ENTRETIENS SUR L'ANTIQUITÉ CLASSIQUE

TOME LVI

DÉMOCRATIE ATHÉNIENNE – DÉMOCRATIE MODERNE: TRADITION ET INFLUENCES

NEUF EXPOSÉS SUIVIS DE DISCUSSIONS
PAR
PASQUALE PASQUINO, CHRISTIAN MANN,
KAREN PIEPENBRINK, OSWYN MURRAY,
CYNTHIA FARRAR, ADRIAAN LANNI,
ERIC ROBINSON, MOGENS H. HANSEN,
PAULINE SCHMITT PANTEL

Entretiens préparés par Mogens H. Hansen, présidés par Pierre Ducrey
et édités par Alain-Christian Hernández

FONDATION HARDT
POUR L'ÉTUDE DE L'ANTIQUITÉ CLASSIQUE
VANDŒUVRES – GENÈVE

2010

Les premiers «Entretiens sur l'Antiquité classique» ont eu lieu en 1952, du 8 au 13 septembre. Dans l'avant-propos du volume où ils sont consignés, le Baron Kurd von Hardt en donne la définition. La voici: «Chaque année, au siège de la Fondation à Vandœuvres, auront lieu des 'Entretiens sur l'Antiquité classique', au cours desquels des spécialistes, représentant plusieurs pays, feront des exposés sur un domaine choisi et, au cours des discussions, procèderont à d'enrichissants échanges de vue.»

Conçue et mise au point par des savants tous aujourd'hui décédés – parmi eux Ludwig Curtius, Bruno Snell, Kurt von Fritz, Albin Lesky, Theodor Klauser, Olof Gigon –, l'institution s'est révélée viable. Cinquante-six fois, des savants de divers pays se sont réunis en été à Vandœuvres; les «Entretiens» ont été régulièrement publiés.

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TABLE DES MATIÈRES

Préface par PIERRE DUCREY VII

Introduction par
MOGENS HERMAN HANSEN XI

I PASQUALE PASQUINO

Democracy Ancient and Modern: Divided Power 1

Discussion 41

II CHRISTIAN MANN

Politische Partizipation und die Vorstellung des Menschen als zoon politikon 51

Discussion 87

III KAREN PIEPENBRINK

Bürgerrecht in der Griechischen Polis und im Modernen Staat 97

Discussion 128

IV OSWYN MURRAY

Modern Perceptions of Ancient Realities from Montesquieu to Mill 137

Discussion 161

V CYNTHIA FARRAR

Taking our Chances with the Ancient Athenians 167

Discussion 218

VI ADRIAAN LANNI

Judicial Review and the Athenian 'Constitution' 235

Discussion 264

VII ERIC ROBINSON

Greek Democracies and the Debate over Democratic Peace 277

Discussion 301

VIII MOGENS HERMAN HANSEN

Ancient Democratic Eleutheria *and Modern Liberal Democrats' Conception of Freedom* 307

Discussion 340

IX PAULINE SCHMITT PANTEL

Démocratie athénienne, démocratie moderne: le rapport à la religion 355

Discussion 389

Conclusion par OSWYN MURRAY 395

INDICES 403

PRÉFACE

Les 56e *Entretiens sur l'Antiquité classique de la Fondation Hardt* marquent, comme la plupart des *Entretiens* précédents, l'aboutissement d'un long processus. L'une des étapes essentielles fut une conversation à Erétrie, dans l'île d'Eubée, en septembre 2006. Mogens H. Hansen nous faisait alors l'honneur et le plaisir d'une visite sur le site exploré depuis 1964 par les archéologues suisses, celui de l'ancienne cité d'Eretria. Il tombait à un moment particulièrement intense: pour la première fois, des sondages étaient pratiqués avec l'espoir de voir se confirmer les hypothèses développées durant des décennies sur l'emplacement du seul grand sanctuaire grec non encore localisé avec précision, celui d'Artémis Amarysia. En dépit de la présence sur place et de l'inspiration du grand historien danois, 2006 ne fut pas une bonne année. Il a fallu attendre 2007 pour que la fouille débouche sur des structures qui pourraient appartenir à l'un des bâtiments du sanctuaire. Des obstacles divers s'opposent depuis lors à la poursuite de l'investigation. Mais tous les espoirs restent permis, le 'suspense' se poursuit.[1]

A vrai dire, la visite de Mogens Hansen à Erétrie n'était pas due seulement à son souhait de visiter le site. Dans le cadre de ses recherches sur la population d'Erétrie, il avait sollicité auprès des autorités archéologiques grecques l'autorisation d'examiner au musée d'Erétrie deux des grands catalogues de citoyens qui

[1] Sur les sondages de 2006, voir T. THEURILLAT, S. FACHARD, "Campagne de fouilles à Amarynthos", in *AKunst* 50 (2007), 135-9; sur les sondages de 2007, voir T. THEURILLAT, S. FACHARD, CL. LÉDERREY, "Amarynthos 2007", in *AKunst* 51 (2008), 154-64, avec une mise en perspective des résultats par D. KNOEPFLER, *ibid.*, 165-71. Pour le dernier état de la recherche sur le sanctuaire d'Artémis Amarysia, voir B. BLANDIN, " Amarynthos au début de l'Age du Fer", in *AKunst* 51 (2008), 180-91.

sont une particularité de l'épigraphie de la cité (*IG* XII 9, 246 et 247).

La conversation d'Erétrie avec Mogens Hansen ne doit rien non plus au hasard, même si d'anciens liens d'amitié et de collaboration l'unissent à l'auteur de ces lignes. Rappelons que depuis quelques années, les membres de la Commission scientifique de la Fondation Hardt orientent leurs réflexions pour les *Entretiens* à venir dans une direction très précise. Il convient en effet à leurs yeux que les *Entretiens* et les volumes qui les suivent prennent pour thèmes des sujets intéressants et utiles non seulement pour les spécialistes, mais aussi pour un public élargi. Les problématiques retenues doivent être inédites, stimulantes et nouvelles.

Le Baron Kurd von Hardt, inventeur de la formule, a fait en sorte que se réunissent chaque année les meilleurs savants, les meilleurs spécialistes autour d'un thème donné. On peut dire que cette tradition a été maintenue tout au long des 56 *Entretiens* qui ont été organisés jusqu'ici, avec quelques adaptations toutefois: alors que la participation de dames resta longtemps exceptionnelle, nous veillons aujourd'hui à ce que l'équilibre de genres soit réalisé dans toute la mesure du possible. Nous faisons en sorte aussi qu'à côté de savants confirmés, une place soit assurée à des représentants de la relève, à des chercheurs ou enseignants plus jeunes. Ceux-ci doivent évidemment avoir déjà apporté la preuve de leurs compétences dans le domaine choisi. Il est à peine nécessaire de souligner que ces conditions rendent la composition de la liste des participants et futurs auteurs fort complexe. Les exigences de qualité qui font la force de la collection des *Entretiens* et du volume réunissant les diverses contributions restent immuables.

Le choix de la Commission scientifique de la Fondation Hardt s'était donc porté sur un thème, la démocratie, et une personne qualifiée pour concevoir des *Entretiens* consacrés à ce sujet. La personne recherchée ne pouvait être que Mogens H. Hansen, dont une partie importante de l'œuvre est consacrée à ce thème, sous les angles les plus divers. Avec l'allant et l'en-

thousiasme qui le caractérisent, il n'a pas tardé à donner son accord. Il a façonné un titre: "Démocratie athénienne — démocratie moderne: tradition et influences", avec sa variante en langue anglaise: "Athenian *Demokratia* — Modern Democracy: Tradition and inspiration", a fait appel à des orateurs, bref il a 'préparé' ces *Entretiens*, selon les termes exacts et les usages propres à la Fondation depuis des décennies. Les communications présentées furent de haut niveau, les discussions animées. Le volume que l'on tient en main se compare donc par la qualité de sa présentation et de son contenu à ses prédécesseurs. Comme le remarque Oswyn Murray dans sa conclusion, le sujet n'est pas épuisé et d'autres aspects de la démocratie pourraient être abordés encore. Laissons-les aux générations montantes et rendons hommage aux auteurs qui nous permettent d'éditer un volume consacré à un sujet qui reste d'une actualité toujours brûlante.

Sur un point, la Fondation a rompu en 2009 avec la tradition. A l'origine, le Baron von Hardt organisait les *Entretiens* dans sa bibliothèque privée. Les séances se déroulaient autour d'une table, dans un cadre intime. Par la suite, elles furent organisées dans la grande salle de la bibliothèque scientifique. En 2009, c'est un rêve qui a pu se réaliser, l'organisation des *Entretiens* dans l'orangerie rénovée. Il n'était pas certain au départ que ce cadre serait effectivement propice à des communications scientifiques et à des discussions savantes. Le résultat dépassa les attentes: les parois de verre donnent à la salle une lumière très agréable et permettent aux participants de laisser errer leur regard sur la nature environnante, tout en échappant au regard des curieux: le jardin du domaine ne porte-t-il pas depuis son origine le nom de "jardin clos"?

Terminons comme il est d'usage par quelques remarques pratiques: le présent volume est le second qui a été entièrement édité par Alain-Christian Hernández. Ce dernier a su relever avec succès le défi lancé par son prédécesseur au long cours, Bernard Grange. La conduite administrative de la Fondation, et donc des *Entretiens*, fut assurée comme ces dernières années

par Monica Brunner, secrétaire scientifique. Que tous les acteurs de cette nouvelle édition des *Entretiens* trouvent ici l'expression de notre gratitude.

Pierre Ducrey

INTRODUCTION

DEMOCRACY ANCIENT AND MODERN

My point of departure for this comparative study of Athenian and modern democracy is the traditional tripartition of constitutions into monarchies, oligarchies and democracies. It goes back to Classical antiquity but is still the backbone of modern studies of forms of state.[1] World history shows that democracy differs from the two other forms of state by being delimited both chronologically and geographically. While monarchies and oligarchies can be found in all periods and all over the world, democracy is attested only in two periods: Classical antiquity and the modern world from ca. 1800 onwards. Furthermore, until the mid twentieth century it was found in the Western World only.[2]

To understand the reason for the chronological distribution we must turn from form of state to type of state. A combined analysis of State-formation and urbanisation leads to the view that, from antiquity to the nineteenth century, there were, basically, two types of state: macro-states each dotted with a number of cities, and regions broken up into city-states, each consisting of an urban centre and its immediate hinterland. The city-state is a micro-state. City-states mostly appear in clusters and a region settled with interacting city-states is what

[1] In his slim book *Modern Political Analysis* (Englewood Cliffs 1963), Robert A. Dahl devotes one whole page (70-1) to a discussion of Aristotle's model of constitutions.

[2] Including Australia and New Zealand which were in fact the earliest democracies after USA, cf. R.A. DAHL, *Democracy and its Critics* (New Haven 1989), 236.

Montesquieu followed by a number of Scandinavian and German historians of the 19th and 20th centuries.[8]

The evidence from other continents is even more meagre. Democratic village communities are attested, e.g., on Bali and among the Thakali in Bhutan.[9] But there is no evidence of democratically governed states in Asia, Africa and South America before the 20th century.

The ancient Hellenic city-state culture stands out as the exception in that a large number of the *poleis* were democratically governed states. Thus, unless in future the specialists in the ancient Near East can produce indisputable evidence of democratically governed city-states in Bronze and Iron Age Mesopotamia and Asia Minor, we must accept the traditional view that democracy as a form of state is a peculiarity of Western civilisation and that democracy was invented in ancient Greece.

The origin of Greek democracy

When and where ancient Greek democracy was instituted is still a matter of dispute. The traditional view is that the cradle of democracy stood in Athens, that it was Kleisthenes the Athenian who introduced popular government in 508/7,[10] and that the term democracy is even later and was presumably coined in the wake of Ephialtes' reforms in 462.[11] This view has been attacked in particular by Eric Robinson and Robert Wallace,[12]

[8] Tac. *Germ.* 11; Montesquieu, *De l'esprit des lois* VI, ch.11, 407 in the Pléiade edition; K. von Amira, *Grundriss des germanischen Rechts* (Strasbourg 1913).

[9] C. Geertz, *Negara. The Theatre State in Nineteenth-Century Bali* (Princeton 1980); M. Winding, *The Thakali. A Himmalayan Ethnography* (London 1998).

[10] J. Bleicken, *Die athenische Demokratie* (Paderborn ²1994), 47; D. Kagan, *Pericles of Athens and the Birth of Democracy* (New York 1991), 1.

[11] Chr. Meier, *The Greek Discovery of Politics* (Cambridge, Mass. 1990), 84.

[12] E.W. Robinson, *The First Democracies. Early Popular Government Outside Athens* (Stuttgart 1997); R.W. Wallace, "Revolutions and a New Order in

and today the prevailing view is that popular government goes back to the Archaic period and is attested in the 6th century both in *poleis* on the Greek mainland and in some of the colonies. I have argued that the term *Demokratia* goes back at least to the 470s, presumably to Kleisthenes[13] and perhaps even further back, namely to the earliest of all preserved constitutional documents, the Great Rhetra which prescribes a constitutional reform which allegedly took place in Sparta in the early Archaic period.

Today almost all ancient historians agree that the Great Rhetra — quoted by Plutarch in his *Life of Lykourgos* 6 — is a genuine Spartan constitutional document from, presumably, the late 7th century. It is also generally believed that in the last clause the garbled γαμω should be emended to δάμῳ so that the last provision of the document was δάμῳ δ' ἀνταγορίαν ἦμεν καὶ κράτος.[14] But reading δάμῳ ... κράτος we have to infer that the concept of δημοκρατία and presumably the term itself can be traced all the way back to the seventh century B.C. and associated with Sparta.[15]

It seems that the cradle of democracy stood in Sparta rather than in Athens but, of course, the Spartan warrior democracy described in the Rhetra was not like the Athenian democracy

Solonian Athens and Archaic Greece", in *Origins of Democracy in Ancient Greece*, ed. by K.A. RAAFLAUB, J. OBER, R.W. WALLACE (Berkeley 2007), 49-82.

[13] M.H. HANSEN, "The Origin of the Term *Demokratia*", in *LCM* 11 (1986), 35-6.

[14] The best interpretation of the meaning of the Rhetra is, in my opinion, O. MURRAY, *Early Greece* (London ²1993), 167: "The meaning of the sentence is given by the commentary: 'The people was sovereign to decide on the motion put forward by the elders and kings'". 168: "thirdly and most emphatically (in the corrupt clause) power is to rest with the people".

[15] See my review of E.W. ROBINSON, *op. cit.* (n. 12) in *BMCR* 1999.9.17 [http://bmcr.brynmawr.edu/ 1999/ 1999-09-17.html]. I advocated this interpretation in *Det athenske demokrati i 4. årh. f.Kr.* (Copenhagen 1978), I, 59 with n. 480. We cannot, however, be absolutely sure that the Rhetra is a genuine archaic document. Plutarch had it from Aristotle's *Constitution of the Lakedaimonians*. Aristotle may have taken it from the exiled king Pausanias' book about the Lykourgan constitution, written in the second half of the 390s (*FGrH* 582), and Pausanias may have tailored or perhaps even faked it.

the Copenhagen Polis Centre has called a city-state culture.[3] As far as we know, from the dawn of history to the end of the eighteenth century all macro-states were governed by monarchs.[4] Most city-states were monarchies too, but due to the small size of city-states quite a few became republics, i.e. states ruled by councils and assemblies, in which decisions were made in meetings, by majority verdict, after a debate among the participants. It is this form of political decision-making which dominates the modern world. What matters in this context is that it has its roots in city-state cultures. It can be traced back to the ancient Mesopotamian city-states; it is well known from the European city-state cultures; it is also seen in some African and Asian city-state cultures.[5]

So from the dawn of history until ca. 1800 A.D. there was a close connection between republican government and urbanised micro-states. Small agrarian republics without an urban centre are far less common.[6] But in history there have been two types of republic: oligarchies in which government was in the hands of a small upper class defined by wealth or noble birth (or both), and democracies in which political participation was open to a larger section of the adult male population so that important decisions had to be made in popular assemblies rather than by magistrates or councils.

[3] *A Comparative Study of Thirty City-State Cultures*, ed. by M.H. HANSEN (Copenhagen 2000), 11-34, 597-623. So far we have identified thirty-seven city-state cultures, see M.H. HANSEN, *Polis. An Introduction to the Ancient Greek City-State* (Oxford 2006), 17-23.

[4] The only two exceptions are Rome from 510-31 B.C. and England from 1649-1660. Republican Rome, however, was not a proper state but an overarching power which governed a four-digit number of dependencies, most of them city-states (M.H. HANSEN, *op. cit.* [n. 3] [2000], 614). I find it significant that as Rome changed from a city-state empire into a macro-state organised into administrative provinces, the republican form of government gave way to monarchy. The short period of republican government in England was an interregnum in the true sense of the term.

[5] M.H. HANSEN, *op. cit.* (n. 3) (2000), 611-2.

[6] One example is constituted by the three Swiss cantons that formed the *Eidsgenossenschaft* in 1291: Schwyz, Uri and Unterwalden.

Oligarchically governed city-states are attested in several continents and in all periods; democracies are few and far between. Large decision-making assemblies are attested in the Assyrian and Babylonian city-state cultures.[7] But, so far, pure (i.e. unmixed) democracy is only attested in the Hellenic *poleis*. In some city-state cultures there have been traces of democracy, in particular in the early phases of the city-state culture in question. There were popular assemblies of some importance in republican Rome. Popular assemblies are attested in the early period of the Italian city-states but they soon disappeared or were reduced to insignificance. For five years, from 1378-82, Firenze was governed democratically. While all the Swiss city-states were oligarchies, some of the small rural cantons were democracies from the 13th century and to the present day. Iceland was a democracy until 1266, if one can speak about democratic government in a stateless society. The Iron-Age German democracy mentioned by Tacitus may be another 'democracy' in a stateless society, but it may also be a myth kept alive by

[7] In the Old Assyrian period the city-state of Assur was governed by (1) a king, (2) a small council of "big men", (3) a large council to which, perhaps, most or even all adult male inhabitants had access, and (4) some magistrates of whom the most important was one appointed by lot for one year (M. TROLLE LARSEN, "The Old-Assyrian City-State" in *A Comparative Study of Thirty City-State Cultures*, ed. by M.H. HANSEN [Copenhagen 2000], 83-5). Assur seems to have had a mixed constitution that combined monarchical, oligarchical and democratic institutions. Obvious parallels are the mixed constitutions of Sparta and Rome. Neither constitution was a pure democracy but in both there was a democratic element. So, an ancient pure democracy has not (yet) been found outside the Western World but if — as seems plausible — most or all adult males had access to the large council in Assur we have one example of an Asian city-state with democratic institutions, and there may have been many more. What we know about Assur in the period ca. 1990-1960 B.C. is due to the accidental preservation of tens of thousands of written tablets from the Assyrian port at Kanesh in Asia Minor. Similar institutions are attested in Neo-Babylonian city-states and in Mari in eastern Syria, see G. BARJAMOVIC, "Civic Institutions and Self-Government in Southern Mesopotamia in the Mid-First Millennium B.C.", in *Assyria and Beyond: Studies Presented to Mogens Trolle Larsen*, ed. by J.G. DERCKSEN (Leiden 2004), 47-98; D.E. FLEMING, *Democracy's Ancient Ancestors. Mari and Early Collective Governance* (Cambridge 2004).

of the Classical period. Since Plutarch found the text of the Rhetra in Aristotle's *Constitution of the Lakedaimonians* it is worth mentioning Aristotle's comment in the *Politics* that the positive form of popular government, the so-called *politeia*, in earlier times was called δημοκρατία (*Pol.* 1297b24-5) and that it was a kind of warrior democracy in which political rights were restricted to hoplites (*Pol.* 1279b2-4, 1297b1-25). *Politeia* was in fact not a pure democracy but a mixed constitution with both democratic and oligarchical institutions (*Pol.* 1295a31-4), and Sparta had a mixed constitution (*Pol.* 1294b18-34). We must not forget that ancient Greek δημοκρατία has a history that spans more than 500 years, from ca. 600 to ca. 100 B.C. or even later,[16] and that the δάμῳ κράτος in Archaic Sparta was very different from the Athenian δημοκρατία in the age of Demosthenes and the Milesian democracy in the Hellenistic period. Similarly modern democracy has a history that spans more than 200 years from the American and French revolutions to the present day and democracy ca. 1800 was very different from what it is in 2009.

So Kleisthenes did not invent democracy in 508/7 but installed in Athens a form of state which had existed for some time in some form in some of the *poleis*. The number of democracies grew in the course of the Classical period. During the first half of the 4th century at least two-fifths of all *poleis* were democracies,[17] and from the age of Alexander to the Roman Conquest of Greece in 146 B.C. democracy was the dominant form of constitution.[18] From then on oligarchic features became more and more prominent in the way the *poleis* were governed,[19]

[16] P. GAUTHIER, *Les cités grecques et leurs bienfaiteurs* (Paris 1985), 66-7; S. CARLSSON, *Hellenistic Democracies* (Uppsala 2005), 379-405.

[17] M.H. HANSEN, "Introduction", in *An Inventory of Archaic and Classical Poleis*, ed. by M.H. HANSEN, T.H. NIELSEN (Oxford 2004), 84.

[18] G. SHIPLEY, *The Greek World after Alexander 323-30 B.C.* (London 2000), 35.

[19] The Athenian democracy was gradually turned into an oligarchy in the second half of the 2nd century B.C. and an oligarchic constitution was imposed after Sulla's conquest of Athens in 86 B.C. See C. HABICHT, *Athens from Alexander to Antony* (Cambridge, Mass. 1997), 315-16.

and I think it is fair to say that towards the end of the Roman imperial period democracy had disappeared for good.[20]

THE RETURN OF DEMOCRACY

With the insignificant exceptions mentioned above, democracy did not reappear in any state as a constitution actually practised by a people until the early 19th century. The first really important mass movement launched under the banner of democracy was Andrew Jackson's democratic party set up in 1828.[21] USA had indisputably become a democracy when Tocqueville visited the country in 1830-2, and his majestic two-volume account of American democracy, published in 1835 and 1840, made Europeans familiar with this political system that derived its name from the δημοκρατία of the ancient Greek city-states. If — with Robert Dahl — we take free and fair elections and universal male suffrage to be the necessary criteria for a state to qualify as an early democracy, the only democracies in 1900 were the USA, Canada, New Zealand, France, Switzerland and Belgium. After the First World War the number of European democracies had risen to fourteen, and the first democracies to appear in Mesoamerica and South America were Argentina (1916-30), Uruguay and Costa Rica.[22] The next great waves of democratisation came after 1945, when democracy spread from the Western world to the third world, and again after 1989 when a large number of central and east European states became democracies. The great majority of the 192 states that exist today claim to be democracies,[23] but only about a third of them deserve the

[20] A.H.M. JONES, *The Greek City from Alexander to Justinian* (Oxford 1940), 170-91.

[21] J. ROPER, *Democracy and its Critics. Anglo-American Democratic Thought in the Nineteenth Century* (London 1989), 53-4; D. HEATER, *Citizenship. The Civic Ideal in World History, Politics and Education* (London 1990), 67.

[22] R.A. DAHL, *op. cit.* (n. 2), 238.

[23] See O. Murray *infra* 137.

name according to the independent non-government organisations that analyse and assess the degree of democratic institutions and freedoms in each country.[24]

So democracy is a form of state that existed in the ancient Greek *polis* world from the 6th to the 1st century B.C. and again in the modern world from ca. 1800 to the present day. Between ca. 150 B.C. and ca. 1800 A.D. democracy was just a historical concept, one of the three forms of government known from the ancient authors: monarchy, oligarchy and democracy. It was a type of constitution no-one had to take seriously any longer, except perhaps as an element of the mixed constitution. But due to the strong influence of Classical literature democracy has always had a place in political discourse, and even a prominent place during the Renaissance and the Enlightenment. So, if we want to study democracy as a concept in political discourse, we have an unbroken tradition from ca. 600 B.C. to the present day.[25] If instead we prefer to study democracy as a political system practised in historical communities, we may have a broken tradition or an inspiration. If we can find important similarities between ancient and modern democracy, they may be due to the influence of Classical literature and a wish to bring back ancient democracy or, at least, to be inspired by the ancient example. Alternatively, we may find similarities that are unrelated to the Classical tradition. With this in mind we can move from the question when and where there have been democratically governed states to the question: what are the similarities between ancient *demokratia* and modern democracy?

[24] R.A. DAHL, *On Democracy* (New Haven 1998), 196-9.

[25] M.H. HANSEN, *The Tradition of Ancient Greek Democracy and its Importance for Modern Democracy* (Copenhagen 2005), 7-18.

ANCIENT *DEMOKRATIA* - MODERN DEMOCRACY[26]

Today the term democracy denotes both a set of political institutions and a set of political ideals.[27] What connects the two different aspects of democracy is the common belief that these ideals are furthered by the *democratic* political institutions more than by any other form of government.[28]

As a set of political institutions democracy is commonly defined as a political system in which power — directly or indirectly — rests with the whole of the people.[29] And in this context it is extremely common — almost inevitable — to refer to the etymology of the term: democracy is derived from ancient Greek *demokratia*, *demos* means people *kratos* means power; thus, democracy means "the power of the people" and signifies the rule of the people.[30] As a set of ideals democracy is connected first of all with liberty next with equality.[31]

It is remarkable how in this respect modern democracy resembles ancient Greek *demokratia*. First, *demokratia* was both a political system and a set of political ideals. Second, the political ideals singled out by the Athenian democrats were liberty (called *eleutheria*) and equality (called *isonomia* and other compounds with *isos*). To illustrate my point I find it sufficient to refer to Perikles' description of Athenian democracy in the funeral oration as reported by Thucydides at 2.37: as today,

[26] The following section (down to note 47) is a revised version of M.H. HANSEN, *Was Athens a Democracy?* (Copenhagen 1989), 4-7.

[27] G. SARTORI, "Democracy", in *International Encyclopedia of the Social Sciences* (New York 1968), 112.

[28] Stated in the preamble to the European Convention on Human Rights of November 1950.

[29] B. HOLDEN, *The Nature of Democracy* (London 1974), 4; ID., *Understanding Liberal Democracy* (London 1988), 5.

[30] A. LIJPHART, *Democracies. Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven 1984), 1: "The Literal meaning of democracy — government by the people — is probably also the most basic and most widely used definition".

[31] B. HOLDEN, *op. cit.* (n. 29) (1988), 28: "Democracy, equality and liberty form, as it were, the three points or angles of a triangle".

democracy (δημοκρατία) is associated with equality (πᾶσι τὸ ἴσον), liberty (ἐλευθέρως) and tolerance (ἀνεπαχθῶς) and for each of these three ideals Perikles describes how it operates both in the private sphere and in the public sphere (τὰ ἴδια διάφορα [...] ἐς τὰ κοινά — τά τε πρὸς τὸ κοινόν [...] τὴν πρὸς ἀλλήλους ὑποψίαν — τὰ ἴδια [...] τὰ δημόσια). In my opinion this passage from Thucydides illustrates a basic similarity between modern democracy and ancient *demokratia*.[32]

Nevertheless, it has become fashionable to emphasise the basic 'difference' between modern democracy and ancient *demokratia*. Students of ancient history as well as students of political science tend to assert that it is a gross anachronism to speak of Athenian democracy. Conceptually democracy and *demokratia* are homonyms, not synonyms.[33] According to Tocqueville the name was the only similarity between the ancient Greek and the modern American form of democracy.[34] Consequently, in our analysis, we ought to distinguish between ancient *demokratia* and modern democracy and emphasise all the differences. Some students of political science are inclined first to invoke the etymology in their definition of the term democracy but then to deny that ancient Greek *demokratia* was a democracy according to the definition they propose. Others prefer to focus on similarities. One is Robert A. Dahl. In his small but illuminating book *On Democracy* he argues that "to deny that Athens was a democracy would be rather like saying that what the Wright brothers invented was not an airplane because their early machine so little resembled ours today".[35]

[32] M.H. HANSEN, *op. cit.* (n. 26), 3-4; ID., "Thucydides' Description of Democracy (2.37.1) and the EU-Convention of 2003", in *GRBS* 48 (2008), 26.

[33] G. SARTORI, *Democratic Theory* (Westport 1988), 250-77; CHR. MEIER, "Bürger-Identität und Demokratie", in *Kannten die Griechen die Demokratie?*, hrsg. von CHR. MEIER (Berlin 1988), 47-94; P. VEYNE, "Les Grecs ont-ils connu la démocratie?", in *Diogène* 123 (1983), 3-33; F. GSCHNITZER, "Von der Fremdartigkeit griechischer Demokratie", in *Demokratia. Der Weg zur Demokratie bei den Griechen*, hrsg. von K.H. KINZL (Darmstadt 1995), 412-31.

[34] A. DE TOCQUEVILLE, *De la démocratie en Amérique* [Paris 1835-40], 2, 3, 15, éd. par J.-CL. LAMBERTI, J.T. SCHLEIFER (Paris 1992), 737.

[35] R.A. DAHL, *op. cit.* (n. 24), 102.

The objections regularly raised against Athenian democracy are twofold. First, democracy is the rule of the 'whole' of the people to the exclusion of minors and maniacs only. Athenian *demokratia* was the rule of the male citizens only to the exclusion of women, resident foreigners and slaves. Thus, by our standards it was oligarchy, not democracy.[36] Second, the rule was exercised directly by the people whereas modern democracy has become government by representatives of the people. Direct democracy has been made impossible by the size of modern nations and undesirable by the complex nature of modern society in which important decisions cannot any longer be left to ordinary citizens.[37]

Thus, Athenian *demokratia* is criticised for being both 'more' democratic and 'less' democratic than democracy. It is more democratic by being government by the people instead of government by those elected by the people. It is less democratic by narrowing down the concept of *demos* to denote the adult male citizens in assembly. Admittedly, there is some truth in both objections against taking *demokratia* to be democracy. On the other hand, both objections show a surprising lack of historical perspective.

Comparing ancient Athenian *demokratia* with modern democracy we must keep in mind that the history of modern democracy spans more than 200 years from the American and French revolutions to the present day. In a historical investigation, do we want to compare *demokratia* with the concept of democracy in the 19th, the 20th or the 21st century?

[36] M.I. FINLEY, *Democracy Ancient and Modern* (London 1973), 15-16; J. LIVELY, *Democracy* (Oxford 1975), 12. This objection to Athenian democracy goes back to J. BENTHAM, *A Fragment on Government* (1776), ch. 2, Section 34, and further back to D. HUME, *On the Populousness of Ancient Nations* (1752), 396, here cited from the World Classics edition of *Essays* (London 1903), 381-451.

[37] G. SARTORI, *op. cit.* (n. 33), 252-7; J. LIVELY *op. cit.* (n. 36), 29-32. This objection goes back to J.S. MILL, *Considerations on Representative Government* (London 1861), 8 in C.V. SHIELD's edition.

Before 1850 no one would object to calling *demokratia* democracy. On the contrary, democracy was usually taken to be direct government practised in a small society by a rather narrowly defined people. Two important testimonies to this fact are the entries "démocratie" and "democracy" in, respectively, Diderot's *Encyclopédie* (1754) and the first edition of the *Encyclopædia Britannica* (1771). In the French *Encyclopédie* the democracies mentioned in de Jaucourt's article were Athens and Rome and the only modern example is San Marino. In the *Encyclopædia Britannica* the short entry reads as follows: "Democracy, the same with a popular government, wherein the supreme power is lodged in the hands of the people: such were Rome and Athens of old; but as to our modern republics, Basil only excepted, their government comes nearer to aristocracy than democracy".[38] In both articles democracy is seen as a purely historical phenomenon. The common belief in the Enlightenment that Rome was a democracy goes back to Jean Bodin who wanted to disprove the view that Rome had a mixed government and therefore argued that the Roman republic must have been a pure democracy.[39] Modern republics were aristocracies, and to list the Swiss canton of Basel as a unique example of a modern democracy was in fact a mistake. In the eighteenth century Basel was a republican city-state governed oligarchically by one small and one larger council, and there was no popular assembly (*Landsgemeinde*). Representative government was called republic not democracy.[40]

The term "representative democracy" made its first feeble appearance in a letter written by Alexander Hamilton in 1777.[41]

[38] *Encyclopædia Britannica* (1771), II, 415.

[39] J. BODIN, *Methodus ad facilem historiarum cognitionem* (1566), in *Œuvres philosophiques de Jean Bodin*, éd. par P. MESNARD (Paris 1951), 177. I owe this observation to Pasquale Pasquino.

[40] J. MADISON, *The Federalist Papers* (1787), n° 10.

[41] Letter from Alexander Hamilton to Gouverneur Morris dated 19 May 1777: "... but a representative democracy, where the right of election is well secured and regulated, and the exercise of the legislative, executive and judiciary authorities is vested in select persons". In the constitution of the Helvetic

The concept is earlier; it can be found in Montesquieu.[42] It flourished briefly in the last decade of the 18th century but disappeared again in the Napoleonic era. And as late as 1848 the new Swiss Federal constitution distinguished between cantons with democracy (a popular assembly) and cantons with representation (an elected parliament).[43]

As regards the concept of people, democracy was believed to be compatible even with slavery. In the seventh edition of *Encyclopaedia Britannica* published in 1842 The United States are praised as "the most perfect example of democracy".[44] This evaluation was written twenty-two years before the abolition of slavery. And in 1858 one could read in the *Ohio State Journal* that: "Negro slavery is the foundation of liberty and the essence of democracy".[45]

Between 1850 and 1920 anyone would admit that there was an essential difference between ancient direct and modern representative democracy. It was Alexis de Tocqueville's account of American democracy which was responsible for the

Republic of 1798 Article 2 proclaimed that the government shall at all times be a "démocratie representative", cf. R.R. PALMER, "notes on the use of the word 'democracy' 1789-99", in *Political Science Quarterly* 68 (1953), 203-26.

[42] In *De l'esprit des lois,* in the chapter about republican government and laws concerning democracy (Book 2 Chapter 2), Montesquieu writes: "Comme la plupart des citoyens, qui ont assez de suffisance pour élire, n'en ont pas assez pour être élus; de même le peuple, qui a assez de capacité pour se faire rendre compte de la gestion des autres, n'est pas propre à gérer par lui-même" (p. 240 in the Pléiade edition). And again in the famous Chapter 6 of Book 11 he notes: "Comme, dans un état libre, tout homme qui est censé avoir une âme libre doit être gouverné par lui-même, il faudroit que le peuple en corps eût la puissance législative. Mais comme cela est impossible dans les grands états et est sujet à beaucoup d'inconvénients dans les petits, il faut que le peuple fasse par ces représentants tout ce qu'il ne peut faire par lui-même" (p. 399). "Tous les citoyens, dans les divers districts, doivent avoir droit de donner leur voix pour choisir le représentant" (p. 400). I believe that, once again, it was Montesquieu who invented the concept of representative democracy and set the agenda for the growth of the idea that in the macro-states of the modern world democracy had to be based on popular election of representatives.

[43] *Constitution Fédérale de la Confédération Suisse du 12 septembre 1848.*

[44] *Encyclopædia Britannica* (⁷1842), VII, 708.

[45] *Ohio State Journal* (September 30, 1858).

dissemination in Europe of the concept of representative democracy. From now on direct democracy was invariably a historical concept and the concept of democracy — without further qualification — was closely linked with the idea of representation. But very few had qualms about democracies that excluded half the population, namely the women who obtained political rights only in the years after World War One, to some extent as a reward for their work in the factories during the war. When president Wilson on the 2 of April 1917 launched the slogan "to make the world safe for democracy" it was a democracy in which women had no political rights.

It is only after 1920, when Wilson's slogan was echoed worldwide by statesmen and scholars, that both objections against Athenian *demokratia* were valid: First the opposition between direct and representative government and second the opposition between the rule of adult male citizens as against the rule of the whole of the people.

But today in 2009 both objections against *demokratia* begin to sound somewhat hypocritical. First the concept of 'the whole of the people'. Since World War Two and especially since the 1960s Western democracies have experienced a substantial immigration, first of guest workers then of refugees.[46] Thus over 7 million people live and work in Germany without having political rights and in Switzerland — allegedly the most democratic country in Europe — over 20 % of the population are without political rights.[47] Modern European democracies have got a metic-problem, just like ancient *demokratia*. The whole of the people no longer means the entire adult population but all 'citizens', just as the term *demos* did in ancient Athens. Again, in the United States only two thirds of the adult citizens have registered and thereby activated their political

[46] L. BOSNIAK, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton 2006).

[47] *Tatsachen über Deutschland* (2009); *Switzerland in its Diversity* (2007-8), 26.

rights, and only half the adult population vote in the election of Presidents. In the midterm elections participation is down to a third of the population. If democracy presupposes that the whole of the people have political rights and that the majority of the adult population make use of their rights, the United States is no longer a democracy but an oligarchy.[48]

The other issue is the difference between direct *demokratia* and representative democracy. It is commonly argued that all the many hundred *polis* democracies were direct[49] whereas all modern democracies are indirect and representative. In outline that is correct but on closer inspection it is a qualified truth.

Aristotle in the *Politics* refers to a type of democracy where the only function of the Assembly of the People is to choose the magistrates and call them to account for their conduct in office, while all political decisions are taken by the magistrates without the People having any say.[50] That is, if not necessarily representative, then at least indirect democracy and it must have been much closer to modern democracy that the direct democracy found in Athens. So the conventional distinction between ancient direct and modern indirect democracy is not quite as sharp as usually believed.[51] But Athens, at any rate, was a direct democracy, the best known in history to date. It is in fact the only ancient democracy for which we have contemporary sources, sufficient to describe its institutions, its structure and its ideology. Accordingly, it is the only ancient democracy that may have served as a model for later democracies and inspired philosophers and statesmen of later ages. Therefore the theme of this conference is a comparison of Athenian and modern democracy, rather than a comparison of ancient and modern democracy.

[48] On the low American voter turnover, see J.S. FISHKIN, *The Voice of the People. Public Opinion and Democracy* (New Haven ²1997), 45-7. Similarly in France ca. 20 per cent of the citizens have not registered in their constituency and are accordingly barred from voting in elections to the *Assemblée Nationale*.

[49] CHR. MEIER, *op. cit.* (n. 11), 85, 165, 218.

[50] ARIST. *Pol.* 1318b21-2, 28ff; 1274a15-8; 1281b32-4.

Conversely, in the course of the 20th century referenda have come to play an increasing role in several modern democracies. In some European states and in 26 of the 50 states of the USA a small but growing number of political issues are decided directly by a vote of the people.[52]

Furthermore, modern technology has made it possible — if we want it — to re-introduce at least some forms of direct democracy. A much larger number of issues can be decided by referenda conducted electronically. Alternatively it is possible to select, from among all voters, a randomised panel of, say, 1,000 persons who can meet and debate an issue and vote about it after some weeks of deliberation. What they decide will indeed be 'the voice of the people' more than any decision made by a parliament. This form of democracy, often called "demarchy", is a form of direct and representative democracy combined. The champions of traditional representative democracy can no longer disregard direct democracy as an 'impossible' form of government in a modern society. They must come out in the open and argue that the most democratic form of government is 'not' the best form of government and that direct democracy is technically possible but undesirable. In such a debate *optimum* will have to be dissociated from *maximum* and we shall have to focus — once again — on the best documented historical example of direct democracy, namely the Athenian democracy in the Classical period.

Tradition and Inspiration

The second half of the title of these *Entretiens* is "Tradition and inspiration". *A priori* both tradition and inspiration suggest similarity; but studying 'long' traditions in particular we may

[51] M.H. Hansen, *The Athenian Democracy in the Age of Demosthenes. Structure, Principles and Ideology* (Bristol ²1999), 3.

[52] I. Budge, *The New Challenge of Direct Democracy* (Oxford 1996). In a more modest form, M. Gallagher, P.V. Uleri, *The Referendum Experience in Europe* (London 1996) and B.R. Barber, *Strong Democracy* (Berkeley 1984).

find that the differences between the early and late stages of a tradition outweigh the similarities. We must also take into account that there can be similarity without any tradition or inspiration, sometimes even a striking similarity. In such cases it is the absence of tradition and inspiration that is interesting.

'Tradition' is a complex concept and I find it important to distinguish between unbroken and broken traditions. By an 'unbroken tradition' I understand institutions, ideas, customs, patterns of material culture etc. transmitted directly from generation to generation. Unbroken traditions can be upheld as they are or changed in the course of time, sometimes changed almost beyond any recognition. By a 'broken tradition' I understand institutions, ideas, customs, patterns of material culture etc. that disappear at a certain point but later are intentionally and artificially revived. Some examples may serve to illustrate the distinction.

In our civilisation the ritual of baptism is an example of an unbroken tradition that has been upheld for almost two millennia. In spite of innumerable variations and divergences, it has been practised in essentially the same form and with the same significance from early Christianity to the present day.[53]

Conversely, monarchy too has an unbroken tradition in Europe from about 500 A.D. and to the present day, but there is an enormous difference in status and powers between Clovis, the first Merovingian king of France and Elizabeth II of the United Kingdom.[54]

The Olympic Games may serve as an instance of a broken tradition. The games were abolished in 393 A.D., but they were revived in 1896, and ever since the link with the ancient Olympics has been an important part of the ideology behind the games.[55]

[53] *Die Taufe. Einführung und Praxis,* hrsg. von C. LANGE, C. LEONHARDT, R. OLBRICH (Darmstadt 2008).

[54] M. CHARLOT, "Monarchy", in *The Blackwell Encyclopaedia of Political Institutions,* ed. by V. BOGDANOR (Oxford 1987), 374-6.

[55] D.C. YOUNG, *The Modern Olympic Games. A Struggle for Revival* (Baltimore 1996).

'Inspiration' is related to the broken tradition and to the unbroken changed tradition, but it is different: An institution, idea, custom or pattern of material culture is influenced by a similar institution, idea, custom or pattern of material culture known from an earlier period of the civilisation in question or from a different civilisation. When the source of inspiration is an earlier stage of the same civilisation, the model can be either an institution or idea that disappeared long ago and is known from history only. Or the model can be an institution or idea that has a long unbroken tradition but has changed. The difference between an inspiration and a broken tradition is that with inspiration there is no intention to copy or revive what has been the source of inspiration, but to learn from it and perhaps incorporate some of its features, but not in the same form. *Or*: the source of inspiration can be held up as a bugbear. In such cases the inspiration is focused on something one has to avoid, not on something that deserves to be revived.

The federal state is an example of 'positive inspiration'. The Aitolian and Lycian federations of the Hellenistic period were federal states, each composed of a number of city-states with a set of federal institutions above the government of each of the dependent member states. Federal states disappeared with the demise of city-states in the course of the Roman imperial period. But in 1787 when representatives from the new American states met in Philadelphia to draw up a new constitution for the former British colonies, the Hellenistic federal states came to serve as a model alongside the Swiss confederacy of 1291 and the Dutch Republic of 1579. The ancient example showed that it was possible to have a state in which sovereignty was divided between some central federal institutions and the governments of the member states. But the Founding fathers did not intend just to copy and revive the ancient federations. They wanted to transform the federation from micro-state to macro-state and to create a new form of political institution. Nevertheless, the inspiration from antiquity cannot be questioned, and the constitution of USA would probably not have

taken the form it has today if it had not been for this inspiration: the basic idea was taken over from the Hellenistic federal states, but at the same time the Founders tried to avoid some of the 'shortcomings' of the Hellenistic federal state, e.g., the disunity of its members which resulted in the Achaians being defeated by the Romans.[56]

The Founders' view of democracy can serve as an example of 'negative inspiration'. They were scared of ancient democracy and disliked direct rule by the people. In a popular assembly passions would often prevail over rationality and democracy would inevitably foster factions. The Founders had this view of democracy from their reading of the classical authors, in particular Xenophon, Plato, Aristotle, Polybios and — above all — Plutarch. Here the ancient Greek example had a strong negative impact, and the influence of the classical tradition was a major reason why it took some decades for Jefferson and Madison to accept that a representative republic could be a democracy and that 'factions' in the form of 'parties' had to be accepted as an inevitable and even beneficial aspect of the new political system.[57] Negative inspiration is in my opinion an important but much neglected field in the study of the Classical tradition.

An obvious example of 'similarity without tradition or inspiration' is the Swiss *Landsgemeinde* which in important respects is strikingly similar to the Athenian *ekklesia.* Every citizen is entitled to address the *Landsgemeinde*, all votes are by show of hands and the majority is roughly assessed by those who chair the meeting. All proposals have been debated and drawn up in advance in the *Kantonsrat* which in this respect is strikingly

[56] C.J. RICHARD, *The Founders and the Classics. Greece, Rome and the American Enlightenment* (Cambridge, Mass. 1994), 105-15; M.H. HANSEN, "Conclusion. The Impact of City-State Cultures on World History", in *A Comparative Study of Thirty City-State Cultures*, ed. by M.H. HANSEN (Copenhagen 2000), 612-3.

[57] R.A. DAHL, *How Democratic is the American Constitution?* (New Haven ²2003), 29-31, 35-7.

similar to the Athenian Council of Five Hundred. A meeting of the *Landsgemeinde* runs for a couple of hours, and there are a dozen of items on the agenda. But the free peasants who created the *Landsgemeinde* in opposition to the Habsburg princes had no idea that their institution in many respects was similar to the Athenian *ekklesia* and *boule*.[58]

What happens when the concepts of tradition, inspiration and similarity are applied to a comparison of ancient and modern democracy?

Because democracy disappeared towards the end of antiquity and did not appear again until the 19th century, no modern democratic institution has an unbroken tradition that can be traced back to antiquity. For representative democracy there is an unbroken tradition which connects modern legislatures with the medieval parliaments of the 13th century onwards, and modern governments with the king's council as known from the high Middle Ages onwards.

A search for 'broken traditions' also leads to negative results. The only attested attempts to re-introduce Athenian institutions came to nothing. Thus, in France in 1802 there was an abortive attempt in a law about special courts to re-introduce ostracism.[59] Again, the legislative commissions proposed by John Stuart Mill in *Representative Government* as an attempt to balance the powers of the elected parliament were inspired by the Athenian fourth-century Boards of *Nomothetai*[60] which Grote, erroneously, had projected back into the age of Perikles.[61] No one ever took up Mill's idea.

[58] M.H. HANSEN, "The Athenian Ecclesia and the Swiss Landsgemeinde", in M.H. HANSEN, *The Athenian Ecclesia. A Collection of Articles 1976-83* (Copenhagen 1983), 207-26.

[59] B. CONSTANT, *De la liberté des anciens comparée à celle des modernes.* Reprinted in B. CONSTANT, *Écrits politiques*, éd. par M. GAUCHET (Paris 1997), 609.

[60] N. URBINATI, *Mill on Democracy. From the Athenian Polis to Representative Government* (Chicago 2002), 63-4.

[61] G. GROTE, *History of Greece* (London 1848) vol. VI, 19-22, cited from the *Everyman's Library Edition* (London 1907).

Nor is there any inspiration that links institutions of a modern representative democracy to their ancient counterparts. The similarities that can be found are not due to tradition or inspiration. An obvious example is judicial review of laws, the procedure by which the supreme court of a country, or a special constitutional court, is empowered to hear any law passed by the parliament and to quash it if it is found to be unconstitutional. Such an institution now exists in most modern democracies[62] and can be traced back to the United States where, in 1803, the power to test and overthrow congressional acts was established and exercised for the first time by the Supreme Court chaired by John Marshal.[63]

The modern judicial review of laws is remarkably similar to the Athenian *graphē paranomōn* and *graphē nomon mē epitēdeion theinai*, the two types of public action by which the popular courts were empowered to hear and overrule any decree (*psephisma*) passed by the *ekklesia* and any law (*nomos*) passed by the *nomothetai*.[64] But, to the best of my knowledge, in spite of the similarity there is no evidence that the Athenian institution inspired John Marshall when he introduced judicial review by the Supreme Court,[65] or Hans Kelsen when in 1920 — inspired by the American model — he designed a constitutional court in Austria which — again — has served as a model for all the European constitutional courts set up after World War Two.[66]

[62] M. GALLAGHER, M. LAVER, P. MAIR, *Representative Government in Modern Europe* (Boston [4]2006), 93-111.

[63] *The Political Role of Law Courts in Modern Democracies*, ed. by J.L. WALTMAN, K.M. HOLLAND (London 1988), 6-7.

[64] M.H. HANSEN, *op. cit.* (n. 51), 205-12. See *infra* p. 20-8 (Pasquino) and p. 235-63 (Lanni).

[65] The similarity between the two institutions is mentioned by T.D. GOODELL, "An Athenian Parallel to the Function of our Supreme Court", in *Yale Review* 2 (1893-1894), 64 *sqq.*, but there is no indication that the introduction of judicial review by the Supreme Court was inspired by the Athenian parallel, cf. M.H. HANSEN, *The Tradition of Ancient Greek Democracy and its Importance for Modern Democracy* (Copenhagen 2005), 22.

[66] T. ÖHLINGER, "The Genesis of the Austrian Model of Constitutional Review of Legislation", in *Ratio Juris* 16 (2003), 206-22.

Not one single Athenian institution seems to have left its mark on posterity neither in the Middle Ages nor in the Early Modern period — when democracy was still conceived as direct rule by the people — nor in the 19th century — when democracy became conceived as representative government based on elections. Popular assemblies have been replaced by parliaments, sortition by election, volunteering citizens by professional politicians, boards of amateur magistrates by a bureaucracy of civil servants, and annual rotation among all citizens by a hierarchy of administrators who serve for decades. There seems to be no field of government in which modern representative democracy has learned from studying the Athenian example.

And yet, during the last generation, Athenian democracy has been viewed by a growing number of people not as a historical curiosity but as a source of inspiration for new forms of democracy.[67] Representative democracy presents a major problem: the problem of participation. It was not felt in the 19th century when democrats everywhere fought for universal suffrage but after World War One, when universal suffrage had become universally accepted, the democrats had to face the problem that the people did not use the democracy they had got.

In this context it has become common to look back to ancient Athens and to envy the Athenians their willingness to participate in politics. The most amazing aspect of Athenian democracy is indeed the degree of participation by the ca. 30,000 adult male citizens who lived in Athens in the age of Demosthenes and Aristotle.[68] This massive involvement in political decision-making and administration is unparalleled in world history. It has elicited admiration in some,[69] but envy in

[67] M.H. HANSEN, *op. cit.* (n. 25), 45-69.

[68] M.H. HANSEN, *op. cit.* (n. 51), 313.

[69] I. MCLEAN, *Democracy and New Technology* (Cambridge 1989), 158: "Could we reinvent Athenian democracy; more pedantically, some combination of democracy and demarchy that was at least as good as the Athenians'? It would have to be better in one regard: it must be workable in an entire population, and

others who then prefer to point out, correctly, that political rights were restricted to adult male citizens and, furthermore, that even in democratic Athens power was in the hands of a small elite of politically active citizens who dominated the democratic institutions.[70] But a different line is taken by some of the politicians and students of political science who advocate more popular participation in political decision-making: what could be achieved in ancient Athens must be achieved again, either by reforming representative democracy or by re-introducing some kind of direct democracy. Some suggest frequent referenda implemented by electronic voting in which all citizens participate.[71] Others prefer to leave political decisions to randomised panels of citizens selected by lot from all citizens, or to have key political issues debated in such panels whose preliminary decision can serve as a recommendation to the parliament that afterwards debates the issue and makes the decision.[72] With a term coined by John Burnheim, this form of popular rule is often called "demarchy" instead of democracy.[73]

There is a noticeable difference in how modern proponents of direct democracy use the Athenian example. Athenian democratic institutions are often ignored or considered irrelevant by those who focus on the idea that all the people all the time must vote on all important political issues. In this context the issue is on how this can be done by electronic voting after the watching of political debates transmitted on TV. On the other

not restricted to free men." See also 5-12, 15-8, 28-9, 109, 127, 130-1, 158-9, 170-1; J.S. FISHKIN, *Democracy and Deliberation* (New Haven 1991), 86-92; ID., *op. cit.* (n. 48), 18-26; 54-55; 80-81, 169; P. RESNICK, *Twenty-First Century Democracy* (Montreal — Kingston 1997), 21-3, 32-5, 88-9, 134-5. L. CARSON, B. MARTIN, *Random Selection in Politics* (Westport 1999), 3-4, 31-3, 35, 40, 100, 104, 108, 116. J.S. FISHKIN, C. FARRAR, "From Experiment to Community Resource", in *The Deliberative Democracy Handbook,* ed. by J. GASTIL, P. LEVINE (San Francisco 2005), 71-2.

[70] I. BUDGE, *op. cit.* (n. 52), 26.

[71] *Ibid.* 188.

[72] C. Farrar, *infra* p. 197-217.

[73] J. BURNHEIM, *Is Democracy Possible? The Alternative to Electoral Politics* (Berkeley 1985), 9, 156-87.

hand, those who really find inspiration by studying the Athenian political institutions are less interested in the face-to-face assembly democracy for which there are contemporary institutions to study, such as the New England town meeting or the Swiss *Landsgemeinde*. They focus instead on the other aspects of Athenian democracy, particularly rotation and selection by lot for which the only modern parallel is the completely different jury system.[74]

Today the champions of modern direct democracy are in fact split between two models: one is the referendum model: to allow all citizens, not only to elect their political leaders but also to decide a large number of key issues by direct vote, which can be conducted electronically.[75] The other is the "demarchy" model: to replace, or rather supplement the elected legislators and their government with small panels of randomly selected citizens who can meet and debate the issues before they vote.[76]

The advantage of referendums over deliberative opinion polls is that all citizens can participate in a referendum. The drawbacks are the absence of a face-to-face debate among all citizens, as well as the difficulty in keeping all citizens sufficiently informed about all the issues that have to be debated and voted on. Conversely, the advantage of deliberative opinion polls over referendums is that a "minipopulus" of at most 1,000 citizens can get access to all the necessary information, they can meet and debate, and they can devote the time and energy necessary to arrive at a rational decision. From a democratic point of view such panels are immensely superior to the ordinary opinion poll panels of the Gallup type. The drawback, on the other hand, is that only a minute fraction of the population gets an opportunity to be directly involved in the

[74] The modern jury system has an unbroken tradition that goes back to the administration of justice in England and other European countries in the early Middle Ages. As in the case of the Swiss *Landsgemeinde* (*supra* p. XXIX-XXX) there is no tradition or inspiration that links the medieval institution to ancient Greece.

[75] See *supra* n. 71.

[76] See *supra* n. 69.

decision-making process. Even in small nations the chance of being selected to serve on a panel is minimal.

It is in this context the Athenian political institutions are studied today as a possible source of inspiration if one wants to reform the prevailing representative democracy.

Moving from institutions to ideology there is, I believe, some even more striking similarities between the ancient and the modern key concepts. In modern liberal democratic ideology "Democracy, equality and liberty form, as it were, the three points or angles of a triangle".[77] Similarly, in Athenian democracy *demokratia*, *eleutheria* and *isonomia* are closely connected. But although there is a similarity, there is no trace of tradition or inspiration. What can be inferred from this? When, as seems to be the case, liberty and equality are connected with democracy in different societies separated by millennia and without any evidence of a direct tradition, we have to presume that there is something fundamental about democracy which is conducive to liberty and equality and, conversely, that liberty and equality are conducive to democracy. It follows that a comparative study of ancient and modern democracy becomes even more important than if the emergence of modern democracy and its ideals of liberty and equality could be explained as a resumption of ancient democracy inspired by a tradition.[78]

The Team of Invited Scholars

These considerations inspired the composition of the team behind this volume of the *Fondation Hardt Entretiens* and the topics each participant was asked to cover.

Comparing modern representative with ancient direct democracy, we have to admit that the differences far outweigh the similarities. But there are a few noticeable similarities between

[77] B. Holden, *Understanding Liberal Democracy* (Oxford 1988), 28.
[78] M.H. Hansen, *op. cit.* (n. 65), 28-9.

ancient and modern democratic institutions. One is the judicial review of law which in USA goes back to 1803 and in Europe to all the constitutional courts set up in connection with the restitution of democracy in Europe after 1945. The other similarity is the modern attempt to involve ordinary citizens in political decision-making either in the form of referenda or in the form of panels of randomly selected citizens who debate and vote on central political issues before they are decided by the parliament or by the people.

In the case of judicial review of laws there is a striking similarity with the *graphē paranomōn*, but no tradition or inspiration. On the other hand, the modern use of political lotteries is undeniably inspired by the Athenian use of sortition in the selection of jurors, legislators, councillors and magistrates. Similarly, the modern use of referendum seems to some extent to have been inspired by the ancient democratic custom to have political issues decided by the people in assembly.

The general comparison between modern representative and ancient Athenian democracy has been entrusted to Pasquale Pasquino who is both a classical scholar and a political scientist. The specific study of judicial review of laws has been assigned to Adriaan Lanni who combines degrees in law, history and classics. And the study of political lottery is undertaken by Cynthia Farrar, a classicist who for many years has been involved in experiments with political lottery and panels of randomly selected citizens.

A growing problem of modern representative democracy is the crisis of political participation which stands in sharp contrast to the massive political participation in the ancient Greek *polis*. One can conduct a historical study of Classical Athens and investigate the reasons for this unparalleled degree of political activity. Or one can conduct a more philosophical study of the claim that the ancient Greeks had a natural inclination for living politically. In this context Aristotle's dictum about man as a political animal takes central stage. And the two approaches can be combined as they are in Christian Mann's contribution.

Citizenship is a central institution both in the ancient and in the modern world, and it is particularly important in democracies because of the considerable political privileges which citizenship entails. Like democracy citizenship has gone through a peculiar historical development. It existed in the ancient world. It disappeared towards the end of antiquity and in the form of political membership of a state it re-appeared towards the end of the 18th century. The only form of citizenship known between the end of antiquity and end of the 18th century was to be citizen not of a state, but of a town or city. Karen Piepenbrink has undertaken to compare differences and similarities between ancient Athenian and modern democratic citizenship.

In political science ancient democracies have recently been in focus in connection with what is called the democratic peace theory, the theory that democracies tend not to go to war with one another. I found it obvious to invite the classical scholar who has really addressed this problem, *viz.* Eric Robinson. Furthermore, he is the scholar who has shown — in my opinion convincingly — that democracy was not invented in Athens in 508/7. In several *poleis* it can be traced back to the sixth century.

Moving from institutions to ideology there is, I believe, some even more striking similarities between the ancient and the modern key concepts: *demokratia, eleutheria* and *isonomia* as against democracy, liberty and equality. But again, the similarity is not due to any tradition or inspiration. For this conference I have chosen to present a comparison of ancient *eleutheria* and modern freedom. Ideally, my contribution ought to have been balanced by an investigation of the concept of *isonomia* compared with the concept of equality. The comparative study of democracy and *demokratia* is covered by Oswyn Murray's contribution.

For two reasons I wanted to have a contribution about religion in ancient and modern democracy. First, modern liberal democracy claims to be just a procedure, i.e., a set of political

institutions that leave it to the individuals to make their own decisions about purpose in life, moral and religion. All such issues belong in the private sphere. It follows that democracy and religion ought to have nothing to do with one another. Nevertheless, one of the most hotly disputed issues today is the place of religion in modern democracy. Second, in ancient history and in ancient scholarship in general the study of religion has come in focus, in particular during the last generation. A plethora of books and articles about antiquity assert that religion permeated all aspects of society. Consequently, religion must have permeated the democratic institutions and ideals. And that is of course true. To mention just one aspect of this issue, there was in democratic Athens a cult of Demokratia, and a cult of Zeus Eleutherios. Strangely enough there was no cult of Isonomia.[79] I have to confess that my own book about Athenian democracy does not include a chapter about religion but only scattered references in different contexts. If I had written the book today it would have included such a chapter. An obvious scholar to write the contribution about democracy and religion is Pauline Schmitt Pantel and I am happy that — hesitatingly — she undertook to write it.

Mogens Herman Hansen

[79] M.H. HANSEN, *op. cit.* (n. 26), 23.

I

PASQUALE PASQUINO

DEMOCRACY ANCIENT AND MODERN: DIVIDED POWER ♦

To my mentor, Ettore Lepore, *in memoriam ac fidelitatem*

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* *

Pars destruens

When Sir Moses Finley published in 1972 his classic book *Democracy, Ancient and Modern*,[1] his primary goal was not merely the description of these two forms of government. More important for him was the criticism of what goes under the strange name of "elitist theory of democracy", in fact the doctrine presented by Joseph Schumpeter in 1942,[2] a doctrine that was particularly successful in the two most ancient and stable modern democracies in the world: the UK and the US. It is not my intention to discuss here either the historical background of Finley's book,[3] or the accuracy of his description of

♦ Anna Krutonogaya discussed with me many drafts of this paper; I want to express to her my deep thanks.

[1] I quote from the French translation of it, M.I. FINLEY, *Démocratie antique et démocratie moderne*, (Paris 2003), with an introduction by Pierre Vidal-Naquet.

[2] J.A. SCHUMPETER, *Capitalism, Socialism and Democracy* (New York 1942), notably chapters 20-23. Finley quotes Schumpeter at page 50.

[3] Largely overlapping with the American McCarthyism.

Schumpeter's theory, but because his text has been very influential, notably outside the milieu of classicists, I'd like to start with it to introduce my remarks.

Finley doesn't deny that there is a great distance between the Athenian *demokratia*[4] and the form of government we have designated with the same word since the second half of the 19th century,[5] but he wants to suggest that by looking at the Athenian ancestor of modern democracy it may be possible for us to modify and improve our political systems. How exactly, it is not really easy to say after rereading his book. But generally speaking Finley insists on the important role that public debate and political participation of active citizens ought to play in contemporary democratic societies; notice that this approach has been in various and mostly vague forms rehearsed by normative theories of republicanism[6] and deliberative democracy.

To begin then, I would like to come back to the question of this 'distance' from a 'descriptive' point of view. Since I started working on ancient and modern democracy, I have been asking myself repeatedly the following question: what is, if any, the 'common' element of these two forms of political regime? The relatively standard answer: they are two forms of the same *genus*, and the *differentia specifica* consists in the fact that the modern version is indirect and representative where the ancient one is direct and immediate, this answer seems to me less and less useful and persuasive. In fact, I find it quite misleading, for reasons I shall spell out, to use the same term to designate the Athenian *demokratia* and the representative government of our contemporary societies. But suppose that we accept this linguistic convention, then we must ask: what is the common quality or substance of the two variants or species, what is the

[4] Hereafter, I'll use this transliteration to designate the political regime that we call Greek/ancient democracy.

[5] See, for instance, pp. 84-5.

[6] See the old article by Q. SKINNER, "The empirical theorists of democracy and their critics: A plague on both their houses", in *Political Theory* 1, 3 (1973), 287-305.

democratic essence of what we call 'democracy'? The answer to these questions has, as far as I can see, two dimensions: a 'negative' and a 'positive' one, an 'anti-aristocratic sentiment' and 'popular sovereignty'.

I have objections to both points which seem to me strong enough to justify an attempt to try to reconsider the entire question.

To be sure, as John Dunn has recently written,[7] the ancient *demokratia* and the modern representative regime have — with the paramount exception of the United Kingdom! — this in common, that they both seem to share the same enemy: aristocracy. But this word actually meant something quite different in the two historical contexts and the enemies were *de facto* not the same ones. In Greece, the oligarchic regimes were political systems, which effectively excluded the *demos* — I'll come back soon to this complex and polysemic term — from the government of the community. *Demokratia*, instead, was largely identical with the government by the *aporoi* i.e. (middle)-lower classes,[8] a regime that did not need to exclude the rich/*gnorimoi*, since they could be systematically outvoted in the *ekklesia*.[9] On the contrary, the anti-aristocratic ideology of the French (and American) Revolution was essentially an instrument in the struggle against absolutism, and the representative government was intrinsically connected with the emergence and consolidation of a new type of political elite that drew its

[7] "Disambiguating Democracy", paper presented at the Dworkin-Nagel Colloquium, NYU, November 2007, 5:
http://www1.law.nyu.edu/clppt/program2007/readings/index.html

[8] This seems to me a better translation of the Greek term since often the 'poor' Athenian citizens had a slave, moreover, notably after the Ephialtes reforms and the increasing role of the People's courts, the participation to political life allowed the *aporoi* to live decently (see M.H. HANSEN, *The Athenian Democracy in the Age of Demosthenes. Structure, Principles and Ideology* [Oxford 1991], 386, *s.v.*).

[9] It is not surprising at all that 'majority rule' was the principle regularly used in the Athenian *demokratia* for collective decision-making procedures, the rich people being a small minority they had no chance to be systematically dominant (without popular direct consensus).

legitimacy from popular elections rather than from blood and *privilegia*. Certainly it is possible to stress that both the ancient and the new democracy are based on the same principle of inclusion (even though the French aristocracy was in the ideology of Sieyès[10] and during the Revolution concretely excluded[11] from the 'nation'), but the differences seem more important than the similarities.[12]

This is even clearer if we consider the concept of 'popular sovereignty',[13] the positive element of the alleged homogeneity of the two forms of government. In the best case, in modern representative governments the term 'people' means the 'citizens', that is the members of a given community, who exercise political rights, among them primarily the possibility (in some few cases the legal obligation) to participate in the selection of their representatives *pro tempore*. Now, in Athens the *demos* was not only *ho kyrios*, the collective actor exercising without mediations the power inside the city, it was also, as I already hinted, a part (*meris*, said Aristotle)[14] of the *polis*, actually the *aporoi*, the 'middle-lower classes'.

If one uses the expression 'to elect' and 'to govern' as synonyms I doubt that we speak the same language. One could maintain that the difference between direct and representative democracy consists exactly in that, to which it could be objected that the people governing the Athenian *demokratia*

[10] E. SIEYÈS, *Qu'est-ce que le Tiers-état* ? (1789).

[11] See P. HIGONNET, *Class, Ideology and the Rights of Nobles during the French Revolution* (Oxford 1981).

[12] I do not want to deny the existence of similarities, but against the trend, nowadays dominant, to look for the existence of an eternal and a-historical democracy I believe it is useful to stress the differences, since they can help us to understand better both the ancient and the modern regime we call by the same name.

[13] Again a vague equivalent of *demos-kratein*.

[14] On the Aristotelian anatomy of the city and the role it played in the history of the western political theory I wrote some comments in "Machiavelli and Aristotle: The anatomies of the city", in *History of European Ideas*, 35.4 (2009), 397-407.

were not 'the people', in the sense of "We the People" of the American constitution, but a social group, mostly the *thetes*, that certainly does not govern in any contemporary democratic country.

In reality, the *demos*, a social-economic-military[15] group, exercised the political power in the ancient *demokratia*[16], where in the so-called contemporary democracies the citizens 'authorize' through elections the political elites competing for power (Schumpeter). It is possible to dislike this state of affairs, but it may be useful to start from a realistic and minimalist description of it if we want to compare our two 'democracies'. By the way, we will soon see that the institutional settings of ancient and modern democracy are significantly more complex than this simple opposition suggests. But it is useful to get rid first of pseudo-identities in order to consider what seems to me a more interesting perspective in comparing our synonymic political systems.[17]

In a recent important book Wilfried Nippel[18] describes exhaustively the history of the word and ideology of democracy

[15] We know that the *thetes* manned the Athenian fleet that after the Median wars became the crucial element of its empire. See CL. MOSSÉ, *Histoire d'une démocratie: Athènes* (Paris 1971), 40 and *passim*.

[16] I follow ARIST. *Pol.* 6. 1. 6. (1317b 8-10): "The argument is that each citizen should be in a position of equality; and the result which follows in democracies is that the poor are more sovereign than the rich, for they are in a majority, and the will of the majority is sovereign" (transl. by E. BARKER [Oxford 1995], 231).

[17] A position similar to the one I'm defended here was already spelled out in 1857 by J.C. Bluntschli: "Die moderne Demokratie ist... eine wesentlich andere als die althellenische... Gerade die specifischen Merkmale der alten Demokratie die Loosaemter und die Volksversammlungen, sind von der neuen Demokratie verworfen, welche die Ämter durch Wahl besetzt, und statt der rohen Volksversammlung durch Wahl erlesene Repraesentantivkörper will" (J.C. BLUNTSCHLI, K.L.TH. BRATER, *Deutsches Staatswörterbuch* [Stuttgart-Leipzig 1857-1870], II, 698 *sqq.*; quoted by H. MEIER, "Zur neueren Geschichte des Demokratiebegriffs", in *Theory and Politics. Festschrift zum 70. Geburtstag für C.J. Friedrich*, hrsg. von KL. VON BEYME [Kluwer 1972], 160).

[18] W. NIPPEL, *Antike oder moderne Freiheit? Die Begründung der Demokratie in Athen und in der Neuzeit* (Frankfurt am Main 2008).

and shows how in the 19th century representative government gradually took on the name of a political form that originally the 'Founding Fathers', both in France and in the United Stated, wanted to oppose! I do not need to dwell on that, instead I'd like to draw attention to a text important for our genealogy, though relatively forgotten. We know that in classical political theory, and until Montesquieu and Rousseau[19], elections were considered a characteristic of aristocratic-oligarchic regimes. Nowadays they are qualified as the essential mark of any democratic system. It is in fact the conflating of 'government' and 'authorization' that is at the origin of this astonishing and crucial metamorphosis. The *Urtext* of this (creative) transformation is 'hidden' surprisingly in Thomas Aquinas' *Summa Theologiae*!

The passage, 'rediscovered' by a great specialist of the medieval political doctrines, Brian Tierney,[20] is worth quoting *in extenso* since it represents the forgotten turning point between the language of the classical doctrine and the new one that will characterize the modern democratic republican tradition. In section [*quaestio*] 105.1 of *Prima Secundae* we read:

> Aliud est quod attenditur secundum speciem regiminis, vel ordinationis principatuum. Cuius cum sint diversae species, ut philosophus tradit, in III Polit., praecipuae tamen sunt regnum, in quo unus principatur secundum virtutem; et aristocratia, idest potestas optimorum, in qua aliqui pauci principantur secundum virtutem. Unde optima ordinatio principum est in aliqua civitate vel regno, in qua unus praeficitur secundum virtutem qui omnibus praesit; et sub ipso sunt aliqui principantes secundum virtutem; et tamen talis principatus ad omnes pertinet, tum quia

[19] See B. MANIN, *Principes du gouvernement représentatif* (Paris 1995), 98-108.

[20] See notably B. TIERNEY, *Religion, Law and the Growth of Constitutional Thought: 1150-1650* (Cambridge 1982), chapter V; ID., "Aristotle, Aquinas, and the Ideal Constitution", in *Proceedings of the Patristic, Mediaeval and Renaissance Conference* 4 (1979), 1-11; moreover, A. BLYTHE, *Ideal Government and the Mixed Constitution of the Middle Ages* (Princeton 1992), 39-59.

> ex omnibus eligi possunt, tum quia etiam ab omnibus eliguntur. Talis enim est *optima politia*, bene *commixta ex regno*, inquantum unus praeest; et *aristocratia*, inquantum multi principantur secundum virtutem; *et ex democratia*, idest potestate populi, inquantum ex popularibus possunt eligi principes, et ad populum pertinet electio principum.[21]

The most relevant feature of this new version of the mixed constitution[22] is that the popular element enters into the picture not through the exercise of any magistracy but via the 'election' of those who govern. This is an extraordinary change in political theory if we remember that elections have been considered since Aristotle at least, and up to the eve of the French and the American Revolutions, as typical aristocratic procedures meant to select those who govern in opposition to the democratic selection by lotteries.[23]

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[21] http://www.corpusthomisticum.org/sth2098.html (italics mine). English translation [*http://www.newadvent.org/summa/2105.htm*]: "The other point is to be observed in respect of the kinds of government, or the different ways in which the constitutions are established. For whereas these differ in kind, as the Philosopher states (Polit. iii, 5), nevertheless the first place is held by the "kingdom," where the power of government is vested in one; and "aristocracy," which signifies government by the best, where the power of government is vested in a few. Accordingly, the best form of government is in a state or kingdom, where one is given the power to preside over all; while under him are others having governing powers: and yet a government of this kind is shared by all, both because all are eligible to govern, and because the rules are chosen by all. For this is the best form of polity, being partly kingdom, since there is one at the head of all; partly aristocracy, in so far as a number of persons are set in authority; partly democracy, i.e. government by the people, in so far as the rulers can be chosen from the people, and the people have the right to choose their rulers".

[22] On this point see my *art. cit.* (n. 14), notably its Appendix.

[23] About lotteries in political theory and institutional history see now: H. BUCHSTEIN, *Demokratie und Lotterie. Das Los als politisches Entscheidungsinstrument von der Antike bis zur EU* (Frankfurt am Main 2009). Famously Aristotle characterizes respectively democracy and oligarchy by lotteries and election as mechanisms to select public magistracies: e.g. ARIST. *Pol.* 4. 9. 4 (1294b 8-9). This is nonetheless an oversimplification, see H. BUCHSTEIN, *op. cit.*, 91-9 and ARIST. *Pol.* 4. 19. 19 (1300a 32-33), probably the source of Thomas.

We can come back now to what I was saying before this short excursus about Thomas and summarize the previous remarks.

1. The anti-aristocratic character of the two democracies has, as we saw, essentially a different polemical target. Moreover, by "inclusion" we mean today something deeply different from what the Athenians had in mind: the one of adult male citizens — one has just to think that no society (not even Switzerland anymore[24]) could claim that it has a democratic regime if it excludes women from access to political rights.

2. Popular sovereignty, not only refers to two radically different political agencies: the *aporoi* in Athens and the 'people' (the citizens with political rights) for us; but also it manifests itself through different institutional forms. Through participation of the *politai* in the *ekklesia*, the *dikasteria* and the magistracies in the Athenian democratic regime; through elections and, as we will see, through the possibility to ask for rights protection in the contemporary constitutional democracy (*rectius*: *verfassungsmäßiger Rechtsstaat*)[25].

It is possible to denounce the latter system (like Finley seems to do) as being a sort of modern oligarchy, in the Aristotelian language: representatives are an elite in the literal sense of the word, made up of professional politicians, likewise the people sitting in Constitutional and Supreme Courts, who are normally legal experts, have the ultimate power to protect citizens' rights. In Athens instead, I will suggest, the *demos* control the *demos*, whereas in representative governments one elite checks another one! Moreover it is possible to develop forms of a new

[24] In 1990 the Swiss canton of Appenzell Rhodes-Interior was obliged by the decision of the Federal Tribunal to introduce the right to vote and the eligibility for the women in the canton. It was the last canton to do it.

[25] Here I shall leave aside the more complex and intriguing question of the *constituent power of the people*. On this point see P. PASQUINO, "Il potere costituente, il governo limitato e le sue origini nel Nuovo Mondo", in *Rivista trimestrale di diritto pubblico* (2009), 311-24.

sort of mixed government,[26] where citizens/voters, via referendum and other forms of political participation, play a role more important than the simple exercise of franchise.

So said and notwithstanding these radical differences, I believe that the two regimes we are considering do in fact have something in common; 'not' their democratic character but, as I'll try to show, the fact that the Athenian *demokratia* in the 4th century as well as contemporary 'constitutional' representative government, *vulgo* democracy, are two different versions of a moderate, limited or divided power.

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Pars construens: divided power

Most of the political systems that we call democracy today do not correspond any longer to the picture of that regime as it was described by the great theorists of the 20th century, and I have in mind notably Hans Kelsen[27] and Joseph Schumpeter. Our democracies cannot be reduced to the standard form of representative government theorized since the end of the 18th century by Emmanuel Sieyès or James Madison, where citizens choose their representatives through periodically free and (later on) competitive elections and have to obey the laws enacted by elected and accountable Parliaments.[28] Notably after the

[26] The mix in this perspective is one between representative and popular (immediate) democracy. Switzerland, California and up to a point Italy are from this specific point of view mixed democracies.

[27] H. KELSEN, *Vom Wesen und Wert der Demokratie* (Tübingen 1929); a partial English translation of this text is now available in *Weimar. A Jurisprudence of Crisis,* ed. by A. JACOBSON, B. SCHLINK (Berkeley 2000), 84-109.

[28] I do not know any systematic description of the constitutional democracy of the 21st century. It may be true that the theory is like Minerva's bird, as Hegel used to say; after all Aristotle described the Athenian *demokratia* when that political form was about dying.

Second World War a new type of institution appeared on the European continent and elsewhere in the constitutional structure of 'democracies': a specialized court of justice[29] that can check the constitutionality of the statutes passed by the elected representatives i.e. interpret, modify and occasionally nullify those statutes. I intend here to compare the Constitutional Courts in countries like Germany, Italy and now France[30] with the Athenian institutions of the 4th century; leaving aside, by the way, the American system of judicial review. It is just worth noticing in passing that, though the 'principle' of judicial review was already spelled out by Alexander Hamilton in the *Federalist Papers* # 78 and more famously in the 1803 opinion — *Marbury v. Madison* — written by Chief Justice Marshall, the American practice of protection of individual rights developed essentially in the 20th century.

Divided power, mixed government and bicameralism

It may be useful to specify briefly here how and why I suggest to distinguish the specific form and the concept of "divided power" from other forms of 'moderate government' (in Montesquieu's sense of the expression),[31] first of all bicameral systems, but also the executive veto. In history and theory Bicameralism[32] has a number of different possible justifications and *raisons d'être*, among others the following three: 1. mixed government, 2. federalism, 3. slowing down the

[29] See T. GINSBURG, *Judicial Review in New Democracies* (Cambridge 2003), notably 1-105.

[30] Since the constitutional reform of July 2008 of the article 61, there will be also in France the possibility to challenge a promulgated statute.

[31] "[...] gouvernement modéré, c'est à dire où une puissance est limitée par une autre puissance" (Pensées #918). *Œuvres complètes, Tome II*, ed. by A. MASSON (Paris 1950).

[32] See B. MANIN, "Les secondes chambres et le gouvernement complexe", in *Revue Internationale de Politique Comparée* 6.1 (1999), 189-199.

legislative process to avoid mistakes caused by passions and lack of information.

By "mixed government" (or "mixed constitution") I mean the classic doctrine (argued by Aristotle, Polybius, Machiavelli and in a special version by Montesquieu himself), according to which public, political power has to be shared among and exercised jointly by the different 'constitutive' parts of the city (or society): *euporoi/aporoi, gnorimoi/demos* (in Athens), *patricii/plebei* (in Rome); *grandi/popolo* (in Florence); Crown/Lords/Commons (in England); *Landesstände/Fürsten* (in the German speaking countries). A bicameral moderate government based on this 'anatomy of the city' is simply and straightforwardly incompatible with the modern conception of a "society without qualities" made up by citizen who have equal rights[33]; therefore such a bicameral system, in which the rights and *privilegia* of a special group or subset of citizens are protected because of their special ontological (later on people will say sociological) nature, can no longer be justified.

Federalism offers an alternative and less archaic justification for bicameralism. However, all states do not have at their origin politically organized collective entities willing to establis a 'closer union', as was the case of the US at the end of the 18th century or of Germany, when it wrote its republican constitutions, in 1919 and again in 1949. So federal bicameralism has limited application. Moreover, is not immune from some justified criticism. How can we explain and defend the fact that Rohde Island has, in important decisions in the second chamber, the same say as New York or California?[34]

[33] On this see P. PASQUINO, "Political Theory, Order and Threat", in *Political Order,* ed. by I. SHAPIRO, R. HARDIN, *Nomos* XXXVIII (New York 1996), 19-41.

[34] A point made again recently by R.A. DAHL, *How Democratic is the American Constitution?* (New Haven ²2003).

Bicameralism may evidently be — as in Italy for instance — fully independent from federalism or mixed government, and have merely the function of avoiding hasty, precipitous, passionate and by consequently poor decisions; this is well known. Unfortunately this justification doesn't make much sense in contemporary *Parteienstaaten* which characterize most European political and constitutional systems. In these systems, the same political majority, sometimes the same party, controls both houses of the Parliament so that the second chamber tends to be just a replication of the first one.[35]

I want to mention a further point, which seems important to me in distinguishing "divided power" from bicameralism. Divided power, as I define it here, supposes that a court or a court-like body — I have in mind the French Constitutional Council — acts as a check upon the legislative (and possibly executive) agencies. Now a court is by definition a *passive* organ. It can't take action *motu proprio*. It has to be asked to adjudicate a conflict by some external actor. It has a decision-making power but no power of initiative. Moreover and more important, a Court is 'not accountable' to voters, which is normally the case for the houses of a Parliament — notwithstanding the British exception. These distinctions between a court and a second chamber seem important to recognize from an analytic point of view. Other differences, by the way, notably decision-making procedures, would be worth inquiring into.

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[35] Divided government in the American sense is not possible in parliamentary regimes like Italy where the cabinet needs the confidence vote of the two houses.

It is nonetheless true, as Adam Przeworski brought to my attention, that bicameralism, even in a parliamentary *Parteienstaat*, makes decisions more difficult and in a sense slower.

The Athenian *demokratia* has been mostly qualified as a political system characterized by 'popular sovereignty' exercised by the citizens in the *ekklesia* (the popular assembly)[36]. Recent important studies[37] have modified substantially this conception of the Athenian *politeia*[38] (which has been one of the reasons for its traditional rejection) showing that the sovereignty of the popular assembly might have been true for the 5th century but not for the period going from 403 to 322BC. Indeed after the Peloponnesian War and the two oligarchic coups in Athens at the end of the 5th century, in 411 and 404BC, *demokratia* was restored and a new institutional setting was established which lasted without 'major' changes until the end of the democratic experience in Athens caused by an exogenous event: the military Macedonian conquest.

In the new *demokratia* the power of the *demos* was distributed in a complex system of separated powers/competences and control mechanisms. Mogens H. Hansen in his seminal work[39] aimed to qualify this system as one characterized by the sovereignty of the *dikasterion* (the people's court). I prefer to speak of 'divided power', not only because it may be slightly

[36] See, for instance: D. HELD, *Models of Democracy*, (Cambridge 1998), 21: "The citizenry as a whole formed the key sovereign body of Athens: the Assembly"; and, among the specialists: CL. MOSSÉ, *op. cit.* (n. 15), 142: "L'assemblée en effet était souveraine et ses pouvoirs théoriquement illimités"; C. AMPOLO, *La politica in Grecia*, (Roma — Bari 1997), 75: "L'*ekklesia* funzionava anche da corpo elettorale [...] non vi era limite alle competenze dell'assemblea, perché non vi era limite alla sovranità popolare".

[37] Notably M.H. HANSEN, *op. cit.* (n. 8) and M. OSTWALD, *From Popular Sovereignty to the Sovereignty of Law. Law, Society, and Politics in fifth century Athens* (Berkeley 1986). See also W. NIPPEL, *op. cit.* (n. 18).

[38] The order of political institutions of the city (*polis*).

[39] *The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Public Action against Unconstitutional Proposals* (Odense 1974); I use the updated Italian translation, *Graphe paranomon. La sovranità del Tribunale popolare ad Atene nel IV secolo a.C. e l'azione pubblica contro proposte incostituzionali* (Torino 2001).

misleading to use the world 'sovereignty'[40] to translate the Greek term *kyrion*, but because one of the goals of this text is to show that in the Athenian democracy of the 4th century there was no monocratic 'sovereign' governmental agency, but as already suggested a divided power.

Here I will first present a brief description of the basic institutions of the Athenian democracy (hereafter the one established at the very end of the 5th century BC), discussing shortly the institution of the *graphē paranomōn*.[41] In the final section I shall draw a parallel focusing on similarities and differences between 'divided power' as exercised in Athens and the one which characterizes most of contemporary 'constitutional democracy'. This expression is used here to distinguish systems found in the US, Germany, Italy, Spain, etc. which are characterized by a 'rigid'[42] constitution and constitutional adjudica-

[40] J. OBER made this point correctly in his *The Athenian Revolution. Essays on Ancient Greek Democracy and Political Theory* (Princeton 1996), 108, where Ober discusses the 'conceptual apparatus' used by Hansen observing that "sovereignty [is] a term that is, so I argue, seriously misleading when applied to classical Greek form of political organization". Notwithstanding the excessive charge by Ober I agree with him. Likewise Hansen who more recently wrote: "I believe for example that 'city-state', 'constitution' and 'democracy' are usable equivalents of *polis*, *politeia* and *demokratia*, whereas concepts such as 'sovereignty', 'politician' and '*political parties*' are better avoided"! (M.H. HANSEN, *op. cit.* [n. 8], xi); see also his remarkable article: "The Political Power of the People's Court in Fourth-Century Athens", in *The Greek City from Homer to Alexander*, ed. by O. MURRAY, S. PRICE (Oxford, 1990), 215-43. In his *op. cit.* (n. 8), 96, using a non-Hobbesian language, Hansen wrote: "Sovereignty did not rest with the *ekklesia*, but was *divided* [italics mine] between the *ekklesia*, the *nomothetai*, and the *dikasteria* [the popular courts]".

[41] On this question see the important contribution by Adriaan Lanni in this volume.

[42] By 'rigidity' we mean the same legal propriety defined by J. Bryce and H. Kelsen, when they distinguish rigid from 'flexible' constitutions. See J. BRYCE, *Flexible and Rigid Constitutions* (1884): "... in States possessing [the rigid constitution] that paramount or fundamental law which is called the Constitution takes rank above the ordinary legislative authority" (the version quoted is in J. BRYCE, *Studies in history and jurisprudence*, [New York 1901], 131) while "in a State possessing a [a flexible constitution], all laws (excluding of course by-laws, municipal regulations, and so forth) are of the same rank and exert the same force" (*ibid.*, 129).

tion, from the 'parliamentary democracy' specific to the UK: the absence of a rigid constitution, parliamentary sovereignty and quasi absence of 'internal' constitutional adjudication.[43]

The Athenian institutions — divided power and 'popular' government [44]

The political and institutional actors we need to take into account to describe the Athenian democracy in the 4th century BC are five: 1. citizens, 2. *ekklesia* + *boulé* [45] (and minor magistrates), 3. people's courts, 4. leaders, a word by which I refer essentially to people like Perikles, Alkibiades and Demosthenes — mostly generals in the 5th century and then orators, able to have some control over the *ekklesia*, in the 4th century —, and 5. initiative takers (*hoi boulomenoi*) or *rhetors*[46].

The Athenian *citizens* were 20/30 thousand during the 4th century, the people attending the *ekklesia* more or less 6000 (this *quorum* was needed for some important decisions). Since the decisions made by the *ekklesia* were considered decisions of the people in its entirety we can say that the *ekklesia* re-presents the people in the sense that it 'is' the people by *synecdoche*[47].

[43] One has to consider nonetheless that UK passed in 2000 the *Human Rights Act* that allows British judges to send back to the government statutes incompatible with the HRA; letting alone the increasing role of the ECJ and of the ECUR on the British legal system, and the new British Supreme court established October 1st 2009.

[44] This section is based essentially on the fundamental work by M. Hansen about the Athenian *demokratia* of the 4th century. The data and information are drawn mostly from M. HANSEN, *op. cit.* (n. 8) and CL. MOSSÉ, *Les institutions grecques à l'époque classique* (Paris 1999).

[45] The Council of the 500.

[46] I will refer later also to a 6th important institution of the 4th century democracy: the *nomothetai*, that exercised what with an anachronistic language can be called legislative/constituent power.

[47] J. Ober uses the term in *op. cit.* (n. 41), 118-9. This unusual expression seems to convey better than any other the fact that the decision of, say, 3001 citizens was considered the equivalent of the decision of, say, 15001! So the *ekklesia* is 'representative' of the citizenship only in the sense that it embodies the whole citizenship making it present also in its partial absence. But since the

Notice that this is probably — with the Swiss medieval *Landesgemeinde* and the American colonial Town meetings in the 17th-18th century — the only case of a decision making political assembly open to anyone having citizens' political rights. The *boulé*, the main body of the magistrates in Athens, made up of 500 people sorted each year by lot among the citizens older than 30 years and by rotation, was essentially in charge of helping the *ekklesia* by organizing the agenda setting of its meetings and preparing the proposals (*proboulemata*), which had to be voted on and/or discussed in the popular assembly. The *boulé*, though, had no monopoly of the agenda setting and has to be considered, moreover, as the main school of political education in Athens. The combination of sortition/lottery and rotation allowed 500 new citizens to get acquainted with the political and administrative life of the city each year. Aristotle was very likely thinking of this board of magistrates when he wrote in the *Politics* that democracy can be defined as a system where citizens "govern and are governed in turn" (1317b 2-3).[48]

ekklesia is open *de jure* and *de facto* to any citizen we cannot speak of representation in the modern sense, the one introduced by Th. Hobbes in political theory, since in Athens any one is citizen and representative at the same time, any one being able to re-present the absents. This seems to be exactly the contrary of the modern theory of representation, according to which we need representatives since we cannot be making decisions for ourselves: "the people must do by its representatives everything it cannot itself do" (MONTESQUIEU, *De l'esprit des lois*, XI, ch. 6, # 22).

[48] In Barker's translation, (*op. cit.* [n. 16], 231), the text sounds: "Another mark [of democratic regimes] is 'living as you like'. Such a life, they argue, is the function of the free man, just as the function of slaves is not to live as they like. This is the second defining feature of democracy; It results in the view that ideally one should not be ruled by any one, or, at least, that one should [rule and] be ruled in turns. It contributes, in this way, to a general system of liberty based on equality". Notice that the standard translation is in this context slightly misleading. 'To govern', in Greek *archein* [ἄρχειν], means here to exercise a magistracy *pro tempore*. Still, properly speaking the governing body in Athens was not the *boulé*, but the *ekklesia* and later on the *dikasteria*. ARIST. *Pol.* 1275a 21-33 reminds us that the *arché* has a double meaning, from where confusion may result. "The citizen in this strict sense is best defined by the one criterion that he shares in the administration of justice and in the holding of office. Offices may

Each year 6000 citizens selected by lotteries from the members of the different tribes were asked to take an oath and be ready to man the people's courts and the committees of *nomothetai* in charge of voting on the new laws. These sworn jurors, in their capacity as members of the *dikasteria* (popular courts), met very often (200 times, more or less, each year) to adjudicate private (*dikai*) and public (*graphai*) conflicts in the city. I will consider later the procedural functioning of the *dikasteria*. Here it is important to notice that courts were large bodies of jurors (Athens, like the Roman Republic and Imperial China did not know professional judges)[49] who were sorted by lotteries in the morning on the day of a meeting of the *dikasteria* from among those of the 6000 who came to the Agora for the lottery. [50]

Here we come to an important aspect of the Athenian democracy worth considering from a comparative perspective.

Athenians distinguished in the 4th century *nomoi* from *psephismata*. The first ones were stable and general norms while the latter (often translated by "decrees" — actually any political or administrative decision made by the *ekklesia* alone) were

be divided into two kinds. Some are discontinuous in point of time [...] Others, however, have no limit of time, for example, the office of jurymen, or the office of a member of the popular assembly" (BARKER, *op. cit.* [n. 16], 85). We may qualify *dikastai* and *ekklesiastai* as perpetual magistracy by opposition to magistracies allotted by rotation. So the classical definition of democracy attributed to Aristotle (to govern and be governed in turn) is very partial, notably in the case of the only *demokratia* we know well: Athens.

[49] See P. PASQUINO, "Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History", in *The Law and Practice of International Courts and Tribunal. A practitioners' journal* 2,1 (2003), 11-25; notably footnotes 5, 6, 7 and 10.

[50] The text of the Heliastic Oath survived in a speech of Demosthenes; here the version of it according M. FRAENKEL, "Der attischen Heliasteneid", in *Hermes* 13 (1878), 452-66; the English translation is in M.H. HANSEN, *op. cit.* (n. 8), 182: "I will cast my vote in consonance with the laws and with the decrees passed by the Assembly and the Council of the 500, but, if there is no law, in consonance with my sense of what is most just, *without favor or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to accusers and defenders alike*" [italics mine].

ad hoc resolutions — though sometimes on very important issues like whether to wage a war. *Nomoi* were introduced by different procedure[51], once the bill was discussed in the *ekklesia* it had to go to a board of the *nomothetai* to be voted upon (this can be described, indeed, as a special form of bicameralism that was later praised by Harrington and adopted by the French Constitution in the *An III* [1795]: one chamber introduces, discusses and amends the bill and the second votes, without the possibility of amending the bill prepared by the first chamber). Athenians actually recognized a hierarchy of norms (to use the Kelsenian language) as will become apparent when analyzing the mechanism of *graphai* before the courts.

'Leaders', at least in their public capacity as *rhetors* proposing bills, and also as simple magistrates (sorted by lotteries or exceptionally elected, like the *strategoi*) were under strict scrutiny and control by the *boulé*, the *ekklesia* and the courts. Control was exercised over them *ex ante* (at the beginning of the office): *dokimasia*[52]; during the office: *eisangelia* (sort of impeachment procedure); *ex post* (at the end of the mandate) through the *euthynai* (rendering of accounts). The *graphē* activated a control exercised by the courts over any citizen (mostly, *de facto*, leaders) taking the initiative of a decision.

Control was exercised not only 'individually' over magistrates, active citizens making proposals (*hoi boulomenoi*) and leaders [53] but also 'collectively', if I may say so, on the *ekklesia* and the *nomothetai* whose decisions (respectively: *psephismata* and *nomoi*) could have been cancelled by the *dikasteria*.

Any public action had to be proposed by a citizen who took the initiative to introduce it in the *boulé*, or in the *ekklesia*– this citizen was called *ho boulomenos* or *rhetor* (literally, the one

[51] See the details in M.H. HANSEN, "Athenian *Nomothesia*", in *GRBS* 26 (1985), 345-71.

[52] Examination by the people's court of magistrates sorted by lotteries.

[53] Elections were another form of control upon the *strategoi*, the generals, if they wanted to be reappointed.

who is willing, the speaker, the active citizen). In an important text,[54] Hansen drew the attention on the quite systematic separation in the Athenian democracy between 'initiative' and 'political decision'.[55]

As just mentioned, all political actions in Athens were initiated with a proposal made by an ordinary citizens (*ho boulomenos*) mostly in the *boulé*, as it possessed large part of the agenda setting power for each meeting of the popular assembly, but at times also in the *ekklesia*, when a counter proposal was offered to the one brought forth by the Council. Each proposal was then debated on in the Assembly through a series of speeches.[56] Then a vote known as *cheirotonia* was conducted by a show of hands. If the proposal was a *psephisma*, the vote was either for the ratification or rejection of the original proposal made by one citizen (*ho boulomenos*) in the *boulé* or of a counter proposal made by another citizen in the *ekklesia*. If the proposal was to introduce a new law (*nomos*), the vote was whether to send the proposed law to the *nomothetai*. By the same token the *ekklesia* chose five citizens to defend the existing law against the revised proposal offered by *ho boulomenos*. These five citizens would then participate in an adversarial proceeding before the board of *nomothetai,* which would make the decision of whether to pass or reject the new proposed *nomos*.

[54] M.H. HANSEN, *Initiative und Entscheidung. Überlegungen über die Gewaltenteilung im Athen des 4. Jahrhunderts* (Konstanz 1983).

[55] It is possible to suggest a schema expanding Hansen's conception of the separation between initiative and political decisions in Athenian democracy with the mechanisms of control found in the institutional setting of the Athenian structure of divided power, namely the means of conflict initiation and adjudication. See FIG. 1 at the end of the text.

[56] Sometimes no debate was necessary as the proposal was unanimously approved. Therefore, each meeting began with a *procheirotonia*, which allowed a vote by a show of hands to be taken on the *prouboulеuma* set for the agenda by the Council for that day. If the proposal was unanimously accepted, it was instantaneously passed.

As long as the process remained undisturbed by conflict it continued without interference by any other political organ. However, once conflict developed, the courts known as the *dikasteria* would step in to adjudicate such disagreements. The conflict, started by a *graphē paranomōn* when the accusation was against a decree and a *graphē nomon mē epitēdeion theinai*, when the accusation was against a law, will be discussed more comprehensively below[57]. However, it is important to note here the nature of the conflict; namely, that the accuser, *ho boulomenos*, taking an initiative by bringing forth the accusation, charged the citizen who had suggested the proposal, himself a *boulomenos* as discussed earlier, with proposing a *psephisma*, or *nomos* that was unconstitutional or even simply undesirable or harmful to the people's interests.

Two instances existed during the 'political procedure' when a citizen could have initiated a conflict by bringing a *graphē*. The 'first' such occasion could have occurred during the debate in the *ekklesia* before the vote was cast.[58] The 'second' possible

[57] It is possible, taking into account the specialized literature, to clarify at least what *paranomon* meant. In his classical book devoted to the Athenian democracy in the 5th century (*op. cit.* [n. 37], 127), Martin Ostwald, drawing upon the detailed research of H.J. Wolff, agrees with the German classicist upon the thesis that "the *nomos* transgressed in an act [meaning: a political decision] *paranomon* consists in the fundamental principles of the democratic constitution [regime] and in its social institutions, including the positive statutes, that embody them". One understands also why, as THUC. 8. 67. 2 and ARIST. *Ath.* 29. 4 tell us, the abolition of the *graphé paranomon* was one of the first decisions of the oligarchic regime of the 400! H.J. WOLFF, *Normenkontrolle und Gesetzesbegriff in der attischen Demokratie. Untersuchungen zur graphē paranomōn* (Heidelberg 1970), 65 noticed that the Athenians considered "ein *Pséphisma* oder *Nomos* schon dann als *παράνομον* bzw. als *ἐναντίος των κειμένων τω*, wenn sie mit den tragenden Institutionen der Gesellschaftsordnung unvereinbar schienen.", with other words when they seem to contradict the legal/institutional system as such. Wolff considered the *graphē paranomōn* as "ein Zügel der Volkssouveränität" (22), and as "demokratisch konzipierte *Selbstbeschränkung* der Demokratie"! (78, italics mine).

[58] In this case *ho boulomenos* has to pronounce in the assembly a *hypomosia*, a sworn objection lodged against the proposed *psephisma*.

point of conflict initiation could have been brought forth after the vote was taken and the decree was passed in the *ekklesia* (even if the decree was passed unanimously during a *procheirotonia*), or after the law was passed by the board of *nomothetai*. Once a *graphē* was initiated, the decision regarding the *psephisma* or *nomos*, as mentioned earlier, was automatically referred to a new political body, the *dikasteria*.[59] Then the two citizens responsible for the political initiations would engage in an adversarial procedure. The two individuals, after taking an oath not to go beyond the scope of the issues in the case, would make a speech. Then, the jurors, 'without discussion' would 'vote secretly'. They would make two such secret votes. The first vote would decide the nature of the decree or law, namely whether it was passed or rejected. The second vote was on the measure of the penalty extended on the losing party, since both the accuser and the initiator of the proposal could be punished if they lost the first vote — the plaintiff if he got less that 1/5 of the jury's ballots. Before the second vote, the parties could give one more short speech addressing the question of punishment. The jurors then voted only on the two proposals offered without any opportunity for modification.

It is immediately clear that the courts had an important role in controlling public decisions in Athens. However, they were not sovereign! If a citizen did not initiate a conflict by bringing forth an accusation then the *dikasteria* had absolutely no ability to act. So the last word of the court was conditional to the will of a citizen to bring the *graphē*. Additionally, even after the *dikasterion* gave its verdict, there was no procedural element stopping any citizen from re-raising a similar proposal[60]. It is

[59] Debate stopped if conflict initiation occurred as in the first instance. Similarly, the law or decree was suspended until the decision of the Court was delivered.

[60] M.H. Hansen observed during these *Entretiens* that DEM. 24. 54-55 (*Against Timocrates*) makes clear that in Athens it was strictly impossible to try somebody twice for the same offense. This look similar to common law rule against 'double jeopardy'. But we have some evidence that the same political

worth stressing that no one political body in Athens retained all or most of the control within the decision making process. Indeed, the process was open. It could only function with all of the political bodies retaining some degree of control and power. Interestingly enough, since all citizens were able to attend the *ekklesia*, and selection of the jury was conducted by lot, it was possible for the same actors to decide on an issue in both the assembly and the court. However, the 'procedural' distinctions within the two political bodies guaranteed that no political body retained all or most of the political power. In other words, neither the *ekklesia* nor the *dikasteria* could claim sovereignty.

The *ekklesia* was responsible for making everyday political decisions. Here the ability of all citizens to participate, the vote by a show of hands, and the deliberative environment allowed the *demos* to voice their concerns and state their opinions in an open forum able to provide a relatively quick solution to everyday problems. This process was sufficient to manage most of the political questions that arose. There were times, however, when such solutions were not adequate. For these situations, the Athenians resorted to the practice of the *graphē*.

The Athenians, after restoring democracy, wanted better, wiser decisions than those monopolized by the *ekklesia*, decisions more favorable to the survival of the democratic order. In the *dikasterion* decisions were made: a) by older, more experienced people (jurors were at least 30); b) on a single question that was decided after 6 hours of discussion (three for each part of the trial) rather than 9 questions in four or five hours (like in the *ekklesia*); c) on the basis of a 'secret vote' protecting the citizens (jurors) rather than by public vote as in the *ekklesia* where votes could be swayed and coerced due to the open

leaders had been brought to courts by a *graphē paranomōn* numerous times; it was enough to find a new occasion or a new pretext to bring a new indictment against the same person.

forum of the environment; d) through the court's conviction of one of the two parties: the plaintiff if he got less than 20% of the votes and the defendant if 51% of the jurors were against him. Thus the *dikasterion* had not just an 'epistemic' role, but also the function of controlling the leaders who might otherwise have been able to impose their will in the hasty public debate of the *ekklesia*, misleading the *demos* and threatening the democratic order. One should recognize that there are biases in both settings: the discussion in the *ekklesia* could be confused and the vote by raising hands was somehow un-free; we have to consider moreover that during the debate, for whatever reason, the counter-arguments might not be presented. On the other hand, in the *dikasterion*, the two parties in conflict could be in very unequal situations if, for instance, the plaintiff was Demosthenes and the defendant a *quivis de populo*, though we may assume that in big cases the plaintiff and the defendant were good orators themselves (or resorted to experienced *logographoi* and *synergoroi*)! The consequence of all this is that the *graphē paranomōn* gave to its decision-makers — namely the jurors — the greater independence and impartiality necessary to control the decisions not only of the *ekklesia* but also of the *nomothetai*; why in the latter case is less evident since the decision-making procedures were, as far as we know, the same ones.

The fact that the *dikasteria* had the last word in legal conflicts (the approximate translation[61] for *dikai* and *graphai*) does not imply by itself that these bodies were also the institutions that had the last word in the ongoing decision making process inside the Athenian *polis*. I will try to clarify this claim. In Athens, as in any organized social structure, conflicts brought to a court needed definitive closure. The lack of such a closure

[61] The translation is approximate since *graphai* were at the same time legal and political conflicts, since from what we can deduce from our sources they had to do both with conflicts between leaders in the city and with the stability of the *demokratia*.

threatens to destabilize any legal and political system. But in the Athenian judicial system there was, as we know, supplementary precaution in place. The plaintiff would have been convicted if he ware not able to persuade more than one fifth of the jurors of the validity of his complaint. As to the defendant in any given trial, punishments ranged in severity from small fines to *atimia*[62] and exceptionally, death. Why employ such a rule, which is unknown to the contemporary constitutional adjudication?[63] We can speculate that it was intended not only to discourage abuses of the *graphē* exploding the caseload of the courts, but also to avoid the continual reopening of similar political conflicts. If the practice of punishing the plaintiff[64] or the citizen who proposed the *psephisma*[65] did not exist then those who were in support of a law or decree rejected by the *dikasteria* could repeatedly reintroduce it until they got a jury that would agree with them. The same would likely then take place with those opposing the law or decree that was finally passed. As one can easily imagine, in such a circumstance the cycle would be never-ending. Indeed, all political participants who did not get their way would have an incentive to reintroduce their respective proposals. This would not only block the decision making process but effectively undermine it. However, with the punishment described above in place, a new incentive policy formed. Having had a proposal rejected, those in favor of that proposal would be less likely to reintroduce it again realizing that there would be a greater probability of having it challenged and rejected in the *dikasteria* thus incurring punishment. In this way the system created a disincentive that

[62] That is, losing the political right inherent to the status of citizen; this happened inevitably if the same person was defeated three times in a *graphē*.

[63] In Germany to avoid abusive *Verfassungsbeschwerden* (constitutional complaints) a fee was established by law, but it seems that the law is generally not enforced.

[64] It must be noted that the plaintiff was not punished if his complaint was rejected by the jury so long as he got more than 1/5 of the votes.

[65] If he was convicted by the court.

served to reduce the reintroduction of proposals in the *ekklesia* that had been previously rejected by the *dikasteria*. This gave the system closure.

All that seems confirmed by the text of Demosthenes; [66] in *Against Timocrates*, he refers to a *nomos* making it illegal to reopen a case both in *dikasteria* and the *ekklesia*:

> [54] When there has been a prior judgment audit or adjudication about any matter in a court of law, whether in a public or a private suit, or where the State has been vendor, none of the magistrates may bring the matter into court or put to the vote [in the *ekklesia*], nor shall they permit any accusation forbidden by law. [55] Why, it looks as though Timocrates were compiling evidence of his own transgressions; for at the very outset of his law he makes a proposal exactly contrary to these provisions. The legislator does not permit any question once decided by judgment of the court to be put a second time; the law of Timocrates reads that, if any penalty has been inflicted on a man in pursuance of a law or a decree, the Assembly must reconsider the matter for him, in order that the decision of the court may be overruled, and sureties put in by the person amerced. The statute forbids any magistrate even to put the question contrary to these provisions.[67]

However, it is equally important to note that this did not restrict the ability of the *ekklesia* to discuss a particular political decision more than once. Suppose that the *dikasterion's* decision severely contradicted the beliefs of a supermajority of the *ekklesiastai*. In such a case, a person opposed to the court's decision would be more likely to reintroduce in the *ekklesia* a similar (though evidently not the identical) proposal knowing that, even if the previous similar *psephisma* was challenged, the probability of it being rejected in the *dikasteria* a second time

[66] DEM. 24. 54-55 (*Against Timocrates*): see above note 60; also K. PIEPENBRINK, *Politische Ordnungskonzeptionen in der attischen Demokratie des vierten Jahrhunderts v. Chr.* (Stuttgart 2001), 154.

[67] The translation, slightly modified, is from http://www.perseus.tufts.edu/cgi-bin/ptext?lookup=Dem.+24+54; see also DEM. 24. 78-80.

and of him being punished would be lower due to the increased probability that the jurors selected that day would pass the proposal rather than reject it. But in the absence of any clear evidence this is just a speculative hypothesis. [68]

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* *

One should ask 'why' the Athenians in the 4th century wanted to introduce such a sophisticated system of control upon the popular assembly and the leaders. It is possible to consider four different reasons connected to the pathologies of the radical democracy of the 5th century. By 'radical' democracy we mean here the system in which all public decisions were made by the popular assembly without appeal. In this sense we can speak of 'popular sovereignty' (meaning sovereignty of the *ekklesia*) in the 5th century and of 'undivided power', at least in a sense that the *kyrion*, the paramount organ was the popular assembly. It is very plausible that the disastrous decision of the Athenian *ekklesia* to agree with Alcibiades in 415 to send a fleet to Sicily and even more the two dramatic experiences of oligarchic regimes in 411 and 404 persuaded the Athenians to modify their *politeia* (the institutional/constitutional structure of the city) introducing both the *nomothetai* and the *graphē paranomōn*.[69] The result was a 'moderate government', organized around the structure of divided powers. That kind of radical democracy had different pathologies, which can be presented as follows:

[68] For an explanation of the punishment of *ho boulomenos*, complementary to the one presented here, see M.H. HANSEN, *op. cit.* (n. 8), 207-8.

[69] The first example we have of *graphē paranomōn* dates from 415, so before the reform of 403; we may suppose that it took slowly the place of ostracism as an instrument of control of the leaders and became a regular element of the institutional system of moderate government of the 4th century. Wilfried Nippel drew my attention to this point (private communication): "Politisch ist im 4. Jh. die *graphe paranomon* eine Art Ersatz für den Ostrakismos als Form des ‚Ausscheidungskampf' zwischen Politikern, aber das war nicht notwendig bei der Einführung vorausgesehen worden".

1. The important political decisions, monopolized by the *ekklesia*, were often arrived at too quickly. So 'bicameralism' — for the enactment of new laws — and some form of judicial review were the first answer to slow down the decision-making mechanism and to avoid the danger of precipitous and 'unconstitutional' (meaning undemocratic[70]) decisions.

2. The same point can be presented from a different point of view. The rapidity of the decisions produced instability of the system (*stasis*, to use the Aristotelian language) — one can think of the two coups at the end of the 5th century. So divided power represented a way to stabilize the democratic system.

3. Leaders and demagogues were able to control the *ekklesia* moving the passions of the citizens and controlling somehow the public vote. So having the possibility to appeal the decision after the '*ekklesiastic*' deliberation in a court following an adversarial procedure and voting 'secretly' was in fact a form of control upon leaders and demagogues. Indeed, the secret ballot made the *dikasteria* an independent body by freeing individuals from fear of repercussions and reprisals from powerful members of their communities.[71]

4. Critics of the Athenian democracy — from the Pseudo-Xenophon to Plato, Aristophanes and, up to a point, Aristotle — stressed that it was a regime biased in favor of the 'poor people' (the *demos*). Checking with a complex system of controls on the passions of the *aporoi* was, in a sense, a way of rebuffing that type of criticism.

My point so far has been that we have to distinguish the radical *demokratia* of the 5th century from the 'divided power'

[70] Considered threatening *demokratia* and favoring an oligarchic regime.

[71] The secret ballot is a crucial element acting quite similarly to the measure of giving judges life tenure. It eliminated the need to satisfy an individual or individuals within the community, removing the element of threat and manipulation inherent to the public voting in the assembly and allowing each individual to truly fulfill their Oath of "listen[ing] impartially to accusers and defenders alike" and of voting "only on the matters raised in the charge".

that characterized the same regime in the 4th century. Now, saying that I take the risk of disagreeing with Aristotle, who qualifies Athens in the 4th century as an "extreme" democracy. In fact I believe that the disagreement is superficial and depends simply on a difference of perspective. Aristotle was interested in what we could call a sociological analysis of political regimes and from his point of view, no matter what is the institutional system of checks, if the *aporoi* control all the important institutions we are in an extreme democracy, far away from the moderation of the mixed government that he preferred. See, for instance, ARIST. *Pol.* 1293a 5-9:

> [the] populace of this kind has more leisure than anyone else, for the need to attend their private affairs does not constitute any hindrance, while it does for the rich, with the result that the latter often absent themselves from the assembly and the courts. Under these conditions [which existed in the 4th century as well as in the 5th!] the mass of the poor become the sovereign power [*kyrion*] in the constitution, in place of the laws (E. Barker's translation).

Or ARIST. *Ath.* 41. 2:

> [...] καὶ πάντα διοικεῖται ψηφίσμασιν καὶ δικαστηρίοις, ἐν οἷς ὁ δῆμος ἐστιν ὁ κρατῶν.

My perspective is instead institutional and constitutional so that I can describe the *demokratia* of the 4th century as moderate as it is based on divided power.

As Jochen Bleicken noticed, the worst enemy of the Athenian people in the 5th century was the people themselves.[72]

[72] J. BLEICKEN, "Verfassungsschutz in demokratischen Athen", in *Hermes* 112 (1984), 383-401 (396: "der größte Feind des Demos ist der Demos selbst"). On the *graphē paranomōn* see H.J. WOLFF, *op. cit.* (n. 57) who first drew the attention to this Athenian institution in the contemporary debate, also: H. YUNIS, "Law, Politics, and the *Graphē paranomōn* in Fourth-Century Athens", in *GRBS* 29 (1988), 361-82. The Greek institution was known in the past to David Hume, see his Essay "Of Some Remarkable Costumes", who could not make sense of this "singular and seemingly absurd [...] procedure introduced in the course of the fifth century B.C. whereby any citizen could prosecute another for

Popular decisions could have been and were detrimental to the stability and survival of the democratic regime. So it was important to organize institutions able to protect the *demos* from the *demos*;[73] which was one of the main functions of the Athenian divided power. I would like to add here that the Athenian democracy was not simply, in the bland sense of this expression, a government by the people. It was, as its critics never tired to repeat, a government by the "poor people". Now the poor people were the majority in both the *ekklesia* and the popular court; in this sense there are very good reasons to agree with Aristotle claiming that the jurors who used to take the Heliastic Oath were old poor people, most likely living in Athens or the Piraeus. One may wonder in which sense the poor people were able to control the poor people? The answer is probably that the *aporoi* in the *dikasteria* and *nomothesia* were able, because of the mechanism of appointment (lotteries) and the specific decision-making procedures, to avoid both the bias of the passions, corruption and control by the leaders of the *ekklesia*. So democracy became more stable and moderate in the 4th century 'without being less popular'. The government by the 'poor' through divided power was an unsurpassed achievement of the Athenian society. And if certainly not a model for us, it is at least a *ktema eis aei* (Thucydides) a *monumentum aere perennius* (Horace); a perennial acquisition in the human political experience.

*

* *

having made an 'illegal proposal' in the Assembly, even when the sovereign [sic!] Assembly had approved it". (So M.I. FINLEY, *Politics in the Ancient World* [Cambridge 1991], 54 summarized Hume's argument).

[73] M.I. FINLEY, *Democracy Ancient and Modern* (London 1973), 27 (= *op. cit.* [n. 1], 74).

Divided power in contemporary constitutional democracies: the "constitution without sovereign"

After the Second World War democracy was restored on the European continent — notably in the defeated countries: Germany and Italy. But the regime established by the Italian Constitution (1947) and the German *Grundgesetz* (1949) was quite different from the previous parliamentary regimes characterized — before and only formally during the authoritarian experience — by the sovereignty of the political majority in Parliament. As is well known both post-fascist countries introduced in their written constitutions a non-elective, non-accountable body with explicit competence of constitutional guarantee. It is, by the way, largely unjustified to believe that this was an effect of the requests by the winner coalitions — notably of the US, since the UK and France did not have a constitutional court! All the evidence we know shows that the Founding Fathers in Germany and Italy were perfectly willing to introduce this institution, by the way refusing the American model of judicial review.[74]

Here I want to try to draw a parallel between the divided power of the Athenian democracy and the divided power that characterizes most of the contemporary constitutional states.

First it is important to establish a clear distinction between parliamentary and constitutional democracies — only the latter being an object of my analysis.[75] Two quotes may help. The first comes from the British legal scholar Albert V. Dicey:

[74] In Italy the socialists and the communists like the supporters of the Parliamentary democracy opposed the project of establishing a 'constitutional court', but they were defeated by the majority in the Constituent Assembly. On those fascinating debates see: P. PASQUINO, "L'origine du contrôle de constitutionnalité en Italie. Les débats de l'Assemblée constituante (1946-47)", in *Les Cahiers du Conseil Constitutionnel* 6 (1998), 79-84 [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/pdf_cahiers/CCC6.pdf].

[75] I tend to consider the British constitutional system a happy remnant of a pre-modern anti-despotic political culture. Lacking a written constitution and a constitutional court the British system notwithstanding its qualities can never be imitated by anyone, except in few cases by British going abroad.

> "The sovereignty of the Parliament is an idea fundamentally inconsistent with the notions which govern the inflexible or rigid constitutions existing in by far the most important of the countries which have adopted any scheme of representative government".[76]

When Dicey wrote these words, towards the end of the 19th century constitutional adjudication did not exist in any of the continental regimes (with the not well known exception of Norway). So it may be interesting to read the reaction of a prominent Italian constitutional lawyer, Vittorio Emanuele Orlando, a strong supporter of parliamentary democracy, shortly after the enactment of the Italian Constitution:

> "[...] the creation of the Constitutional Court [...] contains an underlying doubtful compatibility with the traditional form of parliamentary democracy; I mean to say that the existence and hence the way in which authority is formed when its main feature is that of being super-parliamentary. The very fact that the Parliament would no longer be sovereign, but would be subject to a sort of subordination vis-à-vis another authority, seems to me *to shift the gravitational center of the political system* (my italics). It will be said that the competence of the high court will be rigidly confined to resolving points of law in a purely objective fashion. Yet who can believe in a total separation between law and fact? [...] What is certain is that the last word on vital government issues will no longer be left to the elective Assemblies, but to eight people [i.e., the majority of the 15 justices]".[77]

Coming back to the main topic of this paper here some general points for comparison.

[76] A.V. DICEY, *Introduction to the Study of the Law of the Constitution* (London 1902), 415.

[77] V.E. ORLANDO, "Studio sulla forma di governo vigente in Italia secondo la Costituzione del 1948", in *Rivista trimestrale di diritto pubblico* 1 (1951), 5-45: 43; translated in P. PASQUINO, "Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy", in *Ratio Juris* 11, 1 (1998), 38-50. I do not agree with Orlando who believed in the sovereignty of the Constitutional Court. The reason to quote his text is to show that it is difficult to deny the discontinuity between Parliamentary democracy and constitutional *Rechtstaat*.

Common elements between the two forms of divided power are:

1. From the point of view of modern democratic regimes, the end of the parliamentary sovereignty is — *mutatis mutandis* — the equivalent of the end of the sovereignty of the *ekklesia* starting with the restoration of the Athenian democracy in 403/02;

2. The rule that decisions made by the legislative and executive organs (the parliament and the administration) can be cancelled by a Court politically not responsible/accountable (with a less ambiguous French expression: *non responsable devant le suffrage*), resembles the powers of the *dikasteria*, whose decisions, like in many European constitutional courts, were secret;

3. The Constitutional Courts are not the ultimate sovereign[78] since their decisions can be reconsidered, either by a supermajority immediately after the ruling of the Constitutional Court (cases in point are the numerous constitutionals amendments passed by the Austrian Parliament during the *Grosse Koalition* government (1945-66, and almost continuously since 1987) to reverse decisions made by the *Verfassungsgericht*, and the vote of the Italian Parliament some years ago[79] to amend the constitution in order to nullify the *sentenza* by the *Corte costituzionale*[80] that cancelled the new art. 513 of the code of criminal procedure) or, less likely, by a future political majority hoping for a different reaction of the Constitutional court (one may think of the quasi-circular character of the Athenian divided power);

4. Both *dikasteria* and constitutional courts are 'passive organs', they have to be asked to adjudicate a conflict (which again is an element which shows that they cannot be considered the new

[78] Legally there is no appeal against the decisions of a constitutional court, but the in case of serious disagreement between the court and a stable political majority it is the court that may give up.

[79] November 9th 1999 the Parliament modified the article 111 of the Constitution.

[80] N. 361, November 2nd, 1998.

political sovereign). This is a point I touched upon earlier in the text that is now worth reconsidering from a slightly different perspective. This will entail coming back to the distinction between bicameralism as form of control upon the central political agency and divided power. It can be argued that bicameral systems need the cooperation of the two houses in order to make a decision. Consider the Athenian institution of *nomothetai*: the *ekklesia* cannot pass a *nomos* alone, it needs to summon a board of *nomotethai* and send them the bill for a debate that will take place before them in the form of the adversarial procedure followed by a vote. It is true that some bicameral systems are 'imperfect' since the opposition by the second house can be overruled (see the House of Lords, and the French Senate), or that (as in Germany) the agreement of the second chamber is not needed concerning some matters. In any event we do not know of a second chamber that is involved in the decision-making process if and only if discretionarily a citizen files a complaint with a magistrate and thereby brings about that a *dikasterion* is convened. This is exactly what happened in Athens, with the further consequence for that citizen of being considered arguing a frivolous complaint implying the risk of *atimia*!

Differences:

1. It is important to oppose the existence of 'professional judges and legal experts' in contemporary societies to the Athenian jurors: 'ordinary citizens without a special legal expertise'. It has to be noted, however, that older people — like the *dikastai* — had a significant amount of political experience since very likely they had already been magistrates and *bouleuetai*, members of the Council of the 500. Legal experts (*légistes* and later on law professors) played, instead, a crucial role in the establishment, functioning and evolution of the modern state, from absolutism all the way through to the establishment of constitutional democracies.

2. A detailed comparative analysis has to devote great attention to two important procedural differences between the *dikasteria* and the Constitutional Courts. (a) the *dikasteria* used a secret voting without deliberation; the Constitutional Court in Europe tends to use secret deliberation without voting![81] (b) the *dikasteria* adjudicate by 'yes' or 'no', by majority rule, where the Constitutional Courts have[82] to produce written arguments, they have to give reasons for their decisions.

I believe that it is useful to introduce some more specific remarks concerning the mechanisms or procedures of decision-making. As just recalled, the Athenian *dikasteria*, after hearing an adversarial procedure, made a decision without discussion among the jurors and through a secret vote.[83] The decision-making mechanism of the European Constitutional Courts[84] is almost the opposite. Hearings are not the norm (in Italy they make up only 22% of the cases, in Germany and Spain only the very important conflicts, and in France, so far, none), though a written adversarial procedure always exists.[85] On the other hand, justices 'tend' not to vote but to use a different mechanism of decision-making, consensus, which I will try to describe. Here are some partial observations concerning this important but complex question.

Independent of the amount of time and type of discussion preceding a collective decision the latter — the decision itself

[81] See *How Constitutional Courts Make Decisions*, ed. by P. PASQUINO, B. RANDAZZO (Milano 2009).

[82] Normally, a constitutional obligation.

[83] The details in P.J. RHODES, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford 1981), 730-4; see also, E.S. STAVELEY, *Greek and Roman Voting and Elections* (London 1972), 95-100.

[84] I'm not considering in this article the case very different indeed of the American Supreme Court and of the courts modeled on the English template of common law.

[85] In France now the arguments and counterarguments of the parts — normally the government and the political minority referring the law to the Constitutional Council — are published with the *arrêt* of the Council and mostly available on the web site of the Council.

— can follow different rules and modalities. I want to contrast and analyze two of them, important here since they overlap with one of the differences between the Athenian people's court and the contemporary European Constitutional Court: 'voting' and 'consensus', by which I mean: deciding according 'the most shared solution'[86] among the members of the decision-making *collegium*.

By 'voting' I understand a decision-making mechanism characterized by the fact that a given number of individuals have their preferences added up openly[87] or secretly to reach a result[88] (we consider here the simple case where the choice is between yes or no — like in the *dikasteria* or in the board of *nomothetai*). The precondition of this decision-making mechanism is the assumed strict *equality* among the members of the body making the decision. Equality in the sense that each of them has the same 'weight' in the decision — more than the same say, since they vote without speaking (like the voters in contemporary elections) and without giving any justification of their secret (or public) choice. The vote can take place after a discussion among those who make the decision (like in the

[86] I prefer to use this expression suggested by Gustavo Zagrebelsky, the president emeritus of the Italian Constitutional Court (see his recent book *Principî e voti* [Torino 2005]), rather than the one I used in a previous article: 'deliberation', because the latter may be misleading (see: "Voter et juger: la démocratie et les droits", in *L'architecture du droit. Melanges en l'honneur de Michel Troper*, éd. par D. DE BÉCHILLON *et al.* [Paris 2006], 775-87).

[87] The open vote was used for instance most of the time in the Roman *comitia* whose members were forbidden to discuss and were not exposed to any previous debate (once the *comitia* were conveyed — informal discussion very likely occurred in the *contiones* preceding the meeting of the *comitia*). Concerning the complex voting mechanism in the Roman *comitia tributa* and *centuriata*, see the classical study by E.S. STAVELEY, *op. cit.* (n. 83), 121-216.

[88] It may be useful perhaps to distinguish 'voting' as decision-making mechanism from 'counting' or 'tallying'. Counting take place in a great variety of circumstances, for instance after the vote to assess its result or after a first discussion to determine how many people accept an option. Counting is in itself not a mechanism of decision-making, but just an activity that can take place before or after the decision independently from it.

Athenian *ekklesia*), or just after hearing (or reading) pros and cons (like in the *dikasteria*), but the decision follows the direction imposed by the *major pars*.

> For when any number of men have, by the consent of every individual, made a community, they have thereby made that 'community' one body, with a power to act as one body,[89] which is only by the will and determination [=decision] of the majority. For that which acts any community, being only the consent of the individual of it, and it being necessary to that which is one body to move one way; it is necessary the body should move that way whither the greater force carries it, which is the 'consent of the majority'[90]

It seems to me that such a mechanism of decision-making inside a political community is compatible only with decisions made by the citizens themselves (referendums) or by accountable officials (elected representatives). And only concerning non-constitutional questions.[91] It seems difficult to grant the same 'legitimate power' to the majority of a Court made up by non-elected and non accountable members.[92]

I believe that a Constitutional Court should not use majority voting in its decision-making mechanism since a small group of people, independently from their competence and expertise, should not impose their will on anyone outside of it, neither the citizens nor their representatives. A Court, as the European organs in charge of constitutional adjudication, is not a 'democratic' [= elected and accountable] organ. This characteristic makes it fit guaranteeing 'divided power' in a *Parteienstaat*. But it seems to impose at the same time some

[89] Meaning able to impose its common will to all the members of the community.

[90] J. LOCKE, *The Second Treatise of Government* [London 1690], # 96.

[91] Where there is a rigid constitution.

[92] I'm aware that 'accountable' can mean almost anything ("Peers — Bolingbroke said with some irony! — are accountable to God, but MPs to their constituents", *Dissertation*, Letter XVII: *Works*, II, 224.), but here it means only: *responsable devant le suffrage*.

restraints. Since the origins (Marshall/Kelsen) the doctrine of a Constitutional Court that would limit itself to enforce or apply the constitution (or to produce just 'constitutional practical syllogisms', where the constitutional norm is the major the statute law the minor and the Court's decision the conclusion) doesn't withstand even a quite superficial scrutiny, the only constraint which seems to be compatible with the decision-making rule of a Constitutional Court is one that excludes the democratic mechanism of majority rule.

What is then the alternative to 'majority rule'? Or, what is exactly the decision-making mechanism I call 'consensus', or more precisely 'the most shared, or accepted solution'? The general abstract idea is that the decision shall not be *sic et simpliciter* the will of a majority, but the argument or the sets of arguments among those presented during both the adversarial procedure and the discussion among the members in charge of the decision, which finds the consensus of the largest number of members of the decision-making body. I speak of arguments since in this type of deliberation (discussion) neither preferences nor interests can be advanced or taken into consideration as such, but only arguments of the type of 'public reason' (in the Rawlsian sense of the expression)[93]. Moreover, and more important, between an argument which is shared only by the majority and one that can meet the agreement of quasi-unanimity of the decision making members, the second ought to be always preferred. Individual convictions and beliefs have to yield to the most shared solution. Only in this case can the Court legitimately impose its decision onto the elected and accountable organ.[94]

[93] The arguments presented, moreover, have to be compatible with the constitution or presented in a language compatible with the one of the constitutional text or with precedent constitutional interpretations.

[94] A concrete example may be useful here. Some time ago the Italian Constitutional court had to rule about the constitutionality of a recent law making legally irresponsible the five highest state authorities [sic!]. A majority of the Court was favorable to reject the law as purely unconstitutional — which would

"It may peradventure be thought, there was never" a decision making mechanism "as this"[95]. Actually, if we look at how European Constitutional Courts make their decisions, we may find something very akin. For sure we are forced to trust what we know through the actors of these decisions, since the procedure is normally covered by secrecy! But according to the testimony of respected European Constitutional Judges like Dieter Grimm, Olivier Dutheillet de Lamothe, Valerio Onida, Gustavo Zagrebelsky, Constitutional Courts tend to avoid voting and seek consensual decisions, even though this may require long discussions and difficult compromises.

Hans Kelsen in his *Von Wesen und Wert der Demokratie* (1920) did question whether majority or compromise was the proper mechanism for decision-making in a democratic society. I believe that both mechanisms have their place. However, each has its own meaning in different types of institutions in a constitutional state.

It is worth adding that decision by consensus was adopted openly in a recent important decision-making body: the *Convention for the Future of Europe* (which actually took up the decision making mechanism already utilized during the first Convention, the one that wrote the *Chart of rights* of the EU). During the year and half of the Convention no vote was taken either in the plenary sessions or in the important meetings of the Presidium![96] The lack of democratic legitimacy of this

have meant the need for the Parliament to find a supermajority able to modify the Constitution in order to pass the same law. A much larger number of justices agreed, by the way, upon a different solution: the law was not unconstitutional but 'confuse' and the Parliament had just to re-write it following some indication of the Court, without the need to modify the Constitution. Notwithstanding the majority in favor of the first solution, the second was adopted because shared by a larger number of members, and more consensual! (*Sentenza* 24, 2004).

[95] TH. HOBBES, *Leviathan* [London 1651], chapter 13, # 11, speaking of his "state of nature".

[96] Personal communication by Giuliano Amato, vice-president of the Convention.

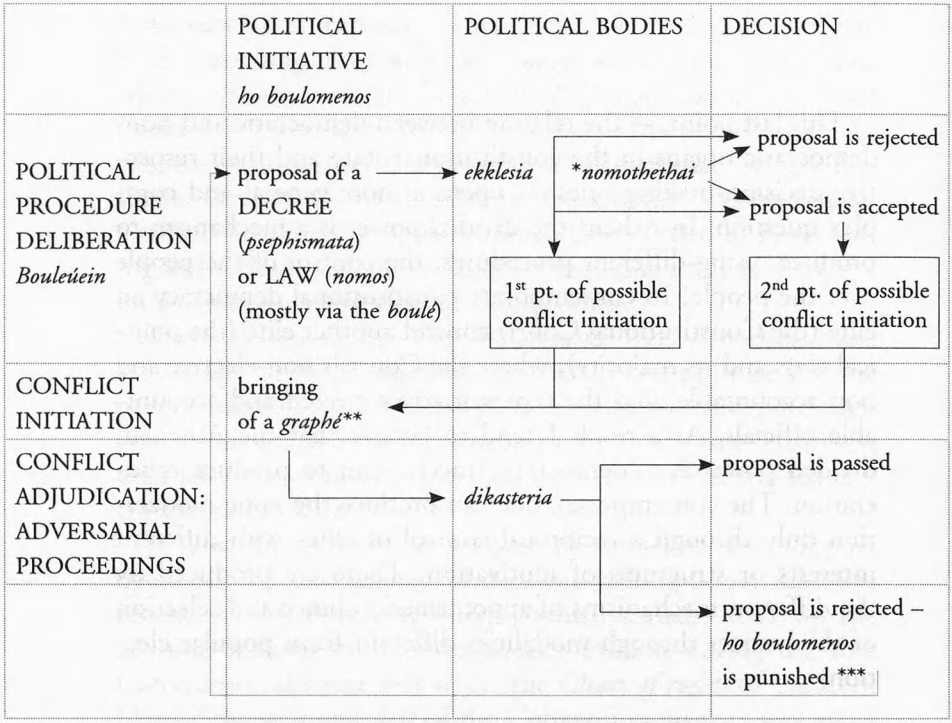
organ explains[97] why they accepted to follow the consensus procedure.

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* *

This last point — the relation between democratic and non-democratic organs in the constitutional state and their respective decision-making rules — opens a more general and complex question. In Athens the divided power is a mechanism to produce, using different procedures, the control of the people over the people! In contemporary constitutional democracy an elite (the Constitutional Court) control another elite (the political class and its majority); where the Court is non-elective and non-accountable, and the representatives elected and accountable officials. As a result I tend to believe that the Athenian divided power is a 'democratic' mechanism to produce moderation. The contemporary one can produce the same moderation only through a reciprocal control of elites with different interests or structures of motivation. These are produced by the different mechanisms of appointment: choice and selection of the justices through modalities different from popular election.

[97] Among other reasons, see: P. PASQUINO, "La Convenzione tra storia e tensioni", in *Quaderni Costituzionali* 24 (2004), 166-8 and P. MAGNETTE, "La Convention européenne: argumenter et negocier dans une assemblee constituante multinationale", in *Revue Française de Science Politique*, 54, 1 (2004), 5-42.

FIG. 1



* If the proposal is of a new law and not a decree, after a preliminary discussion in the *ekklesia*, it goes to the *nomothetai* for the final decision

** *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* can be brought after a decree/law was passed (and exceptionally before the assembly took the vote)

***A 'modified' version of the proposal could maybe be brought up again in a new meeting of the *ekklesia* for a new vote. If a *graphē paranomōn* was brought against the proposer of a *psephisma* before it had been passed by the Assembly, the Court's decision to uphold the *psephisma* served both as an acquittal of the proposer and as a ratification of his proposal. This view is developed in M.H. HANSEN, *The Athenian Ecclesia II* (Copenhagen 1989), 271-81. cf. ID., *op. cit.* (n. 8), 210 and 338, thesis n° 83.

DISCUSSION

O. Murray: In relation to your fascinating comparison of the functions of the Athenian *nomothetai* and the modern institution of the Constitutional Court I should like to make two observations.

The first concerns your starting-point in Moses Finley's book *Democracy Ancient and Modern* of 1973. I am sure our respected convenor is too modest to point this out himself; but Finley wrote before the crucial transformation in our understanding of Athenian democracy. In the sixties when I was a young teacher I remember considering that the study of Athenian democracy was dead: little had happened since the discovery of the *Athenaion Politeia* in the previous century, and there was nothing left to do but describe the system as it was; the standard handbook was the incredibly old-fashioned *History of the Athenian Constitution* by Charles Hignett of 1952, which was subtitled *to the end of the fifth century B.C.* It was assumed that nothing had happened thereafter; the book ends with the statement:

> The Athenians of the restoration would probably have agreed that the radical democracy was the constitution which divided them least, and as at any rate more tolerable than any other form of government it endured without serious opposition until it was again overthrown by a foreign conqueror. (298)

Finley inhabited that universe, and I have no evidence that he ever left it; but at least he showed us that we could engage with modern political thought from our secure foundation of the knowledge of fifth century democracy.

From 1976 the studies of Mogens Herman Hansen began to appear, and we gradually became aware that the subject was

undergoing a transformation; in 1987 I organised the publication of Hansen's *The Athenian Democracy in the Age of Demosthenes* in the series I was editing for Blackwell's. By then I had understood the real nature of the Hansenian Revolution, which was that there was very little evidence for the working of Athenian democracy in the fifth century, and that we could study in detail only the fourth century democracy of the age of Demosthenes. Moreover the two democracies appeared to be completely different: to paraphrase Hansen, in the fifth century the assembly had been unchecked, and to the question, 'who is sovereign (*kyrios*) in Athens?' an Athenian would have replied 'the people'; whereas in the fourth century he would have replied, 'the laws'. What the *Athenaion Politeia* had described as the eleventh and last revolution of the Athenian *politeia*, and as the simple restoration of the democracy in 401 B.C., was in fact a revolution — not a restoration but a transformation. Aristotle never noticed the most important revolution of all. Of all this I know you are well aware, since it lies at the basis of your paper; but I mention it explicitly only because there are some here who are too young to have experienced that amazing revolution in the study of Athenian democracy.

It does however lead to my second point. You characterize the Athenian *demokratia* as "not the people, in the sense of 'We the People' of the American constitution, but a social group, the *thetes*". That is to follow Aristotle, and may well be true of the fifth century; but I would contend that it is false for the fourth century. As Hansen has argued, the population of Athens declined permanently as a consequence of the plague and military disasters of the Peloponnesian War, by approximately 30%. Because of the strict inheritance laws this implies that on average the landholdings of individual citizens will have increased by the same amount, and that many previously landless *thetes* will have become landowners. The political and military history of Athens supports the view that this created a social change which Aristotle and Plato failed to recognise:

fourth century strategy is concentrated on the building of forts to create land defences, and Athens is far less interested in sea-power; according to Plutarch *Themistocles* 19.6 the assembly place on the Pnyx (Pnyx II) was reversed under the Thirty to face the land instead of the sea, in order to reflect this new interest. The importance of independently working slaves (*choris oikountes*) and metics in the economy, and for the latter even in the army, might suggest a shortage of manpower. By the end of the fourth century 'Aristotle' in the *Athenaion Politeia* can talk as if enrolment in the military *ephebeia* is required of all Athenians, which would imply that all citizens are hoplites; it is still disputed whether this can really be true.

Whatever the details, it seems to me clear that fourth century Athens was not controlled by the poor in Aristotle's sense, but by a land-owning peasantry. So I begin to reflect whether we should attribute the great success and stability of fourth century post-imperial Athens not to institutional reforms, but rather to a flourishing bourgeoisie. And that leads me to a question worthy of Montesquieu, for you modern experts as much as for the ancient world: has there ever been — can there ever be — a successful democracy that does not depend on a large and stable bourgeoisie?

P. Pasquino: Thank you for stressing the crucial role that *The Athenian Democracy in the Age of Demosthenes* played in the renewal of our understanding of the ancient *demokratia*. Hansen's book was indeed as you say the starting point of my comparison between the ancient and the modern democracy.

Your second point opens in fact a big question, somehow a conundrum, that would be worth a specific and full investigation, a question which shows that in a sense Hansen's work has not yet been fully discussed and evaluated in all its consequences. I believe that I understand Aristotle pretty well, history of political theory is my field and apparently we do not disagree in the interpretation of the *maestro di color che sanno*, as Dante called him. I shall come back to him later on, but first

a clarification. Unlikely my mentor Ettore Lepore, I'm not a specialist of social and economic history of the ancient Greece, so the reason why I tend to present the Athenian democracy from an historical point of view as a government by the *aporoi* is ... because this is what I read in Hansen's masterwork on *The Athenian Democracy*. There are numerous passages where he suggests that in the 4th century the lower classes had a predominant role in the *ekklesia* and the *dikasteria*. For sure Hansen like Aristotle may be wrong. And following them, me too. But I'm just following Hansen on this question. He seems, however, to have modified his view on this point, perhaps because he wants to show that the ancient and the modern democracy are more similar that one would believe *prima facie* reading his main book.

I think by the way that there may be a pseudo-disagreement due to the rendering of the word *aporoi*. Poor, as I may have said somewhere in my text — and I need to be clearer and this is a reason why I want to thank you for your question — should not be used as a translation of the Greek term *aporoi*. The Athenian lower classes were not the equivalent of 'our' poors. *Aporoi* may have owned a slave. So that is why I prefer to use the expression *middle-lower classes*.

It is well possible, I do not have the competence to make a clear assessment, that the middle classes became the predominant social force in the Athenian society and institutions of the 4th century. Then I'm wondering why Aristotle, who knew well the Athenian *demokratia* of his time, was unhappy with it, being himself strongly in favor of the middle classes (one can think of his positive assessment of Theramenes and of his doctrine of the *mese politeia*). But suppose that Aristotle was very biased, very Platonist politically, something I have serious difficulties to believe, well this Athenian democracy was still able to create the violent rejection by the upper classes. And indeed the representatives of them (philosophers and writers) were violently hostile to that regime until the end of the experience. So I need to think and read more on that.

There is a second reason to take Aristotle seriously, that is the secular hostility to the Athenian democracy, shared famously by the founding fathers of the American and French modern representative government (*vulgo* democracy). Why people not hostile to middles classes were so worried about *demokratia*? Again that is a question that needs further scrutiny, and after all may depend again on the huge influence of Aristotle on the modern western political culture. To conclude, it is possible that like Hansen, I stress the institutional setting of the *demokratia* in the 4th century (in my own language: divided power) and that Aristotle was interested essentially in the social basis of that form of government. In this perspective he was probably right: for a Greek *demokratia* was the order of a *polis* where the majority (and at that time the majority were the middle-lower classes) had the most important say in virtually each single political decision.

M. Hansen: I am happy to see that both Pasquino and Murray agree with my interpretation of the development of Athenian democracy. I have to add, however, that far from all ancient historians have been persuaded. Several scholars still believe that the Athenian democratic institutions were essentially the same throughout the period from 462 to 322 and that the attested reforms during this period did not change the basic character of the democratic constitution.

The most critical account of my analysis of the distinction between the *ekklesia* and the *dikasteria* is J. Bleicken, "Die Einheit der athenischen Demokratie in klassischer Zeit", in *Hermes* 115 (1987), 257-83 where he states his own view of the relation between Assembly and courts as follows: "[Die Athener] haben das Gerichtsurteil nicht dem Volksbeschluss gegenübergestellt. Es gibt keinen Hinweis darauf, dass man die Entscheidungen der beiden Gremien als auf zwei verschiedenen und daher für ein Spannungsverhältnis offenen Ebenen gefällt sah; es scheint, dass man sich ein solches Spannungsverhältnis zwischen den beiden Gremien nicht einmal vorzustellen in der Lage war" (273).

To counter this view and defend my interpretation it suffices, I think, to quote a few passages from Demosthenes: [...] πολλοὶ παρ' ὑμῖν ἐπὶ καιρῶν γεγόνασιν ἰσχυροί, Καλλίστρατος, αὖθις Ἀριστοφῶν, Διόφαντος, τούτων ἕτεροι πρότερον. ἀλλὰ ποῦ τούτων ἕκαστος ἐπρώτευεν; ἐν τῷ δήμῳ: ἐν δὲ τοῖς δικαστηρίοις οὐδείς πω μέχρι τῆς τήμερον ἡμέρας ὑμῶν οὐδὲ τῶν νόμων οὐδὲ τῶν ὅρκων κρείττων γέγονεν (Dem. 19. 297). ἆρ' οὖν τῳ δοκεῖ συμφέρειν τῇ πόλει τοιοῦτος νόμος ὃς δικαστηρίου γνώσεως αὐτὸς κυριώτερος ἔσται, καὶ τὰς ὑπὸ τῶν ὁμωμοκότων γνώσεις τοῖς ἀνωμότοις [the Assembly, cf. 24.80] προστάξει λύειν; (Dem. 24.78). For scores of other sources of the same kind and a full discussion of the issue, see M.H. Hansen, "*Demos, Ecclesia* and *Dicasterion* in Classical Athens", in *The Athenian Ecclesia* I (Copenhagen 1983), 139-58 and II (Copenhagen 1989), 213-8.

You note that "the people governing the Athenian *demokratia* was not the people, in the sense of *we the people* of the American constitution, but a social group, the *thetes*, that certainly do not govern in any contemporary democratic regimes. In reality, the *demos*, a social-economic- military group, exercised the political power in the ancient *demokratia* [...]". Here, I think, we should distinguish between the supporters and the critics of democracy. When an Athenian democrat used the word '*demos*' about a group of persons (and not in the sense of the Athenian state or democracy) he did not mean a social group, the common people, but the whole body of citizens (e.g. Aeschin. 3.224, cf. M.H. Hansen, *op. cit.* [n. 8], 138, n. 40), and he simply ignored the fact that only a minority of all citizens were able to turn up to meetings (see also p. 15 *supra*). Critics of the democracy, on the other hand, especially philosophers, tended to regard the *demos* as the 'ordinary people' in contrast to the propertied class (e.g. Arist. *Pol.* 1291b17-29. Cf. p. 28 *supra*), and in their eyes the Assembly was a political organ in which the city poor, the artisans, traders, day-labourers and idlers, could by their majority outvote the minority of countrymen

and major property-owners (e.g. Plato *Resp.* 565a; Arist. *Pol.* 1319a25-32). In the Attic orators I have not found one single indisputable example of *demos* used in the social sense about the common people, the poor opposed to the rich. Thus the Athenian democrats used the word *demos* in a sense that was not essentially different from 'We the people' in the American constitution of 1787.

If we move from concepts to political and social institutions we meet a similar distinction between proponents and critics of democracy. According to Plato and Aristotle democracy was the rule of the demos in the sense of the common people, i.e. the rule of the *aporoi* at the expense of the *euporoi* and in their eyes the Assembly was a political organ in which the city poor, the artisans, traders, day labourers and idlers could by their majority outvote the minority of countrymen and major property-owners.

The Athenian democrats claimed that poverty did not bar a citizen from exercising his political rights (Thuc. 2.37). They also state that democracy is the rule of the majority (*hoi polloi, oi pleiones, to plethos*), but they never admit that it was the rule of a majority of poor citizens. When decrees are introduced with the formula *edoxe to demo* the *demos* denotes the citizenry and not the common people. Leaving the political initiative to *ho boulomenos* there was a risk of being misled by demagogues and sycophants who wanted to soak the rich on behalf of the people. But the Athenian democrats took pride in the various measures against such persons and claimed that mostly the *dikastai* resisted the temptation to enrich themselves by confiscating the fortune of a wealthy citizen (Hyp. 3.33-6).

Now the problem is: who are right, the philosophers or the democrats? You base your analysis on the assumption that, basically, it is the philosophers who provide us with a correct understanding of the essence of Athenian democracy. It is worthwhile, I think, to debate this key issue in this circle. For the moment I suspend judgement.

P. Pasquino: I said something about this complex question in my answer to Oswyn Murray. I want to repeat here what Joseph Schumpeter said in 1942 speaking of democracy: one type of regime is a society where the people 'govern' and a different regime the one where they 'authorize' member of the political elite to govern at their place. That difference can be considered a detail. With my paper I wanted to oppose to this reductionist approach and insist upon the 'democratic' (popular) dimension of the Athenian democracy as against to the strong oligarchic elements that characterize the modern representative government.

M. Hansen: Following in particular Ernest Barker (*Principles of Social and Political Theory* [Oxford 1951], 59ff) I find it important to distinguish between immediate and ultimate sovereignty. The immediate sovereign is the institution that makes (most of) the important decisions in the state. The ultimate sovereign is the institution that makes the final decisions in case of 'appeal'. In an absolute monarchy the monarch makes both the important and the final decisions, as Bodin notes in his description of sovereignty. In a democracy it is the parliament (or the head of government) that makes the important decisions, but it is the constitutional court that makes the final decisions.

In Athens it was the *ekklesia* that made most of the important political decisions, even in the fourth century, *viz* all the decisions about foreign policy, war and peace, finances, religion etc. But it was the *dikasterion* that made the final decision in case of 'appeal'. It is in this sense the *dikasterion* is *kyrion panton*, see my *The Sovereignty of the People's Court* (Odense 1974), 17-18.

I know that supporters of 'constitutional democracy' tend to hold that in such a democracy there is no longer any sovereign. As an alternative I suggest to take up the distinction between immediate and ultimate sovereignty as expounded by Barker.

To avoid the anachronism involved in using the modern concept of sovereignty in an analysis of Athenian democracy, I suggest instead to speak about 'supreme power' *vel sim.*

P. Pasquino: Barker's argument seems to me persuasive only in a 'judicial' logic: if there is a legal conflict there should be a closure, a final word (the king was indeed the 'supreme court' in the European Middle Age). In a society based on a real institutional pluralism constitutional, theorists tend to say that not an organ but only the constitution is the 'sovereign'. In contemporary democracies the constitutional/supreme courts have the last word 'only' concerning the specific question brought to them. They have not the final say in the ongoing decision-making process of a constitutional state. It is possible that in the Athenian *demokratia* the role of the 'people's courts' was more paramount, because of the popular nature of the organ. But that may be in a sense an open question, difficult to answer on the basis of our scanty historical evidence.

II

CHRISTIAN MANN

POLITISCHE PARTIZIPATION UND DIE VORSTELLUNG DES MENSCHEN ALS *ZOON POLITIKON*

Die Teilhabe eines Bürgers an einem Gemeinwesen kann auf zwei verschiedene Arten bestimmt werden: Erstens im Sinne einer formalen Zugehörigkeit, in der Gegenwart etwa eine durch einen Ausweis dokumentierte Staatsangehörigkeit, der eine Konstruktion und Abgrenzung einer Gemeinschaft anhand von Kriterien wie gemeinsamer Kultur, Geschichte oder Abstammung zugrunde liegt; zweitens im Sinne einer aktiven Mitwirkung an der kollektiven Willensbildung durch die Teilnahme an den politischen Institutionen.[1] Nur letztere ist gemeint, wenn im Folgenden von politischer Partizipation die Rede sein wird.

Mir wurde die Aufgabe zugewiesen, den Zusammenhang zwischen der aristotelischen Lehre, der Mensch sei von Natur aus ein *zoon politikon*, und dem hohen Grad politischer Partizipation in der athenischen Demokratie zu untersuchen[2] und

[1] Dazu U. WALTER, *An der Polis teilhaben. Bürgerstaat und Zugehörigkeit im archaischen Griechenland* (Stuttgart 1993), 14-7.

[2] M.H. HANSEN, *The Athenian Democracy in the Age of Demosthenes. Structure, Principles and Ideology* (Oxford 1991), 314: "for many Greeks political activity was a positive value and participation in the decision-making process an end in itself not just a means to self-advancement. According to Aristotle, man is a 'political animal', i.e. the very stuff of human life at its most basic is involvement in social organisation, or, as we might say nowadays, in the determining

die Nachwirkungen in modernen Debatten über Demokratie nachzuzeichnen. Dem entspricht die Gliederung des Aufsatzes: In einem ersten Schritt werden diejenigen Passagen untersucht, in denen Aristoteles sein Theorem vom *zoon politikon* entwickelt, wobei der Schwerpunkt auf die *Historia animalium* und die *Politik* gelegt wird (I), danach erfolgt eine Analyse verschiedener Aspekte der politischen Partizipation im demokratischen Athen (II). Insbesondere soll danach gefragt werden, welche Motivation die athenischen Bürger antrieb, sich mit einem gewaltigen, in anderen Gemeinschaften unvorstellbaren Zeitaufwand in den politischen Institutionen der Polis zu betätigen. Schließlich sollen ausgewählte Aussagen moderner Autoren über die Bedeutung und Probleme einer massiven Beteiligung des Volkes an politischen Entscheidungsprozessen vergleichend herangezogen werden (III). Es muß nicht betont werden, daß bei diesem weiten Thema viele Aspekte nur in groben Zügen erörtert werden können.

I. Der Mensch als zoon politikon *bei Aristoteles*

Aristoteles' Dictum, der Mensch sei von Natur aus ein *zoon politikon*, ist in der Moderne breit rezipiert worden und gehört wohl zu den am häufigsten zitierten Sätzen der antiken Philosophie. Die Vorstellungen, was Aristoteles mit diesem Theorem genau meinte und wie sich dieses zu anderen Teilen seiner Theorie verhalte, gehen allerdings weit auseinander. Dies ist auch dadurch bedingt, daß der Satz vom Menschen als *zoon politikon* in Aristoteles' Oeuvre gleich mehrfach vorkommt und dabei — je nach Werk und Kontext — unterschiedliche Färbungen erhält. Die komplexen Forschungsdebatten können hier nur knapp skizziert werden; im Vordergrund soll die Frage

and distribution of the community's values. It seems that the Athenians derived actual enjoyment from the formal play with complicated procedures such as sortition and voting. No doubt that was motivation enough for some Athenians to take an active part in political life".

stehen, inwieweit man die aristotelische Lehre mit der intensiven politischen Partizipation im demokratischen Athen in Zusammenhang bringen kann. Ein solcher Zusammenhang ist in der älteren Forschung postuliert worden, indem Aristoteles' Satz vom *zoon politikon* als Ausdruck einer Vorstellung betrachtet wurde, die bei den Griechen klassischer Zeit und insbesondere in Athen verbreitet gewesen sei: Die Natur des Menschen habe nach griechischer Vorstellung darin bestanden, politisch tätig zu sein, und deshalb habe der Mensch seine Natur am besten in den demokratischen Institutionen verwirklichen können. Hermann Bengtson schrieb zum klassischen Griechenland mit Bezug auf Aristoteles: "Damals [d.h. in der klassischen Zeit] ist der griechische Bürger zum 'politischen Lebewesen' (ζῷον πολιτικόν) geworden".[3] Hintergrund dieser Aussage ist ein teleologischer Entwurf der griechischen Geschichte, der das demokratische Athen nicht nur als End- und Höhepunkt der Polisentwicklung,[4] sondern auch als höchste Stufe in der Entwicklung des griechischen Menschen behandelt. Diese athenozentrischen Vorstellungen sind allerdings längst überholt, so daß ein etwaiger Zusammenhang zwischen der aristotelischen Lehre und der Demokratie neu überdacht werden muß.

Am Beginn der *Historia animalium* nimmt Aristoteles eine Einteilung der Tierarten vor, wobei er nicht nur somatische, sondern auch ethologische Kriterien zur Klassifizierung heranzieht: Zunächst unterscheidet er zwischen solitären Tieren und Herdentieren, letztere wiederum gliedert er in verstreut lebende und in 'politische'. Beispiele für solche 'politischen' Tiere sind für ihn Menschen, Bienen, Wespen, Ameisen und Kraniche; diese seien noch weiter einzuteilen in diejenigen, die unter einem Führer stünden (etwa Bienen und Kraniche), und die

[3] H. BENGTSON, *Griechische Geschichte. Von den Anfängen bis in die römische Kaiserzeit*, HdAW III.4 (München ^{5}1976), 149.

[4] In ähnlicher Weise hat John Pocock die griechische Polis auf das demokratische Athen reduziert (s.u. S. 82-4).

'anarchisch', d.h. ohne organisierte Führung lebenden (wie die Ameisen).[5]

Auffällig ist in diesem Abschnitt die Verwendung von *politikos* in biologischem Zusammenhang. Dieser Begriff ist hier weder ethisch aufgeladen, noch liefert er eine anthropologische Bestimmung. 'Politisch' bezeichnet in diesem Kontext vielmehr die Bildung einer Organisation zum Erreichen gemeinsamer Ziele; da dieses Phänomen auch bei Tierarten zu beobachten ist, etwa bei der Arbeitsteilung in einem Bienenstock oder beim gemeinsamen Zug der Kraniche, vermag es keine Sonderstellung des Menschen zu begründen.

Auch in der *Politik* ist gleich zu Beginn des Werkes vom *zoon politikon* die Rede, allerdings in anderem Zusammenhang. Aristoteles entwickelt hier eine allgemeine Theorie menschlicher Gemeinschaften, wobei er zunächst die Polis in ihre 'unzusammengesetzten' Bestandteile (τὰ ἀσύνθετα) zerlegt. Die elementaren Gemeinschaften seien diejenigen zwischen Mann und Frau sowie zwischen Herrn und Sklaven; diese Gemeinschaften konstituierten die *oikia*, die von Natur aus zur Befriedigung der täglichen Bedürfnisse existiere. Mehrere *oikiai* bildeten ein Dorf, mehrere Dörfer schließlich eine Polis, die den kleineren Einheiten allerdings nicht nur hinsichtlich der Größe übergeordnet sei.

> "Die aus mehreren Dörfern sich bildende vollendete Gemeinschaft nun aber ist bereits die Polis, welche, wie man wohl sagen darf, das Endziel völliger Autarkie erreicht hat, indem sie zwar entsteht um des bloßen Lebens, aber besteht um des vollendeten Lebens willen. Drum, wenn schon jene ersten Gemeinschaften naturgemäße Bildungen sind, so gilt dies erst recht von jeder Polis, denn diese ist Endziel von jenen; die Natur ist eben Endziel, denn diejenige Beschaffenheit, welche ein jeder Gegenstand

[5] ARIST. *HA* 487b 33 – 488a 14; s. dazu D. O'MEARA, "Der Mensch als politisches Lebewesen. Zum Verhältnis zwischen Platon und Aristoteles", in *Der Mensch – ein politisches Tier? Essays zur philosophischen Anthropologie*, hrsg. von O. HÖFFE (Stuttgart 1992), 14-25, hier 15f.; W. KULLMANN, "Der Mensch als politisches Lebewesen bei Aristoteles", in *Hermes* 108 (1980), 419-43, hier 431-4.

erreicht hat, wenn seine Entwicklung vollendet ist, eben diese nennen wir die Natur desselben, wie z.B. die des Menschen, des Rosses, des Hauses. Auch ist das Ziel und der Endzweck das Beste, die Autarkie ist aber der Endzweck und das Beste.
Hiernach ist denn klar, daß die Polis zu den naturgemäßen Gebilden gehört und *daß der Mensch von Natur ein politisches Lebewesen ist*; und derjenige, der von Natur und nicht durch zufällige Umstände außer aller politischen Gemeinschaft lebt, ist entweder mehr oder weniger als ein Mensch, wie etwa der von Homer Beschimpfte: ‚Ohne Geschlecht und Gesetz, ohne eigenen Herd'. Denn dieser ist von Natur ein solcher und gleichzeitig gierig nach Krieg, da er isoliert dasteht, wie man im Brettspiel sagt. Daß ferner der Mensch in weit höherem Maße als die Bienen und alle anderen herdenweise lebenden Tiere ein politisches Lebewesen ist, liegt klar zutage. Denn nichts tut, wie wir behaupten, die Natur zwecklos. Der Mensch ist aber das einzige Lebewesen, das Sprache besitzt. Die bloße Stimme nämlich zeigt nur das Angenehme und Unangenehme an, darum kommt sie auch den anderen Lebewesen zu (denn so weit reicht ihre Natur, Angenehmes und Unangenehmes wahrzunehmen und von dieser Wahrnehmung einander Zeichen zu geben); die Sprache dagegen ist dazu bestimmt, das Nützliche und Schädliche deutlich kundzutun und also auch das Gerechte und Ungerechte. Denn das ist eben dem Menschen eigentümlich im Gegensatz zu den Tieren, daß er allein fähig ist, sich vom Guten und Schlechten, von Recht und Unrecht Vorstellungen zu machen".[6]

[6] ARIST. *Pol.* 1252 b 27 – 1253 a 17: ἡ δ' ἐκ πλειόνων κωμῶν κοινωνία τέλειος πόλις, ἤδη πάσης ἔχουσα πέρας τῆς αὐταρκείας ὡς ἔπος εἰπεῖν, γινομένη μὲν τοῦ ζῆν ἕνεκεν, οὖσα δὲ τοῦ εὖ ζῆν. διὸ πᾶσα πόλις φύσει ἔστιν, εἴπερ καὶ αἱ πρῶται κοινωνίαι. τέλος γὰρ αὕτη ἐκείνων, ἡ δὲ φύσις τέλος ἐστίν· οἷον γὰρ ἕκαστόν ἐστι τῆς γενέσεως τελεσθείσης, ταύτην φαμὲν τὴν φύσιν εἶναι ἑκάστου, ὥσπερ ἀνθρώπου ἵππου οἰκίας. ἔτι τὸ οὗ ἕνεκα καὶ τὸ τέλος βέλτιστον· ἡ δ' αὐτάρκεια καὶ τέλος καὶ βέλτιστον. ἐκ τούτων οὖν φανερὸν ὅτι τῶν φύσει ἡ πόλις ἐστί, καὶ **ὅτι ὁ ἄνθρωπος φύσει πολιτικὸν ζῷον**, καὶ ὁ ἄπολις διὰ φύσιν καὶ οὐ διὰ τύχην ἤτοι φαῦλός ἐστιν, ἢ κρείττων ἢ ἄνθρωπος· ὥσπερ καὶ ὁ ὑφ' Ὁμήρου λοιδορηθεὶς 'ἀφρήτωρ ἀθέμιστος ἀνέστιος'· ἅμα γὰρ φύσει τοιοῦτος καὶ πολέμου ἐπιθυμητής, ἅτε περ ἄζυξ ὢν ὥσπερ ἐν πεττοῖς. διότι δὲ πολιτικὸν ὁ ἄνθρωπος ζῷον πάσης μελίττης καὶ παντὸς ἀγελαίου ζῴου μᾶλλον, δῆλον. οὐθὲν γάρ, ὡς φαμέν, μάτην ἡ φύσις ποιεῖ· λόγον δὲ μόνον ἄνθρωπος ἔχει τῶν ζῴων· ἡ μὲν οὖν φωνὴ τοῦ λυπηροῦ καὶ ἡδέος ἐστὶ σημεῖον, διὸ καὶ τοῖς ἄλλοις ὑπάρχει ζῴοις (μέχρι γὰρ τούτου ἡ φύσις αὐτῶν ἐλήλυθε, τοῦ ἔχειν αἴσθησιν λυπηροῦ καὶ ἡδέος καὶ ταῦτα σημαίνειν ἀλλήλοις), ὁ δὲ λόγος ἐπὶ τῷ δηλοῦν ἐστι τὸ συμφέρον καὶ τὸ βλαβερόν, ὥστε καὶ τὸ δίκαιον καὶ τὸ ἄδικον· τοῦτο γὰρ πρὸς τὰ ἄλλα ζῷα τοῖς

Im Unterschied zur *Historia animalium* begründet Aristoteles hier eine Sonderstellung des Menschen: Dieser sei in höherem Maße *politikos* als alle Tiere, auch als die in einer Gemeinschaft organisierten wie die Bienen. Um dies zu begründen, greift Aristoteles auf das Axiom zurück, die Natur habe nichts geschaffen, was keinen Zweck besitze: Da der Mensch als einziges Lebewesen über eine Sprache verfüge, die ihn nicht nur Lust oder Schmerz ausdrücken ließe wie die Tiere mit ihren Lauten, sondern auch in die Lage setze, Recht und Unrecht zu kommunizieren, gehörten gemeinschaftliche Normen zur menschlichen Natur. In diesem Sinne sei der Mensch ein Polisbildendes Lebewesen. Während Gemeinschaften wie *oikia* oder Dorf nur zur Befriedigung elementarer Bedürfnisse dienten, entspreche die Polis der Natur des Menschen in besonderem Maße, weil er in ihr seine Beziehungen normativ ausgestalten könne. Die vorpolitischen Gemeinschaften besäßen kein spezifisches *telos*; sie seien lediglich dazu da, daß der Mensch leben könne — die Polis dagegen biete dem Menschen die Möglichkeit, gemäß seiner Natur *gut* zu leben. Sie sei auch darin die höchste der menschlichen Gemeinschaften, daß sie die Autarkie und damit den vollendeten Zustand erlangt habe. Zwar könne der Mensch, wie aus der Passage ersichtlich wird, auch ohne die Polis eine Zeitlang existieren,[7] aber er benötigt die Polis, um seine von der Natur gegebenen Anlagen zu verwirklichen; in dieser teleologischen Sichtweise ist das höchste Ziel des Menschen nur in der Polis zu erreichen.[8] Anders als in der *Historia Animalium* bildet das Theorem des *zoon politikon* hier eine Komponente der politischen Anthropologie, und entsprechend verschiebt sich auch die Bedeutung von *politikos*. In diesem Kontext liefert das Adjektiv keine biologische Bestimmung,

ἀνθρώποις ἴδιον, τὸ μόνον ἀγαθοῦ καὶ κακοῦ καὶ δικαίου καὶ ἀδίκου καὶ τῶν ἄλλων αἰσθησιν ἔχειν· (Übersetzung Fr. Susemihl).

[7] Dies hat jüngst C.D.C. REEVE, "The Naturalness of the Polis in Aristotle", in *A Companion to Aristotle*, ed. by G. ANAGNOSTOPOULOS (Malden 2009), 512-25, hier 515f. zu Recht noch einmal betont.

[8] E. SCHÜTRUMPF, *Aristoteles: Politik, Buch I* (Berlin 1991), 207-10.

es bezieht sich nicht allgemein auf organisierte Gemeinschaften unter Lebewesen, sondern bedeutet 'auf die Polis bezogen'.[9]

Will man den Satz vom *zoon politikon* vor dem Hintergrund der griechischen politischen Philosophie verorten, ist vor allem die Absetzung von der Vorstellung zu beachten, die Polis sei durch einen Gesellschaftsvertrag entstanden. Gemäß dieser Vorstellung, die bei den Sophisten greifbar ist und wohl auf Demokrit zurückgeht,[10] hätten die Menschen zunächst in einem Naturzustand ohne Staatlichkeit gelebt; erst durch Einigung auf einen *nomos* sei die Polis entstanden. Dagegen richtet sich Aristoteles, indem er die Vorgängigkeit der Polis betont: "Auch von Natur ursprünglicher (*proteron*) aber ist die Polis als das Haus und jeder einzelne von uns".[11] Damit wird die Naturgegebenheit der Polis betont und ein dauerhaftes menschliches Leben außerhalb dieser für unmöglich erklärt.[12]

Deutlich wird diese Stoßrichtung auch in der zweiten Stelle der *Politik*, in der vom *zoon politikon* die Rede ist. Im dritten Buch befaßt sich Aristoteles mit den Unterschieden zwischen guten und schlechten Verfassungen und gelangt von der Ausgangsfrage, warum die von Menschen geschaffenen *politeiai* so

[9] R.G. MULGAN, "Aristotle and the Value of Political Participation", in *Political Theory* 18 (1990), 195-215; K. PIEPENBRINK, *Politische Ordnungskonzeptionen in der attischen Demokratie des vierten Jahrhunderts v. Chr.* (Stuttgart 2001), 60f.; W. KULLMANN, *art. cit.* (Anm. 5), 434, hat zwar richtig eingewandt, daß Aristoteles sich in der *Politik* nicht auf die Polis beschränke, sondern auch außergriechische Formen von Staatlichkeit einbeziehe, aber im Gesamtzusammenhang spielt dies eine geringere Rolle.

[10] FR. STEINMETZ, "Staatengründung – aus Schwäche oder Geselligkeitsdrang? Zur Geschichte einer Theorie", in *Politeia und res publica*, hrsg. von P. STEINMETZ (Wiesbaden 1969), 181-99, hier 195f.; W. KULLMANN, *art. cit.* (Anm. 5), 432f.

[11] ARIST. *Pol.* 1253a 18f.: καὶ πρότερον δὲ τῇ φύσει πόλις ἢ οἰκία καὶ ἕκαστος ἡμῶν ἐστιν. Aristoteles zieht hier wieder einen biologischen Vergleich: Ein Fuß oder eine Hand könnten isoliert nicht den ihnen zugedachten Zweck erfüllen, deshalb sei der Körper früher als seine Teile.

[12] Zur Frage, ob nach Aristoteles die Polis nicht nur begrifflich, sondern auch historisch die primäre Form menschlicher Gemeinschaft sei, s. W. KULLMANN, *art. cit.* (Anm. 5), 423f.

stark voneinander differierten, zu grundlegenden Überlegungen über die Ursachen der Gemeinschaftsbildung. Hier richtet sich Aristoteles explizit gegen die These, Menschen würden primär durch den Nutzen dazu getrieben, Gemeinschaften zu bilden. Aristoteles setzt dagegen, daß der Mensch von Natur aus ein *zoon politikon* sei, und verweist auf den Beginn seines Werkes zurück: "Da haben wir aber in den Anfängen unserer ganzen Erörterung, in denen die Bestimmungen über die Hausverwaltung und das Verhältnis des Herrn zum Sklaven getroffen wurden, auch gesagt, daß der Mensch von Natur ein politisches Lebewesen ist. Und aus diesem Grund treibt es die Menschen, auch ganz abgesehen von dem Bedürfnis gegenseitiger Unterstützung, zum Zusammenleben".[13] In der Folge schließt er allerdings auch den gemeinsamen Nutzen nicht aus, sondern weist ihm eine sekundäre Bedeutung zu; die Erhaltung des Lebens selbst sei ein Grund, warum die Menschen Gemeinschaften bildeten und an ihnen festhielten.

Vom *zoon politikon* ist auch in den beiden Ethiken des Aristoteles die Rede, doch können die betreffenden Passagen keine Aufschlüsse über das in der *Politik* entwickelte Theorem bringen. An einer Stelle der *Eudemischen Ethik* fehlt bei der Bestimmung des *zoon politikon* der Zusatz "von Natur aus" und damit ein entscheidendes Element.[14] In der *Nikomachischen Ethik* wird der Polis eine weit geringere Rolle zugewiesen als in der *Politik*, an einer Stelle sogar eine Unterordnung der Polis unter die Gemeinschaft zwischen Mann und Frau vorgenommen: "Die Freundschaft zwischen Mann und Frau ist nach allgemeiner Ansicht eine Naturgegebenheit. Denn der Mensch ist von Natur ein Wesen, das eher auf die Gemeinsamkeit zu zweien als auf die (umfassende) der Polis eingestellt ist, und zwar um so mehr, als die Hausgemeinschaft ursprünglicher als

[13] ARIST. *Pol.* 1278b 17-21: εἴρηται δὴ κατὰ τοὺς πρώτους λόγους, ἐν οἷς περὶ οἰκονομίας διωρίσθη καὶ δεσποτείας, καὶ ὅτι φύσει μέν ἐστιν ἄνθρωπος ζῷον πολιτικόν. διὸ καὶ μηδὲν δεόμενοι τῆς παρὰ ἀλλήλων βοηθείας οὐκ ἔλαττον ὀρέγονται τοῦ συζῆν·

[14] ARIST. *EE* 1242 a 22.

die Polis ist und mehr den Charakter der Notwendigkeit hat und der Trieb nach Fortpflanzung dem Lebewesen in umfassenderer Weise eingepflanzt ist. Während nun bei den Tieren die Gemeinschaft nur so weit (nämlich bis zur Paarung) reicht, schließen die Menschen nicht nur wegen der Fortpflanzung eine Hausgemeinschaft, sondern auch wegen der Bedürfnisse des täglichen Lebens".[15] Im Widerspruch zur Lehre, der Mensch verwirkliche seine Natur in der Polis, steht auch der Lobpreis des *bios theoretikos* im 10. Buch der *Nikomachischen Ethik*.[16]

II. Politische Partizipation im demokratischen Athen

Die Anfänge politischer Partizipation reichen in Griechenland bis in die archaische Zeit zurück. Bereits in den homerischen Epen werden mehrere Heeresversammlungen im griechischen Lager vor Troja und eine Volksversammlung auf der Agora von Ithaka geschildert. Letztere war von Telemachos einberufen worden, und nach den Worten des Dichters fanden sich alle Männer Ithakas ein, ohne allerdings den Anlaß der Versammlung zu kennen.[17] Aus den Vermutungen, die der greise Aigyptios anstellt, wird deutlich, daß Versammlungen dieser Art im allgemeinen bei Gefahr für die Gemeinschaft

[15] ARIST. *EN* 1162a 16-21: ἀνδρὶ δὲ καὶ γυναικὶ φιλία δοκεῖ κατὰ φύσιν ὑπάρχειν· **ἄνθρωπος γὰρ τῇ φύσει συνδυαστικὸν μᾶλλον ἢ πολιτικόν**, ὅσῳ πρότερον καὶ ἀναγκαιότερον οἰκία πόλεως, καὶ τεκνοποιία κοινότερον τοῖς ζώοις. τοῖς μὲν οὖν ἄλλοις ἐπὶ τοσοῦτον ἡ κοινωνία ἐστίν, οἱ δ' ἄνθρωποι οὐ μόνον τῆς τεκνοποιίας χάριν συνοικοῦσιν, ἀλλὰ καὶ τῶν εἰς τὸν βίον· (Übersetzung Fr. Dirlmeier); vom *zoon politikon* ist außerdem die Rede in: *EN* 1097b 11; 1169b 18f.

[16] H. FLASHAR, "Ethik und Politik in der Philosophie des Aristoteles", in *Gymnasium* 78 (1971), 278-93, hier 287; R.G. MULGAN, *art. cit.* (Anm. 9) hat den Versuch unternommen, das Ideal des *bios theoretikos* mit dem Theorem des *zoon politikon* in Einklang zu bringen, und darauf verwiesen, daß die Polis einen Raum für tugendhaftes Handeln biete; dies ist zwar richtig, doch bleibt davon unberührt, daß die praktische und damit auch die politisch aktive Lebensform in der *Nikomachischen Ethik* lediglich als zweitrangig behandelt wird.

[17] HOM. *Od.* 2, 1-259.

abgehalten wurden, etwa bei einer drohenden Invasion feindlicher Heere. Im konkreten Fall ist der Anlaß jedoch eine private Notlage: Telemachos erwartet vom Volk offenbar Unterstützung gegen die Freier, und nach der Schilderung des Dichters gelingt es ihm auch, die Sympathien der Männer von Ithaka zu gewinnen. Von einer *ekklesia* des demokratischen Athen ist die homerische Volksversammlung freilich noch weit entfernt: Ihr fehlt die Regelmäßigkeit — es handelt sich um die erste Versammlung seit über 20 Jahren! —, und sie hat auch keine Kompetenz für bindende Beschlüsse. Nach dem Wortgefecht zwischen Telemachos und seinen Unterstützern auf der einen Seite und den Freiern auf der anderen Seite löst sich die Versammlung auf, und alle gehen nach Hause. Das Volk ist in der schwach organisierten homerischen Polis auf die Zuschauerrolle reduziert, es kann allenfalls Zustimmung oder Unmut äußern.[18]

Trotz dieser Einschränkungen ist signifikant, daß schon in der homerischen Welt die Idee greifbar ist, öffentliches und privates Unglück hingen miteinander zusammen. In der archaischen Literatur wird der Gedanke verschiedentlich aufgegriffen, am eindringlichsten hat ihm Solon in seiner Eunomia-Elegie Ausdruck verliehen: "So kommt das Unglück der Gemeinschaft heim zu jedem einzeln, / des Hofes Tore halten es nicht länger willig ab, hoch übern Zaun ist's schon gesprungen, trifft sein Opfer sicher, / auch wenn da einer in den letzten Zimmerwinkel flieht".[19] Es sei illusorisch zu glauben, man

[18] S. dazu die klassisch gewordene Analyse bei M.I. FINLEY, *The World of Odysseus* (Cleveland [2]1962), 79-84, sowie U. WALTER, *op. cit.* (Anm. 1), 29-44 und K.A. RAAFLAUB, "Homeric Society", in *A New Companion to Homer*, ed. by I. MORRIS, B. POWELL (Leiden 1997), 624-48, hier 641-45.

[19] SOL. 3 G.-P. (= 4 W.), 26-29: οὕτω δημόσιον κακὸν ἔρχεται οἴκαδ' ἑκάστῳ, | αὐλειοι δ' ἔτ' ἔχειν οὐκ ἐθέλουσι θύραι, | ὑψηλὸν δ' ὑπὲρ ἕρκος ὑπέρθορεν, εὗρε δὲ πάντως, | εἰ καί τις φεύγων ἐν μυχῷ ἦι θαλάμου. (Übersetzung J. Latacz). S. dazu A.W.H. ADKINS, *Poetic Craft in the Early Greek Elegists* (Chicago 1985), 121; CHR. MÜLKE, *Solons politische Elegien und Jamben (Fr. 1-13; 32-37 West). Einleitung, Text, Übersetzung, Kommentar* (München 2002), 142-5.

könne sich vor dem *demosion kakon* in den eigenen *oikos* zurückziehen. In der Konsequenz begründet dies eine Notwendigkeit, sich um die Angelegenheiten der Polis zu kümmern, auch um im Privaten sorgenfrei leben zu können.[20]

Es ist allgemein bekannt, daß im demokratischen Athen die politische Partizipation des Volkes — d.h. der männlichen Bürger[21] — ein in der Vormoderne exzeptionelles Ausmaß erreichte. Es ist hier nicht der Ort, um die vieldiskutierte Frage, wann man den Beginn der athenischen Demokratie ansetzen müsse, ausführlich zu behandeln.[22] Wesentlich in unserem Zusammenhang ist, daß sich fast alle bedeutenden Maßnahmen seit dem späten 6. Jahrhundert als Versuche begreifen

[20] Das Solon zugeschriebene Gesetz, das jeden Bürger zur Parteinahme bei inneren Streitigkeiten verpflichtet (ARIST. *Ath.* 8,5; PLU. *Sol.* 20,1), würde durchaus in diesen Zusammenhang passen, jedoch scheinen die Argumente gegen eine solonische Urheberschaft und für eine Datierung in die Krise nach 404 stärker zu sein; s. J. BLEICKEN, "Zum sogenannten Stasis-Gesetz Solons", in *Kolloquium für Alfred Heuss.* Frankfurter Althistorische Studien 12 (Kallmünz 1986), 9-18.

[21] Der Status von Frauen und Metöken wird in der Forschung der letzten Jahre kontrovers diskutiert. Während diesen Gruppen in der älteren Forschung nur geringe Beachtung geschenkt wurde, ist ihre Bedeutung in vielen jüngeren Werken betont worden. E. COHEN, *The Athenian Nation* (Princeton 2000); M. ADAK, *Metöken als Wohltäter Athens. Untersuchungen zum sozialen Austausch zwischen ortsansässigen Fremden und der Bürgergemeinde in klassischer und hellenistischer Zeit (ca. 500-150 v.Chr.)* (München 2003); J. BLOK, "Recht und Ritus der Polis. Zu Bürgerstatus und Geschlechterverhältnissen im klassischen Athen", in *HZ* 278 (2004), 1-26; EAD., "Fremde, Bürger und Baupolitik im klassischen Athen", in *Historische Anthropologie* 15 (2007), 309-26. Für einen Versuch, die Spannung zwischen dem politischen Ausschluß von Frauen und Metöken und deren Integration in kultischen und sozialen Kontexten unter Rückgriff auf die Systemtheorie Niklas Luhmanns zu beschreiben, s. CHR. MANN, "Politische Gleichheit und gesellschaftliche Stratifikation: die athenische Demokratie aus der Perspektive der Systemtheorie", in *HZ* 286 (2008), 1-35.

[22] Einen Überblick über die verschiedenen Ansätze liefert der Sammelband *Origins of Democracy in Ancient Greece*, ed. by K.A. RAAFLAUB, J. OBER R.W. WALLACE. (Berkeley 2007); s. außerdem J. MARTIN, "Von Kleisthenes zu Ephialtes. Zur Entstehung der athenischen Demokratie", in *Chiron* 4 (1974), 5-42; J. BLEICKEN, "Zur Einheit der athenischen Demokratie in Klassischer Zeit", in *Hermes* 115 (1987), 257-283, hier 282f.

lassen, die Mitwirkung des Volkes an der politischen Willensbildung zu steigern. Gleichzeitig muß betont werden, daß die Politisierung der Bürgerschaft auch eine Voraussetzung demokratischer Reformen darstellte, denn das Volk war nicht allein Zuschauer und Nutznießer des aristokratischen Machtstrebens, sondern bildete in entscheidenden Situationen auch einen wichtigen Faktor. Deutlich wird dies bereits bei den Reformen des Kleisthenes: Josiah Ober hat, m.E. zu Recht, jüngst noch einmal unterstrichen, daß der Aufstand des Volkes gegen Isagoras und die Spartaner erst die Voraussetzung dafür schuf, daß Kleisthenes seine politische Neuordnung Attikas durchführen konnte.[23] Die damit beginnende Entwicklung Athens zur Demokratie war keinesfalls zwangsläufig, aber sie konnte auf einem Interesse breiter Schichten an der Polis aufbauen.

Die Maxime der kleisthenischen Reformen kann mit dem von Christian Meier eingeführten Begriff der "bürgerlichen Gegenwärtigkeit" treffend bezeichnet werden.[24] Die Neuorganisation des attischen Bürgerverbandes, die Stärkung der Demen (als den Nuclei basisdemokratischer Entscheidungsfindung) und die Schaffung neuartiger, gegen die Tradition zusammengestellter Phylen verfolgten das Ziel, auch diejenigen Bürger in die Entscheidungsprozesse einzubeziehen, die aufgrund ihres Wohnorts kaum in der Lage waren, regelmäßig in die Stadt Athen zu kommen und dort in den politischen Institutionen mitzuwirken. Die proportional zur Bevölkerungszahl

[23] J. OBER, "'I Besieged that Man'. Democracy's Revolutionary Start", in *Origins of Democracy in Ancient Greece*, ed. by K.A. RAAFLAUB, J. OBER R.W. WALLACE (Berkeley 2007), 83-104. Die Hauptquellen für die Ereignisse sind HDT. 5, 62-66 und 69-73; ARIST. *Ath.* 19f. Die Frage, welche Reformschritte Kleisthenes bereits vor der spartanischen Invasion auf den Weg gebracht hatte, ist in Anbetracht der Quellenlage nicht befriedigend zu lösen; s. zu dieser Frage K.-W. WELWEI, *Das klassische Athen. Demokratie und Machtpolitik im 5. und 4. Jahrhundert* (Darmstadt 1999), 9f.; G. ANDERSON, *The Athenian Experiment. Building an Imagined Political Community in Ancient Attica, 508-490 BC.* (Ann Arbor 2003), 35f.

[24] CHR. MEIER, *Die Entstehung des Politischen bei den Griechen* (Frankfurt am Main ²1989), 129-38.

verteilten Sitze im neugeschaffenen Rat der 500 sollten für eine gleichmäßige Repräsentation aller Gebiete Attikas sorgen, außerdem wohl auch für eine Beteiligung aller sozialer Schichten; *isonomia* (‚gleicher Anteil am *Nomos*') sollte an die Stelle aristokratischer Dominanz treten.[25] Durch die soziale und ökonomische Überlegenheit der Aristokratie und die fehlenden Möglichkeiten vieler ärmerer Bürger, sich in den politischen Institutionen zu engagieren, waren der Gleichheit freilich Grenzen gesetzt.

In den Jahren nach den Reformen des Kleisthenes behauptete sich der neuformierte athenische Bürgerverband auf militärischem Gebiet hervorragend, zunächst gegen die direkten Nachbarn aus Theben und Chalkis, schließlich gegen die Perser. Diese Erfolge und die nachfolgende Errichtung einer Vorherrschaft in der Ägäis steigerten das Selbstbewußtsein des Demos weiter und schufen außerdem auch die finanziellen Bedingungen für eine weitere Stärkung der politischen Partizipation. Zensusschranken wurden abgebaut,[26] und um auch ärmeren Bürgern die aktive Mitwirkung in den politischen Institutionen zu ermöglichen, wurden im 5. Jahrhundert Diäten eingeführt: Auf Antrag des Perikles beschloß man zu einem nicht genau zu bestimmenden Zeitpunkt in der Mitte des Jahrhunderts, Richtern und Ratsherren zwei Obolen pro Tag auszuzahlen, 424 oder etwas früher wurde dieser Betrag auf Antrag

[25] Zur Gliederung Attikas nach den Reformen des Kleisthenes s. J.S. TRAILL, *The Political Organization of Attica. A Study of the Demes, Trittyes, and Phylai, and Their Representation in the Athenian Council* (Princeton 1975); ID., *Demos and Trittys. Epigraphical and Topographical Studies in the Organization of Attica* (Toronto 1986); D. WHITEHEAD, *The Demes of Attica, 508/7 — ca. 250 B.C.* (Princeton 1986). Die Intentionen des Kleisthenes werden in der Forschung kontrovers diskutiert: Eine Maßnahme zur schnelleren Mobilisierung von Hopliten vermutet P. SIEWERT, *Die Trittyen Attikas und die Heeresreform des Kleisthenes* (München 1982), taktisches Kalkül zur Stärkung der Position der Alkmeoniden favorisieren J. MARTIN, *art. cit.* (Anm. 22), 12-17 und GR.R. STANTON, "The Tribal Reform of Kleisthenes the Alkmeonid", in *Chiron* 14 (1984), 1-41. Die ältere Vorstellung, Kleisthenes sei ein visionärer Schöpfer der Demokratie gewesen, wurde jüngst wieder von G. ANDERSON, *op. cit.* (Anm. 23), 81 und *passim* vertreten.

[26] 458/7 wurden Zeugiten zum Archontat zugelassen: ARIST. *Ath.* 26, 2.

Kleons auf drei Obolen erhöht.[27] Die Sätze entsprachen in etwa dem Tageslohn eines ungelernten Arbeiters; sie machten die politischen Funktionen nicht lukrativ, aber zumindest ermöglichten sie die Teilnahme auch den ärmsten Athenern, die auf tägliche Einkünfte angewiesen waren.[28] Später wurden auch für den Besuch von Volksversammlungen und den Großen Dionysien Gelder bezahlt.[29]

Am präzisesten läßt sich die politische Partizipation des Volkes für das 4. Jahrhundert beziffern, dank der aristotelischen *Athenaion politeia* sowie der Angaben in den erhaltenen Reden und Inschriften. Volksversammlungen wurden pro Jahr 30 oder 40 Mal abgehalten, die übliche Teilnehmerzahl lag bei etwa 6.000 Bürgern. Die Zahl der ausgelosten Richter an einem Gerichtstag belief sich auf ungefähr 2.000, solche Gerichtstage gab es jährlich ungefähr 200. Die 500 Ratsherren hielten etwa 250 Sitzungen in ihrem Amtsjahr ab. Dazu kommen 700 weitere Ämter.[30] Bei einer Gesamtzahl von ca. 30.000 Bürgern im 4. Jahrhundert (vor den Erschütterungen des Peloponnesischen Krieges lag diese Zahl bedeutend höher)[31] bestand eine hohe Wahrscheinlichkeit, daß ein athenischer Bürger in seinem Leben in den Rat gelost wurde oder ein anderes Amt bekleidete. Zu diesen Aktivitäten auf Polisebene kommen noch die Versammlungen und Ämter auf lokaler Ebene, d.h. in der

[27] Perikles: ARIST. *Ath.* 27, 3f.; PLU. *Per.* 9, 2-3; PLATO *Grg.* 515e; ARIST. *Pol.* 1274a 8-9. Kleon: AR. *Eq.* 50f. 255. 797-800; *V.* 690. Die Diäten für die Ratsherren wurden im 4. Jahrhundert auf 5 Obolen erhöht (ARIST. *Ath.* 62, 2).

[28] Der demokratische Charakter der Diäten geht auch aus dem Umstand hervor, daß auf der Agenda der oligarchischen Verschwörer von 411 die Abschaffung der Diäten ganz oben stand.

[29] ARIST. *Ath.* 41, 3. 62, 2; HARP. s.v. θεωρικά.

[30] Die Zahlen nach M.H. HANSEN, *op. cit.* (Anm. 2), 313.

[31] M.H. HANSEN, *Demography and Democracy* (Herning 1985); ID., *Three Studies in Athenian Demography* (Copenhagen 1988); ID., *op. cit.* (Anm. 2), 53. 92. Diese Schätzung hat sich gegenüber niedrigeren Ansätzen (A.H.M. JONES, *Athenian Democracy* [Oxford 1957], 76-81; E. RUSCHENBUSCH, "Zum letzten Mal: die Bürgerzahl Athens im 4. Jh. v. Chr.", in *ZPE* 54 [1984], 253-69; ID., "Doch noch einmal: die Bürgerzahl Athens im 4. Jh. v. Chr.", in *ZPE* 72 [1988], 139f. gehen von nur etwa 21.000 Bürgern im 4. Jahrhundert aus) durchgesetzt.

Demenorganisation, hinzu. Für heutige Betrachter ist das Ausmaß an politischer Mitwirkung kaum vorstellbar; nicht die Wahl von Repräsentanten wie in den modernen Demokratien, sondern die ständige Aktivität eines großen Teils der Bürgerschaft prägte die politische Partizipation.

Um eine möglichst breite Streuung zu erreichen, setzte man Losverfahren ein: Die Ratsherren und die meisten Amtsträger wurden ausgelost, nur wenige, besonders sensible Ämter, vor allem die Strategie, wurden durch Wahl besetzt. Am exzessivsten wandte man das Losverfahren bei den Richtern an: In einem ersten Verfahren wurde ausgelost, wer am betreffenden Tag zu Gericht sitzen solle, in einem zweiten die einzelnen Gerichtshöfe per Los zugewiesen, und schließlich wurde noch die Sitzordnung ausgelost. Losung wurde für ein zentrales Element der Demokratie gehalten; denn während sich in Wahlen diejenigen durchsetzen würden, die aufgrund ihres gesellschaftlichen Ranges und ihrer finanziellen Möglichkeiten auf eine Bekanntheit ihrer Person in der Bürgerschaft rechnen konnten, sollte das Losverfahren die Bedeutung des Sozialstatus bei der Ämterbesetzung verringern.[32]

Vor diesem Hintergrund bildete politische Partizipation für die Bürger Athens nicht nur eine Option, sie war eine moralische Verpflichtung. Treffend läßt Thukydides dies den Perikles im "Epitaphios" formulieren: "Wir vereinigen in uns die Sorge

[32] Zum komplizierten Verfahren, das bei ARIST. *Ath.* 68f., beschrieben wird, s. die Erläuterungen von A.L. BOEGEHOLD, *The Lawcourts at Athens. Sites, Buildings, Equipment, Procedure, and Testimonia. The Athenian Agora XXVIII* (Princeton 1995), 32-36; G. THÜR, "Das Gerichtswesen Athens im 4. Jahrhundert v. Chr.", in *Große Prozesse im antiken Athen*, hrsg. von L. BURCKHARDT, J. VON UNGERN-STERNBERG (München 2000), 30-49, hier 39-46; zur Gegenüberstellung von demokratischer Losung und 'oligarchischer' Wahl ARIST. *Pol.* 1294b 7-9: λέγω δ' οἷον δοκεῖ δημοκρατικὸν μὲν εἶναι τὸ κληρωτὰς εἶναι τὰς ἀρχάς, τὸ δ' αἱρετὰς ὀλιγαρχικόν ("Ich meine damit folgendes: Es gilt als demokratisch, die Ämter durch Los zu besetzen, dagegen als oligarchisch, die Inhaber zu wählen".) Vor diesem Hintergrund ist es folgerichtig, daß die Losung sofort nach den oligarchischen Umstürzen von 411 und 404 abgeschafft und nach der Restitution der Demokratie sogleich wieder eingeführt wurde.

um unser Haus zugleich und unsere Stadt, und den verschiedenen Tätigkeiten zugewandt, ist doch auch in staatlichen Dingen keiner ohne Urteil. Denn einzig bei uns heißt einer, der daran gar keinen Teil nimmt, nicht ein stiller Bürger, sondern ein schlechter".[33] Hier klingt zwar einerseits an, daß es auch Bürger gegeben habe, die sich der Teilnahme an der politischen Willensbildung zu entziehen versuchten, betont wird jedoch der soziale Druck auf jeden einzelnen, sich nicht ins Private zurückzuziehen. Ein formeller Zwang zur Teilnahme in den politischen Institutionen, etwa zum Besuch der Volksversammlung oder der Besetzung von Richterstühlen, bestand allerdings nicht.

Zusätzlich zur Partizipation in den politischen Institutionen nahm der athenische Bürger an den Angelegenheiten der Polis auch noch in anderen Kontexten teil. Zunächst sind hier die liturgischen Pflichten und auch der Militärdienst zu nennen, der jedes Jahr viele Athener als Soldat oder Ruderer auf teilweise sehr weit von der Heimat entfernte Kriegsschauplätze brachte.[34] Große Bedeutung für die Polis Athen kam außerdem den Kulten zu, die auch Metöken und Frauen integrierten.[35] Darauf sei hier zumindest verwiesen; eine genauere Analyse dieser Formen der Teilnahme an der Polis kann hier nicht geleistet werden, da der Fokus auf der politischen Partizipation liegt.

[33] THUC. 2, 40, 2: ἔνι τε τοῖς αὐτοῖς οἰκείων ἅμα καὶ πολιτικῶν ἐπιμέλεια, καὶ ἑτέροις πρὸς ἔργα τετραμμένοις τὰ πολιτικὰ μὴ ἐνδεῶς γνῶναι· μόνοι γὰρ τόν τε μηδὲν τῶνδε μετέχοντα οὐκ ἀπράγμονα, ἀλλ' ἀχρεῖον νομίζομεν· (Übersetzung G.P. Landmann). Zum positiven Gehalt von ἀπράγμων s. V. EHRENBERG, "Polypragmosyne: A Study in Greek Politics", in *JHS* 67 (1947), 46-67; A.W. GOMME, *A Historical Commentary on Thucydides, II (Books 2-3)* (Oxford 1956), 121f.

[34] Gegen eine allzu idealisierte Sicht des athenischen Engagements in diesen Bereichen hat jüngst M.R. CHRIST, *The Bad Citizen in Classical Athens* (Cambridge 2006) die zahlreichen Versuche athenischer Bürger dokumentiert, Liturgien oder Kriegsdienst zu umgehen.

[35] Zur religiösen und militärischen Partizipation s. die Ausführungen von R.K. SINCLAIR, *Democracy and Participation in Athens* (Cambridge 1988), 53-61.

Inwieweit lassen sich nun Verbindungslinien zwischen der politischen Partizipation in der athenischen Demokratie und Aristoteles' Bestimmung der menschlichen Natur als *zoon politikon* ziehen? Das Ergebnis fällt mager aus, und das nicht nur, weil Aristoteles' Schriften generell höchst problematische Quellen für die Zustände in griechischen Poleis darstellen.[36] Zunächst einmal erscheint selbstverständlich, daß sich der hohe Grad politischer Partizipation in Athen nicht aus der aristotelischen Lehre ableiten läßt. Eine solche Kausalität wäre allein schon aus chronologischen Erwägungen unmöglich — schließlich entstand die Demokratie in Athen, selbst wenn man ihre Ausformung erst mit den sogenannten Reformen des Ephialtes ansetzt,[37] lange bevor Aristoteles seine Lehren entwickelte. Der antiken Demokratie ging keine theoretische Fundierung voraus, ganz im Gegensatz zur Moderne: Prinzipien wie Gleichheit, Gewaltenteilung und Rechtsstaatlichkeit wurden in der politischen Theorie der Moderne diskutiert, bevor sie in Verfassungen umgesetzt wurden. Hingegen basierte die athenische Demokratie nicht auf philosophischen Konzepten, weder aristotelischen noch anderen.

Es bleibt folglich eher die Frage, ob Aristoteles' Theorem vom *zoon politikon* aus der hohen politischen Partizipation in Athen abzuleiten ist. Auch hier ist Skepsis angebracht: Aristoteles untersucht in der *Politik* nicht nur den Menschen in einer Demokratie, sondern den Menschen an sich. Demokratie, das darf man bei allem durch die Quellenlage bedingtem Athenozentrismus nicht vergessen, war keinesfalls die übliche politische Ordnung einer griechischen Polis, von den Nichtgriechen ganz abgesehen. Aristoteles behandelte in seiner *Politik* bekanntlich das gesamte Panorama der Verfassungen, die Herrschaft der Wenigen und die Herrschaft eines Einzelnen einbezogen;

[36] CHR. MEIER, *op. cit.* (Anm. 24), 10: "[Aristoteles] verstellt den Blick auf die Griechen der archaischen und klassischen Zeit mindestens ebenso sehr, wie er ihn eröffnet".

[37] Zur Debatte über den Beginn der Demokratie s. o. Anm. 22.

die Lehre vom *zoon politikon* am Beginn dieses Werkes kann folglich nicht zur Erklärung demokratischer Spezifika herangezogen werden.

Viel eher als den Ausdruck eines demokratischen Lebensgefühls wird man in der Bestimmung des Menschen als *zoon politikon* ein philosophisches Theorem erblicken, das zur Beschreibung der politischen Praxis und deren Wahrnehmung durch die Zeitgenossen kaum taugt. Es sei auch darauf verwiesen, daß *politikon* in diesem Zusammenhang nicht als 'politisch' im Sinne eines Funktionssystems zu verstehen ist. Eine Polis läßt sich nicht auf Politik reduzieren, sie bildet eine Gemeinschaft in vielerlei Hinsicht, etwa als Kult- oder Wehrgemeinschaft.[38] Doch Letzteres hatte Athen mit den meisten anderen Poleis gemeinsam, spezifisch an der athenischen Demokratie war die breite politische Partizipation gerade der ärmeren Bürger. Aus dem zitierten Dictum des thukydideischen Perikles wird ersichtlich, daß man es als athenische Besonderheit betrachtete, wenn Politik nicht nur wenigen überlassen, sondern von der Masse der Bürger gestaltet wurde. Demokratie galt eben nicht als ein zwangsläufiges Produkt des menschlichen Wesens, sondern als eine besondere Errungenschaft Athens, die durch permanenten Einsatz bewahrt werden müsse.

Hansen hat die These aufgestellt, die Bürger Athens hätten an Verfahren wie Losung oder Wahlen eine innere Freude empfunden, so daß keine externe Motivation notwendig gewesen sei, um sie zur Teilnahme an der Politik zu veranlassen.[39]

[38] Die Gemeinschaftsbildung außerhalb der politischen Institutionen wurde von E. COHEN, *op. cit.* (Anm. 21) betont; zur Problematik, das Politische aus einer Betrachtung des demokratischen Athen auszublenden, s. CHR. MANN, *art. cit.* (Anm. 21), 1-5.

[39] M.H. HANSEN, *op. cit.* (Anm. 2), 314: "It seems that the Athenians derived actual enjoyment from the formal play with complicated procedures such as sortition and voting. No doubt that was motivation enough for some Athenians to take an active part in political life; nevertheless there were still reasons for providing a stimulus". In der Folge führt Hansen diese sekundären Anreize aus: Diäten hätten die Mitwirkung in der Politik für die einfachen Athener attraktiver machen sollen, Ehrungen für verdiente Politiker, z.B. die Speisung im Prytaneion, für die angesehenen Athener.

Dies ist eine beachtenswerte Idee, und sie erscheint plausibel in Anbetracht der hochentwickelten demokratischen 'Technologie', etwa der Losmaschinen zur Ermittlung der Richter. Auch die erhaltenen Ostraka bieten einen Anhaltspunkt für einen geradezu spielerisch zu nennenden Umgang mit der Institution. Manche der erhaltenen Ostraka sind mit Beischriften versehen, einige sogar mit Ritzzeichnungen, etwa von Persern, Pferden oder Füchsen. Dabei handelte es sich nicht um belanglose Kritzeleien, sondern um Anspielungen mit politischem Gehalt; sie bilden ein Indiz für die von Hansen benannte Freude, an der Institution des Ostrakismos teilnehmen zu können.[40] Freilich läßt sich nicht genau bestimmen, inwieweit den athenischen Bürgern politische Partizipation ein Wert an sich war; in den Quellen wird dieser Aspekt nicht diskutiert.

Vielmehr wird in den zeitgenössischen Texten ein anderes Moment der politischen Partizipation thematisiert: die Ausübung von Macht. Daß die Herrschaft des Volkes als das bestimmende Merkmal der politischen Ordnung Athens galt, ist zum einen an dem Begriff *demokratia* ablesbar, der spätestens seit der Mitte des 5. Jahrhunderts die übliche Bezeichnung für die politische Ordnung Athens darstellte.[41] Zum anderen zeigen zahlreiche Quellenpassagen aus unterschiedlichen Gattungen,

[40] ST. BRENNE, in *Ostrakismos-Testimonien I*, hrsg. von P. SIEWERT (Stuttgart 2002), T 1/156-164; ausführlich zur Institution des Ostrakismos und seiner Funktion in der athenischen Demokratie: ST. BRENNE, *Ostrakismos und Prominenz in Athen: attische Bürger des 5. Jh.s auf den Ostraka* (Wien 2001); S. FORSDYKE, *Exile, Ostracism and Democracy. The Politics of Expulsion in Ancient Greece* (Princeton 2005), 144-204; CHR. MANN, "Macht des Volkes – Disziplinierung des Adels. Überlegungen zur Funktion des Ostrakismos", in *Die Sprache des Politischen in actu*, hrsg. von A. DE BENEDICTIS *et al.* (Göttingen 2009), 31-50.

[41] In der Forschung geht man zumeist davon aus, dass der Begriff *demokratia* erst in der Mitte des 5. Jahrhunderts geprägt worden sei (CHR. MEIER, *Die Entstehung des Begriffs "Demokratie". Vier Prolegomena zu einer historischen Theorie* [Frankfurt am Main 1970], 44f.; J. BLEICKEN, *Die athenische Demokratie* [Paderborn ^{4}1995], 64-72; R. SEALEY, *The Athenian Republic. Democracy or Rule of Law?* [London 1987], 98-102). Es gibt jedoch auch Stimmen, die Entstehung des Begriffs in den politischen Debatten am Ende des 6. Jahrhunderts anzusetzen (M.H. HANSEN, *op. cit.* [Anm. 2], 69f.).

daß die Mitwirkung in den politischen Institutionen als Ausübung von Macht gedeutet wurde. In gattungsüblicher komischer Überzeichnung beschreibt Philokleon in Aristophanes' *Wespen* seine Rolle als Richter:

> Bei dem Eintritt gleich in die Schranken beweis' ich dir klar und unwiderleglich:
> Daß sich unsere Gewalt wohl messen darf mit der Herrschaft jedes Monarchen!
> Welch Wesen auf Erden ist hoch beglückt, gefeiert und reich, wie ein Richter,
> Hat Freuden die Füll', ist gefürchtet zugleich, wie ein Richter, und vor allem ein alter?
> Am Morgen gleich, wenn er kriecht aus dem Bett, da erwarten ihn mächtige Männer,
> Vier Ellen hoch, an den Schranken schon: ich trete herzu, und entgegen
> Streckt einer sogleich mir die samtene Hand, die den Säckel des Staates bestohlen.
> Sie verneigen sich tief, uns sie bitten und flehn und schwimmen in Tränen und schluchzen: [...]
> Da geruhen wir wohl die Saiten des Zorns ein bißchen herunterzustimmen!
> Das heißt doch, gewaltig, allmächtig sein und dem Reichtum ins Angesicht lachen?[42]

Beschrieben ist hier die Durchbrechung sozialer Rangordnung durch die Demokratie: Was Philokleon so euphorisch stimmt, ist der Umstand, daß gerade reiche und angesehene

[42] Ar. V. 548-555. 574f.:
(Φι.) καὶ μὴν εὐθύς γ' ἀπὸ βαλβίδων περὶ τῆς ἀρχῆς ἀποδείξω
τῆς ἡμετέρας ὡς οὐδεμιᾶς ἥττων ἐστὶν βασιλείας.
τί γὰρ εὔδαιμον καὶ μακαριστὸν μᾶλλον νῦν ἐστι δικαστοῦ,
ἢ τρυφερώτερον ἢ δεινότερον ζῷον, καὶ ταῦτα γέροντος;
ὃν πρῶτα μὲν ἕρποντ' ἐξ εὐνῆς τηροῦσ' ἐπὶ τοῖσι δρυφάκτοις
ἄνδρες μεγάλοι καὶ τετραπήχεις· κἄπειτ' εὐθὺς προσιόντι
ἐμβάλλει μοι τὴν χεῖρ' ἁπαλὴν τῶν δημοσίων κεκλοφυῖαν.
ἱκετεύουσίν θ' ὑποκύπτοντες τὴν φωνὴν οἰκτροχοοῦντες·
[...]
χήμεῖς αὐτῷ τότε τῆς ὀργῆς ὀλίγον τὸν κόλλοπ' ἀνεῖμεν.
ἆρ' οὐ μεγάλη τοῦτ' ἔστ' ἀρχὴ καὶ τοῦ πλούτου καταχήνη;
(Übersetzung L. Seeger)

Athener ihn, den einfachen Bürger, um Gnade anflehen mußten. Ganz wie ihm beliebte, konnte er Gnade gewähren oder verweigern, ohne sich dafür rechtfertigen zu müssen. Die Begriffe *arche* und *basileia*, die Philokleon zur Umschreibung seiner Richtergewalt heranzieht, verdeutlichen, daß es hier um Macht geht. Das die griechische Aristokratie kennzeichnende Dominanzstreben wird im klassischen Athen auf den einfachen Bürger übertragen.

Unabhängig davon, wie man den politischen Bezug der Komödie einschätzt und ob man in den Machtphantasien des Philokleon eine Kritik des Dichters am athenischen Rechtswesen annimmt,[43] entspricht dessen Wahrnehmung seiner Rolle der Darstellung in anderen Quellen. Herodot beschreibt in seiner Verfassungsdebatte die *isonomia* — so der von ihm gewählte Ausdruck — als Herrschaft der vielen und benutzt dafür die Begriffe *arche* und *kratos*.[44] In Pseudo-Xenophons *Athenaion politeia* beschreibt der Autor die Demokratie als moralisch verwerfliches, aber im Sinne des Machterhalts bestens funktionierendes System. Die politische Gleichheit sorge aufgrund der Zahlenverhältnisse zwangsläufig für eine Dominanz des einfachen Volkes über die 'Besseren'. Die aktive Teilnahme auch der ärmsten und ungebildeten Bürger an den

[43] Einige Ansätze aus der Debatte über den politischen Gehalt der Alten Komödie seien hier genannt: Laut A.W. GOMME, "Aristophanes and Politics", in *CR* 52 (1938), 97-109, und R.M. ROSEN, *Old Comedy and the Iambographic Tradition* (Atlanta 1988) handelt es sich um ein literarisches Spiel ohne konkrete politische Funktion, J. HENDERSON, "Comic Hero versus Political Élite", in *Tragedy, Comedy and the Polis (Papers from the Greek Drama Conference, Nottingham 1990)*, ed. by A.H. SOMMERSTEIN *et al.* (Bari 1993), 307-319; ID., "Attic Old Comedy, Frank Speech, and Democracy", in *Democracy, Empire, and the Arts in Fifth-Century Athens*, ed. by D. BOEDEKER, K.A. RAAFLAUB (Cambridge, Mass. 1998), 255-73, sowie D. KONSTAN, *Greek Comedy and Ideology* (New York 1995), 6, nehmen eine Verarbeitung politischer Zustände, aber ohne konkrete Stoßrichtung an. Laut J. SPIELVOGEL, "Die politische Position des athenischen Komödiendichters Aristophanes", in *Historia* 52 (2003), 3-22 hingegen wollte der Dichter in seinen Werken auf konkrete Reformen zur Verbesserung der politischen Ordnung Athens hinarbeiten.

[44] HDT. 3, 80, 6; 81, 1.

politischen Institutionen sei in dieser Hinsicht zweckmäßig, obwohl diesen vernünftige Einsicht völlig fehle: "Sie aber sind auch in diesem Punkt ausgezeichnet beraten, indem sie auch den gemeinen Mann reden lassen; denn wenn nur die Edlen redeten und sich berieten, so wäre es ganz unleugbar für ihresgleichen selbst vorteilhaft, für die Volkspartei jedoch nicht gerade vorteilhaft; so aber, da jeder, wer da will, zu Worte kommt, wenn er sich nur erhebt, macht irgendein gemeiner Mensch ausfindig, was für ihn sowohl wie für seinesgleichen vorteilhaft ist".[45] Der Tenor der gesamten Schrift ist, daß das einfache Volk in Athen einen höchst effektiven Apparat geschaffen habe, um seine Herrschaft im Innern und nach außen zu verteidigen, d.h. gegen die 'Edlen' unter den Athenern und gegen die Mitglieder des Seebundes. Die Liturgien etwa werden als eine Herrschaftstechnik des Volkes verstanden, die einen doppelten Zweck verfolge: Erstens könnten durch die Ausplünderung der reichen Athener Schiffe ausgerüstet und Polisfeste finanziert und damit die Demokratie gestärkt werden, zweitens schwäche man so die wirtschaftliche Leistungskraft der Reichen und damit derjenigen, die am ehesten antidemokratischer Umstürze verdächtig seien.[46]

Im 4. Jahrhundert wurde der Aspekt der Machtausübung weniger deutlich betont als im 5., die einschneidenden Erfahrungen von 411 und 404/03 werden hier nachgewirkt haben. Das Bewußtsein, daß Demokratie die Herrschaft des Volkes

[45] [X.] *Ath.* 1,6: οἱ δὲ καὶ ἐν τούτῳ ἄριστα βουλεύονται ἐῶντες καὶ τοὺς πονηροὺς λέγειν. εἰ μὲν γὰρ οἱ χρηστοὶ ἔλεγον καὶ ἐβουλεύοντο, τοῖς ὁμοίοις σφίσιν αὐτοῖς ἦν ἀγαθά, τοῖς δὲ δημοτικοῖς οὐκ ἀγαθά· νῦν δὲ λέγων ὁ βουλόμενος ἀναστάς, ἄνθρωπος πονηρός, ἐξευρίσκει τὸ ἀγαθὸν αὑτῷ τε καὶ τοῖς ὁμοίοις αὐτῷ. (Übersetzung E. Kalinka). S. dazu die Kommentare von W. LAPINI, *Commento all'Athenaion politeia dello Pseudo-Senofonte* (Firenze 1997), 62-6; *The 'Old Oligarch': the Constitution of the Athenians Attributed to Xenophon,* ed. by J.L. MARR, P.J. RHODES (Oxford 2008), 68-70. Wie Pseudo-Xenophon beschreibt auch Thukydides die Herrschaft des Volkes als eine sehr widerstandsfähige politische Ordnung, deren Sturz durch die Oligarchen im Jahr 411 als große Leistung (THUC. 8, 68).

[46] [X.] *Ath.* 1,3.

bedeute und die Macht in den politischen Institutionen ausgeübt werde, war allerdings nach wie vor vorhanden. Deutlich wird dies vor allem in den Reden, etwa wenn Demosthenes über den athenischen Demos sagt: "denn das athenische Volk, das oberster Herr ist über alles, was in der Polis geschieht, und das die Macht hat, zu tun, was ihm beliebt...".[47] Die Verlagerung von Befugnissen von der Volksversammlung auf andere Gremien, vor allem auf die Nomotheten und die Dikasterien, bedeutete nicht eine Beschneidung der Macht des Volkes. Insbesondere die Dikasterien wurden nicht als eine mit der Volksversammlung konkurrierende Gewalt betrachtet — eine solche Konkurrenz wurde in den überlieferten Quellen nicht einmal gedacht —, sondern als alternativer Aggregatzustand des athenischen Volkes, oder, mit Finleys Worten: "The courts were an expression, not a reduction, of the absolute power of the people".[48] Eine Abnahme hinsichtlich der Intensität politischer Partizipation läßt sich für das 4. Jahrhundert ebenso wenig belegen wie eine häufig postulierte mentale Politikmüdigkeit.

III. Politische Partizipation in der modernen Demokratietheorie

Inmitten aller Begeisterung, die dem antiken Griechenland und insbesondere dem klassischen Athen vom Bildungsbürgertum der Neuzeit entgegengebracht wurde, bildete die athenische Demokratie eine Ausnahme; die Architektur, Skulpturen und Literatur der Polis wurden bewundert, die politische Ordnung hingegen vielfach kritisiert.[49] Dabei griff man die in der

[47] DEM. 59 (*In Neairam*) 88: ὁ γὰρ δῆμος ὁ Ἀθηναίων κυριώτατος ὢν τῶν ἐν τῇ πόλει ἁπάντων, καὶ ἐξὸν αὐτῷ ποιεῖν ὅ τι ἂν βούληται...

[48] M.I. FINLEY, "Athenian Demagogues", in *Past & Present* 21 (1962), 3-24, hier 10; s. zu diesem Aspekt vor allem J. BLEICKEN, *art. cit.* (Anm. 22), 271-3.

[49] Einen hervorragenden Überblick über dieses weite Feld bieten der Artikel von H. MÜNKLER und M. LLANQUE, s.v. "Demokratie", in *DNP* 13 (1999), 721-38, mit zahlreichen Literaturangaben, sowie W. NIPPEL, *Antike oder moderne*

antiken Literatur geläufigen Argumente gegen eine Herrschaft des Volkes auf: Die breite Masse sei zu ungebildet, um kluge Entscheidungen zu treffen, außerdem führe die Diskussion und Abstimmung in einer sehr großen Gruppe zwangsläufig dazu, daß Emotionen über Vernunft siegten. Eine zielgerichtete und nachhaltige Politik sei somit in einer politischen Ordnung, die einer Versammlung vieler Tausend Bürger die wichtigsten Kompetenzen überlasse, nicht möglich; vor allem aber bestehe die Gefahr, daß skrupellose Demagogen die Emotionen der Menge zu ihrem eigenen Vorteil ausnutzten. Vor diesem Hintergrund wurde die Demokratie für alle Katastrophen verantwortlich gemacht, die Athen in klassischer Zeit erlitt: sei es das Desaster in Sizilien 415-413, die Bürgerkriege von 404/03 oder die Niederlagen gegen die Makedonien 338 und 322. Gerade für die liberalen Vordenker der modernen Demokratien lieferten die Athener nicht ein Vorbild, sondern ein Schreckensbild, das vor einer direkten Herrschaft des Volkes warnen müsse. Exemplarisch seien hier die *Federalist Papers* genannt, die wichtigsten verfassungstheoretischen Schriften aus der Gründungsphase der USA, in denen die neu zu schaffende "republic" explizit von der (direkten) "democracy" abgesetzt wird. James Madison schreibt über die Unzuverlässigkeit der Volksversammlung: "In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob". An anderer Stelle geißelt er, ganz in der Tradition des Thukydides, die Leidenschaften des breiten Volkes: "so there are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the

Freiheit? Die Begründung der Demokratie in Athen und in der Neuzeit (Frankfurt am Main 2008), und P.J. RHODES, *Ancient Democracy and Modern Ideology* (London 2003). Laut J.T. ROBERTS, *Athens on Trial. The Antidemocratic Tradition in Western Thought* (Princeton 1994) fiel die Bewertung der athenischen Demokratie im Zeitalter der Aufklärung fast unisono negativ aus, doch diese Sicht wird von Oswyn Murray (s. den Beitrag in diesem Band) relativiert.

artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn [...] What bitter anguish would not the people of Athens have often escaped, if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the / indelible reproach of decreeing to the same citizen, the hemlock on one day, and statues on the next".[50]

Vor allem aber wurde in der liberalen Tradition kritisiert, daß die individuellen Freiheitsrechte in Athen zu wenig gewahrt worden seien. Gegenüber der Macht des Volkes, die in der *ekklesia*, in den Gerichten oder beim Ostrakismos Ausdruck gefunden habe, sei der einzelne Bürger schutzlos gewesen. "Unter den drei Staatsformen ist die der Demokratie, im eigentlichen Verstande des Wortes, notwendig ein Despotism, weil sie eine exekutive Gewalt gründet, da alle über und allenfalls auch wider einen (der also nicht mit einstimmt), mithin alle, die doch nicht alle sind, beschließen; welches ein Widerspruch des allgemeinen Willens mit sich selbst und mit der Freiheit ist".[51] Die athenische Demokratie wurde als "Tyrannei der Mehrheit" kritisiert, in der das Volk zwar alle Freiheiten besessen habe, über Krieg und Frieden, die Staatsfinanzen und alle anderen wichtigen Dinge zu entscheiden, die Freiheit des einzelnen vor der staatlichen Gewalt dagegen nur unzureichend geschützt gewesen sei.[52] Fustel de Coulanges geht sogar noch einen Schritt weiter: Nicht nur sei die individuelle Freiheit durch die starken politischen Institutionen eingeschränkt gewesen, die politische Partizipation selbst habe eine Einschränkung

[50] J. MADISON, *The Federalist Papers*, Nr. 55, ed. by G. WILLS (New York [2]2003), 339; ID., *The Federalist Papers*, Nr. 63, ebd. 384f. Zu den wenigen positiven Bewertungen der athenischen Demokratie in der Gründungsphase der USA s. J.T. ROBERTS, *op. cit.* (Anm. 49), 179f.

[51] I. KANT, *Zum Ewigen Frieden* (Königsberg 1795), 26.

[52] Zu dieser, besonders bei Constant, Fustel de Coulanges und Burckhardt faßbaren Kritik an der athenischen Demokratie s. W. NIPPEL, *op. cit.* (Anm. 49), 201-16.

der Freiheit bedeutet: "On voit que c'était une lourde charge que d'être citoyen d'un État démocratique, qu'il y avait là de quoi occuper presque toute l'existence, et qu'il restait bien peu de temps pour les travaux personnels et la vie domestique. [...] Telles étaient les exigences de la démocratie. Le citoyen, comme le fonctionnaire public de nos jours, se devait tout entier à l'État. [...] Il n'était pas libre de laisser de côté les affaires publiques pour s'occuper avec plus de soin des siennes. C'étaient plutôt les siennes qu'il devait négliger pour travailler au profit de la cité. Les hommes passaient leur vie à se gouverner". [53]

Daß die direkte Demokratie mit ihrer hohen politischen Partizipation der gesamten Bürgerschaft abgelehnt und ihr das Prinzip der Repräsentation entgegengesetzt wurde, hat nicht nur mit der Größe der modernen Flächenstaaten zu tun. Es ist auch Ausdruck dafür, daß bei der Herausbildung der modernen Demokratie nicht die Herstellung einer Volksherrschaft, sondern der Schutz des Individuums vor den staatlichen Instanzen leitend war.[54]

Erst in der zweiten Hälfte des 20. Jahrhunderts mehrten sich Stimmen, die an den modernen Demokratien einen Mangel an Partizipationsmöglichkeiten kritisierten und eine direkte

[53] N.D. FUSTEL DE COULANGES, *La cité antique* (Paris [13]1890), 396 (Kapitel IV 11).

[54] Eine Ausnahme unter den zeitgenössischen Demokratien bildet die Schweiz, deren Verfassung von — aus der Tradition der Landsgemeinde herrührenden — weit ausgebauten Partizipationsrechten des Volkes geprägt ist. Mehrere Formen von Referenden und Volksinitiativen stehen zur Verfügung, um eine Abstimmung der Bürgerschaft über Gesetze und Maßnahmen herbeizuführen. Die Schweizer Erfahrungen widerlegen die These, daß direkte Demokratie mit politischer Stabilität unvereinbar sei, sie zeigen aber auch, daß die politische Gleichheit nicht zwangsläufig durch direktdemokratische Verfahren gefördert wird, denn die Möglichkeiten zur politischen Partizipation werden, noch deutlicher als in anderen Ländern, vorwiegend durch wohlhabende und gebildete Bürgerinnen und Bürger genutzt. S. dazu H. TRECHSEL, "Volksabstimmungen", in *Handbuch der Schweizer Politik. Manuel de la politique suisse*, hrsg. von U. KLÖTI *et al.* (Zürich 1999), 557-88; GR. FOSSEDAL, *Direct Democracy in Switzerland* (London 2002); H. KRIESI, *Direct Democratic Choice — the Swiss Experience* (Lanham 2005).

Mitbestimmung der Bürger an der politischen Willensbildung forderten. Die sogenannte deliberative Demokratietheorie bemängelt, daß Demokratie in der liberalen Tradition zu häufig allein als eine politische Methode betrachtet und durch ihre Institutionen definiert worden sei. "Darüber", so schreibt Jürgen Habermas als einer der führenden Vertreter dieser Richtung, "gerät die Idee der Herrschaft des Volkes fast ganz in Vergessenheit".[55] Es sei eine verengte Perspektive, wenn man Demokratie nur als eine Staatsform unter vielen betrachte und mißachte, daß sie eine weiter reichende Funktion besitze: "Demokratie arbeitet an der Selbstbestimmung der Menschheit, und erst wenn diese wirklich ist, ist jene wahr. Politische Beteiligung wird dann mit Selbstbestimmung identisch sein".[56] Politische Ordnungen, die den Namen "Demokratie" trügen, müßten sich daran messen lassen, inwieweit sie diese gesellschaftliche Aufgabe erfüllten.

Zentrale Bedeutung wird in diesem Zusammenhang der Deliberation zugewiesen. Die (von Habermas als Kommunikationsgemeinschaft verstandene) Gesellschaft könne aus ihrer Mitte heraus zu vernunftgeleiteten Entschlüssen gelangen, wenn eine Kultur gemeinsamer Beratung geschaffen würde. Die Beratungen sollten grundsätzlich zeitlich unbegrenzt sein, allen Bürgern offen stehen und vom Fehlen interner und externer Zwänge gekennzeichnet sein: "... in dem Maße, in dem mündige Bürger unter Bedingungen einer politisch fungierenden Öffentlichkeit, durch einsichtige Delegation ihres Willens und durch wirksame Kontrolle seiner Ausführung, die Einrichtung

[55] J. HABERMAS, "Politische Beteiligung — ein Wert 'an sich'?", in *Student und Politik. Eine soziologische Untersuchung zum politischen Bewußtsein Frankfurter Studenten*, hrsg. von J. HABERMAS *et al.* (Neuwied 1961), 13-7, hier 15; s. dazu M. SCHEYLI, *Politische Öffentlichkeit und deliberative Demokratie nach Habermas. Institutionelle Gestaltung durch direktdemokratische Beteiligungsformen?* (Baden-Baden 2000); G. PALAZZO, *Die Mitte der Demokratie. Über die Theorie deliberativer Demokratie von Jürgen Habermas* (Baden-Baden 2002).

[56] Ebd. Zu weiteren Vertretern der deliberativen Demokratietheorie s. M.G. SCHMIDT, *Demokratietheorien* (Wiesbaden [4]2008), 240-3.

ihres gesellschaftlichen Lebens selber in die Hand nehmen, wird personale Autorität in rationale überführbar".[57] Dadurch würde die Geschlossenheit der Politik als Herrschaftssystem aufgebrochen und gesellschaftliche Kontrolle über die Willensbildung erreicht, zugleich die Distanz zwischen Regierenden und Regierten verringert. Wesentliche Voraussetzung sei hierbei die kognitive Verbesserung der Staatsbürger, denn nur wenn die Allgemeinheit sowohl ausreichend über die zu beratschlagenden Traktanden informiert als auch zur Reflexion der Diskussionsstrategien in der Lage seien, werde eine gerechte Beteiligung aller an der Entscheidungsfindung möglich. Kritiker der deliberativen Demokratietheorie wenden dagegen ein, daß die Ungleichheit innerhalb der Bürgerschaft durch die Bedeutungszunahme einer zeitintensiven Beratung nicht abgeschwächt, sondern verstärkt würde, da die für die Politik abkömmlichen Reichen im Vorteil seien. Außerdem hätten gebildete und gut vernetzte Bürger weitaus bessere Chancen, sich in den Debatten durchzusetzen. Ebenso dürfe bezweifelt werden, daß es möglich sei, gezielte Desinformation, die Durchsetzung von Partikularinteressen und Gruppendruck zu verhindern.[58]

Ein anderer Befürworter stärkerer politischer Partizipation ist Benjamin Barber. Seinen Ausgangspunkt bildet eine auf Rousseau[59] basierende Kritik am Prinzip der Repräsentation: Die Delegation politischer Macht an Repräsentanten verstoße nicht nur gegen Freiheit, Gleichheit und soziale Gerechtigkeit, sondern führe zu einer Verringerung bürgerlichen Engagements. Die Bürger orientierten sich in einer solchen — laut Barber 'schwachen' — Demokratie zunehmend an ihren individuellen und Gruppeninteressen; dabei verlören sie nicht nur

[57] J. HABERMAS, *art. cit.* (Anm. 55), 16.

[58] Zur Kritik an der deliberativen Demokratietheorie s. M.G. SCHMIDT, *op. cit.* (Anm. 56), 249f.

[59] Vgl. dazu das von B.R. BARBER, *Strong Democracy. Participatory Politics for a New Age* (Berkeley 1984), 145 zitierte Dictum Rousseaus: "à l'instant qu'un peuple se donne des représentants, il n'est plus libre". (J.-J. ROUSSEAU, *Du Contrat social ou Principe du droit politique* [Amsterdam 1762], 68 – III 15).

das Gemeinwohl aus dem Blick, es bestehe auch die Gefahr, daß Gegner der Demokratie sich die Beteiligungslosigkeit der Bürger zunutze machten, um autoritäre Regimes zu errichten. Aus diesen Gründen könne nicht mehr, wie von der liberalen Demokratietheorie gefordert, der Schutz der bürgerlichen Freiheiten das oberste Gebot sein, statt dessen müsse der Zusammenhalt der Bürger gestärkt werden. Nur wenn die Bürger direkt an den politischen Entscheidungen beteiligt würden, sei eine Überwindung der Partikularinteressen möglich. Ziel müsse sein, die vom Repräsentationsprinzip gesetzten Grenzen zu überwinden und eine Selbstregierung des Volkes, eine 'starke Demokratie' zu erreichen. Diese entspreche auch am besten dem menschlichen Wesen — wie Habermas betrachtet Barber die Demokratie nicht lediglich als politische Ordnung, sondern als der menschlichen Natur angemessene Lebensform.

Während Habermas den größten Wert auf die Bildung des Bürgers legt und demzufolge vor allem Gedanken zur Herstellung eines vernunftgeleiteten Diskurses anstellt, geht Barber von einem bereits ausreichend qualifizierten Bürger aus und entwickelt konkrete Maßnahmen zur Stärkung der direkten Demokratie.[60] Dazu zählt er neben der flächendeckenden Einrichtung von Nachbarschaftsversammlungen und einer neuen Architektur des öffentlichen Raumes auch die Einführung von Losverfahren bei der Besetzung kommunaler Ämter; dabei bezieht sich Barber explizit auf die athenische Demokratie;[61] es handelt sich jedoch um einen bloßen Verweis ohne theoretische Ausgestaltung, so daß man nicht davon sprechen kann, Athen habe bei der Entwicklung des Konzepts der 'starken Demokratie' Pate gestanden.

Neue Nahrung hat die Debatte über die direkte Demokratie durch die Entwicklung des Internets erhalten. Bereits Carl Schmitt hatte sich mit dem Szenario auseinandergesetzt, "daß

[60] B.R. BARBER, *op. cit.* (Anm. 59), 261-311 (Chapter 10: "The Real Present: Institutionalizing Strong Democracy in the Modern World").
[61] Ebd. 292.

eines Tages durch sinnreiche Erfindungen jeder einzelne Mensch, ohne seine Wohnung zu verlassen, fortwährend seine Meinungen über politische Fragen durch einen Apparat zum Ausdruck bringen könnte und daß alle diese Meinungen automatisch von einer Zentrale registriert würden, wo man sie dann nur abzulesen brauchte".[62] Durch das Internet ist es sogar möglich, daß die Meinungen (fast) aller Bürger nicht nur "von einer Zentrale", sondern von der Allgemeinheit eingesehen werden können. Der amerikanische Vizepräsident Al Gore sprach 1994 von einer "new Athenian era of democracy", die aufgrund des Internets und der damit verbundenen globalen Partizipationsmöglichkeiten anbrechen könne.[63]

In der Tat haben in den letzten Jahren alle Regierungen, Parteien und Organisation die Bedeutung des neuen Mediums entdeckt und ihre Internetauftritte ansprechend gestaltet und mit Blogs und regelmäßigen Videobotschaften angereichert. Das prominenteste Beispiel für eine erfolgreiche Nutzung des Internets ist zweifellos der amerikanische Präsident Barack Obama, der seinen Wahlerfolg auch der ständigen Mobilisierung und Vernetzung von Millionen Bürgern verdankte. Die Nutzung des Internets geht jedoch über den Wahlkampf hinaus: Obama hatte stets betont, daß die politischen Pläne nur dann durchzusetzen seien, wenn das amerikanische Volk auch nach der Wahl in hohem Maße am Geschehen in Washington teilnehme; denn nur dann sei die Macht der Lobbyisten zu

[62] C. SCHMITT, *Verfassungslehre* (München 1928), zitiert nach der 5. Auflage Berlin 1970, 245f.

[63] "[...] the (Global Information Infrastructure) will not only be a metaphor for a functioning democracy, it will in fact promote the functioning of democracy by greatly enhancing the participation of citizens in decision-making." (Rede vor der International Telecommunications Union am 21. 3. 1994, zitiert nach: A.E. REGAN, J.D. ZUERN, "Community-service learning and computer-mediated advanced composition. The going to class, getting online, and giving back project", in *Computers & Composition* 17 [2000], 177-95, hier 191). Für eine differenzierte Einschätzung der Chancen und Risiken einer Cyber-Demokratie s. H. BUCHSTEIN, "Bittere Bytes. Cyberbürger und Demokratietheorie", in *Deutsche Zeitschrift für Philosophie* 44 (1996), 583-607.

brechen. Zur Mobilisierung des Volkes dient wie vor der Wahl in erster Linie das Internet, durch das die Aktivitäten auf lokaler und regionaler Ebene angestoßen, koordiniert und als Willensbekundungen des Volkes verbreitet werden könnten.[64] Das Ziel einer stärkeren Beobachtung des politischen Geschehens durch das Volk konnte nach vorläufigen Erkenntnissen erreicht werden, inwieweit der politische Willensbildungsprozeß tatsächlich beeinflußt wird, bleibt abzuwarten.

Und Aristoteles? Dessen Einfluß auf die politischen Wissenschaften und insbesondere auf die Demokratietheorie ist unbestreitbar, und ebenso hat sein Theorem, der Mensch sei von Natur ein *zoon politikon*, reichen Nachhall gefunden.[65] Dabei handelt es sich jedoch um getrennte Phänomene: In der Demokratietheorie spielt das Theorem des *zoon politikon* nur eine untergeordnete Rolle, politische Partizipation wird aus ihm nicht abgeleitet. Auch Jürgen Habermas und Benjamin Barber, die der politischen Partizipation in einem demokratischen Staat einen Wert an sich zumessen, greifen nicht darauf zurück.[66]

Eine wichtige Rolle spielt das *zoon politikon* allerdings in der sogenannten "neo-athenischen" Richtung des Republikanismus, die in den letzten Jahrzehnten im angelsächsischen Raum Anhänger gefunden hat.[67] Der Republikanismus setzt sich

[64] Zum Versuch, die Mobilisierung der Bürgerschaft auch nach den Wahlen hoch zu halten, vgl. den Eintrag von David Plouffe zur Gesundheitsreform auf http://my.barackobama.com/page/community/post/obamaforamerica/gGxnnm (15.6. 2009): "We'll build the teams and draw up the plans for winning health care reform the same way we won the election: Building support one block, one neighbour, one conversation at a time. And we'll put those plans into action".

[65] Eine Suche nach "zoon politikon" unter www.google.de liefert 92.600 Treffer (Stand: 5.6. 2009).

[66] R.G. MULGAN, *art. cit.* (Anm. 9), 195 mit Anm. 1 deutet einen solchen Einfluß des Aristoteles auf Barber an, die von ihm genannten Passagen vermögen dies aber nicht zu belegen.

[67] Den Hinweis verdanke ich Mogens Herman Hansen. Darstellungen dieser Tradition bieten P. PETTIT, *Republicanism. A Theory of Freedom and Government* (Oxford 1997); J.W. MAYNOR, *Republicanism in the Modern World* (Cambridge 2003); einen Überblick über den gegenwärtigen Stand des Republikanismus

scharf vom Liberalismus ab und kritisiert insbesondere die Vertragstheorien. Gegen John Rawls' und anderer Denker liberaler Tradition Konzentration auf die individuellen Freiheitsrechte betont der Republikanismus die Bedeutung einer von allen Bürgern getragenen Tugendordnung. Tugendhaftes Handeln müsse als Grundlage des politischen Zusammenlebens anerkannt, und es müsse dem moralischen Zerfall der Gesellschaft entgegengewirkt werden; nur dann sei es möglich, einen Gemeinsinn zu sichern, der die Freiheitsrechte auch in der Zukunft garantieren würde. Es ist ein wichtiges Anliegen der Vertreter des Republikanismus, aufzuzeigen, daß ihre Tradition dem Liberalismus vorausgeht,[68] und so nimmt es wenig Wunder, daß auch auf Aristoteles zurückgegriffen wurde. Michael Sandel schreibt: "To put the point another way, the republican sees liberty as internally connected to self-government and the civic virtues that sustain it. Republican freedom requires a certain form of public life, which depends in turn on the cultivation of civic virtue. Some versions of republicanism construe the dependence of liberty on self-government more strongly than others. The strong version of the republican ideal, going back to Aristotle, sees civic virtue and political participation as intrinsic to liberty; given our nature as political beings, we are free only insofar as we exercise our capacity to deliberate about the common good, and participate in the public life of a free city or republic".[69] Ganz ähnlich interpretierte John Pocock das Theorem vom *zoon politikon*: "that could only happen if there

liefern die Beiträge in *Republicanism and Political Theory,* ed. by C. LABORDE, J.W. MAYNOR (Oxford 2008), mit reichen Literaturhinweisen. Für eine radikale Kritik s. R.E. GOODIN, "Folie Républicaine", in *Annual Review of Political Science* 6 (2003), 55-76.

[68] C. LABORDE, J.W. MAYNOR, "The Republican Contribution to Contemporary Political Theory", in C. LABORDE, J.W. MAYNOR, *op. cit.* (Anm. 67), 1-28.

[69] M.J. SANDEL, *Democracy's Discontent. America in Search of a Public Philosophy* (Cambridge, Mass.) 1996, 26 (in der Anmerkung verweist Sandel auf die Bücher 1 und 3 von Aristoteles' *Politik*). Vgl. ebd. 7: "It is only as participants in political association that we can realize our nature and fulfil our highest ends" (ebenfalls mit Verweis auf die *Politik*).

were revival of the ancient notions of political *virtus*, of the *zōon politikon* whose nature was to rule, to act, to make decisions..."; "... the ancient ideal of *homo politicus* (the *zōon politikon* of Aristotle), who affirms his being and his virtue by the medium of political action, whose closest kinsman is *homo rhetor* and whose antithesis is the *homo credens* of Christian faith".[70]

Unter Bezug auf Aristoteles wird politische Aktivität als Verwirklichung der menschlichen Natur verstanden. Das Mißverständnis ist evident: Pocock und Sandel fassen das aristotelische *politikon* als "politisch" im modernen Sinne auf, als Bezeichnung eines Funktionssystems zur kollektiven Willensbildung. Doch davon ist bei Aristoteles, wie gesehen, nicht die Rede: In der *Historia animalium* ist *politikon* nicht einmal auf Menschen beschränkt, sondern bezieht auch andere organisierte Lebewesen mit ein, in der *Politik* ist es im Sinne von "auf die Polis bezogen" zu verstehen. Aristoteles Konzept des *zoon politikon* ist viel weiter gefaßt als von Pocock und Sandel postuliert: Eine Reduzierung auf Partizipation in freien Staaten oder gar auf "political action" widerspricht dem Umstand, daß Aristoteles eben auch die monarchischen Verfassungstypen einbezieht, in denen eine politische Mitwirkung des Volkes gar nicht vorgesehen ist; mit dem Satz vom *zoon politikon* bringt er zum Ausdruck, daß der Mensch von Natur aus ein polisbildendes Lebewesen sei; daß der Mensch ein politisch aktives Lebewesen sei wie von der republikanischen Tradition angenommen, ist nicht gemeint.[71]

[70] J. POCOCK, *The Machiavellian Moment, Florentine Political Thought and the Atlantic Republican Tradition* (Princeton ²2003), 335, 550.

[71] Einen sensibleren Umgang mit Aristoteles durch einen Politologen zeigt R.A. DAHL, *Modern Political Analysis* (Englewood Cliffs ³1976), 100. Dahl macht nicht den Fehler, *politikon* unreflektiert mit "politisch" zu übersetzen, sondern geht vom allgemeineren Aspekt der Gemeinschaftsbildung aus: "... because human beings are social, they develop political systems. Evidently they cannot dwell together without entering into relationships of influence; whenever these relationships become stable and repetitive, political systems exist. In this looser sense, then, one might say (with Aristotle) that man *is* a political animal. Whatever his values and concerns, man is inevitably enmeshed in political systems —

Ein zweites Mißverständnis kommt hinzu, das sich im Namen der "neo-athenischen" Richtung bereits andeutet: Deren Anhänger reduzieren die griechische Poliswelt auf die athenische Demokratie und machen es so möglich, daß die Theorie eines Philosophen in eine allgemeine Meinung der athenischen Bürgerschaft verwandelt wird: "The story as we have traced it first, that of how the *Athenian assertion* that man was *zōon politikon*, by nature a citizen, was revived ..." (meine Hervorhebung).[72] Einem antiken Athener wäre die Aussage, alle Menschen seien von Natur aus Bürger, bestimmt erstaunlich und wohl auch gefährlich vorgekommen, denn sie hätte die im politischen Raum scharf gezogenen Grenzen zwischen Bürgern und Nichtbürgern verwischt.

Zusammenfassung

Aristoteles' vielzitiertes Dictum, der Mensch sei von Natur aus ein *zoon politikon*, besaß weder einen spezifischen Bezug zur antiken Demokratie, noch übte es einen nennenswerten Einfluß auf die moderne Demokratietheorie aus. Aristoteles bezog sich mit seinem Theorem auf die Polis im allgemeinen, nicht auf die athenische Demokratie im besonderen; die kennzeichnenden Merkmale letzterer waren die politische Gleichheit und die intensive Partizipation aller Bürger. Diese Partizipation wurde als die Ausübung von Macht begriffen, wie der

whether or not he likes or even notices the fact." (Dahls Kursive). Für eine ähnliche Warnung vor einer Fehlinterpretation des Aristoteles s. H. ARENDT, *Was ist Politik?* (München 1993), 37: "Aristoteles, für den das Wort 'politikon' durchaus ein Adjektiv der Polis-Organisation und nicht eine beliebige Bezeichnung für menschliches Zusammenleben überhaupt war, meinte keineswegs, daß alle Menschen politisch seien oder daß es Politik, nämlich eine Polis, überall gäbe, wo Menschen lebten [...] Was er meinte, war lediglich, daß es eine Eigentümlichkeit des Menschen ist, daß er in einer Polis leben kann und daß diese Polis-Organisation die höchste Form menschlichen Zusammenlebens darstellt und daher in einem spezifischen Sinne menschlich ist".

[72] Ebd. 462.

Begriff *demokratia* (= 'Volks*herrschaft*'), aber auch zahlreiche Zeugnisse aus dem 5. und 4. Jahrhundert zeigen: In der Volksversammlung, beim Ostrakismos oder in den Dikasterien herrschte die Bürgergemeinschaft über den einzelnen, vor allem über den einzelnen Aristokraten, der in einem von der politischen Gleichheit bestimmten Ordnung dem Mehrheitswillen trotz seiner individuellen sozialen Überlegenheit unterworfen war. Gemäß der modernen Terminologie war die athenische Demokratie "input-orientiert",[73] denn oberstes Ziel blieb es, dem Willen der Mehrheit des Volkes zur Durchsetzung zu verhelfen. Eine 'Regierung', die ein Gegengewicht zu den Institutionen des Volkes hätte bilden können, gab es nicht, alle Ämter wurden schwach gehalten.

Die in der Moderne über die politische Partizipation geführten Diskurse und die Stellung der athenischen Demokratie in diesen verdeutlichen die großen Unterschiede zwischen der antiken und der modernen Demokratie. Die den modernen Verfassungen zugrundeliegende liberale Theorie ging, auch genährt von antiken Kritikern der athenischen Demokratie, von einem tiefen Mißtrauen in die Fähigkeiten des breiten Volkes aus: Anstatt die wichtigen Entscheidungen den Launen des Volkes zu überlassen, sollte der Wille des Volkes mittels der Wahl von Repräsentanten ermittelt werden, politische Partizipation nur noch mittelbar stattfinden. Die Spaltung der politischen Spitze in Regierung und Opposition sowie die Teilung der Gewalten sollten zu große Machtakkumulationen verhindern und sicherstellen, daß die individuellen Freiheitsrechte gesichert blieben; das Ziel war nicht die Herstellung einer Herrschaft des Volkes, sondern der Schutz des Einzelnen vor der staatlichen Macht.

Auch wenn seit der zweiten Hälfte des 20. Jahrhunderts wieder vermehrt eine stärkere Beteiligung des Volkes an der

[73] Zu einer neueren Analyse der input- und output-orientierten Perspektiven der Demokratie s. F.W. SCHARPF, "Demokratie in einer kapitalistischen Wirtschaft", in *Regieren in Europa. Effektiv und demokratisch?* (Frankfurt am Main 1999), 16-22.

politischen Willensbildung gefordert wird, ist das leitende Prinzip der Überlegungen nicht die Macht des Volkes. Bei Habermas als einem der führenden Vertreter der deliberativen Demokratietheorie folgt aus einer stärkeren politischen Partizipation des Volkes vielmehr eine Schwächung der — im Sinne einer machtgeleiteten Ordnung verstandenen — Politik: "Das würde den Charakter von Herrschaft verändern; und sofern in der Politik immer auch ein Moment blinder Herrschaft steckt, mahnt die Idee der Demokratie an die Vergänglichkeit des Politischen als solchen".[74] Dies ist ein deutlicher Gegensatz zur Stärke des politischen Raumes im klassischen Athen.

Wenn heutzutage die Bürger aufgefordert werden, sich an Wahlen zu beteiligen, wird in der Regel das Argument angeführt, eine hohe Wahlbeteiligung stärke die gemäßigten Kräfte und stabilisiere damit die bestehende politische Ordnung. Mit der athenischen Vorstellung von Volksherrschaft hat das nichts zu tun. Wenn Barber, Gore und andere das klassische Athen als Beispiel für eine funktionierende Demokratie heranziehen, dann ist dies lediglich der Beweis, daß die athenische Demokratie, vom Ausschluß von Frauen, Sklaven und Metöken abgesehen, mittlerweile als vorbildhaft gilt, es ebnet aber nicht den tiefen Graben zwischen der antiken und der modernen Vorstellung von politischer Partizipation ein.

[74] J. HABERMAS, *art. cit.* (Anm. 55), 16.

DISCUSSION

K. Piepenbrink: Mein Eindruck ist ebenfalls, daß Aristoteles keinen unmittelbaren Zusammenhang zwischen seinen Überlegungen zum *zoon politikon* und dem Moment der politischen Partizipation herstellt. Im ersten Buch der 'Politik', das bekanntermaßen stark durch seine spezifisch philosophischen Modelle geprägt ist, geht es ihm m.E. primär darum, den Vorrang der Polis vor den anderen sozialen Bezugskreisen hervorzuheben und dies ontologisch wie teleologisch zu untermauern. Er streicht hier heraus, daß der Mensch seine Bestimmung insbesondere dann erfüllt, wenn er sich vorrangig auf die Polis bezieht, während die anderen Bezüge nachrangig sein sollten. Das meint u.a., daß er die Belange der Polis denen des Oikos voranzustellen hat. Ein politisches Engagement, so wie Aristoteles es im dritten Buch der 'Politik' im Zusammenhang mit seinen allgemeinen Reflexionen zum Bürger (speziell zum Bürger in der Demokratie) entwirft, ist im ersten Buch m.E. nicht angedacht. Ebenso wenig sind die Aussagen zum *zoon politikon* vorzugsweise auf die Demokratie zu beziehen. Aristoteles äußert sich, wenn ich recht sehe, nicht explizit zum Zusammenhang zwischen dem *zoon politikon* und bestimmten Verfassungsformen. Hier zu spekulieren, ist freilich nicht ganz unproblematisch: Wenn ich es doch versuchen sollte, scheint es mir am wahrscheinlichsten, daß der Mensch seine Bestimmung als *zoon politikon* am ehesten in der Politie verwirklicht, keinesfalls jedoch in den drei *parekbaseis* und damit auch nicht in der Demokratie, da hier die Ausrichtung auf das Gemeinwohl und damit auf die Belange der Polis nach aristotelischem Verständnis nicht ausreichend ausgeprägt ist.

Chr. Mann: Ich kann dem nur zustimmen. Wichtig erscheint mir vor allem der Hinweis auf den grundlegenden Unterschied zwischen den einzelnen Büchern der *Politik*: In der besprochenen Passage des ersten Buches wird die Polis als eine soziale Gemeinschaft verstanden, mit der *oikia* als kleinster Einheit, im dritten Buch hingegen als — im modernen Sinne — 'politische' Gemeinschaft, mit dem Bürger als kleinster Einheit. Aristoteles klärt das Verhältnis der beiden Beschreibungsmuster nicht, woraus sich weitere Probleme ergeben: In manchen Passagen gehören die Frauen zur Polis dazu, in anderen nicht. Angesichts dieser Unterschiede innerhalb des Werkes ist es — und auch hierin stimme ich zu — nicht zulässig, Passagen aus verschiedenen Büchern der *Politik* heranzuziehen, um das *zoon politikon* zum demokratischen Bürger zu verengen.

P. Schmitt Pantel: Pouvez-vous préciser le contenu que vous donnez à la notion de participation politique à Athènes? Est-ce qu'elle s'arrête à la participation aux institutions politiques? Je pense entre autres à deux expressions employées par des historiens de l'antiquité: Claude Nicolet parle du "métier de citoyen" à propos des Romains, Christian Meier utilise l'expression de "militant" pour le citoyen grec athénien, qui me paraissent recouvrir d'autres types d'activités que la seule participation aux assemblées, aux magistratures et aux tribunaux.

Chr. Mann: Wir stehen hier wieder vor der Frage, wie man politische Partizipation definiert. Soll man darunter allgemein alle auf die Polis bezogenen Handlungen verstehen, oder ist eine Fokussierung vorzunehmen auf die Teilnahme an Institutionen und Verfahren, in denen kollektiv bindende Entscheidungen hergestellt werden? Zunächst einmal ist es völlig korrekt, daß die Athener ihr "Bürger-Sein" nicht nur beim Besuch der Volksversammlung und Gerichte erfuhren, sondern auch bei vielen anderen Aktivitäten, etwa dem Militärdienst oder der Teilnahme an Prozessionen und Opfern. Diese Aspekte sind in der Forschung reichlich untersucht worden; ich habe

sie nur am Rande erwähnt, weil sie für andere Poleis genauso gelten: Soweit die Quellenlage Einblicke erlaubt, kann man sehen, daß der Kampf für die Polis im Krieg und die Partizipation an gemeinschaftlichen Kulten wichtige Facetten der Bürgeridentität bilden, und zwar auch in oligarchisch organisierten Poleis. Für meine Themenstellung, die auch auf die Frage einer Sonderstellung Athens in der griechischen Poliswelt abzielt, erscheint mir eine Fokussierung auf die politischen Institutionen notwendig zu sein. Auch die Athener selbst sahen eine herausragende Errungenschaft ihrer Polis darin, eine politische Ordnung geschaffen zu haben, welche die Entscheidungsgewalt über alle wichtigen Angelegenheiten der Polis in die Hände der einfachen Bürger legte.

M. Hansen: In a ground-breaking article published last year (Chr. Mann: "Politische Gleichheit und gesellschaftliche Stratifikation: die athenische Demokratie aus der Perspektive der Systemtheorie", in *HZ* 286 [2008], 1-35), you argue that a more consistent analysis of the various aspects of Athenian democracy can be obtained if one applies Niklas Luhmann's theories about social systems. You write (p. 6): "Aufbauend auf Forschungsarbeiten, welche die Lösung der politischen Verfahren vom gesellschaftlichen Hintergrund als Charakteristikum der athenischen Demokratie auffassen, möchte ich die These aufstellen, daß man die athenische Demokratie als ein politisches Funktionssystem in der Umwelt einer stratifizierten Gesellschaft beschreiben kann. [...] Kulte, Oikosstrukturen, Symposiengemeinschaften etc. erscheinen dann nicht mehr als ein Teil der Politik, sondern als deren Umwelt. Athenische Frauen waren von eminenter Bedeutung für die Kulte und für die Existenz der *oikoi*, ohne sie wäre die Demokratie kollabiert. Ebenso hätte die Wirtschaft Athens ohne die Metöken nicht aufrechterhalten werden können, was ebenfalls zum Ende der Demokratie geführt hätte. Aber die Operationen der Demokratie, das heißt des politischen Systems, wurden nicht von Kulten oder dem Austausch materieller Güter bestimmt, sondern gehorchten eigenen Regeln".

I believe that Luhmann's Systemtheorie as described by you can be applied to Aristotle's complex description of the *polis* and his view about man as a *zoon politikon* whose *telos* is to live a *politikos bios*. In fact in an article (M.H. Hansen, "Aristotle's Two Complementary Views of the Greek Polis", in *Transitions to Empire. Essays in Greco-Roman History 360-146 B.C., in Honor of E. Badian*, ed. by R.W. Wallace, E.M. Harris [Norman 1996], 195-210.) I analysed Aristotle's view of the *polis* along such lines, only I did not associate my analysis with Luhmann's theories. In the light of these considerations I shall present an interpretation of Aristotle's dictum about man as a *zoon politikon* which in some respects differs from the one offered by you in your contribution to this conference but conforms to your views in the article I quoted above.

Like you (p. 54) I find it significant that Aristotle's statement in the *Politics* about man as a *zoon politikon* is brought in the first book (*Pol.* 1253a 1-3, cf. 1278b 17-19) in connection with Aristotle's analysis of the *polis* as a community consisting of households (*oikiai*), each comprising husband, wife, children and slaves. The *polis* described in Book 1 is a social and economic community, and women, children and slaves are members of the *polis* (for women, see also *Pol.* 1269b 15ff: women constitute half the *polis*). Aristotle explains that the *polis* comes into existence for the simple purpose of maintaining life but exists for the purpose of the good life (*zen* versus *eu zen*, *Pol.* 1252b 29-30, so also Mann, p. 56) which is the life of the politically active citizens (*Pol.* 1326b 7-18). *Eu zen* is a form of *eudaimonia* from which slaves and animals are excluded (*Pol.* 1280a 31-3). So a *polis* that exists for the purpose of the good life is the prerogative of mankind and is even restricted to a fraction of all human beings. According to Aristotle only Greeks (*Hellenes*) possess the combination of spirit (*thymos*) and intellect (*dianoia*) which both are preconditions for *polis*-formation (*Pol.* 1327b 20-33). Barbarians who live east or west of Hellas are not capable of living in *poleis*, their communities are *ethne... apoliteuta* (*Pol.* 1327b 26). The result is that no more than a

fraction of the world's population are human beings in the full sense. But — I think — it did not bother Aristotle that the overwhelming majority of all human beings were excluded from being true human beings, i.e. persons who could live a *bios politikos*. Perfection is for the few, not for the many.

The atom of the *polis* in this sense is not the *oikia* but the *polites*, i.e. the adult male citizen (*Pol.* 1274b 41, 1275b 20). Books 3-8 are devoted to the *polis* in the political sense. It is a political community from which women, children, slaves and foreigners are excluded (1275a 7-8, 1278a 1-6, 1280a 31-4, 1326a 18-20).

The *polis* in the *Politics* Book 1 is a community created for the purpose of maintaining life itself. Accordingly the statement about man as a *zoon politikon* comes close to the statement about *zoa politika* in the *Historia Animalium* (*HA* 487b 34-88a 13, see *supra* p. 52), and Aristotle can repeat that even bees and other gregarious animals are *zoa politika* (*Pol.* 1253a 8). But man is the only animal in command of speech and with a sense of what is just and unjust (*Pol.* 1253a 9-18, cf. *supra* p. 56). That brings us to the *polis* as a political community and justifies the statement that man is a political animal 'more than' bees and other gregarious animals.

In Books 3-8 it is the political aspects that are the essence of Aristotle's understanding of what a *polis* is and what it means to be a *politikon zoon*. He defines the *polis* in the political sense as a *koinonia politon politeias* (*Pol.* 1276 b2) (M.H. Hansen, *Polis and City-State. An Ancient Concept and Its Modern Equivalent* [Copenhagen 1998], 133-4). Like any other substance an Aristotelian *polis* is a compound of form and matter, and in case of the *polis*, the matter is the *politai* (*Pol.* 1325b 39-26a 5) and the form is the *politeia* (*Pol.* 1276b 2-11). In the first sense the *polis* is an aggregate of *politai* (1274b 41), in the second it is a system of magistracies in the state (*taxis archon*) and in particular of the supreme magistracy (*Pol.* 1278b 8-10). Again, *archai* are taken in the broad sense of those who deliberate, judge and command (*Pol.* 1275a 23-33, 1299a 25ff).

When *polis* is seen as a political community rather than as a social and economic community the statement that man is by nature a *zoon politikon* must be interpreted in the light of these definitions and in conjunction with the statement that the *telos* of the typical human being is to live a *politikos bios* (*Pol.* 1324a 13-25b 32). But what does one have to do to live a political life? One's job cannot be production or trade, since the full citizen ought to be exempted from work (*Pol.* 1278a 8-11; 1326b 30-2, 1328b 33-29a 2). Admittedly, most citizens have to work for a living, but only out of dire necessity, not to obtain happiness and fulfill their purpose in life. Nor can the citizen's task be war and deeds of arms, since the ideal *polis* may be isolated and have no hostile neighbours with whom to fight (*Pol.* 1325a 1-5). Nor can the purpose of human life be devoted to study and contemplation, since such pursuits pertain to the philosophical life, not to the life of a citizen. For the citizen the essence of life must be to participate in politics, to rule and be ruled in turns (*Pol.* 1283b 42-84a 3; 1325b 23-7). The *polites* is above all a person who participates in political and judicial decision-making (*Pol.* 1275a 22-3, 1281b 31) and in this capacity he must act justly and altruistically (*EN* 1130a 3-5, cf. 1134b 2ff; *Pol.* 1279a 8-15).

Ho politikos bios, however, is not the only form of life worth living. The alternative is the contemplative life (*theoretikos bios*). As you correctly note (p. 59), in the *Nicomachean Ethics* Aristotle seems to prefer the contemplative life to the political. In the *Politics* he goes for the political life as the true *telos* of mankind (*Pol.* 1324a 13-25b 32). And a life in contemplation is incompatible with the political life (*EN* 1177b 4); it is a life for gods or demi-gods (*EN* 1177b 26ff), and a life in isolation (*Pol.* 1324a 28; *EN* 1177a 32-4). Admittedly, the philosopher lives in a society and respects its laws (*EN* 1178b 5-7), but he is not a member of the *polis*, he is essentially *apolis* (*Pol.* 1253a 2-4, 1324a 16-17), and it is probably the philosopher Aristotle has in mind when in *Historia Animalium* he asserts that not all men are *zoa politika*, some are *monadika* (*HA* 488a 7).

Man as a *zoon politikon* is probably meant to cover all Hellenic *poleis*, perhaps over one thousand, of which some were monarchies, some oligarchies and — in Aristotle's time — only half of them democracies. I agree with you (p. 52, 67) (p. 2, 13) that the statement about man as a *zoon politikon* does not refer to Athens specifically nor is it restricted to democracies, but there are indications in the *Politics* that the statement fits a democracy better than a monarchy or an oligarchy. Aristotle defines a *polis* as a *koinonia* (*Pol.* 1276b 1) and as a multitude of *politai* (*Pol.* 1274b 41, 1286a 29) and he defines a *polites* as a person who participates in political decision-making (*Pol.* 1275a 22-3). It is only in a democracy that all *politai* take part in political decision-making, and therefore Aristotle admits that his definition of a *polites* as a person who participates in political decision-making fits democracy better than any other type of constitution (*Pol.* 1275b 5-6). Conversely, in a monarchy in the full sense, there is just one *polites*, the *basileus* in a kingdom (*Pol.* 1284a 3-10, 1287a 8-12, 1288a 15-19) and the *tyrannos* in a tyranny (1295a 17-22). Aristotle is of course aware of the problem that one cannot have a *polis* consisting of one person only. Therefore he modifies his view of *basileia* and says that kingdom may be the rule of a small *genos*, not always of one person (*Pol.* 1284a 4-5). On the other hand, he also insists that a person whose *arete* exceeds the *arete* of all other *politai* combined is no longer the member of the *polis* (*Pol.* 1284a 8). Aristotle's *pambasileia* (*Pol.* 1287a 8-12) is an utopia to such an extent that he does not even envisage kingdom as a possibility in his own description of the best *politeia* in Books 7-8. Tyranny is a *dystopia* to such an extent that tyrannies ought to be denied the status of a *politeia* or at least rated lowest among constitutions (1293b 27-30, cf. 1289b 2). Accordingly, when Aristotle in Books 4-6 replaces the sixfold model of constitutions described in Book 3 with a fourfold one, he excludes monarchies and classifies constitutions as aristocracies, oligarchies, *politeiai* or democracies (*Pol.* 1290a 13-29) (M.H. Hansen,

"Aristotle's Alternative to the Sixfold Model of Constitutions", in *Aristote et Athènes*, éd. par M. Piérart [Paris 1993], 91-101).

To sum up. That man is a *zoon politikon* means first of all that essentially it is man's nature (*physis*) and purpose in live (*telos*) to be a member of a *polis*. Man is a *polis*-animal. On this fundamental point I agree with you (pp. 56, 83). But I would like to put more emphasis on the different aspects of *polis*-life. On the one hand the *polis* was a social and economic community centred on a town created by a form of *synoecism* (*Pol.* 1252b 20) of villages each consisting of households. All inhabitants were members of the *polis* in this sense. On the other hand the *polis* was also a political community of adult male citizens from which women, foreigners and slaves were excluded. In the first sense man is one among a plurality of *politika zoa* and it is not only men but also other animals that live in *poleis*. One example is Aristotle's statement at *HA* 617b 13-14 that ravens and crows live in *poleis*. In the second sense man is the only *politikon zoon* and, more specifically, the *politika zoa* are the adult male citizens who can live a *politikos bios*. The Aristotelian *politika zoa* form a hierarchy with *poleis* of ravens and crows towards the bottom and *poleis* of Hellenic citizens at the top.

I admit that Aristotle's view of *polis* as an essentially political community of *politai* may be one-sided, and his dictum about man as a *zoon politikon* may be a narrow one, but I hold that in this context political animal is an essentially correct rendering of Aristotle's statement and that the Latin translation *animal sociale* covers only one aspect of the Aristotelian view. The other aspect is the *zoon politikos* by nature whose *telos* is to live a *politikos bios*. In political philosophy and today in, e.g. modern republicanism it is this view of man as a political animal that has been in focus. *Contra* you (p. 83-4) I do not think that Pocock and Sandal have misinterpreted Aristotle's dictum. They have focused on the political, you has emphasised the biological aspect of what it means to be a *politikon zoon* and you seem even to deny that man in his capacity of

zoon politikon has to fullfil his *telos* by being a politically active citizen (p. 84). Inspired by your use of Luhmann's theories I am inclined to see Aristotle's *polis* consisting of *politai* as *ein operativ geschlossenes System*, his polis consisting of *oikiai* as *Umwelt*, and I take the concept of *zoon politkon* to cover both aspects of the *polis*. *Politika zoa* live in *poleis* but they form a hierarchy with bees, ants, ravens and crows at the bottom and Hellenic citizens at the top.

On the other hand, I agree with you (p. 84) that it is a misnomer to speak about a neo-Athenian wing among the supporters of modern republicanism. Neither Pocock, nor Sandel nor any other who writes about modern republicanism has anything to say about Athenian democracy but those among them who are inspired by the Greek rather than the Roman tradition refer to Aristotle's dictum about man as a *zoon politikon*. The proper term would be neo-aristotelian republicanism (M.H. Hansen, *Den moderne republikanisme og dens kritik af det liberale demokrati* [2007], 53, n. 243).

Chr. Mann: Die Unterschiede zwischen Aristoteles und Luhmann scheinen mir markant zu sein. Der wichtigste besteht darin, daß Aristoteles Menschen als Grundelemente der Gesellschaft betrachtet, Luhmann hingegen Kommunikationen; letzteres bereitet den Boden für die Möglichkeit, die Gesellschaft in verschiedene Systeme auszudifferenzieren und deren spezifische Regeln der Kommunikation zu analysieren. Auch in der *Politik* lassen sich unterschiedliche Beschreibungsmuster von Gesellschaft fassen, deren Verhältnis zueinander wird jedoch nicht thematisiert; dadurch ergibt sich die genannte Unschärfe. Ich würde deshalb sagen, daß die unterschiedlichen Definitionen von *Polis* in der *Politik* als Indiz dafür herangezogen werden kann, eine Differenzierung der *Polis* in Funktionssysteme à la Luhmann zumindest für denkbar zu halten.

III

KAREN PIEPENBRINK

BÜRGERRECHT IN DER GRIECHISCHEN POLIS UND IM MODERNEN STAAT*

I. Einleitung

Die Thematik des Bürgerrechts wird gegenwärtig in vielen westlichen Demokratien diskutiert — in wissenschaftlichen Diskursen wie auch in der breiteren Öffentlichkeit. Das Interesse gilt dabei sowohl dem Phänomen der Staatsbürgerschaft, d.h. den Bestimmungen, was einen Bürger bzw. eine Bürgerin in dem jeweiligen Staat rechtlich konstituiert und auf welche Weise der Bürgerstatus erlangt wird, wie auch den Bürgerrechten, also den Rechten, die aus der Zugehörigkeit zur Bürgergemeinschaft resultieren. Ich werde mich in diesem Beitrag weitestgehend auf den erstgenannten Aspekt konzentrieren.

Auch wenn die meisten Studien, die in modernen Demokratien von Juristen, Politologen oder Soziologen zur Staatsbürgerschaft verfasst werden, gegenwartsorientiert sind, berücksichtigen sie doch vielfach die historische Perspektive des Sujets. In der Regel kommt hier auch die griechisch-römische Antike zur Sprache. Zumeist wird zu dem Zweck auf Rom rekurriert,

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um die Bedeutung des Rechtsstatus für den Bürger herauszustreichen; auf Griechenland, speziell die attische Demokratie, bezieht man sich hingegen, um das Moment der politischen Partizipation hervorzuheben. Referenzpunkt für letzteres ist in den meisten Arbeiten die politische Philosophie des Aristoteles, weniger unser empirisches Wissen über die Praxis der griechischen Polis.[1]

Während die Wirkungsgeschichte des römischen Rechts in dem Zusammenhang weitestgehend unstrittig ist und auch positiv gewürdigt wird, stößt man hinsichtlich der Bedeutung der griechischen Demokratie für die Konzeption des Staatsbürgers allerdings zuweilen auf Skepsis. Hintergrund hierfür ist besonders der Umstand, dass der griechische Bürger — gerade in der Form, wie Aristoteles ihn entwirft — auf den Stadtstaat bezogen ist und nicht ohne weiteres auf den modernen Flächenstaat transferierbar scheint. Dies wurde besonders im 18. und 19. Jahrhundert moniert, als das politische Denken des Aristoteles zunehmend in die Kritik geriet und zunächst mit den etatistisch orientierten Positionen des Absolutismus, dann mit dem aufkommenden liberalen Gedankengut nicht mehr kompatibel schien.[2]

Gegenwärtig wird die Relevanz der aristotelischen Tradition für die Definition von Bürgerrecht unterschiedlich bewertet:

[1] Zur Problematik des aristotelischen Bürgerbegriffs siehe J. BLOK, "Becoming Citizens. Some Notes on the Semantics of 'Citizen' in Archaic Greece and Classical Athens", in *Klio* 87 (2005), 7-40, hier 31-5.

[2] Hierzu etwa M. RIEDEL, "Bürger, Staatsbürger, Bürgertum", in *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland.* Bd. 1, hrsg. von O. BRUNNER, W. CONZE, R. KOSELLECK (Stuttgart ^{4}1992 [zuerst 1972]), 672-725; R. KOSELLECK, K. SCHREINER, "Einleitung. Von der alteuropäischen zur neuzeitlichen Bürgerschaft. Ihr politisch-sozialer Wandel im Medium von Begriffs-, Wirkungs- und Rezeptionsgeschichten", in *Bürgerschaft. Rezeption und Innovation der Begrifflichkeit vom Hohen Mittelalter bis ins 19. Jahrhundert*, hrsg. von R. KOSELLECK, K. SCHREINER (Stuttgart 1994), 11-39; W. NIPPEL, "Republik, Kleinstaat, Bürgergemeinde. Der antike Stadtstaat in der neuzeitlichen Theorie", in *Theorien kommunaler Ordnung in Europa*, hrsg. von P. BLICKLE (München 1996), 225-47.

Noch immer wird kritisch angemerkt, dass der Bürger aristotelischer Prägung über keine unveräußerlichen Rechte verfüge,[3] die ihm als Mensch attestiert werden, und in der Polis keine Freiheitsrechte existierten, welche sich im Sinne moderner Grundrechtskonzeptionen als Abwehrrechte gegen den Staat verstehen lassen.[4] Affirmiert werden die aristotelischen Reflexionen zum Bürgerrecht hingegen, wenn der Gesichtspunkt der bürgerlichen Egalität wie auch besonders der aktiven politischen Beteiligung betont werden soll, was seit einigen Jahren zunehmend geschieht.[5]

Sieht man vom Gedanken der unmittelbaren Teilhabe an der Herrschaft als konstitutives Moment für den Bürger einmal ab, begegnen in den aktuellen Debatten zur Staatsbürgerschaft allerdings kaum Hinweise auf die politische Philosophie des Aristoteles oder die demokratisch verfasste griechische Polis überhaupt. Hinsichtlich der Staatsbürgerschaft scheinen die Herausforderungen, mit denen moderne Staaten konfrontiert sind, doch deutlich von denen der Polis abzuweichen, so dass hier nach Ansicht vieler Autoren kaum unmittelbare Anknüpfungsmöglichkeiten an die griechische Antike gegeben

[3] Inwieweit ein Bürger in der attischen Demokratie über individuelle Freiheitsrechte verfügte, wird seit mehreren Jahrzehnten kontrovers diskutiert; dazu u.a. K.J. DOVER, *Greek Popular Morality in the Time of Plato and Aristotle* (Oxford 1974), 289; M.I. FINLEY, *Economy and Society in Ancient Greece* (Cambridge 1981), 92-5; D. COHEN, "Democracy and Individual Rights in Athens", in *ZRG Rom. Abt.* 114 (1997), 27-44; W. NIPPEL, *Antike oder moderne Freiheit? Die Begründung der Demokratie in Athen und in der Neuzeit* (Frankfurt am Main 2008); P. LIDDEL, *Civic Obligation and Individual Liberty in Ancient Athens* (Oxford 2007), bes. 309-31; vgl. auch den Beitrag von M.H. Hansen in diesem Band.

[4] So etwa J. HABERMAS, "Staatsbürgerschaft und nationale Identität", in *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Darmstadt [4]1994 [zuerst 1990]), 632-59, hier 635-7; vgl. auch O. HÖFFE, *Wirtschaftsbürger, Staatsbürger, Weltbürger. Politische Ethik im Zeitalter der Globalisierung* (München 2004), bes. 21.

[5] Siehe beispielsweise M.I. FINLEY, *Ancient and Modern Democracy* (London 1973), 3-37; M.H. HANSEN, *The Tradition of Ancient Greek Democracy and its Importance for Modern Democracy* (Copenhagen 2005), bes. 23f.

sind: Das gilt insbesondere für das Phänomen der Globalisierung, verbunden mit der Frage, welche Formen supranationaler Staatsbürgerschaft vorstellbar und gestaltbar sind, sowie die Problematik der Migration. Überdies wird in jüngster Zeit vermehrt über sozial und kulturell bedingte Ungleichheit in einzelnen Gemeinwesen reflektiert und gefragt, ob die uniforme Staatsbürgerschaft dieser gerecht wird bzw. inwieweit hier Minderheitenrechte implementiert werden sollten. Auch Genderaspekte kommen in dem Zusammenhang zur Sprache. Diese Fragen werden bislang meist ohne ausdrückliche historische Bezugnahmen diskutiert.[6]

Mir geht es im Folgenden nicht darum, explizit zu erörtern, ob die griechische Antike in dem Kontext nicht doch in höherem Maße als Paradigma fungieren kann. Auch möchte ich keine rezeptions- oder wirkungsgeschichtliche Studie anfertigen. Stattdessen möchte ich eine komparatistische Untersuchung durchführen, indem ich das attische Bürgerrecht und aktuelle Staatsbürgerrechte einem Vergleich unterziehe. Dabei sollen sowohl strukturelle Parallelen wie auch fundamentale Differenzen beleuchtet werden. Ich konzentriere mich entsprechend auf solche Merkmale, die geeignet sind, markante Gemeinsamkeiten wie Verschiedenheiten zu eruieren und zu interpretieren.

Viele Aspekte müssen dabei zwangsläufig unberücksichtigt bleiben. Die Beschäftigung mit der griechischen Polis wird sich aus Gründen der Überlieferung auf das klassische Athen fokussieren, genauer auf die attische Demokratie des vierten Jahrhunderts. Hinsichtlich der modernen Staaten werde ich mich

[6] Zur Orientierung über die aktuellen Debatten seien genannt P. MAGNETTE, *Citizenship. The History of an Idea* (Oxford 2005); J. MACKERT, H.-P. MÜLLER, "Die Staatsbürgerschaft vor postnationalen Herausforderungen", in *Moderne (Staats)Bürgerschaft. Nationale Staatsbürgerschaft und die Debatten der Citizenship Studies*, hrsg. von J. MACKERT, H.-P. MÜLLER (Wiesbaden 2007), 9-27; M. LISTER, E. PIA, *Citizenship in Contemporary Europe* (Edinburgh 2008).

der Schwerpunktsetzung der aktuellen Diskussionen entsprechend weitgehend auf Europa, die USA und Kanada beschränken. Aufgrund internationaler Rahmenbedingungen wie auch vergleichbarer praktischer Herausforderungen bestehen hier große Gemeinsamkeiten im Umgang mit der Staatsbürgerschaft. Historisch bedingte Unterschiede zwischen den Staaten werden zur Sprache kommen, soweit sie für unsere Thematik aufschlussreich sind.

II. Abstammungs- oder Territorialprinzip?

In Athen wird das Bürgerrecht bzw. der Anspruch darauf gewöhnlich mit der Geburt erworben. Seit dem Bürgerrechtsgesetz des Perikles ist es bekanntlich erforderlich, dass beide Elternteile athenische Bürger sind. Der Erwerb aufgrund der Tatsache, dass jemand auf attischem Territorium geboren wurde, ist nicht vorstellbar. Dies hat nicht zuletzt damit zu tun, dass sich die Polis als Personenverband versteht, der eine Abstammungsgemeinschaft darstellt.[7] Territoriale Aspekte sind weniger relevant, es sei denn in Verbindung mit der Abstammung — etwa bei Autochthonievorstellungen.

In den meisten modernen Staaten ist mittlerweile ebenfalls die Geburt ausschlaggebend, d.h. es gilt das *ius sanguinis*. Das *ius-soli*-Prinzip dominiert demgegenüber beispielsweise noch in den USA und in Irland. Aber auch hier existiert es nicht mehr in Reinform, sondern wird durch das *ius sanguinis* ergänzt. Viele Staaten haben in Einwanderungsphasen das Territorialprinzip praktiziert, sind aber davon abgekommen, nachdem sich ein ausreichend großes Staatsvolk herausgebildet hat, dessen Konsolidierung fortan im Fokus der Politik des Landes

[7] Zu dem Gesichtspunkt etwa J. BLOK, "Recht und Ritus der Polis. Zu Bürgerstatus und Geschlechterverhältnissen im klassischen Athen", in *HZ* 278 (2004), 1-26, hier 2, 15f., 18-21.

stand. Beispiele für ein reines Abstammungsprinzip sind etwa die skandinavischen Länder, die Schweiz, Österreich, Luxemburg, die Türkei und Deutschland.[8]

Eine zentrale Differenz zwischen modernen westlichen Demokratien und Athen ist darin zu sehen, dass es heute für die Zuerkennung der Staatsbürgerschaft an ein Kind genügt, wenn ein Elternteil über die betreffende Staatsangehörigkeit verfügt. Sind die Eltern unverheiratet, gilt der Status der Mutter. Sind sie hingegen verheiratet, verfügen aber über verschiedene Staatszugehörigkeiten, treffen entweder sie die Entscheidung bezüglich des Kindes oder das Kind erhält eine doppelte Staatsbürgerschaft — diejenige eines Elternteils und die des Landes, in dem es geboren wurde, so dass sowohl das Abstammungs- wie auch das Territorialprinzip wirksam werden. Anders als noch vor einigen Jahrzehnten verhält es sich heute nicht mehr so, dass ein ehelich geborenes Kind in einem solchen Fall automatisch die Staatsbürgerschaft des Vaters bekommt.

Die spezifischen Bedenken gegenüber Ehen mit Angehörigen anderer Gemeinwesen, die Perikles zu seinem Gesetz veranlasst haben mögen, werden von modernen Demokratien nicht geteilt. Dass derartige Verbindungen in politischer Hinsicht problematisch werden könnten, ist heute nicht mehr vorstellbar.

III. Bürgerrechtsverleihung: Verfahren und Intentionen

In Athen ist es normalerweise nicht möglich, dass ein Metöke oder ein Fremder, der das Bürgerrecht erwerben möchte, hierzu selbst einen Antrag stellt. Es handelt sich um ein politisches Prozedere, welches der Betreffende nicht persönlich initiieren kann, da er über kein politisches Partizipationsrecht verfügt —

[8] Zu Belegen siehe B. ZIEMSKE, *Die deutsche Staatsangehörigkeit nach dem Grundgesetz* (Berlin 1995), 196.

es sei denn, es ist ihm ein entsprechendes Privileg verliehen worden. Die Antragstellung bei der Boule muss gewöhnlich von einem Bürger vorgenommen werden. Die Entscheidung wird dann von der Volksversammlung in einem genau geregelten mehrstufigen Verfahren getroffen.[9]

In heutigen Demokratien ist es dagegen der Bewerber bzw. die Bewerberin selbst, der einen Antrag bei der jeweils zuständigen Behörde einreicht. Die Entscheidung erfolgt in vielen Staaten als Verwaltungsakt. Entsprechend stellt die Tatsache, dass der oder die Betreffende zum Zeitpunkt der Antragstellung noch nicht zur politischen Teilhabe berechtigt ist, kein Hindernis dar. Es finden sich gleichwohl Beispiele, in denen auch legislative Organe an der Einbürgerung beteiligt sind. Zu nennen wäre etwa Dänemark, wo die Naturalisation per Gesetz erfolgt. Das Fehlen der politischen Partizipationsmöglichkeit ist hier aber gleichsam irrelevant, da der Antragsteller bzw. die Antragstellerin im Repräsentativsystem selbstverständlich keinen unmittelbaren Anteil an der Formulierung und Einbringung des entsprechenden Gesetzesantrages hat. Daneben gibt es den Fall, dass die Entscheidung durch Gerichte getroffen wird, so beispielsweise in den USA.

Im modernen Staat existieren exakte juristische Bestimmungen, unter welchen Bedingungen eine Einbürgerung möglich ist; vielfach bestehen zusätzlich Verwaltungsvorschriften. In Athen sind die gesetzlich fixierten Kriterien weitaus unpräziser. In klassischer Zeit kommt wohl lediglich das Gesetz zur Anwendung, dass *andragathia eis ton demon* voraussetzt.[10] Der

[9] Eine Übersicht über das Verfahren geben etwa A. BILLHEIMER, *Naturalization in Athenian Law and Practice* (Gettysburg 1917), bes. 13f.; M.J. OSBORNE, *Naturalization in Athens.* Vol. III and IV (Brussel 1983), 155ff.; M.H. HANSEN, *Die athenische Demokratie im Zeitalter des Demosthenes. Struktur, Prinzipien und Selbstverständnis* [Deutsch von W. Schuller] (Berlin 1995), 96.

[10] Siehe DEM. 59, 89; dazu E. SZANTO, *Das griechische Bürgerrecht* (Freiburg 1892), 46; A. BILLHEIMER, *op. cit.* (Anm. 9), 24f. Daneben existiert das Solon zugeschriebene Gesetz, demgemäß es nur denen gestattet sei, Bürger zu werden, die für immer aus ihrer Polis verbannt seien oder mit ihrem ganzen Haus nach

Entscheidungsspielraum der beteiligten Institutionen, d.h. in Sonderheit der Volksversammlung, ist damit zweifellos weitaus größer als in modernen Staaten. Das hat nicht zuletzt damit zu tun, dass das Bürgerrecht in Athen gerade im vierten Jahrhundert primär als Ehrung verstanden wird.[11] Intention ist, Personen, die sich in besonderem Umfang um die Polis verdient gemacht haben, zu ehren bzw. solche, die über die Voraussetzungen verfügen, der Polis in außerordentlichem Maße zu nützen, zu motivieren, dies tatsächlich in Zukunft zu tun. All das geschieht nach dem Prinzip der Reziprozität. Wer außergewöhnliche Leistungen vorzuweisen hat, darf mit einer Ehrung rechnen; er hat jedoch keinen Rechtsanspruch darauf, erst recht nicht auf ein ganz bestimmtes Privileg. Eine Besonderheit stellt die Verleihung des Bürgerrechts an Gruppen dar. Hier kann die Intention der Ehrung ebenfalls eine Rolle spielen, etwa bei der berühmten Einbürgerung der Samier, die sich bei der Überwindung der Oligarchie in Athen Verdienste erworben haben.[12] Ansonsten dient die Verleihung des Bürgerrechts an größere Gruppen zumeist vorrangig dem Zweck der Vergrößerung der Bürgerschaft. In klassischer Zeit geschieht dies — abgesehen von der Phase des Peloponnesischen Krieges — jedoch nur selten. In der attischen Demokratie des vierten Jahrhunderts steht die Honorierung Einzelner im Vordergrund.

In modernen Demokratien ist der Gesichtspunkt der Ehrung in dem Zusammenhang in den allermeisten Fällen nicht von Bedeutung. Ausnahmen stellen Verleihungen des Staatsbürgerrechts an prominente Künstler oder Sportler dar.[13] Ehrungen,

Athen übersiedelten, um ein Gewerbe zu betreiben (PLUT. *Sol.* 24, 4). Eine Verleihung des Bürgerrechts auf der Basis dieses Gesetzes lässt sich in klassischer Zeit nicht mehr nachweisen (dazu M.J. OSBORNE, *op. cit.* [Anm. 9], 141f.).

[11] Den Zusammenhang zwischen der Betrachtung der Ehrung als Gabe des Volkes, dem Verzicht auf Formulierung genauer Kriterien und der Zuständigkeit der Volksversammlung betont auch E. SZANTO, *op. cit.* (Anm. 10), 31.

[12] Hierzu mit Quellenbelegen A. BILLHEIMER, *op. cit.* (Anm. 9), 36f.

[13] Zu Regelungen für Künstler und Sportler am Beispiel Deutschlands, Österreichs und der USA siehe I. VON MÜNCH, *Die deutsche Staatsangehörigkeit. Vergangenheit – Gegenwart – Zukunft* (Berlin 2007), 189-91.

wie sie für die Poliswelt konstitutiv sind, sind in modernen Staaten generell von weitaus geringerer Relevanz. Das hat zweifelsohne nicht nur mit Veränderungen in der Mentalität zu tun, sondern auch mit dem Umstand, dass ein moderner Staat nicht in vergleichbarer Weise auf euergetische Leistungen einzelner Personen angewiesen ist wie ein antiker Stadtstaat.

Aus der Tatsache, dass in heutigen Staaten gesetzliche Regelungen zur Bürgerrechtsverleihung existieren, in denen festgeschrieben wird, welche Bedingungen die betreffenden Personen erfüllen müssen, folgt aber nicht in jedem Fall, dass diese einen Anspruch auf die Staatsbürgerschaft haben, der gegebenenfalls gerichtlich einklagbar ist. Ob eine Einbürgerung stattfindet, liegt auch gegenwärtig noch grundsätzlich im Ermessen des Staates. Es kommt aber vor, dass ein Staat bestimmten Personengruppen, an deren Einbürgerung er besonderes Interesse zeigt, einen solchen Anspruch konzediert.[14]

IV. Bürgerrechtsverleihung: Personen und Voraussetzungen

Mit dem attischen Bürgerrecht werden im von uns betrachteten Zeitraum insbesondere Einzelpersonen geehrt, die der politischen Elite anderer Gemeinwesen angehören und eine wichtige Rolle in den zwischenstaatlichen Beziehungen einnehmen. Daneben können auswärtige Gelehrte und Künstler, etwa Tragödiendichter, Schauspieler oder Philosophen, die einen bedeutenden Beitrag zum kulturellen Leben Athens geleistet haben, auf diese Weise ausgezeichnet werden.[15] Metöken oder Fremden, die permanent in Athen leben, wird dagegen nur

[14] So differenziert etwa die Bundesrepublik zwischen einer 'Ermessenseinbürgerung' und einer 'Anspruchseinbürgerung'; hierzu B. ZIEMSKE, *op. cit.* (Anm. 8), 124-30.

[15] Beispiele hierfür finden sich besonders im Hellenismus, aber auch bereits in klassischer Zeit; siehe dazu A. BILLHEIMER, *op. cit.* (Anm. 9), 69ff.

selten das Bürgerrecht gewährt.[16] Sollen diese honoriert werden, geschieht das bei Metöken eher durch die Verleihung der Isotelie bzw. Atelie, bei Fremden auch durch Gewährung der Proxenie. Signifikant ist also, dass das Bürgerrecht vorzugsweise Personen zugestanden wird, die ihren Lebensmittelpunkt außerhalb Athens haben und sich auch nach der Verleihung nicht dauerhaft in der Stadt niederlassen. In den meisten Fällen üben sie das Bürgerrecht somit nicht praktisch aus. Ausnahmen stellen die schon erwähnten Verleihungen an Gruppen dar.

In heutigen Staaten verhält es sich in der Hinsicht grundsätzlich anders: Einen Antrag auf Einbürgerung kann normalerweise nur mit Erfolg stellen, wer bereits längere Zeit im jeweiligen Staat ansässig ist. Auch in den wenigen Fällen, wo die Staatsbürgerschaft als Ehrung verliehen wird, setzen die Staaten voraus, dass die Betreffenden bereits im Land leben und dies auch künftig tun werden. Analog dazu differieren auch die heutigen Kriterien, nach denen über eine Einbürgerung entschieden wird, deutlich von den athenischen: Der moderne Staat ist vorrangig daran interessiert, dass die Personen über Eigenschaften verfügen, die es ihnen erlauben, sich gut in Staat und Gesellschaft zu integrieren. Entsprechend wird postuliert, dass sie bereits eine bestimmte Zahl von Jahren ihren Hauptwohnsitz im Land haben und sich auch tatsächlich ohne längere Unterbrechungen hier aufgehalten haben. In den USA, Großbritannien, Frankreich und den Niederlanden sind es im Schnitt fünf Jahre, in Deutschland, Österreich, Spanien und Griechenland zumeist zehn, in der Schweiz gar zwölf Jahre. Die Bewerber müssen in der Lage sein, den Lebensunterhalt für sich und ihre Familie aus eigener Kraft zu bestreiten.[17] Sie

[16] Dazu etwa P. SPAHN, "Fremde und Metöken in der Athenischen Demokratie", in *Mit Fremden leben. Eine Kulturgeschichte von der Antike bis zur Gegenwart*, hrsg. von A. DEMANDT (München 1995), 37-56, hier 54.

[17] Eine Übersicht über die Kriterien in den einzelnen Staaten gibt P. WEIL, "Zugang zur Staatsbürgerschaft. Ein Vergleich von 25 Staatsangehörigkeitsgesetzen", in *Staatsbürgerschaft in Europa. Historische Erfahrungen und aktuelle*

dürfen sich keine schweren Rechtsverstöße haben zuschulden kommen lassen. Zudem sollten sie mit der politischen Ordnung, der Geographie, der Geschichte und den landesüblichen Lebensformen zumindest in den Grundzügen vertraut sein. Sie müssen sich in der Landessprache verständigen können. Oftmals sind Tests zu absolvieren, mit denen dies überprüft wird. Gefordert wird, dass ausreichend Anknüpfungspunkte an das Land bestehen. Der bloße Aufenthalt in einem Staat oder auch der Erwerb von Grund und Boden reichen dazu im Verständnis der meisten modernen Demokratien nicht aus. Ein besonderes Interesse zeigen viele Staaten gegenwärtig an der Einbürgerung Jugendlicher und junger Erwachsener, die im Land aufgewachsen sind, die Sprache beherrschen und bereits gut integriert sind. Für sie gelten zum Teil erleichterte Bedingungen.

Integrationsgesichtspunkte sind für die Athener hingegen zumindest im vierten Jahrhundert nicht von zentraler Bedeutung. Aufgrund der Tatsache, dass die Majorität der Betreffenden nicht in Athen lebt, ist dies nicht von praktischer Relevanz.

In Athen wird das Bürgerrecht dem Gedanken der politisch motivierten Ehrung entsprechend für gewöhnlich an Männer verliehen. Deren minderjährige Kinder können aber ausdrücklich mitberücksichtigt werden.[18] Bezeichnend ist, dass die Ehefrau nicht mitbedacht wird. Dass diese Praxis zur Folge hat, dass die Ehepartner dann verschiedene Bürgerrechte aufweisen, stellt für die Athener in dem Zusammenhang kein Problem dar.

Heutige Staaten betrachten es demgegenüber als eher ungünstig, wenn die Familienmitglieder über verschiedene Staatsangehörigkeiten verfügen. Insofern fördern viele die

Debatten, hrsg. von CHR. CONRAD, J. KOCKA (Hamburg 2001), 92-111, hier 96. Die weiteren Ausführungen zu Regelungen in einzelnen Staaten stützen sich auf die Zusammenstellung und Auswertung der betreffenden Gesetze, die Ziemske im Anhang zu seiner Monographie (*op. cit.* [Anm. 8], 333ff.) bietet.

[18] Zum Status der Nachkommen der Geehrten siehe M.J. OSBORNE, *op. cit.* (Anm. 9), 150-4.

Einbürgerung von Ehefrauen, deren Männer bereits die Staatsangehörigkeit erhalten haben. Viele Ehemänner beantragen die Staatsbürgerschaft auch nicht nur für sich selbst, sondern zugleich für ihre Gattin und die minderjährigen Kinder. Die Frage nach der Staatsangehörigkeit der Ehefrauen wird in dem Kontext gegenwärtig allerdings kontrovers diskutiert: Zum einen findet sich die eben genannte Überzeugung, dass es im Interesse der Integration der Familie von Vorteil sei, wenn beide Elternteile über das Bürgerrecht des Staates verfügen, in dem sie ansässig sind. Dagegen wird das Selbstbestimmungsrecht der Frau angeführt, das mit der früheren Erwartung, dass die Frau selbstverständlich die Staatsbürgerschaft des Gatten annimmt, nicht mehr vereinbar ist.[19] Insbesondere gilt eine automatische Einbürgerung, die ohne ihre ausdrückliche Zustimmung geschieht, in heutigen westlichen Demokratien als nicht mehr akzeptabel.

Generell gestaltet es sich in modernen Staaten einfacher, die Verleihung des Bürgerrechts auf der Basis familiärer Bindungen zu erlangen als in Athen. Das äußert sich etwa auch darin, dass für Kinder, die aus dem Ausland adoptiert werden, problemlos die Staatsbürgerschaft der Adoptiveltern beantragt werden kann oder sogar automatisch mit der Adoption zuerkannt wird. In Athen ist es hingegen nicht möglich, die Verleihung des Bürgerrechts auf der Grundlage einer Adoption zu erwirken.[20] Gegenwärtig besteht keine mit Athen vergleichbare Skepsis gegenüber verwandtschaftlichen Beziehungen zu Angehörigen anderer Gemeinwesen mehr. Die Haltung der Athener resultiert hier aus der Rolle der Einzelnen im Stadtstaat wie auch aus der Furcht vor mangelnder politischer Loyalität speziell der Angehörigen der sozialen Eliten.

[19] In der Konsequenz haben einige Staaten die Wartezeit vor einer Beantragung der Staatsbürgerschaft für die betroffenen Frauen verlängert; hierzu P. WEIL, *art. cit.* (Anm. 17), 102f.

[20] Umgekehrt verliert ein athenischer Bürger, der von einem Fremden adoptiert wird, sein athenisches Bürgerrecht nicht (s. AESCHIN. 2, 28).

Interessen des Staates im Zusammenhang mit der Einbürgerung sind in der attischen Demokratie wie in modernen Staaten virulent. Generell aber schenken die modernen Demokratien den Belangen der Betroffenen mehr Beachtung, als es in Athen der Fall ist. Dies hat maßgeblich damit zu tun, dass sich nach heutigem Verständnis nicht nur der Bürger durch Rechte auszeichnet, die der Staat zu respektieren hat, sondern bereits der Nichtbürger. Besonders markant werden die Interessen des Staates in Athen in philosophischen Texten formuliert. Ein Beispiel sind die Überlegungen des Aristoteles, dass die Zahl der Bürger nach Möglichkeit so bemessen werden solle, dass die Polis autark sei.[21] Hier spielt die Vorstellung, dass ein Nomothet oder *politikos* eine Polis von Grund auf gestalten könne, eine wichtige Rolle.[22] Die Bedürfnisse des einzelnen Bürgers sind dabei nicht bedeutsam. Aristoteles geht an der Stelle von einer hohen Gestaltungskompetenz des Gesetzgebers aus, dessen Wirken *idealiter* am Beginn einer Polis steht. Ein vergleichbarer Handlungsspielraum ist für die Autoren, die gegenwärtig zu der Thematik Position beziehen, nicht vorstellbar. Sie haben es mit historisch gewachsenen Staaten wie auch internationalen rechtlichen Vorgaben zu tun. Im Vordergrund der Betrachtung des Aristoteles stehen politische wie ökonomische Belange der Polis. Wirtschaftliche Gesichtspunkte sind bei den Überlegungen, die in modernen Demokratien in dem Kontext angestellt werden, von geringerer Bedeutung als in Athen. Dies könnte auf den ersten Blick verwundern, wo man doch meinen sollte, dass moderne Staaten angesichts des Sozialstaatsprinzips weitaus größere finanzielle Aufwendungen für die Bürger betreiben. Hier ist aber zu bedenken, dass der Großteil solcher Leistungen in vielen heutigen Demokratien bereits Personen zugutekommt, die über ein permanentes Aufenthaltsrecht verfügen. Insofern sind derartige Gesichtspunkte weniger

[21] ARIST. *Pol.* 1326b 22-24.
[22] Siehe etwa ARIST. *Pol.* 1276a 32-34.

bei der Frage nach der Verleihung der Staatsbürgerschaft als bei der Gewährung des Niederlassungsrechts relevant.

V. Haltungen zu Bürgerrechtsverleihungen

In Athen wird die Vergabe des Bürgerrechts im vierten Jahrhundert in öffentlichen Diskursen gern kritisiert. Die Rhetoren gerade der demosthenischen Zeit etwa bemerken mehrfach, dass die Polis gegenwärtig das Bürgerrecht allzu bereitwillig verleihe.[23] Sie praktizieren dies besonders angesichts der Ehrungen für einzelne Personen, die der sozialen Elite zuzurechnen sind. Ihre Kritik zielt weniger auf den Umstand, dass Fremde zur Teilhabe an der Herrschaft gelangen, als auf das Phänomen der Auszeichnung Einzelner, das mit dem Prinzip der demokratischen Gleichheit kontrastiert werden kann. Demosthenes moniert zudem, dass die Betreffenden sich zumeist nicht in Athen niederlassen und damit keine starke Verbundenheit mit athenischen Normen aufweisen.[24]

Generell handhabt die attische Polis das Bürgerrecht spätestens seit perikleischer Zeit — von Abweichungen während des Peloponnesischen Krieges und der Nachkriegszeit einmal abgesehen — sehr restriktiv. Das manifestiert sich auch in der ausgeprägten Zurückhaltung gegenüber der Verleihung des Bürgerrechts an Personen, die bereits in Athen leben oder motiviert werden könnten, sich hier künftig niederzulassen.[25] Über die Ursachen ist in der Forschung intensiv diskutiert worden: Einen der Hauptgründe sehen viele Forscher darin, dass eine Vergrößerung der Bürgerschaft — sei es durch Bürgerrechts-

[23] Siehe etwa DEM. 23, 211; dazu E. SZANTO, *op. cit.* (Anm. 10), 45; A. BILLHEIMER, *op. cit.* (Anm. 9), 90-2.

[24] DEM. 23, 126; die Kritik richtet sich weniger gegen die Geehrten selbst als vielmehr gegen die Antragsteller.

[25] Zur Motivation der Athener siehe A. BILLHEIMER, *op. cit.* (Anm. 9), bes. 89-91.

verleihungen oder durch andere Faktoren — in einer Demokratie, in der jeder Bürger über eine Stimme verfügt und wesentlichen Anteil an politischen Entscheidungen hat, größere politische Konsequenzen nach sich zieht als in anders verfassten Gemeinwesen.[26] Weiterhin wird bemerkt, dass Athen gerade seit der perikleischen Ära, als in größerem Umfang öffentliche Ressourcen zur Verfügung stehen, an denen die Bürger partizipieren können, auch aus ökonomischen Gründen verstärkt darauf achtet, dass nicht zu viele Personen hier Zugang erlangen. Die dritte Begründung stimmt mit der überein, die oft auch für das Bürgerrechtsgesetz des Perikles angeführt wird: die Sorge, dass Fremde sich nicht ausreichend in Athen integrieren und nicht die erforderliche Loyalität zeigen.

Die athenische Bürgerschaft hat sich offenbar nicht daran gestört, dass Metöken über viele Jahre, wenn nicht gar Jahrzehnte unter ihnen leben, ohne eine Chance auf Einbürgerung zu erhalten. Einen Zusammenhang zwischen Länge des Aufenthaltes und berechtigtem Interesse an Gleichberechtigung sehen sie nicht. In modernen Demokratien setzt sich hingegen zunehmend die Auffassung durch, dass dauerhafter Aufenthalt zum Wohle beider Seiten mit einer Einbürgerung verbunden sein sollte. Entsprechend werden oftmals Bestimmungen erlassen, die gerade die Einbürgerung von Ausländern mit langem Aufenthalt im Land erleichtern. Hier besteht die Vorstellung, dass die Akzeptanz der bisherigen Bevölkerung gegen Zuwanderer steigt, wenn diese die Staatsbürgerschaft erhalten.[27] Hinzu kommt die Einsicht, dass die betreffenden Staaten faktisch zu

[26] Das gilt etwa auch im Vergleich zur römischen Republik; hierzu CHR. MEIER, "Der griechische und der römische Bürger. Gemeinsamkeiten und Unterschiede im Ensemble gesellschaftlicher Bedingungen", in *Griechenland und Rom. Vergleichende Untersuchungen zu Entwicklungstendenzen und -höhepunkten der antiken Geschichte, Kunst und Literatur*, hrsg. von E.G. SCHMIDT (Jena 1996), 41-66, hier 57; grundsätzlich zu der Thematik W. NIPPEL, *op. cit.* (Anm. 3), 34.

[27] Zu letzterem am Beispiel der Bundesrepublik B. ZIEMSKE, *op. cit.* (Anm. 8), 33f.

Einwanderungsländern geworden sind, selbst wenn sie sich traditionell nicht so verstehen.

Allerdings gibt es diesbezüglich Kontroversen. Wie stark jene ausgeprägt sind, hängt zum einen davon ab, inwieweit sich das betreffende Land als Einwanderungsland begreift. Stammen die aktuellen Bürger selbst von Einwanderern ab, ist die Bereitschaft zu vollständiger Integration tendenziell größer. Ein weiterer Faktor ist darin zu sehen, wie groß die Kluft zwischen Migranten und Bürgern ist. Problematisch gestaltet es sich, wenn die Migranten sich hinsichtlich ihrer Hautfarbe, ihrer kulturellen Prägung oder ihrer Religionszugehörigkeit von der Mehrheitsbevölkerung unterscheiden und zudem in ökonomischer Hinsicht benachteiligt sind. Insgesamt handelt es sich um eine komplexe Angelegenheit, bei der unterschiedliche Auffassungen dazu vertreten werden, in welchem Grade eine Gesellschaft multikulturell sein kann und welcher Grundkonsens bei aller Diversität erforderlich ist. Weitgehend einig ist man sich jedoch, dass Migranten Chancengleichheit erhalten und damit vor allem deren Kinder gefördert werden müssen, etwa durch gezielten Sprachunterricht.[28]

Die Bereitschaft moderner Demokratien, Bürgerrechtsverleihungen vorzunehmen, variiert erheblich. Generell kann hier wieder unterschieden werden zwischen Staaten, die sich seit langem als Einwanderungsländer verstehen, und solchen, auf die das nicht zutrifft.[29] Erstere sind in der Regel in höherem Maße bereit, die Staatsbürgerschaft zu verleihen; insbesondere zeichnen sie sich auch dadurch aus, dass sie eher geneigt sind, Immigranten, denen sie bereits eine unbeschränkte Aufenthaltsgenehmigung erteilt haben, auch die volle Staatsbürgerschaft zu gewähren. In dieser Hinsicht scheint gegenwärtig die

[28] Zur Forderung nach Chancengleichheit etwa K. HAILBRONNER, *Staatsangehörigkeitsrecht* (München 1991), V.

[29] Hierzu beispielsweise L.M. FRIEDMAN, "Ethnicity and Citizenship", in *Citizenship and Immigration*, ed. by V. FERRARI, TH. HELLER, E. DE TULLIO (Milano 1998), 65-78, hier 75.

Hauptdiskrepanz zwischen den Praktiken der verschiedenen Staaten zu liegen, während die Immigration mittlerweile in den meisten Ländern rigide gehandhabt wird. Ängste vor vermeintlicher Überfremdung und Konflikten um Ressourcen werden vielfach artikuliert; gleiches gilt für die Sorge, dass die betreffenden Personen sich nicht ausreichend in die Gesellschaft integrieren werden.

Im Unterschied zu Athen richtet sich diese Skepsis nicht gegen Einzelpersonen, sondern gegen Angehörige bestimmter Gruppen. Mangelnde Loyalität des oder der Einzelnen scheint wohl insbesondere deshalb weniger gravierend, weil Einzelne nicht in dem Maße das politische Leben prägen wie in der klassischen Polis und damit die politische Ordnung nicht mehr in gleicher Manier zu gefährden vermögen. Noch immer gilt es aber als wichtig, dass sich eine Verbundenheit mit dem Personenverband herausbildet.[30] Politische Konsequenzen von Einbürgerungen im Sinne von Auswirkungen auf politische Entscheidungen werden gegenwärtig kaum diskutiert. Das hat zweifellos damit zu tun, dass sich in Repräsentativsystemen, wie die meisten modernen Demokratien sie ja aufweisen, das Abstimmungsverhalten Einzelner nicht in vergleichbarer Weise auswirkt.

VI. Der Status von Bürgern im Vergleich zu ansässigen Personen ohne Bürgerrecht

Im klassischen Athen unterscheiden sich die Metöken in ihrem Rechtsstatus von Bürgern.[31] So wird die vorsätzliche Tötung eines Metöken bekanntlich nicht vom Areopag

[30] Dazu am Beispiel der Bundesrepublik mit weiteren Literaturhinweisen B. ZIEMSKE, *op. cit.* (Anm. 8), 132.

[31] Anders Busolt, der bemerkt: "Diese Leute waren in privatrechtlicher Hinsicht den politisch Berechtigten im wesentlichen gleichgestellt" (G. BUSOLT, *Griechische Staatskunde. Hälfte 1: Allgemeine Darstellung des griechischen Staates,* [München 1963 (zuerst 1920), 220]). Gleichwohl listet er im Anschluss an diese grundsätzliche Einschätzung die Unterschiede zu den Bürgern auf.

verhandelt, sondern nur von den Epheten am Palladion,[32] und damit offenbar als weniger schweres Verbrechen betrachtet.[33] Im Unterschied zu Bürgern können Metöken vor Gericht gefoltert werden. Eine Klage gegen einen Metöken muss wie die gegen einen Fremden beim Polemarchen eingereicht werden. Metöken zahlen mit dem Metoikion eine spezielle Steuer und haben nicht das Recht, Grund und Boden zu erwerben — es sei denn, sie sind explizit privilegiert worden.[34] Ehen mit Athenern sind ihnen ebenso wie Fremden nicht gestattet. Auch von kostenlosen Getreideverteilungen sind beide Gruppen ausgenommen. Zu Diäten und Theorika haben sie keinen Zugang, da sie ja von Richterstellen und Herrschaftsfunktionen exkludiert sind und auch an vielen städtischen Festen nicht teilnehmen.[35] Materielle Zuwendungen des Staates werden in Athen nicht wie gegenwärtig dem Sozialstaatsprinzip entsprechend nach Bedürftigkeit vorgenommen, sondern sind an die Teilhabe am politischen Leben gebunden. Anders als Bürger sind Nichtbürger nicht berechtigt zu opfern.[36]

In ihren Pflichten unterscheiden sich die Metöken hingegen wenig von den Athenern: Verfügen sie über ein entsprechendes Vermögen, werden sie zur Eisphora und zu den Leiturgien herangezogen. Einschränkungen gibt es hier möglicherweise nur

[32] Zu den verschiedenen Verfahren siehe D.M. MACDOWELL, *The Law in Classical Athens* (London 1978), 117.

[33] Entsprechend betont Manville zu Recht, dass der 'superior status' eines Bürgers gegenüber einem Nichtbürger besonders in diesem Bereich manifest werde (PH. B. MANVILLE, *The Origins of Citizenship in Ancient Athens* [Princeton 1990], 12).

[34] Vgl. I. WEILER, "Fremde als stigmatisierte Randgruppe in Gesellschaftssystemen der Alten Welt", in *Klio* 71 (1989), 51-9, hier 56f.

[35] Die Beteiligung von Metöken an öffentlichen Festen wird gleichwohl unterschiedlich eingeschätzt; siehe hierzu M. ADAK, *Metöken als Wohltäter Athens. Untersuchungen zum sozialen Austausch zwischen ortsansässigen Fremden und der Bürgergemeinde in klassischer und hellenistischer Zeit (ca. 500-150 v.Chr.)* (München 2003), 32 mit Hinweisen auf die Positionen in der älteren Literatur.

[36] Zur Bedeutung kultischer Aspekte für den Bürgerstatus im klassischen Athen generell J. BLOK, *art. cit.* (Anm. 7), bes. 22-4.

bei der Trierarchie.[37] Zudem können sie zum Kriegsdienst verpflichtet werden.[38] Letzteres mag verwundern, wenn man bedenkt, dass Nichtbürger in modernen Staaten normalerweise nicht wehrpflichtig sind, obwohl der Nexus zwischen Kriegsdienst und politischer Partizipation heute tendenziell weniger stark ausgeprägt ist als in der Polis der klassischen Zeit. Die athenische Praxis lässt sich mit den Spezifika des Stadtstaates mit seiner relativ geringen Bevölkerungszahl begründen. Differenzen zwischen Bürgern und Nichtbürgern sind überdies hinsichtlich der Pflichten gegenüber der eigenen Familie zu sehen, die kultisch begründet sind.

In modernen Demokratien verhält es sich wie in Athen so, dass die Nichtbürger, auch wenn sie über eine langfristige oder gar zeitlich unbegrenzte Aufenthaltsgenehmigung verfügen, von der politischen Teilhabe vollständig oder doch weitgehend ausgeschlossen sind. Sie sind weder im Besitz des aktiven noch des passiven Wahlrechts für die Volksvertretungen. Einige Länder machen allerdings Ausnahmen für den kommunalen Bereich. In rechtlicher Hinsicht ist die Diskrepanz zwischen Ausländern mit langfristiger Aufenthalts- und auch Arbeitserlaubnis und Staatsbürgern signifikant geringer als in Athen zwischen Metöken bzw. Fremden und Bürgern: Juristisch fixierte Unterschiede bestehen heute nur wenige; einige sind gleichwohl vorhanden: So haben Nichtbürger nicht das Recht, nach Belieben ins Land einzureisen, sondern unterliegen vielfach einer Visumspflicht. Zudem genießen sie nicht den Schutz des Landes, wenn sie sich im Ausland aufhalten, unterstehen also nicht dem diplomatischen Schutz. Vor Gericht unterscheidet sich ihr Status von dem der Staatsbürger vor allem in solchen Angelegenheiten, die direkt das Staatsbürger- oder

[37] Die Übertragung der Trierarchie an Metöken wird bis heute kontrovers diskutiert; siehe dazu M. ADAK, *op. cit.* (Anm. 35), 77-86 mit zahlreichen Literaturhinweisen.

[38] Zur Rekrutierung von Metöken im Kriegsfall siehe M. ADAK, *op. cit.* (Anm. 35), 67 mit weiteren Literaturangaben.

Ausländerrecht betreffen: So können sie in vielen Ländern ihre Aufenthaltsberechtigung einbüßen, wenn sie längerfristig arbeitslos sind und ihren Lebensunterhalt daher nicht mehr aus eigenen Mitteln zu bestreiten vermögen.[39] Einige Staaten wie etwa die Bundesrepublik Deutschland unterscheiden in ihrem Grundrechtskatalog zwischen solchen Rechten, die sämtlichen Personen zukommen, welche sich auf ihrem Territorium aufhalten, und Rechten, die den Bürgern vorbehalten bleiben. Auf die Weise wird eine Differenzierung zwischen Menschen- und Bürgerrechten vorgenommen. Erstere sind kein Derivat des Bürgerstatus, sondern werden allen Männern und Frauen aufgrund ihres Menschseins attestiert, haben also grundsätzlich einen anderen Legitimationshintergrund.[40] In steuerlicher Hinsicht sind Nichtbürger den Bürgern im Normalfall gleichgestellt. In welchem Ausmaß sie am Sozialwesen des Staates, in dem sie leben, partizipieren, hängt davon ab, wie ihr Aufenthaltsstatus beschaffen ist, ob bzw. in welcher Form sie erwerbstätig sind und wie lange sie bereits im Land leben.

Diskriminierungen erfahren Nichtbürger häufig bezüglich ihrer Erwerbsmöglichkeiten. Je nach Staat und Art ihres Aufenthaltstitels bestehen hier aber erhebliche Unterschiede: Sie reichen von der gänzlichen Verweigerung der Arbeitserlaubnis über eine befristete Erlaubnis bis hin zum Ausschluss von bestimmten Berufen.[41] In vielen Staaten gilt die Regel, dass Arbeitsplätze, für die qualifizierte Bewerber unter den eigenen Bürgern gefunden werden können, nicht mit Ausländern

[39] Zum Problem der diskriminierenden Regelungen siehe J. MACKERT, *Kampf um Zugehörigkeit. Nationale Staatsbürgerschaft als Modus sozialer Schließung* (Opladen 1999), bes. 180-92.

[40] Dazu ausführlich A. SIEHR, *Die Deutschenrechte des Grundgesetzes. Bürgerrechte im Spannungsfeld von Menschenrechtsidee und Staatsmitgliedschaft* (Berlin 2001); siehe grundsätzlich auch M. WALZER, *Spheres of Justice. A Defense of Pluralism and Equality* (New York 1983), 31-63.

[41] Eine Übersicht über die betreffenden Berufe und Länder unter Hinweis auf geplante Änderungen gibt S. WIESSNER, *Die Funktion der Staatsangehörigkeit* (Tübingen 1989), 303.

besetzt werden dürfen. Bestimmungen dieser Art sind der griechischen Polis fremd. Nach athenischem Verständnis betrifft die Erwerbsarbeit den häuslichen Bereich und wird kaum seitens der Polis reguliert. Zu nennen wäre an der Stelle höchstens das Verbot des Landerwerbs, das Metöken und Fremden eine landwirtschaftliche Tätigkeit auf eigenem Grund und Boden unmöglich macht, sofern sie nicht das Privileg der Enktesis erhalten haben. Dass es der Polis hier nicht um die Regulierung eines Arbeitsmarktes geht, bedarf keiner Erwähung.

Die grundlegenden Unterschiede zwischen Athen und modernen Staaten hinsichtlich des Rechtsstatus von Bürgern und Nichtbürgern und ihrer Position vor Gericht sind besonders auf das Spezifikum zurückzuführen, dass das athenische Gerichtswesen in höherem Grade politisch geprägt ist, so dass sich das Fehlen politischer Rechte hier weitaus stärker manifestiert. Wer kein Bürger ist, befindet sich zunächst einmal in einer prekären Lage: Sein Status hängt davon ab, ob er als Metöke anerkannt ist oder ob es sich um einen Fremden handelt. In letzterem Falle ist für ihn entscheidend, ob ein Rechtshilfevertrag zwischen seiner Heimatpolis und Athen besteht bzw. ob er bei Bedarf auf Unterstützung durch einen Proxenos hoffen kann. In modernen Demokratien herrscht dagegen die Vorstellung vor, dass auch Nichtbürger als Menschen über Rechte verfügen — unabhängig davon, welche gesetzlichen Bestimmungen in dem jeweiligen Land gelten und welche vertraglichen Vereinbarungen zwischen diesem und dem Heimatland des Betroffenen existieren.

Abweichungen sind weiterhin im Hinblick auf Erwartungen an das Verhalten gegenüber der Familie zu erkennen. Solche sind in modernen Staaten nicht konstitutiv für die Staatsbürgerschaft. In dem Zusammenhang ist vor allem bedeutsam, dass speziell westliche Demokratien keine religiös begründeten Erwartungen an ihre Bürger stellen.

VII. Neubürger

In welchem Grade Neubürger gegenüber gebürtigen Bürgern in Athen benachteiligt sind, ist nicht ganz leicht einzuschätzen. Hinweise darauf, dass Personen, die durch Volksbeschluss zu Bürgern werden, möglicherweise gegenüber anderen Bürgern diskriminiert sind, erhalten wir etwa in der Demosthenes zugeschriebenen Rede Apollodors gegen Stephanos: Apollodor bemerkt hier, dass es für gebürtige Bürger genüge, Leiturgien gemäß den Gesetzen zu geben; von Personen wie ihm, die durch das Votum der Volksversammlung zu Bürgern geworden seien, werde hingegen erwartet, dass Leiturgien als dankbare Bezahlung einer Schuld geleistet würden.[42] Demnach wird bei Neubürgern eine spezifische Haltung postuliert, die durch den Reziprozitätsgedanken bestimmt ist. Objektiv fassbare Benachteiligungen von Neubürgern sind darin zu sehen, dass sie keines der Archontenämter bekleiden können und von Priestertümern ausgeschlossen sind,[43] außerdem — zumindest in bestimmten Phasen — wohl von einigen Phratrien.[44]

In den meisten modernen Staaten unterscheidet sich ein Neubürger, dem das Bürgerrecht verliehen worden ist, in seinem Rechtsstatus nicht von einem Bürger, der das Bürgerrecht durch Geburt erlangt hat. Es gibt allerdings Ausnahmen: Spanien und Griechenland etwa differenzieren verfassungsrechtlich zwischen 'Neubürgern' und 'Altbürgern'.[45] In vielen Staaten ist der Entzug der Staatsbürgerschaft durch den Staat beim Vorliegen bestimmter Tatbestände bei Neubürgern leichter als bei Altbürgern. In einigen Ländern verhält es sich so, dass Personen, welche die Staatsbürgerschaft durch

[42] DEM. 45, 78.

[43] Vgl. DEM. 59, 92; dazu A. BILLHEIMER, *op. cit.* (Anm. 9), 15f.; M.J. OSBORNE, *op. cit.* (Anm. 9), 173-6.

[44] Siehe dazu M.J. OSBORNE, *op. cit.* (Anm. 9), 176-81; G. BUSOLT, *op. cit.* (Anm. 31), 228.

[45] Belege finden sich bei B. ZIEMSKE, *op. cit.* (Anm. 8), 207.

Naturalisation erhalten haben, nicht das Amt des Staatsoberhauptes erlangen können.

Sehr viel markanter als rechtliche Differenzen ist in modernen Staaten die Skepsis, die vielen Neubürgern durch die alteingesessenen Bürger entgegengebracht wird. Diese richtet sich vorrangig gegen bestimmte Gruppen von Neubürgern, speziell solche, die aus einem anderen Kulturkreis stammen oder einer anderen Religionsgemeinschaft angehören als die Mehrzahl der Altbürger. Deren Integrationswilligkeit und -fähigkeit wird in der Gesellschaft nicht selten angezweifelt. Vielfach werden Neubürger zudem als Konkurrenten auf dem Arbeitsmarkt gefürchtet. In der Praxis sind sie also oft eher mit sozialen Vorbehalten als mit rechtlichen Diskriminierungen konfrontiert.

VIII. Bürgerrecht und politische Ordnung

Aristoteles vertritt die Auffassung, dass die Definition des Staatsbürgers abhängig von der Art der politischen Ordnung sei. Den Staatsbürger schlechthin, der sich seinem Verständnis nach durch Partizipation am Richten und am Herrschen auszeichnet, sieht er speziell in der Demokratie verwirklicht.[46]

In den aktuellen Debatten finden sich keine derartigen Überlegungen. Sie beschränken sich zumeist auf Europa, die USA und Kanada, selbst wenn sie Globalisierungsfragen mitdiskutieren. Damit wird gewissermaßen vorausgesetzt, dass man bei der Frage nach dem Bürger auf den Bürger in der Demokratie zielt. Allerdings wird der Bürger mehr als Angehöriger eines Rechtsstaates definiert, denn als Mitglied eines demokratisch verfassten Gemeinwesens. Im Vordergrund stehen eher Rechte gegenüber dem Staat sowie Anspruch auf Schutz durch den Staat als direkte Herrschaftsrechte. Der

[46] ARIST. *Pol.* 1275b 3-6.

moderne Bürger steht hier stärker in der Tradition des römischen Bürgers, die das Bürgersein als Rechtsverhältnis begreift, denn in der der griechischen Polis. Ein weiterer Grund für den Umstand, dass die Art der politischen Ordnung nicht in vergleichbarer Weise mit dem Bürgerstatus konnektiert wird, hat damit zu tun, dass das Territorialprinzip in modernen Demokratien von wesentlich größerer Bedeutung für das Staatsbürgerrecht ist. Das gilt nicht nur für solche, die das Bürgerrecht gemäß dem *ius soli* zuerkennen, sondern auch für diejenigen, welche sich am *ius sanguinis* orientieren. Hier kommt der moderne staatsrechtliche Grundsatz zum Tragen, nach dem das Staatsgebiet neben dem Staatsvolk und der einheitlichen Staatsgewalt für den Staat konstitutiv ist.[47] Das trifft nicht allein auf Demokratien zu, sondern kann ebenso mit konstitutionellen oder parlamentarischen Monarchien verbunden werden.

IX. Mehrfachstaatsbürgerschaft

Intensiv diskutiert wird in modernen Demokratien die doppelte Staatsbürgerschaft. Manche Länder zeigen diesbezüglich wenig Bedenken. Das gilt besonders für solche, aus denen eine vergleichsweise große Zahl von Bürgern emigriert und dauerhaft im Ausland lebt. Ein Beispiel ist die Türkei, die Mehrstaatigkeit nicht nur im Ausnahmefall, sondern grundsätzlich gestattet.[48] Viele Staaten aber fordern die Aufgabe der bisherigen Staatsbürgerschaft als Voraussetzung für die Naturalisation. Einige praktizieren dies rigoros, etwa die skandinavischen Länder, andere zeigen sich moderater. Gar nicht verlangt wird

[47] Die Drei-Elemente-Lehre Jellineks wird auch heute — wenn auch mit Modifikationen — noch vielfach vertreten. Siehe G. JELLINEK, *Allgemeine Staatslehre* (ND der 3. Aufl. von 1928 [Darmstadt 1959]), 394f., 406f., 427f.; zum Rang Jellineks in der Staatslehre vgl. J. KERSTEN, *Georg Jellinek und die klassische Staatslehre* (Tübingen 2000), 455-69.

[48] Zu den Belegen siehe B. ZIEMSKE, *op. cit.* (Anm. 8), 145.

der Verzicht auf die frühere Staatbürgerschaft in der Schweiz und Großbritannien, in klassischen Einwanderungsländern wie den USA oder Kanada und eben in der Türkei.

Mehrfachstaatsbürgerschaften werden heute aus verschiedenen Gründen als problematisch bewertet: Sie können die Integration der Betreffenden in das Land, in dem sie ihren Lebensmittelpunkt haben, erschweren, weil sie sich in geringerem Maße als andere mit diesem identifizieren. Besonders aber werden Pflichtenkollisionen erörtert, die gerade im Bereich der Wehrpflicht entstehen können. Auch beim Recht des Staates, einem Bürger diplomatischen Schutz zu gewähren, kann es zu Konflikten kommen.

In letzter Zeit hat sich die Einstellung zu der Thematik aber in vielen Staaten etwas gewandelt. Das ist speziell darauf zurückzuführen, dass die Interessen der Betroffenen stärker in den Blick genommen werden: Heute wird — anders als in vielen Ländern noch vor einigen Jahrzehnten — nicht mehr erwartet, dass die Beziehungen zum Herkunftsland abgebrochen werden. Hinzu kommt, dass es Staaten gibt, die ihre Staatsbürger gar nicht entlassen. Ein Vorschlag, wie möglichen Problemen begegnet werden kann, ist, zwischen einer 'herrschenden' und einer 'ruhenden' Staatsbürgerschaft zu unterscheiden. Entsprechende bilaterale Verträge sind bislang etwa zwischen Spanien und mehreren südamerikanischen Staaten abgeschlossen worden.[49] Sonderregelungen gelten zum Teil für Migrantenkinder: Sie können in einigen Ländern zwei Staatsbürgerschaften besitzen, solange sie minderjährig sind.

Im klassischen Griechenland scheint in der Zugehörigkeit zu zwei oder mehr Bürgerschaften kein Problem gesehen worden zu sein, zumindest nicht in den Fällen, in denen der Betreffende in nur einer Polis lebt und auch nur hier politisch aktiv ist.[50]

[49] Zu Quellen und Literaturhinweisen siehe K. HAILBRONNER, *op. cit.* (Anm. 28), 78.

[50] Dazu etwa A. MAFFI, "La citoyenneté en Grèce et à Rome", in *Citizenship and Immigration*, ed. by V. FERRARI, TH. HELLER, E. DE TULLIO (Milano 1998), 19-26, hier 22.

X. Verlust der Staatsbürgerschaft

In Athen ist es prinzipiell möglich, das Bürgerrecht zu verlieren. Das kann insbesondere infolge eines Diapsephismos geschehen, durch eine *graphē xenias* oder infolge eines Volksbeschlusses zugunsten einer Bürgerrechtsverleihung mittels *graphē paranomōn*.[51] Zudem begegnet das Phänomen der Atimie, bei dem die Forschung diskutiert, ob wir es hier zumindest in einigen Fällen mit einem Verlust des Bürgerrechts zu tun haben. Orientieren wir uns am Kriterium der politischen Partizipation, dann könnte man den Effekt zumindest der vollständigen Atimie in der Weise einschätzen.[52] Das wird bestärkt durch die Tatsache, dass solche *atimoi* auch von der Wehrpflicht ausgenommen sind.[53] Hinzu kommt, dass sie von den Kulten ausgeschlossen sind und sich von der Agora fernzuhalten haben. Auch ist ihnen untersagt, eine Klage einzureichen oder sich vor Gericht zu verteidigen. Dagegen spricht aber etwa, dass die Betreffenden mit großer Wahrscheinlichkeit — im Unterschied zu Metöken und Fremden — eine Ehe mit einer Athenerin eingehen dürfen.

In modernen Demokratien haben wir nichts Vergleichbares zu konstatieren. Eine erwachsene Person kann zwar in der Ausübung der bürgerlichen Rechte eingeschränkt sein — das gilt etwa für Strafgefangene oder auch für Menschen, die aufgrund von Erkrankungen nicht geschäftsfähig sind; deren Staatsbürgerschaft bleibt davon aber unberührt. Die Staaten sind prinzipiell interessiert, dass keiner ihrer Bürger in den

[51] Ein prominentes Opfer letzterer Praxis ist der Redner Lysias; siehe PLUT. *Mor.* 835f-836a *Vit. X orat.*; zu den drei genannten Verfahren siehe M.H. HANSEN, *op. cit.* (Anm. 9), 96.

[52] Kahrstedt spricht von 'Suspendierung des Bürgerrechts' (U. KAHRSTEDT, *Staatsgebiet und Staatsangehörige in Athen* [Stuttgart 1934], 106); E. SZANTO (*op. cit.* [Anm. 10], 61) geht davon aus, dass das Bürgerrecht durch Verurteilung zur Atimie effektiv verloren geht. G. BUSOLT (*op. cit.* [Anm. 31], 231), spricht vom 'Verlust der bürgerlichen Berechtigung'; zu der Thematik insgesamt auch M.H. HANSEN, *Apagoge, Endeixis and Ephegesis* (Odense 1976), bes. 55, 61f.

[53] U. KAHRSTEDT, *op. cit.* (Anm. 52), 117.

Zustand der Staatenlosigkeit gerät. Begründet wird dies besonders mit der Fürsorgepflicht des Staates gegenüber seinen Bürgern, weniger damit, dass ein Austritt aus dem Staatsverband aus staatlichem Interesse vermieden werden soll. Ein solcher Austritt ist nur dann möglich, wenn die Staatsangehörigkeit eines anderen Landes beantragt ist, so dass die Betreffenden nicht staatenlos werden.

Ein willkürlicher Entzug der Staatsangehörigkeit wird heute als menschenrechtswidrig eingeschätzt. Dennoch ist es völkerrechtlich noch immer möglich, dass ein Staat einem Bürger die Staatsbürgerschaft nimmt, etwa wenn er sich dauerhaft im Ausland aufhält, sich der Wehrpflicht entzieht, in die Armee, den öffentlichen Dienst oder ein Wahlamt eines anderen Staates eintritt oder auch infolge von Strafverurteilung.[54] Dies wird allerdings kontrovers diskutiert, insbesondere wenn es um tatsächlichen Entzug geht, der vom Staat vorgenommen wird, nicht durch ein Ausscheiden, das auf Initiative des Betroffenen und freiwillig zustande kommt. Die Allgemeine Erklärung der Menschenrechte der UN postuliert ein Verbot des willkürlichen Entzuges der Staatsangehörigkeit;[55] jedoch hat dies lediglich empfehlenden Charakter. Die meisten Staaten kennen neben dem Verlust gleichwohl auch den Entzug. Ausnahmen sind beispielsweise Schweden, Portugal oder auch die Bundesrepublik Deutschland, deren Haltung geprägt ist durch die Erfahrung der Zwangsausbürgerungen während des Nationalsozialismus.

Eine einfache Auswanderung hat weder in der attischen Demokratie noch in modernen Gemeinwesen Auswirkungen auf das Bürgerrecht.[56] Zu erwähnen sind schließlich noch das

[54] Eine Auflistung der Kriterien mit Gesetzeshinweisen bietet B. ZIEMSKE, *op. cit.* (Anm. 8), 70.

[55] Resolution 217 (III) Universal Declaration of Human Rights, in: United Nations, General Assembly, Official Records, third Session (part I) Resolutions (Doc. A/810, S. 71).

[56] Athener wie Konon, Iphikrates oder Chabrias haben jahrelang im Ausland gelebt, galten aber selbstverständlich weiter als athenische Bürger (hierzu U. KAHRSTEDT, *op. cit.* [Anm. 52], 90).

Exil und die Koloniegründung, die in Griechenland von zentraler Bedeutung sind, in modernen Demokratien aber freilich nicht mehr begegnen: Wie es sich mit denen verhält, die als Exilierte in anderen Poleis leben, ist umstritten. In klassischer Zeit bleibt das Bürgerrecht bei diesen wohl in der Regel unberührt. Unklar ist, ob hier zu differenzieren ist zwischen Personen, die etwa wegen Verletzung mit Tötungsintention zur *phyge* verurteilt sind, solchen, die sich quasi freiwillig ins Exil begeben, um einer Verurteilung beispielsweise wegen Mordes zu entgehen, und denen, die sich aus politischen Gründen im Exil aufhalten.[57] Eine Besonderheit liegt bei der Gründung einer Kolonie vor, wo das Bürgerrecht der Metropole eingebüßt, aber zugleich das der Apoikie erworben wird.[58] Falls geregelt ist, dass Siedler unter bestimmten Bedingungen in die Mutterpolis zurückkehren dürfen, können sie ihr früheres Bürgerrecht möglicherweise wieder in vollem Umfang nutzen. Ein bekanntes Beispiel, das dies belegt, ist der Volksbeschluss der hypoknemidischen Lokrer zur Koloniegründung in Naupaktos.[59]

XI. Zusammenfassung

Wir haben also hinsichtlich des Bürgerrechts signifikante Parallelen wie Differenzen zwischen dem klassischen Athen und modernen Demokratien zu konstatieren.

Beginnen wir mit den Unterschieden: Sie sind insbesondere auszumachen in der Art und Weise der Beantragung und Verleihung des Bürgerrechts, in der Möglichkeit der Aberkennung, im Umgang mit dem Besitz mehrerer Bürgerrechte, in der Rolle von Familie wie von Religion in dem Zusammenhang, in der Beurteilung der politischen Konsequenzen von Bürgerrechtsverleihungen, in den Motiven des Gemeinwesens bei der

[57] Siehe dazu U. KAHRSTEDT, *op. cit.* (Anm. 52), bes. 91-103.
[58] Zu dem Phänomen E. SZANTO, *op. cit.* (Anm. 10), 64.
[59] Siehe zu dem Beispiel E. SZANTO, *op. cit.* (Anm. 10), 62.

Vergabe des Bürgerrechts und im Rechtsstatus von Bürgern gegenüber Nichtbürgern. Die Differenzen lassen sich zurückführen auf wesentliche Unterschiede zwischen griechischen Poleis und modernen Staaten überhaupt: Für unsere Thematik relevant sind besonders das Verhältnis von Territorialprinzip und Personenverband, die Rolle von Verwaltungsakten gegenüber Entscheidungen der gesetzgebenden Instanzen, die Regelungsbereiche des Staates, die Bedeutung internationaler Abkommen und multilateraler Verträge sowie allgemeine Rechtsvorstellungen. Zu letzterem ist vor allem die Idee der unveräußerlichen Rechte des und der Einzelnen zu nennen, die als Menschenrechte konzipiert und nicht an den Bürgerstatus in einem bestimmten Staat gebunden sind.

Eine zentrale Gemeinsamkeit zwischen Athen und modernen westlichen Demokratien ist darin zu sehen, dass ein unmittelbarer Zusammenhang zwischen dem Bürgerrecht und der Berechtigung zur politischen Partizipation besteht — auch wenn die Teilhabe freilich sehr unterschiedlich gestaltet ist. In dem Aspekt ist in beiden Fällen der fundamentale Unterschied zwischen Bürgern und Nichtbürgern zu sehen. Dies scheint mir keineswegs selbstverständlich — insbesondere angesichts der Tatsache, dass gegenwärtig in wissenschaftlichen Arbeiten wie auch in Debatten in der breiteren Öffentlichkeit nicht selten die Ansicht begegnet, dass die Staatsbürgerschaft in heutigen Staaten besonders um materieller Vorteile willen erstrebt werde, also auch in diesem Bereich eher der *homo oeconomicus* als der *homo politicus* in Erscheinung trete.

Eine zweite Parallele ist in der restriktiven Handhabung der Bürgerrechtsverleihung in Athen und einigen modernen Staaten zu sehen. In der Moderne begegnet sie primär in solchen Ländern, bei denen sich die Nationenbildung vor der Staatsbildung vollzogen und sich auch ein festes Staatsgebiet erst vergleichsweise spät herausgebildet hat. Diese betonen die ethnische Identität der Bevölkerung, die sich besonders in kulturellen Phänomenen äußert. Die Forschung hat das immer wieder etwa für Deutschland betont — besonders im Unterschied zu

den USA oder auch zu Frankreich.[60] Die Gründe für die Zurückhaltung bei der Verleihung der Staatsbürgerschaft sind damit andere als in Athen: Sie sind nicht im strengen Sinne politischer Natur, d.h. haben nichts zu tun mit den Spezifika der politischen Entscheidungsprozesse im Land, sondern sind eher kulturell bedingt. Das Zusammengehörigkeitsgefühl wird in derartigen Ländern weniger über gemeinsames politisches Engagement als vielmehr durch verbindende kulturelle Momente gewonnen.[61] Das zeigt sich nicht zuletzt darin, dass hier die Einbürgerung vorrangig solcher Personen skeptisch betrachtet wird, die in Lebensformen und Religionszugehörigkeit von der Mehrheitsbevölkerung abweichen. Weitere Beispiele sind Staaten, die sich auf der Basis ethnischer Zugehörigkeit neu formieren, wie es etwa in den Balkanstaaten nach der Auflösung des Osmanischen Reiches geschehen ist und sich auch aktuell nach dem Zerfall Jugoslawiens wieder beobachten lässt.[62] Auch hier haben wir es mit dem Phänomen zu tun, dass

[60] Hierzu CH. JOPPKE, "Einwanderung und Staatsbürgerschaft in den USA und Deutschland", in *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 51 (1991), 34-54, bes. 37; R. BRUBAKER, *Citizenship and Nationhood in France and Germany* (Cambridge, Mass. 1992), bes. 179-89; E.-W. BÖCKENFÖRDE, "Staatsbegriff und Nationalitätskonzept" in *Staat, Nation, Europa. Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie*, hrsg. von E.-W. BÖCKENFÖRDE (Frankfurt am Main 1999), 59-67; D. GOSEWINKEL, "Citizenship in Germany and France at the Turn of the Twentieth Century: Some New Observations on an Old Comparison", in *Citizenship and National Identity in Twentieth-Century Germany*, ed. by G. ELEY, J. PALMOWSKI (Stanford 2008), 27-39, bes. 39.

[61] Damit soll selbstverständlich nicht gesagt werden, dass kulturelle Gesichtspunkte für die bürgerliche Identität im klassischen Athen nicht relevant seien. Um Unterschied zu den genannten modernen Staaten sind sie in Athen aber wohl von geringerer Bedeutung für den Umgang mit dem Bürgerrecht als die Art der politischen Ordnung.

[62] Siehe dazu H. SUNDHAUSEN, "Unerwünschte Staatsbürger. Grundzüge des Staatsangehörigkeitsrechts in den Balkanstaaten und Rumänien", in *Staatsbürgerschaft in Europa. Historische Erfahrungen und aktuelle Debatten*, hrsg. von CHR. CONRAD, J. KOCKA (Hamburg 2001), 193-215, bes. 208f.

Gemeinwesen versuchen, politische Identität über kulturell-ethnische zu gewinnen, was oftmals einen rigiden Umgang mit dem Bürgerrecht nach sich zieht. Der Hintergrund ist gleichwohl wiederum ein grundsätzlich anderer als in Athen.

Welches ist nun der Nutzen einer derart komparatistischen Betrachtung? Er liegt meiner Ansicht nach weniger darin, bei gegenwärtigen Orientierungsbedürfnissen Bezugnahmen auf die Antike zu ermöglichen, als darin die Spezifika der griechischen Polis wie des modernen Staates im Umgang mit dem Bürgerrecht zu beleuchten und auf ihre Ursachen hin zu erforschen. Dies verhilft zu einem vertiefteren Verständnis beider Typen von Gemeinwesen, als wenn man seinen Fokus ausschließlich auf einen von ihnen richtete.

DISCUSSION

M. Hansen: With the differences which you correctly point out — and summarise on pp. 124-7 — citizenship is today in important respects what it once was in the ancient Greek *Polis*: a person's juridically defined, inherited membership of a state in virtue of which that citizen enjoys a number of social, economic and — in particular — political privileges in that state which a non-citizen living in the state is deprived of or can only enjoy to a limited extent — I think we agree on that.

You apply a comparative method (p. 100). Allow me to add a historical perspective. In antiquity this form of political citizenship was a membership of the *Polis* both in the sense of state and city. It disappeared towards the end of Antiquity; and when citizenship appeared again in the Middle Ages it was as citizenship of a city, not a state. The citizens were the privileged inhabitants of a city and together with clergy, nobility and peasants they formed one of the orders of medieval society. In the full political sense citizenship was found only exceptionally, *viz.* in the small city-states in Italy, Switzerland and south Germany.

But since the French Revolution citizenship has once again expanded into a political concept that includes all the native inhabitants of a state and not just the privileged part of the city-dwellers. Once again it is the political aspect that is the core of the concept of citizenship. On the other hand, citizenship in the sense of belonging to a privileged urban elite has disappeared, see M.H. Hansen, *Polis. An Introduction to the Ancient Greek City-State* (Oxford 2007), 111.

In Europe the French Revolution was the pivot of the revival of political citizenship. The leaders of the revolution wanted to change the French people from being subjects of a king to

becoming citizens of a nation, and the classical tradition played an important role in the development. The revolutionary leaders wanted a revival of ancient political citizenship. In this respect there is an intriguing parallel between citizenship and democracy. Both existed in the Greek *Polis* world, disappeared towards the end of Antiquity, but re-appeared with the American and French revolutions, and are today interconnected key concepts in modern political systems.

From the late 18th until the mid 20th century the privileges connected with citizenship were gradually extended and came to comprise civil rights (protection of person and property etc.), freedom rights (freedom of speech, movement, association, religion, etc.), economic rights (benefits, public pensions, free access to public health service and education etc.) and political rights (voting rights, the right to stand for public office etc.). Since the mid 20th century civil, freedom and economic rights have changed their status from citizen rights to human rights enjoyed by all inhabitants of a country and no longer reserved for citizens (see your pp. 99, 116, 125). Human rights were a key concept in the last decades of the 18th century. Note, however, the American Bill of Rights of 1791. But between ca. 1800 and 1945 there was little or no mention of human rights. However, many of the constitutions of the 19th and 20th centuries included chapters about the rights of citizens. Similarly, the ancient Athenians had no concept of human rights but a number of the rights that today are protected as human rights were citizen rights in ancient Athens as they were in Europe in the 19th and early 20th centuries. No citizen could be executed without due process of law (Isoc. 15, 22; Lys. 22, 2) and *medena akriton apokteinai*) was felt to be a right which all citizens enjoyed (Lys. 19, 7; Dem. 25, 87). Another rule forbade torture of Athenian citizens (Andoc. 1, 43). The Athenian democracy further provided some protection of a citizen's home. Demosthenes was severely criticized by Aischines for breaking into a house and arresting the alleged traitor, Antiphon, without a warrant, i.e. a *psephisma* of the

People (Dem. 18, 132; 22, 51-2.). Finally in Aristotle's *Constitution of Athens* we are told that as soon as the Archon enters upon his office, he proclaims through the public herald that whatever a person possessed before he entered upon his Archonship he will have and possess until the end of his term. This is the ancient Athenian way of protecting the right of private property (Arist. *Ath.* 56, 2), see M.H. Hansen, "The Ancient Athenian and the Modern Liberal View of Liberty as a Democratic Ideal", in J. Ober, C. Hedrick, *Dēmokratia* (Princeton 1996), 96-8.

K. Piepenbrink: Haben Sie herzlichen Dank für diesen weitgespannten historischen Abriss, der eine andere Perspektive auf das von mir behandelte Thema bietet. Er zeigt zentrale Anknüpfungspunkte auf, welche die meisten Autoren, die sich gegenwartsorientiert mit dem Sujet beschäftigen, nicht bemerken. Besonders anregend scheint mir die Beobachtung, dass einige der Rechte, die in der griechischen Polis den Rang von Bürgerrechten haben, heute als Menschenrechte konzipiert werden. Für wichtig halte ich auch in diesem Zusammenhang die Unterscheidung von 'Tradition' und 'Inspiration', die Sie in Ihrem Einleitungsbeitrag vornehmen, und die damit eng verbundene Differenzierung zwischen expliziter Rezeption und Wirkung, die den jeweiligen Zeitgenossen nicht bewusst geworden ist, sowie strukturellen Parallelen, die von beidem abzugrenzen sind.

P. Schmitt Pantel: Vous signalez les différences entre le droit de cité à Athènes et dans les démocraties modernes, il me semble que deux autres traits caractérisent le droit de cité athénien et le différencient des états modernes, sans être toutefois spécifique à la démocratie: le droit de posséder la terre et le droit de sacrifier. Qu'en pensez-vous?

K. Piepenbrink: In der Tat habe ich die beiden Rechte nur kurz gestreift. Sie sprechen m.E. ein grundsätzliches Problem

der modernen Forschungen zum attischen Bürger an. Der Fokus hat hier lange auf dem Recht zu politischer Partizipation im Sinne von Teilhabe an Herrschaftsinstitutionen und der Frage nach 'Rechtsstaatlichkeit' gelegen, während viele andere Aspekte, insbesondere jener der Religion, in den Hintergrund geraten sind. Das mag damit zusammenhängen, dass die Forschung sich über weite Strecken von modernen staatsrechtlichen Konzeptionen hat leiten lassen. Hinzu kommt sicher auch, dass man sich hier lange primär auf die 'Politik' des Aristoteles gestützt hat, wo ja religiöse Gesichtspunkte kaum zur Sprache kommen. Mir scheint sich das in jüngster Zeit aber etwas zu ändern, angeregt durch Ihre Studien sowie — speziell zur Bürgerrechtsthematik — auch durch die Arbeiten von J. Blok.

P. Schmitt Pantel: Une brève étude du processus historique qui a abouti au droit de cité à Athènes permettrait-elle de préciser son caractère démocratique?

K. Piepenbrink: Ja, ich denke, dass ein Blick auf die historische Entwicklung des Bürgerrechts in Athen dazu hilfreich sein könnte. Das gilt besonders für die These, dass die restriktive Handhabe des Bürgerrechts auf die spezifischen Merkmale der Demokratie zurückzuführen ist und nicht für die Polis generell gilt. In archaischer Zeit wird bei der Aufnahme neuer Bürger wohl großzügiger verfahren — wenn wir an das sog. 'Bürgerrechtsgesetz' Solons wie dann auch besonders an die Herrschaftspraxis der Peisistratiden und die Maßnahmen des Kleisthenes denken. Freilich müssen wir insbesondere was das Solon zugeschriebene Gesetz betrifft sehr vorsichtig sein, da wir weder über dessen Entstehung noch über seine Anwendung zuverlässige Informationen haben. Ein interessanter Aspekt des solonischen Gesetzes ist, dass hier, wo an tatsächliche Ansiedlung von Fremden in Athen gedacht ist, das Moment der Loyalität gegenüber der neuen Polis und der Gesichtspunkt der Integration eine größere Rolle spielen als im von mir betrachteten Zeitraum.

In klassischer Zeit wird die Aufnahme von Neubürgern offenbar stärker problematisiert. Einen Hinweis hierauf gibt u.a. Aristoteles, wenn er bemerkt, dass in vielen Poleis das Bürgerrecht eingeschränkt werde, sobald die Bürgerschaft einen ausreichenden Umfang erlangt habe (siehe u.a. Arist. *Pol.* 1278 a 30ff.). In Athen scheint sich die Verleihung des Bürgerrechts an größere Gruppen weitestgehend auf die Phase des Peloponnesischen Krieges zu beschränken.

In hellenistischer Zeit dann nehmen die Chancen, das attische Bürgerrecht zu erlangen, gegenüber der klassischen Zeit signifikant zu: Die Zahl der Bürgerrechtsverleihungen steigt, wie M.J. Osborne in seiner groß angelegten Studie gezeigt hat, ohne aber zu einem Massenphänomen zu werden. Voraussetzung für die Gewährung des Bürgerrechts ist nicht mehr *andragathia eis ton demon*, sondern es besteht die Möglichkeit, durch Absolvierung der Ephebie Mitglied des Bürgerverbandes zu werden. Wirtschaftliche Überlegungen wie Handelsinteressen scheinen in dem Zusammenhang nun eine größere Rolle zu spielen. Hinzu kommt die Operation mit dem Bürgerrecht bei der Formung zwischenstaatlicher Beziehungen, besonders bei der Gestaltung der Isopolitie.

O. Murray: I welcome your comparison between Athenian and modern conceptions of citizenship. Since the nineteenth century it has been normal to use the Roman concept of citizenship (which was of course far more developed than anything in Greece) to emphasise the similarities and difference between the ancient and the modern world; and it has often been held that the Roman definition in terms of legal status rather than birth, leading to the idea of universal citizenship, is the origin of conceptions of membership of the Christian community, and so of all later western attempts to define citizenship. This was a very popular view with liberal imperialists in the nineteenth and twentieth centuries in both Britain and France. But this universalising tendency in defining citizenship has been largely abandoned in the modern world with the collapse of

the great overseas empires, and the unwillingness of the former imperial powers to grant their erstwhile subjects full citizenship. Now there is more and more a tendency to deny citizenship even to those white settlers from former colonies who can prove their 'patrial status', or to those who descend from mixed marriages and are born abroad, let alone to those seeking to assert their human right to migrate. In the present generation the problems of economic migration and refugee status have supervened on the phenomenon of the *Gastarbeiter* to make all advanced countries impose draconian restrictions on those seeking citizenship, and to make the problem of citizenship the most contested area of modern democratic politics. Our present experience is far closer to the increasing restrictions on the right to citizenship imposed by democratic Athens than to Roman imperial dreams of the universal brotherhood of mankind. Only perhaps states founded on the *Einwanderungsprinzip* like the United States of America retain even a vestige of the Roman conception.

My problem with your attempt at comparison is that I believe that every modern state has for historical reasons a quite different conception of citizenship in law and in fact; and the attempt to develop a concept of European citizenship has failed completely to unify our conceptions of citizenship even within the European community. In Britain the notion of integration within the host nation has been abandoned in favour of a conception of multi-cultural ethnic diversity: the idea of a test of 'Britishness' or even of the ability to speak English is greeted with derision on both left and right. The number of so-called 'illegal immigrants' is unknown, since for fear of deportation they do not dare to claim any of the rights available to legal citizens. More and more we are being driven to a situation in which, as you say, we are compelled to distinguish between human rights and the rights of citizenship for groups who live together in the same community. I think Aristotle would have found it impossible to understand the British conception of citizenship.

Perhaps the only modern state that has a conception of citizenship as clear as that of Athens is Israel. Despite its status as a religiously or ethnically restricted *Einwanderungsstaat*, Israel possesses a defined body of citizens ruling through a democratic system, and an equally clear subordinate metic class of the former inhabitants of Palestine, with limited citizen rights, together with of course a major problem of displaced refugees which has analogies with the slave population of Athens.

I do suspect that we all need to consider very carefully Aristotle's conception of a citizen body based on forms of *koinonia*; it may be that he can help us solve the problem of the dissolution of community values in the modern state. Or it may be that we are living through the experience of the break-up of the nation-state, and that we should return to the Roman conception of universal *civitas* — in which case the answer more probably lies in the experience of the United States of America, not in Athens, nor in Europe nor in Israel.

K. Piepenbrink: Sie sprechen viele wichtige Punkte an. Mein Eindruck bei der Beschäftigung mit dem Bürgerrecht in modernen Staaten ist ebenfalls, dass trotz zahlreicher internationaler Abkommen, welche die Staatsbürgerschaft tangieren, nach wie vor sehr viele Differenzen in der Ausgestaltung des Staatsbürgerrechts auszumachen sind, die ihre Ursachen in den Spezifika der Geschichte des jeweiligen Landes haben. Das gilt selbst für die Mitgliedstaaten der EU. Dies ist selbstverständlich ein Umstand, der einen Vergleich methodisch erschwert. Ich habe versucht, einige Grundmerkmale aufzuspüren und zugleich einige der grundsätzlichen Differenzen aufzuzeigen. Dabei stütze ich mich auf entsprechende komparatistische Studien, die von Juristen, Soziologen und Politologen angestellt worden sind. Sie konzentrieren sich zumeist auf die Mitgliedstaaten der Europäischen Union, die USA und Kanada, was dazu führt, dass etwa Israel mit seinen Besonderheiten gar nicht in den Blick gerät. Alternativ hätte ich mich auf einen einzelnen modernen Staat konzentrieren und diesen mit der Polis der

Athener vergleichen müssen, was aber methodisch mindestens so problematisch gewesen wäre, eben weil es keinen 'Modellfall' gibt.

Der Hinweis auf das aristotelische Konzept der *koinonia* scheint mir auch hilfreich, um das Moment der Identifikation mit der Bürgerschaft und der aktiven Teilhabe der Bürger herauszustreichen. Unter diesem Aspekt wird der aristotelische Ansatz aktuell von verschiedenen Autoren rezipiert. Ob man damit den Überlegungen des Aristoteles mit all ihren philosophischen Implikationen gerecht wird, ist freilich eine andere Frage.

Die Möglichkeit des Rekurses auf das römische Modell, das Sie zum Schluss ansprechen, wird gegenwärtig vielfach erörtert, besonders wenn es um supranationale Ansätze geht. Gleichwohl begegnet aber auch dieses nur einem Teil der Herausforderungen, mit denen moderne Staaten konfrontiert sind. Man wird abwarten müssen, wie sich die Diskussionen hierzu entwickeln.

IV

OSWYN MURRAY

MODERN PERCEPTIONS OF ANCIENT REALITIES FROM MONTESQUIEU TO MILL

We tend to forget how swift the transitions of political thought are, as political forces attempt to justify their current obsessions by means of past ideas and past practices. The modern cult of democracy is in fact extraordinarily recent: its appearance as the most ideal form of government is essentially a product of the Cold War and the propaganda of both the Soviet Union and the United States, who made 'democratic government' the central issue of their ideological conflict; from that war of ideas the alleged "2500th anniversary of the birth of democracy" in 1992/3 was the culmination of this tendency to view ancient democracy as an inspiration for modern democracy.

Nowadays virtually every modern state is a democracy; and one may almost measure the distance from true democratic ideals by the official insistence on that fact. While many countries are content with designating themselves as 'republics', the addition of superfluous adjectives such as 'People's Republic' (of China, or Bangladesh), or 'Socialist Republic' (of Vietnam), does not add conviction to their credentials as defenders of western style liberty; whereas the addition of the word 'Democratic', as in the Democratic Republic of the Congo or the Deutsche Demokratische Republik or the Democratic Socialist Republic of Sri Lanka may positively suggest opposition to such values, while the ultimate 'Democratic People's Republic

of (North) Korea' recalls indeed the famous remark of Voltaire: "le saint empire romain n'était ni saint, ni romain, ni empire".[1] The conclusion might seem to be that the less attention paid to personal freedom, the more corrupt and tyrannical the regime, the more it insists on its democratic credentials; or perhaps this prevailing nomenclature simply calls attention to the fact that democracy and liberty are (as philosophers are fond of observing) fundamentally incompatible, like liberty, equality and fraternity. In contrast countries designated officially as 'kingdoms' seem to have a more healthy democratic record, as in Denmark, the Netherlands or the United Kingdom, or even Lesotho, Saudi Arabia, Siam or Thailand.

But until the new age of American domination, in the twentieth century democracy was not usually regarded as in itself an ideal form of government; and it has always been seen as a far more loaded and ambiguous concept than the easy comparison between modern America and ancient Athens might suggest. It is true that for a brief period at the end of the First World War, under American influence, democracy was proclaimed as the preferred form of government for the newly independent countries of the Austro-Hungarian Empire.[2] But within a decade the word disappeared from practical political discourse, as it became clear that democracy meant the resurgent nationalism of the middle European states, the persecution and enforced migration of minorities, and the free democratic elections that brought into power Fascism, National Socialism and the left-wing Spanish Republic, in each case against the wishes of well entrenched and substantial minorities, to cause a decade of armed conflict. For old-fashioned liberals of this period like

[1] I note that the Liberal Democratic Party which ruled Japan for 54 years was similarly "once described as neither liberal nor democratic, and not even really a party" (*The Independent* Monday 31st August 2009, 16).

[2] See M. MAZOWER, *Dark Continent: Europe's Twentieth Century* (London 1998), esp. chapter I.

Benedetto Croce the central ideal of modern political thought was not democracy but 'liberty', which was often seen as antithetical to and threatened by modern 'democracy'.

This can be illustrated for ancient history by a text shortly to be published in its original English version,[3] the eight lectures given by the young refugee Arnaldo Momigliano in Cambridge in spring 1940, in that tense period known in Britain as "the phoney war", when many hopes and dreams were entertained — before the collapse of Dunkirk and of the French resistance, the appointment of Churchill as Prime Minister, the entry of Italy into the war, and the Battle of Britain. The lectures are entitled *Peace and Liberty in the Ancient World.* Their theme is the philosophical one inspired by Benedetto Croce, of the unity of Greek and Roman history as an expression of the fundamental truths of western society. In these lectures Momigliano argued that the Greeks understood and indeed created the western ideal of liberty, but could not reconcile it with the idea of peace; the Romans, who inherited something of the Greek idea of liberty, lost it in the pursuit of peace. These two great ideals of western man, of peace and liberty, were in perpetual conflict until they were reconciled by Christianity: only in Christianity could peace — the peace of God — be reconciled with the idea of the freedom of the individual. For anyone brought up in the empirical tradition of positivist historical research, this was a completely alien way of looking at ancient history, as the interplay between great concepts, rather than as the history of events and the political and military power struggles of a long dead civilization; and there is no evidence that the miniscule audience of seven senior members of Cambridge University who faithfully attended the lectures could understand it, whether because of Momigliano's halting English and

[3] A. MOMIGLIANO, *Decimo Contributo alla storia degli studi classici e del mondo antico,* a cura di R. DI DONATO (Roma 2010).

heavy Piedmontese accent, or simply because for them history meant something quite different: as he said in 1972, "when I arrived in Oxford in 1939, it was enough to mention the word 'idea' to be given the address of the Warburg Institute".[4]

To a modern audience there is one obvious omission in this account, as Franco Basso pointed out to me when I presented an account of these lectures to a group of Cambridge graduate students in theology and classics in October 2006: there is no discussion of the phenomenon of Greek democracy. The rise of democracy and its explanation in relation to Athenian cultural achievements is indeed virtually ignored. This is despite the fact that the decline and fall of democracy was one of the most fundamental issues of the 1930s: in Italy Momigliano and Piero Treves along with other members of the school of Gaetano De Sanctis battled over the significance for liberty (but not for democracy) of the conflict between Demosthenes and Philip; while in England I well remember Peter Brunt describing to me the huge importance that this ancient version of a modern conflict had for his generation of students. The absence of democracy itself from this intense debate reflects the distance between ourselves and the inter-war generation; so swiftly does the significance of apparently stable political concepts change — and who is to say that our present perceptions are any more true than those of a previous or a future generation?

Benedetto Croce (and his disciple Robin Collingwood) were the last liberal representatives of the belief that history and philosophy must be studied together, if either is to have any meaning: if the two disciplines are now in contact at all, it is in the realm of methodology with Michel Foucault and the modern French school, rather than in political thought, which has lost its way with the collapse of the serious study of Marxism. It is

[4] A. MOMIGLIANO, *Sesto Contributo alla storia degli studi classici e del mondo antico* (Roma 1980), 329.

in an effort to combat the consequences of this vacuum that it seems to me important to return to the one period of western culture where history and philosophy marched together in an attempt to understand the nature of human society — the Enlightenment.

The eighteenth century is often seen as a period whose historical ideas were vitiated by a belief that human nature is constant and that therefore the study of history is to be understood as a lesson for life (*historia magistra vitae*). The conflict between the Ancients and the Moderns was indeed predicated on the shared assumption that human nature does not fundamentally change, and that the question of the relevance of the ancient world to the modern should be discussed on the assumption that the past might (or might not indeed) be relevant as a model for the future: for the moderns it was the differences in material conditions and scientific discoveries that meant the irrelevance of ancient ideas to the modern world, not the changing nature of humanity.

But this famous *querelle*, which was carried on in France and Britain especially, was simply the public display of a shared set of values, which enabled most thinkers of the period to nuance their views between one or the other poles of the conflict, and for the most part to persist in regarding ancient political institutions as at least capable of illuminating modern ones. Rome was of course especially important in this debate for its relevance to the Founding Fathers of the new American republic and the Constitution of the United States. In comparison Greece has usually been thought to have been less studied in the early modern age, although I shall argue that in the eighteenth century it was the centre of a very serious debate that is still relevant to us today.

Again this debate has often been characterised (by myself among others) as a simple and stereotyped contrast between Sparta and Athens, based on a comparison of Plutarch's *Lives* of Lycurgus and Solon; and it is true that Plutarch was the main evidence available and that the more superficial

educational works of the period scarcely rise beyond this comparative level. Thus it is relatively easy to establish two different sides in a debate — the 'Spartophiles' (such as Mably, Rousseau and Adam Ferguson) and the 'Athenophiles' (Voltaire, Hume, Adam Smith, de Pauw[5]), and to arrange all writers of the period in a spectrum between these two poles. The conservative view of the virtues of Sparta is usually considered to have been dominant. It is my purpose to argue here that this interpretation, proposed at length by Jennifer Talbert Roberts[6] and independently espoused by our esteemed convenor,[7] is fundamentally misguided. Recent research by younger scholars has called into question this simplistic version of a conflict between Athens and Sparta.[8] In contrast I wish to argue that the 'radical' view of Athens was equally strong in the eighteenth century, and that its importance has been obscured by the attempt of nineteenth-century radicals to claim that they were the innovators introducing a new view of Athens. This view especially asserted by the Utilitarians, and by liberal writers such as Macaulay, ignores the fact that virtually all their alleged new ideas about democratic Athens were already common

[5] I have omitted any discussion of C. DE PAUW, *Recherches Philosophiques sur les Grecs* (Berlin 1788) [English translation 1793] in this study because his work is so original that it seems impossible to consider him in relation to other writers on history; I hope to return to him on a later occasion.

[6] J.T. ROBERTS, *Athens on Trial. The Antidemocratic Tradition in Western Thought* (Princeton 1994).

[7] M.H. HANSEN, "The Tradition of the Athenian Democracy A.D. 1750-1990", in *Greece & Rome* 39 (1992), 14-30.

[8] See especially the studies of C. AKÇA ATAÇ, "Imperial Lessons from Athens and Sparta", in *History of Political Thought* 27 (2006), 642-60; G. CESERANI, "Modern Histories of Ancient Greece: Genealogies, Contexts and Eighteenth-Century Narrative Historiography", in *Ancient History and Western Political Thought: The Construction of Classical Time(s)*, ed. by A. LIANERI (Cambridge forthcoming); P. LIDDEL, *Civic Obligation and Individual Liberty in Ancient Athens* (Oxford 2007); *Reinventing History: The Enlightenment Origins of Ancient History*, ed. by J. MOORE, I. MACGREGOR MORRIS, A.J. BAYLISS (London 2008); P. RAHE, *Montesquieu and the Logic of Liberty* (Yale 2009); K. VLASSOPOULOS, *Unthinking the Greek Polis* (Cambridge 2007).

opinions from the mid eighteenth century onwards. But all such attempts to draw lines between adversaries should not let us forget that behind these accounts lies a continuing serious and philosophically important attempt, shared by both historians and philosophers in the eighteenth as well as the nineteenth centuries, to understand the virtues and defects, in practice and in theory, of different forms of government in their relation to both antiquity and the modern age.

I have written elsewhere at length about views of the Spartan system, and do not wish to repeat my views here.[9] But two aspects of the arguments in favour of Sparta over Athens are significant. The first is that the majority of proponents of Sparta were not actually interested in proposing a Spartan model, but were rather engaged in undermining the relevance of antiquity to the modern age: they were 'crypto-moderns' arguing against the use of ancient models. As a result they spent a great deal of time admitting the defects of the Lycurgan constitution — its cruelty, its abuse of slavery in the helot system, its use of terror and so on. Its chief advantages were the alleged stability and permanence of its constitution, the sense of discipline and courage encouraged by its education, its economic primitiveness and the absence of such undesirable features of modern political life as the culture of polite society and the arts. But very few of the protagonists of Sparta actually wanted to return to this primitivist dream, although it could be idealised as a form of primitive polity similar to and suitable for rugged Highland peoples like the Scots. These models belong to a nostalgia for the primitive that is recognised as having little to offer modern polite society apart from an image of military virtue.

[9] O. MURRAY, "British Sparta in the Age of Philhellenism", in *The Contribution of Ancient Sparta to Political Thought,* ed. by N. BIRGALIAS, K. BURASELIS, P.A. CARTLEDGE (Athens 2007) 345-89; but I would no longer espouse all the interpretations put forward there.

The second feature of the arguments in favour of Sparta that seems to me relevant is that most of these accounts are deliberately offered as paradoxical or unconventional opinions. This is of course especially true of Rousseau's extravagant views, which were often derided. The protagonists of Sparta usually assume (perhaps correctly) that they represent a minority arguing against a conventional opinion that sees Athens as the more appropriate model for the modern world. So they can argue against both Athens and the use of ancient models at the same time, using Sparta to assert their own originality and independence as well as attempting to undermine the ancient model.

One of the more extreme claims of recent writers has been that the word 'democracy' itself was even avoided in the eighteenth century because of its connotations with Athens.[10] But this again is a simplification. One of the champions of Athens, William Young, wrote of himself in 1777:

> A warm advocate for the liberties of mankind (liberties which political institution ought surely to medicate with the tenderest hand, not wantonly corrode or amputate), I may perhaps appear bold in asserting that a democracy, in the high perfection of its establishment, is the state best calculated for general happiness.[11]

Even after two Revolutions, the American and the French, Young modified this view only slightly, substituting "the free state of Athens" for the word 'democracy', and adding "that any true and good objection to it is founded, not on the immediate vices of such constitution of government, but in *the presumptive brevity of its career.*"[12] This is a view that George Grote and John Stuart Mill would be happy to espouse in their own generation.

[10] J.T. ROBERTS, *op. cit.* (n. 6), 208-9.

[11] W. YOUNG, *The history of Athens politically and philosophically considered, with the view to an investigation of the immediate causes of elevation, and of decline, operative in a free and commercial state* (London 1777), 63.

[12] ID. (London 1804), 85.

The conception of Athenian democracy in the eighteenth century was indeed based on evidence completely different from that available to us. Any description of the Athenian constitution rested of course on Plutarch's *Life of Solon*: it would be a hundred and fifty years before the Aristotelian *Athenaion Politeia* was discovered. Epigraphy did not enter Greek history until long after George Grote, in the late nineteenth and early twentieth century.[13] Consequently the Golden Age of Athens lay between the Persian Wars and the reforms of Ephialtes, in the age of Cimon. This again is an interpretation derived from Plutarch's *Lives*. Moreover one of the obsessions of eighteenth-century thought was the phenomenon of 'decline and fall': it was generally agreed by all writers that the radical democracy represented a decline from an earlier democratic form of government; and Pericles in particular is often cast as the villain who began the decline of Athens. But what was it that made Athens great and how was this greatness maintained?

This question can best be approached by citing what seems to be the earliest serious full-length history of Greece by one of the most original of eighteenth-century historians, the long-forgotten Irishman John Gast.[14] Gast was in his day an important figure: an Anglican clergyman educated at Trinity College Dublin, he devoted his intellectual powers to Greek history. His first work, *The Rudiments of the Grecian History* of 1753 is perhaps the earliest representative of the great upsurge of critical narrative history that occurred in the mid century in the British Isles: for strictly his work is earlier than any of the famous triumvirate of British historians, William Robertson,

[13] O. MURRAY, "Ancient History, 1872-1914", in *The History of the University of Oxford, vol.VII. Nineteenth Century Oxford, Part 2*, ed. by M.G. BROCK, M.C. CURTHOYS (Oxford 2000), 333-60.

[14] See my article "Ireland Invents Greek History: the Lost Historian John Gast", in *Hermathena* 184 (2008). I quote from the earlier text of 1753, with cross-reference to vol. I of the composite two-volume edition of 1793 *The History of Greece* edited by Joseph Stock, both published in Dublin.

David Hume and Edward Gibbon. His second work, *The History of Greece, from the Accession of Alexander of Macedon, till its final subjection by the Roman Power* (1782), was indeed presented by John Murray the publisher as a rival to the great publishing success of the first volume of Gibbon's *Decline and Fall* in 1776, and in the National Library of Scotland there is an extensive and fascinating collection of letters from Murray to Gast on how best to approach his theme; I cannot resist quoting this programmatic statement for the new historiography:

> I have observed that all our successful historical writers, particularly Hume, Gibbon and Robertson, have reduced their works to the level of the understanding of common readers. They interrupt not their narratives either with deep learning or with profound criticism. They preserve the thread of their story from interruptions of all kinds; they heighten its interest, and carry their readers to the conclusion impatient to unwind the chain of events, and to enjoy the catastrophe... I do not mean that references to Authorities should not be given; these we find in the authors I have mentioned and should be given in a similar manner. I only contend that an historian should render his work as interesting to the reader as truth will permit. Affect the heart properly, and the business is accomplished.

Gast's second work had a long life on the continent, being translated into German and French, and surviving as the only serious account of the Hellenistic world available for fifty years until Droysen (1833-43), whose account while more enthusiastic offers little historical advance on Gast, as far as the history of Greece 'properly so called' is concerned (though Droysen's work of course covers also Syria and Egypt).

As is very clear from both of Gast's volumes, his knowledge of French antiquarian scholarship was almost as profound as that of Gibbon; and this is not surprising. For Gast belonged to the Huguenot refugee community settled in Dublin from the late seventeenth century onwards; his father had fought in the campaigns of Queen Anne before settling in Dublin, and was a doctor by profession. Gast himself was bilingual, and

began his career as a pastor in the French-speaking veteran settlement of Portarlington. But more important for his intellectual formation was the fact that his mother was a close relative of the Baron de Montesquieu, from whose family he inherited wealth later in life. Gast's historical vision is indeed steeped in the work of Montesquieu, both his most popular work, the *Considérations sur les causes de la grandeur des Romains et de leur décadence* (1734), a book that supplies the theoretical structure of Gast's second work, and the *Esprit des Lois* (1748).

Gast's earlier work, *The Rudiments of Grecian History*, is written as thirteen dialogues between three characters, 'a master, a scholar who has made some progress in ancient history, and a novice'. It is this curious literary device that enabled Gast to write the first truly critical account of Greek history in terms both of scholarship and of personal and political opinions. For the pupils are made to repeat and defend the conventional narrative as it appears from a careful but literal study of the ancient sources, while their Master continually explains to them that there is another reality behind the texts that they have misunderstood.

In this earlier work of 1753 he describes the Athenian assembly:

> There was also the Great Assembly, in which every Citizen, not declared Infamous, had a Suffrage. — So that in *Athens* the poorest Member of the Commonwealth was immediately interested in the Public Fortune. In despotic States, it matters not, at least to the meaner Ranks of Men, who has the Power; and Revolutions of Government only bring on a Change of Masters. But here, the lowest *Athenian* had a Country, in the properest sense, to fight for; he was one of the Lords of the Commonwealth; he had real Rights and Privileges; and could not give up the Constitution without being a Traitor to himself. (1753 p. 359; 1793 p. 274)

This earliest of all the political interpretations of Athenian history highlights the assembly as the source of Athenian achievements, both political and cultural. In particular it encourages us to look far beyond the modern obsession with

institutions to the values that they promote. The prime advantage of direct democracy is that "the lowest *Athenian* had a Country, in the properest sense, to fight for; he was one of the Lords of the Commonwealth; he had real Rights and Privileges; and could not give up the Constitution without being a Traitor to himself"; in contrast, the representative or republican governments that in Gast's day were still in the process of formation, excluded all but the elite from participation in politics.

It is possible to distinguish four strands of argument in the defence of Athenian democracy, all of which are already present in Gast, and which run through eighteenth-century views of Athens. The first and most obvious is the relationship between the Athenian democratic political institutions and the ideal of liberty, conceived of as the freedom of the individual; initially this did not involve a contrast between ancient and modern liberty (although many writers come close to expressing the views that we tend to associate with Benjamin Constant's famous lecture, *De la liberté des anciens comparée à celle des modernes* of 1819),[15] and was therefore a theme well suited both to the attempt by the *philosophes* to liberalise French political institutions and to the English Whig conception of the role of parliament in the Glorious Revolution. It was only with the American War of Independence (1776-83) that this conception of the relation between ancient and modern liberty began to become controversial, when it was shown that modern peoples could behave like ancient Athenians, and be inspired by the idea of liberty to fight for their independence.

The second strand derives from Montesquieu. For him the essential characteristic of successful popular government was "virtue"; as he says in the section *Du principe de la démocratie*:

> Dans un état populaire, il faut un ressort de plus, qui est la vertu.

[15] See for instance W. YOUNG, *op. cit.* (n. 11).

And again:

> Les politiques grecs qui vivoient dans le gouvernement populaire ne reconnoissoient d'autre force qui pût le soutenir que celle de la vertu. Ceux d'aujourd'hui ne nous parlent que de manufactures, de commerce, de finances, de richesses, et de luxe même. (Book III, chapter III)

Much of the historical thought of the period is concerned with how to define, create and preserve this conception of political virtue. William Young was an avowed follower of Montesquieu, and his work *The Spirit of Athens*, first published in 1777,[16] is centred on this problem, which he defines as one of patriotism:

> *Then* the interest of the whole was deemed that of each; now the inverse is adopted, and each would operate on the whole. The genius of patriotism, which animated every breast, no longer exists; nay the very instances of its existence are questioned: we wonder at past transactions and ancient stories; we doubt that the Greek Codrus, or Roman Decii devoted themselves; and that the elder Brutus should sacrifice the dearest ties of nature, to a sentiment we so little know the force of, now seems singular, if not impossible. (1804 p. 11; 1777 p. 9)

This remained a central theme in the interpretation of Athenian democracy down to George Grote, who defined in very similar terms what he called "constitutional morality":[17]

> A paramount reverence for the forms of the constitution, enforcing obedience to the authorities acting under and within those forms, yet combined with the habit of open speech, of action

[16] There were two further editions with substantial alterations in 1786 and 1804; see the excellent account of P. LIDDEL, "William Young and the Spirit of Athens", in *Reinventing History: The Enlightenment Origins of Ancient History*, ed. by J. MOORE, I. MACGREGOR MORRIS, A.J. BAYLISS (London 2008), 57-85. I quote for the most part from the 1804 edition of Young, which is more widely available. It is quite false to view Young as an opponent of Athenian democracy at any date.

[17] A term picked up by N. URBINATI, *Mill on Democracy. From the Athenian Polis to Representative Government* (Chicago 2002), although Mill himself refers rather to "the unwritten maxims of the Constitution — in other words the *positive political morality* of the country", J.S. MILL, *Considerations on Representative Government* (New York 1861), chapter V.

> subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts — combined, too, with a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be not less sacred in the eyes of his opponents than in his own.
> (*History of Greece,* Part II, ch. XXXI [1888], vol. III, 372)

According to Grote this morality is difficult both to establish and to preserve: apart from the post-Clisthenic Athenian democracy, "it may be found in the aristocracy of England (since about 1688) as well as in the democracy of the American United States", but not (he claimed) in the Swiss cantons nor in the French Revolution.

A third strand was more controversial, the importance of commerce and manufacture. Montesquieu had, as the quotation above demonstrates, deprecated the tendency to connect freedom and commerce; yet since Adam Smith 'natural liberty' has included both economic and political libertarianism, to the extent that capitalism and democracy are in the modern age now thought to have a natural affinity. Once again it is remarkable to find in John Gast, writing about the same time that Adam Smith began lecturing in Glasgow, a fully developed emphasis on the importance of commerce in the creation of Greek civilisation. The question of the ancient economy is controversial for two reasons. The first is the question whether Athenian and modern commerce could truly be compared; the second is whether commerce (ancient or modern) might lead directly or indirectly to luxury and therefore decline. For William Young Athens and eighteenth-century England were directly comparable: the Athenian empire was related to the idea of 'the dominion of the seas'; but "with the same haste a commercial nation accedes to empire, it speeds to dissolution". For commercial activity brought luxury, which inevitably led to corruption and decadence. Once again this is a theme common to almost all thinkers of the period, and served as one

of the chief explanations for the decline of Athens, which in turn provided a lesson for the modern age.[18]

Finally, as Gast claimed, the working of the Athenian democratic assembly is essentially connected with the development of a popular culture which was capable of supporting the highest level of creativity and education, both among the intellectual elite and in the audience who was called on to appreciate it:

> *Liberty*...was also the principal Cause of this; for Science and Arts are always the Attendants of *Liberty*. *Genius* is, as it were, licentious; it loves to sport itself after its own wanton manner, neither exposed to the Jealousies of Tyrants, nor to the Threats of Laws. It is then only, that the Mind becomes capable of the *wide-expatiating* View, and of the *bold-towering* Thought. — Thus it was at Athens. There, Imagination knew no bounds; and all the Excess of Liberty was fully indulged, except when the Religion of the Superstitious People happened to be wounded. (1753 p. 363; 1793 p. 274)

> Another Cause, that contributed to the Advancement of Literature at *Athens*, was *the Form of Polity*. All Matters were referred to the great Assembly of the People; and, as I have told you, neither Domestic Regulations, nor Foreign Alliances, neither Peace, nor War, could be ultimately determined on, till their Consent had given ratification. On these accounts, *Persuasion* was among the principal Instruments of the *Athenian* Government; and the lowest Citizens were accustomed to be addressed by Persons, exercised in all the Arts of Speech. Now this not only made Oratory necessary for those, who were desirous of appearing to advantage in the Public Councils; but also by these means the People themselves were rendered *nice* and *critical Hearers*. (1753 p. 365; 1793 p. 279)

The connection between artistic creativity and liberty was a common theme in eighteenth-century thought; and it is such a

[18] I. HONT, "The Luxury Debate in the Early Enlightenment", in *The Cambridge History of Eighteenth-Century Political Thought*, ed. by M. GOLDIE, R. WOKLER (Cambridge 2006), 379-418.

prevalent view that it is difficult to trace it to any individual thinker.[19] It served as a general explanation of the preeminence of Greek art and Greek literature. As Winckelmann said, "In Absicht der Verfassung und Regierung von Griechenland ist die Freiheit die vornehmste Ursache des Vorzugs der Kunst";[20] or as William Young put it towards the end of the century:

> Free states (it hath by many been observed) are the best nursery-bed of the arts; and other states (it will be observed) have run a career somewhat similar to Athens; and have known a period when emulation, sickening in the stagnation of public services and duties, might be supposed to invigorate in others scenes of employment (1804 p. 9).

This view again remained part of the general conception of Athenian democracy down to the age of Grote and Mill, and would indeed probably be endorsed by many of us to this day.

Nevertheless Athens had declined, and had begun to do so at the height of her democratic power, if the connection between Pericles and the decline and fall were to be maintained. As Gast said, with Ephialtes and Pericles, Athens entered a period of luxury and decline: "What a Patriot, what a Blessing might this Man have been! but Ambition is a treacherous guide." (1753 p. 471; 1793 p. 365):

> Thus affairs went on, till at length the growing vanity, the haughtiness, and ambition of the *Athenians*, on the one hand, and the envy and various resentments of the *Grecian* States, on the other, brought on a war, which tried the strength of this specious *Fabric*, and has left to succeeding Ages this instructive lesson, that *there is not any Empire can be lasting, but what is founded on Moderation, Justice, and Virtue.* (1753 p. 492; 1793 p. 385)

[19] But see now the discussion after this paper provoked by Pauline Schmitt Pantel.

[20] J.J. WINCKELMANN, *Geschichte der Kunst des Altertums* (Dresden 1763); M.H. HANSEN, *The Tradition of Ancient Greek Democracy and its Importance for Modern Democracy* (Copenhagen 2005), 14.

Young's view is the same:

> Perhaps it had been well for the republic, had he never been born! But his death was equally fatal to it, as his life, for none other knew how to redress the evils which he had occasioned. He had accustomed the people to the voice of a demagogue... On his death, a thousand pretenders arose, and with rival arts and equal weakness perplexed the public councils, disunited the people, and led them to ruin and destruction. (1804 p. 255)

But Young also had a more contemporary criticism:

> But a free commonwealth hath too seeds of dissolution proper to itself.
>
> In such [a] state, the primary authority is resident in the many; but, of course, the executive power must be delegated to the few. The *first* is in the hands of the people, whose will being once determined and promulgated, necessity from day to day more rarely calls for their interposition: the *second*, entrusted to their agents, requires unremitted exertion. As the one power becomes dormant, the latter increases in vigilance; till at length the importance of the state yields to the consequence of private men, and the servant of the public directs the legislation he should obey. (1804 p. 86)

The consequence is a natural tendency for the executive to usurp the functions of the state.

There are two criticisms of Athenian democracy that eighteenth-century writers tend to ignore or at least play down. The first is the trial of Socrates, which for the German tradition since at least Hegel has always been the turning-point of ancient civilisation. Although Gast for instance devotes a long discussion to it, he does not regard it as an accusation against the Athenian state, or as evidence for a conflict between the state and the individual conscience; rather for him Socrates is a proto-Christian and his death is a simple example of martyrdom in the service of a higher religion. In general (apart from extreme interpretations like that of De Pauw, who regards the execution of Socrates as fully justified) it seems that eighteenth-century historians chose to ignore the episode as an example of inconvenient religious or ethical enthusiasm.

Even more surprising in an age when slavery was becoming ever more problematic, eighteenth-century writers prefer not to comment on Athenian slavery. That is an attitude they share with both Grote and Mill — who have far less justification for their silence, since both of these later thinkers were fully committed to the anti-slavery movement. It is as if for them Athens must be so perfect that neither the existence of slavery nor the oppression of women can be allowed to shadow the picture.

In this respect William Mitford does not deserve the scorn and contempt that was heaped on him by his radical critics. He might have been a proponent of constitutional monarchy, and a fierce critic of the Athenian political system; but his most convincing criticism of both Athens and Sparta in relation to the modern British constitution was the absolute dependence of both Sparta and Athens on slave labour. The Utilitarians chose to ignore his defence of liberty for the individual in their fury at his disapproval of democracy.[21]

Another forgotten English historian offers a transition to the nineteenth century.[22] Bulwer-Lytton is nowadays dimly remembered as the author of the romantic novel *The Last Days of Pompeii*; and perhaps as the author of two of the most famous phrases in the English language, "Poverty makes for strange bedfellows", and "The pen is mightier than the sword". In his day he was commercially the most successful novelist in Britain between Sir Walter Scott and Charles Dickens. Having antagonized his mother by making an unsuitable marriage, his allowance was cut off; he decided to follow the footsteps of Sir Walter Scott and Lord Archer, and save himself from bankruptcy by writing novels and buying himself a seat in the

[21] See the defence of Mitford against his critics in the preface by his brother Lord Redesdale to the posthumous New Edition of his *History of Greece* (London 1835), esp. xviii-xxiv.

[22] See my introduction to the bicentenary edition of E. BULWER-LYTTON, *Athens: Its Rise and Fall* (London 2004).

House of Commons. Within a decade (1828-37) he had recouped his fortunes. He was a reforming Member of Parliament from 1831 to 1841; he became a prominent member of the group of the philosophical radicals, a friend of the Utilitarian philosophers around James Mill, and a colleague in parliament of the future historian of Greece, George Grote, then a banker and M.P. for the City of London (1832-41), although, despite being colleagues in the same Radical parliamentary group, towards the end of their time in Parliament he and Grote seem to have become more distant. In 1838 Bulwer-Lytton made his most famous speech, advocating the abolition of the last vestiges of slavery — a speech so brilliant that it silenced all opposition. He also had family connections with the Philhellenes; for in 1824 his elder brother Henry ("a silly supercilious young man" according to William St Clair) had volunteered to oversee the transfer of £130,000 in gold sovereigns to the provisional Greek government in Nauplion from the London Greek Committee, in order to finance the War of Independence.

As a young man Bulwer-Lytton was a figure of considerable social style, a lover of Byron's former flame, Lady Caroline Lamb; with his youthful looks and "glitteringly golden hair that, worn in ringlets, played about his shoulders", he had cut a swathe through the salons of Paris. He invented the concept of the 'dandy':

> A fop, a philosopher, a voluptuary and a moralist — a trifler in appearance but rather one to whom trifles are instinctive, than one to whom trifles are natural — an Aristippus on a limited scale, accustomed to draw sage conclusions from the follies he adopts, and while professing himself a votary of pleasure, desirous in reality to become a disciple of wisdom.[23]

[23] E. BULWER-LYTTON, *Pelham: or The Adventures of a Gentleman* (London 1848) preface to edition, iv.

In later life he became a Conservative politician, and under Disraeli his political career flourished. It was in fact Bulwer-Lytton who sent Gladstone into exile as governor of the Ionian Islands in 1858, and in 1862 on the abdication of King Otto of Bavaria, he was even offered the throne of Greece, which (along with many others) he declined. In his day Bulwer-Lytton, "Poet, Essayist, Orator, Statesman, Dramatist, Scholar, Novelist" (*The Times*, 1873) was described as "not only the foremost novelist, but the most eminent living writer in English literature" (*Quarterly Review* 1873). He was buried in Westminster Abbey, with a sermon by Benjamin Jowett on "one of England's greatest writers and one of the most distinguished men of our time". His descendants have included a Viceroy of India, and a Governor of the Bank of England; they have acquired an Earldom, and their family seat of Knebworth is now "the stately home of Rock", where all the greatest modern rock bands have performed.

In 1837, in his Radical phase and almost a century after John Gast, Bulwer-Lytton composed a work with the traditional Montesquieu title, *Athens: Its Rise and Fall.* This unfinished work (he completed only the *Rise*) was designed as the first Radical Utilitarian history of Greece, long before Grote; and it was a book that, because of its author's reputation as a novelist had wide circulation even among the general public. Bulwer-Lytton shows the continuity with eighteenth century thought by echoing Gast's praise of the Athenian assembly in fine romantic prose:

> [...] we cannot but allow the main theory of the system to have been precisely that most favourable to the prodigal exuberance of energy, of intellect, and of genius. Summoned to consultation upon all matters, from the greatest to the least, the most venerable to the most trite — to-day deciding on the number of their war-ships, to-morrow on that of a tragic chorus; now examining with jealous forethoughts the new barriers to oligarchical ambition; — now appointing, with nice distinction, to various service the various combinations of music; — now welcoming in their forum-senate the sober ambassadors of Lacedaemon or the

jewelled heralds of Persia, now voting their sanction to new temples or the reverent reform of worship; compelled to a lively and unceasing interest in all that arouses the mind, or elevates the passions, or refines the taste; — supreme arbiters of the art of the sculptor, as the science of the lawgiver, — judges and rewarders of the limner and the poet, as of the successful negotiator or the prosperous soldier; we see at once the all-accomplished, all-versatile genius of the nation, and we behold in the same glance the effect and the cause: — every thing being referred to the people, the people learned of every thing to judge. Their genius was artificially forced, and in each of its capacities. They had no need of formal education. Their whole life was one school. [...] All that can inspire the thought or delight the leisure were for the people. Theirs were the portico and the school — theirs the theatre, the gardens, and the baths; they were not, as in Sparta, the tools of the state — they were the state! Lycurgus made machines and Solon men. In Sparta the machine was to be wound up by the tyranny of the fixed principle; it could not dine as it pleased — it could not walk as it pleased — it was not permitted to seek its she machine save by stealth and in the dark; its children were not its own — even itself had no property in self. Sparta incorporated under the name of freedom, the worst complexities, the most grievous and the most frivolous vexations, of slavery. And therefore it was that Lacedaemon flourished and decayed, bequeathing to fame men only noted for hardy valour, fanatical patriotism, and profound but dishonourable craft — attracting, indeed, the wonder of the world, but advancing no claim to its gratitude, and contributing no single addition to its intellectual stores. But in Athens the true blessing of freedom was rightly placed — in the opinions and the soul. Thought was the common heritage which every man might cultivate at his will. This unshackled liberty had its convulsions and its excesses, but producing unceasing emulation and unbounded competition, an incentive to every effort, a tribunal to every claim, it broke into philosophy with the one — into poetry with the other — into the energy and splendour of unexampled intelligence with all. Looking round us at this hour, more than four-and-twenty centuries after the establishment of the constitution we have just surveyed, — in the labours of the student — in the dreams of the poet — in the aspirations of the artist — in the philosophy of the legislator — we yet behold the imperishable blessings we derive from the liberties of Athens and the institutions of Solon. The life of Athens became extinct, but

> her soul transfused itself, immortal and immortalizing, through the world. [24]

When two decades later in the 1850s George Grote in turn took up the theme of Athens, he was the heir to a long tradition, which he chose to ignore in favour of attacking the favourite target of the radicals, the historian William Mitford. Grote's only original touch is in fact his preference for Clisthenes over Solon as the founder of democracy — that is, for the radical parliamentary reformer over the eighteenth-century philosophic lawgiver. Similarly his friend John Stuart Mill, writing on liberty (1859) and on representative government (1861), is echoing an essentially eighteenth-century view, that democracy was not an end in itself, but a system of government that, unless it could be combined with a form of mass education and the creation of a sense of civic virtue, was likely to be incompatible with personal liberty.

Thus the nineteenth-century radical view of history espoused by Grote and Mill was not a new departure, as they liked to claim, but a continuation of the mainstream liberal conception of Athenian democracy. It was only in the brief period of transition, or the *Sattelzeit* as Reinhart Koselleck has called it, from the American to the French Revolutions, that the tide turned away from Athenian democracy with the much overrated Scotsman William Gillies and the far more interesting William Mitford in Britain, with the American founding fathers (whose chief interest was the preservation of property and the continuation of slavery) and with the French Revolutionary thinkers under the influence of Rousseau, Mably and Saint-Just, though each group approached the Spartan theme in very different ways. The only new developments that the High Victorian generation of Grote and Mill can offer are the new positive interpretation of Pericles, who is no longer seen as the demagogue responsible for the decline and fall of Athens, and Grote's

[24] E. BULWER-LYTTON, *Athens: Its Rise and Fall*, Book II, chapter I, XVI.

inspired and at the time highly controversial perception that it was Clisthenes not Solon who had created Athenian democracy.[25] The first development is a result of the renewed nineteenth-century interest in Thucydides as a model for the writing of history. And the second was of course a direct consequence of the political experience of George Grote as a Radical Member of Parliament in the newly democratic local electoral system of the Great Reform Bill of 1832. But these are simply minor twists in the continuing dialogue between ancient and modern democracy.

The eighteenth and nineteenth-century debates on the virtues of Athenian democracy cannot be dismissed as irrelevant to an understanding of the ancient world, or to modern political doctrines; like all attempts to understand and to learn from the past, they combine a proper attention to antiquarian research with a philosophical approach, and a recognition that all history that offers any interpretation at all is ultimately contemporary history. But the necessary desire to be relevant to contemporary society, while it is admirable in itself, should not allow us to neglect the interpretations of previous ages. For they have the power to liberate us from the short-term passions of contemporary politics.

I conclude with the lessons that we can perhaps learn from the debates that began with Montesquieu in the eighteenth century, and continued uninterruptedly until the age of Mill. Democracy is not a universal ideal, or even necessarily the best form of government in all circumstances. As Mill saw, it has two preconditions for its successful establishment. The first is universal education to the highest possible level. The second is that constant in democratic thought, the *vertu* or 'constitutional morality', that binds together a community in the pursuit of common political ends, and that is threatened by any

[25] I owe this observation to the undergraduate thesis (2007) of my former pupil Mohan Rao of Magdalen College, Oxford.

form of sectarian, religious or tribal divisions. Both these preconditions have been ignored or called into question in the modern drive towards universal democracies.

If, but only if, these conditions exist, a democratic system has significant advantages: it can lead to forms of personal liberty that allow economic progress, artistic creativity, and a sense of personal self-esteem. But it also involves constant vigilance against potential dangers — the usurpation by the executive of the powers belonging to the community, the threat of populist leadership or demagoguery, exercised whether by rhetoric or by television (what difference is there, an Italian friend recently remarked, between Cleon and Berlusconi?), and most dangerous of all the threat to minorities from majority rule. Perhaps finally, with our contemporary version of the South-Sea Bubble, we should consider the corruption that is brought to a free society by luxury, and the failure to pay sufficient attention to its consequences, whether for other societies or for the environment itself. These are all important modern issues which can only be obscured by ignoring past debates and the philosophical interpretation of historical events.

DISCUSSION

M. Hansen: You hold that "within a decade [after World War One] the word [democracy] disappeared from practical political discourse". On the whole I agree but I think you exaggerate. There were strong supporters of democracy in many western countries. In Austria democracy was defended by Hans Kelsen who wrote the Austrian constitution of 1920, and some years later he published his book *Vom Wesen und Wert der Demokratie* (Tübingen 1927). In Czechoslovakia Tomas Masaryk, the president of the new republic until 1935, was almost the symbol of democracy. In Belgium the fascist Rexist party was a serious threat to Belgian democracy in the 1930s. But the Rexists were defeated in 1937 by prime minister van Zeeland and his government. Thorvald Stauning, the Danish prime minister 1929-42, advocated democracy in his electoral addresses in 1935. In the Spanish civil war (1936-9) a large section of the 'Republicans' or 'Loyalists' were liberal democrats who fought alongside socialists and communists. Finally, Franklin D. Roosevelt was a loyal democrat and in December 1940, a year before Pearl Harbor, he delivered one of his most famous speeches in which he declared USA's determination to aid Great Britain and stated what became the catchword of the speech: "we must be the great arsenal of democracy", etc.

In my opinion democracy did not "disappear from practical political discourse" during the interwar period; but it became indeed a much contested form of constitution with adversaries and adherents, just as it was in ancient Greece. And democracy came under attack from two sides: from Marxists and socialists to the left and from fascists and nazis to the right.

O. Murray: I agree of course that there were voices raised in defence of forms of liberal democracy in the twenties and thirties; but my point is rather one related to practical political discourse, that is the normal discourse of politicians: at least in origin totalitarian and Marxist regimes declared themselves to be (and often were) true democracies in the sense of embodying the will of the people; and they often retained large parts of the pre-existing parliamentary institutions and ideologies: particularly in central Europe it would have been difficult to draw a clear distinction between 'democratic' and 'undemocratic' regimes. In general political discussions among the liberal elite during this period the word 'democracy' tended to be avoided, and 'liberty' replaced it as the central concept, because the freedom of the individual citizen was directly threatened by class-based, nationalist and totalitarian ideologies, whether or not they claimed to be democracies. The reasons for this are well brought out in Mark Mazower, *op. cit.* (n. 2).

P. Schmitt Pantel: Dans votre présentation de la réflexion de John Gast sur la démocratie vous soulignez qu'il attribue à la démocratie athénienne le développement d'une "culture du peuple" (*popular culture*) et vous remarquez que le lien entre l'activité créatrice et la liberté est un thème commun à la pensée du 18ème siècle. Est-ce que ce lien est, dans la pensée du 18ème chez John Gast et chez d'autres auteurs, précisé, explicité? Et si oui en quels termes, avec quels arguments? Je pose cette question car dans les dernières décennies ce thème a été repris et abordé par différents chercheurs à propos de plusieurs domaines de la culture athénienne, le théâtre par exemple ou encore l'iconographie monumentale. Le lien entre démocratie et culture est bien sûr aussi un problème très contemporain.

O. Murray: Your question is fundamental, and I do not at present have a completely satisfactory answer to it. I believe that the origin of this claim of a relationship between liberty and artistic creativity lies in the last chapter (44) of Longinus

On the Sublime, which became famous throughout Europe through Boileau's translation and his accompanying treatise of 1674. Here Longinus discusses "the well-worn view that democracy is the kindly nurse of great men, and that great men of letters have flourished only under democracy and perished with it". Although Longinus himself argues against this view, it is clear that the cult of the Sublime embraced it whole-heartedly. In Britain this became a standard literary and political doctrine of the Whig revolution: in a recent survey Jonathan Lamb refers to the critics William Wotton, Sir Richard Blackmore, Leonard Welsted and John Davies, and says: "These men approach Longinus with a strong Whiggish belief in Revolution principles, and interpret his life and work as unremitting opposition to arbitrary rule, both in the spheres of politics and of literature. They read the last section of his treatise, where the mutualities of liberty and eloquence, and slavery and decadence, are loudly affirmed, literally as a defense of democracy, 'the Nurse of true Genius'". (J. Lamb, "The Sublime", in *The Cambridge History of Literary Criticism, vol 4 The Eighteenth Century,* ed. by H.B. Nisbet and C. Rawson [Cambridge 1997], 396).

Certainly the footnote to the passage of Gast that I have quoted justifies his claim specifically with reference to Longinus: it runs, "Vide *Longinum* de Sublimi. Sect. 44. Vide etiam *Quint.* de Instit.Orat L. 10 C. 1" (Gast 1753, 363).

This view derived from Boileau was still fundamental to libertarian thought in the Romantic age, and Mill wrote in 1859: "Genius can only breathe freely in an *atmosphere* of freedom. Persons of genius are, *ex vi termini*, more individual than any other people — less capable, consequently, of fitting themselves, without hurtful compression, into any of the small number of moulds which society provides in order to save its members the trouble of forming their own character" (*On Liberty* ch. III.). I do not know exactly how this interpretation found favour on the continent of Europe; but it was clearly widely accepted in both France and Germany by the mid eighteenth century, in the age of Voltaire and Winckelmann.

In other words the positive interpretation of Athenian democratic institutions began not among historians and antiquarians, but as a consequence of the theory of the Sublime, which led to a positive re-evaluation of Athenian art and literature, and particularly of tragedy from the middle of the eighteenth century: it was the literary and artistic achievements of Athenian culture that the German tradition especially admired from Winckelmann onwards, through Goethe and Schiller to Humboldt and Hegel; and critics naturally attributed the genius of the Athenians to the stimulus of freedom and democratic political institutions. So the increasingly positive evaluation of Athenian literature and art was actually the cause rather than a consequence of the renewed emphasis on liberty as a political ideal. There is of course a certain irony in such conceptions, given that the eighteenth century was above all the age of successful royal and aristocratic patronage of the arts.

Modern interpretations of the relation between freedom and the arts seem to be completely unaware of this earlier debate, but they too involve a similar implicit contradiction. The two prevalent theories of artistic creativity, the importance of patronage in its production, and the importance of the autonomy or freedom of the artist, are of course strictly incompatible. Modern attempts to claim that public or state institutional patronage somehow does not inhibit freedom in the way that private capitalist patronage does, are specious (one need only cite the experience of Shostakovitch), but widely accepted by artists hungry for state (or private) subvention and by culture-mad administrators of public funds. This is the background to contemporary attempts to claim that it was Athenian democratic institutions that caused the development of great art. In fact of course there is no relationship (or rather often a negative relationship) between democracy and art; and although there may be some connection between personal freedom and artistic innovation, there are plenty of contrary ancient and modern examples of tyranny and persecution producing great art.

P. Pasquino: Speaking of Montesquieu, an extraordinarily influential figure in the political thought of the Enlightenment, both in Europe and in the New World, you quote a very important text: "Les politiques grecs qui vivoient dans le gouvernement populaire ne reconnoissoient d'autre force qui pût le soutenir que celle de la vertu. Ceux d'aujourd'hui ne nous parlent que de manufactures, de commerce, de finances, de richesses, et de luxe même" (livre III ch. III). Grote was right: it seems extremely difficult to combine what the author of *De l'esprit des Lois* called *vertu* and what the Scottish social philosophy defined as "commercial society". This tension is at the origin of Sieyès' political theory of the representative government. In his famous speech against the King's veto held in The French Constituent Assembly on September 7th 1789, the *abbé*, who by the way in his manuscripts praised the Athenian political regime, claimed that democracy (which for him was the same as Athenian democracy) could not be the political form that the constitution had to establish in France since "les manufactures et le commerce" made impossible the participation of citizens into public life; instead elected and accountable professional politicians had to be in charge of the government. 'Representation' rather than 'virtue' became the name of the new regime.

O. Murray: Yes I agree; the concept of *vertu* was seen early on as difficult to define; and there was a shift from 'virtue' to 'representation' as the central problem in democratic thought in this period, which is very important. It is somehow combined with the idea that the chief difference between ancient and modern societies is the greater development of modern economic structures: that was already seen by Montesquieu, and of course goes right through to Benjamin Constant on ancient and modern liberty and beyond: the great battle among twentieth century economic historians of the ancient world was precisely that between the modernists and the primitivists like Moses Finley in his book on *The Ancient Economy*.

Yet as I quoted him, Grote still believes that political virtue is important in the creation of the possibility of democratic government; and so too does John Stuart Mill in his *Considerations on Representative Government* (1861), where he discusses those societies unsuited to particular forms of government (ch. I) and the prerequisites for representative government (ch. IV). So in the Old World at least the need for a *koinonia* or a common sense of unity was still felt to be important, as it is today in communitarian interpretations of democracy. Once again the continuities are as revealing of the central issues of democratic theory as the apparent changes in historical interpretation.

V

CYNTHIA FARRAR

TAKING OUR CHANCES WITH THE ANCIENT ATHENIANS

Prologue

After some two thousand years of neglect or outright rejection by democratic governments and political theorists, sortition and its less exotic sibling rotation are staging a comeback. Theorists are explaining the intrinsic fairness of lotteries; institutional reformers are offering more or less utopian proposals to amend or supplement existing systems of government with randomly selected bodies; and field experimenters are organizing consultations with randomly-invited groups of citizens.[1]

[1] Theory: J. ELSTER, *Solomonic Judgments* (New York 1989); P. STONE, "The Logic of Random Selection", in *Political Theory* 37, 3 (2009), 375-97; ID., "Voting, Lotteries, and Justice," in *Polity* 40, 2 (April 2008), 246-53, B. GOODWIN, *Justice by Lottery* (Exeter 2005). More or less utopian proposals: E.J. LEIB, *Deliberative Democracy in America. A Proposal for a Popular Branch of Government* (University Park, PA 2004); J. BURNHEIM, *Is Democracy Possible?* (Sydney 2006); B.R. BARBER, *Strong Democracy. Participatory Politics for a New Age* (Berkeley 1984); E. CALLENBACH, M. PHILIPS, K. SUTHERLAND, *A Citizen Legislature/A People's Parliament* (Exeter 2008); A. BARNETT, P. CARTY, *The Athenian Option: Radical Reform for the House of Lords* (Exeter 2008); K. O'LEARY, *Saving Democracy. A Plan for Real Representation in America* (Stanford 2006); D.C. MUELLER, R.D. TOLLISON, T.D. WILLETT, "Representative Democracy via Random Selection", in *Public Choice* 12 (1972), 57-68; R.G. MULGAN, "Lot as a Democratic Device of Selection", in *Review of Politics*

All of these scholars and innovators appeal, in one way or another, more or less knowledgeably, to the practices of the ancient Athenians. Yet these analyses, blueprints, and experiments all misconceive or deliberately misapply the Athenian use of lot and rotation.

Consider, for example, my own article with James Fishkin, describing the roots of his experimental approach to democratic reform, the Deliberative Poll™. We refer to "selection of decision-makers by lot".[2] Fishkin and I are both well aware that in Athens the primary decision-making body, the assembly, was not selected by lot. And we both recognize that the Athenians relied on self-selection, which the Deliberative Poll explicitly seeks to minimize or mitigate. Mogens Hansen, who arguably knows more about the detailed workings of Athenian democracy than anyone since Aristotle, has suggested the use of the lot for a purpose very different from its Athenian role: to recruit a mini-Assembly. Direct democracy on a modern scale could, he suggests, be achieved by random selection of citizen panels, convened electronically on a rotating basis from among all citizens, to vote on proposals from a parliamentary body.[3]

46 (1984), 539-60. Theory plus experiments: J.S. FISHKIN, *The Voice of the People: Public Opinion and Democracy* (New Haven 1995); J.S. FISHKIN, *When the People Speak. Deliberative Democracy and Public Consultation* (Oxford 2009). Experiments: CONGRESSIONAL MANAGEMENT FOUNDATION, "Online Town Hall Meetings: Exploring Democracy in the 21st Century" (2009), available at: http://www.cmfweb.org/index.php?option=com_content&task=view&id=294; A. COOTE, J. LENAGHAN, *Citizens Juries: Theory into Practice* (London 1997); http://www.citizensassembly.bc.ca/public; *Designing Deliberative Democracy: the British Columbia Citizens Assembly*, ed. by M.E. WARREN, H. PEARSE (New York 2008).

[2] J.S. FISHKIN, C. FARRAR, "Deliberative Polling: From Experiment to Community Resource", in *The Deliberative Democracy Handbook*, ed. by J. GASTIL, P. LEVINE (San Francisco 2005), 71.

[3] M.H. HANSEN, "Direct Democracy, Ancient and Modern", in M.H. HANSEN, *The Tradition of Ancient Greek Democracy and its Importance for Modern Democracy* (Copenhagen 2005), 54-6. The example Hansen cites (proposed by Denmark's Marcus Schmidt), selects a legislative assembly by lot from among all Danish citizens, to determine the order in which they perform this rotating and mandatory responsibility.

So it seems that even (or perhaps especially) those who are deeply familiar with Athenian institutions are picking and choosing elements — the lot and rotation — and applying them in ways not contemplated by the Athenians. For their part, the Athenians scavenged practices that were not distinctively democratic — including the lot and rotation, as well as tribes, and elections — and recycled them to create a radically different political structure. Lot and rotation do not in themselves contain an exportable essence of Athenian democracy. To determine whether and how these devices could be used to promote the kind of self-government we associate with the Athenians, it is essential to understand how casting lots and taking turns fitted into the distinctive nexus of political institutions they created. What were the Athenians trying to achieve with these institutional tools — and without them?

Democracy without drawing lots or taking turns

In the *Politics*, Aristotle characterizes democracy as a system based on full enfranchisement: "the recognized principle of democratic justice is that all should count equally" (1318a 5-6). Freedom and membership are sufficient entitlement to participate in ruling. Democracy's assertion of an equal chance of sovereign power for every free citizen echoes throughout Aristotle's inventory of democratic institutions:[4]

- all free citizens rule over each, and each rules in turn over all
- officials are selected "by all out of all," without a property qualification, or with a low one
- "all men sit in judgment," or judges are "selected out of all"
- the assembly is "supreme over all causes," or over the most important ones

[4] ARIST. *Pol* 6. 2.

How could a constitution that accorded sovereignty to 'all' citizens, whatever their personal, social or economic characteristics, possibly secure the wellbeing of the whole polity? A system based on full empowerment of large numbers of relatively-poor citizens could, in Aristotle's judgment, flourish if it were "well regulated by laws and customs", and the best such example was Athens.[5]

From the beginning of Athenian democracy, one objective of institutional reform was to create a fully inclusive filter for the exercise of power, and thereby to achieve unified and effective governance and to forestall factional strife, whether between families or parts of Attica or between the many and the few. As it evolved at Athens, democracy was designed not to privilege one set of interests (the poor, for example) over another, but to be fully and exclusively political.[6] That is, the Athenian democracy separated political identity and role from social status or wealth or the ability to provide armour or — more perplexingly from our point of view, and from the standpoint of contemporary critics — from education or talent or experience or personal character.[7] The Athenians explicitly affirmed and

[5] ARIST. *Pol.* 6.4. In this context, he cites approvingly Cleisthenes' measures to "increase the power of the democracy at Athens" by creating "fresh tribes and brotherhoods" and turning private rites into public ones. He recommends that in general "every contrivance should be adopted which will mingle the citizens with one another and get rid of old connexions". See also ARIST. *Ath.* 39.3, on the statesmanlike behavior of the Athenians after their defeat by the Spartans.

[6] ARIST. *Pol.* 6. 2: the "recognized principle of democratic justice" is that "all should count equally"; thus "the poor should have no more share in the government than the rich, and should not be the only rulers, but all should rule equally according to their numbers". For a democratic perspective on the same point, see Athenagoras' speech to the Syracusans, THUC. 6. 39. Although oligarchic theory and practice seek to exclude the poor (who of course could otherwise, at least in principle, outvote them), I know of only one reference to a polity that excluded the rich: THUC. 8. 21, which refers to an uprising of the people at Samos. The victorious *demos* excluded landowners from the government, and even forbade intermarriage.

[7] I discuss this point at greater length in C. FARRAR, "Power to the People", in *Origins of Democracy in Ancient Greece*, ed. by K.A. RAAFLAUB, J. OBER, R.W. WALLACE (Berkeley 2007), 174-5. As Hansen noted during discussion at these

institutionalized the power of the political realm, of the sovereignty of citizens qua citizens. By doing so, they flouted traditional aristocratic or oligarchic claims of continuity between social, economic, or personal qualities and entitlement to power. The system they created did not empower economic or social or personal inequalities; neither, however, did it eliminate such inequalities. Rather, the Athenians sought to mobilize the potential of every citizen on behalf of the *polis* by, in Plato's scornful words, distributing "a kind of equality to equal and unequal alike".[8]

To create a fully democratic political filter for self-government by all citizens, the Athenians used institutional devices selectively in different contexts and for different purposes. All relied on a fundamental principle of equal freedom: the ability of every citizen to choose whether and how to participate in governance. In the cluster of practices most closely associated with the sovereign power of the *demos* in assembly, lot and rotation played no part. These institutional practices include the citizen assembly itself, which was a self-selected subset of the *demos* as a whole; the exercise of leadership; and selection by the assembly of individuals to play those administrative or

Entretiens, ARIST. *Pol.* 6. 2 confirms that sortition was used for posts in which no professional knowledge or experience was thought to be required. DEM. 24. 112, with M.H. HANSEN, *The Athenian Democracy in the Age of Demosthenes. Structure, Principles and Ideology* (Oxford 1991), 239, is the only source for appeal to inexperience as a valid excuse during the *euthuna*. But as I argue below, the lot is not to be understood as a default mechanism for relegating trivial tasks to *hoi polloi*. In a democratic context, the use of the lot ensured that only in a very few cases would any personal qualities be considered in selection for offices, and the Athenians used other filters, including self-selection, and the educational effects of political exposure in the Assembly and elsewhere, to promote competence in office. As Hansen observes, our sources do not speak of incompetent magistrates, and there are few instances of dismissal during office or condemnation during a *euthuna*. Note that I am here treating the 'democratic constitution' as one thing, though it of course evolved over time, as one would expect if, as I believe, the Athenians were alert to the implications of various ways of deploying different political methods.

[8] PLATO *Resp.* 8. 558; cf. ARIST. *Pol.* 6. 2.

executive roles for which a specific kind of experience or talent was deemed essential.

Assembly

The Assembly was regarded as 'the people' of Athens, although only about 20% of the citizen body attended on any one occasion. The reduction (or increase) of the sovereign people to a manageable, appropriate, fiscally-sustainable size was not achieved through the use of the lot, or by rotating through the entire citizen body.[9] The size of the Pnyx limited the number of attendees to roughly the quorum required for some topics, and in the 4th century, with the building of a walled enclosure, actually prevented more than about 6000 from attending.[10] The make-up of the Assembly on any particular day depended on who got there first. And with the exception of pay (in the 4th century), a flat amount that obviously constituted more of an incentive for the less affluent, no attempt was made to achieve representativeness. Indeed, the make-up of the Assembly was filtered through individual decisions about the relevance of a particular agenda to a citizen's interests or experience. Agendas were determined by regular and very specific (constitutionally specified) requirements to address particular tasks at particular sessions, supplemented by proposals brought forward by the probouleutic Council at regular or special sessions.[11] Anyone who wished (*ho boulomenos*) could ascend the *bema* to propose or seek to amend a decree or to weigh in on a proposal. The sovereign exercise of power by a large self-selected sub-group that varied over time, and in ways related to the task at hand and to individual concerns and priorities,

[9] See ARIST. *Pol.* 4. 14 on the constitution of Telecles the Milesian, which rotated the members of the deliberating body.

[10] M.H. HANSEN, *op. cit.* (n. 7), 130-1.

[11] ARIST. *Ath.* 43. 3-6.

engaged a very large percentage of the people in listening to opposing arguments and weighing alternative courses of action. The actions of this shifting and formless body (unstructured by tribes, for example)[12] were influenced, but by no means controlled, by the lot-selected and rotating Council's agenda-setting and presiding functions.[13]

Leadership

In the Athenian democracy, leaders — by which the Athenians meant individuals with sustained influence over the *demos* — were not identified through lot or rotation.[14] This seems an obvious point; these devices are often said to eviscerate the very possibility of leadership, because they give power to people regardless of their prominence or skill or experience, or indeed their performance in office. But leaders were also not identified in the way we would expect, i.e. through election.[15] Leadership was not a function of holding a particular office, nor was there an identifiable leadership class.[16] In the 5th century, those who

[12] Except that in 346/5 the Athenians passed a law stipulating that the tribes take turns sitting near the *bema*, to help maintain order. AESCHIN. 1. 33-4. See M.H. HANSEN, *op. cit.* (n. 7), 137-8 on the evidence regarding seating arrangements.

[13] For example, when he seeks to persuade the Athenians to reverse their previous decision to sail to Sicily, Nicias appeals to the President of the Assembly to put the question again, THUC 6. 14.

[14] Famously, in Pericles' Funeral Oration, THUC. 2. 37: "when it comes to esteem in public affairs, a man is preferred according to his reputation for something, not in rotation, but based on excellence". Translation as per A.W. GOMME, *A Historical Commentary on thucydides* (Oxford 1956), II, 108, with M.H. HANSEN, *op. cit.* (n. 7), 73. Contra the implication of M.H. HANSEN, *op. cit.* (n. 7), 236, Pericles is not here referring to selection for important offices (he makes no reference to offices, or election), but to leadership.

[15] On the role of financial officers, see M.H. HANSEN, *op. cit.* (n. 7), 270-1, and M.H. HANSEN, *The Athenian Ecclesia II* (Copenhagen 1989), 31, vs. J.W. HEADLAM, *Selection by Lot at Athens* (Cambridge 1891), 113-14.

[16] See ISOC. 12. 143f; J.W. HEADLAM, *op. cit.* (n. 16), 114-116; M.H. HANSEN, *op. cit.* (n. 7), 271; E.S. STAVELEY, *Greek and Roman Voting and Elections* (London 1972), 54.

sought to influence Assembly decisions were collectively referred to as *rhetores kai strategoi.*[17] Those who *prostateuein tou demou* or *epimeleisthai ton demosion* were often — when Athens was constantly at war — also those who commanded the military.[18] In the 4th century, this role was most often played by men with no official position, whether elected or allotted: the *rhetores.* At any given Assembly meeting, as many as several hundred individuals might take the initiative to come forward to speak, but only a dozen or so sought to lead the Assembly.[19]

The leaders of the people tended to come from the ranks of the well-bred and/or the well-heeled.[20] But aspirants to great and sustained influence had to compete for that standing by persuading the assembly day after day that they, not their rivals, offered the best advice. Success could be fleeting; rejection was always possible. No individual, whether general or orator, and whatever his social or economic standing, was entitled to influence, much less power.[21] The Assembly wielded its sovereign power by voting on specific proposals, not by voting for a particular person.[22] Headlam has argued that the use of lot and rotation for roles other than the Assembly was essential if the

[17] DEM. 18. 170; 24. 142; AESCHIN. 1. 28-32; 3. 55; LYS. 22. 2; DIN. 1. 71; 1. 100. See M.H. HANSEN, *op. cit.* (n. 7), 268-71, for the evolution of roles and terms.

[18] XEN. *Mem.* 2. 8. 4; 3. 7. 1; 3. 6, with J.W. HEADLAM, *op. cit.* (n. 16), 117.

[19] M.H. HANSEN, *op. cit.* (n. 7), 144; 172; 271, with J.W. HEADLAM, *op. cit.* (n. 16), 116; 173 re *prostates tou demou.*

[20] See J.K. DAVIES, *Athenian Propertied Families,* (Oxford 1971) with M.H. HANSEN, *op. cit.* (n. 7), 272-4.

[21] Glaucon, a member of a prominent family, was XEN. *Mem.* 3. 6 reports "attempting to *demegorein,* striving to *prostateuein* the polis", but was making a laughingstock of himself when he ascended the *bema,* because of his youth and ignorance. Socrates advises him that he is taking a big risk by speaking about matters he does not understand. If he wants to "win fame and admiration in the *polis*", and persuade the Athenians to listen to him, he must think through what he proposes to do. See J.W. HEADLAM, *op. cit.* (n. 16), 115.

[22] The generals were only a partial exception (see Nicias' challenge to Cleon to assume Nicias' generalship to carry out his strategy in Pylos, which was approved by the Assembly). See J.W. HEADLAM, *op. cit.* (n. 16), 27.

people were to maintain their power.[23] His own argument about the limited role of the elected generals and financial officials suggests, however, that the Assembly ruled the leaders, whether or not they were selected by lot.[24] As Protagoras' account of the Athenian democracy illustrates,[25] the continuously exercised sovereignty of the assembly created a public filter for leadership, a way of at once mobilizing and constraining the role of knowledge, experience and character on behalf of the *polis* as a whole.[26]

Elections

In addition to judging political persuasiveness, the assembly also identified needed talent, experience, or skill for particular roles. At specifically designated meetings, the Assembly elected military and some financial officials. Election — by contrast with the lot — was considered an 'aristocratic' procedure, one that would result in the selection of the 'best', which could refer to the traditional elite and/or to the most capable.[27] But when incorporated in a *politeia* in which all citizens were eligible to vote and to stand for office, and the term of office was limited, election could — as in Athens — be deployed for democratic ends.[28] According to the 5th century writer whose views earned him the nickname "Old Oligarch", the Athenians

[23] J.W. HEADLAM, *op. cit.* (n. 16), 39.

[24] J.W. HEADLAM, *op. cit.* (n. 16), 172-3. See ARIST, *Pol.* 3. 11 on the role of the people in an election.

[25] PLATO *Protag.* 320d-328d with C. FARRAR, *The Origins of Democratic Thinking* (Cambridge 1988), 77-98.

[26] See J. OBER, *Democracy and Knowledge. Innovation and learning in Classical Athens* (Princeton 2008), 156-65 on the effect of dispersed knowledge on the relationship between leaders and people in the assembly.

[27] ARIST. *Pol.* 2. 12; 4. 9; 6. 4; 6. 5; and see 3. 13 on the conjunction of good birth with excellence; ISOC. *Panath.*12. 153-4, [XEN.] *Ath. Pol.*1. 2; PLATO *Leges* 757; DEM. 59. 75. See discussion by B. MANIN, *The Principles of Representative Government* (Cambridge 1997), 27.

[28] ARIST. *Pol.* 6. 2

used election for those offices that "bring safety to the whole people if they are in the hands of the right people, and danger if they are not".[29] The choice of the people was not in practice limited to individuals of a certain rank or experience or property. This filtering process sometimes worked in surprising ways. Xenophon describes an encounter between Socrates and one Nicomachides, an experienced military commander who complains of having failed to be elected general: "Isn't it like the Athenians? They have chosen Antisthenes, who has never served in a hoplite regiment or distinguished himself in the cavalry and understands nothing but money-making". Socrates points out that Antisthenes possesses other qualifications that the Athenians might reasonably value in a general.[30]

Why draw lots and take turns?

Athenian democracy relied upon a variety of institutions and practices, including: eligibility of all citizens, with no property requirement, to participate in the assembly and of those of a certain age to stand for office; majority rule; voting (primarily) on proposals not persons; leadership through persuading the Assembly; elections for offices requiring skill; brief terms of office. Together these principles and devices filtered out any extra-political entitlement to power and filtered in the motivations and behaviors likely to lead to unified and effective governance.

[29] [XEN.] *Ath. Pol.* 1. 3.

[30] XEN. *Mem.* 3. 1-2. See ARIST. *Pol.* 3. 11 on the consistency of democratic practices: it makes sense to give men who are not individually qualified by property or merit to hold certain offices the power to elect office-holders or to hold them to account. His argument about the wisdom of the crowd, and the ability of the person who uses the house to judge the builder, justifies reliance on both the lot and election, for different purposes. Compare the incoherence of claims by ancient critics of democracy and by modern democrats that the people are unqualified to play any substantive role, but they are qualified to elect.

What, then, was the added value of the lot and rotation to the Athenian democracy? These were not exclusively democratic devices. As an impersonal process, the lot is an inherently plausible and well-attested means to distribute a good or a burden among people with equal claims, and can be used to avert factional conflict within a restricted class, in which all individuals are to be treated equally.[31] Rotation, too, occurs in non-democratic contexts, as a mechanism to prevent entrenchment and distribute access to power fairly. These procedures are applied politically in a range of constitutional forms. Whether or not the 'hoplite' constitution attributed to Draco is authentic,[32] the author of the *Athenaion Politeia* regarded it as plausible that this constitution should include the selection of a Council and officials by lot, with rotation. The use of the lot to select Archons from among 100 men pre-selected by tribes, and from a restricted property class, is attributed to Solon, but by the time of the Persian Wars they were being elected; at that point the Athenians reverted (by this account) to selecting them by lot from among a group of 500 elected in the demes, still from the highest property class. (The historical validity of this account is hotly contested.[33]) The oligarchic "constitution for the future" developed by the 400 includes selection of a Council by lot.[34] My point here is less an historical than a conceptual one: the lot and rotation could plausibly be incorporated in a range of political systems. For Aristotle, rotation ("ruling and being ruled in turn") is a fundamental principle of

[31] There are many examples of the use of the lot to allocate goods or burdens fairly, including flute girls: ARIST. *Ath.* 50. 2; and military responsibilities: THUC. 6. 62. 1; 8. 30. 1

[32] ARIST. *Ath.* 4. 3 with M.H. HANSEN, *op. cit.* (n. 7), 50.

[33] ARIST. *Ath.* 8. 1 with 22. 5. See M.H. HANSEN, *op. cit.* (n. 7), 50: "whether one believes or disbelieves that the Athenians were using the lot as early as Solon really depends on one's conception of the original purpose of the lot".

[34] ARIST. *Ath.* 30. 2. See also HDT. 3. 83; PLATO *Leges* 763; 765. The lot was used in this way in Venice and Florence. See J. ELSTER, *op. cit.* (n. 1), 81-4.

good government that applies to rule by the few as well as the many.[35] In Plato's *Politicus*, the Visitor suggests a scenario in which "an annual lottery" selects rulers "either from among the wealthier citizens or the whole citizen body".[36]

Why, then, were the lot and rotation used in Athenian democracy, and used in just the way that they were? In prevailing accounts of Athenian democracy, the distinctive contributions of the lot and rotation, as devices used for some contexts and purposes but not others, remain obscure. Some scholars have portrayed the lot as simply an instrumental feature of a system committed to rotation. Lot can be seen as the fairest way to determine whose turn is next when an opportunity or responsibility is to be shared out among the entire citizenry, or as many as possible.[37] Others emphasize that the lottery is intended primarily to prevent the accumulation of experience or specialized excellence by any individual in any one role, because this would generate a governing elite and threaten the sovereignty of the assembly. In this case, too, rotation appears fundamental. With rotation required, election — according to Staveley — is beside the point or, in Manin's analysis, illogical, because the electors would not be permitted to choose anyone they wish, but only from among those without prior experience in that role.[38]

[35] ARIST. *Ath.* 7. 3; 14.

[36] PLATO *Polit.* 298e.

[37] J.W. HEADLAM, *op. cit.* (n. 16), 188 on ARIST. *Ath.* 4, which to him reveals the underlying point of rotation and the lot; and 187 with *Ath.* 54-6. E.S. STAVELEY, *op. cit.* (n. 16), 55; M.H. HANSEN, *op. cit.* (n. 7), 236 agrees that the fundamental principle is rotation, but does not treat service as mandatory. See PLATO *Prot.* 319d; PLATO *Theaet.* 173c-d; ISOC. 15. 38; DEM. 22. 36-7; 23.4, 24. 66; AESCHIN. 3. 233; 3. 220 with M.H. HANSEN, *op. cit.* (n. 7), 267 on expectations about participation. More recently, J. OBER, *op. cit.* (n. 26) has emphasized the role of rotation, along with broad participation, and the specification, structure and accountability of the administrative boards, in his analysis of the efficiency and effectiveness of Athenian democracy.

[38] Like Staveley, Headlam believes that the use of the lot and rotation for administrative roles was intended to protect the power of the assembly, by ensuring mediocrity elsewhere. The lot and rotation are, in his view, not simply

The interpretation of the Athenian use of lot and rotation in terms of a basic and conceptually coherent commitment to taking turns — in order to give everyone a chance or to ensure mediocrity among office-holders — simply does not account for the peculiarities of actual practice. Aristotle's *Athenaion Politeia* confirms that rotation was an independent principle: it applied to some elective offices as well.[39] If rotation is fundamental, to prevent entrenchment or fairly distribute power, why permit self-selection by any group, including members of the Assembly? Why not rotate an Assembly selected by lot? Or if short terms, rotation, and accountability are consistent with elections, why not elect all magistrates? The Assembly evidently felt it could control even elected (non-rotated) officials; why go to such lengths to ensure — as allegedly lot and rotation did — that those in some official roles would be nonentities? And why both lot and rotation for some roles, but only the lot for others? Why did they not rotate membership of the lot-selected juries? Or if the pure self-selection reflected in the Assembly is fundamental, then why not assimilate every group to that model? For example, if an agenda-setting and presiding body is required to structure the deliberations of the Assembly, why select such a Council by lot, with a ban on serving more than twice? Why not simply allow whoever wished to play a particular role to come forward, and select the required groups on a first-comer basis, like the assembly? Or appoint volunteers, then rotate?

complementary or logically related but parts of a single process: the lot simply determines the order in which all citizens will take their turn. B. MANIN, *op. cit.* (n. 27), 31 argues that there was a conflict between the elective principle and rotation, because "the elective principle entails that citizens be free to choose", including choosing to re-elect. However, the *Athenaion Politeia* states that the Athenians did rotate some elective offices; and also limited election by tribe. See ARIST. *Ath.* 54. 3; 56. 4; 62. 3.

[39] ARIST. *Ath.* 62. 3, with 54. 3; 56. 4. See P.J. RHODES, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford ²1993), 696, on the debate about interpreting 62. 3. See ARIST. *Pol.* 6. 2, where his point about limitations on re-selection, and brief tenure in office, are not couched in terms of a distinction between election and the lot.

The Athenians' selective use of the lot and rotation in combination with self-selection cannot be explained in terms of a purely negative or a uniform objective. If the aim was to enforce mediocrity and ineffectuality in all institutional roles other than the Assembly, rotation alone would have been sufficient, and self-selection is difficult to comprehend. If the objective was to distribute political authority among all citizens, mandatory participation would make more sense. Moreover, together the two claims make even less sense of Athenian practices than they do individually: what is the democratic point of engaging all citizens in roles that are by design powerless? Instead, an explanation should start by exploring the institutional roles of the bodies for which lot and rotation were used, by comparison with those — discussed above — for which they were not considered relevant, and then analyzing the distinctive contribution made by each of the two devices to the democratic functioning of these bodies. The interpretation that emerges from this investigation must also make sense of Athenian reliance on self-selection.

Institutionalizing democracy

To function effectively, the democracy needed to designate groups that would be consistent over a period of time, to facilitate the work of the Assembly and hold it accountable to the laws (the Council, the juries), and to implement the Assembly's decisions (the boards of magistrates, and the Council). And it was for these institutions that the Athenians used lot (for all these roles) and rotation (for the probouleutic and administrative functions).[40] The specific application of these

[40] J.W. HEADLAM, *op. cit.* (n. 16), 90 suggests that the requirement of enforcing mediocrity among officials itself led to the proliferation of undemanding roles with very limited writs. Contra, J. OBER, *op. cit.* (n. 26), especially the example he discusses at length, 124-133. A rotating division of labor is key to Ober's account, too, but he documents the success of this system in building

devices depended on the group's role and size. They were very influential, even if they largely lacked decision-making authority. The extended role of (in the case of magistracies) a relatively small group of citizens was essential to the proper functioning of the *polis*, but it was also a potential hazard in a system that depended on equal power. [41] The risk was addressed in part through a system of scrutiny during and at the end of a magistrate's term of office, with a particular focus on rooting out corruption and treason, but with the opportunity to bring a charge for any offence whatever.[42] However, the selection process, rotation requirement (for magistracies) and resulting make-up of the boards served as the primary safeguard.

The democratic lot

The principle embodied in the lot — having an equal chance to be selected,[43] whoever you might be, whatever your affiliations or qualifications or experience or views — applied to those democratic bodies or functions for which a strictly impersonal criterion was required.[44] Sortition is a procedure that, in

capacity in and among individuals to benefit the polis in ways that an exclusively assembly-with-elite-leaders-focused polity could not have achieved.

[41] See, for example: ARIST. *Ath.* 49. 3: "the *Boule* used to take decisions about the models and the robe, but this is now done by a dikasterion selected by lot, for it was felt that the *Boule* was swayed by personal feelings"; beginning in 410, members of the *Boule* were assigned to sit by lot (PHILOCH. Fr.140); all magistrates (but not the Assembly) were required to take oaths: so, for example, the Council, in LYS. 31. 1; XEN. *Mem.* 1. 1. 18. Once these bodies are selected, the individuals are identifiable, and subornable.

[42] M.H. HANSEN, *op. cit.* (n. 7), 220-224. Note that this opportunity to widen the scope was not much exploited.

[43] See discussion of this distinctive aspect of equality — not equality of opportunity in the meritocratic sense, nor equal result, but an equal chance of being selected for a thing — in B. MANIN, *op. cit.* (n. 27), 35-6. During these *Entretiens*, Mogens Hansen referred me to the explicit statement of this principle at DEM 39. 1.

[44] Then as now, the lot was regarded as an impartial means of allocating goods or burdens. So, for example, the Spartans used the lot to select the men

Manin's paraphrase of Rousseau, "allocates magistracies without the intervention of any particular will", i.e. a will that is partial, or tied to individual personalities or claims.[45] With this selection mechanism in place, no-one could argue a better claim to inclusion, and no-one could be excluded for any reason other than basic threshold criteria established through the initial screening, or *dokimasia*.[46] Morevoer, no-one could secure inclusion purely by his own action (unlike, for example, deciding on the spur of the moment to attend the assembly).

The lot's impersonal and equal allocation of a chance to be chosen established the legitimacy of these administrative bodies. The Athenians inhibited corruption and prevented the appearance of corruption — corruption in the broad sense of a direct relationship between individual advantage and political office — by means of extraordinarily complex measures to ensure the transparency and impartiality of the selection process.[47] The group as a whole could be seen as a collection of citizens whose personal attributes pre-selection are irrelevant to their role, and who are expected to put whatever relevant attributes or insights or knowledge they possess — and what they acquire through service — to the use of the *polis*.

Juries Jurors were selected by lot from among citizens over thirty to create a large group (roughly the size of the Assembly) that (unlike the Assembly) would be consistent across the

who would go to Sphacteria. It was particularly useful in cases where the intervention of a personal will would have political consequences: so Kleisthenes created tribes from trittyes by lot, even though the objective of mixing groups from across Attica could have been achieved more effectively by deliberately (personally) assigning them. See J.M. MOORE, *Aristotle and Xenophon on Democracy and Oligarchy* (Berkeley 1975), 239; M.H. HANSEN, *op. cit.* (n. 7), 46-9.

[45] B. MANIN, *op. cit.* (n. 27), 77 with 74-76; J.-J. ROUSSEAU, *Du contrat social ou Principe du droit politique* (Amsterdam 1762), 4. 3.

[46] E.S. STAVELEY, *op. cit.* (n. 16), and following him J. ELSTER, *op. cit.* (n. 1), interpret the *dokimasia* as a substantive screening. The evidence is against them; see the discussion of the sources in M.H. HANSEN, *op. cit.* (n. 7), 218-9.

[47] ARIST. *Ath.* 64-66.

course of a year,[48] and whose make-up was determined in a strictly impersonal way. The refusal to permit the use of reasons of any kind beyond the logic of the process itself for the selection and allocation of jurors makes explicit the fact that no-one has any special claim to a place in the pool or on a jury, and thwarts corruption by anyone trying to influence the outcome of a trial.[49] Through this two-stage process, the Athenians were able to convene an identifiable pool of jurors while still reducing the potential for subversion. The selection of a judicial pool by lot may well have been largely a matter of administrative convenience, so that a suitably large body would already have been sworn in and given a ticket.[50] Given the size of the pool, and the re-shuffling of the group for any particular trial, rotation was not considered necessary to prevent the entrenchment of any particular set of interests or concerns. In the 4th century, groups of *nomothetai* selected from the jury pool as needed assumed the role of legal review and revision — a role that rivaled the sovereignty of and reflected the democratic values associated with the Assembly.[51] The selection of

[48] The permeability and hence the constraints on the juries fall between the magistrates and the Assembly. The size of the pool meant that the lot did not have a filtering effect; the group as a whole resembled in profile the attendees at any given year's assemblies, except that jurors had to be over the age of 30. (It is relevant here that the assembly did occasionally serve as a judicial body.) Like the assembly-goers, the jurors were not subject to *euthuna* nor held accountable for their votes, and it was open to them to decide whether to present themselves for service on any given day. The oath-taking and regular use of a secret ballot set them apart from the people in Assembly. Rather than simply ask for volunteers as needed, it was presumably more efficient to ensure that a large screened group, already sworn in, would be ready to be assigned to trials as needed. (See [XEN.] *Ath. Pol.* 3. 6 for the pressure of jury business.) Also, given the role of the *dikastai* as a check on the actions of the assembly and officials, and, in the 4th century, as the law-makers, there may have been value to being a designated group, with a certain sense of themselves as a whole, with a charge separate from the people in Assembly.

[49] See P. STONE, "The Logic of Random Selection", in *Political Theory* 37, 3 (2009), 375-97, to be discussed at greater length below.

[50] ARIST. *Ath.* 63.

[51] See the contributions of P. Pasquino and A. Lanni in this volume.

the annual juror pool of 6000 by lot meant that any citizen over thirty had an equal chance to serve on a panel, but no citizen was specially entitled or qualified to do so. Assignment by lot to a board of *nomothetai* from among the *dikastai* who showed up on a particular day likewise ensured equal access to this powerful body, and disrupted the possibility of an externally-manipulated, non-political connection to the matter at hand. Like members of the Assembly and jurors in other cases, the panel served as *nomothetai* for a single day. The *nomothetai* were therefore continually 'repopulated', like the Assembly, from among a very large group of citizens, and did not need to be rotated.

Council and Boards Sortition forged a connection between the actions of these relatively small groups of citizens and the concerns and preferences of their fellow citizens, without turning these bodies into agents or exemplars of identifiable traits or concerns. The selection process enforced:

1. Access for the many The lot (along with open participation in the sovereign assembly) made good on the promise of full eligibility for a broad range of official roles.[52] The poor, uneducated,

[52] ARIST. *Pol.* 6. 5; [XEN.] 1. 1-3. Only for a small number of positions and responsibilities was wealth considered relevant. On the continued existence of property-class requirements for some roles, see ARIST. *Ath.* 47. 1; 8. 1. The implication of 8.1 is that only in the case of the Treasurers was the law of Solon still in force; he is explicit about that in this instance, and silent in others that might be thought comparable. Nonetheless, *dokimasia* candidates were required to state their class, *Ath.* 7. 4. See AESCHIN. 3. 27, 30. The restriction of eligibility in some cases, and election in others is further confirmation of the Athenian ability to discriminate between appropriate contexts for making social/economic status relevant, and not, and to change this over time, and the growing impact of the lot: so, for example, re the treasurers of Athena, ARIST. *Ath.* 47. 1 says that by his day, "the man picked by lot holds office even if he is very poor". Contrast the case of liturgies, for which wealth was essential. [XEN.] 1. 13 observes that "the Athenian people realize it is the rich who pay, and the common people for whom such things are arranged and who serve in the triremes". The liturgists were chosen in various ways (M.H. HANSEN, *op. cit.* [n. 7], 111) — and rotated, though not in any formal way. They were not, for example, chosen by lot from within a limited class. The Athenians acknowledged that archonships often required significant outlays (ARIST. *Ath.* 47. 1; AESCHIN. 3. 27, 30), but these

and/or inexperienced, who might well not have the nerve to step to the *bema* to address the Assembly, would perhaps be more inclined to volunteer for a role shared with a small-to-medium-sized group of other citizens (10, on a Board; 50, on the *prytany* of the Council), none of whom, thanks to rotation (except the small number of recidivists on the Council), could lay claim to expertise in that role. In a *deme* assembly, where local hierarchies of kinship and status are most likely to make themselves felt, candidates for the Council come forward.[53] If election, or even a formal nomination were required, who would come forward? The usual suspects.[54] In the years before 487/6, when the tribal assemblies met to elect candidates to submit for the central lottery, who would be likely to put in their names?[55] Especially for the archonships, once the most illustrious offices in the *polis*, the traditional hierarchy of economic and social class would continue to hold sway.[56] Selection by lot was impartial; no-one else could

offices were not limited to the wealthy. And see ARIST. *Ath.* 56. 4: in the case of the Assistants to the board for the Great Dionysia, they were initially elected, and expected to cover their own costs; by Aristotle's day, they were chosen by lot, and received public funds to cover expenses.

[53] Selection in *demes* was phased out for other offices, but preserved for the *Boule*. ARIST. *Ath.* 62. 1: corruption in choice of officials in *demes* led to selection in tribes, for offices other than the *Boule* and the Guards.

[54] Compare the modern use of 'reservations' for particular demographic groups, used to overcome entrenched social hierarchies. India has created a system of reserving seats in some districts exclusively for women, so that women will come forward as candidates. (Note that they use the lot to decide which district will exclude men from the ballot.) E. DUFLO, "Why Political Reservations?" available at http://econ-www.mit.edu/faculty/eduflo/papers. Using the lot to select among candidates would be an alternative strategy — but it both violates the modern belief in meritocracy, and also might not be sufficient to break through the directly and indirectly coercive effects of traditional male dominance. See also the predominantly male turnout for the Deliberative Poll in China, below.

[55] ARIST. *Ath.* 21 suggests that it was the creation of new tribes and the requirement to use a *deme* name rather than a patronymic that prevented discrimination based on ancestry, e.g. discerning who was a newly confirmed citizen.

[56] In the Solonian tradition, as recounted by Aristotle, these offices were once limited to the top two property classes (*Ath.* 7, esp. 7. 4; 8. 1; 47. 1). Double sortition — first in the tribal assembly, then in the *ecclesia* (as distinct from a process in which candidates came to the assembly and were selected by lot by tribe), may have been a holdover from a Solonian tradition, ARIST. *Ath.* 8. 1, or perhaps just the most convenient way of handling the rotation of specific archonships across tribes (see ARIST. *Ath.* 55,1, with HDT. 6. 109-10). Or,

influence the luck of the draw, so anyone stood an equal chance of being chosen. This, together with pay, would presumably have the consequence that more of the less advantaged would be inclined to step forward.

2. Access for the few Even those whose inclinations and affiliations might be out of sympathy with the prevailing dispositions of the majority would be able to serve as a member of one of these boards. Isocrates (7. 22-23) argues that the impartiality of the lot poses a threat to the *demos*: men of an oligarchical disposition, too, could be chosen. The evidence of Lysias' speeches on *dokimasia* suggests that complicity in the overthrow of the constitution in 404/3 could in principle be grounds for rejection at this threshold review.[57] Yet anyone with views short of outright treason could hope to be selected to serve on, say, the Council, and to influence the actions of the *polis*.

3. Diversity (1) and (2) together meant that a body chosen by lot would be likely to be diverse, to a greater degree than formal mixing by (artificial) tribe and/or *demes* alone would ensure: diverse, that is, by economic and social class and life experience, not just by geography.

4. A rigorously political context for personal interests The lot served as a bulwark against various ways of corrupting the democracy. It hindered the development of 'constituency' relationships between magistrates and the general public. Individuals brought their particular attitudes, priorities, and experiences to the task at hand, but were not 'representing' a specific aspect of their identity. Moreover, they had to advance the business of the polis in cooperation with men very different from themselves. Individual characteristics and concerns would be expressed in the context of the wellbeing of the *polis* as a whole, not in relation to the power of the numerically or socially or economically superior. The Boards selected by lot therefore served as a useful counterpoint to the logic of the numerical superiority of the poor, and the potential for affiliation by personal characteristics

as E.S. STAVELEY, *op. cit.* (n. 16), 39 suggests "a method of ensuring that each tribe in fact put forward ten nominations for the final sortition and of preventing thereby any attempt to manipulate and regulate nominations at the tribal level".

[57] On *dokimasia* and political convictions, see M.H. HANSEN, *op. cit.* (n. 7), 218-9; 236-7, with LYS. 16. 25, 26, 31, all of which relate to 403/2.

and status, associated with the open weave of the assembly. A view with a 'majority' following among the people was not guaranteed a majority in the Council or on a Board; and (in part because of tribal selection and structuring), personal affiliations were unlikely to dominate the proceedings.

Democratic rotation

What is the distinctive value of rotation, a ban on holding the same office more than once (or — rarely — twice) in a democracy? Rotation was not used to ensure that most or all citizens participated in government: individuals were permitted to stand for office every other year, so long as the position was not one he had held before, and the jurors were not rotated over time. If the aim of rotation were to facilitate the broadest possible participation in ruling, then the Athenians should have required that archons, for example, stand for no other office until every citizen has played some role or other.[58] Something like this scheme for taking turns would seem to be required by a narrow reading of Aristotle's well-known articulation, in the *Politics*, of what he calls a fundamental principle of liberty: "to be ruled by none, if possible, or, if this is impossible, to rule and be ruled in turn".[59] Yet for Aristotle, and in practice,

[58] As in Draco's constitution as described in ARIST. *Ath.* 4; see J.W. HEADLAM, *op. cit.* (n. 16), 188.

[59] ARIST. *Pol.* 6. 2: he goes on to say that "all should rule over each, and each in turn over all". As articulated here, this principle only makes sense as a general, not a specific, point: every Athenian can take a turn to rule in some way, whether as a member of the Assembly or in another role. Freedom rests in being ruled by people who will take their turn as the governed. See ARIST. *Pol.* 3. 4: "he who has never learned to obey cannot be a good commander"; "the good citizen should know how to govern like a freeman and how to obey like a freeman". The contrast is with one or some few men ruling over all, without yielding place to others and being governed in their turn. (This point is made explicitly in EUR. *Suppl.* 406-8.) He is not suggesting that all citizens must take their turn in a specific office. Most Athenians would never take 'their turn' as general, nor would they be considered (or consider themselves) capable of doing so. ARIST.

rotation is not a mechanism confined to democracies. Every constitution except rule by one man treats full citizens as relative equals in some respect or other: because they are equally free, or equally wealthy or well-bred or wise, depending on the system. If every citizen has a right to rule as well as an obligation to be ruled, and alternation contributes to good government — as Aristotle suggests in Book 3 of the *Politics* — then why did the Athenians use the mechanism selectively, for some roles but not others?

As practiced in Athens, rotation is not based on a claim of actual equality (Athenian democrats did not subscribe to this belief).[60] And the lot alone is sufficient to enforce the claim that no-one is specially qualified to hold a particular magistracy. Rather, the Athenians drew on the ability of rotation to forge reciprocity: according to Aristotle, in any constitutional system based on "the principle of equality and likeness, the citizens think that they ought to hold office by turns." As a result of this regular displacement, "somebody else would look after his interest just as he, while in office, had looked after theirs".[61] For the Athenians, this way of promoting active, ongoing continuity with the rest of the people was essential for the occupants of relatively small administrative boards that operate with the same membership for an entire year without regular interaction with or oversight by the Assembly.

Pol. 7. 14 argues that taking turns "governing and being governed" is a fundamental principle in any polity, because equals should be treated equally. See discussion in B. MANIN, *op. cit.* (n. 27), 28-9.

[60] e.g. THUC. 2. 37. 1. As Hansen emphasized to me at these *Entretiens*, it was critics of democracy who linked the lot to an alleged democratic belief in natural equality (ISOC. 7. 21-2; PLATO *Leges* 757b. Hansen also noted that ambition (*philotimia)* and competitiveness (*hamilla)* spurred political initiative (DEM. 10. 71; 20. 108; 18. 320); neither is consistent with a belief in natural equality.

[61] ARIST. *Pol.* 3. 6.

Council and Boards Rotation hinders smaller and relatively independent groups — whether elected or allotted — from acquiring an entrenched, function-specific profile, and thus prevents over time the kind of discontinuity with the people that the lot inhibits for most administrative positions in any given year. Rotation fosters a dynamic relationship with the broader citizen body by each individual, and by the Board as a whole over time. Despite being chosen by lot, with no regard for his abilities, a member of a Board can and is expected to develop competence in a particular role by the simple fact of performing its responsibilities week after week. However, the individual officeholder recognizes that although he now rules in this domain, he will be ruled by someone else before long.[62] The magistrate is therefore likely to remain alive to the way his actions affect the concerns of the 'lay' citizen he himself recently was and will be again, as well as to retain a sense of how this role connects with other determinants of the *polis*' wellbeing. In addition to mitigating the isolating effects of specialization by individual magistrates during their term of office, rotation also ensures (in a way that lot alone cannot) that no particular office can come to be the domain of any one or a group of citizens, who could otherwise put themselves forward repeatedly for selection, by lot or vote, for the same position.

Differences of size and function help explain different applications of the principle. Among rotating offices, the Council exercises the most powerful role. One might therefore expect the principle of rotation to be applied rigorously to Council membership. But precisely because of its importance, the Athenians (who tolerated shortfalls on smaller boards) insisted on operating with a fully-manned Council — with the requisite numbers from each tribe to man each *prytany*. Because the Council is a relatively large body, with influence over the full range of issues affecting the *polis*, and (other than the non-rotating Generals)

[62] See B. MANIN, *op. cit.* (n. 27), 29-30.

the most closely engaged with the *demos* in Assembly, the Athenians could afford to abrogate the strict rotation principle, and permit individuals to serve twice. For smaller groups with narrower, more isolating functions, strict rotation applied.

The puzzle of self-selection

The feature of Athenian democracy that confounds most scholarly analyses of selection for magistracies, and most modern interpretations and applications of the lot and rotation, is the Athenians' reliance on self-selection: *ho boulomenos*. If the motives for using the lot and rotation were as other scholars — or I — assert, why did the Athenians not instead (or also) make participation mandatory? If the Athenians proliferated magistracies and used lot and rotation to facilitate office-holding by all citizens in turn, whether as a principle of equal freedom or to prevent challenges to the Assembly or to disseminate knowledge and experience, why not just require participation? This difficulty led Headlam to bite the (logical) bullet and conclude that the Athenians drew lots from an inclusive list (as we now do for juries).[63] In doing so, he defied the evidence for voluntarism, evidence that has only increased with more recent epigraphical findings.[64] I have suggested that the aim of the

[63] J.W. HEADLAM, *op. cit.* (n. 16), 94; and his comments on the *Athenaion Poiteia* account of Draco's constitution, 188. As Headlam himself acknowledges, if this were so, then the practicalities of selecting the members by rotation in the *demes* would mean that the lot was not really required; rotation by, for example, seniority, would do. If rotation were the aim, a list could be kept of who had performed a particular magistracy and, as with the Arbitrators described by Aristotle (*Ath.* 53.5), individuals could be selected in the order they were enrolled on the list of Ephebes, and required to assume the designated role.

[64] On the evidence for voluntarism, see M.H. HANSEN, *op. cit.* (n. 7), 233; 248-9. It is telling that the Athenians tolerated vacancies on Boards (other than the *Boule*), permitted two terms on the *Boule*, and preserved pay for the *Boule* into the 4th century, rather than mandate participation. See AR. *Ec.* 834 (and see 682), where Praxagora lays comic emphasis on the revolutionary requirement

lot was to make all functions that did not require expertise genuinely accessible to and reflective of the diversity of the entire citizenry, and to detach office-holding from any claim of entitlement based on personal qualities, social status or experience; and that the aim of rotation was to prevent specialized isolation and entrenchment by smaller, annually selected bodies with narrower administrative functions. Wouldn't these aims, too, be better achieved by requiring participation in administration?[65] Why create such an elaborately 'impersonal' process for selecting among those who self-select? Why not just ban the most personal of motivations, namely self-selection? Why not reserve the role of *ho boulomenos hois exestin* to speaking in the Assembly, and originating laws, decrees, and public prosecutions, and put service on the Council or a Board in the same category as military service or being an Arbitrator, which were compulsory?

The answer to this puzzle, I suggest, is that *ho boulomenos* was more fundamental to Athenian democratic citizenship than the lot or rotation. The Athenians' selective deployment of lot and rotation for the structuring of essential administrative and judicial functions can then be understood as making self-selection safe — and valuable — for the operations of a democratic *polis*. Not only are these practices consistent, but they are mutually reinforcing: self-selection, the lot, and rotation made collective self-government possible and effective.

According to Aristotle, "democracy is the form of government in which the free are rulers".[66] "All democrats", he says, affirm the principle that "a man should live as he likes".[67] *ho*

that 'all' citizens (pantes astoi) must present themselves for the drawing of lots: "yes, that's the way we do things now".

[65] *Ho boulomenos hois exestin*, as Hansen has demonstrated, is as much a formal feature of Athenian practice as the lot or rotation or artificial tribes, and arguably, as Hansen observes, "the real protagonist of the Athenian democracy". M.H. HANSEN, *op. cit.* (n. 7), 72 with 266-8.

[66] ARIST. *Pol.* 4. 4.

[67] ARIST. *Pol.* 6. 2. Note the absence of any specific reference to self-selection or initiative in this passage, where Aristotle lays out the distinguishing features of

boulomenos may look on the surface like a democratic arrogation of a privilege of the social and economic elite who, after all, could always do as they pleased. But self-selection by any citizen was in fact a quintessentially democratic challenge to that elite, whose power rested on authority defined in non-or-extra-political terms. Oligarchs do not see political freedom as a virtue;[68] freedom is the lowest common denominator, the only attribute that distinguishes citizen from slave, and it is a characteristic or status that the polis itself creates and enforces. The oligarchic or aristocratic claim to power, by contrast, is founded on "birth, wealth, and education".[69] Responding to the charge that he had not come before the people very often, Aeschines observes that "in oligarchies, it is not anyone who wishes that may speak but only those who have authority (*dynasteuein demegorei*); in democracies, anyone who wishes may speak, whenever he wishes".[70] This passage and others reveal that *ho boulomenos* is a pro-equal-freedom, anti-entitlement practice: any citizen may speak, with no justification other than believing he has something to offer, and no-one must speak, or indeed take political action of any kind.[71] Self-selection challenges the very idea of extra-political power.

Mandatory exercise of power, or even a responsibility to do so, is associated in the ancient sources not with promoting

democracy. However, he does identify 'freedom' as the essential democratic principle, upon which even the democratic claim to equality rests: all men are equally free. See also EUR. *Suppl.* 438: "Thus freedom speaks: who wishes to bring good counsel can become *lampros*; but one can also keep silence. What could be *isaiteron*?" ARIST. *Rhet.*1. 8. 5; THEOPHR. *Char.* 28. 6; For the critical perspective, PLATO *Resp.* 557b-558c; 562b-564a; ARIST. *Pol.* 5. 9; 6. 4; [XEN.] 1. 2; 1. 6; 1. 8. See M.H. HANSEN, *op. cit.* (n. 7), 76 and ID., *Was Athens a Democracy? Popular Rule, Liberty and Equality in Ancient and Modern Political Thought* (Copenhagen 1989), 12 with R.G. MULGAN, *art. cit.* (n. 1), 18-20.

[68] See M.H. HANSEN, *op. cit.* (n. 7), 76, with [XEN.] 1. 8; THEOPHR. *Char.* 28. 6; ARIST. *Pol.* 6. 4.

[69] ARIST. *Pol.* 6. 2.

[70] AESCHIN. 3. 220 (*Ag. Ctes.*) with B. MANIN, *op. cit.* (n. 27), 16.

[71] See EUR. *Suppl.* 422-433.

popular participation, but rather with ensuring that those 'entitled' to govern take their turn. So, for example, in the constitution attributed to Draco by Aristotle[72] and the "constitution for the future" drafted by the regime of the 400[73]. In both cases, power was limited to men of hoplite property status. The 'Draconian' *Boule* was to be selected from those over 30, "and nobody could hold the same office twice until all those eligible had held it; then the allotment started again from the beginning". Anyone who did not attend was to be fined. In the "constitution for the future" drafted by the 400, too, the entire body of property-eligible citizens was to be divided into groups, each to serve as the *Boule* for a year, in turn.[74] In the supposed 'blending' of oligarchic and democratic elements in Plato's Laws, *ho boulomenos* is associated with the weakness of the less powerful, because it is combined with more stringent participation by the upper classes in a way that reinforces the elite's traditional power.[75] In his critique of Athens for detaching personal ability from political authority, Plato's Socrates invokes *ho boulomenos*: in a democracy, he scoffs, "you are not obliged to be in authority, however competent you may be, or to submit to authority, if you do not like it [...] and though you may have no right to hold office or sit on juries, you will do so all the same if the fancy takes you".[76]

[72] ARIST. *Ath.* 4. 14.

[73] ARIST. *Ath.* 30.

[74] Turns were determined by lot. This is an example of the use of the lot just to determine who goes first, when everyone must participate; so too is the selection of which *prytanis* will act as the Council's executive committee for the month, ARIST. *Ath.* 43. 2.

[75] PLATO *Leges* 756 with ARIST. *Pol.* 2. 6. The process of selecting the Council in Plato's Laws is compulsory, and absence is fined, during the first two phases, when nominations for the representatives from the highest and second highest classes are solicited. On the days when candidates for the 3rd and 4th classes are identified, the requirements are loosened for the two lower classes, presumably to make it easier for the elite to secure lower-class candidates they approve of. In the end, everyone must vote.

[76] PLATO *Resp.* 557e. Note the sarcastic reference to the principle of "ruling and being ruled" (*archein/archesthai*). Compare Plato's ideal city, in which

The principle of *ho boulomenos* permeated the Athenian democracy, as a protection against the assertion of traditional privilege or arbitrary and oppressive power. Yet *ho boulomenos*, as the *Laws* passage about the role of the upper classes suggests, posed risks to a democracy. The late 5th and 4th century sources, especially, recognized the threat to the *polis* of the unconstrained exercise of freedom, whether by the traditional elite, no longer entitled to a share of rule but now required to fight for it through persuasion or guile; or by the people, confusing freedom with license, or simply passively permitting the socially and economically powerful to hold sway. As Aristotle observes, "modern oligarchs," unlike traditional ones, "are as covetous of gain as they are of honour".[77] He declares that the primary danger of too free and open a political system arises from those with wealth and standing, because "the practical difficulty of inducing those to forbear who can, if they like encroach, is far greater, for the weaker are always asking for equality and justice, but the stronger care for none of these things".[78]

In most administrative roles, these risks were mitigated by the use of the lot and rotation. When it came to serving on the Council or Boards, no-one was entitled to do so by extra-political status or power, no-one was forced, and everyone was free to step forward. Self-selection combined with the use of the lot protected the weak against the most dangerous 'encroachers'. The lot made *ho boulomenos* a reality for all Athenian citizens,

competence is not determined either by conventional categories, nor by the *polis*, and those who are competent — the philosophers — must be forced to rule.

[77] ARIST. *Pol.* 6. 7; and see [XEN.] 1. 8 re the actions of the elite, who can be expected to pursue their own interests at the expense of the people. See the science fiction writer Arthur C. Clarke's system, in which anyone who wants the job is automatically disqualified, and the lot is used to select from among the rest (cited in B. GOODWIN, *op. cit.* [n. 1], 159).

[78] ARIST. *Pol.* 6. 3. See C. FARRAR, *op. cit.* (n. 25) for the argument that this concern about untrammeled power — reflected in tragedy as well as philosophy — is in part a legacy of the power of the Athenian empire.

by giving everyone an equal and impartially-determined chance to serve. And the lot combined with rotation prevented *ho boulomenos* from turning into license or domination by any individual or group, either on the Council or a Board in a particular year, or over time.

Self-selection was not merely an expression of democratic freedom that — when structured by lot and rotation — was consistent with popular self-rule; *ho boulomenos* also filtered political participation in a fully democratic way. In deciding whether to step forward for office, each citizen judges for himself whether he wants the responsibility that comes with this freedom, and whether he is up to it, or could be.[79] The phrase *ton Athenaion ho boulomenos hois exestin* enjoins each citizen to reflect on what he has to offer the *polis*. The *dokimasia* will confirm eligibility in the formal sense; each citizen determines for himself his suitability for a particular role. Here, I suggest, rests the primary value of self-selection to democratic administration (as well as to the operation of the Assembly). The individual alone assesses his own eligibility to be in a pool of candidates, and he does so in the knowledge that he will be judged, during and after his term of office, by his fellow citizens. In his analysis of the use of sortition in Athens, Montesquieu observed that the selection by lot only from among those who presented themselves "implied both lot and choice". He concluded that "people without ability must have been very reluctant to put their names forward for selection by lot".[80] Other features of the process would have helped overcome this reluctance: experience in the Assembly, or in the courts; pay (in the 5th century

[79] See B. MANIN, *op. cit.* (n. 27), 13 on the fact that this self-scrutiny involves a prospective judgment, not the a posteriori assessment required by a *euthuna*, or in an election for an office without required rotation. Citizens eligible for jury service — as for magistracies — decided whether to put themselves forward for selection to the pool. As with the Assembly, however, they also chose whether or not to turn up on a particular day.

[80] MONTESQUIEU, *De l'esprit des lois*, 2. 2, with B. MANIN, *op. cit.* (n. 27), 71-2.

for all magistrates and for the *Boule* in the 4th)[81] and the impersonality of the lot itself, as well as the lure of exerting influence, or fulfilling an honorable civic duty. Not just anyone could stand in for his fellow citizens: only someone who passes a self-scrutiny and is willing to be judged on what he expects to be able to achieve.

For the smaller, enduring, and less permeable political boards, self-selection combined with the lot and rotation made effective democratic self-rule possible:

- self-selection filtered for capacity and interest based on purely internal, not external, criteria
- the lot ensured that office-holding was not, however, an act of sheer will, but the result of a strictly impersonal and political process, and enforced the principle of equal chance, which established a psychological relationship between the office-holder and other citizens; and
- rotation ensured that the interest in an office that motivates self-selection could not turn into entrenched influence, and that the lot, which excluded interested citizens from a particular role, could not (in all likelihood) exclude them forever.

Together, the three mechanisms ensured that each citizen could say of almost any office-holder: not "that person looks like me, or represents my interests", but "that could be me!". And no magistrate can justify thinking of himself as in office because of demonstrated capacity or a special claim. Anyone else with an interest in performing his role could have been doing so instead of him, and would be doing so very soon.

[81] The *Athenaion Politeia* (27. 4) observes that once Perikles arranged for jurors to be paid, *kleroumenon epimelos aei mallon ton tuchonton e ton epieikon anthropon,* i.e. some say that the quality of the courts declined, "since it was always just any random person rather than the more respectable (the better sort, but also by implication, given the contrast with wanting to be paid, the upper classes? See P.J. RHODES, *op. cit.* [n. 39], 342-3) who took care to ensure that their names were included in the ballot for places on the juries". Note that one can't actually take care to be selected, only to be included in the drawing.

The process as a whole (self-scrutiny, impersonal selection, recognition of drastically limited tenure and the prospect of being governed in a particular domain by others selected in the same way) created a pool of political equals who did not mirror the *demos*, but were actively continuous with them, and therefore connected personal concerns with political claims in a way that randomly selecting names from a list of citizens and requiring them to serve on one Board after another could not have achieved. The powerful political filter created by Athenian institutions, including lot and rotation — a system that has been criticized as leveling individual difference or as privileging the *polis* over the individual — [82] was in fact intended to be applied by free individuals, *hoi boulomenoi*, according to their own lights.

Re-casting lot (and re-turning to rotation)

The revival of these devices by modern reformers is not fueled by an ongoing tradition.[83] Inspiration may be at work; modern reformers do seem to covet what modern democracy lacks and the Athenians achieved: self-government. But the lot and rotation were not the basis of Athenian self-rule. What differentiates them from us most decisively is that in Athens the people made all the important decisions — and held the smaller executive and administrative subgroups accountable — through a body continuous with and continuously permeable by themselves at will (the Assembly), and through a comparably large group similarly self-nominated but selected by lot year on year (the *dikastai* and, in the 4th C, the *nomothetai*). In modern

[82] See e.g. S.T. HOLMES, "Aristippus in and out of Athens", in *American Political Science Review* 73 (1979), 112-28.

[83] See Hansen's introduction to this volume, and Murray's contribution; B. MANIN, *op. cit.* (n. 27) and O. DOWLEN, *The Political Potential of Sortition. A study of the random selection of citizens for public office* (Exeter 2008).

democracies, no group with this kind of relationship to the people makes decisions.[84] And this is not primarily a function of the size of the modern polity. When he framed the American representative system, Madison acknowledged that the Athenians, too, relied on representatives. The essential difference between the two systems of government was not, he argued, "the total exclusion of the representatives of the people from the administration" of the ancient city-state, but rather "the total exclusion of the people in their collective capacity" from the modern republic.[85]

Modern reformers are deploying sortition to constitute subgroups of the *demos* that can be plausibly regarded as 'the people in their collective capacity'. A comparison between this modern application of the lot and the very different role of sortition in Athenian democracy reveals that the lot alone cannot establish active continuity between people and rulers.

Doing without reasons

The most systematic and persuasive modern analysis of sortition has been offered recently by Peter Stone.[86] According to Stone, the lot is not simply a default mechanism, to be used

[84] On the hollowing out of the New England town meeting through diminution of town powers, see J.J. MANSBRIDGE, *Beyond Adversary Democracy* (Chicago 1980), chapter 11.

[85] J. MADISON, *The Federalist Papers* (1787), n° 63; with B. MANIN, *op. cit.* (n. 27), 2.

[86] P. STONE, *art. cit.* (n. 49), 375-397. As he and other scholars have observed, the underlying logic of the use of a lottery is the absence of any reason for discriminating between candidates for a good, or a burden (or an inability to ascertain a reason reliably). Thus, as Rousseau observed, "all things being equal, both in mores and talents as well as in maxims and fortune, the choice would become almost indifferent". J.-J. ROUSSEAU, *Du contrat social* (1762), 4. 3., cited and discussed by B. MANIN, *op. cit.* (n. 27), 77. See also J.W. HEADLAM, *op. cit.* (n. 16), 121; J. ELSTER, *op. cit.* (n. 1), and R.G. MULGAN, *art. cit.* (n. 1), 54-8: "equality of desert is the main ethical assumption underlying the lot".

when contenders are relevantly equal and there are no reasons to choose one rather than another. Sortition, on Stone's account, actively "sanitizes" the process of reasons, preventing the choice from being made on the basis of any reason whatever. Sortition thus has desirable incentive effects: it "prevents individuals from influencing the outcome [of the selection process] on the basis of reasons, whether good or bad". [87] To prevent, for example, stacking of a jury or bribing of jurors, a government might decide to use the lot, even though the regrettable consequence would be an inability to select jurors on the basis of competence or intelligence.[88] When individuals have equal claims or rights to a good (or equal responsibility for a burden) the use of the lot to insulate the process from bad reasons is not discretionary; it is required.[89]

In practice, using a selection process that actively sanitizes reasons has both negative and positive force. Negatively, random selection ensures that the make-up of the group has not been determined by externally-specified agendas or special interests. The deliberators are invited without regard for any personal characteristic or preference. Thus, for example, Fishkin's Deliberative Poll™, which randomly invites citizens (in the way one would for an opinion poll) and pays them to attend a one or two day deliberation.[90] Contrast — as Fishkin

[87] P. STONE, *art. cit.* (n. 49), 386.

[88] *Ibid.*, 381.

[89] *Ibid.*, 391, contra J. ELSTER, *op. cit.* (n. 1), 107-9.

[90] For a comprehensive account of the method and the applications, see now J.S. FISHKIN, *op. cit.* (n. 1). To this point, most Deliberative Polls have been advisory. However, in 2004, a Deliberative Poll was for the first time authorized by a government — in China. The township of Zeguo faced a markedly reduced budget for infrastructure projects, and decided to convene a randomly invited sample of the population to weigh the alternatives and set priorities. The government sought to "reduce any perception of corruption", and to provide a channel for the equal expression of all, not just the voices of the most privileged or vocal citizens. See J.S. FISHKIN, B. HE, A. SIU, "Public Consultation Through Deliberation in China: the First Chinese Deliberative Poll", in *The Search for Deliberative Democracy in China* ed. by E.J. LIEB and B. HE (New York 2006), and J.S. FISHKIN, B. HE, R.C. LUSKIN, A. SIU, "Deliberative Democracy in an

himself has done — random selection with the process of ideological mobilization that skewed the Congressional Town Hall meetings on health policy held in the United States in the summer of 2009.[91] In 2003, the government of the Canadian province of British Columbia randomly selected 160 people from a randomly selected pool of more than 15,000 to sit on a Citizens' Assembly to recommend the best possible electoral system for consideration by the full electorate. This daring move was precipitated by an election that gave the Liberal party the popular vote, but awarded a majority of legislative seats to the party with the second-highest tally. The Liberals vowed to convene a Citizens Assembly on electoral reform when next they came to power.[92] The primary purpose of using the lot to

Unlikely Place", in *British Journal of Political Science* (forthcoming) [available at cdd.stanford.edu/research/papers/2006], and J.S. FISHKIN, *op. cit.* (n. 1), 106-111. While comparable in structure to the other DP's, this experiment was exceptional in two respects: Virtually everyone who was invited to attend came. Fishkin attributes this to China's political culture. Note the connection discussed earlier between self-selection and freedom. The self-selection that was (mistakenly) permitted occurred at the household level — with the result that the deliberating body was 70% male. This too attests to the absence of freedom to choose to participate or not, but here because of social not political dominance. Fishkin points out the ability of a deliberative democratic process to take place in the absence of 'party competition'. This feature confirms my suggestion, above, that the lot facilitates individual, not group or constituency-based filtering and representation. In addition to the Deliberative Poll (see the website of Fishkin's Center for Deliberative Democracy, http://www.stanford.edu/cdd), the most prominent instances of the use of the lot are Citizens Juries, A. COOTE, J. LENAGHAN, *op. cit.* (n. 1) and consensus conferences and planning cells, C.M. HENDRIKS, "Consensus Conferences and Planning Cells: Lay Citizen Deliberations", in *The Deliberative Democracy Handbook*, ed. by J. GASTIL, P. LEVINE (San Francisco 2005), 80-110. Citizens' juries, consensus conferences, and (occasionally) Deliberative Polls use stratified random samples.

[91] See J.S. FISHKIN, "Town Halls by Invitation", in *New York Times* (August 15, 2009) [available at: http://www.nytimes.com/2009/08/16/opinion/16fishkin.html]; and CONGRESSIONAL MANAGEMENT FOUNDATION.

[92] A recently published book on the Assembly declares (misleadingly) that this was "the first time in the history of democracy that a body of randomly chosen citizens have been authorized to recommend a major change in a state's electoral system". M.E. WARREN, H. PEARSE, *op. cit.* (n. 1), 21. *Mutatis mutandis*, the *nomothetai* anticipated the Citizens Assembly by more than two thousand years.

select a panel was to insulate the process of developing an electoral reform proposal from any charge that it was designed to benefit the party in power. The government needed a method that would avoid any perception that it had stacked the panel with its partisans. Election was not a plausible alternative: not so much because the aim was to engage ordinary citizens, but because the electoral process itself was at issue. Random invitation bleached any reasons, and thus any possibility of external influence, out of the selection process.[93]

Positively, as Stone shows, the reason-sanitizing force of the lottery results in a subgroup of the citizenry that is 'descriptively representative': a cross-section of the population, untainted by any externally-specified considerations whatever. Current proposals and initiatives for empowering the public use the lot to select a subset of the people whose claim to legitimacy depends on being a representative cross-section.[94] They propose to "shrink the people" into a "*minipopulus*" of manageable size.[95]

[93] See the history of the Citizens Assembly at: http://www.citizensassembly.bc.ca/public/inaction/history. In July 2003, the staff of the Assembly initiated a month-long voter registration drive to alert the public that anyone who wished to be considered had to be enrolled on the provincial voters list. (Compare Athenians putting forward their names for the jury pool.) August 29, 2003, Harry Neufeld, Chief Electoral Officer of Elections BC, delivered to the Citizens' Assembly 15,800 randomly selected names from British Columbia's voters list. These names formed the pool of potential members for the member-selection process. In October, the first four members were selected: names were drawn at random at a public meeting in Fort St. John. One man and one woman were similarly chosen from each of the 79 provincial electoral districts.

[94] See Y. SINTOMER, *Le Pouvoir au Peuple: jurys citoyens, tirage au sort et démocratie participative* (Paris 2007), 103-4: the lot as used in the modern context is not designed to achieve collective self government but rather representation via a microcosm; and O. DOWLEN, *op. cit.* (n. 83), 231 on a-rational as distinct from 'representative' procedures.

[95] *Minipopulus* derives from R.A. DAHL: the term from *Democracy and its Critics* (New Haven 1989), 340; the idea from *After the Revolution? Authority in a Good Society* (New Haven 1970), 149. "Manageability" is in the eye of the beholder, and depends in part on whether decision-making occurs face to face or over the internet, and how much group deliberation is thought desirable; the *minipopulus* may number in the hundreds (Fishkin) or the tens of thousands (Schmidt). See the discussion of ways of assembling a microcosm, and the virtues and drawbacks of microcosmic deliberation in J.S. FISHKIN, *op. cit.* (n. 1), 54-60.

The underlying assumption is that the decisions of a group constituted in this way will be fair and be seen to be fair because all individual interests (not interest 'groups') are represented.[96] These individuals are representative precisely because they have been selected through an impartial process. Random selection is the only way to secure a group that is, in the words of John Adams, "in miniature an exact portrait of the people at large".[97] Since, as Stone argues, the characteristics that enter into the stipulation of representativeness are indefinitely large,[98] no explicitly balanced and careful recruitment strategy can succeed in achieving a fully representative sample. Randomness registers a huge potential number of variables, which could not in practice be specified in advance by someone seeking to assemble a 'representative' group by picking identifiable groups in their proportion to the population.[99] All such alternatives will

[96] See P. STONE, *art. cit.* (n. 49), 387-8; and L. CARSON, B. MARTIN, *Random Selection in Politics* (Westport 1999), 99-100.

[97] J. ADAMS, *Thoughts on Government* (1776), in *The Life and Works of John Adams,* ed. by C.F. ADAMS (Boston 1850-6), vol. IV, 195.

[98] P. STONE, *art. cit.* (n. 49), 387. Note that the anti-federalists never considered using the lot for this purpose; rather, they proposed to elect representatives from small districts, with brief tenure and term limits (i.e. rotation). O. DOWLEN, *op. cit.* (n. 83), 152-71 discusses piecemeal measures and unrealized proposals for the use of the lot in the colonial period, primarily to "establish Congress as impartial vis-à-vis the thirteen states". Note James Wilson's 1787 proposal that the president should be chosen by a randomly-selected subset of the Congress.

[99] The jury is of course the only modern institutional example of empowering a cross-section of the population. Jurors have been drawn from established lists, and required to serve. As recently as 1972, Britain imposed a property requirement for jury service. The use of random selection has resurfaced (it was introduced in several American colonies in the 17th century, and spread in the 18th: see O. DOWLEN, *op. cit.* [n. 83], 176-7). In 1968, the U.S. Congress enacted the Jury Selection and Service Act, which provides for a jury pool "selected at random from a fair cross-section of the community", and stipulates that voter lists be supplemented as needed to ensure representation of less active citizens. E.J. LEIB, *op. cit.* (n. 1), 109, with 92, n. 10 and L. CARSON, B. MARTIN, *op. cit.* (n. 96), 26-30. The relevance of the jury to other applications of the lot is limited by their constrained role (what Leib calls "other" and opposed to "self" government). But it may be possible to appeal to the use of the lottery in

necessarily reflect some externally specified understanding of what kinds of people or groups should be represented.

The potential benefits of using straightforward sortition to 'shrink' the populace for policy-making purposes become clearer by comparison with processes that select participants by specific identity group or organized interests. Though they too are attempting to short circuit the influence of entrenched power, these reformers balk at the idea of doing without reasons. A random process can produce apparently un-representative groups, as measured by salient categories (including, importantly, the already marginalized groups in society). Modern adapters of the lot often seek to achieve a formally representative group according to antecedently specified criteria, and therefore use (or propose) a stratified random sample. Even though stratified random sampling is fully impersonal, it may appear to be the result of careful (too careful?) selection. Some reformers whose objective is to promote a more inclusive and participatory form of democracy do not use sortition at all. In such cases (to take only the most prominent United States example, many of the deliberations organized by AmericaSpeaks; or the budgeting process pioneered by the city of Porto Alegre)[100] the assembled group may look representative by demographic or affiliation or ideological perspective, but organizers may have a difficult time overcoming the perception that

this context (as Leib does) to challenge resistance to the very idea of using a process that abdicates reasons for selection, and to make a case for the capacity of ordinary citizens.

[100] AmericaSpeaks (http://www.americaspeaks.org and C.J. LUKENSMEYER, J. GOLDMAN, S. BRIGHAM, "A Town Meeting for the Twenty First Century", in *The Deliberative Democracy Handbook*, ed. by J. GASTIL, P. LEVINE (San Francisco 2005), 154-63; and Porto Alegre: M. GRET, Y. SINTOMER, *Porto Alegre: l'espoir d'une autre démocratie* (Paris 2005). See also the account of Australia's mixing and matching of different approaches, including combinations of the AmericaSpeaks with the Citizens Juries and Deliberative Polling methods L. CARSON, J. HARTZ-KARP, "Adapting and Combining Deliberative Designs: Juries, Polls, and Forums", in *The Deliberative Democracy Handbook*, ed. by J. GASTIL, P. LEVINE (San Francisco 2005), 120-40.

external interests have influenced the selection. So one important question for moderns is whether genuinely equal access (via unstratified random sampling) or apparent representativeness is more important to the public's sense of the legitimacy of the process.

The fully random use of the lot for initiatives like Deliberative Polling and the Citizens Assembly creates a manageable subgroup that is a microcosm of the larger *demos*; what matters for the group's legitimacy is not primarily that every citizen had an equal chance of being chosen, nor that there is an active relationship to the people as a whole, but that the group has been selected without regard to any reasons whatever, and that it is (therefore) identical in every respect to the pool from which it is drawn. Creating a 'descriptively representative' subgroup of this kind requires selection from the relevant population as a whole. Statistical resemblance between a governing or administrative subgroup and the *demos*, that is, requires the inclusion of all members of the *demos* in the pool, and mandatory service by anyone who is randomly selected. The relationship between the full *demos* and the lot-selected policymaking body is therefore very different from the active continuity fostered by the Athenian system. Athenian self-government operated through self-selection. And self-selection, for the sovereign Assembly and for administrative and judicial subgroups, subverts the very idea of 'descriptive representation', and imports reasons. The Athenian use of sortition wields the sanitizing force described by Stone: no social or economic criterion, no claim of intelligence or experience is permitted to matter. Yet they combined this rigorously impersonal and a-rational filter with a highly personal and reason-laden one, self-selection.

Reasons of state

In a variety of Athenian institutional contexts, self-selection enforced the very principle embodied in the lot: that no extra-political criteria would determine who wielded power.

Self-selection also ensured that 'political' reasons would enter the process, reasons applied by each individual for himself, within a system that promoted equal freedom and equal access. Each citizen had to decide whether he wished to and could effectively 'represent' the *polis*. The reasons he brought to bear on the decision (anticipated strength of character, nerve, ability to learn, potential fit between experience and these particular challenges) could not possibly be specified in advance as the basis for selection. This is true not only because the number of permutations and degrees of discrimination would be huge — as in the case of descriptive representation secured through an entirely impersonal process — but also because the criteria being deployed are imaginative projections of the self, not straightforward inferences from past behavior or objective evidence or even well-worked-out and highly specified variables. *Ho boulomenos* achieved something that no fully sanitized or externally-specified process could: free and equal access filtered by highly well-informed screening for the ability to perform the function well enough.

Reliance on static statistical resemblance rather than active continuity as the basis for the legitimacy of a subgroup creates a passive relationship to the *demos*, both in the selection and the governing process. As a cross-section, this subgroup by design lacks any filter; it mirrors the population as a whole.[101] Yet the question of the relationship between the subgroup and the broader public keeps surfacing in the modern context, just as it did for the Athenians when they created smaller and less permeable groups to carry out the work of the people. Having done away with reasons in the selection process, modern advocates of the lot invent other filters for promoting effective governance. These filters are externally imposed, and exacerbate

[101] As Sintomer points out, it is no accident that the principle of random selection irrupted into the modern world in the form of the opinion poll. Y. SINTOMER, *op. cit.* (n. 94), 103-7, 144-7 on the emergence and impact of the opinion poll.

the disjunction between the subgroup and the broader public (which the Athenian institutions mitigated). Without self-selection, rotation, and the frequency and permeability of decision-making groups, the lot does not foster a sense of active continuity with the public at large. The problematic modern relationship between a lot-selected subgroup and the people as a whole emerges clearly in both of the examples mentioned above: the *minipopulus* (represented here by the Deliberative Poll), and the agenda-setters (the British Columbia Citizens Assembly). I do not cite these examples because they are especially problematic — on the contrary, they appreciate and seek to address the need to connect the subgroup to the *demos.*[102]

Minipopulus The Deliberative Poll's "scientific random sample" generates a thought experiment: the results of the citizen deliberations are extrapolated to what the populace as a whole would think if it had a chance to deliberate. Self-selection, which enters after citizens are selected by lot, not (as in Athens) beforehand, is considered a problem; full participation of the invited cross-section would be ideal.[103] And indeed, if descriptive representation of all features (not just conventionally specified characteristics) is the objective, and extrapolation to

[102] Fishkin is acutely aware of this problem. See especially his thoughtful discussion in J.S. FISHKIN, *op. cit.* (n. 1), 83 and 95-9.

[103] E.J. LEIB, *op. cit.* (n. 1) proposes a 'popular branch' of the American legislature, randomly selected and rotated, and explicitly insists on mandatory participation, because even with the lot, and pay, self-selection will necessarily, in his view, result in domination by the better educated and more affluent. Exceptions to mandatory service include B.R. BARBER, *op. cit.* (n. 1), 291-3 for town offices (but note his suggestion that no citizen be permitted to serve again until all who wish to have done so) and J. BURNHEIM, *op. cit.* (n. 1), whose functional workgroups would be chosen by lot from among volunteers. He makes the case that this would ensure motivated, competent participants and, because of the proliferation of functional groups, would not greatly restrict the range of participation. See discussion in L. CARSON, B. MARTIN, *op. cit.* (n. 96), 102-14. H. ARENDT, *The Human Condition* (Chicago 1958) espouses self-selection, with a view to winnowing out the apathetic; differential passivity that privileges the already-motivated is evidently a problem that can be addressed institutionally, as per the Athenians. See also M.I. FINLEY, *Democracy Ancient and Modern* (London 1973).

the populace plausible, then random selection from the entire relevant pool is essential. Fishkin seeks to mitigate the problem introduced by self-selection by showing whether those who attend resemble the entire randomly-invited sample on standard demographic variables and selected attitudes.[104] But whether or not others, similarly chosen and comparably exposed to information and deliberations, would in fact make the same choices, the result will tend not to be perceived that way.[105] This consequence is compounded by selecting by lot first, and then only reluctantly allowing, or outright forbidding, self-selection.[106] Although town halls with mobilized participants present problems of legitimacy, so too do town halls that are perceived as closed (note the title given by the *New York Times*

[104] Fishkin's method enables him to determine (by comparing the attendees on various measures to the contacted individuals as a whole), whether the group that attends is 'representative' on key measures. See his discussion in J.S. FISHKIN, *op. cit.* (n. 1), 111-9. He then extrapolates the results to what the public as a whole would think if it had a chance to deliberate. However, the group that chooses to attend can not be said to be 'descriptively representative' in Stone's sense. It is important to emphasize (as Fishkin often observes) that opinion polls, too, involve self-selection: the decision whether to answer the phone, and to take the survey. (In recent years, polling has been complicated by the inability to access cell phones through standard random digit dialing.) Pollsters compensate by 'weighting' the results according to the proportions of various demographic features and attitudinal 'markers' in the population as a whole.

[105] The result may nonetheless be seen as more legitimate than decisions made by a dominant elite or special interests, and may also provide 'cover' for leaders who face popular mistrust of the political process. See, for example, the Deliberative Polls carried out by Fishkin in Athens (to nominate a candidate for office) and China. Detailed analyses available at http://cdd.stanford.edu/polls/greece/ and http://cdd.stanford.edu/polls/china/.

[106] Even if one explicitly aimed to bring self-selection in by this means, note the very different valence and symbolism: once invited, by a process that gives everyone an equal chance, anyone who wishes to attend, can; in the ancient structure, the application of a political test, i.e. self-scrutiny, occurs first, but no-one is entitled to a place. The first feels exclusionary (see the response to Ségolène Royal's suggestion, cited below); the second combines personal initiative with impersonal selection. See B. GOODWIN, *op. cit.* (n. 1), 158-60, who describes self-selection as one of the "compromises" in modern proposals for the use of the lot.

to James Fishkin's column arguing for a meeting of constituents selected by lot: "Town Halls by Invitation"). In the 2006 Presidential election in France, Ségolène Royal, the socialist party candidate, responded to what she said was a popular demand for more accountability by elected officials, and proposed the creation of citizen juries selected by lot to play this role.[107] Her suggestion provoked the observation (from thinkers sympathetic to her aims) that such a process would be illegitimate because it relies on "un groupe réduit de participants plutôt que d'être ouverts à tous".[108]

As the Athenian experience confirms, whenever a group is relatively small in relation to the *demos*, and closed — even if it is not making decisions — it is essential to demonstrate both that it is continuous with and open over time to the people qua citizens (through a combination of self-selection, lot, and rotation) and that it is able to 'filter' in a way that connects personal concerns to political requirements. The vociferous objections to Ségolène Royal's idea included the charge of 'populism' (i.e. unfiltered or direct citizen decision-making).[109] To make their assembly-substitute more than just an opinion poll, to provide

[107] "Je pense qu'il faudra clarifier la façon dont les élus pourront rendre compte, à intervalles réguliers, a des jurys citoyens tirés au sort' in *Le Monde* (November 18, 2006), cited in Y. SINTOMER, *op. cit.* (n. 94), 7. The Athenians did of course use such an assessment procedure, regularly at the end of an allotted or elected official's term, and whenever a citizen challenged an official's performance, as citizens were invited to do at specified (and frequent) meetings of the assembly.

[108] Y. SINTOMER, *op. cit.* (n. 94), 10.

[109] *Ibid.* As I have argued above, in ancient Athens the (temporarily) closed but large group of jurors, selected by lot from among those who presented themselves, and allocated by lot to specific trials or hearings, was designed to be continuous with the people as a whole, but also to be protected from any influence (any reasons, as per Stone), that could taint the results of their deliberations, including *ad hoc* self-selection for a particular trial. Note that unlike the typical deliberative experiment today, including the citizen jury — and unlike the regular jury — the Athenian jury was large, and did not deliberate in small groups, but simply heard competing arguments, reviewed (or heard) relevant documentation, and voted by secret ballot.

a political filter that might plausibly lead to good judgments, the modern reformers add a strenuous and externally framed deliberative process. This is the 'deliberative' aspect of the 'deliberative opinion poll'. The gatherings of 100-500 people are given carefully balanced background materials. They meet in randomly-assigned and moderated small groups and develop question for experts and elected officials on panels designed to represent different stances on the issue under discussion.

These external filters increase the separation between the selected group and the people as a whole. In the very process of deliberating, the participants become — and are seen as — different from their fellow citizens.[110] Of course this was true on Athenian boards, as well, and it is a desirable and intended consequence of being given responsibility for a sustained period (a day, or a year) as collective problem-solvers. Athenian institutions, however, maintained active continuity between the smaller, longer-term groups and the *demos* as a whole over time, through: the ability to opt in, plus an impersonal selection process, and rotation. Whatever change in priorities, knowledge, or attitudes may occur comes from within each citizen and through the interaction among them, and in light of constant identification with those who might equally have occupied their place and will do so soon. Their actions can not be attributed to framing (however balanced) by experts or carefully selected stakeholders.[111]

[110] For Fishkin, opinion change and knowledge acquisition as a result of deliberating are signs that the deliberation was successful; the point is precisely not to be an opinion poll. J.S. FISHKIN, B. HE, A. SIU, *art. cit.* (n. 90), 3. See B.A. ACKERMAN, J.S. FISHKIN, *Deliberation Day* (New Haven 2004), 72: participants in Deliberative Polls become 'celebrities'. See also C. FARRAR, *art. cit.* (n. 7), 185-6.

[111] Compare the relationship among the *prytaneis* of the Council, aspiring Athenian leaders, and the Assembly, which relied for its promotion of thoughtful policy solely on dynamic engagement among the participants. The highly structured procedures for jury deliberations (including the *nomothetai*) may be a more appropriate comparison. However, even there, the Athenians relied on individual initiative, and the 'defenders' were selected by the people in assembly (and the juries did not deliberate).

Agenda-setters The Citizens Assembly's charge — determining whether to propose election reform, and if so, of what kind — was very different from that of the Athenian Council (it more closely resembles the writ of the *nomothetai*). But like the probouleutic Athenian Council, the 160 citizens of British Columbia did sit for nearly a year, and brought a proposal to the people rather than deciding it themselves. However, the Citizens Assembly performed a single extended deliberative task, and then went out of business. There was no question of rotation.

The Assembly was described as 'representative' of the people at large, but participation was not mandatory; the members were randomly selected from among the individuals in the randomly invited pool of 15,800 who showed up at the local selection meeting.[112] Descriptive representation was not achieved. Here too, the relationship between the lot-selected body and the people is problematic. The organizers of the Citizens Assembly recognized the need to make a connection. The Assembly deliberated, and actively sought out the views of the people, through public meetings and hearings, before presenting a proposal for consideration by the electorate. Their proposed reform came close to receiving the required 60% of the popular vote in a referendum. The proposal (a significant reform of the status quo) was presented again in 2009, and was defeated by a larger margin.[113] The Assembly consulted their

[112] See http://www.citizensassembly.bc.ca/public/news/2003/12/dmaclachlan-3_0312082027-257: "At the initial selection meeting for Vancouver-Kingsway, on Nov. 20, there were no male candidates in attendance. A woman from Kingsway was selected, but the vacancy remained for a man". Note that the Assembly selection process was stratified by geography, by sex, and by Aboriginal origin (two seats were dedicated to aboriginals).

[113] On the 2009 vote, which defeated the proposal by a larger margin, see K. CARTY, F. CUTLER, P. FOURNIER, "Who Killed BC-STV?", in *The Tyee online* [http://thetyee.ca/Views/2009/07/08/WhoKilledSTV/]: "Another key reason for the drop in support involves the role of the body that proposed BC-STV, the Citizens' Assembly on Electoral Reform. After the 2005 vote, we published an analysis showing voters who knew about the Citizens' Assembly and its deliberations were far more likely to vote in favour. Voters said yes if they knew the

peers but was not institutionally responsive to them. The *Boule* at Athens played a sifting role that made it possible for Assembly democracy to function. The important debates took place in the Assembly — and referenda, including the one in Canada, do not replicate this structure. The revision of a Council proposal or the 'filling in' of an open *probouleuma* by the Assembly was a common occurrence at Athens and did not cast aspersions on the probouleutic process.[114] In British Columbia, by contrast, the referendum was seen as a setback for the process, and a second vote was scheduled, to try to pull the public across the vote threshold.[115]

Bridging the distance

Modern democratic republics deliberately established distance, and a strong filter, between the people and the rulers.[116] In recent times, governments have tended to oscillate between exercising independent leadership, for which they are held accountable only at elections, and regularly taking the pulse of

Citizens' Assembly was made up of ordinary folks and not stacked with government-appointed elites. In 2009, the influence of the Citizens' Assembly all but evaporated. Decisions were primarily determined by views on the substance of STV. Some may applaud this greater independence. Others will lament that voters were still not very well informed about STV — respondents scored an average 2.5 out of 6 questions correct on our 'test' — and were unable or unwilling to rely on the informed judgment of their fellow citizens in the Citizens' Assembly, as they did in 2005".

[114] M.H. HANSEN, *op. cit.* (n. 7), 140.

[115] Other processes for 'sifting' voter choices have been proposed and attempted — including Citizens Juries and Consensus Conferences, some designed primarily to inform voters of what a group who look like them statistically concluded when they had a chance to deliberate and learn, which voters do not have a chance to do. C. HENDRIKS, *art. cit.* (n. 90), 80-110. N. CROSBY, D. NETHERCUT, "Citizens Juries: Creating a Trustworthy Voice of the People" in *The Deliberative Democracy Handbook*, ed. by J. GASTIL, P. LEVINE (San Francisco 2005), 111-9.

[116] See the discussion of mirror vs. filter in the debates among the American Founders in J.S. FISHKIN, *op. cit.* (n. 1), 15-9.

the electorate through opinion polls and the media. Either there is a powerful external filter, or none at all. Absent in both cases is a process for filtering of decisions by the people themselves. The absence of active continuity between decision-makers and the *demos* is particularly acutely felt now, I suggest, for reasons that echo the Athenian circumstance: marked inequality, an entrenched elite, corruption (and/or perceived corruption) of the political process, polarization and fragmentation.[117] No wonder sortition is appealing: it seems to promise equal access to power, and an impersonal, transparent process for identifying decision-makers. But the question of continuity between people and rulers recurs with any sovereign (or even strongly advisory) subset.

What would it take to forge active continuity of the Athenian kind in a modern setting? Can the lot — even with self-selection and rotation — achieve legitimacy for a decision-making sub-group, legitimacy that for the Athenians depended on permeability? In what contexts might these mechanisms create a filter for effective decision-making that could be applied by the citizens themselves? Three seem worth exploring: local government, the media, and local/national processes for promoting substantive political accountability.

Local government At the local level, it may be possible to build recognition over time of the capacity of ordinary citizens, to give them authority to make decisions, and to motivate the process of self-selection and self-filtering that gives the process legitimacy. If the community is sufficiently small (the size of Athens,

[117] See e.g. B. GOODWIN, *op. cit.* (n. 1), 146, 159; O. DOWLEN, *op. cit.* (n. 83), 229; B.A. ACKERMAN, J.S. FISHKIN, *op. cit.* (n. 110), 189-90; C. FARRAR, *art. cit.* (n. 7), 186-9; Y. SINTOMER, *op. cit.* (n. 94). Current examples include gridlock in the New York State legislature; the revelations of unseemly (to say the least) expenditures by UK Members of Parliament; the growth in the number of Independents and the influence of the Libertarian movement in the U.S, as well as identity politics everywhere, and the widespread perception that governments are at the mercy of special interests. The growing and technologically increasingly sophisticated demand for transparency is a sign of popular mistrust. See for example the work of the Sunlight Foundation in the U.S.

say), decision-making could reside in an entirely permeable, self-selected Assembly. To replicate the breadth of participation and fluidity of the Athenian Assembly, it would make sense to begin experimentation in communities with a longstanding tradition of town meetings to decide such matters as the budget, and to make these meetings genuinely open by paying for participation (on the model of the modern jury), making them more frequent, and broadening their writ. A lot-selected and rotating Council could be given responsibility for drafting the non-routine element of the town assembly's agenda.[118]

In larger communities (in population or territory or both), entirely self-selected subgroups of a manageable (and therefore highly constrained) size might well not be regarded as actively continuous with the entire polity. The same would likely be true if the 'assembly' met less frequently. In these cases, the decision-making group would need to be treated more like Athenian boards, and be selected by lot from among those who present themselves. Self-selection would provoke self-scrutiny. The use of the lot would assure every person who comes forward that she stands an equal chance of being selected; neither his personal qualities nor another's influence can bar (or speed) his way. And rotation (and short terms) would be required to mitigate even the perception of entrenchment and insulation in this (temporarily) closed group, an even more significant threat when the group has decision-making authority. To foster perceived continuity with the community at large of any relatively small body selected by lot, the focus should be on the selection and rotation process ("that could be me", "I'm not entitled to the role", and "someone else I won't choose will replace me soon"). Active continuity with (and representation of) the people will not be achieved by real or apparent 'representativeness',

[118] For the Council, it might be necessary, in order to jumpstart broad participation, to start with a randomly selected group, to reach beyond the usual suspects and convey the message that they, too, are equipped to participate in a decision-making process.

whether secured through a random or stratified sample or by hand-picking a diverse group.

One danger of experimenting at too local a level is that such communities are often homogeneous by ethnicity, race, and/or wealth and also too small to have leverage over the issues most significant for their own futures, namely economic development, transportation, waste management, education.[119] The local experiments I have been engaged in, both in New Haven and around the country (with public television) cover an entire metropolitan area. They have been consultative, and the 'agenda-setters' have not been chosen by lot, but selected by the sponsors — often with input from a variety of stakeholders — to reflect the range of opinion on the issue from among the great and the good. The partnership with television offers an opportunity to achieve the kind of publicity associated with Athenian decision-making, and even to increase its reach, in order to bridge the greater modern divide between a policy-making (or even advisory) subgroup and the people as a whole.

Media

The media can help make the connection between lot-selected groups — whether at the local or the national level — and the public at large, and engage the public in considering the relationship between individual concerns and political requirements.[120] The internet and mobile technologies have made *ho boulomenos* possible on an unprecedented scale. Unconstrained by traditional barriers of wealth or position, ordinary people are coming forward in droves to express themselves and to connect with others — but these technologies have more often than not accelerated affiliation by interest or background or comfort zone, not engagement as citizens. The creation of online 'panels' may be a useful way to create a

[119] See C. FARRAR, *art. cit.* (n. 7), 185.
[120] See J.S. FISHKIN, *op. cit.* (n. 1), 146-50.

national assembly (assuming the digital divide is bridged) — though the Athenian example (and the logic of the internet) would suggest that anyone and everyone should be permitted to participate in the assembly (but with only one 'avatar,' and under one's real name), with a 'probouleutic' role played by a much smaller group selected by lot and rotated. Building civic structure into the media, when all the incentives run to disaggregation and consumerism, will be at least as difficult as challenging entrenched power in political systems — and requires confronting, too, the illusion that the decentralized media can alone constrain unresponsive elites. Moreover, without regular opportunities to engage in responsible political engagement, individuals selected for these high-profile roles may become more rather than less cynical or alienated.[121]

Local/national accountability

Holding policy-makers accountable is a familiar role for the public — and this may be a fruitful context for habituating citizens and rulers to the potential for real self-government. Ségolène Royal's proposal reflects the appeal of this idea. Incorporating a highly publicized and entirely permeable system of local review into the extant national electoral process may be less controversial and more plausibly legitimate than convening independent boards of assessment by lot. Consider the proposal by James Fishkin and Bruce Ackerman to hold a Deliberation Day just before every U.S. presidential election.[122] The day is declared an official holiday, participants are paid, and

[121] To alter attitudes toward the governing potential of ordinary citizens, and to build a democratically responsible structure for engagement of the many voices on the internet, I have used online video to tell the story of a group of ordinary Americans (invited randomly, then auditioned) who confront each other as well as candidates and policymakers, and wrestle publicly with the difficult choices faced by the electorate. See http://www.purplestates.tv. Over the course of the 2008 election campaign, a majority of the Purple States citizen team did become more cynical and alienated.

[122] B.A. ACKERMAN, J.S. FISHKIN, *op. cit.* (n. 110).

anyone who wishes gathers at a local site (a school). They watch a televised debate, in which the candidates respond not to journalists but to questions refined through deliberation by an "assembly of 500 citizens" who have been randomly selected.[123] The 500 operate as a sort of 'probouleutic' body in the shape of a Deliberative Poll, and the full 'assembly' gets a chance to watch them interrogate the arguments of the political leaders.

The local, self-selected assemblies meet in randomly assigned small groups to discuss the issues, and to develop questions for local representatives of the candidates. Exit polls enable the country as a whole to learn what these local assemblies have concluded about the candidates. Deliberation Day is intended not just to enable participants to make more informed decisions on Election Day, and to communicate their deliberation-filtered views to others, but to reorient the electoral process to make it more responsive to a broad, informed, and constructively critical public. Deliberation Day can be seen as a two-stage probouleutic process, but it is focused on the performance of officials, not on the policies to be pursued by the country. It is as if an Athenian *euthuna* of a general ended inconclusively, and its results were posted publicly or conveyed to the assembly when it met to vote on candidates for the next Board. The potential longer-term benefit would arise through repetition of citizen gatherings on Deliberation Day (with rotation of the lot-selected 'probouleutic' group), and gradually for other purposes between election cycles as well. Habituation could move the representative democracy beyond an 'agency' model with a more active and informed constituency, to a collective sense that the people are at least indirectly influencing policy, that officials are 'standing in' for them and leaders are fully responsive and accountable.

[123] *Ibid.*, 24-5.

Epilogue and prologue

As the Athenians knew well, democratic self-government does not just happen by itself; "distributing a kind of equality to equal and unequal alike" goes against the grain, and not just among entrenched political elites. Groups assembled by lot and rotated are no substitute for other institutions of popular rule. Freedom to rule (or not to) is fundamental. But as ancient experience suggests, in appropriate contexts and combined with other practices (especially frequency and regularity of citizen decision-making, clout, and self-selection), lot and rotation are powerful devices for realizing equal political freedom and effective self-rule in the face of marked social and economic inequality.[124]

[124] In addition to the participants in these *Entretiens*, I should like to thank John Dunn, with whom I have discussed these issues over many years; Jim Fishkin, for encouraging and enabling me to grapple with the potential of his Deliberative Polling methodology in theory and on the ground; and Peter Stone, for more recent conversations. Doubtless each will disagree with some or all parts of my argument — but unlike my *Entretiens* colleagues, they have been given no opportunity to say so!

DISCUSSION

M. Hansen: You ask the question why the Athenians did not make participation mandatory but preferred rotation and sortition among volunteering citizens (p. 190). The answer you suggest is that the Athenians found that *ho boulomenos* represents a more fundamental aspect of their democracy than participation by all citizens. I agree and would like to add a comment. The right to be *ho boulomenos* implies as its complement the right 'not' to be *ho boulomenos*. In spite of Perikles' remark in the Funeral Oration that the citizen who does not participate is considered useless and not one who prefers privacy (Thuc. 2.40.2), several sources show that it was legitimate and acceptable to stay out of politics. In the opening of his speech a defendant might tell the jurors as a *captatio benevolentiae* that he has never been in a court before (Plato *Ap.* 17*sqq.*; Lys. 19.55; Is. 1.1; Isoc. 15.38). And the preference for a private life is mentioned without any disapproval at, e.g., Lys. 19.18; Dem. 10.70-4, 18.303, 22.30.

C. Farrar: The texts you cite (and see also Isoc. 15.150) reflect one aspect of Athenian willingness to tolerate the consequences of *ho boulomenos*: playing no role in determining the fate of the *polis* (the *apragmon*). The other aspect is exploiting politics as an opportunity for personal (especially pecuniary) advantage (the *polupragmon*). Our sources are replete with portrayals of both types; the evidence is assembled by L.B. Carter, *The Quiet Athenian* (Oxford 1986) and by P. Demont, *La cité grecque archaïque et classique et l'idéal de tranquillité* (Paris 1990). Aristophanes' *Wealth* pits one extreme against the other (911-922).

O. Murray: Your paper is both fascinating and revolutionary. By bringing a new institutional element into the study of Athenian democracy, the principle of self-selection or *ho boulomenos*, you change our perception both of Athenian democracy and of its relation to modern democratic ideas. I would like to ask questions on each of these aspects.

My first question is, what sort of research is now needed in order to understand the strengths and weaknesses of the ancient principle of *ho boulomenos*? Should we follow up the voluntary nature of democratic participation, as for instance Lionel Carter attempted in his stimulating book, *The Quiet Athenian*, concentrating on the classes of citizens who refused or chose to participate and their reasons for these choices? Or should we rather emphasise the reasons for the apparently very high incidence of participation as compared to the modern experience, as Moses Finley did in his equally provocative book, *Democracy Ancient and Modern* (New Brunswick 1973)? It is clear that in order to follow up your insights we are going to have to abandon institutional history for the history of ancient mentalities.

C. Farrar: For a deeper understanding of the significance of the Athenian commitment to *ho boulomenos* I think we will indeed need to look again at practices and attitudes of passivity or engagement — especially, to the extent we can discern this given the nature of our sources, when behavior violated the stereotypes. For example, Aristophanes plays with the idea that no-one wanted to attend the Assembly until pay was instituted: now, "everyone tries to get in to get the money, and if kept out, they impugn the motives of those who did get paid." *Ec.* 210. And as I note in the essay, in his critique of the regime proposed in Plato's Laws, Aristotle observes that it is oligarchic, not democratic, because "the rich are compelled by law to attend the assembly and vote for magistrates or discharge other political duties, while the rest may do as they like". And he adds, regarding the election of magistrates under Plato's system,

"some of the lower classes, not being compelled, will not vote" (*Pol.* 2.6; see also 4.13).

It's also important to explore the ways in which the Athenians simultaneously reinforced and restrained the implications of the freedom to participate (or not). I have tried to show here how the institutions of the lot and rotation made *ho boulomenos* a reality for every citizen while inhibiting the will to power, or to trespass on others (*pleonexia* is sometimes equated in our sources with *polupragmosune*). Elsewhere ("Gyges' Ring: Reflections on the Boundaries of Democratic Citizenship", in *Démocratie athénienne et culture,* éd. par M. Sakellariou [Athènes 1996]), I have explored the implications of the gap that democracy opened up between personal and political identity. By asserting that all Athenians were formally equal politically, without seeking to alter their personal and social inequality, the democracy required citizens to forge their own civic identity in the context of constant appraisal and definition by others. One risk was personal alienation from the demands of the political realm, the other over-identification with politics. In addition to institutional mechanisms designed to ensure that personal qualities and affiliations were neither ignored nor decisive politically, I suggest that the Athenians developed practices that re-constituted personal foundations for solidarity that did not rest on traditional social roles. In my article, I briefly discuss the reconstrual of the relationship between *erastes* and *eromenos*; the concepts of *charis, philia,* and the extension of credit; definitions of categories of property; and the provision of banquets (as discussed by P. Schmitt Pantel in her contribution to the same volume. Looking further at these and other ways of addressing the consequences of *ho boulomenos* might be one way forward.

O. Murray: My second question relates to the gap that you have opened up between the practices of ancient and modern democracies. Given the complexity of their differences what do you think are the core principles that might allow us to relate

the institutions of ancient democracy to those of modern democracy? I can think of two principles that seem to be shared by both: the first is the principle of *euthuna*, the idea that there must be institutional safeguards that subject the governing elite to periodic control by the people, and indeed restraint or even rejection. In this respect the safeguards of ostracism, *euthuna*, and the *nomos-psephisma* distinction share many common institutional functions with the electoral practices of western two-party systems; but these features are not usually thought of as central to the concept of democracy itself. The second principle is that of individual liberty in a political sense — combining political equality and the right to participate or not participate (the freedom *zen hos bouletai tis*, to live as one likes) even if it involves non-participation. But this raises the traditional question, in what senses are ideas of ancient and modern liberty truly identical? Is it liberty rather than democracy that we should be talking about? And once again, given the notorious problems in the concept of liberty, are we not confronted by the need to consider such questions from the point of view of the changing history of mentalities?

C. Farrar: The first shared principle does not, I think, help us discern a way of bridging the differences between ancient and modern democratic institutions. As you say, these safeguards are not central to the idea of democracy, though regular elections are of course central to the democratic self-image of modern liberal republics. In Athens, the *euthuna* does not seem to have been very consequential (see M.H. Hansen, *op. cit.* [n. 7], 224). The persistent threat of ostracism (in the 5th C.) and of *eisangeliai* or *graphai* (which seem to have displaced ostracism in the 4th) were part of an elaborate and thoroughgoing system (including rotation and sortition) for ensuring that the people were always (not just periodically) in control.

I am indeed suggesting that we need to look again at similarities between ancient and modern concepts of liberty — but

perhaps even more importantly, at the way they were realized in practice. In modern 'democracies', citizens are formally recognized as political equals (one person one vote, or one person several votes), and equally free. But they are not given the opportunity or enabled to develop the capacity to exercise that freedom or realize that equality. In modern political theory, we tend to posit a trade-off between freedom and equality: by advancing (social and economic) equality we reduce freedom. Athenian democratic practices suggest another possibility: a system that actively promotes 'political' equality and freedom through reliance on and facilitation of personal initiative by any citizen whatever. The efficacy of this system depended on making equal participation possible (by subverting entitlement through the lot and pay), giving all participants clout (through the primacy of the Assembly — and the role of the equally large pool of *nomothetai*), and the use of rotation to maintain the relationship between people and officials.

M. Hansen: In my opinion a main purpose of using the lot is to avoid corruption, rivalry between candidates and *stasis*. It is nowhere stated in our sources that the lot was used to counteract corruption, but it can be inferred from the detailed description of sortition of *dikastai* in Arist. *Ath.* 63-8 (Farrar p. 182 with n. 47). That sortition obviates *stasis* and rivalry between candidates is argued by Arist. *Pol.* 1303a15 and the author of the *Rhetorica ad Alexandrum* 1424a12ff. Contrariwise Isoc. 7.22-3 and *Dissoi Logoi* DK 90.7 argue that democratic sortition involves an increased risk of *stasis*.

C. Farrar: I agree with you if by corruption you mean pursuing one's own advancement (in terms of material benefit or political prominence or fulfilling or creating a personal obligation) by distorting the workings of the democratic process or its aim, the wellbeing of the *polis* as a whole. This would then include rivalry between candidates that simply pits partisans of one leader against their enemies. The passage you cite from

Aristotle's Politics notes that Heraea moved from choosing magistrates by election to selecting them by lot because "the electors were in the habit of choosing their own partisans". And in the case of juries, the Athenians sought to thwart any ability to profit (in the ways mentioned above) by being able to choose a particular trial assignment. But this is not a distinctively democratic application of the lot, nor does it explain why the lot was used in some democratic contexts but not others. If rivalry is the key, then why not select the generals by lot? Or simply rotate office-holders, without using sortition? I argue that the Athenians used the lot to give effect to equal and entirely impersonal access to selection for every magistracy except those few thought to require special skills. In a system that privileged the freedom of *ho boulomenos*, the lot was essential.

M. Hansen: A main purpose of rotation was probably to ensure that no citizen by filling the same magistracy continuously could build up a power position that might endanger the supreme powers of the Athenian people as embodied in the Assembly. There is no direct evidence that this was the purpose of rotation and sortition, but I believe it can be inferred from what we know about the selection and function of Athenian magistrates. According to Aristotle, the powers of magistrates in a democracy ought to be reduced to a minimum (*Pol.* 1317b28-31). That was in fact the effect of a number of regulations applied in Athens to the selection and function of magistrates: rotation was ensured by a short term of office (one year) combined with a ban on iteration (Arist. *Pol.* 1317b23-5; *Ath.* 62.3), and to have a high number of citizens serving as magistrates at the same time was ensured by the subdivision of tasks among a high number of magistracies (Plato *Plt.* 303a; *Ath.* 43-62), and by the common practice of having a magistracy filled by ten officials rather than being held by one person (Theophr. 26.1-2; Arist. *Ath.* 43-62). — Combining all these institutions with Aristotle's general principle, may

we infer that the institutions served the purpose of reducing the powers of magistrates in order to protect the powers of the Assembly and the people's court?

C. Farrar: The argument that rotation (and the sortition that determined whose turn it was to serve) was intended to preserve the power of the Assembly is maintained by J.W. Headlam — and I have addressed his claim in the paper, so will not repeat it here. However it is worth re-emphasizing the importance of focusing on the distinctive role of rotation (and the lot). Boards of ten and short terms applied to a non-rotated role as well: the generals. Indeed, rotation meant that no one person could deepen expertise through serving repeatedly in a single administrative role. But during the course of a year, the holders of a particular office would carry special weight in discussions about their area of experience and responsibility. Rotation played a positive (not a purely negative) role in a system that had to create smaller and enduring executive and probouleutic bodies but wished to maintain a connection between them and the public at large (not merely the Assembly).

M. Hansen: You state that "rotation was not used to ensure that most or all citizens participated in government" (p. 187). I have some reservations about this view. You are right that the ban on iteration prevented a citizen from serving twice on the same board but that there were dozens of other boards so that a fairly small section of the citizenry may have filled most or all posts. On the other hand, Plato emphasises that in a democracy the tasks incumbent on magistrates are split up in small chunks so that a high number of citizens have to serve as magistrates (*Plt.* 303a). And Aristotle states at *Pol.* 1332b26 that for a number of reasons 'all' citizens must participate in the rotation between rulers and ruled. The principal reason (the only one mentioned) is equality.

A wish to have as many politically active citizens as possible can also be inferred from the rules for membership of the Coun-

cil of Five Hundred. In the fifth century there may have been a ban on iteration for councillors as there was for all other magistrates selected by lot; but in the fourth century a citizen could be a Councillor twice in his lifetime (Arist. *Ath.* 62.3). The permission to serve twice was probably a reform introduced in the late fifth century and necessitated by the decline in the number of citizens during the Peloponnesian War. With a total of ca. 30,000 adult male citizens the result was that every second citizen above 30, i.e. something like a third of all citizens, sooner or later, were members of the Council, some of them twice (M.H. Hansen, *Demography and Democracy* [Herning 1985], 51). A board of, say, 200 citizens could without any difficulty have performed the tasks of the Council. Several of the smallest demes, each with one seat in the council, would then have had to alternate with another small *deme* in the *phyle*, a system already attested for a few of the small demes in the period of ten *phylai* (J. Traill, *The Political Organization of Attica* [Princeton 1975], 78) and unproblematic in principle since there is no evidence and no reason to assume that a councillor from a given *deme* was expected to represent the interests of his *deme* in the Council. Such a form of representation was unknown to the Athenians. A wish to have the highest possible number of citizens participating in politics and administration must have been one of the reasons for having as many as five hundred citizens serving at a time. Finally, the frequent re-use of dikastic *pinakia* indicates that there was a considerable rotation in the composition of the panel of 6,000 jurors who functioned as *dikastai* and *nomothetai* (M.H. Hansen, *op. cit.* [n. 7], 182).

C. Farrar: What I wish to argue is that freedom is more fundamental in determining the shape of Athenian institutions than a desire to promote participation. That is, once we accept the requirement of *ho boulomenos*, then yes, indeed they did try to encourage participation. Hence they had to relax the rules on iteration for the *Boule*, instituted pay for the Assembly, etc. The size of the *Boule* seems to me to be a function of its role:

it had to be plausibly representative of the people (not, I agree, a constituency relationship, but rather "that could be me").

Aristotle's generic definition of a citizen (in *Pol.* 3.1) is someone who "has the power to take part in the deliberative or judicial administration of the *polis*". The passage you cite (7.14) about the necessity that citizens take their turn governing occurs in the context of a discussion of the best city, and more specifically on the question of whether some individuals should rule permanently. As for the passage in the *Politicus*, Plato is emphasizing that government by the masses can achieve nothing, whether for good or ill, because responsibilities are distributed in small chunks to lots of people (by contrast with other forms of government), not that power is divided 'in order' to distribute it to lots of people. And he makes no reference to rotation in this context.

M. Hansen: I still prefer a different interpretation of Thuc. 2.37.1 from that suggested by you (on page 173, note 14): "contrary to the implication of Hansen [...] Pericles is not here referring to selection for important offices (he makes no reference to offices, or election), but to leadership" We agree that in Athens leadership was exercised by a group of *rhetores kai strategoi* (p. 174) and that "the Assembly wielded its sovereign power by voting on specific proposals, not by voting for a particular person" p. 174). At Thuc. 2.37.1 the point at stake is the reason for preferring one person over another (ἕκαστος ... προτιμᾶται). Thus, the context must be election of leaders rather than preference for a specific policy. But since in the fifth century there was a considerable overlap between *rhetores* and *strategoi*, I agree with you, however, that Thucydides may have leadership in a broader sense in mind in which case the reference is not restricted to the election of *strategoi* and other officials.

C. Farrar: It is worth pointing out that there were very few elections in Athens. Voting primarily occurred when the

Assembly chose whether or not to support the proposal of an individual [or of the *Boule*, but that is not at issue here]. In this passage, Pericles goes on to say that if a man has any good to offer the *polis*, poverty will not cause him to remain in obscurity (*axiomatos aphaneia kekwlutai*). That is, the Athenian system ensures that the polis is able to discern and make use of the *arête* and *axiosis* of any citizen. Can this point really be confined to the generalship? I suggest that Pericles is here referring to the contrast between the democracy's commitment both to equality under the law of all citizens (the 'men' clause) and to the recognition of the excellence of some (the 'de' clause). *Axiosis* is indeed not secured by rotation (which covered virtually all offices). The democracy offered myriad opportunities for earning recognition — including not only votes on measures in the Assembly, but also, significantly, the election (by the *Boule*, according to A. Gomme, following F. Jacoby) to be the speaker at the *epitaphios*, of the man who *axiosei proeke* (Thuc. 2.34.6).

M. Hansen: You have no mention at all of any religious aspect of sortition. It has been argued by several scholars that by using the lot one left it to the Gods to decide who should run the community (e.g. Fustel de Coulanges, in *Nouvelle revue historique de droit français et étranger* 2 [1878] 613ff; G. Glotz in *DarSag* IV [1907] 1401-8; A. Andrewes in *CAH5* III.3 [1982], 386). In ancient Greece cleromancy, the lot-oracle, flourished in archaic, classical and Hellenistic times. The selection of priests was often done by lot (*IG* I, 35.3-8; *SEG* 12.80; Dem. 57.46ff); priests are the servants of the God: let him choose. But the only unambiguous evidence for the selection of priests by lot being seen as leaving the choice to the Gods is a passage in Plato's *Laws* (759b, cf. 741b); and in that very work Plato distinguishes between selection by lot of priests and election of magistrates and insists on the distinction between sortition and divine decision (757b). What is more, those lot-chosen priests were subject to *dokimasia* before entry into

office (759c) — hardly a compliment to divine omniscience. All in all, there is not a single good source that straightforwardly testifies to the selection of magistrates by lot as having a religious character. Thus, I tend to believe that religious motives can be ignored in a discussion of sortition of jurors and magistrates in Classical Athens (M.H. Hansen, *op. cit.* [n. 7], 50-1). I note too that P. Schmitt Pantel has no mention of sortition in her contribution about democracy and religion, but I note as well that the religious aspect of election by lot of magistrates has been restated and emphasised by, among others, Victor Bers and Paul Demont. Do you share the view that religious motives are irrelevant in an account of political lottery in Classical Athens?

C. Farrar: I agree that there is no good evidence that the Greeks used the lot to hand off decisions to the gods. And in any case this claim is irrelevant to my argument about the distinctively democratic use of the lot and rotation by the Athenians, which asks why they used one device or another, or both, for some political roles but not others. Were the gods thought to be incompetent at choosing generals?

E. Robinson: In your formulation, Athenian democracy did not privilege one group over another, but established an egalitarian political identity for citizens that ignored issues of wealth and social status. Such an ideal is indeed often put forward in our sources for Greek democracies, not only, for example, in Pericles' funeral oration (Thuc. 2.37), but also in Athenagoras' speech in Syracuse (Thuc. 6.39). But, as Pasquale Pasquino has emphasized in his paper, democracy was also sometimes characterized, especially by Aristotle (e.g., *Pol.* 1317b8-10), as rule of the *aporoi*, since the greater number of relatively poor citizens gave them a strong majority when voting in the assembly or the courts.

In my view, both descriptions are correct, and depend on one's perspective. Ancient *demokratia* did include everybody

and made use of citizens' talents regardless of their background and on the basis of equality. Nevertheless, much of the time the masses of the poor could and did outvote their richer fellow citizens. How do you see this issue, and how would a more Aristotelian take on the *aporoi* and *demokratia* affect your view of sortition and rotation in democracies?

C. Farrar: Aristotle gives us (as so often) more than one characterization of this issue. At the end of the chapter you cite, 6.2, he observes that the "recognized principle of democratic justice" is not that the poor should rule the rich, but that "all should count equally, for equality implies that the poor should have no more share in the government than the rich, and should not be the only rulers, but that all should rule equally according to their numbers" (6.2, and see also 4.4). Aristotle does not mention the Samian case noted by Thucydides (8.21), where the people entirely excluded the landowners from the government.

My view is that the poor could in principle outvote the rich in the assembly, or dominate the juries — though especially in the latter case, it was very difficult to plan to do so (because of the operation of the lot for specific cases). And as I suggest in my text, lot and rotation reinforced the idea of equal access and equal constraints. Whether a citizen was rich or poor, he was neither entitled to a magistracy nor prevented from putting himself forward for one. See also Euripides *Suppl.* 404: "Athens is free. The *demos* rule in turn (*en merei*). They do not give the greater share to the rich; the poor man has an equal share".

Chr. Mann: Meine Frage berührt weniger die rechtliche Ausgestaltung des Losverfahrens als die ungeschriebenen Regeln politischer Kommunikation. Die Akzeptanz, als politischer Funktionsträger Gruppeninteressen zu vertreten, scheint mir in der antiken und modernen Demokratie ganz unterschiedlich zu sein. Im klassischen Athen läßt sich nur in Ausnahmefällen

erkennen, daß Funktionsträger für Partikularinteressen eintraten; nach unseren Quellen erwartete der *demos* vielmehr, daß politische Vorschläge und Entscheidungen stets auf das Wohl aller Athener ausgerichtet waren. In modernen Demokratien dagegen ist es trotz kritischer Stimmen Usus, daß einzelne Parlamentarier sich für die Interessen einer bestimmten Region oder einer bestimmten Interessengruppe engagieren, etwa der Bauern, Autobauer etc. Besteht in der Moderne aus diesem Grund nicht das Risiko, daß die Zufälle des Losverfahrens eine Begünstigung bzw. Benachteiligung einzelner Gruppen mit sich bringen, oder führt das Losverfahren vielmehr dazu, daß die Erlosten sich stärker dem Gemeinwohl und nicht speziellen Gruppen verantwortlich fühlen?

P. Schmitt Pantel: Une des différences entre l'exercice de la démocratie à Athènes et aujourd'hui réside, dites-vous, dans l'absence actuelle d'institutions de *self-government.* Le tirage au sort au sein d'un groupe de citoyens pour discuter d'un projet particulier vous parait être un bon moyen pour réintroduire le processus démocratique et lutter contre une certaine dépolitisation. Quelle aide, quel avantage, apporte exactement le tirage au sort dans ce processus? Ne peut-on penser que pour redonner un contenu à la citoyenneté la participation directe des groupes prenant en charge des problèmes politiques, sociaux, d'environnement particuliers est un moyen plus dynamique et plus simple? Votre usage du tirage au sort n'est-il pas lié à une situation qui est propre aux USA mais qui n'existe pas forcement dans d'autres démocraties modernes? Le modèle de l'autogestion appliqué à un échelon local représente, me semble-t-il, une alternative intéressante dans la perspective d'une éducation à la démocratie.

A. Lanni: I take it that the normative thesis from your paper is that modern attempts to recreate Athenian-style democracy on a smaller scale should abandon attempts at complete representativeness and instead embrace some measure of self-selec-

tion, just as the Athenians did. I wonder whether self-selection isn't much more problematic in the modern world given the prevalence of organized interest groups, whereas in Athens the absence of such interest groups and the cultural monopoly enjoyed by courts and legislatures made it much more likely that ordinary Athenians would participate.

C. Farrar: One implication of Eric's earlier question was that the *aporoi* might perhaps function as a group to wield collective power. Christian, Pauline, and Adriaan: your questions all seem to me to address some aspect of the argument that the modern situation differs from the ancient precisely in the way groups make their interests felt politically. My claim about the Athenians is that the lot and rotation helped forge a system in which citizens functioned as individuals, not groups. Athenian magistrates could not see themselves as entitled to a particular role because of some distinctive set of interests, nor did they represent a particular constituency or set of concerns, nor yet could they use their position to advance their own personal interests over time. They had to take account of the views of others, who had an equal chance of being chosen, and would replace them in a year's time.

As you point out, Christian, in the modern world elected representatives advance or defend the cause of particular interest-groups. (This may perhaps be more true outside the United States, because of the differences between parliamentary and presidential systems, as well as proportional representation vs. first-past-the-post for election to office.) The use of the lot, you suggest, might therefore harm specific interest groups. Or, to look at it more positively, perhaps lotteries might make the people as a whole, rather than special groups, feel more accountable and responsible for what happens to the commonwealth. I entirely agree, as I said above, that the Athenian system hindered the operation of interest-groups of any kind. And it is probably true to say that what I've called the active continuity between those who participate and those who don't, including

equal access and no entitlement, could foster greater identification with the decisions of the *polis*. However, this sense of collective responsibility depends upon the opportunity to actually make and carry out decisions (not just elect decision-makers), and on a regular basis.

Pauline, as you note, I think that the local level is probably the most promising arena for implementing something like the Athenian system. However, I don't share your view that we could rely just on self-selection, whether by locality or by interest in a particular issue. The use of the lot makes a commitment to equal access and collective self-government a reality. Without sortition, the risk is domination by a moneyed or educated elite, and/or by narrow interest groups that (in the absence, too, of rotation) develop specialized expertise and do not have to take into account other priorities or concerns.

I agree that I should have explored the relevant ways in which the U.S. and other democracies differ. However, the lot has proved appealing outside America, for example in the form of citizen juries and deliberative polls, in part (as Ségolène Royal's proposal suggests) to address problems of entrenchment and perceived lack of accountability to the broader public.

By contrast, Adriaan, you suggest that it is precisely the self-selection component of the Athenian system as I've presented it here that is problematic, because it will result in the continued dominance of organized interest groups. As I said in response to Pauline, I agree that self-selection without the lot, rotation, and regular opportunities to participate in decision-making would indeed privilege the better organized and the elite. And I am suggesting that we might try to instantiate a different notion of 'representativeness': not a cross-section at one moment in time, but a reflection of the diversity of the demos over time, based on actively opting in.

M. Hansen: Your study is focused on one aspect of modern direct democracy, *viz.* 'demarchy', the use of randomised panels in modern democracy compared with the Athenians' use of

sortition and rotation. There is no mention of the other aspect *viz.* to make an extensive use of the referendum and allow the whole of the people to decide many or even most important issues by direct vote. This line is taken by, e.g., I. Budge, *The New Challenge of Direct Democracy* (Oxford 1996) and, in a more modest form, by M. Gallagher, P.V. Uleri, *The Referendum Experience in Europe* (London 1996) and B.R. Barber, *Strong Democracy* (Berkeley 1984). Admittedly the ancient evidence plays a larger role in discussions of 'demarchy' than in debates about the modern use of referendum. But what is your reason for leaving out any discussion of the referendum model? Do you reject it as too utopian to deserve discussion?

A. Lanni: Your paper focuses on deliberative bodies. Another type of direct democracy involves aggregation, for example through *referenda* procedures. Some research has been done suggesting that deliberation may lead to distortion and suggesting that aggregation may be more reliable (e.g. C.R. Sunstein, "Deliberating Groups vs. Prediction Markets [or Hayek's Challenge to Habermas]", in *Episteme* 3.3 [2006], 192-213; C.R. Sunstein, R. Hastie, "Four Failures of Deliberating Groups", in *John M. Olin Law & Economics Working Paper*, 401 [2008], [available at http://www.law.uchicago.edu/files/files/401.pdf]). Can you elaborate on why you've chosen the deliberative route for your contemporary projects?

C. Farrar: I don't discuss the possibility of rule by referendum not because I think it is utopian, Mogens, but because I think this kind of direct democracy is undesirable. Even if individual voters had access to balanced information (and were required to review it before voting), even if the wealthy were penalized for not participating and the poor were paid to do so, or all were required to participate (in order to stymie attempts to mobilize specific interest groups), such a system would not achieve what the Athenian institutions created. Aggregating views through *referenda* may tap the people's

collective wisdom (or at any rate knowledge), as praised by Aristotle and more recently promoted by Cass Sunstein (see also his *Infotopia* [Oxford 2006]) and James Surowiecki (in *The Wisdom of Crowds* [New York 2004]). However, this process does nothing to promote a sense of citizenship, or connectedness to decision-making over time. The Athenian system rested on the opportunity for active engagement with a diverse group of other citizens, in relatively small groups; a role in implementing, not just enacting; and exposure to the views of individuals (not just policy wonks) with different perspectives, as they seek to take account of opposing views in an evolving forum, as in the Athenian assembly.

As you observe, Adriaan, raw aggregation of the prediction-markets variety explicitly claims to be superior to deliberation as a method of reaching informed conclusions. In the political context, Sunstein has indeed argued (on the basis of rigorous experimental studies) that deliberation leads to what he calls 'polarization', i.e. that the views of participants in a group become more extreme after deliberation than their individual opinions would have predicted. However, as Sunstein himself notes in *Republic.com 2.0* (Princeton 2007), this effect does not occur when groups are diverse, as for example in Deliberative Polling, which not only invites people randomly but then assigns them randomly to small group deliberations. An experimental study I carried out with colleagues, using data from Deliberative Polls, confirms the absence of group effects of the kind Sunstein describes (C. Farrar, D. Green, J. Green, D. Nickerson, S. Shewfelt, "Does Discussion Group Composition Affect Policy Preferences? Results from Three Randomized Experiments", in *Political Psychology* 30.4 [2009], 615-47. See also the discussion of polarization [including Sunstein's arguments] in J.S. Fishkin, *op. cit.* [n. 1], 2009, 85-7, 101-2, 131-3).

VI

ADRIAAN LANNI [1]

JUDICIAL REVIEW AND THE ATHENIAN 'CONSTITUTION'

What do the Athenian procedures for reviewing the legality of statutes (known to us, but not the Athenians, as 'judicial review') tell us about the existence of a 'higher law' in Athens? Anyone familiar with Athenian history might assume that the answer would throw an unflattering light on Athens. Our first detailed information about the procedure for judicial review of legislation is the infamous Arginusae affair, in which the Athenians had several generals sentenced to death collectively and executed without trial. And all of our surviving law court speeches in constitutional cases appear to be motivated first and foremost by political rivalry, rather than a desire to protect the Constitution.[2] Nevertheless, I think we can discern from these sources a coherent theory of the Athenian 'Constitution'— that is, a sense of which types of higher law were considered important enough to justify overturning new legislation.

This paper describes the procedures for reviewing legislation in Athens, then turns to a close examination of the legal

[1] I thank Victor Bers, Richard Fallon, Mogens Hansen, Wesley Kelman, Michael Klarman, Daryl Levinson, Michael Gagarin, Jed Shugerman, Matthew Stephenson, Mark Sundahl, Mark Tushnet, and Harvey Yunis for advice on this project.

[2] Of course, the American practice of judicial review was also firmly established in a case that was fundamentally a partisan political dispute — *Marbury vs. Madison*.

arguments in our surviving speeches. I argue that prosecutors consistently attempted to depict the statute as a threat to the basic democratic legislative or adjudicative process. This suggests that the legal review of statutes was understood as a means of preserving popular decision making structures rather than enforcing substantive values. From a modern perspective, classical Athens offers an interesting alternative model of a highly democratic form of 'judicial review' in which constitutional precommitments were limited and constitutional challenges were adjudicated by large juries of ordinary citizens. Far from taking issues out of the realm of popular decision making, judicial review in Athens was quite limited in scope and focused on preserving the key democratic political values: the citizenry's lawmaking power, and the jury's wide power to adjudicate disputes.

II. The Review of Legislation in Athens

In this section I describe the procedures for overturning legislation in Athens. Our understanding of these procedures, as of so much of Athenian institutional history, has been greatly enhanced by the work of our convener, Mogens Hansen.[3] The *graphē paranomōn*, which was introduced not later than 415 B.C.,[4] was the original mechanism for challenging legislation as *paranomos* ("contrary to law," or "unconstitutional"). The legal reforms at the end of the fifth century established a

[3] E.g., M.H. HANSEN, *The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Public Action Against Unconstitutional Proposals* (Odense 1974); ID., "*Graphe Paranomon* Against *Psephismata* Not Yet Passed by the *Ekklesia*", in *C&M* 38 (1987), 63-73.

[4] AND. 1.17, 22. For discussion of various theories on the origin of the *graphē paranomōn*, see M.J. SUNDAHL, *The Use of Statutes in the Seven Extant* graphe paranomon *and* graphe nomon me epitedeion theinai *Speeches* [Unpublished Ph.D. Dissertation] (Brown University 2000), 24-6.

hierarchy between laws (*nomoi*) that proclaimed general and permanent higher norms of general application and time-limited decrees (*psephismata*); in theory, at least, no decree could contravene a law, and no new law could contradict an existing law unless the pre-existing law was simultaneously repealed.[5] Following this reform, the *graphē paranomōn* was limited to challenges to decrees, while a new procedure, the *graphē nomon mē epitēdeion theinai* ("public procedure for introducing an unsuitable law"), was introduced for challenging new laws.[6]

Any male citizen could lodge a challenge, which would result in a jury trial in which the sponsor of the legislation was charged with defending his law or decree. The typical jury included 501 members, but in high-profile cases more jurors might be used.[7] Proposed legislation could be challenged either before or after it was enacted by the Assembly or (in the case of a law) the *nomothetai*;[8] in both cases, the legislation was suspended pending the outcome of the trial. If the prosecution was successful, the decree or law was nullified and, if the challenge was initiated within a year, the defendant was subject to a punishment assessed by the jury.[9] If the jury upheld a decree or law that had already been duly enacted prior to being challenged, then the legislation became valid. It seems that if in a

[5] M.H. HANSEN, "Athenian *Nomothesia*", in *GRBS* 26 (1985), 345-71; ID., *The Athenian Democracy in the Age of Demosthenes. Structures, Principles and Ideology* (Oxford 1991), 171-4.

[6] M.H. HANSEN, *op. cit.* (n. 3), 44-8; H.J. WOLFF, *'Normenkontrolle' und Gesetzesbegriff in der attischen Demokratie* (Heidelberg 1970), 40-1. I refer to *nomoi* as laws, *psephismata* as decrees, and use the general terms statute or legislation to refer to both *nomoi* and *psephismata*.

[7] AND. 1.17.

[8] XEN. *Hell.* 1.7.12-14; DEM. 22.5, 9-10; M.H. HANSEN, *art. cit.* (n. 3), 75-80. E. CARAWAN, "The Trial of the Arginousai Generals and the Dawn of Judicial Review", in *Dike* 10 (2007), 36-7 suggests that, at least in the fifth century, a decree could not be overturned after it was implemented.

[9] DEM. 20 hyp.2.3; cf. DEM. 20.144; 23.104; H.J. WOLFF, *op. cit.* (n. 6), 9-10; E. CARAWAN, *art. cit.* (n. 8), 32-5 argues that the one-year time-limit on liability may not have been true of the fifth-century *graphē paranomōn*.

graphē paranomōn the jury upheld a decree that had been challenged prior to enactment, the decree automatically became valid even though the Assembly had never voted on the measure.[10]

The sufficiency of a court verdict in a *graphē paranomōn* to give a proposed but unenacted decree the force of law is but one indication that the court's role in these cases extended beyond simply insuring that the decree was consistent with the existing laws. As has often been pointed out, our surviving *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* speeches contain both 'legal' arguments—that is, discussion about why the legislation does or does not contravene existing law—and 'political' or 'policy' arguments about whether the legislation is in the city's interest.[11] In fact, prosecutors in these suits explicitly divide their speeches into legal and policy arguments.[12]

Scholars differ on the relative importance of legal and policy arguments to the jury's decision. Based on the tendency of prosecutors to begin with legal arguments and isolated comments suggesting that the prosecutor had an obligation to demonstrate that the decree was unconstitutional,[13] Wolff concludes that the legal issues were paramount and the (admittedly copious) political arguments were merely superfluous attempts to prejudice the jury.[14] Hansen, by contrast, emphasizes that speakers tend to devote more time to the political arguments

[10] DEM. 24.9-14; M.H. HANSEN, *art. cit.* (n. 3); cf. J.M. HANNICK, "Note sur la *graphe paranomon*", in *AC* 50 (1981), 393-397. Presumably in the case of proposed laws upheld in a *graphē nomon mē epitēdeion theinai*, the measure would still need to be duly enacted through the *nomothetai*. DEM. 20.100; M.J. SUNDAHL, *op. cit.* (n.4), 19; M.H. HANSEN, *art. cit.* (n. 5), 360-370.

[11] E.g., M.H. HANSEN, *art. cit.* (n. 3), 71; H. YUNIS, "Law, Politics, and the *Graphē paranomōn* in Fourth-Century Athens", in *GRBS* 29 (1988), 361-82. In the case of honorary decrees, there is a third argument, that the beneficiary is unworthy of the honor, which is often considered a form of 'political' plea (for example, by H. YUNIS, *art. cit.*, 361).

[12] E.g. DEM. 23.18; H. YUNIS, *art. cit.* (n. 11), 370-5.

[13] E.g. DEM. 18.110.

[14] H.J. WOLFF, *op. cit.* (n. 6), 13-4; 60-4.

and at times suggest that they are the most important.[15] He views both types of argument as relevant, but contends that proof that a decree was inexpedient was sufficient to overturn it, even if it did not contravene existing law.[16] Yunis contends that both legal and political pleas were necessary to a verdict: he agrees with Wolff that prosecutors were obliged to show that the legislation was unconstitutional, but argues that a prosecutor could not convince a jury to overturn a decree unless he could also show that it was contrary to Athens' interests.[17]

My own view is that both types of argument were considered relevant, and it was up to the jury in each individual case to decide the relative importance of the legal and policy arguments for and against the statute. Scholars have interpreted the evidence on the status of the legal plea so differently because this question was itself part of what was at issue in these cases, leading to contradictory statements by different speakers depending on which position best supported their case.[18] And litigants could make very different choices about which types of evidence to include in their speeches. The *graphē paranomōn* concerning Demosthenes' crown, one of the few cases in which both sides of a case survives, illustrates the lack of consensus on the relative importance of legal and political arguments:

[15] E.g. AESCHIN. 3.49; M.H. HANSEN, *art. cit.* (n. 3), 71 and nn. 34-5.

[16] M.H. HANSEN, *art. cit.* (n. 3), 71-2 (citing DEM. 58.89-91).

[17] H. YUNIS, *art. cit.* (n. 11), 364-70. He emphasizes the way that speakers approach legal and political arguments as "complementary strands to be consulted by jurors" (364), citing both the organization of speeches and specific passages (e.g. AESCHIN. 3.260).

[18] Compare: DEM. 18.110 ("I must first, in sequence, present arguments concerning the illegality itself"); HYP. Fr. 7 (Aristogeiton comes close to admitting in his defense that his proposal to free the slaves and restore all exiles in the aftermath of Chaeronea contravened the law but was justified on policy grounds: "But did you not read the laws which prohibit this? I was not able to, because Macedonian arms obstructed their words"); DEM. 59.91 (suggesting that citizenship grants could be overturned through a *graphē paranomōn* if "the man who received the gift was shown to be unworthy"); AESCHIN. 3.260 (charging the jurors to reach a decision based on both *ta dikaia kai ta sumpheronta*).

Aeschines offers a detailed discussion of the relevant laws,[19] while Demosthenes responds to these legal arguments in a mere nine sections, shunted off to an inconspicuous part of the speech.[20] Such a situation, in which the jurors are presented with two contrasting views of 'the case', each of which employs a radically different balance between legal and policy arguments, suggests that neither type of argument was considered ex ante decisive or even superior to the other.

In this respect, the different emphases in constitutional arguments is consistent with my more general approach to decision making in Athenian popular courts: there was no authoritative rule of decision, and the jury panel was typically presented with a highly contextualized account of the dispute and left to its own devices to arrive at a just resolution of each case.[21] In this way, each juror was free to decide for himself whether legal or extra-statutory norms were more important. However, the surviving constitutional cases differ from other popular court cases in three respects: (1) because the dispute centers on the validity of a statute, these cases tend to include more, and more detailed,

[19] AESCHIN. 3.8-48.

[20] DEM. 18.111-120. H. YUNIS, *art. cit.* (n. 11), 375-81 notes this difference and suggests that while prosecutors were obliged to argue for overturning the statute on both political and legal grounds a defendant with a weak legal case might emphasize policy arguments in his favor. M. GAGARIN, "Law and Politics in the Case on the Crown", Address delivered to the American Society for Legal History (Toronto 2008) argues that both the discussions of Demosthenes' career and his character in this case should be considered a 'legal' argument in Athenian terms because what mattered in a public suit was the wording of the indictment, not the statute. But the point remains that Aeschines and Demosthenes devote different levels of emphasis to the argument over whether the decree contravenes standing law.

[21] A. LANNI, *Law and Justice in the Courts of Classical Athens* (Cambridge 2006), 41-74. I argue that the Athenians consciously adopted a highly discretionary approach to justice in the popular courts. This choice reflects both a normative belief that a wide variety of contextual information was often relevant to reaching a just decision, as well as a political commitment to popular decision making in a direct democracy.

legal argumentation;[22] (2) the juxtaposition of separate, parallel statutory and extra-statutory arguments is generally quite explicit; and (3) many (but by no means all) of the extra-statutory arguments focus on forward-looking questions of Athens' policy interests (*to sumpheron*),[23] while speakers in ordinary cases tend to focus on the character of the litigants and notions of desert (*to dikaion*).[24] We will return in Part III to what these differences suggest about the unusual constitutional role of the jury in *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* cases. What is important at this point is that the jury in these cases, as in all Athenian popular court cases, was free to disregard the law in favor of policy or other extra-statutory norms.

II. Legal Review of Statutes and the Athenian 'Constitution'

If I am right that the laws did not provide a determinative guide to a verdict in Athenian popular courts and jurors could freely ignore them in individual cases, then the *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* present something of a paradox: if law is not ultimately authoritative but is just one piece of evidence for jurors to consider along with

[22] Cf. S.C. TODD, "The Purpose of Evidence in Athenian Courts", in *Nomos: Essays in Athenian Law, Politics, and Society*, ed. by P.A. CARTLEDGE, P.C. MILLETT, S.C. TODD (Cambridge 1990), 31-2 who notes the greater legal argumentation in *graphē paranomōn* cases and suggests that statutes take the place of witnesses in these cases.

[23] Of course, other forms of extra-statutory argument are also prominent in constitutional cases, including not only the question of worthiness in cases involving honorary decrees, but also the character of the litigants. As H. YUNIS, *art. cit.* (n. 11), 369 n. 29 points out, these cases were a mixture of what Aristotle would characterize as deliberative and forensic oratory.

[24] Discussions of a speaker's past and promised future liturgies and deterrence arguments are two instances where speakers in non-constitutional cases appeal to Athens' policy interests, but both these types of arguments tend to be couched in terms that are consistent with justice and moral desert.

competing (and often contradictory) norms, why have procedures to insure that new legislation does not contravene existing law? A close examination of the 'legal' arguments in constitutional cases — that is, prosecution arguments that a law or decree contravenes existing law — may offer some clues.

It may be helpful to summarize briefly my thesis and its relationship to previous scholarship at the outset before delving into an analysis of the cases. I contend that prosecutors sought to present the statute under review as one that interfered with the democratic legislative or adjudicative process by, for example, charging that it was not enacted through the proper legislative procedures or that it violated the right to a trial or the finality of court judgments. Our evidence suggests that the Athenians thought the legal review of statutes should be focused on preserving basic democratic decision making structures (which in Athens included the popular courts as well as the Assembly); in practice only statutes that were perceived to threaten democratic procedures were considered *paranomos* (unconstitutional) in the legal sense (though, as we have seen, statutes could be independently overturned for policy reasons as well). Although the grounds for overturning legislation as contrary to law was limited in scope, legal review of statutes through the *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* procedures was considered vital to preserving the democratic Constitution.

Previous scholarship analyzing legal pleas in constitutional cases has focused on distinguishing the different types of legal argument found in the speeches and evaluating their relative importance without attempting to suggest a common theory of the Athenian 'Constitution' that underlies the various arguments. Lipsius identified two types of argument for challenging a statute as unconstitutional: (1) procedural violations in the process of proposing or enacting the statute; and (2) contradictions with the substance of an existing law.[25] Wolff's landmark

[25] J.H. LIPSIUS, *Das attische Recht und Rechtsverfahren* (Leipzig 1905), 390-2; cf. M.H. HANSEN, *op. cit.* (n. 5), 205, who distinguishes between arguments based on 'formal' and 'material' illegality.

study, *"Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie*, added a third category of legal argument: the statute under review contravened general principles that could be logically derived from existing statutes, as opposed to directly contradicting a specific provision.[26] Wolff viewed this third category of argument as most central to Athenian notions of constitutionality, and carefully traced the Athenians' increasing sophistication at extracting fundamental principles from statutes over time. Two additional aspects of Wolff's theory are important for our purposes: first, the fundamental principles involve moral and social values and institutions (*Institutionen der Gesellschaftsordnung*) as well as democratic political and legal norms (*die Rechtsordnung als Ganzes*: "the legal system as a whole");[27] and, second, the general principles are always derived from statutes and are never appealed to as independent, abstract values.[28]

In a recent dissertation and article, Sundahl catalogues the legal arguments in the surviving constitutional speeches according to the three categories described above.[29] He argues, contra Wolff, that arguments that the statute contravened general legal principles were actually the least prominent, and were primarily limited to one speech, Demosthenes 23, *Against Aristocrates*.[30] Sundahl demonstrates that the other two types of argument—procedural illegality and direct conflict with a provision of a standing law—dominate the speeches.[31] He argues that the grounds for challenging a statute was therefore relatively narrow, limited mostly to formal procedural violations or evident contradictions, and concludes that the procedures for legal

[26] H.J. WOLFF, *op. cit.* (n. 6), 45-67.

[27] *Ibid.*, especially 49-50 and 65.

[28] *Ibid.*, 66.

[29] M.J. SUNDAHL, *op. cit.* (n. 4); ID., "The Rule of Law and the Nature of Fourth-Century Athenian Democracy", in *C&M* 54 (2003), 127-56.

[30] M.J. SUNDAHL, *op. cit.* (n. 4), 122; M.J. SUNDAHL, *art. cit.* (n. 29), 138-9.

[31] M.J. SUNDAHL, *op. cit.* (n. 4), 116-29.

review of statutes was only a 'weak restraint' on the sovereignty of the Assembly.[32]

In the analysis below, I isolate what I think is a common thread among most of the legal arguments that have previously been separated into the three distinct categories described above: allegations that the statute interferes with the basic legislative or adjudicative procedures of the democratic Constitution. Some of these procedures — for example, aspects of the fourth-century legislative process — were explicitly enumerated by statute, while others, such as the right to a trial, were implicit. The procedures for legal review of statutes were less concerned with enforcing substantive consistency with standing law than with safeguarding popular decision making in the Assembly and courts. Under this view, arguments regarding formal or procedural irregularities in passing the statute under review reflect concerns about safeguarding the legislative process. And we will see that the majority of the arguments alleging either direct contradictions with existing laws or contravention of general principles involve basic procedural rights or otherwise implicate the integrity of the adjudicative process in the popular courts. The Athenian 'Constitution' was thus both broader and narrower than Wolff's characterization: broader, because the arguments challenging the constitutionality of statutes do seem to suggest an appreciation for an overarching set of abstract democratic principles to which legislation must conform, independent of individual existing statutes; and narrower, because those principles seem to have been limited to protecting popular decision making in the legislative and adjudicative process, rather than including substantive moral and social values.

The most useful sources for analyzing the legal review of statutes are the four surviving *graphē paranomōn* speeches

[32] M.J. SUNDAHL, *art. cit.* (n. 29), 127.

(Aeschines 3, Demosthenes 18, 22, and 23),[33] the two remaining *graphē nomon mē epitēdeion theinai* speeches (Demosthenes 20 and 24), and Xenophon's account of the Assembly debate concerning the Arginusae affair.[34] A difficulty immediately presents itself: four of these seven speeches involve challenges to honorary decrees, hardly the most promising subject matter for discerning the nature of the Athenian 'Constitution'. And this is not a statistical blip; of the thirty-two *graphē paranomōn* prosecutions where we know the subject of the challenged decree, nineteen involved honorary decrees.[35] In practice, the *graphē paranomōn* procedure was commonly used merely as a weapon against political enemies—either by challenging decrees proposed by one's enemy or by challenging honors voted to him.[36] Yet even in cases involving apparently unimportant honorary decrees, the way that prosecutors frame their challenges — the way they tried to depict the decree as interfering with the legislative and adjudicative process — is revealing of the principles the Athenians viewed as important enough to justify overturning a statute. In what follows, I analyze the legal arguments in the Arginusae affair, the two surviving *graphē nomon mē epitēdeion theinai* prosecution speeches, and the three surviving *graphē paranomōn* prosecution speeches.[37]

[33] We also have fragments of two other speeches: (1) the end of a fifth speech, Hyperides 2, *Against Philippides*, which includes a quotation of the honorary decree under review, but does not include extended legal argument, and (2) the recently discovered fragments from Hyperides, *Against Diondas*, which is a defense speech and therefore does not present arguments for the unconstitutionality of the decree.

[34] XEN. *Hell.* 1.7.9-35; we also have fragments or references to several additional cases, catalogued in M.H. HANSEN, *op. cit.* (n. 3), 28-43, but as discussed below these fragments are of only limited use in discerning how prosecutors framed their legal arguments.

[35] M.H. HANSEN, *op. cit.* (n. 5), 211.

[36] M.H. HANSEN, *op. cit.* (n. 3), 62-5.

[37] I do not separately discuss the one surviving defense speech in a *graphē paranomōn*, Demosthenes 18, for which we have the corresponding prosecution speech (Aeschines 3). I also do not discuss the references to other constitutional cases collected by Hansen. Even in the few cases where we have some informa-

The Arginusae affair

The only case pre-dating the legislative reforms about which we have significant information is the Arginusae affair.[38] The generals in charge of the naval victory at Arginusae in 406 B.C. were criticized for failing to rescue the shipwrecked sailors after the battle. Kallixenos introduced a decree calling for the Athenians to decide on the guilt of the eight accused generals in a single vote during the current Assembly meeting. Euryptolemos challenged the decree as unconstitutional. When it was proposed that Euryptolemos be judged in the same vote as the generals, he withdrew his challenge and instead moved a counterproposal—ultimately unsuccessful— suggesting alternative procedures through which the generals could be given a proper trial. Xenophon provides an account of Euryptolemos' speech in the Assembly,[39] which gives us some indication of the arguments he would have presented if his *graphē paranomōn* had gone to trial. He argues that Kallixenos' decree is unconstitutional because it contravenes the general principle, not explicitly provided for by statute, that defendants have right to a trial and to an individual assessment of guilt.[40] Thus the very first

tion regarding the nature of the legal challenge to the statute, it is impossible to tell whether we know of all the legal arguments that were employed, which legal arguments were emphasized, and how they were presented; we will see that even where substantive contradictions exist prosecutors often present them in a way that emphasizes that the statute interferes with the legislative or judicial process. One observation from the catalog that may be worth noting: setting aside challenges to honorary decrees and decrees involving foreign policy, the only challenges for which we have more than one example involve procedural rights (execution without trial: Hansen Cat. Nos. 3, 14, 29; imprisonment: Hansen Cat. No. 1). M.H. HANSEN, *op. cit.* (n. 3), 62.

[38] XEN. *Hell.* 1.7.9-35. E. CARAWAN, *art. cit.* (n. 8) argues that the function of the *graphē paranomōn* was significantly different in the fifth and fourth centuries. In my view, we simply do not have enough evidence about fifth-century *graphē paranomōn* procedures to evaluate this claim. What is important for our purposes is that even the single fifth-century case that we have some information about accords with the thesis that the Athenians viewed decrees that intervened with basic procedural rights as *paranomos*.

[39] XEN. *Hell.* 1.7.16-33.

[40] XEN. *Hell.* 1.7.23.

discussion of the constitutionality of a statute that survives involves an attempt to protect the basic procedural right to trial in the popular courts.[41]

Demosthenes 24: Against Timokrates

Androtion and two other Athenians seized an enemy ship and hoped to keep the booty, but a political opponent passed a decree requiring that those in possession of the enemy property pay back the money or become state debtors, which would result in imprisonment until the debt was paid.[42] In an apparent attempt to escape with the booty, Androtion and his associates then had Timokrates, a political ally, propose a law (*nomos*) which permitted state debtors to avoid prison until the ninth prytany if the Assembly approved sureties put forward by the debtors.[43] Demosthenes wrote the first prosecution speech on behalf of the prosecutor Diodorus in the *graphē nomon mē epitēdeion theinai* challenging Timokrates' law.

Nearly all of Diodorus' legal arguments allege that the law undermines democratic decision making by interfering with the legislative or adjudicative process. He begins with a detailed description of the requirements for enacting a new law, and argues that Timokrates intentionally circumvented the deliberative process by trying to sneak his law through during a holiday.[44] Timokrates did not follow the ordinary procedures

[41] Interestingly, many of the early American instances of judicial review also involved the preservation of the right to a jury trial. For discussion, see M.J. KLARMAN, "How Great were the 'Great' Marshall Court Decisions?", in *Virginia Law Review* 87 (2001), 1111-84.

[42] DEM. 24.12-14. The decree called on the trierarchs to pay the treasury and then seek reimbursement from those in possession, with recourse to a lawsuit if necessary. If Androtion and his associates forced a trial and were unsuccessful, it seems that as state debtors a penalty would be added, making them liable for twice the original debt. D.M. MACDOWELL, *The Law in Classical Athens* (London 1978), 166-7.

[43] DEM. 24.39-40.

[44] DEM. 24.17-32.

of publicly posting the law and having the proposal read out at a prior Assembly meeting before bringing it to vote.[45] Instead, while the Council was adjourned for a festival he had the *nomothetai* called in an emergency session, ostensibly to deal with urgent financial matters related to the festival, but in fact "in order that the law be passed and become law uncontested without anyone noticing or speaking against it".[46] Diodorus urges the jurors to overturn the law as unconstitutional because Timokrates "completely stripped you of your right to deliberate (*bouleusasthai*) and examine these matters by trying to pass a law during the festival".[47] Diodorus also notes that Timokrates has contravened the law prohibiting legislative proposals on behalf of the disenfranchised or the indebted unless special procedures — presumably intended to insure that the Athenians are not tricked into enacting legislation against the city's interests — are observed.[48]

Diodorus then turns from discussion of how the law was improperly enacted to an examination of the unconstitutional provisions in the law. He charges that the law violates a series of laws that safeguard the finality of duly-decided judicial verdicts. He contends that the law's provision that an imprisoned debtor may appeal to the Assembly to approve his sureties and release him violates (1) the law prohibiting a convicted defendant or his representative from seeking reconsideration of a judicial sentence in the Council or the Assembly; (2) the law prohibiting officials from bringing up for reconsideration any matter that has been decided by a court, and (3) the law providing that all verdicts and awards decided under the democracy (but not those decided during the reign of the Thirty tyrants) shall be valid.[49] Later in the speech, Diodorus under-

[45] DEM. 24.26.
[46] DEM. 24.28.
[47] DEM. 24.32.
[48] DEM. 24.45-48.
[49] DEM. 24.53-59.

scores the broader implications of upholding a law that interferes with a court's sentence: "I suppose that all would agree that to render invalid court judgments that have been made is monstrous, unholy, and subverts the democracy".[50] Diodorus also contends that because Timokrates introduced his law with Androtion in mind,[51] it contravenes the prohibition against ad hominem legislation, noting that this 'democratic' prohibition assures that all citizens are treated equally under the laws. Among the long list of statutes Diodorus alleges the law contradicts, only one — the law that provides for defendants convicted through the *eisangelia* procedure to be imprisoned until they pay any fine assessed[52] — involves a straightforward substantive contradiction with the proposed law that does not implicate the integrity of democratic legislative or judicial procedures.

Demosthenes 20: Against Leptines

The Social War (357-355 B.C.) put Athens in financial crisis. Several measures were proposed to try to bolster the city's revenues, one of which was a law (*nomos*) proposed by Leptines to abolish all exemptions from liturgies, the public services imposed on wealthy citizens and metics. Citizens (for example successful generals) and foreigners who had done services for Athens could be offered life-long exemptions from these duties by decree. Leptines' proposed law would abolish past and future exemptions, and would punish anyone who claims an exemption with disenfranchisement and confiscation of property.[53]

[50] DEM. 24.152.

[51] DEM. 24.59-60. He also argues, falsely, that because the law exempts certain classes of debtors— namely tax-farmers, lessees, and their sureties — it does not apply equally to all and therefore constitutes ad hominem legislation.

[52] DEM. 24.62-65.

[53] M.J. SUNDAHL, *op. cit.* (n. 4), 185 reconstructs the law from partial quotations in DEM. 20.29, 127, 156, 160.

Demosthenes delivered the speech that survives as a supporting speaker (*sunegoros*) for the prosecutor in the successful[54] *graphē nomon mē epitēdeion theinai* challenging the law.[55]

Demosthenes presents four legal challenges to the law. The first, and most detailed, legal argument (88-101) charges that Leptines violated the proper legislative procedure in enacting his law. Demosthenes argues that Leptines has violated several aspects of the procedures for ratifying a new law: he did not move to repeal an existing contradictory law;[56] he did not publicly post the proposed law,[57] and he did not have the proposed law read out at the Assembly prior to the vote.[58] Throughout, he emphasizes that Leptines has subverted the laws designed to protect the legislative process: these procedures prevent laws from "taking force just as they happened to take shape in a moment of crisis, without undergoing proper scrutiny"[59] and ensure that "each of you hear [the laws] many times and examine them at leisure and make them law only if they are just and in the public interest".[60] In the course of this discussion, Demosthenes quotes a law providing "all awards granted by the people shall be valid", a provision intended to confirm awards granted by the democracy while cancelling those enacted during the tyranny of the Thirty.[61] Although Demosthenes does point out that Leptines' law abolishing exemptions from liturgies appears to contradict this pre-existing law and is therefore unconstitutional, it is remarkable that he makes this point offhandedly in the midst of his discussion of procedural violations.

[54] DIO CHRYS. 31.128; for discussion see E.M. HARRIS, *Demosthenes, Speeches 20-22* (Austin 2008), 20-1.

[55] On the procedure for this action, see M.H. HANSEN, *art. cit.* (n. 5), and M.H. HANSEN, "Athenian *Nomothesia* in the Fourth Century B.C. and Demosthenes' Speech Against Leptines", in *C&M* 32 (1980), 87-104.

[56] DEM. 20.89; cf. DEM. 24.34.

[57] DEM. 20.94.

[58] DEM. 20.94; cf. DEM. 24.21, 25; M.H. HANSEN, *art. cit.* (n. 5).

[59] DEM. 20.90.

[60] DEM. 20.94.

[61] DEM. 20.96; E.M. HARRIS, *op. cit.* (n. 54), 51, n.131.

His quotation of the pre-existing law is followed immediately with the procedural violation, not the substantive contradiction, arguing that Leptines should not have proposed his law before repealing the standing law that all awards are valid.[62]

Demosthenes also claims that Leptines' law interferes with the integrity of the adjudicative process. He argues that the law violates the principle prohibiting any public or private charge from being brought twice. He gives an example of a man who successfully defeated a *graphē paranomōn* challenging a decree that granted him an exemption from liturgies, and argues, falsely, that since Leptines' law would deprive the man of his exemption it would constitute re-trying the previous case contrary to law.[63]

Against Leptines includes two legal arguments that do not fit our scheme. First, Demosthenes argues that the portion of Leptines' law imposing disenfranchisement and confiscation of property on anyone who asks for an exemption is unconstitutional because it contravenes an existing law providing that court-assessed penalties must take the form of a punishment that affects either the person or the property of the convicted person, but not both.[64] The thrust of this plea is that the law is unconstitutional because the penalty it proposes is substantively too severe. Second, Demosthenes contends that by limiting the people's ability to grant rewards to benefactors, Leptines' law violates the principle implicit in Solon's law on testaments that Athenians have the right to give away their property to whomever they wish.[65] However, both of these arguments are brief, occupying a total of only four sections.

[62] DEM. 20.96-97.

[63] DEM. 20.147. Of course, this is a specious argument: the issues in the previous case involving this individual's exemption and the current case were not the same and did not in fact constitute retrying the case twice.

[64] DEM. 20.155-157. In fact, this argument is false because the law cited did not limit the use of multiple penalties in statutes, but only in penalty hearings (*timesis*).

[65] DEM. 20.102-104.

These two exceptions aside, the primary legal arguments in this speech focus on how the law allegedly contravenes legislative or judicial procedures rather than on why the law is substantively unconstitutional.

Aeschines 3: Against Ktesiphon

Ktesiphon proposed a decree that his ally Demosthenes be awarded a golden crown in the theater during the Dionysia to honor his services to Athens.[66] Aeschines, Demosthenes' political enemy, challenged the proposed decree via a *graphē paranomōn*. Both the prosecution speech and Demosthenes' defense speech on behalf of Ktesiphon survive. This case is a prime example of the use of the *graphē paranomōn* procedure as a political weapon, and both speakers devote a significant portion of their speech to discussion of Demosthenes' character and political career. Nevertheless, Aeschines does offer detailed legal arguments challenging the honorary decree as unconstitutional. (9-48).[67]

Aeschines begins by characterizing his prosecution as not about partisan politics but rather about the preservation of the democratic Constitution. He emphasizes that the *graphē paranomōn* is the mechanism through which the laws, and hence

[66] DEM. 18.118.

[67] Aeschines attempts to couch his argument that Demosthenes is unworthy of the honors as a legal argument by suggesting that the praise of Demosthenes in the proposed decree violates the prohibition against lying in a public decree (AESCHIN. 3.49-50). As H. YUNIS, *art. cit.* (n. 11), 371 points out, the locution "all ... the laws" (AESCHIN. 3.50) suggests that there was no specific law against lying in a decree. I follow Yunis in characterizing this portion of the speech as part of the political rather than the legal plea. For an argument that all issues in the indictment, including this one, were considered 'legal' in the Athenian sense, see M. GAGARIN, *art. cit.* (n. 20). Even if we were to consider this a legal argument, it would conform to my thesis: the general principle banning proposing decrees including false statements was presumably intended to safeguard popular decision making by preventing the people from being misled by politicians.

the democracy, are preserved.[68] Referring to the jurors in such cases as "guardians of the democracy",[69] he states: "No man should be unaware, but each should be clear that whenever he goes into a court to judge a *graphē paranomōn*, on that day he is destined to cast a vote concerning his own right to free speech (*parrhesia*)".[70] In accordance with this strategy, Aeschines depicts the honorary decree as a danger to the integrity of democratic mechanisms of accountability. In his first and most detailed legal challenge, he contends that the decree contravenes a statute forbidding the crowning of an official prior to the mandatory audit of his conduct at the end of his term.[71] He explains that a corrupt official could convince a politician to get the Assembly, unaware of his misdeeds, to vote him a crown, which would then prejudice the jury assigned to conduct the audit.[72] Permitting officials to preempt the audit with crowns and honorary decrees would lead, he argues, to the acquittal of guilty officials and thus hamper the mechanism set up to insure accountability for public officials.[73] Aeschines' secondary legal argument—that the decree provides for the crown to be awarded in the theater, which contravenes a statute prescribing that crowns voted by the people be announced in the Assembly[74]— does not implicate the integrity of the Constitution, and is another exception to the trend I have identified. Once again, however, this argument is given less attention than the argument alleging that the statute poses a threat to an impartial adjudication.

[68] AESCHIN. 3.1-8.
[69] AESCHIN. 3.7.
[70] AESCHIN. 3.6.
[71] AESCHIN. 3.9-31.
[72] AESCHIN. 3.9-12.
[73] AESCHIN. 3.9-12.
[74] AESCHIN. 3.32-48.

Demosthenes 22: Against Androtion

At the end of his year of service in the Council, Androtion proposed a decree, as was customary, honoring his cohort of outgoing Council members. A political enemy took the opportunity to bring a *graphē paranomōn* challenging the constitutionality of the decree. Demosthenes wrote the speech delivered by the second prosecutor in the case. The prosecution appears to have had a very strong argument for a direct substantive contradiction with standing law: a pre-existing law explicitly forbade a Council that had failed to build triremes during its term of office from requesting honors, and Androtion's Council had not built any triremes. Yet the speaker does not lead with this apparently iron-clad plea. Instead, he begins by alleging that Androtion has subverted the legislative process by bringing the issue directly to a vote in the Assembly without first obtaining the required approval of the Council to put it on the Assembly agenda.[75] Even when discussing the conflict with the trireme law, the speaker presents the proposed decree as dangerous not only because it decreases the incentives for the Council to build valuable triremes, but also because it might lead to the Assembly being "persuaded or tricked" by clever speakers into awarding unmerited honors.[76]

For good measure, the speaker challenges the decree as unconstitutional based on two additional 'formal' violations: Androtion was disqualified from proposing the decree because he had been a prostitute and was a state debtor.[77] The speaker explains at some length why prostitutes are barred from making proposals. He states that Solon imposed these restrictions to protect the 'constitution'[78] (*politeia*): "he [Solon] forbade their participating in deliberation to prevent the *demos* from

[75] DEM. 22.5-7.
[76] DEM. 22.8-13; quotations from 22.11.
[77] DEM. 22.21; 33.
[78] DEM. 22.31.

being tricked by them and doing wrong".[79] In this way, permitting someone who was disqualified due to character or citizenship status to propose a law was viewed as a threat to the rationality of the legislative process. Thus, even though the prosecution had a very strong case for the proposed decree's direct contradiction with a law, the speaker is careful to present the decree as unconstitutional in large part because it endangered the Assembly's democratic decision making procedures.

Demosthenes 23: Against Aristokrates

Aristokrates proposed a decree honoring Charidemus, a mercenary leader who fought with Athens' Thracian ally, Kersobleptes. The decree made Charidemus inviolable, providing that anyone who might kill him would be liable to seizure and removal from the territory of Athens' allies.[80] The decree further provided that "if any city or private person rescues him [i.e., the killer of Charidemus], he shall be excluded from any treaty (*ekspondos*)".[81] Demosthenes wrote the prosecution speech delivered by Euthykles in the *graphē paranomōn* challenging the decree.

The prosecution's primary legal argument is that the decree is unconstitutional because it denies anyone who might kill Charidemus various procedural rights, particularly the right to be tried in court. The decree calls for the killer to be seized without trial, violating the principle that punishment is not justified unless the accused has been found guilty in a trial.[82] By failing to provide for a trial, the decree circumvents all the special procedural protections afforded by Athens' homicide courts,[83] and prevents an accused killer from arguing to the

[79] DEM. 22.31-32.

[80] DEM. 23.16. On the political background to this case, see M.J. SUNDAHL, *op. cit.* (n. 4), 178-80.

[81] DEM. 23.91.

[82] DEM. 23.25-28.

[83] DEM. 23.63-79.

jury that his act was justified (for example, through self-defense), or involuntary.[84] In this way, the decree undermines the judicial process and strips the people of their power to judge homicide cases. The decree also contravenes other laws protecting defendants' procedural rights: he contends that the decree permits the accusers to torture and mistreat the accused in any way they wish, which violates laws that protect even convicted murderers of such treatment;[85] and the decree permits the killer of Charidemus to be seized outside of Athens, violating the laws which do not permit Athenians to pursue exiled murderers outside the country.[86] He suggests that the decree threatens the very judicial system and encourages self-help and violence "by exposing a man to arrest you allow everything the law forbids: that the man who has arrested him may exact money from him, may rough him up and abuse him, and, acting on his own, kill him. How could anyone be more guilty of an unconstitutional proposal?".[87] In this way the prosecutor converts a decree intended to honor and declare allegiance with one of Athens' allies in Thrace into a grave threat to the adjudicative process.

Conclusions

We have seen that most of the legal arguments challenging legislation as unconstitutional focus on depicting the statute as a threat to the legislative or judicial process. The thesis that the Athenians viewed the legal review of statutes as a mechanism for preserving basic democratic decision making institutions is bolstered by the well-known tendency of speakers to depict the

[84] DEM. 23.47-60.
[85] DEM. 23.27-31.
[86] DEM. 23.34-47.
[87] DEM. 23.35-36. The prosecutor also alleges that the decree violates the prohibition against *ad hominem* laws (DEM. 23.86).

graphē paranomōn as the safeguard of democracy.[88] Although the Athenians appear to have recognized only a limited set of constitutional principles that justified overturning legislation, these principles were fundamental to insuring the integrity of legislative and judicial decisions.

III. Democratic Judicial Review?

The previous section focused on prosecutors' arguments that the challenged legislation contravened existing law. But legal arguments form only part of the argumentation in constitutional cases; as Yunis has noted, *graphē paranomōn* cases involved "legal and political review at once".[89] I want to return briefly to the broader question of the constitutional role of jurors in *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* cases. These procedures are generally compared to judicial review, particularly as practiced in its strong form in the United States.[90] But while there is no perfect modern analog to Athenian practice, American-style judicial review is particularly inapposite. In fact, we will see that the Athenian procedures provide an alternative model of 'judicial review' that avoids one of the central criticisms of American judicial review, namely that it is undemocratic.

[88] E.g. AESCHIN. 3.1-8; DEM. 24.5, 152. For discussion, see M.H. HANSEN, *op. cit.* (n. 3), 55-61.

[89] H. YUNIS, *art. cit.* (n. 11), 369.

[90] E.g., R.J. BONNER, G. SMITH, *The Administration of Justice from Homer to Aristotle* (Chicago 1938), 296-297; M.H. HANSEN, *op. cit.* (n. 5), 209; T.D. GOODELL, "An Athenian Parallel to a Function of our Supreme Court", in *Yale Review* 2 (1893-1894), 64-73. E. CARAWAN, *art. cit.* (n. 8) criticizes the "constitutional model" of the early *graphē paranomōn* procedure. For a brief summary of different types of modern judicial review (e.g. strong vs. weak), see J. WALDRON, "The Core of the Case against Judicial Review", in *Yale Law Journal* 115 (2006), 1353-9.

The Athenian procedures for reviewing legislation may have more in common with notions of bicameralism than modern judicial review, though this analogy is also imperfect.[91] The virtues of the reviewing Athenian court are similar to those typically attributed to the second chamber in a bicameral system, namely that it provides the opportunity for a second evaluation of the legislation, often in the context of a body whose deliberations are considered more rational and/or whose members are considered wiser or more experienced than the primary, and more representative, legislative chamber. By requiring a fresh hearing on a different day, the *graphē paranomōn* provided some safeguard against hasty or ill-advised legislation, particularly given the fear that skilled public speakers might mislead or whip the *demos* into a frenzy. The court hearing itself insured that the legislation was examined for an entire day, and that both sides of the case were given a full airing by prepared speakers.[92] And although there was substantial overlap between the Assemblymen and the jurors, the two groups were not exactly the same: the jury was limited to men over thirty years old,[93] a significant difference in a society like Athens, where age was very strongly associated with wisdom and rationality,[94] and where the life expectancy at birth was roughly twenty-five years.[95]

The comparison to bicameralism is supported by various aspects of the jury's role that suggest a legislative as well as

[91] M.H. HANSEN, *op. cit.* (n. 3), 50 is one of the few modern scholars to compare the *graphē paranomōn* to a bicameral system rather than judicial review.

[92] As M.H. HANSEN, *op. cit.* (n. 3), 50-1 points out, debate in the Assembly may have been significantly more chaotic.

[93] *Ibid.*, 50.

[94] E.g. AESCHIN. 1.24; for discussion, see K.J. DOVER, *Greek Popular Morality in the Time of Plato and Aristotle* (Oxford 1974), 102-6.

[95] M.H. HANSEN, "The Political Powers of the *Dikasteria*", in *The Greek City: From Homer to Alexander*, ed. by O. MURRAY, S. PRICE (Oxford 1991), 222-3.

judicial function. We have seen that jurors in constitutional cases were charged with evaluating the wisdom and expediency of the legislation as well as determining whether it was consistent with existing law. And the jury acted directly as a legislative body in the cases where its verdict upholding a proposed decree gave the decree the force of law even though it had never been approved by the Assembly. Of course, one major difference between the Athenian review of statutes and modern bicameral systems is that in Athens review was not automatic but was triggered only if a citizen challenged a proposed or enacted statute. The second difference is that while modern legislatures in constitutional systems may consider the constitutionality of proposed legislation in their deliberations, the Athenian procedures insured that legal argumentation was always present (if not necessarily determinative): the prosecutor was obliged to put forward the law(s) that the statute under review allegedly contradicted, and these laws were displayed on a board during the trial.[96] The overall picture that emerges from the Athenian constitutional cases is a hybrid without a modern parallel: a procedure that calls for a second look at legislation, in which the obligation to examine the constitutionality of the statute gives some protection to enduring principles while ultimately permitting the jury to ignore those principles in favor of short-term policy interests if they wish.[97]

From a modern point of view, the Athenian procedures are particularly striking because they offer an alternative model of 'democratic' judicial review, in fact of judicial review without

[96] M.J. SUNDAHL, *op. cit.* (n. 4), 36-9.

[97] The ability to ignore constitutional principles in favor of short-term policy interests is somewhat analogous to the "notwithstanding clause" of the Canadian Constitution, which permits Parliament to explicitly reenact statutes that have been held unconstitutional in court, though in Athens a single institution — the court — evaluates both the constitutionality and the expediency of the legislation.

professional judges. A central criticism of American-style judicial review is the 'counter-majoritarian difficulty' — that is, that judicial review permits unelected judges to impose their own values by overturning legislation that reflects the will of the majority.[98] This critique cannot be avoided by adopting the view that courts merely enforce democratically chosen long-term precommitments against the passions of the moment. Even under this notion of constitutionalism as "tying oneself to the mast" in the manner of Odysseus, critics contend that overturning the will of the current majority in favor of a previous majority is also democratically illegitimate.[99] 'Process theory', most closely associated with John Hart Ely, attempts to resolve the counter-majoritarian difficulty presented by judicial review.[100] Under this approach, American courts should avoid substituting their own substantive values for those of the majority in the legislature, and should only intervene to ensure the integrity of the democratic political process.[101] Ely's notion of what constitutes a democratic failure was different from the Athenians: Ely viewed expanded representation of minority viewpoints as central to protecting democratic process; for the Athenians 'preventing' some classes of people—state debtors,

[98] The classic formulation is A. BICKEL, *The Least Dangerous Branch* (New Haven 1986), 16-7. For a recent statement of the problem, see J. WALDRON, *art. cit.* (n. 90), 1386-1406; for a response, see R.H. FALLON, "The Core of an Uneasy Case for Judicial Review", in *Harvard Law Review* 121 (2008), 1693-1736.

[99] For a discussion and critique of this (and other) standard defenses of constitutionalism, see M.J. KLARMAN, "What's so Great About Constitutionalism?", in *Northwestern University Law Review* 93 (1998), 145-94.

[100] J.H. ELY, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge 1980).

[101] *Ibid.*, 74-89. For a critique, see L.H. TRIBE, "The Puzzling Persistence of Process-Based Constitutional Theories", in *Yale Law Journal* 89 (1980), 1063-1080; for a defense, see M.J. KLARMAN, "The Puzzling Resistance to Political Process Theory", in *Virginia Law Review* 77 (1991), 747-832.

former prostitutes, and the like—from proposing legislation was vital to ensuring the integrity of the political process.[102] But the underlying idea seems to have been similar: constitutional review should be used as a means of preserving popular decision making structures (which in Athens included courts) rather than enforcing substantive values. It is important to reiterate that the idea of limited, process-oriented review applied only to the 'legal' arguments in the Athenian constitutional cases; we have seen that jurors in these cases were encouraged to make explicit policy judgments about the legislation as well. But the range of constitutional principles that were thought to justify overturning legislation on 'legal' grounds was small, and limited to those that enhanced rather than constrained popular sovereignty.[103]

So far, we have examined one dimension in which Athenian 'judicial review' can be said to be 'democratic': in practice the content of the Athenian 'Constitution' was quite narrow, constraining the will of the current majority only when a proposed statute was thought to threaten the basic democratic legislative or judicial process. But in contrast to modern judicial review, Athenian judicial review was democratic in two other respects as well: (1) constitutional challenges were decided by large juries of ordinary citizens rather than expert judges; and (2) constitutional principles could be overridden by the popular jury to further current policy interests.

From a modern perspective, these two aspects of Athenian judicial review are of particular interest given the rise of the

[102] Despite the obvious differences in the treatment of minorities, most of the types of democratic failures discussed in the Athenian speeches would also be recognized as such under Ely's theory.

[103] In this way, the Athenians' limited approach to judicial review avoided the 'dead hand problem', that is, the difficulty of a previous legislature constraining the current legislature. The other countermajoritarian aspect of judicial review addressed by process theory — the power of unrepresentative judges — was much less of an issue in Athens because constitutional cases were decided by a jury similar, but not identical, in composition to the Assembly.

popular constitutionalism movement in recent years. 'Popular constitutionalism' has been used to describe work by progressive scholars who are skeptical of the antidemocratic nature of American-style judicial review and favor (in various forms) an enhanced role for constitutional interpretation by the people.[104] A common criticism of popular constitutionalist approaches is that it is not always clear how, where, and with what effect popular interpretation of the Constitution is to occur, and how this process differs from ordinary political debate. By contrast, Athens provided for a structured procedure in which ordinary Athenians were obliged to consider whether proposed legislation was unconstitutional while ultimately preserving popular sovereignty.

We do not know enough about the outcomes of Athenian constitutional cases to determine how effective these procedures were at protecting core democratic principles.[105] But the frequent use of the *graphē paranomōn*[106]— even if motivated in

[104] Major works in this vein include J. WALDRON, *art. cit.* (n. 90); L. KRAMER, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2005); M. TUSHNET, *Taking the Constitution Away from the Courts* (Princeton 2000); R.D. PARKER, *"Here, The People Rule": A Populist Constitutional Manifesto* (Cambridge 1994). For a critical discussion of the popular constitutionalism movement, see E. CHEMERINSKY, "In Defense of Judicial Review: The Perils of Popular Constitutionalism", in *University of Illinois Law Review* (2004), 673-89.

[105] At first glance, the Arginusae affair seems to suggest that constitutional principles like the right to trial could be easily pushed aside by the whims of an irrational *demos*. But on closer examination it seems possible that if the Athenians had employed their judicial review procedures in this case the disastrous decision might have been averted. Euryptolemos initially challenged the decree calling for the generals to be sentenced in the Assembly without trial, but withdrew his constitutional challenge and made a counter-proposal suggesting a trial. If he had persisted in his challenge his arguments might well have prevailed in a new day-long hearing before a jury: even in the heated atmosphere of the Assembly meeting, it was Euryptolemos' counter-proposal for a trial, not Kallixenos' original decree, that won the initial vote. It was only when an ally of Kallixenos asked for a second show of hands that Kallixenos' proposal ultimately passed. XEN. *Hell.* 1.7.23-35.

[106] M.H. HANSEN, *op. cit.* (n. 3), 25-6.

most cases by political rivalry — must have had some deterrent effect on politicians. And the *graphē paranomōn* was abolished during both of Athens' oligarchic revolutions, presumably because the oligarchs feared that this procedure could be used to block their actions.[107] It has often been remarked that the Athenian democracy was remarkably stable and enduring compared to other Greek city-states.[108] It is tempting to think that despite the apparently trivial nature of our surviving constitutional cases, the Athenian procedures for reviewing legislation played some role in Athens' success.

[107] THUC. 8.67; ARIST. *Ath.* 29.4; DEM. 24.154; AESCHIN. 3.191; M.H. HANSEN, *op. cit.* (n. 3), 55.

[108] E.g. J. OBER, *Democracy and Knowledge. Innovation and Learning in Classical Athens* (Princeton 2008), 71.

DISCUSSION

M. Hansen: I find Lanni's main thesis convincing: that the principal purpose of the *graphē paranomōn* was to protect the democratic legislative and adjudicative procedures and thereby to be the bulwark of the democratic constitution in general. The following comments are addenda about some questions which, I think, A. Lanni did not have sufficient space to deal with in the paper.

(1) To have judicial review of laws in a state presupposes that the state has a hierarchical system of norms which the relevant court can take into account when it has to uphold or quash a given act which has been indicted as 'unconstitutional'. Thus, judicial review presupposes the existence of some form of constitution or at least some form of hierarchy of norms.

Accordingly and correctly, from the beginning of the paper and throughout Lanni mentions: existence of a 'higher law' in Athens, constitution, hierarchy, higher norms, the Athenian 'constitution', etc. But Lanni does not debate the question to what extent there was an Athenian 'constitution' and what the relation was between the *politeia* and the two closely related types of public action: *graphē paranomōn* and *graphē nomon mē epitēdeion theinai.*

Contra M.I. Finley, *The Ancestral Constitution* (Cambridge 1971), I think there can be little doubt that both the philosophers and the Athenians had a fair understanding of the difference between a *politeia* (which — in this specific sense — consisted of norms of competence) and ordinary *nomoi* (which were norms of conduct). In *op. cit.* (n. 5), 65, 165, I have some reflections on what a *politeia* was in general and the relation in Athens between the *politeia* and the law code. I discuss the relation between *nomoi* and *politeia* in "Solonian democracy in

Fourth century Athens", in *ClMed* 40 (1989), 83-7 and there is a very good chapter in J. Bordes, *Politeia* (Paris 1982), 361-84.

Many of the constitutional norms seem to have been unwritten and the written constitutional norms did not form a separate and especially protected part of the Athenian law code. The Athenians — as we all know — had no constitution in the formal sense and their hierarchy of norms comes down to three principles. (a) Some acts were protected by an entrenchment clause which made it more difficult to change the law or decree in question (*IG* II2, 43.51-65). (b) The distinction made in 403 between *nomoi* (permanent and general rules) and *psephismata* (temporary and/or individual rules) (see my *op. cit.* [n. 5], 171). This distinction became fundamental for the use and importance of the *graphē paranomōn*. (c) If a new *nomos* was in conflict with an older *nomos*, the old *nomos* had priority over the new (Dem. 24.33*sqq*.). This distinction applied in *graphai nomon mē epitēdeion theinai*. Thus, by contrast with modern law, the Greek preferred the *lex prior* principle to the *lex posterior* principle (*op. cit.* [n. 5], 175, cf. Demosthenes' story about the Lokrians at 24.139-43) and the Athenians' idea that the best *politeia* was a *patrios politeia*. — But both (a), (b), and (c) applied to rules of all kinds, not to constitutional rules in particular.

(2) Lanni aptly compares the Athenian judicial review of law with that of the Supreme Court of the USA. But the recent constitutional development in Europe since 1945 might be just as relevant.

Inspired by Hans Kelsen's ideas and the Austrian constitutional court set up in the period between World War One and Two, almost all European democracies have got a constitutional court. Today, Britain, the Scandinavian countries, Switzerland and Holland are exceptional in not having one. The most famous is probably the German *Bundesverfassungsgericht* in Karlsruhe, but the French *Conseil Constitutionnel*, and some twenty other constitutional courts have been set up since

World War Two and are today extremely important. Furthermore, there is the European Court of Justice in Luxembourg that exercises judicial review of all national laws passed by the parliaments of the 27 member states of the EU. As I point out in *op. cit.* (n. 5), 209 (to which Lanni refers) several of the national constitutional courts have become more powerful than the US Supreme Court, and they are active all the time. Between 1951 and 2000 132,000 cases were brought before the German *Bundesverfassungsgericht*, and most of the member states have their own constitutional court. Ca. 95% of the verdicts passed by the *Bundesverfassungsgericht* relate to constitutional complaints concerning violations of individual rights protected by the constitution. In most cases the issue is the application of a law in a specific case. But during the same period the constitutional court has quashed 5% of the laws passed by the *Bundestag* as invalid or in conflict with the German Basic Law. In fact, I believe that the *Bundesverfassungsgericht* is more active and more important than the Supreme Court in USA. Similarly, the European Court of Justice in Luxembourg has in some respects become the most powerful of all the EU-institutions.

The European courts have become as active as the Athenian *dikasteria* were in the fourth century B.C. hearing *graphai paranomon* plus some *graphai nomon mē epitēdeion theinai*. Also, they have become the ultimate sovereign deciding battles fought between parties and leading politicians in the parliament, just as the Athenian *dikasteria* decided battles fought between leading *rhetores* in the *ekklesia*. And they play a central role in that new form of democracy that is commonly labelled 'constitutional democracy'.

Looking up the entry "democracy" in *Encyclopedia Britannica* (the micropedia edition of 2002) one finds that altogether three types of democracy are listed (1) direct democracy, (2) representative democracy and (3) constitutional democracy. No. (3) is new. Until the last decade of the 20th century, handbooks and textbooks describing democracy have no men-

tion of constitutional democracy. The basic idea behind this new type is that a democracy without a proper constitution protected by a constitutional court runs a considerable risk of becoming a tyranny of the majority, and is exposed to abuse of power by popularly elected parliamentarians and arrogant bureaucrats. One result is the violation of minority rights. The pivot of constitutional democracy is that section of the constitution of the country in question that protects human rights combined with the defence of these rights through the courts, especially through the constitutional court with its right to judicial review. Adherents of constitutional democracy mistrust the elected parliamentarians and mistrust too the people who elect the parliamentarians. Government by judges is to be preferred as the only proper protection of citizen rights and human rights.

But the modern constitutional courts are oligarchic or — at best — aristocratic institutions and for people who believe in a strong parliament elected by a sovereign people 'constitutional democracy' is simply undemocratic. As far as I can see, the chink in the constitutional democrats' armour is the question: *quis custodiet ipsos custodes?* If the constitutional democrats are right that power invariably corrupts and must be controlled, what about the power in the hands of the constitutional courts? Many of the judges are appointed according to party affiliation and are in fact themselves politicians and thus exposed to the same abuse of power as the parliamentarians. It is here the Athenian *dikasteria* stand out (as Lanni duly notes). The *graphē paranomōn* is a democratic institution, and modern constitutionalists ought perhaps to listen to the ancient Greeks and consider how the constitutional courts can be made democratic. One reform might be to have the judges appointed by popular election for a period of time so that — like the parliamentarians — they become accountable to the people when they have to stand for re-election (D.C. Mueller, *Constitutional Democracy* [Oxford 1996], 281-8). Such a system is unacceptable to most Europeans but may perhaps be more acceptable in

the USA where judges at state-level are elected by the people in about half the states. In Europe the independence of the courts is valued above having a democratic judiciary.

For constitutional democracy cf. e.g. D.C. Mueller, *op. cit.* and W.F. Murphy, *Constitutional Democracy* (Baltimore 2007).

A. Lanni: I think we have to be careful about comparing the number of constitutional cases heard in the United States Supreme Court and European constitutional courts to determine how active or important a court is. Constitutional courts in Europe are dedicated to deciding constitutional issues; in the United States, all lower federal courts can decide constitutional questions, and many constitutional cases are resolved without reaching the United States Supreme Court.

I agree that the Athenian approach of using ordinary citizens offers an intriguing possibility for those who view modern judicial review as undemocratic. But I am less optimistic about the suggestion of using elected judges; the American experience of a largely elected judiciary in the state courts has not been a happy one.

M. Hansen: I agree that when an Athenian *dikasterion* heard a *graphē paranomōn* or a *graphē nomon mē epitēdeion theinai*, it came to function as a kind of second legislative chamber. There is an interesting modern parallel. Between 1951 and 1999 the German *Bundesverfassungsgericht* has quashed 5% of all laws passed by the *Bundestag*. But in most cases the court's verdict is not the end of the matter: with its verdict the court appends an amended version of the law which can be accepted as constitutional. The result is usually that the *Bundestag* simply incorporates the changes *verbatim* and has the revised text accepted by the court. Thus, the *Bundesverfassungsgericht* becomes in fact a third legislative chamber alongside the *Bundestag* and the *Bundesrat*. See, e.g., M. Gallagher, M. Laver, P. Mair, *Representative Government in Modern Europe* (Boston ^{4}2006), 95-6; P. Schindler, *Datenhandbuch zur Geschichte des*

Deutschen Bundestages 1949 bis 1999 1-3 (Baden-Baden 1999), 2495-2511.

Finally, the question about tradition and inspiration. The modern judicial review of laws is — as we both agree — in important respects similar to the Athenian *graphē paranomōn* and *graphē nomon mē epitēdeion theinai*. But to the best of my knowledge there is no evidence that the Athenian institution in 1803 served as a model for the American judicial review by the Supreme Court. The similarity between the institutions is mentioned by T.D. Godell, *art. cit.* (n. 90), but there is no indication that the parallel was noted in 1803. Similarly, the model for the European constitutional courts is the Austrian court. It was part of the new constitution of 1920 as valid from 1930, and it was designed by Hans Kelsen, who was professor of public law at the University of Vienna. In an article published in *The Journal of Politics* 4 (1942), 183-200, Kelsen acknowledges inspiration from the Supreme Court of the USA, but neither in the article nor in Kelsen's book *Vom Wesen und Wert der Demokratie* (Tübingen ^{2}1929) is there any mention of the Athenian *graphē paranomōn* as a source of inspiration.

A. Lanni: There is a large literature on the origins of modern judicial review, but none of the theories suggest that the Athenian practice offered any inspiration. For discussion, see, e.g. M. S. Bilder, "The Corporate Origins of Judicial Review", in *Yale Law Journal* 116 (2006), 502-66; J. Rakove, "The Origins of Judicial Review: A Plea for New Contexts", in *Stanford Law Review* 49 (1997), 1031-64; L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004), 77-8; D. J. Hulsebosch, "A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review", in *Chicago-Kent Law Review* 81 (2006), 825-66.

P. Pasquino: We all agree that the existence of the *graphē paranomōn* implies that a *psephisma*, a decision passed by the

ekklesia can be cancelled by the *dikasteria*. That suggests that there is a hierarchy between the two institutions. The court can nullify what the *ekklesia* decided. In this sense Hansen's doctrine of the sovereignty (perhaps better 'superiority') of the *dikasteria* is vindicated, it is difficult indeed to claim that the *ekklesia* is the supreme power if another organ can cancel its decisions! The point I want to stress is that, because of the absence of reasons given in courts' decisions, the hierarchy of norms is *de facto* simply coincident with the hierarchy of organs, it may even be nothing more than that. It is unclear which constraints operate upon the members of the people's courts, who moreover vote by secret ballot. The reading and analysis of the speeches held in courts gives us some ideas of the arguments considered persuasive to win a case, but these seem to be largely *ad personam* and the explicit reference to *nomoi* and to the contradiction between *psephisma* and *nomos* is thin and mostly concerning procedural aspects.

Sure we have too little evidence about both *graphē paranomōn* and *graphē nomon mē epitēdeion theinai*; nonetheless it is clear that the Kelsenian idea of norms hierarchy doesn't apply strictly to the Athenian case. *Nomoi* are, as far I can understand following Wolff, 'both' what we call *statute laws* and *constitutional norms*. *Psephismata* by the way are not simply acts of the administration but more often decisions of what Rudolf Smend called *politische Gewalt*, often *auswärtige politische Gewalt*. In that sense I fully agree that the function of the *graphē paranomōn* seems more comparable to the self-defense mechanisms we call militant democracy (K. Loewenstein, "Militant Democracy and Fundamental Rights", in *The American Political Science Review* 31, 3 (1937), 417-32 and 31, 4 (1937), 638-58) than with the Kelsenian constitutional syllogism. Athens, because of the experiences of 411 and 403 lived in the anxiety of oligarchic attacks to the democratic order and used apparently the courts to protect and defend *demokratia* from internal/endogenous political threats. More than protection of an abstract hierarchy of norms or defense of entrenched

constitutional rights the courts were a political organ in charge of protecting the democratic *politeia*. If all that makes sense, there should have been reasons to believe that the jurors were able to fulfill this task, somehow better than the *ekklesiastai*. Why was a *dikasterion* more democratically minded than the people's assembly? — which implies also the supplementary question: what exactly 'more democratic-minded' mean? Probably both 'anti-oligarchic' and able to resist the establishment of a dominant political elite. And why? because of composition of the people's courts or because of their decision-making procedures, or both — as I tend to believe? The first dimension is more political (see M.H. Hansen, *op. cit.* [n. 5], 184, about the composition of the *dikasteria*: more poor people, whom because of the secret voting procedure nobody can control), the second one more epistemic: to avoid bad *ekklesiastic* decisions. Both are in any event preservative of the democratic order.

In this perspective the distinction between legal and political arguments may be a modernizing and after all a misleading approach. If *nomoi* are both statute laws and constitutional norms or 'conventions' (since there was no written document called *Athenaion politeia*) it is difficult to distinguish political and legal arguments. The rhetoric of the plaintiff aims to show that the *psephisma* is dangerous for the democratic order so '*paranomon*'. A text by Demosthenes that Lanni quotes (n. 12) is a beautiful piece of forensic rhetoric showing that common weal and *paranomia* converge: "Such, men of Athens, are the purposes for which the provisional resolution was moved, in the hope that it would be ratified by a deluded Assembly; and such the reasons why we, desiring to frustrate its ratification, have brought this present indictment. As I have undertaken to prove three propositions,—first that the decree is unconstitutional, secondly that it is injurious to the common weal, and thirdly that the person in whose favor it has been moved is unworthy of such privilege,—it is, perhaps, fair that I should allow you, who are to hear me, to choose what you wish to hear first, and second, and last" (Dem. 23.18).

The distinction between political and legal arguments (see p. 238) seems to be here actually between procedural and substantive *paranomia*; due process is procedural in a substantive sense, so it doesn't help to clarify the distinction.

A final remark concerns the conclusion of Lanni's paper. "Popular constitutionalism" Athenian style may be more democratic/populist but, taken very seriously (something that legal experts like Kramer and Tushnet do not really do!) would imply to dismantle legal expertise and somehow law school, as Mao did during the by antiphrasis 'Cultural' Revolution. Athenian model would be here a plea for primitivism.

A. Lanni: I completely agree that the 'legal' arguments focus on protecting the democracy, and in that sense have substantial political import. But the distinction I make between political and legal arguments is not an anachronism. Rather, it comes directly from the speeches themselves, which often distinguish between the two types of argument.

E. Robinson: You show that concerns about safeguarding the democratic constitution or democratic process predominated among the Athenian legal arguments used to challenge legislation. I'd like to invite you to speculate about why this was. Was it, for example, because there was a common, constant fear in Athens that the democracy was under threat, and orators wished to play upon these (e.g., the kind of fears dramatized by Thucydides at 6.27 and 35-40, or trauma left over from the Thirty)? Or could it have been that (*contra* one of the theses of L. J. Samons, *What's Wrong with Democracy* [Berkeley 2004]) the idea of *demokratia* really was enormously popular with the *demos* at Athens and one could always score rhetorical points by claiming to be *demokratia*'s defender? Or something else entirely?

A. Lanni: It is an excellent question. In my view, a sense that the democracy was always under threat was the primary factor, particularly after the experience of the Thirty. It is inter-

esting that the fear of oligarchic revolution and the trauma caused by the Thirty was such that a prosecutor could tar his opponent by arguing that even though he was too young to have been involved in the Thirty, he "has the character of that government" (Isoc. 20.10-11). Even in the fifth century, we can see evidence of worry about threats to the democracy, the herm scandal of 415 being the most prominent example.

C. Farrar: In the suggestive reflections you offer at the end of your paper, you observe that Athenian 'judicial review' was democratic not only because of its narrow focus on threats to basic democratic procedures, but also because of who decided (large juries of ordinary citizens rather than expert judges) and because those juries could subordinate constitutional "precommitments" to policy considerations. Another distinctive feature of the Athenian constitutional (and legislative) process was the role of ho *boulomenos*, the instigator of *graphai* (as well as assembly decrees). An individual Athenian citizen had to raise the constitutional question — not, as in modern systems, another governmental body nor an individual who has 'standing', i.e. who is directly affected — and on the argument of your paper, *ho boulomenos* challenged the law on behalf of the democracy. Thus the ambiguity of a process that is, as you say, at once political and constitutional is already present at the moment of instigation: one individual challenges another, not simply to resolve the case at hand, but to achieve a political victory, and the challenge is founded not on a violation of his individual rights, but of the rights of the *demos* as a whole. What does this reliance on individual initiative mean for the substance of judicial review, and for how it differs from political debate in the assembly? And what are the implications for the arguments of the "popular constitutionalists" of our own day?

A. Lanni: One rationale for modern standing doctrine is that it insures that the party bringing suit has a stake in the outcome and will vigorously represent its position, which is

particularly important where a constitutional ruling will create a precedent for other similar cases. One criticism of limited standing is that in cases affecting the public interest there may not always be a readily available plaintiff, which is why some countries, such as Canada, have special standing provisions for cases affecting the public interest. As you imply in your question, we can certainly see in the Athenian cases the drawbacks of a generalized standing rule, as the constitutional issue in *graphē paranomōn* cases could be subordinated to the political rivalries of the litigants. But we can also see the system's virtues in the frequency of *graphē paranomōn* challenges, which presumably had some deterrent effect on politicians.

P. Schmitt Pantel: La *graphē paranomōn* est, comme vous le montrez, un moyen de protéger la démocratie. Parmi les exemples que vous donnez de cette procédure, je voudrais vous poser une question sur le cas d'Androtion (Dem. 22). Androtion a proposé un décret, dont un de ses ennemis conteste la légalité avec différents types d'arguments. Il avance des arguments juridiques classiques, une loi précédente va à l'encontre de cette proposition et de plus Androtion n'aurait pas obtenu l'accord du Conseil avant de présenter sa proposition devant l'Assemblée. Puis il ajoute deux arguments qui sont d'une autre nature: Androtion serait disqualifié car il est un prostitué et un débiteur de la cité. Ma question porte sur le second type d'arguments: est-il le signe que les manières d'être, les façons de se comporter, les mœurs, les *epitedeumata*, des citoyens entrent en compte dans la construction et la définition de la démocratie? Autrement dit, que les *nomoi* qui protègent la démocratie sont de différente nature?

A. Lanni: I think the primary worry was that statutes proposed by former prostitutes or state debtors were suspect because of concerns about such men's independence, moral status, and self-control. Aeschines mentions the worry that a man who had sold his body was apt to sell out the city as well

(Aeschin. 1.29; also Dem. 22.30-32). The notion that engaging in prostitution or having lost control of one's finances evinced an insatiable appetite for sex or money incompatible with the self-control required of a self-governing citizenry may have also played a role. As you point out, this is a very different approach from that taken by modern process theorists like Ely, who tend to argue that protecting the democratic process entails ensuring 'more' participation, especially by disadvantaged groups and other 'outsiders'.

O. Murray: I was fascinated by your comparison of Athenian and American methods of judicial review. It seems to me that the basic difference is between a system without a written constitution, in which unconstitutionality has to be judged in relation to existing statutes, and a system where the question of constitutionality is essentially determined in relation to a formal written constitution. In this respect the Athenian model seems to be much closer both to the model currently being evolved in the European Union and to the interference by the judiciary in the interpretation of law in the British system; in particular British courts have more and more been using conflict with the Declaration of Human Rights and other European conventions imposed by the European Union, in order to strike down decisions made in relation to English law: that has for instance, for good or ill, severely limited the British government's attempts to protect society against terrorism and to create a viable set of anti-terrorism measures that also respect the rights of individuals. But the same problem arises in the British and European systems as in the American one, that those judging the question of constitutionality are themselves unelected and unaccountable, and often viewed as out of touch with democratic (or at least liberal) opinion. At present this conflict is being used in Britain by nationalists trying to wreck the European Union. In this respect the Athenian system seems clearly superior, and perhaps we should adopt it forthwith in some form or another, as you indeed seem to suggest. Do you

think the European experience is any different in this respect from that in the United States?

A. Lanni: You deftly identify many of the problems with judicial review in its modern form — its incompatibility with popular sovereignty, particularly when (and this is a recent phenomenon) judges rely on non-domestic sources of law in adjudicating domestic disputes. The backlash you describe as occurring in Britain also occurred in recent American history. The Warren court in the United States was freewheeling in its constitutional decisions in the 1960s, and this helped make the U.S. electorate more conservative and anti-elite in the 1970s and 1980s. The Athenians would be horrified by how much power unelected judges wield in our society. On the other hand, we place a higher value on the protection of individual rights than the Athenians did, and since Lord Coke people have believed (correctly) that unelected judges are important in articulating and protecting these rights. To take a recent example, in the United States, the courts acted first to declare that prisoners in Guatanamo might have some rights, and Congress followed later. So you have to choose to some extent between popular sovereignty and protecting the rights of individuals. Like a lot of practicing lawyers in the United States I'm in the middle on this: I'm enough of a lawyer/elitist and a proponent of individual rights to think we should continue to have unelected judges, but I'm enough of a populist to believe that this power should be used by judges with restraint and that judges should only depart significantly from popular views in extreme cases (e.g., to strike down racial segregation). American judges learned this after the 1960s, and it sounds like British judges might be learning it now. One key difference however is that the European electorate, at least, has always shown less antipathy toward its elites than the American electorate, and many countries on the continent have had bad experiences with unrestrained popular sovereignty. The judges in Europe might get away with running things for a long time.

VII

ERIC ROBINSON

GREEK DEMOCRACIES AND THE DEBATE OVER DEMOCRATIC PEACE

In 2001 I published an article addressing the application of the modern international relations theory known as 'Democratic Peace' to the ancient Greek world.[1] In brief, the theory posits that democratically governed states tend not to make war on each other. The idea goes back to Immanuel Kant's writings about the potential for perpetual peace between states with republican constitutions; in the 1970s and 1980s modern theorists took up the idea again and further developed it. As the theory is typically formulated, the pacific effect only holds when it is a question of democracy vs. democracy — it makes no claims as to democracies being less warlike in general — and bases the proposition on statistical surveys of major armed conflicts involving various regime types over the last 200 years that do indeed show a remarkable paucity of cases of democracies going to war against other democracies.

Not all international relations experts agreed, however, that this was a real effect — they disputed the way wars or constitutions were classified in the statistical surveys, or they claimed that factors other than democracy explained the results. In the 1990s

[1] "Reading and Misreading the Ancient Evidence for Democratic Peace", in *Journal of Peace Research* 38 (2001), 593-608. In the same journal issue, as part of the debate headed by my article, I added a rejoinder: "Response to Spencer Weart", 615-7.

some proponents of democratic peace turned to the ancient Greek world to further bolster the case for the theory, claiming that it held in ancient Greece much as in the modern world.

This is where I entered the fray. My article, appearing in the *Journal of Peace Research*, rejected the claim that a democratic peace held among the ancient Greek city-states. I will not repeat all the arguments here; as this audience no doubt already knows, examples of ancient democracies fighting wars against one another are not hard to find, the most obvious case being democratic Athens' attack out of the blue against democratic Syracuse in 415 BC (in which democratic Argos participated as well, incidentally, fighting for the Athenians). I concluded that the apparent absence of democratic peace in ancient Greece need not point to a fatal flaw in the theory itself, which seemed well supported for the modern period, but from differences in the nature and circumstances of ancient *demokratia* on the one hand and modern democracy on the other.

When my article appeared in 2001 it was the first entry in the debate by a classical historian. Since then ancient historians have continued to stay away from the subject for the most part. I would like to claim that this is because everyone read my piece and found that the final word had been spoken. But I doubt it. Mostly, historians in our field do not pay much attention to hot topics in international relations. And for those few of us who might be aware of the ongoing democratic peace argument, its inapplicability to ancient Greece must seem fairly clear. (Classicists do not need to read my article to doubt an ancient democratic peace, though social scientists might, which is why I submitted the paper to *Journal of Peace Research* and not *Journal of Hellenic Studies*). A few ancient specialists have mentioned the issue in passing in recent years — including Mogens Hansen in the introductory portion of his *Inventory*, where the notion of an ancient democratic peace is also firmly rejected.[2] Most

[2] M.H. HANSEN, T.H. NIELSEN, *An Inventory of Archaic and Classical Poleis* (Oxford 2004), 84-5. Other passing references occur in L. ASMONTI, "On

classicists, however, have ignored it, even theoretically inclined authors (such as Josiah Ober and Polly Low) writing recent studies that would have profited from discussion of the phenomenon were it more viable in the Greek context.[3]

But outside the world of the classics, the democratic peace debate has continued to rage — and to evolve. Whereas in the 1980s and 90s much toner was being spilled over the question of whether or not democratic peace actually exists as a statistically demonstrable phenomenon, more recently that issue seems to have been settled: almost everyone now accepts that democracies over the past century or two have shown a remarkable tendency to avoid making war upon other democracies. Instead, the argument has turned to the question of explanations: what is it, exactly, about modern democracies that causes this effect? Some offer structural/institutional answers, contending that the procedures of democratic states, especially the various checks on executive authority, make it harder for leaders to escalate disputes into full-blown wars, a difficulty which is doubled (and thus far more potent a factor in heading off wars) when two democracies are in conflict. Others argue normatively, suggesting that the culture of democracy promotes values such as tolerance of opposing views, compromise, and non-violent competition that render its leaders apt to bargain with like-minded counterparts in other democracies rather than initiate wars.

Variations and extensions of these basic arguments have come to the fore over the last decade. Some have emphasized accountability: democratic leaders, wishing above all to remain

Syracuse and Democracy. Diod. XIII.20-32", a paper delivered at the University of Reading in October 2007; and D. PRITCHARD, "How do Democracy and War Affect Each Other?", in *Polis* 24.2 (2007), 328-52; P. HUNT, "Athenian Militarism and the Recourse to War", in *War, Culture and Democracy*, ed. by D. PRITCHARD (Cambridge, forthcoming).

[3] Major examples include P. LOW, *Interstate Relations in Classical Greece* (Cambridge 2007) and J. OBER, *Democracy and Knowledge. Innovation and Learning in Classical Athens* (Princeton 2008).

in office, cannot afford to wage an unsuccessful war and risk the wrath of the voters, and thus are more hesitant than autocrats to choose war over negotiation, unless the war seems easily winnable.[4] For others, the inevitably greater and more credible releases of information taking place in democracies (as leaders of necessity communicate with their public) best explain reduced military conflicts between them.[5] Finally, in recent years momentum has built for a revival of a very Kantian version of democratic peace. Kant's hypothesis, from 1795, forecast a perpetual peace based not just on a predominance of republican-style governments, where the voice of the people who would have to fight the wars might be heard, but on the combined effect of these regimes along with expanded international commerce and international organizations. Various studies produced over the last several years have sought to bolster the case for each of these factors, or for all of them working in concert.[6] Because Kant talked of liberal republics, not democracies (a point to which we shall return), and looked beyond

[4] B. BUENO DE MESQUITA, J.D. MORROW, R.M. SIVERSON, A. SMITH, "An Institutional Explanation of the Democratic Peace", in *American Political Science Review* 93 (1999), 791-807.

[5] E.g., G. LEVY, R. RAZIN, "It Takes Two: An Explanation for the Democratic Peace", in *Journal of the European Economic Association* 2 (2004), 1-29; D. LEKTZIAN, M. SOUVA, "A Comparative Theory Test of Democratic Peace Arguments, 1946—2000", in *Journal of Peace Research* 46 (2009), 17-37.

[6] B. RUSSETT, J.R. ONEAL, *Triangulating Peace: Democracy, Interdependence, and International Organizations* (New York 2001); L.-E. CEDERMAN, "Modeling the Democratic Peace as a Kantian Selection Process", in *Journal of Conflict Resolution* 45 (2001), 470-502; D.H. BEARCE, S. OMORI, "How Do Commercial Institutions Promote Peace?", in *Journal of Peace Research* 42 (2005), 659-78; M.W. DOYLE, "Kant and Liberal Internationalism", in *Toward Perpetual Peace*, ed. by P. KLEINGELD (New Haven 2006), 201-42; V. DANILOVIC, J. CLARE, "The Kantian Liberal Peace (Revisited)", in *American Journal of Political Science* 51 (2007), 397-414; E. GARTZKE, "The Capitalist Peace", in *American Journal of Political Science* 51 (2007), 166-191. Opposing this trend: M.D. WARD, R.M. SIVERSON, X. CAO, "Disputes, Democracies, and Dependencies: A Reexamination of the Kantian Peace", in *American Journal of Political Science* 51 (2007), 583-601 (on which see below); C.F. GELPI, J.M. GRIECO, "Democracy, Interdependence, and the Sources of the Liberal Peace", in *Journal of Peace Research* 45 (2008), 17-36.

constitution types to broader international factors, this version of the theory is usually labeled 'Liberal' or 'Kantian' peace rather than democratic peace.

In what ways might democratic experiences of peace and war in antiquity help address the questions of democratic peace? I will soon revisit the tendencies (or lack thereof) toward peace among ancient democracies, considering some evidence I did not in my previous publications on the subject. But just as the modern debate has moved on from 'whether' to 'why' democratic peace works, so the main thrust here will be to employ the history of *demokratia* and war to critique some of the explanations presently being advanced concerning why democratic (or liberal) peace functions in the modern world.

The stakes are higher than for most issues ancient historians weigh in on. It goes beyond our academic discipline, or indeed that of political science. Recent western governments, and most particularly that of the United States, have endorsed the basic message of democratic peace. The Clinton administration occasionally proclaimed the contribution to world peace of democratization; and, to the shock of many — especially the liberal academic proponents of democratic peace — the following Bush administration embraced the notion even more fiercely, in part justifying its unprovoked invasion of Iraq with the claim that replacing the despotic regime of Saddam Hussein with a democracy would help bring peace to the troubled Middle East. Democratic peace theory, it would seem, is one international relations debate that powerful politicians (or at least their advisors) are paying attention to. Let us see what ancient history, which has the potential to be a key testing ground, has to contribute.

The Missing Ancient Democratic Peace

The world of the Greek city-states will not contribute to the debate in the way originally hoped for by some proponents of

democratic peace. A pattern of war-avoidance between ancient *demokratiai* is hard to detect. As I demonstrated in my two *Journal of Peace Research* contributions and Mogens Hansen further elaborated in *Inventory*, there are plentiful examples of wars between classical-era democracies. A shortlist would include fifth-century confrontations arising from both Peloponnesian Wars, fighting in Sicily involving Syracuse, Acragas, and other area democracies c. 445, Tarentum vs. Thurii in the third quarter of the fifth century, and fourth-century wars including Thebes vs. Plataea in 373, Thebes vs. Athens in the 360s, Athens vs. Amphipolis in the 360s, and the Athenian Social War of the 350s. In terms of this most basic of empirical tests — were there wars between classical democracies? — the ancient democratic peace fails badly.[7]

But let us break things down further, looking for signs of inter-democratic cooperation or explanations for its absence in particular states. Athens, perhaps unsurprisingly, is prominently represented in wars among *demokratiai*, having been an aggressive power and a democracy almost the entire classical period. Interestingly, a number of ancient authors connect the Athenian democracy with Athenian proclivity for war. These range from Herodotus' claim that its freedom made Athens a major military power (5.78) to Aristophanes' joke about how quickly masses of Athenians would rush to arms should even a puppy from a minor ally be seized (*Ach.* 540-554).[8] Scholars have at times tried to assess the degree of militarism in democratic Athens, with the conclusion generally being that the city's martial culture, though not necessarily more extreme than that of

[7] The one statistical study attempted thus far was that of B. RUSSETT, W. ANTHOLIS, in "Chapter 3. The Imperfect Democratic Peace of Ancient Greece", in *Grasping the Democratic Peace* (Princeton 1993), 43-71. The statistical results were far from convincing as far as any ancient democratic peace is concerned. See the discussion in my *art. cit.* (n. 1).

[8] See also LYS. 2.55-56, DEM. 60.25-26.

its contemporaries, was sufficiently strong to make appeals to war voiced in the assembly more likely to succeed.[9]

Outside Athens the picture gets no more pacifistic. Argos, Syracuse, and Thebes (to pick three of the best-attested non-Athenian classical democracies) also had long runs of democratic government in the fifth and fourth centuries, but, unlike Athens, they also experienced years of oligarchic or tyrannical rule. Were they more peaceful under democratic periods than non-democratic? In a word, no. All three fought as frequently when democratic as not. Argos fought Sparta at Sepeia before its democracy took hold, but then participated in both the first and the second Peloponnesian wars, the Corinthian War, and many more besides. Syracuse, it is true, fought frequently under its tyrants against both Greeks and Carthaginians; but under its fifth-century democracy it did much the same, constantly picking fights with rivals within Sicily and occasionally warring with others. And Thebes, though certainly willing to fight as an oligarchy (including sparking the second Peloponnesian War), launched its most aggressive, continuous, and successful military ventures after its democratic revolution in 379. Of critical importance, all three democracies engaged other democracies at least once in the course of their many battles, showing that no dyadic democratic peace blocked their will to war.[10]

Only one passage from an ancient author directly addresses war- and peace-making motivated by regime type. Demosthenes

[9] Most recently, P. HUNT, *art. cit.* (n. 2). See also K.A. RAAFLAUB, "Father of all, destroyer of all: War in late fifth-century Athenian discourse and ideology", in *War and Democracy. A Comparative Study of the Korean War and the Peloponnesian War*, ed. by D.R. MCCANN, B. S. STRAUSS (Armonk, NY 2001), 307-56.

[10] Argos vs. democratic members of the Peloponnesian League (including Elis and Mantinea) during the Peloponnesian Wars, and vs. Syracuse after 415; Syracuse vs. Acragas and other Sicilian Greek cities, and Athens and Argos after 415; fourth-century Thebes vs. Plataea in 373 and Athens in the 360s. For the circumstances and nature of democratization in the various cities noted here, see E. ROBINSON, *Democracy Beyond Athens. Popular Government in the Greek Classical Age* (Cambridge, forthcoming).

in his speech *For the Liberty of the Rhodians* tries to convince the Athenians to intervene on behalf of democracy in Rhodes. In the course of the oration he says:

> You may also observe, Athenians, that you have been engaged in many wars both with democracies and with oligarchies. You do not need to be told that; but perhaps none of you considers what are your motives for war with either. What, then, are those motives? With democracies, either private quarrels, when they could not be adjusted by the State, or a question of territory or boundaries, or else rivalry or the claim to leadership; with oligarchies you fight for none of these things, but for your constitution and your liberty.[11]

Of most obvious significance is the fact that Demosthenes considers it common knowledge Athens fought multiple wars with democracies (and oligarchies as well), confirming what we know from other sources. Indeed, the implication here is that Athens 'often' fought other democracies, with quarrels over territory or leadership or private disputes escalating to war unchecked by any sense of democratic fellow-feeling.

There is more to it, however. We also see Demosthenes place the issue of constitution type front and center in his appeal, drawing a picture of the world as a place of eternal struggle between democracy on the one hand and oligarchy on the other.[12] He makes this aspect even more explicit as he continues in the speech:

> Therefore I should not hesitate to say that I think it a greater advantage that all the Greeks should be your enemies under

[11] DEM. 15.17. (Loeb translation by J.H. VINCE). ὁρᾶτε δὲ κἀκεῖν', ὦ ἄνδρες Ἀθηναῖοι, ὅτι πολλοὺς ὑμεῖς πολέμους πεπολεμήκατε καὶ πρὸς δημοκρατίας καὶ πρὸς ὀλιγαρχίας. καὶ τοῦτο μὲν ἴστε καὶ αὐτοί: ἀλλ' ὑπὲρ ὧν πρὸς ἑκατέρους ἔσθ' ὑμῖν ὁ πόλεμος, τοῦτ' ἴσως ὑμῶν οὐδεὶς λογίζεται. ὑπὲρ τίνων οὖν ἐστίν; πρὸς μὲν τοὺς δήμους ἢ περὶ τῶν ἰδίων ἐγκλημάτων, οὐ δυνηθέντων δημοσίᾳ διαλύσασθαι ταῦτα, ἢ περὶ γῆς μέρους ἢ ὅρων ἢ φιλονικίας ἢ τῆς ἡγεμονίας: πρὸς δὲ τὰς ὀλιγαρχίας ὑπὲρ μὲν τούτων οὐδενός, ὑπὲρ δὲ τῆς πολιτείας καὶ τῆς ἐλευθερίας.

[12] For a recent discussion of this speech's combination of idealism and power politics, see P. LOW, *op. cit.* (n. 3), 72-4.

> democracy than your friends under oligarchy. For with free men I do not think that you would have any difficulty in making peace whenever you wished, but with an oligarchical state I do not believe that even friendly relations could be permanent, for the few can never be well disposed to the many, nor those who covet power to those who have chosen a life of equal privileges [...]. Now, all other wrongdoers must be considered the enemies of those only whom they have wronged, but when men overthrow free constitutions and change them to oligarchies, I urge you to regard them as the common enemies of all who love freedom.[13]

The self-serving nature of this logic, coming as part of Demosthenes' (ultimately unsuccessful) plea for Athenian intervention on behalf of the democratic Rhodians, is obvious. It is striking nevertheless. Between democracy and oligarchy, war and distrust are permanent features of the landscape, he claims — but *demokratiai* who fight can always easily come to terms with each other. This comes closer than any other statement from antiquity to articulating a notion of democratic peace. The difference is that Demosthenes' 'democratic peace' envisions an easy end to democratic wars that have already started, rather than prevention of them in the first place. This is supposedly possible because all democracies recognize, or ought to recognize, that they share much with each other, not least being eternal enmity with oligarchy and its supporters.

Demosthenes' statements, therefore, provide both further confirmation that the modern version of democratic peace did not function in Greece, while at the same time float the notion

[13] DEM. 15.18, 20 (Loeb translation by J.H. VINCE). τοὺς μὲν οὖν ἄλλους τοὺς ἀδικοῦντάς τινας αὐτῶν τῶν κακῶς πεπονθότων ἐχθροὺς ἡγεῖσθαι χρή: τοὺς δὲ τὰς πολιτείας καταλύοντας καὶ μεθιστάντας εἰς ὀλιγαρχίαν κοινοὺς ἐχθροὺς παραινῶ νομίζειν ἁπάντων τῶν ἐλευθερίας ἐπιθυμούντων [...]. ὥστ' ἔγωγ' οὐκ ἂν ὀκνήσαιμ' εἰπεῖν μᾶλλον ἡγεῖσθαι συμφέρειν δημοκρατουμένους τοὺς Ἕλληνας ἅπαντας πολεμεῖν ὑμῖν ἢ ὀλιγαρχουμένους φίλους εἶναι. πρὸς μὲν γὰρ ἐλευθέρους ὄντας οὐ χαλεπῶς ἂν εἰρήνην ὑμᾶς ποιήσασθαι νομίζω, ὁπότε βουληθείητε, πρὸς δ' ὀλιγαρχουμένους οὐδὲ τὴν φιλίαν ἀσφαλῆ νομίζω: οὐ γὰρ ἔσθ' ὅπως ὀλίγοι πολλοῖς καὶ ζητοῦντες ἄρχειν τοῖς μετ' ἰσηγορίας ζῆν ἠρημένοις εὖνοι γένοιντ' ἄν.

that regime type did matter to *polis* foreign policy and that democracies shared a sort of bond. It would be easy to accept the former and dismiss the latter, chalking it up to a failed rhetorical gambit. And yet there is, in fact, corroboration in other sources for the existence of inter-democratic connections of a kind in the Greek world.

Thucydides provides a number of passages suggesting such bonds.[14] Not all are to be taken at face value — Diodotus' broad claim to the Athenian assembly during the Mytilenean Debate that "everywhere the *demos* is your friend" (3.47.2) likely exaggerates the state of affairs for rhetorical effect, much as Demosthenes may have done in his plea for aid for the Rhodians.[15] But other passages, especially ones in which Thucydides expresses his own views and not someone else's speech, provide stronger support for inter-democratic affinities. At 3.82.1 he says:

> ...[The Corcyrean civil war] seemed the more savage, because it was among the first that occurred; for afterwards practically the whole Hellenic world was convulsed, since in each state the leaders of the democratic faction (*hoi tōn demōn prostatai*) were at variance with the oligarchs (*hoi oligoi*), the former seeking to bring in the Athenians, the latter the Spartans. And while in time of peace they would have had no pretext for asking their intervention, nor any inclination to do so, yet now that these two states were at war, either faction in the various cities, if it desired a revolution, found it easy to bring in allies also, for the distress at one stroke of its opponents and the strengthening of its own cause.[16]

[14] Some of the following draws upon E. ROBINSON, "Thucydides and Democratic Peace", in *Journal of Military Ethics* 5 (2006), 243-53.

[15] Even if G.E.M. DE STE. CROIX, "The Character of the Athenian Empire", in *Historia* 3 (1954-5), 1-41 chooses to believe Diodotus as they make their case for a 'popular' Athenian empire.

[16] Loeb translation by C.F. SMITH. οὕτως ὠμὴ ἡ στάσις προυχώρησε, καὶ ἔδοξε μᾶλλον, διότι ἐν τοῖς πρώτη ἐγένετο, ἐπεὶ ὕστερόν γε καὶ πᾶν ὡς εἰπεῖν τὸ Ἑλληνικὸν ἐκινήθη, διαφορῶν οὐσῶν ἑκασταχοῦ τοῖς τε τῶν δήμων προστάταις τοὺς Ἀθηναίους ἐπάγεσθαι καὶ τοῖς ὀλίγοις τοὺς Λακεδαιμονίους. καὶ ἐν μὲν εἰρήνῃ οὐκ ἂν ἐχόντων πρόφασιν οὐδ' ἑτοίμων παρακαλεῖν αὐτούς, πολεμουμένων δὲ καὶ ξυμμαχίας ἅμα ἑκατέροις τῇ τῶν ἐναντίων κακώσει καὶ σφίσιν αὐτοῖς ἐκ τοῦ αὐτοῦ προσποιήσει ῥᾳδίως αἱ ἐπαγωγαὶ τοῖς νεωτερίζειν τι βουλομένοις ἐπορίζοντο.

Thucydides articulates clearly here what is often implied elsewhere, that during and after the Peloponnesian War Athens supported democracies and democratic factions, while Sparta tended to back oligarchies and oligarchic factions. This general phenomenon is well attested, of course.[17] But notice how here Thucydides talks of the essential role played by the larger war between Athens and Sparta, thus placing the democratic (and oligarchic) interconnections, such as they were, in a polarized, long-term constitutional struggle — much as Demosthenes did. It is also worth noting that Thucydides has the local factions inviting the great powers to intervene, not the great powers initiating all the trouble themselves. This is, too, important, for it confirms that the constitutional confrontation was not something driven entirely by the imperialist moves of Athens and Sparta, but by political actors all across the polis landscape.

Thucydides at 5.28-44 reveals the actuality of democratic affinities in a different way. In his narrative for the years after 420 BC, when Argos was mounting a diplomatic and, ultimately, a military challenge to Sparta's leadership within the Peloponnese, Thucydides repeatedly mentions the significance of regime type in the complex negotiations that took place over alliances. Mantinea joined Argos' new coalition first, in part because, as Thucydides says, the Argives were "democratically governed like themselves" (5.29.1). Soon afterwards another Peloponnesian democracy, Elis, signed on (5.31.1).[18] Two further potential allies came close to joining, but then begged off: Thucydides says that Boeotia and Megara, both oligarchies at this time, worried that the democracy of the Argives would not be advantageous to them in alliance (5.31.6). Finally, Argos welcomed the Athenians into their coalition for a variety of

[17] E.g., [XEN.] 1.14, 16, 3.10-11; ARIST. *Pol.* 1307b; DIOD. 13.47.8; THUC. 1.19, 126, 8.64-65. The polarization continued well into the fourth century. Alexander intervened in favor of democracies, no doubt because the Persians had generally favored oligarchic regimes (ARR. *Anab.* 1.17.10-18.2).

[18] On the evidence for Elean democracy, and that of others at this time, see E. ROBINSON, *op. cit.* (n. 10), chapter 1.

reasons, including, Thucydides specifies, because of their common democratic systems (5.44.1). Thus, though Thucydides never gives a concluding statement to this effect, it is obvious from his own reporting that the Argive challenge to Spartan power aligned itself starkly in terms of the ongoing democratic/oligarchic polarization. Indeed, when the Spartans triumphed over Argos and its allies at the Battle of Mantinea in 418, they soon fomented a (short-lived) oligarchic coup at Argos. The Spartans, too, seemed well aware of the significance of regime type in making or keeping friends and enemies.

We may summarize the testimony on ancient democratic affinities as follows. Democracies could and did form attachments to each other in the fifth and fourth centuries on the basis of shared constitution, typically via alliances or assistance in civil or military struggles. They did this in the context of longstanding antagonism between democracy and oligarchy fueled by great power rivalries (initially Athens vs. Sparta, but later including Argos, Thebes, Persia and others). Nevertheless, these affinities never rose to the point of preventing warfare between democracies. Indeed, democracies were among the most belligerent ancient *poleis*, and while their grandest wars tended to be fought against non-democratic rivals, they showed no hesitation at all in initiating or joining in bloody struggles with each other from time to time.

Testing Democratic Peace Theories

One might suppose that this messy state of affairs, in which a modern style of democratic peace clearly did not exist in antiquity and yet faint strands of inter-democratic affinity are detectable, would be difficult to apply usefully to the high-stakes debate regarding the very real post-1815 phenomenon. On the contrary, it makes for a perfect testing environment. Recall the plethora of explanations for why exactly the modern

democratic peace works. All of them — normative or structural arguments of various kinds — have some support in the modern data. How can one choose between them? Theorists can argue over their merits, more or less convincingly, but in an environment where democratic peace generally holds, it is difficult to eliminate explanations categorically.[19] What one needs is a second testing environment with plenty of democracies in which democratic peace did 'not' hold — such as classical antiquity. When solutions to the modern puzzle posit that x or y characteristic explains why democracies avoid war with each other, one can check to see if the characteristic was 'absent' in ancient democracies. If so, the theory will be bolstered. If it was equally present, however, one has good reason to doubt that it is the central driver of modern democratic peace.

One scholar has recognized the potential importance of the missing ancient democratic peace for critiquing modern explanations. Azar Gat argues powerfully that the elephant in the room no one discusses is the massive impact of modernity itself.[20] Since the industrial and technological revolutions that have taken place over the last two centuries —the same span in

[19] In a rare recent challenge to the consensus on the existence of democratic peace, S. ROSATO, "The Flawed Logic of Democratic Peace Theory", in *American Political Science Review* 97 (2003), 585-602, attacks the theory by attacking the logic behind the reasons offered for why it works. In coming at the issue this way he gets things precisely backwards: the current impediment to progress is not that none of the explanations are any good, but rather that there are 'too many' good explanations, each of which makes a degree of intuitive sense and for which statistical evidence of one kind or another can be deployed. Rosato's analysis has been fiercely disputed: D. KINSELLA, "No Rest for the Democratic Peace", in *American Political Science Review* 99 (2005), 453-7; B.L. SLANTCHEV, A. ALEXANDROVA, E. GARTZKE, "Probabilistic Causality, Selection Bias, and the Logic of the Democratic Peace", in *The American Political Science Review* 99 (2005), 459-62; S. ROSATO, "Explaining the Democratic Peace", in *The American Political Science Review* 99 (2005), 467-72; D.A. ZINNES, "Constructing Political Logic: The Democratic Peace Puzzle", in *The Journal of Conflict Resolution* 48 (2004), 430-54.

[20] A. GAT, "The Democratic Peace Theory Reframed. The Impact of Modernity", in *World Politics* 58 (2005), 73-100.

which the modern democratic peace phenomenon has emerged — peoples' lives in the developed world have changed drastically over earlier eras of history. Wealth creation has multiplied and the standard of living has soared far beyond what any ancient society could sustain; hardship, mortality, and pain have been drastically reduced; metropolitan life dominates over rural, and the service economy grows. In these circumstances the material benefits of peace have mushroomed, while the material benefits of war have declined: modern nations profit far less from aggregation of land or booty than their smaller ancient counterparts did, while the costs of warfare remain prodigious; economically, far greater gains can be made through trade and integration in the global economy than by conquest. Gat dismisses all the usual explanations for democratic peace and substitutes his own lengthy list of factors, all tied to the vast economic, technological, and cultural transformations of the modern world.

Gat's conclusion is too drastic. He moves from a sound insight regarding the ancient/modern disparity in economic and social circumstances to a complete rejection of all prior explanations that have been crafted to fit the democratic peace data. Moreover, the causes he substitutes — a laundry list of factors including the raised standard of living, non-violent social norms, the entertainment society, the sexual revolution, women's voting rights, and the shrinking ratio of young males in the population — are all essentially monadic, not dyadic. That is, they would seem to predict that modern democracies seek to avoid war generally (which the data does not support), as opposed to avoiding it with democracies only (which the data does).[21]

[21] Another recent study that uses examples from the pre-modern world to contribute to the democratic peace debate is J. FEREJOHN, F. ROSENBLUTH, "Warlike Democracies", in *Journal of Conflict Resolution* 52 (2008), 3-38. These authors apply what often comes across as a rather shallow knowledge of antiquity to help develop a new explanatory schema for the modern democratic peace.

Let us proceed more carefully, therefore, testing particular theories that have been advanced against the results we have seen from ancient Greece. One of the more influential democratic peace explanations over the last decade has been the modified institutional approach of Bruce Bueno de Mesquita *et al.*[22] At its heart is the idea that democratic leaders will be especially selective in the wars they choose to fight because their political survival depends on a successful outcome, whereas autocrats are more likely to be able to weather a defeat and remain in power (by continuing to reward their key supporters), thus enabling a greater degree of military adventurism. Moreover, as a consequence of their leaders' priorities, democracies tend to mobilize more completely for war and thereby make more dangerous foes. Democratic leaders are therefore especially loath to start wars with other democracies. For wars they are confident of easily winning (which will usually not be against other democracies), they will not hesitate to strike.

One of the strengths of this model is its apparent ability to explain not only the basic dyadic democratic peace phenomenon, but ancillary results that have emerged in the research as well. These include the existence of imperial democracies and their propensity to make war often, even at times against other democracies (explanation: the extreme power imbalance means the democratic leaders need not fear defeat and loss of office), or the statistical success modern democracies seem to enjoy in war[23] (explanation: democratic leaders have every incentive to mobilize completely and spare no expense in war-making,

Athens had a large franchise and few checks on decision-making leading to lots of aggression; the post-Marian Roman Republic was similar (though it is admitted that Rome had already conquered a sizable empire before Marius 'removed' checks on popular decision-making).

[22] *Art. cit.* (n. 4).

[23] The greater rate of victory of democracies has been documented in D. REITER, A.C. STAM, *Democracies at War* (Princeton 2002). For a critique, see now M. DESCH, *Power and Military Effectiveness: The Fallacy of Democratic Triumphalism* (Baltimore 2008).

while autocrats often prefer to hoard resources to reward their essential supporters). This approach is often cited and has had much influence on the current debate.

How does the model fare in the testing ground of classical Greece? Superficially, it has an attractive feature. The democratic Athenian Empire of the fifth century certainly showed itself to be militaristic, as we have seen, and willing to take on foes it thought it could defeat regardless of regime type. Thus the model, by predicting democratic empires, would seem to account for Athenian imperialism, one of the forces behind the failure of democratic peace in Greece. But at a more fundamental level, the model falters when applied to Greek circumstances. At its heart, the approach relies upon the accountability of democratic leaders to deter war between democracies, at least in the absence of a massive power imbalance. The problem is that this should work in the context of ancient, direct democracy at least as well as in a modern representative system. Whether it is a question of being reelected to offices such as the generalship or simply retaining one's influence as a rhetor in the assembly, ancient democratic leaders were just as vulnerable to negative fallout from having urged a failed military policy as modern ones. Indeed, given the unsavory record ancient democracies accumulated for harshly punishing leaders unsuccessful in war — often with loss of office, exile or death[24] — the logic of the model should predict that *demokratiai* would show even greater hesitancy about initiating wars (especially when two *demokratiai* confront each other) than modern democracies. That they manifestly did not suggest the explanation has a major flaw.

[24] Treatment of Athenian generals: M.H. HANSEN, *The Athenian Democracy in the Age of Demosthenes. Structure, Principles and Ideology* (Oxford 1991), 215-8; D. HAMEL, *Athenian Generals* (Leiden 1998), 118-21, 158-60. Non-Athenian cases: THUC. 5.60, 6.103, DIOD. 11.88, 11.91, 12.78.4-6, 15.72.1-2, PLUT. *Pel.* 25; E. ROBINSON, *op. cit.* (n. 10), under Argos, Syracuse, Thebes.

Harder to evaluate in ancient terms is the hypothesis that modern democratic peace succeeds due to asymmetrical releases of information. According to this theory,[25] in democracies leaders involved in a confrontation with another state must communicate with the decision-making public in a credible way, whereas autocratic leaders do not. When two democracies are involved in an escalating disagreement, the communications by both sides' leaders to their publics (through public statements or news media reporting) enable each side an equivalent level of credible information, which maximizes the odds of making concessions and avoiding war. The presence of an autocracy (or two) in the process ruins this effect, since information release is and will be perceived as arbitrary by the other side. This destroys the trust usually needed to promote concessions, making war far more likely.

What renders this hypothesis harder for us to test is not the incomparability of asymmetrical information release itself — ancient democracies no doubt revealed more as part of their widely attended, open assembly deliberations than did more secretive ancient oligarchies or monarchies, paralleling the modern model well enough. The difficulty comes in assessing the degree to which Greek city-states were in a position to 'listen' to pronouncements being made in rival cities. On the one hand, it was surely the case that, in an era long before instantaneous distance communication or independent news media, *polis* decision-makers typically could not reliably inform themselves about what was being said or done by a potential adversary, no matter how open and democratic the adversary might be. This would tend to validate the modern theory, since a key element in the process preventing modern democratic wars would be missing in antiquity. On the other hand, ancient

[25] The above summary is based on G. LEVY, R. RAZIN, *art. cit.* (n. 5). See also D. LEKTZIAN, M. SOUVA, *art. cit.* (n. 5), which offers some support for the information-release thesis.

democracies were aware of this asymmetry and the potential for useful news reaching enemy ears. Pericles famously boasted in the funeral oration about the bold openness of his city, where things of potential advantage to foes might be seen or learned.[26] There were times in which we can well imagine open democratic deliberations enabling the kind of information exchange on which the model depends. Xenophon provides a rather extreme example regarding the Phliasian democracy: in 381 Phlius conducted assembly meetings with 5000 citizens in attendance in full view of their foes who were besieging them at the time.[27] In all, given the uncertainty about how often rival city-states would have been in a position to 'hear' democratic information releases, we cannot adequately test the modern theory.

Finally, we noted above that one of the major recent trends in the democratic peace debate is the revival of explicitly Kantian styles of explanation for the democratic (or, in this context, 'liberal') peace phenomenon. Kant in his 1795 *Zum ewigen Frieden. Ein philosophischer Entwurf* imagined a three-part transformation the world would need to undergo before perpetual peace would manifest itself: the general spread of republican constitutions, the establishment of an international federation of states, and open hospitality among peoples allowing peaceful travel and interchange. Modern liberal peace theorists have adapted these ideas to contemporary circumstances, interpreting them as indicating that a combination of liberal representative government, participation in international governmental organizations, and large-scale integration into networks of commerce will together produce peaceful results between states sharing these characteristics.[28] Individually, each

[26] THUC. 2.39.1.

[27] XEN. *Hell.* 5.3.16.

[28] See, for example, B. RUSSETT, J.R. ONEAL, *op. cit.* (n. 6); D.H. BEARCE, S. OMORI, *art. cit.* (n. 6); M.W. DOYLE, *art. cit.* (n. 6); V. DANILOVIC, J. CLARE, *art. cit.* (n. 6).

of these three factors may or may not promote peaceful relations, but when all three are present, states are exceedingly unlikely to go to war with each other. The statistics can be argued about, but studies of conflicts of the last 200 years generally bear out this thesis, with the effect becoming increasingly strong over time and especially in the last half century or so, presumably because the Kantian processes have been intensifying over this time period, with representative government spreading, international organizations growing, and globalized trade rising.[29] The logic of the thesis is straightforward: as liberal values including popular representation in government and respect for other peoples' rights spread, and as international integration makes peace far more profitable than war, modern populations and the governments that they elect find themselves increasingly unwilling to escalate conflicts to the point of war, at least when the adversary is perceived as part of the larger cooperative liberal community.

Comparison with circumstances of the classical Greek city-states would seem to lend support to the adapted Kantian peace thesis. An obvious difference between the ancient and contemporary world is the level of commercial integration. While literary source references, pottery distribution, shipwrecks, coin hoards and such reveal that extensive trading took place in Greece, goods could move great distances, and some cities

[29] L.-E. CEDERMAN, *art. cit.* (n. 6) considers the intensification over time of Kantian peace as essential to our understanding of it: we should see the phenomenon not as a constant law, as many political scientists try to do, but an emergent macroprocess. However, M.D. WARD *et al.*, *art. cit.* (n. 6) caution that the statistical results over this timespan favoring a Kantian democratic peace appear substantially less robust when dependencies between states are factored in: e.g., Great Britain's war with Iraq in 1991 was hardly an independent dyadic event, but depended much on actions of the United States. When dependencies are accounted for, the results show that shared democratic constitutions remains a mild factor in reducing conflicts between dyads in the last half-century, but trade integration and international organization involvement have no pacifying effect at all. Conversely showing that integrated financial markets, not democracy, promotes peace is E. GARTZKE, *art. cit.* (n. 6).

came to depend on imports (as did classical Athens with its grain supply), nevertheless there existed nothing like the accelerating local, regional, and global interdependence of economies characteristic of modern times.[30] Markets were rudimentary, and nothing like the international finance system upon which so many modern people, businesses, and governments depend could even have been imagined. To the extent that economic interdependence contributes to Kantian peace theory, its relative absence among the ancient Greeks helps support the theory.

Less clear-cut is the ancient/modern comparison when it comes to state involvement in international organizations. To some extent, the contrasts further bolster the Kantian peace. Certainly there was no ancient equivalent of the League of Nations, United Nations, European Union, NATO, International Court of Justice, GATT, IMF, G7, G8 or other such influential organizations that individually and collectively tie together western (and occasionally other) democracies in a way that surely helps deter militarized conflict between them. On the other hand, inter-*polis* and Pan-Hellenic organizations did exist that also functioned to enjoin cooperation. There was the Delphic Amphictiony; federal leagues such as that of Boeotia in the fifth century and many more in the fourth; large alliance systems such as the Peloponnesian League or the Second Athenian Sea League; and the various Common Peaces of the fourth century.[31] As with commercial integration, the scale of the modern phenomena far outstrips ancient examples, but perhaps to a lesser degree when it comes to international organizations than economic interdependence.

[30] For a useful recent overview of ancient Greek commerce, see A. MÖLLER, "Classical Greece: Distribution", in *The Cambridge Economic History of the Greco-Roman World*, ed. by W. SCHEIDEL, I. MORRIS, R. SALLER (Cambridge 2007), 362-84.

[31] For a discussion of some of these factors in Greek international relations, see P. LOW, *op. cit.* (n. 3), 54-67.

What of liberal, republican government vs. *demokratia*? Is there something about modern liberal constitutionalism — and not ancient direct democracy — that enhances dyadic peace? There are differences, of course, between the two. Kant himself emphasized that democracy of the ancient type did not count as republican — for him a republican constitution involved representation and the separation of executive and legislative power, whereas democracy meant the despotic rule of the people. Modern theorists building on the notion of a Kantian peace have elided the difference in labeling, applying Kant's perpetual peace approach to modern democracies. They are able to do this because modern democracies mostly fit Kant's republican definition, being representative with separated executive and legislative functions (parliamentary democracies only slightly less so). But ancient democracy was direct, of course, with the *demos* ruling in person through the assemblies and the courts. Moreover, *demokratia* lacked the same liberal concerns with individual rights. The differences are subtler than used to be thought. As Mogens Hansen has repeatedly argued, ancient democratic *eleutheria* was more similar to modern notions of liberty than is sometimes allowed — the ancients did acknowledge a private sphere for citizens, for example, and considered many of the citizen privileges we associate with 'rights' to be essential to a democracy.[32] Yet even Hansen acknowledges that differences existed. The Greeks did not conceive of or talk about rights in the same way (or as emphatically) as we do. The ancient public/private distinction was not about the individual vs. the state, the one commonly drawn now. For our purposes, therefore, we need not doubt that important conceptual differences existed that could conceivably affect the ways ancient and modern democracies behave in situations of potential conflict with like regimes.

[32] M.H. HANSEN, "The Ancient Athenian and Modern Liberal View of Liberty as a Democratic Idea", in *Demokratia*, ed. by J. OBER, C. HENDRICK (Princeton 1996), 91-104.

Indeed, for some observers, it is the liberality itself of developed modern democracies, not democratic processes such as popular voting, that drives the democratic peace phenomenon. Vesna Danilovic and Joe Clare have found that 'illiberal' democracies (e.g., Peru in the time of Fujimori), do not obey the democratic peace in external wars nearly as well as truly liberal states do, and fight many more civil wars besides.[33] Others have shown that new, 'partial' democracies in which democratic procedures have been implemented but liberal institutions such as an independent judiciary or a free press have not yet been established are more likely to go to war than other states, not less.[34] Given the relative lack of a liberal profile for ancient *demokratia*, we may take these results as further indication that Kantian peace theory, with its emphasis on liberal values and an interconnected international order, fares well in the testing ground of antiquity, precisely because the factors said to be key for enabling the modern function of democratic peace were largely absent in the ancient setting where democratic peace failed.

Conclusion

It has not been my purpose here to exhaustively critique every normative or institutional theory in light of classical Greece's missing democratic peace. Rather, I wanted to demonstrate how ancient history might best be used for evaluating modern democratic peace theories. Its value lies not in trying

[33] They do find, however, that procedural democracies still tend to follow a dyadic democratic peace, even if liberal democracies are more peaceful monadically as well. V. DANILOVIC, J. CLARE, *art. cit.* (n. 6).

[34] E.D. MANSFIELD, J. SNYDER, *Electing to Fight: Why Emerging Democracies Go to War* (Cambridge, Mass. 2005). See also F. ZAKARIA, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York 2004); J.M. OWEN, "Iraq and the Democratic Peace: Who Says Democracies Don't Fight?", in *Foreign Affairs* 84 (2005), 122-7.

to add more cases of dyadic democratic peace to the modern statistical heap, as some writers attempted in the 1990s. That effort foundered on the rocks of the Greek world's stubborn refusal to show a true democratic peace. Instead, we should use the negative example provided by classical antiquity — the only other era in history with plentiful democracies, but one without demonstrable democratic peace — to isolate and test those factors said to be the key drivers of the modern democratic peace. The results of the brief evaluations made here suggest that theses relying on the greater accountability of democratic vs. autocratic rulers are not well supported, since ancient democratic leaders were at least as vulnerable as modern ones. Kantian peace proposals fare better, since they emphasize features of modern states that did not exist (or not on anything like the modern scale) in antiquity. Informational models cannot be clearly judged, since it is hard to say how well rival city-states were able to 'hear' the greater information output of democratic *poleis*.

Another of our results was the detection of notable affinities between ancient democratic states in the context of longstanding democratic/oligarchic antagonism. Great powers competing for influence sparked or exacerbated this conflict. That the affinities (invoked, embraced, and probably exaggerated by Athenian orators like Demosthenes and Thucydides' Diodotus) never led to democratic peace is interesting. I have speculated elsewhere on why this was, suggesting that it had something to do with the *polis*-centered mentality of the Greeks.[35] In the context of this conference, I would merely add that their existence, even in attenuated form, hints at the connectedness of ancient and modern democracy. The two were not the same,

[35] E. ROBINSON, *art. cit.* (n. 14). Based on the results of the present study, I now wonder if the explicitly liberal bent of modern democracies — or rather such liberalism's absence in ancient ones — played a stronger role in the missing democratic peace in antiquity. See also the point made by Christian Mann in the discussion to follow.

nor was one based on the other; yet in odd and occasionally surprising ways, ancient and modern democratic experience can sometimes be heard to echo one another, even when they follow different paths.[36]

[36] I would like to thank Mogens Hansen, Luca Asmonti, Peter Hunt, David Maier, and the participants at these *Entretiens* for contributions at various stages of this project.

DISCUSSION

O. Murray: I agree completely with your view that no such concept as democratic peace can be detected in the ancient world. Democratic Athens in particular was (at least in the fifth century) probably the most aggressive Greek polis of the period, and established her empire on the basis that it is right for the powerful to rule the weak, as Thucydides put it in a succession of speeches by Pericles and Cleon, and in the Melian dialogue; Thrasymachus makes the same argument in the fourth century in Plato's *Republic*. Even when Athens had less power she still exercised it to the full in the pursuit of her own interests, and without regard to the concept of peace. The idea of a *koine eirene* which emerged in the fourth century was dependent on non-democratic states like monarchic Persia and oligarchic Sparta for its implementation.

But I am puzzled by the underlying modern theory of democratic peace. I can see no evidence for the proposition that democracies are less warlike than other forms of government over the last 200 years. It seems to me a very solipsistic view which no European historian could maintain for a moment. More wars have surely been started in the modern world by democracies than by dictatorships or traditional monarchies; as both ancient and 18th century thinkers perceived, the more successful monocratic regimes have been successful precisely because they are better at avoiding aggressive actions and more inclined to look after their own internal security than republics or democracies.

In particular the modern world has been created from the most bloodthirsty of European conflicts that arose between powers, all of whom were essentially liberal democracies fighting for imperial control over the rest of the world; the enthusiasm

of the peoples of all European nations for their democratic national governments fuelled the greatest bloodbath of the twentieth century in the First World War; and ever since then democracies have been obsessed with war, whether it is classified as hot or cold or against terror. I find it very difficult to see any difference in this respect between the ancient and the modern democratic systems. And apart from fighting each other, so-called democratic states are woefully inclined to make war on states that they classify (with or without justification) as non-democratic: witness the history of Israel and the continuing conflicts in the Middle East relating to Iran and Iraq. Indeed as Friedrich Meinecke saw, the modern world can learn a great deal about the aggressiveness of democracy from studying the record of ancient democracies, both Greek and Roman. Kant's dream remains unconnected with reality in his own or any other age.

The question that I would like to ask, not perhaps of you who are simply responding to modern concepts, but of those who hold such theories, is why are democracies so prone to war and so militaristic? And I suspect the answer lies in the ability to mobilise public opinion and in the self-satisfaction of modern democracies, who believe themselves to be superior forms of government entitled to impose their wills on the unregenerate states who do not espouse western democracy. To which one may perhaps add the economic argument that modern democracies seem to be better at organising production, and therefore prone to the problems of over-production, for which the best solution is the creation of weapons and other surplus goods that can then be eliminated by their use and destruction in war. The arrogance of democratic regimes is every day making the world a more dangerous place for all of us: to think otherwise is to live in a Panglossian world of fantasy. Perhaps our only solution lies in international organisations to prevent war, like the United Nations or its ancient equivalents, the *koine eirene* and the *pax Augusta*.

E. Robinson: I agree completely with you that evidence for the proposition that "democracies are less warlike than other forms of government", as you put it, is notably lacking, whether talking about the last 200 years or classical antiquity.

I must emphasize, however, that few of the modern theorists engaged in the debate about democratic peace believe any such thing either. What most argue for, or attempt to explain, is the phenomenon that democracies make war 'on other democracies' less frequently than on other foes. This is a very different proposition. It is also one for which the political scientists have managed to assemble substantial statistical evidence based on major conflicts taking place over the last 200 years. I admit that I find this evidence to be convincing on the surface of it.

But before I declare myself a convert to the notion that modern democracies inherently baulk at war against other democracies (even as they behave with ferocious aggression toward others), I would like the theorists to be able to more confidently explain 'why' this trend exists — a purpose to which I was trying to make some small contribution in this paper. There could easily be other factors than the constitutional form itself that account for the notably lower frequency of wars of democracy vs. democracy in recent times. Until we can more confidently explain what lies behind the statistical correlation, I will reserve final judgement on the value of the democratic peace hypothesis.

M. Hansen: You state in your first paragraph that [the democratic peace theory] "makes no claims as to democracy being less warlike in general". That is indeed what some adherents of the theory state, but it is a qualified truth as, I believe, you will readily admit. The Kantian version of the democratic peace does make such a claim both in its original (p. 277, 280) and in its revived form (p. 294-8) In Kant's opinion the first and most important condition for having eternal peace is a republican constitution which, as you point out (p. 294, 297), is

close to modern representative democracy. Kant's argument is that, under a republican form of constitution, decisions about war and peace rest not with a monarch but with those who have to fight in the ranks, who have to pay the costs, who have after the war to rebuild the society and repay the inevitable debts, i.e. the ordinary citizens. According to Kant decisions about war and peace are made by the 'representatives' of the citizens but, in Kant's view, what they decide is the will of the people. The representatives are seen as the true delegates of the citizens. If they act as they think fit themselves they will be like the monarch and Kant's argument loses its force. So the representatives make the decision on behalf of the people but what they decide is what the people want, and they prefer peace to war because they have to bear the burdens of war themselves.

Kant's view is rational and *a priori* compelling, but it is disproved by history. Athens and several hundred other *poleis* were direct democracies in which war was decided by the people in Assembly, i.e. precisely by those who had to fight as hoplites in the ranks or to man the fleet. In Thucydides and Xenophon there are accounts of popular assemblies in which war has been decided and later upheld by the majority of the citizens. And in Eur. *Suppl.* 481-485 this fact is formulated as a general truth: ὅταν γὰρ ἔλθῃ πόλεμος ἐς ψῆφον λεώ, / οὐδεὶς ἔθ' αὑτοῦ θάνατον ἐκλογίζεται, / τὸ δυστυχὲς δὲ τοῦτ' ἐς ἄλλον ἐκτρέπει· / εἰ δ' ἦν παρ' ὄμμα θάνατος ἐν ψήφου φορᾷ, / οὐκ ἄν ποθ' Ἑλλὰς δοριμανὴς ἀπώλλυτο. "For, when for war a nation caste the votes, / then of his own death no man take the count / but passes on to his neighbor this mischance. / But were death full in view when votes were cast / never war-frenzied Greece would rush on ruin". (Loeb translation by A. S. Way.)

If today a decision about war had to be made by a referendum, would a modern democratic people act as Kant supposed or as the Athenians did? That is a very complicated question which it would be interesting to investigate.

E. Robinson: Kant's logic does indeed suggest that liberal

republics ought never choose to go to war for the reasons adduced, and thus one might think his democratic peace theory is monadic (i.e., holding that democracies are less warlike generally) and not dyadic (democracies only tend to avoid wars between each other). And I agree that history would show the monadic notion to be wrong. However, to be fair to Kant, his treatise does not speak of the situation in the world as it is, but as it could be if his specified conditions for perpetual peace obtained — and these conditions would be dyadic. Remember, Kant's argument holds that when 'every state' has a republican constitution there would be perpetual peace, which is necessarily a dyadic situation. Kant also insists that international organizations and universal hospitality must exist as potent forces. These provisos are critical, I think, in understanding why modern theorists, who are generally dyadic in their versions of liberal or democratic peace, still invoke Kant and are willing to use his vision for peace to help interpret the data despite the fact that, as you point out, the logic used to build parts of Kant's model is monadic will not withstand separate application to the real world.

Would a modern democratic people act as Kant supposed in the idealized circumstances of his liberal republics or as the Athenians actually did? Probably the latter, if I had to guess. Polls, such as those taken in the United States on the eve of President Bush's U.S. invasion of Iraq in 2003, suggest that people in a modern popular state think as Euripides describes and would (at least sometimes) readily vote themselves to war. The polling margins are usually close, however — they certainly were in the U.S. regarding the Iraq war — and the difference between casually answering a pollster and going somewhere to register a binding vote to commit the nation to war could affect results. It is certainly an interesting question.

Chr. Mann: Ein wichtiger Unterschied zwischen antiker und moderner Kriegführung scheint mir in der Bedeutung von Beute zu liegen. Für die Soldaten in den regulären Armeen

moderner Demokratien spielt die Beute gegenüber dem Sold eine eher untergeordnete Rolle, für die Bürger einer griechischen *Polis* dagegen war Beute ein essentieller Aspekt der Kriegführung: In den Krieg zu ziehen, bedeutet nicht nur Gefahr für Leib und Leben, sondern auch die Aussicht auf reichen materiellen Gewinn. Wenn man sich die Frage stellt, warum so häufig athenische Bürger für Kriege stimmten, in denen sie selbst kämpfen würden, sollte dieser Aspekt berücksichtigt werden. In dieser Hinsicht ist allerdings mehr der Reichtum als die politische Ordnung des Kriegsgegners relevant.

E. Robinson: You make an excellent point. The prospect of plunder no doubt played a much larger role in the minds of ancients pondering war than with modern decision-makers. Azar Gat in his article underscoring the massive social, cultural, and economic differences between the ancient and modern worlds lists "booty" first among the reasons why Athenians will have voted for wars despite the obvious risks and costs. It seems clear to me that for the Greeks constitutional form alone did not have quite the weight in rhetoric and decision-making about going to war that it does for many modern nations. I have tried to suggest in this paper that there were in fact affinities between democracies, and that constitutional form did on occasion matter in the formulation of state policy, despite the clear absence of a democratic peace. The plunder that soldiers could look forward to from a successful military campaign may well be one of the key factors explaining why, when it came to the decisive votes in assembly meetings in Athens and other *demokratiai*, war would usually win out over the peace that the vaguely felt inter-democratic affinities might have otherwise worked to promote.

VIII

MOGENS HERMAN HANSEN

ANCIENT DEMOCRATIC *ELEUTHERIA* AND MODERN LIBERAL DEMOCRATS' CONCEPTION OF FREEDOM[1]

I

A central theme in virtually all modern discussions of political freedom is the subdivision of freedom into two sorts, one positive and one negative. On the one hand, freedom is essentially a negative ideal: liberty[2] is freedom 'from' something, i.e. something one can avoid. On the other hand it is also a positive ideal: freedom is characteristically freedom 'to do' something, i.e. something in which one can participate.

The distinction between positive and negative freedom can be found in Kant's writings,[3] but became a central theme in

[1] In this contribution I develop the views I have advanced in *Was Athens a Democracy?* (Copenhagen 1989) and "The Ancient Athenian and the Modern Liberal View of Liberty as a Democratic Ideal", in *Demokratia. A Conversation on Democracies Ancient and Modern*, ed. by J. OBER, C. HEDRICK (Princeton 1996), 91-104.

[2] Like most others I use liberty and freedom synonymously. In Google there are ca. 600,000 attestations of "individual liberty" and ca. 900,000 of "individual freedom".

[3] I. KANT, *Grundlegung der Metaphysik der Sitten* (1785), in *Immanuel Kant. Werkausgabe* XI, hrsg. von W. WEISCHEDEL (Frankfurt am Main 1977), 81.

political philosophy only with Isaiah Berlin's inaugural lecture in Oxford in 1958, entitled *Two Concepts of Liberty*.[4]

According to Berlin, negative freedom is individual freedom, the right to live as one chooses without interference from the state or from other individuals.[5] Everybody has a right to this kind of freedom, and accordingly it is restricted by others' right to the same freedom.[6] One's own right to live as one likes must be balanced against other individuals' right to live as they like. There has to be equality of freedom,[7] and tolerance is a necessary counterpart of negative freedom. But negative freedom is also restricted by the obligation to obey the laws of the state.[8] It follows that individual freedom, the right to live unobstructed by others, is confined to a specific sector of society and does not apply in all aspects of life.[9]

Berlin adds two comments to his description of negative freedom: (1) negative freedom is modern, and is unattested in the ancient world as a conscious political ideal.[10] (2) Negative freedom is described as a kind of political freedom[11] but is not attached to any specific form of state.[12] In some despoties one can find forms of individual freedom which cannot be found in some democracies, and absolute monarchs have sometimes granted their subjects some forms of freedom which citizens have been denied in democratic states.[13] Thus, freedom of religion was respected under Frederick the Great, the absolute monarch who ruled Prussia from 1740 to 1786. He did not interfere with the religious beliefs of his subjects, although,

[4] Republished in 1969 as the third of *Four Essays on Liberty* (Oxford), 118-72.
[5] *Ibid.*, 122.
[6] *Ibid.*, 126.
[7] *Ibid.*, 125.
[8] *Ibid.*, 124.
[9] *Ibid.*, 124.
[10] *Ibid.*, 129.
[11] *Ibid.*, 122.
[12] *Ibid.*, 129-31.
[13] M. VIROLI, *Republicanism* (New York 2002), 43, 47.

according to the Peace of Westphalia of 1648, he was entitled to decide the religion of the state he ruled and have it enforced.[14] By contrast, in democratic Northern Ireland a minority of catholics was for two generations systematically oppressed by a majority of protestants.[15]

Positive freedom stems "from the wish on the part of the individual to be his own master".[16] Self-government involves, of course, that no one else makes decisions on one's behalf. But to be one's own master may also involve the capability to master one's self.[17] Throughout history from Plato and onwards human beings have been seen as having a split personality. We are divided between a 'lower self', that first of all is inclined to satisfy our passions, and a 'higher self', a 'rational self' that ought to dominate the otherwise unbridled passions. True freedom is only achieved if the rational self is in control, and it is this form of freedom which, according to Berlin, is the core of positive freedom. But the goals pursued by one's better self are not always confined to an individual. They are often pursued by a group to which the individual wants to belong: a tribe, a race, a church, a state.[18] Freedom becomes a social value, and seen in this light there is an opposition between the two forms of freedom: Positive freedom is collectivistic, negative freedom is individualistic. Negative freedom is the right of the individual to act unobstructed by others. The goal of positive freedom is through the community to which one belongs to let one's

[14] R. KOSER, *König Friedrich der Grosse* (Stuttgart 1903), II, 547-56. Friedrich is quoted for the dictum: "Ein jeder kann bei mir glauben, was er will, wenn er nur ehrlich ist" (556).

[15] A. ARBLASTER, *Democracy* (Milton Keynes 1987), 12: "For fifty years between 1922 and 1972 the Unionist Party won every election in the province with a clear majority of votes cast... They used this strong position to reduce the Catholic and generally Irish nationalist minority of the population to the level of second class citizens, discriminated against in public housing and employment, and excluded from positions of power and authority".

[16] I. BERLIN, *op. cit.* (n. 4), 131.

[17] *Ibid.*, 132-4.

[18] *Ibid.*, 132, 134, 144.

true rational self dominate the temptation just to live as one likes. A form of freedom which essentially concerns the individual — *viz.* the relation within an individual between reason and passion — has by Isaiah Berlin been turned into a collectivistic form of freedom applied to a community. The consequence is that the values and ideals cherished by the community become an obligation for the members of the group. Thus, freedom — i.e. positive freedom — has been turned into its opposite: domination and coercion.[19] As champions of positive liberty Berlin singles out Plato, Spinoza, Montesquieu, Burke, Hegel, Marx, and — of course — Rousseau.

In this way the two forms of freedom have become incompatible opposites[20] and, according to Berlin, it is negative freedom that is true freedom. Negative freedom is praised as a positive value whereas positive freedom is censured as a negative value. Berlin prefers that the state interferes as little as possible with the citizens' pursuit of their own goals and he makes it abundantly clear that, in his opinion, positive freedom entails the opposite of freedom: domination.[21]

Berlin's distinction between negative and positive freedom caught on immediately and in political philosophy and political science it has taken central place in discussions of the concept of freedom;[22] but often Berlin's interpretation has got a twist to it. In political science the distinction between

[19] *Ibid.*, 148.

[20] *Ibid.*, 166.

[21] *Ibid.*, 171.

[22] An alternative view of the concept of freedom has been offered by G. MACCALLUM, "Negative and Positive Freedom", in *The Philosophical Review* 76 (1967), 312-34. He questions the division of freedom into negative and positive and argues that any form of freedom should be considered "as one and the same triadic relation". Any kind of freedom is "always *of* something (an agent or agents), *from* something, to *do*, not do, become, or not become something". His analysis has been accepted by some, e.g., J. RAWLS, *A Theory of Justice* (Cambridge, Mass. ²1999), 177, but rejected by others, e.g., T. BALDWIN, "MacCallum and the Two Concepts of Freedom", in *Ratio* 26 (1984), 125-42 and Q. SKINNER, "A Third Concept of Liberty", in *London Review of Books* 4, April (2002), 16-8.

negative and positive freedom is typically applied in analyses of the ideology and values of modern democracy, but the distinction is interpreted differently from what we find in Berlin's treatise.

Freedom, and in particular individual freedom, is the basic value of modern democracy. It consists in all individuals' right to live as they choose without interference from the state or other individuals. This form of freedom is identical with Berlin's negative freedom. But it is usually argued that this form of freedom is peculiar to democracy,[23] and it is ignored that, according to Berlin, negative freedom may exist under any form of government and can be found even in an absolute monarchy.

The interconnectedness of freedom and democracy becomes even more apparent in political scientists' understanding of positive freedom. In democratic political theory positive freedom is not viewed as self-determination in the sense of self-control but in co-determination in the sense of participation. Positive freedom is not the result of a person's endeavour to be ruled by one's higher self in order to pursue more valuable goals in life than doing as one likes.[24] Nor is it the collective belief of a group of such persons that they have a monopoly on the truth. As a political form of freedom positive freedom is

[23] J. LIVELY, *Democracy* (Oxford 1975), 126; R.A. DAHL, *Democracy and its Critics* (New Haven 1989), 93. *Cf.* the preamble to the European Convention of Human Rights of November 1950.

[24] F. VON HAYEK, *The Constitution of Liberty* (Chicago 1960) distinguishes between (a) "'political freedom', the participation of men in the choice of their government, in the process of legislation, and in the control of administration. It derives from an application of our concept to groups of men as a whole which gives them a sort of collective liberty" (13), and (b) 'inner' or 'metaphysical' (sometimes also 'subjective') freedom. It refers to the extent to which a person is guided in his actions by his own considered will, by his reason or lasting conviction, rather than by momentary impulse or circumstance" (15). Precisely the same distinction between active political freedom and passive "inner freedom" is drawn by H. ARENDT, *Between Past and Future* (London 1961), 146.

perceived as every citizen's right directly or indirectly to participate in political decision-making.[25] With such a shift in interpretation positive freedom becomes inextricably connected with democracy.[26]

Even with this changed understanding of positive freedom there is still a marked difference between negative and positive freedom. Positive freedom — the right to political participation — is a communal value. Negative freedom — every person's right to live as he chooses — pertains to the individual. Unbounded individual freedom must result in disintegration of state and society. Unbounded political freedom leaves no sphere in which a person can act unobstructed by others. Hence positive and negative freedom can only coexist if the opposition between the two forms of freedom is combined with an opposition between a public sphere — in which citizens participate in politics and public administration — and a private sphere in which individuals are protected against interference from the state as well as from other individuals.[27]

[25] J. GRAY, *Liberalism* (Minneapolis 1986), 57: "It is often argued that the conception of freedom employed by classical liberal writers is wholly or predominantly a negative one, whereas revisionary liberals and socialists invoke a more positive conception. [...] In its simplest and clearest form, the distinction is that marked by Constant, and stated in our own time with unsurpassed insight by Isaiah Berlin, between noninterference and independence on the one hand and an entitlement to participate in collective decision-making on the other hand". But Gray misinterprets Berlin by identifying his self-determination in the sense of self-control with political participation.

[26] B. HOLDEN, *Understanding Liberal Democracy* (Oxford 1988), 21: "There is a link between liberty and democracy through the connection between self-government and self-determination: the self-determined — the free — individual is the self-governing individual. Here individual liberty is seen to involve participation in, rather than the absence of, government activity". Described by Holden as connected with "the 'positive' conception of liberty" (*Ibid.*). *Cf.* G. SARTORI, *Democratic Theory* (Westport 1962), 286; R.A. DAHL, *op. cit.* (n. 23), 89; M. VIROLI, *op. cit.* (n. 13), 11.

[27] M.H. HANSEN, *op. cit.* (n. 1), 17. I. BERLIN, *op. cit.* (n. 4), 124 admits that individual freedom presupposes a distinction in society between the public and private domains.

A further consequence of the political scientists' different understanding of positive freedom is that negative and positive freedom are no longer irreconcilable opposites as they are according to Berlin's interpretation. On the contrary, both forms of freedom exist side by side in any democracy, but in different spheres: positive freedom in the political sphere and negative freedom in the private sphere. The opposition between positive and negative freedom becomes connected with the opposition between state and (civil) society.

The changed view of, in particular, positive freedom has implications for the history of the two aspects of freedom. According to Berlin negative freedom is modern. He traces it back to Thomas Hobbes, but no further.[28] In the preface to the republication of his inaugural lecture Berlin denies both that the Athenians had a clear conception of individual freedom[29] and that negative freedom was a conscious political ideal in Classical Greece.[30] According to Berlin, the legendary democratic freedom in Classical Athens was centred on the citizens' patriotism which induced them to perform their civic duties of their own acccord and without coercion.[31] That was a form of positive freedom which was a characteristic of the ancient world and can be exemplified by the guardians of Plato's utopian republic,[32] i.e. it is a sort of freedom that is focused on one's duty to live as a citizen in accordance with the laws and ideals of the community.

In the historical part of his essay Berlin goes back to the famous lecture which Benjamin Constant gave to the Royal Athenaeum in 1819 and had published soon afterwards: *De la*

[28] I. BERLIN, *op. cit.* (n. 4), 123: TH. HOBBES, *Leviathan* 1.21.1. See Q. SKINNER, "The Idea of Negative Liberty: Machiavellian and Modern Perspectives", in Q. SKINNER, *Visions of Politics* (Cambridge 2002), vol. 2, 187.

[29] I. BERLIN, *op. cit.* (n. 4), xl.

[30] *Ibid.*, 129.

[31] *Ibid.*, xl-xli, countered in M.H. HANSEN, *op. cit.* (n. 1), 10-1.

[32] I. BERLIN, *op. cit.* (n. 4), 152.

liberté des anciens comparée à celle des modernes.[33] In his lecture Constant distinguishes between two forms of freedom: an ancient and a modern. The ancient form is the citizens' participation in politics, their right to govern the state. It is social in character and lays stress on the community.[34] It is a political form of freedom by contrast with the modern freedom which is individual and consists in every person's right to live as one chooses without interference from others.[35] Constant describes the two forms of freedom as opposites, and with one exception modern freedom did not exist in antiquity.[36] The exception is the Athenian democracy in the Classical period. The Athenians cherished individual freedom: a citizen's right to live at his discretion.[37]

[33] Reprinted in B. CONSTANT, *Écrits politiques*, éd. par M. GAUCHET (Paris 1997), 591-619.

[34] *Ibid.*, 594: "[La liberté ancienne] consistait à exercer collectivement, mais directement, plusieurs parties de la souveraineté tout entière, [...] mais en même temps que c'était là ce que les anciens nommaient liberté, ils admettaient, comme compatible avec cette liberté collective, l'assujettissement complet de l'individu à l'autorité de l'ensemble".

[35] *Ibid.*, 593.

[36] *Ibid.*, 594, singles out Sparta as the typical Greek city-state: the Spartan poet "Terpandre ne peut chez les Spartiates ajouter une corde à sa lyre sans que les Éphores ne s'offensent. Dans les relations les plus domestiques, l'autorité intervient encore." See also 592; 600; 601, 607. — The ancient source is PLUT. *Mor.* 238c. Until ca. 1850 Sparta was almost universally conceived as the typical Greek city-state and Athens as the exception. The modern understanding of Athens as the more typical city-state is due to G. GROTE, *History of Greece* (New York 1846-56), see E. RAWSON, *The Spartan Tradition in European Thought* (Oxford 1969), 359-62. Grote's view was anticipated by E. BULWER-LYTTON, *Athens: its Rise and Fall* (London 1837), republished by O. MURRAY (London 2004); but Bulwer-Lytton's work was soon consigned to oblivion and only recently rediscovered by Murray. The credit for the general change of view must go to Grote.

[37] B. CONSTANT, *op. cit.* (n. 33), 595: "Il y a dans l'antiquité une république où l'asservissement de l'existence individuelle au corps collectif n'est pas aussi complet que je viens de le décrire. Cette république est la plus célèbre de toutes; vous devinez que je veux parler d'Athènes."; 600: "Athènes [...] était de toutes les républiques grecques la plus commerçante, aussi accordait-elle à ces citoyens infiniment plus de liberté individuelle que Rome et que Sparte."; 601: "À Lacédémone, dit un philosophe, les citoyens accourent lorsqu'un magistrat les appelle; mais un Athénien serait au désespoir qu'on le crût dépendant d'un mag-

Berlin lets us understand that his distinction between positive and negative freedom is based on Constant's distinction between ancient and modern freedom and that his distinction is essentially the same as that established by Constant.[38] Thus, Constant's ancient freedom is taken to be a form of positive freedom and Constant's modern individual freedom is identified with Berlin's negative freedom.[39]

There is indeed an overlap, but Berlin's concept of positive freedom does not correspond to Constant's ancient freedom. Constant's ancient freedom is based on a description of historical societies. Berlin's positive freedom is focused on philosophical utopias from Plato to Rousseau. Berlin's positive freedom is first of all self-determination in the sense of self-control. Constant's ancient freedom is political freedom in the sense of all citizens' participation in political decision making. In antiquity the individual had to submit to the *polis* in all aspects of life, but the *polis* was ruled by the citizens who thereby possessed a remarkable measure of political freedom. As a rule individual freedom from public control was unknown in the ancient world, except in Athens. In the ancient world the citizen was sovereign in public affairs but a slave of the *polis* in his private life.[40] The reason Constant takes this overall view of ancient freedom is that he shared the contemporary view that the typical Greek *polis* was Sparta whereas Athens was an exception. The reason for the similarity between the Athenian and

istrat ". Constant's view that the Athenians enjoyed the modern form of freedom is already advanced in an unpublished draft of the lecture written in 1806, *Ibid.*, 836 n. 8. The manuscript shows furthermore that Constant was inspired by C. DE PAUW, *Recherches philosophiques sur les Grecs* (Paris 1788); see P. VIDAL-NAQUET, *La démocratie grecque vue d'ailleurs* (Paris 1990), 197-202.

[38] I. BERLIN, *op. cit.* (n. 4), 163-6.

[39] J. GRAY, *op. cit.* (n. 25), 57; J.W. MAYNOR, *Republicanism in the Modern World* (Cambridge 2003), 14, 30; M. VIROLI, *op. cit.* (n. 13), 38-41.

[40] B. CONSTANT, *op. cit.* (n. 33), 595: "Ainsi chez les anciens, l'individu, souverain presque habituellement dans les affaires publiques, est esclave dans tous ses rapports privés".

the modern view of freedom is, in Constant's opinion, that the Athenian economy was based on commerce.[41]

Berlin has failed to notice that, according to Constant, the Athenians cherished individual as well as political freedom. Berlin holds that negative and positive freedom are irreconcilable opposites.[42] Constant shows that they co-existed in ancient Athens and to some extent they must be brought to co-exist once again.[43] The politically active citizen of ancient Athens lived in a micro-state, i.e. the *polis*. Constant acknowledges that it would be both impossible and undesirable to restore ancient citizenship in modern nation states. According to Constant, it was the French Revolution's most serious mistake that such an attempt was made.[44] On the other hand, Constant regrets that political freedom has disappeared completely from modern states. A certain measure of political freedom is indispensable for state and society. Therefore a certain measure of political freedom must be restored.[45] Not in the form of all

[41] *Ibid.*, 595-6; 600; 836 n.8. Constant's understanding of ancient Athenian freedom as similar to the modern form of individual freedom did not preclude that in several respects he was critical of Athens and in particular of the Athenian administration of justice. Thus, he singled out for criticism the trial of the generals in 406 (601) and the trial of Sokrates in 399 (612); he found that ostracism was an outrageous institution (601, 609), and he concluded that "l'individu était encore bien asservi à la suprématie du corps social à Athènes, qu'il ne l'est de nos jours dans aucun État social libre de l'Europe" (601).

[42] I. BERLIN, *op. cit.* (n. 4), 132; 148;166.

[43] B. CONSTANT, *op. cit.* (n. 33), 618-9: "Loin donc, Messieurs, de renoncer à aucune des deux espèces de libertés dont je vous ai parlé, il faut, je l'ai démontré, apprendre à les combiner l'une avec l'autre [...] En respectant leurs droits individuels, en ménageant leur indépendance, en ne troublant point leurs occupations, elles doivent pourtant consacrer leur influence sur la chose publique, les appeler à concourir par leurs déterminations et par leurs souffrages à l'exercice du pouvoir, leur garantir un droit de contrôle et de surveillance par la manifestation de leur opinions, et les formant de la sorte, par la pratique, à ces fonctions élevées, leur donner à la fois et le désir et la faculté de s'en acquitter".

[44] *Ibid.*, 591-2; 607-8.

[45] *Ibid.*, 612: "La liberté individuelle [...] voilà la véritable liberté moderne. La liberté politique en est la garantie; la liberté politique est par conséquent indispensable." *Cf.* 617-9.

citizens' direct participation in political decision making, but in connection with representative government.[46] Modern citizens must not be tempted by the blessings of modern freedom to give up political freedom altogether. Admittedly, that is what those in power want so that they can wield power without any disturbing control.[47] In a representative system of government all citizens must participate in choosing and controlling those in power. In several almost prophetical passages Constant anticipates the emergence and progress of modern democracy during the 19th and 20th centuries.

Constant's understanding of ancient political and modern individual freedom is remarkably close to the modern democratic view that freedom has two aspects: all citizens' right directly or indirectly to participate in political decision making and all individuals' right to live as they choose without interference from the state or other individuals. But the important line from Constant to modern democracy is often overlooked because Constant's political writings were almost consigned to oblivion after his death in 1830. And it is only in the course of the last generation that he has been restored to the position in political philosophy that he deserves. Today Constant is considered the father of modern liberalism.[48]

Nevertheless, in many modern accounts of the concept of freedom the authors follow Berlin's interpretation of his own positive freedom as, essentially, identical with Constant's political freedom. Similarly, many scholars have not noticed that Berlin has misrepresented Constant's conception of ancient

[46] *Ibid.*, 615-19.

[47] *Ibid.*, 616: "Le danger de la liberté moderne, c'est qu'absorbés dans la jouissance de notre indépendance privée, et dans la poursuite de nos intérêts particuliers, nous ne renoncions trop facilement à notre droit de partage dans le pouvoir politique. Les dépositaires de l'autorité ne manquent pas de nous y exhorter. Ils sont si disposés à nous epargner toute espèce de peine, exceptée celle d'obéir et de payer!".

[48] S. HOLMES, *Benjamin Constant and the Making of Modern Liberalism* (New Haven 1984), 3.

freedom by overlooking that, according to Constant, the Athenians cherished individual freedom as well as political freedom and thus were an exception to a general rule that ancient freedom was a form of political freedom which left no room for individual freedom.

II

Who is right in his interpretation of ancient Athenian freedom, Constant or Berlin? The best way of answering this question is to quote and comment on the longest and most explicit description of democratic freedom in our sources, i.e. Aristotle's in *Politics* Book 6.[49]

> Freedom is the foundation of a democratic constitution. That is what they say arguing that it is only under this constitution that people enjoy freedom since, as they hold, every democracy aim at freedom. One form of freedom is to be ruled and rule in turn. And democratic justice is arithmetic equality, not equality according to merit. With such a conception of justice the majority must be supreme and what the majority decides is final and constitutes justice. For they say that every citizen must have an

[49] ARIST. *Pol.* 1317a40-b17: ὑπόθεσις μὲν οὖν τῆς δημοκρατικῆς πολιτείας ἐλευθερία (τοῦτο γὰρ **λέγειν εἰώθασιν**, ὡς ἐν μόνῃ τῇ πολιτείᾳ ταύτῃ μετέχοντας ἐλευθερίας· τοῦτου γὰρ στοχάζεσθαί **φασιν** πᾶσαν δημοκρατίαν)· ἐλευθερίας δὲ ἓν μὲν τὸ ἐν μέρει ἄρχεσθαι καὶ ἄρχειν. [καὶ γὰρ τὸ δίκαιον τὸ δημοτικὸν τὸ ἴσον ἔχειν ἐστὶ κατ' ἀριθμὸν ἀλλὰ μὴ κατ' ἀξίαν, τοῦτου δ' ὄντος τοῦ δικαίου τὸ πλῆθος ἀναγκαῖον εἶναι κύριον, καὶ ὅ τι ἂν δόξῃ τοῖς πλείοσι, τοῦτ' εἶναι τέλος καὶ τοῦτ' εἶναι τὸ δίκαιον·] **φασὶ** γὰρ δεῖν ἴσον ἔχειν ἕκαστον τῶν πολιτῶν· [ὥστε ἐν ταῖς δημοκρατίαις συμβαίνει κυριωτέρους εἶναι τοὺς ἀπόρους τῶν εὐπόρων· πλείους γάρ εἰσι, κύριον δὲ τὸ τοῖς πλείοσι δόξαν.] ἓν μὲν οὖν τῆς ἐλευθερίας σημεῖον τοῦτο, ὃν **τίθενται πάντες οἱ δημοτικοὶ** τῆς πολιτείας ὅρον· ἓν δὲ τὸ ζῆν ὡς βούλεταί τις. Τοῦτο γὰρ τῆς ἐλευθερίας ἔργον εἶναί **φασιν**, εἴπερ τοῦ δουλεύοντος τὸ ζῆν μὴ ὡς βούλεται. τῆς μὲν οὖν δημοκρατίας ὅρος οὗτος δεύτερος· [ἐντεῦθεν δ' ἐλήλυθε τὸ μὴ ἄρχεσθαι, μάλιστα μὲν ὑπὸ μηθενός, εἰ δὲ μή, κατὰ μέρος, καὶ συμβάλλεται ταύτῃ πρὸς τὴν ἐλευθερίαν τὴν κατὰ τὸ ἴσον]. In this quote of the Greek text I have put Aristotle's comments in square brackets and indicated in bold type how he reports the democrats' view.

> equal share. It follows that in democracies the poor prevail over the rich because they are in the majority and because decisions made by the majority are final. This is one characteristic of freedom which all democrats lay down as their definition of the constitution. Another characteristic is 'to live as one likes'. For this they say is the result of being free just as 'not to live as one likes' is the result of being enslaved. This is the second definition of democracy. From that has come [the wish] not to be ruled, preferably by nobody at all, or failing that, to take turns, which furthers a freedom based on equality.

The first thing to note is that in this passage Aristotle does not produce his own conception of democratic freedom but gives an account of the democrats' own view.[50] The implicit subject of εἰώθασι in 1317a41 is the δημοτικοί in b11. We are not told who these democrats are. Historians and commentators usually presume that Aristotle must have Athens in mind whenever he writes about democracy.[51] But it is not as simple as that. When Aristotle in the *Politics* adduces historical examples to support his general observations about democracy, his references to Athens are outnumbered by references to other democracies, e.g. Syracuse, Rhodes and Kyrene. And the democratic institutions he discusses can in several instances be shown to be different from those attested in Athens.[52] The passage quoted above tells us how some Greek democrats conceived of democratic freedom. Without supporting evidence it cannot *a priori* be taken to represent the Athenian democrats' views; and it can only to some extent shed light on Aristotle's own conception of freedom. His report of what the democrats believe is interspersed with three comments, in lines b5-7, b8-10 and b14-17. These comments combine a report of the democrats' views with Aristotle's critical attitude to these views.

[50] J. BARNES, "Aristotle and Political Liberty", in *Aristotle's Politics. Critical Essays*, ed. by R. KRAUT, S. SKULTEKY (Lanham 2005), 192.

[51] J. OBER, *The Athenian Revolution* (Princeton 1996), 20-1; R. KRAUT, *Aristotle. Political Philosophy* (Oxford 2002), 11.

[52] M.H. HANSEN, *Polis and City-State* (Copenhagen 1998), 104-5.

Aristotle states that, according to the democrats, freedom is the foundation of a democratic constitution and peculiar to democracy, both as an actual fact (μετέχοντας) and as an ideal (στοχάζεσθαι). Democratic freedom consists partly in being ruled an ruling in turn (τὸ ἐν μέρει ἄρχεσθαι καὶ ἄρχειν)[53] and partly in living as one likes (ζῆν ὡς βούλεταί τις).

The first form of freedom, to be ruled and to rule in turn, is linked to the democratic concepts of citizenship and equality. It implies active participation in the political institutions and offers a narrow definition of freedom as a privilege enjoyed by adult male citizens only. On the other hand it is enjoyed by 'all' adult male citizens and the democrats' preference for arithmetic equality (τὸ ἴσον τὸ κατ' ἀριθμόν) entails that every citizen counts for one. It follows that the majority rules (οἱ πλείονες, τὸ πλῆθος), and since the majority of the citizens are poor, democracy becomes 'rule of the poor'.

The other aspect of freedom "to live as one likes" is opposed to the destiny of the slave which is "not to live as he likes". "To live as one likes or chooses" must be a form of individual freedom since different individuals make different choices as to what they want to do. Therefore this form of freedom is not restricted to the political sphere. On the contrary, it is opposed to the political sphere in so far as the ideal is not to be ruled (μὴ ἄρχεσθαι) and that precludes any form of government and leads to anarchy (ἀναρχία).[54] Since it is impossible to abolish government altogether, the democrats must put up with the second-best option which is to take turns in ruling and being ruled.

Aristotle's account of democratic freedom shows that ancient Greek democrats distinguished between two opposed forms of democratic freedom: a kind of positive political freedom which

[53] Note the sequence: passive — active. A citizen is ruled when he is young and comes to rule when he gets older: ARIST. *Pol.* 1329a2-17; 1332b12-3a16. *Cf.* 1259b4-5; 1261a32-4.

[54] *Cf.* PLATO *Resp.* 560e

consisted in taking turns participating in government, and a kind of individual freedom which consisted in living as one likes and was described as a negative form of freedom by being opposed to slavery.

The next step is to compare Aristotle's general description of democratic freedom with what we know about freedom as an ideal cherished by the Athenian democrats.

First, Athenian sources confirm the essential aspects of Aristotle's description of democratic political freedom. In Euripides' *Supplices* King Theseus praises Athens as a free *polis* and as evidence he states that the people rule due to the principle that the magistrates serve in annual rotation and that the Athenians do not favour the rich over the poor (404-8). In an earlier scene Theseus describes Athens as an ἰσόψηφος πόλις (353). Thus, in political decision-making each citizen counts for one and in this respect the Athenians advocate what Aristotle calls numerical or arithmetic equality (1317b4). We meet the same line of thought in Perikles' funeral oration: rotation in office and personal merit are singled out as equally important principles to be applied in the selection of those who rule the *polis* (Thuc. 2.37.1), and Perikles stresses that poverty does not bar a meritous citizen from political influence.[55]

According to Aristotle to live as one likes was the other central aspect of democratic freedom and again the Athenian sources support Aristotle's account. The most famous statement of the view is the chapter about Athenian democracy in Perikles' funeral oration: "Freedom is a feature of our public life; and as for suspicion of one another in our daily private pursuits, we do not frown on our neighbour if he behaves to

[55] THUC. 2.37.1: ὡς ἕκαστος ἔν τῳ εὐδοκιμεῖ, οὐκ ἀπὸ μέρους τὸ πλέον ἐς τὰ κοινὰ ἢ ἀπ' ἀρετῆς προτιμᾶται, οὐδ' αὖ κατὰ πενίαν, ἔχων γέ τι ἀγαθὸν δρᾶσαι τὴν πόλιν, ἀξιώματος ἀφανείᾳ κεκώλυται. Today most commentators agree that the prepositional group ἀπὸ μέρους must be used synonymously with ἐν μέρει or κατὰ μέρος and refer to rotation, see S. HORNBLOWER, *A Commentary on Thucydides,* I (Oxford 1991), 300-1.

please himself or set our faces in those expressions of disapproval that are so disagreeable, however harmless. We are tolerant in our private dealings with one another but in public matters it is first of all fear that keeps us from breaking the law. We obey the authorities and the laws, in particular those enacted to protect injured persons as well as the unwritten laws that cannot be broken without acknowledged disgrace".[56]

Perikles returns repeatedly to this view of individual freedom, e.g. in Chapter 39 where he contrasts the Athenians' unbound lifestyle with the public upbringing and education practised in Sparta.[57] Nikias strikes the same note in his speech to the trierarchs before the final battle in the harbour of Syracuse: he reminds them that their fatherland is the freest in the world where all enjoy the privilege to live their lives without being under command.[58]

Outside Athens we meet the ideal in the debate over the constitutions in Herodotos' Histories, a debate allegedly conducted in Persia in 522 B.C. between seven Persian nobles, but in fact reflecting Greek constitutional views of the mid fifth century. After the debate, Otanes, who argued in favour of democracy, complies with the decision of the six others to restore monarchy, and let one among themselves be king. He withdraws from the competition, but he makes one condition: "I wave my right to compete with you about being king

[56] THUC. 2.37.2: ἐλευθέρως δὲ τά τε πρὸς τὸ κοινὸν πολιτεύομεν καὶ ἐς τὴν πρὸς ἀλλήλους τῶν καθ' ἡμέραν ἐπιτηδευμάτων ὑποψίαν, οὐ δι' ὀργῆς τὸν πέλας, εἰ καθ' ἡδονήν τι δρᾷ, ἔχοντες, οὐδὲ ἀζημίους μέν, λυπηρὰς δὲ τῇ ὄψει ἀχθηδόνας προστιθέμενοι. ἀνεπαχθῶς δὲ τὰ ἴδια προσομιλοῦντες τὰ δημόσια διὰ δέος μάλιστα οὐ παρανομοῦμεν, τῶν τε αἰεὶ ἐν ἀρχῇ ὄντων ἀκροάσει καὶ τῶν νόμων, καὶ μάλιστα αὐτῶν ὅσοι τε ἐπ' ὠφελίᾳ τῶν ἀδικουμένων κεῖνται καὶ ὅσοι ἄγραφαι ὄντες αἰσχύνην ὁμολογουμένην φέρουσιν.

[57] THUC. 2.39.1: ἡμεῖς δὲ ἀνειμένως διαιτώμενοι οὐδὲν ἧσσον ἐπὶ τοὺς ἰσοπαλεῖς κινδύνους χωροῦμεν.

[58] THUC. 7.69.2: πατρίδος τε τῆς ἐλευθερωτάτης ὑπομιμνήσκων καὶ τῆς ἐν αὐτῇ ἀνεπιτάκτου πᾶσιν ἐς τὴν δίαιταν ἐξουσίας, [...] S. HORNBLOWER, *A Commentary on Thucydides,* III (Oxford 2008), 692 translates: "the freest country in the world, where there was no interference with anyone's daily life". Thus, ἀνεπίτακτος ἐξουσία means that in his daily life one has a right to live as one likes without being under command.

since I want neither to rule nor to be ruled, but I do it on the condition that neither I nor any of my descendants be ruled by any of you".[59] Herodotos adds that in his time Otanes' descendants are the only ones among the Persians who are free and they are ruled only to the extent they choose, provided that they obey the laws of the Persians.

An important aspect of the right to live as one likes is freedom of expression. It is often called *parrhesia*[60] and is praised by, e.g., Demosthenes (9.3): "In other matters you find it so important to grant freedom of speech to all who live in Athens that you allow even foreigners and slaves to share in this privilege, and among us one can see many slaves having more freedom to speak their mind than citizens have in some other *poleis*, but you have granted them no share whatsoever in political deliberations". Demosthenes distinguishes between two forms of *parrhesia*: the right to speak in the assembly and the right to speak one's mind. The first form is mostly called *isegoria*, the second *parrhesia*. To speak in the assembly was, of course, a privilege restricted to citizens. To speak one's mind was enjoyed not only by citizens but also by women, foreigners and slaves.[61] It was open to inhabitants and belonged in the private sphere of life.

[59] HDT. 3.83.2: ἐγὼ μέν νυν ὑμῖν οὐκ ἐναγωνιεῦμαι· οὔτε γὰρ ἄρχειν οὔτε ἄρχεσθαι ἐθέλω· ἐπὶ τούτῳ δὲ ὑπεξίσταμαι τῆς ἀρχῆς, ἐπ' ᾧ τε ὑπ' οὐδενὸς ὑμέων ἄρξομαι, οὔτε αὐτὸς ἐγὼ οὔτε οἱ ἀπ' ἐμεῦ αἰεὶ γινόμενοι. 3: καὶ νῦν αὕτη ἡ οἰκίη διατελέει μούνη ἐλευθέρη ἐοῦσα Περσέων καὶ ἄρχεται τοσαῦτα ὅσα αὐτὴ θέλει, νόμους οὐκ ὑπερβαίνουσα τοὺς Περσέων.

[60] K.A. RAAFLAUB, *The Discovery of Freedom in Ancient Greece* (Chicago 2004), 223-5; P. LIDDEL, *Civic Obligation and Individual Liberty in Ancient Athens* (Oxford 2007), 25-6. DEM. 59.28.

[61] Apart from DEM. 9.3, see [XEN.] *Ath. Pol.* 1.12; PLATO *Resp.* 557a; PLATO *Grg.* 461e; AR. *Th.* 540-3; *Ra.* 948-51; DEMOCR. fr. 226. See D.M. CARTER, "Citizen Attribute, Negative Right: A Conceptual Difference between Ancient and Modern Ideas of Freedom of Speech", in *Free Speech in Classical Antiquity*, ed. by I. SLUITER, R.M. ROSEN (Leiden 2004), 199-202; R.K. BALOT, "Free Speech, Courage, and Democratic Deliberation", in I. SLUITER, R.M. ROSEN, *op. cit. (supra)*, 236-42. For a rather critical view of Athenian *parrhesia*, see A.W. SAXONHOUSE, *Free Speech and Democracy in Ancient Athens* (Cambridge 2006).

"To live as one likes" is often described as an ἐξουσία, i.e. as an opportunity or a permission to do something, but almost always with the connotation of having the right or the power to do something.[62] So the Athenians considered "to live as one likes" to be a right,[63] but when it is praised as a democratic ideal it is stressed that this right belongs in the private sphere. It is a right one has in everyday life and in relation to one's neighbours and other citizens individually. As stressed by Perikles it is restricted by the obligation to allow others to live as 'they' like. Individual freedom has tolerance as its complement. Furthermore, one must obey the laws and a breach of the law cannot go unpunished. In such a context the democratic ideal to live as one likes is converted to an offence which prosecutors hold up as a bugbear to intimidate the jurors at the people's court, in particular in an argumentation aimed at the effect an acquittal will have on public moral: "If you acquit the defendant he and others will believe that one can do as one likes" or "if everybody lives as he likes, laws will no longer be valid".[64] To live as one likes is no longer a democratic value, it is a vice and a threat to the democracy.

It is significant that such arguments are used in public actions, rather than in private ones. Furthermore it is almost always found in trials relating to public institutions and the

[62] Opportunity: αὐτῷ ἐξουσία ἦν σαφῶς εἰδέναι (ANTIPHO 1.6); permission: ἐξουσίαν ὁ νόμος δέδωκε (PLATO *Smp.* 182e); power: ἐξουσίαν ἔχειν θανάτου (POLL. 8.86); freedom and right: ἐξουσία τοῦ λέγειν (PLATO *Grg.* 461e). On rights, see F.D. MILLER, Jr., *Nature, Justice, and Rights in Aristotle's Politics* (Oxford 1995), 101-4; D.M. CARTER, *art. cit.* (n. 61), 202-5.

[63] The Athenians had no notion of human rights, cf. M. OSTWALD, "Shares and Rights: 'Citizenship' Greek Style and American style", in J. OBER, C. HEDRICK, *op. cit.* (n. 1), 49-62, but many of the modern human rights were acknowledged as citizen rights, see M.H. HANSEN, *op. cit.* (n. 1), 12-17. See also R.W. WALLACE, "Law, Freedom, and the Concept of Citizens' Rights in Democratic Athens", in J. OBER, C. HEDRICK, *op. cit.* (n. 1), 105-19.

[64] The argument is used by prosecutors as a kind of precedent: In the case at hand, acquittal will induce citizens to break the laws, conviction to obey them, see L. RUBINSTEIN, "Arguments from Precedent in Attic Oratory", in *Oxford Readings in the Attic Orators,* ed. by E. CARAWAN (Oxford 2007), 362.

administration of the *polis*. It is used against Eratosthenes who is called to account for his conduct as one of The Thirty (Lys. 12.85); against the younger Alkibiades who without permission served in the cavalry instead of obeying the summons to serve among the hoplites (Lys. 14.11); against some corn-dealers who have purchased larger amounts of grain than permitted by the law (Lys. 22.19); against Nikomachos who was a member of a legislative committee (Lys. 30.34); against Timokrates who was charged with having proposed and carried an unsuitable law (Dem. 24.47); against Aristogeiton who had appeared as speaker in the people's assembly and as prosecutor before the people's court although he was indebted to the treasury (Dem. 25.25; 26.13); against Neaira, allegedly a prostitute from Corinth who had married an Athenian citizen (Dem. 59.112); and against Timarchos who had appeared as a speaker in the people's assembly although he had made profit from male prostitution (Aeschin. 1.34).

In all these cases the defendant is charged with having committed a crime relating to the *polis*. The only known attestation of the argument in a private action is in Demosthenes' speech *Against Phainippos* which was held in connection with a legal dispute over the obligation to serve as trierarch (Dem. 42.2, 9). Thus the action relates to the financing of the Athenian navy and is in fact a public matter although the trial takes the form of a private action.[65]

I conclude that a study of forensic rhetoric confirms what Perikles states in his funeral oration, Demosthenes in his third speech against Philip and Aristotle in his analysis of the democratic concept of freedom: the right to live as one likes belongs in the private sphere and concerns the citizens' daily dealings

[65] For an exemplary collection of the sources, see P. LIDDEL, *op. cit.* (n. 60), 22. He does not point out that all examples but one come from speeches for the prosecution in public actions. His purpose in collecting these sources is to question or at least to modify the view that freedom to live as one likes was a democratic ideal.

with one another. In the public sphere, it is fear of the law and obedience to the authorities that are emphasised as essential characteristics of democracy.[66]

While individual freedom is cherished as a value by the Athenian democrats if practised among people in the private sphere, it is severely criticised and rejected altogether by Plato and Aristotle; and Xenophon and Isokrates too take a critical view of this lifestyle.[67]

In the *Republic* Plato opens his account of the nature of democracy by stating that the fundamental value is freedom (*eleutheria*), in particular freedom of speech (*parrhesia*)[68] and the right to live as one likes.[69] Everyone can arrange his private life at pleasure.[70] The freedom to do as one likes results in the democratic *polis* being like a patchwork dress of different types of person,[71] and if one endeavours to establish a new *polis* the democratic *polis* can serve as a marketplace of constitutions from which one can choose.[72] In a democracy there is no obligation to rule nor to be ruled.[73] One does not have to join the others going to war or keeping the peace,[74] and one does not have to obey the laws that debar one from serving as a magistrate or a juror.[75] Convicted persons are treated leniently,[76] and even persons sentenced to death or exile can appear in public. Democratic freedom is, in fact, anarchy.[77]

[66] For a clear description of the difference between the spheres, see DEM. 24.192-3.

[67] See, e.g., ISOC. 7.20 and XEN. *Mem.* 4.5.2-5.

[68] PLATO. *Resp.* 557b5: παρρησία, assimilated from παν-ρησία, *cf.* 562c-d.

[69] 557b5-6: ἐξουσία ἐν αὐτῇ [the *polis*] ποιεῖν ... ὅτι τις βούλεται.

[70] 557b8-10: ἰδίαν ἕκαστος ἂν κατασκευὴν τοῦ αὑτοῦ βίου κατασκευάζοιτο ἐν αὐτῇ, ἥτις ἕκαστον ἀρέσκοι.

[71] 557c6-7: αὕτη πᾶσιν ἤθεσιν πεποικιλμένη καλλίστη ἂν φαίνοιτο.

[72] 557d8: παντοπώλιον ... πολιτειῶν.

[73] 557e2-4: μηδεμίαν ἀνάγκην ... εἶναι ἄρχειν ... μηδὲ αὖ ἄρχεσθαι ἐὰν μὴ βούλῃ.

[74] 557e4-5: μηδὲ πολεμεῖν ... μηδὲ εἰρήνην ἄγειν.

[75] 557e5-6: ἐάν τις ἄρχειν νόμος σε διακωλύῃ ἢ δικάζειν.

[76] 558a4: πρᾳότης ἐνίων τῶν δικασθέντων.

[77] 560e2, 5: ἐλευθερία as ἀναρχία. *Resp.* 558c4: δημοκρατία as an ἄναρχος πολιτεία.

Democracy is characterised by contempt for the principles on which Plato's own utopia is based: noble nature and good education. Regardless of qualifications anyone can meddle in politics.[78] It suffices that one declares his loyalty to the people;[79] and equality is bestowed on equals and unequals alike.[80]

In Book six of the *Politics* Aristotle gives an account of the democrats' own view of freedom and restricts his criticism to two comments about arithmetic equality by which democracy becomes the rule of the majority, i.e. the poor citizens. Aristotle's own explicit criticism of democratic freedom is advanced in Book five in a discussion of how one can protect and preserve a given type of constitution, *viz.*, by exposing the young to an education which makes them conform to the constitution they will have to live under when grown up.[81] Aristotle states that what they do in a radical democracy is inexpedient, and the reason is a wrong understanding of freedom. Democracy is defined by two criteria: majority rule and freedom. Majority rule is associated with equality and justice whereas "freedom is what a person wants to do; so that in such democracies everyone lives as he likes, and 'as he desires', as Euripides says; but that is wrong. Because to live in accordance with the constitution must not be seen as a form of slavery but as salvation".[82]

[78] 558b6-7: οὐδὲν φροντίζει ἐξ ὁποίων ἄν τις ἐπιτηδευμάτων ἐπὶ τὰ πολιτικὰ ἰὼν πράττῃ.

[79] 558c1: εὔνους ... τῷ πλήθει.

[80] 558c5-6: ἰσότητά τινα ὁμοίως ἴσοις τε καὶ ἀνίσοις διανέμουσα.

[81] ARIST. *Pol.* 1310a12-22.

[82] ARIST. *Pol.* 1310a25-36: ἐν δὲ ταῖς δημοκρατίαις ταῖς μάλιστα εἶναι δοκούσαις δημοκρατικαῖς τοὐναντίον τοῦ συμφέροντος καθέστηκεν, αἴτιον δὲ τούτου ὅτι κακῶς ὁρίζονται τὸ ἐλεύθερον. δύο γάρ ἐστιν οἷς ἡ δημοκρατία δοκεῖ ὡρίσθαι, τῷ τὸ πλεῖον εἶναι κύριον καὶ τῇ ἐλευθερίᾳ: τὸ μὲν γὰρ ἴσον δίκαιον δοκεῖ εἶναι, ἴσον δ' ὅ τι ἂν δόξῃ τῷ πλήθει, τοῦτ' εἶναι κύριον, ἐλεύθερον δὲ [καὶ ἴσον] τὸ ὅ τι ἂν βούληταί τις ποιεῖν· ὥστε ζῇ ἐν ταῖς τοιαύταις δημοκρατίαις ἕκαστος ὡς βούλεται, καὶ εἰς ὃ χρήζων, ὡς φησὶν Εὐριπίδης· τοῦτο δ' ἐστὶ φαῦλον· οὐ γὰρ δεῖ οἴεσθαι δουλείαν εἶναι τὸ ζῆν πρὸς τὴν πολιτείαν, ἀλλὰ σωτηρίαν.

Later in Book six he states that "the opportunity to do whatever one wants is unable to restrain the badness inherent in every human being."[83]

Comparing Plato's and Aristotle's account we can detect a shift in emphasis between the two aspects of freedom: the political freedom which consists in the right to rule and be ruled, and the individual freedom which consists in the right to live as one likes. In Aristotle the political freedom takes pride of place. The democratic freedom to participate in politics is mentioned by Plato, but only in passing.[84] The kind of freedom in which he is interested is the democratic citizen's right to do as he likes[85] and his opportunity to organise his private life at pleasure.[86] What is the result? According to Plato the human soul has three parts: reason, spirit and appetite (440e-441a). If one lives in accordance with the democratic ideal to do whatever one wants (561c6-e2), the consequence is that the appetitive part of the soul comes to prevail over the rational (560b7-11). Man becomes dependent on his desires and is in fact turned into a slave of the appetitive part of his soul (559c-d. 564a). By such a line of thought democratic freedom is converted into its opposite. The person who is a slave of his desires is no longer free but unfree and his enslaved status both as a person and as a citizen is most clearly seen when democracy has been converted into a tyranny (577b-e).

[83] ARIST. *Pol.* 1318b38-41: τὸ γὰρ ἐπανακρέμασθαι, καὶ μὴ πᾶν ἐξεῖναι ποιεῖν ὅ τι ἂν δόξῃ, συμφέρον ἐστίν· ἡ γὰρ ἐξουσία τοῦ πράττειν ὅ τι ἂν ἐθέλῃ τις οὐ δύναται φυλάττειν τὸ ἐν ἑκάστῳ τῶν ἀνθρώπων φαῦλον.

[84] PLATO *Resp.* 558b6-7, *cf.* n. 78.

[85] 557b5-6: ἐξουσία ποιεῖν ὅτι βούλεταί τις.

[86] 557b8-10, *cf.* n. 70.

III

In my opinion the sources show that Constant got it right, and Berlin got it wrong. Euripides, Thucydides and Aristotle show that in Athens and in democratic *poleis* in general freedom was partly political freedom by ruling in turn and partly the individual's freedom from political oppression by living as one chooses. A positive political freedom in the public sphere is contrasted with a negative individual freedom in the private sphere. Nevertheless, Isaiah Berlin is inclined to deny the parallel between ancient Greek *eleutheria* and modern freedom. In the introduction to his *Four Essays on liberty* he devotes more than a page to the historical origins of the concept:

> "I have found no convincing evidence of any clear formulation of [the notion of individual liberty] in the ancient world. Some of my critics have doubted this, but apart from pointing to such modern writers as Acton, or Jellinek, or Barker, who do profess to find this ideal in ancient Greece, some of them also, more pertinently, cite the proposal of Otanes after the death of Pseudo-Smerdis in the account given by Herodotus, the celebrated paean to liberty in the Funeral Oration of Pericles, as well as the speech of Nikias before the final battle with the Syracusans (in Thucydides), as evidence that the Greeks, at any rate, had a clear conception of individual liberty. I must confess that I do not find this conclusive. When Pericles and Nikias compare the freedom of the Athenian citizens with the fate of the subjects of the less democratic states, what (it seems to me) they are saying is that the citizens of Athens enjoy freedom in the sense of self-government, that they are not slaves of any master, that they perform their civic duties out of love for their *polis*, without needing to be coerced, and not under the goads and whips of savage laws or taskmasters (as in Sparta or Persia). So might a headmaster say of the boys in his school that they live and act according to good principles not because they are forced to do so, but because they are inspired by loyalty to the school, by 'team spirit', by a sense of solidarity and common purpose; whereas at other schools these results have to be achieved by fear of punishment and stern measures. But in neither case is it contemplated that a man might, without loosing face, or incurring contempt, or a diminution of his human essence, withdraw from

> public life altogether, and pursue private ends, live in a room of his own, in the company of personal friends, as Epicurus later advocated, and perhaps the Cynic and Cyrenaic disciples of Socrates had preached before him. As for Otanes, he wished neither to rule nor to be ruled — the exact opposite of Aristotle's notion of true civic liberty. [...] I do not say that the ancient Greeks did not in fact enjoy a great measure of what we should today call individual liberty. My thesis is only that the notion had not explicitly emerged, and was therefore not central to Greek culture, or, perhaps, any other ancient civilization known to us". [87]

Almost every sentence of this passage can be disputed and several disproved by the evidence we have of freedom in Greek political thought. In the Funeral Oration Perkles repeatedly distinguishes between a public sphere (*to koinon*) and a private sphere (*ta idia*) in which every Athenian is free to live as he pleases and to have a lifestyle different from that of his neighbours.[88] *Pace* Berlin, Perikles 'does' imply that the Athenians "needed to be coerced" to obey the laws.[89] Nikias does 'not' compare "the freedom of the Athenians with the fate of the subjects of less democratic states", and he does 'not' link freedom with "civic duties" but with individual freedom in private life.[90] It is misleading to contrast Otanes' claim with "Aristotle's notion of true civic liberty". First, Aristotle had no personal view of true civic liberty[91] but gives only a — partly

[87] I. BERLIN, *op. cit.* (n. 4), xl-xli.

[88] THUC. 2.37: As today, democracy (δημοκρατία) is associated with equality (πᾶσι τὸ ἴσον), liberty (ἐλευθέρως) and tolerance (ἀνεπαχθῶς) and for each of these three ideals Perikles describes how it operates both in the private sphere and in the public sphere (τὰ ἴδια διαφορά ... ἐς τὰ κοινά — τά τε πρὸς τὸ κοινόν ... τὴν πρὸς ἀλλήλους ὑποψίαν — τὰ ἴδια ... τὰ δημόσια). Thus the oppositon between the private and the public becomes a characteric element of democratic ideology, one which permeates all aspects of society.

[89] THUC. 2.37.3: we obey the laws out of fear: διὰ δέος μάλιστα οὐ παρανομοῦμεν, see also S. HORNBLOWER, *op. cit.* (n. 55), 301-2.

[90] THUC. 7.69.2 quoted in n.58.

[91] This point is argued in M.H. HANSEN, "Democratic Freedom and the Concept of Freedom in Plato and Aristotle", in *GRBS* 50 (2010), 1-27.

critical — account of the democratic notion of freedom. Second, Aristotle says that the essence of democratic 'political' freedom is to be ruled and rule in turn; but his description of individual freedom in democracies matches Otanes' claim. In Aristotle's description of democratic freedom at *Pol.* 1317a40-b17 Berlin has focused on the first half of it (b1-11) without paying any attention to the second half (b11-17). And these views of personal freedom are not just found in Herodotos, Thucydides and Aristotle, but in other sources as well, e.g. in the *Supplices* by Euripides, in Plato's the *Republic*, and in Demosthenes' speeches. Furthermore, "to withdraw from public life [...] and pursue private ends" was perfectly respectable,[92] and to "withdraw from public life 'altogether'" is often — even in forensic speeches — held up as an honourable way of life. Like all other people the Athenians practised 'doublethink'.[93] On the one hand, they expected every citizen to participate in the running of the democratic institutions, and passive citizens can be censured by Perikles and called "useless" rather than "quiet".[94] On the other hand, the Athenian jurors listened — apparently with approval — to a man who told them that he had always stayed away from the *bouleuterion*, the *dikasteria* and the *agora* altogether.[95] The clash of views is undeniable and must not be avoided by suppressing one of the two opposed ideals, i.e. that personal freedom and the right to keep out of

[92] EUR. *Suppl.* 438-41; LYS. 19.18; DEM. 10.70-4; 18.308; 19.99; 22.30. *Cf.* L.B. CARTER, *The Quiet Athenian* (Oxford 1986).

[93] 'Doublethink', a word coined by George Orwell in his novel *Nineteen Eighty-Four* (1949), denotes "the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them". The concept was brilliantly pursued by John Crook in an (unpublished) lecture held at Copenhagen University in December 1978.

[94] THUC. 2.40.2: τόν τε μηδὲν τούτων μετέχοντα οὐκ ἀπράγμονα, ἀλλ' ἀχρεῖον νομίζομεν.

[95] LYS. 19.55; IS. 1.1 (courtroom speeches); PLATO *Ap.* 17d; ISOC. 15.38 (literary imitations of courtroom speeches), see M.H. HANSEN, *The Athenian Democracy in the Age of Demosthenes. Structure, Principles and Ideology* (Oxford 1991), 267-8.

public life was indeed an essential feature of Athenian democracy. Thus, in Athens negative individual freedom comprised the right to stay out of politics.[96]

Berlin's introduction to the *Four Essays* was written in 1969. A manuscript of a lecture delivered at Yale University in 1962 was published posthumously in 2002 with the title "The Birth of Greek Individualism".[97] It covers much of the same ground as the later introduction to the four essays but is more detailed. Much space is devoted to an account of Plato's and Aristotle's view that the state has an absolute claim upon the citizens, which is correct for both the philosophers but says nothing about the Athenians' view of freedom. In the manuscript Berlin mentions Euripides' and Demosthenes' praise of freedom of speech, but both sources are brushed aside without discussion. Berlin denies that the citizens had rights against the *polis* and compares Athens to a public school: "Schoolboys, however lightly ruled have no rights against the masters".[98] Berlin does not mention the *euthynai* by which a citizen could sue an outgoing magistrate for misconduct in office; if the issue at stake was a private matter, the case was heard by a popular court presided over by one of The Forty.[99] A number of such cases must have been heard every year, and if the prosecuting citizen

[96] *Pace* H. ARENDT, *On Revolution* (London 1963), 284 who describes self-exclusion as "one of the most important negative liberties we have enjoyed since the end of the ancient world, namely, freedom from politics, which was unknown to Rome and Athens and which is politically perhaps the most relevant part of our Christian heritage". The difference between the ancient and the modern world is rather that in Athens it was probably a small group of citizens who availed themselves of this negative freedom whereas today it is a very small group of citizens who are politically active in the ancient sense of what political participation implies.

[97] I. BERLIN, *Liberty* (Oxford 2002), 287-321.

[98] *Ibid.*, 301.

[99] For Athens see ARIST. *Ath.* 48.3-6. For a list of *euthynai* heard by the Athenian courts, see M.H. HANSEN, *The Athenian Ecclesia II. A Collection of Articles 1983-89* (Copenhagen 1989), 10 with n. 32. For other Greek *poleis*, see the magisterial collection of the evidence in P. FRÖLICH, *Les cités grecques et le contrôle des magistrats (IV^e-I^er siècle avant J.-C.)* (Genève 2004).

had the magistrate convicted, he would have vindicated his right to something against the *polis*.[100]

IV

The debate over negative and positive freedom has been carried on since Berlin's inaugural lecture in 1958 and it is still an important issue both in political philosophy and in ancient history. In a recent monograph about ancient and modern liberty Wilfried Nippel devotes a section to discussing Berlin's concepts of negative and positive freedom and the issue whether the Athenians had any notion of individual freedom.[101] He selects me as the protagonist of the view that individual freedom was an important aspect of Athenian democratic ideology. As the representative of the opposite view he refers to the chapter *Athens's Illiberal Democracy* in the first volume of Paul Rahe's magnum opus: *Republics Ancient and Modern*.[102]

In an introductory section of this chapter Rahe discusses a broad selection of the sources which — favourably or unfavourably — draw a picture of Athens as a democracy in which the citizens are free to speak their mind and live as they like. He admits that on the basis of this evidence one might think that "the city Athena had somehow become an open society, with a ethos similar to that of James Madison's litigious liberal republic".[103] But the next section is opened with the statement: "And yet nothing could be further from the truth"[104], and my Essay *Was Athens a Democracy?* is held up as the exponent of

[100] For trials in Athens brought by a citizen against the *polis*, see LYS. 17, 18 and 19.

[101] W. NIPPEL, *Antike oder moderne Freiheit? Die Begründung der Demokratie in Athen und in der Neuzeit* (Frankfurt am Main 2008), 332-5.

[102] P. RAHE, *Republics Ancient and Modern. Vol. 1. The Ancien Régime in Classical Greece* (Chapel Hill 1994), 172-204.

[103] *Ibid.*, 178.

[104] *Ibid.*

the mistaken view which even in our own day is advocated by many students of the classics.[105]

To refute my view Rahe adduces five observations which, in his opinion, disclose the illiberal character of Athenian democracy. 1. The Athenians had slaves. 2. Women were excluded from political life. 3. The Athenians did not naturalise metics. 4. Athens had no written constitution. 5. The protection of a citizen's home was not peculiar to democratic Athens, it was found in Sparta as well. — Later in the chapter he adds some further charges which, in his view, show that Athens was "an illiberal democracy." The two most important are: 6. The Athenians controlled an empire and ruled their allies tyrannically.[106] 7. In religious matters the Athenians did not tolerate diverging opinions or deviant behaviour.[107]

All Rahe's points of criticism can be raised not only against the ancient Athenian but also against modern democracies which unquestionably have had individual freedom as an ideal which people tried to uphold.

Re 1. In 1776 when Thomas Jefferson drafted the Declaration of Independence about one fifth of the population of the southern American colonies were slaves. Jefferson owned close to 200 slaves, and when he died in 1826 only five were freed. There were still slaves in USA in 1842 when one could read in the 7th edition of the *Encyclopaedia Britannica* under the entry "democracy" that "the most perfect example of democracy is afforded by the United States of North America at the present day". Slavery was not abolished until 1863, and it was only with the Civil Rights Act of 1964 that black Americans living in the southern states became full American citizens.

Re 2. When President Wilson in his speech to Congress in April 1917 wanted "to make the world safe for democracy" women had no political rights in any of the belligerent powers,

[105] *Ibid.*, 325, n. 41.
[106] *Ibid.*, 179.
[107] *Ibid.*, 182.

except Australia and New Zealand; and in Belgium, Italy and France women had to wait till after the Second World War before they got political rights.

Re 3. In almost all modern democracies guestworkers and refugees have no political rights. In Switzerland, allegedly the stronghold of democracy, over 20% of the population are foreigners without the political rights possessed by citizens.[108]

Re 4. UK has no written constitution and Parliament is empowered to pass any law whatsoever. The only constitutional protection of freedom is UK's accession in 2000 to the European Convention on Human Rights. Until recently several other democracies were organised like Britain and had no constitution until the end of the 20th century.

Re 5. In 4th century Sparta there were indeed walled houses described as private nests,[109] but we do not know whether or not Spartan officials were empowered to penetrate into a private house without a warrant from the *gerousia* or the ephors. And these houses were seen as a defect in Spartan society[110] whereas the inviolability of a citizen's home in Athens was considered to be a democratic ideal protected by the laws.[111]

Re 6. In 1915 all London buses had stuck up a bill with an English translation of Pericles' praise of liberty in the funeral speech.[112] But at that time England ruled an empire whose members were certainly not governed democratically. Like Athens, Britain was a democracy at home but an imperial power abroad.

Re 7. The Athenian trials of people charged with aberrant views about religious or constitutionals matters must be compared with similar trials in modern democracies, and in an American context with the persecution during the McCarthy

[108] *Switzerland in its Diversity* (2007-8), 26.

[109] PLATO *Resp.* 548a-b, *cf.* P. RAHE, *op. cit.* (n. 102), 144.

[110] M.H. HANSEN, "Was Sparta a Normal or an Exceptional *Polis*?", in *Sparta: Comparative Approaches,* ed. by S. HODKINSON (Swansea 2009) 385-416.

[111] DEM. 18.132; 22.51-2. See M.H. HANSEN, *op. cit.* (n. 1), 13-4.

[112] F.M. TURNER, *The Greek Heritage in Victorian Britain* (London 1981), 187.

period of people suspected of communist views and espionage on behalf of the Sovjet Union. The evidence does not support Rahe's view that there were numerous such trials in Classical Athens. In 415 Alkibiades was convicted not because of his parodying the Eleusinian mysteries but because in a private party he had diclosed the secrets to uninitiated persons.[113] Similarly, Diagoras was not convicted of atheism, but of having disclosed the mysteries in his book.[114] Sokrates was probably convicted as a missionary, because, without public permission, he had introduced what could be seen as a new kind of oracle cult based on his *daimonion*. And if the circle around Sokrates had not included so many traitors with oligarchic sympathies, he could probably have continued his criticism of democracy uninterrupted.[115] Rahe claims that there were many such trials in Athens, but the sources are Hellenistic biographies of dubious value. After Sokrates it was an accolade for a philosopher to have been charged with impiety, and the Hellenistic biographers were eager to bestow the honour on quite a few of Sokrates' contemporaries and successors: Anaxagoras, Protagoras, Prodikos, Stilpon, Theodoros, Aristotle and Theophrastos.[116] Anaxagoras may have been put on trial,[117] but the

[113] M.H. HANSEN, *Eisangelia* (Odense 1975), 74-6.

[114] AR. *Av.* 1073 with *scholia*, cf. N. DUNBAR, *Aristophanes Birds* (Oxford 1995), 581-3.

[115] M.H. HANSEN, *The Trial of Sokrates — from the Athenian Point of View* (Copenhagen 1995), 19-31. My views were disputed by S.R. SLINGS in his review in *Mnemosyne* 51 (1998), 501-6, which I countered in "The Trial of Sokrates — from My Point of View", in *Noctes Atticae*, ed by B. AMDEN *et al.* (Copenhagen 2002), 150-8. My reconstruction of the trial is also disputed by A.W. SAXONHOUSE, *op. cit.* (n. 61), 104-5; but she does not mention a main point in my argument, *viz.* that a majority of the citizens who appear in the circle round Sokrates seem to have been black sheep and disreputable persons whom the Athenians had sentenced to death, often *in absentia* (27).

[116] E. DERENNE, *Les procès d'impiété intentés aux philosophes à Athènes au V^me^ & au IV^me^ siècles av. J.C.* (Liège 1930); K.J. DOVER, "The Freedom of the Intellectual in Greek Society", in *Talanta* 7 (1976), 24-54; R.W. WALLACE, "Private Lives and Public Enemies: Freedom of Thought in Classical Athens", in *Athenian Identity and Civic Ideology*, ed. by A.L. BOEGEHOLD, A.C. SCAFURO (Baltimore 1994), 127-55.

evidence for all the other public prosecutions of philosophers for impiety is anecdotal and dangerous to rely on without further information. Even the trial of Anaxagoras is not above suspicion.[118] If we can trust our sources, in order to have a law that warranted a suit of that kind, a certain Diopeithes had to propose and carry a decree that public action be brought against atheists and astronomers, probably a *hendiadys* for atheistic astronomers.[119] In any case, the urgent need for a decree in order to have Anaxagoras put on trial indicates that the Athenians did not normally interfere with what people thought about the gods as long as they did not profane the mysteries or mutilate the Herms or commit other acts of impiety.

None of the objections made by Rahe disprove the sources that show that the Athenians cherished individual freedom and that — within the limits dictated by the nature of ancient societies — they lived up to their ideal. Besides, is there any example in world history of a society that has lived up to its own ideals one hundred per cent? Rahe for his part is conscious of the fact that all his charges against Athenian democracy have parallels in modern democracies but holds that one must "recognise as anomalous in modern democracies phenomena which are clearly illiberal vestiges of the premodern world". As indicated above Re 1-7, that is to whitewash modern democracies in order to blacken the Athenian one.

The only one of Rahe's objections that is potentially relevant is the last one. I admit that the trial of Sokrates may have been an infringement of the individual's freedom of expression. If so, it was in my opinion a miscarriage of justice and not, as Rahe may argue, a juridically justified verdict passed by an illiberal democracy. Our sources do not allow us to decide the issue since we cannot any longer reconstruct the case for the

[117] E. DERENNE, *op. cit.* (n. 116), 13-41.
[118] K.J. DOVER, *art. cit.* (n. 116), 29ff; R.W. WALLACE, *art. cit.* (n. 116), 136-7.
[119] PLUT. *Per.* 32.2-5; *Mor.* 169e; DIOD. 12.39.2; DIOG.LAERT. 2.12.

prosecution.[120] We cannot even reconstruct the defence. We know from Xenophon's *Apology* that Sokrates had *synegoroi* who spoke in his defence. Any reconstruction of the political aspects of the trial based on Plato's and Xenophon's accounts alone is bound to be defective in as much as it is likely that the political charges were dealt with by the *synegoroi*.[121] Furthermore, it must be kept in mind that the trial of Sokrates took place only four years after the second oligarchic revolution and less than two years after the civil war between Athens and Eleusis. 399 was not a 'normal' year. Once again a modern parallel is revealing. The terrorist attack on USA on 9/11 caused almost all democratic states to impose restrictions on fundamental rights and freedoms such as the protection of person and freedom of speech. Antiterrorist laws have made modern democracies less democratic, and nine years after 9/11 there is still a prison at Guantánamo Bay where USA detain prisoners who have never had the opportunity to appear before a court. From a democratic point of view the years after 9/11 have not been 'normal years'.

V

To conclude: if the Athenians had no notion of individual freedom, how can it be that it appears as an ideal in the sources that praise democracy? And that it is criticised as a misunderstanding of man's purpose in life in sources that take a negative view of democracy? If the Athenians had no notion of individual freedom, it is a mystery to me that they are able to describe it in words and phrases that are so close to those used by modern

[120] M.H. HANSEN, *op. cit.* (n. 115), 4, 7-15, 31.

[121] XEN. *Ap.* 22. M.H. HANSEN, *op. cit.* (n. 115), 13-14. That it was the rule rather than the exception to have *synegoroi* in public actions is demonstrated by L. RUBINSTEIN, *Litigation and Cooperation. Supporting Speakers in the Courts of Classical Athens* (Stuttgart 2000), 58-65.

champions of freedom, *viz.* that people in a democracy are allowed to live their private lives as they like or that an essential difference between democratic Athens and oligarchic Sparta is that in Athens one is allowed to praise the Spartan constitution and way of life whereas in Sparta it is an offence to praise any other constitution than the Spartan (Dem. 20.105-8).

I find it incomprehensible that scholars can deny that the Athenian democrats cherished individual freedom 'as an ideal'. Whether they lived up to their ideal is a different question. That issue cannot be settled by referring to Euripides or Thucydides or Demosthenes. But here the philosophers are valuable sources. Both Plato and Aristotle give voice to the view that democratic freedom to live as one likes was not just an ideal but — alas — a reality, and that is one of their reasons for rejecting democracy as a debased form of constitution. Plato in particular but Aristotle too would not have focused on individual freedom as one of the most objectionable aspects of democracy if "to live as one likes" had been an empty rhetorical phrase — professed at the annual public burial of soldiers killed in the course of the year or in some of the tragedies performed at the Dionysia — but of no importance in real life.

Thus Plato and Aristotle are in fact the best sources we have to confirm what the Athenian democrats claimed: that individual freedom in the private sphere to live as one likes was an important ideal and to a large extent a reality too in Classical Athens. One question remains: to what extent did individual freedom in Athens develop into anarchy as claimed by Plato but contested by the Athenian democrats themselves? That issue must be dealt with in a future investigation.

DISCUSSION

C. Farrar: What makes personal freedom (living as one likes) a 'democratic' value? I suggest that the ancient democrats connected the personal and the political (and freedom in the two realms) in a way that we don't — not just that they drew the line in a different place. Everyone, whatever their personal or social characteristics, so long as they are not slaves, is freed from domination by others. Aristotle (in his 'best city' mode) and Plato object to this in one way, but not in another — personal excellence is to be the requirement of political power, and order will therefore suffuse both realms. They (like the democrats) say they do not want to 'read off' from conventional sources of personal and political domination to political entitlement — but they do want to tie political power to a personal characteristic, namely excellence or merit.

M. Hansen: Since Athens was a direct and not just a representative democracy, citizens could connect the personal and the political in a way that we don't. I agree. We must not forget that excellence and merit were important principles in Athenian democracy. Even in a direct democracy there has to be 'leaders' and 'followers'. What the Athenians required from their *rhetores kai strategoi* was that their leadership was based on excellence and merit, see, e.g., Thuc. 2.37.1 and the numerous honorary decrees passed by the Athenians in honour of their leaders (e.g., Aeschin. 3.49-50; *IG* II^2 223 A 11-12).

C. Farrar: For the Athenians, democratic political institutions gave both freedom (in the private sphere) and power (in the public sphere) to people who were not deemed to be entitled to either. So just as 'everyone' is entitled to rule and be

ruled (or not), so too 'everyone' is free in the private context. This private freedom is primarily, I suggest, freedom from interference from other individuals (as in Pericles' Funeral Oration and Thuc. 7.69.2, and as you yourself indicate, p. 330; and note your conclusion that the argument against 'just living as one likes' occurs in public actions, not private ones).

M. Hansen: I agree that at 2.37.2 Thukydides mentions freedom from interference from other 'individuals', but at 7.69.2 the reference must be to freedom from interference from the *polis*. Nikias speaks about everybody's right (ἐξουσίας) in Athens not to be under command (ἀνεπιτάκτου) in one's daily life (ἐς τὴν δίαιταν).

I suppose that by "people who were not deemed to be entitled to either" you understand ordinary citizens, i.e. the 'followers' who did not possess the excellence required from the democratic 'leaders'. In this context I find it worth adding that Aristotle — but not Plato — was open to the view that the limited wisdom of ordinary citizens could be added up when they attended an assembly, and that — in this way — the assembly as a whole could possess more wisdom than any individual person or narrow group of meritous persons (*Pol.* 1282a16-17).

C. Farrar: I agree with you that the Athenian democracy did respect individual (though not human) rights, and they did distinguish public from private. But I don't think that they did so because they were reconciling a 'negative' and a 'positive' view of freedom. Instead, they were keen to ensure a principle of non-domination in both realms, through democratic institutions in which everyone could participate. The distinction between public and private was important because in the public realm, when they were making and enforcing laws, citizens were called upon to act as citizens — a self-understanding built through institutions like rotation and the lot — not just as private individuals with private interests, whims, and desires. As Aristotle says (*Pol.* 1279a8f), it is because of the principle of

taking turns to rule that 'despotism' is prevented, and the interests of all are preserved.

M. Hansen: I agree with you that the Athenians "were keen to ensure a principle of non-domination in both realms, through democratic institutions in which everyone could participate". But that is not incompatible with the view that they had to reconcile the positive (political) and the negative (individual) view of freedom by distinguishing between a public and a private sphere of life.

Any view of democratic freedom — ancient as well as modern — has to face the problem that there is an inherent opposition between positive political and negative individual freedom (see p. 312). If one maximises the sphere of individual freedom, there is no room left for political decision making in which to participate. The result is anarchy (Plato's and Aristotle's view of Athens). If one maximises the sphere political freedom there is no room left for doing anything unobstructed by others. The result is a totalitarian society (many Athenian democrats' view of Sparta). So today — as well as in ancient Athens — the precondition for combining the two aspects of freedom is to distinguish between a public sphere in which we participate in political decision making (directly in Athens, indirectly in modern democracies) and a private sphere in which we can live as we please without interference from the state or from other individuals. In Athenian political thought the distinction was between the public (τὸ κοινόν or δημόσιον) and the private (τὸ ἴδιον), in modern liberal democracy the commonly made distinction is between state and civil society.

In Athenian sources the distinction appears in what seems to be a paradox: in sources praising the Athenian constitution we are told that to live as one likes is an essential aspect of democratic freedom (pp. 321-3 *supra)*. In speeches for the prosecution in public actions we are told the opposite: that to allow the defendant to live as he likes is an offence which undermines law and society (pp. 324-5 *supra)*. These two apparently

contradictory views, however, are perfectly compatible when connected with the distinction between the private and the public sphere.

Plato and Aristotle, however, did not accept a distinction between a public and a private sphere and they criticised the democrats for making it. Plato in particular thought that in the best *polis* everything had to be under public control, and to a large extent Aristotle was inclined to share this view. As I have argued here and shall argue in more detail in my forthcoming article (see p. 330 n. 91) they held that to allow people to live as they like would lead to anarchy (Plato *Resp* 563d; Arist. *Pol.* 1319b28).

C. Farrar: This is very different from modern democracy (despite the language of self-determination) — modern citizens are not equally free to rule, so their personal freedom is not in this way continuous with political power. Modern systems can be 'liberal' (i.e. enforce the rule of law, and protect human rights), and even give everyone the right to vote, without being fully democratic (i.e. without giving all citizens "the power to take part in the deliberative or judicial administration", Arist. *Pol.* 1275b19-20). Modern citizens are in effect self-ruled 'only' in the private sphere. Robert Dahl once observed that individual freedom secured by rights can be seen as the consolation prize for the modern citizen's loss of political power. I think this is misleading: Athenians enjoyed personal freedom precisely because of their status as powerful citizens of a democratic *polis*.

M. Hansen: Yes, "modern citizens are self-ruled 'only' in the private sphere" because in the public sphere they do not have "the power to take part in the deliberative or judicial administration" but just the right to vote. The Athenian citizens were self-ruled both in the public and in the private sphere. That constitutes, as you say, an essential difference between ancient 'direct' and modern 'representative' democracy

When Robert Dahl sees individual freedom as a "consolation prize" he is echoing what Constant predicted in 1819 and warned against: if enjoying modern individual freedom we give up all claims to political freedom we end up as passive subjects of the rulers.

K. Piepenbrink: Ich stimme Ihnen zu, dass die Athener in bestimmten Kontexten eine derartige Unterscheidung vornehmen. Mein Eindruck ist, dass es daneben auch Situationen gibt, in denen sie eine Interdependenz zwischen den beiden Elementen herausstreichen. Das scheint mir etwa in der Gerichtsrhetorik der Fall zu sein, z.B. wenn ein Kläger für sich reklamiert, Schutz für seine Person bzw. seinen häuslichen Bereich zu suchen (also — wenn man die Begrifflichkeit verwenden möchte — ‚negative Freiheit' zu erlangen) und gleichzeitig bemerkt, dass er dies dadurch erstrebt, dass er sich als Bürger engagiert, indem er eine Klage einreicht (also seine ‚positive Freiheit' nutzt). Einen ähnlichen Zusammenhang hat m.E. D. Cohen herausgearbeitet, als er den Nexus zwischen Gesetzesherrschaft und individuellen Rechten im Athen des vierten Jahrhunderts aufgezeigt hat (siehe D. Cohen, "Democracy and Individual Rights in Athens", in *ZRG Rom. Abt.* 114 [1997], 27-44, bes. 32-34).

M. Hansen: You are right. In many cases negative and positive freedom were both involved simultaneously. Enjoyment of individual rights in the private sphere presupposes the protection of these rights by the political institutions in the public sphere. In Athens both the Assembly and the popular courts were manned with ordinary citizens who volunteered (*hoi boulomenoi*). Thus a prosecutor in a private or public action concerning the infringement of an individual right would make use of his positive freedom to defend his negative freedom.

A. Lanni: Critiques of the modern public/private distinction have pointed out that the line between public and private is

exceedingly fuzzy, and perhaps even nonsensical since so much of what we consider 'private' is dependent on protection provided by public acts. Can you elaborate on where the Athenians drew the line between public and private? Were the City Dionysia and other religious festivals, for example, considered public or private?

M. Hansen: The City Dionysia and other similar festivals were certainly public, but at the same time private individuals could make dedications and perform sacrifices in public temples, and, e.g. the house cults of Hestia and Zeus Herkaios were presumably private whereas there were public cults of the two deities as well, see R. Parker, *Athenian Religion* (Oxford 1996), 5-7. To draw a clear line between the public and private was impossible in ancient Greece, just as it is today. But at the same time the opposition between the public and the private was important in Classical Athens, just as it is today, both in theory and in practice. And τὸ ἴδιον *versus* τὸ κοινὸν or δημόσιον is an opposition attested again and again in all our sources. Yes, individual freedom (in the private sphere) is indeed "dependent on protection provided by public acts". For a treatment of the issue, see my chapter "The Opposition between the Private and the public", in *Polis and City-State* (Copenhagen 1998) 86-91 = *Polis et cité-état* (Paris 2001) 128-35.

A. Lanni: At the end of your paper you raise the question of whether the Athenians lived up to their ideal of protecting individual freedom and the private sphere. I believe that they did not. The prevalence of informal social sanctions (e.g. Xen. 1.7.35; Lys. Fr. 38; Dem. 25.63; Thuc. 2.37.3) — and the potential seriousness of such sanctions in a rural society where one was dependent on neighbours and friends to survive downturns— must have severely restricted individual freedom. Moreover, in practice, the distinction between public and private behavior was not maintained. As I contend in "Social Norms in the Courts of Ancient Athens," in *Journal of Legal*

Analysis 1.2 (2009), 691-736, litigants argue that verdicts should turn in part on the extent to which they and their opponents had adhered to a variety of norms of private behavior, from their treatment of relatives and friends to their sexual behavior. In this way, the Athenian popular courts did not respect a 'private sphere' but rather actively enforced private social norms.

M. Hansen: Yes, I agree that the practice in Athenian courts to treat the opponent's character and way of life must have had an influence on social behaviour and thereby restricted a citizen's negative freedom to live as he liked. That is an important point. But, as far as I know, it is the same in modern democracies. For a comparison in this respect between ancient Athenian and modern Danish administration of justice, see L. Rubinstein, *Litigation and Cooperation* (Stuttgart 2000), 194 n. 21, 212-18. I suppose you can supply the literature for the American and British systems. Even in modern democracies, one's social behaviour in general is important for how one is treated in a law court and in this way modern democratic courts too tend to restrict the field within which people can live as they like.

Chr. Mann: Die Analyse der philosophischen Diskurse leuchtet mir ein, ich frage mich allerdings, ob die Athener ihre individuelle Freiheit durch die Demokratie geschützt sahen. Für die Aristokraten gilt dies sicherlich nicht, sie sahen sich einem starken normativen Druck seitens des *demos* ausgesetzt. Zu leben, wie man wollte, hieß für die griechischen Aristokraten, ihren sozialen Status öffentlich zu präsentieren, aber genau in dieser Hinsicht fühlten sie sich durch die demokratische Ordnung eingeschränkt, wie vor allem die Quellen des 5. Jahrhunderts zeigen. Was die Bauern in den Dörfern Attikas betrifft, wurde die individuelle Freiheit weniger durch rechtliche Regelungen als durch soziale Kontrolle eingeschränkt. Hier trat nach den Reformen des Kleisthenes ein Wandel ein,

indem die Demenorgane gestärkt wurden (W. Schmitz, *Nachbarschaft und Dorfgemeinschaft im archaischen und klassischen Griechenland* [Berlin 2004], 411-66). Für mich stellt sich daher die Frage, welche Gruppen der athenischen Bürgerschaft von dem Schutz individueller Freiheiten profitierte, welche die athenische Demokratie Deiner Meinung nach mit sich brachte.

M. Hansen: I agree with you that "zu leben, wie man wollte, hiess für die griechische Aristokraten, ihren sozialen Status öffentlich zu präsentieren". It has often been noted that one of the fascinating aspects of Athenian democracy is that most democratic leaders in the fifth century and many in the fourth were members of the old upper class families who — apparently without much regret — gave up the aristocratic form of ruling the people and came to lead the people instead (cf., e.g. J.K. Davies, *Athenian Propertied Families* [Oxford 1971], xvii; E. Stein-Hölkeskamp, *Adelskultur und Polis-gesellschaft* [Stuttgart 1989], 235-7). They had ample opportunity to demonstrate their social status, e.g. by being prominent speakers in the Assembly, by performing liturgies, and if — like Alkibiades — they were victorious in the Olympic games, such triumphs were seen to lend lustre to the *polis* as well as to the winner personally (Isoc. 16.32-5). There were, of course, other aristocrats who after the introduction of democracy preferred to turn their back on politics and to live as passive citizens who minded their own business. They are scorned by Perikles in the Funeral Oration (Thuc. 2.40.2), but their attitude was respected and in Athens negative individual freedom comprised the right to stay out of politics (see p. 331). The opportunity for the aristocrats to adjust themselves to democratic government and democratic freedom was eased by the fact that democratic equality was restricted to the political sphere. In Athens there was never any attempt during the democracy to demand and implement a redistribution of land (ἀναδασμὸς γῆς) or a cancellation of debts (ἀποκοπὴ χρεῶν).

The individual freedom enjoyed by small farmers is a different matter. In the Greek *polis* in general and in Athens in

particular there was no sharp barrier between an urban and a rural population. Many farmers must have been *Ackerbürger,* i.e. they lived in Athens but had their fields in the hinterland outside the walls. Farmers settled in the inland and coastal demes seem to have visited Athens frequently, as demonstrated, e.g. by the dicastic *pinakia*, cf. my *The Athenian Ecclesia* 2 (Copenhagen 1989), 233. Therefore I suspect that the '*Dorfgemeinschaft*' mattered less in Ancient Greece than in Medieval and new modern Europe. The freedom to speak one's mind is claimed to be a privilege open not only to citizens, but also to foreigners, women and slaves (see p. 323). And the unbound life style in everyday social relations is not only praised by democrats, but also severely criticised by those who dislike democracy (the Old Oligarch, Isokrates, Plato and Aristotle, see p. 326). The criticism indicates that it was at least to some extent a reality and not just empty praise. On the other hand, in daily life there must have been a social pressure, sometimes a strong social pressure. There is in all societies, non-democratic as well as democratic, ancient as well as modern, *cf.*, for example, what Tocqueville has to say about the strong social pressure in the American democracy, *De la démocratie en Amérique* (Paris 1835-40), 2.7.7, (293-4 in the Pléiade edition).

O. Murray: I agree with your rather negative interpretation of the influence of Isaiah Berlin's inaugural lecture of 1958. That was of course a seminal paper in the rhetoric of the Cold War, which has to be considered alongside those other great texts of the age — Karl Popper's *The Open Society and its Enemies* of 1945 (revised 1952) and his *The Poverty of Historicism* of 1957. Later one discovered that much of this activity, in the famous literary journal *Encounter* and elsewhere, had been funded by the CIA, often without the knowledge of the protagonists: that would indeed be an interesting study in the secret history of liberty. But I too have received hospitality from the Liberty Fund, as well as its Soviet equivalent. It is a

great pity that, like many of us as we get older, Berlin was unwilling to revise his opinions.

I think however that you have still accepted too much of Berlin's view of the history of liberty. The rediscovery of Benjamin Constant was much earlier than you suggest: it is due to Benedetto Croce and his disciples in the 1930s (see B. Croce, *Constant e Jellinek intorno alla differenza tra la libertà degli antichi e quella dei moderni* [Napoli 1930], whose importance was recognised in a review by A. Momigliano in *RFIC* ns IX [1931], 262-4); Croce was translated into English by his disciple R.G. Collingwood; and his view of liberty was fundamental to liberal European thought before and during the Second World War. The distinction that Berlin was trying to make is already the basis of Momigliano's lectures as a refugee, "Peace and Liberty in the Ancient World", given in Cambridge in 1940 (Italian translation, *Pace e libertà nel mondo antico,* a cura di R. Di Donato [Roma 1996]; the English original will shortly be published).

Moreover you seem to follow Berlin in ignoring the importance of religion in the history of liberty; as Lord Acton saw, Christianity was fundamental to the conception of a sphere of personal freedom of thought — and not just once in the age of persecutions, but again in the development of the idea of freedom of religious thought from Protestantism to the American Revolution. An Anglican Christian addresses almost daily a God "whose service is perfect freedom" (*Book of Common Prayer, Second Collect, for Peace*).

M. Hansen: Concerning Benedetto Croce I note that, once again, you have drawn attention to a book which is practically unknown to others — including me — who write about the issue of negative and positive freedom. In Stephen Holmes' monograph on Constant there is no reference to Croce. Once again Momigliano seems to be the intermediary figure. I look forward to seeing the publication of the English original of his lecture.

Concerning religion, I do not want to ignore or play down the importance of religion in the history of freedom. As you note, it was ignored by Berlin. It was ignored by Constant too and, to the best of my knowledge, it is not a key issue in the discussion about the relation between negative and positive freedom. I intend to take it up in a future study about other aspects of the history of freedom.

O. Murray: Since we are discussing the relevance of ancient ideas to the modern world, a student of the modern idea of freedom might well respond to both Berlin and yourself that the concept of liberty is more complicated. There is much to recommend the view of Idealism from Hegel and Croce, that sees the history of humanity as the history of liberty: the continuous thread in western history at least is the developing idea of freedom, which has changed and will continue to change its meaning in each successive age. But I wonder whether this can still satisfy us from a multi-cultural perspective. What is the Arabic for 'liberty', and how does it differ from western ideas? And what is the Chinese concept of liberty? I have found no enlightenment on these crucial questions for the future of the human race in either the *Muqaddimah* of Ibn Khaldun or the *Analects* of Confucius. We desperately need an answer to the question whether there is anything outside the western tradition that corresponds to the central importance of the theme of liberty in our history.

M. Hansen: As you correctly point out, to see the history of humanity as the history of liberty may be a thread of western history which dominates idealism from Hegel to Croce. But it is a narrow view which overlooks that in the Christian tradition equality matters much more than liberty. And during the Enlightenment — before romanticism and idealism — liberty was usually balanced by equality. Furthermore to focus on liberty is a western view of civilisation. As you say, neither in Muslim nor in Chinese civilisation is there any notion of freedom as a right the individual has against state and society.

O. Murray: I am not at all sure that Constant arrived at his view of the two types of liberty because he regarded Sparta as the typical Greek *polis*; his thesis related to the whole of antiquity, not simply to Greece: he saw no sign of the modern type of liberty in Rome either. And you perhaps exaggerate the exception that he made of ancient Athens: he does after all offer the Athenian institution of ostracism as an example of the absence of the modern idea of liberty and the power of the ancient community over the rights of the individual.

M. Hansen: You are right that Constant's thesis relates to the whole of antiquity. Even ancient Gaul gets a mention (592) alongside Sparta, Athens and Rome. But I hold that Sparta and Athens take centre stage and in several passages Rome is referred to alongside Sparta (595, 597, 599, 600). Like the Spartans, the Romans had no notion of the modern kind of freedom. Note that Rousseau and Mably are the two philosphers singled out and severely criticised by Constant (604-6). They were both Spartophiles and in particular Mably is taken to task by Constant for his misguided admiration for Sparta and his equally misguided contempt for Athens (606). Constant's explicit description of Athens as "the exception" shows that he followed the prevailing French view during the Enlightenment that Sparta was the normal *polis*. But the Athenian exception is so important to Constant because the Athenians' dual conception of freedom serves as the outstanding historical model for his main thesis in the lecture: that ancient political and modern individual freedom must exist side by side and that neglect of political freedom will lead to servitude (616-19). You are also right that Constant's positive evaluation of Athenian freedom does not preclude that he is critical of some Athenian institutions, for example ostracism (see p. 316 n. 41).

O. Murray: Your discussion of Arist. *Pol.* 6.2 does not solve what is for me the central puzzle. I believe you are right to

emphasise that in ancient Athens there were two aspects of the democratic argument in favour of democracy. But I am still left with the question, what is the source for this doctrine? W.L. Newman in his great commentary simply attributes it to *hoi demotikoi*, which does not help much. We find traces of such views elsewhere of course, as the much derided book of E.A. Havelock, *The Liberal Temper in Greek Politics* (1957) showed — in Thucydides' funeral oration, in Plato's *Protagoras*, in Euripides' *Supplices*. One of its most famous expressions is, as you say, in the debate on constitutions in Hdt. 3, with Otanes' declaration "I do not want either to rule or to be ruled", a slogan that I have seen written on a wall in Athens as an election manifesto, presumably of an anarchist group. The latest Herodotus commentary of David Asheri rightly says "the maxim is worthy of a philosopher" (p. 476). But what philosopher? I fear that as long as we cannot answer this question, we are always open to the perfectly reasonable objection that Aristotle was not referring to any developed body of democratic doctrine, but had simply distilled these ideas from his own interpretation of the logic of the democratic position — in which case he could be held to have been the originator of this coherent democratic theory. Indeed the reference you cite in note 50 from Jonathan Barnes to support your view specifically leaves open these two possibilities: "Does Aristotle recognize the two sorts [of freedom]? He seems to be talking *in propria persona*; but given his rejection of the 'democratic' definition of freedom at 5.9 1310a27-36, it may be that the present passage is in implicit *oratio obliqua* — Aristotle is reporting, and not endorsing, a democratic view".

M. Hansen: The subject of φασι at 1317b1 must be πάντες οἱ δημοτικοί at b11. Thus Aristotle states that he reports a view allegedly shared by all democrats, probably politically active citizens as well as philosophers. This interpretation is — as I argue — confirmed by the sources we have: Thucydides, Euripides, and Demosthenes in particular. There was 'a devel-

oped body of democratic doctrine' which can be traced back to the fifth century.

However, not all the statements made in the passage 1317a40-b17 are a report of democratic views. Aristotle has inserted three comments in which he states his own — critical — view of democratic ἐλευθερία, see the quote p. 318 note 49 *supra*. The third comment runs from ἐντεῦθεν at b14 to ἴσον at b17. So τὸ μὴ ἄρχεσθαι, μάλιστα μὲν ὑπὸ μηθενὸς, εἰ δὲ μή, κατὰ μέρος is not what the democrats hold, but Aristotle's own inference and again he blames arithmetic equality.

Otanes' statement at Hdt. 3.83.2 is different. It must be seen in the context of the previous debate among the seven Persian nobles. In context οὔτε γὰρ ἄρχειν οὔτε ἄρχεσθαι ἐθέλω means "I do not want to be king nor do I want to be ruled by a king". The result is that he and his descendants become ἐλεύθεροι (83.3) and the link to democracy is that Otanes was the noble who argued in favour of democracy during the debate (80). A democratic citizen or philosopher 'living in a democracy' would not hold the view "I do not want to rule nor do I want to be ruled". His view would be that he would rule together with his fellow citizens and be ruled by the laws and by the officials in annual rotation. That he would prefer not to be ruled at all is Aristotle's and Plato's dismissive analysis of the consequences of having a democratic constitution.

IX

PAULINE SCHMITT PANTEL

DÉMOCRATIE ATHÉNIENNE, DÉMOCRATIE MODERNE: LE RAPPORT À LA RELIGION

Je partirai de quelques remarques préliminaires. Et tout d'abord je ferai une double constatation. Toute synthèse sur la religion grecque à l'époque classique commence par souligner l'importance des liens de la religion avec la *polis*, mais rares sont les études qui abordent la question des liens spécifiques de la religion avec la démocratie. Les recherches très nombreuses sur la démocratie grecque, et particulièrement sur la démocratie athénienne, n'offrent quasiment pas d'analyse sur les rapports entre la religion et ce type de régime politique.[1] Pourquoi? La question proposée à notre réflexion et discussion: religion et démocratie athénienne, est-elle sans fondement et donc soit impossible à traiter, soit même sans intérêt? Je ne le pense pas à condition de trouver un angle d'attaque qui permette de ne pas brasser un domaine trop large comme celui des relations entre religion et cité. Autrement dit à condition de choisir des exemples significatifs de ce rapport, qui ne pourront pas prétendre à l'exhaustivité ni à plus forte raison permettre une synthèse.

[1] Mon inventaire a porté sur les livres parus durant les vingt dernières années, à la fois individuels et collectifs; les '2500 ans de la démocratie athénienne' ayant suscité bien des publications. Parmi les exceptions, R. PARKER, *Athenian Religion. A History* (Oxford 1996) et L.J. SAMONS II, *What's wrong with Democracy? From Athenian Practice to American Worship* (Berkeley 2004).

Dans le monde contemporain, 'aujourd'hui', le rapport entre religion et démocratie, qui est au cœur des préoccupations politiques et des prises de positions idéologiques depuis longtemps, connaît un regain d'intérêt dont il faut comprendre les raisons. La montée des fondamentalismes est bien sûr un élément décisif de ce processus. D'une certaine manière, la question posée lors de ces *Entretiens* est plus une question du présent que du passé. Toutefois la grande diversité des régimes démocratiques contemporains rend impossible une étude sérieuse des singularités de ce rapport d'une démocratie à une autre et très aléatoire une généralisation.

Enfin la question qui est au cœur des *Entretiens*, celle des traditions et des influences entre la démocratie athénienne et la démocratie moderne, est, sur le thème précis de la religion quasiment sans objet, du moins à mon sens.

Je vais donc naviguer entre les écueils et je ne propose pour le moment que des remarques à la fois impressionnistes et dispersées. Les participants aux *Entretiens* par leurs questions et leurs remarques me permettront d'aller plus avant dans un sujet qui se révèle, pour moi en tout cas, difficile.

Comparer

Sur le statut de la comparaison entre le monde antique et 'nous', je rappellerai les remarques de Pierre Vidal-Naquet. Dans la préface écrite pour l'édition française du livre de Moses I. Finley, *Démocratie antique et démocratie moderne*,[2] préface intitulée "Tradition de la démocratie grecque", l'historien se pose cette question: "Y a-t-il une comparaison possible et sérieuse entre la démocratie grecque et la nôtre?". Et il précise en quoi à son avis la démocratie athénienne nous concerne.

[2] M.I. Finley, *Démocratie antique et démocratie moderne* (Paris 1976).

"Il ne s'agit pas certes de dire qu'Athènes était belle car Pékin ou Borobudur le furent ou le sont aussi, ni que notre culture est imprégnée de culture grecque car c'est chaque jour un peu moins vrai, ni qu'Isocrate avait du bon, car son programme éducatif n'a plus grand chose à nous dire... La Grèce n'est pas dans notre histoire et pour comprendre celle-ci nous n'avons nul besoin de savoir comment fonctionnait l'assemblée athénienne, ce qu'était la Boulé et comment était appliqué l'ostracisme. Ce qui est dans notre histoire ou du moins dans une partie de notre histoire et que nous ne pouvons en arracher parce qu'elle est le passé, c'est le dialogue avec la Grèce et d'abord avec les textes grecs. La réélaboration, tantôt sous la forme mythique ou idéologique, tantôt sous la forme du travail critique et scientifique de l'héritage grec est une des données de notre histoire intellectuelle, qui s'exprime dans la création, sans cesse renouvelée, de nouveaux modes de discours, de nouveaux concepts, de nouveaux champs épistémologiques ...".[3] Ce qu'il est légitime d'étudier, si l'on suit Pierre Vidal-Naquet, est le travail d'interprétation, génération après génération, du discours démocratique des Grecs. Autrement dit une enquête historiographique. Il n'est pas question dans ce texte, ni dans toute l'introduction, des rapports entre démocratie et religion.

Ce sujet ne passionne pas Moses I. Finley non plus dans le livre que je viens de citer. Les circonstances des trois conférences qui sont à l'origine du livre l'expliquent. M. Finley de retour à Rudgers en 1972, université dont il avait été chassé en 1952 par le maccarthisme, a pour objectif principal de comprendre comment et sur quoi se construit le discours politique justifiant la démocratie réelle ou supposée. Il mentionne toutefois la religion à propos de la constitution du sentiment de *koinonia* (fait de *philia* et de *dikê*) qui lui paraît essentiel en

[3] P. VIDAL-NAQUET, "Tradition de la démocratie grecque", préface à M.I. FINLEY, *op. cit.* (n. 2), 39-40. Repris dans *Les grecs, les historiens, la démocratie* (Paris 2000), 219-45.

démocratie. "A mon avis ce sens de la communauté fortifié par la religion d'Etat, les mythes et les traditions fut le ressort essentiel des succès de la démocratie athénienne sur le plan des faits. Ni l'assemblée souveraine et le droit d'y participer sans restrictions, ni les jurys populaires, ni le choix des magistrats par tirage au sort, ni l'ostracisme, n'aurait pu éviter soit le chaos d'une part, soit la tyrannie de l'autre, s'il n'y avait eu assez de contrôle de soi dans le corps des citoyens pour maintenir dans de justes limites le comportement de tous".[4] Le contrôle de soi, caractéristique du démocrate selon Finley, est donc un produit de la vie en commun sous tous ces aspects, des pratiques parmi lesquelles la religion a une place importante.

M. Finley revient sur ce point quand il parle des procès en impiété et de la condamnation de Socrate. Voici quelle est son explication de la loi de Diopeithès (votée entre 432 et 429 avant J.-C.) et de son application contre Anaxagore puis contre Socrate: "La peur qui transparaît dans la loi de Diopeithès et dans les procès qui en découlèrent doit être identifiée pour ce qu'elle prétend être: la peur que les fibres religieuses et morales de la communauté fussent atteintes par la corruption des jeunes gens et tout particulièrement des jeunes appartenant à l'élite sociale [...] De jeunes aristocrates avaient organisé un club appelé les *kakodaimonistai* (littéralement "les adorateurs du diable") dont le programme était de se moquer de la superstition et de mettre les dieux à l'épreuve en dînant les jours néfastes [...] Ils étaient, Platon le fait admettre à Socrate dans son *Apologie,* les jeunes disciples de Socrate".[5] Dans ces deux passages, la religion apparaît comme un fondement de la communauté.

Enfin M. Finley esquisse une comparaison entre les Grecs et nous en remarquant: "Les deux premières interdictions du premier amendement à la constitution des Etats-Unis: 'Le Congrès ne fera pas de loi concernant l'établissement d'une

[4] M.I. FINLEY, *op. cit.* (n. 2), 80-1.
[5] *Ibid.*, 168-9.

religion officielle ou restreignant la liberté de parole' auraient été incompréhensibles pour un Athénien. Et s'il les avait comprises, il les aurait jugées abominables. La religion grecque était profondément liée à la famille et à l'état".[6] Et en une page aussi rapide qu'impeccable, M. Finley résume toutes les caractéristiques de la religion grecque. Sur la comparaison qu'il esquisse avec le monde contemporain je reviendrai plus tard.

Jean-PierreVernant a également peu écrit de façon explicite sur le rapport entre la religion et la démocratie. Dans un texte où il réfléchit à son engagement politique et particulièrement à ses activités de militant communiste, enraciné, comme il le dit, dans l'antifascisme, de façon un peu surprenante il en vient au thème du "polythéisme, monothéisme et démocratie ".[7] Il s'interroge sur le lien entre le polythéisme et la forme du régime. "Même si un lien existe entre l'invention de la démocratie à Athènes et le polythéisme grec, il ne faut pas perdre de vue que les religions polythéistes ne s'accompagnent généralement pas de la démocratie [...] On ne peut donc pas poser une relation directe et simple entre polythéisme et démocratie, monothéisme et système autoritaire. Une religion monothéiste peut être un obstacle à la démocratie, mais pas nécessairement".[8] Puis il insiste sur la liberté que laisse à l'individu la religion polythéiste, ce qui est a priori paradoxal. "En Grèce la religion polythéiste recouvre toute la vie sociale, les magistratures ont une dimension sacrale. Mais cette imprégnation de l'existence collective y compris la sphère politique par le religieux ne revêt pas la forme d'une contrainte intellectuelle. Sans Eglise ni clergé, sans dogme ni credo, sans théologie, la religion réglemente bien l'ensemble des pratiques du culte mais elle ne domine pas la vie de la pensée. Elle laisse subsister en dehors d'elle des espaces où se

[6] M.I. FINLEY, *op. cit.* (n. 2), 139-40.

[7] J.-P. VERNANT, "Le trou noir du communisme", in *Œuvres. Religions, rationalités, politique* (Paris 2007), 2166-71.

[8] *Ibid.*, 2169.

développe l'enquête sur le vrai, par la négation critique, la discussion argumentée, le débat contradictoire".[9]

Ce n'est pas dans les synthèses sur la religion grecque écrites par J.-P. Vernant qu'il faut chercher une réflexion sur la démocratie et la religion, mais plutôt dans les études précises de certains mythes et de certaines pratiques comme celle du sacrifice. Là, J.-P. Vernant voit se construire un système qui lie la pratique égalitaire de la découpe de la viande et de sa consommation avec la répartition égalitaire du pouvoir. La cité du sacrifice est isonome mais l'égalité devant la loi ne suffit pas à définir la démocratie. Il faut aussi lire la réflexion menée conjointement avec Pierre Vidal-Naquet sur *Mythe et Tragédie.*[10] J'en parlerai plus loin.

J.-P. Vernant n'a pas abordé de front cette question pour des raisons de méthode. Bien que très soucieux du contexte historique de l'élaboration des rites et des mythes qu'il étudiait, et de l'évolution dans le temps des croyances, il n'a jamais écrit une 'histoire' de la religion grecque, au sens restreint que l'on donne parfois à 'histoire': événementiel et chronologique.

Une religion politique

Avant d'interroger les liens éventuels entre la démocratie athénienne et la religion, il faut se débarrasser de toute une série d'habitudes de lectures qui traînent, en particulier celles qui visent à compartimenter l'expérience religieuse grecque en de grands domaines, une construction héritée d'une vision christiano-centrique du polythéisme antique. Ainsi Pierre Brulé critique la manière dont les historiens cloisonnent les manifestations de la religion grecque en quatre grands domaines: la

[9] *Ibid.*

[10] J.-P. VERNANT, P. VIDAL-NAQUET, *Mythe et tragédie en Grèce ancienne* (Paris 1972) et ID., *Mythe et tragédie deux* (Paris 1986).

religion civique-étatique-poliade-patriotique-officielle-publique (le mot gigogne est de lui), la religion populaire, la religion individuelle, la religion personnelle.[11] Ces quatre 'religions' sont décrites comme en partie antagonistes. Les Grecs ont-ils découpé en tranches leurs conceptions des dieux, du sacré, de la piété? Ou est-ce le discours des modernes qui procède ainsi? se demande-t-il. Je le suivrai volontiers dans cette critique et dans la proposition qu'il fait d'abandonner toutes ces appellations pour n'en conserver qu'une: celle de religion politique, partant du constat maintes fois fait qu'à l'époque classique le fait religieux est un fait politique. "Proposition qui se retourne comme un gant: le politique est habité tout le temps et partout par le religieux".[12]

C'est déjà ce que proposait Christiane Sourvinou-Inwood.[13] D'une manière plus radicale peut-être parce que totalement réversible: "Le rôle de la *polis* dans la religion grecque avait pour pendant le rôle d'organisation de la religion dans la *polis*: la religion constituait le cadre et le foyer de la *polis*. La religion était le centre même de la *polis*".[14]

Les caractères de cette religion politique sont bien connus et il est inutile de les rappeler. Je voudrais juste faire remarquer que la plupart d'entre eux ne préjugent aucunement de la forme du régime politique. Une religion de citoyens avant tout, qui fonctionne sur l'inclusion des semblables et l'exclusion des autres, où le 'faire ensemble' est valorisé, dans laquelle l'accès au divin est le même pour tous: ces traits se retrouvent dans une cité oligarchique comme dans une cité démocratique. La

[11] P. BRULÉ, "La religion, histoire et structure", in *Le monde grec aux temps classiques. Tome 2: le IVe siècle,* éd. par P. BRULÉ, *et al.* (Paris 2004), 413-79.

[12] *Ibid.*, 427.

[13] CHR. SOURVINOU-INWOOD, "What is *Polis* religion?", in *The Greek City from Homer to Alexander,* ed. by O. MURRAY, S. PRICE (Oxford 1990), (trad. française: *La cité grecque: d'Homère à Alexandre* [Paris 1992]). ID., "Further Aspects of *Polis* Religion", in *AIONArch* 10 (1988), 259-74.

[14] CHR. SOURVINOU-INWOOD, *op. cit.* (n. 13), 366 [trad. de F. Regnot].

perméabilité constante entre les catégories du politique et du religieux existe à tous les niveaux de l'organisation sociale (*oikos*, dème, *koinon*, cité...). Les questions posées lors de la docimasie, le discours de Cléocritos à Athènes en 404/403, les cas d'*asebeia* en sont des exemples.

Des expressions comme *nomizein theous*, que l'on traduit souvent par "croire aux dieux" et qui signifie exactement "suivre la coutume des dieux" et comme *therapeuein tous theous*, "servir les dieux", expression du don et du contre don, de l'échange, entre les dieux et les hommes, mettent l'accent plus sur les gestes que sur la croyance. Le pouvoir de communiquer avec les dieux n'a rien à voir lui non plus avec la démocratie ou l'oligarchie.

L'abandon du compartimentage de l'expérience religieuse devrait aller de pair avec l'effacement d'une interprétation de la religion en termes de crise et de décadence. Ce qui est bien reconnu pour l'histoire politique et l'histoire des institutions devrait l'être également pour la religion. Pierre Brulé fait remarquer que pour décrire la majorité des fêtes athéniennes classiques (dont les fameuses Panathénées) on a recours à des documents des IV^e^ et III^e^ siècles. Les divinités étrangères et leurs rites, la participation aux mystères, la vogue des cultes de guérison, ne sont pas le signe de la décadence d'autres pratiques mais d'un enrichissement des formes d'un polythéisme qui ne cesse d'évoluer. Et là encore la démocratie a peu à dire.

Bref, si les spécialistes de la religion en écrivent de moins en moins l'histoire, c'est que celle-ci est impossible à faire faute de documents pour l'essentiel du monde grec et même difficile à faire pour Athènes.

Démocratie athénienne et religion: les cultes

Rares sont donc les livres sur la religion grecque qui mettent en perspective religion et démocratie et qui réfléchissent explicitement à un lien éventuel entre les deux. Il ne faut d'ailleurs

pas s'attacher seulement au terme 'démocratie' pour comprendre comment les historiens des religions ont parlé de ce lien éventuel, mais regarder quels sont les critères qui ont paru à ces historiens spécifiques de la démocratie et comment ils ont tenté de les repérer dans la religion. Cela permet de restreindre le champ d'enquête dans le thème très vaste qui serait celui de 'cité et religion'. Mais en même temps les choix risquent de se révéler arbitraires car il n'y a à mon sens aucune définition stricte de la démocratie antique dès lors que l'on réfléchit sur un ensemble de pratiques et d'institutions qui constitue ce que l'on appelle de façon commode une 'culture démocratique'.

Les chercheurs qui ont dressé une liste de thèmes touchant à notre interrogation sont des historiens soucieux de replacer les phénomènes religieux dans un processus historique, voire même chronologique, précis. Ils l'ont fait soit de façon générale en décrivant un ensemble de pratiques et de croyances qui pouvaient relever d'un moment historique particulier: Athènes au V^e siècle par exemple, soit de façon ponctuelle en étudiant un aspect seulement de cet ensemble, par exemple la réécriture des mythes à Athènes au V^e siècle. La mise au point générale récente la plus claire est celle de Robert Parker.[15] Il consacre un chapitre (ou une partie de chapitre) à cette question: "The Fifth Century: Democracy and Empire". Ce chapitre me servira de fil directeur.

Robert Parker rappelle d'abord qu'au V^e siècle à Athènes l'histoire évènementielle et l'histoire de la religion interagissent, dans deux domaines: celui de la démocratie et celui de l'empire. Comment? La constitution nouvelle, celle qu'a mise en place Clisthène, a d'abord des implications religieuses dans le contrôle du peuple sur les structures traditionnelles de la vie religieuse. R. Parker remarque dans l'activité de l'assemblée à la Pnyx le nombre important de décrets pris qui ont à voir avec la

[15] R. PARKER, *op. cit.* (n. 1).

religion. Plusieurs décrets traitent des aspects financiers des cultes: des taxes payées par des propriétaires de bateaux ou des marchands pour des divinités inconnues du cap Sounion, ou d'Apollon Delios à Phalère et des Dioscures. Des cultes qui étaient financés par des individus privés le sont désormais par des taxes publiques. Mais R. Parker nuance la nouveauté de cette immixtion dans les affaires religieuses de l'assemblée en donnant l'exemple d'un décret du second quart du V^e^ siècle qui concerne le culte à Eleusis: le démos ne fait que poursuivre le rôle dévolu à d'autres instances avant la 'démocratie'. On peut dès lors se demander si ce n'est pas l'accroissement des sources épigraphiques qui donne cette impression d'une ingérence plus forte de la cité démocratique dans le domaine religieux.

Un autre exemple qui serait le signe d'un changement dû à la démocratie est celui du choix de la prêtresse d'Athéna Niké, recrutée désormais par tirage au sort, une pratique typique de la démocratie, et non dans un génos. Un troisième trait concerne les liturgies. Leur rôle croissant dans l'organisation de certains concours et fêtes, au V^e^, serait aussi une marque de changement, non pas bien sûr dans le geste, le don à la collectivité existe depuis longtemps, mais dans la finalité: la générosité devient une obligation. C'est la démocratie elle-même qui retire la gratitude de la population. Sur ce point je ne suivrai pas R. Parker, car pour avoir regardé ce phénomène de près à propos des grands hommes athéniens, je pense plutôt que, même dans le cadre de la liturgie, la reconnaissance va aux généreux donateurs et à leur famille plus qu'à la démocratie.[16]

Un exemple incontournable de cette relation nouvelle entre cité démocratique et religion est bien sûr celui des funérailles publiques. Mais là encore des questions se posent sur la spécificité de la démocratie en ce domaine. Reprenons les différents

[16] P. SCHMITT PANTEL, *Hommes illustres. Mœurs et politique à Athènes au Ve siècle,* (Paris 2009).

points. On a parfois fait une corrélation entre la fin de l'érection de stèles funéraires par les familles dans les nécropoles athéniennes et l'institution des funérailles publiques pour les morts à la guerre. R. Parker montre qu'il n'y a pas de corrélation directe entre les deux faits et donc pas de changement que l'on puisse attribuer clairement au nouveau fonctionnement politique. De plus la cérémonie des funérailles publiques perdure à la fin du siècle alors que les stèles réapparaissent dans les nécropoles. Le *patrios nomos* est une incursion de la cité dans le secteur le plus intime des familles, celui du rituel funéraire et de la mémoire des morts, comme l'a souligné F. Jacoby.[17] Il correspond à un moment particulier de l'histoire de la cité qui doit affronter les tensions d'une guerre quasi permanente durant la plus grande partie du V^e^ siècle et en même temps trouver le moyen d'assurer la stabilité du régime démocratique.

Mais si l'on considère les thèmes même de l'oraison funèbre, Nicole Loraux a montré que plusieurs d'entre eux se référaient à une vision aristocratique de la cité.[18] Et que les principaux traits post-clisthéniens ('démocratiques') n'apparaissaient pas ou peu. Que "l'invention" de cette cité n'était sur plusieurs plans guère démocratique. Le thème de l'autochtonie, développé dans les oraisons funèbres et dans les mythes de l'époque classique n'est de plus pas spécifique à Athènes et donc pas attribuable lui non plus à une idéologie démocratique.

La création d'une mythologie politique propre à Athènes au V^e^ siècle est un sujet important, que l'on pense à la re-création du mythe de Thésée[19], à celui d'Ion[20], aux cultes de Déméter

[17] F. JACOBY, "Patrios Nomos: State burial in Athens at the public cemetery in the Kerameikos", in *JHS* 64 (1944), 37-66; C. W. CLAIRMONT, *Patrios Nomos. Public Burial in Athens during the Fifth and Fourth Centuries B.C.* (Oxford 1983).

[18] N. LORAUX, *L'invention d'Athènes. Histoire de l'oraison funèbre dans la cité classique* (Paris 1981).

[19] C. CALAME, *Thésée et l'imaginaire athénien. Légende et culte en Grèce antique* (Lausanne 1990).

[20] N. LORAUX, *Les enfants d'Athéna. Idées athéniennes sur la citoyenneté et la division des sexes* (Paris 1981).

et Coré à Eleusis[21], et à toute la mythologie qui enserre les monuments de l'Acropole.[22] Dans ce travail de re-écriture des mythes se trouve sans doute l'essentiel de l'idéologie démocratique: idéologie indissociablement politique et religieuse.[23]

L'étude du corpus des tragédies athéniennes du V^e^ siècle fournit un bon exemple du travail effectué sur les mythes en démocratie. Jean-Pierre Vernant et Pierre Vidal-Naquet remarquent dès l'introduction de leur premier livre sur ce thème: "Les tragédies, bien entendu, ne sont pas des mythes. On peut soutenir au contraire que le genre tragique fait son apparition à la fin du VI^e^ quand le langage du mythe cesse d'être en prise sur le réel politique de la cité [...] Dans le conflit tragique, le héros, le roi, le tyran apparaissent bien engagés encore dans la tradition héroïque et mythique, mais la solution du drame leur échappe: elle n'est jamais donnée par le héros solitaire, elle traduit toujours le triomphe des valeurs collectives imposées par la nouvelle cité démocratique".[24] Les analyses de ces deux historiens se bâtissent sur un va et vient constant entre les mythes tels qu'ils étaient hérités du passé et la pensée juridique, sociale, institutionnelle de la cité athénienne démocratique. L'institution de l'ostracisme, celle de l'éphèbie, la mise en place de nouveaux tribunaux, et bien d'autres traits encore de la culture démocratique, forment le contexte sous-jacent aux tragédies. Il est impossible de développer ici ce point au demeurant bien connu. On pourrait s'interroger sur le lien entre ce travail de la tragédie sur les mythes d'une part et la religion de l'autre. Pour

[21] L. BRUIT ZAIDMAN, "Le religieux et le politique. Déméter et Coré dans la cité athénienne", in *Athènes et le politique*, éd. par P. SCHMITT PANTEL, F. DE POLIGNAC (Paris 2007), 57-82.

[22] A. SHAPIRO, "Autochtony and the visual Art in Fifth-Century Athens", in *Democracy, Empire and the Arts in Fifth-Century Athens,* ed. by D. BOEDEKER, K.A. RAAFLAUB (Cambridge, Mass. 1998), 127-51. D. CASTRIOTA, *Myth, Ethos and Actuality. Official Art in Fifth-Century Athens* (Madison 1992).

[23] E. COHEN, *The Athenian Nation* (Princeton 2000).

[24] J.-P. VERNANT, P. VIDAL-NAQUET, *Mythe et tragédie en Grèce ancienne* (Paris 1972), 7.

moi le lien est double: les mythes sont une des composantes de l'univers religieux et la tragédie (et plus largement le théâtre au V^e siècle) font partie du culte de Dionysos. Le discours tragique mêle de façon inextricable un discours sur les valeurs religieuses au sens large et sur les valeurs politiques de la cité.

Restent les rituels. Sont-ils spécifiquement démocratiques? La plupart d'entre eux sont inscrits dans la longue durée de la vie en cité comme les sacrifices, les distributions de viande, les repas, les offrandes, les prières, les chœurs, les processions, les concours... L'entretien au Prytanée à Athènes (la *sitesis)* pour les vainqueurs aux concours panhelléniques et pour d'autres catégories de citoyens est certes un honneur insigne, mais sans lien direct avec le caractère démocratique de la *politeia.* C'est plutôt une survivance d'un type d'honneur archaïque.[25]

On fait parfois de la pratique du banquet lors des fêtes une caractéristique de la cité démocratique. Mais le partage égalitaire des viandes et la participation au repas du groupe des sacrifiants sont aussi anciens que les textes grecs, ils sont déjà présents chez les héros d'Homère, et ils touchent ensuite toutes les cités, quel que soit leur régime. Certes le cercle des meilleurs était différent, plus restreint, que celui des citoyens athéniens lors d'un banquet public, mais le principe du partage et de la consommation en commun de la viande du sacrifice comme marque d'appartenance au groupe (dont la délimitation varie historiquement) n'a pas été inventé par le régime athénien du V^e siècle et ne lui est pas réservé. Ce qui est en revanche peut-être proprement athénien est la pratique de la liturgie du banquet, l'*hestiasis.* Dix *hestiatores,* un par tribu, était chargé de nourrir le *dèmos* lors des Panathénées et peut-être lors des Dionysies. Nous retrouvons là le caractère démocratique de l'institution de la liturgie. Dans ce cas, comme dans celui de la chorégie, il y a bien une volonté nouvelle de faire porter sur un

[25] P. SCHMITT PANTEL, *La cité au banquet. Histoire des repas publics dans les cités grecques* (Paris 1992).

petit nombre de riches citoyens désignés par la cité le financement de la fête.

Périclès rappelle l'importance à Athènes des fêtes en l'honneur des dieux et les structures politiques de la cité au V^e^ siècle encouragent leur développement.[26] W. Robert Connor, l'un des artisans du renouveau des recherches en ce domaine, conclut même: "Historians at our remove must recognize, whatever their political preferences, the crucial role that festivals played in the shaping of classical Athenian democracy".[27] Les fêtes des Dionysies en particulier ont été, selon l'opinion de plusieurs chercheurs, un excellent laboratoire pour observer les liens entre un grand rituel et des structures institutionnelles démocratiques.[28] Au processus même de la fête qualifié de "fête de la liberté" s'ajoute ce que W.R. Connor appelle "a Dionysiac social imaginary", indissociable de l'idéologie démocratique. Pour cet historien, si les Athéniens n'écrivent pas la théorie de leur démocratie, ils la mettent en actes, en particulier dans les Dionysies.

Faut-il annexer à ce chapitre 'démocratie' ce que l'on peut dire des liens entre la réalisation de l'empire, *arché,* et la religion? Il faudrait pour cela être persuadé que l'*arché* est un phénomène caractéristique de la démocratie. En séparant les remarques sur l'empire de celles sur la démocratie Robert Parker fait preuve d'une prudence de bon aloi. Tous les exemples recensés ne portent en eux aucune injonction propre à la démocratie,

[26] W.R. CONNOR, "Festival and Democracy", in *Démocratie athénienne et culture,* éd. par M. SAKELLARIOU (Athènes 1996), 79-89.

[27] *Ibid.,* 89.

[28] J.J. WINKLER, "The Ephebes' Song: *Tragôidia* and *Polis*", in *Representations* 11 (1985), 26-62. S. GOLDHILL, "The Great Dionysia and Civic Ideology", in *JHS* 107 (1987), 58-76. W.R. CONNOR, "Tribes, Festivals and Processions. Civic Ceremonial and Political Manipulation in Archaic Greece", in *JHS* 107 (1987), 40-50. ID., "City Dionysia and Athenian Democracy", in *Classica et Medievalia* 40 (1989), 7-32. ID., "Civil Society, Dionysiac Festival and the Athenian Democracy", in *Dēmokratia. A Conversation on Democracies, Ancient and Modern,* ed. by J. OBER, C. HEDRICK (Princeton 1996), 217-25.

sauf à penser et écrire que l'*arché* est consubstantielle à la démocratie, ce qui n'est pas mon avis.[29] Il est donc difficile de traquer ce qui appartient en propre à la démocratie athénienne dans les textes ayant trait à la religion et aux actes rituels.

Démocratie athénienne et religion: le paysage sacré

Qu'en est-il dans le vaste domaine de l'archéologie et de la figuration? Dans une étude sur les liens entre les images et le politique à Athènes au V^e^ siècle, François Lissarrague et Alain Schnapp remarquent: "L'expression de l'imaginaire collectif, les valeurs qui permettent au sentiment d'appartenance à la cité de s'incarner s'expriment dans le cadre composite d'un décor urbain et monumental qui est le ressort même de l'identité civique". [30] Je renvoie à toute leur démonstration qu'il est impossible de présenter ici dans le détail et qui s'appuie en particulier sur le travail de Tonio Hölscher.[31] Elle brasse un

[29] Les liens entre l'*arché* et la religion concernent les relations avec les alliés dans le domaine des cultes. Les Athéniens introduisirent certains de leurs cultes sur les territoires des cités alliées et ils demandèrent aux alliés de participer aux grandes fêtes à Athènes. Ainsi depuis 440 les alliés doivent envoyer une vache et une panoplie aux Grandes Panathénées pour participer à la procession. Et un phallus pour les Dionysies. Autre exemple: le décret des prémices d'Eleusis. En 420 les Athéniens exigent des alliés de donner les premiers produits des récoltes de blé et de seigle à Eleusis en remerciement pour le don qu'Eleusis a fait aux cités du blé. Le mythe de la mission de Triptolème existe depuis le VI^e^ et le décret insiste sur le fait que cette mesure est en accord avec la tradition ancestrale et l'oracle de Delphes. R. Parker cite aussi dans ce cadre le tribut payé par les alliés qui est en partie destiné aux dieux et en particulier à Athéna (1/6 ^ème^), le mythe d'Ion, le cas des vicissitudes du culte d'Amphiaraos à Oropos, les interventions d'Athènes à Délos.

[30] F. LISSARRAGUE, A. SCHNAPP, "Athènes, la cité, les images", in *Athènes et le politique,* éd. par P. SCHMITT PANTEL, F. DE POLIGNAC (Paris 2007), 25-56.

[31] T. HÖLSCHER, *Griechische Historienbilder des 5. und 4. Jahrhunderts v.Chr.* (Würzburg 1973); ID., "Images and Political Identity: the Case of Athens", in *Democracy, Empire, and the Arts in Fifth-Century Athens*, ed. by D. BOEDEKER, K.A. RAAFLAUB (Cambridge, Mass. 1998), 153-83. Voir aussi l'ensemble des contributions de ce livre.

domaine plus large que celui des rapports entre la démocratie athénienne et la religion, l'art du V^e^ siècle ne se limitant pas aux temples, aux offrandes et aux statues des dieux, mais elle répond en partie à la question que nous nous posons, à partir de documents qui sont au cœur du fonctionnement religieux et civique d'Athènes. Rappelons l'idée qui sous-tend l'analyse de Tonio Hölscher et la leur: à Athènes l'apparition d'un style nouveau coïncide avec la mise en place d'un régime politique. "Ce nouvel ordre est construit sur des liens symboliques qui unissent l'espace, le temps et l'exercice de l'activité politique".[32] Du changement qu'impulse la réforme clisthénienne, les auteurs donnent plusieurs exemples qui mêlent les valeurs religieuses et politiques. Le *tropaion*, le rassemblement des armes prises aux ennemis sur la place du champ de bataille laissé par les vainqueurs comme un témoin de leur victoire, est lié à la consécration, dans les sanctuaires, des armes ou du butin. La 'monumentalisation' du *tropaion* de Marathon[33], et le monument du même genre qui semble avoir été édifié après la bataille de Salamine[34] témoignent du désir de laisser un signe, qui ne soit plus éphémère, de la domination. La volonté d'exalter la domination de la cité n'est sans doute pas une prérogative de la démocratie athénienne, car des monuments de ce genre sont attestés à Delphes et dans des cités très différentes, mais Athènes a montré la voie.

La figure de Thésée est, dans l'art comme dans le mythe, réactivée au V^e^ siècle et devient celle du héros civique: artisan

[32] F. LISSARRAGUE, A. SCHNAPP, *art. cit.* (n. 30), 34. "Ce modèle affirme avec solennité le caractère radicalement original de la nouvelle 'constitution' d'Athènes. En somme la structure politique de la cité s'érige en œuvre d'art". *Ibid.*

[33] Sur le lieu même de la bataille un chapiteau ionique est érigé, sans doute couronné d'un groupe sculpté où figurait Niké. T. HÖLSCHER, *art. cit.* (n. 31); E. VANDERPOOL, "A Monument to the Battle of Marathon", in *Hesperia* 35 (1966), 93-106.

[34] P. WALLACE, "Psyttaleia and the Trophies of the Battle of Salamis", in *AJA* 73 (1969), 293-303; W.C. WEST, "The Trophies of the Persian Wars", in *Classical Philology* 64 (1969), 7-19.

du synoecisme, initiateur de la vie en commun, garant de l'équilibre des composantes de la cité. Ainsi au Théséion trois tableaux représentent le héros.[35] Autre exemple bien connu: le groupe des héros éponymes des tribus athéniennes érigé sur l'agora, auxquels la cité rend un culte[36]. Ce culte manifeste l'idée d'une cité unifiée, qui incorpore ses différentes composantes. Le monument est en même temps un lieu politique où se fait la publicité des décisions de la cité selon le nouvel ordre clisthénien.[37]

D'autres exemples comme les trois hermès érigés par Cimon après la victoire d'Eion (en 476), le décor de la *stoa poikilé*,[38] celui du bouclier de la statue d'Athéna sur l'Acropole, établissent le lien entre le passé mythique d'Athènes et les victoires du présent, forgeant ce que François Lissarrague et Alain Schnapp appellent "une esthétique de la mémoire", qui est "authentifiée et actualisée lors des oraisons funèbres tenues publiquement sur le Céramique. Les images viennent renforcer les mots [...] La cité triomphante se sait menacée, elle élabore une véritable

[35] PAUS. 1,17,2-3. Sur l'un, Thésée combat les Amazones, un motif également présent, précise Pausanias, sur le bouclier de l'Athéna de l'Acropole et sur la base du Zeus d'Olympie. Sur un autre tableau, il affronte les Centaures et les Lapithes et sur un troisième il rapporte du fond des mers l'anneau de Minos, allusion à l'empire maritime d'Athènes.

[36] U. KRON, *Die zehn attischen Phylenheroen. Geschichte, Mythos, Kult und Darstellungen* (Berlin 1976).

[37] Le groupe des *tyrannoctones* serait un autre exemple, mais je le laisse volontairement de côté d'abord parce qu'il a été très bien étudié et parce qu'il me semble relever plus de l'idéologie politique que du lien entre la religion et la démocratie. S. BRUNNSÅKER, *The Tyrant-Slayers of Kritios and Nesiotes* (Stockholm ²1971); B. FEHR, *Die Tyrannentöter, oder, kann man der Demokratie ein Denkmal setzen?* (Frankfurt am Main 1984) (trad. française [Paris 1989]); M. TAYLOR, *The Tyrant Slayers: the Heroic Image in Fifth Century B.C. Athenian Art and Politics* (Salem, N.H. 1991); W. OENBRINK, "Die Tyrannenmörder. Aristokratische Identifikation oder Leitbilder der athenischen Demokratie? Rezeption eines politischen Denkmals in der attischen Vasenmalerei", in *Bildergeschichte. Festschrift Klaus Stähler*, hrsg. von J. GEBAUER *et al.* (Möhnesee 2004), 373-400; F. LISSARRAGUE, A.SCHNAPP, *art. cit.* (n. 30), 41-5.

[38] T. HÖLSCHER, *op. cit.* (n. 31), 50-84.

politique monumentale qui est le pendant du discours démocratique. Les images font partie intégrante du dispositif".[39]

De cette politique monumentale un des exemples les plus célèbres est la reconstruction de l'Acropole. Le dossier est très connu et fort bien étudié. Le Parthénon construit entre 447 et 438 par l'architecte Ictinos a un décor sculpté à la fois classique et novateur. Les frontons (exécutés entre 438 et 432) sont décrits par Pausanias. Ils racontent à l'ouest la dispute pour l'Attique entre Athéna et Poséidon, à l'est la naissance d'Athéna, deux thèmes relatifs à l'histoire d'Athènes. Gigantomachie, Amazonomachie, Iliouperis et Centauromachie, tels sont les thèmes des quatre ensembles de métopes sur les quatre côtés du temple. L'affrontement entre les Grecs et les Amazones est lui aussi au cœur de l'histoire mythique d'Athènes. Enfin la frise qui couronne l'extérieur du mur de la *cella* du temple représente en un long cortège le peuple athénien qui s'avance vers les dieux assis en deux groupes de six entourant l'archonte-roi et la prêtresse d'Athéna pour la remise du *péplos*. Si l'interprétation de la procession est bien celle de la fête des Panathénées, on a là une mise en scène de la cité démocratique dans la diversité des sexes, des statuts peut-être et des fonctions, dans un moment essentiel du rite, l'offrande du *péplos* à Athéna. Sans surinterpréter la scène et vouloir y voir un discours hégémonique que la cité athénienne adresserait aux cités alliées et aux autres Grecs, il faut remarquer la nouveauté de la représentation d'hommes et de femmes, de mortels, sur un édifice sacré, aux côtés des dieux, comme une marque sereine de la confiance entre les habitants d'Athènes et leurs dieux. Le *dèmos* dans ces caractéristiques propres au V^e^ siècle athénien est bien là, la pluralité des divinités et le rite fondamental de l'offrande aussi; c'est un bel exemple du lien entre démocratie et religion. D'autres existent sur l'Acropole et en Attique. Le paysage sacré est porteur d'un discours démocratique.

[39] F. LISSARRAGUE, A. SCHNAPP, *art. cit.* (n. 30), 41.

Une autre question vient à l'esprit: quel sens donner aux personnifications de la Démocratie et du Démos qui apparaissent au cours de l'époque classique? Elles sont à replacer dans le processus d'ensemble des personnifications de notions abstraites dans le panthéon grec, qui varient selon la nature des répertoires: vases, inventaires des cultes, stèles, décrets. Sur les vases, Diké affrontée à Adikia apparaît vers 510.[40] Elle est suivie courant V^e siècle par Themis, Peitho, Hygieia, puis dans le dernier tiers du siècle par Eudaimonia, Eukleia, Eunomia, Makaria, Paidia. Les valeurs privilégiées par ces figures sont à la fois morales et politiques. Elles ne reflètent pas un type de régime précis.

Un sacrifice à Démocratia semble avoir été organisé en 332/331 par les stratèges.[41] Et on a rapproché ce culte de celui de Démos attesté par une inscription rupestre sur la colline des Nymphes à l'ouest de l'agora[42]. Démos aurait été représenté sur une peinture de Parrhasios à la fin du V^e siècle[43]. Selon Pausanias, la stoa de Zeus Eleutherios figurait les douze dieux Olympiens et était ornée d'une autre fresque où apparaissait Thésée dans une composition d'Euphranor: "Sur le mur opposé sont peints Thésée, Démocratia et Démos. L'image est celle de Thésée qui permit aux Athéniens d'adopter un régime d'égalité".[44]

[40] Vienne 3722; *ABV* 320/11 et *ARV2* 11/3. A. SHAPIRO, *Personifications in Greek Art*, (Zürich 1993), 39-44, cat. 6. Sur la question des personnifications voir aussi F. HAMDORF, *Griechische Kultpersonnifikationen der vorhellenistischer Zeit*, (Mainz 1964); CHR. AELLEN, *A la recherche de l'ordre cosmique: forme et fonction des personnifications dans la céramique italiote* (Zürich 1994); E. STAFFORD, *Worshipping Virtues. Personification and the Divine in Ancient Greece* (Swansea 2000); W. MESSERSCHMIDT, *Prosopopoiia: Personifikationen politischen Charakters in spätklassischer und hellenistischer Kunst* (Köln 2003).

[41] A.E. RAUBITSCHEK, "Demokratia", in *Hesperia* 31 (1962), 238-43. Il cite la scholie à Eschine I, 39 = Diels-Kranz, 88 A 13.

[42] U. KRON, *op.cit.* (n. 36), 63-75; O. TZACHOU-ALEXANDRI, in *LIMC* III (1986), 375-6, *s.v. Demos*

[43] PLIN. *Nat.* 35.69, voir K. GLOWACKI, "A Personification of Demos on a new Attic Document Relief", in *Hesperia* 72 (2003), 447-66. D'autres images de Démos sont attribuées à Aristolaos et à Euphranor.

[44] PAUS. 1,3,3-4.

La figure de Démos est plus souvent présente que celle de Démocratia. Nul doute pour notre propos que c'est bien Démos qui incarne la nouvelle puissance du peuple des citoyens à l'intérieur d'Athènes. Sur trois reliefs attiques du IV^e^ siècle, le nom de Démos est inscrit en regard de l'image.[45] Je laisse de côté l'analyse précise des scènes pour souligner que l'activité politique des citoyens est, au-delà du thème iconographique, devenu un objet de culte. La divinisation de Démos comme celle de Démocratia marque l'adhésion aux valeurs que promeut la cité athénienne des V^e^ et IV^e^ siècles.

Texte et image: Démos et Démocratia

Un document permet de poursuivre cette réflexion sur les allers-retours entre la démocratie athénienne et la religion. C'est la stèle découverte lors des fouilles de l'agora d'Athènes sur laquelle est inscrite une loi votée en 337/336 sur la proposition d'Eucratès fils d'Aristotimos, du dème du Pirée, qui est décorée d'un relief figurant une femme couronnant un homme assis.[46] Le texte de la loi est bien connu.

> [...] Si quiconque se soulève contre le peuple pour installer une tyrannie, ou contribue à installer une tyrannie, ou bien renverse le peuple ou la démocratie à Athènes, que celui qui aura assassiné l'homme coupable de l'un de ces crimes soit pur (*hosios*) de toute souillure. Qu'il ne soit permis à aucun des membres du conseil de l'Aréopage, alors que le peuple ou la démocratie aurait été renversé à Athènes, de se rendre sur l'Aréopage, ni de se réunir en séance (*synédrion*), ni de délibérer sur quoi que ce soit. Si

[45] M. MEYER, *Die griechischen Urkundenreliefs*, (Berlin 1989); C. LAWTON, *Attic Document Reliefs. Art and Politics in Ancient Athens* (Oxford 1995); A. SMITH, *Political Personifications in Classical Art* (New Haven 1997), 172-79; K. GLOWACKI, *art.cit.* (n. 43) établit un corpus complet de la série. Voir aussi F. LISSARRAGUE, A. SCHNAPP, *art. cit.* (n. 30) 48-52.

[46] B.D. MERITT, "Greek inscriptions", in *Hesperia* 21 (1952), 355-59. *SEG* XII, 1955, n. 87.

> l'un des membres de l'Aréopage, alors que le peuple ou la démocratie aurait été renversé à Athènes, se rend sur l'Aréopage, ou bien se réunit en séance, ou bien délibère sur quoi que ce soit, qu'il soit privé de ses droits civiques (*atimos*), lui et sa famille, que ses biens soient confisqués et que la dîme soit consacrée à la déesse. Que le secrétaire du conseil fasse graver cette loi sur deux stèles de marbre et les fasse installer l'une à l'entrée de l'Aréopage, là où se trouve l'entrée du conseil, la seconde à l'assemblée du peuple. Que le trésorier du peuple donne pour la gravure des stèles vingt drachmes sur les fonds réservés au peuple pour les dépenses par décret.[47]

Cette stèle a été très étudiée depuis sa publication, mais, comme le remarque A.J.L. Blanshard, les épigraphistes se sont intéressés au texte, les archéologues à l'image et rares sont ceux qui ont tenté une explication des deux en même temps.[48] Il s'agit peut-être d'une réactualisation d'une ancienne loi de l'époque de Solon. Elle témoigne en tout cas de l'atmosphère de crainte dans laquelle vivent les Athéniens après Chéronée, redoutant que la Macédoine puisse abolir le régime démocratique. La loi témoigne de la force du modèle démocratique, comme l'image qui la surmonte: Démos couronné par Démocratia. Nul doute qu'il n'y ait une étroite correspondance entre les mots et l'image. A.J.L. Blanshard a fait une étude très précise des deux personnifications qui sont représentées de face, ce qui est unique, et regardent le passant-lecteur de l'inscription. Démos est sous les traits d'un homme d'un certain âge, non pas un vieillard mais un adulte, comme l'est le citoyen qui jouit de tous ses droits. Il est habillé comme pour se rendre à l'assemblée. Il est assis comme l'est parfois Zeus en sculpture et sur les vases. Ce n'est toutefois pas un citoyen ordinaire mais une divinité à laquelle on rend un culte tout comme Démocratia.

[47] Traduction de P. BRUN, *Impérialisme et démocratie à Athènes. Inscriptions de l'époque classique* (Paris 2005), 189-90.

[48] A.J.L. BLANSHARD, "Depicting Democracy: an Exploration of Art and Text in the Law of Eukrates", in *JHS* 124 (2004), 1-15. On trouvera dans cet article le rappel de la bibliographie sur cette stèle.

Son lien avec la démocratie qui est rappelé tout au long du texte est rendu en image par un geste intéressant: Démocratia, debout, le couronne.

Pour ma part je pousserai l'analyse un peu plus loin qu'on ne le fait habituellement en soulignant dans le texte et dans l'image l'omniprésence du religieux. Dans la loi, le meurtrier de l'aspirant à la tyrannie est déclaré *hosios,* une catégorie fondamentale de la pensée religieuse qui comprend à la fois ce qui est *hieros*: sacré et ce qui est *hosios*: conforme à ce qui est prescrit, conforme à la norme. Celui qui n'intervient pas est déclaré *atimos,* or là encore cette notion associe l'idée de privation de droits civiques et d'interdiction d'accès aux rituels. La punition consiste dans la perte de ses biens, or sous ce terme il faut comprendre la propriété foncière qui a une valeur religieuse tout autant qu'économique. Et la dîme des biens est donnée à Athéna. De part en part dans cette loi (comme dans de nombreuses lois grecques) ce que nous appelons le politique est mêlé au religieux, cette loi est d'une certaine manière 'sacrée' même si dans l'esprit de bien des historiens les 'lois sacrées' sont uniquement celles qui régissent l'organisation de cultes et de rituels... La louange et la sanction sont politico-religieuses. Il n'y a donc à mon sens aucune rupture entre la représentation figurée et le texte. L'image transmet le même message que le texte: l'importance du *démos*, qui est d'une certaine manière en position de vainqueur couronné par la déesse comme peut l'être un athlète par Niké. C'est un très bel exemple de la nécessaire connivence du religieux et du politique en démocratie.

Polythéisme et démocratie

Jusqu'à présent j'ai confronté la démocratie à la religion, cherchant ce qui dans les traits cultuels pouvait être la marque de la démocratie. Il faudrait faire la démarche inverse et confronter la religion à la démocratie, c'est-à-dire voir si le polythéisme grec n'a pas en lui des traits qui en font un bon

acolyte de la démocratie. Plusieurs éléments peuvent être repérés. Tout d'abord, et tous les historiens de la religion grecque le soulignent, l'absence d'un système codifié et uniformisé autour de dogmes et de livres sacrés, l'absence de *religio*, et en même temps l'absence d'une autorité qui régisse vie religieuse et croyances, une 'Eglise'. Le polythéisme peut ainsi s'adapter aux circonstances historiques, aux institutions, aux lois, plus facilement que s'il avait sa propre doctrine et son propre encadrement. Ensuite la pluralité des divinités. Elle n'est pas forcément porteuse de démocratie — une hiérarchie existe même entre les membres des panthéons! —, mais elle permet des configurations multiples, des choix de divinités poliades et de héros qui sont malléables, adaptables aux idéologies politiques les plus diverses. Enfin le fonctionnement même de la pratique religieuse qui repose sur la communauté, *koinonia*, quelle que soit sa taille, et qui est un lieu idéal d'échange social et d'apprentissage des valeurs de solidarité qui sont aussi celles de la démocratie.

Dire que le polythéisme grec est un ferment de *koinonia* n'en fait pas pour autant le parangon de la démocratie, mais rien dans son fonctionnement ne semble pouvoir s'opposer à un élargissement de l'accès aux dieux et aux rites, l'ouverture sociale est possible. La question qu'il faudrait maintenant poser pour aller jusqu'au bout de cette constatation de bonne entente, de connivence entre un système religieux et une pratique politique, est: les structures cultuelles à Athènes ont-elles eu un rôle dans le processus de mise en place de cette parenthèse historique que nous appelons la démocratie? Je n'ai bien sûr pas de réponse, mais il y a des indices. Il faut les chercher entre autres dans les travaux de W.R. Connor sur le rôle des groupes religieux et des fêtes,[49] de François de Polignac sur les cultes des héros de tribus clisthéniennes[50] (Ajax et la tribu Ajantis,

[49] W.R. CONNOR, *art. cit.* (n. 26).

[50] F. DE POLIGNAC, "Ajax l'Athénien. Communautés cultuelles, représentations de l'espace et logique institutionnelle dans une tribu clisthénienne", in

Hippothoon...) et dans ceux de Paulin Ismard sur les associations en Attique.[51]

Dans un chapitre de sa thèse Paulin Ismard mesure ce qu'il appelle "les échelles d'expression communautaire de la vie religieuse". L'usage partagé d'un sanctuaire, la fête organisée par plusieurs dèmes, la dimension régionale de concours (en Attique), sont autant d'exemples qui montrent que l'approche du territoire menée selon une perspective horizontale et non hiérarchique peut révéler de multiples liaisons entre communautés, constitutives du lien social. Le culte civique, compris comme les rituels organisés par la collectivité civique dans son ensemble, n'est alors plus qu'une des échelles parmi d'autres de la sociabilité rituelle.

Si l'on fait la synthèse des apports des travaux que je viens de citer, on voit à la fois l'importance des réseaux que forment les associations cultuelles dans le processus de sédimentation du nouveau système politique (contre une vision d'une réforme clisthénienne venant du haut, à partir d'un centre déjà constitué, le changement vient des structures de base de la société) et l'importance que jouent certains cultes dans ce processus. En deux mots, une vision différente de l'instauration du système démocratique à Athènes réactive l'importance du cultuel dans ce processus. La cité de Clisthène l'Athénien de P. Lévêque et P. Vidal-Naquet était avant tout une cité des institutions politiques,[52] la cité des réseaux esquissée par une nouvelle génération de chercheurs laisse place à une polyphonie où les pratiques religieuses, parce qu'elles sont enracinées dans, ou même

Athènes et le Politique, éd. par P. SCHMITT PANTEL, F. DE POLIGNAC (Paris 2007), 111-32; ID., "Après Ajax, Hippothoon. Les héros 'marginaux' du système clisthénien", in *Clisthène et Lycurgue d'Athènes. Autour du politique dans la cité classique,* éd. par V. AZOULAY, P. ISMARD (Paris 2010).

[51] P. ISMARD, "Les associations en Attique de Solon à Clisthène", in *Individus, groupes et politique à Athènes de Solon à Mithridate,* éd. par J.P. COUVENHES, S. MILANEZI (Tours 2007), 17-33; ID., *La communauté des communautés. Les associations à Athènes, VIe-Ier siècle* (Paris 2010).

[52] P. LÉVÊQUE, P. VIDAL-NAQUET, *Clisthène l'Athénien* (Paris 1964).

constitutives des communautés, participent pleinement de la définition du nouvel espace politique. Cette brève contribution à une histoire de la religion et du politique à Athènes pourrait être développée.

Aujourd'hui. La diversité des rapports entre démocraties et religions

Comme je l'ai dit dès l'introduction, on ne peut trouver ni une tradition ni des influences entre le rapport qu'entretenait le polythéisme grec avec la démocratie athénienne et les rapports qu'entretiennent les démocraties modernes avec les religions.

Pourquoi? Il y a plusieurs niveaux de réponse et dans l'espace imparti je me contenterai d'en mentionner certains sans pouvoir les développer. Le premier est au cœur de nos *Entretiens*, c'est l'impossibilité de faire se correspondre les catégories du 'politique' (ou de la démocratie) et de la 'religion', 'chez nous' et en Grèce ancienne.

Le second est l'absence totale d'homogénéité dans les relations entre les démocraties modernes et les religions. Autrement dit, on ne peut pas parler dans ce domaine de 'la' démocratie moderne un dinosaure sans existence, mais il faudrait détailler 'les' démocraties modernes. Je prends un exemple récent.

Le jeudi 4 juin 2009 Barack Obama, 44e président des Etats-Unis, prononce un discours au Caire dans l'auditorium de l'université. C'est l'un des discours de la "refondation" entreprise par Barack Obama depuis son élection, avec le même fil conducteur: la paix entre les races, entre les nations, entre les religions. Le président a cité Dieu sans relâche et aussi "le saint Coran". La presse française a rendu compte de façon élogieuse de "cet effort pour briser un cycle de défiance et de discorde et de fonder un nouveau départ entre les Etats-Unis et les musulmans, sur le respect mutuel et sur cette idée que l'Amérique et l'Islam ne s'excluent pas".[53] Un passage toutefois du discours

[53] Discours de Barack Obama, cité dans *Le Monde* (6 juin 2009), 6.

du président des Etats-Unis a fait sursauter la France laïque. Dans le cinquième point de son discours Barack Obama aborde le thème de la liberté de religion. Et il déclare: "La liberté de religion joue un rôle crucial pour permettre aux gens de vivre en harmonie. Nous devons toujours examiner les façons dont nous la protégeons. Il importe que les pays occidentaux évitent d'empêcher les musulmans de pratiquer leur religion comme ils le souhaitent, par exemple en dictant ce qu'une musulmane devrait porter. En un mot *nous ne pouvons pas déguiser l'hostilité envers la religion sous couvert de libéralisme*".[54] Et dans le point six, sur les droits des femmes: "Je sais que cette question suscite un sain débat. Je rejette l'opinion de certains selon laquelle une femme qui choisit de se couvrir la tête est d'une façon ou d'une autre moins égale, mais j'ai la conviction qu'une femme que l'on prive d'éducation est privée d'égalité".[55]

La phrase que j'ai mise en italiques a fait l'objet d'un sous-titre dans l'article du journal *Le Monde* relatant le discours et d'un commentaire dans l'analyse du journaliste sur la liberté de porter le voile.[56] Le lendemain le même journal consacre un premier article à la visite de Barack Obama en France pour les cérémonies du 6 juin, et un second article dont le titre est: "Port du voile: les réactions en France à Barack Obama. Le président américain a critiqué à mots couverts la loi française dans son discours du Caire".[57]

Nous voici au cœur de l'actualité et au cœur de notre sujet: démocratie moderne et religion. Autant de démocraties modernes, autant de manières d'entretenir des liens avec la religion, et cela depuis le XVIII[e] siècle au moins...

Revenons au discours du Caire pour décrire les formes du désaccord entre la démocratie américaine et la démocratie française sur la question du rapport avec la religion. Puis nous élargirons le propos en faisant un peu d'histoire.

[54] *Ibid.*
[55] *Ibid.*
[56] P. CLAUDE, "Analyse", in *Le Monde* (6 juin 2009), 7.
[57] Article de S. LE BARS, in *Le Monde* (7-8 juin 2009), 6.

Stéphanie Le Bars dans l'article intitulé "Port du voile" souligne d'abord que la religiosité des propos de Barack Obama pourrait paraître excessive à des esprits français empreints de laïcité. Que de plus, outre les propos sur la liberté de se voiler pour une femme, le président a déclaré: "le gouvernement américain a recours aux tribunaux pour protéger le droit des femmes et des filles à porter le hidjab et pour punir ceux qui leur contesteraient ce droit". Pour les commentateurs français tout ceci montre que le président des Etats-Unis n'a pas compris le sens de la loi française de l'interdiction de tout signe religieux à l'intérieur de l'enceinte scolaire. D'une loi d'apaisement des tensions, et d'égalité dans l'enceinte d'une institution constitutive de la République: l'école, il a fait une loi discriminatoire, allant contre la liberté religieuse, voire contre l'Islam. "Alors que dans l'ensemble de son discours M. Obama se montre proche de 'l'islam des lumières', sur le voile il redevient américain et dogmatique laissant entendre que le port du voile signifie la liberté", remarque l'anthropologue Malek Chebel.[58] Selon d'autres commentateurs, cette instrumentalisation politique de la religion est calculée, elle permet à Barack Obama dans un même temps de critiquer les régimes de certains pays islamiques qui ne respectent pas les droits des femmes.

Ce récent débat n'est qu'un exemple parmi des centaines du regain d'intérêt dans les démocraties modernes pour l'attitude à avoir envers les religions. Alors que la séparation de l'église et de l'état en France (en 1905) semblait avoir tari le sujet pour toujours en installant la laïcité comme une force constitutive de la démocratie, les dernières années ont vu ressurgir sous des formes diverses des interrogations, chez les intellectuels comme chez les politiques.[59] Face à la montée des fondamentalismes, l'interrogation porte aujourd'hui sur l'imbrication entre le politique et le religieux d'une manière générale, la démocratie et la

[58] *Ibid.* L'opinion de M. Chebel est citée dans l'article ci-dessus.

[59] M. GAUCHET, *La religion dans la démocratie, parcours de la laïcité* (Paris 1998).

religion d'une manière plus spécifique.[60] La religion et la démocratie peuvent-elles faire bon ménage? Et à quelles conditions?

Quelques exemples

Les relations entre la démocratie et la religion sont, pour ne prendre que le cas de l'Europe et des Etats-Unis, extrêmement diverses du point de vue institutionnel.[61] Dans certains cas, la ou les religions sont reconnue(s) officiellement et l'Etat pourvoie en partie à leur entretien. En Norvège par exemple l'Eglise évangélique et luthérienne est reconnue comme Eglise d'Etat.[62] En Allemagne, la liberté de religion est garantie par la loi fondamentale et la séparation entre l'Eglise et l'Etat s'entend comme la neutralité de l'Etat en matière de philosophie religieuse. Toutefois, la Constitution considérant la religion comme une mission publique, l'Etat soutient les communautés religieuses (enseignement religieux, impôt du culte, facultés de théologie...).[63] En Angleterre, la religion anglicane est religion officielle et la reine en est le chef.[64] La France a connu le régime

[60] G.A. ALMOND, R. SCOTT APPLEBY, E. SIVAN, *Strong Religion. The Rise of Fundamentalisms around the World* (Chicago 2003). L'étude des fondamentalismes religieux est un moyen pour mieux comprendre le lien entre la religion et la démocratie parce que ces mouvements semblent nier le processus démocratique. Le pluriel indique que plusieurs religions traditionnelles ont donné naissance à des mouvements fondamentalistes, entre autres le christianisme, le judaïsme, l'islam, l'hindouisme, le bouddhisme.

[61] Les lois fondamentales de l'état d'Israël, par exemple, le définissent comme "juif et démocratique".

[62] L'éventuelle séparation de l'Eglise et de l'Etat fait l'objet d'un débat permanent.

[63] Ce sont les Länder qui sont compétents en matière de culte. L'Eglise catholique d'Allemagne, l'Eglise évangélique d'Allemagne, le Conseil central des juifs en Allemagne ont des contrats avec la république fédérale d'Allemagne. Et en septembre 2006 la Conférence de l'Islam en Allemagne a été instituée.

[64] C'est en 1531 que le roi d'Angleterre Henri VIII se proclame "chef suprême de l'église et du clergé d'Angleterre".

du concordat, instauré par Bonaparte en 1801,[65] jusqu'en 1905 date de la loi sur la séparation de l'église et de l'Etat.[66] La démocratie n'a plus aucun devoir d'entretien des Eglises et celles-ci sont indépendantes du pouvoir politique, toutefois elles sont sous le contrôle du Ministère de l'intérieur et des cultes.[67] En Italie, en 1945, la nouvelle constitution instaure de la même manière la séparation de l'Eglise et de l'Etat.[68] Une évolution semblable apparaît en Espagne dans la constitution de 1978 qui stipule qu'aucune religion ne sera religion d'état, mais la réalité est assez différente comme le prouve la tentative du gouvernement Zapatero en 2004 d'appliquer "une feuille de route" qualifiée par le catholicisme espagnol de "laïcisme agressif".[69]

Enfin la mention de Dieu et du christianisme dans le préambule de la constitution européenne (2004) a fait l'objet de vifs débats: "les racines chrétiennes de l'Europe" ne seront finalement pas mentionnées, alors que plusieurs états le souhaitaient dont l'Allemagne avec Angela Merkel et la Pologne, ainsi que l'église catholique dans son ensemble. Voici ce qu'écrivait Romano Prodi qui regrettait l'absence de référence explicite au christianisme: "Aujourd'hui l'Union Européenne voit à ses

[65] Le concordat est signé avec la papauté le 15 juillet 1801, il est voté avec les articles organiques qui organisent les cultes par le Corps législatif le 8 avril 1802.

[66] La loi date du 9 décembre 1905, elle a été proposée par le député socialiste Aristide Briand, elle met fin à un long affrontement qui a opposé une France républicaine et laïque à une France royaliste et catholique. La région de l'Alsace en France reste sous régime concordataire car elle faisait partie de l'Allemagne en 1905.

[67] Le ministère a créé le "conseil français du culte musulman" en 2003, qui s'occupe entre autres de la construction des mosquées, de l'organisation des fêtes religieuses, de la désignation des aumôniers, de la formation des imans.

[68] Ceci rompt avec une longue tradition du catholicisme religion d'état, qui avait été réactivée par les accords du Latran en 1929.

[69] "La feuille de route" annoncée le 23 septembre 2004 par le gouvernement Zapatero a pour but de laïciser les institutions et séparer définitivement l'Eglise de l'Etat, vingt-six ans après les principes affirmés par la Constitution. L'église catholique bénéficie en effet d'un traitement de faveur en matière fiscale et de larges subventions étatiques. Le nouveau statut prévoit d'instaurer l'égalité de traitement entre les diverses religions représentées dans le pays.

frontières orientales la Russie, l'Ukraine et le Belarus; la Turquie au sud-est. Avec l'entrée de Chypre et de Malte l'Union Européenne est en contact direct avec le Proche Orient. Avec cette nouvelle géographie, l'Europe a une nouvelle responsabilité internationale en ce qui concerne le droit, la justice, la paix, mais celle-ci ne pourra s'exercer que si la question de son identité est résolue".[70] L'identité de l'Europe des démocraties repose-t-elle sur une seule religion? On pourrait gloser longtemps sur un tel texte, il nous rappelle en tout cas que la question de la religion et la démocratie se pose désormais aussi au sein de cette nouvelle communauté qu'est l'Europe.

Les Etats-Unis connaissent également la séparation des églises et de l'état selon des modalités qui leur sont propres.

Lire Tocqueville

Les Etats-Unis et la France offrent deux modèles opposés des rapports qui se sont tissés entre politique et religion dans la construction démocratique. Aux Etats-Unis la liberté religieuse est fondatrice, la séparation entre l'Eglise et l'Etat en découle. En France la démocratie s'est construite en s'émancipant des croyances religieuses, la séparation de l'Eglise et de l'Etat est l'aboutissement d'une longue lutte.

La réflexion sur les apports de la religion à la démocratie est un des axes majeurs de l'œuvre d'Alexis de Tocqueville (1805-1859) que je choisis parmi d'autres parce qu'elle compare le cas des Etats-Unis et celui de la France et me permet de sortir d'un modèle trop franco-français.[71] Tocqueville a renforcé sa conviction du lien nécessaire entre démocratie et religion au contact de la démocratie américaine. "A mon arrivée aux Etats-Unis, ce

[70] Lettre adressée à *La Repubblica* le 1er juillet 2005.

[71] Voir D. HERVIEU-LÉGER, J.-P. WILLAIME, *Sociologies et religion. Approches classiques* (Paris 2001), le chapitre sur Alexis de Tocqueville; A. ANTOINE, *L'impensé de la démocratie. Tocqueville, la citoyenneté et la religion* (Paris 2003).

fut l'aspect religieux du pays qui frappa d'abord mes regards [...] J'avais vu parmi nous l'esprit de religion et l'esprit de liberté marcher presque toujours en sens contraire. Ici je les retrouvais intimement unis l'un à l'autre: ils régnaient ensemble sur le même sol".[72] Ce trait est expliqué par l'histoire du pays: "La plus grande partie de l'Amérique anglaise a été peuplée par des hommes qui, après s'être soustraits à l'autorité du pape, ne s'étaient pas soumis à aucune suprématie religieuse; ils apportaient donc dans le nouveau monde un christianisme que je ne saurais mieux peindre qu'en l'appelant démocratique et républicain: ceci favorisera singulièrement l'établissement de la démocratie et de la république dans les affaires. Dès le principe la politique et la religion se trouvèrent d'accord et depuis elles n'ont point cessé de l'être".[73]

Penser les deux dimensions simultanément, tel est le défi que le cas américain oblige à relever et qui va à l'encontre de la réalité française, tout comme des théories philosophiques des Lumières. Selon les philosophes du XVIII[e] "le zèle religieux devrait se calmer au fur et à mesure que le progrès des Lumières et de la liberté se répandraient".[74] Le fait américain oblige à reconsidérer la place de la religion dans l'espace démocratique. Tocqueville contredit le schéma des sociologues des religions qui, dans les années mille neuf cent soixante en Europe présupposaient que plus il y avait de modernité moins il y avait de religion. Et il anticipe les analyses de ceux qui au contraire avancent que la modernité, ce n'est pas moins de religieux, mais du religieux autrement.[75]

L'Amérique pour Tocqueville offre l'exemple d'une démocratie qui a su ménager l'espace nécessaire à une dimension qu'il estime naturelle à l'homme et utile à la société, et elle a pu

[72] A. DE TOCQUEVILLE, *De la démocratie en Amérique* [1835-1840], éd. par F. FURET (Paris 1981), 401.
[73] *Ibid.*, 392-3.
[74] *Ibid.*, 401.
[75] D. HERVIEU-LÉGER, J.-P. WILLAIME, *op. cit.* (n. 71), 50.

le faire paradoxalement, par la claire séparation du politique et du religieux. Tocqueville prône pour sa part la séparation des Eglises et de l'Etat. S'il accorde une grande place à la religion, ce n'est pas pour lui donner le pouvoir, c'est au contraire pour qu'elle reste cantonnée dans la sphère qui lui est propre. Quel est le rôle politique de la religion? "La religion en prenant en charge le désir d'absolu qui habite naturellement l'homme empêche d'investir directement ce désir dans la dimension politique et protège ainsi l'humanité des potentialités de l'organisation sociopolitique que nous qualifions aujourd'hui de totalitaires".[76] Et la religion a un rôle fondamental dans le processus de construction de la citoyenneté. Tocqueville développe ce rôle selon trois axes dans les deux tomes de son livre *De la démocratie.* La religion corrige l'excès de rationalité et d'indépendance de l'individu démocratique; elle dématérialise ses désirs et ses objectifs de vie; enfin, elle lui permet de retrouver le sens d'une temporalité ouverte sur l'avenir.

Un autre point est très intéressant dans la pensée de Tocqueville sur la religion et la démocratie: la Révolution française lui apparaît comme une révolution religieuse, "une révolution politique qui a opéré à la manière et qui a pris en quelque chose l'aspect d'une révolution religieuse".[77] Elle inspire le prosélytisme, elle pénètre par la prédication et la propagande, elle considère l'homme en général indépendamment du pays et du temps, elle a l'air de tendre à la régénération du genre humain plus qu'à la réforme de la France. Son grave défaut, selon Tocqueville, fut de mêler politique et religion. "Les lois religieuses ayant été abolies en même temps que les lois civiles étaient renversées, l'esprit humain perdit entièrement son assiette: il ne sût plus à quoi se retenir ni où s'arrêter".[78] Tocqueville voit bien le danger que fait courir à la démocratie tout empiètement

[76] A. ANTOINE, *op. cit.* (n. 71), 140.

[77] A. DE TOCQUEVILLE, *L'Ancien Régime et la Révolution* [1856], éd. par F. MÉLONIO (Paris 1988), 106.

[78] *Ibid.*, 247.

du politique sur le religieux et du religieux sur le politique. Par sa réflexion sur le cas américain et sa théorisation de la place de la religion en démocratie, Tocqueville, selon les sociologues contemporains, ouvre des pistes pour penser le religieux à l'heure de la désacralisation du politique et de la démocratisation de la religion.

Ce rapide rappel de l'importance de la pensée de Tocqueville pour comprendre aujourd'hui les liens entre religion et démocratie me permet de poser une question et d'indiquer un domaine de recherches en historiographie que je n'ai découvert qu'en travaillant sur ce sujet. La question est simple. Les penseurs depuis les Lumières dans les différents pays de notre culture occidentale ont-ils réfléchi à la place de la religion dans la démocratie antique? Il me semble, pour l'historiographie française en tout cas, que le désir constant des générations précédentes, depuis l'époque des Lumières, de se référer à un modèle antique qu'il soit celui de Sparte, celui d'Athènes, ou celui de Rome, ne s'est presque jamais soucié de la place qu'occupait la religion. Le polythéisme est apparu quantité négligeable dans la définition des systèmes politiques des mondes antiques, alors même que la place à donner à la religion était un sujet d'intérêt, voire même un cheval de bataille pour tous ceux qui élaboraient des constitutions modernes. En est-il de même en Angleterre, Allemagne, Italie, aux Etats-Unis? Il me paraît intéressant d'y réfléchir dans le futur.[79]

Je n'ai pas essayé de comparer le rapport entre démocratie et religion dans la démocratie athénienne et dans nos diverses démocraties modernes, et je n'ai pas non plus cherché les traditions et les influences, non par mauvaise volonté, mais par

[79] Je n'ai pas eu le temps de faire une recherche sur ce point. Pour la France P. Vidal-Naquet, par exemple, n'aborde jamais la question de la religion quand il étudie la présence de l'Antiquité dans la Révolution française, *La démocratie grecque vue d'ailleurs* (Paris 1990) et *Les grecs, les historiens, la démocratie* (Paris 2000). CL. MOSSÉ, *L'Antiquité dans la Révolution française* (Paris 1989), non plus.

impossibilité à "comparer l'incomparable" comme le disait Marcel Detienne. Même en faisant le pari que l'anachronisme est un moyen que ne doit pas négliger l'historien comme le démontrent brillamment Marc Bloch[80] puis Nicole Loraux,[81] je n'ai pas pu trouver des chemins de traverse qui ne soient pas totalement artificiels pour mener cette enquête. En lisant Tocqueville pourtant je me suis demandée si le rapport qu'entretient la démocratie américaine avec la religion n'avait pas quelques traits communs avec celui que connaissait la démocratie athénienne: une certaine manière d'irriguer tout le tissu social et d'être à l'œuvre dans la construction de l'identité du citoyen américain. Mais aussitôt les divergences apparaissent, le but principal de la liberté individuelle dans la démocratie américaine étant bien loin de ce que l'on peut percevoir dans l'Athènes démocratique. Ce n'est pas un constat d'échec, d'une part parce que la spécificité de ces deux moments démocratiques, Athènes au V^e^ siècle, nos démocraties au XXI^e^, a bien sûr une raison historique et qu'il ne faut pas vouloir forcément aplanir les différences et voir des convergences, les ruptures ont aussi un sens. D'autre part, parce qu'au fil de la réflexion, j'ai découvert qu'en fait, tant dans l'histoire de la démocratie athénienne que dans l'histoire de notre propre rapport au passé antique, le thème de la religion n'avait été qu'effleuré alors qu'il méritait sans doute une attention plus grande. Une fois la page tournée de la laïcité militante, il faut peut-être suivre Tocqueville et se demander si le religieux en démocratie ce n'est pas "une référence donnant sens sans imposer de normes, un imaginaire permettant de laisser libre le lieu du pouvoir, et donc de vivre réellement la démocratie, une éthique nourrissant les vertus civiques et le sens de la solidarité".[82]

[80] M. BLOCH, *Apologie pour l'histoire ou Le métier d'historien,* (Paris [7]1974).

[81] N. LORAUX, "Eloge de l'anachronisme en histoire", in *La tragédie d'Athènes. La politique entre l'ombre et l'utopie* (Paris 2005), 173-90.

[82] D. HERVIEU-LÉGER, J.-P. WILLAIME, *op. cit.* (n. 71), 58.

DISCUSSION

M. Hansen: Sortition of magistrates was an institution closely associated with democracy. It is disputed whether there was a religious background, *viz.* that by using the lot the decision was left to the Gods. You have no discussion of the topic. Is that because you share the view that in Democratic Athens sortition of magistrates was seen as a democratic but not as a 'religious' procedure by which the god decided?

P. Schmitt Pantel: Sur la question très compliquée de la place et de la signification du tirage au sort dans la démocratie athénienne, je suis d'accord avec les conclusions de Paul Demont qui a étudié de près ce dossier ("Le tirage au sort des magistrats à Athènes: un problème historique et historiographique", in *Sorteggio Pubblico e Cleromanzia dell'Antichità all'età moderna,* a cura di F. Cordano, C. Grottanelli, [Milano 2001], 63-81.): "A côté de la présentation idéologique du tirage au sort comme caractéristique de la démocratie, et de l'évidence matérielle de son rôle dans la démocratie extrême, il faut probablement laisser une place à la croyance en l'intervention des dieux dans le processus jusqu'aux époques classique et hellénistique et il ne faut pas négliger les utilisations non démocratiques du tirage au sort dans les cités grecques".

M. Hansen: You quote Christiane Sourvinou-Inwood for the view that "la religion constituait le cadre et le foyer de la *polis*. La religion était le centre même de la *polis*". I have always held that the centre of the *polis* was where the citizens isolated themselves from women, foreigners and slaves, i.e. in all the political institutions.

P. Schmitt Pantel: La remarque est importante et ne peut être tranchée en quelques lignes. La citation complète de Christiane Sourvinou-Inwwood montre une pensée plus nuancée: "Le rôle de la *polis* dans la religion grecque avait pour pendant le rôle d'organisation de la religion dans la *polis*: la religion constituait le cadre et le foyer de la *polis*. La religion était le centre même de la *polis*". (*op. cit.* [n. 13, trad. française], 366). Elle suggère une équivalence entre le rôle du politique et le rôle du religieux dans la cité, pas une suprématie du religieux sur le politique. L'expression "la religion était le centre de la cité" peut prêter à malentendu si on ne lit pas la phrase dans son ensemble. Personnellement, comme je l'indique, je préfère une autre formulation, suggérée par Pierre Brulé, celle de "religion politique", qui part du constat qu'à l'époque classique le fait religieux est un fait politique. Mogens Hansen et moi nous n'avons pas la même définition du politique, pour moi le politique ne se résume pas aux institutions politiques.

O. Murray: Your claim that modern writers since the Enlightenment have paid little attention to the place of religion within ancient society seems to me to ignore the central importance of the trial of Socrates in modern accounts; for this is normally seen not as a question of politics or public order (as some modern rationalists have wished to view it) but as a fundamental question about the relationship between the beliefs of the individual and the religion of the state. On the one hand Socrates may be seen as the martyr in the service of a new religious or philosophical world view, on the other hand he may be seen as the destructive force that destabilises or creates the dissolution of traditional society. From the mid eighteenth century onwards this trial is viewed as the central episode in Greek history, indeed for Hegel and Nietzsche it becomes the central episode in world history. Rightly or wrongly the whole weight of the difference between ancient and modern (Christian) religion is placed on the figure of Socrates. This has been

well explored in a number of books, most recently the two volumes of the conference on Socrates in London edited by M.B. Trapp, *Socrates from Antiquity to the Enlightenment* and *Socrates in the Nineteenth and Twentieth Centuries,* Centre for Hellenic Studies King's College London, 9-10 (Aldershot 2007). Do you see the trial of Socrates as significant in the modern understanding of the relation between religion and society in Athens?

P. Schmitt Pantel: Vous avez raison d'attirer l'attention sur le procès de Socrate. Mogens Hansen m'a fait une remarque proche: "All sources show that freedom of speech and thought was an ideal cherished by the Athenian democrats, and in Demosthenes (20.105-8) it is exemplified by the right in Athens to praise the Spartan Constitution at the expense of the Athenian, while in Sparta it was an offence to praise any other constitution than the Spartan. But did the democratic freedom of speech and thought extend to religion? That is an issue which has been debated incessantly since the trials of Anaxagoras and Socrates. And I find it relevant to bring it up in this context". J'ai laissé de côté le procès de Socrate car il me semblait constituer un énorme dossier très étudié. Voir encore le livre récent de Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (New York 2009) et le compte rendu de Pierre Brulé, in *BMCR* (2009.10.30). Il s'agit d'un sujet que l'on ne pouvait pas traiter en quelques phrases, d'autant plus qu'il est lié à la fois au regard porté par la pensée philosophique, au moins celle de Platon, sur la religion en général et au problème de l'incroyance au V^{e} siècle. Pierre Brulé a fait une mise au point récente dans: "Contributions des *Nuées* au problème de l'incroyance au Ve siècle", in *La norme en matière religieuse en Grèce ancienne, Kernos* Suppl.21, (2009), 49-67. Mais laissons la démocratie athénienne pour regarder l'historiographie de la question. Je suis totalement d'accord avec vous: le procès de Socrate est au cœur de la perception moderne de la démocratie athénienne, mais moins, me semble-t-il, autour de la question de la relation

entre les croyances de l'individu et la religion de la cité, que autour de la place laissée à la liberté de penser et d'agir en démocratie C'est une voie que j'aurais du explorer.

C. Farrar: You cite Finley (discussing ancient Athens) and Tocqueville (on 18th century France) as proponents of the view that religion is peculiarly important to social order at a time when political change threatens (in different ways) to unseat 'l'esprit humain'. Your discussion of ancient religion suggests that the achievement of solidarity was a function of religion in a range of *polis* regimes, not just democracies — that the need to construct a kind of 'sameness' within a political boundary existed for the definition of a shared citizenship even when citizens were not accorded equal access to political power. I wonder if there isn't something about the claims of a very demanding version of democracy — the "equality to equals and unequals alike" (to use Plato's words) characteristic of revolutionary France and the Athenian democracy — that pushes the idea of politically relevant 'sameness' to an implausible extreme that is particularly likely to trigger the perceived need for reinforcement by a shared religion.

One important difference between the French revolutionary and the Athenian 'uses' of religion is that the former is uprooting a religion of personal belief, the other reinterpreting/extending a religion of ritual and collective practice. Likewise, Athenian democracy, though demanding politically, did not seek to eliminate differences in the personal sphere. Do you think it may be the case that politico-religious sameness without personal uniformity, a way of "donnant sens, sans imposer de normes, un imaginaire permettant de laisser libre le lieu du pouvoir" (p. 388), is possible only if religion is a matter of practice, not belief (in something like the same way that, in Athenian democratic politics, equality is a matter of institutional forms, not — as in the French revolutionary case — attempted homogenization of personal attributes)?

P. Schmitt Pantel: Il est impossible de réduire la religion dans la démocratie athénienne à un ensemble de pratiques rituelles partagées. Si en tant qu'historiens nous minimisons l'importance de la croyance, c'est bien souvent parce que nous manquons de documents sur cet aspect. Ou, pour la génération d'historiens qui nous a précédés, parce que seul un monothéisme semblait alors susceptible de susciter l'adhésion personnelle. Donc je ne pense pas que la similitude politico-religieuse soit seulement possible si la religion est fondée sur les pratiques et non sur la croyance. Ma dernière citation est plutôt d'ordre historiographique. Je fais l'hypothèse que le peu de réflexion sur la place de la religion dans la démocratie grecque chez les historiens contemporains est lié à une conception laïque de la démocratie contemporaine. Il devrait être possible aujourd'hui de penser le fait religieux et le fait politique, y compris démocratique, sur le même plan, sans préjugés.

P. Pasquino: Je voudrais ajouter une observation à l'exposé remarquable de Pauline Schmitt, notamment à propos de la question sur laquelle elle a attiré l'attention vers la fin de sa contribution: "l'absence totale d'homogénéité dans les relations entre les démocraties modernes et les religions".

Il me semble qu'on peut distinguer schématiquement trois cas: celui des Etats-Unis, de l'Italie et de la France.

A l'origine de la république établie à la fin du 18^{e} siècle dans le Nouveau Monde, celle qu'au 19^{e} siècle on commencera à appeler 'démocratie', la religion et la liberté religieuse ont joué un rôle capital. Mais il s'agit d'une religion qui se présente d'emblée sous la forme du pluralisme des sectes et des croyances et à l'enseigne de la tolérance, pluralité de religions qui a été coextensive avec et en un sens a façonné le pluralisme politique et culturel de la nation américaine.

La religion s'est présentée, en revanche, sous une autre figure dans son rapport à la politique en des pays du vieux continent tels que l'Italie et la France. Le quasi monopole religieux du

catholicisme romain dans les deux nations a produit néanmoins des résultats différents. D'un côté des Alpes, sur la Seine, il conduit à un affrontement direct avec la religion et la papauté pendant la Révolution, affrontement qui a donné comme aboutissement le sécularisme devenu depuis une dimension fondamentale de la culture 'républicaine' française. De l'autre côté, sur le Tibre, la présence du Vatican a d'abord fait obstacle, avec le *Non possumus* prononcé par Pie IX, à la participation des catholiques à la vie politique italienne et aux premières tentatives de construire une démocratie parlementaire; après le fascisme et la guerre, la volonté de compromis avec l'Eglise de Rome des gouvernements italiens, de la DC à Craxi, a permis à celle-ci de garder une position de privilège qui continue, au de là de la dissolution du parti d'inspiration catholique, à peser lourdement sur la vie politique de la péninsule.

Voilà quelques éléments qui montrent, si cela était nécessaire, la justesse des observations de P. Schmitt concernant l'absence d'homogénéité du rapport dans les sociétés modernes entre religion et démocratie.

CONCLUSION

The last time that I came to Vandœuvres was by train in April 1974. It was the height of the Cold War, and this was the only institution in the West that classicists from the Eastern bloc were permitted to visit. For that generation from the East it was a lifeline, while we from the West learned for the first time how the bonds that united the *République des Lettres* were the most important of all, transcending both nationality and ideology. I recall visiting the *Fondation Bodmer*, with its museum built as a reinforced bunker so as to preserve a few documents for civilisation in the not unlikely event of nuclear war. And I recall most of all evenings in the Baron's library, drinking the last of his whisky, and discussing with the Polish papyrologist Zbigniew Borkowski what incredible youthful folly had caused him to join the Communist Youth, and me to join the British army in order to fight communism, as we searched in vain for the Red Star in the night sky. Now the Fondation Hardt serves a different purpose in a better world, and it is a delight to find it once more flourishing, after a period of uncertainty, under the genial leadership of its inspiring director, Pierre Ducrey.

So it seemed to me especially appropriate to be discussing the relations between ancient and modern democracy in this setting, and at a time when a recently triumphant democratic ideology is once again entering the difficult process of discovering its limitations and its problems. Mogens Hansen, who has done more than any other living scholar to revive the study of ancient Greek democracy, called us together to consider, as he explains in his introduction, the relationship between Athenian institutions and those of modern democratic states; and I think

our papers and their discussions, carefully planned by him, covered many of the most important institutional aspects of this relationship.

In his introduction Hansen has concentrated on the extent to which the modern world has been influenced by, or can make use of, ancient examples to clarify modern problems. This is of course an important part of the questions we were called upon to address, and one which many of his contributors (myself included) specifically approached. But I think that most (perhaps all) of those who took part in these discussions recognised that we were not professional politicians or political scientists or political philosophers. We were students of the ancient world with a sincere interest in the problems of the modern. Whatever we may have contributed to the understanding of the origins of modern democratic thinking, this is not and cannot belong to the core of our expertise.

In the course of this week of intensive discussion I believe that, rather than coming to conclusions about the influence of the ancient on the modern world, many of us found ourselves reflecting on the inverse relationship, of the influence of the modern world on the ancient. For in the study of Athenian democracy, as in all historical research, we have to begin from our own experience; and the questions that we ask derive not so much directly from the evidence itself as from our reflection on that evidence. I will give three relevant examples of how this inverse relationship has worked.

It has recently once again been reasserted that the origins of our study of the ancient *polis* derive from the insights of the great contemplative Swiss historian, Jacob Burckhardt.[1] It was

[1] K. VLASSOPOULOS, *Unthinking the Greek Polis* (Cambridge 2007) following the lead of W. Gawantka in 1985; although both these writers think that this vitiates the fundamental insight. It is clear that I take a more positive view.

he who saw the central importance of the phenomenon of the *polis*; and the reason that he was able to perceive this, as no professional ancient historian had been able to do, was precisely because he lived in an age when nationalism had recently become the dominant ideology, and in the peripheral non-nationalistic society of the little city of Basel.[2] His negative insight derived from his distaste for Prussian nationalism after 1870, while his positive message was related to his own experience as a member of the Basel ruling elite in the fundamentally oligarchic but libertarian merchant and agrarian society of nineteenth-century Switzerland. Without Basel the Greek *polis* would never have been discovered, and Mogens Hansen's great Copenhagen Polis Centre would never have happened. It is important to reflect that our modern knowledge of Greek democracy depends ultimately on two individuals who lived respectively in Switzerland and Denmark — two small and in global terms insignificant, but very democratic, societies, not so very different from the Greek city-state.

Again the strength of the studies of Moses Finley derives from his continuous and problematic involvement in American affairs. The history of the study of ancient slavery from Marx to Finley is the history of the impact of the modern on the ancient world. Finley himself viewed slavery in the way that he did because of the similarities and differences between ancient slavery and the still burning question of slavery in the American southern states. That would indeed be a fascinating subject to pursue in some future *colloque*. But his book on *Democracy Ancient and Modern* (London 1973), which provides the intellectual starting point for our own meeting, is also marked by his concern for the impact of modern democratic thought on our perception of the ancient world. He began from the contemporary theory that indifference, apathy or acquiescence

[2] L. GOSSMAN, *Basel in the Age of Burckhardt* (Chicago 2000).

was the most important attribute of the modern electorate, and proceeded to show that the opposite was true of ancient Athens; so his emphasis was on the importance of participation in democracy. But behind this insistence on the importance of the modern citizen standing up to be counted lay his own experience at the hands of the supine and corrupt political system called democracy in the age of that archetypal demagogue, Senator McCarthy. If he had not been driven into exile in Europe on the basis of false accusations, he would never have written with such passion on Athenian democracy.

I could go on with examples of the reciprocal relationship between the ancient and the modern worlds, and how the modern world has enabled us, and continues to enable us, to understand the ancient world better. But I will simply recall another lesson from a time of adversity, when that archetypal wandering Jew, Jules Isaac, a great educator dismissed from office by his colleague, the collaborator Jérôme Carcopino (who to the shame of the French nation was later elected to the *Académie Française*) was roaming the roads of Vichy France with two manuscripts in his battered briefcase. The first, *Jésus et Israël*, was to make him famous throughout Europe when it was published in 1948 after the war, and to cause him to be received in his 82nd year by Pope John XXIII. The second manuscript, *Les Oligarques: essai d'histoire partiale*,[3] was a lament for his beloved Athens, betrayed by the oligarchs in collaboration with the Spartan enemy, as France had been betrayed in the modern world. His book closes with an expression of hope:

> J'écris ces lignes ultimes, quelque part en France — en ce qui fut la France, — le samedi dix-sept octobre mil neuf cent quarante-deux: les 'bons' sont toujours aussi malfaisants; savoir si les 'méchants' seront aussi magnanimes.

[3] The book was first published after the war in 1946 (Les éditions de Minuit, Paris); I have used the edition published by Calmann-Lévy, Paris 1989.

The old adage *historia magistra vitae* has in our age more than ever before been transformed into a new one, v*ita magistra historiae*. At the end of these days of study, that is for me the most important lesson, and the ultimate reason for comparing ancient and modern democratic practices. It is clear that we create our insights through self-selection, as a result of our own experience in attempting to overcome a number of weaknesses that we perceive in modern democratic politics. And we come to understand the ancient world more clearly because it is or is not like the modern. Sometimes we discern genuine patterns in the ancient evidence as a result of modern experience, sometimes we misunderstand the ancient world; but that is a risk that must be taken. It is absolutely essential to attempt to use modern parallels in order to construct our ancient world. And it is our ability to understand better antiquity, or our recognition that we cannot understand antiquity, that has been revealed in these discussions. For that reason I suspect that our book will be ultimately be read with greater profit by those who wish to conduct research into the ancient world, and to understand the nature of its problems, than by those professional social scientists who for the most part do not need, or do not think they need, the insights of the past.

Thus, taking the inverse view of our deliberations, and leaving aside the more general papers of P. Pasquino and myself, we have attempted to understand the question of how teleological is the Greek political experience, how far would the ancient world have accepted the Aristotelian analysis based ultimately on the example of Athens (Chr. Mann). We have looked at the Athenian conception of citizenship, not as a legal status, but as a privilege and a right involving also a duty to society (K. Piepenbrink).[4] We have considered a new and

[4] This is of course the subject of P. LIDDEL, *Civic Obligation and Individual Liberty in Ancient Athens* (Oxford 2007).

hitherto unnoticed revolutionary principle of ancient democracy, that of self-selection (*ho boulomenos*), whose importance has been brought to our attention for the first time by C. Farrar as a result of her work on participation in modern democracies. We have reflected on the advantages of judicial interference in the democratic process in Athens, and its problematisation once professional lawyers rather than ordinary citizens become involved (A. Lanni). We have recognised the close relationship between imperialism and democracy in ancient Athens (as in ancient Rome, early modern England and the modern USA), which runs so contrary to the pipe dreams of modern theorists (E. Robinson). We have considered the continuities and discontinuities in the ancient and modern conceptions of liberty, and some of us have even come to question whether liberty is necessarily always a good (M. Hansen). And finally we have once again come up against the difficulty of placing both ancient religion and modern religion in any conception of a democratic political system (P. Schmitt Pantel).

These seem to me some of the more important issues which our discussions have raised. Beyond that we have, I would suggest, emphasised the complexity of the relations between ancient and modern ideas and the difficulty of positing clear parallels, the absence of influence from Athens to the modern world, and the differences between ancient and modern democracy, despite the apparent similarities in terms of institutions, vocabulary and practices. We have, I hope, made it a little more difficult to assert glib generalisations like 'the 2500th anniversary of democracy'.

In our discussions I can detect only one glaring omission, which I have already alluded to. It relates to the current impoverishment of political debate in consequence of the collapse of Marxism as a responsible political theory. We have completely failed to discuss the role of the economy in the creation and maintenance of democracy, in a way that would have amazed

our eighteenth-century predecessors from Montesquieu and Adam Smith onwards.[5] Surely the economy and democracy are essentially related to each other, they would have said. And surely the most important economic element in ancient democracy is slavery, and in the modern economy the exploitation of wage labour, which, as Marx saw, is so akin to it. In this respect we have fallen into the same trap as George Grote and John Stuart Mill, who preferred not to talk about anything as democratically embarrassing as slavery. But it is too late to rethink our colloquium, and where would we find a scholar in the present age prepared to tackle such a theme? We must be content with what we have managed to do.

Oswyn Murray

[5] These questions have most recently been raised in relation to Athenian democracy in the book of A. MORENO, *Feeding the Democracy: the Athenian Grain-supply in the Fifth and Fourth Centuries B.C.* (Oxford 2007).

INDEX LOCORUM

Aeschines:
1, 24: 258.
1, 28-32: 174.
1, 29: 275.
1, 33-34: 173.
1, 34: 325.
2, 28: 108.
3: 245, 252.
3, 1-8: 253, 257.
3, 6: 253.
3, 7: 253.
3, 8-48: 240.
3, 9-12: 253.
3, 9-31: 253.
3, 27: 184.
3, 30: 184.
3, 32-48: 253.
3, 49: 239.
3, 49-50: 252, 340.
3, 50: 252.
3, 55: 174.
3, 191: 263.
3, 220: 178, 192.
3, 224: 46.
3, 233: 178.
3, 260: 239.
Schol. ad Aeschin. 1, 39: 373.
Andocides, orator:
1, 17: 236, 237.
1, 22: 236.
1, 43: 129.
Antiphon, orator:
1, 6: 324.
Aristophanes:
Acharnenses:
540-554: 282.
Aves:
1073: 336.
Ecclesiazusae:
210: 219.
682: 190.
834: 190.
Equites:
50-51: 64.
255: 64.
797-800: 64.
Plutus:
911-922: 218.
Ranae:
948-951: 323.
Thesmophoriazusae:
540-543: 282, 323.
Vespae:
548-555: 70.
690: 64.
Schol. ad Ar. *Av.* 1073: 336.
Aristoteles:
Athenaion Politeia:
4: 178, 187.
4, 3: 177.
4, 14: 193.
7, 3: 178.
7, 4: 184, 185.
8, 1: 177, 185.
8, 5: 61.
14: 178.
19-20: 62.
21: 185.
22, 5: 177.
26, 2: 63.
27, 3: 64.
27, 4: 196.

29, 4: 20.
30: 193.
30, 2: 177.
39, 3: 170.
41, 2: 28.
41, 3: 64.
43: 223.
43, 2: 193.
43, 3-6: 172.
47, 1: 185.
48, 3-6: 332.
49, 3: 181.
50, 2: 177.
53, 5: 190.
54, 3: 179.
55, 1: 185.
56, 4: 179, 185.
62, 1: 185.
62, 2: 64.
62, 3: 179.
63: 183, 222.
64-66: 182.
68-69: 65.
Ethica Eudemia:
1242a 22: 58.
Ethica Nicomachea:
1097b 11: 59.
1130a 3-5: 92.
1134b 2 *sqq.*: 92.
1162a 16-21: 59.
1169b 18-19: 59.
1177a 32-34: 92.
1177b 4: 92.
1177b 26 *sqq.*: 92.
1178b 5-7: 92.
Historia Animalium:
487b 33 – 488a 14: 54, 91.
488a 7: 92.
617b 13-14: 94.
Politica:
1: 90, 91.
1, 1, 7 (1252b 20): 94.
1, 1, 7-11 (1252b 27 – 1253a 17): 55.
1, 1, 8 (1252b 29-30): 90.
1, 1, 8-9 (1253a 1-3): 90.
1, 1, 9 (1253a 2-4): 92.
1, 1, 9 (1253a 8): 91.
1, 1, 10-11,(1253a 9-18): 91.
1, 1, 11 (1253a 18f): 57.
1, 5, 2 (1259b 4-5): 320.
2, 1, 5 (1261a 32-4): 320.
2, 6: 193.
2, 9, 3 (1274a 8-9): 64.
2, 9, 4 (1274a 15-8): xxv.
3, 1, 2 (1274b 41): 91, 92.
3, 1, 3 (1275a 7-8): 91.
3, 1, 4 (1275a 22-23): 92, 93.
3, 1, 4-5(1275a21-33):16,91.
3, 1, 6 (1275b 3-6): 119.
3, 1, 6 (1275b 5-6): 93.
3, 1, 8 (1275b 20): 91.
3, 1, 12 (1276a 32-34): 109.
3, 1, 13 (1276b 1): 93.
3, 1, 13-14 (1276b 2-11): 91.
3, 3, 1 (1278a 1-6): 91.
3, 3, 2 (1278a 8-11): 92.
3, 4: 187.
3, 4, 1 (1278b 17-21): 58, 90.
3, 4, 5-6 (1279a 8-15): 92.
3, 5, 10 (1280a 31-34): 90, 91.
3, 6: 183, 188.
3, 6, 6 (1281b 31): 92.
3, 6, 7 (1281b 32-4): xxv.
3, 7, 13(1283b42-1284a3): 92.
3, 8, 1 (1284a 3-10): 93.
3, 8, 1 (1284a 4-5): 93.
3, 8, 1 (1284a 8): 93.
3, 10, 5 (1286a 29): 93.
3, 11: 175, 176.
3, 11, 1-2 (1287a 8-12): 93.
3, 11, 12 (1288a 15-19): 93.
3, 13: 175.
4, 2, 2 (1289b 2): 93.
4, 3, 4-5 (1290a 13-29): 93.
4, 4: 191.
4, 6, 1 (1293b 27-30): 93.
4, 7, 3 (1294b 7-9): 65.

4, 7, 4 (1294b 8-9): 7.
4, 7, 5 (1294b 18-34): xvi.
4, 7, 3 (1295a 17-22): 93.
4, 9: 175.
4, 12, 3 (1299a 25 *sqq.*): 91.
4, 14: 172.
4, 19, 19 (1300a32-33): 7.
5, 6, 7-5, 7, 2 (1307b): 287.
5, 7, 19-21 (1310a12-22): 327.
5, 7, 21-22 (1310a25-36): 327.
5, 7, 22 (1310a 27-36): 352.
6, 1, 5-8 (1317a 40-1317b 17): 318, 331, 353.
6, 1, 6 (1317a 41): 319.
6, 1, 6 (1317b 1): 352.
6, 1, 6 (1317b 1-11): 331.
6, 1, 6 (1317b 2-3): 16.
6, 1, 6 (1317b 4): 321.
6, 1, 6 (1317b 8-10): 5, 228.
6, 1, 7 (1317b 11): 319.
6, 1, 7 (1317b 11-17): 331.
6, 1, 8 (1317b 23-25): 223.
6, 1, 8 (1317b 28-31): 223.
6, 2: 169, 170, 171, 175, 179, 187, 191, 192.
6, 2, 2 (1318b 21-2): xxv.
6, 2, 3 (1318b 28 *sqq*): xxv.
6, 2, 4 (1318b 38-41): 328.
6, 3: 194.
6, 4: 175, 192.
6, 5: 175, 184.
6, 7: 194.
7, 2, 1- 7, 3, 6 (1324a 13-1325b 32): 92.
7, 2, 2 (1324a 16-17): 92.
7, 2, 3 (1324a 28): 92.
7, 2, 9 (1325a 1-5): 92.
7, 3, 6 (1325b 23-27): 92.
7, 4, 1-2 (1325b 39-1326a 5): 91.
7, 4, 4 (1326a 18-20): 91.
7, 4, 7 (1326b 7-18): 90.
7, 4, 8 (1326b 22-24): 109.
7, 5, 1 (1326b 30-32): 92.
7, 8, 2(1328b33-1329a2):92.
7, 8, 3-4 (1329a 2-17): 320.
7, 12-7, 13, 5 (1332b 12-1333a16): 320.
7, 14: 188.

Rhetorica:
1, 8, 5: 192.

Demosthenes:
9, 3: 323.
10, 70-4: 218, 331.
10, 71: 188.
15, 17: 284.
15, 18: 285.
15, 20: 285.
18: 245.
18, 110: 238, 239.
18, 111-120: 240.
18, 118: 252.
18, 132: 130, 335.
18, 170: 174.
18, 308: 331.
18, 320: 188.
19, 99: 331.
20: 249.
20 hyp. 2, 3: 237.
20, 29: 249.
20, 89: 250.
20, 90: 250.
20, 94: 250.
20, 96: 250.
20, 96-97: 251.
20, 100: 238.
20, 102-104: 251.
20, 105-108: 339, 391.
20, 108: 188.
20, 127: 249.
20, 144: 237.
20, 147: 251.
20, 155-157: 251.
20, 156: 249.
20, 160: 249.
22: 254.
22, 5: 237.

22, 5-7: 254.
22, 8-13: 254.
22, 9-10: 237.
22, 11: 254.
22, 21: 254.
22, 30: 218, 331.
22, 30-32: 275.
22, 31: 254.
22, 31-32: 255.
22, 33: 254.
22, 36-37: 178.
22, 51-52: 335.
23: 243, 255.
23, 4: 178.
23, 16: 255.
23, 18: 238, 271.
23, 25-28: 255.
23, 27-31: 256.
23, 34-47: 256.
23, 35-36: 256.
23, 47-60: 256.
23, 63-79: 255.
23, 86: 256.
23, 91: 255.
23, 104: 237.
23, 126: 110.
23, 211: 110.
24: 247.
24, 5: 257.
24, 9-14: 238.
24, 12-14: 247.
24, 17-32: 247.
24, 21: 250.
24, 25: 250.
24, 26: 248.
24, 28: 248.
24, 32: 248.
24, 33 *sqq.*: 265.
24, 34: 250.
24, 39-40: 247.
24, 45-48: 248.
24, 47: 325.
24, 53-59: 248.
24, 54-55: 21, 25.
24, 59-60: 249.
24, 62-65: 249.
24, 66: 178.
24, 78-80: 25, 46.
24, 112: 171.
24, 139-143: 265.
24, 142: 174.
24, 152: 249, 257.
24, 154: 263.
24, 192-3: 326.
25, 25: 325.
26, 13: 325.
39, 1: 181.
42, 2: 325.
45, 78: 118.
58, 89-91: 239.
59, 28: 323.
59, 75: 175.
59, 88: 73.
59, 89: 103.
59, 91: 239.
59, 92: 118.
59, 112: 325.
60, 25-26: 282.

Dinarchus:
1, 71: 174.
1, 100: 174.

Dio Chrysostomus, Prusensis, sophista:
31, 128: 250.

Diodorus Siculus:
11, 88: 292.
11, 91: 292.
12, 39, 2: 337.
12, 78, 4-6: 292.
13, 47, 8: 287.
15, 72, 1-2: 292.

Diogenes Laertius:
2, 12: 337.

Euripides:
Supplices:
404: 229.
406-408: 187.
422-433: 192.
438: 192.
438-441: 331.
481-485: 304.

Harpocratio, grammaticus: 64.
Herodotus:
3: 352.
3, 80: 353.
3, 80, 6: 71.
3, 81, 1: 71.
3, 83: 177.
3, 83, 2: 323, 353.
3, 83, 3: 353.
5, 62-66: 62.
5, 69-73: 62.
6, 109-110: 185.
Homerus
Od. 2, 1-259: 59.
Hyperides, orator:
3, 33-36: 47.
2 adv. Philippum: 245.
adv Dion: 245.
Fr. 7: 239.

Isaeus, orator:
1, 1: 218, 331.
Isocrates, orator:
7, 20: 326.
7, 21-2: 188.
7, 22-23: 186, 222.
15, 22: 129.
15, 38: 178, 218, 331.
15, 150: 218.
12, 143-144: 173.
12, 153-154: 175.
16, 32-35: 347.
20, 10-11: 273.

Lysias, orator:
2, 55-56: 282.
12, 85: 325.
14, 11: 325.
16, 25: 186.
16, 26: 186.
16, 31:186.
17: 333.
18: 333.
19: 333.
19, 7: 129.
19, 18: 218, 331.
19, 55: 218, 331.
22, 2: 129, 174.
22, 19: 325.
30, 34: 325.
31, 1: 181.
Fr. 38: 345.

Pausanias:
1, 3, 3-4: 373.
1, 17, 2-3: 371.
Philochorus, historicus:
Fr. 140: 181.
Plato:
Apologia:
17d: 218, 331.
Gorgias:
461e: 323, 324.
515e: 64.
Leges:
741b: 227.
756: 193.
757: 175.
757b: 188, 227.
759b: 227.
759c: 228.
763: 177.
765: 177.
Politicus:
298e: 178.
303a: 223, 224, 226.

Protagoras:
319d: 178.
320d-328d: 175.
Respublica:
548a-b: 335.
557a: 323.
557b-558c: 192.
557b 5: 326.
557b 8-10: 326.
557c 6-7: 326.
557d 8: 326.
557e: 193, 326.
558: 171.
558a 4: 326.
558b, 6-7: 327.
558c 1: 327.
558c 4: 326.
558c 5-6: 327.
560e: 320, 326.
562b-564a: 192.
562c-d: 326.
563d: 343.
565a: 47.
Symposium:
182e: 324.
Theaetetus:
173c-d: 178.
Plinius Secundus Maior, C.:
Nat. 35, 69: 373.
Plutarchus:
Moralia:
169e: 337.
238c: 314.
835f-836a: 122.
Vitae:
Lyc. 6: xv.
Pel. 25: 292.
Per. 9, 2-3: 64.
Per. 32, 2-5: 337.
Sol. 20, 1: 61.
Sol. 24, 4: 104.
*Them.*19, 6: 43.
Pollianus, epigrammaticus:
8, 86: 324.

Solon Atheniensis:
3, 26-29: 60.

Theophrastus:
Characteres:
26, 1-2: 223.
28, 6: 192.
Thucydides:
1, 19: 287.
1, 126: 287.
2, 34, 6: 227.
2, 37: 47, 173, 228, 330.
2, 37, 1: 188, 226, 321, 340.
2, 37, 2: 322, 341.
2, 37, 3: 330, 345.
2, 39, 1: 294, 322.
2, 40, 2: 66, 218, 331, 347.
3, 47, 2: 286.
3, 82, 1: 286.
5, 28-44: 287-288.
5, 60: 292.
6, 27: 272.
6, 35-40: 272.
6, 39: 170, 228.
6, 62, 1: 177.
6, 103: 292.
7, 69, 2: 322, 330, 341.
8, 21: 170, 229.
8, 30, 1: 177.
8, 64-65: 287.
8, 67: 263.
8, 67, 2: 20.
8, 68: 72.
Xenophon:
Apologia Socratis:
22: 338.
Hellenica:
1, 7, 9-35: 245, 246.
1, 7, 12-14: 237.

1, 7, 16-33: 246.
1, 7, 23: 246.
1, 7, 23-35: 262.
5, 3, 16: 294.
Memorabilia:
1, 1, 18: 181.
2, 8, 4: 174.
3, 1-2: 176.
3, 6: 174.
3, 7, 1: 174.
4, 5, 2-5: 326.
[Xenophon]
Athenaion Politeia:
1, 1-3: 184.
1, 2: 175, 192.
1, 3: 176.
1, 6: 192.
1, 8: 192, 194.
1, 12: 323.
1, 13: 184.
1, 14: 287.
1, 16: 287.
3, 6: 183.
3, 10-11: 287.

INDEX AUCTORES RECENTIORES

Ackerman, B.A.: 209, 212, 215.
Adak, M.: 61, 114, 115.
Adams, C.F.: 202.
Adams, J.: 202.
Adkins, A.W.H.: 60.
Aellen, Chr.: 373.
Akça Ataç, C.: 142.
Alexandrova, A.: 289.
Almond, G.A.: 382.
Amden, B.: 336.
Ampolo, C.: 13.
Anagnostopoulos, G.: 56.
Anderson, G.: 62, 63.
Antholis, W.: 282.
Antoine, A.: 384, 386.
Arblaster, A.: 309.
Arendt, H.: 84, 206, 311, 332.
Asmonti, L.: 278, 300.
Azoulay, V.: 378.

Baldwin, T.: 310.
Balot, R.K.: 323.
Barber, B.R.: XXVI, 78, 79, 81, 86, 167, 206, 233.
Barnes, J.: 319, 352.
Barnett, A.: 167.
Bayliss A.J.: 142, 149.
Bearce, D.H.: 280, 294.
Beazley, J.D.: 373.
Béchillon, D. de: 35.
Bengtson, H.: 53.
Berlin, I.: 308, 309, 310, 311, 312, 313, 315, 316, 317, 318, 329, 330, 331, 332, 333, 348, 349, 350.
Bickel, A.: 260.
Billheimer, A.: 103, 104, 105, 110, 118.
Birgalias, N.: 143.
Blanshard, A.J.L.: 375.
Bleicken, J.: xiv, 28, 45, 61, 69, 73.
Blickle, P.: 98.
Bloch, M.: 388.
Blok, J.: 61, 98, 101, 114, 131.
Bluntschli J.C.: 5.
Blythe, A.: 6.
Böckenförde, E.-W.: 126.
Boedeker, D.: 71, 366, 369.
Boegehold, A.L.: 65, 336.
Bogdanor, V.: XXVII.
Bolingbroke, H. St. J. de: 36.
Bonner, R.J.: 257.
Brater, K.L.Th.: 5.
Brenne, St.: 69.
Brigham, S.: 203.
Brock, M.G.: 145.
Brubaker, R.: 126.
Bruit Zaidman, L.: 366.
Brulé, P.: 360, 361, 362, 390, 391.
Brun, P.: 375.
Brunner, O.: 98.
Brunt, P.: 140.
Brunnsåker, S.: 371.
Bryce, J.: 14.
Buchstein, H.: 7, 80.
Budge, I.: XXVI, XXXIII, 233.
Bueno de Mesquita, B.: 280, 291.
Bulwer-Lytton, E.: 154, 155, 156, 158, 314.
Buraselis, K.: 143.
Burckhardt, J.: 396.
Burckhardt, L.: 65, 75.

Burnheim, J.: XXXIII, 167, 206.
Busolt, G.: 113, 118, 122.

Calame, C.: 365.
Callenbach, E.: 167.
Cao, X.: 280.
Carawan, E.: 237, 246, 257, 324.
Carson, L.: XXXIII, 202, 203, 206.
Carter, D.M.: 323, 324.
Carter, L.B.: 218, 219, 331.
Cartledge, P.A.: 143, 241.
Carty, K.: 210.
Carty, P.: 167.
Castriota, D.: 366.
Cederman, L.-E.: 280, 295.
Ceserani, G.: 142.
Charlot, M.: XXVII.
Chemerinsky, E.: 262.
Christ, M.R.: 66.
Clairmont, C. W.: 365.
Clare, J.: 280, 294, 298.
Cohen, D.: 99, 344.
Cohen, E.: 61, 68, 366.
Connor, W.R.: 368, 377.
Conrad, Chr.: 107, 126.
Constant, B.: XXX, 75, 148, 165, 312, 313, 314, 315, 316, 317, 318, 329, 344, 349, 350, 351.
Conze, W.: 98.
Coote, A.: 168, 200.
Couvenhes, J.P.: 378.
Crook, J.: 331.
Crosby, N.: 211.
Curthoys, M.C.: 145.
Cutler, F.: 210.

Dahl, R.A.: XI, XVII, XVIII, XX, XXIX, 11, 83, 201, 311, 312, 343, 344.
Danilovic, V.: 280, 294, 298.
Davies, J.K.: 163, 174, 347.
de Benedictis, A.: 69.
de Ste. Croix, G.E.M.: 286.
de Tullio, E.: 112, 121.
Demandt, A.: 106.
Derenne, E.: 336, 337.
Desch, M.: 291.
Di Donato, R.: 139, 349.
Dicey, A.V.: 30, 31.
Dover, K.J.: 99, 258, 336, 337.
Dowlen, O.: 197, 201, 202, 212.
Doyle, M.W.: 280, 294,
Duflo, E.: 185.
Dunbar, N.: 336.

Ehrenberg, V.: 66.
Eley, G.: 126.
Elster, J.: 167, 177, 182, 198, 199.
Ely, J.H.: 260, 275.

Fallon, R.H.: 260.
Farrar, C.: XXXIII, 168, 170, 175, 234, 400.
Fehr, B.: 371.
Ferejohn, J.: 290.
Ferrari, V.: 112, 121.
Finley, M.I.: XXI, 1, 2, 8, 29, 42, 60, 73, 99, 165, 206, 219, 264, 356, 357, 358, 359, 392, 397.
Fishkin, J.S.: XXV, XXXIII, 168, 199, 200, 201, 206, 207, 209, 211, 212, 214, 215, 234.
Flashar, H.: 59.
Forsdyke, S.: 69.
Fossedal, Gr.: 76.
Fournier, P.: 210.
Fraenkel, M.: 17.
Friedman, L.M.: 112.
Frölich, P.: 332.
Fustel de Coulanges, N.D.: 75, 76, 227.

Gagarin, M.: 240, 252.
Gallagher, M.: XXVI, XXXI, 233, 268.
Gartzke, E.. 280, 289, 295.
Gast, J.: 145, 146, 147, 148, 150, 151, 152, 153, 156, 162, 163.

Gastil, J.: XXXIII, 168, 200, 203, 211.
Gat, A.. 289, 290, 306.
Gauchet, M.: XXX, 314, 381.
Gawantka, W.: 396.
Gelpi, C.F: 280.
Ginsburg, T.: 10.
Glowacki, K.: 373, 374.
Goldhill, S.: 368.
Goldie, M.: 151.
Goldman, J.: 203.
Gomme, A.W.: 66, 71, 173, 227.
Goodell, T.D.: XXI, 257.
Goodin, R.E.: 82.
Goodwin, B.: 167, 194, 207, 212.
Gosewinkel, D.: 126.
Gossman, L.: 397.
Gray, J.: 312, 315.
Gret, M.: 203.
Grieco, J.M.: 280.
Grote, G.: XXX, 144, 145, 149, 150, 152, 154, 155, 156, 158, 159, 165, 166, 314, 401.

Habermas, J.: 77, 78, 79, 81, 86, 99.
Hailbronner, K.. 112, 121.
Hamdorf, F.: 373.
Hamel, D.: 292.
Hannick, J.M.: 238.
Hansen, M.H.: XII, XIII, XV, XVI, XVIII, XIX, XX, XXVI, XXIX, XXX, XXXI, XXXII, XXXV, XXXVIII, 3, 13, 14, 15, 17, 18, 19, 21, 26, 40, 41, 42, 44, 45, 46, 51, 64, 68, 69, 81, 90, 91, 93, 95, 99, 103, 122, 128, 130, 142, 152, 168, 171, 172, 173, 174, 177, 178, 181, 182, 184, 186, 188, 190, 191, 192, 211, 221, 225, 228, 236, 237, 238, 239, 242, 245, 246, 250, 257, 258, 262, 263, 271, 278, 282, 292, 297, 307-353, 390, 391, 395, 396, 400.
Hardin, R.: 11.
Harris, E.M.: 90, 250.
Hartz-Karp, J.: 203.
He, B.: 199, 209.
Headlam, J.W.: 173, 174, 175, 178, 180, 187, 190, 198, 224.
Hedrick, C.: 130, 307, 324, 368.
Held, D.: 13.
Heller, Th.: 112, 121.
Henderson, J.: 71.
Hendriks, C.M.: 200, 211.
Hervieu-Léger, D.: 384, 385, 388.
Higonnet, P.: 4.
Hobbes, Th.: 16, 38, 313.
Hodkinson, S.: 335.
Höffe, O.: 54, 99.
Holden, B.: XIX, XXV, 312.
Holland, K.M.: XXXI.
Holmes, S.: 317, 349.
Holmes, S.T.: 197.
Hölscher, T.: 369, 370, 371.
Hont, I.: 151.
Hornblower, S.: 321, 322, 330.
Hunt, P.: 279, 283.

Ismard. P.: 378.

Jacobson, A.: 9.
Jacoby, F.: 227, 365.
Jellinek, G.: 120, 329, 349.
Jones, A.H.M.: XVII, 64.
Joppke, Ch.: 126.

Kahrstedt, U.: 122, 123, 124.
Kalinka, E.: 72.
Kant, I.: 75, 280, 294, 297, 304, 305, 307.
Kelsen, H.: XXXI, 9, 14, 37, 38, 161, 269.
Kersten, J.: 120.
Kinsella, D.: 289.
Klarman, M.J.: 247, 260.
Kleingeld, P.: 280.

Klöti, U.: 76.
Kocka, J.: 107, 126.
Konstan, D.: 71.
Koselleck, R.: 98, 158.
Koser, R.: 309.
Kramer, L.: 262, 269, 272.
Kraut, R.: 319.
Kriesi, H.: 76.
Kron, U.: 371, 373.
Kullmann, W.: 54, 57.

Laborde, C.: 82.
Lange, C.: XXVII.
Lanni, A.: XXXI, XXXVI, 14, 183, 240, 400.
Lapini, W.: 72.
Laver M.: XXXI, 268.
Lawton, C.: 374.
Leib, E.J.: 167, 202, 206.
Lektzian, D.: 280, 293.
Lenaghan, J.: 168, 200.
Leonhardt, C.: XXVII.
Lévèque, P.: 378.
Levine, P.: XXXIII, 168, 200, 203, 211.
Levy, G.: 280, 293.
Lianeri, A.: 142.
Liddel, P.: 99, 142, 149, 323, 325, 399.
Lipsius, J.H.: 242.
Lissarrague, F.: 369, 370, 371, 372, 374.
Lister, M.: 100.
Lively, J.: XXI, 311.
Llanque, M.: 73.
Locke, J.: 36.
Loraux, N.: 365, 388.
Low, P.: 279, 284, 296.
Lukensmeyer, C.J.: 203.
Luskin, R.C.: 199.

MacCallum, G.: 310.
MacDowell, D.M.: 114, 247.
Macgregor Morris, I.: 142, 149.
Mackert, J.: 100, 116.
Madison, J.: XXII, XXIX, 9, 74, 75, 198.
Maffi, A.: 121.
Magnette, P.: 39, 100.
Mair, P.: XXXI, 268.
Manin, B.: 6, 10, 175, 179, 181, 182, 188, 189, 192, 195, 197, 198.
Mann, Chr.: 61, 68, 69, 89, 90, 92, 93, 94, 95, 299, 399.
Mansbridge, J.J.: 198.
Mansfield, E.D.: 298.
Manville, Ph. B.: 114.
Marr, J.L.: 72.
Martin, B.: XXXIII, 202, 206.
Martin, J.: 61, 63.
Maynor, J.W.: 81, 82, 315.
Mazower, M.: 138, 162.
McCann, D.R.: 283.
McLean, I.: XXXII.
Meier, Chr.: XIV, XX, XXV, 62, 67, 69, 88, 111.
Meier, H.: 5.
Mélonio, F.: 386.
Meritt, B.D.: 374.
Messerschmidt, W.: 373.
Meyer, M.: 374.
Milanezi, S.: 378.
Mill, J. S.: XXI, XXX, 144, 149, 152, 154, 155, 158, 159, 163, 166, 401.
Miller, F.D. Jr., 324.
Millett, P.C.: 241.
Möller, A.: 296.
Momigliano, A.: 139, 140, 349.
Montesquieu, Ch-L. de S. de: XIV, XXIII, 6, 11, 16, 43, 147, 148, 149, 150, 156, 159, 165, 195, 310, 401.
Moore, J.: 142, 149.
Moore, J.M.: 182.

Moreno, A.: 401.
Morris, I.: 60, 296.
Morrow, J.D.: 280.
Mossé, Cl.: 5, 13, 15, 387.
Mueller, D.C.: 167, 267, 268.
Mulgan, R.G.: 57, 59, 81, 167, 192, 198.
Mülke, Chr.: 60.
Müller, H.-P.: 100.
Münkler, H.: 73.
Murray, O.: XV, XVII, 14, 74, 143, 145, 258, 314, 361.

Nethercut, D.: 211.
Nielsen, T.H.: XVI, 278.
Nippel, W.: 5, 13, 26, 73, 75, 98, 99, 111, 333.

O'leary, K.: 167.
Ober, J.: XV, 14, 15, 61, 62, 130, 170, 175, 178, 180, 263, 279, 297, 307, 319, 324, 368.
Oenbrink, W.: 371.
Öhlinger, T.: XXXI.
Olbrich, R.: XXVII.
O'Meara, D.: 54.
Omori, S.: 280, 294.
Oneal, J.R.: 280, 294.
Orlando, V.E.: 31.
Orwell, G.: 331.
Osborne, M.J.: 103, 104, 107, 118, 132.
Ostwald, M.: 13, 20, 324.
Owen, J.M.: 298.

Palazzo, G.: 77.
Palmowski, J.: 126.
Parker, R.: 345, 355, 363, 364, 365, 368, 369.
Parker, R.D.: 262.
Pasquino, P.: XXII, XXXI, XXXVI, 8, 11, 17, 30, 31, 34, 39, 183, 228, 399.
Pauw, C. De: 142, 153, 315.
Pearse, H.: 168, 200.
Pettit, P.: 81.
Philips, M.: 167.
Pia, E.: 100.
Piepenbrink, K.: XXXVII, 25, 57, 399.
Pocock, J.: 53, 82, 83, 94, 95.
Polignac, F. de: 366, 369, 377, 378.
Powell, B.: 60.
Price, S.: 14, 258, 361.
Pritchard, D.: 279.

Raaflaub, K.: XV, 60, 61, 62, 71, 170, 283, 323, 366, 369.
Rahe, P.: 142, 333, 334, 335, 336, 337.
Randazzo B.: 34.
Raubitschek, A.E.: 373.
Rawls, J.: 82, 310.
Rawson, E., 163, 314.
Razin, R.: 280, 293.
Reeve, C.D.C.: 56.
Regan, A.E.: 80.
Reiter, D.: 291.
Resnick, P.: XXXIII.
Rhodes, P.J.: 34, 72, 74, 179, 196.
Richard, C.J.: XXIX.
Riedel, M.: 98.
Roberts, J.T.: 74, 75, 142, 144.
Robinson, E.W.: XIV, XV, XXXVII, 283, 286, 287, 292, 299, 400.
Rosato, S.: 289.
Rosen, R.M.: 71, 323.
Rosenbluth, F.: 290.
Rousseau, J.-J.: 78, 142, 158, 182, 198, 310, 315, 351.
Rubinstein, L.: 324, 338, 346.
Ruschenbusch, E.: 64.
Russett, B.: 280, 282, 294.

Sakellariou, M.: 220, 368.
Saller, R.: 296.

Samons, L.J.: 272, 355.
Sandel, M.J.: 82, 83, 95.
Sartori, G.: XIX, XX, XXI, 312.
Saxonhouse, A.W.: 323, 336.
Scafuro, A.C.: 336.
Scharpf, F.W.: 85.
Scheidel, W.: 296.
Scheyli, M.: 77.
Schlink, B.: 9.
Schmidt, E.G.: 111.
Schmidt, M.G.: 77, 78.
Schmitt Pantel, P.: XXXVIII, 152, 220, 228, 364, 366, 367, 369, 378, 394, 400.
Schmitt, C.: 79, 80.
Schnapp, A.: 369, 370, 371, 372, 374.
Schreiner, K.: 98.
Schumpeter, J.A.: 1, 5, 9, 48.
Schütrumpf, E.: 56.
Scott Appleby, R.: 382.
Sealey, R.: 69.
Shapiro, A.: 366, 373.
Shapiro, I.: 11.
Siehr, A.: 116.
Siewert, P.: 63, 69.
Sieyès, E.J.: 4, 9, 165.
Sinclair, R.K.: 66.
Sintomer, Y.: 201, 203, 205, 208, 212.
Siu, A.: 199, 209.
Sivan, E.: 382.
Siverson, R.M.: 280.
Skinner, Q.: 2, 310, 313.
Skulteky, S.: 319.
Slantchev, B.L.: 289.
Slings, S.R.: 336.
Sluiter, I.: 323.
Smith, A.: 142, 150, 401.
Smith, A.: 280, 374.
Smith, C.F.: 286.
Smith, G.: 257.
Snyder, J.: 298.
Sommerstein, A.H.: 71.
Sourvinou-Inwood, Chr.: 361, 389, 390.
Souva, M.: 280, 293.
Spahn, P., 106.
Spielvogel, J.: 71.
Stafford, E.: 373.
Stam, A.C.: 291.
Stanton, Gr.R.: 63.
Staveley, E.S.: 34, 35, 173, 178, 182, 186.
Steinmetz, Fr.: 57.
Steinmetz, P.: 57.
Stone, P.: 167, 183, 198, 199, 201, 202, 204, 208.
Strauss, B.S.: 283.
Sundahl, M.J.: 236, 238, 243, 244, 249, 255, 259.
Sundhausen, H.: 126.
Sutherland, K.: 167.
Szanto, E.: 103, 104, 110, 122, 124.

Taylor, M.: 371.
Thür, G.: 65.
Tierney, B.: 6.
Tocqueville, A. de: XVII, XX, 348, 384 *passim*, 392.
Todd, S.C.: 241.
Tollison, R.D.: 167.
Traill, J.S.: 63, 225.
Trechsel, H.: 76.
Tribe, L.H.: 260.
Turner, F.M.: 335.
Tushnet, M.: 262, 272.
Tzachou-Alexandri, O.: 373.

Urbinati, N.: XXX, 149.

Vanderpool, E.: 370.
Vernant, J.-P.: 359, 360, 366.
Vidal-Naquet, P.: 1, 356, 357, 360, 366, 378, 387.

Viroli, M.: 308, 312, 315.
Vlassopoulos, K.: 142, 396.
von Beyme, Kl.: 5.
von Hayek, F.: 311.
von Münch, I.; 104.
von Ungern-Sternberg, J.: 65.

Waldron, J.: 257, 260, 262.
Wallace, P.: 370.
Wallace, R.W.: XIV, XV, 61, 62, 90, 170, 324, 336, 337.
Walter, U.: 51, 60.
Waltman, J.L.: XXXI.
Walzer, M.: 116.
Ward, M.D.: 280, 295.
Warren, M.E.: 168, 200.
Weil, P.: 106, 108.
Weiler, I.: 114.
Weischedel, W.: 307.
Welwei, K.-W.: 62.
West, W.C.: 370.
Whitehead, D.: 63.
Wiessner, S.: 116.
Willaime, J.-P.: 384, 385, 388.
Willett, T.D.: 167.
Winckelmann, J.J.: 152, 163, 164.
Winkler, J.J.: 368.
Wokler, R.: 151.
Wolff, H.J.: 20, 28, 237, 238, 239, 243, 270.

Young, D.C.: XXVII.
Young, W.: 144, 148, 149, 150, 152, 153.
Yunis, H.: 28, 238, 239, 240, 241, 252, 257.

Zagrebelsky, G.: 35, 38.
Zakaria, F.: 298.
Ziemske, B.: 102, 105, 107, 111, 113, 118, 120, 123.
Zinnes, D.A.: 289.
Zuern, J.D.: 80.

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