon the same situations and the same legal principles. For example, the case of an adulterer caught in the act is found in MAL, HL and the Gortyn Code, with variations in the punishment inflicted, but all with some discretion in punishment allowed to the husband. The punishment of theft by payment to the owner of a multiple of the thing stolen is found in CH, HL, CC, and the Twelve Tables. The case of the burglar caught by night, who could be killed on the spot, assumes the character of a literary topos, being reported in CE, CC, XII Tables, and, apparently, the laws of Solon (as reported by Demosthenes, Against Timocrates 113).

Closer examination of the recurring cases points not merely to a literary connection by copying or emulation but to a much deeper underlying intellectual tradition. It is revealed through the process of composition of a casuistic code. The starting point was a legal case. It may have been a real case judged by a court, or it may have been drawn from a well-known incident in epic or historical legend (which were regarded as factual events), or it may have been a purely fictitious case invented for the sake of argument. Preferably it was a case that involved some delicate or liminal legal point that would provide food for discussion and throw into relief more commonplace rules. The case was stripped of all non-essential facts (e.g. the names of the parties, circumstances not relevant to the decision), and turned into a theoretical hypothesis, with its legal solution, thus forming an individual casuistic law.

That was by no means the end of the process. The law codes are not a concatenation of individual laws or even associated laws; rather, they are composed of sets of theoretical discussions. Once a law had been created, details of its hypothetical circumstances were then altered to produce a series of alternatives that would, for example, change liability to non-liability, or would aggravate or mitigate the penalty. That set of variations around a single case formed a scholarly problem, which could be used as a paradigm for teaching or for further discussion.

A good illustration of the ancient methodology is the problem of the goring ox in CH:

250. If an ox gores a man while walking down the street and causes his death, that case has no claim.

251. If a man's ox is a gorer, and his local council has warned him that it is a gorer and he does not dock its horns and does not check his ox and it gores the son of a man and causes his death, he shall pay thirty shekels of silver.

252. If a man's slave, he shall pay twenty shekels of silver.

If we take the central paragraph as the original hypothesis, we can see that it has been varied along two axes: 1) circumstances in which there is no liability; 2) the status of the victim (which changes the level of liability). Many more variations could be imagined.

Over time, a canon of traditional problems emerged that was passed on from school to school and from society to society, through several millennia. Where the same

problem emerges in a number of law codes, two features of the academic method used in creating those codes ensured that the content would be similar and yet different. Those features may be characterized as *abridgement* and *creativity*.

It can be seen from the example of the goring ox that the discussion is by no means complete. The casuistic method precludes comprehensiveness, but even so, the three paragraphs in CH leave it clear that many intermediate situations were known but were excluded for the sake of brevity. All the law codes are equally summary in their presentation of scholarly problems. They stake out the parameters of a problem rather than cover all its facets. Thus when we find a variant in one code but not in another, it does not necessarily mean that the variant was unknown to the latter code.

On the other hand, the discussion in one school may lead to a line of variation not pursued elsewhere. Having a fund of well-known problems at their disposal, intellectual circles could refer to them obliquely, while they adapted and extended them by logical extrapolation.[8] (This is not to be confused with different rulings on the same facts, which is always possible in different legal systems.)

These features are well illustrated by the treatment of the goring ox problem in the two other codes in which it is found.

Codex Eshnunna

53. If an ox gores another ox and causes its death, both ox owners shall divide the price of the living ox and the carcass of the dead ox.

54. If the ox is gorer and the local council has warned its owner but he has not docked its horns and it gores a man and causes his death, the owner of the ox shall pay 40 shekels of silver.

55. If it gores a slave and causes his death, he shall pay 15 shekels of silver.

56. If a dog is vicious and the local council has warned its owner but he has not guarded his dog and it bites a man and causes his death, the owner of the dog shall pay 40 shekels of silver.

57. If it bites a slave and causes his death, he shall pay 15 shekels of silver.

58. If a wall is threatening to fall and the local council has warned its owner, but he does not strengthen his wall and the wall collapses and causes the death of a man's son, it is life; order of the king.

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[8] While a creative process cannot always be proved in individual cases, its existence in principle is demonstrable, because certain codes have characteristic obsessions. For example, all codes are concerned with status, mostly as between free men and slaves, sometimes with sons as an extra variant. CH goes further, in considering again and again variations of class between free men. Again, most codes vary punishment for theft according to the type of animal stolen, e.g. an ox or a sheep, but the HL provisions on theft list in obsessive detail different species, grades, and ages of animals. Some codes trace rights through several degrees of affinity, but Gortyn lists every possible relative, however distant, who may be entitled, a trait echoed by Drakon's law regarding the relative who is entitled to pardon a killer.

Exodus 21

28. And if an ox gores a man or a woman and they die, the ox shall be stoned and its flesh not eaten but the owner of the ox is free of liability.

29. If the ox is a previous gorer and its owner is warned but does not guard it and it causes the death of a man or a woman, the ox shall be stoned and its owner shall be killed.

30. If ransom is demanded of him, he shall pay for saving his life whatever is demanded of him.

31. If it gores a son or a daughter, the same rule will apply to him.

32. If it gores a male or female slave, he shall pay their owner 30 shekels and the ox shall be stoned.

33. And if a man opens a pit or digs a pit and does not cover it and an ox or an ass falls in it,

34. the owner of the pit shall pay, he shall indemnify its owner and the carcass is his.

35. And if a man's ox gores his neighbor's ox and it dies, they shall sell the living ox and divide its price and they shall also divide the carcass.

36. Or if he was warned that it was previous gorer and its owner did not guard it, he shall pay ox for ox and the carcass is his.

Comparing all three, we see that the case of an ox goring an ox is found in the biblical code and CE, but is missing from CH. It is unlikely that Hammurabi's draftsmen were unaware of this possibility, found in an earlier and a much later code that have no historical connection between them. The same applies to CE, which omits circumstances where the owner would not be liable, considered by CC and CH. On the other hand, CE's extension of the analogy, applying the same principles of liability to a savage dog but not to a tumbledown wall, seem to be its own invention, especially since it brings in a local decision to support the latter ruling.

The purpose of this long digression into the jurisprudence of the ancient Near East is to avoid a superficial juxtaposition of cross-cultural parallels. Instead, we would emphasize structural relationships between elements within a very long tradition, notwithstanding the complexity that longevity and transmission in themselves engender in the relationship between different cultures.[9]

The Greek law codes stand on the very edge of the Near Eastern tradition and on the cusp of an intellectual paradigm shift that was to transform the concept and function of a law code. The predominantly casuistic Bronze Age codes of Mesopotamia belonged to the realm of scientific inquiry, while legislation was a

[9] An example of the complexities of transmission is the word *theoi* that heads many Greek legal inscriptions. Pounder (1984) has traced the origins of this enigmatic heading through earlier Greek inscriptions back into the Ancient Near East, into the extensive curses and blessings that are common at the *end* of inscriptions such as CH.

separate genre, in the form of predominantly apodictic decrees and edicts. The Iron Age codes of the Mediterranean – Hebrew, Roman, and Greek – begin to combine the two, until the code itself becomes a legislative instrument. Thus Drakon's law could well have been a legislative act, while drawing on the features of the law code tradition.[10]

Were we to seek a simple parallel to Drakon's law, we need look no further than near-contemporary laws from the Bible. The distinction between intentional and unintentional killing, in connection with the issues of asylum and exile, is made in no less than three laws in the Pentateuch, one from each of its law codes.[11]

Exod. 21: 12-14 read:

He who strikes a man and kills him shall be put to death. As for one who did not stalk him but God forced his hand, I shall establish a place whither he may flee. But if a man plots against his neighbor to kill him with guile, from my altar you shall take him to die.

At first sight, the biblical parallel neatly fills in the missing elements in the Drakontian law, supporting Stroud's surmise that a law on intentional homicide followed the law on unintentional homicide, being inscribed on a part of the stele that is now lost. Unfortunately, it does not solve the problem of the word *kai* at the beginning of the Greek law, whether we translate "and (if)" or "even (if)." On the first hypothesis, if the Drakontian law began with a general statement on homicide like the biblical law, then the copyists would surely have copied it. On the second, the pattern of the biblical law, with its contrast between asylum for unintentional homicide and death for intentional homicide offers no support for the legal framework required by the translation, namely exile as a universal penalty. As Gagarin points out, the phrase "even if" makes reiteration of the law on intentional homicide unnecessary: the phrase takes as a matter of common knowledge that the law is identical to that of unintentional homicide (1981: 101-102).

The usefulness of the biblical law lies in its showing that Drakon did not invent the distinction between intentional and unintentional homicide or the penalty of exile. At the very least, these elements were part of a common legal culture of the Mediterranean basin in the first millennium B.C. The "deep structure" of Drakon's

[10] See Westbrook 1990 and 2000. It is important to note that "casuistic" is a mode of thinking more than a stylistic feature. None of the law codes comprise solely conditional clauses, although some are purer than others. The Mediterranean codes of the first millennium (with the notable exception of the Great Code of Gortyn) contain a high admixture of apodictic commands, which may reflect the shift from academic treatise to normative legislation.

[11] Exod. 21: 12-14 (Covenant Code); Num. 35: 9-34 (Priestly Code); Deut. 19: 1-13. Josh. 20: 1-9 contains a further version of the same law. The relationship between these laws, each of which differs in detail, is the subject of considerable debate among biblical scholars. See Barmash 2005: 71-93.

law makes it highly unlikely that its idiosyncrasies can be explained as deriving from the special facts of an actual contemporary case to which the lawgiver was responding, as Thür has proposed. (1985: 509). On the contrary, it is legitimate to look beyond Athens, indeed, beyond Greece, for a solution to our problem, even if this particular parallel failed to provide one.

A New Theory

It is a common assumption of all commentators on the Drakon inscription that the original inscription from which it was copied was exclusively concerned with homicide. There is no demonstrable basis for that assumption.

We have no idea of the length of the original inscription on the *axones*, or how many *axones* there were, for that matter. Plutarch's reference to the eighth law on the thirteenth axon of Solon indicates that a single *axon* could contain far more than a single law (Solon 19.4). Drakon's monument could have contained laws on many different subjects, just like the Gortyn Code. Later sources refer to laws of Drakon on various matters, notably adultery, theft, oaths, and idleness, but we are informed that Solon abolished all Drakon's laws except for those on homicide, which would explain why they alone would be of interest to the Athenian commission of 409/8.[12]

The extant fragment comprises highly specialized rules on certain narrow aspects of homicide, mostly pardon by the relatives for an unintentional killer and certain modalities of the killer's exile. There are many other aspects of homicide that could have been regulated, such as intentional homicide, justified homicide, indirect causation, procedural matters, etc., etc. In the casuistic law code tradition, not all the rules regarding one topic (or what we would regard as one topic) are necessarily dealt with in a single block; they may be scattered in different parts of the code. If that were the case with Drakon's law, even to a small degree, the commission would have had to comb the text looking for passages to extract.

Schmitz argues that the use of the singular "law" (*nomos*) in the preamble to the inscription infers that Drakon's law only concerned homicide (2001: 17). The preamble, however, tells us only what law was to be copied; it says nothing about the source from which it was copied. If we are to rely on inferences, then the headings "first *axon*" and "second *axon*" inserted by the copyist are powerful evidence for the opposite thesis. The use of such references makes much more sense if one is presenting excerpts from various locations in a longer source than if one is simply copying a text in its entirety.

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[12] Ath. Pol. 7.1; Plut., Solon 17.2. Schmitz (2001: 9-16, cf. Humphreys 1991: 18-19) argues that Drakon's laws concerned only homicide and that what apparently were other offences in fact all related to homicide. That might be arguable for adultery, where the husband who kills the lover caught in flagranti with his wife is not guilty of murder, but to assimilate theft of fruit and vegetables or a fine for breach of oath into homicide requires special pleading.

If the copyist were merely going through Drakon's inscription and extracting the sections on homicide and the section before the present law on unintentional homicide located on the first *axon* did not concern homicide, then clearly he would not have bothered to copy it. At the same time, that preceding law must have had sufficient connection with the homicide law for the latter to begin with the word "and."

What then was the subject of the missing law? The law code tradition suggests an answer. It provides compelling evidence not from an isolated parallel but from a canonical legal problem attested in several codes. Our starting point is a Mediterranean code roughly contemporary with the era of Drakon. Ex. 21: 18-19 from the biblical Covenant Code reads:

If men quarrel and a man strikes his neighbor with a stone or a fist and he does not die, but falls to his bed: if he rises and walks abroad on his stick, the striker is clear of liability; he shall only pay for his idleness and ensure his medical treatment.

Strikingly modern in its emphasis on compensation and rehabilitation, this law is a singular exception to the standard principles of redress for physical injury. They are best summarized in the Roman law of the Twelve Tables (8.2):

If he destroys a limb, unless he compounds with him, there shall be like for like.

This is the famous talionic law, which is found not only as a scholarly problem but constitutes a literary topos in its own right. The biblical version is (Ex. 21: 24-25):

An eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burning for a burning, a wound for a wound, a lash for a lash.

In case the meaning should be unclear, the law from CH that we have already seen is unsparingly literal (196):

If a man knocks out the eye of a man, his eye shall be knocked out.[13]

Two elements of the compensation law in Exodus indicate why it is an exception to the talionic principle. Firstly, the injury is not permanent and appears to leave no visible mark. This is not stated expressly, but emerges from the detailed description of the consequences. Secondly, it was not intentional, or at least not premeditated: it

[13] Some law codes have fixed payments instead of talio (e.g. CE 42-46, HL 7-9, 11-16), while CH has a mixture of both. We have argued elsewhere that these represent fixed ransom in lieu of revenge (Westbrook 1988b: 39-77.

arose from a quarrel and did not involve a weapon, merely a fist or stone that was picked up in anger.[14]

Moving backwards in time, HL present the same case, with some variations:
10. If someone wounds a man and makes him ill, he shall nurse him. He shall give a man in his place and he (the latter) shall work in his house until he is well. When he is well, he shall give him six shekels of silver and pay the doctor's fee.

The question of intention is not mentioned, but that is no indication that it was not a factor in the law or that the draftsman was unaware of the question. For the third and earliest source on this same problem focuses directly on the mental element. CH 206-208 also add a further variation of great significance:

If a gentleman strikes a gentleman in an affray and inflicts a wound on him, that gentleman shall swear, "I did not strike knowingly" and shall pay the doctor.

If he dies of his blow, he shall swear, and if he (the victim) is the son of a gentleman he shall pay 30 shekels of silver;

If he is the son of a commoner he shall pay 20 shekels of silver.

The discussion is therefore less concerned with the temporary nature of the injury but makes abundantly clear that the lack of intention (to cause injury when he punched someone in a fight) is a key mitigating factor. It then extends the discussion of unintentional wounding to that of unintentional homicide.

If Drakon's original law derived from this traditional problem, then the law on unintentional homicide would naturally have followed a law on unintentional injury. Of course, this extension of the traditional problem on injury could reflect creative jurisprudence on the part of CH, that was restricted to its own legal system. One final piece of evidence demonstrates that, to the contrary, it was part of the canonical discussion.[15]

It will be recalled that the biblical version of this law states that the injured man "does not die, but falls to his bed." It is a seemingly superfluous piece of negative information, since we are told in graphic terms how the victim makes a recovery. Its inclusion reveals that the biblical draftsman was well aware of a variation in the

[14] There is a striking resemblance to classical Athenian *aikeias*, which was a private claim for compensation for physical assault arising from an altercation, as opposed to deliberate wounding (*trauma ek pronoias*): Dem. 47.45-7, 47.64. See MacDowell 1978: 123; Cohen 2005: 215-16.

[15] CE 47-47A most probably involve the same problem, with the same extension to homicide, but the terseness of the discussion and uncertainties in the terminology make the evidence of these paragraphs unreliable: If in a fight(?) a man injures(?) a man, he shall pay 10 shekels of silver. If in a brawl a man causes the death of the son of a man, he shall pay 40 shekels of silver.

standard problem leading the discussion into the realm of homicide, but chose not to include it. It was a case of abridgement, not creativity. If the traditional problem also informed Drakon's law, it would have regarded unintentional homicide as a legitimate component in the discussion of unintentional injury.

Summary and Conclusions

The commission charged with copying Drakon's law of homicide extracted from the existing monument all relevant rules on homicide that they found and excluded any connected rules that were on other subjects. Accordingly, they excluded a section on injury that had preceded the first excerpt that they found, leaving only the provisions on homicide.[16]

The commissioners were highly pedantic in the execution of their task. They copied; they did not revise. As has been pointed out, they even copied obsolete rules that could no longer be valid.[17] Taking their orders literally and pedantically, they copied the homicide section as they found it, with the initial "and" (*kai*), even though it served no particular purpose in its new context.[18]

Furthermore, if the present text on the marble stele is a digest of disparate rules on homicide extracted from various places in the original source, then a more radical possibility emerges. The twenty or so decipherable lines of law that we have may themselves not represent a single law but several laws juxtaposed. This would explain certain anomalies that have disturbed commentators.

For example, the first sentence of the law (line 11), which has been the subject of our present inquiry, may have been separate from what follows, being a mere supplement to a law on unintentional wounding. The next rule (lines 11-13), which seems to introduce premeditated homicide in an inappropriate context, would have

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[16] It has been suggested that ll.33-34 in fact contained a section on injury, thereby making it unlikely that one had existed before the opening paragraph (oral communication of Prof. G. Thür). Since only a fragment remains, any reconstruction is speculative, but it seems to us unlikely that a text otherwise entirely concerned with homicide should suddenly discuss minor injury. The lines could well have concerned the same homicide mentioned in ll.34-35. More important is the fact that they were not concerned with substantive liability but with an entirely different legal issue: that of evidence. The statement regarding the one who initiated the violence ([... *archon*]*ta cherōn a*[*dikon* ...]) points to an evidentiary presumption for the purpose of allocating culpability.

[17] E.g. the retroactive clause in lines 19-20. See Stroud 1968: 50-51. The pedantry of the copyists is well illustrated by a companion piece to the present inscription, where the damaged original was transcribed with such caution that the stonecutter preferred to carve three pairs of points to indicate an illegible word rather than make the most obvious restoration: Lewis 1967: 132. (I am grateful to Prof. P. Rhodes for bringing this text to my attention.)

[18] It should be emphasized that this hypothesis could be constructed independently, without mention of the ancient Near East. What the Near Eastern evidence does is to place the hypothesis in a tangible context and thereby lift it out of the realm of interesting speculation.

been a later section concerned essentially with jurisdictional matters. The rules on pardon (lines 13-20), which use a different term for unpremeditated (*akon*), would again have started life as an independent rule.

If the first rule that the commissioners came across on the axon was merely a brief remark extending a discussion of unintentional wounding to unintentional homicide, then it is all the more understandable why they should have left the sentence in its entirety, including its initial *kai*.

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KAREN RØRBY KRISTENSEN (ODENSE)

RESPONSE TO RAYMOND WESTBROOK

For long, the rather enigmatic καὶ ἐάμ, the initial words of Drakon's law on unintentional homicide have troubled scholars. Initially, this was translated into 'and if'. Since scholars were unable to explain the absence of provisions relating to intentional homicide, a different translation was proposed. Many scholars now subscribe to the interpretation of these modest words as 'even if' and thus endow ἐάν with a concessive force. However, Professor Westbrook has argued persuasively that this does not provide a satisfying explanation, either, on the grounds that such an extreme ellipsis is unlikely in any law, and, further, that intentional homicide is unlikely to have been punished with exile alone.[1] However, if a court could pass a verdict of exile, I suppose that the same court could pass one of death, too. Evidently, at the time when the original law was passed, in the late seventh century B.C., killings were no longer regarded as a matter to be settled in disputes that involved solely two or more families. Moreover, there are no obvious reasons why capital punishment would not have been an option in the later Archaic Age as it certainly was in the Classical period: clemency, compassion and Human Rights were no issues in antiquity.

Hence, I am fully inclined to agree with Westbrook's doubts relating to the translation of καὶ ἐάμ as 'even if' in the first line of Drakon's homicide law, and thus favour the plain and simple translation 'and if'.

Professor Westbrook suggests that we may find an alternative explanation for καὶ ἐάμ if we look at the Near-Eastern legal codes. Whilst I am no expert in Near-Eastern law, I have chosen to approach the question of legal codes as a literary legal genre from a Cretan point of view. Crete is the place where we supposedly find legal codes in the Greek sphere. The first question I should like to address is this: is the law code really a single legal genre? Secondly, I shall repeat a question recently raised by K.-J. Hölkeskamp: 'What's in a code?'[2] I believe different 'codes' will produce different answers to this question. Professor Westbrook holds that we need to look for the underlying legal principles and disregard differences caused by time and space. In the past half a century or so, we have been troubled by the discussions

[1] This is the implication of the interpretation of καὶ ἐάμ, as 'even if', that is to say: 'even if a man not intentionally kills another, he is exiled' (translation M. Gagarin *Drakon and early Athenian Homicide Law* New Haven and London 1981: xvi).

[2] K.-J. Hölkeskamp "What's in a code? Solon's laws between complexity, compilation and contingency", *Hermes* 133, 2005: 280-293.

on *the unity of Greek law* and on this question scholars remain divided. Recently, some bridge building has taken place, suggesting a unity of *procedural* Greek law while leaving substantive law to all its diversity.[3] However, Professor Westbrook's proposition means that we should be further troubled by the unity of *law* in general!

We learned above that 'the characteristic that mark these sources [i.e. the legal codes] as belonging to a single genre, … lie in both their form and content'. Their form, that is the casuistic conditional sentence, a protasis succeeded by an apodosis, is thus a feature of the law code.[4] Moreover, we are told that 'the law codes are not a concatenation of individual laws or even associated laws.'

Archaic Greek legislation does indeed consist of casuistic formulas, though sometimes in very elaborate sequences. Likewise, in many cases the content of individual pieces of legislation concerns aspects of every-day life. Similarity in content does not prove much, though. For example adultery may have occurred everywhere and therefore hardly proves that a universal legal principle did apply, because, as Professor Westbrook argues, 'some discretion was allowed to the husband'. In fact, according to the Law Code of Gortyn the husband was to receive a fine. Only if the relatives of the adulterer failed to pay the fine or ransom would the husband be allowed to do whatever he wanted to the adulterer.[5] The whole situation aims at an out-of-court settlement and the removal of any future claims. In case of adultery the husband would always be the individual most directly affected: the interest of the wife's family and the family of the adulterer would be of only secondary importance.

I shall now proceed to discuss Professor Westbrook's 'goring ox'. I find it hard to believe that his test case proves more than that:

1. Goring oxen were a problem
2. Oxen had long horns in these societies
3. Greece apparently did not suffer from goring oxen.

We do, nonetheless, have evidence for savage dogs (in Gortyn), although disputes arising in connection with injuries caused by dogs remained an issue that concerned only the owner of the dog and the individual who had sustained damage.

We may go on to pose another question. When do individual laws become legal codes? I cannot really answer this question on the basis of the Cretan material. However, Crete proves excellent as an example of the nature of archaic legislation and how it evolved over time. Genuine archaic laws are known in substantial numbers from Crete; we have some 225 pieces of legislation, including small fragments as well as fully preserved legal texts, most notably the so-called Law

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[3] See for example M. Gagarin "The Unity of Greek Law" in M. Gagarin & D. Cohen (eds.) *The Cambridge Companion to Ancient Greek Law* Cambridge 2005: 29-40.

[4] This is also the case for the casuistic formula without the conditional sentence proper: 'he who does this or that, shall pay so and so'. So is the case also in Exodus cited above in Professor Westbrook's paper: 'He who strikes a man and kills him shall be put to death'

[5] See *IC* IV 72 II.20-24, and further in II.28-36.

Code of Gortyn. But despite the survival of this extraordinary inscription, the organisation of legislation into legal codes is not a prominent feature of Archaic Cretan law! On the contrary, nearly two centuries were to pass before the Cretans began to compile and organise legislation to the extent attested in the Law Code of Gortyn. Sections of this inscription certainly have been the object of theoretical considerations, but even these are few. These considerations seem, however, to have favoured the process of organisation, rather than that of 'paradigmatic foundation for further legal discussions'. The first column of the Code constitutes such a case: on the basis of the occurrence of a vacat, we can identify several closely related pieces of legislation, which at some point were compiled so as to form an entity.[6] We may subdivide the text of this column into six sections. The first deals with illegal seizure of the person who was the object of a dispute (I.2-12), followed by a singleton casuistic conditional sentence that appears to be an amendment of the preceding law (I.12-14). The following section (I.15-36) no longer concerns seizure, but the actual substance giving rise to the process of litigation. The evident connection is the ban against seizure of the person whose status was the issue in the following law. Upon this follows a law prescribing the procedure to be followed if closure of the matter is prevented (for example if the disputed man took sanctuary in a temple, I. 36-49). Three short additions close the first law of the Law Code (I.49-51, I.51-56, I.56-II.2). The last of these provisions refers back to the initial piece on seizure by stating whom one could legally seize.

We can thus identify two different processes: first, an attempt to incorporate and organise legislation relating to the same situation, and, second, the continuous process of enacting supplementary additions to the original law, which in this case was also brought together with another law of related substance. Although the result is impressing, the first law of the Law Code remains a compilation of related legislation. Eventually the Law Code was organised into a shape where the individual pieces form a coherent entity. Careful analysis of the Law Code suggests that it was a compilation undertaken over some length of time during which legislation was not only compiled but also subjected to reorganisation of the individual laws, and to the addition of further supplementary enactments. In that respect, the Law Code is not a code; rather it is a thematically coherent inscription, which even suffers from a number of shortcomings. Professor Westbrook states that the casuistic method precludes comprehensiveness. The implication of this contention is that the Law Code of Gortyn is not a code. The case to which Westbrook refers demonstrates exactly that: the inheritance law was designed to

[6] See in particular M. Gagarin "The Organisation of the Gortyn Law Code" *Greek Roman and Byzantine Studies* 23 1982: 129-146 (especially 138-140), A. Maffi "Processo di status e rivendicazione in proprietà nell Codice di Gortyna: 'Diadikasia' o azione delittuale?" *Dike* 5, 2002: 111-134, discussing the suggestions of Thür in Symposion XII (1999), and K.R. Kristensen "Codification, Tradition, and Innovation in the Law Code of Gortyn" *Dike* 7, 2004: 135-168.

cover all possible cases.[7] However, the fourth and fifth groups of heirs were so loosely defined that this reflects a way of thinking, more than it reflects an attempt to fill all possible gaps.

Even if I could be persuaded that the Law Code is indeed a legal code, which I cannot, I find it troubling to see how this could be part of a tradition. A considerable number of inscriptions, some of them admittedly quite fragmentary, were scattered all over the Pythios temple in Gortyn and are all dated within a period of some seventy-five years.[8] They do, nonetheless, contain the casuistic formula. They appear to be dealing with family matters, political matters, sacred matters and so on, and even possible injuries to individuals and property. The famous eight laws from Dreros,[9] more or less the contemporaries of Drakon's homicide law, were not arranged in a form even remotely resembling a continuous code; rather, the text consists of eight single enactments, still in the form of the casuistic formula. At least four dozens of legal inscriptions from Crete antedate the so-called codes and were all separate single legal enactments published at random on the walls of the temples in for example Dreros, Lyttos, Gortyn and Axos.[10] The so-called codes do not antedate the late sixth or perhaps even the fifth century B.C. By this point in time (that is, the late sixth century B.C.), the masons had begun to cut their laws in continuous boustrophedon in one or more columns. Still, there are also a number of cases where individual pieces of legislation that were unrelated to one another were listed in the same column.[11]

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[7] See *IC* IV 72 V.5-28.

[8] *IC* IV 1-27, 29-38, and 40, c. 600-525 B.C., although *IC* IV 30 could be dated even lower 500 B.C. (?).

[9] P. Demargne & H. van Effenterre *Bulletin de correspondance hellénique* 61 1937: 333-348 (republished in *Recueil d'inscriptions politiques et juridiques del'archaïsme grec I* Rome 1994 I no. 81), H. van Effenterre "Une bilingue étéocrétoise?" *Revue de philologie, de literature et d'historie ancienne* 3, 1946: 131-138, and H. van Effenterre "Inscriptions archaïques crétoises" *Bulletin de correspondance hellénique* 1946: 588-606 no. 1-6 (except for no. 6, they are republished in *Nomima. Recueil d'inscriptions politiques et juridiques del'archaïsme grec I* Rome 1994 nos. 64, 68 (see also *Nomima. Recueil d'inscriptions politiques et juridiques del'archaïsme grec II* Rome 1995 II no. 89), 27, 66 and *Nomima II* no. 10).

[10] In addition to the eight laws from Dreros, there are the Gortynian inscriptions from the Pythion *IC* IV 1-27, 29-38, and 40. Amongst these there are a number fragments that may not belong with the Pythion, though P. Perlman ("Gortyn. The first seven hundred years. Part II. The laws from the Temple of Apollo Pythios" in Th.H. Nielsen (ed.) *Even More Studies in the Ancient Greek Polis*, 6, 2002: 187-227) has recently argued that they all do. Further texts of this type are the 'main code' of Axos (see below), as well as H. & M. van Effenterre "Nouvelles lois archaïques de Lyttos" *Bulletin de correspondance hellénique* 1985: 158-162 (= H. van Effenterre & F. Ruzé *Nomima. Recueil d'inscriptions politiques et juridiques del'archaïsme grec I* Rome 1994, no.12).

[11] See for example *IC* IV 43AabBab, which comprises four non-related and individual laws, and *IC* I xviii 5 from Lyttos where the upper part beyond the punctuation mark in line

Furthermore, the number of inscriptions that could reasonably be designated as 'codes' are desperately few: the 'main code' of Axos consists of a cluster of eight inscriptions,[12] which *may* have shared a common content and *may* have been part of the same wall. In addition to the famous Code, no more than two inscriptions could be called codes, and they too are from Gortyn.[13] The origin of the so-called legal codes of Crete appears to be the result of a longer development within an internal Greek tradition. The casuistic formula is a feature that is a characteristic of codes, at least as much as a characteristic of individual pieces of legislation. It even extends beyond Near-Eastern and Mediterranean law and legislation: it is also a feature of orally transmitted Icelandic laws, of the laws of Geágás of the twelfth and thirteenth centuries, as well as of the Mediaeval Danish landscape laws.

Still, I agree with Professor Westbrook's objections to the widespread translation of καὶ ἐάμ in the first line of Drakon's law, though I do not believe we can make out the content of the preceding law. Compilations of Cretan legislation are unpredictable: sometimes the sequences of individual stipulations within them are well considered; sometimes they are not. We do not have evidence that the case would have been any different at Athens in the late seventh century B.C.

seven seems to deal with inheritance (line 3 σὺν τõι ἀδε[λπιõι). The lower part is apparently on theft (line 15 συλέν 'rob').

[12] See *IC* II v 1-7, and 11, c. 525-500 B.C.

[13] That is, *IC* IV 41 I-VII as well as *IC* IV 75A-D where pledge apparently is the issue in all four columns.

DAVID WHITEHEAD (BELFAST)

ATHENIAN JURIES IN MILITARY *GRAPHAI*

Though much is uncertain in modern scholarship about the public prosecution (by *graphê*) of military offences under classical Athenian law,[1] the points of common agreement have long included two inter-connected ones which relate to the procedural conduct of cases brought under this head. The consensus has held (*a*) that it was the generals (*stratêgoi*) who presided over the court which heard such cases, and (*b*) that the dikasts themselves were the defendant's fellow-soldiers.[2] And this is because points *a* and *b* alike appear to rest on a firm evidential basis: the opening chapters of, respectively, Lysias 15 and 14 *Against Alkibiades*, which are the only speeches from a military *graphê* which survive in full (from the year 395).

When I was invited to submit a proposal for a paper at *Symposion 2007*, this seemed a good opportunity to voice a suspicion (which had originated a year or so earlier) that only the first of these orthodoxies is well-founded. So the first and longest part of what follows here (Part I) is a lightly-revised version of what I did submit, and what was accepted as my submission; it is also the version to which Peter Rhodes formulated the first (oral) version of his Response. However, just weeks before speaking to my paper in Durham I learned of a published study (Bertazzoli 2001) which had anticipated some of my arguments; arguments that I had wrongly believed to be novel. On the advice of Edward Harris (who opined that an academic standpoint can gain strength when it is reached by a plurality of scholars working independently of one other) I have therefore not, here, absorbed Bertazzoli's arguments as if I had read them when framing my own. Instead, part II below – presented verbally, and summarily, in Durham – is my response to Bertazzoli. Part III then reflects briefly on the discussion at *Symposion 2007* itself (including the views of my Respondent) and the current state of the argument.

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[1] See e.g. Lipsius (1905-1915) 452-459, MacDowell (1962) 110-112, Harrison (1971) 31-34, MacDowell (1978) 159-161; Hamel (1998a) 63-64, vastly expanded in Hamel (1998b); Harris (2004) 256-260.

[2] So e.g. Jebb (1893) 253; Lipsius (1905-1915) 112-113, 143, 456; Berneker (1964); Harrison (1971) 32, 46; Rhodes (1972) 183 n. 4; Pritchett (1974) 234; MacDowell (1978) 160; Ridley (1979) 513; Carey (1989) 144; Fernández Nieto (1990) 111 (point *a* only); Saunders (1991) 324 ('special military courts') and 328 n. 28 ('special courts of soldiers'); Hansen (1991) 268-9 (point *a* only); Hamel (1998a) 63, and *obiter* in Hamel (1998b) 398 (point *b* only); Kapparis (1999) 224; Todd (2000) 161; Hansen (2003) 279 (point *b* only).

I

In Lysias 15.1 the (unidentifiable) speaker begins thus:

> Ἐγὼ μέν, ὦ ἄνδρες δικασταί, καὶ ὑμᾶς αἰτοῦμαι τὰ δίκαια ψηφίσασθαι, καὶ τῶν στρατηγῶν δέομαι, ἐπεὶ καὶ ἐν τῇ ἄλλῃ ἀρχῇ πολλοῦ ἄξιοι τῇ πόλει γεγόνασι, καὶ τῶν τῆς ἀστρατείας γραφῶν κοινοὺς εἶναι τῷ τε διώκοντι καὶ τῷ φεύγοντι, καὶ μὴ βοηθοῦντας ᾧ ἂν βούλωνται πᾶσαν προθυμίαν ἔχειν παρὰ τὸ δίκαιον ὑμᾶς ψηφίσασθαι ('For my part, men of the jury, I ask you to vote for what is just, and the generals I beg – since in the rest of their official duties too they have behaved in a way worthy of the polis – to be impartial also towards both the plaintiff and the defendant in *graphai astrateias*, and, by not helping the party they might favour, to make every effort to have you vote contrary to what is just').

Jebb, Harrison, Pritchett and Carey all cite this passage as sufficient to prove that the generals who are being exhorted to display this impartiality (or neutrality) are holding the actual presidency of the court.[3] Strictly speaking it falls short of that, since the passage could equally well bear the interpretation that the generals were merely present in court and giving evidence *ex officio*. Nevertheless as the speaker proceeds, through §§ 2-4 which are addressed to the generals themselves, he puts forward procedural analogies with other presiding officials – the thesmothetai, the (*sc*. eponymous) archon, the polemarch, and the Eleven – which do make it necessary to accept that here too the address is to the actual presidency of the court, the authority which, in that capacity, will be (in a twice-repeated phrase) putting the matter to the vote.[4]

Accepting this, furthermore, creates no problems for our understanding of Athenian law and legal procedure in the fourth century. Above and beyond the fact that the ten generals were allowed to exercize summary judicial powers *in the field* (?Aristot.*Ath.Pol*.62.1, etc.) – what Fernández Nieto felicitously calls 'la jurisdicción castrense'[5] – they were (as indeed Lys. 15.1 notes) holders of a public office (ἀρχή) which had its civilian aspects. So here, in short, the ἀρχή is the εἰσάγουσα ἀρχή: in suits which arose out of military service it was one of the generals who accepted the case in the first instance and brought to a court for determination.[6]

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[3] Jebb (1893) 253; Harrison (1971) 32 with n. 3; Pritchett (1974) 234; Carey (1989) 144. For κοινός as even-handed cf. e.g. Thuc.3.53.2, 3.68.1; Isoc.5.80; ?Aristot.*Ath.Pol*.6.3.

[4] Hence 15.1-4 is the appropriate citation, as in e.g. Hansen (1991) 269 n. 39 (but contrast 190 with n. 116); Hamel (1998a) 63 n. 20.

[5] Fernández Nieto (1990) 115.

[6] That the full board of ten would have been spared from other duties to undertake this task is of course impossible. Lys.15.1 (τῶν στρατηγῶν δέομαι κτλ) does appears to indicate a

Should one therefore be believed that the dikasts, too, in such military lawsuits were entirely composed of Athenians wearing (as it were) their helmets, i.e. soldiers rather than regular dikasts?

> Solid grounds, *prima facie*, for thinking so come in Lysias 14.4-5 (again delivered by an unidentifiable speaker):
> δοκεῖ δέ μοι καὶ πολίτου χρηστοῦ καὶ καὶ δικαστοῦ δικαίου ἔργον εἶναι ταύτῃ τοὺς νόμους διαλαμβάνειν, ὅπῃ εἰς τὸν λοιπὸν χρόνον μέλλει συνοίσειν τῇ πόλει. (5) τολμῶσι γάρ τινες λέγειν ὡς οὐδεὶς ἔνοχός ἐστι λιποταξίου οὐδὲ δειλίας· μάχην γὰρ οὐδεμίαν γεγονέναι, τὸν δὲ νόμον κελεύειν, ἐάν τις λίπῃ τήν τάξιν εἰς τοὐπίσω δειλίας ἕνεκα, μαχομένων τῶν ἄλλων, περὶ τούτου τούς στρατιώτας δικάζειν. ὁ δὲ νόμος οὐ περὶ τούτων κελεύει μόνον, ἀλλὰ καὶ ὁπόσοι ἂν μὴ παρῶσιν ἐν τῇ πεζῇ στρατίᾳ (‘It seems to me that it is the task of an honest citizen and of an upright dikast alike to interpret the laws in a way that will benefit the city in the future. (5) For certain people dare to say that nobody is liable to a charge of desertion or of cowardice, since no battle took place; but (that) the law prescribes that if someone deserts his post in retreat because of cowardice, while the others are fighting, the soldiers are to be dikasts in respect of this man. But the law makes prescriptions not only about these men but also any who fail to appear in the infantry ranks’).

I want to suggest that modern scholars have accepted this at face value too readily, without considering either the conceptual or the practical difficulties it raises. How did the kind of *ad hoc* soldier-dikasts envisaged here relate to the annual pool of ordinary dikasts, whose empanelling and general procedural handling is so copiously attested in the *Ath.Pol.* and elsewhere? In Mogens Hansen’s summary, ‘a juror in the People’s Court had (1) to be at least thirty years old; (2) to have been picked by lot at the beginning of the year as a member of the panel of 6000 citizens from which the jury for each individual case would be drawn; (3) to have sworn the Heliastic Oath; and (4) to have been picked by lot on a given day to serve for that day’.[7] If *ad hoc* soldier-dikasts were subject to these conditions, one would like to know exactly how so (especially in respect of points 2 and 3); and if not, on what basis and with what alternative guarantees. Had they sworn the normal oath? Were they paid? On

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plurality (and hence a subset of the ten), but one can posit rhetorical elision here, moving implicitly from the plural to singular. See further below, Part III.

[7] Hansen (1991) 178-203, at 181. Peter Rhodes rightly points out in his Response that the procedures for jury empanelling (etc.) described in the *Ath.Pol.* (and summarised here by Hansen) was not yet in use in the 390s. See further below, Part III.

such points the sources – including Lysias 14 and 15 themselves, to which we must return below – are silent.[8]

Once acknowledged, such concerns as these can in my view be met by a fresh look at, and a broader interpretation of, the phrase περὶ τούτου τοὺς στρατιώτας δικάζειν in Lys.14.5.

My translation of this passage, given above, sought to be as neutral as possible, but there is one fundamental question here which it is virtually impossible not to beg: is the relevant law actually being quoted, *verbatim*? Debra Hamel certainly thinks so, and formats her own translation accordingly:[9]

> Some dare to say that no one is liable to a charge of *lipotaxion* or *deilia* because there has not been any battle, and that the law prescribes, "if someone leaves his position out of cowardice, moving to the rear while the others are fighting, in the case of this man the soldiers serve as jurors." But the law applies not only to these men, but also to all those who do not appear in the infantry.

No other translator makes his/her view comparably clear, though others may of course share it nonetheless. In any event the proposition is that we have here an extract from the law in question, which would need to be treated in precisely the same terms as (e.g.) the citations of the law on homicide etc. (with τὴν βουλὴν δικάζειν as counterpart to the present τοὺς στρατιώτας δικάζειν) in Demosth. 23.22, 24, 26, 30 and 215. And if this were demonstrably true it would be pointless to challenge the idea, no matter how awkward its corollaries, that this part of the law created military dikasts. But surely caution is required here. These (for us) vital words are proffered not as explicit quotation of what the law says, nor even as the speaker's implicit endorsement of what it says, but, on the contrary, merely as part of what 'certain people' (τινες) say that it says; 'certain people' whom the speaker cites only and immediately to disagree with. (They are presumably, as Carey

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[8] All that is clear from Lys.14-15 is that the jurors hearing that case had sworn an oath or oaths (14.22, 40, 47; 15.10). Harrison (1971) 46 (effectively repeating Lipsius (1905-1915) 143) writes that '[t]here must have been some procedure, the details of which we cannot recover, for making a special selection of jurors in two types of case. In those which involved matters connected with the Mysteries only those initiated into the Mysteries could sit as jurors [Andok.1.28, 31], and in cases of military indiscipline in the field juries were composed of men who had been serving on the campaign in question [Lys.14.5]'. This at least acknowledges the problem, but the implied parallelism looks, to me, misleading. Andok.1.28 concerns not a recurrent procedural arrangement but a specific decree to deal with the scandals of 415; and besides, the most plausible interpretation of the decision taken then is that 'of the jury allotted to the case, those members who had not been initiated were to be excluded' (MacDowell (1962) 82).

[9] Hamel (1998b) 364.

suggests, the defendant's friends and supporters.[10]) Perhaps the wording of the law attributed to these people is exact. That is a possibility I cannot disprove. But perhaps, instead, only the words ἐάν τις λίπῃ τὴν τάξιν εἰς τοὐπίσω δειλίας ἕνεκα, μαχομένων τῶν ἄλλων represent direct quotation, or perhaps only ἐάν τις λίπῃ τὴν τάξιν εἰς τοὐπίσω δειλίας ἕνεκα, *or perhaps none of it at all*.[11] Under any of these three scenarios, at any rate, the phrase τοὺς στρατιώτας δικάζειν would not compel belief in the existence of a special category of dikasts who were all, by definition, soldiers.

Besides, is the phrase not a troublingly vague one? In an instance like τὴν βουλὴν δικάζειν (Demosth. 23: above) it is clear that the council of the Areiopagos is meant, because the council of the Areiopagos has a clear, objective and ongoing existence. But here, orthodoxy requires us to believe, an Athenian simply set up 'the soldiers' as dikasts – leaving it to modern scholars to explain, as they have routinely felt obliged to do, that *particular* στρατιῶται are meant: those 'who had served on the campaign'?[12]

We do have here, I reiterate, an extra, complicating layer of rhetoric in that what is presented first is what τινες assert about the law. For a parallel, where this is even more overt, see [Demosth.] 43.7: οὗτοι ἅπαντες κοινῇ ἐπιβουλεύσαντες προσεκαλέσαντο τὴν γυναῖκα πρὸς τὸν ἄρχοντα εἰς διαδικασίαν τοῦ κλήρου τοῦ Ἀγνίου, φάσκοντες τὸν νόμον κελεύειν ['claiming that the law prescribes etc.'] παρὰ τοῦ ἐπιδεδικασμένου καὶ ἔχοντος τὸν κλῆρον προσκαλεῖσθαι, ἐάν τις βούληται ἀμφισβητεῖν. Litigants, to put it mildly, were under no obligation to present their opponents' arguments accurately, fairly or completely.[13] Yet even if this complication is stripped out and 14.5 treated as if everything in it was expressed by the speaker himself, his main aim is to convince the court that the law covers pre- as well as post-engagement dereliction of duty; *astrateia* as well as *lipotaxion*.[14] All else, surely, is secondary, unemphatic, and this includes the phrase περὶ τούτου τοὺς στρατιώτας δικάζειν. It becomes a loose way – prompted by the fact that this is,

[10] Carey (1989) 152.

[11] The relevant passage of law is of course read out to the court at the end of § 5, so one seizes upon § 6 for any clue as to what the dikasts have heard (Ἀκούετε, ὦ ἄνδρες δικασταί, ὅτι κτλ); and the repetition of the phrase εἰς τοὐπίσω might be significant in that regard.

[12] MacDowell (1978) 160; his gloss is typical.

[13] Compare (*mutatis mutandis*) Dover (1993) v: 'I have observed that other people cannot be trusted to state my own arguments correctly and adequately, and I have to infer that I cannot be trusted to state theirs'.

[14] This point is somewhat obscured in the most recent translation, that of Todd (2000) 164: '[*a*] Some people dare to claim that nobody is liable to charges of desertion or cowardice, since no battle took place, whereas [*b*] the law says etc'. Rather, both *a* and *b*, together, make up the daring claim, and *b* is refuted by what the law actually prescribes (ὁ δὲ νόμος οὐ περὶ τούτων κελεύει μόνον, ἀλλὰ καὶ κτλ). This is better conveyed in the Loeb edition (Lamb (1930) 341), and latterly by Hamel (1998b) 364 (quoted above).

precisely, a military case – of expressing *a general likelihood that the dikasts will include soldiers*, including some who may have been on the campaign(s) in question.[15]

The hypothesis can be tested by reading Lysias 14 and 15 with this very issue in mind. Are the speakers, uniquely in the corpus of fully-extant Attic oratory, addressing a panel of dikasts made up entirely of soldiers (as the orthodox view of 14.5 obviously has to suppose) or a normal Athenian dikasterion?

Support for orthodoxy might appear to arise principally from five other (and for present purposes ancillary) passages:

(i) 14.7: the speaker claims that the younger Alkibiades 'did not march out with you' (οὐκ ἐξῆλθε [Reiske: ἐπεξῆλθε mss] μεθ' ὑμῶν);

(ii) 14.9: his behaviour is said to have shown that 'he despised you and feared the enemy' (ὑμῶν κατεφρόνησε καὶ τοὺς πολεμίους ἔδεισε);

(iii) 14.15: the dikasts are flattered by being told that, unlike the defendant, 'you[16] did not dare to abandon the ranks or to choose what was pleasant for you yourselves; no, you were much more afraid of the laws of the polis than the danger of facing the enemy' (οὐκ ἐτολμᾶτε ἀπολιπεῖν τὰς τάξεις οὐδὲ τἀρεστὰ αὐτοῖς αἱρεῖσθαι ἀλλὰ πολὺ μᾶλλον ἐφοβεῖσθε τοὺς τῆς πόλεως νόμους ἢ τὸν πρὸς τοὺς πολεμίους κίνδυνον);

(iv) 14.17: Alkibiades is referred to as the man who 'did not dare to fight with you' (οὐκ ἐτόλμα μεθ' ὑμῶν μάχεσθαι);

(v) 15.12: the dikasts are urged to vote in the same frame of mind 'as when you thought that you were about to face the ultimate danger against the enemy'[17] (ἥνπερ ὅτε ᾔεσθε πρὸς τοὺς πολεμίους διακινδυνεύσειν).

I begin with passages i and iv, which constitute an obvious pairing. Since the phrases ἐξῆλθε μεθ' ὑμῶν and μεθ' ὑμῶν μάχεσθαι do unquestionably refer to the particular campaign in question, that of 395, the plural 'you' of μεθ' ὑμῶν might seem in isolation to demand to be understood as the particular soldiers who fought in it. But the fact is, we have no right to interpret such phrases in isolation. Rather, they have to be placed in a broader context: the context of how speakers in Athenian lawsuits conventionally addressed (and manipulated) dikasts, which, let it be repeated, are in all other surviving speeches besides Lysias 14-15 "civilian" dikasts. Thus passage i, Lys.14.7, could be juxtaposed with Lys.25.9: some of those who had

[15] For recently-serving soldiers as a subset of a jury see Lys.21.10 (καὶ ταυθ' ὅτι ἀληθῆ λέγω, πάντες ἐπίστασθε ὅσοι ἐτυγχάνετε ὄντες ἐκεῖ τῶν στρατιωτῶν); [Demosth.] 50.3 (δέομαι ὑμῶν ἁπάντων δικαίαν δέησιν· ὅσοι μὲν τῶν στρατιωτῶν ἐστε καὶ παρῆτε ἐκεῖ, αὐτοί τε ἀναμνήσθητε καὶ τοῖς παρακαθημένοις φράζετε τήν τ' ἐμὴν προθυμίαν κτλ). When the term στρατιῶται reappears later in Lys.14 it embraces allied contingents as well as Athenian troops (§ 14).

[16] These second-person plurals come immediately after a mention, in 14.14, of οἱ στρατιῶται in the third person, but the context makes it clear that this means the whole army, non-Athenian allies included; cf. Carey (1989) 157.

[17] I borrow here the translation of Todd (2000) 176, for reasons which will emerge below.

registered for Eleusis in 403 besieged their own side 'having marched out with you', ἐξελθόντες μεθ' ὑμῶν. And with passage iii, Lys.14.17, one could compare Lyk.*Leok*.57: rather than absconding in 338, Leokrates should have stayed to hold off the enemy 'by fighting with you', μεθ' ὑμῶν μαχόμενος. In these instances μεθ' ὑμῶν is not to be taken literally, for it is part and parcel of the familiar psychological assimilation of three levels of second-person plurals: you the dikasts in the present case = you all dikasts (past, present and future) = you the citizens at large.[18]

Other military versions of this are sometimes fairly broad-brush in their application (so Lys.10.27: the speaker's father was many times a *stratêgos* and shared dangers) μεθ' ὑμῶν) and sometimes relate to specific campaigns. And if they are of the latter type, they fall into one of three sub-types: (*a*) they can refer, as here, to recent events (so Demosth.23.151, Charidemos campaigned μεθ' ὑμῶν against Amphipolis, and Hyp.*Ath*.29: Athenogenes did not serve μεθ' ὑμῶν at Chaironeia);[19] (*b*) they can relate to events long enough ago for only the elderly dikasts to remember (so Demosth.20.52-53, from 355: Corinthians fought μεθ' ὑμῶν τῶν τοτε στρατευσαμένων in 394); or (*c*) they can concern events far back in the distant, historical past (so [Demosth.] 59.96, from c.340: the Plataians fought μεθ' ὑμῶν in 479).

In the light of all this, our passages ii, iii and v likewise do not demand to be understood as referring narrowly to the present dikasts in an antecedent role as soldiers on the campaign which has brought the younger Alkibiades to trial. Instead, I contend, all four of these passages conform fully with the conventional rhetorical treatment of Athenian dikasts alluded to above.

And so indeed do Lys.14-15 as a whole; 14 especially. To avoid undue repetition, the more striking examples will suffice. When 14.10 describes Alkibiades as 'not scrutinized by you' (οὔτε ὑφ' ὑμῶν δοκιμασθείς) for cavalry service, this associates the present dikasts with the body which actually performed that task, the *boulê* (*Ath.Pol*.49.1-2, etc.); 14.17 makes them conceptually responsible for the death-sentence passed on the elder Alkibiades (cf. 14.39 below); 14.24 refers to what 'you' habitually do in tolerating defendants who speak at length on the merits of themselves and their ancestors; 14.25 recalls Archedemos Blear-Eye embezzling 'your' property; 14.30 claims an onus to punish any member of Alkibiades' family who comes to court as one falling on both the present dikasts and future ones (καὶ ὑμῖν καὶ τοῖς μέλλουσιν ἔσεσθαι), i.e. not only in military trials; 14.39 declares that 'the more senior of you' (οἱ πρεσβύτεροι ὑμῶν) condemned the elder Alkibiades to death; 14.43 refers, more generally, to previous occasions when 'you' have acquitted guilty defendants. And note also 14.32-34, where the dikasts are invited to be indignant that the defendant 'is using your (*sc*. military) virtues as

[18] See on this, in brief, Whitehead (2000) 48-49, 67.

[19] Dein.2.18, ὅτε δ' ὑμεῖς ἐστρατεύεσθε πάντες, οὗτος ἦν ἐν τῷ δεσμωτηρίῳ, probably refers to Chaironeia also (looking back from 323); so Worthington (1993) 306.

precedents for his own villainy (ταῖς ὑμετέραις ἀρεταῖς χρῆται παραδείγμασι περὶ τῆς ἑαυτοῦ πονηρίας)'; this turns out to mean the democratic counter-revolution launched from Phyle, that iconic event from which so many other litigants in late fifth-century and early fourth-century lawsuits sought to generate warm patriotism and cognate emotions in the dikasts sitting in judgement on them.[20] In sum: the dikasts in Lys.14-15 are always apostrophised in the way familiar from countless other forensic speeches (ὦ ἄνδρες δικασταί), never as anything else; they are never asked to bring to bear any factual knowledge from the campaign; and in what is presented as the first military trial of its kind for almost a decade (14.4) it is never suggested that they are coming to their task as novices, who might benefit from guidance (real or rhetorical) on that score. Instead they are treated throughout as the normal, seasoned dikasts they surely were.

Is there other evidence which bears upon this question? At this point it is necessary to look outside Lys.14-15, and indeed beyond forensic oratory of any kind – to Plato, *Laws* 943A-D. The extent to which this passage may have influenced interpretation of Lys.14.5 is not clear to me, though they have certainly (and unsurprisingly) been mentioned together.[21] In any event Plato has this to say:

> στρατεύεσθαι τὸν καταλεγέντα ἢ τὸν ἐν μέρει τινὶ τεταγμένον. ἐὰν δέ τις ἐκλείπῃ τινὶ κάκῃ μὴ στρατηγῶν ἀφέντων, γραφὰς ἀστρατείας εἶναι πρὸς τοὺς πολεμικοὺς ἄρχοντας, ὅταν ἔλθωσιν ἀπὸ στρατοπέδου, δικάζειν δὲ τοὺς στρατεύσαντας ἑκάστους χωρίς, ὁπλίτας τε καὶ ἱππέας ... καὶ τοὺς ἄλλους δὲ κατὰ ταὐτὰ εἰς τοὺς αὑτῶν συννόμους ... ἐὰν δὲ στρατεύσηται μέν τις, μὴ ἀπαγαγόντων δὲ τῶν ἀρχόντων οἴκαδε προαπέλθῃ τοῦ χρόνου, λιποταξίου τούτων εἶναι γραφὰς ἐν τοῖς αὐτοῖς οἷς περὶ τῆς ἀστρατείας ('He who has been rostered or assigned to some special detail is to go on campaign. If anyone is cowardly and absconds without the generals' leave, public prosecutions for failure to serve [*astrateia*] are to be brought before the military authorities, after return from camp, and the jurors are to be those men who have been on (the) campaign, separately grouped: hoplites and cavalry and the other categories likewise,

[20] See for example Isok.16, a closely contemporary (and thematically related: Carey (1989) 148-150) speech delivered in a trial where again the defendant is the younger Alkibiades; a rhetorical flourish in the final chapter (§ 50) makes him, the speaker, lament the prospect that τοτε μὲν μεθ' ὑμῶν, νῦν δ' ὑφ' ὑμῶν τῆς πόλεως στερήσομαι. Also e.g. Isok.18.2 with 48-50; Lys.13.62-63, 26.17-20, 31.8-14; Aischin. 2.176, 3.187-190.

[21] See e.g. England (1921) 2.573: 'Ast quotes Lysias, *Adv. Alc.*, where it is stated that at Athens it was the military law that that desertions were to be established before courts of fellow-soldiers – no doubt presided over by their officers'. 'Ast' is G.A.F.Ast (1778-1841), presumably in his edition of the dialogue (Leipzig 1814; *non vidi*). From the other angle of approach, writers on Athenian law who might cite Plato, few actually do; an exception is Lipsius (1905-1915) 453 nn. 5-6, on the terminology of suits.

> each appearing before their own comrades ... If someone does go on active service, but returns home before the commanders withdraw the troops, any such men are to be publicly prosecuted on charges of desertion [*lipotaxion*] before the same (jurors) as are concerned with *astrateia*.').

If *Lysias* had expressed himself with the same clarity as this on the particular point which I have addressed here, it would have been fruitless to question the usual understanding of it. In any event, Plato does make himself clear about how such matters would be dealt with in his best-practically-possible polis, Magnesia.

In doing so he alerts us to relevant and important differences of approach to them, then and now. Present-day systems of trial by jury usually take pains to ensure that those sitting in judgement on a given defendant are not already hostile to him. Here by contrast, whether the charge in question is draft-dodging or subsequent desertion, hostility seems almost bound to be felt, by soldier-jurors who had done their duty and risked their lives in ways that he (unless he could prove otherwise) had not.

That Plato's thinking here was consistent *in general terms* with the morality of his time seems clear if one compares e.g. Lys.12.84 (Eratosthenes will be tried by 'jurors who are none other than those maltreated men themselves', οὐχ ἑτέρων ὄντων τῶν δικαστῶν ἀλλ' αὐτῶν τῶν κακῶς πεπονθότων) and Lys.26.1 ('I am vexed that he is coming before you confident in this hope, as if those wronged were one set of people and those preparing to vote on these issues another, instead of those who suffered the maltreatment and those who will hear about it being the same', ἀγανακτῶ εἰ ταύτῃ τῇ ἐλπίδι εἰς ὑμᾶς ἥκει πιστεύων ὥσπερ ἄλλων μέν τινων ὄντων τῶν ἠδικημένων, ἑτέρων δὲ τῶν ταῦτα διαψηφιουμένων, ἀλλ' οὐκ ἀμφότερα τῶν αὐτῶν καὶ πεπονθότων καὶ ἀκουσομένων); and cf. Lyk.*Leok*.134.[22] (For its obverse side, a favourable predisposition, see Lys.21.22: ἐγὼ μὲν οὖν, ὦ ἄνδρες δικασταί, οὐκ οἶδ' οὕστινας ἢ ὑμᾶς ἐβουλήθην περὶ ἐμοῦ δικαστὰς γενέσθαι, εἴπερ χρὴ τοὺς εὖ πεπονθότας περὶ τῶν εὖ πεποιηκότων εὔχεσθαι τὴν ψῆφον φέρειν; 'so for my part, men of the jury, I do not know what jurors I would prefer to try my case than you, if one ought to pray that the benefited vote on the benefactors'). Yet morality is one thing, procedure another. Plato does, for Magnesia, create a procedure for these military offences in which the jurors are those who have been most directly affected by them. His phrase δικάζειν ... τοὺς στρατεύσαντας – unlike Lysias' τοὺς στρατιώτας δικάζειν! – is clear and explicit. Is he therefore adopting real-life Athenian procedure? As always with *Laws*, the question needs to be open-mindedly posed, not begged. On the present topic there are features of Plato's scheme for which no Athenian precedent is known – the separate approach taken to infantry, cavalry, etc. – and his psychology-driven ideas about appropriate penalties, omitted above, seem more nuanced than the

[22] Cf. Carey (1989) 131 (and 153), with further references.

corresponding provisions (*atimia*, etc.: Lys.14.9) of Athenian law.[23] So whether his soldier-jurors were borrowed from Athens too must be declared not proven.

I end by returning to Attic oratory, and with an argument from silence. In his First Philippic Demosthenes famously[24] laments Athens' reliance on mercenaries rather than citizen troops in the mid fourth century, one consequence of which he regards as the malicious unreliability of reports reaching the Athenians on the performance of their generals (Demosth.4.46). And how, he rhetorically asks, can this be stopped? 'When you, men of Athens, designate the same men as soldiers and eye-witnesses of the generals' performances and, on their return home, jurors at the *euthynai*, so that you will not merely hear about your own affairs but also be present to see them' (ὅταν ὑμεῖς, ὦ ἄνδρες Ἀθηναῖοι, τοὺς αὐτοὺς ἀποδείξετε στρατιώτας καὶ μάρτυρας τῶν στρατηγουμένων καὶ δικαστὰς οἴκαδ' ἐλθόντας τῶν εὐθυνῶν, ὥστε μὴ ἀκούειν μόνον ὑμᾶς τὰ ὑμέτερ' αὐτῶν ἀλλὰ καὶ παρόντας ὁπᾶν: Demosth.4.47)'. This would have been the most golden of opportunities to comment that the law already created such eye-witness jurors in military *graphai* – if that had been so. Again, therefore, I am drawn to the conclusion that it was not so.

II

As explained in the preface to this paper, a version of it (Part I here) had been written and submitted without benefit of reading Bertazzoli 2001. Her article poses a rhetorical question, 'Tribunali militari in Atene?', and answers it with a quiet but firm Not Proven. So she, not I, deserves the credit for first challenging the entrenched modern orthodoxy in this area; unsurprisingly, I find her general position persuasive; and if it is enhanced in its persuasivess by what I have put forward here, so much the better. That said, our approaches (and conclusions) are not *precisely* the same, so the differences between us may aid clarity in certain areas.

Bertazzoli found (as I did not) one or two scholars in the past who, without fully developing the point, did query orthodoxy on this matter. Mention must particularly be made of of Ines Caimo's edition (Florence 1935) of Lysias' speeches *Against Alkibiades*. There, so I gather (*non vidi*), Caimo argued that, in the key phrase from 14.5 (περὶ τούτου τοὺς στρατιώτας δικάζειν), τοὺς στρατιώτας is *not the subject of the infinitive but its object*.[25] Bertazzoli mentions this in passing on the second page of her exposition[26] and returns to it in her concluding section.[27] There she first

[23] Saunders (1991) 324-8, at 324: 'the penalties he prescribes are not those of Attic law'. Contrast Morrow (1960) 270): 'there is nothing in either the procedure or the constitution of these courts, so far as we can see, that departs from Athenian practice'.

[24] For discussion see e.g. Pritchett (1974) 4-33; Hansen (1975) 59-65.

[25] Also, but less importantly, Caimo is said to have understood the τούτου in περὶ τούτου as not masculine but neuter.

[26] Bertazzoli (2001) 58.

[27] Bertazzoli (2001) 69-70.

declares that construing the passage in such an unusual way – like Caimo she could find no parallels, and neither can I – might make better logical sense of it. However, she finally, and I believe correctly, endorses the traditional *grammar* (and hence translation) of the phrase but adopts the same sort of *interpretation* of it as I have argued for here: that the dikasts will be, in plain and simple fact, (ex-)soldiers.

As broader context for her (I might venture to say our) understanding of Lys.14.5, Bertazzoli brings to bear much the same two-faceted approach as I have. One facet is to stress now uncomfortably the idea of special, *de iure* soldier-dikasts fits with the rest of the Athenian court system, especially, in her view, its reliance on sortition.[28] The other is to deal with other items of evidence, those of (so to speak) ancillary relevance. Concerning Plato, *Laws* 943A-D, we are at one in our belief that it has no probative bearing on what happened *in Athens*.[29] As to the Athenian evidence itself, we share only some, not all, of it in common. For instance: she missed the relevance (as an argument from silence) of Demosth.4.47. But I, more reprehensibly, missed the relevance of Demosth.39.17 and [Demosth.] 59.27:[30] there, prosecutions for *lipotaxion* and *astrateia* respectively seem to be envisaged as taking place in regular jury-courts (with, in the former case, paid dikasts).

So much for the dikasts in such cases; what of the presidency of the court? I began my own analysis (part I here) by arguing that the other element of the standard picture – that *stratêgoi* presided – is still the correct inference to draw from Lys.15.1-4. Oddly, in such a long and careful piece, Bertazzoli never addresses this point directly. Instead her conclusion is couched in rather vague terms: she has shown, she claims in her final sentence, the need to reconsider 'alcuni aspetti della giurisdizione militare ateniese, in quanto le ipotesi formulate dai moderni non sembrano suuficiamente suffragate dalle fonti'.[31] I am not entirely sure what these plurals mean; but I am, still, sure what they ought not to include. Bertazzili poses her question, 'Tribunali militari in Atene?', and answers it in the negative: there were *no* 'tribunali speciali per la giurisdizione relativa ai reati militari, cioè vere e proprie corti marziale'.[32] No indeed. Not merely no summary justice for Athenian soldiers while still under arms (of the kind attested for Argos by the Thrasylos anecdote in Thuc.5.60.6); also, and more important for present purposes, no courts martial in a context which might be described, borrowing Roman terms, as *domi* rather than *militiae*, i.e. within the same conceptual sphere of crime, procedure and punishment as ordinary law and ordinary (civilian) life. However, given the fact – as I believe it to be – that prosecutions for these military offences were heard under the presidency of high military office-holders, it seems necessary to say that the traditional picture of 'tribuni speciali' for them cannot be entirely swept away.

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[28] Bertazzoli (2001) 62-65, cf. 70
[29] Bertazzoli (2001) 66-69.
[30] Bertazzoli (2001) 66.
[31] Bertazzoli (2001) 70.
[32] Bertazzoli (2001) 57.

III

I begin with two points which take up the end of part II, on the presidency of the court in these cases. First: in the version of my paper presented at Durham, I declared that Lys.15.1 guarantees that a plurality of generals – a subset of the full board of ten – should be envisaged as presiding. Gerhard Thür professed himself unconvinced, however, and reasonably so. Even if ἀρχαί themselves were multiple (e.g. the thesmothetai, the Eleven), they acted individually when acting as εἰσάγουσα ἀρχή to (and in) a court. So my suggestion, already at n. 6 above, is that Lysias is making his client slide rhetorically from the plurality of generals who will be participants in the case – who will 'testify for Alcibiades', as Harris (2004) 259 bluntly puts it – to their individual colleague in the chair. Secondly: my original analysis lacked a diachronic element. I do believe that one of the generals was εἰσάγουσα ἀρχή at the the time of this trial, the mid-390s. But my Respondent draws attention to the suggestion of Harrison (1971) 32-33 – which, like Rhodes, I believe could be stated more confidently – that Demosth.39.17 reveals that by about the middle of the fourth century the εἰσάγουσα ἀρχή (for *lipotaxion* at least) had become a taxiarch.

The harder questions therefore remain those which pertain to the status and credentials of the dikasts in these cases. I have the following observations to make.

As briefly indicated already in Part I (at n. 7), it was wrong – of Whitehead and Bertazzoli alike, it can now be said – to cite the highly elaborate system of jury empanelling (etc.) as set out in the *Ath.Pol.* as a procedural impediment to the notion of soldier-dikasts in 395, Then, as Peter Rhodes points out, such a system (involving e.g. individual jurors' *pinakia*) was not yet in use. Nevertheless *a* system was in use, and if, as is routinely assumed, it is the one glimpsed in Aristophanes' *Ekklesiazousai* and *Ploutos*,[33] it still in my opinion involved a level of complexity into which a special role for soldier-dikasts would have introduced awkward complications.

Plato, *Laws* 943C-D continues to tantalise. I am aware now, though not when I wrote what is now Part I here, of Bertrand (2001).[34] In it, while approaching the question from the Plato side, he nevertheless voices doubts *obiter* about the orthodox view that the ἄνδρες δικασταί addressed in Lys.14-15 are the defendant's former comrades-in-arms And naturally I endorse his warning against assuming that, in this regard, Plato's model was Athens.[35]

For Magnesia Plato's prescription is that δικάζειν τοὺς στρατεύσαντας. Saunders translates 'Such cases must be judged by the soldiers who have fought in

[33] So e.g. MacDowell (1978) 37-38; and see also, more broadly, Boegehold (1995) 30-36, esp. 31-34 (where this 410-c.340 system informs the second of his 'Three Court Days').

[34] My thanks to Prof. Bertrand for a photocopy of this.

[35] Bertrand (2001) 17-18.

the campaign',[36] and this is justified both by the context and by the tense of the participle. The aorist points to dikasts who have been on a *specific* campaign (cf. e.g. Hyp. *Epit*.35, τοὺς ἐπὶ Τροίαν στρα⟨τεύ⟩σαντ[α]ς) – in this instance, evidently, the one where the defendant's alleged sins, of omission and/or commission, have been committed. But to assert, as so many have done, that Lysias' τοὺς στρατιώτας δικάζειν means the same thing is unjustified. It might describe men *of campaigning experience in general terms*; those dikasts who knew something about armies (and appropriate behaviour in them); cf. e.g. ἐστράτευμαι in Isai.2.42 and 7.41, and ἐστρατευμένος in Demosth.21.95.

In Part I (at n. 8) I briefly addressed the phenomenon which has often been introduced as a supporting analogy for the notion of special soldier-dikasts: those who were (or were not) Mystery-initiates. (See also Bertazzoli (2001) 59-62.) Whether this was a one-off arrangement for the circumstances of 415 or a standing rule in cases of this kind, MacDowell's simple model of empanelling a putative jury, discarding from it those who did not meet this qualification, and then (evidently) replacing them with others who did meet it might offer a way of visualising how τοὺς στρατιώτας δικάζειν could have worked in practice. Even naval service would not have been enough.[37] But I remain unconvinced that any of this was laid down by law.

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[36] Saunders (1970) 490, with my emphasis.

[37] As it happens, assumptions that dikasts will be sailors (or, more generally, of nautical/thetic status) as opposed to soldiers are hard to find in *any* extant speech; so no great importance, in my view, can be assigned to Lys.14.39 and its distancing of the present jury (τις ὑμῶν) from those who had died at Aigospotamoi (τοὺς τεθνεῶτας ἐν ⟨τῇ⟩ ναυμαχίᾳ).

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RESPONSE TO DAVID WHITEHEAD

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

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

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

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

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1 Rhodes (1972), 183 n. 4.

2 Cf. Whitehead, n. 6 and p. 34.

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

4 Cf. Whitehead, pp. 30-2, 34-5.

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

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

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

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

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[5] He has a passing reference to this at p. 30.

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

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

[8] Whitehead poses the question at p. 25.

[9] Cf. Whitehead, pp. 28-30.

But Whitehead's interpretation is strengthened if we consider with that § 14:[10]

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

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

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

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

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

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[10] Cf. briefly Whitehead, p. 28 with n. 16.
[11] Carey (1989), 157-8.
[12] Thus the translation of Todd (2000).
[13] Accepted by Whitehead n. 14.
[14] Whitehead, pp. 25-6, 34.
[15] E.g. MacDowell, (1978), 37-8.
[16] Andoc. 1. *Myst.* 28, 31, with the interpretation of MacDowell (1962), 82, accepted by Whitehead, n. 8 and p. 35. Note that this was done for the trial of Andocides in 400 as well as in 415.

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

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

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

[17] Cf. Whitehead, pp. 26-7.
[18] Whitehead, p. 27.

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ISAEUS AND THE ATHENIAN INHERITANCE LAWS

As a student primarily of rhetoric, my first inclination is to come down firmly on one side of the debate on Athenian law between those who study it from a legal perspective and those who come at the subject from the rhetorical angle.[1] I am, however, currently working on Isaeus, who has the potential to help us bridge the divide – was he not, after all, the member of the canon of ten Attic orators who came closest to being an expert in the laws and who used them as the basis of his arguments? On the other hand, Isaeus had a reputation in the ancient world as well as the modern for cleverness (*deinotes*), a word which in this context implies deception. Some of the tensions apparent here are what I shall endeavour to explore in this paper.

I shall begin with the rhetorical angle. Isaeus had the distinct honour of receiving a critical essay by the ancient world's leader in this field, Dionysius of Halicarnassus. Dionysius originally wrote on only six of the ten in the canon (who may have been selected by Caecilius of Caleacte), later adding a piece on Dinarchus, but omitting Antiphon, Andocides and Lycurgus altogether. Of the six he says (*On the Ancient Orators* 4):

> ἔσονται δὲ οἱ παραλαμβανόμενοι ῥήτορες τρεῖς μὲν ἐκ τῶν πρεσβυτέρων, Λυσίας Ἰσοκράτης Ἰσαῖος, τρεῖς δ' ἐκ τῶν ἐπακμασάντων τούτοις, Δημοσθένης Ὑπερείδης Αἰσχίνης, οὓς ἐγὼ τῶν ἄλλων ἡγοῦμαι κρατίστους.
>
> The orators to be compared will be three from the earlier generation, Lysias, Isocrates and Isaeus, and three from those who flourished after these, Demosthenes, Hyperides and Aeschines. These I consider to be the best orators. (trans. Usher)

The essays on Hyperides and Aeschines do not survive, and it quickly becomes clear which of the other four was considered the best and which the least good – but at least Isaeus is included. Dionysius' criticisms of Isaeus' methods, however, do not come close to the barbs of his main modern commentator, William Wyse.[2]

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[1] There is a good article on this by Harvey Yunis in Gagarin and Cohen (2005).

[2] Wyse (1904).

Dionysius wrote (*Isaeus* 3) that Isaeus 'blackens his opponent's character, outgenerals the jury with his stratagems and tries by every means to help his client's case' (καὶ πρὸς μὲν τὸν ἀντίδικον διαπονηρεύεται, τοὺς δὲ δικαστὰς καταστρατηγεῖ, τοῖς δὲ πράγμασιν, ὑπὲρ ὧν ὁ λόγος, ἐκ παντὸς πειρᾶται βοηθεῖν). Wyse easily outgenerals Dionysius, for example on p. 393, 'the impudence of these paragraphs is a measure of Isaeus' contempt for the intelligence of an Athenian tribunal'. But we have to remember that Isaeus was a professional speechwriter, and what competent logographer did not seek to do everything he could to earn his fee? The beginnings of a rehabilitation of Isaeus' reputation are already discernible in A.R.W. Harrison's *Law of Athens*, when he writes, 'Throughout his commentary Wyse attempts to discredit Isaios' statements as to what was the law. This scepticism has been much overdone; it is unlikely that Athenian juries were so gullible or so ignorant of the law as it implies'.[3] Stephen Todd is not convinced by Harrison's point, and rightly notes that jurors might be convinced by a 'cunning and slightly dishonest litigant' regardless of what the law actually said.[4] More recently, Stephen Usher picked up the rehabilitatory baton in his *Greek Oratory*, though he can still remark 'This is Isaeus at his most devious'.[5]

But if Isaeus is so devious, this raises the thorny question of the validity of his speeches as a source for Athenian law, a topic also excellently discussed by Todd in relation to the orators as a whole in his 1990 article. How reliable is Isaeus' reporting and interpretation of the laws? This is an area to which Wyse devoted meticulous care, and many of his conclusions are still accepted by legal historians today – and rightly so. But what I will venture to suggest is that this is another area where Isaeus has been to some extent unfairly castigated. If Athenian statutes were primarily procedural rather than substantive, this means that there was often considerable scope for litigants to interpret laws as supporting their case, and since the jurors were not routinely bound by precedent or directed by a judge, they would decide in favour of the case that was presented to them the more persuasively – and thereby did not break the dicastic oath they swore to judge according to the laws. So it is doubtless sensible to start, with Todd, 'from the premise that an orator will lie his head off at the slightest opportunity',[6] and even to follow the method of Paul Millett as recorded by Todd,[7] that you should 'disregard anything the orator says which might benefit his case; only believe the *obiter dicta* which he happens to mention in passing'. This is, of course, to judge the ancient logographer by the standards of the modern historian: it is one thing for a speaker to interpret the law misleadingly for his own purposes, but quite another to lie about what a law actually said – there was no procedure for checking this in court, though it seems from Dem.

[3] Harrison (1968) 122 n. 1.
[4] Todd (1990) 172-3.
[5] Usher (1999) 128 n. 6; for the remark see p. 162.
[6] Todd (1990) 173.
[7] Todd (1990) 174.

26.24 that the citing of a non-existent law carried the death penalty. Does Isaeus regularly lie his head off, or perhaps more often interpret? Take as an example the discussion of adoption at 10.9-10:

> οἶμαι τοίνυν πάντας ὑμᾶς εἰδέναι, ὦ ἄνδρες, ὅτι κατὰ διαθήκας αἱ εἰσαγωγαὶ τῶν εἰσποιήτων γίγνονται, διδόντων τὰ ἑαυτῶν καὶ υἱεῖς ποιουμένων, ἄλλως δὲ οὐκ ἔξεστιν. εἴτε οὖν Ἀρίσταρχον φήσει τις αὐτὸν διαθέσθαι, οὐκ ἀληθῆ λέξει· γνησίου γὰρ ὄντος αὐτῷ Δημοχάρους υἱος οὔτ' ἂν ἐβούλετο ταῦτα πρᾶξαι, οὔτε ἐξῆν δοῦναι τὰ ἑαυτοῦ ἑτέρῳ· εἴτε Ἀριστάρχου τελευτήσαντος Δημοχάρην αὐτὸν ποιήσασθαι, καὶ ταῦτα ψεύσονται. παιδὸς γὰρ οὐκ ἔξεστι διαθήκην γενέσθαι· ὁ γὰρ νόμος διαρρήδην κωλύει παιδὶ μὴ ἐξεῖναι συμβάλλειν μηδὲ γυναικὶ πέρα μεδίμνου κριθῶν. μεμαρτύρηται δὲ Ἀρίσταρχον μὲν πρότερον Δημοχάρους τοῦ υἱος τελευτῆσαι, ἐκεῖνον δὲ ὕστερον τοῦ πατρός· ὥστε κατά γε διαθήκην ἐκείνων, οὐδ' εἰ διέθεντο προσῆκεν αὐτῷ τούτων τῶν χρημάτων κληρονομῆσαι. ἀνάγνωθι δὴ καὶ τοὺς νόμους, καθ' οὓς οὐδετέρῳ αὐτῶν ἐξῆν διαθήκας ποιήσασθαι.
>
> NOMOI

> I think you all know, gentlemen, that introductions of adopted children take place through a will, with men devising their property and adopting a son, and any other procedure is not allowed. So if anybody says Aristarchus I made a will himself, he will not be speaking the truth: while he had a legitimate son, Democharès, he would not have wanted to do so and was not allowed to bequeath his property to another. And if they say that on the death of Aristarchus I Democharès adopted Aristarchus II, they will be lying about this too. A minor is not allowed to make a will, for the law expressly forbids a child or woman to make a contract for the disposal of more than a medimnus of barley. Now it has been testified that Aristarchus I died before his son Democharès and that the latter died after his father; so even if they had made wills, Aristarchus II was not entitled to inherit this property by will. Read, then, the laws according to which neither of them was allowed to make a will.
>
> LAWS

Everyone, e.g. Lene Rubinstein,[8] says minors cannot adopt, but note that the speaker has just lied, if you like, or misinformed the jurors about adoptions by will ('and any other procedure is not allowed'): it is not the case that the only legal method of adoption was for a man to make a will, adopt a son and introduce him to his phratry

[8] Rubinstein (1993) 16.

and deme, because a man might leave a will in which the adoptive son was named but the procedure was not carried out until after his death (he might be going off to war, say); and moreover, there existed the possibility of posthumous adoption, whereby the deceased's family might carry out an adoption to secure the future of his estate after an unforeseeable event such as his premature death. Again, it is also not strictly the case that a man with a legitimate son, here Aristarchus and Democharès, was not allowed to devise his estate to anyone else, because there was a law (quoted at [Dem.] 46.24) which allowed a man to nominate an heir in the event of the death of his son during his minority. Now it may well be that men usually adopted *inter vivos* and themselves introduced their adopted sons to their phratry and deme, to forestall the kinds of dispute evidenced in Isaeus' speeches; and probably men did not usually leave a will when they had a son. Further, I imagine that many of the jurors listening to this speech will have agreed with the speaker's general line of argument, even if they knew it was not watertight. But why, if we can show that these two assertions are false, and if we follow the Todd-Millett method, should we simply accept the speaker's third contention, that minors were not allowed to make a will? This is no *obiter dictum*. Notice that the speaker does not actually say that there was a law prohibiting minors from making a will – he can only quote the provision of a law restricting a minor's financial capacity, and it is an *a fortiori* argument that a minor then could not devise his property; and in the Greek it is unclear whether the qualification 'more than a medimnos of barley' applies to minors as well as women, or only to women. These last points were made by Wyse, while not doubting for once the truth of what Isaeus' client says, and I am not going to act as devil's advocate and argue that a minor could make a will. But I will ask what the laws were that the speaker has read out at the end of §10? Did the clerk read out the whole text, or an edited version that suited his arguments? Is Isaeus deliberately lying? Or is he interpreting the laws tendentiously for the sake of his client, as we really ought to expect him to do? And why should we assume that the opponents in all these cases quoted the laws any more truthfully than Isaeus' clients? Laws, of course, are classified by Aristotle among the ἄτεχνοι πίστεις or inartificial proofs, along with witnesses, contracts, torture and oaths (*Rhetoric* 1.15.1-12), and he suggests strategies on how to proceed if the laws do not favour your case (*Rhetoric* 1.15.4):

> φανερὸν γὰρ ὅτι, ἐὰν μὲν ἐναντίος ᾖ ὁ γεγραμμένος τῷ πράγματι, τῷ κοινῷ νόμῳ χρηστέον καὶ τοῖς ἐπιεικέσιν ὡς δικαιοτέροις.
>
> For it is evident that, if the written law is counter to our case, we must have recourse to the general law and equity, as more in accordance with justice. (trans. Freese)

I shall return to this presently. But mark that for Aristotle laws are proofs, not an objective criterion against which both parties must operate as today. The competent logographer, then, supports his client using whatever methods he deems necessary, and his skill should be assessed accordingly. I do not believe that Athenian laws were as clear-cut as Wyse would have us believe, and in modern terms Isaeus was skilled at exploiting loopholes in them. This is unfortunately of no comfort to the legal historian seeking to discover what the laws actually said – but it is meat and drink for students of rhetoric.

Where does this leave us with Isaeus as a source for legal history? Does he deserve the reputation of being the orator who is closest to being a legal expert, and how does he use the laws in his speeches? These questions immediately take us into the realm of invention, one of the five parts of rhetoric (the others being arrangement, style, memory and delivery); and it might also be argued that the answer to the question about Isaeus' legal expertise depends to a large extent on an accident of historical survival. As is well known, all fifteen of the extant speeches of Antiphon concern homicide, and similarly the eleven speeches of Isaeus that survive in the manuscripts all concern inheritance in one form or another. Richard Jebb long ago suggested that this may be due to the way the speeches were arranged in the collection, with the largest or most famous group put first, and he pointed out that the final speeches of these two orators both appear to break off before the end, so the speeches on other types of case have been lost.[9] We know that Antiphon wrote on various other topics, including allied tribute and peacocks, and we also know from the large fragment in Dionysius that is regularly printed as Isaeus speech 12 that Isaeus wrote on citizenship rights. Now the latter may be significant. I have argued elsewhere that there is in fact little evidence in Isaeus' case for any great variety of speeches; rather, inheritance disputes clearly formed the bulk of the Isaean corpus, at least as it was known later in antiquity.[10] Fifteen of the forty-five identified titles and/or fragments listed in the Teubner edition of Thalheim were almost certainly connected with inheritance, and several more may well have been. The only other major category for which we have evidence is that of the cognate area of citizenship rights – seven speeches concerned citizenship, with at least four treating the rights of freedmen. Further, Chris Carey has recently suggested that a papyrus fragment usually attributed to Lysias is more likely to be by Isaeus, and this too concerns either inheritance or citizenship.[11] Flimsy though this evidence is, it may point to the conclusion that Isaeus did indeed concentrate on a particular area of the law.

Whatever the truth of this, Isaeus certainly makes extensive use of the laws in his speeches, quoting them as evidence and using them to form the basis of probability arguments. Or does he? In fact, in four of the eleven speeches no law is

[9] Jebb (1893) ii.314.
[10] Edwards (2006) 72-5.
[11] Carey (2005).

cited at all, though there are clearly reasons for this.[12] Speech 4 is a *synegoria*, and speech 5, an action to compel the discharge of a suretyship, was based on an affidavit, which is read out twice. But rather more interestingly in speeches 1 and 9 the speaker is both times arguing against the validity of a will on moral rather than legal grounds, because the law was not on his side. This reminds us of Aristotle's advice in the *Rhetoric*, that a speaker should emphasise law if the statutes strengthen his case, but equity if they weaken it. On the face of it Isaeus does exactly what Aristotle was later to suggest, but let us investigate this a little further.

In the eleven inheritance speeches, Isaeus uses the word νόμος and its parts some 149 times. I would break down this usage into three basic categories, though I am fully aware that this is a very simplistic approach, where the first two categories have overlaps and which lumps all the examples that are not in the other two into a third, catch-all category – rather like Aristotle's division of speeches into forensic, the overlapping deliberative and the catch-all epideictic. My categories are (1) passages where the laws are actually read out to the jurors; (2) passages where speakers state what the laws say, without having them read out; (3) other general references to the laws, which we might designate as the purely rhetorical use of them. Taking these in reverse order, more than half the occurrences of *nomos* in Isaeus fall under category (3), as we might expect. There are numerous passages in the speeches where speakers make general, often vague references to the laws, though sometimes clearly with the laws relevant to their case in mind, even when they are against them, such as 1.4: 'and the laws have given us the right of succession as next of kin' (δεδωκότων δ' ἡμῖν καὶ τῶν νόμων κατὰ τὴν ἀγχιστείαν). On other occasions speakers highlight how their opponent is abusing or misusing the laws, such as 11.36: 'my adversary has in this matter acted entirely unjustly … but has cleverly devised the whole plot from motives of self-interest, uttering calumnies, misinterpreting the laws and seeking to get the better both of you and of me contrary to justice …' (ὅτι μὲν οὖν οὔτε περὶ τούτων οὐδὲν δίκαιον πεποίηκεν οὔτε περὶ τῶν ἄλλων ἀληθὲς οὐδὲν εἴρηκεν, ἅπαντα δὲ δεινῶς πλεονεξίᾳ μεμηχάνηται διαβάλλων καὶ τοὺς νόμους παράγων καὶ ὑμῶν καὶ ἐμοῦ παρὰ τὸν δίκαιον περιγενέσθαι ζητῶν …). A common expression is κατὰ τοὺς νόμους ('according to the laws'), which appears some 35 times (i.e. almost a quarter of the times the word appears); and in several of the speeches the laws are connected with justice in the final appeal to the jurors, such as 4.31: 'remember the laws and the oaths which you swore and also the evidence which we have placed before you, and give your verdict in conformity with justice' (ἀλλὰ καὶ τῶν νόμων ἀναμνησθέντες καὶ τῶν ὅρκων οὓς ὠμόσατε, πρὸς δὲ τούτοις καὶ τῶν μαρτυριῶν ἃς ἡμεῖς παρεσχήμεθα, τὰ δίκαια ψηφίσασθε). One remarkable fact, however, is that *nomos* does not appear at all in

[12] See Edwards (2006) 75.

speech 5, even though the speaker is faced by an uphill task and we might expect him to appeal vaguely at least to the laws and justice.

In the majority of cases where Isaeus uses the laws as the basis of arguments, his client simply states what the law said without having it read out. This must raise our suspicions because there were no presiding judges in Athenian courts to instruct the jurors on matters of law. So before we can believe what a speaker says the law says, we really need corroborative evidence, but this is not always available – what do we do then? For example, the speaker of speech 9, who is contesting the validity of a will which would deprive him of the estate of Astyphilus, says (9.13):

> ἀλλὰ μὴν οὐδ' αἰσχυνθῆναι οὐδενὶ προσήκει ἐπὶ τοιαύταις διαθήκαις ὡς πλείστους μάρτυρας παρίστασθαι, νόμου γε ὄντος ἐξεῖναι ὅτῳ βούλοιτο δοῦναι τὰ ἑαυτοῦ.
>
> Moreover, no one ought to be ashamed of summoning the largest possible number of witnesses to the execution of such a will, when there is a law which permits a man to bequeath his property to whomsoever he wishes.

Now we know from [Dem.] 46.14, where the law on testaments is quoted, that this statement of the law by Isaeus is true – except that the law adds the rider 'if he have no male children lawfully born, unless his mind be impaired by one of these things, lunacy or old age or drugs or disease, or unless he be under the influence of a woman, or under constraint or deprived of his liberty' (ἂν μὴ παῖδες ὦσι γνήσιοι ἄρρενες, ἂν μὴ μανιῶν ἢ γήρως ἢ φαρμάκων ἢ νόσου ἕνεκα, ἢ γυναικὶ πειθόμενος, ὑπὸ τούτων του παρανοῶν, ἢ ὑπ' ἀνάγκης ἢ ὑπὸ δεσμοῦ καταληφθείς) (trans. Murray). These conditions are not at issue here, so the omission is not a problem; and I am accepting that the law quoted in Demosthenes' text is genuine. But at 3.68 the speaker says: 'the law states explicitly that, in the absence of legitimate male issue, a man can dispose of his property as he pleases, but that, if he has daughters, the legatees must take them as well' (ὁ γὰρ νόμος διαρρήδην λέγει ἐξεῖναι διαθέσθαι ὅπως ἂν ἐθέλῃ τις τὰ αὑτοῦ, ἐὰν μὴ παῖδας γνησίους καταλίπῃ ἄρρενας· ἂν δὲ θηλείας καταλίπῃ, σὺν ταύταις); and Isaeus says this again at 10.13: 'her own father, in default of male heirs, could not have disposed of his estate without disposing of her with it; for the law ordains that he may dispose of his property to whomsoever he wishes, if he disposes of his daughters with it' (καὶ τῷ μὲν πατρὶ αὐτῆς, εἰ παῖδες ἄρρενες μὴ ἐγένοντο, οὐκ ἂν ἐξῆν ἄνευ ταύτης διαθέσθαι· κελεύει γὰρ ὁ νόμος σὺν ταύταις κύριον εἶναι δοῦναι, ἐάν τῳ βούληται, τὰ ἑαυτοῦ). Harrison, like others before him, accepts Isaeus' remarks and, citing these two passages as evidence, states 'if there were daughters but no sons he could adopt a son on

condition that he married her to one of the daughters'.[13] If there were no other evidence for this claim, both times of course made by Isaeus' clients from self-interest, we would be justifiably suspicious, especially since Lene Rubinstein has shown that disposal of the daughter did not always happen.[14] But Isaeus himself had already had the law read out at 3.42: 'no one has the right to devise or dispose of any of his property without also disposing of any legitimate daughters whom he may have left at his decease. You will understand this when you hear the text of the laws read out. Read these laws to the judges' (οὔτε γὰρ διαθέσθαι οὔτε δοῦναι οὐδενὶ οὐδὲν ἔξεστι τῶν ἑαυτοῦ ἄνευ τῶν θυγατέρων, ἐάν τις καταλιπὼν γνησίας τελευτᾷ. γνώσεσθε δὲ αὐτῶν ἀκούσαντες τῶν νόμων ἀναγιγνωσκομένων. ἀναγίγνωσκε τούσδε αὐτοῖς). Unless he is guilty of citing a non-existent law, Isaeus is a good authority, if the only one, for a law dictating the testator's duty with regard to his legitimate daughters. I merely note that a similar provision for daughters of fathers who died intestate is attested in [Dem.] 43.51. Wyse grudgingly writes, in his note on 3.68, 'for the form of the clause referring to daughters unfortunately Isaeus is our only authority'. On the other hand, given that Rubinstein is right (as I am sure she is), this seems with Wyse to be a case where Solon's law was no longer adhered to in the fourth century, even after presumably being reinscribed during the revision of the laws at the end of the fifth century – is this an instance of customary practice (*nomos* in that sense) overriding the law (*nomos* in the other sense)? One other example: note that at 3.52-3, where the speaker has been arguing that his opponent's niece Phile was illegitimate, as evidenced by the small dowry bestowed on her, he concludes this section of arguments by referring to and then having read out the laws which were 'precise on all these points' (οἱ δὲ νόμοι περὶ ἁπάντων διορίζουσι τούτων). Is this a tiny shred of evidence for a law regulating dowries?

My third category is the most frustrating one, because when Isaeus does have the law read out, the manuscripts do not preserve the text, except on one occasion at 11.11 where, as with many of the quotations in our manuscripts of Demosthenes, the alleged text is probably a reconstruction on the basis of what follows. Furthermore, on some occasions such as the one mentioned just now (3.42) it is not even clear which law was read out: was it part of a testamentary law not quoted in full at Dem. 46.14, or was it part of a separate law concerning heiresses (referred to also at Dem. 37.45)? Isaeus actually has the law read out on fifteen occasions in the eleven speeches, but ten of these citations come in three speeches only, three in speech 3, three in speech 7 (these are in fact three clauses from the same law) and four in speech 11. A variety of laws, or of different clauses within them, is used, including laws on adoption (2.16, 6.8), heiresses (3.42, 53), the rules of succession (7.21-2, 11.1, 4, 11, ?22) and testaments (10.10), marriage (3.38), neglect of parents (8.34),

[13] Harrison (1968) 85.
[14] Rubinstein (1993) 95-6.

and at 6.48 a law concerning women's attendance at the Thesmophoria, again our only source for such a law with no details of what it contained. But it is interesting to revisit Aristotle's advice on using the law when it is in your favour and trusting to equity when it is not, with regard to these three speeches where the laws are most employed. Whatever the possible deceptions and weaknesses in the legal arguments of speech 3, *On the Estate of Pyrrhus*, it is nevertheless the case that this was a second prosecution for perjury conducted by the speaker: he had already been successful in his suit against Xenocles, who was claiming the estate on behalf of his wife, and was now attacking Xenocles' witness Nicodemus, the brother of the wife's mother. So the speaker certainly believed he had the law on his side, and Isaeus uses the law as Aristotle suggests. In speech 7 the speaker Thrasyllus claims the estate of Apollodorus as his adopted son, but the trouble he has is that the formalities of the adoption had not been completed, and a rival claim was made by the deceased's first cousin, who was female. There is no doubt (it seems) who Apollodorus intended to succeed him and Thrasyllus' claim was in equity a strong one. But legally, without the adoption being complete, he was a remoter relative than his rival. Nevertheless, on the basis of the rules of the order of succession, the *ankhisteia*, he argues that her sister's son Thrasybulus had a stronger claim being male and shut out his aunt, but had given up the estate in Thrasyllus' favour. This is a complex issue which I have simplified, but it is almost certain that Isaeus here misrepresents the law, since Thrasybulus was the son of a daughter who had the same rights as her sister and the principle that 'males have precedence' (κρατεῖν τοὺς ἄρρενας) did not apply in that case. So on this occasion Isaeus seems to get the best of both worlds: he uses arguments from equity *and* has the law read out in such a way that it could be misinterpreted. What, then, of our third speech, speech 11 *On the Estate of Hagnias*, the one where Isaeus makes the most extensive use of the laws and which begins, from a rhetorical point of view, most remarkably and uniquely in the orators with the citation of a law, followed by a discussion of the laws which includes a rare cross-examination of the speaker's opponent (at 11.5)?

Almost all scholars have accepted the identification of Hagnias with the ambassador who was captured by the Spartan Pharax on an embassy to Persia in 397/6, handed over to the Spartans and executed (*Hell. Oxy.* 7.1). Sally Humphreys, however, pointed out some time ago that Harpocration equates his Hagnias with a man mentioned by Isaeus in his lost *Against Eucleides*, and does not refer to speech 11. Further, in §8 Isaeus talks of the 'business which turned out advantageously for the city', whereas the 397/6 embassy probably did not.[15] Humphreys posited that Hagnias died on a later embassy, perhaps the one to Amyntas, king of Macedon, in 375 or 373. I am not one of those who fear the cut of Occam's razor, and I agree with Humphreys. The later date solves the very real problem that if Hagnias died in 396, his niece will have controlled the estate for about thirty-five years (down to the

[15] Humphreys (1983).

awarding of the estate to Phylomache in 361/0, cf. [Dem.] 43.31) without, it seems, being married or having any children. If instead he died about twenty years later, the niece could now have inherited the estate and died when still unmarried. The problem arises because Hagnias had (unusually, it seems) adopted by will a female relative, his niece, but on condition that were she to die childless his estate should pass to his half-brother Glaucon (Glaucon would be posthumously adopted as Hagnias' son). This is indeed what transpired (§9), but the authenticity of the will was then challenged by Eubulides (§9; [Dem.] 43.43-45), who was Hagnias' second cousin on his father's side and first cousin on his mother's side. When he died, the case was successfully pursued on behalf of his daughter Phylomache by her husband Sositheus. Phylomache was Hagnias' first cousin once removed on his father's side and so took precedence over Glaucon, who was Hagnias' half-brother but on his mother's side. Since, however, the result of the trial was to overturn Hagnias' will, his other second cousins Stratius, Stratocles and Theopompus now entered a claim. The first two died, and Theopompus claimed the estate against (or so he says, §16) Phylomache and Hagnias' mother, who was also her own son's second cousin but being female after Theopompus in the line of succession (§17). But according to [Dem.] 43.7-8 there were five claimants, Phylomache, Theopompus, Glaucon, Glaucus and Eupolemus (who was possibly, with Humphreys, the son of Callistratus, Hagnias' father Polemon's cousin).[16] Sositheus claims that a deal was struck by the others against Phylomache, a written agreement being deposited with Medeius of Hagnus. It was also alleged that Theopompus had agreed with Stratocles to give the latter's son, whose guardian he was, half of the estate if his claim was successful (§§24-6). Theopompus of course denied this, and he won the whole estate by proving that Phylomache's grandmother was not a legitimate sister of Polemon: she was therefore only related to Hagnias as his second cousin once removed through her great-grandfather Eubulides, and Theopompus was the closest relative (Hagnias' mother probably had no legal claim as mother). The saga was far from over, however, since Theopompus was prosecuted some time in the early 350s for maltreatment of an orphan (§§6, 15) by another of the son's guardians, on the basis that he had defrauded him of half of Hagnias' estate.

Isaeus bases Theopompus' defence on the law of succession of collateral relatives, which we know from Is. 7.20, supplemented by [Dem.] 43.51:

> πατρῴων μὲν οὖν καὶ ἀδελφοῦ χρημάτων τὸ ἴσον αὐτοῖς ὁ νόμος μετασχεῖν δίδωσιν· ἀνεψιοῦ δέ, καὶ εἴ τις ἔξω ταύτης τῆς συγγενείας ἐστίν, οὐκ ἴσον, ἀλλὰ προτέροις τοῖς ἄρρεσι τῶν θηλειῶν τὴν ἀγχιστείαν πεποίηκε. λέγει γάρ "κρατεῖν δὲ τοὺς ἄρρενας καὶ τοὺς ἐκ τῶν ἀρρένων, οἳ ἂν ἐκ τῶν αὐτῶν ὦσι, κἂν γένει ἀπωτέρω τυγχάνωσιν ὄντες".

[16] Humphreys (1983) 223 n. 13.

> Thus the law gives the sister and the sister's son an equal share of their father's and their brother's estate; but when a first cousin, or any other kinsman in a remoter degree, dies, it no longer grants such equality, but gives the male relatives the right of succession as next-of-kin in preference to the female. For it declares that "the males and the issue of the males, who are descended from the same stock, shall be preferred, even though their relationship to the deceased is more remote".

> ὅστις ἂν μὴ διαθέμενος ἀποθάνῃ, ἐὰν μὲν παῖδας καταλίπῃ θηλείας, σὺν ταύτῃσιν, ἐὰν δὲ μή, τούσδε κυρίους εἶναι τῶν χρημάτων. ἐὰν μὲν ἀδελφοὶ ὦσιν ὁμοπάτορες· καὶ ἐὰν παῖδες ἐξ ἀδελφῶν γνήσιοι, τὴν τοῦ πατρὸς μοῖραν λαγχάνειν· ἐὰν δὲ μὴ ἀδελφοὶ ὦσιν ἢ ἀδελφῶν παῖδες, ... ἐξ αὐτῶν κατὰ ταὐτὰ λαγχάνειν· κρατεῖν δὲ τοὺς ἄρρενας καὶ τοὺς ἐκ τῶν ἀρρένων, ἐὰν ἐκ τῶν αὐτῶν ὦσι, καὶ ἐὰν γένει ἀπωτέρω. ἐὰν δὲ μὴ ὦσι πρὸς πατρὸς μέχρι ἀνεψιῶν παίδων, τοὺς πρὸς μητρὸς κατὰ ταὐτὰ κυρίους εἶναι. ἐὰν δὲ μηδετέρωθεν ᾖ ἐντὸς τούτων, τὸν πρὸς πατρὸς ἐγγυτάτω κύριον εἶναι. νόθῳ δὲ μηδὲ νόθῃ μὴ εἶναι ἀγχιστείαν μήθ' ἱερῶν μήθ' ὁσίων, ἀπ' Εὐκλείδου ἄρχοντος.

> Whenever a man dies without making a will, if he leaves female children his estate shall go with them, but if not, the persons herein mentioned shall be entitled to his property: if there be brothers by the same father, and if there be lawfully born sons of brothers, they shall take the share of the father. But if there are no brothers or sons of brothers, their descendants shall inherit it in like manner; but males and the sons of males shall take precedence, if they are of the same ancestors, even though they be more remote of kin. If there are no relatives on the father's side within the degree of children of cousins, those on the mother's side shall inherit in like manner. But if there shall be no relatives on either side within the degree mentioned, the nearest of kin on the father's side shall inherit. But no illegitimate child of either sex shall have the right of succession either to religious rites or civic privileges, from the time of the archonship of Eucleides. (trans. Murray)

Much ink has been spilled on the question as to whether the inheritance expert pulled the wool over the jurors' eyes, and I here follow my arguments in my translation of the speeches.[17] The law defined close relatives (*ankhisteis*) as being relatives 'as far as children of cousins (μέχρι ἀνεψιῶν)'. I suggested earlier that Athenian laws were not tightly worded, and the difficulty here lies in the meaning of

[17] Edwards (2007).

'cousin'. The Greek word ἀνεψιός covers what in English we would call first cousins and second cousins, and therefore it is not clear whether 'children of cousins' means 'children of first cousins' (i.e. 'first cousins once removed') or 'second cousins' (i.e. children of a parent's first cousin). Theopompus was Hagnias' second cousin, and on the interpretation that 'children of cousins' means 'first cousins once removed', he was outside the required degree of kinship. But Theopompus won both his cases, the one against Phylomache and that against his fellow-guardian, and his son may later have won a further case on the same basis (the case of [Dem.] 43). Two juries, therefore, certainly agreed with Theopompus' interpretation of the law, and I contend, despite what I said earlier about Isaeus' misinterpretation of the law in speech 7, that we have reason to accept that his version of it here was allowable, rather than that he managed to hoodwink the jurors on both occasions. But did Theopompus hoodwink them in the matter of his ward? He was the son of a second cousin of Hagnias, which must indicate that he was outside the requisite degree of kinship. Theopompus therefore argues correctly that he was not entitled himself to claim a share of Hagnias' estate. But his father did have a claim, though he died before he established it, and so the opponent may have argued that his son ought to inherit his father's share with the rest of his estate (just as Theopompus himself passed on his estate to his son Macartatus). But the jurors in our trial at least disagreed, and I do not think that this was because they were incapable of following the family tree. Perhaps part of the answer lies in the difference between those who were permitted by the law to enter directly into an inheritance by *embateusis* and those who had to establish their claim in court by *epidikasia*.[18] Since the jurors were here deciding a case of maltreatment, they may have been convinced that Theopompus had not maltreated his ward, who had not as yet established his claim to the estate.

But perhaps they were fooled after all. Nevertheless, the prosecutions of Theopompus' witnesses for false testimony which followed (cf. §45) did not lead to his loss of the estate, which he enjoyed until his death. At this point Phylomache tried again. She had become the heiress to the estate of her father Eubulides and she had one of her sons, also named Eubulides, posthumously adopted as her father's son ([Dem.] 53.14). If her grandmother had been legitimate (which Theopompus had successfully contested), her son would now have been in law a first cousin once removed of Hagnias, and Sositheus claimed Hagnias' estate on that basis against Theopompus' son Macartatus (by [Dem.] 43). The thrust of his argument is again that the law only covered the sons of first cousins (i.e. first cousins once removed) and Theopompus as a second cousin was outside the prescribed limit. But since Macartatus' own son, who was an ephebe in 324/3 and therefore born about the time of this trial in c. 344/3, was called Hagnias, the likelihood is that Macartatus retained the estate of Hagnias (though we should not perhaps push this argument too far).

[18] See Todd (1993) 220-1.

Scholars have mostly been very reluctant to accept that Theopompus is doing anything other than pulling the wool over the jurors' eyes, believing that his interpretation of the word *anepsios* is wrong. I wonder if, at worst, the legal expert who was his logographer in fact merely took advantage of loose wording in the law and found a loophole. Either way, his client's success in my opinion will ultimately have depended more on Isaeus' skilful rhetoric than on the letter of the law, and also more on what the jurors thought of as being the common practice (*nomos*) of their time than what the lawgiver necessarily intended. Others may disagree, and all this is an indication of how thorny indeed is the question of the validity of Isaeus' speeches as a source for the legal history of classical Athens. But this student of rhetoric is fully convinced that the law is there to be discovered.

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APPENDIX

Occurrences of νόμος in Isaeus by speech:	Citation of laws in Isaeus by speech:
1: 6	1: 0
2: 18	2: 1
3: 22	3: 3
4: 8	4: 0
5: 0	5: 0
6: 15	6: 2
7: 14	7: 3
8: 9	8: 1
9: 6	9: 0
10: 17	10: 1
11: 34	11: 4

STEPHEN C. TODD (MANCHESTER)

RESPONSE TO MICHAEL J. EDWARDS

Mike Edwards' paper is characteristically subtle and thought-provoking in its presentation both of law and also of rhetorical performativity. Since I have no substantial disagreement with the core of his argument,[1] my response will begin with a brief position statement on the historical problems involved in reading the speeches as legal texts. The bulk of my attention will then be devoted to two questions relating to the law of inheritance which seem to merit further discussion, focusing on the extended dispute over Hagnias' property (Isai. 11 and Dem. 43).

The problem of how to interpret the Orators as historical evidence for Athenian law is something of which I have become increasingly aware over the past decade, while completing a commentary on the first eleven speeches of Lysias. This is a problem most clearly associated with Wyse's classic but much-criticised commentary on Isaios (Wyse 1904). Criticisms of Wyse have traditionally focused on the extent of his scepticism about Isaios' statements of Athenian law.[2] Scepticism, however, can take at least two forms, and I wonder if such criticisms have always distinguished adequately between scepticism as over-confident conclusion (Wyse was for instance notoriously ready to assume that the orator's clients were always legally in the wrong and his opponents legally in the right, to an extent that is at least statistically implausible) and scepticism as doubt (which is in my view a justifiable starting-point, based on the premise that we should always suspect distortion and misrepresentation). If I now had to sketch out a methodology of legal interpretation for the commentator on the Orators, it would emphasise issues of external control (do we have any statements of law in this area by other Orators, ideally those arguing from an opposing perspective?), and – although here we can proceed only by internal inference – issues of profit and loss within the speaker's rhetorical strategy (what has he to gain from misrepresentation, and how easy would it be for the audience or the opponent to nail him?).

[1] On the juridical issues raised by Edwards' paper, my first point concerns the vexed question of the meaning (legally and otherwise) of the Greek term *anepsios*,

[1] Edwards' use of terms like "exploiting loopholes" differs in nuance but not necessarily in substance from my earlier phrase "lie his head off at the slightest opportunity" (Todd 1990: 173, quoted by Edwards at n.6), for which I should perhaps plead the rhetorical intemperance of youth.

[2] Thus e.g. Harrison (1968-71.i: 122 n.1), quoted by Edwards at n.3.

conventionally rendered "cousin", which for the English hearer would naturally denote a first cousin (that is, the child of ego's parent's brother or sister).

In cases of intestacy, Athenian inheritance law gave precedence to relatives on the father's side, provided these were within a permitted degree of kinship, but there is dispute over the precise limits of that degree. Our speeches use the term *ankhisteia* or "kinship" to denote both the fact of such relationship and any inheritance claim based on it.[3] But the defining phrase used in the inheritance law – found in speeches on both sides of the long-lasting family dispute over Hagnias' property,[4] thereby providing external control – seems to have been *mekhri anepsiōn paidōn*, lit. "as far as the children of *anepsioi* (pl.)".[5]

Edwards suggests that "*anepsios* covers what in English we would call first cousins and second cousins, and therefore it is not clear whether 'children of cousins' means 'children of first cousins' (i.e. 'first cousins once removed') or 'second cousins' (i.e. children of a parent's first cousin)",[6] but this formulation does not seem wholly satisfactory, for two reasons. The first is that although scholars have noted a couple of passages in which *anepsios* is used to denote ego's father's cousin (i.e. somebody to whom one is first cousin once removed),[7] there is to my knowledge no case of its being used more remotely. More significantly, if *anepsios* itself included second cousins, then even the most restrictive reading of *mekhri anepsiōn paides* would cover second cousins once removed. And that is precisely the issue in the first of our two surviving cases involving the estate of Hagnias, where the speaker Theopompos (himself a second cousin of the deceased) argues that his brother's son as rival claimant is not *gegonōs … ex anepsiōn* ("born from *anepsioi*", Isai. 11.5). Methodologically, the framing of this argument as a direct and explicit challenge to the opposition surely means that the boy's father Stratokles

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[3] Thus e.g. Isai. 11.5, Dem. 43.27.

[4] Isai. 11.2, 11.11 (once in text and once in quotation of law), 11.12; Dem. 43.51 (quotation of law: the plural phrase is not used in the body of this speech, though the claimant Euboulides is described on three occasions as *anepsiou pais* or "child of cousin", at 43.26, 27, 34). What looks like a paraphrase of the same law is found at Isai. 7.22 ("if there are no *anepsioi* or *anepsiōn paides*…").

[5] For the question of whether this phrase denoted the same degree of relationship as the phrases *mekhri/entos anepsiotētos kai anepsiou* in the homicide law (*IG*, i^3.103, line 21 [restored from law at Dem. 43.57], and cf. also line 15) and *entos anepsiadōn* in a law on funerals (law at Dem. 43.62), see variously Broadbent (1968: 122-125), Bianchetti (1982: 146-149), and MacDowell (1989: 19).

[6] Edwards, this vol., p. 52; cf. similarly Edwards (2007: 175).

[7] Dem. 43.41 and 43.49. These passages were used by Harrison (1947: 43) to argue that Theopompos in Isai. 11 was justified in claiming as *pais anepsiou* (e.g. Isai. 11.10, etc.), on the basis that this phrase can therefore mean "son of a father's cousin", i.e. a second cousin. Wyse (1904: 673-674), by contrast, had assumed that the *ankhisteia* should have extended only to the deceased's first cousin once removed (= the child of his first cousin, thereby excluding Theopompos). Thompson (1970: 75) notes that the text at Dem. 43.41 has been doubted, but that there is no reason for emending Dem. 43.49.

would not naturally be regarded as Hagnias' *anepsios*; otherwise it would be too easily open to refutation. But Stratokles, like his brother Theopompos, was a second cousin to Hagnias, which implies that *anepsios* cannot normally have carried the meaning of second cousin.

Linguistically, it is perhaps worth speculating whether *anepsios* might be one of those family-relationship words that are capable of having an informal usage which everybody recognises is not strictly accurate, just as in English the brother or sister of ego's grandfather is frequently addressed or referred to informally as "uncle" or "aunt", even though everybody knows this is shorthand for "great-uncle" and "great-aunt". This is not (or at least not quite) the same as arguing that the word would have a different meaning in law from its meaning in common usage, because of the notorious fact that Athens did not have either judges or jurists able to develop an authoritative technical discourse of the type that is found in modern legal systems. Instead, the meaning of a legal statute at Athens was open to fresh negotiation between litigant and juror on every occasion. But I am coming progressively to the view that there are important questions to be asked about how Athenian juries coped with the fact that legal statutes often used (and continued to use) a vocabulary that is often quite distinct from familiar linguistic usage: *graphomai*, for instance, to denote the process of public prosecution, is not something we routinely meet in non-oratorical literature.[8]

On the question of *anepsiōn paides*, many scholars have (like Edwards) followed Harrison: not necessarily in details of interpretation (for which see below), but rather in believing that Theopompos' claim cannot have been wholly without merit, given his success in persuading not only the court but also the Arkhōn.[9] It should indeed be noted here that Theopompos' victory in Isai. 11 served to confirm rights which he had recently acquired by success in a previous case from which no speech survives, so we are talking about repeated rather than one-off success.

Harrison himself, as we saw at n. 7 above, bases Theopompos' claim on a reading of *anepsios* as capable of including father's cousin, with a second cousin therefore being *pais anepsiou* of the deceased. To my mind more attractive is the view of Thompson,[10] that the key ambiguity may lie in the plural use of *paides* in the statutory phrase *mekhri anepsiōn paidōn* (for which see n. 5 above) – his point being

[8] Some aspects of this problem are discussed in Todd (2000).

[9] For the view that we cannot be sure and possibly indeed that the Athenians themselves may not have been clear what the phrase meant, see e.g. Schaps (1975: 54 n.3); Davies (1978: 108, noting the contrast with earlier acceptance of Wyse's interpretation at Davies 1971: 79); MacDowell (1978: 107, on which see further below); Rubinstein (1993: 42 with n.32). A dissenting view is that of Thompson (discussed below).

[10] It is however worth noting here the suggestion of Broadbent (1968: 73), that Theopompos may have confused the jury into accepting a degree of relationship traced through Hagnias' mother's side (on which he was Hagnias' first cousin once removed) with agnatic status on Hagnias' father's side (on which he was, as we have seen, second cousin).

that to describe the deceased and the claimant as sons of (first) cousins means that the claimant is himself a second cousin to the deceased, and not the son of a first cousin.[11] This view had previously been considered by Harrison, who however rejected it as a "transparent quibble"; Thompson, drawing on a suggestion put forward by Miles, argues that it is a natural way of thinking if the law is framed in terms of distance of claimant and deceased from a common ancestor, rather than distance of claimant from deceased.[12]

Thompson himself seems to regard this not simply as a possible reading but as "the correct interpretation" of the statutory phrase; MacDowell by contrast considers the phrase ambiguous, though he does accept that "the original drafters of the law must have known what they meant".[13] In favour of ambiguity, it should be noted that although Theopompos does twice describe his own status in relation to Hagnias as *anepsiou pais* (Isai. 11.10, 11.18),[14] he first does so immediately after introducing his claim by telling how he and various others, including not only Hagnias but the now-deceased claimants Stratios and Stratokles, were all *ex anepsiōn gegonotes* ("born from *anepsioi*", Isai. 11.8), as if it is somehow important for him to start with the premise that "we" were born from *anepsioi* before moving to the claim that "I" am *anepsiou pais*.[15] This may suggest that he does not regard his interpretation of the law as unchallengeable.[16]

[2] My second set of questions concerns the likelihood of cases emerging which would test the limits of the *ankhisteia*, in the way that would seem to be presupposed by the shared assumption underlying both Thompson's and MacDowell's formulations, that this phrase in the law must have had one single intended meaning, at least in the mind of its legislators.

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[11] Thompson (1970: 76-79, cf. 1976: 5).

[12] Harrison (1947: 42); Thompson (1970: 77), drawing on Miles (1950: 74).

[13] The quotations are from Thompson (1970: 76) and MacDowell (1978: 107).

[14] The phrase is more common in Dem. 43 (§§ 26, 27, 32, etc.), perhaps in response to Theopompos' success.

[15] It is notable that this move is made only after Theopompos has challenged the opposition to describe the basis on which his nephew can be described as *gegonōs … ex anepsiou* ("born from [an] *anepsios*", Isai. 11.5). This could perhaps be taken to imply that use of this phrase with the singular *anepsios* would naturally be read as a claim to be the son of the deceased's first cousin, until and unless the hearers have been conditioned by the plural *anepsioi* at 11.8 to see it as a description of a group which included the deceased's father as well as the claimant's (or claimants').

[16] I am not sure how far to push the fact that forms of *gignomai*, rather than *pais*, can on occasions be used to denote issue *ad infinitum* rather than simply sons (thus Lys. 2.20): does the wording of the challenge outlined in the previous footnote therefore imply that Theopompos at least is unaware of Harrison's reading of *anepsios* as "father's cousin" (on the basis that otherwise he would be opening himself to refutation based on the fact that his nephew was himself descendant – albeit a grandson – of Hagnias' father's cousin)?

Two sorts of approaches are possible here, the first of which is to focus on demographic issues. It is hard to judge with precision how often an Athenian male might be expected to die intestate with no kin on his father's side closer than first cousin once removed or alternatively second cousin, not least because we do not have funerary inscriptions of a scale and especially type (i.e. identifying the dedicator's relationship to the deceased) which have enabled the construction of plausible kinship-simulation tables for the Roman world.[17] To the extent that similar demographic conditions obtain, however, the Roman evidence would suggest that such cases will have been extremely rare, at least for citizens. (Metics, qua immigrants, may not have had a comparable network of kin.) It is perhaps worth noting here the argument of Humphreys, based on archaeological as well as literary evidence, that extensive groupings of family tombs seem to have been rare at Athens, with Hagnias' family being one of only four known cases in which as many as four generations appear to have shared the same burial location. Indeed, Humphreys suggests that in the present case it is precisely the recurrent litigation which has served to maintain an unusually strong sense of identity within the extended family.[18]

To speak of the correct or intended meaning of the phrase is of course to presuppose that the function of legislation is to deal with situations that are expected to arise. But there can be other motives for the ways in which laws are worded, and we should at least consider the possibility that this phrase in the law should be read not so much as an expectation that the outer limits of the *ankhisteia* will be an issue that requires close attention, but rather as an ideological statement about the nature of the family, intended to privilege relatives on the father's side, at least to the extent that they can reasonably be regarded as kin, ahead of those on the mother's.[19]

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[17] See e.g. Saller (1994: 43-69), a reference which I owe to Tim Parkin. Saller's preferred computer simulation for the bulk of the male population in the Roman world (his tables 3.1.d-e, based on a model with life expectancy at birth [e_0] of 25 years, and with average age at first marriage being 20 years for females and 30 years for males) suggests that 62% of 70-year-old males would have at least one living son (82% at least one living child of either sex), 64% at least one living grandson (75% at least one living grandchild), and 54% at least one living nephew (68% at least one living nephew or niece), with figures for living children and nephews/nieces declining slowly after ego's early or mid fifties, but those for grandchildren rising much more steeply. This is of course a much more restricted range of kin than any definition of the Athenian *ankhisteia*, since Saller's tables do not include cousins, great-nephews, etc.

[18] Humphreys (1980: 115-116, 123). It is worth noting that the most plausible reconstruction of the family history places the common ancestor Bouselos as "active early in the fifth century" (Davies 1971: 79).

[19] We may note here that a significant proportion of ego's kin on the father's side can be expected to share the deceased's deme and phratry, because membership in these groups was hereditary in the male line; by contrast, ego's kin on the mother's side will only share membership in these groups if her family happen to belong to the same deme or phratry as her husband. I have elsewhere described the Athenian inheritance system as

As well as demographic factors, however, two socio-legal considerations may be relevant in estimating the frequency with which inheritance claims will have involved the outer fringes of the privileged kin-group. Both of them are features of the Athenian legal system which to us appear decidedly odd.

The first is that Athenian inheritance law distinguishes sharply between the rights of sons (including also those adopted *inter vivos*) and those of all other claimants (whether by will or through kinship). The former inherit automatically, at the moment of their father's death, in equal shares; indeed, in a sense a son's rights actually pre-date his father's death, because if he happens to predecease his father, his share will be divided among his own sons.[20] Other claimants, by contrast, require a lawcourt to adjudicate in their favour, and their rights are apparently regarded as dating only from the moment of successful litigation, rather than from the fact of their having survived the deceased: such at any rate is the natural inference from Isai. 11.10, where Theopompos evidently succeeded in persuading the court that the rights of his brother Stratokles had lapsed because the latter had died before the hearing of their joint claim to Hagnias' estate, and therefore that Stratokles' son could not inherit his father's claim even though Stratokles had clearly survived for at least some time after Hagnias' death.[21]

The second principle derives in a sense from the first, because of what has been described as "the essentially relative character"[22] of the legal processes for establishing inheritance rights at Athens. The standard procedure for claiming a contested inheritance was *diadikasia* (*epidikasia* if uncontested), the function of

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"male-oriented but not agnatic" (Todd 1993: 217): i.e. that although male relatives take precedence over females within the same degree, nevertheless a closer relationship through the female line takes precedence over a more distant relationship traced through males (e.g. a sister's son ahead of a paternal uncle).

[20] For this principle (division *per stirpes* rather than *per capita*), see Harrison (1968-71.i: 131 with n.1).

[21] This is in sharp contrast to modern jurisdictions, which tend to envisage inheritance rights as coming into existence at death: hence the existence of rules determining the order of survivorship in cases where several persons perish in one incident. (In English law, for instance, the so-called *commorientes* rule in § 184 of the Law of Property Act 1925 is that "such deaths shall [subject to any order of the Court], for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder"; subsequent legislation however has modified this rule in its application to spouses, especially in case of intestacy, to prevent the combined estates passing entirely to the relatives of the younger one in cases where the couple have no children.) Survivorship is important for modern jurisdictions because it may have implications for inheritance tax, and will normally determine whether a bequest goes to the heirs of the beneficiary or the reversionary heir of the original testator: Athens had no concept of death duties; and by linking inheritance rights to a court's decision, it removed the need to determine survivorship.

[22] Harrison (1968-71.i: 220).

which was to determine which of the competing applicants had the better right, but further claims could apparently be submitted on the same basis up to five years after the death of the successful claimant.[23]

The combined effect of these rules is that claimants other than sons become in a sense no more than life-tenants of the inherited property: only if such a claimant produces his own son, and if that son inherits in turn and without dispute, does the estate in question definitively pass into his hands.[24] But the more that such rules applied in practice to keep the ultimate destination of an inheritance provisional for a generation after the death of the original owner, this will inevitably have distorted the demographic position because of the death of those who would previously have been claimants.[25]

In Hagnias' case, the consequence was to permit Sositheos, a member of a rival branch of the family, to re-open the challenge against Theopompos' heir Makartatos following the former's death. The dates of these various events are contested, but even a late dating for Hagnias as proposed by Humphreys leaves a gap of approximately three decades between the latter's death and the hearing of Sositheos' claim.[26] But what is significant here is the wording of Sositheos' claim to Hagnias' *klēros* ("estate", Dem. 43.1, etc.): in other words, that the estate that Theopompos had inherited is conceived of as continuing to exist as a separate and identifiable part of Theopompos' property.

It is of course hard to be sure how far such language reflects reality on the ground, because to describe an opponent as possessing two or more estates is a powerful allegation of greed and exploitation.[27] But we do hear of at least one other case in which a subsequent hearing granted the totality of an inherited estate to a

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[23] This is generally inferred – e.g. by Wyse (1904: 340) and by Harrison (1968-71.i: 247) – from a combination of Isai. 3.58 (five-year period after the death of the *klēronomos* [inheritor]) and Dem. 43.16 (law permitting cases to be reopened after the death of a successful *epidikasia* claimant "provided the *prothesmia* [statutory period of limitation] has not elapsed").

[24] There are similar rules restricting the capacity of an adopted heir himself to adopt: for discussion of disputed points, see Harrison (1968-71.i: 85-86) and Rubinstein (1993: 17-18).

[25] It is worth noting that Sositheos in Dem. 43 claims the property in the name of his son Euboulides after having had the latter posthumously adopted as the child of his maternal grandfather: the reasons for this are not stated, but one (possibly coincidental) consequence is to move him one generation closer to the deceased Hagnias.

[26] Humphreys (1983) accepts the traditional date of 361/0 as the date of Phylomakhe's initial success in gaining the estate, in a hearing shortly before Isai. 11 (the evidence is a witness testimony at Dem. 43.31); she proposes a date in the 340s for Dem. 43 (in view of epigraphic evidence for Makartatos' as-yet unborn second son); but she rejects the identification of Hagnias with the ambassador of that name recorded at *Hell.Oxy.* VII(II).1, thereby allowing her to down-date this event from 396/5 to some time in the 370s.

[27] E.g. Dem. 42.21, as well as Isai. 11.47.

claimant who at the earlier hearing twelve years previously had received only a third of it (Isai. 5.7), which would seem to suggest that the other two-thirds of the estate was envisaged as being still identifiable in a form that could be handed over. The existence or otherwise of a market in land will of course have affected this: to the extent that an Athenian inheriting a piece of landed property was expected to run it as a going concern rather than selling it off and using the cash to expand his existing holdings, the effect will have have been to make it easier for a particular inheritance to be recognised as an identifiable sub-set of his possessions.

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ORALITÀ E SCRITTURA NELLA PRASSI GIUDIZIARIA ATENIESE TRA V E IV SEC. A.C.

Se è vero che il processo venne, nel mondo greco, sin dalle origini concepito come un νεῖκος, una "contesa" (Hom. *Il.* 18,497; *Od.* 12,440; Hes. *Op.* 30 e 35)[1], e che negli studi moderni sul diritto attico si è sottolineato come ancora in tutto il IV sec. a.C. esso continuasse a presentarsi, nella sua struttura formale, come un ἀγὼν λόγων, in altri termini un "agone verbale" tra i due contendenti, il ruolo della scrittura nella prassi giudiziaria di Atene non sempre ha ricevuto la dovuta attenzione ed è stato per lo più considerato trascurabile e marginale[2]. La dimensione dell'oralità che, come un filo conduttore, avrebbe caratterizzato il processo nelle *poleis* greche da Omero alla fine dell'età classica, è stata anzi recentemente assunta, in un saggio ricco di spunti e di interessanti stimoli, da Michael Gagarin come uno degli elementi che, sul piano procedurale (ma non sostanziale), consentirebbero di parlare di una "unità" del diritto greco[3].

In effetti, nell'età degli oratori la forma del processo attico era quella di una lizza oratoria, una gara di parole e discorsi in cui i due ἀντίδικοι uno dopo l'altro presentavano in un'orazione di lunghezza prestabilita i propri argomenti e le proprie ragioni ai giudici (da 201 fino a 1501 e più, secondo l'importanza del processo[4]), i quali, dopo avere ascoltato, prendevano a maggioranza la propria inappellabile decisione sulla base del principio della libera valutazione delle prove, limitandosi a votare per l'una o l'altra parte senza peraltro, per lo più, interagire con esse. Significativamente, inoltre, il processo non si concludeva con un motivato verdetto, bensì con il semplice conteggio dei voti (ψῆφοι) e la proclamazione dell'esito della votazione da parte dell'araldo (Arist. *Ath. Pol.* 69,1)[5].

All'interno di questo contesto, la discussione si è in particolare concentrata sugli elementi di prova utilizzati da attore e convenuto per dimostrare il proprio punto di vista. Si è osservato infatti come dal *corpus* degli oratori attici traspaia, nelle cause

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1 Gernet 1955, p. 63.

2 Gagarin 2004, p. 22: "Athenian legal procedure, though gradually accepting some forms of writing for peripheral matters, kept it away from the heart of the trial, so that throughout the classical period it retained the oral nature it had had from the beginning"; cfr. anche Gagarin 2001, pp. 457-462; 2003, pp. 72-77.

3 Gagarin 2005, pp. 34-38.

4 Harrison 1971, p. 47.

5 Thür 1987 e 2004, pp. 43-44.

che avevano come protagonisti i cittadini, una netta preferenza a sostenere le proprie tesi sulla base della testimonianza orale di parenti, amici e membri delle stesse associazioni e gruppi sociali (demi e fratrie) e una speculare "diffidenza" per i documenti scritti, i quali vengono regolarmente presentati come inaffidabili e facilmente manipolabili, mentre un'eccezione sarebbe rappresentata, a partire dalla metà del IV sec. a.C., dalle cause di diritto marittimo (δίκαι ἐμπορικαί) che, vedendo implicati in prevalenza commercianti e uomini d'affari non-ateniesi, meteci e schiavi – personaggi per definizione esclusi dalle reti di relazioni sociali cui appartenevano i *politai* –, ruotavano intorno a rapporti di tipo contrattuale e potevano anzi essere esperite esclusivamente in presenza di accordi scritti[6].

Si ammette generalmente che a partire dall'inizio del IV sec. a.C. – la data precisa è incerta[7] – le testimonianze venivano obbligatoriamente preparate e messe per iscritto durante la fase istruttoria per essere lette, alla stessa maniera degli altri "documenti" utilizzati come mezzi di prova (Arist. *Ath. Pol.* 53,2: τὰς μαρτυρίας καὶ τὰς προκλήσεις καὶ τοὺς νόμους; 67,3: [ψήφισμα ἢ] νόμον ἢ μαρ[τυρίαν ἢ σύμβολον]; *Rhet.* 1375a24: νόμοι, μάρτυρες, συνθῆκαι, βάσανοι, ὅρκος), dal segretario (*grammateus*) in tribunale (Dem. 45,44: ὁ νόμος μαρτυρεῖν ἐν γραμματείῳ κέλευει), ma che questo passaggio dalla testimonianza diretta alla testimonianza "documentata", rispondente soprattutto alla necessità di garantire un più ordinato svolgimento del processo e contenerne rigorosamente i tempi, e quindi funzionale ad obiettivi di carattere meramente "tecnico"[8], avrebbe tutt'al più soltanto scalfito la natura essenzialmente orale del processo attico. Ne deriva un'immagine piuttosto statica dei meccanismi di svolgimento del processo attico stesso in cui, da un lato, gli aspetti retorici[9] e la dimensione sociale che ne costituivano una componente fondamentale risultano nella nostra percezione inevitabilmente potenziati, dall'altro, l'elemento dinamico costituito dalla progressiva diffusione, in una società dominata dall'oralità, della scrittura e, parallelamente a ciò, la sua sempre più sistematica utilizzazione nell'ambito delle pratiche amministrative della *polis*[10], viene al contrario sottovalutato o posto in secondo piano. Per dar conto

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[6] Humphreys 1985; Cohen 2003; Lanni 2005; 2006, pp. 41-74, 149-179; 2007. Per una diversa valutazione del ruolo dei μάρτυρες nel processo attico, non meri *supporters* di uno dei contendenti ma "testimoni" nel senso tecnico del termine, v. peraltro Mirhady 2002. Sulle *dikai emporikai* cfr. da ultimo Cohen 2005, pp. 297-302, con la precedente bibliografia.

[7] Rhodes 1995, pp. 310-311; Rubinstein 2000, p. 72 con n. 143; Cobetto Ghiggia 2002, pp. 190-193; Fezzi 2004, pp. 109-115.

[8] Maffi 1988, pp. 194-195; Rubinstein 2000, pp. 72-75; Fezzi 2004, pp. 115-118; per altre possibili spiegazioni, che attengono più direttamente agli aspetti sostanziali delle pratiche processuali, cfr. Todd 2002, pp. 160-161.

[9] A questo proposito, per una rassegna sistematica delle problematiche in discussione, v. Bearzot 2007.

[10] Thomas 1989, 1992 e 1994 (in generale piuttosto riduttiva nel ruolo attribuito alla scrittura); Davies 2003; Pébarthe 2006. Sugli archivi pubblici nel mondo greco, e sulle

dell'apparente anomalia di tale fenomeno – soprattutto se messo a confronto con la precoce e ubiqua diffusione della legge scritta – il Gagarin deve infatti ipotizzare che esso fosse funzionale alla natura democratica del regime politico ateniese, tale da evitare la professionalizzazione del diritto e da garantire che "litigation would remain under the direct control of the people"[11] – ciò che peraltro non spiega il ricorrere di tale forma del processo anche in altre *poleis* del mondo greco (prima fra tutte Gortina).

Ci si può peraltro domandare se questa prospettiva di indagine sia idonea a fornirci un quadro completo e affidabile di quanto realmente avvenisse nei *dikastêria* ateniesi e se un approccio "istituzionale" non possa in qualche modo contribuire a modificare questa ricostruzione della prassi giudiziaria ateniese e produrre un'immagine più equilibrata del rapporto tra oralità e scrittura anche in relazione alle forme dell'amministrazione della giustizia. Per ritornare al problema dell'introduzione della testimonianza scritta e "documentata", Demostene (45,44-45; cfr. anche 46,6) insiste, ad esempio, sulle motivazioni "sostanziali" e non soltanto di natura tecnica di tale provvedimento, sottolineando come la legge esigesse che la testimonianza fosse registrata su una tavoletta (ἐν γραμματείῳ) per evitare che, durante il processo, il testimone potesse aggiungere o togliere elementi a quanto già affermato davanti al magistrato, in maniera tale che vi fosse trasparenza e, nell'eventualità di un'azione per falsa testimonianza (δίκη ψευδομαρτυρίων), il contenuto della deposizione non potesse divenire oggetto di contestazioni[12]. Similmente, l'importanza che la documentazione scritta poteva, anche soltanto in termini quantitativi, assumere nell'ambito del processo è riflessa, sul piano letterario, dalla figura dell'ἀπονενοημένος, "il pazzo morale", l'uomo che ha perso ogni pudore, nei *Caratteri* di Teofrasto, in cui questo personaggio viene presentato come colui il quale "è bravo a comparire in tribunale, sia quale accusatore sia quale imputato, ad accampare sotto giuramento impedimenti legali per non presentarsi all'udienza o a venirci con in grembo una cassetta contenente gli atti [processuali] e in mano sfilze di documenti" (ἱκανὸς δὲ καὶ δίκας τὰς μὲν φεύγειν, τὰς δὲ διώκειν, τὰς δὲ ἐξόμνυσθαι, ταῖς δὲ παρεῖναι ἔχων ἐχῖνον ἐν τῷ προκολπίῳ καὶ ὁρμαθοὺς γραμματειδίων ἐν ταῖς χερσίν) (6,8). Il passo, come spesso succede nei *Caratteri* teofrastei, è di interpretazione meno agevole di quanto potrebbe a prima vista

pratiche amministrative da essi riflesse, è ora fondamentale, in una prospettiva diacronica, Boffo 2003; cfr. anche Faraguna 2005. Sul caso, paradigmatico, delle registrazioni fondiarie v. Faraguna 1997, 2000 e 2003.

[11] Gagarin 2004, p. 25; cfr. anche Gagarin 2005, pp. 34-38.

[12] Su questo punto cfr. da ultimo Pébarthe 2006, pp. 329-331. Un esempio di contenzioso originante dalla discrasia tra quanto contenuto in un documento scritto e quanto concordato oralmente, alla presenza di testimoni, tra le parti è offerto da Is. 5,25 (v. sotto).

apparire e le precise circostanze cui si fa in esso riferimento non del tutto chiare[13]: in ogni caso, sia che l'*aponenoêmenos* vi fosse direttamente coinvolto o agisse soltanto come testimone, la spiegazione più plausibile è che gli atti che dovevano essere contenuti nell'*echînos* e i *grammateidia* fossero documenti, presumibilmente privati, relativi alla causa in discussione e, pur nell'evidente enfasi caricaturale, ciò rivela in maniera concreta come nella preparazione di un processo la documentazione scritta dovesse avere un ruolo tutt'altro che secondario.

Prima di inoltrarmi nella mia argomentazione mi sembra utile rilevare, in via preliminare, come a tale interpretazione del funzionamento del sistema giudiziario ateniese abbia in qualche misura indirettamente concorso anche la critica ad esso esplicitamente avanzata da Platone nel dialogo delle *Leggi*[14]. In quest'opera il filosofo ateniese fa infatti cominciare la sua trattazione sull'organizzazione della giustizia nella città di Magnesia con l'affermazione che una *polis* non potrebbe essere tale (πόλις ἄπολις ἂν γίγνοιτο) se i tribunali non fossero stabiliti in maniera conveniente e rimarcando, da un lato, come un giudice "muto" (ἄφωνος), quali di fatto erano i *dikastai* ateniesi, "non sarebbe mai capace di rendere giustizia" (οὐκ ἄν ποτε ἱκανὸς γένοιτο περὶ τὴν τῶν δικαστῶν κρίσιν) e, dall'altro, come "il tempo, la lentezza del procedimento, le ripetute istruttorie (ἀνακρίσεις)", a differenza di quanto avveniva nei *dikastêria* ateniesi in cui la durata di un processo non superava mai la lunghezza di un giorno, "servano a chiarire il dibattito" (πρὸς τὸ φανερὸν γίγνεσθαι τὴν ἀμφισβήτησιν σύμφορον) (766d-e). Ne discende, per la città di Magnesia, un progetto di giustizia, definita da L. Gernet "aristocratica"[15], articolato, tanto per le cause private che per quelle pubbliche, su tre livelli di tribunali, soltanto l'ultimo dei quali, costituito da membri eletti tra i magistrati e soggetti, come questi ultimi, a *dokimasia*, era, a differenza di quanto avveniva ad Atene, inappellabile[16]. In esso il processo assumeva carattere inquisitorio e l'accertamento della verità si fondava non soltanto sui *logoi* dei due contendenti ma anche, e soprattutto, sugli interrogatori condotti a turno dai giudici (855c-856a). Platone evidenzia in particolare come l'esame della causa dovesse durare tre giorni e, fatto per noi significativo, come l'uso della scrittura per la verbalizzazione, da parte dei giudici,

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[13] Si veda ora il commento *ad loc.* di Diggle 2004, pp. 258-264. Sui tribunali come elemento dell'esperienza quotidiana nei *Caratteri* teofrastei cfr. Leppin 2002, in part. pp. 42-43, 49-50 e 53-54.

[14] Gagarin 1999, pp. 179-180; 2000.

[15] Gernet 1951, p. CXXXII; ma cfr. Gagarin 2000, p. 218, il quale osserva come "on trouve aussi des differences importantes entre sa pensée juridique et l'ésprit du droit des cités aristocratiques comme Gortyne".

[16] Per una ricostruzione e approfondita analisi dell'organizzazione del sistema giudiziario descritto, non sempre in maniera organica e sistematica, da Platone cfr. Gernet 1951, pp. CXXXII-CLI; Piérart 1973, pp. 386-463. Si veda ora anche Brisson-Pradeau 2006, pp. 415-416, n. 104 e *passim*.

di quanto venuto alla luce durante il procedimento dovesse avere un ruolo importante nell'indagine sull'oggetto della causa[17].

D'altra parte, come osservava L. Gernet, "non sorprende tanto il fatto che Platone, il quale, in reazione allo stato di cose esistente ad Atene, voleva dei magistrati che governassero e avessero poteri effettivi, abbia attribuito loro funzioni di questo tenore quanto piuttosto il fatto che, pur partendo da queste premesse, egli abbia lasciato largo spazio ad un sistema del tutto differente"[18]. Tali modalità di svolgimento del processo sembrano infatti applicarsi soltanto alle cause che potevano portare alla pena capitale (θανάτου πέρι) ed erano giudicate dal tribunale supremo, formato dai "custodi delle leggi" (νομοφύλακες) e da un collegio di magistrati eletti in base al criterio dell'eccellenza, mentre ai livelli più bassi della giustizia, tanto per le cause civili quanto per quelle di diritto pubblico il giudizio era affidato, nel caso l'arbitrato non avesse avuto successo, ai tribunali popolari (κοινὰ δικαστήρια) formati, come quelli democratici di Atene, a partire dalle tribù (φυλετικὰ δικαστήρια)[19]. Riconoscere quindi che, nella volontà di offrire una precisa definizione dei reati, di poter contare su giudici competenti e assimilabili a magistrati, di organizzare l'*iter* giudiziario in modo da promuovere l'accertamento della verità e consentire giudizi equi e non affrettati, avvalendosi a tal fine anche dello strumento della scrittura, nonché di limitare al massimo il ruolo della retorica, Platone deliberatamente intendesse, conformemente al suo progetto filosofico *complessivo* di una società fondata sulla virtù (ἀρετή), prendere le distanze dal modello di organizzazione della giustizia dell'Atene democratica, non significa quindi ammettere che egli intendesse sistematicamente respingere tutti gli elementi che *singolarmente* contribuivano a comporre tale modello, al punto che se egli proponeva l'uso della verbalizzazione scritta dei risultati dell'interrogatorio se ne possa automaticamente inferire che tale funzione della scrittura mancasse del tutto ad Atene[20], e questo tanto più perché il sistema ateniese servì da ispirazione a Platone anche per altri molteplici aspetti dell'ordinamento giudiziario delineato nelle *Leggi*, a cominciare dalle procedure per la presentazione e l'istruzione di una causa (948d, 956e-957a)[21]. Ed è proprio partendo da questi elementi che, ritornando ad Atene e al problema degli "effetti" generati dalla scrittura sul sistema giudiziario, dobbiamo ora riprendere in considerazione su nuove basi i caratteri e l'organizzazione del processo attico.

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[17] Bertrand 1999, pp. 213-217, 232-238; Gagarin 2000; Brisson-Pradeau 2006, pp. 14-23.

[18] Gernet 1951, p. CXXXVII.

[19] Piérart 1973, pp. 388-393, 441-444, 462-463.

[20] Bertrand 1999, p. 214, nota anzi a questo proposito che "[d]ans la cité des Magnètes, où les procès concernant certaines affaires importantes doivent durer trois jours, l'audience publique regroupe les étapes de la procédure qui étaient dissociées à Athènes car il semble que l'on y fait coexister plaidoiries et interrogatoires sur les faits eux-mêmes pour permettre à une vérité d'émerger".

[21] Piérart 1973, pp. 399-402.

Il momento dibattimentale che si svolgeva davanti ai giudici del tribunale popolare e si concretizzava nell'*agôn* oratorio tra i due contendenti costituiva infatti soltanto l'ultimo atto di una procedura complessa le cui prime fasi avevano luogo davanti al magistrato ed erano accompagnate dalla produzione, a cura di quest'ultimo, di una significativa mole di documentazione scritta. Per quanto questo fatto venga per lo più riconosciuto, il problema è soprattutto quello di valutare in che termini tali fasi preliminari e tale documentazione scritta influissero poi sull'andamento e gli esiti del processo, condizionando di fatto la libertà delle parti nella scelta degli argomenti e delle prove da presentare ai giudici. Per quanto, nell'ottica di chi, come gli studiosi moderni, sia costretto, sulla base dei discorsi degli oratori e della *Retorica* di Aristotele, a guardare il sistema giudiziario ateniese da una prospettiva distorta e limitata agli aspetti "retorici" del processo, possa a prima vista apparire di importanza secondaria, la questione è in realtà cruciale e attiene al problema, di ben più ampia portata, del carattere tecnico o meno del diritto greco e, al di là del *topos* tipicamente democratico, ricorrente con frequenza nei discorsi, secondo cui gli oratori si presentano come totalmente inesperti di diritto, del livello di competenza giuridica necessario per poter adire i tribunali.

L'uso della scrittura condizionava in realtà lo svolgimento di una causa in grado ben maggiore di quanto gli studiosi siano disposti ad ammettere. Ciò avveniva sin dalle prime fasi del procedimento dopo che l'attore, con la *prosklêsis*, aveva ingiunto alla presenza di testimoni al convenuto di comparire davanti al magistrato competente in un certo giorno[22]. In tale occasione il magistrato, o meglio il suo γραμματεύς (o ὑπογραμματεύς)[23], registrava infatti su una tavoletta di legno (σανίς) l'atto di accusa, nel V sec. forse ancora presentato oralmente (Ar. *Nub*. 758-772), redigendo un documento dalla struttura formulare cui gli oratori fanno riferimento con il termine tecnico ἔγκλημα (o, meno frequentemente, ἐπίγραμμα)[24] e, per quelle di diritto pubblico, γραφή, nel quale venivano annotati i dati anagrafici delle due parti, il tipo dell'azione esperita nonché l'indicazione della pena proposta (τίμημα) e, talora, in coda a questi elementi, anche una sintetica ma circostanziata descrizione dei fatti che avevano dato origine alla querela[25]. Se, ad esempio, nell'orazione demostenica *Contro Stefano I* l'esposto letto dal segretario recita semplicemente "Apollodoro figlio di Pasione del demo di Acarne accusa Stefano figlio di Menecle di Acarne di falsa testimonianza, danni per un talento" (Ἀπολλώδορος Πασίωνος Ἀχαρνεὺς Στεφάνῳ Μενεκλέους Ἀχαρνεῖ ψευδομαρτυρίων, τίμημα τάλαντον) e ad esso doveva essere "allegato" ἐν τῷ γραμματείῳ il testo della testimonianza su cui

[22] Su questa fase preliminare della procedura giudiziaria ateniese v. Harrison 1971, pp. 85-94.

[23] Sickinger 1999, p. 37, con riferimento a Ar. *Nub*. 769-772, e Antiph. 6,35; cfr. anche Pritchett 1996, pp. 19-20.

[24] Bertrand 2002.

[25] Per una sistematica raccolta e discussione dei dati delle fonti letterarie ed epigrafiche al riguardo cfr. Faraguna 2006, con la precedente bibliografia.

verteva l'accusa (45,46), in quella *Contro Panteneto* l'*enklêma*, oggetto di una puntuale disamina, viene arricchito del racconto dettagliato di come Nicobulo si fosse impadronito, per mezzo dei suoi schiavi, di 90 mine che Panteneto intendeva versare alla città come canone d'affitto per una concessione mineraria nel distretto del Laurion, causandone così l'iscrizione nel registro dei pubblici debitori e continuando anche in seguito, con altri illeciti, il suo comportamento vessatorio (37,22, 25-29 e 33; cfr. anche Dion. Hal. *Din*. 3 = Din. fr. XLVIII, T2 Conomis; Plut. *Alc*. 22,4). Nella *Contro Afobo III*, relativa all'eredità che gli era stata sottratta dai suoi tutori, Demostene dichiara inoltre di non avere fissato l'entità dei danni (*timêma*), alla maniera dei sicofanti, semplicemente indicando una cifra totale, bensì di avere presentato un elenco dettagliato per voci in cui era specificato l'ammontare di ciascuna somma ricevuta da Afobo, da chi egli l'aveva ottenuta e a quale titolo (Dem. 29,30-31). Si comprende pertanto come l'*enklêma* potesse essere un documento piuttosto articolato e riportare numerosi dati ed elementi. Ad esso, nella registrazione del magistrato, corrispondeva la controdichiarazione scritta del convenuto (ἀντιγραφή), costruita, in maniera speculare, sullo stesso schema dell'*enklêma* (Dem. 45,46 e 87).

In un altro contributo ho mostrato, sulla base della testimonianza delle fonti letterarie e, soprattutto, delle iscrizioni, che la tavoletta su cui il magistrato effettuava la registrazione serviva, come una sorta di scheda, anche per l'annotazione dei dati – nome del *dikastêrion*, data del processo, presenza o assenza dell'accusato, esito del giudizio – relativi alla fase processuale della causa e che essa veniva quindi conservata *a fini amministrativi* nell'archivio del magistrato[26]. Quello che è necessario qui evidenziare è peraltro che il documento redatto dal magistrato poteva essere di grande rilevanza anche *sul piano giuridico* in quanto esso fissava non soltanto i limiti entro cui doveva muoversi l'attore nella sua strategia giudiziaria ma anche quelli entro i quali doveva avvenire il giudizio del tribunale. Il primo punto viene mirabilmente illuminato da un passo dell'orazione demostenica *Contro Nausimaco e Senopite* in cui l'attore, nell'opporre una παραγραφή ad un'azione, una δίκη ἐπιτροπῆς, iniziata da Nausimaco e Senopite di cui il padre Aristecmo era stato tutore, chiede che venga letto il testo dell'atto di accusa in cui si dichiara che la somma di denaro oggetto della disputa figurava a titolo di credito nei conti relativi all'eredità dei due fratelli amministrata da Aristecmo (38,14-15) e lo confronta con quello dell'*enklêma* presentato dagli stessi in una precedente causa avente lo stesso oggetto, di cui viene data nuovamente lettura, nel quale lo stesso Aristecmo veniva questa volta accusato di non avere rimesso il rendiconto sulla gestione dell'eredità da lui amministrata (38,15-16). E' interessante osservare che tra le due cause era intercorso un periodo di ben 14 anni (!) (38,6) e come, anche a notevole distanza di tempo, i documenti giudiziari, che dovevano essere stati custoditi da qualche parte, forniscano il fondamento per l'argomentazione dell'oratore.

[26] Faraguna 2006; cfr. ora anche Sickinger 2007, pp. 204-206.

Quanto al secondo punto, sebbene la questione rimanga controversa, G. Thür ha, nella relazione presentata all'ultimo *Symposion* svoltosi a Salerno, sostenuto con solidi argomenti che il giuramento con cui, da un lato, gli ἀντίδικοι si impegnavano ad attenersi nella loro orazione all'oggetto della lite (Arist. *Ath. Pol.* 67,1: εἰς αὐτὸ τὸ πρᾶγμα ἐρεῖν), e, dall'altro, i δικασταί si impegnavano a giudicare in conformità al solo oggetto dell'accusa (Dem. 24,151: περὶ αὐτοῦ οὗ ἂν δίωξις ᾖ) si riferisse in concreto ai termini della questione quale era stata definita proprio nell'*enklêma*, che diveniva in tal modo il criterio fondamentale per valutare se l'oratore avesse parlato ἔξω τοῦ πράγματος[27].

Diviene perciò lecito affermare che la redazione dell'*enklêma* nell'udienza preliminare davanti al magistrato non era soltanto un atto formale bensì aveva conseguenze sostanziali per tutti i successivi sviluppi dell'azione legale che veniva in tal modo intrapresa. L'oralità del processo su cui si è soprattutto appuntata l'attenzione degli studiosi viene quindi in questa prospettiva ad acquistare un nuovo significato. Lo stesso deve, a mio giudizio, valere anche per il passaggio successivo del procedimento giudiziario. Dopo che il magistrato aveva, nell'udienza preliminare, giudicato la causa ammissibile (εἰσαγώγιμος) – un atto anch'esso non soltanto formale che lo esponeva al rischio di essere accusato, in sede di *euthunai*, di avere illegittimamente consentito l'"introduzione" della causa – egli fissava infatti una data per quella che è stata definita la fase "dialettica" della procedura[28], corrispondente, per le cause di diritto pubblico, all'"istruttoria" (ἀνάκρισις), per la maggior parte di quelle di diritto privato (con la significativa eccezione delle *dikai* relative al diritto familiare e successorio che erano di competenza dell'arconte[29]) all'"arbitrato" (δίαιτα). In quanto segue ci si occuperà esclusivamente dell'*anakrisis* nella convinzione che le procedure dell'*anakrisis* e della *diaita* fossero analoghe e parallele.

Quel poco che sappiamo su quanto avveniva all'*anakrisis* ci è noto da alcuni brevi accenni contenuti nelle orazioni ed è a stento sufficiente a offrirci un quadro completo di questa fase della procedura[30]. Non tenerne conto sarebbe d'altra parte metodologicamente arbitrario, perché chi giudica il sistema giudiziario ateniese sulla sola base dell'*agôn* oratorio che aveva luogo nel tribunale rischia di offrirne un'immagine parziale e falsata e, soprattutto, di sottovalutare l'elemento tecnico inerente al confronto dialettico con cui i contendenti cercavano di "inchiodare"

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[27] Thür 2007, da leggere con i commenti di Talamanca 2007. Per l'espressione *exô tou pragmatos* cfr. Arist. *Rhet.* 1354a22-23. Sul problema se gli oratori attici, al di là delle affermazioni di principio, veramente poi rispettassero tale impegno v. Rhodes 2004. Sul testo del giuramento dei *dikastai* e sulle sue implicazioni v. ora Harris 2007.

[28] Thür 2005, p. 152.

[29] Bonner-Smith 1938, pp. 97-116; Harrison 1971, pp. 19-21; diversamente Duran 2002.

[30] Sull'*anakrisis* v. in particolare Harrison 1971, pp. 94-105; Maffi 1985; Todd 2002; Bertrand 2006. Un'importante testimonianza per il V sec. ci è offerta da Aesch. *Eum.* 403-489 (v. in proposito Harris 2000, pp. 75-77).

l'altra parte a posizioni che divenivano così vincolanti anche per la fase "retorica" del processo. Sappiamo infatti che l'istruttoria davanti al magistrato poteva svolgersi in più sedute (Is. 6,12; Dem. 53,22) e che era lecito chiedere una sospensione e un aggiornamento (Is. 6,13). Il termine *anakrisis* significa in particolare "interrogatorio" ed erano innanzitutto i contendenti a porsi reciprocamente domande. Una legge, riportata da Dem. 46,10, stabiliva che in questo caso gli *antidikoi* erano tenuti a rispondere (anche se non a testimoniare) e che il magistrato poteva costringere la parte reticente a ottemperare a tale obbligo (Is. 6,12-16). Da un'altra orazione di Iseo, *Sull'eredità di Aristarco*, capiamo inoltre che il magistrato non aveva soltanto il ruolo di spettatore passivo ma aveva a sua volta il diritto di intervenire e richiedere che una questione venisse chiarita: l'attore dichiara infatti di essere stato obbligato ἐν τῇ ἀνακρίσει ad aggiungere (προσγράψασθαι) nell'*enklêma* che sua madre era sorella di Aristarco (II), un'ammissione che rischiava di pregiudicare gravemente il successo della sua rivendicazione dell'eredità di Aristarco (I) (Is. 10,2)[31]. Similmente, secondo l'orazione lisiana *Contro Agorato*, a seguito dell'arresto (ἀπαγωγή) cui aveva direttamente proceduto Dionisio ai danni di Agorato, gli Undici, per ricevere l'atto di accusa, avevano preteso che lo stesso Dionisio aggiungesse nell'*enklêma* la specifica dicitura ἐπ' αὐτοφώρῳ di norma applicata a quei casi in cui il colpevole veniva trovato in possesso del corpo del reato (e, per estensione, quando la colpevolezza era "manifesta") (Lys. 13,85-87)[32].

Le affermazioni fatte dalle parti davanti al magistrato avevano valore soltanto se sostenute da testimoni (Is. 6,15). La testimonianza, non solo nel IV sec. ma, presumibilmente, anche nel V, non avveniva nella forma di una dichiarazione libera bensì mediante la semplice conferma, espressa in un linguaggio formulare, che quanto il testimone era chiamato a testimoniare era vero[33]. Il testo della testimonianza veniva per questa ragione preparato e messo per iscritto su una tavoletta di legno (*grammateion*) prima dell'udienza e, come dice Demostene, poteva essere "portato da casa" (οἴκοθεν) già confezionato (Dem. 46,11). Valevano naturalmente come mezzo di prova anche i documenti scritti pubblici e privati. Tra i secondi, come è ben noto, le orazioni di IV sec. fanno riferimento a testamenti, contratti, un documento di affitto di una banca, documenti finanziari, inventari di patrimoni, contabilità privata, ecc.[34]. Può accadere talora che, come in Dem. 36,40, sia l'attore stesso a redigere un documento e a farlo leggere ai giudici per aggiungere efficacia alla propria argomentazione. Significativamente, nella *Contro Macartato*, in un'intricata causa relativa ad una eredità e a chi avesse diritto alla successione, l'attore dichiara di avere avuto l'intenzione di indicare su un πίναξ in forma scritta

[31] Wyse 1904, pp. 649-655; Harrison 1971, pp. 95-96; cfr. Cobetto Ghiggia 1999, pp. 247-269.

[32] Sul significato dell'espessione *ep'autophôrôi* cfr. Todd 1993, pp. 275-276; Harris 1994.

[33] Thür 2005, pp. 152-155.

[34] Bonner 1905, pp. 61-66; Pébarthe 2006, pp. 325-326.

tutti i parenti di Agnia – si può pensare ad una sorta di albero genealogico – per poi presentarli uno per uno ai giudici (γράψας ἐν πίνακι ἅπαντας τοὺς συγγενεῖς τοὺς Ἀγνίου, οὕτως ἐπιδεικνύειν ὑμῖν καθ' ἕκαστον), ma di avere poi desistito perché i *dikastai* seduti più lontano si sarebbero trovati a mal partito (ἐπειδὴ δ' ἐδόκει οὐκ ἂν εἶναι ἐξ ἴσου ἡ θεωρία ἅπασι τοῖς δικασταῖς, ἀλλ' οἱ πόρρω καθήμενοι ἀπολείπεσθαι) ([Dem.] 43,18).

Certo, in assenza di procedure per l'autenticazione pubblica dei documenti privati, la validità di testamenti e contratti poteva essere sempre messa in discussione[35]. La prassi voleva che tali documenti venissero sigillati e depositati presso una terza parte che se ne faceva garante e si impegnava a non produrre l'originale e ad aprire i sigilli, anche al solo scopo che ne venisse fatta una copia, senza il consenso degli interessati e la presenza di testimoni. Nell'eventualità di contestazioni una parte poteva formalmente ingiungere alla controparte, con una πρόκλησις presentata in forma scritta, ad autorizzare che il depositario mettesse a disposizione l'atto in originale e che se ne facesse una copia, cosa che, in caso di diniego, poteva essere utilizzata come argomento nella fase "retorica" del processo[36]. Un significativo esempio ci viene fornito nuovamente dall'orazione *Contro Stefano I* demostenica, dove, secondo il testo della testimonianza oggetto della *dikê pseudomarturiôn*, Stefano di Acarne e due altri personaggi confermavano di essere stati presenti (μαρτυροῦσι παρεῖναι) quando Formione, davanti all'arbitro, aveva intimato (προυκαλεῖτο) ad Apollodoro, nel caso questi mettesse in dubbio che il *grammateion* deposto nell'ἐχῖνος fosse la copia del testamento di Pasione, di aprire il documento (ἀνοίγειν τὰς διαθήκας) e Apollodoro aveva respinto l'ingiunzione (45,8). Buona parte della seguente argomentazione di Apollodoro (9-26), mirante a dimostrare di non avere mai ricevuto la *proklêsis*, si fonda su una discussione punto per punto del contenuto della *proklêsis* stessa, al fine di evidenziarne l'implausibilità della formulazione[37].

Alla luce di quanto avveniva durante l'*anakrisis* e della mole di documentazione scritta che durante essa veniva raccolta diviene così comprensibile la già menzionata immagine caricaturale teofrastea dell'*aponenoêmenos* che si presenta in tribunale "con in grembo una cassetta (*echînos*) contenente gli atti processuali e in mano sfilze di documenti" (Theophr. *Char*. 6,8), un'immagine che, in tempi recenti, ha in qualche modo ricevuto conferma dalla pubblicazione di una *defixio*, una tavoletta di piombo, significativamente databile all'inizio del IV sec. a.C., contenente una maledizione rivolta contro l'avversario, l'attore di una causa privata (*dikê*), in cui il

[35] Sull'atteggiamento, riflesso dai discorsi degli oratori, degli Ateniesi verso i testamenti si vedano Thompson 1981; Rubinstein 1993, pp. 74-75; Pébarthe 2006, pp. 335-337; Ferrucci 2007, pp. 144-146. I termini della questione sono bene sintetizzati da Arist. *Probl*. 950b5-8.

[36] Cfr. in proposito Maffi 1988, pp. 196-206; Rydberg-Cox 2003.

[37] Sul problema dell'autenticità dei documenti contenuti nell'orazione cfr. Trevett 1992, pp. 180-192.

defigens "lega" alle divinità degli Inferi "la mente e l'anima e la lingua" di Irene, una donna, e, insieme a questi, ἔργα τὰ περὶ τῆς πρὸς ἡμᾶς δίκης λέγει (*SEG* 48,356, ll. 1-7; cfr. anche *SEG* 51,328), un'espressione con buona verisimiglianza da interpretare nel senso di "gli atti che raccoglie per la *dikê* contro di noi", con riferimento quindi ai documenti, agli atti processuali[38].

Il punto fondamentale ai fini del nostro discorso è peraltro che – oggi possiamo affermarlo con relativa sicurezza – le prove e gli atti raccolti durante l'*anakrisis* erano i soli a poter essere utilizzati dagli *antidikoi* nella fase dibattimentale davanti ai *dikastai*. L'istruttoria era in altri termini decisiva ai fini della strategia processuale e della definizione dei mezzi di prova, e degli argomenti, utilizzati dall'accusa e dalla difesa nei rispettivi discorsi né vi era per i contendenti la possibilità di sorprendere l'avversario con nuove testimonianze o nuovo materiale documentario, provocando veri e propri colpi di scena in tribunale[39]. Mentre infatti fino a poco più di due decenni fa si riteneva pressoché unanimemente, sulla scorta della testimonianza dell'*Athenaion Politeia* aristotelica, che tale regola valesse esclusivamente nei casi di arbitrato pubblico in cui una delle parti non accettasse il giudizio dell'arbitro e facesse appello contro di esso (Arist. *Ath. Pol.* 53,2-3: "se uno dei contendenti si appella al tribunale, mettono le testimonianze (μαρτυρίας), le citazioni (προκλήσεις) e i testi di legge (νόμους) in due vasi (εἰς ἐχίνους) separati – l'uno quelli dell'accusatore, l'altro dell'accusato – e dopo averli sigillati e avervi aggiunto, scritta su una tavoletta, la decisione dell'arbitro, trasmettono il tutto ai quattro giudici della tribù dell'accusato. Essi li prendono in consegna e li introducono nel tribunale … Non è consentito (*scil.* in tribunale) utilizzare né leggi né citazioni né testimonianze diverse da quelle deposte negli *echînoi* dall'arbitro")[40], la pubblicazione del coperchio di un *echînos* di terracotta, databile alla fine del IV sec. a.C., su cui era annotata, con lettere dipinte, la lista dei documenti che il vaso conteneva e in cui troviamo l'indicazione δ]ιαμαρτυρία ἐξ ἀνακρίσεως (*SEG* 32,329)[41] ha portato ad una riconsiderazione di tale assunto. Nonostante la

[38] Costabile 2001, in part. pp. 189-192. Sui primi due testi della tavoletta si vedano peraltro le importanti osservazioni critiche di Jordan 2004. Quanto agli "atti processuali" (*erga*) cfr., per un parallelo, Wuensch 1897, nr. 94, nella quale il convenuto lega alle divinità degli Inferi "le testimonianze e tutti gli atti processuali che si preparano contro di me" (τὰς μαρτυρίας καὶ τὰ δικαιώματα ἅπαντα ἃ παρασκευάζει ἐπ' ἐμέ). Sul significato del termine *dikaiômata* in questo contesto cfr. Bechtel et al. 1913, pp. 25-33; Gigon 1987, pp. 541-542 ("'Rechtsgrund' in einem Prozess"), con riferimento a Arist. *Coel.* 279b7-9.

[39] In tal senso ora, convincentemente, Thür 2007.

[40] La più ampia argomentazione a favore della tesi che la procedura descritta nell'*Athenaion Politeia* si applicava soltanto all'arbitrato e che negli altri casi rimaneva sempre la possibilità, anche dopo l'*anakrisis*, di portare nuovi elementi di prova in tribunale si deve a Lämmli 1938, pp. 74-128; cfr. anche Bonner-Smith 1930, pp. 283-293.

[41] Boegehold 1982 e 1995, pp. 79-81.

molteplicità delle proposte di integrazione del testo, molto lacunoso, e le anche fortemente divergenti interpretazioni della natura della causa e della vicenda giudiziaria cui la lista di documenti si riferiva, vi è infatti tra gli studiosi un ampio consenso sul fatto che l'espressione *ex anakriseôs* non poteva che comparire sul coperchio in relazione al processo per il quale era stata preparata la documentazione contenuta nell'*echînos* (una *dikê pseudomarturiôn*?) e che quindi tali "contenitori" venivano utilizzati non soltanto nei casi in cui la decisione dell'arbitro (διαιτητής) veniva impugnata ma anche nelle cause istruite dall'arconte[42]. Bisogna del resto osservare che in un passo delle *Vespe* di Aristofane, una commedia a sfondo "giudiziario" prodotta nel 422 a.C. in cui viene messa alla berlina la passione tutta ateniese per i tribunali, il termine *echînos* compaia in associazione ad una *dikê* "chiamata" dall'arconte (1435-1441)[43] e che l'uso del contenitore per la custodia degli elementi di prova in tali cause risulta così attestato ben prima dell'introduzione della procedura dell'arbitrato pubblico nel 399/8 a.C.[44]. Non sorprende pertanto che esso potesse essere continuato anche nel IV sec. A riprova di ciò l'*echînos* era menzionato anche in un'altra commedia di Aristofane per noi perduta, le *Danaides* (fr. 274 K.-A.), ed è degno di nota che nel lemma di Arpocrazione (s.v. ἐχῖνος) che registra la notizia tale occorrenza venga ricordata, a fianco di Dem. 49,65 e Arist. *Ath. Pol.* 53,2-3, in funzione della definizione secondo cui l'*echînos* ἔστι μὲν ἄγγος τι εἰς ὃ τὰ γραμματεῖα τὰ πρὸς τὰς δίκας ἐτίθεντο.

Un ulteriore importante esempio di come l'uso della scrittura e di documenti scritti potesse condizionare, se non addirittura "sovvertire" l'oralità del processo attico ci viene offerto da un'orazione di Iseo, la *Contro Leocare*. Qui, nel contesto dell'annosa disputa per la successione di Diceogene (II), in cui – è necessario sottolinearlo – le parti fondavano le proprie pretese su due diversi testamenti scritti, uno dei quali era stato riconosciuto come falso da un tribunale, si fa riferimento ad un accordo (ὁμολογία), poi non rispettato da Diceogene (III) e dal suo garante Leocare, con cui il primo si impegnava a rinunciare ai due terzi dell'eredità contestata a favore delle figlie di Diceogene (II) (Is. 5,17-18 e 25-29). E' importante osservare che tale compromesso venne stipulato davanti al tribunale (ἐπὶ τοῦ δικαστηρίου) (5,19), al termine del processo, quando i giudici avevano *già* votato, e per qualche ragione era chiaro che l'esito sarebbe stato sfavorevole a Leocare, ma *prima* che si procedesse alla conta delle *psêphoi* (le quali vennero di conseguenza

[42] Boegehold 1982 e 1995, pp. 79-81; Soritz-Hadler 1986; Wallace 2001; Thür 2007. Scettico Todd 1993, pp. 128-129. Diversamente Duran 2002, contro l'opinione più largamente condivisa secondo cui l'arbitrato sarebbe stato possibile soltanto per le cause di competenza dei Quaranta, propone di leggere il testo dipinto sul coperchio dell'*echînos* in rapporto ad una *diaita* che seguiva l'*anakrisis* condotta dall'arconte.

[43] Non mi pare che il passo, ricco di doppi sensi forse anche di carattere osceno, sia stato sufficientemente chiarito nei commenti moderni: MacDowell 1971, pp. 317-318; Sommerstein 1983, pp. 242-243; cfr. anche Duran 2002, pp. 65-66.

[44] Per la data v. Rhodes 1995, pp. 305-306.

"rimescolate") (5,17-18), e che il suo contenuto venne messo per iscritto su una tavoletta (ἐν τῷ γραμματείῳ) alla presenza di testimoni e degli stessi *dikastai* (5,25-26)[45]. Ciò non impedì peraltro ulteriori controversie sui termini del patteggiamento e, in particolare, se i beni da restituire dovessero essere "liberi da obbligazioni" (ἀναμφισβήτητα) o meno, e, a dimostrazione della compresenza e complementarità di oralità e scrittura tipica della società greca, l'attore sostiene che "allorquando ci trovammo sulla tribuna, per la concitazione, depositammo alcune clausole per iscritto, per le altre producemmo testimoni" (ἡμεῖς δέ, ὦ ἄνδρες, τότ' ἐπὶ τοῦ βήματος σπεύδοντες τὰ μὲν ἐγράψαμεν, τῶν δὲ μάρτυρας ἐποιησάμεθα) (5,25). Rimane nondimeno il fatto che l'oratore più volte insista sullo statuto privilegiato del documento scritto come mezzo di prova e critichi gli avversari i quali "non vogliono neppure rispettare un accordo scritto" (οὐδὲ γὰρ τὰ γραφέντα ἐθέλουσι ποιεῖν) (5,26)[46].

Diversamente da quanto avveniva per le *graphai* e le cause di diritto pubblico, per le quali, nel caso in cui l'attore non si presentasse dal magistrato all'*anakrisis* o, dopo l'istruttoria, disertasse il processo in tribunale, era prevista, come misura volta a scoraggiare la sicofantia, la severa sanzione dell'*atimia*, in altri termini la perdita

[45] Per la ricostruzione della complessa vicenda giudiziaria cfr. ora Cobetto Ghiggia 2002, con ampio e utile commento ai passi citati (pp. 170-194). Non posso peraltro concordare con l'autore quando interpreta l'espressione ἐν τῷ γραμματείῳ τῷ ἐπὶ τοῦ δικαστηρίου γραφέντι nel senso di "nel registro scritto conservato presso il tribunale" (pp. 107 e 190-193): l'esistenza di archivi custoditi "presso il tribunale" sarebbe tra le altre cose senza paralleli – gli archivi giudiziari erano custoditi ad Atene nelle sedi dei singoli magistrati (Faraguna 2006) – e, in assenza della registrazione pubblica dei contratti, è molto più plausibile che il documento, una volta redatto, fosse stato depositato secondo la prassi consueta presso una terza parte. Sull'orazione di Iseo in questione cfr. anche Ferrucci 1998, pp. 73-79.

[46] In risposta alle obiezioni sollevate, nella sua "response", da Michael Gagarin a proposito di questo passo di Iseo, vorrei osservare che, all'inizio dell'orazione, nel riportare il testo della deposizione giurata (ἀντωμοσία) fatta davanti al magistrato, l'attore omette di menzionare la clausola secondo cui i beni andavano resi ἀναμφισβήτητα: ὡς τοίνυν ἀληθῆ ἀντωμόσαμεν, Κηφισόδοτος οὑτοσὶ οἶδε, καὶ μάρτυρας ὑμῖν παρεξόμεθα πρῶτον ὡς ἀπέστη ἡμῖν τοῖν δυοῖν μεροῖν τοῦ κλήρου, εἶτα ὡς ἠγγυήσατο Λεωχάρης (5,2; cfr. anche 4). Ciò fa pensare che i termini dell' ὁμολογία non prevedessero in realtà esplicitamente una clausola sul fatto che i beni da restituire dovessero essere "liberi da vincoli e ipoteche" e che l'attore, giocando sottilmente con i termini τὰ ὡμολογημένα e ὁμολογία (25-26), cerchi di presentare come un dato di fatto concordato tra le parti ciò che rientrava nello spirito del compromesso ma non era stato formalmente specificato e messo per iscritto (cfr. Cobetto Ghiggia 2002, pp. 190-194; Edwards 2007, pp. 76-79). Mi sembra che ciò riveli in maniera inequivocabile come, almeno in questo caso, non sia "l'argomentazione orale a controllare l'uso dei documenti", bensì, al contrario, il contenuto, sfavorevole, dell'accordo scritto a determinare la natura e il tenore degli argomenti impiegati dall'oratore nell'intento di fuorviare i *dikastai*.

del diritto di agire in giudizio[47], nelle cause di diritto privato (*dikai*) era sempre possibile giungere ad un accordo extragiudiziale (Isocr. 18,39; Dem. 34,18; 48,3), addirittura, come in questo caso estremo, quando l'*agôn logôn* aveva già avuto luogo, e valeva quindi il principio, tipico dei rapporti contrattuali, che "quanto uno abbia volontariamente concordato con un altro, sia (giuridicamente) valido" (ὅσα ἄν τις ἑκὼν ἕτερος ἑτέρῳ ὁμολογήσῃ, κύρια εἶναι) ([Dem.] 56,2; cfr. Hyp. 4 (*Athen.*),13)[48]. Un esempio parallelo a quello testé esaminato ci viene offerto dall'orazione demostenica *Contro Panteneto*, dove una *proklêsis*, un'ingiunzione scritta a fornire uno schiavo perché testimoniasse sotto tortura e, in una proposta di compromesso, a vincolare all'esito di tale testimonianza la risoluzione della disputa viene presentata a Nicobulo all'ultimo minuto prima del processo, quando egli si accingeva ad entrare in tribunale e il sorteggio dei giudici era già stato effettuato (37,39-41). Nuovamente, tuttavia, nella confusione di tale inattesa situazione, dopo avere sigillato egli stesso la *proklêsis*, Nicobulo non ebbe il tempo di redigere una copia (ἀντίγραφον) dell'atto, cosicché quando venne il momento di sottoporre lo schiavo a tortura, Panteneto si presentò con una *proklêsis* di tenore diverso da quella accettata dall'avversario e pretese di interrogare egli stesso lo schiavo, ciò che gli avrebbe presumibilmente consentito di ottenere la testimonianza desiderata[49]. Come evidenziato da A. Maffi, "la *proklêsis* si rivela dunque il mezzo con cui orientare la dialettica probatoria nella direzione giudicata più favorevole per ciascuna delle parti"[50] e la scrittura, lungi dallo svolgere una funzione del tutto marginale, diventa quindi uno strumento essenziale della prassi giudiziaria anche in funzione della strategia perseguita dagli *antidikoi* nella fase dibattimentale al cospetto dei giudici.

Se l'argomento fin qui sviluppato è corretto, vi sono quindi tutti gli elementi per modificare la tesi secondo cui il processo attico sarebbe rimasto in tutta l'età classica ancorato alla dimensione dell'oralità, al punto che gli elementi retorici ed extra-giuridici avrebbero avuto in esso un ruolo dominante. Al contrario, la nostra analisi ha evidenziato come la fase dibattimentale non fosse in realtà che il momento culminante e conclusivo di una procedura che aveva inizio con la notificazione della causa al magistrato e aveva una tappa fondamentale nell'*anakrisis*, durante la quale venivano presentati e messi agli atti tutti gli elementi probatori che le parti intendevano far valere e, salvo il caso di compromessi raggiunti nel frattempo (in cui il ruolo della scrittura era nuovamente importante), far leggere dal *grammateus* nel *dikastêrion*. Emerge quindi come l'agone oratorio dovesse di conseguenza svolgersi entro binari rigorosamente predefiniti e come la linea accusatoria o difensiva

[47] Sulla questione v. Harris 1999, con la successiva discussione di Wallace 2006 e la replica di Harris 2006.

[48] Thür 1977, pp. 157-158; Carawan 2006.

[49] E' probabile che il resoconto dei fatti presentato da Nicobulo deformasse fortemente a suo favore quanto era realmente avvenuto nell'occasione: si veda il commento di Carey-Reid 1985, pp. 146-150.

[50] Maffi 1988, pp. 196-198.

sostenuta davanti ai giudici, vigendo il divieto di presentare in questa fase nuove testimonianze, fosse il risultato di una strategia entro certi limiti già messa a punto davanti al magistrato. La redazione di documenti scritti veniva in questo contesto ad avere una funzione cruciale in quanto, per utilizzare le parole di Demostene, garantiva che "non si potesse né togliere né aggiungere alcunché a quanto messo per iscritto" (ἵνα μήτ' ἀφελεῖν ἐξῇ μήτε προσθεῖναι τοῖς γεγραμμένοις μηδέν) (45,44) e consentiva in tal modo trasparenza e un più corretto e ordinato svolgimento del processo[51].

Ci si può allora domandare se tale "forma" del processo attico, che lo poneva agli antipodi rispetto al νεῖκος "omerico", fosse il risultato di un'evoluzione propria del IV sec. a.C. o non avesse invece le sue radici nella prassi dei sistema giudiziario ateniese del V sec. a.C. L'impressione è infatti che gli studiosi considerino l'introduzione dell'obbligo della testimonianza scritta come un momento di svolta che segnò l'ingresso della scrittura sulla scena giudiziaria ateniese, sottovalutando in tal modo la presenza di documentazione scritta già nel primo secolo della democrazia ateniese. Abbiamo constatato, infatti, che Aristofane, nelle sue commedie, faceva in più occasioni riferimento agli *echînoi* e che questi contenitori dovevano già allora servire per la custodia di documenti scritti. A ciò si aggiunge il fatto che lo stesso Aristofane ci fa conoscere nelle *Vespe*, seppure in forma parodiata, il testo di un *enklêma* dalla struttura del tutto analoga a quella dell'atto di accusa testimoniata dalle orazioni demosteniche (894-897: ἐγράψατο Κύων Κυδαθηναιεὺς Λάβητ' Αἰξωνέα τὸν τυρὸν ἀδικεῖν ὅτι μόνος κατήσθιεν τὸν Σικελικόν· τίμημα κλῳὸς σύκινος[52]; cfr. anche *Nub*. 766-772) e che, nuovamente nelle *Vespe*, egli allude ad un testamento con il quale una figlia ereditiera (ἐπίκληρος) veniva data in sposa ad un uomo, che con tale atto veniva anche adottato dal testante, la cui validità, nonostante la presenza dell'originale e dei sigilli della custodia, veniva in seguito a qualche contestazione impunemente resa nulla dagli onnipotenti giudici del tribunale (583-587)[53]. In un frammento eschileo di incerta attribuzione, il cosiddetto "frammento di Dike" (281a Radt)[54], si fa riferimento a Dike "che registra le colpe [degli uomini] sulla tavoletta di Zeus" ([γράφουσα] τὰ<μ>πλακήματ' ἐν δέλτῳ Διό[ς]), in attesa che il πίναξ venga "dispiegato" nel giorno stabilito (ll. 21-23), un'immagine, qui forse attestata per la prima volta[55], che doveva avere la sua origine nelle pratiche giudiziarie

[51] Sulla questione v. ora le illuminanti considerazioni di Thür 2007.

[52] "Il cane di Cidateneo accusa Lebete di Essone di essere colpevole di aver mangiato da solo il formaggio siciliano. Pena: un collare di legno di fico".

[53] MacDowell 1971, pp. 211-212; Thompson 1981; Pébarthe 2006, pp. 335-336. Sul linguaggio giuridico nelle commedie di Aristofane cfr. Willi 2003, pp. 72-79.

[54] Sui problemi interpretativi posti dal frammento e sulla questione dell'identificazione del dramma cui esso apparteneva (le *Etnee*?) cfr. da ultimo Patrito 2001.

[55] Patrito 2001, pp. 82-83. Si veda anche Aesch. *Eum*. 273-275, dove è detto che Ade, giudice grande degli uomini sotterra, "tutto sorveglia con la mente δελτογράφῳ (che

contemporanee e in particolare, si può ipotizzare, nuovamente nella prassi, verisimilmente molto antica[56], di fissare per iscritto il testo dell'accusa portata davanti al magistrato. Nella medesima prospettiva, in un frammento del dramma euripideo *Palamede* (fr. 578 Kannicht), rappresentato nel 415 a.C., la scrittura viene esaltata per la sua utilità nella comunicazione epistolare, nelle questioni di eredità (παισίν τ' ἀποθνήσκοντα χρημάτων μέτρον γράψαντα λείπειν, τὸν λαβόντα δ' εἰδέναι) e, quel che per noi qui più conta, per il potere del δέλτος, la tavoletta scrittoria, di risolvere le controversie tra gli uomini e di impedire che si dica il falso (ἃ δ' εἰς ἔριν πίπτουσιν ἀνθρώποις κακὰ δέλτος διαιρεῖ, καὶ οὐκ ἐᾷ ψευδῆ λέγειν)[57]. Cratino, infine, nei suoi *Cheirones* utilizzò l'aggettivo βιβλιαγράφος (fr. 267 K.-A.) forse a proposito di un personaggio, Pandeletos (fr. 260 K.-A.), che gli *scholia* alle *Nuvole* di Aristofane (924) descrivono come συκοφάντης...καὶ φιλόδικος καὶ γράφων ψηφίσματα, καὶ εἷς τῶν περὶ τὰ δικαστήρια διατριβόντων[58].

Per quanto si tratti di "indizi" sparsi e non organizzabili in un quadro coerente, sono elementi che hanno tutti riscontro nelle pratiche di IV sec. e che ci consentono di guardare a queste ultime in un'ottica di continuità. L'obbligo della testimonianza "documentata" viene così ad acquisire il significato non di una radicale innovazione bensì di una razionalizzazione di pratiche già esistenti. Dopo tutto, un frammento del più volte citato Aristofane anticipava di più di un secolo l'immagine teofrastea dello scriteriato (*aponenoêmenos*) che giunge in tribunale gravato da un gran numero di documenti, alludendo, in un contesto, che è per noi purtroppo irrimediabilmente perduto, a chi portava con sé "cesti (pieni) di *dikai* e mucchi di decreti" (fr. 226 K.-A.: εἰ μὴ δικῶν γε γυργαθοὺς ψηφισμάτων τε θωμοὺς φέροντες)[59].

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registra cioè le cose come su una tavoletta)". Sulla metafora della mente come *deltos* cfr. Nieddu 2004, pp. 45-52.

[56] Come si può inferire dalla γραφή introdotta dalle riforme soloniane.

[57] Sui frammenti del *Palamede* cfr. Falcetto 2002, pp. 50-51 e 96-119, con commento soprattutto di carattere filologico. Per un tentativo di ricostruzione del dramma v. Falcetto 2001. Cfr. anche, in una prospettiva diversa, Ceccarelli 2002, pp. 16-20.

[58] In tal senso, sulla scorta del Meinecke, il commento al frammento di Kassel e Austin; cfr. anche Traill 2005, nr. 763615.

[59] Devo tale riferimento a Pébarthe 2006, p. 343.

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RESPONSE TO MICHELE FARAGUNA

In his fine paper, Michele Faraguna takes certain facts about writing in the Athenian legal process, and draws conclusions from them that differ from my own view of the nature of the legal process. In my response I will try to make clear precisely where I agree and where I disagree with his views.

Faraguna and I agree that by the fourth century, at least, the specific accusation in a case – either the *enklēma* in a private suit (*dikē*) or the *graphē* in a public suit – was put in writing, though the *enklēma* was probably not written down in earlier times. In addition, we both accept Thür's argument that the *graphē* or *enklēma* established the boundaries within which the litigants had to remain in order to keep their arguments from going "outside the issue" (*exō tou pragmatos*). However, the reason why the accusation exerts this kind of control over the litigants' arguments and the jurors' decision is not that it was put in writing, since even when the *enklēma* was presented orally, the accusation controlled the case in the same way. In Antiphon 6, for example, the speaker quotes the charge against him together with his response,[1] and this charge then controls the arguments that follow, just as a written charge would. But this speech was probably delivered in 419 when the *enklēma* was not yet written down in this case, and the speaker's words also imply that the charge and his own response were not written down but presented orally ("they swore"). Thus, even though in this case the accusation was delivered orally, it controls the case in the same way as a written accusation would. Indeed, in almost any legal system, whether or not writing is used, there must be a statement of the charge and this statement must exert some control over the arguments in the case. Writing has nothing to do with this function.

In addition to the accusation, of course, other written documents played a role in the judicial process. Perhaps as early as the late fifth century (as Faraguna argues) these documents together with the *graphē* or *enklēma* were collected at the *anakrisis* or the arbitration hearing, were sealed in jars (*echinoi*), and were later read out in court by the clerk during the trial. Each litigant could include whatever documents he wished as long as they were presented at the preliminary hearing and were sealed

[1] Antiphon 6.16: "They swore that I killed Diodotus having planned the death, but I (swore) that I did not kill him either by planning or by my own hand" (διωμόσαντο δὲ οὗτοι μὲν ἀποκτεῖναί με Διόδοτον βουλεύσαντα τὸν θάνατον, ἐγὼ δὲ μὴ ἀποκτεῖναι, μήτε χειρὶ ἐργασάμενος μήτε βουλεύσας).

in the *echinos*. No other documents could be used in court.[2] These facts are well known, but Faraguna and I disagree about the importance of these written documents.

First, Faraguna emphasizes the importance of the preliminary hearing in establishing which written documents would be used in court. I agree that this was an important function of the preliminary hearing, but the presentation of written documents occupied only a small part of the hearing, which mostly consisted of oral questions and answers between the magistrate and the two litigants. The dialogue was conducted entirely orally and could last into the night; the collection of written documents was of secondary importance.

Second, although most litigants introduce written documents into their pleadings, the oral arguments control the use of these documents, not vice versa. Litigants not only select which documents to use and when and how to use them, but they (or their logographer) in fact write many of these documents themselves, especially witness statements. In the fourth century witness testimonies are recorded in writing, in part to ensure that they will be available in case there is a later suit for false witness (*dikē pseudomartyriōn*), but they carry no more weight because they are written down than they did in earlier times, when they were presented orally. To support his view that written documents are more important, Faraguna cites the speaker at Isaeus 6.15, who says that the facts must be confirmed by witnesses, but this statement could just as easily have been made when witnesses presented their testimony orally. Written documents have some importance in the Athenian legal process but they do not control the judicial process, let alone subvert its fundamental orality.

In their pleadings, litigants express a variety of views about the importance of written documents. Some downplay the value of a document such as a will or a contract, but others stress the importance of these same documents. The litigant's attitude is usually determined by which position fits best with his argument. Thus, examples where a litigant maximizes or minimizes the importance of a written document prove nothing. All we can say is that many Athenians were suspicious of certain kinds of written documents, especially wills, but most also had respect for some written texts, especially laws, whose authority is never questioned in court.

Faraguna argues that one example from Isaeus 5 shows the importance of a written document, but this passage does not really support his conclusion. At one point in this speech (5.25-26) the speaker refers to an agreement (*homologia*) that was reached at the last minute in court; he says that some of the details of this

[2] The shameless man (the *aponenoēmenos*) in Theophrastus (*Characters* 6.8), to whom Faraguna refers, ignores this rule when he brings an *echinos* full of documents into court with him. Because he has no moral sense, he intends to violate the rules by substituting a different *echinos* with different documents for those that were presented at the preliminary hearing.

agreement were hastily written down in a *grammateion* but others were only agreed to orally in front of witnesses:

[25] Leochares, the man who went surety for him and who is to blame for all our troubles, denies that he went surety, as witnesses have testified, claiming that this is not included in the document written up in court. At the time, gentlemen, we were in a hurry on the platform, and we wrote down some things but secured witnesses to others. But our opponents agree that those matters that were agreed on then which are in their own interest are valid, even if they are not in writing, but they deny the validity of what is not in their interest, unless it is in writing. **[26]** But I, gentlemen, am not surprised that they deny things they agreed to, since they are not even willing to carry out those that were written.[3]

Faraguna claims that in the last sentence of this quotation the speaker insists on the privileged status of the written document as a method of proof and criticizes his opponents because they are unwilling to do what is written. This is true, but in the first part of the passage the speaker criticizes his opponent for violating the part of the agreement that was not written down but to which witnesses have testified – that the opponent agreed to provide surety. Thus, the speaker insists that both parts of the agreement should be followed, oral and written, and he criticizes his opponents for violating both. The advantage of a written agreement is that its terms are harder to deny, and the fact that the opponents do not follow the written agreement is thus more shameless. But those parts of the agreement that were written down do not have a privileged status just because they were written. And the fact that the speaker never introduces the written agreement in court, though he does call witnesses (5.24) to confirm his narrative account of the entire agreement, oral and written, shows clearly that the written agreement has no special importance for his case.

The use of written texts certainly increased over time, in law as in the rest of life, but the question remains, how did this affect Athenian judicial procedure? Faraguna argues that the increasing use of written texts made Athenian procedure more technical and less rhetorical. I cannot agree. First, as I noted, oral dialogue still dominated the preliminary hearing. Second, whatever the significance of the preliminary hearing, the most important stage of the judicial process was the trial, and this consisted almost entirely of oral pleadings by the litigants. The boundaries of their arguments may have been controlled by the specific charge filed by the plaintiff, but the fact that the accusation was written was not significant, and within the boundaries set by the accusation, the speakers themselves (or their logographers) determined what arguments they would make and which written documents they

[3] ὁ δ' ἐγγυησάμενος αὐτὸν Λεωχάρης καὶ τῶν πάντων ἡμῖν κακῶν αἴτιος οὗ φησιν ἐγγυὴσασθαι ἃ καταμαρτυρεῖται αὐτοῦ, ὅτι ἐν τῷ γραμματείῳ τῷ ἐπὶ τοῦ δικαστηρίου γραφέντι οὐκ ἔνεστι ταῦτα. Ἡμεῖς δέ, ὦ ἄνδρες, τότε ἐπὶ τοῦ βήματος σπεύδοντες τὰ μὲν ἐγράψαμεν, τῶν δὲ μάρτυρας ἐποιησάμεθα· οὗτοι δέ, ἃ μὲν αὐτοῖς συμφέρει τῶν ὁμολογηθέντων τότε, κύριά φασιν εἶναι, εἰ καὶ μὴ γέγραπται, ἃ δ' οὐ συμφέρει, οὐ κύρια, εἰ μὴ γέγραπται. [26] Ἐγὼ δ', ὦ ἄνδρες, οὐ θαυμάζω ὅτι ἔξαρνοί εἰσι τὰ ὡμολογημένα· οὐδὲ γὰρ τὰ γραφέντα ἐθέλουσι ποιεῖν.

would introduce in support these arguments. None of these documents was constrained by formulaic requirements, and in many cases the documents were actually written by the litigant himself (or his logographer) specifically to fit the needs of his argument. Thus, the arguments controlled the use of written documents, not vice versa.

On the other hand, the essentially oral nature of Athenian law does not mean that it was dominated by rhetorical and extra-judicial elements, as Faraguna claims. As Rhodes (2004), Lanni (2006), and others have argued, the Athenians had a broader concept of legal relevance than we do today, but for the most part litigants managed to stick to the issue. Writing was primarily used to ensure a level playing field – what Thür calls "fairness"; it prevented a speaker from surprising his opponent with a new document at the last minute, but it did not alter the fundamental orality of the judicial process.

Finally, I would agree with Faraguna that writing was used with increasing frequency in the administration of law for keeping records, but I doubt these records were preserved by magistrates beyond their term in office. Faraguna cites Demosthenes 38.15, where a fourteen-year-old *enklēma* is read out in court, as evidence that documents were officially preserved, but this charge was brought against the speaker's father, and it is more likely that either the father himself kept a copy of the *enklēma* or that he remembered what it said and told his son.

Even if we cannot say in absolute terms how important these various uses of written texts were in the Athenian judicial process, we can say with certainty (as I argue in Gagarin 2008) that by comparison with other early legal systems, the role of written documents in Athenian judicial procedure was far more limited and that this was the main reason why the Athenian legal system was never dominated by professionals, as all other legal systems have been, and why the language of Athenian law remained much less technical than it is in almost every other system. Even in the Hellenistic period, when the use of writing increased in all areas of life, in most cities the role of written documents in court appears to remain limited and the legal process retained its fundamentally oral, non-professional, and non-technical nature.

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THE ATHENIAN PENALTY OF *EPOBELIA*

The penalty imposed in public cases in Athens on a prosecutor who failed to win his case, obtaining fewer than one-fifth of the jury's votes, has been thoroughly discussed in recent years by two of our colleagues, Edward Harris and Robert Wallace.[1] But there has been little recent discussion of a penalty imposed on a failed prosecutor in private cases, *epobelia*. One aspect of *epobelia*, the date of its introduction, has been considered by David Whitehead,[2] but I have found no detailed treatment of the whole topic since the one in the second volume of Harrison's *The Law of Athens*.[3] This was the volume left incomplete when Harrison died in 1969. When it was published, the references in the footnotes were mostly supplied by myself, but the text remained as Harrison left it. His account of this topic has never seemed to me very satisfactory, and so in this paper I am trying to improve on it.

Epobelia means a payment of one obol per drachma, in other words one-sixth of a sum of money. It is obvious, therefore, that there can be *epobelia* only when a sum of money is under consideration. Thus in a case in which the matter in dispute or the penalty demanded was not monetary, for example the death penalty, there could not be *epobelia*, because one could not pay one-sixth of that penalty. *Epobelia* would seem most appropriate when the prosecutor was claiming a sum of money from the defendant: if the prosecution failed, he would have to pay the defendant one-sixth of the amount he had demanded, as compensation for the trouble he had caused him.

The earliest instance known is one mentioned in Isokrates' speech *Against Kallimakhos*. The date of this case is probably 401/0.[4]

> Isok. 18.11-12. λαγχάνει μοι δίκην μυρίων δραχμῶν, προβαλλομένου δ' ἐμοῦ μάρτυρα ὡς οὐκ εἰσαγώγιμος ἦν ἡ δίκη διαίτης γεγενημένης,

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[1] E.M. Harris, *Dike* 2 (1999) 123-42, reprinted with afterthoughts in his *Democracy and the Rule of Law in Classical Athens* (Cambridge, 2006) 405-22; R.W. Wallace, *Symposion 2003* (2006) 57-66, with a response by Harris on pp. 67-72.

[2] D. Whitehead, *Mus. Helv.* 59 (2002) 86-9.

[3] A.R.W. Harrison, *The Law of Athens* 2 (Oxford, 1971) 183-5. There is a summary of the subject in C. Carey and R.A. Reid, *Demosthenes: Selected Private Speeches* (Cambridge, 1985) 208-9. For earlier discussion see J.H. Lipsius, *Das attische Recht und Rechtsverfahren* (Leipzig, 1905-15) 937-9.

[4] I have argued in favour of this date in *RIDA* 18 (1971) 267-73. Whitehead, *Mus. Helv.* 59 (2002) 71-84 argues for 403/2. The exact date is not important for my present purpose.

> ἐκείνῳ μὲν οὐκ ἐπεξῆλθεν, εἰδὼς ὅτι, εἰ μὴ μεταλάβοι τὸ πέμπτον μέρος τῶν ψήφων, τὴν ἐπωβελίαν ὀφλήσει, πείσας δὲ τὴν ἀρχὴν πάλιν τὴν αὐτὴν δίκην ἐγράψατο, ὡς ἐν τοῖς πρυτανείοις μόνον κινδυνεύσων. "He initiated against me a case for 10,000 drachmas. When I brought forward a witness to testify that the case was not admissible because an arbitration had taken place, he did not proceed against the witness, because he knew that, if he did not obtain one-fifth of the votes, he would incur the *epobelia*. After persuading the magistrate, he prosecuted the same case again, intending to risk only the *prytaneia*."

This is an example of the old procedure of *diamartyria*. The speaker tried to bar Kallimakhos' prosecution by bringing forward a witness to testify that it was not admissible because the dispute had already been settled by arbitration. Kallimakhos could have countered this by prosecuting the witness in a case for false witness (*dike pseudomartyrion*); but if he had done that and had obtained fewer than one-fifth of the jury's votes, he would have had to pay the *epobelia*, one-sixth of 10,000 drachmas, amounting to 1,666 drachmas 4 obols. So instead he let that case lapse, and brought a new prosecution for 10,000 drachmas (probably in the following year), in which he would risk only the *prytaneia*, the court fee of 30 drachmas.[5] From this we see that *epobelia* was payable in a case of false witness, when a litigant was claiming a sum of money from a witness as compensation for loss of a case, but not when he was simply prosecuting an opponent to claim a sum of money.

The next instance arises from the case in which Kallimakhos is prosecuting the speaker to claim 10,000 drachmas for the second time. This is the case for which the extant speech *Against Kallimakhos* is written. Again the speaker wishes to block the prosecution, but this time he is using a different method. He begins his speech by explaining to the jury that this is the very first trial under a new procedure called *paragraphe*, recently established by a law proposed by Arkhinos in support of the oaths which were sworn by the Athenians to defend the reconciliation in the year 403.

> Isok. 18.2-3. εἰπόντος Ἀρχίνου νόμον ἔθεσθε, ἄν τις δικάζηται παρὰ τοὺς ὅρκους, ἐξεῖναι τῷ φεύγοντι παραγράψασθαι, τοὺς δ' ἄρχοντας περὶ τούτου πρῶτον εἰσάγειν, λέγειν δὲ πρότερον τὸν παραγράψαμενον, ὁπότερος δ' ἂν ἡττηθῇ, τὴν ἐπωβελίαν ὀφείλειν, ἵν' οἱ τολμῶντες μνησικακεῖν ... παραχρῆμα ζημιοῖντο. "On the proposal of Arkhinos you made a law that, if anyone brings a case contrary to the oaths, the defendant is to be permitted to bring a *paragraphe*, and the magistrates are to bring this into court first, and the man bringing the *paragraphe* is to speak first,

[5] The figure of 30 drachmas is given in Isok. 18.3.

> and whoever loses is to owe the *epobelia*, so that those who dare to recall the troubles ... are to be punished immediately."

As a method of barring a prosecution that was in some way illegal, the new procedure of *paragraphe* effectively replaced the old procedure of *diamartyria*,[6] but the penalty of *epobelia* was applicable in the new procedure too. The speaker says "whoever loses is to owe the *epobelia"*; so in this new procedure the penalty was to be paid not only by a prosecutor who failed to win his case but also by a losing defendant. Nothing is said here about one-fifth of the votes; the speaker seems to imply that *epobelia* had to be paid by the losing litigant in every *paragraphe* trial.

The speech *Against Kallimakhos* tells us nothing about the earlier history of *epobelia*, but it has been suggested that its origin can be deduced from a scholium on Aiskhines.

> Schol. to Ais. 1.163 (329b Dilts). ἐπωβελία οὖν τὸ ἕκτον μέρος τοῦ τιμήματος, ὃ προσώφειλεν ὁ ἁλούς. ἐνομοθέτησε δὲ τοῦτο ὁ Ἀρχῖνος ἐγγράψας τῷ νόμῳ τὰ μὲν πρυτανεῖα εἶναι τοῖς δικασταῖς παρὰ τοῦ ἁλόντος, ὅ ἐστιν ἐπιδέκατον τοῦ τιμήματος, τὴν δὲ ἐπωβελίαν τῷ δημοσίῳ παρὰ τοῦ μὴ ἑλόντος. "*Epobelia* was one-sixth of the assessment, which the convicted man owed in addition. This legislation was due to Arkhinos, who wrote it in the law that the *prytaneia*, which is one-tenth of the assessment, goes to the jurors from the convicted man, and the *epobelia* goes to the public treasury from the man who has failed to convict."

This scholium clearly contains some mistakes or confusions. The writer first says that *epobelia* was paid by ὁ ἁλούς, the convicted defendant, but at the end he says it was paid by τοῦ μὴ ἑλόντος, the failed prosecutor; perhaps he means that it was paid by whichever litigant lost the case, but if so he has hardly made that clear. He says that *prytaneia* were one-tenth of the assessment, but that is wrong; the speech *Against Kallimakhos* shows that the *prytaneia* were only 30 drachmas for a case concerning 10,000 drachmas.[7] So I would not place much trust in the other information given by this scholium. However, Whitehead has suggested that the reference to Arkhinos means that Arkhinos proposed the law which first introduced *epobelia*; since, as we have seen, *epobelia* existed before the institution of the procedure of *paragraphe*, that would mean that Arkhinos proposed two laws, one introducing *epobelia* and another, perhaps in the next year, introducing *paragraphe*.[8] This suggestion cannot be proved wrong, but I think that it is really too much to build on an unreliable scholium. It seems to me likely that Arkhinos' law about

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[6] An exception is a *diadikasia* with several claimants for an inheritance, for which *diamartyria* continued to be used.

[7] Isok. 18.3; cf. Dem. 47.64.

[8] Whitehead, *Mus. Helv*. 59 (2002) 86-9.

paragraphe included a provision that *epobelia* should be payable under that procedure, and that the scholiast may simply be referring to that when he says that Arkhinos "wrote it in the law". So I prefer to say that we do not know when, before 401, *epobelia* was first introduced.

We can now pass on to the next reference to *epobelia*. This occurs in Demosthenes' first speech *Against Aphobos*, of which the date is 364/3. Aphobos was one of the three guardians of the young Demosthenes, and when Demosthenes came of age they failed to hand over to him the money which he believed was due. He therefore prosecuted them, claiming 10 talents from each. This is not a *paragraphe* case; it is simply a claim for money.

> Dem. 27.67. ἂν γὰρ ἀποφύγῃ μ' οὗτος, ὃ μὴ γένοιτο, τὴν ἐπωβελίαν ὀφλήσω μνᾶς ἑκατόν. καὶ τούτῳ μέν, ἐὰν καταψηφίσησθε, τιμητόν, κοὐκ ἐκ τῶν ἐαυτοῦ χρημάτων ἀλλ' ἐκ τῶν ἐμῶν ποιήσεται τὴν ἔκτεισιν · ἐμοὶ δ' ἀτίμητον τοῦτ' ἔστιν, ὥστ' οὐ μόνον ἔσομαι τῶν πατρῴων ἀπεστερημένος, ἀλλὰ καὶ πρὸς ἠτιμωμένος, ἂν μὴ νῦν ἡμᾶς ὑμεῖς ἐλεήσητε. "If Aphobos gets off – as I hope he won't – I shall have to pay *epobelia* of 100 minas. If you convict him, his penalty is to be assessed, and he'll make the payment not from his own money but from mine; but that penalty for me is a fixed one, so that I shall not only lose my patrimony but be disfranchised as well, if you don't take pity on me today."

Demosthenes means that, if he loses the case, he will be required to pay Aphobos 100 minas because that is one-sixth of the 10 talents which he is claiming; but actually, if he fails to recover the 10 talents, he will be left with very little money and so will not be able to pay the 100 minas, and he will consequently suffer *atimia*, disfranchisement. This is an interesting point, overlooked by Harrison.[9] Elsewhere we hear of *atimia* imposed for failure to pay money owed to the state treasury. But *epobelia* was not paid to the state treasury but to the successful opponent. That is clear in the Aphobos case from a passage in Demosthenes' second speech.

> Dem. 28.18. ποῖ δ' ἂν τραποίμεθα, εἴ τι ἄλλο ψηφίσαισθ' ὑμεῖς περὶ αὐτῶν; εἰς τὰ ὑποκείμενα τοῖς δανείσασιν; ἀλλὰ τῶν ὑποθεμένων ἐστίν. ἀλλ' εἰς τὰ περιόντ' αὐτῶν; ἀλλὰ τούτου γίγνεται. τὴν ἐπωβελίαν ἐὰν ὄφλωμεν. "Where can I turn, if you vote for any other verdict [than conviction] on them? To the property given as security to my creditors? But that belongs to those creditors. To what is left over? But that goes to this man [Aphobos], if I incur the *epobelia*."

[9] See, however, M.H. Hansen, *Atimistraffen i Athen i Klassisk Tid* (Odense, 1973) 120.

So we must accept that failure to pay *epobelia* to an opponent, like failure to pay a debt owed to the state treasury, led to *atimia*. The other point to notice in these texts is that there is no mention of failure to obtain one-fifth of the votes. Demosthenes implies that he will incur *epobelia* if he loses the case, by however narrow a margin.

These passages show that *epobelia* was payable in a case in which an orphan, on coming of age, claimed his inheritance from a guardian. Should we say that that is evidence for inheritance cases only, or may we conjecture that *epobelia* had now become payable in all claims for money? Harrison takes the former view, and tries to compile a list (a rather short list): he says "The fine is vouched for in the following suits ..."[10] It seems to me unlikely that orphans were one of only a few types of prosecutor made subject to this penalty, and more likely that it was now extended to all financial claims; but the question cannot be answered with certainty.

The next instance of *epobelia* is in the speech *Against Euergos and Mnesiboulos*, dated around 354. The speaker, who had been appointed to be a trierarch, had a protracted dispute with Theophemos about some naval gear which Theophemos was due to hand over, and at one point, when the trierarch tried to seize some property from Theophemos' house as security, a fight broke out between them. Afterwards each accused the other of starting the fight, and each brought against the other a prosecution for battery (*dike aikeias*). The case in which Theophemos prosecuted the trierarch came to trial first, and Theophemos won it, so that the trierarch had to pay him compensation or damages.

> Dem. 47.64. ἐκτίνοντος δέ μου τῷ Θεοφήμῳ, ᾧ ὠφλήκειν τὴν δίκην, ἐπειδὴ ἐξέτινον πολλῶν παρόντων μαρτύρων χιλίας μὲν καὶ ἑκατὸν δραχμὰς ⟨τὴν καταδίκην, ὀγδοήκοντα δὲ καὶ ἑκατὸν δραχμὰς⟩ καὶ τρεῖς καὶ δύ' ὀβολὼ τὴν ἐπωβελίαν, τριάκοντα δὲ τὰ πρυτανεῖα (τῶν γὰρ ἄλλων οὐδὲν αὐτῷ ἐπιτιμίων ὤφλον), λαβὼν τοίνυν παρ' ἐμοῦ ἐπὶ τῇ τραπεζῇ χιλίας τριακοσίας δέκα τρεῖς δύ' ὀβολὼ τὸ σύμπαν κεφάλαιον ... "When I was paying Theophemos, to whom I had lost the case, as I was paying, in the presence of numerous witnesses, 1,100 drachmas <as damages, and 183 drachmas> 2 obols as the *epobelia*, and 30 as the *prytaneia* – for I incurred no other assessed payment to him – so after getting from me at the bank a total of 1,313 drachma 2 obols ..."

The words in angled brackets were supplied by Boeckh, and it seems that they must be correct, to make the arithmetic fit; a scribe must have omitted them by jumping from one instance of δραχμὰς to the next. So here we have a case in which the convicted defendant had to pay *epobelia* to the successful prosecutor. This case was not a claim for money owed; it was a prosecution for battery, and the *epobelia* was

[10] Harrison, *The Law of Athens* 2.183.

calculated as one-sixth of the sum awarded as damages. Presumably this sum was the penalty which had been proposed by the prosecutor.

In the first speech *Against Stephanos* we find Apollodoros referring to an earlier case in which he prosecuted Phormion, and Phormion barred the prosecution by bringing a *paragraphe*.

> Dem. 45.6. προλαβὼν δέ μου ὥστε πρότερος λέγειν διὰ τὸ παραγραφὴν εἶναι καὶ μὴ εὐθυδικίᾳ εἰσέναι, καὶ ταῦτ' ἀναγνοὺς καὶ τἄλλ' ὡς αὐτῷ συμφέρειν ἡγεῖτο ψευσάμενος, οὕτω διέθηκε τοὺς δικαστάς, ὥστε φωνὴν μηδ' ἡντινοῦν ἐθέλειν ἀκούειν ἡμῶν · προσοφλὼν δὲ τὴν ἐπωβελίαν καὶ οὐδὲ λόγου τυχεῖν ἀξιωθείς, ἀλλ' ὑβρισθεὶς ὡς οὐκ οἶδ' εἴ τις πώποτ' ἄλλος ἀνθρώπων, ἀπῄειν βαρέως, ὦ ἄνδρες Ἀθηναῖοι, καὶ χαλεπῶς φέρων. "He was able to speak before me, because it was a *paragraphe* and he was not facing a straight trial, and by reading these [testimonies], and by the other lies which he considered were to his advantage, he so influenced the jurors that they refused to listen to a single word of ours. So I incurred the *epobelia* and wasn't even given a hearing. I don't know if any other person has ever been so insulted, men of Athens, and I went away indignant and upset."

That confirms that *epobelia* was paid by the loser in a *paragraphe* trial, and does not add anything more to the passages which we have already looked at.

Two further instances of *epobelia* in the fourth-century orations are both in mercantile cases. The mercantile laws establishing a special procedure for trials involving merchants importing and exporting goods to and from Athens were passed soon after 355, and the speech *Against Lakritos* is probably to be dated around 351. Androkles had lent 3,000 drachmas to a merchant named Artemon, who had since died, and so Androkles was claiming repayment from Artemon's brother Lakritos by the mercantile procedure, but Lakritos tried to bar the prosecution by a *paragraphe*.

> Dem. 35.46. ἀλλὰ τί κελεύεις, ὦ Λάκριτε; μὴ ἱκανὸν εἶναι ἡμᾶς ἀποστερεῖσθαι ἃ ἐδανείσαμεν χρήματα ὑμῖν, ἀλλὰ καὶ εἰς τὸ δεσμωτήριον παραδοθῆναι ὑφ' ὑμῶν προσοφλόντας τὰ ἐπιτίμια, ἐὰν μὴ ἐκτίνωμεν; "What is it you're demanding, Lakritos? That it should not be sufficient to deprive us of the money we lent you, but that we should also be thrown into prison by you if we fail to pay the penalty which we incur in addition?"

Here τὰ ἐπιτίμια must refer to *epobelia*, and so once again we see that the loser in a *paragraphe* trial was liable to that penalty. But the new feature here is the reference to imprisonment if the *epobelia* is not paid. We find this again in the speech *Against Dionysodoros*. This is not a *paragraphe* case, but simply a claim for money owed.

The speaker and his partner are claiming repayment of a loan of 3,000 drachmas. Instead of paying up, Dionysodoros is resisting the claim in court.

> Dem. 56.4. ἀλλὰ δεύτερον ἔτος τουτὶ καρπούμενος τὰ ἡμέτερα, καὶ ἔχων τό τε δάνειον καὶ τὴν ἐργασίαν καὶ τὴν ναῦν τὴν ὑποκειμένην ἡμῖν, οὐδὲν ἧττον εἰσελήλυθεν πρὸς ὑμᾶς, δῆλον ὡς ζημιώσων ἡμᾶς τῇ ἐπωβελίᾳ καὶ καταθησόμενος εἰς τὸ οἴκημα πρὸς τῷ ἀποστερεῖν τὰ χρήματα. "For more than a year he has had the use of our money, and while retaining the loan and the proceeds and the ship given to us as security, he has nevertheless come into your court, evidently intending to punish us by the *epobelia* and imprison us besides depriving us of the money."

If the prosecutors lose the case, they will not only be required to pay *epobelia* but will also be liable to imprisonment. This was a feature of the mercantile laws: we know from the speech *Against Apatourios* (Dem. 33.1) that anyone condemned to make a payment in a mercantile case was imprisoned until he paid it. Otherwise it would have been too easy for a merchant, especially if he was not an Athenian, to sail off from Athens without paying.

That completes the catalogue of actual cases known to us in which *epobelia* was payable, but a couple of other texts should be briefly mentioned. First, a passage in which Aiskhines imagines that a man has hired a male prostitute and made a written agreement with him, but then prosecutes him for failing to do what had been agreed.

> Ais. 1.163. ἔπειτα οὐ καταλευσθήσεται ὁ μισθούμενος τὸν Ἀθηναῖον παρὰ τοὺς νόμους, καὶ προσοφλὼν ἄπεισιν ἐκ τοῦ δικαστηρίου οὐ τὴν ἐπωβελίαν μόνον, ἀλλὰ καὶ πολλὴν ὕβριν; "Then won't the man be stoned for hiring an Athenian illegally, and leave the court after incurring not just the *epobelia* but also a charge of outrageous insolence?"

In this imaginary case the prosecutor is claiming either a refund of the fee he has paid to the prostitute, or perhaps compensation for failure to carry out the agreement. He is claiming a sum of money, and will pay *epobelia* if he loses the case.

The other passage is an entry in the lexicon of Polydeukes (Pollux) for the procedure of *phasis*.

> Pol. 8.47-8. φάσις ... καὶ τὸ μὲν τιμηθὲν ἐγίνετο τῶν ἀδικουμένων, εἰ καὶ ἄλλος ὑπὲρ αὐτῶν φήνειεν · ὁ δὲ μὴ μεταλαβὼν τὸ πέμπτον μέρος τῶν ψήφων τὴν ἐπωβελίαν προσωφλίσκανεν. ἦν δὲ ἕκτον τοῦ τιμήματος. "*Phasis* ... And the assessed amount went to those who suffered wrong, even if someone else brought the *phasis* on their behalf. The litigant who did not obtain one-fifth of the votes incurred *epobelia* in addition. It was a sixth of the assessment."

If that statement is true, it is the only evidence for payment of *epobelia* in a public case. But I think there must be some confusion. *Phasis* was a prosecution on behalf of the state, not of individuals who suffered wrong; and if the prosecution was successful, half of the assessed penalty went to the prosecutor and half to the state. So I believe Polydeukes has confused *phasis* with a private prosecution, and I do not accept this evidence that *epobelia* was payable in *phasis*.[11]

I will now give a summary of the stages by which the use of *epobelia* may have developed. But I stress that not all these stages are firmly attested by the surviving evidence; the discovery of further evidence might easily change the picture.

(1) Before 401 *epobelia* was payable by the prosecutor in a case for false witness (*dike pseudomartyrion*) if he failed to obtain one-fifth of the jury's votes. We do not know whether it was payable in any other cases at this time.

(2) A law proposed by Arkhinos, probably in 401/0, made *epobelia* payable by either litigant losing in a *paragraphe* trial, by however small a margin.

(3) At some time between 400 and 364 a law was passed making *epobelia* payable by the unsuccessful litigant, whether prosecutor or defendant, in any private case. Until he paid, he was subject to *atimia*.

(4) Soon after 355 the mercantile laws authorized imprisonment of the unsuccessful litigant in a mercantile case until he paid the *epobelia*.

Finally there are two questions to which I can only guess the answers, because I have found no relevant evidence.

(*a*) Many private cases were referred to a public arbitrator (*diaitetes*), and if both litigants accepted the arbitrator's verdict, the case never went to a trial by jury. Did *epobelia* have to be paid by the litigant whom the arbitrator decided against? My guess is that it did not, especially since the arbitrator's decision could be a compromise with no outright winner or loser. One purpose of the institution of *epobelia* must have been to deter litigants from putting the state to the trouble and expense of providing a trial by jury. If they accepted the arbitrator's verdict and thus made a jury trial unnecessary, it was reasonable to let them off the *epobelia*.

(*b*) How was the *epobelia* calculated in a case in which the proposed penalty was not a payment of money? Possibly the answer is that in private cases, unlike public ones, it was virtually unknown for the penalty to be anything other than a payment of money or surrender of some property which could be valued, so that the question never arose.

[11] It is likewise rejected by Lipsius, *Das attische Recht* 937 n. 26, and Harrison, *The Law of Athens* 2.184.

ROBERT W. WALLACE (EVANSTON)

RESPONSE TO DOUGLAS M. MACDOWELL

I was happy to receive, very promptly, Douglas MacDowell's careful, even cautious study of the *epobelia*, the "obol on the drachma" that I shall translate "the one-sixth." I am less cautious and have little time and so plunge in, making nine points.[1]

First, in our earliest reference to the one-sixth, Isokrates 18.11-12 of 403/2,[2] Kallimachos initiated against the unnamed speaker a suit for 10,000 drachmas. A witness testified that the case was not admissible because it had been arbitrated. Kallimachos did not prosecute this witness for false witness because if he failed to get one-fifth the votes, he must pay the one-sixth. "After persuading the official, he brought the same suit again, intending to risk only the *prytaneia*." From the witness episode related here, Lipsius,[3] Whitehead (90), and MacDowell all conclude that the one-sixth was payable in a suit for false witness, when a litigant was claiming money from the witness "as compensation for loss of a case" (MacDowell). MacDowell adds, it was not payable "when he was simply prosecuting an opponent to claim a sum of money." Now, at the *anakrisis* for Kallimachos's first suit the official declined to let that case go forward because a witness stated that the arbitration had gone against Kallimachos and he had not challenged it. May I suggest that if Kallimachos sued the witness and failed to get one-fifth the votes, he would have owed one-sixth not to the witness but in the original case for 10,000 drachmas, which the verdict in the false witness case would have automatically decided?[4] If so, the one-sixth was applicable not in cases of false witness but at least in this failed prosecution to claim 10,000 drachmas, just as Demosthenes (27.67) later claimed it was in his suit for money against his guardians.

Second, although MacDowell might modify his statement "it is obvious … there can be *epobelia* only when a sum of money is under consideration" because he himself mentions suits such as *paragraphai* involving the one-sixth but no money, I see his point and shall begin to suggest that the one-sixth was introduced in money suits in 403/2 in the wake of the Thirty's fiscal rapacities (see Isokr. 18.35) and the

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1 In addition to MacDowell's essay, I cite A.R.W. Harrison, *The Law of Athens* I, II (Oxford 1968, 1971) and D. Whitehead, "Athenian laws and lawsuits in the late fifth century B.C.," *MH* 59 (2002) 71-96, by author's surname. I am grateful to David Whitehead for sending me a copy of this article.

2 For the date see Whitehead 71-84, 89; the alternative is 401 (MacDowell n. 4).

3 J.H. Lipsius, *Das attische Recht und Rechtsverfahren* III (Leipzig 1915) 937-39.

4 See Harrison II 128-31, and S.C. Todd, *The Shape of Athenian Law* (Oxford 1993) 146.

reintroduction of *dikai*, not only to compensate the defendant "for the trouble the prosecutor had put him to," as MacDowell rightly says, but especially to discourage frivolous financial lawsuits (Harrison II 120). The provision certainly had that effect on Kallimachos, although he attempted to devise a way around it, on which now my third point.

"After persuading the official, [Kallimachos] brought the same suit again, intending to risk only the *prytaneia*." Despite varying scholarly opinions (see Whitehead 85-86, 88), "persuading the archon" I think points neither to a change of archon in a new year nor to "persuading by cash." The speaker mentions neither point although the first would have clarified and the second helped his argument. On the contrary, the following clause that Kallimachos's new prosecution risked only *prytaneia* indicates that Kallimachos convinced the official to let him prosecute his case under a different and older statute: one that did not stipulate paying the one-sixth but only *prytaneia*. This implies what we shall see elsewhere, that there was no general procedural statute about the *epobelia*. Rather, one or more laws on recovering money stipulated the one-sixth, others did not.

Fourth, in 403/2 the speaker of Isokrates 18 tries to stymie Kallimachos's new prosecution by the brand-new procedure called *paragraphê* ("counter-indictment").[5] Introduced by Archinos, *paragraphai* targeted improper prosecutions more generally, and included the one-sixth penalty, as Apollodoros's case against Phormion (Dem. 45.6), Demosthenes *Against Lakritos* (35.46) and the garbled scholion on Aeschines 1.163 (329b Dilts) also attest. Hence, in his second suit Kallimachos once again did not escape liability for the penalty of one-sixth, in the *paragraphê* procedure which – bad luck for him – could have been introduced after he initiated that suit. The *paragraphê* procedure also stipulated that if he did not pay, he would suffer *atimia* (Isokr. 18.35).[6] *Paragraphai* did not necessarily involve money and either defendant or plaintiff might be liable; in cases not involving money we don't know how the amount of "one-sixth" was fixed. Thus we have immediately found a different statutory version of the one-sixth. Because Isokrates 18 doesn't mention losing by four-fifth the votes in *paragraphai*, MacDowell further concludes that the one-sixth was owed even if a litigant lost by the smallest margin. However, this penalty would have been a tremendous deterrent to bringing any *paragraphê,* and in paying the one-sixth in the *paragraphê* that he lost, Apollodoros stresses that the dikasts "refused to listen to a single word" of his, suggesting that he basically got no votes. In 403/2 Isokrates 18.3 expressly says that the *epobelia* in *paragraphai* was directed again those "audacious enough to *mnesikakein*" regarding the horrors of 404, a motivation confirmed for Archinos by *Ath. Pol.* 40 as Whitehead (85) notes.

Fifth – skipping down six or more decades – Dem. 47.64 is extraordinary: in a suit for assault where no money was at issue, the *defendant* had to pay (and says he did pay) the one-

[5] See H.J. Wolff, *Die attische Paragraphe* (Weimar 1966).

[6] For a general discussion, see M.H. Hansen, "*Atimia* in consequence of private debts?," *Symposion* 1977 *Vorträge zur griechischen und hellenistischen Rechtsgeschichte,* eds. J.Modrzejewski and D. Leibs (Cologne and Vienna 1982) 113-20. Hansen suggests that the cases in question were close to public cases.

sixth on damages of 1,100 drachmas (as MacDowell says, probably the penalty proposed by the prosecutor), plus 30 drachmas *prytaneia*. This again must refer to a different statutory provision. Furthermore, we hear of the one-sixth in no other case of assault.

Sixth and most explosively, in his suit against Aphobos in 364/3 to reclaim his patrimony, the young orphan prosecutor Demosthenes says that if he loses he must pay the one-sixth, and if he cannot pay he is disfranchised (Dem. 27.67, 68).[7] Why on earth would the Athenians have singled out desolate and impoverished orphans to suffer such brutal punishments? Because of this difficulty, MacDowell suggests that the *epobelia* "was now extended to all financial claims." On the other hand, we have no good evidence for such a general procedural law,[8] and we scarcely ever hear of the one-sixth. If every prosecutor was liable to it – and, Demosthenes says, *atimia* – in lawsuits for money, surely others would have mentioned it? At any rate in the assault case in Dem. 47.65, 75, the speaker says he was anxious to pay the one-sixth penalty imposed on him simply because "I did not think it best to be in default" or for his opponent Theophemos to carry off more of his property. Sections 65, 75, and 76 of that speech nowhere indicate any penalty for non-payment so serious as disfranchisement. Because it is incredible that the Athenians singled out destitute orphans to pay the one-sixth or face disfranchisement for seeking to recover their property, and because there is no evidence that most other prosecutors faced these penalties, I boldly suggest that in fact Demosthenes was not necessarily liable to the one-sixth or disfranchisement. One-sixth statutes with disfranchisement for non-payment existed at least in *paragraphai* (Isokr. 18.35), but Demosthenes was not prosecuting under a statute of that type. To gain sympathy he alleges that these penalties applied and he does not mention that he would have to lose by four-fifth the votes (but only "if [Aphobos] is acquitted"), all for dramatic effect.[9]

Seventh and following from this last point, please note how many of our very few mentions of the one-sixth are hypothetical, except in *paragraphai*. Kallimachos in Isokrates 18 didn't pay it, the young Demosthenes didn't pay it, Androkles in Demosthenes 35.46 didn't pay it, and Aeschines 1.163 (contracting for the services of a male prostitute) is a fantasy. Except in the one case of assault and a few *paragraphai*, the one-sixth is only ever mentioned as a possibility. Furthermore, nobody ever boasts that he will make his opponent pay the one-sixth. Rather, Apollodoros (Dem. 45.6) is indignant that he had to pay it – as bad (he says) as not getting a hearing. Aeschines 1.163 and the mercantile cases in Demosthenes 54 and 56 present the one-sixth as a harsh punishment like imprisonment. In addition, in 56.4 Demosthenes states "he has come into your court *dêlon hôs* …" MacDowell

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[7] The latter passsage (I "run the risk of *atimia*") makes clear that the legal penalty is meant, not personal dishonor.

[8] Harrison II 183 rightly rejects the general statements by the late lexicographers *Anec. Bekk.* 255.29-30, *Et. Mag.* 368.48ff., and *Souda* s.v. *epobelia*.

[9] See C. Carey and R.A. Reid, *Demosthenes Selected Private Speeches* (Cambridge 1985) 208: "it is probable that at 27.67 Dem. is using exaggerated language."

translates *dêlon hôs* "evidently intending to punish us by the one-sixth and imprison us …" I agree: *dêlon hôs* indicates that these punishments were not made explicit, but the speaker is evoking them for dramatic effect.

Eighth, this helps suggest a date for the first *epobelia* measure. After the Thirty were overthrown in 404/3, *dikai* were suspended (see Whitehead 72). As for example Lysias 17.3 remarks, "because there were no *dikai*, we were unable to recover from them what they owed." During this period arbitrations took the place of *dikai*, as in Isokrates 18 in the first case involving Kallimachos, seeking to recover money lost under the oligarchy (18.35). The reinstitution of *dikai* in 403/2 will have led to a flood of suits to recover alleged assets.[10] The penalty of *epobelia* aimed to control these suits. According to the Aeschines scholion Archinos himself introduced this measure, a claim Whitehead (88) defends but MacDowell doubts. Shortly afterwards, Archinos proposed *paragraphai* as a broader means of controlling litigation, also including a one-sixth provision and adding disfranchisement for non-payment.

Finally, ninth, Pollux 8.47-48 says that in *phasis* cases litigants not gaining one-fifth the votes incurred the one-sixth. No one has believed this (see Whitehead 90 n. 72), because *phasis* was a public suit and part of the money went to the polis. However, in one type of *phainein*, for cutting down too many olive trees and where the prosecutor split the fine with the polis, we are expressly told that the prosecutor had to pay *prytaneia* – otherwise levied only in private cases – on that portion of the penalty going to him (Dem. 43.71, Harrison II 94). It is consistent that in public suits like *phainein* where a prosecutor stood to gain from another individual, complete defeat also meant paying the one-sixth. This again was a distinct statutory provision involving the *epobelia*.

I conclude that in 403, the Athenians introduced the one-sixth to reduce frivolous financial prosecutions. It worked well and so, soon afterwards, a one-sixth clause was added to the new *paragraphe* law, but with different terms; here, either litigant was liable, and the penalty for non-payment was disfranchisement. At some point, some law or laws involving "showing" also stipulated the one-sixth, as did one law about battery; mercantile laws regarding *paragraphai* or financial claims remanded prosecutors who could not pay the one-sixth to jail. In an earlier *Symposion* paper on *phainein* I argued that there was no general law setting down that procedure, but different laws each specified its own procedure of "showing."[11] The one-sixth is parallel. Liability to pay one-sixth of a disputed value was invoked in different ways, in different legal contexts. Other laws remained unaffected and in force. Because the initial one-sixth law against rapacious prosecutors reflected the chaos of 404, because it was severe and was judged to be severe and litigants like Demosthenes and the merchants could appeal to its severity to influence their cases, people rarely prosecuted under it, and so it has remained obscure – at least until recent work by David Whitehead, Professor MacDowell, and (just maybe) myself.

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[10] In or shortly after 403/2, the number of deme judges was increased from thirty to forty and they henceforth served in Athens, confirming increased judicial activity.

[11] R.W. Wallace, „*Phainein* in Athenian laws and legislation," in *Symposion* 1999, *Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, eds. G. Thür and F. Nieto (Cologne and Vienna 2003) 167-81.

JAMES P. SICKINGER (TALLAHASSEE)

INDETERMINACY IN GREEK LAW: STATUTORY GAPS AND CONFLICTS

Historians have traditionally counted the emergence of written law among the most significant developments of the archaic and classical periods of Greek history. They agree less about the reasons why the Greeks first wrote down laws and what impact written law actually had in practice. It used to be believed that the earliest written laws were the work of individual lawgivers who created extensive legal codes that helped to establish order and good government. Fixing certain rules in writing standardized legal procedures, made them known and widely accessible, and curtailed the arbitrary exercise of judicial power by aristocratic judges.[1] Eventually there developed an equation between written law on the one hand and equality and democracy on the other. The mythical Theseus thus claims in Euripides' *Suppliants*, composed in the 420s, that written laws provided equal justice for both rich and poor and allowed the weaker man to prevail over the stronger, if he had justice on his side (Eur. *Suppl.* 429ff.). A century later Aischines also touted respect for law, by which he certainly meant written laws, as one of the defining qualities of democracy and a feature that set it apart from oligarchic and despotic forms of government (Aisch. 3.6-7).[2]

More recent scholarship, however, has adopted a more critical approach toward surviving traditions about the earliest Greek laws and lawgivers. Scholars are now less inclined to believe in the existence of large-scale law codes in the archaic period, or that written law brought justice and equality to all citizens. Instead, laws appear to have been enacted piecemeal and in response to specific situations or crises, not in large, coherent collections or at the hands of individual lawgivers.[3] Moreover, neither good government nor democracy necessarily followed when states did set laws down in writing. The *poleis* of Crete, for example, which possessed the most ancient tradition of written law in the Greek world, retained aristocratic governments well into the classical period, and Aristotle criticized Cretan magistrates for preferring to administer their duties by their own discretion as

[1] So, e.g., Busolt 1920: 527-41; Bonner and Smith 1930: 67-81, esp. 67-8; cf. also Finley 1970: 103-4; Jeffrey 1976: 42-4; Murray 1993: 181-4.

[2] For the later equation of writing and democracy see Thomas 2005: 41-3.

[3] See especially Hölkeskamp 1992a, 1992b, 1999; cf. also Thomas 1996; 2005; Gschnitzer 1997; Gehrke 2000. Gagarin 1986 accepts some traditions about early Greek lawgivers but sees the earliest written laws as responses to specific crises.

opposed to written measures (*Pol.* 1272a35-39; cf. 1272b1-11). In addition, some features of written laws limited their efficacy. Laws could be vaguely worded or imprecise, raising questions about their applicability in particular situations. Excessive legislation might also create conflicting statutes on the same topics, leaving uncertain what law applied to a particular case. Aristotle recognized these and other qualities of written laws, and in the *Rhetoric* (1375a22-1375bb22) he offered litigants advice as to how they could exploit these failings to their advantage. This advice may have been effective rhetorically, but it surely upsets any notion that the simple existence of written laws ensured the equitable administration of justice.[4]

The presence of gaps, ambiguities, and other indeterminate qualities in written laws has also played a role in debates about the nature of the Athenian legal system and whether the Athenians actually achieved the "rule of law." Some scholars have argued that reforms of the late fifth century made the laws, and not the people, sovereign at Athens, and that Athenian jurors strove to uphold and enforce the laws when they made their decisions in legal cases.[5] Others, however, emphasize the use of litigation by citizens as a method to pursue personal feuds and enhance individual honor and status. Features of Athens' laws contributed to this use of the courts. Laws failed to define precisely the offenses that they covered, thus giving jurors broad discretion in interpreting the meaning and applicability of individual laws to particular cases.[6] Likewise, conflicting statutes allowed litigants to produce opposing laws on the same subject, thereby creating uncertainty and leaving it to jurors to decide which law, if any, applied in a given situation.[7]

This picture of both Athenian and Greek law, one that depicts them as made up of statutes characterized by gaps, ambiguities, and conflicts, is rather dim, and it suggests that the Greeks tolerated a fair degree of legal inconsistency and indeterminacy. To some extent that may have been the case, but the goal of this paper is to suggest that the situation was not quite so bleak. The Athenians and their fellow Greeks were well aware of the indeterminate qualities of written laws, and they sometimes took active, legislative steps to mitigate inconsistency, ambiguity, and conflict. Much of the evidence for such corrective steps comes from Athens, where our sources are more abundant and complete. But other material, especially inscriptions, from outside of Athens and from several periods of Greek history shows that a concern for remedying defects in the formulation and shape of written laws was not a phenomenon peculiar to Athens of the classical period. The solutions

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[4] Aristotle's advice, however, did not necessarily translate into actual practice: Carey 1996.

[5] See especially Ostwald 1986 and Sealey 1987 for the view that the Athenians achieved the rule of law in the late fifth century. For the view that jurors routinely attempted to apply the laws see Harris 2000; 2005; 2007a.

[6] Cohen 1995, especially 188-95; Todd 1993: 54-62; cf. also Christ 1998: 23-4, 195-6; Lanni 2006. But see now Harris 2007b.

[7] Todd 1993: 58-60.

adopted by individual states certainly did not eliminate statutory ambiguity, gaps, or conflicts entirely or remove the impact of these attributes on the administration of justice in Greek courts. They do show that both the Athenians and the Greeks valued consistency in their written laws.

Let us begin with contradictions. In the years 410-399, the Athenians subjected their existing laws to an extensive review. Our knowledge of this undertaking derives primarily from Lysias's speech *Against Nikomachos*, Andokides' speech *On the Mysteries*, and fragments of laws and a sacrificial calendar that were published on stone at the end of the fifth century.[8] Even with this fairly abundant amount of information, many details of this review remain obscure. But its goals seem to have included the removal of contradictory and obsolete measures that had accumulated during the fifth century and the creation of a coherent "code" of laws.[9] As part of this review of existing laws, or shortly after its completion, the Athenians also instituted new procedures to control lawmaking (*nomothesia*) in the future, and several different laws that governed legislation during the fourth century are attested.[10] Although their relationship to one another is unclear, an overriding concern of nearly all of them was the prevention and removal of contradictory statutes. According to one law, proposals for new laws had to be accompanied by the repeal of existing laws with which they conflicted (Dem. 20.93). Another law allowed the repeal of older laws only if they were replaced by newer ones and on the condition that the new law did not contradict any existing statute (Dem. 24.33). Still another law assigned the *thesmothetai*, who normally presided over certain types of lawsuits, the task of conducting periodic searches of the city's laws in order to identify and remove conflicting statutes (Aisch. 3.38-9).

How effective these measures were is difficult to say. Some scholars believe that the increasing volume of new legislation in the fourth century thwarted the attempt to create a coherent body of law at the end of the fifth century, and that the Athenians soon abandoned the idea of maintaining a consistent code.[11] And yet good evidence for incoherence and contradictory statutes in the fourth century is difficult to come by. One possible instance of conflicting statutes may have been exposed in the dispute between Aischines and Demosthenes over the crown proposed by Ktesiphon for Demosthenes' public services (Dem. 18; Aisch. 3). Each orator cited laws to support his view of the legality or illegality of Ktesiphon's motion, suggesting that the Athenians may not have had entirely consistent laws on the awarding of crowns. Curiously, however, neither speaker claimed that the laws he had adduced was contradicted by others, and Aischines (3.40) went so far as to claim that contradictions in the laws were impossible. Because the texts of the relevant laws cited by each speaker do not survive it is impossible for us to gauge if or how far they actually conflicted with one another. But apparent contradictions may be more the product of selective citation and interpretation by the two speakers than outright inconsistency in the laws themselves.[12]

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[8] On the late fifth-century revision see especially Rhodes 1991 and Robertson 1990; cf. also Todd 1996; Sickinger 1999: 94-105; Volonaki 2001. For the inscribed sacrificial calendar see now Lambert 2002.

[9] I use the term "code" for the sake of convenience, and not in the modern sense.

[10] For procedures of Athenian lawmaking in the fourth century see Hansen 1991: 161-77; Rhodes 1985; MacDowell 1975.

[11] Todd 1996: 130. Hansen 1991: 164, refers specifically to the abandonment of a central, inscribed code of laws.

[12] For detailed analysis of the legal issues and arguments see Harris 2000: 59-67.

Allusions to conflicting statutes are otherwise rare and of limited value. Demosthenes maintains in the speech *Against Leptines* that powerful politicians had managed to relax the statutory restrictions on lawmaking, so that the number of conflicting statutes was so great that commissioners were required to weed them out.[13] The context of this claim, however, is significant. Demosthenes alleges that Leptines had similarly ignored legal requirements governing the proposal of new laws, and his aim was to highlight and even exaggerate the dangers posed when proper legislative procedures were ignored; his characterization of the legislative situation cannot be regarded as disinterested or wholly accurate. The same holds true for a similar charge leveled in the Lysianic speech *Against Nikomachos*. The speaker asserts that Nikomachos, while serving as one of the *anagrapheis* or "recorders" responsible for reviewing Athens' laws at the end of the fifth century, had dispensed conflicting statutes to litigants involved in the same suits (Lys. 30.3). But he does not cite the supposedly conflicting laws or call witnesses to support his allegations, and his goal was undoubtedly to blacken the character of Nikomachos, not to offer an unbiased picture of the coherence or consistency of the city's laws. The fact that a speaker makes such an allegation – that litigants had received conflicting statutes – implies that events of this nature were regarded as both irregular and undesirable.

The inscribed copies of fourth-century Athenian laws may also shed light on the frequency of legislation and the possibility of conflicting statutes. Only nine laws on stone are presently known from the fourth century.[14] Since the Athenians probably never sought to publish all their laws in stone copies, this small number may not accurately reflect the quantity of new laws enacted over the course of the fourth century.[15] But even so, the number is surprisingly small, and it hardly supports an image of frequent legislation that gave rise to multiple, potentially contradictory statutes. What is more, features of some fourth-century laws that do survive indicate that the Athenians were aware of the possibility of conflicting legislation or that they framed new laws with existing ones in mind. Thus, Nikophon's law on silver coinage from 375/4 concludes with instructions to the secretary of the *boulē* to dismantle any *stēlai* recording decrees whose contents conflict with its terms.[16] That removal was tantamount to repeal of those decrees, and its purpose was undoubtedly to prevent problems or difficulties that might arise from the existence of decrees whose terms were made obsolete by the terms of the new law. Another law, dating from 353/2 and dealing with offerings of first-fruits to the Eleusinian goddesses, does not mention repeal or destruction of any existing statutes. But it opens by

[13] Dem. 20.91: ἐπειδὴ δὲ τῶν πολιτευομένων τινὲς δυνηθέντες, ὡς ἐγὼ πυνθάνομαι, κατεσκεύασαν αὑτοῖς ἐξεῖναι νομοθετεῖν, ὅταν τις βούληται καὶ ὃν ἂν τύχῃ τρόπον, τοσοῦτοι μὲν οἱ ἐναντίοι σφίσιν αὑτοῖς εἰσὶ νόμοι, ὥστε χειροτονεῖθ' ὑμεῖς τοὺς διαλέξοντας τοὺς ἐναντίους ἐπὶ πάμπολυν ἤδη χρόνον, καὶ τὸ πρᾶγμ' οὐδὲν μᾶλλον δύναται πέρας ἔχειν. See also Dem. 24.142 and Isok. 8.50 for complaints about excessive legislation at Athens.

[14] For a list see Stroud 1998: 15-16.

[15] On the selectivity of Athenian publication practices see Sickinger 1999: 64-72, esp. 72-3.

[16] Rhodes and Osborne 2003, no. 25, lines 55-56. For other instances of tearing down inscriptions when their contents became obsolete by later legislation, see *IG* 2^2.43; *IG* 2^2.116; Philochoros *FGrH* 328 F55a, b.

reaffirming the validity of an older law of Khairemonides on the same subject.[17] By introducing itself in this way the newer law removes any questions about its relationship with the older law and makes clear that its terms are not meant to rewrite or change it, but simply to add to and supplement its provisions with newer regulations. In other words, the new law was not enacted in ignorance of earlier legislation but with a clear knowledge of the contents of an earlier law on the same subject.

The safeguards instituted by the Athenians to guard against the intrusion of contradictory statutes were not unique. Measures against unconstitutional proposals, including *dikai paranomōn*, are attested in several Greek *poleis* and testify to a general concern for the maintenance of a consistent bodies of laws.[18] Many states also established specific procedures for enacting new legislation, such as specifying times when certain issues could be addressed or when lawmaking itself might take place.[19] We do not know if these measures were as stringent as at Athens or if they always included requirements for the repeal of contradictory statutes, but restrictions on legislative activity will have reduced the opportunities for introducing new and potentially conflicting measures. In addition, new legislation from some *poleis* incorporates provisions that effectively nullify already existing but inconsistent statutes. A few honorary second-century decrees from Magnesia on the Maeander conclude by rescinding any existing decrees that contradict their texts "with respect to that which is in conflict."[20] Laws and decrees from other states also call for the annulment or physical removal of older legislation rendered obsolete by their terms. This practice may have been especially common for voided treaties,[21] but it also extended to other types of measures, including one from Thasos concerning citizenship rights.[22]

Another technique for guarding against the ratification of contradictory statutes was the insertion of entrenchment clauses that restricted or prohibited amendment or repeal of a law or decree.[23] The earliest epigraphically preserved examples date from the early fifth century.

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[17] *IG* 2^2.140, lines 8-10: τὰ [μὲν ἄλλα κατὰ τὸ]ιν Χαιρημονίδο νό[μον τὸν περὶ τῆ]ις ἀπαρχῆς.

[18] *SEG* 23.405, line 12 (Demetrias); *IPriene* 44, line 18 (Alexandreia Troas); *ILabraunda* 56, line 3 (Mylasa). See also Quaß 1971: 42 with n. 60.

[19] *IG* 9.1^2.2.583, line 76: ἐπεί κα νομοθεσία καθίκῃ (Akarnania); *IKyme* 19, lines 21-24. For discussion of "lawful procedure" in the ratification of new legislation see Rhodes with Lewis 1997: 520-2; on legislative practice in general see Quaß 1971: 44-68.

[20] *IMagnesia* 92b, lines 16-19: λελύσθαι δὲ καὶ εἴ τι ψήφισμά ἐστιν ἐναντίον τῶιδε τῶι ψηφίσματι κα[τ' αὐ]τὸ τοῦτο κα|θ' ὅ ἐστιν ἐναντίον; cf. *IMagnesia* 92a, lines 13-4; 102, lines 21-2; see Rhodes with Lewis 1997: 523.

[21] *IG* 2^2.43, lines 31-35; *IG* 2^2.116, line 39 But see now Bolmarcich 2007.

[22] *IG* 12 Suppl., no. 364, lines 11-13: [προσγράψαι δὲ πρ]|ὸς τὸν νόμον τὸν τῆς ἀτιμίης τόδε τὸ ψ[ήφισμα ἐν τῆι ἀγορῆι καὶ ἐν λιμένι] |καὶ καθελῆν τὸς προστάτας καὶ τὸγ γρα[μματέα τὸ περὶ Ἀπημάντο ψήφισμα] |καὶ τὸν ἱροποιὸν ἐπὶ τὸ Ἡρακλέος τὸ ἰ[ρὸν ἀναγράψαι ταῦτα].

[23] For the practice see Harris 2006: 22-24; Rhodes with Lewis 1997: 524-5.

One well-known instance is the fifth-century agreement from Halikarnassos about the resolution of property disputes; it imposes confiscation of property and either exile or enslavement on anyone intending or trying to annul the agreement's provisions.[24] In the fourth century a series of decrees from Mylasa not only ordered the confiscation of the property of individuals who had plotted against Mausolous but also prescribed curses against anyone proposing measures contrary to their terms.[25] Other texts envision that they might be annulled or amended and so prescribe sanctions against anyone attempting to change them, sometimes by declaring in advance all such proposals invalid. Thus, a number of citizenship decrees from Thasos prohibit proposing or voting upon any measures that would nullify their grants, but they also preemptively make void any contradictory measures that are enacted.[26] A decree from Miletos of the late third century provides for payments to individuals who donated money to the city, and it prohibits anyone from proposing, amending, putting to a vote, reading out, or recording a motion that would deprive the donors of their due payments or make any substitutions. If any such measure were proposed, it was to be invalid (*akura*) and the proposer fined 1000 staters and made *atimos* until the fine was paid.[27] A second-century law from Teos governing the education of the city's children also specifies penalties not only if certain legally required funds are not paid, but also if any citizen or magistrate proposes, amends, puts to a vote, or otherwise introduces a law contrary to the law itself, or in any way tries to annul its contents by suggesting diversion of or other uses for the specified funds; those acts were to be invalid and the wrongdoer guilty of sacrilege.[28]

Insertion of sanctions against future changes to laws or decrees hardly guaranteed that conflicting measures would not be ratified at a later date, nor did it ensure that the laws of

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[24] Ruzé and Van Effenterre 1994, no. 19, lines 32-42: τὸν νόμον τοῦτον |ἤν τις θέλῃι συγχέαι ἢ προθῆτα[ι] ψῆφον ὥστε μὴ εἶναι τὸν νόμο|ν τοῦτον, τὰ ἔοντα αὐτῶ πεπρήσθω |καὶ τὠπόλλωνος εἶναι ἱερὰ καὶ αὐτὸν φεύγεν αἰεί· ἢν δὲ μὴ ἦι αὐτ|ῶι ἄξια δέκα στατήρων, αὐτὸν [π]|επρῆσθαι ἐπ' ἐξαγωγῆι καὶ μη[δ]|αμὰ κάθοδον εἶναι ἐς Ἁλικαρν|ησσόν.

[25] Rhodes and Osborne 2003, no. 54, lines 12-16: καὶ πρόσθετα ποιήσαντες Μαυσσώλλωι, ἐπαρὰς |ἐποιήσαντο περὶ τούτων, μήτε προτιθέναι ἔτι |παρὰ ταῦτα μηδένα μήτε ἐπιψηφίζειν· εἰ δέ τις |ταῦτα παραβαίνοι, ἐξώλη γίνεσθαι καὶ αὐτὸν |καὶ τοὺς ἐκείνου πάντας; cf. also lines 28-31, 48-50.

[26] *IG* 12.8.267, lines 12-16: μὴ [ἐξεῖ]|ναι δὲ ὑπὲρ τούτων μηδενὶ μήτε εἰπεῖν μήτ' ἐπε[λθεῖ]ν ὑπὲρ λύσιος μήτ' ἐπιψηφίσαι ἀκρατέα εἶνα[ι ταῦ]|τα τὰ ἐψηφισμένα. ὃς δ' ἂν παρὰ ταῦτα εἴπηι ἢ ἐπέλθηι ἢ ἐπιψηφίσηι, τά τε δόξαντα ἄκυρα ἔστω κα[ὶ χι]|λίους στατῆρας ὀφειλέτω ἱεροὺς τῶι Ἀπόλλωνι τῶι Πυθίωι, χιλίους δὲ τῆι πόλει. Compare also *IG* 12 Suppl., nos. 355, 358, 362, 364.

[27] *SIG*[3] 577, lines 24-9 (= *IMilet* 1.3.147): μὴ εἶναι δὲ τούτων μήτε ἀνατάκτηι ἀ|φαίρεσιν ποιήσασθαι μήτε ἄλλωι μηθενὶ ἀντεισφοράν, ὡς δεῖ μὴ |ἐξαιρεῖσθαι ἢ ἔλασσον λαμβάνειν τοὺς δεδωκότας τοῦ ὡμολογη|μένου καὶ κατακεχωρισμένου ἐν τῶιδε τῶι ψηφίσματι. ἐὰν δέ τις εἴπηι |ἢ προθῆι ἢ ἐπιψηφίσηι ἢ ὑπογραμματεὺς ἀναγνῶι ἢ γραμματεὺς ἀναγρά|ψηι, τά τε γραφθέντα ἄκυρα εἶναι καὶ ὀφείλειν ἕκαστον τῶν αἰτίων |στατῆρας χιλίους καὶ εἶναι ἄτιμον, ἕως ἂν ἐκτείσηι.

[28] *SIG*[3] 578, lines 40-6: ἢν δὲ οἱ ἐνεστηκότες ταμίαι ἢ οἱ ἑκάστοτε γινόμενοι |μὴ παραδῶσιν τὸ ἀργύριον τοῦτο κατὰ τὰ γεγραμμένα, ἢ ἄλλος τις ἄρχων |ἢ ἰδιώτης εἴπηι ἢ πρήξηται ἢ προθῆι ἢ ἐπιψηφίσηι ἢ νόμον προθῆι ἐναντίον τού|τωι ἢ τοῦτον τὸν νόμον ἄρηι τρόπωι τινὶ ἢ παρευρέσει ἡιοῦν ὡς δεῖ τὸ ἀργύρι|ον κινηθῆναι ἢ μὴ ἀναλίσκεσθαι ἀπ' αὐτοῦ εἰς ἃ ὁ νόμος συντάσσει, ἢ ἄλλ[ηι που] |καταχωρισθῆναι καὶ μὴ εἰς ἃ ἐν τῶιδε τῶι νόμωι διατέτακται, τά τε πραχθέν|τα ἄκυρα ἔστω.

Greek *poleis* were coherent, internally consistent, and entirely free from contradictions. The citizen assemblies that typically ratified new legislation did not always observe their own constraints on legislative procedure, and a carefully-worded motion might avoid the appearance of conflict, even if its terms addressed the same subject as an existing law. Conflicts certainly will have arisen. Even so, we should not dismiss attempts to prevent the intrusion of contradictory statutes as hollow or wholly ineffectual. The Greeks regarded as best those laws that were stable and unchanging, and even the Athenian democracy was suspicious of frequent changes to its laws.[29] Those attitudes are reflected in the precautions and measures adopted by Greek states to guard against conflicting statutes.

Even so, the Greeks were also well aware that, in spite of their convictions that laws should remain fixed and unaltered, written laws were sometimes incomplete, ambiguously worded, or failed to address new circumstances and situations. Change was sometimes necessary, and so they sometimes took steps to address vagueness or omissions in their laws.[30] One method was simply to tolerate gaps and ambiguity, and to let judges and jurors decide by using their best judgment, what the Greeks called ἡ δικαιοτάτη γνώμη, when cases arose that were not specifically addressed in written laws. At Athens this sentiment was expressed in the oath taken each year by jurors, in which they swore to apply the city's laws and decrees and to vote according to their best judgment in situations that were not covered by a written statute. Some scholars have also argued that jurors disregarded the laws and resorted to their best judgment more often, especially in cases in which the law seemed to conflict with their sense of justice or when confronted with vague or ambiguous laws.[31] But we have few direct insights into the minds of jurors, and it is striking that the speeches of the Attic orators do not urge them to adopt this course of action; instead, these speeches routinely stress jurors' obligation to vote according to the laws.[32]

But whatever weight individual jurors put on the law or their own private views, the Greeks did not always leave it to court proceedings to settle how statutory gaps should be filled or ambiguous laws interpreted. They also took active, legislative steps to fill gaps, make corrections, or otherwise remedy ambiguities in the contents of their laws. As we have already seen, between the years 410 and 399 the Athenians undertook a large-scale review and republication of their existing laws.[33] The task was entrusted to a board of *anagrapheis* whose initial duties seem to have been to collect and republish the original laws of Drakon and Solon and later modifications to them, perhaps for the purpose of creating a single, fixed code of laws. Enacting new legislation was not part of their assignment. The work of the *anagrapheis* was

[29] For Athenian resistance towards legislative change see Boegehold 1996; on legislative change more generally see Camassa 1994, esp. 101-108.

[30] See Gehrke 2000: 148-50; Quaß 1971: 19-21.

[31] For a reconstruction of the oath and discussion of this expression see Harris 2007a; on its application see also Johnstone 1999: 33-42; Todd 1994: 59-60; Biscardi 1970; Meyer-Laurin 1965.

[32] See especially Harris 2000; 2007a.

[33] For further discussion see the works cited in note 8 above.

interrupted by the takeover of the Thirty Tyrants in 404, but they were reappointed after the restoration of the democracy in 403 and completed their duties in 399. The restoration of the democracy, however, appears to have highlighted some problems in the laws that the *anagrapheis* had collected. So when democratic government returned, the Athenians voted to continue using the laws of Drakon and Solon, which probably meant the laws compiled by the *anagrapheis* in their first term, but they also appointed *nomothetai* who, according to the terms of the decree of Teisamenos, were to produce proposals for new laws "on whatever matters there is a further need."[34] That is, the *nomothetai* were to make additions and fill gaps in the existing laws, and Andokides mentions some of supplementary laws that were eventually ratified: magistrates were not to use any unwritten law; *nomoi* were to have greater force than decrees; no law could be directed against a single individual but had to apply to all Athenians; and so on (And. 1.87). These supplementary laws spelled out more clearly than had been the case before how laws (*nomoi*) were to be applied and what was their proper relationship to other types of legislation (i.e. *psēphismata*, decrees). But the enactment of these supplementary measures also shows that the Athenians were quite willing to take legislative action to resolve ambiguities or fill gaps in the existing laws; they did not always allow uncertainties to persist or to be settled on a case by case basis by the courts.

Athenian procedures for lawmaking in the fourth century provided further opportunities for revising, updating, and supplementing older legislation. One of the laws governing the introduction of new laws, cited by Demosthenes in the speech *Against Timokrates*, required the assembly to conduct an annual vote on the existing laws according to four different categories, and to decide whether any group seemed unsatisfactory or insufficient.[35] If a group of laws was found wanting, citizens were given the opportunity to propose new measures in that area. Neither Demosthenes nor the text of the law included in the speech explains the grounds on which existing laws could be rejected as unsatisfactory, and probably no specific grounds were spelled out in the statute itself. But several reasons can be imagined. Some laws might have become obsolete in light of new conditions. Changing economic, social, or political circumstances will have necessitated revisions to older laws, and existing legislation sometimes will have failed to address topics or situations over which unforeseen disputes or uncertainty had arisen. Indeed, P.J. Rhodes has suggested that one of the fourth-century laws on *nomothesia*, the so-called "Repeal Law" that allowed older to be annulled only if they were replaced by a new one, was itself intended to fill gaps in the requirements of the "Review Law" that had previously governed legislative procedure.[36]

Some of the inscribed copies of fourth-century laws also reflect attempts to fill gaps, remove ambiguity, or otherwise supplement existing legislation. The law on Eleusinian first fruits (*IG* II^2 140), discussed above, is itself cast in the form of an amendment or supplement to an existing law of Khairemonides on the same subject.

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[34] Andok. 1.83: ὁπόσων δ᾽ ἂν προσδέῃ. For a recent discussion of the decree see Carawan 2002.

[35] Dem. 24.20: ἡ δὲ χειροτονία ἔστω ἡ προτέρα, ὅτῳ δοκοῦσιν ἀρκεῖν οἱ νόμοι οἱ βουλευτικοί, ἡ δ᾽ ὑστέρα, ὅτῳ μὴ δοκοῦσιν· εἶτα τῶν κοινῶν κατὰ ταὐτά.

[36] Rhodes 1985: 57.

The new law gives the assembly overall responsibility for deciding how first-fruits were to be collected, but it makes the *boulē* responsible for their actual collection and for ensuring that the proper sacrifices are made. Because the older law of Khairemonides does not survive, we cannot say with certainty how the new provisions alter, revise, or supplement its provisions. But some features of the older law must have been ambiguous, incomplete, or somehow incompatible with conditions at the time the new law was passed. The Athenians did not allow these deficiencies to stand or leave them to be sorted out in legal proceedings; they sought to rectify them through the legislative process.[37]

Nikophon's law on silver coinage, enacted in 375/4, may also reflect a new statute intended to fill a legislative gap or to address a situation not addressed in an older law.[38] The first part of the law (lines 3-36) outlines the responsibilities of an existing official, the *dokimastēs* or public tester of coinage, and makes provisions requiring Athenians to accept Athenian coinage. The second part of the law (lines 36-44) establishes a second tester who was to operate in the Peiraieus. Because earlier legislation outlining the duties of the original *dokimastēs* does not survive, the degree to which all parts of Nikophon's law alter older laws, revise their procedures, or fill gaps in their contents is unknown. The law's wording makes it clear that addition of a second tester is an innovation, but how far the law's other provision retain, modify, or replace older regulations is difficult to say. One possibility is that an influx of counterfeit coinage into Athenian markets led some Athenians to reject of authentic issues of foreign coinage and thereby necessitated the creation of a second tester, as well as new measures regulating the treatment and handling of vetted coins.[39] But whatever the background to its enactment, ratification of the new law illustrates the Athenians' willingness to modify and supplement existing statutes in response to changing needs and conditions.

The Athenians were not alone in their attempts to find legislative remedies to correct, supplement, or fill gaps in existing statutes. Greek *poleis* tended to be conservative in enacting new laws, and, as we have seen, many statutes included sanctions against nullifying, changing, or even supplementing the contents of existing legislation. Nonetheless, the Greeks were realistic enough to recognize that changes and additions to laws were sometimes necessary, and this realization is documented by provisions of laws and decrees that allow and even call for legislative changes and supplementation. One of the earliest examples is a late sixth-

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[37] The Athenians legislated on the collection and offering of first-fruits to the Eleusinian goddesses on several occasions: *IG* 1^3 78 (425-415 B.C.); the law of Chairemonides, mentioned in *IG* 2^2 140 (undated; between 403/2 and 353/2, line 9); *IG* 2^2 140 itself (353/2 B.C.); and *Agora* 19, no. 57, which mentions the *aparchē* of grain (undated; probably mid-fourth century).

[38] Rhodes and Osborne 2003, no. 25

[39] See Rhodes and Osborne 2003: 116-9, for discussion of the general background and references to earlier studies.

century law from Olympia concerned with procedures for making changes to existing written laws, by garnering the approval of a council of 500 and the full assembly.[40] Its framer recognized that situations might arise that he had not foreseen or that rendered the law inadequate or in need of amendment. Instead of simply leaving it to the discretion of a magistrate or court to decide how to deal with new situations, he made it possible to change the law with the consent of both *boulē* and assembly. Another early example appears in a Locrian law concerning a colony at Naupaktos. One of its clauses forbids anyone from violating its terms unless both the assembly of the Opuntians and the Naupaktians allow it.[41] This qualification seems to envision that circumstances might arise in which the terms of this law do not apply, but it does not leave it to a court or magistrate to make that decision. Instead, the law allows itself to be amended with the consent of the legislative bodies of each community.

Emergency or revolutionary situations were especially prone to highlight deficiencies or omissions in existing laws, and provisions for filling potential gaps or resolving uncertainties in existing legislation appear in the laws and decrees of several cities enacted in the wake of changes of government or constitutional instability. I have already mentioned the decree of Teisamenos, which called for additions to Athens' laws in the tumultuous final years of the fifth century, after the fall of the Thirty Tyrants and the restoration of the democracy. The campaigns of Alexander the Great caused similar changes in government in many *poleis* and also created constitutional instability, and these conditions led some states to supplement and revise their laws. Thus, a decree from Mytilene from the late 330s provides detailed regulations allowing the return of exiles and the restoration of property. It explicitly acknowledges that its terms might be incomplete, and it invests the city's council with the authority to settle matters.[42] On Chios, a letter from Alexander the Great himself called for the appointment of lawgivers (*nomographoi*) who were to write and correct the city's laws because of the restoration of democratic government and the return of exiles.[43] Both developments will have created problems. Some citizens will have found themselves susceptible to prosecution

[40] Ruzé and Van Effenterre 1994, no. 109, lines 3-6: τõν δέ κα γραφέõν, ő τι δοκέοι καλιτέρος ἔχεν πο⟨τ⟩ τὸν θεόν, ἐξαγρέον καὶ ἐlνποõν σὺν βολαῖ πεντακατίον ἀϝλανέος καὶ δάμοι πλεθύοντι δινάκοι· (δινά)κοι δ' ἐν τρίτlον, αἴ τι ἐνποιοῖ αἴτ' ἐξαγρέοι; cf. also Ruzé and Van Effenterre 1994, no. 108, and Quaß 1971: 51-2.

[41] Ruzé and Van Effenterre 1994, no. 43, lines 38-41: hόσστις : κα τὰ ϝεϝαδεφότα : διαφθείρει : τέχναι καὶ μαχανᾶι : καlὶ μιᾶι, : hότι κα μὲ ἀνφοτάροις : δοκέει hοποντίον : τε χιλίον : πλέθlαι καὶ Ναυπακτίον : τõν ἐπιϝοίϙον : πλέθαι, : ἄτιμον εἶμεν : καὶ χρέlματα παματοφαγεῖσται.

[42] Rhodes and Osborne 2003, no. 85B, lines 37-38: αἰ δέ κέ τι ἐνδεύη τῶ ψαφίσματος, lἰ[περὶ τούτω ἀ κρίσις ἔστω ἐπ]lὶ τᾶι βόλλαι.

[43] Rhodes and Osborne, no. 84A, lines 4-6: αἱρεθῆναι δὲ νομογράφους, οἵτινες γράψουσι καὶ διορθώσουσι τοὺς νόμους, ὅπως μηδὲν ἐναντίlον ἦι τῆι δημοκρατίαι μηδὲ τῆῖ τῶν φυγάδων καθόδωι.

under the laws of a previous regime, and returning exiles will have made claims on property that others believed they had acquired legally. Neither Alexander probably nor the Chians were content with leaving such disputes to the discretion of judges or juries, so *nomographoi* were appointed to draft new legislation and correct older laws, presumably by revising some statutes and addressing issues not dealt with in them.

War and revolution, however, were not necessary to convince the Greeks that laws needed revision, clarification, or supplementation. A law from Megalopolis of the second century grants the current year's council the right to make additions to the published laws if they seemed to be wanting or deficient in any way.[44] Another measure from Megalopolis does not mention gaps or failings so explicitly, but it seems to give the council and assembly the right to make additional corrections or supplements to a *diagramma*.[45] Other documents from the Hellenistic period contain frequent references to corrections to existing legislation or officials called "correctors", and often their work will have involved making additions to and filling gaps in older laws. Thus, a set of judicial agreements between the Stymphalos and Sikyon from the late fourth century concedes that the terms of the agreement might not be beneficial to both cities,[46] and it allows for the appointment of correctors (*diorthōtēres*) charged with drawing up new proposals to be presented to and approved by both cities. A decree of the Akarnanian *koinon*, which transfers control of the Aktian games from the city of Anaktoria to the koinon itself, specifies strong penalties against changes to it, but then concludes with a provision allowing for corrections to the sacred laws, probably ones affected by its terms, provided that nothing contradicts with its own provisions as they were inscribed on the *stēlē*.[47] Elsewhere we find mention of the possibility of correcting or revising a Tean law in a letter from Eumenes II to the artisans Dionysos, [48] while a third-century decree

[44] *IPArk* 30, lines 6-9: [εἰ δέ τι δόξε]ι ἐνλείπειν ἐν τοῖς νόμοι[ς τοῖς προ|γεγραμμέ]νοις, κύριον ἔστω τὸ ἐφ' ἔτο[ς συνέδρι|ον ὅσσα κα]ὶ δόξει τῶι συνεδρίωι ἀδιοίκει[τα προσθεῖ|ναι].

[45] *IG* 5.2.434, line 8: [εἰ δὲ δόξῃ τῶι δάμωι ἢ τοῖς συνέδρ]οις ἐπιδιορθῶσαι τὸ διάγραμμα.

[46] *IPArk* 17, lines 184-201: εἰ δ[έ τ]ι τῶν ἐν τâι συνβολâι γραφέντω[ν κ]ὶαὶ δοξάντων ἐν τâι χρήσει μὴ συν̣[φ]ερόντως ἔχειν δοκέοι τοῖν πολίοιν, [ἔτι ε]ρ̣αι πότεραι πρεσβέας ἀποστειλάν̣[τ|ων τ]ούτων, ὁποτέραι δόξαι τοῖν π̣[ο|λίο]ιν τῶν γεγραμμένων τι μὴ σ[υν|φ]ερόντως ἔχειν· τὼ δὲ πόλιε διορ[θ|ω]τήρας ἐλέσθαι τâς συνβολâς· το[ὺ|ς δὲ α]ἱρεθέντας διορθωτήρας, ἃ κ̣[αἰβουλεύ]σωντι, δεῖξαι τâι τε βουλậ[ι|καὶ τâι ἐ]κ̣κλησίαι ἐν ἑκατέραι το[ῖν|πολίοιν· ὅ]σ̣σα δέ κα δόξει τῶν διορθ̣ω̣[ουμέν]ων κ̣α̣λῶς ἔχειν, γράφε[σθ|αι πὸτ τὰ]ν συνβολάν, ἄλλο δὲ μ[ηδ|ὲν ἐκ]ατέραν τοῖν πολίοιν κινε[ῖ|ν τῶν ἐ]ν τâι συνβολâι γεγραμμ[έ|νων].

[47] *IG* 9.1^2.583, lines 75-7: τοὺς δὲ ἱε[ρο]ὺς |νόμους ἐξέστω διορθοῖν, ἐπεί κα νομοθεσία καθίκῃ, μηθὲν ὑ̣ῆ̣εναντίον|τοῖς ἐν τâι στάλαι καταγράφοντας τ[– –

[48] *IPergamon* 163, IIA, lines 6-8: εἰ δὲ προσδεῖται διορθώσεως ὁ ὑπὲρ τούτου νόμος,|καὶ πρότερον ἑτοίμως ἔχειν συνδιορθοῦσθαι, καὶ |νῦν τὸ αὐτὸ ποιοῦντα̣[ς παρ'] ἡ̣μ̣ῶ̣ν̣ εὑρεθήσεσθαι.

from Samos begins by describing its provisions as corrections or supplements to an older *diagraphē* concerning shopkeepers operating in the sanctuary of Hera.[49]

These provisions for changing and amending laws demonstrate that the Greeks were quite open to altering and supplementing older legislation, and that to some degree they were unwilling to accept deficiencies, shortcomings, and weaknesses in their existing laws. New legislation was indeed passed to correct, supplement, and clarify older statutes. When coupled with the steps that the Greeks took to guard against the intrusion of conflicting statutes, these measures point to a more general desire to maintain at least minimally coherent, consistent, and up-to-date collections of laws. The very nature of written laws meant, of course, that some ambiguity always remained, and no system of law could ever be entirely free of gaps, overlap, or contradictions within its corpus of statutes. Likewise, some topics may have attracted more frequent legislative attention, and hence legislative change, while others were allowed to retain a greater degree of ambiguity or uncertainty or imprecision. Thus, many of the *nomoi* enacted and published on stone by the Athenians during the fourth century were concerned with religious or financial matters or a combination of both, while inscriptions from other states show that these areas were similarly the subject of close scrutiny. New legislation governing personal relations, on matters inheritance, *hybris*, and adultery, appears less well attested,[50] perhaps because the Greeks were more willing to accept some ambiguity and to give courts broader discretion in applying statutes on those matters. But it remains important to remember, when considering the nature of Athenian and Greek law, that the Greeks were aware of and concerned with the indeterminate qualities of at least some of their laws, and that they took steps to address these features not only in the courts but also by means of legislation.[51]

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[49] *SEG* 27.545, lines 3-5: τάδε εἰσήνεγκαν οἱ νεω[ποῖαι περὶ τῶν |καπηλείων, διορθωσά]μενοι τὴν διαγραφὴν τῶν καπή[λων τῶν ἐν |[τῶι ἱερῶι τῆς Ἥρας κατ]ὰ τὸ ψήφισμα, καὶ ὁ δῆμος ἐκύρωσ[εν]; see Thür and Taeuber 1978.

[50] Carey 1998 notes that Athenian laws in some areas had stronger substantive than procedural orientation than laws on other topics, and so were less susceptible to varying interpretations.

[51] I have avoided comment on the complicated issues raised by the Gortynian law code. But see Kristensen 2004, and the earlier studies cited there, who observes that the features of this collection show that many of its laws had been the subject of supplementary legislation and revision.

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RESPONSE TO JAMES P. SICKINGER

In the late third or early second century, Epikteta of Thera set up an endowment for the funding of sacrifices to the Muses and Heroes. In the inscription, the text of her will is followed by detailed regulations on how the funds are to be administered and the sacrifices conducted by the cultic association (*koinon*), the rules of which are set out on the stone (*IG* XII, 3 330 lines 109-288). In the context of the paper presented by Sickinger, the very final lines of the enactment are of interest, because they testify to an awareness, on the part of the persons who drafted the regulations, of the need to ensure consistency in the decisions made by the association in future, so that the association would continue to operate in the way envisaged by its founder. The text provides for the appointment of an *episophos* who must ensure that Epikteta's will and the law of the association are inscribed both on stone and on a wooden plaque, and he is also instructed to furnish a document box in which all documents pertaining to the association are to be deposited. A *grammatophylax* is given responsibility for bringing this movable archive to future meetings of the association, undoubtedly to facilitate consultation in connection with the decision-making process (*IG* XII, 3 330 lines 267-288).

The evidence of the regulations of Epikteta's *koinon* thus bears out one of Sickinger's most important points, namely that the desire to avoid internal conflict between individual enactments was not confined to classical Athens, and that the epigraphical evidence testifies to consistency as a priority in democratic and non-democratic communities alike. Especially the evidence for special sessions of law-making (*nomographiai*) and revision (*diorthosis*), attested in several communities in different parts of the Greek world, shows this very clearly, although far fewer details are known about these procedures in other Greek states than about the corresponding processes at Athens in the classical period.[1]

However, the epigraphical evidence also has its limitations when used as a source for legal ideology, not least because investigations of other Greek communities almost invariably have to depend on the reading of individual inscriptions in isolation, without the benefit of any additional information on how the enactments were interpreted by litigants and applied by the courts in practice. In my present response, I shall focus first on some of the evidence for attempts by other Greek communities to fill perceived statutory gaps. Second, I shall discuss

[1] *Nomographia*: *e.g.* *IG*IV 679 (Hermione, C3 or C2), *IG* IX, 1^2 192 (Aitolian *koinon* 203/2 BC, see Rigsby 1996: 292-294 no. 132); *diorthosis*: *IG* IX, 1, 4^2 798, lines 137-139 (Korkyra, C2).

some of the problems presented by the non-Athenian evidence adduced by Sickinger for the measures taken by other Greek communities to prevent conflicts between different enactments. Thirdly and finally, I shall touch briefly on the problems connected with the bridging of the gap between legal ideal and legal realities, both at Athens and elsewhere in the Greek world.

I agree fundamentally with Sickinger's observation that there is good evidence, non-Athenian as well as Athenian, to support the proposition that the Greeks generally not only were aware of the problems presented by gaps in their legislation but also tried to address these problems by passing supplementary legislation that was intended to fill such gaps. Sickinger cites a number of passages which set out legislative procedures serving that end or which authorise the passing of such amendments or supplements in various contexts. His examples include some very early attestations of these types of legislative process from Elis and Naupaktos, and in these two instances it is safe to rule out that the communities in question were basing their procedures on an already existing Athenian model.[2]

In what follows I shall adduce as additional evidence a number of non-Athenian enactments that testify to such supplementary legislative measures having taken place in practice. A Chian enactment (*PEP Chios* 26, *SEG* 35: 923) dating from the fifth or fourth century shows very clearly that the more recent enactment was passed in order to address a question which the original enactment left open, and the text provides for the publication of the supplement on the stele on which the older enactment was inscribed.[3] The question addressed in the more recent enactment is what punitive measures should be taken against a priestess who has received a portion in excess of that to which she is entitled according to the earlier enactment. The answer prescribes that she should face the same punishment as the worshippers who make the sacrifice – a penalty which has not been preserved on the surviving part of the *stele*. What is clear, however, is that the more recent enactment relies on its readers' understanding of the context into which it is placed, and without reference to that context the more recent enactment would have been totally unenforceable.

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[2] *I. v. Ol.* 7 = Minon (2007) no. 4 (C6), *IG* IX, 1^2 718 (Naupaktos C5). Note, however, that the latter document regulates the relationship between the community of Opous and that of the Naupaktians, and that it contains many of the characteristics of a treaty. As will be argued below, the formulation of amendment procedures as found in numerous treaties from across the Greek world is problematic when used as evidence for legislative procedures as they operated *internally* in each of the communities that was party to the agreement.

[3] ἐπὶ Π[ερ]ικλέος· Λε[υ]καθεῶνος ὀγδό̣[ηι· ἡ] βουλὴ ἔγν[ω] βασιλέων ψῆφον θε̣[μ]έν[ω]ν· [τ]ῆ̣ι ἱερέαι τῆ̣ς Ἐλειθίη⟨ς⟩, [ὅ]ταν ἡ πόλις π[ο]ῆ̣ι, γ[ίν]εσθαι τὰ̣ ἐ̣ν̣ [τ]ῆ̣ι στήληι [γ]ε̣[γ]ρα[μ]μέ̣ν̣α̣ κα[ὶ] ἀ̣π̣ὸ̣ [τ]οῦ ἱερέ̣[ο]υ̣ [ἀ]π̣ο̣δ[ό]σ[θ]αι [κ]εφαλήν· ἢ̣[ν] δὲ ἰ[δ]ιώ̣[τ]ης π̣[ο]ιῆ̣ι, γίνεσθαι αὐτῆ̣ι τὰ̣ [ἐν τ]ῆ̣ι στήληι γεγραμμέ̣ν̣α̣· ἢ̣[ν δέ τ]ι ἄ̣[λλ]ο λάβ̣ηι, [ζ]ημιοῦσθ[α]ι, [ὡ]ς ο̣[ἱ θύον]τες τὰ̣ [ἱε]ρ̣[ε]ῖ̣[α]· ταῦ̣τ̣α̣ [δὲ προσ]γ[ρ]άψαι πρὸς τὴ̣[ν] στήλην̣ [παρὰ τῶι Ἡ]ρ̣αίωι· ἐ̣πιμεληθῆναι [δὲ το]ὺ̣[ς ἱε]ρ̣οποιοὺς κτλ.

As far as the Chian example is concerned, the modern reader has an immense advantage because both texts have survived together. There are in fact a substantial number of parallels to such supplementary legislation from other *poleis*,[4] but only a few of them have survived together with the original enactment to which the supplementary enactment refers. Such an 'orphaned' supplementary enactment from fourth-century Miletos (*SEG* 15: 677 = *LSAM* 45) may be adduced to illustrate the problem. The contents of this piece of legislation are very similar to the Chian supplementary enactment,[5] but the Milesian supplement can no longer be fully understood, because its original statutory context has been lost. Such 'orphans' can sometimes be difficult to recognise as pieces of supplementary legislation, but a systematic survey of the practice of inserting statutory cross references into individual enactments, as in the Milesian example, can in many cases help to identify them.

The practice of passing supplementary legislation in order to fill perceived statutory gaps is thus well documented. As Sickinger demonstrates, the same can be said for the abolition of existing enactments in connection with the passing of new decisions. However, it must be pointed out that there are only very few documented examples of abolition of enactments that are explicitly referred to as *nomoi* or *thesmoi*. I have managed to find only three examples, one of which is not altogether secure.[6] If one is prepared to count the instances where one enactment automatically cancels out any earlier conflicting *psephismata* or *dogmata*, the sample grows

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[4] See *e.g. SEG* 50: 1101 (Bargylia, C2 or C1), *CID* IV 2 (Delphic Amphiktyony, C4), *I. di Cos* ED 178 (Kos, C3), *SEG* 39: 729 = *SEG* 37: 1670 = Kontorini ἀνεκδοτὲς ἐπιγραφὲς Ῥόδου II no. 1 (Lindos, C3).

[5] ἐπὶ Παρ[θ]ενοπαίο, μηνὸς Ἀρτεμισιῶνος, Κεκροπὶς ἐπρυτάνευεν, Φιλίννης Ἡροδότο ἐπεστάτει, ἔδοξεν τῆι βολῆι καὶ τῶι δήμωι, Ἡράκλειτος εἶπεν· τὰ μὲν ἄλλα καθότι ἐν τῆι στήληι γέγραπται· ἐὰν δέ τις μὴ ἀποδῶι τὰ γέρεα τῆι ἱερῆι τῆς Ἀρτέμιδος τὰ γεγραμμένα ἐκγραφέτω αὐτὸν πρὸς τοὺς πράκτορας ὁ κύριος τῆς ἱερῆς ἐπαγγείλας ὀφείλοντα τὴν ζημίην τὴν γεγραμμένην. ὃς δ' ἂν ἐκγραφῆι, εἰὰμ μὴ ἐξομόσει ἐν τῆι βολῆι μὴ θῦσαι ἢ ἀποδοῦναι τὰ γέρεα τὰ γινόμενα, ὀφειλέτω τὴν ζημίην καὶ ἐκπραξάντων αὐτὸν οἱ πράκτορες κατὰ τὸν νόμον. τὸ δὲ ψήφισμα προσεγκόψαι ἐς τὴν στήλην, ὁ δὲ ταμίας ὑπηρετησάτω.

[6] *SEG* 38: 1245; *cf. SEG* 34: 1238 (Kyme?, C3/2):]ομέναν δὲ τᾶν δικᾶν ταύταν καὶ τᾶν διαλύσιων [ἔμμενα]ι τὰν προθεσμίαν τῶ νόμω τῶ παλάω καὶ χρῆσθαι τῶι [νῦν ὑ]πάρχοντι κτλ.; *IK Kyme* 11 lines 12-16 (C3): αἰ δέ ποι ἐν νόμῳ τινὶ ἄλ[λο τι γράφηται ἐνάντιον τῷ ν]όμῳ τούτῳ ἄκυρον ἔστω· τὸν δὲ νόμ[ον τοῦτον ἀναγραψάντων οἱ ἐσσ]όμενοι δικάσκοποι εἰς στάλαι[ς --------]ρας ὁ νόμος οὗτος κυρωθῆ πα[ρ τῶ δάμω; *IG* XII, 5 647 (Koressia, C3): τὸν δὲ νόμο[ν λῦσαι(?) ὃν εἶπεν περὶ — — — —]πά[λ]ης Πολυπείθης, τοὺς [δὲ προβούλ]ους τ[οὺς ἀεὶ ὄντας ἐγ]διδόναι ἐν τῶι Μαιμακτηρ[ιῶνι μη]νὶ τὴμ μησ[..... ἐνά]τηι ἀπιόντος καὶ διδόναι τῶι ἐγλ[αβόν]τι εἰς ἱερεῖα 150 δραχμάς· τὸν δ' ἐγλαβόντα ἔγγυον καταστ[ῆ]σαι, ὃν ἂν δέχωνται οἱ πρόβουλοι ἑστιάσειν κατὰ τὸν νόμον· (...) end of *nomos* text: ἂν δὲ δόξει ὁ νόμος, ἀναγράψαι εἰς στήλην καὶ στῆσαι εἰς τὸ τέμενος.

considerably larger, but in this area I think that it is necessary to proceed with caution.

To be sure, it must not be assumed that the Greek *poleis* generally in the late classical and Hellenistic period operated with a clear distinction and hierarchical relationship between different types of enactments on the model which is known from fourth-century Athens and, for example, the Aitolian *koinon* in the Hellenistic period. In fact, an inscription from Hellenistic Ioulis suggests that even in *poleis* that distinguished terminologically between *nomoi* and *psephismata*, such a terminological distinction was not necessarily applied with any rigid consistency.[7] Indeed, it is highly likely that there were many communities that did not make any distinction at all along these lines. Even so, it must be taken into account that wholesale annulment of previous conflicting enactments usually concerns only *psephismata*,[8] and that some of the examples cited by Sickinger occur in enactments that concern the relationship between two or more states.

I confess to being uneasy about the use of treaties calling for the annulment of older decrees as evidence for a general desire to achieve internal consistency in the body of legislation in a particular *polis*. The decrees, the annulment of which was called for by the terms of these treaties, would have borne embarrassing testimony to a previously hostile relationship between two or more states that had now found it convenient to enter into alliance or another type of positive relationship with each other. Often the decision by a particular state to enter into a binding agreement with another state would have been internally divisive and politically controversial, and if older enactments with a hostile content were allowed to remain valid and on display, such documents would have been ready for deployment as weapons in any future political attempt to have the agreement annulled – and not necessarily through an orderly court-process. For that reason, clauses of this type would have sent a vital message to the other party to the treaty that the relationship was taken seriously and was intended to be lasting.[9]

Likewise, entrenchment clauses are not unproblematic when considered as a 'technique for guarding against contradictions'. For, again, it must be taken into

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[7] *IG* XII, 5 595 lines 21-23 (Ioulis, C3 or early C2): ἀναγράψαι δὲ τόδε τὸ ψήφισμα [ἐν στήληι λιθίνηι πρὸ τοῦ Πυθίο]υ καὶ χρῆσθαι νόμωι τούτωι ὑπὲρ τῶν χρη[μάτων τοῦ Ἀπόλλωνος εἰς τὸν ἀεὶ] χρόνον· For further epigraphically-attested examples, see F. Quass *Nomos und Psephisma* (Munich 1971), 26-29.

[8] *I. Priene* 61, *I. Magnesia* 92a, 92b, 94, 102, *RO* 25. The Thasian example cited by Sickinger (*IG* XII, 8 264 Suppl. p. 152 = Koerner (1993) no. 71), which concerns the citizen rights of the children born in mixed marriages, is problematic as evidence in the present context: while it is clear that the *prostatai* and the *grammateus* are physically to remove a text currently on display, it is not clear from the text in its present state of preservation what type of enactment is at issue here.

[9] This is very clearly the case in *RO* 22.31-35 (*cf. IG* II^2 43), while *RO* 44.39-40 (*cf.* II^2 116) explicitly orders the removal of a stele which concerned Athens' relationship with Alexander the Great, against whom the Thessalian *koinon* and Athens were now uniting.

consideration that a substantial number of such clauses may have been meant first and foremost to have been read as a guarantee issued to a particular individual, group of individuals, or to another community rather than as a reflection of a desire to ensure general consistency within the community's body of legislation as a whole. From the archaic period to the middle of the second century BC I have so far traced 80 examples of entrenchment clauses, not counting the Athenian ones, and not counting the treaties in which similar clauses occur. Fifteen of the examples do indeed serve the purpose of guarding an enactment of general and permanent validity against alteration as well as physical destruction,[10] and it is interesting to note that five of these concern the distribution of and entitlement to land.[11] The emphasis is often on the inscribed text as a physical object, rather than on the law in more abstract terms: even as late as the mid-fourth century, an Elean enactment graphically prescribes that the person who destroys the text is to be treated as a 'thief of a sacred image'.[12]

However, it appears from the total of 80 examples that the clauses tend to be predominant in certain types of enactment, which concern decisions that directly affect specific individuals or groups. Nineteen examples occur as a measure to prevent virement of funds donated – by endowment or through *epidosis* – for particular purposes and to prevent alterations to the administration and running of Stiftungen according to the wishes of their founders.[13] Another fourteen entrenchment clauses attempt to provide some guarantee to individuals who have

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[10] *IG* IV 506 = Koerner no. 29 (Argos, C6); *SEG* 33: 275 (Argos, C5); *FD* III 1 294 col. vii (C5 or C4); Minon (2007) no. 30 = *Buck* 65 (Elis, C4); *SEG* 51: 1105 (Eretria, C4); *IK Erythrai u. Klazomenai* 1 (Erythrai, C5); *ML* 32, *SEG* 33: 862, 37: 856, Koerner no. 84 (Halikarnassos, C5); *SEG* 47: 1427 (Himera, C6 or C5); *Syl.* (3) 141 (Issa, C4); Herzog *Heil. Gesetze v. Kos* 12 (Kos, C4); *IP Ark.* 30 (Megalopolis, C2); *IK Mylasa* 301 (Mylasa, *phyle* of Harbesytai, C2); *IG* IX, 1 (2) 609 cf. Koerner no. 47 (Naupaktos, C6/5); *IG* IX, 1 (2) 718, cf. Koerner no. 49 (Naupaktos, C5); *SEG* 43: 293 (Pharkadonioi in Thessaly, C3?).

[11] *ML* 32, *SEG* 33: 862, 37: 856, *cf.* Koerner no. 84; *SEG* 47: 1427 (Himera, C6 or C5); *Syl.* (3) 141 (Issa, C4); *IG* IX, 1 (2) 609 *cf.* Koerner no. 47 (Naupaktos, C6/5); *SEG* 43: 293 (Pharkadonioi (*koinon*), date?).

[12] Minon (2007) no. 30 = *Buck* 65 (Elis, C4): αἰ δέ τιρ ἀδελτώηαιε τὰ στάλαν, ὠρ ἀγαλματοφώραν ἐόντα πάσχην. *cf. e.g. IG* IV 506 = Koerner no. 29 (Argos, C6), Minon (2007) no. 22 = *I. v. Ol.* 16, Koerner no. 44 (Elis, C5), *SEG* 47: 1427 (Himera, C6 or C5), *PEP Teos* 261 (Teos, C5).

[13] *IG* XII, 7 515 (Aigiale, C2); *IC* II v 35 (Axos, C1?); *PEP Chios* 27 (Chios, C3); *Syl.* (3) 672 (Delphi, C2); *IG* XII, 2 529 (Eresos, C2); *IG* XII, 9 236 (Eretria, C4 – Knoepfler *CRAI* (1988) [1989] 382-421); *I. Scyth. Min.* II 58 (Histria, C2); *PEP Kolophon* 4 (with *SEG* 19: 699) (Kolophon,C4); *IG* IX, 1, 4 (2) 798 (Korkyra, C2); *I. di Cos* ED 149 (Kos, 280 BC); *I. di Cos* ED 146 (Kos, C2); *SEG* 51: 1063 (Kos, C2); *SEG* 50: 1195 (Kyme, C3); *I. Milet* I,3 145 (Miletos, C3/2); *I. Didyma* 488 (Miletos, C2); *IG* XII, 6 172 (Samos, C3); Dubois (1989) no. 187 (Tauromenion, C2); *PEP Teos* 41 (Teos, C2); *IG* XII, 3 Suppl. 330 C 61-67(Thera, C2).

entered into a contractual relationship with the community in question against any changes made to their terms.[14]

This third type corresponds very closely to the entrenchment clauses found in a number of treaties, some of which have been cited by Sickinger, and which impose severe restrictions on the alteration of the treaties in question by addition, subtraction, or rephrasing of the agreement.[15] Arguably, the main purpose of such entrenchment clauses is to guard against unilateral alteration of the treaty's terms by one of the parties, and the same is undoubtedly true of the clauses which explicitly permit alterations to such arrangements on condition that the consent of both parties is obtained.[16] Closely related to this is a fourth category comprising a further sixteen documents in which the entrenchment clauses serve to guarantee individual honorands or groups of honorands against any attempt to revoke the privileges bestowed on them.[17]

Finally, a number of entrenchment clauses issue guarantees of a more sinister kind, namely a guarantee to a hegemonic power that sentences passed against his opponents within a given community will not be reversed if the political tide should turn. It must be emphasised that this fifth category does not aim to entrench general enactments in the shape of laws or decrees: the purpose of these clauses is to protect particular *verdicts* against any future attempt to pardon the individuals convicted or to restore confiscated property to them or their descendants.[18] It is thus not internal consistency in the communities' legislation that is the issue here, and these texts are of only very marginal relevance as evidence for the legal ideology prevailing in the communities in question.

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[14] *SEG* 33: 1034 (Aigai in Aiolis, C3); Migeotte (1984) no. 49 lines 41-46 (Arkesine, C4/3); Migeotte (1984) no. 50 lines 45-51 (Arkesine, C3); Migeotte (1984) no. 51 line 28 (Arkesine, C4/3); *IG* XII, 9 191 A 29-33 (Eretria, C4); *IK Iasos* 220 (Iasos, C5 or C4); *IK Kalchedon* 10 (Kalchedon, C3/2); *IK Kalchedon* 11 (Kalchedon, C3); *I. di Kos* ED 55 (Kos, C4); *SEG* 50: 764 bis; *I. di Cos* ED 237 (Kos, C2); Migeotte (1984) no. 97 lines 24-35 = *Milet* I, 3 147 (Miletos, C3); *I. Priene* 201 (Priene, ca. 200 BC); *I. Priene* 202 (Priene, C2); *I. Priene* 203 (Priene, C2).

[15] *E.g.* Minon (2007) no. 10 = *I. v. Ol.* 9, *IG* IX,1^2 583, *IPArk.* 17.195-200.

[16] See *e.g. IP Ark.* 28.18-19, *IG* IX, 1 98, *IC* I viii 13.21-24, *IC* I xvi 5.45-48, *IC* II i 2b.25-26, *IC* III iii 3a.86-87, *IC* III iii 3b.6-7, *IC* III iii 4.74-77, *IC* III iii 5.8-11, *IC* III iv 6.4-7, *IC* IV 184b.22-25.

[17] *ID* 1520 (Delos, *koinon* of Beryttioi, C2); *Buck* no. 23 = *Inscr. chypriotes syllabiques* 217 B (Idalion, C5); *IK Ilion* 24 (Ilion, ca. 300 BC); *IK Ilion* 36, cf. *SEG* 41: 1049 (Ilion, C3); *SEG* 33: 1039 (Kyme, C2); *IK Adramyttion* 34 (Nasos/Pordoselene C4); *SEG* 41: 1379 (*koinon* of Pernitai, C4); *SEG* 23: 424 (Pherai, C4); *I. Priene* 12 (Priene, C3); *IG* XII, 1 155 (Rhodes: *koinon* of Haliadai and Haliastai, C2); *TAM* III.i 1 (Termessos, C2); *IG* XII, 8 264 and *IG* XII Suppl. p. 152 (Thasos, C4); *IG* XII, 8 267 (Thasos, C3); *IG* XII, 8 355 (Thasos, C3); *IG* XII Suppl. 358 (Thasos, C3); *IG* XII Suppl. 362 (Thasos, C2).

[18] *Tod* II 150 (Amphipolis, 357/6); *RO* 83 = *IG* XII, 2 236 (Eresos, C4); *IK Mylasa* 1 (Mylasa, C4); *IK Mylasa* 2 (Mylasa, C4); *IK Mylasa* 3 (Mylasa, C4).

For the entrenchment clauses generally it can be argued that most of the attested clauses provide extra reassurance to interested parties that their entitlement would not be jeopardised if the community found itself in serious financial difficulties, or if political conditions, be they internal or external, changed dramatically. Indeed, the perceived need for such extra reassurance in treaties, public contracts and honorary decrees may be interpreted as evidence that the communities in question had but few permanent, *general* legal restrictions that could be invoked to prevent the alteration of decisions of this particular type. Furthermore, although many of the entrenchment clauses provide evidence for an awareness that the decisions in question might be undermined by stealth through the passing of apparently innocuous proposals,[19] I think it is debatable to what extent they, and their counterparts in treaties between states, can be interpreted as testifying *primarily* to a desire for statutory consistency in the communities that had framed and ratified the documents.

However, Sickinger also brings up another type of evidence which offers incontrovertible testimony to a general desire to prevent statutory conflict, namely attestations of procedures akin to the Athenian procedures of *graphe paranomon* and *graphe nomon me epitedeion theinai*. In addition to the texts cited by Sickinger,[20] I should like to draw attention to evidence such as that provided by *PEP Chios* 26 which suspends any penalties against those who have proposed the decree or facilitated its passage through the process of ratification.[21] The perceived need explicitly to suspend such procedures obviously testify to their existence in third-century Chios, and *IG* IV 554 from early fifth-century Argos provides a possible parallel.[22] There can be little doubt that procedures of this type, no matter the type of

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[19] See *e.g. IG* XII,9 236 with Suppl. 553 *cf. SEG* 38: 875 (Eretria C4) and *ML* 32, *Syl.*[3] 45 *cf.* Koerner no. 84, *SEG* 37: 856 (Halikarnassos, C5).

[20] For further references to non-Athenian attestations of this kind of procedure see also J.Triantaphyllopoulos (1985a: 68-69, n. 37) and (1985b: 219-221).

[21] εἰ δ[έ τινα ἐσ]τὶν ἐπίτιμα τῶι γράφοντι ἢ τοῖς προτιθεῖσιν [τόδε τ]ὸ ψήφισμα ἢ τοῖς ἄρχουσιν περὶ τῶν ἐν τῶιδε [τ]ῶι ψηφίσματι γεγραμμένων ἀφεῖσθαι αὐτοὺς τῶ[ν ἐ]πιτίμων· τὸ δὲ ψήφισμα τόδε ἀφήκειν εἰς φυλακὴν καὶ σωτηρίαν τοῦ δήμου.

[22] *Cf.* Koerner (1993) no. 27. The relevant passage runs as follows: αἴ τιστις [ἒ τὰ]ν βολὰν τ[ὰ]ν ἀνφ' Ἀρίσστονα ἒ τὸν⟨ς⟩ συναρτύοντας [ἒ ἄ]λλον τινὰ ταμίαν εὐθύνοι τέλος ἔχον ἒ δικάσ[ζο]ι ἒ δικάζοιτο τον γρασσμάτον Ηένεκα τᾶς καταθέσιος ἒ τᾶς ἀλιάσσιος τρέτο καὶ δαμευέσσθο ἐνς Ἀθαναίαν. At least Koerner's translation (1993: 78) suggests that he regarded this as a possible parallel to the Athenian *graphe paranomon*: 'Wenn irgendeiner [entweder] den Rat unter Ariston oder das Kollegium der Artynai [oder] einen anderen Schatzmeister einer Überprüfung unterzieht, da er ein Amt bekleidet, oder wenn einer einen Prozeß anstrengt wegen der Einreichung der Vorschläge oder wegen der Abhaltung der Volksversammlung...' although he refrains from elaborating this point in his commentary. Wörrle (1964: 32-33 with n 3) is equally cautious. In addition to the Chian and Argive examples, a formula attested in a series of Thasian enactments may also allow a similar interpretation: μὴ [ἐξεῖ]ναι δὲ ὑπὲρ τούτων μηδενὶ μήτε εἰπεῖν μήτ' ἐπε[λθεῖ]ν ὑπὲρ λύσιος μήτ' ἐπιψηφίσαι ἀκρατέα εἶνα[ι ταῦ]τα τὰ ἐψηφισμένα. ὃς δ' ἂν παρὰ ταῦτα εἴπηι ἢ ἐπέλθ̣ηι ἢ ἐπιψηφίσηι, τά τε

constitution under which they were operating, testify to consistency and coherence in the community's legislation as an important priority.

Still, if there is strong evidence for attempts to create and maintain legislation that was coherent as well as comprehensive in a considerable number of Greek states, it remains to be asked to what extent such coherence and consistency could be achieved in practice, both when statutes were created during a legislative process and, not least, when they were to be applied to real cases by the courts. While Sickinger concentrates on the former, that is on the legislative processes themselves and the legal ideology that underpinned them, I shall attempt in what follows to draw attention to some reasons why potential statutory conflict may have been difficult to avoid in practice.

The foundation document of Epikteta's Stiftung, with which I began my response, shows a clear awareness that consistency between different decisions relating to the administration of the foundation could be achieved only if previous enactments were readily available for consultation; hence the creation of the portable archive that had to be brought along to future meetings of the *koinon*. This may have worked for a small organisation with a limited output of decisions, but it is harder to imagine a similar thorough consultation at state level, where the volume of potentially relevant (and therefore also potentially conflicting) enactments was far larger. To some extent this may have been remedied at Athens by permitting decrees and laws to be challenged for a long period after their ratification: if a citizen should later – perhaps much later – come across an older enactment which clearly conflicted with the one that had recently been passed, it would still be possible to remedy the situation and have the more recent enactment overturned. And the regular scrutiny of the body of laws (but, it must be noted, *not* of decrees) may have been an important complement to the legal procedures that clearly relied on the will, courage and inclination of volunteer prosecutors to bring contradictions to the attention of the community and its courts.

I shall refrain here from entering a scholarly minefield by asking to what extent these formal structures succeeded in practice in eliminating conflicting laws and decrees, except to say that, in so far as the elimination of decrees that conflicted with existing legislation depended entirely on the initiative of private citizens, it is very unlikely that the process of elimination was entirely comprehensive or consistent.

δόξαντα ἄκυρα ἔστω κα[ὶ χι]λίους στατῆρας ὀφειλέτω ἱεροὺς τῶι Ἀπόλλωνι τῶι Πυθίωι, χιλίους δὲ τῆι πόλει. (*IG* XII, 8 267, *cf. IG* XII *Suppl.* 350, 355, and 358). This interpretation depends on the meaning of ἐπελθεῖν ὑπὲρ λύσιος: the verb ἐπελθεῖν is probably not used in the usual way of 'approach' or 'address' a decision-making body, since that is made redundant by εἰπεῖν. If, on the other hand, the verb is used in the sense of 'attack', the formula protects the present enactment not only against future contrary proposals that might invalidate its terms, but also against attacks on it made through a process that may well have involved the courts. However, there is also the possibility that the verb may mean 'discuss' (*cf. IK Iasos* 51 line 2 and Plato *Laws* 772C-D), and, if so, would still relate narrowly to proceedings in council and/or assembly.

But even if we imagine that the system worked optimally at the legislative stage, the way in which statutes were used by litigants in court will, in my opinion, have created some serious problems of potential conflicts that could not readily have been preempted, no matter how thorough the scrutiny of the legislation in connection with its passing and ratification, or how large the number of ambitious citizens who might be ready and able to challenge a new piece of legislation through a legal procedure akin to the *graphe paranomon*.

When we as historians treat a law that has survived on stone, we are dealing with a continuous text, the individual clauses of which are most readily understood and interpreted in relation to each other. I think it is highly likely that a conscientious and cautious drafter of a new enactment, be it at Athens or in another Greek *polis*, would have approached earlier legislation in a similar way. He would have had a clear incentive to ensure as far as possible that his proposal would not be open to attack by checking, for example, that his proposal violated neither the letter nor the spirit of an existing law or a decree that had been sealed with an entrenchment clause. The importance of the overall legislative context for the interpretation of individual parts of a piece of legislation has been mentioned earlier in connection with the orphaned supplementary statutes, which are sometimes extremely difficult to deal with precisely because their original statutory context has been lost. This problem, obviously, is due to accident of survival. It would not have impeded the interpretative process in which the proposer of a new law or decree would have needed to engage in order to minimise the risks that he himself would face in connection with the passing of his enactment.

But if we leave the legislative stage to consider how existing laws and decrees were used in practice by litigants when they addressed the courts in actual cases, it is important to note that it was not only permissible but also a very widespread practice to cite or quote individual clauses of particular statutes in total isolation from their original, wider context. It might be objected that when laws were read out by the court attendant, they would normally have been read out in their entirety, rather than as single, free-standing clauses, and therefore that the dicastic audience would inevitably be able to interpret each individual clause with the restrictions that its original context would have provided. This argument presupposes that the documents in, for example, Dem. 23, many of which are precisely such single clauses, were inserted much later in the Hellenistic period, and that they do not reflect what was actually read out to the judges on the day. However, even if this proposition is accepted, it does not really undermine my general point, for a surprising number of litigants rely on simply citing individual clauses of laws in the course of their argumentation, without calling on the court attendant to read out the actual text.

In the appendix to this article, I have set out the instances where laws are read out by the court attendant in speeches delivered before the normal *dikasteria*, as well as listing the 49 extant speeches in which the speaker does at no point ask for a *nomos* to be read out by the official. This, however, does not mean that all of the speakers in the latter category refrain from citing the laws in support of their cases. In fact, no fewer than 25 of the speeches refer directly to specific, individual *nomoi*, ranging from verbatim quotation of single clauses to

less precise paraphrases of the lawtext in question.[23] Moreover, paraphrasing of individual clauses out of context occurs very frequently also in those speeches which do occasionally adduce laws as documentary evidence.[24]

This practice sometimes gives rise to statutory interpretations which to the modern observer seem perverse, precisely in those cases where we know the context from which a particular clause is derived. There are several such examples, but considerations of space do not permit me to cite more than one.[25] In Dem. 43.78, Sositheos, who is contending on his son's behalf for the estate left by Hagnias, cites one clause of Solon's law on intestate succession. His aim is to demonstrate that his opponent's father had 'been in contempt of the law' by adopting his son Makartatos II into the *oikos* of his maternal uncle, Makartatos I, because Solon's law gives precedence to males and descendants of males.[26] When read in its original context, it is clear that this particular clause has nothing to do with adoption, be it *inter vivos* or posthumous. As far as the posthumous adoption of Makartatos is concerned, there is nothing to suggest that the clause in no way affected Makartatos' standing: Makartatos was the closest surviving relative of his adoptive father and thus the legitimate heir to his estate.[27] While it is highly unlikely that the entire case of Sositheos depended on his audience's accepting this interpretation – and many of the listeners might well be able to recall the wider context of this clause for themselves – it is still important to recognise that the practice of citing single clauses out of context broadened the scope for interpretation considerably, and hence also the scope for statutory conflicts when the laws were adduced during disputes in the courtroom.

At least some of the Athenians were aware of this and recognised it as a problem, as is evident from the mutual accusations of Demosthenes and Aischines in the dispute over

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[23] I have found direct references to particular *nomoi* in the following speeches of the second category: Ant. 5.9, 10, 11, 16-17, Lys. 6.52, 13.91, 22.6, Isokr. 18.2-3, 20.3, Isaios 4.14 and 16, 9.13, Dem. 19.7 and 131, 22.5, 8, 11, 21, 30, 33, 34, 25.73, 26.24, 39.12 and 39, Dem. 45.44, 49.67, 53.27, Aisch. 2.95, Hyp. 1 *Dem.* fr. 1 col I, fr. 6 col. XXIV, 2 *Lyk.* fr. 1 and fr. 3, 3 *Eux.* 4, 7-8, 29, 4 *Phil.* 3, Lyk. 1.102, Dein. 1.71, 2.14, 3.4.

[24] *E.g.* Dem. 20.9, 21.43, Aisch. 1.138. For a detailed discussion of the practice as evidenced in the speeches of Isaios, see M. Edwards's contribution to the present volume.

[25] For another example, see M. Edwards's interpretation of Isaios 10.9-10 in his contribution to the present volume. See also Hillgruber (1988: 106-109) for other possible instances.

[26] καὶ οὕτως ἐστὶν ὑβριστής, ὥστε γενομένου αὐτῷ υἱέος τοῦ μὲν εἰσαγαγεῖν εἰς τὸν οἶκον τὸν Ἀγνίου υἱὸν τῷ Ἀγνίᾳ ἐπελάθετο, καὶ ταῦτα ἔχων τὸν κλῆρον τὸν Ἀγνίου καὶ φάσκων πρὸς ἀνδρῶν αὐτῷ προσήκειν· τοῦτον δὲ τὸν υἱὸν τὸν γενόμενον τῷ Μακαρτάτῳ εἰσπεποίηκεν τῷ πρὸς μητρὸς εἰς τοὺς Προσπαλτίους, τὸν δὲ Ἀγνίου οἶκον εἴακεν ἔρημον εἶναι τὸ τούτου μέρος· φησὶ δὲ τὸν πατέρα τὸν ἑαυτοῦ Θεόπομπον προσήκειν Ἀγνίᾳ. ὁ δὲ νόμος κελεύει ὁ τοῦ Σόλωνος κρατεῖν τοὺς ἄρρενας καὶ τοὺς ἐκ τῶν ἀρρένων· ο τος δὲ οὑτωσὶ ῥᾳδίως κατεφρόνησεν καὶ τῶν νόμων καὶ τοῦ Ἀγνίου, καὶ εἰσεποίησεν τὸν υἱὸν εἰς τὸν οἶκον τὸν πρὸς μητρός. πῶς ἂν γένοιντο τούτων ἄνθρωποι παρανομώτεροι ἢ βιαιότεροι;

[27] For this adoption, see Rubinstein (1993: 123 cat. no. 23). The claim of Makartatos to the estate in its entirety did not go unchallenged; Lys. frs. 217 and 218 (Carey) testify to an unknown person laying claim to half of the estate, while apparently recognising Makartatos II as the rightful heir to the other half. Carey is probably right in suggesting that this claim related to the inheritance left by the brother of Makartatos I, who had predeceased him.

Ktesiphon's decree.[28] Accusations of 'bending' the laws (sometimes expressed by the verbs *paragein*, *diastrephein* and *klimazein*) are made also by other litigants against their opponents.[29] Since it was an offence to cite a non-existent law, it may be suspected that this lesser accusation was in fact connected with the kind of 'creative' interpretation of single clauses out of context.

However, such expressions of unease in relation to partial citation of *nomoi* are rare in the orators, and there can be no doubt that the citation of single clauses in isolation was an established and generally accepted convention in the Athenian courtroom. The convention may reflect the way in which the Athenians (and perhaps the Greeks generally) related to the letter of their written laws as, in principle, unambiguous,[30] to the extent that the unambiguousness would not be adversely affected even when only a single clause of a law was presented to the court. This last observation is thus not new, but it is necessary to bear it in mind, because it highlights the need to separate the process of legislation from the processes in which the laws were applied in practice when discussing the extent to which the Athenian legislative safeguards were likely to have been successful in eliminating conflicting statutes – or, more accurately, *parts* of statutes.

Equally importantly, it is essential to bear in mind the possibility that this attitude to and use of written laws as attested for fifth and fourth century Athens may have been part of a broader Greek legal tradition that existed also in those communities whose legal systems are known only from inscriptions. When the modern historian comes across a large, beautifully coherent piece of legislation preserved on stone it is necessary to envisage the possibility that its provisions were regularly hacked about and cited out of context by litigants when it came to enforcing its clauses in practice. Alas, the nature of the epigraphical evidence does not allow us to assess to what extent this was really the case.

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[28] Compare Aisch. 3.35 and Dem. 18.21.

[29] See *e.g.* Isaios 11.4, 36; Dem. 23.215; Dein. fr. 9.3 (Conomis).

[30] *E.g.* Wolff (1970: 68-69).

Wolff, H.-J. (1970): 'Normenkontrolle' und Gesetzesbegriff in der attischen Demokratie. Sitzungsberichte der Heidelberger akademie der Wissenschaften, philosophisch-historische Klasse 1970 2. Abh. Heidelberg.

APPENDIX

Laws read out by the court attendant in Attic forensic oratory
(S = *synegoria*; laws may have been read out by previous speaker)

• Publ. prosecution speeches in which laws are read out by court-attendant (9)
Lys. 14.3, 5, 8, 47 S; Aisch. 1.12, 16, 21, 35; 3.15, 22, 30, 32, 39, 47 (*graphe paranomon*); Dem. 20.27, 92, 95 (bis), 96, 97, 153 S (*graphe nomon me epitedeion theinai*); 21.8, 10, 46, 94, 113; 23.22, 28, 37, 44, 51, 53, 60, 62, 82, 86, 87 (*graphe paranomon*); 24.32, 41-42, 45, 50, 54, 56 (bis), 59, 104 (several laws read out) (*graphe nomon me epitedeion theinai*); 58.5, 11, 14, 21 (bis), 49, 51; 59.16, 52, 87 S

• Publ. prosecution speeches in which laws are not read out by court-attendant (19)
Lys. 6 (incomplete, S), Lys. 12, Lys. 13 S, Lys. 15 S, Lys. 22 (probably S), Lys. 27 (probably S), Lys. 29 (probably S), Lys. 30 (probably S), Dem. 19, Dem. 22 S, Dem. 25 S, Dem. 26 S, Dem. 53, Dein. 1 S, Dein. 2 S, Dein. 3 S, Hyp. 1 *Dem.* (incomplete, S), Hyp. 4 *Phil.* (incomplete, S), Lyk. 1 (the only law read out is the Lakedaimonian law in 1.129)

• Publ. defence speeches in which laws are read out by court-attendant (4)
And. 1.85, 87 (bis), 96; Lys. 9.8; Isaios 11.1, 4, 9, 22; Dem. 18.120 S

• Publ. defence speeches in which laws are not read out by the court-attendant (10)
Ant. 5, Lys. 5 (incomplete, only prooimion preserved, S), Lys. 18 (incomplete, only *epilogos* preserved), Lys. 19 (incomplete, only *epilogos* preserved), Lys. 20 S, Lys. 21 (incomplete, only *epilogos* preserved), Lys. 25 (incomplete, only *epilogos* preserved), Aisch. 2, Hyp. 2 *Lyk.* (incomplete), Hyp. 3 Eux. S

• Priv. prosecution speeches in which laws are read out by court-attendant (18)
Isaios 3.38, 42, 53; 6.8, 48 S; Lysias 10.14, 16, 17; Dem. 27.58, 32.23, 33.3, 27, 36.24, 25, 62, 37.18, 33, 35, 38.4, 17, 40.19, 41.10, 44.14, 46.8, 10 (bis), 14, 18, 20, 22, 24, 26, 47.24, 73, 77, 48.11, 30, 50.57 (probably), 54.24; Hyp. 5 *Ath.* 33

• Priv. prosecution speeches in which laws are not read out by court-attendant (12)
Lys. 32 (incomplete, S); Isokrates 17, 18, 20 (incomplete, *prooimion* and *diegesis* not preserved), 21 S; Isaios 5; Dem. 28 (rejoinder), 30, 31 (rejoinder), 39, 45 (but note that laws are cited extensively in the rejoinder, Dem. 46), 49

• Private defence speeches in which laws are read out by court-attendant (6)
Isaios 2.16 S; Dem. 29.39 S, 34.37, 42 , 35.51, 52.19, 57.31, 57.32

• Private defence speeches in which laws are not read out by court-attendant (4)
Isokr. 16 (incomplete, only part of *pistis* section and *epilogos* preserved), Lys. 23,
Isaios 12 (incomplete, S), Dem. 55

• *Diadikasia* speeches in which laws are read out by court attendant (5)
Isaios 7.21, 22 (bis), 8.34, 10.10 (several laws read out), Dem. 42.16 (several laws read out), 23, 43.16, 50, 53, 56 (several laws read out), 62, 71, 75 S

• *Diadikasia* speeches in which laws are not read out by court attendant (4)
Lys. 17; Isaios 1, 4 S, 9.

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SANCTIONS IN SACRED LAWS

The sanctions found in Greek sacred laws are a neglected topic. I know of only one treatment, Robert Parker's essay, 'What are Sacred Laws?' published only two years ago.[1] As the question mark in Parker's title implies, one reason for the neglect of this topic is uncertainty about sacred laws. No other field in Greek law has witnessed so many collections with so few definitions of what the collections contain.[2] Let me begin by pointing out difficulties in the phrase, 'sacred laws'. One difficulty, a familiar one, lies in the term 'law'. To address this difficulty, let me summarize the view of the legal anthropologist Pospisil, who described laws in such a way as to accommodate ancient and illiterate societies as well as modern and literate ones. A law, he said, had four features: it was generally applicable, it was enforceable by some one, it described rights and duties, and it contained sanctions.[3] To these I would add that it provides some procedure by which to impose these sanctions. As applied to a typical Greek 'sacred law' about sacrifice at some shrine, such a law would apply to all worshippers, the polis controlling the shrine would enforce it, it would describe worshippers' rights and duties, and it would contain sanctions against worshippers who did not carry out their duties. The procedure would be for the priest to levy a fine, or perhaps bar the worshipper.

A second difficulty concerns the other word in the phrase, 'sacred laws'. 'Sacred' might be thought to differ from 'secular' or 'profane', so that religious laws would form one corpus, and secular laws another. This is not true of the Greek laws under consideration. The typical law, one issued by a polis, would not differ from other laws issued by the same polis save for its subject, *ta hiera*, or religious matters. In this paper I shall thus refer to laws about religious matters as opposed to other matters, or, for brevity's sake, to 'religious regulations'. (To stress the difference

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[1] Parker (2005) reprised at (2006) 63. Henrichs (2003) does not discuss the nature of sacred laws in his discussion of regulations at 42-5. I thank the members of Symposion 2007 for their criticisms of this essay, most especially Martin Dreher, the respondent, but also Jean-Pierre Bertrand, Michael Gagarin, Douglas MacDowell, Lene Rubinstein, and Gerhard Thür. Several corrections are due to these criticisms. I owe more to Edward Harris, the host for Symposion 2007. He read two drafts of this piece, and his essay 'Antigone the Lawyer, or the Ambiguities of Nomos' (2006) was the starting point for this attempt to coordinate divine and human responses to violations of the law.

[2] Most recently, Lupu (2005).

[3] Pospisil (1971) 44-78, whose description I applied to regulation of supplication in Naiden (2006a).

between these regulations and bodies of law like canon law, I eschew the term 'law'. I also wish to avoid comparison between these regulations and 'unwritten laws', *agraphoi nomoi*. The Greeks thought these laws to be of divine origin, whereas regulations were of human origin.) For the most part, evidence will come from the late Archaic and Classical Period.

A third difficulty arises even with this phrasing. To return again to a typical law or regulation, the polis issues it. Some regulations, though, come not from the polis but from some part of it, like a deme, but carry the same authority. Still other regulations come from some organization that the polis acknowledges, like a phratry or a society, but these laws do not carry the same authority. Further attention will show, I think, that regulations of this third kind mostly lack sanctions. They are not laws in Pospisil's sense, or laws according to some definitions other than Pospisil's.[4] Accordingly, I shall refer to them as by-laws. Just as corporate by-laws differ from national or local laws, these by-laws differ from regulations of the polis or of demes. Yet another relevant category is that of personal instructions to perform rituals. These, too, differ from polis regulations.

This last distinction points to a conclusion advanced by Parker in his essay, one that I endorse. Many regulations about religious matters, or supposed regulations about these matters, lack sanctions; by the standard of Pospisil, they are not truly laws. Parker goes on to argue that they are 'recorded conventions, (they) derive from exegetical tradition, (their) aim is to advise, and (they) lack sanctions and procedures for enforcement'. To sum up these regulations in Parker's own phrase, they are 'black-tie rules'.[5] In contrast, other regulations about religious matters are just that, regulations, they derive from legislation, and they aim to coerce. In one way, though, regulations passed by an assembly and by-laws or personal instructions are alike. Obedience to all of them is taken for granted. Social solidarity in the archaic and classical polis accounts for this obedience.

This view has much to recommend it. It fastens on the cardinal fact that sanctions are rare, and that on this score many laws found in the familiar collections merit scepticism. It also recognizes similarities between polis regulations and by-laws and personal instructions. I would nonetheless propose a different explanation for this cardinal fact and for these similarities. Sanctions are rare because the community includes them only with regard to those practices on which it has staked its own survival or well-being, or the well-being of an important shrine. If the community is not at risk in these regards, it will not resort to sanctions. It will issue instructions, but it will leave the consequences of not following those instructions to the individuals or groups whom it is addressing. The reason for issuing sanctions

[4] E.g., Gagarin (1986) ch. 1, with refs.

[5] Parker (2005) 65, 62. Henrichs (2003) 52 anticipates this idea, but without using any summarizing phrase. Parker ibid. cites the observations of Seyrig (1927) 197-8, on laws seeking to prevent mistakes by worshippers. Cf. W.V. Harris (1989) 83 holding that regulations had little effect on religious practices.

where survival or well-being are at stake, and the reason for letting individuals and groups look after themselves, are one and the same. Any ritual subject to a regulation, by-law, or instruction can go wrong. It can fail, meaning to say that it will not appease the god being addressed. That, as I have argued elsewhere, and shall argue briefly today, is a neglected feature of Greek rituals, notably sacrifice, the most regulated ritual. Since rituals can fail, the community will wish to make sure that the most important rituals do not in fact fail, and it will issue sanctions that deter any conduct that will cause such a failure.[6] As for other, less important rituals, including those performed by individuals and groups, failure is a problem for them, not for the community. It is, however, a problem – more of a problem than Parker or others have acknowledged. As Lysias says, the impious must pay a price to both gods and men.[7]

Let us begin with the Andanian Mystery Law, a 91 BCE redaction of a fourth-century law. The law begins with an oath that the priests and priestesses must swear that they will insure that the Mysteries take place 'in a way suitable for the goddess, and justly', and that they 'do nothing improper or unjust that would invalidate the Mysteries'.[8] Those who do not swear the oath must pay a fine of 1,000 drachmas and find someone to replace them. Those who do swear are obliged to carry out the numerous provisions of this, the longest extant Greek law relating to a single ritual or festival. A college of ten magistrates chose the priests and priestesses and swore the same oath (sec. 25). Among other officials, five treasurers were liable to pay double damages in case of any malfeasance, plus a fine of 1,000 drachmas. Those who meddled with the finances of the Mysteries through assembly resolutions were liable to pay 2,000 drachmas (sec. 11). *Rhabdophoroi,* or sergeants at arms, could whip those who prevented the Mysteries from proceeding properly (sec. 10). The college of ten told them whom to punish (sec. 25). They themselves could be punished by the priests (sec. 10). All these sanctions concerned the Mysteries. Sanctions for crimes unrelated to the Mysteries, but occurring at the same time, also appear in the law. They were perhaps more severe than sanctions for these crimes when committed at other times.[9]

Here we have many sanctions, and a clear reason for them: the Mysteries at Andania were central to the traditions that the Messenians developed in order to justify an independent Messenian polis after 371 BCE. The community's survival,

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[6] Naiden (2006b).

[7] Lys. 6.10, paraphrasing Pericles at Th. 2.37.2. Other views: Parker (2005) 66 with W.V. Harris as above; earlier, Hirzel (1902).

[8] *Syll*. 736 sec. 1. Save where textual issues require it, references to inscriptions are to collections as abbreviated in *LSJ*, plus familiar recent collections as abbreviated at the PHI epigraphical website. Unless otherwise indicated, all inscriptions date from the Archaic or Classical Periods.

[9] All these passages are noted by Harter-Uibopuu (2002) passim.

or to be precise, its supposed revival, was at stake.[10] If we discount these traditions, we can still say that the political integrity of the community was at stake, in a word, that its well-being was at stake. This is no less true of the sections of the regulations dealing with finances. These sections concern the well-being of the great shrine.

Other regulations cover all the rituals performed in a single location, including a regulation of the Amphictyons in charge of the shrine of Delphic Apollo. The Amphictyons vote to impose a fine of 30 staters on any *hieromnēmōn*, or ambassador, who does not perform his duties, and if he does not pay the fine they will 'deny access to the shrine and make war against the city from which he comes'.[11] The threat underscores the point that not all regulations about religious matters entirely or mostly lack sanctions. Once again the reason for the sanctions is clear: the well-being of a great shrine is at stake.

Along with the issue of survival may come that of jurisdiction. When the Spartan King Agesilaus went to Aulis in Boeotia and tried to perform a sacrifice in imitation of Agamemnon, Theban magistrates prevented him, saying that it was illegal for a foreigner to sacrifice except under certain conditions, and Agesilaus gave way. Although the Spartans thought otherwise, the issue here is a regulation (or perhaps a local rule) that forbade sacrifices of this description.[12] The priest on the spot must have protested, then summoned magistrates. They informed Agesilaus of the regulation or rule and obstructed him. Given his standing, this is a severe response. And it is comprehensible: if Boeotia were to lose some of its jurisdiction to Sparta, it might lose its independence, too. It survival would supposedly be at stake.

In other cases, a regulation forbids foreigners from sacrificing at all. Another king of Sparta, Cleomenes, discovered this at Argos, but he was at the head of so formidable an army that no magistrate came to the aid of the protesting priestess.[13] Other regulations of this type must have been numerous, even if few survive.[14] One feature of these regulations is that they sometimes ban persons of a given ethnic group, such as Dorians, and not all foreigners. In these instances, the concern is not with the jurisdiction of one polis, but with ties among all those poleis whose citizens are allowed to sacrifice. The concern, in other words, is regional or federal. This concern also animates *agōgimos* clauses issued by the Delphic Amphictyons. One of these clauses compels poleis to arrest persons charged with misuse of sacred property and remand them to Delphi.[15]

Several regulations explain the reason for these varied sanctions. As a second-century BCE regulation from Astypalaea says, 'in the future everything regarding

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[10] A short account: Deshours (2006) 55-8 with refs.
[11] *Syll*. 145. sec. 4; so also *FD* 3.77.
[12] Paus. 3.9.4, Plut. *Ages*. 6.6; X. *HG* 3.5.5.
[13] Hdt. 6.81-2.
[14] *Rhabdophoroi*: as above. Other instances: *LGS* 95; *Syll*. 981, with a fine for temple staff.
[15] *FD* III 4.539.39-45.

honors given to the god (Dionysus) should be the very best', and adds that anyone who does not sacrifice on time 'will be accursed, and the prytanes will fine him besides'.[16] The same reasoning inspires an Athenian law punishing officials who do not get the Panathenaic procession off on time.[17] The god may have indicated 'what is best' through an oracle, as in Herodotus, where Apollo made it clear to the Aeginetans that their first offering to him after Plataea was not all it should have been.[18] They responded by making a second, better offering. Or the god may set standards by forbidding some practice, as in an Athenian dedication in which Pan 'forbids' anything 'dyed or colored'.[19] The polis would wish to carry out these instructions in order to avoid the rejection experienced by the Greeks on the occasion of their first sacrifice after Plataea. I have shown elsewhere that rejection of offerings, especially of sacrifice, was not so uncommon that a polis could ignore the possibility. Instead the polis would try to prevent it. In Herodotus, Cleomenes' attempt to sacrifice at Argos, which met with no opposition from any magistrates, met with opposition from the goddess of the temple, who shot fire at him and drove him away. Another Spartan leader, Cleombrotus, attempted sacrificial extispicy, but met with a solar eclipse instead.[20] In Pausanias, the Athenians found themselves rejected at Delphi after one of their citizens failed to pay a fine to the Amphictyons.[21] These are all crucial instances. Once rejected, Cleomenes will go mad. Cleombrotus will lead his army backward, not forward, and the Athenians will find themselves deprived of access to the Delphic oracle.

With motives such as these, communities sometimes impose severe sanctions. The Arcadians imposed the death penalty on women who fell foul of Demeter by not dedicating brightly colored clothing.[22] In this case, we do not know why the community felt its survival or well-being was at stake, but in another case of capital punishment, we do. Athenians imposed the death penalty (or later exile) for cutting down olive trees sacred to Athena.[23] These trees were offshoots of her gift to the community when she competed with Poseidon in order to become its protector, and proper treatment of this multiplied gift ranked with proper performance of important rituals. In the Persian Wars, the goddess had used her sacred olive to encourage the people at a crucial juncture.[24]

We have already noticed heavy fines; the heaviest would seem to be a talent, imposed for violation of an oath sworn by delegates from Heraea and neighboring

[16] *LSS* 83.5-7, 10-4.
[17] *Syll*. 271.31-5.
[18] Hdt. 8.122.
[19] *SEG* 36.267, from the Roman era.
[20] Hdt. 6.81-2, 9.10.3.
[21] Paus. 5.21.5.
[22] *SEG* 11.1112
[23] Death: Arist. *Ath*. 60.2. Later exile: Lys. 7.3, 32.
[24] Hdt. 8.55.

Elis.[25] This is a treaty that makes the oath the express subject of the agreement. Here again we know the reason for the severe sanction: the treaty was vital for these two intermittent enemies. The second heaviest fine is 2,000 staters imposed as a fine for misconduct in the shrine of Ptoan Apollo. [26] (Here for a second time we do not know the reason for the severe sanction.)

Another punishment was to bar the miscreant from the shrine. The Andanian Mystery law forbade *rhabdophoroi* who broke the law from being initiated. Regulations prohibiting foreigners from participating in rituals fall into this category also. So do regulations preventing violators from incubating in shrines of Asclepius.[27] Some of these regulations are obscure, like the two already noticed. In such cases, we face the danger of arguing backwards: if the punishment is severe, the ritual must be important to the community's survival or well-being. For the most part, however, regulations with severe sanctions concern rituals or shrines that are important for other reasons, as at Andania and Delphi.

In contrast, hardly any religious regulations compel the performance of a ritual and then impose severe sanctions for failure to comply. The Erythrae decree, for one, imposes heavy fines on councilors who do not swear the requisite oath to Athens, but I know of only one other example.[28] This lack of examples contrasts with the Roman attempt to compel Christians to attend pagan sacrifices, as attested in the *Libelli* of the Decian Persecution, and from later, similar attempts in the medieval period. The distinction between Greek antiquity and these later periods underscores the limits of the sanctions in the religious regulations. These sanctions do not attempt to incorporate individuals into a congregation. They only attempt to protect a community against the consequences of individual misconduct. The concern of these sanctions is to keep favor with immortals, not to build solidarity with mortals. On the contrary, religious regulations call on mortals to police one another. One regulation calls on priestesses to fine worshippers and on worshippers to bring suits against priestesses.[29]

When smaller groups or individuals issue by-laws and instructions on comparable topics, they do not avail themselves of any such sanctions. This is not because the same fear of rejection does not obtain. It does. A first-century CE inscription from a stele establishing the worship of a minor god, Men *tyrannos*, alludes to this fear, saying 'if anyone tries to force his way in, his sacrifice will be unacceptable to the god'. The inscription goes on to prescribe a ritual by which the offender may regain his standing, but warns, 'If anyone causes trouble or is officious, he will find himself in the wrong when it comes to Men *tyrannos*, whom

[25] *Syll*. 9.
[26] *IG* VII 4135.20-3.
[27] *SEG* 44.505, where the fine is perhaps for not performing a sacrifice.
[28] *Syll*. 41.30-1, 64.34-6.
[29] *SEG* 1.344.30-36

he will not be able to mollify'.[30] Since an individual establishing a local cult lacks the power to impose any sanctions, he makes do with these admonitions. If an individual uses legal language as well, this is a *façon de parler*, as in a funerary stele in which any person violating the instructions on the stele should be 'liable to the imperial treasury', that is, *hypeuthynon*, because he has 'committed impiety against the gods of the underworld'.[31] More common is the assertion that it is *ou themis*, not acceptable according to sacred rights, to violate the instructions given on the stele, as in a Neapolitan inscription forbidding the burial of another woman in the same spot as the author's daughter, and adding, 'a strong curse upon him'.[32] These instructions accompanied by the warning *ou themis* appear eight times in Sokolowski, but not once does a sanction accompany them. The fear of the gods that inspires the community to impose sanctions inspires the individual to issue warnings. We have come as far as we can from regulations such as the Andanian inscription.

Sometimes, though, a person or group has the backing of the community, such as the priest of Zeus *Phratrios* who, acting in accordance with some unmentioned decree, set up a stele including the instructions that 'the phratriarch will pass judgment in whatever cases come up each year, and if he does not, he will pay 500 drachmas to the priest of Zeus *Phratrios*. The priest (and anyone who wishes to prosecute?) will collect the money'.[33] This example is Athenian, and so is another in which the community provides for sacrifices at a shrine run by *orgeōnes* or guild members. These sacrifices must all occur at and not beside the altar, the motive being, as above, that the sacrifices be conducted as well as possible. Otherwise some fine will be levied. But the *orgeōnes*, not the community or communal officials, will control the money.[34] In these cases the community has lent some of its power to subordinate groups. But only some: the fines are lower and capital punishment is out of the question. The reason is that the stakes are lower. The *orgeōnes*' relations with their goddess are less important to the community than the community's relation with Athena, relations secured by safeguarding the sacred olive trees.[35]

In other circumstances, it is makes no difference whether those who might impose sanctions are the community, a group, or individuals. The stakes are too low, and so the rules of conduct for shrines contain the same warnings as issued by individuals. One such circumstance is forbidding access to shrines. These, however,

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[30] *LSCG* 55.8-10, 15-7.

[31] *IGRR* 4.1082.5-10, 15-8, from the Imperial period.

[32] *I. Napoli* 2.94, 2.126 ter. Parker (2005) 65-6 gives other examples; for him these are 'recorded conventions'.

[33] *IG* II^2 1237a.46-50.

[34] *IG* II^2 1361.7-11.

[35] Or a subordinate group could divide responsibility with the community. In a by-law for the cult of Isis in Athens, there are penalties expressed in an unknown number of drachmas for unknown but minor offenses, but if the offenses merit a severe response, the temple staff may appeal to the council of Athens and the *archōn basileus* (*LSCG* 50.4-10).

are not cases where forbidding access is matter of civic survival or well-being. The god of the shrine in question has his wishes, and the person or persons publishing the rule choose to give any who would worship this god fair warning. The warning often contains the phrase *hauton aitiasthai*, 'let it be on the violator's conscience'.[36] The phrase *hauton aitiasthai* should not be underestimated. It does not mean that punishment is impossible. It only means that the god will see to it, not the community or others. If, however, the violator of the instruction is a slave, one community thought the matter was now different. So a polis in Pontus issued this regulation: 'Let no foreigner go inside the perimeter (of the shrine) without a guardian. If he is caught doing otherwise and he is a slave, let him be whipped and put up for sale, but let a free person have it on his own conscience'.[37] In this case, the community sees to the punishment, the same as in more serious circumstances in which survival is at stake. Indirectly, its survival is at stake this time also. The violation of religious regulations by slaves might lead to their violating other regulations. The Andanian Mystery Law, far-reaching as it is, contains a similar clause.[38]

In some instances, the community making the regulation is not looking not to its own survival or well-being, but to the income or convenience of the priest whom it regulates and often has appointed. Other times, it is trying to prevent cumulative and not immediate harm to a shrine, sometimes harm resulting from the misappropriation of natural resources. In these cases, the penalty is usually payment of a small fine.

First, fines imposed in the interest of priests. On Cos, those who do not give privileged portions to the priest must pay him and the inscription adds that the priest can collect the money by legal process.[39] Such fines of course were common. The community was bound to let the priest or priestess keep some of the fines that he or she collected.

Second, fines to prevent cumulative harm. For the nuisance of having animals in a shrine where they were not wanted, Ialysus imposed a fine of one obol.[40] For nuisances committed on Acropolis, Athens was a little more severe: three obols for causing nuisances by putting pots in doorways or against walls and also for boiling meat between the temple and the great altar or behind the temple or along the Hecatompedon. Dung left by a worshipper's beast of burden drew the same fine.[41] More serious offenses were not nuisances, but instances of negligence that would do worse harm. Structures on the Acropolis needed to remain sound, and so priests who failed to inspect them on schedule faced fines of two drachmas. But this fine was

[36] *ITralles* 245; *SEG* 26.1225; *LSAM* 85; Reinach (1906) n. 17; *IEph* 1520; *SB* 8.9669.
[37] *St. Pont.* 3.278.
[38] Sec. 15.
[39] *LSCG* 161a.20-4.
[40] *LSCG* 136.30-3.
[41] *LSCG* 3.5-11.

small compared to the danger and damage that would result from riding on horseback through the Acropolis, crowded as it was with dedications and people, and so Athens charged a fine of 100 drachmas for this offense.[42]

Third, fines to prevent the misappropriation of resources; these fines sometimes are not small. For some unknown reason, Cos fined those cutting sacred cypress wood the large sum of 1,000 drachmas.[43] Several Athenian regulations are easier to interpret. One prohibited cutting stone from the Pelargic rock at the foot of the Acropolis, imposing a fine of 500 drachmas for violators, and two others prohibited taking wood from sacred groves.[44] The one of these two that included a fine provided 50 drachmas if a free person took the wood, and a whipping if a slave took it, the same distinction noticed above. These fines seem modest, especially compared to the death penalty for damaging sacred olive trees in Attica. The contrast arises from the relation between the two kinds of plants and important rituals. The olive, to repeat, was a gift from Athena, one that played a role of good omen during the Persian wars. The wood in the grove of Apollo *Erithaseos*, a minor manifestation of this god, fell under the protection not of the Athenians *tout court*, but the priest acting 'on his own behalf, that of his fellow demesmen, and that of the Athenian people'.[45] He held the same subordinate position as the priest of Zeus *Phratrios*. By the reckoning of a community that reveres the gods, but not the ecosystem, his wood is worth less.

A fine of 50 drachmas, and still more one of one obol, may seem small enough to amount to a fee, not a fine, and one regulation, also concerning the misappropriation of natural resources, deals with both fees and fines, and does not draw a strong distinction between them. Both odd yet brief, it may be quoted in full: 'And let them sacrifice to the Nymphs according to the prophecy from Pythian (Apollo). Those who drink from the Salt Springs should pay an obol yearly to the shrine of the Nymphs. Those who do not pay the obol must not drink from the spring. If they insist, they must pay a fine of five drachmas. If any one takes or draws water without paying an obol, he owes for each amphora's worth'.[46] The fine amounts to an additional fee for late payment. Yet the form given to this additional fee is that of a regulation. The source, as often, is an oracle; the occasion is a ritual; and the small sanction tacitly acknowledges that the community is not at stake, only the relation between the worshipper and the goddesses. And, as before, there is no notion of conserving the resource as opposed to honoring the god. Those who draw water by the amphora may continue to do so, provided that they pay the Nymphs.

The examples cited so far come from numerous communities, and point to a caveat with respect to any classification of sanctions in religious regulations: no two

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[42] Ibid. 21-2, 14-7.
[43] *LSCG* 150. 3-4.
[44] *IG* I^3 78a.55-59; *IG* II^2 1362, especially ll. 7-15; 1177.17-21.
[45] Ibid. ll. 2-7, quoted by Parker (2005) 58-9 as an example of 'rare and striking style'.
[46] *IG* I^3 256.

communities place the same value on the same rituals. In some shrines, foreigners could not participate in rites, and would be expelled if they tried; on Amorgos, a foreigner's participating in a right was a trivial enough matter that a priest who failed to prevent it paid a fine of ten drachmas. In Athens, some olive trees were sacrosanct. In groves elsewhere, cutting wood was subject to fines from 1,000 drachmas down to 50. Xerxes should have stormed these places, not the Acropolis where Athena's olive defied the worst he could do.

Xerxes committed the crime of *asebeia*. The relation between this crime and sanctions in religious regulations is the remaining topic I wish to discuss. The first problem, as with religious regulations, is one of definition. The wording of the Athenian (or any other) law of *asebeia* is unknown to us. How broad was it?[47] It evidently forbade some offenses also addressed by religious regulations, but how many? The greater the overlap, the more often matters covered by the religious regulations would be subject to the sanctions found in the law of *asebeia*, and the less true it would be that, for the most part, these matters were not subject to sanctions. The smaller the overlap, the less often these matters would be subject to sanctions. The smaller the overlap, in other words, the better, both for Parker's notion of black-tie rules, and for my notion of a ladder of regulations, some enforced by the community, others enforced only by gods in their dealings with individual worshippers or small groups.[48]

Several inscriptions from outside Athens shed light on this question. The Arcadian inscription that provides capital punishment for the woman who offends Demeter, says that the magistrate who fails to deal with her commits *asebeia* as well as owing 30 drachmas. At Ialysus, those who paid their obol for letting in animals committed the same crime. At Astypalaea, those who did not parade on time were subject to a curse and liable to an unstated fine.[49] These three regulations in effect draw the sting from *asebeia* by imposing a fine. Regulations from Lindus and Miletus also collect fines from those guilty of *asebeia*.[50] Among these regulations, that of Astypalaea is especially revealing: to commit *asebeia* and to be cursed are interchangeable, meaning that the community collects the money and leaves further action to the gods. But this division of responsibility, one consistent with Parker's views, is not the whole story. A trial for *asebeia* must have awaited those failing to

[47] For example, did it cover the offense committed by Megacles during the Cylonian conspiracy, as thought by Wolff (1945)?

[48] A short and selective bibliography on *asebeia*, which has received far more attention than sanctions in 'sacred laws': Lipsius (1905-15) 2.1.359, noting the lack of any citation of the text of any law; Derenne (1930) 12, anticipating the view to be set forth immediately below; Rudhardt (1960); Cohen (1988), making the point that *asebeia* is typically and normally a matter of attitudes as well as conduct, but in a different sense than the sense below. Another stream of scholarship regards *asebeia* trials as political trials: see most recently O'Sullivan (1997).

[49] Ll. 12-4 as above; so also *LSCG* 118.31-6.

[50] *LSS* 90.88-91, 117-2; *LSAM* 53.25-8.

pay the fine, as Lene Rubinstein pointed out in a comment on Parker's essay. *Asebeia* occurs when the errant worshipper does not acknowledge his error. It may well have been severely punished.[51]

Attitudes matter. It is not, however, an attitude of impiety that matters. Willful defiance of the law matters.[52] The regulation from Cos illustrates this difference. As noted, it provided for a charge of *asebeia* and a fine, but made the charge depend on the purpose of the accused. If he was conducting public business, he would be exempt. The notion is the same: any crime of *asebeia* comprehends defiance of the law.[53] To translate *asebeia* as 'impiety' is thus misleading. In these instances, 'failure to defer to the authorities' is a better translation. These authorities include the gods and the laws of the polis, no distinction being drawn between them. The gods, after all, supposedly inspire religious regulations, notably by way of oracles such as the one that dealt with the shrine of the Nymphs.[54]

This survey of sanctions in religious regulations of the Archaic and Classical Periods has several consequences. The first is that Greek religion is not permissive. There are no black-tie rules, only rules enforced by god rather than man, or by some men rather than the community. Second, Greek religion can be bureaucratic without being subject to experts. In the texts of polis regulations and corporate by-laws, at least, there is no role allotted to experts like the *exegetai* of Athens.[55] There is a role allotted to priests and other public officials.

The third, tentative conclusion concerns the relation between regulations having sanctions and the law of *asebeia*. Outside of Athens, the two are complementary. The regulations having sanctions mark the first response to improper conduct, and the law of *asebeia* marks the second, presumably sterner response. This is not to say that other situations are not possible. Some convictions for *asebeia* may have had nothing to do with any regulations having sanctions. Some convictions of this kind, moreover, may have led to capital punishment. It would be wrong to suggest that outside Athens the response to religious crimes was always or even typically mild.

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[51] Parker (2005) n. 30.

[52] For the same point about attitudes and conduct in acts of supplication, see Naiden (2006a) ch. 6; for the same point about purification, Chaniotis (1997) 156-58. The general legal parallel: balance between considerations of procedure and considerations of substance in Greek law, for which see E.M. Harris (2006) XVII, XXVII-XXIX, and the subsequent essays in the volume.

[53] This regulation also contains the unusual notion of '*asebeia* against the shrine', which should mean that the act of *asebeia* did not affect the accused otherwise, and would accordingly not be grave (*LSCG* 150a.5-7). Perhaps it meant that he would be banned from that shrine and not others. A different view of most of these inscriptions: Parker (2005) 65.

[54] The topic of A. and I. Petrović (2006).

[55] A conclusion consistent with Lys. 6.10, which says that *exegetai* give advice in conformity with unwritten, not written laws.

Inside Athens, however, only one regulation fits the pattern for elsewhere in Greece, and it dates from 37 BCE.[56] This difference suggests that in Athens the relation between regulations and the law of *asebeia* was not the same as elsewhere. What was it? In this connection, the case of Socrates is a tempting one to revisit. Everyone will remember the charges: thinking that the gods of the community do not exist, introducing new gods, and corrupting the youth. Once again, *asebeia* concerns attitudes, but not an attitude of defiance towards a religious regulation. Instead it concerns defiance towards the gods themselves. Attitudes aside, it concerns another offense, corrupting the youth.

Against these charges, Socrates' defenders, especially Xenophon, make the usual defense, which is that the defendant never broke a regulation regarding a ritual. In that sense, he was not guilty. Had he been guilty, he presumably would have paid any fine, for his attitude was unimpeachable. Should that not have been the end of the matter? Socrates had honored the gods and he had obeyed the laws: he was a paragon, and deserved the free meals that he impudently said would be an appropriate punishment if he were convicted. But the answer to our question is that this defense was irrelevant to the charges of atheism and corruption of the youth. Neither of these charges was a matter of disobeying regulations. The accusers of Socrates were attacking his philosophy and his pedagogy, matters well beyond any regulations. These matters also went well beyond some other Athenian *asebeia* cases, such as the mutilation of the Herms or the profanation of the Mysteries, both of which concerned rituals and the like.

Did the accusers venture beyond the bounds of the law of Athens? To repeat, we do not know what the law of *asebeia* was, and so I shall not answer this question.[57] But I think that their prosecution against Socrates would have been impossible in most if not all other Greek communities. In these communities, the law of *asebeia* conformed to the spirit of numerous regulations of rituals. This spirit – the gods first, the community second, and the individual last – has been the topic of this paper.

[56] *LSCG* 50a.5-7.

[57] No: Rudhardt (1960). No regarding the corruption of the young: Havelock (1986) 4-5, developed by Robb (2006). Yes: MacDowell (1978) 200-02, and also holding that the trial of Socrates was perhaps 'political'.

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MARTIN DREHER (MAGDEBURG)

ANTWORT AUF F.S. NAIDEN

Fred Naidens Vortrag über „Sanktionen in heiligen Gesetzen“ greift ein Thema auf, das in der Tat erst viel zu selten die Aufmerksamkeit der Forschung gefunden hat. So tut Naiden gut daran, den Begriff der lex sacra zu definieren, den er jedoch lieber, wenn ich recht sehe, durch den Begriff „religious law“ bzw. „religious regulations“ ersetzen möchte.[1] Zumindest im Deutschen wäre statt ‚heiliges’ oder ‚religiöses Gesetz’ nach Meinung einiger Forscher der Terminus ‚kultisches Gesetz’ besser geeignet. Da ich aber auch darin keinen entscheidenden Unterschied sehe (alle genannten Bezeichnungen sind sprachlich gleichermaßen problematisch, da nicht die entsprechenden Gesetze selbst heilig, religiös oder kultisch sind, sondern ihr Inhalt sich auf heilige usw. Angelegenheiten bezieht, im Deutschen wäre daher der Ausdruck „Kultgesetze“ am geeignetsten) bleibe ich bei der eingeführten Bezeichnung ‚heilige Gesetze’. Daß ein Gesetz tatsächlich immer, wie Pospisil postuliert, eine Sanktion enthalten muß, und sogar, wie Naiden darüber hinaus will, ein Verfahren zur Durchsetzung der Sanktion, würde ich im übrigen bezweifeln.

Es wäre im vorliegenden Zusammenhang wohl auch nützlich gewesen, den Begriff „sanction“ zu definieren, der am ehesten, wenn man ihn nicht als „Sanktion“ übernehmen will, mit dem deutschen Wort „Zwangsmittel“ (Strafandrohung) wiedergegeben werden kann. Es sei auch darauf hingewiesen, daß das Wort sanctio bezeichnenderweise dem gleichen Wortfeld (sancire usw.) und vor allem eben dem gleichen inhaltlichen Bedeutungsbereich entstammt wie sacer in der lex sacra. Daran ist für den vorliegenden Zusammenhang folgendes wichtig: Während für mich zur Definition der Sanktion auch alle in den leges sacrae erwähnten (oder auch nicht erwähnten und möglicherweise stillschweigend vorausgesetzten) göttlichen Strafen gehören, scheint Naiden „sanctions“ nur als die von Menschen auszuführenden Bestrafungen anzusehen. Nur unter dieser Voraussetzung kann er mit Robert Parker von dem „cardinal fact“ ausgehen, Sanktionen in heiligen Gesetzen seien selten. Flüche und ähnliche Formulierungen (αὐτὸν αἰτιᾶσθαι, ἐνθύμιον), die den Zorn der Götter beschwören,[2] will Naiden auf den Bereich der „by-laws“ beschränken und mit Robert Parker als Hinweise („black tie will be worn“) oder Warnungen einstu-

[1] Die erst in die Druckfassung aufgenommene Unterscheidung zwischen „laws“ und „regulations“ halte ich in dieser Form nicht für hilfreich.

[2] Beispiele bei Parker, 1983, 253 A.105; vgl. dens. 2004, 66 mit Anm. 47. Vgl. Körner Nr. 44, Z. 18f.: ἐν τῷ μεγίσθῳ ἐνέχοιτο.

fen, die von Individuen und Untergruppen der Polis ausgingen.[3] Die Griechen haben diese göttlichen Sanktionen jedenfalls sehr ernst genommen, und angesichts dessen, daß diese bis hin zur Vernichtung ganzer Städte reichen konnten,[4] kann keine Rede davon sein, es handle sich um keine „severe sanctions".[5] Die Unterscheidung zwischen menschlichen und göttlichen Sanktionen müßte anderen Kriterien folgen.

Auf die eben in Frage gestellte Prämisse, Sanktionen kämen in leges sacrae selten vor, baut Naiden seine Hauptthese, daß Sanktionen nur verhängt worden seien, wenn das Überleben der ganzen Gemeinschaft oder die Rechtsordnung[6] gefährdet gewesen sei. Die These müßte zunächst dahingehend präzisiert werden, daß nur schwere Sanktionen gemeint sind. Denn zum einen wählt der Autor aus den Quellen nur Beispiele für hohe Strafen aus, obwohl etwa im Mysterien-Gesetz von Andania, seinem ersten Exempel, neben den zitierten 1000-Drachmen-Strafen auch vielfach 20 Drachmen und Dupla für kleinere Vergehen vorgesehen sind,[7] zum anderen spricht er selbst zunächst nur von „severe sanctions". Die geringeren Strafen ordnet er zuerst nur den nichtstaatlichen Akteuren zu, kommt aber schließlich auch selbst auf „small fines" zu sprechen, bei denen für die „community" nicht so viel auf dem Spiel stehe, erkennt also implizit an, daß auch öffentliche Strafen klein sein können. Unklar bleibt, ab welchem Betrag eine Geldstrafe als hoch zu gelten hat. 1000 Drachmen scheinen mehrmals hoch, einmal aber auch als mäßig eingestuft zu sein.[8]

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[3] Ein anderer Fall, in dem, zumindest außerhalb von Athen, die Götter für die eigentliche Bestrafung zuständig waren, scheinen für Naiden die Asebie-Vergehen zu sein. In welchem Verhältnis sie zu den „by-laws" stehen, wird allerdings nicht reflektiert. Einen Beleg dafür, daß auch in Athen konkrete Akte von Tempelschändung, und nicht nur die Philosophie und Pädagogik des Sokrates als Asebie bestraft wurden, liefert übrigens IDélos 98 B, Z. 24-30, nach der einige Delier zu Geldstrafen und dauerhafter Verbannung (ἀειφυγία) verurteilt wurden; vgl. dazu Dreher 1995, 203ff.

[4] Beispiele für solche göttlichen Strafen wegen Verletzung des Asylgebots: Thuk. 1,128,1 (vgl. Paus. 4,24,5-6; Ail. var. 6,7); Polyain. Strat. 8,46; Iust. 20,2,3-8. Ein interessantes Zusammenwirken von staatlichen Gerichten und dem Losorakel der Athena Alea ist dokumentiert im Urteil von Mantineia, G. Thür / H. Taeuber, IPArk 18. Ein paar Beispiele von Konsequenzen daraus, daß Götter bestimmte Opfer abgewiesen haben, gibt Naiden sogar selbst (vor Anm. 18), ohne diesen Zusammenhang zu erkennen.

[5] Der Hinweis auf die göttlichen Sanktionen fehlt auch bei Parker 2004, der das Fehlen ausdrücklicher Sanktionen mit dem selbstverständlichen Gesetzesgehorsam der Bürger erklären will.

[6] Im Text vor Anm. 6 ist für die Druckfassung der Terminus „jurisdiction" durch „well-being" ersetzt worden. Mit der Einfügung dieses doch sehr dehnbaren Begriffs ist offenbar in Frage gestellt, daß es bei den schweren Sanktionen immer um die *Existenz* der Polis gegangen sei.

[7] Syll.[3], 736, Z. 75-78. 101-103. 105-6. 110-111. 160-166. Vgl. zu diesen Strafen die Kommentare von Harter-Uibopuu 2002.

[8] Als schwere Strafen werden von Naiden die Todesstrafe, die Verbannung sowie Geldstrafen genannt. Bei letzteren nennt er zwar die schwerste (1 Talent) und die zweitschwerste (2000 Statere), gibt aber nicht an, bei welchem Betrag für ihn eine schwere

An der Grundthese erstaunt auch, daß sie von vornherein nur auf leges sacrae bezogen wird, denn sie ist so allgemein, daß sie genauso für alle anderen Gesetze gelten könnte, zumal, worauf zuletzt Parker aufmerksam gemacht hat,[9] die leges sacrae als eigene Kategorie nicht immer eindeutig abgrenzbar sind, und zumal Naiden von der Definition eines Gesetzes an sich ausging und die heiligen Gesetze nur und zu Recht wegen ihres inhaltlichen Bezugs auf sakrale Angelegenheiten von den anderen Gesetzen unterschieden hat. Zumindest aber müßte man prüfen, in welchen Fällen auch profane Gesetze ohne Sanktionen formuliert sind,[10] und inwiefern sich eine Verknüpfung zwischen der Schwere der Sanktion und dem Schaden für die Gemeinschaft herstellen läßt. In profanen Gesetzen, zumindest in Dekreten, eine Kategorie, die Naiden ausnahmsweise auch selbst heranzieht (nämlich das athenische Erythrai-Dekret), sind in Einzelfällen nämlich auch Aussagen darüber zu finden, wozu das sanktionierte Vergehen führen kann, welche Auswirkungen des Fehlverhaltens die Polis also befürchtet: dazu gehört insbesondere die Auflösung der Demokratie oder eines auswärtigen Bündnisses.[11] Die leges sacrae hingegen enthalten soweit ich sehe, solche Begründungen nicht. Naiden behauptet das zwar (vor Anm. 16), aber seine Beispiele enthalten nur Aussagen über die Gottheiten, etwa ob die Götter mit den Opfern usw. zufrieden sind oder nicht, und sind nie auf das Schicksal der Polis bezogen.

Aus der Kenntnis unterschiedlicher Rechtsordnungen und des menschlichen Bedürfnisses nach Gerechtigkeit kann man gewiß anerkennen, daß in den allermeisten Gemeinschaften eine Abstufung der Sanktionen nach der Schwere der Vergehen erfolgt.[12] Naiden scheint diesen allgemeinen Grundsatz allerdings als ein festes Schema in der griechischen Poliswelt zu verstehen. Er spricht selbst von „my notion of a ladder or ranking of laws“ (vor Anm. 48). Einen Einwand gegen diese gleichmäßige Abstufung der Sanktionen hat Naiden selbst formuliert: die einzelnen Poleis setzten für ähnliche Vergehen unterschiedliche Sanktionen fest, hatten also durchaus unterschiedliche Wertsysteme (nach Anm. 46). Eine solche Relativierung wäre jedoch auch innerhalb jeder Polis nötig. Die Sanktionen variierten je nach der zeitlichen Entwicklung. Für viele Vergehen wurden die Strafen mit der Zeit milder, ver-

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Strafe beginnt. 1000 Drachmen scheint er zu den hohen Geldstrafen zu rechnen (in Andania), 500 Drachmen bezeichnet er als „lower“ (nach Anm. 34); an anderer Stelle scheint die Summe von 1000 Drachmen jedoch zu den „modest fines“ zu gehören (nach Anm. 44).

9 Parker 2004, 59. 67.

10 Ohne Sanktion z.B. Körner Nr. 7 (aber Epistatai für Eleusis-Heiligtum); Nr. 13 (zumindest sehr wahrscheinlich, auch wenn der Schluß fehlt); Nr. 14 (im verlorenen Schluß sind sicher nicht mehr für alle Amtsträger Strafen festgesetzt); Nr. 23; Nr. 30;

11 Z.B. IG II^2 43, Z. 58f.: ὡς διαλύων τὴν συμμαχίαν.

12 Der frühe athenische Gesetzgeber Drakon ist schon in der Antike dafür kritisiert worden, daß er, vielleicht auch nur vermeintlich, für alle Vergehen gleichermaßen die Todesstrafe oder jedenfalls sehr harte Strafen festgelegt habe: Aristot. Pol. 1274b15; Plut. Sol. 17.

einzelt gab es aber auch die umgekehrte Entwicklung.[13] Neue Straftatbestände wurden aus aktuellen Gründen mit besonders schweren Sanktionen versehen, spielten unter veränderten Bedingungen aber keine Rolle mehr.[14] Poleis, die unter der Jurisdiktion eines übergeordneten Souveräns standen, insbesondere der eines römischen Statthalters, waren auch in ihrer Sanktionsgewalt beschränkt bzw. hatten entsprechende Vorgaben zu beachten. Naidens Beispiele, die von der archaischen bis in die nachchristliche Zeit reichen (und nicht nur auf die archaische und klassische Zeit beschränkt sind), tragen dieser Differenzierung nicht Rechnung. Schließlich dürften wir aber selbst dann, wenn wir uns auf eine Polis in einer bestimmten Epoche beschränken würden, keinen in sich stimmigen ‚Sanktionskatalog' wie in modernen Rechtsordnungen erwarten.[15] Auch in der Polis wurden wahrscheinlich Vergleiche mit dem oder jenem anderen Gesetz gezogen. Aber jedes Gesetz wurde einzeln beschlossen; nicht nur die Gesetzesvorschrift, sondern auch die Sanktion wurde von einem Individuum (in der ὁ βουλόμενος) entworfen und in die Beschlußgremien eingebracht, in denen es von juristischen Laien verabschiedet wurde.

Noch einmal methodisch formuliert: Jeder wird voraussetzen, daß eine Polis, die ihre Existenz durch ein bestimmtes Vergehen gefährdet sah, dafür keine kleine Geldstrafe von sage 10 Drachmen, sondern eine hohe Bestrafung wie Todesstrafe oder Verbannung mit Vermögenskonfiskation festsetzte. Aus dieser Annahme ergibt sich jedoch nicht Naidens umgekehrte petitio pricipii, daß jedes mit einer hohen Sanktion (und wo fängt diese an?) belegte Vergehen in den Augen der Polis existenzgefährdend gewesen sei.[16] Daß diese Vorstellung hinter der Festsetzung einer hohen Strafe stand, ist allgemein nicht beweisbar; im Einzelfall, wenn es die Quellen zulassen, erkennbar (und in Fällen von nichtreligiösen Gesetzen und anderen Texten auch ausgesprochen); eine Quantifizierung aber ist in jedem Fall schwierig, bei menschlichen wie bei göttlichen Sanktionen: wie können sich die Menschen

[13] Daß die Todesstrafe für Tötung in Athen nicht von Drakon, sondern wahrscheinlich erst von Solon eingeführt wurde, zeigt Thür 1990, 155f. Die von Naiden herangezogene Sanktion für das Absägen heiliger Ölbäume in Athen wurde nach der *communis opinio*, der sich Naiden anschließt, von der Todesstrafe in Verbannung umgewandelt, Ath. Pol. 60,2; Lys. 7,32.41. Gegen die Existenz der Todesstrafe argumentiert jedoch Horster 2006. Aristoteles (bzw. Ath. pol. 60,2) erweckt allerdings den Eindruck, daß das Abholzen zu seiner Zeit überhaupt kein strafbares Vergehen mehr gewesen sei, da man nicht mehr feststellen könne, von welchen konkreten Bäumen das abgelieferte Öl stamme.

[14] Vgl. z.B. das athenische Anti-Tyrannis-Gesetz von 336 v.Chr., SEG 12, 87, und ähnliche Gesetze in anderen Poleis.

[15] Entsprechende moderne Überlegungen, ob z.B. die Strafen für Körperverletzung im Verhältnis zu Eigentumsdelikten nicht zu niedrig seien, oder die Neuordnung von Bußgeldkatalogen beruhen auf einem systematischen Vergleich, auf dem Corpus-Charakter der Rechtsordnung, den die griechischen Poleis nicht kannten.

[16] Naiden sucht diese Kritik vergeblich zu entkräften, indem er in die Druckfassung folgende Warnung eingefügt hat: „In such cases, we face the danger of arguing backwards: if the punishment is severe, the ritual must be important to the community's survival or well-being".

sicher sein, welche Folgen der Zorn einer Gottheit haben würde? Die Götter haben sehr viele Möglichkeiten, ihre Vernachlässigung zu bestrafen, gegenüber der Gemeinschaft oder gegenüber den Frevlern selbst. Nicht immer steht dabei die Existenz oder, wie Naiden sagt, das Überleben („survival") der Polis auf dem Spiel. Auch unterhalb dieser Kategorie kann vieles passieren, was die Menschen zu fürchten haben.

Außer dem des Überlebens nennt Naiden noch einen zweiten Bereich, den eine Polis durch schwere Strafen geschützt habe, ihre Jurisdiktion. Sein einziges Beispiel dafür ist allerdings schwerlich beweiskräftig.[17] Im Fall des Agesilaos, der in Aulis opfern wollte, dürfte es nämlich kein Gesetz und schon gar keine Sanktion gegeben haben, auf die die Amtsträger, die ihn daran hinderten, sich bezogen haben könnten. Aus den Quellen geht auch nicht hervor, daß einem Nicht-Böoter das Opfern verboten gewesen wäre. Vielmehr hat Agesilaos das Opfer von seinem eigenen Mantis darbringen lassen, und das verstieß, so Plutarch (Ages. 6,6) κατὰ τοὺς νόμους καὶ τὰ πάτρια der Böoter. Deshalb haben Abgesandte der Böotarchen die Opferteile vom Altar gerissen, also den Opfervorgang gewaltsam beendet. Es geht hier daher nicht um Jurisdiktion, sondern um die Mißachtung einer selbstverständlichen Regel, daß nämlich die Opfer in Aulis vom örtlichen Priester nach den Vorschriften des Heiligtums ausgeführt werden. Ein wirkliches Beispiel dafür, daß Fremde ein Heiligtum nicht einmal betreten dürfen, ist für den fernen Vorgänger des Agesilaos, Kleomenes, überliefert, der in vieler Hinsicht ähnlich rücksichtslos wie Agesilaos war. Als Kleomenes 506 v.Chr. den Athena-Tempel auf der Athener Akropolis betrat, sagte ihm die Priesterin, kein Dorier dürfe das Gemach der Göttin betreten. Kleomenes antwortete, er sei Achaier, kein Dorier. Die göttliche, nicht menschliche Strafe bestand nach Herodot (5,72) darin, daß die Expedion der Spartaner nach Athen scheiterte. Ein Gesetz allerdings, das die Aneignung der Jurisdiktion einer Polis durch einen anderen Souverän unter Strafe gestellt hätte, ist mir nicht bekannt.

Ein Bereich, welcher hingegen wirklich mit hohen Sanktionen belegt wurde, und der deshalb neben dem Überleben genannt werden könnte, sind die finanziellen Angelegenheiten einer Polis. Die Furcht vor Veruntreuung oder vor dem Mißbrauch von Geldern muß, gemessen an den dafür betriebenen Gegenmaßnahmen, erheblich gewesen sein. Von Naiden werden einige Sanktionen aus dem Mysteriengesetz von Andania unter den Bestimmungen aufgeführt, die für das Überleben der Polis wichtig sein sollen. Das Überleben dürfte allerdings kaum durch die finanziellen Vergehen gefährdet gewesen sein, welche die Pente (Fünf), die Antragsteller in der Volksversammlung und der Tamias begehen mußten, um Strafen in Höhe von 1000 oder

[17] Während oben (vgl. Anm. 6) „jurisdiction" zugunsten von „well-being" aus dem Text herausgenommen wurde, kennzeichnet der Begriff im Text vor Anm. 12 weiterhin den zweiten Bereich neben „survival".

2000 Drachmen zu gewärtigen.[18] Hier stand nicht die Existenz, sondern es standen die finanziellen Interessen der Polis im Vordergrund.[19]

Das von Naiden untersuchte Thema ist so interessant und vielfältig, daß sich weitere Fragestellungen ergeben. Aus rechtshistorischer Sicht schiene mir besonders wichtig, die an den Sanktionen in den leges sacrae beteiligten Personen und Ämter und ihre rechtlichen Funktionen näher zu analysieren. Bis zu welcher Höhe können kultische Amtsträger Geldbußen verhängen? In welchen Fällen entscheiden reguläre Institutionen wie die Ekklesia oder Gerichte? Werden Sondergerichte eingesetzt bzw. in welchen Fällen werden kultische Gremien von der Polis als Gericht eingesetzt, wie die Hieroi in Andania?

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[18] Naidens Wiedergabe der Vorschriften bleibt lückenhaft; vgl. hingegen Harter-Uibopuu 2002.

[19] Auf diesen Bereich könnte sich der von Naiden nachträglich eingefügte Begriff „well-being“ beziehen (vgl. o. Anm. 6), obwohl er gerade im Zusammenhang mit dem Mysterien-Gesetz mit „political integrity“ gleichgesetzt wird (nach Anm. 10).

SOPHIE ADAM-MAGNISSALI (ATHÈNES)

DROIT ET ALTÉRITÉ DANS LE MONDE ANCIEN: LE CAS DES MINEURS DANS L'ATHÈNES CLASSIQUE

La question de l'altérité présente, ces dernières années, un caractère d'actualité, attirant l'intérêt d'un certain nombre de disciplines, dont le droit. Cette thématique fait de plus en plus l'objet de colloques, d'ouvrages collectifs et de monographies[1].

L'altérité peut être involontaire, volontaire, ou mixte. Des formes d'altérité involontaires peuvent être engendrées par des facteurs tels que l'identité sexuelle (hommes – femmes), le manque de liberté (libres – esclaves), la citoyenneté (citoyens – non citoyens), la difformité corporelle, l'âge, etc. Certains facteurs, tels que le comportement ou les convictions, peuvent donner lieu à une altérité volontaire, tandis que d'autres, comme le statut économique ou social, créent une altérité mixte.

Dans le domaine du droit, le facteur de l'âge engendre un groupe de personnes, à savoir les mineurs, présentant une altérité involontaire. Cette altérité pourrait être qualifiée de «provisoire», étant donné que tout mineur, à sa majorité, va pénétrer dans la classe des majeurs.

L'âge est un état qui constitue un élément essentiel de la personnalité d'une personne physique, servant à son identification et influant sur tous ses actes. Les personnes ont, en fonction de leur âge, une maturation différente sur le plan biologique, psychologique et social et, partant, une différence de comportement. Pour cette raison, dans le domaine du droit, un découpage en classes d'âge a toujours revêtu un intérêt particulier. Le fait d'atteindre un âge donné a toujours été un critère permettant de considérer qu'un individu était parvenu à un état de maturité intellectuelle et sociale, lui conférant, de ce fait, la capacité d'exercer des actes juridiques. Les classes d'âge établies dans tout ordre juridique prennent, en général, en considération l'évolution moyenne des facultés intellectuelles de l'homme, une personne étant jugée capable ou incapable de procéder à certains actes précis en fonction de la classe d'âge à laquelle elle appartient.

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[1] Durant l'année acad. 2006-07, le Séminaire d'Histoire du Droit organisé par la Professeur Julie Vélissaropoulos et ses collaborateurs à Athènes, portait sur le thème: «Droit et altérité dans le monde ancien". Par ailleurs, le «Collegio di diritto romano" de 2008, sur le thème «*Homo, caput, personna. La costruzione giuridica dell'identità nell'esperienza romana*" organisé par le «*Centro di studi e recerche sui Diritti Antichi*» a consacré une thématique toute entière à «L'identità tramite la differenziazione: le Alterità».

Le découpage de la vie humaine en tranches d'âge, deux ou davantage, est un phénomène propre à toutes les sociétés et à toutes les cultures, depuis l'antiquité jusqu'à nos jours. On constate même une grande variété de découpages dans les étapes de la vie humaine, ayant donné lieu à des systèmes «binaires» (jeunes – vieux), «ternaires» (enfants – hommes mûrs – vieux) ou à des systèmes avec plus de découpages. Dans la *Rhétorique*[2], Aristote utilise le système ternaire et se réfère aux trois âges de la vie: la *jeunesse* (νεότης), la *maturité* (ἀκμή) et la *vieillesse* (γῆρας). Un tel découpage (enfants – hommes mûrs – vieux) était d'ailleurs adopté par le droit d'Athènes.

Dans les sociétés antiques, le découpage en fonction de l'âge, notamment des hommes adultes, était répandu, car il desservait les besoins militaires et politiques des cités. En effet, en pratiquant un tel découpage, les cités étaient en mesure de connaître, à tout moment, leurs effectifs de citoyens, capables soit de les défendre en cas de guerre, soit de participer activement à la vie politique et à l'administration. La répartition en classes d'âge était pratiquée par la plupart des cités grecques, mais les informations que nous puisons dans les sources antiques en ce qui concerne la terminologie utilisée pour le découpage, sont rares[3].

Des «rites de passage» et des cérémonies spécifiques marquaient, dans toutes les sociétés primitives, l'entrée d'un individu dans la société et son passage d'une classe d'âge à l'autre. Etant donné que ces événements représentaient des moments très importants de la vie de chaque individu, ils devaient être rendus publics. Les historiens et les anthropologues, plus particulièrement, se sont intéressés aux «rites de passage» qui existaient en Grèce, sans que la question ne laisse indifférents les juristes[4].

Dans le droit, de l'antiquité à nos jours, la distinction entre mineurs et majeurs continue d'être essentielle. La présente étude se propose d'étudier les lois qui concernaient les mineurs dans l'Athènes classique et d'aborder des questions relatives aux droits et à la protection des mineurs. Nous n'aborderons que le cas des mineurs de sexe masculin, car les femmes, sur le plan juridique, étaient toujours mineures, même si elles étaient adultes sur le plan biologique. Par conséquent, elles avaient pendant toute leur vie des droits restreints.

I. Terminologie

Avant d'aborder des questions plus spécifiques, nous nous pencherons un peu sur des questions de terminologie, notamment les termes utilisés dans les sources antiques pour désigner les mineurs.

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[2] Aristote, *Rhétorique*, II (12), 1388 b-1389 a.

[3] Pour Sparte p.ex. nous connaissons quelques noms des différentes classes d'âge: παῖς, μειράκιον, εἴρην, μελλείρην, μικιζόμενος ou μικιχιζόμενος, πρατοπάμπαις, ἀτροπάμπαις, ὠβίδας, etc. Voir MacDowell 1986, p. 159-167; Marrou 1946, p. 216-230; Legras 2002, p. 18sq.

[4] Jeanmaire 1939; Gernet 1968; Cantarella 1985; Perentidis 2002, p. 3-38.

Une terminologie spécifique pour définir les mineurs et les majeurs ne semblait pas s'être consacrée à Athènes. Par contre, le droit de Gortyne nous donne un exemple de terminologie spécifique concernant le mineur sous le terme d'ἄνεβος[5]. Le majeur, quant à lui, est défini sous le terme de δρομεύς[6]. Dans les inscriptions hellénistiques de Milet se trouvent aussi les termes ἄνηβος (mineur) et ἡβῶν (majeur)[7]. Sur des papyrus d'Égypte, on trouve les termes ἀφῆλιξ – ἐνῆλιξ.

A Athènes, le mineur est attesté, sur le plan juridique, par le terme παῖς (pl. παῖδες). Ce que l'on appelle, de nos jours, «un enfant» est défini, sans aucune distinction, sous les termes παιδίον, παῖς ou μειράκιον[8].

Il n'existait pas non plus un terme spécial pour qualifier la majorité, mais seulement les expressions descriptives suivantes: ἐξελθεῖν ἐκ παίδων, ἀπαλλάττεσθαι ἐκ παίδων, δοκιμάζεσθαι, δοκιμάζεσθαι εἰς ἄνδρας, ἐγγράφεσθαι, ἐγγράφεσθαι εἰς τοὺς δημότας, ἄνδρα γίγνεσθαι, ἄνδρα εἶναι δοκιμασθῆναι[9] et une expression plus spécifique, ἐπὶ διετὲς ἡβᾶν ou ἐπὶ διετὲς ἡβῆσαι.

Toutes les expressions précitées sont claires et compréhensibles (*sortir* ou *se libérer de l'enfance*, *épreuve des hommes*, *s'inscrire aux registres des dèmes*, etc.) et portaient sur le droit qui était conféré aux jeunes, par un âge précis, de passer de la classe des enfants à la classe des hommes et s'inscrire aux registres des dèmes, après avoir subi une épreuve correspondante (δοκιμασία). En revanche, l'expression ἐπὶ διετὲς ἡβᾶν[10], que l'on rencontre très rarement dans les sources, a fait l'objet de divers débats parmi les historiens du passé, parce que les scholiastes et lexicographes de l'antiquité les ont conduits vers des conclusions erronées[11].

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5 *IC* IV (*Lois de Gortyne*), XI. 19.

6 *IC* IV (*Lois de Gortyne*) I. 41, III 22, V. 53, VI. 36, VII. 41.

7 Vélissaropoulos 2008, p. 268-270.

8 Hippocrate (*Des hebdomades*, 5) avait proposé un découpage de la vie humaine en périodes de 7 années, en corrélation avec certaines transformations biologiques: παιδίον (petit enfant) jusqu'à l'âge de 7 ans (ἄχρι ὀδόντων ἐκβολής), παῖς, (enfant) de 7 à 14 ans (ἄχρι γονῆς ἐκφύσεως) et μειράκιον (adolescent) de 14 à 21 ans (ἄχρι γενείου λαχνώσεως).

9 Isocrate, *Aréopagitique*, 37: ἐπειδὴ δ' εἰς ἄνδρας δοκιμασθεῖεν, ἐξῆν αὐτοῖς ποιεῖν ὅ τι βουληθεῖεν. Démosthène (29), *Contre Aphobus A*, 5: ἕως ἐγὼ ἀνὴρ εἶναι δοκιμασθείην.

10 Démosthène (46), *Contre Stéphanos II*, 20: Καὶ ἐὰν ἐξ ἐπικλήρου τις γένηται καὶ ἅμα ἡβήσῃ ἐπὶ δίετες, κρατεῖν τῶν χρημάτων, τὸν δὲ σῖτον μετρεῖν τῇ μητρί. Οὐκοῦν ὁ μὲν νόμος κελεύει τοὺς παῖδας ἡβήσαντας κυρίους τῆς μητρὸς εἶναι, τὸν δὲ σῖτον μετρεῖν τῇ μητρί. *Ibidem*, 24: Ὅ τι ἄν γνησίων ὄντων υἱέων ὁ πατὴρ διαθῆται ἐὰν ἀποθάνωσιν οἱ υἱεῖς πρὶν ἐπὶ δίετες ἡβᾶν, τὴν τοῦ πατρὸς διαθήκην κυρίαν εἶναι.

11 Harpocration, v. *Ἐπιδιετὲς ἡβῆσαι*: Δημοσθένης ἐν τῷ κατὰ Στεφάνου. Δίδυμὸς φησιν ἀντὶ τοῦ ἐὰν ις' ἐτῶν γένωνται· τὸ γὰρ ἡβῆσαι μέχρι ιδ' ἔστιν. ἀλλ' οἱ ἔφηβοι παρ' Ἀθηναίοις ὀκτωκαιδεκαετεῖς γίνονται, καὶ μένουσιν ἐν τοῖς ἐφήβοις ἔτη β, ἔπειτα τῷ ληξιαρχικῷ ἐγγράφονται γραμματείῳ, καθά φησιν Ὑπερείδης ἐν τῷ πρὸς Χάρητα ἐπιτροπικῷ· «ἐπεὶ δὲ ἐνεγράφην ἐγὼ καὶ ὁ νόμος ἀπέδωκε τὴν

De nos jours, cette expression prête encore à confusion, mais il ne doit pas faire de doute qu'elle désigne la majorité. Il s'agit d'une expression datant des siècles archaïques, qui signifiait que deux années s'étaient écoulées depuis l'adolescence (ἥβη), que certains historiens situaient à l'âge de 14 ans, ce qui est le plus probable, et d'autres à l'âge de 16 ans. Or, à l'époque archaïque, l'expression en question signifiait, parallèlement à l'âge biologique de 16 ans, l'âge légal d'entrée dans la phratrie, qui équivalait, avant les réformes de Clisthène, à une entrée au corps civique. A l'époque classique, l'expression ἐπὶ διετὲς ἡβᾶν a survécu, signifiant toujours l'entrée au corps civique, qui ne se faisait plus par l'entrée à la phratrie, mais par l'inscription au dème à l'âge de 18 ans. Pour cette raison, l'expression en question doit être interprétée comme désignant la majorité[12].

II. Les limites de la minorité

Une autre question qu'il convient d'examiner est celle des limites de la période de la minorité, à savoir quand celle-ci commence et quand elle se termine.

Elle commence à la naissance, bien que l'existence d'un être humain intéresse le droit à partir de la période précédant sa naissance. Les législateurs de toutes les époques se sont intéressés au *fœtus*, mettant en évidence des questions, telles que la capacité de droit et certains autres droits et obligations de ce dernier.

Dans la présente étude, je ne m'étendrai pas à des questions relatives au *fœtus* – lequel, d'ailleurs, en relation avec le mineur présente une particularité plus poussée – mais j'examinerai l'altérité du mineur, depuis l'année de sa naissance jusqu'à la fin de la période de la minorité, qui est en même temps le début de la majorité.

Or, quel est précisément ce seuil? Dans l'Athènes classique, le législateur considérant comme seuil de la maturité la 18ème année l'a définie comme moment d'accès à la majorité. Cette limite d'âge était clairement associée à la capacité de quelqu'un de porter des armes: à Athènes, la majorité avait pour effet d'entraîner l'enrôlement immédiat du jeune chez les *éphèbes*, suivi d'une période de deux années de service pour sa patrie, du moins à partir de la période à laquelle fut introduite l'institution de l'*éphébie*[13].

Les historiens n'ont pas manqué de soulever la question du moment exact d'accès à la majorité, à savoir si c'était l'accomplissement de la 17ème ou de la 18ème année.

A l'époque contemporaine, où la naissance est immédiatement enregistrée sur des registres d'état civil et des certificats de naissance sont établis, la majorité est facile à prouver et se situe pour chaque individu à un moment différent de l'année. Pour les Athéniens, faute d'un système d'enregistrement à la naissance, il n'était pas

κομιδὴν τῶν καταλειφθέντων τῇ μητρί, ὅς κελεύει κυρίους εἶναι τῆς ἐπικλήρου καὶ τῆς οὐσίας ἁπάσης τοὺς παῖδας, ἐπειδὰν ἐπιδιετὲς ἡβῶσιν».

[12] Voir Golden 1990, p. 27-28. V. aussi Labarbe 1953.

[13] Pélékides 1962.

facile de prouver leur âge et, partant, la date exacte de leur majorité[14]. C'est pourquoi l'Assemblée des dèmotes visait essentiellement à contrôler l'état physique des enfants afin de vérifier leur âge[15]. Une fois les jeunes enregistrés sur les registres du dème (ληξιαρχικὸν γραμματεῖον), cette inscription était par la suite l'unique fait susceptible de prouver leur majorité.

Or, cette inscription ne se faisait pas pour chacun séparément le jour exact de sa majorité. Elle se faisait une fois par an, lors d'une cérémonie officielle. Il n'est pas certain que cette cérémonie eût lieu le dernier mois de l'année athénienne, le *Skirophorion*, ou au début de l'année. Les informations sont imprécises et il se peut que cette date ne fût pas la même dans tous les dèmes de l'Attique. Lors de la cérémonie en question, tous les jeunes qui avaient l'âge approprié devaient se présenter. Bien que la référence dans la *Constitution d'Athènes* soit claire, «ὀκτωκαίδεκα ἔτη γεγονότες» (18 ans révolus)[16], certains auteurs considèrent qu'elle n'est pas particulièrement sûre, car Aristote n'utilise pas le même mode de calcul de l'âge pour établir l'âge électif des députés, des juges ou des arbitres[17]. De ce fait, certains soutiennent que le point crucial était l'accomplissement de la 17ème année[18].

Le jour précis de l'inscription au dème, il n'était pas possible que tous aient exactement le même âge. Les futurs citoyens avaient, entre eux, une différence d'âge qui variait d'un à onze mois. Les expressions comme «sortir de l'enfance» ou «se libérer de l'enfance» me font penser que l'inscription était destinée à ceux qui, pendant l'année écoulée, étaient dans leur 18ème année et c'est, à mon avis, dans ce sens qu'il faut comprendre la référence précitée de la *Constitution d'Athènes*. Ainsi, certains des nouveaux citoyens au moment de leur inscription avaient dû avoir accompli leur 18ème année et d'autres pas encore, selon qu'ils étaient nés au début ou à la fin de l'année.

III. Période de minorité

La période de la minorité est reliée à une série de questions légales, qui présentent un intérêt particulier, telles que le pouvoir paternel, la tutelle, l'exposition des enfants, l'introduction d'un enfant dans la famille ou dans la phratrie, etc. Je m'en tiendrai uniquement aux questions qui confèrent l'altérité au groupe des mineurs, c'est-à-dire à leurs droits restreints ou à l'absence de certains droits, tant en droit privé qu'en droit public.

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[14] On voit bien que dans le discours de Démosthène (39), *Contre Boeotos I*, 27-29, il n'était pas facile de prouver qui de deux frères était le plus âgé.

[15] Aristophane, *Les guêpes*, 578.

[16] *Constitution d'Athènes*, 42. 1. Cf. Rhodes 1985, p. 497-8.

[17] Rhodes 1972, p. 172.

[18] Harrison 1971, II, p. 84 et 205sq.; Golden 1979, partic. 35-38. Le discours (29) de Démosthène *Contre Aphobos I*, 19 est l'argument principal en faveur de cette thèse.

A. Période de minorité dans le domaine du droit privé.
La principale caractéristique de la période de la minorité est l'incapacité d'exercice. Bien que les mineurs eussent une capacité de droit, dans le sens où ils avaient des droits et des obligations, ils étaient privés de la capacité d'exercice, dans le sens où ils n'avaient pas la faculté d'exercer ces derniers.

En vertu de la loi qui est mentionnée dans un passage d'Isée[19], «il est expressément interdit à un mineur de contracter, de même qu'à une femme, s'agissant de biens dont la valeur est supérieure à celle d'un médimne d'orge». Ladite loi comporte certaines imprécisions dans son énoncé: a) la loi interdit-elle à un enfant de contracter ou b) interdit-elle à un enfant de contracter s'agissant de biens dont la valeur est supérieure à celle d'un médimne d'orge, à l'instar de ce qui est interdit aux femmes? En d'autres termes, le mineur avait-il une incapacité d'exercice totale ou n'avait-il qu'une capacité d'exercice restreinte à des biens de valeur réduite, comme c'était également le cas des femmes?

Les deux versions ont été alléguées: celle qui considère que le mineur avait une incapacité totale[20] et celle qui le considérait comme ayant une capacité d'exercice restreinte s'agissant de transactions de faible valeur. Cette dernière interprétation est également confirmée par Harpocration, qui mentionne que «l'enfant et la femme ne sont pas autorisés à contracter...»[21].

Pour ma part, j'adhère à l'opinion qui considère que le mineur avait une incapacité d'exercice totale. Je ne pense pas que dans le passage précité, la loi assimile un mineur à une femme. Les femmes et les enfants sont très souvent mentionnés ensemble dans les textes anciens, car ils constituent deux groupes de population disposant, en général, de droits restreints, sans toutefois que cela ne signifie que ces deux groupes sont assimilés dans tous les cas. Je considère qu'ils sont mentionnés ensemble dans ladite loi, du fait que leur capacité d'exercice n'était pas pleine. Un Athénien mineur était «un être imparfait» qui n'avait la faculté de délibérer que sous une forme imparfaite, selon Aristote[22], mais, à sa majorité, il allait acquérir une pleine capacité d'exercice pour conclure un contrat quelconque. A l'inverse, la femme, selon le droit attique, ne pourrait jamais accéder à une pleine capacité d'exercice et, partant, le législateur devait, pour faciliter plus particulièrement les transactions, lui conférer la possibilité de contracter s'agissant

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[19] Isée (10), *La succession d'Aristarchos*, 10: ὁ γὰρ νόμος κωλύει παιδὶ μὴ ἐξεῖναι συμβάλλειν μηδὲ γυναικὶ πέρα μεδίμνου κριθῶν.

[20] C'était l'interprétation de Dion Chrysostome, (*Discours*, 74, 9… νόμος οὐκ ἐᾷ συμβάλλειν ὡς ἀπίστους οὖσιν, οὐδὲ γυναικὶ παρ' Ἀθηναίοις συναλλάσσειν πλὴν ἄχρι μεδίμνου κριθῶν …). Voir Beauchet 1897 (1976), II, p. 208; Harrison 1971, I, p. 73.

[21] Harpocration, v. *ὅτι παιδὶ*: Ὅτι παιδὶ καὶ γυναικὶ οὐκ ἐξῆν συμβάλλειν πέρα μεδίμνου κριθῶν Ἰσαῖος ἐν τῷ περὶ τοῦ Ἀριστάρχου κλήρου φησίν.

[22] *Politiques*, I, 1260a: L'enfant a la faculté de délibérer sous une forme imparfaite, tandis que la femme possède cette faculté, mais sans possibilité de décision.

de biens de valeur restreinte, tels que ceux que les femmes achetaient d'habitude pour le foyer dans la vie quotidienne.

Cela ne revêt peut-être pas un intérêt pratique particulier, mais si le mineur procédait à la conclusion d'un contrat, en dépit de l'interdiction précitée de la loi, il convient de se demander si cet acte juridique était entaché de nullité. La réponse est affirmative. Il nous faut, toutefois, souligner que Beauchet[23] avait soutenu, sans un témoignage précis quelconque, que ladite nullité était relative et non absolue, à savoir que seul le mineur, lui-même pouvait l'invoquer et non pas un cocontractant quelconque ou un tiers qui aurait un intérêt légal. Ceci était dû au fait que l'interdiction de la loi avait été prévue au profit du mineur et de l'*oikos* paternel et non pas au profit du tiers contractant. Par conséquent, le père ou le tuteur qui avait la garde d'un mineur, pouvaient exiger de la tierce personne l'exécution d'un contrat, sans que cette dernière n'allègue l'incapacité du mineur cocontractant. Une action spéciale quelconque intentée contre une tierce personne qui aurait contracté avec un mineur, en dépit de l'interdiction de la loi, ne semblait cependant pas prévue.

L'absence de capacité d'exercice n'autorisait pas les mineurs à procéder à d'autres actes légaux, concernant, le cas échéant, des droits spécifiques du droit privé, tels que le droit de conclure un mariage, d'établir un testament ou de procéder à une adoption:

1. L'âge légal, en tant que condition de validité du mariage, n'est pas énoncé expressément dans un texte quelconque, mais, étant donné que le mariage avait un caractère contractuel, les contractants (le père de la femme et le futur mari) devaient avoir pleine capacité d'exercice. Par conséquent, l'Athénien mineur qui était privé de capacité d'exercice ne pouvait pas se marier. Il ne pouvait accéder au droit en question qu'à sa majorité[24].

Quant aux femmes, l'âge nubile ne concernait que leur maturité biologique, étant donné qu'elles étaient destinées à la procréation.

2. En ce qui concernait les testaments, dans le passage précité d'Isée[25], il est mentionné expressément qu'un mineur était incapable d'établir un testament. Un testament ne pouvait être établi que par des hommes majeurs, à condition qu'ils n'aient pas de fils légitimes[26].

On ne sait pas s'il y avait au IV^{e} siècle av. J.-C. des exceptions à la règle précitée (le fait de ne pas avoir de descendants légitimes de sexe masculin), étant donné que les sources citent certains exemples d'Athéniens qui avaient établi des testaments, en dépit de l'existence de descendants[27]. Selon Harrison[28], au IV^{e} s., la

[23] Beauchet 1897 (1976), p. 210.

[24] Démosthène (40), *C. Boeotos II*, 4, 12.

[25] V. *supra* note 19: Isée (10), *La succession d'Aristarchos*, 10: Παιδὸς γὰρ οὐκ ἔξεστι διαθήκην γενέσθαι· ὁ γὰρ διαρρήδην κωλύει …

[26] Isée (3), *La succession de Pyrrhos*, 68: ἐὰν μὴ παῖδας γνησίους καταλίπῃ ἄρρενας.

[27] Lysias (19), *Pour Aristophane*, 33 s.; Démosthène (27), *C. Aphobos I*, 5, 42 s.; Idem (28), *C. Aphobos II*, 15; Idem (36) *Pour Phormion*, 34 s.; Idem (45), *C. Stéphanos I*, 28.

loi «avait été altérée» et c'étaient les tribunaux qui tranchaient, le cas échéant, les différends. Or, comme le note S. Todd[29], dans tous les cas en question, les descendants étaient des mineurs et les testaments établis ne les excluaient pas de la succession au profit d'une tierce personne. A mon sens, c'est l'existence même de descendants mineurs qui dictait au testateur d'établir un testament, afin qu'aucun doute ne subsiste quant au fait qu'il s'agissait de ses successeurs.

Par un testament, le père pouvait encore désigner des tuteurs (un ou plusieurs) pour ses enfants mineurs ou laisser des ordres concernant la gestion de leurs fortunes ou la vente de celles-ci. Une telle vente devait avoir lieu aux enchères publiques et sous le contrôle de l'archonte éponyme[30].

3. En ce qui concernait les adoptions, un mineur ne pouvait procéder à un acte d'adoption, étant donné que seuls pouvaient procéder à un tel acte les hommes majeurs qui n'avaient pas de descendants légitimes de sexe masculin, comme c'était également le cas dans l'établissement d'un testament, d'autant qu'à l'origine, les adoptions ne se faisaient que par testament. Par la suite, certes, elles avaient commencé à être autorisées entre vivants (*inter vivos*).

Un testament, de même qu'une adoption par testament, ne saurait être considéré comme un contrat. Qu'il soit considéré comme acte légal incomplet[31] ou acte unilatéral, les mineurs ne pouvaient, conformément à la loi, procéder à un quelconque de ces actes (testament, adoption).

B. Période de minorité dans le domaine du droit public.

1. Les mineurs ne disposaient pas de droits civiques et ne pouvaient pas participer à la vie publique de la cité (Assemblée du peuple, magistratures, etc.)[32].

2. Les mineurs étaient ἀτελεῖς, c'est-à-dire exemptés de certaines obligations fiscales[33]. Les mineurs, se trouvant sous l'autorité paternelle, n'avaient en principe pas de fortune personnelle. Lorsqu'ils héritaient de leur père, s'ils étaient majeurs, ils étaient, à l'instar de tous les citoyens athéniens, assujettis aux obligations fiscales; s'ils étaient, toutefois, mineurs, la question se pose de savoir s'ils continuaient à être ἀτελεῖς.

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[28] Harrison 1971, p. 152: «This principle has been considerably eroded by the fourth century, and it must have been a matter for the courts to decide in any particular case whether a man had gone too far in leaving property away from legitimate sons. Testators would have had to make nice calculations on the matter, bearing in mind the known propensity of the courts to override wills".

[29] Todd 1993, p. 225 note 28.

[30] Aristote, *Constitution d'Athènes*, 56, 7. Voir aussi *infra* V, a, p. 157.

[31] Rubinstein 1993, p. 46.

[32] L'âge de 30 ans était une des conditions de l'éligibilité pour la plupart des magistrats (Démosthène (24), *C. Timocrate*, 150) ainsi que pour les membres de la Boulê (*Constitution d'Athènes* 30, 2; Xénophon, *Mémorables,* 1.2.35-36; *IG* I^3 14, 9-11) ou les juges (*Constitution d'Athènes*, 63, 3).

[33] Lysias (32), *C. Diogeiton*, 24 (l. 5-6).

Comme il ressort des sources, cette ἀτέλεια comportait les *liturgies*, mais non pas l'εἰσφορά. L' εἰσφορά constituait une taxe spéciale sur le capital -et non sur le revenu- destinée à couvrir certains besoins nationaux urgents, tels que les dépenses militaires. C'est d'ailleurs pourquoi la loi n'autorisait pas d'exemptions dans ce cas[34]. Dès lors, les tuteurs, en se chargeant de la tutelle à la fois des mineurs orphelins et de leur fortune, étaient tenus d'acquitter toute obligation fiscale afférente. Les pupilles étaient exemptés des *liturgies* ordinaires et de la *triérarchie*[35], mais non pas du versement de l' εἰσφορά, à condition de disposer d'une fortune suffisante[36]. Il est fort probable, sans avoir les preuves nécessaires à l'appui, qu'une εἰσφορά n'était pas imposée aux fortunes de moins de 1.000 drachmes.

3. De plus, les mineurs ne pouvaient comparaître en justice, en tant que plaideurs ou témoins. Un tel droit n'appartenait qu'aux personnes majeures et libres qui avaient la plénitude de leurs droits[37]. Les personnes qui étaient frappées d'ἀτιμία ne pouvaient pas y comparaître.

En ce qui concerne la capacité des mineurs et des femmes de témoigner au tribunal, le professeur MacDowell[38] mentionne qu'il n'est pas certain qu'une loi l'interdise expressément. Il se demande s'ils ne témoignaient pas parce que, sur le plan social, il était considéré inapproprié de leur part de parler en public devant un tribunal. De plus, il souligne que, bien que, dans la pratique, il y ait dû y avoir des affaires dans lesquelles le témoignage d'un enfant ou d'une femme aurait été d'une importance cruciale, les Athéniens étaient prêts à priver plaideurs et juges des témoignages afférents plutôt que d'autoriser qu'un témoignage soit déposé par une personne qu'ils considéraient, pour des motifs totalement distincts de l'affaire en cause, comme inappropriée à prendre la parole devant le tribunal.

Sur ce point, j'aimerais ajouter que l'existence d'une loi interdisant expressément le témoignage des mineurs et des femmes n'était pas nécessaire, dans la mesure où les droits procéduraux appartenaient en principe aux majeurs dotés de pleins droits. Par conséquent, ceci entravait le témoignage tant des femmes que des ἄτιμοι ou des mineurs, puisque ces personnes n'avaient pas la plénitude de leurs droits civiques ou politiques.

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[34] Démosthène (20), *C. Leptine*, 18, 26, 129.

[35] Démosthène mentionne qu'il a été chorège (*14, Sur les Symmories*, 16) et triérarque (*21, C. Midias*, 154) dès qu'il atteint la majorité. Parmi les *liturgies* ordinaires (λειτουργίαι ἐγκύκλιοι) sont la χορηγία, γυμνασιαρχία, ἑστίασις et parmi les extraordinaires (λειτουργίαι προστακταί) la τριηραρχία et la προεισφορά.

[36] Démosthène mentionne aussi que pendant sa minorité sa fortune a été assujettie plusieurs fois à l'*eisphora*: *(27) C. Aphobos I*, 7-8; *(28) C. Aphobos II*, 4, 7, 11; *(29) C. Aphobos III*, 59.

[37] Des *métèques*, les *xenoi* et les citoyens d'autres cités pouvaient être également plaideurs; cf. Todd 1990, p. 27 note 12; Biscardi 1982, p. 267.

[38] MacDowell 1978, p. 243: «Women and children seem never to have given evidence, though it is not clear whether that was because a law forbade them to do so or just because it was considered socially improper for them to speak in a public court».

Les enfants mineurs pouvaient témoigner par l'intermédiaire de leur tuteur (ἐπίτροπος). Or, une fois la majorité atteinte, un mineur pouvait témoigner, même s'agissant de faits qui auraient eu lieu quand il était mineur[39].

Il a été allégué[40] que les enfants, les femmes et les esclaves pouvaient témoigner lorsqu'il s'agissait de cas d'homicides. Bien que les informations dont on dispose ne nous en donnent pas la certitude, il semble toutefois qu'effectivement, dans les cas en question, il était considéré comme convenable de déployer davantage d'efforts afin de vérifier les allégations.

Les enfants et les femmes d'un accusé pouvaient jouer un rôle quelque peu étrange devant les tribunaux. Ils pouvaient accompagner l'accusé et, une fois que ce dernier avait terminé sa plaidoirie, il avait le droit de les présenter au tribunal, en même temps que d'autres amis ou parents, afin d'émouvoir et d'influencer les juges pour obtenir son acquittement.

Il convient de signaler tout particulièrement que le législateur athénien avait prévu, en ce qui concernait certains droits, une sorte de sursis de la majorité et, en revanche, en ce qui concernait certaines obligations, il avait prévu une sorte de prolongement de la minorité.

a) Concernant le sursis de la majorité:

i) Pendant les deux années qui suivaient l'inscription sur les registres des dèmes, c'est-à-dire pour toute la durée du service de l'*éphébie*, il y avait un sursis quant au droit de l'Athénien, désormais majeur, de participer à l'Assemblée du peuple.

ii) Le jeune athénien ne pouvait acquérir immédiatement la capacité de comparaître en justice. Le sursis en question durait également deux ans (période de l'*éphébie*), à la seule exception des affaires de succession, de la revendication d'une femme *épiclère* ou d'un sacerdoce de famille[41].

Le texte même de la *Constitution d'Athènes* nous éclaire sur l'institution de ces limitations: «… afin qu'ils n'aient pas de prétextes pour s'absenter …». Par conséquent, la limitation du droit des *éphèbes* d'être plaideurs a été instituée, afin que nul ne puisse justifier son manquement aux obligations du service de l'*éphébie*. Il en est de même de leur participation à l'Assemblée. D'ailleurs, pendant les deux années de l'*éphébie*, ils effectuaient leur service à l'extérieur de la cité, en tant que garnison dans les forts du port du Pirée ou en tant que περίπολοι dans les forts des

[39] Isée (12), *La défense d'Euphilétos*, 10.

[40] MacDowell 1963, p. 90-109; Idem 1978, p. 119. Todd (1993, p. 96 et 1990, p. 26 note 12) considère qu'une telle acception devrait être rejetée.

[41] Aristote, *Constitution d'Athènes*, 42, 5: «Pendant ces deux années de garnison, les éphèbes portent une chlamyde et sont exempts de toute charge. Afin qu'ils n'aient pas de prétextes pour s'absenter, ils ne peuvent ester en justice ni comme défendeurs ni comme demandeurs, excepté lorsqu'il s'agit de recueillir une succession, une fille épiclère ou un sacerdoce de famille. À l'expiration des deux années, ils sont désormais confondus avec les autres citoyens».

frontières de l'Attique et il ne leur aurait pas été facile de participer à d'autres activités.

b) Concernant le prolongement de la minorité:

i) D'après la *Constitution d'Athènes*[42], les *éphèbes*, au cours de leur service de deux ans, étaient exemptés des obligations fiscales (ἀτελεῖς εἰσίν πάντων). Or, le contenu de cette ἀτέλεια n'est pas clairement établi. Il est probable qu'à l'époque de la *Constitution d'Athènes*, l' ἀτέλεια des *éphèbes* comprenait toutes les *liturgies*, y compris l' εἰσφορά[43].

ii) À l'époque de la Guerre du Péloponnèse, une catégorie précise, celle des orphelins de guerre, continuait de jouir, un an après leur majorité, de l'exemption d'assumer les *liturgies*[44].

Dans cette réglementation concernant ces «privilèges fiscaux», à côté des explications données par la *Constitution d'Athènes* dans le cas des *éphèbes* et du respect aux hommes morts pour la patrie dans le cas spécial des orphelins de guerre, il me semble qu'on pourrait y voir une raison supplémentaire, à savoir la protection de la jeunesse elle-même. En effet, la cité, consciente du manque d'expérience des jeunes, les empêchait ainsi de commettre des actes qui, le cas échéant, s'avèreraient préjudiciables à eux-mêmes ou à leur fortune.

IV. Garde et représentation des mineurs

Les personnes qui n'avaient pas la capacité d'exercer leurs droits ne restaient pas sans défense en ce qui concernait la protection ou la promotion de leurs intérêts. Il y avait toujours une personne qui était chargée de leur garde. Dans l'Athènes classique, le pouvoir paternel incluait la garde des enfants mineurs. Ce pouvoir paternel durait jusqu'à la majorité des enfants de sexe masculin. Jusqu'à cette date, les enfants n'avaient pas de libre-arbitre, mais dépendaient du père. En cas de décès du père avant leur majorité, la garde était assumée par le frère majeur, le cas échéant, ou le grand-père paternel et en l'absence de l'un ou de l'autre, un tuteur était désigné. Plusieurs personnes pouvaient être en même temps tuteurs.

La garde comportait une représentation directe et indirecte du mineur, selon que les actes légaux étaient entrepris au nom du mineur (directe) ou au nom du père ou du tuteur (indirecte)[45].

La représentation du mineur avait lieu tant en droit privé qu'en droit public. Le père ou le tuteur étaient chargés de toute la gestion des intérêts économiques et personnels des mineurs.

Celui qui assumait la garde et la représentation était, dès lors, en mesure de conclure tout acte juridique concernant le mineur, voire de le représenter par-devant

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[42] V. note précitée 41. Cf. Rhodes 1985, p. 509.

[43] V. *supra* III, B, 2.

[44] Lysias (32), *C. Diogeiton*, 24-25: παῖδας … καὶ ἐπειδὰν δοκιμασθῶσιν ἐνιαυτὸν ἀφῆκεν ἁπασῶν τῶν λῃτουργιῶν.

[45] Beauchet 1897 (1976), II, p. 211.

les tribunaux ou les autres autorités de la cité, étant donné que le mineur n'avait pas le droit de comparaître en justice. Le représentant du mineur, s'il devait intenter une action au profit du mineur, devait agir en déclinant son identité aux autorités et aux tiers. Il n'était certes pas interdit au mineur d'accompagner son père ou son tuteur auprès du magistrat ou des autorités de la cité, afin qu'une action soit intentée.

V. Existait-il une protection légale de l'enfance?

Les limitations d'âge dans l'exercice des différents droits, que nous avons mentionnés, sont également prévues dans les législations contemporaines de la plupart des États. Or, de nos jours, ces limitations ont été fixées en vue de la protection de la personne elle-même, qui, en raison de son expérience sociale restreinte, n'a pas conscience de la responsabilité que peut entraîner l'exercice des droits. Dans le même temps, cela permet également d'éviter d'éventuelles incidences négatives sur la sécurité des transactions et du droit et d'assurer la protection des tiers[46].

Contrairement à ce qui prévaut actuellement, dans l'Athènes classique, la protection des enfants mineurs assujettis au pouvoir paternel ne se fondait pas sur le motif de leur jeune âge. Le pouvoir paternel et les droits en émanant visaient en principe l'intérêt exclusif de l'*oikos* et du père lui-même et non l'intérêt du mineur[47]. Bien sûr, le fait que le mineur appartenait à l'*oikos* paternel lui assurait implicitement la protection en question.

Il en était de même de la tutelle. Elle a été consacrée essentiellement pour la protection des intérêts de l'*oikos*, tout en assurant en même temps la protection des intérêts économiques et personnels du mineur.

Le pupille, après sa majorité, pouvait intenter contre son tuteur une action, le δίκη ἐπιτροπῆς. Cette action visait à une reddition de comptes de la part du tuteur concernant la gestion de la fortune du mineur et à la restitution des biens mobiliers ou immobiliers que le tuteur ne lui aurait pas rendus, le cas échéant, ainsi qu'au versement d'une indemnisation. Le mineur pouvait, de plus, exercer le δίκη βλάβης contre les successeurs du tuteur, en exigeant la réparation des dommages que le tuteur aurait causés au mineur au cours de la période de sa tutelle.

Bien que tout semble indiquer que la protection du mineur était une question secondaire et que ce qui prévalait, c'était l'intérêt de l'*oikos* paternel, il existe certaines données qui nous permettent de penser que le législateur athénien reconnaissait implicitement un état d'immaturité des personnes de la petite enfance et s'efforçait, selon des modalités diverses, de les protéger. Les données en question sont les suivantes:

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[46] La protection de l'enfance et de la jeunesse est prévue dans les constitutions de la plupart des législations contemporaines. Les enfants sont également protégés par des organes spéciaux tels que le Défenseur des enfants, le Médiateur ou Ombudsman, etc.

[47] Harrison 1971, I, p. 80.

a. Il y avait une loi qui prévoyait le contrôle de la garde du mineur et de la gestion de sa fortune par une autorité publique, l'archonte éponyme[48].

Dans les cas où le tuteur devait procéder à la liquidation de la fortune du mineur, la loi prévoyait des enchères publiques sous le contrôle de cet archonte. Si, en outre, la fortune comportait une parcelle agricole, le tuteur devait, soit la cultiver, soit l'affermer à un agriculteur. Cet affermage (μίσθωσις ὀρφανικοῦ οἴκου) constituait une procédure spéciale menée également sous la direction de l'archonte éponyme. Ce dernier était tenu de proclamer une vente aux enchères publiques, qui se déroulait par-devant le tribunal et d'adjuger la chose affermée au dernier enchérisseur. Si le tuteur n'affermait pas la parcelle en question, une plainte pouvait être intentée à travers la procédure de *phasis* (φάσις μισθώσεως οἴκου).

b. Il y avait, par ailleurs, vers le milieu du IV^e^ s., certains magistrats dont parle Xénophon, les ὀρφανοφύλακες ou ὀρφανισταί à propos desquels on ne dispose pas d'informations. Il semble que ces derniers étaient chargés de veiller sur les orphelins mineurs des morts à la guerre. Ils devaient, à cet effet, surveiller le comportement des tuteurs à l'égard des orphelins et des filles épiclères et rapporter à l'archonte éponyme tous les faits afférents[49].

c. Athènes n'avait pas directement légiféré sur l'éducation des enfants en fixant les programmes scolaires ou en finançant l'éducation, mais elle manifestait un intérêt qui portait essentiellement sur la surveillance des mœurs dans le cadre scolaire. Pour éviter les risques de séduction sexuelle, auxquels étaient exposés les enfants en se rendant dans les lieux d'enseignement, la cité avait réglementé, de manière stricte, le fonctionnement des écoles et des palestres: leurs horaires d'ouverture et de fermeture, le nombre de disciples etc.[50].

d. La protection de l'enfance réside également dans le droit des enfants à l'alimentation et à l'éducation ou plutôt à l'apprentissage d'un métier, comme le stipule la loi[51]. Et ceci découle clairement du fait que le père qui n'aurait pas rempli ses obligations n'avait pas droit à la γηροτροφία, c'est-à-dire la fourniture par le fils d'alimentation et de logement.

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[48] Aristote, *Constitution d'Athènes*, 56, 7: L'archonte prend soin des orphelins, des épiclères et des femmes qui après la mort de leur mari prétendent qu'elles sont enceintes. Si quelqu'un leur fait tort, l'archonte peut lui infliger une amende ou le traduire devant le tribunal. L'archonte est aussi chargé d'affermer les biens des mineurs et des épiclères, les biens des épiclères jusqu'à ce qu'elles atteignent leur quatorzième année; il prend hypothèque sur les biens des fermiers. Si les tuteurs ne fournissent pas les aliments à leurs pupilles, l'archonte les contraint à payer le nécessaire. V. aussi Démosthène (43), *Contre Macartatos*, 75 et Lysias (32), *Contre Diogeiton*, 23. Ainsi que Simantiras 1972.

[49] Xénophon, *Poroi* II, 7. Cf. Photius, Suda, v. ὀρφανισταί. Cf. Karabélias 2002, p. 79.

[50] Eschine (1), *Contre Timarque*, 12.

[51] Plutarque, *Solon*, 22, 1.

De la même façon, le fils majeur pouvait manquer à son obligation légale de s'occuper de son père dans sa vieillesse, si, lorsqu'il était mineur et assujetti au pouvoir paternel, il avait été contraint par son père à la débauche[52].

e. Un autre cas, dans lequel la cité protégeait les droits d'une catégorie spéciale d'enfants mineurs, était celui des orphelins de guerre, dépourvus, le cas échéant, d'une fortune suffisante. La cité se chargeait d'élever et d'éduquer, aux frais du trésor public, les enfants dont les pères étaient tombés au champ d'honneur[53].

f. Je considère enfin que l'exemption des jeunes Athéniens de l'obligation des charges (*liturgies* ou autres), qu'il s'agisse des *éphèbes* ou des orphelins de guerre, se présente, une fois de plus, comme une forme de protection de la jeunesse.

Toutes ces dispositions indiquent clairement qu'à Athènes, l'enfance, ainsi que la jeunesse, faisaient l'objet d'une prévoyance légale. Cela nous permet de penser que la cité manifestait un certain souci et une sorte de protection sociale envers la jeunesse, sous quelque forme que ce soit: protection des mineurs et de leur patrimoine face à une mauvaise administration d'un tuteur, protection des mineurs orphelins par respect envers leurs pères morts pour la patrie ou surveillance des mœurs.

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[52] Eschine (1), *Contre Timarque*, 13.

[53] Diogène Laërce, *Vies, doctrines et sentences des philosophes illustres*, 1, 55: ἀπειρόκαλον γὰρ τὸ ἐξαίρειν τὰς τούτων τιμὰς, ἀλλὰ μόνων ἐκείνων τῶν ἐν πολέμοις τελευτησάντων, ὧν καὶ τοὺς υἱοὺς δημοσίᾳ τρέφεσθαι καὶ παιδεύεσθαι. Cf. Aristote, *Constit. d'Athènes*, 24, 3; idem, *Politique*, III 1268 a 8-11; Eschine (3), *Contre Ctésiphon*, 154; Thucydide, II, 46. V. aussi Stroud 1971, partic. p. 199-200.

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RÉPONSE À SOPHIE ADAM-MAGNISSALI

Parmi les questions abordées par Sophie Adam-Magnissali dans sa communication sur la condition juridique des mineurs dans l'Athènes classique il y a celle de l'âge de la majorité qui, selon le témoignage d'Aristote[1], y était fixé par le législateur à dix-huit ans. Qu'en était-il dans l'Egypte hellénistique et romaine?

En ce qui concerne les effets qu'entraînait la majorité, les sources papyrologiques nous apprennent que, à l'instar de ce qui se passait dans le monde grec classique, dans l'Egypte ptolémaïque et romaine, la majorité brisait les liens de la puissance paternelle ou mettait fin à la tutelle des mineurs orphelins et rendait l'individu mâle capable de tous les actes de la vie civile[2].

Pour aborder la question de savoir à quel âge le mineur devenait majeur, nous examinerons dans un premier temps les données documentaires datant de l'époque ptolémaïque et, dans un second temps, celles datant de l'époque romaine.

Deux ἐντεύξεις, une requête et une plainte, adressées à Ptolémée IV Philopator, montrent que les mineurs avaient la capacité de jouissance mais n'avaient pas la capacité d'exercice. Ainsi, dans le *P. Ent. 15*, le Macédonien de la descendance Hipponikos s'adresse au roi car, à cause de son jeune âge (*l. 6* et *8-9*: νεώτερός εἰμι, νεωτέρου μου ὄντος), il ne pouvait pas contracter la novation d'une dette qui permettrait le renouvellement d'une hypothèque sur un vignoble qu'il avait hérité par testament de son frère Hermias[3]. Mineur donc, et, semble-t-il sans père, ni tuteur, Hipponikos demande que la novation soit faite au nom de son frère défunt par les soins de l'agoranome[4]. L'échéance de l'hypothèque étant proche, Hipponikos éviterait ainsi que le vignoble ne tombât aux mains du créancier, ce dernier, un cavalier arcadien appelé aussi Hipponikos, étant d'accord pour nover. Selon l'apostille de l'ἔντευξις, la novation par fiction juridique n'a pas été refusée à Hipponikos le Macédonien.

Le cas rapporté par le *P. Ent. 49* = *M. Chrest. 224* est celui de Sopolis, un jeune «pas encore majeur» (*l. 4:* οὐδέπω ὄντα τῶν ἐτῶν), lequel, séduit par Démô, une

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1 *Const. d'Athènes* 42,1; cf. Adam-Magnissali, S. (2008), n. 16.

2 Sur l'incapacité des mineurs et les institutions de protection voir Taubenschlag, R. (1916), p. 177-230 = (1959), p. 261-321 et Idem (1929) p. 115-128 = 1959, p. 323-337; cf. Idem, (1955), p. 130-170 et, pour la période après l'édit de Caracalla, Arjava, A. (1998), p. 147-165, en particulier, p. 155-159.

3 Sur la portée de ce document voir Schönbauer, E. (1924), p. 91sq.

4 Qui faisait enregistrer le contrat de novation; cf. Wolff, H.J. (1978), p. 81, n. 2.

prostituée de Crocodilopolis, a signé à cette dernière la reconnaissance d'une dette de mille drachmes[5]. Pour y parvenir, Démô avait placé des gens à proximité, sans doute pour avoir des témoins tout prêts, lesquels, très probablement, l'ont aussi aidée à persuader le jeune homme. Le papyrus contient la plainte contre Démô présentée par le père de Sopolis, nommé également Sopolis, qui estimait avoir subi un tort[6] et qui demandait la citation devant le stratège de Démô, de son κύριος et de la personne (συγγραφοφύλαξ) auprès de laquelle l'acte de reconnaissance (une συγγραφή privée à six témoins) avait été déposé[7], afin qu'une enquête sévère ait lieu. Si on établissait que le prêt n'avait pas eu lieu, le père demandait que la courtisane rendît le document signé par son fils et se remettait au stratège pour qu'elle reçût la peine appropriée pour l'acte illégal qu'elle avait commis[8].

L'expression οὐδέπω ὄντα τῶν ἐτῶν figure aussi dans le *P. Mich. Zen. 23*, une lettre adressée en 257 av. n. è. à Zénon, l'intendant du dioecète Apollônios, dans laquelle l'expéditeur Aristeidès dit avoir été choisi par ses concitoyens pour devenir σιτώνης, à savoir liturge chargé des achats de blé pour une cité non identifiée et qui était peut-être située hors d'Egypte[9]. Aristeidès prétend ne pas avoir l'âge requis pour exercer ce service public à cause de sa minorité et demande à Zénon l'intervention d'Apollônios afin d'en être débarrassé (*l. 3*: οὔπω ὄντι μοι τῶν ἐτῶν).

Les trois documents précités contiennent les périphrases «νεωτέρου μου ὄντος», «οὐδέπω ὄντα τῶν ἐτῶν» et «οὔπω ὄντι μοι τῶν ἐτῶν» qui traduisaient la qualité de mineur de quelqu'un. Les trois suivants mentionnent l'âge de jeunes gens qui concluent des actes juridiques assistés ou non d'un tuteur.

Daté du III^{ème} siècle av. n. è., le *P. Lille I 55* contient un contrat alimentaire, une συγγραφὴ τροφῖτις, de deux drachmes[10]. Les parties contractantes sont Pausis, fils d'Amneus, âgé de quarante ans et Petosiris, fils de Doriôn, âgé de dix-huit ans qui agit en droit sans assistance. Le bénéficiaire de l'entretien alimentaire s'appelle Petosambis[11].

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[5] Au sujet de cette affaire lire le commentaire des éditeurs Gueraud, O. (1931), p. 122-124 et Mitteis, L. (1912) p. 245, la traduction en anglais du *P. Ent. 49* par Pomeroy, S. (1984), p. 147 et l'analyse juridique de son contenu par Rupprecht, H.A. (1971), p. 61-62 et par Wolff H.J. (1978), p. 147; cf. Seidl, E. (1962), p. 108-109 et 164.

[6] *L. 1*: ἀδικοῦμαι; *l.* 10: ἐπ' ἀδικίαι γεγραμμένη et *l.* 12-13: οὐκ ἀδικηθήσομαι. Il ne s'ensuit pas que le père de Sopolis fut tenu par la loi de répondre pour son fils auprès de sa créancière. Très probablement, il s'agissait pour lui de faire face à la nécessité réelle de payer la somme que son fils serait engagé à verser à la courtisane.

[7] Cette personne étant d'habitude l'un des six témoins; cf. Wolff, H.J. (1978), p. 59, n. 13 et Rupprecht, H.-A. (1995), p. 47, n. 55.

[8] *L.11-12*: περὶ δ'αὐτῆς Διοφάνην τὸν [στρατη]γὸν διαγνῶναι.

[9] A cet égard, cf. le commentaire de l'éditeur du *P. Mich. Zénon*, Edgar, C.C. (1931), p. 84. Sur la liturgie de la σίτου ἐκδοχεία cf. Lewis, N. (1997), p. 20.

[10] Cf. le commentaire des éditeurs des *P. Lille*, Jouguet, P. et alii (1907), p. 228-229 et Taubenschlag, R. (1932), p. 141-142 = (1959), p. 347-348.

[11] Si l'on admet ce nom comme un nom de femme, le contrat pourrait être un contrat de mariage conclu selon le modèle autochtone de συγγραφή τροφῖτις, la mariée étant

Daté de 110 avant notre ère, le *PSI IX 1018* est un contrat de vente d'une partie des revenus de la charge de prêtrise, en l'occurrence des «*jours de culte*» (ἡμέραι ἁγνευτικαί) concernant un champ situé dans le sanctuaire d'Aphrodite à Mémnoneia du nome pathyrite. C'est le prêtre égyptien pastophore Pikôs, fils de Pséminis, âgé d'environ 20 ans, qui les vend à un autre prêtre pastophore[12]. A vingt ans, Pikos agit seul, mais, malheureusement son âge ne peut pas être considéré comme exact car, d'après le *PSI IX 1022*, il aurait eu 25 ans en 106, d'après le *PSI IX 1024* il aurait eu 32 ans en 104 et d'après le *PSI IX 1025* il en aurait eu 30 en 104 av. n. è[13].

Le *BGU III 996,* daté de 107/106 av. n. è., brouille les pistes puisque, dans ce contrat de vente d'une maison, le vendeur Salès, âgé de 18 ans et sa sœur Tanemieus, âgée de 25 ans, agissent assistés d'un tuteur. Salès étant «Perse de la descendance», R. Taubenschlag a formulé l'hypothèse que cette catégorie de personnes connaissait une période de minorité plus longue[14]. Trente années plus tard, E. Seidl a considéré que ce document n'était pas décisif pour la détermination de l'âge de la majorité en Egypte hellénistique puisque d'autres raisons, comme par exemple celle de la faiblesse d'esprit, peuvent expliquer le prolongement de la période de minorité de Salès[15].

L'absence d'indication précise de l'âge rend délicate la formulation d'une hypothèse pour l'entrée dans la majorité civile à l'époque ptolémaïque.

En 1916, R. Taubenschlag avait retenu l'âge de dix-huit ans comme limite de la minorité dans l'Egypte hellénistique et romaine[16] mais, en dehors du *BGU III 996*, qu'il a considéré à part en raison de la qualité de «Perses de l'épigone» des parties contractantes, son choix reposait sur des documents datés de l'époque romaine[17]. En 1932, le même savant optait pour l'âge de quatorze ans comme limite de la minorité

Petosambis, la fille de Pausis et le marié le jeune Pétosiris. Sur la συγγραφὴ τροφῖτις voir Seidl, E. (1962), p. 52 et Yiftach-Firanko, U. (2003), p. 136.

12 Sur la vente de leurs prébendes par les prêtres égyptiens voir Préaux, C. (1939), p. 489-490

13 Cf. le commentaire des éditeurs, Vitelli, G.-Norsa, M. et alii (1929), des *PSI IX*, p. 23-24 et Legras, B. (1999), p. 219.

14 Taubenschlag, R. (1932) p. 143 = (1959), p. 350; cf. Legras, B. (1999), p. 219-220. La question de la valeur qu'il faut attribuer à la désignation «Perse de l'épigone» utilisée dès la fin de l'époque ptolémaïque reste encore ouverte. Les nombreuses suggestions relatives à sa signification ethnique et juridique ont pour point commun d'admettre que ce qualificatif désignerait une origine extérieure à l'Egypte; cf. Bickermann, E. (1927), p. 218-219, Pestman, P. (1963), p. 15-23, Modrzejewski, J. (1983), p. 260-262, Vandersleyen, C. (1988), p. 191-201 et La'da, C.A. (1997), p. 563-569. En ce qui concerne la place des Perses dans le système fiscal lagide, voir Clarysse W. et Thompson, D.J. (2006), p. 72,142-143,157-159 et 322.

15 Seidl, E. (1962), p. 108.

16 Tout en proposant une fourchette entre quatorze et dix-huit ans pour la population d'origine grecque: Taubenschlag, R. (1916), p. 179-184 et (1959), p. 266-268; cf. Meyer, P. (1906), p. 94, n. 1 et Idem, (1920), p. 31.

17 *P. Fay. 97* = *M. Chrest. 315* (78); *BGU IV 1068* (101) et *1014* (138).

des jeunes en Egypte aussi bien à l'époque ptolémaïque qu'à l'époque romaine mais le *P. Oxy. XVII 2134* , daté de 170, qui a étayé son hypothèse, s'est avéré inadéquat puisque, comme O. Montevecchi l'a démontré, le mot *ἀφήλικος* est le génitif du nom propre Ἀφῆλιξ et ne servait pas à désigner la minorité de la personne en question mais son patronyme[18].

On sait qu'à l'époque romaine l'âge de la majorité civile des pérégrins coïncidait avec celui de leur majorité fiscale qui était de quatorze ans, lorsque les hommes commençaient à payer l'impôt personnel[19]. Pour ce qui est de l'époque ptolémaïque, si les sources révèlent l'existence de taxes calculées par tête[20], dont l'ἁλική qui frappait les hommes et les femmes, elles n'indiquent pas l'âge à partir duquel les contribuables y étaient assujettis[21].

Si l'on admet l'hypothèse de l'âge de la majorité à quatorze ans, des questions se posent concernant l'âge du jeune Sopolis qualifié οὐδέπω ὢν τῶν ἐτῶν, donc mineur, dans le cas d'escroquerie relaté dans le *P. Ent. 49*[22]. En effet, quelle qu'ait été la précocité sexuelle des habitants du royaume lagide, il semble un peu prématuré qu'un garçon n'ayant pas atteint quatorze ans, se soit intéressé à l'amour vénal. Cependant, son immaturité est évidente puisqu'il a signé une reconnaissance de dette de mille drachmes en faveur de la courtisane Démô et que, dans l'Égypte ptolémaïque, l'écrit était la preuve par excellence aussi bien dans les procès grecs que dans les procès égyptiens[23]. Certes, étant donné l'état de minorité de Sopolis fils,

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[18] Montevecchi, O. (1935), p. 303-304. Le *P.Oxy. XVII 2134* contient une demande à l'archidicaste en vue de l'enregistrement d'un contrat de prêt garanti par une hypothèque sur un terrain et de la notification de cet enregistrement à la débitrice Hélène Ἀφήλικος. Selon les conjectures de Taubenschlag, R. (1932), p. 142-143 = (1959), p. 348-349, Hélène a dû se marier et enfanter à l'âge de dix ans.

[19] Cf. *infra*, p. 166-167.

[20] Basées sur des données fournies par des déclarations de recensement telles celles conservées dans les *W. Chrest. 198* et *199* (III^{ème} s. av. n. è.) et dans les *P. Tebt. I 103*, *121* et *189* (Ier s. av. n. è.); cf. le *P. Count 16* (III^{ème} s. av. n. è.) qui donnait une liste de contribuables frappés d'un impôt personnel et les catégories qui en étaient exemptées. Sur les opérations de recensement dans l'Egypte ptolémaïque et leur signification fiscale voir Wallace, R.S. (1938), p. 418-442, Préaux, C. (1939), p. 380-387 et Clarysse, W. et Thompson, D.J. (2006), p. 10-35.

[21] Préaux, C. (1939), p. 249-252; cf. Clarysse, W. et Thompson, D.J. (2006), p. 41-42, qui pensent que la majorité fiscale dans le royaume lagide intervenait à l'âge de quatorze ans. Les arguments qu'ils utilisent à l'appui de cette hypothèse sont les suivants: d'abord, s'il est vrai que, en vertu d'un décret royal pris entre 176 et 170 av. n. è. (*P. Harr. I 61 = SB VIII 8993*), l'enregistrement des esclaves avait lieu quand ces derniers atteignaient leur quinzième année, il est probable qu'on calculait leur âge en comptant l'année entamée en plus des années révolues, et il s'agissait donc de leur quatorzième année; ensuite, la majorité royale était probablement fixée à l'âge de quatorze ans (p. 42).

[22] Cf. *supra*, p. 161-162.

[23] Sur la valeur probante du document dans l'Egypte ptolémaïque et, plus particulièrement, sur l'absence de disposition légale à cet égard voir Wolff, H.J. (1978), p. 144sq et Mélèze Modrzejewski, J. (1984), p. 1173-1187.

la συγγραφή qu'il avait signée pouvait être annulée pour cause d'abus frauduleux de l'état d'ignorance ou de faiblesse d'un mineur mais pour obtenir cette annulation, Sopolis père a besoin de prouver que son fils n'avait rien reçu de la part de Démô[24]. Or, la transaction ayant revêtu la forme d'une συγγραφή à six témoins et le συγγραφοφύλαξ étant sans doute acquis à la courtisane, la preuve de l'inexistence du prêt ne paraît pas évidente. Par ailleurs nous ne disposons que de la version des événements présentée par le père du jeune homme et nous ignorons celle de la courtisane qui contestait peut-être la minorité du jeune homme.

Quant au droit de l'Egypte pharaonique, le *P. Turin 2021*[25] nous apprend qu'au moment du remariage de leur père, certains enfants que celui-ci a eus du premier lit étaient représentés par leurs «deux aînés» mais nous ne savons pas si l'âge de la majorité était légalement fixé ou s'il dépendait d'une «maturité» à évaluer[26]. Dans la légende d'Osiris au sujet d'Horus, dans des textes de Siout au sujet du petit fils d'un nomarque et dans des documents concernant les rois Thoutmosis III et Aménophis II, la majorité royale est signalée par des expressions telles que «une fois que son bras fut devenu vigoureux[27]» ou «il a eu la voix juste»[28] ou «une fois devenu un homme fort[29]» ou «[et je suis entré] pourvu de toutes ses excellences et comblé du discernement des dieux … comme Horus lorsqu'il eut atteint sa maturité, ou pris conscience de son être dans le Temple de mon père Amon-Rê» [30]. Seul le document sur Aménophis II indique un âge précis (dix-neuf ans) correspondant à cet accès à la maturité: «... Sa Majesté était apparue en qualité de roi comme un bel adolescent, devenu conscient de lui-même et qui avait accompli sa dix-huitième année …»[31].

Dans son livre sur les jeunes Grecs dans l'Egypte ptolémaïque et romaine, B. Legras[32] a conclu que l'âge de la majorité princière de la famille royale des Lagides était fixé à seize ans. Sa démonstration est basée d'une part sur les dates de la cérémonie des Ἀνακλητήρια, qui marquait l'arrivée des princes à l'âge de la majorité[33], et d'autre part sur le fait que, si leur avènement au trône était proclamé avant qu'ils n'aient atteint seize ans, une tutelle était mise en place. B. Legras formule aussi l'hypothèse que la majorité des jeunes Grecs était fixée à seize ans comme pour les princes[34]; mais il ne nous semble pas possible d'établir de lien entre la majorité princière et celle des jeunes habitants du royaume, la première étant

[24] Cf. Rupprecht, H.-A. (1971), p. 62.
[25] *III*, *10*.
[26] Cf. Théodoridès, A. (1975), p. 91-93.
[27] Il s'agit d'Horus; cf. Moret, A (1930), p. 744 (*l. 16*).
[28] Horus est ici qualifié «justifié (de voix)»; cf. Moret, A. (1930), p. 745, n.69 ad *l.18* et Erman, A. (1952) (pour la traduction française), p. 100-101.
[29] Siout, *V*, *29*.
[30] C'est Thoutmosis qui parle: Sethe, *Urk. IV*, *160*.
[31] Trad. Van De Walle, B. (1938), p. 255.
[32] Legras, B. (1999), p. 109 sq.
[33] Ὅταν εἰς ἡλικίαν ἔλθωσιν: Polybe *18*, *55*, *3* et *28*, *12*, *8-9*.
[34] Legras, B. (1999), p. 220-221.

déterminée par des raisons hautement politiques qui ne valaient pas pour la seconde. D'une manière analogue, dans le haut clergé memphite, comme la charge du grand prêtre était héréditaire, il arrivait que le grand prêtre de Memphis fût investi de ce titre à l'âge de quatorze ans, tel Psentaïs III en 76 av. n. è., nommé par Ptolémée XII Aulète parce que son père Petobastis, qui exerçait cette fonction, est mort[35]. Imouthes, le fils de Psentaïs III a été nommé grand prêtre en 39 av. n. è. à l'âge de sept ans et dix jours, après le décès de son oncle maternel qui avait succédé à Psentaïs III.

Comme la législation ptolémaïque intervenait peu dans les questions relevant du droit privé, nous ne disposons pas de texte normatif, loi royale ou poliade, fixant l'âge de la majorité dans l'Egypte sous les Lagides. Notre documentation est composée d'actes de la pratique juridique et judiciaire et, de tous les documents précités, l'indice le plus fiable pour fonder une hypothèse sur le seuil de la majorité dans l'Egypte ptolémaïque nous est fourni par le *P. Lille I 55*: le jeune Petosiris, qui y agit sans tuteur, a dix-huit ans. Une majorité fixée à dix-huit ans pour tous les habitants mâles de l'Egypte ptolémaïque serait donc en accord avec le *P. Lille I 55*, correspondrait à la tradition grecque[36], et plus particulièrement athénienne, de l'entrée dans la majorité et ne serait pas en contradiction avec le contexte égyptien. Mais comme les règles coutumières qui régissaient, en l'absence de règle légale, la personne et la famille dans le royaume évoluaient aussi en fonction des nouvelles conditions de vie, notamment sociales, tendant à l'indépendance de l'individu par rapport à la famille[37], il se peut que la fin de la minorité, ait été fixée par l'usage à un âge situé entre celui de l'entrée dans la puberté[38] et la dix-huitième année d'un adolescent. Par ailleurs, à son état actuel, la documentation ne nous informe ni sur l'âge de la majorité fiscale[39] ni sur celui de l'entrée dans l'éphébie[40] dans l'Egypte ptolémaïque.

Pour l'époque romaine la publication du *P. Brem. 39* a établi clairement la majorité légale des jeunes pérégrins. Il contient la demande qu'un tuteur a adressée en 115 au stratège pour qu'il le décharge de la tutelle de deux mineurs, un frère et une sœur. Il signale que ses deux pupilles étaient devenus majeurs (τέλειοι), le garçon ayant atteint la majorité fiscale et la fille s'étant mariée. La majorité fiscale était fixée à quatorze ans, lorsque le contribuable commençait à payer l'impôt personnel, la λαογραφία, dont l'assiette était établie selon les données du

[35] Et c'est Psentaïs qui couronna le jeune Ptolémée Aulète, né entre 98 et 95 av. n. è., quelques mois plus tard; voir à cet égard Crawford, D. J. (1980), p. 39-40; cf. Clarysse, W. et Thompson, D.J. (2006), p. 42, n. 41.

[36] Beauchet, L. (1897), p.127; cf. les objections de Pélékidis, C. (1962), p. 53-54 et 56.

[37] Cf. Mélèze Modrzejewski, J. (2005), p. 343-354 et Rupprecht, H.-A. (2005), p. 328-342.

[38] Au sujet des informations que nous possédons sur l'âge de l'entrée dans l'ἥβη à Athènes et dans le monde grec, voir Pélékidis, C. (1962), p. 51-70; cf. Adam-Magnissali, S. (2008), p. 148.

[39] Cf. *supra*, n. 21.

[40] Cf. Legras, B. (1999), p. 142.

recensement familial quatrodécennal et les déclarations de naissance qui intervenaient entre deux recensements[41]. En considérant comme fiscalement majeurs les pérégrins d'Égypte à quatorze ans, les Romains s'assuraient de bonnes rentrées fiscales. Par ailleurs, en fixant l'âge de la majorité civile des pérégrins d'Égypte à quatorze ans ils l'alignaient sur la minorité des jeunes Romains *sui iuris*, à savoir les orphelins impubères qui restaient sous tutelle jusqu'à leur puberté.

Le terme le plus fréquent utilisé dans les documents d'époque romaine pour désigner les mineurs est celui d'ἀφῆλιξ mais on rencontre assez souvent la périphrase οὐδέπω ὢν τῶν ἐτῶν. En 1916, R. Taubenschlag a considéré que l'expression οὐδέπω ὢν τῶν ἐτῶν désignait les mineurs âgés de moins de sept ans ayant une incapacité d'exercice totale et correspondant à la catégorie des *infantes* du droit romain, tandis que les ἀφήλικες avaient une capacité d'exercice restreinte[42]. Un quart de siècle plus tard, dans son article «οὐδέπω ὢν τῶν ἐτῶν»[43], A. Christophilopoulos a démontré que, dans les documents de la pratique, l'expression οὐδέπω ὢν τῶν ἐτῶν désignait aussi bien les mineurs de moins de sept ans que ceux qui avaient plus de sept ans; cette expression et le terme ἀφῆλιξ avaient le même sens et étaient synonymes d'autres expressions telles que οὐδέπω ὢν ἐν ἡλικίᾳ[44], ἀτελὴς ὢν τὴν ἡλικίαν[45] et καταδεὴς ὢν τὴν ἡλικίαν[46], lesquelles servaient à désigner les mineurs.

La question qui se pose pour l'Egypte romaine est de savoir combien de temps après l'Édit de Caracalla et la généralisation de la cité romaine en 212 le terme ἀφῆλιξ désignait un mineur de vingt-cinq ans, selon le droit romain[47], et non pas un mineur de moins de quatorze ans selon le droit pérégrin. Dans l'espace provincial égyptien il n'existe aucun document dans lequel cet âge soit signalé comme limite de la minorité. D'après les sources disponibles, ce glissement ne s'est pas produit du jour au lendemain.

Dans sept papyrus datés du II^{ème} et du début du III^{ème} siècle[48], des citoyens romains habitant l'Égypte demandent à bénéficier de la protection de la loi

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[41] Sur l'établissement de la λαογραφία romaine selon les données des déclarations du recensement familial quatrodécennal voir Modrzejewski, J. (1985), p. 257sq. et Bagnall, R.S. et Frier, B.W. (1994), p. 27-30.

[42] Taubenschlag, R. (1916), p. 195-199 = (1959), p. 283-287; cf. Idem, (1955), p. 147-148.

[43] Christophilopoulos, A. (1940), p. 378-382 = (1973), p. 90-93.

[44] *P. Oxy. II 273 = M. Chrest. 221*, *l. 13-14* (95).

[45] *BGU II 242 = M. Chest. 116*, *l. 9-10* (180-192)

[46] *P. Oxy. I 54*, *l. 2-3* (201); cf. *P. Mil. Vogl. I 25*, *col. V*, *l. 3-7* (127).

[47] En droit romain le mineur de vingt-cinq ans était une personne pubère *sui iuris* dont la tutelle avait pris fin et qui n'avait pas encore atteint ses vingt-cinq ans; cf. Lemosse, M. (1975), p. 247-255.

[48] *P. Oxy. XII 2111*, *l. 14-15* (135); *BGU II 378 = M. Chrest. 60*, *l. 21-22* (147); *BGU II 61 1 = M. Chrest. 370*, *col. I*, *l. 6-7* (discours de Claude au Sénat) (37-61); *P. Oxy. X 1274*, *l. 13-14* (III^{e} s.). Voir aussi *BGU VII 1574, l. 16-17* (176) et *P. Oxy. VII 1020 = Jur. Pap.*

Laetoria[49], comme par exemple dans le *P. Oxy. XVII 2111* où une femme invoque cette loi en sa faveur, tandis que l'avocat de son adversaire prétend que celle-ci a déjà dépassé l'âge légal. En ce qui concerne le recul de la capacité à l'âge de vingt-cinq ans, il n'est saisissable dans notre documentation que longtemps après 212. Dans un article paru en 1979[50], N. Lewis a pensé que, dans le *PSI IV 303,* daté de la 2ème moitié du IIIème siècle, le mot *ἀφῆλιξ* était déjà utilisé dans le sens romain d'un jeune de moins de vingt-cinq ans mais, en l'occurrence, il y a eu erreur sur la personne et, de ce fait, on ne peut pas admettre que l'*ἀφῆλιξ* en question avait entre dix-huit et vingt-cinq ans[51]. Le cas d'un personnage du dossier de Sakaon, signalé dans les *P. Sakaon 37* (*l. 2*) et *1* (*l.12*), datés respectivement de 284 et de 310, proposé aussi par N. Lewis comme *ἀφῆλιξ* au sens romain[52], n'est pas non plus à retenir à la suite des nouvelles lectures de la *l. 2* du *P. Sakaon 37* faites par D. Hagedorn en 1996. Ce dernier conclut que nous manquons de preuves pour admettre que la romanisation de la notion d'*ἀφῆλιξ* a eu lieu avant le Vème ou le VIème siècle[53].

Les conclusions d'A. Arjava qui, en 1999, a étudié les aspects sémantiques de la pénétration en Égypte du principe romain de l'incapacité juridique des jeunes jusqu'à l'âge de vingt-cinq ans sont plus nuancées[54]. Il met l'accent sur la présence de la terminologie propre à la curatelle des mineurs qui, en dépit d'un emploi souvent inadéquat, témoigne de l'intégration progressive de cette institution dans la vie provinciale. Le premier document qui mentionne un curateur est le fragmentaire

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17, *l. 5* et *7* (198-201) dans lesquels il est fait allusion à la loi *Laetoria*; cf. Hagedorn, D. (1996), p. 224, n. 4.

[49] On sait que cette loi votée peu avant 191 av. n. è. permettait de poursuivre quiconque avait contracté, en profitant de l'inexpérience d'un partenaire âgé de moins de vingt-cinq ans et que cette infraction, la *circumscriptio*, entraînait une condamnation pécuniaire au profit du mineur dont l'acte restait valable et devait être exécuté. Par la suite, les *minores viginti quinque annorum* contre lesquels on avait intenté une action en paiement ont pu opposer une exception et éviter d'exécuter l'acte juridique à propos duquel ils avaient été trompés; de même, grâce au préteur, ils pouvaient obtenir une *restitutio in integrum ob aetatem*. Mais il suffisait qu'un mineur soit assisté d'un curateur pour que tout soit considéré comme s'étant déroulé de manière régulière. Les tiers contractant avec les mineurs ont alors pris l'habitude d'exiger que ce dernier soit assisté d'un curateur. En droit, l'assimilation des mineurs aux impubères et des curateurs aux tuteurs a été l'œuvre de Justinien. Dans les faits, dès l'époque classique, bien que la loi *Laetoria* n'ait pas diminué la capacité juridique des jeunes de moins de vingt-cinq ans, elle les frappait d'une certaine incapacité puisqu'ils étaient considérés comme incapables de gérer leurs affaires domestiques; cf. Monier, R. (1947, réimpr. 1970), p. 333-336 et Kaser, M. (1971), p. 276-277 et 369-371.

[50] Lewis, N. (1979), p. 117-119

[51] Selon toute vraisemblance, l'auteur du recours conservé dans le *PSI IV 303*, qui s'occupait de la perception de taxes dans les villages, n'était pas le garçon *ἀφῆλιξ* mais son grand-père: Lewis, N. (1981), 73-74.

[52] Lewis, N., *ibid*.

[53] Hagedorn, D. (1996), p. 226, n. 10.

[54] Arjava, A. (1999), p. 202-204.

BGU III 705, daté de 206. Le terme réapparaît vers le milieu du III[ème] siècle comme par exemple dans le *P. Oxy. XIV 1637*, daté de 257-259, qui conserve une division de propriété: un frère et une sœur qui sont parties prenantes agissent le premier assisté d'un curateur (κουράτωρ) et la deuxième d'un tuteur (ἐπίτροπος)[55]. Si on peut admettre que le droit romain en matière de curatelle des mineurs avait été reçu en Égypte à cette époque, on ne peut pas suivre l'évolution du sens du terme ἀφῆλιξ qui, dans les documents, continuait de désigner des mineurs de quatorze ans selon le droit pérégrin[56]. Il arrive aussi que, dans les textes datés du III[ème] que dans ceux datés du IV[ème] siècle, les jeunes assistés d'un curateur ne portent pas de qualificatif. Dès la fin du III[ème] siècle, ce sont les termes de κηδεμών[57], de κηδεστής[58] ou de φροντιστής[59] qui désignaient les personnes assistant un ἀφῆλιξ et qui pouvaient correspondre aussi bien au tuteur d'un impubère de moins de quatorze ans qu'au curateur d'un jeune de moins de vingt-cinq ans. C'est le cas avec le terme de κηδεμών dans un document officiel, le *P. Oxy. VI 888*, qui contient un édit préfectoral daté de la fin du III[ème] ou du début du IV[ème] siècle[60]. Enfin, c'est seulement dans un document daté du VI[ème] siècle, le *P. Londres I 113*, un compte rendu de procès, que le terme d'ἀφῆλιξ désigne clairement un jeune de moins de vingt-cinq ans n'ayant pas atteint l'âge légal: le vendeur d'un immeuble, un mineur de vingt-cinq ans, se déclare en tant que tel et demande la rescision d'une vente en raison de sa minorité[61] mais aussi pour avoir été lésé dans le prix de l'immeuble vendu. En dépit donc d'une terminologie et d'une chronologie incertaines, le droit provincial et les documents de la pratique montrent que les provinciaux d'Égypte ont peut-être mis un certain temps à s'adapter aux règles juridiques romaines en

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[55] *L. 2-4*; cf. le *P. Oxy. LIV 3756*, *l. 4-6* (325).

[56] Soit leur âge est signalé comme dans le *SB VIII 9901*, *l. 17-18* (235) et le *PSI X 1102*, *l. 8-9* (III[ème] s.), dans lesquels il est respectivement question d'ἀφήλικες de six de quatre et de deux ans, soit ils sont assistés d'un tuteur (ἐπίτροπος) sans que leur âge ne soit signalé, comme dans les *P. Ryl. II 109*, *l. 18-19* (235) et *P.Oxy.VI 907*, *l.18-20* (276); cf. A. Arjava, A. (1999), p. 203, n. 13 et 12.

[57] *P. Oxy. XXVII 2474*, *l. 20-21* (III[ème] s.).

[58] *P. Sakaon 37*, *l. 2*: κηδέστρια (284).

[59] *P. Caire Isid.104*, *l. 5* (296).

[60] Il s'agit d'une demande à l'exégète au sujet de la tutelle de deux mineurs orphelins, précédée d'un édit du préfet Flavius Valerius Pompeianus relatif aux tuteurs nommés par les autorités; cf. le *P. Caire Masp. II 67151*, qui a conservé le testament d'un médecin antinoïte de 570, dans lequel le testateur institue ses fils légataires universels et nomme le supérieur d'un monastère κηδεμόνα, en l'occurrence *tutor testamento datus* de ceux de ses enfants qui ne peuvent pas encore parler et curateur de ses enfants mineurs jusqu'à ce qu'ils atteignent l'âge de la majorité (*l. 231*: ως] νηπιο[υ]ς και [α]φηλικα[ς] ε[ως αν επαυξησωνται] την ηλικιαν).

[61] *L. 11*: [οτι εν αφ]ηλικοτητι προ [της μεθεξε]ως εννομου ηλικιας των εικοσι πεντε ενιαυτων την πρασιν εποιησατο και περιεγραφη; cf. Taubenschlag, R. (1932), p. 144 = (1959), p. 351 et (1955), p. 330.

matière de minorité mais qu'ils les ont acceptées en considérant les mineurs de vingt-cinq ans comme des incapables ayant besoin d'une mesure de protection.

La question de l'âge de la majorité à travers les papyrus grecs d'Égypte se révèle, pour ce qui est de l'époque ptolémaïque, le miroir de la continuité du droit grec en matière des personnes et de la famille et, pour ce qui est de l'époque romaine, celui de la réception du droit romain, soit par la contrainte, dans le cas de la majorité légale et fiscale à quatorze ans, soit progressivement, dans le cas de la majorité à vingt-cinq ans.

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OWNERSHIP AND SECURITY IN MACEDONIAN SALE DOCUMENTS

I. In 1988 Edward M. Harris published an important contribution to Athenian law of real security. His point was, and certainly still is, that *hypothēkē* (roughly "encumbrance") and *prasis epi lysei* ("sale on condition of release") do not differ in substance, only in terminology. With this conclusion, Harris demolished most of the sophisticated discussions that had taken place among generations of legal historians. Harris' results are based on the so-called 'principle of cash sale' developed by Fritz Pringsheim in *Greek Law of Sale* (1950). According to Pringsheim, in Greek legal thought and practice, mutual consent to sell and buy goods did not create any obligation either to deliver these goods or to pay the set price.[1] Sale was just a means of transferring ownership, or more precisely, ownership was transferred by payment of the price. Legal protection was therefore given in two cases: 1) to the *purchaser*, who had paid the price but did not receive the goods, so that he could seize what he had purchased; 2) to the *vendor*, who had delivered the goods without receiving the price, so that he could recover the goods, since he had not in fact lost ownership.[2] This principle worked tacitly and extended beyond any legislation. For our purposes, it is of no consequence that Pringsheim wrongfully viewed the *diadikasia* as the means of protecting ownership.[3] Harris does not deal with procedure, nor will I repeat my arguments in this paper.

In order to explain Athenian real security, Harris adapted the principle of cash sale most successfully. Since there was no formal act of hypothecation like the Roman *fiducia*,[4] an Athenian creditor became a mortgagee by handing over money in accordance with the particular deed of loan that contained all further specifications on repayment, interest, risk and security. While the debtor usually remained in possession of the pledged property, the creditor had the same position as a purchaser who had paid the price in advance (Pringsheim's case 1); when the debtor defaulted, the creditor, as owner, was entitled to seize the property. Following Finley (and others) Harris correctly points out that, in Athens, real security was

[1] Pringsheim 1950, 90f. and 179-219, criticized by Cohen 2006; but see the response by Jakab in the same volume, based on Wolff 1957, 28f.

[2] Pringsheim 1950, 13.

[3] See Thür 1982 and 2003; [not consulted by Harris in his response; so the discussion is on completely different levels].

[4] Harris 1988, 359f.

substitutive in nature ("Verfallspfand").[5] Just as with cash sale, here we have another principle operating behind mortgage contracts all over the Greek world, yet nowhere stated explicitly in any statute.[6]

In my opinion, a common corpus of statutes is not required for a unity of Greek law to exist. Rather, we must look for – mostly unwritten – principles, which were implicitly followed by the laymen who skillfully drafted sales, leases, loans, mortgages and other contracts.[7] In the Greek poleis, *general* rules governing contract or property were not topics of legislation. Harris, however, was dealing strictly with Athens, and was therefore not concerned with Greek law in general.

From Athens, we primarily have two kinds of sources on real security: detailed narrations by the orators and short notes inscribed on stone slabs, *horoi*, which originally were simple boundary stones. The function of the mortgage *horoi* was to warn third persons that the property was pledged to someone and thus the possessor was not free to alienate it unencumbered.[8] As Harris correctly maintains,[9] the few lines of text on the *horoi* primarily reflect the view of the creditor; in most cases, the use of the term *epramenou* (sold) on the stones informed everybody about the actual legal status. The term *epi lysei* (on release), which typically follows, seems to comply with the needs of the debtor; his property was not lost forever.[10] This well balanced, concise, juristic formulation never occurs in court speeches. Here, only the context makes it clear when a sale was not in fact a sale, but rather part of a loan agreement. In oratory, debtors generally prefer to use terms that are derived from *hypotithenai*, which is less forceful than "sale."[11] Any correlation between *horos* inscriptions and registers of properties kept within the demes of Attica[12] cannot be proven.

I disagree with Harris only on one point: who was the owner of the encumbered property? Harris carefully quotes some passages, which indicate that the creditor is the owner, and others that assign this capacity to the debtor.[13] From a modern view of ownership as an absolute legal title, this seems to be an irresolvable contradiction. Because Athenians had no formal procedures for conveyance like the Roman *mancipatio*, Harris contends: "each person naturally tended to answer it in the way which was most advantageous for him," and further: "…in the field of real security…in the absence of any regulations there was no way of resolving the

5 Harris 1988, 356; Finley 1951, 115.
6 Thür 2006, 32f. (read "substitutive" on p. 33).
7 Thür 2006, 23f.
8 On this subject in general, see Finley 1951, reviewed by Wolff 1953; see also Finley 1953 (1968) on the *poletai* inscriptions, a valuable third type of evidence.
9 Harris 1988, 377.
10 Harris 1988, 378.
11 Harris 1988, 377.
12 Faraguna 1997.
13 Harris 1988, 367-70.

question of who owned hypothecated property."[14] For Harris it is only a matter of rhetoric.[15] Admittedly, rhetoric plays a role in questions about encumbered property, in particular, to whose material possessions did it belong in an economic sense? The legal aspect, however, is absolutely clear: according to the terms of the loan deed, the person who had handed over the money had the right to file a claim of ownership against any third person and, after the trial, to seize the property. Thus, with the same type of action, the creditor on the one hand was entitled to enforce the law against the (defaulting) debtor, and on the other, the debtor was still entitled to defend his right to the property against any third person, including even the creditor (until the time of maturity). With the consent of the creditor,[16] the debtor could still alienate or pledge the encumbered property. At the end of this study I will address how multiple charges on the same real property worked.

To sum up my critique, the Athenians were not uncertain about their idea of ownership; rather, our modern concept of 'absolute' and 'exclusive' title does not conform to Athenian legal thought. In their eyes, ownership was a position that was elastic and separated by function,[17] one that could be modified by mutual agreements between different parties. So, quite correctly, both creditor and debtor might call themselves 'owners.' For this reason, it seems to me rather absurd that the *poletai* in their records[18] called the confiscated property the "house of Theosebes" (owned by Theosebes) just for rhetorical reasons. I would more willingly trust in the wording of the official document.

Private agreements from the Greek poleis are scarcely preserved. As far as I know, the deeds follow standard forms well attested all over the Greek world. It was not a specific Athenian law code on real security[19] that paved the way for the rise of trade and credit, but rather, ingeniously handled contract clauses based on simple – one might even call them 'dogmatic' – principles, such as cash sale or substitutive security. Contract clauses [e.g. Dem. 35, 10-13], not [general] statutes met the needs of a growing economy.

II. Let us now turn from these introductory thoughts to the main focus of this study, the epigraphically preserved sale documents from Northern Greece. Here the sources are the same as if we only had *horos* inscriptions at Athens. For this reason alone, our preliminary 'dogmatic' considerations appear to have been necessary.

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[14] Harris 1988, 367f.

[15] Harris 1988, 367.

[16] As we shall see, not only did "the parties" (the debtor and subsequent creditors) have to agree, Finley 1953, 481, 483 and 489 (1968, 545, 547 and 554), but also the prior creditor. Harris 1988, 369 is not precise: "…the borrower temporarily lost his right to alienate [this piece of property]." As I demonstrate below, a prior creditor had the option to "block up" the transaction or to agree.

[17] Discussed by Kränzlein, 1963, 33-35.

[18] Hesperia 10, 1941, no. 1, 9.

[19] So Harris 1988, 381, contra Finley, 1953, 483 n. 23 and 490 n. 44.

1) Sale documents from Olynthus, Amphipolis and other sites in Northern Greece have been published since 1930.[20] In his useful overview, Faraguna (2000) analyzed all 39 texts published up to the time of his study; new texts are continuously appearing.[21] Faraguna correctly noticed that it was not sale contracts, but excerpts from public registers that were published on stone.[22] In Mieza, a stone inscription of such a register was found.[23] The individual items of an entry are: buyer – ἐπρίατο (has bought) – vendor – real property – neighbors – price – receipt[24] – guarantor – date – witnesses.[25] The sale documents from Amphipolis, which are approximately one hundred years older, are also drafted in this way. Consider for example *SEG* XLI 558, a text that is exceptional for its reference to the (usual) fact that the sale contract (*syngraphē*) was deposited with a guardian (l. 5-6).[26] Neither in the registers nor in the excerpts of individual 'sale documents' are the full texts of the contracts preserved. Thus we do not know whether the documented sales are either real sales with intention to alienate the properties, or securities, which would constitute sales on condition of release (*praseis epi lysei*).

Most of the stones were found in situ, in the houses themselves or on the fields. At first glance they all, like the *horoi*, seem to have served as "markers" to warn third persons that the properties were pledged.[27] But only three of the texts, now over 40, explicitly mention security: two are drafted according to the standard form of a loan,[28] one sale mentions a time limit for *apolysis*,[29] a fourth document with a time limit remains uncertain.[30] In the first two cases the creditors appear simply to have enregistered loan documents containing *hypothēkai*. All inscriptions dealing

[20] Starting with D.M. Robinson, Excavations at Olynthus II, 1930; for details, see Hatzopoulos 1988 and 1991, Faraguna 2000, 99-108.

[21] Not all are important; for *SEG* XLVII 999 see below, n. 37 and the discussion that follows.

[22] Faraguna 2000, 106f.

[23] *ArchEph* 142, 2003 [2005], 163s., 188s., Mieza, 250-25 B.C. (e.g. the 3rd of 10 entries): Ζώπυρος Γοργία ἐπρίατο πα[ρὰ] Ε[ὐ]πολέμου τοῦ Στάρτ[2]ιος ἐν Δροέσται γῆς ψιλῆς, πλέθρα [...] Τὰ ἐχόμενα τῶν l[3] ἀμπέλων τῶν Ἀττίνα καὶ τῆς γῆς ἧς παρὰ Βίωνος ἠγόρα[4]σε Ζώπυρος, τὸ πλέθρον δραχμῶν ⋮ Ο ⋮ Τὴ[ν τιμ]ὴν ἔχει πᾶσαν. l[5] Βεβαιωτὴς Ἀττίνας Ἀνδρονίκου. Ἡ ὠνὴ ἐ[γένε]το μηνὸς (...) l[7] (...) Μάρτυρες δι[καστῶ]ν Λυσανίας l[8] Σικίττου καὶ τῶν ἄλλων (...); *SEG* LIII 613, 19-27.

[24] Further support for the cash sale principle.

[25] The μάρτυρες δικαστῶν are not of interest for our purposes in this article.

[26] *SEG* XLI 558, Amphipolis, 357/56 B.C.: [Ἀ]γαθῆ τύχη. (?) ἐπ[ρία[2]τ]ο τὴν οἰκίαν παρὰ Θεοδώρο[υ, l[3] ἧι] γείτων Κλεόδαμος, δρα[χ[4]μῶ]ν δισχιλίων ὀκτακοσ[ίων l[5] κατ]ὰ τὴν συγγραφὴν τ[ὴν παρὰ l[6] ...]μωνι. Μάρτυρες (...)l[7-9] (date). Cf. also no. 557, 18-19.

[27] Finley 1951, 31; Wolff, 1953, 417; Hennig 1987, 168.

[28] *SEG* XXXVIII 637 and 640, Olynthus, 352/51 and 350/49; first edited by Robinson; see the recent edition by Hatzopoulos 1988, 58-60.

[29] Robinson, *TAPA* 62, 1931, 42f. (no. 2), Olynthus 350/49.

[30] Robinson, *TAPA* 69, 1938, 51f. (no. 5), Olynthus 355/54; see Hatzopoulos 1988, 61f. On all four texts, see Youni 1996.

with sale seem to originate from sale documents that were filed to the register by the purchasers, but usually the excerpts published on stone do not tell us the reasons for the transactions – whether definitively to alienate the property or to hedge a loan by *prasis epi lysei*. From the Greek poleis not a single example of an original private sale contract is preserved, [31] either with or without condition of release. The only example of a loan document with *hypothēkē* is a maritime loan from Athens, Dem. 35, 10-13.

The prevailing opinion is that the documents from Northern Greece represent real sales unless security is explicitly mentioned.[32] If this is correct, what sense did it make to set up a slab of stone on the property? Possibly the buyers wanted to announce that ownership had changed when the purchased estate was vacant or leased, or when the house was rented to a third person. Less likely is that the sum paid for the house was a matter of pride to its new owner.[33] I think the question has yet to be solved. Apart from explicit wording, we can only determine whether it was a real sale or security that was documented on stone from the circumstances of the transactions, which are seldom transmitted. In the remainder of this section, I shall discuss four – feasible – examples, three with two corresponding documents each (2-4) and one with peculiar terminology (5-7).

2) *SEG* XLI 564, which comes from Amphipolis, 350-200 B.C.,[34] could conceivably be a *prasis epi lysei*, although the phrase itself is not explicitly stated in the text. The slab, inscribed on both sides, was built into a wall; side B was the last that was visible. The older text, side A, tells us that (most likely)[35] Derdas had bought the house for 170 stateres. The name of the seller is lost. It appears that a plain sale has been documented here. But from side B we might infer that Derdas was only the creditor; he might have bought the house *epi lysei*. The debtor (if identical with the seller from side A) later rebought the house for the same price, for 85 "heavy" (double) stateres; his name too has been lost from side B.

The identification of the seller's name (A, line 2) as that of the buyer (B, l. 1) is probable because of the *kata ton nomon* clause (B, l. 5-6), which is unique in the sale documents from Northern Greece. *Nomos* in commercial transactions does not refer to any statute, but rather to standard business practices, e.g. the *nomoi*

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[31] The Mylasa documents (*IK* 34/35) use a παραχώρησις form, see below, n. 60. For the alternate form ὠνὴ ἐν πίστει in the papyri, see Pestman 1985.

[32] Faraguna 2000, 103.

[33] Nevett 2000, 334.

[34] *SEG* XLI 564: (Side A) Ἀγαθῆι τύχηι. Ἐπ[ρίατο Δέρδας(?) Ἀρπά|²λου τὴν οἰκίαν [παρὰ *τοῦ δεῖνος*] |³ ἧι γείτονες Νικ[όλαος, *ὁ δεῖνα*, Κοι|⁴ρανίδης, Πολυ|[... χρυσῶν] |⁵ Φιλιππείων ΗΡΔΔ. [Βεβαιωταὶ .....]|⁶ρης Ἀστία Πρωτ|[.....] |⁷ Μάρτυρες (...) (Side B) [*Ὁ δεῖνα* ἐπρίατο τὴν οἰκί]αν παρὰ Δ(έ)ρδα, ἧι |² [γείτονες *ὁ δεῖνα*, Ν]ικόλαος, στατήρωγ |³ [χρυσῶν Φιλιππεί]ων μεγάλων ΡΔΔΔΠ |⁴ [..... ἐ]πὶ Ἡρακλεοδώρου ἰε|⁵[ρέως .....]δης κατὰ τὸν νό|⁶[μον (...).

[35] See the note in *SEG*.

parathēkōn or *arrabōnōn*.[36] In our case we seem to have a *nomos*, a clause in security contracts, about releasing pledged property after reimbursement. Finally, we must address the question of why the debtor had the repurchase of his house documented on stone (side B) instead of simply removing the slab containing the mortgage inscription (side A) from the wall. Maybe the house was rented to someone and therefore the landlord's free ownership was not manifest to the public, or perhaps the switch from 170 simple to 85 double stateres was the reason for the second inscription. In B (l. 1), however, a buyer different from the seller in A (l. 2) should not be ruled out; Derdas might have bought the house from X (side A) and resold it to Y (side B) for the same price.

3) In *SEG* XLVII 999 from Tyrissa, which dates to after 200 B.C., we have excerpts of two sale documents, l. 1-13 and 13-25, integrated into one text.[37] The basic formula very closely follows that of the register from Mieza,[38] only the receipt of the price is missing; the problem of the *basilikoi dikastai* is not relevant here. As usual the inscription starts with the later transaction (l. 1-13) and is followed by the earlier one (l. 13-25). The deal begins with Philagros buying a vineyard from Philippos for 45 stateres (l. 13-25). The later document (l. 1-13) reveals that Philagros had died in the meantime; it was not he, but rather his widow, who sold the estate jointly with a certain Boukartas. While still alive, Philagros had granted co-ownership to this Boukartas (l. 3-4), probably his son. This fact makes it clear that the first transaction was a real sale. But Polyainos, the buyer in the second transaction, may have only been the creditor, who bought the property *epi lysei*. Indeed the price of 40 stateres (l. 8) instead of 45 (l. 16-17) need not have been the full value of the estate.

Retention of the original guarantor, Nikanor (l. 18-19), might have been the reason for integrating the first sale document into the second. The witnesses differ here except for one. Normally no guarantors appear in inheritance cases,[39] but Boukartas became co-owner already in his father's lifetime. The stone, however,

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[36] There is a parallel in a sale document from Camarina(?), *SEG* XLVII 1435, 6, which is most striking because it too was a repurchase of encumbered property. Similar wording is also used in a register entry for a sale subject to redemption (PDura 15 a 6, 195 B.C.: ἀποδώσω λύσιμα κατὰ τὸν ν[όμον ...), quoted by Pringsheim 1950, 107 n. 12. For the use of *nomos* in *parathēkē* contracts and sale deeds with *arrabōn*, see Jakab 2005, 202-08; on *nomoi tōn hypothēkōn* in the papyri in particular, see p. 205.

[37] *SEG* XLVII 999: [--- ἐπρίατο Πολ]ύαινος τὰς ἀ[μ|[2]π]έλους τὰς Βουκάρτα κ|[3]αὶ Φιλάγρου παρὰ τῆς Φιλά|[4]γρου γυναικὸς καὶ Βουκάρ|[5]τα, δίκης γενομένης |[6] [προς] τοῖς βασιλικοῖς δικα[σ|[7]τ]αῖς, στατήρων χρυσῶ[ν |[8] τ]εσσαράκοντα· μάρτ[υ|[9]ρες τούτων· (... |[13] ...) ἐπρίατο Φίλ[αγ|[14]ρος] τὰς ἀμπέλους π[αρὰ |[15] Φι]λίππου τοῦ Χιωνίδα σται|[16]τήρων χρυσῶν τεσσαρ|[17]άκοντα πέντε, αἷς γείτ|[18]ων Ἀτ[τ]ίνας· βεβαιωτ[ὴς |[19] Ν]ικάν[ωρ]· (... |[20-25] date, witnesses).

[38] See above, n. 23.

[39] Hatzopoulos 1988, 26; 1991, 58. Since heritage was officially controlled, an heir who was selling inherited goods was not obliged to offer surety.

could simply have indicated the change in ownership of a vineyard that was not farmed by the sellers, Boukartas and his mother, or the buyer, Polyainos, but instead leased to a third person.

4) *SEG* XXXVIII 673 and 672[40] both come from central Chalcidice (Stolos?) and date to 351/50 B.C. They are not connected by an identical estate, but by one of the persons involved. The form is Olynthian, which differs from that of Amphipolis. Instead of *epriato* the excerpts have a heading *ounē* (= *ōnē*, buying; the term *eutheia* will be explained below in section 6). In August 351 Nikon sold a house to Menippos for 232 drachmae (no. 673), in April 350 the same Nikon bought four houses from Dinnys for 1,000 drachmae (no. 672). From this last transaction we have more specific details: Dionysios, Nikon's brother, formerly had "hypothecated" the four houses to Dinnys. Youni has already conjectured that the word ὑπέθετο (672, 9) could indicate a *prasis epi lysei*.[41] As Harris determined, in Athens the terminology differs depending on whether it is representing the perspective of the creditors or the debtors;[42] here too, Nikon, belonging to the debtors, is using the less forceful term.

Nikon seems to have inherited the four houses when his brother died. It is probable, to my mind, that he wanted to clear the family property of debt. Since he was not the original debtor, he did not settle for simply removing the stone, which was most likely set up by the creditor Dinnys. Rather, he set up another stone to document publicly that he had "redeemed" his houses – a case, to my mind, similar to *SEG* XLI 564 (above, section 2). Most strikingly, Nikon demanded three guarantors for the purpose of ceding the full rights on his houses to him (672, 12-13). With consent of Nikon's late brother, the creditor Dinnys could have repledged the properties to further persons; Nikon, then, wanted to be sure to free his houses from any mortgage. The whole transaction demonstrates an elastic view of ownership as a position that shifted according to function. In Roman law it was impossible to buy one's own property. The Greeks, however, used the form of a sale not only to create security, but also to terminate it. Incidentally, if Dinnys had been in possession of a deed of loan with a *hypothēkē* clause instead of a sale on release, the case would have been the same.

There is one further observation to be made regarding the earlier transaction, no. 673, where Nikon acted as vendor. As in *SEG* XLVII 999, 1-13[43] there is no

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[40] *SEG* XXXVIII 673: Θεός. l[2] Οὐνὴ εὐθέα. (date)l[4] Μένιππος Θάμωνος παρὰ Νίκων[ος] l[5] τοῦ Κτήσωνος οἰκίην ἐξῆς Διl[6]ονυσίο τοῦ ᾽Αννίκαντος καὶ τὸ l[7] ὑπερῷον 88XXXΔΔ. Μάρτυl[8]ρες (...) and 672: Θεός. Τύχη. l[2] Οὐνὴ εὐθεῖα. (date)l[3] Νίκων Κτήσωνος παρὰ Δίννους τοῦ Ποττl[4]εος τὰς οἰκίας ἐμ πόλει (... l[5-9] neighbours) ἃ ὑπέθε⟨θε⟩*vac*το Διονύσιος ὁ Κτl[10]ήσωνος Διννῦδι Ποττεος ἐπὶ Νίl[11]κωνος τοῦ ᾽Οπώριος ἐπιστάτεος l[12] *v* Ψ: Βεβαιωταὶ (...) l[14] Μάρτυρες (...).

[41] Youni 1996, 143f.

[42] See above, n. 11.

[43] See above, n. 39; cf. also below, n. 45.

guarantor. Nikon seems to have inherited that house too. It is possible that Nikon did not really intend to sell the house, rather to mortgage it; he might have taken up a loan on that house to repay later the debts to Dinnys that were backed by the four houses, which he inherited from his brother Dionysios (672, 9-10). The use of four houses as security on a loan of 1,000 drachmae fits squarely with 232 drachmae secured by one house. The purchase prices could have been higher. On the other hand, we do not know the individual values of the houses.

5) The last text, *SEG* XXXVIII 671[44] from Stolos(?), 350/49 B.C. also follows an Olynthian form. It is interesting because of the peculiar term *ounē katochos* (l. 2) (roughly, "a 'bound' purchase"), which will be explained shortly. The slab was found in a vineyard. It was reused for the present inscription after the earlier one had been carefully erased. One year after Nikon's transaction (above, section 4) Glaukias sold farmland, vineyards and townhouses for 300 drachmae to Apollodoros, again without a guarantor. This last detail is in no way peculiar because the text mentions that Glaukias had inherited the entire fortune from his father Straton (l. 7-8).[45] Nevertheless, three peculiarities remain: 1) the price of 300 drachmae seems very low for the considerable amount of real estate. In the documents discussed in the previous section, just four houses were used as security on a loan of 1,000 drachmae, and one house presumably for 232 drachmae. The value of Glaukon's properties seems to have far exceeded the 300 drachmae established as a purchase price.[46] 2) In contrast to all other entries and documents, the specific location of the properties in relation to the neighboring estates is not given. 3) Finally, only this inscription bears the heading *ounē katochos*. This term may tell us something about the background of the sale document and the kind of transaction with which we are dealing.

6) Until now, Hatzopoulos' explanation of the term *katochos* in his *editio princeps* has gone uncontested.[47] In contrast to *ounē eutheia* (achat direct), which was in his opinion a purchase that immediately resulted in acquisition of ownership, *ounē katochos* (achat ferme) was a definitive purchase without the possibility of repurchase. Either term, in his opinion, indicates a real sale, not involving security. From a legal point of view this distinction is unsustainable. If we follow Hatzopoulos' (unproven) presumptions, the immediate and the definitive purchase are one and the same thing.

We must therefore look more closely at these two antithetical terms. The adjective εὐθύς, poetically ἰθύς, does not appear elsewhere in sale transactions. In

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[44] *SEG* XXXVIII 671: Θεός. Τύχη ἀγαθή. Οὐνὴ l[2] κάτοχος. (date) l[4] Ἀπολλόδωρος Πόριος παρὰ l[5] Γλαυκία τοῦ Στράτωνος γέηι, l[6] ἀμπέλους, οἰκίας τὰ ἐν l[7] πόλει, πάντα ἃ ἔλαβε παρὰ Σ[τρά]τωl[8]νος τοῦ Ἱππίω 888. Μάρτυρες l[9-11] (...). On this inscription, see also Thür 2008.

[45] See above, n. 39 and 43.

[46] Hatzopoulos (1988, 26) is likewise suspicious of the low price, but in my opinion, uncertainty about the size of the properties is not a sufficient explanation.

[47] Hatzopoulos 1988, 64.

Athens a *euthydikia* is a 'straight' lawsuit, one without objection by *diamartyria* or *paragraphē*.[48] In Homer, I would argue, to utter a 'straight' or the 'straightest' *dike* means proposing a judgment, which nobody in the circle would contradict.[49] A 'straight' buy, once we have sufficiently accounted for the antithesis, could be considered a "smooth" transaction, i.e. one that does not face objection from any third party.

We have better evidence for the *ounē katochos*, a purchase that is 'bound' by something (to translate the term *katochos* in a neutral way). Hatzopoulos' use of magic binding in sacral texts and curse tablets for explanation is unhelpful.[50] In connection with transfer of real estate, I found the term *katochimos*, related to *katochos*, in three significant sources: a court speech from Athens (a), an inscription of Mylasa (b), and in some Graeco-Egyptian papyri (c) – a potential problem for scholars, who deny the 'unity' of Greek law, especially when explaining the enigmatic *ounē katochos* in an inscription from central Chalcidice.

a) In Isai. 2, 28[51] we find the term in the Attic form κατοκώχιμος.[52] In his lifetime Menekles, whose succession was in dispute, was guardian of a ward. When the boy came of age, Menekles had to return the fortune to him, but was out of ready money. Menekles therefore had to sell off land. His brother, who (most likely) had a security on the property,[53] objected (ἠμφισβήτει) and barred the transaction. As a result, Menekles had to exclude (ὑπολείπεσθαι) the share claimed by his brother from being sold, thus suffering a great financial loss.

Menekles' brother had tried to establish the property as *katochimon* so that the former ward could seize it. But Menekles managed to sell his share and – in vain – charged his brother for the loss. Since the property had been mortgaged before, perhaps to the brother and also to the ward,[54] κατοκώχιμον γένηται cannot mean, "in

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[48] See Corbetto Ghiggia 2003, 426.

[49] Here I need not reopen the discussion about Hom. Il. 18, 508 and 23, 580 (see Thür 2007, 186).

[50] Hatzopoulos 1988, 64 n. 3; [for a similar *katochos* in Dionys. Hal. *Isocr.* 9 see Thür 2008, 467 n. 13].

[51] Isai. 2, 28f.: ... διεκώλυε τὸ χωρίον πραθῆναι, ἵνα κατοκώχιμον γένηται καὶ ἀναγκασθῇ τῷ ὀρφανῷ ἀποστῆναι. ἠμφισβήτει οὖν αὐτῷ μέρους τινὸς τοῦ χωρίου ... καὶ ἀπηγόρευε τοῖς ὠνουμένοις μὴ ὠνεῖσθαι. (29) κἀκεῖνος ... ἠναγκάζετο ὑπολείπεσθαι οὗ ἠμφισβήτησεν οὗτος.

[52] The best manuscripts have the Hellenistic form *katochimon*. Following Hesychius (κατοκώχιμον· κατόχιμον, ἐνέχυρον), editors emend to the Attic form, see Wyse 1904, 259. For the etymology, see H. Frisk, Etym. Wörterbuch 1973, s.v. ἔχω (I 603) and ὀκωχή (II 375).

[53] Alternatively, the brother could have been co-owner; see Wyse 1904, 259; Avromović 1997, 70 n. 32

[54] The speaker is not clear on this point, see Wyse 1904, 258f.; Avramović 1997, 69-71. On *apotimēma* (which we would expect here, although it is not mentioned at all), see Wolff 1954. The crucial argument rests on ἀποστῆναι. In my opinion, Menekles would have to "shrink" from the land, because it was pledged to the ward. The land substituted the debt

order that it might be held as a pledge."[55] The brother, as pledgee, was able to prevent the owner Menekles from selling the land for a good price and easily paying down his debt to either creditor, i.e. to the ward or to the brother. After the brother's protest (ἀμφισβητεῖν) the buyer got ownership of the property no longer encumbered to the ward, but still encumbered to the brother. Therefore *kato(kō)chimos* must mean a property that is partially "bound, blocked up by protest, under litigation."

In a similar case, in Dem. 53, 10, the creditor Arethousios had successfully prevented the debtor, who was his brother, from further encumbering a property that the brother had pledged to him.[56] Nevertheless the land did not become *katochimos* because the brother, without security, got the money he needed through a loan by a third person.

b) Numerous inscriptions documenting the sale and lease of land are known to us from Mylasa (*IK* 34/35).[57] In an honorary decree for Iatrokles (no. 109; 76 B.C.) we find the words (restored with a high degree of plausibility) that we have just seen in Isai. 2, 28 "properties, which became *katochima*."[58] The same Iatrokles appears as the vendor of some properties in a dossier of sale and lease inscriptions (no. 202-204).[59] It is very probable that there is a connection between the properties mentioned in the honorary decree and the circumstances of Iatrokles' land transaction. Iatrokles was honored (in addition to other benefactions) for having imparted properties, which became *katochima*, to the phyle of the Otōkondeis. He had sold several properties to the phyle, which leased them outright to a third person. What happened in the course of the transactions is recorded in the *embateusis* document (204, 9-10), transferring possession in accordance with a sale

(see below, section III). When his land would have become κατοκώχιμον (blocked up by his brother's protest), Menekles had to sell it as it was (encumbered to his brother), in order to satisfy the former ward. For this reason, he was in danger of fetching a price that did not cover the former ward's debt. After foreclosure Menekles would have lost all his rights on the land, and his opponent, the former ward instigated by Menekles' brother, would have made the full profit. In course of the sale transaction, if the brother would have accepted the money that Menekles owed to him, Menekles could have sold the property free of any encumbrance, to his full profit.

55 Thus translated in Loeb (Forster); it seems to be influenced by Hesychius (see above, n. 52). More precise is Aelius Moeris, quoted by Wyse 1904, 259, in his *Lexicon Atticum* (2nd-3rd cent. B.C.; ed. Hajdu 1998): κατοκώχιμα· τὰ κατεσχημένα ἐνέχυρα, Ἀττικοί – κατόχιμα Ἕλληνες. The meaning here is that the properties are already encumbered and only become *katochima* (blocked up, bound) through subsequent activity.

56 On this case, see Harris 1988, 353.

57 Blümel 1987.

58 *IK* 34, 109, 8: ... ἀναδιδούς τε τὰ γεινόμενα κατόχ[ιμα] ... The last word has been restored by W. Froehner, *Inscr. Louvre* 1865, followed by L. Robert, *Op. Min.* III 1969, 1491; Blümel 1987, 35.

59 On the form of the so-called 'lease inscriptions,' see Behrend 1973, 157f.; Blümel 1987, 74-76.

contract (*parachōrēsis*) that was enacted, but not preserved.[60] Then an obstruction occurred: Melanthias came forth to claim (διαμφισβητεῖν) that a portion of the land to be sold to the phyle belonged to him, or was pledged to him (technically it makes no difference). He filed a lawsuit against Iatrokles that had yet to be decided (κριθῇ, l. 11).

Iatrokles did not desist from selling the land, but he inserted a clause into the contract excluding (*hypoleipesthai*) the share under dispute. From a juristic perspective, Iatrokles implemented a maneuver that was technically perfect for overcoming the obstacle of a third person claiming a right on the land, an act that could have prevented the sale. After he had won the case Iatrokles generously passed the recovered share to the buying phyle, most likely without additional charge, and was honored. In the honorary decree, the properties "blocked up by protest" were concisely labeled *katochima*.

This case has obvious connections with the Isaeus text: real estate about to be sold falls under dispute (*di-amphisbētein*); a share of it is blocked up (*katochimon*) because of a protest; that share is then excluded (*hypoleipesthai*) from being sold.

c) Further parallels to *katochima* can be found in contemporary Greek papyri from Egypt. Preisigke has already listed numerous texts to be translated as "blocked up" ("was in Verfangenschaft ist, gesperrt").[61] A private lawsuit[62] or public debts constituted reasons for "blocking up" land;[63] in Roman times a *katochē* entry in the *bibliothēkē enktēseōn* secured the rights of third persons.[64]

7) Let us now return to the *katochos* inscription from the Chalcidice (*SEG* XXXVII 671) for a brief description of events. Glaukias had inherited several properties from his father. He "sold" them *en bloc* at a cheap price to Apollodoros without specifying their locations, a circumstance that already hints more at a temporary measure than at real sale.

The purchase was registered as *katochos*. It appears that some of the lots became *katochima*, which means that a secured creditor had protested and might have filed a lawsuit. But the creditor could not prevent the sale outright, only block up the share of his claim. If the creditor had won, the price would have gone down; otherwise, it would have risen. The buyer, Apollodoros, had agreed to the price in spite of the protest and had taken the risk of receiving a smaller portion of the land, which means that the transaction was for security and was not a real sale. In a real

[60] *IK* 34, 204, 9-12: ... εἰς ἃ καὶ παρακεχώρηκεν αὐτοῖς l[10] [ο]ὐθὲν ὑπολειπόμενος ἑαυτῷ ἐν τοῖς τόποις τούτοις πλὴν τῶν διαμφισβητουμένων l[11] [π]ρὸς Μελάνθιον Πόλλιος· ἐὰν δὲ κριθῇ καὶ τὰ διαμφισβητούμενα κατὰ Ἰατροκλῆν, ἔσονται l[12] [κ]αὶ εἰς ταῦτα ἐμβεβατευμένοι κυρίως κατὰ τήνδε τὴν ἔμβασιν·

[61] F. Preisigke, Fachwörter 1915 and Wörterbuch 1925ff. s.v.

[62] PFrankf. 7, verso l. 8-9 (Faijum, after 218/17 B.C.); see the editor, H. Lewald, p. 46; cf. recto, col. I 15-18.

[63] PTebt. I 60, 102-03 (118 B.C.) is a typical example; cf. nos. 61b 253; 64b 6; 71, 65; 72, 226 of the volume and p. 555f.

[64] Wolff 1978, 226 and 236; see e.g. MChr. 314 (Oxyrhynchos, 97 B.C.).

sale, the price would have been fixed after the trial was over. However, as creditor, Apollodoros could have easily calculated whether the share of the properties not under dispute would cover the loan given under security. Thus Glaukias got his loan forthwith and Apollodoros was secured in spite of a pending lawsuit.

All of these subtleties are concisely articulated through the terms *ounē katochos*, "a buy blocked up," that means a buy of a *chōrion katochimon*, of "a property 'blocked up' by protest." Conversely, in Olynthus and her surroundings, a sale transaction that was not protested by a third person was registered as *eutheia*, i.e. as a "smooth" purchase.[65] Finally, the antithetical terms themselves have nothing to do with 'real' sale versus *prasis epi lysei*. Every case depended on the specific circumstances: the transaction between Glaukias and Apollodoros seems to have been for security, whereas those of Menekles (Isai. 2, 28) and Iatrokles (*IK* 34, 109) were real sales.

III. This study began with the simple question of whether the numerous sale inscriptions from Northern Greece originate from sale or mortgage contracts. For texts dealing with plain sale, an answer can be given only by conjecture. One inscription, the Glaukias case, *SEG* XXXVII 671, attracted special attention because of the peculiar heading *ounē katochos*. This term led us to texts dealing with alienation or multiple charges of encumbered real properties. In Greece, procedural remedies for protecting or enforcing ownership are the same as they are for securities.[66] Thus, our observations on attempts to "block up" portions of properties from being sold or encumbered may explain how, in practice, multiple charges worked in a system based on substitutive real security. Of course, substitutive security often brings about inequities: usually the simple exchange of property for debt places one of the parties (primarily the debtor) at a disadvantage. All over the Greek world, the developing economy aimed to avoid this phenomenon by taking individual measures from case to case. First, in the maritime loan mentioned above in section I (Dem. 35, 10-13) the creditors formulated express provisions so that they might – without pressure by any statute – sell the encumbered goods with the possibility of further action for the *elleima* (i.e. if the sale price did not cover the amount of money owed).[67] As Finley has correctly noted, and there is some evidence

[65] In 349 B.C. Philipp II conquered the eastern Chalcidice. An increase in sale or credit transactions before that date probably reflects these events (see Faraguna 2000, 197s.); frequent unsettled protests might have brought about the differentiation between "smooth" buys and "blocked up" ones in the headings of the register entries too.

[66] Correctly observed by Finley 1953, 484 (1968, 548) for Athens; indirectly admitted also by Harris 1988, 376; see above, section I. [My argument is protection, not 'definition' of ownership.]

[67] Finley 1953, 486f. (1968, 552) and n. 34. I am doubtful of Finley's opinion on *apotimēma*, but cannot go into details here. Outside Athens, *on special occasions*, there is also *hyperochē* regulated (Finley 1953, 489 n. 9, [a few additions in Harris' response]) or stipulated (Thür 1987, 237f. n. 32: *pleonasma* in a security deed for a maritime loan,

to generalize his observation, the Athenians stayed with their basic principle of substitutive security,[68] which was only occasionally mitigated by agreements of the parties.[69]

I disagree with Finley's contention, however, that parties aimed for collateral security. Finley incorrectly believed that support could be found for his argument in the *poletai* record on the confiscated house.[70] The text does in fact document multiple charges on one and the same property, but the collateral effect was achieved by confiscation and public sale by auction, as Finley himself cautiously admitted.[71] Yet nowhere in the realm of Greek private security management do we find an attestation for compulsory sale, which would be necessary for substantiating the idea of collateral security.[72] Therefore, in my opinion, consent of the parties must be understood in a different way than Finley has posited: not only did the debtor (i.e. the owner remaining in possession) and the subsequent creditor have to agree, but so did the prior creditor (or creditors). Otherwise they could protest (ἀμφισβητεῖν) and "block up" the deal,[73] so that the debtor had to exclude (ὑπολείπεσθαι) from encumbrance the amount owed to the prior creditor. As a result, a rank among multiple creditors automatically came into existence.[74] Prior rights to property might have been created amicably with the clause "by however much more it is worth" (ὅσῳ πλείονος ἄξιον).[75]

The character of substitutive security becomes apparent when a debtor, who had charged his property to several creditors, went into default. Law ruled no compulsory sale by auction. According to the cash sale principle, every creditor had a [separate!] claim of ownership to recover his goods. He could "eject" the present possessor, but by the same turn it could happen to him.[76] In reality, bargaining would

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PVindob. G. 40.822, Alexandria, 2nd cent. A.D). Prior to this maritime loan, *elleima* and *hyperochē* / *pleonasma* (the sale of the encumbered goods taken for granted) are nowhere mentioned in the same document. Only in Roman times did *hypothēkē* really become collateral.

68 Finley 1953, 490 (1968, 557).

69 Finley 1953, 484 (1968, 548f.).

70 See above, n. 18.

71 Finley 1953, 480f. (1968, 544).

72 Finley 1953, 487 (1968, 552).

73 For preventing encumbrance, see Dem. 53, 10 (above, n. 56); for partially preventing alienation, see Isai. 2, 28; *IK* 34, 204, 9-10 (see above, sections II a and b).

74 Finley 1953, 482 (1968, 546) observed that in the *poletai* record there is no hint of a rank among the last three creditors. The official character of the auction and the policy to fix the lowest bid could explain this phenomenon. I do not see any parallel with the private enforcement of securities. Also Dem. 37 is not a case of legal enforcement, but rather of bargaining, *pace* Harris 1988, 376.

75 Finley 1953, 482f. (1988, 547) is warning to generalize this kind of agreement. It is pure conjecture to combine it with an agreement to sell encumbered goods after foreclosure.

76 For the risks of the procedure of *dikē exoulēs*, see Thür 2003, [disregarded in Harris' response].

have commenced: who was ready and able to pay the claims of the other creditors taking into account the value of the property that he would recover? A creditor, who achieved a higher rank through protest, had first choice. He could demand to be paid in full by the subsequent creditors or he could pay off their claims and recover the land. A creditor of inferior rank would abandon his rights to the property when its worth was less than the claims of all the colleagues whom he had to satisfy. So the effects of collateral security were achieved by means of the age-old principle of substitution. Admittedly, there is no direct evidence for my conclusion. But when ownership and security as parallel institutions are viewed alongside the concept of "blocking up" that has just been brought to light, a degree of probability is at least achieved.

What happened when a debtor had secretly encumbered his property to several creditors? This very scenario seems to have happened in the Pantainetos case (Dem. 37), where the debtor was in fact allowed to do so at no disadvantage. In the Greek world (and here we can generalize), there were one or more guarantors involved in nearly every sale – this may have been one reason to formulate also encumbrances as sales. The guarantor, a propertied person who knew the circumstances of the land to be bound, acted as an additional security when unforeseen creditors surfaced.[77] In the system of substitutive security, multiple charges on property could only have worked with this aspect of personal security in the background.[78]

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[77] For the role of Mnesikles in the Pantainetos case, see Harris 1988, 373f.

[78] I thank Jessica L. Miner for checking my English.

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RESPONSE TO GERHARD THÜR

I am glad to say that there is much relating to the topic of real security in Greek Law about which Professor Thür and I agree. Most important, Thür accepts my position, now followed by many scholars, that "*hypotheke* (roughly 'encumbrance') and *prasis epi lysei* ('sale on condition of release') do not differ in substance, only in terminology."[1] In my response, I will concentrate on points where I differ with him. I divide my response to Professor Thür's rich and stimulating paper into three parts. In the first I discuss the nature of real security in the law of Athens and other Greek *poleis*. In the second I examine Thür's claim that "our modern concept of 'absolute' and 'exclusive' title does not conform to Athenian legal thought." In the third and final part I make some remarks about Thür's discussion of the documents from Northern Greece. In an appendix I present the evidence showing the role of statutes in fostering economic activity.

I) There are two basic forms of real security: substitutive and collateral.

In the substitutive form of security, the object pledged as security for the obligation is viewed as equivalent to the obligation and acts as a "substitute" for the obligation. Consequently there is no possible difference between the monetary value of the obligation and the market value of the security. This has two important practical implications. First, if the creditor distrains upon the security as a result of the debtor's default, then sells the security and does not receive the full amount of the obligation, he has no right to demand from the debtor the difference between the amount of the debt and the sale price of the security. Conversely, if the sale price of

[1] This is the main argument in Harris (1988), now reprinted with "Afterthoughts" in Harris (2006) 163-206. This point in my analysis has been accepted by Gauthier (1989) 396-97, Todd (1993) 254-5, Hatzopoulos (1991) 59, MacDowell (2004) ("earlier work has now been superseded by Harris 1988 and 1993"), Youni (1996), and Rhodes and Osborne (2003) 179. Although I accepted Pringheim's principle of cash sale in Harris (1988), I am now less convinced by this theory than I was twenty years ago. See, for example, the critique of Millett (1990) 175-82, apparently unknown to Thür.

I basically agree with Thür about the unity of Greek law and the existence of basic principles "followed the laymen who skillfully drafted sales, leases, loans, mortgages and other contracts." He might have cited the important study of Chaniotis (2004), which traces these principles in the area of property law in inter-state arbitration.

I would like to thank Selene Psoma and Fred Naiden for reading over a draft of this essay, catching several errors, and making useful suggestions.

the security is greater than the amount of the obligation, the debtor has no right to demand from the creditor the excess over the amount of the obligation.[2] In this form of security the creditor aims to gain possession of the security for his personal use, not to obtain the cash value of the security. Second, because there can be no difference between the amount of obligation and the sale price of the security, a debtor cannot pledge the security for two different obligations, with the first creditor having the right only to the amount of the sale price equivalent to the obligation, the second creditor having a right only to any excess amount resulting from the sale of the security.

In the collateral form of security the creditor does not aim to gain possession of the security but to obtain the cash value of the security to pay his obligation. The practical implications of this approach are very different. In the event of default, the creditor still has the right to seize and sell the security, but he has the right only to the amount equivalent to the debtor's obligation (and any penalties incurred). If there is an excess amount resulting the sale, the debtor has the right to the cash remaining after the obligation is paid off. On the other hand, if the cash obtained through the sale is less than the amount of the obligation, the creditor has the right to demand the difference from the debtor. In this type of security the creditor normally attempts to evaluate the market value of the security to ensure that it greatly exceeds the amount of the obligation.[3]

Finley believed that the Athenians and other Greeks knew only the substitutive form of security because their level of economic development remained at a low level for various reasons. Because the Greeks did not have extensive markets and credit relations, they did not think in market terms. According to Finley, for "the collateral idea to dominate, a relatively fluid credit economy is required, in which everything is readily translated into money; in which, in other words, all goods and commodities may have an immediate market value and are so conceived by the society." As a result, "Athenian security was normally substitutive in character."[4] In particular, Finley pointed to Demosthenes' inventory of his father's estate when he claimed that the orator calculated the value of the twenty bed-makers in terms of "the size of the debt they secured" and "does not think of re-calculating the value of the twenty slaves in market terms."[5] Finley's view was not original; Manigk had

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[2] Finley (1985) 115: "The creditor took the property in case of default and that was the end of the matter."

[3] For a summary of the differences between the two types of real security see Finley (1985) 115. Thür discusses only the rights of multiple creditors in real security but misses the crucial issue of the borrower's right to the excess and the creditor's right to collect any deficit. This invalidates much of his argument.

[4] Finley (1985) 115. Finley (1953) admitted that the *poletai* records appear to contain the first apparent example of collateral security. I questioned this view in Harris (1988) 366, note 62 (= Harris [2006] 184, note 62) but now am inclined to accept it.

[5] Finley (1951) 116. For the flaws in Finley's analysis of Dem. 27.9 see Harris (1988) 362-63 (= Harris [2006] 179-81).

taken the same position many years before.[6] I followed Finley's view in essays published in 1988 and 1993,[7] and Thür believes that I was correct to do so ("Following Finley (and others) Harris correctly points out that, in Athens, real security was substitutive in nature ('Verfallspfand')."). Thür does not observe, however, that I retracted my endorsement of Finley's position in my book published in 2006 without presenting detailed reasons.[8] His paper now provides me with a welcome opportunity to present the evidence showing that the Athenians and other Greeks did develop the collateral form of security.

Finley's belief that the Athenians and other Greeks did not develop the notion of collateral security was based on views about the nature of exchange in Ancient Greece.[9] Finley claimed that one could not speak of markets in the ancient Greek world because most exchange moved along networks among friends, kin or neighbors or through relations of dependence (clientship, tribute of subjects, etc.). The justification for his position is to be found in his *The Ancient Economy*.[10] Finley argued that one could not analyze economic activity in the ancient world in terms of a "world market" because such a market could not come into existence without "the extreme division of labour and the absence of household self-sufficiency."[11] Because "Neither predicate existed to a sufficient degree in antiquity," Finley argued that one could not view the ancient economy as "an enormous conglomeration of interdependent markets." Finley ruled out *a priori* the possibility that there might have been enough specialization of labor to create local and regional markets.

Although the Greeks did not develop vertical specialization of labor to any significant degree, there was a considerable amount of horizontal specialization in the Classical period. In Athens alone, there are over 170 occupations attested in the fifth and fourth centuries BCE. A high enough level of specialization therefore existed to create the conditions necessary for extensive commodity exchange in local and regional markets.[12] *Pace* Finley this meant that creditors did have a permanent market available where they could readily convert securities into cash and were therefore capable of thinking in market terms. The obstacle that Finley claimed was

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6 Manigk (1916).

7 Harris (1988) 356 and (1993). Thür does not appear to know the latter essay (reprinted in Harris [2006] 207-39), which *inter alia* demonstrates that Wolff's analysis of *apotimema* is based on a mistaken reading of several key passages.

8 Harris (2006) 239 citing Biscardi (1999) 173-98.

9 Thür does not examine the assumptions about the Greek economy lying behind Finley's views about real security.

10 Finley (1973) 34.

11 This phrase is taken from Berry (1967) 106.

12 For the evidence of horizontal specialization and its connection to the rise of permanent markets see Harris (2002b). For a more extensive analysis of markets in the Greek economy see Bressson (2007) and (2008) *passim*. Thür appears to be unaware of the earlier critique of Finley found in Bresson (2000).

responsible for preventing the emergence of the collateral idea did not in fact exist. I now turn to the evidence for collateral security overlooked by Finley.

1) Demosthenes 28.18
ποῖ δ' ἂν τραποίμεθα, εἴ τι ἄλλο ψηφίσαισθ' ὑμεῖς περὶ αὐτῶν; εἰς τὰ ὑποκείμενα τοῖς δανείσασιν; ἀλλὰ τῶν ὑποθεμένων ἐστίν. ἀλλ' εἰς τὰ περιόντα αὐτῶν; ἀλλὰ τούτου γίγνεται, τὴν ἐπωβελίαν ἐὰν ὄφλωμεν.

Translation: "To where would we turn if you should vote for any other verdict? To the property pledged as security to our creditors? But that belongs to them. To the excess (resulting from the sale of the security)? But that belongs to him if we owe the *epobelia*."

Demosthenes has brought a suit against his guardians for squandering his inheritance and tells the judges that if they vote against him, he will not have any property left. He claims that he has pledged most of his property as security to creditors so as to obtain loans for liturgies and other expenses. He assumes that if his creditors seize and sell this property, he will still have a right to the excess (περιόντα) from which he can pay Aphobos the *epobelia* for losing his suit.[13] He therefore assumes that he will have a right to any difference between the sale price of the security and the amount of his obligation to his creditors. On the substitutive approach to security, Demosthenes would not have a right to any excess.

2) *IG* ii^2 2670 = Finley (1985) no. 146,
ὅρος χωρίο προικὸς | Ἱπποκλείαι Δημοχά|[ρ]ος Λευκονοιῶς Τ· | [ὅσ]ωι πλείονος ἄξι|[ον] Κεκροπίδαις | [ὑπόκειται καὶ Φλυεῦ|[σι].

Translation: "Marker of a property (given as) dowry for Hippocleia, daughter of Democharis of Leuconoia, one talent. The excess value has been pledged as security to the Cecropidai and to the Lycomedai and to the members of the deme of Phlya."

3) *Hesperia* suppl.7 (1943) 1, no. 1 = Finley (1952) no. 147, lines 1-7.
ὅρος οἰκίας ἀποτε[τιμ]|ημένης προικὸς Ε[ἰρη?]|νεὶ Ἀντιδώρου Λευκονοιέως θυγατρὶ Χ δρα[χμῶν·]| ὅσωι πλέονος ἀξία ἐ[τιμήθ]|η Ἀγλαοτίμει ὑπόκε[ιται] | ΗΗ καὶ Γεφυραίοις ΗΗ| (. . .)

Translation: "Marker of a house pledged as security for the dowry of Eirene (?), daughter of Antidorus of Leuconoion, 1,000 drachmas. The excess value has been pledged as security to Aglaotimes for 200 drachmas, and to the *Gephyraioi* for 200 drachmas, and (…)."

In both of these arrangements, it is envisioned that the security would be sold in case of default and the excess of the amount over the amount of the first lien would be given to the other creditors. In others words, this presupposes a forced sale, not joint ownership by the creditors.

[13] On the nature of the *epobolia* see now MacDowell and Wallace in this volume.

4) *SIG*[3] 976, lines 64-68 – Law about Grain from Samos 200-150 BCE
ἐὰν δέ τις τῶν | δανεισαμένων μὴ ἀποδιδοῖ τὸ ἀργύριον ἢ πᾶν ἢ μέρος τι, τὸ ὑπόθεμα ἀποδόσθω ἡ χιλαστύς. καὶ ἐάν τις ὑπεροχὴ γένητα[ι], | ἀποδότω τῶι τὸ ὑπόθεμα δόντι. ἐὰν δέ τι ἐνλίπῃ, τὴν πρᾶξιν | ποιησάσθω ἐκ τοῦ ἐγγύου.

Translation: "If any of the borrowers does not pay back the money either the entire sum or a part, let the Chiliastys sell the security (*hypothema*). If there is an excess amount, let him return it to the person who gave the security. If there is a deficit, let him collect it from the person who provides the security."

5) *SIG*[3] 672, lines 64 – Decree of Delphi – 162-160 BCE
εἰ δέ κα μὴ ἀποδι|δῶντι καθὼς γέγραπται, τὰ ἐνέχυρα αὐτῶν τᾶς πόλιος ἔστω, καὶ οἱ ἐπιμεληταὶ ἀεὶ οἱ ἐγδανείζοντες κύρ[ι]|loι ἔστωσαν πωλέοντες. εἰ δὲ πωλείμενα τὰ ἐνέ|χυρα μὴ εὑρίσκοι τὸ ἀργύριον ποθ' ὃ ὑπέκειτο τᾶι πόλει, πρά|κτιμοι ἔστωσαν τοῖς ἐπιμεληταῖς ἀεὶ τοῖς ἐνάρχοις τοῦ | ἐλλείποντος ἀργυρίου αὐτός τε ὁ δανεισάμενος καὶ οἱ γενόμενοι ἔγγυοι, τρόπωι ὧι θέλοιεν πράσσειν, καθὼς καὶ τᾶλ[λ]α δαμόσια καὶ ποθίερα πράσσονται.

Translation: "If they do not pay back in accordance with what has been recorded, let their securities belong to the city, and the Overseers who made the loans have the power to sell them. If the securities once they are sold do not provide the money (i.e. the loan) for which they were pledged to the city, let the borrower and his sureties be liable to the Overseers for the remaining sum (which they can collect) in any way they wish to collect, in the same way as they do with other public and temple money."

As in the law from Samos, the security is not viewed as a substitute for the loan, but as providing cash from its sale. The debtor has the right to the excess. In both of these laws there is a forced sale carried out by public officials.

6) *SIG*[3] 364, lines 32-41 – Law of Ephesus about Debt (early third century BCE)
ὅσοι δὲ ἐπὶ | τοῖς ὑπερέχουσι δεδανείκασιν, εἶναι τὴγ κομιδὴν αὐτοῖς ἐκ τοῦ περιόντος μέρους τῶι | γεωργῶι, κἂν εἷς κἂμ πλείους ὦσι, τοῖς πρώτοις καὶ τοῖς ἄλλοις ἐπεξῆς, τὸν δὲ | [νό]μον εἶναι καὶ τούτοις καθάπερ καὶ τοῖς πρώτοις πρώτοις δανείσασιν. εἰ δέ τινες | [ὑποθέ]ντες ἄλλοις κτήματα δεδανεισμένοι εἰσὶμ παρ' ἑτέρων ὡς ἐπ' ἐλευθέροις | [τοῖς κ]τήμασι, ἐξαπατήσαντες τοὺς ὑστέρους δανειστάς. ἐξεῖναι τοῖς ὑστέροις | [δανεισ]ταῖς ἐξαλλάξασι τοὺς πρότερον δανειστὰς κατὰ τὸν συλλογισμὸν τοῦ κοινοῦ πο|[λέμου] ἔχειν τὰ κτήματα, ἐὰν δὲ ἐνοφείληταί τι αὐτοῖς ἔτι, εἶναι τὴγ κομιδὴν τοῖς | [δανεισ]ταῖς ἐκ τῆς ἄλλης οὐσίας τοῦ χρειστοῦ πάσης, τρόπῳ ᾧ δύνωνται, ἀζημίοις | [ἁπάση]ς ζημίας.

Translation: "All those who have lent money on the surplus (of property already pledged as security) can recover their money from the excess, whether there is one (creditor) or are more (than one), the first (lenders) and the others in order. The same rule applies to these as to those who made the first loan. If some have given property to others as security when borrowing money from others making them believe that

this property is unencumbered and deceive the later lenders, it is permitted for the later lenders to exchange places with the previous lenders taking into consideration the Common War and take possession of the property. But if there is still something owing to them, the lenders have the right to recover it from all the property of the borrower in whatever way they can without incurring any penalty."

Here again too the creditor has the right to demand any deficit between the price obtained by the sale of the security and the amount of obligation. In all these passages it is taken for granted that the security can readily be converted into cash. In an economy where there were permanent markets in most communities, that should come as no surprise. Thür claims that "the effects of collateral security were achieved by means of the age-old principle of substitution" but admits that "there is no direct evidence for my conclusion." The evidence examined above shows that there is no need to speculate about the bargaining among creditors in case of default to overcome the obstacles posed by the substitutive form of security. In fact, the one detailed account of bargaining among creditors, which is found in Demosthenes' *Against Pantaenetus*, makes it clear that creditors followed the collateral principle.[14]

II) Thür asserts that "our modern concept of 'absolute' and exclusive title doesn't fit to the Athenians' legal thinking. In their eyes ownership was an elastic, functionally divided position to be modified by mutual agreements between different parties." Because the Athenians had a different view of ownership, both the creditor and the debtor might view property pledged as security as belonging to both at once. Thür provides almost no evidence for this sweeping assertion, which collides with weighty objections on both theoretical and empirical grounds.

First, the theoretical grounds. In a seminal article A. M. Honoré examined the definitions of ownership found in lawcodes from very different legal traditions: British and American drawing on the common law tradition, French, Italian, and German shaped by the Civil law tradition, and the Soviet influenced by Marxist conceptions.[15] In each case there was broad agreement that ownership is "the greatest possible interest in a thing which a mature system of law recognizes."[16] He then listed ten incidents of ownership that are recognized in all these legal systems: 1) right to possess, 2) right to use, 3) right to manage, 4) right to income, 5) right to

[14] This is most obvious at Dem. 37.12 where one set of creditors states that the value of Pantaenetus' workshop is much more than the amounts of their two loans. In other words, they make a distinction between value of the loans and the market value of the security and do not regard the security as a substitute for the two loans. For a detailed analysis of these negotiations see Harris (1988) 370-77 (= Harris [2006] 190-99). For the reasons why the court sided with Nicobulus in his case against Evergus see Harris (2004) 253-56.

[15] Honoré (1961).

[16] In Harris (1988) 369 (= Harris [2006] 188) I wrote that ownership is an almost universal concept. At the time I was not aware of the work of Honoré providing the evidence for this view.

capital, 6) right to security, 7) transmissibility, 8) absence of term, 9) prohibition of harmful use, and 10) liability to execution.[17] Honoré did not confine himself to modern European systems, but also drew on work by anthropologists like B. Malinowski, whose field-work revealed that pre-state communities with low levels of technical specialization and social differentiation share the same basic conception of ownership.

Although different legal systems recognize the same basic rights of owners, they may differ in the following areas: 1) who is capable of exercising the rights of ownership? 2) what kinds of items can be subject of ownership? and 3) what are the restrictions placed on the rights of ownership? *Pace* Thür, Greek legal systems and modern ones did not differ in terms of their basic conceptions of the rights of ownership, but about these issues. For instance, foreigners could not own land in Athens and many other Greek *poleis* whereas they can in Modern Europe and North America.[18] In ancient Greece masters could own other human beings and exercise the rights of ownership over them; most countries in the world have now outlawed the ownership of human beings. In ancient Greece there were very few restrictions on the owner's rights over his land; today there are numerous zoning, building, and environmental regulations restricting the rights of owners.[19]

Second, empirical grounds. I have searched through the work of A. Kränzlein about ownership and property and find no view of ownership in the laws of the Greek *poleis* similar to the one adumbrated by Thür. In fact, Kränzlein builds much of his analysis on a passage from Plato, *Euthydemus* 301e-302a which defines ownership as having the power to do whatever one pleases with an object: "Do you consider then, he said, those things yours which you control and have the power to use as you wish? For example, an ox or a sheep would you consider them yours if you were free to sell or give them, or sacrifice them to any god you might wish? And those objects that are not like this are not yours? (…) It is just as you say: only things like this are mine."[20] This is very close to the definition given by Honoré.

Third, the Athenians and other Greeks often describe the act of pledging security as agreement of sale, which is an alienation of property, not sharing of property. In fact, in several *horoi* the creditor indicates that the act of hypothecation makes him the owner of the security, not joint owner (Finley nos. 1, 2, 2A). There is a word for common ownership in the Greek *koinonia* and words derived from it.[21]

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[17] For the exercise of these rights by owners over slaves in ancient Greece see Harris (2006) 250-51.

[18] For the rule and the exceptions see Hennig (1994).

[19] For public regulation of private property see Hennig (1995).

[20] ἆρ' οὖν, ἔφη, ταῦτα ἡγεῖ σὰ εἶναι, ὧν ἂν ἄρξῃς καὶ ἐξῇ σοι αὐτοῖς χρῆσθαι ὅ τι ἂν βούλῃ, οἷον βοῦς καὶ πρόβατον, ἆρ' ἂν ἡγοῖο ταῦτα σὰ εἶναι, ἄ σοι ἐξείη καὶ ἀποδόσθαι καὶ δοῦναι καὶ θῦσαι ὅτῳ βούλοιο θεῶν; ἃ δ' ἂν μὴ οὕτως ἔχῃ, οὐ σά; - πάνυ μὲν οὖν, ἔφην, οὕτως ἔχῃ. τὰ τοιαῦτα ἐστὶ μόνα ἐμά.

[21] On joint ownership see Biscardi (1999) 23-74.

To my knowledge, no creditors or borrowers in Athens and other Greek *poleis* ever use this term to describe their relationship in regard to the security. I therefore see no reason to alter the basic features of my analysis of the reasons for the differing views of the creditor and the debtor about the ownership in Athenian Law.[22]

III) Thür claims that four documents from Northern Greece recording sales actually concern transactions involving real security (*SEG* 41:564; *SEG* 47:999; *SEG* 38: 671-73). None of the documents however actually contain terms denoting real security or indicate that the sales took place in the context of loans or other obligations.[23] On the other hand, the texts found on *horoi* from Attica, Amorgos, Lemnos and Skyros either use the language of real security or assert that the buyer has the right of redemption in the sale or indicate that the sale takes place in the context of a loan or other type of agreement and is therefore a pledge of security. Thür's analysis of these documents rests on nothing more than improbable speculation.

Thür claims that the term οὐνὴ κάτοχος (*SEG* 38:671) in an inscription found in Northern Greece at Amygdalia indicates that the document records a transaction involving property pledged as security. The inscription records a sale of a vineyard and a house in the city by a Glaucias, son of Strato, to Apollodorus, son of Poris, for three hundred drachmas. Thür attempts to explicate this term by analyzing a passage from Isaeus (2.28), two inscriptions from Mylasa (*IK* 34, 109, 8-10; 204.9-12) and three papyri (*PFrankf.* 7.6-9; *PTebt*. I 60.102-4; *MChr*. 314.34-37). In these passages different words are used to describe a property on which there is a lien or which is subject to dispute. Thür then claims that a creditor had a claim on the property of seller Glaucias, but the buyer Apollodorus decided to go ahead with the transaction. Because there was a risk for Apollodorus, Thür believes this was not an actual sale but a loan on security (although nothing in the inscription would suggest this). Depending on the outcome of the dispute, the price of the property would be adjusted upwards or downwards. Thür cites no other example of this unparalleled type of arrangement either in Northern Greece or in other *poleis*. There are several problems with this argument, but the most serious objection is that the term οὐνὴ κάτοχος occurs in none of the passages studied by Thür.[24] At Isaeus 2.28 the word used is κατοκώχιμον ("encumbered"). In one of the inscriptions from Mylasa and

[22] Thür misrepresents my analysis when he claims that I consider the difference of opinion about the ownership of the security as "only a matter of rhetoric." The issue is legal not rhetorical. In fact, I do not use the terms "rhetoric" or "rhetorical" in my essay.

[23] Nothing compels one to believe that the word *nomos* in SEG 41:564 must refer to a clause in a security contract.

[24] One might also point out that the creditor is not named in the inscription, and there is no mention of any potential adjustment of the sale price. This much of Thür's argument rests on nothing more than speculation.

two of the papyri the term is κατόχιμος ("encumbered"). In the remaining papyrus the word is κατοχή.

A better way to determine the meaning of the phrase would be to examine a passage where the adjective κάτοχος is actually found. Dionysius of Halicarnassus in his *Isocrates* (9) summarizes Isocrates' discussion of Spartan claims to Messenia in his *Archidamus*. The Spartans had received the territory from the sons of Cresphontes as a gift following instructions from the god. The war they fought for it strengthened their acquisition (ἐπικυρώσαντος . . . τὴν κτῆσιν τοῦ πολέμου),[25] and the passage of time made it κάτοχος and secure (βέβαιον). The term is used as a synonym of "secure" and is employed in a context where the speaker argues the Spartans have firm and uncontested ownership of the land. This would indicate that the phrase οὐνὴ κάτοχος should mean "secure" or "incontestable sale." This translation makes much better sense in the context of the sale document from Northern Greece. Just as the Spartans have secure title of Messenia because they received it from the previous owners, the sons of Cresphontes, Glaucias has secure title of the land sold to Apollodorus because he inherited it from his father Strato (lines 7-8). The document is similar to another found in the same place, which records a sale of land by Dinnys son of Pottes (?) to Nicon, son of Cteson. In this document Dinnys asserts his legitimate title to his land by stating he received it as security from Dionysius, the son of Cteson (lines 9-12).[26]Another parallel can be found in a *horos* found on Amorgos where the seller or pledgor asserts his secure title to land by indicating that he acquired it legitimately.[27] This interpretation is supported by the passage of Dionysius, makes much better sense in the context of the document, and finds parallels in two inscriptions. It is thus superior to that of Thür.

We have found that there are no good reasons to believe that any of the inscriptions analyzed by Thür have anything to do with real security. They are thus irrelevant to the discussion of the topic and cannot be used to support his arguments about the substitutive nature of real security in Greek Law.

[25] For legitimate acquisition of territory by gift and by war see Chaniotis (2004).
[26] See Hatzopoulos (1988) 27 for the text.
[27] For instance, Finley no. 102.

APPENDIX

Thür claims that "Contract clauses, not statutes met the needs of a growing economy" but presents no ancient sources to support this general statement. There is much evidence, overlooked by Thür, which disproves his view.

Several ancient authors observed a connection between the development of statutes and the growth of economic activity. The work entitled the *Anonymous Iamblichi* notes the importance of "law and order" (*eunomia*) for the circulation of goods, which brings advantages to all men: "Trust (or credit) arises from law and order (*eunomia*) and brings great benefits to all men and is responsible for great advantages. For as a result of this (i.e *eunomia*) wealth comes into common use, and in this way even if there is little, it is still sufficient because it circulates."[28] A similar view is found in a passage of Isocrates (7.31-35). A litigant in an Athenian court urges the judges to enforce a loan contract because of the benefits strict adherence to the law has on trade: "For the resources provided to those who work do not come from the borrowers but from the lenders. No ship, no ship-owner, no passenger could put to sea if the part contributed by the lender were removed. In the laws there are many excellent protections granted to them. It is your duty to make clear that you cooperate in enforcing them and do not give in to dishonest men so that you gain the greatest possible advantage from your market." (Dem. 34.51-52). Another litigant tells the judges that their decision to uphold the law about contracts will have a good effect on their market: "Many of the men who have chosen to engage in overseas trade are watching you to see how you will decide this case. If you think that written contracts and agreements between partners should be binding and if you will not take the side of those who break them, those involved in lending will more readily make their assets available. As a result, the port will thrive, and you will benefit." (Dem. 56.48-50).

These general statements are supported by the evidence of many statutes enacted by the Athenians and other Greek *poleis* that served to provide the legal infrastructure needed for market relations.[29] This list is not comprehensive but proves the basic point that the Athenians passed many statutes to meet the needs of a growing economy.

1) Maritime laws – Dem. 35.3 with Cohen (1973); Vélissaropoulos (1980).
2) Law about real security – Dem. 41.7-10 with Harris (2006) 207-39.
3) Law about testing coinage – Stroud (1974).
4) Law about warranty against latent defects in sale of slaves – Hyp. *Ath.* 15. Possibly extended to other items – see Lysias. 8.10-12.
5) Law against fraud in the Agora – Hyp. *Ath.* 14.
6) Law about price of grain, flour, and bread – *Ath. Pol.* 50.1
7) Law against buying more than *phormoi* of grain – Lysias 22.5-6.
8) Law banning exports of grain from Athens – Dem. 34.37; 35.50-1; 58.8-9.
9) Law making it illegal to make loan for export of grain from Athens – Dem. 35.50.

[28] For a perceptive analysis of this passage see Faraguna (1994) 584-87.

[29] For a general treatment of the relationship between law and economy in Classical Athens see Harris (2006) 143-62. For market regulations in Athens and other Greek *poleis* see Stanley (1976).

10) Law about selling grain collected from the *pentekoste* and *dodekate* in Anthesterion – Stroud (1998) and Harris (1999).
11) Law on personal security – Dem. 33.27.
12) Law about weights and measures – *IG* ii^2 1013 with *Ath. Pol.* 51.1.
13) Law regulating the hire of females who play the *aulos*, harp or lyre – *Ath. Pol.* 50.2.
14) Warranty of title in sale assured by law – Isaeus 5.22 with Wyse (1904) 435-37.
15) Laws about mining – Dem. 37.35-36 with Faraguna (2005) and MacDowell (2005).
16) Possible law setting recommended prices – see Bresson (2000) 183-210.
17) Law about charging interest in loans – Lysias 10.18.
18) Decrees granting privileges to Proxenoi – Culasso Gastaldi (2004). For the role of *Proxenoi* in facilitating trade – Dem. 53 with Marek (1985).
19) Commercial Treaties Between Poleis (s*umbola*) – Gauthier (1972).
20) Law requiring that losses resulting from jettison be shared equally among all passengers – Athenaeus 7.292a-b. Cf. *Digest* 14.2.2. pr.

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II. HELLENISTIC AND GRECO-ROMAN LAW

ALBERTO MAFFI (MILANO)

ECONOMIA E DIRITTO NELL'ATENE DEL IV SECOLO

1. Per quanto riguarda il mondo greco la questione della responsabilità e della rappresentanza in ambito negoziale si innesta nella inesauribile discussione sull'economia greca. Nella vasta letteratura in materia vorrei fare qui particolare riferimento al tema del credito, a cui sono stati dedicati quasi contemporaneamente, una quindicina d'anni fa, due libri importanti: il libro di Paul Millett sul fenomeno del prestito visto sotto il profilo socio-economico e il libro di E. Cohen sull'economia ateniese vista nella prospettiva dell'attività bancaria. I due autori adottano punti di vista pressoché opposti (ma il caso ha voluto che nessuno dei due potesse tenere conto delle opinioni dell'altro): Millett tende a vedere il fenomeno del credito "embedded" nella reciprocità e solidarietà sociale che regna all'interno del ceto dominante ateniese e, di conseguenza svaluta il ruolo della banca, a cui, secondo lui, i cittadini ricorrevano solo in ultima istanza, dopo che i canali intercomunitari si erano rivelati impraticabili; Cohen riconosce invece alla banca un ruolo rilevante, se non addirittura determinante, nel creare e alimentare il credito monetario[1]. Un punto su cui la divergenza fra i due studiosi appare particolarmente accentuata riguarda l'identificazione dei finanziatori del commercio marittimo (tramite il c.d. *daneion nautikon*): Millett esclude che le banche svolgessero, per così dire istituzionalmente, questo ruolo, mentre Cohen lo afferma. Un corollario di questa contrapposizione è la diversa destinazione che ciascuno dei due studiosi attribuisce al denaro preso in prestito: secondo Millett prevalgono i crediti per scopi non produttivi, almeno per quanto riguarda i cittadini; secondo Cohen la destinazione produttiva è invece quantitativamente molto più rilevante, anche per quanto riguarda i cittadini. Entrambi gli studiosi toccano nei loro libri questioni giuridiche, ma non ne fanno oggetto di un interesse specifico. Ci si può chiedere a questo punto se lo studio dei dati giuridici possa portare un qualche contributo alla discussione.

Che una specifica disciplina giuridica del commercio sia identificabile non è messo in dubbio da nessuno. E' merito dei lavori ancora fondamentali di U.E. Paoli e di L. Gernet[2] avere messo in luce le peculiarità di questa disciplina, basata sui

[1] Punto di vista ribadito e ulteriormente sviluppato più di recente da Shipton 1997.

[2] U.E. Paoli, *Studi di diritto attico* e *L'autonomia del d. commerciale greco;* L. Gernet, *Actions commerciales*, DS. A questi va aggiunto senz'altro il primo libro di E. Cohen, Athen. Mar. Courts.

nomoi emporikoi e resa operativa mediante le *dikai emporikai*. Appare dunque assodato che, a partire all'incirca dalla metà del IV sec., Atene ha introdotto nel proprio diritto una serie di principi tesi a snellire e a modernizzare il diritto degli scambi proprio dei cittadini (ad es. riconoscendo a stranieri e schiavi la capacità di stare in giudizio, attribuendo valore di prova privilegiata ai contratti scritti, stabilendo un breve periodo di tempo per la definizione della causa ecc.). Non solo, ma per quanto riguarda le azioni giudiziarie relative al commercio marittimo, la indubbia esistenza, già nel V sec., di una magistratura denominata *nautodikai*, le cui competenze restano peraltro difficili da definire, induce a pensare che il commercio marittimo, e in particolare le controversie che eventualmente potevano scaturirne, fosse già oggetto di una disciplina specifica ben prima dell'introduzione delle *dikai emporikai*.[3]

Tuttavia occorre osservare che in questo modo la nozione di diritto commerciale appare limitata al commercio marittimo e, almeno nella prospettiva di Paoli[4], ai commercianti o, quanto meno, agli "atti di commercio".

Ci si può chiedere allora se non sia individuabile una serie di regole specifiche applicabili ad altri settori economici, diversi dal commercio marittimo inteso in senso proprio, come per esempio il settore del credito su cui, come abbiamo visto, è particolarmente vivace la discussione. Sembra di poter ricavare indizi in tal senso dal fatto che nell'*Ath.Pol.* (52 e 59) si fa riferimento a categorie di azioni giudiziarie diverse dalle *dikai emporikai*, ma riferibili a pratiche economiche specifiche.

In AP. 52.2 troviamo la lista delle *dikai emmenoi* di competenza degli *eisagogeis*. A parte l'azione per la restituzione della dote, l'azione per *aikeia* e le azioni tendenti a risolvere le controversie fra trierarchi, le altre azioni hanno chiaramente a che fare con attività economiche e in particolare con la tutela del credito. La prima è un'azione mirante a ottenere il pagamento dell'interesse legale (12% annuo): qui la coincidenza fra scadenza mensile dell'interesse e *dike emmenos* (cioè da portare a sentenza nel giro di un mese[5]) fornisce una motivazione evidente dell'inclusione di questa azione nella categoria. La seconda azione mira invece alla restituzione del capitale dato in prestito per aprire un'attività commerciale nell'agora: è possibile che vi sia una complementarietà con l'azione precedente. Colpisce comunque il rilievo dato allo scopo del prestito: intanto si tratta evidentemente di un prestito "produttivo"; in secondo luogo il privilegio assicurato al creditore sembra motivato dal desiderio di avere nell'agora soltanto ditte solide (forse per il prestigio del luogo?). Seguono due categorie di azioni (si noti l'uso del plurale che sembra alludere appunto a settori economici complessi e articolati): le *dikai eranikai* e le *dikai koinonikai*. Quanto alle prime appare interessante il fatto che, contrariamente ad es. all'opinione di Millett, il cosiddetto "prestito fra amici"

[3] V. sul tema, oltre a Gernet, op. cit., Cohen, *Ath. Mar. Courts*, cap. 3.

[4] Ma Paoli aveva già affermato con decisione il ruolo primario delle banche come finanziatrici del commercio marittimo.

[5] V. da ultimo Talamanca in Symposion 2003.

sia assistito da una tutela giudiziaria più rigorosa di quella approntata dal diritto ordinario. Quanto alle *dikai koinonikai*, il loro contenuto è discusso[6]. Suggerisco due possibili interpretazioni. La prima è che ci si riferisca qui ad azioni nascenti da controversie fra comproprietari, e, a questo proposito, non mi sembra da escludere che i due genitivi *kai andrapodon kai hypozugion* dipendano da *koinonikai*: si tratterebbe cioè delle controversie fra comproprietari di schiavi o animali relative alle conseguenze giuridiche del comportamento tenuto dallo schiavo o dall'animale comune[7]. In alternativa potrebbe trattarsi di un equivalente delle *actiones pro socio* di diritto romano[8]: in questo caso il legame con la materia economica (e in particolare con il credito) potrebbe risultare coerente con le altre categorie qui elencate; ma resterebbe da spiegare l'enigmatico riferimento a schiavi e animali. Lasciando da parte le *dikai trierarchikai*, per le quali, come per le *telonikai* di AP 52.3, è opportuno che si giunga a una rapida soluzione per ragioni di interesse pubblico, vengono da ultime le *dikai trapezitikai*. E di nuovo viene da chiedersi perché queste azioni, che sono evidentemente riferite a controversie scaturite dall'attività dei banchieri, ricevano un trattamento privilegiato: in ogni caso sembra evidente che il legislatore attribuisce un rilievo particolare al corretto e rapido svolgimento delle operazioni bancarie. Se al gruppo di azioni relative ad attività economiche (e in particolare ad operazioni di credito) che godono di un trattamento privilegiato seguendo le indicazioni di AP 52.2[9], aggiungiamo le *dikai emporikai* e le *dikai metallikai* di AP 59.5, vediamo delinearsi un consistente settore di azioni giudiziarie che potremmo qualificare nel loro insieme come un nucleo di diritto dell'economia.

Una ipotesi che possiamo formulare è dunque che il diritto attico si interessi di una vasta gamma di attività economiche assicurando loro una tutela privilegiata all'interno dell'ordinamento[10]. Si tratta però di capire se, oltre ad assicurare loro un

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[6] Lo stato della dottrina è riassunto da Rhodes, *Commentary*, p. 585: "'Concerning associations'. This is sometimes interpreted to mean suits entered by or against associations … but it is not certain that Athenian law regarded an association as a person, capable of suing and being sued" (con riferimenti a Lipsius e Harrison). Inoltre Rhodes rinvia a un passo dell'orazione demostenica sulle Simmorie (14.16) in cui t*a koinonika* si riferisce ai beni comuni (eventualmente ereditari).

[7] Anche per queste due supposte categorie di azioni l'interpretazione in dottrina è molto incerta. Secondo Harrison, cit. da Rhodes loc. cit., si tratterebbe di cause relative a danni provocati da schiavi o animali, piuttosto che di processi relativi alla proprietà su di essi. Lipsius pensava invece alle azioni intentabili dall'acquirente di schiavi o bestie risultati affetti da vizi (A.R. p. 745), ma anche all'azione per *afairesis* (p. 640).

[8] Così già Beauchet IV, 353.

[9] Mi sembra singolare che Millett si limiti a registrare questo trattamento privilegiato (p. 277 n. 50) senza trarne alcuna conseguenza e soprattutto senza dar conto del fatto che anche le *dikai trapezitikai* vi sono comprese.

[10] Naturalmente potremmo avere le idee più chiare se sapessimo quando e come si è formata la lista delle *dikai emmenoi* . Secondo Gernet, DS 173-178, le azioni mensili sono state introdotte nella seconda metà del IV sec. e la lista di AP 52.2 riprende il testo

iter processuale più spedito, l'attribuzione della qualifica di *dike emmenos* comporti, in quanto tale, ulteriori conseguenze. Mi chiedo cioè se ulteriori indagini, rivolte soprattutto alle orazioni giudiziarie, consentano di confermare l'esistenza di altri principi peculiari all'attività economica, o a specifici settori di essa, nel diritto attico.

2. Qualche indicazione utile per individuare un filo conduttore della nostra indagine ci può venire da alcuni recenti sviluppi nell'ambito degli studi romanistici. Negli ultimi decenni numerosi studiosi di diritto romano hanno rivolto un rinnovato interesse al diritto commerciale romano, inteso in un senso più ampio di quello tradizionale, dato che al centro dell'attenzione c'è ora la figura dell'imprenditore piuttosto che quella tradizionale del commerciante[11]. Recentemente i risultati di tali ricerche sono stati condensati in un breve manuale di diritto commerciale romano[12]. L'impostazione degli autori di questo testo sarà discutibile, la si può considerare anacronistica o parziale: tuttavia mi pare che abbia messo in luce l'importanza di alcuni dati che possono risultare utili anche per lo studio del diritto ateniese dell'economia. Un punto fondamentale mi pare il seguente: gli autori sottolineano fortemente come l'attività dell'imprenditore romano si sia svolta prevalentemente ricorrendo alla collaborazione di schiavi e liberti, e come i giuristi siano quindi stati chiamati a creare gli strumenti necessari a disciplinare giuridicamente i rapporti economici posti in essere da tali soggetti, soprattutto allo scopo di definire e delimitare la responsabilità dei padroni/patroni.

Ora, per chi legga le orazioni "commerciali" conservate nel *corpus demosthenicum*, è del tutto evidente che anche in Grecia[13] gli schiavi (e, forse in minor misura, gli schiavi liberati, con la notevole eccezione di Formione), per quanto riguarda le attività economiche, svolgono un ruolo altrettanto significativo di quello che è documentato per Roma. A Roma gli strumenti, che il diritto mette a disposizione (almeno dal II sec.a.C.) dei terzi contraenti per far valere in giudizio eventuali pretese contro gli schiavi altrui impegnati in attività economiche e in particolare commerciali, si sono tradotti soprattutto nella c.d. azioni adiettizie. Non solo; ma, per quanto riguarda varie ipotesi di intermediazione o sostituzione negoziale ad opera di liberi, che comunque si rendessero necessarie od opportune

della legge introduttiva. La questione è stata ripresa da Cohen, *Ath. Mar. Courts,* pp. 12ss., la cui accurata trattazione non mi sembra però abbia condotto a risultati ulteriori.

[11] In questo senso si può notare una certa convergenza con la posizione assunta da Thompson (si pensi al suo noto articolo dedicato all'entrepreneur attico del 1983) e molto criticata da Bogaert e da Millett.

[12] Cerami, Di Porto, Petrucci, Diritto commerciale romano, Torino 2002.

[13] Anche senza spingersi ad affermare, con il Paoli, che Atene non ha fatto altro che recepire le consuetudini del commercio internazionale, questo è un settore in cui si possono abbastanza tranquillamente ritenere estensibili al mondo panellenico i risultati delle indagini sulle fonti attiche.

per un miglior svolgimento delle attività commerciali, sono stati riconosciuti nuovi rapporti giuridici come il mandato e la gestione di affari altrui.

E' dunque legittimo chiedersi come siano state giuridicamente regolate in Grecia pratiche economiche che appaiono perfettamente analoghe a quelle disciplinate a Roma grazie all'intervento dei giuristi romani. In parte, e a differenza che a Roma, vi saranno stati degli interventi legislativi (come i *nomoi emporikoi*), ma è probabile che sia stata soprattutto la prassi contrattuale e giudiziaria a integrare ampiamente i nuclei legislativi. Come abbiamo detto, anche in Grecia il ruolo degli schiavi è indubbiamente primario nel mondo degli scambi commerciali e, più in generale, delle attività produttive. Ce lo attestano già per la seconda metà del V sec. a.C. due singolari passi della c.d. *Ath.Pol.* attribuita allo Ps. Senofonte (1.11 e 1.18). Ma sono soprattutto le c.d. orazioni commerciali del *corpus demosthenicum* a confermarlo.

D'altronde queste orazioni ci fanno conoscere anche tutta una serie di ruoli svolti da uomini liberi, che si tratterà prima di tutto di meglio mettere a fuoco nell'ambito delle strutture del commercio e poi di qualificare più esattamente dal punto di vista giuridico (ma il tema è troppo vasto per affrontarlo in questa relazione).

3. Iniziando dagli schiavi, occorre preliminarmente osservare che la condizione giuridica degli schiavi in Grecia, e in particolare ad Atene, non è stata ancora oggetto di una trattazione esauriente[14].

Il punto che più ci interessa in questa sede riguarda la responsabilità del padrone per gli atti compiuti dallo schiavo. Mi riferisco soprattutto al ruolo degli schiavi nella conduzione delle imprese. Si fa riferimento qui sia alle attività commerciali legate ai traffici marittimi (*naukleroi* ed *emporoi* di condizione servile), sia alle attività artigianali, commerciali o addirittura industriali[15], oltre che bancarie, affidate a schiavi. Nonostante sia stata più volte sottolineata la posizione privilegiata in cui palesemente vengono a trovarsi molti di tali schiavi sia sul piano sociale che su quello giuridico[16], il loro statuto giuridico (in assenza di una riflessione giuridica nella Grecia antica) appare ancora piuttosto impreciso nelle trattazioni moderne. A me pare che, partendo dall'idea, sopra accennata, secondo cui le realtà socio-economiche dell'impresa produttiva e commerciale sono sostanzialmente analoghe

[14] Non è un caso che in un classico come Westermann e poi nei contributi di Finley e di Garlan (per citare due studiosi ben noti di questa problematica) gli aspetti giuridici siano ben poco trattati. Ma anche il manuale di Harrison, che resta la trattazione più ampia e approfondita in materia, appare alquanto superficiale. Qualcosa di più si è fatto per Gortina: si veda l'articolo di Link in Dike 4; ma la condizione degli schiavi cretesi appare sotto molti aspetti assai diversa da quella degli schiavi ateniesi.

[15] La fabbrica di scudi del padre di Demostene, gli specialisti nella lavorazione del cuoio di Aeschn. 1,97, il laboratorio minerario di Panteneto, le profumerie di Atenogene ecc.

[16] V. già Westermann, seguito da Garlan, Bogaert e da una prospettiva più giuridica Harrison, E.E. Cohen, Millett.

nel mondo greco e nel mondo romano, possa rivelarsi utile, con le opportune cautele, confrontare i dati greci con l'impianto concettuale romano[17].

4. Vediamo come impostava il problema Partsch in un lungo inciso del GB (p. 135ss.), che, nonostante i punti discutibili su cui mi soffermerò qui sotto, resta una delle sintesi più significative in materia. Partsch introduceva una distinzione fra varie categorie di schiavi, che nelle fonti appaiono designate con termini apparentemente diversificati. Una prima categoria corrispondeva allo schiavo *oiketes*, lo schiavo che lavora o in casa o in azienda. Questo tipo di schiavi non poteva essere titolare di un patrimonio e non poteva porre in essere negozi giuridici: è il padrone che conclude negozi sia che si tratti di darli in affitto sia che si tratti di acquistare il cibo per il loro sostentamento (Dem. 53.21). E tuttavia sembra che l'azione civile per danneggiamento potesse rivolgersi contro lo schiavo stesso (Dem. 37.51 e 55.31), anche se la sentenza era pronunciata contro il padrone. Dunque lo schiavo non è altro che uno strumento del padrone (p. 135-36).

Mi pare di poter subito osservare che in queste affermazioni di Partsch c'è qualcosa di strano: non si capisce come si possa agire contro uno schiavo che per il diritto sostanziale appare del tutto incapace. Inoltre non è chiaro come sia costruito un iter procedurale che inizia con un'azione rivolta contro lo schiavo e termina con una sentenza contro il padrone. Sembrerebbe adombrata qui una costruzione che precorre le *actiones adiecticiae qualitatis*, e che, tuttavia, è poco compatibile con la procedura giudiziaria attica.

Ma accanto a questa prima e più generale categoria di schiavi se ne colloca, secondo Partsch, una seconda, quella del *doulos misthoforon* o *choris oikon*, "ein halbfreier Sklave, dem die wirtschaftliche Selbstständigkeit in seiner eigenen Wohnstätte oder die eigene Vermögensbewirtschaftung bei ausschliesslicher Verpflichtung zur Zahlung eines Zinses den Namen gibt" (p. 136). Questa categoria di schiavi[18] è munita di capacità negoziale e processuale: un esempio è dato da Lampis, che compare come testimone in giudizio nella *c. Apaturio* e dal carbonaio Sirisco negli *Epitrepontes* di Menandro (n. 4) (Dove a margine si può osservare che Lampis non è mai definito *doulos misthoforon* o *choris oikon*). Fungono dunque da rappresentanti dei loro padroni con la capacità di esprimere una propria volontà negoziale. Si è così invocato un parallelo con il *peculium* romano (già Beauchet 2,

[17] D'altronde ciò si può riscontrare a più riprese nelle opere degli studiosi che si sono occupati del tema. Mi riferisco ad es. a Partsch e poi a Gernet e a Paoli, non a caso tutti storici del diritto, quindi in grado di istituire un confronto fra istituti giuridici greci e romani.

[18] Discutibile è anche l'equiparazione fra *misthophorountes* e *choris oikountes*. Si veda Perotti, Atti del Colloque 1973 sur l'Esclavage, che li distingue nettamente, in quanto i primi sono gli schiavi dati in affitto dal padrone, mentre i secondi sono gli schiavi che svolgono un'attività autonoma versando eventualmente al padrone una *apophora*. Se è così, l'argomentazione di Partsch risulta alquanto fuorviante.

445, 448). A questo punto la domanda da porsi, sempre secondo Partsch, è la seguente: il padrone risponde di tutti i debiti del servo, oppure risponde solo dei debiti contratti per condurre l'esercizio? E in questa seconda ipotesi occorre che il padrone abbia espressamente autorizzato il compimento di quel tipo di negozio?[19] . Una serie di dati (come la punibilità dell'omicidio o dell'offesa ai danni dello schiavo e la capacità di stare in giudizio) conducono Partsch a ritenere possibile che "der *doulos misthoforon* aus seinen Geschäften selbst mit seinem Vermögen haftete". D'altra parte occorre prendere in considerazione anche l'ipotesi che il *misthoforon* si trovi in una situazione simile a quella del romano *institor*: in questo caso il padrone risponderebbe comunque delle obbligazioni contratte dall'*institor*. Tuttavia il fatto che in Hyper. 5.22 non si faccia riferimento a una norma che sancisca la responsabilità del padrone per i debiti contrattuali del *misthoforon* (quale era, secondo Partsch, lo schiavo Mida) induce a dubitare della validità dell'analogia con l'*institor* romano, salvo il caso in cui il *misthoforon* non sia stato investito espressamente della qualità di rappresentante del padrone (p. 139). Un caso di questo genere sarebbe riscontrabile in Isocr. *Trapezit.* 17.42, allorché Pasione offre garanzia per Archestrato a favore dell'oratore. In conclusione Partsch ritiene che non si possa giungere a risultati sicuri in materia di "Geschäftsfähigkeit" dello schiavo attico. Lo schiavo ordinario è incapace; in che misura il *misthoforon* possa assumere e soddisfare debiti col proprio patrimonio resta incerto; ma altrettanto incerto è se ogni negozio posto in essere dal *misthophoron* obblighi il padrone, a meno che non sia stato nominato rappresentante.

Ora, a me pare che l'analisi di Partsch sia indebolita dall'uso di strumenti inadeguati. Lo schiavo *misthoforon* gode di un privilegio puramente economico per concessione unilaterale del padrone: è come se avesse affittato il fondo o l'azienda di cui è responsabile, ma questo non muta il regime giuridico dei rapporti economici fra padrone e schiavo. Considerare lo schiavo dotato di uno statuto giuridicamente privilegiato (tanto da definirlo "halbfrei", come fa Partsch[20]) complica inutilmente le cose[21]. Inoltre un conferimento esplicito della qualifica di rappresentante allo

[19] Ad es., con riferimento al diritto romano, come giustificare la concessione di garanzia da parte dello schiavo e la conseguente *actio de peculio* o addirittura l'*actio institoria*, visto che qui non si avrebbe alcun vantaggio per il patrimonio gestito dal *servus*?

[20] Giustamente critico su questa qualifica già Klees, p. 130 n. 18.

[21] Non convincono nemmeno le recenti considerazioni di E. Cohen, *Athen. Nation*, 145, secondo cui i *choris oikountes* realizzavano la stessa funzione dei liberti romani (evidentemente accoglie qui la definizione di alcuni lessicografi, che però non trova conferma nelle fonti classiche). Infatti ad Atene la manomissione sarebbe stata poco praticata. Più in generale osservo che il punto di vista che sta alla base del pur interessante libro di E. Cohen, appare un po' forzato. Nel cap. V ("Wealthy Slaves in a «Slave Society»"), Cohen sostiene che nella realtà molti schiavi occupavano una posizione di privilegio sia dal punto di vista economico che dal punto di vista sociale. E fin qui bisogna riconoscere che gli esempi da lui addotti (peraltro tutti notissimi) nel loro insieme fanno impressione (anche se direi che la protezione contro la *hybris* ai danni

schiavo non trova riscontro nelle fonti[22]. Occorre dunque ribadire che il padrone risponde dei debiti e acquista i crediti che derivino tanto dall'attività dei *misthoforountes* e dei *choris oikountes* quanto da quella degli schiavi ordinari.

5. A questo punto possiamo riprendere le mosse dal manuale di diritto commerciale romano sopra citato, secondo cui lo schiavo imprenditore poteva rivestire due ruoli diversi: 1) poteva venire preposto a un'impresa nel ruolo di responsabile dell'attività (*institor* o *exercitor*), con la facoltà di condurre affari, stipulare negozi, maneggiare liberamente denaro ecc., fermo però restando che la sua attività produceva effetti direttamente in capo al padrone, sia attivi che passivi (in particolare il padrone era illimitatamente responsabile dei debiti contratti dall'*institor*). 2) poteva invece essere autorizzato a svolgere un'autonoma attività economica utilizzando il proprio peculio: in questo caso la responsabilità del padrone era limitata all'entità del peculio.

6. Quale è invece la situazione nell'Atene dell'età degli oratori? Apparentemente esisteva una sola legge in materia di responsabilità del padrone per l'attività dello schiavo; si tratta di una legge risalente a Solone, in base a cui responsabile per gli *adikemata* commessi dallo schiavo era il padrone del tempo in cui l'illecito era stato commesso[23]. Dunque, in assenza di una norma relativa alla responsabilità per inadempimenti contrattuali, nella *c. Atenogene* si tenta di convincere la giuria ad

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dello schiavo tende a proteggere l'onore del padrone, non quello dello schiavo, esattamente come accadeva – e accade – per l'onore delle donne: *Ath. Nat.* pp. 147-148). Il punto su cui, in quanto storico del diritto, dissento nettamente è quello relativo al significato delle norme (in particolare, evidentemente, relative alla situazione giuridica degli schiavi). Cohen scrive (*Ath. Nat.* p. 141): "In recent years, scholars have come to recognize that, for any society, the formal rules of legal substance and procedure cannot be understood, and are not applied, in disassociation from psychological, economic, and social realities, and that these rules, "the law", perform functions beyond the narrow control of behavior, including the statement of communal values that may be quite different from social reality". Sarebbe ingenuo negare effettività a un'affermazione come questa, ma il diritto vale prima di tutto proprio per il fatto di essere creato e dichiarato vincolante. In che misura poi venga osservato è tutto un altro discorso, di pertinenza più della sociologia storica o della psicologia storica del diritto che della storia del diritto in quanto tale. A meno che non si arrivi al punto di constatare che una norma ha cessato di fatto di esistere, e in questo caso si parla di "desuetudine". Ma non mi sembra questo il caso delle norme, o dei principi se si vuole, che regolano la condizione dello schiavo nell'Atene del IV sec. (che rimane una "cosa", sicuramente priva di diritti e di doveri giuridicamente riconosciuti e resi effettivi tramite il ricorso ai tribunali, salvo casi eccezionali in cui però lo schiavo agisce sempre nell'interesse del padrone e quindi fa valere diritti del padrone).

[22] Su questo punto v. già la critica di Paoli in *Autonomia,* p. 468 n. 21.

[23] Hyper. *c. Athen.* § 22. Si veda sul punto soprattutto Gernet, *Esclavage*, DS pp. 155ss., a cui si ispirano nella sostanza tutti gli studiosi successivi.

applicare per analogia[24] la norma soloniana[25]. Questa applicazione analogica, da cui si desumerebbe che nel IV sec. il padrone era considerato comunque responsabile anche per i debiti contratti dallo schiavo nell'esercizio di un'attività economica condotta autonomamente, è stata contestata da E. Cohen. Secondo Cohen proprio dall'orazione contro Atenogene si desume che Mida, lo schiavo gestore della profumeria appartenente ad Atenogene "on several separate occasions … is explicitly characterized as personally obligated for the debts" (dato che ai §§ 6, 10, 20 ricorre il verbo *ofeilein*)[26]. Ma se può assumere obbligazioni, continua Cohen, significa che assume anche la responsabilità per il loro soddisfacimento, e addirittura potrà essere parte, oltre che testimone, nei relativi eventuali processi. E' soltanto nei casi in cui lo schiavo agisce come "agent for his owner" (dunque in qualità di "rappresentante" si potrebbe tradurre nella prospettiva di Partsch, in parte, come si vede, ripresa da Cohen) o come associato del padrone ("joint liability for joint undertakings")[27], che il padrone sarebbe responsabile per i debiti contratti dal suo schiavo. In base a questi principi si spiegherebbe in particolare l'utilità per un banchiere di cedere in affitto la sua banca ad un proprio schiavo. In tal modo, infatti, il banchiere sarebbe rimasto responsabile della restituzione dei depositi da lui ricevuti prima della conclusione del contratto di affitto, ma non di quelli successivi. Un "formal lease" avrebbe escluso il dubbio che lo schiavo operasse come "agent" del padrone o che essi fossero "coventurers"[28]. Altrimenti, conclude Cohen, che utilità ci sarebbe stata nel dare in affitto la banca?[29]

7. A me pare che il punto di vista di Cohen sia contraddetto già soltanto dal testo da cui il suo ragionamento prende le mosse, cioè l'orazione *c. Athenogenem*. Come è noto, si tratta dell'azione intentata dall'acquirente Epicrate contro il venditore Atenogene in seguito alla vendita degli schiavi, che gestivano una delle sue profumerie, insieme all'esercizio commerciale. L'accusa è di aver frodato l'acquirente nascondendo l'entità dei debiti gravanti sulla profumeria. Ora, la prima

[24] "Cette interprétarion de la loi s'impose pour des raisons pratiques; elle appartient à une espèce de jurisprudence" (Gernet, *Esclavage*, DS p. 162).

[25] Contra Meyer-Laurin, Symposion 1974, che si schiera con F. Pringsheim, GLS 454, secondo cui anche ad Atene doveva valere il principio *noxa caput sequitur*. Dunque la norma soloniana, riferita da Iperide si riferiva in ultima analisi al soggetto tenuto a sopportare le conseguenze della *noxa*. Ma proprio con riferimento al caso presentato nell'orazione questa interpretazione non convince, perché qui non si parla di azioni intentate contro l'acquirente (contra Pringsheim, *op. cit.*, p. 455 n.1).

[26] *Ath. Bank.*, p. 94.

[27] *Ibid.*, p. 95.

[28] *Ibid.*, p. 96.

[29] E. Cohen ha recentemente confermato il suo punto di vista in *Companion* 2005, dove rinvia ad *Ath. Bank.* 94-110 "for a full exegesis of Athenian legal accommodation to business practices, even in derogation of general rules otherwise prevailing …" (p. 295 n. 29) e in *Slave Power* 2007.

cosa da chiarire è quale sia stato l'oggetto della vendita. Todd scrive che Atenogene avrebbe venduto "three slaves and a workshop and, in the small print, all their liabilities" (*Shape*, p. 188). Per E.E. Cohen, invece, la responsabilità di Epicrate non deriva dall'acquisto dello schiavo, ma dal fatto che ha assunto esplicitamente, in forza del contratto, la responsabilità per i debiti contratti dallo schiavo *(Athen. Bank.*, p. 94). In realtà, se leggiamo i §§ 5-6 dell'orazione, vediamo che Atenogene vende gli schiavi con i loro debiti e con le scorte presenti nel negozio. Dunque vende gli schiavi insieme all'oggetto della loro attività economica, cioè quello che in termini romani sarebbe il loro peculio (che si potrebbe definire familiare, visto che si tratta di un padre e due figli). Che l'oggetto della vendita fossero gli schiavi (e non l'azienda in quanto tale) è ribadito almeno altre due volte nel corso dell'orazione: §§ 15 e 23. Particolare attenzione merita il § 23. Per quanto mutilo, dal testo sembra si possa ricostruire con sicurezza la probabile argomentazione della controparte Atenogene. Questi sostiene di aver offerto il fanciullo concupito da Epicrate (non si capisce se vendendolo o manomettendolo[30]), manifestando però l'intenzione di non disfarsi di Mida. Sarebbe stato invece Epicrate a insistere per acquistare Mida e i suoi due figli. Da ciò la difesa di Atenogene arguiva che Epicrate aveva inteso darsi al commercio (quindi, implicitamente, che non poteva essere stato così ingenuo nell'operazione di acquisto come da lui affermato). Naturalmente Epicrate controbatte al § 26 che non aveva avuto alcuna intenzione di dedicarsi al commercio di profumi e ribadisce che, nel concludere l'affare, la sua intenzione era stata tutt'altra. In ogni caso mi sembra chiaro che, nella prospettazione di entrambe le parti, l'acquisto dell'azienda è soltanto il riflesso dell'acquisto dello schiavo che ne è il titolare. Ma se il trasferimento dell'azienda, con il suo attivo e il suo passivo, consegue naturalmente all'acquisto dello schiavo che ne è titolare, è probabile che il trasferimento dei debiti della profumeria ad Atenogene si sarebbe avuto anche senza l'assunzione esplicita di essi da parte di Epicrate mediante l'*homologia* di cui al § 6. Infatti Epicrate non nega di essere obbligato a pagare i debiti contratti da Mida nell'esercizio dell'azienda, anche se la loro entità non risulta definita dall'*homologia* (al § 20 si limita a dire: "non è giusto" che io debba pagare i debiti di cui non ho sentito parlare). A me pare dunque che la funzione dell'*homologia* nel nostro caso sia principalmente quella di ribadire che l'acquisto di uno schiavo che esercita un'attività commerciale comporta anche l'acquisto dell'azienda da lui gestita, in particolare del passivo inerente allo svolgimento di quell'attività[31]. Il testo dell'orazione non fornisce comunque elementi per escludere l'ipotesi di un acquisto degli schiavi senza accollarsi i debiti da essi contratti ma anche senza acquisire

[30] A questo proposito ci sarebbe da chiedersi chi avrebbe dovuto rispondere dei debiti qualora Mida e i suoi figli fossero stati manomessi.

[31] Nel nostro caso va anche tenuto conto dell'esigenza di formalizzare l'assunzione di responsabilità da parte dell'acquirente allo scopo di aggiungervi la garanzia prestata da Nicone di Cefisia (§§ 8 e 20).

l'attivo dell'esercizio commerciale: dunque, in termini romani, un acquisto degli schiavi senza peculio.

8. Ora, se Mida fosse stato il solo responsabile dei debiti derivanti dalla gestione della profumeria, come sostiene Cohen, per quale ragione il venditore Atenogene avrebbe speso tanta fatica per ottenere che il compratore se li accollasse? Non solo, ma anche una volta scoperto il reale ammontare dei debiti, perché l'acquirente sarebbe tenuto a pagarli, visto che Mida certamente non li ha contratti in qualità di agente o di associato dell'acquirente stesso (ma nemmeno del venditore, a quanto sostiene lo stesso Cohen)? Dunque Mida non è affatto l'unico responsabile dei debiti contratti nell'esercizio della profumeria: o il venditore o il compratore, dunque o l'ex-padrone o il padrone attuale, ne sono pienamente responsabili. Ma se questo è vero, allora cade anche la motivazione addotta da Cohen, che consiglierebbe di affittare la banca a un proprio schiavo. In realtà non è concepibile un contratto formale di affitto tra padrone e schiavo: il *misthos* di cui si parla (ad es. in Dem. 36.43, 46, 48, a proposito della *misthosis* della banca a quattro schiavi da parte degli eredi di Pasione) deve essere interpretato, se si tratta davvero di schiavi, come una *apophora*.[32] E la ragione per dare la banca in gestione può essere semplicemente cercata nel desiderio di fare la vita di rentier che si confà a un ex-schiavo che voglia adeguare il suo stile di vita a quello del ceto di cui la sua ricchezza gli consente ormai di far parte (o di aspirare a far parte). Quanto allo schiavo, il regime della *apophora* è finalizzato soprattutto a comprarsi la libertà: dunque dal punto di vista del padrone una simile aspirazione garantisce che lo schiavo cercherà di fare del suo meglio.

9. Tornando alla c. Atenogene, possiamo dire che in definitiva siamo di fronte a un regime che, in termini romani (o romanistici) si potrebbe definire misto: da un lato crediti e debiti afferiscono all'esercizio commerciale e non sono immediatamente riferiti al patrimonio del padrone; dall'altro, però, il padrone risponde integralmente dei debiti; non esiste una responsabilità limitata all'entità del peculio[33]. E tuttavia il caso della profumeria mostra che incomincia a delinearsi un regime che si avvia verso la concezione del *peculium* romano, e ciò proprio con riferimento alla vendita di un'azienda che potremmo definire "peculiare". Abbiamo visto infatti che

[32] Si veda l'equilibrata trattazione dell'argomento in Klees, p. 143ss., da cui risulta che *misthos* può indicare sia il canone pagato al padrone da chi prende in affitto i suoi schiavi, sia, più raramente, anche l'*apophora* versata direttamente dallo schiavo che gestisce un'attività economica in proprio. Per quanto riguarda il c.d. affitto ai quattro personaggi di Dem 36. 13-14, la dottrina si divide fra coloro che li ritengono ancora schiavi nel momento in cui prendono in gestione la banca (Gernet DS 163, Bogaert 1968, 79) e chi pensa che fossero già stati manomessi (da ultimo Klees, p. 153-54).

[33] Gernet, *Esclavage*, DS, 163 n. 2. V. anche Lipsius, 795 e Meyer-Laurin, Symposion II, 265 n. 10.

Atenogene ha venduto gli schiavi e l'esercizio commerciale comprensivo di crediti e debiti. Ma, mentre la responsabilità derivante da un illecito è personale (tanto è vero che non può essere separata dalla persona dello schiavo[34]), la responsabilità derivante da un atto lecito si riverbera immediatamente nella sfera giuridica del padrone. Dunque l'acquirente non potrebbe essere chiamato a rispondere di un debito contratto dallo schiavo prima dell'acquisto (e non ci sarebbe bisogno di applicare analogicamente la legge di Solone sulla responsabilità da delitto degli schiavi). Il trasferimento della responsabilità all'acquirente si verifica solo se, come nel caso della c. Atenogene, debiti e crediti non afferiscono direttamente alla persona dello schiavo, bensì all'esercizio commerciale che costituisce una sorta di patrimonio separato facente capo allo schiavo stesso, dunque una sorta di peculio, che viene trasferito unitamente alla persona dello schiavo esercente[35], ma senza che il nuovo padrone possa invocare una responsabilità limitata all'attivo del peculio stesso[36].

II

10. Come abbiamo accennato, Cohen sostiene che "contractual arrangements with slaves had meaning (because legally enforceable) only if slaves could be parties to commercial litigation"[37]. Ora, siccome nel caso delle *dikai emporikai* è attestato che gli schiavi potevano stare in giudizio, anche nell'ambito delle *dikai trapezitikai*, che rientrano fra le *dikai emmenoi*, devono godere dello stesso privilegio (e questa

[34] Per questo Meyer-Laurin riteneva giustamente che la norma soloniana in materia di responsabilità da illecito cozzasse con il diritto ad effettuare la *noxae datio*, attestato anche in Grecia, in particolare dalle Leggi di Platone: d'altronde quando il comportamento da cui deriva l'illecito è stato posto in essere per ordine del padrone, è lui che ne risponde (dunque in questo caso sicuramente *noxa caput non sequitur*). Questo principio è chiaramente affermato nel diritto di Gortina del V sec. (IC IV 47).

[35] In questo senso sostanzialmente già Lipsius, 795, secondo cui la legge di Solone non può trovare applicazione neppure in via analogica "weil die Schulden nicht auf der Person des Midas, sondern auf dem Geschaeft hafteten". Sembra però che dalla dottrina successiva il punto di vista di Lipsius non solo non sia stato accolto, ma nemmeno preso in considerazione. Klees, p. 135, si chiede se, al momento della vendita della profumeria, lo schiavo Midas fosse in possesso di un proprio patrimonio: penso che la questione non si ponga, dato che tutto appare investito nell'azienda commerciale.

[36] Per quanto riguarda il punto di vista di E. Cohen, si potrebbe dunque concludere che egli ha trasferito nel mondo greco il duplice sistema romano, dove si distingue lo schiavo *institor*, della cui amministrazione tanto l'attivo quanto il passivo fanno capo immediatamente al *dominus*, che risponde integralmente dei debiti, dallo schiavo gestore di un'impresa "peculiare", in cui attivo e passivo vanno calcolati nell'ambito del *peculium*, dato che, in linea di principio, il *dominus* risponde dei debiti solo entro la capienza del *peculium*. La differenza è che ad Atene, contrariamente a quel che pensa Cohen, l'attivo del "peculio" non costituisce un limite alla responsabilità del padrone.

[37] *Ath. Bank.*, p. 96.

equiparazione è rafforzata dal fatto che schiavi e stranieri risultano ugualmente attivi sia nel commercio marittimo sia nelle attività bancarie)[38]. Né si deve trarre un indizio contrario dal fatto che nel *Trapezitico* di Isocrate "the banking slave" Kittos viene richiesto di testimoniare mediante *proklesis eis basanon*. Infatti l'orazione di Isocrate risale all'inizio del IV sec., cioè a un'epoca in cui le *dikai trapezitikai* non erano ancora state incluse nelle *dikai emmenoi*[39].

A me pare che tutto questo ragionamento sia insostenibile. Lo stesso Cohen aveva osservato anni fa che delle *dikai emmenoi* fanno parte azioni del tutto diverse fra loro, per cui è impossibile stabilire "whether the various suits shared procedural similarities other than speed"[40]. Non c' è dunque una ragione valida per ritenere che il fatto di essere incluse nel novero delle *dikai emmenoi* renda tali azioni automaticamente partecipi di caratteristiche procedurali che sono attestate soltanto per alcune di esse (e in particolare per le *dikai emporikai*). D'altronde che gli schiavi non godessero del privilegio di essere parte in un processo mi pare confermato dall'orazione *c. Panteneto* (Dem. 37), che si riferisce, come è noto, a una *dike metallike*, cioè a una categoria di azioni che rientrano nelle *dikai emmenoi* (ed è datata, secondo Gernet nell'Introduzione all'orazione nell'ed. Belles Lettres, al 346 o 345: quindi potrebbe essere stata già inclusa nella legge istitutiva delle *dikai emmenoi*).

Senza riprendere l'intera vicenda che ha dato luogo al processo[41], mi limito a ricordare che Evergo, in assenza di Nicobulo suo concreditore nei confronti di Panteneto, dopo aver preso possesso dell'azienda di lavorazione del metallo appartenente a Panteneto, viene accusato da quest'ultimo di avergli sottratto il denaro per pagare il canone di affitto della miniera, provocando così la sua iscrizione nel registro dei debitori pubblici. Panteneto agisce contro Evergo per danno e vince la causa. Al ritorno di Nicobulo, e nonostante l'*afesis* riconosciutagli, Panteneto agisce anche contro di lui chiedendo il medesimo risarcimento ottenuto da Evergo. L'atto di accusa, i cui capi sono riportati per esteso nel corso dell'orazione, inizia imputando a Nicobulo la responsabilità per aver ordinato ad Antigene, suo schiavo, di sottrarre allo schiavo di Panteneto il denaro da versare al Tesoro (§ 22); non solo, ma di averlo preposto all'atelier detto Trasillo, di proprietà di Panteneto, rendendo lo schiavo *kyrios* dei beni di Panteneto stesso, contravvenendo al divieto di quest'ultimo (§ 25). Nicobulo si difende sia dalla prima accusa che dalla seconda accusa affermando che non avrebbe mai potuto dare quegli ordini ad Antigene, visto che in quel periodo non era presente ad Atene[42]. E aggiunge: come è possibile che

[38] *Ibid*., p. 97.
[39] *Ibid*., p. 97 n. 170.
[40] *Ath. Mar. Courts*, p. 20.
[41] V. in particolare Harris 1988.
[42] Interessante il § 24 in cui Nicobulo riporta l'accusa di Panteneto di aver ordinato al proprio schiavo di fare qualcosa che un cittadino non avrebbe potuto ordinare a un

Panteneto abbia scritto queste cose nel suo atto d'accusa (e che Panteneto abbia considerato responsabile Antigene anche della sottrazione del denaro al proprio schiavo ce lo conferma il § 50, su cui v. sotto)? Ora dal § 26 apprendiamo due cose: la prima è che, nel processo contro Evergo, Panteneto non ha fatto riferimento allo schiavo Antigene; la seconda è che Nicobulo non nega che lo schiavo Antigene abbia avuto il ruolo che Panteneto gli attribuisce nel secondo capo d'accusa (probabilmente perché il fatto è stato testimoniato da Panteneto: v. § 48 - e forse si trattava di un capo d'accusa che non era stato rivolto contro Evergo), ma sostiene che è stato Evergo a metterlo a capo (*katestese*) dell'atelier. Occorre tener conto che ormai Evergo è stato condannato; quindi non rischia niente se nel corso dell'orazione gli vengono attribuiti ulteriori illeciti[43].

11. La questione dello schiavo viene ripresa dopo un lungo intervallo ai §§ 50 e 51. Alla fine del § 50, contraddicendosi rispetto alla linea avanzata al § 26, Nicobulo nega che i fatti che sono stati imputati a Evergo (e che hanno portato alla sua condanna) siano imputabili anche al proprio schiavo Antigene. Segue il § 51, che riporto integralmente nella traduzione Gernet: " Aussi bien, Panténètos lui-meme l'a mis complètement hors de cause: car ce n'est pas maintenant qu'il devait l'accuser, ni dans l'acte où il le réclamait pour la question; il aurait du lui intenter l'action et, ensuite seulement, s'en prendre à moi, le maitre. Au lieu de cela, c'est à moi qu'il a intenté l'action, et c'est mon esclave qu'il incrimine. Les lois ne permettent pas cette procédure: a-t-on jamais vu, dans une action intentée au maitre, alléguer le fait de l'esclave comme si c'était celui du maitre?".

Sembra che il § 51 abbia sempre creato difficoltà agli interpreti e ai commentatori dell'orazione. Lipsius parafrasava così: "Pantainetos habe vielmehr gegen diesen [scil. Antigenes] klagbar werden und sich gegen ihn selbst als dessen kyrios nur in der Klagrede wenden sollen" (p. 795-6). Gernet, nell'introduzione alla sua edizione Belles Lettres, osserva: in caso di atto (illecito) posto in essere dallo schiavo "le maitre est toujours responsable, en droit grec comme en droit romain. Mais à Athènes la procédure est différente suivant les espèces: lorsque l'esclave a agi sur l'ordre du maitre, c'est le maitre qui est actionné; lorsque il a agi de son chef, c'est lui-même – la condamnation étant d'ailleurs, prononcée contre le maitre". E conclude, riferendosi evidentemente al testo del § 51: "Nicoboulos en prend texte pour ergoter un peu" (p. 228). Più di recente Harrison (I p. 174) osserva piuttosto sbrigativamente che, secondo Nicobulo, "the proper procedure for Pantainetos would have been to sue the slave and by this means get a judgement against himself as the slave's master"; Cataldi (p. 440 n. 69) riprende quasi alla lettera l'opinione di Gernet; quanto a E. Cohen, mi pare che tenda a interpretare Dem. 37.51 in senso

cittadino di fare: così intendo *ha oude polites politen dynait'an poiesai* (Gernet traduce invece: "ce qu'un citoyen ne pourrait meme pas faire à un citoyen" (p. 238).

[43] Ma Isager – Hansen sottolineano che questo argomento non può valere, "for the master is liable for the offences of his slave" (p. 194).

conforme alla sua tesi di fondo, secondo cui gli schiavi potevano in certi casi essere ritenuti responsabili in proprio. Egli scrive infatti: "Indeed, we know of several cases where a slave was in fact sued directly, as a named defendant, but where the master insisted, at least partly for tactical reasons, that the suit should instead have been brought directly against the slave's owner" (*Ath.Bank*., p. 95)

Io però non credo che il testo enunci un principio generale quale quello proposto da Gernet (secondo cui occorrerebbe distinguere se vi sia o non vi sia stato un ordine del padrone) e variamente ripreso dalla dottrina successiva. Credo che il passo vada inquadrato nella fattispecie processuale a cui l'orazione si riferisce. Abbiamo detto che nell'azione contro Evergo lo schiavo non era nominato. E' adesso che serve a Panteneto tirarlo in ballo, allo scopo di poter accusare Nicobulo, assente all'epoca dei fatti. Il passo (§§ 50-51) gioca dunque su due piani temporali e sulle due azioni, quella che avrebbe dovuto essere intentata allora (cioè quando Nicobulo era assente) e quella che è stata intentata adesso. L'azione attuale muove dal fatto che i comportamenti imputati a suo tempo a Evergo hanno visto in realtà come corresponsabile anche Antigene; e tuttavia allora Antigene non è stato menzionato da Panteneto; dunque sostiene Nicobulo, ha implicitamente riconosciuto che era estraneo ai fatti. Avrebbe dunque dovuto allora, quando ha agito contro Evergo, agire anche contro Nicobulo adducendo nell'*enklema* la responsabilità di Antigene. Ora invece, accusa me formalmente di avergli provocato i danni di cui chiede il risarcimento, ma in realtà attribuisce la responsabilità ad Antigene (*nun d'eilechen men emoi, kategorei d'ekeinou*). Dunque è una incongruenza procedurale quella di cui Nicobulo accusa Panteneto. Della distinzione fra schiavo che si conforma a un ordine e schiavo che agisce di sua spontanea volontà in questo passo non v'è traccia[44]: non è questione che viene in discussione o che rileva, anche se effettivamente si accenna a una preposizione all'atelier conseguente a un ordine (*prostaxai*)[45]. Naturalmente questo passo non attesta neanche il riconoscimento allo schiavo di una capacità di stare autonomamente in giudizio, senza coinvolgere il

[44] Per vedere riconosciuta la rilevanza dell'ordine impartito allo schiavo (o a un subordinato) occorre rivolgersi alla legislazione gortinia, precisamente alle due iscrizioni denominate NM (IC IV 41) e OM (IC IV 47). In particolare per quanto riguarda OM, l'ordine impartito allo schiavo *katakeimenos* (cioè dato a pegno) rileva per stabilire la responsabilità del creditore o del debitore in ordine alle conseguenze dell'illecito commesso dallo schiavo. Se vi è stato un ordine del creditore, l'azione andrà intentata contro il creditore; se non vi è stato ordine, contro il debitore. E' interessante notare che invece, quando ad Atene lo schiavo è dato in affitto, sarà sempre il padrone e non il locatario a rappresentarlo in giudizio (v. Dem. 53.20).

[45] Interessante che, sempre stando a quanto Nicobulo dice al § 51, Panteneto non avrebbe avuto diritto nemmeno di avanzare la *proklesis eis basanon* nei confronti di Antigene, apparentemente perché sarebbe stata giustificata solo se fosse stata richiesta nel processo contro Evergo. Tuttavia, che questo sia un argomento del tutto specioso risulta dal fatto che Nicobulo aveva accettato inizialmente la *proklesis eis basanon* rivoltagli da Panteneto (§§ 39-40).

padrone[46]. E nemmeno di testimoniare liberamente, visto che viene in discussione, fra gli altri punti, proprio la *proklesis eis basanon* con cui viene richiesta da Panteneto la testimonianza di Antigene.

Possiamo dunque concludere dall'esame della c. Panteneto che, nell'ambito delle *dikai metallikai*, gli schiavi preposti a un'attività connessa allo sfruttamento delle miniere non sembrano godere di uno statuto privilegiato.

III

12. Tutto ciò significa allora che l'ipotesi che intendevamo verificare si rivela del tutto inconsistente, cioè che non è possibile identificare, al di fuori delle *dikai emporikai*, delle norme o anche semplicemente delle pratiche introdotte in via consuetudinaria, che si possano considerare come innovazioni o deroghe al diritto ordinario con l'intento di riconoscere e quindi di favorire attività economiche di rilievo? Io credo che la risposta non debba essere assolutamente negativa e che vi siano specifiche pratiche economiche che trovano un riconoscimento giuridico. Abbiamo già visto come alcuni aspetti del rapporto fra padroni e schiavi impegnati in attività economiche vengano disciplinati in modo da assicurare una certa autonomia alla gestione di aziende da parte di schiavi. Vorrei ora concludere mettendo in luce l'emergere nell'Atene del IV sec. di un contratto nell'ambito dell'attività bancaria, che si ritroverà poi nella disciplina giuridica delle attività bancarie a Roma

Lo spunto ci è dato dall'orazione di Apollodoro contro lo stratego Timoteo (Dem. 49), scritta per una causa che dovrebbe rientrare fra le *dikai trapezitikai*: si tratta di un'orazione ricchissima di informazioni sul funzionamento, anche dal punto di vista giuridico, di una grande banca ateniese nella prima metà del IV sec. Alcune analogie con il futuro c.d. diritto bancario romano sono evidenti: quella che salta immediatamente all'occhio è la rilevanza probatoria privilegiata dei registri bancari. Restando in questa prospettiva comparativa vorrei occuparmi di un aspetto apparentemente marginale della vicenda narrata nell'orazione, che però rivela una somiglianza singolare con uno degli istituti noti al diritto bancario romano: il c.d. *receptum argentarii*.[47] Ricostruire la natura e i caratteri di questo istituto in diritto romano non è facile, perché Giustiniano lo ha cancellato dalla compilazione. Tuttavia alcuni passi del Digesto permettono di capire che si trattava della promessa di pagare il debito di un cliente rivolta dal banchiere a un creditore, o su mandato del cliente stesso o per iniziativa del banchiere stesso, che veniva così ad attuare una *negotiorum gestio*.

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[46] Del caso di Callaro in Dem. 56 poco si può dire perché non conosciamo le circostanze che hanno condotto a promuovere un'azione contro lo schiavo distinta da quella contro il padrone. Ma possiamo supporre che dal punto di vista procedurale il caso non sia diverso da quello adombrato nella c. Panteneto.

[47] Sul *receptum argentarii* v. Andreau 1987, p. 597ss.; Petrucci in *D. comm. Rom.*, p. 105ss.

Ora, in Dem. 49. 27-28 e 65[48] troviamo la promessa di Pasione di pagare il trasporto del legname donato dal re di Macedonia a Timoteo. Il verbo usato è *hupischneomai*, che ha il significato generico di promettere. Gernet sostiene tuttavia che non si tratta di una promessa generatrice di un'obbligazione contrattuale, per cui il terzo delegato da Timoteo a pagare il trasporto con il denaro di Pasione non acquista un diritto di credito azionabile (comm. al § nell'ediz. Belles Lettres). Gernet adduce, a conferma di questa sua opinione, la svalutazione da parte di Rabel del significato tecnico del verbo *sustesai*[49] nel contesto dell'episodio, in quanto normalmente è Filonda che viene "presentato" a Pasione, ma una volta è Pasione ad essere "presentato" a Filonda (§ 28). A me sembra però che la validità della promessa prestata da Pasione non dipenda dalla natura della "presentazione" del creditore. Infatti Pasione paga e iscrive Timoteo come debitore nel registro del suo conto (esattamente come a Roma il banchiere iscrive nel registro come debitore il nome di colui che gli ha dato l'ordine di pagare). E Timoteo, a sua volta, non si difende sostenendo che si è trattato di un dono e quindi non dell'adempimento di un obbligo (e ciò nonostante che si parli molto di *charis* nel contesto di questo episodio: v. ad es. § 28). Sostiene invece che Filonda non ha prelevato dalla banca il corrispettivo del trasporto del legname, quindi che la somma non è stata effettivamente versata da Pasione. In realtà, stando almeno al racconto di Apollodoro, all'arrivo della nave Filonda ordina a Pasione di pagare adempiendo all'obbligo che si era assunto, e Pasione esegue l'ordine di Filonda e paga. Possiamo dunque dire che la c. Timoteo ci testimonia dell'esistenza di un negozio complesso analogo a quello che a Roma avrebbe dato luogo a un *receptum argentarii* ?

La dottrina che possiamo considerare oggi maggioritaria ritiene che con il *receptum argentarii* il banchiere si assumesse un'obbligazione di garanzia nei confronti del creditore del cliente *dominus*. Andreau (p. 402) parla esplicitamente di un duplice incontro fra banchiere e creditore: nel momento in cui il banchiere "s'engage" e nel momento in cui il banchiere adempie ("paie"). Ora, senza voler addentrarmi qui in una discussione sulla natura e sulla struttura del *receptum argentarii*, che ha suscitato di recente un rinnovato interesse, a me pare che questa ricostruzione della vicenda costitutiva del rapporto non corrisponda alle esigenze pratiche a cui dovette rispondere l'istituto. Mi sembra cioè molto più probabile, trattandosi di un'obbligazione assunta mediante dichiarazione unilaterale come accade appunto nel caso della promessa di Pasione, che il banchiere incontrasse il creditore soltanto nel momento in cui questi si presentava per riscuotere la somma che il banchiere si era obbligato a pagare.

Receptum allora, qui come negli altri casi attestati in diritto romano, sembra alludere a un impegno particolarmente rigoroso, posto a carico di determinate

[48] Nella relazione da me tenuta a Durham ho citato erroneamente il § 67 invece del § 65.

[49] E. Rabel, *Systasis*, in Archives d'Histoire du Droit Oriental, 1937, 214ss. (= *Schriften*, 607ss.).

categorie di persone. Ritornando al caso della nostra orazione, Pasione si obbliga a pagare una somma di denaro a soddisfacimento di una pretesa nascente da un'obbligazione che non esiste ancora a carico di Timoteo. Non si tratta nemmeno di un prestito da Pasione a Timoteo, come sostiene Rabel (p. 215 = 609), perché dalle scritture della banca la somma risulta pagata al trasportatore (indicato da Filonda), non a Timoteo e nemmeno a Filonda (nonostante il fatto, come risulta dal § 29, che sia stato proprio Filonda a ritirare il denaro dalla banca e a versarlo al trasportatore). E tuttavia mi pare che il negozio intercorso fra Timoteo, Pasione e il trasportatore (indicato da Filonda), implichi necessariamente la partecipazione di tutte e tre le parti, nel senso che Pasione si obbliga nei confronti Timoteo a pagare (con denaro proprio) il trasportatore del legname di Timoteo che sarà indicato da Filonda[50].

E' vero che non siamo in grado di dire se il trasportatore e lo stesso Timoteo sarebbero stati legittimati ad agire contro il banchiere Pasione, qualora questi non avesse pagato, ma niente nel testo della c. Timoteo ci impedisce di supporlo. Il fatto che non vi sia traccia di una testimonianza del comandante della nave, che aveva trasportato il legname, contribuisce naturalmente a rendere più incerta la definizione del rapporto e del ruolo che i vari personaggi menzionati vi hanno svolto.

In definitiva a me pare che, sia o non sia persuasiva l'analogia con il *receptum argentarii* romano, la vicenda che abbiamo qui richiamato confermi l'esistenza di regole giuridiche specificamente tese a disciplinare l'attività bancaria, seguendo le esigenze economiche che si realizzano appunto tramite le operazioni di banca.

13. I casi che ho esaminato sono forse già sufficiente per concludere che non possiamo parlare per l'Atene del IV secolo di una elaborazione consapevole di un "diritto dell'economia" distinto dal diritto comune. Ciò è dovuto naturalmente in primo luogo all'assenza dei giuristi. E tuttavia vi sono indizi che l'esigenza di disciplinare in modo specifico singoli aspetti delle attività economiche emerga chiaramente dalle fonti, sia per scelte consapevoli di politica legislativa sia per la recezione nella prassi giudiziaria di usi e costumi imposti dalla "razionalità" economica (che ritroveremo poi per la maggior parte integrati dai giuristi, con i necessari adattamenti e perfezionamenti, nel sistema giuridico romano). Il funzionamento della banca ad Atene si rivela un terreno particolarmente fertile di innovazioni in campo giuridico: molte di esse attendono ancora di essere enucleate e

[50] Resta da chiarire se nel *receptum argentarii* romano l'ordine di pagare il terzo, rivolto dal cliente al banchiere, sia veramente estraneo alla struttura del negozio, come sostiene ad es. Andreau, p. 600. Vorrei oltre tutto sottolineare che evidentemente Pasione non ha a disposizione fondi lasciati da Timoteo per pagare il legname (a differenza quindi di quanto accade nel Trapezitico isocrateo, §37, dove si fa osservare ai giudici che il medesimo Pasione non avrebbe prestato garanzia se non avesse avuto a disposizione fondi del debitore principale). Se poi volessimo istituire un'analogia con un negozio del diritto moderno, io penserei a qualcosa di più vicino a una delegazione che a un accollo.

valutate attraverso un'analisi accurata delle singole fattispecie presentate dalle orazioni giudiziarie attiche.

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RISPOSTA A ALBERTO MAFFI

La densa relazione di Alberto Maffi[1] offrirebbe l'occasione per aprire una discussione non soltanto sui temi specifici trattati, ma anche sui presupposti di carattere generale per i temi in essa affrontati e su altri aspetti che stanno, comunque, più sullo sfondo. Per i problemi di spazio inerenti a questa raccolta, mi limiterò a proporre – in una versione alquanto ridotta – quella parte delle mie osservazioni che riguardava l'interpretazione data dal relatore alla controversia Epicrate vs. Atenogene (Hyp. *or*. 5), la quale rappresenta il caso più complicato fra i tre che egli ha affrontati[2].

Com'è noto, si tratta qui dell'acquisto di una profumeria, un *myropôlion* che Epicrate ha comprato da Atenogene: la bottega era condotta da uno schiavo di quest'ultimo, un certo Mida, che, nella relativa gestione, aveva contratto debiti di cui – qualsiasi ne fosse stato il fondamento – risultava essere responsabile stesso Atenogene[3]. In seguito alla vendita del *myropôlion* la responsabilità per tali debiti

[1] Di tale relazione, non insensibilmente raccorciata nell'esposizione orale, tengo presente la versione che, in formato .pdf, è stata posta a disposizione dei partecipanti al convegno. Nella veste da me tenuta presente, la relazione di Alberto Maffi non coincide di certo precisamente col testo che precede questa mia risposta, né quel file .pdf aveva l'impaginazione che la relazione stessa ha per l'innanzi assunto in questo volume. Pur se mi verrà fatto di citare, fra virgolette, alcune frasi, più o meno lunghe, od alcune parole dalla redazione da me tenuta presente, m'è sembrato quindi inutile indicare il numero della pagina del file .pdf suddetto, da cui io le ho attinte. Per rispettare in qualche modo la 'storicità' degli accadimenti, non ho del resto voluto aggiornare la mia 'risposta' sulla redazione finale approntata per la stampa dall'autore, il quale me l'ha posta a disposizione con grande cortesia ed amicizia e, per evitare tentazioni al proposito, non l'ho neppure letta. Mi scuso, di conseguenza, per le eventuali *inconcinnitates* che si possano cogliere nella mia risposta rispetto al testo della relazione qui stampato.

[2] Conto invece di pubblicare fra le *Note e discussioni* del prossimo numero del *BIDR*. l'originaria – se non allargata – stesura della mia risposta.

[3] Non risulta altresì dall'orazione che anche Mida fosse responsabile, come sembrerebbe presupposto nel modo in cui si esprime il Maffi ("dunque Mida non è affatto l'unico responsabile dei debiti contratti nell'esercizio della profumeria: o il venditore o il compratore, dunque o l'ex-padrone o il padrone attuale, ne sono pienamente responsabili"). In un ambiente ispirato ad una completa più che marcata empiria, non si può argomentare al riguardo partendo dall'impiego del verbo *opheilein* che indica anzitutto un 'dovere' sul piano socio-economico o morale: dovere che, soprattutto il primo, può – ma non deve necessariamente – assurgere ad obbligo giuridico. V'è poi la questione di quali sarebbero stati i beni od il patrimonio con i quali avrebbe risposto

era venuta a ricadere – sulla base di una causa, sulla quale il relatore ed io abbiamo opinioni diverse – su Epicrate, con la conseguente liberazione dello stesso Atenogene.

Per quanto riguarda "l'acquisto di uno schiavo preposto a un'attività economica autonoma" Maffi ritiene, infatti, che "i debiti sono compresi nell'acquisto ... a meno che non venga esplicitamente esclusa la vendita dell'esercizio insieme a quella dello schiavo che lo gestisce" e tende, conseguentemente a configurare la responsabilità dell'acquirente Epicrate in modo analogo a quello in cui, in diritto romano, veniva regolata la posizione del compratore di uno schiavo munito di un peculio, nel quale, come nel nostro caso, fosse compreso un esercizio commerciale[4].

A me sembra che al proposito sia decisivo l'accertamento dell'oggetto del contratto, descritto dal relatore in modo tale da adattarsi alla ricostruzione del regime giuridico della detta transazione da lui stesso presentata[5]. Le fonti parlano, a mio avviso, con molta nettezza contro, non a favore della ricostruzione qui discussa. Nei §§ 5-6, infatti, il logografo si limita a dare per scontato che il *myropôlion* fosse stato acquistato da Epicrate insieme a Mida, che lo gestiva, ma non viene precisato il contenuto del contratto in base al quale ciò era avvenuto.

Senza poter dire che questi passi vadano contro l'ipotesi del Maffi, essi non rappresentano una prova a favore della stessa. Iperide si sarebbe infatti potuto esprimere nel modo in cui lo leggiamo nei detti passi, anche nel caso in cui, secondo la sua prospettazione[6], l'acquisto della bottega – segmento decisivo del complessivo disegno criminoso inventato da Atenogene e dalla sua complice Antigona – fosse, dal punto di vista della struttura 'giuridica' del negozio, l'oggetto principale del contratto, mentre gli schiavi avessero costituito una sorta di accessorio di tale

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Mida, perché tale responsabilità fosse effettiva: l'ipotesi che oggetto della responsabilità stessa fosse il *myropôlion* considerato come una sorta di *peculium*, rappresenta, allo stato delle nostre conoscenze, l'assunzione di un dato non fondato sulle fonti.

4 "Infatti al § 7 viene prospettata in linea teorica l'ipotesi di un acquisto degli schiavi senza accollarsi i debiti da essi contratti (il che sembra significare – contro Cohen – che i debiti sono compresi nell'acquisto di uno schiavo preposto a un'attività economica autonoma a meno che non venga esplicitamente esclusa la vendita dell'esercizio insieme a quella dello schiavo che lo gestisce), ma anche (pur nel silenzio del testo) senza acquisire l'attivo dell'esercizio commerciale: dunque, in termini romani, un acquisto degli schiavi senza peculio".

5 Si vedano le varie prese di posizione del Maffi, tutte più o meno chiaramente convergenti nella direzione accennata: "in realtà, se leggiamo i §§ 5-6 dell'orazione, vediamo che Atenogene vende gli schiavi con i loro debiti e con le scorte presenti nel negozio. Dunque vende gli schiavi insieme all'oggetto della loro attività economica, cioè quello che in termini romani sarebbe il loro peculio", mentre, poi, divengono oggetto della vendita "gli schiavi e l'esercizio commerciale comprensivo di crediti e debiti".

6 Dalla quale dipende non soltanto, come si vedrà anche più avanti, l'individuazione del regime giuridico, ma anche la ricostruzione dei fatti, sul cui reale svolgimento è in generale difficile trarre sicure notizie dalle orazioni contenute nel *Corpus*.

oggetto e, in quanto 'funzionali' all'esercizio dell'azienda, fossero naturalmente ricompresi nell'alienazione della stessa.

Che quest'ultima ricostruzione fosse però quella che aleggiava alla mente di Iperide può, a mio avviso, ricavarsi – al di là delle eventuali incertezze della costituzione del testo – dal § 26. Indubbiamente, se constasse altrimenti che oggetto della compravendita non fosse stato il *myropôlion* gestito da Mida e dai suoi due figli, sibbene questi schiavi (di cui uno interessava particolarmente Epicrate)[7], il detto § 26 non costituirebbe un insormontabile ostacolo ad accettare una tale ricostruzione. Mancando, però, tale prova, esso fornisce all'ipotesi da me preferita un appoggio testuale che non si trova invece per quella avanzata dal Maffi, a meno che non la si voglia trovare nel – metodologicamente dubbio – paragone con l'esperienza romana: ma il dover ricorrere ad argomenti di tal genere prova più contro che a favore dell'ipotesi che con essi si vorrebbe sostenere.

D'altro lato, bisogna sottolineare che nulla nei §§ 6-8 giustifica l'assunto di Alberto Maffi per cui "i debiti sono compresi nell'acquisto di uno schiavo preposto ad un'attività economica a meno che non venga esplicitamente esclusa la vendita dell'esercizio insieme a quella dello schiavo che lo gestisce". A tale interpretazione è contrario il tenore letterale del passo, nel quale, in ciò sono d'accordo con Edward Cohen, la responsabilità dell'acquirente parrebbe derivare dalla circostanza che Epicrate si era esplicitamente accollati – nell'acquisto di Mida (comunque lo si voglia configurare rispetto a quello del *myropôlion*) – i debiti contratti dallo stesso Mida nell'esercizio della bottega, come risulta con tutta chiarezza dal § 6 (dove è contenuta, si potrebbe dire, la proposta di contratto fatta da Atenogene), nonché dai §§ 7-8.

In questi §§ l''accollo', se lo vogliamo chiamare così, dei debiti del *myropôlion* è presentato, infatti, come oggetto di una specifica convenzione fra le parti, non come il risultato – secondo quanto vorrebbe il Maffi – della mancata esclusione dell''azienda-peculio' dalla vendita di Mida. Qualsiasi fosse poi stata l'effettiva portata di tale convenzione, bisogna preliminarmente osservare come essa abbia tutt'altro contenuto che quello ipotizzato dal Maffi: essa si riferisce all'accollo dei debiti, non riguarda la determinazione dell'oggetto della vendita.

Non voglio, con ciò, escludere che – a parte il problema se rispondesse ai fatti realmente accaduti – la rappresentazione che ne dà Iperide possa non essere corretta rispetto a quell'ordinamento attico, per cui è sempre assai difficile accertare la portata 'oggettiva' di una normazione (semmai ne sia esistita una). Ma non abbiamo alcuna prova di un tale valore 'oggettivo' della normazione attica in materia, onde possiamo ragionare soltanto sulla raffigurazione fornitane da Iperide. Anche qui, la sola prova portata, in definitiva, dal relatore consiste nel paragone con le *actiones adiecticiae qualitatis* del diritto romano, con il regime dell'*actio de peculio* più che

[7] Come risulta a tutte lettere dal § 5 e dal § 24, il vero – e non commerciale – interesse di Epicrate era di ottenere la 'disponibilità' del *pais*, uno dei figli di Mida.

con quello dell'*actio institoria*. Ma un tale paragone – per avere un qualche valore (se mai vi riesca) – deve fondarsi su qualcosa di più della simiglianza delle situazioni economiche regolate[8], altrimenti, oltre ad essere infondato, un siffatto modo di procedere diventa metodologicamente assai pericoloso[9].

Resta poi aperta anche qui la questione fondamentale nell'utilizzazione delle fonti del *Corpus oratorum Atticorum*: al di là della tesi – più o meno apparentemente – difesa dal logografo, che cosa possiamo sapere del regime attico rispetto a vendite di questo genere? Io partirei, anzitutto, da una considerazione di buon senso. Iperide non aveva alcuna ragione a prospettare strumentalmente delle inesattezze sul regime giuridico del contratto, dato che si limitava a chiedere il risarcimento del danno per il comportamento scorretto di Atenogene durante le trattative, risarcimento che – per quanto possiamo sapere – non dipendeva da tale regime[10].

Bisogna però avvertire che è, comunque, assai difficile precisare i dettagli di tale disciplina. Come dato minimale, di cui penso si possa fare stato fino ad una prova del contrario (che il Maffi non ha in alcun modo fornito), dall'*Or*. 5 di Iperide risulta come l'accordo delle parti, il quale aveva come oggetto immediato l'accollo dei debiti, abbia avuto un ruolo decisivo per la successione di Epicrate nei debiti che gravavano su Atenogene in relazione al venduto dal secondo al primo. Oltre a ciò è difficile andare, e rimangono molti punti dubbi.

Uno principalmente, almeno agli occhi dell'interprete moderno, al quale risulta difficile ammettere che un patto intervenuto fra il debitore ed un terzo potesse avere l'effetto di produrre un mutamento nella persona del debitore, una sorta di successione nel debito, con effetto liberatorio verso il precedente debitore[11], soprattutto

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[8] La mia convinzione al proposito è rafforzata dal fatto che l'analogia viene in pratica a sfumare, perché il relatore delinea un 'regime misto', che risulta completamente estraneo alle strutture romane, sovrapposte a freddo su tale regime, al solo scopo di instaurare un raffronto fra i due ordinamenti che non si vede bene a che cosa possa servire, se si tiene conto delle disparità fra gli stessi evidenziate nel corso di questa risposta.

[9] Sotto tale profilo, da tutto questo discorso mi sembra si possa ricavare un insegnamento. Non si può procedere ad un paragone fra l'ordinamento romano e quello attico, dopo aver ricostruito quest'ultimo alla luce di quanto sappiamo per il primo (e, come già dicevo, non v'è dubbio che la ricostruzione del Maffi si fondi sul detto paragone). Se la comparazione possa servire a qualcosa (ciò di cui sono abbastanza dubbioso), essa deve effettuarsi dopo aver ricostruito l'uno e l'altro ordinamento in sé considerati, non sulla base della 'Hineininterpretierung' dell'uno nell'altro, in qualsiasi verso ciò avvenga (ma non è di certo facile che si abbia la proiezione di strutture del diritto attico in quello romano).

[10] Lo stesso varrebbe, del resto, anche se, per avventura, Iperide avesse chiesto l'annullamento del contratto per il raggiro subito da Epicrate e/o si fosse basato su di esso per ottenere il risarcimento del danno: prospettive queste ultime un po' troppo modernizzanti per esser imputate alle vedute correnti nell'Atene del IV sec. a.C.

[11] Almeno nella prospettazione di Iperide, l'accordo non si è limitato ai rapporti interni, perché altrimenti Epicrate sarebbe stato in grado di rifiutare il pagamento ai terzi creditori, aspettando che Atenogene agisse contro di lui per l'inadempimento del-

se si tiene conto che – a differenza, ad es., di quanto può succedere nell'accollo novativo o privativo, secondo il diritto italiano vigente[12] – ciò sarebbe avvenuto senza la partecipazione dei creditori, per così dire, ceduti.

S'affaccia così spontanea l'ipotesi che l'accordo fra Epicrate ed Atenogene in tanto avesse rilevanza, in quanto fosse connesso col trasferimento dell'azienda (e su questo è da concordare con il Maffi), ma né nella *Contra Athenogenem* né altrove v'è qualche indizio che un accordo del genere potesse funzionare soltanto nella fattispecie in cui si alienasse uno schiavo e l'azienda da quest'ultimo autonomamente gestita. Indubbiamente, nel caso in questione, ciò era avvenuto, ma non è stata fornita alcuna prova che fosse una circostanza decisiva per la disciplina giuridica del trasferimento dei debiti o non soltanto un *accidens*.

Allo stato delle nostre conoscenze, si trattava di una regola che – sancita da un *nomos* o fondata sulla prassi[13] – riguardava il trasferimento delle attività commerciali e non la gestione delle aziende da parte degli schiavi: il collegamento con tale gestione, proposto dal relatore, si basa, come si è già detto, solo sul paragone col diritto romano, palesemente insufficiente a tale scopo[14], mentre

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l'accordo per difendersi contro l'azione così proposta opponendo il raggiro subito. D'altro lato, il logografo non contesta in alcuna maniera che, sulla base di quanto stabilito fra le parti, il proprio cliente fosse tenuto verso coloro che vantavano un credito derivante dalla gestione di Mida; né, da quanto è rimasto dell'orazione, risulta in qualche modo che Atenogene fosse rimasto anch'egli obbligato nei confronti dei creditori, ciò che – direi – avrebbe modificato profondamente lo scenario complessivo, onde, anche nella prospettazione di parte del logografo, ne sarebbe dovuta rimanere traccia.

[12] Qui si debbono distinguere due diversi aspetti. Da una parte, quello relativo alla creazione dell'obbligazione del terzo accollatario nei confronti dei creditori dell'accollante, che si risolve in un contratto a favore di terzo, com'è implicitamente riconosciuto nell'art. 1273, 1° comma, cod.civ.ital., nel quale si richiede, ai sensi dell'art. 1411, il consenso del creditore, soltanto allo scopo di rendere irrevocabile la stipulazione a favore del terzo. Dall'altro, quello della liberazione del debitore accollante, la quale, ai sensi del 2° e 3° comma del citato art. 1273, prevede che "l'adesione del creditore importa liberazione del debitore originario solo se ciò costituisce condizione espressa della stipulazione o se il creditore dichiara espressamente di liberarlo./ Se non vi è liberazione del debitore, questi rimane obbligato in solido col terzo".

[13] Non possiamo, ovviamente, fare completo affidamento sul fatto che, nell'orazione di Iperide, non si trovi alcun accenno a tali aspetti, dato che il discorso in questione è mutilo. È comunque significativo il fatto già rilevato che Iperide non metta mai in dubbio che Epicrate sia rimasto obbligato nei confronti dei creditori di Mida (nell'ambito dell'attività connessa col *myropôlion*) e che si limiti a chiedere, con ogni probabilità mediante una *dikê blabês*, il risarcimento del danno nei confronti del venditore. Questo sembrerebbe indicare più nel senso dell'esistenza di un *nomos* che in quello di una prassi, per quanto consolidata.

[14] Se, come qui si sostiene, la norma riguardava il trasferimento delle attività commerciali e non la gestione delle aziende da parte degli schiavi, il paragone col diritto romano, con l'*actio de peculio* e con quella *institoria*, verrebbe, d'altronde, inevitabilmente a cadere. Non avremmo infatti qui un regime confrontabile con i modi in cui, secondo il diritto pretorio, i proprietari di schiavi romani rispondevano per i debiti dei loro servi ed il

permane una grossa incertezza in ordine ai dettagli, soprattutto per quanto concerne il ruolo dell'accollo convenzionale dei debiti e dello specifico accordo fra Atenogene ed Epicrate a tale riguardo[15].

Siamo, comunque, in presenza di una regolamentazione che riguardava specificamente l'attività economica e commerciale, disciplinando la sorte dei debiti connessi con l'azienda ceduta. Sono forse più realista del re, ma per gli aspetti più particolarmente commercialistici si mostrava ad Atene un'attenzione maggiore di quanto non avvenisse a Roma, dove lo stesso risultato si poteva raggiungere – indirettamente – sulla base del regime del *peculium* servile, il quale non era però limitato alla gestione di un'azienda. Sotto questo profilo, il paragone è legittimo, ma anche, molto probabilmente, inutile.

paragone servirebbe soltanto a confondere le idee sulla disciplina che, sulla base delle affermazioni di Iperide, l'interprete moderno è in grado di costruire per il diritto attico. Nel caso concreto, la disciplina della vendita di un'azienda commerciale gestita da uno schiavo non sarebbe dipesa dalla responsabilità del proprietario per gli atti giuridici posti in essere dallo schiavo stesso, bensì da una norma che riguardava l'alienazione delle aziende in generale.

[15] Indubbiamente, va riconosciuto che Hyp. *or.* 5.12 non dà elementi univoci all'interprete moderno, il quale voglia procedere alla ricostruzione dell'affare intercorso fra questi personaggi. Noi non conosciamo il tenore delle *synthêkai* che Iperide fa leggere al § 12, dato che esse non vengono riportate nel papiro che ci ha restituito il discorso in questione (a parte i dubbi sulla genuinità dei documenti, soprattutto di quelli privati, che si trovano in un ristretto numero di orazioni giudiziarie). Nel § 6, infatti, noi abbiamo soltanto quella che potremmo chiamare la proposta definitiva di Atenogene, la quale, dal nostro punto di vista, può essere letta in due modi diversi: o nel senso che il venditore volesse ribadire di non essere disposto a derogare al regime naturale della compravendita di un'azienda (secondo il quale l'acquirente rimanesse obbligato per i debiti contratti per la stessa); o in quello che per ciò fosse necessaria una specifica pattuizione delle parti, in deroga al regime naturale del contratto (secondo il quale, in questa alternativa, l'acquirente non resterebbe invece obbligato). È difficile trovare una soluzione anche sul piano di una logica astratta, fondata sul bilanciamento degli interessi in gioco, perché – per i terzi creditori – l'interesse ad avere come debitore l'acquirente od il venditore non può essere valutato in astratto, sibbene in concreto.

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LA MONARCHIE LAGIDE EST-ELLE UN «ÉTAT DE DROIT»? SANCTIONS DES ATTEINTES À LA SÛRETÉ ET À L'ÉCONOMIE DU ROYAUME

1. Quelle justice pour une société multiculturelle?

Le système judiciaire des Lagides compte au nombre des chefs-d'œuvre qui fondent la grandeur de la civilisation hellénistique en Égypte au III^e^ siècle av. n.è.[1] Moins bien connu du grand public que le Phare d'Alexandrie ou le Musée et la Bibliothèque, la géométrie d'Euclide ou la géographie d'Ératosthène, la poésie de Callimaque ou la Bible des Septante, il force l'admiration des historiens par la modernité des solutions qu'il applique pour ordonner, par le biais de la sanction, le pluralisme juridique d'une société multiculturelle[2]. Favorisant le maintien des règles et concepts juridiques propres à chaque groupe de la population du royaume, il pèse de tout son poids sur le débat au sujet du monde hellénistique envisagé comme une «civilisation mixte» dans laquelle se seraient amalgamés le passé grec et le passé local des pays conquis par Alexandre le Grand[3]. Du point de vue politique, il nous aide à nuancer la représentation de la monarchie des Lagides comme un «régime colonial», les conquérants et les conquis jouissant de la même protection légale dans un réseau des tribunaux à «vocation nationale» qui ont pour mission de faire respecter les traditions des uns et des autres[4]. Pour toutes ces raisons, le système judiciaire créé par Ptolémée II Philadelphe vers 275 av. n.è. est une composante de

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[1] Cette étude reprend quelques résultats de mon dernier séminaire de «Papyrologie et histoire des droits de l'Antiquité», tenu à l'École pratique des Hautes Études (Sciences historiques et philologiques) en 2006-2007. Avant d'être présentée au XVI^e^ Symposion international d'histoire du droit grec et hellénistique (Durham, Grande Bretagne, septembre 2007), elle a fait l'objet d'un exposé aux Journées d'histoire du droit Kasra Vafadari organisées le 15 juin 2007 par l'Université de Paris X-Nanterre; une version polonaise de cet exposé a donné lieu à une conférence faite à Varsovie, le 12 décembre 2007, à l'invitation de l'Institut d'Histoire du Droit de l'Université de Varsovie, à paraître dans la revue *Meander*.

[2] Pour les détails, voir la mise au point dans Mélèze Modrzejewski 2003.

[3] Je précise, une fois de plus, mon point de vue à ce propos dans ma contribution au *Cambridge Companion to Ancient Greek Law* 2005.

[4] Sur cette question complexe, excellente mise au point par Hauben 2006.

tout premier ordre de l'idée que nous nous faisons du monde hellénistique comme type d'État et comme système d'organisation des rapports socio-économiques.

La documentation papyrologique apporte constamment des pièces nouvelles pour consolider la reconstruction du système judiciaire des Lagides proposée par Hans Julius Wolff au début des années 1960[5]. Ainsi, pour nous limiter à deux exemples notables parmi les textes récemment publiés, un document datable de la fin du III^e^ siècle av. n.è. nous fait connaître un jury de chrématistes, agents royaux, à Éléphantine qui condamne aux travaux forcés deux individus, dont un Macédonien coupable d'avoir enfreint la réglementation relative à la désignation d'un tuteur pour une femme[6]. Témoin de l'intérêt que la justice royale porte au statut personnel des habitants du royaume, il atteste le recours à la peine des travaux forcés pour la répression des abus dans ce domaine[7]. Une autre nouveauté qui mérite une mention concerne les archontes du *politeuma* juif d'Hérakléopolis qui dans les années 144/3-133/2 exercent une vaste activité parajudiciaire dans des affaires dont ils sont saisis, très vraisemblablement en vertu d'une délégation royale[8]. Le cas d'une «fiancée adultère» en apporte une illustration particulièrement significative[9].

2. Le roi justicier

Ces deux exemples permettent de souligner un trait de notre documentation concernant le fonctionnement de la justice ptolémaïque. Elle est étonnamment abondante en ce qui concerne les instances à «vocation nationale», les dicastères pour la population hellénophone et les laocrites pour les Égyptiens autochtones, ainsi que les organes judiciaires ou parajudiciaires intervenant dans le règlement des litiges au nom du roi, comme les chrématistes, ou en vertu d'une délégation royale, comme les dirigeants du *politeuma* juif d'Hérakléopolis; à cela s'ajoute tout ce que nous savons à propos d'une pléiade de fonctionnaires locaux, agissant comme auxiliaires de la justice régulière, puis s'engageant dans une activité coercitive qui progressivement se substitue à la juridiction des tribunaux. En revanche, le roi dans l'exercice direct de ses fonctions de juge est presque invisible. Héritier des pharaons et incarnation de l'«homme royal» placé au-dessus des lois de la cité par la pensée politique grecque du IV^e^ siècle, le Lagide est la source première du droit comme il est le maître de la justice dans son royaume. Théoriquement, aucune limite ne s'impose à sa législation et à sa justice. Dans la pratique, il concentre son pouvoir de

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5 Wolff 1962 (1970). Voir, sur ce livre, Mélèze Modrzejewski 1963 et 1988.

6 *P. Eléph. Wagner* 1. Voir Nachtergael 1998 et Łukaszewicz 2003. Adam Łukaszewicz a repris ce texte dans son ouvrage de 2001, p. 195-197, qui contient une introduction à la papyrologie avec un recueil de 111 documents papyrologiques en version polonaise.

7 À comparer – la législation royale sanctionnant de la peine capitale le changement arbitraire du nom et de la marque d'origine (*ethnikon*): *BGU* VI 1213 et 1250 (III^e^/II^e^ s. av. n.è.); cf. mon art. 1983, p. 244-252.

8 *P. Polit. Iud.*, éd. Cowey – Maresch 2001.

9 Voir mon art. 2005-2006.

législateur sur la protection de ses intérêts économiques, laissant la vie juridique de ses sujets indigènes et immigrés suivre le cours coutumier de leurs traditions respectives; de même il n'use personnellement de son pouvoir de juge que dans les rares cas qui mettent en jeu sa dignité de souverain ou la sûreté de l'État qu'il incarne.

De cette justice «retenue» du roi les documents papyrologiques ne parlent guère. Il faut se tourner vers d'autres sources que les juristes le plus souvent ignorent ou abordent avec méfiance. Il en est ainsi, pour ce qui est de la dignité royale, du crime de lèse majesté dans sa version hellénistique. Grâce à Athénée de Naucratis[10] et à Plutarque[11] nous en connaissons un cas cocasse, celui du poète obscène («cinédologue») Sotadès de Maronée, à qui le mariage de Ptolémée II avec sa sœur aînée Arsinoé avait inspiré un petit poème désobligeant; son exploit poétique lui a valu quelques applaudissements des Alexandrins choqués par les noces incestueuses de leurs souverains, mais aussi un châtiment peu banal: il fut d'abord jeté en prison, puis enfermé dans un vase de plomb et précipité dans la mer. Le châtiment de Sotadès nous donne l'exemple, unique dans les sources ptolémaïques, de l'exécution d'une peine capitale par noyade, καταποντισμός, à la suite d'une sentence prononcée sans nul doute par le roi lui-même dans le cadre de sa justice «retenue»[12].

Pour un autre volet de cette justice, à savoir les crimes contre la sûreté de l'État, la littérature judéo-alexandrine nous fournit une contrepartie de l'affaire Sotadès. On la trouve dans un roman politico-religieux qui nous est parvenu dans certains manuscrits de la Septante sous le titre de *Troisième livre des Maccabées*. Œuvre d'un Juif alexandrin, nourri d'une vaste culture grecque et animé d'une ardente piété juive, il nous conte l'histoire d'un violent conflit qui, à la fin du III^e^ siècle av. n.è., au lendemain de la quatrième guerre de Syrie, aurait opposé les Juifs d'Égypte au roi Ptolémée IV Philopator en rapport avec le culte de Dionysos dont ce souverain fut un fervent adorateur[13]. Le drame que l'auteur met en scène pour nous faire assister à l'exécution d'un verdict royal frappant les Juifs présente pour l'historien du droit un intérêt comparable à celui que revêt pour la connaissance de la justice impériale à Rome (*Caesariana cognitio*) le procès du gymnasiarque alexandrin Isidôros contre le roi juif Agrippa I^er^ devant l'empereur Claude, connu exclusivement par un groupe de papyrus du dossier dit d'*Actes de martyrs païens d'Alexandrie*[14].

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[10] Athénée, *Banquet des Sophistes* XIV, 620.

[11] Plutarque, *Moralia* 11a (*Sur l'éducation des enfants*).

[12] Sur tout cela, voir mon art. 1998.

[13] Je renvoie ici, pour les citations et pour les éléments de commentaire, à la traduction française que j'ai préparée pour la *Bible d'Alexandrie*, à paraître en 2008 aux Éditions du Cerf (et, dans une version limitée à la traduction annotée, pour le t. II des *Écrits intertestamentaires*, à paraître sous la direction de Marc Philonenko dans la Bibliothèque de La Pléiade, chez Gallimard).

[14] *CPJud.* II 156. Voir mon art. 1986.

3. Ptolémée Philopator et les Juifs

Deux incidents mineurs inaugurent le conflit. Vainqueur du Séleucide Antiochos III près de Raphia au printemps 217 av. n.è., Philopator rétablit son contrôle sur la région et visite les villes sur le chemin qui le mène à Jérusalem. Admirant la façade du Temple, il veut en voir l'intérieur. Son intérêt pour l'architecture de l'édifice est perçu par les Juifs comme une tentative de profanation du sanctuaire dont l'accès est interdit aux païens. Le sacrilège sera évité, mais l'incident inspire au roi méfiance et rancune envers ses sujets juifs de Judée. A leur tour, ceux d'Alexandrie et d'Égypte le déçoivent lourdement en refusant, à quelques exceptions près, de participer à l'action de grâces en l'honneur de Dionysos destinée à célébrer sa victoire. La loyauté des Juifs à l'égard de leur souverain étant ainsi mise en doute, le conflit grossit et culmine dans un drame. Accusés de préparer un complot contre le pouvoir royal, ils sont déclarés ennemis de l'État et doivent subir un châtiment «qui convient aux traîtres»: la peine des travaux forcés, qui les menaçait dans un premier temps, cède la place à une sentence capitale. Amassés avec femmes et enfants sur l'hippodrome d'Alexandrie, ils seront piétinés par un troupeau de cinq cents éléphants enivrés par de l'encens et du vin pur. Au dernier moment, ils échappent miraculeusement au massacre: effrayés par la soudaine apparition de deux anges du Seigneur, sinon, plus prosaïquement, par le bruit de la foule de spectateurs et la troupe, les éléphants font demi-tour et chargent les soldats du roi. Quelques «passants innocents», pour employer la détestable formule d'un ancien premier ministre français, en l'occurrence des soldats piétinés par les éléphants à la place des Juifs, auront payé les frais du spectacle. Le tyrannique roi, transformé par ce miracle en bienveillant protecteur, libère les prisonniers de l'hippodrome et les autorise à exterminer les apostats qui avaient accepté de rendre des honneurs à Dionysos.

Cette bouleversante histoire, relatée dans un grec raffiné et d'une richesse parfois déconcertante, paraît peu crédible aux commentateurs modernes. Dans un ouvrage paru en 2004, une jeune historienne américaine l'a rangée dans la catégorie de «fictions historiques», qui réinventent le passé pour fortifier l'identité juive en milieu païen[15]. Disons plus simplement que, comme dans tout roman, réalité et fiction s'agrègent sous le calame de notre auteur selon une logique qui n'est pas celle d'un professeur d'histoire mais celle d'un théologien doublé d'un moraliste politique. Ce qui le préoccupe n'est pas de nous restituer un épisode de l'histoire des Juifs d'Égypte, mais de formuler une réponse à la question qui, jusqu'à nos jours, n'a rien perdu de son actualité pour les diasporas juives, sinon pour toutes les minorités attachées à une tradition identitaire: en cas de conflit entre cette tradition et le pouvoir du pays d'accueil, quelle est la limite au-delà de laquelle la loyauté devient rupture et reniement de soi-même? Notre Alexandrin, Juif rigoureux qu'on qualifierait aujourd'hui de «fondamentaliste», trouve cette réponse dans la fidélité à la loi religieuse qui condamne comme un crime inexpiable toute forme d'idolâtrie –

[15] Johnson 2004, partic. p. 121-223.

le service des «dieux étrangers». Pour imprimer à son message une force de persuasion commensurable avec sa propre conviction, il plante un décor dans lequel ses ampliations littéraires s'étalent sur une charpente ancrée dans la réalité sociale et institutionnelle de son temps.

C'est là que réside son intérêt pour l'histoire du droit: il est notre principal témoin de l'action directe de la justice royale des Lagides en matière de crimes de trahison et d'atteinte à la sûreté de l'État. Sans doute trouvons-nous dans les papyrus des échos d'actes de trahison, comme la défection du «condottiere» Galestès sous le règne de Ptolémée VI Philométor ou de mouvements rebelles dans la *chōra* défiant le pouvoir royal[16]. Mais seul *3 Mac*. nous fournit à la fois le schéma d'un jugement et des détails éclairant la nature des actes incriminés et le mode d'exécution de la sanction pénale. Si l'historicité de l'événement reste discutable, ces données formelles reflètent la pratique judiciaire telle qu'elle était réellement.

La double qualité du souverain Lagide comme juge et comme législateur fait que ses décisions à caractère judiciaire peuvent revêtir la forme d'actes législatifs. On connaît plusieurs ordonnances royales, προστάγματα, combinant un jugement avec une mesure normative; la décision prise dans un cas particulier pourra s'appliquer, à l'avenir, à des cas analogues, à la manière d'un précédent judiciaire, comme dans le droit anglo-saxon de nos jours. Dans le cas qui nous intéresse ici, cette combinaison d'une ordonnance et d'une sentence se trouve dans la lettre que Ptolémée Philopator adresse à ses agents pour mettre en marche la déportation des Juifs du royaume vers Alexandrie où ils doivent subir le châtiment de leur «trahison» (*3 Mac*. 3, 12-29). Le roi invoque les «preuves convaincantes» (3, 24: τεκμήρια) de la «mauvaise disposition» (δυσνοεῖν) des Juifs à son égard, les déclare «traîtres et ennemis barbares» (προδότας καὶ βαρβάρους πολεμίους), ordonne leur comparution forcée (3, 25: ἀποστεῖλαι πρὸς ἡμᾶς) et annonce une sanction capitale «qui convient aux ennemis malveillants» (πρέποντα δυσμενέσι φόνον); ils sont soumis à un «traitement réservé aux conspirateurs» (4, 10: ἐπίβουλοι). Le verdict est prononcé «sans enquête préalable ni examen des preuves» (7, 5): la gravité des accusations portées contre les Juifs appelle une réaction immédiate et impose une procédure sommaire. De l'exécution de la sentence (3, 26: κολασθέντων) on attend un effet bienfaisant pour l'Etat lagide (τὰ πράγματα): la stabilité (εὐστάθεια) et la tranquillité (διάθεσις). À ce niveau de l'administration de la justice, objectifs politiques et répression pénale se confondent facilement.

La comparaison des crimes reprochés aux Juifs avec celui dont s'était rendu coupable Sotadès de Maronée permet de souligner un point important de notre enquête: le caractère exceptionnel du mode d'exécution de la sentence, une peine de mort «inexorable et ignominieuse», comme le dit l'ordonnance royale (*3 Mac*. 3, 25: ἀνήκεστον καὶ δυσκλεῆ). Pour Sotadès, ce fut, nous venons de le rappeler, le *katapontismós*, précipitation dans la mer du coupable enfermé dans un tonneau. Pour

[16] Pour le détail, voir mon article 2000.

les Juifs, on a préféré une sorte de *damnatio ad bestias*. Bien connu à Rome dans l'histoire des persécutions des chrétiens (*ad leones* !), ce supplice était réservé à des condamnés de bas rang et aux esclaves coupables d'un crime envers leur maître[17]. Il était appliqué dans l'Égypte romaine: deux individus furent condamnés «aux bêtes», πρὸς θηρία, par un préfet d'Égypte vers la fin II^e^ siècle de n.è.[18] Pour l'Égypte ptolémaïque, les éléphants de Ptolémée Philopator fournissent le seul exemple que nous en ayons actuellement. Dans le contexte alexandrin de la fin du III^e^ siècle avant n.è., après la victoire de Raphia qui a permis à Philopator d'amener en Égypte des éléphants de guerre indiens pris à Antiochos, il demeure parfaitement recevable du point de vue de l'histoire du droit pénal. L'auteur de *3 Mac.* n'a pas inventé cet épisode de toutes pièces: il l'a emprunté à une source extérieure à son roman[19], dont se servira aussi, dans une version un peu différente, l'historien Flavius Josèphe[20] et qui survivra jusqu'au XI^e^ siècle dans des chroniques byzantines[21].

4. *Apotumpanízein*

Pour les complices des «traîtres» une autre sanction est prévue – et nous abordons le point central de cet essai: c'est l'*apotumpanismós* (ἀποτυμπανισμός), l'exposition au poteau, annoncée par le verbe ἀποτυμπανίζειν (ἀποτυμπανισθήσεται: *3 Mac.* 3, 27), que les traducteurs modernes, ignorant le droit criminel grec, rendent par de maladroites périphrases («torturer», «tourmenter»[22]), mais dont les jusgrécistes connaissent bien le sens. On croyait autrefois que ce verbe, attesté de bonne heure à Athènes, désignait une exécution consistant à frapper mortellement le condamné avec un gourdin ou à coups de bâton. La découverte, en 1911 et 1915, dans le site du Vieux Phalère, de dix-sept squelettes portant un carcan de fer autour du cou et des crampons autour de chacune des mains et de chacun de pieds, auxquels adhéraient encore des restes de bois, a permis de modifier cette opinion: en fait, il s'agit d'un procédé qui consistait à attacher le cou, les mains et les pieds du condamné à un poteau dressé sur le sol et le laisser dans cette position jusqu'à ce que mort s'ensuive. C'est ce qu'a démontré, dans une étude désormais classique, l'archéologue grec A. Kéramopoullos[23], dont les conclusions, cautionnées par

[17] Les *Sentences* dites de Paul, un ouvrage de la fin du III^e^ siècle de n.è., signalent que la condamnation aux bêtes était également pratiquée, concurremment avec la crucifixion, pour la répression de la magie (*Sententiae Pauli* 5, 23, 17). L'exécution avait lieu au cirque, juste avant les luttes des gladiateurs, quand le public était le plus nombreux.

[18] *P.Petaus* 9, 185 de n.è.

[19] Je dois cette observation à l'éditeur polonais de l'ouvrage: Wojciechowski 2001, p. 32sq.

[20] *C. Apion* 2, 53-55.

[21] Fishman-Duker 1978.

[22] Ainsi encore le dernier éditeur américain, Croy, p. 13: «shall be tortured». Le même manque d'information met dans l'embarras l'éditeur polonais, Wojciechowski 2001, qui parle (p. 70 et note 142) d'un «instrument de torture non identifié».

[23] Kéramopoullos 1923.

l'autorité de Louis Gernet[24], sont adoptées très largement par les papyrologues et les jusgrécistes, d'Ulrich Wilcken[25] à Eva Cantarella[26].

Dans la Grèce classique, l'*apotumpanismós* était réservé à des délinquants méprisables, notamment les traîtres. Dans sa *Vie de Périclès*, Plutarque signale un cas typique à ce propos[27]. Au milieu du V^e^ siècle av. n.è., un contentieux oppose, à l'intérieur de la Ligue de Délos, deux cités-membres, Samos et sa voisine Milet. En 440 une révolte oligarchique éclate à Samos. À la demande de Milet, Périclès intervient avec la flotte, renverse le gouvernement oligarchique de Samos, prend des otages et laisse une garnison sur place. Mais les oligarques reprennent le pouvoir avec le soutien du satrape Pissouthnès et livrent aux Perses la garnison athénienne, entraînant Byzance dans la défection de la Ligue. Pour empêcher que la rébellion ne s'étende davantage, Périclès intervient à nouveau. Après neuf mois de siège les Samiens capitulent. Périclès fait abattre leurs murs, prend leurs vaisseaux et impose aux vaincus une indemnité de guerre de 200 talents, dont ils paient une partie en fournissant des otages comme sûreté pour le paiement du reste. La démocratie est rétablie.

L'historien samien Douris, cité par Plutarque, complète ce récit en parlant du supplice infligé aux capitaines et soldats de marine samiens. Conduits sur l'agora de Milet, ils y restèrent pendant dix jours attachés à des planches et quand ils étaient sur le point d'expirer, Périclès ordonna de leur briser les crânes à coups de massue et de jeter leurs corps sans sépulture[28]. Malgré les doutes de Plutarque, la crédibilité de Douris de Samos paraît solide[29]. Son récit rend compte de la réalité juridique de cet épilogue de la rébellion des Samiens: les chefs de la flotte rebelle et leurs soldats, jugés coupables de trahison à l'égard de la Ligue de Délos, subissent la peine de mort selon le mode d'exécution applicable aux traîtres.

Que le supplice des triérarques de Samos ne soit pas un cas isolé, nos sources le démontrent abondamment. Aristote utilise l'exemple de l'*apotumpanismós* en analysant la crainte, sentiment qui n'est pas ressenti sans être accompagné par l'espoir de pouvoir échapper à ce qui vous l'inspire; toutefois, ceux que la fortune a comblés ne craignent rien dans leur impudence comme ceux que l'avenir laisse

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[24] Gernet 1927 (1968).

[25] Wilcken 1927 (1977), p. 562; cf. Idem, *Sitz.-Ber. der Preuss. Akad. der Wiss.* 1923, XXIII, p. 151-152.

[26] Cantarella 2000, p. 35-40. Adhésion nuancée aux conclusions de Kéramopoullos dans la thèse de Farsédakis 1978, p. 207-212. Moins réservée, dans un article de vulgarisation, Vélissaropoulos 1984.

[27] Plutarque, *Périclès* 28, 2.

[28] La loi athénienne, citée par Xénophon, *Helléniques* 1, 7, 22, refusait aux individus condamnés pour trahison et pour sacrilège la sépulture en Attique; on en trouve un double écho, chez Dion de Pruse, *Discours* 31, 85 (pour la trahison), et chez Diodore de Sicile, *Bibliothèque historique* 16, 25, 3 (pour le sacrilège). Voir Helmis 2007, p. 261sq.

[29] Dans ce sens Kéramopoullos 1923, «avec de bonnes raisons» selon Gernet 1927 (1968), p. 304 note 11.

froids quand il n'y a plus rien à espérer, tels les condamnés que le bourreau attache aux planches (ἀποτυμπανιζόμενοι). Ils fournissent au Stagirite une illustration typique des «cas désespérés» (τῶν ἀνελπίστων) sur lesquels «nul ne délibère» (οὐδεὶς βουλεύεται)[30].

Aristote ne précise pas quels délinquants il a en vue. Mais on aurait tort d'en tirer la conclusion que l'*apotumpanismós* représentait un mode universel d'exécution de la peine capitale utilisable dans tous les cas que celle-ci sanctionnait. En fait, son domaine d'application à Athènes était limité à certaines catégories de justiciables bien définies. Aux traîtres emboîtent le pas les criminels «malfaisants», κακοῦργοι. Une étude de Michael Gagarin a permis de préciser le sens de cette notion: elle désigne les asociaux, qui ne reconnaissent pas les devoirs s'imposant aux membres de la communauté et, pour cette raison, ne méritent pas les privilèges et la protection dont bénéficient les honnêtes citoyens[31]. En faisaient partie, aux termes de la loi, les voleurs, κλέπται, et en particulier les détrousseurs, λωποδύται, et les trafiquants d'esclaves, ἀνδραποδισταί; pris en flagrant délit, ils étaient traînés devant les Onze, et s'ils avouaient, ceux-ci pouvaient ordonner leur exécution par *apotumpanismós*[32]. Le même sort les attendait si, ayant protesté devant les Onze, ils étaient déférés devant le tribunal qui prononçait leur condamnation[33].

La liste ne s'arrête pas là. Aux traîtres et aux voleurs il faut joindre les pirates, auxquels appartiennent, selon A. Kéramopoullos, les squelettes des suppliciés du Vieux Phalère[34], ainsi que les μοιχοί, intrus qui pénètrent dans la maison du citoyen à son insu pour séduire les femmes qui se trouvent sous son contrôle: si le séducteur n'est pas mis à mort par le chef de famille que la loi autorise à le tuer impunément s'il est pris en flagrant délit de μοιχεία, il subira le traitement prévu pour les κακοῦργοι[35]. Comme le μοιχός, le meurtrier pouvait aussi être traité comme un κακοῦργος[36], ce qui ne signifie pas nécessairement que l'*apotumpanismós* ait été le mode général d'exécution de la sanction de l'homicide[37]. Enfin, l'offense faite aux dieux était susceptible d'entraîner la mort sur la planche. Ce fut le cas de l'impie gouverneur perse Artayctès, profanateur du sanctuaire de Protésilas à Eléonte

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[30] Aristote, *Rhétorique* II (5), 1353a. Comme le note Gernet 1927 (1968), p. 303, ce texte d'Aristote aurait pu fournir aux hellénistes une indication plus précise sur le véritable sens du verbe *apotumpanizein*, avant la découverte des squelettes du Vieux Phalère, car il suppose un supplice prolongé, ce qui n'est pas le cas du condamné qu'on massacre à coups de bâton.

[31] Gagarin 2003.

[32] Lysias, *Contre Agoratos* (13), 65 [67]-66 [68].

[33] Aristote, *Constitution d'Athènes* 52, 1. Cf. Cantarella 2000, p. 57.

[34] Kéramopoullos 1923, p. 42sq.; cf. Gernet 1927 (1968), p. 317.

[35] Cantarella, 2000, p. 38. Sur le délit de *moicheia*, Eadem 1995.

[36] Lysias, *Contre Agoratos* (13), 56. Voir la notice de L. Gernet, *Lysias. Discours*, I, 1924 (6e éd., 1967), p. 186.

[37] Opinion de MacDowell 1963, p. 112sq.

(Elaious) dans la Chersonèse de Thrace[38]. Ce fut aussi celui de Mnésiloque dans les *Thesmophories* d'Aristophane qui, pris en flagrant délit d'impiété, a été «attaché à la planche» (δῆσον ... ἐν τῇ σανίδι) par un archer scythe sur ordre du prytane qui était venu constater sa faute[39]. Et le supplice de Prométhée, présenté par Eschyle selon l'image du condamné à l'*apotumpanismós,* donne une idée de la force avec laquelle ce supplice agissait sur l'imaginaire collectif des Athéniens[40].

Au passage de la cité à la monarchie, les principaux candidats à l'exposition au poteau, les traîtres, ont survécu. *3 Mac*., point de départ de ces réflexions, en témoigne: l'ordonnance royale menace les complices des traîtres – en l'occurrence des Juifs convaincus de trahison – de cette sanction, étendue au groupe familial du complice (πανοικίᾳ). De plus, tout endroit qui aurait servi de refuge à un Juif coupable de trahison «sera déclaré interdit d'accès et livré aux flammes, de sorte qu'il soit rendu à tout jamais inutilisable pour tout être mortel» (*3 Mac*. 3, 29). L'auteur de *3 Mac*. s'inspire ici du texte biblique (*Deut*. 13, 13-17) réprimant l'incitation à l'idolâtrie: si le bruit qui court à ce propos est confirmé par l'enquête, la ville où cette «abomination» s'est produite doit être détruite par le feu et restera à jamais inhabitée – une «ruine éternelle». Juif et Grec à la fois, notre Alexandrin renforce une donnée de la réalité judiciaire ptolémaïque (*apotumpanismós*) par une sanction complémentaire empruntée à la loi mosaïque, la destruction du refuge allant de pair avec la destruction des complices des traîtres.[41] Le même verbe (ἀπετυμπανίσθη) est utilisé dans la version grecque du livre de Daniel (*Dn* LXX 7, 11) pour rendre l'araméen *qeṭal* (*qeṭilat*), «tuer», à propos de la quatrième bête du fameux songe du prophète; le traducteur grec choisit pour elle une forme de mise à mort qui, dans notre texte, menace les complices des traîtres. Comme l'auteur de *3 Mac*., ce traducteur, sans doute également un Alexandrin, puise lui aussi dans la réalité institutionnelle ambiante qui lui prête son vocabulaire.[42] Par ces emprunts, la Septante reflète la pratique judiciaire de la monarchie ptolémaïque en matière de crimes contre la sûreté de l'État. Elle rejoint ainsi la documentation papyrologique

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[38] Hérodote 7, 33; cf. 9, 116.

[39] Aristophane, *Thesm*. 930-946, 1041sq. Cf. Gernet 1927 (1968), p. 304sq.

[40] Gernet, à la suite de Kéramopoullos 1923, p. 306.

[41] La référence à ce texte du *Deutéronome* et son interprétation rabbinique (Talmud de Babylone, *Sanhedrin* VIII 71a) ont permis au Grand Rabbin René-Samuel Sirat de convaincre le cardinal Franciszek Macharski, archevêque de Cracovie, d'accepter que les carmélites qui s'étaient installées à Auschwitz quittent ces lieux destinés à rester une «ruine éternelle» (*tel 'olam*) en souvenir de six millions de Juifs, dont un million et demi d'enfants, qui y ont été exterminés par les nazis: voir Sirat 1995.

[42] Sur l'auteur (alexandrin ou palestinien?) et la date (fin du II^{e} s. av. n.è.?) de la version grecque amplifiée du livre de *Daniel*, voir Dorival – Harl – Munnich 1988 (1994), p. 105. Théodotion, qui propose une nouvelle traduction grecque de la Bible – ou révise la Septante – à Ephèse (?) vers la fin du II^{e} s. de n.è., préfère ἀναιρεῖν (ἀνῃρέθη) «enlever, détruire», verbe plus proche de l'original araméen.

relative à un deuxième groupe des candidats à l'*apotumpanismós*, les «asociaux» (κακοῦργοι).

5. Sanctions pour les agents des monopoles royaux

Dans un régime où le souci du bien public de la cité cède la place à la protection des intérêts du roi, ces malfaiteurs asociaux se retrouvent parmi les ouvriers et agents des monopoles royaux; ceux-ci sont soumis à la juridiction du diœcète, ancêtre de nos ministres des finances et de l'économie qui, en vertu d'une délégation du roi, exerce dans ce domaine un contrôle répressif pouvant aller jusqu'à la peine de mort[43]. Dans l'Égypte des Lagides, le délit économique prend des dimensions démesurées, comme ce sera le cas vingt siècles plus tard du sabotage et d'autres infractions à l'économie socialiste dans la défunte Union soviétique et ses satellites.

Un petit lot de documents papyrologiques en rapport avec cette forme de délinquance complète le témoignage de la Septante qui l'éclaire de son côté. Le plus ancien de ces documents (milieu du III^e^ siècle av. n.è.) est une lettre du diœcète Apollonios à l'administrateur de son domaine dans le Fayoum, Zénon[44]. Elle a pour objet un litige qui oppose deux employés du monopole royal de la bière: le receveur (ταμίας), qui collecte les sommes payées par les clients, et le brasseur (ζυτοποιός) Amenneus, un ancien fermier de la brasserie du domaine à Philadelphie[45]. Le trésorier a commis des abus, sans nul doute en rapport avec la gestion des fonds qu'il est chargé de collecter, et Apollonios complimente Zénon de l'avoir mis en prison. Il ordonne à présent une confrontation des deux adversaires devant le chrématiste Péton, qui l'assiste dans ses fonctions judiciaires[46]. S'il apparaît que les propos d'Amenneus, rapportés par Zénon à Apollonios, sont conformes à la vérité, le coupable doit être conduit devant le diœcète, de passage à Krokodilopolis, capitale du Fayoum, et sera «pendu» (κρεμήσεται).

Mais qui est le coupable? À une exception près, les commentateurs, à commencer par l'éditeur du papyrus, désignent sans hésiter le brasseur Amenneus. Ils comprennent l'instruction donnée par Apollonios à Zénon (lignes 7-9) comme ceci: «S'il apparaît conforme à la vérité qu'Amenneus a dit ce que tu as écrit, qu'il soit conduit devant nous et il sera pendu». Dans cette interprétation, Ammeneus doit donc être puni non pas pour des actes, ce qui serait compréhensible, mais pour des propos qu'il aurait proférés et que Zénon a rapportés à son patron, ce qui est plus

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[43] Wolff 1962 (1970), p.126, 160sq.

[44] *P.Cair.Zen.* II 59202 (Philadelphie, 254 av. n.è.); *Pap.Prim.*[4], n° 61; première édition: *P.Edgar* 33 = *SB* III 6739. Traduction en français (défectueuse) et bref commentaire dans Orrieux 1983, p. 152.

[45] Sur le monopole de la bière, les pages consacrées à la brasserie par Préaux 1939, p. 152-158, demeurent essentielles.

[46] Qu'un chrématiste royal soit aux ordres du diœcète, le fait avait surpris l'éditeur: Edgar 1926, p. 61 et 63; mais comme le diœcète agit en tant que délégué du roi, le fait n'a rien d'anormal. Voir Wolff 1962 (1970), p. 77.

difficile à expliquer. Puisqu'il s'agit d'un différend qui l'oppose au receveur, on peut penser à des accusations injustifiées. Mais dans ce cas, la peine de «suspension» ne convient à ce que prévoit à ce propos la loi royale, quel que soit le sens à donner à la «pendaison» menaçant le brasseur: la loi ne connaît que l'amende (τίμημα) à verser par le faux témoin à la partie adverse[47]. En revanche, les instructions d'Apollonios seraient plus faciles à comprendre si nous inversions les rôles en rapportant le verbe κρεμήσεται au receveur, exposé aux tentations prévaricatrices – son emprisonnement le suppose déjà – du fait de ses fonctions financières et en innocentant Amenneus[48]. Dans ce cas, ce sont les accusations portées par le receveur contre Ammeneus (lignes 4-5) qui seraient mensongères selon les propos de ce dernier, ceux-ci étant «conformes à la vérité».

En tout cas, il semble bien que notre brasseur ait échappé à une peine affligeante, quelle que fût la vérité que devait établir le chrématiste Péton. C'est ce que suggèrent quelques papyrus de la collection de Fribourg en Brisgau édités par Willy Clarysse en 1988: on y voit un vendeur de bière (ζυτοπώλης) quasi homonyme, Ameneus (avec un seul *nu*) fils de Thotortais, à Tholthis, dans le voisin nome Oxyrhynchite, en pleine forme, une vingtaine d'années plus tard[49]. Il pourrait bien s'agir du même personnage.

6. Bastonnade ou mort au pilori?

Quant à la menace couverte par le verbe κρεμήσεται, tous les commentateurs étaient pendant longtemps bien d'accord qu'elle indiquait une peine capitale[50]. Ce consensus a été perturbé en 1966 par un article du Britannique Eric Turner, selon qui il s'agirait là, non pas d'une pendaison, mais d'une bastonnade: le «pendu» serait en fait attaché au pilori pour recevoir la portion coutumière de coups de bâton[51]. Mais cette hypothèse, qui a séduit bien des chercheurs[52], ne résiste pas à un examen attentif du papyrus dans son contexte[53].

Ainsi, pour l'arrière-plan égyptien, une étude du châtiment au pilori due à une égyptologue experte permet de nuancer sérieusement les références égyptologiques de Turner[54]. Le pilori égyptien, *mnj·t (menit)*, c'est le pieu d'amarrage, doué d'une double valeur symbolique: pour le vivant, il signale le port, étape d'un voyage qu'on pourra reprendre en toute sécurité, le navire amarré ne pouvant pas dériver; pour le

[47] *P.Hal.* 1, lignes 24-78 = P.M. Meyer, *Jur. Pap.* 74, partic. ligne 61. Sur l'origine royale de ces dispositions, voir Wolff 1962 (1970), p. 26

[48] Dans ce sens déjà David – Van Groningen, p. 124.

[49] Clarysse 1988: *P. Freib.* inv. 120 f = *SB* XX 14428; *P. Freib.* inv. 120e+125c = *SB* XX 1442; *P. Freib.* inv. 130 = *SB* XX 14430.

[50] Wolff 1962 (1970), p. 126 et les auteurs cités à la note 11.

[51] Turner 1966.

[52] Notamment Bluche 1975, p. 156-158 et note 75; Helmis 1986, p. 200.

[53] Un membre de notre séminaire, Chris Rodriguez, reviendra en détail sur cette question dans une étude qu'il prépare actuellement.

[54] Beaux 1991.

malfaisant, il marque l'étape ultime: le navire enchaîné ne repartira pas. C'est cette deuxième signification qui intéresse le droit pénal, sous une double forme: celle d'une bastonnade exceptionnelle – il n'en existe que deux exemples connus – qui sanctionne des délits particulièrement graves et équivaut à l'exécution rituelle d'un ennemi du royaume; puis celle de l'exposition publique de la dépouille du condamné, malfaiteur égyptien ou rebelle, attaché au pilori après exécution par crémation ou par décapitation. *Mutatis mutandis*, la première situation évoque la planche grecque prévue pour les traîtres et les κακοῦργοι, alors que la seconde trouve son analogie dans la loi biblique ordonnant la «suspension sur le bois» du cadavre du condamné à mort pendant la journée suivant son exécution[55]. En essayant de sauver notre brasseur de la mort à la grecque, Eric Turner, ignorant le sens et la fonction du pilori égyptien, l'a voué à un supplice tout aussi atroce[56].

Il est peu probable qu'Apollonios, Carien hellénisé et haut fonctionnaire royal, ait envisagé une telle sanction pour le coupable dans l'affaire de la brasserie de Philadelphie. Ce n'est pas un pieu d'amarrage, mais une planche et des crampons de fer qui l'attendent à Krokodilopolis, comme ce fut le cas des capitaines samiens deux siècles plus tôt. Après *3 Mac*., le papyrus du Caire apparaît comme le premier témoignage documentaire de cette continuité dans l'Égypte des Lagides. Cette conclusion est confirmée par deux autres documents de notre dossier papyrologique.

Dans le premier, une requête datée de 221 av. n.è., apparaît à deux reprises, pour la première fois dans les papyrus, le verbe ἀποτυμπανίζειν (à l'infinitif futur: ἀποτυμπανιεῖν)[57]. L'éditeur, Octave Guéraud, en connaissait le sens dégagé par l'étude d'A. Kéramopoullos, dont les arguments lui paraissaient «fort sérieux» et «impressionnants», mais hésita à l'utiliser dans sa traduction[58]. Nous sommes encore à Krokodilopolis, où un procès au sujet de la propriété d'une maison dans un village fayoumique oppose une dame égyptienne, Tétosiris, à un certain Apollodôros, adversaire détestable: il menace de recourir à l'*apotumpanismós* pour empêcher les témoins de la dame en question, des ouvriers égyptiens et un colon grec, de présenter des témoignages écrits sous serment en faveur de la défenderesse[59]. Nous ignorons la fonction du personnage et nous ne savons pas si, et comment, les intérêts du trésor royal interviennent dans ce litige. Le document en question atteste seulement l'actualité de l'*apotumpanismós* en Égypte, au début du règne de Ptolémée IV Philopator, et certifie ainsi la vraisemblance historique du recours à cette forme de supplice dans l'ordonnance dont l'auteur de *3 Mac*. attribue la paternité à ce souverain.

Nous quittons le Fayoum et nous pénétrons dans l'enceinte du Sarapéum de Memphis, théâtre des événements dont il est question dans un troisième papyrus, le

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[55] *Deutéronome* 21, 22-23.

[56] Pour une autre méprise du même auteur, voir notre art. 1988 (1992).

[57] *P. Ent*. 86, lignes 6 et 8.

[58] Guéraud 1931, p. 213.

[59] Sur cette procédure, voir Helmis 1991, p. 143sq.

dernier du dossier, un document du milieu du II^e^ siècle av. n.è., dont nous ne retiendrons que la partie finale concernant des ouvriers du monopole royal de l'huile, tous Égyptiens, menacés du supplice qui nous intéresse[60]. La menace est liée à l'interdit en vertu duquel le droit d'asile dans un sanctuaire du Sarapéum (*pastophorion* «des prêtres», l. 25, ou «d'Aphrodite», l. 36) leur est refusé. La seule violation du droit d'asile ne suffit pas à justifier une sanction aussi sévère; la qualité d'agents d'un monopole royal propre aux contrevenants est certainement en jeu[61]. Une nouvelle fois, l'*apotumpanismós* apparaît dans notre documentation comme mode d'exécution de la peine capitale frappant ces «nouveaux malfaiteurs» que sont les ouvriers des monopoles coupables d'actes nuisibles à l'économie royale. L'association des verbes ἀποκτείνειν (l. 34) «mettre à mort», et ἀποτυμπανίζειν (l. 37: μὴ ἀποτυμπανισθῶσιν), «exposer au poteau», ne laisse aucun doute sur la nature du châtiment[62]. Les coups de bâtons imaginés par des commentateurs mal avertis disparaissent définitivement.

7. Une continuité du droit pénal grec

D'Athènes à Alexandrie, de Milet à Memphis, notre enquête fait surgir la continuité d'un élément caractéristique du droit pénal grec. Les doutes que les pièces du dossier pouvaient faire naître lorsqu'elles étaient traitées isolément s'effacent dans un éclairage réciproque des sources de nature aussi diverse que la rhétorique judiciaire attique, la littérature judéo-alexandrine et la documentation papyrologique d'Égypte. Cette permanence d'un concept et d'une pratique, qui place les Lagides dans le sillage de Périclès, nous dicte une réponse nuancée à la question formulée dans le titre de cet essai: l'État ptolémaïque mérite-t-il le label d'un «État de droit», un *Rechtsstaat*, au sens moderne du terme, à savoir un système institutionnel dans lequel la puissance publique est soumise aux normes de droit, ou, pour reprendre la formule de Hans Kelsen, «un État dans lequel les normes juridiques sont hiérarchisées de telle sorte que sa puissance s'en trouve limitée»[63].

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[60] *P.Paris* 11 = *UPZ* I 119 (Memphis, 156 av. n.è.). Sur le dossier du Sarapéum de Memphis, on pourra lire prochainement la monographie de Bernard Legras, *Les reclus grecs du Sarapieion de Memphis. Une enquête sur l'hellénisme égyptien*, tirée de sa thèse d'habilitation à diriger des recherches soutenue à la Sorbonne (Université Paris-I) en novembre 2003.

[61] Nous connaissons un cas où le privilège d'exercer le droit d'asile, accordé à un temple égyptien, est sanctionné par la peine de mort, mais cette sanction ne concerne pas une catégorie de demandeurs d'asile, comme dans le papyrus du Sarapéum; elle vise ceux (il s'agit sans nul doute surtout de fonctionnaires royaux) qui tenteraient de faire sortir par la force du temple quelqu'un qui y a trouvé refuge: *I.Fay.* II 116-118, ordonnance de Bérénice IV accordant le droit d'asile au temple du dieu crocodile Pnéphérôs à Théadelphie (57 av. n.è.).

[62] *UPZ I* 119, lignes 34 et 37. Le commentaire de Wilcken sur les rapports entre ces deux verbes se confirme à la lumière des remarques de Harris 2001.

[63] Pour plus de détails, voir Schachtschneider 2006.

La cruauté des manières de donner la mort dont se sert la justice royale en Egypte dans la répression des atteintes à la dignité du souverain, aux intérêts de l'économie royale ou à la sûreté de l'État ne peut laisser indifférent le lecteur du dossier que nous venons de parcourir. L'auteur de *3 Mac.* n'hésite pas à comparer Ptolémée Philopator à l'exécrable Phalaris, tyran d'Agrigente, qui brûlait ses victimes vivantes dans le ventre d'un taureau d'airain et savourait le beuglement produit par leurs cris[64]. Le traitement réservé aux prisonniers qu'on doit conduire à Alexandrie «usant de la violence et de la contrainte», μετὰ ὕβρεων καὶ σκυλμῶν, choque par sa brutalité, même si ce n'est qu'un stéréotype destiné à mieux impressionner le lecteur[65]. Il en va de même pour la mort sur la planche qui menace les ouvriers et les agents des monopoles royaux pour des manquements qui nous paraissent mineurs et qui est devenue assez courante pour intimider les témoins appelés à déposer dans une banale affaire immobilière. Le moins qu'on puisse dire, c'est que les Lagides ne versent pas dans la douceur quand ils sévissent contre les justiciables qui relèvent de leur «justice retenue».

Cependant, dans tous ces cas, le pouvoir royal ne frappe pas ses victimes de manière arbitraire, mais se manifeste à l'occasion d'actes de justice fondés sur un dispositif légal. Les agents du roi chargés de donner la mort ne se livrent pas à des actes de barbarie pour satisfaire les caprices d'un tyran sanguinaire, mais agissent dans le cadre légal d'un système judiciaire hiérarchiquement structuré (comme le souhaite Kelsen), en exécutant des sentences prononcées par l'autorité qui couronne ce système. De ce point de vue, il serait excessif d'opposer une démocratie athénienne «humanitaire» à un royaume lagide «despotique»[66]. Les Lagides ne sont pas plus inhumains à l'égard de leurs traîtres, offenseurs et malfaiteurs que ne le fut Périclès à l'égard des triérarques samiens[67]. Sans doute, sous sa forme romancée, le conflit qui opposa les Juifs d'Égypte à Ptolémée Philopator a-t-il failli déboucher sur une véritable *shoah;* mais à la différence de ce qui devait se passer dans l'Europe du XX^{e} siècle écrasée par les nazis, les Juifs d'Égypte sont voués à la mort en exécution d'une sentence pénale, et non pas seulement parce qu'ils étaient Juifs.

Quoi qu'il en soit, l'auteur du *Troisième Livre des Maccabées* mérite la reconnaissance des jusgrécistes. Son intention n'était pas d'instruire les historiens du droit, mais il nous a fourni le point de départ d'une enquête qui, pratiquée dans un esprit pluridisciplinaire, aide à suivre la permanence du droit grec à travers les mutations qui marquent le passage de la cité classique à la monarchie hellénistique, en clarifiant nos idées sur la nature de la justice royale dans l'Égypte des Lagides.

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[64] *3 Mac.* 5, 20; 5, 42; cf. Polybe, *Histoires* 12, 25.

[65] *3 Mac.* 3, 25: tournure à caractère technique qu'on rencontre dans les plaintes pour violence et mauvais traitements conservées par les papyrus. On retrouve le terme σκυλμοί encore en *3 Mac.* 4, 6 et 7, 5. Sur ce terme, voir Passoni Dell'Acqua 1974.

[66] Je rappelle, à ce propos, les remarques de Helmis 1990.

[67] Nous rejoignons la discussion sur le thème «cruauté et démocratie»: voir Debrunner Hall 1996 p. 82sq., et le compte rendu d'A. Lanni, *Bryn Mawr Classical Review* 96.9.22.

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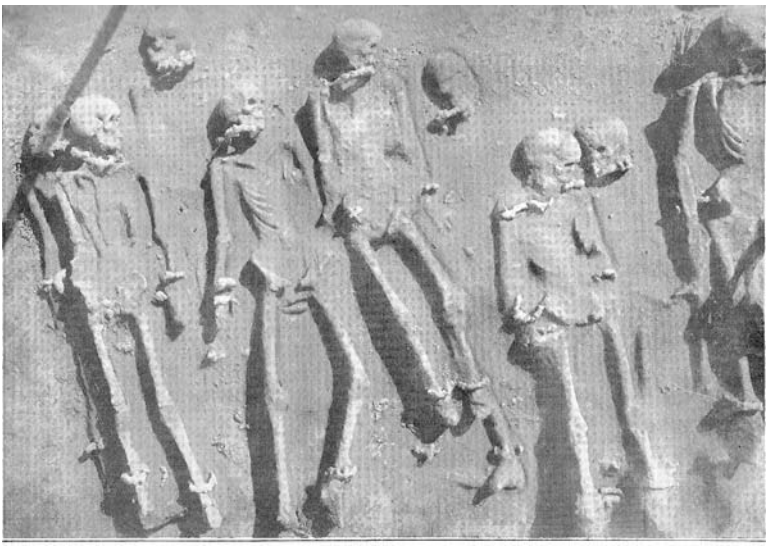
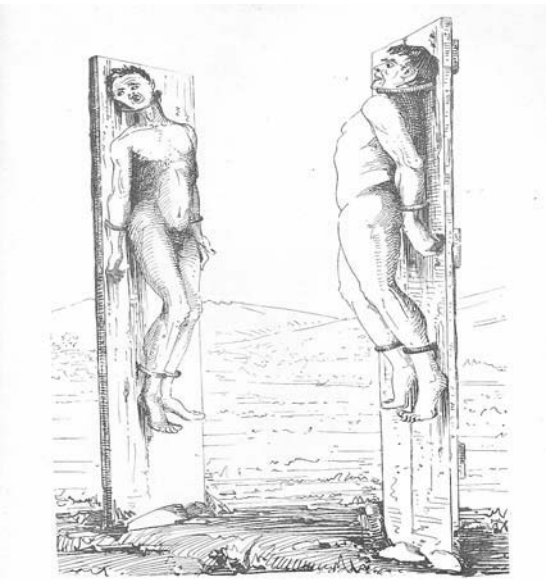
*La mort sur la planche (*apotumpanismós*)*
(d'après A. Kéramopoullos, *Ho apotumpanismós*, Athènes 1923, pl. 7 et 17)



Les squelettes du Vieux Phaléron (fragment)



Apotumpanizómenoi (reconstitution)

JEAN-MARIE BERTRAND (PARIS)

RÉPONSE À JOSEPH MÉLÈZE MODRZEJEWSKI

Je remercie Joseph Mélèze d'avoir proposé que je réponde à son propos et surtout de m'avoir donné à lire sa traduction de Maccabées III et le magistral commentaire qu'il donne de ce texte difficile. La conclusion de sa contribution à notre réunion est émouvante car elle témoigne de la confiance absolue qu'il a toujours manifestée envers la puissance du Droit. Avec l'optimisme qui le caractérise, il nous dit que ce qui pourrait sembler être le pire n'est jamais tel quand il s'est construit dans le cadre d'une procédure régulière dont on comprend qu'elle doit, pour lui, être nécessairement publique et contradictoire. J'ai exprimé naguère quelle admiration j'avais pour cette position qui est aussi un mode de penser et de vivre mais je ne peux m'empêcher de constater que tel État, vainqueur avec d'autres, des nazis, criminels absolus et hors normes, a pu, dans un cadre juridique tout à fait régulier en apparence, faire fonctionner les instruments d'une répression que l'on a dénoncée à juste titre pour ses intentions comme pour sa pratique. Je regrette, comme nous tous, l'absence d'Eva Cantarella dont l'expertise aurait pu contribuer de façon décisive à notre discussion.

J'apprécie, en tout cas, que la communication de Joseph Mélèze permette de réévaluer de façon explicite la valeur du mythe de la «douceur grecque» qui a plus à voir avec l'idéologie que certains, en France notamment, prétendent pertinente qu'avec une analyse correcte de la réalité du monde hellénique. Il semble que certaines bonnes âmes aient oublié ce que fut le supplice de Mélanthios le chevrier d'Ithaque qui avait donné aux prétendants les armes avec lesquelles ils tentèrent de se défendre: on lui coupa les narines et les oreilles ainsi que les parties viriles que l'on jeta aux chiens, avant de lui couper les pieds et les mains puis de le laisser agoniser dans la cour du palais pendant que se balançaient aux poutres des portiques les corps de servantes infidèles (*Odyssée*, 22, 474-479). Il n'est pas inutile, néanmoins, de donner brièvement un exemple des inconvénients que peut procurer l'idée selon laquelle les Grecs seraient ontologiquement incapables de commettre telle ou telle violence; l'affaire des Suppliciés de Fourni peut suffire pour ce faire. Rappelons que l'on a trouvé naguère dans les égouts des latrines d'une grande maison sise dans la baie de Fourni à Délos un squelette presque complet et les pauvres restes d'un autre, les deux individus avaient, comme en témoignent les clous fichés dans leurs os et la rouille qui marque encore les os du carpe de l'un d'entre eux, été fixés par les jambes et les mains à un support dont il est vraisemblable de penser qu'il était de bois, l'un au moins (celui dont on possède le squelette le moins

lacunaire) ayant été décapité sans que l'on ait pu dire si ce le fut *ante* ou *post mortem*. Est significative de l'impossibilité pour certains de penser les Grecs en tortionnaires la dernière note de l'étude qui par sa position, au centre de la dernière page, semble constituer les derniers mots de l'unique article, à ma connaissance, analysant ces ossements et la façon dont ces morts avaient été traités (Pierre et Nicolas Ducrey, «Les suppliciés de Fourni», *BCH* Suppl. 1, p. 173-181). Les auteurs soulignent que, pour Jean Marcadé, la Maison de Fourni aurait abrité les réunions d'un *koinon* d'Orientaux, que Christian Le Roy le fouilleur de 1961, dont on attend qu'il publie le volume du site, leur a donné pour information que «certains indices pouvaient laisser penser que ses propriétaires étaient des Romains». Il leur est ainsi possible de conclure avec un soulagement perceptible que «dans un cas comme dans l'autre, il ne s'agirait pas de Grecs». Il semble, néanmoins, que, depuis 1973, Ch. Le Roy ait changé d'opinion car dans la 4ème édition du *Guide de Délos* (n° 124, p. 314), il indique que les corps «ont pu faire l'objet d'une exposition publique préalable à la mise à mort», réintroduisant ainsi, dans cette exécution de pirates éventuellement à la solde de Mithridate ou de criminels ordinaires, le politique nécessairement hellène. Il est important qu'il le fasse et rende ainsi justice aux «Barbares» en acceptant que les Grecs soient leurs semblables, même si ce ne peut être qu'à titre d'hypothèse car l'on doit rester sceptique devant l'idée que l'on aurait exposé en un lieu aussi peu symbolique de la puissance publique des coupables reconnus et l'on comprend mal par ailleurs pourquoi leur corps aurait été caché dans un lieu aussi privé que des latrines alors qu'il aurait été facile au bourreau de les faire jeter, comme celui d'autres condamnés en d'autres cités, hors des limites de la cité.

La pratique de Périclès à l'égard d'alliés sécessionistes est, bien évidemment, significative de la façon dont Athènes pouvait traiter les criminels et il ne faut sans doute pas oublier, pour rester en contexte et ajouter un peu de couleur au récit du massacre, qu'un Samien célèbre, le tyran Polycrate, avait été traité par Oroitès, son adversaire barbare, de la semblable façon, sans avoir obtenu la grâce d'être assommé; il mourut «baigné par les eaux du ciel, oint par le soleil dont la chaleur faisait sortir les humeurs de son corps» (Hérodote, 3, 125). On peut souligner que les éléments de barbarie témoignant de la dureté du conflit interne à l'alliance athénienne ne se limitèrent pas à cette exécution puisque l'on sait aussi que les Samiens avaient marqué, au fer rouge sans doute, d'une chouette le visage de leurs prisonniers athéniens, Périclès ayant répliqué en imprimant une Samienne, vaisseau pansu typique de l'île, sur le visage des Samiens tombés entre ses mains (Plutarque, *Périclès*, 26, 4), cette marque s'accompagnant d'une inscription qui avait fait dire à Aristophane dans les *Babyloniens* que les Samiens étaient un peuple *polugrammatos*.

Pour s'en tenir au fond des choses, il est évident que l'*apotympanismos* fut un mode d'exécution ordinaire dans le monde grec, à Athènes notamment où les démocrates patriotes lièrent les complices de Cléomène Ier «du lien de mort» (*Athènaioi katédèsan tèn épi thanatôi*, Hérodote, 5, 72), où tel condamné à mort par

le Conseil rejugé par le Tribunal qui l'innocenta fut surnommé, «l'Échappé du tympanos» (*ho apo tou tumpanou*, Aristote, *Constitution des Athéniens*, 45). Il est à noter, même si cela peut passer pour un détail, qu'il ne faut pas imaginer que les modalités de l'exposition aient été toujours semblables et conformes à ce que nous croyons être la norme depuis la découverte de Phalère et sa publication par Antonios Kéramopoullos. Monique Halm-Tisserant, dans un livre quelque peu décevant (*Réalités et imaginaire des supplices en Grèce ancienne*, Paris, 1998) car il ne débouche pas assez sur l'imaginaire contrairement à ce qu'elle promet, fait remarquer, utilisant une documentation iconographique assez abondante pour qu'on soit convaincu de la justesse de sa proposition, que nombre de condamnés étaient exposés dans des positions qui n'étaient pas celles que l'on croit canoniques en s'en tenant au dossier analysé par Antonios Keramopoullos. Les condamnés pouvaient être maintenus dans la position assise sur un billot ou au sol, les genoux repliés ou non, les coudes plus ou moins contenus, ces postures étant particulièrement pénibles et, à terme, tout aussi mortiphères qu'une position plus étirée. Les images reprises de l'article de Nathalie Beaux montrent qu'il pouvait en être de même en Égypte.

Il faut, sans doute, néanmoins, relativiser le caractère nécessairement capital de la condamnation au pilori. On apprend de Platon (*Lois* 855b-c) que l'on peut condamner des coupables à des «postures non conformes à la nature» (*amorphai edrai*) mais que cela n'est pas condamnation à mort et, seulement, «traitement infâmant» (*propèlakismos*). Il doit d'agir pour lui de rester dans une logique de pénalité dont les cités connaissaient la pratique. Charondas avait établi que les lâches devaient être exposés durant trois jours sur l'agora vêtus en femme (Diodore, 16, 12, 1-2). À Athènes, certains coupables non pendables se voyaient «stigmatisés» (j'ai naguère étudié ce terme, *Symposion 1995*, p. 27-47; *De l'écriture à l'oralité, lectures des* Lois *de Platon*, Paris, 1999, p. 163-166) par l'exposition sur la place publique. Démosthène signale (*Contre Timocrate*, 114) qu'il était possible d'imposer cette peine d'une durée de cinq jours et cinq nuits à un voleur que tout le monde pouvait voir «entravé» (*dédéménos*). Lysias (*Contre Théomnèstos*, 16) permet de comprendre que le condamné à cette peine était installé dans une sorte de carcan appliqué aux chevilles, dont une loi de Solon donnait le nom, *podokakkè*. Le mot est dit par le plaideur avoir cessé d'être en usage, ce qui semble bien être le cas étant donnée la rareté des attestations bien que Démosthène l'emploie (*Contre Timocrate*, 105), aussi condamnait-on, à l'époque, «à être mis dans le bois» (*en tôi xylôi*). Même si, donc, la punition ne procurait pas la mort, on peut se demander dans quel état se trouvait en fin de peine celui dont le juge avait souhaité que la honte devînt publique.

Pour ce qui est de ce que nous connaissons des pratiques des rois lagides à l'égard des révoltés ou des traîtres, nous savons qu'ils n'étaient pas tendres et ne dédaignaient pas de s'impliquer dans le châtiment mais que les modes de mise à mort furent divers. Les rebelles de Lycopolis furent tués par bastonnade au cours des

fêtes du couronnement de Ptolémée Épiphane (*Memphis, Dém.* 16)[1]. Les derniers chefs des révoltés furent mis à mort après avoir été traînés nus dans les rues de Saïs par le char royal (Polybe, 22, 17, 3-6). C'est encore au cours de la cérémonie du sacre qu'Évergète II fit mettre à mort des Cyrénéens coupables d'avoir manifesté une «liberté de parole justifiée» (*dikaiai parrèsiai*) à l'égard de sa concubine (Diodore de Sicile, 33, 13). Le jeu du montré/caché peut parfois surprendre. Sotadès fut jeté en mer enfermé dans un tonneau, ce qui par ailleurs donnait au *katapontismos* de caractère ordalique un aboutissement mieux prévisible que si on l'avait laissé libre de ses mouvements; le corps de Cléomène de Sparte fut exposé enveloppé dans un sac de cuir (Plutarque, *Agis et Cléomène*, 59, 4); les enfants de Cléomène, sa femme, qui fut particulièrement digne dans la mort, et ses suivantes étant, sans doute discrètement, égorgés. Il est important de considérer que ce n'est pas, donc, par une particulière cruauté mais par une certaine fidélité à l'hellénisme que l'*apotympanismos* fut pour eux un mode banal d'exécution. Les Juifs savaient parfaitement, d'ailleurs, ce qu'il en était, le livre d'Esther, dont on a pu souligner ce qu'il doit à la culture égyptienne, montrant, par exemple, comment Aman, qui avait fait préparer un *xylon* de cinquante coudée pour Mardochée, y fut lui-même «attaché» (7, 10, *ékrémasthè Aman épi tou xylou*) en compagnie du corps de ses enfants préalablement massacrés (9, 14). Pour ce qui est des peines accessoires, la destruction de la maison des traîtres s'ajoutait aussi bien à la mise à mort des personnes visées par le décret royal de *Maccabées III* qu'à celle qui frappa à Athènes les soutiens de Cléomène aux temps de Clisthène ou, plus tard, les initiateurs de la révolution de 411; dans une cité de Locride, elle aurait concerné tout homicide et par extension toute personne qui s'en seraient pris, pour subvertir la société, à la loi foncière (*Nomima* I, 44, cf. *RD*, 78, 2000, p. 219-231).

[1] Je conserve ici l'une des interprétations traditionnelles d'un texte dont la signification est difficile à connaître. Je remercie Anne-Emmanuelle Veisse, auteur d'un livre remarqué sur les «*révoltes égyptiennes*» (Louvain, 2004), d'avoir bien voulu me faire part de son analyse du passage. De fait, le texte grec est imprécis (l. 28), le roi «a puni *kathèkontôs*», le texte démotique écrit *sans qu'une préposition soit exprimée*, «il les fit tuer [*avec ou bien* sur] le bois», Didier Devauchelle, *La pierre de Rosette*, Paris, 1990, traduisant «*par le bâton*». Deux auteurs, Wolja Erichsens dans son *Demotisches Glossar* (1954) et R.S. Simpson dans sa *Demotic Grammar in the Ptolemaic Sacerdotal Decrees* (1996) pensent qu'il est question du supplice du pal, mais il ne semble pas en exister de parallèle pour l'Égypte ptolémaïque. La formule hiéroglyphique pour désigner l'empalement est «mettre sur le sommet du bois», elle apparaît dans le texte de l'édition de référence procuré par Wilhelm Spiegelberg (*Rosettana*, 1922) qui reprend, pour le mettre en regard du démotique, le texte hiéroglyphique établi par Kurt Sethe (*Urkunden* 2, 1904) sans signaler que la pierre est lacunaire pour ce passage et que ce qui semble être présenté par lui comme une attestation est une simple inférence, l'édition de Sethe indiquant bien, pourtant, de façon explicite qu'il s'agit bien d'une restitution. Le «bâton» dont on frappe les mauvais serviteurs dans les *Sagesses démotiques* étant désigné par un autre terme que le «bois» du décret de Memphis, l'expression «il les fit tuer [?] le bois» pourrait donc être considérée comme désignant un pilori et non la bastonnade.

Si nous revenons à notre propos initial, il nous faut bien admettre que nul Grec n'ignorait que les exécutions capitales accompagnées parfois de tortures étaient d'usage régulier dans son monde; un homme comme Platon n'avait pas «particulièrement de pudeur à en parler», comme l'a parfaitement compris Anne Merker évoquant le *Gorgias* («Corps et châtiment chez Platon», *Études platoniciennes*, 1, 2005, p. 11-49) où l'on voit comment le juste peut voir son corps tordu, dépecé, mutilé, ses yeux brûlés, alors qu'il est «attaché au pieu et que son corps dégouline d'une sanie semblable à la poix» (*Gorgias*, 473c, je considère que le verbe *katapittousthai* est employé de façon métaphorique et que l'on pourrait mettre ce passage en parallèle avec le texte d'Hérodote décrivant la mort de Polycrate), ses enfants et sa femme subissant sous ses yeux les mêmes supplices. Dans la *République* où l'essentiel de la description est repris, il est question aussi d'empalement (*République*, 361e-362a). Un texte célèbre montre qu'entrer à Athènes en remontant du Pirée était passer près du lieu des supplices, le *dèmion*, et qu'une curiosité morbide pouvait pousser tel ou tel à se repaître du spectacle de l'exposition des cadavres quelque répugnant que ce fût (*République*, 439e-440a). Dans la cité Magnète sont repris certains aspects de la pénologie ordinaire de l'époque: exposition, peine du fouet (notamment pour les esclaves et les étrangers à la cité qui peuvent, avant d'être expulsés, être marqués au visage et aux mains du rappel de leur faute, *Lois* 854d) ou violences indéterminées autorisées envers tout citoyen coupable de transgression à telle ou telle règle (notamment les agronomes coupables d'avoir manqué à la règle de disponibilité permanente, *Lois* 762b-d). Il ne se donne pas la peine de préciser de quelle façon il entend que se fasse la mise à mort quand elle est prescrite (si ce n'est dans le cas du meurtre d'un citoyen par un esclave qui doit mourir sous les coups de fouet du bourreau, *Lois*, 872b, mais on se demande à quoi peut servir le fait que la famille ait le choix du nombre des coups à donner à moins que la fustigation ne soit qu'un préalable à une mise à mort plus rapide). Platon pose comme principe que le châtiment n'est pas fait pour faire mal (*ouk épi kakôi*, *Lois*, 854d) mais qu'il est proposé pour dissuader de faire le mal et surtout pour soigner le coupable (ce qui peut induire l'usage de moyens coercitifs ou douloureux, tel passage du *Politique* sait que le dirigeant légitimé par sa compétence doit amputer ou cautériser, faire souffrir les corps soumis à son expertise pour leur bien, 293a-c) ou pour en débarrasser la cité. S'il y a trois prisons dans la cité (*Lois* 908a), celle qui est réservé aux coupables les plus infâmes ne leur procure d'autre supplice que la réclusion entravée (il ne faut pas négliger le verbe *dédesthai*) sans contact avec quiconque que les esclaves chargés de les nourrir (*Lois* 908a et 909c). Cette proposition, faite pour qu'ils subissent une «double mort» (*Lois*, 908e), témoigne du refus des pratiques répugnantes dont Platon connaît les dérives cruelles et déshonorantes pour qui s'y livre et *a fortiori* s'y complaît, mais il est évident que cette réclusion perpétuelle dans des conditions d'isolement absolu ne peut être considéré comme un adoucissement véritable de la pratique pénale.

JULIE VÉLISSAROPOULOS-KARAKOSTAS (ATHÈNES)

LES *NOTHOI* HELLÉNISTIQUES

La bâtardise grecque attire, depuis bien longtemps, l'intérêt des historiens et des juristes.[1] Cependant, sous le poids écrasant des *nothoi* péricléens, leurs homonymes des cités hellénistiques n'ont pas donné lieu à des débats aussi animés parmi les historiens ni à des essais d'exégèse aussi nombreux que ceux consacrés aux *nothoi* d'Athènes.

D'après la définition du lexicographe Pollux,[2] *gnèsioi* sont les enfants issus d'une épouse légitime et *nothoi* ceux qui sont nés de mère étrangère ou d'une concubine. Qualifiés, par les poètes d'autrefois, de *skotioi*, «enfants de l'ombre»[3] ou de *parthénioi*, «enfants issus d'une *parthénos*», les bâtards de l'époque hellénistique témoignent de la persistance de la règle de la double ascendence civique. Dans les

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[1] Α. Χριστοφιλόπουλος, «Ὁ μετ' ἀλλοδαπῆς γάμος κατὰ τὸ ἀρχαῖον ἑλληνικὸν καὶ ἑλληνιστικὸν δίκαιον», *Δίκαιον καὶ Ἱστορία*, 1973, p. 76-85. S.C. Humphreys, «The Nothoi of the Kynosarges», *JHS* 94 (1974), p. 88-95. C. Patterson, *Pericles' Citizenship Law of 451-50 B.C.*, New York, 1981. C. Patterson, «Those Athenian Bastards», *Classical Antiquity* 9 (1991), p. 40-73. P. Carlier, «Observations sur les nothoi», in R. Lonis, *L'étranger dans le monde grec II*, Nancy, 1992 (Actes du Deuxième Colloque sur l'Étranger, Nancy, 19-21 septembre 1991). D. Odgen, *Greek Bastardy in the Classical and Hellenistic Periods*, Oxford, 1996. C. Vial, «Mariages mixtes et citoyenneté des enfants: trois exemples en Égée orientale», in R. Lonis (éd.), *L'Étranger dans le monde grec* II (1992), p. 287-296 (pour Cos, Milet et Rhodes). A.-M. Vérilhac – Cl. Vial, *Le mariage grec du VIe siècle av. J.-C. à l'époque d'Auguste*, Paris, 1998 (BCH Supplément 32). E. Stavrianopoulou, *Grupenbild mit Dame. Untersuchungen zur rechtlichen und sozialen Stellung der Frau auf den Kykladen im Hellenismus und in der römischen Kaiserzeit*, Stuttgart, 2006, p. 48 suiv. Pour les mariages mixtes dans l'Egypte ptolémaïque, voir les études fondamentales de J. Mélèze-Modrzejewski: «La structure juridique du mariage grec», *Scritti in onore di Orsolina Montevecchi*, Bologna, 1981, p. 231-268 (=*Symposion 1979*, Athènes, 1981, p. 39-71, Idem, «Un aspect du couple interdit dans l'Antiquité: les mariages mixtes dans l'Egypte hellénistique», in L. Poliakov, *Le couple interdit. Entretiens sur le racisme*, Paris – La Haye – New York, 1980, p. 53-73; Idem, «Dryton le Crétois et sa famille ou les mariages mixtes dans l'Egypte hellénistique», in *Aux origines de l'hellénisme. La Crète et la Grèce. Hommage à Henri Van Effenterre*, Paris, 1984, p. 353-377.

[2] Pollux, 3, 21: Γνήσιος μὲν ὁ ἐκ γυναικὸς ἀστῆς γαμετῆς – ὁ δὲ αὐτὸς καὶ ἰθαγενής – νόθος δὲ ὁ ἐκ ξένης ἢ παλλακίδος. ὑπ' ἐνίων δὲ καλεῖται καὶ μητρόξενος· τὰ δὲ χρήματα τὰ τοῖς νόθοις διδόμενα Ἀριστοφάνης νοθεῖα καλεῖ.

[3] Schol. Euripide, *Alceste* 989: σκότιοι λέγονται οἱ λαθραῖοι παῖδες καὶ ἐξ ἀδαδουχήτων γάμων γενόμενοι.

cités où elle est directement attestée, la bâtardise n'apparaît pas comme une pathologie du lien matrimonial, mais comme une infraction aux lois sur la citoyenneté. Ni la tendance observée au sein du monde hellénistique vers la légitimation des enfants issus de mère étrangère, pas plus que des facteurs comme le mélange des populations, le droit d'épigamie, l'extension du fédéralisme, les synoecismes ou la vente du droit de cité, n'ont fait disparaître l'infirmité civique attachée aux mariages mixtes.[4]

A la littérature ancienne sur les *nothoi* hellénistiques sont récemment venues s'ajouter trois études grâce auxquelles la question de la bâtardise dans la Grèce ancienne redevient d'actualité: celle de D. Odgen, celles de C. Vial et, enfin, la monographie d'E. Stavrianopoulou sur la femme dans les Cyclades. Les trois auteurs examinent les deux secteurs à l'intérieur desquels s'exprime la bâtardise, à savoir citoyenneté et mariage, en donnant, là où cela est possible, des réponses ou formulant des hypothèses nouvelles.

Dans les pages qui suivent, j'aimerais soumettre à votre réflexion les témoignages épigraphiques sur les *nothoi*. En deuxième lieu, j'essaierai de formuler quelques conclusions concernant les causes de la bâtardise, d'une part, et le statut juridique des *nothoi*, de l'autre.

Les textes épigraphiques qui ont trait aux *nothoi* et aux enfants «issus de mère étrangère» (*mètros xénès*) proviennent de quatre cités: Cos, Rhodes, Ténos et Milet. A ces quatre provenances nous ajouterons une cinquième, Kalymna, qui n'a pas été signalée dans les études de D. Odgen, ni dans celles de C. Vial et de E. Stavrianopoulou.

I. Les nothoi de Cos

L'île de Cos présente une stratification civique et sociale particulièrement complexe et, en grande partie, insaisissable pour nous. Au sein du corps civique apparaissent des groupements dont la participation à la vie publique et religieuse de leur cité n'obéit pas aux mêmes règles. À cette différenciation observée au sein du corps civique correspond la diversification des non- citoyens, parmi lesquels se trouvent les *nothoi*.

Nos renseignements sur les *nothoi* de Cos proviennent de trois inscriptions:

1 – Fondation de Diomédon, vers 300 av. J.-C., Herzog, *Heilige Gesetze von Kos*, 10; *RIJG* II, XXIV B; *Syll.*[3] 1106; Segre, *Iscr. di Cos*, ED 149, D III, lignes 144-155:

ἐπιμηνίους δὲ αἱρεῖσθαι
τοὺς ἐγ Διομέδοντος καὶ τοὺς ἐγγ[ό]-
[ν]ους αὐτῶ· ἂν δέ τις νόθος κρ[ι]-
θεὶς γνωσθῆι μετέχειν τῶν ἱερῶ[ν],

[4] D. Odgen, *Greek Bastardy*, p. 276 et 289 suiv.

μὴ ἐξέστω αὐτῶι μετέχειν τῶν
[ἱ]ερωσυνῶν. λαμβάνετε δὲ ἀπ[ὸ]
τῆς προσόδου ὥστε τῶι Πασίω[ι]
εἰς θυσίαν δραχμὰς πεντήκο[ν]-
τα, ταῖς δὲ Μοίραις τεσσαράκο[ν]-
τα. θυόντω δὲ Πασίωι κα[ὶ]
ταῖς Μοίραις οἱ κατ' ἀνδρογένε[ι]-
[α]ν.

Traduction des éditeurs du RIJG
«Les officiants seront élus par les enfants de Diomédon et leurs descendants. Si un individu est convaincu d'avoir, étant bâtard, participé à la confrérie, il n'aura pas droit à une part des victimes. Prenez sur le revenu de quoi offrir à Pasios (dieu inconnu) un sacrifice de 50 drachmes, et aux Moirai un sacrifice de 40 drachmes; mes ascendants par les mêmes offriront les sacrifices».
Traduction J. V.-K.
«Les épimènioi seront élus par les enfants de Diomédôn et leurs descendants. Si un nothos a été jugé digne de participer aux sacrifices, qu'il ne lui soit pas permis de participer aux prêtrises[5]*. Prenez sur le revenu afin d'offrir à Pasios un sacrifice de 50 drachmes, et aux Moirai un sacrifice de 40. Que les sacrifices à Pasios et aux Moirai soit faits par les parents du côté des hommes».*

Dans sa fondation, la plus ancienne fondation privée que nous connaissons jusqu'à présent, Diomédôn dispose, entre autres, au sujet de ses descendants qui n'auront pas la qualité de *gnèsioi*. S'écartant des interprétations précédentes, S. Sherwin-White[6] et, à sa suite, D. Odgen estiment que les *nothoi* ne sont pas exclus du culte

[5] Cf. D. Odgen, *Greek Bastardy*, p. 314 suiv. «At the end of the text we find a series of codicils to the previous rules written in a stylistically poor fashion and in no apparent order. One of them concerns the choice by Diomedon's descendents of the priests of the monthly offering: «Il someone, being a *nothos*, is chosen (*kritheis*. N. 119: Dareste et al. II, 103 translate *kritheis* rather by convaincu, «convicted», and therefore take this provision to be separate from the preceding one on the priests of the monthly offering. I think it follows on, and picks up the «choosing» (*haireisthai*) in line 31) and recognized to be participating in the sacred things, let it not be allowed for him to participate in the priesthoods (or: victims)». D. O. estime, avec raison, que *hiérosynai* signifie «prêtrises». «Thus the point of this stipulation would be that a *nothos*, once recognized, may participate in the rites, but may not become a priest (Ziebarth has a different view: he thinks that *nothoi* are here totally excluded from participation from the cult, and, furthermore, unwarrantedly assumes that the only *nothoi* in question here are those granted citizenship. It remains unclear whether in making this provision this private society is in tune with public practices as regards the religious rights of *nothoi*. It is conceivable that the society merely enacts a duty imposed upon it by the state (as the provisions of the Athenian phratries relating to nothoi might be held to be)».

[6] *Ancient Cos. An historical Study from the Dorian settlement to the Imperial period*, Göttingen, 1978 (Hypomnemata 51), p. 365: «Although the cult was limited to the descendants of Diomedon in the male line, the requirement of legitimacy was waived to

instauré par le fondataire. Ce que Diomédôn leur interdit, c'est l'accès aux prêtrises, prohibition largement répandue dans le monde grec.

2 – Règlement du culte d'Aphrodite Pandèmos et Aphrodite Pontia, fin III[e] siècle, Segre, *Iscr. di Cos*, ED 178, A, lignes 15-26:

ἵνα δὲ ἐπαύξηται τὰ τίμια τᾶς θεοῦ,
φαίνωνταί τε ταί γαμοῦσαι πᾶσαι τᾶν τε πολιτίδων καὶ νόθων καὶ παροίκων κατὰ δύναμιν τὰν αὐτῶν τιμῶσαι τὰν θεὸν, ὅσαι κα γαμῶνται, χρηματισθείσας εἰσωμοσίας, θυόντω πᾶσαι τᾶι θεῶι ἱερῆον μετὰ τὸν γάμον ἐν ἐνιαυτῶι· ταῖ⟨ς⟩ δὲ συντελούσαις τὰ ἐψαφισμένα μεινον ἦμεν. ὁμοίως δὲ καὶ ἀκολούθως τοῖς προκεκυρωμένοις συντελῶντι τὰς θυσίας τοί{ς} τε ἔμποροι{ς} καὶ τοὶ{ς} ναύκληροι{ς} ὁρμώμενοι{ς} ἐκ τᾶς πόλιος· ὅσσοι κα μὴ θύσωντι ὡς γέγραπται, ἐπιτίμιόν τε αὐτοῖς ἔστω, καὶ ὀφειλόντω ἐπιτίμιόν τᾶ⟨ι⟩ ἰερείαι δραχμὰς δέκα, α δὲ πρᾶξις ἔστω αὐτᾶι καθάπερ ἐξ δίκας.

Traduction

«Afin que les honneurs envers dieu s'amplifient et les citoyennes, les nothoi et les paroikoi qui se marient montrent qu'elles honorent la déesse selon leur capacité, toutes les femmes qui se marient, après la réalisation des eisômosiai, devront offrir à la déesse un sacrifice, dans l'année qui suit la conclusion du mariage; tout le mieux pour celles qui sacrifieront conformément aux prescriptions. De la même manière et conformément aux prescriptions, les commerçants et les nauclères qui ont leur siège dans la cité devront faire des sacrifices; s'ils ne sacrifient pas conformément aux prescriptions, ils seront frappés d'une amende et devront verser à la déesse dix drachmes à titre d'amende; le recouvrement aura lieu comme en vertu de procès».

Le document s'achève par une liste de noms de citoyennes, de *nothoi* et de métèques. Sur les 37 noms lisibles sur la pierre, 21 sont des citoyennes, 4 des *nothai* et 12 des métèques. A une exception près (une femme métèque nommée Nikation, sans indication ni du patronyme ni de la somme versée), tous les noms, même ceux des métèques, sont suivis d'un patronyme. Les sommes offertes par les citoyennes sont plus élevées que celles offertes par les femmes appartenant aux deux autres catégories.

Ignoré ou à peine invoqué par les trois auteurs précités, ce document me paraît être d'une importance capitale pour la question du statut des *nothoi* et, surtout, de la nature de l'union dont ils sont issus. L'union d'une femme *nothos* avec un citoyen constitue, du moins à Cos, un *gamos*, un mariage légalement reconnu et soumis aux mêmes formalités et aux mêmes rituels que le mariage entre citoyens. Toutes les

the extent that bastards were permitted to participate in the cult; but were not eligible for the priesthood».

femmes fraîchement mariées doivent, sous peine exécutoire «comme en vertu de procès», faire le sacrifice prescrit à la déesse. Aux termes du décret, ce sacrifice devra avoir lieu «après la réalisation des *eisomôsiai*». Le mot *eisômosia* est un hapax. L'étymologie du terme, la préposition εἰς et le verbe ὄμνυμι, indique un rapport certain avec la prestation d'un serment accompagnant le mariage dans l'île de Cos.[7] Le décret n'envisage pas l'*eisômosia* comme un acte ou un rituel facultatif ou de nature purement cérémonielle. Les termes συντελεσθείσας τὰς εἰσωμοσίας, indiquent, me semble-t-il, que l'*eisomôsia* avait un caractère obligatoire pour la conclusion ou du moins pour la preuve du lien matrimonial.

3 – Cos, souscription publique, entre 205-201 av. J.-C., Paton-Hicks, *Inscriptions of Cos*, 10; Michel, *Recueil*, 642; L. Migeotte, *Les souscriptions publiques*, 50, lignes 1-11:

[ἐπὶ μον]άρχου Νικομήδους
[- - - - - - - -]ο]υ νουμηνίαι· Διοκλῆς
[Λεωδ]άμαντος εἶπε· ὅπως
[ἐφ' ἑκά]στου καιροῦ φαίνων-
[ται τ]οὶ πολῖται συναντι-
[λα]νβα[ν]όμενοι τᾶς κοινᾶς
[ἀ]σφαλείας· δεδόχθαι· ἐ-
[π]αγγέλεσθαι τὸς δηλο-
μένος τῶν τε πολιτᾶν καὶ
πολιτίδων καὶ νόθων καὶ πα-
[ρ]οίκων καὶ ξένων.

Traduction
«Nikomèdès étant monarchos, le premier du mois - - - Proposition de Dioklès, fils de Léôdamas. Afin qu'il soit évident qu'en toute circonstance, les citoyens considèrent la sécurité publique comme une affaire commune. Plaise. Que les citoyens, les citoyennes, les nothoi, les paroikoi et les étrangers qui se déclareront, promettent publiquement».

Ce troisième document sur les *nothoi* de l'île de Cos est d'une nature différente que les deux précédents. Pris pour faire face aux problèmes causés par la guerre[8] –

[7] Le serment prêté à l'occasion du mariage apparaît également dans un papyrus d'Oxyrhynchos (*PSI* I, 64), daté du I^er^ siècle av. J.-C., qui contient les engagements assermentés d'une épouse vis-à-vis de son mari. Certains de ces engagements nous sont connus par des contrats matrimoniaux, tandis que d'autres ne sont attestés que par ce document, unique en son genre, qui contient le serment matrimonial d'une femme égyptienne hellénisée.

[8] Il s'agit soit de la guerre crétoise de 205 soit de la guerre de 201 menée toujours par Philippe V de Macédoine contre Rhodes, au cours de laquelle Cos subit les attaques de la

invocation de la «sécurité commune» et du «salut de la patrie et des alliés» – le présent décret fait appel à la générosité de tous les habitants de la cité: hommes et femmes, citoyens, citoyennes, *nothoi*, *paroikoi*, étrangers de passage sont sollicités pour apporter leur aide afin que la cité sorte de la crise.[9]

Nous savons, par d'autres sources épigraphiques, que la loi de Cos sur la citoyenneté est particulièrement sévère. L'extranéité de la mère exclut les descendants du droit de cité, leur accordant le statut de *nothoi*. D'après le décret de Halasarna, voté vers 200 av. J.-C. par les tribus des Dymanes et des Hylleis qui participent au culte d'Apollon et d'Héraclès, la citoyenneté de la mère et même du grand- père du côté maternel paraît être déterminante pour la définition du statut des fidèles.[10]

La loi de Halasarna[11] impose à tous ceux qui avaient le droit de participer à ces cultes de s'inscrire devant les naopes, «*attendu qu'avec le temps les personnes inscrites sur le registre du dieu deviennent difficiles à identifier, afin qu'on les identifie et que ceux qui accueilleront les banqueteurs puissent contrôler aisément la foule des participants au culte*» (A l. 17-18). Pour la confection des rôles, chacun devait donner son nom et son patronyme, «*en indiquant aussi sa tribu et le nom de sa mère avec la mention de celui des citoyens dont elle est la fille*» (A l. 31-37). La loi de Cos exige, pour être citoyen, d'avoir non seulement un père citoyen, mais encore une mère fille de citoyen. Ainsi sont exclus de la citoyenneté les enfants issus d'une femme née étrangère et ayant reçu le droit de cité de Cos avant son mariage et aussi, à plus forte raison, les étrangères bénéficiant de l'épigamie (non attestée pour Cos à ma connaissance). Comme le faisait remarquer le premier éditeur de l'inscription, «à Cos, l'application de la loi sur la double filiation était, en cette fin du IIIe siècle, assurée par le soin apporté à l'état civil et aux recensements».[12]

L'importance accordée par le décret de Halasarna à l'identité de la mère a été associée à la participation de la mère, originaire de Cos, à la dation en mariage de sa

flotte macédonienne; sur les circonstances historiques du décret, voir L. Migeotte, *loc. cit*.

9 L. Migeotte, *Les souscriptions publiques*, p. 149.

10 A.-M. Vérilhac-C. Vial, *Le mariage grec*, p. 60 suiv.

11 M. Dubois, «Décret inédit de l'île de Cos», *BCH* 6 (1882), p. 249-267; Paton-Hicks, *Inscr. Cos*, no 367; *Syll.*[3] 1023; G. Pugliese-Carratelli, *ASAA* 41-42, NS 25-26 (1963-1964), no 26, p. 183-184, lignes 29-37: ἀπογραφέσθων αὐ|τοὶ ἐπεί κα παραγένων|ται ἐν τριμήνωι τὸ ὄνο|μα πατριαστὶ ποτὶ τὸς | ναοποίας, ἐξαγύμε|νος καὶ τὰν φυλὰν καὶ | τᾶς ματρὸς τὸ ὄνομα | καὶ τίνος τῶν πολιτᾶν | θυγάτηρ ὑπάρχει. Traduction M. Dubois, loc. cit.: «*Quant aux absents, les surveillants les inscriront; s'ils ne le font pas, qu'eux-mêmes se fassent inscrire par les napoiai dans un délai de trois mois après leur retour, indiquant le nom de leur père, leur tribu, le nom de leur mère, et de quel citoyen elle est la fille*».

12 Ibid., p. 61.

fille dans le contrat d'Elephantine,[13] hypothèse réfutée, avec raison, par J. Modrzejewski[14] et, à sa suite, par D. Odgen.[15] Dans les contrats matrimoniaux conclus par les Grecs de l'Egypte lagide, la participation des femmes au mariage de leurs enfants ne se limite ni aux seuls originaires de l'île de Cos ni au seul contrat d'Elephantine.

II. Les enfants issus «de mère étrangère» de Rhodes

L'épigraphie rhodienne nous a conservé la mention de six personnes (dont deux frères) nés de père Rhodien et de mère étrangère, qualifiés de μητρὸς ξένης. Les modernes les appellent *matroxénoi*, terme non attesté dans l'épigraphie rhodienne. Des personnes «nées de mère étrangère» apparaissent dans quatre documents rhodiens.

4 – Liste de souscripteurs de la tribu de Lindos pour la restauration de la parure et des *potèria* d'Athena Lindia, vers 325 av. J.-C., *ILindos* 51 c, col. I, lignes 26-27:

[Σ]ωσικ[λ]ῆς Κοσμοκλέος
[ματρὸς δ]ὲ ξένας.

Traduction
«Sôsiklès fils de Kosmoklès, de mère étrangère».

Les souscripteurs qui figurent sur la liste appartiennent à la tribu de Lindos, que nous retrouverons à propos des μητρὸς ξένης, et sont classés par dèmes. Sôsiklès, qui n'était ni citoyen rhodien, ni membre du dème des Druitai, apparaît à la fin de la liste des membres du dème de son père, associé aux démotes dans un même geste pieux.[16]

5 – Dédicace gravée sur la base d
e deux statues, vers 200 av. J.-C., A. Maiuri*, Nuova silloge epigrafica di Rodi e Cos*, Firenze, 1925, no 19, col. I, lignes 1-10 et col. II, lignes 1-5:

col. I
῾Ηράκλειτος Παυσανία.
vacat

[13] P. Eleph. 1. Cette thèse a été notamment suivie par et Cl. Préaux, «Le statut de la femme à l'époque hellénistique, principalement en Egypte», *Recueils de la Société J. Bodin, XI. La femme*, Bruxelles, 1959, p. 147-150 et par S.B. Pomeroy, *Women in Hellenistic Egypt*, New York, 1984, p. 90 et n. 11.

[14] «La structure juridique du mariage grec», p. 248-249 et «Dryton le Crétois», p. 360, n. 35.

[15] Ouvrage précité, p. 315-316.

[16] Ainsi C. Vial, «Mariages mixtes», p. 290.

ʾΑπολλόδοτος ʿΗρακλείτου
Νεττίδας ματρὸς δὲ ξένας
τὸμ πατέρα
φυλαρχήσαντα
φυλᾶι ʾΙαλυσία[ι]
καὶ νικήσαντα εὐα[ν]δρίαι
καὶ λαμπάδι Διοσωτήρια
ʾΑσκλαπίεια ʿΑλίεια
θεοῖς.

col. II
ʾΑπολλόδοτος ʿΗρακλείτου
Νεττίδας ματρὸς δὲ ξένας.
ʿΗράκλειτος ʾΑπολλοδότου Σάμιος
ᾧι ἁ ἐπιδαμία δέδοται τὸμ πατέρα
θεοῖς.

Traduction
«Hérakleitos fils de Pausanias. Apollodotos fils d'Hérakleitos du dème Netteia, de mère étrangère, à son père président de la tribu de Ialysos, vainqueur (à la compétition) de l'étant physique (euandria) et de la course à la torche aux concours de Zeus Sôter, d'Asklépios et des Alieia. Dieux. Apollodotos fils d'Hérakleitos du dème Netteia, de mère étrangère. Hérakleitos fils d'Apollodotos Samien à qui a été donné le droit de résidence, à son père. Dieux».

Dans la dédicace interviennent trois personnes qui représentent les trois générations successives d'une même famille: le grand- père, Hérakleitos fils de Pausanias, citoyen important de Rhodes, son fils Apollodotos, de mère étrangère et, enfin, le petit-fils Hérakleitos, citoyen de Samos qui a obtenu le droit d'*épidamia* à Rhodes. Père et fils appartiennent à des dèmes différents, l'un à un dème de la tribu d'Ialysos, l'autre au dème de Netteia de la tribu de Lindos, fait qui a suscité de nombreuses discussions parmi les historiens. Pour les uns, Apollodotos est né citoyen, mais étant issu de mère étrangère, il ferait partie des citoyens de deuxième catégorie.[17] Pour les autres, notre personnage est né ayant le statut de μητρὸς ξένης, mais il a par la suite acquis le droit de cité rhodien; cela expliquerait son appartenance à un dème de la tribu de Lindos et non pas de Ialysos, tribu de son

[17] Ainsi A. Maiuri, *Nuova silloge epigrafica di Rodi e Cos*, Firenze, 1925, nos 19 et 130, et K. Latte, RE XVII, *Nothoi,* col. 1037. L'hypothèse a été rejettée, avec raison, par G. Pugliese-Carratelli («Sullo stato di cittadinanza in Rodi», *Studi in onore di V. Arangio-Ruiz*, Napoli, 1953, p. 485-491) qui a démontré que ces catégories étaient des inventions des modernes. Cf. C. Vial, «Mariages mixtes», p. 287 suiv. Pour la confusion de Hiller, v. Gaertringen, RE Suppl. (1931), col. 766, s.v. *Rhodos*, estimant qu'Hèrakleitos était le père et Apollodotos le fils, voir Α. Χριστοφιλόπουλος, «ʿΟ μετ' ἀλλοδαπῆς γάμος» p. 79, n. 35.

père, citoyen de naissance. Enfin, d'après une autre hypothèse, Apollodotos n'a jamais acquis le droit de cité rhodien. Il est né et il est mort ayant le statut civique que lui assignait sa naissance de père citoyen et de mère étrangère, statut qui impliquait son enregistrement au dème lindien de Netteia, et non pas à celui de son père, réservé aux citoyens de naissance.

Toute aussi problématique est la citoyenneté du troisième personnage de la dédicace, à savoir du le petit-fils, citoyen de Samos qui a obtenu le statut de métèque de Rhodes.[18] Une chose est sûre à son sujet: il n'est ni citoyen rhodien ni μητρὸς ξένης. La voie par laquelle il est devenu Samien nous échappe. Par octroi du droit de cité par décret du peuple samien? L'hypothèse n'est pas à exclure, comme il n'est pas non plus improbable que notre personnage doive sa citoyenneté samienne à sa mère, citoyenne de Samos, hypothèse réfutée par D. Odgen qui refuse, de manière catégorique, de reconnaître à la femme la capacité de transmission du droit de cité.[19]

Il est hors de doute qu'en principe, la femme n'a pas la capacité de transmettre son droit de cité à ses descendants issus de son union avec un étranger. La structure patriarcale de la société grecque rendait difficile cette transmission et, en même temps, dans un grand nombre de cités hellénistique le vieux principe de la double ascendance civique ne semble pas avoir été abandonné. Pourtant, Aristote connaissait déjà quelques cités qui admettaient dans leur corps civique les enfants nés de mère citoyenne mais dont le père était étranger.[20] Cette possibilité apparaît

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[18] A. Χριστοφιλόπουλος, «Ὁ μετ' ἀλλοδαπῆς γάμος», p. 80: Ἴσως ἐν προκειμένῳ συνέτρεχον ἰδιαίτεροι λόγοι, διὰ τοὺς ὁποίους ὁ Ηράκλειτος φέρεται ὡς Σάμιος. Εἴτε δηλ. ἀπέκτησεν ἐξ ἰδίας πρωτοβουλίας τὴν σαμιακὴν ἰθαγένειαν ἀποβαλὼν οὕτω τὴν ἰδίαν εἴτε προέρχεται ἐκ γάμου τοῦ μητροξένου πατρὸς του Ἀπολλόδοτου μετ' ἀλλοδαπῆς, ὁπότε ὡς ἔχων τοὺς τρεῖς ἐκ τῶν τεσσάρων δευτεροβαθμίων αὐτοῦ ἀνιόντων ἀλλοδαηοὺς ἀπελείετο κατὰ διάταξιν τυχὸν τοῦ ροδιακοῦ δικαίου, ἀνάλογον πρὸς συγχρόνους τινὰς νομοθεσία, τῆς πολιτείας.

[19] D. Ogden, *Greek Bastardy*, p. 301-303: «Many have implausibly argued versions of the idea that the younger Heraclitus was entitled to Samian citizenship because his mother, an alien to Rhodes, was a Samian (n. 54: «Thus Maiuri, Nuova Silloge, 31; Pugliese Carratelli, 490 and Christophilopolulos, 80). But he would have been «patroxenos» to Samos, and it is therefore very unlikely that he was entitled to Samian citizenship as of right. We must, I think, assume that the younger Heraclitus has somehow received an extraordinary grant of Samian citizenship (no doubt his money helped there), or that he is, curiously, sporting a bogus ethnic (possibly based upon his mother's actual origin), which has no effect in Samos itself».

[20] Aristote, *Politique* 1275b et 1278a: Ὁρίζονται δὲ πρὸς τὴν χρῆσιν πολίτην τὸν ἐξ ἀμφοτέρων πολιτῶν καὶ μὴ θατέρου μόνον, οἷον πατρὸς ἢ μητρός· οἱ δὲ καὶ τοῦτ' ἐπὶ πλέον ζητοῦσιν, οἷον ἐπὶ πάππους δύο ἢ τρεῖς ἢ πλείους. . . . . Ἐν πολλαῖς δὲ πολιτείαις προσεφέλκεται καὶ τῶν ξένων ὁ νόμος· ὁ γὰρ ἐκ πολίτιδος ἔν τισι δημοκρατίας πολίτης ἐστίν, τὸν αὐτὸν δὲ τρόπον ἔχει καὶ περὶ τοὺς νόθους παρὰ πολλοῖς, Οὐ μὴν ἀλλ' ἐπεὶ δι' ἔνδειαν τῶν γνησίων πολιτῶν ποιοῦνται πολίτας τοὺς ποιούτους (διὰ γὰρ ὀλιγανθρωπίαν οὕτω χρῶνται τοῖς νόμοις), εὐποροῦντες δ' ὄχλου κατὰ μικρὸν παραιροῦνται τοὺς ἐκ δούλου πρῶτον ἢ δούλης, εἶτα τοὺς πὸ γυναίκων, τέλος δὲ μόνον τοὺς ἐξ ἀμφοῖν ἀστῶν πολίτας ποιοῦσιν.

dans trois (à ma connaissance) documents épigraphiques dont le plus ancien, du début du IV[e] siècle av. J.-C., provient de l'île de Thasos.[21]

IG XII 8, 264, lignes 8-9:

[ὅσοι ἐκ Θα]-
σίωγ γυναικῶν εἰσιν, τότος Θά[σιος εἶναι - - -

Traduction
«Ceux qui sont issus de femmes thasiennes seront Thasiens».

La clause du décret thasien ne doit en aucune manière être considérée comme une rupture avec le principe qui veut que les enfants nés de père étranger aient le statut d'étranger. Elle introduit une mesure de circonstance et de portée limitée aux seuls originaires de Néapolis, colonie de Thasos,[22,] sans affecter les autres étrangers compagnons de femmes thasiennes dont les enfants sont exclus du droit de cité.

De portée moins restreinte semble être la mesure prise, au III[e] siècle, par la cité thessalienne de Phalanna lorsque, en accordant le droit de cité aux peuples voisins, elle concéda aussi sa *politeia* aux fils nés des ses citoyennes.

IG IX 2, 1228, lignes 3-21:

Ἀγαθὰ τύχα· λειτορεύον-
τος τοι Ἀσκλαπιοῖ Ἀντιμα-
χοι Φιλιουνείοι, ταγευόντουν
Εὐάρχοι Εὐαρχείοι,
Κρατεραίοι Παυσανιαίοι,
Στατίπποι Λακρατίππειοι,
Κλεολάοι Ἀντικρατείοι,
Νικίας Ἡρακλειδαίοι,
Ἱπποκράτεις Ἱπποκλεαίοι,
Εὐρυλόχοι Προυταγοραίοι
Φαλανναίουν πόλις ἔδου-
κε Περραιβοῖς καὶ Δολόπεσ-
σι καὶ Αἰνι ννεσι καὶ Ἀχαι-
οῖς καὶ Μαγνείτεσσι καὶ τοῖς
ἐς τᾶν Φαλανναιᾶν[23] πολι-

[21] A. Wilhelm, *Akademieschriften* I, p. 112-114. J. Pouilloux, *Recherches sur l'histoire et les cultes de Thasos I,* Paris, 1954, p. 205-212.

[22] Ainsi J. Pouilloux, loc. cit., et Cl. Vatin, *Recherches sur le mariage et la condition de la femme mariée*, p. 126.

[23] Cf. Le commentaire de Dittenberger: τοῖς ἐς τᾶν Φαλανναιᾶν i.e. filiis mulierum Phalannaearum ex peregrinis patribus genitis.

τείαν τοῖς ποκγραψαμένοις
καὶ δοκιμασθέντεσσι κὰτ
[τ]ὸν νόμον.

Traduction
«A la bonne fortune. Antimachos fils de Philiounios étant prêtre d'Asklèpios, Euarchos fils d'Euarcheios, Kratéraios fils de Pausanias, Statippos fils de Lakratippeios, Kléolaos fils d'Antikrateios, Nikias fils d'Hèrakleidaios, Hippokratès fils d'Hippokleaios, Eurylochos fils de Proutagoras étant tages. La cité de Phalanna à accordé aux Pérraibéens, aux Dolopésséens, aux Ainiannéens, aux Achéens, aux Magnètes et aux fils de femmes Phalannéennes le droit de cité, après qu'ils auront été enregistrés et auront subi l'examen selon la loi».

Les fils des femmes Phalanéennes et de pères étrangers naissent étrangers, mais deviennent citoyens par la même procédure que les autres étrangers visés par le présent décret, à savoir par enregistrement et *dokimasia*.

Dans les exemples qui viennent d'être cités, la transmission du droit de cité par les femmes s'intègre dans le cadre d'une politique de naturalisation massive au profit, non pas de n'importe quels étrangers, mais uniquement de populations voisines. Le droit de transmission individuelle du droit de cité par la mère à son enfant[24] issu de père étranger est attesté par un décret d'octroi du droit de cité, du I^er^ siècle avant J.-C., provenant d'Aigialè d'Amorgos.

IG XII 7, 392, lignes 9-11:

Σεραπίωνα
10 Διονυσίου Σελευκῆ, Νικαρέτης ὑ-
πάρχοντα υἱὸν τῆς πολείτιδος.

Traduction
«Sérapiôn fils de Dionysios, Seleucéen, qui est fils de Nikarétè, citoyenne».

Originaire d'une des villes nommées Seleukeia, le nouveau citoyen d'Aigialè est issu de mère citoyenne, mais d'un père étranger à qui a probablement été donné le droit d'épigamie[25].

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[24] Sur la foi de la loi de Dymè (III^e^ siècle av. J.-C.) sur la citoyenneté et le pouvoir accordé aux veuves *époikoi* d'acheter le droit de cité pour elles-mêmes et leurs fils mineurs et filles célibataires (*Syll.*[3] 531; réed. A. Rizakis, *Tyche* 5 (1990), p. 110-123; SEG XL, 394; cf. Ph. Gauthier, *Bull.* 1991, no 303). E. Szanto (*Das griechische Bürgerrecht*, Freiburg/Brisgau, 1892, p. 71) admet qu'à Dymè, les enfants issus de mère citoyenne et de père étranger, avaient le droit de cité. Contra A. Χριστοφιλόπουλος, op. cit., p. 81-82.

[25] A. Χριστοφιλόπουλος, op. cit., p. 83-84, donne toute une liste d'exemples de citoyens d'Athènes qui ont épousé des femmes étrangères.

Enfin, un dernier témoignage épigraphique qui atteste la possibilité de transmission du droit de cité par la mère aux enfants est compris dans une lettre, écrite le 8 octobre 135 av. J.-C., par le roi Attale III de Pergame et adressée au conseil et au peuple de Cyzique.

IPergamon I, 248; *OGIS* 331; Welles, *Royal Correspondance*, 66, lignes 15-16:

εἰδὼς οὖν ὅτι πρὸς μητρὸς καὶ ὑμ[έ]-
τερος ἐστι πολίτης.

Traduction
«*Sachant que, du côté de sa mère, il est citoyen de votre cité* (i.e. Cyzique)».

Revenons cependant à notre famille rhodienne. Partant du cas d'Apollodotos, A.-M. Vérilhac et Cl. Vial concluent qu'à la différence de Milet et de Ténos, le père citoyen rhodien ne pouvait pas, en demandant sa naturalisation, faire entrer dans le corps des citoyens l'enfant qu'il avait eu d'une étrangère.[26] Son fils Hérakleitos ayant le statut de *mètros xénès*, Apollodotos *n'a pas pu*, d'après les deux auteurs françaises, l'introduire dans le corps civique de sa cité. La question cependant qui se pose est de savoir non pas si le père avait ou non les moyens légaux pour que son fils soit reconnu comme citoyen, mais *s'il a voulu* qu'il n'ait plus le statut «de mère étrangère».

Aucun des documents rhodiens mentionnant des individus nés de mère étrangère ne laisse croire que cette filiation avait un caractère blâmable, honteux ou discriminatoire. Lorsque la mère *xénè* est citoyenne d'une cité grecque[27] et lorsqu'elle fait partie d'une famille notoire de sa cité, les structures patriarcales de la famille deviennent moins rigides, permettant la transmission du droit de cité par la mère à ses descendants.

6 – Inscription funéraire (?), A. Maiuri, *Nuova silloge epigrafica di Rodi e Cos*, 130 (texte non daté), lignes 1-3:

[- - - - - - - - - - -]
ματρὸς δὲ ξένας
γυνὰ δὲ Φίλωνος
χρηστὰ χαῖρε.

[26] A.-M. Vérilhac-C. Vial, *Le mariage grec*, p. 65 suiv.

[27] La qualité de «citoyenne de cité grecque» constitue une condition d'accès à la citoyenneté milésienne dans le traité de sympolitie entre Milet et Pidasa, *IMilet* I 3, 149, lignes 10-12: Εἶναι Πιδασεῖς Μιλησίων πολίτας καὶ τέκνα καὶ γυναῖκας, ὅσαι ἂν ὦσι φύσει Πιδασίδες ἢ πόλεως Ἑλληνίδος πολίτιδες.

Traduction
« - - - et de mère étrangère, digne épouse de Philôn, salut».

Épouse d'un citoyen nommé Philon, la défunte était issue «de mère étrangère». En dépit de son état fragmentaire, l'inscription nous permet de formuler une conclusion fondamentale pour le statut des personnes nées de mère étrangère: le statut des enfants de mère étrangère n'a rien de discriminatoire.

7 – Dédicace à Athena Lindia, faite vers 260-250 par l'équipage d'un navire de guerre, IG XII 766, lignes 12-14; *ILindos* 88 b, col. III, lignes 286-288:

Εὔξεινος Κρατίνου, μητρὸς δὲ ξένας.
Καλλικράτης Ἀριδείκευς, ματρὸ(ς) δὲ ξένας.
Δαμάτριος Ἀριδείκευς, ματρὸ[ς δ]ὲ ξένας.

Traduction
«Euxeinos fils de Kratinos, de mère étrangère. Kallikratès fils d'Arideikeus, de mère étrangère. Damatrios fils d'Arideikeus, de mère étrangère».

La liste des membres de l'équipage comporte plus de soixante citoyens rhodiens, désignés par leur nom et leur patronyme, au moins deux étrangers (un Halicarnassien et un autre dont l'ethnique a disparu mais qui est signalé comme «bienfaiteur») et trois hommes dont le nom et le patronyme sont suivis de la mention «de mère étrangère».

Comme le soulignent A.-M. Vérilhac et Cl. Vial, si ces hommes ont été mobilisés dans une marine qui semble à cette époque montée presque exclusivement par des citoyens, c'est qu'à Rhodes les enfants nés de mère étrangère avaient des droits et des devoirs militaires.

III. Les nothoi de Ténos

Les *nothoi* téniotes sont attestés par un seul document, un acte législatif de la seconde moitié du IV^e^ siècle, émanant probablement d'une subdivision civique, qui porte le titre «loi d'admission».

8 – *IG* XII Suppl. 303; R. Etienne, «Astu et polis à Ténos», *Ktèma* 9 (1984), p. 203-211. Du même, *Ténos II. Ténos et les Cyclades du milieu du IVe siècle av. J.-C. au milieu du IIIe siècle après J.-C., Paris*, 1990, p. 45-47, lines 1-9.

Νόμος εἰσαγωγῆς· γυναῖκα χιμάρωι, υἱὸν χιμάρ[ωι· μὴ ἐσάγεν]
πρὶν ἂν πεντήκοντα ἔτη τῶι πατρὶ γένηται· ὁμ[οπάτριον δὲ]
πατρὸς ἀποθανόντος μὴ ἀπῶσαι τοῖς ἔτεσ[ι - - -] τοῖς γεγραμμένοις
νόθον μὴ ἔναι ἐσάγεν μὴ ἐξωθεῖται, ἔτ[εσι τοῖς καὶ]
5 ἐπὶ γνησίοις νόθον ἐσάγεν· ὃς δ' ἂν νόθον ἐσά[γηι, ἀποτινέτω]
εἰκοσιπέντε δραχμάς· ἐπὶ τὴν ἱστίην ὀμνύτω [καὶ μάρτυρας]

[δ]ύ[ο] παρεχέτω ὀμνύντας οἰόμενον· ὁ δὲ ἐσάγων [ὀμνύτω ἢ μὲν]
[ὁμοπ]άτριον ἢ ἀδελφô παῖδα· ὀμνύτω δὲ καὶ ἡ μ[ήτηρ· ὃς δ' ἂν μὴ]
[πείθηι] τῶν παρόντων τινά, ζημιόσθω πέντε δρ[αχμαῖς].

Traduction
«Loi sur l'admission. Que l'épouse offre un jeune chevreau. Le fils aussi un jeune chevreau. Le fils ne pourra être admis avant que le père ait atteint l'âge de cinquante ans. Après la mort du père, on n'écartera pas un frère consanguin. L'admission d'un nothos est interdite. Toutefois, s'il n'est pas rejeté, il sera admis aux mêmes conditions d'âge que les fils légitimes. Celui qui présente un nothos paiera 25 drachmes et prêtera serment sur le foyer de la cité. Celui qui présente un frère consanguin ou le fils d'un frère affirmera aussi sous serment le degré de celui qu'il présente. Prêtera aussi serment la mère. Si quelqu'un des membres présents fait opposition à l'un de ces serments, celui qui l'aura prêté sera frappé d'une amende de 5 drachmes».

Pendant longtemps on a cru que la présente loi était une «loi sacrée» de plus, émanant d'une association religieuse et portant sur les conditions d'admission de nouveaux membres. Dans sa seconde étude sur Ténos, R. Etienne a cependant reconnu dans ce document une loi émanant d'une des subdivisions civiques téniotes, probablement une *patra,*[28] par laquelle sont fixées les conditions d'accès de nouveaux citoyens[29]. Après avoir traité de l'admission du fils légitime, la loi passe au bâtard, établissant le principe de son exclusion de la subdivision paternelle: «Qu'il ne soit pas permis d'introduire (*eisagein*) un *nothos*». Cependant, la disposition suivante envisage le cas où, en dépit de l'interdiction initiale, la candidature du *nothos* a été retenue par les membres de la subdivision. Il sera alors introduit aux mêmes conditions d'âge que les fils légitimes (*gnésioi*), mais la personne qui l'introduit, probablement son père, devra payer la somme de 25 drachmes et jurer sur le foyer de la cité que le *nothos* est réellement son fils. La loi téniote exige du père d'un fils bâtard de présenter deux témoins qui témoigneront de sa filiation avec le *nothos*, procédure qui n'est pas imposée au sujet des fils *gnèsioi*.

Ce qui est intéressant dans la loi de Ténos, c'est le rôle de la mère, soumise, comme le père, à la prestation de serment, condition indispensable pour l'introduction de son fils dans la subdivision paternelle. Le serment est cependant imposé aux seules citoyennes dont peuvent naître des fils *gnèsioi*, et non pas aux étrangères mères d'enfants *nothoi*.

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[28] Selon R. Etienne (*Ténos II*, p. 37-39), la *patra* serait une subdivision à caractère gentilice, comparable au génos attique. En revanche, pour Ph. Gauthier (*Bull.* 1991, 431), la *patra* téniote serait l'équivalent de la phratrie attique («contamination de deux formes distinctes (πάτρα/ φάτρα – φατρία/φρατρία) pour désigner une seule et même subdivision civique»).

[29] R. Etienne (*Ténos II*, p. 45-47 et «Astu et polis à Ténos», *Ktèma* 9 (1984), p. 203-211 et p. 45-47) a démontré que les *phylai* de Ténos étaient dix et non pas douze comme on le croyait jusqu'à présent. Cf. A.-M. Vérilhac-C. Vial, *Le mariage grec*, p. 65, et E. Stavrianopoulou, «*Gruppenbild mit Dame*», p. 52-54.

Comme le fait remarquer E. Stavrianopoulou,[30] certains termes utilisés dans la loi de Ténos, comme εἰσαγωγή, νόθοι, ou certaines procédures comme les sacrifices, la prestation de serment, la peine pécuniaire infligée aux contrevenants et, surtout, l'introduction du fils par le père, trouvent leur parallèle dans les sources attiques et dans la procédure d'introduction d'un Athénien dans une phratrie ou dans une corporation religieuse. Cependant, il ne faut pas, souligne-t-elle,[31] surestimer les ressemblances entre la phratrie athénienne et la subdivision civique des Téniotes. Les deux institutions se différencient sur trois points: l'indication de l'âge du père comme condition légale pour l'introduction, le caractère strictement agnatique de la subdivision en rapport directe avec les structures aristocratiques de Ténos et, enfin, le rôle de la mère dans la preuve de la légitimité de son fils.

IV. Les *nothoi* de Milet

Notre information sur les *nothoi* milésiens provient des listes, établies au cours du III^e^ et du II^e^ siècles, sur lesquelles sont inscrits les noms des personnes qui reçoivent, chaque année, la citoyenneté de Milet.[32]

9. – *IMilet* I 3, 45 (216/5 av. J.-C.), col. I, lignes 1-10 et col. II, lignes 2-10:

ἐπὶ στεφανηφόρου Εὐανδρίδου οἵδε ἐγένοντο πο[λῖ]ται κατὰ ψήφι[σμα
τ]οῦ δήμου·
I.
Ἀρτεμίδωρος Ἀρτέμωνος Βοιώτιος ἐκ Θηβῶν.
Ἀρχίας Διοσκουρίδου Βαργυλιήτης.
Διογένης Δημητρίου Ἁλικαρνασσεὺς ἄνηβος.
Μίλητος Ἡρακλείδου Σμυρναῖος,
γυνὴ τούτου Ἡδεῖα Ἀντιγένου Ἀντιοχίς,
υἱοὶ ἄνηβοι Ἡρακλείδης, Ἀντιγένης.
Πόλλις Μέλανος Μυλασεύς, γυνὴ τούτου
Ἀρτεμισία Ἐπικράτου Ἁλικαρνασσίς,
υἱοὶ Μητρόδωρος, Βασιλείδης ἄνηβοι.
II.
Κρόνιος Ἀπατουρίου Ἡρακλεώτης, γυνὴ
Μενίσκη Δημητρίου Μάγνηησα,
υἱοὶ Δημήτριος, Ἀπατούριος ἄνηβοι.
Στράτων Σωτᾶ Μάγνης.
Στρατοκλῆς Διονυσίου Κολοφώνιος.
Μεγαλόκλεια Δημητρίου Ἀνδρία.

[30] «Gruppenbild mit Dame», p. 52.
[31] *«Gruppenbild mit Dame»*, p. 54-55.
[32] *IMilet* III 3, nos 41, 45, 46, 51, 64, 65, 65a, 67, 70, 72, 74, 74a, 76, 77, 78, 79, 87, 89.

Διογένης Χαροπίνου νόθος
Βίων Χαιριμένου Καρύστιος
10 Ἡρόστρατις Θεοδώρου νόθη κόρη.

Traduction
«I. Euandridas étant stéphnéphore, les suivants ont été faits citoyens par décret du peuple. Artémidôros fils d'Artémôn, Béotien de Thèbes. Archias fils de Dioskouridès, Bargylien. Diogénès fils de Dèmètrios, Halicarnacéen mineur. Milètos fils d'Hèrakleidès, Smyrnéen, sa femme Hèdeia fille d'Antigénès, Antiochéenne, les fils mineurs Hèrakleidès et Antigénès. Pollis fils de Mélas, Mylasséen, sa femme Artémisia fille d'Epikratos, Halicarnacéenne, les fils Mètrodôros et Basileidès, mineurs.
II. Kronios fils d'Apatourios, Hèrakléôte, sa femme Méniskè fille de Dèmètrios, Magnésienne, les fils Dèmètrios et Apatourios, mineurs. Stratôn fils de Sôtas, Magnésien. Stratoklès fils de Dionysios, Kolophônien Mégalokleia fille de Dèmètrios, Andrienne. Diogénès fils de Charopinos, bâtard. Biôn fils de Chairiménos, Karystien. Hèrostratis fille de Théodôros, fille bâtarde».

Les naturalisations milésiennes portent sur trois catégories d'individus, hommes ou femmes. La première contient des étrangers dont les noms s'accompagnent d'un ethnique, la deuxième est composée de *nothoi* désignés par leur nom et leur patronyme et, enfin, le troisième groupe se compose d'individus dont les noms ne sont suivis ni d'un ethnique ni de la qualification *nothos*.

Les bénéficiaires bâtards sont enregistrés par leur nom suivi de leur patronyme au génitif et de la qualification *nothos* ou *nothè* d'un tel. Les adultes sont mentionnés sans indication de leur classe d'âge, tandis que les personnes qui n'ont pas atteint la majorité sont désignées comme «mineurs». En dépit, cependant, de leur minorité, les noms des mineurs s'accompagnent, tout comme ceux des adultes, soit d'un ethnique, lorsqu'ils ils ne s'agit pas de bâtards, soit de la qualification de *nothos* ou encore de la seule mention de leur minorité. Les mineurs du premier groupe reçoivent le droit de cité à titre individuel, tandis que ceux du troisième acquièrent la citoyenneté par suite de la demande de leurs parents et en même temps que ces derniers. Si des mineurs ont pu être individuellement politographiés, on peut supposer que leurs parents ont déjà acquis le droit de cité milésienne ou bien qu'ils sont près d'atteindre la majorité.

10. – *IMilet* I 3, 79, lignes 1-15:

Ποσειδώνιος Διονυ[σ]ίου
Πιαδασεὺς ἄνηβος.
Αἰνέας Σίμωνος Σιδώνιος.
Ἀπολλώνιος Βακχίου Ἡρακλεώ[της].
5 Μένανδρος Ἀπολλωνίου Ἡρακλεώ[της].
Ἀναξίλας Ζωπύρου Ἀντιοχεύ[ς].
Ἀπολλώνιος Βουλαγόρου Στρατονι[κεύς].

ʾΑρίβαζος ʾΑνδρέου Συρακόσιος,
γυνὴ τούτου Φιλίστα Μητροφάν[ο]υ[ς]
Συρακοσία, υἱὸς Μητροφάνης ἄνηβος.
Τίμων Νίνου ʾΟροαννεύς.
ʿΕρμογένης Παμμάχου νόθος ἄνηβος
ʿΗδῆα Παμμάχου νόθη κόρη.
Πολυκλῆς ʾΑριστοκλέους Σελ[ευκεύς.]

Traduction
«Poseidônios fils de Dionysios, Pidaséen, mineur. Ainéas fils de Simôn, Sidonien. Apollônios fils de Bakchios, Hérakléen. Anaxilas fils de Zôpyros, Antiochéen. Apollônios fils de Boulagoros, Stratonicéen. Aribasos fils d'Andréas, Syracuséen, sa femme Philista fille de Mètrophanès, Syracuséenne et leur fils Mètrophanès, mineur. Timôn fils de Ninos, Oroannéen. Hérmogénès fils de Pammachos, nothos mineur. Hèdèa fille de Pammachos, fille nothos. Théogénis fille d'Aléxiôn, fille nothos. Polyklès fils d'Aristoklès, Séleucéen».

Comme le soulignent A.M. Vérilhac et Cl. Vial, «il est clair que le bâtard ou la bâtarde recevait la citoyenneté justement parce qu'il ou elle avait pour père un citoyen milésien qui le ou la déclarait devant la cité comme son bâtard ou sa bâtarde et qui demandait à ce titre sa naturalisation. Il est très probable que cette régularisation impliquait le paiement d'une taxe[33]».

Le mariage entre *nothoi* produit les effets du mariage légitime, notamment en matière de légitimité des enfants issus de cette union.

11. – *Milet* I 3, 74a III, lignes 3-6:

Δεινομένης Βάττου νόθος
καὶ γυνὴ τούτου Μενιττὼ
Τιμοκρίτου νόθη καὶ υἱὸς
ἄνηβος Μενεσθεύς.

Traduction
«Deinoménès fils de Battos, bâtard, et sa femme Ménittô fille de Timokritos, bâtarde, et le fils Ménéstheus, mineur».

Parmi les couples de naturalisés dont l'identification contient leur ethnique, plus que de la moitié constituent des mariages mixtes entre personnes d'origine différente: mari Smyrnien et épouse Antiochéenne,[34] mari Mylasséen et épouse Halicarnasséenne,[35] mari Héracléôte et épouse Magnésienne,[36] mari Ephésien et

[33] *Le mariage grec*, p. 64.
[34] *IMilet* I 3, 45, lignes 5-6.
[35] Ibid., 45, lignes 8-9.
[36] Ibid., 45 II, lignes 2-3.

épouse Samienne,[37] mari Magnésien et épouse Ephésienne,[38] mari Amiséen et épouse Séleucienne,[39] mari Pidaséen et épouse Hérakléôte,[40] mari Apollôniate du Méandre et épouse Trallienne,[41] mari Cyrénéen et épouse Ephésienne[42] ou encore, mari Hérakléôte et épouse Séleucienne.[43] Tous les couples mixtes qui ont reçu la citoyenneté milésienne ont des enfants, politographiés en même temps que leurs parents, qui, cependant, n'ont pas le statut de *nothoi*.[44] Peut-être qualifiés ainsi dans leurs cités paternelles, Milet leur refuse ce statut: ils ne sont que des enfants issus de parents étrangers et non pas de père citoyen et de mère étrangère. Un exemple particulièrement intéressant est fourni par la politographie d'une femme qui a dû changer trois fois son ethnique d'origine. D'abord par suite de son adoption et ensuite par sa naturalisation, la femme en question a cessé de porter l'ethnique de sa cité de naissance.

12. – *IMilet* I 3, 76-78, II, lignes 1-3:

Μενίσκη ᾽Απολλωνίου Εὐρωμὶς
κατὰ φύσιν, κατὰ ποίησιν δὲ Διοδώρου
τοῦ ᾽Αριστέου Πιδασὶς κόρη.
῾Ηρᾴσκος Βοΐσκος νόθος ἄνηβος

Traduction
«Méniskè fille d'Apollônios, Euromienne de naissance, par adoption fille de Diodôros fils d'Aristéos, fille Pidaséenne».

Enfin, la troisième catégorie de naturalisés comprend les nombreux nouveaux cito, identifiés par leur seul nom et leur patronyme.[45] Ces individus ne sont ni des *nothoi* ni, non plus, des *xénoi* issus de deux parents étrangers. L'absence d'éthnique

[37] Ibid., 41, lignes 3-4.
[38] Ibid., 46, lignes 3-4.
[39] Ibid., 76, I, lignes 6-7.
[40] Ibid., 76, II, lignes 5-7.
[41] Ibid., 74, lignes 2-4.
[42] Ibid., 57, lignes 5-8.
[43] Ibid., 64, lignes 1-2.
[44] *IMilet* I 3, 45, ligne 7; ibid., 45, ligne 10; ibid., 45, II, ligne 4; ibid., 41, ligne 5; ibid., 46, ligne 5; ibid., 76, I, ligne 9; ibid., 76, II, lignes 89; ibid., 74, ligne 4; ibid., 57, ligne 10; ibid., 64, ligne 3.
[45] *IMilet* I 3, 61: 21 personnes naturalisées, hommes et femmes, parmi lesquelles des parents. Cf. ibid., 62; ibid., 34a-i. Dans *IMilet* I 3, 65 frg. 2, lignes 2-6, le droit de cité est accordé à trois frères, identifiés par leur nom et leur patronyme, sans indication de leur origine, ainsi que de l'épouse et de la fille du premier. Par ce même acte a été politographiée une femme, Dèmô fille d'Apatourios (ligne 8), sans indication d'ethnique et sans la qualification *nothos*.

pourrait indiquer leur naissance de père non milésien dont la citoyenneté importe peu pour la définition du statut de ses enfants, mais de mère citoyenne.

Bien qu'ils soient *nothoi*, les nouveaux citoyens de Milet ont des patronymes. Contrairement aux étrangers naturalisés dont les noms s'accompagnent, outre de leur patronyme, d'un ethnique, à propos des *nothoi* c'est la mention du père qui détermine leur origine. Issus de père citoyen, ils prétendent à une paternité certaine et à une union licite entre leurs parents. Les parents des *nothoi* ont dû vivre dans un état matrimonial ou quasi matrimonial reconnu par la loi. Ce que la loi leur refuse c'est le statut de *gnèsioi*, pour lequel la loi milésienne exige la double ascendance civique dont ces individus sont privés. Sont-ils nés de mère étrangère? Cela paraît être sûr, car, si le caractère défectueux de leur statut civique résultait de l'illégalité de l'union entre leurs parents, les *nothoi* auraient été privés de patronyme.

V. Les nothoi crétois

Le terme *nothos* étant absent des documents crétois, D. Odgen concluait que le statut de bâtard était inconnu dans l'île de Crète.[46] Cependant, ainsi qu'A. Chaniotis l'a démontré,[47] l'emploi du terme opposé, *gnèsios*, présuppose l'existence, dans la Crète hellénistique, de descendants qui, pour des motifs qui nous échappent, ne méritent pas le statut d'enfant légitime. Par ailleurs, outre le fait que l'onomastique crétoise contient des noms dont le premier composé est le mot *nothos*, les exemples d'identification de personnes par leur matronyme, lorsque le père est soit inconnu soit de statut servile, montre que, même si le mot *nothos* fait défaut, le statut de bâtard existe.

VI. Kalymnos: politographie du fils d'un citoyen

Aux termes de la loi de Ténos, à l'initiative de son père, le *nothos* peut se faire inscrire à la subdivision civique paternelle et acquérir le droit de cité. Un bel exemple de demande du droit de cité par le père au profit de son fils, qualifié toutefois non pas de *nothos* mais de *progonos*, nous est fourni par une inscription de Kalymna, datée d'environ 280 av. J.-C.

13. – Segre, *Tituli Calymnii* 40, lignes 1-17:

ἔδοξε τᾶι βουλᾶι καὶ τῶι δά[μωι], γνώμα προστατᾶν· ἐπειδὴ Ἀ-
γοράναξ Ἀγορακλεῦς ἐπελθὼ-
ν ἐπί τε τὰν βουλὰν καὶ τὸν δᾶ-
μον ἀξιῶι τὸν υἱὸν αὑτοῦ τὸν
πρόγονον Ἀγορακλῆ ποιήσασ-
θαι πολίταν, δεδόχθαι τᾶι βουλᾶ[ι]

[46] D. Odgen, op. cit., p.

[47] *Cretan Studies* 7 (2002), p. 51-57. Cf. *SEG* LII (2002), 827.

[κ]αὶ τῶ̣ι δάμωι, Ἀγορακλῆ τὸν υἱ-
[ὸ]ν τὸν πρόγονον τὸν Ἀγοράκα-
[κ]τος πολίταν ἦμεν Καλυμνί-
ων καὶ αὐτὸν καὶ ἐγγόνους, φυ-
λὰν δὲ αὐτῶ̣ι ὑπάρχειν καὶ
συγγένειαν, ἂν καὶ τῶ̣ι πατρὶ
μέτεστι Ἀγοράνακτι· τὸ δὲ ψᾶ-
φισμα τόδε ἀναγράψαι εἰς στά-
[λ]αν [λι]θίναν κα[ὶ] θέμεν εἰς [τὸ] ἰ-
[ερὸν τοῦ Ἀπόλλωνος - - - - - - - -].
- - - - - - - - Φ

Traduction
«Plaise au conseil et au peuple. Avis des prostates. Attendu qu'Agoranax fils d'Agorakleus, se présentant au conseil et au peuple a demandé qu'Agoraklès, le fils progonos d'Agoranax soit fait citoyen, il a plu au conseil et au peuple d'octroyer à Agoraklès fils progonos d'Agoranax le droit de cité de Kalymna, à lui et à ses descendants. Qu'il fasse partie de la même tribu et de la même syngéneia que son père Agoranax. Que le présent décret soit inscrit sur une stèle de marbre qui sera érigée au sanctuaire d'Apollon - - -».

Le sens du mot *progonos* n'est point évident. Les Modernes l'ont traduit par «le premier né», enfant «issu de mariage précédent», «fils de l'épouse» ou encore «ancêtre», significations difficilement compatibles avec le décret précité ou même exclus par celui-ci. Trois siècles après la demande du père Kalymnien, nous rencontrons un autre *progonos* dans une clause du testament d'Epikratès.

P. Herrmann et K.Z. Polatkan, «Das Testament des Epikrates und andere neue Inschriften aus dem Museum von Manisa», *Österr. Ak. Wiss. phil.-hist. Kl.* 265 (1969), p. 12, lignes 112

῾Ομοίως παρακαλῶ
τὸν κληρονόμον ἔχειν ἐν παραθήκη Μητρᾶν τὸν πρό-
γονόν μου καὶ προνοῆσαι αὐτοῦ τῆς εὐσχημοσύνης
ἀξίως ἐμοῦ τὸν τῆς ζωῆς αὐτοῦ χρόνον.

Traduction
«De même, je prie mon héritier de prendre en garde Mètras, mon progonos, et de prendre soin à ce qu'il jouisse, pendant toute sa vie, d'un mode de vie digne de mon statut».

Le *progonos* d'Épikratès n'est ni son «premier né» ni un des ses «ancêtres». Le testateur n'avait qu'un seul fils, décédé lors de la rédaction du testament et de la fondation du culte dédié à sa mémoire. Le *progonos* en question ne paraît pas être âgé; les termes «pendant toute sa vie» et non pas «pour le reste de sa vie» qu'emploie Épikratès pourraient indiquer justement le contraire, c'est-à-dire son âge

relativement jeune.[48] Mètras serait ainsi ou bien fils de l'épouse du testateur qu'elle a eu d'un mariage précédent[49] ou son descendant *nothos*, statut qui ne lui permet pas d'être institué héritier de son père naturel en excluant les «proches parents».[50] C'est un de ces proches parents que le testateur a dû instituer comme héritier, héritier dont ni le nom ni les liens de parenté ne sont indiqués dans la partie du testament qui nous est parvenue. Faute de mieux, Épikratès l'a nommé comme *klèronomos*, mais il n'a pas voulu partager avec lui sa dernière demeure.

Conclusions

Les documents que nous venons d'invoquer attestent que, dans certaines cités hellénistiques, telles Rhodes, Cos et Milet, les enfants issus de père citoyen et de mère étrangère ne naissent pas citoyens. Ne bénéficiant pas du statut de *gnèsioi,* issus de mère épouse *gamétè*, ils sont qualifiés de *nothoi* ou de *mètros xénès* et forment une classe bien définie et hiérarchiquement supérieure aux autres catégories de non citoyens. Ils bénéficient d'un statut particulier, qui varie sans doute selon les cités, et constituent une catégorie à part, spécificité qui se fait sentir principalement dans le domaine des institutions publiques et religieuses.

Toutefois, le mariage dont ils sont issus, tout comme les mariages qu'ils concluent eux-mêmes, ne laissent pas la cité indifférente. Le mariage des *nothoi* ou des *mètroxénoi* intéresse la cité dans la mesure où ces personnes remplissent, avec les *paroikoi*, le réservoir des potentiels citoyens. C'est dans cette catégorie de ses habitants, privilégiée par rapport aux métèques mais désavantagée par rapport aux citoyens, que la cité puise, en cas d'oliganthropie, pour recruter des nouveaux citoyens ou, encore, c'est à eux qu'elle fera appel pour subvenir à ses besoins financiers et militaires.

A Rhodes, à Milet, à Cos, même les mariages avec une étrangère doivent, me semble-t-il, être conformes aux lois de la cité de l'époux afin que les descendants puissent avoir la qualité de *nothos* ou d'enfant de mère étrangère. L'union entre citoyen et étrangère n'est donc pas en dehors du cadre des institutions de la cité. Peut-être en marge de celles-ci, elle est créatrice d'effets socio-juridiques, soumettant le couple mixte à des modalités matrimoniales proches ou même identiques à celles qui sont imposées aux citoyens.

Le caractère licite de ces unions apparaît nettement dans une inscription de l'époque impériale, II^{e}/ III^{e} s. ap. J.-C., provenant d'Antiphellos en Lycie. Gravée

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[48] P. Herrmann et K.Z. Polatkan, «Das Testament des Epikrates und andere neue Inschriften aus dem Museum von Manisa», *Österr. Ak. Wiss. phil.-hist. Kl.* 265 (1969), p. 35-6, n. 54: «Die Bitte für seine εὐσχημοσύνη zu sorgen, «solange er lebt» (Z. 115), lässt eher vermuten, dass es sich um eine schon bejahrte Person handelt, also vielleicht doch einen noch lebenden «Vorfahr?».

[49] Cf. l'inscription funéraire de Pamphylie, *SEG* VI, 667, lignes 3-4: καὶ Ῥοῦφον Ἀλεξάνδρος τὸν πρόγονόν μου, υἱὸν Ῥουφείνης (son épouse).

[50] Ligne 73: οἱ ἔνγιστά μου γένους.

sur la dernière demeure de deux hommes, Mènas et Iasôn, l'épitaphe mentionne les personnes qui pourront se faire inhumer dans cette tombe.[51]
SEG XLVI, 1703, lignes 2-4:

[ἐ]αυτοῖς καὶ
γυν[αι]ξὶν αὐτῶν καὶ τέκν[οις] καὶ γυναιξὶν [τῶ]ν [τ]έκνων
ἡμῶ[ν καὶ αἰ]ς κατὰ νόμον [συμβιώ] {η}σωσιν.

Traduction
«pour eux-mêmes, leurs épouses, leurs enfants, les épouses de nos enfants ainsi que les femmes avec lesquelles ils vivront conformément à la loi».

[51] CIG 4300; A.-V. Schweyer, *Les Lyciens et la mort: une étude d'histoire sociale* (thèse Univ. Paris I 1992) vol. II: *Recueil d'inscriptions grecques*, p. 4, no 2; A. Laronde, in A. Chastagnol – S. Demougin – C. Lepelley (éds.), *Splendissima Civitas. Études d'histoire romaine en hommage à François Jacques*, Paris, 1996, p. 202-206.

ANDRÉAS HELMIS (ATHÈNES)

RÉPONSE À JULIE VÉLISSAROPOULOS-KARAKOSTAS

Les conséquences juridiques du statut de *nothos* dans les cités grecques, à l'époque classique comme à l'époque hellénistique, sont principalement de deux ordres: d'un côté, elles concernent l'accès du *nothos* à la citoyenneté, de l'autre sa participation à l'héritage paternel. Une étude récente de Daniel Ogden fournit à cet égard une mise au point utile sur ces questions[1]. Dans cette brève contribution on envisagera un aspect particulier de la condition du *nothos*, celui du degré de son intégration dans la famille parentale; curieusement, peut-être, les textes les plus éloquents à ce sujet concernent les rites funéraires. La documentation en la matière est loin d'être abondante; les témoignages plutôt allusifs que nous fournissent les orateurs peuvent se compléter si on élargit l'horizon chronologique, pour y inclure des textes datant de l'époque dite de l'hellénisme romain.

Dans le monde des cités tout un arsenal juridique tend à assurer la continuité de l'*oikos*; c'est notamment le cas des dispositions législatives en matière de mariage, de filiation ou des successions. La permanence de l'*oikos* concerne en premier lieu les aspects patrimoniaux; elle concerne également, et c'est tout aussi important, la permanence des cultes familiaux. A cet égard, nous savons combien un citoyen se souciait pour avoir des descendants qui puissent accomplir envers lui, les devoirs funéraires. «Tous les hommes, à l'article de la mort, prennent des mesures de prévoyance dans leur intérêt propre», écrit Isée, «afin que leur maison ne soit pas livrée à l'abandon, mais qu'il reste après eux quelqu'un pour accomplir les sacrifices funèbres et tous les rites dus aux défunts. Aussi ceux qui n'ont pas d'enfants au moment de leur mort en adoptent-ils du moins pour les laisser après eux»[2]. Les enfants adoptés sont ainsi appelés à rendre tous les devoirs funéraires envers leurs parents adoptifs[3].

Tel ne semble pas être le cas avec les *nothoi*. Une disposition législative excluait les *nothoi* aussi bien de la «proche parenté» (ἀγχιστεία) que des «rites sacrés et saints» (ἱερὰ καὶ ὅσια)[4]. Cette expression désignait probablement des rites

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1 D. Ogden (1996).

2 Isée, *Sur la succession d'Apollodoros*, 30; cf. également *Sur la succession de Méneclès*, 36; 45-46.

3 Sur le rôle respectif des enfants adoptifs du défunt et de ses autres parents en matière de rites funéraires, cf. L. Rubinstein (1993), p. 70-75.

4 Démosthène, *Contre Macartatos*, 51: νόθωι δὲ μηδὲ νόθηι μὴ εἶναι ἀγχιστείαν μήθ' ἱερῶν μήθ' ὁσίων; Aristophane, *Les Oiseaux*, 1661-1665: νόθωι δὲ μὴ εἶναι ἀγχιστείαν

religieux, qui étaient accomplis au niveau à la fois de l'*oikos* et de la *polis* et qui devaient comprendre, entre autres, les rites funéraires[5]. Si l'on accepte cette interprétation, il faudra admettre que les *nothoi* athéniens étaient tenus à l'écart des devoirs funèbres envers leurs parents. La loi en question est attribuée par Aristophane à Solon, alors que d'après le témoignage du *Contre Macartatos* elle daterait de l'archontat d'Euclide (403 av.); il n'est pas impossible qu'à la fin du V^e^ siècle on a procédé à une nouvelle rédaction, avec un contenu plus radical.

La mise à l'écart des *nothoi* est déduite *a contrario* d'un passage du discours d'Isée, où sont énumérés quelques indices de la légitimité des enfants: «il ne suffit pas de dire le nom de la mère pour que les enfants soient légitimes; mais il faut prouver qu'on dit vrai en faisant comparaître les parents, qui sauraient qu'elle a cohabité avec Euktémon, les membres du dème et de la phratrie, qui déclareraient s'ils ont entendu dire ou s'ils savent qu'Euktémon s'est acquitté d'une liturgie pour elle. En outre, où est-elle ensevelie, dans quel tombeau (ποῦ τέθαπται, ἐν ποίοις μνήμασι)? Qui a vu Euktémon lui rendre les derniers devoirs (τίς εἶδε τὰ νομιζόμενα ποιοῦντα Εὐκτήμονα)? Et encore, où vont les enfants pour offrir les sacrifices et les libations funèbres (ἐναγίζουσι καὶ χέονται)? Qui a été témoin de ces cérémonies parmi les citoyens et parmi les esclaves d'Euktémon?»[6]. La légitimité des enfants présuppose la légitimité de l'union parentale. L'accomplissement des devoirs funèbres, par l'époux survivant aussi bien que par les enfants, constitue un indicateur important de légitimité, à la fois de l'union des parents et du statut des descendants. Contrairement au *nothos*, on demande à l'enfant légitime d'être en mesure de localiser la tombe de son père et de sa mère (il est important de souligner qu'il ne semble y avoir aucune différenciation entre l'homme et la femme) ainsi que d'y offrir sacrifices et libations[7].

Il a été question jusqu'à présent des devoirs funéraires des enfants envers les parents. Pour envisager la situation inverse, à savoir les devoirs funéraires des parents envers les enfants, plus particulièrement envers les *nothoi*, la documentation nous impose un double déplacement, géographique et chronologique. En effet, les quelques textes éloquents en la matière sont des inscriptions funéraires provenant principalement de l'Asie Mineure et datant de l'époque impériale.

Une telle inscription nous renseigne sur un monument funéraire érigé en Phrygie par deux frères, Gaïos et Mènophilos. Le texte délimite, comme il est fréquent dans

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παίδων ὄντων γνησίων· ἂν δὲ παῖδες μὴ ὦσι γνήσιοι, τοῖς ἐγγυτάτω γένους μετεῖναι τῶν χρημάτων. Sur la participation aux «rites sacrés et profanes» de la maison comme signe de l'appartenance à une famille, cf. également Démosthène, *Contre Bœotos I*, 35.

5 Sur cette expression, cf. A. Maffi (1977), surtout p. 47-49.

6 Isée, *Sur la succession de Philoktémon*, 64-65.

7 L'importance de la capacité de localiser la tombe des parents n'est pas sans rappeler la question posée, lors de la *docimasie* des archontes venant d'être élus, sur les tombes familiales: «puis [on lui demande] s'il possède des tombeaux de famille et où ils sont» (Aristote, *Constitution d'Athènes*, 55, 3).

ce type de document, le cercle des parents qui sont autorisés, sous peine d'amende, à y être ensevelis: le monument, entouré d'une enceinte, et le sarcophage sont destinés à accueillir les deux propriétaires, leurs épouses ainsi que leurs enfants légitimes[8]. Cette clause, réservant une tombe aux «seuls enfants légitimes», on la rencontre aussi dans quelques autres inscriptions funéraires trouvées en terre anatolienne; elles ont été recensées par Louis Robert, qui invite à un certain scepticisme quant à la compréhension littérale de l'expression: «il ne faut pas», écrit-il, «voir un trait de cynisme et d'immoralisme familial ... réservant la tombe aux seuls enfants légitimes, les autres devant être inhumés ailleurs ou bien où bon semblera à qui de droit»; pour expliquer l'expression, Louis Robert pense qu'il faut comprendre l'adjectif γνήσιος comme «une épithète sentimentale du même ordre que γλυκύτατος ou φίλτατος et que partant du sens de ‹légitime, authentique› ... on a donné à γνήσιος, accompagnant un terme de parenté, un sens affectif»[9].

Même si l'argumentation est convaincante, elle ne suffit pas pour autant à éliminer les traits de ce que Louis Robert qualifiait «de cynisme et d'immoralisme familial», dont témoignent d'autres documents, qui ne comportent pas l'adjectif γνήσιος. En effet, deux autres inscriptions funéraires de notre dossier réservent aux *nothoi* un sort posthume sans aucun doute inférieur à celui des enfants légitimes. Il en est ainsi d'un document provenant de Xanthos, dont le contenu et la rédaction sont d'un type très commun en Asie Mineure. Le texte nous a conservé les dispositions prises par les propriétaires du monument, Roufos fils de Jason et Mion fille de Tlépolémos, qui précisent quelles sont les personnes auxquelles, à l'exclusion de toute autre, sont destinés les sarcophages. Celui qui se trouve en face de l'entrée est réservé au couple fondateur; des emplacements sont prévus pour les enfants issus du mariage: Tlépolémos, qui porte le nom de son grand-père maternel, sera enseveli seul dans le sarcophage de droite, tandis que les autres enfants occuperont le sarcophage de gauche. Dans cette même partie du monument seront également ensevelis les enfants des «mariages légaux»[10]. D'après l'éditeur, il s'agit

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[8] *M.A.M.A.* 6, 358, l. 4-11: τὸν βωμὸν καὶ τὴν/κατ᾽ αὐτοῦ σορὸν σὺν τῶι περιβόλωι κοι/νῶς κατεσσκεύασαν ἑαυτοῖς/καὶ ταῖς γυναιξὶν αὐτῶν Μεσσαλείνηι/Παπᾶ καὶ Βασιλῶι Εὐξένου, ὡς μηδενὶ/ἑτέρωι ἐξεῖναι ἐπεισενενκεῖν ἢ θεῖναι/ξένον νεκρὸν ἢ σορὸν, μόνοις γνησίοις/ἡμῶν τέκνοις («[ils] ont fait construire le monument et le sarcophage qui y est déposé en commun pour eux-mêmes et pour leurs épouses, Messalina, fille de Papas, et Vasilo, fille d'Euxénos; personne d'autre n'aura le droit d'y ensevelir un corps étranger ou un sarcophage, mis à part nos enfants légitimes»); on remarquera le passage maladroit de la troisième à la première personne, lorsqu'il s'agit d'évoquer les enfants.

[9] L. Robert (1965), p. 219-222.

[10] A. Balland (1981), 87, l. 1-6: Τὸ ἡρῷον κατεσκεύασαν Ῥοῦφος Ἰάσονος καὶ Μιον/Τληπολέμου Ξάνθιοι ἐπὶ τῷ τεθῆναι αὐτοὺς μὲν/ἐν τῇ ἄντικρυς πυαλίδι, ἐν δὲ τῇ ἐν δεξιοῖς τὸν υἱὸν/αὐτῶν Τληπόλεμον, ἐν δὲ τῇ ἐν εὐωνύμοις τὰ ἕτερα/τέκνα αὐτῶν καὶ τὰ ἐκ νομίμων γάμων γεννηθέντα αὐ/τοῖς, ἑτέρῳ δὲ μηδενὶ ἐξεῖναι θάψαι τινά («Roufos fils de Jason et Mion fille de Tlépolémos, tous les deux de Xanthos, ont

des νόμιμοι γάμοι des parents, Roufos et Mion: «entendons qu'ils avaient été l'un et l'autre mariés légalement chacun de leur côté avant de s'épouser, et que de leurs premiers mariages étaient nés des enfants légitimes». Il nous semble que les νόμιμοι γάμοι en question ne sont pas ceux des parents, mais se réfèrent aux mariages des enfants; si tel est le cas, la clause entend faire inclure dans le cercle des personnes ayant droit à être ensevelies dans le monument les petits-enfants, qui seront issus des mariages légitimes des descendants de la première génération. De toute façon et quelle qu'elle soit l'interprétation adoptée, nous avons affaire à une précision restrictive, excluant du bénéfice d'ensevelissement les éventuels enfants naturels.

On trouve un écho de la même attitude envers les enfants bâtards dans le dernier texte, également d'époque impériale, provenant de la région de l'Attique. Le défunt est mort à l'âge de quatre-vingt-deux ans; il avait obtenu sa liberté quand il était enfant et il a vécu, pendant soixante ans, avec sa femme, avec laquelle il a eu «des enfants légitimes et non des bâtards»[11]. L'adjectif γνήσια, opposé à *notha*, qualifie ici, sans aucun doute, les enfants issus d'un mariage légal. A la différence des inscriptions précédentes, ce texte ne comporte pas de dispositions autorisant ou interdisant l'ensevelissement. C'est une épigramme funéraire, une sorte de *curriculum vitae post mortem*, dans lequel on prend soin de faire valoir l'existence d'enfants légitimes et non des bâtards, précision intéressante pour l'histoire de la société et des mœurs; d'autant plus que le père en question est un affranchi.

Dans le monde des cités, la naissance hors mariage est génératrice d'une situation de marginalité sociale. C'est ce que confirment les textes que nous venons d'examiner, qui montrent que cette infériorité se manifeste également face à la mort: devant la tombe, les enfants illégitimes sont inférieurs aux enfants issus d'un mariage légal et cela résulte aussi bien de textes législatifs (c'est le cas d'Athènes) que de dispositions prises par des particuliers (notamment dans l'Orient hellénisé).

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D. Ogden (1996): Greek Bastardy in the Classical and Hellenistic Periods, Oxford.

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L. Rubinstein (1993): Adoption in IV. Century Athens, Copenhagen.

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fait construire le monument, afin qu'ils soient ensevelis dans le sarcophage situé en face, celui de droite étant destiné à leur fils Tlépolémos, celui de gauche aux autres enfants, ainsi qu'aux enfants issus de leurs mariages légaux; personne ne pourra y ensevelir quelqu'un d'autre»).

[11] *IG* II/III 13150, l. 6-7: ἐξήκοντ' ἔτε[σιν μετ' ἐμῆς ἐβίωσα γυναικός],/[ἐ]ξ ἧς ἔσχα τέκνα γνήσια κοὐχὶ νόθα («j'ai vécu pendant soixante ans avec ma femme, avec qui j'ai eu des enfants légitimes et non des bâtards»).

BERNHARD PALME (WIEN)

MILITÄRS IN DER RECHTSPRECHUNG DES RÖMISCHEN ÄGYPTEN

Im kaiserzeitlichen Ägypten lag die höchste richterliche Gewalt in den Händen des Statthalters (*praefectus Aegypti*). Darüber hinaus hatten – in rangmäßiger Abstufung – auch einige Prokuratoren wie der Iuridicus, der Idios Logos oder die Epistrategoi richterliche Kompetenzen in Verwaltungs- und Finanzverfahren[1]. Die nach römischem Recht geführten Prozesse hatten die Form des Kognitionsverfahrens. Für die Klage- und Ladungsformalitäten, die Vorbereitung und Durchführung eines Prozesses sowie für die Vollstreckung der Urteile und den Strafvollzug konnten die richterlichen Organe das Personal der *officia* einsetzen, das vor allem aus dem Militär gestellt wurde. Die vielfältigen Aktivitäten der römischen Armee im administrativen und judiziellen Bereich sind durch zahlreiche literarische und dokumentarische Quellen für die gesamte Kaiserzeit und für alle Teile des Reiches hinlänglich bezeugt[2]. Da in der Hohen Kaiserzeit bekanntlich kein vergleichbarer ziviler Beamtenapparat existierte, standen dem Kaiser und seinen Statthaltern einzig die Personalressourcen der Armee zur Verfügung[3]. In Ägypten, das keiner ernstzunehmenden

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[1] Zur Rechtsprechung im römischen Ägypten s. generell L. Mitteis, Grundzüge und Chrestomathie der Papyruskunde II: Juristischer Teil, 1. Hälfte: Grundzüge, Leipzig – Berlin 1912, 23-32; E. C. Baade, Jurisdiction in Roman Egypt, Diss. Yale 1956; H.-J. Wolff, Organisation der Rechtspflege und der Rechtskontrolle der Verwaltung im ptolemäisch-römischen Ägypten bis Diokletian, RHD 34 (1966) 32-40; E. Seidl, Rechtsgeschichte Ägyptens als römische Provinz, St. Augustin 1973, 93-108; B. Anagnostou-Canas, Juge et sentence dans l'Égypte romaine, Paris 1991, 172-198.

[2] Zu zivilen Aufgaben der Armee im allgemeinen s. H. Zwicky, Zur Verwendung des Militärs in der Verwaltung der römischen Kaiserzeit, Winterthur, 1944; R. MacMullen, Soldier and Civilian in the Later Roman Empire, Cambridge MA – London, 1963, bes. S. 23-77; ders., Roman Bureaucratese, Traditio 18 (1962) 364-378. – Für Ägypten insbesondere J. Lesquier, L'armée romaine de l'Egypte d'Auguste à Dioclétien, Cairo 1918, 227-248, J.-J. Aubert, Policing the Countryside: Soldiers and Civilians in Egyptian Villages in the Third and the Fourth Centuries A.D., in: Y. Le Bohec (éd.), La hiérarchie (Rangordnung) de l'armée romaine sous le Haut-Empire. Actes du Congrès de Lyon (15-18 sept. 1994), Paris 1995, 257-265; R. Alston, Soldier and Society in Roman Egypt. A Social History, London, New York 1995, 79-81. Quellen dazu finden sich in der Sammlung von S. Daris, Documenti per la storia dell'esercito romano in Egitto, Milano 1964 (= Doc.Eser.Rom.), Nr. 66-82.

[3] Verwaltungsaufgaben (z.B. bei der Epikrisis, dem Zensus) und Schreibpersonal der Armee sind wiederholt untersucht worden, vgl. etwa Zwicky (o. Anm. 2); A.H.M. Jones,

Bedrohungen durch äußere Feinde ausgesetzt war, erscheint die Präsenz der römischen Armee verhältnismäßig stark, obwohl die Truppenstärke kontinuierlich reduziert wurde[4]. Nach Strabon, *Geogr*. 17.1.12 dürften es um 25 v.Chr. ca. 22.000 Mann gewesen sein; noch vor 23 n.Chr. hat man die Zahl der Legionen von drei auf zwei reduziert (Tac., *Ann*. 4.5.), und seit dem jüdischen Aufstand (115-117) stand nur noch die *legio II Traiana* in Nikopolis bei Alexandreia[5]. Inschriftliche Zeugnisse zeigen, daß im Verlauf des 1., 2. und 3. Jh. die Gesamtstärke zwischen ca. 11.000 und 16.000 Mann schwankte[6].

Im folgenden sei ein Aspekt herausgegriffen, der für die Rechtspraxis in der Provinz nicht unerheblich ist: Die Aufgaben der Militärs in der Rechtsprechung. Papyri und Ostraka gewähren hierzu einige aufschlußreiche Einblicke, wobei uns der Zufall der Überlieferung sogar einige Testimonien in die Hand gespielt hat, die außerhalb Ägyptens entstanden sind und als wichtige Vergleichsstücke zur ägyptischen Dokumentation hinzutreten. Dennoch bietet auch die papyrologische Evidenz selten mehr als kurze Momentaufnahmen, die zudem über eine weite Zeitspanne verstreut und unterschiedlicher örtlicher Herkunft sind.

Unumstritten ist die schon angesprochene Rolle der Militärs in der Rechts*pflege*, etwa als Vollzugsorgane der Justiz, bei der Zustellung amtlicher Schriftstücke (Urteile, Ladungen), beim Zugriff auf Personen (sei es durch Überstellungsbefehle, sei es durch Suche nach Vermißten) und schließlich beim Strafvollzug, von der Züchti-

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[4] Grundlegend dazu ist immer noch Lesquier (o. Anm. 2) 1912, ferner H. Devijver, L'Égypte e l'armée romaine, in: L. Criscuolo, G., Geraci, (edd.), Egitto e storia antica, Bologna 1989, 37-54; Alston (o. Anm. 2) 13-38 mit umfangreicher Bibliographie auf S. 241-258.

[5] Lesquier (o. Anm. 2) 54f.; S. Daris, Legio XXII Deiotariana, in: Y. Le Bohec (éd.), avec la collaboration de C. Wolff, Les légions de Rome sous le Haut-Empire. Actes du Congrès de Lyon (17-19 sept. 1998). Tome I, Lyon – Paris 2000, 365-367 und ders., Legio II Traiana Fortis, in: Le Bohec – Wolff (loc. cit.), 359-363. Vgl. nun die Aufstellung bei Alston (o. Anm.2) 24-26 mit Table 2.1 und 2.2. Dazu kommt (zeitweise) die Besatzung von Nubien, vgl. M.P. Speidel, Nubia's Roman Garrison, in: ANRW II.10.1, Berlin – New York 1988, 767-798.

[6] Vgl. etwa CIL XVI 29 (83), CIL III 6627 (= RMD 9) (105), CIL XVI 184 (150-178), ZPE 82 (1990) 137-153 (179). Eine Kalkulation der Truppenstärke gibt Alston (o. Anm. 2) 31f. und Table 2.3.

gung bis zur Hinrichtung[7]. Des weiteren werden Soldaten – insbesondere die in der Chora stationierten *centuriones* – genauso wie die lokalen Behörden von den richterlichen Instanzen (Präfekt und Prokuratoren) herangezogen, um als offizielle und vertrauenswürdige Gewährsleute die oft langwierige Beweisaufnahme an Ort und Stelle durchzuführen. Ein besonders eindrucksvolles Beispiel dafür ist die Rolle des Zenturio Lucretius in dem bekannten Delatorenprozeß des Priesters Nestnephis gegen seinen Amtsbruder Satabus in den Jahren 11-16 n.Chr. in Soknopaiu Nesos, in dem es unter anderem um den Vorwurf ging, Satabus habe sich widerrechtlich öffentliches Bauland angeeignet[8]. Bei der Verhandlung auf dem Konvent des Präfekten am 30. Juni 15. n.Chr. entschied der zuständige Richter, der Idios Logos Seppius Rufus, die Angelegenheit durch den Zenturio, den Strategen und Basilikos Grammateus überprüfen zu lassen: In seinem Schreiben an den Zenturio ordnet Seppius Rufus an: „Da nämlich Satabus Aufschub verlangt, um seine Rechte an Ort und Stelle nachzuweisen, habe ich die Verhandlung vertagt bis zur Untersuchung durch den Zenturio Lucretius, den Strategen und den Basilikos Grammateus. Sie sollen dem Konvent das Untersuchungsergebnis vorlegen. Dem Satabus habe ich befohlen, dort zu erscheinen und die Urkunden, wenn er wirklich welche besitzt, mit Prüfungsvermerk des Zenturio beizubringen“[9]. Der Zenturio soll also (gemeinsam mit den Gaubehörden) die von Satabus vorzulegenden Urkunden über die Rechtmäßigkeit des Besitzerwerbes durch seinen Vermerk bestätigen. Dies soll dann beim

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[7] Alston (o. Anm. 2) 81-101; B. Palme, Zivile Aufgaben der Armee im kaiserzeitlichen Ägypten, in: A. Kolb (Hg.), Herrschaftsstrukturen und Herrschaftspraxis: Konzepte, Prinzipien und Strategien von Herrschaftsorganisation und Administration im römischen Kaiserreich, Berlin 2006, 299-328.

[8] Zu den komplizierten Einzelheiten dieses langwierigen Rechtsstreites s. F. A. J. Hoogendijk, Het 'Nestnêphis-proces'. Een strijd tussen Egyptische priesters in de 1ste eeuw n.Ch., Hermeneus 66 (1994) 255-262; H.-A. Rupprecht, Die Streitigkeit zwischen Satabous und Nestnephis, in: G. Thür, F.J. Fernández Nieto (Hgg.), Symposion 1999. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Pazo de Mariñán, La Coruña, 6.-9. Sept. 1999, Köln – Weimar – Wien 2003, 481-492 und zuletzt Th. Kruse, Der Königliche Schreiber und die Gauverwaltung. Untersuchungen zur Verwaltungsgeschichte Ägyptens in der Zeit von Augustus bis Philippus Arabs (30 v.Chr.-245 n.Chr.), Bd. I, München, Leipzig 2002, 532-538.

[9] SB X 10308, 7-13: Αἰτησαμένωι Σαταβ[οῦτι] χρ[όν]ον εἰς τὴν | ἐπὶ τόπων ἀπόδειξιν ὑπερεθέμ[ην] εἰς διάκρισιν | Λ[ο]κρητίου ἑκατοντάρχου καὶ τοῦ [σ]τρατηγοῦ καὶ βασιλι̣κ̣οῦ γραμματέως, ὅπως ἐπὶ τοῦ [δ]ιαλογισμοῦ τὴν | δ̣ι̣άκρισιν δηλώσωσι. Τῷ δὲ Σαταβοῦτι παρήγγειλα | [παρεῖν]αι τότε καὶ τὰς οἰκονομίας, [εἴ] τινας ἔχει, | [ἐ]πισκεμμέν[α]ς τῷ ἑκατοντάρχηι ἐπιφέρειν (Übersetzung nach H. Metzger, MH 24 [1967] 220). SB X 10308 ist eine Kopie des Schreibens, von dem noch zwei weitere Abschriften existieren: SB I 5954 und P.Lond. II 276a (S. 148). Eine vierte gleichlautende Abschrift ist an den Basilikos Grammateus gerichtet: SB I 5239. Der identische Wortlaut aller Kopien erklärt wohl, warum auch in dem an Lucretius adressierten Brief der Zenturio später im Text unpersönlich als Zenturio Lucretius angesprochen wird. Ein gemeinsam mit dem Strategen in einem Rechtsstreit agierender *centurio* wird auch in einem Text des Drusilla-Prozesses, P.Gen. I^2 74, 22 (Ars., 139-145), erwähnt.

(nächsten?) Konvent die Grundlage der richterlichen Entscheidung sein. Zudem sollen sie beim Konvent Bericht erstatten. Die Angelegenheit ist eine rein zivile, die ebenso gut vom Strategen und Basilikos Grammateus alleine hätte erledigt werden können. Der einzige Grund, warum der Zenturio Lucretius involviert wurde, ist offenbar, daß der Idios Logos ihn als Vertrauensmann dabei haben wollte. Auf diesen Punkt wird zurückzukommen sein.

All dies sind Aufgaben, die man heute im Bereich der Exekutive, nicht der Justiz, ansiedeln würde. Darüber hinaus finden sich jedoch auch Hinweise darauf, daß Militärpersonen in der Rechts*sprechung* tätig waren. Im folgenden sei spezieller auf diese Rolle von Militärs eingegangen, die klar über den eigentlichen Aufgaben- und Kompetenzbereich des Militärs hinausgeht.

Der Statthalter konnte die Prozeßvorbereitung und auch die Urteilsfindung an einen der Prokuratoren delegieren oder eine andere geeignete Person als *iudex pedaneus* einsetzen[10]. Feste Regeln scheint es für solche Delegationen keine gegeben zu haben[11], so daß neben Prokuratoren und anderen Amtsträgern gelegentlich auch Militärs (insbesondere Offiziere) als *iudices pedanei* begegnen. Als solcher leitet im Jahre 124 ein *praefectus cohortis* auf dem Konvent einen Erbschaftsprozeß zwischen Ägyptern (M.Chr. 84). Die Einsetzung des Offiziers durch den Präfekten wird zu Beginn des Verhandlungsprotokolls festgehalten: „Aus dem Akt der *commentarii* des Blaesius Marianus, *praefectus* der cohors I Flavia Cilicum equitata, delegiert durch Aterius Nepos, *vir egregius*, *praefectus* (sc. *Aegypti*)“[12]. Der Offizier leitet den gesamten Prozeß, berät sich mit einem juristischen Sachverständigen (νομικός) und

[10] Zum *iudex pedaneus* in den Papyri s. Mitteis (o. Anm. 1) 42f. Im allgemeinen geht man davon aus, daß primär der *juridicus* als Vertretung des Präfekten fungierte: H. Kupiszewski, The Iuridicus Alexandreae, JJP 7-8 (1953/4) 187-204; F. Elia, I iuridici Alexandreae, in: Studia in memoria di Santo Mazzarino, III = QC 2 (1990) 185-121. Jurisdiktionelle Aufgaben delegierte der Präfekt jedoch nicht nur an den Iuridicus (BGU XI 2013 [ca. 149], M.Chr. 60 [nach 147]; 61 [166]), sondern auch an andere Amtsträger, z.B. einen Epistrategen (M.Chr. 93 [250]), Strategen (M.Chr. 79 [49]), einen Ex-Agoranomos (SB XIV 12139, Kol. IV 3-4 [2.-3. Jh.])

[11] Die Vertretung des Präfekten scheint von Fall zu Fall entschieden worden zu sein: F. Mitthof, Munatidius Merula, ritterlicher Procurator und stellvertretender Dioiket der Provinz Ägypten im Jahre 201 n.Chr.), Tyche 17 (2002) 121-127, bes. 125; skeptisch jedoch W. Habermann, Publius Marcius Crispus, Epistratege und Iuridicus in Ägypten unter Antoninus Pius, in: P.Paramone, S. 241-250, bes. 242 Anm. 4. Maßgeblich für die Auswahl könnten momentane Verfügbarkeit und Fachkompetenz gewesen sein.

[12] CPR I 18 = SPP XX 4 = M.Chr. II 84 = Meyer, Jur.Pap. Nr. 89, 1-3 (Ars., 124): Ἐκ τόμου [ὑπο]μνηματισμῶν [Β]λαισίου Μα[ρ]ιανοῦ ἐπάρχου σπείρης | πρώ[τ]ης Φλαουίας Κιλίκων [ἱ]ππικῆς, ἐξ ἀναπομπῆς Ἀτερίου | [Νέπω]τος τοῦ κρατίστο[υ ἡγ]ε[μ]όνος. Die Delegation als *iudex pedaneus* ist, wie üblich, durch ἐξ ἀναπομπῆς ausgedrückt. Sachverhalt und Aufbau der umfangreichen Urkunde sind trefflich referiert von P. Meyer, Jur.Pap. Nr. 89 Einleitung.

diktiert schließlich die Entscheidung (ἀπόφασις), die anschließend verlesen wird[13]. Nicht anders wäre der Präfekt selbst vorgegangen. In gleicher Weise war vermutlich auch der *tribunus* Iulius Quadratus, der in dem bruchstückhaften Protokoll P.Tebt. II 488 vom Jahre 121/2 einen Prozeß leitete, in das Richteramt eingesetzt worden[14]. Ein weiteres Beispiel für einen Tribunen als Richter liegt in dem umfangreichen, aber stark beschädigten M.Chr. 90 vom Jahre 161 vor. Der Prozeß zwischen einem Iulius Voltimus aus Paraitonion und seinem Gläubiger, Sempronius Orestinus aus Tarentum, über die Einziehung von hypothekarisch belasteten Grundstücken wurde in zweiter Instanz vor dem Präfekten in Alexandreia verhandelt[15]. Zuvor hatte Orestinus bei dem als *iudex pedaneus* eingesetzen Tribun Sempronius Honoratus eine Klage erhoben, ein Urteil in seinem Sinne erwirkt und danach die Zwangsvollstreckung durch ἐμβαδεία vollzogen. Der *tribunus* hatte auch den Verkauf der Grundstücke verfügt. Nun bot Voltimus das Kapital an und verlangte die Rückgabe der Grundstücke; über die Frage der Zinsen ging der Rechtsstreit an den Präfekten, denn eine Berufung an den höherrangigen Beamten war stets möglich, auch nach längerer Zeit[16]. Die streitenden Parteien tragen zwar lateinische Namen, doch der Umstand, daß sie keinen Dienstgard, sondern ihre Herkunfts angeben, spricht gegen die Annahme, daß es sich um Soldaten handelt. Weshalb ein Tribun als Richter in diesem Streit um ein Darlehen unter Zivilisten eingesetzt wurde, ist nicht ersichtlich.

Aber nicht nur ritterständische Offiziere fungierten als *iudices pedanei*. Die Papyri führen auch einige Fälle vor, wo Zenturionen als Richter eingesetzt sind. Dies ist bemerkenswert, denn anders als die ritterständischen Offiziere, von denen sie ein deutlicher sozialer Abstand trennte, waren die Zenturionen Berufsoffiziere. Insgesamt sind die Beispiele nicht zahlreich, aber ihre zeitliche Streuung über das gesamte Prinzipat spricht für einen dauerhaft gepflegten Usus.

Ein eindeutiges Beispiel für einen Zenturio als *iudex pedaneus* findet sich in dem Urteil P.Mich. III 159 (37-43) über einen Erbstreit unter Soldaten, wo es Z. 5-10 heißt: „… und für diesen Prozeß hat L. Selius Laetus, *praefectus castrorum*, den Publius Matius, *centurio* der legio III Cyrenaica, als Richter eingesetzt und ihm

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[13] Z. 23-26: Βλαίσιος Μαριανὸς | ἔπαρχος σπ[είρης π]ρώτης Φλαο[υ]ία[ς Κι]λίκων ἱππικῆς συνλαλήσας | Ἀρτε[μι]δ[ώρῳ τ]ῷ νομ[ι]κῷ [π]ε[ρὶ το]ῦ πράγματος ὑ[πη]γόρευσεν ἀπό[φασιν ἡ καὶ ἀν]ε[γ]νώσθ[η] κατὰ λέξ[ιν ο]ὕτως κτλ.

[14] P.Tebt. II 488 (Tebt., 121/2): Das stark beschädigte Fragment zeigt den Tribunen (Ἰούλιος Κυαδρᾶτος χιλίαρχος κτλ.) immerhin eindeutig als Leiter der Verhandlungen, bei denen es unter anderem um eine Beschwerde im Zusammenhang mit Bauarbeiten ging.

[15] M.Chr. 90 = P.Oxy. III 653 descr. (Alex.?, 161). Im folgenden stütze ich mich auf die Rekonstruktion des Sachverhalts durch L. Mitteis, M.Chr. 90 Einleitung, wo auch der weitere Verlauf des Prozesses skizziert ist.

[16] Z. 6-9: Ἰσιδώ[ρου ῥή]τορος ὑπὲρ Σεμπρ[ωνίου Ὀρεστίνου ἀπο]κριναμένου ἐπὶ Σεμπρωνίου Ὀνοράτου χιλιάρχου ᾐρῆσθαι τὸ πρᾶγμα καὶ κατακεκρίσθαι τὸν Οὐόλτιμον. [- - -] Ἰουλίου Φίδου γραμματέως [- - -] Ὀρεστίνου λέγοντος νομίμο[ι]ς κεχρῆσθαι κτλ. Vgl. auch Z. 16: ... Ὀνορᾶτος ἐκέλευσεν αὐτὰ πραθῆναι κτλ. (Zeilenzählung nach Mitteis).

befohlen, ein Urteil zu fällen. P. Matius, *centurio* der legio III Cyrenaica, hat sich als Beisitzer M. Marcius P. f. Fal. Optatus, *decurio* der ala Xoitana, und L. Herennius Valens, *decurio* der ala Apriana, und Octavius Domesticus, *decurio* der ala Vocontiorum, hinzugezogen, und hat, nachdem der Fall von beiden Seiten vorgetragen und die Sicherstellungen verlesen waren, ein Urteil gesprochen und in diesem Urteil zum Ausdruck gebracht … etc.“[17]. Der *praefectus castrorum* setzt also den *centurio* P. Matius als Richter ein (*dedisset*) mit dem ausdrücklichen Befehl, ein Urteil zu fällen (*iudicareque iussiset*). Matius wählt wiederum drei Dekurionen aus drei verschiedenen Einheiten als Beisitzer, verhandelt die Causa und fällt eine Entscheidung. Beide Parteien gehörten dem Soldatenstand an, was erklärt, warum der Rechtsstreit innerhalb des Militärs ausgetragen wurde[18]. Unklar bleibt jedoch, warum der *praefectus castrorum*, der ursprünglich mit dem Fall befaßt war, an den Zenturio delegiert. Die Wahl der zusätzlich hinzugezogenen Dekurionen dagegen erklärt sich daraus, daß die Parteien aus der ala Apriana bzw. ala Vocontiorum kommen und zwei der Dekurionen vermutlich deren Vorgesetzte waren.

Ein wesentlich späteres Zeugnis für die Einsetzung eines Zenturio als Richter liegt in dem Vertrag P.Oxy. XIV 1637 aus den Jahren 256-261 über die Aufteilung von Landbesitz vor. Die Besitzteilung sei „auf Befehl des *vir clarissimus* Mussius Aemilianus durch den *iudex pedaneus* Demetrius, Zenturio des ehrenwerten *princeps praefecturae*“ erfolgt[19]. Die kontraktierenden Parteien sind ein gewisser Aurelius Ammonianus und seine Frau und Schwester Heraklidiaina, ein Bezug zum Soldatenstand ist nicht gegeben. Der „Befehl“ (ἐγκέλευσις) des Zenturio kann – gerichtet an Zivilisten – nur ein richterlicher Spruch gewesen sein.

Juristische Sachkenntnis, die Voraussetzung für eine solchen Verwendung von Militärs ist, scheint insbesondere bei Offizieren ritterlichen Standes nicht gefehlt zu

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[17] P.Mich. III 159 = CPL 212 = ChLA V 280 = FIRA III 64 (Ars.?, 37-43): … *inque eam rem L. Selius Laetus praefectus castrorum P. Mattium (centurionem) leg. III Cyrenaicae iudicem dedisset iudicareque iussiset. P. Matius (centurio) leg. III Cyrenaicae adhibitis sibi in consilio M. Marcio P. f. Fal. Optato deq(urioni) ala Xoitana et L. Herennio Valente deq(urioni) ala Apriana et Octavio Domestico deq(urione) ala Vocontiorum causa ex utraque parte perorata cavitionibusque perlectis sententiam dixit et ea sententia pronuntiavit* etc. (Übersetzung nach Palme [o. Anm. 7] 317.

[18] Zum Gerichtsstand der Soldaten in der Prinzipatszeit s. J. B. Campbell, The Emperor and the Roman Army, 31 B.C.-A.D. 235, Oxford 1984, 254-263 und umfassend J.H. Jung, Die Rechtsstellung der römischen Soldaten. Ihre Entwicklung von den Anfängen Roms bis auf Diokletian, ANRW II 14, Berlin – New York 1982, 882-1013, bes. 947-960. – Zur Bildung eines eigenständigen *ius militare* s. C. E. Brand, Roman Military Law, Austin – London 1968 (mit Quellensammlung); V. Giuffrè, Il ‚diritto militare‘ dei Romani, Bologna 1980, bes. 31-87; J. Vendrand-Voyer, Origine et développement du «droit militaire» romain, Labeo 28 (1982) 259-277.

[19] P.Oxy. XIV 1637, 9-10 (Oxy., 256-261): Ἐξ ἐγκελ(εύσεως) τοῦ λαμπ(ροτάτου) Μουσσίου Αἰμιλ[ιανοῦ διὰ κριτοῦ τοῦ] | δοθέντος Δημητρίου (ἑκατοντάρχου) τοῦ ἀξιολ(ογωτάτου) πρίγκιπος τῆς ἡ[γεμονίας; zur Ergänzung von κριτοῦ vgl. den Komm. *ad loc.*

haben. Eine Erklärung dafür könnte sein, daß die jugendlichen Aspiranten unter Umständen schon vor Beginn einer ritterlichen Laufbahn gehalten waren, Prozessen vor den Magistraten beizuwohnen. Die Möglichkeit, juristisches Wissen und Erfahrung in der Abwicklung streitiger Verfahren zu erwerben, war demnach noch vor der Bekleidung militärischer Kommanden durchaus gegeben. Gelegentlich begegnen ritterliche Amtsträger, die sogar Spezialisten in juristischen Fragen geworden sind. Ein *praefectus classis* und ein *tribunus* bilden gemeinsam mit dem Dioiketes und einem Epistrategen beispielsweise das Beratergremium (*consilium*) des *praefectus Aegypti* bei einem Konvent der Jahre 176-179 im Arsinoites[20].

Von den besprochenen Testimonien spielt einzig P.Mich. III 159 im militärischen Milieu. Bei den anderen Texten sind die streitenden Parteien Zivilisten, und auch der Gegenstand von Streit oder Rechtsgeschäft ist rein zivil (Erbschaftsangelegenheiten, Teilung von Landbesitz, Darlehen). Als *iudices pedanei* haben die Offiziere Entscheidungsbefugnis, sind also keine bloßen Kommissare zur Vorerhebung. Ein Grund für die Einsetzung eines Militärs anstelle eines zivilen Amtsträgers ist in diesen Beispielen nicht ersichtlich. Allerdings scheint zumindest bei manchen Offizieren die Einsetzung als *iudex* so häufig vorgekommen zu sein, daß sie eigene Protokollbände führten[21].

Einige Papyri aus der Zeit der Adoptivkaiser[22] erwähnen im prozessualen Kontext das Amt eines ἐπὶ τῶν κεκριμένων, über dessen Kompetenzen in der rechtshistorischen Forschung jedoch keine Einigkeit herrscht. Den vorliegenden Quellen ist nicht zweifelsfrei zu entnehmen, ob er lediglich ein mit dem Vollzug betrautes Exekutivorgan war, oder ob er als Rechtsexperte Fachgutachten erstellen und dadurch dem Richter bei der Urteilsfindung unterstützte, oder ob dieser Amtsträger auch selbständig Urteile fällen durfte[23]. Indizien deuten darauf hin, daß seine Kompetenz sich zumindest auf die Prozeßführung, wahrscheinlich auch auf die richterliche Entscheidung erstreckte. Ebenso kontrovers wurde die Frage diskutiert, ob der ἐπὶ τῶν κεκριμένων kraft einer Sonderdelegation und somit als *ad hoc* eingesetzter *iudex*

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[20] SB XVI 12749, 4 (Ars., 176-179): … π[αρ]όντων ἐν συμβου[λίῳ ...] ... Βα[. . . . .]υ Λουκουννίου ὑπάρχου (*sic*) στόλου, Ἰουλίου [Κ]ρισπείνου χι(λιάρ)χ(ου) κτλ.

[21] Der Auszug M.Chr. 84, 1 stammt ἐκ τόμου [ὑπο]μνηματισμῶν [Β]λαισίου Μα[ρ]ιανοῦ κτλ. (s. o. Anm. 12).

[22] Die Tätigkeit der ἐπὶ τῶν κεκριμένων ist von 107 n.Chr. (Datum der Entscheidung in P.Fam.Tebt. 19) bis mindestens 186 (P.Oxy. II 237, Kol. VIII) bezeugt.

[23] Baade (o. Anm. 1) 146-150; J.M. Rainer, Zum ἐπὶ τῶν κεκριμένων, ZPE 50 (1983) 109-116 mit Besprechung der Testimonien und Verweisen auf die ältere Forschung, die diskutierte, ob der ἐπὶ τῶν κεκριμένων lediglich die Exekution eines Urteils zu überwachen hatte (Mitteis), oder auch die Urteile überprüfen konnte (Gradenwitz), oder gar ein Hilfsrichter war, der Appellationen zu prüfen hatte. P. Jörs, Erzrichter und Chrematisten, SZ 40 (1919) 1-40, bes. 29 und 37f. und K. Kalbfleisch, Aus dem Amtstagebuch des Strategen Apollonides, APF 15 (1953) 90f. sehen in ihnen den Vollstreckungsrichter (*rerum iudicatarum exsecutor*, C.J. VII 53, 6).

datus agierte, oder mit Dauerdelegation ausgestattet war und somit ein reguläres Amt gewesen ist. Beim derzeit vorliegenden Quellenmaterial ist diese Frage nicht definitiv zu entscheiden, doch im vorliegenden Zusammenhang ist ohnehin eine andere Beobachtung relevant: In fünf von acht Fällen führt der ἐπὶ τῶν κεκριμένων einen militärischen Titel, in den anderen Fällen scheinen die lateinischen *tria nomina* auf dasselbe Milieu zu weisen[24].

Die von den ἐπὶ τῶν κεκριμένων mit militärischem Rang behandelten Fälle sind folgende: 1) M.Chr. 88 (nach 142)[25] betrifft eine Phase in dem langwierigen und bekannten Prozeß der Klägerin Drusilla gegen Iulius Agrippianus, in der es darum ging, ob der Beklagte das Recht habe, ein Pfand, das er als Gläubiger des verstorbenen Mannes der Drusilla erhalten hatte, zurückgeben muß, weil es zur Mitgift der Drusilla gehörte. Das Verfahren kam erst vor den Tribunen und ἐπὶ τῶν κεκριμένων, als Agrippianus in den Militärdienst getreten war. 2) Das amtliche Schriftstück P.Stras. IV 281, Kol. IV 1-8 (142) ist zu fragmentarisch, um seinen Gegenstand bestimmen zu können[26]. Man versteht lediglich, daß der *praefectus classis* und ἐπὶ τῶν κεκριμένων auf Veranlassung des Präfekten handelt. 3) P.Stras. III 146 = SB V 8261 (Ars.?, 156-159): In eine Klageschrift an den Präfekten ist das Protokoll einer früheren Verhandlung vor einem ἐπὶ τῶν κεκριμένων, dem Kohortenkommandanten Iulius Proculus, eingelegt. Der Kläger ist Zivilist, der Status des Beklagten ist wegen der starken Beschädigung des Papyrus ebenso wenig erkennbar wie der Streitgegenstand. 4) Um eine Erbschaftsangelegenheit geht es in BGU II 613 (161?), wo der ἐπὶ τῶν κεκριμένων und *praefectus alae* die Ansprüche eines Veteranen prüfen soll[27]. 5) Der bislang späteste Beleg für einen ἐπὶ τῶν κεκριμένων, P.Oxy. II 237, Kol. VIII (nach 186), betrifft keinen Prozeß, sondern lediglich die von einem juristischen Sachverständigen (νομικός) an den ἐπὶ τῶν κεκριμένων und *praefectus classis* adressierte Rechtsauskunft in Dotalsachen.

Insgesamt zeigt sich, daß in M.Chr. 88 und P.Oxy. II 237, Kol. VIII Soldaten in die vor dem ἐπὶ τῶν κεκριμένων verhandelte Rechtssache involviert waren. Bei P.Stras. III 146 wäre es zumindest möglich, daß der Beklagte Soldat war. Es könnte daher sein, daß das Recht der Soldaten auf militärischen Gerichtsstand die Einset-

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[24] Keinen militärischen Titel führen Cascelius Geminus in SB VI 9252 = P.Fam.Tebt. 19 = SB VI 9252 (Ars., 118); der gewesene Hypomnematographos Cerealis in P.Ross.Georg. II 20 (Ars., 145-147); Severus in P.Fouad I 26 (Ars., 157-159). Bei keinem der Verfahren, die vor diesen ἐπὶ τῶν κεκριμένων verhandelt wurden, waren Soldaten involviert.

[25] M.Chr. 88 = P.Cattaoui verso, Kol. V 32-VI 2 (Alex. oder Ars., nach 142): ἐπὶ Σεντίου Μαξίμ[ο]υ χ[ι]λιάρχου τοῦ ἐπὶ | τῶν κεκρ[ι]μένων.

[26] P.Strasb. IV 281, Kol. IV 1-8 (Herk. unbek., 142): - -] ἐ[π]ά̣ρ̣[χ]ῳ [σ]τ[ό]λου καὶ ἐπὶ τῶν | κεκριμένων | ἐξ ἐγκελεύσ[εως] | διὰ ἀναφορίου τ̣ο̣ῦ̣ | κρατίστου ἡγεμόνος Ἀ̣ο̣υ̣ι̣δ̣ί̣ο̣υ̣ Ἡ̣λ̣ι̣[ο]λδώρου.

[27] BGU II 613 = M.Chr. 89, 5-6 (Ars., 161?): [± 7] Φαβρικιανῷ ἐπάρχωι εἴλης καὶ ἐπὶ τῶν κεκριμέν(ων); vgl. auch Z. 5-6: Φαβρικιανῷ [ἐ]πάρχῳ εἴλ(ης) καὶ ἐπὶ τῶν [κεκριμέν(ων) ..]. Einzelheiten des Verfahrensablaufes sind umstritten, vgl. Rainer (o. Anm. 23) 111.

zung eines Offiziers als ἐπὶ τῶν κεκριμένων bedingte oder Offiziere *ad hoc* eingesetzt wurden, wenn der Rechtsstreit Militärpersonen betraf[28]. Alle Militärs, die als ἐπὶ τῶν κεκριμένων eingesetzt werden, sind Offiziere aus dem Ritterstand. In der Regel war der Verhandlung vor dem ἐπὶ τῶν κεκριμένων bereits ein anderes Verfahren vorausgegangen, in BGU II 613, P.Fouad I 26 (s. Anm. 24) und P.Stras. III 146 ging das Verfahren dann an den Präfekten, in P.Ross.Georg. II 20 (s. Anm. 24) dürfte es das Endverfahren gewesen sein. Nicht eindeutig sind die Quellen hinsichtlich der Frage, ob der ἐπὶ τῶν κεκριμένων Urteile fällte (gegen die man an den Präfekten berufen konnte) oder lediglich durch Fachgutachten vorbereitete (wie in M.Chr. 88). Die Bandbreite der behandelten Fälle reichte vom Erbrecht, Pfandrecht, Schuldrecht bis zum Familienrecht. Die bisweilen verzwickten Rechtsfragen verlangten beträchtliche juristische Kompetenz des Richters.

Ein verwandtes Phänomen ist die Bestellung ausgedienter Militärs in das Amt des ἀρχιδικαστής[29]. Unter den weit über hundert bekannten Trägern dieses Amtes[30], das im 2. Jh. in der Regel mit einer Funktion als ἱερεύς (d.h. νεωκόρος τοῦ μεγάλου Σαράπιδος) verbunden ist und im vollen Titel ἀρχιδικαστὴς καὶ πρὸς τῇ ἐπιμελείᾳ τῶν χρηματιστῶν καὶ τῶν ἄλλων κριτηρίων lautet, finden sich bislang acht ehemalige Offiziere. Ohne auf die Problematik des Ursprunges und der Entwicklung des Amtes des ἀρχιδικαστής und die Frage einzugehen, wie weit es auch in der früheren Kaiserzeit noch munizipalen Charakter hatte[31], bleibt festzustellen, daß die eingesetzen Ex-Militärs abermals durchwegs aus den ritterlichen *tres militiae* kommen. Die bekannten Amtsträger sind in chronologischer Reihenfolge: Iulius Vestianianus Asclepiades qui et Leonides, *praefectus cohortis*[32]; Munatianus, *tribunus*[33]; ein Ano-

[28] In P.Fouad I 26 trägt das Verfahren vor dem ἐπὶ τῶν κεκριμένων die Protokollnummer 233, was auf regelmäßige Tätigkeit schließen läßt.

[29] Vgl. bereits H. Devijver, The Roman Army in Egypt (with Special Reference to the Militiae Equestres), in: ANRW II.1, Berlin – New York 1974, 452-492, bes. 483f. (Liste) und 489f. (= MAVORS VI 141-181, bes. 172f. und 178f.).

[30] Liste der Amtsträger bei P.J. Sijpesteijn, P.Theones, Appendix B; Ergänzungen bei P.J. Sijpesteijn, K.A. Worp, ZPE 110 (1996) 181f.

[31] Zum Amt und seinen Kompetenzen s. P. Koschaker, Der Archidikastes, SZ 28 (1907) 254-305, bes. 260; P. Jörs, Erzrichter und Chrematisten, SZ 36 (1915) 230ff.; 39 (1918) 52ff.; 40 (1919)1ff.; A. Calabi, L'ἀρχιδικαστής nei primi tre secoli della dominazione romana, Aegyptus 32 (1952) 406-424, bes. 412; Baade (o. Anm. 1) 141-146; Seidl (o. Anm. 1) 101; Anagnostou-Canas (o. Anm. 1) 187-191; H.J. Wolff, Das Recht der griechischen Papyri Ägyptens, München 1978, 28; 129-131.

[32] SB XX 14635, 11-14 (Oxy., 1. Juli 127): Οὐηστιν[ιανῶ]ι Ἀσκ[ληπιάδηι] | τῶι καὶ Λεωνίδηι Λεωνίδου ἐξηγητεύσαντος γ[ενομένωι ἐπάρχωι σπεί]|ρης τρίτης Βρακῶν καὶ πρώτης Θρακῶν ἱ[ερεῖ καὶ ἀρχιδικαστῆι καὶ] | πρὸς τῇ ἐπιμελ(είᾳ) τῶν χρημ̣α̣τισ̣|[τῶν καὶ τῶν ἄλλων κριτηρίων] (Eingabe an den Archidikastes in einer Darlehensangelegenheit). – P.Mil.Vogl. I 25 V 10-13 (Tebt., Mai/Juni 127): Ἰο̣[ύ]λιος Οὐηστειν̣ειαν̣[ὸς] Ἀσκ[ληπιάδης] ὁ καὶ Λεωνίδη[ς] γ̣ε[νό]μενος ἔπαρχος σ̣π̣ε̣ί̣ρα[ς] τρίτης [Β]ρακῶν καὶ πρώτης [Θ]ρακ[ῶν] ὁ εἰερεὺς [καὶ ἀρχιδικαστής (zwei Pro-

nymus, *praefectus cohortiis*[34], Claudius Philoxenus, *praefectus cohortis* und zudem τῶν ἐν τῷ Μουσείῳ σιτουμένων[35]; Aelianus, *praefectus* einer *cohors equitata*[36]; Ulpius Asclepiades, *praefectus cohortis*[37]; Areius, *tribunus*[38]; Balbinianus, *praefectus cohortis* und gleichfalls τῶν ἐν τῷ Μουσείῳ σιτουμένων[39].

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zeßprotokolle, finanzielle Angelegenheiten). Zur Karriere des Iulius Vestinianus s. Devijver (o. Anm. 29) 490 (= MAVORS VI 179).

[33] P.Mil.Vogl. I 26, 1-2 (Tebt., 31. Jan. 128): [Μουνατι]ανῷ [Μ]ουνατιανοῦ ἀπὸ [ἱερέω]ν γενομένου ἀρχιδι[κασ]τ[οῦ] υἱῷ τῶν ἐν τῷ Μουσείῳ σιτουμένων ἀτελῶν, κεχιλιαρχηκότι, γενομένῳ στρατηγῷ τῆς πόλεως, ἱερεῖ ἀρχιδικαστῇ καὶ πρὸς τῇ ἐπιμελείᾳ τῶν χρηματισ|[τῶν καὶ] τῶ[ν ἄ]λλων κριτηρίων (Parachoresis von Katökenland).

[34] PSI VIII 962 Fragm. B, 16-20 (Herakl., 131/2): [- - νεωκόρου μεγά]λου Σαράπιδος | [- - γενομένῳ ἐπάρχῳ σ]πείρης τρι|[της - - ἱ]ερεῖ [καὶ] ἀρχιδικα|[στῇ καὶ πρὸς τῇ ἐπιμελεί]ᾳ τῶν χρηματιστῶν |[καὶ τῶν ἄλλων κριτηρί]ων.

[35] BGU I 136 = M.Chr. 86, 21-24 (Herk. unbek., 24. März 135): Κλαύδιος Φιλόξενος νεωκόρος | [τοῦ μεγ]άλου Σαράπιδος γενόμενος ἔπαρχος σπείρης πρώτης | [Δα-μασ]κηνῶν τῶν ἐν τῷ Μουσείῳ σιτουμένων ἀτελῶν | [ἱερεὺ]ς καὶ ἀρχιδικαστής (Protokoll, Prozeß um die Erbschaft einer Minderjährigen; der Archidikastes spricht das Urteil). – BGU I 73 = M.Chr. 207, 1-5 (Ars., 20. Juni 135): Κλαύδιος Φιλόξενος νεωκόρος τοῦ μεγάλου | Σαράπι[δ]ος γεν[ό]μεν[ο]ς ἔπαρχος σπεί|ρης πρώτης Δαμα[σκ]ηνῶν τῶ[ν] ἐν | τῶι Μουσείωι σιτουμένων ἀτελῶν | ἱερεὺς καὶ ἀρχιδικαστὴς (Der Archidikastes erinnert den Strategen des Arsinoites, eine fällige Amtshandlung vorzunehmen; gehört zum Drusilla-Prozeß).

[36] P.Oxy. 1472, 8-13 (Oxy., 29. Juni 136): Αἰλιανῷ Εὐφράνορος γενομένου ἐξηγητοῦ υἱῷ νεωκόρῳ | τοῦ μεγάλου Σαράπιδος γενομένῳ ἐπ[ά]ρχῳ σπείρας δευτ(έρας) | Κομμαγηνῶν ἱππικῆς ἱερεῖ ἀρχιδικαστῇ καὶ πρὸς τῇ ἐ|πιμελείᾳ τῶν χρ[η]ματιστῶν καὶ τῶν ἄλλων κριτηρί[ω]ν, | διὰ Δημητρίου το[ῦ κα]ὶ Δομιτίου ἀποδεδειγμένου ἐξηγητοῦ | διέποντος τὰ κατὰ [τ]ὴν ἀρχιδικασ[τ]είαν (Eingabe bzgl. der Rückzahlung eines Korn-Deposits durch die Erben des Schuldners). – P.IFAO III 18, 2-5 (Oxy., 136): Αἰλιανῷ Εὐφράνορο[ς γεν]ομέ[ν]ου ἐξηγητοῦ υἱῷ [νεωκόρῳ τοῦ μεγάλου Σαράπιδος γενομένῳ ἐπάρχῳ] | σπείρ[ης τρί]της Κομμ[αγην]ῶν ἱππ[ι]κῆς ἱερεῖ ἀρχιδι[κ]αστ[ῇ καὶ πρὸς τῇ ἐπιμελείᾳ τῶν χρηματιστῶν] | καὶ τ[ῶ]ν ἄλλων κριτηρίων διὰ Δημητρ[ίου] τοῦ καὶ Δομιτίου [ἀποδεδειγμένου ἐξηγητοῦ διέποντος τὰ κατὰ τὴν] | ἀρχιδικαστείαν (Eingabe an den Archidikastes in Erbschaftsangelegenheiten).

[37] M.Chr. 372 Recto Kol. III = P.Cattaoui II 6-8 (Alex. oder Ars., nach 142): Οὔλπιος Ἀσκληπιά|δης γενόμενος ἔπαρχος σπείρης δευτέρας | Ἰ[σπ]α[ν]ῶν ὁ ἱερεὺς κα[ὶ] ἀρχιδικαστής (Sammlung von Präjudizien über Soldatenehen).

[38] P.Hamb. IV 271, 7-10 (Oxy., 2. Jh.): Ἀρείῳ Ἡρακλείδου νεωκό|[ρου τοῦ μεγάλου Σαράπιδος γενομέ]νου ἐξηγητοῦ υἱῷ [τ]ῶν κεχει[λιαρ]|[χηκότων - - - ἱερεῖ ἀ]ρχιδικστῇ καὶ πρ[ὸς] τῇ ἐπιμελ[είᾳ] | [τῶν χρηματιστῶν καὶ τῶν ἄλλων] κριτηρίων (Eingabe; Brief des Archidikastes an den Strategen).

[39] PSI Com. 14, 1-5 (Ars., 2. Hälfte 2. Jh.): Βαλβεινιανῷ, Βαλβεινια]νο[ῦ γενο]μένου ἐπ[ιτρ]όπο[υ Σ]εβα[στ]οῦ υἱῷ, νεωκόρ[ῳ] | [τοῦ μεγάλου Σαράπιδος, τῶν ἐν] τῷ Μουσείῳ σειτουμ[έ]νων ἀτελῶν, γενομένῳ ἐπά[ρ]|[χῳ σπείρης πρώτης Φλαυίας ἱππι]κῆς, ἱερεῖ ἀρχιδικαστ[ῇ] καὶ πρὸς τῇ ἐπιμελείᾳ τῶν χρη|[ματισιμῶν καὶ τῶν ἄλλων κρ]ιτηρίων (Antirrhesis gegen ein durch den Archidikastes verhängtes Exekutionsverfahren). – Die Eingabe an den Archidikastes P.Oxy. XLI 2978, 1-6 (Oxy., 2. Hälfte 2. Jh.) hat exakt denselben Titel. Balbinianus hat sich auch durch ein Proskynema auf dem Menon-Koloß verewigt: SB V 8362.

Die primäre Zuständigkeit des Archidikastes war die Leitung und Beaufsichtigung der Urkundenarchive sowie die Registrierung von Urkunden. Obwohl er keine selbständige Jurisdiktion hatte, wurde der Archidikastes doch öfters zur Durchführung von Prozessen delegiert und ist auch im Rahmen seiner Verwaltungstätigkeit häufig mit Rechtsangelegenheiten und Verfahren mit finanziellem Hintergrund befaßt. Anders als bei den von Fall zu Fall zu *iudices pedanei* bestellten Militärs kann eine allfällige Involvierung von Soldaten in einzelne Amtsangelegenheiten nicht ausschlaggebend für die Bestellung von Offizieren gewesen sein, denn als Archidikastes mußte der Amtsinhaber alle in seinen Kompetenzbereich fallenden Geschäfte erledigen. Juristischer Sachverstand, administrative Expertise und Organisationstalent mögen Fähigkeiten der ehemaligen Offiziere gewesen sein, die für die Bekleidung des Amtes willkommen waren, doch dürfte daneben das gesellschaftlichen Ansehen der ritterständischen Ex-Militärs eine weitere Voraussetzung gewesen sein. Bei der Sichtung der Belege springt sofort ins Auge, daß nahezu alle ἀρχιδικασταί, die einen militärischen Rang hatten, ihr Amt in der Regierungszeit des Kaisers Hadrian versahen[40]. Andererseits sind aus dieser Zeitspanne auch ἀρχιδικασταί ohne militärischen Rang bekannt, die zeitlich sogar zwischen den oben angeführten Amtsträgern amtierten[41]. Zwei der Archidikastai mit militärischer Vergangenheit waren Söhne eines τῶν ἐν τῷ Μουσείῳ σιτουμένων, zwei weitere Söhne eines νεωκόρος τοῦ μεγάλου Σαράπιδος und drei waren Söhne ehemaliger Exegeten; einige bekleideten auch selbst derlei Würden. Dies entspricht exakt dem sozialen Hintergrund auch der anderen Archidikastai und zeigt die Herkunft dieser ritterständischen Amtsträger aus der alexandrinischen Elite. Ausschlaggebend für die Einsetzung zum Archidikastes war eben der soziale Rang, nicht das militärische Amt. Die Häufung der Belege in hadrianischer Zeit mag eine bevorzugte Rekrutierung von hochrangigen Offizieren aus den provinzialen Führungsschichten widerspiegeln, die in einer Linie mit der verstärkten lokalen Rekrutierung liegen würde, die seit den Adoptivkaisern generell zu beobachten ist.

Die oben besprochene Funktion von Zenturionen als von hochgestellten Amtsträgern eingesetzte *iudices pedanei* ist grundsätzlich zu unterscheiden von der Rolle, die in der Chora stationierte *centuriones*, *decuriones* oder *beneficiarii* als Empfänger von Petitionen der Landbevölkerung spielten. Als die unmittelbar greifbaren Repräs-

[40] Der einzige späterer Amtsträger ist Balbinianus, dessen Datierung an PSI Com. 14, 26 hängt, wo die ed. pr. (ἔτους) κς las und dieses 26. Regierungsjahr auf Commodus bezog (= 185/6). An der fraglichen Stelle ist jedoch keine Datumsangabe zu lesen, s. D. Hagedorn, ZPE 152 82005) 177f. Der einzige datierende Hinweis in diesem Dokument ist demnach das 14. Jahr des *divus* Hadrianus (= 129/30), in dem ein früherer Schritt des Verfahrens stattfand. Weil der zeitliche Abstand zum gegenwärtigen Verfahrensschritt nicht allzu groß sein kann, dürfte PSI Com. 14 um die Mitte oder in der 2. Hälfte des 2. Jh. entstanden sein, vgl. F. Mitthof, APF 53 (2007) 82.

[41] Beispielsweise P.Ryl. II 287 (Herm., 130); P.Fam.Tebt. 29 = Jur.Pap. 48 (Ars., 133).

sentanten der Staatsgewalt wurden diese Soldaten zur Anlaufstelle für Rechtsuchende und Adressaten ihrer Bittschriften. Welche Autorität ein Zenturio vor Ort besaß, kommt in der Eingabe SB IV 7469, die ein Metropolit an die δημόσιοι des Dorfes Theadelphia richtete, klar zum Ausdruck. Um seiner Bittschrift Nachdruck zu verleihen, fügt er hinzu „Hiermit reiche ich diese Petition ein, damit Ihr die Untersuchung durchführt, bevor ich etwa eine Eingabe an den *centurio regionarius* richte“[42].

Über 50 Urkunden dieser Art sind bislang auf Papyrus aufgetaucht[43]. Die Provenienz dieser Dokumente zeigt eine auffällige räumliche Konzentration auf den Arsinoites, was durch eine stärkere Präsenz des Militärs oder eine hohe Auslastung der zivilen Amtsträger erklärlich sein mag, vielleicht aber bloßer Zufall der Überlieferung ist[44].

Allen Petitionen ist gemeinsam, daß sie von einfachen Leuten aus der ägyptischen Chora verfaßt wurden und Konflikte des Alltags, wie Diebstahl, Flurschaden, Besitzstreitigkeiten, Körperverletzung und ähnliches zum Gegenstand haben. Die am 18. April 193 im Dorfe Soknopaiu Nesos am nordwestlichen Rand des Fayum abgefaßte Petition P.Mich. III 175 darf als typisches Beispiel gelten:

„An Ammonius Paternus, *centurio*, von Melas, Sohn des Horion, aus dem Dorfe Soknopaiu Nesos, Priester des in diesem Dorfe befindlichen Gottes. Es gehört mir und meinen Neffen Phanesis und Harpagathes im gemeinsamen Besitz zu gleichen Teilen, (ererbt) vom Großvater mütterlicherseits, in eben diesem Dorfe ein ummauerter freier Platz, wo wir Jahr für Jahr unser Heu deponieren. Als kürzlich der eine (Neffe), Harpagathes, gestorben ist, kam sein Anteil zu gleichen Teilen auf uns beide. Gestern aber, am 22., als ich mein Heu auf dem Platz deponieren wollte, ging mich Phanesis gewaltsam und frech an, beanspruchte mein Heu und ließ es mich nicht in unserem Teil deponieren, sondern versuchte, mich daraus zu vertreiben und für sich alleine zu beanspruchen, was mir gehört, wobei er auch noch mit größter Brutalität gegen mich vorging. Daher ersuche ich Dich, zu befehlen, daß er über-

[42] SB IV 7469, 6-10 (Thead., 193): Διὸ ἐπιδίδωμι το[ῦτο] | τὸ βιβλί[δι]ον, ὅπως τ[ὴν] | ἀναζήτησιν ποιήσηται (*l.* ποιήσητε) | πρ{ε}ὶν ἢ ἀνενέγκω τῷ ἐπὶ | τῶν τόπων ἑκατοντάρχ[ῳ].

[43] Listen der Belege bei Alston (o. Anm. 2) 88-90 und J. Whitehorne, Petitions to the Centurion: a Question of Locality?, BASP 41 (2004) 155-169, bes. 161ff.; bezüglich der *beneficiarii* s. J. Nelis-Clément, Les beneficiarii: militaires et administrateurs au service de l'Empire (I^{er} s.a.C.-VI^{e} s.p.C.), Paris 2000, 227-243. M. Peachin, P.Sijp. 15, S. 86-88 bietet eine informative Paraphrase der 23 aussagekräftigsten Petitionen an Zenturionen.

[44] Whitehorne (o. Anm. 43) 158-160 betont die ungleiche räumliche Verteilung dieser Petitionen und erwägt, ob sie vielleicht auf den Arsinoites beschränkt waren. Aber die Formulierung τῷ διακειμένῳ ἐν τῷ Ἀρσινοείτῃ ἑκατοντάρχῃ in P.Mich. VI 425, 5 (Karanis, 198) könnte besagen, daß es in jedem Gau einen Zenturio gab, wofür auch der außerägyptische Befund spricht, s. unten Anm. 53-56.

stellt werde, damit ich Deiner *clementia* teilhaftig werde. Das Glück sei Dir stets hold!“[45]

Welche weiteren Schritte die Leute durch die Petitionen veranlaßt sehen wollen, ist oft nicht klar formuliert; anscheinend hatten die Beschwerdeführenden nicht immer eine Vorstellung, welche rechtlichen Schritte die Petition veranlassen sollte. Die Delikte, gegen die Beschwerde geführt wird, sind nicht immer Bagatellen. Selbstverständlich spiegeln die Bittschriften das Rechtsverständnis der enchorischen Bevölkerung wider, das keineswegs den Kategorien des römischen Rechts Rechnung trägt. Vielfach wird auch gegen mehrere Delikte gleichzeitig Beschwerde erhoben, so daß selbst eine Unterscheidung in Zivil- und Strafeingaben unmöglich ist[46]. Ebenso laienhaft sind auch die Vorstellungen, in welcher Weise die adressierten Soldaten einschreiten sollen. In vielen Fällen soll der Zenturio sofort Abhilfe schaffen und z.B. den Übeltäter bestrafen oder gestohlenes Gut zurückbringen[47].

Gegen die ältere Forschung, die eine jurisdiktionelle Kompetenz des Militärs diskutierte oder die Usurpation einer solchen vermutete, hat Michael Peachin in einer peniblen Studie gezeigt[48], daß die Zenturionen in diesen Angelegenheiten keine echte richterliche Funktion ausübten, sondern entweder um polizeiliches Einschreiten oder um prozeßvorbereitende Maßnahmen angegangen wurden. In etlichen Bittschriften ersucht man den Zenturio, eine Untersuchung einzuleiten und oder

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[45] P.Mich. III 175 = Doc.Eser.Rom. 77 (Sokn. Nes., 193): Ἀμμωνίῳ Πατέρνῳ (ἑκατοντάρχῃ) | παρὰ Μέλανος Ὡρίωνος ἀπὸ κώμης Σο|κνοπαίου [Ν]ήσου ἱερέως τοῦ ὄντος ἐν τῇ | κώμῃ θε[ο]ῦ. Ὑπάρχει ἐμοί τε καὶ τοῖς ἀ|νεψιοῖς μ[ο]υ Φανήσ⟨ε⟩ι καὶ Ἀρπαγάθῃ κοι|νῶς ἐξ ἴσου παππικὸν κατὰ μητέρα ἐν τῇ | αὐτῇ κώμῃ ψ{ε}ιλὸς τόπος περιτετ⟨ε⟩ιχισμέ|νος ἔνθα [ἀ]ποτιθόμεθ[α] (*l.* ἀποτιθέμεθα) κατ’ ἔτος ὃν ἔχο|μεν χόρτον. Τοῦ οὖν ἑνὸς Ἀρπαγάθου ὑ|ποτύπου τελευτήσαντος καὶ τοῦ μέρους | αὐτοῦ καταντήσαντος εἰς ἀμφοτέρους | ἐξ ἴσου, ἐχθές, ἥτις ἦν κβ, ἐμοῦ ἀποτιθο|μένου (*l.* ἀποτιθεμενου) ἐν τῷ τόπῳ τὸν ἡμέτερον χόρ|τον ὁ Φανῆσις βιαίως καὶ αὐθάδως | ἐπελθὼν ἐκσπετέρισεν (*l.* ἐσφετέρισεν) μου τὸν χόρτον οὐ|κ ἐάσας με ἐν τῷ ἡμετέρῳ μέρ⟨ε⟩ι ἀποτί|θεσθαι ἐπιχειρῶν ἐκ τούτου ἀποθεῖν (*l.* ἀπωθειν) | με καὶ αὐτὸν μόνον ἀντιποιεῖσθαι τοῦ μοι | προσήκοντος οὐ μόνον ἀλλὰ καὶ τὴν ἀνω|τάτην μοι ὕβριν παρεῖχεν. Ὅθεν ἀξιῶ κελεῦ|σε (*l.* κελεῦσαι) μεταπεμφθῆναι αὐτὸν ἵνα δυνηθῶ τῆς | ἀπὸ [σ]οῦ ἐπι⟨ε⟩ικ⟨ε⟩ίας τυχεῖν. Διευτύχει.

[46] So schon Mitteis (o. Anm. 1) 35: „Der Grund, weshalb man in so vielen Fällen sich zunächst an die Unterbehörden wendet, ist der, daß es sich hier regelmäßig um Bagatellsachen handelt, wie Diebstahl, Raufhändel, Feldbeschädigung. Dabei bleibt es bei der mangelhaften juristischen Formulierung, die diese Stücke zeigen, meist auch zweifelhaft, ob Schadenersatz oder Strafe gefordert wird, so daß eine Unterscheidung zwischen Zivil- oder Strafeingaben schon aus diesem Grunde hier undurchführbar ist, abgesehen davon, daß sie in diesem Verfahren auch keine Berechtigung hätte.“

[47] SB XVI 12951 (Karanis, 100); BGU I 36 = Doc.Eser.Rom. 82 = M.Chr. 125 (Sokn. Nes., 98-117); SPP XXII 55 (167); P.Tebt. II 304 (Tebt., 167/8); P.Mich. III 175 = Doc.Eser.Rom. 77 (Sokn. Nes., 193); BGU II 515 = Doc.Eser.Rom. 78 = W.Chr. 268 (Ars., 193); BGU I 157 (Karanis, 2./3. Jh.).

[48] Peachin (o. Anm. 43) 88f. mit der Diskussion der Zeugnisse.

einen schriftlichen Bericht einzufordern[49]. Dies ist ein bekannter Vorgang, der den Zweck hatte, Beweise – insbesondere solche, die im Laufe der Zeit verschwinden konnten, wie etwa die Folgen einer Körperverletzung – durch amtliche Beglaubigung festhalten. Ein amtlicher Bericht sollte Tatbestände zwecks Vorlage bei einem später angestrebten regulären Prozeß aktenkundig machen. Hier wurde seitens der Bevölkerung die Stellung des Soldaten als offizieller Vertrauensmann bei prozeßvorbereitenden Maßnahmen in Anspruch genommen, wie sie umgekehrt auch seitens der Staatsgewalt eingesetzt wurde, um durch Lokalaugenschein oder Prüfung von Urkunden vor Ort verläßliche Unterlagen für den Prozeß zu beschaffen[50] . Bisweilen sollte der Soldat auch nur Überbringer der Petition sein und sie an den *praefectus Aegypti*, einen Epistrategen oder einen anderen Amtsträger mit richterlicher Kompetenz weiterleiten, während er selbst nur ein Duplikat behielt. In diesen Fällen erwarteten die Petenten offenbar eine Erledigung ihrer Bittschrift im Wege des Subkriptionsverfahrens[51]. Das Duplikat beim Zenturio machte den Fall aktenkundig.

In einigen Petitionen scheint der Bittsteller den Zenturio jedoch wirklich als eine richterliche Instanz angerufen zu haben, die in einem Konflikt sofort eine Entscheidung treffen sollte[52]. Diese Fälle sind natürlich kein Beweis für eine seitens der Militärs angemaßte Jurisdiktion; vielmehr führen sie vor Augen, daß in der Vorstellung der enchorischen Bevölkerung keine scharfe Abgrenzung zwischen der konfliktlösenden Tätigkeit der Zenturionen und einem gerichtlichen Streitverfahren vor tatsächlichen Jurisdiktionsträger bestand. Zudem ist diesen Petitionen nicht zu entnehmen, ob der Offizier diesem Begehren stattgegeben oder ob er andere Schritte veranlaßt hat. In keinem Fall sind diese von der Zivilbevölkerung formulierten Petitionen als Zeugnisse einer informellen oder gar offiziellen, regelmäßig ausgeübten Jurisdiktion der *centuriones, decuriones* oder *beneficiarii* zu werten. Schon früh hat man anscheinend auch ein System der Rotation eingeführt, um das Verwurzeln einzelner Zenturionen zu verhindern und Korruption hintanzuhalten.

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[49] P.Gen. I^2 3 (Sokn. Nes., 178/9); SB XIV 11904 (Tebt., ca. 184); P.Amh. II 78 (Sokn. Nes., 184); SB III 6952 (Herk. unbek., 195); SPP XXII 49 (Sokn. Nes., 200/1); P.Gen. I^2 16 (Sokn. Nes., 207); SPP XXII 54 (Sokn. Nes., 210); BGU I 98 (Sokn. Nes., 211); PSI III 222 = Doc.Eser.Rom. 81 (Herakl., Ende 3./Anf. 4. Jh.).

[50] Vgl. die Ausführungen (oben bei Anm. 9) zum Liegenschaftsprozesses im sog. Satabus-Archiv, SB X 10308, 8-13 (Sokn. Nes., 15 n.Chr.), wo der *centurio*, Strategе und Basilikos Grammateus die Untersuchung durchführen und deren Ergebnisse dem Präfekten vorlegen sollen.

[51] In P.Oxy. XVII 2130 = Sel.Pap. 292 (Oxy., 267) legt ein Ratsherr seine Eingabe wegen ungerechtfertigter Nominierung für ein liturgisches Amt zu Füßen der Kaiserstatue nieder, damit sie der wachhabende Soldat an den Präfekten weiterleite: ἀνεθέμην ἐν τῷ αὐτ[ό]θι Σεβαστείῳ | πρὸς τοῖς θείοις ἴχνεσι τοῦ κυρίου ἡμῶν | Αὐτοκράτορος Γαλλιηνοῦ Σεβαστοῦ δια|πεμφθησόμενα ὑπὸ τοῦ στατίζοντος | τῷ λαμπροτάτῳ ἡγεμόνι Ἰουουενίου (*l.* Ἰουουενίῳ) | Γενεαλίου (*l.* Γενεαλίῳ) αὐτῷ τε τῷ στατίζοντι τὰ ἴσα | ἐπιδούς.

[52] BGU I 4 (Ars., 177) und die Kopie BGU XV 2458; BGU II 454 = Doc.Eser.Rom. 79 (Ars., 193); SPP XXII 87 (Sokn. Nes., 202); P.Cair.Isid. 63 (Karanis, nach 297).

Die Rolle der Militärorgane als Anlaufstelle für Rechtsuchende in der Chora entspricht ganz und gar dem Bild, das sich aus dem Quellenmaterial auch anderer Teile des Reiches ergibt. In der Rede, die Hadrian im Juli 128 vor den versammelten Truppen in Lambesis hielt, erwähnte der Kaiser in seiner Aufzählung der Leistungen, die das Heer dem Reich und seinen Bewohnern erbringt, unter anderem die Verfügbarkeit der Soldaten in einer großen Anzahl weit verstreuter *stationes*[53]. Die Beschreibung eines Petitionsvorganges bei Herennius Modestinus, einem namhaften Juristen aus der Mitte des 3. Jh., geht wie selbstverständlich davon aus, daß Klage- und Bittschriften (*libelli*) bei einem Zenturio eingereicht werden konnten[54]. Die Aufgabe der Zenturionen als Empfänger und Übermittler von Petitionen einerseits und bei prozeßvorbereitenden Amtshandlungen andererseits spiegelt demnach keine lokal bedingte Besonderheit Ägyptens wider. In Vindolanda am Hadrianswall findet man gleichfalls *centuriones regionarii*, für die man solche Aufgaben annehmen möchte[55], und auch in Appadana, in der Provinz Syria Coele, ist ein Zenturio in sehr ähnlicher Funktion papyrologisch bezeugt[56].

In Ägypten begegnen Zenturionen auf Posten im Land, ἐπὶ τῶν τόπων, schon sehr bald nach der Eingliederung des Landes in das Imperium Romanum: P.Oslo II 30 = Daris 71 (Sentrepaei, Ars.) vom Jahre 20 v.Chr. ist derzeit der früheste Beleg[57]. Aber waren die Zenturionen ἐπὶ τῶν τόπων und ihre Tätigkeit im Bereich der Rechtspflege eine *römische* Einführung? Ein Blick zurück auf die Papyri der vorrömischen Zeit lehrt, daß man vielmehr die nahtlose Fortsetzung der sog. „ptolemäischen Beamtenjustiz" vor sich hat, wie sie Hans-Julius Wolff ausführlich beschrieb[58]. Auch gegenüber den zivilen und militärischen Amtsträgern des ptolemäischen Königreiches suchte die Zivilbevölkerung exekutive Schutz- oder Vollstreckungsmaßnahmen, ohne auf eine richterliche Entscheidung dringen zu können, wie sie nur das griechische Dikasterion leisten konnte. In den Eingaben an Beamte und Militärs der ptolemäischen Epoche hofften die Petenten nicht auf eine Rechts*feststellung* mit formeller Rechtskraft, sondern auf Rechts*verwirklichung* durch Einsatz der Amtsautorität. Bei den Petitionen an Zenturionen blieb das genauso. Diese Ge-

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[53] AE 1899, 126 = CIL VIII 2532 = 1042 = ILS 2487; 9133; 9134; 9135: … *quod multae quod diversae stationes* …

[54] Dig. XLVII 2, 73 (Modest., 7 resp.): *Sempronia libellos composuit quasi datura centurioni, ut ad officium transmitterentur, sed non dedit: Lucius pro tribunali eos recitavit quasi officio traditos: non sunt inventi in officio neuque centurioni traditi* …

[55] T.Vindol. II 250, 8-9 sowie III 653 back 2 und App. 255 back; vgl. M. Peachin, Five Vindolanda Tablets, Soldiers, and the Law, Tyche 14 (1999) 223-235, bes. 229, Anm. 20.

[56] P.Euphr. 5 (243), ed.: D. Feissel, J. Gascou, Documents d'archives romains inédites du Moyen Euphrat, JS (1995) 107-117 = SB XXII 15500.

[57] Gefolgt von P.Ryl. II 141 (Euhemeria, 37 n.Chr.); P.Thomas 5 (Philadelphia, 46 n.Chr.).

[58] H.-J. Wolff, Das Justizwesen der Ptolemäer, (MB 44), München 1962, bes. 113-130. Sehr instruktive Beispiele liefern hierzu neuerlich die jüngst edierten Eingaben an den Phrurarchen Dioskurides aus den Jahren 154-145 v.Chr. (P.Phrur. Diosk).

pflogenheit endet im übrigen keineswegs, als um die Wende vom 3. zum 4. Jh. n.Chr. die Petitionen an Zenturionen, Dekurionen etc. aus der papyrologischen Dokumentation verschwinden. Vergleichbare Bittschriften finden sich beispielsweise um die Mitte des 4. Jh. unter den Papieren des bekannten Flavius Abinnaeus, der zwischen 342 und 344 sowie neuerlich zwischen 346 und 351 Kommandant des Kastells Dionysias am südwestlichen Rande des Fayum war[59]. Noch aus dem 5. Jh. liegen Petitionen von Zivilisten an lokale Garnisonskommandanten, die jetzt den Titel *tribunus* tragen, vor[60]. Lediglich die Postierungen von Zenurionen oder Beneficiariern in weit über das Land verstreuten *stationes* scheint im frühen 4. Jh. zugunsten einer stärkeren Streuung der Garnisonstruppen selbst aufgegeben worden zu sein. Die Rolle der Kommandanten als die staatliche Autorität vor Ort und Anlaufstelle von Beschwerdeführenden und Hilfesuchenden blieb auch in der Spätantike erhalten.

Iudices pedanei, οἱ ἐπὶ τῶν κεκριμένων, ἀρχιδικασταί, lokale Repräsentation der Jurisdiktion etc. – vielfältig stellen sich die Aufgaben der Militärs in der Rechtsprechung und als Hüter der Rechtsordnung im kaiserzeitlichen Ägypten (und darüber hinaus) dar. In der Regel blieb die Tätigkeit der Militärs jedoch auf die Hilfs- und Exekutionsdienste für die eigentlichen Jurisdiktionsorgane beschränkt. Eine richterliche Funktion durften sie nur ausüben, wenn sie als *iudices dati* eigens dazu delegiert wurden. Die Heranziehung von ehemaligen Offizieren aus dem Ritterstand zu hochrangigen Ämtern mit jurisdiktionellem Pouvoir (wie dem eines ἀρχιδικαστής) erfolgte nicht nach militärischen Gesichtspunkten, sondern *ad personam*, wobei soziale Stellung und eventuell Sachkenntnis ausschlaggebend waren. Selbst eine informelle Rechtsprechung durch Zenturionen oder Dekurionen in der Chroa ist nicht nachweisbar, auch wenn die Zivilbevölkerung eine solche bisweilen erwartete. Über ihre bekannte Funktion als Hilfsorgane der Justiz ging die Befugnis der Militärs in der Jurisdiktion selbst nur in *ad hoc* bestimmten Ausnahmefällen hinaus.

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[59] Nicht weniger als 14 Bittschriften sind in den P.Abinn. erhalten geblieben, vgl. die Zusammenstellung bei B. Palme, Spätrömische Militärgerichtsbarkeit in den Papyri, in: H.-A. Rupprecht (Hg.), Symposion 2003. Vorträge zur griechischen und hellenistischen Rechtsgeschichte (Rauischholzhausen, 30. Sept.-3. Okt. 2003), Wien 2006, 383-384.

[60] Vgl. beispielsweise P.Oxy. L 3581, 21-23 (Oxy., 4./5. Jh.): ὅθεν παρακαλῶ τὴν σὴν τοὐμοῦ στερρότητα κελεῦσαι αὐτὸν παρα[σ]τῆναι | καὶ ἀπαιτηθῆναι αὐτὸν κατὰ τὴν ἔνγραφον αὐτοῦ ὁμολογίαν τὰς δύο οὐγκείας (*sic*) τοῦ χρυσοῦ καὶ | ὅσα ἐζημιώθην ὑπὲρ αὐτοῦ καὶ ἐπιστραφῆναι αὐτὸν ἐφ' οἷς τετόλμηκεν κατ' ἐμοῦ. – P.Rain.Cent. 91, 7-10 (Herk. unbek., 419): [– – το]ὑσδ[ε] τ[ο]ὺς λιβέλλους ἐπιδίδωμι τῇ σῇ | ἀνδρίᾳ (*sic*) ἀξιῶν παραστῆναι αὐτὴν καὶ πρῶτον μὲν | τῆς ὕβρεως ἐκδικίας με τυχῖν (*sic*), ἔπιτα (*sic*) δικαστὴν ἀπαρ|τιῖσθαι (*sic*) περὶ ὧν αὐτῇ ἐ[γ]καλῶ ἑτέρων ἐγκλημάτων κτλ.

ÉVA JAKAB (SZEGED)

ANTWORT AUF BERNHARD PALME

Bernhard Palme hat vor vier Jahren in Marburg einen anregenden Vortrag zur „Spätrömischen Militärgerichtsbarkeit in den Papyri“ gehalten[1]. Er hat darin das Verfahren vor den militärischen Sondergerichten untersucht, frühe Zeugnisse des Libellverfahrens aufgezeigt und das Spannungsfeld zwischen ziviler und militärischer Gerichtsbarkeit im 4.-6. Jh. beleuchtet[2]. In dem vorliegenden Beitrag (Durham 2007) behandelt er die Problematik aus einem abweichenden Blickwinkel. Er skizziert ein Mosaikbild über die Aufgaben, die Angehörige oder ehemalige Angehörige des Militärs im Umfeld der Rechtsprechung im römischen Ägypten in der Periode des Prinzipat wahrgenommen haben. Im Mittelpunkt steht das Phänomen, dass die einfache Landbevölkerung oft Petitionen an *centuriones, decuriones* und *beneficiarii* richtete, um Entscheidungen in alltäglichen Streitigkeiten zu erlangen. Das bereits in seinem früheren Beitrag angeschnittene Thema hat Palme jetzt auf einer erweiterten Quellenbasis neu aufgerollt.

Der Referent zählt vier Tätigkeitsbereiche zu den Aufgaben von Militärs in der Rechtsprechung: 1) Militärs in richterlicher Funktion, 2) Militärs im Amt eines *epi ton kekrimenon*, 3) ehemalige Militärs im Amt eines *archidikastes* und 4) die quasi-judizielle Tätigkeit, die in den Petitionen an Centurionen manifestiert gewesen sei.

Vorausgeschickt sei die Bemerkung, dass die Auswertung der Quellen nach Stichwörtern (etwa Militärs) gewisse immanente Gefahren hat. Vom Referenten angeregt, prüfte ich rasch allein die in FIRA III (*Negotia*) abgedruckten Kaufurkunden über Mobilien aus dem Imperium Romanum: Von den insgesamt neun Urkunden (überwiegend Wachstafeln, aber auch Papyri) sind in sechs (also 66 %) Soldaten als Kontrahenten zu finden. Bisher kam jedoch (glücklicherweise) niemand auf die Idee, den Sklaven- und Viehhandel deshalb als militärische Angelegenheit auszulegen! Kehren wir aber zum vorliegenden Beitrag von Palme zurück. Im Folgenden werde ich auf jeden Themenkreis des Referenten kurz eingehen.

Für Militärs in richterlicher Funktion führt Palme insgesamt neun Dokumente an, wovon er sechs ausführlicher bespricht. Liest man die Urkunden durch, sticht die Vielfalt der Sachverhalte ins Auge: Die Militärs treten in einigen Texten als Richter

[1] Inzwischen publiziert, B. Palme, Spätrömische Militärgerichtsbarkeit in den Papyri, in: Symposion 2003, hg. von H.-A. Rupprecht, Wien 2006, 374-408.

[2] S. dazu auch die Antwort von A.J.B. Sirks, in: Symposion 2003, hg. von H.-A. Rupprecht, Wien 2006, 409-414. Palme, Spätrömische Militärgerichtsbarkeit (o. Anm. 1) 380ff. bietet eine gute Übersicht über die Forschung zur wirtschaftlichen und sozialen Stellung der Militärs.

im regulären Kognitionsverfahren unter Zivilisten (M.Chr. II 84; vielleicht auch P.Tebt. II 488) oder im Erbstreit unter Soldaten auf (P.Mich. III 159); aus einer weiteren Urkunde erfahren wir von einem militärisch besetzten Gericht; ein anderer Papyrus berichtet von Militärs als Mitglieder des *consilium* des *praefectus Aegypti* beim Konvent (SB XVI 12749). Der Rechtshistoriker würde deutlicher nach inhaltlichen Kriterien differenzieren: Die Tatsache, ob es sich um ein Strafverfahren oder um ein Zivilverfahren handelt, könnte für die rechtliche Relevanz von entscheidender Bedeutung sein. Wesentliche Unterschiede sind auch in der ordentlichen oder in der Sondergerichtsbarkeit zu erwarten. Es könnte weiterhin der Personenstand der Parteien von Relevanz gewesen sein: Ob soldatische oder zivile Parteien in einem Rechtsstreit verwickelt waren.

Die Mitwirkung von Militärs in einem Prozess unter Soldaten oder im *consilium* des Statthalters sind reguläre Fälle, die keinen Beitrag zu besonderen Aufgaben der Militärs in der Rechtsprechung liefern können. Auf eine solche scheinen höchstens M.Chr. II 84 und P.Tebt. II 488 hinzudeuten. Der Tebtynis Papyrus, die Abschrift eines Prozessprotokolls, ist jedoch stark fragmentarisch; zum Sachverhalt sind kaum Anhaltspunkte überliefert. M.Chr. II 84 ist hingegen gut erhalten und zeigt die Einsetzung eines Militärs als *iudex datus* für einen Erbstreit unter Zivilisten (Ägyptern).

Die Tätigkeit angesehener Personen als *iudex pedaneus*, eingesetzt vom Präfekten für einen konkreten Fall, war in allen Provinzen üblich. Es ist herrschende Lehre[3], dass der Präfekt in den Provinzen oft gezwungen war, wegen mangelnder Zahl qualifizierter Honoratioren, aus dem Stab der eigenen Beamten oder Offiziere Richter vorzuschlagen (im Formularprozess) oder einzusetzen (im Kognitionsverfahren). Das hatte jedoch weniger mit der militärischen Funktion, viel mehr mit dem sozialen Stand des Betroffenen zu tun. Das Phänomen würde ich also eher als sozialgeschichtlich, aber weniger als rechtshistorisch interessant bewerten. Der militärische Rang des eingesetzten *iudex datus* hat dabei höchstens mittelbare Relevanz.

Von besonderem Interesse könnte höchstens P.Mich. III 159 (= FIRA III Nr. 64, 41 n.Chr.) sein, ein Urteil im Erbstreit zwischen einem Veteranen und einem aktiven Kavalleristen. Der *praefectus castrorum*, der Lagerkommandant hat einen Centurio zum Richter eingesetzt. Seidl nimmt an, dass der Statthalter dem Lagerkommandanten für solche Fälle eine Generaldelegation erteilt habe[4]. Riccobono[5] sieht darin die Gerichtsbarkeit unter Militärangehörigen; zur Vermutung einer Sondergerichtsbarkeit scheint auch Pieler zu neigen[6]. Die meisten Autoren

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[3] M. Kaser / K. Hackl, Das römische Zivilprozessrecht, München 1996, 440f.; E. Seidl, Rechtsgeschichte Ägyptens als römischer Provinz, Sankt Augustin 1973, 103.

[4] S. dazu Seidl, Rechtsgeschichte (o. Anm. 3) 102.

[5] S. dazu den Kommentar von Riccobono zu FIRA III Nr. 64, auf S. 190f.

[6] P. Pieler, Gerichtsbarkeit, in: RAC X (Reallexikon für Antike und Christentum), Stuttgart 1977, 384.

stellen jedoch auf einen *iudex pedaneus* im Kognitionsverfahren ab[7]; dafür spricht auch die schriftliche Fassung des Urteils[8].

Die Einsetzung eines *centurio* als *iudex datus* lässt sich aus dem Kontext gut erklären: Es handelt sich zwar um eine private Angelegenheit, aber die Parteien gehören (bzw. gehörten) dem Militär an. Der militärische Obere als Richter dürfte wegen der Erfahrung bei den Privilegien im Erbrecht und in den komplizierten familiären Verhältnissen von Vorteil gewesen sein (das war durchaus Usus in allen Provinzen). Allein der *praefectus castrorum* als Delegierender erweckt Reminiszenzen an ein *forum militare*; die Quelle ist jedoch ohne Parallele und nicht so klar, dass man daraus die These einer zivilen Sondergerichtsbarkeit ableiten könnte.

Anschließend führt Palme mehrere Belege an, die davon berichten, dass Militärs oder ehemalige Militärs in verschiedenen Ämtern der Rechtsprechung anzutreffen seien: Die vorgelegten Quellen belegen ohne Zweifel, dass aktiv dienende oder ausgediente Militärs (Offiziere) öfters in hohen Positionen der Rechtsprechung aufzufinden sind. Ich sehe darin jedoch allein das Zeugnis der hohen sozialen Stellung bzw. Schätzung dieser Schicht. Die bekleidete richterliche Funktion und die militärische Laufbahn des betroffenen stehen m. E. jedoch in einem lockeren, höchstens mittelbaren, daher juristisch kaum relevanten Zusammenhang.

Ein Drittel seines Vortrags widmet B. Palme der quasi-judiziellen Tätigkeit von Militärs. Er erwähnt, dass fünfzig Urkunden mit Petitionen an Offiziere überliefert sind, die Belege aus einer breiten Zeitspanne (vom 1. bis 5. Jh.) bieten. Näher werden von ihm vier Dokumente behandelt[9]. Er kommt zu dem Schluss, dass die Offiziere eine Art Anlaufstelle für Rechtsuchende bildeten, und sieht folgende Aufgaben belegt: rasche Hilfe in einem Rechtstreit zu erlangen, eine Untersuchung einzuleiten und Fakten behördlich festzustellen. Er stellt zu Recht fest, dass die Centurionen (nach diesen Dokumenten) „keine richterliche Funktion ausüben“, es gehe viel mehr um ein bloßes „polizeiliches Einschreiten“ oder um „prozessvorbereitende Maßnahmen“[10].

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[7] S. dazu etwa Kaser / Hackl, RZ (o. Anm. 3) 166 Anm. 24: „Ob wenigstens unter römischen Bürgern (z. B. eingewanderten Römern) nicht auch vor dem *praefectus Aegypti per formulam* prozessiert werden konnte, bleibt eine offene Frage, solange wir hierfür keine Belege besitzen.“ Auf ein bloßes Kognitionsverfahren stellt jedenfalls H.-A. Rupprecht, Kleine Einführung in die Papyruskunde, Darmstadt 1994, 144f. ab. Zum Text vgl. auch M. Humbert, Aspects de l’Empire romain, Paris 1964, 122f. und Seidl, Rechtsgeschichte (o. Anm. 3) 102.

[8] Kaser / Hackl RZ (o. Anm. 3) 495.

[9] P.Mich. III 175 (193); SB I 7469 (193); P.Rain.Cent. 91 (419) und P.Oxy. L 3581 (4.-5. Jh.).

[10] Auf die neuere Literatur verweist bereits B. Palme, s. etwa den Beitrag von M. Peachin, A Petition to a Centurion from the NYU Papyrus Collection and the Question of Informal Adjudication Performed by Soldiers (P. Sijp. 15), in: Miscellanea in Memory of P.J. Sijpesteijn, (AmStudPap), hg. von A.E. Hanson.

Es sei bemerkt, dass die Bezeichnung „Petition“ in der Papyrologie nach äußerlichen Merkmalen verliehen wird, die jedoch juristisch (je nach Inhalt) vielerlei bedeuten kann. Der Rechtshistoriker würde auch hier etwas schärfer differenzieren; man sollte vor allem zwischen den Klageschriften (im weiteren Sinne) im Straf- und Zivilprozess unterscheiden. Delikte (Diebstahl, Körperverletzung) gehören nach römischem Recht bekanntlich zum Zivilprozess[11].

Bei öffentlichen Straftaten haben die lokalen Beamten oft eine Voruntersuchung (Verhör) durchgeführt und den Täter verhaftet; ein gutes Beispiel liefert dafür etwa Marcian in D. 48,3,6 (2 de iudic. publ.):

> Divus Hadrianus Iulio Secundo ita rescripsit et alias rescriptum est non esse utique epistulis eorum credendum, qui quasi damnatos ad praesidem remiserint. idem de irenarchis praeceptum est, quia non omnes ex fide bona elogia scribere compertum est. (1) Sed et caput mandatorum exstat, quod divus Pius, cum provinciae Asiae praeerat, sub edicto proposuit, ut irenarchae, cum adprehenderint latrones, interrogent eos de sociis et receptatoribus et interrogationes litteris inclusas atque obsignatas ad cognitionem magistratus mittant. igitur qui cum elogio mittuntur, ex integro audiendi sunt, etsi per litteras missi fuerint vel etiam per irenarchas perducti. sic et divus Pius et alii principes rescripserunt, ut etiam de his, qui requirendi adnotati sunt, non quasi pro damnatis, sed quasi re integra quaeratur, si quis erit qui eum arguat. et ideo cum quis anakrisis faceret, iuberi oportet venire irenarchen et quod scripserit, exsequi: et si diligenter ac fideliter hoc fecerit, conlaudandum eum: si parum prudenter non exquisitis argumentis, simpliciter denotare irenarchen minus rettulisse: sed si quid maligne interrogasse aut non dicta rettulisse pro dictis eum compererit, ut vindicet in exemplum, ne quid et aliud postea tale facere moliatur.

Marcian berichtet von einem Edikt Hadrians, worin er als Statthalter der Provinz Asia angeordnet habe, dass die dingfest gemachten Räuber vom lokalen Friedenswarte ausführlich verhört werden sollen; die Protokolle sollen dann an den Gerichtsherrn weitergeleitet werden, der den Prozess führt. Es ist bekannt, dass die Militärs in Ägypten ähnliche Aufgaben wahrgenommen haben, wenn sie als lokale Polizeiorgane in Straftaten eingeschritten waren[12]. Aber auch im Zivilprozess standen Militärs als Verwaltungsorgane dem Statthalter bei (CJ 3,9,1):

> Res in iudicium deducta non videtur, si tantum postulatio simplex celebrata sit vel actionis species ante iudicium reo cognita. inter litem enim contestatam et editam actionem permultum interest. lis enim tunc videtur contestata, cum iudex per narrationem negotii causam audire coeperit.

Die Kaiser Septimius Severus und Caracalla haben im Jahre 202 an Valens ein Reskript erteilt. Es macht den Anfragenden auf die juristische Relevanz der Differenzierung zwischen verschiedenen Prozessschritten aufmerksam[13]. Uns

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[11] Vgl. dazu etwa M. Kaser / R. Knütel, Römisches Privatrecht, 17. Auflage, München 2003, 313ff.

[12] S. dazu bereits Palme, Spätrömische Militärgerichtsbarkeit (o. Anm. 1) 390ff.

[13] Kaser / Hackl, RZ (o. Anm. 3) 571 Anm. 7 macht darauf aufmerksam, dass die *postulatio* deshalb *simplex* heißt, weil sie das „einseitige, nicht kontradiktorische Verfahren“ vor der Ladung (im Libellprozess) betrifft. Diese Feststellung baut jedoch auf Zeugnisse aus dem

interessiert allein die Tatsache, dass die Überreichung der Klageschrift an eine lokale Amtsperson noch zur Prozesseinleitung und nicht zum eigentlichen Gerichtsverfahren gehörte. Wenn nur eine Petition überliefert ist, worin das Klagebegehren an einen Militärangehörigen adressiert ist, ist dies lediglich ein Indiz dafür, dass der Adressat in das Gerichtsverfahren involviert gewesen sein dürfte. Das ist jedoch keineswegs zwingend. Es muß also offen bleiben, wer die Ladung des Beklagten vorgenommen hat oder wer später in dem betroffenen Streitverfahren ein Urteil gesprochen hat.

Die von Palme vorgelegten vier Quellen könnte man nach streng juristischen Aspekten etwas abweichend bewerten: Zwei Papyri (P.Mich. III 175 und SB IV 7469) berichten von Gewalttaten, welche die Rechtsuchenden durch ein rasches polizeiliches Einschreiten geahndet haben wollten. Die in den zwei weiteren Urkunden angedeuteten Aufgaben würde ich jedoch weder polizeilich noch richterlich nennen. P.Rain.Cent. 91: Der Veteran Kyros überreicht Klageschriften an einen Tribunen und bittet, seine Gegnerin zum Erscheinen zu veranlassen und die Sache an einen zivilen Richter zu übertragen. P.Oxy. L 3581: Bitte einer Frau an einen Tribunen, ihren Gegner zu gestellen und seine Schulden einzutreiben.

Die Mitwirkung bei der Ladung und beim Weiterleiten prozessualer Schriftstücke gehören zum gewöhnlichen Aufgabenbereich von Militärs, was bereits Modestin beschreibt (D. 47,2,73; 7 resp.):

> Sempronia libellos composuit quasi datura centurioni, ut ad officium transmitterentur, sed non dedit: Lucius pro tribunali eos recitavit quasi officio traditos: non sunt inventi in officio neque centurioni traditi: quaero, quo crimini subiciatur, qui ausus est libellos de domo subtractos pro tribunali legere, qui non sint dati? Modestinus respondit, si clam subtraxit, furtum commissum.

Modestin entschied einen Fall, der offensichtlich aus einer Provinz stammte. Das juristische Problem liegt darin, ob das heimliche Entwenden und das prozessuale Bekanntgeben eines Schriftstücks den Tatbestand eines Delikts verwirklicht. Uns interessiert hier weniger Modestins bejahende Antwort. Viel wertvoller ist die Information, dass die *centuriones* selbstverständlich als behördliche Organe während des Prozesses mitgewirkt haben. Die prozessierende Sempronia (es handelt sich dabei sehr wahrscheinlich um einen Blankettnamen) wollte ihr Schriftstück durch den *centurio* dem (geografisch wohl fern amtierenden) Gericht zukommen lassen. Es liegt nahe, dass Sempronia an den *centurio* eine Petition hätte richten wollen, worin sie ihren Prozess und ihren Standpunkt erklärt hat. Wäre allein dieses Dokument auf uns gekommen, könnte es den Eindruck erwecken, dass der *centurio* als gerichtliche Instanz angegangen worden wäre.

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5. Jh. auf, während unsere Konstitution aus dem Jahre 202 stammt. Trotzdem scheint die Tatsache hier eine gewisse Relevanz zu haben, dass die nachklassische *litis contestatio* erst nach der Feststellung der Prozessvoraussetzungen eingetreten ist, wenn die Verhandlung zur Sache angefangen hat; vgl. dazu auch Kaser / Hackl, RZ (o. Anm. 3) 593.

Dazu kommt, dass beide Petenten zu einer schutzbedürftigen Gruppe gehört haben dürften: Der Veteran (aus dem Aspekt der lokalen militärischen Einheit) erwartet wegen seiner ehemaligen Zugehörigkeit zu Recht Hilfe, während die allein auftretende Petentin eine Witwe gewesen sein könnte[14].

Zusammenfassend ist Folgendes festzustellen: Die richterliche Funktion der Offiziere gilt im Schrifttum als umstritten. Die meisten Autoren stellen darauf ab, dass Beamte mit polizeilicher Funktion (Epistrategen, Strategen, *decuriones* und *centuriones*) „öfter um Abhilfe gegen geschehenes Unrecht angerufen" worden seien, ihr Einschreiten habe jedoch nur „einen provisorischen Charakter" gehabt – eine eigentliche Gerichtsbarkeit habe ihnen gefehlt[15] (so bereits Mitteis). Das Abinneus-Archiv schien jedoch darauf hinzudeuten, dass die Praxis andere Wege gegangen sei: Sogar Zivilisten untereinander hätten (im 4. Jh.) in fast allen Rechtsbereichen einen *iudex militaris* beansprucht; so etwa Pieler[16] (ähnlich früher auch Palme).

Die Prüfung der Sachverhalte spricht jedoch dafür, dass der denkbare Gegenstand der betroffenen Petitionen im Rahmen der in Juristentexten bezeugten normalen Tätigkeit von Militärs geblieben ist. Centurionen, die ein richterliches Amt durch ihre militärische Stellung bekleidet hätten (als richterliche Instanz), sehe ich in keiner der vorgelegten Quellen belegt.

Der Statthalter wurde nur dann angegangen, wenn ein regulärer Prozess angestrebt wurde. In alltäglichen Streitigkeiten, wo der soziale Friede nur vorübergehend gestört wurde, aber an sich kein Rechtsproblem vorlag, konnte man nur die Lokalbeamten um Hilfe bitten. Die Rechtsuchenden erwarteten eine unmittelbare, rasche polizeiliche oder friedensrichterliche Intervention gegen einen bekannten Gegner, wie das bereits P. Meyer (Jur. Pap. 281f.) festgestellt hat.

Eine zweite Gruppe bilden die Petitionen, die einen prozessvorbereitenden Schritt betreffen. Die lokalen Beamten hatten im Straf- und Zivilverfahren gewisse Voruntersuchungen, die Bekanntgabe der Klage oder die Zustellung der Ladung durchzuführen. Das bedeutete aber keine judizielle Tätigkeit, sondern bloß eine Hilfeleistung im Prozess vor dem Statthalter.

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[14] Zum Schutz hilfsbedürftiger Personen durch den Statthalter s. J.W. Krause, Witwen und Waisen im römischen Reich II. Wirtschaftliche und gesellschaftliche Stellung von Witwen, Stuttgart 1994.

[15] L. Mitteis / U. Wilcken, Grundzüge und Chrestomathie der Papyruskunde II, Leipzig-Berlin 1912, 28ff.

[16] Pieler, Gerichtsbarkeit (o. Anm. 6) 454f. und Palme, Spätrömische Militärgerichtsbarkeit (o. Anm. 1) 408.

FRITZ MITTHOF (WIEN)

FORENSISCHE MEDIZIN IM RÖMISCHEN UND SPÄTANTIKEN ÄGYPTEN*

I. Einleitung

Die griechischen Papyri aus dem römischen und spätantiken Ägypten liefern die klarsten Zeugnisse für die Existenz einer forensischen Medizin im Altertum. Bislang sind vierzig Urkunden aus der Zeit vom späten 1. bis ins frühe 6. Jh. n.Chr. bekannt, welche die Erstellung medizinischer Gutachten im Auftrag der Verwaltungs- bzw. Justizbehörden zum Gegenstand haben[1]. Die Texte handeln größtenteils von Verletzten, die Opfer eines Gewaltverbrechens oder Unfalls geworden sind; in manchen Fällen betreffen sie Verstorbene, deren Todesumstände den Behörden klärungsbedürftig erschienen, und gelegentlich sogar Erkrankte. Das älteste sicher datierte Dokument stammt aus dem Jahre 96 n.Chr. (Test. 1), das jüngste datiert auf 509 n.Chr. (Test. 40). Bislang ist dieses Material fast ausschließlich aus der medizinhistorischen Perspektive betrachtet worden[2]; hingegen sind die rechtsgeschichtlichen Fragen, die es aufwirft, weitgehend unbeachtet geblieben. Einzig im Zusammenhang mit der Erörterung der Frage nach der Bedeutung von Sachverständigengutachten als Beweismittel im Prozeßrecht der Kaiserzeit haben die Texte in der Fachliteratur Beachtung gefunden, wenngleich auch nur in oberflächlicher Weise[3]. Daneben hat es Bemühungen gegeben, bestimmte Einzelstücke einer juristischen Deutung zu unterwerfen, so besonders den bekannten Fall des tödlich verunglückten Sklavenjungen (Test. 11)[4].

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* Für abgekürzt zitierte Literatur s. das Verzeichnis am Ende des Beitrages. Alle Zeitangaben sind, sofern nicht anders vermerkt, nach Christus.

1 Eine chronologische Liste aller Testimonien ist unten in der Appendix I abgedruckt; die dort aufgeführten Texte werden im folgenden nach der in der ersten Spalte genannten fortlaufenden Nummer zitiert (Test. + Nr.).

2 Die wichtigsten Beiträge zu dieser Thematik sind in zeitlicher Reihenfolge: Sudhoff (1909) 239-253; Nanetti (1941); Boswinkel (1956); Pfeffer (1969) 39; Amundsen/Ferngren (1978); Kudlien (1979) 60f.; Roesch (1982); Manfredi (2004); Hirt Raj (2006) 110-119; Mitthof (2007).

3 So etwa bei Wenger (1925) 286 Anm. 34; ders. (1953) 836; Taubenschlag (1955) 518; Kaser/Hackl, (1996) 369 Anm. 71. W. Hellebrand hat zwar im ersten Teil seiner Studie zum Prozeßzeugnis im Recht der Papyri (1934) auf S. 107 für den zweiten Teil eine genauere Behandlung der Verwendung von Ärzten als Sachverständigen im römischen Ägypten in Aussicht gestellt, doch ist dieser Band leider niemals erschienen.

4 Vgl. zuletzt Heinen (2006) mit der älteren Literatur; s. unten Anm. 17.

Der vorliegende Beitrag verfolgt das Ziel, die Thematik weiter zu vertiefen. Zu diesem Zweck wird in vier Schritten vorgegangen. An erster Stelle werden die beiden Fragen behandelt, wie und zu welchem Zweck medizinische Gutachten im römischen Ägypten erstellt wurden. Es folgen Beobachtungen zum Gebrauch bzw. Nichtgebrauch solcher Gutachten. Am Ende des Beitrages stehen Überlegungen zu der Frage, ob die in den vorangehenden Abschnitten festgestellten Entwicklungen auf Ägypten beschränkt waren.

II. Die Erstellung medizinischer Gutachten

Die Erstellung eines medizinischen Gutachtens erfolgte in drei Schritten: Antragstellung, Beauftragung des Amtsdieners bzw. Arztes und Begutachtung[5]. Antragsteller war entweder der Geschädigte oder – sofern dieser unmündig oder auf Grund der erlittenen Verletzungen nicht mehr fähig war, seine Interessen selbst wahrzunehmen – eine Person aus dem engeren Lebensumfeld. Zumeist handelt es sich dabei um ein Familienmitglied (Ehegatte, Kind, Bruder oder Schwester), um den Dienstgeber oder – im Falle von Sklaven – um den Besitzer. Bis ins frühe 4. Jh. n.Chr. waren solche Anträge an das Büro des obersten Gaubeamten, den Strategen, gerichtet, später dann – nach Umwandlung der ägyptischen Gaue in *civitates* zu Beginn des 4. Jh. n.Chr. – an einen hohen Munizipalbeamten mit Zuständigkeit für das Polizei- und Rechtswesen[6].

Der Antrag (βιβλίδια) enthielt die Personalien des Antragstellers und eine Schilderung des Anlasses. Der Empfänger des Antrags erteilte einem subalternen Beamten den Auftrag (ἐπιστέλλειν/ἐπιτρέπειν), entweder allein oder gemeinsam mit einem Arzt die geschädigte Person aufzusuchen, sich durch Augenschein (ἐφορᾶν/ἐπιθεωρεῖν) einen Eindruck von deren Zustand (διάθεσις) zu verschaffen und hierüber in schriftlicher Form zu berichten (ἐγγράφως προσφωνεῖν). Vom 1. bis 4. Jh. n.Chr. begegnet in diesem Zusammenhang regelmäßig ein Amtsdiener (ὑπηρέτης)[7]; später werden dann auch andere Beamte wie etwa der δημόσιος ταβουλάριος und der ἀντισκρίβας in dieser Funktion genannt. Der Anweisung war eine Abschrift des Antrages beigefügt, damit der untersuchende Beamte und der Arzt über die Details informiert waren. Der *terminus technicus* für ein solches Gutachten lautete προσφώνησις.

Die medizinischen Gutachten sind keine Einzelerscheinung, sondern Teil einer allgemeinen Entwicklung, die in der Forschung bislang kaum angemessen gewürdigt worden ist. Im römischen und spätantiken Ägypten war das Einholen von Expertisen durch die Organe der Verwaltung und Rechtsprechung sehr verbreitet. In allen Rechts- oder Verwaltungsfragen, deren Klärung besondere Sachkenntnis erforderte,

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[5] Zum Procedere vgl. z. B. Test. 11 und 13.

[6] Besonders gut bezeugt sind in diesem Zusammenhang der Exactor und der Logistes (*curator civitatis*), daneben vereinzelt die Nyktostrategoi, der Prytanis und die *riparii*.

[7] Vgl. Strassi (1997) 46f.

wurden Fachleute um eine schriftliche Stellungnahme gebeten[8]. Diese Vergleichstexte zeigen große Ähnlichkeit zu den medizinischen Gutachten. Gute Beispiele für die enge formale Verwandtschaft und mitunter sogar wörtliche Übereinstimmung solcher Expertisen mit den medizinischen liefern P.Oxy. I 53 (Oxy., 316), der Bericht eines Zimmermanns über den Zustand eines Baumes, und P.Oxy. XXXVIII 2849 (Oxy., 296), der Antrag einer Frau auf Begutachtung eines verletzten Stieres.

III. Der Zweck medizinischer Gutachten

Medizinische Gutachten sind im römischen Ägypten in verschiedenen Kontexten anzutreffen und scheinen demzufolge auf den ersten Blick auch verschiedene Zwecke erfüllt zu haben. Nach Ansicht Ofelia Nanettis, der eine der ausführlichsten Studien zu dieser Urkundengruppe zu verdanken ist, lassen sich folgende Funktionen unterscheiden: 1) Beweismittel für einen Straf- oder Zivilprozeß; 2) Totenschein; 3) Attest[9].

Allerdings ist nur die erste dieser drei Gattungen in den Papyri eindeutig und zweifelsfrei zu fassen. In solchen Anträgen, in denen explizit mitgeteilt wird, für welchen Zweck das Gutachten benötigt wurde, ist zumeist von der Wahrung des Anspruchs der geschädigten Partei auf rechtliche Genugtuung bzw. Vergeltung (ἐκδικία) die Rede[10]. Bisweilen wird die Behörde auch gebeten, das Gutachten bis zum Prozeßtermin in amtliche Verwahrung (ἐν καταχωρισμῷ) zu nehmen[11]. In manchen Texten wird dieser Prozeß von der geschädigten Partei sofort angestrebt, in anderen nur für den Fall angekündigt, daß sich gravierende Konsequenzen aus dem Angriff bzw. Unfall ergeben sollten (wenn nämlich das Opfer seinen Verletzungen erliegt oder – sofern es sich um eine Schwangere handelt – durch Fehlgeburt sein Kind verliert). Einen direkten Beleg für die Verwendung eines medizinischen Gutachtens in einem Prozeß bietet Test. 15, das Fragment einer Verhandlung vor dem Epistrategen betreffs eines Erbschaftsstreites. Vor diesem Hintergrund besteht kein Zweifel, daß die medizinischen Gutachten in Zivil- und Strafprozessen als Beweismittel dienten.

Für die Erfolgsaussichten einer Klage wegen Körperverletzung war es sicherlich von Bedeutung, daß das medizinische Gutachten möglichst rasch erstellt wurde.

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[8] Das damals bekannte Material ist bei Kupiszewski (1952) zusammengestellt; dort erscheinen außer Ärzten auch Architekten, Landvermesser und Handwerker.

[9] Nanetti (1941) 313f. An derselben Stelle wird auch noch eine vierte Kategorie angeführt, und zwar die Bescheinigung über eine ärztliche Visite und Behandlung; hierfür kann ich allerdings in der Dokumentation keinen Beleg finden.

[10] Man beachte etwa Test. 19 und 28. Nach Bagnall (1989) gehört es zu den wesentlichen Merkmalen der Anzeigen von Straftaten im römischen Ägypten, daß diese nicht so sehr auf die Bestrafung des Täters, sondern eher auf die Entschädigung des Opfers abzielen.

[11] Test. 14. Die Bitte um amtliche Verwahrung begegnet nicht nur bei Anzeigen von Körperverletzung, sondern auch bei Eigentumsdelikten wie Diebstahl, Sachbeschädigung, Brandstiftung etc.

Soweit genaue Zeitangaben erhalten sind, ist zu erkennen, daß zwischen dem Schadensfall und der behördlichen Visite für gewöhnlich kaum mehr als ein bis zwei Tage verstrichen. Bisweilen hat man es offenbar sogar unterlassen, eine medizinische Erstversorgung des Opfers vorzunehmen, bevor nicht die amtliche Untersuchung erfolgt war (Test. 13). Besonders deutlich wird das Problem der Fristüberschreitung in Test. 2: Die Besitzerin einer verunglückten Sklavin hatte zunächst keine Anzeige gegen den Unfallverursacher erstattet, weil das Strategenamt damals nicht besetzt gewesen sei, wie sie behauptet, und weil sie überdies der Meinung gewesen sei, daß die Verletzungen rasch verheilen würden. Mehrere Wochen (genauer 12 bis 42 Tage) später haben sich die Verletzungen jedoch als lebensgefährlich entpuppt, und die Petentin bittet nun den Strategen flehentlich um Hilfe. Der übliche Verfahrensweg stand ihr zu diesem Zeitpunkt nicht mehr offen, und eine Klage gegen den Unfallverursacher hatte offenbar nur noch dann Aussicht auf Erfolg, wenn es ihr gelang, besondere Umstände geltend zu machen. Aus all dem dürfen wir schließen, daß für die Beantragung eines medizinischen Gutachtens eine bestimmte Frist bestand.

Ebenfalls gut bezeugt ist die amtliche Untersuchung von Todesfällen. Eine erste Gruppe bilden die Anzeigen von (mutmaßlichen) Tötungsdelikten; diese Texte sind der soeben besprochenen Gruppe der Beweismittel für Strafprozesse zuzuordnen[12]. Daneben wurden den Behörden aber auch Todesfälle angezeigt, bei denen kein Fremdverschulden vorlag oder zumindest ein solches nicht angenommen wurde, ebenso wie Leichenfunde, bei denen die Todesart nicht feststand. Im einzelnen sind uns folgende Fälle überliefert: Test. 8 handelt von einem Mann namens Hierax, der im Haus eines gewissen Epagathos tot an einem Strick hängend aufgefunden worden war. Es erscheint kein Antragsteller. In Test. 9 wird der Tod eines Gärtners gemeldet, der beim Bestäuben von Dattelpalmen abgestürzt und verstorben war. Die Anzeige stammt vom Besitzer des Palmenhains, der zugleich der Arbeitgeber des Gärtners war und den Leichnam auch selbst gefunden hatte. Er hebt hervor, daß sich zum Zeitpunkt des Unfalls keine andere Person am Unfallort aufgehalten hatte, wohl um Fremdverschulden auszuschließen. Test. 11 handelt von einem achtjährigen Sklavenjungen, der während eines Dorffestes bei dem Versuch, vom Dach eines Hauses heimlich eine Gruppe von Tänzerinnen zu beobachten, herabgestürzt war und sich tödliche Verletzungen zugezogen hatte. Der Antrag wurde von einem nahen männlichen Verwandten (γαμβρός) des Besitzers des Jungen gestellt. In Test. 25 schließlich geht es um einen toten Schäfer. Der Verfasser der Anzeige hatte die Leiche offenbar gefunden, wußte aber nicht, wie der Mann zu Tode gekommen war.

Welchen Zweck medizinische Gutachten in solchen Fällen hatten, ist nicht leicht nachzuvollziehen. In zwei Texten bemerken die Antragsteller, daß ohne ein solches Dokument bzw. das entsprechende amtliche Verfahren keine Bestattung

[12] Test. 36 und 39.

(κηδεία) vorgenommen werden könne[13]. Man könnte geneigt sein, aus dieser Bemerkung zu folgern, daß im römischen Ägypten eine allgemeine Regel bestand, wonach die Bestattung eines Verstorbenen ohne Freigabe des Leichnams durch die Behörden nicht zulässig war, mithin sämtliche Todesfälle amtlich überprüft werden mußten.

Eine solche Schlußfolgerung verträgt sich allerdings schlecht mit der übrigen papyrologischen Evidenz. Besonders die Existenz der in großer Zahl auf uns gekommenen Todesanzeigen, in welchen die Gau- und Dorfbehörden von Angehörigen des Verstorbenen über den Todesfall unterrichtet und um die Eintragung seines Namens in das entsprechende Verzeichnis (τετελευτηκότων τάξις) gebeten werden[14], wäre kaum verständlich, wenn sämtliche Todesfälle amtlich untersucht worden sein sollten. Aus diesen Todesanzeigen ist nämlich nichts über eine derartige generelle Untersuchungspflicht zu erfahren[15]. Hätte es ein solches Verfahren gegeben, so hätte man in den Todesanzeigen wohl auf dieses Bezug genommen, ja eigentlich wären die Todesanzeigen dann sogar überflüssig gewesen, da die Gaubehörden bereits über entsprechende Unterlagen verfügt hätten.

Alternativ ließe sich annehmen, daß im römischen Ägypten, wenn auch nicht in allen, so doch zumindest in gewaltsamen oder suspekten Todesfällen die Behörden von Amts wegen die Todesumstände untersuchten. Zur Stützung einer solchen These könnte man besonders auf jene Fälle aus unserer Urkundengruppe verweisen, in denen kein Antragsteller für die Erstellung des Gutachtens genannt wird (Test. 8; vgl. auch Test. 6). Hiergegen ist allerdings einzuwenden, daß es höchst fraglich ist, ob es im römischen Ägypten überhaupt eine öffentliche Strafverfolgung von Tötungsdelikten gegeben hat[16]. Zudem sind die Gutachten weder im Falle des herabgestürzten Sklavenjungen (Test. 11) noch des erhängten Hierax (Test. 8) präzise genug um zu beurteilen, ob Fremdverschulden sicher auszuschließen war; denn der Junge könnte ja auch vom Dach gestoßen und Hierax von anderen erhängt worden sein, womit es sich um Mord oder – zumindest im Falle des Sklavenjungen – eventuell auch um fahrlässige Tötung gehandelt hätte[17]. Eine kriminalistische

[13] Test. 9 und 11.

[14] Zum Verfahren vgl. Kruse (2002) I 139-168.

[15] Vgl. Heinen (2006) 196-198.

[16] Rupprecht (1990) bejaht zwar die Existenz einer öffentlichen Strafverfolgung von Tötungsdelikten im ptolemäischen Ägypten, doch ist die von ihm angeführte Evidenz m. E. nicht eindeutig. Für das römische Ägypten liegen, soweit ich sehe, überhaupt keine Zeugnisse vor, die eine solche Annahme stützen würden.

[17] Als möglicher Hintergrund für die amtliche Prüfung der Leiche des Sklavenjungen in Test. 11 wurden in der Forschung mehrere Motive erwogen: zum einen – von staatlicher Seite – die Wahrung der Interessen des Fiskus, da der Sklavenjunge ab dem 14. Lebensjahr kopfsteuerpflichtig geworden wäre, zum anderen – von seiten des Besitzers – entweder Schadensersatzansprüche gegen einen eventuellen Verursacher des Unfalls oder die Angst vor Strafverfolgung wegen eines Verstoßes gegen die gesetzlichen Bestimmungen zum Schutze von Sklaven vor Gewaltakten ihres Herrn; vgl.

Spurensicherung wurde von den Gutachtern offenkundig nicht erwartet. Der Grund hierfür ist wohl darin zu erblicken, daß die Behörden solche Ermittlungen nur bei Vorliegen einer entsprechenden Anzeige angestellt hätten.

Es scheint daher ratsam, nach einer anderen Erklärung für die Existenz der oben angeführten Gruppe von Anzeigen bzw. Gutachten über Todesfälle ohne Fremdverschulden zu suchen. Den Schlüssel zu ihrem Verständnis liefert meines Erachtens das bereits erwähnte Test. 25. Der Verfasser dieser Anzeige eines Leichenfundes möchte sich, wie er betont, rechtlich absichern (ἀσφαλιζόμενος). Wer den Behörden einen Unfalltod oder Leichenfund meldete, wollte demnach in erster Linie einen möglichen Verdacht gegen sich selbst oder andere ihm nahestehende Personen abwenden und sich für den Fall einer gerichtlichen Verfolgung des Todesfalls ein amtliches Dokument beschaffen, das ihn entlastete.

Als letzte Gruppe sind die von Nanetti als Atteste eingestuften Texte zu erwähnen, also Gutachten, die dem Antragsteller bestätigten, daß er auf Grund einer Erkrankung das Bett nicht verlassen konnte. Zwei Urkunden lassen sich in diesem Sinn deuten, nämlich Test. 22 und 38. In beiden Fällen bleibt unklar, wozu die Erkrankten das Attest benötigten; es steht zu vermuten, daß sie sich gegen eventuelle rechtliche Konsequenzen absichern wollte, die sich aus ihrer krankheitsbedingten Verhinderung ergeben konnten.

Aus den vorangehenden Betrachtungen folgt, daß medizinische Gutachten niemals von Amts wegen, sondern immer auf individuelle Initiative eingeholt wurden. Ihre wichtigste Funktion bestand offenbar darin, dem Antragsteller ein amtliches Dokument zur Verfügung zu stellen, das ihm entweder die Durchsetzung seiner Rechtsansprüche erlaubte oder ihn vor unberechtigten Forderungen anderer Personen im Rahmen eines Zivil- oder Strafverfahrens schützte. Hingegen haben die Verwaltungs- und Justizbehörden, wie es scheint, das Instrument nicht zur Aufklärung von gewaltsamen oder suspekten Todesfällen und schon gar nicht zur Erfassung aller Todesfälle eingesetzt. Lediglich im Falle eines Übergriffs auf Amtspersonen, d. h. nur dann, wenn der Staat betroffene Partei war, haben die Behörden von sich aus ein Gutachten angefordert (Test. 36). Aus diesen Feststellungen folgt, daß wir zwei der drei Definitionen Nanettis, nämlich „Totenschein“ im Sinne einer Urkunde, die Tod und Todesursache festhält, und „Attest“ im Sinne einer Bescheinigung über den Gesundheitszustand, nur dann gelten lassen dürfen, wenn wir hinzufügen, daß es sich um Dokumente handelte, die im Unterschied zu modernen Verhältnissen nicht auf amtliche, sondern auf private

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Straus (1988) 877; Heinen (2006) 199-202. Allerdings ist bei dieser Diskussion der merkwürdige Umstand unberücksichtigt geblieben, daß der Vorfall, der sich beim Haus des Besitzers des Sklavenjungen ereignet hatte, nicht von diesem selbst, sondern von einem Verwandten zur Anzeige gebracht wurde. Ich sehe hierin ein wesentliches Indiz, daß die Anzeige als rein private Initiative aufzufassen ist und die Begutachtung von den betroffenen Personen zwar als ein nützliches, aber nicht als ein notwendiges und schon gar nicht als ein gesetzlich vorgeschriebenes Procedere betrachtet wurde.

Initiative erstellt wurden, und zwar nicht für administrative, sondern für rechtliche bzw. judizielle Zwecke.

IV. Gebrauch und Nichtgebrauch medizinischer Gutachten

In der bisherigen Forschungsliteratur zu den medizinischen Gutachten aus dem römischen und spätantiken Ägypten ist ein auffälliges Phänomen bislang völlig unbeachtet geblieben. Eine Durchsicht aller Anzeigen von Körperverletzung aus dem 1. bis 6. Jh. n.Chr. führt nämlich zu dem überraschenden Ergebnis, daß nur in einem kleinen Teil dieser Dokumente um die Erstellung eines medizinischen Gutachtens gebeten wird. In den meisten Fällen begnügt sich der Aussteller mit der Bitte um eine gerichtliche Verfolgung des Angriffs entweder durch den Adressaten selbst oder aber durch eine höhere Instanz, an welche dieser das Verfahren weiterleiten soll[18]. Von einer schriftlichen Dokumentierung der erlittenen Verletzungen, selbst wenn diese oftmals lebensgefährlich waren, ist hier nicht die Rede. Derzeit sind aus dem 1. bis 6. Jh. n.Chr. knapp fünfzig Anzeigen über Körperverletzung bekannt, deren Petitum erhalten ist[19]. Von diesen enthält nur ein halbes Dutzend die Bitte um eine Untersuchung des Opfers durch eine Amtsperson bzw. Arzt. Wie soll man diesen Befund erklären?

Zunächst ist darauf hinzuweisen, daß in der Zusammensetzung der Dokumentation regionale Schwerpunkte bestehen. Der Großteil der Anzeigen, die die Erstellung eines medizinischen Gutachtens zum Gegenstand haben, stammt aus dem Oxyrhynchites, einem der wichtigsten Fundplätze für Papyri. Hingegen bietet die ebenfalls überaus reiche papyrologische Evidenz aus dem Arsinoites bislang keinen einzigen direkten Beleg für ein solches Procedere. Aus dieser Tatsache ließe sich folgern, daß das Verfahren im Arsinoites nicht praktiziert wurde, doch liegen andere Texte vor, die seine Existenz eindeutig belegen und daher eine solche Annahme unmöglich machen[20]. Eine andere Erklärungsmöglichkeit stützt sich auf die Unterschiede, die hinsichtlich der Fundsituation zwischen den beiden Gauen bestehen. Bekanntlich wurde das Material aus dem Oxyrhynchites nahe der Gaumetropole gefunden und dokumentiert vornehmlich den Schriftverkehr der Stadtbevölkerung, während das Material aus dem (römischen) Arsinoites zu einem großen Teil aus den Dörfern in den Randzonen des Gaues stammt. Die Entfernung zur Metropole liefert, wie mir scheint, ein plausibles Eklärungsmuster, in welchen Fällen die Gau- bzw. Munizipalbehörden um die Entsendung von Amtspersonal und Ärzten gebeten wurden und in welchen nicht. Offenbar war es für die Stadtbevölkerung leicht und daher auch allgemein üblich, sich bei der Anzeige von Gewaltdelikten oder Unfällen der Dienste der Gau- bzw. Munizipalverwaltung und der Amtsärzte zu bedienen, während diese Vorgehensweise für die Landbevölkerung nicht in Frage kam, da solche Personen in den Dörfern nicht greifbar waren und der

[18] Beispiele sind etwa P.Oxy. XXXIII 2672 (Oxy., 218) und P.Princ. II 29 (Ars., 258).
[19] S. unten Appendix II.
[20] Test. 3 und 18.

zeitliche Aufwand, sie einzuschalten, wegen der Distanz zur Metropole zu groß gewesen wäre.

V. Sonderfall Ägypten[21]?

Für die medizinischen Gutachten aus dem römischen Ägypten sind bislang keine Vorläufer bekannt. Die Papyri aus ptolemäischer Zeit bieten uns nicht den geringsten Hinweis für ein solches Verfahren. In den Anzeigen über Körperverletzung und Tötungsdelikte aus dieser Periode wird zwar regelmäßig die Verhaftung der Täter gefordert, niemals aber die Entsendung von Gutachtern[22]. Aus den griechischen Poleis liegen ebenfalls keine Quellen vor, die eine institutionalisierte Form der Verwendung medizinischer Gutachten in Prozessen oder Verwaltungsverfahren bezeugen[23]. Aus dem völligen Fehlen von Testimonien für die vorrömische Zeit können wir schließen, daß diese Form der Beweismittelerhebung im Auftrag der Verwaltungs- oder Justizbehörden eine Folge der römischen Herrschaft darstellte. Hierzu paßt, daß die Verwendung von Gutachten durch Behörden und Justizorgane, wie bereits oben bemerkt, überhaupt eine Neuerung der römischen Zeit darzustellen scheint.

Diese Entwicklung fällt zusammen mit einer anderen Innovation der römischen Herrschaft, nämlich der Einführung von öffentlichen Ärzten (δημόσιοι ἰατροί) in den ägyptischen Metropolen, einer Maßnahme, die als eine von vielen Etappen in dem von Rom bewirkten Umformungsprozeß dieser Städte von Gauzentren zu *civitates* gelten darf. Der früheste sichere Papyrusbeleg für die Bezeichnung δημόσιος ἰατρός stammt aus dem Jahre 173 n.Chr.[24]. Der Titel impliziert, daß die betreffenden Ärzte in einem bestimmten Rechtsverhältnis zu den Kommunen standen, dessen genauer Charakter uns allerdings unbekannt bleibt. Wir dürfen vermuten, daß es sich im Prinzip um dieselbe Institution handelt, die auch in anderen Regionen des Reiches nachweisbar ist. Besonders zu erwähnen sind hier die ἀρχιατροί, die Antoninus Pius per Dekret in den kleinasiatischen Städten installiert

[21] Zu diesem Abschnitt s. besonders die Ausführungen bei Amundsen/Ferngren (1979) 53-56.

[22] Man beachte etwa die beiden Anzeigen wegen Verletzung einer Schwangeren P.Tebt. III 800 = CPapJud I 133 (Ars., 153 oder 142 v.Chr. [vgl. BL IV 99]) und P.Ryl. II 68 (Herm., 89 v.Chr.), die Anzeige wegen der Verletzung eines Badegastes P.Tebt. III 798 = CPtolSklav II 246 (Ars., 2. Jh. v.Chr.) sowie die Mordanzeige P.Köln VI 272 (Ars. ?, 2. Hälfte 3. Jh. v.Chr.). Ein Verzeichnis solcher Dokumente bieten M. Hombert/Cl. Préaux, Recherches sur le *prosangelma* à l'époque ptolémaïque, Cd'É 17 (1942) 259-286, bes. S. 274-285 mit dem zugehörigen Addendum bei M. Parca, *Prosangelmata* ptolémaïques: une mise à jour, Cd'É 60 (1985) 240-247; man beachte auch A. Papathomas, P.Heid. VII 394, Einl. S. 49f.; D. Kaltsas, P.Heid. VIII 421, Einl. S. 319f.; Ch. Armoni, P.Heid. IX 423, Einl. S. 29f.

[23] Die spärlichen literarischen Zeugnisse sind bei Irmer (1967) und Amundsen/Ferngren (1977) behandelt. Vgl. auch Stamatu (2005).

[24] Test. 8. Zum problematischen P.Oxy. I 40, 1-10 (ca. 143 n.Chr.), der offenbar keinen Beleg für einen δημόσιος ἰατρός darstellt, s. zuletzt Hirt Raj (2006) 105, Anm. 17.

hat. Diese Maßnahme fällt ungefähr in dieselbe Zeit, als die öffentlichen Ärzte auch in Ägypten eingeführt wurden[25]. Zwar hat Louis Cohn-Haft große Skepsis gegenüber einer Gleichsetzung der ägyptischen Amtsärzte mit den Archiatroi gezeigt, doch dürften die von ihm festgestellten Differenzen, wie er selbst bereits andeutet, auf der unterschiedlichen Quellenlage bzw. den unterschiedlichen Blickwinkeln der Quellen beruhen: dort Inschriften oder Gesetzestexte, hier Papyri; dort öffentliche Selbstdarstellung und standesrechtliche Bestimmungen, hier praktische Tätigkeit[26]. Daß die Einbindung der öffentlichen Ärzte anderer Provinzen in administrative und judizielle Vorgänge für uns nicht greifbar ist, dürfte also mit dem Fehlen aussagekräftiger Schriftquellen aus den betreffenden Reichsteilen zu erklären sein.

Im übrigen gibt es direkte Verbindungslinien zwischen den Maßnahmen des Antoninus Pius und den Verhältnissen in Ägypten. So bezeichneten sich die öffentlichen Ärzte von Hermupolis als δημόσιοι ἰατροὶ τῶν ἐν τῷ ὡρισμένῳ ἀριθμῷ τῶν δοκίμων. Diese Formel zeigt, daß die betreffenden Ärzte einem *numerus clausus* unterworfen waren. Nun hat auch Antoninus Pius in seinem bereits erwähnten Dekret einen solchen *numerus clausus*, der sich nach der Einwohnerzahl richtete, für die kleinasiatischen Städte verfügt[27]. Hieraus ergibt sich wiederum die Vermutung, daß die ägyptischen Amtsärzte, gleich ihren Kollegen aus anderen Reichsteilen, ebenfalls nach *probitas morum* und *peritia artis* ausgewählt wurden und daß sie für ihre Dienste ein *salarium* von der Stadt bezogen, daneben aber auch private Honorare einstrichen[28].

Vor diesem Hintergrund halte ich es für wenig wahrscheinlich, daß das Aufkommen der medizinischen Begutachtung eine Sonderentwicklung der Provinz Ägypten darstellt; vielmehr dürfte das Phänomen, ähnlich der Schaffung öffentlicher Ärzte, als Teil einer allgemeinen Entwicklung einzustufen sein, durch welche der Staat die Ärzteschaft mehr und mehr in seinen Dienst zu stellen und für seine Bedürfnisse zu nutzen suchte.

VI. Resümee

Medizinische Gutachten waren im römischen Ägypten ein Hilfsmittel entweder für Opfer von Gewaltdelikten und Unfällen, ihre Forderungen gegenüber dem Angreifer oder Verursacher nach Wiedergutmachung zu unterstützen, oder aber für Personen, die von solchen Vorfällen indirekt betroffen waren, sich vor rechtlichen Nachteilen zu schützen. Ihre Verwendung war freiwillig; sie wurden besonders dort angefordert, wo Vertreter der Behörden und Ärzte rasch erreichbar waren, nämlich in den Städten. Primäre Triebkraft bei der Entwicklung dieses Beweismittels war das

[25] Zu öffentlichen Ärzten in anderen Teilen des Römischen Reiches s. zuletzt Samama (2003) 38-45.

[26] Cohn-Haft (1956) 69-71.

[27] Vgl. M. Hirt (Raj), P.Louvre II 116, 3-4 Komm.

[28] Vgl. Below (1953) 41-44; Hirt Raj (2006) 105-107.

Streben Roms, den Provinzialen ein größeren Rechtsschutz zu bieten. Daneben mag man auch gehofft haben, daß das Instrument den Gerichtsbehörden eine effizientere Abwicklung der Prozesse ermöglichen würde.

Hingegen hat Rom es unterlassen, die medizinische Begutachtung auch auf andere Bereiche der Verwaltung und Rechtspflege auszuweiten, und zwar selbst dort, wo eine solche Verwendung nahegelegen hätte. Bereits Amundsen und Ferngren haben in ihrer Studie zur forensischen Medizin im römischen Recht auf den seltsamen Umstand aufmerksam gemacht, daß bei bestimmten Kategorien von Verwaltungsverfahren oder Rechtsstreitigkeiten die Heranziehung von Ärzten als Gutachtern zwar zu erwarten wäre, aber nicht nachzuweisen ist, so etwa bei der Freistellung von der liturgischen oder militärischen Dienstpflicht, bei Entmündigung wegen Geisteskrankheit, bei körperlichen Mängeln von Sklaven etc.[29]. Diese Beobachtung wird durch die Papyri bestätigt. So ist etwa, um nur ein Beispiel zu nennen, im Rahmen der Prüfung der Idoneität von Kandidaten für öffentliche Liturgien und deren eventuelle Entschuldigung aus Gesundheitsgründen niemals von der Beiziehung eines Arztes die Rede. Offenbar reichte hier der Augenschein des untersuchenden Beamten bzw. Richters.

Der Gedanke einer institutionalisierten forensischen Medizin als eines festen Bestandteils des Verwaltungs- und Justizapparates war somit im römischen Kaiserreich zwar bereits im Kern vorhanden, jedoch ist seine Verwirklichung im Ansatz steckengeblieben.

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[29] Amundsen/Ferngren (1979) 40-44.

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APPENDIX I

Testimonien für die amtliche bzw. ärztliche Begutachtung von Gewalt- bzw. Unfallopfern, Leichen und Erkrankten aus dem römischen und spätantiken Ägypten (1.-6. Jh. n.Chr.)[30]

Nr.	Edition	Ort	Datum	Inhalt
1**	P.Oslo III 95 = CPapHengstl 37	Oxy.	96	Ärztliches Gutachten über eine verletzte Sklavin, erstellt im Auftrag des Strategen; Auftrag übermittelt durch einen Hyperetes
2	P.Oxy. L 3555[31]	Oxy.	1./2. Jh.	Bittschrift an den Strategen betreffs des Unfalls eines Sklavenmädchens
3**	BGU III 647[32]	Ars.	130	Ärztliches Gutachten über einen Verletzten, erstellt im Auftrag des Strategen; Auftrag übermittelt durch einen Hyperetes
4**	P.Oxy. XVII 2111, 32-33	unbek.	ca. 135	Prozeßprotokoll mit Erwähnung eines Hyperetes und eines Arztes, vermutlich im Zusammenhang mit einem Gutachten
5**	P.Gen. II 103	Ars.	147	Petition in einer Vormundschaftssache mit Erwähnung einer *inspectio ventris* durch eine Hebamme
6	P.Oxy. III 476[33]	Oxy.	ca. 159-161	Gutachten von Entaphiastai über eine Leiche, erstellt im Auftrag des Strategen; Auftrag übermittelt durch einen Hyperetes
7**	P.Oxy. XXXI 2563, 17-30	Oxy.	ca. 170	Petition an den Epistrategen mit Erwähnung eines amtsärztlichen Gutachtens über einen Verletzten, erstellt im Auftrag des Strategen und im Beisein eines Hyperetes

[30] Die Zeugnisse für die Begutachtung von Gewalt- oder Unfallopfern machen den Großteil der folgenden Texte aus. Von der Begutachtung von Leichen handeln Test. 6, 8, 11, 25, 36 und 39, von Erkrankten Test. 22 und 38. Aufgenommen wurde außerdem auch die amtliche Bestätigung über das Vorliegen einer Schwangerschaft (Test. 5). Aus manchen Texten ist nicht zu ersehen, was Gegenstand der Begutachtung war. Jene Fälle, in denen neben der untersuchenden Amtsperson auch ein Arzt (bzw. Hebamme) hinzugezogen wird, sind mit Asterisk gekennzeichnet, jene Fälle, in welchen diese(r) nicht als „öffentlich" (δημόσιος) bezeichnet wird, mit zwei Asterisken. Eine ähnliche Liste hat Hirt Raj (2006), nach S. 316 (Tableau III) erstellt. Dort wird auch die Unfallanzeige P.Princ. II 29 genannt, in der allerdings nicht von einem amtlichen bzw. ärztlichen Gutachten die Rede ist, weshalb dieser Text im vorliegenden Beitrag in Appendix II erfaßt ist; hingegen fehlen bei Hirt Raj die Test. 2, 9, 25, 37 und 39.

[31] Die Petentin berichtet, daß sie keine Unfallanzeige beim Strategen eingereicht hat; der Text ist also ein indirektes Zeugnis für unsere Thematik.

[32] Mit BL I 439.

[33] Zur Datierung vgl. P.Oxy. LX 4060, Komm. zu Z. 40, zur Lesung Korr. Tyche 541, Tyche 21 (2006) 201.

8*	P.Oxy. I 51[34]	Oxy.	173	Amtsärztliches Gutachten über eine Leiche, erstellt im Auftrag des Strategen und im Beisein eines Hyperetes
9	CPGr II App. 1[35]	Oxy.	178	Anzeige eines Leichenfundes an den Strategen
10*	PSI V 455	Oxy. (?)	178	Amtsärztliches Gutachten über einen Verletzten, erstellt im Auftrag des Strategen (?) und im Beisein eines Hyperetes
11*	P.Oxy. III 475 = W.Chr. 494[36]	Oxy.	182	Antrag an Strategen auf Begutachtung einer Leiche durch Hyperetes und Auftrag des Strategen an den Hyperetes zur Erstellung des Gutachtens unter Beiziehung eines Amtsarztes
12*	P.Flor. I 59[37]	unbek.	225, 241 oder 279	Antrag an Strategen (?) auf Begutachtung eines Verletzten durch Hyperetes und Amtsarzt
13*	P.Oxy. LVIII 3926	This	246	Antrag an Strategen auf Begutachtung zweier Verletzter durch Hyperetes und Auftrag des Strategen an den Hyperetes zur Erstellung des Gutachtens unter Beiziehung eines Amtsarztes
14*	P.Oxy. XII 1556	Oxy.	247	Antrag an Strategen (?) auf Begutachtung eines Verletzten durch Hyperetes und Amtsarzt
15*	P.Oxy. XII 1502 Recto, 5	Oxy.	ca. 260/261	Prozeßprotokoll mit Erwähnung eines amtsärzlichen Gutachtens
16*	P.Oslo III 96[38]	Oxy.	272	Amtsärztliches (?) Gutachten über einen Verletzten
17*	P.Oxy. XLV 3245, Kol. I	Oxy.	297	Amtsärztliches Gutachten über einen Verletzten im Auftrag des Prytanis; Auftrag übermittelt durch einen Hyperetes

[34] Mit BL IX 177.

[35] *Ed. pr.* I. A. Sparks, A report of accidental death, BASP 8 (1971) 7-10; vgl. Drexhage (1986) 23. Der Petent bitte, es möge das übliche Verfahren zur Anwendung kommen (Z. 18-19: ἀξι[ὼν] τὰ [ἀκόλο]υ̣θα γενέσθ[αι), womit er die amtliche Inspektion der Leiche meinen dürfte.

[36] Nd. Pap. Lup. 11 (2002) 173-175; zur Lesung vgl. K.A. Worp, ZPE 133 (2000) 190.

[37] Mit BL I 143f. & III 156. Die Urkunde stammt aus dem Phaophi eines 5. Regierungsjahres. Die Reste des Kaisernamens in Z. 16-17 lassen sich nicht nur auf Severus Alexander oder Gordian III. (dann 28. Sept.-27. Okt. 225 oder 241) beziehen, wie der Herausgeber bemerkt, sondern auch auf Probus: Μά̣[ρκου Αὐρηλίου Πρόβου Εὐσε]|βοῦς Εὐτυχοῦς Σεβαστοῦ κτλ. (dann 29. Sept.-28. Okt. 279).

[38] Erhalten ist nur ein kleines Fragment vom Ende des Dokuments, so daß unklar bleibt, wer der Aussteller ist und wer es in Auftrag gegeben hat.

18	P.Mert. II 89	Ars.	300	Gutachten eines Hyperetes über einen Verletzten im Auftrag des Strategen
19*	P.Oxy. LXI 4122	Oxy.	305	Antrag an Logistes auf Begutachtung einer verletzten Frau durch Hyperetes und Amtsarzt
20*	P.Oxy. LIV 3729	Oxy.	307	Amtsärztliches Gutachten über einen Verletzten, erstellt im Auftrag des Logistes; keine Erwähnung eines Hyperetes
21*	BGU III 928[39]	Herakl.	307 oder 311	Amtsärztliches Gutachten über einen Verletzten, erstellt im Auftrag des Logistes; Auftrag übermittelt durch einen Hyperetes (?)
22*	P.Oxy. VI 896, Kol. II[40]	Oxy.	316	Amtsärztliches Gutachten über einen erkrankten *officialis* im Auftrag des Logistes; keine Erwähnung eines Hyperetes
23*	P.Oxy. LXIV 4441 (= P.Oxy. VI 983 = SB III 6003), Kol. I	Oxy.	316	Amtsärztliches Gutachten über einen Verletzten im Auftrag des Logistes; keine Erwähnung eines Hyperetes
24*	P.Oxy. LXIV 4441 (= P.Oxy. VI 983 = SB III 6003), Kol. II	Oxy.	316	Amtsärztliches Gutachten über einen Verletzten im Auftrag des Logistes; keine Erwähnung eines Hyperetes
25	P.Sakaon 50 = P.Thead. 57[41]	Ars.	318	Anzeige eines Leichenfundes; Adressat unbekannt
26*	CPR XVII A 23	Herm.	322	Amtsärztliches Gutachten über zwei Verletzte im Auftrag des Strategen bzw. Exaktors; Auftrag übermittelt durch einen Hyperetes
27*	P.Oxy. I 52[42]	Oxy.	325	Amtsärztliches Gutachten über ein verletztes Mädchen im Auftrag des Logistes; keine Erwähnung eines Hyperetes
28*	P.Oxy. LI 3620	Oxy.	326	Antrag an Nyktostrategen auf Begutachtung einer verletzten Frau durch eine (öffentliche?) Hebamme

[39] Mit BL III 15, VII 16 & XI 22.

[40] Mit BL I 328.

[41] Zur Datierung s. BL VIII 301 & IX 231. In dem Text werden die Begutachtung der Todesumstände (ἐπιθεωρῆσαι ... τὸν θάνατον) bzw. die Erstellung einer amtlichen Bescheinigung (ἀσφάλεια) erwähnt; er ist damit ebenfalls ein indirektes Zeugnis für unsere Thematik.

[42] Mit BL I 312, VII 126 & XI 142; zur Lesung vgl. außerdem N. Gonis, ZPE 126 (1999) 211.

29*	P.Louvre II 116 (= SB XX 14638) & SB XX 14639 (= P.Cair. Preis. 7) (Duplikat)	Herm.	ca. 330-340	Gemeinsames Gutachten des Amtsarztes und des Hyperetes über einen Verletzten im Auftrag des Ekdikos
30*	P.Oxy. XLIV 3195, Kol. II[43]	Oxy.	331	Amtsärztliches Gutachten über einen Verletzten, erstellt im Auftrag des Logistes und des Ekdikos
31*	P.Oxy. LXVI 4528 (= P.Oxy. LXIII 4366)	Oxy.	336	Amtsärztliches Gutachten über einen Verletzten, erstellt im Auftrag des Stellvertreters des Syndikos; keine Erwähnung eines Hyperetes
32*	P.Athen. 34[44]	Herakl.	347	Amtsärztliches Gutachten über mehrere Verletzte, erstellt im Beisein eines Hyperetes; Auftraggeber unbekannt
33*	P.Oxy. LXIII 4370	Oxy.	354	Amtsärztliches Gutachten über einen verletzten Sklaven, erstellt im Auftrag des Logistes; keine Erwähnung eines Hyperetes
34*	P.Oxy. LXVI 4529	Oxy.	376	Amtsärztliches Gutachten über einen Verletzten, erstellt im Auftrag des Stellvertreters des Logistes; keine Erwähnung eines Hyperetes
35*	P.Lips I 42[45]	Herm.	391	Gemeinsames Gutachten des Amtsarztes und des Hyperetes über einen Verletzten, erstellt im Auftrag des Nyktostrategos
36*	P.Rein. II 92[46]	Oxy.	393	Amtsärztliches Gutachten über eine Leiche, erstellt im Auftrag des Logistes; keine Erwähnung eines Hyperetes
37	P.Herm. 20	Herm. (?)	4. Jh.	Wiederholung einer Anzeige wegen Körperverletzung mit Erwähnung eines amtlichen bzw. ärztlichen Gutachtens
38	SPP I, S. 8 Nr. III[47]	Apollinopolis Parva	455	Attest eines Antiskribas für eine Erkrankte, erstellt nach gemeinsamer Visite mit einem *praeco* (?) und zwei weiteren Personen

[43] Mit BL VIII 267.

[44] Mit BL III 219, VII 229f. & VIII 390.

[45] Mit BL VII 79f. & VIII 171.

[46] Mit BL VII 169; zur Lesung vgl. außerdem L. Capron *et al.*, ZPE 150 (2004) 209 und N. Gonis, ZPE 159 (2007) 270.

[47] Mit BL V 141, VII 254 & XI 258. Dieser Text wird in der Liste von Hirt Raj (s. oben Anm. 30) zitiert als „Sudhoff I, p. 247“. Der in BL V 141 mitgeteilte Vorschlag, das korrupte Wort βρεκον in Z. 7 als Verschreibung für ἰατρῷ zu deuten, scheint mir wenig plausibel; ich halte es für wesentlich wahrscheinlicher, daß hier ein Fehler für πραίκονι vorliegt.

39**	SB XVIII 13127 (= P.Bon. 22)	Oxy.	5./6. Jh.	Antrag an die *riparii* auf Begutachtung einer Leiche durch den öffentlichen *tabularius* und einen Arzt
40**	P.Oxy. XVI 1885[48]	Oxy.	509	Antrag an Ekdikos auf Begutachtung eines Verletzten durch den öffentlichen *tabularius*, einen Arzt und die *riparii*

APPENDIX II

Anzeigen von Körperverletzung und Todesfällen infolge von Gewalttaten oder Unfällen aus dem römischen und spätantiken Ägypten (1.-6. Jh. n.Chr.)[49]

Arsinoites

Testimonium	Ort	Datum	Adressat	Opfer
P.Stras. VI 566[50]	?	7	?	Deklarant
P.Louvre I 1	Soknopaiu Nesos	13	Stratege	Deklarant
P.Ryl. II 136	Euhemereia	34	Epistates phylakiton	Deklarant
P.Ryl. II 141	Euhemereia	37	*centurio*	Deklarant
P.Ryl. II 145	Euhemereia	38	Epistates phylakiton	Angestellter des Deklaranten
P.Lond. III 1218 (S. 130)[51]	Euhemereia	39	Epistates phylakiton	Frau des Deklaranten
P.Ryl. II 151	Euhemereia	40	Epistates phylakiton	Tochter des Deklaranten
SB XX 15077	Tebtynis	45	Epistatai des Dorfes	Deklarant
P.Mich. V 228	Areos	47	Stratege	Frau des Deklaranten
P.Mich. V 229	Talei	48	Stratege	Deklarant
P.Mich. V 230	Talei	48	Stratege	Kind des Deklaranten
BGU I 36 = M.Chr. 125 und	Soknopaiu Nesos	98-117	*centurio*	Deklarant

[48] Zur Lesung vgl. N. Gonis, ZPE 154 (2005) 209. Ob dieser Text als Beleg für die Beiziehung eines Arztes gelten darf, ist unsicher. Ich schlage für die Lücke am Beginn von Z. 13 auf Grund der Parallele SB XVIII 13127 (Test. 39) folgende Ergänzung vor: τόν τε δημόσιον ταβουλάριον | [καὶ τὸν ἰατρὸν] καὶ τοὺς ῥιπαρίους κτλ.

[49] Erfaßt sind nur solche Anzeigen, in denen das Petitum erhalten ist und die daher eine Aussage über das vom Antragsteller angestrebte Verwaltungs- bzw. Gerichtsverfahren erlauben. Jene Texte, in denen die Behörden um eine Untersuchung des Gewalt- bzw. Unfallopfers durch einen Amtsdiener bzw. Arzt ersucht werden (bzw., wie in P.Herm. 20, bereits zu einem früheren Zeitpunkt ersucht worden waren), sind mit einem Asterisk markiert.

[50] Mit BL VII 252.

[51] Mit BL I 281f.

BGU II 436 (Duplikat)[52]				
P.Tebt. II 331	Tebtynis	ca. 131	Strategе	Deklarant
P.Oxy. L 3561	Arsinoites	165	Strategе	Deklarant
P.Tebt. II 304[53]	Tebtynis	168	*decurio*	Bruder des Deklaranten
P.Fay. 108	Ptolemais Euergetis	169/170	Strategе	Deklaranten
P.Gen. I² 3 = M.Chr. 122	Soknopaiu Nesos	178 oder 179	*centurio*	Deklaranten
BGU I 242 = M.Chr. 116[54]	Karanis	187	Strategе	Deklaranten
BGU II 515 = W.Chr. 268[55]	Arsinoites	193	*centurio*	Mutter des Deklaranten
P.Mich. III 175[56]	Soknopaiu Nesos	193	*centurio*	Deklarant
BGU I 45[57]	Soknopaiu Nesos	203	Strategе	Sohn des Deklaranten
P.Fouad I 29	Bakchias	224	Strategе	Sohn des Deklaranten
P.Princ. II 29[58]	Philadelpia	258	Strategе	Bruder des Deklaranten
P.Col. VII 171 = P.Coll.Youtie II 77	Karanis	324	*praepositus pagi*	Deklarant
P.Abinn. 46	Philadelphia ?	343	*praepositus alae*	Deklarant
P.Abinn. 51 & 52[59]	Hermopolis	346	*praepositus alae*	Deklarantin
P.Abinn. 57	Theoxenis	346	*praepositus alae*	Deklarant

Hermopolites

Testimonium	Ort	Datum	Adressat	Opfer
P.Amh. II 141 = M.Chr. 126	Penne	350	*praepositus pagi*	Deklarantin
*P.Herm. 20 (Test. 37)	Hermupolis (?)	4. Jh.	?	Bruder des Deklaranten

Oxyrhynchites

Testimonium	Ort	Datum	Adressat	Opfer
P.Oxy. XIX 2234	Teis	31	*centurio*	Deklarant
SB X 10239[60]	Oxyrhynchos	37	Strategе	Frau des Deklaranten

[52] Mit BL I 45.
[53] Mit BL I 426 & VII 271.
[54] Mit BL II.2 15 & 211; zur Datierung vgl. BL VI 11.
[55] Mit BL II.2 18, III 13 & V 11.
[56] Mit BL III 109f.
[57] Mit BL I 11.
[58] Mit BL III 149 & VII 168.
[59] Mit BL V 3.

SB X 10244[61]	Oxyrhynchos	50	Stratege (?)	Frau des Deklaranten
P.Fouad I 28[62]	Oxyrhynchos	59	Stratege	Deklarant
P.Oxy. XXXVI 2758	Oxyrhynchos	ca. 110-112	Stratege	Frau des Deklaranten
P.Oxy. XXXIII 2672	Oxyrhynchos	218	Stratege	Deklarantin und Sklavin ihres Sohnes
*P.Oxy. XII 1556 (Test. 14)	Oxyrhynchus	247	Stratege?	Deklarant
*P.Oxy. LXI 4122 (Test. 19)	Oxyrhynchos	305	Logistes	Frau des Deklaranten
*P.Oxy. LI 3620 (Test. 28)	Oxyrhynchos	326	Nyktostrategen	Frau des Deklaranten
P.Freib. II 11 = SB III 6294[63]	Phobou	336	Syndikos	Pachtbauern der Deklarantin
*P.Oxy. XVI 1885 (Test. 40)	Oxyrhynchos	509	Ekdikos	Diener (?) des Deklaranten
SB VI 9239[64]	Oxyrhynchos	548	Tachygraphos des *officium praesidis*	Deklarantin

Andere Gaue

Testimonium	Ort	Datum	Adressat	Opfer
*P.Oxy. LVIII 3926 (Test. 13)	This	246	Stratege	Mann und Sohn der Deklarantin
P.Grenf. II 78 = M.Chr. 63	Kysis (Große Oase)	307	*praeses*	Deklarant
P.Kell. I 21[65]	Kellis (Große Oase)	321	Ek- oder Syndikos	Frau des Dekl.

Herkunft unbekannt

Testimonium	Ort	Datum	Adressat	Opfer
P.Hamb. IV 240	?	119/120	?	Frau des Deklaranten und deren Schwester
P.Harr. II 192[66]	?	167	Stratege	Deklarant
*P.Flor. I 59 (Test. 12)[67]	?	225, 241 oder 279	Stratege	Deklarant

[60] Mit BL VII 217 & VIII 357 sowie G. Messeri, Aegyptus 81 (2001) 287f.
[61] Nd. M. Piccolo, Aegyptus 83 (2003) 202-204, Nr. 2.
[62] Mit BL III 60 & IX 88. Vgl. Drexhage (1986) 22.
[63] Mit BL II.2 60 & 123f.
[64] Mit BL V 111.
[65] Mit BL XI 99f.
[66] Mit Hirt Raj (2006) 111, Anm. 36.
[67] Mit BL I 143f. und III 56.

BERNARD LEGRAS (REIMS)

RÉPONSE À FRITZ MITTHOF

La communication de Fritz Mitthof apporte une contribution qui fait date sur la médecine légale dans l'Égypte romaine étudiée selon la perspective de l'histoire du droit. Cette enquête dégage en effet une riche problématique qui intéresse les jusgrécistes, les romanistes et les spécialistes de la médecine antique. Nous savons aussi – et il faut s'en réjouir pour l'avenir de nos études – qu'elle peut intéresser aussi un large public comme l'atteste l'exposition organisée à Vienne au *Papyrusmuseum* de la Bibliothèque nationale d'Autriche, une exposition sur les médecins et la médecine dans les papyrus, dont le beau catalogue qui, vient de paraître, témoigne de l'éclat[1].

Les papyrus grecs apportent des données que ne donnent pas les autres types de sources grecques et romaines sur la médecine et les médecins. F. Mitthof constate que l'activité des médecins, à la lumière des textes papyrologiques, se résume à quatre points: visiter et soigner les malades, établir des certificats de décès, produire des expertises écrites à l'intention des tribunaux et fournir des certificats de maladie destinés à l'employeur. Les inscriptions grecques mentionnent clairement la première dimension de leur activité, les soins aux malades, mais ne font nulle mention ou allusion aux trois autres. Alors qu'Ofelia Nanetti ne pouvait recenser que 20 documents en 1941[2], il est possible d'en dénombrer aujourd'hui environ 40. F. Mitthof présente, grâce à ce corpus élargi, une vue claire de la place de la médecine dans la vie juridique de la province. On ne peut que suivre sa démarche qui consiste à étudier les étapes de la procédure d'expertise médicale, ses objectifs administratifs et judiciaires, les espaces territoriaux où elle était mise en œuvre, et enfin la question de l'époque de son introduction en Égypte. Il faut en particulier adhérer à la principale de ses conclusions, à savoir qu'il s'agit là d'une innovation romaine favorisée par l'installation de médecins publics (δημόσιοι ἰατροί) dans les métropoles de nome dans le cadre de la diffusion par étape du modèle civique dans la *chôra*. Le débat qui est consubstantiel à la naissance de la papyrologie juridique sur les ruptures et les continuités entre l'Égypte ptolémaïque et l'Égypte romaine s'en trouve ainsi enrichi. On pourrait cependant élargir encore l'analyse en soulignant que l'apparition de ces médecins que l'on peut définir comme des médecins légistes, des médecins experts ou des médecins du travail, se fait dans un

[1] H. Froschauer, C. Römer éd., 2007.
[2] O. Nanetti, 1941, p. 301-302.

contexte favorable en raison de la place qu'occupe le médecin dans la cité grecque et dans les royaumes hellénistiques. Les décrets civiques honorant ces praticiens dans le monde hellénistique mettent en valeur le fait que le médecin public est déjà un professionnel au service de la cité qui faisait l'objet d'une rigoureuse sélection en l'absence de certificat ou de diplôme. Cette *tekhnê*, qu'apprécient aussi les rois hellénistiques qui en font souvent des *philoi*, leur permettait d'accéder à des honneurs obtenus grâce à trois critères analysés par Natacha Massar dans un livre paru en 2005[3]: «servir la cité en tant qu'entité politique, accomplir des bienfaits civiques, rehausser l'image de la *polis*»[4]. Grâce à F. Mitthof, nous savons désormais que le médecin hellénistique qui est au service de la cité ou du roi est désormais un auxiliaire du pouvoir romain dans ses aspects judicaires. L'exemple – qui reste unique dans les sources – d'une famille hermopolitaine du III^{e} siècle de n.è. où un médecin, Hermeios (ou Hermias) voit son fils, Palladios, embrasser la carrière de juriste (δικολόγος), vient renforcer cette conclusion. Ce choix pourrait être interprété comme le signe d'une certain lien social entre les deux professions[5]. L'appartenance de Palladios à une famille aisée lui avait ouvert les portes d'études de droit. Mais toute hypothèse qui voudrait voir le fils se diriger vers une discipline que le père aurait côtoyée en tant qu'expert légiste serait évidemment fort audacieuse. On adhérera aussi à l'idée – déjà défendue par Paul Roesch – que ce type d'expertises médicales se pratiquait dans d'autres provinces de l'Empire, mais que les sources écrites conservant les rapports ont été perdues[6]. Les médecins publics égyptiens devaient, à l'inverse, pratiquer, comme leurs confrères des autres provinces, les soins envers les malades, bien que les papyrus n'en fassent pas mention. Les *dêmosioi iatroi* n'étaient donc pas seulement des experts nommés par l'administration et la justice[7]. L'importance du corpus qui met en exergue presque autant de cas de violences, d'agressions physiques, de coups et blessures et de meurtres, tend en revanche à montrer que la violence n'a nullement diminué dans l'Égypte romaine comme le pensent d'aucuns[8]. F. Mitthof souligne cependant avec raison que certaines expertises n'étaient cependant pas décidées à la suite d'un délit ou d'un crime mais à la suite d'un accident. Des générations de papyrologues ont ainsi souri devant le cas tragique du jeune esclave âgé de huit ans qui fit une chute mortelle en tombant d'une maison pour regarder le spectacle des danseuses à castagnettes (*P. Oxy.* III 475=*W. Chr.* 494, 182 de n.è.).

La discussion sur l'origine de ces expertises pourrait cependant être enrichie par l'intégration au corpus du dossier papyrologique relatif à l'*imspectio ventris*. Cet examen obstétrical est en effet pratiqué en Égypte selon les règles de l'édit «De

3 N. Massar, 2005.
4 N. Massar, 2001, p. 201.
5 E. Samama, 2003, n°438.
6 Paul Roesch, 1982, p. 120.
7 Ceci était le point de vue de L. Cohn-Haft, p. 69-71.
8 Cf. le bilan proposé dans J.-M. Bertrand éd., 2005.

l'inspection du ventre et de la surveillance de l'accouchement» (*De inspiciendo ventre custodiendoque partu*), où il constitue de fait un transfert de droit romain vers l'Égypte au sens où l'entendait le regretté Jean Gaudemet[9]. Ce dossier comprend trois papyrus grecs concernant une affaire de tutelle en 147/148 sous Antonin le Pieux: deux papyrus de Genève, *P. Gen.* II 103 et 104, et un papyrus de Berlin, *BGU* XIII 2213. Le premier, repris dans le volume II des *P. Gen.* paru en 1986, publié en 1894 par Jules Nicole, a fait l'objet d'une analyse minutieuse d'Ulrich Wilcken dans l'*Archiv für Papyrusforschung*, t. 3 (1906). Il ne fait cependant pas partie de la liste publiée par Ofelia Nanetti en 1941, non plus d'ailleurs de l'article de Paul Roesch de 1982 consacrés de fait aux seuls «Médecins publics dans l'Égypte impériale». L'intérêt de ce papyrus a été accru par la publication, en 1976, d'un papyrus berlinois complétant les sept premières lignes de la colonne III dont des lacunes ont pu être complétées, et en 1982 dans la *ZPE*, t. 47, 1982, d'un fragment, *P. Gen. inv.* 290, se rapportant à cette affaire, un document repris dans le vol. II des *P. Gen* sous le numéro 104. L'importance de ce dossier genevois pour l'étude des aspects juridiques et sociaux de la maternité en Grèce ancienne et dans l'Égypte gréco-romaine a été souligné dès 1977 par Sophie Adam[10], puis par Joseph Mélèze Modrzejewski[11] et Barbara Anagnostou-Canas[12]. Petronilla, une veuve romaine vivant dans la *chôra*, s'adresse au *iuridicus* Calvisius Patrophilus, pour formuler deux requêtes. La première ne nous concerne pas ici directement, mais sa mention nous est utile car elle permet de localiser son lieu de résidence: la veuve lui demande de choisir lequel des deux candidats possibles exercera la tutelle sur son fils mineur Lucius Herennius. Avant de se déterminer le *iuridicus* écrit au stratège du nome Arsinoïte, district d'Hérakeidês, où réside Petronilla afin de savoir quel est le candidat le plus digne de confiance. Ceux-ci habitant le nome Aphroditopolite, le stratège de l'Arsinoïte se retourne lui-même vers son collègue de l'Aphroditopolite pour obtenir ces renseignements. L'autre requête concerne un enfant à naître et les mesures qu'il convient de prendre (col. II, l. 1-10). Petronilla doit être examinée par une sage-femme (μαῖα, l. 3 et 10), qui agit sur ordre. La sage-femme confirme qu'elle est enceinte, mais précise qu'elle ne pourra accoucher chez elle. Elle veillera cependant sur Petronilla jusqu'à sa délivrance. Ce passage a été rapproché par Ludwig Mitteis, qui l'avait signalé à Ulrich Wilcken, du passage d'Ulpien, *Digeste*, 25, 4, 10: *De inspiciendo ventre custodiendoque partu*. En dépit des différences que l'on peut constater (une sage-femme d'un côté, cinq femmes libres de l'autre), il s'agit bien de la même procédure fondée sur une expertise. On sait qu'elle a pour objectif en droit romain de confirmer que le *nasciturus* a bien pour père le défunt, et de le confier à sa naissance à la personne que le père aura désignée ou le préteur à défaut de volonté exprimée par le père. Comme le dit Yan Thomas, il s'agit d'éviter

[9] J. Gaudemet, 1976.
[10] S. Adam, 1977, p. 73s.
[11] J. Mélèze Modrzejewski, 1988, p. 577 et note 24.
[12] B. Anagnostou-Canas, 1991, p. 31.

«une imposture» en reconnaissant un héritier légitime et d'imposer l'exercice du droit paternel lors de «l'accouchement (qui) est un rituel juridique»[13]. La raison de cette demande d'*inspectio ventris* par Petronilla reste énigmatique. Le *P. Gen.* II 104 permet de faire une hypothèse. Des parents de la famille, les Antonii Diogenes et NN (l. 15-16), lui créent des difficultés en accusant l'enfant à naître d'«illégitimité» (νοθεία). D'où son appel à la pitié (l. 17) pour faire reconnaître comme père légitime son défunt mari Herennius Valerius.

L'absence de mention de médecins publics ne doit pas être un obstacle à l'intégration de ce dossier dans les *Testimonia*. Les papyrus de Genève montrent que des sages-femmes pouvaient aussi être sollicitées au titre de la médecine légale. Celles-ci font pleinement partie de ce que l'on peut appeler le personnel médical. Les inscriptions grecques réunies par Evelyne Samama dans son corpus sur la naissance d'un corps médical ne laissent pas de doute sur la question[14]. Le terme de *maia,* polysémique, ne signifie pas toujours vieille femme, grand-mère ou nourrice. Une intéressante inscription antique du IV^e^ siècle av. n.è mentionne ainsi Phanostatê, sage-femme et médecin, μαῖα καὶ ἰατρός[15]. L'utilisation du composé ἰατρομαῖα à partir du III^e^ siècle, qui se lit aussi sur les inscriptions romaines, atteste que cette sage-femme est bien une obstétricienne dont la compétence est médicale. Le médecin Hérophile d'Alexandrie, chef d'une prestigieuse école de médecine fondée sans doute dans la première moitié du III^e^ siècle av. n.è., était connu pour son intérêt envers l'obstétrique. Une tradition – qui est peut-être légendaire – compte parmi ses élèves une femme Hagnodikê qui aurait suivi ses cours revêtus de vêtements masculins. Les médecins grecs et romains ont décrit les gestes obstétricaux ce qui montre que l'art de faire naître relève bien de leur domaine de compétence.

La dimension juridique de cette *inspectio ventris*, permet d'apporter un élément supplémentaire aux questions formulée par F. Mitthof sur les innovations juridiques dues à la domination romaine. Il s'agit en effet là d'un cas de la pratique judiciaire où des juges provinciaux appliquent le droit romain général à des justiciables romains. Barbara Anagnostou-Canas en a rappelé récemment la liste: application des règles de l'usucapion anale en matière de meubles, usage de la *datio tutoris*, du *ius trium liberorum*, de la *bonorum possessio*, invocation de la *Lex Laetoria*[16]. Des dispositions édictales sont invoquées dans les papyrus, mais elles semblent limitées à des questions spécifiques, en particulier la possession en matière de testaments (*edictum successorium*) et ne sauraient permettre d'invoquer l'hypothèse d'un *edictum provinciale* général régulièrement promulgué par les préfets d'Egypte[17].

[13] Y. Thomas, 1986, p. 221.
[14] E. Samama, 2003. p. 7-10.
[15] E. Samama, 2003. n° 2.
[16] B. Anagnostou-Canas, 2006, p. 81-82.
[17] J. Mélèze Modrzejewski, 1970, p. 341-343; I*d*. 1978.

Dans le cas de l'édit sur l'*inspectio ventris,* son application en Egypte fut rapide puisqu'il date probablement du règne d'Hadrien[18].

L'intégration de ce dossier permettrait aussi de nourrir les *Testimonia* d'un apport arsinoïte, dont F. Mitthof, constate (p. 9-10) l'indigence à côté de l'importance des sources oxyrhynchites. L'*inspectio ventris* doit en effet se faire sur le lieu de résidence de Petronilla.

Un document du nome Héracléopolite, *P. Athe.* 34 publié en 1939, qui ne figure pas dans les *Testimonia,* mais que répertorie Ofelia Nanetti (n° 14) et que donne Paul Roesch dans son choix de quatre textes traduits (n° 3) permettrait aussi de rétablir quelque équilibre dans les lieux de provenance des sources. L'éditeur G.A. Pétropoulos, puis P. Roesch, le donnent «de provenance inconnue». Mais la mention, à la l. 14, de la *kômê* de Tokôis, village de l'Hérakléopolite attesté de 51/50 av. n.è. au VII^{e} siècle, ne laisse guère de doute sur son origine. Ce document donne de plus une illustration saisissante des violences dans la *chôra* égyptienne au III-IV^{e} siècle, puisque l'expertise demandée au médecin public de la métropole porte sur les blessures infligées à cinq bergers, ce qui montre une attaque en règle sans doute par des brigands. Le document permet de situer socialement le demandeur qui est l'employeur des bergers dont le texte ne dit pas s'ils étaient libres ou esclaves: Aurelius Heraklammôn, *tabularius* et conseiller de la cité est un notable de l'administration municipale.

L'une des questions importantes que soulève l'étude de ce dossier concerne les limites du recours à l'expertise médicale dans le domaine judiciaire. Il apparaît en effet que les médecins n'étaient sollicités que si leur intervention avait un sens. Un appel tardif quand les traces de blessures, de coups ou d'atteinte au corps de la victime avaient disparu rendait ses observations sans intérêt. Un exemple est donné par le *P. Oxy.* III 472, col. II et III, dont l'étude pourrait être intégrée au dossier[19]. Ce papyrus, qui date du règne d'Hadrien, conserve la plaidoirie d'un avocat défendant Dionysia, une femme accusée d'empoisonnement (φαρμακεία). Mais selon l'avocat, le défunt, dont les finances sont dans un état lamentable, pourrait s'être suicidé en s'administrant lui-même un *pharmakon* (l. 5-6). Le document ne permet pas de savoir devant quel juge se déroulait le procès, mais il pourrait s'agir de l'épistratège C. Quintianus. L'une des questions qui se posait est donc la cause du décès du défunt, empoisonnement ou suicide. Le cas était assurément difficile, la médecine légale n'ayant pas toujours les moyens de faire la différence dans le cas de l'absorption d'un poison. On peut donc se demander dans ce cas si l'absence d'expertise sur le corps du défunt est liée à la conscience de l'impuissance d'un médecin à trancher le cas ou à l'impossibilité de faire l'expertise le procès se déroulant bien après le décès du défunt, l'avocat ayant peut-être élaboré tardivement cette stratégie de défense de sa cliente.

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[18] A. Metro, 1964.

[19] Cf. B. Anagnostou-Canas, 1991, p. 125.

Au total, la contribution de Fritz Mitthof permet de faire le point sur un dossier que les découvertes et les publications incessantes en papyrologie juridique ont considérablement étoffé depuis les derniers travaux consacrés à cette question, que ce soit sous l'angle juridique, historique ou médical. Il me semble cependant qu'un intégrant les papyrus genevois, et quelques autres documents ce corpus pourrait encore s'étoffer. Les sages-femmes y ont leur place au même titre que les médecins publics ! L'expertise médicale sur le corps humain n'est pas, dans l'Égypte romaine, le privilège exclusif de l'homme, une innovation qui résulte clairement, dans le cas de l'*inspectio ventris*, d'un transfert de droit romain.

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THE *CHEIROGRAPHON* AND THE PRIVATIZATION OF SCRIBAL ACTIVITY IN EARLY ROMAN OXYRHYNCHOS[1]

The *cheirographon* is the documentation of a legal transaction in the format of a letter. Its author is the prospective debtor, its addressee the future creditor. The *cheirographon* opens as a rule with the greeting χαίρειν, which is followed by the provisions of the contract. These are reported in the first person, frequently introduced by the verb ὁμολογῶ. Finally, at the bottom of the document, we find its date of composition.[2] The *cheirographon* is one of the most popular types of format used for the documentation of legal transactions in Egypt. It is attested for the first time in the third century BCE, and is still widely in use during the Byzantine period.[3]

The *cheirographon* shows an outstanding peculiarity. Other legal documents report the circumstances of their composition: the double document reports that it was issued in the presence of six witnesses who could later be summoned and confirm that the contents of the document really reflect the terms of the contract. The agoranomic instrument was, as shown by its name, composed by and before the

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[1] I thank Prof. R.S. Bagnall for reading and commenting on this paper, and Prof. R. Westbrook for stepping in as my respondent on a very short notice, and for his highly illuminating notes.

[2] Wolff, *Recht der griechischen Papyri Ägyptens in der Zeit der Ptolemäer und des Prinzipats, II: Organization und Kontrolle des privaten Rechtsverkehrs* (Munich 1978) 107. Cf., e.g. *P.Grenf.* II 17 = *MChr* 138 (136 BCE – Thebais): ἔτους λδ Τ[ῦ]βι $\overline{\theta}$. Πατοῦς Πατοῦτος | Τακμήιτι Πατοῦτος χαίρειν. ὁμολογῶ | ἔχειν παρὰ σοῦ κῶνον σιδηροῦν ἐν ὑποθήκῃ, ἐφ' ᾧ ἐὰν με ἀπαιτῇς καὶ μὴ ἀποδίδω σοι ἀποτίτσω σοι χαλκοῦ (τάλαντον) α | τιμὴν τοῦ προγεγραμμένου κώνου. | ἔγγυος Θαῆσις πρεσβυτέρα Πόρτιτος | τῶν προκειμένων πάντων. ἔγραψεν | ¯Δρύτων Παμφίλου ὑπὲρ αὐτῶν διὰ τὸ φάσκειν | αὐτοὺς μὴ εἰδέναι γράμματα. | (ἔτους) λδ Τῦβι $\overline{\theta}$. Variations, as for example the omission of the χαίρειν formula, are also attested: cf., e.g., *P.Tebt.* II 391 = *MChr* 138 (99 CE – Tebtynis), and Wolff, *ibid*. 107 n. 6.

[3] Cf., e.g., *P.Col.* IV 76 (247 BCE – Philadelphia (?)) and *P.Cair.Masp*. III 67328 (521 CE – Aphroditês Kômê, Antaiopolitês). It is also used outside Egypt. We possess *cheirographa* from second-century CE Judaea and Arabia, e.g., *P.Yadin* 11 (124 CE – En Gedi) and from early first-century CE Puteoli: cf.,e.g. *T.Sulpicii* 48 (48 CE). The *cheirographon* is also frequently mentioned in literary, jurisprudential and epigraphic sources from different parts of the Roman Empire from the second century BCE onwards. Cf. Wolff (supra n. 2) 110.

agoranomos – a state notary who would register the document in his files and witness to its validity.[4] The *cheirographon*, on the other hand, does not report, before the Byzantine period, where it was composed or by whom; nor does it report the presence of witnesses. The document does not indicate, in other words, how its applicability can later be tested.[5]

A possible solution to the problem of validity is provided by one of the meanings of the adjective χειρόγραφον as it appears in *LSJ*: *holograph, manuscript*, i.e. "a document wholly in the handwriting of its author."[6] Following this etymology, H.J. Wolff, formulated in his *RGP* II the rule, by which the *cheirographon* was made *binding* (sic!) because the debtor wrote the document in his own hand, because he wrote the document *mittels bindender Schrift*.[7] Yet Wolff, like those studying the *cheirographon* before him, was well aware of the difficulty of this statement. While some *cheirographa* are known or can be assumed to be written by the debtor, in others the debtor just adds a short account of the transaction (*hypographê*) beneath a contract that is written by someone else, while in a third group of documents even the *hypographê* is issued by another person. [8] Still, we do not have any evidence of a *cheirographon* being invalidated because it was not completely, or even partially holographic. [9]

I do not claim that the existence of the 'allographic' *cheirographa* is completely irreconcilable with Wolff's explanation.[10] I also grant that, in accordance with its name, the *cheirographon* was widely used throughout the Ptolemaic and Roman periods for the holographic documentation of obligations, avoiding the complexities

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[4] Wolff (supra n. 2) 57-59, 83-84.

[5] In very few cases, witnesses are present at the composition of the *cheirographon*. Cf., e.g., *P.Fouad* I 45,17 = *ChLA* XLII 1207 = *FIRA* III 121 = *CPL* 189 (153 CE – Alexandria); *P.Oxy*. XLIX 3483,11-12 (early I CE). Witnesses are also routinely deployed in *cheirographa* in Judaea/Arabia: *P.Yadin* 11^{v} (124 CE – En Gedi), 21, 31-32 and 34; 22,37-38 and 40 (both 130 CE – Ma'oza).

[6] LSJ^{9} p. 1985 s.v. χειρόγραφος, ον. and *Webster's Third New International Dictionary of the English Language* (Springfield, Massachusetts 1961) p. 1081 s.v. *holograph*.

[7] Wolff (supra n. 2) 107-108.

[8] E.g., Mitteis, *Grundzüge und Chresthomathie der Papyruskunde* II, 1 (Leipzig 1912) 56; Wolff, (supra n. 2) 108.

[9] Accordingly, in the *dêmosiôsis* procedure (cf. infra p. 337) the *hypographê* (i.e. a summarizing account of the transaction at the bottom of the contract) needs to be written by the debtor, but not the entire document. Cf. e.g., *P.Oxy*. IX 1200, 45-46 (266 CE – Oxyrhynchos): περὶ τοῦ εἶναι τὴν ὑπογραφὴν | ἰδιόγραφον τοῦ γράψαντος. The fact that a legal instrument was written by the debtor in person could be used, however, as a proof of his liability: cf. H.C. Youtie, ''Υπογραφεὺς: The Social Impact of Illiteracy in Graeco-Roman Egypt', *ZPE* 17 (1975) 201-221 (= *Scriptiunculae posteriores* I (Bonn 1981) 179-199) at 211 n. 27.

[10] We could assume that Wolff's *Prinzip der Eigenhändigkeit* was valid, and whenever the document was written by others, this deviation was caused by the debtor's illiteracy. In this case, he would empower a literate bystander to compose the document for him; cf., in this direction, Youtie (supra n. 9) 206-207.

involving the witnessed or notary instruments. But I am not sure that holography ever became a legal principle, a real *essentiale negotii* for the *cheirographon*. In the course of the Ptolemaic and Roman periods we repeatedly encounter scribes who 'usurp' the scheme of the *cheirographon* as a routine scheme for documents issued by them, in their office: this is the case with the *liblarii* of early second-century CE Arabia;[11] this is also the case with the *tabelliones* throughout the empire from the fourth century CE onwards.[12] In both cases the *cheirographon* is routinely employed and as a matter of course. Accordingly, at least in the eyes of the scribes who applied the *cheirographon* in their offices, drawing up the document in the debtor's own handwriting was not a legal prerequisite. This may speak against Wolff's theory. In the case of the *liblarii*, however, and to some extent also in that of the *tabelliones*, we face one major difficulty: we are not familiar with the causes and the historical context of the introduction of the *cheirographon* as the routine scheme of the professional scribe.[13] Such an historical context is provided, on the other hand, by the third example, that of early Roman Oxyrhynchos.

The *cheirographon* is extremely popular in Roman Oxyrhynchos. Taking just the most common types of transactions (e.g. sales, loans), we have some 85 contracts issued in Oxyrhynchos in the first three centuries CE as *cheirographa*, which make roughly a third (85:254) of all the contracts that came down to us from that nome.[14] In comparison, in the Arsinoitês the *cheirographa* make less than 8 per cent of the total finding (7.8%).[15] The importance of the *cheirographon* in the Oxyrhynchite nome is best explained, I believe, if we assume that in Oxyrhynchos, just as in second-century CE Arabia or in the later Roman Empire, the *cheirographon* was used by a professional scribe as his routine, default format. Yet we need not make do with just a hypothesis. The assumption that many if not most Oxyrhynchite *cheirographa* were written by a professional scribe is strongly supported by their physical features, as well as by references made in the document to the circumstances of its composition. We may even be able to conjecture the

[11] The Judean *cheirographa* bear much resemblance to the late antique *tabellio* documents (i.e., the incorporation of the date and place clause at the beginning of the document and the naming of the scribe who wrote the document), and may have served as their prototype (cf. infra n. 66).

[12] E. Sachers, 'Tebellio', *RE* IV A.2 1844-1863 at 1854; H.J. Wolff, 'Der byzantinische Urkundenstil Ägyptens im Lichte der Funde von Nessana und Dura', *RIDA* 8 (1961) 115-154, at 115-119; M. Kaser, *Das römisches Privatrecht* II (Munich 1975) 78-80.

[13] On the *tabelliones* cf. infra n. 66.

[14] 45 loan contracts (63% of a total of 71 Oxyrhynchite loans), 22-23 land conveyances (56% of 39), 8 animal sales (80% of 10), 5 lease contracts (4% of 128), 5 marriage documents (28% of 18) and 1 slave sale (6% of 17). Receipts were not studied in the present survey.

[15] 31-32 loan contracts (13% of 242), 28 animal sales (42% of 67), 13 land conveyances (7% of 194), 2 leases (0.6% of 325), 1 slave sale (5.5% of 18), 1 marriage document (2% of 46).

location of that scribe and to pinpoint some important landmarks in his history in the course of the early Roman Empire. Before we do so, let us survey the features and fields of application of the *cheirographon* in the Ptolemaic period.

The format of *cheirographon* is applied in legal documents as early as the third century BCE, and remains common in later times. [16] This popularity can be accounted for by its simplicity: unlike other contemporary formats, the composition of the *cheirographon* did not necessitate the presence of witnesses or a state official, nor was it ever registered on a regular basis in a public archive.[17] The scheme of the document is also quite simple: the *cheirographon* is not usually issued as a double-document;[18] it usually does not contain the cumbersome date or penalty clauses, which are typical in other Ptolemaic formats:[19] in *cheirographa* one uses just what one needs in a simplified form. The *cheirographon* is also unique in its physical features: it is usually very narrow, its width measuring in some extreme cases 6 cm. and incorporating 10-15 letters.[20] The material can be procured by cutting of strips from other papyri, as I usually do when I have to take notes in the library. Nor was it necessary to be a professional scribe to write a *cheirographon*: in *P.Dion*. Dionysios son of Kephalas writes, according to E. Boswinkel and P.W. Pestman, his *cheirographa* himself.[21] If one is illiterate or slow-writing, he or she would naturally need the *cheirographon* to be written by someone else. Yet even in such cases one would not turn necessarily to a professional scribe.[22]

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[16] The Ptolemaic source material yields 78 documents of this format. It is the third best attested scheme after the double document (226 documents), and the *agoranomic* instrument (158).

[17] The practice of registering *cheirographa* in an official archive (probably the local *grapheion*) is attested in late second-century BCE Hermopolitês: cf. *P.Dion*. 32,21-22 (107 BCE); 34,17-18 (116 BCE). It is, however, unattested in any other Ptolemaic or Roman source. In the second and third centuries CE the *cheirographon* could be deposited in the Archives of the *Nanaion* and the *Hadrianeion* in Alexandria. Yet this procedure – the *dêmosiôsis* – is a special measure, taken some time after the document was composed and under special circumstances (cf. infra n. 57): not every *cheirographon* was subject to *dêmosiôsis*. Cf. Jörs (cf. infra n. 57) 118.

[18] Cf., however, *P.Hamb*. II 170 (241 BCE – Oxyrhynchitês); *P.Oxy*. XLIX 3493 (175 CE – Oxyrhynchos) and Wolff (supra n. 2) 75-77. The Judaean *cheirographa* also take the form of double document. Cf., e.g., *P.Yadin*. 11 (124 CE – En Gedi).

[19] Compare with *P.Grenf*. II 17 (text supra n. 2) the double document *BGU* X 1943 (215/4 BCE – Thôlthis) lines 1-3 (date and place clause), and lines 11-13 and 17-19 (penalty clauses).

[20] Cf., e.g., *SB* XII 10782 (247/6 BCE – Oxyrhynchitês (?)).

[21] *P.Dion*. p. 282.

[22] In the deposit contract *P.Grenf*. II 17 from 136 BCE Thebais (text supra n. 2) Papous son of Papous, who "says that he does not know letters" has the famous Dryton son of Pamphylos write the *cheirographon* for him. Dryton is not a professional scribe, but is still able to put together a quite flawless legal document (cf. *P.Dryton* p. 409). I thank Dr. Vandorpe for discussing with me the paleography of this document.

In the Ptolemaic period, then, the *cheirographon* made possible the expeditious and uncomplicated documentation of transactions. It would be used primarily when the parties deemed the transaction important enough to be submitted to writing, but not sufficiently important to necessitate the intricacies involving, e.g., summoning six witnesses or approaching a public scribe. Accordingly, most Ptolemaic *cheirographa* record relatively small-scale land-related economic activities such as loans of grain, land-leases and land-related contracts of labor.[23]

The *cheirographon*'s sphere of economic activity shifts after the Roman conquest. In the Arsinoitês it no longer focuses on agriculture.[24] It is used here as 'filler' for the documentation of obligations for which no other format has taken root as well as for the documentation of animal sales and loans.[25] In other respects we note continuity: the *cheirographon* is still frequently written by the debtor himself or, in cases of illiteracy, by a literate bystander. The text is still also quite narrow, with an approximate average of 20-25 letters a line.[26]

The sphere of activity changes in the Oxyrhynchitês as well: here the *cheirographa* focus primarily on cash loans.[27] Yet in Oxyrhynchos the changes

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[23] Cf., e.g., *P.Hib*. I 86 (248 BCE – Oxyrhynchitês (?)): wheat loan; *PSI* IX 1023 (106 BCE – Pathyritês): receipt; *PSI* X 1097 (54/3 BCE – Oxyrhynchos): lease contract.

[24] In the early Roman Arsinoitês, land related transactions commonly assume, particularly in the late first and second century, the form of *hypomnêma*. Cf. U. Yiftach-Firanko, 'The Rise of the *hypomnêma* as a Lease Contract in the First Century Arsinoitês,' in J. Frösén et. al. (edd.) *Proceedings of the XXIV International Congress of Papyrology, Helsinki 1st-7th of August 2004* (Societas Scientiarum Finica, Helsinki 2007) Vol. II 1051-1061.

[25] Cf., e.g., *P.Bingen* 61 (56 CE – Tebtynis): sale of a donkey; *P.Louvre* I 12 (142 CE – Soknopaiou Nêsos): sale of a camel; *P.Heid*. III 239 (163 CE – Ptolemais Euergetis): loan contract; *P.Mich*. V 266 (38 CE – Tebtynis (?): provisory deed of gift; *P.Hamb*. I 70 = *SB* III 6274 = *Sel.Pap*. I 59 = *FIRA* III 29 (after 28.8.145 CE): acknowledge of indemnity; *P.Ryl*. II 94 = *Sel.Pap*. II 255 (15-36 CE – Euhêmeria): act of bail.

[26] Cf. *P.Mich*. V 266 (38 CE – Tebtynis (?)), with a picture at <<http://wwwapp.cc.columbia.edu/ldpd/app/apis/item?mode=item&key=michigan.apis.2848>>; *P.Sakaon* 61 = *P.Thead*. 3 (299 CE – Theadelphia), with a picture at <<http://ipap.csad.ox.ac.uk/4DLink4/4DACTION/IPAPwebquery?vPub=P.Sakaon&vVol=&vNum=61>>. There are also some exceptions: cf. *P.Mich*. V 276 (47 CE – Arsinoitês), with as many as 120 letters a line.

[27] Cash loans are recorded in thirty-two out of the fifty-four Oxyrhynchite *cheirographa* surveyed here: *P.Coll.Youtie* I 50 (early II CE); *P.Genov*. II 62 (98 CE); *P.Harr*. I 85 (117 CE); *PIFAO* I 14 (140 CE); III 30 (early I CE); *P.Oslo* II 40a and 40b (150 CE); III 130 (late II CE); *P.Oxy*. II 269 = *Sel.Pap*. I 69 (after 137 CE); 272 (after 10.5.66 CE); III 507 = *Sel.Pap*. I 62 (146 CE); XIV 1641 (68 CE); XXXIV 2722 (154 CE); XXXVI 2773 (82 CE); 2774 (129 CE); XLIV 3198 (145/6 or 170/1 CE); XLVII 3351 (34 CE); XLIX 3487 (65 CE); 3490 (140/1 CE); LV 3798 (144 CE); *P.Princ*. II 32 (99/100 CE); *P.Turner* 17 (69 CE); *P.Ups.Frid*. 3 (122 CE); *P.Yale* I 63 (64 CE); 65 (141-144 CE (?)); *PSI* VI 687 (I-II CE); VIII 878 (152/3 CE); *SB* VI 9296 (153-161 CE); 9372 (II CE); X 10222 = *P.Oxy*. II 305 *descriptum* (20 CE); 10238 (37 CE); 10246 (55 CE). Cf. also the *parathêkê P.Oxy*. XXXIII 2677 (II CE) and the dowry receipt *P.Oxy*. II 267 = *MChr* 281 (37 CE).

amount to much more than that. The first relates to the use of the *hypographhê*. As a rule, the *hypographhê* presupposes the involvement of at least two different persons in the composition of the document, both at least to some extent literate. The *hypographhê* is most commonly used when the document is composed by a professional scribe, and the debtor (or his literate bystander) adds his autograph confirmation.[28] Accordingly, the Ptolemaic *cheirographa*, which are commonly holographic, very rarely contain *hypographhai* (2-3:47).[29] This is also the case in first-century CE Arsinoitês,[30] but not in contemporary Oxyrhynchos. Here the *hypographhê* is present in fifteen documents, and absent in only two.[31] Whenever the document contains a *hypographhê*, the lines in the body of the text also tend to get longer[32], and the hand tends to be that of an experienced, professional scribe.[33]

The Oxyrhynchite *cheirographa* were mostly written, then, by professional scribes, who used a relatively wide format. The documents do not relate the name of the scribe, yet we do have some circumstantial evidence. Most of the documents in our group record a money transfer διὰ τῆς ἐπὶ τοῦ πρὸς Ὀξυρυγχιτῶν πόλει Σαραπιείου τραπέζης (or sim.) with an account of bankers involved.[34] At the bottom of the document we also find a confirmation by a bank official of the act of transfer (*diagraphê*) itself. Moreover, in most cases the *cheirographon* is reported to

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[28] Wolff (supra n. 2) 164-166.

[29] The Ptolemaic exceptions are *P.Mich.* III 183 (182 BCE – Tebtynis); *P.Oxy.* XIV 1639 (73/44 BCE – Oxyrhynchos); *P.Tebt.* I 156 = *MChr* 47 (91 BCE – Tebtynis) (?). *P.Oxy.* XIV 1639 is the earliest instance of a bank *cheirographon* of the type discussed in this article. In the related material the bank *cheirographon* is already mentioned a century earlier: *P.Ryl.* IV 585 fr. 2 ll. 45-46 (early II BCE – Unknown Provenance).

[30] Among the first-century Arsinoite documents surveyed here, sixteen contain no *hypographhê*; only two do. No *hypographhê* in: *BGU* I 260 = *MChr* 137 (89 CE); *P.Bingen* 61 (56 CE – Tebtynis); *P.Gen.* I 23 = *MChr* 264 (70 CE); *P.Louvre* I 16 (41-54 CE – Soknopaiou Nêsos); *P.Mich.* I 266 (38 CE – Tebtynis (?)); V 276 (47 CE); 331 (41 CE); 338 (45 CE); 353 (48 CE); 354 (52 CE); IX 571 bis (96-98 CE – Karanis); *P.Ryl.* II 94 = *Sel.Pap.* II 255 (15-36 CE – Euhêmeria); *P.Tebt.* II 387 (73 CE – Tebtynis); 391 (99 CE – Tebtynis); *P.Wisc.* II 53 (55 CE – Koptos); *SB* XIV 12138 (41-54 CE – provenance uncertain). *Hypographhê* in *BGU* XI 2112 (mid I CE); *Stud.Pal.* XXII 17 (I/II CE).

[31] With *hypographhê*: *P.Oxy.* II 264 = *MChr* 266 (54 CE); 267 = *MChr* 281 (37 CE); 269 = *Sel.Pap.* I 69 (57 CE); XIV 1641 (68 CE); XXXVI 2773 (82 CE); XLIX 3483 (early I); 3487 (65 CE); LVIII 3915 (30 CE); *P.Oxy.Hels.* 29 (54 CE); *P.Turner* 17 (69 CE); *P.Yale* I 63 (64 CE); *SB* X 10222 = *P.Oxy.* II 305 *descriptum* (20 CE); 10238 (37 CE); 10246 = *P.Oxy.* II 304 *descriptum* (55 CE); 10256 (55-67 CE). Without *hypographhê*: *P.Oxy.* II 272 (after 10.5.66 CE); XLVII 3351 (34 CE).

[32] An average of ca. 35 letters a line in Oxyrhynchite documents that contain *hypographhê*. Cf., e.g., *P.Oxy.* II 267 = *MChr* 281 (40 letters a line); XLIX 3487 (35); *SB* X 10222 = *P.Oxy.* II 305 *descriptum* (35). In the Ptolemaic period the average is ca. 25 letters a line. In the contemporaneous Arsinoitês the average is 27.

[33] Cf., e.g., *P.Oxy.* XLIX 3487 (65 CE), with a picture at <<http://163.1.169.40/gsdl/collect/POxy/index/assoc/HASH0102/0a069d91.dir/POxy.v0049.n3487.a.01.hires.jpg>>.

[34] Cf. infra n. 38.

be issued on the same day as the transfer. [35] Accordingly, there seems to have been a close connection between the scribe and the bank. I do not think, however, that the scribe was actually working from within the bank. Before 69 we may have more than one bank near the *Sarapeion*[36] and the same format is used by them all. I assume therefore an independent bureau, located near the *Sarapeion*, which issues legal documents recording transactions involving neighboring banks.[37] The view that the scribe was independent will also help us to understand the later development of the scribal office.

The involvement of banks in the documentation of legal transactions is attested in *cheirographa* from Oxyrhynchos down to the mid third century CE. Yet as time goes by, it becomes less frequent. In the first century we count as many as fourteen Oxyrhynchite bank *cheirographa*, and only nine that are not associated with the bank. In the first half of the second century we have a roughly equal number of documents in both groups (4 to 7). But in the second half of the second century we have just five documents that report the involvement of a bank and 20 that probably do not. In the first half of the third century CE the relation is two to 49, and no bank *cheirographon* is found among the 51 Oxyrhynchite *cheirographa* dating to its later half.[38]

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[35] *P.Oxy.* II 264, 22-26 = *MChr* 266 (54 CE): *Kaisareios* 15; 269,20-22 = *Sel.Pap.* I 69 (57 CE): *Germanikeios* 18; XLIX 3487,38-41 (65 CE): *Phaôphi* 4; LV 3798,53-57 (144 CE): *Epagomenai*; *SB* X 10222,30-32 = *P.Oxy.* II 305 *descriptum* (20 CE): *Tybi* 16; 10234,10-11 = *P.Oxy.* II 323 *descriptum* (35 CE): *Neos Sebastos* 21; 10238,26 (37 CE): *Choiach* 24 (restored in the *diagraphê*); 10246,26-28 = *P.Oxy.* II 304 *descriptum* (55 CE): *Neos Sebastos* 4. In *P.Oxy.* LVIII 3915,29-30 (30 CE) the document is composed in *Sabastos* 10, and the transfer takes place on the following day (*Sebastos* 11). The same month as in the actual document (*Pachôn*), but with no indication of the exact day, is reported in the *diagraphê* of *P.Oxy.* II 267,32-34 = *MChr* 281 (37 CE).

[36] R. Bogaert, 'Les banques affermées de l'Égypte romaine', *Studi in onore di Cesare Sanfilippo*. III (Milan 1983) 37-61 at 48.

[37] Cf. J. Krüger, *Oxyrhynchos in der Kaiserzeit: Studien zur Topographie und Literaturrezeption* (Frankfurt am Main 1990) 101.

[38] First century: reference to a bank in *PIFAO* III 30,3-4 (early I); *P.Oslo* III 130,9-10 (late I); *P.Oxy.* II 264,6-7 (54 CE); 267,3-4 = *MChr* 281 (37 CE); 269,2-3 = *Sel.Pap.* I 69 (57 CE); XLIX 3487,7-9 (65 CE); LVIII 3915,13-14 (30 CE); *P.Turner* 17,6-7 (69 CE); *P.Yale* I 63,3 (64 CE); *SB* X 10222,5-7 = *P.Oxy.* II 305 *descriptum* (20 CE); 10234,1-13 = *P.Oxy.* II 323 *descriptum* (35 CE); 10238,3-5 (37 CE); 10246,2-4 (55 CE); XIV 11302,7 (late I CE). No reference to a bank in *P.Oxy.* II 272 (after 10.5.66 CE); XIV 1641 (68 CE); XXXVI 2773 (82 CE); XXXVIII 2846 (late I CE) (?); XLVII 3351 (34 CE); 3483 (early I CE) (?); *P.Oxy.Hels.* 29 (54 CE); *P.Princ.* II 32 (99/100 CE); *SB* X 10256 (55-67 CE). Approximately datable to the first or second century with reference to a bank: *SB* VI 9372,4-6 (II CE); XVI 13041,2 (I-II CE). Early second century: reference to a bank in *P.Köln* III 148,3-6 (117-153 CE); *P.Oxy.* LV 3798,16-18 (144 CE); *P.Oxy.Hels.* 34,10-12 (101 CE); *P.Yale* I 65,10-13 (141-144 CE (?)). No reference in *PIFAO* I 14 (140 CE); *P.Mert.* I 14 (103 CE); *P.Oxy.* III 507 = *Sel.Pap.* I 62 (146 CE); 511 (103 CE); XIV 1710 (148 CE); XXXVI 2774 (129 CE); *P.Ups.Frid.* 3 (122/3 CE).

However, what we have here is not simply a gradual decline: in the third quarter of the second century, that is the period extending from 150 to 174, we have four bank *cheirographa* out of a total of ten documents in which the clause referring to the bank was preserved, yet all these *cheirographa* date to the beginning of the quarter, to the 150's.[39] In the entire period extending from the beginning of the Roman period down to the end of the 150's we note as many as twenty-four *cheirographa* involving a bank, while such an involvement can be ruled out in seventeen only.[40] In the rest of the second and the third century, on the other hand, we find four bank *cheirographa* at the most out of a corpus of 112 *cheirographa* issued in the Oxyrhynchite nome.[41] I am under the impression that something happened around 160, an impression that is also supported by the related material. Down to the early 160's, bank *cheirographa* are mentioned in twelve papyri, at least ten of which are certainly Oxyrhynchite.[42] There is, on the other hand, no undisputable reference from any later date.[43]

Late second century: reference to a bank in *P.Mil.* I 51,6-8 (after 161 CE); *P.Oxy.* I 91,8-10 (187 CE); XXXIV 2722,7-8 (154 CE); *PSI* VIII 878,8-9 (152/3 CE); *SB* VI 9296,8-11 (153-161 CE). No reference in *P.Matr.* I 2 (181/2 CE); *P.Mert.* I 19 (173 CE); *P.Oslo* II 40a and 40 b (150 CE); *P.Oxy.* IV 719 ll. 10-29 (after 25.10.193 CE); XIV 1696 (197 CE); XVII 2134 (after 13.12.170 CE); XVII 2135 bis (188 CE); XLIX 3493; 3494 (both from 175 CE); LVII 3911 (199 CE); *P.Oxy.Hels.* 36 (167 CE); *P.Rein.* II 101 (198-209 CE); *P.Stras.* I 54 (153/4 CE); *P.Wisc.* I 9 (183 CE); *PSI* XII 1253 (186 CE); *SB* XVI 12333 (189-193 CE); XX 14199 (179 CE); XXIV 16009 (186 CE (?)). Third century *cheirographa* reporting the involvement of a bank are *P.Oxy.* XXXI 2584,7-9 (211 CE); *SB* V 7634,18-20 (249 CE).

[39] *P.Mil.* I 51 (after 161 CE); *P.Oxy.* XXXIV 2722 (154 CE); *PSI* VIII 878 (152/3 CE); *SB* VI 9296 (153-161 CE). No reference to a bank in *P.Mert.* I 19 (173 CE); *P.Oslo* II 40a and 40 b (150 CE); *P.Oxy.* XVII 2134 (after 13.12.170 CE); *P.Oxy.Hels.* 36 (167 CE); *P.Stras.* I 54 (153/4 CE).

[40] A bank is mentioned in *PIFAO* III 30 (early I CE); *P.Köln* III 148 (117-153); *P.Oslo* III 130 (late I CE); *P.Oxy.* II 264 (54 CE); 267 = *MChr* 281 (37 CE); 269 = *Sel.Pap.* I 69 (57 CE); XXXIV 2722 (154 CE); XLIX 3487 (65 CE); LV 3798 (144 CE); LVIII 3915 (30 CE); *P.Oxy.Hels.* 34 (101 CE); *P.Turner* 17 (69 CE); *P.Yale* 60 = *SB* VI 9289 (6/5 BCE); 63 (64 CE); 65 (141-144 CE (?)); *PSI* VIII 878 (152/3 CE); X 1099 (6/5 BCE); *SB* VI 9296 (153-161 CE); X 10222 = *P.Oxy.* II 305 *descriptum* (20 CE); 10238 (37 CE); 10246 (55 CE); XIV 11302 (late I CE); XVI 12700 = *SB* XIV 11286 (Augustan period). No bank in *PIFAO* 1 14 (140 CE); *P.Mert.* I 14 (103 CE); *P.Oslo* II 40a and 40 b (150 CE); *P.Oxy.* II 272 (after 10.5.66 CE); III 507 = *Sel.Pap.* I 62 (146 CE); 511 (103 CE); XIV 1641 (68 CE); 1710 (148 CE); XXXVI 2773 (82 CE); 2774 (129 CE); XLVII 3351 (34 CE); *P.Oxy.Hels.* 29 (54 CE); *P.Princ.* II 32 (99/100 CE); *P.Stras.* I 54 (153/4 CE); *P.Ups.Frid.* 3 (122/3 CE); *SB* X 10256 (55-67 CE).

[41] *P.Mil.* I 51 (after 161 CE); *P.Oxy.* I 91 = *Sel.Pap.* I 79 = *CPGr* I 35 (187 CE); XII 1473 (201 CE) (?); XXXI 2584 (211 CE).

[42] *P.Oxy.* I 98,11-12 = *P.Lond.* III 764 *descriptum* (141/2 CE); II 241,31-33 (ca. 98/9 CE); VIII 1132,16-17 (ca. 162 CE); XLIX 3487,13-16 (65 CE); LV 3798,27-28 (144 CE); *P.Turner* 17,13-15 (69 CE); *P.Yale* I 63,6-8 (64 CE); 65,17-18 (141-144 CE (?)); *PSI* XII 1235,17-18 (86-89 CE); *SB* VI 9190,16-17 (131 CE – Talaô); 9569,13-14 (91, uncertain

Thus, the question becomes: why is the bank so rarely documented in Oxyrhynchite *cheirographa* after 160 CE? Before 160, Oxyrhynchite *cheirographa* refer to transactions that were carried out in a bank, and later in *the* bank near the *Sarapeion*. According to R. Bogaert this was originally a private bank, but in 153 it was confiscated by the state.[44] The change in the *cheirographa*, which sets in a decade later, was an outcome, perhaps, of this confiscation. I do not know if the change in the documentation affected the actual activity in the bank as well. Whichever may be the case, it did not affect the scribes who had previously recorded, in the format of the *cheirographon*, transactions involving a bank.

Earlier in the paper I gave five features that distinguish the Oxyrhynchite bank *cheirographa* from the regular, private ones (supra pp. 329-331). Besides (1) the actual reference to the bank in the document and (2) the transfer account at its bottom, I also pinpointed (3) the existence of a *hypographê*, (4) the professional hand of the text, and (5) the wide format. After 160, the reference to the bank in the document and the confirmation of transfer become rare. This is not the case, however, with the other three features. *Cheirographa* with *hypographai* are just as prevalent in the Oxyrhynchitês after 160 as they were before that date;[45] the wider

provenance); *SB* XVIII 13122,5-6 = *P.Palau Rib*. 9 (II CE, uncertain provenance). Cf. also a contemporaneous reference to a bank *cheirographon* outside the Oxyrhynchitês in *Stud.Pal*. XX 1,29-30 = *CPR* I 1 = *MChr* 220 lines 12-13 (83/4 CE), reporting a *cheirographon* issued at the quarter of the Tameiôn in Ptolemais Euergetis. Cf. R. Bogaert, 'Liste géographique des banques et des banquiers de l'Égypte romaine, 30^{A}-284', *ZPE* 109 (1995) 133-173 at 142-143.

[43] A possible, but not certain references, in *P.Oxy*. XII 1473,6-7 (201 CE); *SB* VI 9201,13-19 (203 CE).

[44] Bogaert (supra n. 36) 55-57.

[45] Evidence on the first century is given above, in note 31. The number of second-century *cheirographa* with and without *hypographê* is roughly equal (13:14), with no manifest different between those written before and after 160 CE. In the first half of the third century, *cheirographa* with *hypographê* are again predominant (20:5-7)**.** Second century *cheirographa* with *hypographê*: *P.Col*. X 254 (129 CE); *P.Mert*. I 19 (173 CE); *P.Oxy*. I 91 = *Sel.Pap*. I 79 = *CPGr* I 35 (187 CE); XIV 1696 (197 CE); XVII 2134 (after 13.12.170 CE); XXXIV 2722 (154 CE); LV 3798 (144 CE); LVII 3911 (199 CE); *P.Oxy.Hels*. 34 (101 CE); 36 (167 CE); *P.Ups.Frid*. 3 (122/3 CE); *P.Wisc*. I 9 (183 CE); *SB* XVI 12333 (189-193 CE). Without *hypographê*: *PIFAO* I 12 (197 CE); 14 (140 CE); *P.Mert*. I 14 (103 CE); *P.Oslo* II 40 a and b (150 CE); *P.Oxy*. III 511 (103 CE); XVII 2135 bis (188 CE); XXXIII 2677 (II CE (?)); XLIX 3493 (175 CE); 3494 (175 CE); *P.Rein*. II 101 (198-209 CE); *P.Yale* I 65 (141-144 CE(?)); *PSI* XII 1253 (186 CE);*SB* XXIV 16009 (186 CE (?)). Third century *cheirographa* with *hypographê*: *BGU* XI 2118 (223 CE); *P.Gen*. II 116 (247 CE); *P.Mert*. I 25 (214 CE); *P.Mich*. XVIII 792 (221 CE); *P.Oxy*. VI 909 = *Sel.Pap*. I 35 (225 CE); VII 1040 (225 CE); X 1276 (249 CE); XII 1473 (201 CE); 1474 (216 CE); XIV 1636 = *Sel.Pap*. I 49 (249 CE); 1697 (242 CE); 1707 = *Sel.Pap*. I 33 (204 CE); XXII 2350 (223/4 CE); XLII 3049 (247 CE); LI 3638 (220 CE); *PSI* I 79 (216/7 CE); IX 1068 (246 CE); *SB* I 5806 (235 CE); V 7634 (249 CE); XII 11228 = *P.Yale* I 68 (204 CE). Without *hypographê*: *P.Fouad* I 39 (244-249 CE); *P.Oxy*.

format is maintained in many documents as well[46] and the hand is still very trained, and seems to be that of a professional scribe.[47] In all probability, the *cheirographa* continue to be issued after 160 by a professional scribe, plausibly in the same offices that were located in the vicinity of the *Sarapeion* and had formerly recorded transactions involving the banks.

Yet the scribes did not merely outlive their banks. In the course of the second and third century, they experience unprecedented growth and prominence. Before the mid second century, many legal documents were issued in Oxyrhynchos at the *agoranomeion*. This was frequently the case with loans, and invariably with marriage documents, wills, and slave and land sales. Yet around the mid second century, things start to change. From the 140's onwards most loans take the form of a *cheirographon*, from around 160 this is the case with animal sales, and from 179 onwards with land sales. A similar process is discernible also for marriage documents. In the late second and third century the *agoranomeia* are engaged primarily in the composition of slave related documents and perhaps wills. [48]

VII 1039 = *Sel.Pap*. I 71 (210 CE); XXXI 2584 (211 CE) (?); XLI 2989 (III CE); LXI 4117 (240 CE); *P.Wisc*. I 15 (236 CE); *PSI* VI 699 (III CE) (?).

[46] Some of the *cheirographa* from this period exhibit a largely unprecedented width: cf., e.g., *P.Oxy*. XLIX 3493 (175 CE) and *SB* XII 11228 = *P.Yale* I 68 (204 CE), both with approximate width of 18 cm and ca. 60 letters the column. Narrower formats are used as well: cf., e.g, *P.Mert*. I 25 (214 CE), with a column of ca. 25 letters and 9 cm. wide.

[47] Cf., e.g., *P.Oxy*. XII 1475: elaborate chancery hand with a high degree of proficiency and stylization and some flourishes. *P.Oxy*. XLIX 3493: Documentary hand written fast but with some letter separation: the product of a capable scribe. I thank Dr. R. Cribiore for commenting on the palaeograpy of the two papyri.

[48] Twenty-three of the 54 loan contracts from Oxyrhynchos that were written prior to 149 CE were composed at the *agoranomeion*: the number of *cheirographa* is 21. Between 150 and 249 the figures are 16 *cheirographa* and only 1 (!) agoranomic loan contract. Land sales: the source material before 159 CE contains 11 cases of Oxyrhynchite land sales composed at the *agoranomeion*, but no *cheirographon*. Between 160 and 250 CE we register just one agoranomic instrument (*SB* XII 11229, 161-168 or 171-179 CE), and between seven and eight *cheirographa* (cf. infra 51). Similar tendency is evident, perhaps, also in marriage documents: 7 out of 10 marriage documents from the first and first half of the second century whose scheme is identifiable take the form of *agoranomic* instrument, only 3 are *cheirographa*. After 150 CE we have just one *agoranomic* marriage document – *PSI Cong*. XX 10^{r} ll. 14-28 (174 CE). The other five documents are either *cheirographa* (2 cases), or private protocols (cf. Wolff (supra n. 2) 122-123). In the case of animal sales, all six third-century documents from Oxyrhynchos take the form of *cheirographon*, and none of *agoranomic* instrument. Still, the almost complete absence of earlier evidence – two documents in all: *P.Oxy*. LVIII 3915 (30 CE); *PSI* X 1119 (156 CE) – does not allow to establish change. Slave sales on the other are always predominately agoranomic throughout the early Roman period. This is the case in 15 of the 16 extant Oxyrhynchite *Greek* documents. This also seems to be the case with Greek wills, at least in the late second century CE: cf., e.g., *P.Col*. X 267 (180-192 CE).

The most interesting and significant of the abovementioned developments is undoubtedly that relating to land sales, and land conveyances in general. The Ptolemaic and Roman rulers of Egypt were always interested in keeping an eye on land conveyances.[49] In the Roman period, one way of achieving this goal was to have all land-sales composed in public instruments, i.e. in legal instruments composed in the *grapheia*, *agoranomeia*, or *mnêmoneia*. In some nomes – most conspicuously the Arsinoitês and the Hêrakleopolitês – this is generally the case at least down to the end of the third century CE.[50]

As we just saw, this is not the case in late second-century Oxyrhynchos. From the late second century, land-sales are recorded in this nome *invariably* in the format of the *cheirographon*. This Oxyrhynchite peculiarity is interesting (and actually quite striking) for two reasons. First, the pattern: the change is across-the-board, and so far as our source material allows us to judge, quite drastic: exclusive use of the agoranomic instrument down to 160, exclusive use of the *cheirographon* from 179 onwards.[51] Drastic shifts of this kind frequently result from conscious acts of reform.

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[49] Cf., e.g., E. Schönbauer, *Beiträge zur Geschichte des Liegenschaftsrechtes im Altertum* (Leipzig 1924); H.J. Wolff 'Registration of Conveyances in Ptolemaic Egypt', *Aegyptus* 28 (1948) 17-96; F. Pringsheim, *The Greek Law of Sale* (Weimar 1950) 232-238. The interest is evident also before Alexander, in different parts of the Greek world. Cf. M. Faraguna, 'A proposito degli archivi nel mondo greco: terra e registrazioni fondiarie', *Chiron* 30 (2000) 65-115; *Idem*, 'Registrazioni catastali nel mondo greco: il caso di Atene', *Athenaeum* 85,1 (1997) 7-33.

[50] As many as 156 of the 188 Arsinoite documents that record sales in the first through third centuries are composed in an *agoranomeion* or a *grapheion*. The same proportion is maintained in the third century: 10 of the 11 extant documents are issued at the *agoranomeion* of Ptolemais Euergetis. Similar figures are conveyed by the Hêraklopolitês: at least 20 out of the 22 documents that may have been issued in this nome (many of which may also be of Arsinoite provenance) are composed at the *agoranomeion*. All these documents stem from the third century CE, so we cannot be certain that this was the case also in earlier times. Such a supposition is rendered, however, quite likely by the Ptolemaic finding: cf., e.g., *BGU* VIII 1733 (80-30 BCE).

[51] All 11 contracts recording the sale of immovables from pre-160 CE Oxyrhynchos are agoranomic. *P.Harr.* I 138 (92 CE); *P.Oxy.* I 99 = *P.Lond.* III 765 *descriptum* (55 CE); 100 = *CPJ* III 454 (133 CE); III 577 *descriptum* (117/8 CE); III 588b *descriptum* (108 CE); *PSI* IV 320 (18 CE); VIII 897 I (93 CE (?)); 897 II (93 CE); X 1118 (25/6 CE); *SB* XVI 12553 (I-II CE); XX 14336 = *P.Oxy.* III 633 *descriptum* (91/2 or 107/8 CE). After 160 we count 22 *cheirographa,* 1 agoranomic instrument, 1 *synchôrêsis* and 1 *grapheion* memorandum. *Cheirographa*: *P.Berl.Möller* 6 = *SB* IV 7343 (late III CE); *P.Gen.* II 116 = *SB* XII 11233 (247 CE); *P.Giss.* I 100 (after March 272 CE); *P.Leid.Inst.* 54 (after 271 CE); *P.Oxy.* IV 719 ll. 10-29 (after 25.10.193 CE); IX 1208 (291 CE); X 1277 (257 CE); XII 1475 (267 CE); XIV 1634 (222 CE (?)); 1696 (197 CE); 1697 (242 CE); 1698 (269 CE (?)); 1699 (240-280 CE); 1700 (late III CE); 1701 (III CE); 1702 (290 CE); XLI 2989 (III CE); *P.Palau Rib.* 11 = *SB* XVI 12537 (III CE); *PSI* VI 705 (late III CE); *SB* VI 8971 = *P.Harr.* I 143 (284/5 CE); XX 14199 (179 CE). Possibly also *P.Giss.* I 51 (202 CE) Agoranomic: *SB* XII 11229 (161-168 or 171-179 CE). *Synchôrêsis*: *P.Oxy.* XIX 2236 (early III CE). *Hypomnêma*: *SB* XX 14974 = *SB* XVIII

This may also have been the case with the Oxyrhynchite land sales. If so, the change in format and scribe was enjoined from above and did not derive simply from a shift in the popular taste.[52]

Second, *cheirographa* recording land sales show, more than any other document, the features that characterized the bank, or *Sarapeion cheirographa* in the preceding period: they all contain *hypographai*, and are written in a professional hand and in an extremely wide format (around 15 cm. wide).[53] If, relying on these features, we assume that *cheirographa* documenting land sales were composed in the office of the *Sarapeion*, the shift was not from an established professional organ to private hands, but from one organ, that of the *agoranomeion*, to another, that adjacent to the bank near the *Sarapeion*.

There are, however, two fundamental differences between the two scribes. First, in the case of the *agoranomeion*, the place of composition is stated explicitly on the papyrus. [54] The *cheirographa*, by contrast, do not disclose their authors; we conjuncture their identity solely on account of the document's physical features. Second, the agoranomic instrument is acknowledged as a δημόσιος χρηματισμός, a designation that accords it two privileges.[55] First, the contents of the document can be enforced without a court sentence. Our attention is drawn, however, primarily by the second privilege.

The rulers of Egypt were always interested in monitoring land. They were especially interested in preventing the creation of conflicting real property rights on the same object, with the legal uncertainty and social unrest that would result from

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13331 (190 CE). *Grapheion* memorandum: *P.Oxy.* XIV 1725 (after 24.6.229 CE). Not clear: *PSI* VIII 946 (III CE).

[52] A reform does not have to take the form of an active action, let alone a comprehensive act of legislation on the part of the provincial authorities in Alexandria (comp. H.J. Wolff (ed. H.-A.Rupprecht), *Recht der griechischen Papyri* I (Munich 2002) 132, on the circumstances that brought about the introduction of the *stipulatio* clause into documentary papyri after 219 CE). In our case, a general ordinance is ruled out by the continued composition of land sales by public scribes in the Arsinoitês after 160 CE (cf. supra n. 50). Yet the tendency to reduce state involvement in private contracts in itself is also manifested in the Arsinoitês – in the shutdown of the village *grapheia* (Wolff, supra 2) 21. The central government seems then to have set the goal – i.e. minimizing state involvement in contracts – but allowed the officials on site to select the measures they deemed appropriate for reaching it. The same policy may account for the downfall of the census and the declarations of birth and death in the third and early four century. Cf. R.S. Bagnall, 'Governmental Roles in the Economy of Late Antiquity', *Production and Public Powers in Antiquity. Eleventh International Economic History Congress, Milan, September 1994. Proceedings* (Milan 1994) 86-91 at 89.

[53] Cf., e.g., *P.Oxy.* XII 1475, with a picture at <<http://ipap.csad.ox.ac.uk/4DLink4/4DACTION/IPAPwebquery?vPub=P.Oxy.&vVol=12&vNum=1475>>.

[54] E.g. *P.Oxy.* II 266,7 = *MChr* 292 = *Sel.Pap.* I 7 (96 CE): ἐν ἀγυιᾷ; XII 1562,2 (279-282 CE, Oxyrhynchos): ἐπὶ τοῦ ἀγορανομείου και μνημονείου.

[55] Wolff (supra n. 2) 139-140, 174-175.

such conflicts. For this purpose, a new archive was created in the mid first century CE, the *bibliothêkê enktêseôn*. Every real property right was to be registered in the *bibliothêkê enktêseôn*. There it would be made public and evident to any future potential purchaser or transferee of the land.[56] Yet to record a right it had to be documented in a δημόσιος χρηματισμός, that is, most conspicuously, an *agoranomic* instrument. If the right was documented in a *cheirographon*, it had to undergo additional scrutiny before it could be submitted to the *bibliophylakes* for registration. Before the mid third century, this scrutiny (*dêmosiôsis*) had to be performed at the *katalogeion* in Alexandria.[57]

In this respect, things do not change in late second-century Oxyrhynchos. *Cheirographa* that have recorded real property rights still have to undergo *dêmosiôsis* before the right can be recorded in the *bibliothêkê enktêseôn*. Since the *cheirographon* is now invariably used for the documentation of real property rights, after 179 every Oxyrhynchite sale-contract has to go through Alexandria before it can be registered in the *bibliothêkê*. In other words, after the reform the purchaser would either leave his newly acquired rights unregistered and run the risk of creating conflicting rights in the future, or endure the costs, time and efforts involving the scrutiny of the purchase by the *katalogeion* in Alexandria.[58]

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[56] On the policies behind the creation of the new archive cf. the 89 CE edict of M. Mettius Rufus (*P.Oxy.* II 237,8,27-43) ll. 31-36: κελεύω οὖν πάντας τοὺς κτήτορας ἐντὸς μηνῶν ἓξ ἀπογράλψασθαι τὴν ἰδίαν κτῆσιν εἰς τὴν τῶν ἐνκτήσεων βιβλιοθήκην καὶ τοὺς δανειστὰς ἃς ἐὰν ἔχωσι ὑποθήκας καὶ τοὺς ἄλλους | ὅσα ἐὰν ἔχωσι δίκαια, τὴν δὲ ἀπογραφὴν ποιείσθωσαν δηλοῦντες πόθεν ἕκαστος τῶν ὑπαρχόντων καταβέβηκεν εἰς αὐτοὺς | ἡ κτῆσ{ε}ις. Παρατιθέτωσαν δὲ καὶ αἱ γυναῖκες ταῖς ὑποστάσεσι τῶν ἀνδρῶν ἐὰν κατά τινα ἐπιχώριον νόμον κρατειται (read κρατῆται) τὰ ὑπάρlχοντα, ὁμοίως δὲ καὶ τὰ τέκνα ταῖς τῶν γονέων οἷς ἡ μὲν χρῆσ{ε}ις διὰ δημοσίων τετήρηται χρηματισμῶν, ἡ δὲ κατῆlσις μετὰ θάνατον τοῖς τέκνοις κεκράτηται, ἵνα οἱ συναλλάσσοντες μὴ κατ' ἄγνοιαν ενεδρευονται (read ἐνεδρεύωνται). Cf. Wolff (supra n. 2) 253-254.

[57] Cf., e.g. *P.Oxy.* IX 1200,44-52 (266 CE – Oxyrhynchos): βουλόμενος (read βουλομένη) δὲ ἀπὸ τῆς δισσῆς ἀσφαλείας μοναχὴν ἐν δημοσίῳ γενέσθαι δίδωlμι τῇ πόλει τὰς ὁρισθείσας (δραχμὰς) ιβ καὶ τὸ τοῦ τειμήματος τέλος, ἀξιῶ ἀναlλαβόντας αὐτὴν παρὰ τοῦ διαπεσταλμένου ὑπ' ἐμοῦ Αὐρηλίου 'Απολlλωνίου ὑπογεγραμμένην ὑπὸ αὐτοῦ περὶ τοῦ εἶναι τὴν ὑπογραφὴν | ἰδιόγραφον τοῦ γράψαντος συνκαταχωρίσαι αὐτὴν τῷδε τῷ ὑπolμνήματι εἰς τὴν 'Αδριανὴν βιβλιοθήκην, τὸ δὲ ἴσον εἰς τὴν τοῦ Ναναίlου, πρὸς τὸ μέν⟨ε⟩ιν μοι τὰ ἀπὸ αὐτῆς δίκαια ὡς ἀπὸ δημοσίου χρηlματισμοῦ ἕνεκα τοῦ εὐδοκηκέναι τῇ δημοσίωσει. (ἔτους) ιγ Γαλλιηνοῦ | Σεβαστοῦ Παῦνι. Cf. Wolff (supra n. 2) 129-132, and in detail, P. Jörs, 'Δημοσίωσις und ἐκμαρτύρησις', *ZSav* 34 (1913) 107-158.

[58] Quite frequently, the registration interest won the upper hand: no other period or place provides half as many appeals for *dêmosiôsis* as late-second and third-century Oxyrhynchos (14 documents): *P.Heid.* IV 325^{r} (215 CE); *P.Matr.* 2 (181/2 CE); *P.Mich.* XI 614 (258/9 CE); *P.Oxy.* IV 719 (after 25.10.193 CE); IX 1200 (266 CE); XII 1473 (201 CE) (?); 1474 (216 CE); 1475 (267 CE); XII 1560 (209 CE); 1561 (before 29.8.269 CE); XII 2134 (after 13.12.170 CE); *PSI* XIII 1328 = *SB* V 7817 (201 CE); *SB* XVI

Accordingly, the removal of land sales from the agoranomic instrument to the *Sarapeion cheirographa* seems to frustrate the principle of legal clarity, the principle that was meant to be served by the creation of the *bibliothêkê enktêseôn* a century earlier.[59] From this perspective, the two reforms are not easily reconcilable. This fact, however, does not make the reform of 160 entirely inexplicable. From the state viewpoint, legal clarity costs. It requires not only the creation and preservation of the *bibliothêkê enktêseôn* itself, but also that of a network of public scribes whose instruments would be recorded in its files.[60]

Accordingly, throughout the Roman period we note an ongoing tendency to limit the types of transactions that are handled directly by the state notary. Leases are withdrawn from the state notaries as early as the first century CE.[61] In the 140's, the same happens in the Oxyrhynchitês with loans.[62] The new policy culminates in the rise of the *tabellio* document and the complete demise of the state notary in the fourth century CE.[63] Hence, the removal of land sales from the state notaries is just one stage in a long, ongoing process of 'privatization' of scribal activity in Egypt.

The most decisive change occurs two centuries later. By the mid fourth century the *cheirographon* takes root everywhere in Egypt, even in places, like the Arsinoite nome, which have formerly been strongholds of the agoranomic instrument. In some places, the change may mean a substantial break with past scribal traditions, as the reform also involves the creation of a new system of private scribes, called *tabelliones*, συμβολαιογράφοι, νοτάριοι or νομικοί.[64] This is not however the case in Oxyrhynchos.

12333 (189-93 CE); XXIV 16265 = *P.Mich.* XI 615 (259/60 CE). All other times and places yield the same number (14 documents): *BGU* II 455 (before 133 – Unknown Provenance); 578 = *MChr* 227 = *JP* 46 (189 CE – Arsinoitês); 614 (217 CE – Arsinoitês); III 717 (149 CE – Arsinoitês); *P.Flor.* I 40 (162/3 CE (?) – Hermopolitês); 68 (after 13.12.172 CE (?) – Hermopolitês); *P.Grenf.* II 71 = *P.Lond.* III 711 *descriptum* = *MChr* 190 (244 – Hibis, Oasis Magna); *P.Lips.* I 10 = *MChr* 189 (240 CE – Hermopolis); 120 = *MChr* 230 (after 3.2.89 CE – Oxyrhynchos (?)); *P.Meyer* 6 (125 CE – Tamais, Arsinoitês); *P.Stras.* V 370 (after 1.175 CE – Arsinoitês); *PSI* XII 1238 (244 CE – Arsinoitês); *SB* XVIII 13974 (after 250 CE – Arsinoitês); XXII 15325 (176 CE (?) – Karanis). *P.Ryl.* II 340^{r} *descriptum* (253 CE) is dated to discussed period but its provenance is uncertain. Eventually, a simpler procedure was devised, as the *cheirographon* could undergo *ekmartyrêsis* – a registration with the *agoranomos* on-site (Wolff (supra 2) 132-133). Yet this solution came very late, not before the second half, and possibly even the last quarter of the third century. Roughly a century stands, then, between the problem and its solution.

59 Cf. supra n. 56.

60 One notes that the change takes place roughly simultaneously with the disappearance of the village *grapheia* in the Arsnoite hinterland. Cf. Wolff (supra n. 2) 21 and supra n. 52.

61 Yiftach-Firanko (supra n. 24) 1057.

62 Supra n. 48.

63 Wolff (supra n. 2) 9-10; *id.* (supra n. 12) 115.

64 Sachers (supra n. 12) 1850-1852.

In Oxyrhynchos the *cheirographon* was already predominant for at least two centuries, and was issued by professional private scribes located near the *Sarapeion*. All that was added in the fourth century were an additional date clause at the beginning of the document, and a new clause at the end, in which the scribe finally reveals, in his own handwriting, his identity.[65] Accordingly, even if the new *cheirographon* was imported in the fourth century from outside Egypt, as H.J. Wolff maintains,[66] in Oxyrhynchos it was sown on fertile ground.

I shall conclude with a methodological note. In monographs on Greek legal documents from Egypt we frequently find the distinction between public documents – i.e. those issued in the presence of witnesses, or under the supervision of a state organ – and private documents, whose composition did not require any of these elements.[67] This distinction is well founded of course, yet one could also make another distinction, based on the writer's level of expertise: i.e. between documents written by laymen and those composed by professional scribes. It can be assumed that a scribe employed by the state was also professional. Therefore, every document that is drawn up in a public notary office can be assumed to be composed professionally. Yet this does not mean, of course, that every document that was not issued by a state notary was also composed 'unprofessionally'. I would even *a priori* assume that non-official documents were commonly issued by professional scribes as well. Yet documents that are not drawn up by a state organ very frequently do not report the identity of their authors; we do not know, therefore, who these scribes were. In this paper, I have tried to develop a method for surmounting this obstacle.

Although the *cheirographon* does not report its author, first-century CE *cheirographa* from Oxyrhynchos contain some important hints. Many record a transaction that was carried out in a bank near the *Sarapeion*, and are drawn up on the same day as the act of transfer itself. Documents that contain these two features exhibit three other characteristics: they contain *hypographai*, are written by experts,

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[65] Cf., e.g., *P.Oxy*. VIII 1130 (484 – Senokômis, Oxyrhynchitês) l. 31: δι' ἐμοῦ Πέτρου ἐράγη.

[66] Wolff (supra 12) 134. Wolff's view is strongly supported by the close similarities between the scheme of the *cheirographa* employed by the *tabelliones* and that used in the second-century documents from Arabia. Note, in particular, four elements: (1) the insertion, at the beginning of the document, of the date formula, and (2) the use of the routine Roman dating, by consuls, rather than the Hellenistic-Egyptian one by the year of the reigning emperor: cf., e.g., *P.Yadin* 11 ll. 1,12-13 (Ein-Gedi, 124 CE and Sachers (supra n. 12) 1855), (3) an autograph confirmation by the scribe who wrote the document, with an indication of his name (*P.Yadin* 11,30 and Sachers (supra n. 12) p. 1856-1858) and (4) the presence of witnesses at the composition of the document (*P.Yadin* 11^{v} and Sachers (supra n. 12) p. 1856).

[67] Wolff (supra 2) 106, 114, 123. Cf. also J. Mélèze-Modrzejewski, 'Le Document Grec dans l'Égypte Ptolémaïque', *Atti del XVII Congresso Internazionale di Papirologia. III (Napoli, 19-26 maggio 1983)* (Naples 1984) 1173-1187 at 1174-1176.

and feature relatively wide formats. On the accumulation of these features in these specific documents I concluded that they were all issued by professional scribes in private bureaus that were located around the *Sarapeion* and acted in close cooperation with the banks. Then, around 160 CE, the reference to the bank largely disappears, but the other features continue to turn up down to the end of the third century. Upon these features – the *hypographê*, the hand and the format – I conclude that the *Sarapeion* scribe, or scribes, never stopped working and documenting transactions in the format of the *cheirographon* down to the end of the Roman period.

This conclusion fits well with what we know in general about legal documentation in Roman Oxyrhynchos. Throughout Egypt legal documents were composed by official scribes in the offices of the *agoranomeion* and the *grapheion*. It was also the case in Oxyrhynchos. Here, however, there was always another 'professional' alternative. One could go to the quarter of the *Sarapeion* and have a document composed by scribes who were just as skillful as those located in the *agoranomeion*; the document would take then the form of a *cheirographon*. This availability explains why the *cheirographon* was so popular and eventually predominant in Roman Oxyrhynchos – even in spheres, like land conveyances, that were monopolized by the state notary in other parts of Egypt.

Moreover, the presence of the alternative was not left unnoticed by the state: the continued existence of the private offices taught the state that the scribal system does not have to be public in order to be effective. The insight gained from this experience paved the way to the disintegration of the *agoranomeia* in the fourth century and their replacement, throughout Egypt, by a network of private scribes who carried out most scribal activities from this point. It also explains why the format chosen was that of the *cheirographon*. In this respect, the history of the *cheirographon* is also the story of the privatization of contractual activity in the course of the Roman period.

HENRI VAN EFFENTERRE †

Henri van Effenterre nous a quittés le 3 Novembre 2007, soulagé semble-t-il de partir vers d'autres cieux: il supportait mal la dépendance à laquelle il avait été réduit, lui que nous avions connu si actif et heureux de partager avec les autres les plaisirs du travail et de l'amitié. Son œuvre scientifique, à laquelle nous voulons rendre hommage dans ce volume de *Symposion,* pourrait paraître écartelée entre l'archéologie minoenne et l'analyse de textes juridiques postérieurs de plusieurs siècles. Pourtant, c'est le même intérêt pour la façon dont les hommes vivaient et dont les communautés fonctionnaient qui l'animait dans les différents domaines qu'il explorait. Son sens du concret, sa perception des motivations et des besoins des hommes, l'ont fréquemment amené à proposer des explications inédites, au risque de choquer d'abord et de voir ses idées rejetées avant qu'elles ne fussent reconnues pour ce qu'elles étaient: indépendantes et novatrices, donc fructueuses et même, très souvent, justes. On est frappé, en parcourant sa bibliographie, de la brièveté de beaucoup de ses articles : ils traitaient de détails concrets à partir desquels il pouvait

ensuite critiquer les idées reçues et construire de plus vastes hypothèses. Parmi celles-ci, il en est une qui sert de fil conducteur à une bonne partie de son œuvre et qui ne fut pas toujours comprise, c'est celle de la continuité entre le monde des palais minoens et celui de la cité grecque; les textes juridiques archaïques ne lui paraissaient pas éloignés des «lois de Minos», autrement dit des règles de fonctionnement qu'il avait perçues dans les communautés minoennes. En véritable historien (à sa formation en Lettres classiques il avait ajouté celle de «Sciences-Pô» et il fut toujours passionné d'histoire contemporaine), il croyait peu au surgissement brutal de nouveautés sociales ou politiques, même après des guerres et des destructions, mais plus aux évolutions de longue durée avec, de temps en temps, une secousse qui apportait quelque changement, comme c'est le cas dans l'histoire des techniques. Certes, cela n'allait pas sans un certain goût du paradoxe, voire de la provocation: il fallait oser parler de la «défaite» de Marathon dans le titre d'un ouvrage de synthèse sur la longue histoire de la gestation de la cité grecque; pour lui, en exacerbant le sentiment «patriotique» des Athéniens, cette victoire les avait entraînés vers l'hégémonie aux dépens de la paix.

Dans ses relations avec ses collègues, même beaucoup plus jeunes, la discussion le trouvait toujours ouvert et l'argument d'autorité lui était totalement étranger: que d'heures de discussions avons-nous passées, lui, Micheline et moi, à échanger nos idées sur les textes des *Nomima,* enrichies de questions posées à d'autres collègues et amis, jusqu'au moment où il fallait trancher; mais il n'imposait son avis que lorsqu'il sentait son intuition solidement fondée sur les pratiques juridiques connues et les textes qui les attestaient. Il avait toujours eu, depuis ses prises de responsabilité dans le scoutisme, le sens du service, de la nécessaire contribution de chacun au fonctionnement de la collectivité et du respect de l'autre. Ses emportements étaient infiniment plus rares que ses marques d'intérêt pour la pensée d'autrui, ses gestes de chaleureuse amitié et ses invitations à poursuivre la discussion ou à en ouvrir d'autres autour d'un bon repas. Dans tout cela, l'accompagnement de Micheline lui était indispensable et, sans elle, son œuvre et ses amitiés n'auraient pas eu la même intensité.

Françoise Ruzé

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