

DIKE

RIVISTA DI STORIA DEL DIRITTO GRECO ED ELLENISTICO

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ARTICOLI

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Un inedito di Mario Talamanca in tema di *homologia kyria*

An Unpublished Work by Mario Talamanca on *homologia kyria*

Abstract

This article presents the unpublished typescript of Mario Talamanca's paper on *homologia kyria*, originally delivered at the 1977 Symposium on Greek and Hellenistic Law in Chantilly, France, but never included in the published proceedings. The rediscovered text not only fills a nearly fifty-year gap in the historiography but also provides a valuable contribution to one of the most debated issues in the study of Greek private law in general and of Attic law in particular. Against the background of the influential thesis of H.J. Wolff, which explained the *homologia* in terms of *Zweckverfügung* and denied its promissory character, Talamanca advanced a critical reading of the Attic sources, stressing instead the consensual dimension of *homologeîn*. His argumentation – grounded in close philological analysis and in a systematic critique of Romanist categories projected onto the Greek experience – shows that the law on *homologia kyria* cannot be reduced to a mere procedural mechanism, nor does it admit the existence of fully consensual contracts in Athens. Rather, Talamanca outlined a third way: in Attic law the principle of consensuality had not yet taken hold, but the significance of a mere undertaking cannot, in any case, be excluded. The publication of this essay, long forgotten and now restored to the scholarly community, seeks not only to pay tribute to one of the most original interpreters of Greek legal history in the twentieth century, but also to reopen the debate on the nature and limits of contractual obligation in the Athenian *polis*.

L'articolo presenta il dattiloscritto della relazione inedita di Mario Talamanca sull'*homologia kyria*, originariamente pronunciata al *Symposion* sul diritto greco ed ellenistico svoltosi a Chantilly, in Francia, nel 1977, ma mai confluita negli atti a stampa. Il testo, oggi riscoperto, non solo colma un vuoto quasi cinquantennale nella storiografia, ma offre anche un contributo prezioso a uno dei temi più discussi nello studio del diritto privato greco in generale e attico in particolare. Sullo sfondo della nota tesi di H.J. Wolff, che interpretava l'*homologia* in base al concetto di *Zweckverfügung*, negandone il carattere promissorio, Talamanca avanzava una lettura critica delle fonti attiche, ponendone in rilievo la dimensione consensuale. La sua argomentazione – fondata su un'analisi filologica puntuale e su una sistematica critica all'applicazione di categorie romanistiche alla realtà greca – mostra come la disciplina dell'*homologia kyria* non possa ridursi a un mero meccanismo processuale, né possa tuttavia condurre ad ammettere l'esistenza ad Atene di veri e propri contratti consensuali. Talamanca delineò piuttosto una terza via: nel diritto attico non si era ancora affermato il principio della consensualità, ma la rilevanza del mero impegno non può essere in ogni caso esclusa. La pubblicazione di questo saggio, a lungo dimenticato e oggi restituito alla comunità scientifica, intende non solo rendere omaggio a uno degli interpreti più originali della storia giuridica greca nel Novecento, ma anche riaprire il dibattito sulla natura e sui limiti dell'obbligazione contrattuale nella *polis* ateniese.

Keywords: *homologia kyria*; Mario Talamanca; *Zweckverfügung*; consensual contracts; Greek private law

Parole chiave: *homologia kyria*; Mario Talamanca; *Zweckverfügung*; contratti consensuali; diritto privato greco

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1. Un inedito dal 1977.

Nel 1977, dall'1 al 4 giugno, si tenne nel Centro conferenze 'Les Fontaines' a Gouvieux, presso Chantilly (Oise), 40 km circa a nord di Parigi, il terzo *Symposion*¹ di diritto greco ed ellenistico, organizzato da Joseph Mo-

¹ I primi due *Symposia* si erano tenuti rispettivamente nel 1971 a Bielefeld, presso Rheda, e nel 1974 a Gargnano, sotto gli auspici rispettivamente di Hans Julius Wolff e

drzejewski. Vi presero parte 40 studiosi, 18 dei quali come relatori.

Quando successivamente si diede avvio alla pubblicazione degli Atti del convegno, che videro la luce nel 1982², tre dei 18 relatori non consegnarono il loro contributo³.

Tra loro vi fu Mario Talamanca⁴.

La recente scoperta, tra documenti risalenti a quel *Symposion*, del dattiloscritto originale, che fu alla base della relazione del Maestro Talamanca⁵, permette di porre il testo a disposizione degli studiosi, colmando per la scienza una lacuna che si protrae da quasi cinquant'anni.

Il documento cartaceo è anepigrafo, ma dalla cronaca dell'incontro scientifico, pubblicata sul volume 95 (1978) della *Savigny Zeitschrift* da Z. Vangelatou, ricostruiamo che il titolo della relazione fu «*'Homologia kyria' in diritto attico*»⁶.

L'argomento occupa ancora oggi, soprattutto da un paio di decenni, una posizione di rilievo nella riflessione giusgrecistica internazionale.

Esso era giunto alla ribalta nel ventennio anteriore al 1977, precipuamente a seguito di un'importante articolo di H.J. Wolff, eloquentemente intitolato «*Die Grundlagen des griechischen Vertragsrechts*»⁷, sulla *Savigny Zeitschrift*

Arnaldo Biscardi. Wolff 1975a e Dimakis 1978 = Biscardi 1979.

² Modrzejewski - Liebs 1982.

³ Nel volume di Atti furono inclusi 11 contributi di autori che non avevano tenuto la relazione al convegno: Dieter Simon (Francoforte); Joseph Modrzejewski (Parigi); Herwig Maehler (Londra); Dieter Nörr (Monaco di Baviera); Jean Triantaphyllopoulos (Atene); Johannes Herrmann (Erlangen/Norimberga); Hans-Albert Rupprecht (Marburgo/Lahn); Georges Daux (Parigi); Erwin Seidl (Mittenwald); Naphtali Lewis (Easton, Connecticut); Haiim B. Rosen (Gerusalemme). Pubblicarono invece il loro testo, dopo averlo presentato al convegno, i seguenti studiosi: Eberhard Ruschenbusch (Francoforte), Alberto Maffi (Trieste), Benedetto Bravo (Varsavia), Henri van Effenterre (Parigi), Julie Velissaropoulos (Parigi/Atene), Gerhard Thür (Vienna), Dimitri C. Gofas (Atene), Mogens Herman Hansen (Copenaghen), Claude Mossé (Parigi), Eberhard Klingenberg (Tubinga), Pierre Cabanes (Clermont-Ferrand), Evangelos Karabélias (Parigi), Arnaldo Biscardi (Milano), Arnold Kränzlein (Graz). La relazione presentata congiuntamente da Mario Amelotti e Livia Migliardi-Zingale (Genova) fu poi pubblicata a nome solo della seconda. Gli articoli pubblicati raggiunsero quindi il numero di 26.

⁴ Gli altri due relatori che non consegnarono il proprio scritto furono Hans Julius Wolff (Friburgo in Brisgovia) e Diederich Behrend (Monaco di Baviera).

⁵ Come sanno tutti coloro che hanno potuto ascoltare le relazioni di Talamanca, egli preparava quasi sempre un testo scritto, ma poi parlava su di esso a braccio.

⁶ Vangelatou 1978, 572.

⁷ Si tratta della prolusione pronunciata da Wolff quando salì, come titolare, la cattedra presso l'Università di Friburgo in Brisgovia il 12 luglio 1956.

del 1957⁸ (ma i prodromi e alcune anticipazioni erano già in due precedenti studi dello stesso Autore, risalenti rispettivamente al 1943 e al 1946⁹).

Il riscoperto contributo di Talamanca si segnala per un duplice interesse. Dal punto di vista della storia della storiografia, permette di ricostruire l'opinione del suo autore, in relazione alla riflessione scientifica dei suoi tempi. Nel senso della sua attualità, le problematiche in esso affrontate sono d'interesse per l'indagine teorica, con rinnovate contrapposizioni tra gli studiosi.

È probabile che nel 1982 Talamanca non abbia pubblicato il testo perché impegnato¹⁰ su altri fronti scientifici, didattici e accademici¹¹, sicché non pervenne in tempo a corredarlo di un apparato di note (il dattiloscritto ne è privo). Né lo fece in seguito. I nomi dei giusgrecisti, con i quali principalmente egli si confrontò, si ritrovano tuttavia indicati nel corpo testo. Ho pertanto restituito in calce all'articolo la lista delle opere alle quali il compianto Maestro faceva presumibilmente riferimento. Aggiungo che il dattiloscritto è suddiviso in paragrafi non numerati, che, nella pubblicazione, ho contrassegnato in ordine progressivo (secondo lo stile tipico dell'Autore), al fine di potervi più agevolmente operare rinvio in questa introduzione.

A parte quanto precisato, il dattiloscritto restituisce un'opera che si distingue per completezza sia sotto il profilo contenutistico, sia sotto quello formale (solo in pochi casi sono dovuto intervenire per rendere perspicuo il testo: ne darò contezza, nei luoghi interessati, con note a piè di pagina). Lo studio risulta del tutto compiuto anche dal punto di vista delle fonti antiche, citate con precisione. Il livello concettuale dell'opera è comparabile

⁸ Wolff (1957) 1968.

⁹ Wolff (1943) 1961; (1946) 1961. Di rilievo sono anche Wolff 1961; 1964; (1965) 2013, 112 ss.; 1966; (1966) 1974; 1975b, 407 s.; (1981) 1983.

¹⁰ Sulla carriera del Maestro, Finazzi 2009; 2011; 2013; Maffi 2009; Capogrossi Colognesi 2011 (di cui si veda anche il toccante ricordo, Capogrossi Colognesi 2012); Mantovani 2011; Caravale 2012; Di Porto 2012; Metro 2012; Lovato 2019; Avitabile 2021.

¹¹ Avrebbe scritto lo stesso Talamanca nel suo *curriculum vitae*, che la moglie del Professor Talamanca, Professoressa Giuliana Foti Talamanca, consegnò al Prof. Maffi, il quale mi ha permesso di leggerlo sul punto: «sulle strutture che, nell'esperienza greca, viene a prendere il ruolo svolto da quella che, a partire dalla giurisprudenza romana, è la figura del *contractus*, ciò che si riallacciava fra l'altro, alle prime indagini sull'*arrabón* nelle fonti greche ed ellenistiche: questa riflessione ha dato luogo ad una relazione tenuta al terzo simposio dei diritti greci, svoltosi a Chantilly, nel 1977, relazione che, nonostante sia stata rimessa più volte in cantiere, dando luogo a sia pur provvisorie 'mises au point', non è ancora stata pubblicata». Gli studi sull'*arrabón* riferiti sono ovviamente Talamanca 1953 e 1954.

con quello degli altri lavori del grande Studioso, sicché è stato ritenuto, in accordo con i Direttori della Rivista, che la pubblicazione del dattiloscritto non sia inopportuna, come sarebbe stato se ci si fosse trovati di fronte a semplici appunti non definitivi. Leggendo il testo si percepisce la sensazione di un'indagine approfondita, oggetto di lunghe meditazioni e giunta sostanzialmente alla sua conclusione. D'altronde Talamanca non ritornò più *ex professo* sulla stessa tematica¹², talché il documento rappresenta anche il suo testamento spirituale in materia.

La pubblicazione dell'inedito sia vista dunque come un dovuto omaggio alla memoria di uno dei più grandi, dotti e originali interpreti dell'esperienza giuridica greca, che l'Accademia italiana abbia espresso¹³.



Centro conferenze 'Les Fontaines' a Gouvieux, presso Chantilly (Oise), Francia.

¹² Non lo fece neanche in Talamanca 1981, ove nei capitoli «La consuetudine e il diritto positivo» (cap. III, 33 ss.), «Equità e diritto positivo» (cap. IV, 41 ss.), «Prassi sociale e amministrazione della giustizia» (cap. VI, 67 ss.) la trattazione sui temi di diritto privato muove principalmente da una visione processuale. In quello stesso libro vi è però un'affermazione del Maestro che si collega al merito che, nella relazione qui pubblicata, egli riconosceva a Wolff sull'innovazione metodologica. A suo giudizio, Wolff aveva contribuito al progresso dello studio dei diritti greci mediante un sistema euristico distaccato dalle sistematiche romanistica e pandettistica (*infra*, § 3). La veloce, ma non trascurabile, osservazione si trova nella nota bibliografica finale, p. 80: «Solo negli ultimi decenni – soprattutto ad opera di H. J. Wolff – si afferma una rigorosa distinzione nell'impostazione dello studio dei diritti greci ed ellenistici, distinzione che comporta, in linea di principio, l'affermazione dell'inutilizzabilità dello strumentario concettuale di derivazione romanistica per la ricostruzione e la descrizione di queste esperienze giuridiche diverse da quella romana. Nasce la 'juristische Gräzistik' come la chiama il Wolff o la 'giusgrecoistica', come da noi dice, ad esempio, A. Biscardi».

¹³ Ringrazio i figli del Professor Talamanca, Valerio e Marco, per il consenso prestato alla pubblicazione della relazione.

2. Sviluppo storico degli studi moderni in materia di *homologia kyria*.

Collochiamoci ora idealmente nel 1977, a Chantilly, compresenti H.J. Wolff, D. Behrend, A. Biscardi, E. Cantarella, P. Dimakis, A. Maffi, J. Modrzejewski, H.-A. Rupprecht, G. Thür, J. Velissaropoulos e gli altri studiosi.

Lo stato dell'arte sull'*homologia* era il seguente.

Si riteneva quasi unanimemente che ad Atene fosse esistita una legge in tema di *homologia kyria*, il cui nucleo centrale, attestato da diverse fonti letterarie, stabilisse che ὅσα ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ, κύρια εἶναι. Essa era in alcuni casi attestata nell'articolazione della c.d. 'variante *hekón*': ὅσα ἂν τις ἐκὼν ἕτερος ἐτέρῳ ὁμολογήσῃ, κύρια εἶναι.

Nel 1926 (anno, peraltro, della sua morte) R. Maschke¹⁴ aveva in verità prospettato un'ipotesi diversa, e cioè che ad Atene non fosse esistita alcuna legge generale, che avesse statuito la validità delle *homologiai*. Aveva proposto di interpretare le testimonianze in argomento, nel senso che tale validità fosse prevista da singole disposizioni per fattispecie specifiche. La tesi non aveva avuto seguito.

A proposito dell'inquadramento della menzionata legge sull'*homologia kyria*, nel 1977 la dottrina era orientata verso l'una o l'altra di due alternative opzioni ricostruttive.

Secondo la prima, risalente nientemeno che a L. Beauchet (1897)¹⁵, a P. Huvelin (1907)¹⁶, a J.H Lipsius¹⁷, a L. Mitteis e U. Wilcken¹⁸ (1912), nonché successivamente ben consolidata mercé l'adesione di studiosi quali P. Vinogradoff¹⁹, L. Gernet²⁰, M.I. Finley²¹, E. Cantarella²², P. Kußmaul²³,

¹⁴ Maschke 1926, 165.

¹⁵ Beauchet 1897, 12.

¹⁶ Huvelin 1907, 134.

¹⁷ Lipsius 1912, 684, 687.

¹⁸ Mitteis - Wilcken 1912, 73.

¹⁹ Vinogradoff 1922, 230.

²⁰ Gernet (1937) 1955, 78; 1959, 402.

²¹ Finley (1951) 1985, 297.

²² Cantarella 1965, 549; (1966) 2011.

²³ Kußmaul 1969, 53.

fino ad A. Biscardi nel 1971²⁴ tra gli altri²⁵, la legge sull'*homologia kyria* aveva consentito l'esistenza nel diritto ateniese dei contratti basati sul consenso. Quest'ultimo era così diventato fonte di obbligazioni. Si riteneva per lo più che tale legge avesse rappresentato il punto di arrivo di uno sviluppo di alcuni secoli di esperienza giuridica, durante i quali ad Atene i contratti si sarebbero potuti concludere soltanto mediante la consegna di cose o la prestazione di garanzie. Questa interpretazione traeva fondamento dal significato del verbo *homologeîn*, inteso come 'promettere' o 'consentire'.

Nel 1957, tuttavia, nello studio già ricordato, Wolff aveva rivoluzionato gli schemi interpretativi tradizionali. Aveva recepito parzialmente alcuni spunti avanzati da J. Partsch nel 1909 e nel 1924²⁶ e si era concentrato in modo particolare su di essi, erigendo una nuova teoria, che in due pubblicazioni del 1966 confermò e ribadì con ulteriori argomenti²⁷. Egli privilegiò una diversa accezione di *homologeîn* attestata nelle fonti²⁸, ovvero quella di 'riconoscere', 'non contestare'. Orientando la sua analisi su codesta diversa sfumatura semantica del verbo, affermò che, in relazione alla legge sull'*homologeîn*, il lessema non esprimesse l'assunzione per il futuro di obbligazioni tramite il consenso, bensì l'accettazione da parte del debitore di un atto di disposizione da parte del creditore²⁹. Wolff teorizzò pertanto che in diritto ateniese i contratti si perfezionassero con una prestazione, che denominò *Zweckverfügung* (ovvero 'disposizione compiuta per un determinato scopo'). Il soggetto, che avesse ricevuto una dazione e non avesse succes-

²⁴ Biscardi (1971) 1999, 108. Biscardi affermò la sua idea anche in una relazione al *Symposion* da lui stesso organizzato a Gargnano nel 1974. La relazione fu pubblicata la prima volta nel 1978: Biscardi A. (1978, 1979, 1982) 1999.

²⁵ Bornkamm 1936; Simonetos (1943) 1968; Lane Fox 1963, 212. Anche secondo Pringsheim 1950, 40 s., l'*homologia*, trasformatasi da confessione in giudizio in confessione extragiudiziale, sarebbe stata a tal punto tutelata per via processuale, ma sarebbe stata un accordo stretto alla presenza di testimoni, del quale il consenso non sarebbe stato che uno degli elementi costitutivi (ciò, peraltro, non sarebbe valso, a suo avviso, per la compravendita, in quanto contratto reale). Sull'origine dei contratti conclusi con la prestazione di una garanzia Cantarella (1988) 2011.

²⁶ Partsch 1909, 76 ss.; 1924, 273.

²⁷ Wolff 1966; (1966) 1974. Cfr. anche Wolff (1981) 1983. Per il diritto dei papiri, ma con riferimenti al diritto greco in genere, Wolff (1946) 1961.

²⁸ Per un panorama sui vari significati della voce verbale Menge-Güthling 1910; Soden 1973, 10 ss.; Platschek 2013, 59 s.; 2018; Youni c.d.s.; Pepe c.d.s.

²⁹ Wolff (1966) 1974, 131.

sivamente eseguito la prestazione prevista in contraccambio, sarebbe stato responsabile di un inadempimento. Tuttavia, non esistendo in diritto attico un'azione generale per la risoluzione dei contratti e neppure, viceversa, per l'adempimento delle obbligazioni contrattuali, costui avrebbe potuto essere convenuto in giudizio unicamente mediante la *dike blabes*³⁰. Secondo la costruzione wolffiana, insomma, l'*homologia* sarebbe stata l'atto attraverso il quale il debitore avrebbe documentato col creditore l'avvenuta *Zweckverfügung* e avrebbe riconosciuto un proprio debito.

La tesi di Wolff s'impose progressivamente nella letteratura giurgreco-stica di area germanofona. In particolare, venne subito accolta da cinque studiosi presenti a Chantilly: H.-A. Rupprecht (nel 1967)³¹, D. Behrend (nel 1970 e nel 1973)³², J. Herrmann (nel 1979)³³, A. Kränzlein (nel 1975)³⁴ e G. Thür (nel 1977)³⁵. Quest'ultimo difese l'esclusiva funzione procedurale dell'*homologein*: *homologiai* sarebbero state a suo avviso le asserzioni che

³⁰ Wolff (1943) 1961, 91. L'impiego della *dike blabes* a seguito di inadempimenti in materia contrattuale è comunemente accettata e condivisa (anche da parte dei 'consensualisti'). Per le fonti, ad es.: [Dem.] 48 e 56 (Lipsius 1912, 652 nt. 60; Gernet [1959] 2002², 131 nt.1). Cfr. anche [Dem.] 52.14. In letteratura, pur da punti di partenza diversi: Beauchet 1897, 395; Lipsius 1912, 653, 657; Paoli 1930, 86; 1933, 86; Gernet (1937) 1955, 73; Mummenthey 1971, 70 ss.; Martini 1991, 105 ss.; Hamza 1991, 231; Jakab 1994; 2006; Thür 1997; 2007; 2013; Carawan 2006; Velissaropoulos-Karakostas 2011, 214 s., 218; Scafuro 2011, 329; Kastle 2012; Maffi 2018, 162 s.; Scheibelreiter 2025a, 55. *Contra* Pringsheim 1950, 51 ss., sostenendo l'esistenza di azioni contrattuali specifiche. L'uso nelle fonti del verbo *aposterein* per indicare l'inadempimento sembra confermare la qualifica di esso in termini di danneggiamento (così Maffi 1980, 32; tra le fonti, [Dem.] 48.39, 50, e inoltre [Dem.] 32.5, 7; 33.24; 34.27; 35.42, 46, 47, 50; 49.2, 4, 21, 41, 45, 54, 61; Isoc. 1.6, 7, 9, 10, 16; 5.2, 9, 10, 35, 48, 50, 55). Anche Hyp. Ath. era un'orazione redatta ai fini di una *dike blabes* (Kenyon 1893, xx; Blass 1894, LIV; Lipsius 1896, 43; Meinecke 1971, 348; Osborne 1985, 56 s.; Carey 1997, 142; C. Cooper in Worthington-Cooper-Harris 2001, 96 nt. 27; Phillips 2009, 91; Thür 2013; Gagliardi 2014. *Contra*, a favore di una *dike bouleuseos*, Maschke 1926, 104, 166; Simonetos (1943) 1968, 476 s.; Maridakis 1963, 398 ss.; Dimopoulou 2012, 226; 2014).

³¹ Rupprecht 1967, 57 s.; cfr. anche Rupprecht 1975.

³² Behrend 1970, 16 s., 27 s.; 1973. Poi, Behrend 1990.

³³ Herrmann 1975, 331.

³⁴ Kränzlein 1975, 187 ss.

³⁵ Thür 1977, 152 ss. In forma compendiata e apodittica si era espresso in tal senso anche Alliot 1954, 463. Da diverso punto di vista, Despotopoulos 112. Un esame della teoria della *Zweckverfügung* e delle principali varianti con cui essa è stata accolta dalla letteratura moderna trovasi in Hamza 1989, 14 s., 18 ss.

le parti avessero compiuto in modo per loro vincolante nella fase pre-dibattimentale o in sede extra-processuale.

Anche dopo il 1977 il tema dell'*homologeïn* ha continuato a segnare uno dei centri nevralgici nella mappa della giusgrecistica, per la sua capacità di incidere sulla comprensione degli assetti strutturali dell'obbligazione da atto lecito, nel diritto greco in generale e in quello attico in particolare. Come accennavo in principio, negli ultimi due decenni gli studi si sono manifestati con maggior ricorrenza e il confronto tra le due contrapposte linee interpretative ha conosciuto una crescente intensità.

Individuo nel 2005, con la pubblicazione di un articolo di E.E. Cohen per il «*Cambridge Companion to Ancient Greek Law*», intitolato «*Commercial Law*»³⁶ e chiaramente schierato a favore del principio consensualistico, la ripresa delle discussioni su larga scala. Cohen riespose le sue idee in modo più ampio in un articolo dell'anno seguente, dal titolo significativamente emblematico, oltre che perentorio e dichiarativo, «*Consensual Contracts at Athens*»³⁷, che rappresentava la rielaborazione della relazione da lui tenuta oralmente al *Symposion* organizzato da H.-A. Rupprecht a *Rauischholzhausen* (Marburgo) nel 2003³⁸.

In quella stessa occasione, nella sua «*Antwort auf Edward Cohen*», É. Jakab³⁹ reagì in modo fermo alla comunicazione di Cohen, come si legge nel volume di Atti edito nel 2006⁴⁰. L'articolo di Jakab appare saldamente ancorato al pensiero wolffiano: l'Autrice si oppose all'uso della dogmatica romanistica e della sua categorizzazione dei contratti, poiché il mondo giuridico ateniese a suo avviso non conosceva un vero e proprio concetto di obbligazione nel senso romano; sostenne che di *homologia* si parla, nelle orazioni attiche primariamente nel contesto processuale e, richiamandosi anche all'opinione di Thür, negò che essa possa essere interpretata come fonte

³⁶ Cohen 2005, 294.

³⁷ Cohen 2006, 73.

³⁸ Per il periodo compreso tra il 1978 e il 2004 menziono Germain 1979; Biscardi 1982, 149; Maffi 1986a, 7; 1986b, 127; Gofas 1994; Scafuro 1997, 128; Whitehead 2000, 274.

³⁹ Jakab 2006.

⁴⁰ Tra gli studi compiuti sul tema nel periodo compreso tra il 1978 e il 2004 appaiono di rilievo quelli di Cataldi 1983, 269; Martini 1991, 105 ss. (ma con attenuazioni: Martini (2001) 2002); Hamza 1991, 231; Todd 1993, 265; Jakab 1994, 191 ss.; Thür 1997, 706; 2002; 2003, 237 s.; Mirhady 2004, 58. Thür 2002 è un contributo particolarmente singolare, trattandosi della voce enciclopedica «*Zweckverfügung*» per il *Neue Pauly*: ovvero, in relazione al diritto ateniese, un neologismo. Sorge qualche perplessità sulla scelta di inserire in un'enciclopedia tale lemma.

di un obbligo contrattuale, essendo a suo avviso produttiva solo di un effetto preclusivo processuale; richiamò ancora una volta l'importanza della teoria della *Zweckverfügung*, secondo cui il vincolo obbligatorio nel diritto greco nasceva dall'atto unilaterale di disposizione con finalità determinata.

Da allora la contrapposizione è rimasta sostanzialmente cristallizzata.

Tra i 'consensualisti' si sono successivamente collocati E.M. Harris nel 2006⁴¹ (e poi a più riprese⁴²), A. Lanni⁴³ e C. Pelloso⁴⁴ nel 2007, D.D. Phillips nel 2009⁴⁵, H. Barta nel 2010 e nel 2011⁴⁶, A.C. Scafuro nel 2011⁴⁷ e M. Faraguna nel 2012⁴⁸. Lo stesso ha poi fatto A. Dimopoulou nel 2014, nel volume di Atti del *Symposion* del 2013, tenutosi alla Harvard University di Cambridge (MA)⁴⁹. Cohen ribadì la sua opinione in quello stesso *Symposion*⁵⁰, nel quale si espresse nella stessa direzione anche il sottoscritto⁵¹ (con ripresa del tema in due ulteriori occasioni successive⁵²). E quindi, ancora, si segnalano I. Arnaoutoglou (2016⁵³), A. Maffi⁵⁴ e M. Gagarin (2018)⁵⁵, D. Schanbacher⁵⁶ e di nuovo Barta (2021)⁵⁷, W. Kaiser (2022)⁵⁸, fino a M.

⁴¹ Harris 2006, 149.

⁴² Harris 2018, 235 s.; 2020; Ibbetson - Caldwell - Harris - MacCormack - Manning - Olivelle 2024, 569, 593.

⁴³ Lanni 2007, 232 e *passim*.

⁴⁴ Pelloso, 2007, 48.

⁴⁵ Phillips 2009, 106: «Therefore, according to the Roman and modern typology, this is a law of consensual contracts».

⁴⁶ Barta 2010, 25 ss., 489 s.; 2011, 1, 374 ss.

⁴⁷ Scafuro 2011, 128.

⁴⁸ Faraguna 2012, 367.

⁴⁹ Dimopoulou 2014.

⁵⁰ Cohen 2014.

⁵¹ Gagliardi 2014.

⁵² Gagliardi 2015a; 2015b.

⁵³ Arnaoutoglou 2016, 112 (ritenendo valida la norma dell'*homologia kyria* – nell'interpretazione 'consensualista' – solo per i contratti scritti).

⁵⁴ Maffi 2018, 168 ss.

⁵⁵ Gagarin 2018.

⁵⁶ Schanbacher 2021, 67, 71 («Athenogenes bezieht sich auf das allgemeine Homologiegesetz, das, ergangen zu Beginn des 5. Jh. v. Chr., Übereinkünfte als Grundlage der Verbindlichkeit anerkennt», sia pur affermando di non annoverarsi tra i consensualisti: *ivi*, nt. 36).

⁵⁷ Barta 2021a, 27; 2021b.

⁵⁸ Kaiser 2022a; 2022b, con riferimento soprattutto ai contratti di *misthosis* documentati dai papiri greco-egizi (specialmente P.Frankf. 1, P.Frankf. 4, BGU VI 1268, BGU VI 1262, P.Hibeh. I 90), ma con accenni anche al diritto greco classico, specialmente di Atene.

Youni e L. Pepe al *Symposion* di Milano del 2024⁵⁹.

Dall'altro lato dell'impostazione della questione si annoverano, con rinnovato richiamo agli argomenti wolffiani, E. Carawan (coi suoi contributi del 2006⁶⁰ e del 2007)⁶¹, di nuovo Thür (2007⁶² e 2013⁶³), J. Velissaropoulos-Karakostas (2011⁶⁴), D.J. Kästle (2012)⁶⁵, Chr. Reiter (2016)⁶⁶ e soprattutto Ph. Scheibelreiter nel 2019 e in altre occasioni successive fino all'anno in corso⁶⁷. A questi autori si sono aggiunti di nuovo Jakab⁶⁸ e inoltre C.M^a. Sánchez-Moreno Ellart al citato *Symposion* milanese⁶⁹.

Scheibelreiter, che al tema ha dedicato studi particolarmente approfonditi (in un caso proponendo le sue ipotesi in un articolo di oltre cento pagine), ha ammesso l'esistenza di una legge principale sull'*homologia*⁷⁰ e si è distaccato dall'opinione di Thür, secondo la quale l'*homologia* avrebbe soltanto fissato le dichiarazioni delle parti in un futuro processo. Egli ha notato che, giusta tale interpretazione, non si spiegano in modo soddisfacente quelle che egli

⁵⁹ Youni c.d.s. e Pepe c.d.s. Cronaca del convegno: Gagliardi 2024a.

⁶⁰ Carawan 2006.

⁶¹ Carawan 2007a; 2007b.

⁶² Thür 2007, 32.

⁶³ Thür 2013. Cfr. anche Thür 2014.

⁶⁴ Velissaropoulos-Karakostas 2011, 214 s., 218. Cfr. già Velissaropoulos-Karakostas 1993, 163 ss.; 1994, 189; 1996, 190; 2002, 133.

⁶⁵ Kästle 2012, 191 nt. 146, 192 nt. 149 e *passim*.

⁶⁶ Reiter 2016.

⁶⁷ Scheibelreiter 2019, 37 ss.; Scheibelreiter 2020, 87 ss.; Scheibelreiter 2025a; 2025b. Esame della letteratura anche in Scheibelreiter 2024, 117 ss. Cfr. anche Jakab c.d.s.

⁶⁸ Jakab c.d.s. Al netto di ogni considerazione sulle difficoltà di impiegare dati del diritto ellenistico in continuità col diritto classico di V e IV sec. a.C. (ben sintetizzate da Maffi 2018, 145), ritengo che, tra i vari contratti di *misthosis* dell'Egitto tolemaico, esaminati da Jakab in contrapposizione a Kaiser 2022a, ce ne sia uno decisivo contro le tesi wolffiane. Si tratta del testo conservato in Frankf. 2. Tale contratto fu redatto nell'agosto 214, quando la piena del Nilo era ancora in corso, il livello delle acque non poteva essere determinato con precisione e quindi la misurazione della superficie coltivabile del terreno oggetto della locazione doveva ancora essere compiuta. L'inizio della coltivazione del terreno era prevista dal 26 settembre 214. Contestualmente alla redazione dell'atto non fu compiuta alcuna *Zweckverfügung*: né avvenne la consegna del terreno agli affittuari (possibile solo dopo il ritiro delle acque), né questi ultimi corrisposero alcunché a titolo di canone o di anticipazione dello stesso. L'affermazione di Jakab (§ IV), che individua allora l'elemento reale della transazione nel fatto che «der Verpächter dem Pächter ein Saatgutdarlehen gewährte (Z. 14)», appare ardita. Oltretutto, come la stessa A. precisa, difetta ogni quietanza delle dette sementi.

⁶⁹ Sánchez-Moreno Ellart c.d.s.

⁷⁰ Scheibelreiter 2025a, 38.

chiama le ‘*homologiai* volontarie’, cioè gli attestati della legge sull’*homologia* secondo la ‘variante *hekón*’⁷¹, le quali non presentano alcun nesso con il diritto processuale né alcun riferimento all’*anakrisis*⁷². Tuttavia, ha ritenuto⁷³ non pertinenti al tema Isoc. 18.24 (testo da lui posto in relazione con il compromesso arbitrale⁷⁴), Din. 3.4 (non sarebbe chiaro il riferimento a una legge) e infine, abbastanza sorprendentemente, [Dem.] 48.11 e 54 (osservando che il riferimento sarebbe principalmente al comportamento sleale di Olimpidoro e che la legge sull’*homologia* non è espressamente citata in tutto il discorso). Si può però osservare che nei primi due testi citati il riferimento all’inadempimento contrattuale sembra chiaro (ἀνάγνωθί μοι τὸν νόμον καὶ τὴν μαρτυρίαν, ὃς κελεύει κύρια εἶναι ὅ τι ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ ἐάν τις [εἰς ἕνα τινὰ] τῶν πολιτῶν ὁμολογήσας τι παραβῆ, τοῦτον ἔνοχον εἶναι κελεύει τῷ ἀδικεῖν), mentre quanto alla *Contro Olimpidoro* la discussione attiene a tematiche relative alla responsabilità contrattuale. In relazione a [Dem.] 47.50, 77 e 42.12, Scheibelreiter ha affermato che gli accordi in questione erano dilazioni per debiti già esistenti (e tuttavia il principio legislativo generale, ὃς κελεύει κύρια εἶναι ὅ τι ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ, è in entrambi i casi recitato; nel secondo, con la specificazione che le *homologiai* erano *pros allelous*). In [Dem.] 56 lo studioso austriaco ha visto una *Zweckverfügung* a monte di un’*homologia* inerente a un mutuo (però la regolamentazione contrattuale è interamente fondata sull’*homologia*, in base alla quale si è compiuta la dazione del danaro e si sono previsti gli interessi). Su questi specifici argomenti, come pure su altri, esaminati con finezza da Scheibelreiter, la trattazione di Talamanca del 1977 mostra, come si potrà constatare, una piena e ancora persuasiva attualità nell’interpretazione dei testi.

3. Talamanca vs. Wolff.

Presenterò ora in sintesi il contenuto della relazione di Talamanca, per passare, nel successivo § 4, all’analisi degli aspetti di maggior rilievo della sua sistematizzazione teorica.

1. Il primo paragrafo funge da introduzione generale. Vi si trova un primo esame della bibliografia di interesse (soprattutto Pringsheim – in mate-

⁷¹ Giustamente egli nega che nelle testimonianze della legge la parola *hekón* sia andata perduta nella tradizione.

⁷² Scheibelreiter 2025a, 35 s.

⁷³ Scheibelreiter 2025a, 41 ss.

⁷⁴ Cfr. Isoc. 18.11.

ria di compravendita – e Wolff). Si sottolinea l'esigenza di evitare l'impiego di categorie romanistiche/pandettistiche nello studio del diritto greco.

2. Talamanca si contrappone all'interpretazione di Wolff dal punto di vista teorico-sistematico.

3. Si analizzano le fonti attiche che contrastano la tesi di Wolff.

4-5. È proposto un esame delle fonti attiche che apparentemente convaliderebbero la tesi di Wolff, ma si mette in luce come anch'esse, in realtà, non l'avvalorino.

6. Le successive riflessioni sono condotte nella prospettiva dell'*aktio-nenrechtliches Denken*: si mette in evidenza come l'impiego della *dike blabes* in materia di inadempimento contrattuale contrasti con la teoria della *Zweckverfügung*.

7. Le conclusioni confermano la tesi, con un accenno finale di rilievo in tema di vizi del consenso.

Già da questa essenziale indicazione dell'itinerario argomentativo del testo, si coglie che durante il *Symposion* del 1977 Talamanca si contrappose recisamente all'impostazione di Wolff⁷⁵.

A Wolff è spesso affiancato Behrend, il quale, solo pochi anni prima, nel 1970, aveva pubblicato il volume nel quale aveva aderito convintamente alla tesi wolffiana. Nel 1977 Behrend (n. 1935) aveva 42 anni ed era quindi poco più giovane di Talamanca, che (n. 1928) ne aveva allora 49. Lo studioso tedesco è menzionato 9 volte nella relazione e Talamanca si riferisce a lui come l'«amico» o «collega» Behrend⁷⁶. Diverso è invece il registro col quale

⁷⁵ La connessione di temi di ricerca scientifica sul diritto greco tra Talamanca e Wolff (cfr. Wolf 2012, 28 s.) non si limitò al tema dell'*homologia*. Invero, come Talamanca stesso riferì al *Symposion* di Rauschholzhausen del 2003 (Talamanca 2006, nt. 1; cfr. Maffi 2012), il volume di Wolff sulla *paragraphé* del 1966 aveva rappresentato lo spunto per i suoi corsi alla Scuola di Perfezionamento (poi Corso di Perfezionamento) in Diritto romano alla 'Sapienza' dal 1968 (Talamanca assunse l'insegnamento, come egli stesso scrive nel *loc. cit.*, «per incitamento di Edoardo Volterra» nel 1964 e l'abbandonò nel 1991: Ferri G. 2011, 448 nt. 52; cito di nuovo le parole del Maestro: «per mancanza d'interesse nei perfezionandi, con quell'anno tacque l'insegnamento dei diritti greci, durante il quale ho avuto spesso l'impressione di parlare soltanto per me stesso». Su Talamanca docente della Scuola di Perfezionamento: Diliberto 2012; 2021, 9). Gli spunti tratti dalla breve opera di Wolff sulla *paragraphé* portarono negli anni '70 Talamanca a una messe di studi (1975a; 1971; 1973; 1975b; (1978) 1979), culminati, al tempo, nel libro che l'A. non consegnò mai alle stampe e che è stato quarant'anni dopo pubblicato postumo per le cure di A. Maffi (Talamanca 2017).

⁷⁶ Diederich Behrend, allievo di Wolfgang Kunkel, morì prematuramente all'età di 59 anni nel 1994, stroncato da un infarto mentre si trovava al lavoro nel suo ufficio

il relatore cita Wolff, che, nato nel 1902, avrebbe compiuto il 9 agosto 1977 i suoi 75 anni e a Chantilly era prossimo al termine del suo insegnamento attivo nei ruoli universitari. Talamanca gli riconosceva il dovuto prestigio accademico, oltre all'*auctoritas* del caposcuola, benché, come vedremo, ciò non lo abbia indotto a lesinare le critiche alla sua tesi. Queste si trovano talora espresse con una discreta veemenza – almeno nella redazione ritrovata, che, peraltro, non è detto sia stata riproposta tal quale all'esposizione orale, né è certo che sarebbe stata mantenuta immutata nella versione scritta definitiva.

Resta ora da offrire, almeno per cenni, un'indicazione della tonalità profonda del discorso di Talamanca e dell'impianto concettuale che lo struttura.

Lo studioso romano era – da par suo – consapevole che l'*homologia*, per lo stato delle fonti, occupava (come ancor oggi occupa) una zona opaca della conoscenza. Riteneva che essa fosse stata spesso travisata dagli

all'Università di Monaco. Già assistente all'Istituto Leopold Wenger di Monaco dal 1970 al 1977, fu cofondatore e redattore del *Rechtshistorische Journal*. La sua opera scientifica principale fu senza dubbio la citata dissertazione del 1970, contenente l'esame analitico di 43 iscrizioni ateniesi in materia di locazione agraria. In essa, in ossequio alla teoria della *Zweckverfügung* (ripresa in Behrend 1973), egli cercò di dimostrare che i Greci regolavano rapporti obbligatori di lunga durata, con complesse prestazioni reciproche, senza la necessaria cornice di un contratto consensuale, come invece sosteneva in quegli anni soprattutto Biscardi (che infatti registrò una serie di obiezioni all'ipotesi di Behrend in Biscardi (1971) 1999). Redasse poi altri studi minori, tra i quali ricordo quelli in materia di processo (Behrend 1971, 390 ss., a proposito di Hommel 1969; inoltre, Behrend 1975, relazione presentata al *Symposion* di Bielefeld del 1971), quelli sul significato del termine greco '*dike*' e sul concetto di prediritto, con attenzione agli aspetti di filosofia del diritto ((1978) 1979; 1994a). Nel 1977 lo studioso aveva però ormai scelto di non perseguire sistematicamente la carriera accademica e aveva assunto un incarico di direttore amministrativo nell'università, nello svolgimento del quale la morte lo colse 17 anni più tardi. Come ricorda il suo collega e caro amico Gerhard Thür, nella toccante necrologia redatta nel 1996, Behrend continuò a studiare il diritto greco, ma le sue pubblicazioni si diradarono (Behrend 1990, di nuovo in tema di locazioni agrarie, pubblicazione della relazione presentata al *Symposion* di Siena e Pisa del 1988; Behrend - Thür - Hübner 1993, primo fascicolo, su Troade e Misia, del *Repertorium der griechischen Rechtsinschriften*, avviato con Thür su un'idea originaria di Wolff; cfr. Behrend 1993; 1994b; 1995). Thür 1996 testimonia che, per il *Symposion* di Corfù del 1995 (Thür - Velissaropoulos-Karakostas 1997), Behrend aveva annunciato una relazione dal titolo «*Die Zweckverfügung: Ruine oder Denkmal?*», con cui intendeva riesaminare criticamente la tesi di fondo della propria dissertazione e verificarne la tenuta alla luce delle ricerche più recenti, restando fedele all'idea di sottoporre a controllo anche i propri risultati. Intensi ricordi di Behrend sono anche quelli di Simon 1995 e di Maffi 1996. [Dò atto che quest'ultimo articolo è mancante in Gagliardi - Pepe 2019, per una svista dei curatori]

sguardi romanistici, che vi avevano proiettato l'ombra lunga delle categorie pandettistiche. A questo, però, il grande Maestro si contrapponeva subito, nel primo paragrafo, con fermezza: nella letteratura recente si era stati troppo disinvolti nel parlare di autonomia privata in relazione al sistema giuridico greco, proiettandovi – senza sufficiente cautela – strutture concettuali esterne. L'applicazione degli schemi romani non si addiceva a quella che egli denominava la 'fenomenologia contrattuale' dell'esperienza greca⁷⁷. Talamanca riconosceva che solo per merito di Wolff ci si era allontanati da tali impostazioni improprie e si era eretto un nuovo paradigma⁷⁸. Lamentava, pur tuttavia, che Wolff avesse negato ogni valenza promissoria all'*homologia*. Quest'ultima era diventata riconoscimento, non proposta. Si era trasformata in silenzio che 'chiudeva', cessando di essere espressione che 'apriva'. Il 'creditore', se così lo si può chiamare con riferimento all'esperienza greca, era rappresentato come il titolare di una posizione di forza: non soggetto di un credito, ma di un dominio. Così, secondo questa visione, la violazione non era inadempimento, ma lesione.

Tutto questo meritava un'analisi sistematica generale, che trova spazio nel paragrafo successivo. Il ragionamento talamanchiano era di tipo sillogistico: per Wolff la *Verfügung* non era oggetto di una promessa, ma presupposto della responsabilità in testa a colui che avesse ricevuto la *Verfügung* stessa; se però si dimostra che il valore di '*homologeïn*' nelle fonti attiche è quello di un atto specificamente promissorio, ecco che lo 'strumentario concettuale introdotto dal Wolff' appare destinato a non reggersi più.

Il successivo svolgimento dell'argomentazione di Talamanca, in effetti, metteva in crisi la lettura di Wolff. Esso evidenziava che le fonti attiche non supportano l'idea che *homologeïn* significhi semplicemente 'riconoscere' un fatto. Anzi, proprio quando l'*homologeïn* era legato alla nascita di un'obbligazione, esso implicava regolarmente l'idea di 'promettere' o 'consentire'. Il fatto che – come «già accennato dal Kussmaul» scrive Talamanca – il verbo dipendente da *homologeïn* sia spesso impiegato nelle fonti all'infinito futuro, e quindi proiettato su una prestazione ancora da eseguire, smonta la pretesa neutralità fattuale della dichiarazione⁷⁹. E così Talamanca poteva affermare che «l'opinione del Wolff non riposa su un effettivo riscontro dell'uso attico». E aggiungeva che lo stesso Wolff «credeva (cors.

⁷⁷ Questa opinione sarebbe stata ribadita anche in seguito dall'A.: Talamanca 2008.

⁷⁸ Cfr. *supra*, nt. 12.

⁷⁹ Kußmaul 1969, 34. Il dato è evidente anche dal diritto dei papiri: Soden 1973, 28.

aggiunto) di poter affermare che il significato tecnico del termine è “auf der Linie des Anerkennens, Nicht-Bestreitens, Einvernehmlich-Feststellens”, e che oggetto dell’*homologeîn* è sempre un fatto», ma egli precisava che «la “Prüfung” non è stata fatta dal Wolff». E in relazione all’affermazione di Wolff, per cui «im Sinne der Feststellung einer anderweit begründeten zukünftigen Tatsache, aber nicht im demjenigen einer aus sich selbst heraus konstitutiv als bindungsschaffendes Versprechen wirkenden Willenserklärung, muss es daher auch zu verstehen sein, wenn die in der Zukunft liegende Erfüllung der eingegangenen Verpflichtung (z.B. *apodoseîn*) als das Objekt des *homologeîn* erscheint», ecco che Talamanca lapidariamente enunciava, senza mezzi termini: «questa notazione mi pare del tutto forzata e forzante». E poi: «a me sembra che l’opinione qui discussa faccia violenza alla logica del discorso in connessioni sintattiche del genere di quella discussa. Ammettere, riconoscere, confessare si può soltanto un fatto passato; un fatto futuro può essere o previsto o promesso (questo, quando si tratti di un comportamento del parlante)».

A questo punto, per Talamanca, si apriva la via – nel § 3 – all’esame, condotto come sempre con acribia e rigore filologico esemplari⁸⁰, delle fonti atte a sorreggere la sua tesi. Posso così riassumerne i capisaldi: 1. la legge sull’*homologia kyria* ebbe effettiva esistenza; 2. si trattava di un’unica legge; 3. nelle fonti attiche, l’*homologia kyria* è sempre evocata in connessione con convenzioni o contratti, mai con confessioni stragiudiziali; 4. è rilevabile l’equivalenza tra *synthekai* e *homologiai*; 5. in alcune orazioni si sottolinea, oltre alla volontarietà, anche la reciprocità dell’*homologia*, che – cito – è «completamente estranea alla logica della confessione»; 6. anche la legislazione utopica di Platone conferma i dati ricavabili dagli scritti dei logografi. Si trovano citate fonti abitualmente richiamate negli studi sull’*homologia kyria*⁸¹ e altre, non meno rilevanti⁸².

D’altronde (§§ 4-5), l’impressione che alcuni (pochi) passi avallino la tesi di Wolff si rivela presto illusoria: rari e marginali anche sul piano statistico, essi ruotano per lo più attorno a *opheilein*, ma ciò che vi si ‘riconosce’ è l’esistenza di un debito, non già una *Zweckverfügung*. Né il contenuto,

⁸⁰ Sul metodo con il quale Talamanca conduceva le sue analisi delle fonti: Capogrossi Colognesi 2021.

⁸¹ Isocr. 18.24-25; Hyp. Ath. 7, 13; [Dem.] 42.11; 47.77; 56.1-2; Plat. *Symp.* 196c; *Crit.* 52e.

⁸² Lys. 1.21; Is. 5.1, 25.

né la struttura logica delle dichiarazioni analizzate si prestano ad essere interpretate secondo lo schema wolffiano: l'*homologeïn* non attesta mai la *Verfügung*, bensì la responsabilità derivatane, già costituita. Finanche i testi più scivolosi, come ad es. Is. 3, non reggono a una lettura tecnica in senso wolffiano. Come già accennato, l'uso del futuro tradisce una dimensione pattizia più che ricognitiva: in Is. 3.28 e 36 *exeïn* non vale promessa, ma constatazione attuale di una situazione destinata a produrre effetti (e rilevante è anche il riferimento a una '*homologetheïsa*' *prox* nel § 36 dell'orazione). In nessun caso l'*homologia* assume il ruolo di fondamento contrattuale e, secondo Talamanca, i pochi esempi citati, lungi dal compromettere la sua tesi, finiscono per rafforzarla.

Il § 6 si apre con la constatazione che il «carattere promissorio dell'*homologia* nella prospettazione che – al livello semantico – si incontra nelle fonti attiche del IV secolo a.C. mette già abbastanza in crisi codesto aspetto dell'ipotesi wolffiana». Ma la confutazione definitiva di quella costruzione, secondo l'Autore, si trae da un rilievo possibile su base processuale: se è vero che il debitore, quando riceveva una *Verfügung* e non corrispondeva il dovuto, s'impossessava illecitamente di una cosa di proprietà del creditore, perché l'azione impiegata a seguito degli inadempimenti risulta essere la *dike blabes* e non la *dike exoules*? La pseudodemostenica *Contro Olimpodoro*, [Dem.] 48, si rivela, per Talamanca, di particolare eloquenza. Le due parti in causa, Olimpodoro e Callistrato, avevano concluso tra loro un'*homologia*, qualificata costantemente nell'orazione come *synthekai* (da qui il rilievo dell'identità dei due sostantivi sotto il profilo giuridico), che potremmo assimilare a una transazione. Callistrato agì poi con *dike blabes* contro Olimpodoro, il quale si difese eccependo l'inadempimento contrattuale dell'attore.

Nella conclusione, Talamanca, oltre a ricapitolare le proprie opinioni, riprese numerosi spunti presentati o anche solo solo sottintesi nella parte precedente della relazione e ne aggiunse di nuovi: 1. La tesi di Wolff aveva avuto il merito di scardinare la dipendenza dalle categorie romanistiche per lo studio del diritto greco; 2. Tuttavia, aveva finito col sostituire a una dogmatizzazione di tipo pandettistico una diversa dogmatizzazione, a sua volta non atta a spiegare le particolarità del sistema contrattuale attico (essendo – cito dal § 6 di Talamanca – nella teoria della *Zweckverfügung* «nettissima la tendenza a sovrastrutturare ai dati concreti offerti dalle fonti una serie di concettualizzazioni che, quale che ne sia la fondatezza, ap-

paiono sostanzialmente sganciate da qualsiasi fondamento testuale»⁸³); 3. L'ipotesi wolffiana, per essere credibile, avrebbe richiesto «la presenza di un'elaborazione concettuale sul piano tecnico-giuridico all'altezza di una giurisprudenza professionale» assente in tutto il mondo greco, la cui esperienza giuridica ha un «carattere essenzialmente ascientifico»: in generale non esiste «una 'dogmatica' inconscia, ch  altrimenti essa non   tale»; 4. Accogliendosi la teoria wolffiana sarebbe problematico «l'inserirsi in un sistema obbligatorio basato sulla "Zweckverfugung" delle garanzie personali delle obbligazioni», nonch  della novazione soggettiva; 5. La pluralit  di leggi sull'*homologia kyria* adombrata da Maschke non   accettabile; 6. Non lo   neppure l'ipotesi di Ku maul, in ossequio alla quale la legge sull'*homologia kyria* si sarebbe limitata a regolare le pattuizioni aggiunte (di questa opinione Talamanca non aveva parlato in precedenza).

Non vi era dunque alcun dubbio, per Talamanca, che la teoria della *Zweckverfugung* fosse «una 'dogmatizzazione' fatta dall'interprete moderno, al di l  della possibilit  che i contemporanei ne potessero aver conoscenza».

E questa era in fondo la conclusione della sua *pars destruens*.

Tuttavia, Talamanca manifestava molta cautela nell'avanzare una propria *pars costruens* e, conducendo l'indagine con quella meticolosit  intellettuale che era cifra della sua grande erudizione, si spingeva con estremo rigore fino alle pi  sottili articolazioni del discorso giuridico. Da un lato riconosceva che «negli scritti dei logografi (e con risonanze immediate anche in filosofi come Platone e Aristotele) si tendeva a individuare nell'assunzione volontaria di impegni il momento vincolante al livello dell'autonomia contrattuale». Dall'altro, nondimeno, gli sembrava difficile pensare, per l'esperienza greca, «a un generico riconoscimento di quella che noi potremmo chiamare l'autonomia contrattuale», secondo il tipo previsto dall'art. 1322 Codice civile italiano (e norme analoghe) richiamato fin dalla p. 1 del contributo, ritenendo «pi  probabile» che la legge sull'*homologia kyria*, anzich  avere introdotto nell'esperienza giuridica greca (e attica in particolare) l'esistenza di contratti basati sul consenso, avesse solo introdotto la necessit  dell'assenza di vizi del volere nella conclusione dei contratti.

⁸³ Il concetto   ripetuto anche nel   7: «le particolarit  del sistema contrattuale attico non si spiegano sostituendo ad una dogmatizzazione di tipo pandettistico una diversa dogmatizzazione».

4. Collocazione dello studio di Talamanca rispetto ai percorsi più recenti della letteratura giusgrecoistica.

Lo studio di Talamanca mantiene la pienezza della sua rilevanza, anche calato nel dibattito giuridico attuale. Non si tratta solo di una tessera finora mancante del mosaico storiografico, ma di un contributo fecondo per rileggere, con occhio critico, la valenza del consenso ad Atene, specialmente con riferimento alla struttura contrattuale. Possiamo porre Talamanca in dialettica con la letteratura recente. Alcuni temi specifici si rilevano.

4.1. Una o più leggi in tema di *homologia*.

L'asserzione della parcellizzazione della disciplina sull'*homologia kyria* in una pluralità di leggi, teorizzata fino al 1977 dal solo Maschke, è stata ripresa in tempi recenti da D. Avilés in un articolo dall'eloquente titolo «*The Athenian Law(s) on Homologia*» (2012)⁸⁴, ed è stata ritenuta ammissibile anche da R.W. Wallace nella sua *response* al *Symposion* del 2013⁸⁵. Essa continua nondimeno a trovare nel saggio di Talamanca una decisa confutazione⁸⁶, saldamente ancorata alle fonti (soprattutto a [Dem.] 47.77⁸⁷). Cosa diversa è concepire che ad Atene sia esistita, oltre alla legge 'generale' che riconosceva vincolanti le *ὁμολογίαι*, un'altra legge che, per ipotesi, a un certo punto abbia vietato, come ipotizzato dal sottoscritto⁸⁸, le *ὁμολογίαι* contrarie a norme inderogabili dell'ordinamento, oppure che abbia vietato accordi ingiusti, come ha pensato Schanbacher⁸⁹. Ma tutti i riscontri convergono nel senso che la legge generale in materia fu una soltanto.

4.2. *Homologia* e *syntheke*.

Lo stesso è a dirsi dell'equivalenza impropriamente istituita nelle orazioni tra

⁸⁴ Avilés 2012, 52 ss., con ripresa in Avilés 2015. L'A. in precedenza aveva aderito alla teoria consensualista (Avilés 2011).

⁸⁵ Wallace 2014.

⁸⁶ *Contra* anche Gagliardi 2015b; Gagarin 2018.

⁸⁷ Così anche Schanbacher 2021, 72.

⁸⁸ Gagliardi 2015b. Cfr. Arist. *Rhet.* 1375b8-11 e inoltre Plat. *leg.* XI, 920d; Gai. 4 *ad leg. XII Tab.* D. 47.22.4. Si pensi, a titolo di comparazione, a un confronto tra gli articoli 1321 e 1418 c.c. it.

⁸⁹ Schanbacher 2021, 70 ss. L'A. ha colto alla base della legge la *ratio* di introdurre il requisito dell'equivalenza oggettiva o soggettiva tra le prestazioni contrattuali.

homologiai (accordi) e *synthekai* (contratti). L'assimilazione tra i due lemmi, presente nelle opere dei logografi, confermata successivamente dai lessici⁹⁰ e certo percepita ai tempi senza fraintendimenti dai fruitori del diritto ateniese, non è stata accolta, per esempio, da Thür nella voce *Syntheke* per il *Neue Pauly*⁹¹. La trattazione sul punto, benché rientrata solo «di scorcio»⁹² nella relazione di Talamanca, trova in essa l'indicazione che in [Dem.] 48, e in particolare al § 11 dell'orazione, «l'assetto di interessi intercorso fra le parti è costantemente qualificato come *synthekai*», con richiamo alla legge sull'*homologia kyria*⁹³.

Ho scritto di un'equivalenza 'impropriamente' istituita dalle fonti tra *homologiai* e *synthekai*. L'*homologia* è a rigore logico un elemento costitutivo della *syntheke*, sicché indicare la seconda con la prima designazione costituisce una sineddoche partitiva, come accade per l'art. 1321 c.c. it., in rapporto all'art. 1325. Riporta il primo: «Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale». Aggiunge il secondo: «I requisiti del contratto sono: 1) l'accordo delle parti; 2) la causa; 3) l'oggetto; 4) la forma, quando risulta che è prescritta dalla legge sotto pena di nullità». L'accordo non può essere al tempo stesso il contratto e un requisito di esso. In questo senso si può affermare che l'*homologia* si identificava col contratto attico: era la parte essenziale del contratto. Quando v'era un documento contrattuale scritto, consistente nella *syntheke*, l'*homologia* trovava in esso una manifestazione formale. Ma se *syntheke* non v'era, l'*homologia* coincideva col contratto in modo comparabile a quanto previsto, ad esempio, dal combinato disposto degli artt. 1321 e 1325 c.c. it.⁹⁴.

⁹⁰ Harpocr. s.v. Ἀσυνθετώτατον; Hesych. s.v. Συγκεῖσθαι (2165); Phot. s.v. Ῥήτρα = *Suid.* s.v. Ῥήτρα; *Suid.* s.v. Συνθήκη (1588). Cfr. *Schol.* Thuc. 1.87.4. Cobetto Ghiggia 2011, 27 s.; Gagliardi 2015b, 1533 nt. 48.

⁹¹ Thür 2001.

⁹² Come si legge nella prima pagina dell'inedito.

⁹³ Così si legge nell'inedito di Talamanca, al § 6. Nella stessa direzione indico: [Dem.] 48.54; 56.2, 3, 4, 6, 7, 10, 11, 12, 14, 15, 16, 26, 27 ecc. (*synthekai* dette anche *syngraphai*: Bianchini (1978) 1979; la *syngraphé* aveva importanza centrale ai fini probatori, anche in base alla clausola κυριώτερον δὲ περὶ τούτων ἄλλο μὴδὲν εἶναι τῆς συγγραφῆς (Dem. 35.39): Velissaropoulos-Karakostas 2001); Hyp. Ath. 15 (*homologia* in relazione con *symbollein*); Plat. *Crit.* 52d-e. Ibbetson - Caldwell - Harris - MacCormack - Manning - Olivelle 2024. Sul differente significato di *symbolaion* Harris 2015.

⁹⁴ Spero con questo di avere chiarito meglio il mio pensiero (espresso in Gagliardi 2014 e 2015b), in relazione a quanto scritto da Maffi 2018, 161 nt. 49. Peraltro, la definizione

4.3. Homologia e categorie romanistiche.

Quanto all'insistenza di Talamanca – nella scia di Wolff e del più giovane Kußmaul – sulla necessità di non descrivere gli istituti del mondo giuridico greco «sotto il profilo contenutistico dei grandi temi della romanistica e della pandettistica», essa trova a sua volta terreno fertile nel dibattito moderno. Cito come significative parole che traggo dal citato contributo di Wallace: «without Roman and modern law, would anyone have described these *homologiai* as contracts in the Roman or modern sense? ... I avoid Roman or modern notions of contract in favor of Athens' less rigorous approach to legal issues, and I take particular care with our sources»⁹⁵. Ha quindi aggiunto Gagarin: «Scholars often discuss the law in the context of the Roman law of contracts and modern contract law; in particular, scholars debate whether Athenian contracts were real or consensual (both terms from Roman law) and what remedies may have been available to redress violations. Some of these scholars seem to lose sight of the fact that Athenian law is not Roman law, and that unlike Roman law, it does not usually define offenses in great detail or elaborate the precise conditions required for enforcement of a law. As others [*i.e.* Wallace] have also recently urged, however, in order to understand Athenian law it is essential to put aside preconceptions based on Roman law and begin with what the Athenians themselves tell us, especially in the forensic speeches»⁹⁶.

In senso contrario, Schanbacher ha osservato che «Die Verwendung dieser Termini [*i.e.* del diritto moderno, derivati dalla tradizione romanistica] erscheint als unschädlich. Es besteht nicht etwa die Gefahr, "to lose sight of the fact that Athenian law is not Roman law"»⁹⁷.

Trovo quest'ultima prospettiva preferibile e tenderei ad attenuare sul punto la cautela di Talamanca e degli altri autori recenti. Se si accetta, con prudenza e prospettiva storica, di impiegare le categorie moderne (chiara-

di contratto dell'art.1321 c.c. it., in quanto fondata sull'accordo, si presenta discutibile per più aspetti. Da un lato, perché nel nostro ordinamento vi sono contratti, per i quali il consenso non è sufficiente. Mi riferisco ai contratti reali. Da un altro lato, perché può nascere un contratto anche in assenza dell'accordo. Si pensi al caso della riserva mentale, a quello in cui colui che conclude fittiziamente come interposto si trovi vincolato a quanto egli abbia dichiarato, per la ragione che sia mancato l'intervento nell'intesa simulatoria da parte del terzo contraente, o al contratto di fatto. R. Sacco in Sacco - De Nova, 1 ss.

⁹⁵ Wallace 2014, 215. Cfr. Wallace 2016.

⁹⁶ Gagarin 2018, 36.

⁹⁷ Schanbacher 2021, 63 nt. 1. Condivisibile Harris 2024.

mente di derivazione romanistica) in chiave atemporale per inquadrare fenomeni giuridici antichi, cui erano ignote determinate concettualizzazioni, sicuramente si guadagna nel disporre di strumenti di lettura capaci di cogliere la coerenza interna di sistemi del passato senza tradirne la specificità storica⁹⁸. Diversamente, non potremmo impiegare nessuno dei nostri termini moderni per descrivere le esperienze trascorse. Per quelle elleniche, se partissimo dal punto di vista qui opposto, dovremmo finire con l'esprimerci in greco antico. Come scrisse Biscardi nel 1971: «D'altronde, le categorie romanistiche o moderne non sono che dei parametri, che ci permettono di meglio apprezzare, nel confronto, l'essenza delle norme e degli istituti onde constano esperienze storiche diverse, aventi ciascuna una propria dogmatica, sia pure embrionale, da scoprire»⁹⁹.

⁹⁸ Penso alla prolusione che E. Betti (che fu uno dei Maestri di Talamanca, insieme a V. Arangio-Ruiz: Capogrossi Colognesi - Di Porto 2021) recitò, con il titolo «*Diritto romano e dogmatica odierna*», il 14 novembre 1927 all'Università degli Studi di Milano, dopo la sua chiamata a una delle cattedre romanistiche: Betti (1928, 1991) 1997 (Gagliardi 2018, 520 ss.; Lo Iacono 2024). Si tratta del 'manifesto bettiano' (Talamanca 1982, 718), nel quale lo studioso di Camerino patrocinò l'assunto secondo il quale i concetti giuridici impiegati dalla dottrina moderna sono adatti e confacenti non soltanto alla descrizione del presente, ma anche all'interpretazione, alla descrizione e alla comprensione degli istituti del passato, avendo la dogmatica 'odierna' il compito di «colmare le lacune concettuali dell'esposizione dei contemporanei, col sussidio prezioso della più raffinata dogmatica [del giurista moderno]». Betti (1931) 1991, 135 ss. Contrapposizione soprattutto di Biondi (1933) 1965 (talché si parlò di 'polemica Biondi-Betti'), ma anche, tra altri, di De Francisci (1936) 1997. Adesione di Orestano (1951) 1981, 106, 108; (1957) 1981; (1960) 1981; (1962) 1981. Nel suo secondo anno di vita (1956), la rivista «*Labeo*» pubblicò un'inchiesta (*Studio e insegnamento del diritto romano*) tra oltre 300 romanisti di tutto il mondo sul metodo di studio e di insegnamento del diritto romano. L'inchiesta aveva risentito profondamente delle innovazioni bettiane, tanto che due dei cinque quesiti erano i seguenti: «1) Nello studio dei diritti antichi, e particolarmente del diritto romano, è inevitabile o almeno indispensabile, o almeno opportuno, approfittare della preparazione "dogmatica" moderna? 2) Nella ricostruzione del diritto romano, e in generale di ogni diritto antico, bisogna limitarsi ad accertare le "dogmatiche" embrionali elaborate dai giuristi dell'epoca, o è lecito procedere ad una inquadratura dogmatica propria dei singoli risultati raggiunti?». Furono pubblicate le risposte di 27 studiosi. Tra loro, Betti (pp. 54 s.) riaffermò le sue opinioni. Tra le prese di posizione in senso contrario è notevole quella di Albanese (p. 49). Non condivide l'impostazione di Betti, oltre ad altri, Cannata (1971-1972) 2011. Posizione più cauta di Costa 1979; Crifò 1979, 266 ss.; Schiavone 1979; Nardoza 2007, 61 ss.; 2021; Mura 2014, IX ss.; Chorus 2021. Sostanzialmente la recepisce, riferendosi all'opinione di Talamanca in relazione al diritto romano, Finazzi 2012, 126.

⁹⁹ Biscardi (1971) 1999, 105

Pertanto, a titolo di esempio, non trovo assolutamente inappropriata la discettazione di Pringsheim sulla compravendita ateniese come ‘contratto non consensuale’¹⁰⁰. Impiegando in astratto la categoria che possiamo denominare dei ‘contratti reali’ (ovvero senza fare alcuno specifico confronto con i singoli i contratti reali del diritto romano¹⁰¹ e riferendoci invece in termini generali a contratti che in qualunque sistema si perfezionino con una consegna), possiamo affermare che, poiché la compravendita attica si concludeva con il pagamento del prezzo¹⁰² (sia pur, talvolta, eccezionalmente sotto la finzione che quest’ultimo fosse lasciato all’acquirente a titolo di mutuo¹⁰³), avesse natura reale. Resta ferma la consapevolezza che i Greci non conoscevano il concetto di ‘contratto reale’ e che finanche la loro concezione di ‘contratto’ non si fondava su una teorizzazione articolata come quella romana o come quella attuale¹⁰⁴.

Allo stesso modo, non vedo nulla di riprovevole nell’affermare che i contratti basati sull’*homologia* (se si condivide la tesi ‘consensualista’) fossero contratti che, impiegando consapevolmente e convenzionalmente la costruzione dogmatica moderna, possiamo denominare ‘consensuali’, nel preciso senso che si perfezionavano col solo consenso.

Restano ferme le differenze fondamentali tra i contratti consensuali ateniesi e quelli romani, nonché moderni¹⁰⁵:

- in Grecia ogni accordo atipico regolante rapporti giuridici patrimoniali, nella misura in cui si ritenga che fosse considerato contratto consensuale vincolante, non bastò mai da solo a fondare obbligazioni direttamente esigibili in giudizio, offrendo tutela soltanto nella forma mediata del risarcimento del danno;

- a Roma, invece, determinati accordi tipici divennero fonte immediata di obbligazioni azionabili in giudizio per l’ottenimento della prestazione convenuta.

¹⁰⁰ Pringsheim 1950.

¹⁰¹ Gaius *inst.* 3.90; Gai. 2 *res cott.* D. 44.7.1.2-6. Maschi 1973, 74 ss.; Pastori 1997; Roncati 2014; Wegmann Stockebrand 2017 (con restrizione della categoria romana al mutuo).

¹⁰² Pringsheim 1950, 89, 134 ss., 167 s.; Jones 1956, 227 ss.; Cantarella 1975; Kränzlein 1975, 190 nt. 14; MacDowell 1978, 138 ss.; Maffi 2005, 260.

¹⁰³ Millett 1990; Scheibelreiter 2015.

¹⁰⁴ Ma non v’è dubbio che le idee di debito e di credito, di promessa obbligatoria e di garanzia fossero note ai Greci sin da Omero, come dimostrato già da Cantarella (1964) 2011.

¹⁰⁵ Pringsheim 1954.

Come ha osservato Maffi, con opinione che condivido, «l'assenza di azioni contrattuali non significa che, attraverso la *dike blabes*, non si potesse far valere l'inadempimento di una promessa, in quanto l'inadempimento realizzava comunque un danno per il promissario. Il creditore insoddisfatto poteva così ottenere l'equivalente in denaro della prestazione che si attendeva dal debitore»¹⁰⁶, con possibile estensione del risarcimento al valore del lucro cessante¹⁰⁷.

Sulla base di tali specificità e distinzioni, l'impiego della categoria di 'contratto consensuale' – intesa con riguardo al momento genetico dell'obbligazione (ossia al consenso) e non alle conseguenze giuridiche dell'inadempimento – appare congruo rispetto al sistema ateniese, pur in assenza, in quest'ultimo, di una elaborazione concettuale autonoma della categoria. Si tratta chiaramente di analogie compiute per approssimazione, ma sono quelle che ci permettono di inquadrare, sia pur imperfettamente, gli istituti di sistemi antichi con il nostro 'strumentario interpretativo'.

4.4. Homologia e Typenzwang.

Per quanto concerne l'opinione bettiana sul *Typenzwang*¹⁰⁸, essa si fondava sull'idea che il diritto romano fosse retto da un vero e proprio vincolo di tipicità, per il quale ogni negozio giuridico trovava tutela solo se ricondotto a una figura tipica, dotata di disciplina propria e di un'azione corrispondente¹⁰⁹. La tipicità non era formalismo, ma struttura funzionale: un insieme di *essentialia* e *naturalia* che garantivano certezza, prevedibilità e integrazione di interessi. Secondo Betti, perfino nel moderno diritto privato la *Typenfreiheit* è largamente apparente: anche gli ordinamenti che proclamano libertà tipologica operano, in realtà, entro figure riconoscibili e socialmente sedimentate, alle quali il sistema ricollega regole dispositive e limiti inderogabili. Secondo lo Studioso, insomma, il diritto romano, come quello moderno, funzionava 'per tipi', sia pur progressivamente riconosciu-

¹⁰⁶ Maffi 2018, 172 s. Anche Id., 161 s.: «Il fatto che non siano documentate azioni giudiziarie di tipo contrattuale non costituisce, a mio parere, un ostacolo insormontabile ad accogliere la tesi dell'homologia nel senso di accordo contrattuale».

¹⁰⁷ Maffi 2018, 167. Cfr. Gagliardi 2014, 194, 205.

¹⁰⁸ Betti (1944, 1966) 1991.

¹⁰⁹ Aspetti ampiamente indagati anche dallo stesso Talamanca (1989) 2006; 1990a, 534 ss.; 1990b; 1991a; 1991b; 2003. Ulteriori spunti in Beduschi 1992; Gallo 1992; Segnalini 2010; Donadio 2010; Hirata 2013; Palma 2013; Sciandrello 2014; Bertoldi 2016, 27 ss.; Petrucci 2018, 3 ss.; Maganzani 2020.

ti e accolti dagli ordinamenti¹¹⁰, in guisa di condizione stessa dell'efficacia dell'autonomia privata.

A questo proposito mi sembra persuasiva, dal *côté* giusgrecistico, l'impostazione di Talamanca, che, guardando al diritto attico, non poteva non notare che in esso la parola 'tipo' non ha lo stesso peso dogmatico, né potrebbe averlo, perché le strutture giuridiche emergevano dalla vita sociale, senza alcun riconoscimento della tipicità in un laboratorio giurisprudenziale e senza un operato comparabile a quello del pretore (per la via editale o, almeno, decretale¹¹¹). Le liturgie giuridiche non erano costruite attorno a schemi tecnico-formali, ma, all'opposto, erano riconosciute nella consuetudine di pratiche condivise e nella protezione che l'ordinamento, in forme spesso frammentarie, decideva di accordare. Anche su questi ultimi aspetti, la parola di Talamanca è stata anticipatrice di riflessioni moderne. Penso ai numerosi autori che, da diverse prospettive, hanno sottolineato come il modello romano non sia esportabile tal quale ad altri ordinamenti antichi privi di un'attività prudenziale comparabile¹¹².

4.5. Homologia e Zweckverfügung.

La confutazione dell'ipotesi wolffiana appare, nell'inedito di Talamanca, definitiva, sia sul piano tecnico-giuridico, sia su quello semantico, in base a una meticolosa lettura delle fonti attiche. Il concetto stesso di *Zweckverfügung* viene designato come una sovrastruttura che, in relazione al mondo ateniese, sul piano sostanziale non risulta concepibile entro il rudimentale armamentario dogmatico disponibile al diritto greco. L'opinione opposta, aggiungo, appare difficile a sostenersi, a meno che non si parta da condizionamenti aprioristici, per tradizioni di scuola.

Maffi, il quale nel 2018 ha sottoposto a un «un rinnovato vaglio critico alcuni gangli fondamentali della costruzione presentata da Wolff nel 1957, rivelatasi poi così influente sulla dottrina successiva»¹¹³, ha richiamato l'attenzione sul fatto che lo studioso tedesco, nella formulazione della propria teoria, non abbia tenuto conto del testo normativo che contiene il più antico

¹¹⁰ Ferri G.B. 1968; De Nova (1974) 2014; Gabrielli 1999; 2006; Cioffi 2008; 2015; De Luca 2024.

¹¹¹ Su ciò Fiori 2003, 195 ss.; 2007; 2012.

¹¹² Biscardi 1987; Schiavone 2006, 5; Cardilli 2008; Pelloso 2008; Gagliardi 2012; (2016) 2016.

¹¹³ Maffi 2018, 170.

riferimento all'*homologia* in senso negoziale, vale a dire il Codice di Gortina¹¹⁴ (IC IV 72, col. VI 51), databile tra il VI e il V secolo a.C. Si tratta di una fonte di quasi cento anni anteriore rispetto alla testimonianza che lo stesso Wolff indicò come la più risalente in materia¹¹⁵.

Maffi si è spinto oltre e si è interrogato se l'atto negoziale che le fonti attiche designano con *homologeîn* possa corrispondere a quello che il Codice di Gortina individua con il verbo *epispēdeîn*.

Invero, in IC IV 72, coll. IV 52 - V 9, si stabiliva la modalità con cui il padre poteva compiere il dono nuziale in favore della figlia, ovvero, in caso di sua morte, il fratello nei confronti della sorella: l'alternativa era fra dare (*didonai*) ed *epispēdeîn* (ἔδοκε ἔπιπέσπενσε¹¹⁶), ove quest'ultimo verbo non poteva significare, se non 'promettere'. La stessa deduzione è possibile per IC IV 72, col. VI, ove alle ll. 9-25 il 'Codice' tutelava il patrimonio della moglie e della madre contro atti di disposizione del loro patrimonio da parte, rispettivamente, del marito e del figlio. Gli atti erano indicati con: vendere (*apodidonai*), dare in garanzia (*katatithenai*) ed *epispēdeîn* (ὁ δ' ἀποδόμενος ἔκαταθὲν ἔπιπέσπενσανς τοῦ πριαμένῳ ἔκαταθεμένῳ ἔπιπέσπενσανμένῳ διπλεῖ καταστασεῖ¹¹⁷). Nei tre casi, il marito o il figlio che avessero compiuto gli atti vietati avrebbero dovuto pagare il doppio del valore del danno arrecato (ciò che, sia constatato incidentalmente, suggerisce un'analogia con la *dike blabes* attica¹¹⁸). È evidente che, anche qui, *epispēdeîn* faceva riferimento a una promessa. E la medesima conclusione è resa possibile da IC IV 72, col. X 25-32, ove era statuito il divieto di *epispēdeîn* – ovvero 'promettere' – di consegnare una persona data in garanzia, o il cui *status* fosse oggetto di controversia¹¹⁹ (ἄντρο[π]ον μεῖ ὄνεθα|ι κατακείμενον πρίν κ' ἀλλύσεται ὁ καταθὲνς, μεδ' ἀμίμῳ|λον, μεδὲ δέκσθαι μεδ' ἐπιπέσπενσθαι μεδὲ καταθέθαι. | αἰ δέ τις τούτων τι φέρκσαι, μεδ|ὲν ἐς κρέος ἔμεν, αἰ ἀποπῶνι|εν δύο μαίτυρε<ς>¹²⁰).

Muovendo da queste testimonianze, Maffi ha potuto dimostrare che il verbo *epispēdeîn* a Gortina indicava una promessa contrattuale.

¹¹⁴ Così, ora, anche Youni c.d.s.

¹¹⁵ Trattasi di *Syll.*³ I, 75 (428/427 a.C.): Wolff (1957) 1968, 514 nt. 70.

¹¹⁶ IC IV 72, col. IV 52-53.

¹¹⁷ IC IV 72, col. VI 18-23.

¹¹⁸ Maffi 2018, 155.

¹¹⁹ Esame della fattispecie in Gagarin - Perlman 2016, 412 s.

¹²⁰ IC IV 72, col. X 25-32.

Lo stesso dato egli ha desunto da un'iscrizione¹²¹, databile intorno al 500 a.C.¹²² e proveniente dalla *polis* cretese di Datal(I)a (probabilmente identificabile oggi con Aphrati)¹²³, che conserva il contratto¹²⁴ col quale i *Datalais*¹²⁵ promisero a un certo Spensizio¹²⁶ di effettuare a suo favore determinate prestazioni per l'attività di scriba¹²⁷: l'atto di promettere è indicato con il verbo *spēndein* (ἔφαδε Δαταλεῦσι καὶ ἐσπένσαμες πόλις | Σπενσιθίωι ἀπὸ πυλᾶν πέντε ἀπ' ἐκάστας θροπά|ν τε καὶ ἀτέλειαν πάντων αὐτῶι τε καὶ γενιᾶ ὄ|ς κα πόλι τὰ δαμόσια τά τε θήια καὶ τὰνθρόπινα | ποιδικάζεν τε καὶ μυαμονευρη¹²⁸). Come *espispēndein*, anche *spēndein*¹²⁹ a Creta indicava un atto produttivo di obbligazioni.

È coerente pensare al parallelismo, evidenziato fin da E. Zitelmann¹³⁰, nonché da A. Magdelain¹³¹, con la *sponsio* romana, che atteneva al finanziamento come l'*epispēndein* gortinio, con natura contrattuale¹³². Pur non potendosi dimostrare¹³³ che i contratti cretesi in questione si concludessero mediante la pronuncia di una formula bilaterale – una domanda del creditore e la corrispondente risposta del debitore – è plausibile che in origine essi avessero tale struttura, non più attestata in età storica. Se ne deduce che già

¹²¹ Jeffery - Morpurgo-Davies 1970 = *SEG* XXVII, 631 = Van Effenterre - Ruzé 1994, I, 22 = Gagarin - Perlman 2016, Da1. Raubitschek 1970; Jeffery - Morpurgo-Davies 1971; Willetts 1972; Hoffmann 1972, 9 s. Esame generale: Thomas 1992, 69 ss.; (1995) 1996; Boffo 2003, 12; Vélissaropoulos-Karakostas 2005; Kristensen 2012; Faraguna 2021, 138 ss.

¹²² Jeffery - Morpurgo-Davies 1970; A.E. Raubitschek *ap.* Hoffmann 1972, 47 s.

¹²³ Viviers 1994; Perlman 2004a. La città sarebbe Lyttos secondo Van Effenterre - Gondicas (1999) 2000. *Contra* A. Chaniotis in Chaniotis - Pleket - Stroud - Strubbe 2002, 363.

¹²⁴ In tal senso Van Effenterre 1973, 34; Gschnitzer 1974, 269 s.; Maffi 1988, nt. 4; Viviers 1994, 236 s.; Pałuchowski 2019, 21 s.

¹²⁵ Ovvero i cittadini di Datal(I)a: Gschnitzer 1974, 265 ss.; Perlman 2014, 178 s.

¹²⁶ Per le ipotesi sulla sua condizione civica: Perlman 2004b, 113 s.

¹²⁷ Macdonald (2005) 2016 nt. 65; Pébarthe 2006.

¹²⁸ A, ll. 1-5. L'iscrizione è stata pubblicata nel 1970 (Jeffery - Morpurgo Davies 1970) e non poteva essere nota a Wolff nel 1957, ma, come osserva Maffi 2018, 146, l'A. non ne ha tenuto conto neppure al tempo della sua presentazione al *Symposion* del 1979 (Wolff (1981) 1983).

¹²⁹ Bile 1988, 356.

¹³⁰ Zitelman in Bücheler - Zitelmann, *Das Recht von Gortyn*, Frankfurt a.M. 1885.

¹³¹ Magdelain (1980) 1990, 611.

¹³² Sacconi 1989, 137; Astolfi 1994, 111 e *passim*; Fayer 2005, 95 ss.; Bartocci 2012; Ingallina (2016-2017).

¹³³ Maffi 2018, 156.

al tempo del Codice di Gortina tali atti si perfezionassero ormai con il mero consenso, liberamente manifestato in forma orale e certamente prima che fosse stato compiuto alcun atto di disposizione da parte del creditore¹³⁴, il che contraddice il principio affermato da Wolff.

È possibile una comparazione tra l'*epispendein/spendein* cretese e l'*homologein* attico. Sotto il profilo privatistico si rileva che entrambi: a) si perfezionavano oralmente; b) producevano l'assunzione dell'impegno a compiere prestazioni; c) generavano tutela sul piano risarcitorio (in relazione a una *blabe*). Così come il termine *homologia*¹³⁵, anche *spondé* era impiegato per indicare accordi internazionali¹³⁶.

Dall'accordo indicato con i verbi *epispendein/spendein* e *homologein*, derivava non soltanto un debito (*Schuld*) ma anche una responsabilità (*Haftung*)¹³⁷. La legge attica sull'*homologia* rese vincolanti gli accordi, sia sinallagmatici, sia con prestazioni unilaterali, assunti verbalmente senza ricorrere a parole solenni¹³⁸.

Maffi ha inoltre svolto un'osservazione che appare concorde con quanto scritto da Talamanca: «sostenere che, quando *homologein* si riferisce a un comportamento espresso da un verbo al futuro (come *apodosein*), il fondamento dell'obbligo non stia nella promessa di tenere quel comportamento, ma in un elemento diverso (che coincide implicitamente con la *Zweckverfügung*), significa escludere a priori l'efficacia vincolante di una promessa contrattuale»¹³⁹.

La teoria della *Zweckverfügung*, oltre che sovrastrutturata rispetto al diritto attico e non sostenuta dalle relative fonti, risulta apodittica, in quanto fondata su una *petitio principii*.

Essa non è compatibile neppure con le norme attiche del versante processuale richiamate soprattutto da Thür. Per rifarmi ancora una volta alle precise parole di Maffi, «se fosse vero che le risposte alla domanda della controparte rese in istruttoria sono vincolanti per la parte che le ha rese, queste dichiarazioni dovrebbero valere come *pisteis atechnoi*: dovrebbero cioè essere protocollate (almeno a partire dal IV sec.a.C.), inserite nel dossier di parte e, su richiesta, lette dal *grammateus* di fronte al tribunale», ciò

¹³⁴ Maffi 2018, 156.

¹³⁵ Youni c.d.s.; Pepe c.d.s.

¹³⁶ Hermann (1971) 1990, 26; Baltrusch 1994; Bayliss 2013.

¹³⁷ Maffi 2018, 170.

¹³⁸ Maffi 2018, 157.

¹³⁹ Maffi 2018, 157.

di cui difetta ogni traccia¹⁴⁰.

Un ulteriore contributo all'inquadramento dell'*homologia* delle origini nei rapporti tra privati, basata su testimonianze letterarie risalenti ai secoli VIII-VI a.C. – e quindi più antiche di quelle esaminate già da Kußmaul nel 1969¹⁴¹ – è stato ultimamente offerto da Pepe al *Symposion 2024*¹⁴². L'Autrice ha rivolto l'attenzione all'apoftegma attribuito a Periandro, tiranno di Corinto (VII-VI sec. a.C.), riportato da Stobeo, che recita: ὁ ἄν ἐκὼν ὁμολογήσεις, <διατήρει>· πονηρὸν <γὰρ τὸ> παραβῆναι [παράβαινε]¹⁴³. Trovo significativo l'impiego arcaico, nel linguaggio comune, del verbo *homologeîn*, con l'aggiunta di *hekón*, per indicare l'assunzione consapevole di un dovere morale, che si considera scellerato *parabaineîn*.

Nello stesso senso sono indicativi¹⁴⁴ (sia pur senza riferimento alla volontarietà espressa dall'aggettivo *hekón*) due brani di Esopo (VI sec. a.C.), nei quali l'atto di farsi carico di un obbligo è indicato con *homologeîn*. Nella *fabula* 9, la volpe e il capro concludono tra loro un accordo che, dato il contesto animale antropomorfizzato, potremmo definire 'para-contrattuale'. Viene detto che la prima non lo rispetta (τοῦ δὲ τράγου μεμφομένου αὐτὴν ὡς τὰς ὁμολογίας παραβαίνουσας ἡ ἀλώπηξ ἐπιστραφεῖσα εἶπεν). Al di là della cornice fantastica, la struttura dell'*homologia* è meramente consensuale, come si deve supporre che fosse almeno in alcune società elleniche, affinché la storia potesse essere compresa dai fruitori del testo. Il secondo racconto, ancora più interessante, si trova nella *fabula* 57, relativa a una *misthosis*, intesa come contratto d'opera¹⁴⁵. Una donna chiama il medico per problemi agli occhi e, dopo essere stata da lui guarita, non vuole corrispondergli il compenso pattuito, poiché nel frattempo il medico le ha rubato le suppellettili della casa e quindi ella a buon diritto afferma di non vedere più nulla. La favola è tradita in tre versioni, segno di una

¹⁴⁰ La citazione è da Maffi 2018, 159. L'A. aggiunge, sempre contro l'opinione di Thür, che nulla obbliga a identificare i testimoni, cui si riferisce la legge citata da Dem. 42.12, come testimoni chiamati ad assistere la parte in istruttoria.

¹⁴¹ Kußmaul 1969, 30 ss.

¹⁴² Pepe c.d.s.

¹⁴³ Stob. *Anth.* 3.1.172 = *Septem Sapientes. Apophthegmata (ex collectione Demetrii Phalerei apud Stobaeum)*, Diels-Kranz, *Die Fragmente der Vorsokratiker*, I, VI ed., Berlin 1951, p. 61, 15.13.

¹⁴⁴ Di nuovo in Pepe c.d.s.

¹⁴⁵ Ovvero proprio quel contratto che, secondo Wolff 1966, 571, era, per usare 'bettianamente' le categorie romanistiche, un contratto 'reale'. Cfr. Martini 1997. *Contra* Biscardi A. 1982, 133 ss., 153 ss.

trasmissione manoscritta accidentata, che tuttavia non muta la sostanza delle narrazioni ai fini della nostra interpretazione. Nella prima versione si fa riferimento a una *misthosis* conclusa mediante *homologia*, senza che vi sia stata alcuna dazione (ἐπει δὲ πάντα ἐκφορήσας κάκεινην ἐθεράπευσεν, ἀπήτει τὸν ὁμολογημένον μισθόν). Nella seconda, l'accordo appare stipulato, s'intende per ragioni probatorie, dinnanzi a testimoni e si afferma che la donna ha compiuto l'atto di obbligarsi mediante una promessa, indicato col verbo *stoichein* (γυνὴ πρέσβυς τοὺς ὀφθαλμοὺς νοσοῦσα ἰατρὸν τινα ἐπὶ μισθῷ παρεκάλεσεν στοιχήσασα αὐτὸν ἐνώπιον μαρτύρων, ὅτι, ἐὰν θεραπεύσῃ αὐτῆς τοὺς ὀφθαλμοὺς, πολὺν λήψεται παρ' αὐτῆς τὸν μισθόν... μετ' οὐ πολὺ δὲ (scil. ὁ ἰατρὸς) θεραπεύσας αὐτὴν ἐξήτει τὸν στοιχηθέντα μισθόν...). Si noti che la pattuizione era avvenuta verbalmente (la donna afferma: «ἐπηγγειλάμην γὰρ δοῦναι αὐτῷ τὸν μισθόν»). Nella terza versione, il perfezionamento della convenzione, che nella prima era espresso con il verbo *homologein*, è reso mediante il ricorso a *symphonein*, considerato equivalente nel contesto (γυνὴ γραῦς ἀλγοῦσα τοὺς ὀφθαλμοὺς εἰσκαλεῖται τινα τῶν ἰατρῶν ἐπὶ μισθῷ συμφωνήσασα, ὡς, εἰ μὲν θεραπεύσειεν αὐτὴν, τὸν ὁμολογηθέντα μισθὸν αὐτῷ δώσειν, εἰ δὲ μή, μηδὲν δώσειν... τοῦ δ' ἰατροῦ τοὺς συμφωνηθέντας μισθοὺς αὐτὴν ἀπαιτοῦντος ὡς καθαρῶς βλέπουσαν ἤδη καὶ τοὺς μάρτυρας παραγαγόντος...).

Credo che i contributi recenti suffraghino e rafforzino le riflessioni di Talamanca, dimostrando che nel mondo greco, in più di uno degli ordinamenti giuridici delle città-stato, gli accordi acquisivano validità con il solo consenso. Credo che, alla luce di queste risultanze, la teoria della c.d. *Zweckverfügung* potrebbe essere abbandonata definitivamente.

4.6. Homologia e vizi della volontà.

Un altro tema sul quale il contributo di Talamanca si rivela importante è quello dei vizi della volontà contrattuale. Una delle numerose diatribe della giusgrecoistica moderna attiene alla questione se gli Ateniesi avessero sviluppato o meno un sistema organico di norme in materia. Alcuni autori l'hanno negato¹⁴⁶, altri l'hanno ammesso, sia pur senza far dipendere la regolamentazione dalla legge sull'*homologia*¹⁴⁷. Nel suo «*Das attische Re-*

¹⁴⁶ Pringsheim 1950, 498; Gernet (1937) 1955, 80 nt. 1; (1951) 1955, 220; (1957) 2002², 229.

¹⁴⁷ Beauchet 1897, 31 ss. (cfr. Huvelin 1907, 135); Simonetos (1943) 1968 (482: «die arglistige Täuschung oder der Betrug macht trotz Fehlens einer ausdrücklichen

cht und Rechtsverfahren» dei primi del '900, Lipsius (che va ascritto tra i 'consensualisti') vi aveva in realtà compiuto un riferimento, affermando che detta legge avesse introdotto la rilevanza della violenza contrattuale ai fini dell'invalidità negoziale, mentre a suo avviso essa non avrebbe riguardato il dolo e l'errore.

In tempi recenti, per la dottrina 'consensualista' la questione è stata riaperta nel 2006 da Cohen, il quale ha colto in [Dem.] 56.2 la conferma dell'effetto vincolante di «whatever arrangements a party might *willingly* agree upon with another», e in [Dem.] 48.11, 54 ha rilevato la citazione della «legge» che disciplina gli accordi «which a *willing* party has agreed upon and covenanted with another *willing* party»¹⁴⁸. In questo modo, egli è pervenuto a collegare, sia pur solo implicitamente, l'effetto della frode o dell'influenza indebita di un contraente sulla volontà dell'altro con la legge sull'*homologia* e ad ammettere che una volontà viziata da dolo o costrizione ad Atene poteva escludere la vincolatività di un accordo. Nello stesso senso si è espresso Gagarin: la legge ateniese sull'*homologia* (intesa come *binding agreement*) non si applicava agli accordi viziati nella volontà, e proprio questa esclusione dimostra che i vizi della volontà erano presi in considerazione e tutelati dall'ordinamento attico¹⁴⁹.

Il medesimo ragionamento ha guidato a esiti analoghi, benché non perfettamente sovrapponibili, Carawan, il quale, sia pur sostenendo che la legge sull'*homologia* non contenesse una disciplina positiva dei vizi della volontà, ha nondimeno concluso che la stessa presupponeva la validità sostanziale degli accordi¹⁵⁰. In altri termini, a suo avviso la legge sull'*homologia kyria* aveva valore solo per gli accordi efficaci, e non per quelli viziati da inganno, coercizione o errore.

L'aspetto sul quale, verso la fine della sua relazione di Chantilly (§ 7), Talamanca fornì un contributo, che credo potrebbe giovare notevolmente al dibattito odierno, fu quello del collegamento alla nostra legge del «riferimento ai vizi del volere». Gli indizi non mancano e si colgono nella clausola *hekón* di diverse testimonianze relative alla legge, come riferimento all'imprescindibilità della volontarietà, talora anche reciproca, nell'*homo-*

Bestimmung die Gültigkeit des Rechtsgeschäfts zweifelhaft»); Biscardi 1982, 138; Cantarella (1966) 2011, 263 ss.; Lambrini (2013) 2013, 16 ss.

¹⁴⁸ Cohen 2006, 74 (cors. aggiunti).

¹⁴⁹ Gagarin 2018.

¹⁵⁰ Carawan 2006.

logein. Importante è anche la formulazione di Plat. *leg.* 11.920d¹⁵¹, rilevata in fine dall'Autore, unitamente a quella di Plat. *Crit.* 52d-e¹⁵². A un tale approdo non osta l'osservazione di Schanbacher¹⁵³, secondo cui gli attributi 'giusto' / 'non (giusto)' (δικαία/μή) sarebbero sintatticamente associati agli oggetti dell'*homologia* (ὄσα ἂν τις ἐκὼν ἕτερος ἐτέρῳ ὁμολογήσῃ) e non all'*homologia* stessa¹⁵⁴, sicché non sarebbero gli accordi a essere giusti, ma le prestazioni in essi previste. La conclusione non è conseguente, poiché, al di là dell'aspetto letterale della formulazione normativa, nella misura in cui faccia riferimento ad anomalie 'dell'accordo', l'errore vizio, il dolo o la violenza invalidanti una volontà negoziale cadono proprio sull'oggetto o su sue qualità (quando non sulla persona dell'altro contraente). Nella formulazione legislativa è ravvisabile una metalepsi.

Quanto alla «difficoltà offerta da Hyp. Ath. 14-17», richiamata da Talamanca nel § 7 dell'inedito, in quel passo si afferma che l'accordo ha vigore soltanto se i relativi oggetti siano *dikaia* e, come osserva lo Studioso, «si fa riferimento a molte altre leggi, ma non allo specifico contenuto di quella sull'*homologia*». Io credo che si potrebbe proficuamente percorrere la strada che conduce a ritenere che la loro citazione delle leggi ulteriori servisse a rafforzare la pretesa dell'attore e fosse svolta a titolo di analogia, allo scopo di convincere la giuria di non-esperti¹⁵⁵ della bontà della pretesa attorea, tecnicamente fondata solo sulla sanzione del dolo prevista dalla legge generale sull'*homologia*. Nella fattispecie, il dolo negoziale aveva riguardato l'ammontare dei debiti gravanti sull'impresa¹⁵⁶, che il compratore si era accollato¹⁵⁷.

¹⁵¹ A proposito di questo passo Maffi 2018, 167 giustamente osserva: «il debitore potrebbe essere costretto con la violenza a riconoscere di aver ricevuto una disposizione da parte del creditore soltanto se la disposizione fosse fittizia, cioè non fosse avvenuta, ipotesi a cui certamente Platone non pensa». L'affidabilità delle *Leggi* di Platone per il diritto attico è discussa (Klingenberg 1976; Jakab 1997: 59 ss., 66 ss.; Nightingale 1999; Gagarin 2000), ma è sensato ritenere che il filosofo si muovesse entro il perimetro di istituti a lui noti per scienza diretta.

¹⁵² Segnalata già da Paoli (1932) 1933, 205.

¹⁵³ Schanbacher 2021, 74 nt. 53.

¹⁵⁴ Su questo limitato aspetto concordo con Scheibelreiter 2025a, 123 s.

¹⁵⁵ Maffi 2015 e, da ult., Gagliardi 2024b, con riferimenti.

¹⁵⁶ Cohen 1992, 94; Cantarella (2010) 2011.

¹⁵⁷ Nel contratto fu previsto che il compratore avrebbe assunto tutti i debiti gravanti sull'impresa, che il venditore assicurò al compratore essere d'infima entità e ampiamente coperti dalle merci presenti nel magazzino (Hyp. Ath. 6); furono elencati precisamente alcuni piccoli debiti e fu poi scritta una clausola, secondo la quale il compratore avrebbe risposto anche di tutti gli altri debiti non elencati (Hyp. Ath. 6). Si trattò di un accolto,

Epicrate non mirava all'annullamento del contratto¹⁵⁸. La *dike blabes* permetteva all'attore di mirare all'interesse positivo differenziale¹⁵⁹, derivante dalla comparazione tra il contratto concluso e quello che sarebbe stato stipulato in assenza di errore, di violenza, o del contegno sleale della controparte¹⁶⁰.

Un parallelismo interessante si rinviene nella legge epigrafica di Efeso, databile all'inizio del III secolo a.C.¹⁶¹. Vi si trova un riferimento all'*homologia kyria* come atto reciproco delle parti. Se ne documenta la natura di accordo contrattuale valido se perfezionato volontariamente e senza costrizione (εἰ δέ τινες... αὐτοὶ νεμόμενοι τὰ κτήματα ἐκόντες τι | συνωμολόγηνται πρὸς τοὺς δανειστάς μὴ βιασθέντες, εἶναι αὐτοῖς τὰ ὠμολογημένα κύρια¹⁶²). In caso di vizio del consenso, si sarebbe potuta attivare la tutela in giudizio (ἐὰν δὲ ὁ μὲμ φῆι βεβιάσθαι, ὁ δὲ μὴ, εἶναι αὐτοῖς κρίσιν περὶ τούτων ἐν τῷ ξενικῷ δικαστηρίῳ, προ|διδιαιτᾶσθαι δὲ αὐτοὺς ἐπὶ τῶν διαιτητῶν κατὰ τόνδε τὸν νόμον¹⁶³)¹⁶⁴.

Credo che l'individuazione di una disciplina esplicita in materia di vizi del consenso dettata precisamente dalla legge sull'*homologia kyria*¹⁶⁵, sia un aspetto sul quale la dottrina giusgrecoistica potrebbe tornare in futuro.

5. Conclusioni.

Mi arresto qui, per non abusare ancora della pazienza del lettore, il quale troverà, com'è naturale, ben maggiore interesse nella diretta lettura del testo di Talamanca.

Concludo, però, indicando un profilo dello studio che ritengo suscettibile di ulteriore discussione.

secondo l'interpretazione di Talamanca 2008: 226 s. Diversa opinione: Maffi 2008, 211 ss.

¹⁵⁸ Harris 2000; Lanni 2007, 226; Barta 2011, 2, 101 ss. Anche su questo aspetto concordo con Scheibelreiter 2025a, 85 s.

¹⁵⁹ Per questa espressione cfr., nella giurisprudenza italiana, soprattutto Cass. Civ. 19024/2005; 5273/2007; 26724 e 26725/2007 (Sezioni Unite); 24795/2008; 5965/2012. Solidoro 2008, 47 nt. 57; Vettori 2008a; 2008b; Sardini 2023, 71 ss.

¹⁶⁰ Gagliardi 2015b, 1537. Diversa interpretazione Meyer-Laurin 1965, 17; Phillips 2009, 91 nt. 8.

¹⁶¹ *I.Ephesos* 4 (= *Syll.*³ 364). Simonetos (1943) 1968, 472 ss.

¹⁶² Ll. 85-86.

¹⁶³ Ll. 87-88.

¹⁶⁴ Sul contesto storico della legge e per un'interpretazione generale di essa, Crowther 1995, 122; 1996, 227; Walser 2008, 47 ss., 197 ss.; Scafuro 2014, 382. Sulle linee qui in esame anche Maffi 2009-2010, 345 s.

¹⁶⁵ Ipotesi in tal senso in Gagliardi 2014; 2015a; 2015b. Adesione di Maffi 2018, 159 nt. 44.

Talamanca scrisse in fine (§ 7) che nelle orazioni redatte dai logografi si tendeva, da parte della dottrina, «a individuare nell'assunzione volontaria di impegni il momento vincolante al livello dell'autonomia contrattuale». E tuttavia, a suo avviso, «ciò non significava, senza dubbio (sottolineatura aggiunta), che nell'Atene di quell'epoca si desse l'operatività di un principio come quello dell'efficacia indiscriminata del consenso, e che questo principio si dovesse riconoscere nella legge dell'*homologia kyria*», sicché gli sarebbe stato «difficile di pensare, nell'intento del legislatore... a un generico riconoscimento di quella che noi potremmo chiamare l'autonomia contrattuale», sia pur ravvisando nella legge la disciplina sui vizi della volontà del consenso. La conclusione del Maestro era di massima prudenza: nel sistema attico non era «certo ancora invalso il principio della consensualità, anche se una rilevanza del semplice impegno non deve ovunque escludersi». La ragione di ciò era colta nei «condizionamenti di una prassi, nella quale, senza dubbio, rilevava una tipicità sociale».

Sia pur opponendosi alla teoria troppo astratta della *Zweckverfügung*, e concedendo qualche rilevanza del consenso nel sistema giuridico attico, Talamanca non ammise quindi l'esistenza e la validità dei contratti consensuali ad Atene, differenziandosi così anche dalle teorie 'consensualistiche'. Secondo il Maestro, nel diritto attico il riconoscimento della vincolatività di accordi volontari e non viziati era possibile, ma senza una generalizzazione della consensualità. La tipicità si configurava come fenomeno sociale, e non come dogmatica tecnica, data l'assenza di un sistema organico di tipi.

In sintesi, la proposta avanzata da Talamanca nel 1977 si distinse tanto dall'impostazione dei 'consensualisti' quanto da quella di Wolff. Lungi dallo sfociare in un'aporia, come potrebbe essersi portati a ritenere sulla base di un esame superficiale, nondimeno la sua trattazione si attestò su un crinale sottile: la legge non sarebbe giunta a sancire una piena libertà negoziale fondata sul consenso, ma, al contempo, avrebbe riconosciuto la forza vincolante delle *homologiai*, purché il consenso fosse risultato immune da vizi. Ritengo che Talamanca sia giunto a edificare tale costruzione muovendo dalla sua profonda convinzione che, nella cultura greca, mancassero una vera dogmatica e una compiuta scienza giuridica.

Concludo con due osservazioni.

La prima. Resta da comprendere che cosa si debba intendere per "tipicità sociale" e che cosa per "tipicità giuridica". Quest'ultima si desumeva, nella Roma repubblicana, dalla tutela processuale che veniva concessa dal

pretore alle parti (*‘aktionenrechtliches Denken’*). Ma in Grecia? In concreto il discorso ruota, come ha messo in luce Maffi nel suo articolo del 2018, intorno alla rilevanza giuridica della promessa (o “semplice impegno” nelle parole di Talamanca), ossia alla possibilità di agire in giudizio nel caso in cui essa non fosse stata adempiuta.

La seconda. Mi domando se, sulla base delle fonti da lui stesso esaminate e di altre, come l’iscrizione efesina e i documenti cretesi, Talamanca non avrebbe potuto fare un passo in più, ammettendo quella consensualità in materia contrattuale, che, forse, traspare dai testi. Essa avrebbe trovato conferma nella sua affermazione, già citata¹⁶⁶, secondo la quale gli assetti negoziali di interesse intercorsi fra le parti erano qualificati come *synthekai* nelle orazioni processuali con richiamo alla legge sull’*homologia kyria*, e con l’osservazione, che, a proposito delle *poleos synthekai*, in più fonti «risulta, per più versi, in tutta chiarezza l’equivalenza fra *synthekai* ed *homologiai*»¹⁶⁷.

Non c’è alcun dubbio che da questa pubblicazione il dibattito trarrà un arricchimento notevole.

¹⁶⁶ *Supra*, § 4.2, nt. 93.

¹⁶⁷ Cito dal § 3 dell’inedito.

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Nei limiti ristretti di ~~una~~ tempo assegnati a ciascuna comunicazione non potrò trattare che assai brevemente del tema che mi sono proposto e che si situa al centro di quelli che è lecito chiamare i problemi della "autonomia privata" nel diritto attico (del IV sec. a.C.). Già dal titolo appare, io spero, evidenti quelli che sono i limiti del discorso. Anzitutto quelli relativi all'esperienza giuridica presa in considerazione, e cioè il diritto attico (prevalentemente del IV sec. a.C., per ragioni di fonti); e ciò va particolarmente sottolineato, in quanto talune distorsioni dipendono, principalmente, in letteratura dall'aver sovrapposto all' 'homologia' attica risultati di analisi condotte su fonti non attiche. In secondo luogo, io mi occuperò dei problemi concernenti quelli che potrebbero chiamarsi, con larga approssimazione, i principi informatori dell'autonomia contrattuale, visti da quella che rimane una prospettiva essenziale al riguardo, e cioè la legge sull' 'homologein': non entreranno, invece, in questa discussione, se non di scorcio, altre tematiche pur di rilevante interesse, quali, soprattutto, la determinazione della portata di talune categorie - o terminologie - connesse con l'autonomia contrattuale, come 'symbolion', 'synallagma', 'synthekai', 'syggraphē', etc.

E' già stato, seppur da un punto di vista parzialmente diverso, osservato (Kussmaul) che le prese di posizione nella dottrina, a partire dalla metà del secolo scorso, dipendono, per molta parte, dalla diversa prospettiva da cui si sono, di volta in volta, posti gli osservatori. Non mi è possibile fare, qui, un'analisi dettagliata della storia della materia (la quale, dopo tutto, rimane piuttosto marginalmente situata rispetto ad interessi più immediatamente sentiti): ne accennerò, rapidamente, alle principali linee. Nel secolo scorso (e l'influsso ne rimane - pur se in frange marginali - fino ai nostri tempi: Démeypère), il problema era visualizzato sotto il profilo dei grandi temi correnti della romanistica e della pandettistica dell'epoca (civilistica, in genere): il problema delle forme dell'autonomia privata e, quindi della rilevanza del consenso; il problema, connesso col primo, ma non identificantesi con esso, dei limiti oggettivi posti all'autonomia privata stessa, e cioè del "Typenzwang" (Betti).

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Homologia kyria in diritto attico¹

1. Nei limiti ristretti di tempo assegnati a ciascuna comunicazione non potrò trattare che assai brevemente del tema che mi sono proposto e che si situa al centro di quelli che è lecito chiamare i problemi della ‘autonomia privata’ nel diritto attico (del IV secolo a.C.). Già dal titolo appaiono, io spero, evidenti quelli che sono i limiti del discorso. Anzitutto quelli relativi all’esperienza giuridica presa in considerazione, e cioè il diritto attico (prevalentemente del IV secolo a.C., per ragioni di fonti): e ciò va particolarmente sottolineato, in quanto talune distorsioni dipendono, principalmente, in letteratura dall’aver sovrapposto all’*homologia* attica risultati di analisi condotte su fonti non attiche. In secondo luogo, io mi occuperò dei problemi concernenti quelli che potrebbero chiamarsi, con larga approssimazione, i principi informatori dell’autonomia contrattuale, visti da quella che rimane una prospettiva essenziale al riguardo, e cioè la legge sull’*homologeîn*: non entreranno, invece, in questa discussione, se non di scorcio, altre tematiche pur di rilevante interesse, quali, soprattutto, la determinazione della portata di talune categorie – o terminologie – connesse con l’autonomia contrattuale, come *symbolaion*, *synallagma*, *synthekai*, *syggraphe*, etc.

È già stato, seppur da un punto di vista parzialmente diverso, osservato (Kusssmaul) che le prese di posizione nella dottrina, a partire dalla metà del secolo scorso, dipendono, per molta parte, dalla diversa prospettiva da cui si sono, di volta in volta, posti gli osservatori. Non mi è possibile fare, qui, un’analisi dettagliata della storiografia (la quale, dopotutto, rimane piuttosto marginalmente situata rispetto ad interessi più immediatamente sentiti): ne accennerò, rapidamente, alle principali linee. Nel secolo scorso (e l’influsso ne rimane – pur se in frange marginali – sino ai nostri tempi: Démeyère), il problema era visualizzato sotto il profilo dei grandi temi correnti della ro-

¹ Testo della relazione presentata al terzo *Symposion* di Diritto greco ed ellenistico, svoltosi dal 1° al 4 giugno 1977 a Chantilly. Pubblicazione a cura di Lorenzo Gagliardi.

manistica e della pandettistica dell'epoca (civilistica, in genere): il problema delle forme dell'autonomia privata e, quindi, della rilevanza del consenso; il problema, connesso col primo, ma non identificantesi con esso, dei limiti oggettivi posti all'autonomia privata stessa, e cioè del 'Typenzwang' (Betti).

La legge attica sull'*homologia*, intesa in un modo abbastanza vicino all'articolo 1322 c.c.it. (e norme analoghe), ciò che era reso possibile dalla sua indeterminatezza, serviva appunto a fondare e la libertà della forma e quella del contenuto (senza, fra l'altro, che spesso si avesse chiaramente la nozione del confine fra questi due aspetti). D'altra parte, senza che ciò possa venire approfondito, influiva a questo riguardo il problema, che si riacciava immediatamente a Gai. 3. 134, della possibilità di individuare nella *syggraphe* un documento dispositivo ed un'astratta promessa di pagamento, visuale, codesta, che non era immediatamente omogenea a quella precedentemente accennata, ciò che spiega taluni atteggiamenti ondegianti nella letteratura meno recente.

La discussione restava abbastanza saldamente ancorata, in questo modo, a categorie romanistiche (pur nel diverso orientamento contingente delle soluzioni pratiche), e l'*homologia*, esplicitamente o meno, veniva sentita come l'equivalente del nostro 'contratto'. È soltanto con gli inizi del nostro secolo che cominciano a porsi – pur se non sempre decisamente ed univocamente – i presupposti per lo sganciamento della nostra problematica dalle categorie romanistiche (od almeno di alcune fra esse), soprattutto da quelle che connotano la sistematica contrattuale nel diritto classico (la prospettiva è diversa per il diritto romano arcaico).

Si può dire che quasi tutti i punti di vista che hanno, di poi, condizionato lo strutturarsi delle varie opinioni emesse a proposito della fenomenologia contrattuale nell'esperienza giuridica greca si possano, più o meno esplicitamente, trovare in J. Partsch, che agli inizi del secolo è stato lo storico del diritto più impegnato nella grecistica. Ciò vale per la posizione centrale tenuta a tale proposito dalla compravendita; per il collegarsi di una fenomenologia² sostanzialmente obbligatoria alla garanzia assunta per i terzi; per l'affermazione del carattere formale dell'*homologia*; per la considerazione dell'*homologia* stessa come fenomeno processuale, come atto di riconoscimento, sostanzialmente confessorio.

Fra le teorie che, a proposito della fenomenologia contrattuale greca, sono state avanzate più di recente (e che si distaccano consapevolmente dal

² Nel testo è scritto: «per il collegarsi del nascersi di una fenomenologia» (N.d.C.).

sistema pandettistico o romanistico in genere), terrò principalmente presenti quelle del Pringsheim e del Wolff (cui tende a riallacciarsi parte della grecistica più recente), che del resto presentano, dal punto di vista sostanziale, orientamenti diversi.

Il Pringsheim è concretamente condizionato dall'oggetto della sua ricerca, la compravendita nel suo inserimento nella fenomenologia contrattuale greca (si tenga presente il tendenziale 'indifferentismo' di questo autore). In sostanza egli si preoccupa di mostrare che, non esistendo contratti consensuali in 'diritto greco', la compravendita non era consensuale né poteva esserlo, e la parte relativa al 'contratto reale' è indotta dal desiderio di mostrare che un contratto reale, in quanto tale, non esisteva nell'esperienza giuridica greca. Non insisto qui sulla circostanza che il punto veramente problematico, per la compravendita 'greca', non è l'assenza di consensualità, ma quella dell'obbligatorietà dell'assetto d'interessi (che il Pringsheim, in definitiva legato alla concezione romanistica della correlazione fra consensualità ed obbligatorietà, non spiegava). Il 'sistema contrattuale' che il Pringsheim tendeva a individuare è essenzialmente basato sulla 'formalità' degli atti vincolanti: l'*homologia*, prendendo alla lettera la formulazione di Dem. 42. 12, è atto formale, compiuto dinanzi a testimoni, i quali, successivamente, sono sostituiti da documenti testimoniali e poi da documenti 'tout court'; ma anche il mutuo, l'esempio caratteristico dei contratti reali, è – nella sua configurazione più compiuta – un contratto formale. Il lato aggredito dal grande studioso è quindi quello della libertà delle forme, più che quello della determinabilità del contenuto: ma, comunque, l'impostazione rimaneva in un binario che era quello tradizionale del secolo scorso, e l'individuazione dell'obbligazione e del contratto nella fenomenologia greca non si distingueva molto dai correlativi istituti romanistici.

Un salto di qualità è rappresentato dall'impostazione del Wolff. Egli elimina, anzitutto, l'*homologia*, ed il relativo *nomos*, dalla discussione sulla 'forma' del contratto greco (anche qui è seguito uno spunto del Partsch, attraverso lo Schwarz: il profilo è anche, ma contraddittoriamente, in Pringsheim). *Homologeîn* significa, tecnicamente, in questa connessione, 'riconoscere', 'non contestare'; la legge relativa non riguarda l'esplicazione dell'autonomia negoziale, bensì la fissazione dei fatti, che il giudice, nel processo, doveva ritenere accertati.

Questi fatti, oggetto di un *homologeîn*, possono aver riguardo alla fenomenologia contrattuale; essi vi rilevano, però, dal punto di vista del fonda-

mento della responsabilità, non in funzione dell'aspetto promissorio, inesistente, dell'*homologia*, ma in virtù del loro atteggiarsi sostanziale. Qui è colto il momento di maggior diversificazione fra la concezione, classica e moderna, dell'obbligazione e del contratto e la struttura che ciò assume nell'esperienza giuridica greca. L'obbligazione non è tendenzialmente un diritto soggettivo relativo, che si struttura in un dovere di prestazione, assunto dal debitore, e nella correlativa responsabilità per l'inadempimento. Il 'creditore' greco (usando il termine per equivalente) si trova in una situazione che viene garantita sul piano di situazioni giuridiche per noi più vicine ai diritti reali, è strutturata come un potere sulle cose (un 'Gewaltverhältnis' od un 'Machtbefugnis' nella terminologia del collega Behrend, che ha particolarmente accentuato questo punto): l'inadempimento è, infatti, una violazione di questa situazione giuridica, che origina dalla *blabe* extracontrattuale, dall'obbligazione *ex delicto*, e che continua ad esser fatta valere, a meno dell'esistenza di azioni tipiche, con la *dike blabes*. Ciò che dà luogo a situazioni in cui possa individuarsi una *dike blabes* in una fenomenologia sostanzialmente contrattuale (e che quindi è il mezzo corrispondente al nostro contratto) è la 'Zweckverfügung' (o 'bedingte Verfügung' nella terminologia di Behrend), oggetto fra l'altro dell'*homologein* che la rende inattaccabile (e quindi anche solo 'fiktive'); colui che, sostanzialmente, è il debitore, ricevendo la 'Verfügung' e non cooperando all'attuazione dello 'Zweck', dello scopo per cui essa è stata effettuata, viene a ledere la posizione di diritto reale del creditore e si espone od all'azione tipica eventualmente prevista o, più genericamente, alla *dike blabes*, indotta – sembra – dalla sottoposizione convenzionale alla *praxis* del 'creditore'.

2. Non insisterò molto sul carattere 'formale' dell'*homologia*, siccome viene costruito dal Pringsheim. L'ipotesi di questo autore, nel suo complesso (e cioè soprattutto in quanto tende a fondare un generale carattere 'formale' del sistema contrattuale greco, anche per quelli che per noi sarebbero 'contratti reali' – mutuo, deposito etc.), si basa su un'imprecisa puntualizzazione dello strumentario concettuale adoperato. A me sembra che, nell'individuazione – ad esempio – di una responsabilità 'ridotta' del mutuatario nel caso di mutuo informale (basata, fra l'altro, su un testo così inaffidante come la *v. doxastai* delle *Lexeis rethorikai*, letta fra l'altro non per intero), sia l'in-

terprete moderno a fare uno scambio fra validità e prova dell'atto, scambio che egli, fra l'altro, non imputa con precisione agli antichi: questi, del resto, non lo facevano, come prova – al di là di ogni dubbio – l'*Amartyros* di Isocrate (dello stesso v., del resto, l'*or.* 17. 2, fraintesa dal Pringsheim, che non si accorge che il banchiere non coopera al contratto, ma è parte; vedi anche Dem. 30. 19-22; Lys. Frg. 39 (Gernet -Byzos)).

Per quanto concerne specificamente il *nomos* sull'*homologeîn*, Dem. 42. 12 non fornisce, sicuramente, una prova decisiva nel senso dell'essenzialità dell'assistenza dei testimoni (che, nel caso in parola, avevano assistito all'atto). Del resto la clausola *enantion martyron*, che il Pringsheim evince dal passo in questione, mal si collega con la sicura applicabilità – ammessa anche dal nostro autore – della legge sull'*homologeîn* alle *sygraphai* ed alle *synthekai* (a prescindere dalla formulazione di Plat. *leg.* 11. 920 d, dove di testimoni non v'è traccia, ma che – lo riconosco – non può essere considerato, *in specie*, decisivo).

Non meraviglia, dunque, che l'ipotesi interpretativa del Pringsheim sia stata, sostanzialmente, declinata sia da coloro che, ancor di recente, ritornano, con atteggiamenti più o meno sfumati, alla teoria 'consensuale' per il contratto greco (il che è di ovvia evidenza), sia da coloro che si orientano nell'ambito delle idee per primo avanzate dal Wolff, ed *in primis* tendenzialmente anche da quest'ultimo. Qui gioca, del resto, un profilo di cui si è già detto: l'ipotesi in esame rimane ancora sostanzialmente ancorata alla impostazione pandettistico-romanistica del sistema contrattuale; essa è un po' marginale rispetto alla più incisiva differenziazione dello strumentario concettuale introdotta dal Wolff, e non può quindi sorprendere che rimanga, in bene o in male, un po' negletta da quest'ultimo.

Nell'ipotesi che fa capo al Wolff, due sono i punti che – almeno a una prima rilevazione – sono qualificanti, e cioè l'oggetto dell'*homologeîn* e il riferimento della legge relativa, e la centralità della 'Zweckverfügung' e della concezione 'reale' del credito. Questi due punti stanno, del resto, in stretto contatto fra di loro. Non è, in effetti, l'assenza di un comportamento a carico del 'debitore' (a prescindere dalla responsabilità per fatti oggettivi) che caratterizza l'ipotesi del Wolff: questo comportamento esiste – e non potrebbe non esistere – ed è lo scopo della 'Verfügung', la condizione, direbbe il Behrend, che rende possibile l'integrazione della *blabe* sul piano dei 'Gewaltverhältnisse'. Essa però non è l'oggetto di una promessa, non è l'oggetto immediato dell'atto di autonomia, e la sua mancata esecuzione

non è il fondamento giuridico diretto, ma soltanto il presupposto della responsabilità di colui che ha ricevuto la ‘Verfügung’ stessa. Se, dunque, si potesse interpretare l’*homologeïn* come un atto specificamente promissorio, avente ad oggetto la prestazione, verrebbe incrinata la solidità dell’opinione qui discussa.

Preliminare a qualsiasi discussione appare, quindi, la determinazione del valore di *homologeïn* nelle fonti attiche (e cioè, sostanzialmente, negli oratori) ed il riferimento che nelle stesse assume la legge sull’*homologia*. Bisogna, al proposito, osservare che, in definitiva, l’opinione del Wolff non riposa su un effettivo riscontro dell’uso attico. Da una parte, soprattutto nell’articolo del 1957, egli si riporta, infatti, a certi usi della prassi notarile greco-egizia, che per il nostro assunto rilevano assai marginalmente, se non in niente del tutto. Dall’altra, nello stesso articolo, è esplicitamente ammesso che l’analisi delle fonti attiche non è stata compiuta («es darf jedoch erwartet werden, dass eine eingehende Prüfung der Belege ergeben wird, dass das – e cioè il significato di ‘versprechen’ per *homologeïn*, che si può cogliere in taluni passi – oft nur eine untechnische, Inhalt, Zweck und Folge der Erklärung der Kürze halber zusammenfassend Ausdrucksweise ist», la cui ‘Prüfung’, contestualmente si nota, «bleibt vorbehalten»: pp. 53 s.). Ciò nonostante l’autore credeva di poter affermare che il significato tecnico del termine è «auf der Linie des *Anerkennens, Nicht-Bestreitens, Einvernehmlich-Feststellens*» (p. 54), e che oggetto dell’*homologeïn* è sempre un fatto.

Se la ‘Prüfung’ non è stata fatta dal Wolff, essa sembrerebbe esser presupposta, almeno come sommaria disamina delle fonti, da una rapida affermazione in senso contrario al Wolff stesso, fatta dal Kussmaul. Io l’ho fatta per il *Corpus oratorum Atticorum*, in base agli indici esistenti. Il risultato coincide con il rapido accenno del Kussmaul cui si accennava. Non voglio, né sarebbe possibile, negare che il termine *homologeïn* (soprattutto il verbo) significhi molto spesso ‘riconoscere’, ‘ammettere’ e, tecnicamente rispetto ad un processo, ‘confessare’, conformemente del resto alla sua astratta capacità semantica, quale si integra dai valori etimologici. In alcuni oratori quest’uso, per cause varie (ma non incidenti neppure su una vicenda diacronica del significato della parola), è del tutto prevalente; negli altri rimane, sia pur con diversa proporzione, sempre quello più attestato. Non interessa, a questo punto, procedere a una più precisa individuazione del campo sostanziale in cui questo generico significato si inserisce. Si passa dalla confessione giudiziale, forse istituzionalizzata (come si può cogliere

nell'or. 22 di Lisia), alle ammissioni, giudiziali o stragiudiziali, coordinate però ad un processo, al significato più generico di 'ammettere' al di là di un puntuale riferimento ad un processo, ad es. da parte dell'opinione pubblica su fatti incontestati (come, ad es., una massima di decisione), ma anche su giudizi di valore. Soprattutto quando esprime un'ammissione della controparte, giudiziale o meno, *homologia* può riferirsi, in siffatto contesto semantico, ad una fattispecie contrattuale, ma si tratta sempre del riconoscimento di un fatto già avvenuto e concluso. *Homologeîn* in quest'uso, non troppo diffuso, non integra un momento della formazione di tale fattispecie.

Quando, invece, *homologeîn* (ed è questo l'uso quasi esclusivo per *homologia*) si riferisca a un elemento di struttura rilevante per il sorgere di una responsabilità contrattuale (nel senso generico costantemente adoperato), bisogna avvertire che, pressoché costantemente, l'unico significato accertabile è quello di 'promettere' o 'consentire', e non è mai invece possibile stabilire – a meno forse di un'eccezione – il significato di 'riconoscere', 'confessare'.

Quali sono i fondamenti di tale affermazione? Il più importante, e già accennato dal Kussmaul, è che, quando abbia un complemento espresso in forma verbale, l'*homologeîn* è costruito sempre con un complemento che si riferisce all'attività dovuta – se si vuole sul piano economico – dal debitore; e che tale attività è prevalentemente, di gran lunga, espressa con l'infinito futuro. È a questi testi che, evidentemente, si riferisce il Wolff, quando, sempre nell'articolo del 1957, afferma: «im Sinne der Feststellung einer anderweit begründeten *zukünftigen Tatsache*, aber *nicht* im demjenigen einer aus sich selbst heraus konstitutiv als bindungsschaffendes Versprechen wirkenden *Willenserklärung*, muss es daher auch zu verstehen sein, wenn die in der Zukunft liegende Erfüllung der eingegangenen Verpflichtung (z. B.: *apodoseîn*) als das Objekt des *homologeîn* erscheint» (p. 54).

Questa notazione mi sembra del tutto forzata e forzante. Per due motivi. Il primo si è che, in questo modo, si travolge quello che appare, dal punto di vista sintattico, il valore unico di *homologeîn* in questa connessione, che è l'unica accertata, in virtù di un'ipotesi interpretativa che non riceve alcun suffragio dalle fonti. A tale proposito è estremamente significativo Dem. 29. 33 (σῆτον τῆ μητρὶ δώσειν ὁμολογεῖν τοῦτον ὡς ἔχοντα τὴν προῖκα). È il solo passo in cui, con riferimento a una dichiarazione negoziale, emergono quelli che, secondo l'ipotesi del Wolff, sono i due momenti essenziali della fattispecie della responsabilità contrattuale: il riconoscimento di una

situazione reale, effetto qui di una precedente ‘Verfügung’, e l’assunzione in funzione di questa di una prestazione. Ebbene, contrariamente all’ipotesi qui discussa, l’*homologeïn* non viene riferito al momento confessorio ma a quello promissorio.

Il secondo motivo è, del resto, assorbente. A me sembra che l’opinione qui discussa faccia violenza alla logica del discorso in connessioni sintattiche del genere di quella discussa. Ammettere, riconoscere, confessare si può soltanto un fatto passato; un fatto futuro può essere o previsto o promesso (questo, quando si tratti di un comportamento del parlante). Rispetto alla prestazione futura, quindi, può avvenire, più che una generica previsione (al di fuori del resto del campo semantico di *homologeïn*), una promessa. L’unico aspetto che, in situazioni del genere, può essere oggetto di un riconoscimento è il dovere, attualmente esistente, di eseguire la prestazione. Ma ciò non è omologo al linguaggio delle fonti in materia, né, del resto, all’opinione del Wolff.

D’altro canto, l’oggetto dell’*homologeïn*, generalmente avvenuto in passato, è considerato in una serie di altre fonti retoriche come oggetto di adempimento o di inadempimento. Si dice, così, οὐχ ὅσον ὠμολόγητο εἶχεν (Lys. 12. 11); τὰ ὁμολογηθέντα καὶ ὁμοθέντα παραβάς (Is. 2. 40); ποιεῖν τ’ οὐδὲν ᾤετο δεῖν ὄν τόθ’ ὠμολόγησεν (Dem. 45. 5); τοὺς τόκουσ ἡξιοῦμεν ἀπολαβεῖν τοὺς ἐξ ἀρχῆς ὁμολογηθέντας (Dem. 56. 12); ἐνέμεινε τοῖς ὠμολογημένοις (Isocr. 18. 11, cfr. il par. 25); ποιῶν τὰ ὠμολογημένα (Aischin. 1. 162 e 163).

Vi sarebbero altri passi del genere: è inutile elencarli, come è inutile insistere sulla circostanza che eseguire, adempiere, violare si può soltanto, in contesti del genere, ciò che è ‘promesso’, non ciò che è ‘riconosciuto’. E, tralasciando altri passi più o meno significativi, vorrei soltanto ricordare l’uso, caratteristico dell’*or.* 56 del *corpus Demosthenicum*, di *homologia* per indicare le condizioni del contratto, e soprattutto quella del ritorno, col carico di grano, sulla piazza di Atene. Significato, codesto, che non può certamente ridursi a quello di ‘riconoscimento’ o ‘confessione’. L’uso è abbastanza isolato, ma ha una sua importanza. Nel momento, infatti, della sua emersione al livello del contesto culturale ionico ed attico, *homologia*, con più specializzazione rispetto a *homologeïn*, indica la convenzione internazionale, soprattutto di *ius belli*, e le sue condizioni. Uso, codesto, rilevato già dal Pringsheim in una connessione che era rimasta sostanzialmente contraddittoria con il ricondurre l’*homologeïn* ad un significato originario

di confessione, come faceva anche quest'ultimo autore. È, dunque, interessante di rilevare come, al suo primo manifestarsi nella sfera culturale attica ed in connessione giuridica, *homologia* significhi non 'confessione', 'riconoscimento', come vorrebbe il Wolff per la regola sull'*homologia kyria*, bensì 'convenzione', 'accordo' e così via dicendo.

3. A questo rilevamento di carattere terminologico sostanzialmente univoco (su quelle che potrebbero apparire o essere delle eccezioni, tornerò immediatamente appresso: sia detto fin d'ora che esse sono numericamente insignificanti) va accostato un dato che ne risulterà omogeneo. Il riferimento della legge sull'*homologia kyria* avviene sempre in connessioni tali da far concludere che, in detta legge, con *homologein* (che era il termine più probabilmente usato) ed eventualmente con *homologia* ci si riferisce all'aspetto promissorio e non a quello confessorio.

Anzitutto va osservato che la legge sull'*homologia* è una legge che viene intesa come quella che si riferisce alle fattispecie contrattuali e, più in genere, alle convenzioni giuridicamente rilevanti (anche se non integrano una responsabilità contrattuale). Questa restrizione non è immediatamente comportata da un'opinione che tendenzialmente veda sancire con essa l'irretrattabilità del fatto *homologemenon*. A tale riguardo debbo far notare che la posizione assunta dal Wolff su questo punto non è completamente esplicitata: nell'articolo del 1957, il riferimento del *nomos* in questione alle fattispecie contrattuali è nettamente meno accentuato che nella conferenza del 1965, pubblicata nel 1966, ma anche in quest'ultima non è del tutto assicurato come esclusivo. Va, dunque, ribadito che l'*homologia kyria* è sempre richiamata, nelle fonti attiche, con riferimento a convenzioni o contratti, mai a confessioni stragiudiziali non inserite nella struttura costitutiva di fattispecie di diverso genere.

Ma un altro punto è più interessante: anche la legge sull'*homologia kyria* è addotta sempre a conferma della 'efficacia' di una promessa, non del carattere vincolante di una confessione (comunque connessa col sorgere di un'obbligazione contrattuale). Questo appare con tutta evidenza nei due casi in cui la legge stessa è citata a sostegno dell'efficacia di due convenzioni che non integrano fattispecie contrattuali, cioè Dem. 42. 12 e 47. 77: non è necessario entrare qui nei dettagli di questi accordi. Il primo riguarda

L'accordo con cui è stato concesso, dall'attore, a Fenippo un rinvio dei termini per la presentazione dell'*apophasis* in una *diadikasia* di *antidosis*, per cui, non presentando la dichiarazione, Fenippo stesso ha violato il (*nomon*) τὸν κελεύοντα κυρίας εἶναι τὰς πρὸς ἀλλήλους ὁμολογίας, ἃς ἂν ἐναντίον ποιήσωνται μαρτύρων. Nel secondo passo si tratta del rinvio della *praxis*, concesso da Teofemo all'attore, a sostegno dell'efficacia del quale si fa leggere il *nomon*, ὃς κελεύει κύρια εἶναι ὅτι ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ.

L'importanza di questi passi è evidente, sol che si pensi non esservi qui alcuna 'Zweckverfügung' che possa essere oggetto di una *homologia*-confessione. Ma a constatazioni non differenti si deve giungere per gli altri testi, a cominciare da Isocr. 18. 24-25 (lascio qui da parte Dem. 48. 11, su cui tornerò più avanti, e che dà risultati completamente omogenei a quelli ora esposti): in un'argomentazione di carattere prevalentemente retorico per rafforzare, nei giudici, la convinzione di applicare le *synthekai* o gli *horkoi* che avevano sancito la riappacificazione e l'amnistia nel 403 a. C., si paragonano le *idiai homologiai* alle *poleos synthekai* (sarebbe terribile se, per la sicofantia dell'attore, τὰς μὲν ἰδίας ὁμολογίας δημοσίᾳ κυρίας ἀναγκάζει εἶναι, τὰς δὲ τῆς πόλεως συνθήκας ἰδίᾳ τὸν βουλούμενον λύειν εἴσατε, mentre nel paragrafo 25, come già ricordato, a proposito dell'amnistia si parla di τοῖς ὁμολογημένοις ἐμμένειν: cfr., del resto, Dem. 40. 46 διαλλαγόντες ἐμμένετε ταῖς ὁμολογίαις). Qui dal contesto risulta, per più versi, in tutta chiarezza l'equivalenza fra *synthekai* ed *homologiai*; del resto, in relazione alle convenzioni d'amnistia è difficile trovare qualche aspetto confessorio.

Tutto ciò trova riscontro nelle altre citazioni. Anzitutto in Dem. 56. 1-2: nel par. 1 si descrive, *ex latere mutuantis*, la posizione delle parti nella *syggraphe nautike*: il debitore, λαβῶν ... γὰρ ἀργύριον φανερόν καὶ ὁμολογούμενον, si limita a rilasciare, in una tavoletta di pochi soldi, τὴν ὁμολογίαν ... τοῦ ποιήσειν τὰ δίκαια. Se l'*argyriion homologoumenon* potrebbe far pensare a un'interpretazione nel senso del Wolff, il successivo accenno all'*homologia* mostra che anche qui – come del resto è più consono al 'Gedankengang' del passo – il senso è quello di 'convenuto'. Ed è a proposito di ciò che il logografo richiama la legge sull'*homologia* come quella su cui basandosi il creditore anticipa il denaro (τοῖς νόμοις τοῖς ὑμετέροις, οἱ κελεύουσιν, ὅσα ἂν τις ἐκὼν ἕτερος ἐτέρῳ ὁμολογήσῃ, κύρια εἶναι). E, così, Hyp. Ath. 13. La fattispecie è nota: Epicrate è stato raggirato, per il desiderio che gli era preso di un giovane schiavo, gestore di una bottega di profumi, di proprietà di Atenogene. Invece di riscattarne la libertà, egli

viene indotto ad acquistarlo e all'accollo dei debiti relativi: questo accollo è descritto come un'*homologia* nel par. 7 (εἰ δὲ πριάμην ὄνη καὶ πράσει, ὁμολογήσας αὐτῷ τὰ χρέα ἀναδέξασθαι), dove sia la costruzione sintattica che la struttura della fattispecie impediscono di vedere un significato 'confessorio' di *homologeïn*. È a proposito di tale accordo che, nel par. 13, si richiama, in *prokatalepsis*, uno svolgimento che potrebbe fare Atenogene, adducendo la legge in questione (ἔρεϊ δὲ πρὸς ὑμᾶς ... ὡς ὁ νόμος λέγει, ὅσα ἂν ἕτερος ἐτέρῳ ὁμολογήσῃ κύρια εἶναι· τὰ γε δίκαια, ᾧ βέλτιστε· τὰ δὲ μὴ τοῦναντίον ἀπαγορεύει μὴ κύρια εἶναι). Anche dal discorso complesso che si snoda in questi due passi si ricava chiaramente, da una parte, il riferimento di *homologeïn* ad una clausola contrattuale (e non alla 'confessione' di un fatto presupposto della responsabilità contrattuale), e, dall'altra, l'ulteriore riportare a questo *homologeïn* della legge sull'*homologia kyria*.

Non insisto, poi, su alcuni passi di Platone in cui la legge stessa è ricordata in relazione sempre al valore promissorio dell'accordo (*symp.* 196 c; *Crit.* 52 e). Più importante è la disposizione legislativa contenuta in *Plat. leg.* 11. 920 d (ὅσα τις ἂν ὁμολογῶν συνθέσθαι μὴ ποιῆ κατὰ τὰς ὁμολογίας, πλὴν ... ὁμολογήσῃ, ... δίκας εἶναι τῶν ἄλλων ἀτελοῦς ὁμολογίας ἐν ταῖς φυλετικαῖσιν δίκαις). Qui è addirittura parola di un'*homologia* ineseguita, e si visualizza cioè un'obbligazione nascente dal contratto ed una responsabilità per il suo inadempimento. Legislazione utopica, senza dubbio, ma che non credo si potesse facilmente svincolare, non da quelli che erano i contenuti concreti della normazione attica, ma da quelli che sarebbero stati, secondo l'ipotesi wolffiana, i momenti portanti di un modo di vedere, di intendere l'*homologeïn*.

Queste osservazioni si rafforzano, ché il quadro assume una sua precisa omogeneità, quando si rifletta sulla circostanza che, nelle citazioni della legge, si sottolinea spesso, in modi diversi, la reciprocità e talora la volontarietà dell'*homologia*: soprattutto la reciprocità è completamente estranea alla logica della confessione, mentre è del tutto omologa a quella della convenzione. Anche in altri passi, del resto, senza un più preciso accenno ad una legge che regolasse questo aspetto, l'esser *kyria* è riferito al risultato di un *homologeïn* che non può rendersi se non nella sfera semantica del 'promettere' e del 'convenire'. Non è possibile discuterli uno ad uno, basterà qui citarli: *Is.* 5. 1 (τὰ ὁμολογημένα ἐπὶ τοῦ δικαστηρίου κύρια ἦμῖν ἔσσεσθαι, specificato dall'ulteriore frase ἐπειδὴ δέ ... οὐ ποιεῖ Δικαιογένης ἂ ὁμολόγησε, δικαζόμεθα Λεωχάρει ἐγγυητῇ ...), 25 (οὔτοι δέ, ἂ μὲν αὐτοῖς

συμφέρει τῶν ὁμολογηθέντων τότε, κύρια φασιν εἶναι, εἰ καὶ μὴ γέγραπται, ἃ δ' οὐ συμφέρει, οὐ κύρια, εἰ μὴ γέγραπται); Lys. 1. 21 (εἰ δέ μή, οὐδέν σοι κύριον ἔσται τῶν πρὸς ἔμ' ὁμολογημένων, e cioè nel caso la serva parlasse); Dem. 33. 30 (ἐπειδὴ ἠφανίσθησαν αἱ συνθήκαι ὑπὸ τούτων, ἐζήτουν ἑτέρας γράφεσθαι οὗτος καὶ ὁ Παρμένων, ὡς ἀκύρων ὄντων αὐτοῖς τῶν πρότερον ὁμολογημένων).

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4. Bisogna adesso trattare dei passi che potrebbero apparire contrari all'ordine di idee sin qui esposto, sulla base dell'analisi della documentazione pertinente. È, anzitutto, da osservarsi che essi rappresentano, statisticamente, un aspetto marginale, del tutto marginale; e che, dal punto di vista del contenuto, essi appaiono ancor più marginali.

La maggior parte di essi si riferiscono a casi in cui oggetto dell'*homologein* è un *opheilein*, variamente atteggiatesi. In Hyp. Ath. 14, questo giro di frase è poco interessante; si riferisce al riconoscimento di un debito (in forma eventuale), fatto nel corso dell'arringa. In Dem. 32. 4 è una dichiarazione durante trattative contrattuali, ma irrilevante ai fini della fenomenologia strutturale della fattispecie. In Isocr. 17. 38-39 l'*homologein* dell'attore è un vero e proprio riconoscimento di debito preesistente. In questo passo sono due, però, gli aspetti interessanti. Dall'una parte, nonostante l'*homologein*, l'attore contesta come simulato questo riconoscimento (dovuto alle particolari condizioni del caso), senza che – a quanto sembri – si senta in qualche modo in imbarazzo per gli effetti vincolanti che, secondo l'ipotesi wolffiana, dovrebbero far considerare indiscutibile il fatto ammesso nell'*homologia*. Questo dà, senza dubbio, da pensare in ordine alla 'fiktive Zweckverfügung', anche se non sono da celarsi punti eventuali di differenziazione. Dall'altra, la struttura logica della dichiarazione è qui ben diversa – e lo è anche in tutti gli altri passi – da quella ipotizzata dall'opinione che si sta discutendo. Oggetto dell'*homologein* non è un fatto, la 'Zweckverfügung', bensì l'obbligazione assunta, l'*opheilein*, che, secondo l'espressione usata dall'amico Behrend, sta soltanto nell' 'Hintergrund', è giuridicamente soltanto un 'Reflex', non il 'Grund der Haftung' (Wolff 1957, p. 26). Il che può, almeno, creare delle notevoli perplessità.

Non ad una fattispecie contrattuale si riferisce Dem. 58. 18: Teocrine προσελθὼν ... ὁμολόγησεν ὀφείλειν καὶ ἐκτείσειν ἐναντίον τῶν φυλετῶν.

Dal punto di vista della struttura esteriore è il passo che, con il caso della dote della sorella di Onetore (che sarà discusso subito appresso), si avvicina di più all'ipotesi wolffiana. Esso potrebbe, a prima vista, essere interpretato come strutturantesi in due momenti, quello del riconoscimento (*opheilein*), quello del conseguente impegno. Per esso vale, però, quanto si è già detto: il riconoscimento avviene rispetto all'obbligo, non alla 'Zweckverfügung', con le perplessità che ne derivano. Ma v'è un ulteriore aspetto da sottolineare – al livello delle strutture espressive che tradiscono un certo modo di pensare: entrambi i momenti, l'*opheilein* e l'*ekteisein*, sono retti dal verbo *homologhesen*. Tenendo presente, da una parte, quanto si è già detto al proposito, e, dall'altra, il carattere unilaterale della struttura dichiarativa, nel caso, appare evidente che *homologein* degrada qui a un significato generico di 'dichiarare', che si qualifica come 'riconoscimento' o come 'promessa' a seconda della diversità dell'oggetto retto.

Analogo il caso, già accennato, della dote della sorella di Onetore, sposata, in seconde nozze, ad Afobo. Qui Timocrate, il primo marito, τὴν δὲ προῖκ' αὐτῶ (cioè Onetore) ... ἐπὶ πέντ' ὀβολοῖς ὀφειλήσειν ὁμολόγησε (Dem. 30. 7); ma gli interessi sono pagati al nuovo marito, cioè Afobo (par. 9: ὡς ὁμολόγησεν ὀφειλήσειν τὴν προῖκα καὶ τὸν τόκον ἀπεδίδου τῆς προικὸς Ἀφόβῳ κατὰ τὰς ὁμολογίας). Altri paragrafi, e soprattutto il par. 16 e il par. 22 (in cui è da notare lo scambio del presente al futuro: ὀφείλειν ὁμολόγησεν καὶ τὸν τόκον οἴσειν), sembrano far pensare – invece che ad un accordo fra Onetore e Timocrate – ad una sorta di accordo trilaterale a cui avesse preso parte anche Afobo. Qui sono due i punti da sottolineare. Anzitutto che, stante la struttura almeno bilaterale della fattispecie, il significato di *homologein* si avvicina di molto a quello del nostro 'convenire', che può coprire sia un 'riconoscimento' che una 'promessa'. In secondo luogo è da sottolineare come *opheilein* sia qui adoperato al futuro (*opheilesein*) in due luoghi su tre: l'uso del futuro rivela, già nella prospettiva sintattica, un carattere più convenzionale che riconoscitorio nell'accenno all'*opheilein*: le parti pattuiscono che Timocrate non restituisca immediatamente la dote, ma continui ad esserne debitore e ne paghi gli interessi. (Dem. 41. 16 non rileva: lì il riconoscimento di *opheilein* è nella fase prenegoziale, giustifica la delegazione di Leocare, non si riferisce all'attuazione di questa).

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5. Rimane un unico passo, in cui potrebbero sorgere – ai fini della discussione sin qui svolta – dei dubbi. E va sottolineato che si tratta di un passo soltanto. È il caso della dote della madre di Phile, sorella di Nicodemo, che l'avrebbe data in matrimonio senza dote a Pirro, a cui avrebbe generato Phile stessa. Su questa mancanza di dote argomenta, nell'*or.* 3, Iseo. La terminologia adoperata al proposito è piuttosto varia. Nel par. 28 si esprime, da parte dell'attore, meraviglia, *εἰ μηδεμίαν προῖκα μήθ' ὁ διδοῦς μήθ' ὁ λαμβάνων διωμολογήσαντο ἕξαι ἐπὶ τῇ γυναικί*. E, più avanti, si afferma che, per evitare facili ripudi, *ἀργύριον πολλῶ μᾶλλον [ἤ] ὁ ἐγγυῶν διωμολογήσατο ἔχειν αὐτὸν ἐπὶ τῇ γυναικί*. Ed ancora, nel par. 36, si accenna alla facilità del ripudio da parte di Pirro, *εἰ μηδεμίαν προῖκα διωμολογήσατο ἕξαι ἐπ' αὐτῇ*. E rispetto a ciò si parla di *homologia proikos* (par. 29. 35), e di *homologtheisa proix* (par. 36).

Bisogna, anzitutto, notare – a proposito della reggenza³ del futuro – che questo esempio non inficia le considerazioni dianzi fatte. L'*exein*, è vero, rappresenta, come oggetto dell'*homologein* un fatto riconosciuto e non promesso; ma si tratta, da una parte, di una circostanza oggettiva, non di una prestazione; dall'altra, la constatazione del fatto di *proika exein*, come del resto risulta anche dallo scambio con il presente *echein*, non è constatazione di un fatto semplicemente futuro, ma di un fatto presente, dipendente dall'attuale costituzione della dote, che svilupperà i suoi effetti in futuro. Dal punto di vista, poi, della ricostruzione dell'*homologia* come atto di riconoscimento, confessorio, rispetto al fondamento sostanziale della responsabilità contrattuale, e cioè della 'Zweckverfügung', i passi in questione non reggono, certamente, al compito di sovvertire le conclusioni precedentemente raggiunte. Bisogna, fra l'altro, osservare che la imputazione del significato di *homologein*, nei passi suddetti, alla sfera semantica del riconoscere è soltanto opzionale, ché nulla vieterebbe di tradurre le attestazioni relative a questa terminologia riportandole alla sfera semantica del 'convenire'.

6. Rimane da accennare, in tutta brevità, all'altro aspetto fondamentale nella costruzione del Wolff (e forse ancor più in quelle da essa derivate), e cioè il diverso atteggiarsi degli aspetti strutturali dell' 'obbligazione'

³ Il testo riporta : «rezione» (N.d.C.).

nel diritto greco ed attico in generale. Vorrei, in primo luogo, rilevare che l'accertamento, dianzi fatto, del carattere promissorio dell'*homologia* nella prospettazione che – al livello semantico – si incontra nelle fonti attiche del IV secolo a.C. metta già abbastanza in crisi codesto aspetto dell'ipotesi wolffiana. Ma si tratta, con ciò, ovviamente, di una rilevazione generica.

D'altro canto, secondo il mio modesto parere, proprio in questo aspetto dell'ipotesi qui discussa – e mi riferisco, come all'esempio più caratteristico, alle pagine che il collega Behrend ha dedicato all'argomento – si può cogliere nettissima la tendenza a sovrastrutturare ai dati concreti offerti dalle fonti una serie di concettualizzazioni che, quale che ne sia la fondatezza, appaiono sostanzialmente sganciate da qualsiasi fondamento testuale: il che presenta particolari profili di perplessità, dacché in questo modo si procede a dare all'esperienza giuridica greca un impianto concettuale di cui essa era, essenzialmente, sprovvista: ma su ciò tornerò più tardi.

Su questo punto non potrò essere che molto breve. Mi limiterò a porre in rilievo dei motivi di dubbio che emergono all'interno dell'opinione qui discussa, al livello soprattutto dei referenti testuali che, seppure scarsi, essa tenta di trovare. Una discussione più approfondita, in senso soprattutto ricostruttivo, imporrebbe un'indagine e una revisione dell'intero materiale a nostra disposizione, ciò che non è qui possibile.

Alcuni punti rimangono piuttosto sommariamente delineati al livello della formulazione delle ipotesi qui discusse. Ad es., la sottoposizione alla *praxis* – od alla *dike* – del 'creditore', come momento essenziale per la responsabilità del 'debitore', ed il ruolo della 'pena convenzionale', come mezzo (a prescindere, in Behrend, dal credere, piuttosto apoditticamente, alla 'Eigentumsdiadikasia'). Per quanto concerne la prima, bisogna, anzitutto, sottolineare che la questione della portata della clausola (immediata sottoposizione all'esecuzione o necessità di esperire preventivamente la *dike*) non è, come credeva il Wolff, priva di significato a questo proposito. L'*executio parata*, infatti, può essere stipulata anche nel caso di esistenza di una *dike* tipica (per rimanere nell'ambito dell'impostazione qui discussa), e, d'altra parte, i casi di *praxis*, che si possono riscontrare nelle fonti attiche dell'epoca qui rilevante⁴, sono estremamente scarsi e per di più tutti relativi alla figura del prestito marittimo.

⁴ Il dattiloscritto riporta: «i casi che si possono riscontrare nelle fonti attiche dell'epoca qui rilevante di clausola *praxis*» (N.d.C.).

Per quanto concerne, poi, il ruolo della ‘pena convenzionale’, come mezzo – originariamente – di liberazione dalla responsabilità, bisogna avvertire che di essa non appare alcun visibile influsso nella prassi attica: e tantomeno nella combinazione a cui il Behrend pensa per questi due aspetti⁵. Testi, infatti, non vengono citati in appoggio a tali ipotesi, e le stesse appaiono, dunque, piuttosto sterili per la nostra discussione.

Il discorso dovrà esser un po’ più articolato per gli altri due aspetti, più strettamente connessi, della configurazione come ‘poteri reali’ (o indifferenziati) dei ‘diritti di credito’ e della *homologia* come atto di riconoscimento della ‘Zweckverfügung’. Per quanto concerne il primo, bisogna, in primo luogo, distinguere chiaramente due profili: l’uno che è strettamente terminologico, ma concerne un profilo tutto sommato marginale e generico. Il ritrovarsi in varie fonti di espressioni in cui il ‘creditore’ designa come ‘suo’ l’oggetto della prestazione od in cui egli accusi il ‘debitore’ di privarlo del proprio denaro (tipico questo del mutuo, per cui il Wolff sottolinea la frequenza del verbo *aposterein* a tale proposito), non è certamente decisivo: queste locuzioni sostanzialmente emotive non dicono una parola decisiva circa la struttura giuridica delle fattispecie interessate.

La possibilità di distinguere, nella prassi e nella normazione attica, due tipi di situazioni giuridiche soggettive lungo una linea di demarcazione coincidente più o meno precisamente con quella che noi cogliamo fra diritti reali e di obbligazione mi sembra si possa cogliere in funzione, com’è ovvio, della protezione giudiziale: lasciando stare la *diadikasia*, che non è mai attestata in funzione di azione a tutela della proprietà, bisogna rendersi conto del modo in cui tale tutela si attegga nel diritto attico, e cioè attraverso il mezzo indiretto della sanzione offerta dalla *dike exoules*. Non mi sembra infondato, dunque, di distinguere situazioni in cui il titolare del ‘diritto soggettivo’ possa esperire, contro chiunque, la *dike exoules* a difesa della sua posizione e situazioni in cui ciò, invece, non avviene. Le prime si avvicinano ai diritti reali, le seconde ai diritti d’obbligazione (a parte situazioni di carattere effettivamente meno avvicinabile a tale distinzione, come quella che attribuisce un potere reale al creditore, in seguito alla *katadike*, sul patrimonio del debitore): e fra queste ultime la distinzione fra *synallagmata akousia* ed *hekousia* (chiaramente sottoposta a un ‘understatement’ dal Wolff e neppure ricordata dal Behrend) mostra

⁵ Dopo la parola «aspetti» il testo riporta queste parole, che ho espunto: «e cioè che la sottoposizione alla *praxis*» (N.d.C.).

l'affacciarsi di una distinzione fra atti leciti e illeciti come fonte dell'obbligazione.

Ora, nel caso di quelle che si potrebbero chiamare le fattispecie di responsabilità contrattuale, non si dà mai, al di là della *katadike* ad un *timema* in denaro, il caso dell'esperimento della *dike exoules*: e l'esperibilità della c.d. *dike blabes* non comporta necessariamente l'idea di una lesione di un diritto reale, ma soltanto – forse – di un diritto patrimonialmente rilevante.

Ciò mi sembra, del resto, risulti con tutta chiarezza anche dai passi da cui il Wolff vorrebbe ricavare, per l'appunto, la costruzione contraria. Anzitutto il famoso caso di Callippo, di cui all'*or.* 52 del *corpus Demosthenicum*. La vicenda è nota (Licone ha depositato presso la banca di Pasione una somma, destinata in caso di morte del depositante ad un certo Cefisiade; Callippo, prosseno degli Eracleoti, pretende – in modo vario secondo Apollodoro – di aver diritto alla somma): Callippo agisce contro Pasione con una *dike blabes* (secondo l'interpretazione che vede nel diritto attico un sistema di azioni tipiche), ἐγκαλέσας – par. 14 – βλάπτειν ἑαυτὸν ἀποδιδόντα Κηφισιάδῃ τὸ ἀργύριον, ὃ κατέλιπε Λύκων ὁ Ἡρακλεώτης παρ' αὐτῶ, ἄνευ αὐτοῦ ὁμολογήσαντα μὴ ἀποδώσειν. Come 'unbefangene Auslegung' il Wolff vi legge che «er – cioè Callippo – in der Verfügung über das Geld eine Eigentumsschädigung erblickte, als das Geld selbst als auf ihn übergegangen betrachtete» (Wolff 1957, p. 46). Ciò è arbitrario: il peso dell'*egklema* non è particolarmente poggiante sulla 'Eigentumsschädigung', anzi – a voler leggere effettivamente senza prevenzioni il passo – l'accento cade sull'illiceità della disposizione in violazione dell'impegno assunto da Pasione di non trasferire il denaro a Cefisiade, senza sentire Callippo: il che è prospettiva piuttosto diversa dall' 'Eigentumsschädigung'.

Del resto anche l'alternanza fra *dike blabes* (contro Pasione) e *dike argyriou* (contro l'erede Apollodoro), certamente una questione di difficile soluzione, non è facilmente spiegabile nell'ordine di idee del Wolff: non si vede, infatti, come la 'Vorenthaltung' di 'fremdes Geld' non dovesse dar luogo a una *blabe*, perseguibile allo stesso titolo di quella rimproverata a Pasione.

Ancor più significativo quanto si ricava da Dem. 48, l'orazione contro Olimpiodoro. Qui Callistrato e Olimpiodoro, messi d'accordo nello spartire l'eredità di Comone, aiutandosi reciprocamente nell'eventuale *diadikasia* ereditaria, vengono poi in litigio, quando Olimpiodoro, ottenuta l'*epidikasia* dopo una serie tanto lunga quanto irrilevante ai nostri fini di

vicende, si rifiuta di dividere l'eredità stessa con Callistrato. Per il Wolff l'unica *causa petendi* possibile, esclusa l'azione in adempimento e la *dike eis dateton apaitesin*, rimane «dass der Beklagte entgegen seiner beeideten Homologie ... dem Kläger das diesem bereits zugeteilte vorenthielt bzw. ihm seinen Anteil an dem dem Sklaven abgenommenen Gelde nicht ausfolgte, d.h. wieder vorenthielt» (p. 69). Mancando nel diritto attico un «Anspruch auf Herausgabe des Eigentums» (p. 69), rimaneva soltanto possibile la *dike blabes*, mentre «die beeidete Homologie spielte dabei nur insofern eine Rolle, als sie bindend ergab, dass im Verhältnis der Parteien zueinander die Hälfte des Gutes als Gut des Klägers galt» (p. 70).

Questa presa di posizione non è, anzitutto, molto perspicua in sé considerata: l'«Anspruch – o Klage – auf Herausgabe des Eigentums» rimane poco precisato; è un'azione che presuppone esistente in testa all'attore il diritto di proprietà? E allora, perché Callistrato non ha cercato di far valere tale diritto contro Olimpiodoro, costringendolo a un'*exagoge* ed esercitando, conseguentemente, una *dike exoules*? Se tale 'Anspruch' è, invece, rivolto al 'trasferimento' della proprietà, l'azione non è fondata sulla lesione di codesto diritto, ma, come del resto dice il Wolff stesso, su una «Verletzung des dem Kläger gehörigen Vermögens» (1957, p. 69); ma tutto sta, in questo caso, a distinguere fra le varie posizioni soggettive che vengono a costituire questo patrimonio.

Se da queste considerazioni astratte si passa all'esame un po' più particolareggiato dell'*or.* 48 si vedrà che, in essa, nulla conferma l'interpretazione del Wolff, mentre si evincono con chiarezza segni nel senso che le parti configurassero gli effetti della fattispecie in modo assai vicino a quello della nostra 'responsabilità contrattuale'. Anzitutto, l'assetto di interessi intercorso fra le parti è costantemente qualificato come *synthekai*, anche nel par. 11, dove si richiama – senza dubbio – la legge sull'*homologia kyria* (βούλομαι οὖν ... τόν ... νόμον ἀναγνῶναι, καθ' ὃν τὰς συνθήκας ἐγράψαμεν πρὸς ἡμᾶς αὐτούς *ktl.*): termine codesto che più difficilmente può esser ritenuto sfuggire a una connotazione nel senso della 'convenzionalità' e della 'contrattualità', e per il quale l'ipotizzare un valore soltanto 'confessorio' del procedimento messo in essere dalle parti potrebbe apparire meno agevole.

Del resto Callistrato agisce per l'esecuzione delle *synthekai*: par. 32: οὐδ' ὅτι οὖν ἠθέληκεν τῶν δικαίων πρὸς με ποιῆσαι, ἀλλ' ἔχει αὐτὸς ἅπαντα, ὁμωμοκῶς καὶ συνθήκας πρὸς με ποιησάμενος ἧ μὴν ἰσομοιρήσειν. Cfr.

par. 54 (dove per l'unica volta si usa il verbo *homologeîn* in relazione all'accordo): πῶς γὰρ οὐ μαίνεται ὅστις οἶεται δεῖν, ἃ μὲν ὁμολόγησεν καὶ συνέθετο ἐκὼν πρὸς ἐκόντα καὶ ὤμοσεν, τούτων μὲν μὴδ' ὀτιοῦν ποιεῖν.

Ma v'è di più: una delle difese d'Olimpiodoro, non respinta 'en principi' ma discussa sul fondamento, è una vera e propria *exceptio inadimpleti contractus*. All'interrogazione di un amico comune διὰ τί οὐκ ἀποδώσει ὁμομοκῶς ἰσομοιρήσειν καὶ τῶν συνθηκῶν ἔτι νυνὶ κειμένων, il convenuto aveva risposto (par. 38) με (e cioè Callistrato) παραβεβηκέναι τὰς συνθήκας, καὶ δεῖνὰ πεπονθέναι ὑπ' ἐμοῦ, καὶ διατελέσαι μέ φησιν ὑπεναντία καὶ λέγοντα καὶ πράττοντα ἑαυτῶ. L'argomento viene ripreso nel par. 46: se quanto sostenuto da Olimpiodoro fosse vero, ἐχρῆν ... αὐτόν ... παραλαβόντα πολλοὺς μάρτυρας ἀξιοῦν ἀναιρεῖσθαι τὰς συνθήκας παρὰ τοῦ Ἀνδροκλείδου ὡς παραβαίνοντος ἐμοῦ καὶ τάναντία πράττοντος ἑαυτῶ καὶ οὐκέτι κυρίων οὐσῶν τῶν συνθηκῶν ἐμοὶ καὶ τούτῳ, καὶ τῷ Ἀνδροκλείδῃ τῷ ἔχοντι τὰς συνθήκας διαμαρτύρασθαι, ὅτι αὐτῷ οὐδὲν ἐστὶν ἔτι πρᾶγμα πρὸς τὰς συνθήκας ταύτας.

7. D'altra parte – ma il discorso qui può essere soltanto accennato – bisogna sottolineare che l'ipotesi discussa può, in astratto, esser considerata una concettualizzazione atta a descrivere, *ab externo*, taluni momenti della fenomenologia 'contrattuale' attica, ma anche in generale greca, a prescindere dalla circostanza che, in effetti, si possa dimostrare che, anche per tali momenti, essa corrispondesse all'effettivo modo di pensare e di sentire corrente nella coscienza sociale contemporanea agli aspetti considerati. Comunque, essa non potrebbe esser mai presa come quella che fissi il principio intorno al quale si organizza, positivamente e negativamente, la fenomenologia 'contrattuale' attica.

V'è, al proposito, da fare – anzitutto – una rilevazione di carattere generale: un principio come quello ipotizzato dall'opinione qui discussa, e che – fra l'altro – non è legislativamente sancito, può strutturarsi nella sua efficacia soltanto in funzione della consapevolezza che i contemporanei abbiano di esso e dei moduli che ne derivano: consapevolezza che, nel complesso atteggiarsi della 'dogmatica contrattuale' greca, presupposto dall'ipotesi in questione, avrebbe richiesto – al livello appunto dei contemporanei – la presenza di un'elaborazione concettuale sul piano tecnico-giuridico all'al-

tezza di una giurisprudenza professionale: e l'assenza di quest'ultima è, per l'appunto, una delle caratteristiche più connotanti dell'esperienza giuridica attica e greca, in generale. Si tratta, nel caso, dunque, di una 'dogmatizzazione' fatta dall'interprete moderno, al di là della possibilità che i contemporanei ne potessero aver conoscenza: tale 'dogmatizzazione', quindi, non può esser comunque considerata come un principio motore del sistema 'contrattuale' attico, perché se si può ammettere una 'dogmatica' non esplicitata all'esterno (come in molte decisioni non motivate dei *prudentes* romani: si pensi a Cervidio Scevola), non v'è una 'dogmatica' inconscia, ché altrimenti essa non è tale.

Di queste considerazioni si trova immediato riscontro nella nostra documentazione. Già nella fenomenologia del sistema contrattuale attico – a prescindere dalle osservazioni testuali già fatte e che sarebbero di per sé dirimenti – molti aspetti non si lasciano spiegare nell'ambito della concezione della 'Zweckverfügung' e dell'obbligazione come potere del creditore da avvicinare più alle situazioni di diritto reale. Si tenga, ad es., presente la difficoltà che l'amico Behrend, fra l'altro lasciato in asso dalle fonti, incontra a collocare nell'ambito della sua teoria il sorgere di un diritto del conduttore. Si pensi alla difficoltà di spiegare concretamente – il richiamo all'originaria 'Gestellungsbürgschaft' potrebbe apparire piuttosto elusivo – l'inserirsi in un sistema obbligatorio basato sulla 'Zweckverfügung' delle garanzie personali delle obbligazioni, dell'*eggye* anzitutto. O come spiegare la novazione soggettiva che, per usare di questa concettualizzazione moderna, sta a base della transazione a tre fra il cliente dello Pseudodemostene, nell'*or.* 33, Parmenonte e Apaturio, dove, nel par. 8, l'atto in cui si concreta tale novazione soggettiva è fra l'altro indicato con il participio *anthomologesamenos* dove il carattere promissorio è del tutto evidente (καὶ τὰς τρεῖς ἄς προειλήφει οὗτος παρ' ἐκείνου, ἀνθομολογησάμενος πρὸς τοῦτον). E perché mai, se il locatore metteva a disposizione del conduttore la cosa locata, poteva poi agire, con la *dike blabes*, se lo scopo della disposizione, e cioè il pagamento del canone, non era stato attuato, ed il venditore tendenzialmente non poteva fare lo stesso, quando avesse posto a disposizione del compratore la cosa venduta (onde la diffusione del contratto arrale)?

Si è che, a mio parere, le particolarità del sistema contrattuale attico non si spiegano sostituendo ad una dogmatizzazione di tipo pandettistico una diversa dogmatizzazione, nel far che, fra l'altro, si è portati inevitabilmente a disconoscere quei dati delle fonti che, omogenei alla prima dogmatizza-

zione, potrebbero mettere in pericolo la seconda. Qualsiasi ‘dogmatizzazione’ riferita all’esperienza giuridica attica corre, per l’appunto, il rischio di non tener conto del carattere essenzialmente ascientifico di essa: ciò che vale, anzitutto, per ipotesi così complessamente strutturate come quella qui discussa (diversamente, ad es., che per la constatazione pringsheimiana della ‘formalità’ dell’*homologia*, la quale, in effetti, potrebbe essere stata sancita, in astratto, da un *nomos* attico).

È, dunque, sul piano dell’empiria che deve essere impostato il discorso. La mancanza del filtro rappresentato da una giurisprudenza professionale ha, del resto, due aspetti contrastanti. Dall’una parte, infatti, manca la funzione propulsiva che la giurisprudenza può avere nella traduzione in termini di strutture giuridiche delle esigenze che affiorano sul piano economico-sociale: ciò può, ovviamente, rappresentare un momento di rallentamento, soprattutto quando si tenga conto della difficoltà – visibile in vari ordinamenti in via di sviluppo e anche in quelli corrispondenti all’area socio-culturale che si può abbracciare col termine di greca – con cui il giuridicamente rilevante, soprattutto sul piano della cooperazione che sta alla base della fenomenologia contrattuale, emerge dall’esperienza sociale (e soprattutto tenendo conto della non immediata omogeneità delle sanzioni rispetto agli scopi perseguiti dalle parti).

Ma, d’altro canto, lo stesso filtro può avere un effetto frenante rispetto alla trasposizione sul piano giuridico delle necessità economico-sociali: basti pensare, per ciò, a un sistema che, elaborato al livello dogmatico il principio della tipicità contrattuale, tenda ad attenersi strettamente, frapponendo tale principio all’ammissibilità dei *nova negotia*.

Nell’esperienza giuridica attica, invece, né l’uno né l’altro aspetto si possono, in relazione a quanto si diceva, cogliere. Vi è, dunque, una maggiore facilità a che i tipi di transazione che si vengono a creare nella prassi socio-economica possano – ma non debbano – trovare riconoscimento al livello dell’‘ordinamento’ (e si pensi, a tale riguardo, alle ampie possibilità che poteva offrire, su quest’ultimo piano, la prassi giudicante, tendenzialmente emotiva, dei tribunali attici: fuori del campo contrattuale si ricordi, ad es., l’*or.* 39 di Demostene); ma, d’altro lato, codesta possibilità è scontata, da un verso, con quella maggiore aderenza al formalismo e al legalismo che può essere uno dei *topoi* di un’esperienza giuridica irreflessa; e, dall’altro, con la maggiore difficoltà, cui già si accennava, a cogliere il giuridicamente rilevante.

Per ritornare alle concrete condizioni della vita socio-giuridica attica nel IV sec. a.C., a me sembra, da una parte, che negli scritti dei logografi (e con risonanze immediate anche in filosofi come Platone e Aristotele) si tendesse a individuare nell'assunzione volontaria di impegni il momento vincolante al livello dell'autonomia contrattuale. Ciò non significava, senza dubbio, che nell'Atene di quell'epoca si desse l'operatività di un principio come quello dell'efficacia indiscriminata del consenso, e che questo principio si dovesse riconoscere nella legge dell'*homologia kyria*. Per quanto concerne quest'ultima, è difficile – dalle allusioni sempre di sfuggita fatte dagli oratori – riconoscere la portata del *nomos* al livello della sua inserzione nell'ordinamento attico. Io non credo alla pluralità delle leggi sull'*homologia*, cui accennava il Maschke, e che salverebbe la tipicità dei comportamenti rilevanti: tale ipotesi non trova alcun fondamento nel ricordo che della legge vien fatto in vari passi.

Non credo, altresì, all'ipotesi più articolata del Kussmaul, per cui si tratterebbe, almeno originariamente, di una legge che regolava le pattuizioni aggiunte: anch'essa non ha un fondamento testuale. Potrebbe, però, risultare difficile di pensare, nell'intento del legislatore (e nei limiti in cui questo fosse avvertibile), a un generico riconoscimento di quella che noi potremmo chiamare l'autonomia contrattuale, proprio per i limiti che essa fattualmente comporta. Io penserei più probabile un riferimento ai vizi del volere, come potrebbe esser suggerito dal ricordo, nelle testimonianze relative alla legge, della volontarietà, talora anche reciproca, dell'*homologeîn*, e dalla stessa formulazione di Plat. *leg.* 11. 920 *d* (che, però, ha un diverso contesto). Rimarrebbe, certamente, la difficoltà offerta da Hyp. *Ath.* 14-17, dove nella lunga discussione in cui si sostiene che la legge ha vigore soltanto se oggetto dell'accordo siano stati *ta dikaia*, si fa riferimento a molte altre leggi, ma non allo specifico contenuto di quella sull'*homologia*. Ed il punto rimarrà, cred'io, sempre discutibile, a meno della possibilità di fruire di una nuova documentazione.

Il 'sistema contrattuale' attico si muove, dunque, entro questi poli: da una parte, il riconoscimento tendenziale dell'autonomia privata, e di una sua certa libertà, che si può ricavare anche dalla legge che dichiara *kyriai* le *pros allelous homologiai*; dall'altra i condizionamenti di una prassi, nella quale, senza dubbio, rileva una tipicità sociale e non è certo ancora invalso il principio della consensualità, anche se una rilevanza del semplice impegno non debba ovunque escludersi. Sono, fra l'altro, limiti nettamente omologhi a quell'empiria che caratterizzava l'esperienza giuridica attica e, più in generale, greca.

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Der moderne Staatsbegriff und die Transformation der griechischen Polis zum Staat (II)

The Modern Concept of the State and the Transformation of the Greek Polis into a State (II)

Für Alberto Maffi¹

Abstract

The following article continues and concludes a first part (published in *Dike* 27, 2024) on the concept of the state. It tries to analyze when and in which way the Greek *polis* became a state in the sense of the definition given in part I. Section A describes the earliest form of the *polis* we know of, the so-called “homeric society”, as a non- or pre-state community. Following the evolutionary terminology widespread in anthropological / ethnological theories we characterize it as a “big men- / chief-society”. Section B deals with the historical transformation of the *polis* into a state. It presents some concrete cases of *poleis* which seem to be the first communities identifiable as states. The following generalizations deal with the most important features of the beginning of statehood, namely its date, the uprising of a general highest power, the course of the transformation, and its agents. Some considerations on the conditions and the reasons of the transformation conclude the article.

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L'articolo continua e conclude una prima parte (pubblicata in *Dike* 27, 2024) sulla nozione di stato. Cerca di analizzare quando e in quale maniera la *polis* greca diventò "stato" nel senso della definizione data nella parte I. La sezione A descrive la prima forma della *polis* che conosciamo, la cosiddetta "società omerica", come una comunità non-statale o pre-statale. Seguendo la terminologia evoluzionistica, diffusa nelle teorie antropologiche ed etnologiche, essa viene caratterizzata come una "big men- / chief-society". La sezione B tratta della trasformazione storica della *polis* in uno stato. Presenta alcuni casi di *poleis* che sembrano essere le prime comunità identificabili come stati. Le generalizzazioni che seguono offrono delle riflessioni sui più importanti aspetti degli inizi della statualità, specialmente la datazione, l'origine di un potere supremo, il corso della trasformazione e i suoi attori. Alcune considerazioni finali sulle condizioni e le ragioni di tale trasformazione concludono l'articolo.

Keywords: Greek *polis*, state, origins, Homeric society, big men-society, features of statehood, Sparta, Athens, Dreros, Tiryns

Parole chiave: *Polis* greca, Stato, origini, società omerica, big-men society, caratteri della statualità, Sparta, Atene, Drero, Tirinto

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Um zu beurteilen, ob, wie und wann ein menschliches Gemeinwesen als Staat zu betrachten ist, ist es unerlässlich, genau zu bestimmen, was unter einem Staat zu verstehen ist. Eine solche Definition wurde im ersten Teil dieses Beitrags entwickelt. Ihr Ausgangspunkt ist die Drei-Elemente-Lehre, die von Georg Jellinek in ihre wirkmächtigste Form gebracht wurde. Sie wird im ersten Teil in verschiedener Hinsicht präzisiert, zu einer umfassenden und für alle historischen Epochen brauchbaren Definition erweitert und gegen Einwände von staatsrechtlicher und historischer Seite verteidigt. Als Kernaussage dieser Definition kann gelten, daß die drei Elemente Staatsgebiet, Staatsvolk und Staatsgewalt einen Staat ausmachen.

Teil eins endet mit der Feststellung, daß die griechischen Poleis der klassischen Zeit vom überwiegenden Teil der Forschung als Staaten angesprochen werden, auch wenn der Begriff oft unzureichend oder gar nicht definiert wird. Die naheliegende Frage, seit wann die Polis im Sinne eines Staates existiert, wird ebenso unterschiedlich beantwortet wie die damit zusammenhängende zweite Frage, *wie* und unter welchen Umständen die Entstehung der Staatlichkeit vor sich gegangen ist. Der hier vorgelegte zweite Teil des Beitrags bietet Antworten auf beide Fragen an und versucht somit, eine konsistente Erklärung für die Transformation der Polis zum Staat vorzulegen.

A Die vorstaatliche „homerische Gesellschaft“

1. *Der negative Befund: Die Nichtstaatlichkeit*

Wenn hier von der „homerischen Gesellschaft“ die Rede ist, dann handelt es sich um einen Begriff, der von der jüngeren althistorischen Forschung geprägt ist und darin eine gewisse Verbreitung gefunden hat.² Er wird hier übernommen, um die Phase der frühen griechischen Geschichte zu bezeichnen, für die wir neben den archäologischen

² Im Titel tragen diese Formulierung etwa Snodgrass 1974 (der aber eine einheitliche homerische Gesellschaft in Frage stellt); Andreev 1988; Ulf 1990. Eine historische Einordnung gibt z. B. auch Raaflaub 1991, 207ff. Viele weitere Publikationen verwenden den Begriff eher selbstverständlich, ohne nähere Erläuterung.

Zeugnissen auf die Epen Homers und Hesiods als Quellen angewiesen sind. Auch wenn diese Texte bekanntlich keine historischen Darstellungen, sondern literarische Erzählungen sind, so sind doch die gesellschaftlichen Strukturen ihrer Entstehungszeit und der direkt vorausgehenden Phase in sie eingeflossen und daher für uns erkennbar.³ Diese Bezüge sind von Seiten der oral-poetry-Forschung näher begründet und von Altertumswissenschaftlern auf die homerische Gesellschaft übertragen worden. Wenn wir die Abfassungszeit der homerischen Werke mit einem Großteil der Forschung auf die Zeit um 700 v. Chr. und diejenigen Hesiods etwas später ansetzen, dann ergibt sich, daß der Endfassung der Epen die sozialen Verhältnisse des 8. Jahrhunderts v. Chr. zugrunde liegen.⁴ Zu Recht wird außerdem immer wieder betont, daß die Entwicklung in den verschiedenen Regionen und den einzelnen Poleis Griechenlands ungleichzeitig verlaufen ist.⁵

Die Rekonstruktion einer relativ einheitlichen, angesichts der fiktionalen Quellen idealtypischen Gesellschaftsordnung setzt voraus, daß in den Gedichten Homers, gemeinsam mit denen Hesiods, eine ähnliche Struktur der darin beschriebenen Gemeinschaften zu erkennen ist, was hier als gegeben angenommen wird.⁶ Gleichzeitig soll diese Struktur als typisch für *die* griechische Polis angesehen werden, obwohl für keine einzige dieser Poleis eine empirische Bestätigung vorliegt. Die kühn erscheinende Konstruktion rechtfertigt sich erstens dadurch, daß die genannten Texte in ganz Griechenland universell verbreitet waren und daher jede Polis zumindest ansatzweise ihre eigene Struktur oder doch ihre eigene vergangene Ordnung wiederzuerkennen vermochte. Noch viel mehr wiegt aber zweitens, daß sich in den Poleis im weiteren Verlauf ihrer Entwicklung sehr ähnliche Ordnungen herausbildeten, so daß man daraus auf einen gemeinsamen Ausgangszustand schließen darf, einen Zustand x sozusagen,

³ Vgl. etwa Ulf 1990, 233-238; Raaflaub 1991, 207-215; Fraß 2018, 70-74.

⁴ So etwa Gschnitzer 1991, 182; Welwei 2002, 62, und viele andere; jüngst Rönneberg 2021, 27-29 mit zahlreichen Literaturverweisen. Auch für eine spätere Datierung in verschiedene Phasen des 7. Jahrhunderts sind gute Argumente vorgebracht worden. Die wohl unendliche Debatte kann aber hier nicht aufgegriffen werden.

⁵ Vgl. z. B. Ulf 1990, 238ff.; Rönneberg 2021, 29.

⁶ So auch Fraß 2018, 72; zweifelnd Müller 2023, 7; stärker differenzierend Whitley 1991, 37.

der eben in den homerischen Epen, insbesondere in der Odyssee, zu erkennen und dem (ja ebenfalls nur angenommenen) *codex archetypus* in der literarischen Überlieferungsgeschichte vergleichbar ist.

Die Frage, mit der wir uns hier zu befassen haben, lautet: Waren die Gemeinschaften, die in den frühesten griechischen Texten beschrieben sind, bereits Staaten? Entsprach ihre Struktur den im ersten Teil dieses Beitrags herausgearbeiteten Kriterien von Staatlichkeit?

Beschränkt man die Bedeutung des Begriffs *polis* auf die Übersetzung 'Stadtstaat' und nimmt den Wortbestandteil 'Staat' ernst, dann ist die soeben gestellte Frage bereits bejaht. Denn Homer und Hesiod bezeichnen die Gemeinschaften, um die es uns geht, als Poleis, ihre Bewohner als Politen.⁷ Doch wenn wir die homerische Verwendung des Terminus mit dem Verständnis der Polis als Stadtstaat gleichsetzen, das für spätere Jahrhunderte zweifellos zutreffend ist, dann setzen wir voraus, was erst noch zu beweisen ist: eben welchen Charakter die homerischen Gemeinschaften besitzen. Ob der erste Teil des Begriffs 'Stadtstaat' für die homerische Polis gerechtfertigt ist, wäre in ähnlicher Weise zu diskutieren wie der Staatsbegriff, wobei unbestritten ist, daß der Begriff, neben der Bedeutung als eine Gemeinschaft oder Gemeinde, auch eine bestimmte gemeinschaftliche Siedlungsform bezeichnen kann. Wie diese Siedlungsform näher ausgesehen hat, soll aber hier nicht geklärt werden, da wir uns auf den politischen Charakter der Gemeinschaften konzentrieren wollen.⁸

Abgesehen von der terminologischen Festlegung des Polisbegriffs auf die Bedeutung 'Stadtstaat' bestand für einen großen Teil der früheren Forschung kein Zweifel daran, daß die homerischen Gemeinschaften als Staaten anzusprechen seien. Für diejenigen, für die seit Beginn der menschlichen Geschichte jedes Zusammenleben als staatliche Gemeinschaft verlief,⁹ änderte sich daran auch in den

⁷ Vgl. zur Polis der homerischen Zeit allgemein etwa Hölkeskamp 2010, 91f.

⁸ Nur nebenbei sei angedeutet, daß die homerischen Poleis ein Zwischending zwischen einer Stadt und einem Dorf zu sein scheinen; vgl. die Bemerkungen von Andreev 1988, 24.

⁹ Vgl. Teil I, S. 19. Im Rahmen dieser Sichtweise hat man von den Gemeinschaften, die den Poleis vorausgingen bzw. parallel dazu bestanden, als „Stammstaaten“ gesprochen und so den griechischen Terminus *ἔθνος* übersetzt, so noch Weiler 1976, 43. Die damit verbundenen Vorstellungen werden in der jüngeren Forschung jedoch nicht mehr vertreten, vgl. etwa Ulf 1990, 215ff.

ersten Jahrhunderten des ersten Jahrtausends v. Chr. selbstverständlich nichts. Aber auch wenn der Staat nicht als naturgegeben angesehen wurde, verwendete man diesen Begriff für die frühgriechische Zeit meist ganz selbstverständlich. Für viele Autoren, die sich näher mit der spezifischen Periode beschäftigen, kann der Buchtitel von A. Fanta: „Der Staat in der Ilias und der Odyssee“, Innsbruck 1882, als programmatisch gelten, ebenso wie der Artikel von R. Köstler, „Die homerische Rechts- und Staatsordnung“ von 1950. Ein weiteres repräsentatives Beispiel ist das Handbuch von Busolt und Swoboda von 1920³, in dem es heißt: „Neben dem *basileus* und dem Rat der Geronten erscheint im Staatsleben als dritter Faktor die Gemeindeversammlung“ (S. 333). Diese und weitere Autoren¹⁰ erblicken in den Beschreibungen der Epen eine institutionalisierte Ordnung, an deren Spitze der jeweils herrschende König (bei Homer: *basileus*) als erblich legitimer Monarch steht, der zusammen mit weiteren Mitgliedern der Elite, die einen festen Rat bilden, politische Entscheidungen trifft und gültige Regeln durchsetzt.¹¹

Diese Sichtweise ist weitgehend überholt und überlebt nur noch vereinzelt, am ehesten in Überblicksdarstellungen, die sie unkritisch und eher beiläufig einfließen lassen.¹² Der überwiegende Teil der jüngeren Forschung hat sich jedoch von der Vorstellung eines homerischen Erbkönigtums verabschiedet, allerdings mit unterschiedlicher Entschiedenheit und unterschiedlichen Konsequenzen. Zunächst wurde erkannt, daß die Macht des *basileus*, der bei Homer an der Spitze der gesellschaftlichen Hierarchie steht, nicht zu vergleichen ist mit der Macht eines (absoluten) Königs, der als Souverän über seine Gemeinschaft herrscht. M. Finley war es, der Anstöße in dieser Richtung auf-

¹⁰ Gschnitzer 1991, der seinen Forschungsüberblick mit dem Titel „Zur homerischen Staats- und Gesellschaftsordnung“ überschreibt, nennt diese und weitere Forscher, darunter Carlier 1984, als Vertreter dieser Position (S. 183. 199-203).

¹¹ Weitere Literaturhinweise auch bei Dreher 1983, 37 mit A. 59; Dreher 2019, 122 mit A. 34.

¹² So Bringmann 2016, 82. 87; Staatlichkeit in der homerischen Zeit hält Bringmann für belegt (S. 86). Als Beispiel aus einem spezifischen Werk sei genannt F. Schulz 2011. Auch wenn Schulz dem Konsensprinzip bei Homer große Bedeutung attestiert (S. 60-62), hält er doch an der „Souveränität des Königs“ fest (63f.): Der „monarchische König“, den er auch als Herrscher bezeichnet, habe das letzte Wort. Daß er generell die homerische Polis für eine staatlich verfaßte Gemeinschaft hält und auch explizit an das Werk von Fanta anknüpft, wird in der Rezension von Dreher 2011, 90f., ausgeführt.

genommen und wirkmächtig ausgeführt hat. Oft wird darauf verwiesen, daß die Bezeichnung *basileus* in den Epen nicht nur für den Mann an der Spitze, sondern auch für weitere reiche und sozial herausgehobene Männer verwendet wird. Gemeinsam mit diesen Männern in seinem Umkreis trifft der *basileus* die Entscheidungen für die jeweilige Polis, und zusätzlich müssen diese *basileis* noch Rücksicht nehmen auf Willensäußerungen des *demos*, des aus freien Bauern bestehenden Volkes, das gelegentlich zu Versammlungen zusammengerufen wird. Diese „Redimensionierung“ des *basileus*¹³ hat dazu geführt, daß man, eben um falsche Parallelen zu vermeiden, „König“ oft nur noch in Anführungszeichen verwendet oder von einem „schwachen“, „gemäßigten“ oder „sogenannten“ Königtum schreibt. Konsequenter wird von anderen auf diese Übersetzung ganz verzichtet, obwohl sie in späterer Zeit die normale und treffende Bedeutung von *basileus* geworden ist. Stattdessen spricht man vom Führer, Anführer oder Leiter einer Polis, oder kennzeichnet die herausgehobene Stellung eines der *basileis* durch den Zusatz „(Ober)-*basileus*“.¹⁴ Dessen Stellung wird treffend als *primus inter pares* beschrieben, der in den Ratsversammlungen den Vorsitz führt, die Gäste der Polis betreut und die notwendigen, durch Herkommen und allgemeine Akzeptanz bestimmten Handlungen ausführt beziehungsweise deren Modalitäten festlegt. Diese Aussagen ergeben sich vor allem aus der homerischen Schilderung des Aufenthalts des Odysseus in der Phäakenstadt Scheria, in der ihn der (Ober)-*basileus* Alkinoos in die Gemeinschaft einführt, Ehrungen für ihn veranlaßt und alle nötigen Maßnahmen für seine Rückführung in die Heimat anordnet. Die einschlägigen Szenen sind diesbezüglich analysiert worden, außerdem wurde herausgearbeitet, daß das Oberkommando des Agamemnon beim Kriegszug gegen Troia, wie es die Ilias beschreibt, nicht gleichzusetzen ist mit der zivilen Stellung des Oberbasileus in seiner Polis.¹⁵

¹³ Für die Zeit vor Finley sei genannt Heuß 1946, 41 = 1969, 60; vgl. sodann Finley 1977, 103 und oft; Dreher, 1983, 37-40; besonders ausführlich argumentiert Drews 1983, passim; Murray 1995, 52; Welwei 2002, 55. 60-65; Lotze 2007, 18.

¹⁴ Dieser selbsterklärende Terminus ist, wenn ich richtig sehe, von Ulf 1990 (erstmalig beiläufig wohl S. 82) in die deutschsprachige Literatur eingebracht worden. Die englische Entsprechung *chief basileus* findet sich bereits bei Qviller 1981, 109, wird aber selten verwendet.

¹⁵ So schon Morgan 1877, 248, der sich auch klar gegen die Verwendung des

Wenn diejenige Instanz, die von allen Forschern unbestritten die höchste Autorität in der Polis besitzt, deren Wort am meisten gilt und die als Leitung des Gemeinwesens anzusprechen ist, wenn dieser *basileus* aber keine Herrschaft in dem in Teil I erläuterten Sinn ausübt, wenn er keine allgemeine Gewalt über die Mitglieder des Gemeinwesens innehat, wenn er keine festgefügte, institutionalisierte Stellung einnimmt, sondern seine grundsätzlich prekäre Vorrangstellung durch persönliches Ansehen, durch Leistung und individuelles Durchsetzungsvermögen sichern muß, dann ist daraus zu schließen, daß dieses Gemeinwesen keinen staatlichen Charakter besitzt.¹⁶ Diese Schlußfolgerung ist in der Forschung erstmals explizit in meiner Dissertation von 1983 gezogen worden.¹⁷ Meist unabhängig von dieser Darlegung sind dann weitere Autoren zu dem Urteil gekommen, die homerische Polis als nichtstaatliche oder, mit Blick auf die spätere Entwicklung, vorstaatliche Gesellschaft einzustufen.¹⁸

Wenn der homerische Oberbasileus nicht der staatliche Regent war, für den viele ihn noch immer halten, und die homerische Gesellschaft mithin keine Monarchie war, besaß diese Gesellschaft dann vielleicht eine andere staatliche Form, die durch eine Verteilung der Herrschaft auf mehrere Personen gekennzeichnet war? In Frage kommen natürlich zum einen ein Rat aus Mitgliedern der Oberschicht, zum anderen die Versammlung des Demos. Beide Gremien waren bekanntlich in der späteren Zeit zentrale Institutionen der griechischen Stadtstaaten, die bei Dominanz des Rates, der Bule, von der Verfassungstheorie der klassischen Zeit als Oligarchien, bei Dominanz der Volksversammlung, der Ekklesie, als Demokratien eingestuft wurden. Nun spricht zwar eigentlich niemand explizit von oligarchischen oder de-

Königsbegriffs ausspricht (S. 246).

¹⁶ Zumindest begrifflich bleibt es daher problematisch, wenn Hölkeskamp 2010, 91, konstatiert, daß die homerischen Helden als 'Könige' über Polis *herrschten* (Herv. M.D.), denn der Herrschaftsbegriff ist staatlich konnotiert, s. Teil I, S. 21; zwei Sätze vorher erscheint „König Odysseus“ ohne Führungszeichen; ähnlich Hildebrandt 2007, 216. Zuletzt hat Müller 2023, 18, dafür plädiert, die Übersetzung 'König' aufzugeben; S. 345ff. untersucht er den Terminus *basileus* ausführlich.

¹⁷ Dreher 1983, 37-45, bes. 44.

¹⁸ Welwei 2002, 41. 64. Die meisten Positionen, welche die Vorstaatlichkeit vertreten, sind anthropologisch-ethnologisch beeinflusst und werden weiter unten separat vorgestellt.

mokratischen Poleis bei Homer, aber die Einstufung der beiden hier angesprochenen Gremien fällt in der Forschung doch recht unterschiedlich aus.

Was zunächst die Ratsversammlung betrifft, so ist in Analogie zur Position des Oberbasileus auch für die Beratungen der Heerführer im griechischen Heer der Ilias eine Gleichsetzung mit der inneren Ordnung einer Polis abzulehnen.¹⁹ Die Beteiligung weiterer Mitglieder der Oberschicht neben *dem* Basileus an der Leitung der Polis thematisiert die Odyssee näher nur für die Phäakenstadt Scheria. Der dortige Oberbasileus Alkinoos umgibt sich in seinem Haus mit Angesehenen oder Vornehmen der Gemeinschaft, die eben auch *basileis* (*Od.* 7, 49), an anderen Stellen ἡγήτορες ἢ δὲ μέδοντες („Anführer und Berater“, *Od.* 7, 186; 8, 11) oder βουλευφόροι („Berater“, *Od.* 13, 12) genannt werden,²⁰ zum Mahl und zur Beratung in seinem Oikos. Sie äußern frei ihre Meinung, machen Vorschläge und erinnern an die gemeinsamen Werte und Traditionen, an die sich Alkinoos bei seinem Handeln halten sollte. Als Entscheidungsinstanz, die Beschlüsse faßt, wird dieses Gremium, wenn man die Gruppe überhaupt so nennen darf, nicht vorgestellt. Abstimmungen finden nicht statt, Kontroversen werden durch Diskussionen ausgetragen, am Ende wird ein Konsens gesucht (und gefunden).²¹

Nach welchen Kriterien sich die Gruppe der Berater zusammensetzt, wird im Epos nicht ausdrücklich gesagt. Für die Beteiligten ist

¹⁹ F. Schulz 2011 mißachtet diese Differenz zu oft und konstruiert eine Art Idealtyp *des* homerischen Rates aus den Ratsversammlungen der Phäaken, der Troer, des Griechenheers und der Götter.

²⁰ Zur Terminologie vgl. etwa F. Schulz 2011, 11. Die Begriffe `Adel' und `Adlige', mit denen sich die Forschung ausgiebig befaßt, werden in der vorliegenden Studie nicht verwendet. Die Forschung hat verschiedentlich gezeigt, daß die sozial herausgehobenen Personen der griechischen Welt nicht wie in späteren Epochen als Geburtsadel zu verstehen sind, sondern daß ihre erhöhte Stellung in erster Linie auf Reichtum in Form von Grundbesitz beruht. Unter solchen und ähnlichen Vorbehalten und Präzisierungen halten auch einige jüngere Publikationen am Adelsbegriff fest, wie Stein-Hölkeskamp 1989; Meister 2020. Nicht selten wird der Terminus auch in Führungszeichen gesetzt, um solche Vorbehalte anzudeuten. Müller 2023, 20, lehnt verschiedene moderne Begriffe ab und kreiert die – bewußt künstliche, aber eben allzu künstliche und sperrige – Bezeichnung „Statusobere“.

²¹ Zum Konsensprinzip, das in der Homerforschung schon seit langem anerkannt wird, vgl. zuletzt F. Schulz 2011, 60-62; Fraß 2020, 221.

es aber offenbar selbstverständlich, daß sie dazugehören. Die moderne Forschung hat keinen Zweifel daran, daß die Anführer der Phäaken aufgrund derselben Kriterien an der Leitung der Polis beteiligt werden, die auch für den Oberbasileus gelten, also ihre herausgehobene soziale Stellung aufgrund ihres Wohlstands sowie ihre Leistungen im Gemeinschaftsleben und im Krieg. Bei den Spielen zu Ehren des Odysseus fordert Alkinoos die bereits genannten „Anführer und Berater“ auf, dem Gast Geschenke zu bringen. Überraschend konstatiert er dabei: „Denn zwölf angesehene *basileis* gebieten in unserem Volk als Führer, der dreizehnte aber bin ich selbst“ (*Od.* 8, 390f.). Die Aussage könnte man so verstehen, daß bei den Phäaken ein dem *basileus* zugeordneter Rat besteht, der sich aus der feststehenden Zahl von zwölf Mitgliedern zusammensetzt. Das würde bedeuten, daß bei Ausscheiden eines Mitglieds jeweils ein neues Mitglied nachrückt. Damit wäre ein gewisses Anzeichen für eine festgefügte Institution, also für ein staatliches Element, gegeben.²² Aber die Aussage des Alkinoos ist nicht als Beschreibung eines phäakischen „Verfassungsbestandteils“ zu verstehen. Sie dürfte vielmehr an Odysseus gerichtet sein,²³ um ihm vor Augen zu führen, wie viele Geschenke er durch die Aufforderung des Alkinoos an dessen Mit-*basileis* zu erwarten hat. Wie an vielen Stellen im Epos erfüllen Gastgeschenke die wichtige Funktion, die Achtung und Wertschätzung gegenüber dem Fremden auszudrücken. Dabei kommt es durchaus auf den materiellen Wert der Gegenstände an, weshalb diese in den anschließenden Worten des Alkinoos einzeln aufgezählt (jeder soll einen Mantel, einen Leibrock und ein Pfund Gold bringen) und angepriesen werden, und auch das im Anschluß thematisierte Versöhnungsgeschenk des Euryalos wird näher beschrieben. Daß es neben Alkinoos zwölf weitere *basileis* sind, von denen Odysseus wertvolle Gastgeschenke erhält, kann auch gewissermaßen ein historischer Zufall sein: Zum aktuellen Zeitpunkt könnten es zwölf Männer sein, deren gesellschaftliche Stellung ihre Mitwirkung im Beraterkreis *erfordert*. Die Zahl mag

²² Überraschenderweise nutzt F. Schulz die Nennung der Zwölfzahl durch Alkinoos nicht ausdrücklich als Argument für seine Vorstellung von einem stark formalisierten Rat, scheint die feste Zahl aber als gegeben vorauszusetzen. Auch Seelentag 2023, 105, spricht von einem „klar bezifferten, einigermaßen stabilen Ratsgremium“.

²³ So auch F. Schulz 2011, 24.

dabei aber flexibel sein: sie würde steigen, wenn weitere Phäaken zu entsprechendem Reichtum gelangten und ihre soziale Position nicht geringer wäre als die der gegenwärtigen Berater, oder fallen, wenn von den aktuellen Beratern jemand seinen Status verlöre.²⁴ Wenn also die herausgehobene soziale Stellung jemanden zum *basileus* macht, und wenn die angesehensten *basileis* einen Anspruch darauf haben, im Beraterkreis des Oberbasileus an der Leitung der Polis mitzuwirken, dann darf man sich das Einrücken in diesen Kreis als gleichsam naturwüchsigen Vorgang vorstellen, der keiner weiteren Formalitäten, allenfalls einer formlosen Einladung seitens des Oberbasileus, bedarf. Spekulationen über einen formalen „Aufnahmemodus“ für die Ratsmitglieder wären damit überflüssig.²⁵

Noch weniger als formaler Rat anzusprechen ist die unbestimmte Anzahl von Geronten, die der *basileus* Alkinoos bei der ersten Begegnung mit Odysseus für den nächsten Tag versammeln will, um die Rückführung des Ankömmlings zu planen. Die Beschreibung dieser Versammlung zu Beginn des 8. Gesangs der Odyssee schwankt zwischen einer Rats- und einer Volksversammlung, die am nächsten Morgen zusammenkommt. In Gestalt eines Herolds spricht die Göttin Athena jeden einzelnen Mann in der Stadt an, verwendet dabei aber als Anrede die oben zitierte Formel ἡγήτορες ἠδὲ μέδοντες, „Anführer und Berater“ (*Od.* 8, 10f.). Fordert sie nun wirklich *alle* Männer des phäakischen Demos auf, zur Versammlung auf der Agora zu eilen, oder nur „jeden“ den sie als einen der Vornehmen identifiziert, also die Anführer, die an anderen Stellen *basileis* oder Geronten genannt werden? Mit der gleichen Formel eröffnet Alkinoos dann die Versammlung, spricht aber auch direkt die 52 jungen Männer an, die als Ruderer Odysseus nach Hause bringen sollen, und fordert sie auf, auf der Stelle ein geeignetes

²⁴ Das Phänomen der möglichen Statusveränderung ist ein wesentliches Unterscheidungsmoment der homerischen *basileis* vom Erbadel späterer Epochen und ist in der Forschung deutlich herausgearbeitet worden, vgl. etwa Stein-Hölkeskamp 1989, 15ff.; Meister 2020, 76ff.

²⁵ Sofern ein Sohn seinem Vater nachfolgt, besteht darin keine formale „Vererbung des Amtes“, sondern es handelt sich um die Konsequenz daraus, daß der Sohn im Normalfall den Reichtum des Vaters und damit dessen soziale Stellung erbt. Die Vermutungen von F. Schulz 2011, 33f., zum möglichen „Aufnahmemodus“ der Ratsmitglieder sind rein hypothetisch.

Schiff vorzubereiten (*Od.* 8, 26-45). Die vorausgesetzte Anwesenheit von geeigneten Ruderern, aus denen sofort die benötigten 52 ausgewählt werden, sowie der offene Versammlungsort der Agora sprechen dafür, daß dem Dichter eine Volksversammlung vor Augen schwebt.²⁶ An dieser Versammlung nehmen, wie bei sonstigen Versammlungen, selbstverständlich auch die „Anführer und Berater“ teil. Dabei werden nur sie direkt angesprochen, weil es auf ihre Übereinstimmung mit dem Oberbasileus ankommt – der engere Kreis der zwölf *basileis* hatte bereits am Vortag seine Zustimmung zur Rücksendung des Odysseus Ausdruck verliehen (*Od.* 7, 226f.) – und weil sie einen gewissen praktischen Anteil an der Ehrung des Gastes durch die Bereitstellung von Geschenken haben. Die nicht zur Elite gehörigen Phäaken hingegen können sich offenbar auch zu der offenen Versammlung gesellen, werden aber von Alkinoos nur als passive Zuhörer betrachtet (dazu sogleich) und daher nicht direkt angesprochen.

Im Fall dieser Versammlung ergreifen aber nicht nur die „einfachen Leute“, sondern auch die „Anführer und Berater“ nicht das Wort, sondern es ist allein Alkinoos, der in wenigen Worten allen bekanntgibt, wie die Rückführung des Odysseus vorzubereiten sei. Gleichzeitig läßt Alkinoos alle anwesenden σκηπτοῦχοι βασιλῆες („szeptertragenden *basileis*“), wie die eingangs (*Od.* 8, 26) als „Anführer und Berater“ Adressierten jetzt angesprochen werden, sowie die ausgewählten 52 Ruderer in sein Haus zu einer feierlichen Bewirtung des Odysseus ein (8, 38-42). Weder in der Versammlung noch bei der anschließenden Bewirtung ist erkennbar, daß die daran teilnehmenden „Anführer und Berater“ beziehungsweise Geronten beziehungsweise *basileis* in irgendeiner Weise gemeinsam agieren, geschweige denn ein festes Gremium bilden würden. Die Annahme von F. Schulz, dieser Kreis bilde neben den zwölf oben genannten engeren Beratern noch einen zweiten „Rat in der Volksversammlung“,²⁷ ist daher grundlos.

Man kann sich fragen, ob die Geronten, die auf der berühmten Schildszene der *Ilias* als Schiedsrichter in einem Rechtsstreit fungieren (*Il.* 18, 497-508), diese Aufgabe in ihrer Eigenschaft als Mit-

²⁶ So auch F. Schulz 2011, 49, 73, aber ohne Begründung.

²⁷ F. Schulz 2011, 25f.

glieder eines solchen „politischen“ Rates wahrnehmen. Immerhin wird für sie ebenso der Terminus Geronten verwendet wie – zumindest implizit – für die zwölf „Anführer und Berater“ des Alkinoos in Scheria (*Od.* 7, 189).²⁸ Ob in der Schildszene unter den Geronten im wörtlichen Sinn „die Alten“ zu verstehen sind, denen die Gemeinschaft am ehesten zutraut, als gerechte Schiedsrichter zu fungieren, läßt sich nicht ausmachen. In anderen Zusammenhängen, das ist oft gezeigt worden, gehören auch jüngere Männer zu den Geronten, so daß man sie im weiteren Sinn als sozial hervorgehobene, angesehene Personen zu verstehen hat, zu denen auf jeden Fall die als *basileis* bezeichneten Männer gehören.²⁹ Die Bezeichnung der Schiedsrichter als Geronten würde also nicht gegen ihre Gleichsetzung mit einem Rat sprechen. Eher schon der Umstand, daß unter ihnen kein Oberbasileus erwähnt ist, der in einem Rat die Leitung hätte, sondern daß alle, ihre Zahl ist nicht angegeben, nacheinander gleichberechtigt ihren jeweiligen Vorschlag vorbringen. Während nun nichts dagegen spricht, daß die hier als Schiedsrichter agierenden Geronten auch in einem an der Leitung der Polis beteiligten Rat mitwirken,³⁰ spricht auch nichts dafür, daß ein solcher Rat in der identischen Zusammensetzung als Schiedsrichter-Gremium fungiert. Und selbst, wenn das der Fall wäre, hätten wir doch kein staatliches Element vor Augen, da die Geronten der Schildszene eben kein Gericht bilden, vor welchem die Kontrahenten zwangsweise zu prozessieren hätten, sondern ein Schiedsgericht, dessen Spruch sich die Kontrahenten freiwillig unterwerfen.³¹

Als Zwischenergebnis können wir festhalten, daß in den Epen zwar ein Beraterkreis vorstellig gemacht wird, nämlich die zwölf

²⁸ Aus der Aussage des Alkinoos, daß am nächsten Tag „noch mehr Geronten“ zusammenkommen sollen, ist zu schließen, daß auch die zwölf Anwesenden unter den Begriff subsumiert werden, so auch F. Schulz 2011, 24.

²⁹ Vgl. etwa F. Schulz 2011, 29; Seelentag 2023, 102.

³⁰ Damit begnügt sich auch F. Schulz 2011, 72, obwohl er sonst an vielen Stellen Räte erblickt.

³¹ Die Schildszene wird besonders in der rechtshistorischen Literatur sehr unterschiedlich interpretiert. Gegen ein Schiedsgericht in der Schildszene hat sich insbesondere Wolff 1961 gewandt, dazu vgl. Maffi 2019, 176ff. Zur weiteren Forschungsdiskussion vgl. etwa Gagarin 1986, 26ff.; Cantarella 2002; Seelentag 2023, 101ff., der allerdings auch „in Ansätzen“ („in gewissem Maß“ S. 110) eine Institutionalisierung einräumt.

„Anführer und Berater“ des Oberbasileus Alkinoos in Scheria, daß diese Gruppe aber als eher informell erscheint und dem Oberbasileus durch eine ähnliche soziale Stellung und persönliche Nähe verbunden ist.³² Ihre Beratungen zielen auf einen Konsens ab und die Teilnehmer bestärken den Oberbasileus bei seiner Aufgabe, die Traditionen der Polis zu achten und umzusetzen. Noch weniger als *der basileus* treffen sie Entscheidungen, und ebensowenig wie jener üben sie in irgendeiner Form eine allgemeine Staatsgewalt über die ganze Polis aus.³³ F. Schulz kündigt zu Beginn seines Kapitels über die homerischen Räte an, die Mitglieder des Rats als Ratsmitglieder oder Berater zu bezeichnen, „weil sich `Ratsherren´ zu institutionell anhört.“³⁴ Wenige Zeilen weiter ist das nächste Unterkapitel jedoch mit „Institution“ überschrieben, womit eben der Rat (*boule*) gemeint ist. Und geradezu bürokratisch wird seine Terminologie, wenn er vom Amt, dem Amtsantritt, der Amtsführung, dem Amtsmißbrauch oder gar der Amtsgewalt der Ratsmitglieder spricht.³⁵ Solche Begriffe setzen eine entwickelte, institutionalisierte (staatliche) Struktur voraus und sind daher für die homerischen Verhältnisse anachronistisch.³⁶

Das zweite Element, das außer dem *basileus* als Träger von staatlicher Gewalt in Frage käme, ist die Volksversammlung. Zwar wird eine solche Annahme nur von ganz wenigen Gelehrten ausdrücklich geteilt,³⁷ aber gegenüber den Positionen, die der Volksversammlung

³² Vgl. auch Fraß 2018, 90: „Gerade die βουλή erscheint vielmehr wie das private, elitäre Beratungsgremium eines *basileus*.“

³³ Wenn einige Autoren dennoch von einer homerischen Adelherrschaft sprechen, so ist damit in erster Linie die Herrschaft der *basileis* in ihrem privaten Bereich, dem *oikos*, gemeint. Sie wird jedoch auch gleichgesetzt mit „wesentlichen obrigkeitlichen Funktionen“, so Heuß 1946, 42 = 1969, 62, der von einem „Staatsgefüge“ spricht, das aber „sehr locker“ sei, denn „außerhalb der als persönliches Eigentum erscheinenden obrigkeitlichen Gewalt gab es eigentlich kaum einen `Staat´. Er reichte so weit wie die jeweilige Adelsgesellschaft.“

³⁴ F. Schulz 2011, 12.

³⁵ F. Schulz 2011, etwa 26. 33 (Amt wird hier ausnahmsweise und distanzierend in Anführungszeichen gesetzt).

³⁶ F. Schulz 2011 verspricht eingangs, die Position des Rates in Bezug auf die Staatlichkeit zu thematisieren (S. 6), ohne dieses Versprechen in der Folge einzulösen. Implizit aber ist erkennbar, daß er die homerischen Räte als staatliche Institutionen versteht. Vgl. dazu Dreher 2011, 90-92.

³⁷ So von Gschnitzer 1991, 196-199, s. auch u. A. 41; Fraß 2018, s. u. A. 44.

jede politische Einflußmöglichkeit absprechen,³⁸ hat gerade die jüngere Forschung die Bedeutung der Versammlung aufgewertet, tendenziell sogar erheblich überschätzt (dazu sogleich). Unbestritten ist, daß sich die homerischen Volksversammlungen – die oft damit gleichgeordneten Heeresversammlungen schließen wir wieder aus der Betrachtung aus (s. o.)³⁹ – wesentlich von der institutionalisierten *ekklesia* der späteren Zeit unterscheiden. Bei Homer finden sich keine formalisierten Abläufe wie Einberufungsformalitäten, Tagesordnung, Kulthandlungen, Antragstellung, Rederecht, Abstimmungen und damit Entscheidungen der *agora*. Die Versammlungen werden von den Anführern dominiert, denen allein es gebührt, ihre Stimme zu erheben. Der *demos* hat keine geordnete Möglichkeit der Meinungsäußerung, kann aber durch spontane gemeinsame Reaktionen wie Gemurmel, Jubel, Geschrei, Protest und ähnliches seine Haltung zum Ausdruck bringen und dadurch die Atmosphäre beeinflussen. Im allgemeinen wird in den Versammlungen Zustimmung zu den Äußerungen der „Oberen“ signalisiert, bei den Phäaken ist das sogar ausschließlich der Fall, wodurch ein Konsens zwischen dem Oberbasileus, den weiteren Anführern und dem *Demos* hergestellt bzw. bekräftigt wird. In Ithaka kommt es etwas mehr auf das Verhalten des Volkes an, weil die Autorität des *basileus* Odysseus zuerst wegen dessen Abwesenheit fehlt und dann nach seiner Rückkehr eingeschränkt ist und erst wiederhergestellt werden muß. Durch die Auseinandersetzungen innerhalb der Führungsschicht, mit den Akteuren Telemach, den Freien und dann auch Odysseus, ist die ganze innere Ordnung der Polis gestört, so daß ein gewisser Spielraum für Aktivitäten des *Demos* entsteht. Dieser handelt jedoch nicht als ein geschlossenes Organ, entwickelt keine eigenen Vorstellungen, sondern schließt sich, je nach vorgegebener Loyalität, der einen oder der anderen Seite der Anführer an.

³⁸ Das gilt einerseits für die ältere Forschung, die alle Macht bei dem als absoluten Monarchen vorgestellten *basileus* konzentriert sieht (vgl. oben), andererseits auch für die sogenannte primitivistische Forschungsrichtung, für die M. Finley steht. In jüngerer Zeit hat van Wees 1992, 281-283, das „homerische Königtum“ verteidigt, und auch F. Schulz 2011, 65, hat sich der älteren Position angenähert, indem er dem König, der sich auch „gegen alle entscheiden“ könne, „das letzte Wort“ zuspricht.

³⁹ Das wird in der Literatur meist nicht getan, z.B. Fraß 2018, 87ff.; ders. 2020, 221ff., wo die Heeresversammlung explizit auch als Volksversammlung bezeichnet wird, kritisiert von Maffi 2022, 266.

Im Ganzen bleibt es dabei, daß die homerische Volksversammlung eine weitgehend passive Rolle spielt und vom Handeln der Anführer abhängig ist, die für die Leitung der Polis zuständig sind.⁴⁰ Die genannten situativen Äußerungsmöglichkeiten des Demos mögen die Anführer der Polis bis zu einem gewissen Grad beeindrucken, werden aber von einigen Historikern, wie bereits angedeutet, erheblich überschätzt, insbesondere wenn ihnen eine formal notwendige Funktion zugeschrieben wird. Wenn Telemach die Göttin Themis anruft, „die die Versammlungen der Männer eröffnet und schließt“ (*Od.* 2, 68f.), dann nimmt Gschnitzer diese religiöse Vorstellung – angesichts der verzweifelten Lage des Odysseus-Sohnes eher eine Wunschvorstellung – als realen Vorgang und schlußfolgert: „Die Einberufung wie die Entlassung der Versammlung ist also Sache des personifizierten Rechtes“ und sieht darin ebenso einen Beleg für die Existenz einer „öffentliche Rechtsordnung“ wie in der Drohung Nestors, daß der Verursacher eines Bürgerkriegs „ohne Phratie, ohne Gesetz und ohne Herd“ (*Il.* 9, 63f.: ἀφρήτωρ ἀθέμιστος ἀνέστιος) sein solle – gerade als ob wir erführen, welches Gericht mit welchem Verfahren die genannten Sanktionen als Urteil verhängen würde.⁴¹ Raaflaub schreibt der Volksversammlung anscheinend einen konstitutionellen Entscheidungsvorbehalt zu, wenn er formuliert, „daß alle wichtigen Entscheidungen ..., die die Gemeinde betreffen, erst durch die Zeugenschaft des Volkes in der Versammlung ihre Gültigkeit erlangen“.⁴² Auch Hölkeskamp scheint die Zustimmung der Volksversammlung als notwendige Bedingung für die Gültigkeit einer Entscheidung vorauszusetzen.⁴³ Fraß räumt zwar ein, daß die homerische Volksver-

⁴⁰ Das ist im Kern die Position von M. Finley, wie sie auch von Hölkeskamp 1997, 2, referiert wird. Vgl. Maffi 2019, 143. Grote 2016a, 261ff., legt eine abgewogene und differenzierte Beurteilung der homerischen Volksversammlung vor. Bezeichnend ist, daß er dabei so gut wie nicht auf die angeblich so zielführende systemtheoretische Begrifflichkeit zurückgreift, unter die er doch seine gesamte Analyse subsumieren will (dazu u. A. 103. 212. 238).

⁴¹ Gschnitzer 1991, 196.

⁴² Raaflaub 1991, 238, mit Zustimmung zu E. Havelock. Eigentlich ist mit „Zeugenschaft“ nur die passive Anwesenheit des Demos ausgedrückt; dann wären jedoch alle konsensualen Entschlüsse der *basileis* automatisch sanktioniert. Wirkliche Bedeutung hätte die Zeugenschaft also nur, wenn der Demos sie auch verweigern könnte, was man sich allenfalls als Auseinanderlaufen der Menge vorstellen könnte.

⁴³ Hölkeskamp 1997, 13: „Durch die allgemeine Zustimmung gewinnt dieser Konsens

sammlung als „eine schwache politische Institution“ erscheine, geht aber so weit zu behaupten, daß sie die einzig entscheidende politische Instanz, die „Letztentscheidungsinstanz“ sei, die „für das gesamte Gemeinwesen verbindliche Entscheidungen“ treffe.⁴⁴ Wenn von der Volksversammlung „zumindest situativ Herrschaft“ ausgehe, dann ist damit im Sinne Max Webers ein Kriterium für Staatlichkeit gegeben (s. Teil I), das auch von Fraß anerkannt wird.

Daß gerade die Volksversammlung, die nach unseren Ausführungen eher noch weniger als der *basileus* oder der Rat als Träger der Staatsgewalt gelten kann, von dem eben zitierten Teil der Forschung als wichtigstes oder sogar einziges solches Element vereinnahmt wird,⁴⁵ könnte durchaus mit der heutigen demokratischen Perspektive zusammenhängen, die dem Demos ein möglichst großes Gewicht innerhalb einer Gemeinschaftsordnung zuzuschreiben versucht.⁴⁶ Möglich ist das nur, weil die Autoren keinen präzisen Staatsbegriff zugrundelegen, sondern mit vagen Hinweisen auf irgendwie „geordnete“ Verhältnisse, mit anachronistisch-rechtlichen Interpretationen griechischer Begriffe wie ὄρκος („Eid“), Θέμις („das personifizierte Recht“), ὀφείλω (= ὀφείλω „schulden“), δεξιῶν („Handschläge“), θωή („Buße“) und vor allem mit der Hervorhebung von „Öffentlichkeit“ und ihrer Bedeutung arbeiten.⁴⁷

dann eigenes Gewicht, einen Geltungs- und Umsetzungsanspruch, den man durchaus als faktische (?) Verbindlichkeit bezeichnen könnte.“ Allerdings werde dieses Ideal nicht immer erreicht. Sanktionierung durch die Volksversammlung postuliert auch Meister, 2020, 78.

⁴⁴ Fraß 2018, 89: „Die Volksversammlung ist aufgrund dieser Entscheidungsbefugnis aber nur die politische Institution, von welcher am ehesten ‚Herrschaft‘ ausgehen kann“ – im Unterschied zu den „beiden rein elitären ‚Institutionen‘, also den individuellen βουλεύεις und den Ratsversammlungen“ (90); ders. 2020, 222. 224.

⁴⁵ Dennoch räumen alle Autoren ein, daß die Volksversammlung nicht in formalen Abstimmungsverfahren entschied.

⁴⁶ Die Bedeutung des Demos herauszuheben, war gleichzeitig auch ein Anliegen der realsozialistischen historischen Perspektive, die in allen Epochen nach einer aktiven und progressiven Rolle des Volkes suchte. Für die homerische Zeit vgl. Andreev 1988, 17. So konnte es dazu kommen, daß die Darlegungen des Leningrader Historikers Andreev von ‚westlicher‘ Seite, hier Gschnitzer 1991, 201, als „ein wohldurchdachtes Bild von den Grundlagen der politischen und sozialen Ordnung bei Homer“ gelobt wurden, während die marxistische Geschichtsauffassung, der auch Andreev verpflichtet ist, im allgemeinen bekanntlich keine Zustimmung erfährt.

⁴⁷ Zu den Begriffen Gschnitzer 1991, 195-198, der selbst in Anspruch nimmt, den

Auf die Zugrundelegung eines Staatsbegriffs verzichten beide Forschungsrichtungen, sowohl die „primitivistische“, für die Finley steht, als auch die gegenteilige „institutionenbejahende“, für die hier Gschnitzer zitiert wurde. Hingegen beziehen sich beide auf die *klassische* Polis als Maßstab für ihre Einordnung. So bestreitet Finley, daß es in der „Welt des Odysseus“ auch „nur die Spur einer Polis im klassischen Sinne“ gegeben habe, also des Stadtstaates mit seiner genuin „politischen Organisationsform“ und seiner typischen Struktur.⁴⁸ Gschnitzer hingegen bemerkt zu den oben zitierten Versen *Il.* 9, 63f.: „Die ganze Wendung ist, trotz der etwas anderen Sprache, aus den Institutionen, dem Denken und der Praxis der klassischen Polis ohne weiteres verständlich, gänzlich unverständlich dagegen für jeden, der in der Ilias nur ‚vorstaatliche‘ oder ‚vorrechtliche‘ Zustände sieht.“⁴⁹ Hölkeskamp konstatiert diese Polarisierung der Forschungsrichtungen korrekt: Beide gingen „von der gleichen Grundvoraussetzung aus – nämlich einem festen, idealtypischen Konzept des ‚klassischen Stadtstaates‘, an dem sie die ‚homerische Polis‘ messen“.⁵⁰ Hölkeskamp meint, die Polarisierung dadurch überwinden zu können, daß er, anhand der Analyse der homerischen *agora*, einen Mittelweg einschlägt: In der *agora* gewinne die Gemeinschaft „auch bereits eine zumindest rudimentäre Identität als ‚politische‘ Institution der Beratung und Entscheidung“, die dann eben eine spezifische oder besondere Staatlichkeit ausmache.⁵¹ Der Mittelweg besteht also einfach darin, die Polis einerseits von der späteren Stadtstaatlichkeit abzuheben (wie es Finley fordert), indem sie nur als *rudimentär* politische Institution eingestuft wird, ihr aber andererseits die Anlage zur oder den *Kern* der späteren Stadtstaatlichkeit (die Gschnitzer als gegeben sieht) zuzusprechen. „Schon die Versammlungen Homers enthalten also jenes Entwicklungspotential, das die

Ausdruck ‚homerischer Staat‘ „mit vollem Bedacht“ zu gebrauchen (S. 198); zur allgemeinen Ordnung ebd. 200; zur Öffentlichkeit vgl. besonders Hölkeskamp 1997, 9, 14; ders. 2003, passim; ders. 2010, 90.

⁴⁸ Finley 1979, 31, zitiert und paraphrasiert bei Hölkeskamp 1997, 1.

⁴⁹ Gschnitzer 1991, 196.

⁵⁰ Hölkeskamp 1997, 4. In A. 16 verweist er auf Ansätze anderer Autoren zur Überwindung des Gegensatzes.

⁵¹ Hölkeskamp 1997, 14; ders. 2003, 87.

spezifische ‚Stadtstaatlichkeit‘ der klassischen Polis prägen sollte“.⁵² Die Reduzierung der (Gschnitzerschen) Stadtstaatlichkeit auf eine *potentielle* Stadtstaatlichkeit (in Richtung Finley) ist jedoch eine rein quantitative Änderung der Perspektive und bleibt offenkundig dem angeblich aufgegebenen Maßstab der klassischen Polis ebenso verhaftet wie es bei den beiden kritisierten Antipoden der Fall ist.⁵³ Was dagegen auch bei Hölkeskamp fehlt, ist ein qualitativer, unabhängig von der spezifischen Form der klassischen Polis gewonnener Staatsbegriff (s. Teil I). Das gilt genauso für weitere Positionen, die sich, wie schon Gschnitzer in seinem Forschungsbericht von 1991 am Rande erwähnt, „zwischen den Fronten“, also zwischen den beiden von ihm analysierten Polen bewegen.⁵⁴ Man hat den Eindruck, daß gerade auch die jüngsten Arbeiten es zu vermeiden suchen, eindeutige begriffliche Einordnungen vorzunehmen. So konstatiert Meister einerseits: „Die Autoritätsstruktur gleicht eher der einer *big man* – Gesellschaft“ (zu dieser Begrifflichkeit s. unten), hält es andererseits aber für „irreführend, von einer ‚vorstaatlichen Gemeindeordnung‘ zu sprechen“ – was doch bedeuten würde, daß wir es mit einer staatlichen Ordnung zu tun hätten. Zwar erscheint ihm „‚Herrschaft‘ wenig institutionalisiert beziehungsweise Herrschaftsrollen nur in Ansätzen ausgeprägt“ – gewisse Herrschaftsrollen wären also anzuerkennen-, und „ob sich hinter den homerischen *basileis* ein tatsächlich zu rekonstruierendes politisches System verbirgt, wage ich zu bezweifeln“ (S. 84). Aber die Herolde als Funktionsträger der Gemeinde, „spezielle Priesterämter“, „eine feste Bestuhlung“ – gemeint ist der Ehrensitz für Odysseus bzw. Telemach (*Od.* 2, 14) – auf der Agora von Ithaka und die materiellen Ehrungen des Demos für einzelne „deuten alle auf eine recht weitgehende Institutionalisierung hin“.⁵⁵ „Eher“ *big man*-Gesellschaft, „wenig institutionalisiert“, „weitgehende In-

⁵² Hölkeskamp 1997, 14.

⁵³ Vgl. auch Hölkeskamp 2010, 90: Es würden bei Homer auch „formellere Zusammenkünfte (*agorai*)“ des Demos geschildert, „die schon wesentliche Elemente der Volksversammlung der klassischen Polis aufweisen.“

⁵⁴ Gschnitzer 1991, 203 A. 69.

⁵⁵ Meister 2020, 76-85, die Zitate 82 und 84f.; von *basileis* als *big men* ist auch auf S. 78 die Rede. Dem Herrschaftsbegriff Max Webers entspreche die homerische Gesellschaft nicht (S. 81), ein anderer wird jedoch nicht angeboten. Ähnlich diffus bleibt in mancher Hinsicht die Arbeit von Fraß 2018, auf die wir weiter unten wieder zurückkommen.

stitutionalisierung“, keine Vorstaatlichkeit, Herrschaftsrollen in Ansätzen, „schwache Herrschaftsstrukturen“, kein politisches System: viele Widersprüche, keine Festlegungen. Vielleicht scheut sich der Autor, anderen Positionen direkt zu widersprechen, vielleicht will er allen ein bißchen zustimmen, vielleicht ist er sich auch selbst unsicher. Erkenntnisse werden auf diese Weise jedenfalls nicht erreicht.

Manche Forscher sehen also insbesondere die Volksversammlung, andere alle drei Instanzen, das sind Oberbasileus, Rat und Volksversammlung, gleichzeitig als Inhaber der unter ihnen aufgeteilten Staatsgewalt an.⁵⁶ Alle diese Konstruktionen einer homerischen „Staatsordnung“ oder „Verfassung“ wurden im Vorstehenden zurückgewiesen. Stattdessen ergab sich auf der Basis des in Teil I entwickelten Staatsbegriffs, daß in den homerischen Epen keine Hinweise auf eine staatliche Struktur oder auf einzelne staatliche Elemente zu finden sind. Die Texte kennen keine institutionalisierten Entscheidungsgremien, keine Ämter mit festen Regeln, keine Heerespflicht, keine (verpflichtende) Rechtsprechung, keine festgelegten Steuern, also nichts, was auf eine allgemeine Gewalt hindeuten würde, der alle Polismitglieder unterworfen wären. Da die Staatsgewalt fehlt, ist das entscheidende Kriterium für die Existenz eines Staates nicht erfüllt. An dem Befund ändert es nichts, daß die beiden anderen Kriterien, die nach der Drei-Elemente-Lehre für einen Staat notwendig sind, nämlich das Staatsgebiet und das Staatsvolk, jeweils ohne den Bestandteil ‚Staats-‘ durchaus gegeben sind: Die homerischen Gemeinschaften bewohnen ein abgegrenztes Territorium, und die freien Bewohner eines solchen Gebiets bilden ein Volk, einen Demos, von dem auch ohne die Existenz eines formalen Bürgerrechts alle wissen, wer Mitglied dieser Gemeinschaft und wer Fremder (*xenos*) ist.⁵⁷

2. Der positive Befund: Die „Häuptlingsstruktur“

Im vorigen Abschnitt wurde dafür plädiert, die homerische Gesellschaft nicht als Staat, also als nichtstaatlich oder vorstaatlich

⁵⁶ Sehr deutlich ist die „Gewaltenteilung“ formuliert von Cantarella 1979, 112.

⁵⁷ Die beiden Elemente des Gebiets und des Volks spielen in der Forschungsdiskussion um den Charakter der homerischen Gesellschaft bezeichnenderweise auch keine Rolle. Auch ohne begriffliche Rückversicherung konzentrieren sich die meisten Autoren auf Phänomene, die dem Bereich der Staatsgewalt zuzuweisen sind.

einzustufen. Indem die Staatlichkeit der homerischen Gesellschaft abgelehnt wird, ist zunächst ein negatives Ergebnis gewonnen. Gleichzeitig stellt sich jedoch die Aufgabe, positiv anzugeben, wie diese Gemeinschaften, die uns im Epos begegnen, zu charakterisieren sind. Ein guter Teil der Charakteristik ergibt sich bereits aus der Argumentation gegen die Staatlichkeit, weil dabei schon immer für die einzelnen Phänomene ein Gegenbild vor Augen steht, das teils explizit angesprochen, teils implizit mitgedacht wird. Da es jedoch in unserem „negierenden“ ersten Abschnitt nicht systematisch entwickelt wurde, soll es hier zusammenhängend vorgetragen und forschungsgeschichtlich eingeordnet werden.

Der an der Spitze der Polis stehende *basileus*, der eben nicht als „König“ gelten kann, wurde bisher behelfsmäßig als *der basileus* oder Oberbasileus bezeichnet. Seine Aufgabe und gleichzeitig sein Privileg bestehen in der Leitung der Polis, die er nicht nach seinem persönlichen Willen, sondern nach den hergebrachten Bräuchen der Gemeinschaft auszuüben hatte. Die Form der Leitung, die wir bewußt weder Regierung noch Herrschaft nennen, besteht nicht in Befehlen, sondern in der Koordinierung der Abläufe und in der Konsensfindung mit den beiden anderen Gruppen von öffentlichen Akteuren, den weiteren *basileis* und dem Demos. Für seine Leistungen, die der Oberbasileus für die Gemeinde erbringt und zu denen auch die Anführerschaft im Kriegsfall gehört, kann er vom Demos als materielle Anerkennung ein Ehrengeschenk, ein *geras*, erhalten, im Normalfall ein Stück Land. Zusammen mit dem Oberbasileus bilden die weiteren *basileis* die Elite der Gemeinde. Sie sind aus dem übrigen Volk hervorgehoben durch ihren Wohlstand, der vor allem in überdurchschnittlichem Landbesitz und daraus resultierenden Erträgen besteht. Die *basileis* treten unter Leitung des Oberbasileus zusammen, beraten und suchen einen Konsens in den Angelegenheiten der Polis. Das Ergebnis der Beratungen wird im allgemeinen vom Oberbasileus ausgeführt. Alle *basileis* nehmen auch an der Volksversammlung teil, die wiederum vom Oberbasileus geleitet wird und entweder von ihm oder einem anderen *basileus* einberufen wird. Der versammelte Demos ist vor allem passiver Zuhörer. Er nimmt zur Kenntnis, was ihm seine Anführer mitteilen, kann aber gegebenenfalls informell Zustimmung oder Ablehnung zum Ausdruck bringen. Die *basileis*

suchen normalerweise auch den Konsens des Volkes zu gewinnen.

Mit welchen Termini können wir die hier skizzierten Positionen, insbesondere die „Prominenzrollen“⁵⁸ bezeichnen, wie könnten die oft belassenen griechischen Ausdrücke „übersetzt“ und gleichzeitig ein Stück weit selbsterklärend wiedergegeben werden? In meiner 1983 erschienenen Dissertation, in der ich die Ablehnung eines homerischen Staates vor allem durch den Nachweis begründe, daß der Oberbasileus nicht als König im allgemeinen Verständnis eines Monarchen (eines Alleinherrschers in einem Staat) anzusehen ist, führe ich für diesen *primus inter pares*, als der er zu Recht oft beschrieben wird, den Begriff ‚Häuptling‘ ein. Das Wort habe ich durchaus mit einer gewissen Naivität verwendet, ohne Rückversicherung in einschlägiger Forschungsliteratur; es standen mir dabei die Häuptlinge der nordamerikanischen Indianerstämme vor Augen, wie sie in der Jugendliteratur vielfach vorstellig gemacht werden.⁵⁹ Bei der Einordnung in wissenschaftlich fundierte Darstellungen ist zunächst zu bedenken, daß unter ‚Indianern‘ eine Vielzahl von gesellschaftlichen Einheiten mit unterschiedlichen Einzelkulturen verstanden wird, die den amerikanischen Kontinent von der Subarktis im Norden bis nach Brasilien im Süden besiedelten. Von all diesen hat spezifisch die Bisonjäger-Kultur der großen Ebenen (plains) in der geographischen Mitte Nordamerikas Eingang in die europäische Populärliteratur gefunden und ist dadurch „zum Inbegriff des nordamerikanischen Indianertums schlechthin“ geworden.⁶⁰ Indianische Führungsfiguren im Abwehrkampf gegen die europäischen Kolonisten wie Sitting Bull oder Crazy Horse wurden dabei zu Ikonen einer idealisierten indigenen Welt erhoben. Trotz dieses verzerrten Blickwinkels ist es nicht abwegig, mögliche Vergleiche gerade an solche relativ bekann-

⁵⁸ Der Luhmannsche Begriff ist in der Alten Geschichte besonders von G. Seelentag in den Vordergrund gerückt worden, vgl. den Titel von Seelentag 2009. Zum Begriff vgl. auch Hölkeskamp 2018, 32f. Ablehnend gegenüber seiner Verwendung in der frühgriechischen Geschichte Müller 2023, 19.

⁵⁹ Dabei ist der Begriff ‚Häuptling‘ vielfältig, als prägend jedoch kann gelten: „In der Frühphase des Kolonialismus wurde das Konzept *Häuptling* auf überseeische Oberhäupter in nicht staatlich organisierten Gesellschaften übertragen“, so <https://de.wikipedia.org/wiki/Häuptling>, abgerufen am 5.5. 2025.

⁶⁰ Lindig / Münzel 1992, 141. Ein Hauptanliegen dieses Werks besteht erklärtermaßen (S. 11) darin, die Vielfalt der indianischen Kulturen zu vermitteln.

ten indianischen Strukturen anzuknüpfen. Denn die genannten und weitere Protagonisten der Indianerkriege verkörpern letztlich den Typus eines Häuptlings oder chiefs, von dem unser Vergleich ausgeht. Abgesehen von den erheblichen Unterschieden in der Lebensweise der homerischen wie der indianischen Gesellschaft, bedingt nicht zuletzt durch die Verschiedenheit der jeweiligen Ökosysteme, besteht eine Ähnlichkeit in der Stellung des Anführers, die in beiden Fällen prekär, nicht strukturell abgesichert und nicht automatisch vererbbar war. Bei den meisten Indianerstämmen ergänzten sich Kriegs- und Friedenshäuptlinge in getrennter Funktion, manchmal traten noch zeremonielle Häuptlinge hinzu. Ähnlich wie der homerische *basileus* mußte sich der Indianerhäuptling „durch Erfolg bei der Jagd, durch Tapferkeit und Klugheit, durch Großzügigkeit und Rednergabe stets neu als Führer erweisen“.⁶¹ Und das galt nicht nur für die meisten Prärie- und Plainstämme, sondern, so fährt die zitierte Studie fort, für die Autorität indianischer Häuptlinge im allgemeinen, die recht schwach gewesen sei. Vielmehr lag die Leitung des Stammes im allgemeinen „in den Händen eines Stammesrates, der aus bewährten Männern bestand, die sich im Krieg und im Frieden ausgezeichnet hatten und hohes Ansehen genossen.“ Auch diese Räte stehen parallel zu jenen der homerischen Gesellschaft. Die Anzahl der Ratsmitglieder schwankte je nach Gemeinschaft und konnte bis zu 50 Männern betragen. Dabei kamen auch Räte mit zwölf Mitgliedern vor,⁶² die also sogar eine direkte Parallele zu den zwölf *basileis* bedeuten, die zusammen mit dem Oberbasileus Alkinoos den Rat der Phäaken bildeten.

⁶¹ Lindig/Münzel 1992, 163. Im Unterschied zu den nomadischen Plain-Stämmen bildete sich in manchen der meist sesshaften Präriestämmen ein stabileres „Häuptlingstum mit erblichen Zügen“ heraus (ebd.), ähnlich wie in den von M. Sahlins untersuchten pazifischen Gemeinschaften, von denen weiter unten die Rede sein wird. Ähnlich Arens / Braun 2008, 49: „Ein Häuptling verfügte kaum über Sanktionsmöglichkeiten und war daher auf den guten Willen der Stammesmitglieder angewiesen.“ Zur Einteilung der indianischen Gemeinschaften nach Größe und Organisationsgrad in Familien, Klans, *Bands* und Stämme vgl. ebd. 47-50. Auf die persönliche Autorität des Häuptlings bei zwei Indianergruppen verweist Service 1977, 82. Bereits Morgan 1877, 71, hat für die nordamerikanischen Irokesen-Stämme festgestellt: “the chiefs [bei Morgan der Anführer einer *gens*] ... were raised to office for personal bravery, for wisdom in affairs, or for eloquence in council.” Sie wurden gewählt und konnten auch wieder abgesetzt werden, ihre Funktion war nicht vererbbar.

⁶² Arens / Braun 2008, 49.

Unabhängig von und etwa zeitgleich zu meinen eigenen Überlegungen haben Wissenschaftler verschiedener Nationalität in den Beobachtungen der ethnologisch-anthropologischen Forschung zu Lebensweisen und Strukturen von primitiven,⁶³ meist außereuropäischen Gemeinschaften Parallelen zu den politischen Strukturen der homerischen Gesellschaft erblickt. Die meines Wissens früheste Arbeit mit dieser interdisziplinären Perspektive ist 1981 unter dem Titel „The Dynamics of the Homeric Society“ erschienen und von dem norwegischen Historiker B. Qviller verfaßt. Es folgen mehrere Artikel des amerikanischen Althistorikers W. Donlan, wobei für unsere Frage nach der Staatlichkeit der homerischen Gesellschaft derjenige von 1982 mit dem Titel „The Politics of Generosity in Homer“ einschlägig ist. Donlan stand nach eigenen Angaben mit Qviller in persönlichem Kontakt und hat, auch aufgrund von dessen eben genanntem Beitrag, seine Ansichten „modifiziert“ und so eine grundlegende Übereinstimmung mit Qviller hergestellt.⁶⁴ Im selben Jahr erschien der Artikel „Origins of State. The case of Archaic Greece“ des britischen Soziologen W.G. Runciman.

Gemeinsam ist allen drei Gelehrten, daß sie auf die Publikationen vor allem der amerikanischen Ethnologen bzw. Anthropologen M. Fried, M.D. Sahlins und E.R. Service zurückgriffen, die ab 1960 erschienen sind. Diese Studien fußten ihrerseits auf älteren Theorien der soziokulturellen Evolution, von denen insbesondere J.H. Stewart und L.A. White genannt werden.⁶⁵ Den Ethnologen geht es darum, die kulturanthropologischen Entwicklungsstufen der menschlichen Gemeinschaften zu analysieren. Die Stufen werden nach ihrem Komplexitätsgrad unterschieden, wobei der Staat die höchste Komplexitätsstufe darstellt. Auch wenn dabei meist recht vage Begriffe vom

⁶³ Zur Rechtfertigung dieses Begriffs vgl. etwa Dreher 2006, 44; Fraß 2018, 12f., s. auch die anthropologische Definition von Service, u. A. 68.

⁶⁴ Donlan 1982, 14 A. 14: Qviller's views ... have caused me to modify somewhat my earlier opinions on the Homeric chiefdom, so that we are now in essential agreement about the political structure of the Homeric world." Nach Fraß 2018, 14, war Donlan "einer der ersten", die das Modell auf die homerische Gesellschaft anwendeten. Qviller wird hier nicht genannt, obwohl er im Literaturverzeichnis aufgeführt ist.

⁶⁵ Zur Forschungsgeschichte der soziokulturellen Evolution vgl. den instruktiven Überblick bei Fraß 2018, 10-17. Über die genannten Autoren hinaus blickt Fraß bis auf deren Vorläufer im 19. Jahrhundert zurück.

Staat zugrundegelegt werden (dazu noch unten), kommen doch alle Untersuchungen zu dem Ergebnis, daß vor bzw. außerhalb der staatlich organisierten Gemeinschaften verschiedene Formen sozial-politischer Strukturen existieren, die sich nicht exakt voneinander abgrenzen lassen, von denen aber doch notgedrungen schematisierte Modelle erstellt werden können und müssen, um die Unterschiede zu verdeutlichen. Das Material der Modelle wird gewonnen aus ethnologisch-soziologischen Untersuchungen neuzeitlicher Gemeinschaften, die sich auf einer vorstaatlichen Entwicklungsstufe befinden, in Polynesien, Melanesien, Papua-Neuguinea, Südafrika, Uganda, Westafrika und Nordamerika. Service untersucht darüber hinaus auch alte Hochkulturen, nämlich die „archaischen Zivilisationen“ in Mesoamerika, Peru, Mesopotamien, Ägypten, im Indus und in China. Die frühen Gemeinschaften der klassischen Antike sind nicht einbezogen.

Fried unterscheidet zwischen einer 'egalitarian society' (die von anderen akephale oder segmentäre Gesellschaft genannt wird), einer 'ranked society' und einer 'stratified society'.⁶⁶ Das ursprüngliche Modell von Service hat ebenfalls drei vorstaatliche Stufen, nämlich 'band', 'tribe' und 'chiefdom'.⁶⁷ Später spricht Service, ähnlich wie Fried, von der einfachsten menschlichen Gemeinschaftsform als 'egalitärer' oder 'egalitär-segmentaler' Gesellschaft.⁶⁸ Die komplexeste Gemeinschaft ist dann der Staat, den Service versteht als „eine auf repressiver Gewalt basierende politische Organisation“, oder als „(politische) Herrschaft“, „als Institut einer Bürokratie, die kraft ihrer Autorität eine Bevölkerung beherrscht“.⁶⁹ Service ist es nun ein zentrales Anliegen hervorzuheben, daß „es auf der ganzen Welt in

⁶⁶ Fried 1960; ders. 1967; vgl. Ulf 1990, 219f.

⁶⁷ Service 1964; vgl. Fraß 2018, 14.

⁶⁸ Er verwendet für diese Gesellschaft auch das Wort 'primitiv', das er als 'einfach', 'früh', 'ursprünglich', 'primär' definiert: Service 1977, 26, und so, ohne abwertenden Sinn, soll es auch hier verwendet sein, vgl. o. A. 63. Das Modell von Service wird auch aufgenommen von Wright 1977, der seinerseits die Staatsentstehungen in Mesopotamien und Mittelamerika erforscht hat.

⁶⁹ Service 1977, 33. Indem sie den Gewaltcharakter des Staates betonen, haben Fried und andere Anthropologen ein wesentliches Element des Staates benannt (s. Teil I). Weitere Charakteristika des Staates sind bei Fried teils treffend, teils zu unspezifisch beschrieben.

unterschiedlich entwickelter Ausprägung Häuptlingstümer gab, von denen feststehen dürfte, daß sie sich allmählich aus egalitären Gesellschaften herausbildeten und die Vorstufe der bekanntesten primitiven Staaten waren“. Allgemeine Kennzeichen dieser Häuptlingstümer im Unterschied zur egalitären Gesellschaft seien, daß sie eine „hierarchische Autoritätsstruktur“ entwickelten, die als „zentrale Lenkungsinstanz“ fungiere, und daß sie „erbliche Statusvorkehrungen“ träfen. Auf der anderen Seite verfügten sie nicht über einen „formal-rechtlichen Apparat gewaltsamer Repression“.⁷⁰ Service stellt eine Reihe von Fallstudien zusammen, wobei in Teil II „moderne primitive Staaten“ in Afrika, Nordamerika⁷¹ und Polynesien, in Teil III „Die archaischen Zivilisationen“ in Mesoamerika, Peru, Mesopotamien, Ägypten, dem Indus und China vorgestellt werden. Sahlins geht es darum, die Bandbreite vorstaatlicher Gesellschaften vorzustellen. Bei seinen Studien auf den süd- und ostpazifischen Inseln hat er im westlichen Melanesien die einfachsten Gemeinschaftsstrukturen vorgefunden: kleine Stämme („tribes“) von 70-100 Personen, die aus politisch nicht integrierten Segmenten bestehen, also segmental sind. Für ihre Anführer prägte Sahlins den Terminus „big-man“ und meint damit einen Mann, der die anderen Stammesgenossen an wirtschaftlicher Tüchtigkeit, persönlicher Ausstrahlung, vielleicht auch militärischer Kraft übertrifft und dadurch eine Reihe von (meist verwandten) Anhängern um sich scharen kann. Diese Gruppe („faction“) kann er

⁷⁰ Alle Zitate ebd. 40. Service gilt als derjenige, welcher den Begriff des *chief* in die akademische Diskussion eingeführt hat, indem er ihn erstmals präzise definierte. Allerdings hat der Terminus bereits eine lange Tradition und wurde in vielen (wissenschaftlichen und nichtwissenschaftlichen) ethnologischen Texten des 18. und 19. Jahrhunderts verwendet, etwa von Morgan 1877, an welchen die neo-evolutionäre Theorie bekanntlich anknüpft. Allerdings wird der Begriff von Morgan in seine Vorstellung einer ubiquitären Gentilgesellschaft eingebunden. So sieht er den chief sowohl bei den Irokesen (S. 114) als auch bei den Griechen (S. 216) als Anführer einer *gens*. Den Terminus ‚chief‘ setzt er mit dem griechischen *archon* gleich (S. 225), nicht mit dem *basileus*, den er als späteren „military commander“ versteht. Es sei noch darauf verwiesen, daß ebenso wie beim Staatsbegriff in der Forschungsliteratur durchaus Variationen bei der Definition von chiefdoms bestehen, die hier nicht ausführlich berücksichtigt werden können; vgl. etwa Scheidel 2013, 10.

⁷¹ Kapitel 9 befaßt sich mit den Cherokee-Indianern im südöstlichen Waldland Nordamerikas, für die der Autor in der Zeit vor 1730 ähnliche Strukturen wie die oben zitierte Literatur zu den Indianern feststellt. Service ist damit der einzige von mir konsultierte „Evolutionist“, bei dem Indianergesellschaften eine Rolle spielen.

kommandieren, mit den Führern der anderen factions muß er sich jedoch arrangieren und sie immer wieder überzeugen. Die komplexesten Gemeinschaftsstrukturen hingegen hat Sahlins im östlichen Polynesien vorgefunden, wo die Gemeinschaften viel größer sind und bis zu zehntausend oder sogar mehrere zehntausend Menschen umfassen. Sie sind „pyramidal“, also hierarchisch und suprapersonal strukturiert. Ihre Anführer sind auch big-men, insofern sie eine sozial herausgehobene Stellung einnehmen, aber die Qualitäten, die in Melanesien von der jeweiligen Person immer wieder nachgewiesen werden müssen, werden in Polynesien dem Amt zugeschrieben. Als „true office and title holders“ üben sie Autorität über permanent stabile Gruppen aus. Den obersten Anführer bezeichnet Sahlins daher als „pivotal paramount chief“, die nachgeordneten Anführer als „chieftains“. Während der melanesische big-man nur persönliche Macht in die Waagschale werfen kann, beansprucht der polynesischer Häuptling „an incontestable right of rule“.⁷² Diese Formulierung sowie der Verweis auf die fortgeschrittensten Gemeinschaften in Tahiti oder Hawaii, in denen der „high chief“ auch über physische Macht in Form einer bewaffneten Einsatztruppe verfügt, die ihm die Herrschaft („mastery“) über die sozial niedrigeren Gemeinschaftsmitglieder verleiht, weisen diese Gemeinschaften, jedenfalls in unserer Terminologie (s. Teil I), als staatliche Gebilde aus. Sahlins hingegen gibt keine Definition des Staates und grenzt das Häuptlingstum in diesem Zusammenhang nicht vom Staat ab, wie er überhaupt wenig Interesse an der Entwicklungsstufe des Staates zeigt.

An den eben vorgestellten anthropologisch-ethnologischen Studien waren für die davor benannten Altertumsforscher zwei Elemente als Parallelen zur homerischen Gesellschaft interessant: erstens die (negative) Parallele der Nichtstaatlichkeit, die sie auch in der frühen griechischen Gesellschaft erkannten, und zweitens die (positive) Parallele einer politischen Struktur, an der vor allem die Position und Funktion der Anführer in den Blick genommen wird.⁷³

⁷² Sahlins 1963, passim. Zum genauen Autoritätsverhältnis des paramount chief zu den chieftains äußert sich Sahlins nicht.

⁷³ Das liegt nahe, da, wie Ulf bemerkt, „Unterhalb der Basilees ... institutionell abgesicherte Abstufungen in der Hierarchie sozialer Geltung nicht recht auszumachen“ seien: Ulf 1990, 230. Die Nichtstaatlichkeit, die prekäre Stellung eines chief und weitere

Die von den Anthropologen als 'big men' und 'chiefs' bezeichneten Leitungspersonen wurden so auch zu Namensgebern mit Modellcharakter für die homerische Gesellschaft. Wie wir gesehen haben, bezeichnen die beiden Funktionen unterschiedliche Komplexitätsstufen in den anthropologischen Modellen, und je nachdem, welcher Stufe die homerische Welt zugeordnet wird, sprechen die Historiker von einer big-man-Gesellschaft oder von einer Häuptlingsgesellschaft, wobei durchaus auch fließende Übergänge konstatiert werden.⁷⁴

Für Qviller erlauben es einige Charakteristika des homerischen „Königtums“, den „*chief basileus*“ mit der big-man-Struktur der Ethnologie parallel zu setzen. Beide hätten die gleiche ökonomische Basis, nämlich Raubzüge und Eigenproduktion. Beide Positionen beruhten auf persönlicher, vor allem wirtschaftlicher Stärke, seien aber gegenüber den weiteren Aristokraten schwach, da sie beständiger Bestätigung bedürften.⁷⁵ Diese erfolge vor allem durch die Gabe von Geschenken (redistribution), wodurch „König“ und big-man sich eine um ihren *oikos* gruppierte Anhängerschaft verschafften, die sie außerdem zur Gefolgschaftsleistung immer wieder überzeugen mußten. Die Position des homerischen *basileus* sei zwar nicht institutionell verankert, dennoch verfüge er über mehr Macht als ein big-man, dessen Zwangsgewalt rudimentär und schwach bleibe. Der big-man arbeite selbst härter als die übrigen Gesellschaftsmitglieder, der *basileus* hingegen arbeite nur teilweise selbst. Der Unterschied zwischen beiden ergebe sich aber vor allem aus der Bedeutung des Geschenkegebens, bei der der big-man nur bewegliche Güter, der *basileus* jedoch auch Land verschenken könne. Aus diesen Gründen,

Parallelen zwischen den Irokesenstämmen und den griechischen Gemeinschaften hat bereits Morgan 1877, bes. 65-67. 222, hervorgehoben.

⁷⁴Nach Sahlins 1963, 289, ist ein chief auch ein big-man, beansprucht aber „an incontestable right of rule“. Nach Service 1977, 108, kann ein big-man einem „embryonalen Häuptling“ ähnlich sein.

⁷⁵ Qviller 1981, 115: „There existed no depersonalized, institutionalized, royal officialdom in Dark Age Greece.“ Qviller bezeichnet daher den „king“ als „a misleading translation“ (S. 109). Er hält aber in dem ganzen Artikel nicht nur an dem Begriff fest (S. 117 spricht er sogar vom „ruler“), sondern betrachtet dieses Königtum als eine Art von eigenständiger politischer Entwicklungsstufe, das mit der Entstehung der Polis (dazu unten) einem aristokratischen Regime Platz machen mußte: „The kings and communities thus (i. e. mit der Landvergabe) created an aristocratic order ready to rule, while the kings disappeared in the same process.“ (S. 134).

die jedoch nicht stringent dargelegt sind, will Qviller den *basileus* zwischen big-man und chieftain plazieren.⁷⁶ Die Vorstaatlichkeit der homerischen Gesellschaft ist bei Qviller eher implizit (vgl. S. 110) als explizit angenommen. Nach Donlan zeigt ein Vergleich der homerischen Gesellschaft mit den anthropologischen Modellen generell und in vielen Details Ähnlichkeit mit dem Typus des *chiefdom*, das auch er als Zwischenform zwischen einer „egalitarian, unranked society and the stratified state“ sieht. Das homerische Häuptlingstum präzisiert er noch näher als „a ‘low-level’ or ‘immature’ chiefdom, because it has elements of a less centrally organized, more segmental, and more egalitarian form than the advanced chiefdom“ (S. 3), an späterer Stelle (S. 10) wird es auch „primitive chiefdom“ genannt. Eine solche Abstufung zwischen unterschiedlich komplexen Formen des Häuptlingstums hat auch Sahlins vorgenommen (s. o.), auf den Donlan an dieser Stelle nicht, an anderen Stellen aber schon Bezug nimmt. Der Oberbasileus, dessen Position auch hier die politische Einordnung der Gesellschaft bestimmt, war auch nach Donlan zwar ein „paramount chief“, aber kein Autokrat, sondern *primus inter pares* in einer instabilen Position. Der Autor will in seinem Artikel zeigen, daß die Großzügigkeit („generosity“) eine zentrale Komponente homerischer Führerschaft ist und sieht das als Bestätigung, daß die Gesellschaft der Epen „closely resembles living examples of inchoate or low-level chiefdoms observed by anthropologists in the field“. Sie sei „something more than a big-man system, something less than a stable and orderly advanced chiefdom“ gewesen.⁷⁷ Runciman schließlich versteht den homerischen *basileus* ebenfalls nicht als einen herrschenden Monarchen, sondern als jemanden, der seine

⁷⁶ Qviller 1981, 109: „...in evolutionary terms, *basileus* here denotes a leader emerging from a big-man developing into a chieftain.“ Vgl. das Referat zu Qviller bei Gschnitzer 1991, 189f. Wenn Gschnitzer meint, ein römischer Konsul oder ein Ministerpräsident in einer Koalitionsregierung müsse ebenfalls Überzeugungsarbeit leisten, und damit sei der vorstaatliche Charakter des homerischen Basileus widerlegt, so geht sein Einwand insofern an der Sache vorbei, als die Überzeugungstätigkeit des Konsuls und des Ministerpräsidenten einen gegebenenfalls auch zwangsweise durchzusetzenden Beschluß des entscheidenden Gremiums (des Senats bzw. des Parlaments) zur Folge hat, also staatliches Handeln herbeiführt, während die Überzeugungstätigkeit des *basileus* kein staatliches Handeln auslöst.

⁷⁷ Donlan 1982, 10.

Position durch persönliche Tüchtigkeit erwerben muß. Der *basileus* entspreche daher, nach Sahlins Unterscheidung, eher dem big-man als dem chief, und die Gemeinschaften der homerischen Epen seien angesichts einer fehlenden permanenten Zentralregierung nicht als Staaten anzusehen.⁷⁸

Einige Jahre nach der angelsächsischen Annäherung an die anthropologisch-ethnologische Forschung führte C. Ulf deren Modelle in die deutschsprachige Althistorie ein. Ulf widerspricht der oft als „primitivistisch“ bezeichneten Sicht Finleys und diesem folgender Autoren, in welcher sich „die homerische Welt als ein nur sehr loser Konnex segmentärer Deszendenzgruppen“ präsentiere (S. 223). Nachdrücklicher als die angelsächsischen Kollegen verweist er auf die Position der *basileis*, also der mehrzähligen Oberhäupter von Deszendenzgruppen, über die ihre Macht jedoch schon hinausreiche (und die von Sahlins „chieftains“ genannt werden). Ihr sozialer Status sei prekär, „individuelle Schwäche kann diese Anführer aus ihrer Position wieder verschwinden lassen“. „Sie lassen sich daher als big-men interpretieren“, die durch persönlichen Einsatz und Leistungsstärke Einfluß gewonnen hätten. Dies finde eine „direkte Entsprechung in der Charakteristik einfacher Häuptlinge“.⁷⁹ Über die einzelnen Deszendenzgruppen hinweg bestehe ein „Demos-Bewußtsein“, die Anerkennung einer Gemeinsamkeit, die „ihren Kulminationspunkt in der Respektierung eines Oberbasileus“ finde. Dieser Respekt schlage sich in den Vorrechten nieder, die dem *basileus* für seine Organisation der Gemeinschaftsangelegenheiten gewährt würden, besonders in der materiellen Besserstellung des *basileus* durch die Zuweisung von Ehrengeschenken, von *temenos* und *geras*. Der

⁷⁸ Runciman 1982, bes. 355f. Der Autor nennt diese Stufe der Nicht-Staatlichkeit (dennoch und leicht mißverständlich) semistate (daher von Lundgreen 2020, 165 A. 22, verständlicher Weise, aber falsch als „prestate“ referiert), eine Stufe, die sich von einem protostate dadurch unterscheidet, daß sie nicht zur Bildung eines (wahren) Staates führe. Ulf 1990, 231 A. 37, unterschlägt Runcimans Ablehnung der Staatlichkeit und setzt dessen „Halbstaatlichkeit“ mit einer gering ausgeprägten Staatlichkeit gleich. Bei Fraß 2018 fehlt Runcimans wichtiger Beitrag. Wir kommen bei der Analyse der Staatsbildung auf Runcimans Bestimmung zurück.

⁷⁹ Ulf 1990, 224 mit A. 25, wo für das letzte Zitat auf eine Studie von Clastres über südamerikanische Indianerpopulationen verwiesen wird. Die ethnologischen Grundannahmen sind auch erläutert bei Ulf / Kistler 2020, 12-18. 153f. 194-197.

privilegierte Besitzstand des Oberbasileus sei von Dauer und nicht, wie beim big-man, darauf angelegt, durch Redistribution wieder eine Besitzgleichheit anzustreben. Damit sei die Position des Oberbasileus als ein „institutionalisiertes Element in der Gesellschaft“ anzusprechen, beziehungsweise, in etwas abgeschwächter Formulierung, als „sich hier abzeichnende, sich institutionalisierende, besonders den Oberbasileus betreffende Sonderstellung“ (S. 227). Wenngleich der Institutionen-Begriff grundsätzlich sehr weit gefaßt werden kann, so muß er in unserem Zusammenhang doch am ehesten als *staatliche* Einrichtung verstanden werden.⁸⁰ Seine Verwendung an den soeben zitierten Textstellen, sowie die Annahme eines „anscheinend institutionalisierte(s)n Rechtsverfahren(s)“ (S. 225) deutet also schon an, daß Ulf in diese Richtung denkt, und dieser Eindruck wird noch verstärkt, wenn er der Position des Oberbasileus „Züge eines Amtes“ zuschreibt und aus der „Respektierung eines Oberbasileus ... die keineswegs unbedingt bewußt vorhandene Absicht“ ersieht, „die existierenden segmentierenden Tendenzen so weit zu reduzieren, daß sich die politische Einheit zum Staat umprägen kann“.⁸¹ Sofern hier also teils in abgeschlossener („institutionalisiert“), teils in entstehender („sich institutionalisierend“) Form, teils als Realität („Züge eines Amtes“), teils als Möglichkeit („zum Staat umprägen kann“) staatliche Elemente angenommen werden, weise ich sie unter Bezug auf die Staatsdefinition in Teil I zurück, weil sie keine „allgemeine höchste Gewalt“ mit den dort erläuterten Implikationen ausmachen. Gänzlich anachronistisch ist der vorsichtige Schluß Ulfs, daß man in den Herolden, die den Oberbasileus begleiten, „vielleicht sogar den Ansatz zur Ausbildung einer Bürokratie erblicken“ dürfe (S. 227). Die geringfügigen Auftritte der Herolde in den homerischen Epen haben eben keinerlei Gemeinsamkeit mit den umfangreichen Verwaltungsapparaten späterer Staatsgebilde.⁸² Mit seinen Anspielungen auf Staatlichkeit, für die er jedoch keine präzisen Kriterien angibt, weicht Ulf die klare Abgrenzung auf, die seine oben genannten Vorgänger zwischen der homerischen Gesellschaft und dem Staat vorge-

⁸⁰ Vgl. Teil I, S.26f.

⁸¹ Ulf 1990, 225.

⁸² Vgl. Teil I, S. 17f. und 38 zu Max Weber, den Ulf hier nicht heranzieht.

nommen hatten.⁸³ Unterhalb dieser Schwelle zur Staatlichkeit stimmt er jedoch im wesentlichen mit Qviller, Donlan und Runciman darin überein, daß der Oberbasileus uns in den Epen als eine politische Führungsfigur entgegentritt, der gemäß den anthropologischen Modellen auf der Entwicklungsstufe zwischen big-man und chief einzuordnen wäre, so daß Ulf auch die Parallele zu „einfachen Häuptlingen“ zieht, ebenso wie Donlan von „primitive chiefdoms“ spricht. Dieser Zuordnung entspricht auch meine damalige Parallelisierung des homerischen Oberbasileus mit einem Indianerhäuptling.

Zahlreiche weitere Altertumswissenschaftler haben die anthropologisch-ethnologische Terminologie übernommen und sich dem „evolutionären“ oder „evolutionistischen“ Modell angenähert, das auch in der vorliegenden Studie zugrundegelegt wird. Nur einige von ihnen können hier noch Erwähnung finden.⁸⁴ J.M. Hall erkennt einige Parallelen zwischen Sahlins' big-men und homerischen *basileis* an. Aber mit Blick auf den in den Epen Homers und Hesiods mehrfach vorgetragenen Anspruch auf erbliche Nachfolge eines Basileus sieht er diese Anführer eher als chieftains denn als big-men. Allerdings geht er darin zu weit, daß er diesen chiefs „a formally constituted ... office“ zuweist, was damit übereinstimmt, daß er die homerische Zeit nicht als vorstaatlichen Zustand, sondern als eine Form von „primitive state“ auffaßt.⁸⁵ In seiner Arbeit zum archaischen Griechenland blickt Fraß auf die moderne Forschungsgeschichte zur Vorstellung einer so-

⁸³ Das wird ausdrücklich bestätigt bei Ulf / Kistler 2020, 17: „Chiefdoms, aber auch ausgeprägte Big Man-Gesellschaften überlappen sich in einigen Merkmalen mit einem Staat.“ Ebenda wird auch zu Staatsdefinitionen Stellung genommen, vgl. Teil I, S. 48 mit A. 112.

⁸⁴ Aus dem Rahmen fällt die Studie des Politologen Ferguson 1991, der als Vorstufe der Polis-Staaten pauschal chiefdoms voraussetzt. Dabei zeigt sich der Autor nicht immer auf der Höhe der altertumswissenschaftlichen Forschung. Der ganze Sammelband (Earle 1991) zeugt im übrigen davon, daß die evolutionäre Position auch in der (archäologischen) Anthropologie zu diesem Zeitpunkt noch dominierte. Vom Beiträger K. Kristiansen wird das gegenüber Kritikern auch ausdrücklich gerechtfertigt (S. 16). Inzwischen haben einige Anthropologen „post-neoevolutionary models“ entwickelt, vgl. Small 2009, der selbst das „dual-process-model“ anwendet. Da gerade letzteres eine reiche Datengrundlage benötigt (Small selbst untersucht die Polis Priene in hellenistisch-römischer Zeit), scheint es für die griechische Frühzeit wenig geeignet zu sein. Terrenato / Haggis 2011, 1, streben eine Überwindung der gegensätzlichen Positionen an.

⁸⁵ Hall 2014, 125f. bzw. 119.

ziokulturellen Evolution seit Charles Darwin zurück. Von den auch hier erwähnten Autoren würdigt er besonders E. Service und M.H. Sahlins.⁸⁶ Obwohl sich die Ethnologen für die Stufe der Staatlichkeit weniger interessiert hätten, könne man mit Hilfe dieser Modelle „die Eigenarten und Einzigartigkeiten der Staatlichkeit herausarbeiten“ (S. 16) Für die Anwendung des ethnologischen Staatsentwicklungsmodells auf die Antike, zu der er sich ausdrücklich bekennt, weiß er sich daher auf den Spuren der althistorischen Studien von Donlan, Ulf, Stahl und Walter.⁸⁷ Deutlicher als die meisten seiner Vorgänger betont Fraß jedoch, daß „die homerische und hesiodeische Welt“ eine „vorstaatliche Ordnung“ gewesen sei.⁸⁸

Auch in den archäologischen Befunden, die in der traditionellen Sicht eines homerischen, staatlichen Königtums nicht beachtet werden, findet das Modell einer big-man- / chief-Gesellschaft Rückhalt. Der bereits genannte J.M. Hall betrachtet „unstable“, das heißt nicht kontinuierlich bewohnte Siedlungen als Anzeichen für big-man-Gesellschaften. Konkreter sind seine Verweise auf herausgehobene Häuser: Das außergewöhnlich große Langhaus in Lefkandi „could have served as a feasting-hall and as a residence of the community’s ‘big-man’“. Größere Häuser in Nichoria (in Messenien) und Koukounaries (auf der Insel Paros) gelten ebenfalls als Wohnsitze eines big-man.⁸⁹ Alle von Hall genannten Gebäude wurden ab der zwei-

⁸⁶ Fraß 2018, 10-17

⁸⁷ Fraß 2018, 20 mit A. 69. Zu dem Modell bekennen sich u.a. auch Whitley 1991, 184; Walter 1993, passim; Stahl 2003, 148f.; De Angelis 2016, 146; Ma 2016, 654f. Bei Meister 2020, 81ff., bleibt die Einordnung der homerischen Welt als *big man*-Gesellschaft halbherzig und widersprüchlich, vgl. o. bei A. 55; gegen die Anwendung des Begriffs auf die homerische Gesellschaft äußert sich Rönnberg 2021, 31; aber er schließt aus den angeführten archäologischen Befunden in Attika auf eine „Festigung der Vorrangstellung der Eliten“ bzw. auf „eine zunehmende innerelitäre Konkurrenz und eine damit verbundene fortschreitende Verstetigung gesellschaftlicher Vorrangstellungen“ in der Zeit vom 9. bis 7. Jh. (S. 260).

⁸⁸ Ausgeführt ebd. 74-105, wobei allerdings eine ungenügende Staatsdefinition zugrunde liegt, s. Teil I, 33f. 54-56. Rönnberg 2021, 29, erkennt in den homerischen Epen einen „noch ‘vorstaatlichen’, aber gewissermaßen protopolitischen Zustand“, kurz darauf jedoch einen ausgesprochen geringen Grad an Staatlichkeit (S. 32).

⁸⁹ Hall 2014, 126. Hall scheint hier, ohne ihn zu nennen, Whitley 1991, 184-186, zu folgen, der den Lefkandi-Befund jedoch vorsichtiger interpretiert, die big-man-Phase auf das 11. / 10. Jahrhundert v. Chr. beschränkt und das Modell auch nicht für anwendbar auf alle instabilen Siedlungen der Dunklen Jahrhunderte hält.

ten Hälfte oder am Ende des 10. Jahrhunderts errichtet, Überschneidungen ihrer Nutzungsdauer mit der Entstehungszeit der kompletten Epen sind unsicher. C. Ulf und E. Kistler verweisen allerdings auch auf Ausgrabungsbefunde für die Zeit von 1050 bis zum Anfang des 7. Jahrhunderts in Mitrou (Ostlokris), Oropos (Nordattika), Zagora (auf der Insel Andros) und Eretria (auf Euböa). In den dortigen sogenannten Compounds („Weilern“, „Hausgesellschaften“) und Streusiedlungen wurden ebenfalls größere, meist apsidiale Wohnhäuser identifiziert, die als „Herrenhäuser“ oder „Sitz eines lokalen Anführers“ gedeutet werden.⁹⁰ Neben den Häusern werden auch reichere Gräber, die sich von gewöhnlichen Bestattungen abheben, als Belege für die Existenz von big men angeführt, zumal sie Analogien zu den bei Homer beschriebenen Grabformen erkennen lassen. Ab dem 10. Jahrhundert wurden einzelne Gräber besonders reichhaltig ausgestattet, und mit dem wirtschaftlichen Aufschwung nahm die Zahl solcher Gräber in der Folgezeit zu. Im 8. Jahrhundert kam hinzu, daß an einigen Gräbern Weihungen vorgenommen wurden, die eine kultische Verehrung des Bestatteten und damit wiederum seine herausgehobene Stellung erkennen lassen.⁹¹

Für sich genommen beschränken sich die Schlüsse von den genannten archäologischen Befunden auf eine gesellschaftliche Ordnung darauf, daß in den einfachen Siedlungen der geometrischen Zeit einzelne Personen zu ihren Lebzeiten (wegen größerer Häuser) und bei ihrer Bestattung (wegen reicherer Gräber) eine sozial höhere Position eingenommen haben als die übrigen Gesellschaftsmitglieder. Welcher Art diese Position war, ob politisch, kultisch oder militärisch, ob diese Personen also Macht über andere ausübten und sie in irgendeiner Form beherrschten, können uns die Befunde nicht mitteilen.⁹² Erkenntnisse darüber lassen sich nur schriftlichen Zeugnissen entnehmen, und diese kommen, wie gesehen, nur aus den frühgriechischen Epen. Immerhin können wir festhalten, daß die archäologi-

⁹⁰ Ulf / Kistler 2020, 38-42. 55-61 und 168-173.

⁹¹ Ulf 1990, 245f.

⁹² Es ist auch nicht entscheidbar, ob die ökonomisch herausgehobenen Männer eher als big men oder als chiefs einzuordnen sind, wie Meister 2020, 226, zu Recht anmerkt. Auf die Begrenztheit von Schlüssen aus archäologischen Zeugnissen auf gesellschaftliche Verhältnisse pochen u.a. Yoffee 2005, 15-21; mit Verweis auf Yoffee Fraß 2018, 16 mit A. 57. 106f mit Kritik an Kistler / Ulf in A. 445.

schen Befunde mit den ethnologischen Modellen, die für die homerische Gesellschaft herangezogen werden, gut vereinbar sind.

Zusätzlich ist die archaische griechische Gesellschaft noch mit einer Gemeinschaft verglichen worden, die geographisch weit von den Studienobjekten der Anthropologen und Ethnologen entfernt ist: den Goden im mittelalterlichen Island. Diesen Vergleich hat P. Zeller wieder in die altertumswissenschaftliche Forschung zur früharchaischen griechischen Gesellschaft einbezogen.⁹³ Zeller vertritt die in der Skandinavistik nicht unumstrittene Position, daß die Isländersagas als Quellen für die gesellschaftlichen Strukturen der isländischen Freistaatszeit (ca. 930 bis 1262/4 n. Chr.) herangezogen werden können.⁹⁴ Gestützt vor allem auf Darlegungen von J.V. Sigurðsson resümiert Zeller, daß es in dieser Zeit „keine systematische Rechtsordnung, keine Zentralgewalt und damit keine entsprechenden institutionellen Einrichtungen wie eine zentralisierte Verwaltung oder einen Erzwingungsstab“ gegeben habe. Auch wenn wir nicht alle diese Kriterien als notwendige Bedingungen für die Existenz eines Staates anerkennen (s. die Staatsdefinition in Teil I), so wird die isländische Gesellschaft an anderer Stelle doch auch von Zeller selbst als „stateless“ oder „acephalous society“ bezeichnet.⁹⁵ Wie für die homerische Gesellschaft der Basileus mit den weiteren *basileis*, so sind für die isländische Gesellschaft die Goden das wesentliche Merkmal, an denen der Vergleich daher überwiegend durchgeführt wird. Die Goden waren, so folgt Zeller wieder Sigurðsson, nach der kulturanthropologischen Typologie „eine Art *big men*“, da sie eine Anführerposition errangen, die sie aus den übrigen landwirtschaftlichen Produzenten zwar heraushob und ihnen gewisse Privilegien

⁹³ Gschnitzer 1991, 185, erwähnt diese Analogie zum Island der Sagazeit, gibt aber keine Literaturbelege dafür an.

⁹⁴ Das von vielen Homer-Forschern akzeptierte Ergebnis der oral-poetry-Forschung, daß die in den Epen beschriebenen gesellschaftlichen Verhältnisse nicht weiter als drei Generationen vom Zeitpunkt der Abfassung der Texte zurückliegen können, wird von Zeller für die Isländersagas nicht berücksichtigt; anscheinend sieht er kein Problem darin, daß die Sagas erst mehrere Jahrhunderten nach den beschriebenen Verhältnissen abgefaßt wurden (Zeller 2020b, 212).

⁹⁵ Zeller 2020a, 201f.; 2020b, 72. Zeller 2020b, 74, fügt an, Island habe nicht „im klassischen Sinn über staatliche Strukturen“ verfügt, definiert aber diesen Staat „im klassischen Sinn“ nicht.

verschaffte, die aber immer prekär und instabil blieb, da sie in keiner Weise institutionalisiert war.⁹⁶ Die Goden organisierten und leiteten die verschiedenen Formen von Versammlungen und fungierten als Vermittler, Berater oder Schlichter innerhalb ihres Einflußbereichs, eines territorial abgegrenzten Godentums, und innerhalb ihrer Anhängerenschaft, manchmal auch darüber hinaus. Auch ein Godentum konnte grundsätzlich vererbt werden, aber der Nachfolger mußte, wie ein *basileus*, seine Eignung unter Beweis stellen.

Wie oben referiert, bezeichnet Zeller in seiner Dissertation (Zeller 2020a) das mittelalterliche Island als „stateless“. In dem im gleichen Jahr erschienenen Artikel (Zeller 2020b) wiederholt er diese klare Zuordnung nicht, sondern wendet sich, gerade in Bezug auf die frühgriechischen Verhältnisse, gegen eine „statische Unterscheidung zwischen staatlicher und nicht-staatlicher Organisation als Analyseraster“.⁹⁷ Die Begründung dafür, sofern man ihrer allenfalls angedeuteten Argumentation überhaupt folgen kann, ist nicht überzeugend. Anscheinend sieht Zeller, sofern man Staatlichkeit und Nichtstaatlichkeit unterscheiden wolle, einen Widerspruch in den Quellenbefunden der homerischen Epen, die einerseits die Funktion und den Bestand der *basileis* und der Geronten als Gruppe nicht infrage stellten, aber andererseits die Position sämtlicher Anführer als zumindest potentiell instabil darstellten. Einen Widerspruch kann ich hier nicht erkennen, zumal Zeller an keiner Stelle zeigt, daß dessen erster Teil, die Position der Anführer als Gruppe, etwas mit Staatlichkeit zu tun haben könnte (diesen Bezug muß man ja wohl herstellen, um die Konstruktion zu verstehen) und im Gegensatz zur (nichtstaatlichen) Position der einzelnen Anführer steht. Im Unterschied zur abgelehnten Perspektive ließen sich die Quellenbefunde der Epen, so schließt Zeller den Gedanken ab, „aus der Perspektive des isländischen Modells hingegen ... als Elemente einer spezifischen Ordnungskonfiguration beschreiben“.⁹⁸ Weder schlägt der Autor einen spezifischen

⁹⁶ Auch den Institutionenbegriff verwendet Zeller widersprüchlich: Die frühe Stellung der Goden sei einerseits „wenig institutionalisiert“ gewesen (2020b, 203), habe aber andererseits „durchaus Züge eines institutionalisierten Amtes“ getragen, da es „potenziell auf Dauer gestellt und in ein System von sozialen Normen und Verfahren eingebunden“ gewesen sei (2020b, 207).

⁹⁷ Zeller 2020b, 209; ähnlich ders. 2013.

⁹⁸ Zeller 2020b, 208f.

Terminus für diese „spezifische Ordnungskonfiguration“ vor, noch erläutert er, warum dieselbe nicht auch durch die Analyse der homerischen Epen selbst erkannt werden könne, sondern das isländische Modell benötige. Mit der Ablehnung der Staatskategorie entfernt sich Zeller überdies von den anthropologisch-ethnologischen Modellen, für die, wie oben gezeigt, die Nichtstaatlichkeit der von ihnen untersuchten primitiven Gesellschaften ein wesentliches Merkmal darstellt. Der abstrakt erhobene Vorwurf, diese Unterscheidung sei „statisch“, läuft schon deshalb ins Leere, weil es ja gerade diese Theorien sind, die eine gewisse *Abfolge* der Gesellschaftsstrukturen, nicht zuletzt den Übergang von nichtstaatlichen zu staatlichen Strukturen, postulieren und daher zusammenfassend als „evolutionistisch“ bezeichnet werden. Es besteht daher der Verdacht, daß der Vorwurf, statisch zu verfahren, nur als modischer Allgemeinplatz verwendet wird, während vermeintlich dynamischere oder flexiblere Modelle für überlegen gehalten werden.⁹⁹

In diesem Abschnitt haben wir uns den einschlägigen Forschungen angeschlossen, die eine parallele Grundstruktur zwischen der homerischen Gesellschaft und zahlreichen primitiven Gemeinschaften in der modernen Welt sowie im mittelalterlichen Island konstatieren. Es handelt sich um nichtstaatliche oder vorstaatliche Gesellschaften, die insbesondere dadurch charakterisiert sind, daß die Position der führenden Personen als *big-men* oder *chiefs* bestimmt werden kann. Die homerische Gesellschaft wird innerhalb dieser Kategorie am besten als Gesellschaft im Übergang von einer *big-man-* in eine *Häuptlings-*gesellschaft verstanden. Auf dieser Basis stellt sich aber die Frage, der viele Autoren ausweichen: Welche Erkenntnis ist damit gewonnen? Daß in real existierenden Gemeinschaften der sogenannten Dritten Welt Gesellschaftsstrukturen empirisch nachzuweisen sind, die denen der homerischen Gesellschaft in vieler Hinsicht entsprechen, kann zunächst als weiteres Argument für die eingangs gesetzte Annahme gelten, daß auch die Gesellschaft der griechischen Epen

⁹⁹ Dazu gesellt sich der weitere Verdacht, daß Zeller die Position seiner Dissertation deshalb revidiert hat, um sie der weitgehend konsensualen Haltung des Sammelbandes Meister / Seelentag 2020 mit seiner Konzentration auf den Konkurrenz begriff, der in Teil I kritisiert wurde, anzupassen.

eine historische Realität besitzt.¹⁰⁰ Diese Annahme, die auch durch andere Argumente gestützt wird, ist in der Forschung immer wieder zugunsten der Vorstellung einer lediglich fiktiven, literarischen Gestaltung gesellschaftlicher Verhältnisse in Frage gestellt worden.¹⁰¹ Darüber hinaus können solche Vergleiche, sowohl der hier nachvollzogene wie auch ähnlich gelagerte, vor allem zwei Funktionen erfüllen: Erstens können die Parallelen der verglichenen Gesellschaften dazu beitragen, die jeweils andere deutlicher oder verständlicher zu beschreiben, nicht zuletzt dadurch, daß die einzelnen Phänomene aus unterschiedlichen wissenschaftlichen Perspektiven betrachtet und mit unterschiedlichen Begriffen vorgestellt werden. So war es hilfreich, daß die anthropologisch / ethnologischen Theorien die Begriffe big-man- und chieftdom-Gesellschaften entwickelt haben, die, wie gesehen, Eingang in zahlreiche Studien über die frühgriechische Gesellschaft gefunden haben, und deren zustimmende Übernahme unmittelbar klarstellt, welche Sichtweise der jeweilige Autor vertritt.¹⁰² Zweitens kann ein Vergleich dazu anregen zu fragen, ob bestimmte Phänomene einer Gesellschaft auch in den jeweiligen Vergleichsgesellschaften existieren oder nicht, und wenn ja, ob sie sich vollständig oder nur teilweise entsprechen. So kann die Aufmerksamkeit auf Details gelenkt werden, die ohne eine solche Anregung garnicht oder nur unzureichend erkannt worden wären.

Auf keinen Fall jedoch darf ein Phänomen, das für die eine Gesellschaft konstatiert wird, unbesehen auf die andere Seite des Vergleichs übertragen und für die andere Gesellschaft als ebenso gegeben angenommen werden. Vielmehr ist jeweils die Frage zu stellen, ob das Phänomen sich auch für die Vergleichsgesellschaft aus den für diese verfügbaren Zeugnissen belegen läßt; wenn nicht, muß die Parallelität entweder offen bleiben, oder es liegt eine abweichende Gegebenheit vor und die Parallelität ist in dieser Hinsicht nicht gegeben. Bis zu diesem Punkt dürfte über das soeben skizzierte methodi-

¹⁰⁰ S. o. bei A. 6. Die Bestätigung der Historizität der homerischen Institutionen nennt auch Donlan 1982, 2. Das Gesagte gilt auch für die zuletzt herangezogene Gesellschaft des mittelalterlichen Islands.

¹⁰¹ Die Historizität einer einheitlichen homerischen Gesellschaft in einer abgrenzbaren Zeit bestreitet vehement Snodgrass 1974, gefolgt etwa von Spahn 1977, 29; van Wees 1992, 261-263..

¹⁰² Vgl. Ulf 1990, IXf.

sche Verfahren ein weitgehender Konsens in der Forschung bestehen. Der Konsens stellt sich als nicht mehr so geschlossen dar, wenn wir die radikaler klingende, aber unausweichliche Konsequenz aus den genannten Regeln ziehen: Wenn wir eine bestimmte Gesellschaft analysieren, wie hier die homerische Gesellschaft, dann tragen alle Vergleiche mit anderen Gesellschaften und alle ins Spiel gebrachten Modelle für sich genommen rein garnichts zur Erkenntnis über unser Studienobjekt bei. Sie sind vielmehr nur aussagekräftig, wenn die hypothetisch angenommenen Parallelitäten für die homerische Gesellschaft eigenständig nachgewiesen werden können. Diese methodische Limitierung jeder Vergleichstätigkeit wird in der Forschungsliteratur zwar in der eigentlichen Vergleichsdurchführung meistens berücksichtigt, aber nicht nur so gut wie nie ausgesprochen, sondern auch durch grundsätzlich wertschätzende Urteile über die Nützlichkeit von Vergleichen und Modellen in Frage gestellt. Die Skala solcher generellen Einstufungen ist sehr breit und kann hier nur angedeutet werden. Sie reicht von vagen Andeutungen über den Mehrwert der jeweiligen Vergleiche bis zur Behauptung, sie könnten Strukturen der homerischen Gesellschaft *erklären*.¹⁰³ Wenn F. Gschnitzer in sei-

¹⁰³ Qviller 1981, 115: „To clarify my theory a model is needed which illuminates the problems that face primitive political leadership“: Die Notwendigkeit („needed“) wird von mir bestritten, die Möglichkeit der Illustration („illuminates“) akzeptiert. Ulf 1990, X, beansprucht, durch die Anwendung der ethnologischen Terminologie „die homerische Gesellschaft begrifflich neu zu fassen ... und wesentlich exakter in den Griff zu bekommen“. Fraß 2018, 15, charakterisiert die Position, der er sich auch selbst anschließt, so: „Zum anderen gibt es die Überzeugung, man könne etwa das ‚bigmen‘ Modell von Marshall D. Sahlins auf die Homerische Elite anwenden und so ihre Stellung in ihren Gemeinwesen besser erklären.“

Grote 2016a, 250, konstatiert zu Recht ein „Defizit vieler theoriegeleiteter Ansätze zur Erklärung der Polis“, weil sie „nicht selten *a priori*-Annahmen von der Existenz bestimmter Strukturen“ an historische Sachverhalte herantrügen. Unter diese Ansätze subsumiert er allerdings auch die „sozialanthropologischen Forschungen zur Entstehung von Staaten aus staatenlosen Gesellschaften“ (S. 249 mit Verweis auf Fried, Service und Cohen/Service). Zu Unrecht, denn wie gezeigt setzen diese auch von mir zustimmend herangezogenen Konzepte gerade keine *a priori* – Annahmen voraus, sondern haben ihre Kategorien, wie big men oder chief, aus der ethnologischen Analyse realer Gesellschaften gewonnen. Im Gegensatz dazu fällt Grotes Verdikt auf ihn selbst zurück, da er von der systemtheoretischen Begrifflichkeit Luhmanns (System. Komplexität, Verfahren) ausgeht (S. 253ff.) und beansprucht, mit deren Verwendung zur *Erklärung* des Phänomens der Polisbildung beitragen zu können (S. 250; ebenso

nem bereits mehrfach zitierten Forschungsüberblick schreibt: „Auch diese Forscher wissen natürlich, daß eine ihrer Natur nach so einseitige und in mancher Hinsicht auch unergiebigere Überlieferung wie die homerische nur mit Hilfe des Vergleichs mit verwandten oder ähnlichen, aber besser bekannten Verhältnissen zu vollem historischen Leben erweckt werden kann, ...“, dann schreibt er selbst solchen Vergleichen zum einen zusätzlichen Erkenntnisgewinn, zumindest eine Ergänzung von bei Homer fehlenden Informationen zu, was immer „zu vollem historischen Leben“ erwecken genau bedeuten mag. Daher kritisiert er zum anderen die von ihm nicht mit einem zusammenfassenden Begriff benannten, von anderen als „evolutionistisch“ bezeichneten Forscher nicht deshalb, weil sie einen solchen Vergleich anstellen, sondern weil sie einen falschen Vergleich anstellten, nämlich den mit primitiven Gesellschaften, namentlich mit dem Island der Sagazeit und „dem reichen Erfahrungsschatz der völkerkundlichen (kulturanthropologischen) Forschung“. Das führe dazu, daß sie staatliche Institutionen leugneten, statt des Staates überall nur ‚Gesellschaft‘ und „überall faktische, formlose, fließende Verhältnisse und Gewohnheiten“ sähen, sogar „die Existenz einer Rechtsordnung“ leugneten.¹⁰⁴ Die Kritik Gschnitzers unterstellt, daß Verhältnisse der primitiven Gemeinschaften umstandslos auf die homerische Gesellschaft übertragen werden,¹⁰⁵ während in Wirklichkeit die Parallelität der beiden Gesellschaftsstrukturen anhand der homerischen Zeugnisse belegt wird. Gschnitzer will stattdessen vergleichend auf die Verhältnisse der nachhomerischen archaischen Zeit blicken und aus dieser Perspektive frühe Formen oder Vorformen staatlicher Verhältnisse in den homerischen Epen erkennen. Er legt aber – nunmehr methodisch korrekt – Wert darauf, daß seine eigene Anschauung nur aus der „Interpretation einschlägiger Homerstellen“ begründet werden könne.¹⁰⁶

Grote 2016b, 467 abstract. 469. 487).

¹⁰⁴ Gschnitzer 1991, 184f. Ihm folgt in vieler Hinsicht Müller 2023, 338-342.

¹⁰⁵ Gschnitzer 185: „Diese Arbeitsweise führt nun leicht auch inhaltlich zu einer ganz neuen Sicht der homerischen Welt (*oder setzt sie schon voraus*)“, Herv. M.D.

¹⁰⁶ Gschnitzer 1991, 195-199. Im Anschluß nennt Gschnitzer eine Reihe von Publikationen, mit denen er sich einig weiß. Auch van Wees 1992, 263, betont die Ähnlichkeit der homerischen mit der archaischen Gesellschaft. Fundamentale Strukturen von government seien gegeben. Als „factoid“ vehement zurückgewiesen

Die Bedeutung des Vergleichs der homerischen Gesellschaft mit den dazu herangezogenen primitiven Gemeinschaften ist freilich nicht nur aufgrund des soeben angeführten methodischen Vorbehalts zu relativieren, sondern auch wegen der Einschränkungen, die beim inhaltlichen Vergleichsverfahren sichtbar werden. So weisen schon die Vergleichsobjekte unterschiedliche Merkmale auf und bilden mithin keine einheitliche Parallelgesellschaft. Das wird von den Anthropologen / Ethnologen selbst deutlich hervorgehoben, etwa von Sahlins, der ausdrücklich auf die unterschiedlichen politischen Verhältnisse der untersuchten Gemeinschaften verweist.¹⁰⁷ Namentlich entfaltet er ein ganzes Spektrum von Gemeinschaftsformen, von denen er die geographisch und strukturell entgegengesetzten Gemeinschaften miteinander kontrastiert, nämlich die big-man-Gesellschaft Westmelanesiens mit der chieftom-Gesellschaft Ostpolynesiens.¹⁰⁸ Wenn wir oben die homerische Gesellschaft als eine Gesellschaft gekennzeichnet haben, die sich zwischen diesen beiden Strukturen bewegt, dann wird schon daraus deutlich, daß wir sie nicht mit einer bestimmten primitiven Gemeinschaft parallel setzen, sondern mit einer Abstraktion aus verschiedenen konkreten Gemeinschaftsformen. Da auf der anderen Seite auch *die* homerische Gesellschaft eine Abstraktion aus mehreren in den Epen beschriebenen Gemeinschaftsformen darstellt, bewegen wir uns auf beiden Seiten des Vergleichs auf der gleichen Ebene.

Die wesentliche Gemeinsamkeit, die dann auch als plakatives Etikett für alle Vergleichsgemeinschaften verwendet wird, ist die grundsätzliche Stellung der Anführer als big-men oder chiefs. Damit soll zusammengefaßt ausgedrückt sein, daß diese Funktionsträger der

wird die Gleichsetzung moderner nichtstaatlicher Gesellschaften mit archaischen Staaten von Yoffee 2005, 6 und oft, der auch behauptet, daß auch die meisten Archäologen die Gleichsetzung ablehnten. Nach van der Vliet 2008, 199, bringt uns die Definition der homerischen Gesellschaft „as a ‘big man’ society or one of chiefdoms“ nicht viel weiter; eine Begründung oder eine alternative Beschreibung gibt der Autor nicht, sondern widmet sich direkt der Staatswerdung der Polis.

¹⁰⁷ Sahlins 1963, 286.

¹⁰⁸ Dabei ist noch zu bedenken, daß ‘big-man’ und ‘chief’ Fremdbezeichnungen sind, mit denen differenzierte Termini der jeweiligen lokalen Sprachen zusammengefaßt werden sollen, während für das homerische Pendant der originale Begriff des *Basileus* verwendet wird.

modernen Randgebiete, des isländischen Mittelalters und eben auch der homerischen Welt, wie oben bereits vorgebracht, einerseits ihr Gemeinwesen politisch leiten und koordinieren, andererseits aber keine allgemeine, staatliche Gewalt über alle Gesellschaftsmitglieder innehaben, sondern eine persönliche, auf Reichtum und Tüchtigkeit beruhende Autorität ausüben, die prekär ist und keine gesicherte Dynastiebildung vorsieht. Neben dieser Gemeinsamkeit, die sich noch weiter spezifizieren ließe, bestehen jedoch auch einige Unterschiede zwischen der homerischen und einigen oder allen Vergleichsgesellschaften. So spielen die verwandtschaftlichen Bindungen bei Homer eine erheblich geringere Rolle als in vielen tribalen Gemeinschaften.¹⁰⁹ Magische Kräfte benötigen die homerischen *basileis* nicht, eine theokratische Überhöhung nehmen sie nicht in Anspruch, Polygamie praktizieren sie nicht.¹¹⁰ Große Gemeinschaftsaufgaben wie die Errichtung von Bewässerungssystemen haben sie nicht zu organisieren. Die (Rück-)Verteilung von eigenen oder gemeinsam erworbenen Gütern, als allgemeine Großzügigkeit bezeichnet eine ganz wesentliche Stütze für die Autorität moderner big-men, ist hingegen bei Homer vor allem auf die Verteilung von Kriegsbeute und auf die Beschenkung auswärtiger Gäste beschränkt und daher keine beständige Notwendigkeit.¹¹¹ Das mittelalterliche Island wiederum unterscheidet sich von der Polis darin, daß Godentümer auch verkauft werden konnten und unter anderem deshalb einem Konzentrationsprozeß unterlagen.¹¹² Im Unterschied zu den isländischen Gemeinschaften, die von außerhalb erobert wurden, entwickelte sich die homerische Gesellschaft zu einem staatlichen Gebilde, nahm aber nicht, wie die meisten Vergleichsgesellschaften, eine monarchische Form an (s. dazu den nächsten Abschnitt).¹¹³

¹⁰⁹ Das wird betont etwa von Hall 2014, 123-125.

¹¹⁰ Im Gegensatz zu den griechischen *basileis* lebt der Leiter der Stadt Troia, Priamos, in der Ilias in Polygamie, was ihn als orientalischen Anführer kennzeichnet.

¹¹¹ Donlan 1982 schreibt der „generosity“ der homerischen Anführer eine zu große, van der Vliet 2011, 125, eine zu geringe Bedeutung zu. Zu einigen der genannten Charakteristika nichthomerischer Gesellschaften vgl. Sahlins 1963, 295; Service 1977, 40. 109ff. 134. 379.

¹¹² Zeller 2020b, 208-212, stellt Gemeinsamkeiten und Unterschiede zwischen Goden und *basileis* zusammen. Zu Besonderheiten der homerischen Gesellschaft vgl. auch Cohen 1978, 4f.; Qviller 1981, 147 A. 8; Hall 2014, 123.

¹¹³ Vgl. Sahlins 1963, 288, zur Herausbildung von Monarchien.

B Die Transformation zum Staat

Ausgangspunkt ist die in der Forschung nur selten bestrittene Annahme, daß die griechische Polis, jedenfalls in ihrer ausgeprägten Form der klassischen Zeit, als Staat anzusehen ist. Diese Annahme wird auch in der vorliegenden Studie geteilt und ist im Schlußabschnitt des ersten Teils (S. 58-60) zusammengefaßt begründet worden. Wie dort angekündigt, soll nunmehr die erheblich umstrittenere Frage untersucht werden, wann und auf welche Weise die Staatswerdung der Polis vor sich ging.

1. Forschungsprobleme

Bewußt werden hier Formulierungen wie 'Staatswerdung' oder 'Transformation zum Staat' verwendet, da in Abschnitt A dargelegt wurde, daß die früheste Gestalt der Polis bis in die homerische Zeit, also etwa gegen Ende des 8. Jahrhunderts v. Chr., einen nichtstaatlichen Charakter besaß. Aus den homerischen Epen ergibt sich nicht nur die reale Existenz von solchen nichtstaatlichen Gemeinwesen, sondern es ist dort auch der Begriff *polis* als zeitgenössische Bezeichnung für diese Gemeinschaften bezeugt.¹¹⁴ Wenn nun in der Forschung vielfach von der Polisentstehung die Rede ist, dann ist damit so gut wie nie die ursprüngliche Entstehung dieser griechischen Gemeinschaften gemeint, die sich nach dem Zusammenbruch der mykenischen politischen Strukturen gebildet hatten. Vielmehr soll damit genau die Herausbildung von neuen Strukturen, insbesondere der dann in klassischer Zeit ausgeprägten Institutionen, bezeichnet sein, die hier Staatswerdung der Polis genannt wird, und die man im allgemeinen ins 7. und 6. Jahrhundert setzt. *Locus classicus* ist ein Artikel von V. Ehrenberg aus dem Jahr 1937: „When did the Polis rise?“ Er wurde in deutscher Übersetzung unter dem Titel „Wann entstand die Polis“ vom Herausgeber F. Gschnitzer an erster Stelle in den Sammelband „Zur griechischen Staatskunde“ (1969) aufgenommen, und Gschnitzer erläutert in seiner Einleitung die Thematik so: „Die Diskussion über die 'Entstehung der Polis' (d. h. über die Entstehung einer institutionell gefestigten, unpersönlichen staatlichen Ordnung

¹¹⁴ Daß in der klassischen Zeit noch beide Bedeutungen präsent waren, kann etwa der Mythos des Protagoras zeigen, Plat. *Prot.* 322a-c, vgl. Dreher 1983, 13.

bei den Griechen), der die ersten Beiträge des Bandes gewidmet sind, ...“.¹¹⁵ Ob man nun, wie Gschnitzer, staatliche Verhältnisse bereits in der homerischen Gesellschaft erblickt, oder, wie mit vielen anderen auch hier, solche erst für die nachhomerische Zeit akzeptiert, es bleibt mißverständlich, eine bereits zuvor existente Gemeinschaftsform erst mit der Herausbildung einer bestimmten Entwicklungsstufe *entstehen* zu lassen. Die Ungenauigkeit erklärt sich daraus, daß der Begriff Polis in diesem Zusammenhang mit der Bedeutung ‚Stadtstaat‘ gleichgesetzt wird, was auch in den allermeisten Fällen angemessen ist, so daß „Polisentstehung“ und ähnliche Formulierungen als ‚Staatentstehung‘ verstanden werden können. Die Gleichsetzung wird, wie im obigen Zitat von Gschnitzer, von einigen Gelehrten ausdrücklich in Anspruch genommen,¹¹⁶ von anderen eher unausgesprochen vorausgesetzt.¹¹⁷

Mit der Fixierung auf die Staatlichkeit der Polis, die in ihrer ausgeprägten, gegebenenfalls demokratischen Form der klassischen Zeit als „Vollendung“ der Polis betrachtet und nicht ohne ideologischen Beigeschmack idealisiert wird, ist die Gefahr verbunden, die Entwicklung von der frühen Polis bis zum klassischen Stadtstaat als zwangsläufig, zielgerichtet, teleologisch anzusehen. Da gerade der Übergang in die Staatlichkeit als eine Weiterentwicklung der menschlichen Gemeinschaften, als zivilisatorischer Fortschritt gilt, liegt es nahe, diese Entwicklung als *positive*, erstrebenswerte Errun-

¹¹⁵ Gschnitzer 1969, Zitat S. XI.

¹¹⁶ Ehrenberg 1969, bes. 18-21, schließt aus verschiedenen Indizien auf eine „Polisentstehung“ in kleinasiatischen und anderen kolonisierenden Städten um 800 v. Chr. Dabei ist ihm bewußt: „Wir haben bisher von der Polis ausschließlich in der Bedeutung ‚Staat‘ gesprochen“ (S. 19), während das Wort ‚p(t)olis‘ zunächst die Burg bezeichnet habe. Ungenügend erläutert sind die Feststellungen, daß sich in der Ilias, „von Einzelstücken wie der Beschreibung des Schildes des Achilles abgesehen, keine Spur von der Existenz der Polis findet, wohl aber in der Odyssee“ (19), und daß für Hesiod „die Polis noch in einem Formungsprozeß begriffen“ sei (18). Zur Gleichsetzung vgl. auch Raaflaub 1991, 241 mit A. 122, und 239 A. 115 mit weiterer Literatur zur „Entstehung der Polis“. Schulz / Walter 2022, I 56, verwenden die Formulierung „Beginn der Polis“. Einen Forschungsüberblick zum Polisbegriff gibt Schuller 2002, 113f.

¹¹⁷ So spricht z. B. Qviller 1981, 110, von den Mechanismen, „that might possibly have transformed Homeric Greece into a *polis*-society“. Hölkeskamp 2010 führt „die Entstehung der Polis“ als Titel seines Beitrags. „Polisbildung“ wird synonym verwendet, z. B. Grote 2016a, 247f.

genschaft zu *bewerten*. Der Vorwurf, die Entwicklungsstadien primitiver und archaischer Gesellschaften als zwangsläufig darzustellen, ist daher den oben referierten Anthropologen / Ethnologen und den ihnen folgenden Historikern / Soziologen nicht erspart geblieben.¹¹⁸ Zu Unrecht. Zwar bezeichnen sie ihre Forschungsposition mitunter selbst als „evolutionary“ und sich selbst dementsprechend als „evolutionists“ und werden auch gern von anderen unter dieses Etikett subsumiert,¹¹⁹ in Wahrheit jedoch beschreiben sie die beobachteten Entwicklungen „neutral“, also ohne Bewertung, als Zunahme von Komplexität bei der Entwicklung von einer egalitarian oder segmentary zu einer ranked oder stratified society (Fried), oder bei der Abfolge der Entwicklungsstufen band-tribe-chiefdom (Service).¹²⁰ Daß dabei keine teleologische Entwicklung vorausgesetzt wird, ergibt sich auch schon daraus, daß sich zwar in vielen Gesellschaften die des Staates als komplexeste Stufe herausbildet, aber eben keineswegs in allen beobachteten Gemeinschaften, von denen nämlich einige auf einer primitiveren Stufe „stehengeblieben“ sind.¹²¹ Außerdem hängt, so die ethnologischen Theorien, die jeweilige Entwicklungsstufe von bestimmten äußeren Bedingungen ab, nicht zuletzt von der Größe der jeweiligen Gemeinschaft. Eine Gemeinschaft von 100 oder 300 Köpfen wäre zum Beispiel zu klein, um in einem solchen Modell von der Stufe der big-man-Gesellschaft auf die eines Häuptlingtums überzugehen.¹²²

Unsere Grundfrage, wann und wie die Polis zum Staat wurde, ist an die in Abschnitt A begründete Voraussetzung gebunden, daß die

¹¹⁸ Z. B. von Moreno García 2022, 20 (vgl. die Rezension von Ulf 2024). Die Kritik wird auch erwähnt von Hall 2014, 123.

¹¹⁹ Vgl. etwa Yoffee 2005, 5-21, mit einem kritischen Überblick über die Forschungsrichtung des „neo-evolutionism“ (‘neo’ bezieht sich auf die Forschung ab den 1940er Jahren, die evolutionäre Theorien des 19. Jahrhunderts, namentlich von H.S. Maine und L.H. Morgan wiederaufnahm); der Vorwurf der „teleology without a god“ wird ebd. S. 21 erhoben. Vgl. ebd. S. 7 A. 5 das Zitat von Sahlins mit der Selbstbezeichnung „evolutionist“.

¹²⁰ S. o. bei A. 65ff. Diese Abfolgen werden inzwischen oft als zu schematisch und überholt kritisiert, so etwa Scheidel 2013, 9: „Multilinear’ evolution has become the dominant concept.“

¹²¹ Das konstatiert Zeller, 20201, 72 f., für das mittelalterliche Island.

¹²² Zur Größe der Gemeinschaften vgl. etwa Sahlins 1963, 287; Service 1977, 109. S. u. 4.

Polis ursprünglich eine nichtstaatliche und erst später eine staatliche Gemeinschaft war. Wird eine der beiden Feststellungen bestritten, ist auch die Grundfrage hinfällig. Das trifft auf der einen Seite auf die Forschungsrichtung zu, nach welcher jede menschliche, nach manchen auch tierische, Gemeinschaft staatlichen Charakter besaß.¹²³ Nach der Entstehung einer Organisationsform zu fragen, die von allem Anfang an, sozusagen naturgegeben, vorhanden war, wäre widersinnig. Diese früher durchaus präzise Forschungsposition spielt in der Gegenwart, soweit ich sehe, keine Rolle mehr. Auf der anderen Seite kann sich auch die Position nicht mit der Staatswerdung der Polis befassen, welche den Staatsbegriff auf die Moderne beschränken will und daher allen vormodernen Gemeinschaften die Staatlichkeit abspricht.¹²⁴ Die Negierungen bedeuten allerdings nicht, daß sich diese Positionen nicht mit der Entwicklung und Entfaltung derjenigen Elemente befassen würden, die wir als Teil der Staatlichkeit ansehen, namentlich der politischen Institutionen und Organisationsformen. Die Elemente werden jedoch nicht dem inhaltlichen Verständnis zugeordnet, das mit dem Staatsbegriff verbunden ist.

2. Die frühesten Stadtstaaten

Ebenso wie wir für die nichtstaatliche Phase von 'primitiven' Gemeinschaften im Sinn von einfach organisierten, wenig komplexen und gegliederten Gesellschaften gesprochen haben,¹²⁵ müssen wir davon ausgehen, daß auch die frühesten Staaten eine primitive, wenig differenzierte Struktur aufwiesen. Und selbst von den wenigen Elementen, welche die Staatlichkeit tragen, kommt im allgemeinen nur ein Teil oder ein einziges zu unserer Kenntnis, nicht zuletzt deshalb, weil unsere Quellen entweder nur sporadische und fragmentarische Einblicke zulassen, wie die Inschriften, oder aufgrund ihrer erheblich späteren Entstehung ein konstruiertes und anachronistisches Bild einer frühen Polis "verfassung" entwerfen, wie die aristotelische *Athenaion politeia*. Dennoch bleibt uns nichts übrig, als uns auf diese Anhaltspunkte zu stützen, um zu versuchen, unsere Frage nach dem

¹²³ S. Teil I, S.19 mit A. 18.

¹²⁴ S. Teil I, S.17 mit A. 12.

¹²⁵ S. o. bei A. 68.

Wann und Wie der Staatsentstehung zu beantworten.

a) *Transformation in actu: Sparta*

Ein frühes und aussagekräftiges Zeugnis für die politische Struktur der spartanischen Polis ist die sogenannte Große Rhetra. Es handelt sich um einen in teils altertümlichem Griechisch verfaßten Text, der von Plutarch in der Lykurg-Vita überliefert ist (Plut. Lyk. 6, 2). Er lautet:

„Nachdem man ein Heiligtum des Zeus Syllanios und der Athena Syllania errichtet hat, Phylen und Oben eingeteilt hat und dreißig (Männer) einschließlich der Anführer als Rat der Alten eingesetzt hat, soll man von Zeit zu Zeit Versammlungen zwischen Babyka und Knakion abhalten und so (Vorhaben in die Versammlung) einbringen und (die Versammlung wieder) auflösen; [dem Volk soll so ...] und Stärke [erwachsen].“¹²⁶

Nach einigen Erläuterungen fügt Plutarch (Lyk. 6, 8) einen Zusatz zur Rhetra an, der nach seiner Angabe später angefügt wurde, nach vielen Interpreten und auch nach meiner Ansicht jedoch zum ursprünglichen Dokument gehört:

„Wenn aber das Volk krumme Willensäußerungen tut, sollen die Alten und die Anführer (τοὺς πρεσβυγενέας καὶ ἀρχαγέτας) es abtreten lassen.“

Plutarch präsentiert die Rhetra durchaus glaubwürdig als Orakel des delphischen Apoll, welches wie üblich als Anweisung formuliert ist: Ein Orakel setzt immer eine Anfrage voraus, und solche Anfragen waren meist nicht als offene Fragen formuliert, in der Art: wie soll Sparta regiert werden? Wer soll die *politeia* verwalten? oder ähnlich. Vielmehr wurden dem Orakel konkrete, zielgerichtete Fragen vorgelegt, die in der Antwort bejahend oder verneinend meist wörtlich wiederaufgenommen wurden.¹²⁷ Daher müssen wir auch für die Rhetra eine Anfrage voraussetzen, die die Antwort des Orakels ungefähr vorformulierte: `Soll man ein Heiligtum für Zeus Syllanios ... errich-

¹²⁶ Ich übernehme meine Übersetzung aus Dreher 2006, 51. In diesem Beitrag sind auch die meisten Überlegungen, die im folgenden daher verkürzt vorgebracht werden, bereits entwickelt (zustimmend Meister 2020, 28 A. 25); um Redundanzen zu vermeiden, wird das nicht jedesmal angemerkt. Im Kern habe ich meine Position schon in Dreher 2012 (1. Aufl. 2001), 41-44, vorgebracht.

¹²⁷ Vgl. Fontenrose 1978 mit dem Katalog der überlieferten Orakelsprüche.

ten?’ oder: ‘welcher Gottheit soll ein Heiligtum errichtet werden? Soll man Phylen und Oben einteilen? ...’ usw. Nach Plutarch war es Lykurg, der „Denker und Lenker“ im frühen Sparta und schließlich auch der Verantwortliche für sämtliche Bestimmungen der spartanischen Verfassung, der sich an das delphische Orakel wandte. Da die moderne Wissenschaft diese mythische Figur nicht als historisch anerkennt, müssen wir annehmen, daß der Text von den Männern entworfen wurde, die zu dieser Zeit für das spartanische Gemeinwesen verantwortlich waren. Wie die Struktur Spartas vor der Ausführung der Rhetra-Bestimmungen ausgesehen hat, wissen wir natürlich nicht genau. Die Rekonstruktion einer „homerischen Gesellschaft“ läßt jedoch eine in allen Poleis analoge Grundstruktur vermuten (s. o.). Daher wird auch in Sparta ein Rat aus Mitgliedern der Oberschicht bestanden haben, der vielleicht bereits von den beiden als *archagetai* bezeichneten Anführern geleitet wurde. Ein solcher Rat wird den homerischen Räten der *basileis* bzw. Geronten ebenso entsprechen haben, wie die *archagetai* dem homerischen Oberbasileus entsprachen. Nach allem, was oben (Abschnitt A) über die homerische Gesellschaft gesagt wurde, muß diese gesellschaftliche Struktur als nicht- oder vorstaatlich angesehen werden. Von diesem Leitungsgremium, so ist zu vermuten, wird die Anfrage an das Orakel ausgegangen sein.¹²⁸

Durch die (zweifellos in schriftlicher Form geschehene) Aufsetzung eines Manifests, als das wir die Vorform der Rhetra bezeichnen dürfen, und die Bitte an das delphische Orakel, die darin formulierten Maßnahmen mit göttlicher Autorität zu sanktionieren, wollte die spartanische Polisleitung eine neue Ordnungsstruktur, wie wir sie vorläufig nennen wollen, für ihre Gemeinschaft einrichten. Daß tatsächlich Neuerungen eingeführt werden sollten, müssen wir als eigentlichen Sinn des Verfahrens annehmen, aber auch der Wortlaut der Prädikate spricht dafür. Ein Heiligtum für Zeus Syllanios und Athena Syllania war also bis dato in Sparta nicht vorhanden. Die Absicht, es zu errichten, sollte zweifellos die folgenden Maßnahmen unter den besonderen Schutz der beiden hohen Gottheiten stellen, seine Errichtung „identitätsstiftend und gemeinschaftstragend“¹²⁹ wirken. Phylen

¹²⁸ Vgl. Dreher 2006, 55.

¹²⁹ Thommen 1996, 41.

und Oben waren nach allgemeiner Ansicht traditionelle spartanische Einheiten, die Phylen „Personenverbände mit gewissen verwandtschaftlichen und lokalen Bindungen“, die Oben wahrscheinlicher Unterabteilungen der Phylen als gleichbedeutend mit den Dorfbezirken Spartas.¹³⁰ Die Neuerung bezüglich dieser Einheiten bestand also nicht darin, daß sie völlig neu geschaffen werden sollten, sondern daß man sie in einer in der Rhetra nicht näher bestimmten Weise neu strukturieren und vielleicht auch aufwerten wollte, möglicherweise um alle Vollbürger als Mitglieder in diese Einheiten einzuordnen. Als Kernbestimmung der Rhetra betrachte ich die sehr konkrete Festsetzung, eine Gerusie aus dreißig Männern zu bilden, in die auch die Archagetai eingeschlossen sein sollten. In späteren Quellen werden diese An- oder vielleicht Heerführer dann *basileis* genannt, sie bleiben zwei an der Zahl, weshalb man auch, nicht sehr glücklich, vom spartanischen „Doppelkönigtum“ spricht.¹³¹ Es ist durchaus möglich, daß die Ratsversammlung, die wir für die Zeit vor der Rhetra postuliert haben, bereits Gerusia genannt wurde. Die Neuerung kann nur in der Festlegung ihrer Mitgliederzahl bestehen. Diese Festlegung impliziert, daß aus den möglichen Kandidaten eine Auswahl getroffen werden mußte, und diese Auswahl konnte wiederum nur in einem förmlichen Verfahren stattfinden, über dessen Ablauf unser Dokument allerdings schweigt. Wenn wir in diesem Fall die späteren Verhältnisse zurückprojizieren dürfen, dann wurden die Geronten in einer Volksversammlung bestimmt, deren Zusammentreten „von Zeit zu Zeit“ im nächsten Satz der Rhetra gefordert wird. Nach den späteren Quellen fanden die Abstimmungen in der spartanischen Volksversammlung nicht durch Stimmsteine oder Handaufheben statt, sondern indem man die Lautstärke der Akklamationen abgeschätzt hat.¹³² Während die Teilnahme an den homerischen Räten von der sozialen Stellung des jeweiligen *big man* abhing, so daß dieser bei Änderung seines Status auch wieder aus dem Kreis auszuschneiden hatte, dürften die in Sparta gewählten Geronten sowie die beiden *basileis* seit Inkrafttreten der Rhetra lebenslang fungiert haben, wie es für die spä-

¹³⁰ Thommen 2003, 36.

¹³¹ Zur Übersetzung ‚König‘ für die frühgriechischen *basileis* vgl. o. bei A. 12-16.

¹³² Thuk. 1, 87, 2; Plut. *Lyk* 26, 3-5. Aristoteles hat diese Form der Abstimmung bekanntlich als „kindisch“ lächerlich gemacht, Aristot. *pol.*1271a9f;

tere Zeit bezeugt ist. Diese Implikationen der „lakonischen“ Bestimmung der Rhetra machen deutlich, daß die spartanische Gerusie in eine politische stabile Institution transformiert wurde, wie wir sie in Teil I idealtypisch beschrieben haben.¹³³ Auch die Volksversammlung ist durch die Festlegung einer gewissen Regelmäßigkeit und ihrer Abhängigkeit von der Gerusie zu einer solchen Institution geworden. Das Einbringen von Themen in die Versammlung (εἰσφέρειν) und die Auflösung der Versammlung (ἀφίσθασται), wie wir die letzte ungestörte Bestimmung der Rhetra verstehen, dürfte wohl der Gerusie als Aufgabe zugeordnet sein. Ausdrücklich wird der Rat, differenziert als „die Alten und die Anführer“, im Zusatz zur Rhetra dazu befugt, eine Volksversammlung auch vor ihrem regulären Ende aufzulösen, wenn das Volk gegen seine Führung aufbegehren sollte.¹³⁴

Es wurde in den vorigen Sätzen schon angedeutet, was nun klar und deutlich ausgesprochen und weiter begründet werden soll: Die Rhetra markiert nichts weniger als die Transformation der spartanischen Gesellschaft in einen Staat. In der Gerusie, zusammengesetzt aus 28 Männern, die, wie später belegt mindestens sechzig Jahre alt sein mußten, und den beiden *archagetai*, später *basileis* genannt, manifestiert sich die Staatsgewalt als, wie in Teil I gezeigt, entscheidendes Kriterium für die Existenz eines Staates. Daß die Gerusie die Staatsgewalt innehat, ist durch direkte Quellenzeugnisse, in denen entsprechende Beschlüsse und Entscheidungen überliefert wären, für die Zeit der Rhetra und die unmittelbare Folgezeit nicht direkt zu beweisen. Es ist jedoch legitim, das aus späteren Verhältnissen rückzuschließen, da die Gerusie dauerhaft das oberste politische Gremium Spartas geblieben ist. Daran ändert auch nichts, daß mit der Zeit das zusätzliche exekutive Amt der Ephoren geschaffen wurde, während die Befugnisse der beiden *basileis* eher eingeschränkt wurden. Nach unseren im ersten Teil (S. 25f.) erstellten Kriterien für den Charakter einer Staatsgewalt war die Gerusie erstens „die im Prinzip *unbeschränkte* Gewalt über Staatsgebiet und Staatsvolk“. Wir können davon ausgehen, daß die Gerusie alle Entscheidungen, die das ganze Gemeinwesen betrafen, gefällt hat, einschließlich der Entscheidung über Krieg und Frieden. Zweitens übte die Gerusie, „die *allgemeine*

¹³³ Teil I, S. 26f.

¹³⁴ Vgl. Dreher 2006, 52. 56.

Gewalt über das gesamte Gemeinwesen“ aus, indem sie als politische Institution nicht nur für bestimmte Personen oder Personengruppen zuständig war. Drittens war sie „*höchste* Gewalt innerhalb des Staatsgebiets“, da es keine andere Person oder eine andere Einrichtung gab, die der Gerusie hätte etwas befehlen können. Das gilt vor allem für die Ekklesia, für welche die Rhetra meines Erachtens keine letztendliche Entscheidungsbefugnis, sondern nur eine passive Anteilnahme an der Staatslenkung vorsieht¹³⁵. Das vierte Kriterium schließlich, die „stabile Formalisierung in Gestalt von *Institutionen*“, ist bereits oben als erstes bestätigt worden, indem der institutionelle Charakter der Gerusie hervorgehoben wurde. Nachdem in der Forschung gezeigt worden war, daß auch in Sparta, wie in den anderen griechischen Poleis, eine soziale Ungleichheit bestand, die auf unterschiedlich großem (Grund-)Besitz beruhte und unterschiedliches soziales Ansehen zur Folge hatte,¹³⁶ wird man nicht daran zweifeln, daß es wie in der homerischen Gesellschaft Männer aus der Oberschicht waren, die sowohl vor als auch nach der Staatswerdung die Geschicke der Polis lenkten und die politischen Entscheidungen trafen. Insofern ist es nicht falsch, Sparta von Anfang an als einen aristokratischen Staat, oder, wenn man denn den oben in Frage gestellten Terminus verwenden will, einen Adelsstaat zu bezeichnen.

Neben der Staatsgewalt als dem entscheidenden Element verlangt die Drei-Elemente-Lehre, die wir unseren gesamten Ausführungen zugrundegelegt haben (Teil I, B), daß auch die beiden weiteren Elemente, Staatsgebiet und Staatsvolk, als Bedingung für die Existenz eines Staates vorhanden sein müssen. Beide Bedingungen halte ich für erfüllt. Die Polis Sparta besaß ein eigenes Territorium, welches teils durch natürliche Grenzen, nämlich das Meer und, im Westen, ursprünglich das Taygetos-Gebirge, teils durch eine offene Landgrenze bestimmt war. Daß ein Anspruch auf ein bestimmtes Territorium erhoben und auch eingelöst wurde, ergibt sich schon aus der mehrstufigen Ausdehnung des Herrschaftsgebiets, nämlich der Ein-

¹³⁵ Wenn man mit dem Großteil der Forschungsliteratur das Gegenteil annimmt, ändert das nichts am Charakter der Rhetra als „Staatsgründungsmanifest“ (Dreher 2006, 54), es würde sich nur ein größerer Anteil der Ekklesie an der Ausübung der Staatsgewalt ergeben.

¹³⁶ Vgl. Dreher 2012, 39 mit Literaturnachweisen.

gliederung Amyklais und der südlichen Eurotas-Ebene noch im 8. Jahrhundert v. Chr., sowie der Eroberung Messeniens im 7. Jahrhundert unter Überwindung des Taygetos-Gebirges. Grenzkriege, insbesondere mit Argos, um Landschaften im Norden des spartanischen Gebietes bestätigen die Bedeutung eines klar abgegrenzten Territoriums. Als Staatsvolk ist die gesamte Bevölkerung dieses sich ausdehnenden Territoriums zu betrachten. Später war diese Bevölkerung in die rechtlich abgestuften Kategorien von Vollbürgern (Spartiaten), Umwohnern (Periöken) und Unfreien (Heloten) gegliedert. Auch ohne formale Rechtsgrundlagen mag diese Gliederung schon in der Frühzeit bestanden haben. Am frühen Staat Anteil hatten demnach nur die in der Stadt Sparta lebenden Vollbürger, nur sie konnten an der Ekklesia teilnehmen; die Bewohner der weiteren, im Territorium liegenden Siedlungen waren frei, aber von der spartanischen Zentralgewalt abhängig; und Unfreie gab es spätestens, seit die Bewohner der Landschaft Helos unterworfen und zu (versklavten) Heloten gemacht worden waren.

Daß mit der Rhetra ein klares Zeugnis für den Übergang Spartas von einem vorstaatlichen in einen staatlichen Zustand vorliegt, wird in der Forschung kaum jemals deutlich ausgesprochen.¹³⁷ Das steht im Kontrast dazu, daß die Forschung in dem Text der Rhetra nahezu einhellig eine Art Verfassungsdokument sieht, das nach Art späterer Gesetze genaue Rechte und Pflichten der dort genannten Gremien sowie präzise Verfahrensregeln für die politische Beschlußfassung vorschreibt. Wenn vom Initiativrecht der Könige, vom Kassieren nicht verfassungskonformer Anträge, von Probouleumata (Vorbeschlüssen des Rates), vom Vetorecht der Geronten und Könige, Änderungsanträgen usw. die Rede ist, dann spiegeln sich darin anachronistische Vorstellungen, die sich aus Analogien zu späteren Verhältnissen speisen. Gegen solche Vorstellungen, die ich an anderer Stelle als „formalistisch und legalistisch“ bezeichnet und kritisiert habe, habe

¹³⁷ Welwei 2004, 59, hingegen kommt meiner Interpretation sehr nahe, wenn er formuliert: „Das 7. Jahrhundert war in Griechenland eine bedeutsame Phase des Übergangs von vorstaatlichen Verhältnissen zu staatlichen Strukturen in zahlreichen Gemeinwesen. In Sparta wird dieser folgenreiche Prozeß gesellschaftlicher und politischer Transformation durch die Bestimmungen der sogenannten Großen Rhetra markiert.“ Ein Literaturverweis wird, wie im ganzen Buch üblich, nicht gegeben, aber Dreher 2012 (hier 2001) ist im Literaturverzeichnis enthalten.

ich die These von der „Primitivität der spartanischen Verfassung“ gesetzt,¹³⁸ weil diese frühe Struktur, die in der Rhetra erkennbar wird, noch sehr nahe an den vorstaatlichen, homerischen Verhältnissen steht, aus denen heraus sie sich gerade entwickelt hat.

Schwierig ist die Frage zu beantworten, zu welchem Zeitpunkt die Transformation zum Staat stattgefunden hat, weil für die Datierung der Rhetra keine sicheren Anhaltspunkte vorliegen. Daher kann man nur nach allgemeinen Indizien urteilen, wobei man sich der Gefahr des Zirkelschlusses bewußt sein muß, indem Vorstellungen über die allgemeine Entwicklung der griechischen Poleis nicht ganz herausgehalten werden können. Die Mehrzahl der Vorschläge bewegt sich in der Zeitspanne von 750 bis 650 v. Chr., die zweifellos akzeptabel, aber doch sehr lang ist, und die daher auf Ende des 8. Jahrhunderts oder den Beginn des 7. Jahrhunderts, also um 700 v. Chr., eingengt werden sollte.¹³⁹ Die Fixierung der homerischen Epen mußte abgeschlossen sein, Olympia mußte einen weithin anerkannten Status als Orakelstätte erworben haben und das spartanische Territorium sollte eine gewisse Größe erreicht haben, was nach der Eingliederung Amyklais und des südlichen Eurotas-Tals gegeben war. Die Planung, Messenien zu erobern, was nach den jahrzehntelangen Messenischen Kriegen gegen Ende des 7. Jahrhunderts vollständig gelungen ist, mag bei der Errichtung einer staatlichen Struktur eine Rolle gespielt haben, weil feste Zuständigkeiten und Beschlußkompetenzen für ein solches Großunternehmen von Vorteil gewesen sein dürften.

Einige Zeit nach der Rhetra, in der zweiten Hälfte des 7. Jahrhunderts, als die Messenischen Kriege noch andauerten, hat der spartanische Dichter Tyrtaios ein Gedicht verfaßt, welches die Eunomia, die gute Ordnung Spartas, preist und die Stärke und Sieghaftigkeit der Polis als erstrebenswert verkündet:

„Denn solches ließ der weithin treffende Gott mit dem silbernen Bogen,
der goldgelockte Apoll, aus dem reichen Vorraum verlauten:
Regieren (ἄρχειν) sollen durch ihren Rat die gottgeliebten Könige
(βασιλῆας),

¹³⁸ Dreher 2006, 58ff., mit entsprechenden Zitaten aus der Literatur.

¹³⁹ Die zahllosen Datierungsvorschläge der Literatur und die dazugehörigen Begründungen können hier nicht referiert werden.

denen am Herzen liegt Sparta, die liebliche Polis,
 regieren sollen die Ältesten, die Geronten, dann auch die Männer des Volkes,
 jeweils gehorchend geraden Gesetzen (ρήτραις)
 sollen sie Gutes reden und alles Gerechte vollbringen,
 und nichts Krummes raten dieser Polis.
 Der Menge des Volkes sollen daraus Sieg und Stärke erwachsen.
 Phoibos hat also der Polis darüber solchermaßen Aufschluß gegeben.¹⁴⁰

Tyrtaios verweist in der ersten und letzten Zeile ausdrücklich auf ein Orakel des delphischen Apolls, dessen Inhalt er in den dazwischenliegenden Zeilen wiedergibt. Er bezieht sich damit zweifellos auf dasselbe Orakel, das auch der Rhetra zugrundeliegt. Allerdings dürfte der Dichter die Aussagen des Orakels freier formuliert haben als die Rhetra und die eine oder andere Wendung selbst noch dazufügt haben. Im Kern aber, und das ist für uns entscheidend, bestätigt Tyrtaios die Beteiligung der drei Subjekte an der Leitung der Polis, die auch in der Rhetra genannt waren: Die (beiden) *basileis*, in der Rhetra *archagetai*, die Geronten, deren Zahl hier nicht genannt wird, sowie das Volk, das in der Rhetra als Versammlung auftaucht. Auffallend ist, daß im Gedicht alle drei Instanzen quasi gleichberechtigt erscheinen und alle als Subjekte dem ganz zu Anfang stehenden Prädikat „regieren“ zugeordnet sind (die grammatische Konstruktion ist ein *AcI*). Das Verb *archein* wird hier mit ‚regieren‘ übersetzt, weil wir nach der obigen Interpretation der Rhetra davon auszugehen haben, daß Sparta zur Zeit des Tyrtaios bereits staatlichen Charakter besaß. Allenfalls die Reihenfolge der Nennungen: *basileis* – Geronten – Volk, könnte auf eine gewisse Abstufung hindeuten. Im Gegensatz dazu hatte die Rhetra, wie oben festgehalten, die beiden Anführer in die Gerusie miteingeschlossen und dieses Gremium von insgesamt 30 Männern als das Leitungsgremium der Polis festgelegt. Den Damos dürfte Tyrtaios deshalb zu den beiden anderen Subjekten „heraufstufen“, weil es ihm nicht nur in diesem Gedicht darum geht, die Einheit, den Zusammenhalt der spartanischen Gesellschaft zu beschwören, die in den Messenischen Kriegen mehrfach unter großen militärischen Druck geriet

¹⁴⁰ Der Text ist überliefert bei Diod. 7, 12, 6; Plut. *Lyk.* 6, 10 zitiert eine kürzere Version, von der hier nur die Formulierung der Zeile 6 übernommen ist. Die Übersetzung ist entlehnt aus Dreher 2006, 50, und beruht auf der dortigen Interpretation (S.45-50).

und mit solcher Lyrik zum Durchhalten und verstärkten Kampfeinsatz aufgefordert wurde.

Insofern die Rhetra und Tyrtaios grundlegende Elemente der Staatsgewalt benennen, Elemente, die auch in der weiteren Geschichte Spartas Bestand hatten, kann man durchaus davon sprechen, daß aus beiden Texten die Existenz einer politischen, einer staatlichen Verfassung erkennbar wird.¹⁴¹ Wie rudimentär oder primitiv diese Verfassung zunächst noch war und sich von späteren, ausgearbeiteten Gesetzen oder sogar Gesetzescorpora unterschied, wird weiter unten noch einmal zu betonen sein.

b) Transformation ante quem: Athen, Dreros, Tiryns

In Sparta konnten wir anhand eines einzigartigen Dokuments, der sogenannten Großen Rhetra, den Übergang der Polis in einen frühen Staat aufgrund mehrerer Indizien nachvollziehen. Für andere Poleis liegen uns zeitgenössische Zeugnisse aus der „heißen Phase“ der Staatswerdung nicht vor. Wir müssen uns vielmehr mit Quellen zufriedengeben, die erkennen lassen, daß die Transformation bereits stattgefunden hatte, die also *ex post* die Staatsentstehung belegen. Als *terminus ante* geben sie jedoch keine Auskunft darüber, wieviel Zeit seit der Staatsentstehung bereits vergangen war, und die zeitliche Zuordnung wird noch dadurch erschwert, daß wir auch die Zeugnisse selbst nicht genau datieren können. Das trifft vor allem auf Inschriften zu, die, ergänzt um wenige literarisch überlieferte Nachrichten, unsere wichtigsten Quellen darstellen, da die öffentliche Aufstellung von Regelungen voraussetzt, daß eine zentrale Autorität in der Polis regierte und Gehorsam gegenüber den Vorschriften einforderte. Die Inschriften enthalten daher in der Regel Gesetze, und diese waren von der höchsten staatlichen Gewalt der Polis beschlossen worden.

Da wir hier keine umfassende Geschichte der archaischen griechischen Poleis verfassen können und uns gezielt auf die frühesten erkennbaren Fälle der Staatswerdung konzentrieren wollen, beschränken wir uns auf die Analyse der wenigen Poleis, für die Informationen aus dem 7. Jahrhundert v. Chr. vorliegen.

¹⁴¹ Vgl. Dreher 2006, 43.

Athen

Wir beginnen mit der Stadt, die später neben Sparta die größte und bedeutendste griechische Polis werden sollte, die aber zur Zeit ihrer Staatswerdung ebenfalls noch in sehr einfachen, primitiven politischen Strukturen organisiert war, mit Athen. Auch wenn wir nur über eine Kopie vom Ende des 5. Jahrhunderts verfügen, so muß diese Inschrift doch als authentische Wiedergabe eines Gesetzes gelten, das von der Forschung in die zwanziger Jahre des 7. Jahrhunderts datiert wird, am ehesten in das Jahr 621/20 v. Chr. Es handelt sich um das berühmte Tötungsgesetz Drakons.¹⁴² Auf die vielfältigen und viel diskutierten Probleme dieses Textes können wir hier nicht eingehen, vielmehr beschränken wir uns darauf zu zeigen, daß das Gesetz den staatlichen Charakter der Polis Athen voraussetzt. Im Jahr 409/408, als Athen demokratisch verfaßt war, wurde die Wiederaufstellung des Gesetzes durch die zuständigen Institutionen, Rat (*boule*) und Volksversammlung (*demos*), beschlossen, so Zeile 2 der Inschrift. Ob diese oder ähnliche Institutionen das Gesetz auch ursprünglich erließen, wird nicht mitgeteilt. Wir können wohl annehmen, daß zu jener Zeit bereits der Rat auf dem Areopag, später nur „der Areopag“ genannt, existierte, der höchstwahrscheinlich die älteste Ratsversammlung Athens war. Auch die Zustimmung einer Volksversammlung, die uns dann ausdrücklich im Zusammenhang mit den Reformen Solons zu Beginn des 6. Jahrhunderts begegnet, ist wahrscheinlich. Jedenfalls haben die zuständigen Institutionen Athens ein Gesetz erlassen, in Z. 20 *thesmos* genannt, das öffentlich aufgestellt wurde – es sind in unserem Text noch die *axones* erwähnt, die materiellen Träger der Inschrift –, und für ganz Athen und seine Bewohner galt. Erhalten ist vor allem der erste Abschnitt, der der unvorsätzlichen Tötung gilt. Schon die Unterscheidung zwischen vorsätzlicher und unvorsätzlicher Tötung setzt ein entwickeltes Rechtsverständnis voraus, das in Gesellschaften, die, wie die homerische, nur die Blutrache kennen, noch nicht vorhanden ist. Die Einschränkung der Blutrache ist denn auch im weiteren athenischen Gesetz das leitende Motiv.¹⁴³ Unausge-

¹⁴² IG I³ 104; Körner Nr. 11; LegDrSol F2.

¹⁴³ Bekanntlich hat dann Aischylos den Übergang von der Blutrache zu formal geregelten Gerichtsverfahren zum Thema der *Eumeniden* gemacht.

sprochen wird nur der vorsätzliche Täter der Blutrache durch die Verwandten des Getöteten ausgesetzt, vorher muß jedoch in einem formalen Gerichtsverfahren geklärt werden, ob der Vorsatz bestanden hat. Auch wer ohne Vorsatz getötet hat, muß das Land verlassen,¹⁴⁴ darf dann aber nicht mehr getötet werden. Die Entscheidung über die Art der Tötung erfolgt durch ein Gericht von 51 Epheten, deren ungerade Zahl darauf verweist, daß sie eine Mehrheitsentscheidung treffen sollten. Eine schwer verständliche und daher in der Forschung umstrittene Beteiligung am Verfahren sieht das Gesetz für die *basileis* vor, die von einer Mehrheit der Interpreten als ein Gremium aus dem (*archon*) *basileus* zusammen mit den vier athenischen Phyllobasileis, also Vorstehern der vier frühen Phylen, verstanden wird; nach der plausiblen Interpretation von G. Thür formulieren sie am Beginn des Verfahrens die Prozeßbeide der Streitparteien. Sehr detaillierte Regelungen schreiben sodann vor, wer für eine mögliche Versöhnung mit dem Täter zuständig ist, die dem Verbannten die Rückkehr nach Athen ermöglichen würde.

Ohne eine vollständige Wiedergabe der Gesetzesbestimmungen anzustreben, sollen aus den wenigen zitierten Regelungen folgende Schlüsse gezogen werden. Aus dem Gesetz ist die Existenz einer staatlichen Gewalt erkennbar. Es muß nicht nur einen Verfasser des Textes gegeben haben, als welcher der legendäre Gesetzgeber Dracon gilt, sondern auch eine gesetzgebende Institution, die das Gesetz beschloß. Es mag ein Rat gewesen sein, dessen Zusammensetzung wir nicht kennen, der die politische Herrschaft in Athen ausübte, und der mit Unterstützung der Volksversammlung dieses und möglicherweise weitere Gesetze in Kraft setzte. Als Amtsträger müssen die in Zeile 12 der Inschrift genannten *basileis* gelten, deren Hauptaufgabe sicherlich außerhalb der Funktion lag, die ihnen im vorliegenden Gesetz zugewiesen wird. Nach dem oben referierten Verständnis, dem hier gefolgt wird, handelt es sich um den amtierenden *basileus*, der nach der aristotelischen *Athenaion politeia* das älteste Amt im vordrakontischen Athen bekleidete und noch in späterer Zeit als einer der neun Archonten vor allem für kultische und prozeßrechtliche

¹⁴⁴ Ein Teil der Forschung zweifelt an der im Text ergänzten Strafbestimmung, also der Verbannung, vgl. zuletzt Harris / Canevaro 2023, 38ff.

Angelegenheiten der gesamten Polis zuständig war,¹⁴⁵ sowie um die vier *Phylobasileis*, die den vier Phylen vorstanden und vermutlich ebenfalls vorrangig kultische Aufgaben wahrnahmen.¹⁴⁶ Als weitere Institution, für die das Gesetz ein festes Verfahren festlegt, muß der Gerichtshof aus 51 Epheten gelten. Plausibel erscheint die Annahme, daß es sich um ältere Männer handelt, die den Geronten in der homerischen Schildszene entsprechen.¹⁴⁷ Da das Gesetz nicht vorschreibt, wie diese Männer ausgewählt und eingesetzt werden sollen, müssen sie als Gremium bereits vorher bestanden haben. Es bleibt uns jedoch unbekannt, für welche anderen Prozesse sie bis dahin zuständig gewesen sein mochten. W. Rieß hat herausgestellt, daß das Gesetz sogar eine „frühe Gewaltenteilung“ erkennen lasse: „Diejenigen, welche die Eide formulieren, richten nicht; diejenigen, die richten, haben die Eide nicht formuliert.“ Und auf einer höheren Ebene bestehe eine weitere Art von Gewaltenteilung darin, daß einerseits die wirklich Mächtigen, die politisch aktiven Magistrate (*eponymos*, *polemarchos*, Thesmotheten) in der Jurisdiktion keine Rolle spielten und diese dadurch nicht politisch mißbrauchen könnten, und daß es andererseits wenig Mächtige (*archon basileus*, Epheten) gewesen seien, denen die Jurisdiktion übertragen worden sei.¹⁴⁸ Wenn wir die beiden Bereiche vorsichtig Exekutive und Judikative nennen dürfen, so bestanden sie schließlich neben der ersten Gewalt, der Legislative, die das vorliegende Gesetz erließ. Auch diese Beobachtungen sprechen für einen bewußten Umgang mit verschiedenen Bereichen der staatlichen Gewalt, der sich in der gesetzlich verankerten Organisa-

¹⁴⁵ Aristot. *Ath. pol.* 3, 2 zur frühen Verfassung und 57, 1-2 für das 4. Jh. v. Chr.

¹⁴⁶ Zu den *basileis* im drakontischen Gesetz vgl. zuletzt Dreher 2019, 93-96; Rieß 2023, 42ff.; Schmitz 2023, 111-115, mit den Verweisen auf Thürs Publikationen in A. 82 sowie auf weitere Interpretationsvorschläge. Auch wenn mit dem Plural *basileis* nur der aktuelle und alle zukünftigen Inhaber dieses Amtes gemeint sein sollten, wie zuletzt Schmitz annimmt, belegt die Erwähnung, daß ein solches Amt schon vor dem Gesetz bestand.

¹⁴⁷ So Rieß 2023, 44f. Zur Schildszene vgl. o. bei A. 28.

¹⁴⁸ Rieß 2023, 45-47. Diese Zuordnungen betreffen jedoch nur die Blutgerichtsbarkeit. Sobald auch die anderen Rechtsbereiche ins Licht der Geschichte treten, nämlich mit der solonischen Gesetzgebung, zeigen sich die genannten Amtsträger als sehr wohl beteiligt an der Rechtsprechung, die Thesmotheten waren sogar ausschließlich damit befaßt. Die Rießsche Beobachtung kann daher allenfalls als „Gewaltenteilung im Ansatz“ gelten.

tion der Polis niederschlug. Das Gesetz Drakons zeigt exemplarisch, daß wir einen wichtigen Indikator für das Bestehen einer Staatsgewalt im Bereich der Gerichtsbarkeit finden. Als Gesetz zeigt es sich als allgemeine, für die ganze Gesellschaft Gültigkeit beanspruchende Vorschrift, der das gesamte Staatsvolk unterworfen ist. Und mit der Festschreibung eines Gerichtszwangs, mit der Festsetzung der Zuständigkeit einer dauerhaften Institution, durch welche über den Charakter eines Tötungsdelikts entschieden wird, bevor gegebenenfalls Blutrache geübt werden kann, manifestiert sich unmißverständlich der staatliche Charakter der athenischen Polis.¹⁴⁹

Nach Aristoteles *Ath. pol.* 4 hat Drakon seine Gesetze unter dem Archon Aristaichmos erlassen, der von der modernen Forschung mit einer gewissen Plausibilität ins Jahr 621/20 v. Chr. gesetzt wird. Damit wäre ein *terminus ante* für die Staatswerdung Athens gewonnen. Gibt es noch frühere Indizien? Da das drakontische Gesetz mit der Regelung der unvorsätzlichen Tötung einsetzt, wurde jüngst vermutungsweise vorgeschlagen, daß für die vorsätzliche Tötung bereits in einem früheren Gesetz der Areopag als Gericht festgelegt worden sein könnte.¹⁵⁰ Aber wenn vor Drakon alle Arten der Tötung zur Ahndung durch Blutrache führten, hätte ein solches Gesetz keinen Platz gehabt. Wenn das sogenannte Tyrannengesetz, das in derselben aristotelischen Schrift zitiert wird, tatsächlich als Reaktion auf den mißglückten Versuch Kylons, sich zum Tyrannen aufzuschwingen, gedeutet werden kann, wie es ebenfalls vorgeschlagen wird,¹⁵¹ dann ergibt sich ein weiterer Anhaltspunkt: Die Besetzung der Akropolis durch Kylon fand in einem olympischen Jahr statt, das zumeist mit dem Jahr 632 v. Chr. identifiziert wird; jedoch sind auch die Jahre 636 oder 640 v. Chr. nicht auszuschließen. Das Gesetz könnte also

¹⁴⁹ Etwas weniger präzise formulieren Harris / Canevaro 2023, 47: Drakons Gesetz „is an example of wider processes of state formation, institutionalization, and of the formalization of rules, which are found in many communities across the Greek world.“ Grote 2016b, 479: „Der sich herausbildende Staat manifestierte sich in eben diesem neuen, abstrakten System der Rechtsprechung“.

¹⁵⁰ Harris / Canevaro 2023, 36. 48f.

¹⁵¹ Dazu und zum ganzen Komplex vgl. Schmitz 2023, 73-86 (F 1 S. 79), mit Bezug insbesondere auf M. Gagarin und G. Thür. Aus den Berichten über die Niederschlagung des Putsches ergeben sich keine sicheren Anhaltspunkte für die Existenz staatlicher Einrichtungen, vgl. Rönneberg 2021, 36, dessen Quellenskepsis allerdings zu weit geht.

spätestens in der Zeit zwischen 632 und 621 v. Chr. erlassen worden sein. Nach Aristot. *Ath. pol.* 16, 10 bestanden zur Zeit des Tyrannen Peisistratos allgemein milde Gesetze über Tyrannen, was besonders folgendes Gesetz (*nomos*) über die Errichtung einer Tyrannis bezeuge: „Festgesetzt (*thesmia*) und althergebracht (*patria*) ist für die Athener das folgende: Wenn jemand sich zur Errichtung einer Tyrannis erhebt oder bei der Errichtung einer Tyrannis mitwirkt, dann sollen er und sein Geschlecht rechtlos (*atimos*) sein.“¹⁵² Das Dokument, das in der *Athenaion Politeia* wörtlich zitiert wird, bezeichnet sich begrifflich analog als gesetzlich festgesetzt (*thesmia*), wie das Tötungsgesetz Drakons sich als Gesetz bezeichnet (*thesmos*, Z. 20). Wiederum liegt also eine allgemein gültige Vorschrift vor, die eine beschließende, die politische Herrschaft ausübende Instanz, sprich eine Regierung, voraussetzt. Der Charakter der staatlichen Gewalt, der sich das Gesetz verdankt, wird noch dadurch unterstrichen, daß für die Zuwiderhandlung eine Sanktion angedroht wird, nämlich die Atimie. Die frühere Forschungsmeinung, daß diese Strafe in der griechischen Frühzeit die Verhängung von „Vogelfreiheit“ bedeute, bei der der Bestrafte jederzeit straffrei getötet werden konnte, hat an Zustimmung verloren gegenüber der Ansicht, daß die Sanktion, ebenso wie in späterer Zeit, Ehrlosigkeit in dem Sinn bedeute, daß der Betroffene keine öffentlichen Ämter mehr ausüben dürfe.¹⁵³ Daß die Strafe, wie auch immer sie verstanden werden muß, nicht von einer staatlichen Instanz, sondern von der Gemeinschaft aller Polismitglieder durchgesetzt werden mußte, tut dem staatlichen Charakter des festgelegten Verfahrens keinen Abbruch.

Von den später in Athen fungierenden Amtsträgern taucht im Tötungsgesetz Drakons lediglich der (Archon) Basileus auf. Daraus ist jedoch nicht zu schließen, daß die weiteren Archontenämter, die nach den Quellen die frühesten Ämter gebildet haben, zur Zeit Drakons noch nicht existiert hätten. Da sie bei einem Tötungsverfahren keine Funktion besaßen, mußten sie auch nicht erwähnt werden. Nach der aristotelischen *Athenaion politeia* bestanden in der Zeit vor Drakon die drei Ämter Basileus, Polemarchos und Archon; daß sie in dieser

¹⁵² Übersetzung M. Dreher, *Aristoteles, Der Staat der Athener*, Stuttgart 2021³.

¹⁵³ Zum Stand der Forschung vgl. Schmitz 2023, 81-85, mit einem ingenüösen, aber voraussetzungsreichen Versuch, die Kontroverse aufzulösen.

Reihenfolge eingerichtet wurden, wie der Autor mit wenig überzeugenden Begründungen behauptet (Aristot. *Ath. pol.* 3, 1-3), ist nicht glaubwürdig. Vielmehr erscheint es aus Gründen der sachlichen Zuständigkeit wahrscheinlicher, daß die drei Ämter zeitgleich eingerichtet wurden, weil man sowohl einen Amtsträger für den kultischen Bereich, einen für das Kriegswesen und einen für allgemeine Leitungsfunktionen benötigte. Daß auch die Trias Lebenszeit – Dekade – Einjährigkeit für die Dauer der Amtszeit eine hypothetische Konstruktion darstellt, ist in der Forschung weitgehend Konsens. Hingegen wird im allgemeinen die weitere Behauptung des Autors akzeptiert, daß die Thesmotheten erst später gewählt worden seien; das könnte durchaus erst in die Zeit nach Drakon fallen. Die athenische Überlieferung, wie sie namentlich durch die Atthidographen erfolgte, kennt nun eine Liste, auf der die jährlich amtierenden Archonten auch in der Zeit vor Drakon aufgezeichnet sind. Es wurde nur der jeweilige Archon verzeichnet, nach welchem das Jahr seiner Amtstätigkeit benannt war; zur Unterscheidung von den anderen Archonten wurde er daher auch *archon eponymos* genannt. Für solche Jahreschroniken bestand offenbar ein praktisches Bedürfnis, so daß sie auch in anderen frühen Gesellschaften erstellt wurden, so etwa die Konsullisten (*fasti*) der römischen Republik. Und ebenso wie in Rom gelten auch die Namensangaben der athenischen Liste nicht als unbedingt zuverlässig, sondern als spätere Rekonstruktionen. Darauf kommt es uns jedoch nicht an, und deshalb müssen wir uns mit den zahlreichen Problemen dieser Überlieferung nicht weiter befassen.¹⁵⁴ Bedeutsam ist vielmehr, daß diese Liste bis ins Jahr 683/2 zurückreicht, für das als erster, wohl fiktiver Name Kreon verzeichnet ist. Auch wenn mit diesem Jahr die Errichtung des Archontenamtes nicht historisch korrekt getroffen sein mag, so kann es doch in die spätere Zeit hineinreichende schriftliche oder mündliche Überlieferungen gegeben haben, die eine ungefähre Datierung des Amtsbeginns in die erste Hälfte des 7. Jahrhunderts erlauben.¹⁵⁵

¹⁵⁴ FGrHist III Suppl. bI, 51; bII, 342. 344. Eine stark fragmentierte, inschriftliche Archontenliste, deren erhaltene Eintragungen vielleicht bis an den Beginn des 6. Jahrhunderts zurückreichen, ist aus der zweiten Hälfte des 5. Jahrhunderts erhalten: Meiggs / Lewis Nr. 6.

¹⁵⁵ Andere Interpreten sind skeptischer und bevorzugen eine spätere Einordnung, vgl.

Die Einrichtung eines Amtes oder mehrerer Ämter, die bestimmte Kompetenzen besitzen und für eine bestimmte Zeit amtierend, ist ein Indiz für die staatliche Struktur einer Gesellschaft. Es besteht kein Grund, daran zu zweifeln, daß die Ämter von Anfang an für die Bereiche zuständig waren, die später für sie bezeugt sind, auch wenn es ursprünglich vielleicht nur Teilbereiche waren. Die Einrichtung solcher Ämter selbst sowie die Festlegung ihrer Kompetenzen und der Amtsdauer muß selbstverständlich von einem Gremium beschlossen und umgesetzt worden sein, das sich als oberste Instanz der staatlichen Herrschaft etabliert hatte. Damit sind wir wiederum auf den ersten Rat verwiesen, über den wir nichts Näheres wissen, dessen Existenz als Bedingung für die Einrichtung von Ämtern wir jedoch voraussetzen müssen.

Aus der Zusammenschau der verschiedenen Indizien ergibt sich, daß wir die Transformation der athenischen Polis in ein staatliches Gebilde etwa in das erste Viertel des 7. Jahrhunderts datieren dürfen.

Dreros

Ein frühes Gesetz aus der kretischen Polis Dreros ist seit langem und von vielen Forschern als Beleg für eine neue Stufe der Polisentwicklung angesehen worden.¹⁵⁶ Es wird anerkannt, daß in Dreros Amtsträger fungieren, daß politische Gremien als Institutionen bestehen und daß formale Verfahren und Beschlüsse vorgesehen sind. Angesichts der zumindest ansatzweise differenzierten Organisationsstruktur der Polis wird von einigen Autoren ausgesprochen, daß Dreros zum Zeitpunkt des Gesetzes eine staatliche Ordnung zuzuschreiben sei.¹⁵⁷ Diese, meist eher als Selbstverständlichkeit formulierte

zuletzt Rönnberg 2021, 60f., mit weiterer Literatur.

¹⁵⁶ Körner 1993, Nr. 90; van Effenterre / Ruzé 1994, Nr. 81; Gagarin / Perlman 2016, Dr1, jeweils mit Kommentar. Nach Fraß 2018, 107f., ist am Gesetz von Dreros nachzuvollziehen, daß „die Schwelle zur frühen Staatlichkeit anscheinend überschritten“ sei; nicht ganz konsequent stuft er das Gesetz anschließend als Bindeglied zwischen der vorstaatlichen homerisch-hesiodischen Ordnung und den frühen staatlichen Ordnungen ein, die sich im frühen 6. Jahrhundert formiert hätten (dazu genauer unten).

¹⁵⁷ So schon Ehrenberg, 1969a (orig. 1943), 27: „Die Inschrift ist ein staatliches Dekret und enthält ein wichtiges staatliches Gesetz“ (zustimmend zitiert von Körner 1993, 334). „Wir sehen also ..., daß der Staat hier schon seit langem als eine Selbstverständlichkeit betrachtet wird und in hohem Grade organisiert ist.“

Feststellung soll hier ausdrücklich bekräftigt werden: Das Gesetz tritt uns als Manifestation eines bereits bestehenden Staates entgegen.

„Gott --- So hat die Polis beschlossen: Wenn jemand Kosmos ist, soll derselbe für zehn Jahre nicht (wieder) Kosmos sein. Wenn er aber (wieder) Kosmos werden sollte, soll er, wenn er ein Urteil fällen sollte, das Doppelte schulden und von allen Ämtern ausgeschlossen (ἄκρηστος) sein, solange er lebt, und was immer er als Kosmos tut, soll ungültig sein. Eidesleister (sollen sein) der Kosmos und die Damioi und die Zwanzig der Polis.“

Die zahlreichen Probleme, welche dieses Dokument aufwirft, müssen hier nicht aufgegriffen werden. Es soll nur die obige Behauptung einer staatlichen Existenz unterlegt werden. Wie das Tötungsgesetz Drakons ist auch das vorliegende Gesetz eine gültige Vorschrift, welche die gesamte Polis betrifft. Und wie bei der spartanischen Rhetra wird es, hier durch eine direkte Anrufung, unter göttlichen Schutz gestellt. Inhaltlich enthält es ein Iterationsverbot für den Kosmos,¹⁵⁸ eine in mehreren kretischen Poleis verwendete Bezeichnung für den (obersten) Amtsträger oder für ein Gremium aus mehreren Amtsträgern, die jeweils auch gleichlautend bezeichnet werden. Das für zehn Jahre geltende Iterationsverbot setzt nicht nur voraus, daß in Dreros ein einjähriges Amt bestand, sondern läßt auch auf den Anlaß für das Gesetz schließen, daß nämlich ein oder mehrere Amtsinhaber versucht hatten, sich durch eine längerfristige oder gar dauerhafte Besetzung des Amtes eine dominante Stellung in der Polis zu verschaffen und dadurch deren institutionelle Struktur zu zerstören. Kurz: das Gesetz sollte einen möglichen Machtmißbrauch, eventuell sogar die Errichtung einer Tyrannis, verhindern. Damit bezeugt es einen bewußten Umgang mit den Institutionen der Stadt vor allem von Seiten derer, die dem Kosmos übergeordnet und daher für die Wahl und Einsetzung dieses Amtsträgers zuständig waren.¹⁵⁹ Als diese Instanz, die das Gesetz beschlossen hat, nennt das Gesetz schlicht

¹⁵⁸ Die abweichende Interpretation von Seelentag 2009, wonach dem Kosmos verboten worden sei, nach seiner Amtszeit weiter als Schiedsrichter zu fungieren, hat bei Rechtshistorikern zu Recht keine Akzeptanz gefunden, s. Gagarin / Perlman 2016, 203f.. Zustimmend jedoch Lundgreen 2020, 185. Seelentag 2023, 116f., hält an seiner Interpretation fest, ohne auf die Kritik daran einzugehen.

¹⁵⁹ „...diese Institution scheint der Souverän im Gemeinwesen von Dreros zu sein“, so Fraß 2018, 109. Etwas abgeschwächt Gehrke 1993, 53.

„die Polis“. Die Frage, welches Gremium oder welche Gremien konkret das Gesetz im Namen der gesamten Polis beschlossen haben, hat in der Forschung viele Antworten hervorgerufen, die angesichts fehlender Indizien nur Vermutungen sein können. In Frage kommen entweder die Versammlung der Bürger, andernorts *Demos* genannt, oder die im Gesetz selbst als Eidesleister genannten *Damioi* sowie „die Zwanzig der Polis“, also Gremien, die aus einer überschaubaren Anzahl von Männern bestanden (erinnert sei an die 30 Mitglieder der spartanischen Gerusie) und die in die Kategorie der Räte gehören, die wir oben auch in Sparta und Athen als oberste Träger der Herrschaftsgewalt identifiziert haben.

Für den Fall der Zuwiderhandlung gegen das Iterationsverbot legt das Gesetz Strafen gegen den unrechtmäßigen Kosmos fest: Er hat das Doppelte von dem zu erlegen, was er als Richter seinerseits als Strafe festgesetzt hat (möglicherweise auch das Doppelte des Streitwerts), und er darf lebenslang kein Amt mehr übernehmen. Die gesetzliche Fixierung von Strafen, wie sie hier und auch im drakontischen Gesetz vorliegt, bedeutet generell eine deutliche Manifestation der Staatsgewalt, ebenso wie die im Gesetz von Dreros folgende Anordnung, daß alle Entscheidungen eines unrechtmäßigen Kosmos ungültig sein sollen. Diese Bestimmungen zeigen, daß eine wichtige Aufgabe des Kosmos in Dreros die Rechtsprechung war, wobei er offenbar als Einzelrichter fungierte. Wiederum, wie beim Tötungsgesetz Drakons, erweist sich die Regelung der Gerichtsbarkeit als wichtiges, wenn nicht wichtigstes Handlungsfeld eines frühen Staates. Im Gesetz von Dreros besteht die oben für das Tötungsgesetz beobachtete „Gewaltenteilung im Ansatz“ nicht, insofern der Kosmos sowohl, wie gesehen, judikative, als auch, wie aus späteren Verhältnissen rückzuschließen ist, exekutive Aufgaben wahrzunehmen hat. Von beiden Bereichen getrennt ist allerdings auch hier die legislative Gewalt, die das vorliegende Gesetz erlassen hat.

Datiert wird das Gesetz von Dreros meist in die Zeit von 650 bis 600 v. Chr., manche Forscher setzen es eher an den Beginn dieser Zeitspanne, also um 650. Wenn es vor das Tötungsgesetz Drakons gehört und nicht selbst das älteste erhaltene Gesetz der griechischen Welt ist, so gehört es zumindest, zusammen mit weiteren Gesetzen

aus Dreros aus der zweiten Hälfte des 7. Jahrhunderts,¹⁶⁰ zu den ältesten griechischen Gesetzen überhaupt. Da es eine staatliche Ordnung widerspiegelt, die institutionell bereits recht differenziert ist, wird diese Ordnung schon einige Zeit bestanden haben, und wir dürfen die Staatsbildung der Polis Dreros ebenfalls, wie bei Athen, in die erste Hälfte des 7. Jahrhunderts v. Chr. setzen.

Um nochmals die begrifflich klare Einordnung des Dokuments zu unterstreichen, sollen ihr abschließend die in sich widersprüchlichen Aussagen von Fraß zur Staatlichkeit im frühen Dreros gegenübergestellt werden. Zwar konstatiert auch Fraß, daß im Gesetz die oben referierten Institutionen genannt sind, also die Polis, der Kosmos, die Damioi und die Zwanzig, und impliziert damit, daß diese Institutionen bereits vor dem Gesetz bestanden haben, gleichwohl betont er, daß das Gesetz erst den Übergang zur Staatlichkeit markiere: „Das Gesetz von Dreros – Die Schwelle zur Staatlichkeit wird überschritten“, lautet die Überschrift zu Kapitel 7.1, in der es eben statt „wird“ „ist überschritten“ heißen müßte.¹⁶¹ Das Gesetz gehöre in die „Entstehungsphase einer politisch institutionalisierten Ordnung, also einer frühen Form von Staatlichkeit“ (S. 109), die Polis befinde sich in einem „evolutionären Übergangscharakter“, denn sie „stand mit einem Bein bereits auf der Stufe zur Staatlichkeit, in welcher die Akzeptanz der institutionalisierten politischen Ordnung erwartet wird. Mit dem anderen Bein stand das Gemeinwesen aber noch auf der Stufe einer vorstaatlichen Ordnung, wie sie in den homerischen Texten erscheint“ (S. 110). Allerdings ermöglicht auch die Metapher der Polis als eines zweibeinigen Wesens nicht die Beseitigung des Widerspruchs, daß sie gleichzeitig eine vorstaatliche und eine staatliche Gemeinschaftsordnung haben soll. Sie kann eben begrifflich nur auf einer Entwicklungsstufe stehen. Der Widerspruch rührt daher, daß Fraß an dieser Stelle seiner Monographie den Staatsbegriff mit der erklärtermaßen erst später realisierten verfassungsmäßigen Ordnung

¹⁶⁰ Gagarin / Perlman 2016, Dr5 (= Körner 1993, Nr. 91), gibt sich ebenfalls als Beschluß der Polis zu erkennen. Bei Dr2 und Dr3 ist das auch möglich, obwohl die Polis nicht genannt ist. Dr4 ist ein Beschluß der *thystai*, wahrscheinlich einer Gruppe von Priestern. Dr6 und Dr7 sind weitere Regelungen aus der zweiten Hälfte des 7. Jahrhunderts, können aber keinem Beschlußgremium zugewiesen werden. Alle diese Inschriften sind so schlecht erhalten, daß ihr Inhalt kaum mehr erkennbar ist.

¹⁶¹ Fraß 2018, 106.

eines Gemeinwesens, die er als unverfügbar betrachtet, verbindet, während diese Unverfügbarkeit im Dreros-Gesetz noch prekär sei, weil dieses mit der realen Möglichkeit rechne, daß ein Kosmos gegen die Iterationsregeln verstoße. Abgesehen davon, daß jedes Strafgesetz mit der Möglichkeit eines Regelverstoßes rechnet, ist eben eine umfassender geregelte und intensiver durchgesetzte Verfassung, wie sie spätere Poleis aufweisen, keine notwendige Voraussetzung, um ein Gemeinwesen als Staat zu definieren.¹⁶² Daß es quantitative Unterschiede in der Intensität der Staatlichkeit gibt, soll nicht bestritten werden und soll uns weiter unten noch beschäftigen. Aber auch ein früher und schwacher Staat muß als Staat betrachtet werden. Das setzt Fraß, ohne den erneuten Widerspruch zu bemerken, selbst voraus, wenn er von „stärker (sc. stärker als Dreros) entwickelten staatlichen Gemeinwesen“ spricht, denn demnach muß es eben auch schwächer entwickelte *staatliche* Gemeinwesen geben, und zu diesen gehört Dreros.

Tiryns

Als letztes Fallbeispiel soll eine Inschrift aus Tiryns dienen, die ins 7. Jahrhundert v. Chr. datiert wird, ohne daß eine genauere Einordnung möglich wäre; die zweite Hälfte des Jahrhunderts erscheint jedoch wahrscheinlicher; auch das 6. Jahrhundert wird vorgeschlagen.¹⁶³ Im Unterschied zu der fast omnipräsenten Dreros-Inschrift wird das etwa gleichzeitige Dokument aus Tiryns in der Literatur über die frühe Polisentwicklung selten herangezogen; es ist auch für unser Thema nicht ganz so ergiebig.

Von der Inschrift sind nur wenige Fragmente mit kurzen Textstücken erhalten, der Anfang und weitere Textteile fehlen. Auch wenn wir deshalb nicht erfahren, welche Instanz das Dokument beschlossen hat, wie etwa in Dreros „die Polis“, und auch wenn die Interpretation wegen der fehlenden Vergleichstexte unter Vorbehalt erfolgen muß, so scheint doch gewiß, daß es sich um eine Anordnung handelt,

¹⁶² Analog dazu wird von anderen Autoren der Staatsbegriff nur für Gemeinwesen mit einer umfassend durchgesetzten Staatsgewalt verwendet, die sie jedoch erst in der Moderne gegeben sehen. Zur Kritik daran s. Teil I, 16f. mit A. 12.

¹⁶³ Text und Kommentar: Körner 1993, Nr. 31 (7. Jh.), danach wird im folgenden zitiert; van Effenterre / Ruzé 1994, Nr. 78 (6. Jh.).

die für die gesamte Polis galt. Angeordnet wird, daß die Platiwoinarchen mögliche Vergehen der *platiwoinoi* bestrafen sollen, und zwar jedesmal mit dem festen Betrag von 30 Medimnen (Korn). Unter den *platiwoinoi* verstehen die Kommentatoren eine Gruppe von Männern, die traditionell eine Art von (kultischer) Trinkgemeinschaft gebildet haben mag, zum Zeitpunkt des Gesetzes aber als Untergliederung der Bürgergemeinschaft zu verstehen sei.¹⁶⁴ Die Platiwoinarchen wären dementsprechend die Leiter dieser Gruppen, die hier durch ein Gesetz mit Strafgewalt ausgestattet werden, und die also als Amtsträger anzusehen sind.¹⁶⁵ Sollten sie ihrer Strafpflicht nicht nachkommen, müssen sie, so der Text weiter, ihrerseits das Doppelte der nicht auferlegten Strafe abführen, also 60 Medimnen (Korn). Wer diese Strafe gegen die Platiwoinarchen zu verhängen hätte, wird im entsprechenden Fragment nicht direkt gesagt. Fragment 7 knüpft aber vielleicht daran an und bestimmt: „Die Platiwoinarchen sollen die Strafe aufbringen (aus der Gemeinschaftskasse?). Wenn sie aber nicht reichlich aufbringen, soll der *epignomon* auferlegen aus dem Privatvermögen ...“.¹⁶⁶ Es ist also durchaus möglich, daß der *epignomon* als Einzelrichter die Platiwoinarchen (auch) für das Strafversäumnis zu verurteilen hat. Wenn sich Fragment 7 jedoch ausschließlich auf ein anderes Verschulden der Amtsträger bezieht, müßte man ein anderes Gericht annehmen, das auch aus dem übergeordneten Gremium selbst bestehen könnte, welches das vorliegende Gesetz in Kraft gesetzt hat.

Zwischen den bis jetzt zitierten Fragmenten finden sich noch, ohne erhaltenen Zusammenhang, die Satzreste: „Wenn die Platiwoinarchen das Amt niederlegen ...“ und: „... es sollen dem *Hieromnamon* übergeben die ...“.¹⁶⁷ Mit dem *Hieromnamon* ist ein weiterer Amtsträger genannt, der wie in vielen anderen Poleis im kultischen Bereich anzusiedeln ist. Eine Aufgabe für ihn hält auch das vor-

¹⁶⁴ Vgl. Gehrke 2009, 400.

¹⁶⁵ Nach Gehrke ebd. besaß der *platiwoinarchos* zwar „disciplinary power and was obliged to exercise it, on pain of punishment“, hält das aber für einen Status „like a state official“ (Hervorh. M.D.) – warum nicht: *as a state official*?

¹⁶⁶ So übersetzt Körner 1993, 88, das Fragment, wobei „vom Gemeinsamen“ im Text steht, was er aber ausläßt und als „Gemeinschaftskasse“ interpretiert. Ungeachtet seiner durchaus sinnhaften Übersetzung bestreitet Körner (S. 93), daß sich aus der Bestimmung ein Sinn gewinnen lasse.

liegende Gesetz fest: „Der *Hieromnamon* soll das öffentliche Vermögen verwalten, wie es der *Damos* beschließt. Die Versammlung ...“. Die Formulierung $\delta\omicron\kappa\epsilon\acute{\iota}$ τῷ δάμοι entspricht der späteren Standardformel, mit der in vielen klassischen demokratischen Poleis Beschlüsse der Volksversammlungen eingeleitet wurden: $\epsilon\delta\omicron\zeta\epsilon\nu$ τῷ δήμῳ. Damit ist also für das frühe Tiryns die Mitwirkung der Volksversammlung an der Verwaltung des staatlichen Vermögens bezeugt, vielleicht ist die Zustimmung der Volksversammlung grundsätzlich für alle Beschlüsse der Polis notwendig. Das heißt jedoch nicht, wie Körner annimmt, daß der *Damos* *allein* über „die Verwaltung und Verwendung des Staatsvermögens“ zu beschließen hatte (S. 92). Denn auch die frühesten Dekrete Athens enthalten die soeben zitierte Formel, zu der erst etwas später als zweites Beschlußgremium die Bule hinzutrat, wenn sie, wie in den meisten Fällen, am Beschluß beteiligt war. Aber ebenso wie man schon für das frühe Athen eine Vorentscheidung der (ungenannten) Bule voraussetzen hat,¹⁶⁷ muß das auch für Tiryns angenommen werden. Ein kleineres, oligarchisches Gremium, wahrscheinlich dasselbe, welches das vorliegende Gesetz beschlossen hat, wird Beschlüsse über das Polisvermögen auf den Weg gebracht und dem *Damos* zur Zustimmung vorgelegt haben. Und nur diese abschließende Zustimmung ist auch in das Gesetz aufgenommen worden.

Wie in Dreros finden wir also auch in Tiryns eine bereits differenzierte institutionelle Ordnung vor: Die allgemeine Herrschaft über die gesamte Polis muß von der Instanz ausgegangen sein, die das vorliegende Gesetz beschlossen hat. Dafür kommt nur ein Rat in Frage, der mindestens für bestimmte Aufgaben die Zustimmung des Gesamtvolkes, des *Damos*, einholt. Als Amtsträger begegnen uns die Platiwoinarchen, der *hieromnamon* sowie der *epignomon* (Richter); es mag weitere gegeben haben. Das Gesetz legt präzise Strafen fest und setzt ein geregeltes Strafverfahren voraus, das vielleicht schon eine Zeitlang in Geltung war. Damit erweist sich auch Tiryns als ein Staat,¹⁶⁸ der vielleicht noch in der ersten, spätestens aber in der zweiten Hälfte des 7. Jahrhunderts v. Chr. konstituiert wurde.

¹⁶⁷ So überzeugend Ehrenberg 1969 (1943), 27f.

¹⁶⁸ Körner 1993 überschreibt sein Dokument Nr. 31 umstandslos: „Tiryns. Staatsordnung“. Neutraler spricht Thommen 1996, 42 A. 95, von der „Gemeindeordnung“ in Tiryns.

Die im Vorstehenden behandelten Zeugnisse werden, wie gesehen, auch in einem großen Teil der bisherigen Forschung als Belege für Veränderung in der politischen Struktur der Polis herangezogen. Den Darstellungen liegt jedoch kein präziser Staatsbegriff zugrunde, so daß ein strikter Bezug auf die Frage nach der konkreten Staatsentstehung nicht hergestellt werden kann. Die meisten Ausführungen bleiben daher im Ungefähren und begnügen sich mit allgemeinen Einordnungen in dem Sinn, die Dokumente als Hinweise auf Formalisierung oder Institutionalisierung politischer Strukturen zu werten.¹⁶⁹ Demgegenüber soll im folgenden versucht werden, eine konkretere Vorstellung vom Charakter der Veränderungen zu gewinnen.

3) Grundzüge und Verlaufsformen der Transformation

Datierung

Wenn wir auf die vorgestellten vier Fallbeispiele zurückschauen, die als die frühesten Zeugnisse für die Transformation von Poleis in Staaten gelten dürfen, so läßt sich für eine allgemeine Chronologie folgendes zusammentragen. Das früheste Zeugnis, das direkt den Zeitpunkt der Staatserrichtung Spartas dokumentiert, ist leider nicht genauer datierbar, dürfte aber um 700 v. Chr. entstanden sein.¹⁷⁰ In diesen Jahrzehnten scheint der Prozeß der Staatsbildungen in den griechischen Poleis begonnen zu haben.¹⁷¹ Unsere weiteren Zeug-

¹⁶⁹ Das gilt auch für die Studie von Ma 2024. Zwar plädiert Ma in Ablehnung der nicht-institutionalistischen Perspektiven vehement dafür, die archaische Polis in erster Linie als Staat zu betrachten – der zweite Abschnitt ist überschrieben: „Bringing the State back in“, eine keineswegs ganz neue Forderung –, stützt sich dabei aber, neben den auch oben herangezogenen Dokumenten aus Dreros und Tiryns (das Gesetz Drakons fehlt erstaunlicherweise) vor allem auf Inschriften des 6. Jahrhunderts v. Chr., in denen die staatlichen Institutionen schon vielfach deutlich vor Augen stehen. Die Entstehung des Staates wird sehr oberflächlich mit der (subjektlosen, s. u. A. 215) Bemühung um Problemlösungen bei Konflikten gleichgesetzt und damit eigentlich umgangen.

¹⁷⁰ Vgl. Dreher 2021, 126.

¹⁷¹ So auch Runciman 1982, 365. Es sei nochmals betont, daß in der vorliegenden Studie ausschließlich von den Staatsbildungen der griechischen Poleis die Rede ist. Daß diese *nicht die ersten* Staatsbildungen auf den von Griechen besiedelten Gebieten waren, ergibt sich daraus, daß nach allgemeiner Ansicht schon die mykenischen (und vielleicht auch die minoischen) Gemeinwesen staatlich verfaßt waren, sei es als Monarchien, sei

nisse, im Unterschied zur literarisch überlieferten Rhetra sind es Inschriften aus Athen, Dreros und Tiryns, gehören zwar in die zweite Hälfte des 7. Jahrhunderts; da sie aber die Staatlichkeit der Poleis voraussetzen, kann diese durchaus bereits in der ersten Jahrhunderthälfte entstanden sein, wofür die athenische Archontenliste ein zusätzliches Indiz darstellt. Wenn die Gesetzgebung im epizephyrischen Lokroi, die dem legendenhaften Gesetzgeber Zaleukos zugeschrieben wird, tatsächlich gegen Mitte oder in der zweiten Hälfte des 7. Jahrhunderts stattgefunden hat, wie vielfach angenommen wird, so besteht darin eine weitere literarische Bestätigung für die Staatlichkeit einer Polis in diesem Zeitraum.¹⁷²

Sofern in der Literatur ausdrücklich ein Übergang aus der Vorstaatlichkeit in die Staatlichkeit angenommen wird, reicht die Zeitspanne vom 8. bis ins 6. Jahrhundert v. Chr.¹⁷³ Im 6. Jahrhundert nimmt die Zahl der heute bekannten inschriftlichen Gesetzestexte gegenüber dem 7. Jahrhundert, auf das wir uns hier beschränkt haben, zu, obwohl sie immer noch überschaubar bleibt, und im 5. Jahrhundert kommt eine größere Zahl von Dokumenten hinzu, die in den Poleis,

es als Oligarchien, vgl. Dreher 2019, 117-120.

¹⁷² Eine sichere Datierung ist jedoch nicht möglich, vgl. Hölkeskamp 1999, 187; von anderer Seite wird das 6. Jahrhundert für die Gesetzgebung vorgeschlagen.

¹⁷³ Donlan 1997 sieht die Phase vom 10. bis 8. Jh. als Zeit der *chiefdoms*, s.o. A. 64. 77; das 8. und 7. Jh. seien die frühe Phase der city-states. Ehrenberg 1969, 18, geht bis an den Anfang des 8. Jahrhunderts zurück. Eine große Zahl von Forschern datiert die „Entstehung der Polis“, wenn sie als „city-state“ definiert wird (s. o. bei A. 116), ins (spätere) 8. Jahrhundert, so Snodgrass 1980, 32-34; Morris 1987 passim; (weitere Angaben bei Rönneberg 2021, 9 A. 37). Andere Forscher bevorzugen eine spätere Datierung: Hall 2014, 135, konstatiert: „the rise of the state, however loosely we define it, is more a feature of the seventh than of the eighth century“; vgl. dens. 2013, 12. Gehrke 1993, 66, legt die „Herausbildung einer spezifischen Staatlichkeit“ ins 7. und 6. Jahrhundert, auf der nächsten Seite sind diese Ordnungen „weitgehend schon (?) im 6. Jahrhundert“ entstanden. Fraß 2018, 107f., plädiert mit Blick auf das Gesetz von Dreros für eine Staatswerdung in der zweiten Hälfte des 7. Jh., setzt die Formierung der frühen staatlichen Ordnungen gleich anschließend jedoch ins frühe 6. Jahrhundert v. Chr.!

Auch Autoren, die nicht direkt von Staatswerdung sprechen und auf eine präzise Begrifflichkeit verzichten, erkennen in diesem Zeitraum Veränderungen in der politischen Organisation der Poleis, zumindest die Bildung von festen Institutionen, Strukturen o. ä. Vgl. die reichhaltigen Literaturangaben zu Datierungsvorschlägen bei Rönneberg 2021, 9-15.

aus denen sie stammen, jeweils die frühesten Zeugnisse von Staatlichkeit sind.¹⁷⁴ Hervorgehoben sei jedoch nochmals, daß diese Zeugnisse, ebenso wie die oben analysierten aus Dreros und Tiryns, uns jeweils nur einen *terminus ante* bereitstellen und daß wir nicht wissen, wieviel früher der Übergang zur Staatlichkeit tatsächlich erfolgt ist.¹⁷⁵ Höchstwahrscheinlich haben diese Übergänge nicht gleichzeitig stattgefunden, da jede Polis ihrem eigenen Entwicklungstempo folgte. Auch dürfen wir vermuten, daß die Transformation zum Staat nicht in jeder Polis neu erfunden, sondern verschiedentlich bereits erfolgten Staatsgründungen nachgebildet wurde.¹⁷⁶ Das geschah sicherlich erst nach einer gewissen Zeit, nachdem die institutionellen Vorbilder etabliert waren und erfolgreich agiert hatten, so daß auch deshalb eine größere Zeitspanne für den Gesamtprozeß anzunehmen ist. Obwohl wir natürlich nicht aus jeder Polis entsprechende Belege besitzen, muß im Hinblick auf die gesamtgriechische Entwicklung doch angenommen werden, daß die Staatswerdung aller griechischen Poleis im Lauf des 5. Jahrhunderts abgeschlossen gewesen ist.

Es sei an dieser Stelle nochmals betont, daß verschiedene archäologische Befunde, die von zahlreichen Forschern als Indizien für die „Entstehung der Polis“ akzeptiert werden, nach der hier verwendeten Definition keine Belege für die Entstehung von Staatlichkeit sein können. Die oft genannten Anhaltspunkte wie Tempelbau, die Errichtung von Stadtmauern oder die Einrichtung einer Agora setzen gewiß gemeinschaftliche Organisationsleistungen voraus, erfordern aber ebensowenig wie Kolonisationsunternehmen (s. u.) das Handeln einer Staatsgewalt.¹⁷⁷

¹⁷⁴ Verwiesen sei auf die Sammlungen der archaischen Gesetzestexte von Körner 1993 und von van Effenterre / Ruzé 1994. Gehrke 1993 geht auf einige dieser Dokumente als Zeugnisse für „politische Institutionalisierung“ (S. 59) ein, zuvörderst auf die Inschriften von Dreros und Tiryns (S. 53-56), ebenso Ma 2024, Abs. 10-17.

¹⁷⁵ In der Literatur wird dieser Unterschied oft mißachtet und der Beginn der Staatlichkeit mit diesen Zeugnissen gleichgesetzt.

¹⁷⁶ Das wird für denkbar gehalten z. B. auch von Whitley 1991, 40; Welwei 2002, 67; Schulz / Walter 2022, I 56.

¹⁷⁷ Vgl. schon Dreher 1983, 141 A. 157. Einen Rückschluß auf die Existenz einer Staatsgewalt erlauben auch andere Befunde nicht, wie Veränderungen bei der Keramikherstellung oder den Bestattungssitten. Einige zutreffende diesbezügliche Argumente führt Rönneberg 2021, 11-15, an. Siehe zu unzulässigen Schlüssen aus archäologischen Befunden auch o. A. 92.

Staatsgewalt

Unsere Definition des Staates basiert, wie in Teil I ausgeführt, auf der Drei-Elemente-Lehre, nach welcher ein Staatsgebiet, ein Staatsvolk und eine Staatsgewalt einen Staat ausmachen. Leicht ersichtlich ist, daß die griechischen Poleis, seitdem sie historische Spuren hinterlassen haben, über die ersten beiden Elemente verfügen. Das dritte und, wie gezeigt, entscheidende Element ist in der griechischen Frühzeit erst hinzugetreten: Die Etablierung einer allgemeinen Staatsgewalt bedeutete den Akt der Staatsgründung, die Transformation der Polis zum Staat.

Soweit wir an unseren Fallbeispielen beobachtet haben, und soweit auch an allen anderen abgeschlossenen Staatserrichtungen sowie an der weiteren Entwicklung der griechischen Poleis ablesbar ist, ist die Existenz einer Staatsgewalt¹⁷⁸ erkennbar am Bestehen von meist formalisierten, auf Dauer angelegten Institutionen, welche die höchste allgemeine Macht in der Polis ausübten. Die Institutionen werden in literarisch überlieferten oder inschriftlich erhaltenen Texten sowohl als solche genannt und beschrieben, als auch werden auf dieselbe Weise ihre Handlungen und die von ihnen festgelegten Regeln überliefert. Die ergiebigsten Quellen dafür sind die Gesetze, die von allen Polisbewohnern beachtet werden müssen und im allgemeinen mit Strafen sanktioniert sind. Schon daran ist ersichtlich, daß die Staatsgewalt vor allem als rechtliche Gewalt in Erscheinung tritt, was in einigen Studien zur Staatsentstehung nicht oder ungenügend berücksichtigt wird.¹⁷⁹ Die Gesetzgebung, die nach dem Prinzip der Gewaltenteilung in den meisten modernen Staaten als Aufgabe

¹⁷⁸ Soweit wir wissen, ist keine Polis durch einen Tyrannen in die Staatlichkeit geführt worden. Die griechischen Tyrannen, die seit dem 6. Jahrhundert v. Chr. viele Poleis beherrschten, haben vielmehr bereits bestehende Staatswesen okkupiert und dann die vorhandenen Institutionen zugunsten ihrer persönlichen Herrschaftsausübung weitgehend entmachtet, wenngleich nicht völlig abgeschafft. Zum geringfügig institutionellen, aber dennoch staatlichen Charakter der Tyrannis vgl. Dreher 2017, 180f.; dazu Maffi 2023.

¹⁷⁹ Vgl. Jellinek 1922, 266. 433: „Solche durch feste Regeln geordnete Willensverhältnisse sind aber Rechtsverhältnisse. So ist denn im Begriffe der Staatsgewalt schon der der rechtlichen Ordnung enthalten.“ Anerkannt auch von Service 1977, 118-122. Zur andernorts fehlenden Berücksichtigung des rechtlichen Bereichs vgl. die Kritik von Maffi 2022, 260.

einer legislativen Gewalt bestimmt ist, wurde bereits in den frühen griechischen Poleis von eigenen, und zwar den höchsten politischen Gremien wahrgenommen, nämlich von einem Rat überschaubarer Größe, der aus ausgewählten Politen bestand. Gegebenenfalls war die Zustimmung der Volksversammlung einzuholen. In Dreros wurde die gesetzgebende Gewalt, wie wir gesehen haben, schlicht als „die Polis“ bezeichnet. Die genannten Gremien erließen nicht nur Gesetze zur Regulierung des gesellschaftlichen Zusammenlebens einschließlich des kultischen Bereichs, sondern faßten auch Beschlüsse, die wir meist Dekrete nennen, über politische Maßnahmen wie zum Beispiel Kriegsführung oder Vertragsschlüsse mit anderen Staaten. Sie setzten auch Amtsträger ein und kontrollierten deren Amtsführung. Diese bildeten die exekutive Gewalt, der im allgemeinen, bei allerdings großen Unterschieden in den einzelnen Poleis, eher geringe Kompetenzen zugestanden wurden, da die griechische Polis als Bürgergemeinschaft der Machtfülle einzelner Amtsträger grundsätzlich mißtrauisch gegenüberstand, wovon auch das oben besprochene Gesetz aus Dreros mit dem Iterationsverbot für den Kosmos zeugt. Die judikative Gewalt schließlich konnte, gerade in der Frühzeit und später besonders bei geringen Vergehen, von einzelnen Amtsträgern ausgeübt werden, wie wir etwa aus dem Gesetz aus Dreros oder aus dem späteren Athen wissen. Aber in fast allen Stadtstaaten gab es für die meisten und vor allem die Kapitalverbrechen Gerichtshöfe mit mehrköpfigen Richtergermien, wie die 51 Epheten, die im oben besprochenen Tötungsgesetz von Drakon das Urteil zu fällen hatten.¹⁸⁰ Nur in Sparta war auch für die Kapitalverbrechen das höchste politische Gremium, die Gerusia, zuständig, wie wir aus späteren Quellen erfahren.¹⁸¹

Die sogenannte Kolonisation, also die Gründung von neuen Siedlungsorten, griechisch Apoikien, setzt die Existenz einer staatlichen Ordnung in der Heimatpolis der Kolonisten nicht notwendig voraus. Die Organisation einer solchen Neusiedlung, von der Befragung des delphischen Orakels über die Bereitstellung der materiellen Ressourcen und der Transportkapazitäten bis zur Aufrechterhaltung des Kontakts zwischen der Apoikie und der Mutterstadt war zwar auf-

¹⁸⁰ Zur Gewaltenteilung als staatlichem Prinzip s. auch Teil I, 26.

¹⁸¹ Xen. *Lak. pol.* 10, 2; Aristot. *pol.* 1275b10; Plut. *Lyk.* 26.

wendig, konnte aber durchaus auch aus eigener Initiative von begüterten Mitgliedern der Oberschicht geleistet werden.¹⁸² Da eine größere Zahl von Apoikien bereits im 8. Jahrhundert angelegt wurde, sowohl in Unteritalien und Sizilien als auch im Schwarzmeergebiet, müßte man zugunsten der gegenteiligen Annahme postulieren, daß die jeweiligen Mutterstädte bereits zu dieser Zeit staatlich organisiert gewesen wären; darauf deutet jedoch nichts hin. Wenn wir bei unserer obigen Datierung bleiben, nach welcher die Staatsgründungen um 700 v. Chr. erfolgten, dann sind die frühen Apoikien, mindestens die des 8. Jahrhunderts, „private“ Unternehmungen unter Führung eines angesehenen Aristokraten, des *oikistes*, gewesen.¹⁸³ Wenn die Aussiedler ihre Heimatpolis nicht aufgrund von internen Auseinandersetzungen verließen bzw. verlassen mußten, wie z. B. die sogenannten Parthenier aus Sparta Tarent gegründet haben sollen,¹⁸⁴ so wird ihre Unternehmung von der Polisgemeinschaft, auch wenn diese noch vorstaatlich organisiert war, unterstützt worden sein, nicht zuletzt, um durch die Erschließung neuer Landgebiete eine Entlastung von dem im 8. Jahrhundert gestiegenen Bevölkerungsdruck zu erreichen. In Städten, die bereits staatliche Ordnungen etabliert hatten, mögen dann die Neugründungen durch Beschlüsse der zuständigen Institutionen staatlich sanktioniert und gefördert, vielleicht sogar initiiert und organisiert worden sein, wie es aus späteren Fällen bekannt ist.¹⁸⁵ Aber eine staatliche Initiative oder Beteiligung muß nicht zwingend angenommen werden, wie das Beispiel des älteren Miltiades aus Athen zeigt, der in der Herrschaftszeit des Tyrannen Peisistratos einen „privaten“ Siedlungszug in die thrakische Cher-

¹⁸² So schon Graham 1964, 7f.; vgl. Welwei 2002, 44. Osborne 1998 dokumentiert sowohl staatliche als auch private Unternehmungen.

¹⁸³ So ist auch die Gründung der Phäakenstadt Scheria bei Hom. *Od.* 6, 4-10, einzustufen, wie Osborne 1998, 256f., zu Recht darlegt. Das stimmt mit dem oben ausgeführten nichtstaatlichen Charakter der homerischen Gesellschaft überein. Die jüngere Forschung geht zudem davon aus, daß die Gründung einer Apoikie kein durchorganisiertes, in sich abgeschlossenes Unternehmen war, sondern in mehreren Siedlungsschritten über mindestens eine Generation hinweg erfolgte, vgl. Hall 2014, 107.

¹⁸⁴ Strabon 6, 3, 2f., 278-280; Aristot. *pol.* 1306b27-30.

¹⁸⁵ Ein offizieller Beschluß der Polis Athen ist inschriftlich bezeugt durch IG II² 1629, vgl. Osborne 1998, 253, mit weiteren Fällen, allgemein auch Stein-Hölkeskamp 2015, 101f. 115.

sones unternahm und dort eine individuelle (staatliche?) Herrschaft errichtete.¹⁸⁶

Ob Koloniegründungen staatlich organisiert waren, hing also davon ab, ob die betreffende Mutterstadt bereits ein Staat war, und ob dieser Staat die Unternehmung in die Hand genommen hat oder nicht. Leider ist gerade für die Poleis, welche die meisten Apoikien gegründet haben, unter anderen das euböische Chalkis, Korinth oder Milet, nicht herauszufinden, wann genau sie in Stadtstaaten transformiert wurden. Es ist durchaus denk- aber nicht nachweisbar, daß eine Transformation zum Staat in den Mutterstädten erst stattfand, nachdem sie in den Apoikien schon erfolgt war und von dort eine Rückwirkung ausging.¹⁸⁷ Denn der Regelungsbedarf war in den Apoikien besonders hoch, weil bei einer Neugründung viel bewußter geplant werden mußte, etwa welche Aufgaben an wen delegiert werden, welche Gremien gebildet werden, wer bei welchen Angelegenheiten Mitsprache haben soll, wie das Ackerland verteilt wird, wie mögliche Konflikte zwischen Siedlern aus verschiedenen Herkunftspoleis (wie z. B. im sizilischen Himera) geregelt werden usw. Wenn diese Möglichkeit zuträfe, wären die ersten (Stadt-)Staaten der griechischen Welt in den neuen Siedlungsgebieten errichtet worden.¹⁸⁸

Auch rein geographische Zusammenschlüsse von kleineren Siedlungen zu größeren, gegebenenfalls urbanen Einheiten sind *per se* keine Staatsgründungen, obwohl diese Gleichsetzung verschiedentlich explizit oder implizit in der Forschung auftaucht.¹⁸⁹ Anlaß dazu

¹⁸⁶ Hdt. 6, 34-38.

¹⁸⁷ Eine Rückwirkung bei der politischen Organisation nimmt auch Schuller 2002, 13, an, ohne sich direkt auf die Staatlichkeit zu beziehen; diese ist immerhin angedeutet bei Welwei 2002, 52.

¹⁸⁸ Für Sparta könnte man sich eine solche Rückwirkung vorstellen, wenn die Gründung der Kolonie Taras um 700 v. Chr., also etwa zeitgleich mit der Staatsbildung erfolgte. Aus Athen hingegen wurden in der Frühzeit bekanntlich keine Kolonien gegründet.

¹⁸⁹ Die geographische Dimension der „Polisentstehung“ betonen etwa Andreev 1988, 26; Schuller 2002, 11; Meister 2020a, 115. Von den meisten Autoren des Sammelbandes Meister / Seelentag 2020, insbesondere in der archäologischen Perspektive von E. Kistler, wird Polisentstehung (im Sinn von Staatsentstehung) nur als (quantitative) Änderung der Siedlungsweise betrachtet. Berechtigte Kritik daran übt Maffi 2022, 254. Im Gegensatz dazu warnt C. Morgan nachdrücklich vor einer Vermischung von politischen Prozessen mit urbanistischen Entwicklungen, wofür Freitag 2007, 385, mehrere Publikationen Morgans zitiert. Service 1977, 347-349, und Runciman 1982, 366,

geben die oft mythenhaften Erzählungen einiger griechischer Poleis über ihre eigene Frühgeschichte, in denen ein Synoikismos, ein „Zusammensiedeln“ mehrerer Siedlungseinheiten einen wichtigen Entwicklungsschritt markiert, wie der dem Theseus zugeschriebene Synoikismos ganz Attikas. Im Hinblick auf den Staatsbegriff, der ja in der griechischen Geschichtsschreibung nicht in unserem Sinn definiert ist, kann ein solcher Synoikismos zunächst nur zur Herstellung von zwei Voraussetzungen für eine Staatsgründung beitragen: Durch den Zusammenschluß mehrerer Gebiete wird ein Territorium geschaffen (oder nur vergrößert), und zugleich wird die Einwohnerzahl dieses Territoriums erhöht, wodurch diese möglicherweise erst die kritische Größe erreicht, die für eine Staatsgründung unerlässlich ist.¹⁹⁰ Für die Staatswerdung muß jedoch als drittes und entscheidendes Element die Errichtung einer Staatsgewalt hinzutreten, was in der einen oder anderen Polis durchaus der Fall gewesen sein mag – historisch belegte Beispiele sind mir aber nicht bekannt. Im oben herangezogenen Fallbeispiel Tiryns kann sogar geschlossen werden, daß die „Strukturierung der Polisgemeinschaft bereits vor der Zusammensiedlung erfolgte“, da „sich keine städtische Siedlung aus der Zeit der Inschriften archäologisch nachweisen läßt“, so daß anzunehmen ist, „daß Tiryns damals aus einer Reihe verstreuter Dörfer bestand, die aber *staatlich* eine Einheit bildeten...“.¹⁹¹ Häufig belegt sind dann in klassischer und hellenistischer Zeit Zusammenschlüsse von im allgemeinen zwei Poleis, als diese Gemeinwesen unstrittig staatlichen Charakter besaßen. Daher mußten in den entsprechenden Verträgen auch staatsrechtliche Rahmenbedingungen wie Bürgerrecht, politische Entscheidungsinstanzen, Gerichtsbarkeit u.a. geregelt werden, sie heißen daher Sympolitieverträge. Es bleibt also festzuhalten, daß ein Synoikismos sowohl von vorstaatlichen als auch von staatlichen Siedlungseinheiten durchgeführt werden konnte.

formulieren deutlich, daß die Urbanisierung noch keinen Staat hervorbringe. Raafaub 1991, 241, lehnt es ab, die Polisentstehung im 8. Jahrhundert nur als Stadtbildung zu verstehen; vielmehr seien politische Merkmale entscheidend. (Allerdings kommt Raafaubs Polis-Definition in A. 122 ganz ohne die Begriffe 'Herrschaft' und 'Staat' aus). Weitere Literatur bei Rönnberg 2021, 16, der auch selbst die Gleichsetzung ablehnt.

¹⁹⁰ S. dazu Teil I, S.24.

¹⁹¹ Körner 1993, S. 89 (Hervorh. M.D.)

Im Unterschied zu einer Staatsgründung (s. dazu u. den übernächsten Unterpunkt) muß ein „Zusammensiedeln“ nicht unbedingt ein einmaliger, gelenkter Akt sein, der zu einem bestimmten Zeitpunkt erfolgt. Vielmehr ist in vielen griechischen Gebieten mit Siedlungsveränderungen zu rechnen, die sich über einen längeren Zeitraum erstreckten und so zur Konzentration der Bevölkerung in einer zentralen Siedlung, mithin zur Stadtbildung oder Stadtvergrößerung führten.

Am fehlenden Nachweis einer Staatsgewalt scheitern auch sämtliche rein archäologisch begründeten Schlußfolgerungen auf die Existenz von politischen, insbesondere staatlichen Strukturen.¹⁹² Wie weiter oben ausgeführt,¹⁹³ erlauben Unterschiede in der Größe von Wohnhäusern sowie in der Grabausstattung zwar Schlüsse auf eine ökonomisch-soziale Differenzierung, aber nicht auf die genaue hierarchische Position der Bewohner beziehungsweise der Bestatteten innerhalb einer Gesellschaft. Ulf und Kistler teilen diese Skepsis in Bezug auf Gräber und Nekropolen, leiten jedoch aus den unterschiedlichen Baubefunden in Lefkandi auf Euböa in der frühen Eisenzeit zunächst die Existenz eines „heterarchischen Herrschaftssystems zwischen lokalen Anführern in Megaron-Bauten“ ab, das sie angesichts von zwei „stattlichen Absidialbauten“ um 1100 v. Chr. von einer „klare(n) Hierarchie“ durch eine Familie als „herrschende Zentralinstanz“ abgelöst sehen.¹⁹⁴ Damit überschätzen sie im konkreten Fall die Aussagekraft von baulichen Zeugnissen in Bezug auf gesellschaftliche Verhältnisse ebenso wie in ihrer allgemeinen Behauptung: „Mit neuen Bauformen werden im Innern einer Gesellschaft neue gesellschaftliche Strukturen angeregt, die soziale Transformationsprozesse auslösen ...“.¹⁹⁵ Neue Bauformen entstehen jedoch nicht aus sich selbst heraus. Sie beruhen auf den Bedürfnissen und

¹⁹² Auch Fraß 2028, 106, betont, daß sich aus archäologischen Befunden keine sozialen und politischen Strukturen rekonstruieren ließen.

¹⁹³ S. o. bei A. 90-93. 177.

¹⁹⁴ Ulf / Kistler 2020, 168f.

¹⁹⁵ Ulf / Kistler 2020, 159f. Vgl. auch S. 50, wo einem neuen Hallenbau in Azoria auf Kreta folgende Auswirkung zugeschrieben wird: „Dieser Bau machte die Bürgerversammlung in Azoria gleichermaßen zu einer physischen Begebenheit wie zu einer politischen Institution ...“ – als ob beide Eigenschaften von einer Halle abhängen würden!

Planungen der handelnden Subjekte und können daher, müssen aber nicht Ausdruck von veränderten gesellschaftlichen oder politischen Strukturen sein.

„*Aktionsmodus*“

Nicht in allen Situationen, in denen die handelnden Subjekte gesellschaftlich relevante Maßnahmen anstreben oder umsetzen, müssen sie auch einen präzisen Begriff davon gehabt haben, der ihre Ziele oder das Ergebnis ihres Handelns zum Ausdruck gebracht hätte. Welche Parolen, Losungen oder Zielbeschreibungen bei der Transformation der frühen Polis zum Staat verwendet wurden, bleibt uns völlig unbekannt. Sicher ist jedoch, daß sich eine solche Transformation nicht von selbst, sozusagen hinter dem Rücken der Beteiligten, vollziehen konnte, sondern daß den handelnden Personen bewußt gewesen sein muß, daß sie mit ihrer konkreten Entscheidung, einem genau definierten Gremium (wie der spartanischen Gerusie), einem oder mehreren diesem Gremium verantwortlichen Amtsträgern (wie dem kretischen Kosmos) oder einem mehrköpfigen Gerichtshof (wie den athenischen Epheten), jeweils mit wie deutlich auch immer definierten Zuständigkeiten versehen eine allgemeine Gewalt über die Bewohner ihres Territoriums einzuräumen, eine Veränderung in der politischen Organisation ihres Gemeinwesens herbeiführten.¹⁹⁶ Eine Konsenssuche unter den führenden Männern der Polis, wie wir sie für die homerische Gesellschaft annehmen, mag zwar weiterhin üblich gewesen sein, die vorstaatlichen Kommunikationsstrukturen bestanden ja fort, aber bei fehlender Einmütigkeit wurden nun Instanzen etabliert, die eine Entscheidung auch gegen den Willen von Minderheiten oder von einzelnen durchsetzen konnten und sollten. Das Mehrheitsprinzip, das nun in formalisierter Weise zählbare Stimmenverhältnisse hervorbrachte – außer bei der spartanischen Volksversammlung, die das allerdings ebenfalls formalisierte Akklamationsprinzip zur Mehrheitsfindung beibehielt – war zugleich Mittel und Ausdruck der neuen Hierarchie.¹⁹⁷ Allgemeingültige Gesetze, meist schriftlich festgeschrieben und bald

¹⁹⁶ Vgl. Dreher 2021; weitere Hinweise im nächsten Abschnitt, bes. bei A. 213.

¹⁹⁷ Allgemein zur Mehrheitsentscheidung Flaig 2013, zum antiken Griechenland S. 173-217, zu den Kriterien für ein formalisiertes und verbindliches Verfahren S. 180.

für alle sichtbar öffentlich aufgestellt, führten allen Polisbewohnern ihre Rechte und Pflichten vor Augen. Verstöße gegen sie oder gegen gesellschaftliche Grundregeln wurden nicht mehr durch schiedsrichterliche Streitschlichtung wie in der homerischen Gesellschaft, sondern durch verpflichtende gerichtliche Verfahren entschieden.

In all diesen Institutionen manifestierte sich die neu errichtete Staatsgewalt, und all diese Institutionen mußten von den daran beteiligten oder davon betroffenen Polisbewohnern als etwas Neues wahrgenommen werden. Es ist deshalb angemessen, die jeweils erste Maßnahme zur Institutionalisierung einer staatlichen Gewalt in einer Polis als einen qualitativen Sprung zu bezeichnen,¹⁹⁸ als einmaligen und akuten Übergang von einer vorstaatlichen in eine staatliche Struktur, als Beginn der Polis als griechischen Stadtstaates.

Qualitative Sprünge kommen in der Geschichte der menschlichen Gemeinschaften immer wieder vor und werden von der Geschichtswissenschaft als solche eingestuft, am offensichtlichsten, wenn es sich um Revolutionen handelt.¹⁹⁹ Bei der Entstehung der frühgriechischen Staatlichkeit jedoch wird diese Metapher mit großer Konsequenz vermieden. In der hier herangezogenen Literatur bildet nur A. Maffi eine Ausnahme, und S. Fraß erkennt immerhin an, daß bei aller Abstufung (dazu sogleich) doch zuerst eine Stufe oder Schwelle zur Staatlichkeit überschritten werden muß.²⁰⁰ Ist in der übrigen Literatur dann doch einmal, am ehesten in Bezug auf einzelne Bereiche wie der Rechtsprechung, von einem Sprung die Rede, dann ist damit lediglich ein großer Unterschied zwischen einem früheren und einem späteren Zustand gemeint,²⁰¹ aber nicht in dem eben ausgeführten

¹⁹⁸ So schon Dreher 2021, 128. Zeller 2020, 209, kritisiert die „Unterscheidung zwischen staatlicher und vorstaatlicher Organisation“ als statisch (s. o. bei A. 98). Die Transformation oder der ‚Sprung‘ vom einen in den anderen Status erscheint mir jedoch alles andere als statisch.

¹⁹⁹ Jellinek 1922, 403, scheint in diese Richtung zu denken: „... der Staat entsteht mit dem Dasein einer faktischen, sofort mit einem Gebiete ausgerüsteten Herrschergewalt“. Jüngst ist das Phänomen zum Thema und zum Titel einer Monographie über den kognitiven Sprung geworden, den der Mensch mit dem Ursprung seiner Vorstellungskraft vollzogen hat: Silvia Ferrara 2021: „Il Salto“.

²⁰⁰ Maffi 2022, 263; Fraß 2018, 23f.: „Aber auch wenn die Schwelle zwischen Staatlichkeit und Vorstaatlichkeit nicht (immer) klar abgrenzbar ist, so existiert sie doch dessen ungeachtet“ (A. 88).

²⁰¹ Nach Lundgreen 2020, 184f., betont „die Forschung“ angesichts der Rechtsprechung

Sinn eines grundlegenden, plötzlichen Sprungs in die Staatlichkeit. Vielmehr besteht man insbesondere in der jüngeren Forschung, in der erst eine ernsthafte Diskussion dieser Thematik begann, auf einer allmählichen, graduellen Entfaltung von Staatlichkeit.²⁰² Ich habe diese Ansicht bereits an anderer Stelle kritisiert und der Vorstellung einer fließenden Entstehung des Staates, von der kein Anfang erkennbar ist, eine Absage erteilt.²⁰³ Denn die Einrichtung, Übernahme und Anerkennung einer allgemeinen Gewalt kann zwar über unterschiedlich lange Zeit initiiert, diskutiert und vorbereitet werden, aber die tatsächliche Konstituierung der damit betrauten Institution kann nur zu einem ganz bestimmten Zeitpunkt geschehen, ebenso wie ein Gesetz zu einem bestimmten Zeitpunkt in Kraft tritt, bei den Griechen im allgemeinen in dem Moment, in dem es beschlossen wurde.

Nun hört sich eine Aussage wie „Sprung in die Staatlichkeit“ vielleicht sehr schroff oder zugespitzt an. Das mag dazu beigetragen haben, daß in der neueren Literatur, die sowieso zu „Soft-Formulierungen“ neigt, „die strikte Dichotomie Staat / Nicht-Staat“ häufig abgelehnt wird.²⁰⁴ Dabei wird übersehen, daß der ‚Sprung‘ vor allem eine analytische Kategorie darstellt, welche das qualitativ neue Element der Staatlichkeit in einer Gesellschaft erfassen will. Damit

des Kosmos im Gesetz von Dreros einen „institutionellen Sprung“ im Vergleich zur Streitschlichtung bei Homer; in A.85 verweist er aber nur auf Hölkeskamp 2003, bes. 98f.

²⁰² So etwa Service 1977, 377; Walter 1993, 18; Scheidel 2013, 13; Grote 2016a, 241 A. 17; Meister / Seelentag 2020, 23. Ulf / Kistler 2020, 151, nennen das „die Forderung, den Begriff ‚Staat‘ flexibler zu fassen“, der sie sich anschließen und Lundgreens „Konzept der Governance“ akzeptieren (s. Lundgreen 2020, 165), mit dem die graduelle Durchsetzung von Schlüsselmonopolen verbunden wird, s. Teil I, S. 45f. Schon Engels 1972 (1884), 111f., hatte zur Entwicklung in Athen konstatiert: „Aber der Staat hatte sich inzwischen im stillen entwickelt“, womit er vor allem die Schaffung von Ämtern in der vorsolonischen Zeit meint. Für das analoge Verständnis des modernen Staates vgl. den programmatischen Titel von Schuppert 2010, „Staat als Prozess“, auf den sich Lundgreen beruft. Weitere Literaturangaben bei Rönneberg 2021, 17f., der sich ausdrücklich diesem Forschungs-„mainstream“ anschließt.

Ein Gutteil der Forschung beschäftigt sich nur mit der Entwicklung, und das heißt dort: mit der Erstarkung des Staates bzw. seiner Institutionen. Dieses Wachstum wird oft mit der Entstehung des Staates gleichgesetzt, obwohl die Existenz des Staates vorausgesetzt und eine eigene Frage ist.

²⁰³ Dreher 2021, 127f., mit Literaturverweisen; anders noch Dreher 1983, 49.

²⁰⁴ Etwa Lundgreen 2014, 35. Vgl. Teil I, S. 42.

ist jedoch keiner großen Zäsur, keinem Umbruch in allen Bereichen einer gegebenen Gemeinschaft das Wort geredet! Selbstverständlich kam es im täglichen Leben der Menschen zu keinen Unterbrechungen oder plötzlichen Veränderungen. Sie setzten ihre Arbeit, ihre kultischen Handlungen und ihr Privatleben wie bisher fort. Und es ist auch im politischen Bereich zwar nicht nachprüfbar, aber durchaus vorstellbar, daß die neu kreierte staatliche Regierung in den Händen derselben Personen blieb, die in der vorausgegangenen, vorstaatlichen Zeit die Polis leiteten (s. dazu unten zu den Akteuren). Aber wenn die dazu berechtigten Männer zur Volksversammlung gingen, hatten sie, zumindest in einem Teil der Poleis, Ratsmitglieder zu wählen und vorgelegten Gesetzen zuzustimmen; wenn sie eine Beschwerde oder eine Klage erheben wollten, konnten und mußten die Bürger sich an einen bestimmten Amtsträger wenden; und wenn ihre Klage angenommen wurde, erhielten sie ein Urteil vom zuständigen Gericht. Die Veränderungen waren also durchaus spürbar, aber auf den politisch-rechtlichen Bereich bzw. auf einen Teil davon beschränkt.²⁰⁵

Außerdem ist offensichtlich und unbestreitbar, daß der Staat am Beginn seiner Existenz als rudimentär, als schwach, als im wörtlichen Sinn primitiv²⁰⁶ gelten muß, da er sich nur in einer oder wenigen Institutionen manifestierte. Und ebenso offensichtlich ist, daß diese zunächst wenigen und vielleicht noch nicht durchsetzungsstarken Institutionen mit der Zeit gestärkt, vergrößert und durch zusätzliche Einrichtungen ergänzt wurden, auch wenn etwa die Schaffung von Ämtern nicht unbedingt in der schematischen Weise erfolgte,

²⁰⁵ Wie bedeutsam dieser Bereich auch für die griechischen Poleis war, könnte an vielen Anhaltspunkten des weiteren Geschichtsverlaufs gezeigt werden. Es soll aber hier nur angedeutet sein, wie unberechtigt die einseitige Kritik eines Teils der Forschung (e. g. J. Blok, A. Duplouy) an einer politisch-rechtlichen Betrachtungsweise ist. Die stattdessen favorisierten kultur- und sozialgeschichtlichen Herangehensweisen sind zwar ihrerseits berechtigt (wenngleich zu einseitig), können die abgelehnten Verfahren jedoch nicht ersetzen.

²⁰⁶ Vgl. dazu Dreher 2006: „Die Primitivität der frühen spartanischen Verfassung“, und o. A. 63. Zu Unrecht behauptet Schmitt 2017, 18, mit der Verwendung des Staatsbegriffs für die Antike werde ausgeblendet, daß die Intensität der Staatlichkeit sehr unterschiedlich sein könne und daß die Polis einen geringeren Grad an Staatlichkeit erreicht habe als die Moderne. Die anfänglich begrenzte Durchsetzung der Staatsgewalt betonen etwa auch Schulz / Walter 2022, I 48.

wie es die aristotelische *Athenaion Politeia* für das frühe Athen rekonstruiert.²⁰⁷ Eine allmähliche Entwicklung gab es also tatsächlich, aber keine, die mit der Staatsentstehung gleichzusetzen wäre, sondern eine, die den bereits errichteten Staat weiterentwickelte.²⁰⁸ Wie schon in Teil I (S. 43) ausgeführt, setzt eine variierende Staatlichkeit auch begrifflich die Existenz eines Staates voraus. Selbstverständlich können wir also von Abstufungen der Staatlichkeit sprechen, da Umfang und Intensität der staatlichen Aktivität zunahm. Es ist ohne weiteres zulässig und sinnvoll, zwischen früher oder schwächerer Staatlichkeit und ausgeprägter oder weit entwickelter Staatlichkeit zu unterscheiden.²⁰⁹ Für das Athen nach der Zeit Dracons sind die allgemein anerkannten Entwicklungsstufen von Staatlichkeit mit den Namen der maßgeblichen Akteure, Solon, Kleisthenes und Ephialtes, verbunden.

Diese Unterschiede zeigen sich am deutlichsten daran, wie umfassend der Zugriff des Staates auf die verschiedenen gesellschaftlichen Bereiche²¹⁰ und auf sämtliche Statusgruppen der Gesellschaft ist. Es versteht sich, daß etwa ein Amtsträger der frühstaatlichen Polis bei der Durchsetzung gesetzlicher Regelungen noch Rücksicht auf seine Standesgenossen nehmen mußte, die wie er selbst vor der Staatserichtung zur Gruppe der *big men* gehört hatten, während dann später im klassischen Athen die Amtsträger ihre Amtspflichten gegenüber allen ohne Ansehen der Person erfüllen mußten; auch wurde ihre Amtsführung in speziellen Verfahren (*euthynai*) überprüft. Es versteht sich ferner, daß die Staatlichkeit der griechischen Polis niemals so umfassend ausgestaltet wurde, wie es in den meisten modernen Staaten der Fall war und ist. Bekanntlich verfügten die Poleis auch in den späteren historischen Phasen nicht über eine Polizei mit den in

²⁰⁷ Aristot. *Ath. pol.* 3.

²⁰⁸ So auch Fraß 2018, 24 A. 88: „Denn die genannten graduellen Abstufungen an Staatlichkeit gibt es nur innerhalb der Kategorie `Staat`“.

²⁰⁹ Fraß 2018, 24 A. 87, verweist dazu beispielhaft auf die Diktion von Grinin. Die Unterschiede im Grad der Staatlichkeit setzen sich übrigens über die gesamte Geschichte bis in die heutige Zeit hinein fort und sind nicht spezifisch für den frühen Staat.

²¹⁰ S. dazu Teil I, S. 25f. Wenn dort die Staatsgewalt als *höchste* Gewalt innerhalb des Staatsgebiets definiert ist, die über allen gesellschaftlichen Bereichen steht, so ist damit nicht gemeint, daß *jede* Staatsgewalt alle diese Bereiche umfassend regelt, sondern nur, daß die Staatsgewalt grundsätzlich in jeden dieser Bereiche eingreifen *kann*.

der Neuzeit üblichen Vollmachten, nicht über eine Staatsanwaltschaft und nicht über einen Verwaltungsapparat. In vieler Hinsicht verließen sie sich auf die Mitwirkung ihrer Bürger, gerade im Rechtswesen und dort besonders bei der Vollstreckung von Gerichtsurteilen in Form der – staatlich sanktionierten – Selbsthilfe. Diese Beschränktheit der Staatsgewalt im Vergleich zu modernen Staaten ist der Grund, aus dem ein Teil der Forschung die Verwendung des Staatsbegriffs für die Vormoderne grundsätzlich ablehnt. Nach der hier zugrundegelegten Staatsdefinition ist diese Position jedoch nicht akzeptabel.²¹¹

Akteure

Gerade von der Forschungsrichtung, die sich für eine allmähliche Entstehung von Staatlichkeit ausspricht, werden die diesbezüglichen Entwicklungsstufen oft mit unpersönlichen, um nicht zu sagen: entpersönlichten Formulierungen umschrieben: So weisen C. Ulf / E. Kistler auf „die Beobachtung“ hin, „dass staatliche Institutionen ... sich in parallel zueinander, aber nicht gleichmäßig anlaufenden und auch nicht prognostizierbaren Prozessen herausbilden“. Für U. Walter ist entscheidend, „daß sich die Funktionen in einem gewissen Maß verfestigten und zu Ämtern wurden“. Und in der systemtheoretisch ausgerichteten Konzeption O. Grotes übernehmen die *abstracta* „Komplexität“ und „politisches System“ die Funktion von *agentes*.²¹²

²¹¹ Vgl. Teil I, S. 16-18.

²¹² Ulf / Kistler 2020, 151f.; Walter 1998, 21 (vgl. Dreher 2021, 128 A. 39); Grote 2016b, 468: „das politische *System* reagierte auf die Steigerung der Komplexität seiner Umwelt also mit einer Erhöhung der eigenen Komplexität. ... Die politischen Systeme der griechischen Poleis reagierten hierauf, indem *sie sich* weiter ausdifferenzierten und komplexere Verfahrensregeln schufen ...“. Und ebd. 487: Bei der „Herausbildung des Politischen ... *schlossen sich* einzelne Systeme voneinander *ab* ... Mit immer noch steigender Komplexität ... *entwickelten sich* zum einen immer mehr Verfahren, ... zum anderen *differenzierten sich* die Systeme weiter aus, so dass *sich* immer mehr Subsysteme ... *ergaben*. ... Auch auf die gestiegene systeminterne Komplexität *reagierten Systeme* also mit Maßnahmen zur Komplexitätsreduktion“ (alle Herv. M.D.). Vgl. auch u. A. 244 und Dreher 2021, 127 A. 36. Schmitz 2008, 64ff., spricht dem Adel die zentrale Funktion bei der Formierung der Polis ab und setzt stattdessen ein abstraktes Subjekt ein: „Die Polis mußte einen anderen Weg suchen, ihre innere Ordnung zu sichern“ (S. 68, Herv. MD). Bei Pettit 2023, 52ff., entwickelt sich (das offenbar vorstaatlich gedachte) „legal system“ ganz ohne das Zutun von handelnden Subjekten in ein (staatliches) „regime of laws“, in welchem dann Individuen „authorized roles“ übernehmen. Im Gegensatz zu

Aber ein Staat entwickelt *sich* nicht selbst. Er wird vielmehr errichtet, gegründet, geschaffen von menschlichen Akteuren, von lebenden Subjekten. Wie schon zu Beginn des vorigen Untertitels („Aktionsmodus“) vorweggenommen, kann die Errichtung einer allgemeinen Herrschaft nur als willentliche, bewußte Handlung verstanden werden,²¹³ auch wenn die handelnden Subjekte Ziel und Resultat ihrer Aktion nicht unbedingt begrifflich erfassen können. Aus diesem Grund ist als Überschrift des ganzen Teils B dieser Abhandlung (wiederholt in mehreren Untertiteln) der Begriff *Transformation* zum Staat bevorzugt worden, weil er die aktive Umgestaltung zu, die Formierung oder Formung von etwas Neuem auszudrücken vermag, gegenüber Begriffen wie Staatswerdung oder Staatsentstehung, die eher ein passives oder mindestens neutrales Geschehen vorstellig machen könnten.²¹⁴

Wer sind nun die Akteure, die die Transformation der Polis zum Staat ins Werk gesetzt haben? Wenn wir von der weiter oben getroffenen Feststellung ausgehen, daß die homerischen Gemeinwesen von den ökonomisch und sozial herausgehobenen Männern geleitet wurden, die von Homer und Hesiod als *basileis*, von der ethnologisch-anthropologischen Forschung als *big men* und *chiefs* bezeichnet werden, dann müssen es eben Mitglieder dieser Schicht gewesen sein, die durch die Einrichtung der oben beschriebenen Institutionen den genannten Sprung zu einer staatlichen Herrschaft ausführten. Auch wenn wir die handelnden Individuen nicht kennen, und auch wenn wir nicht davon ausgehen müssen, daß das gesamte „homerische“

den Vorgenannten will Seelentag 2020, 62f.; ders. 2023, 100, seinen Blick ausdrücklich auf „die möglichen Akteure von Institutionalisierung“ richten.

²¹³ So auch etwa Jellinek 1922, 48-50. 175: Der Staat sei „eine Funktion der menschlichen Gemeinschaft“, keine objektive reale Macht, kein natürliches Gebilde. Er beruhe auf bewußter, vernünftiger Willensaktion, wie alle menschlichen Verhältnisse (S. 176). Sein Substrat bildeten „Willensverhältnisse Herrschender und Beherrscher“ (S. 177). Van der Vliet 2005, 133 (“intentional”); 2008, 211 (“conscious and directed / purposeful actions”); 2011, 120 („agency: conscious human action”); nach Ando 2017, 7, ist die Staatsgründung eine aktive Handlung. Vgl. schon die Kritik von Marx an Hegel, Marx 1872 (1843), 224: „Wäre Hegel von den wirklichen Subjekten als Basen des Staates ausgegangen, so hätte er nicht nötig, auf eine mystische Weise den Staat sich versubjektivieren zu lassen.“

²¹⁴ Gleichwohl werden auch diese Termini, nicht zuletzt um sprachliche Eintönigkeit zu vermeiden, im vorliegenden Text synonym verwendet.

Leitungskollektiv eins zu eins als neue staatliche Regierung fungierte, so ist es doch naheliegend, daß es, im Gesamten, diejenigen waren, die in der Gesellschaft zuvor schon die Macht innegehabt hatten, und die sich nunmehr die formalisierte Herrschaft aneigneten.²¹⁵ Es ist unschwer vorstellbar, daß es die homerische Ratsversammlung der *basileis* war, wie sie im Epos für die Phäakenstadt Scheria beschrieben wird, die im entsprechenden Moment *sich* feste Regeln gegeben und eine feste Mitgliederzahl (wie in Sparta, s. o.), eine Amtsdauer und die Modalitäten der Mitgliederwahl beschlossen und damit eine Boule, einen Rat als formalisierte Institution ins Leben gerufen hat. Und warum soll nicht der homerische Oberbasileus, der schon zuvor als der Erste unter Gleichen fungiert und Koordinierungsaufgaben wahrgenommen hatte, nun als erster Amtsträger mit bestimmten Zuständigkeiten und Vollmachten eingesetzt worden sein (und in Athen weiterhin als (*archon*) *basileus* bezeichnet worden sein)? Da wir dem homerischen *basileus* den Charakter eines Königs aberkennen (s. o. Abschnitt A), ist auch die von vielen Forschern geteilte Annahme gegenstandslos, daß vor der entstehenden „Adelsherrschaft“ zunächst die homerische Monarchie „entmachtet“ bzw. abgeschafft worden sein müsse.²¹⁶ Hingegen ist eine personelle Kontinuität der handelnden Vornehmen beim Übertritt über die Schwelle der Staatlichkeit denkbar, aber keineswegs notwendig. Es waren demnach

²¹⁵ Auch Runciman 1982, 373, geht davon aus, daß die *basileis* übereinkommen mußten („had first to have agreed“, also eine bewußte Entscheidung trafen), ihre Rollen von informellen Anführern in „that of rulers holding offices“ zu transformieren. Eine gewisse personelle Kontinuität scheinen etwa auch Schmitz 2008, 44, und Grote 2016a, 271, vorauszusetzen. Hingegen sehen Ulf / Kistler die Notwendigkeit für die „Big Men ...“, sich mit den neuen politischen Verhältnissen in der Polis zu arrangieren“. Wer aber hat dann diese neuen Verhältnisse hergestellt? Das bleibt in den meisten Darstellungen offen, gerade wenn behauptet wird, die big men des 8. Jahrhunderts seien irgendwie verschwunden und eine neue Aristokratie sei (aus dem Nichts heraus?) entstanden, so etwa Morris 1998, 76. Ma 2016, 645, bestreitet ausdrücklich, daß die Eliten der Motor der archaischen Gesellschaft gewesen seien (S. 656), und macht sie zu passiven *Objekten* einer subjektlosen Entwicklung (S. 645): „les élites ont été formées par et dans la polis“; so auch Ma 2024 (s. o. A. 169).

²¹⁶ Vgl: Dreher 1983, 45f. An der These von einer Entmachtung des Königtums wird meist auch dann noch festgehalten, wenn im Gefolge Finleys dem homerischen Oberbasileus eine „relativ schwache Position“ (Stein-Hölkeskamp), eine nur graduelle Vorrangstellung vor den anderen *basileis* attestiert wird; so sieht auch Stein-Hölkeskamp 1989, 95, einen „Prozeß der Entmachtung der monarchischen Spitze“.

die Mitglieder der Oberschicht, die Eliten, diejenigen, die sich später Aristokraten nannten, diejenigen, die in der Moderne auch als Adel bezeichnet werden,²¹⁷ die den Staat initiierten. Ein guter Teil der Forschung erkennt an, wenngleich aus unterschiedlichen Gründen, daß die frühe Polis als eine „Adelsherrschaft“ konstituiert war.²¹⁸ Daß dieser „Adel“ deshalb auch die Staatsgründung zur Erhaltung und Intensivierung seiner Herrschaft in Gang gesetzt haben muß, mag vielleicht manchmal impliziert sein, wird aber selten ausgesprochen. Denn dieser Schlußfolgerung steht entgegen, daß die Forschung die starke Konkurrenz der Aristokraten untereinander, das sogenannte agonale Verhalten in verschiedenen gesellschaftlichen Bereichen, wie es in der frühgriechischen Lyrik widerspiegelt wird, traditionell als individualistisch und eher gemeinschaftsschädlich einstuft.²¹⁹ G. Seelentag hat diesen scheinbaren Widerspruch dadurch aufzulösen versucht, daß er die aktive Rolle der Elite als „Kartellbildung“ bezeichnet. Der Begriff des Kartells ist zwar nicht ganz glücklich, weil er der modernen Ökonomie angehört und daher viele seiner Implikationen bei der gemeinschaftlichen politischen Handlungsweise der Aristokraten nicht gegeben sind.²²⁰ Im Kern jedoch trifft es zu,

²¹⁷ Wie eingangs erläutert (o. A. 20), wird der Terminus 'Adel' in der vorliegenden Studie nicht verwendet, auch wenn er synonym mit 'Oberschicht' oder 'Elite' verstanden werden kann. Vgl. zur sozialen Charakterisierung der Elite Duploux 2006, passim.

²¹⁸ „Der archaische Staat bis zur Wende des 7. Jahrhunderts war ganz sein (sc. des Adels) Geschöpf“, so Heuß 1969 (orig. 1946), 61; Stein-Hölkeskamp 1989, 95; Hall 2014, 127: „The emergence of an aristocracy can be considered symptomatic of the rise of the state.“ Auch viele Forscher, die keinen Übergang der Polis in einen Staat anerkennen, räumen der Elite die dominante Rolle bei der Polisentwicklung ein, dokumentiert bei Ma 2016, 639.

²¹⁹ Duploux 2006, 289f., wendet sich gegen die traditionelle Ansicht, daß die Aristokratie neben der Polis oder sogar ihr entgegen gestanden habe. Wettkämpfe innerhalb der Elite seien daher keine Störung, kein Gegensatz zum „ordre civique“ gewesen. Auch nach Schmitz 2008, 47ff., dominiert in der Forschung seit langem die Ansicht, daß die Konkurrenz(kämpfe) der Aristokraten ihr Interesse am Gelingen eines Gemeinwesens weit überlagere. Schmitz bekräftigt letztlich diese Ansicht, überspringt dabei aber die hier untersuchte Phase der eigentlichen Staatsentstehung. Seine unzureichend präzierte „Entstehung der Polis“ verfolgt er vor allem beim Übergang von der archaischen zur klassischen Zeit (S. 70); seine Thesen sollen daher hier nicht mehr kritisiert werden. Zur Forschung vgl. auch Seelentag 2023, 123.

²²⁰ Seelentag 2020, 67ff., bes. 74f.; ders. 2023, 122ff., mit weiteren Konkretisierungen. Daß Seelentag zu einseitig im wirtschaftlichen Bereich bleibt, zeigt seine Kennzeichnung

daß die Angehörigen der griechischen Oberschichten in irgendeiner Form Absprachen getroffen haben mußten, die ihre Konkurrenz zugunsten einer nach festen Regeln geordneten allgemeinen Herrschaft einschränkten.

Die erste Staatsform der griechischen Poleis muß also, wenn wir die Diktion der späteren Verfassungsschemata verwenden, als Oligarchie oder Aristokratie bezeichnet werden. Die Entwicklung einer (i. e. der homerischen) big man- / chief - Gesellschaft zu einer aristokratischen Staatsform unterscheidet die griechische Polis von den Gesellschaften, die von der anthropologisch-ethnologischen Forschung analysiert wurden. Die genannte Forschungsrichtung hat sich nämlich auf diejenigen chiefdoms konzentriert, die in Form von Monarchien zu Staaten geworden sind. Diesen Übergang hat die evolutionistische Forschung anscheinend als so regelhaft angesehen, daß sie die Transformation der Polis, die diesem Schema eben nicht folgt, nahezu unbeachtet ließ. Das führt unter anderem zu allgemeinen Aussagen, die gerade für die griechische Polis nicht zutreffen.²²¹ Die Polis war daher zunächst auch nicht Gegenstand des *Early State con-*

der archaischen Eliten als „Ausbeutungscoalition“ (S. 74f.). Sicherlich waren die Oberschichten auch bestrebt, ihre wirtschaftliche Vorrangstellung abzusichern. In erster Linie aber bedeutete die Staatsgründung die Errichtung einer umfassenden *politischen* Herrschaft, was bei Seelentag 2020 untergeht, aber bei Seelentag 2023, 124, zumindest angedeutet ist (s. u. 4. Ursachen der Transformation). Zur Verwendung des Kartell-Begriffs unter Rückgriff auf G. Simmel vgl. meine Kritik an Meister / Seelentag 2020 in Teil I, 50ff. Ulf 2011 versucht, das Problem durch eine andere Bestimmung von Wettbewerb anzugehen, so daß Wettbewerb geradezu als ein Mittel erscheint, „um gesellschaftliche Zusammenhänge zu erzeugen“ (S. 314). An vielen konkreten Konflikten dürfte diese Interpretation jedoch scheitern.

²²¹ „Bei der Untersuchung der modernen primitiven Staaten, aber auch der archaischen Zivilisationen, betrachten wir im Grunde die Evolution der Bürokratie einer theokratischen Autorität“: Service 1977, 13 (Qviller 1981, 144, gibt als Grund dafür das fehlende Prinzip der Primogenitur an, was sicher zu kurz greift); „Alle Häuptlingstümer sind Theokratien“, ebd. 366. Unter den sechs „archaischen Zivilisationen“ von Mesoamerika über Ägypten bis China, die Service vorstellt, ist das antike Griechenland nicht zu finden, es ist auch in den Fallstudien von Sahlins 1963 und Breuer 2014 nicht enthalten. Lediglich Runciman sieht auch Einzelpersonen (Könige, Despoten, Tyrannen) als frühgriechische Staatsgründer an, indem er nicht auf die Polis, sondern auf Ethne wie Thessalien blickt. Über deren Entstehung und Staatswerdung, die zweifellos in eine spätere Epoche fallen, fehlen uns jedoch zuverlässige Nachrichten; sie sind auch nicht Gegenstand dieser Abhandlung, s. o. A. 9.

cept, das in den 1970er Jahren in den Niederlanden von einer eigenen Forschergruppe, der „Early State Society“, entwickelt wurde, bis sich E.C.L. van der Vliet diesem Gegenstand zuwandte.²²²

Aber was ist mit dem Demos? Wenn wir wieder auf die vorstaatliche homerische Gesellschaft zurückblicken, dann hatten wir dem Demos eine gewisse Bedeutung für die Gesamtstabilität der Polis zugestanden, aber doch auf die vor allem passive Rolle des Volkes und seiner Abhängigkeit von den Anführern hingewiesen.²²³ Angesichts dieses Befundes erscheint es schon prinzipiell ausgeschlossen, daß von einem solchen Demos irgendeine politische Initiative oder Bewegung ausgegangen wäre, umso weniger eine wie die Herstellung einer staatlichen Ordnung, in welcher der Oberschicht die nahezu ausschließliche Herrschaftsgewalt vorbehalten war. Dementsprechend ist in die Überlieferung über die früharchaische Zeit, so dürftig sie ist, auch keinerlei Kunde über Revolten oder revolutionäre Aktionen von Seiten des Volkes eingegangen – das ist erst für Auseinandersetzungen (*staseis*) im solonischen Athen Ende des 7. Jahrhunderts der Fall. Dennoch hat die frühere Forschung, immer mit Blick auf die späteren innenpolitischen Kämpfe zwischen Demos und Elite, zwischen Demokraten und Oligarchen, auch für die Frühzeit einen wie auch immer gearteten Druck des Demos auf die Oberschicht angenommen, um politische Veränderungen zu erreichen. Und auch wenn dabei nicht direkt von der Staatsgründung die Rede ist, so sind doch einzelne Aspekte der Institutionalisierung gemeint. Es ist sicher nicht falsch, etwa die Ersetzung willkürlicher Schiedsurteile der *basileis* durch geregelte Gerichtsverfahren und die Veröffentlichung von allgemeingültigen Gesetzen, Maßnahmen also, die im Rahmen der Staatseinrichtung erfolgt sind, als vorteilhafte Errungenschaften auch für die unteren Schichten zu werten. Das mag auch ein wichtiger Grund dafür sein, daß der Demos die Transformation, die zur Herrschaft der Aristokratie geführt hat, zumindest ohne Wi-

²²² Van der Vliet 2005, 120, und 2008, 197, macht darauf aufmerksam, daß Griechenland in den 21 Fallstudien in Claessen / Skalnik (eds.) 1978 nicht vorkommt, und daß in all diesen Fällen eine Monarchie entsteht. In seinen eigenen Studien macht van der Vliet die Polis daher zum Hauptgegenstand.

²²³ Vgl. o. vor A. 40. Vgl. zur Rolle des Demos auch den Überblick von Maffi 2019, zu Homer S. 143.

derstand, vielleicht sogar mit Zustimmung, akzeptiert hat. Aber ein Rückschluß auf ein aktives Engagement des Demos für diese Ziele ist daraus nicht abzuleiten; die entsprechende Position wird heute auch kaum noch vertreten.²²⁴ Das irritiert, weil gerade ein Teil der jüngeren Forschung die politische Macht der *homerischen* Volksversammlung eher überschätzt,²²⁵ so daß man erwarten würde, daß ihr auch bei der Staatsgründung eine bedeutende Rolle zugesprochen würde. Daß das nicht geschieht, liegt wohl daran, daß dieser Transformationsprung selbst nur sehr selten zum Untersuchungsgegenstand gemacht wird.

Da keine Anzeichen für grundsätzliche Auseinandersetzungen, geschweige denn für organisierte Kämpfe (wie die späteren *staseis*) erkennbar sind, bleibt auch die traditionelle marxistische Theorie,²²⁶ welche die Geschichte als eine Geschichte von Klassenkämpfen versteht, in Bezug auf die griechische Frühgeschichte eine *petitio principii*. Die verallgemeinerte Theorie wird von F. Engels so zusammengefaßt: „Da der Staat entstanden ist aus dem Bedürfnis, Klassengegensätze im Zaum zu halten, da er aber gleichzeitig mitten im Konflikt dieser Klassen entstanden ist, so ist er in der Regel Staat der mächtigsten, ökonomisch herrschenden Klasse.“²²⁷ Engels entwickelt diese These anhand mehrerer Fallbeispiele, darunter der „Entstehung des athenischen Staates“ (Kap. V), die er als die prägnanteste Form der Staatsentstehung betrachtet: „Athen bietet die reinste, klas-

²²⁴ Die Kritik von Meister 2020, 224 (vgl. Meister / Seelentag 2020, 13), an dieser Position führt daher auch nur ältere Studien an. Seelentag 2020, 76f., beschreibt treffend die abgestufte Teilhabe des Demos an den Gemeinschaftsangelegenheiten der Polis; 2023, 122, lehnt er es ab, den Demos als wesentliche gesellschaftliche Kraft bei der Konturierung von Gesetzen anzusehen. Hingegen scheint Ma 2024, Abs. 12, der die Herrschaft einer Elite ablehnt (s. o. A. 215) wieder eher, aber sehr unbestimmt, an „the `people““ als Träger des frühen Staates zu denken.

²²⁵ S. o. bei A. 38–46.

²²⁶ Nur auf diese kann hier geblickt werden. Zur weiteren Entwicklung dieses Ansatzes auch jenseits marxistischer Perspektiven vgl. vom Hau 2015, 132–134, der ihn „the class-analytic approach“ nennt. Auch Stahl 2003, 96–98, stellt den marxistischen „Denkansatz“ vor, dessen Konzentration auf die Kategorie der Klassengesellschaft er ablehnt. Im Gegensatz zu vom Hau ignoriert er die Weiterführung dieses Ansatzes und bezeichnet die marxistische Forschung als „heute praktisch tot“.

²²⁷ Engels 1972 (orig. 1884), 166f. Im gleichen Sinn heißt es weiter unten (S. 168): „Auf einer bestimmten Stufe der ökonomischen Entwicklung, die mit Spaltung der Gesellschaft in Klassen notwendig verbunden war, wurde durch diese Spaltung der Staat eine Notwendigkeit.“

sische Form: Hier entspringt der Staat direkt und vorherrschend aus den Klassegegensätzen, die sich innerhalb der Gentilgesellschaft selbst entwickelten.“²²⁸ Engels geht dabei von zwei falschen Voraussetzungen aus. Zum einen nimmt er die legendenhaften Erzählungen über die athenische Frühgeschichte für historische Tatsachen, namentlich die Verfassungsgebung des Theseus, mit der er offenbar die Staatsentstehung beginnen läßt, auch wenn er das nicht ausdrücklich ausspricht und auch wenn gerade für diesen historischen Moment keine Klassenkämpfe angeführt werden. Zum anderen schreibt er der „Gentilgesellschaft“, also der vorstaatlichen Zeit, eine intensive ökonomische Entwicklung zu: Warenproduktion, Siegeszug des Geldes, Zinswucher, Verschuldung, Ansiedlung von Fremden, höhere Zahl von Sklaven als von Freien, sollen dabei die Faktoren sein, die Engels in völlig anachronistischer Zuordnung anführt. Solon „eröffnete die Reihe sogenannter politischer Revolutionen“, in welcher „der entstehende Staat“ „dem ausgebeuteten Volk“ zu Hilfe kam und das Eigentum der Schuldner schützte (S. 112). Aber erst mit der durch Kleisthenes reformierten Verfassung sei der Staat „in seinen Hauptzügen fertig“ gewesen (S. 116).²²⁹

Die Engelssche Behauptung, daß der Staat durch Klassenkämpfe entstanden sei, wurde zum Dogma der marxistischen Geschichtswissenschaft. In dem Sammelband „Beiträge zur Entstehung des Staates“ stellt der Mitherausgeber J. Herrmann in seinem Vorwort das obige erste Engels-Zitat den Beiträgen voran, die es dann durch die Fallbeispiele von Mesopotamien bis hin zu Altrussland bestätigen. In ihrem Beitrag zu Sparta formuliert es G. Bockisch so: „Die erste Phase der Staatsbildung, d. h. die Formierung der Klassenstruktur auf der Grundlage des Bodeneigentums, beginnt mit der Eroberung Amyklais um 800“ (S. 126). Gleichzeitig sei die „Heilotie“ (sic) in Lakonien durchgesetzt worden, so daß auch der lakedaimonische Staat der Frühzeit die typischen Staatsmerkmale aufweise: „Den Hauptanteil am Ackerboden besaß eine aristokratische Schicht, das Mehrprodukt wurde durch eine abhängige Bevölkerung erarbeitet, außer-

²²⁸ Engels 1972 (1884), 164; ähnlich schon S. 116.

²²⁹ Auf die verschiedenen Irrtümer und Widersprüche kann hier nicht eingegangen werden. Es ist aber zu bedenken, daß dem Autor die aristotelische *Athenaion politeia* noch nicht zur Verfügung stand.

dem bestand noch eine breite Schicht freier Bauern, deren Stellung durch die Grundeigentümer ökonomisch gefährdet war.“ (S. 127). Auch von Bockisch wird die Staatsbildung als kontinuierlicher Prozeß über einen längeren Zeitraum hinweg angesehen (S. 132). „Die Staatsbildung in Sparta“ sei „durch die dem Lykurg zugeschriebene Verfassungsurkunde abgeschlossen“ worden, die Bockisch um 720 datiert.²³⁰

Ein wesentlicher, hier relevanter Widerspruch in den marxistischen Darstellungen liegt darin, daß sie einerseits den frühen Staat als einen Klassenstaat betrachten, in dem die Großgrundbesitzer die unteren Klassen beherrschten und ausbeuteten, andererseits aber, aus ideologischen Gründen, den „Volksmassen“ eine bedeutende Rolle zuschreiben und sie damit erheblich überschätzen. Anlässlich der Reformen des Kleisthenes erkennt Engels zwar „aristokratische Vorrechte“ an, „aber das Volk behielt (!) die entscheidende Macht“ durch die Entscheidungen in der Volksversammlung, hätte diese Macht also schon besessen, bevor die Staatsbildung abgeschlossen war! In Sparta wurde dieser Gegensatz nach Bockisch dadurch entschärft, daß die freien Bauern sich mit der Aristokratie „zur exklusiven Schicht der Spartiaten“ formierten.²³¹

In den neu entstandenen frühgriechischen Staaten bildeten die herrschenden Aristokraten noch weniger als in der vorstaatlichen homerischen Gesellschaft einen in sich geschlossenen, gegen die unteren Bevölkerungsschichten abgeschotteten Stand, der seine Vorrechte auf die Nachkommen vererbt hätte – auch wegen dieses Unterschieds wird der Adelsbegriff hier nicht verwendet.²³² Dazu paßt, daß gesellschaftliche Organisationen, die unterhalb der Polisebene bestanden, wie Phylen, Phratrien, Demen, Gene, anscheinend nicht nur aus Angehörigen der Aristokratie bestanden, sondern schichtenübergreifend organisiert waren. Das war möglich,

²³⁰ Gemeint ist die Große Rhetra, die zu Beginn von Bockischs Beitrag eingeführt wird und die oben als Gründungsdokument des spartanischen Staates interpretiert wurde.

²³¹ Engels 1972 (1884), 113; Bockisch 1972, 128, mit einem stillen Wechsel vom Begriff der Klasse zu dem der Schicht.

²³² Eine Diskussion darüber, ob für diese Oberschicht der Begriff 'Klasse' angebracht wäre, den insbesondere die soeben vorgestellte marxistische Doktrin, aber auch andere Denkrichtungen in sehr unterschiedlichem Verständnis verwenden, soll hier nicht geführt werden, da sie keine zusätzlichen Erkenntnisse ergäbe.

weil die griechische Polis spätestens mit ihrer Staatswerdung eine gewisse Gleichheit der Politen mit sich brachte. Die Anerkennung des Privateigentums als grundlegenden Strukturelements der Gesellschaft²³³ schloß ökonomische oder soziale Gleichheit aus, an den bestehenden Eigentumsverhältnissen änderte sich durch die Staatsgründung nichts; die Gleichheit bezieht sich vielmehr auf den rechtlichen und den politischen Bereich.²³⁴ Ebenso wie die Staatsgewalt die Unterwerfung *aller* Polismitglieder unter ihre Herrschaft anstrebte, konnten umgekehrt alle Polismitglieder (in diesem Fall mit Ausnahme der Fremden und Unfreien) die *gleiche* Behandlung durch die Staatsgewalt, nach gleichen Gesetzen und Regeln, beanspruchen. Mit der Staatsgründung waren diese Polismitglieder also zu Polisbürgern, zu Staatsbürgern geworden.

Die Beteiligung der Staatsbürger an den Polisangelegenheiten vollzog sich weitgehend als Interaktion zwischen den Institutionen der Polis und den Bürgern als Einzelpersonen, als Individuen. Als solche nahmen sie an den Versammlungen des Volkes teil und stimmten dort ab, an solche wurden Ämter vergeben, als solche fungierten sie in rechtlichen Angelegenheiten. An anderer Stelle habe ich die Vorstellung kritisiert, welche die oben genannten Verbände als die wichtigsten Elemente einer Polis betrachtet, und habe „die ausschließende Entgegensetzung von Individuen und sozialen Verbänden ... für irreführend“ erklärt.²³⁵ Diese Verbände wurzelten, so weit wir das

²³³ Für die homerische Zeit betont von Andreev 1988, 81f.; vgl. auch Zurbach 2013, 985ff., bes. 989f. Den Zusammenhang zwischen individuellem Landbesitz, Bürgerrecht und Institutionalisierung der Polis betont Faraguna 2024, bes. 124. 126. 135.

²³⁴ Hervorgehoben auch von Grote 2016a, 270; 2016b, 486. Ein Kennzeichen dieser Gleichheit war die Anwendung des Mehrheitsprinzips bei den meisten Entscheidungen, die von mehrköpfigen Gremien getroffen wurden. Vgl. o. mit A. 196. Die intensivste politische Ausgestaltung erfuhr diese Gleichheit natürlich in den griechischen Demokratien der klassischen Zeit, während sie in der Anfangszeit des Staates noch eingeschränkt war, insbesondere durch die Reservierung der Ämter für wohlhabende Bürger.

²³⁵ Dreher 2021, 120. Der ganze Artikel ist dem Verhältnis von Staat und Individuum bis in die klassische Zeit gewidmet. Duploux 2006, 291, konstatiert zu Recht: „ce sont donc les individus qui, par leurs interactions“ (sowie die Interaktion zwischen Individuum und Kollektiv, S. 292), „esquissèrent les contours de la cité“. bleibt jedoch bei dieser vagen Angabe stehen und sieht die Polis durch die genannte Interaktion bereits ausreichend gekennzeichnet, „bien plus que comme une entité institutionnelle ou une forme spécifique d’État“ (S. 292). Der verfehlt Gegenatz wird in Duploux 2019

vermuten können, in verwandtschaftlichen, kultischen, lokalen oder regionalen Beziehungen und waren oft unabhängig von der politischen Struktur einer Polis entstanden. Bei der Staatsgründung mögen sie durchaus dazu beigetragen haben, die Polismitglieder in die neuen Strukturen zu integrieren, sie als Polisbürger zu identifizieren (wenngleich noch ohne formales Bürgerrecht) und damit auch die Identität der gesamten Polis zu stärken. Hinweise darauf, daß sie dabei eine entscheidende Funktion eingenommen hätten, finden sich jedoch nicht. Hingegen wurden sie offenbar erst später, mit der stärkeren staatlichen Durchdringung der Polis, auch formal in die politische Struktur einbezogen,²³⁶ wie idealtypisch sichtbar an den demokratischen Reformen des Kleisthenes am Ende des 6. Jahrhunderts, welche die (lokalen) Demen in bürgerschaftliche Grundeinheiten transformierten und neu eingeteilte Phylen als Basis für die Beteiligung der Bürger an verschiedenen Gremien in Anspruch nahmen.

Obwohl wir den einzelnen Individuen als den agierenden Subjekten die tragende Rolle bei der Staatsgründung beimessen, bedeutet diese Transformation auf der anderen Seite gleichzeitig eine Ent-Personlichung, Ent-Individualisierung, Objektivierung oder Verdinglichung,²³⁷ indem jeder Einzelne nunmehr stärker in ein geregeltes, formalisiertes, eben institutionalisiertes System eingebunden ist. Aufseiten der Regierenden besteht die Veränderung darin, daß die persönliche Autorität der *basileis*, welche die homerische Gesellschaft geleitet hatten, nun durch einen formalisierten Herrschaftsanteil, durch eine „amtliche“ Funktion ersetzt wurde, die der Machtentfaltung des einzelnen Aristokraten Grenzen setzte, wie oben im gesetz-

weiter ausgebaut.

²³⁶ Dazu Roussel 1976, bes. 4-6 („la Cité grecque ... apparaît comme une forme de communauté politique *sui generis*“, S. 6). 311f.; Gehrke 2009, 400; Dreher 2021, 121.

²³⁷ In dieser Hinsicht stimme ich mit den sonst kritisierten Ansätzen überein: Meister / Seelentag 2020, 22, übernehmen die Begriffe Objektivierung und Versachlichung, mit denen die Soziologen Berger und Luckmann den Prozeß der Institutionalisierung beschreiben. Am Ende einer „Objektivierung“ stehe die „Verdinglichung“ von Institutionen, die damit „als eine dem menschlichen Handeln weitgehend entzogene überpersonelle Entität“ zu begreifen seien. Eine „Entindividualisierung“ konstatieren sowohl der mit systemtheoretischen Vorgaben arbeitende Grote 2016b, 482, als auch Schulz / Walter 2022, I 57, die (wie ich selbst und im Unterschied zu den Vorgenannten) diese als ein Merkmal der Entwicklung von der „vorstaatlichen Phase“ zur „Polisstaatlichkeit“ verstehen.

lichen Iterationsverbot von Dreros gesehen. Auf seiten der Regierten hatte die Veränderung zur Folge, daß sie nun nicht mehr dem einen *basileus* zu folgen hatten, dem sie persönlich verpflichtet und von dem sie vielleicht auch ökonomisch abhängig waren, sondern daß sie den jeweiligen Amtsinhabern kraft deren gesetzlicher Autorität Gehorsam zu leisten hatten, wobei sich der Idee nach alle Beteiligten nicht mehr nach den überkommenen konsensualen Traditionen, sondern nach transparenten, „objektiven“ Regeln richten sollten.

4) Ursachen der Transformation

Eine gründliche Suche nach den Ursachen für die Transformation der griechischen Poleis zu Staaten würde eine genauere Analyse der griechischen Frühgeschichte unter Einbeziehung aller wirtschaftlichen und gesellschaftlichen Bereiche erfordern. Das kann hier nicht geleistet werden, so daß wir es bei einigen summarischen Überlegungen belassen müssen. Diese können keine gesicherte Gewißheit vermitteln, da die Staatsgründung eben einen Entschluß der handelnden Subjekte voraussetzt (s. o. am Beginn von 3.) und wir nicht wissen, welche Motive und Überlegungen für sie letztlich entscheidend waren.

Aus dieser Voraussetzung folgt umgekehrt, daß die gesellschaftliche Entwicklung *nicht* mit unbedingter Notwendigkeit in die als Fortschritt empfundene Staatlichkeit münden mußte. Aber genau dieser Vorwurf einer teleologischen Sichtweise wird gegen die evolutionäre Forschungsrichtung immer wieder erhoben. Dabei wird deren Analyse, daß viele Gesellschaften über die Stadien von big-men-Gesellschaften und chieftoms zur Staatlichkeit gelangt sind, fälschlicherweise die Aussage unterstellt, daß *jede* Gesellschaft diesen vorgezeichneten Weg von einer primitiven Stufe bis hin zur Staatlichkeit gehen *müsse*. Aber die evolutionistisch orientierten Anthropologen / Ethnologen haben moderne primitive Gesellschaften entdeckt, die den Übergang in die Staatlichkeit nicht vollzogen haben, sondern auf der Stufe von big men-Gesellschaften oder chieftoms verbleiben. Ebenso gilt auch für die griechische Frühgeschichte, daß die Entwicklung von der homerischen Gesellschaft zur klassischen Polis nicht als zwangsläufige Entwicklung anzusehen ist.²³⁸

²³⁸ So auch Wright 1977, 385; Hölkeskamp 1997, 4; Fraß 2018, 26; Seelentag 2023,

Gleichwohl ist auffällig, daß die auch in der vorliegenden Studie nachgezeichnete Entwicklung in allen Poleis, für die wir entsprechende Nachrichten haben, in ähnlicher Weise verlief. Für alle müssen wir eine vorstaatliche, homerische Phase voraussetzen, und alle verfügen in der klassischen Zeit über mehr oder weniger differenzierte, auf jeden Fall aber staatliche Strukturen. Das deutet darauf hin, daß es in der griechischen Frühgeschichte Faktoren gegeben haben muß, die den oben postulierten Entschluß, eine Staatsgewalt zu begründen, wenn auch nicht erzwungen so doch, vorsichtig ausgedrückt, nahegelegt haben. Ausschau zu halten ist dabei nicht nach eher naturwüchsigen Voraussetzungen für Staatlichkeit wie einer ausreichenden Bevölkerungsgröße und einem definierten Territorium, den beiden ersten notwendigen Elementen eines Staates, sondern nach wirklichen Anstößen, nach Antriebselementen, die das aktive Handeln auslösen, dessen die Errichtung der Staatsgewalt als des dritten Elementes in der Drei-Elemente-Lehre bedarf. Wir werden gleich sehen, daß es durchaus auch quantitative Faktoren sein können, die zu dem qualitativen Sprung der Staatsgründung beitragen können.

99; s. auch. o. bei A. 118-122. Sehr nah an einer teleologischen Deutung bewegt sich hingegen die systemtheoretisch orientierte Interpretation der Polisentwicklung von O. Grote. Sein Ausgangspunkt ist das Luhmannsche Postulat, wonach alle höher entwickelten Gesellschaften eine „übermäßige Komplexität“ ausprägten: Grote 2016a, 253. Die Komplexität habe in der archaischen Zeit geradezu explosionsartig zugenommen, was zu einer „Zunahme von Handlungsmöglichkeiten“ geführt habe. Reichlich spekulativ erscheint die Folgerung: „Die sich in relativ kurzer Zeit gravierend verändernde griechische Welt musste vielen Zeitgenossen als ‚übermäßig komplex, unüberblickbar und unkontrollierbar‘ (Zitat Luhmann) vorkommen“ (S. 261), eher eine *petitio principii*, um daraus den Schluß zu ziehen, auf den es dem Autor letztlich ankommt: Diese überbordende Komplexität *mußte* einfach reduziert werden durch das systemtheoretische Allheilmittel „Legitimation durch Verfahren“. Erst durch ergebnisoffene Verfahren mit verbindlichen Ergebnissen und die Einrichtung von funktionalen Ämtern sei ein eigenes System des Politischen entstanden. Die implizite Teleologie zeigt sich an Formulierungen wie „*Notwendig* wurde die Ausdifferenzierung der Ämter durch die ... Komplexitätssteigerung der griechischen Welt“ (Grote 2016a, 268, Herv. M.D.); die zunehmenden Handlungsmöglichkeiten „erhöhte(n) *zwangsläufig* auch die Komplexität der Macht“ (sprich: der politischen Organisation, für die übrigens auch die Sozialanthropologie im Umfang der Komplexität ein wichtiges Kriterium erblickt, vgl. o. nach A. 65). „Hieraus erwuchs der *Bedarfan* neuen Organisationsformen politischer Herrschaft.“ Auch Grotes Konstruktion einer subjektlosen, sich selbst tragenden Entwicklung (s. o. A. 212) bestätigt die teleologischen Implikationen.

Die Forschung hat das Problem von verschiedenen Seiten betrachtet und dabei einige der Faktoren, welche die Staatsgründungen beeinflussten, namhaft gemacht.²³⁹ Als eine mögliche Systematisierung wurde vorgeschlagen, Konflikttheoretiker und Integrationstheoretiker zu unterscheiden.²⁴⁰ Für erstere führen Konkurrenz und Auseinandersetzungen zwischen Gruppen oder gesellschaftlichen Fraktionen dazu, daß eine Gruppe dominant wird, die zentrale Herrschaft ergreift und sich dadurch Ressourcen sichert. Für die Poleis, über die wir rudimentär informiert sind, haben wir oben festgestellt (s. Unterpunkt „Akteure“), daß in der kritischen Phase keine Anzeichen für solche Auseinandersetzungen oder gar Klassenkämpfe zu erkennen sind.²⁴¹ In anderen Poleis jedoch mögen interne Konflikte zur Aufrichtung einer staatlichen Herrschaft beigetragen haben. Die zweite Forschungsmeinung, die Integrationstheorie, betont die Möglichkeit der Koordinierung und Organisation einer großen Zahl von Menschen durch staatliche Systeme. Dabei komme es auf die Herstellung von Legitimität an, das heißt auf die Akzeptanz der Regierung durch die Bürger, welche die Vorteile staatlicher Herrschaft höher schätzten als deren letztlich gewaltsame Absicherung. In einer Art von „social contract“ stelle der Staat durch das Management von Komplexität das Wohlergehen aller sicher. Beide Ansätze haben wichtige Aspekte erfaßt, jedoch konzentriert sich die Konflikttheorie zu sehr auf Konflikte zwischen Gruppen, Schichten oder Klassen, während die Integrationstheorie dem Staat eine idealisierte, konfliktlose Harmonie-Herstellung zuschreibt.

Ob äußere Kriege als Katalysatoren der Staatsentstehung in Betracht zu ziehen sind,²⁴² ist für die griechische Frühzeit kaum zu

²³⁹ Für dieses Problem kommt es nicht darauf an, ob die hier postulierte sprunghafte Transformation akzeptiert oder eine allmähliche Staatswerdung vertreten wird.

²⁴⁰ Cohen 1978, 6. Für Cohen selbst bestehen „multiple roads to statehood“, er bekennt jedoch, mehr Sympathien für die Integrationstheorie zu hegen, als deren Repräsentanten er E. Service anführt, während er für die Konflikttheorie M. Fried nennt. Gegen verschiedene Konflikttheorien argumentiert Service 1977, 335ff. Ähnlich wie Cohen unterscheidet Carneiro 1970, 733, „voluntaristic theories“ und „coercive theories“. Zu seinem eigenen „circumscription“-Modell vgl. u. A. 246. Einen nützlichen Überblick über die verschiedenen Theorien (einschließlich der von Cohen und Carneiro) gibt Scheidel 2013, 11-14.

²⁴¹ So auch Service 1977, 12, für andere Gesellschaften.

²⁴² Für Carneiro 1970, 734, ist Krieg eine notwendige, wenngleich nicht hinreichende

entscheiden. Grundsätzlich könnten militärische Unternehmungen eine intensivere Organisation und wohl auch eine institutionalisierte hierarchische Struktur erfordert haben, aber es müßte sich dabei um größere Konflikte handeln, die den Einsatz der gesamten Polis erforderten. Als ein solches Großunternehmen käme höchstens die spartanische Eroberung Messeniens in Frage, aber die sogenannten Messenischen Kriege dürften am ehesten im Lauf des 7. Jahrhunderts ausgefochten worden sein, also *nach* der oben angenommenen Staatswerdung Spartas um 700 v. Chr.

Es müssen also doch vor allem interne Entwicklungen gewesen sein, die, vielleicht begünstigt auch durch äußere Faktoren wie den zunehmenden Handel oder die Kolonisierungsunternehmungen, den Anstoß zu Transformationen gegeben haben. An erster Stelle wird in vielen Darstellungen das Bevölkerungswachstum (an sich) angeführt.²⁴³ Wie gesagt ist eine gewisse kritische Größe zwar die Voraussetzung für die Entstehung eines *Staatsvolks*, aber ein Umschlag von einer vorstaatlichen in eine staatlich organisierte Gesellschaft vollzieht sich nicht automatisch durch das Erreichen einer bestimmten Größe. In den ethnographischen Befunden korreliert das Bevölkerungswachstum zwar sehr häufig mit der Zunahme sozialer und politischer Komplexität, aber ein solcher „ermöglichender Faktor (enabler) ist keine Ursache“.²⁴⁴

Bedingung für den Zusammenschluß mehrerer chiefdoms zu einem Staat. Die Bedeutung von Kriegen wird, ohne Bezug auf Griechenland, abgelehnt von Service 1977, 335ff.

²⁴³ Locus classicus ist Snodgrass 1977, 10ff.; vgl. Welwei 1998, 35; Ulf 2011, 397; jüngst auch z. B. Pettit 2023, 56. Auf die Zunahme von Bestattungen in Attika in spätgeometrischer Zeit verweist Morris 1987, 171ff.; differenzierter jetzt Rönnberg 2021, 167ff., aber eine Siedlungsverdichtung stellt auch er fest (S. 126ff.). Daß die Bevölkerung in Griechenland nach dem Rückgang in den sogenannten Dunklen Jahrhunderten wieder zunahm, ist allgemein anerkannt, vgl. etwa Hall 2014, 78f. Kritisch sieht dieses Kriterium Whitley 1991, 40f.

²⁴⁴ Service 1977, 342; der Autor kritisiert (S. 341-347) zu Recht Positionen, die „ermöglichende Faktoren, wie genügende Nahrungsmenge und eine gewisse Bevölkerungsgröße, ... für kausal-vorgängige Auslöser“ (S. 342) halten. Vgl. auch Breuer 2014, 33.

Ohne Rückgriff auf die Ethnologie stellt die systemtheoretisch orientierte Analyse von Grote den Komplexitätsbegriff ins Zentrum (vgl. o. A. 212). Die „übermäßige Komplexität“ (Luhmann) der archaischen Zeit habe zu einer „Zunahme von Handlungsmöglichkeiten“ geführt, was an fünf sehr heterogenen Aspekten – an erster

Allerdings ist die Bevölkerungszunahme einer von mehreren Faktoren, welche die soziale Differenzierung begünstigten.²⁴⁵ Dazu kommen weitere:²⁴⁶ Die Verbreitung von Eiseninstrumenten erhöhte die landwirtschaftliche Produktivität und begünstigte eine handwerkliche Spezialisierung, die schon in den homerischen Epen sichtbar ist. Die Eisenproduktion veränderte auch die Waffentechnik und deren Herstellung. Kriegszüge, wie sie idealtypisch die Ilias erzählt, haben nicht zuletzt die Gewinnung von Beute, insbesondere von Metallen, zum Ziel und vermehrten den Reichtum erfolgreicher Krieger. Auch Sklaven waren eine begehrte Kriegsbeute, die zusammen mit unterworfenen Bevölkerungsgruppen wie den spartanischen Heloten durch ihre Arbeitsleistung oder ihren Verkauf den Besitz ihrer Eigentümer vergrößerten. Die Erhöhung des landwirtschaftlichen Mehrprodukts ermöglichte ebenso wie eine verstärkte handwerkliche Warenherstellung zunehmenden Handel (mit Wein, Öl, Keramikgefäßen, Waffen) mit entsprechenden Gewinnchancen. Auch auf der gesellschaftlichen Ebene konnten etwa Vererbungen und Eheschließungen die Ungleichheit der Vermögensverhältnisse verstärken. Die Verwendung der Schrift schließlich veränderte und erleichterte viele geschäftliche und private Abläufe.

Die Unterschiede in den Eigentumsverhältnissen und deren zugrundeliegende Dynamik erhöhten, das wäre das nächste Glied in der Kausalkette, die Anfälligkeit für Auseinandersetzungen zwischen den Eigentümern.²⁴⁷ Von schlichter Uneinigkeit über zu leistende

Stelle steht das Bevölkerungswachstum – illustriert wird.

²⁴⁵ Vgl. Rönneberg 2021, 260.

²⁴⁶ Vgl. auch Dreher 1983, 49-51. Umfangreiche Bedingungen für eine Staatsentstehung sammelt auch das „circumscription“-Modell von Carneiro 1970, 734ff., das ausgeht von einem abgegrenzten, landwirtschaftlich genutzten Gebiet, das zu einer Gemeinschaft gehört, und die darauf wirkenden Einflüsse zusammenstellt. Interne gesellschaftliche Entwicklungen sind nach Chacon u.a. 2015 hauptsächlich verantwortlich für den Übergang von „Chiefdom to State“. Allerdings weichen ihre Definitionen, sei es vom Häuptlingstum, sei es vom Staat, von den hier zugrundegelegten ab. Auf die Schwierigkeit, einzelne Faktoren zu gewichten, verweist zu Recht Scheidel 2013, 13. Sehr allgemein bleibt Davies 2018.

²⁴⁷ Vgl. z. B. Schulz 2008, 56. Weil die Gesamtstruktur der griechischen Poleis auf dem privaten Eigentum ihrer Mitglieder aufgebaut ist, unterscheiden sich die Poleis von allen primitiven Gesellschaften, die Service untersucht hat und von denen er konstatiert, daß das Privateigentum bei der Staatsentstehung keine Rolle spiele, vgl.

Bezahlung oder Verzinsung, von einfachen Delikten wie Diebstahl oder Betrug über Raub und Körperverletzung bis hin zum Mord aus Habgier werden die Eigentumsdelikte gereicht haben, wie sie sich dann auch in der Gesetzgebung des 7. Jahrhunderts widerspiegeln (s. die o. unter B 2b behandelten Fälle). Für viele davon waren die Schlichtungsverfahren, die in der homerischen Gesellschaft praktiziert wurden, nicht mehr angemessen und praktikabel. Gerade die Entpersönlichung und Unübersichtlichkeit, die eine Bevölkerungszunahme mit sich bringt, hat die auf persönlichem Vertrauen beruhende Schlichtung von Streitigkeiten entwertet. Die hier in Anschlag gebrachten Streitigkeiten unterscheiden sich von den Konflikten zwischen Schichten und Klassen, die von der oben abgelehnten Konflikttheorie für die Staatsentstehung in Anspruch genommen werden. Es sind vielmehr Konflikte zwischen den Individuen, den wirtschaftlich handelnden Subjekten, die, wie oben betont, als Einzelglieder die Gesamtpolis konstituieren.²⁴⁸

Die Staatsgründung verstehe ich als Reaktion auf die vorgenannten Entwicklungen, als Versuch, mit den entstandenen Herausforderungen umzugehen, ihre gemeinschaftsschädlichen Auswirkungen einzudämmen und die Institutionalisierung zu fördern. Zentrale Aufgabe eines Staates, der aus Privateigentümern als selbst wirtschaftenden Individuen besteht, ist der Schutz von Person und Eigentum.²⁴⁹ Körperliche und sachliche Unversehrtheit zu gewährleisten, geschieht durch die Sanktionierung von Verstößen gegen diese Schutzgarantie. Dazu bedarf es des Rechts, das in Form von Gesetzen Verstöße definiert und dagegen gerichtete Strafen festlegt. Außerdem regeln Gesetze die innere Ordnung des Staates, also seine Verfassung, sowie

Service 1977, 350. Die Ausklammerung der frühgriechischen Entwicklung aus den ethnographischen Untersuchungen, die schon oben konstatiert wurde (A. 221. 222), erweist sich in diesem Punkt als besonders problematisch.

²⁴⁸ In Gehrkes sehr abstrakter Formulierung ist „die Ausformung von Staatlichkeit auf Probleme zurückzuführen, die sich durch den Organisationsbedarf von komplexer werdenden Gesellschaften und vor allem durch deren Konflikthaftigkeit ergeben“, Gehrke 1993, 49. 66f.

²⁴⁹ Diese ökonomisch-soziale Struktur ist in den von Service analysierten Gesellschaften nicht gegeben (s. o. A. 247). Vielleicht hat er wegen dieser Differenz die griechische Polis nicht in seine Fallbeispiele aufgenommen. Seine verallgemeinernden „positiven Folgerungen“ (so Kap. 17, S. 359ff.) für die Entstehung der Zivilisation (d. h. des Staates) haben daher auch keine Relevanz für die griechische Frühgeschichte.

die Rechte und Pflichten der Amtsträger. Die Entstehung des Staates ist daher unmittelbar mit der Entstehung des Rechts verbunden,²⁵⁰ und, wie oben bei unseren Fallbeispielen gesehen, sind die frühesten Manifestationen der Staatsgewalt rechtlicher Natur.

Als größte Eigentümer vor allem an Land, aber auch an mobilem Besitz, besaß die griechische Oberschicht das größte Interesse an der Schutzfunktion des Staates. Ihre Angehörigen, die Aristokraten, betrieben die Errichtung staatlicher Strukturen erstens aus diesem Interesse heraus, zweitens aus ihrer schon bisher bestehenden Verantwortung für die gesamte Gemeinschaft, demonstriert oben für die homerischen *basileis*, drittens zur Aufrechterhaltung ihrer hervorgehobenen und dominanten Stellung in der Gesellschaft, denn mit der Institutionalisierung von Funktionen in Form von Ämtern war nicht nur Macht, sondern auch ein entsprechendes Ansehen verbunden, man denke nur an die Benennung des Jahres nach dem obersten Amtsträger, in Athen dem Archon eponymos, und viertens zur Beschränkung ihrer Konkurrenz untereinander, indem die nunmehr formalen, festgelegten Verfahren dafür sorgten, daß innerhalb der Oberschicht regelmäßige Machtwechsel stattfanden, sowohl durch die Beschränkung der Amtszeiten auf meistens ein Jahr, als auch durch Iterationsverbote wie in Dreros (s. o.) oder durch Anti-Tyrannengesetze wie in Athen.²⁵¹

Der Großteil der Politen war ebenfalls Eigentümer, im allgemeinen von mittleren oder kleinen Landstücken und von entsprechendem mobilen Besitz. Als solche hatten sie ein grundsätzlich gleiches Interesse am (staatlichen) Schutz ihrer Person und ihres Eigentums.

²⁵⁰ Vgl. Jellinek 1922, 266. Das Recht im eigentlichen Sinn als kodifiziertes, abstraktes Recht ist daher eigentlich immer als staatliches Recht zu verstehen; vgl. Sellnow 1973, 25: „Vom Recht kann also nur gesprochen werden, wenn der Staat existiert, der in der Lage ist, die positive Gesetzgebung durch Gewalt durchzusetzen.“ Mangels geeigneter Begriffe spricht man jedoch auch für die vorstaatlichen Verhältnisse von rechtlichen Verfahren, primitivem Recht o. ä. Mit der Formulierung „droit et prédroit en Grece ancienne“ hat L. Gernet 1951 die Unterscheidung auch begrifflich fixiert. Eine wörtliche deutsche Übersetzung wie „Vor-Recht“ hat sich jedoch nicht etabliert.

²⁵¹ Zum Tyrannengesetz vgl. o. mit A. 152. Zum Zweck der archaischen Gesetze allgemein meint Harris 2018, 204, daß manche davon, wie andere Gelehrte behaupten, der Eindämmung der aristokratischen Konkurrenz gedient haben mögen, „but the vast majority of laws enacted ... were directed at regulating the conduct of all members of the community.“

Formalisierte und institutionalisierte Verfahren boten ihnen in vielen Fällen bessere Aussichten auf die Durchsetzung ihrer Anliegen als die traditionellen, von persönlichen Strukturen geprägten Entscheidungsfindungen,²⁵² die nach Hesiod oft von willkürlich handelnden, „geschenkefressenden *basileis*“ getroffen wurden. In nunmehr formalisierten Volksversammlungen konnte der Demos, wenngleich nur pauschal und bis zu einem gewissen Grad, an politischen Entscheidungen mitwirken.

Bei den Politen, die keines oder nur ein so kleines Landstück als Eigentum hatten, daß sie davon nicht leben konnten, beschränkte sich das Interesse an staatlichem Schutz auf die Unversehrtheit ihrer Person. Obwohl ihr soziales Ansehen in einer Landbesitzer-Gesellschaft entsprechend gering war, galten sie doch als vollwertige Bürger und waren zur Teilnahme an der Volksversammlung und der Inanspruchnahme des Rechtswegs berechtigt.

Zu den gemeinsamen Interessen von Oberschicht und den übrigen Schichten gehörte schließlich auch der schon weiter oben angesprochene militärische Bereich. Sofern eine Polis bedroht oder angegriffen wurde, schützten die Bürger als Soldaten Leben und Eigentum der Polismitglieder durch Verteidigung. Eigene Angriffe auf andere Gemeinschaften hatten oft Land- oder Beutegewinne und durch deren Verteilung die Vergrößerung individuellen Eigentums zum Ziel. Solche kriegerischen Aktivitäten werden zwar bereits in den homerischen Epen geschildert, können aber bei der Staatsgründung eine Rolle gespielt haben, indem etwa striktere Hierarchieverhältnisse und spezialisierte Ämter wie der athenische Polemarchos eingerichtet wurden. Ein weiteres gemeinsames, auf die Gemeinschaft gerichtetes Interesse war die Abgrenzung der Bürgerschaft, also der zur Polis Gehörenden, von allen *anderen*. Unter den oben skizzierten historischen Voraussetzungen dürften in der Zeit vor und um 700 v. Chr. die allgemeine Migration und die Sklavenhaltung zugenommen haben. Auch wenn ein formales Bürgerrecht in vielen Poleis erst spä-

²⁵² Ohne Bezug auf die griechische Polis wird die „balance of power between rulers and ruled“ von Pettit 2023, 3. 61, zum entscheidenden Kriterium für einen „nomothetischen Staat“ erklärt, den er als einzigen wirklichen Staat idealisiert. Ein solcher entstehe ganz ohne subjektive Absichten, nur zum Besten der Gemeinschaft!

ter eingeführt wurde,²⁵³ so dürften doch von Anfang an staatliche Institutionen darauf geachtet haben, wer als Fremder (*xenos*) und wer als Sklave zu gelten hatte.

Die Transformation der Polis zum Staat änderte also nichts an den wirtschaftlichen und sozialen Strukturen der Gesellschaft,²⁵⁴ es handelte sich nicht um eine Revolution. Im Gegenteil scheint die Staatsgründung gerade darauf abgezielt zu haben, die bestehenden Verhältnisse abzusichern und weiterzuentwickeln. Indem der archaische griechische Staat sich als Gesamtheit der Polismitglieder, als Gemeinschaft der Oikos-Inhaber konstituierte, unterschied er sich von praktisch allen anderen frühen Staaten, die aus big men- und chiefdom-Gesellschaften hervorgegangen waren. Die damit verbundene formale politische und rechtliche Gleichheit – jeder Bürger besaß ein gleiches Votum in der Volksversammlung; jeder Bürger war vor dem Gesetz gleich – perpetuierte jedoch die ökonomische und soziale Ungleichheit. Und diese Ungleichheit spiegelte sich auch in der politischen Hierarchie wider, da für lange Zeit nur Mitglieder der Oberschicht aktiv an der Ausübung der Staatsgewalt beteiligt waren. In diesem Bereich teilte sich die Bevölkerung also in Herrschende, auch wenn sie nur zeitweise in Gremien und Ämtern tätig waren, und in Beherrschte, wie es schon Aristoteles analysierte und wir es eingangs in der Definition des Staates vorausgesetzt hatten.²⁵⁵

Die genannte Antinomie bestand, soweit unsere Quellen überhaupt blicken lassen, in den einzelnen Poleis unterschiedlich lange und mehr oder weniger stabil. Erst aufgrund weiterer Entwicklungen, interner und externer, bildete sich ein bewußter Interessensgegensatz zwischen den oberen und den unteren Schichten heraus. Mit den Möglichkeiten, diesen Gegensatz in organisiertes Handeln zu kanalisieren, gingen dann in klassischer Zeit die Auseinandersetzungen mancherorts in regelrechte Bürgerkriege (*staseis*) über, und mündeten auch in politischen Kämpfen um die Staatsform, welche die Poliswelt in oligarchische und demokratische Staaten teilen sollte.

²⁵³ Vgl. dazu für das Beispiel Sizilien Dreher 2007, passim.

²⁵⁴ Ähnlich Andreev 1988, 26f.

²⁵⁵ Aristot. *pol.* 1277a25-28. Vgl. van der Vliet 2005, 128; s. auch Teil I, S. 27.

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Τὰν ἀπλόον τιμὰν διπ(π)λεῖ καταστασεῖ. Procedural penalties in the law of Gortyn*

Τὰν ἀπλόον τιμὰν διπ(π)λεῖ καταστασεῖ. Sanzioni procedurali nel diritto gortinio

Abstract

Procedural penalties intended to discourage parties from engaging in lawsuits were not uncommon in ancient legal systems. In Roman law, the procedural penalty of litiscrescence was used to sanction a defendant who denied a special obligation by increasing the *lis* (value of the claim). As such, if the *iudex* (judge) sided with the plaintiff, a *condemnatio in duplum* had to occur. In order to prevent a *condemnatio in duplum*, the defendant had to acknowledge his obligation before the praetor, meaning no trial before a *iudex* would be needed. This article examines whether a functional analogon of the procedural penalty of litiscrescence existed in the law of Gortyn. For this, it is necessary to exegetically analyse provisions of the law of Gortyn that indicate or refer to a condemnation for the double value. Furthermore, particular attention must be given to how a confession or denial before court was handled under the law of Gortyn.

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Le sanzioni procedurali volte a scoraggiare le parti dall'intraprendere azioni legali non erano rare nei sistemi giuridici antichi. Nel diritto romano, la sanzione processuale della litiscrescenza veniva applicata al convenuto che negava la propria responsabilità nell'ambito di una determinata azione, con conseguente aumento della *lis*. Se l'*iudex* si pronunciava a favore dell'attore, seguiva *condemnatio in duplum*. Per evitare una *condemnatio in duplum*, il convenuto doveva riconoscere il suo obbligo davanti al *praetor*, il che significava che non sarebbe stato necessario un *iudex*. Questo articolo esamina se un analogo funzionale della sanzione procedurale della litiscrescenza esistesse nel diritto gortinio. A tal fine, è necessario analizzare esegeticamente le disposizioni del diritto gortinio che indicano o fanno riferimento a una *condemnatio in duplum* nel contesto di una causa. Inoltre, occorre prestare particolare attenzione al modo in cui il diritto gortinio trattava la confessione o il diniego davanti al tribunale.

Keywords: law of Gortyn, Roman law, procedural misconduct, litiscrescence, pledge, comparative analysis of ancient laws

Parole chiave: diritto gortinio, diritto romano, abuso del processo, litiscrescenza, pegno, analisi comparativa delle leggi antiche

1. Introduction

In Roman law, the procedural penalty of litiscrescence (*litis crescentia*)¹ appears in the context of certain actions (*actiones*),² whereby the value of the claim (*lis*) was increased if the defendant denied his liability before the praetor.³ Actions with litiscrescence were enumerated by Roman jurists.⁴

¹ Zimmermann 1996, 308, 974; Ernst 2022, 320. Similar terms also exist in other languages: litiscrescenza (Italian), see Rotondi 1922, 413; Litiskreszenz (German), see Kaser, Hackl 1996, 139; litiscroissance (French), see Paoli 1933, 17.

² See Polara 2007, 195-238; Varvaro 2008, 218-39.

³ Pugsley 1982, 6; Kaser, Hackl 1996, 139-40, 283-4.

⁴ Gai. 4.9: *Rem vero et poenam persequimur velut ex his causis, ex quibus adversus infitiantem in duplum agimus; quod accidit per actionem iudicati, depensi, damni iniuriae legis Aquiliae, aut legatorum nomine, quae per damnationem certa relicta sunt*. Translation: Gordon, Robinson 2001, 405, 407: *We seek both property and penalty, on the other hand, in those cases where, for instance, we raise an action for double damages against someone who denies a claim, as happens with an action on judgment debt, on expenditure, for wrongful loss under the Aquilian Act, or for definite thing left by obligatory legacy*.

Further enumerations of actions with litiscrescence can be found in Gai. 4.171 and Pauli Sententiae 1.19.1, see Varvaro 2008, 218-22.

All of these actions shared the common characteristic that the value of the claim doubled if the defendant did not confess before the praetor but instead denied his liability.⁵ In such cases, the praetor had to appoint a judge (*iudex*),⁶ who could either condemn the defendant for double the amount or acquit him. The increase of the value of the claim was described with the expression *lis infitiando crescit in duplum*.⁷

If the defendant was sued in a proceeding with litiscrescence, he had to evaluate his chances of winning the lawsuit. He could either deny his liability (*infitiari*) or confess to his obligation (*confessio in iure*). If his chances of winning the lawsuit were low, it was better for him to perform a *confessio in iure* and voluntarily pay his debt. In Roman law, the procedural penalty of litiscrescence had the important function to reduce the number of lawsuits.⁸

The literature has highlighted that a functional analogon of the procedural penalty⁹ of litiscrescence existed in several ancient legal systems. Specifically, legal scholars refer to Babylonian law¹⁰ and to the law of Gortyn.¹¹ Furthermore, such a penalty might be present in the Laws of Plato,¹² on the

⁵ Zeiss 1967, 26; Kaser, Hackl 1996, 140.

⁶ The penalty of litiscrescence was not entirely abolished by Justinian. However, the distinction between the phases *in iure* and *apud iudicem* disappeared in Justinianic law; see Kaser 1975, 345. In Justinianic law, the defendant had to make a confession before a judge in the preliminary phase of the lawsuit in order to avoid an increase of the value of the claim; see de Jong 2015, 361.

⁷ Paoli 1933, 17; Varvaro 2023, 50.

⁸ Kaser, Hackl 1996, 283-4.

⁹ For more information about procedural penalties in Athenian law, see Thür 2015, 39.

¹⁰ Düll 1948, 218; Kelly 1966, 154; Pfeifer 2013, 21.

¹¹ Zitelmann in Bücheler, Zitelmann 1885, 172; Dareste 1886, 268; Beauchet 1897, 329; Düll 1948, 218; Guarducci 1950, 95, 107; Kelly 1966, 154; Scheibelreiter 2009, 147-50; Scheibelreiter 2010, 359-60, 368-70; Alonso 2012, 38; Scheibelreiter 2020, 91, 219, 265.

¹² Plat. Nom. 9.865b-d: text: Schöpsdau 2001, 212: Ἐὰν δὲ αὐτόχειρ μὲν, ἄκων δὲ ἀποκτείνει τις ἕτερος ἕτερον, εἴτε τῷ ἑαυτοῦ σώματι ψιλῶ εἴτε ὀργάνῳ ἢ βέλει ἢ πάματος ἢ σίτου δόσει ἢ πυρὸς ἢ χειμῶνος προσβολῇ ἢ στερήσει πνεύματος, αὐτὸς τῷ ἑαυτοῦ σώματι ἢ δι' ἑτέρων σωμάτων, πάντως ἔστω μὲν ὡς αὐτόχειρ, δίκας δὲ τινέτω τὰς τοιάσδε· ἐὰν μὲν δοῦλον κτείνει, νομίζων τὸν ἑαυτοῦ διειργάσθαι τὸν τοῦ τελευτήσαντος δεσπότην ἀβλαβῆ παρεχέτω καὶ ἀζήμιον, ἢ δίκην εἰς τὴν ἀξίαν τοῦ τελευτήσαντος ὑπεχέτω διπλῆν, τῆς δὲ ἀξίας οἱ δικασταὶ διάγνωσιν ποιείσθωσαν, καθαρμοῖς δὲ χρῆσασθαι μείζουσιν τε καὶ πλείοσι τῶν περὶ τὰ ἄθλα ἀποκτεινάντων, τούτων δ' ἐξηγητὰς εἶναι κυρίους οὓς ἂν ὁ θεὸς ἀνέλῃ· ἐὰν δὲ αὐτοῦ δοῦλον, καθηράμενος ἀπαλλαττέσθω τοῦ φόνου κατὰ νόμον.

Stele of Punishments,¹³ and in a letter (RC 3) from Antigonos Monophthalmos to the Teians.¹⁴

Translation: Pangle 1979, 259: *If with his own hands, but involuntarily, one man should kill another; whether it be with his own unarmed body, or with an instrument, or missile, or by giving some drink or food, or by applying fire or cold, or by deprivation of air – whether he acts with his own body or through other bodies – in all cases let it be as if by his own hands, and let him pay something like the following judicial penalties. If he should kill a slave, he must render the master of the dead slave free of injury and penalty by reckoning what it would cost him to be deprived of a slave of his own, or else sustain a judicial penalty equal to twice the value of the deceased – the value to be assessed by the judges. He is to employ purifications that are greater and more numerous than those employed by persons who kill during the games, and the Interpreters whom the god selects are to be sovereign in these matters. If it's his own slave, he is to be released under law from the murder once he's undergone purification.*

See Knoch 1960, 75-6, 163, who explicitly states that the increase of the liability was the result of a procedural penalty.

¹³ For the text and translation, see Prignitz, Thür 2025, 190-2. The term ἡμέλιον (Attic: ἡμιόλιον), which refers to an increase of the value of the claim, can be found in l. 53 and l. 55; see further Thür 1984, 510-1; Thür 2020, 36-8, 43, 56-8 with additional references.

¹⁴ Egetenmeier 2016/2017, 186 n. 62.

RC 3: § 6b (l. 27-39): text: Egetenmeier 2016/2017, 171: ὅσα δὲ <ύμῖν> ἔστιν πρὸς τοὺς Λεβεδίους ἢ τοῖς Λεβεδίοις π[ρὸς ὑμᾶς, ποεῖν ἀμφοτέ-] | [ρ]ους συνθήκην, γράψασθαι δὲ τὴν συνθήκην καὶ ἂν τι ἀντιλ[έγεται πρὸς τὴν] | [σ]υνθήκην, ἐπικριθῆναι ἐν τῇ ἐκκλησίᾳ <έν> ἑξαμήνῳ· ἔκκλητον [δὲ πόλιν γενέσθαι, κα-] | [θᾶ] ἀμφοτέροι συνωμολόγησαν Μιτυλήνην. τὰ μὲν οὖν ἄλλα ὑπ[ολαμβάνομεν ἀκολουθῶς] | [γ]ράφειν τοὺς συνθηκογράφους οἷς ἂν ποτε γινώσκωσιν· ἐπεὶ [δὲ τοσαῦτα τὸ πλῆθος ἄ-] | κούομεν εἶναι τὰ συναλλάγματα καὶ τὰ ἐγκλήματα ὥστε, ἂν τῷ [νόμῳ διακριθῆ] διὰ παν-] | τὸς τοῦ χρόνου, μηθένα ἂν δύνασθαι ὑπομεῖναι – καὶ γὰρ ἕως το[ῦ]δε οὐ δοκεῖ προκοπὴν εἶ-] | ληφέναι ταῦτα ἄπερ οὐδὲ αἰ συν[θῆ]κ[αι] συντελέσθαι διὰ τὸ ἐ[κ πολλοῦ ἀδίκαστα] | εἶναι ὑμῖν τὰ συναλλάγματα – καὶ ἂν προστιθῶνται οἱ τόκοι πάντων τῶν ἐτῶν, μηθενί] | [δ]υνατὸν εἶναι ἀποτεῖσαι, οἰόμεθα δὲ δεῖν, ἂμ μὲν ἐκόντες ἀπο[τείσωσιν οἱ ὀφεί-] | [λο]ντες, γράφειν τοὺς συνθηκογράφους μὴ πλεον διπλάσιον ἀποδ[ιδόναι τοῦ ἀρχαίου,] | ἂν δὲ εἰς δίκην ἐλθ<ό>ντες ὀφείλωσι, τριπλάσιον. ὅταν δὲ ἢ συνθήκη ἐπικυρωθῆ, γρά-] | ψασθαι τὰς δίκας καὶ ἐγδικάσασθαι ἐν ἐνιαυτῷ.

The translation, with slight changes, is based on Welles 1934, 21: *As to those suits which you have against the Lebedians or the Lebedians have [against you, that both cities make] an agreement, and the agreement should be written down, and if any objection is raised [against the] agreement that a decision be given by the arbiter city within six months; that the arbiter [city be] Mitylene, as both have agreed. [We think it best] that the committee charged with drawing up this instrument should write the other terms according to what they decide. As we hear that the suits over contracts and over statements of claim are [so numerous] that if [they were judged according to the law], even without interruption, no one would be able to wait for the end – for up*

However, most of the literature references just mentioned are general references regarding the functional analogon of the procedural penalty of litiscrescence. In order to determine whether such a penalty was part of ancient legal systems, a broader investigation is necessary, one that also takes procedural law into account. In view of the paucity of research focussing on the law of Gortyn, the present contribution aims to address this lacuna by analysing several provisions that indicate an increase of the value of the claim.

2. Condemnation for more than the simple value of the claim

Unlike in Roman law, where actions with litiscrescence were enumerated, the law of Gortyn does not contain any specific information about a functional analogon of the procedural penalty of litiscrescence. As such, in order to identify provisions that could include a functional analogon of the procedural penalty of litiscrescence, it is necessary to analyse sources that explicitly refer to a simple value of a claim and state or indicate that the defendant could be condemned for more than that value. Ultimately, through an exegetical analysis, it can be concluded whether the condemnation for more than the simple value was the result of a functional analogon of the procedural penalty of litiscrescence.

After reviewing sources from the law of Gortyn, the sources IC IV 41 3.7-17, IC IV 47 16-33, IC IV 79 1-21, and IC IV 72 9.24-40 were selected for closer analysis.¹⁵ These four sources share the commonality that they

to now [it does not appear that any progress] has been made with these nor have the contracts been executed because the suits have [long] remained [unadjudicated] – and if the interest [of all the years] accumulates [no one] would be able to pay it. We think it best for the committee to provide, if [the debtors pay] of their own accord, that they pay no more than double the value [of the debt], and if they go to court [and are adjudged liable], that they pay three times its value. Whenever the agreement [is ratified], (we think it right) that the suits be filed and judged within a year.

For more information about Antigonos Monophthalmos, see Billows 1990; Badian 1996, 752-3; for more information about RC 3, see Welles 1934, 16-23; Bencivenni 2003, 169-201.

¹⁵ Further cases in the law of Gortyn, where a conviction could result in a multiple amount, are, for example, cited by Pelloso 2009/2010, 110-1, 162-7 and Scheibelreiter 2020, 247, 265. However, there is no indication that the conviction for multiple amounts in the sources IC IV 72 1.35-39, IC IV 72 3.9-16, IC IV 72 6.18-24, IC IV 72 6.37-44, IC IV 72 9.11-15, and IC IV 78 1-8 (see section “4.3.2 Functional analogon of the procedural penalty of litiscrescence?”) could be attributed to a denial of the defendant before the δικαστάς.

all refer explicitly to a simple amount, which must be distinguished from a double amount or a multiple amount. Furthermore, in all sources, with regard to a conviction for a multiple amount, a connection to procedural misconduct seems possible.

3. Procedural law

3.1 Jurisdictional authority

In the context of dispute resolution, the law of Gortyn mostly refers to the δικαστάς¹⁶ but sometimes also to the κόσμος.¹⁷ Gortyn had several κόσμοι¹⁸ who acted as the highest public officials.¹⁹ The exact functions of the κόσμος and the δικαστάς in the context of a lawsuit are fiercely debated among legal scholars.

Kohler/Ziebarth and Bonner/Smith argue that both the δικαστάς and the κόσμος could resolve a case, and whether the case had to be decided by a δικαστάς or a κόσμος depended on who, by law, had jurisdiction over the matter.²⁰

Wolff assumes that the κόσμος “controlled the steps to be taken by the parties” and, thus, had a similar function to the praetor.²¹ According to Wolff, the κόσμος was not allowed to resolve the case by himself. Instead, he had to appoint a δικαστάς, who then had to resolve the case.²² Wolff argues that it cannot be verified whether the δικαστάς was a public official or a private citizen.²³

Thür emphasises that the appointment of a δικαστάς by a κόσμος is not mentioned in the law of Gortyn, meaning that the solution of Wolff does not seem to align with the sources. Thür provides another solution. According

¹⁶ The Attic word δικαστής represents the equivalent of the Doric word δικαστάς; see Thür 1998, 1161.

¹⁷ See Kohler, Ziebarth 1912, 81; Wolff 1946, 63-5.

¹⁸ One of these κόσμοι was, for example, the ιεραργός κόσμος who was responsible for religious affairs, see Willetts 1967, 32. The κσένιος κόσμος had to deal with issues regarding foreigners; see Thür 2005, 15; see further section “4.3.1 Introduction”.

¹⁹ Kohler, Ziebarth 1912, 44.

²⁰ Kohler, Ziebarth 1912, 81; Bonner, Smith 1968, 87.

²¹ Headlam 1892/1893, 49-50 also refers to Roman law and to the terms “*in jure*” and “*in judicio*” but assumes that the δικαστάς presided over both phases.

²² Wolff 1946, 64-6. Seelentag 2013, 327 assumes that the κόσμος could either appoint a δικαστάς or resolve the case by himself.

²³ Wolff 1946, 66; Wolff 1961, 58.

to Thür, the term δικαστάς referred to a specific κόσμος who was assigned to a case.²⁴

Due to a lack of sources, a clear distinction between the terms δικαστάς and κόσμος is not possible. However, the κόσμος is rarely mentioned in the context of dispute resolution. Furthermore, the concept of the appointment of a δικαστάς by a κόσμος must not be imposed upon the sources. Roman law and the law of Gortyn are two fundamentally different legal systems, and thus, it cannot be assumed that their forms of dispute resolution before a magistrate were similar. Overall, Thür's approach appears to be the most compelling solution, as it does not require any further assumptions and is capable of explaining the different usages of the terms κόσμος and δικαστάς.

3.2 Dispute resolution

In the law of Gortyn, there are not many provisions with procedural law, and thus, it is very difficult to draw conclusions about this topic.²⁵ However, it is clear that there were two methods for how a dispute could be resolved.²⁶ The sources refer to the terms δικάδδεν²⁷ (“rule”)²⁸ and ὁμνύντα κρίνεν (“decide”).²⁹

If a case had to be resolved by δικάδδεν, the δικαστάς had to follow a certain procedure.³⁰ Specifically, the δικαστάς had to rule the case in accordance with the testimony of witnesses or the oath of a party.³¹ In such a

²⁴ Thür 1996, 63; Thür 2005, 16; Thür 2006, 46; Thür 2014, 6.

²⁵ Wolff 1961, 57; Thür 2014, 5.

²⁶ IC IV 72 11.26-31: text and translation: Gagarin, Perlman 2016, 421: τὸν δικαστάν, ὅτι μὲν κατὰ | μαίτιυρανς ἔγρατται δικάδδ- | εν ἔ ἀπόμοτον, δικάδδεν ἄι ἔ- | γρατται, τὸν δ' ἄλλὸν ὁμνύντ- | α κρίνεν πορτί τὰ μολιόμεν- | α. vac. – *Whenever it is written that the judge is to rule according to witnesses or an oath of denial, he is to rule as is written, but in the other cases he is to swear an oath and decide with reference to the pleadings. vac.*

For additional information regarding the edition of the text, see Guarducci 1950, 140; Willetts 1967, 49; Körner 1993, 554-5 (181); Effenterre, Ruzé 1995, 37 (4).

²⁷ The Attic form δικάζειν represents the equivalent of the Doric form δικάδδεν; see Thür 1998, 1161.

²⁸ Gagarin 2010, 128; see further Zitelmann in Bücheler, Zitelmann 1885, 68: “urtheilen”; Headlam 1892/1893, 49: “he gives judgement”.

²⁹ Gagarin 2010, 128; see further Zitelmann in Bücheler, Zitelmann 1885, 69: “entscheiden”; Headlam 1892/1893, 49: “he decides”.

³⁰ Gagarin 2010, 129.

³¹ IC IV 72 11.26-31; see further Zitelmann in Bücheler, Zitelmann 1885, 71; Thür

case, the δικαστάς only executed the law without forming his own opinion about whether the claim of the plaintiff was actually justified or not.³² A case could only be resolved by the method of δικάδδεν if there was a statutory justification.³³

The other method for resolving a dispute is referred to as ὀμνόντα κρίνεν. In such cases, the δικαστάς had to find out the truth³⁴ and, thus, decide the case by his own judgment.³⁵ Furthermore, the δικαστάς had to swear an oath to guarantee that he did not abuse his power.³⁶

Regarding the sources IC IV 41 3.7-17, IC IV 47 16-33, and IC IV 72 9.24-40, it is necessary to discuss whether the case had to be decided by the method of δικάδδεν or by the method of ὀμνόντα κρίνεν. Generally, a functional analogon of the procedural penalty of litiscrescence could occur under both methods because liability for a multiple amount could, for example, be triggered by the refusal of the defendant to take an oath or by a decision and an oath of the δικαστάς.

3.3 Denial before court

If one party sued another party, a proceeding before a δικαστάς³⁷ had to occur. The sources provide little information about the phases of the lawsuit. Headlam argues that the lawsuit could be divided into two phases, with the first being the preliminary phase.³⁸ Moreover, Thür explains that in the first phase of the lawsuit, the δικαστάς had to create a programme for the trial, and in the second phase, the resolution of the dispute was required.³⁹

Before it was determined by which method the case was to be decided, the defendant had the possibility to acknowledge his obligation before the δικαστάς. If the defendant made such a confession a trial was not necessary.⁴⁰ This meant that – if the case had been decided by the method of

2005, 16.

³² Zitelmann in Bücheler, Zitelmann 1885, 71.

³³ IC IV 72 11.26-31; see further Zitelmann in Bücheler, Zitelmann 1885, 68; Gagarin 2010, 129.

³⁴ Zitelmann in Bücheler, Zitelmann 1885, 68-9.

³⁵ Thür 2005, 16.

³⁶ Steinwenter 1925, 47.

³⁷ See section “3.1 Jurisdictional authority”.

³⁸ Headlam 1892/1893, 49-54.

³⁹ Thür 2009, 493.

⁴⁰ See Maffi 1983, 156, who refers to the rule *confessus pro iudicato habetur* in the

δικάδδεν – a separate meeting before a sacred place, in order to swear an oath, could have been avoided. However, if the case would have been decided by the method of ὀμνύντα κρίνεν, the confession would have spared the δικαστάς from conducting further investigations into the matter.

In relation to the sources IC IV 41 3.7-17, IC IV 47 16-33, IC IV 79 1-21, and IC IV 72 9.24-40, it should be analysed whether liability for a multiple amount was caused by misconduct of the debtor before the δικαστάς⁴¹ or by misconduct of the debtor that occurred outside the court proceedings. It is important to distinguish between these two possibilities, as the legal position of the debtor would be more favourable in the first case. In the first case, the debtor could prevent a condemnation for a multiple amount by confessing to his obligation at the beginning of the lawsuit, whereas in the second case, the debtor was unable to prevent a condemnation for a multiple amount if the creditor was not willing to reach a settlement.

With regard to the concept of the increase of the value of the claim, this paper adopts a broad understanding of this term. A verb that explicitly expresses a denial can be found only in IC IV 41 3.7-17 (l. 15-16: ἐκσαννήσεται).⁴² However, a functional analogon of the procedural penalty of litiscrescence may also be present even if the text of the source contains no term that explicitly indicates a denial, since it is evident that when the debtor did not make a confession but instead engaged in proceedings against the creditor, he implicitly denied the creditor's claim.

4. Sources

4.1 IC IV 41 3.7-17

4.1.1 Introduction

The first source to be analysed is an inscription that was discovered on the north wall of the agora and can be dated to the beginning of the 5th century

context of the law of Gortyn (“*vale dunque per il diritto gortinio una regola analoga a quella romana: confessus pro iudicato habetur*”); see further section “4.4.2 Grounds for obligations”.

⁴¹ About the problem of a fraudulent legal proceeding in Gortyn, see Benke 2021/2022, 42-3.

⁴² The form ἐξαρνεῖσθαι (Attic) means “to deny [before a court]”; see section “4.1.2.2 Grounds for a condemnation for the double value”.

B.C.⁴³ This inscription is called the Second Code⁴⁴ or Little Code⁴⁵ and it contains only seven columns, meaning it is much smaller than the Great Code.⁴⁶ The following text deals with the liability of a person who received an animal.

IC IV 41 3.7-17
 αἷ κα τετ-
 ράπος ἢ ὄνν[ι]θα παρ-
 καταθ[ε]μένοι ἢ κρη-
 10 σάμενος ἢ [ἀλ]λαῖ δε-
 κσάμε[νο]ς μὴ νονατ-
 ὸς εἴη αὐτ[ὸν ἄ]ποδόμ-
 ην, τὸ ἀ[πλ]ῶον κατασ-
 τασεῖ. αἱ δ[έ κ' ἐ]πὶ τᾶι
 15 δίκαι [μο]λίον ἕκσαν-
 νήσεται, δι[πλ]εῖ κατ-
 αστᾶσ[αι κ]αὶ θέμημ πόλι.

If someone has used or for some other reason received an animal or bird and is not able to give it back to the person who entrusted it to him, he shall pay the simple value. But if while contending in court he denies (having received it?), he shall pay double and is to give to the city.⁴⁷

IC IV 41 3.7-17 addresses a situation in which the παρακαταθεμένος (the transferor)⁴⁸ handed over a τετράπος⁴⁹ or an ὄρνις⁵⁰ to another party (the transferee). The word τετράπος describes a quadrupedal herd animal⁵¹ and the word ὄρνις a fowl.⁵² Subsequently, the reason for the transfer of the

⁴³ Effenterre, Ruzé 1995, 237; Hölkeskamp 1999, 124.

⁴⁴ Willetts 1967, 3; Davies 2005, 307.

⁴⁵ Davies 2005, 307.

⁴⁶ Metzger 1973, 124.

⁴⁷ Text and translation: Gagarin, Perlman 2016, 295. For additional information regarding the edition of the text, see Guarducci 1950, 91; Metzger 1973, 97; Körner 1993, 376 (127); Effenterre, Ruzé 1995 237, 239 (65).

⁴⁸ See Scheibelreiter 2020, 90; for more information about the term παρακαταθήκη, see Kießling 1956, 69; Scheibelreiter 2020, 42-5.

⁴⁹ The Attic word τετράπους represents the equivalent of the Doric word τετράπος; see Schwyzler 1923, 91, 454; Liddell, Scott, Jones 1996, 1782.

⁵⁰ The Attic form ὄρνιθα represents the equivalent of the Doric form ὄρνιθα (l. 8); see Buck 1910, 69; Willetts 1967, 53. For information on the syntax, see Gagarin, Perlman 2016, 296.

⁵¹ Scheibelreiter 2020, 89; Alonso 2012, 38: “quadruped”.

⁵² Metzger 1973, 97; Gagarin 2008, 129; Alonso 2012, 38. According to Körner 1993,

τετράπος or ὄρνις is characterised by the phrase ἢ κρησάμενος ἢ ἀλλᾷ δεκσάμενος (l. 9-11). In particular, the word κρησάμενος refers to a loan for use or a lease,⁵³ whereas the words ἀλλᾷ δεκσάμενος could refer to a deposit or a pledge.⁵⁴

The question arises whether the case mentioned in the text, in which only a single τετράπος or ὄρνις was handed over, reflected the usual practice in Gortyn. It seems plausible that, in many cases, several animals were entrusted for herding and grazing.⁵⁵

IC IV 3.7-17 focusses on the following problem. Specifically, the transferee was not able to return the τετράπος or ὄρνις to the παρκαταθεμένος (l. 11-13: μὴ νυνατὸς εἶη αὐτὸν ἀποδόμην). Unlike in IC IV 47 16-33,⁵⁶ IC IV 41 3.7-17 does not mention any possibility for the transferee to prove that he is not responsible for his inability to return the object⁵⁷ he received.⁵⁸ Therefore, it has to be assumed that the transferee was liable regardless of his fault for the disappearance or death of the τετράπος or ὄρνις.⁵⁹

If the transferee could not return the τετράπος or ὄρνις to the παρκαταθεμένος, he had to pay the simple value of the τετράπος or ὄρνις to the παρκαταθεμένος (l. 13-14: τὸ ἀπλόον καταστασεῖ). Furthermore, the text discusses a situation, in which the transferee who does not return the τετράπος or ὄρνις also refuses to pay the simple value to the παρκαταθεμένος. In such a situation, if the transferee were condemned, he would have to pay twice the value of the τετράπος or ὄρνις (l. 16-17: διπλεῖ καταστασαι) and a fine to the polis (l. 17: καὶ θέμημ πόλι). It would be reasonable to assume

382 n. 32, most often a pigeon or goose was transferred.

⁵³ See Metzger 1973, 98; Körner 1993, 382; Scheibelreiter 2020, 89. The English word “loan” is ambiguous because it can refer to either a *mutuum* or a *commodatum*.

⁵⁴ See Koschaker 1917, 22; Felgentraeger 1933, 81; Metzger 1973, 98; Davies 2005, 307; Scheibelreiter 2020, 89.

⁵⁵ In this context, parallels with other ancient legal systems seem possible. Such a situation is, for example, illustrated by the case preserved in CBS 4579, Nippur (2nd half of 13th century B.C.), where 25 sheep were entrusted, see Thür 2022, 8-9; see further Jauß 2023, 30-3. Sheep and goats were probably the most frequently transferred animals in ancient times, see Bolla-Kotek 1969, 46.

⁵⁶ See section “4.2.1 Introduction”.

⁵⁷ According to Metzger 1973, 99, the transferee was not allowed to keep the τετράπος or ὄρνις by paying the simple value to the παρκαταθεμένος.

⁵⁸ This distinction is highlighted by Metzger 1973, 104-5.

⁵⁹ Felgentraeger 1933, 81; Metzger 1973, 100; Scheibelreiter 2020, 91; for the opposing view, see section “4.1.2.2 Grounds for a condemnation for the double value”.

that the value of a lost animal (or of the lost animals) would have to be determined by the δικαστάς under oath (ὀμνύντα κρίνεν).⁶⁰

There are no further indications in the text regarding the fine to be paid to the polis.⁶¹ As a result, the exact details of the penalty remain unknown. Two possibilities seem plausible. Firstly, the penalty could be an independent monetary fine. In this case, the transferee would have to pay the double value to the παρκαταθεμένος as well as an additional fine to the polis.⁶² However, this interpretation is called into question by the absence of any explicit mention of the amount of the penalty.

Secondly, it is also conceivable that this penalty concerns a portion of the amount for which the transferee is being held liable.⁶³ The sum to be paid to the polis would therefore already be included in the double value.

4.1.2 Functional analogon of the procedural penalty of litiscrescence?

4.1.2.1 Condemnation for the double value

Generally, the transferee had to pay the simple value if he was unable to return the τετράπος or ὄρνις to the παρκαταθεμένος. The phrase αἰ δέ κ' ἐπὶ τᾷ δίκαι μολίον ἐκσαννήσεται (l. 14-16) explains the situation in which the transferee would have to face a condemnation for the double value.

In IC IV 41 3.7-17, it is not mentioned by which method of dispute resolution⁶⁴ – δικάδδεν or ὀμνύντα κρίνεν – a condemnation for the double

⁶⁰ See further IC IV 72 1.7-12: text and translation: Gagarin, Perlman 2016, 338: αἰ [δέ] κα | με [λαγ]άσει, καταδικαδέτο τῷ μὲν | ἐλευθέρῳ στατεῖρα, τῷ δόλο [δα]ρκν- | ἂν τᾷς ἡμέρας φεκάστας, πρὶν κα λα- | γάσει τῷ δὲ κρόνο τὸν δι[κ]αστ- | ἂν ὀμνύντα κρίνεν. – *And if he does not release him, let him rule that he pay a stater for a free person and a drachma for a slave for each day until he releases him. And the judge is to swear an oath and decide about the amount of time.*

For additional information regarding the edition of the text, see Guarducci 1950, 126; Willetts 1967, 39; Effenterre, Ruzé 1995, 359.

⁶¹ One possible reason a fine had to be paid to the polis is that the παρκαταθεμένος was a lower-ranking official of the polis.

⁶² Guarducci 1950, 95; Körner 1993, 383; Scheibelreiter 2020, 265.

⁶³ See Effenterre, Ruzé 1995, 240.

⁶⁴ It is not known which method of dispute resolution was applied more often. Zitelmann and Gagarin emphasise that the law of Gortyn often does not mention the method for how the dispute should be resolved and, thus, conclude that the method of ὀμνύντα κρίνεν, which did not require a statutory justification, may have been more common; see Zitelmann in Bücheler, Zitelmann 1885, 68; Gagarin 2010, 129.

According to Thür, the view that the δικαστάς was a judge belonging to the magistracies

value could be achieved. It would be natural to assume that the δικαστάς would risk taking a personal oath (ὀμνόντα κρίνεν) only if he was certain about the case⁶⁵ – for example, because he witnessed the transfer of the τετράπος or ὄρνις from the παρκαταθεμένος to the transferee.

In most cases, however, it seems more plausible that he would settle the dispute through δικάδδεν. Generally, he could administer oaths to the witnesses⁶⁶ of the transfer who had been named by the παρκαταθεμένος or administer a dispute-deciding oath either to the παρκαταθεμένος (“*accusatory oath*”⁶⁷) or the transferee (“*exculpatory oath*”⁶⁸).

Due to the parallels between IC IV 41 3.7-17 and IC IV 47 16-33, which will be discussed later,⁶⁹ it is reasonable to assume that in IC IV 41 3.7-17 – as indicated in IC IV 47 16-33 by the term ναῖ (l. 27)⁷⁰ – the legal dispute should be settled by an accusatory oath of the παρκαταθεμένος (the plaintiff). Therefore, a condemnation for the double value could have occurred if the παρκαταθεμένος performed the accusatory oath.

It should be noted, however, that the considerations just presented are merely conjectures based on plausibility. Whether the dispute referred to in IC IV 41 3.7-17 was ultimately decided by δικάδδεν or by ὀμνόντα κρίνεν cannot be determined with certainty.

4.1.2.2 Grounds for a condemnation for the double value

Among scholars, conflicting doctrines can be found regarding the reason for the condemnation for the double value. The first doctrine seeks to explain the condemnation for double value as a procedural penalty. According

of the polis, who convicted or acquitted the defendant by a judgment rendered on the substance of the case rather than on procedural grounds, is incorrect. In his view, the δικαστάς was the jurisdictional authority, who set the procedure for trials. Thür assumes that the procedural law of Gortyn remained at the stage of the Homeric oaths that determined the outcome of a trial; see Thür 2009, 493; see further Thür 2010, 148-50; see section “3.1 Jurisdictional authority”.

See further Thür 2006, 46 (“*Die wenigen im Gesetz erwähnten dikazein-Sprüche, die einen Eid auferlegen, sind also nicht als Ausnahmen zu betrachten, sondern als die Regel.*”).

⁶⁵ See further Thür 2010, 148.

⁶⁶ See further Thür 2006, 43.

⁶⁷ See further Gagarin, Perlman 2016, 407.

⁶⁸ See further Gagarin, Perlman 2016, 562.

⁶⁹ See section “4.2.1 Introduction”.

⁷⁰ See section “4.2.3.1 Condemnation for the double value”.

to Scheibelreiter, the word ἐξαρνείσθαι (l. 15-16: ἐκσαννήσεται)⁷¹ refers to a denial before court, similar as the Latin word *infitiari*.⁷² Furthermore, several legal scholars emphasise that the condemnation for the double value, which is mentioned in IC IV 41 3.7-17, was the result of a functional analogon of the procedural penalty of *litiscaesio*.⁷³

Consequently, the situation would be as follows: After the initiation of the proceedings, the δικαστάς would question the transferee to determine whether he had indeed received a τετράπος or an ὄρνις from the παρκαταθεμένος and was therefore obliged to return it. The transferee could then either pay or acknowledge his obligation⁷⁴ before the δικαστάς, or deny his liability.

If the transferee were to acknowledge his obligation, a dispute resolution by δικάδδεν or by ὀμνύντα κρίνεν would no longer be necessary, and the transferee would have to compensate the παρκαταθεμένος with the simple value. If, however, the transferee were to deny having received a τετράπος or an ὄρνις,⁷⁵ he would thereby be entering into a lawsuit. The dispute would have to be resolved by δικάδδεν or by ὀμνύντα κρίνεν, and, in the event of losing the lawsuit, the transferee would have to compensate the παρκαταθεμένος with the double value.

According to the second doctrine, the double value is to be understood as a penalty directed at conduct outside the context of a trial. Several legal scholars refer in this context to a breach of trust⁷⁶ or a concealment,⁷⁷ which would mean that the transferee would be punished for unlawfully keeping the τετράπος or ὄρνις. This interpretation is supported by the fact that the

⁷¹ The Attic form ἐξαρνήσεται represents the equivalent of the Doric form ἐκσαννήσεται (l. 15-16); see Scheibelreiter 2009, 148 n. 102.

⁷² Scheibelreiter 2009, 147-151.

⁷³ Beauchet 1897, 329; Düll 1948, 218; Guarducci 1950, 95, 107; Scheibelreiter 2009, 147-150; Scheibelreiter 2010, 359-60; Alonso 2012, 38; Scheibelreiter 2020, 91, 219, 265.

⁷⁴ Such an acknowledgment constituted an independent ground of obligation, which had the same legal quality as a verdict, see Maffi 1983, 156; see the sections “3.3 Denial before court” and “4.4.2 Grounds for obligations”. A confession would have been particularly reasonable if the transferee had no money but wished to avoid liability for the double amount.

⁷⁵ See Scheibelreiter 2009, 148 (“*Ableugnen der Verwahrung*”); Gagarin, Perlman 2016, 296 (“*he probably denies having received the animal*”).

⁷⁶ Lipsius 1912, 738.

⁷⁷ Mitteis, Wilcken 1963, 258; Thür, Taeuber 1994, 179 n. 49.

text does not explicitly mention that the transferee denies having received⁷⁸ a τετράπος or an ὄρνις.⁷⁹

Furthermore, comparing IC IV 41 3.7-17 to IC IV 41 2.17⁸⁰ and IC IV 47 16-33⁸¹ could indicate that IC IV 41 3.7-17 refers to the liability of the transferee based on fault, rather than strict liability. Accordingly, just as a certain view is held regarding IC IV 47 16-33,⁸² the liability in IC IV 41 3.7-17 could also be explained on the basis of double damages resulting from a delictual act.

Following the second doctrine, a denial in court would be irrelevant. The transferee would already owe the παρκαταθεμένος the payment of the double value before the proceedings began. Therefore, the παρκαταθεμένος could claim this payment by initiating a lawsuit, without the transferee having any means to prevent it, for example, by confessing to his obligation.

Both interpretations of IC IV 41 3.7-17 are possible and can be supported by good reasons; however, in my opinion, the first doctrine seems preferable, given the wording of IC IV 41 3.7-17, especially the use of the verb ἐξαρνεῖσθαι. This verb indicates a denial before court.⁸³ If IC IV 41 3.7-17 concerned a liability for the double value resulting from a delictual act, the

⁷⁸ See Metzger 1973, 100 (“*Das Ableugnen des Beklagten wird darin bestehen, daß er ein besseres Recht des Klägers auf das Tier bestreitet und es als sein eigenes erklärt*”); Körner 1993, 383. However, a problem arises in Metzger’s explanation, as the verb ἐξαρνεῖσθαι can hardly be understood as expressing a superior right.

⁷⁹ In IC IV 47 16-33, which is similar to IC IV 41 3.7-17, the denial of having received the κατακείμενος is not explicitly mentioned, see section “4.2.1 Introduction”.

⁸⁰ IC IV 41 2.1-17: text and translation: Gagarin, Perlman 2016, 294:[—]ε[...]|ται, τὸ φίσφον κατασ-|τασεῖ. vac. ἵππον δὲ κ’ [ἦ]μ-|ί[ο]νον κ’ ὄνον τὸ μὲν | νυνατὸν ἐπιδίεθαι | αἱ ἔγρατται· αἱ δὲ κα | τετνάκηι ἢ μὴ νυν-|ατὸν ἦι [ἦ] ἐπιδίεθθαι, | καλῆν ἀντι μαιτύρ-|ον δυσὸν ἐν ταῖς πέν-|τε αἱ δείκσει ὅπῃ κ’ | ἦι, κ’ ὀρκιότερον ἦμη-|ν αὐτὸν καὶ τὸν μα-|ίτυραν αἱ ἐπέδιδετ-|ο ἢ ἐπήλευσε ἢ ἐκάλλη | δεικσίον. vac. κύνανς | ἀπαμπαιόμενο[—]—
— he shall pay an equal amount. vac. If possible, a horse or a mule or an ass is to be led (to the offending animal’s owner) as is written. But if it is dead or cannot be led, then (the injured animal’s owner) is to summon (the other) in presence of two witnesses within five days in order to display it, whenever it is; and the summoner and his witnesses are to be the ones who swear as to whether he led or brought it or summoned him so as to display it. vac. Someone who wards off the attack of dogs —
For additional information regarding the edition of the text, see Guarducci 1950, 90; Körner 1993, 376 (127); Effenterre, Ruzé 1995 237 (65).

⁸¹ See section “4.2.1 Introduction”.

⁸² See section “4.2.3.2 Grounds for a condemnation for the double value”.

⁸³ See further Plat. Nom. 9.949a; Liddell, Scott, Jones 1996, 587.

use of the verb ἐξαρνεῖσθαι could be misleading. Therefore, it appears that IC IV 41 3.7-17 refers to a functional analogon of the procedural penalty of litiscrescence.

4.2 IC IV 47 16-33

4.2.1 Introduction

The second source (IC IV 47 16-33) was discovered on the east wall of the agora and, thus, can be dated to the beginning of the 5th century B.C.⁸⁴ This source deals with a dispute between two parties in the context of a pledge.

IC IV 47 16-33
 αἰ δέ κ' ἄ-
 πόληται ὁ κατακείμενος, δικ-
 ακσάτο ὁμόσαι τὸν καταθέμε-
 νον μήτ' αὐτὸν αἴτιον ἔμην μήτ-
 20 ε σὺν ἄλλοι, μήτ' ἐπ' ἄλλοι ρισάμη-
 ν. αἰ δέ κ' ἀποθάνη, δεικσάτο
 ἀντὶ μαιτύρον δυῶν.
 αἰ δέ κα μὴ ὁμόσει ἄι ἔ-
 γραται ἢ μὴ δείξει, τ-
 25 ἂν ἀπλόον τιμὰν κατα-
 στασεῖ. αἰ δέ κ' αὐτὸν αἰ-
 τιῆται ναὶ ἀποδόθαι ἢ
 ἀποκρύψαι, αἰ κα νικ-
 αθεῖ, τὰν ἀπλόον τ-
 30 μὲν διπλεῖ κατα-
 στασεῖ. αἰ δέ κα ναεὺ-
 ηι, ἐμπανία δεικσάτ-
 ο.

And if the indentured (slave) disappears, let (the judge) rule that the current master is to swear that he is not to blame himself nor with someone else nor does he know (that the slave is) with someone else. And if (the slave) dies, let (the current master) show (him to the old master) before two witnesses. And if he does not swear as is written or does not show him, he shall pay the simple value (of the slave). And if (the old master) accuses him (the current master) in fact of selling or hiding away (the slave), if he (the accused) loses

⁸⁴ See Hölkeskamp 1999, 124. There are two columns preserved; see Metzger 1973, 124.

the case, he shall pay double the simple value. And if (the slave) takes refuge in a temple, he is to show him clearly (to the old master).⁸⁵

The word κατακείμενος, which appears in l. 17, refers to a pledge. In the law of Gortyn, there are several possibilities for how a person could be involved as a security in a pledge.

Firstly, the term κατακείμενος could describe a free person. In the literature, there is debate over whether κατακείμενος should be regarded as the (principal) debtor or as a guarantor. According to one opinion, the debtor who had an obligation could pledge himself to the creditor.⁸⁶ This situation meant that the person who pledged himself would temporarily lose his freedom.⁸⁷ Such a person would be referred to as a κατακείμενος.⁸⁸ This view is criticised by Maffi. In his opinion, a free person, referred to as κατακείμενος, should be regarded as a guarantor.⁸⁹

Secondly, a πάστας (*i.e.*, the master of a serf) could pledge his serf to the creditor. Such a serf was also referred to as a κατακείμενος.⁹⁰ The creditor (*i.e.*, the pledgee; the recipient of the κατακείμενος) was characterised as the καταθέμενος.⁹¹

In IC IV 47 16-33, a situation is mentioned in which the κατακείμενος was granted asylum in a temple, leading to a dispute between the καταθέμενος and another person. Therefore, it is clear that in IC IV 47 16-33, the word κατακείμενος can only identify a serf, as correctly highlighted in the translation of Gagarin/Perlman.⁹² The law of Gortyn contains the “*servile terms*” δόλος and φοικεύς.⁹³ However, in the literature, it is fiercely debated whether the legal positions of the δόλος and the φοικεύς were different.⁹⁴

⁸⁵ Text and translation: Gagarin, Perlman 2016, 319. For additional information regarding the edition of the text, see Guarducci 1950, 106; Metzger 1973, 101; Körner 1993, 408 (138); Effenterre, Ruzé 1995, 99 (26).

⁸⁶ Körner 1993, 409.

⁸⁷ Willetts 1955, 54; Willetts 1967, 14.

⁸⁸ Guarducci 1950, 153 uses the term *nexus* to describe a κατακείμενος who was free before he pledged himself.

⁸⁹ Maffi 1983, 91-9.

⁹⁰ Körner 1993, 409.

⁹¹ Willetts 1955, 54-6.

⁹² Gagarin, Perlman 2016, 319.

⁹³ Willetts 1967, 14; see IC IV 72 4.31-36; IC IV 72 5.25-28.

⁹⁴ Körner 1993, 468-70 argues that the φοικεύς had more rights than the δόλος; see further Bile 2019, 40-6; different: Lipsius 1909, 397-8; Link 2001, 90; Lewis 2023, 229-37.

The text focuses on the following problem. Specifically, a *πάστας* (pledger) handed over the *κατακείμενος* (pledged one)⁹⁵ to the *καταθέμενος* (pledgee) as a pledge. Subsequently, the *κατακείμενος* was no longer available and a dispute between the *πάστας* and the *καταθέμενος* arose. In such a situation, both parties may have had an interest in initiating a lawsuit.

Firstly, the *πάστας* could try to demand his *κατακείμενος* from the *καταθέμενος*. The *πάστας* had the right to claim the *κατακείμενος* back if he fulfilled his obligation.⁹⁶ It is important to note that the *κατακείμενος* was likely required to carry out work for the *καταθέμενος*, thereby paying off the obligation of the *πάστας*. Such a pledge would be classified as an *ἀντίχρησις*.⁹⁷

Secondly, the *καταθέμενος* could try to demand another pledge from the *πάστας* because he no longer had a security for his claim against the *πάστας*.⁹⁸ However, in IC IV 47 16-33, it is clear that the *πάστας* initiated a lawsuit against *καταθέμενος*, since the text mentions how the *καταθέμενος* could defend himself.

IC IV 47 16-33 contains information on how such a dispute between the *πάστας* and the *καταθέμενος* should be resolved. The text makes a distinction between three reasons for the *κατακείμενος* no longer being available for the parties: The *κατακείμενος* could disappear (l. 16-17: *αἱ δέ κ' ἀπόληται ὁ κατακείμενος*), die (l. 21: *αἱ δέ κ' ἀποθάνη*), or flee into a temple (l. 31-32: *αἱ δέ κα ναεῦη*). All of these three variations are introduced with the conditional *αἱ*.⁹⁹

4.2.2 *Disappearance, death, and refuge in a temple*

If the *κατακείμενος* disappeared (l. 16-17: *αἱ δέ κ' ἀπόληται ὁ κατακείμενος*), the *καταθέμενος* was able to swear an oath.¹⁰⁰ In this oath, the *καταθέμενος* could deny that he was involved in or knew anything about the disappearance of the *κατακείμενος* (l. 17-21: *δικακσάτο ὁμόσαι τὸν καταθέμενον*

⁹⁵ Kristensen 2004, 74 refers only to a *δοῦλος*.

⁹⁶ For further information on the expiration of the pledge, see Metzger 1973, 102.

⁹⁷ For more information about the term *ἀντίχρησις*, see Taubenschlag 1955, 287-91.

⁹⁸ See Körner 1993, 410-1.

⁹⁹ Metzger 1973, 104 refers only to two cases (“*zwei Fälle*”) because the *κατακείμενος* could either disappear (flight to an unknown place or a temple) or die.

¹⁰⁰ Gagarin 1997, 126-7 assumes that the reason for this regulation, which seems to privilege the *καταθέμενος*, was that there was usually no other evidence than the oath of the *καταθέμενος* available to resolve the lawsuit.

μητ' αὐτὸν αἴτιον ἔμην μήτε σὺν ἄλλοι, μήτ' ἐπ' ἄλλοι φισάμην).¹⁰¹

IC IV 47 16-33 only mentions a situation in which the καταθέμενος decides not to swear an oath (l. 23-24: αἱ δέ κα μὴ ὁμόσει ἄι ἔγραται). In such a case, the καταθέμενος had to pay the simple value of the κατακείμενος to the πάστας (l. 24-26: τὰν ἀπλόον τιμὰν καταστασεῖ). The legal consequence for swearing an oath is not discussed in the text. It seems to be likely that the καταθέμενος would be freed from his obligation and, thus, would not have to pay the simple value of the κατακείμενος to the πάστας.¹⁰²

If the κατακείμενος had died (l. 21: αἱ δέ κ' ἀποθάνη), the καταθέμενος had to present the dead body of the κατακείμενος in front of two witnesses (l. 21-22: δεικσάτο ἀντι μαιτύρον δυσῶν).¹⁰³ This had to be done outside formal legal proceedings. In this way, the καταθέμενος could prove that the cause of death was natural,¹⁰⁴ and thus, it seems that the πάστας could not successfully sue the καταθέμενος.¹⁰⁵ If the καταθέμενος failed to swear an oath or present the dead κατακείμενος (l. 23-24: αἱ δέ κα μὴ ὁμόσει ἄι ἔγραται ἢ μὴ δείκσει), he had to pay the simple value of the κατακείμενος to the πάστας (l. 24-26: τὰν ἀπλόον τιμὰν καταστασεῖ).

Furthermore, the κατακείμενος who had fled into a temple and received asylum could no longer be returned to the πάστας (l. 31-32: αἱ δέ κα ναεύη).¹⁰⁶ The text only mentions that the καταθέμενος should show the κατακείμενος in the temple (l. 32-33: ἐμπανία δεικσάτο), so that the πάστας would have no claim against him.¹⁰⁷ In the event of refusal, it could be assumed that the same legal consequence would apply as for failing to

¹⁰¹ See Latte 1920, 9; Willetts 1955, 56.

For more information about the oath in the law of Gortyn see, Gagarin 1997, 125-34.

¹⁰² Metzger 1973, 104. Körner 1993, 411 assumes that the καταθέμενος could even successfully demand a new security for the obligation of the πάστας from the πάστας. Given that there are no further indications in the text which refer to a new security, the view of Körner seems problematic.

¹⁰³ Maffi 2003, 19. For more information about witnesses in the law of Gortyn, see Gagarin 2010, 140-2.

¹⁰⁴ It seems likely that not only two witnesses but also the πάστας had to be present when the καταθέμενος presented the dead κατακείμενος; see Körner 1993, 411.

¹⁰⁵ See Metzger 1973, 104. According to Körner 1993, 411, the καταθέμενος could also claim a new security from the πάστας in this variation. Since there are no further indications in the text, it appears that such an assumption about a new security cannot be made.

¹⁰⁶ Maffi 2003, 22 highlights that the text does not mention abuse by the master as a requirement for a κατακείμενος to receive asylum.

¹⁰⁷ Metzger 1973, 104.

swear an oath or refusing to present the dead κατακείμενος in front of two witnesses, meaning the καταθέμενος would have to pay the simple value of the κατακείμενος.¹⁰⁸

4.2.3 Functional analogon of the procedural penalty of litiscrescence?

4.2.3.1 Condemnation for the double value

The text distinguishes between liability for the simple value and for the double value. As in IC IV 41 3.7-17, it is also necessary here to consider how a conviction of the debtor could be achieved. Regarding IC IV 47 16-33, one must first distinguish between the variants in which liability is limited to the simple value. This involves examining the scenarios in which the κατακείμενος disappears and in which the κατακείμενος dies, as liability of the simple value is explicitly mentioned in the text.

If the κατακείμενος disappeared, the καταθέμενος had to take an oath (*i.e.*, the exculpatory oath). The word δικάδδεν (l. 17-18) is a clear indication that a lawsuit between the πάστας and the καταθέμενος was already pending. There are two possible outcomes of the lawsuit. The καταθέμενος could either take the oath and, thus, win the case against the πάστας, or he could refuse to take the oath and lose the case. Losing the case led to a condemnation for the simple value.

If the κατακείμενος had died, the καταθέμενος had to find two witnesses who could testify to the natural cause of death. The δικαστάς had to condemn the καταθέμενος to pay the simple value if he could not provide two witnesses.

Following these two situations, where only liability for the simple value is mentioned, the text also makes reference to liability for the double value. According to Gagarin/Perlman, a conviction for the double value could occur even if the καταθέμενος had already won a lawsuit against the πάστας by an swearing oath.¹⁰⁹ However, the sources provide no support for this interpretation. It would be implausible to assume that the defendant's exculpatory oath could be overridden by the plaintiff's accusatory oath. Consequently, it cannot be assumed without justification that a second

¹⁰⁸ Metzger 1973, 104; Maffi 2003, 19.

¹⁰⁹ Gagarin, Perlman 2016, 321: "*This indicates that here, at least, an exculpatory oath would not be automatically decisive, but a suit could still be brought against someone even after he had sworn the oath.*"

lawsuit could be pursued by the *πάστας* after losing a lawsuit against the *καταθέμενος*.

If the *πάστας* believed that the *καταθέμενος* had sold or was hiding the *κατακείμενος* (l. 26-28: αἱ δὲ κ' αὐτὸν αἰτιῆται ναὶ ἀποδόθαι ἢ ἀποκρύψαι), he could initiate a different type of a lawsuit against the *καταθέμενος*.

If the *καταθέμενος* lost this lawsuit against the *πάστας* (l. 28-29: αἶ κα νικαθεῖ), he would have to pay the double value (*i.e.*, twice the simple value of the *κατακείμενος*) to the *πάστας* (l. 29-31: τὸν ἀπλόον τιμὴν διπλεῖ καταστασεῖ). As indicated by the term *ναὶ*¹¹⁰ (l. 27), the procedure was decided on the basis of the oath of the *πάστας* (*i.e.*, the accusatory oath). Therefore, the *πάστας* won the lawsuit and received the double value if he took the accusatory oath.

Another interpretation is offered by Körner, who argues that it was not the *καταθέμενος* who was required to pay the double value if he lost the lawsuit against the *πάστας*, but rather the *πάστας* if he lost the lawsuit against the *καταθέμενος*.¹¹¹ While this interpretation could be aligned with the literal wording of the passage, it makes little sense why a plaintiff should be penalised for losing a case.

4.2.3.2 Grounds for a condemnation for the double value

Similar to IC IV 41 3.7-17,¹¹² IC IV 47 16-33 also does not explicitly state why the defendant (*καταθέμενος*), in the event of losing the case, was required to pay the double value. With regard to the liability for the double value, two reasons can be suggested.

It could be assumed that the circumstances underlying IC IV 47 16-33 were comparable to those in IC IV 41 3.7-17, in which the transferee denied before the *δικαστᾶς* having received the entrusted object and was consequently sanctioned by a judgment imposing the double value. Accordingly, the *καταθέμενος* would deny having received the *κατακείμενος* from the *πάστας*. The denial of the *καταθέμενος* before the *δικαστᾶς* would increase the value of the claim. Guarducci, Egetenmeier, and Scheibelreiter explain the liability of the *καταθέμενος* for the double value as resulting from a functional analogon of the procedural penalty of *litiscaesio*.¹¹³

¹¹⁰ See Liddell, Scott, Jones 1996, 1173.

¹¹¹ Körner 1993, 411.

¹¹² See section "4.1.2.2 Grounds for a condemnation for the double value".

¹¹³ Guarducci 1950, 95, 107; Egetenmeier 2016/2017, 186 n. 62; Scheibelreiter 2020,

Nevertheless, this interpretation can be contested. An argument against the existence of parallels between IC IV 41 3.7-17 and IC IV 47 16-33 can be made, namely that in IC IV 41 3.7-17, in addition to the conviction for the double value, a penalty payable to the polis is also stated. Furthermore, IC IV 47 16-33 does not explicitly mention that the *καταθέμενος* denied having received the *κατακείμενος* from the *πάστας*. The fact that the *κατακείμενος* had been handed over from the *πάστας* to the *καταθέμενος* might already have been undisputed. This view is supported by the fact that the pledge was likely an *ἀντίχρησις*,¹¹⁴ which would have had to be public in a small society like Gortyn. Therefore, a denial of having received the *κατακείμενος* seems unlikely.

A liability for the double value could be explained by a delictual act committed by the *καταθέμενος* apart from the lawsuit. Such a delictual act could, for example, have been committed by the *καταθέμενος* fraudulently claiming that the *κατακείμενος* had run away or died.¹¹⁵ The reason for the conviction for the double value would thus lie in the fact that the *πάστας* stated, at the initiation of the proceedings, that the *καταθέμενος* had acted fraudulently.¹¹⁶

Both of the interpretations of IC IV 47 16-33 outlined above are plausible. The scenarios mentioned in IC IV 47 16-33, in which the *καταθέμενος* does not deny having received the *κατακείμενος* and instead could exonerate himself through an oath or witnesses, all relate to liability for the simple value. It does not seem implausible that a *καταθέμενος* who actually sold or concealed the *κατακείμενος* would attempt to exonerate himself by denying that he had received the *κατακείμενος*.

Furthermore, an increase of the value of the claim is indicated by the wording of IC IV 47 16-33. The text does not explicitly refer to a double value but instead states that the *καταθέμενος* has to pay twice the simple value (l. 29-31: τὰν ἀπλόων τιμὰν διπλεῖ καταστασεῖ). Specifically, one simple value could contain the value of the *κατακείμενος*, and the other simple value could be added to this value as a procedural penalty.

It is particularly noteworthy that in IC IV 47 16-33 – unlike in IC IV 41 3.7-17 (l. 15-16: ἐκσαννήσεται)¹¹⁷ – there is no reference to a judicial denial

92, 219, 265.

¹¹⁴ See section “4.2.1 Introduction”.

¹¹⁵ See Körner 1993, 411.

¹¹⁶ Körner 1993, 411.

¹¹⁷ See section “4.1.2.2 Grounds for a condemnation for the double value”.

by the defendant. However, the fact that a lawsuit is taking place between the πάστας and the καταθέμενος indicates that the καταθέμενος engaged in the legal proceedings and has therefore implicitly also denied the claim of the πάστας. Nevertheless, due to the lack of any indication of a judicial denial in IC IV 47 16-33, the existence of a functional analogon of the procedural penalty of litiscrescence appears less likely than in IC IV 41 3.7-17.

Overall, the source IC IV 47 16-33 could refer to another functional analogon of the procedural penalty of litiscrescence in the law of Gortyn, although this cannot be stated with certainty. Another source that distinguishes between a liability for the simple value and a liability for the double value is mentioned in the following section.

4.3 IC IV 79 1-21

4.3.1 Introduction

The next inscription was found in the debris of the Pythion,¹¹⁸ which had originally been a theatre.¹¹⁹ This inscription can be dated to the 5th century B.C.¹²⁰ The text¹²¹ regulates the relationship between craftsmen and the polis.

IC IV 79 1-21
 [c.7] . ο κριθ[ᾶν c.5]
 [c.5]κια κα[c.9]
 [. σύ]κον ἑκατὸν μ[εδίμν-]
 [ονς κα]ῖ γλεύκιος προκό[ο]-
 5 [νς ἐ]κατὸν καὶ τὰν π[c.3]
 [c.2]ν[.]αλκίαν ἔ ἄλλαν φ[ισ-]
 [ρό]μετρον τῷ προκ[όο. φερ-]
 [γάδδ]εθαι δὲ ἐπὶ τοῖ μ[ι-]
 [σ]τοῖ αὐτοῖ πάν[τ]α [τοῖς]
 10 [ἐμ πόλι φ]οικίονσι το<ῖ>ς [τ']
 [ἐλ]ευθέροις καὶ το[ῖς δόλ-]
 [οις. αἰ δ]ὲ μὲ λείοιεν φερ[γά-]
 [δδε]θαι, δέκα στατε[ρ]α[νς]
 [τῷ πα]θέματος φεκάστ[ο]
 15 [τ]ὸν κσένιο[ν ἐ]στει[σάμ-]

¹¹⁸ Körner 1993, 437.

¹¹⁹ Manzetti 2019, 435.

¹²⁰ Perlman 2000, 60-1.

¹²¹ The legal nature of the text is unclear. Guarducci 1950, 182 and Willetts 1954, 216 refer to a decree.

[ενον] πόλι θέμεν. αἱ δ[ἐ μ-]
 [ἐ] ‘στεισαιεν [τ]ὰν [ἀπλόον ἄ-
 [ταν(?), πράδ]δεθαι τὰν διπ[λεί-]
 [αν] αὐτοῖν ἑκάστο[ν c.6]
 20 [c.2]μ[. . . τ]ὸνς τίτανς ἐσ[τ-]
 [εἰ]σανταν[ς] τ[ἄι πόλι θέμεν.]

[...] of barley [...] of figs one hundred [medimnoi, and] of must one hundred prokooi, and [c. 13] or another measure equal to a prokooos. And all the work is to be done for this exact wage by those who live in the city, both free men and slaves. And if they should not wish to work, the foreigners' official is to exact payment from them of ten staters for each offense¹²² and deposit it with the city. And if they should not pay the simple fine (?), each of them will be fined the double amount; [but if they do not pay?] the titai are to pay (the fine) and deposit it with the city.¹²³

In the first sentence, natural products are listed. The exact context of these natural products is not explained by the preserved text, but it seems likely that they were given as payment to craftsmen.¹²⁴ Subsequently, the text states that the craftsmen¹²⁵ should receive the same payment as craftsmen from the polis (l. 7-12: φεργάδδεθαι δὲ ἐπὶ τοῖ μιστοῖ αὐτοῖ πάντα τοῖς ἐμ πόλι φοικίονσι τοῖς τ' ἐλευθέροις καὶ τοῖς δόλοισ). Therefore, the craftsmen who had a contract with the polis¹²⁶ and, thus, received natural products and money¹²⁷ for their services had to be foreigners.

¹²² The words δέκα στατεῶρανς τὸ παθέματος ἑκάστο (l. 13-14) should be interpreted as meaning that 10 staters have to be paid for each day of refusal; see Metzger 1973, 127. Similar to Gagarin/Perlman, Youni 2010, 155 understands the words δέκα στατεῶρανς τὸ παθέματος ἑκάστο (l. 13-14) as neutral, meaning “10 staters for each infringement”. Youni’s interpretation aligns with that of Körner 1993, 438 and Seelentag 2015, 297: “zehn Statere für jeden Schaden”. Further information on the interpretation of the words δέκα στατεῶρανς τὸ παθέματος ἑκάστο can be found below.

¹²³ Text and translation: Gagarin, Perlman 2016, 439. For additional information regarding the edition of the text, see Guarducci 1950, 182; Metzger 1973, 127; Körner 1993, 438 (154); Effenterre, Ruzé 1994, 129 (30).

¹²⁴ Seelentag 2015, 297. Körner 1993, 439 argues that the text refers to craftsmen or artists.

¹²⁵ Willetts 1954, 216 assumes that the foreign craftsmen were freedmen. Critical: Körner 1993, 439.

¹²⁶ See Perlman 2002, 209. It should therefore be noted that the polis here – unlike in IC IV 41 3.7-17 – was not merely involved as a third party.

¹²⁷ Körner 1993, 439.

The κσένιος κόσμος¹²⁸ had to protect the interests of the polis.¹²⁹ If the craftsmen refused to perform their duties (l. 12-13: αἱ δὲ μὲ λειοίεν φεργάδδεθαι), and thus, breached the contract, the κσένιος κόσμος could demand 10 staters from every craftsman for every day¹³⁰ on which he refused to complete his work (l. 13-16: δέκα στατεῖρανς τῷ παθέματος φεκάστο τῶν κσένιον ἐστεισάμενον πόλι θέμεν).

However, the obligation of a craftsman could also increase. If the craftsman did not pay the 10 staters (l. 16-18: αἱ δὲ μὲ ᾿στεισαιεν τὴν ἀπλόον ᾿ταν), he then had to pay the double amount (20 staters; l. 18-19: πράδδεθαι τὴν διπλείαν αὐτοῦν φεκάστον).¹³¹ In the last passage, the text refers to the τίται. Due to the incompleteness of the text, it is unclear whether the κσένιος κόσμος or the τίται had to exact the double amount from craftsmen who refused to pay the 10 staters.¹³² For the present question concerning a functional analogon of the procedural penalty of litiscrescence, it is irrelevant who exacted the penalty; the key point is that a doubling of the penalty occurred.

4.3.2 Functional analogon of the procedural penalty of litiscrescence?

According to IC IV 79 1-21, a craftsman who refused to perform his duties could either face a liability for the simple amount or a liability for the double amount.¹³³ Generally, the craftsman only had to pay the simple amount. However, if he did not make a payment to the κσένιος κόσμος, he was punished by having to pay the double amount (l. 16-19: αἱ δὲ μὲ ᾿στεισαιεν τὴν ἀπλόον ᾿ταν, πράδδεθαι τὴν διπλείαν αὐτοῦν φεκάστον). It is not known how much time a craftsman was given to pay the simple amount in order to avoid an increased penalty.

¹²⁸ See Seelentag 2015, 297, who highlights the mention of the κσένιος κόσμος as evidence that the craftsmen were foreigners. Hölkeskamp 1999, 122 uses the notation ξένιος κόσμος; see further Perlman 2004, 1164; Thür 2005, 15.

¹²⁹ Perlman 2002, 209.

¹³⁰ This interpretation of Metzger 1973, 127 seems correct. Penalties were typically stipulated on a daily basis in construction contracts; see Thür 1984, 493-4.

¹³¹ A similar provision where the refusal to pay a penalty led to an increased penalty can, for example, be found on the Stele of Punishments (l. 47-48); see Thür 2020, 36 n. 17 with further references; see section “1. Introduction”.

¹³² Körner 1993, 441.

¹³³ Liability for the double amount is also mentioned in IC IV 78 1-8; however, unlike in IC IV 79 1-21, this double amount is attributable to a delictual conduct; see further Gagarin, Perlman 2016, 437-9

Furthermore, it is unclear whether craftsmen had the possibility to make an objection against the penalty of 10 staters. According to Körner, it seems that such an objection may have been possible. In such a case, a *δικαστάς* would have to decide whether the craftsman had a valid reason to refuse his work. For example, a valid reason could have been attending an annual festival, as these festivals were important for the foreign craftsman but unknown by the citizens of the polis.¹³⁴

Körner's view is supported by the fact that the polis probably relied on foreign craftsmen. If these craftsmen could not object to a penalty, they would have been less willing to work. The considerations just described are, of course, based on plausibility arguments and therefore cannot be proven.

If Körner's assumption were true, the craftsman could indeed object to his penalty (10 staters), and the double amount (20 staters) could indicate another functional analogon of the procedural penalty of *litiscescence*, as illustrated in the following example.

A foreign craftsman refused to work for 3 days, and thus, the *κσένιος κόσμος* gave him a fine for 30 staters. The craftsman did not make a payment to the *κσένιος κόσμος*. Subsequently, the *κσένιος κόσμος* sued the craftsman on behalf of the polis. Before the court, the craftsman could either confess to his obligation and pay 30 staters or deny his liability by objecting to the penalty. If the craftsman denied his liability, the *δικαστάς* would either have to sentence him to a payment of 60 staters or acquit him if the craftsman had a valid reason to refuse his work. Therefore, the condemnation for 60 staters could be explained by an increase of the value of the claim.

The fact that the phrase *αἱ δὲ μὲ ἴστέσαιεν τὰν ἀπλόον ἄταν, παράδδεθαι τὰν διπλείαν αὐτοῦν ῥέκαστον* (l. 16-19) first refers to a simple amount and subsequently to a double amount could indicate that the double amount was the result of a functional analogon of the procedural penalty of *litiscescence*. Evidence from the Stele of Punishments supports the existence of a functional analogon of the procedural penalty of *litiscescence*, as in that case, a public official (construction official) initiated a proceeding.¹³⁵

However, this interpretation of IC IV 79 1-21 is based on two assumptions. The first assumption is that a craftsman would have the possibility to object to a penalty, leading to a trial before a *δικαστάς*.¹³⁶ However, the proce-

¹³⁴ Körner 1993, 440-1.

¹³⁵ See section "1. Introduction".

¹³⁶ Since it is unclear whether any proceedings actually took place, no further speculation

dure described in IC IV 79 1-21 may not have been a judicial proceeding, but rather an administrative proceeding. The second assumption is that the craftsman could pay the simple amount and, thus, avoid a penalty of the double amount until the moment he declared his statement of defence to the court.

Against the existence of a procedural penalty speaks the fact that in IC IV 79 1-21 not a single word – unlike in IC IV 41 3.7-17 (l. 15-16: ἐκσαννήσεται)¹³⁷ – is used that would indicate a denial of the obligation before court. Moreover, the source IC IV 79 1-21 provides no evidence that the craftsman entered into a dispute with the polis, whereby he would implicitly deny the claim. Accordingly, the κσένιος κόσμος could set the amount of the penalty without any possibility of a formal trial, which the τίται were then obliged to execute.

Overall, it can be concluded that IC IV 79 1-21 does not provide clear evidence for a functional analogon of the procedural penalty of litiscrescence in the law of Gortyn. The source only mentions that the double amount could be exacted from the craftsman but does not explain the procedural acts that would lead to such an act of enforcement. This source would only provide evidence of a functional analogon of the procedural penalty of litiscrescence if the abovementioned two assumptions were true, which cannot be verified due to a lack of additional sources.

The sources discussed hitherto (IC IV 41 3.7-17, IC IV 47 16-33, and IC IV 79 1-21) distinguish between a liability for a simple amount and a liability for a double amount; however, this distinction is absent from the following locus, which is discussed in the next section.

4.4 IC IV 72 9.24-40

4.4.1 Introduction

The next source is part of the Great Code¹³⁸ and, thus, can be dated to the middle of the 5th century B.C.¹³⁹ This text regulates the liability of heirs for different types of obligations incurred by the decedent.

will be made here as to whether such proceedings would be resolved through δικάδδεν or ὀμνόντα κρίνεν.

¹³⁷ See section “4.1.2.2 Grounds for a condemnation for the double value”.

¹³⁸ The Great Code contains 12 columns, in which a variety of topics are discussed; see Gagarin 1982, 131.

¹³⁹ Davies 2005, 306; Scheibelreiter 2020, 84.

IC IV 72 9.24-40

αἱ ἀν[δ]εκσ-
 25 ἀμ[ε]νος ἔ νενικαμένο[ς ἔ ἐν]κ-
 οιοτὰνς ὀπέλογ ἔ διαβαλόμε-
 νος ἔ διαφειπάμενος ἀποθά-
 νοι ἔ τούτοι ἄλλος, ἐπιμολ-
 ἐνυ ἰσ̄ πρὸ τῷ ἐνιαυτῷ ὁ δὲ δικα-
 30 στὰς δικαδδέτο πορτι τὰ ἀποπ-
 ονιόμενα. αἱ μὲν κα νίκας ἐπι-
 μολεῖ, ὁ δικαστὰς κὸ μνάμον,
 αἱ κα δόει καὶ πολιατεύει, οἱ δὲ μ-
 αίτυρες οἱ ἐπιβάλλοντες, ἀνδοκ-
 35 ἄδ <δ>ἔ κένκοιοτᾶν καὶ διαβολᾶς κ-
 αἱ διρέσιος μαίτυρες οἱ ἐπιβ-
 ἄλλοντες ἀποπονιόντων. ἔ δέ κ' ἄ-
 ποφείποντι, δικαδδέτο ὁμόσ-
 α<ν>τα αὐτὸν καὶ τὸν μαίτυρ-
 40 ανς νικεῖν τὸ ἀπλόον. vac.

If someone should die who has undertaken an obligation, or has lost a suit, or owes (money) that he pledged (?), or has initiated litigation, or has agreed (to pay), or if another (has an obligation) to the deceased, litigation is to be brought concerning the matter within a year; and let the judge rule according to the testimonies. If someone brings suit concerning a case he won, (let) the judge and the rememberer, if he is alive and active in civic life, (testify), these being the appropriate witnesses; but in cases of security or money owed or litigation initiated or an agreement, let the appropriate witnesses testify.¹⁴⁰ And when they have spoken,¹⁴¹ let (the judge) rule that when he (the plaintiff) and the witnesses have sworn, he is to win the simple amount. vac.¹⁴²

The text focusses on situations in which the legal relationship between a creditor and a debtor is disrupted by the death of the debtor,¹⁴³

¹⁴⁰ This is different from Willetts 1967, 47: “*the heirs as witnesses shall testify*”. Metzger is critical of the translation of Willetts. According to Metzger 1973, 107, the word ἐπιβάλλοντες (l. 34) has a broader meaning. For more information on the interpretation of the word ἐπιβάλλοντες, see below.

¹⁴¹ This is different from Maffi 1983, 157, who highlights that the word ἀποφείποντι (l. 37-38) could indicate that the witnesses refused to testify. In my view, both interpretations of the word ἀποφείποντι are possible.

¹⁴² Text and translation: Gagarin, Perlman 2016, 403. For additional information regarding the edition of the text, see Guarducci 1950, 138; Willetts 1967, 47; Metzger 1973, 106; Körner 1993, 537 (175); Effenterre, Ruzé 1995 159 (45).

¹⁴³ The words ἀποθάνοι ἔ τούτοι ἄλλος (l. 27-28) could suggest that the following

whose obligation is characterised using the words ἀνδεκσάμενος (l. 24-25), νενικαμένος (l. 25), ἐνκοιστὰνς ὀπέλον (l. 25-26), διαβαλόμενος (l. 26-27), and διαφειπάμενος (l. 27).¹⁴⁴ According to the text, following the death of the debtor, the creditor had to sue the heirs within a year (l. 28-29: ἐπιμολένυ ἰὸ πρὸ τῷ ἐνιαυτῷ), meaning that the action of the creditor was subject to a one-year statute of limitations.¹⁴⁵

Subsequently, the text refers to procedural provisions. The δικαστάς had to rule (l. 30, 38: δικαδδέτο)¹⁴⁶ the case based on the testimony or oath of witnesses and/or the plaintiff (the creditor). If the debtor had already been sentenced by a δικαστάς (l. 31-32: αἱ μὲν κα νίκας ἐπιμολεῖ), the δικαστάς and the μνάμων¹⁴⁷ from the previous trial had to testify (l. 32-34: ὁ δικαστάς κὸ μνάμων, αἶ κα δόει καὶ πολιατεύει,¹⁴⁸ οἱ δὲ μαίτυρες οἱ ἐπιβάλλοντες).

In the other cases, such as ἀνδεκσάμενος (l. 24-25), ἐνκοιστὰνς ὀπέλον (l. 25-26), διαβαλόμενος (l. 26-27), and διαφειπάμενος (l. 27), the appropriate witnesses had to be questioned (l. 34-37: ἀνδοκᾶδ δὲ κένκοιστᾶν καὶ διαβολᾶς καὶ διαρρέσιος μαίτυρες οἱ ἐπιβάλλοντες ἀποπονιόντων). Appropriate witnesses were primarily those who were present at the time when the obligation of the debtor was established.¹⁴⁹ According to Zitelmann and Willetts, the δικαστάς could also allow the heirs to act as witnesses.¹⁵⁰ How-

provisions were also applicable if the creditor died; see Metzger 1973, 107.

¹⁴⁴ For the translation and explanation of these five terms, see section “4.4.2 Grounds for obligations”. A similar plurality of facts appears for example in IC IV 72 10.20-25; see further Benke 2021/2022, 10-44.

¹⁴⁵ Metzger 1973, 107.

¹⁴⁶ If a case was ruled by the method of δικάδδεν, the δικαστάς had to apply a certain procedure, which led to the verdict; see Gagarin 2010, 129. For more information about the term δικάδδεν, see section “3.2 Dispute resolution”.

¹⁴⁷ Hölkeskamp (1999) 123 uses the notation μνάμων.

¹⁴⁸ The words αἶ κα δόει καὶ πολιατεύει (l. 33) refer to the μνάμων and the δικαστάς; see Körner 1993, 539.

¹⁴⁹ Metzger 1973, 107.

¹⁵⁰ Zitelmann in Bücheler, Zitelmann 1885, 171; Willetts 1967, 47, 74. Critical: Metzger 1973, 107; Körner 1993, 539 n. 6.

Generally, the law of Gortyn did not allow both parties to swear an oath. An exception can only be found in IC IV 81 1-24, where both parties had to sewar an oath, and thus, the party that could find more oath-helpers won the case; see Thür 2009, 493.

IC IV 81 1-24: text and translation: Gagarin, Perlman 2016, 446: δενδρόον καὶ ρουκίας ὄ[κ' ὀμό-] | [σον]τι τὸν ὀμόρον ἐννέα οἱ | ἐπάνκιστα πεπαμένοι, μ[ο-] | [λεν, κ]αλεν δ' ἀντι μαίτυρο- | ν δυὸν πρότритον τὸν ἀπ[c.3] | [c.2]σαντα μετρεσιόμενο- | ν' αἱ δὲ κα με εἶει καλίον[τι αἶ] | [ἔγρ]αται, αὐτὸς μετρέθο τε | καὶ προπονέτο προτέταρ[τον] | [ἀν]τι

ever, since the heirs had a personal interest in the outcome of the trial and were likely not involved in establishing the obligation, they appear unsuitable as witnesses.¹⁵¹

The word δικαδδέτω (l. 30, 38: δικαδδέτω) indicates that the case was ruled based on the testimony of the witnesses or on an oath of a party.¹⁵² In the text, the testimony of witnesses (l. 29-31: ὁ δὲ δικαστὰς δικαδδέτω πορτὶ τὰ ἀποπονιόμενα) and the oath of the plaintiff and others¹⁵³ (l. 38-40: δικαδδέτω ὁμόσαντα αὐτὸν καὶ τὸνς μαίτυρανς νικεῖν τὸ ἀπλόον) are both mentioned. Since the text first mentions the testimony of witnesses, it is likely that, generally, the case was ruled based on the testimony of witnesses.¹⁵⁴

However, the circumstances under which the lawsuit between the creditor and the heirs could be decided by an oath of the plaintiff are questionable. An oath of the plaintiff could have been mandatory if the witnesses refused testimony¹⁵⁵ or could not provide (convincing) testimony.¹⁵⁶

μαίτυρον δυὸν παρέμε- | ν ἑνος ἀγοράν. ὁμνύμε[ν δ-] | [ἐ εἶ] μὰν τοῦτο μὲν ἐστι ἀβλο- |
 πία δικαίος πρὶν μολέθ[θαι] | [τὰν] δίκαν, ὄ δ' ἐνεκύρακσαν | μὲ ἔμεν νικεῖν δ' ὄτερα
 κ' οἱ π[λί-] | [εἰς ὁ]μόσοντι. vac. κ' αἶ κ' ἐς στέγα- | ς ἐνεκυράκσοντι, πονίον[τι μ-] | [ἐ
 ὕρ]οικεῖν ὄ ἐνεκύρακσαν συν- | εκσομόσαθθαι τὸν ὁμό[ρον] | [τοῖ]ν ἑννέα τρίνς, οἷς κα
 προ- | ρεῖπει, μὲ ἐνροικεῖν ὄ ἐνεκύ[ρα-] | [κσ]α[ν. α]ἰ δὲ τίς κα τὸν ὁμόρ- | ον vac. – *of
 trees and a house, when nine of the neighbors who possess the nearest land swear, (he)
 is to bring the case (?) and summon before two witnesses three days in advance the
 one who [c. 12], so that he can measure (the property). And if he does not come after
 he summons him as written, let him measure it himself and declare to him four days in
 advance before two witnesses that he should be present in the agora. And he is to swear
 that indeed this (the property) is (as claimed) without fault and lawfully before the case
 is tried, and the person from whom they received security (is to swear) that it is not.
 And whichever the majority swear, (that side) is to win. vac. And if they take something
 as security from a house, if the person from whom they received security asserts that
 he does not live in (the house), three of nine neighbors whom he notified earlier are
 to swear with him that the one from whom they received security does not live in (the
 house). But if one of the neighbors vac.*

For additional information regarding the edition of the text, see Guarducci 1950, 187; Metzger 1973, 127; Körner 1993, 442 (155); Effenterre, Ruzé 1995, 171 (47); Arnautoglou 1998, 74; Gagarin 2008, 260-1; see further Papakonstantinou 2008, 114-6. For general information on the oath of witnesses in Gortyn, see Latte 1920, 28-32.

¹⁵¹ See Körner 1993, 539 n. 6.

¹⁵² Zitelmann in Bücheler, Zitelmann 1885, 71; Thür 2005, 16.

¹⁵³ Gagarin 2010, 133-4, 140 mentions witnesses, while Zitelmann in Bücheler, Zitelmann 1885, 171 refers to oath-helpers.

¹⁵⁴ See Zitelmann in Bücheler, Zitelmann 1885, 171; Maffi 1983, 157.

¹⁵⁵ Maffi 1983, 157-8.

¹⁵⁶ Zitelmann in Bücheler, Zitelmann 1885, 171.

In such a case, the plaintiff would win the lawsuit and receive the simple amount if he swore an oath (l. 38-40: δικαδδέτο ὁμόσαντα αὐτὸν καὶ τὸν μαίτυρανς νικεῖν τὸ ἀπλόον) or lose the lawsuit if he refused to swear an oath. Before the question of whether this reference to a simple amount indicates a functional analogon of the procedural penalty of litiscrescence can be analysed, it is necessary to briefly examine the grounds for obligations, which are listed in IC IV 72 9.24-40.

4.4.2 Grounds for obligations

In IC IV 72 9.24-40, several grounds for the obligation of the debtor are described with the terms ἀνδεκσάμενος (l. 24-25), νενικαμένος (l. 25), ἐνκοιστὰνς ὀπέλογ (l. 25-26), διαβαλόμενος (l. 26-27), and διαφειπάμενος (l. 27). These terms have been analysed by legal scholars.

According to the main doctrine, the word ἀνδεκσάμενος (l. 24-25) refers to a surety, meaning that the debtor acted as a guarantor.¹⁵⁷ Metzger specifies this to a guarantee with sole liability of the guarantor (“*Gestellungsbürgschaft*”).¹⁵⁸ Another interpretation of the word ἀνδεκσάμενος (l. 24-25) was presented by Maffi. Maffi suggested that this word could indicate that the debtor made a confession and, thus, was liable due to this confession.¹⁵⁹

In the literature, there is a consensus regarding the interpretation of the word νενικαμένος (l. 25),¹⁶⁰ which is thought to refer to an obligation of the debtor resulting from a verdict.¹⁶¹ According to Zitelmann, the debtor had to be condemned to pay a certain amount of money.¹⁶²

Due to a lack of sources, the remaining grounds for obligations, including ἐνκοιστὰνς ὀπέλογ (l. 25-26), διαβαλόμενος (l. 26-27),¹⁶³ and διαφειπάμενος

¹⁵⁷ See Baunack, Baunack 1885, 114; Merriam 1886, 31; Partsch 1909, 35, 117; Kohler, Ziebarth 1912, 21; Guarducci 1950, 166; Willetts 1967, 47, 74; Körner 1993, 538; Vélissaropoulos-Karakostas 1994, 187; Gagarin 2008, 118; Scheibelreiter 2020, 85.

¹⁵⁸ Metzger 1973, 109.

¹⁵⁹ Maffi 1983, 128.

¹⁶⁰ This word is also mentioned in IC IV 72.11.32; see further Benke 2021/2022, 38.

¹⁶¹ See, for example, Guarducci 1950, 166; Maffi 1983, 129; Effenterre, Ruzé 1995, 160; Scheibelreiter 2020, 85.

¹⁶² Zitelmann in Bücheler, Zitelmann 1885, 169; see further Gagarin, Perlman 2016, 424: “[...] *losing a suit usually means owing money*”.

¹⁶³ In the Great Code, this expression first appears in IC IV 72 9.26-27 as διαβαλόμενος, where it means “*the [person] who has fallen into a dubious or deceitful situation*” and secondly, the word appears in the plural accusative in IC IV 72 9.35 as διαβολᾶς; see

(l. 27), are subject to significant uncertainty.¹⁶⁴ It has been argued that the term ἐνκοιστάνς ὀπέλογ (l. 25-26) might refer to a possessory pledge¹⁶⁵ or a loan for use,¹⁶⁶ meaning that the debtor was obliged to return the object back to the creditor.¹⁶⁷ The word διαβαλόμενος (l. 26-27)¹⁶⁸ could indicate wrongful conduct,¹⁶⁹ such as fraud¹⁷⁰ or concealment,¹⁷¹ whereas the word διαφειπάμενος (l. 27) may refer to a distinct contractual stipulation.¹⁷²

4.4.3 Functional analogon of the procedural penalty of litiscrescence?

The source IC IV 72 9.24-40 does not mention a liability for the double amount. However, it is notable that the text explicitly states that the heirs would have to pay the simple amount to the creditor if the creditor and the witnesses swore an oath and, thus, won the lawsuit against the heirs (l. 38-40: δικαδδέτο ὁμόσαντα αὐτὸν καὶ τὸνς μαίτυρανς νικῆν τὸ ἀπλόον).

In the literature, it has been highlighted that the reference to the simple amount should be understood as distinguishing the simple amount from the double amount¹⁷³ or from a multiple amount.¹⁷⁴ The reason why the heirs only had to be condemned for the simple value could – as several legal scholars point out – have been that the heirs could not unjustifiably deny the claim of the creditor because they would have had no knowledge whether the creditor actually had a claim against the debtor (the decedent). Therefore, the heirs would be excused and, thus, would not have to face a functional analogon of the procedural penalty of litiscrescence.¹⁷⁵

However, the absence of any wording in IC IV 72 9.24-40 – unlike in

Benke 2021/2022, 20.

¹⁶⁴ Metzger 1973, 111-2.

¹⁶⁵ Guarducci 1950, 166.

¹⁶⁶ Prellwitz 1928, 143-4.

¹⁶⁷ See Scheibelreiter 2020, 85-6.

¹⁶⁸ The word διαβολή means “deception” or “a murky/dubious situation”; see Benke 2021/2022, 20.

¹⁶⁹ Metzger 1973, 112; Körner 1993, 538.

¹⁷⁰ Willetts 1967, 47, 74.

¹⁷¹ Baunack, Baunack 1885, 114, 136.

¹⁷² Guarducci 1950, 166; Scheibelreiter 2020, 86 n. 326.

¹⁷³ Zitelmann in Bücheler, Zitelmann 1885, 172; Dareste 1886, 268; Körner 1993, 539.

¹⁷⁴ Wenger 1901, 68 n. 9; Metzger 1973, 112.

¹⁷⁵ Zitelmann in Bücheler, Zitelmann 1885, 172; Dareste 1886, 268; Wenger 1901, 68 n. 9; Metzger 1973, 108.

IC IV 41 3.7-17 (l. 15-16: ἐκσαννήσεται)¹⁷⁶ – that would signal a denial of the obligation before the court speaks against the existence of a procedural penalty. Another possible reason for a liability for the simple amount could have been that Gortynian legislators considered it unjust for a creditor to exact a penalty in addition to his claim if he was unable to prove his claim with witnesses.¹⁷⁷

Furthermore, it is conceivable that the law of Gortyn recognised a special type of limited liability for heirs.¹⁷⁸ Therefore, the liability for the simple amount could also be explained by a *pro viribus* or a *cum viribus* liability.

Overall, it seems possible that the debtor, if he were still alive, would have faced a functional analogon of the procedural penalty of litiscrescence had he himself denied the creditor's claim. However, it cannot be determined under which of the five grounds for obligations¹⁷⁹ such a penalty could apply.

5. Conclusion

The law of Gortyn does not only contain substantive law but also procedural law. Some of these procedural provisions include procedural penalties. As has been shown, there are several provisions that could entail a functional analogon of the procedural penalty of litiscrescence.

It seems likely to me that IC IV 41 3.7-17, where the verb ἐξαρνεῖσθαι (l. 15-16: ἐκσαννήσεται) is found, refers to such a penalty.¹⁸⁰ IC IV 47 16-33,¹⁸¹ IC IV 79 1-21,¹⁸² and IC IV 72 9.24-40¹⁸³ might also relate to this penalty, although there is greater uncertainty in these cases.

The possibility of an increase of the value of the claim induced the defendant to evaluate his chances of winning the lawsuit. He had to decide for himself whether he was willing to risk a condemnation for the double

¹⁷⁶ See section “4.1.2.2 Grounds for a condemnation for the double value”.

¹⁷⁷ See Maffi 1983, 161-4.

¹⁷⁸ See the remarks of Benke 2021/2022, 38 regarding IC IV 72 11.31-42.

¹⁷⁹ Zitelmann in Bücheler, Zitelmann 1885, 172 even thinks that it might be possible that, in all cases, an increase of the value of the claim could occur (“[...] *dass sonst in Gortyn das römische lis infitiando crescit in duplum galt [...]*”); Wenger 1901, 68 n. 9 contemplates an increase of the value of the claim in the case of a judgement debt.

¹⁸⁰ See section “4.1.2.2 Grounds for a condemnation for the double value”.

¹⁸¹ See section “4.2.3.2 Grounds for a condemnation for the double value”.

¹⁸² See section “4.3.2 Functional analogon of the procedural penalty of litiscrescence?”.

¹⁸³ See section “4.4.3 Functional analogon of the procedural penalty of litiscrescence?”.

value. If his chances were low, it was in his best interests to either pay or confess to his debt before the δικαστάς¹⁸⁴ and, thus, avoid a condemnation for the double value. As a result, the creditor received the payment without any delay.

Without a confession – if the dispute had to be resolved through δικάδδεν – an additional court session at the sacred place to swear the oath would have been required. If, however, the dispute had to be resolved through ὀμνόντα κρίνεν, the δικαστάς would have had to conduct further investigations.¹⁸⁵

In Gortyn, a functional analogon of the procedural penalty of litiscrescence was the exception rather than the norm. Whenever the transferor entrusted the transferee with a herd of animals (IC IV 41 3.7-17) or a serf (IC IV 47 16-33), there could have been a strong need to protect the transferor and ensure that he could recover his property without delay. This interest may have been safeguarded by a functional analogon of the procedural penalty of litiscrescence.

However, it should be noted that in Gortyn, denying a claim before the jurisdictional authority¹⁸⁶ and entering into legal proceedings did not delay the plaintiff's pursuit of his claim as much as it would have under Roman law. This was because in Gortyn, many cases were decided by the method of δικάδδεν,¹⁸⁷ which made lengthy evidentiary procedures unnecessary.

¹⁸⁴ A confession before the δικαστάς constituted an independent ground of obligation with the same legal quality as a verdict, see Maffi 1983, 156; see section “3.3 Denial before court”. It would be logical for the debtor to make such a confession if he had no money but wanted to avoid liability for the double amount.

¹⁸⁵ It can be assumed that the δικαστάς would not lightly have risked giving a false oath, which is why he would only have decided the case by the method of ὀμνόντα κρίνεν if he was certain; see further Thür 2010, 148. Therefore, it seems likely that further investigations were usually necessary. See section “3.2 Dispute resolution”.

¹⁸⁶ See section “3.3 Denial before court”.

¹⁸⁷ See sections “3.2 Dispute resolution” and “4.1.2.1 Condemnation for the double value”.

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Notes on the “Stele of the Punishments” from Epidaurus

Note sulla “Stele delle sanzioni penali” di Epidauro

Abstract

This essay examines several legal aspects in the recently published “Stele of the Punishments” from Epidaurus. The essay shows that the search of the house of Pasiteles in Hermione for stolen goods by officials from Epidaurus was in no way illegal. In the account of the search the text mentions the role of a slave to establish the liability of Lykiskos. Pasiteles was summoned before the Three Hundred at Epidaurus, questioned about his actions, and asked to name sureties, to swear an oath of denial, and to pay court fees. After he did not show up at his trial, the Three Hundred found him guilty of theft, condemned him to a fine of double the amount stolen, and voted to confiscate his property. Some time later, Lykiskos was condemned to pay a fine either for his role in this theft or for another offense. The legal procedure followed in the cases reveals similarities and differences from legal procedure at Athens. Finally, the stele aimed to warn those working in the sanctuary against embezzling valuable items and also demonstrated to Greek visitors to the shrine of Asclepius that the people of Epidaurus upheld the basic tenets of the rule of law.

Questo saggio esamina diversi aspetti giuridici della recentemente pubblicata “Stele delle sanzioni penali” di Epidauro. Il saggio dimostra che la perquisizione della casa di Pasiteles a Ermione, alla ricerca di beni rubati, da parte dei funzionari di Epidauro non era affatto illegale. Nel resoconto della perquisizione, il testo menziona il ruolo di uno schiavo nel determinare la responsabilità di Lykiskos. Pasiteles fu convocato davanti ai Trecento a Epidauro, interrogato sulle sue azioni

e invitato a nominare dei garanti, a prestare giuramento di negazione e a pagare le spese processuali. Dopo che non si presentò al processo, i Trecento lo dichiararono colpevole di furto, lo condannarono a una multa pari al doppio dell'importo rubato e votarono di confiscare i suoi beni. Qualche tempo dopo, Lykiskos fu condannato a pagare una multa per il suo ruolo in questo furto o per un altro reato. La procedura legale seguita nei casi in questione rivela somiglianze e differenze rispetto alla procedura legale in uso ad Atene. Infine, la stele aveva lo scopo di mettere in guardia coloro che lavoravano nel santuario dal sottrarre oggetti di valore e dimostrava anche ai visitatori greci del santuario di Asclepio che il popolo di Epidauro sosteneva i principi fondamentali dello Stato di diritto.

Keywords: Epidauros, house-searches in Greek Law, legal procedure (Greece), oaths in litigation, theft, rule of law as source of legitimacy

Parole chiave: Epidauro, perquisizioni domiciliari nel diritto greco, procedura legale (Grecia), giuramenti nei contenziosi, furto, Stato di diritto come fonte di legittimità

In February 1972 Charalampos Kritzas discovered an ancient inscription used as the lintel to the door of the church of the Dormition of the Virgin at the village of Koroni near the town of Ligario in the Peloponnese.¹ The stele was then removed from the wall of the church, and a preliminary report was published by Kritzas and Mavrommatidis in 1987.² In 2020 Kritzas and Prignitz published a complete text and detailed study of the inscription and dated lines 1-50 to around 360 BCE, lines 51-55 to around 355 BCE, and lines 56-63 to after 338 BCE. Prignitz and Thür have recently published a new study of the inscription.³ The inscription concerns several trials arising from work done in the sanctuary of Asclepius at Epidauros.

The first part of the inscription concerns legal proceedings against Pasiteles, a man from Hermione. When about to work at the shrine of Asclepius he agreed to have any legal case against him heard at Epidauros (lines 2-5). Officials at Epidauros received a denunciation that there was glue, wax and ivory in the house of Pasiteles at Hermione, and this was removed

¹ For the discovery of the inscription and a photograph see Kritzas and Prignitz 2020: 1-3.

² Kritzas and Mavrommatidis 1987: 11-14.

³ Prignitz and Thür 2025. The analysis of the legal issues in this article draws on Thür 2021. In this article I will address the arguments in Prignitz and Thür 2025 and refer to Thür 2021 in the notes.

from his house (lines 5-11). The names of five men from Epidaurus who removed the materials follow (lines 11-14). These men caught at the door a slave-girl taking out in her garment ivory sent out by the wife of Lykiskos, the son of Pasiteles (lines 14-18). The names of six men from Hermione called as witnesses follow (lines 18-22). The Three Hundred at Epidaurus conducted a preliminary hearing, which Pasiteles attended and at which he was asked to swear an oath (lines 22-29). When Pasiteles then did not attend his trial, the court voted that he was guilty of the theft of the ivory and for the costs of additional work (lines 29-37). The Three Hundred also voted to confiscate and sell the property of Pasiteles (lines 37-39). The names of the twelve *epistatai* follow (lines 40-47). The sale of his property yielded two thousand drachmas (lines 47-48). The next section concerns three more cases, which I will not discuss here (lines 49-59). The final case concerns Lykiskos for the theft of ivory (lines 60-64).

The inscription raises several important questions about legal matters, which I will discuss in the following notes.

The Agreement to Have the Case Heard at Epidaurus (lines 2-5)

[Π]ασ[ιτέ]λης Ἑρμιονεὺς τάδε ὠμολό[γησε]
 ἐργασόμενος ἐν τῷ ἱερῷ τοῦ Ἀσκλη[πι]-
 οῦ· αἴ τί κα φαίνεται περὶ τὸν θεὸν ἀδι[κ]-
 [ῶ]ν, δίκαν ὑφέξεν Ἐπιδαυρίοις.

Translation: Pasiteles, a citizen of Hermione, agreed the following when about to work in the sanctuary of Asclepius: if he is clearly committing an injustice against the god, he will undergo a trial among the Epidaurians.

line 2 ὠμολό[γησε]: The contract or contractual agreement is expressed by the verb with the future participle. The law of the Epidaurians therefore appears to be similar to the law of the Athenians, which required that whatever one party agreed willingly with another is binding (Dem. 42.12; Dem. 56.2). Prignitz and Thür claim that “After being awarded a contract and offering a surety they received their wages, or a first instalment thereof, and at that point the contract was valid.”⁴ First, not all contracts for work in construction contained a clause about a surety, but primarily those in charge of a large project such as constructing an entire building.⁵ As C. Carusi has

⁴ Prignitz and Thür 2025: 207. Cf. Thür 2021: 62.

⁵ See for instance *IG VII 3073*, line 27 (Lebadeia). Guarantors could also be required for small jobs. See for example *IG I³ 476*, lines 46-54, 270-280; *I.Oropos 292*.

observed, “one third of the contractors attested in the Eleusinian accounts operated outside the framework of building contracts,” which means that they were not subject to such clauses.⁶ In the records studied by Feyel most of the craftsmen working at Greek temples did not provide a surety.⁷ In fact, in this case the document states that Pasiteles had not provided a surety at the time of the trial (line 30). If he had provided a surety when he made this original agreement, the court would have collected the penalty imposed on him at his trial from his surety. The fact that the court had to confiscate and sell the property of Pasiteles also reveals that he had not named a surety (lines 37-38). Nor is there any reason to believe that the contract was valid only after the craftsman received some payment. The document states nothing about such a payment. Thür follows the view of Wolff about Greek contracts, but this view is not convincing and has been widely criticised.⁸ line 3 ἐργασόμενος. Prignitz and Thür translate the future participle as “in order to start working”, but this is misleading because it implies that this promise was needed as a requirement to start the work. The future participle only means “when about to start working.” The agreement of Pasiteles to undergo a trial at Epidaurus may however have been contained in his building contract at Epidaurus, but we do not know what that contract contained. lines 4-5 - Prignitz and Thür translate φαίνεται περὶ τὸν θεὸν ἀδι[κ]||[ῶ]ν “if he should seem to do wrong to the god.”⁹ The construction φαίνεται with the participle ἀδι[κ]||[ῶ]ν means “if he is clearly doing wrong to the god.”¹⁰ The verb φαίνεται with the infinitive means “appear to.”¹¹

Search of the House of Pasiteles (lines 5-11)

Ἐμανύθ[η]

[ἐ]ν ταῖς οἰκίαις ταῖς Πασιτέλεως τοῖς ἐπ[ι]-
[σ]τάταις τοῦ ἔργου καὶ τοῖς ἱερομνάμο-
σι καὶ τοῖς ἱαρεῦσι κόλλα καὶ κηρὸς ἱα-
ρὸς καὶ ἐλέφας καὶ ἐξηνίχθη ἐκ τᾶς οἰκ-

⁶ See Carusi 2020: 140.

⁷ See Feyel 2006: 31-316.

⁸ See Harris 2020 with references to earlier works. See also Maffi 2018.

⁹ Prignitz and Thür 2025: 191.

¹⁰ Smyth 1956: 476. See, for example, Antiphon 5.29: ἐφαίνετο τῶν προβάτων ὄν αιμα (“it was clearly the blood of cattle”); Isaeus 2.20: οὐ παραφρονῶν φαίνεται (“he is clearly not insane”), 23: ἐπιτιμῶν αὐτῷ φαίνεται (“he is clearly blaming him”).

¹¹ L.-S.-J. φαίνω B 2.

ίας τᾶς Πασιτέλους ἐν Ἑρμιόνι· τοῖδε ἐ-
ξήνικον ἐκ τᾶς οἰκίας·

Translation: It was denounced to the commissioners of the work and to the overseers of the sanctuary (ιαρομνάμονες) and to the priests that glue and sacred wax and ivory (were) in the house of Pasiteles and were carried out of the house of Pasiteles in Hermione. The following carried (them) out: (names of five men of Epidaurus).

This section is very abbreviated because it mentions two actions and omits several steps that must have occurred between these two actions. The first action is the denunciation of the items taken from the construction at the shrine of Asclepius in Epidaurus. The second action is the removal of these items from the house of Pasiteles at Hermione. After the report that the stolen items were in the house, the authorities of Epidaurus must have instructed the five men to go to Hermione and to search the house. What is also not stated is whether the five men from Epidaurus approached the authorities at Hermione and obtained permission to search the house. One must recall that in this period Hermione and Epidaurus were both members of the Kalaurian Amphictyony (Strabo 8.6.14; *IG* IV 842), but there is no information about the legal arrangements in force among members.¹² There may have been a convention among the members like the one between Delphi and Pellana and the one between Stymphalos and Demetrias, both of which contained provisions about theft.¹³ One should also recall that in the treaty between Antiochus and Rome the Rhodians are granted the right to collect debts and conduct searches for property in the territory of Antiochus (Livy 38.38.11-12: *si quae pecuniae debentur, earum exactio esto; si quid ablatum est, id conquirendi cognoscendi repetendique item ius esto*. Cf. Polybius 21.43.17). There also appear to be rules about theft in the convention between Athens and Troezen (*IG* II² 46, line 72: [- ἐπ ἀν]τοφώρω[ι - -]).¹⁴ Whatever the regulations governing the relationship between the two

¹² On the Calaurian Amphictyony see Kelly 1966. Prignitz and Thür 2025 do not discuss the Amphictyony.

¹³ Convention between Delphi and Pellana: Haussoullier 1917 (115-130 on theft); *IPArk* 17.

¹⁴ Prignitz and Thür 2025: 211 assert that “in a foreign polis they (i.e. the men from Epidaurus) could not intervene with official authority but only as private persons searching for stolen goods, undoubtedly with the permission of the domestic authorities and under control of the six Hermionian citizens listed in lines 18-22, who had been called up for this purpose.” As the evidence from the treaties shows, it may have been possible for the men of Epidaurus to make the search as members of the Calaurian

communities, it is clear that what the Epidaurians did in Hermione was not illegal because six citizens of Hermione were summoned (ἐνσκληθέντες) as witnesses to the removal of the stolen items. Had their actions been illegal, the men of Epidaurus would certainly not have summoned citizens of Hermione to witness what they were doing. The text does not indicate who called the witnesses though the passage seems to indicate that it was the men of Epidaurus.

Prignitz and Thür claim that this document “provides the first evidence of a house search (as opposed to the enforcement of a court sentence) practiced in Greece, and it comes not from an Archaic source, but rather from the Classical period.”¹⁵ Prignitz and Thür notice that Kritzas and Prignitz compared the episode mentioned in this inscription with an episode described in the demosthenic speech *Against Evergus and Mnesibulus* ([Dem.] 47.58-59).¹⁶ Prignitz and Thür rightly observe that the parallel is not close because the episode in the demosthenic speech concerns the “private enforcement of a court sentence although performed with illegal violence” while in the case of Pasiteles there is “a private invasion of a private house in search of stolen goods.”¹⁷ Yet Prignitz and Thür claim that the search of the house of Pasiteles was underhanded and irregular.¹⁸ They also claim that as a result Pasiteles later objected to the search before the Three Hundred.¹⁹

Prignitz and Thür then examine evidence about the search of a house for stolen goods in Roman Law, which provided the procedure *quaestio lance et licio* by which the victim of a theft could enter the house of the alleged thief (Gaius *Inst.* 3.192-193. Cf. Gellius 11.18.9-10; 16.10.8). The person making the search was to enter the house naked wearing only a girdle and

Amphictyony, a point Prignitz and Thür miss. The passage also does not state that the six men had control of the investigation but only indicates that they were present (παρέγεντο) presumably as witnesses. See Kritzas and Prignitz 2020: 28 with note 144 who identify the passive participle as a form of the verb εἰσκαλέω, which is used for the action of calling witnesses (Arist. *Vesp.* 936). For the practice of summoning witnesses during a search see Dem. 47.36: ἐκέλευσα τὸν παῖδα καλέσαι εἴ τινας ἴδοι τῶν πολιτῶν παριόντας ἐκ τῆς ὁδοῦ, ἵνα μάρτυρές μοι εἴησαν τῶν λεγομένων.

¹⁵ Prignitz and Thür 2025: 213.

¹⁶ Kritzas and Prignitz 2020: 27-28.

¹⁷ Thür in Prignitz and Thür 2025: 211.

¹⁸ See Prignitz and Thür 2025: 211 (“The commission was sent to Hermione without the knowledge of the suspected person”), 213 (“Instead, in bad faith, they took advantage of his (i.e. of Pasiteles) absence”).

¹⁹ Prignitz and Thür 2025: 214.

carrying a dish to prevent him from bringing anything into the house. If the goods were discovered in the house, the theft was considered *furtum manifestum*, and the thief was condemned to a fine of four times the stolen goods. Prignitz and Thür then assert that “In Archaic Greek law, however, we have no direct evidence of a similar institution” and that “the survival of the verb in the technical sense ‘to search a house for stolen goods’ indicates that this institution was well known even in Classical times.”²⁰ Yet Prignitz and Thür go on to claim that “In Athens, intruding into a private house was probably illegal except for the purpose of enforcing a court sentence, which was the normal practice for a victorious plaintiff.”²¹ Prignitz and Thür next cite two passages in note 83 but do not discuss them. The first is Aristophanes *Clouds* 498-499 where Socrates states that it is customary to enter the Phrontisterion naked (γυμνούς εισιέναι νομίζεται). Strepsiadēs agrees but states that he is not going in to conduct a search (ἀλλ’ οὐχὶ φωράσων ἔγωγ’ εἰσέρχομαι). The EM scholion on the passage explains the term φωράσων in the following way: οἱ γὰρ εισιόντες ἐπὶ τὸ θεάσασθαι χρήματα τοῦ δημοσίου ἢ ἐπὶ τὸ ἐρευνῆσαι γυμνοὶ εἰσήεσαν, ἵνα μὴ τι ὑπὸ τὰ ἱμάτια κρύψωσιν (translation: Those who enter to see money from the treasury or to search entered naked so that they did not hide anything under their clothes). The term is also found at Aristophanes’ *Frogs* (1363). A passage from Isaeus (6.42) provides more context. The speaker states that when slaves told his clients that their opponents had removed furniture to a neighbouring house, his clients demanded the right to search the house (φωρᾶν) according to the law (κατὰ τὸν νόμον). *Pace* Prignitz and Thür, this passage clearly indicates that such a house-search was legal.²²

Prignitz and Thür quote a passage from the Plato’s *Laws* (954a-c) about the search of a house. It is necessary to give the entire passage with an English translation:

²⁰ Prignitz and Thür 2015: 211-212. Prignitz and Thür do not observe that the Greek term ἐπ’ αὐτοφώρῳ was considered to be equivalent to the Roman term *furtum manifestum* in Roman Law. See Justinian *Institutes* 4.1.3 and *Digest* 47.2.3 with Harris 2006: 373-390, which shows that the analysis of the term ἐπ’ αὐτοφώρῳ by Cohen 1983: 52 and Hansen 1976: 48-53 is not reliable and that the term should be translated “red-handed.” The conclusions of this essay have been accepted by Kapparis 1996: 72 note 19, MacDowell 2000: 254, Fisher 2001: 225-226, Carey 2004 and Pelloso 2008: 77-98. One cannot find any reference to these works in Prignitz and Thür 2025.

²¹ Thür in Prignitz and Thür 2015: 212.

²² Cf. Lipsius 1905-1915: 440 and Harrison 1968: 207.

φορᾶν δὲ ἂν ἐθέλη τις παρ' ὄτρωον, γυμνὸς ἢ χιτωνίσκον ἔχων ἄζωστος, προομόσας τοὺς νομίμους θεοὺς ἢ μὴν ἐλπίζειν εὐρήσειν, οὕτω φορᾶν. ὁ δὲ παρεχέτω τὴν οἰκίαν, τὰ τε σεσημασμένα καὶ τὰ ἀσήμαντα, φορᾶν. ἐὰν δὲ τις ἐρευνᾶν βουλομένω φορᾶν μὴ διδῶ, δικάζεσθαι μὲν τὸν ἀπειργόμενον, τιμησάμενον τὸ ἐρευνώμενον, ἂν δὲ τις ὄφλη, τὴν διπλασίαν τοῦ τιμηθέντος βλάβην ἐκτίνειν. ἐὰν δὲ ἀποδημῶν οἰκίας δεσπότης τυγχάνη, τὰ μὲν ἀσήμαντα παρεχόντων οἱ ἐνοικοῦντες ἐρευνᾶν, τὰ δὲ σεσημασμένα παρασημνήσθω καὶ ὄν ἂν ἐθέλη φύλακα καταστησάτω πέντε ἡμέρας ὁ φορῶν. ἐὰν δὲ πλείονα χρόνον ἀπῆ, τοὺς ἀστυνόμους παραλαβὼν οὕτω φορᾶτω, λύων καὶ τὰ σεσημασμένα, πάλιν δὲ μετὰ τῶν οἰκείων καὶ τῶν ἀστυνόμων κατὰ ταῦτα σημηνάσθω.

If anyone wishes to make a search on any man's property, let him search in this way, naked or wearing a short *chiton* without a belt after swearing an oath before (entering) by the customary gods that he expects to find (the stolen items). Let him (i.e. the owner) make the house available to search, both the sealed and the unsealed items. If one (the owner) does not allow the person wishing to search to make the search, let the person prevented initiate legal proceedings after assessing the value of the object being sought, and if he (i.e. the defendant) owes (the judgment), let him pay damages worth double the assessed amount. If the master of the house happens to be away, let those living in the house make available the unsealed items to search, and let him the person searching counter-seal the sealed items and place any guard he wishes for five days. If he (i.e. the owner) is away a longer time, let him (the person making the search) take along the *astynomoi* and make the search in this way, opening the sealed items and sealing them up again in the presence of the inhabitants and the *astynomoi*.

Prignitz and Thür compare the actions of the men from Epidaurus with the provisions for a search in Plato's *Laws*.²³ First, the inscription does not state that the men from Epidaurus followed the requirement to enter the house naked. Second, "there was no one in the house who could oppose the search" because "Pasiteles and his son Lykiskos were probably working at Epidaurus at the time." Third, the owner of the house Pasiteles was absent. As a result, Prignitz and Thür claim that the men from Epidaurus "took advantage of his absence" and "violated "his right to be heard in court if we include pretrial measure as part of court proceedings."²⁴ Because the men

²³ Prignitz and Thür 2025: 213.

²⁴ Prignitz and Thür 2025: 213 note 86 claim that the men of Epidaurus violated the principle found in the Judicial Oath at Athens that the defendant had the right to present his case. For the Judicial Oath Prignitz and Thür cite Dem. 24.151 (this should be Dem.

of Epidaurus did not follow correct procedure, Prignitz and Thür speculate that “Pasiteles, when summoned to stand trial on the charge of *klope*, had protested the search of his house, which was the basis of the charge, as illegal.”²⁵ Prignitz and Thür cite no evidence at all for this speculation, and there is nothing in the inscription that suggests Pasiteles objected to the search of his house.

There are several objections to the analysis of Prignitz and Thür. First, the type of house search described by Plato in the *Laws* is made by a private individual searching for his own private property. In the document from Epidaurus public officials from Epidaurus are searching for public property. Second, in the house search described by Plato the victim of theft does not know whether the stolen goods are in the house he is about to search or not. As a result, he has to swear a preliminary oath by the legally prescribed gods that he expects to find (the stolen goods) (προομόσας τοὺς νομίμους θεοὺς ἢ μὴν ἐλπίζειν εὐρήσειν). In the case from Epidaurus, however, the authorities knew that the stolen goods were in the house because someone had presented a denunciation (line 5: ἐμανύθη) that they were to be found there. The two procedures were therefore not similar. In the passage from Plato’s *Laws* a search is conducted to determine if the stolen goods are in the house of the person suspected of committing the theft. In the document from Epidaurus the men sent by the authorities of the temple know that the goods are in the house of Pasiteles and enter the house to recover the stolen goods, not to establish the guilt of Pasiteles. There was no reason for them to enter the house naked so that they would not plant items in the house and make a false accusation. They could not be suspected of framing Pasiteles because Pasiteles had already been denounced prior to the search.

Second, it is not correct to state that Pasiteles was deprived of his right to be heard in court. In the following section (lines 22-37) it is clear that Pasiteles was summoned to appear before the court in Epidaurus. He had the opportunity to attend his trial and present a defense against the charges but did not appear at the trial (ἐγδεδρακὼς τὸ δικ[α]στήριον).

Third, even in the passage from Plato’s *Laws* it is not illegal to make the search in the absence of the owner. If the owner is away for a long

24.149-151), but this document has long been recognized to be a forgery and omits several provisions from the oath. See Canevaro 2013: 173-180 for detailed analysis and references to earlier discussions.

²⁵ Prignitz and Thür 2025: 214.

time, the person searching for stolen goods can take the *astynomoi* with him (τοὺς ἀστυνόμους παραλαβών) and make the search (φωράτω) together with members of the family and the *astynomoi*. The two procedures are therefore very different. The passage in Plato shows that there is no reason to believe that the search of a house in the absence of its owner was necessarily illegal. What made the search of a house legal was the cooperation of the authorities, in this case, the *astynomoi*.

Other passages show that a house-search was legal provided it was carried out in the correct manner. In the *Oeconomica* (2.1351b34) attributed to Aristotle Charidemus once issued an order (κήρυγμα) in the cities he controlled that no one should keep a weapon in the house and if anyone did not obey, he should pay the penalty imposed by the order. The people thought that Charidemus was not serious in making the order, and each kept the weapons that he had in countryside. Charidemus then made a sudden search of the houses (ἔρευναν ἐξαίφνης ποιησάμενος τῶν οἰκιῶν) and from those in whose houses he found a weapon he imposed a fine. Nothing in the passage indicates that such a search was illegal. Nor was there a requirement for the search to be made in the presence of the owner.

In his speech *On the Crown* Demosthenes (18.132) recalls that he arrested (λαβόντος ἐμοῦ) Antiphon, who had lost his citizenship at Athens (ἀποψηφισθέντα) and was hidden in the Piraeus (κεκρυμμένον ἐν Πειραιεῖ) after having promised Philip to burn the shipyards. Demosthenes then brought him to the Assembly (καταστήσαντος εἰς τὴν ἐκκλησίαν). Aeschines objected that Demosthenes' conduct was intolerable in a democracy when he treated abusively (ὑβρίζων) unfortunate citizens and went into houses (ἐπ' οἰκίας βαδίζων) without a decree (ἄνευ ψηφίσματος).²⁶ What this clearly implies is that the search of a house was legal if made in accordance with a decree of the Council or Assembly.²⁷ The Areopagus later investigated Antiphon and arrested him, but it is not clear whether they found him inside a house or not. It is also possible that after Gylippus was denounced to the ephors at Sparta for having Athenian owls hidden under his roof, the ephors may have searched his house for the stolen coins (Plu. *Lys.* 16-17.1).

²⁶ Antiphon must have been a non-citizen at the time because he was later tortured (Dem. 18.133).

²⁷ For analysis of the passage see Harris 1995: 172, which corrects the mistakes in Hansen 1976: 32-33.

The most detailed account of a house-search is found in the demosthenic speech *Against Evergus and Mnesibulus* (47.22-38). A trierarch was told by the Council to collect naval equipment held by Demochares and Theophemus. Demochares complied, but Theophemus did not. The trierarch then went to the house of Theophemus and showed him the decree of the Council giving him the power to collect the equipment in any way possible. He invited Theophemus to tell the men sending out the fleet and the Council that he was not responsible for the equipment or to return it. If he did not comply, he would seize his property in compensation for what he owed. When Theophemus still did not comply, the trierarch seized the slave woman and attempted to drag her away as compensation for his debt. There was disagreement about what happened next, but the trierarch claims that Theophemus struck him. The trierarch then went to the Council and showed the members the marks from the blows and later won a judgment against Theophemus, which shows that his attempt to stop the search was illegal. What the incident shows is that the trierarch had the right to enter the house of Theophemus in search of public property or to distrain on his property when following a decree of the Council.²⁸

There is another case of a house-search in a papyrus from Kerkeosiris dated to 113 BCE (*P. Ten.* I 38.10-28).²⁹ Apollodorus, who supervised the oil monopoly, received a report of smuggling in the village and conducted an investigation with the local *epistates* and the *archiphylakitês*. Apollodorus went to the house of a leather-worker and found a Thracian woman inside but the smuggled goods removed. The papyrus is fragmentary at this point but appears to indicate that the search continued in another house where the contraband goods were found.

All this evidence makes it clear that house-searches conducted by public officials in the pursuit of criminals or for the recovery of stolen public property were perfectly legal in the Greek *polis*. *Pace* Prignitz and Thür, there is no reason to think that Pasiteles had any grounds for objecting to the actions of the men of Epidaurus who searched for stolen property in his house at Hermione.³⁰ There are also no grounds for believing that he was deprived of his legal rights because he was summoned before the court at Epidaurus and had the opportunity to reply to the charges against him.

²⁸ For analysis of the incident see Harris 2013a: 41-43.

²⁹ For analysis of the incident see Bauschatz 2013: 233-236.

³⁰ Cf. Thür 2021: 48.

The Role of the Slave-Woman in the Theft (lines 14-18)

τὸν δὲ ἐκπεμπόμενον ὑπὸ τᾶς γυναι-
κὸς τᾶς Λυκίσκου τοῦ υἱοῦ τοῦ Πασιτέλ-
εὺς ἐπὶ ταῖς θύραις ἐν τῷ κόλπῳ τὴν θ-
εράπαιναν ἐχφέρουσαν ἔλαβον ἐλέφαν-
τα.

Translation: They caught (the ivory) being sent out by the wife of Lykiskos, the son of Pasiteles, at the door (of the house) as the slave-girl was carrying the ivory out (of the house) in the fold (of her garment).

First, a point of syntax. Prignitz and Thür translate: “They (also) seized the ivory that was sent out (of the house) by the wife [15] of Lykiskos, the son of Pasiteles (when they caught) at the doors the servant who tried to smuggle it out in her bosom.”³¹ They therefore translate the verb twice, in the first case with the ivory being sent out as the object and in the second case with the slave-girl as the object. But there is only one verb in the sentence, and the two nouns in the accusative cannot both be the objects of the main verb because they are not linked by a connective. They do not understand the syntax of the sentence and do not see that the phrase τὴν θεράπαιναν ἐχφέρουσαν is an accusative absolute. The construction is rare but well attested.³²

In their discussion of the legal aspects of the inscription, Prignitz and Thür do not comment on this section. Kritzas and Prignitz compare the slave-woman in the demosthenic *Against Mnesibulus and Evergus* ([Dem.] 47.58), who attempts to remove some property belonging to the trierarch, but the two situations are not comparable.³³ The slave woman in this case

³¹ Kritzas and Prignitz 2020: 7 translate the section “They (also) seized the ivory which was sent out (of the house) by the wife of Lykiskos, the son of Pasiteles, (when they caught) at the doors the servant who tried to smuggle it out in her bosom.”

³² See Smyth 1890: 339-340 and Schwyzler 1950: 402-403. There are several examples preceded by ὡς (Xen. *Mem.* 1.3.2: καὶ ἠῦχετο δὲ πρὸς τοὺς θεοὺς ἀπλῶς τὰγαθὰ διδόναι, ὡς τοὺς θεοὺς κάλλιστα εἰδότας ὅποια ἀγαθὰ ἐστὶ. Lys. 14.16: οὐκ ἀξιοῦντες τοῦ Ἀλκιβιάδου ὑέος τοσαύτην δειλίαν καταγνώσαι, ὡς ἐκείνων πολλῶν ἀγαθῶν ἀλλ’ οὐχὶ πολλῶν κακῶν αἴτιον γεγεννημένον), but there are also several without ὡς (Plato *Lg.* 819d: περὶ ἅπαντα ταῦτα ἐνοῦσάν τινα φύσει γελοῖαν τε καὶ αἰσχροῦ ἄνοιαν ἐν τοῖς ἀνθρώποις πᾶσιν, ταύτης ἀπαλλάττουσιν. Herodot. 5.103: καὶ γὰρ τὴν Καῦνον πρότερον οὐ βουλομένην συμμαχεῖν, ὡς ἐνέπρησαν τὰς Σάρδις, τότε σφι καὶ αὕτη προσεγένετο). There is also an example in [Arist.] *Ath. Pol.* 30.2 - see Harris 1990: 249-250.

³³ Kritzas and Prignitz 2020: 28.

attempts to take away items that Theophemus does not have a right to seize. In the Epidaurus inscription the slave-girl is removing stolen items and trying to prevent them from being seized by the officials from Epidaurus. The phrase is very important however from a legal perspective. The sentence states that the ivory was sent out of the house by the wife of Lykiskos, yet makes it clear that the men from Epidaurus did not catch the wife with the ivory but the slave.

Here one needs to recall the rule about the liability of masters for the actions of their slaves.³⁴ If a slave committed an offense on her or his own initiative, only the slave could be held liable for the offense. On the other hand, if the slave committed an offense on the orders of the master, the master could also be held responsible for the offense. The most famous example of this principle is found in the speech of Antiphon *On the Stepmother*. The stepmother of the accuser gave a drug to the slave of Philoneus and told her to put it in the cups of Philoneus and her husband, claiming that it was a love-potion, when it was actually poison (Antiphon 1.15-16; 20). After the men drank the poison, they became ill and died (Antiphon 1.19-20). As a result, the stepson of the wife accused her of murdering his father (Antiphon 1.2-3).³⁵ There was also a law at Athens that “Damages and losses caused by slaves are to be paid by the master who owned the slaves at the time they caused them” (trans. Cooper) (*Hyp. Ath.* 22).³⁶

In the law code of Gortyn (G47 Gagarin-Perlman = *IC IV* 47, lines 1-8) a male slave or a female slave (δῶλος ἢ δόλα) who is given over to a creditor to work off a debt (κατακείμενος) and is in a position comparable to a slave and who does wrong (ἀδικήσει) on the orders of the current master to whom he has been surrendered, the case is to be brought against the current master (κελομένο ἀμάρτηι τοῖ καταθεμένοι).³⁷

The document clearly establishes that even though the men from Epidaurus caught only the slave-girl carrying out the ivory, the slave-girl was acting on orders from the wife of Lykiskos. This links Lykiskos to the theft

³⁴ This topic is not discussed by Thür 2021 and by Prignitz and Thür 2025.

³⁵ The accusation is a case of intentional homicide. See Harris 2006: 398-399 (*pace* MacDowell 1963: 62-63 who mistakenly thought the charge is *bouleusis*). See also Lewis 2018: 47, note 79.

³⁶ On this passage see Lewis 2018: 46-47.

³⁷ On the terms for slaves in the Gortyn Lawcode see Lewis 2013, Lewis 2020 and Lewis 2023 (*pace* Gagarin 2010), who shows that the words *dolos* and *woikeus* both denote slaves.

and shows that both Pasiteles and Lykiskos were responsible for the theft of the ivory, which meant that each could be sentenced to pay a fine for the theft.

The First Phase of the Legal Proceedings (lines 22-29)

Τάδε ἐδῖκα-

σαν τοὶ Τρια[κ]άτιοι Ἐπιδαυροῖ, ἀπὸ τοῦ
βωμοῦ τὰν ψ[ᾠφο]ν φέροντες τοῦ Ἀσκληπι-
οῦ, διαδικα[σά]μενοι παρέντος Πασιτέλ-
[ε]υς, π[ρο]σδε[χθέ]ντος καὶ ἐλεγχομένου· ὅ-
ρκον δ[ιδό]ναι το[ῖς] θεοῖς μὲν καὶ βωμοῖ-
[ς] Ἐπιδαυρίων ἐκείν[οις], οὓς κα αὐτὸς ἔλ-
ηται.

Translation: The Three Hundred at Epidaurus made the following legal judgments, taking the ballot from the altar of Asclepius, after having conducted a hearing when Pasiteles was present and was admitted to the court and questioned (and asked) to give an oath to the gods and at those altars of the Epidaurians, whichever ones he would choose.

This section is very important for the understanding of legal procedure at Epidaurus. At Athens there were several steps required to get a case to court. First, the accuser was required to summon the defendant to appear before the relevant magistrate on a given day and to have two people act as witnesses to the summons.³⁸ When the two litigants met before the magistrate, the accuser presented his charges in a written plaint (*enklema*), which contained the full name of the accuser, the full name of the defendant, the kind of procedure being brought, and a statement of the charges indicating how the defendant had violated the substantive part of the relevant statute.³⁹ At this stage the defendant had to reply to the charges and deny that he violated the substantive part of the relevant statute (Dem. 42.17; 45.46). It was probably at this point that the magistrate ordered the litigants to pay the court-fees or *prytaneia* (Pollux 8.38). For certain private cases, the magistrate sent the case to a public arbitrator. If the public arbitrator

³⁸ Harrison 1971: 85-86.

³⁹ On the form of the plaint and its role in litigation at Athens see Harris 2013b and for the impact of the *enklema* on the arguments presented in court see the essays in Harris and Esu 2025. Thür 2008 does not see that the statement of the charges had to conform to the language of the statute.

could not reconcile the parties or if one party did not accept his judgment, the documents were placed in an *echinos*, and the case was sent to court ([Arist.] *Ath. Pol.* 53.1-7).⁴⁰ After the magistrate received the plaint and the response to the plaint, he set a date for the *anakrasis*. During this part of the procedure, the magistrate could question the parties, and the parties could question each other.⁴¹ It was possible at this stage for the accuser in a public case to withdraw his charge without penalty.⁴² At the end of the *anakrasis* the magistrate decided whether or not to accept the plaint. If he accepted the plaint as presented or with modifications, he assigned the case to a court, and the trial took place before the judges who had sworn an oath.⁴³ The magistrate who conducted the *anakrasis* played no role at the trial in court.⁴⁴

It is clear in the document from Epidaurus that Pasiteles must have been summoned to appear in court because he was present, received before the court and questioned (lines 25-26: *παρέντος Πασιτέλ[ε]υς, π[ρο]σδε[χθέ]ντος καὶ ἐλεγχομένου*) even though the document does not state this explicitly. The verb *ἐλέγχειν* can mean either “test/interrogate” or “convict,” but the participle *ἐλεγχομένου* cannot mean “convicted” because the conviction of Pasiteles occurred at a later stage. The document also does not indicate who brought the charges before the Three Hundred though it appears that it must have been the *epistatai* who are listed in lines 40-47. These omissions are similar to the omission of the order by the authorities in Epidaurus to the five men to conduct a search of the house of Pasiteles. The document gives an abbreviated account of the legal procedure, providing only a few salient points. There is also a phrase about giving an oath (lines 26-29), but the syntax is unclear: there are three participles followed by the infinitive *διδόναι*, but it is difficult to see the connection between the participles and the infinitive. The verb *ἐλέγχειν* never appears to be followed by an infinitive.

The stage of the procedure at which Pasiteles was present, admitted to the court and questioned must have taken place before the Three Hundred voted to convict him of theft because the document states that when the Three Hundred made their final judgment Pasiteles avoided the court (*ἐγδεδρακῶς*

⁴⁰ On private and public arbitration see Harris 2018.

⁴¹ On the *anakrasis* see Harrison 1971: 94-105.

⁴² See Harris 2006: 404-422.

⁴³ For the judicial oath see Harris 2013a: 101-137.

⁴⁴ For officials presiding at trials see [Arist.] *Ath. Pol.* 64-66, 68-69.

τὸ δικ[α]στήριον) and was not present for his trial (φυγο[δ]ικήσας). On the other hand, there is no indication that there was another hearing between the initial hearing and the final trial before the Three Hundred. Lines 22-25 are a little confusing because they start by stating that the Three Hundred voted from the altar, a phrase that is repeated later about the trial at which the judgment to convict was made.⁴⁵ But the document appears to make a clear distinction between the preliminary phase at which Pasiteles appeared and the trial at which he did not appear by using one verb for the preliminary phase (διαδικα[σά]μενοι) and another for the actual trial (lines 22-23: ἐδίκα|σαν; line 31: ἐδικάσθη). The aorist participle also appears to imply that the action of the participle in the middle voice (διαδικα[σά]μενοι) took place before the action of the verb in the active voice (ἐδίκα|σαν). One should therefore translate lines 22 to 26 “the Three Hundred judged the following taking the ballot from the altar, after having conducted a hearing when Pasiteles was present and was admitted to the court and questioned.” This clearly indicates that the preliminary hearing and the trial in court were both conducted by the Three Hundred.

Prignitz and Thür attempt to link the passive participle ἐλεγχόμενου with a procedure like the *anakrisis* at Athens and object: “No Greek court “questions” a defendant.” They also find it odd that “Instead of being presided over by the competent magistrate, the president of the Council, the session was held by the entire Council, which served as the authority under which the preparatory stage was carried out.” The problem with this analysis is that there is no other evidence for legal procedure at Epidaurus and no way of knowing if the president of the Council normally received legal charges. Prignitz and Thür then try to explain the unusual procedure by the nature of the case: “The reason may have been that Pasiteles, when summoned to stand trial on the charge of *klope*, had protested the search of his house, which was the basis of the charge, as illegal.”⁴⁶ There is not a shred of evidence that Pasiteles made such an objection to the charge. Moreover, as we saw in the previous section, there was nothing illegal about house-searches conducted by officials, especially if they had evidence that there were stolen goods inside the house.

Prignitz and Thür continue with more speculation: “In Athens, when protesting a charge as unlawful, a defendant could enter a *paragraphe* and

⁴⁵ Pace Thür 2021 42-43, I see no reason to assume that the vote was by secret ballot.

⁴⁶ Prignitz and Thür 2025: 214. Cf. Thür 2021: 48.

the whole law court was required to vote on this claim. In Epidaurus the “questioning session” and the decision on unlawfulness could have occurred at the same time before the Council, and the participle προσδεχθέντος probably indicates that the Three Hundred admitted hearing Pasiteles’ remonstrations during an extended pretrial session.⁴⁷ Yet nothing in the document indicates that Pasiteles brought an action similar to a *paragraphe* at Athens. The participle προσδεχθέντος shows that Pasiteles was admitted to the court and does not indicate that any counter-charge he made was admitted by the court. At Athens the trial on a charge of a *paragraphe* was heard by a court after the preliminary hearing and not at the preliminary hearing.⁴⁸

There is a much better way to understand the participle ἐλεγχόμενον at the preliminary stage of the procedure. In the *Eumenides* of Aeschylus, Athena acts like the magistrate who received the charges at Athens.⁴⁹ The Erinyes act like accusers by identifying themselves and presenting their charges. They then invite Orestes to swear an oath of denial as was standard at the hearing when the accuser presented his charge. When he refuses to swear an oath that he did not kill his mother because he will plead that he did so justly, the Erinyes call on Athena to question Orestes (line 433: ἐλέγχε), which she then does (lines 436-438) by asking him about his country (χώραν), his lineage (γένος) and his version of the events (ξυμφορὰς τὰς σάας) and then to reply to the charge (τόνδε ἀμυναθοῦ ψόγον). In the account of Cinadon’s conspiracy in the Xenophon’s *Hellenica* (3.3.4-11) the ephors receive information from an informer about the plot. After Cinadon was arrested and brought back, he was questioned by the ephors (ἠλέγκετο) and, after confessing, was punished.⁵⁰ In both cases the verb ἐλέγχειν is used about officials who question a defendant. The questioning of Pasiteles by the Three Hundred fits very well into the preliminary phase of the trial when Pasiteles had the chance to reply to the charges. What is different from legal procedure in Athens where the magistrate who received

⁴⁷ Prignitz and Thür 2025: 214.

⁴⁸ On the *paragraphe* in Athenian Law see Harris 2015.

⁴⁹ For analysis of the passage see Harris 2019: 413-415.

⁵⁰ Note also that at Thuc. 1.131.2 Pausanias presents himself for trial to those who wish to question (ἐλέγχειν) him. It is clear that the magistrates who try him are the same as those who question him. *Vat. Gr.* 2306 fr. A 1-30 appears to refer to questioning by magistrates at Sparta (ἀνακρίνουσι . . . ἀνακρίναντες). See the discussion in Keaney 1974. At private and public arbitrations at Athens the arbitrator could question the litigants. See Is. 5.32 and Dem. 27.50-51 with Harris 2018.

the charges and conducted the *anakrasis* did not participate at the trial was that at Epidaurus the Three Hundred conducted both the preliminary hearing and the trial that followed. It also appears that in contrast to Athens where there were three phases in the procedure (first when the magistrate received the charges, second when the magistrate conducted the *anakrasis*, and third the trial in court) at Epidaurus there were only two phases, both before the Three Hundred. At the preliminary hearing the defendant was asked to swear an oath denying the charges both at Athens (Pollux 8.55) and at Epidaurus, and after this preliminary hearing at Epidaurus the defendant was expected to pay court fees (lines 30-31: *πρυτανεῖα*) as at Athens. There were both similarities and differences between the legal procedures in the two communities.⁵¹

The Trial before the Three Hundred (lines 29-37)

ἐγδεδρακῶς τὸ δικ[α]στήριον, ἐν ᾧ
 οὐδ' ἔδω[κ]ε[ν] ἐγγύαν μηδ' ἔθηκεν πρυτανε-
 ῖα, φυγο[δ]ικῆσας, τάδε ἐδικάσθη ὑπὸ τῶν
 Τριακατίων, ἀπὸ τοῦ βωμοῦ τὰν ψᾶφον φέ-
 ροντες τοῦ Ἀσ[κ]λαπιοῦ· ἐπιγράψαι ἔνο[χ]-
 ον [τοῦτ]ον τὰς κλοπᾶς τοῦ ἐλέφαντος [κα]-
 [ι] ἀναγρά[ψ]α[ι] τῶν παρέργων ᾧν ἔλετο ὁ ἐ[ρ]-
 γῶνας [δρ]αχμᾶς \mathbb{P} , σ]ὴν ζαμίαις ταῖς λυθ[η]-
 [σ]ομ[έ]να[ις] γίνεται χίλια δραχμαί.

Translation: Having not shown up before the court, in which he did not present a pledge of personal security nor deposit the court-fees and having avoided the trial. The following was judged by the Three Hundred, taking the ballot from the altar of Asclepius: to record this man guilty of theft of the ivory and to write up the (five hundred?) drachmas for the additional work that the workman undertook. With the penalties to be paid the (total) is one thousand drachmas. The Three Hundred, taking the ballot from the altar, voted a public sale of (i.e. his property).

⁵¹ There is no reason to believe that Pasiteles refused to swear the oath and that “if he had sworn, he would have been acquitted of the charge of embezzlement.” Cf. Thür 2021: 49. The oath at Epidaurus was clearly similar to the one sworn by defendants at Athens before a trial and not to the exculpatory oath at Gortyn (*pace* Prignitz and Thür 2025: 215). Defendants who swore the oath of denial at Athens could still be convicted in court.

The most striking aspect of this section is the loose syntax. The participles ἐγδεδρακῶς (line 29) and φυγο[δ]ικήσας (line 31) are not connected to a noun in the nominative or to the implicit subject of a verb in the singular. In fact, there appears to be a sentence with two participles and no main verb. In lines 31-33 the present active participle in the nominative φέροντες modifies the noun τῶν Τριακατίων in the genitive. The text mentions the fact that the Three Hundred took their ballots from the altar of Asclepius three times (lines 23-25, 32-33, 39-40).

Pasiteles clearly did not show up for his trial before the Three Hundred and was condemned to a fine *in absentia*. The power of a court to condemn a defendant *in absentia* is well attested in Athenian Law. Perhaps the best known is the conviction of Alcibiades in 415 (Thuc. 6.61.7). There were others also convicted *in absentia* for impiety during the same year (Andoc. 1.13). Another famous example is the conviction of Philocrates for treason in 343 (Dem. 19.116; Aeschin. 2.6; *Agora* XIX, P26, lines 455-460). Courts at Sparta also condemned defendants in their absence (Xen. *Hell.* 3.5.25).

The document implies that Pasiteles should have named a surety but states that he did not (line 30 - οὐδ' ἔδω[κ]ε[ν] ἐγγύαν). In Athenian law there are two procedures for theft, but in neither case was the defendant required to name a surety. The first is *apagoge* to the Eleven ([Arist.] *Ath. Pol.* 52.1). If the thief was caught “red-handed” (ἐπ' αὐτοφώρῳ), the accuser could seize him and bring him to the Eleven.⁵² If he admitted his guilt, the Eleven put him to death. If he denied his guilt, the case was heard in court, and if the defendant was convicted, he was put to death. The second procedure was the private action for theft, which followed the procedure used in other private actions. If the defendant was convicted, he paid a penalty of double the amount of the stolen item. The search of the house was only a method of discovery and not a legal action. The evidence for both these procedures does not indicate that the defendant was required to name a surety before the trial.

The reason why the authorities in Epidaurus required a surety was because Pasiteles was not a citizen.⁵³ At Athens a metic who was accused in

⁵² For the meaning of the term see Harris 2006: 373-390. The term is mistranslated by Cohen 1983: 52. The procedure also applied to “clothes-snatchers” and enslavers but not to seducers (*moichoi*) pace Cohen 1984: 156-157 and Hansen 1976: 44-45. See Harris 2006: 291-293.

⁵³ Cf. Kritzas and Prignitz 2020: 35, who do not however cite any sources.

a private action was required to provide sureties to the Polemarch, who would pay the amount awarded by the court if the defendant did not pay (Dem. 32.29; Isoc. 17.12). There is a similar rule in the judicial treaty between Stymphalos and Demetrias (303-300 BCE) (*IPArk* 17, lines 173-176: τοὺς δὲ μετοικέ[ο|ντ]ας γὰ κατενγ[υ]ῆν εἰς δίκαν τ[οὺς] | ἐν Δημητριάδι [πο]λιτεύοντας ἢ ἐ[ἴ]ν[υ] Σ[τυμφάλοι].⁵⁴

The document also states that Pasiteles did not pay the court fees. At Athens both the accuser and the defendant were required to pay the *prytaneia* (Pollux 8.38; Isocr. 18.3, 12; Dem. 47.64; [Xen.] *Ath. Pol.* 1.16), but the term is not attested elsewhere. In the convention between Stymphalos and Demetrias there was a court fee called the *epidekaton* (*IG* V, 2 357, lines 58-63. Cf. *IG* XII 8, 640 (Peparathos), lines 24-25: προ[δ]ικίαν ἐπιδεκάτωγ).

The Decision to Confiscate the Property of Pasiteles (lines 37-40)

Κατ-

εδίκασσεν τὰν τ[ῶ]ν ἐόντων δαμοπρασία-
[ν ἄ]πὸ τοῦ βωμοῦ τὰν ψᾶφον φέροντες ἅ [Τρ]-
ια[κ]ατία·

Translation: The Three Hundred taking the ballot from the altar voted the public sale of the property (of Pasiteles).

This appears to be a separate vote from the vote to convict Pasiteles for theft. If Pasiteles had attended the trial, the court could have asked him to pay the penalty. Alternatively, if Pasiteles had named a surety, the court could have collected the fine from the surety. This compelled them to confiscate his property, that is, to declare that the state owned his property as a result of his failure to pay the penalty and to sell this property and use the sale price to pay the penalty imposed by the court. This should not be called a “forced sale” because the court is not forcing Pasiteles to sell but confiscating his property. It is the state that sells the property because the state has become the owner for the property. The noun δαμοπρασία[ν] (lines 38-39) therefore includes two steps, first, the confiscation and, second, the sale of the property. One can see the two steps in the *poletai* records from Athens for the year 367/6 (*Agora* XIX, *Poletai* P5 (367/6) = Crosby *Hesperia* 10 (1941) = *SEG* 12.100, lines 1-38).

⁵⁴ See Thür and Täuber 1994: 175, 215.

The Sale of the Property of Pasiteles (lines 47-48)

παρ τῶμ πριαμένων τὰ Πασ-
[ι]τέλευς τᾶς καταδίκας XX

Translation: From the buyers of the property of Pasiteles from the sentence two thousand drachmas.

This amount is double the amount of the one thousand drachmas mentioned in line 37, which was the value of the ivory stolen and the work that the new worker had to do. Kritzas and Prignitz claim that “The 2000 drachmas can only be part of the total proceeds of the auction, which can hardly by chance have been a round sum. We think that the 2000 drachmas, being double of the 1000 drachmas given in l. 37, is the part of the sale of property that benefits the building concerned. There was likely more, which could then either have been the state’s revenue or have been used to cover a first subtotal of the penalty for theft.”⁵⁵ But lines 33-37 make it clear that the amount of one thousand drachmas was the amount of damage assessed for the theft of the ivory (τᾶς κλοπᾶς τοῦ ἐλέφαντος) and for the additional work to be done. The text they give combining the phrases in lines 33-37 with only a comma at line 36 is misleading because the phrase σὺν ζαμίαις ταῖς λυθ[η][σ]ομ[έ]να[ις] γίνεται χίλια δραχμαί with the finite verb γίνεται is clearly a separate sentence from the preceding sentence, which contains two infinitives (ἐπιγράψαι . . . ἀναγρά[ψ]α[ι]). A full stop is required and not a comma. This phrase gives the total amount of damages assessed by the court: “with the damages to be paid (the total) comes to one thousand drachmas.”⁵⁶

Then why is the amount taken from the sale of Pasiteles’ property double the amount of the damage assessed by the court? There are two reasons. First, in cases of theft the defendant who was convicted had to pay double the amount of the stolen item (Dem. 24.114-115; Aulus Gellius 9.18 [dupli poena]; Plato *Laws* 857a. Cf. Gaius *Inst.* 3.190).⁵⁷ The rule about payment of twice the amount of the item stolen was also in effect in the convention

⁵⁵ Kritzas and Prignitz 2020: 37.

⁵⁶ The verb γίνεται is often used in the accounts from Epidaurus to indicate a sum of money. See *IG* IV²,1 108 *passim*.

⁵⁷ On the information contained in the document at Dem. 24.105 see Canevaro 2013: 157-173 with detailed refutation of the attempt of Scafuro 2005 to defend the authenticity of the document.

[Κ]λεόστρατος Μελινίς : ἀδικήματος *vacat*
 ὅτι τὸν *ηελέφαντα* ἔκλεπτε. *Vacat*

Translation: From Lykiskos: sacred 10 drachmas, public 6 drachmas 4 obols, sacred 11,598 drachmas 4 obols. Magistrate of the penalties: Kallikritos; president: Kleostratos from Melinis. For the offense, because he stole the ivory.

Prignitz and Thür claim that “The case against Pasiteles was reopened several years later when his outstanding debts were enforced against his son Lykiskos (lines 60-63).”⁶⁴ Nothing in the language of these lines or in the sections about the cases against Pasiteles supports such an interpretation. First, the section about the punishment of Lykiskos explicitly states that Lykiskos was guilty (line 62: ἀδικήματος) because he stole the ivory (line 63: ὅτι τὸν *ηελέφαντα* ἔκλεπτε). Second, this section does not state that he was liable to pay the fine because he was the heir of Pasiteles. When an heir was required to pay a debt inherited from his father, the public record stated that his liability resulted from his status as heir.⁶⁵ Third, there is no indication in lines 47-48 that the money gained from the sale of the property of Pasiteles did not cover the full amount of the fine. In fact, this section indicates that the sale of the property for two thousand drachmas covered twice the amount of the money (one thousand) owed by Pasiteles (lines 33-37), which was doubled (line 48). This section does not record any outstanding amount from the fine, which Lykiskos, the son of Pasiteles, would have inherited. Fourth, as we noted above, the order of the wife of Lykiskos to have their slave take the ivory out of the house (lines 14-18) shows that Lykiskos was involved in the theft of the ivory and was thus liable for the penalty resulting from conviction for the theft. In fact, Lykiskos appears to have stolen a larger amount than his father because his fine was much greater (2,000 drachmas vs. 10 sacred drachmas, 6 public drachmas, 4 obols and 11,598 sacred drachmas and 4 obols). Alternatively, the fine may have been imposed for another theft.

⁶⁴ Prignitz and Thür 2025; 207. Cf. Thür 2021: 38.

⁶⁵ See for example *IG II²* 1615, line 96; 1622, line 439; 1623, line 117, etc. Cf. Dem. 35.49.

Conclusion

The “stele of the punishments” is valuable for the information the document provides for law and legal procedure at Epidaurus. The document omits some information such as the identity of the person who provided the information about the stolen goods, the order to the men of Epidaurus to search the house of Pasiteles, the approval of the authorities at Hermione to conduct the search, the summons to Pasiteles to present himself to the court, and the names of the accuser(s). Yet the account of the legal proceeding in lines (22-37) indicates that there were two hearings, one to question the defendant and to invite him to swear an oath, and a second to hear the case, to render a judgment, and to impose a punishment. Both hearings were conducted in front of the Three Hundred. Though there are some similarities with the legal procedure of Athens such as the swearing of an oath of denial by the defendant, the requirement for metics to name a surety, and the payment of court fees, legal procedure at Epidaurus was much different from that at Athens. There were only two hearings and nothing similar to the *anakrasis* at Athens, and the same body, the Three Hundred, receives the charges and tries the case, whereas at Athens the magistrate who received the charges and conducted the *anakrasis* did not play a role at the trial. At Athens the trial was heard by judges drawn from a panel of six thousand selected on the day of the trial; at Epidaurus the trial was conducted by a permanent body, the Three Hundred. In this regard, trials at Epidaurus were similar to trials at Sparta heard by the Council of Elders sitting with the kings (Pausanias 3.5.2). Yet in cases tried before the Council of Elders and kings, the charges were brought first before the Ephors (Xen. *Hell.* 5.4.24). This provides another example of the diversity of legal procedures in the Greek *poleis*.⁶⁶ On the other hand, it appears that the penalties for theft and for damage were double the amount of the assessed value of the stolen item and damage sustained. The substantive rule was the same as that found at Athens.⁶⁷ At Athens records were kept of trials in the Metroon.⁶⁸ We do not know if this record of a trial at Epidaurus was unusual or not. And the inscription raises some questions about the legal relationship between Ep-

⁶⁶ This inscription provides another piece of evidence against the unconvincing view of Gagarin 2006: 29-40 that the unity of Greek Law is to be found in matters of procedure.

⁶⁷ For the unity of Greek Law in substantive matters and diversity in legal procedure see Harris 2024.

⁶⁸ See Harris 2013b and Boffo and Faraguna 286-289.

idaurus and Hermione as members of the Kalaurian Amphictyony, which cannot be answered until more information becomes available.

One must also bear in mind the audience of this inscription. The stele was erected at the sanctuary of Asclepius, which was a shrine open to all Greeks who came from many places to seek cures.⁶⁹ This record of the trial of Pasiteles sent a message not only to the people of Epidaurus but also to the Greeks who came to Epidaurus. As Canevaro has recently shown, the rule of law was a value held by all Greeks and served as the source of legitimacy for their institutions.⁷⁰ One of the key features of the rule of law was fairness in procedure. In this inscription the authorities at the shrine are not only warning foreigners who come to work there that they must be careful not to steal materials and to perform their work carefully. They are also showing that all those who are accused of crimes will be treated fairly. The accused will have their cases heard in court and be presented with the charges. They will have the opportunity to name sureties. They will be convicted only if there is strong evidence against them. And the document states three times that the Three Hundred took their ballots from the altar of Asclepius and therefore placed themselves under the watchful eye of Asclepius when deciding the case. Their legal duty was also a religious duty. The Three Hundred clearly took their task very seriously. This was an important message to convey to the Greeks coming to worship at Epidaurus.⁷¹

⁶⁹ See Edelstein and Edelstein 1998 for Epidaurus as an international sanctuary.

⁷⁰ Canevaro 2017.

⁷¹ For the relationship between law and religion see Harris 2006: 40-80. I would like to thank Marios Anastasiadis, Alberto Esu, David Lewis and two anonymous readers for reading a draft of this essay and offering useful suggestions.

Appendix

ca. 360	[.]Ο[.]Ι [.]	stoich. 31
	<p>[Π]ασ[ιτέ]λης Ἐρμιονεύς τάδε ὁμολό[γησε] ἐργασόμενος ἐν τῷ ἱαροῦ τοῦ Ἀσκλα[πι]- οῦ· αἷ τί κα φαίνεται περὶ τὸν θεὸν ἀδι[κ]- 5 [ῶ]ν, δίκαν ὑφέξεν Ἐπιδουρίοις. Ἐμανύθ[η] [έ]ν τῷ οἰκίαι τῷ Πασιτέλευς τοῖς ἐπ[ι]- [σ]τάταις τοῦ ἔργου καὶ τοῖς ἱερομνάμο- σι καὶ τοῖς ἱαρεῦσι κόλλα καὶ κηρὸς ἱα- ρὸς καὶ ἐλέφας καὶ ἐξηνίχθη ἐκ τῆς οἰκ- 10 ἰας τῆς Πασιτέλευς ἐν Ἐρμιόνι· τοῖδε ἐ- ξήνικον ἐκ τῆς οἰκίας· Θιό[ξ]ενος Θιοπόμ- που, Παντόλμας Αἰνέτου, Ἐμπεδοκράτης [Ι]σολόχου, Ἴσυλλος Σωκράτους, Ἐπιδούρ- ιοι· τὸν δὲ ἐκπεμπόμενον ὑπὸ τῆς γυναι- 15 κὸς τῆς Λυκίσκου τοῦ υἱοῦ τοῦ Πασιτέλ- εὺς ἐπὶ ταῖς θύραις ἐν τῷ κόλπῳ τὴν θ- εράπαιναν ἐχφέρουσαν ἔλαβον ἐλέφαν- τα. Τοῖδε Ἐρμιονεῖς παρέγεντο ἐνσκλη- θέντες· Ἀριστόκριτος [Μ]εγακλέος, Λυγκ- 20 αεὺς Λύωνος, Δαμόκριτος [Ἐ]χεδάμου, Ἐρα- τοκλῆς Αντιλαΐδα, Ἀλικρανεῖας Ἀμφιά- νακτος, Ἀρχέας Δαμοκρίτου. Τάδε ἐδίκασ- σαν τοὶ Τρια[κ]άτιοι Ἐπιδουροῖ, ἀπὸ τοῦ βωμοῦ τὴν ψ[ᾶ]φον φέροντες τοῦ Ἀσκλαπι- 25 οῦ, διαδικα[σά]μενοι παρέντος Πασιτέλ- [ε]υς, π[ρο]σδε[χθέ]ντος καὶ ἐλεγχόμενου· ὄ- ρκον δ[ιδό]ναι το[ῖς] θεοῖς μὲν καὶ βωμοῖ- [ς] Ἐπιδουρίων ἐκείν[οις], οὓς κα αὐτὸς ἔλ- ηται. ἐγδεδρακὼς τὸ δικ[α]στήριον, ἐν ᾧ 30 οὐδ' ἔδω[κ]ε[ν] ἐγγύαν μηδ' ἔθηκεν πρυτανε- ῖα, φυγο[δ]ικήσας, τάδε ἐδικάσθη ὑπὸ τῶν Τριακατίων, ἀπὸ τοῦ βωμοῦ τὴν ψᾶφον φέ- ροντες τοῦ Ἀσ[κ]λαπιοῦ· ἐπιγράψαι ἔνο[χ]- ον [τοῦτ]ον τῆς κλοπᾶς τοῦ ἐλέφαντος [κα]-</p>	

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***Anagrapheis ton nomon* and the ‘Evolving Law Reform’ Against the Background of Athenian Legal Culture in Late 5th Century BCE**

Gli *Anagrapheis ton nomon* e la ‘riforma legislativa in evoluzione’ sullo sfondo della cultura giuridica ateniese alla fine del V secolo a.C.

Abstract

The paper aims to reconstruct the procedures of the scrutiny of the laws (a vital part of the ‘evolving law reform’) in late 5th century BCE Athens, approaching them from a broader legal-cultural perspective that highlights the *anagrapheis tōn nomōn*’s vital role in revealing features of Athenian legal culture. I argue that the *anagrapheis* were neither mere transcribers of the laws nor officials vested with extensive legislative authority. Instead, their significance lay in the logistical challenges of finding, identifying and collecting laws during the preparatory step, before submission to the *Ekklēsia* for final approval. The *Anagrapheis*’ works underscore not their individual relevance *per se*, but rather the broader complexity, flexibility, and importance of legal scrutiny itself for late 5th century Athens. Thus, contextualising their role within the ‘evolving law reform’ illuminates multiple aspects of Athenian legal culture – ranging from ways of legal thinking, to social attitudes toward legislation, as well as the materiality of laws and the logistical complexities of legal inquiries, such as the establishment of archives, or the ways of publishing laws. After briefly presenting the sources (II), and outlining Nicomachus’ trial (III), I analyse the evidence to highlight key features of legal scrutiny, focusing on the *anagrapheis*’ vital role (IV), and conclude each subsection by considering what this reveals about Athenian legal culture (IV). A broader examination of the legal scrutiny procedures, law reform complexities, and their connections to legal culture is presented in the final sections (V–VI).

L'articolo si propone di ricostruire le procedure di esame delle leggi (parte essenziale della “riforma legislativa in evoluzione”) nell’Atene della fine del V secolo, analizzandole in una prospettiva giuridico-culturale più ampia che evidenzi il ruolo fondamentale degli *anagrapheis tōn nomōn* nel rivelare le caratteristiche della cultura giuridica ateniese. Gli *anagrapheis* non erano né semplici trascrittori delle leggi né funzionari investiti di un’ampia autorità legislativa. La loro importanza risiede piuttosto nelle sfide logistiche di trovare, identificare e raccogliere le leggi durante la fase preparatoria, prima della presentazione all’*ekklēsia* per l’approvazione finale. Il lavoro degli *anagrapheis* non sottolinea la loro rilevanza individuale in sé, ma piuttosto la più ampia complessità, flessibilità e importanza dell’esame stesso delle leggi per l’Atene della fine del V secolo. La contestualizzazione del loro ruolo all’interno della “riforma legislativa in evoluzione” illumina quindi molteplici aspetti della cultura giuridica ateniese, che vanno dai modi di pensare il diritto agli atteggiamenti sociali nei confronti della legislazione, così come la materialità delle leggi e le complessità logistiche della ricerca dei testi giuridici, come la creazione di archivi o le modalità di pubblicazione delle leggi. Dopo aver presentato brevemente le fonti (II) e aver delineato il processo di Nicomaco (III), analizzo la documentazione per evidenziare le caratteristiche fondamentali del controllo giuridico, concentrandomi sul ruolo chiave degli *anagrapheis* (IV), e concludo ogni paragrafo considerando ciò che questo rivela sulla cultura giuridica ateniese (IV). Nelle sezioni finali (V-VI) viene presentato un esame più ampio delle procedure di controllo giuridico, delle complessità della riforma legislativa e delle loro connessioni con la cultura giuridica del tempo.

Keywords: Athenian law, law reform, scrutiny of the laws, legal culture, lawgiving, Solon, Solonian laws, Draco’s law, *anagrapheis tōn nomōn*, trial of Nicomachus, trial of Andocides

Parole chiave: diritto attico, riforma legislativa, esame delle leggi, cultura giuridica, legislazione, Solone, leggi soloniane, legge di Draconte, *anagrapheis tōn nomōn*, processo di Nicomaco, processo di Andocide

I. Introduction¹

¹ The article is funded by the National Science Centre, Poland under the project PRELUDIUM-21 entitled ‘The Intellectual Background of the Law Reform in Late Fifth-Century BCE Athens’, research grant no. 2022/45/N/HS3/02918. Numerous threads from this paper were debated in many academic forums. Especially, I thank the participants of the workshop at the University of Münster entitled *Consolidation of Law. Experiencing Ancient Documents* (29 Nov–2 Dec 2023) for their helpful comments. On various occasions, I also had the opportunity to discuss parts of this research with other scholars, namely Mirko Canevaro, Michele Faraguna, Claudio Simon Huayna Ávila, David Lewis, Eleni Volonaki, Marek Węcowski, Aleksander Wolicki, Oliver Zizzari – conversations with them were very stimulating for my ongoing research on this topic,

In the late 5th century,² the Athenians embarked on a landmark legal project to search, collect, scrutinise, revise, and republish all generally valid laws. A pivotal role in achieving this was performed by a specially constituted board of officials known as the *anagrapheis tōn nomōn*³, whose work on the so-called 'the scrutiny of the laws' spanned the periods 410-404 (interrupted by the Thirty) and 403-399 (resumed after the restoration of democracy)⁴. Turbulent dynamics of the late 5th century, specifically the Peloponnesian War and two oligarchic coups, repeatedly reshaped the scope and direction of this legal effort.⁵ The project thus evolved in response to shifting social, political, and institutional needs, as well as the logistical challenges of conducting legal scrutiny. The work of the *anagrapheis* was a vital part of the deeper legal developments of this period – 'evolving law reform', with its premises, working methods, and the legal-institutional framework that adopted the changing factors in late 5th century Athens.

So far, scholars have examined in detail the role of the *anagrapheis* in the scrutiny of the laws, beginning with the thesis of Paul Gantzer.⁶ The studies

and I am grateful for them. Additionally, I would like to thank Jonathan Griffiths for proofreading the very first version of the text. Last but not least, I owe a particular debt of gratitude to Jakub Filonik, Janek Kucharski, Maria Nowak, Mariana Franco San Román, and Jakub Urbanik, as well as anonymous Reviewers, for helpfully revising and commenting on the draft of this paper. All remaining errors and shortcomings are mine and mine only.

² All dates are BCE unless otherwise noted.

³ Throughout this paper, I will simply refer to them as *anagrapheis* (sg. *anagrapheus*). Moreover, the terms *Boulē* and the 'Council (of Five Hundred)', as well as *Ekklēsia* and the 'Assembly', are used interchangeably.

⁴ Scholars differ in how they describe the outcome of the *anagrapheis*' work. The most common designations refer to a 'law revision' (Gantzer 1894; Oliver 1935; MacDowell 1962; Clinton 1982; Ostwald 1986; Natalicchio 1990; Sickinger 1999; Pébarthe 2006; Harris 2020); others prefer terminology closer to 'code' or 'codification' (Harrison 1955; Hansen 1990; Rhodes 1991); others: Robertson 1990 ('review and publication'), Volonaki 2001 ('the re-publication of Athenian laws'), Shear 2011 (the most often: 'reorganisation of the laws'). However, the 'scrutiny of the laws' best reflects the meaning of the verb *dokimazein* (Andoc. 1.82), meaning 'to test' or 'to scrutinise', and is directly tied to the revival of the project after 403 (thus, Carawan 2013; Joyce 2022; cf. Harris-Canevaro 2023, 17-18 – 'the *dokimasia* of the laws'). The term 'law reform' is also used occasionally to emphasise the broader scope of legal developments in this period, e.g., Todd 1996, 120-131; Canevaro 2015, 33-46.

⁵ For the crisis as a determinant of constitutional-legal changes in the late 5th century, see Carugati 2019, 38-74.

⁶ Gantzer 1894.

include the sacred calendar,⁷ the republication of Draco's law on homicide⁸, or Nicomachus' trial as the sole *anagrapheus* known by name.⁹ Scholars have raised questions about the procedural aspects of the legal scrutiny, the chronology and scope of the *anagrapheis*' work, the format and location(s) of the published laws, and the impact of the oligarchic coups¹⁰ – mainly focusing on 410-399. Despite recognising the two 'terms' of the *anagrapheis*' activity (410-404, 403-399)¹¹ and, thus, the 'stages' of the scrutiny of the laws, their work has rather been seen as a coherent whole, which has often led scholars to a 'stability trap', assuming that the range of tasks and procedures must have remained relatively similar throughout the entire period.¹² From a broader, though rarer, adopted perspective, scholars have also addressed questions concerning the origins of the law reform, the role of the *anagrapheis*, its effects, and its significance for the development of the Athenian legal order.¹³ Yet most studies, with a few exceptions, have interpreted the remit of the *anagrapheis* as purely procedural, reducing their role to that of mere scribes.¹⁴

⁷ Dow 1953-1957; Dow 1960; Dow 1961; Lambert 2002; Fingarette 1971; Gawlinski 2007 (publication of a new fragment – Agora I 7577); see *CGRN* 45 (ed. by J.-M. Carbon).

⁸ Stroud 1968; Gallia 2004; Pepe 2012, 7-78; Schmitz 2023, esp. 88-110 (with most recent bibliography).

⁹ See Carawan 2010; cf. recently Oranges 2018 and Davis 2024 (yet, also with emphasis on the sacred calendar).

¹⁰ On the latter, see the comprehensive approach set out in Shear 2011.

¹¹ The chronology of their terms is not obvious; see Rhodes 1991, 88-89; Todd 1996, 103 n. 5; cf. Dow 1960, 271-272, who argues for 411/0-404/3 and 403/2-400/399, and for the trial after terminating Nicomachus' office in 399/398; Ostwald 1986, 407 n. 249 opts for 411/410-405/404. See also n. 35 below.

¹² Some scholars have observed these factors but have not always elaborated on them; see Rhodes 1991, 91; cf. Harrison 1955, 30; MacDowell 1978, 46-47; Clinton 1982, 28; Robertson 1990, 53; Volonaki 2001, 149 n. 24; Shear 2011, 79-85; Oranges 2018, 59 n. 34.

¹³ Todd 1996, 120-131; cf. Sickinger 1999, 94-105 (through the prism of the archive); Canevaro 2015, 1-43 (who discusses the tensions between the prevailing ideology of legislation that mistrusted legal change, on the one hand, and the pragmatic need for legal change, on the other hand, or what he calls 'tacit legal change'; on *anagrapheis*, *ibid.* 33-37); Dreher 2022 (considering the model of repealing laws); also Carawan 2013, 232-250, *contra* Joyce 2022, 98-107 (in the context of the amnesty, the latter interprets the pledge of μη μνησικακεῖν to mean that both sides agreed not to bring cases about the past to court; the former perceived it as only a promise to abide by the terms of the agreements concluded in 403 and later).

¹⁴ See Robertson 1990, 45; Rhodes 1991, 92-93; Natalicchio 1990, 65; Oranges 2018, 67-76; Harris 2020, 155. On the broader remit of the *anagrapheis*, see Dow 1963, 38;

My primary aim, by contrast, is to reconstruct the procedures of the scrutiny of the laws (as a vital part of the 'evolving law reform'), approaching them from a broader legal-cultural perspective that gives more importance to the *anagrapheis*' role in describing certain features of Athenian 'legal culture'. I argue that the *anagrapheis* were neither mere transcribers of the laws nor officials vested with extensive legislative authority. Instead, their significance lay in the logistical challenges of finding, identifying, collecting and drafting laws during the preparatory stage, before submission to the *Ekklēsia* for final approval. The *Anagrapheis*' works underscore not their individual relevance *per se*, but rather the broader complexity, flexibility, and importance of legal scrutiny itself for late 5th century Athens. Thus, contextualising their role within the 'evolving law reform' offers valuable insight into multiple elements of Athenian legal culture – ranging from ways of legal thinking, to social attitudes toward legislation, ideology of legislation¹⁵ as well as materiality of laws and the logistical complexities of legal inquiries, such as the establishment of archives, the use of media for law or the ways of publishing laws.

For 'legal culture',¹⁶ I adopt Lawrence M. Friedman's definition: *those parts of general culture - customs, opinion, ways of doing and thinking - that bend social forces toward or away from the law and in particular ways.*¹⁷ I also follow Roger Cotterrell, who perceives legal culture as *clusters of social phenomena: patterns of thought and belief, patterns of action or interaction, and characteristic institutions.*¹⁸ This paper does not seek to impose a theoretical framework on the ancient evidence, but rather to explore whether such a perspective reveals patterns embedded in Athenian legal culture – particularly the relationship between *ways of doing* and *ways of thinking*. After briefly presenting the sources (II), and outlining Nicomachus' trial (III), I analyse the evidence to highlight key features of legal scrutiny, focusing on the *ana-*

Stroud 1968, 25; Todd 1996, 108; Volonaki 1998; Volonaki 2001, 144-145.

¹⁵ I borrow the notion of the 'ideology of legislation' from Canevaro 2018 (also used in Canevaro 2015, 7).

¹⁶ Though each definition of legal culture has its limits, the concept is seldom applied explicitly in studies of ancient law, with some exceptions: Hawke 2011, 4-21; Etxabe 2019, 1-19; Stolfi 2020. Cf. also recent work on Greek law and institutions in the New Institutionalism approach, e.g. Joyce 2022; Esu 2024.

¹⁷ Friedman 1975, 15.

¹⁸ See Cotterrell 2006, 88; R. Cotterrell is, however, critical towards L. Friedman's concepts (see *ibid.* 83-96); in particular, he stresses the vagueness of the notion and its components, including the definition of 'culture'.

grapheis' vital role (IV), and conclude each subsection by considering what this reveals about Athenian legal culture (IV). A broader examination of the legal scrutiny procedures, law reform complexities, and their connections to legal culture is presented in the final sections (V–VI).

II. Sources for the *anagrapheis tōn nomōn* and 'evolving law reform'

Lysias' *Against Nicomachus*,¹⁹ Andocides' *On the Mysteries*,²⁰ and epigraphic evidence represent the primary sources for the 'evolving law reform'. The only certain result of the *anagrapheis*' work is a fragmentary inscription dated to 409/8 (*IG* I³ 104) – the decree with Draco's law on homicide.²¹ The majority of scholars also link their work with other inscriptions dating to 410-399 (also very fragmentary), such as the law on the *Boulē* (*IG* I³ 105)²² dated to ca. 409, and intensely debatable laws on the sacred calendar, which are mostly opisthographic.²³ Based on their content and, above all, the type of alphabet, the two Faces are dated as follows²⁴: Face A, a text engraved in the Ionic alphabet, is dated to the II Stage of the *anagrapheis*: 404/3-400/399 (here we have one part of the sacred calendar *SEG* 52.48A), while Face B, which is written in the Attic alphabet, is thus dated to the I

¹⁹ I follow the *OCT*'s edition of Carey 2007; translations are taken from Todd 2000. I used the commentaries: Edwards 1999 and Volonaki 1998 (I am grateful to Eleni Volonaki for granting me access to her PhD thesis).

²⁰ I follow the *OCT*'s edition: Dilts-Murphy 2018 and *On the Mysteries*' commentary: MacDowell 1962 (translation by D.M. MacDowell in Gagarin-MacDowell 1998).

²¹ Stroud 1968, cf. *OR* 183A; Schmitz 2023 (Sol F2), and the latest edition of the text in Harris-Canevaro 2023.

²² See *OR* 183B, found on the Acropolis (though J. Shear argues it was a 'walking inscription' originally displayed in the Agora: Shear 2011, 96; *contra* Lewis 1967, 132); cf. Boffo-Faraguna 2021, 108-113.

²³ Linking these inscriptions with the *anagrapheis* has been widely accepted, as in J.-M. Carbon's edition of the sacred calendar – *CGRN* 45; cf. Lambert 2002; *AIO* 1185, *AIO* 1189; also Dow 1960; Rhodes 1991, 89-90; Robertson 1990. M. Canevaro initially supported such an attribution (Canevaro 2015, 37-38), but later, with E.M. Harris, expressed greater caution (Canevaro-Harris 2016-2017, 43-45; cf. Joyce 2022, 105-107). Accepting *IG* I³ 105 and the opisthographic inscriptions as products of the *anagrapheis* does not contradict M. Canevaro and E.M. Harris's view that Teisamenus' decree is inauthentic, and that these inscriptions were not created by the procedure it describes or formed part of a 'wall' – a position I share. I return to this issue when discussing the laws' location (below, 4.9).

²⁴ Lambert 2002, 355; cf. Shear 2011, 79-89.

Stage of the *anagrapheis*: 411/0-404/3 (in spite of the other part of the sacred calendar: *SEG* 52.48B, this Face also contains a law on trierarchy: *IG* I³ 236a; there is also a separate inscription in the Attic alphabet with a kind of tax law – *IG* I³ 237)²⁵. Although the unpreserved prescripts cannot certainly prove that the *anagrapheis* produced these inscriptions (as *IG* I³ 104 does), their content, dates, and links with other sources have convincingly led the vast majority of scholars to such a conclusion.²⁶

The main challenge is the inconsistencies in interpreting these sources, especially the decrees incorporated in the MS of Andocides. Until roughly the last decade,²⁷ studies barely addressed the doubts on the (in)authenticity of the decrees cited in MSS. The documents in *On the Mysteries* are especially relevant in this paper.²⁸ Mirko Canevaro and Edward M. Harris have argued that Teisamenus' decree (Andoc. 1.83-84) is not a genuine document but a later forgery. In their view, many such fabrications may have originated in schools as rhetorical exercises, possibly during the Second Sophistic²⁹. Yet, Mogens H. Hansen and Edwin Carawan argued for their genuineness³⁰. Indeed, several inconsistencies can be explained by elim-

²⁵ Though found on the Acropolis, these are linked to the legal scrutiny, as the same hand is identified as in *IG* I³ 236a (Lambert 2002, 355 n. 12, 360, 391, after D. Lewis); both transl. by S. Lambert (*AIO*).

²⁶ For a comprehensive epigraphic and archaeological perspective, considering all of the inscriptions mentioned above as *anagrapheis*' work, see Shear 2011, 79-97. For the sacred calendar, see above n. 23. For *IG* I³ 105, this is acknowledged in: *OR* 183B, *AIO* (s.v. 'Laws about the Council of 500', n. 1); Rhodes 1991, 89-90; Robertson 1990, 56; Boffo-Faraguna 2021, 108-109 with n. 32 (the stele with *IG* I³ 105 seems to have a similar size to *IG* I³ 104).

²⁷ On the history of this research, originating in the 19th century and based on documents in the *Corpus Demosthenicum*, see Canevaro 2013a, 3-7 (incl. a chapter by E.M. Harris; on the stichometric method, *ibid.* 10-27). As the decrees in *On the Mysteries* are not stichometrically marked, see criteria for inauthenticity in Canevaro-Harris 2012, 98-100; cf. Scafuro 2016, 75 (the review of Canevaro 2013a) on general non-stichometric methods.

²⁸ Canevaro-Harris 2012 analyse the decrees of Patrocleides (Andoc. 1.77-79), Demophantus (Andoc. 1.96-98), and minor legal citations (e.g. Andoc. 1.85, 87), all deemed inauthentic. Sommerstein 2014 agrees on Patrocleides, Teisamenus, and the minor laws, but defends Demophantus (*contra* Harris 2015).

²⁹ For detailed analysis, see Canevaro-Harris 2012, 110-116; Canevaro 2013a, 337-338.

³⁰ However, there has recently been greater acceptance of M. Canevaro and E.M. Harris's stand, e.g., Simonton 2020; Boffo-Faraguna 2021, 152, 208; Joyce 2022; see also Canevaro-Harris 2016-2017, 10 n. 3 mentioning others supporting their point, such as N. Luraghi, M. Novotny, L.F.T. D'Ajello, S. Halliwell, M. Könczöl, and C. Pébarthe; also Dilts-Murphy 2018, *ad loc* and Dreher 2022, 23. On authenticity of

inating this decree from the analysis.³¹ Ultimately, a clear stance remains indispensable in this debate. Given the above, it seems methodologically safer to avoid relying on the decrees in Andocides' *On the Mysteries*.

III. The trial of Nicomachus – a glimpse into the nature of the *anagrapheis*' office

The turn of the 5th and 4th centuries saw an increase in well-known trials with an evident political motivation.³² Despite the amnesty covenant, which aimed at preventing further *staseis*, the desire for revenge against political opponents was still immense in 5th century Athens. As a result, several famous trials, such as that of Socrates (399)³³, Agoratus (399)³⁴, Nicomachus (399)³⁵, and Andocides (likely 400),³⁶ occurred at the turn of the century. Despite the legal angle, our sources on the law reform should also be read against this political backdrop, as they reflect the nature of emotions of the time. This is particularly true of the charges against Nicomachus. Even if building a general view of *anagrapheis* based only on this man's activities could be misleading, his case gives us some insights into the 'character of the office' as a whole.

the decrees: Hansen 2016; Hansen 2017 (accepts the *ep' andri* law in Andoc. 1.87); *contra* Canevaro-Harris 2016-2017; Carawan 2017 (decrees derive from a 4th century compiler, Craterus); *contra* Harris 2021 (rejects this since most of the documents, which Craterus was working on, date 480-410). M.H. Hansen's view acknowledged by Oranges 2018, 61 n. 39; Lasagni 2018, 241-242; Schmitz 2023, 8-10.

³¹ Most scholars discussed it before (!) the debate on (in)authenticity and sought to explicate the inconsistencies, mostly by arguing in favour of the superior reliability of the decree; see Harrison 1955, 30-33; MacDowell 1962, 194-199; Sickinger 1999, 99-100; Rhodes 1991, 95-100; Robertson 1990, 62-63; Volonaki 2001, 159-163 n. 48. For explanations which reject the decrees, see Joyce 2022, 124; cf. also Dreher 2022, 23, n. 51.

³² On the period's political agenda, see Todd 1996, 115-120; Joyce 2022, 129-142; Carawan 2013, 115-138. Despite political enmity, Davis 2024, 283 stresses a third possible motive against Nicomachus: the loss of benefits and status (families involved in sacrificial offices might lose emoluments if sacrifices were reduced).

³³ See Joyce 2022, 170-189, with the most recent bibliography.

³⁴ See *Against Agoratus* (Lys. 13.12 vis-à-vis Cleophon's case); Todd 1996, 117-119.

³⁵ As per the date of the speech, either 400/399 or 399/8 is accepted; it depends on the interpretation of Lys. 30.2, 4. via the peculiarities of the Athenian calendar and their implications for chronology, either inclusively or exclusively; see Todd 1996, 103 n. 5, cf. Dow 1960, 271-273; Ostwald 1986, 407; Rhodes 1991, 88-89.

³⁶ MacDowell 1962, 11-15 (who dates the trial to 400, which means that it would predate the trial of Nicomachus).

Although the title of the speech in the manuscript (κατὰ Νικομάχου γραμματέως εὐθυνῶν κατηγορία)³⁷ points to a prosecution at the audit of magistrates (*euthynai*), the exact charge against Nicomachus and the type of the procedure are not commonly agreed³⁸. It has been suggested that it might have been an *eisangelia* (as described in *Ath. Pol.* 45.2: the so-called 'eisangelia to the Council', to use Mogens H. Hansen's classification).³⁹ The *euthynai*⁴⁰ seems, however, a preferable interpretation; assuming that the procedure of the private accusation took place during the audit of *euthynoi* (as *Ath. Pol.* 48.4-5), we can be rather sure that Nicomachus must have undergone earlier, at least, the financial audit before the *logistai*. Hence, the prosecutor brought vague charges (various allegations are given in *Lys.* 30.2-5, 9-15, 28) without evoking in the text of the speech any particular law which Nicomachus would have broken⁴¹. Unfortunately, we do not know the result of the trial.⁴²

The evidence suggests that Nicomachus underwent *euthynai* at some

³⁷ Later summaries and titles of speeches often relied on the speech content, leading to errors – such as calling Nicomachus a *grammateus*; see Rhodes 1991, 89 n. 14; cf. Todd 1996, 104 n. 6; Oranges 2018, 60.

³⁸ See Carawan 2010, 85-87 n. 41 and 44 (who suggests a *graphē paranomōn*; the prosecutor would initiate proceedings by *hypomosia*, before the Council or the Assembly).

³⁹ See Hansen 1975, 23, 116-117; Edwards 1999, 155-159. Todd 1996, 104-106, leans toward *eisangelia*, although he acknowledges uncertainty; he also considers *graphē alogiou* (cf. Oranges 2018, 58 n. 29). 'Eisangelia to the Council' allowed impeachment for official misconduct (*Lys.* 30.7: ἐν τῇ βουλῇ), followed by referral to a court (*Lys.* 30.1: ὃ ἄνδρες δικασταί); on the explanation of the *Boulē* in *Lys.* 30.7, see Harris-Esu 2021, 87; cf. Oranges 2018, 56. Recently on *eisangelia*, see Harris-Esu 2021 (with reinterpretation of Hansen 1975).

⁴⁰ On Athenian *euthynai*, see Efstathiou 2007; cf. Oranges 2021. The procedure comprised two stages: first, a financial audit by ten *logistai*, with possible charges (*Ath. Pol.* 54.2); Oranges 2018, 55-56, revisiting Robertson 1990, 71-72, argues that Nicomachus was accused of *adikion* (maladministration) at this point. Second, *euthynoi* examined broader misconduct (*Ath. Pol.* 48.4-5), and any citizen could bring charges within 30 days. Written accusations were passed from *euthynoi* to *thesmothetai* and then to a relevant tribunal. Harris-Esu 2021, 79-80 (*contra* Hansen 1975, 116-117) locate Nicomachus' charge here, based on *Lys.* 30.5.

⁴¹ This does not mean the specific law underpinning the accuser's case was not specified at the trial's indictment, as this was a central principle of Athenian law (see, e.g. Harris 2013b). Yet, the text of the speech reveals that the accuser did not request the reading of any particular law, summoning only witnesses (*Lys.* 30.20).

⁴² Some scholars have tried to prove that Nicomachus failed the trial, see Robertson 1990, 75; also more recently Carawan 2010; *contra* Davis 2024, 274, 284-285.

point during his office, either during Stage I or at the end of his term (Stage II), therefore exempted from annual control (Lys. 30.3, 5, 29).⁴³ One may assume that, since the *anagrapheis* held the status of *archai*, they were subject to administrative control, and that *euthynai* might have been required upon the completion of the scrutiny of the laws. This, however, did not occur quickly, due to political interruptions and other challenges the *anagrapheis* may have encountered.⁴⁴ Nicomachus held his office between 410 and 404, and then, after the Thirty, he was reappointed under the restored democracy in 403 until 399 (see more below). Indeed, the legally prolonged term of Nicomachus suggests that his work met with general approval in democratic Athens. The office of the *anagrapheis* was unusual and almost without precedent for such a complex task⁴⁵, which may explain why the Athenians introduced exceptional provisions for this office, including *euthynai* (cf. Lys. 30.29).⁴⁶

The oligarchic associations of the prosecutor are rather apparent (cf. Lys. 30.7) and recognised by vast majority of the scholars. Although he charged Nicomachus with such political leanings, the situation was probably *vice versa*, as pointed out convincingly by Sterling Dow for the first time: Nicomachus must have been associated with the democrats, while the accuser belonged to the oligarchs, which is mainly proved by the fact that he was re-established as *anagrapheus* by the resurrected democracy

⁴³ Lys. 30.3: ‘The city had been reduced to utter disaster before he gave up his office and agreed to submit accounts’ (ἀλλὰ πρότερον ἢ πόλις εἰς τὰς μεγίστας συμφορὰς κατέστη, πρὶν τοῦτον ἀπαλλαγῆναι τῆς ἀρχῆς καὶ τῶν πεπραγμένων εὐθύνας ὑποσχεῖν). Interpretations vary: Stroud 1968, 25 n. 29, and Ostwald 1986, 122 argue that Nicomachus was excused from annual *euthynai*; others suggest he underwent it during Stage I – see MacDowell 1962, 197; Clinton 1982, 29; Todd 1996, 109; Volonaki 2001, 151; Shear 2011, 74; Blok 2017, 82; Oranges 2018, 58-60; Esu-Harris 2021, 86-87; Davis 2024, 275. *Contra* Rhodes 1991, 89 and n. 12 (only final *euthynai* in 399); Carawan 2010, 82 (he was exempt as he was not a proper *archōn* but an employee).

⁴⁴ Cf. Rhodes 1991, 89.

⁴⁵ On the possible relevance of the *anagrapheis* or *syngrapheis* mentioned during the first oligarchic coup (*Ath. Pol.* 29.2, 30.1-2, using only the participle τοῦ ἀναγράφοντος) for understanding the *anagrapheis* of 410–399, see Volonaki 2001, 141-144. M. Ostwald (Ostwald 1986, 407-408, 414-416) argued that the *anagrapheis* continued drafting constitutions until 404, guided by *syngrapheis* possibly appointed during the coup (cf. *Ath. Pol.* 29.2). M. Ostwald’s view is not widely accepted, see Volonaki 2001, 143-144; Rhodes 1991, 88-89; Robertson 1990, 52 n. 25; Sickinger 1999, 228 n. 23.

⁴⁶ Perhaps, the *Ekklēsia* was even involved in the renewal of this office – see Efstathiou 2007, 127 n. 47.

in 403.⁴⁷ Moreover, during the rule of the Thirty, he did not even reside in the city, a fact the accuser could not refute (Lys. 30.15). Supporting his allegations, the accuser referred to the case of Cleophon (opponent of the oligarchs⁴⁸), which concluded with the death penalty in ca. 405 (Lys. 30.9-14), in which Nicomachus was blamed as he had 'presented' (*apodeiknynai*: Lys. 30.11) the appropriate law. I read this, however, as a slanderous interpretation of his activity, considering that he was doing his tasks as required.⁴⁹

Regarding further political innuendos, in Lys. 30.11, the accuser uses the verb *systasiazein*, which suggests that he was part of some political faction (*stasis*). Furthermore, a close reading of the speech shows that Nicomachus' accuser was not acting alone in the trial (Lys. 30.1, 34-35), but the defendant may also have had his *synēgoroi*.⁵⁰ All of the above supports the view that significant strife existed among various political groups, with tensions dating back to the late 5th century. Nicomachus, as a prominent figure likely associated with democratic sympathies, appears to have been involved in these dynamics as well.

Although Nicomachus' general work was approved (re-established at the office in 403), there is even more evidence that presents him as a contentious figure. Assuming that the same Nicomachus is meant,⁵¹ one may find traces of such a controversy in Aristophanes' *Frogs*, performed at the Lenaia in 405. In one of the scenes, Hades advises some Athenian political

⁴⁷ Dow 1960, 291; cf. Todd 1996, 115-117. Carawan 2010, 89-90 (rejecting the emendation in Lys. 30.8 to 'Four Hundred and Five Thousand') argues the prosecutor was one of the Three Hundred, linked to the Thirty (cf. *Ath. Pol.* 35.1), and suggests opposition came from aristocrats returning from Eleusis in 401/0; *contra* Joyce 2022, 101-102; accepted by Davis 2024, 282 n. 43, 284.

⁴⁸ On Cleophon, see further Baldwin 1974.

⁴⁹ I return to this passage below in 4.1.

⁵⁰ Suggested already by F. Blass and more recently accepted by Rubinstein 2000, 38; more sceptical Todd 1996, 114. The speech was likely a *deuterologia*, elaborating key arguments and drawing the judges' attention to issues warranting further emphasis; cf. Oranges 2018, 51-52 n. 6 and 54-55 n. 8-9. Moreover, it remains uncertain whether the Nicomachus named in a *defixio* from the Kerameikos (dated ca. 400), listed alongside other prominent individuals involved in a trial, is to be identified with the *anagrapheus* from Lys. 30. Some scholars support this association (see Gager 1992, 127-129 no. 41; cf. Hansen (H.) 1990, 2-4; Costabile 2000, 75-84; Schmitz 2023, 5 n. 11).

⁵¹ See PAA 716230; cf. the prosopographical overview of the name Nicomachus, Hansen (H.) 1990, 1-4. Even if without doubt, generally, this identification is accepted by most scholars.

figures, including Cleophon and Nicomachus, to commit suicide (Ar. *Ran.* 1500-1507).⁵² As Annabella Oranges⁵³ observed, Aristophanes condemns the presence of many *hypogrammateis* in the city (cf. *Lys.* 30.28), who are ‘accused’ by him of constantly deceiving the people in another scene, preceding the latter (Ar. *Ran.* 1083-1086). It is tempting to include Nicomachus and other *anagrapheis* in this collective portrait. However, one should still remember the character of such a genre: Aristophanes is particularly keen on mocking democratic politicians. So even if we can detect social criticism towards officials such as *anagrapheis*, it is intriguing that the (likely oligarchic-oriented) accuser seems angry at the judges (who broadly represent the Athenian *dēmos*) because they had appointed via election (not sortition)⁵⁴ such a bad man as Nicomachus to serve an office (*Lys.* 30.28-29). In this passage, he is mentioned alongside Teisamenus, son of Mechanion, a prominent demagogue of the late 5th and early 4th centuries, as recently argued by Matt Simonton⁵⁵. Given all the above, Nicomachus emerges not merely as an anonymous citizen performing clerical duties. Instead, he was a politically and socially recognised figure, which likely facilitated his democratic election as an *anagrapheus*.

As for Nicomachus’ social background, *Lys.* 30.2 (cf. 30.5-6, 27, 29) describes him as the son of a *dēmosios* (state slave) – a common rhetorical topos aimed at undermining an adversary’s citizenship. Yet his role as a liti-

⁵² Myrmex is mentioned alongside Cleophon and Nicomachus (though Myrmex is otherwise unknown); cf. Baldwin 1974, 37. Notably, Aristophanes calls Nicomachus and Myrmex *poristai*, likely referring to a financial office linked to provisioning, although the details remain unclear (cf. Antiph. 6.49; see Simonton 2020, 15). If accurate, this would imply Nicomachus held two offices simultaneously, which would have been very unusual.

⁵³ Oranges 2018, 77 n. 90.

⁵⁴ *Lys.* 30.29: ‘And finally, you have chosen Nicomachus to write up the ancestral [regulations] (...)’: καὶ τὸ τελευταῖον Νικόμαχον εἴλεσθε ἀναγράφειν τὰ πάτρια (...). J. Blok notes that αἰρεῖν can generally mean ‘to appoint’ or ‘select’ (esp. when method unspecified); see Malkin-Blok 2024, 383 n. 330. Yet J. Blok’s doubts, based on Arist. *Pol.* 4.1300a8-b5, overlook that Aristotle distinguishes αἰρεῖν (to select via election) from κληροῦν (to select via sortition). In *Lys.* 30.28-29, the accuser blames the Athenians for knowingly electing Nicomachus (even contrasting him with lawgivers like Solon). Similarly, Andoc. 1.82 contrasts κληροῦν for the *Boulē* with αἰρεῖν for *nomothetai* (cf. *Ath. Pol.* 30.1: board of 100 elected – αἰρεῖν – by the Five Thousand). I am grateful to Claudio Simon Huayna Ávila for the remarks on this point.

⁵⁵ See Simonton 2020, 1-10. On Teisamenus, see more below n. 60-61.

gant confirms he was a citizen by the time of the trial. While many *dēmosioi* held administrative and archival positions in Classical Athens (*Ath. Pol.* 47.5, 48.1), recent scholarship shows that free citizens also performed such roles.⁵⁶ Moreover, in both Greece and Rome, we can identify families that appear to have inherited specialised knowledge in particular professions (e.g. heralds)⁵⁷. The election of *anagrapheis* like Nicomachus (*Lys.* 30.28-29) suggests that they were expected to possess not only standard clerical skills but also concrete experience and expertise necessary for carrying out their duties.

To sum up, the *anagrapheis* were almost unprecedented in Athens for such a complex endeavour. The new project of scrutinising the laws, with its exceptional legal challenges, required special rules for those officials (like those for their *euthynai*). The *anagrapheis* were elected, so they featured the necessary skills and experience (not just clerical). They were likely to be people closely associated with democracy (as the 'law reform' was a democratic project), recognisable among the Athenian public, and therefore potentially controversial; some, such as Nicomachus, were also involved in the current political network. It makes Nicomachus, and likely other *anagrapheis*, not random citizens, but meaningful public figures that belong to one of the aspiring groups of 'secretarial experts' that Aristophanes sharply satirised at the time.

IV. The *anagrapheis* and the Athenian legal culture

It has often been observed that there was a paramount shift in 404/3 when the Thirty interrupted the work of the *anagrapheis* and overthrew the Athenian democracy; this is why scholarship frequently discusses the first (410-404) and the second (403-399) 'terms' of the office separately, by dividing the period of the scrutiny of the laws. This is accurate, but this division was not premeditated. Rather, it was a forceful intervention

⁵⁶ See Volonaki 1998 *ad Lys.* 30.2. On Nicomachus within the context of state slaves, see Ismard 2015, 109-110 and the critical review of this book by Hansen 2019a, 342-343 (who treats the discussed passages on Nicomachus' slave origins only as slanders); cf. Pébarthe 2015 (also review). I would like to thank one of the Reviewers for rethinking this aspect.

⁵⁷ In Athens, we also have the *hyperetai*, the assistants to the officials (for example, some military personnel). In the mid-4th century, the *hyperetēs* was (also) a minor council official (see more Abbott 2012, 83-84). I am grateful to Aleksander Wolicki for bringing this context to my attention.

in the work of the *anagrapheis* (hence, perhaps the terms ‘stages’ describe it better).

The accuser claimed that Nicomachus had prolonged the stages of the office: in Stage I for six years, which was supposed to be finished in four months (Lys. 30.2), and in Stage II for four years, instead of thirty days (Lys. 30.4). This may indicate that the public expected a quick and efficient completion of the project, yet the reality turned out to be quite different. I will not focus on a division of the *anagrapheis*’ work into Stages I and II. Instead, I will highlight the features of these procedures from a synchronic perspective and potentially underline their diachronic (!) facets from this approach. Ultimately, after 404, the project evolved into a law reform, so I will address this juncture separately, focusing on a vital feature of this procedure – flexibility.

Most scholars agree that Nicomachus held the office of *anagrapheus tōn nomōn*.⁵⁸ Addressing him with *nomothetēs* (Lys. 30.2, 27) or *hypogrammateus* (Lys. 30.27)⁵⁹ was likely ironic or simply derogatory.⁶⁰ Moreover, *IG I³ 104* informs us that the office was collegial, so Nicomachus did not operate alone, even though the accuser intends to give such an impression. We do not know, however, the number of *anagrapheis*.⁶¹

⁵⁸ Lys. 30.2, 25 against *IG I³ 104*, ll. 5-6; moreover, the prosecutor repeatedly uses the verb *anagraphein*: Lys. 30.2, 4, 19, 20, 21, 25, 29.

⁵⁹ An office of *hypogrammateus* is attested for the end of the 5th century (*IG I³ 476*, l. 268); see more in *OR 181B*.

⁶⁰ Thus Harrison 1955, 29; Rhodes 1991, 92; Robertson 1990, 52; Todd 1996, 104; Volonaki 2001, 145; Pébarthe 2006, 135 n. 147; Schmitz 2023, 6 *contra* Hansen 1990, 68-69, also Oranges 2018, 61-82, who suggests that Nicomachus was *nomothetēs* after the overthrow of the Thirty in 403. This assumption relies on, among other sources, Lys. 30.28, where a certain Teisamenus appears (see note below), and the recognition of the decree of Teisamenus as authentic. Indeed, all these terms appeared in late 5th century Athens in legal and administrative contexts; see Volonaki 2001, 141-146; cf. Stroud 1968, 20-28.

⁶¹ There have been attempts to identify the *anagrapheis* with the activity of the ‘Twenty’ mentioned by Andocides (Andoc. 1.82), the *scholion* to Aeschin. 1.39 (it is quoted below, n. 91) and in Poll. 8.112; see Stroud 1968, 25 n. 24. In Lys. 30.28, the accuser rhetorically insults a certain Teisamenus, son of Mechanion, who would perform the same tasks as the *hypogrammateis* (trying to act as *nomothetēs*). Therefore, some scholars have tried to identify this figure with Teisamenus from the alleged decree in the speech of Andocides; Edwards 1999, 172; cf. more recently Oranges 2018, 77 n. 90; cf. MacDowell 1962, 198; Volonaki 2001, 158; see also Hansen (H.) 1990, 4-6. From the other perspective, recently M. Simonton argued that we can infer that Teisamenus would be rather *anagrapheus* like Nicomachus, see Simonton 2020, 4-5.

that the *anagrapheis*' role was simply clerical, involving the collection and copying of laws for the new archive in the Metroon, dating back to the late 5th century.⁶⁵ As Eleni Volonaki highlights⁶⁶, the verb *anagraphein* in various sources may denote any of these activities. However, she concludes that the remit of the *anagrapheis* was not only secretarial but required a sort of discretionary power (being comprised, in the first instance, of tracing and selecting all binding laws)⁶⁷. I will elaborate on the importance of the preparatory step in the legal scrutiny, focusing on what the tasks of 'searching for' such laws may have precisely entailed.

4.1. The preliminary step of legal scrutiny: significance and logistical challenges

IG I³ 104, ll. 6-7 attests that the *anagrapheis* (plural form!) took over (*paralambanein*) Draco's law from the *archōn basileus* and inscribed it (*anagraphein*) in a stone in front of the Royal Stoa. However, they did not do it alone; the secretary of the Council was also accountable since the *grammateis* were almost always entrusted with the publication of the law (among others, they delegated such a task to an appropriate stonemason).⁶⁸ Interestingly, IG I³ 118 (OR 185; dated 408/407) provides another example of an

⁶⁵ On the history of the Metroon, see Harrison 1955, 27-29 (dating to ca. 403); cf. Boegehold 1972, 30 (who proposes 409); cf. Sickinger 1999, 105-113 (who does not rule out a link between the construction of the Metroon and the legal scrutiny and the *anagrapheis*' activities); Pébarthe 2006, 147-171; and recently Boffo-Faraguna 2021, 207-209.

⁶⁶ See Volonaki 2001, 141; cf. MacDowell 1978, 46; Clinton 1982, 30; Rhodes 1991, 91; Pébarthe 2006; also *LSJ* s.v. ἀναγράφω.

⁶⁷ Volonaki 2001, 164-165. The broader remit of *anagrapheis* is also noticed by Dow 1963, 38; Stroud 1968, 25; Todd 1996, 108 (the title of the paper is meaningful: '...the Fate of the Expert in Athenian Law').

⁶⁸ On the secretaries, see *Ath. Pol.* 54.3-5; generally on the secretary of the *Boulē*, see Rhodes 1972, 134-143 (the *grammateus tēs boulēs* from IG I³ 104, ll. 6-7, is identified with the *grammateus kata prytaneian* mentioned at the beginning of *Ath. Pol.* 54.3 – '(...) he has authority over the documents, guards the resolutions passed, makes all copies and is present at the council sessions' (ὄς τῶν γραμμάτων ἐστὶ κύριος, καὶ τὰ ψηφίσματα τὰ γινόμενα φυλάττει, καὶ τὰλλα πάντα ἀντιγράφεται καὶ παρακάθηται τῇ βουλῇ); cf. also Volonaki 2001, 145; Oranges 2018, 60 n. 38. Critical edition of the *Athenaion Politeia*, which I use: Aristotele, *Costituzione degli Ateniesi*, a cura di P.J. Rhodes, traduzione di A. Zambrini, T. Gargiulo, P.J. Rhodes, Milano 2016 (I refer here as Rhodes 2016). I draw primarily on the commentary on this work: Rhodes 1985², (first published 1981, reprinted with corrections 1985); English translation from Rhodes 2017.

atypical involvement in the publication of an inscription, one that includes not only the secretary of the Council.⁶⁹ It preserves a decree approving an alliance treaty with the citizens of Selymbria. This agreement had to be finalised by Alcibiades and sworn to by, among others, the *strategoï*. From this (especially ll. 31-36), we see that the *strategoï* must have been involved earlier in negotiating the alliance, which is probably why they were also in charge of publication together with the secretary of the *Boulē*. This parallel raises the question of why the *anagrapheis* were necessary when, in principle, control over the supposedly simple task of publishing the laws should have been sufficiently ensured by the secretary of the *Boulē*.⁷⁰

The tasks of *anagrapheus* could be concluded from the list of abuses allegedly committed by Nicomachus. The accuser lists several instances of Nicomachus' abuses of the magistrate of *anagrapheus*. These include: the extension of the office and the allegation of taking bribes: Lys. 30.2, 4, 25; the failure to submit the *euthynai* and a general charge of disobedience to decrees and laws: Lys. 30.5; and, most importantly, fraud in producing the sacred calendar. An interesting statement is made among the accusations, which is repeated almost in the same words, in Lys. 30.2: 'He was paid daily for adding [laws] and erasing others' (καθ' ἐκάστην δὲ ἡμέραν ἀργύριον λαμβάνων τοὺς μὲν ἐνέγραφε τοὺς δὲ ἐξήλειπεν), and Lys. 30.5. Regarding the sacred calendar, the main charge was that Nicomachus wrote out more sacrifices than he had been instructed to do (Lys. 30.19: ἀναγράφας γὰρ πλείω τῶν προσταχθέντων). Moreover, in Lys. 30.20, he is accused of listing the sacrifices in such a way that there was a lack of money in the *polis* for the ancestral sacrifices; this is described as Nicomachus' fault, as he improperly *anagraphein* the sacrifices with their prices.

It has been observed that the latter allegations against Nicomachus do not withstand scrutiny.⁷¹ Noel Robertson already emphasised the relevance

⁶⁹ On the collaboration between the secretary and *strategoï*, see Filias 2025 (esp. pp. 231-232 also providing analogy with the *anagrapheis*).

⁷⁰ Cf. Oranges 2018, 69 n. 66.

⁷¹ Cf. Dow 1960, 275; Sickinger 1999, 98-99; Volonaki 2001, 148; Rhodes 1991, 92; Shear 2011, 83; Joyce 2022, 103-105. K. Clinton assumes that the *anagrapheis* were only concerned with scrutinising laws that altered Solon's laws in any way, whereas other laws were left out of the scrutiny – hence, the accuser's allegation that Nicomachus added and erased laws; Clinton 1982, 29. Hansen 1990, on the other hand, argues that the charge of 'adding' and 'erasing' laws refers to the actual power of the *anagrapheis* to destroy the texts of laws (including, as I grasp his argument, the *stēlai*, which, however, does not seem plausible to me). Yet, the accusation of destroying legal text (most likely inscriptions)

of *engraphein* and *exaleiphein* in the context of the *anagrapheis*' work⁷². He has rightly pointed out that these verbs refer not only to 'adding' and 'erasing' something in stone (like *stelai*) but also to other portable materials, e.g., papyri or wooden tablets (such as *sanides*)⁷³. These would have served as copies of laws transcribed for the Metroon. Even if this is a valuable observation, I would not conclude that the *anagrapheis* were mere 'transcribers of laws'. Their responsibilities required much greater expertise, primarily due to the logistical nature of their work and the (pre-)conditions of the Athenian legal landscape, which I discuss in detail throughout Section 4.

Notably, in *IG I³ 104*, l. 6, the *anagrapheis* were ordered to take over (*paralambanein*) the law from the *archōn basileus*. The verb *paralambanein* means 'receiving' portable items, such as money or a sacred object, from another official.⁷⁴ Hence, the conclusion is that the *anagrapheis* took from the *archōn basileus* some copy of the laws on a portable material (papyri or another material known in Athens, such as *pinakes*, or *sanides*). The *archōn basileus* was responsible for these matters, so he could have possessed the text of such laws (one of the rare arguments for the existence of this kind of archive in the 5th century).⁷⁵

appears here to be the rhetorical strategy of the accuser. In *Lys.* 30.25 he implies that people like Nicomachus devastate Athenian legislation (νομοθεσίαν ἀφανίζοντας). Indeed, this verb is found in clauses preserving inscriptions or other documents from deterioration (as forms of 'curses'); examples are collected in Lombardi 2010, 181-183 (e.g. *ibid.* 183: I.Iasos II, no. 220, ll. 7-8, dated to ca. 425-375: 'whoever makes unseen these stele or this inscription, let him be punished like a sacrilegious person' (ἦν δέ τις τήν στήλην ἀφανίσει ἢ τὰ γ[ρ]άμ[ματα.] πα]σχέτω vacat ὡς ἱερόσυλος; cf. *CGRN* 42; see also so-called the Teian 'Dirae': *OR* 102, fig. B, ll. 35-41, dated to 1st half of 5th century); notably, Nicomachus is also called ἱερόσυλος in *Lys.* 30.21.

⁷² On the *anagrapheis* as 'transcribers', see Robertson 1990, 45-55. For archival contexts, see Pébarthe 2006, 135 n. 148 (who cites the law from Paros – concerning the reorganisation of the archives – which also uses these two verbs; he cites this law after the edition of Lambrinudakis-Wörrle 1983, 285, ll. 7-12). Lycurgus (*Lys.* 1.66) also reports removing the law from the archives of the Metroon: on this *loc*, see Boegehold 1996, 205-207.

⁷³ For these verbs, see also Rhodes 1991, 93 n. 31; cf. Dreher 2022, 66-67. Epigraphic evidence also shows *anagraphein* used for *pinakes* (*IG I³ 78a* / *OR* 141, l. 26; dated likely 435) and *sanides* (*IG I³ 68* / *OR* 152, l. 17; dated ca. 428-425).

⁷⁴ Boffo-Faraguna 2021, 103-104; cf. Stroud 1968, 28-29.

⁷⁵ Robertson 1999, 56; cf. Sickinger 1999, 62-92 (arguing that, in the 5th century, the archive must have been used by the Council and administered by the secretary of the *Boulē*).

Regarding some parallels in the use of *engraphein* and *exaleiphein*, the *Athenaion Politeia* refers to the official act of recording various public affairs. For example, when describing the disputes between the Thirty (*Ath. Pol.* 36.2), we learn that, while drawing up the list of the three thousand citizens, the oligarchs 'erased some of the men written in it and added instead some of those excluded' (τοὺς μὲν ἐξήλειπον τῶν ἐγγεγραμμένων, τοὺς δ' ἀντενέγραφον τῶν ἔξωθεν). In another passage, we read about the scope of work of *apodektai*, the officials involved in administrating the public revenues⁷⁶ (*Ath. Pol.* 48.1): 'There are ten *apodektai*, allotted by tribes. These take over the boards, and wipe off (παραλαμβάνοντες τὰ γραμματεῖα, ἀπαλείφουσι) the monies paid, in the presence of the council in the council house, and they give back the boards (ἀποδιδόασιν τὰ γραμματεῖα) to the public slave. And if anybody misses a payment he is written in there (ἐνταῦθ' ἐγγέγραπται), and he is obliged to pay double the amount missed or to be imprisoned, and the council has the power to exact this and to imprison, in accordance with the laws.' Here, we may discern another form of *apaleiphein*⁷⁷ – 'to wipe out', 'to erase', or 'to cancel' – clearly concerning some portable writing material (*grammateion*). Another relevant passage also pertains to the administration of leases of estates in the *polis* via the description of the scope of the *pōlētai* (*Ath. Pol.* 47.2): 'And the taxes sold for a year they hand to the council, writing up on whitened boards the purchasers and the prices for which they are purchased' (καὶ τὰ τέλη τὰ εἰς ἐνιαυτὸν πεπραμένα, ἀναγράψαντες εἰς λελευκωμένα γραμματεῖα τὸν τε πριάμενον καὶ ὅσου ἂν πρίηται, τῇ βουλῇ παραδιδόασιν). Thus, the verb *eksaleiphein* can also indicate the action of 'wiping out'.

Given these points, the verbs *engraphein* and *exaleiphein*, along with the accuser's main allegations, should be reinterpreted against the background of Nicomachus' activity as *anagrapheus* until the preparatory step of the scrutiny of the laws, that is, before voting at the Assembly and final publication of the laws. This was the step where the *anagrapheis* were expected to write down the early versions of the laws, most likely on portable tablets, such as *sanides* or *pinakes*. They may have also created lists or catalogues of laws for citizens to consult before the Assembly meetings, as it was done during the 'annual revision' of laws in 4th century *nomothesia* proceedings, when the drafts of the laws were displayed before the Monu-

⁷⁶ On the Athenian administration of such public revenues, see Sickinger 1999, 68-69.

⁷⁷ *LSJ* s.v. ἀπαλείφω; cf. the abridged glossary at the end of Boffo-Faraguna 2021, 756.

ment of the Eponymous Heroes⁷⁸. Even if the drafts of these laws were not made accessible to the citizens already in that period, the *anagrapheis* must have recorded them provisionally on the portable materials before handing them over to other officials (i.e. mainly to the *Boulē*) for further consultation and/or further proceedings, i.e. initiating ‘probouleumatic path’ for the Assembly (see below).

Since the *anagrapheis* possessed a certain degree of expertise in the documentary and administrative affairs of the *polis*, as elected officials, and, even more importantly, due to their ongoing legal inquiries while scrutinising the laws, they ultimately became well acquainted with the Athenian legal landscape. From this perspective, it is also possible to interpret the prosecutor’s accusations against Nicomachus, who was said to have ‘revealed’ (*apodeiknunai*) the law allowing the Council’s involvement in the trial, which would ultimately lead to Cleophon’s conviction (Lys. 30.11).⁷⁹ The closest parallel to using *apodeiknunai* in this passage⁸⁰ is in Xen. *Hell.* 2.3.11, in which Xenophon reports the activities of the Thirty: ‘Though they were chosen to draft laws for a constitution, they continually delayed drafting and displaying them (συγγράφειν τε καὶ ἀποδεικνύναι), but they appointed a council and the other officials just as they saw fit’. Here, the activity expressed by *apodeiknunai* is preceded by the operations of *syngraphein nomous*, which pertains to some work on laws concerning the constitution. The Thirty operated without democratic procedures and made

⁷⁸ On 4th-century Athenian *nomothesia*, see Canevaro 2013b, 139-160 (analysis of Dem. 20.94); Canevaro 2016; cf. Dem. 24.25, 24.18. Draft laws were typically posted near the Monument of the Eponymous Heroes, following established procedure (Dem. 24.25; 20.94). Early literary references to this monument can be found in Ar. *Eq.* 977-980 (performed in 424), with firmer evidence in Ar. *Pax* 1183-1184 (performed in 421). Isoc. 18.61 (dated 402) mentions a decree proclaimed before the monument – it is discussed by Shear Jr. (T.L.) 1970, 203-204 n. 89.

⁷⁹ ‘The Council wanted to destroy Cleophon and were afraid that they would not be able to get him executed there. So they persuaded Nicomachus to reveal a law which said that the Council should judge the case together with the *dikastai* (πείθουσι Νικόμαχον νόμον ἀποδείξει ὡς χρῆ καὶ τὴν βουλὴν συνδικάζειν). And this fellow, the greatest of knaves, was so openly part of the faction that he revealed this law (ἀποδείξει τὸν νόμον) on the day the trial was held’ (transl. S.C. Todd, slightly modified).

⁸⁰ The verb *apodeiknunai* has several connotations, such as ‘to prove something’, ‘to display’, ‘to produce’, ‘to give advice’ (Hdt. 1.170), or in the physical sense (which seems to be accurate in Lys. 30.11) ‘to deliver something’, such as accounts (Hdt. 7.119: ἀποδείκνυμι τὸν λόγον). See also *LSJ* s.v. ἀποδείκνυμι. Translation of this passage of Xenophon is mine.

changes as they pleased, but the laws had to be made known in public. In Cleophon's case, Nicomachus could have simply 'presented' the relevant law on tablets to the public, or shared the results of their 'legal inquiry' with the Council, as the *anagrapheis* were normally supposed to do.⁸¹ Thus, the Council was only informed that such a law was potentially part of the legal order and was in force. The possibility to consult some laws with *anagrapheis* makes their role in the scrutiny of laws quite important. If it were so easy just to find valid laws at that time, citizens would simply do it without their help.

Therefore, one of the most vital tasks of the *anagrapheis* was to draft and write down a catalogue or even a text of laws on portable tablets, to be publicly displayed and consulted by the Athenians before voting in the *Ekklēsia*. Writing down might seem like a straightforward task, but the activities of *engraphēin* and *exaleiphein* suggest that the *anagrapheis* had to make careful preliminary selections and conduct inquiries across numerous legal documents, often dispersed across different media. Notably, the very distinguishing of the general valid laws on the given topic (*nomoi*) was the most challenging activity. Indeed, it was only after the restoration of democracy in 403 that a formal distinction between *nomoi* and *psēphismata* was introduced, along with a clear hierarchy.⁸² This very distinction may have, in part, emerged from the practical experience of the *anagrapheis* themselves.⁸³ In this context, their work was far from merely clerical: it demanded familiarity with archival practices and the competence to determine the legal nature and status of particular texts.⁸⁴ From this perspective, we can better understand the rhetorical, slanderous image the accuser constructed, claiming that Nicomachus acted like a *nomothētēs*, even pretending to be Solon (Lys. 30.2, 28). Indeed, the *anagrapheis* did not wield extensive institutionally inbuilt legislative powers. However, the logistical and technical nature of their work highlights their vital role in the legal

⁸¹ As will be discussed below in 4.2, the most common verbs denoting the sharing of 'documents' between officials are *paradidonai* and *paralambanein*; this is why I prefer the first interpretation of *apodeiknumi* in Lys. 30.11 as publicly displaying a relevant law.

⁸² On the distinction between *nomoi* and *psēphismata*, see Hansen 1978. In the 4th century, in conjunction with this separation, we have two procedures: for *psēphismata*, the existing *graphē paranomōn*, and for *nomoi* the *graphē nomon mē epitēdeion theinai*; see Canevaro 2019.

⁸³ Cf. Sickinger 1999, 98.

⁸⁴ Dreher 2022, 18 has also made this suggestion; cf. Canevaro 2015, 36-38.

scrutiny project, with adequate knowledge of both the administration and the ‘legal landscape’ of Athens.

Moreover, the possibility for citizens to consult the laws before the Assembly was an essential element of Athenian legal culture (as in, e.g., *Ath. Pol.* 29.3)⁸⁵. Even if the hypothesis of public displaying draft of laws is rejected, the *anagrapheis* must have rewritten preliminary versions of the legislation for the *Boulē*’s further work (on which more below); they must have used some portable material, a point which is also consistent with Athenian administrative practices attested in 5th century evidence. The *anagrapheis* were not simply ‘transcribers of the laws’, and this is why their works were ‘controlled’ in various ways, as I will also argue below.

4.2. *The anagrapheis and official cooperation*

In *Lys.* 30.3, the accuser charges Nicomachus with refusing to hand over the laws (*paradounai tous nomous*).⁸⁶ Moreover, in *IG I³ 104*, l. 6, we read that the *anagrapheis* were tasked with taking over (*paralambanein*) the laws from the *archōn basileus*.⁸⁷ In the *Athenaion Politeia*, these two verbs (‘to hand over’: *paradidonai* and ‘to receive’: *paralambanein*)⁸⁸, refer to the cooperation of various officials (such as *apodektai*) in handing over certain objects to other magistrates for further reworking. It could also be understood that Nicomachus was reluctant to hand over the laws which he found (on tablets or papyri), i.e., to transfer them to other officials, such as the *Boulē* or other magistrates responsible for a particular law (who supervised the ongoing results of the archive’s inquiry, as the *archōn basileus* probably could, because he possessed the copy of Draco’s homicide law).

⁸⁵ There is great discussion of the verb σκοπεῖν (‘to read’, ‘to inspect’); see more on this in Lasagni 2018.

⁸⁶ I discuss *Lys.* 30.3 in detail below in 4.6.

⁸⁷ Cf. Stroud 1968, 28 (citing A. Wilhelm’s observation, who also called attention to these verbs).

⁸⁸ See *LSJ* s.v. παραδίδωμι; *Ath. Pol.* 44.2-3: the *Boulē* transmits the agenda of the *Ekklēsia*; *Ath. Pol.* 47.2: the transmission of whitewashed tablets; *Ath. Pol.* 48: the handing over of the accounts of the *dikastēria*; *Ath. Pol.* 49.2: handing over the inventory (I quote some of these passages above, see, above, in 4.1). We have a parallel which shows the cooperation of the secretary of the Council with a public slave (*dēmosios*) in writing down public datasets in a stone, as well as making several (!) copies of these documents in other forms: there is a decree on the inventory of the treasury at Chalkotheke on the Acropolis (*IG II² 120*, esp. ll. 13-19), dated to 353/352; see Sickinger 1999, 125; cf. Pébarthe 2006, 275; Lasagni 2011, 347-348.

This reluctance might have stemmed from the fact that the task had taken longer than expected. Thus, the cooperation during the scrutiny of the laws was aimed at preventing abuses in creating a new body of laws.

Due to the nature of this work, there may have been challenges in tracking down the legal texts and making such an initial compilation, or catalogue, of laws. Furthermore, laws in the late 5th century were available as inscriptions scattered around the *polis*. Before the Metroon was built, the officials controlled the archives according to their jurisdiction in a specific area of law, in addition to the *Boulē*'s archive. Possible doubts about the discretionary activities of the *anagrapheis* may have arisen precisely at this preliminary step because they had to search the archives, look through the various *stēlai* to find laws of a general nature in force (so some selection of various documents was logistically indispensable), and, eventually, surrender them to the *Boulē* for further scrutiny proceedings. The *Boulē* could not monitor everything the *anagrapheis* did. In practice, then – indeed, by bypassing the Athenian rules (discussed in section 4.3) – the *anagrapheis* had a 'logistical space' allowing them to potentially disregard some laws identified at the preliminary scrutiny step. Otherwise, the accusation would not hold up to logic or even to basic probability.

One can imagine what it meant for the *anagrapheis* to 'find laws' using a parallel the description of the establishment of the rule of the Four Hundred (*Ath. Pol.* 29.2-3):

Pythodorus' decree was of this nature: the assembly should elect together with the ten *probouloi* already in existence twenty others from those over the age of forty, who should swear to draft what they thought best for the city and should draft proposals for their salvation; anybody else who wished could make proposals, so that they could choose the best from all. (3) Cleitophon proposed in other respects as Pythodorus, but that those who were elected should also search out the traditional laws which Cleisthenes enacted when he established the democracy (προσαναζητήσαι δὲ τοὺς αἰρεθέντας ἔγραψεν καὶ τοὺς πατρίους νόμους οὓς Κλεισθένης ἔθηκεν ὅτε καθίστη τὴν δημοκρατίαν), so that they could hear these too and arrive at the best policy (admittedly, he added, the constitution of Cleisthenes was not democratic, but similar to that of Solon).⁸⁹

The verb *prosanazētein* – 'to search out besides' or 'to investigate' –

⁸⁹ Transl. by Rhodes 2017, with the last sentence slightly modified; see Rhodes 1985², *ad loc.*

is found in this form only in this passage.⁹⁰ The word derives from the verb *zēteîn*, which shares a similar semantic range.⁹¹ However, what does searching out or investigating the laws entail? It would appear that both senses are pertinent to the preparatory step of the *anagraphēis*' work.⁹² In *IG I³ 52* (the decree of Callias; *OR* 144; ca. 434/433), a new treasury was established for the 'Other Gods', to which money previously 'borrowed from them' for expenses to the *polis* had to be returned. We read in this inscription (ll. 7-13):⁹³ that the *prytaneis*, together with the Council (πρυτάνες

⁹⁰ *LSJ* s.v. *προσαναζητέω* (cf. s.v. *ἀναζητέω*; *ζητέω*). Jakub Filonik has helpfully drawn my attention to the prefix *pros* here, which may have suggested preliminary or additional activities; this may entail that it was part of some bigger inquiry undertaking. There is also the form *anazēteîn* (found in, e.g. Thuc. 8.33.4, 2.8.3), which commentators on Thucydides (Gomme-Andrewes-Dover 1981, 214-215) comprehend as meaning to 'investigate something whose existence is already known or presupposed' (cf. Hdt. 1.137); in the sense of 'search for' it occurs later and less frequently; thus, they believe that Cleitophon must have assumed that Cleisthenes' laws were available somewhere (or he was being disingenuous), a point which may also be confirmed by the content of *IG I³ 105*. On the availability of the laws of Cleisthenes, see Rhodes 1985², 375-376; cf. Shear 2011, 31 n. 43.

⁹¹ J.L. Shear draws attention to a scholion *ad* Aeschin. 1.39 (see Shear 2011, 230, with n. 11), which is rarely cited by scholars, in which we are informed of the activities of the Twenty who took the first steps to restore democracy and remedy the effects of the Thirty (cf. Andoc. 1.81-82). The scholion reads: 'When the demos had recovered its freedom, twenty citizens were appointed to search out and write up the laws which had been destroyed (ἀπολαβὸν οὖν ὁ δῆμος τὴν ἐλευθερίαν εἴλετο πολίτας εἴκοσι τοὺς ζητήσοντες καὶ ἀναγράφοντας τοὺς διεφθαρμένους τῶν νόμων), and they decreed that they propose new laws in the place of the destroyed ones in the archonship of Euclides, who was the first archon after the Thirty' (transl. by J. Shear; Teubner edition: Dilts 1992, 22). This passage presents a slightly different account from that of Lysias and Andocides. Although it seems that the rule of the Twenty can be conceived of as coordinating activities of seeking out and writing down the laws of the destroyed ones, we do not know whether the *anagraphēis* were also engaged in this activity.

⁹² Cf. Boffo-Faraguna 2021, 112.

⁹³ 'Let the thirty accountants ([ἡοι λ]ογιστῶν) now in office reckon what is due to the gods accurately, and let the Council have full power for the convening of the accountants (συναγοεῖς δὲ τῶν λογιστῶν ἐβόλῃ αὐτοκράτορ ἔστω). Let the prytany together with the Council repay the monies, and delete the records when they have repaid them, seeking out the boards and the writing tablets and anything that may be written anywhere else' (ἀποδόντων | [δὲ τ]ὰ χρέματα ἡοι πρυτάνες μετὰ τῶν βολῶν καὶ ἐχσάλειφόντων ἐπει | [δὲ τ]ὰν ἀποδοσῶν, ζετέσαντες τὰ τε πινάκια καὶ τὰ γραμματεῖα καὶ ἕα μ π | [ο ἄλ]λοθι εἴ γε γραμμένα). Let the priests and the religious officials and anybody else who knows reveal what is written (ἀποφαινόντων δὲ τὰ γεγραμμένα ἡοί τε ἡερ | [ἔς κ]αὶ ἡοι ἡεροποιοὶ καὶ εἴ τις ἄλλος οἶδεν); transl. by S. Lambert, P.J. Rhodes from *AIO*; see *OR* 144. I also noticed that the task of seeking out the boards is linked with supervising records, including 'deleting' (*exaleiphein*) something.

μετὰ τῆς βολῆς), were supposed to search (*zētein*) for accounts concerning the expenditure on loans from the treasury of the Other Gods recorded on various tablets (*pinakes, grammateia*), which were held mainly by the appropriate officials. It is curious that, in the case of the appointment of new magistrates, we have precise instructions on how to search for accounts; proper officials, and also others who had accounts, were required to reveal them and thus facilitate the work of the other magistrates. I believe that a similar work organisation, based on officials' cooperation, may have been adopted in the case of the *anagrapheis*, especially concerning later *nomoi* that overlapped with Solonian laws and were thus difficult to identify.

Furthermore, *IG I³ 104* provides us with more noteworthy information on this score. Notably, it reports a relatively conventional legislative procedure, indicated by the phrase 'the Council and the people decided' (l. 3: ἔδοχσεν τῷ βουλευτῷ καὶ τοῖς δέμοις) and implying a 'probouleumatic procedure'.⁹⁴ The specific mover is named, suggesting that one of the *bouleutai* had already submitted a motion to the Council for voting on this particular law under the scrutiny at the Assembly. This confirms the general principle of Athenian decision-making: that no proposal could advance without a preliminary decree (*probouleuma*) of the *Boulē* (cf. *Ath. Pol.* 45.4; *Dem.* 22.5). Relying on Peter J. Rhodes' studies, which has found broad acceptance in the scholarship, a *probouleuma* could be either 'open' – where the *Boulē* merely outlined a general framework to be developed in the Assembly – or 'closed', presenting a fully formulated proposal for approval or rejection. In both cases, however, the final decision layed with the *Ekklēsia*, which retained the power to modify or reshape each *probouleuma*; while it is difficult to determine the exact character of *IG I³ 104*,⁹⁵ the final action to instruct the *anagrapheis*, would not have been possible without the probouleumatic initiative of the Council. This raises the essential questions about its role – including that of the secretary of the Council – at the

⁹⁴ On the role of the 'probouleumatic' decrees, see Rhodes-Lewis 1997, 11-24; cf. Esu 2024, 57-58.

⁹⁵ P.J. Rhodes notes that the formula ἔδοχσεν τῷ βουλευτῷ καὶ τοῖς δέμοις represents 'the standard enactment formula when the publication of Athenian decrees becomes frequent, c. 460'; as late as the 4th century such a formula indicated the taking of the *verbatim* motion of the *Boulē* as opposed to another formula, ἔδοχσεν τοῖς δέμοις, which was used when the *Ekklēsia* introduced something more; see Rhodes-Lewis 1997, 20. In *IG I³ 110*, dated 408/7 (i.e. a year later after Draco's law), we find the formula ἔδοξεν τῷ βολῆτι καὶ τοῖς δήμοις (ll. 2-3), and in ll. 26-27 we have an amendment to the motion (Ἀντιχάρης εἶπε: τὰ μὲν | γ' ἄλλα καθάπερ τῷ βολῆτι).

very preliminary step before laws reach the Assembly. When the Athenians passed this decree in 409/8 in the Assembly, it was clearly understood as part of the exceptional project of legal scrutiny, and it conformed to the general framework and instructions governing that process (see Section 4.3 for further discussion).

The *Boulē* played a vital role in scrutinising the laws, coordinating the transmission of relevant motions to the Assembly, and setting the agenda of the *Ekklēsia*. Martin Dreher has recently asked if each law was voted on separately, considering the possibility that specific laws (those deemed ‘kürzere und unproblematischere’; yet it is debatable what this means) may have been voted on *en bloc*.⁹⁶ We lack the sufficient evidence to address this question definitively. Yet, it was within the discretion of the *Boulē* to decide, on a case-by-case basis, which matters to include in a given Assembly session.

One can, therefore, observe a close cooperation between the *anagraphēis*, the officials responsible for the law under the scrutiny at a given point in time (such as the *archōn basileus* from IG I³ 104, who also oversaw copies of the laws), the *Boulē* (and its secretary), and ultimately the *Ekklēsia*, where the laws were voted on. The Council may have been consulted on matters such as the order of issues to be addressed, evident contradictions in the regulations, the wording of the laws, or other challenges faced by the *anagraphēis*.⁹⁷ Unfortunately, we cannot reconstruct these proceedings accurately due to the lack of sources. Yet, the analogy drawn from the Callias decree suggests that the *anagraphēis* could have relied on the cooperation of a wide range of offices for this purpose.

Considering the Athenian legal, administrative, political, and constitutional order as a whole, the issue of cooperation between various institutions was pivotal. Recently, Alberto Esu⁹⁸ has discussed an interesting perspective on decision-making in Classical and Hellenistic Greece, which he calls ‘divided power’. According to him, decision-making in these periods involved a complex and horizontal exchange and sharing of authority, discourse and expertise among various institutions in the Greek *poleis*, such as councils, officials, assemblies, and tribunals. In the case of law reform, one may see a similar paradigm of thinking and acting. Depending on their

⁹⁶ See Dreher 2022, 22.

⁹⁷ Cf. Stroud 1968, 25; Sickinger 1999, 98-99; Volonaki 2001, 145, 150.

⁹⁸ Esu 2024, *passim*.

competence, various officials and institutions added something themselves while inspecting and verifying the work of their antecedents at various levels. Of course, the final version of the laws being scrutinised was voted on in the Assembly, but, before this could happen, it was the *anagrapheis* who had to begin the arduous work of legal inquiry in collaboration with the institutions discussed above. Therefore, the cooperation of the offices in the legal scrutiny and, later, in the law reform is one of the most vital elements of Athenian legal culture. Yet this is not seen in Lysias since the accuser wants to put all the blame for the improprieties in the laws, especially those relating to the sacred calendar, on Nicomachus, so he omits the participation of the other institutional bodies and officials in the proceedings.

4.3. Legal instructions (syngraphai) – the principle of 'legalism'

Besides the cooperation of democratic bodies, there was another element aimed at controlling the activities of the *anagrapheis*. They seem to have been instructed to compile the texts of laws (including, perhaps, a list of sources from which to index them). Thus, the prosecutor attempted to prove Nicomachus' abuses in producing the calendar, insinuating that he had written out more than he should have. The main consequence of these abuses was that 'ancestral offerings' could no longer be performed (cf. Lys. 30.17-25). It is useful to examine in detail Lys. 30.17, in which the accuser embarks on a long thread about the sacred calendar:

πυνθάνομαι δὲ αὐτὸν λέγειν ὡς ἀσεβῶ καταλύων τὰς θυσίας. ἐγὼ δ' εἰ μὲν νόμους ἐτίθην περὶ τῆς ἀναγραφῆς, ἡγοῦμην ἂν ἐξεῖναι Νικομάχῳ τοιαῦτα εἰπεῖν περὶ ἐμοῦ· νῦν δὲ τοῖς κοινοῖς καὶ κειμένους ἀξιῶ τοῦτον πείθεσθαι. θαυμάζω δὲ εἰ μὴ ἐνθυμεῖται, ὅταν ἐμὲ φάσκη ἀσεβεῖν λέγοντα ὡς χρῆ θύειν τὰς θυσίας τὰς ἐκ τῶν κύρβεων καὶ Ἰοῦ πλείω κατὰ τὰς συγγραφάς, ὅτι καὶ τῆς πόλεως κατηγορεῖ· ταῦτα γὰρ ὑμεῖς ἐψηφίσασθε. ἔπειτα εἰ ταῦτα νομίζεις δεινά, ἧ που σφόδρα ἐκείνους ἡγεῖ ἀδικεῖν, οἱ τὰ ἐκ τῶν κύρβεων μόνον ἔθουον.

Apparatus: 1 στηλῶν Taylor: εὔπλων, ὅπλων MSS; Nelson 2006: οὐ πλείω⁹⁹

I am informed that he claims I have committed impiety by abolishing the sacrifices. If I had been the person who made the laws about writing-up, then I admit that Nicomachus would have been entitled to say things like this about me. But as it is, I believe that he should obey the established rules

⁹⁹ M. Nelson's emendation is not included in the OCT Carey's edition of Lysias (Carey 2007, *ad loc.*).

that we hold in common. When he claims that I am committing impiety by saying that we should perform the sacrifices from *kurbeis* (and not in excess) according to *syngraphai*, I am astonished at his failure to realize that he is accusing the city also - for this is what you have decreed. And if you, Nicomachus, think this is so terrible, then presumably you believe that those who used to sacrifice only from the *kurbeis* were committing the greatest of crimes. (transl. by S.C. Todd, slightly modified)

The accuser reveals here the existence of certain νόμοι περὶ τῆς ἀναγραφῆς, the content of which regrettably remains unknown.¹⁰⁰ Since Nicomachus and other *anagrapheis* were elected (Lys. 30.29), specific instructions might have been provided for them, ordaining how the laws would be recorded (*anagraphein*). One may assume this occurred at the preliminary step before the *Ekklēsia*. Additionally, the accuser alludes to a decree – the verb *psēphisasthai* is used, implying that the citizens themselves ordered how Nicomachus should write out the sacrifices.¹⁰¹ Such an action aligns with the accuser’s crucial statement that ‘we should perform the sacrifices from *kurbeis* (and not in excess) according to *syngraphai*’.

These *syngraphai* may have been components of the decree containing νόμοι περὶ τῆς ἀναγραφῆς (unfortunately, the prosecutor does not refer to them directly in the speech). Nevertheless, their existence is implied, and it was common in 5th-century Athens to establish *syngraphai* through decrees that produced both general and detailed laws. In such cases, *syngrapheis* acted as proposers of decrees (e.g., *IG I³ 78a/OR 141/CGRN 31*, ll. 3-4; *IG I³ 21*, l. 2). Some decrees even ordered the drafting of *syngraphai* and outlined procedures for the election of *syngrapheis* (cf. *IG I³ 35*, ll. 14-17). Therefore, *syngrapheis* were typically *ad hoc* officials tasked with drafting specific regulations or technical instructions – often in matters of religion, finance, or architectural technicalities – and may rightly be seen as ‘expert’ boards.¹⁰²

However, a proper understanding of Lys. 30.17 requires noting the problematic manuscript transmission: καὶ τῶν στήλων is an emendation intro-

¹⁰⁰ Although Lysias grammatically used the subjunctive moods, we can assume that he refers to real circumstances in which the *Ekklēsia* established such *nomoi*. I want to thank Janek Kucharski for paying attention to this aspect of the grammar.

¹⁰¹ Instead, Davis 2024, 276 interprets this allusion through the lens of the instructions given in Draco’s homicide law (*IG I³ 104*, ll. 4-7).

¹⁰² See more, in Koch 1999; Carusi 2006, 11.

duced by Joannes Taylor in the 18th century.¹⁰³ Recently, Max Nelson¹⁰⁴ has proposed an alternative reading of this passage, suggesting οὐ πλείω, meaning 'not in excess' (based on Lys. 30.19, 21). Accepting this emendation, we may interpret that the accuser means that the *syngraphai* (see below) included the sacrifices (or, perhaps more broadly, *ta hosia kai ta hiera*; Lys. 30.25 *pr.*) only from *kurbeis*, and *not in excess*. This implication could also be supported by the closing sentence of Lys. 30.17, which mentions ἐκ τῶν κύρβεων μόνον ('only those from the *kurbeis*'; cf. the outset of Lys. 30.18). Hence, when talking about ancestral sacrifices, Lysias notes only those recorded on the *kurbeis*, implying that these were the only ones stipulated in the *syngraphai*. Some scholars have interpreted this to mean that the *stēlai* would have been amendments to the original sacred calendar, including listing the most ancient sacrifices and later modifications to the Solonian sacred calendar, which were written down on the *kurbeis*.¹⁰⁵ Such an interpretation is only compatible with Lys. 30.17 when we consider Max Nelson's emendation (otherwise, the accuser would point to the 'proper source' of the ancestral sacrifices also being *stēlai*).¹⁰⁶

Therefore, we may observe that, at the start of the scrutiny of the laws,

¹⁰³ The MS reads either εὐπλῶν or ὄπλων; J. Taylor, *Lysiae orationes et fragmenta*, London 1739, *ad loc.* His emendation has been widely accepted. The tradition of this corrigendum is described in Nelson 2006.

¹⁰⁴ M. Nelson translates this phrase as: 'it is necessary to make the sacrifices from the *kurbeis* (and not in excess) according to the drafts' (Nelson 2006, 311). Few scholars have accepted his emendation (e.g. Meyer 2016, 376 n. 199; Boffo-Faraguna 2021, 104 n. 14), while others reject it (Oranges 2018, 74 n. 85; Davis 2024, 273, 277). The passage is significant, as M. Nelson's correction has been used to reconstruct lacunae in the sacred calendar inscriptions – particularly in the so-called 'ek-rubrics' (see Lambert 2002, 378). S. Dow interpreted the 'ek-rubrics' as references to sources from which offerings were to be recorded, not as funding sources (*pace* Oliver 1935). On Face A of the inscription (in the Ionic alphabet, thus dated to the *anagraphis*' activity, 404/3–400/399), frg. 2, cols. 1-3, l. 77 is typically restored as ἐκ τῶν στ[ηλῶν], though the τ is highly uncertain. P.J. Rhodes, inspecting the stone with C. Habicht, noted that the area after *sigma* is too damaged to be legible (Rhodes 1991, 94 n. 40); Oliver 1935 read *symbolōn*; Dow 1953-1957 preferred *stēlōn*, which P.J. Rhodes found more likely; Robertson 1990, 68-70 suggests *syngraphōn*.

¹⁰⁵ See Parker 1996; Lambert 2002 ('post-Solonian' sacrifices) 257 n. 23. A comparable meaning could be [ἐκ (?)] νέων [...?..]: 'from the new ones' – Face A, frg. 2, line 3; cf. Rhodes 1991, 95.

¹⁰⁶ Some scholars noticed the uncertainty on this point but did not elaborate on that much, see Harrison 1955, 34 n. 5; cf. Todd 1996, 111 n. 19; Rhodes 1991, 95; Nelson 2006, 310-311; Boffo-Faraguna 2021, 104-105 n. 15.

there was a step of fixing the remit of the *anagraphais*, prescribed by laws (*nomoi*) and instructions (*syngraphai*) – presumably in the form of a decree – from which the *anagraphais* were to proceed (cf. Lys. 30.4; and the use of the verb *prostattein* in Lys. 30.2, 4, which may denote following orders).¹⁰⁷ Thus, I follow Peter J. Rhodes, who states that ‘*syngraphai* should denote a draft presented to the Assembly for approval, in this case presumably the decree which ordered the *anagraphais* to revise the sacrificial calendar and which specified the sources to be followed’.¹⁰⁸

We do not know whether there were such instructions from the very beginning of the project (in the form of *syngraphai*), or the Athenians introduced them later on as the work became more cumbersome, or with only specific areas of laws (such as the laws associated with *ta hiera kai ta hosiā*). Notably, the term reconstructed [...?.. κατὰ (?) τῶς χρογγραφᾶ[ς ..?..] in the sacred calendar appears in Face B of an inscription written in the Attic alphabet, dated to 410-404. If we connect these *syngraphai* to the other so-called ‘ek rubrics’ written in the Ionic alphabet¹⁰⁹, dated after 404/3, we may assume that the precise instructions for the sacred calendar were documented since 410.

The discussion of *syngraphai* in the context of the work of the *anagraphais* on the scrutiny of the laws shows that they did not have complete discretion in their operations but that the scope of their work, to a certain

¹⁰⁷ Cf. Hdt. 7.21.2; *IG* II² 10, l. 8 (see *AIO* 1191).

¹⁰⁸ Rhodes 1991, 95; similarly Harrison 1955, 34; also Parker 1996, 45 n. 6; Oranges 2018, 72-75. By contrast, Robertson 1990, 70ff. argues that the *syngraphai* were distinct sources from which the *anagraphais* transcribed laws – complementing the *stēlai* and encompassing what lay beyond the *kurbeis*. Carawan 2010, 75-79, sees *syngraphai* as expert compilations of sacred law. Davis 2024, 278, likewise entertains the meaning of ‘schedule of some kind’, e.g. in parallel to *IG* I³ 46, l. 19 – though even there, broader interpretations are possible.

¹⁰⁹ On Face A of the sacred calendar inscription (after 403), the so-called ‘ek rubric’ accurately provides the authoritative sources (after Lambert) for the inscribed sacrifices: ἐκ τῶν φυλοβασιλικῶν (‘from the king of phyle’; appears 3 times: frg.1, col.3, l. 6, frg. 3, col.1-3, vv. 33-34 and 45-46), ἐκ τῶν κατὰ μῆνα (‘of those according to the months’; appears 3 times: frg. 1, col. 1, l. 4, frg. 3, col.1-3, l. 6 and 21), ἐκ τῶν μὴ ῥητιῦ (‘of those unspecified,’ i.e. moving days, appears once: frg. 1, col. 3, l. 24). These are all taken to be subcategories of the Solonian calendar. J.-M. Carbon in *CGRN* 45 adds (after Lambert 2002, 257): ‘Also, the rubric “from the stelai” is “likely to relate to the newer, ‘post-Solonian’ sacrifices”, which the appointed commission needed to integrate in the revision of the laws’ (except that, as I have elaborated on above in n. 104, this place is probably not identifiable as a *stēlai*); see Lambert 2002, 357 and *CGRN* 45; the ‘ek rubrics’ are also discussed by Robertson 1990, 67-68.

extent, was defined by the law. This highlights the place of Athenian 'legalism', that is, the belief (or the general rule) implying that public institutions must act only on the basis of – and within the limits of – the law¹¹⁰. The prescription of specific legal frameworks was intended to facilitate the work of the *anagrapheis*, but also to prevent them from arbitrarily including some issues in their work. Particularly relevant in this respect were the laws concerning cults and their financing, as Athenians usually prepared *syngraphai* concerning religious matters. It is hard to say whether similar instructions were prescribed for other areas of the law. In any case, the context of Lysias' speech and the logic of the scrutiny of the laws indicate that an attempt was made to carry out the work within a legal framework and compliant with the existing administrative practice. Notably in Lys. 30.5, there is a serious charge that he operated without caring about the laws (as in Lys. 30.5: μήτε τῶν νόμων φροντίζειν). This is a strong argument because, for the Athenians, 'legalism' in the process of legal scrutiny was one of the essential elements in proceedings and generally reflected their approach to the functioning of the *polis*.

4.4. The (Solonian) laws – between materiality and the imaginaries of Athenian laws

At the end of the 5th century, laws of Solon were often perceived as the best and moderate pieces of legislation, an example of the implementation of *eunomia* and the remedy for *stasis*. In the last decades of the 5th century, the desire to reinstate the ancestral constitution (*patrios politeia*) and the ancestral laws (*patrioi nomoi*) gained popularity, becoming associated on many occasions with the figure of Solon.¹¹¹ Both groups favouring oligarchy (e.g. *Ath. Pol.* 29.3) or democracy used these catchwords (e.g. Thuc. 8.76.6). Solon in the 5th century, or even earlier, was a semi-legendary¹¹² figure; hence,

¹¹⁰ There is no space here to elaborate on the definition(s) of 'legalism' in the context of legal and constitutional theory. It is worth quoting Article 7 of the Constitution of the Republic of Poland of 2nd April 1997: *The organs of public authority shall function on the basis of, and within the limits of, the law*. This is related to a general reflection on the rule of law in modern democracies.

¹¹¹ See Hignett 1952, 5-7; Fuks 1971; Finley 1975; Ostwald 1986, 415; Walter 1976 (argued that *patrios politeia* as an oligarchic ideal was an invention of 4th century) *contra* Rhodes 2011, 16-17 (he also pays attention to the flexibility of this catchword; on Nicomachus, *ibid.* 21-22); cf. also Shear 2011, 41-51; Canevaro 2015, 22-23.

¹¹² See Sagstetter 2013; cf. Carey 2015 on Solon's reception in classical Athens. 'Figure

almost all the laws of Athens were ultimately attributed to him. Indeed, one may also find such an image in *Against Nicomachus*.

The accuser in the speech (Lys. 30.2) states that Nicomachus had been instructed to publish the laws of Solon (τοὺς νόμους τοῦ Σόλωνος) within four months. It would seem, therefore, that the scrutiny of the laws concerned only the laws of Solon, which was not true, as we have other sources. Andocides, while describing the legislative activity after the overthrow of the Thirty (Andoc. 1.81-82), refers to the laws of Solon and Draco. The attribution of the law on homicide to Draco was quite clearly established in the Athenians' legal consciousness.¹¹³ Yet, the prosecutor focuses exclusively on the sacred calendar, the core of which must have also been established during Solon's time, albeit for logistical reasons¹¹⁴ subsequently altered throughout the 6th and 5th centuries. Other epigraphic sources related to the activities of the *anagrapheis*, such as the laws on the *Boulē* (IG I³ 105), taxation and the trierarchy (IG³ 236a and IG³ 237), clearly indicate later pieces of legislation. So far, one can also assume the most straightforward solution. The speech focuses only on Nicomachus as one of the *anagrapheis*, so the accuser implies that the defendant was not dealing with Draco's law but with other laws explicitly attributed to Solon.

Although most laws in Athens were traditionally attributed to Solon, such a provenance often does not stand up to scrutiny.¹¹⁵ The longstanding tradition of attributing nearly all laws to Solon can be traced back to the 5th

of Solon' is also found in stories about the Twelve Tables' origins; see Miśkiewicz 2023, 99-103.

¹¹³ In Antiphon's speeches, which were written before the legal scrutiny, it is clear that the laws concerning homicide were considered to be among the oldest and best (e.g. Antiph. 6.2). However, it is curious that Antiphon does not explicitly link Draco to these laws – perhaps this was obvious to the citizens at the time. On Draco's law reception in Athenian oratory, see e.g. Carey 2013.

¹¹⁴ See Leão-Rhodes 2015, 140-143; cf. Schmitz 2023, 509-539; Parker 1996, 43-55.

¹¹⁵ Several sources attribute later laws to Solon. Andocides, e.g., presents the anti-tyranny decree of Demophantus (ca. 410) as Solonian (Andoc. 1.95), which some interpret as suggesting an original Solonian law against tyranny – see Schmitz 2023, 79-86 (with recent bibliography and divergent views on its authenticity and dating). More relevant here is the projected image, not the historicity. Cf. also Andoc. 1.111 (κατὰ τὸν Σόλωνος νόμον, on the *Boulē*), Dem. 20.93 (on *nomothesia*), Hyp. 3.22 (on the distinction between *nomoi* and *psēphismata*). For reconstructions of Solonian laws, see Ruschenbusch 1966; updated in Ruschenbusch-Bringmann 2014 (with translation); Leão-Rhodes 2015; Schmidt 2023. Scafuro 2006 has argued, however, that there may be some laws that, despite not being authentic archaic in their form, may contain a 6th century 'Solonian kernel'.

century, with an increased emphasis in the 4th century, possibly influenced by the discourse on the scrutiny of the laws. For the Athenians, Solonian laws constituted the entirety of valid laws, except for laws on homicide, which were explicitly attributed to Draco. It is plausible that the Athenians were aware that some laws were enacted at later dates.¹¹⁶ However, the main objective of this imagination was to underscore Solon's pivotal role as a *prōtos heuretēs* of the Athenian legal and constitutional order. Solon epitomised the archetypal *nomothetēs*, a view which also led him to be represented as the leading candidate for the title of the 'father of democracy' by the late 5th century.¹¹⁷ Furthermore, Solon's laws were reinforced by the public display of his archaic laws on *axōnes/kurbeis*, allowing citizens to associate specific geographical spots with Solon's legislative legacy. Indeed, linking locations to a particular historical figure was integral to preserving collective and cultural memory.¹¹⁸

But, the *anagrapheis* had to deal with a very concrete task, so they were required to ask themselves about where to search for laws. James P. Sickinger¹¹⁹ notices that several sources attest that *psēphismata* were stored in the archive of the Council, as coordinated by its secretary¹²⁰. The *anagrapheis* also had access to the Solonian laws written down on *axōnes/kurbeis*, which must also have been displayed in the major public spots; the sources mention many places (such as the Acropolis, the Stoa Basileios, or the *prytaneion*) and pinpoint the moments when these objects were moved between them.¹²¹ Wherever they may have been, or whatever their medium was, they

¹¹⁶ Clinton 1982, 30; cf. Gagarin 2020.

¹¹⁷ On various candidates for the 'father of democracy' (Theseus, Solon, or Cleisthenes), see Ruschenbusch 1958, cf. Rhodes 2014, see Hansen 1989, Loddo 2018, esp. 39-88.

¹¹⁸ On cultural memory in general, see Assmann 1999. In the case of so-called figures of memory, there is very often space allocated (such as concrete objects, buildings or routes); no matter where the 6th- and 5th-century *axōnes/kurbeis* with Solon's (and Draco's) laws were stored, a direct association was fostered. This fed the assumption that laws were bestowed mainly by Solon (and Draco); cf. Thomas 1996, 31, who draws attention primarily to writing down the laws, mainly inscriptions, as part of the 'monumentalisation' of the law and their role in Greek civilisation; cf. Wolpert 2002 (on the scrutiny of the laws, see *ibid.* 37-42).

¹¹⁹ See Sickinger 1999, 94-97.

¹²⁰ The laws stored in the Council's archive were arranged based on certain rules, with decrees ordered by *prytany* and name of the Council's secretary, and possibly by the first secretary to the Council; see Sickinger 1999, 63-92.

¹²¹ More recently, Davis 2011, 22ff recapitulates the discussions on what the *axōnes/kurbeis* might have been, considering all ancient testimonies as well as discussing all

were available to 5th century Athenians.¹²² Beyond collective memory or oral tradition regarding Solon, Athenian (or broader Greek) laws had also, equally vital, material and visible form – a point demonstrated in recent studies by James P. Sickinger, Michele Faraguna, and Laura Boffo.

Moreover, *IG I³ 104* implies that the officials in charge of the law might have had their own archives, as the *archōn basileus*. Notably, the publication of decrees in the form of inscriptions was not automatic, and several laws may have been published on other portable materials (double publication of laws or making copies is also likely¹²³). The *anagrapheis*, therefore, prepared drafts of copies of laws by doing queries in all public spots where laws could be written down in any¹²⁴ form (e.g. *stēlai* with inscriptions, archives of officials, the *Boulē*'s archive in the Old Bouleuterion, or the 'place(s) of availability' of *axōnes/kurbeis*).

At this point, we can discern how the ideology of legislation ascribing all generally valid laws to Solon (and some to Draco) did not cohere with reality; there were many non-Solonian laws in the Athenian legal order. This is also a crucial point in understanding Athenian legal culture, as it highlights the connection (in this case, the contradiction) between the *way of thinking* and the *way of doing*, as Lawrence M. Friedman described it. The belief that all applicable laws were the laws of Draco and, above all, Solon, was important not only at the level of the ideology of legislation

passages which mention the spots and transfer of *axōnes/kurbeis*. The earliest evidence comes from Anaximenes of Lampsakos, ca. 380-320, who was supposed to have written that Ephialtes transferred *axōnes/kurbeis* from the Acropolis to the Bouleuterion and the Agora. *Ath. Pol.* 7.1 implies that Solon's laws on *kurbeis* were displayed in the Stoa Basileios, which is also questionable since the Stoa was erected much later, in the 5th century; Polemon (early 2nd century) is said to have seen them in the *prytaneion*, a point which is also confirmed by Plutarch, who saw the remnants of the laws and called them *kurbeis*; see Davis 2011; cf. Hansen (H.) 1991, 127-200; also Leão-Rhodes 2015, 1-9; cf. Meyer 2016; Boffo-Faraguna 2021, 105-106 n. 20. For more recent discussions, see Schmitz 2023, 15-62 and Chabod 2024.

¹²² For several scholars, the turning point for keeping the laws and producing potential copies of them was Xerxes' sacking of Athens in 480; see Davis 2011, 3. Davis 2024, 279 also stresses the problem of the possible bad physical condition of *kurbeis* and the issue of reading some of them by *anagrapheis*.

¹²³ See Andoc. 1.76: Andocides recounts that, after the enactment of Patrocleides' decree in 405, which annulled the convictions of *atimia* previously imposed on citizens, the Athenians decided to 'remove all these decrees, both their original versions, as well as copies' (ταῦτ' οὖν ἐψηφίσασθε ἐξαιεῖναι πάντα τὰ ψηφίσματα, καὶ αὐτὰ καὶ εἴ ποῦ τι ἀντίγραφον ἦν); cf. Shear 2011, 84-85.

¹²⁴ See Volonaki 2001, 150 n. 25; also Thomas 1989, 45-60; cf. Shear 2011, 83-85.

and the discourse on the best laws but also for a specific forensic strategy that was quite often used by parties in court.¹²⁵ But from a pragmatic point of view, such an assumption was misleading because the *anagrapheis* had to find all general and abstract laws in force and, therefore, needed to face the real problems while doing legal inquiries and finding all generally valid laws on various media in different locations where they were written – including those enacted after Solon and Draco. This huge task required a high level of competence and knowledge of the Athenian administration.

4.5. Working methods of the anagrapheis and the 'divisions' of the law

An attractive hypothesis has been put forward by Gil Davis,¹²⁶ who argued that Solon's original laws were produced in the form of wooden *kurbeis*, and that the *anagrapheis*, in 410-399, introduced the division into *axōnes* and their numbering. There are no direct sources to confirm this hypothesis; however, it is undeniable that the *anagrapheis* must have structured their legal inquiries in some way. Even if *IG I³ 104* refers to the collegial nature of their work, *Lys. 30* concentrates on the actions of Nicomachus specifically – who was also subject to individual *euthynai* – and the very scope of the task would have necessitated a preliminary division of responsibilities. This inscription itself continues the division of Draco's law into separate *axōnes*, by mentioning the *πρῶτος ἄχσον* (l. 10) and the *[δεύτ]ερος [ἄχσον]* (blurred in l. 56). This also shows that *anagrapheis* likely were enjoined to take the laws already ordered and divided into *axōnes* at the moment of the final publishing¹²⁷. To what extent this division reflects broader patterns in the structure of Athenian law remains debatable. But one may try to answer such a question, considering the general scholarly studies on the relationship between substantive and procedural elements in Athenian law.

Recent scholarship has revealed a more complex view, where the Athenian laws appear to focus equally on both the substantive and procedural elements, and moreover, *nomoi* seem to be even primarily organised by substantive 'categories' as argued by Edward M. Harris.¹²⁸ Mogens H. Han-

¹²⁵ See e.g. Gagarin 2020.

¹²⁶ Davis 2011, *passim*.

¹²⁷ See Boffo-Faraguna 2021, 107-108.

¹²⁸ Harris 2013a, 138-175, 359-378 (discussing the previous scholarship) *contra* (e.g.) Hansen 1975, 10, 14, 21 and Todd 1996, 123-124 (both stressing procedural orientation of Athenian law); cf. more recently Harris-Lewis 2022 (for the substantive

sen ultimately stresses that procedure often follows substance, and a certain degree of procedural unity is often found in laws with similar substantive concerns¹²⁹. Taken together, these perspectives prompt us to think that the *anagrapheis*, in their compilation efforts, may have approached the laws from both angles, though the final arrangement likely prioritised substantive orientation, as will be shown below.¹³⁰

IG I³ 104 (ll. 4-5) refers explicitly to the transcription of Draco's homicide law (τὸ[v] Δράκοντος νόμον τὸμ περὶ τῷ φό[v]ο ἀναγρα[φ]σά[v]τον), which suggests a 'substantiative element' as main reference. But, it is at the same time developed in cooperation with the *archōn basileus*, who had a prescribed legal-procedural jurisdiction over such regulations and possessed a copy of homicide law as well. On the other hand, *IG I³ 105*, with the law on the *Boulē*, contains several independent older documents (from different periods) joined together.¹³¹ And, indeed, it proves a rather substantive orientation of the law, focusing on the constitutional matter. The same substantive focus can be found in *Lys. 30*, where the emphasis is on the laws concerning cults, calendars, and sacrifices (see below).

IG I³ 105 may offer helpful insight into the working methods of the *anagrapheis*. David M. Lewis has observed that, in l. 43. ([...] *hóπος ἄν δοκεῖ :: δέμοι τῷ Ἀθηναίων πλε[θύοντι ..23..]*) instead of the editors' supplemented τῷ, there are three times two overlapping dots – marks which also appear in ll. 34, 44, and 50, to separate portions or clauses of the text, but which in this case would have been used by *anagrapheis* to indicate that the original text was damaged and they could not read it.¹³² The consequence of this is that the *anagrapheis* may sometimes have found it diffi-

focus of Greek archaic laws). A balance view was presented in Carey 1998 (p. 109: 'The evidence does not allow us to exclude the possibility of a change in the balance between procedural and substantive law between the archaic and the classical period; but we can state that from Solon onwards the Athenians were using laws with both a procedural and a substantive emphasis according to the nature of the issue subjected to legislation'). I thank one of the Reviewers for the critical remarks that prompted me to rethink this thread.

¹²⁹ See Hansen 2019b, 465-468.

¹³⁰ Cf. Joyce 2022, 116-117; Schmitz 2023, 11.

¹³¹ Rhodes 1972, 198; Ryan 1994, 121; Gallia 2004, 454; Shear 2011, 76-78; Boffo-Faraguna 2021, 109, 112.

¹³² Lewis 1967, 132: 'stone, which was carved by a careful man transcribing a damaged original with such fidelity that he preferred to mark three blank spaces which he could not read rather than make what appears to us the easiest of conjectures'; cf. Shear 2011, 78; and also recently Boffo-Faraguna 2021, 112.

cult to read the text of the laws which they were tracking down, but, more crucially, at no step of the scrutiny of the laws (*Boulē* or *Ekklēsia*) was it decided (in this precise example of the law(s) on the Council) to update the archaic language or to 'fill in' gaps in the text of the old law. Thus, the *anagrapheis* had to find the laws on a given topic (such as, here, a separate law on the functioning of the *Boulē*), draft preliminary versions for further work in the *Boulē* and the Assembly, and, for the final publication, follow the instructions of the *Ekklēsia*'s decree, which enacted the edition of the law in question, thus authorising the definite version of the legal text. As we can see, the *anagrapheis* did not even 'correct' an apparent discrepancy. Still, they had to follow the instructions of the Assembly, and, at this stage of their activities, they could be called mere 'scribes'.¹³³ Yet, at the preliminary step of their tasks, they needed to search for all laws concerning the Council, which might have been a challenge.

One may inquire here about Nicomachus' role in the division of *anagrapheis*' work. After all, he is the only *anagrapheus* about whose remit we are informed. Nicomachus was indeed tasked with the work on the laws concerning religious matters, including the sacred calendar.¹³⁴ He served as an *anagrapheus* during two stages of the scrutiny of the laws. In Lys. 30.25, the accuser's statement, 'He who became *anagrapheus* of *ta hosia kai ta hiera*' (ὁς καὶ τῶν ὁσίων καὶ τῶν ἱερῶν ἀναγραφεὺς γενόμενος), has led some scholars¹³⁵ to infer that the prosecutor suggests that Nicomachus han-

¹³³ Still, it is worth stressing that *IG I³ 105*, with its meticulous preservation of archaic language, does not exclude the possibility that there was a substantive amendment during the scrutiny of the laws to the 'body of legislation' concerning the *Boulē*, not by the *anagrapheis*, but at the moment of the debating laws at the Assembly (see below, 4.7).

¹³⁴ Davis 2024, 280-282 discusses various categories of sacrifices ('ancestral sacrifices': *patrioi thusiai* and 'additional feasts': *epithetoi heortai*) on which Nicomachus would work on.

¹³⁵ In the context of Lys. 30.25 the distinction between Stage I (410-404: secular) and Stage II (403-399: sacred) also makes no sense (thus Todd 1996, 109-110), as is also pointed out by M. Edwards and E. Volonaki (although the latter maintains this sacred/secular division); Edwards 1999, 171; Volonaki 2001, 148-149. Because of this dichotomy of secular and sacred, Shear 2011, 83 n. 51 questions Francken's emendation in Lys. 30.25, which removed the *kai tōn hierōn* at this point: οὔτοι δ' ἐπὶ τῇ τῶν νόμων ἀναγραφῇ [καὶ τῶν ἱερῶν] δῶρα λαμβάνοντες; then *nomoi* would be secular rules and *hiera* would be religious ones; Hansen 1990, 70 (attributing Nicomachus' work with secular and sacred laws in the II Stage also invokes this passage). However, there are no such divisions in the sources.

dled both secular (*ta hōsia*) and sacred matters (*ta hiera*). However, such an interpretation should be rejected. The phrase *ta hōsia kai ta hiera* carries a specific meaning that involves financing religious activities in Athens and encompasses theatrical performances, worship practices, and other associated expenses. Josine Blok emphasises this distinction, stating: ‘*Hiera kai hōsia* does not mean ‘matters sacred and profane,’ but refers to human obligations to the gods in two distinct but related ways: human gifts to the gods (*hiera*) and conduct toward gods and humans demonstrating proper respect for the gods (*hōsia*).’¹³⁶ Based only on the accuser’s depiction of Nicomachus’ duties, one would presume that he dealt with a specific type of law, likely on cult (which was inherently linked to financial issues), during both the I and the II Stages of the *anagrapheis*’ remit, as is also attested by the inscriptions which preserve fragments of the sacred calendar.¹³⁷

Given the Athenians’ ways of legal thinking, the separation between ‘secular’ and ‘sacred’ laws should certainly be rejected, as this would be a decidedly anachronistic distinction. However, Lysias’ speech clearly distinguishes a certain area of the laws related to cults, and especially their financing, and this may have been the main task of Nicomachus during his two stages of work: to search out all the laws related to this (as instructed in *syngraphai*). Laws on *ta hiera kai ta hōsia*, Draco’s homicide law, and the surviving fragments on the law about the *Boulē* illustrate the significant emphasis placed on substantive focus in Athenian law. This does not preclude, however, that – given the organisational complexities involved in legal inquiries – the *anagrapheis* may have initiated the process of locating relevant laws by consulting the magistrates responsible for their administration, such as the *archōn basileus*.

4.6. Contradictory laws and its social perception

As discussed above, we have seen that the *anagrapheis* faced some difficulties in finding the laws with their written media and following instructions on how to proceed with the task. Of course, as I have shown in the example of the law on the *Boulē*, the *anagrapheis* did not introduce for their own any formal amendment to laws under scrutiny (including grammatical or stylistic changes). But they still needed to find the various laws on the same

¹³⁶ Blok 2017, 99; also recently noted by Oranges 2018, 81-82.

¹³⁷ On these inscriptions, see above, n. 23-26 and, below, n. 187, 192.

topic; and tracing later amendments to the Solonian laws on the same matter was not easy. Moreover, the *anagrapheis* may have encountered conflicting laws during their legal inquiries – an outcome of the growing problem in the late 5th century arising from the absence of clear procedures and rules for making and changing laws, as recently persuasively emphasised by Mirko Canevaro.¹³⁸ From this perspective, I now turn to the significance of Lys. 30.3.:

εἰς τοῦτο δὲ κατέστημεν ὥστε ἐκ τῆς τούτου χειρὸς ἐταμιευόμεθα τοὺς νόμους καὶ οἱ ἀντίδικοι ἐπὶ τοῖς δικαστηρίοις ἐναντίους παρείχοντο, ἀμφοτέρω παρὰ Νικομάχου φάσκοντες εἰληφέναι. ἐπιβαλλόντων δὲ τῶν ἀρχόντων ἐπιβολὰς καὶ εἰσαγόντων εἰς τὸ δικαστήριον οὐκ ἠθέλησε παραδοῦναι τοὺς νόμους;¹³⁹ ἀλλὰ πρότερον ἢ πόλις εἰς τὰς μεγίστας συμφορὰς κατέστη, πρὶν τοῦτον ἀπαλλαγῆναι τῆς ἀρχῆς καὶ τῶν πεπραγμένων εὐθύνας ὑποσχεῖν.

We were reduced to such straits that we had laws rationed out to us from his hands, and litigants brought forward contradictory laws for the lawcourts, both sides claiming that they had received them from Nicomachus. **When officials were imposing penalties and introducing cases into court, he was still reluctant to hand over the laws.** The city had been reduced to the direst disaster before he gave up his office and agreed to submit accounts for his conduct of office (transl. by S. Todd; modified; emphasis is mine).

First, I consider the sentence printed in bold. Nicomachus is accused of refusing to hand over the laws (οὐκ ἠθέλησε παραδοῦναι τοὺς νόμους). What exactly could this have meant? Nicomachus had already been working ‘too long’ on these preliminary draft laws to submit them for further consultation, thus delaying the scrutiny proceedings even further.¹⁴⁰ The verb *paradidonai*, used by the accuser, is also attested in several sources

¹³⁸ Canevaro 2015, esp. 18-43. Even if M. Canevaro rightly notices Lys. 30.3 (*ibid.* 22-23), I will try to emphasise the greater importance of this passage. See also Dreher 2022 for a more complex view of the mechanism for repealing laws in Athens from the archaic to the classical period.

¹³⁹ Surprisingly, the understanding of this phrase is quite uncontroversial, which, until now, many scholars have somewhat misunderstood and mistranslated. I follow here N. Robertson 1990, 54 n. 36: ‘And when the archons were imposing fines and bringing cases into court, he was still reluctant to hand over the laws’; similarly Edwards 1999, 164; cf. Carawan 2010, 81 n. 30 *contrary* cf. Todd 2000: ‘When the Archons imposed summary fines on him, and summoned him before a lawcourt, he still refused to surrender the laws’ (similarly Volonaki 1998, *ad loc* and Gernet 1962, *ad loc*). Further on, in the main body of the text, I clarify my understanding of the passage.

¹⁴⁰ Cf. Shear 2011, 83.

cited above¹⁴¹ in relation to transferring certain boards to other officials for further administrative or legal proceedings. It should be remembered that this was a legal project that went beyond the original premises. The work must have proved arduous and lengthy. However, most citizens realised this; after all, Nicomachus had been in office for the entire duration of the scrutiny of the laws in 410-399.

Certain ‘social factors’ must also have mattered, which is how I interpret the information from Lys. 30.3 that the litigants in court told each other that they had obtained the laws from the hand of Nicomachus (ἐκ τῆς τούτου χειρὸς ἐταμεινόμεθα τοὺς νόμους)¹⁴², and *nomoi* turned out to be contradictory. It is plausible that the Athenians, having heard that such a legal scrutiny was taking place and that the *anagrapheis* were querying old laws, may have kept bothering Nicomachus and other officials, seeking their help. Moreover, the Athenians meticulously reviewed the information on the new legal project. They knew who was working on the legal scrutiny very well, so they later tried to ‘legitimise’ their actions in court by saying that, in case something happened, it was Nicomachus who discovered the laws. Most Athenians could not afford a logographer to undertake legal research for them. The average citizen could have taken advantage of the ongoing interim period while the laws were being revised and tried to exploit the conspicuous inconsistencies. These are merely hypotheses, of course, but one must always consider the social factor in this type of reform. Sometimes systemic problems are hidden, and making them public causes people to start looking at them with increased attention, trying to take advantage of the prevailing chaos. Citizens could turn to Nicomachus and other *anagrapheis* for help, and then the litigants would claim to have received laws from them; they probably obtained the information that such laws, and not others, were available and had been enacted at some point. I understand similarly, as discussed above, the involvement of Nicomachus in Cleitophon’s case (Lys. 30.11), when he ‘revealed’ (*apodeiknunai*) the existence of a law on the Council. Generally, the situation where laws were contradictory was no fault of Nicomachus, but it provides a ‘snapshot’ of the quite chaotic legal and judicial state in late 5th century Athens.¹⁴³

¹⁴¹ See above, in 4.1.

¹⁴² The verb ταμεινέειν denotes here derogatory meaning; I want to thank one of the Reviewers to paying my attention to this.

¹⁴³ See recently Canevaro 2015, 15, 17 and Dreher 2022, 32 on legislative chaos in the context of the *anagrapheis*.

Such an interpretation may also be supported by the proper reading of one sentence of Lys. 30.3: ἐπιβαλλόντων δὲ τῶν ἀρχόντων ἐπιβολὰς καὶ εἰσαγόντων εἰς τὸ δικαστήριον οὐκ ἠθέλησε παραδοῦναι τοὺς νόμους. It should not be understood here (as most scholars do)¹⁴⁴ as meaning that Nicomachus was fined and brought to court (for in Greek, we do not have the complement to ἐπιβαλλόντων and εἰσαγόντων). This is simply a general report on the state of the facts, i.e. the presence of conflicting laws in the legal order; in such a situation, the administration and courts of Athens had to proceed regardless, such that officials still introduced cases into tribunals, imposing penalties even when conflicting laws existed (τοὺς νόμους ἐναντίους). The litigants (*antidikoi*) 'brought forward for the court' (ἐπὶ τοῖς δικαστηρίοις παρείχοντο) contradictory laws; this must refer to the phase of *anakrasis* in which the parties presented the laws they wanted to be read by the secretary in the *dikastēria*¹⁴⁵, or the laws on which the *enklēma* (written complaint) was formulated. Therefore, the officials (*archontes*), having conflicting laws at their disposal, still had to decide whether the issue was admissible or not (the accuser uses the crucial verb *eisagein*).

By the 'conflicting laws' (*nomoi enantioi*), in Lys. 30.3, I understand regulations whose inconsistencies could not be eliminated by interpretation (linguistic improvements of laws, as proved, were not implemented¹⁴⁶). They would be somewhat directly contradictory laws, such as different penalties for one offence (a specific number of drachmas in the case of a fine or limits on the ability of officials¹⁴⁷ to impose a fine) or the allocation of powers to handle the same case to various magistrates (which would make

¹⁴⁴ See above, n. 139.

¹⁴⁵ Cf. Antiph. 5.20, 22; Lys. 23.8; on the Athenian trial, see Harrison 1971; cf. Todd 1993, 77-167; Harris 2013b. On court documentation, see also Filonik 2024.

¹⁴⁶ See above on the *Boulē* in 4.5; also on Draco's law in Harris-Canevaro 2023.

¹⁴⁷ Indeed, officials had the autonomy to impose fines on citizens; see Edwards 1999, 163-164; cf. Rhodes 1985², *ad Ath. Pol.* 56.7; MacDowell 1978, 235-237; Harrison 1971, 4-7. In Lys. 30.3 Lysias used the word ἄρχων, a term which can mean simply 'official' (*LSJ* s.v. ἄρχων); cf. Aesch. 3.27 (καὶ ἐπιβολὰς ἐπέβαλλε, καθάπερ οἱ ἄλλοι ἄρχοντες). Compare also the inscription regulating the conduct of the festival in honour of Hephaestus, dated 421/0, which allows *hieropoioi* to impose fines of up to 50 drachmas on those disrupting the order of the festival, and if someone deserved a higher penalty they had to bring a case into court with the official concerned (Il. 25-28: καὶ ἂν τις τι ἀκοσμεῖ[ι, κύριοι ὄντων αὐ] | τοὶ μὲν ζεμ[ιὸν μέχρι πε]ντέκοντα δραχμῶν καὶ ἐκγράφε εἰς [...12..... ἐὰ] | [v] δέ τις ἄχσ[ιος εἰ μέζον]ος ζε[μ]ίας, τὰς ἐπιβολὰς ποιό[ν]τον [hoπόσας ἂν δοκεῖ κ] | [α]ἰ εἰσαγόν[τον εἰς τὸ δικασ]τέρι[ο]ν τὸ τὸ ἄρχοντος, see *CGRN* 43, ed. by J.- M. Carbon, S. Peels, V. Pirenne-Delforge).

it difficult for officials to decide whether a case was *eisagogimos* or not).

Certainly, blaming Nicomachus for the existence of contradictory laws in the Athenian legal order was part of the accuser's rhetorical strategy. However, as I have tried to show, it could actually reflect the public perception of his work (as well as that of the other *anagrapheis*) due to the unprecedented nature of this scrutiny. The scrutiny of the laws may have paradoxically opened Pandora's box, by revealing the inconsistencies in the legal system, exposing its loopholes, and highlighting the inclusion of directly conflicting laws that could not be circumvented by interpretation, such as the question of variations in sanctions of penalties, or the attribution of a particular case to a particular official.

This social aspect of perceiving the law reform through the lens of the activities of *anagrapheis* is vital to Athenian legal culture. Such a perspective helps to understand the Athenians' behaviour and mindset regarding the legal or judicial order. Indeed, Athenians were aware of the courts' power, so they eagerly litigated to fight for their interest and, from a more ideological point of view, for justice. We can assume they knew how the judicial order functioned and recognised its benefits and weaknesses. In Lys. 30.3 we are informed about the parties in courts evoking contradictory laws, which means that the order – for some reason – stopped working, and it might have been an impulse to benefit from this state of affairs. The same is said by Andocides (Andoc. 1.86), when he describes the reasons behind introducing (after 403) one of the vital rules and threats related to the possible breaking of the amnesty due to *sykophancy* (*sykophantein*), as part of the layered political and legal circumstances after the Thirty. Yet, it seems that abusing the inconsistency of the legal order appeared from the beginning of the legal scrutiny when the *anagrapheis'* activities were publicly known.

Nicomachus was not responsible for this state of affairs. He was just aware that this was the way things were, and in the course of the work, which took a long time, he just had to seek out and trace these inconsistencies. The place for the final verification of the laws was the Assembly, where the laws were voted on, which the accuser overlooks throughout the speech.

4.7. Debating laws at the Assembly

Regarding the shifting of decision-making primarily to the Assembly, there

is a passage that scholars have largely overlooked.¹⁴⁸ The second part of Lys. 30.21 reads: 'And in the middle of this, that temple robber is running around, claiming that he has written down piety rather than thrift. Moreover, he says that if these things do not please you, you should erase them (κἂν τοῦτοις ὁ ἱερόσυλος περιτρέχει, λέγων ὡς εὐσέβειαν ἀλλ' οὐκ εὐτέλειαν ἀνέγραψε: καὶ εἰ μὴ ταῦτα ὑμῖν ἀρέσκει, ἐξαλείφειν κελεύει).'¹⁴⁹ In this passage, the accuser seems to be invoking the behaviour of Nicomachus, who had to defend himself by reminding the judges that he did not have the power to authorise the laws under scrutiny. Instead, an external body, like the Assembly, needed to approve them; the verb *areskein*, in some contexts, can denote a decision taken by a public body.¹⁵⁰ Furthermore, if such a thrust was accurate, Nicomachus' attitude would show his great self-confidence and, at the same time, demonstrate that he believed the Athenians were pleased with the outcome of his work on the legal scrutiny.¹⁵¹ But it also reflects the most important thing that, even if the *anagrapheis*' remit was not merely clerical at the preliminary step of legal scrutiny, the most crucial step in the decision to create a refreshed body of laws were the orders of the Assembly – as we learned from *IG I³ 104*. After proceedings by the *anagrapheis* with cooperation with other officials (mainly the *Boulē*), there was a meeting of the Assembly, which voted on accepting or rejecting a particular law. Yet, I assume that the Assembly, from the very beginning of this legal project, was also able to introduce amendments.

Recently, Mirko Canevaro and Edward M. Harris, when analysing Draco's law, have convincingly argued that *IG I³ 104* contains an original archaic law of Solon that has not undergone any amendment (as indicated, among other things, by the language used).¹⁵² Eventually, even if their analysis of the inscription together with other sources on Athenian homicide law has shown that we are dealing with an archaic text of Draco's law, which was not amended during the scrutiny of the laws, it does not have to imply that the

¹⁴⁸ I have only noticed it in Oranges 2018, 75-76.

¹⁴⁹ Transl. S.C. Todd, slightly modified (my gratitude to Janek Kucharski and Jakub Filonik for their remarks on this passage).

¹⁵⁰ *LSJ* s.v. ἀρέσκω (ἀρέσκει *is used impers. to express the opinion or resolution of a public body*; cf. Latin *placet*), as i.e. Hdt. 8.19 (ταῦτα ἤρεσέ σφι ποιέειν); Ar. *Eq.* 1311 (ἦν δ' ἀρέσκη ταῦτ' Ἀθηναίους).

¹⁵¹ Cf. Hansen (Hardy) 1990, 48.

¹⁵² Harris-Canevaro 2023; I accept their main conclusions on the original and unamended Draco's homicide law.

same happened with each law under scrutiny. I will now argue that amendments cannot be excluded from the procedures of this project.

One of Mirko Canevaro and Edward M. Harris' arguments involves the use of the verb *dokimazein* by Andocides to denote the scrutiny of laws (Andoc. 1.82) as only 'yes or no' voting on the laws. Indeed, by referring to various contexts in which this verb appears, such as the *dokimasia* of officials, they conclude that, during the legal scrutiny, the Assembly could either accept or reject the law in question, as this is the general sense of *dokimasia*.¹⁵³ Nevertheless, the scrutiny of laws in the Assembly was a distinctive process, in which deliberation might have preceded the final voting. At the end of this procedure, some laws would be approved without amendments, others were modified, and some rejected, depending on whether the *Ekklēsia* ultimately passed a given law or not. From this perspective, the verb *dokimazein* can be understood not as a mere dichotomy of approval or rejection, but as a flexible framework for legal evaluation. This is not unlike modern legislative practices, where ultimately a law is either enacted (with or without amendment) or not at all – *tertium non datur*.

Beyond the well-known Andoc. 1.82, there is another telling example of *dokimazein* in a legislative context. In Xen. *Mem.* 4.4.14, during a moral-philosophical discussion, Hippias observes: '*Socrates, how could anyone believe that laws or the obedience to them are a serious matter, when the very people who set them down often change them, having rejected them after scrutiny?*' (...οὓς γε πολλάκις αὐτοὶ οἱ θέμενοι ἀποδοκιμάσαντες μετατίθενται).¹⁵⁴ The aorist ἀποδοκιμάσαντες (from the verb ἀποδοκιμάζειν that means 'reject on scrutiny') alongside the verb μετατίθενται (from μετατίθημι that means 'replace', 'change', 'substitute') are strictly connected here.¹⁵⁵ Moreover, the verb *dokimazein* is used in a more abstract context by Plato (Pl. *Resp.* 3.407c) to perceive philosophy in terms of virtue that can be practised and tested (ὥστε, ὅπη ταύτη ἀρετὴ ἀσκεῖται καὶ δοκιμάζεται); from this angle, *dokimazein* does not necessarily imply dichotomy of approving and rejecting of something, but a kind of checkpoint of the way of improvement¹⁵⁶. Considering the specific legislative context of *dokimasia* of

¹⁵³ The core idea of *dokimasia* was to check whether someone (or something in the case of, e.g., *dokimasia* of silver) fitted some standards (e.g. legal, religious, social or economic). See Todd 2010; cf. Harris-Canevaro 2023, 19; Chabod 2024, 274 n. 97.

¹⁵⁴ Transl. by A. L. Bonnette (emphasis is mine) taken from Bonnette–Bruell 1994.

¹⁵⁵ *LSJ* s.v. ἀποδοκιμάζω and μετατίθημι.

¹⁵⁶ More abstract and philosophical senses of political and legal vocabulary are observed

the laws, I would argue that there was a space for amending the laws.

Moreover, supposing that some laws may have been contentious, eliminating the possibility of amendments could block the enactment of such a law altogether, effectively 'boycotting' the re-enactment of the contemporary *nomoi*. Within the general framework of making *psephismata* in Athens, an inherent feature is the possibility of making amendments.¹⁵⁷ Before the introduction of *nomothetai* (and the separation of *nomoi* from *psephismata*) at a later stage of the law reform, making general laws seemed to fit somehow the standard decree-making process¹⁵⁸; the prescript with Draco's law reflects it (at least partially) as the proposer presented his motion before the *Boulē* (see above). Amendments were always inserted in the inscriptions with the content of a *psēphisma* after the main portion of the proposal. Albeit *IG I³ 104* has not been preserved in its entirety¹⁵⁹, the amendment that revised the text of the main law may have already been applied to the text of the inscription¹⁶⁰ or, which was more common in Athens, appeared only after the 'original' text of a law, as also we have in Great Code from Gortyn. Generally, Greeks instead did not make a coherent version of the amended text of the law as it is common in modern promulgations of laws.¹⁶¹ Indeed, there

in Lloyd 1979, 252-253 with n. 120 (also on 'testing and examining ideas').

¹⁵⁷ In the inscription on the first fruits of Eleusis (*IG I³ 78a*), where the proposers were *syngrapheis* (a group of experts in sacred matters), the opportunity for amendments was also retained (l. 47: the amendment was made by the prophet Lampon). On the legislative process of Athens in the context of epigraphic formulas, see Rhodes-Lewis 1997, 11-31; cf. Rhodes 1972, 52-81 and Henry 1977, 17-18 (stressing the inconsistencies in epigraphic formulas). On the politics of amendment in 5th century Athens, see recently Osborne 2024 (focuses on a more statistical approach showing that the Assembly seems to more often amend decrees in the 5th century than in the 4th century; cf. Osborne 2018 with the meaningful title: *the theatre of the amendments*). On the 'probouleumatic' formulas, see above in 4.2.

¹⁵⁸ Cf. Esu 2024, 24-26 on the separation of law-making and decree-making in Athens and Greece; cf. Rhodes-Lewis 1997, 17, 32; Canevaro 2015, 14, 18-20.

¹⁵⁹ Notably, the inscription begins with *kai* — 'and' or 'even if' (?) — what raised the question of whether original law might have started this way; see Sickinger 1999, 20-21; cf. Harris-Canevaro 2023, esp. 27-37.

¹⁶⁰ We have at least one such case, *IG I³ 110* (see *OR 184*), a decree of honour (dated 408/7) for Oiniades of (Palai)skiathos, which contains an amendment (ll. 26-31: Antichares proposed: in other respects in accordance with the Council, but in the proposal a correction shall be made for 'of Skiathos', so that there shall be written, 'Oiniades of Palaiskiathos'. This amendment is already engraved and included in the main text of the decree: ll. 7-8; on that amendment, see Osborne 2018, 43-44.

¹⁶¹ In the *Gortyn Law Code*, amendments to some earlier provisions appear only at the end of the inscription. They include in the section 11.24-5 an amendment to 1.1-

is no direct evidence of such intervention in the Draco's law inscription. Nevertheless, considering the broader linguistic and epigraphic context, we cannot entirely exclude the possibility of amendments to other laws under scrutiny, assuming that all such laws were intended to follow a pattern similar to that of *IG I³ 104*. There is even more evidence to support this.

IG I³ 105 proves that the law on constitutional matters was part of the legal discourse of the late 5th century and ultimately was part of the scrutiny of the laws. We know that before this happened, the law on *Boulē* had changed a few times, and simultaneously, the oath of Council must have been amended as well¹⁶². In *IG I³ 1453 (OR 155)*; decree enforcing use of Athenian coins, weights and measures, dated ca. 414), we learn that the secretary of the Council is to add the necessary clause to the oath of the Council (l. 10: προσγράψαι δὲ καὶ πρὸς τὸν ὄρκον [τ]ὸν τῆς βουλῆς). Moreover, we know from the fragment of Philochorus (*FGrHist* 328 F 140) that in 410/9, Athenians changed the law on *Boulē*, introducing the sortition of seats and thus modifying the bouleutic oath as well.¹⁶³ Indeed, we do not have much evidence to link the latter amendment with the *IG I³ 105* (understood as the very same legislative operations within the scrutiny of the all laws concerning *Boulē*), even if it fits with the chronology. But, still, there is evidence that Athenian modified their laws on the same matter when it was necessary, and the secretary of the Council was in charge of establishing relevant text (similar is stressed in Diocles' law on the clauses of the law validity; see below). Remarkably, even if the law on the *Boulē* (and the oath as well) was modified, Athenians in the 4th century regarded the *hōrkos* as wholly in force in the version from Cleisthenes' reforms (*Ath. Pol.* 22.2).

Unfortunately, we do not have clear evidence to establish the exact pro-

2.2 (on seizure before trial), in 11.31-45 a supplement to 9.24-40 (on obligations of the deceased), in 11.46-55 an amendment to 2.45-3.16 (on divorce), in 12.1-5 an amendment to 10.14-25 (on gifts to Women), in 12.6-19 an amendment to 8.42-53 (on heiresses who are Children); I follow the edition and commentary of Gagarin-Perlman 2016 (G.72); also see Gagarin 1982, esp. 145-146.

¹⁶² See Sommerstein-Bayliss, 2012, 40-43.

¹⁶³ *FGrHist* 328 F 140: φησι γὰρ Φιλόχορος ἐπὶ Γλαυκίππου «καὶ ἡ βουλή κατὰ γράμμα τότε πρῶτον ἐκαθέζετο· καὶ ἔτι νῦν ὁμνῶσιν ἀπ' ἐκείνου καθεδεῖσθαι ἐν τῷ γράμματι ὅτι ἂν λάχῳσιν. However, Rhodes 1991, 93 does not link this amendment with scrutiny of the laws (for *ratio legis* behind this 'new law', see Rhodes 1985², 192; Ostwald 1986, 321-322, 418-419). Moreover, the oath of the Council was also modified because of the amnesty clauses, see *Andoc.* 1.91.

cedures for amending old laws during the scrutiny of the laws (either of the stages of this project). Still, the logic of these developments, contradictory laws (Lys. 30.3: the place of this passage in the speech suggests the I Stage), and other political, constitutional, and economic factors led to the conclusion that modifying old laws must have happened from 410. If Athenians 'dared' to reject Solonian laws during legal scrutiny, why would they not consider amending them – it would even more suit the image that such laws were still Solon's laws. It was from the time of the Four Hundred's regime onwards that Athenians began explicitly discussing the old laws, often (ab)using slogans such as *patrioi nomoi* — in contrast to the earlier dominant legislative ideology, which was generally suspicious of legal change.¹⁶⁴ Of course, the procedural situation may have changed when, in 403, Athenians established the board of *nomothetai* to work on their new laws; perhaps from this moment, they were working additionally on amendments to the Solonian laws as part of the scrutiny of the laws (with certain cooperation with the *anagrapheis* at the preliminary step).¹⁶⁵

Indeed, *anagrapheis* did not formally amend or edit the laws; this stage was related to the formal setting of the final version of the laws in force and the deliberations in the Assembly. Nicomachus and others, at this stage of the scrutiny of the laws, merely carried out the instructions of the *Ekklēsia*, based on their inquiries so far and the preliminary texts of the laws discovered and collected earlier.

Lysias' speech shows that the laws concerning worship and sacrifices, especially their financial dimension, were controversial among some Athenians. It was probably about them that the most heated debates took place at the Assembly. In contrast, the old laws of Draco were broadly held in esteem, and there was no perceived need to change them. Thus, legal discourse¹⁶⁶ is an essential element of Athenian legal culture embedded within a broader culture of deliberation. From this perspective, we can observe a spectrum of crucial values for some groups; in Lys 30.21, discussed above, we learn that, for some people, the argument for arranging the new sacred calendar was a mark of *eusebeia*, and for others, *euteleia*. Even if we do not

¹⁶⁴ On mistrusting legal change and tacit legal change, see more Canevaro 2015, esp. 30-43.

¹⁶⁵ I would like to thank Mirko Canevaro for suggesting such a possibility.

¹⁶⁶ On the legal discourse in Greece, see Humphrey 1988 (on Nicomachus and the law reform, see especially *ibid.* 476); cf. Wohl 2010, 291-316.

know the particular Athenian law, we can try to examine what we can learn through the perspective of legal discourse to detect crucial values or ways of thinking, at least for some parts of Athenian society. The Assembly was one of the apparent forums of legal discourse for the scrutiny of the laws (the ‘evolving law reform’). Lys. 30.21 shows that Nicomachus was also aware of the strength of this argument, as he was supposed to point out that he only ‘removed’ (*exaleiphein*) something if the Athenians so decided. From this perspective, it was the people (*dēmos*) who were lawgivers; this was a considerable change in the light of the previous ideology of legislation, which perceived only specific great *nomothetai* as true lawgivers (cf. Lys. 30.28).¹⁶⁷ It marked a crucial shift in late 5th century mentalities – one that reflects a key element of Athenian legal culture: the connection between *ways of doing* and *ways of thinking* in the context of legal change.

4.8. Flexibility: from the scrutiny of the laws to the ‘law reform’

I have tried to emphasise that a fundamental feature of the late 5th century legal developments was the flexibility in response to changing political, social, and military circumstances and growing administrative problems and challenges. A watershed moment came in the coming to power of the Thirty, which began bloody and brutal interventions in Athenian laws and the courts (*Ath. Pol.* 35.2); tinkering with Solon’s laws entailed emending some while destroying the inscriptions and preserving others.¹⁶⁸ Undoubtedly, the Thirty also interrupted and intervened in the work of the *anagrapheis*. Some scholars have interpreted the destruction of inscriptions with the sacred calendar written in the Ionic alphabet as the ravaging activities of the Thirty.¹⁶⁹ When democracy was restored and scrutiny of the laws resumed,

¹⁶⁷ Discussed in more detail in Canevaro 2015, 32-33.

¹⁶⁸ On the oligarchy’s general approach to violence and stability, analysed against the background of the Thirty’s activities, their treatment of the court and the law, see Simonton 2017, 90-93; cf. Osborne 2003, 262-266; Shear 2011, 176-186; Rhodes 1985² *ad Ath. Pol.* 35.2; on destroying inscription by Thirty, see Culasso Gastaldi 2014, 4; cf. Low 2020, 250-254 (stresses the symbolic meaning of such operations; cf. Shear 2011; Aesch. 3.190).

¹⁶⁹ On the sacred calendar, see more above, n. 23-26 and, below, n. 187, 192. The inscription reporting on the traces of wiping out are frags. 2 and 3 in Lambert’s edition; see more in Rhodes 1991, 93-95 (a brief overview of scholarly positions on interpreting damage marks); cf. Clinton 1982, 32, 35; Robertson 1990, 44-45; Lambert 2002, 355; Shear 2011, 240-243; Joyce 2022, 106-110.

the project took on a new dimension.

This stage is elucidated in Andocides' *On the Mysteries*. In this case, the orator tried to convince the judges that, after democracy was restored and amnesty was declared, all laws (both *nomoi* and *psēphismata*), including those established before the archonship of Euclides (403/2), were no longer valid (Andoc. 1.89). Consequently, the decree of Isotimides from 415, which imposed penalties on Andocides, was no longer in force (Andoc. 1.71). Therefore, the prosecutors in this lawsuit were precluded from charging him with impiety (*graphē asebeias*)¹⁷⁰ for his involvement in the Eleusinian Mysteries in 400.¹⁷¹ Nevertheless, Lysias' speech challenged the idea that restoring democracy entailed repealing all previous activities of the *anagraphēis* and initiating a new review of the laws, as implied in Andoc. 1.82. The amnesty agreement did not aim to invalidate previously enacted decrees.¹⁷² On the contrary, it intended to preclude litigation for actions committed before 403/2 (i.e. mainly during the rule of the Thirty) as argued by Douglas M. MacDowell.¹⁷³ Thus, Andocides confused legal application with legal validity.¹⁷⁴ The following passage deserves particular attention (Andoc. 1.81-82):¹⁷⁵

¹⁷⁰ On the broader background of the trials for *asebeia*, see Filonik 2013, 42-43. However, R. Van Hove has recently argued that Andocides' trial took place under *endeixis atimias* (Van Hove 2025).

¹⁷¹ This case is recently discussed by Joyce 2022, 24-25 and 107-126, who enumerates Andocides's factual and legal manipulations; cf. MacDowell 1962, Hamel 2012, Hagen 2021.

¹⁷² See Joyce 2022, 115.

¹⁷³ MacDowell 1962, 128, 200; Joyce 2022, 110-111, 120. Another example of manipulation of Andocides in this context is the portrayal of Leon's condemnation to death by the Thirty as a result of Meletos' actions (Andoc. 1.94) – Meletos could not be held responsible for this, as this would have contradicted the amnesty covenant that individuals could not be tried in court for deeds preceding the archonship of Euclides.

¹⁷⁴ It is worth stressing that Athenians, to some extent, seem to have distinguished legal vocabulary to denote 'applying' laws (the form from *χράομαι*; 'using' laws by magistrates and by the litigants; cf. *Ath. Pol.* 53.3) and 'making laws (in)valid' (*κυρίουσ εἶναι* confirming that the law is a part of the legal order; as in Diocles's law, see below n. 185). Thus, even Andocides, highlighting archonship of Euclides as the crucial caesura, employs almost verbal form *χρησθαι* (Andoc. 1.88-89, 93), only for somewhat rhetorical impression tries to convince that it makes decree of Istotimides 'invalid': *ἄκυρόν ἐστιν* (Andoc. 1.8, 72; cf. the juggling of the key verbs in Andoc. 1.99). Generally, on the Greek legal terminology on (in)validity, see Dimopoulou 2014; cf. Dreher 2022, 63-67.

¹⁷⁵ See Canevaro 2015, 38-40.

[81] ἐπειδὴ δ' ἐπανήλθετε ἐκ Πειραιῶς, γενόμενον ἐφ' ὑμῖν τιμωρεῖσθαι ἔγνωτε ἂν τὰ γεγενημένα, καὶ περὶ πλείονος ἐποιήσασθε σῶζειν τὴν πόλιν ἢ τὰς ἰδίας τιμωρίας, καὶ ἔδοξε μὴ μνησικακεῖν ἀλλήλοις τῶν γεγενημένων. δόξαντα δὲ ὑμῖν ταῦτα εἴλεσθε ἄνδρας εἴκοσι: τούτους δὲ ἐπιμελεῖσθαι τῆς πόλεως, ἕως ἄλλοι οἱ νόμοι τεθεῖεν: τέως δὲ χρῆσθαι τοῖς Σόλωνος νόμοις καὶ τοῖς Δράκοντος θεσμοῖς. [82] ἐπειδὴ δὲ βουλήν τε ἀπεκληρώσατε νομοθέτας τε εἴλεσθε, ἠύρισκον τῶν νόμων τῶν τε Σόλωνος καὶ τῶν Δράκοντος πολλοὺς ὄντας οἷς πολλοὶ τῶν πολιτῶν ἔνοχοι ἦσαν τῶν πρότερον ἔνεκα γενομένων, ἐκκλησίαν ποιήσαντες ἐβουλεύσασθε περὶ αὐτῶν, καὶ ἐψηφίσασθε, δοκιμάσαντες πάντας τοὺς νόμους, εἴτ' ἀναγράψαι ἐν τῇ στοᾷ τούτους τῶν νόμων οἱ ἂν δοκιμασθῶσι. καὶ μοι ἀνάγνωθι τὸ ψηφισμα.

ἄλλοι Stahl : ἂν οἱ A (ἂν del. Dobree) : αὖ οἱ Weidner : δὴ οἱ Richards²

[81] After your return to Athens from Piraeus, though it was in your power to take revenge, you decided to let bygones be bygones. You thought the preservation of Athens more important than personal vengeance, and you resolved not to revive accusations against one another for what had happened. On this resolution you appointed twenty men; they were to have charge of the city until other laws should be enacted. Meanwhile the *nomoi* of Solon and the *thesmoi* of Draco were to be applied. [82] After you had drawn lots for a Council and appointed lawmakers, they found that under many of the *nomoi* of Solon and of Draco many citizens were liable to penalties for what they'd done earlier. You called an Assembly, discussed about it, and decreed that all the laws should be scrutinised, and then those laws which were scrutinised should be inscribed in the Stoa. Please read the decree. (transl. by D.M. MacDowell, slightly modified)

Andocides mentions here the appointment of temporary officials, the Twenty, who were to exercise interim rule and monitor the legal chaos in the wake of the overthrow of the Thirty, including bringing order to the laws they had destroyed (cf. a *scholion*¹⁷⁶ to Aesch 1.39). In restoring democracy and the rule of law¹⁷⁷, the Athenians resumed the scrutiny of the laws and implemented appropriate legal measures to prevent further *stasis*. In addition to the hitherto known procedures related to the legal scrutiny, an additional element was introduced to constitute a systemic law reform, namely the 'lawmakers' (*nomothetai*); at the same time, this was not an

¹⁷⁶ See above, n. 91.

¹⁷⁷ There is an ongoing discussion on applying the rule of law to Athens; for such a perspective, see Harris 2013a and Canevaro 2017, and recently, in the context of the legal scrutiny, also Joyce 2022, 93-98.

office related to the scrutiny of the laws, as some scholars¹⁷⁸ have argued, but a body appointed to draft and produce new laws that would establish principles of a 'constitutional' nature (Andoc.1.86-1.88). These included settling the validity of the law and decisions, establishing the division of *nomoi* and *psēphismata*, and enforcing the rule not to enact laws against individuals (*ep' andri*).¹⁷⁹

Andocides, in the sentence introducing the decree (Andoc. 1.82), erroneously – whether deliberately or not – equates two things: the scrutiny of the existing laws and the enactment of new laws (which is why the decree of Teisamenus¹⁸⁰ has caused so many problems for those who accept its authenticity). We do not know precisely how these *nomothetai* were elected. Their remit was plausibly to produce new laws rather than revise the existing ones.¹⁸¹

What Andocides confirms is the Assembly's decision to 'scrutinise (*dokimadzein*) all the laws' and then to publish (*anagraphein*) them in the Stoa. It appears that a literal understanding of this passage does not imply that Andocides, when referring to the decision of the Assembly, meant the actual *Ekklēsia* in which the legal scrutiny of all Athenian laws had already occurred. Instead, the decision had just been made to complete this process. This decision signified rather a continuation of the earlier work, in which the *anagrapheis* played a crucial role. Undoubtedly, the activities of the *anagrapheis* continued until 399, as Lys. 30 explicitly confirms.

It is also important to note that Nicomachus' trial came after the An-

¹⁷⁸ A. Oranges viewed Nicomachus as a *nomothetēs* after the overthrow of the Thirty; see Oranges 2018, *contra* Harris-Canevaro 2012; also Canevaro-Harris 2016-2017, 39-40 (*contra* Hansen 2016).

¹⁷⁹ See more in Canevaro 2015, 40-43.

¹⁸⁰ This is a crucial point in interpreting the procedural issues and in holistically considering the role of the *anagrapheis* in this 'stage' of law reform. In the recent secondary literature on the scrutiny of the laws, as far as I have noticed, only C. Joyce, following studies of E.M. Harris and M. Canevaro, does not accept the authenticity of this decree (cf. above n. 30 with a list of other scholars who, while studying other topics, accept their views). Contrary to C. Joyce, I draw from such an assumption a slightly different interpretation of the passages from *On the Mysteries*. I generally skip in this section the scholarship that consciously (Oranges 2018; Hansen 2016) or not (MacDowell 1962; Hansen 1990; Shear 2011) takes into account the authenticity of the decree of Teisamenus and attempts to reconcile the contradictions stemming from Lysias and this document.

¹⁸¹ However, we cannot exclude the possibility that after 403 – additionally – they might have had some influence on the amendments to old laws; see above in 4.7.

docides case, which indicates that the entire scrutiny project had already been completed. Still, the retrospective description of the law reform undertaken by Andocides suggests that, already in 400, all of the laws were scrutinised.¹⁸² Difficulties in presenting the chronology¹⁸³ of the events arise especially with Andoc. 1.85 (after the inserted the decree of Teisamenus), in which it is reported (transl. by Douglas M. MacDowell, slightly modified): ‘So the laws were scrutinised in accordance with this decree, and the ones which were confirmed were inscribed in the Stoa. When they’d been inscribed, we passed a law which is universally enforced (ἐδοκιμάσθησαν μὲν οὖν οἱ νόμοι, ᾧ ἄνδρες, κατὰ τὸ ψήφισμα τουτί, τοὺς δὲ κυρωθέντας ἀνέγραψαν εἰς τὴν στοάν. ἐπειδὴ δ’ ἀνεγράφησαν, ἐθέμεθα νόμον, ᾧ πάντες χρῆσθε).’ Here Andocides seems to imply that the scrutiny of the laws took place rather quickly, as a new law was enacted immediately afterwards. However, the orator does not specify the timing of the events described, nor does he indicate when new laws and fundamental decrees with the constitutional principles – described in Andoc. 1. 85, 86 and 88 – were enacted.

Andocides does not refer to the office of *anagrapheis*; however, he uses a key verb in this regard: *anagraphein*.¹⁸⁴ At the same time, he is not eager to mention the work of the *anagrapheis* because, if he did, he would have to acknowledge a ‘continuity’ of their work from 410. On the contrary, the orator is keen to establish the starting point for the validity of the newly enacted laws. Andocides omits the critical issue of the validity of norms introduced by Diocles’ law (Dem. 24.42), which may directly refer to the work of the *anagrapheis* in the years 410–404 by acknowledging the effects of their works as valid laws.¹⁸⁵ I would follow the interpretation of

¹⁸² Hansen 1990, 65.

¹⁸³ On the chronology, see Canevaro-Harris 2016-2017, 39-42.

¹⁸⁴ Ultimately, this need not come as a surprise since, unlike Lysias in *Against Nicomachus*, Andocides is not interested in the office of *anagrapheis* as something especially relevant. Besides, Lysias often just uses the verb *anagraphein* (and not the name of the office *anagrapheus*); likewise, when the *Athenaion Politeia* discusses various types of *syngraphein*-type activities, we are dealing with a description of an activity and not always indicating a specific office, see Volonaki 2001, 141-143.

¹⁸⁵ Dem. 24.42: ‘Diocles proposed: The laws enacted before the archonship of Eucleides during the democracy and as many as were enacted after the archonship of Eucleides and are recorded are to be valid. Those enacted after the archonship of Eucleides and enacted in the future shall be valid from the day each is enacted except if a date has also been specified on which the law is to take effect. (Διοκλῆς εἶπεν: τοὺς νόμους τοὺς πρὸ Εὐκλείδου τεθέντας ἐν δημοκρατία καὶ ὅσοι ἐπ’ Εὐκλείδου ἐτέθησαν καὶ εἰσὶν ἀναγεγραμμένοι, κυρίους εἶναι. τοὺς δὲ μετ’ Εὐκλείδην τεθέντας

the announcement of the scrutiny of the 'old' laws as a continuation of the systematic work until 399.

Both the controversy over the inclusion of contradictory laws in the order (Lys. 30.3) and the lack of specific transitional rules from the beginning of this legal project, combined with the interference of the Thirty in legal scrutiny, led to the decision in 403 to introduce systemic measures, ordering not only the comprehensive legal scrutiny but also the introduction of general rules of a constitutional nature; this is why we are ultimately dealing with a comprehensive and 'evolving law reform'.

How did the changes after 403 affect the work of the *anagrapheis*? The sources do not directly provide insights, as Andocides does not focus on this aspect. Diocles' law (Dem. 24.42) seems to make invalid all laws enacted during the Thirty and, simultaneously, to make order in the previous works of the *anagrapheis* in 410-404 by making them valid. This is how one may comprehend the first clause of this regulation: 'The laws enacted before the archonship of Eucleides during the democracy and as many as were enacted after the archonship of Eucleides and are recorded (*anagegrammenoi*) are to be valid'.¹⁸⁶ For the *anagrapheis*, the destruction of inscriptions containing the laws introduced by the Thirty may have hindered further work. However, the most important thing is that the legal situation was systematically sorted out, which did not happen from the beginning of the legal project. This is why already, since 410, there were some problems and the *anagrapheis* and the *polis* must have reacted flexibly to ongoing challenges (perhaps by introducing more *syngraphai* or by prolonging the remit of the *anagrapheis* and establishing different rules

καὶ τὸ λοιπὸν τιθεμένων κυρίους εἶναι ἀπὸ τῆς ἡμέρας ἧς ἕκαστος ἐτέθη, πλὴν εἴ τῷ προσγέγραπται χρόνος ὄντινα δεῖ ἄρχειν). The secretary of the Council is to add this clause to the established laws within thirty days. In the future, let whoever happens to be serving as secretary add that the law is valid from the date on which it has been enacted' (transl. adapted from Harris 2018). It is questionable how we should understand these laws, especially the three periods (before/in/after the archonship of Eucleides of 403/2), given the uncertainty of the chronological scope of the phrase ἐν δημοκρατίᾳ (meaning in the time between 410 until the rule of the Thirty) and also ἀναγεγραμμένοι (which may allude to the activities of the *anagrapheis*; cf. Anodc. 1.86, 88). On Diocles' law in the context of Andoc. 1. 86, 88 and the understanding of *anagraphein*, see also MacDowell 1962, 87, 126-127, 197; Clinton 1982, 34; Hansen 1990, 64-65; Rhodes 1991, 97 n. 43; Canevaro-Harris 2012, 116 n. 98; Canevaro 2013a, 123; Joyce 2022, 117.

¹⁸⁶ See note above.

for their *euthynai*). The Athenians responded to this legal project, given that its main aims lay in consolidating the laws and establishing a more consistent legal order.

4.9. *The publication of laws*

The place and format of publication are among the most debated aspects of the scrutiny of the laws.¹⁸⁷ According to *IG I³ 104*, Draco's law was commissioned to be published in a stone by the *anagrapheis* together with the secretary of the Council in front of the Royal Stoa (πρόσ]θε[ν] τῆς στοᾶς τῆς βασιλείας); Andocides writes about writing (*anagraphein*) laws: ἐν τῇ στοᾷ (Andoc. 1.82) and εἰς τὴν στοάν (Andoc. 1.86). Thus, most scholars presume that the legal scrutiny led to the publication in stone nearby the Stoa Basileios. More doubts arise over the form of the publication due to the interpretation of the mention of a wall (Andoc. 1.84: εἰς τὸν τοίχον) in the decree of Teisamenus. The contradiction between Andocides's paraphrases and the contents of the *psēphisma*, among others, has led Mirko Canevaro and Edward M. Harris to question the authenticity of the decree. Noel Robertson separated the question of compiling the laws and transcribing them for the Metroon archive from the issue of publishing the laws. According to him, the Stoa referred to by Andocides was the South Portico I in the Agora.¹⁸⁸ I endorse Kevin Clinton's view that not all Athenian laws

¹⁸⁷ In fact, every scholar has had to address this issue, starting with Dow 1961; Robertson 1990; Rhodes 1991; Canevaro-Harris 2012 and Canevaro-Harris 2016-2017, 40-44; see Joyce 2022, 103-107 for a recent summary of the discussion (recognising the stands of M. Canevaro and E.M. Harris on the non-existence of the wall) and Schmitz 2023, 9-11 (who maintains the plausibility of the wall). See also Lambert 2002, 356 n. 17, who states: 'However I prefer 'stele-series' to Dow's term 'wall' and Dow's attribution of the surviving fragments to two, or perhaps three, 'walls', while possible, is questionable. Of the published fragments with both faces preserved only two have the same thickness. Moreover, it is quite possible that stelai of different thickness were joined in a single series, with Face A aligned, Face B protruding back to a differing extent (indeed, a positive case can be made for this in the case of the group A fragments) and/or that there was more than one stele-series which contained stones of the same, or about the same, thickness'. Cf. Canevaro-Harris 2016-2017, 43 n. 100; cf. Shear 2011, 239-247.

¹⁸⁸ Robertson 1990, 52-60 thinks that the publication of Draco's law came before the Stoa Basileios, arguing that this was because the law on homicide was under the jurisdiction of the *archōn basileus*. Cf. Rhodes 1991, 91, who states that the Stoa Basileios was chosen, due to tradition, because the laws of Solon and Draco in the 5th century would have been kept there at the *axōnes/kurbeis*.

under scrutiny could have fit in front of the Royal Stoa¹⁸⁹. Kevin Clinton explains this by arguing that the scrutiny likely covered only Draco's or Solon's laws (and possibly their later modifications). However, the evidence discussed above suggests that the project encompassed all Athenian laws. In my view, Kevin Clinton's observation prompts a further question: were all laws under scrutiny actually published as inscriptions?

Some scholars assume that there was some kind of initial selection of which laws should be produced in this additional form.¹⁹⁰ Athenian epigraphic culture, as discussed above, lends credence to the idea that scrutinised laws, in their primary form, were recorded on another material: possibly papyri, perhaps *sanides* or *pinakes*, which were eventually archived in the Metroon. Andoc. 1.82 refers to the publication (*anagraphēin*) of all laws in the Stoa, although, as discussed above, the verb can also denote writing on portable materials. In contrast, *IG I³ 104* explicitly mandates the inscription of Draco's homicide law on a stone stele, which nonetheless does not exclude the possibility that additional copies were made for archival purposes. In the 4th century, the Royal Stoa, as Mogens H. Hansen noted, is not associated with published laws as a specific reference point; instead, the orators mention either the Metroon or a particular freestanding stele. Therefore, it seems that having archival copies on portable devices was essential during the scrutiny of the laws. This is also suggested by the decision to establish a state archive overseen by the Council.¹⁹¹

¹⁸⁹ See Clinton 1982, 32-33, also Hansen 2016, 45.

¹⁹⁰ Sickinger 1999, 104 implies that, given the inscriptions written in the Attic alphabet (that is, the sacred calendar, those of the trierarchy, and taxes), perhaps one criterion for selection was to publish in inscriptional form those laws related to Athens' finances. In contrast, one may ask, what is the connection between Draco's law and finance? We have too few sources (on the epigraphic ones, see Dow 1961, 67) to give any criteria in this respect.

¹⁹¹ J. Sickinger offers the most persuasive reconstruction: 'Hansen has pointed out that we do not meet a law code published in the Royal Stoa in the orators after Andokides' speech, and he suggests that after the code had been inscribed, changes to it forced the Athenians to abandon the idea of a full publication of all laws on stone; henceforth, they chose to deposit laws written on papyri in the Metroon. This suggests a two-staged development: laws were originally published on stone and only later housed in an archive. But publication of laws on stone and their simultaneous deposition in an archive are not mutually exclusive, and the Boule's archives may have received copies of the revised code throughout the entire review process'; Sickinger 1999, 103-104; cf. Hansen 1990, 64-67. However, it seems to make more sense to select accordingly which laws to publish in a stone as well as on portable materials, and which only on portable materials. Some archival copy must always have been there. The most recent

I follow the interpretation that exclude the view of the final publication of laws under scrutiny in the form of the wall.¹⁹² Edward M. Harris and Mirko Canevaro dismiss this idea, pointing to significant differences in the depth of the discussed fragment of inscriptions.¹⁹³ Yet, ‘clips’ between the *stēlai* have been spotted in one location. It is speculated whether they were part of the inscription from the start. The opisthographic character of the inscription implies a specific organisation into some cohesive unit; however, they are still too fragmentary to allow an ultimate stance. It is not impossible that more laws were published as freestanding inscriptions in a stone at the very beginning. However, while working on the sacred calendar, conceivably a series of freestanding *stēlai* Athenians introduced later. Ultimately, it is hard to determine this. Instead, the available sources, including Julia L. Shear’s detailed archaeological research, indicate that the Royal Stoa was the final location where the scrutinised laws were made public. But it is true when Athenians decided to use the inscriptional form for them, because archival copies played primary function – thus I see double publication as the most likely scenario.

In the context of Athenian legal culture, public access and the opportunity to consult a law’s relevant version was the most crucial element in the publication of the laws. In this context, the construction of the Metroon was pivotal as pointed out by Noel Robertson, James P. Sickinger or recently Michele Faraguna; indeed, this seems far more important than the ‘monumentalisation’ of the law in the form of free-standing *stēlai* set up in the Royal Stoa (this aspect of publishing laws was known in Athens since Solon). Citizens needed to be sure which versions of laws were valid so they could later invoke them in court, and the officials (and judges) would also know what laws to adopt and what sanctions to apply (cf. Lys. 30.3).

discussions of this crucial problem are gathered by Boffo-Faraguna 2021, 218-223.

¹⁹² For J. Shear, in a way, it was; see Shear 2011, 95: ‘The term ‘wall’ describes the screen construction created by the inscriptions and the columns in the two annexes [of Stoa Basileios – note R.M.]. In 403/2, the phrase ‘where they were written up before’ [Andoc. 1.84 – note R.M.] refers to the laws inscribed by the *anagrapheis* during their first term of office on the *stelai* in the intercolumniations of the stoa’s two wings’; *ibid.* 245 (‘in 399, at the end of the project of recollecting and restoring the laws, accordingly, the little Stoa Basileios contained vast amounts of inscribed text: great *stelai* with the texts of the laws stood once again between the columns of the two annexes, while the sacrificial calendar now covered the back wall of the building’). One must remember that J. Shear recognises the authenticity of the decree of Teisamenus.

¹⁹³ See Canevaro-Harris 2016-2017, 43.

V. Summary of the procedures for the scrutiny of the laws

Below, I propose reconstructing the legal scrutiny procedures, considering that they may have evolved throughout 410-399, and as flexibility seems to have been their main feature.

Step I: the decision of the Assembly to scrutinise all existing laws, electing the *anagrapheis* and setting the remit for them:

1. Election (not selection by lot!) of the *anagrapheis* after the overthrow of the oligarchic rule in 410 (Lys. 30.5, 29). Perhaps they were elected for a fixed period, which was later extended (in)formally (?) due to the scale of the work (the accuser's manipulation of alleged terms in Lys. 30.2: 4 months 'extended' to 6 years; Lys. 30.4: 30 days 'extended' to 4 years).

2. The establishment of the rules according to which the *anagrapheis* were to compile the laws (possible the *nomoi peri tēs anagraphēs* in Lys. 30.17). We do not know the content of these rules, but, by analogy with Callias' decree, a general range of tasks and methods of procedure must have been specified. The accuser alludes to some instructions, which were probably incorporated into a decree (Lys. 30.2, 4-5, 17). The central question is at what step and concerning which laws certain *syngraphai* were presented to *anagrapheis*. After the restoration of democracy, when it was decided to continue the scrutiny of the laws (Andoc. 1.82), perhaps some instructions were refined (potentially against the laws devastated by the Thirty).

Step II: 'preparatory': the primary work of the *anagrapheis* and other democratic bodies on the drafts of laws under scrutiny [*anagraphein* for the first time]:

3. Allocating responsibilities among the *anagrapheis* (perhaps Nicomachus was in charge of *ta hiera kai ta hosia*) and cooperation with other officials, especially including members of the *Boulē*. Possibly arranging a timetable for the work, as well as the sequence in which to deal with particular laws; setting up a plan to 'search' for spots where there could be *nomoi* (while also establishing some rules for querying the archive of the *Boulē* or other officials).

4. Searching for laws, among other places in the archives, logistically distinguishing between *nomoi* and *psēphismata*, tracing similar regulations and contradictions in the laws, preparing draft laws for further consultation with the *Boulē*, as well as possibly with other officials under whose jurisdiction the laws in question were enforced.¹⁹⁴ Strict cooperation of the

¹⁹⁴ See Sickinger 1999, 98-99: 'Starting from the laws of Drakon and Solon, they traced

officials and the transmission (*paradidonai/paralambanein*) of the drafts of laws to each other.

5. Work on the drafts of laws in the *Boulē*. A concrete mover of the decree (such as in *IG I³ 104*, l. 4) commissioned which law(s) needed to be scrutinised at the Assembly.

6. Possible promulgation of the agenda of the *Ekklēsia*, perhaps including posting specific drafts (or at least a catalogue of the laws), so that citizens could familiarise themselves with them. These were possibly displayed in front of the Monument of the Eponymous Heroes, written out as portable boards: *pinakes* or *sanides*.

Step III: Debate and vote at the Assembly:

7. Voting on the existing laws at the Assembly. I assume that the *Ekklēsia* could propose amendments from 410. A discussion had to occur about some of the ‘problematic’ laws; possible changes had to be introduced then. After 403, hypothetically, *nomothetai* worked additionally on amendments to some old laws under scrutiny.

Step IV: Publication of the laws [*anagraphein* for the second time]:

8. The *anagrapheis*, together with the Secretary of the Council, coordinated the publication of the laws after scrutiny at the *Ekklēsia* according to the instructions in the decree passed by the Assembly. I accept the primary publication of the laws in portable form (papyrus, perhaps wooden tablets) for the new emerging Metroon archive and, possibly also, if the Assembly so resolved, the display of the inscription in the Royal Stoa.

VI. Conclusion: Decoding features of the Athenian legal culture

I may start my final remarks, as the late Peter J. Rhodes once did when studying the Athenian law reform in 410-399, by noting: ‘This has been an intricate study’.¹⁹⁵ Indeed, this reform is undoubtedly a complex topic due to, i.a., the fragmentary and ambiguous nature of the available evidence as well as, sometimes, the contested authenticity of some sources.

The work of the *anagrapheis* illustrates the complexity, difficulty, and flexibility of this legal project, particularly in light of the logistical chal-

later supplements to these laws and which provisions were still in force. In cases where ambiguity or uncertainty existed, they may have been required to defer to the *Boulē* and *Ekklēsia* for a final decision, though appeals of this sort are unattested in our sources’. Cf. Volonaki 2001, 145 and 150 n. 24; Stroud 1968, 25.

¹⁹⁵ Rhodes 1991, 100.

lenges they faced. I have argued that they were neither mere scribes nor officials vested with institutional legislative authority. Instead, as elected officials, they were expected to possess a certain degree of expertise necessary for locating laws recorded on various dispersed 'media', identifying general laws (*nomoi*) even before their formal distinction from *psēphismata*, tracing later amendments and contradictions, and thus collecting laws for further submission to the *Boulē* and, subsequently, the *Ekklēsia*. The final act of *anagraphein* – publishing the laws after the Assembly's approval – was, in fact, mainly a clerical task.

Recognising the significant role played by the *anagrapheis* in the scrutiny of the laws – as part of the broader undertaking of the law reform – opens up a wider reflection on Athenian legal culture. In particular, it invites an inquiry into how *ways of thinking* about law (such as prevailing images of lawgivers and their legislation, conceptual divisions within Athenian law, or social expectations surrounding legal scrutiny) intersected with *ways of doing* – namely, the materiality of legal texts or the technical structure of legal inquiries. This outline merely touches on a spectrum of questions that illuminate key dimensions of Athenian legal culture. I am aware, however, that these issues require further conceptual development and methodological refinement. In what follows, I briefly summarise the most salient elements that emerged through this study.

An essential element of Athenian legal culture, perceptible through the prism of law reform, is the unique standing in Athenian cultural memory and legal consciousness of lawgivers such as Solon, Draco, and Cleisthenes. Political and public narratives were constructed around these *nomothetai* (with a special place reserved for Solon), and the ideology of legislation was used in the public space to promote certain legal and constitutional changes. This element of Athenian legal culture certainly still requires further research because it often reflects clashes between ways of doing and thinking regarding legal issues.

The Athenians began scrutinising the laws in 410 directly as a reaction to the oligarchic coups. Consolidating the laws and granting them renewed legitimacy when they were voted on in the Assembly was a remedy to strengthen democracy (as well as the rule of law). Nicomachus' profile as an *anagrapheus* and his continuation in office even after the overthrow of the Thirty demonstrates that the scrutiny of the laws, or more broadly the 'evolving law reform', was a democratic project, i.e. one which was

endorsed by supporters of democracy and implemented by the democratic institutions and means. Remarkably, *à rebours*, the oligarchs tried to cynically use democratic mechanisms to give legitimacy to their actions (such as the use of *syngraphai* or the intimidation of the Assembly to vote on changes) because they were aware of how significant the democratic institutions were for the majority of Athenian society.

The critical factor behind the procedure for scrutiny of the laws is what I have called the ‘principle of legalism’, according to which, first, the legal changes had to be established by a law voted by the Assembly and, second, new competent officials (*anagrapheis*) were elected by the *dēmos* (not drawn by lot), who were given a specific task and instructions (including in the form of a *syngraphai*) on how to proceed. This was the preparatory step of work on legal scrutiny, which was a significant responsibility and required relevant knowledge and skills. This grounds my characterisation of the *anagrapheis* not as secretarial scribes who mechanically transcribed statutes but as specific ‘experts’ familiar with the legal and archival-administrative aspects of the *polis*. This also testifies to the professional scale of this project from the inside, as the *anagrapheis* were the first to face these challenges (including, apparently, being able to distinguish between *nomoi* and *psēphismata*, which until 403 was not formally and archivally recognised). The final version of the laws was voted on in the Assembly, and then published by the *anagrapheis*, and only the law that passed the appropriate scrutiny procedure was valid (at least from a particular moment of the reform). Despite the existence of doubts from 410 onwards on what to do with conflicting *nomoi* in the legal order, in the context of a still ongoing scrutiny that lasted a couple of years (cf. Lys. 30.3), the matter was sorted out after 403, when additional rules ordering the validity of the law were duly implemented, such as the law of Diocles (Dem. 24.42). This stipulated (retrospectively, according to the period 410-403), firstly, that only the laws established under the democracy were valid, repealing the oligarchic actions before 403/2 and, at the same time, those laws in force which had gone through the proper scrutiny procedures and had been published by the *anagrapheis* (*anagegrammenoi*). Secondly (prospectively for future legislation: within the continuation of the legal scrutiny, as well as new laws – from 403 as the area of responsibility of *nomothetai*), Diocles’ law prescribed the general rule that law is in force at the moment when it is enacted by the Assembly (unless another time is indicated at the *Ekklēsia*).

Despite these difficulties, the Athenians, in the scrutiny of the laws, tried to adhere to the democratic principle of legalism, acting within the limits and based on the law.

The activity of the *anagrapheis* in the context of executing the scrutiny of the laws also shows that they did not act alone but collaborated with other magistrates of Athenian institutions (the *Boulē*, the officials in charge of bringing cases into courts, such as the *archōn basileus*, the *Ekklēsia*). The cooperation of officials in this respect was essential and represents a significant part of Athenian thinking about decision-making and the *polis*, which fits in with the concept of 'divided power' (as recently discussed by Alberto Esu). Co-operation both strengthened the professional aspects of law reform but was also an element that controlled abuses (which, in Lysias' speech, obviously fell solely on Nicomachus as *anagrapheus*, while the participation of the *Boulē* or the *Ekklēsia* in this process was passed over in silence).

Another element of Athenian legal culture discernible for the 'evolving law reform' is the place of legal discourse, i.e., the perception of law as a matter that can be discussed and argued about and, consequently, for which new solutions may be put forward. This is why it seems likely that the Athenians drafted laws and displayed them publicly before the discussion and voting at the Assembly. This fits with their general approach to legislation (also evident later in the 4th century) and the general democratic principle of acquainting citizens with draft laws before voting and allowing anyone who wishes (*ho boulomenos*) to put forward their suggestions. The oligarchs even promoted a similar idea in 411 (see *Ath. Pol.* 29.3). To what extent the oligarchs realistically took this into account is secondary; what matters is that democratic standards were invoked.¹⁹⁶ Moreover, from the perspective of legal discourse, it seems reasonable to assume that the laws under scrutiny could also be amended rather than only accepted or rejected. From a discourse perspective, it is also possible to grasp only part of the potential discussions concerning the criteria and values for examining (*dokimazein*) the law, such as the question of 'piety' (*eusebeia*) or 'thrift' (*euteleia*) in the case of laws with a sacred calendar (cf. *Lys.* 30. 21).

The publication of the law in the form of free-standing inscriptions in the Royal Stoa emerges directly as a competence of the *anagrapheis* under *IG I³ 104*. This certainly had to take place as an additional element of the

¹⁹⁶ See Rhodes 1985², 374; cf. Lasagni 2018.

‘monumentalisation of the law’, but, given the scale of the problems with the previous dispersal of the law in various places, as well as the technical impossibility of publishing all the laws in the form of inscriptions, it seems that the construction of the Metroon, the central archive, was fundamental to the scrutiny of the laws, primarily in terms of the accessibility of the law and its certainty, i.e., by ensuring a legal state of affairs in which the law is valid and can be invoked before an official or in court.

The model of the office of the *anagrapheis* shows that we deal with a rather unprecedented office for this type of work because the very project of scrutinising all the laws in force in Athens was innovative at the time. Hence, there were also problems with the implementation of this project, which must have arisen as the *anagrapheis* began to inquire into the laws: issues with identifying the laws of Solon or Draco or subsequent amendments to these laws, establishing the relevant text of the laws, contradictions in the laws, and so on. Therefore, quite a flexible approach had to be adopted with many aspects of this project from 410 onwards (as can already be seen in the potential extension of the office of *anagrapheis*). This probably also raised the social controversy surrounding the office of *anagrapheis* (including Nicomachus). Moreover, the legal scrutiny was also linked to a constantly changing political, constitutional, economic, military, and social situation, culminating in the Athenians’ defeat in the Peloponnesian War and the rule of the Thirty. The continuation of the legal scrutiny after 403 had to be adapted, among other things, to the validity of the amnesty clause.

The significance of such legal developments in the context of Athens’ systemic problems with building a coherent legal order and the problem of the presence of contradictory laws in the system would require a separate treatment. Certainly, however, one must be very careful when applying concepts such as ‘law code’ to the activities of the *anagrapheis*.¹⁹⁷ Given the evolution of the work on the laws and the critical systemic changes after 403, it seems to me that the most suitable term would be a law reform, or, more precisely, an ‘evolving law reform’. This is also part of Athenian legal culture, which, given its experience of ‘developing or building democra-

¹⁹⁷ Scholarship often uses the term ‘law code’ without explanation; critically on that notion concerning Solonian laws, see Hölkeskamp 2005. As in the potential law code from the late 5th century, it is also often used without any justification, as in Rhodes 1991 (but Joyce 2022, 97 stresses the problematic nature of such a notion).

cy'¹⁹⁸, was able to respond to multiple crises and ultimately find the appropriate legal, political, and systemic instruments to prevent further conflicts in the *polis*.¹⁹⁹ The activity of the *anagrapheis* in the context of the scrutiny of the laws was only one important element of the efforts to rebuild the rule of law in Athens, and this is why it is vital to look at their activity from the broader perspective of legal culture.

¹⁹⁸ From the perspective of the chronological reshaping of Athenian democracy, one may assume that we may start with Solon; yet, I leave aside the ongoing debates on the origins of democracy; see, e.g. Węcowski 2009, 350-360.

¹⁹⁹ As M. Węcowski points out, the pursuit of the *dēmos* to permanently adjust the systemic mechanisms that ensure their power and this power's stability and safety can be considered one of the characteristics of democracy from a synchronic point of view. See Węcowski 2009, 389-390.

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Citizen *nothoi*? The cases of Phile (Isaeus 3) and the two 'Mantitheuses' (Dem. 39 and [Dem.] 40)

***Nothoi* cittadini? I casi di Phile (Iseo 3) e dei due 'Mantitei' (Dem. 39 and [Dem.] 40)¹**

Abstract

This article defends arguments expressed in an earlier article published in *Polis* 36 (2019), against the recent critique of Brenda Griffith-Williams (2020 and 2023), about the role of *nothoi* in the democratic polis. The evidence of Dem. 39 (*Against Boeothus I*), [Dem.] 40 (*Against Boeothus II*) and Isaeus 3 (*On the Estate of Pyrrhus*) shows that *nothoi* could be citizens at Athens, despite the assertions of many modern scholars to the contrary, and that the chief limitation which *nothoi* faced was to do with inheritance entitlements. A careful examination of the case against Boeothus shows that the issue at stake was the inheritance of Mantitheus' estate, not citizenship, even though the latter is at several points dragged in for rhetorical reasons. Similarly, Isaeus' third speech on closer analysis gives an overwhelmingly probable indication, though disputed by many scholars, that the daughter of Pyrrhus, a woman alternatively called Phile and Cleitarete, who married an Athenian named Xenocles, was an illegitimate daughter (*nothe*) of the deceased Pyrrhus, the rights to whose estate were up for dispute. These speeches give further confirmation to my earlier argument that legitimacy at Athens carried

¹ I am grateful to Pietro Cobetto Ghiggia, David Lewis, Rosalia Hatzilambrou, Edward Harris, and Alberto Maffi for reading earlier drafts of this paper, as well as to the anonymous referees for *Dike*, for their acute remarks. I should also like to thank and acknowledge Brenda Griffith-Williams, in reply to whose arguments the present article is chiefly directed, for pointing out various inadequacies in my article in *Polis* 2019 and, in consequence, for prompting me to clarify my earlier position. All remaining errors are my own.

two distinct senses: citizenship legitimacy, which from 451/0 meant having two Athenian parents to whom the inductee to a deme could point on his eighteenth birthday, and engyetic legitimacy, which is what was required for inductees, male and female, to phratries.

Questo articolo difende le argomentazioni da me espresse in un precedente articolo pubblicato su *Polis* 36 (2019), contro la recente critica di Brenda Griffith-Williams (2020 e 2023), sul ruolo dei *nothoi* nella polis democratica. I casi di Dem. 39 (*Contro Beoto I*), [Dem.] 40 (*Contro Beoto II*) ed Iseo 3 (*Sulla proprietà di Pirro*) dimostrano che i *nothoi* potevano essere cittadini di Atene, nonostante le affermazioni contrarie di molti studiosi moderni, e che la principale limitazione a cui i *nothoi* andavano incontro riguardava i diritti ereditari. Un attento esame del caso contro Beoto mostra che la questione in gioco era l'eredità del patrimonio di Mantiteo, non la cittadinanza, sebbene quest'ultima venga introdotta in diversi punti per ragioni retoriche. Analogamente, il terzo discorso di Iseo, ad un'analisi più attenta, fornisce un'indicazione estremamente probabile, sebbene contestata da molti studiosi, che la figlia di Pirro, una donna chiamata alternativamente File o Clitarete, che aveva sposato un ateniese di nome Senocle, fosse una figlia illegittima (*nothe*) del defunto Pirro, i cui diritti sul patrimonio erano oggetto di controversia. Questi discorsi confermano ulteriormente la mia precedente argomentazione secondo cui la legittimità ad Atene aveva due significati distinti: legittimità di cittadinanza, che dal 451/0 significava avere due genitori ateniesi a cui chi veniva introdotto in un demo poteva fare riferimento al suo diciottesimo compleanno, e legittimità da *engye*, che è ciò che era richiesto per coloro che, maschi e femmine, venivano introdotti nelle fratrie.

Keywords: Citizenship, *nothoi*, legitimacy, inheritance, demes, phratries

Parole chiave: Cittadinanza, *nothoi*, legittimità, eredità, demi, fratrie

In an earlier article, I argued that legitimacy in Athens, from the mid fifth century onward, had two distinct legal senses: the first of these was about citizenship, which hinged on having two Athenian parents according to the requirements of Pericles' citizenship law, the second invoked the legal status of the parental union, *viz.* whether the parents had been lawfully conjoined by the formal procedure of *engye*.² The case of Phile, preserved in the third

² Thus, Joyce 2019: 447-8. The purpose of the present paper is to defend that reading against the most recent challenge of Griffith-Williams (2020, 2023). In my earlier article, I referred to Dem. 39 and [Dem.] 40 as an adoption case, which needs further nuance. It was not adoption *sensu stricto*, provided the case for the defence, *viz.* that the defendant was the legitimate son of Mantias, was credible. See further n. 9.

speech of Isaeus (*On the Estate of Pyrrhus*), shows that the matter of Phile's legitimacy in the inheritance case affected the right to inherit the estate, not the right to be counted a citizen of Athens by ethnicity.³ D.M. MacDowell argued, to my mind persuasively, that the legal status of Phile as a *nothe* did not rule out her right to be conjoined in law to an Athenian.⁴ Phratry membership, whilst implying citizenship (since non-citizens were excluded), established engyetic descent and, consequently, entitlement to inherit an estate.⁵ The matter before the deme, by contrast, was the ethnicity of the parents, which, as [Arist.] *Ath. Pol.* 42.1 attests, was the criterion that decided citizenship; no mention is made there of the legal status of the union.⁶

In a practical sense, phratry and deme membership overlapped, and perhaps in the great majority of cases it was normally expected that citizens were born of legally recognised unions. After all, if unions were legally recognised, parentage would have been far easier to prove than otherwise, which

³ Joyce 2019: 480-483.

⁴ MacDowell 1976, accepted by Walters (1983: 317-32); Leduc (1990: 277); Cantarella (1997: 97-111); Avramovic (1997: 262); Carey (1999); Cobetto Ghiggia (1999); Joyce (2019). Earlier scholars who anticipated MacDowell include Erdmann (1934: 377-383); Latte (1936: col. 1072); Hignett (1952: 343-345); and Harrison (1968: 63-65). In support of the view that union with a concubine (*pallake*) from earliest times permitted the production of citizen children, see Sealey (1984); Bertazzoli (2003 and 2005). Those who deny that *nothoi* could be citizens include Rhodes (1978); Patterson (1981: 31; 1990: 39-73); Lotze (1981: 159-178); Hansen (1985: 73-75; Blok (2017); Dmitriev (2018); Maffi (2019); Griffith-Williams (2020, 2023). In her commentary on Isaeus 3, Hatzilambrou (2018: 31-35) presents some forceful arguments against those who claim that *nothoi* could not be citizens but remains tentative. Griffith-Williams (2023: 318, 325, n.11) defers to Rhodes as if his reply to MacDowell was convincing, but as Dmitriev, who himself takes the line that *nothoi* could not be citizens, acknowledges, Rhodes' arguments against MacDowell were inadequately framed because they failed to deal with the legal objections that arise from Isaeus 3.

⁵ The evidence is summarised at Joyce 2019: 480-486.

⁶ Rhodes (1981: 496) tried to circumvent this objection by stating that 'there are many omissions in the second part of *A.P.* and I do not believe that a strong case can be based on this.' As read, this can only carry weight if there are strong independent reasons to believe that other criteria beside the ethnicity of the parents came into play. Unfortunately, neither Rhodes, nor those who have followed his lead, have been able to produce decisive evidence to show that considerations other than ethnicity were considered and seem to overlook the most important objection, which is that the second half of the *Ath. Pol.* is not the only place where the requirements of the law of Pericles were spelled out; its details are clarified at 26.3 which, like 42.1, states that only ethnic legitimacy was required.

explains why the psychological connection between phratry membership and citizenship was so closely forged.⁷ The problem we have is not merely that no source expressly states that phratry membership was a prerequisite of citizenship, but that there exists positive evidence to show that *nothoi* – here, children of unrecognised unions – could indeed be counted citizens, provided the parents were Athenian on both sides.⁸ This is clearly implied in Isaeus’ third speech, to which I return in the second part of my paper. In the first part, I wish to examine a case of identity theft recorded in the two Demosthenic speeches *Against Boeotus I and II* (Dem. 39 and [Dem.] 40). Older scholarship described this as an adoption case, but more recently, B. Griffith-Williams has argued that the matter in dispute was not of adoption, even if terminology used in those speeches resembles adoption language, but acknowledgment of lawful parentage.⁹ In addition, Griffith-Williams argues

⁷ See Joyce 2019: 469. Alongside Dem. 39 and [Dem.] 40, Griffith-Williams (2023: 318) cites Isae. 7.27-28, which I did not discuss in my earlier article, as proof that the deme was concerned with matters beyond ethnicity but reads more into it than is warranted. This passage shows only that the deme could defer to the verdict of the phratry, since phratry entry implied legitimacy in both senses (engyetic descent and two citizen parents, on which see *IG II²* 1237 lines 108-112). The reason the deme deferred to the phratry here was simply because the legality of the speaker’s adoption had been questioned, and the deme needed proof that Apollodorus had adopted him. This does not prove that deme busied itself with family matters beyond requiring evidence that the family could give that the application was valid. In this instance, the testimony of the phratry was required because the fact of the adoption had been challenged by the speaker’s opponents when he was introduced to the deme on his eighteenth birthday. The matter for the deme was the identity of the speaker as the son (by adoption) of two Athenian parents. There is no evidence, however, that the engyetic legitimacy of the adoptee came under scrutiny by the deme.

⁸ That *nothoi* were from the earliest times understood to be legitimate members of the community is clear from the Draconian specifications for lawful killing, which specified that a man had an unlimited right to kill someone who slept with his wife or concubine, and that both were kept for the begetting of free children. Some but not all scholars have concluded that cohabitation with a concubine was a legally recognised union of sorts and that the offspring who resulted from it were ‘lawful’ in the sense that they were lawful members of the community, even if, as *nothoi*, they did not enjoy the inheritance entitlements of *gnesioi* (sprung from engyetic unions). As Bertazzoli (2005) has rightly argued, there is no reason to suppose that the circumstances of Pericles’ citizenship law imposed any limitation on the legal protections granted to *nothoi* who, in the language of Classical Athenian law, were citizens just as, in the language of Draconian law, they were ‘free’ members of the community.

⁹ For an overview, though selective and incomplete, of the relevant scholarship, see Griffith-Williams (2020: 40-42). As Griffith-Williams points out, this understanding is

from the two Demosthenic speeches that descent from an unlawful union ruled out any possibility of enrolment in the citizen body, and supports the arguments of J.H. Blok, that citizenship was about lawful descent.¹⁰

In my earlier paper, I argued that deme and phratry dealt with two separate areas of concern, the one with citizenship, the other with inheritance.¹¹ Griffith-Williams has questioned my argument that citizenship was about ethnicity, not wedded legitimacy, of parentage and has brought evidence into the discussion, which I did not discuss adequately, to argue the contrary case. Whilst noting the force of some of her criticisms, I defend my main argument by reference to further evidence that I did not discuss. In the first section, I examine two lawsuits filed by Mantitheus against his half-brother Boeotus (Dem. 39 and [Dem.] 40); in the second, I examine the case of Phile (Isae. 3). Citizenship and inheritance were separate concerns: the one was a public matter, determined by the deme when the candidate reached majority; the other a private, decided by the phratry into which initiands were enrolled.

I

Sometime around 348 BCE, Mantitheus, son of Mantias, sued his half-brother, Boeotus, for damages. The formal complaint was *blabe* ('harm'), a legal

imprecise because the sense of *poiesis* need not be limited to adoption cases, though she grants that this is one of its attested meanings. Given that the speaker denies any blood relation, the act of recognition (from his point of view) might have had the appearance of an adoption but of an unlawful kind, given that Mantias had lawful male issue by a different relationship. Even if this is the case, 'recognition' or 'acknowledgement' is a better way to render the term because it does not bias the issue.

¹⁰ Blok 2017; *contra* Joyce 2023.

¹¹ Referenced above, n. 2. This is not the place to decide whether *nothoi* had identical political rights as *gnesioi*, or were placed under certain legal restrictions, as argued by Bearzot (2005) and Kamen (2013: 62-70). In a more recent study of state support for orphans, Bearzot (2015: 26-27) has argued that orphan *nothoi* enjoyed the same rights as orphan *gnesioi* and, like *gnesioi*, participated in the parade of the fallen dead, served in the army, and appeared at the Great Dionysia, yet were not enlisted in demes. Even if their political rights were not identical with *gnesioi*, it is nevertheless certain, as Bearzot has noted, that they enjoined many more rights than metics or freed slaves. Bearzot's claim that *nothoi* did not appear on the deme lists depends on inconclusive evidence; see my remarks in the concluding section. Against Kamen's view of a sliding spectrum of social 'statuses' that situated *nothoi* in an inferior position to full citizens and differentiated them from citizens, see Joyce 2025.

concept that admitted wide interpretation. As E.M. Harris has shown, legal terminology at Athens entailed slippage in its application.¹² Even if the ‘harm’ done to the speaker was more theoretical than actual, nothing prevented Mantitheus from suing his opponent for damage if he could argue that the *dike blabes* could cover potential damage, as well as actual damage sustained. The issue was the usurpation of the name Mantitheus by the defendant. The speaker argues that his birthrights were being upended. The plaintiff did not prevail in 348 and, a year later, re-ignited the case to argue that the identity theft had implications for the return of his mother’s dowry. By the time of the two trials, the defendant and his brother, Pamphilus, had been received into the family of Mantias. Both speeches refer to a past dispute some ten years earlier, when the defendant’s mother, Plangon, arranged by deception to have Boeotus brought into the family of Mantias.¹³ Throughout, the speaker states that the defendant was not the birth son of Mantias (e.g. at 39.2; 40.47, 49). Nevertheless, in 348 and again in 347, he had little choice but to recognise the decision of 358 as binding and must accept the defendant and his brother as his kinsmen.¹⁴

The earlier decision resulted in the legal recognition of Boeotus and Pamphilus (who from now on for convenience will be referred to thus, to distinguish the former, who claimed the name Mantitheus, from Mantitheus

¹² For a more general discussion of open texture in Athenian law, see Harris (2013: 213–245). Harris points out that legal terminology, as in modern legal systems, needed to be interpreted, and that the fact that the law was open to interpretation means not that it was loosely or casually applied but, to the contrary, that the Athenians took legal terms seriously; the case of Boeotus is discussed in detail (2013: 223–225).

¹³ Griffith-Williams (2020: 34 and 44 n. 5) implies that this decision was the result of an arbitration, but the accounts at 39.2–3 and 40.10–12 of the process do not add up. In the first speech, we are informed that the case went before a court, not an arbitrator, whereas the second implies an arbitration. An arbitration *sensu stricto* was a process whereby two disputants came to an agreement or compromise *via* a private arbitrator, possibly to their mutual benefit, whereas in this case, the outcome was binary (yes or no). It is more likely that the hearing of 358 was decided in a lawcourt. For a fuller discussion of the distinction, see Harris 2018.

¹⁴ The hypothesis to Dem. 39 implies that the speaker and the defendant had the same birth father, which is what was established after the first trial. Yet, it is clear from main body of the first speech that the speaker denied this. It is perhaps, in part, because of the wording of the hypothesis that scholars have inferred that the legal point at issue was the matter of the defendant’s legitimacy; this is not however easily supported by the text of the speech, which, as Griffith-Williams (see below) acknowledges, makes no reference to the legal circumstances under which the defendant was born.

the speaker) as the legitimate sons of Mantias. The speaker uses language of adoption to describe the process of legal acknowledgement. Some scholars have taken the cue and called this adoption,¹⁵ but more recently, Griffith-Williams has drawn attention to some of the semantic and legal difficulties:

When *poieisthai* and *poiēsis* are used, in other sources, as synonyms for *eispoieisthai* and *eispoiēsis*, that reflects the fact that the Athenian procedure for adopting a son was essentially the same as for acknowledging a natural, legitimate son: both required the son to be introduced to his (natural or adoptive) father's phratry and enrolled in his deme, although there was of course no equivalent of the *dekatē* in the case of an adoption. (2020: 42)

Whether or not the defendant was the son of Mantias, Mantitheus had to recognise him, at least officially, as his lawful half-brother. As Griffith-Williams observes, the reception of Boeotus into the family of Mantias could not have been adoption *sensu stricto*, because in Athenian law, no adoption could happen unless the adopting parents had no lawful male issue.¹⁶ In this case, Mantias already had a recognised son, Mantitheus (the speaker), and if Boeotus was brought into the family as the natural son of Mantias, this cannot have been adoption in the normal sense. On this strict point of law, Griffith-Williams is correct. But in other respects, her treatment of the case misconstrues the legal point at issue. A little earlier, she writes:

‘[The speaker] never directly claims that Boeotus is illegitimate – the word *nothos* (‘bastard’) does not occur in either of the speeches – but this is strongly implied in the alternative identity that he constructs for Boeotus as an outsider who has inveigled his way through fraud both into Mantias’ *oikos* and into the citizen body.’ (2020: 38)

The speaker maintains not that Boeotus was illegitimate, which is neither stated nor implied, but that Boeotus and Pamphilus *were not the natural sons of Mantias*.¹⁷ If believable, the problem for Mantias was that when

¹⁵ As I did myself, casually and inaccurately, at Joyce 2019: 484.

¹⁶ For comprehensive studies of the law of adoption in fourth-century Athens, see Rubinstein 1993 and Cobetto Ghiggia 1999. As Cobetto Ghiggia noted (1999: 81 n. 49), ‘il verbo *poiesato* e il sostantivo *poiesin* non andranno intesi come riferiti ad una presunta adozione...ma ad un riconoscimento di paternità.’

¹⁷ It might appear from 40.9 that the speaker alleges that Mantias fathered illegitimate children with Plangon and sought later to deny the fact. But the language rigorously

his *affaire de coeur* finally came to light, it was possible for Plangon's children to draw attention to it by claiming to be unlawful offspring; to offset the disgrace, they pressured him to acknowledge them as his natural and legitimate sons so that they would gain an inheritance, and so that he could avoid public humiliation.

The speaker states adamantly that they were not Mantias' sons (39.2; 40.9). If so, the mooted issue was not whether they were born in wedlock, but whether they were Mantias' natural children. If they were not, as the speaker claims, two possibilities arise: either (a) they were fathered by another man with whom Plangon had relations while still the wife of Mantias, a legal relationship which the speaker fervently denies; or (b) they were Plangon's children by a different (later or earlier) relationship and postured as the natural and legitimate children of Mantias for the sake of a richer inheritance, once Mantias formed an unlawful attachment to their mother.¹⁸ The speaker implies that Mantias accepted paternity only under blackmail (39.2; 40.9). Does this mean that they were Mantias' illegitimate children with Plangon? This makes little sense. Mantias brought them before the phratry on the claim that they were lawfully his, and by declaring them to be his, he would be declaring that they were born in wedlock to Plangon, before divorcing her to marry the speaker's mother. Yet the speaker repeatedly denies that the children of Plangon were his father's children and that Mantias and Plangon had ever been lawfully conjoined. If the speaker's case is to be believed, the point is not that Boeotus and Pamphilus were illegitimate children, but that they were not Mantias' children at all.¹⁹ Legally, for the speaker's purposes, this makes little difference, since they would not have been recognised in Mantias' phratry without either natural or enygetic descent that could be proved. However, it is

denies that they were Mantias' sons despite the protestation of Plangon that they were (τὸν μὲν ἄλλον χρόνον οὗτοι διήγον οὐκ ὄντες τοῦ ἐμοῦ πατρός). The present participle οὐκ ὄντες means simply that the children did not belong to Mantias. The implication is not that they were illegitimate sons, but rather that they were not his natural sons.

¹⁸ It is unclear from 39.26 whether the speaker denies that Plangon was Mantias' *pallake*. Hyperides, for example, kept *pallakai* in other residences, not an uncommon practice at Athens (Athen. 13.590d).

¹⁹ The claim which Griffith-Williams (2020) makes throughout, that the case hinged on whether the defendant and his brother were *nothoi*, is unsupported. If that had been the legal issue, it is extraordinary that the prosecution makes nothing of it. The case hinges not on the enygetic status of the two brothers but whether Plangon's children belonged naturally to Mantias.

essential to observe accurately how the speaker frames the argument, since if the children could claim neither natural nor legitimate descent from two Athenian citizens, not only was inheritance closed off, but potentially so was citizenship if an Athenian father could not be produced. This is why the matter of citizenship is raised, not because it depended on engyetic descent, but because if no Athenian father could be confirmed, citizenship was ruled out.

On the speaker's side, the case went thus: (1) Mantias had one wife only, the speaker's (unnamed) mother (40.8); (2) Mantias had two natural and lawful children, the speaker and a younger brother (unnamed), who died in childhood (40.7); (3) the relationship with Plangon, the mother of Boeotus and Pamphilus, started before the death of the speaker's mother but never took the form of a lawful marriage (40.8, 24, 26, 27); (4) Plangon already had two infant sons, who were educated in Hippothontis, not Mantias' tribe (39.22-6); (5) when Mantias and Plangon started relations, they did not marry (40.9); (6) when the relationship with Plangon deteriorated, Plangon blackmailed Mantias, who bought her off so that she would refuse, when challenged, the oath (39.3; 40.10); (7) unexpectedly, Plangon went back on her promise and swore that the children were fathered by Mantias (39.4; 40.11, 41); (8) to save his reputation, Mantias enrolled the now adolescent son of Plangon into his phratry under the name Boeotus, acknowledging under duress that he and Plangon had been lawfully married (39.4; 40.11, 35, 54); (9) Mantias soon afterwards died (39.5; 40.13); (10) upon attaining his majority, Plangon's elder son, named Boeotus, introduced himself as 'Mantitheus', claiming on spurious evidence that he had been introduced by Mantias in infancy as 'Mantitheus' (39. 5; 40.18, 28).

On the defendant's side, we can at best reconstruct the argument from the way in which the speaker seeks to refute it, since no speech for the defence survives. In outline: (1) Mantias was married to Plangon, the defendant's mother;²⁰ (2) the defendant and his brother were born in lawful wedlock and presented in infancy to Mantias' phratry as Mantitheus and Pamphilus (40.28); (3) soon after their birth, Mantias formed an attachment to the mother of the speaker, which resulted in divorce and disownment of the children (40.25-6); (4) in adulthood, the defendant sued his father Mantias for recognition (39.2; 40.10); (5) the matter was decided in his favour

²⁰ This is implied by the fact that the trial of 358 was decided in the defendant's favour; see 39.3; 40.10-11, and by the fact that the speaker repeatedly tries to refute it.

and, in consequence, Mantias introduced him at the Apatouria under the name given in infancy (39.3; 40.11, 28); (6) after Mantias died, the defendant went to Thorikos, his father's deme, to be enrolled as a full citizen (39.5; 40.18, 28); (7) he as allegedly the eldest, and not the speaker, was lawfully called Mantitheus, son of Mantias, of the deme Thorikos (39.5, 30).

The speaker alleges that Plangon swore falsely that Boeotus was her child by Mantias (39.3; 40.10-11); and, in consequence, that the latter was left with no alternative but to enrol him in his phratry. He testifies that in childhood, Boeotus visited the chorus of boys in the tribe Hippothontis, not Acamantis, the tribe of Mantias (39.23-24).²¹ Full enrolment in the deme did not happen until eighteen, but infants were introduced to one of the ten Cleisthenic tribes long before they were inducted into the deme at adulthood.²² The fact that the children of Plangon had been recognised in Hippothontis suggests either that they were introduced not as Mantias' offspring but as children by a different man, or that they were Mantias' lawful

²¹ Rosalia Hatzilambrou reminds me in private correspondence that Boeotus is not said to have been enrolled in the tribe of his grandfather but only participated in the chorus of the boys (the verb used is φοιτᾶν, not ἐγγράφεσθαι). Whilst true, the force of the argument stands whether we can envisage a formal process of infant enrolment or a *de facto* recognition of lineage, as the speaker makes clear subsequently (39.25-28). We have no conclusive evidence that tribes formally 'enrolled' children and, in any case, citizenship was not finalised until eighteen, when formal enrolment in the deme took place. However, as I have argued elsewhere (see Joyce 2022), the maintenance of a register did not indicate finality when it came to membership of an institutional body: phratries, for example, kept rosters of potential as well as actual members, since infants were introduced at the *dekate* and records were maintained of their introduction to those bodies, even though confirmation did not happen before adolescence; even after the Apatouria, an initiand could be removed from the register if successfully challenged at the *diadikasia*.

²² This is implied at *IG* II² 1237 lines 119-121, which refer to the name, patronymic and demotic of initiands to the phratry through the paternal, as well as the maternal, lines. Scholars have debated whether the demotics belonged to the candidate, not yet enrolled in either the phratry or the deme, or to their father and maternal grandfather, seeing that women did not possess demotics in the same way that male citizens did, though it was not uncommon to see the suffix -θεν to denote a female demotic; see Whitehead 1986: 77. Recently, Polito (2020: 74) has argued that the demotics here cannot belong to the initiands but were acquired vicariously, on the grounds that the phrase τὸ ὄνομα πατρόθεν does not match the ordinary formulation of the genitive as attested in the phrase that follows, τῆς μητρὸς πατρόθεν. At Joyce 2022: 70, n. 16, I voiced objections to that reading, arguing that citizen children were from infancy referred to by the demotics of both parents, as proof of ethnic legitimacy.

children but moved to the tribe of their maternal grandfather, once relations with Plangon had soured.²³ If citizenship hinged on engyetic legitimacy, as Griffith-Williams and others have argued, and if, as Griffith-Williams simultaneously argues, the thrust of the speaker's case is to cast doubt on the defendant's legitimate descent, a salient self-contradiction presents itself: why then did an illegitimate boy visit a Cleisthenic tribe if the issue at stake was indeed that he was a *nothos*, and if the law of citizenship debarred *nothoi* from access to the citizen body?

The speaker adds another twist. In the event Plangon kept to her initial promise to refuse the oath challenge, arrangements were in place to have the children adopted by their maternal uncles (40.10-11). Ordinarily, without the acknowledged paternity of Mantias, Plangon would have pointed to lawful paternity by someone else. As P. Cobetto Ghiggia has pointed out, it remains unclear when the requirement for marriage between the natural parents of the adoptee became a legal prerequisite for adoption.²⁴ Quite possibly, in 358, it was not yet required that an adoptee show engyetic descent and that it was enough to be born of two citizen parents. If so, we might have an explanation for why the sons of Plangon could be adopted in the event Mantias disowned them, provided they could point to an Athenian father, married to their mother or otherwise. Even if lawful parentage was not required, if the decision had gone Mantias' way, he would have denied paternity, in which case Plangon had a fall-back position whereby she could arrange adoption for the two boys, so that citizen status was not jeopardised. This means that despite superficial impressions (see further below),

²³ Rudhardt (1962: 61) maintained that the visitation to Hippothontis in childhood implies that Boeotus and his brother were legitimate offspring. This has been questioned more recently by Maffi (2019), who argues that if the children had been legitimate, they would have visited Acamantis, the tribe of Mantias, and, furthermore, that the practice of introduction to the mother's tribe reflects a panhellenic custom witnessed elsewhere, for example, at Gortyn, which recognised maternal filiation and allowed a degree of recognition for those who could not point to a legitimate father. As the speaker's objection shows (39.28), the matter is not about the engyetic descent of the boys but solely about their paternity: if they had been the natural sons of Mantias, they would have belonged to Acamantis. The objective is to argue not for the illegitimacy of Plangon's sons but for their unrelatedness by blood to Mantias.

²⁴ Thus, Cobetto Ghiggia (1999: 82): 'Il discorso è datato intorno al 348, ma il contesto in cui collocare l'episodio analizzato risale ad almeno un ventennio precedente. Non si può pertanto affermare con assoluta certezza che il requisito della purezza dei natali per l'adottando fosse comunque e sempre necessario.'

the citizenship of Plangon's children did not hinge on the possibility that Mantias was their lawful father.

There is no mention in either speech that Plangon's children were *nothoi*. The most that is stated is that the defendant and his brother were not the sons of Mantias. If the speaker is to be believed, Mantias arranged initially for the children to be adopted by their maternal uncles (40.11). If so, it must be assumed either that Mantias really was the legitimate father, as the defence claimed, and sought some dubious way to deny paternity at the trial of 358 but affirmed it later when he and Plangon organised transferral to the guardianship to the uncles; or that their father was someone else who had been Plangon's husband. Who was the mystery man? We are not told. Probability suggests that the sons of Plangon were the legitimate children of Mantias, as the defence held; that the parents had been married but later separated; that because of the separation, he did not enrol them in adolescence; and that this led to Boeotus, who had by now come of age, to sue his birth father. The material about conflicting oaths taken by Plangon looks very much like invective to discredit her and her sons. On that reconstruction, Mantias had fathered lawful children by his first wife, Plangon, before he divorced her to marry the (unnamed) mother of the speaker. Because of the divorce, which might have taken place when Mantias suspected the paternity of the two boys, he was unprepared to recognise the sons at the Apatouria. Yet, it seems unlikely that Boeotus would have launched a recognition claim unless he had been presented in infancy and was therefore the legitimate son of Mantias.

There are passages in both speeches to suggest that his rightful place as a citizen had come into dispute (39.2, 39.31; 40.10, 40.42). Griffith-Williams points to them to argue that without engyetic legitimacy, citizenship was barred.²⁵ The first (39.2) states that the defendant had protested that his citizenship was under threat (τῆς πατρίδος ἀποστερεῖσθαι). If Mantias was not the father, then who was? Without an Athenian father who could be identified, it was impossible to register in a deme at eighteen. The key point here is natural paternity, not engyetic legitimacy. The second (39.31) shows that by claiming to be Mantias' son, the defendant was able to claim

²⁵ This claim is made also by Maffi (2019), whose reconstruction makes two foundational assumptions: (1) that Pericles' citizenship law required birth from engyetic union; and (2) that if Mantias had kept the boys after separating from Plangon, he would by implication have recognised their legitimacy.

citizenship and Mantias' estate. It is important not to conflate two issues. Boeotus needed Mantias as his birth father so that he could register in the deme; he needed Mantias as his legitimate father so that he could inherit the estate. The third (40.10) indicates, *pace* Griffith-Williams, that the claim to citizenship did not rest on his acknowledgement by Mantias: the speaker claims that on the eve of the trial of 358, Mantias and Plangon had come to an arrangement whereby she would have her sons adopted, on the condition that she would decline, and citizenship would not be affected (οὔτε τούτους ἀποστερήσεσθαι τῆς πολιτείας). The fourth (40.42) shows that the recognition of the defendant as the son of Mantias secured two outcomes, (1) right of inheritance and (2) right of citizenship. Rhetorically, the speaker presents the decision as an affront to the city as well as to the *oikos*. Yet, as the second speech shows (40.10-11), if the denial by Mantias had stood, this would not have presented a problem if adoption by the uncles had gone ahead, normally if they could point to engyetic parentage.

Plangon needed to secure her sons not citizen status but entry to a wealthy household. The emotive language used to imply that without that acceptance, their identity as Athenians would have been imperilled, is exaggerated. Even if, in practice, it was extraordinarily difficult to document natural parentage outside engyetic descent, there is no sign in these speeches or elsewhere that it was impossible. Mantias' acknowledgement of Boeotus as his natural son, at very least, was important in the practical sense that, without it or some other arrangement, such as adoption by their uncles, it would have been hard in practice for Plangon's sons to prove dual Athenian parentage when approaching the deme. The need to document engyetic descent was thus a practical matter, rather than a strict point of law, as far as citizenship was concerned. The problem which all *nothoi* faced was that the practical barriers to documenting ethnicity as Athenians were considerable if their father denied paternity. Even if not *nothoi*, this was the very same practical issue which Boeotus and Pamphilus theoretically faced if they could not identify a father. Thus, it makes sense for the speaker to claim that everything – inheritance and citizenship – rode on the verdict of the court in 358, but the evidence does not necessitate the conclusion that without the acknowledgment by Mantias, citizenship was closed off.

In short, the argument that *nothoi* could not be citizens makes several prior assumptions. The first is that the matter before the deme, in addition to the ethnicity of the parents, was the nature of the union. There is no source

to show this. The wording of Pericles' citizenship law ([Arist.] *Ath. Pol.* 26.4; Plut. *Per.* 37.2-5; Ael. *V.H.* 6.10 and 13.24) entails only that ethnic legitimacy – i.e., two Athenian parents, married or otherwise – was required.²⁶ The second is that without the acknowledgement by Mantias of paternity, Plangon's children would have been disinherited not only of an estate but also of their rights to citizenship. Yet, by visiting the tribe Hippothontis in childhood, their citizenship was *de facto* recognised already.²⁷

II

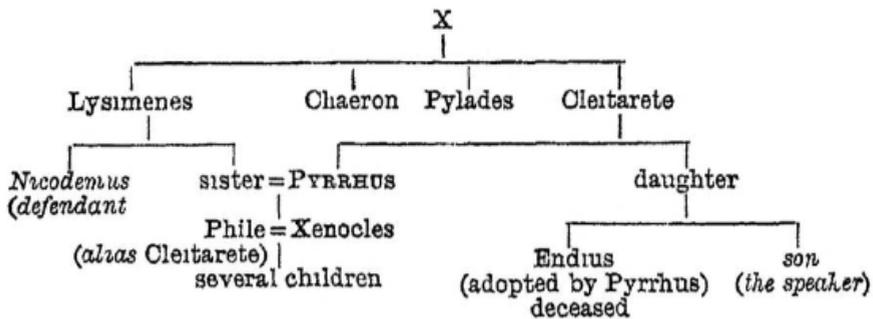
The third speech of Isaeus (*On the Estate of Pyrrhus*) is one of the most contested documents on Athenian family law.²⁸ It concerns a disputed in-

²⁶ As Cobetto Ghiggia (1999: 82) states, 'La cittadinanza ad Atene, infatti, si determinava *iure sanguinis* e non *iure soli*, e, prima del decreto proposto da Pericle, per possederla era sufficiente la qualità di *polites* del padre, con qualche limitazione nel caso in cui la madre fosse straniera... Si aggiunga inoltre, che, per essere cittadino, non era necessaria la nascita da un matrimonio legittimo: poteva infatti essere iscritto nelle liste della propria tribù anche il figlio naturale, nato da una relazione fra un uomo e una donna *astoi*, seppure non regolarmente sposati.' This is an important observation. Before Pericles' law, the matter was determined based on blood line (*ius sanguinis*) and not by being born on Attic soil (*ius soli*). Therefore, if the arguments of Griffith-Williams are to stand, we would need to envisage a shift in the conception of citizenship after 451/0, so that the determining criterion ceased to be bloodline only. The institution of the male demotic, and the near total absence of a female demotic (except vicariously, through the woman's father), is an institutional relic of a time when the only thing that mattered was the ethnicity of the father, nothing more, not the ethnicity of the mother or the condition in which the man was joined.

²⁷ Some will object that because registration into the citizen body did not happen until eighteen, the tribal registers kept tentative, not finalised, records of citizen children. As I have already argued (Joyce 2022), this is to make misleading assumptions about the purpose of registers in the Athenian system. Entry on a register did not necessary imply final membership, since *IG II² 1237* lines 29-44 show that final membership in the phratry was not confirmed until the year after the Apatouria, at the *diadikasia*, even though a register of inductees was maintained prior to that point; see also Isae. 7.16. The verb used in the orators to refer to infant enrolment is *eisagein*, not *engraphein* (thus, Isae. 8.19-20; [Dem.] 43.11; Dem. 57.54), but cognates of *eisagein* are used at *IG II² 1237* lines 18-19, 115, 117 to suggest enrolment; see Joyce 2022: 68. Even though the entry on to a tribal register in infancy was not final in the sense that citizenship was not confirmed until the candidate was fully enrolled in the deme upon reaching his eighteenth birthday, there was nevertheless a conceptual distinction kept before then between citizen and non-citizen children.

²⁸ The dating of the speech has been a matter of some controversy. Wevers (1969: 21), followed by MacDowell (1971: 24-26), suggested a date around 389, but it has also

heritance claim between the nephew and the alleged brother-in-law of a wealthy Athenian who adopted the speaker's brother, since deceased. The speaker, who is unnamed, sued Nicodemus, the brother-in-law of his maternal uncle, Pyrrhus, for providing false testimony concerning the legal status of his sister's child by Pyrrhus (called alternatively Phile and Cleitarete). Nicodemus, her maternal uncle, had earlier claimed that he had given his unnamed sister, the mother of Phile, in marriage to Pyrrhus, in which case Phile was their lawful offspring and therefore entitled to inherit the estate. To assist, I insert a family tree (taken from the Loeb edition of Isaeus 3):



The complication was that Pyrrhus had adopted his sister's eldest son, named Endius, now deceased, the speaker's brother. In Athenian law, if the only lawful issue was a daughter, a father could dispose of the property with the heiress (*epikleros*), who would then normally marry the nearest-of-kin, in this case Endius (Isae. 3.50).²⁹ Thus, if the daughter of Pyrrhus by the defendant's sister was her father's lawful offspring, it would have been unusual for Endius to marry off his cousin and adoptive sister to anyone else. The

been suggested that the law forbidding citizens to marry non-citizens ([Dem.] 59. 15, 52) did not appear until c. 380 (see Kapparis 1999: 198-202); on a possible *terminus ante quem* see Hatzilambrou 2018: 10. However, as Cobetto Ghiggia (2012: 91-92) observes, the only real dating criterion we have in the speech comes from the references at §22 to Diophantus of Sphettus and Dorotheus of Eleusis, who were alive in the second half of the fourth century, which makes the earlier dating far less possible, as was first argued by Wyse (1904: 276-277).

²⁹ Hatzilambrou (2018: 28) allows for the possibility that this was not legally mandatory, even if it was normal in social custom. The problem is that too much rests on speculation. The argument at Isae. 3.50 to my mind makes sense in law *if and only if* it is taken as read that this was a legal obligation. The marriage of Phile to Xenocles, according to the speaker, necessitates that she was a *nothe*, as otherwise she would have been married off to Endius.

speaker protests that Nicodemus' sister had cohabited with Pyrrhus without a dowry, in which case Phile could not have been heiress to the estate.³⁰ The legal issue is whether Phile was the lawful daughter of Pyrrhus.³¹

The speaker argues that the woman whom Nicodemus claims to have married off, and whom the defence claimed to have been the wife of Pyrrhus, could not have been eligible for marriage because, being sexually loose, no one could have chosen to live with her either as his wife or as his concubine (§§15-16). The Greek says οὐδ' ἐξ ἐνὸς ἄλλου φαίνεται τεκοῦσα (§15) and οὐδενὶ ἄλλῳ ἐγγυηθεῖσα οὐδὲ συνουκήσασα φαίνεται (§16). The argument is that no self-respecting man could even have cohabited with her, let alone married her, and that if Pyrrhus could convince himself to do the former, he could not have persuaded himself to do the latter. It was recognised by relatives who knew her as Phile, not as Cleitarete, that she was Pyrrhus' daughter (οὐκ ἂν ἦδει τὸ ὄνομα τῆς θυγατρὸς, ὡς φασι, τῆς αὐτοῦ; §34). The disputed matter was whether the sister of Nicodemus was Pyrrhus' lawful wife.

Endius gave his cousin, Phile, in matrimony to a man called Xenocles, with whom she had at least two children. Seeing that under such circumstances, Endius should marry Phile himself if she were legitimate, the fact that he gave her in marriage to Xenocles must therefore indicate either that Endius had disregarded the law, or that Phile was a *nothe*. If, as the speaker claims, Phile was the bastard child of Pyrrhus, Endius did nothing wrong by marrying her off, in which case it was permitted in law for *nothoi* to marry. If she was the rightful claimant to the estate of her natural father, then her marriage to Xenocles was null and void. If, however, she was a *nothe*, the legal consequence was not that her own marriage would now be declared invalid, but that she would not have been allowed to inherit her father's property. Either way, there is no sign that by getting wedded to Xenocles she was doing anything that the law did not permit.³² The

³⁰ The dowry was an important component for the union to be legal, on which see Cobetto Ghiggia 2011. Hatzilambrou (2018: 116-117), whilst recognising the strength of the dowry as a social convention, denies that the dowry was absolutely required in law for the marriage to be legally binding.

³¹ The hypothesis states: ὁ Ἐνδίου δὲ ἀδελφὸς νόθην εἶναι φησιν, ἐξ ἐταίρας Πύρρῳ γενομένην, which shows that the legal question was the circumstances of the parental union. At §24, we are informed that the legal matter at an earlier hearing was ἢ ἐξ ἐταίρας ἢ ἐξ ἐγγυητῆς τὴν ἑαυτοῦ γυναῖκα εἶναι.

³² The law referred to at [Dem.] 59.16 and 52 specified that it was illegal for an Athenian

terms under which Endius, as the lawful heir to the estate of his uncle and adoptive father, gave Phile in marriage indicate that she was a *nothe* and thus debarred from the inheritance. As MacDowell deduced, the natural implication must be that illegitimate offspring could marry, which means that illegitimate offspring could be citizens, whereas the only type of marriage that was forbidden in law was intermarriage between citizens and foreigners. Legitimacy in the engyetic, as distinct from the ethnic, sense, affected status not as a citizen but as an heir or heiress, a matter of private law without wider ramifications.³³

Aware of these difficulties, Griffith-Williams refers to the speaker's disbelief that the marriage could ever have gone unchallenged and infers that the marriage was therefore illegal:

First, in the rhetorical question addressed sarcastically to the defendant, Nicodemus, he asks whether the latter did not realise that he was making his niece, Phile, a *nothe* by allowing Endius to claim the estate without respecting her position as an *epikleros* (3.41). Secondly, he accuses Pyrrhus himself of disinheriting Phile and making her a *nothe* by adopting Endius without introducing Phile to his phratry (3.75)...He also repeatedly insinuates that Phyle was given in marriage by *engye* to Xenocles as the daughter of a *hetaira* (*hos ex hetairas*) (3.6, 24, 45, 48, 52, 55, 70, 71). What he does *not* say is that such a marriage, if it happened, would have been legally valid; indeed, he strongly implies that it would not, in his denunciation of Nicodemus (Isae. 3.52). (2023: 321).

The last of these statements, that the marriage could not have been legally binding, is the one which I most wish to challenge. The point is not

to marry a non-Athenian, not that it was illegal for two Athenians to marry, one of whom was born out of wedlock. When after 403 this law was implemented has no meaningful bearing upon this case, provided the sense legitimacy defined in the law was ethnic and not engyetic. As Hatzilambrou (2018: 31-32) rightly observes, 'since from probably the first decades of the fourth century, marriage and co-habitation as spouses (*to synoikein*) between a citizen and non-Athenian woman (*aste*) was not permitted...the fact that an illegitimate woman could be given in marriage as a lawful wife to an Athenian citizen can be taken as a strong indication that illegitimate children were entitled to hold Athenian citizenship.'

³³ For my earlier discussion of this case, see Joyce 2019: 481-483. Rhodes' objection (1978: 91-2) that there was no reliable way to establish the legal status of Phile because she was female ignored the evidence of *IG II²* 1237 lines 116-121, which shows that the legal status of fathers and mothers of phratry initiands was meticulously recorded; for the reference to MacDowell, see note 4.

that the marriage was unlawful.³⁴ The point is rather that since Phile was given in marriage by Endius as a *nothe*, Nicodemus the defendant put up no protest at the time that her legal status was being misrepresented, in which case Endius conducted himself in conformity with all the laws that specified that he could marry off his illegitimate cousin. When the speaker states that the laws are precise on these matters, he is not saying that the laws forbade marriage between illegitimate parties, but that the laws laid down rules for dowries, inheritance, legitimacy, and adoption, which would have been violated if Endius had given the lawful progeny of Pyrrhus in betrothal and hoped to retain his claim as the adoptive heir. The moot point is whether Phile was legitimate. If she were lawful offspring, then the right thing for Endius to have done would have been to marry her himself, as the speaker clarifies (3.50).³⁵ Instead, Endius married her off, which implies she was a *nothe*.³⁶

³⁴ There is an important assumption at the heart of the reasoning chain, which is that, unless legitimate, Phile would not have been permitted to marry. Nothing, however, in Athenian law that we know of makes any of this self-evident. Cobetto Ghiggia (2011) has inferred from a wide range of oratorical passages that what made a bride legitimate in Athenian law was not the condition into which she was born (*viz.* to parents lawfully or unlawfully conjoined), but the condition through which she was married; *engye* was normally accompanied by a dowry, which was expected, but not mandatory in law; of course, a woman married dowerless raised suspicions which could be rhetorically exploited; *engye* was the condition through which a woman was considered legitimate and, on that basis, was lawfully wedded.

³⁵ This is implied also at 3.42 and 68, both of which refer to a law of Solon which specified that anyone who died leaving legitimate daughters, and no legitimate sons, was not entitled to bequeath any part of the estate without including the daughters in the inheritance. The second of those passages clarifies that if he had legitimate daughters, a man could not adopt a male heir without including his daughter in the inheritance. This legal requirement is attested also at Isae. 10.13 and [Dem.] 43.51. Hatzilambrou (2018: 170) points to passages elsewhere in the orators (e.g., Lys. 19.39.41; Dem. 27.5, 42-46; 28.15-16; 36.34-35; 45.28) which might suggest that the law was not applied so strictly in the fourth century, seeing that they attest fathers with legitimate male heirs who nevertheless left wills with stipulations about the estate. Even if the law was applied less stringently in some cases, this should not undermine the force of what the speaker recognises: if Endius had been lawfully adopted, the normal expectation was that he should marry the legitimate daughter of his adoptive father; the fact that this did not happen means either that Phile was a *nothe* or that Endius had conducted himself very unconventionally.

³⁶ Hatzilambrou (2018: 26, 169-170, 208-210) questions this legal point, claiming that the law at most placed a legitimate daughter at the disposal of the adoptee but did not obligate the adoptee to take her in marriage. However, what sections 69-71, discussed

At some point, a law was passed that forbade marriage between Athenians and *xenoi* ([Dem.] 59.16, 52). When a child was introduced to the phratry of his natural or adoptive parents, it was required that he be born of two Athenian parents who were lawfully conjoined (Isae. 7.16). Our best attested process for phratry admission (*IG II²* 1237 lines 108-112) shows that what was sworn at the altar was that the child was born legitimately from married parents. The lexical definition of legitimacy (Poll. 3.21) stated that one had to be born of a woman who was both a citizen and married but says nothing of the circumstances in which the woman was born. The orators attest the importance of the dowry in cementing the lawful status of the woman's union to her husband but do not refer to the woman's birth status.³⁷ If the birth status of the woman was unimportant, as the silence of the orators implies, there can be no forceful objection against Endius giving Phile in marriage as a *nothe*.

The speaker clarifies (69-71) that the adoption of Endius by Pyrrhus could have been lawful only if Phile had been a *nothe* or, if she had been born of legitimate parentage, betrothed to the adoptee. If the betrothal of Phile to Xenocles was unlawful, this was not because Phile was a *nothe*. The marriage to Xenocles would have been unlawful if Phile had been *legitimate*, not illegitimate. The objection hinges on the testimony of the uncles of Pyrrhus that Phile was legitimate and that they had been present at the *dekate*.³⁸ If true, their testimony is contradicted by the fact that they al-

below, of the speech indicate is that if Phile had been the legitimate daughter of Pyrrhus, it would have been proper for Endius to marry her, not betroth her. The fact that Phile was betrothed to Xenocles is used by the speaker as proof that she was not legitimate, as otherwise that marriage should not have gone ahead.

³⁷ See, for example, Andoc. 4.13-14; Dem. 27.5, 65-66; 30.4; 41.6; 46.18; Isae. 8.29.

³⁸ At Joyce 2019: 482, I pointed out that girls could be presented to the phratry if legitimate, as implied also at sections 73 and 76 of the speech. Griffith-Williams (2023: 325 n. 5) contests my statement as an over-simplification. Even if female children did not have the same status in the phratry that male children did, it is untrue that the legitimacy of girls was not recognised in the same way as was the legitimacy of boys. The third speech of Isaeus shows that unlike the deme, for which we have no evidence of female enrolment, in the case of the phratry there is clear evidence that girls were introduced, which suggests, therefore, that the criteria for each was different. As Lambert (1998: 36-37) observed: 'It does not seem to have been uniform practice, but there is evidence that women might sometimes be introduced to their fathers' phratries as children and it was normal, probably necessary, that a new wife be presented to and received by her husband's phratry at a ceremony known as the *gamelia*. This seems not to have amounted to the same sort of tight control that the phratries exercised

lowed Phile, whom they called Cleitarete, to be betrothed to Xenocles. The phrase ὡς ἐξ ἑταίρας οὔσαν ἐκείνῳ ἐγγυᾶσθαι ('as one being born of a mistress to be betrothed to him') might imply that the scandal consisted of the fact that Phile, as illegitimate daughter of Pyrrhus, was given to Xenocles in a relationship that took on the form of a lawful union. Yet such a reading would miss the point. The implication is rather that if Phile/Cleitarete had been the legitimate daughter of Pyrrhus, as her great-uncles were claiming, the law forbade her to be betrothed to Xenocles once Pyrrhus had lawfully adopted Endius as his rightful heir.

Some have argued that Isaeus interpreted the law with excessive rigidity because he needed to maintain Phile's illegitimacy.³⁹ L. Rubinstein, for example, has argued that the only firm legal requirement was that a man who had legitimate daughters should make satisfactory provisions for a dowry if that meant that their financial needs were met, and then arrange for the estate to be taken over by an adoptive son. The problem here is that we have no evidence outside Menander to support the claim and, as R. Hatzilambrou rightly cautions, the *Dyscolus* is not reliable evidence because, according to that comedy, the adoptee was his wife's son by an earlier relationship who could not marry his half-sister.⁴⁰ Menander describes adoption *inter vivos*,

over admission of their male members – women do not as a rule seem to have been regarded actually as members of phratries; but there was oversight of a sort exercised by the phratry, whereas there is no evidence for demes having taken any interest in overseeing women's descent qualifications.' If correct, Lambert's observation implies that the criteria for admission to each body were different and that the purpose of each was different. The statement that women were not 'regarded actually as members of phratries' demands a clear definition of 'membership'. Presumably, Lambert meant that women could not exercise the same voting rights as men, but this does not mean that women were not 'members' of the phratry if indeed they were inducted, as these two passages from Isaeus show; comparable evidence for their induction to the deme, by contrast, is lacking.

³⁹ Thus, Hatzilambrou 2018: 208: 'It is possible...that Isaeus is interpreting the law very strictly because it is in his client's best interests to do so, whereas in fact it might be the case that someone could adopt without the adopted son being obliged to marry the legitimate daughter of his adoptive father, even if his adoption were not *inter vivos*.' Hatzilambrou points to Men. *Dysc.* 738-739, where Cnemon adopts his stepson and tells him to marry off his legitimate daughter with a dowry.

⁴⁰ Rubinstein 1993: 96; see the cautionary remarks of MacDowell (1982: 46) and Hatzilambrou (2018: 209); for the Menander reference, see the previous note. Griffith-Williams (2013: 205-209) suggests that the law was generally in force but, in some special cases, could not always be firmly applied.

whereas Endius was adopted in Pyrrhus' will. Others, for example A. Maffi, have argued that the requirement was fixed in law and that Isaeus was hence not being overly literalist.⁴¹ Hatzilambrou proposes a compromise whereby the law as interpreted by Isaeus was standard in the event one legitimate daughter only was left, and the father had adopted a son in his will, but if the father had specified in his will that the daughter could be dowered and married off to someone other than his adoptive son, the law under those circumstances permitted this.⁴² As she points out, this would have to happen anyway in the event the father had more than one legitimate daughter, but in this case, we have no evidence of any daughter other than Phile. Yet, the explanation that the law was massaged assumes the very thing that needs to be proved.

There is no implication in the speech that Phile's marriage to Xenocles was illegal.⁴³ This could of course be taken to mean, as MacDowell inferred, that *nothoi* could marry,⁴⁴ but it might alternatively suggest, as S. Dmitriev has recently understood it, that Phile was not a *nothe* after all.⁴⁵ If, however, the legal status of Phile had not been in dispute, as Dmitriev seems to infer, it would be difficult then to understand how this case would ever have come before the court. The point at dispute was whether Phile was the lawful daughter of Pyrrhus and, by implication, whether Endius had behaved lawfully in giving Phile in marriage to Xenocles. When the speaker refers to the laws of Athens (§50), he is not suggesting or implying that the laws of the

⁴¹ Maffi 1991: 218.

⁴² Hatzilambrou 2018: 209-210.

⁴³ Thus, Hatzilambrou 2018: 33: 'It is certainly striking that the orator omits any reference to illegality regarding the marriage of Phile.'

⁴⁴ This is also recognised by Cobetto Ghiggia (2012: 96-7), who states: 'È più probabile pensare che File fosse nata da una relazione "non ufficiale" di Pirro e quindi non fosse figlia legittima, mentre la madre di File non era concubina di Pirro, in quanto più volte viene designata come etera.'

⁴⁵ Dmitriev 2018: appendix 1: '[A] legitimate daughter was allegedly given in marriage as if she were the "child of a mistress". It was not the status of Phile as the legitimate child that the speaker was disputing but the status in which she had been given to Xenocles.' As I have already argued (see Joyce 2019: 483), that misconstrues the purpose of the speech, which is to show that Phile was not due to inherit the estate of Pyrrhus. The idea that Pyrrhus might have been married to Phile's mother, and therefore that Phile was indeed legitimate, was rejected by Maffi (1989: 189), who claimed that 'possa essere data in moglie soltanto la donna nata da un legittimo matrimonio fra un cittadino e una cittadina'. From a different perspective, and with different conclusions, the suggestion is rejected also by Cobetto Ghiggia (2012: 96).

city made marriage between *nothoi* and *gnesioi* illegal. The point he makes is just that the laws had *not* been violated precisely because Phile was a *nothe* and married off without any conflict of interest with Endius arising. Had Phile been the heiress to the estate, as her uncle Nicodemus claimed, then by marrying Xenocles, the laws would have been abused.

M.J. Edwards has suggested that Isaeus often interprets the law as he chooses and that definitive conclusions from the speeches as to what the law precisely stated are impossible.⁴⁶ Developing those observations, Hatzilambrou raises the possibility that the phrase *syn taute* or *syn tautais* (3.42, 58) does not necessitate that the heiress had to marry the adopted son, only that the father must provide for his daughter or daughters. If true, the adopted son had the legal right to give the *epikleros* in marriage to another if it were in her best interest to do so. Thus, by adopting Endius, Pyrrhus was declaring his daughter no longer to be the *epikleros* but left a channel open whereby she could become the heiress again upon Endius' death.⁴⁷ If true, we might have reason to think that Phile was legitimate, lost her right to the inheritance when Endius was adopted, and regained her right to the inheritance once Endius died. That suggestion offers a route around the conundrum if it was unlawful for *nothoi* to marry. Yet the solution she proposes is necessary only if the last statement has independent warrant, which it does not.

Other scholars have pointed out that Isaeus does not explicitly refer to the legitimacy of the marriage between Xenocles and Phile and argued *a fortiori* that in the absence of such a mention, we should not assume with confidence that the marriage was legal.⁴⁸ It has also been suggested that the law referenced at [Dem.] 59. 16 and 52, which forbade cohabitation between citizens and foreigners, might have applied to Phile if illegitimate, even if she could not be classed as a 'foreigner' *sensu stricto* but nevertheless lacked recognition as a citizen.⁴⁹ The first of those arguments proceeds *e silentio* and cannot have force without some independent reason to believe that *nothoi* were not classed as citizens. The second assumes that metic status might have included those who were born of two Athenian parents but could not point to engyetic union, but that is only a hypothetical possibility that claims no authority in any ancient source.

⁴⁶ Edwards 2009: 41-54.

⁴⁷ Hatzilambrou 2018: 29.

⁴⁸ This argument was first launched by Wyse (1904: 279).

⁴⁹ Rhodes (1978: 91); Ogden (1996: 164-165).

Others still have argued that though *nothoi* were not citizens, they could nevertheless marry and produce lawful citizen offspring through their unions. That claim directly contradicts the wording of Pericles' citizenship law, which expressly stated that no one could be a citizen unless both parents were Athenian.⁵⁰ In concession to those who hold that *nothoi* could not be citizens, Hatzilambrou grants that the silence of Isaeus on the matter of illegality should not imply with certainty that *nothoi* could be citizens given that the law prohibiting marriage between a citizen and a non-*aste* may not at this time have been effective. However, as she also points out, the silence of the logographer on the matter is not a good reason to suppose that the legal technicality was omitted by the brother of Endius (*viz.* the speaker), who was simply too embarrassed to comment on it, since with or without an explicit mention the point would have stood in law that by marrying off his cousin to Xenocles, Endius would have conducted himself unlawfully if such marriages were forbidden.⁵¹ Either the laws mentioned in the Demosthenic speech *Against Neaera* were not in force at the time this speech was delivered or, if they were, they did not apply to the case of Phile and Endius for the simple reason that Phile was not a *xene*. Hatzilambrou goes on to argue that '[w]hat does seem inexplicable is the motive which drove Xenocles to contract a lawful marriage with an illegitimate girl, as Isaeus' client alleges, if in fact illegitimate children were debarred from becoming Athenian citizens' and that 'it would be unlikely for an Athenian citizen to agree to marry a woman (and in addition with such a small dowry) if by so doing their children would be debarred from citizenship.'⁵²

III

The third speech of Isaeus thus confirms the impression we gain from Dem. 39 and [Dem.] 40 *Against Boeotus I* and *II* that it was possible in law for

⁵⁰ Wolff (1944: 82-84); Bickerman (1975: 1-25); Hansen (1986: 75); *contra* Hatzilambrou (2018: 32-33).

⁵¹ Hatzilambrou 2018: 33-34.

⁵² Hatzilambrou 2018: 34. On the following page (35), Hatzilambrou expresses doubts that 'the information in Isaeus' third speech helps us materially in deciding whether the illegitimate children of two Athenian citizens were able to claim Athenian citizenship'. However, combined with inferences from the first and second Demosthenic speeches discussed in the first section, her perceptive arguments against the pronouncements of Rhodes, Ogden and Hansen weigh strongly in favour of citizen *nothoi*.

nothoi to be citizens. The insistence that *nothoi* could not be citizens has only ever been speculation and proceeds from the fact that, in practicality, the testimony of the phratry was with regularity used by initiands to the deme because phratry membership confirmed legitimacy in all senses. That should not be taken to mean that the issue which the deme decided was identical. In very many cases, especially when parents were not alive when a citizen male was inducted into the deme, the only meaningful back-up was the phratry, yet this should not mean that phratry testimony was absolutely required. The purpose of the deme was to decide legitimacy in the ethnic sense, that of the phratry to decide legitimacy in the engyetic sense though the latter sense implied the former.⁵³

Some may dismiss this debate as arcane in the light of the poverty of the evidence. I believe nevertheless that the issue is important because it affects our understanding of what the Athenian community understood by citizenship. The distinction between *gnesioi* and *nothoi* is in origin Homeric, and the legal conception of this did not change over time, despite what scholars have claimed about the significance of the citizenship law of 451/0.⁵⁴ Just as *nothoi* could be members of the archaic community, so could they be members of the democratic *polis*. The benefactions bestowed in the last decade of the fifth century upon orphans of Athenian citizens who had lost their lives under the Four Hundred in 411 illustrate this. The wording of Theozotides' decree of c. 410 (*SEG* 28.46 = OR 178) does not clarify that the beneficiaries included both *gnesioi* and *nothoi*, but a later rider (*SEG* 14.36; cf. *IG* II² 5), dated c. 400, to an earlier honorary decree, whose exact identity is disputed, seems to have limited the support for *nothoi*.⁵⁵ A fragment of Lysias (fr. 64 Carey) refers to a trial for an illegal proposal (*graphe paranomon*). Though the circumstances are too shadowy to reach firm conclusions, if the rider refers to Theozotides, then the list of names, which begins at line 24 of Theozotides and refers to orphans by patronymic and demotic, implies that *nothoi*, if included, had both patronymics and demotics. If so, we have circumstantial evidence for the enrolment of *nothoi* in demes.⁵⁶

⁵³ As argued at Joyce 2019.

⁵⁴ Thus, II. 2.727; 11.202; 13.173; cf. *Ar. Av.* 1650; *Soph.* fr. 87.

⁵⁵ On the uncertain relationship, see Blok 2015: 95-96.

⁵⁶ Clearly, the final enrolment did not happen until age eighteen, but as I have argued elsewhere, demes and phratries maintained rosters of potential as well as confirmed applicants; see Joyce 2022.

If citizenship was about engyetic legitimacy, we must imagine the *polis* to be an outgrowth of the *oikos*. Certainly, there is evidence to imply this, such as the first book of Aristotle's *Politics*, which envisages the *oikos* to be a fundamental building block of the city, but we should not push the model too hard. The tradition is clear that Cleisthenes made the deme, not the *oikos*, the most important structural sub-unit of the city, mainly to undercut the importance of the family as a determinant of citizenship. When Cleisthenes legislated, only one Athenian parent (the father) was required, which implies that, from the start, membership of the citizen community was not about engyetic legitimacy. What we do know is that in 451/0, the requirement was elevated to two parents, but nothing in the tradition confirms that a new understanding of citizenship at that time, based upon the right to inherit, was inaugurated. Such a measure would have been reactionary and against the spirit of democratic reform which, most importantly, aimed to break the tenure of the propertied over citizenship and, consequently, self-governance. The matter will perhaps never be decided, but in the absence of positive evidence to the contrary, it is easier to believe that whilst phratry membership was the norm for practical purposes, it was not absolutely required.

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RECENSIONI

**Hans Beck / Kaja Harter-Uibopuu (eds.),
*Ancient Greek Law. Vectors of Unity and Local
 Idiosyncrasy*, Leiden 2025, p. 266.
 ISBN 978-3-412-53312-0 (OpenAccess).**

Nel libro vengono pubblicati gli Atti di un Convegno, tenutosi a Münster nel 2023. Consta di undici contributi e di un indice delle iscrizioni citate (non è chiaro perché non di tutte le fonti), mentre la bibliografia è annessa separatamente a ciascun contributo. La cifra che vorrebbe essere comune ai vari contributi ripropone, come si evince dal sottotitolo, la vecchia questione unità/pluralità con riferimento al diritto del mondo greco. La soluzione che i curatori presentano si può riassumere nella seguente proposizione: la tensione “of independence and union with others...created room and opportunity for common, or rather comparable institutions in law, not because of a common legal heritage or let alone similar dogmatic views, but because everyday life was easier to handle when there was agreement on certain legal processes and procedures, e. g., common principles in the question of the accessibility of local courts for non-citizens, in cross-polis marriages, or in trans-polis trade, among others” (p. 12). Nello stesso tempo, però, si parla di “common legal traditions”. Non è chiaro, dunque, se, almeno secondo i curatori, vi sia un insieme di concezioni comuni, salvo differenziazioni marginali, oppure se le convergenze siano dovute soltanto a esigenze pratiche. Trovo singolare che dei fondamentali lavori di H.J Wolff su questo tema non vi sia quasi traccia nel corso del volume (salvo che per il contributo di Sanger su cui v. *infra*). In ogni caso, in parecchi dei contributi pubblicati, il tema unità/pluralità dell’esperienza giuridica greca non trova un riscontro sostanziale nella trattazione. Veniamo al primo contributo: Hans Beck, *Land and law in Archaic Thebes*, p. 15-42. L’A. esordisce con alcune affermazioni relative alle norme contenute nel Codice di Gortina: “If there were no sons but a daughter, the heiress (*epikleros*) was obliged to marry the closest relative of the deceased who then took possession of the family property”. Qui andrebbe precisato che cosa si intende per “possession” (p. 15). Non è infatti il marito della *epikleros* che diventa proprietario dei beni,

ma i figli generati da lui e dalla *epikleros* stessa. Sempre in relazione alle ereditiere, l'A. scrive: "If there were no legitimate male descendants at all, they might refuse to marry (7.52 to 8.8), although under noticeable loss of her property" (p. 15). Qui andrebbe precisato che possono rifiutare di sposare il parente designato, non che possono decidere di non sposarsi. Al di là di queste puntualizzazioni, il punto fondamentale è che dal Codice di Gortina non risulta in alcun modo che "political participation and social status were intertwined with the possession of property" (p. 15). Anzi: se si aderisse all'interpretazione sottoscritta da autorevole parte della dottrina, che vede in lavoratori dipendenti (*Foikeis*) del defunto coloro a cui il Codice assegna l'eredità in assenza di parenti (col. V 25-28), non si tratterebbe nemmeno di uomini liberi. Ma lasciamo da parte Creta, a cui l'A. si limita ad accennare, e veniamo al tema specifico del contributo, ossia le testimonianze giuridicamente rilevanti provenienti dalla Beozia arcaica. La prima fonte presa in considerazione è naturalmente la vicenda della lite tra Esiodo e il fratello. Qui l'A. segue le tracce dell'interpretazione proposta da Anthony Edwards, secondo cui vi sarebbe stata una prima divisione concordata fra i due fratelli "within prevailing legal practices of the community; hence, no court was required" (p. 20). Dopo di che Perse, irritato per il mancato sostegno da parte del fratello, "turned to Thespias for support from another authority (the gift-eating kings there, βασιληῶν δωροφάγους, 38-39), possibly seeking review of the original division of the farm" (p. 20). Ora, proprio quel che sappiamo del diritto ereditario greco rende molto improbabile questa interpretazione. La divisione ereditaria (sicuramente in parti uguali tra fratelli, nonostante i dubbi dell'A.) è basata sul consenso fra gli eredi. La col. V del Codice di Gortina non prevede una divisione giudiziale dell'eredità; prevede solo che, in caso di disaccordo sulla composizione delle quote ereditarie, i beni vengano venduti e resi così matematicamente divisibili in parti uguali. Certo si può obiettare che non sappiamo se nella Beozia esiodea si possa parlare di corrispettivo in denaro; e che un argomento basato sulla comparazione rileva soltanto se si crede nell'esistenza di principi giuridici comuni. In ogni caso, parlare di "conflicts between various agents, conceptions of law, and bodies vested with legal authority" (p. 21) a proposito della disputa tra i due fratelli non mi pare giustificato da elementi ricavabili dal testo esiodeo. Oltre tutto le opere di Esiodo offrono un quadro molto più ricco e complesso delle procedure di risoluzione delle liti, che l'A. non prende in considerazione, così come non tiene conto di

fondamentali prese di posizione in proposito da parte di Bonner, Steinwenter, Wolff ecc. Passiamo al passo della *Politica* aristotelica relativo all'attività legislativa di Filolao (Pol. 1274b2-6): νομοθέτης δ' αὐτοῖς ἐγένετο Φιλόλαος περί τ' ἄλλων τινῶν καὶ περί τῆς παιδοποιίας, οὓς καλοῦσιν ἐκεῖνοι νόμους θετικούς· καὶ τοῦτ' ἐστὶν ἰδίως ὑπ' ἐκείνου νενομοθετημένον, ὅπως ὁ ἀριθμὸς σφίζηται τῶν κλήρων. Filolao ha dunque emanato norme in materia di "making of children" (traduzione letterale da condividere) che vengono intese dalla dottrina prevalente (a mio parere correttamente) come leggi in materia di adozione. A proposito della qualifica attribuita a questi *nomoi*, l'A. enuncia, invece, una tesi, credo, del tutto nuova: "νόμοι θετικοί does not translate as "laws of adoption" but simply "set laws," in the sense of fixed or statute laws" (p. 23). Ora, è vero che il verbo, da cui l'aggettivo è ricavato, potrebbe evocare i tesmoteti ateniesi; ma, ad una lettura non pregiudiziale del testo aristotelico, è chiaro che la qualifica si riferisce alle leggi in materia di παιδοποιία, non all'insieme della legislazione di Filolao (si noti che un aggettivo teso a qualificare l'oggetto di una normativa lo incontriamo in altre fonti, ad es. dove si parla di *nomoi emporikoi*). Inoltre, sempre secondo l'A., "the making of children" va inteso come "their status definition through law" (p. 23): vedremo poco più avanti che cosa l'A. intende con una simile traduzione. Quanto alla seconda parte della proposizione aristotelica, essa alluderebbe a "an overall package of laws rather than one legal matter alone" (p. 23). L'A. propone quindi la seguente traduzione del brano: "'Philolaos became the Thebans' lawgiver in regard to various matters, including the legal status of children, which they call statute laws; and this (i. e., the overall package) was specifically enacted by him so that the number of the *kleroi* might be preserved" (p. 23). A me pare che anche la traduzione della seconda parte della proposizione risulti poco plausibile. Infatti, se coordinata con la prima parte, indicherebbe che l'intera legislazione di Filolao avrebbe avuto di mira la conservazione del numero dei *kleroi*; mi pare evidente, invece, che la conservazione del numero dei *kleroi* dipende soltanto dalla legge sulla παιδοποιία. Ma soffermiamoci ora sul senso che l'A. attribuisce a quest'ultimo termine. L'A. osserva che questo è l'unico passo delle opere di Aristotele in cui ricorre il termine παιδοποιία, mentre di norma il filosofo si serve del termine τεκνοποιία (d'altronde l'A. riconosce che i due termini sono normalmente usati come sinonimi nella letteratura di età classica). L'A. ritiene quindi che i due termini, almeno nel contesto della legislazione arcaica, abbiano significati di-

versi (in particolare mettendo a confronto le disposizioni, di contenuto apparentemente analogo, di Fidone e di Filolao, così come riportate da Aristotele nel II libro della *Politica*). E per illustrare la differenza si rifa (p. 25 n. 26) alla tesi di Fossey, *Boiotia in Ancient Times*, 1979, p. 80, secondo cui “it is clear that the word *παῖδιον* is used for the child when the law concerns or recognizes descent through the male; *τέκνον* is used of the case when the child is seen only in relation to its mother”. L’opinione di Fossey si basa su un uso (che possiamo considerare chiaramente atecnico) da parte dei tragediografi, e soprattutto su un’interpretazione (purtroppo influenzata da una tesi oggi del tutto abbandonata di Willetts) di col. IV 1-6 del Codice di Gortina, in cui *teknon* e *paidion* sarebbero riferiti rispettivamente a una discendenza matrilineare e patrilineare. Per dimostrare che questa interpretazione è del tutto cervellotica basterebbe leggere le norme relative alla successione ereditaria nella col. V 9 ss. del Codice, dove i discendenti sia del padre che della madre sono appunto denominati *tekna*. Sembra quindi di capire che, per l’A., Filolao, pur provenendo da un ordinamento giuridico (Corinto), dove la filiazione matrilineare era determinante, si sarebbe adeguato alle consuetudini tebane attribuendo la successione dei fondi in base ai principi della successione patrilineare (per nascita o per adozione); il che si desumerebbe appunto dall’uso del termine *παιδοποιία* da parte di Aristotele (p. 25: “Aristotle might thus indeed have encountered in his sources that the Corinthian Philolaos, a man from a matrilineal community, enacted a piece of legislation in Thebes that resonated with patrilineal traditions there – hence, *παιδοποιία*”). A parte il fatto che, come abbiamo visto, questa interpretazione si basa su un fondamento linguistico inesistente, non si capisce in che cosa Filolao avrebbe innovato rispetto ai principi che già regolavano la successione ereditaria a Tebe. La novità consisterebbe nella loro messa per iscritto. Oltre ai fondati dubbi su una traduzione del tutto originale di *thetikoî* da parte dell’A., non mi pare che Aristotele intendesse caratterizzare esclusivamente attraverso il ricorso alla scrittura le novità legislative introdotte da Filolao. Il contributo dell’A. prosegue con l’accurato esame di alcune tavolette bronzee ritrovate a Tebe all’inizio degli anni ‘2000. Le considerazioni dell’A. relative a tali testi sono di grande interesse e contribuiranno certamente a future discussioni in proposito (anche se non tutte mi sembrano condivisibili)..

I saggi di Athina Dimopoulou, *Diversity and unity of public institutions and sanctions. The case of the cities of Lesbos (Archaic to Hellenistic Ti-*

mes) (p. 43-64), e di Donatella Erdas, *Selling land and houses in the ancient Greek poleis. Some notes on procedures, liabilities, and parties involved* (p. 65-82) costituiscono delle intelligenti e utili messe a punto delle nostre conoscenze relative agli argomenti trattati. Il saggio di Alain Bresson, *Ancient Greek monetary laws and regulations* (p. 83-109) costituisce una sintesi di grande interesse e utilità per lo storico del diritto, indagando sulla politica legislativa delle *poleis* in relazione alla produzione monetaria e alla sua rilevanza per la vita economica e sociale. Il saggio di Dorothea Rohde, *Exceptions that prove the rule. The local conditionality of debt cancellations* (p. 111-131) a mio parere non aggiunge molto di nuovo alla vasta bibliografia in materia. Mi limito poi a menzionare gli interessanti contributi di Ruben Post, *A unique federal fiscal and legal institution from Early Hellenistic Achaia* (p. 133-150), di Zinon Papakonstantinou, *Greek legal pluralism. The case of sport and festivals* (151- 180), di Laura Gawlinski, *Personal, local, global Greek dress in ritual norms* (p. 181-202) e di Lina Girdvainyte, *Roman legal enactments in mainland Greece in the 2nd century BCE. A source of unity in the face of fragmentation?* (p. 203-223). Qualche parola in più sul contributo, come sempre stimolante, di Patrick Sänger, *P.Eleph. I: A document and its origin. Some thoughts on the methodology of Hans Julius Wolff and Joseph Méléze Modrzejewski* (p. 225-237). I due grandi studiosi, citati nel titolo del contributo, consideravano il famoso contratto di matrimonio, datato 310 a.C., cioè circa 20 anni dopo la conquista macedone dell'Egitto, espressione di tradizioni giuridiche importate dalla Grecia classica (all'origine della *koiné* giuridica ellenistica), quindi nettamente distinte dalle pratiche giuridiche locali. L'A. mette invece in luce una serie di caratteristiche del documento che farebbero pensare all'influenza di tradizioni egiziane con riferimento non "to legal formulas and their development, but instead to the materiality, the components, and the external design of the deed". Questa influenza sarebbe dimostrata dall'uso del doppio documento scritto (*syngraphe*) e dalla presenza dei testimoni all'atto. La *koiné* giuridica ellenica (influenzata soprattutto dal diritto attico) sarebbe dunque un'entità molto meno separata dal contesto locale di quanto comunemente non si ritenga. Come dicevo, la tesi è ben argomentata. Tuttavia, mi chiedo prima di tutto se gli elementi (tutto sommato) estrinseci su cui essa si basa (e lo stesso A. lo riconosce) non siano secondari rispetto al contenuto stesso del documento, che sembra essere genuinamente greco, salvo confronti con possibili analoghi contratti di matrimonio demotici. Inoltre, mi chiedo se i

circa 20 anni dall'insediamento della popolazione greca in Egitto si possano considerare un periodo di tempo sufficiente a contaminare pratiche greche ed egiziane. Infine, mi chiedo se le caratteristiche del documento, che l'A. attribuisce appunto all'influenza locale, non potrebbero trovare una spiegazione nel fatto che gli sposi provengono da due località piuttosto distanti, e lo stesso vale per due dei testimoni. Da citare naturalmente, last but not least, il contributo di Philipp Scheibelreiter, *Common concepts in Athens and Rome? A comparative legal perspective on the ὁμολογία* (p. 239-262), in cui l'A. difende una concezione originale del contenuto dell'*homologia* (in particolare ateniese) attraverso un confronto con la *nuncupatio* oggetto di un versetto delle XII Tavole. Complessivamente si tratta di un volume ricco di spunti di grande interesse, che mostra quante tessere ancora manchino al mosaico che gli studiosi di diritto greco si sforzano di ricostruire e contribuisce indubbiamente ad arricchirlo.

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8th Meeting of Young Historians of Greek Law

8° Incontro dei giovani storici del diritto greco

Athens, September 12-13, 2025

The 8th Meeting of Young Historians of Greek Law, organized by Professor Athina A. Dimopoulou (National and Kapodistrian University of Athens) and Professor Emeritus Edward M. Harris (Durham University), took place at the Athens University History Museum on September 12-13, 2025. This biennial gathering brought together emerging scholars in the field of ancient Greek legal history to present cutting-edge research on topics ranging from Mycenaean landholding to Roman-era judicial procedures in Asia Minor.

Friday, September 12, 2025

Linda Rocchi (Kopenhagen) – “Finding the ‘who’ in ‘whoever wishes’: the legal capacity of volunteers in ancient Greek statutes”

Linda Rocchi’s presentation explored the institution of voluntary prosecution (*ho boulomenos*) in ancient Greek law, examining who possessed the legal capacity to act as volunteer prosecutors in public cases. Through careful analysis of both literary sources (particularly Athenian orators) and epigraphic evidence, Rocchi demonstrated that while voluntary prosecution in Athens was primarily designed to enlist citizen participation, non-citizens—including metics—were permitted to prosecute in certain types of public cases, such as *probolai* related to the Eleusinian Mysteries and *graphai adikōs heirschthēnai*. Her research revealed that when statutes explicitly specified “whoever wishes among the Athenians,” this restriction

to citizens was typically maintained, but when sources simply stated “whoever wishes” without further qualification, the matter became more ambiguous, possibly indicating broader participation. Rocchi argued that this ambiguity was particularly evident in religious matters and foreign policy contexts, where broader involvement of both citizens and non-citizens appears to have been the norm, suggesting a more nuanced understanding of legal capacity than previously recognized.

Julian Schneider (Hamburg) – “Between Success and Failure: Interstate Arbitration and the (Un)Reliability of Arbitral Awards in Ancient Greece”

Julian Schneider addressed the long-standing scholarly debate about the effectiveness of interstate arbitration in ancient Greece, challenging both overly pessimistic and optimistic assessments. He examined the phenomenon of “repeaters”—cases where the same two *poleis* returned to arbitration multiple times over the same dispute—which had led earlier scholars like Bérard to dismiss arbitration as fundamentally ineffective. Through detailed analysis of specific cases, including the territorial dispute between Sparta and Messene (eight decisions) and boundary conflicts between Narthakion and Melitaia (five decisions), Schneider demonstrated that repeated arbitrations did not necessarily indicate failure, but rather reflected the complex political realities and enforcement challenges of the Greek interstate system. He argued that the reliability of arbitral awards depended heavily on several factors, including the careful construction of arbitration agreements with witnesses and penalty clauses, the choice of a high-authority arbitrator, the production of detailed *apophysis* documents that transparently explained the decision-making process, and the commemoration of decisions through public inscriptions. Schneider’s analysis revealed that while arbitration could not guarantee permanent resolution—especially when powerful political actors like Rome became involved—it provided a sophisticated legal framework that Greek *poleis* consistently chose to utilize despite its limitations.

Alexandra Bartzoka (Patras)– «La seconde Confédération maritime, les tribunaux athéniens et les alliés dans la première moitié du IV^e siècle avant J.-C.: l’apport des inscriptions»

Alexandra Bartzoka’s presentation examined the judicial relationships between Athens and its allies in the Second Athenian Confederacy (377

BCE), focusing on whether Athenian courts exercised jurisdiction over allied matters as they had during the Delian League. Through careful analysis of inscriptions, particularly the decree of Aristoteles, she demonstrated that references to trials before “the Athenians and the allies” remained ambiguous—possibly indicating either joint tribunals or separate judgments by each party—and that this ambiguity likely reflected Athens’ deliberate attempt to present a more collaborative image than during its fifth-century empire. Bartzoka’s detailed examination of evidence from Keos, following its revolts in the 360s BCE, reveals a complex picture: inscriptions concerning the Athenian monopoly on ochre show the use of specific legal procedures like *endeixis* (denunciation leading to arrest) and *phasis* (denunciation of contraband). These cases involved both local Keian magistrates (*astynomoi*, *prostatai*) and Athenian officials (the Eleven), sometimes suggesting a two-step judicial process or the possibility of appeal (*epheisis*) to Athens. Her analysis of the term *ekklētos* (a city called upon to judge) in these and other inscriptions suggests that this institution allowed for the transfer of certain cases to Athens, but without necessarily reproducing the total interventionist judicial control of the fifth century.

Laura Loddo (Pisa) – “Exile and Civic Reconciliation: Remarks about a New Inscription from Airai”

Laura Loddo presented groundbreaking research on a recently published (2024) inscription from the Ionian *polis* of Airai concerning civic reconciliation following internal conflict (*stasis*), placing it within the broader context of Greek amnesty practices. The inscription, which dates to sometime between the 350s and 340s BCE and involves the prominent figure Hermias of Atarneus, records reconciliation agreements that include the famous *mē mnēsikakein* formula (the commitment “not to remember past ills”) and provisions for property restoration, making it a valuable addition to the corpus of Greek amnesty documents. Loddo challenged the editors’ interpretation that this represented a “bipartisan reconciliation,” arguing instead that Hermias likely imposed or heavily influenced the settlement, particularly given the unusual provision that exiles should immediately recover their lands and, after reimbursement of purchase prices, their houses—with Hermias himself designated to determine the funding source for these reimbursements. Through comparison with other cases of property restoration in Greek amnesties, including those at Methymna, Phlious, and Sicyon, Lod-

do demonstrated that the Airai inscription’s approach—full restitution with compensation paid to new owners—was characteristic of reconciliations imposed by external powers or strong individuals rather than negotiated settlements, suggesting that the normative framework governing property rights in such contexts was fundamentally shaped by power relations rather than purely legal principles.

Adrian Häusler (Zürich/Warszawa) – “Paradeixis, enechyrasia, probolē: Ptolemaic debt enforcement within Greek legal history”

Adrian Häusler’s presentation examined the sophisticated debt enforcement procedures developed in Ptolemaic Egypt, focusing on three key stages: *paradeixis* (designation of assets by the creditor), *enechyrasia* (the executory pledge constituted by officials), and *probolē* (the public auction of seized property). Using detailed analysis of several early Ptolemaic documents, including the well-preserved *probolē*-protocols in BGU XIV 2376/2377 (36/35 BCE) and the much earlier document, probably a full protocol of a *paradeixis* and an *enechyrasia* in P.Hib. I 32 (245 BCE), Häusler demonstrated that a formally regulated execution procedure following a *diagramma* (royal regulation) can be traced back at least to the mid-third century BCE, likely during the reign of Ptolemy II Philadelphos or early in Ptolemy III’s reign. He argued against Hans Julius Wolff’s influential thesis that these procedures were part of the early *Justizdiagramma* of Ptolemy II Philadelphus (285-246 BCE), showing instead that fragmentary texts like P.Hib. II 197 and P.Hal. 1, which mention *enechyrasia* followed by *embateusis* (entry into possession) rather than auction, likely represent earlier, local practices—possibly Alexandrian *politikoi nomoi*—that predated the centralized diagrammatic regulation. Häusler’s comparative study of Greek execution practices outside Egypt—drawing on sources like the Pergamon inscription, loan documents from Arkesinē and Delos, Athenian procedures, and Gortyn law—established that *enechyrasia* was a pervasive Greek institution. This strongly suggests that the Ptolemaic system of debt enforcement, while formalized through royal legislation, was fundamentally based on customary practices shared throughout the Greek world, rather than being an entirely new, top-down imposition originating solely from the royal palace.

Maria Elina Koulouri (Hamburg) – “Unintentional Homicide in Ancient Greek Thought: Exploring the Spectrum from Accident to Negligence in Plato’s Laws”

Maria Elina Koulouri’s presentation explored whether ancient Greek law recognized a distinction analogous to the modern legal differentiation between negligent and accidental homicide, focusing on Plato’s *Laws* as a key philosophical source. She demonstrated that while earlier sources like Draco’s homicide law and Antiphon’s *Tetralogies* established the foundational *hekōn/akōn* (voluntary/involuntary) distinction, they lacked a clearly developed conceptual framework for differentiating degrees of culpability within unintentional killing. Koulouri argued that Plato, operating within his distinctive curative rather than retributive philosophy of justice, transformed this traditional dichotomy into a sophisticated diagnostic tool: the prescribed penalty reveals an implicit diagnosis of the fault’s source within the individual’s soul and its impact on the *polis*. Through analysis of Plato’s treatment of “special cases”—unintentional killings in athletics, military training, and medicine, which receive only purification or complete exoneration rather than exile—she showed that Plato recognized varying levels of culpability based on factors like benevolent intent, accepted risk in socially valuable activities, and the role of chance (*tychē*). Koulouri further demonstrated that Plato’s concept of *ameleia* (neglect), particularly in contexts of familial and civic duties, reveals an incipient notion of negligence as a failure to fulfil specific, legally defined obligations, while his acknowledgment of *tychē* (chance) marks the boundary where human responsibility dissolves into pure accident—together creating a nuanced spectrum of unintentional harm that moves beyond simple binary categories and provides a foundational grammar for Western legal thought on this complex issue.

Saturday, September 13, 2025

Edward Jones (London) – “The Athenian Logistai in the Fifth Century”

Edward Jones examined the Athenian *logistai* (accounting officials) in the fifth century BC. He noted that the *logistai* played an important role in Athenian finances and administration, as they were responsible for examining accounts during *euthynai* (an annual accountability procedure) and also

calculated debts to sacred treasuries. Jones highlighted that scholars have differing views about the number of boards and exact roles of the fifth-century *logistai*. His paper resolves this problem by working through the slim (and mostly epigraphic) evidence, arguing that in the fifth century there was probably a single board of thirty *logistai* with broad accountability-related and public and sacred accounting duties.

Anna Dolganov (Wien) – “Roman constitutional reforms in Achaea and Macedonia in the 2nd and 1st centuries BCE”

In her presentation, “Roman constitutional reforms in Achaea and Macedonia in the 2nd and 1st centuries BCE,” Anna Dolganov investigated the sweeping constitutional reforms imposed by Rome following its conquest of mainland Greece. Dolganov’s research directly challenges modern historical accounts, which have often downplayed these Roman interventions as being merely temporary or superficial. She argued that the significance Polybius testimony has been largely overlooked. Through a careful analysis of epigraphic evidence, Dolganov demonstrated that these reforms were, in fact, neither temporary nor superficial. Rather, they constituted a lasting Roman reconfiguration of Greek political institutions and the shape of the local ruling class.

Giacinto Falco (Milano) – “Homonoia and Nomos: Legal and Cultural Foundations of Concord in Archaic and Classical Greece”

Giacinto Falco explored the relationship between the concepts of *homonoia* (concord, like-mindedness) and *nomos* (law, custom) in archaic and classical Greek thought, examining how these principles functioned both as cultural ideals and as practical legal foundations for social cohesion. His presentation traced the development of *homonoia* from its early appearances in Greek literature through its more developed expression in classical political philosophy. Falco demonstrated that *homonoia* was not merely an abstract philosophical ideal but had concrete legal manifestations in civic procedures, particularly through arbitration mechanisms and oaths of unanimity designed to foster agreement among citizens. Through analysis of both literary sources and inscriptions, he showed how Greek communities institutionalized concord through these legal mechanisms, including the appointment of arbitrators to seek compromise before judgment and

constitutional arrangements requiring citizens to swear oaths of concord. This analysis revealed *homonoia* and *nomos* as complementary forces in the construction and maintenance of Greek political order.

Kyriaco Nikias (Wien) – “Possession and ownership in the Mycenaean vocabulary of landholding”

Kyriaco Nikias presented a challenging reassessment of Mycenaean land tenure by questioning whether modern legal concepts of possession and ownership can be meaningfully applied to Linear B documents from Bronze Age Greece. Through careful linguistic analysis of terms like *ki-ti-me-na* and *ke-ke-me-na* land found in the Pylian land records, Nikias argued that the traditional scholarly distinction between “private” and “public” land oversimplifies a more complex and fundamentally different system. He demonstrated that the Pylian documents reveal a land regime characterized by overlapping and stratified claims to property, with multiple partial alienations (*o-na-to* interests) creating webs of interdependence rather than absolute ownership—suggesting a customary, decentralized normative structure rather than one imposed by palace authority. Nikias challenged influential scholarly models, including Yves Duhoux’s recent attempt to apply a possession-ownership framework overlaid on a feudal model, arguing that such anachronistic legal categories obscure rather than clarify Mycenaean property relations. His analysis suggested that focusing on patterns of alienation—both full and partial—and the distribution of land among different social groups provides better insight into Mycenaean land tenure, revealing it as a fundamentally relational system embedded in social and economic networks rather than one based on abstract legal rights analogous to Roman *dominium* or modern ownership.

Sophia Regopoulos (Nürnberg) – “Power through wealth as a (legal) reason for ostracism? A study on Aristotle’s Pol. III 13, 1284a20”

Sophia Regopoulos examined a famous passage in Aristotle’s *Politics* (III 13, 1284a20) where the philosopher states that democratically governed *poleis* ostracized those “thought to be outstandingly powerful on account of wealth or popularity or some other form of political strength,” investigating whether private wealth could serve as legal justification for this extraordinary measure. She began by establishing through historical ev-

idence—including ostraka inscriptions mentioning Megakles' wealth and horse-breeding, Plutarch's account of Pericles' fear of ostracism due to his wealth, and accusations against Hyperbolos regarding money acquired through wickedness—that wealth was indeed a motivation for ostracism in practice, though never as a solely sufficient criterion and always intertwined with concerns about bad character (*mochthēria*). Regopoulos then turned to Aristotle's theoretical framework, demonstrating that his philosophical position—rooted in his conviction that wealth is neither inherently good nor bad but depends on the character of its possessor and the purpose for which it is used—shaped his analysis of ostracism as a constitutional remedy. Through careful reading of the *Politics*, she argued that Aristotle's ostracism passage must be understood within his broader discussion of constitutions: ostracism based on wealth is just “in a certain way” (*dikaion ti*) insofar as it serves to restore a certain equality and preserve the constitution from disruption, functioning as a “second-best” therapeutic measure (*deuteros plous, iatria*) when proper constitutional design (*eunomia*) is lacking. Regopoulos concluded that while Aristotle acknowledges ostracism's philosophical justification as responding to constitutional imbalance caused by excessive wealth, his treatment reveals it as a pragmatic political tool whose application he views as both theoretically limited and historically problematic—particularly when used for partisan rather than constitutional purposes—and whose focus on temporary exile rather than property confiscation suggests that the “cure” addresses the immediate political disruption rather than the wealth itself.

Dionyssis Filias (Athenai) – “Plutarch's *demosiai dikai* (Prae. Ger. Rei. 805a-b) in the light of honorific decrees: *ekdikoi* and trials of public interest in late Hellenistic and Roman Asia Minor”

Dionyssis Filias presented an innovative interpretation of a passage in Plutarch's *Praecepta gerendae rei publicae* where the author advises young politicians that “public lawsuits (*demosiai dikai*) and embassies to the Emperor” offer the best opportunities for launching a political career in the limited environment of the Roman Empire. Through systematic analysis of honorific inscriptions from Asia Minor, Filias argued that Plutarch's seemingly generic term *demosiai dikai* actually referred to a specific institution: the *ekdikoi*, legal representatives appointed by Greek *poleis* to defend communal interests before higher judicial authorities, including

Roman governors and emperors. He demonstrated that while the term *ekdikoi* originated in Hellenistic interstate arbitration, where representatives defended *polis* claims before foreign courts, it evolved under Roman rule into a crucial mechanism through which Greek cities engaged with imperial justice—particularly in cases involving territorial disputes, property claims, financial matters, and misconduct by Roman officials (such as the case of Veranius Philagros of Kibyra, who successfully prosecuted Tiberius Neikophoros before Emperor Claudius for illegally extracting 3,000 drachmas annually from the *polis*). Filias showed that *ekdikoi* often combined their role with that of ambassadors (*presbeutai*), appearing before emperors in trials concerning matters of public interest, and that their success in such cases—recovering disputed territories, reclaiming public property, or stopping extortion—brought them recognition and launched political careers, precisely as Plutarch described. His analysis revealed that Plutarch, while using traditional Athenian legal terminology and drawing on classical examples (Pericles, Themistocles, Cleon), was actually describing a contemporary Roman-era practice specific to the Greek East, thereby demonstrating the continuity and adaptation of Greek legal institutions within the framework of imperial power.

The two-day meeting demonstrated the vitality and diversity of current research in ancient Greek legal history, bringing together papyrologists, epigraphists, legal historians, and philosophers to address questions ranging from Bronze Age property systems to imperial-era legal practice. The conference highlighted both the rich potential of new epigraphic discoveries (such as the Airai amnesty inscription) and the continued value of reexamining well-known sources through fresh theoretical and comparative lenses. The presentations collectively emphasized the importance of moving beyond Atheno-centric approaches to recognize the diversity of Greek legal cultures while also identifying common principles and institutional frameworks that transcended individual *poleis*. The meeting's success in fostering interdisciplinary dialogue and introducing emerging scholars' research bodes well for the future of Greek legal history as a field, and the assembled scholars look forward to future gatherings that continue this important work.

